DOCTRINE IN CONTEXT

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In Windsor *and* Brown*: Marriage Equality and Racial Equality*, Professor Michael Klarman explores the U.S. Supreme Court's decisions in *Brown v. Board of Education*[1] and *United States v. Windsor*[2] to demonstrate "how American constitutional law works."[3] Klarman convincingly argues that "[r]ulings such as *Brown* and *Windsor* became conceivable only because of enormous changes in the surrounding social and political contexts."[4] In this sense, his account shows that Supreme Court adjudication is not an internal undertaking but rather is oriented toward the broader political and cultural environment in which the Court operates.

More specifically, Klarman claims that "[l]awyers and law professors may care greatly about legal doctrine, but the Justices do not appear to be much influenced by it — at least not in landmark cases such as *Brown* and *Windsor*."[5] In one sense, as Klarman argues, "doctrine played little role in the outcome[] of . . . *Windsor*."[6] Justice Kennedy's majority opinion broadly invoked and combined concepts of equality, liberty, and federalism.[7] And it barely engaged the governmental interests offered to support section 3 of the Defense of Marriage Act[8] (DOMA).[9] Accordingly, as Klarman suggests, the political and social contexts and their relationship to institutional considerations may better explain the result.

Yet, in another sense, doctrine — and more specifically the mobilization and construction of doctrine in lower courts and in nonjudicial domains — contributed to the result in *Windsor* by shaping the legal and political context in which the Court intervened. As I show in this brief response, advocates mobilized doctrine,[10] using doctrinal argu-

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[1] 347 U.S. 483 (1954).

[2] 133 S. Ct. 2675 (2013).

[3] Michael J. Klarman, *The Supreme Court, 2012 Term — Comment:* Windsor *and* Brown*: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 128 (2013).

[4] *Id.* at 130.

[5] *Id.* at 138.

[6] *Id.* at 129.

[7] *See Windsor*, 133 S. Ct. at 2693–95.

[8] 1 U.S.C. § 7 (2012).

[9] *See Windsor*, 133 S. Ct. at 2690

[10] I thank Professor Scott Cummings for suggesting this phrase.

ments and concepts to pressure elected officials and convince lower court judges to support the marriage equality cause. And doctrine in turn provided a vehicle through which political actors and judges could articulate and justify support for marriage equality. Even if, as Klarman suggests, doctrine does little to constrain the Justices in landmark Supreme Court decisions, doctrine plays a significant role outside and below the Court. Ultimately, doctrine shapes the environment that Klarman convincingly shows influences the Justices in cases like *Windsor*.

To illustrate this dynamic, I offer a brief narrative of the role of heightened scrutiny in the context of DOMA. I show that LGBT advocates leveraged heightened scrutiny — in court and in the political arena — in ways that shaped the backdrop against which the Court resolved the issue in *Windsor*, even though the *Windsor* opinion offered no analysis of heightened scrutiny.[11] *Windsor*, in turn, provides a different set of resources for advocates, lawmakers, and judges moving forward.

To be clear, I am not making a causal claim about particular doctrinal principles; rather, I am showing the way in which doctrine provides a set of arguments and justifications for positions and decisions that shape the surrounding legal, political, and cultural context in which the Court intervenes.[12] Understanding the role of doctrine in this way highlights and clarifies the role of law more generally, showing how LGBT advocates use legal strategies to push their cause forward, both in and out of court.[13]

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[11] Klarman, *supra* note 3, at 141.

[12] Rather than view law as an exogenous determinant, I take an interpretive approach that understands law as constitutive. *See* Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 946–47 & 947 n.15 (2011). On this approach, see Michael McCann, *Law and Social Movements*, *in* THE BLACKWELL COMPANION TO LAW AND SOCIETY 506, 507–08 (Austin Sarat ed., 2004). For an analysis of the nature of evaluation of law's impact, with specific attention to distinctions between causal and constitutive explanations, see Scott L. Cummings, *Empirical Studies of Law and Social Change: What is the Field? What are the Questions?*, 2013 WIS. L. REV. 171, 196–98.

[13] In his essay Klarman devotes little attention to marriage litigation before *Windsor*. *See* Klarman, *supra* note 3, at 138. But in *From the Closet to the Altar*, his 2013 book on the path to marriage equality, Klarman carves out a more prominent role for court-centered strategies. In fact, as compared to his earlier work, Klarman takes a more favorable view of litigation in the marriage equality campaign. *Compare* MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR 208 (2013), *with* Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431, 482 (2005). *See also* Jane S. Schacter, *Making Sense of the Marriage Debate*, 91 TEX. L. REV. 1185, 1194 (2013) (reviewing MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR, *supra*) ("To his credit, Klarman notes expressly in the book that some of his views have changed."). Therefore, to the extent this response demonstrates the positive impact of litigation, it supplements Klarman's recent work.

HEIGHTENED SCRUTINY AND DOMA

The changing political and social context does not automatically produce victories for social movements; instead, it offers opportunities that movement activists must recognize and exploit. By launching a litigation campaign against DOMA in 2009, LGBT movement lawyers seized on the more favorable political environment offered by the new Administration. Heightened scrutiny became an important tool in pushing the President and his Administration toward explicit support for the marriage-equality cause.[14]

While President Obama had long opposed DOMA as discriminatory,[15] his Administration initially defended the statute in litigation.[16] Yet advocates cultivated an early legal victory to pressure the Obama Administration to shift positions. After the federal district court in *Gill v. Office of Personnel Management*[17] ruled section 3 of DOMA unconstitutional,[18] LGBT movement lawyers filed new challenges in the Second Circuit — *Pedersen v. Office of Personnel Management*[19] and *Windsor v. United States*.[20] *Windsor*, of course, would ultimately make its way to the Supreme Court.

Unlike the First Circuit, where *Gill* was filed, the Second Circuit lacked precedential authority on whether sexual orientation–based classifications merited heightened scrutiny for equal protection purposes. This open doctrinal question provided an opportunity for LGBT movement lawyers to pressure the Obama Administration, which had

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[14] Years before *Windsor*, LGBT advocates mobilized heightened scrutiny at the state level. As Professor Scott Cummings and I have shown in our study of the California marriage-equality movement, advocates built the state's domestic partnership law with an eye toward eventual state-court litigation in which arguments for heightened scrutiny would prove significant. Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1268 (2010). When LGBT advocates eventually litigated the marriage issue in California, they pointed to pieces of the legislative record to support their arguments for heightened scrutiny. *See id.* at 1288. Ultimately, in ruling in favor of marriage equality in 2008, the California Supreme Court found that sexual orientation constituted a suspect classification for state constitutional purposes. *In re* Marriage Cases, 183 P.3d 384, 401 (Cal. 2008). Within the following year, the state supreme courts of Connecticut and Iowa applied heightened scrutiny to invalidate their marriage laws. *See* Kerrigan v. Comm'r of Public Health, 957 A.2d 407, 412 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862, 896 (Iowa 2009). These legal decisions produced married same-sex couples, and they authorized same-sex marriages that formed the basis for some of the federal challenges to section 3 of DOMA.

[15] See Abby Goodnough, *State Suit Challenges U.S. Defense of Marriage Act*, N.Y. TIMES, Jul. 9, 2009, at A20.

[16] Charlie Savage & Sheryl Gay Stolberg, *In Turnabout, U.S. Says Marriage Act Blocks Gay Rights*, N.Y. TIMES, Feb. 24, 2011, at A1.

[17] 699 F. Supp 2d 374 (D. Mass. 2010), *aff'd sub nom.* Massachusetts v. U.S. Dep't of Health and Human Servs., 682 F.3d 1 (1st Cir. 2012).

[18] *See id.* at 387.

[19] 881 F. Supp. 2d 294 (D. Conn. 2012).

[20] 833 F. Supp. 2d 394 (S.D.N.Y. 2012), *aff'd*, 699 F.3d 169 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013).

been defending DOMA under a rational basis theory.[21] And it furnished the opening for sympathetic lawyers inside the Department of Justice (DOJ) to reshape the Administration's position.[22]

Ultimately, in his announcement that the Administration had switched positions and would no longer defend DOMA, Attorney General Eric Holder used the doctrine of heightened scrutiny to explain and justify his position.[23] While Klarman points to the many political and cultural developments that have favored lesbian and gay equality in recent years,[24] the Attorney General attended to the political, legal, and cultural history of discrimination to justify heightened scrutiny.[25] Yet the mere fact that lesbians and gay men had attracted the executive branch's attention as a quasi-suspect class speaks to the increasing political power that Klarman highlights.[26] In this sense, important doctrinal developments emerging from outside the courts reflected the more favorable political and social context, and those developments further shaped the context, both inside and outside the courts, in pro-LGBT ways.

The doctrinal arguments for heightened scrutiny facilitated realignments such that the executive branch became a powerful LGBT movement ally and began to litigate *against* the federal law.[27] Doctrine provided a political resource and became the vehicle through which to reposition political actors. Even though this development was channeled through litigation, it represented a broader shift on a major issue that bled outside the courts. In this sense, doctrine played a role in bridging the political and legal arenas.

Indeed, at a time when the federal political branches seemed to lag behind the courts on sexual-orientation equality, legal doctrine offered a type of cover to political actors. President Obama and Attorney General Holder could articulate their support for marriage equality by relying on technical language of equal protection doctrine.[28] The doctrine allowed them to support marriage equality in a way that appeared to be cabined to the specific issue of federal recognition of

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[21] *See* Douglas NeJaime, *Cause Lawyers Inside the State*, 81 FORDHAM L. REV. 649, 692 (2012).

[22] *See id.* at 693–94.

[23] *See* Letter from Eric H. Holder, Jr., Att'y Gen., to Hon. John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), *available at* http://www. justice.gov/opa/pr/2011 /February/11-ag-223.html.

[24] *See* Klarman, *supra* note 3, at 132–35.

[25] *See id.*

[26] *Cf.* Kenji Yoshino, Leary Lecture, *The Paradox of Political Power: Same-Sex Marriage and the Supreme Court*, 2012 UTAH L. REV. 527.

[27] *See* Douglas NeJaime, *The View From Below: Public Interest Lawyering, Social Change, and Adjudication*, 61 UCLA L. REV DISCOURSE 182, 201–02 (2013), http://www.uclalawreview .org/pdf/discourse/61-13.pdf.

[28] *See, e.g.*, Letter from Eric H. Holder to John A. Boehner, *supra* note 23.

same-sex couples' valid state-law marriages.[29] Indeed, not until months later did the President explicitly declare his personal support for marriage equality.[30] Yet the DOJ's doctrinal argument clearly implied that other laws that discriminated against lesbians and gay men, including state marriage bans, were unconstitutional. Through the doctrine of heightened scrutiny, the Obama Administration articulated arguments that broadly supported the marriage equality cause without saying so directly. In fact, this tension in the Administration's position became clear as the Solicitor General eventually argued against Proposition 8 in *Hollingsworth v. Perry*[31] and yet resisted what Klarman refers to as the "'fifty-state' solution"[32] striking down all remaining state marriage bans.[33]

The Administration's position had a significant impact on the trajectory of DOMA challenges in the lower courts. Below the Supreme Court, many federal judges likely view doctrine as a disciplining force. Fearful of reversal and, for some, concerned about potential elevation, these judges experience constraints on decisionmaking that Supreme Court Justices do not.[34] They have greater incentives to reason in a doctrinally clear and cautious way. In other words, doctrinal analysis in the lower federal courts often looks different than the more open-ended and ambiguous reasoning Klarman identifies in *Windsor*. As Professor Katie Eyer has argued, in the absence of Supreme Court precedent, the executive branch's position on DOMA provided a doctrinal argument for heightened scrutiny that came with the legitimacy and authority of the President and his Administration.[35] The DOJ's position provided a type of permission to federal judges inclined to

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[29] *See, e.g.*, *id.*

[30] *See* Interview by Robin Roberts with President Barack Obama (May 9, 2012), *available at* http://abcnews.go.com/Politics/transcript-robin-roberts-abc-news-interview-president-obama/story?id=16316043.

[31] 133 S. Ct. 2652 (2013).

[32] Klarman, *supra* note 3, at 128.

[33] *See* Transcript of Oral Argument at 52–55, *Hollingsworth*, 133 S. Ct. 2562 (No. 12-144).

[34] This may be less true of some senior, high-profile judges on the federal courts of appeals. Indeed, in the same-sex marriage context, two established appellate judges authored doctrinally controversial decisions. Judge Reinhardt's opinion for the Ninth Circuit in *Perry v. Brown* struck down Proposition 8 under a rational basis theory that made much of the fact that the initiative eliminated an existing right to marry. *See* 671 F.3d 1052, 1063 (9th Cir. 2012). And Judge Boudin's decision for the First Circuit in *Massachusetts v. United States Department of Health and Human Services* struck down section 3 of DOMA by explicitly staking out a rational-basis-plus standard of review and integrating federalism concerns into the equal protection analysis. *See* 682 F.3d 1, 11, 16 (1st Cir. 2012).

[35] *See* Katie Eyer, *Lower Court Popular Constitutionalism*, 123 YALE L.J. ONLINE 197, 202 (2013), http://www.yalelawjournal.org/images/pdfs/1204.pdf ("[T]he lower courts — cast as appliers rather than makers of constitutional law — may more often look for extrinsic doctrinal validation by the Supreme Court or authoritative popular constitutional actors, such as the President or Congress, before making similarly responsive moves.").

strike down DOMA but wary of staking out new doctrinal ground. Moreover, given that lower court decisionmaking inevitably occurs before Supreme Court adjudication and thus earlier in a movement's trajectory, the types of political shifts that have been channeled through doctrine seem more important to lower courts worried about moving too far ahead of political and popular sentiment.

The DOJ's new position influenced the complexion of DOMA litigation as federal courts began to accept heightened scrutiny arguments that the Supreme Court had yet to explicitly consider. The district court judge in *Golinski v. United States Office of Personnel Management*,[36] another movement-led DOMA lawsuit, noted how influential it was that the DOJ sent the head of the Civil Division to make the case against DOMA in court.[37] For Judge White, the DOJ attorney's presence made "a statement of the significance that DOJ and the administration place on this question."[38] Ultimately, the court applied heightened scrutiny to invalidate section 3 of DOMA. In doing so, it relied on the DOJ's reasoning, particularly its analysis of the political powerlessness of lesbians and gay men.[39]

The *Golinski* court was not alone. Other federal courts responded positively to the DOJ's position. Two additional federal courts found that sexual orientation-based classifications merit heightened scrutiny.[40] In one of those opinions, the court explicitly "adopt[ed] the Holder Letter."[41] Eventually, the Second Circuit in *Windsor* found, just as the DOJ had, that lesbians and gay men qualified for heightened scrutiny for federal equal protection purposes.[42]

Of course, these courts may have ruled against DOMA regardless of the Administration's position. And if they were influenced by the Administration's shift, the shift itself likely had a greater impact than the specific doctrinal argument justifying it. Indeed, some of these same courts also found DOMA unconstitutional under a rational basis theory.[43] In this sense, the DOJ's switch of position, standing alone, seems most significant. Yet the doctrine of heightened scrutiny provided the tool for movement lawyers to pressure the Administration

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[36] 824 F. Supp. 2d 968 (N.D. Cal. 2012).

[37] *See* NeJaime, *supra* note 21, at 696.

[38] Chris Geidner, *Golinski Has Her Day in Court, DOJ Sends Senior Lawyer to Argue DOMA's Unconstitutionality*, METROWEEKLY (Dec. 16, 2011, 5:10 PM), http://metroweekly.com/poliglot/2011/12/golinski-has-her-day-in-court.html (quoting Tara Borelli, Staff Attorney, Lambda Legal).

[39] *See Golinski*, 824 F. Supp. 2d at 989.

[40] *See* Pedersen v. Office of Pers. Mgmt., 881 F. Supp. 2d 294, 333 (D. Conn. 2012); *In re* Balas, 449 B.R. 567, 576 (Bankr. C.D. Cal. 2011).

[41] *In re Balas*, 444 B.R. at 576.

[42] Windsor v. United States 699 F.3d 169, 185 (2d Cir. 2012).

[43] *See, e.g.*, *Pedersen*, 881 F. Supp. 2d at 334; *In re* Balas, 449 B.R. at 579.

and for the Administration to articulate its position while minimizing charges that it was making a raw political move. These developments, routed through the framework of heightened scrutiny, altered the institutional considerations that judges likely considered as they weighed DOMA's constitutionality. Doctrine both provided the vehicle to reshape the political context and, in turn, contributed to the perceived viability of legal conclusions finding DOMA unconstitutional. Overall, this demonstrates a key point: the doctrine of heightened scrutiny may not have necessarily dictated results, but its deployment by advocates, executive branch lawyers, and federal judges helped construct the legal, political, and cultural environment that grew increasingly favorable to same-sex marriage as the Supreme Court moved closer to considering the issue.

Once the Supreme Court was set to weigh in, two federal appellate courts and multiple federal district courts had invalidated section 3. If, as Klarman explains, the Justices care greatly about the context in which they intervene, the weight of judicial authority had quickly and comprehensively turned against DOMA in a way that supported — from an institutional rather than merely doctrinal perspective — the outcome in *Windsor*. And the Court considered DOMA in a context in which the executive branch, based on the exact reasoning adopted by the appellate court in *Windsor*, not only refused to defend the law but also made the case against it. Indeed, at oral argument, the Solicitor General powerfully argued for DOMA's unconstitutionality.[44] This realignment not only gave rise to the substantial justiciability issues that the Court confronted in *Windsor*, but it also shaped the political context in which the Court intervened.

Again, my claim is not that heightened scrutiny was necessary to the DOJ's shift in position; rather, it is that heightened scrutiny served as a way to justify and articulate that shift and in doing so, influenced the broader environment surrounding same-sex marriage. Of course, the Court in *Windsor* did not engage the heightened scrutiny question. Yet even if the Court never resolves that question — which seems possible — the doctrinal claim for heightened scrutiny played a significant role in shaping the terrain on which the Court considered marriage equality.

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[44] *See* Transcript of Oral Argument at 91, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307) ("[T]his discrimination, excluding lawfully married gay and lesbian couples from Federal benefits, cannot be reconciled with our fundamental commitment to equal treatment under law.").

AFTER *WINDSOR*

As Klarman explains, the Court resolved *Windsor* and *Hollingsworth* in ways that produced landmark victories for the LGBT movement yet left unsettled the larger question regarding the constitutionality of state marriage bans.[45] By disposing of *Hollingsworth* on standing grounds and providing ambiguous doctrinal reasoning with no mention of heightened scrutiny in *Windsor*, the Court ensured that the questions surrounding state marriage bans would continue to be worked out in the lower federal courts and in the states.[46]

On one hand, the Supreme Court's refusal to address the issue of heightened scrutiny could allow that doctrinal issue to continue to gain steam. Certainly, the lower court decisions based on heightened scrutiny provide authority to rule in favor of sexual orientation equality claims in a range of contexts, including challenges to state marriage bans. On the other hand, heightened scrutiny may prove less important after *Windsor*. The quickly shifting political terrain, which increasingly favors same-sex marriage, may influence the analysis of political powerlessness in a way that pushes courts away from heightened scrutiny.[47] More importantly, the Court's decision in *Windsor* fuels arguments that state marriage prohibitions cannot withstand mere rational basis review. If the governmental interests mustered in defense of DOMA failed to satisfy the Court in *Windsor*, those same rationales seem similarly unconvincing when used to defend state marriage bans, regardless of the level of scrutiny.[48]

Ultimately, *Windsor* provides resources — doctrinal, rhetorical, political, and cultural — for the many actors outside and below the Supreme Court continuing to push for marriage equality.[49] Advocates immediately filed lawsuits in federal court challenging state marriage bans based on *Windsor*'s reasoning.[50] And they filed new motions in existing state-court lawsuits arguing that *Windsor* renders nonmarital

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[45] *See* Klarman, *supra* note 3, at 154.

[46] *See* NeJaime, *supra* note 27, at 204.

[47] *See* Schacter, *supra* note 13, at 1201–02. For an insightful analysis of the issues raised by assessments of political power in the sexual orientation context, see Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363 (2011).

[48] *See* Douglas NeJaime, Windsor*'s Right to Marry*, 123 YALE L.J. ONLINE 219, 245 (2013), http://www.yalelawjournal.org/images/pdfs/1205.pdf.

[49] *See* NeJaime, *supra* note 27, at 204.

[50] *See, e.g.*, Class Action Complaint for Declaratory and Injunctive Relief, Harris v. McDonnell, No. 5:13-cv-00077-MFU (W.D. Va. Aug. 1, 2013), *available at* https://www.aclu.org/files/assets/complaintwithfilinginfo.pdf; Complaint for Declaratory and Injunctive Relief at 46, Whitewood v. Corbett, No. 1:13-cv-01861-JEJ (M.D. Pa. July 9, 2013), *available at* https://www.aclu.org/files/assets/whitewood_v_.corbett_--_complaint.pdf.

recognition regimes constitutionally inadequate.[51] In *Windsor*'s wake, local clerks in Pennsylvania and New Mexico began issuing marriage licenses to same-sex couples.[52] Executive branch officials in those states used litigation as an opportunity to express their support for marriage equality.[53] Lawmakers in Illinois and Hawaii — states that offered nonmarital recognition to same-sex couples — passed marriage equality bills in special legislative sessions.[54] Federal and state judges used *Windsor* to find same-sex couples' exclusion from marriage unconstitutional and to recognize same-sex marriages celebrated in other states.[55]

The doctrine articulated in *Windsor*, even if ambiguous and abstract, has provided the tools to push ahead and to further shape the political, social, and legal context before the Court once again confronts the question of marriage equality. As the events in *Windsor*'s wake demonstrate, other doctrinal concepts can do what heightened scrutiny has done in the marriage equality campaign — serve as a mobilizing tool, channel political support, and furnish justifications for lower courts. Ultimately, then, doctrine serves less as a force that determines outcomes and more as a resource that helps movements make claims, gain political support, and secure judicial validation. Actors outside the Supreme Court use doctrine to push forward constitutional and social change. How successful they are in doing so ultimately influences the Supreme Court when it renders a decision on a controversial and highly salient issue.

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[51] Memorandum in Support of Plaintiffs' Motion for Summary Judgment at 5, Darby v. Orr, No. 12 CH 19718 (Ill. Cir. Ct. Ch. Div. July 10, 2013); Plaintiffs' Brief in Support of Motion for Summary Judgment at 20–21, Garden State Equality v. Dow, No. MER L-1729-11 (N.J. Super. Ct. Law Div. July 3, 2013).

[52] *See* Jeri Clausing, *Gay Marriage Stirs Little Public Outcry in NM*, ASSOCIATED PRESS, Sept. 11, 2013, *available at* http://bigstory.ap.org/article/same-sex-marriage-stirs-little-public-outcry-nm; Daniel Kelley, *Pennsylvania Clerk Told to Stop Issuing Gay Marriage Licenses*, REUTERS, Sept. 12, 2013, *available at* http://www.reuters.com/article/2013/09/12/us-usa-gaymarriage-pennsylvania-idUSBRE98B0WE20130912.

[53] *See* Trip Gabriel, *Move for Gay Marriage Gets a Lift in Pennsylvania*, N.Y. TIMES, July 12, 2013, at A12; Nick Wing, *Gary King, New Mexico Attorney General, Calls for End to State's Prohibition on Gay Marriage*, HUFFINGTON POST (July 23, 2013, 12:06 PM), http://www.huffingtonpost.com/2013/07/23/gary-king-gay-marriage-new-mexico_n_3639478.html.

[54] Monica Davey & Steven Yaccino, *Illinois Sends Bill Allowing Gay Marriage to Governor*, N.Y. TIMES, Nov. 6, 2013, at A12; Erik Eckholm, *Battle Nears End in First Front Line on Gay Marriage*, N.Y. TIMES, Nov. 9, 2013, at A11.

[55] *See, e.g.*, Obergefell v. Kasich, No. 1:13-cv-501, 2013 WL 3814262, at *1 (S.D. Ohio July 22, 2013); Garden State Equality v. Dow, 2013 WL 5687193 (N.J. Oct. 18, 2013); Griego v. Oliver, No. D 202 CV 2013 2757, slip op. at 4 (N.M. Jud. Dist. Ct. Sept. 3, 2013).