

2013 Higgins Distinguished Visitor

THE BRANDEIS BRIEF AND 21ST CENTURY CONSTITUTIONAL LITIGATION

by
Alan B. Morrison*

*The “Brandeis brief” is an ideal that many lawyers have of an advocacy tool used to persuade a court facing a difficult constitutional question how extra-record materials can help the court decide in favor of the advocate. Long time constitutional litigator and now George Washington Associate Dean Alan Morrison examines the original Brandeis brief and concludes that, judging by the advocacy standards of today, the original brief was not a very effective advocacy tool. He uses that examination to ask a more basic question: what kinds of factual material bearing on constitutional questions should be considered if cited in briefs—amicus or otherwise—and which should come in through the adversary process, including the right to cross-examine the authors of key studies. He uses the constitutional challenge to the Defense of Marriage Act that the Supreme Court struck down in *United States v. Windsor* to argue that much of the material on both the standard of review question and the merits of certain of the defenses would have profited from further probing at the trial court level, although because of the grounds relied in by the majority, those questions were not answered, but are likely to arise again in the challenges to state law bans on same-sex marriages.*

* Lerner Family Associate Dean for Public Interest & Public Service Law, George Washington University Law School. This Essay was presented in an abbreviated form when the author was the 2013 Higgins Distinguished Visitor at the Northwestern School of Law of Lewis & Clark College. It has benefited greatly from comments made then and by others.

I.	INTRODUCTION.....	716
II.	THE BRANDEIS BRIEF AND THE OPINION IN <i>MULLER V. OREGON</i>	720
III.	PROVING FACTS IN CONSTITUTIONAL LITIGATION: THE SAME-SEX MARRIAGE CASES	730
	A. <i>Adjudicative Facts</i>	730
	B. <i>Facts Relating to the Level of Scrutiny</i>	730
	1. <i>History of Discrimination</i>	731
	2. <i>Immutability</i>	732
	3. <i>Political Powerlessness</i>	733
	C. <i>Facts Relevant to Merits Determinations</i>	735
	1. <i>Uniformity</i>	736
	2. <i>Proceeding with Caution</i>	739
	3. <i>Saving Money</i>	740
	4. <i>Encouraging Responsible Procreation</i>	741
	5. <i>Supporting Preferable Child Rearing</i>	742
	a. <i>Improper Motives as a Counter to the Proposed Justifications</i>	746
	b. <i>Re-Visiting the Ultimate Question</i>	747
IV.	AFTERWORD.....	749

I. INTRODUCTION

In the summer of 2012, I was putting together a program on the about to be argued and subsequently decided affirmative action case of *Fisher v. University of Texas*.¹ Counsel for the parties were understandably reluctant to participate in a public forum shortly before the main event, and so I read amicus briefs to identify well-stated and disparate points of view for the program. In the course of that endeavor, I noticed that a number of the briefs discussed studies supporting their side, while others cited opposing studies, or argued about the validity of studies that came out favoring their adversaries. Some briefs contained assertions about the benefits, or lack of benefits, from racial diversity in higher education, while others focused on discrimination against Asian Americans and how that should factor into the Court’s decision. How, I asked myself, could the Supreme Court be expected to decide which side was right, and if these studies mattered, shouldn’t they have been introduced at a trial where the authors could be cross-examined, not so much to see who was “telling the truth,” but to probe the methods and assumptions that underlay their conclusions?

Like many others who file amicus briefs, I had in the back of my mind the model of the brief filed by Louis Brandeis in *Muller v. Oregon*,² a

¹ 133 S. Ct. 2411 (2013).

² 208 U.S. 412 (1908).

brief that I had actually never read. I had always assumed that it was like modern day amicus briefs and that reading it could help me understand whether the conflicts among amicus briefs today are deviations from the Brandeis approach or direct descendants of it. I had our library obtain a copy of it and the other briefs in the case, all of which I read after first reading the Court's opinion so that I understood what was at issue. My original intent had been to use the briefs and the decision in *Fisher* to make some observations about the use and misuse of amicus briefs by those who submitted them and by the Supreme Court. However, because the decision in *Fisher* was mainly a modest extension of the Court's prior ruling in *Grutter v. Bollinger*,³ it was not well-suited for such an exposition.⁴

While this process was underway, I was also working with counsel in two sets of cases challenging the constitutionality of the unequal treatment of same-sex couples. In the first, the challenge to the Defense of Marriage Act (DOMA),⁵ I filed amicus briefs in several courts arguing that DOMA's differing treatment, for federal law purposes, of same-sex married couples from opposite-sex couples violated Equal Protection,⁶ as the Court eventually held in *United States v. Windsor*.⁷ My involvement in the challenge to California's Proposition 8 (Prop. 8), which limited marriage to opposite-sex couples, was mainly through offering written comments to plaintiffs' lead counsel. Examining the briefs in those cases caused me to recognize that there was a basic and unexplored issue of what kind of evidence is or should be required to make various kinds of determinations in cases in which the constitutional validity of statutes like DOMA and Prop. 8 is the issue.⁸

³ *Fisher*, 133 S. Ct. at 2421; *Grutter v. Bollinger*, 539 U.S. 306, 343–44 (2003).

⁴ For my take on the impact of *Fisher*, see Alan B. Morrison, *U. of Texas Won't Sweat Affirmative Action Ruling: As Hypothetical Memo Shows, Despite Challenger's 7-1 'Victory' in Fisher, State Schools Face Little Risk*, NAT'L L.J., July 22, 2013 at 30.

⁵ Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419.

⁶ Brief of Amicus Curiae of Citizens for Responsibility and Ethics in Washington on the Merits in Support of Respondent Edith Schlain Windsor at 4, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), ECF No. 59 [hereinafter Brief of Citizens for Responsibility, Supreme Court]; Brief of Amicus Curiae Citizens for Responsibility and Ethics in Washington at 4, *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012) (No. 12-2335), ECF No. 160 [hereinafter Brief of Citizens for Responsibility, Second Circuit].

⁷ 133 S. Ct. 2675, 2693 (2013).

⁸ Prop. 8 was a California ballot initiative, passed by 52.3% of the electorate, which amended the State constitution. *Strauss v. Horton*, 207 P.3d 48, 68 (Cal. 2009). This Essay treats it as if it were a state statute, passed by the legislature, because no one has suggested that the outcome of a federal constitutional challenge to a state law should vary because the law was enacted by the initiative process or that the law became part of a state constitution, instead of its body of statutes. On the federal side there is no initiative process, and so if a provision became part of the United States Constitution, there could be no further challenge to it.

I also concluded that there were insights to gain from the original Brandeis brief and other parts of *Muller* because the case was, like the same-sex marriage cases, a constitutional challenge to a statute that treated one group—women who worked in laundries and certain other places—better than women who worked elsewhere and better than all men. And it too raised the question of what kind of showing was needed to overturn or support such a law.⁹ Moreover, since the *Muller* decision involved a laundry that was less than 10 miles from where I was giving this talk, I could not skip the opportunity to discuss the case and the briefs submitted, which I assume that most law students and most lawyers, like me, had never read. That is Part II of this Essay.

Part III moves to the 21st century and focuses on the same-sex marriage cases and asks what kind of evidence, if any, should be required to defend (or attack) the laws at issue there. As I read the briefs in those cases, they raised three different kinds of issues on which facts may be relevant, or at least of some assistance, in answering the questions presented. First, the plaintiff must prove the historic facts regarding, in the case of DOMA, how she was adversely affected by the law. In most constitutional cases, that proof is neither difficult to establish nor controversial, although, as we will see in the case of Prop. 8, the facts showing how the favored class—opposite-sex married couples—benefited may pose different problems.

Second, a hotly disputed issue in both cases was the level of scrutiny (sometimes called the standard of review) that should be used to assess the fit between the asserted purposes of the law and the classifications that it draws. As a general matter, the Court has divided legislative classifications for equal protection analyses into three main groups: strict scrutiny, which is reserved for classifications that involve suspect classifications (such as race) or involve fundamental rights (such as voting).¹⁰ Most legislative classifications are treated under the rational basis test, under which wide discretion is afforded those who enacted the law, and classifications are rarely overturned.¹¹ In addition, the Court has ruled that gender-based classifications should receive intermediate scrutiny, which in most cases turns out to be something very close to strict scrutiny, at least measured by the low survival rate for statutes employing such classi-

⁹ For other views of the Brandeis Brief and its originality and importance in *Muller* and elsewhere, see David E. Bernstein, *Brandeis Brief Myths*, 15 GREEN BAG 2d 9 (Autumn 2011); Noga Morag-Levine, *Facts, Formalism, and the Brandeis Brief: The Origins of a Myth*, 2013 U. ILL. L. REV. 59 (2013).

¹⁰ *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969).

¹¹ *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2079–80 (2012) (citing *Heller v. Doe*, 509 U.S. 312, 319–20 (1993)); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973).

fications.¹² In the same-sex marriage cases, the plaintiffs (and the United States) urged the Court to apply intermediate scrutiny to classifications based on sexual orientation.¹³ As I will discuss below, part of the argument on the legal issue of what standard should apply was based on facts about how society treats those whose sexual preferences run to members of their own sex, and there were significant differences among the parties as to those facts and how they should be established. That is the second area of exploration in Part III.

Third, what facts are relevant, and how must they be established, once the historic facts are proven and the level of scrutiny established? Since the majority in *Windsor* did not state what level of scrutiny it was applying to DOMA, a matter on which Justice Scalia chided it in his dissent,¹⁴ I will assume that it applied some form of rationale basis review, as did the First Circuit in an earlier DOMA case, *Massachusetts v. U.S. Department of Health & Human Services*.¹⁵ The defenders of DOMA made various arguments, some with factual components to them. Again, that raises the same question, albeit in a different context: how should such factual disputes be resolved?

Part III addresses one other question: to what extent do these factual disputes matter, or is all of the debate about legal questions, especially the question of how much deference the courts should accord the legislature when it creates classifications that benefit, or more likely disfavor, one group vis-à-vis another that is similarly situated. As I will argue, it is hard to accept the notion that facts are irrelevant, but it is equally hard to argue that courts should be free to second-guess legislatures by making unfavorable findings of fact whenever there is a claim that a group has been treated less favorably than others. The device of using levels of scrutiny to avoid confronting these questions on a case-by-case basis is one way to answer these questions, but that approach puts great pressure on how the level of scrutiny-categorization question is resolved. The final portion of Part III will suggest a somewhat different way of balancing the role of courts and the desirability of deferring to legislatures—except when there is a good reason not to do so. The good reason exception is the most difficult to define and confine, but I shall try to identify the sit-

¹² *United States v. Virginia*, 518 U.S. 515, 532–34 (1996).

¹³ Brief on the Merits for Respondent Edith Schlain Windsor at 15, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), ECF No. 64 [hereinafter Brief for Respondent Windsor]; Brief for the United States on the Merits Question at 18–19, *Windsor*, 133 S. Ct. 2675 (No. 12-307), ECF No. 62 [hereinafter Brief for the United States].

¹⁴ *Windsor*, 133 S. Ct. at 2706 (Scalia J. dissenting).

¹⁵ 682 F.3d 1, 11 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2884 (2013).

uations where an exception to legislative deference is justified and to state their supporting rationales.¹⁶

II. THE BRANDEIS BRIEF AND THE OPINION IN *MULLER V. OREGON*

Muller was a test case if ever there was one.¹⁷ Mr. Muller owned the Grand Laundry in Portland, where he employed women who worked more than the ten hours per day that was the maximum allowed by a 1903 Oregon law. As was common at the time, the law contained only criminal sanctions, and so Muller was criminally charged on September 18, 1905, with a single violation of having one woman work for more than ten hours in one day, although it seems inconceivable that this was the only time he had required a woman to work in excess of the hours allowed. Defendant's demurrer motion to dismiss the indictment as a violation of due process, with no evidentiary support for either side, was denied, after which Muller pled guilty to the charge and was assessed the minimum fine of \$10 (the maximum was \$25).¹⁸ Ten dollars was worth much more then than now, but even in 1905 no one would have taken the case to the Oregon Supreme Court and then the U.S. Supreme Court just to avoid paying that fine.

If a state passed a law today setting a ceiling of ten hours of work per day in certain industries, there is little doubt that it would be sustained. The Oregon law covered more than laundries, but it did not apply to every place where women worked.¹⁹ That limitation was a minor part of Muller's challenge,²⁰ but it did not have to be included because he had a very recent and very significant precedent on his side. On April 17, 1905, the Supreme Court had ruled in *Lochner v. New York* that the law forbidding any person to be employed by a bakery for more than sixty hours in a week was unconstitutional because it violated the rights of the parties to contract with one another.²¹ Bakeries were not laundries, but no one argued that those differences mattered for constitutional purposes. Nor was the difference in the nature of the violations—working more than sixty hours in a week vs. working more than ten hours in a day—of any

¹⁶ I have made similar attempts in Issue Briefs for the American Constitution Society. Alan B. Morrison, *Revisiting Judicial Activism: The Right and Wrong Kinds*, AM. CONST. SOC'Y (Sept. 2013), http://www.acslaw.org/sites/default/files/Morrison_-_Revisiting_Judicial_Activism.pdf; Alan B. Morrison, *The Right and Wrong Kinds of Judicial Activism*, AM. CONST. SOC'Y (May 2010), <http://www.acslaw.org/sites/default/files/ACS%20Issue%20Brief%20-%20Morrison%20Judicial%20Activism.pdf>.

¹⁷ For an interesting history of the case and those involved in it, see Ronald K. L. Collins & Jennifer Friesen, *Looking Back on Muller v. Oregon*, 69 A.B.A. J. 294 (1983).

¹⁸ *Muller v. Oregon*, 208 U.S. 412, 417 (1908).

¹⁹ Act of Feb. 19, 1903, 1903 Or. Laws 148.

²⁰ Brief for the Plaintiff in Error at 16, *Muller*, 208 U.S. 412 (No. 107).

²¹ 198 U.S. 45, 45, 64 (1905).

significance. Nor did the State of Oregon argue that *Lochner* should be overturned. Rather, the only ground for distinction, and the one ultimately adopted by the Court, was that the State had the right to pass legislation that provided women more protection than men, which this law did since it applied only to women.²²

Fast forward to today. Would such a law be constitutional, or would the Equal Protection Clause require that men and women be treated equally, absent some very good reason for not doing so? Today, such a law, even though it favored and did not discriminate against women, would have a difficult time being upheld. Indeed, in the major gender discrimination cases, many engineered and argued by now Supreme Court Justice Ruth Bader Ginsburg, the laws set aside favored women over men—and almost certainly were chosen for that very reason. My favorite is *Craig v. Boren*, in which Oklahoma’s law, which allowed women to drink certain alcoholic beverages at a younger age than men, was struck down as a violation of Equal Protection.²³ The State could raise the drinking age for everyone, or lower it for all, but it could not differentiate on the basis of gender.²⁴ Having ruled that women could not be treated more favorably than men made it much easier for the Court to hold, in an opinion thirty years later by Justice Ginsburg, that Virginia Military Institute could not exclude all women from admission, absent better reasons than it was able to muster.²⁵ And, in a case even closer to *Muller*, the Court held in *UAW v. Johnson Controls, Inc.* that a company rule supposedly designed to protect pregnant women from injuring their fetuses was not narrowly enough tailored to that end.²⁶

Because *Lochner* was a right to contract decision, *Muller*’s lawyers argued in the Supreme Court that, because women in Oregon, even those who were married, had a right to contract equal to that of men, their right to contract to work for more than ten hours in a day should be upheld, like that of their male counterparts, although there were probably no men working in this or any other laundry.²⁷ The brief argued that working in a laundry was not dangerous or unhealthful for women, as evidenced by the fact that such employment was not forbidden, but limited in the amount of time a woman could work.²⁸ It did recognize that the State, in the exercise of its “police power” might pass certain laws, but ar-

²² *Muller*, 208 U.S. at 422–23.

²³ 429 U.S. 190, 204, 210 (1976).

²⁴ *Id.* at 208–09.

²⁵ *United States v. Virginia*, 518 U.S. 515, 534 (1996).

²⁶ 499 U.S. 187, 199–200 (1991).

²⁷ Brief for the Plaintiff in Error, *supra* note 20, at 16.

²⁸ *Id.* at 13.

gued that the classifications “must have some sort of relation to subjects properly within the police power of the state.”²⁹

The defendant rhetorically asked, how it can be that a woman’s contract to work ten and a half hours in that service tends to impair the public health, and that in the distant and remote future the possible children which she may bear will need the protection of this statute? Can it be assumed that the employment would be any more injurious to her or any woman in good health than to a man of equal age?³⁰

Or, as the brief further argued, “What conditions of employment exist in a laundry that endanger a healthy woman that do not apply alike to a healthy man?”³¹ The brief did not argue that the state had no power to limit work in unhealthy places, but contended that laundries were not such places and that any restrictions had to apply to both men and women.³² It cited as the examples of permissible restrictions those applicable to pregnant women in certain employments³³ or laws barring men (and presumably women) from occupations where they may contract lead poisoning.³⁴

The brief subsequently made an assertion that, I suggest, would be the question and not the answer, if such an equal protection claim were raised today. “It is difficult to imagine any employment that may be dangerous to women employees that would not be equally dangerous to men.”³⁵ Indeed, an even more refined question would be, why should women be limited to ten hours a day when men can and do work twelve or more? What is startling is that no one seems to have thought that *some* court should take *some* evidence on this or any subsidiary point, or that the legislature should have had *some* evidence before it decided to treat one class of persons differently from another. Nor does it appear to have occurred to anyone that one way to answer the question might be to require one side to come forth with some evidence to support its position. And the issue of the burden of proof does not seem to have been considered, even though, under the approaches of that time, it could be assigned either to the state, because it was restricting freedom of contract, or to the challenger, on the basis that state laws should be presumed valid absent some reason to conclude otherwise.

At various places, the brief suggests “chivalry”³⁶ or the “guardianship of a paternal government,”³⁷ or “wards of the state”³⁸ as explanations, al-

²⁹ *Id.* at 14.

³⁰ *Id.* at 19–20.

³¹ *Id.* at 20.

³² *Id.* at 21–22.

³³ *Id.* at 23.

³⁴ *Id.*

³⁵ *Id.* at 24.

³⁶ *Id.*

beit insufficient ones, for this law. Somewhat surprisingly, *Lochner* was not invoked until page twenty-seven, where it then became Muller's principal defense. Yet nowhere did Muller argue that facts or evidence might have some bearing on the differing treatment of men and women regarding the limits on the number of hours per day that each can work.

The State's brief did little more to confront the central dilemma of justifying different treatment of women vs. men. It defended this law because of "the detrimental effect thereof upon the children of such women, which of necessity must follow such employment,"³⁹ as shown by the fact that similar laws in other states had, with one exception, been sustained. It further defended the law as one that "was not enacted for the purpose of depriving the woman of her right to enter into such contracts, but purely for the purpose of regulating the manner in which she should do so";⁴⁰ a statement that could apply equally to the baker who wanted to work more than sixty hours a week in *Lochner*.

After citing a New York case that observed differences between men and women in the number of days per week or hours per day that they could work, the brief asserted that "it is a matter of common knowledge that there is in this connection a clear distinction between the sexes, in opportunity, strength and capacity," and that women have "fewer avenues of employment" open to them, resulting in "keener" competition for jobs, and "because of a physical difference, she is not able to endure the hours of work that a man is fitted for."⁴¹ To which it added: "Let us not forget that work in a laundry, even under the best conditions, is manual labor, severe and exposed."⁴²

The brief was further bolstered by similar observations from the courts of other states. One stated that the ill effects of certain work on women were based on the "universal knowledge with all reasonably intelligent people" from which certain undesirable consequences "logically follow."⁴³ Another concluded that "[c]ertain kinds of work . . . would wreck the constitution and destroy the health of women," but apparently not men,⁴⁴ even though this was not a law that excluded women from laundries, but only limited their hours of work there. The state's principal defense, which "reache[d] every point raised by plaintiff in error and decide[d] every one . . . adversely to his contention," was that the law

³⁷ *Id.* at 26.

³⁸ *Id.* at 30.

³⁹ Brief for the State of Oregon at 10, *Muller v. Oregon*, 208 U.S. 412 (1908) (No. 107).

⁴⁰ *Id.*

⁴¹ *Id.* at 10–11.

⁴² *Id.* at 11.

⁴³ *Id.* at 12.

⁴⁴ *Id.* at 14.

“d[id] not destroy the right of contract” but its “effect [wa]s to reasonably regulate such right” for women in the places covered by it.⁴⁵

Finally, on page 18 of 23, the State turned to *Lochner*, which “will no doubt be much relied upon.”⁴⁶ After quoting from the opinion, the State noted that “there is some question, in fact, as to whether or not a woman is as fully able to assert her rights and care for herself as is a man,” because, “it seems to us,” that this law “possibly does, to a large measure, involve . . . both the public safety and welfare.”⁴⁷ The brief then argued that:

a woman, unfitted as she is for most kinds of manual labor, remembering the keenness of competition for the places she can fill [*i.e.*, job discrimination] . . . and knowing . . . that she is the mother of the citizens of a coming generation, can we say that a law restricting the number of hours in which she may labor, in certain classes of hard work, is not a law involving the safety, the morals, nor the welfare of the public?⁴⁸

The same could be said, as applied to most male workers at bakeries, but that view did not prevail in *Lochner* by a bare majority, as the State’s brief observed,⁴⁹ although not even hinting that *Lochner* should be overruled. The same point could be made about the brief’s suggestion that “it has always been left to the law-making power to say when such legislation becomes necessary,” and that “a large discretion is necessarily vested in the legislature” to make these judgments.⁵⁰ The brief further argued that the “[C]ourt, we believe, must presume that the legislature intended this act to be in harmony with” the state and federal constitutions.⁵¹ The remainder of the brief contained further arguments for legislative deference based on the fact that the members of that body “represent practically all phases of citizenship in our state,” and that their discretion “should not be interfered with . . . unless their power has been improperly, illegally and oppressively used,”⁵² which, of course, is the question, not the answer.

It was on this state of the record that Louis Brandeis submitted his brief in *Muller*. There are a number of features that make it noteworthy. First, it was not an amicus brief, but was submitted on behalf of the State

⁴⁵ *Id.* at 15.

⁴⁶ *Id.* at 18.

⁴⁷ *Id.* at 19.

⁴⁸ *Id.*

⁴⁹ *Id.* at 20.

⁵⁰ *Id.* at 21.

⁵¹ *Id.* at 22.

⁵² *Id.*

of Oregon, which also filed its own brief.⁵³ Even more unusual, Brandeis was listed as counsel on both briefs.⁵⁴ That would never happen today, in part because Supreme Court Rule 37.6 now requires that amicus briefs other than those filed by the United States or a State or locality must indicate “whether counsel for a party authored the brief in whole or in part,” and whether anyone else contributed funding for the writing or printing of the brief.⁵⁵ That Rule does not seem to contemplate the opposite situation, with counsel for an amicus writing a party’s brief, in whole or in part, but the tenor of the Rule is that there should be separation between an amicus and a party.

One reason for the separation today is that there are word limits on merits briefs (15,000 for the main briefs).⁵⁶ For that reason, having a party author (and pay for) an amicus brief might be a way around those limits.⁵⁷ But in 1907 there were no limits of any kind, and the first ones for the Supreme Court appeared in 1980 when parties first had to keep briefs to fifty pages.⁵⁸ Page limits became word limits after computers arrived, in part because lawyers were using single-space, smaller-type footnotes to maximize their submissions. Because he had no page limits, Brandeis’s brief in *Muller* was able to reach 113 pages, when today an amicus brief is limited to 9,000 words or less than 35 pages.⁵⁹

Aside from it not being brief, the Brandeis submission was more of a compendium of information than an argument supporting Oregon’s law. It began with nearly eight pages in which it quoted the statutes of 19 other states that limited the hours of work for women in various ways. There followed two pages of Argument, which consisted mainly of quotations, including from, of all cases, *Lochner*, with no explanation of their applicability to this case.⁶⁰ There was also a quote from the effective date provision of the Oregon law, which recited that “the female employees in the various establishments are not [currently] protected from overwork,” as support for the emergency that enabled the law to become effective

⁵³ *Id.* at 1; Brief for the Defendant in Error at 1, *Muller*, 208 U.S. 412, (No. 107), available at <http://www.law.louisville.edu/library/collections/brandeis/node/235> [hereinafter Brandeis Brief].

⁵⁴ Brief for the State of Oregon, *supra* note 39, at 1; Brandeis Brief, *supra* note 53, at 113.

⁵⁵ SUP. CT. R. 37.6.

⁵⁶ SUP. CT. R. 33.1(g)(v).

⁵⁷ The disclosure rule (not a prohibition) could be based on a theory that amicus briefs are supposed to be disinterested, and if a party helped write them, their objectivity would be lost. Today, no one thinks that most amicus briefs are disinterested reflections on the law, but rather they are orchestrated to achieve desired goals by the parties and, especially in high profile cases, their supporters.

⁵⁸ SUP. CT. R. 34.3 (1980); SUP. CT. R. 39–42 (1970); SUP. CT. R. 21 & 31 (1884).

⁵⁹ SUP. CT. R. 33.1(g)(xi), (xii); Brandeis Brief, *supra* note 53, at 113.

⁶⁰ Brandeis Brief, *supra* note 53, at 1–8, 9–10.

once the Governor signed it.⁶¹ It then cited three cases (including *Lochner*) for the proposition that courts can take judicial notice of “facts of common knowledge” and asserted that the remainder of the brief would “establish, we submit, conclusively, that there is reasonable ground for holding that to permit women in Oregon to work in a ‘mechanical establishment, or factory, or laundry’ [the places covered by the law] more than ten hours in one day is dangerous to the public health, safety, morals or welfare.”⁶² It then stated that these “facts of common knowledge will be considered” under two headings: “[l]egislation . . . restricting the hours of labor for women,” (both foreign and US, totaling seven pages) and the remaining 92 pages on the “world’s experience upon which the legislation limiting the hours of labor for women is based.”⁶³

From this preview, the reader would expect to encounter materials that focus on the special needs of women, at least partially if not exclusively in laundries, with a particular focus on how working more than ten hours in a day was detrimental to their health and perhaps to that of their children, living or yet to be born. But the first set of laws cited—from Great Britain—applied the hourly limits to everyone, although there is one special provision allowing women who are employed in a “[w]orkshop” to have unspecified time off from work, apparently taken in lieu of time for meals.⁶⁴ Moreover, the work day in Great Britain was 12 hours, not 10, including time off for meals. France was next in the brief, but its limits applied to men also. Some of the other protective laws cited applied, in some respects or others, only to women, but in some of them the workday extended to 12 hours.⁶⁵

There followed a short discussion of the American laws previously quoted, but it did not provide much in the way of justification for the Oregon statute’s protective stance for women. The brief assured the Court that these laws were not “the result of sudden impulse or passing humor,” but rather the product of “deliberate consideration . . . in the face of much opposition.”⁶⁶ Moreover, none of these laws had been repealed and “[n]early every amendment in any law ha[d] been in the line of strengthening the law or further reducing the working time.”⁶⁷ It also assured the Court that “an elaborate investigation” of the effects of the reduction in the number of hours worked required by the Massachusetts law, undertaken by the State’s Bureau of Labor Statistics, showed that the law there “had not resulted in increasing the cost or reducing wages,” af-

⁶¹ *Id.* at 10.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 11–12.

⁶⁵ Italy for example. *Id.* at 14.

⁶⁶ *Id.* at 16.

⁶⁷ *Id.*

ter which four other New England states followed suit. It then concluded by observing that only the Illinois law had been declared unconstitutional, and it limited the work day to eight hours and the work week to 48 hours.⁶⁸ It did not observe that all of the other cases dealing with similar laws came from state courts, and all of them predated *Lochner*.

The reader would have hoped, if not expected, that the remainder of the brief would be limited to the issue in the case: the justification for limiting the hours of all women who work in laundries and similar workplaces to ten hour days, with a total of no more than 60 hours in a week. Such justifications would include and possibly be limited to studies (some better quality than others), statements of experts (although not necessarily under oath or subject to cross-examination) who had focused on the distinction at issue in the case, and other kinds of evidence that would sustain the proposition that women were in need of the protection that the Oregon law afforded them. But the materials cited were not limited in that or any other respect. Some involved practices equally applicable to men and women; some dealt with pregnant women or those with young children at home (limits not applicable to Oregon's law); and some dealt with workplaces that were dangerous to all workers, or posed special dangers for some.⁶⁹ There was no attempt to explain the relevance of any of these materials: they were simply set forth for the reader to take in, as needed and as useful. There was also little effort to explain either why ten hours per day was a sensible number for women or why the legislature's judgment on that figure was one that should be followed, except that some, but not all, other jurisdictions had followed it. If I had been a Justice, or even a law clerk, I doubt that I would have lasted much past page 20 because the brief, while exhaustive in its research, was simply not of much help in deciding whether there was any evidentiary basis for this specific Oregon law—if such a basis were needed to sustain it. Nor did it show that the Oregon legislature even considered any of this evidence in its drafting process.

What influence did the Brandeis brief have on the Court's decision to uphold the Oregon law? The author of the opinion surely read the Brandeis brief, which it specifically mentioned in the opinion's sole (and lengthy) footnote, and which cited the 19 similar laws in the US and the six comparable laws from abroad noted by Brandeis.⁷⁰ The footnote also mentioned some of the studies about the dangers to women, with which it agreed. And it noted the benefits to the economy of shorter hours, although that benefit would equally apply to the limitations struck down in *Lochner*. The footnote summed up its conclusion with a quotation from

⁶⁸ *Id.* at 16–17.

⁶⁹ *Id.* at 18–47.

⁷⁰ *Muller v. Oregon*, 208 U.S. 412, 419–20 n.1 (1908).

an inspector in Hanover, Germany that these German laws were justified by “(a) the physical organization of women, (b) her maternal functions, (c) the rearing and education of the children, (d) the maintenance of the home [and that these factors] are all so important and so far reaching that the need for such reduction need hardly be discussed.”⁷¹ Was the Brandeis brief necessary to supply those reasons? I rather doubt it.

The opinion then cited the four state court decisions that sustained similar laws as showing “a widespread belief that women’s physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil.”⁷² The Court recognized that constitutional questions cannot be decided based on a consensus of public opinion, but “when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by truth in respect of that fact, a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge.”⁷³

From this point, the opinion turned quite paternalistic:

That woman’s physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of women becomes an object of public interest and care in order to preserve the strength and vigor of the race.⁷⁴

It then pointed to the issue of job competition especially against men, but also observed, as if it were an eternal truth, that a woman’s “disposition and habits of life . . . will operate against a full assertion of those rights.”⁷⁵

Because of these differences, the Court concluded, “she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained.”⁷⁶ It continued that, even if she were given equal rights with men

⁷¹ *Id.*

⁷² *Id.* at 420.

⁷³ *Id.* at 420–21.

⁷⁴ *Id.* at 421.

⁷⁵ *Id.* at 422.

⁷⁶ *Id.*

it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man.⁷⁷

There is more, but the point is clear: women are in need of protection, and because this law does that, it can be sustained because it “is designed to compensate for some of the burdens which rest upon her . . . without questioning in any respect the decision in *Lochner v. New York*.”⁷⁸

Unless one were able to probe the minds of the Justices, it would be impossible to determine the impact that the Brandeis brief had on the outcome in *Muller*. At the very least, it provided the Court with some assurance that what Oregon had done was not out of the mainstream, that there were studies of various kinds that supported some special treatments for women, and that there was no evidence that the economies of the states and countries that had enacted such laws suffered from doing so. Much, but not all, of that could have been said about New York’s law applicable to men working in bakeries that the Court had set aside three years earlier. And the opinion surely did not answer the specific question of whether *this* preferential treatment for women was justified, in large part because no one put the question in that narrow a fashion.

Even if the Brandeis brief did not provide the legal or factual impetus to create the male/female distinction that enabled the Court to uphold the Oregon law, it almost surely made the Court feel more comfortable in doing so. Its opinion was mainly a recognition that society in general treated men and women unequally, and so if women were protected by law in a way that men were not, that was not so bad, especially where the law adversely affected the laundry owners in a very modest way.

And, of course, the opinion, like the brief, did not ask, let alone attempt to answer the questions posed by this Essay: if facts do matter on these questions, by what method(s) must they, or may they, be presented to the court that is deciding the constitutional question, and is the answer the same for all the questions that arise in a constitutional challenge? To attempt to answer those questions, I will examine the two same-sex marriage cases decided in 2013, with the main focus on DOMA, and with Prop. 8 brought in on some aspects.

⁷⁷ *Id.*

⁷⁸ *Id.* at 423.

III. PROVING FACTS IN CONSTITUTIONAL LITIGATION: THE SAME-SEX MARRIAGE CASES

A. *Adjudicative Facts*

In every lawsuit, the plaintiff must prove, by admissible evidence, the facts needed to establish her claim. Thus, in *Windsor*, the plaintiff had to prove that she was validly married, that she paid the estate tax that the IRS said she owed, that she would have paid \$363,053 less if her marriage to her same-sex wife had not been barred by DOMA, and that she filed a timely claim for refund that the IRS did not allow. In this case, those facts were easy to prove by conventional means, as the plaintiff did. The plaintiff also offered other background facts, through sworn affidavits and admissible documents, regarding her long-term relationship with Thea Speyer, whom she eventually married.⁷⁹ Those additional facts, while not necessary to prove her case, were helpful to set the stage and made her case more appealing in the public eye, and perhaps to the Justices. And as we will see, they may have some relevance on other legal issues in the case. The only point about these facts (and those on the other side if defendant had wished to contest them) was that they had to be presented by the same means that facts are proven in any litigation: by admissible evidence.⁸⁰

B. *Facts Relating to the Level of Scrutiny*

In equal protection cases, the first issue that the courts are supposed to address is the level of scrutiny to be applied to the classification being challenged, which, in the same-sex marriage cases, is that of sexual orientation in its relation to marriage. Those whose sexual preference is for members of the opposite sex are favored over those whose preference is for members of the same sex. The Supreme Court had not ruled on the appropriate level of scrutiny in this area before the DOMA cases were filed, but the parties agreed that the test for determining whether intermediate scrutiny would apply involved three questions: Does the disfa-

⁷⁹ *United States v. Windsor*, 133 S. Ct. 2675, 2683 (2013).

⁸⁰ Ms. Windsor was married in Canada before New York permitted same-sex couples to marry. That raised the question of whether her marriage would have been recognized in New York, which had a history of recognizing most out-of-state marriages, even those that it would not have permitted to be performed in New York. There were several lower court opinions in New York recognizing same-sex marriages performed elsewhere, but the New York Court of Appeals had not definitively ruled on the issue. *See Windsor v. United States*, 699 F.3d 169, 177 (2d Cir. 2012). Because the validity of her marriage in New York is a legal question, on which the relevant facts are not in dispute, it falls outside the ambit of this Essay. In the end, the Supreme Court assumed without deciding the validity of Ms. Windsor's marriage as a matter of New York law. *Windsor*, 133 S. Ct. at 2689.

vored group (1) have a history of being discriminated against; (2) have characteristics that are immutable or sufficiently part of their persona that they should not be required to change them; and (3) lack sufficient political power such that the courts are needed to protect their rights?⁸¹ Those questions could be answered in the abstract, but they would surely profit from having some factual basis, and so the questions are: what facts are relevant and how should they have to be proven? I address the three factors in turn.⁸²

1. *History of Discrimination*

Edith Windsor's equal protection challenge was not that she alone was a victim of discrimination, but that DOMA discriminated against all same-sex couples.⁸³ Thus, on the appropriate level of scrutiny issue, she would need to present evidence of a "history" of class-based discrimination, which raises the question: what period of time must this history cover? One way to think about that aspect is to ask why the history is relevant to the validity of the classification. The proper answer would appear to be that, if there was discrimination against same-sex relationships in 1996 when DOMA was enacted, then it is more likely to have been a product of discrimination than of acceptable reasons, and for that reason the courts should view the justification for the law with considerable suspicion. Arguably, the relevant history for Prop. 8 would extend at least to 2008, when it was enacted, and by which time discrimination based on sexual orientation had lessened, but had by no means been eliminated.

But whatever the relevant time period, the same question of how the history of discrimination should have to be proven remained. One way that Ms. Windsor sought to prove this history was by telling the history of discrimination against her personally, which she included in her sworn

⁸¹ *Windsor*, 699 F.3d at 181. The questions in the text are a slightly shortened and paraphrased version of the test used by the Second Circuit majority in concluding that a form of heightened scrutiny was required in that case. The United States and Ms. Windsor used similar formulations in their briefs in the Supreme Court. For simplicity, and because the precise wording of the test is not relevant for the purposes of this Essay, the analysis will proceed using the version in text. A fourth factor was included by the Second Circuit and appears in some of the cases and briefs: "whether the class has a defining characteristic that" "frequently bears [a] relation to ability to perform or contribute to society." *Id.* That has seemed to me either to be a non-factor (because every group can contribute in *some* way), or it asks a more narrow question—can the group contribute in a way related to the substantive area in which the difference arises—in which case it appears to be an issue related to the merits. Given the focus of this Essay, the three factors in the text are more than sufficient to illustrate the questions, and hence this fourth factor will not be discussed further.

⁸² This discussion is adapted from the discussion in the Supreme Court brief submitted on behalf of Edith Windsor. Brief for Respondent Windsor, *supra* note 13, at 17–31. These issues were also discussed in the brief of the United States, agreeing with Windsor. Brief for the United States, *supra* note 13, at 18–36.

⁸³ *Windsor*, 133 S. Ct. at 2683.

affidavit.⁸⁴ But she could not personally testify to discrimination against all gays and lesbians, and so some other means had to be utilized. Plaintiff obtained expert witnesses—mainly academics who had studied this history and written about it—and offered their affidavits, which contained their conclusions and the facts and arguments supporting them.⁸⁵ Those conclusions became subject to probing through depositions of all plaintiff's experts, as the defendant had every right to do. In the end, there was not a serious debate about whether there was a history of discrimination against gays and lesbians, although the parties differed as to the extent to which that had changed in recent years.⁸⁶

2. *Immutability*

There are several parts to this factor, but there is one that has a strong factual element to it. Is sexual orientation like race, which is fixed before birth, and thus a trait that can never change? Ms. Windsor's life story has something to say on this subject. She married her brother's best friend, and then divorced him ten months later because she realized that her sexual preference was for women and not men.⁸⁷ But that fact does not answer the question more generally. Here again, expert testimony was supplied by plaintiff, again subject to cross-examination by defendant, that posited that the vast majority of gays and lesbians did not, and most could not, change their sexual orientation, although some people who identified themselves as gays or lesbians could and did change their sexual preferences at various times in their lives. On this aspect, there was more of a factual difference between the parties, although again it was a matter of degree: plaintiff did not contend that no one changed, and defendant did not argue that everyone or even most gays and lesbians could change.⁸⁸

⁸⁴ Affidavit of Edith Schlain Windsor, at 3, *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 10 Civ. 8435), ECF No. 38.

⁸⁵ E.g., Expert Affidavit of George Chauncey, Ph.D. at 1, *Windsor*, 833 F. Supp. 2d 394 (No. 10 Civ. 8435), ECF No. 38; Expert Affidavit of Gary Segura, Ph.D. at 1, 4, *Windsor*, 833 F. Supp. 2d 394 (No. 10 Civ. 8435), ECF No. 43.

⁸⁶ The named defendant was the United States, but the Attorney General had refused to defend DOMA, and so the Bipartisan Legal Advisory Group of the House of Representatives (BLAG) intervened to defend DOMA. This substitution of defendants raised substantial questions of whether the appeal from the decision of the district court was proper, and hence whether the Supreme Court had jurisdiction to decide the merits question. See *Windsor*, 133 S. Ct. at 2684–89; *Id.* at 2698–2705 (Scalia, J., dissenting). Similar problems arose in the Prop. 8 case and resulted in the Supreme Court not reaching the merits there. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013). For convenience, I will use the term defendant in both cases to refer to the person (entity) that presented the defense of the law at issue.

⁸⁷ Joint Appendix at 494, 496, *Windsor*, 133 S. Ct. 2675 (No. 12-307), ECF No. 23.

⁸⁸ Plaintiff objected to the evidentiary basis for defendant's claim that sexual orientation was less immutable than plaintiff's experts had testified. That issue also

The significance of the differences on immutability is lessened because there are other elements of this part of the test that have non-factual aspects to them. Some classifications that receive heightened review are not immutable and the fact that individuals change them does not change the level of scrutiny. Thus, classifications based on alienage receive heightened scrutiny,⁸⁹ even though each year hundreds of thousands of aliens become citizens.⁹⁰ Discrimination based on gender is subject to intermediate scrutiny,⁹¹ even though today transgender surgery is regularly performed in the United States. No one would suggest that women who suffer discrimination because of their gender should be required to undergo a change of sex operation to avoid it, nor that the availability of that procedure is a reason not to apply a higher level of scrutiny to gender discrimination. Thus, the immutability factor has evolved to include those aspects of a person's life that, if changeable, ought not be required to be changed to avoid discrimination because it is "a fundamental aspect of their identity."⁹² This "ought" inquiry extends far beyond the facts relating to relative immutability, thus making the factual aspect not irrelevant, but of considerably less significance, especially since it is only one part of one of three factors.

3. *Political Powerlessness*

The time frame issue is also relevant here, but there is a potential difference in focus in this context. The political power question is arguably relevant because, if a group has no chance of legislatively fixing the law—by passing a statute or another initiative to repeal the law, then court intervention and heightened review may be warranted. Thus, in the DOMA case, the defendant argued that, while gays and lesbians may have lacked political power when DOMA was passed, that is not true today, and so the courts should not step in.⁹³ For this they cited Congress's repeal of "Don't Ask, Don't Tell," the passage of same-sex marriage laws in nine states and the District of Columbia, the support of President Obama and his administration in this case, and the fundraising and voting influence of gays and lesbians in federal elections.⁹⁴

arose on the factual aspects of the merits in *Windsor*, and I will discuss both parts of that issue *infra* notes 91–94 and accompanying text.

⁸⁹ *In re Griffiths*, 413 U.S. 717, 721 (1973).

⁹⁰ *Naturalization Fact Sheet*, U.S. CITIZENSHIP AND IMMIGRATION SERVS. (Oct. 24, 2012), <http://www.uscis.gov/news/naturalization-fact-sheet>.

⁹¹ *United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting).

⁹² Brief for Respondent *Windsor*, *supra* note 13, at 28.

⁹³ Brief on the Merits for Respondent The Bipartisan Legal Advisory Group of the U.S. House of Representatives at 51, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No.12-307), ECF No. 24 [hereinafter Brief for Respondent Bipartisan Legal Advisory Group].

⁹⁴ *Id.* at 51–53.

One preliminary question that seemed to have been largely unexplored is what is the proper unit of government where the political power of gays and lesbians should be determined? Should it be Congress for DOMA, and California for Prop. 8? Since Prop. 8 was the result of an initiative, and can only be amended by another initiative, should the question be answered in terms of the likely outcome of future initiatives in California? But suppose the challenge were to a constitutional amendment in Mississippi, where the polling numbers of those supporting same-sex marriage were 22% in contrast to 59% nationally?⁹⁵ It seems quite unlikely that the level of scrutiny for a class of discriminations would vary depending on the source of the law being challenged, but if the facts really do matter, it is hard to avoid such a conclusion.

However, it is likely that the precise facts do not matter for another reason. If the percentage of the voting population who are gays or lesbians were the measure of power (as it may have been for blacks, at least in some cases), then the factual dispute is much smaller since no one suggests that they comprise more than 10% of the voters, plainly not enough to elect a majority of any legislative body or to prevail in an initiative. Indeed, women were a majority of the voters when they were declared to be entitled to have gender classifications subject to heightened scrutiny, suggesting that numbers alone are not dispositive, or perhaps even significant. But to the extent that the inquiry seems broader, and is designed to probe the actual ability of gays and lesbians to influence lawmakers on issues of importance to them, the question is even less subject to factual development, or at least of producing facts that will provide any real help in answering this part of the inquiry.

That does not mean that facts are wholly irrelevant or that they should not be subject to some degree of rigor in their presentation. Surely, there is no reason that someone cannot be found to present at least their best estimate on the percentages of gays and lesbians in the population generally and among voters in particular, both nationally and in the state where the law was enacted. Similarly, if there are real disputes about the results of polls, those who created the polls should be called to testify and be subject to cross-examination, at least on deposition, so that their methods can be subject to full probing, their precise polling questions analyzed, and their assumptions brought into the open. And if this kind

⁹⁵ E.g., *Q: Overall, Do You Support or Oppose Allowing Gays and Lesbians to Marry Legally?*, WASHINGTON POST POLITICS (Apr. 17, 2014), http://www.washingtonpost.com/page/20102019/WashingtonPost/2014/03/05/NationalPolitics/Polling/question_13288.xml?uuid=VWqBHKQjEeO4ZTiyVNkgYw#; *Mississippi Miscellany*, PUBLIC POLICY POLLING (November 19, 2013), <http://www.publicpolicypolling.com/main/mississippi/>.

The actual numbers are not significant as there is no doubt that they vary widely by region, as well as other demographics.

of evidence comes in only through citations in briefs—either by parties or amici—the courts should consider it with great caution.

In the end, it seems unlikely that the Supreme Court will use the answers to these factual questions to decide the level of scrutiny for discrimination based on sexual orientation. That is, in part, because there are three separate sub-questions and facts are only one element of each. And within each there is no obvious way to integrate the factual and non-factual aspects of each sub-question. Similarly, there is no precise method for integrating the answers to the sub-questions into the answer to the ultimate question, suggesting that even the answers to the sub-questions are of diminished significance. These problems might suggest that facts do not really matter, and thus any way that they come in is acceptable. I would argue to the contrary: since so much else is so soft, the courts should at least try to get the facts as correct and as subject to probing as possible, given the limits of our adversary system. Thus, at least for facts that will inform these judgments on level of scrutiny that only the courts will make, the courts should assure the factual foundations are as solid as they can be so that a better conclusion can be derived from them.

C. *Facts Relevant to Merits Determinations*

The defendants in both same-sex marriage cases and Justice Scalia in his dissent in *Windsor* argued that the most relaxed version of the rational relationship standard of review applied.⁹⁶ Under that level of review, as long as anyone can think of any reason why the classification is rational, even if it was never considered by those that passed the law, and no matter how slim the factual basis to sustain it, the law will be upheld.⁹⁷ In that situation, the evidentiary question becomes irrelevant as a matter of law. Similarly, on the other extreme, if heightened scrutiny applies, so that the legislature had to identify the basis for the differing treatment of the two groups and it had to supply evidence that important government interests could not be accomplished (or only with much greater difficulty) without the disparate treatment of the disfavored group, the evidentiary question would again become close to immaterial. The Supreme Court did not resolve the standard of review question in cases alleging discrimination based on sexual preferences, but I assume that facts relevant to the merits will matter in some such cases in the future, and therefore I will next discuss how facts should be established in those cases.

⁹⁶ *Windsor*, 133 S. Ct. at 2706 (Scalia, J., dissenting); Brief for Respondent Bipartisan Legal Advisory Group, *supra* note 93, at 20; Brief of Petitioners at 29, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144), ECF No. 33.

⁹⁷ See *Windsor*, 133 S. Ct. at 2706; Jeremy B. Smith, Note, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 *FORDHAM L. REV.* 2769, 2773–74 (2005).

For these purposes, I will assume that some level of scrutiny, like that applied by the First Circuit in *Massachusetts v. U.S. Department of Health & Human Services*,⁹⁸ applies in these cases, such that facts are significant, but not conclusive. As I discuss below, there are some defenses of DOMA in particular in which facts seem to be irrelevant as a matter of law. However, similar questions are also presented in Prop. 8 where they are at least arguably relevant and, as I explain, would surely be relevant in suits in other states where, unlike California, civil unions or domestic partnerships are not available. There are five justifications offered to support these laws: (1) the need for uniformity; (2) maintaining tradition and/or moving with caution; (3) saving money; (4) controlling procreation among opposite-sex couples; and (5) creating incentives for raising children in the preferred setting of one man and one woman who are married to one another and are the biological parents of the children.⁹⁹ In addition, I will also discuss a further inquiry that focuses, as did Justice Kennedy in *Windsor*, on the legislature's motivation for enacting DOMA, which he found to be improper, and for which he relied on statements made on the floor of Congress by individual members. Justice Scalia's dissent argued that such statements were wholly irrelevant, and I will discuss that argument as well when I deal with the factual proof offered to support the majority's conclusion of an improper motive.¹⁰⁰

1. Uniformity

This is an issue only under DOMA, and it is based on a claim that treating same-sex marriages the same way as opposite-sex marriages under federal law will lead to disuniformity because only some states allow both kinds of marriages, and thus federal law will not be the same everywhere. It was not disputed that, if DOMA were overturned, same-sex couples would be treated differently under federal law depending on whether they were legally married under the applicable state law. But it is also not disputed that, if there is federal uniformity under DOMA, there will be a lack of uniformity between federal law and the law in the states that recognize same-sex marriages. Thus, under DOMA, Edie Windsor was treated as married for New York's tax laws, but not for federal tax laws.¹⁰¹ Stated another way, some degree of disuniformity is unavoidable so long as only some states recognize same-sex marriages. That might

⁹⁸ 682 F.3d 1, 11 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2884 (2013).

⁹⁹ Brief for Respondent Bipartisan Legal Advisory Group, *supra* note 93, at 20–21; Brief of Petitioners, *supra* note 96, at 12–14.

¹⁰⁰ Although there might be additional justifications proffered and those in text might be formulated somewhat differently, that is not significant because this Essay seeks only to show how factual issues generally should be resolved in constitutional litigation, rather than what items of proof are required to decide a particular constitutional question.

¹⁰¹ *Windsor*, 133 S. Ct. at 2683.

suggest that lack of uniformity is irrelevant, but the better argument is that, while uniformity for the sake of uniformity is not a valid reason, uniformity may reduce administrative burdens that, in some situations, may be an appropriate justification. And on that question, there are some “facts” that may be relevant and that should be subject to some degree of proof in the trial court.

There is no way to “prove” directly how much of a burden there would be on federal agencies if DOMA were not the law, but courts could inquire into whether there are other examples of similar disuniformity and how federal agencies respond to them. The first part would consist of examples under federal law where state law is relevant and where not all state laws are identical. Common law marriage is an area where there are considerable differences among the states, and at least the Internal Revenue Service (IRS) has long allowed state law to control, with no known effort to change the practice at the IRS or in Congress.¹⁰² There are other federal laws where lack of cross-state uniformity is firmly embedded in the law, social security survival benefits being one.¹⁰³ If there are examples of lack of uniformity and that they cause administrative difficulties, the defendant should have the burden of demonstrating such problems, from which a court might conclude that similar problems might arise if DOMA were overturned. To meet that burden, the defendant would have to offer evidence, subject to cross-examination, from present or former government officials or perhaps experts who have studied the issue. But absent such factual proof (regardless of the form that it might take), the factual basis for a uniformity justification would be lacking, and so it should fail on that ground.¹⁰⁴

There are two further responses to the uniformity defense that might have been raised as factual matters at the trial court, but were not. Instead, they came in through amicus briefs on appeal. The first was through a brief filed on behalf of Citizens for Responsibility & Ethics in

¹⁰² See Rev. Rul. 58-66, 1958-1 C.B. 60; Rev. Rul. 83-183, 1983-2 C.B. 220.

¹⁰³ *Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021, 2034 (2012).

¹⁰⁴ In his dissent, Justice Scalia observed that the federal definition of marriage eliminated a problem that would arise if a same-sex couple, validly married in New York, were to move to another state that did not allow such marriages or recognize those performed in states that did allow them. *Windsor*, 133 S. Ct. at 2708. There would surely be a question as to how the federal government would respond, but there is no reason to think that the question would be any more difficult to answer in this context than it has been in other similar situations, such as common law marriage under the Internal Revenue Code. The simplest solution would be to treat a marriage as valid for federal purposes if valid where it was performed. Not surprisingly, this problem was never offered in Congress as a basis for a federal uniformity rule, nor was it suggested by the defendant in its uniformity defense. Brief for Respondent Bipartisan Legal Advisory Group, *supra* note 93, at 33–37. In any event, this problem is a rather modest one and seems like a tail wagging the dog example, rather than a serious objection to treating same-sex marriages the same as those involving partners of the opposite sex.

Washington (CREW) initially in the First Circuit¹⁰⁵ and then in an expanded version on the same theme in the Second¹⁰⁶ and Ninth Circuits¹⁰⁷ and ultimately in the Supreme Court in *Windsor*.¹⁰⁸ The brief pointed out that DOMA had perverse effects in three areas of federal law by excluding those laws from applying to same-sex married couples, which produced unintended adverse consequences under (1) federal ethics and other related laws; (2) the provisions of the Internal Revenue Code that were designed to close tax loopholes or prevent abuses by married couples; and (3) the portions of the Bankruptcy Code that treated married couples as a single unit and sought to prevent manipulation of the law to harm creditors, including the Federal Government.¹⁰⁹ In theory, experts in all three areas could have provided affidavits and been subject to depositions on their testimony, if there had been disputes about the basis—whether called factual or legal—for their submissions. But there were no disputes, and hence there was no harm to the process by which these points were brought to the attention of the courts that heard DOMA cases.¹¹⁰

A second anti-uniformity response is that the differences between federal and state marriage law imposed burdens on employers in states that recognized same-sex marriages. That is because they had to distinguish between same and opposite-sex marriages in awarding benefits and in verifying withholdings of federal and state income taxes.¹¹¹ Again, there was no dispute that this lack of uniformity caused a problem and imposed additional costs on employers, and hence those “facts” could be judicially noted or a court could rely on amicus briefs to support that

¹⁰⁵ Brief Amicus Curiae of Citizens for Responsibility and Ethics in Washington as Amicus Curiae in Support of Affirmance of Judgment Below, *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012) (No. 10-2204), ECF No. 217.

¹⁰⁶ Brief of Citizens for Responsibility, Second Circuit *supra* note 6.

¹⁰⁷ Brief of Amicus Curiae Citizens for Responsibility and Ethics in Washington in Support of Appellee Urging Affirmance, *Golinski v. U.S. Office of Pers. Mgmt.*, 724 F.3d 1048 (9th Cir. 2013) (No. 12-15388), ECF No. 77.

¹⁰⁸ Brief of Citizens for Responsibility, Supreme Court, *supra* note 6.

¹⁰⁹ *Id.* at 5–25.

¹¹⁰ The majority in *Windsor* cited a number of provisions from the CREW brief to illustrate the perverse impacts of DOMA. *United States v. Windsor*, 133 S. Ct. 2675, 2694–95 (2013) (including 2 U.S.C. § 31-2(a)(1) (2012); 11 U.S.C. § 101(14)(A) (2012); 11 U.S.C. §§ 523(a)(5), (15) (2012)); 18 U.S.C. § 115 (2012); and 18 U.S.C. § 208(a) (2012); Brief of Citizens for Responsibility, Supreme Court, *supra* note 6, at iii–vi. CREW’s amicus brief in the Second Circuit was expressly relied on by that court in striking down DOMA. *Windsor*, 699 F.3d at 187. The First Circuit in *Massachusetts*, relied on statutes contained in CREW’s brief filed there, in pointing out some of the “odder consequences” of DOMA as a further defect in the law. *Massachusetts*, 682 F.3d at 13 & n.8.

¹¹¹ Brief of 278 Employers and Organizations Representing Employers as Amicus Curiae in Support of Respondent Edith Schlain Windsor (Merits Brief) at 14–17, 25–27, *Windsor*, 133 S. Ct. 2675 (No. 12-307), ECF No. 67.

point. But if the extent of the burden were relevant, and if there were disputes about it, evidence should have been presented at the trial court level, presumably by someone from an HR department or perhaps an accounting, payroll, or benefits consulting firm, so that the witness could be subject to cross-examination mainly to clarify issues of methodology and to ascertain what assumptions the expert made.

In the actual litigation, neither argument was specifically directed at the uniformity justification, although, in hindsight, that would also have been an effective way to frame them. Instead, both arguments were that DOMA had perverse consequences that no rational Congress could have intended absent some other overriding interest.¹¹² In point of fact, these consequences arose because Congress did not make any real inquiries into what DOMA would do and how it would affect the more than 1,100 laws that were covered by it. That argument was also appropriate, but pointing out these consequences of the lack of uniformity would also have been useful and would not have required any additional factual basis to support them.

2. *Proceeding with Caution*

DOMA was also defended on the ground that the consequences of treating same-sex marriages the same as opposite-sex marriages were unknown, and hence Congress was justified in enacting DOMA because it simply preserved the status quo.¹¹³ Leaving aside the question of how the courts or the executive branch might have interpreted existing law before DOMA, there is an initial question of whether the enactment of DOMA can be accurately described as proceeding with caution. Several facts suggest that caution is not an accurate description, whether the question is labeled legal or factual.

First, caution is a relative term that is dependent on the facts. When DOMA was enacted in 1996, no state had enacted same-sex marriage and Hawaii—the state where the possibility was first raised—amended its constitution to preclude that from happening.¹¹⁴ Thus, it may make sense for the City of Buffalo to be sure that its snow plows are operating properly, but it probably does not have to road test them in July, which is more or less what Congress did when it passed DOMA. Second, DOMA was a permanent change to more than 1,100 laws, not a short-term measure to allow Congress to assess what should be done. Third, a Congress proceeding with caution would surely have wanted to know the impact of DOMA on the operation of the agencies whose laws it affected and on

¹¹² Brief for Respondent Windsor, *supra* note 13 at 61; Brief of Citizens for Responsibility, Supreme Court, *supra* note 6, at 4.

¹¹³ Brief for the U.S. Department of Health & Human Services, et al., at 32–41, 51–55, *Massachusetts*, 682 F.3d 1 (No. 10-2204), ECF No. 19.

¹¹⁴ Haw. CONST. art. 1, § 23; *Baehr v. Lewin*, 852 P.2d 44, 57 (Haw. 1993).

the people subject to those laws, as well as the fiscal impact on limiting marriage to opposite-sex couples. Senator Robert Byrd, the long-time chair and/or ranking member of the Senate Appropriations Committee, stated that he had no idea of DOMA's fiscal impact, and neither did anyone else.¹¹⁵ Similarly, a call for a study by the General Accounting Office, as it was known then, was rebuffed by the House,¹¹⁶ another signal that caution was being thrown to the winds and was surely not the reason for DOMA.¹¹⁷

Fortunately for DOMA's challengers, all of these facts were readily apparent from the undisputed legislative record, and so could be offered at any stage of the proceedings by a party or an amicus. But if there had been disputes, the better course would have been to have them aired and decided at the trial court level. Furthermore, by offering such evidence in the trial court, challengers would make it more difficult, and perhaps impossible, for the defendant to try to rebut these points on appeal by citing to other written material that asserted contrary positions.

3. *Saving Money*

For purposes of this Essay, I assume that saving money is a legitimate goal in some situations, although doing so at the expense of a disfavored class for no good reason is not appropriate.¹¹⁸ As the BLAG brief points out, the House Committee thought that recognizing same-sex marriages under federal law would increase the benefits being paid and thus impose burdens on federal resources.¹¹⁹

If a rational Congress were trying to save money, it would at least have sought expert opinions on the subject, but as the prior section shows, Congress did not bother to about DOMA's fiscal impact and rejected the suggestions of those who did. This failure of inquiry is especially important because DOMA affected more than 1,100 very complicated laws, as every Member of Congress and the President should have known. As it turned out, eight years later the Congressional Budget Office (CBO)

¹¹⁵ 142 CONG. REC. 22,448 (1996).

¹¹⁶ 142 CONG. REC. 17,092-93 (1996).

¹¹⁷ Caution, in the sense of not wanting to move too fast, was claimed as a basis for Prop. 8. However, the claim that Prop. 8 was needed to overturn the adverse impact of same-sex marriages could not be used. That is because signatures for Prop. 8 were gathered while the prior case was pending in the California Supreme Court. The Court issued its ruling on May 15, 2008, and on June 2, 2008, the Secretary of State certified that it had sufficient signatures for Prop. 8 to go on the November ballot. *Strauss v. Horton*, 207 P.3d 48, 66, 68 (Cal. 2009). Efforts to stay the effect of the prior ruling were denied, and the decision became final, and marriages started, as of June 16, 2008. *Id.* at 68. That timing meant that the actual impact of same-sex marriages on the citizens of California could not have been a basis to support Prop. 8.

¹¹⁸ The impropriety of relying on discriminatory cost-savings was argued by Windsor in her brief. Brief for Respondent Windsor, *supra* note 13, at 53-54.

¹¹⁹ Brief for Respondent Bipartisan Legal Advisory Group, *supra* note 93, at 9-10.

did a study of DOMA's costs and savings, and it concluded that DOMA might *cost*, not save, the Treasury almost \$2 billion a year.¹²⁰ As the defendant pointed out, that study is subject to some questions, and the \$2 billion figure may be reached only if all same-sex couples choose to marry, even when the financial consequences of doing so were adverse, a situation that also applies to opposite-sex couples.¹²¹ Even if defendant is correct, that would only alter the extent of the impact on the deficit, and not whether it produced cost-savings at all. And if the legislature at least had to assert that DOMA was intended to save money for that to be a legitimate justification, someone would have to explain why no one had actually investigated the question before passing such a law with no sunset provision. Finally, since the question in *Windsor* was whether the money-saving justification was valid,¹²² not whether plaintiff could prove that DOMA would cost the Treasury substantial amounts, the combination of not asking (or caring) and the CBO report that DOMA would actually cost money should have been enough to defeat this justification, even if it were available as a matter of law in *Windsor*.

4. *Encouraging Responsible Procreation*

As I understand this argument as applied to DOMA, it is that making the benefits of federal law available only to opposite-sex married couples will encourage individuals to marry and procreate their own biological children as a married couple. Because this first step cannot, as a matter of biology, be satisfied by same-sex couples, there would be no reason to extend federal benefits to them. Aside from the fact that this consideration was never mentioned in the DOMA debates, this claim has a number of flaws, none of which require factual proof to reject.

First, it is not the province of the federal government to make rules regarding marriage as a general proposition, let alone to decide what kinds of marriages states should allow. Numerous cases involving the Commerce Clause make clear that family law issues are for the states and not the federal government.¹²³ Thus, this argument and the related defense based on preferable settings for child rearing are at most defenses

¹²⁰ *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 14 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2884 (2013) (citing CONG. BUDGET OFFICE, THE POTENTIAL BUDGETARY IMPACT OF RECOGNIZING SAME-SEX MARRIAGES (JUNE 21, 2004), available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/55xx/doc55559/06-21-samesexmarriage.pdf>).

¹²¹ Brief for Respondent Bipartisan Legal Advisory Group, *supra* note 93, at 40 n.8.

¹²² *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013).

¹²³ In *United States v. Morrison*, the Court struck down the Violence Against Women Act as beyond the scope of federal power, despite a claim that the aggregate effect of such violence on interstate commerce would be substantial because that rationale could "be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant." 529 U.S. 598, 615–16, 627 (2000).

that a state could use to sustain a Prop. 8 type law. But it is not a proper federal defense to DOMA because these concerns are not ones that Congress may legitimately consider.

Second, the equal protection issue under DOMA is not why Congress might wish to confer certain benefits (and obligations) on opposite-sex married couples, but why it wanted to *deny* them to same-sex married couples. Leaving aside child-rearing, which I discuss in the next subsection, and recognizing that opposite-sex married couples are eligible for federal benefits (and subject to federal obligations) whether they have children or not, the defendant would have to show some reason why having two people get married is a positive good that Congress wants to support if the people are of the opposite sex, but that a marriage relationship that has been approved by their state is worth less for federal law purposes when the people are of the same sex.

At one point, the defendant seemed to suggest that Congress was trying to encourage opposite-sex marriage by the DOMA incentives. Whatever sense that argument might make as applied to unmarried individuals, it is utterly irrational when applied to couples of the same sex who are already married in their states. The reason is that, for that incentive to be effective, it would require those couples to divorce, change their sexual orientation, and find someone of the opposite sex willing to marry them. The supporters of DOMA in Congress and its defenders in court never tried to make such a showing based on expert testimony or other evidence. It is difficult to imagine who would testify to such an inherently bizarre notion or theory of incentives, but the defense never tried. Again, because this is a defense to DOMA and not part of plaintiff's case, plaintiff cannot be faulted for not offering proof at the trial court of the contrary position.

5. *Supporting Preferable Child Rearing*

The argument here is that the state has an interest in seeing that children are raised in the setting most conducive to their becoming productive and happy members of society and that the state believes that the ideal setting is for the parents to be an opposite-sex legally married couple. Three preliminary points should be noted before turning to the question of how the courts should resolve the merits—both factual and legal—of this argument.¹²⁴

First, like the prior defense on ideal marriages, this defense is wholly irrelevant to DOMA because it is a state and not a federal concern. Thus,

¹²⁴ Factual finding 55 made by Judge Walker in *Perry* after trial seems significant on one aspect of harm to others, at least on that record: "Permitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages." *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 972 (N.D. Cal. 2010).

once New York has passed a law that allows same-sex married couples to raise children, based on New York's conclusion that doing so does not contravene a policy of New York, it is not the business of the federal government to take the opposite position.

Second, when DOMA and Prop. 8 were argued, there were eight states that had civil unions or domestic partnerships that, for child rearing purposes, treated those relationships identically to those of married couples.¹²⁵ In other words, although those states—which included California—did not permit same-sex couples to marry, they did not differentiate between same and opposite-sex couples in terms of rights and obligations to raise their children. Therefore, if the distinction between same and opposite-sex married couples is to be maintained in those eight states, there must be some other basis for doing so.

Third, this defense is based on an incentive theory that couples will undertake the desired activity to receive the benefit or reward. But the distinction between same-sex and opposite-sex marriages is not structured as a reward system for having biological children in wedlock, such as a tax credit for engaging in the preferred activity. Moreover, the “benefit” can be obtained without having children, and it does not expire when children are gone from the home, or it is certain that no new ones are going to be born to the couple or even adopted.¹²⁶

These three responses to the incentive argument, if accepted as a matter of law, would not need any factual basis to support them, nor would any particular kind of proof be needed because the texts of the laws in the state would supply whatever factual proof is needed. Nonetheless, it would be advisable for a plaintiff wishing to make these points to find an expert, perhaps in family law, to explain the system to the judge in the trial court through an affidavit. The defendant might object, possibly on the ground that the meaning and effect of state laws are issues of law and not fact. But at least that would prevent the defendant from later arguing that the plaintiff needed to offer proof on those issues, and it would also likely smoke out any defendant who wished to contest these points and effectively require it to take a position, with supporting admissible evidence, at an earlier stage of the proceedings.

The aspect of the child-rearing justification, on which facts, or at least expert opinions, might matter and might be in dispute is whether children are more likely to develop properly—whatever that may mean—if they are raised by two parents of the opposite sex, rather than two parents of the same sex. There are studies on this question, with the conclusions challenged by one side or the other, although Judge Walker in the

¹²⁵ Rebecca Glenberg, *How Will the Supreme Court's Big Gay Rights Cases Affect Virginia?*, ACLU OF VA. (Mar. 25, 2013), <http://acluva.org/11214/how-will-the-supreme-courts-big-gay-rights-cases-affect-virginia/>.

¹²⁶ 26 U.S.C. § 6013 (2012).

Prop. 8 case concluded that the supporters of same-sex marriage had the better of the argument.¹²⁷ It is unlikely that, in an area as controversial as this, any study or series of studies will convince the other side of its conclusions in part because the supporters and opponents of same-sex marriage have strongly held views. Moreover, an objective third party would also note the following difficulties, among others, with attempting to prove either side of the argument.

First, the number of same-sex marriages in which there are children raised from birth, or at least a very young age, are small, especially when compared to children of opposite sex-marriages. The number might be increased by including children of same-sex couples living together, perhaps in civil unions or domestic partnerships. But some would argue that not being able to say to a child that the parents are married may itself be a cause of some of the child's perceived difficulties. Second, it is difficult to assess how well a child has developed until he or she is an adult, and perhaps not even when they reach age 21. But whatever the age, any responsible study would take many years to complete, which makes the pool of current data even smaller. Third, unlike matters such as height or weight, there are no generally accepted and objective criteria by which to measure appropriate development in a child. And last, most responsible social scientists would be unwilling to state their conclusion with certainty, but would likely say that the evidence points (strongly perhaps) in one direction or the other.

Assuming that the person offering the opinion on child rearing can qualify as an expert, what should a court do if a challenger offers testimony that the exclusion of same-sex couples from the right to marry is unjustifiable because there is no reliable evidence that raising children in an environment in which the parents have the same gender is harmful to the children? My initial response as a judge would be to ask the defendant to supply some contrary evidence, of the same general kind, and then to allow both parties to probe the views of experts on the other side through depositions. In *Windsor*, the defendant attempted to rely on materials contained in citations in its brief to oppose plaintiff's expert affidavits on this point and some others. Plaintiff objected for a variety of reasons, and the district court, rather than striking the references, allowed plaintiff to make supplemental submissions in response to those citations, but did not allow defendant to respond further.¹²⁸ In my view,

¹²⁷ *Perry*, 704 F. Supp. 2d at 973 (finding 56: “[C]hildren of same-sex couples benefit when their parents can marry.”).

¹²⁸ Memorandum of Law in Support of Motion to Strike Documents Referenced by Defendant-Intervenor in Opposition to Plaintiff's Motion for Summary Judgment at 9–20, *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 10 Civ. 8435), ECF No. 66; Memorandum of Law of Intervenor-Defendant the Bipartisan Legal Advisory Group of the United States House of Representatives in Opposition to Plaintiff's Motion to Strike,

plaintiff had the better of the argument, but given the relatively minor role that this issue played in evaluating DOMA, the district court's ruling was a fair compromise.

The most difficult question would arise if the court concluded that there is some evidence on both sides of the issue of whether same-sex parents are equal to opposite-sex parents in terms of child rearing. In most cases where there is a factual dispute, including disputes involving experts, the trier of fact resolves the question, which in these cases would be the district judge, with appellate review subject to the clearly erroneous standard under Rule 52(a).¹²⁹ Following that route would mean, for example, that Judge Walker's ruling on this issue in *Perry*,¹³⁰ if it were upheld by the Supreme Court, would establish the constitutional principle for every state, based solely on the record in that proceeding, which does not seem right or fair to every other state.

On the other hand, assuming that the expert testimony carries some weight and that the trial judge makes an assessment of the strength of the opinions of the experts from both sides, it would also make no sense to disregard the evaluation of a federal judge who either sat through a trial or read the affidavits and deposition testimony and formed an opinion on the relative merits of the positions of both sides. Surely, if the judge concluded that the evidence from one side was just barely admissible, or of very little weight, it would be a disservice to the higher courts for that view not to be expressed by the judge and taken into account on appeal. Similarly, if the trial judge found that the evidence was nearly in balance, that too ought to be made clear on the record, along with the reasons for that conclusion. Those opinions of the trial court—and that is a more accurate description than calling them findings of fact—should carry some weight with the appeals courts in cases where the defendant has to offer some factual basis for its claims that a particular justification suffices to sustain the law.

Even taking all that into account, a court, which is likely to mean the Supreme Court, will have to decide what to do in the face of uncertainty: uphold the differing treatment because the legislature enacted it, or strike it down because it disfavors the plaintiff group and the defendant has failed to submit sufficient evidence to support the differing treatment. In *Windsor*, the Court did not address that precise question, but in-

Windsor, 833 F. Supp. 2d 394 (No. 10 Civ. 8435), ECF No. 69; Reply to Memorandum in Support of Motion to Strike Documents Referenced by Defendant-Intervenor in Opposition to Plaintiff's Motion for Summary Judgment, *Windsor*, 833 F. Supp. 2d 394 (No. 10 Civ. 8435), ECF No. 73; Order, *Windsor*, 833 F. Supp. 2d 394 (No. 10 Civ. 8435), ECF No. 75; Order, *Windsor*, 833 F. Supp. 2d 394 (No. 10 Civ. 8435), ECF No. 79.

¹²⁹ FED. R. CIV. P. 52(a).

¹³⁰ 704 F. Supp. 2d at 999–1000.

stead found another basis for striking down DOMA, to which I now turn, and then will double back to this ultimate question.

a. Improper Motives as a Counter to the Proposed Justifications

Justice Kennedy, writing for the majority in *Windsor*, did not decide whether the proffered justifications sufficed. Instead, mixing together a modicum of federalism and an observation that Congress usually defers to states on the meaning of marriage, the majority concluded that “careful consideration” was required of this “unusual” deviation.¹³¹ To this, it added that Congress showed that its motivations for DOMA were improper for a variety of reasons, mainly because it was designed to undermine, and did undermine, the “dignity” of same-sex married couples, a term that was used in one form or another 10 times in just Part III of the opinion.¹³² Among the other descriptions of what Congress had done were that it was a law “designed to injure” and intended to harm; that it showed “improper animus” and imposed a “stigma” on same-sex married couples; that its “purpose and effect” were to express “disapproval”; that it also “frustrates” New York’s objectives by restricting choices; that it creates “second class marriages” that “demean[]” and “humiliate[]” same-sex married couples and their children because the effect of DOMA is to “impose inequality” on plaintiff and others subject to it.¹³³

Justice Scalia’s dissent took great exception to the majority’s conclusion that Congress had acted with animus when it enacted DOMA.¹³⁴ He objected to the majority’s reliance on floor statements from a modest number of members and on the House Committee Report as reflective of the views of only some members. He observed that the animus should also be ascribed to the Senate that agreed with the bill and President Clinton who signed it into law, but saw no basis for doing so.¹³⁵ Some aspects of his objections ring true because they apply to all similar sources of snippets of legislative history, although they do not generally apply to the tenor of the debate that existed for DOMA. Nonetheless, even if overstated, the majority’s conclusions are buttressed by the fact that none of these other interests now relied on were mentioned, no other neutral reasons were offered, and the remarks were unrebutted and reflective of attitudes about gays and lesbians that were generally prevalent at the time. At the very least, these statements should have given any court pause before accepting other lawyerly, neutral sounding justifications being offered in court to defend DOMA.

¹³¹ *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013) (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

¹³² *Id.* at 2689–96.

¹³³ *Id.* at 2692–94.

¹³⁴ *Id.* at 2707–09 (Scalia, J., dissenting).

¹³⁵ *Id.* at 2708.

b. Re-Visiting the Ultimate Question

I assume that there will rarely if ever again be a record of pre-enactment statements like those in support of DOMA, either because there is no record kept, the supporters are better informed about what not to say, or the law was enacted by a majority of the voters and the ballot materials were carefully sanitized. If such anti-gay sentiments are much less prominent and more restrained, the Court will have to deal with the ultimate question of effective child rearing. What should a court do with a justification that has some support and is not laughable on its face, when there is more evidence on the other side, but that evidence is not conclusive? As I have tried to make clear, the answer to that question is not a factual one, nor can it be resolved solely by a battle of the experts. Moreover, to the extent that facts are relevant, even if not dispositive, those facts should be supported by evidence submitted in the trial court that is at least probed and tested by the adversary process, whether at a trial or on paper, via affidavits and depositions. Stated in terms of Brandeis briefs, if there is evidence that is in any way disputed, amicus briefs, or even those of the parties, are not an appropriate way to present that evidence to the courts.

Although the battle of experts on the child rearing issue is likely to continue to be inconclusive, at least in the minds of some, there is other objective evidence that a court should take into account in assessing the state's interest in seeing that children are raised by a two parent married couple consisting of one man and one woman. First, there is the matter of adoptions. Most state laws permit adoptions by a fit adult, regardless of whether the adult is married under state law.¹³⁶ Single women and men can adopt, and, if as is true in most states, gay or lesbian couples—whether married or in domestic partnerships or simply living together—may adopt and raise the adopted child,¹³⁷ then it is hard to see how the child rearing argument can sustain a state's refusal to allow same-sex couples to marry based on a claim of concern over proper child rearing.

Second, single women become pregnant every day, sometimes intentionally, sometimes not. Most pregnancies result from sexual intercourse, but some are brought about by artificial insemination. No state forbids single women from having artificial insemination, even though the result, if successful, will mean that the child will probably not be raised in a home with a man married to the woman as a co-parent. And if the woman is in a committed and loving relationship with another woman, that does not make the raising of the child by the two women any more unlawful or harmful to the child than being raised by a single parent. As

¹³⁶ Elizabeth Farrar & Zach Neumann, eds., *Adoption and Foster Care*, 12 GEO. J. GENDER & L. 409, 415–16 (2011).

¹³⁷ *Id.* at 426–27.

long as a state permits adoptions and pregnancies by persons not in a traditional one man-one woman married relationship, the claim that the traditional relationship is so important to child rearing that the state can forbid same-sex couples to be married is utterly illogical.

But suppose that a state forbids all adoptions except by married couples, allows artificial insemination only by married infertile couples, and creates significant incentives for pregnant single women to give up their children for adoption. In that situation, there would only be the battle of the experts, and under current case law there is no answer to the question of how to resolve their differences in determining the validity of a state law banning same-sex marriages. The court seems to have decided similar equal protection cases, sometimes in the open and sometimes not, by assigning a greater or lesser burden of proof, or something similar. In cases using heightened scrutiny, the defendant has almost an impossible barrier to overcome, as does the challenger in traditional economic rational basis cases. That leaves the few cases, of which DOMA was thought to be one, where proper review seems to require more than rational basis, but less than intermediate scrutiny. That is how the First Circuit decided *Massachusetts v. U.S. Department of Health & Human Services*, ruling for the plaintiffs by finding that the reasons offered did not suffice given the nature of the harm to the plaintiffs and the lack of substantial interest offered by the defendant.¹³⁸ That also seems to be the approach taken in the cases relied on by the First Circuit, in each of which the court did not say what kind of scrutiny it was applying, but ruled against the government.¹³⁹

There is one additional aspect of the lawsuits challenging differing treatment for same-sex couples that has not been sufficiently emphasized in the Equal Protection analysis: the importance of the right at issue. In the Prop 8 case, Judge Walker found that plaintiffs had a Due Process right to marry that the state could deny them only for compelling reasons.¹⁴⁰ One does not have to agree with that conclusion to recognize that the plaintiffs' discrimination claim there involved a very important right—marriage—and it surely makes sense to factor that into the balance, as the Supreme Court cases cited in note 139 impliedly did. By contrast, if instead of denying same-sex couples the right to marry, a state university decided that at homecoming there would be a king and queen, but not either two kings or two queens, we might think that was a silly rule, but the harm to a same-sex couple from it would not likely result in a judicial decision invalidating it, but the denial of the right of same-sex couples to marry should.

¹³⁸ 682 F.3d 1, 11 (1st Cir. 2012) *cert. denied*, 133 S. Ct. 2884 (2013).

¹³⁹ *See, e.g., Romer v. Evans*, 517 U.S. 620, 635 (1996); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985); *USDA v. Moreno*, 413 U.S. 528, 538 (1973).

¹⁴⁰ *Perry*, 704 F. Supp. 2d at 991–95.

Part of the reason that the First Circuit approach worked well, even though the Supreme Court did not follow it, was that the reasons offered in support of DOMA were in the main not federal, and those that were federal were very weak, given the very significant adverse impacts on same-sex married couples. However, it would be a harder case if a state also did not allow domestic partnerships or civil unions, and if a recent initiative came out 60-40 against same-sex marriage and other related alternatives. If the experts in such a case disagreed over the big question of child rearing, the court would face a much more difficult choice than has been presented so far.

Calling the different treatment discrimination almost answers the question of how to resolve the question, but it is hard to see how any other label is proper. In the end the court will have to decide whether laws that do not affirmatively help one group that has the benefits—opposite-sex married couples—but significantly burden another group—same-sex couples who wish to attain the status of a married couple, with all the rights and obligations attendant to it—are consistent with our basic system founded on equality. Resolving factual disputes may help to clarify what is at stake, but the answer cannot come from the facts alone.

Moreover, invoking whatever standard of scrutiny five Justices support is little more than a device for deciding whether individual freedoms should trump group classifications when there is no clear answer to the question of whether one answer is more likely to produce harm than another. Perhaps admitting that the level of scrutiny, as a proxy for who bears the burden of uncertainty, would be a more direct way of answering these questions, and it surely would be a more transparent way of doing so.

IV. AFTERWORD

Since I gave my talk at Lewis & Clark in mid-October 2013, much has happened in the challenges to bans on same-sex marriages, which have now been filed in every state. As of this date, all thirteen trial judges who have considered a ban have found them to be unconstitutional. Appeals have been argued in the Tenth and Fourth Circuits, and briefing is underway in the Fifth and Sixth Circuits, and in some jurisdictions no appeals were filed. The decisions have all heavily cited Justice Kennedy's broad opinion in *Windsor*, as well as the portion of Justice Scalia's dissent which predicted that state bans on same-sex marriage would be declared unconstitutional based on the majority's opinion in *Windsor*.

Perhaps because there is so much favorable language in *Windsor*, the plaintiffs in these cases have seen no need for a trial or in most cases even discovery. But the one case where there were live witnesses in a two week

non-jury case, *DeBoer v. Snyder*,¹⁴¹ demonstrated how important a trial can be. In defense of its law, Michigan offered the testimony of a University of Texas sociology professor Mark Regnerus to show that children of opposite-sex marriages do better than children of same-sex marriages.¹⁴² However, based on cross-examination and other evidence that undercut the objectivity of the study that Regnerus did, the trial judge found his testimony “entirely unbelievable and not worthy of serious consideration.”¹⁴³ It remains to be seen what part, if any, the absence of a trial will have on the ultimate outcome of the bans on same-sex marriages.

A non-judicial event is also worthy of note, the publication of Jo Becker’s book, *Forcing the Spring* (Penguin Press 2014), which is an account by a New York Times reporter who was embedded with the team of plaintiffs’ lawyers in the Prop. 8 case from before it was filed until the case was concluded.¹⁴⁴ Her account of the trial and its impact on Judge Walker and the wider world that heard the stories of the plaintiffs demonstrated to me the value of the trial as both a litigation and an educational tool. Every lawyer with a major law reform case needs to consider those benefits and weigh them against the costs and delays that accompany a trial. When cases of this significance are before the courts, they may well recognize the advantages of a trial in assuring that the courts reach the right decision.

¹⁴¹ 973 F. Supp. 2d 757 (E.D. Mich. 2014).

¹⁴² *Id.* at 770–71.

¹⁴³ *Id.* at 766.

¹⁴⁴ JO BECKER, *FORCING THE SPRING: INSIDE THE FIGHT FOR MARRIAGE EQUALITY* (2014).