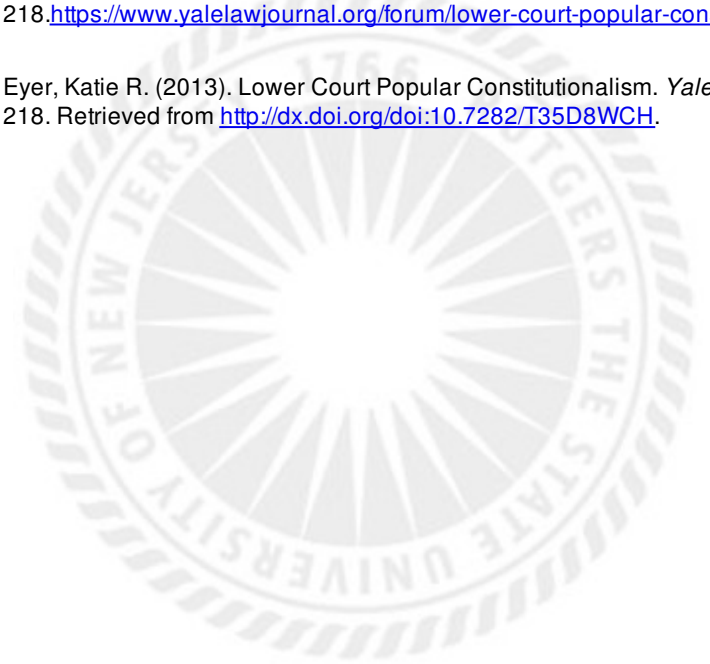
Lower Court Popular Constitutionalism



THE YALE LAW JOURNAL ONLINE

KATIE EYER

Lower Court Popular Constitutionalism

Scholars of popular constitutionalism have persuasively argued that an array of nonjudicial actors—social movements, the federal political branches, state and local political entities—play an important role in shaping constitutional meaning. To date, the accounts of such scholars have largely focused on the ways that constitutional doctrine at the Supreme Court level can be infiltrated and shaped by such popular constitutional influences. In this Essay, Professor Katie Eyer draws on the events following the Obama Administration's February 2011 Defense of Marriage Act (DOMA) announcement—and the history of gay equality litigation that preceded it—to develop a theory of the lower federal courts as participants in the popular constitutionalism dialogue.

Many contemporary constitutional theorists agree that the process of forging constitutional meaning is a messy affair.[1] Rather than the traditional jurocentric conception of constitutional change, such theorists have conceptualized constitutional change as a multiparty, contested, evolutive process.[2] Thus, the act of forging constitutional meaning is conceived of as a

1. *See, e.g.*, BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009); Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 B.U. L. REV. 539 (2009); Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959 (2004); Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007) [hereinafter Post & Siegel, Roe *Rage*]; Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027 (2004); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de Facto ERA*, 94 CALIF. L. REV. 1323 (2006) [hereinafter Siegel, *Constitutional Culture*]; Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191 (2008) [hereinafter Siegel, *Dead or Alive*]; Gerald Torres, *Social Movements and the Ethical Construction of Law*, 37 CAP. U. L. REV. 535 (2009).

2. *See* sources cited *supra* note 1.

process in which the Supreme Court's constitutional doctrine is in ongoing dialogue with an array of societal actors—social movements, the President, Congress, state and local political actors—in a continuously iterated, multi-sited, developing constitutional conversation.

This Essay suggests that another important actor—the lower federal courts—ought to feature significantly in this descriptive account.[3] Drawing on the events following the Obama Administration's February 2011 announcement—that the President had concluded that section 3 of the Defense of Marriage Act (DOMA)[4] was unconstitutional, and that sexual orientation classifications must be subject to heightened scrutiny—this Essay sketches a case study of the lower courts as participants in the popular constitutionalism dialogue. As this case study suggests, lower courts may—like the Supreme Court itself—constitute important entry points for non-judicial (i.e., popular) constitutional understandings. Thus, just as the Supreme Court may be directly or indirectly influenced by popular constitutional understandings, so too the lower courts may shape their doctrine in ways that are responsive to constitutional dialogue beyond the judiciary.

There are a number of reasons why this "lower court popular constitutionalism" may, despite our hierarchical judicial system, matter. First, to the extent that popular constitutional actors' understandings infiltrate and are persuasively incorporated into lower court adjudication, that, in turn, may influence the Supreme Court's own constitutional jurisprudence.[5] In that sense, lower courts may be seen as simply another conversant in the multiparty dialogue between the Supreme Court and the array of other actors that scholars

---

3. *Cf.* Ori Aronson, *Inferiorizing Judicial Review: Popular Constitutionalism in Trial Courts*, 43 U. MICH. J. L. REFORM 971 (2010) (noting the dearth of attention paid to lower federal courts in the popular constitutionalism literature and arguing that restricting constitutional adjudication to the federal district courts would better serve the normative objectives of popular constitutionalism). State courts obviously may also be expositors of constitutional meaning, and have in fact played a highly substantial role in the process of constitutional change vis-à-vis gay equality. *Cf.* David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2066-67 (2010) (discussing the role of state courts as expositors of constitutional meaning). I nevertheless have elected to focus exclusively on the lower federal courts because the federal courts were the primary audience for the specific popular intervention I address herein.

4. DOMA has two operative provisions: section 2, which authorizes states to decline to recognize out-of-state same-sex marriages, 28 U.S.C. § 1738C (2006), and section 3, which defined marriage for federal purposes as a "legal union between one man and one woman," 1 U.S.C. § 7 (2006). President Obama's announcement and the litigation culminating in *United States v. Windsor* dealt only with the latter, and thus when I refer to DOMA for the remainder of this Essay, I am referring to section 3.

5. *See, e.g.*, Pamela C. Corley et al., *Lower Court Influence on U.S. Supreme Court Opinion Content*, 73 J. POL. 31, 40-41 (2011).

of popular constitutionalism have identified as being involved in the process of contesting and developing constitutional meaning.

But as importantly, the lower courts are—practically speaking—themselves highly important constitutional meaning-makers. In a regime in which the Supreme Court has increasingly underdetermined its constitutional doctrine and takes exceedingly few cases for review, many constitutional cases reside within a domain of discretion in which outcomes on the ground are decided by the lower courts.[6] Thus, from a practical perspective, the constitutional law that applies to the vast majority of litigants is driven in important part by lower court determinations as to how to fill the interstices of Supreme Court doctrine.[7]

Both of these reasons for attending to lower court popular constitutionalism—its potential for indirect impact on the Supreme Court's doctrine and its role in shaping the lower courts' own constitutional approach—are intriguingly suggested by the aftermath of the Obama announcement. As described more fully below, a virtually unanimous deluge of lower court opinions finding DOMA unconstitutional followed the Obama Administration's announcement—a factor that could hardly have gone unnoticed by the Court itself in electing to take up and strike down section 3 in the face of arguably significant standing problems.[8]

Moreover, and perhaps more importantly, the Obama announcement seems to have generated meaningful shifts in the lower courts' approach to constitutional LGB[9] equality claims generally. Thus, claims for full inclusion of sexual orientation as a suspect classification under Equal Protection doctrine—a long stalled project in early 2011—experienced a striking renaissance in the two-and-a-half years following the President's endorsement of the notion in his February 2011 announcement. While the long-term durability of this latter development remains to be seen, it could—at least in the lower courts—mark the beginnings of a highly important shift towards full constitutional recognition of gay equality claims.

Two caveats are in order before proceeding to the substantive discussion below. First, popular constitutionalism is, like its subject, a vast and messy field, with many competing and not wholly consistent normative and

---

6. *See, e.g.*, Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 AM. U. L. REV. 457, 459-62, 474-77 (2012).

7. *Id.*; *see also infra* Part I.

8. United States v. Windsor, 133 S. Ct. 2675 (2013).

9. Since my arguments pertain to the doctrinal treatment of sexual-orientation-based classifications specifically, I mostly use the term "LGB" as a descriptor herein rather than the more inclusive "LGBT." The broader term is used where appropriate, primarily as a descriptor for the broader rights movement and/or its attorneys.

descriptive claims.[10] Thus, this Essay is necessarily responsive to only a subset of popular constitutionalism's various adherents, namely those who have embraced popular constitutionalism as a descriptive project of how constitutional meaning—through dialogue between the courts and various popular actors over time—is in fact made.[11]

Second, my account here is necessarily reductive. As the *Windsor* litigation itself illustrates, President Obama is far from the only popular constitutional actor who has been engaged in shaping understandings of DOMA's constitutionality (much less gay equality under the Constitution more generally).[12] Thus, it would clearly be inaccurate to suggest that the Obama announcement was the sole or even primary driving force of the events I chronicle here. Like all other substantial shifts in constitutional understanding, these developments have roots in much broader processes of social movement "mobilization, countermobilization, coalition and compromise,"[13] or what Reva Siegel and Robert Post have referred to as the ongoing process of constitutional "norm contestation."[14]

Nevertheless, as set out below, there are significant reasons to believe that the Obama announcement, while far from exclusively responsible, helped to shape and facilitate the developing approaches of the lower courts, both with respect to DOMA specifically and in regard to gay equality claims more generally. In particular, the Obama intervention seems to have played a catalyzing role in liberating the lower courts to—despite the opaque and underdetermined nature of the Supreme Court's LGB case-law—move away from a lower court jurisprudence developed in an era when gay inequality under the Constitution was the norm. It thus appears that the Obama Administration's announcement, by filling an authoritative void left by the Court itself, created space for the lower courts' recognition of, and responsiveness to, changed circumstances in the "constitutional culture" surrounding gay equality.[15]

The remainder of this Essay explores these themes in three parts. Part I describes the backdrop of the lower courts' approach to gay equality claims

---

10. *See, e.g.*, Tom Donnelly, *Making Popular Constitutionalism Work*, 2012 WIS. L. REV. 159, 160-61.

11. *See* sources cited *supra* note 1.

12. This point is illustrated by the vast array of popular constitutional actors participating both as parties and as amici in the *Windsor* litigation itself. *See* Docket, *Windsor*, 133 S. Ct. 2675 (No. 12-307), http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-307.htm.

13. Siegel, *Dead or Alive*, *supra* note 1, at 193.

14. Post & Siegel, Roe *Rage*, *supra* note 1, at 381.

15. Siegel, *Constitutional Culture*, *supra* note 1, at 1325.

prior to February 2011, with a particular focus on the question of whether sexual orientation classifications warrant heightened scrutiny under the Equal Protection Clause.[16] As this Part explores, prior to February 2011, there had been—despite *Romer* and *Lawrence*—minimal shifts in the lower courts' long-standing unwillingness to endorse heightened scrutiny for sexual-orientation-based classifications. Thus, despite *Romer*'s and *Lawrence*'s rhetorical (and partial doctrinal) repudiation of the anti-gay premises that undergirded *Bowers v. Hardwick*, the lower courts—without clearer doctrinal guidance from the Court—largely continued to adhere to the pre-*Romer* consensus that heightened scrutiny was inappropriate.

Part II next takes up the Obama announcement and its aftermath, tracing responsive developments first in the lower courts and ultimately in the Supreme Court itself. As this Part sets out, there is a strong case to be made that the Obama announcement helped to shape the ultimate outcomes (invalidation as unconstitutional) of the many DOMA challenges that were decided in its aftermath, both in the lower courts and in *Windsor* itself. But perhaps the more striking apparent contribution of the Obama intervention was to once again make heightened scrutiny a respectable doctrinal argument in the lower courts. Thus, for the first time in decades, multiple lower courts endorsed heightened scrutiny for sexual-orientation-based classifications in the aftermath of the Obama announcement. And although *Windsor* itself did not follow the Obama Administration's lead on this aspect of its analysis, declining to reach the question of heightened scrutiny, there were signs in *Windsor*'s aftermath that the shift in lower court culture might nevertheless endure.

Finally, Part III concludes with some brief observations regarding the implications of the foregoing for a broader theory of lower court popular constitutionalism. Drawing on existing scholarship regarding lower court constitutional adjudication, this Part suggests that the history of gay equality litigation (and the Obama announcement's role in it) is consistent with the

16. There are a number of ways that LGB litigants have sought heightened scrutiny under the Equal Protection and Due Process Clauses. *See, e.g.*, Katie R. Eyer, *Marriage This Term: On Liberty and the "New Equal Protection,"* 60 UCLA L. REV. DISC. 2, 11 (2012). My focus herein—in accordance with the focus of the Obama announcement—is exclusively on the "protected class" approach to heightened scrutiny under the Equal Protection Clause. For this purpose, moreover, litigation brought under the Equal Protection component of the Fifth Amendment is treated—as the lower courts have traditionally treated it—as identical to litigation brought under the Equal Protection Clause of the Fourteenth Amendment. *See* United States v. Hughes, 632 F.3d 956, 960 (6th Cir. 2011) ("The analysis of a Fifth Amendment equal protection claim is identical to an equal protection claim under the Fourteenth Amendment."). *But cf. Windsor*, 133 S. Ct. 2675 (relying on a blend of due process and equal-protection-based reasoning in addressing a Fifth-Amendment-based equal protection claim).

differing institutional roles that are in the contemporary era ascribed to (and largely internalized by) the Supreme Court and the lower courts as constitutional adjudicators. Thus, the Supreme Court—as the self-conceived apex of constitutional interpretation—may feel freer to respond to shifts in broader public opinion or culture, without clearly defining its doctrinal justification. In contrast, the lower courts—cast as appliers rather than makers of constitutional law—may more often look for extrinsic doctrinal validation by the Supreme Court or authoritative popular constitutional actors, such as the President or Congress, before making similarly responsive moves. Thus, the history of gay equality suggests not only the importance of understanding lower court popular constitutionalism, but the beginnings of a potential framework for inquiry.

I. LOWER COURT CONSTITUTIONALISM AND GAY EQUALITY: TO 2011

By the early 1980s, it had become clear that among the most powerful means of achieving constitutional equality goals was protected class status.[17] Treatment as a protected class under the Equal Protection Clause meant the virtual eradication of open, invidious government actions targeting the group in question.[18] And perhaps as importantly, it signaled an important normative judgment regarding the group's stature within our constitutional polity. As the Court itself emphasized, protected groups were those groups as to which there were almost never "good" (i.e., non-invidious) reasons for subjecting them to adverse treatment.[19]

Set against this backdrop, it is unsurprising that protected class status was among the arguments pursued by gay rights litigators in the 1970s and 1980s in their efforts to secure equality for LGB litigants.[20] And indeed, there were

17. *See, e.g.*, William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2250-69 (2002).

18. *Id.*

19. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440-41 (1985); *see also* Eskridge, *supra* note 17 (making a similar observation about the significance of suspect class status).

20. Eskridge, *supra* note 17, at 2265-66. Arguments for suspect class status—although sporadically relied on by the LGBT rights movement in the 1970s and early 1980s—actually gained greater prominence later in the 1980s, perhaps due to *Bowers v. Hardwick*'s repudiation of what had been, to that point, a comparatively successful due-process-based strategy. *See, e.g.*, PATRICIA A. CAIN, RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT, 122-23 (2000); *infra* notes 26-31 and accompanying text.

strong arguments for protected class status under the criteria—history of discrimination, relation to ability, political power, and immutability (or a distinguishing characteristic)—that the Court had traditionally deemed relevant to the determination.[21] As a result, by the early 1980s, a number of commentators and courts were already beginning to suggest that heightened scrutiny for sexual-orientation-based classifications might be warranted.[22] In 1985, in a dissent from the denial of certiorari, Justices Brennan and Marshall would put their imprimatur on the developing claims for full gay constitutional inclusion, noting that "homosexuals constitute a significant and insular minority" and that "[s]tate action taken against members of such groups based simply on their status as members of the group traditionally has been subject to strict, or at least heightened, scrutiny by this Court."[23]

But later that same year, the Court would take up the case of *Bowers v. Hardwick*—a challenge to Georgia's sodomy law—a move which would mark the sharp reversal of any trend towards the lower courts' embrace of gay equality claims.[24] Although the law itself was neutral as to sexual orientation—and the challenge was based on due process rather than equal protection grounds—the rhetorical thrust of the Court's opinion was difficult to miss. Deriding the notion that the Constitution might "confer[] a fundamental right upon homosexuals to engage in sodomy," the Court rejected the notion that "majority sentiments about the morality of homosexuality" might be an insufficient basis to support a law.[25]

In the aftermath of *Bowers*, claims for heightened scrutiny as a matter of equal protection doctrine continued to be made in the lower courts. And indeed, it initially seemed plausible that *Bowers* might not derail efforts to secure protected class status under the Equal Protection Clause. Thus, in the two-and-a-half years following *Bowers*, the two circuits to address the

---

21. Both the Supreme Court and the lower courts have varied in their statements of these criteria, as well as the extent to which they have deemed them all necessary to a finding of suspect or quasi-suspect class status. For a contemporary discussion of the factors, see, for example, Windsor v. United States, 699 F.3d 169, 182-85 (2d Cir. 2012).

22. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 944 n.17 (1978); Harris M. Miller II, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 799-800 (1984); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1309 (1985); *see also* Ancanfora v. Board of Educ., 359 F. Supp. 843, 852-53 (D. Md. 1973), *aff'd on other grounds* 491 F.2d 498 (4th Cir. 1974) (suggesting that suspect class status might be appropriate).

23. Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of certiorari).

24. 478 U.S. 186 (1986).

25. *Bowers*, 478 U.S. at 190, 196.

propriety of treating LGB status as suspect split with one another, and at least two district courts endorsed the notion of heightened scrutiny for sexual-orientation-based classifications.[26]

But this initial openness to LGB claims for heightened scrutiny would prove to be short-lived. Each of the early decisions recognizing heightened scrutiny was vacated or overruled by the end of 1990.[27] And by the mid-1990s, a clear, strong consensus had begun to emerge that *Bowers* precluded a finding that "homosexuality" constituted a suspect class for equal protection purposes.[28] As the D.C. Circuit put it in an early and ultimately much-relied-upon assessment of *Bowers*'s impact: "It would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause. . . . After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal."[29]

During the ensuing decade, similar reasoning would be repeatedly relied upon by the lower federal courts to reject claims for heightened scrutiny.[30] By the mid-1990s, although isolated district courts continued to sporadically find heightened scrutiny appropriate, each of the seven circuit courts that had addressed the issue had held that LGB classifications did not qualify for heightened scrutiny.[31] And, applying rational basis review, claims for LGB equality were regularly—albeit not uniformly—rejected by the courts.[32]

---

26. High Tech Gays v. Def. Indus. Sec. Clearance Office, 668 F. Supp. 1361, 1368-72 (N.D. Cal. 1987), *rev'd in part and vacated in part by* 895 F.2d 563 (9th Cir. 1990); BenShalom v. Marsh, 703 F. Supp. 1372, 1377-80 (E.D. Wisc. 1989), *rev'd sub nom.* Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989). *Compare* Watkins v. U.S. Army, 837 F.2d 1428, 1444-48 (9th Cir. 1988) (finding that strict scrutiny applies), *withdrawn and superseded on reh'g en banc by* 875 F.2d 699 (9th Cir. 1989), *with* Padula v. Webster, 822 F.2d 97, 101-03 (D.C. Cir. 1987) (refusing to apply strict or heightened scrutiny).

27. *See* sources cited *supra* note 26.

28. *See infra* note 31 and accompanying text.

29. *Padula*, 822 F.2d at 103.

30. *See, e.g.*, Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 54 F.3d 261, 266-68 (6th Cir. 1995), *vacated and remanded*, 518 U.S. 1001 (1996); *High Tech Gays*, 895 F.2d at 571-73; Woodward v. United States, 871 F.2d 1068, 1075-76 (Fed. Cir. 1989); *Ben-Shalom*, 881 F.2d at 464.

31. *See* Thomasson v. Perry, 80 F.3d 915, 927-28 (4th Cir. 1996); *Equal. Found.*, 54 F.3d at 266-68 (6th Cir.); Walmer v. U.S. Dep't of Def., 52 F.3d 851, 854 (10th Cir. 1995); *High Tech Gays*, 895 F.2d at 571-73 (9th Cir.); *Woodward*, 871 F.2d at 1075-76 (Fed. Cir.); *Ben-Shalom*, 881 F.2d at 464 (7th Cir.); *Padula*, 822 F.2d at 103 (D.C. Cir.).

32. *See, e.g.*, sources cited *supra* note 31. *But cf.* Pruitt v. Cheney, 963 F.2d 1160, 1165-66 (9th Cir. 1992) (denying a motion to dismiss an equal protection claim on rational basis review); Anderson v. Branen, 799 F. Supp. 1490, 1491-92 (S.D.N.Y. 1992) (same); Dubbs v. CIA,

It was thus with some trepidation that the LGBT legal community greeted the Supreme Court's grant of certiorari in the case of *Romer v. Evans*.[33] The Colorado Supreme Court had, in a sweeping opinion, found Colorado's "Amendment 2"—designed to divest the LGB community of anti-discrimination protections—to be in violation of the Equal Protection Clause.[34] Although not founding its reasoning on suspect class status, the Colorado Court had nevertheless applied heightened scrutiny (based on the burdening of the fundamental right of political participation), a rarity in post-*Bowers* equal protection litigation.[35] Thus, the Supreme Court's decision to grant review—of a rare gay equal protection victory below—seemed unlikely to be an auspicious sign.

But the Supreme Court's 6-3 decision, issued in May 1996, quickly dispelled these fears. Characterizing Amendment 2 as a "denial of equal protection of the laws in the most literal sense," the Court found "its sheer breadth . . . so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects."[36] Concluding that "Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else," the Court found the law to violate the Equal Protection Clause.[37] Thus, the Court—while declining to clearly situate its decision within the "tiers of scrutiny" framework that it had historically developed—made clear that animus-based anti-LGB discrimination, at a minimum, should no longer survive.

Romer afforded renewed momentum to the efforts of LGBT rights litigators to use rational basis review to challenge anti-gay classifications. Such claims were occasionally successful in the lower courts even prior to *Romer*, and

769 F. Supp. 1113, 1118 (N.D. Cal. 1990) (same); Swift v. United States, 649 F. Supp. 596, 601-02 (D.D.C. 1986) (same).

33. JOYCE MURDOCH & DEB PRICE, COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT 460-61 (2001).

34. *See* Evans v. Romer, 854 P.2d 1270, 1282-86 (Colo. 1993) ("Evans I") (holding that Amendment 2 "to a reasonable probability, infringes on a fundamental right protected by the Equal Protection Clause of the United States" and must be subject to strict scrutiny); Evans v. Romer, 882 P.2d 1335, 1341-50 (Colo. 1994) ("Evans II") (finding that Amendment 2 could not withstand strict scrutiny); *see also id.* at 1341 & n.4 (declining to revisit the Court's prior holding in Evans I that Amendment 2 was subject to strict scrutiny under the Equal Protection Clause).

35. *Evans II*, 882 P.2d at 1339-41 & n.3.

36. Romer v. Evans, 517 U.S. 620, 632-33 (1996).

37. *Id.* at 635.

became an increasingly viable approach in its aftermath.[38] But *Romer* did little to shift the consensus of the lower courts that rational basis, rather than any form of heightened scrutiny, was the appropriate standard of review. Noting that *Romer* used the language of rational basis review, the lower courts typically read it either as confirming—or at a minimum not disturbing—the preexisting consensus that rational basis review, and not the heightened scrutiny applicable to suspect or quasi-suspect classes, was the appropriate standard.[39]

As a result, by the time that *Lawrence v. Texas* came up to the Court in 2003, it was fair to say that the heightened scrutiny project was—as a matter of federal equal protection doctrine—largely moribund. The lower courts routinely dismissed gay claims for suspect or quasi-suspect class status summarily, relying on pre-*Romer*, *Bowers*-based circuit precedents, or, sometimes, on *Romer* itself.[40] Despite the fact that *Romer* had not addressed the proper standard of review for sexual orientation classifications, and had arguably undermined some of *Bowers*'s core precepts, the lower courts continued, in the face of *Romer*'s ambiguous language, to adhere to their pre-*Romer* consensus that arguments for heightened scrutiny for the LGB community were not sustainable.

As a sign of this essentially moribund status, the petitioners' brief in *Lawrence*—while arguing strongly for the invalidation of the Texas "Homosexual Conduct" law—devoted only a single footnote, without citation, to the contention that that sexual-orientation-based classifications should compel heightened scrutiny under the Equal Protection Clause.[41] And in response, the respondents—relying on both *Romer* and the unanimous circuit court authority rejecting suspect class status—would note that "applying a rational-basis analysis to classifications based upon sexual orientation is not a matter of controversy in this Court or the federal courts of appeals."[42]

The Supreme Court's decision in *Lawrence*—invalidating the Texas law and overruling *Bowers*—would not take up this dispute, instead hewing to a due

---

38. For pre-*Romer* cases, see *supra* note 32; for post-*Romer* cases, see, for example, *Flores v. Morgan Hill Unified School District*, 324 F.3d 1130, 1137-38 (9th Cir. 2003); *Stemler v. City of Florence*, 126 F.3d 856, 872-74 (6th Cir. 1997); *Nabozny v. Podlesny*, 92 F.3d 446, 456-58 & n.12 (7th Cir. 1996); *Zavatsky v. Anderson*, 130 F. Supp. 2d 349, 356 (D. Conn. 2001); and *Weaver v. Nebo School District*, 29 F. Supp. 2d 1279, 1287-89 (D. Utah 1998).

39. *See, e.g.*, Schroeder v. Hamilton Sch. Dist., 282 F.3d 946, 950-51 (7th Cir. 2002); Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 294 (6th Cir. 1997); Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126, 1132 (9th Cir. 1997); Richenberg v. Perry, 97 F.3d 256, 260 & n.5 (8th Cir. 1996).

40. *See* sources cited *supra* note 39.

41. Brief of Petitioners at 32 n.24, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102).

42. Respondents' Brief at 30-31, *Lawrence*, 539 U.S. 558 (No. 02-102).

process rationale.[43] Moreover, it would, like *Romer*, speak in terms that were simultaneously sweeping but doctrinally ambiguous. Thus, the Court's decision nowhere explicitly clarified the appropriate standard of review, relying extensively on fundamental rights precedents while simultaneously using the language of rational basis review.[44] And, although acknowledging important equality-undermining aspects of the law (and the plausibility of an equal protection argument for its invalidity), the majority did not ultimately rest its holding on equal protection grounds, nor otherwise clarify its doctrinal views on gay equality.[45] Thus, although *Lawrence* was in many ways a rhetorically sweeping endorsement of gay equality, its doctrinal implications for gay equal protection claims were far from clear.

Faced with this doctrinal ambiguity, the lower courts uniformly declined invitations in the immediate wake of *Lawrence* to revisit pre-*Lawrence* precedents that had rejected heightened scrutiny for sexual-orientation-based classifications.[46] Despite the fact that many such precedents traced back to cases that had rested in whole or in part on the Court's now-overruled 1986 decision in *Bowers v. Hardwick*, *Bowers*'s overruling in *Lawrence* had little effect.[47] By 2003, the long-standing circuit consensus, coupled with the long failure of the Supreme Court itself to recognize gays and lesbians as a protected class, was seen as reason enough to continue to hold that sexual-orientation-based classifications were not suspect.[48]

For the next decade, as public attitudes continued to shift, and LGBT rights litigators continued to build a body of precedent applying meaningful rational basis review, an increasing number of sexual-orientation-based government

---

43. *Lawrence*, 539 U.S. at 574-75.

44. *Compare id.* at 565-66, 571, 573-74 (relying on fundamental rights precedents), *with id.* at 578 (ultimately concluding that "[t]he Texas statute furthers no *legitimate* state interest which can justify its intrusion into the personal and private life of the individual") (emphasis added).

45. *See id.* at 574-75 (declining to rule on equal protection grounds); *cf. id.* at 579-86 (O'Connor, J., concurring) (relying on a "more searching form of rational basis review" under the Equal Protection Clause and concluding that the Texas sodomy law was invalid).

46. *See, e.g.*, Cook v. Gates, 528 F.3d 42, 61-62 (1st Cir. 2008); Price-Cornelison v. Brooks, 524 F.3d 1103, 1113 n.9 (10th Cir. 2008); Witt v. Dep't of the Air Force, 527 F.3d 806, 821 (9th Cir. 2008); Scarbrough v. Morgan Cnty. Bd. of Educ., 470 F.3d 250, 261 (6th Cir. 2006); Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 818 (11th Cir. 2004).

47. *See generally* Arthur S. Leonard, *Exorcising the Ghosts of* Bowers v. Hardwick*: Uprooting Invalid Precedents*, 84 CHI.-KENT L. REV. 519, 544-56 (2009) (addressing this issue at length).

48. *See, e.g.*, *Cook*, 528 F.3d at 61-62; *Price-Cornelison*, 524 F.3d at 1113 n.9; Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 866-67 (8th Cir. 2006); *Lofton*, 358 F.3d at 818 & n.16.

actions would be struck down on rational basis review.[49] But success on rational basis grounds was far from assured, as early challenges to the Defense of Marriage Act—virtually all unsuccessful prior to 2009—illustrated.[50] Nor did the existing state of affairs send a strong signal to government actors that anti-LGB discrimination was no longer constitutionally or normatively acceptable.

Finally, by the late 2000s, there began to be signs that even the long-standing rejection of sexual orientation as a suspect classification was beginning to come under pressure.[51] For the first time in many years, isolated courts began to express the view—at least in dicta—that perhaps sexual orientation classifications should be subject to heightened scrutiny.[52] (And, at

---

49. *See, e.g.*, *Price-Cornelison*, 524 F.3d at 1113; *Scarbrough*, 470 F.3d at 261; Johnson v. Johnson, 385 F.3d 503, 530-33 (5th Cir. 2004); Dragovich v. U.S. Dep't of the Treasury, 764 F. Supp. 2d 1178, 1190-91 (N.D. Cal. 2011); Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 396-97 (D. Mass. 2010).

50. *See* Smelt v. Cnty. of Orange, 374 F. Supp. 2d 861, 874-75, 880 (C.D. Cal. 2005), *aff'd on other grounds*, 447 F.3d 673 (2006); Wilson v. Ake, 354 F. Supp. 2d 1298, 1307-09 (M.D. Fla. 2005); *In re* Kandu, 315 B.R. 123, 143-48 (Bankr. W.D. Wash. 2004). A number of other DOMA challenges prior to 2009 were dismissed on procedural or standing grounds. *See, e.g.*, Walker v. United States, 298 Fed. Appx. 383, 384 (5th Cir. 2008); Mueller v. Comm'r, 39 Fed. Appx. 437, 438 (7th Cir. 2002); Merrill v. Comm'r of Internal Revenue, Nos. 22608-07, 3058-08, 2009 WL 20115106, at *2 n.2 (U.S. Tax. Ct. July 13, 2009); Mueller v. Comm'r of Internal Revenue, No. 15289-98, 2000 WL 371545, at *3 (U.S. Tax. Ct. Apr. 12, 2000). *But cf.* Bishop v. Oklahoma *ex rel.* Edmondson, 447 F. Supp. 2d 1239, 1252-53 (N.D. Okla. 2006) (denying a motion to dismiss in 2006). By 2009 and 2010, the judicial consensus had begun to shift against DOMA's validity. *See In re* Levenson, 560 F.3d 1145, 1149 (9th Cir. 2009) (Reinhardt, J., acting in an administrative capacity); *Gill*, 699 F. Supp. 2d at 396-97; Massachusetts v. U.S. Dep't of Health and Human Servs., 698 F. Supp. 2d 234 (D. Mass. 2010); *see also In re* Golinski, 587 F.3d 901, 903-04 (9th Cir. 2009) (Kozinski, C.J., acting in an administrative capacity) (construing the Federal Employees Health Benefits Act to include same-sex spouses to avoid potential constitutional difficulties); *Dragovich*, 764 F. Supp. 2d at 1190-91 (denying motion to dismiss in a DOMA challenge). *But cf.* Barragan v. Holder, No. CV 09-08564, 2010 WL 9485872, at *1-2 (C.D. Cal. Apr. 30, 2010) (rejecting equal protection challenge to DOMA).

51. There also began to be signs around this same time that judicial opinion might be turning against DOMA itself, a trend that accelerated considerably following the February 2011 Obama announcement. *See* sources cited *supra* note 50 for late 2000s decisions questioning or invalidating DOMA. For decisions following the Obama announcement, see *infra* note 70.

52. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010); *see also Levenson*, 560 F.3d at 1149 (suggesting that heightened scrutiny might be appropriate). Although this development may be partially attributable to *Lawrence*, its timing (a half a decade post-*Lawrence*) suggests that broader shifts in the public culture regarding gay equality may also have played a role. *See, e.g.*, *Gay and Lesbian Rights*, GALLUP, http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx (last visited Aug. 7, 2013) (showing significant changes in public opinion from 2003 to 2010). Notably, despite increasing intimations during this time

least one circuit case, relying on *Lawrence*, would apply heightened scrutiny on due process grounds.)[53] Nevertheless, as of early 2011, the string of decisions rejecting suspect class status for the LGB community remained largely unbroken, with only two isolated district courts—in the fourteen years since *Romer*—holding that suspect class status was appropriate.[54]

II. THE OBAMA INTERVENTION AND RESPONSE

It was against this backdrop that the Obama Administration, on February 23, 2011, announced its determination that classifications based on sexual orientation should be subject to heightened scrutiny, and that section 3 of the Defense of Marriage Act was thus unconstitutional.[55] In a letter sent to House Speaker John Boehner, Attorney General Eric Holder spelled out the reasons for this determination, tracing the characteristics that the Supreme Court has traditionally found to justify heightened scrutiny, and finding that each was met by sexual-orientation-based classifications.[56] Although acknowledging that "there is substantial circuit court authority" holding that rational basis review was the applicable standard, the Holder letter rejected that authority *inter alia* as resting on *Bowers* (now overruled by *Lawrence*), and on an inaccurate reading of *Lawrence* and *Romer* as having resolved the issue of the proper level of scrutiny to apply.[57] The Administration thus rejected the virtually unanimous lower court authority in favor of its own view that heightened scrutiny for sexual-orientation-based classifications was appropriate.[58]

---

frame that suspect class status might be appropriate for gays and lesbians, it was not until after the Obama announcement that one sees any significant number of cases so holding. Thus, it appears that both conditions—hospitable public culture surrounding gay equality and an authoritative doctrinal proponent (in this case the President)—were needed before the lower courts felt free to embark on a substantial shift in doctrinal approach.

53. *See* Witt v. Dep't of the Air Force, 527 F.3d 806, 817-21 (9th Cir. 2008); *see also* Log Cabin Republicans v. United States, 716 F. Supp. 2d 884, 964-66 (C.D. Cal. 2010) (applying *Witt*). *But cf. Witt*, 527 F.3d at 821 (summarily rejecting the plaintiff's equal protection claim on the grounds that *Lawrence* did not disturb preexisting circuit precedents demanding rational basis review).

54. *See Perry*, 704 F. Supp. 2d at 997; Able v. United States, 968 F. Supp. 850, 862-64 (E.D.N.Y. 1997), *rev'd on other grounds*, 155 F.3d 628, 632 (2d Cir. 1998).

55. Letter from Eric Holder, Att'y Gen., to Hon. John Boehner, Speaker, House of Representatives (Feb. 23, 2011), http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.

56. *Id.*

57. *Id.* at 2.

58. *Id.*

Applying this standard, the Administration further concluded that DOMA could not be constitutionally sustained.[59] Noting that only "actual state purposes" could be considered under the heightened scrutiny standard of review, the Holder letter observed that the legislative record strongly suggested that "moral disapproval" and "animus" had been the actual motivations for the law.[60] And thus, unable to rely on the type of hypothetical rationales that the Administration had traditionally forwarded in defense of DOMA (an acceptable practice under rational basis review[61]), the Administration concluded that the law could not reasonably be defended as constitutional.[62] The Holder letter thus informed Speaker Boehner that the Department of Justice would cease defending the law in litigation, although it would continue to enforce it pending a judicial determination of its constitutionality.[63]

Holder's letter to Boehner—and its underlying disclosure that the Obama Administration would decline to defend DOMA—was the subject of widespread press coverage, generating more than three hundred news stories in the first week alone.[64] In the weeks and months that followed, it also formed the basis for numerous litigation arguments made by both the Justice Department itself and private litigants, for both the application of heightened scrutiny and DOMA's unconstitutionality.[65] Thus, by early 2012, virtually all of

---

59. *Id.*

60. *Id.* at 3.

61. *Compare* Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 818 (11th Cir. 2004) (observing that on rational basis review "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature") (quoting FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993)), *with* Windsor v. United States, 699 F.3d 169, 185 (2d Cir. 2012) (observing that for the purposes of heightened scrutiny "[t]he justification must be genuine, not hypothesized or invented *post hoc* in response to litigation") (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)).

62. Letter from Eric Holder, *supra* note 55, at 3.

63. *Id.* at 3-4.

64. The search for news articles was conducted in the Westlaw database USNEWS using the following search terms: obama /50 ("defense of marriage act" doma) /50 (((refus! declin! "will not") /5 defen!) "attorney general" holder letter) & da(aft 2/22/2011 & bef 3/2/2011).

65. *See, e.g.*, Press Release, Dep't of Justice, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), http://www.justice.gov/opa/pr/2011/February/11-ag-222.html (announcing that the DOJ would advise courts in all pending DOMA litigation of the President's conclusion that heightened scrutiny should apply and that section 3 is unconstitutional); *see also* Letter from Tony West, Assistant Att'y Gen. to Margaret Carter, Clerk of the U.S. Court of Appeals for the First Circuit (Feb. 24, 2011) (informing the First Circuit Court of Appeals of the announcement the following day). For private party briefs, see, for example, Motion To Vacate Stay Pending Appeal at 7, Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012) (No. 10-16696); Appellant's Reply Brief at 2-5,

the pending DOMA cases—and many other non-DOMA LGB cases—were being litigated against the backdrop of a presidential determination that heightened scrutiny was appropriate, and section 3 of DOMA unconstitutional.[66] During the same time frame, the Bipartisan Legal Advisory Group of the United States House of Representatives ("BLAG") successfully moved to intervene in numerous DOMA proceedings to argue in contradistinction that DOMA was constitutional, and that the weight of existing legal authority made clear that rational basis was the proper standard.[67]

Although legal authority addressing DOMA's constitutionality had been deeply divided at the time of President Obama's announcement,[68] the judicial determinations following the February 23, 2011 Holder letter were virtually unanimous in deeming it unconstitutional.[69] Of the eight decisions in the lower federal courts addressing DOMA's constitutionality after the letter was released, seven found it to be constitutionally invalid as a matter of equal protection doctrine.[70] (An eighth decision summarily affirmed DOMA's

United States v. Osazuwa, 446 F. App'x 919 (9th Cir. 2011) (No. 10-50109); Brief for Appellee/Cross-Appellant Log Cabin Republicans at 67-68, Log Cabin Republicans v. United States of America, 658 F.3d 1162 (9th Cir. 2011) (Nos. 10-56634, 10-56813); Plaintiffs' Motion for Preliminary Injunction at 21, Bassett v. Snyder, 2013 WL 3285111 (E.D. Mich. June 28, 2013) (No. 12-10038), https://www.aclu.org/files/assets/bassett_plaintiffs_pi_brief.pdf; and Plaintiffs' Notice of Motion and Motion for Summary Judgment at 15, Sevcik v. Sandoval, 911 F. Supp. 2d 996 (D. Nev. 2012) (No. 2:12-cv-00578), http://www.lambdalegal.org/sites/default/files/sevcik_nv_20120910_plaintiffs-motion-for-summary-judgment.pdf.

66. *See* sources cited *supra* note 65.

67. *See, e.g.*, Brief on Jurisdiction for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 4-5, 133 S. Ct. 2675 (2013) (No. 12-307).

68. *See* sources cited *supra* note 50.

69. As noted *supra* note 51, even prior to the Obama announcement, courts were increasingly expressing skepticism regarding DOMA's constitutionality. (And indeed, a major decision holding DOMA unconstitutional (on rational basis review) was decided just months prior to the Obama announcement, *see* Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 396-97 (D. Mass. 2010).) This incipient trend—which likely helped push the Administration itself to enter the fray—increased substantially in the aftermath of the Obama announcement. *See infra* note 70 and accompanying text.

70. Windsor v. United States, 699 F.3d 169, 180-88 (2d Cir. 2012); Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 15-17 (1st Cir. 2012); Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 981-1002 (N.D. Cal. 2012); Dragovich v. U.S. Dep't of the Treasury, 872 F. Supp. 2d 944, 953-59 (N.D. Cal. 2012); Windsor v. United States, 833 F. Supp. 2d 394, 402-06 (S.D.N.Y. 2012); Pedersen v. Office of Pers. Mgmt., 881 F.Supp.2d 294, 309-347 (D. Conn. 2012); *In re* Balas and Morales, 449 B.R. 567, 573-79 (Bankr. C.D. Cal. 2011); *see also In re* Somers, 448 B.R. 677, 682-83 (Bankr. S.D.N.Y. 2011) (relying on Obama announcement to exercise discretion in bankruptcy case and allow joint filing by gay married couple despite DOMA).

constitutionality on the basis of preexisting circuit precedent.)[71] Thus, by the time that the Supreme Court elected to take up the issue in December 2012, a clear majority of the courts that had addressed DOMA's constitutionality—and virtually all of those that had addressed it in the preceding two-and-a-half years—had found the statute unconstitutional.

Even more striking was the incipient shift in broader gay equality doctrine that the Obama announcement seemed to spur. After years of summarily dismissing claims for heightened scrutiny, the lower courts began within months of the Obama intervention to address the question of heightened scrutiny with renewed seriousness.[72] And, although not all courts would find heightened scrutiny to be appropriate, the result would be a greater volume of cases endorsing heightened scrutiny for sexual-orientation-based classifications than in the previous fifteen years combined.[73]

Among the first courts to follow the Holder letter's lead would be the Central District of California Bankruptcy Court, in an opinion signed by twenty of its twenty-four judges.[74] Relying extensively on and ultimately "adopt[ing]" the Holder letter's analysis of the appropriate standard of review for sexual-orientation-based classifications, the court in *In re Balas* concluded that heightened scrutiny applied, and that DOMA's restrictions on joint bankruptcy filing were therefore unconstitutional.[75] Thus, bankruptcy—among the first contexts in which a DOMA challenge had initially been rejected—would prove to be one of the first outposts for the newfound revival of heightened scrutiny.[76]

The *Balas* decision was echoed in the following year by two district courts, first in the Northern District of California and then in the District of Connecticut.[77] Following the same basic reasoning as that set out in the Holder letter—and also drawing explicitly on the DOJ's case-specific briefing—each

---

71. Lui v. Holder, No. 2:11-CV-1267, 2011 WL 10653943, at *3 (C.D. Cal. Sept. 28, 2011).

72. *See, e.g.*, *Windsor*, 699 F.3d at 180-85; *Golinski*, 824 F. Supp. 2d at 981-90; *Pedersen*, 881 F. Supp. 2d at 310-33; *In re Balas*, 449 B.R. at 573-77; *see also infra* note 95 and accompanying text (noting that even among cases rejecting heightened scrutiny since the Obama announcement, many have considered the issue much more extensively and seriously than was the norm pre-announcement).

73. *Compare* sources cited *supra* note 72, *with* sources cited *supra* note 54. No decisions endorsing heightened scrutiny were issued in 1996, the year *Romer* was decided, or during the previous year.

74. *In re Balas*, 449 B.R. at 569.

75. *Id.* at 573-78.

76. *Id.*; *see also In re* Kandu, 315 B.R. 123, 143-48 (Bankr. W.D. Wash. 2004) (rejecting an early DOMA challenge).

77. *See Golinski*, 824 F. Supp. 2d at 981-90; *Pedersen*, 881 F. Supp. 2d at 310-33.

court traced the factors governing suspect class status and ultimately concluded that heightened scrutiny was appropriate.[78] Despite noting long-standing circuit precedents to the contrary, both concluded—as the Holder letter had—that such precedents had been irredeemably undermined by *Bowers*'s overruling in *Lawrence*.[79]

And finally, on October 18, 2012, the issue of heightened scrutiny would be taken up by the Second Circuit—one of the few circuits lacking binding authority on the appropriate standard of review—in *Windsor v. United States*.[80] Drawing on the recent precedents finding heightened scrutiny to be appropriate, and following reasoning very similar to that set forth in the Holder letter, the Second Circuit in *Windsor* would ultimately conclude that "homosexuals compose a class that is subject to heightened scrutiny."[81] Thus, after decades of unanimous rejection by the courts of appeals of LGB arguments for protected class status, the Second Circuit would break from its sister circuits to find heightened scrutiny the appropriate standard of review.

Less than two months later, on December 7, 2012, the Supreme Court itself would take *Windsor* up, granting certiorari review.[82] But unlike *Romer* fifteen years before, there was reason for significant optimism that the Court did so here not to reverse, but instead to affirm the pro-gay decision below. Much had changed since 1996, with the public, the President, the lower courts and the Court itself much more openly receptive to arguments for gay equality. Indeed, polls taken during *Windsor*'s pendency suggested that even full legal marriage equality (much less the more modest step of invalidating section 3 of DOMA) was widely perceived even by marriage opponents as inevitable.[83]

And in fact, when the Court issued its decision on June 26, 2013, it would, by a narrow majority, find section 3 of DOMA unconstitutional.[84] Speaking in the sweeping terms characteristic of its prior opinions addressing LGB equality, the *Windsor* Court issued a decisive victory to those who had contended that DOMA caused real and intended harm to same-sex couples and

78. *See Golinski*, 824 F. Supp. 2d at 985-90; *Pedersen*, 881 F. Supp. 2d at 314-33.

79. *See Golinski*, 824 F. Supp. 2d at 983-85; *Pedersen*, 881 F. Supp. 2d at 311-12.

80. Windsor v. United States, 699 F.3d 169, 181-85 (2d Cir. 2012).

81. *Id.* at 185.

82. United States v. Windsor, 133 S. Ct. 786 (2012) (granting writ of certiorari).

83. *See* Pew Research Center, *In Gay Marriage Debate, Both Supporters and Opponents See Legal Recognition as 'Inevitable,'* http://www.people-press.org/2013/06/06/in-gay-marriage-debate-both-supporters-and-opponents-see-legal-recognition-as-inevitable (last visited Aug. 21, 2013).

84. United States v. Windsor, 133 S. Ct. 2675 (2013).

their families.[85] Finding that DOMA "demeans [same-sex] couple[s]" and "humiliates [the] tens of thousands of children" in their care, the Court concluded that "no legitimate purpose overcomes the purpose and effect [of DOMA] to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."[86]

But *Windsor*, like *Romer* and *Lawrence* before it, would also speak in terms that—while eloquent and sweeping—were of highly ambiguous doctrinal significance. Although nominally an equal protection decision, the Court's analysis bore scant resemblance to traditional equal protection doctrine.[87] Drawing widely on seemingly *sui generis* federalism and liberty-based reasoning, the Court offered virtually no guidance on how its reasoning might be applied to future cases, either in the equal protection context or elsewhere.[88] Even the Court's dissenters—while agreed in their derision for the majority's reasoning—could not agree on its implications, reaching exactly opposite conclusions on its significance for state recognition of same-sex marriages.[89]

Notably absent from the *Windsor* majority's discussion was any analysis of the grounds on which the Obama Administration had based its opinion as to DOMA's constitutionality: that sexual-orientation-based classifications must be subjected to heightened scrutiny.[90] Although noting the executive's position on this point—and its decision not to defend DOMA as a result—the majority pointedly declined to address the issue on its merits, addressing it only obliquely and in passing in its discussion of standing.[91] Thus, the *Windsor* Court, like the *Romer* and *Lawrence* Courts before it, provided only the thinnest of guidance regarding the proper approach to gay equality claims, leaving it largely to the lower courts to find their own way in the changing constitutional terrain.

---

85. *See id.*

86. *Id.* at 2694, 2696.

87. *See id.* at 2693-96; *see also id.* at 2706 (Scalia, J., dissenting) (noting that "if this is meant to be an equal-protection opinion, it is a confusing one" and critiquing the majority's doctrinal approach).

88. *Id.* at 2693-96 (majority opinion).

89. *Compare id.* at 2696-97 (Roberts, J., dissenting), *with id.* at 2709-11 (Scalia, J., dissenting).

90. *See id.* at 2706 (Scalia, J., dissenting).

91. *Id.* at 2683-84, 2688-89 (majority opinion).

III. TOWARD A THEORY OF LOWER COURT POPULAR CONSTITUTIONALISM

In the wake of *Romer* and *Lawrence*, there was vast optimism but ultimately relatively little doctrinal change in the lower courts' approach to gay equality claims.[92] Rational basis review continued to overwhelmingly dominate the lower courts' approach to sexual-orientation-based classifications. Few courts suggested that global or fundamental transformations in the legal standards applied to LGB claims were appropriate. And while incremental shifts did gradually occur, it was largely through the slow case-by-case adjudicative process of winning cases on rational basis review—a process that *Romer* and *Lawrence* no doubt facilitated and encouraged, but did not radically reshape. Thus, although *Romer* and *Lawrence* have played a role in shifting broader public and judicial perceptions of gay equality (a shift that no doubt has resulted in increased rational basis victories), their influence on the lower courts' doctrinal reasoning can fairly be characterized as underwhelming.

In contrast, President Obama's popular constitutional intervention seems to have jump-started a much deeper renewal of constitutional dialogue in the lower courts about the proper constitutional stature of gay equality.[93] Although based on an independent, extrajudicial assessment of constitutional meaning by the executive branch,[94] the Obama intervention seems to have been received by the lower courts, in the absence of authoritative guidance from the Supreme Court, as a signal that heightened scrutiny is once again a respectable—if perhaps not mandatory—doctrinal approach.[95] And, given that the factors warranting heightened scrutiny tend to, if fully analyzed, support LGB claims for heightened scrutiny, such doctrinal "space" may well lead to more profound shifts in the lower courts' gay equality approach.

---

92. *See supra* notes 39-50 and accompanying text.

93. *See supra* notes 68-81 and accompanying text.

94. *See, e.g.*, *Windsor*, 133 S. Ct. at 2689 (noting that the Obama decision not to defend DOMA was "based on a constitutional theory not yet established in judicial decisions"); *see also* Golinski v. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 988 (N.D. Cal. 2012) (noting that the "Department of Justice functions under an independent obligation to assess the constitutionality of a statute it has been tasked to defend" and that "the announcement by the Department of Justice . . . was an independent assessment of the constitutionality of DOMA").

95. Even among those courts that have rejected arguments for protected class status since the Obama announcement, many have analyzed the issue at length, in contrast to the pre-Obama era, when such arguments were typically disposed of summarily. *See, e.g.*, Sevcik v. Sandoval, No. 2:12–cv–00578, 2012 WL 5989662, at *9-16 (D. Nev. Nov. 26, 2012); Jackson v. Abercrombie, 884 F. Supp. 2d 1065, 1099-1102 (D. Hawaii 2012).

Of course, the durability of this legacy of the Obama intervention remains to be seen. Although early signs suggest that the lower courts are continuing the trend of seriously reconsidering whether heightened scrutiny for gays and lesbians is warranted,[96] it is too soon to know if this trend will endure. And it is certainly possible that the Supreme Court's decision in *Windsor*—ambiguous, declining to endorse the Obama Administration's position in favor of heightened scrutiny—may be read by the lower courts as a signal to halt the incipient move in that direction. In short, only time will tell whether the several decisions that endorsed heightened scrutiny following the Obama announcement are the beginning of a lower court revolution in gay equality, or simply a brief diversion.

Either way, the history of gay equality claims makes clear that much would be lost in a perspective exclusively focused on the Supreme Court. The Court's interventions in gay equality—rare and doctrinally ambiguous—tell far from the full story of constitutional gay equality claims. In the federal judiciary (itself a clear second to state judiciaries until recently[97]), it is in the lower courts that the important details of gay equality claims have been predominantly worked out. Thus, to the extent that popular constitutionalism is a descriptive project, understanding the lower courts—and their susceptibility to and differing institutional relationship to popular constitutionalism—must be a key goal.

And indeed, as both the Obama intervention and the history of gay equality litigation generally suggest, the institutional relationship of the lower federal courts to popular constitutional influences may be quite different from that of the Court itself. Thus, the history of gay equality claims in the lower federal courts suggests that such courts may be slower and more hesitant than the Supreme Court to make doctrinal moves responsive to broader shifts in the constitutional culture, particularly in the absence of some clear doctrinal signal from the Court itself. On the other hand, as to targeted interventions by authoritative popular constitutional actors (such as the President and perhaps Congress) the Obama experience suggests that the lower courts may—in appropriate circumstances[98]—be at least as receptive a site for popular constitutional understandings.

---

96. *See* Basset v. Snyder, No. 12-10038, 2013 WL 3285111, at *14-16 (E.D. Mich. June 28, 2013) (after *Windsor*, suggesting, after a review of the traditional factors warranting heightened scrutiny, that "[t]he Sixth Circuit's pronouncements on th[is] question are worthy of reexamination"); *see also supra* note 72 and accompanying text.

97. *See, e.g.*, Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 990-97 (2011); Post & Siegel, Roe *Rage*, *supra* note 1, at 381-82.

98. The Obama announcement, for example, took place in a context where the Supreme Court's doctrine, while underdetermined, was not directly conflicting, and in which broader popular

And while these observations from the history of gay equality claims are merely suggestive, they are consistent with what a broader theoretical account might suggest. Thus, as others have observed, the lower federal courts are, in our system, bounded by a constitutional culture that regards them primarily as the faithful agents of the Supreme Court's constitutional perspective.[99] In contrast, the Court itself has, at least in the contemporary era, embraced a self-understanding that places it at the top of the constitutional interpretive hierarchy.[100] Within this basic framework, it is unsurprising that the Supreme Court would feel freer than the lower federal courts to respond to perceived shifts in public constitutional culture—particularly in an environment rich with underdeveloped and ill-classifiable doctrinal moves.[101] In contrast, and for similar reasons, the lower courts might—in the absence of concrete Supreme Court guidance—be *more* receptive to the interpretive moves of authoritative popular constitutional actors such as the President or Congress precisely because of the perceived need for an authoritative legal framework within which to situate broader shifts in public constitutional understandings.[102]

In short, the Obama intervention suggests the importance of—and a number of theoretical starting points for—attending to the significance of

---

constitutional culture was consistent with such a move. In contrast, interventions by authoritative popular constitutional actors seem unlikely to have a similarly robust effect on lower court constitutional adjudication where they run contrary to broader popular constitutional culture, or are in arguable conflict with the Court's own doctrine.

99. *See, e.g.*, Gewirtzman, *supra* note 6, at 465-66.

100. *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2688 (2013); *see also* Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4, 128-29 (2001).

101. *Compare* Siegel, *Dead or Alive*, *supra* note 1, at 191-215 (making the case that the doctrinal approach adopted by the Supreme Court in *District of Colombia v. Heller* is responsive to changes in popular constitutional understandings surrounding gun rights), *with* Allen Rostron, *Justice Breyer's Triumph in the Third Battle Over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 707 (2012) (arguing that the lower courts, in struggling with how to interpret the Court's ambiguous doctrinal approach in *Heller* and *McDonald*, have largely embraced a restrained approach "that leads to all but the most drastic restrictions on guns being upheld.").

102. *Compare* Thomas E. Kleven, Brown*'s Lesson: To Integrate or Separate Is Not the Question, but How to Achieve a Non-Racist Society*, 5 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 43, 53 n.56 (2005) (noting that forced busing was very widely unpopular among whites as early as the 1970s), *with* H.W. Perry, Jr. & L.A. Powe, Jr., *The Political Battle for the Constitution*, 21 CONST. COMMENT. 641, 664 (2004) (observing that while prior administrations had pursued other strategies to oppose busing, the Reagan Administration adopted the position that all race-conscious remedies, such as busing, were unconstitutional), *and* Janice C. Griffith, *Judicial Funding and Taxation Mandates: Will* Missouri v. Jenkins *Survive Under the New Federalism Restraints?*, 61 OHIO ST. L. J. 483, 504 (2000) (locating the timing of the lower courts' turn away from busing in the 1980s, i.e., shortly after the Reagan Administration adopted its constitutionally based position opposing busing).

lower federal courts in the popular constitutionalism project. The picture that ultimately emerges will no doubt be, like popular constitutionalism itself, far more complex; a rich, messy, and dynamic affair.

CONCLUSION

By refocusing our attention on the complex network of actors beyond the Supreme Court, popular constitutionalism has enriched our understanding of how constitutional understandings evolve. Lower federal courts—often the adjudicators of last resort in federal constitutional cases—are a key, if sometimes overlooked, part of this network. As participants in the popular constitutional dialogue, as well as receptive sites for the infiltration of popular constitutional understandings, the lower federal courts matter to a faithful descriptive account of constitutional change.

But as the experience of the Obama announcement—and the history of attempts to secure sexual-orientation-based heightened scrutiny generally—suggest, it is far from clear that the lower federal courts' relationship to popular constitutionalism can be conceptualized in the same terms as that of the Court itself. Indeed, it would be highly surprising if the lower federal courts, operating under very different institutional constraints, were to approach constitutional adjudication in precisely the same manner as the Court. And thus, too, the influence of popular constitutionalism may predictably be felt differently in the lower federal court domain.

More and deeper analysis is needed to more fully understand how and when the lower federal courts are likely to be responsive to popular constitutional interventions. But the history of the LGB community's long efforts to secure heightened scrutiny suggests that, in conducting such an inquiry, understanding institutional role-culture may be key. As we move forward to a richer understanding of how the lower courts operate in relation to popular constitutional influences, we should attend to the ways the lower courts' bounded role—and their attendant demand for doctrinal authority—may both constrain and facilitate the instantiation of popular constitutional understandings in law.

Katie Eyer is an Assistant Professor of Law at Rutgers School of Law—Camden. *She thanks Kati Kovacs, Kim Mutcherson, and Ingrid Waldron for helpful conversations regarding this essay, and Benjamin Farkas and other members of the* Yale Law Journal *editorial staff for excellent editorial suggestions.*

Preferred citation: Katie Eyer, *Lower Court Popular Constitutionalism*, 123 YALE L.J. ONLINE 197 (2013), http://yalelawjournal.org/2013/9/15/eyer.html.