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A STORY OF A BIRTH AND A FUNERAL: A RHETORICAL ANALYSIS OF *WINDSOR* AND *SHELBY COUNTY*

*Min Kyung Lee**

In 2013, the Supreme Court decided two major cases—United States v. Windsor *and* Shelby County v. Holder. *The Court's rulings prompted inquiries and criticisms regarding how the Court could simultaneously signal the birth of marriage equality and mark the end of racial equality. This Article compares these two cases by introducing another dimension that may make them more harmonious than they appear. In particular, it focuses on the Court's narrative framework in each case and conducts a rhetorical analysis to analyze these narrative frameworks. It argues that the Court employs a personal narrative in* Windsor *and an institutional narrative in* Shelby County*, yet it conceptualizes and focuses on a "right" in each case. Additionally, the Court's use of a personal narrative in* Windsor *and an institutional narrative in* Shelby County *increases the persuasiveness of the opinions.*

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INTRODUCTION

The summer of 2013 was a critical time for the Supreme Court of the United States. During that time, the Court decided two major cases: *United States v. Windsor*[1] and *Shelby County v. Holder*.[2] Its rulings in these cases perplexed many civil rights activists and legal scholars because the decisions seemed at odds on the issue of equality: many viewed *Windsor* as a step forward in achieving marriage equality[3] and *Shelby County* as a retreat in racial equality.[4] Questions arose as to the Court's apparent inconsistency.[5] Some scholars analyzed these questions in the context of social movements. Is the LGBT movement a new racial movement?[6] Are we living in the world of post-racialism?[7] Do we

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[1] United States v. Windsor, 133 S. Ct. 2675, 2682 (2013).

[2] Shelby County, Ala. v. Holder, 133 S. Ct. 2612, 2618 (2013).

[3] *See, e.g.*, John D. Inazu, *More Is More: Strengthening Free Exercise, Speech, and Association*, 99 MINN. L. REV. 485 (2014); Douglas NeJaime, Windsor*'s Right to Marry,* 123 YALE L.J. ONLINE 219, 221–23 (2013), http://www.yalelawjournal.org/2013/9/15/nejaime.html.

[4] *See, e.g.*, Atiba R. Ellis, Shelby Co. v. Holder*: The Crippling of the Voting Rights Act,* AM. CONSTITUTION SOCIETY BLOG (June 27, 2013), http://www.acslaw.org/acsblog/shelby-co-v-holder-the-crippling-of-the-voting-rights-act (stating that "relying on the myth of racial progress, the Supreme Court failed to confront the racial balkanization in voting that exists"); Tanya Hernandez, *A Watered-Down Vision of Equality,* N.Y. TIMES, June 26, 2013, http://www.nytimes.com/roomfordebate/2013/06/26/is-the-civil-rights-era-over/a-watered-down-vision-of-equality ("One can celebrate the victories for gay people . . . while at the same time decrying the decisions' limited vision of equality. That limited vision eroded the pursuit of equality in this term's racial justice cases.").

[5] *See, e.g.*, Enumale Agada & Aaron Blacksberg, *A Tale of Two Cases:* Shelby County v. Holder *and* United States v. Windsor, HARV. AM. CONSTITUTION SOC'Y (Nov. 2, 2013), http://www3.law.harvard.edu/orgs/acs/2013/11/02/a-tale-of-two-cases-shelby-county-v-holder-and-united-states-v-windsor/ (describing a talk by Professor Pam Karlan, wherein she compared the two cases).

[6] *See, e.g.*, Paul Butler, *The Court Should Focus on Justice Rather Than Rights*, N.Y. TIMES, July 19, 2013, http://www.nytimes.com/roomfordebate/2013/06/26/is-the-civil-rights-era-over/the-court-should-focus-on-justice-rather-than-rights.

[7] *See, e.g.*, Atiba R. Ellis, *Mission Accomplished? Post-Racialism in* Shelby

no longer feel the need to focus on racial equality but feel the stronger need to address marriage inequality? The focal point of these inquiries was the inconsistent outcomes of these two cases: one that signaled an advance of civil rights while the other signaled a retreat.

This Article attempts to shift the focus from the outcome of the cases to the processes by which they were decided: it analyzes *how* they were decided rather than *what* the outcomes were. It argues that by analyzing the content of the decisions, one might find them more harmonious than what their starkly different outcomes might suggest. It further argues that this mode of analysis reveals two similarities that are not easily apparent from looking at the outcomes. First, both cases evoke a similar rhetoric regarding the concept of *rights*. While one case is a discussion of individual rights and the other of institutional rights, the Court engages in an extensive discussion of the particular *right* in each case. The rhetoric suggests that the Court is not necessarily pro-right in *Windsor* and anti-right in *Shelby County*. Instead, it suggests that the Court conceptualizes the subject of rights differently in each case: rights of individuals in *Windsor* and rights of institutions, like states, in *Shelby County*. Second, to advance these conceptualizations of rights, the Court in both cases uses rhetorical devices that make the outcomes more persuasive.

In describing how the Court convincingly conceptualizes rights in both cases, this Article uses the terms *personal narrative* and *institutional narrative*. As used in this Article, personal narrative is storytelling that focuses on developing personal characters and triggering emotional attachment to those characters and their stories. In contrast, institutional narrative focuses on reducing this personal connection between individual characters and the reader. An institutional narrative seeks to gain legitimacy and persuasiveness by focusing on an institution, such as the federal government, including its traditions and principles. This Article explores the effects of the Court's framing of these two

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County, AM. CONSTITUTION SOC'Y BLOG (Feb. 25, 2013), http://www.acslaw.org/acsblog/mission-accomplished-post-racialism-and-shelby-county for post-racialism discussion.

narratives—it does not express a normative argument for either one.

This Article proceeds in four parts. Part I describes the conventional reception of *Windsor* and *Shelby County*. It explores how scholars have attempted to compare, analyze, and understand these cases in relation to their outcomes. Part II describes the methodology of rhetorical analysis. Part III uses rhetorical analysis to explore the personal narrative presented in *Windsor*. Part IV uses rhetorical analysis to explore the Court's institutional narrative in *Shelby County*. This Article concludes with a comparative discussion of the two cases and highlights the similarities that have been largely overlooked.

I. RECEPTION OF *WINDSOR* AND *SHELBY COUNTY*

The Supreme Court's decisions in *Windsor* and *Shelby County* caused significant consternation among civil rights activists and legal scholars. This is unsurprising—a focus solely on the outcomes makes the rulings seem at odds.

Scholars and practitioners generally view *Windsor* as a step forward in achieving marriage equality. For example, some scholars have described *Windsor* as "a landmark victory for gay rights"[8] that "did much to advance the cause of same sex-marriage when it held that the United States should follow the lead of the various states in deciding on whether to accept same-sex marriage."[9] Another scholar described it as a "Supreme Court term [that brought] important progress on [the same-sex marriage] front."[10]

At the same time, many criticized *Shelby County* as a retreat in racial equality. One critic spoke of the decision: "relying on the myth of racial progress, the Supreme Court failed to confront the

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[8] Inazu, *supra* note 3, at 521.

[9] Richard A. Epstein, *Foreword: The Unfinished Business of the Supreme Court-an Introduction*, 8 N.Y.U. J.L. & LIBERTY 137, 138–39 (2013) (citing William Baude, *Interstate Recognition of Same-Sex Marriage after Windsor*, 8 N.Y.U. J.L. & LIBERTY 150, 159 (2013)).

[10] Adam Lioz*, Breaking the Vicious Cycle: How the Supreme Court Helped Create the Inequality Era and Why a New Jurisprudence Must Lead Us Out*, 43 SETON HALL L. REV. 1227, 1281 (2013).

racial balkanization in voting that exists."[11] Some scholars went so far to say it "marks the end of the civil rights era."[12] Reacting to the holding, Adam Lioz declared: "our generation must carry forward the torch of racial equality," and hinted that *Shelby County* created room for more improvement in racial equality.[13]

Many perplexed scholars focused on these inconsistent outcomes. Some asked how "[o]ne can celebrate the victories of gay people . . . while at the same time decrying the decisions' limited vision of equality. That limited vision eroded the pursuit of equality in this term's racial justice cases."[14] Various scholars focused on this inconsistency through multiple angles, but these analyses shared a commonality: they all focused on the outcomes. For example, many scholars approached the cases in the context of social movements. For example, some noted that *Windsor* forms a parallel with the growing support of gay movements in society, while *Shelby County* is congruent with the recent discussion of a post-racial society. Some argued that while the Supreme Court's decision in *Windsor* coincides with the growing support for gay rights,[15] the "[e]xisting social realities belie the claim that the antidiscrimination norm has achieved unqualified success for African-Americans or that we have reached a 'post' racial society."[16] A similar analysis contrasts *Windsor* and the growing support for gay rights with *Shelby County* by stating, "one needs to look no further than the recent *Shelby County v. Holder"* decision to see some evidence to the contrary.[17] Again, these analyses focus solely on outcomes—*Windsor*'s invalidation of the Defense of

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[11] Ellis, *supra* note 7.

[12] Inazu, *supra* note 3, at 518 n.168.

[13] Lioz, *supra* note 10, at 1281 n.257.

[14] Hernandez, *supra* note 4 ("One can celebrate the victories for gay people while at the same time decrying this term's sadly limited vision of justice for all.").

[15] Inazu, *supra* note 3, at 519–20.

[16] *Id.* at 518. *See also, e.g.*, Mario L. Barnes et al., *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 972 (2010); Inazu, *supra* note 3, at 517–20, 534 n.168; Butler, *supra* note 6; Ellis, *supra* note 7.

[17] Jane S. Schacter, *Unequal Inequalities? Poverty, Sexual Orientation, and the Dynamics of Constitutional Law*, 2014 UTAH L. REV. 867, 881–82 (2014).

Marriage Act ("DOMA"), and *Shelby County*'s invalidation of the Voting Rights Act.

This Article does not analyze the wisdom of this scholarship. Instead, it attempts to supplement this comparative exercise by shifting the focus from the cases' outcomes to the processes by which they were decided. It examines how the Court narrated the points at issue and the choice of language in the opinions. It argues that a focus on *how* the cases were examined—rather than simply their holdings—reveals similarities that may not otherwise be apparent: most importantly, the persuasive narration of the concept of "rights."

II. METHODOLOGY: RHETORIC AS A MEANS OF PERSUASION

The Supreme Court's decisions in *Windsor* and *Shelby County* display two consistencies: first, the Court in both cases presents an extensive discourse of the concept of the "right" at issue, and second, the Court uses various rhetorical devices to convince the readers of its conceptualization of these rights, and thus, the outcomes of the cases. In so arguing, this Article conducts a rhetorical analysis of both *Windsor* and *Shelby County.*

Rhetorical analysis "looks at how the law works by exploring a meaning-making process, one in which the law is 'constituted' as human beings located within particular historical and cultural communities write, read, argue about, and decide legal issues."[18] Many scholars who conduct rhetorical analyses focus on how the Supreme Court uses rhetorical devices as a means of persuasion and these scholars define rhetoric as a "written discourse . . . [or] other [type] of symbolic communicative activity used to alter attitudes and mobilize action or to induce cooperation."[19] This definition of rhetoric is consistent with the Aristotelian tradition, which views rhetoric as "a faculty of considering all the possible means of persuasion on every subject."[20]

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[18] Linda L. Berger, *Studying and Teaching "Law as Rhetoric:" A Place to Stand,* 16 J. LEGAL WRITING INST. 3, 5 (2010).

[19] Prentice, *supra* note 19, at 87 (internal quotation marks and citations omitted).

[20] ARISTOTLE, ARISTOTLE'S TREATISE ON RHETORIC, BOOK 1, 11 (Theodore

According to Charles Miller, the Supreme Court has two major roles: "(1) to enunciate a political legal order through formal adjudication, and (2) to preserve the social-political bonds of the country."[21] To serve its second role, the Court must convince readers that its decisions are "reasonable, if not right."[22] Sometimes, however, logic is not enough to persuade readers: "[E]ven if people are unable to find any flaw in the logical chain leading from an agreed-upon premise to a desired conclusion, they can, and regularly do, simply choose to remain unpersuaded."[23] Therefore, to persuade the reader, the Court has to persuasde "through the medium of ordinary language" in addition to its sound legal argument.[24] This medium of ordinary language includes rhetorical strategies like "emotional appeals, symbolism, audience adaptation, and other persuasive techniques . . . ."[25]

The narrative structure of cases is important because "[l]aw is now widely recognized as one of those places where narrative finds a home."[26] Law does not exist in a vacuum. It forms an integral part of society, as "no set of legal institutions or prescriptions exist apart from the narratives that locate it and give it meaning."[27] Therefore, when we understand law within the context of narratives, "law becomes not merely a system of rules to be observed but a world in which we live."[28] In other words, a study of the Supreme Court's narrative shows how the Court, through storytelling, attempts to build a bridge between its legal

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Buckley trans. London, Bohn 1857), *available at* https://books.google.com/books?id=PIIUAAAAcAAJ.

[21] CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 189 (1969).

[22] Austin Sarat, *Rhetoric and Remembrance: Trials, Transcription, and the Politics of Critical Reading,* 23 LEGAL STUD. F. 355, 371 (1999).

[23] Sherman J. Clark, *The Character of Persuasion,* 1 AVE MARIA L. REV. 61, 64 (2003).

[24] ARISTOTLE, *supra* note 21, at 8.

[25] Prentice, *supra* note 19, at 89.

[26] Austin Sarat, *Narrative Strategy and Death Penalty Advocacy*, 31 HARV. C.R.-C.L. L. REV. 353, 355 (1996).

[27] Robert M. Cover, *The Supreme Court, 1982 Term Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983).

[28] *Id.* at 5.

arguments and the reader's world. Since stories can "create emotional responses . . . narratives then[] appear to be uniquely suited to changing opinions and beliefs which are held emotionally, and which may be resistant to other forms of persuasion."[29] This Article, using narrative as a methodological tool, examines the stories presented in the two cases and how the facts and evidence are framed to contribute to the respective narratives. This analysis reveals coherency in the Supreme Court's employment of the two frameworks and its narratives within them.

III. THE PERSONAL NARRATIVE OF *WINDSOR*

A. Introduction to Windsor

United States. v. Windsor is a landmark decision in which the Supreme Court struck down DOMA. The plaintiff, Edith Windsor, was the surviving spouse of Thea Spyer.[30] The two were married in Canada, where same-sex marriage was legal.[31] New York, where the couple resided, did not allow same sex marriage at the time but recognized their Canadian marriage.[32] However, Windsor was denied the benefit of spousal deduction in federal estate taxes.[33] This denial was because the federal law, DOMA, did not recognize same-sex marriage under its definition of "marriage," nor did it recognize a same-sex partner as a "spouse."[34] It defined "marriage" as "only a legal union between one man and one woman as husband and wife," and "spouse" as "only . . . a person of the opposite sex who is a husband or a wife."[35] After Windsor paid taxes, she brought an action for a federal tax refund and to declare the relevant portion of DOMA as violative of the Fifth

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[29] Philip J. Mazzocco & Melanie C. Green, *Narrative Persuasion in Legal Settings: What's the Story?*, 23 JURY EXPERT 27, 28 (2011).

[30] United States v. Windsor, 133 S. Ct. 2675, 2682 (2013).

[31] *Id.*

[32] *Id.* at 2689.

[33] *Id.* at 2683.

[34] *Id.*

[35] 1 U.S.C. § 7 (2012) (DOMA § 3), *held unconstitutional in Windsor*, 133 S. Ct. 2675.

Amendment.[36] The Department of Justice refused to defend the statute, but the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives intervened in the litigation to defend DOMA's constitutionality.[37]

The Southern District of New York and the Second Circuit ruled that the portion of DOMA that excluded same-sex partners from the definition of "spouse" was unconstitutional and ordered the United States to pay a refund to Windsor.[38] The Supreme Court affirmed the Second Circuit.[39] In its decision, the Court ruled that DOMA and its definitions of "marriage" and "spouse" violated the Fifth Amendment, as they denied homosexual couples the liberty and equal protection granted by the Due Process Clause,[40] because Section 3 of the statute limited marriage to heterosexual couples.[41]

B. Possibility of Alternate Framing

Windsor is about both an individual and an institution. On the one hand, it is the story of Edith Windsor and her loving, same-sex marriage.[42] On the other hand, it is about institutional power and the conflict between federal and state institutions and their ability to define marriage.

The parties presented the Court with these alternative framings. The complaint filed in the Southern District centered on "Edie and

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[36] *Windsor*, 133 S. Ct. at 2683.

[37] *Id.*

[38] *Id.* at 2683–84.

[39] *Id.* at 2696.

[40] *Id.* at 2683.

[41] See *id.* (quoting § 3 of DOMA as having provided: "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.").

[42] *See generally* Complaint, Windsor v. United States, 833 F. Supp. 2d 394 (S.D.N.Y. 2010) (No. 1:10CV08435); *see also* Video: Edie and Thea (ACLU 2013) (telling through interviews the love affair of Edie Windsor and Thea Spyer), *available at* https://www.aclu.org/lgbt-rights/edie-windsor-and-aclu-challenge-defense-marriage-act.

Thea's life stories."[43] The facts section begins: "Edie and Thea's life stories are in one sense remarkable for the extraordinary times through which they lived, and at the same time quite typical of the lives of gay men and lesbians of their generations . . . ."[44] This rhetorical strategy to establish an empathetic personal character reaches its peak when the complaint states that "Edie and Thea went on to live lives of great joy, full of dancing, love, and celebration."[45] The facts section adds further depth regarding the couple's lives. These sections provide seemingly extraneous but moving details, such as "Thea was fortunate enough to be able to flee Amsterdam with her stepmother at the outbreak of the Second World War, thereby escaping the Holocaust."[46] The complaint ultimately devotes four pages to Edie and Thea's love story[47] and only a single page to DOMA.[48]

In Windsor's motion for summary judgment, this personal narrative is also prevalent. The word "Edie" appears forty-three times, "Edith" three times, and "Windsor" seven times.[49] The preliminary statement of this memorandum similarly starts with the story of Edie and Thea.[50] The factual background in Windsor's brief to the Supreme Court also begins with how Windsor and Spyer "fell in love and embarked upon a relationship that would last until Dr. Spyer's death forty-four years later."[51] Their love story continues until page five of the brief.[52] The word "Windsor" appears thirty-nine times.[53]

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[43] *See generally* Complaint, *supra* note 43.

[44] *Id.* para. 13.

[45] *Id.*

[46] *Id.* para. 14.

[47] *Id.* paras. 20–51.

[48] *See id.* paras. 60–69.

[49] *See* Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, Windsor v. United States, 833 F. Supp. 2d 394 (S.D.N.Y. 2010) (No. 1:10CV08435), 2011 WL 3165327.

[50] *Id.* at 1.

[51] Brief on the Merits for Respondent Edith Schlain Windsor at 1, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307) [hereinafter Brief on the Merits for Respondent Windsor], 2013 WL 701228.

[52] *Id.* at 5.

[53] *Id. passim*.

In contrast, BLAG's brief frames the issue with detachment and abstraction, and focuses on institutional process and power.[54] The trial court brief begins by stating that "when people disagree in the legislative process, they often are required to listen to each other so as to be able to rebut arguments actually made by opponents and change enough minds to bring about legislative change."[55] It is not the story of Edie and Thea that introduces the case. Rather, the legislative process and its integrity begin the story.[56] Further, BLAG's brief refers to Windsor with impersonal nouns. The word "plaintiff" appears fifty-four times but "Edie" and "Windsor" only once each (in fact, "Edie Windsor" was the only time these two words appeared).[57]

The treatment of DOMA also differs. Windsor's Supreme Court brief starts by framing the Act's personal implications: "this case raises questions whether Section 3 of the Defense of Marriage Act, which excludes legally married couples who are gay from the federal rights, benefits, and burdens that govern all other married couples, is constitutional."[58] The implications of DOMA are immediately linked with "married couples who are gay."[59] On the other hand, the BLAG Supreme Court brief begins with DOMA and how "every state and the federal government define marriage."[60] Its discussion of DOMA starts with the issue of Congressional power and authority, not with DOMA's implications for gay and lesbian couples: "DOMA reflected Congress' determination that each sovereign should be able to determine for itself how to define marriage for purposes of its own law."[61]

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[54] *See* Reply Memorandum of Law for Bipartisan Legal Advisory Group at 1, Windsor v. United States, 833 F. Supp. 2d 394 (S.D.N.Y 2011) (No. 10-CV-8435), 2011 WL 4428691.

[55] *Id.*

[56] *Id.*

[57] *Id.* at 11.

[58] Brief on the Merits for Respondent Windsor, *supra* note 52, at 1.

[59] *Id.*

[60] Brief on the Merits for Respondent Bipartisan Legal Advisory Group of the U.S. House of Representatives at 2, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307).

[61] *Id.* at 3–4.

As the court documents demonstrate, there were two possible alternatives for conceptualizing the case: one deploying rhetoric that emphasizes the Act's consequences to people such as Edith Windsor, and another focusing more abstractly on DOMA and highlighting the legislative, sovereign powers of Congress. In the face of these alternatives, this Article argues that the Court in *Windsor* adopted a personal narrative that illuminated the strategic narration of an individual right.

C. Rhetoric on Rights: Rights of Individuals

Since *Windsor* posed a Fifth Amendment challenge to DOMA, most observers expected that the Court would at least engage in a discussion of individual rights, such as the right to due process and equality. The significant aspect of this case, and the subject of this Article, is *how* the Court conducts its discussion of individual rights.

First, the Supreme Court created a protagonist, Edith Windsor, to reinforce its rhetoric on her individual right. Justice Kennedy's majority opinion opens with a story of Windsor and her partner, Thea Spyer.[62] "Two women then resident in New York were married in a lawful ceremony in Ontario, Canada, in 2007."[63] This opening introduces the protagonist, Windsor, and her partner. This immediately frames the case as a story of a personal character.[64] This sentence also immediately gives detailed information on Windsor. First, she was once a resident in New York, second, married in Ontario, third, she was married to another woman, and fourth, she married in 2007.[65] Contrast this framing to that of the dissents. Chief Justice Roberts began his dissent with a jurisdictional question and placed a legal issue at the forefront.[66] Similarly, Justice Scalia started his dissent with the notion that "this case is about power in several respects," and he framed the

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[62] United States v. Windsor, 133 S. Ct. 2675, 2682 (2013).

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.* at 2696 (Roberts, C.J., dissenting).

case in relation to an abstract concept of power.[67] The second sentence of Justice Kennedy's opinion continues his personal narrative of the story of the two women: "Edith Windsor and Thea Spyer returned to their home in New York City."[68]

Throughout the opening paragraph, Justice Kennedy kept constant this narrative about the two women. The second sentence tells the reader her name and the name of her spouse.[69] Other sentences in the first paragraph also begin with references to Windsor or Spyer: "Two women," "Edith Windsor and Thea Spyer," "Spyer," "Windsor," "She," and "Windsor."[70] Even DOMA, the federal statute in question, is introduced in the context of its implications for Edith Windsor—how this federal statute was barring her from claiming the estate tax exemption.[71] Similarly, although the last two sentences of the first paragraph do not start with the main characters as the subjects, their discussion of the procedural posture of the case highlights the central narrative of the two women.[72]

The procedural discussion of the case makes specific references to Windsor and how the case impacts her personally.[73] For instance, Justice Kennedy states, "the United States District Court and the Court of Appeals ruled that this portion of the statute is unconstitutional *and ordered the United States to pay Windsor a refund*."[74] An alternative statement could have been that the courts "ruled that this statute was unconstitutional and ordered a refund of the taxes paid." Similarly, the last sentence of the first paragraph states, "this Court granted certiorari and now affirms the judgment in Windsor's favor"—again bringing Windsor into the equation instead of simply stating "and now affirms."[75] As a result, "Windsor," "Spyer," or "she" (referring to Windsor) appears in

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[67] *Id.* at 2697–98 (Scalia, J., dissenting).
[68] *Id.* at 2682 (majority opinion).
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.* at 2689.
[73] *Id.* at 2682–86, 2689.
[74] *Id.* at 2682 (emphasis added).
[75] *Id.*

every sentence in the opening paragraph, showing the Court's conceptualization on a personal level.[76] Instead of impersonal pronouns like "appellee" or "respondent," the opinion consistently refers to Windsor by name. In fact, "Windsor" appears 30 times in Justice Kennedy's opinion.[77]

This personal narrative allows the Court to engage in in-depth discussions of the facts and issues presented in connection with individual rights. The Court's discussion of DOMA is an example. The Court repeatedly links the impact of the statute to a right of an individual, including the protagonist Windsor.[78] It is true that the discussion of DOMA also includes an examination of the relationship between federal and state power.[79] However, even in that discussion of government power, the Court touches upon the impact on the individual: "diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect."[80] Thus, the issue of state and federal power is not only explored in the abstract but also discussed in the context of personal relations and the personal harm that DOMA causes. By delving into interpersonal relationships, the Court provides a thorough examination of how individuals are affected. In fact, the majority opinion states that the question presented is "one of immediate importance to the Federal Government and to *hundreds of thousands of persons*."[81] The opinion goes on to state that "DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others."[82] Again, the harm to individuals is discussed extensively. This discussion goes beyond localized harm that the government causes to individuals. It also explores the indirect harm caused by other people's perceptions and possible

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[76] *Id.*
[77] *Id. passim*.
[78] *Id.* at 2682–89.
[79] *Id.* at 2694.
[80] *Id.*
[81] *Id.* at 2689 (emphasis added).
[82] *Id.* at 2696.

treatment of same-sex couples. Even if the reader is predisposed to focus on governmental power or DOMA's content, this discussion on personal consequences allows the reader to refocus on the personal consequences to the individuals involved.

This extensive rhetoric regarding individual rights is also apparent in the introduction of third parties. For example, to illuminate the harmful consequences of DOMA, Justice Kennedy discusses the rights of children: "DOMA also brings financial harm to children of same-sex couples."[83] He comprehensively describes DOMA's harmful effects on children, thereby creating vivid imagery of their victimization.[84] For example, the opinion states "it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family . . . ."[85] In addition to financial harm to children, the word "humiliates" introduces another dimension of harm—the emotional consequences for children. This multi-dimensional description of harm assists the reader in clearly identifying the victims—children of same-sex couples—and in vividly imagining their suffering.

The Court's use of children in its narrative goes into greater depth than Windsor's brief. The brief refers to children mostly to discuss the connection between DOMA and procreation.[86] It discusses how the Act is unrelated to encouraging procreation and to "support for relationships that can result in mothers and fathers jointly raising their biological children."[87] Only one sentence—"DOMA deprives children with married gay parents of tangible protections and stigmatizes their families by branding them unequal"[88]—alludes to children's victimhood.

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[83] *Id.* at 2695.

[84] *Id.* at 2694–95.

[85] *Id.* at 2694.

[86] Brief on the Merits for Respondent Windsor, *supra* note 52, at 40–47.

[87] *Id.*

[88] *Id.* at 46.

D. Persuasive Effect

The Supreme Court, in its discussion of rights, employs many rhetorical techniques to convince the reader of its concept of an individual right and, therefore, its decision. First, having a protagonist drive the story of the opinion persuades the reader by rendering him sympathetic to the character and the character's emotions. Vivid characters have often been tools for persuasion. Studies have shown that "narratives influence beliefs and attitudes in part by encouraging empathetic and emotional connections with story characters."[89] When a person reads a legal opinion, he comes with his own beliefs, rationales, and worldview. When the views of the opinion are inconsistent with those of the reader, the reader becomes resistant and may remain unconvinced even after understanding and acknowledging the soundness of the court's reasoning. However, focusing on a character allows the reader to distance himself from his preconceived notions and to be transported to—and to become more invested in—the narrative of the story presented. The character of the story, in other words, invites and guides the reader into the world that the opinion presents.

The theory of the transportation imagery model examines how the reader gets "immersed in the world of the story"[90] and distances himself from his own preexisting beliefs and opinions.[91] In order to study the transportation imagery model, Philip Mazzocco gave a short story of a homosexual to the participant readers.[92] The story involved a protagonist and a teenager who recently came out as gay, in order "to produce tolerance and acceptance of homosexuals."[93] The results of the study indicated

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[89] Mazzocco & Green, *supra* note 30, at 28.

[90] *Id.*

[91] *Id. See generally* RICHARD J. GERRIG, EXPERIENCING NARRATIVE WORLDS: ON THE PSYCHOLOGICAL ACTIVITIES OF READING (Yale Univ. Press 1993) (explaining narrative transportation within the context of novels).

[92] Philip Mazzocco et al., *This Story is Not for Everyone: Transportability and Narrative Persuasion,* 1 SOC. PSYCHOL. PERSONALITY SCI. 361, 362 (2010). Although this study was conducted to show individual differences in transportability, I limit my discussion to the general effect of transportability.

[93] *Id.* at 362.

that after reading the story, the persuasive narrative "influenced transportable recipients by increasing empathy for homosexuals."[94] As the results show, the readers were affected by "cognitive responses, beliefs, and attitude and intention changes" of the narrative transportation.[95] This is consistent with the idea that identifiable characters facilitate the "receiver's identification with and potential empathy for the characters" because the readers "vicariously experience characters' beliefs and emotions, empathize with them, and become engrossed in the story."[96]

This transportation contributes to the persuasiveness of the Court's holding for two reasons. First, the reader may identify with the character and vicariously experience the pain that DOMA brings to Windsor and homosexual couples. This identification may facilitate acceptance of the Court's holding that DOMA and its definition of marriage are unfair and unconstitutional, just as the identifiable character altered readers' attitudes toward homosexuality in the Mazzocco study. Second, the discussion of the Act's personal consequences may trigger an emotional response to how the characters in the opinion suffer from the denunciation of their marriage. Therefore, the reader may be more sympathetic to same-sex couples and Edith Windsor's claims after conceptualizing DOMA as a medium of inflicting personal harm.

Second, the Court's delineation of what is at stake in relation to children also serves a persuasive function. Sympathy is important in persuasion. To understand emotions and "to name them and describe them, to know their causes and the way in which they are excited" is one of "three means of effecting persuasion."[97] If the reader is sympathetic to people whom DOMA negatively affects, he will be more likely to agree with the Court's decision to strike down the statute. The discussion of children is a great mechanism to arouse this sense of sympathy in readers.[98] It creates vividly

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[94] Mazzocco & Green, *supra* note 30, at 31.

[95] Tom van Laer et al., *The Extended Transportation-Imagery Model: A Meta-Analysis of the Antecedents and Consequences of Consumers' Narrative Transportation,* 40 J. CONSUMER RES. 797, 800 (2014).

[96] *Id.* at 802.

[97] ARISTOTLE, *supra* note 21, pt. III.

[98] George Loewenstein & Deborah A. Small, *The Scarecrow and the Tin Man: The Vicissitudes of Human Sympathy and Caring,* 11 REV. GEN. PSYCHOL.

identifiable victims—a "determinant of sympathy"—because "sympathy, like other emotions, is highly attuned to visual imagery, and the more vivid that imagery is, the more likely one is to sympathize."[99] "[P]ortrayals of needy individuals who have suffered misfortune for reasons beyond their control" is a prime example of describing identifiable victims associated with "sympathetic information."[100] Similarly, researchers have found that "moral emotions," including sympathy, are "highly intercorrelated and strongly related to perceived vulnerability."[101] Children—toddlers in particular—are the category of people who are ranked highest on the vulnerability scale.[102]

Third, the Court in its narration of individual rights explores the love story as a genre. Throughout the opinion, the love story between Windsor and Spyer is developed extensively to fit the "universal" factors of love to which the reader can relate.[103] Highlighting the universal features of love in Edith Windsor's relationship makes it easier for the reader to recognize that Windsor and Spyer loved each other just as a heterosexual couple loves each other. This emphasis on the universal nature of love is particularly important because many fictional narratives on love have described love as "timeless and natural" and part of "human nature."[104]

The idea of commitment is important because of the notion that love is about "emotional commitment, empathy, and exclusivity so strong that lovers are … prepared to . . . continue their relationship

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112, 118 (2007) (discussing the plight of 18-month-old "Baby Jessica").

[99] *Id.*

[100] *Id.*

[101] Anton J. M. Dijker, *Perceived Vulnerability as a Common Basis of Moral Emotions,* 49 BRIT. J. SOC. PSYCHOL. 415, 415 (2010).

[102] *Id.* at 420.

[103] United States v. Windsor, 133 S. Ct. 2675, 2683–84 (2013).

[104] DAVID R. SHUMWAY, MODERN LOVE: ROMANCE, INTIMACY, AND THE MARRIAGE CRISIS 2 (2003); *see also* Anne E. Beall & Robert J. Sternberg, *The Social Construction of Love,* 12 J. SOC. PERS. RELATIONSHIPS 417, 423 (1995) (describing the triangular theory of love). The theory states that love includes three components: passion, intimacy, and decision/commitment. Robert J. Sternberg, *A Triangular Theory of Love*, 93 PSYCHOL. REV. 119 (1986).

beyond death."[105] The Court's description of the love between Windsor and Spyer resonates with this universal description of love based on emotional commitment. For instance, the Court highlights how they were involved in a "long term relationship,"[106] highlighting the lasting element of their commitment. The intensity of emotional dedication to one another is underscored by the Court's description of how Spyer "left her entire estate to Windsor," [107] and their continued efforts to affirm their commitment through marriage. First, they tried "waiting some years" for the legalization of gay marriage,[108] but when "citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage," they traveled to Ontario to get married.[109] This framing of Windsor's love as the love that all readers experience was evident when the Court stated that they "affirm[ed] their commitment to one another before their children, their family, their friends, and their community."[110] The repetition of "*their* children, *their* family, *their* friends, and *their* community" places same-sex couples in the same position as any other individuals with their own family members, loved ones, and communities. The readers, therefore, can identify with the love and desire for commitment. Like heterosexual couples, Windsor and Spyer and other same-sex couples love each other and want to show it through commitment.

In addition, emphasizing Windsor's love makes it easier for the reader to accept the holding because love is frequently associated with marriage. While in the past love and marriage were not necessarily correlated, the notion of romantic marriage has gained great prominence in modern society.[111] For instance "[i]n Western cultures, love is important because it is strongly associated with

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[105] Johnathan Gottschall & Marcus Nordlund, *Romantic Love: A Literary Universal?,* 30 PHIL. & LITERATURE 432, 443 (2006).

[106] *Windsor*, 133 S. Ct. at 2683.

[107] *Id.* at 2682–83.

[108] *Id.* at 2689.

[109] *Id.*

[110] *Id.*

[111] SHUMWAY, *supra* note 105.

marriage"[112] and people frequently view love as an essential component of marriage or marriage as a result of love.[113] As a consequence, the connection between love and marriage[114] seems natural to the reader. The reader relates Windsor's and Speyer's love to his or her own and thus is more likely to accept the Court's decision.

Further, Windsor's love story is tragic. Death dramatized the love between Windsor and Spyer. The journey to their marriage began because they were "concerned about Spyer's health."[115] Even when one partner had fallen ill and was suffering, the couple still "longed to marry,"[116] and Windsor stood by Spyer's side until Spyer's death.[117] This death invokes the genre of the tragic love story. Tragedy has historically been a source of emotional involvement for the reader. From Homer's *Iliad* to Sophocles' *King Oedipus*, readers become personally involved in "narratives" that "help members of an audience understand the problematic in social life and integrate understandings with existing models of self and other."[118] This theme is common in tragedy—that of humans living "in a world in which they choose many of their own actions," where "their mental models are usually imperfect and invariably incomplete" and where "their agency is limited by the constraints of embodiment."[119] Windsor's and Spyer's suffering due to an event beyond their control triggers the same sort of "personal involvement" that the classic tragedies bring to the reader and make him "once again moved" with "tears in [his]

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[112] Beall & Sternberg, *supra* note 105, at 426.

[113] Jeffry A. Simpson et al., *The Association between Romantic Love and Marriage: Kephart (1967) Twice Revisited,* 12 PERS. SOC. & PSYCHOL. BULL. 363 (1986).

[114] Although Shumway talks about the importance of emerging rhetoric on "intimacy," this discussion is beyond the scope of this article. *See* SHUMWAY, *supra* note 105.

[115] *Windsor*, 133 S. Ct. at 2683.

[116] *Id.* at 2689.

[117] *Id.* at 2683.

[118] Keith Oatley, *Why Fiction May be Twice as True as Fact: Fiction as Cognitive and Emotional Simulation,* 3 REV. GEN. PSYCHOL. 101, 110 (1999).

[119] *Id.*

eyes."[120] Furthermore, the intensity of personal involvement through emotional experience is critical to persuasion because these sorts of emotions "signal situations that are personally important" to readers and beyond their rational understanding.[121] Readers—triggered by memories, emotions, and reactions—invest a part of themselves in the tragic love story between Windsor and Spyer. Exploring the love story as a genre enables not only a discussion of the legal issue presented in relation to individual right—the right to marry—but also makes the discussion more convincing.

IV. THE INSTITUTIONAL NARRATIVE OF *SHELBY COUNTY*

In the previous section, this Article discussed how the Supreme Court conducted an extensive discourse on an individual right in *Windsor* and the way in which the Court advanced the rights of same-sex couples. As also discussed, commentators have criticized *Shelby County* as retreat in racial equality. This Article does not dispute the notion that *Shelby County* invalidated a crucial portion of the Voting Rights Act—an action that can be described as adversarial to an individual right. Nevertheless, a close examination of the opinion's language reveals a heavy discussion and framing based on the notion of a right, just as in *Windsor,* albeit on a different level. The Court engaged in a persuasive narration of an individual right in *Windsor*, and a persuasive narration of an institutional right in *Shelby County*.

A. Introduction to Shelby County v. Holder

In *Shelby County v. Holder,* the Supreme Court held that Section 4 of the Voting Rights Act was unconstitutional because current political conditions rendered its coverage formula obsolete.[122] Shelby County sought a declaratory judgment that Sections 4(b) and 5 of the Voting Rights Act were facially

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[120] *Id.* at 111.

[121] *Id.* at 112.

[122] Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612, 2631 (2013).

unconstitutional.[123] Section 5 of the Voting Rights Act of 1965, enacted to address racial discrimination in voting, required States to "obtain federal permission before enacting any law related to voting"[124] and Section 4 of the Act applied that requirement "only to some States" covered by the formula it provided.[125] While the Supreme Court did not speak to Section 5, the Court declared that Section 4 of the Act was no longer constitutional.[126]

B. Possibility of Alternate Framing

Similar to *Windsor*, *Shelby County* could have also been framed in the context of a personal or institutional narrative. On the one hand, the story was institutional because a county, and not an individual, brought the suit. On the other hand, the case complicates the individual rights of minority voters and their struggles for equal voting rights.

The parties presented the Court with these alternative framings. Shelby County focused its brief on an institutional narrative.[127] In the introduction to its petition for certiorari, Shelby County began with the notion of state power: "Article IV and the Tenth Amendment reserve to the States the power to regulate elections."[128] The beginning of the petition describes the main character of the story—the state—and the theme of state power. Also, when discussing the contemporary evidence of discrimination, the County presented evidence on an abstract level—for example, its discussion of the objection rate,[129] voter turnout and registration rates,[130] a state-by-state comparison of Section 2 litigation data,[131] and "instances of racially polarized voting."[132]

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[123] *Id.* at 2621–22.

[124] *Id.* at 2618.

[125] *Id.*

[126] *Id.* at 2631.

[127] Petition for Writ of Certiorari, Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612 (2013) (No. 12-96); Brief For Petitioner, Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612 (2013) (No. 12-96).

[128] Petition for Writ of Certiorari, *supra* note 128, at 1.

[129] Brief For Petitioner, *supra* note 128, at 29.

[130] *Id.* at 44.

[131] *Id.* at 46–49.

In contrast, there are also examples of personal narratives. The respondent-intervenors Bobby Pierson et al. began Section A of their petition with, "[a]fter 'enduring nearly a century of systematic resistance to the Fifth Amendment,' Congress enacted the Voting Rights Act of 1965, [Pub. L. No. 89-110, 79 Stat. 437 (1965)], 'to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country.'"[133] Then the second sentence immediately frames on an individual level what is at stake by stating that "[f]or nearly fifty years, the Voting Rights Act has played a pivotal role in helping to preserve the right to vote for all Americans."[134] Also, the brief for the federal respondent to the Supreme Court uses a personal narrative to present evidence of current discrimination. It introduces the individual "voter" as the subject.[135] It then discusses how the States "discriminated against African-American voters"[136] and "resist[ed] minority voters' equal enjoyment of the right to participate in the political process."[137] The amicus brief for the New York Law School Racial Justice Project states that the Voting Rights Act's success "was a turning point in 'the struggle to end discriminatory treatment of minorities who seek to exercise one of the most fundamental rights of our citizens: the right to vote.'"[138] The discussions focused on rights at an individual level, articulated the implications of Section 4 for African Americans, and situated the Act in relation to the history of intentional discrimination against African American voters. The Court, likewise, could have

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[132] *Id.* at 48.

[133] Brief for Respondent-Intervenors Bobby Pierson, Willie Goldsmith, Sr., Mary Paxton-Lee, Kenneth Dukes, and Alabama State Conference of the NAACP at 1, Shelby Cnty., Ala v. Holder, 133 S. Ct. 2612 (2013) (No. 12-96).

[134] *Id*.

[135] Brief for the Federal Respondent at 30–34, Shelby County, Ala v. Holder, 133 S. Ct. 2612 (2013) (No. 12-96).

[136] *Id.* at 38.

[137] *Id.* at 20.

[138] Brief for the New York Law School Racial Justice Project as Amicus Curiae in Support of Defendant-Appellee and Defendant-Intervenor-Appellee at 4, Shelby County, Ala v. Holder, 133 S. Ct. 2612 (2013) (No. 12-96) [hereinafter Brief for NYLS Racial Justice Project], 2011 WL 6098776 (citing Bartlett v. Strickland, 556 U.S. 1 (2009)).

explained that voters of some states are granted a different level of protection than voters of other states because those states have to receive preclearance from the federal government. To further illustrate the difference between a personal and an institutional narrative, an alternative opening to the opinion could have discussed examples of "extraordinary problems," such as African Americans being unable to vote because they were blocked at the ballots. This alternative narrative focusing on minority voters and their struggle to gain their constitutionally guaranteed right to vote would have triggered sympathy toward them. They are identifiable victims who are suffering because of invidious discriminatory policies that state actors have undertaken to suppress their voting strength. Highlighting this story of personal struggle would also have facilitated transportation of the reader into the story of the struggling voters.

The Court could have framed the narrative in different ways. It could have created an institutional narrative that focused on state and national data, or a personal narrative that focused on minority voters and their struggles. The following sections demonstrate that the Court chose an institutional narrative in a strategic way to increase persuasiveness of the outcome of *Shelby County*. While a personal narrative, as the Court used in *Windsor*, focuses on triggering an emotional or psychological reaction to the personal character and Windsor's story, an institutional narrative detaches personal emotion or connection, and redirects the focus to the institution (in this case, the state) and its traditions and principles. But, similar to *Windsor,* the Court in *Shelby County*—with the unit as a state—employs persuasive rhetoric based on the concept of a right.

C. Rhetoric on Right: State Right

Just as *Windsor* framed a protagonist in its story, *Shelby County* creates a protagonist of the "state" to begin its discussion of the right at issue. The majority opinion begins by stating that "[t]he Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem"[139] and focuses on

[139] Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612, 2618 (2013).

the statute. The Court, when discussing the implications of Section 5 of the Voting Rights Act in relation to the states, notes that "Section 5 of the Act required States to obtain federal permission before enacting any law related to voting—a drastic departure from basic principles of federalism."[140] The Court further recognized that "§ 4 of the Act applied that requirement only to some States . . . ."[141] Throughout the opinion, the words "state" and "states" appear sixty-nine times, while the words "voter" and "voters" appear twenty-eight times (only when used as nouns or adjectives).[142]

With the "state" as the protagonist, the Court engages in the discussion of the right, similar to its engagement in the discussion of right with Edith Windsor as the protagonist in *Windsor*. The Supreme Court engages in a discussion of institutional rights, namely, the right to maintain its sovereignty under federalism, just as a person has a right to maintain his autonomy as a person. The majority opinion starts with the introduction of "basic principles of federalism" [143] and returns to this idea of a "fundamental principle" [144] of federalism throughout the opinion. Then, it references these "basic features of our system of government" when discussing how the Voting Rights Act is a drastic departure from this institutional feature.[145] In fact, the features of the Voting Rights Act of 1965 are repeatedly characterized as "extraordinary measures" or "drastic departures." [146] Chief Justice Roberts' majority opinion describes the Act as "strong medicine,"[147] and recounts the "exceptional conditions" [148] that led to the "unprecedented nature of these measures," [149] which "sharply

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[140] *Id.*

[141] *Id.*

[142] *Id. passim*.

[143] *Id.* at 2618.

[144] *Id.* at 2622 (quoting Northwest Austin v. Holder, 129 S. Ct. 2504 (2009)).

[145] *Id.* at 2624.

[146] *Id.* at 2618.

[147] *Id.*

[148] *Id.* (quoting South Carolina v. Katzenbach, 383 U.S. 301, 334 (1966)).

[149] *Id.*

departed"[150] from the basic principles of federalism.[151] The emphasis on the "extraordinary" and "drastic" nature of the Voting Rights Act in conjunction with the description of an "institutional feature" that is "fundamental" highlights the Voting Rights Act pre-clearance requirement as an exception to the norms of federalism. Phrases such as "substantial federalism costs"[152] and "extraordinary legislation otherwise unfamiliar to our federal system"[153] are additional examples of how the Court underscores the principle of federalism and the maintenance of institutional integrity. The Court's statement that "[s]tates retain broad autonomy in structuring their governments and pursuing legislative objectives"[154] is another example of an emphasis on sovereignty under the principle of federalism.

Furthermore, the Supreme Court engages in rhetoric of institutional rights based on equality among the states. The majority opinion declares that the nation was founded as a "union of States, equal in power, dignity, and authority."[155] However, according to the Court, §4 of the Act violated the *fundamental rights* of the states in an extraordinary way.[156] Just as *Windsor* highlighted a violation of a right in relation to DOMA, the Court discusses the Voting Rights Act in relation to a violation of a state right: "While one State waits months or years and expends funds to implement a validly enacted law, its neighbor can typically put the same law into effect immediately, through the normal legislative process."[157] The Court even frames the question in relation to a

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[150] *Id.* at 2624.

[151] Also note the Court's use of amplifying terms such as "exceptional conditions," "uncommon exercise," "exceptional condition," "extraordinary legislation," *id.* at 2623, "far cry from the initial five year period," *id.* at 2626, "extraordinary legislation," *id.* at 2628, and "far from ordinary," *id.* at 2630. Although this continued reference to "extraordinary" nature of the Act is partly due to the legal standard, this repetition of similar phrases also has rhetorical significance.

[152] *Id.* at 2627–28.

[153] *Id.* at 2628.

[154] *Id.* at 2623.

[155] *Id.* (citing Coyle v. Smith, 221 U.S. 559, 567 (1911)).

[156] *Id.*

[157] *Id.* at 2624.

state's right to equal treatment, saying that "[t]he question is whether the Act's extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements."[158] The discussion of equality continues as the Court recognizes that a "fundamental principle of equal sovereignty requires showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets. These basic principles guide our review of the question before us."[159] The Court repeatedly refers to equal sovereignty among the states as a "fundamental principle," highlighting its rhetoric on the federalist institutional structure and its core implications on a state's right to sovereignty.[160] It further states "Over a hundred years ago, this Court explained that our Nation 'was and is a union of States, equal in power, dignity and authority.'"[161] The phrase, "[o]ver a hundred years ago," is used to assert that this principle of equal sovereignty among the states has been elaborated for a long period. The opinion also makes a reference to the "tradition of equal sovereignty,"[162] strengthening its position by highlighting states' long-standing right to sovereignty.

D. Persuasive Effect

As in *Windsor*, the Court's rhetoric on rights gains persuasiveness through various rhetorical devices. First, as discussed above, the Court aligns attachment and transportation from voters to the character of the state.

Second, the Court's reference to federalism enhances the legitimacy of its decision. Scholars such as Robert Hume have observed the Court's use of esteemed rhetorical sources to enhance its persuasiveness.[163] Hume stated that "when deciding hard cases, justices must know that their opinions are likely to be scrutinized

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[158] *Id*. at 2617.
[159] *Id*. at 2622 (internal quotation marks omitted).
[160] *Id.* at 2623.
[161] *Id.*
[162] *Id.* at 2624.
[163] *See* Hume, *supra* note 19.

by individuals both on and off the bench."[164] Hume further argues that the Court's usage of esteemed sources like the *Federalist Papers* enhances the "legitimacy of [its] decisions" because the Justices can associate their rulings with the legitimacy of the sources that they cite.[165] The Justices can enhance their legitimacy through the "use of persuasive opinion content, including rhetorical sources" and by "associating their rulings with the views of well-respected authorities."[166] Hume has found that the "Justices do indeed cite rhetorical sources with greater frequency when the legitimacy of their decisions is lowest."[167]

Just as the Justices can enhance the legitimacy of their decisions through the use of esteemed sources, they can improve their persuasiveness by associating their decisions with other factors that enhance legitimacy, such as tradition. Max Weber has argued that there are three sets of authority: legal authority, traditional authority, and charismatic authority.[168] In discussing the traditional authority of federalism, Weber acknowledges the possibility of history establishing legitimacy, "if legitimacy is claimed for it and believed in on the basis of the sanctity of the order and the attendant powers of control as they have been handed down from the past, 'have always existed.'"[169] Just as a person, such as a monarch, can gain legitimacy and authority through the notion of tradition, an institutional principle, such as federalism, can gain legitimacy through its durability.[170] This method is especially efficient because federalism is one of the most important institutional structures of the United States,[171] and the idea of each

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[164] *Id.* at 818.

[165] *Id.*

[166] *Id.* at 821.

[167] *Id.* at 831.

[168] MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 341 (Simon & Schuster 2009).

[169] *Id.*

[170] *Id.*

[171] Federalism is described as "one of the most important and innovative concepts in the US constitution." *Federalism*, PBS, http://www.pbs.org/tpt/constitution-usa-peter-sagal/federalism/#.UsQvg9LuKSo (last visited Jan. 1, 2014). I do not wish to get into a debate about decreasing significance of federalism in the United States. Still, the federalist system is essential in

state enjoying its sovereignty under the umbrella of the federal government is one of the unique features of the country's institutional structure.[172]

This emphasis on the principle of federalism is consistent with the Shelby County's Supreme Court brief. The brief uses language such as "federalism burden,"[173] "federalism costs,"[174] "severe federalism problems,"[175] the "fundamental principle of equal sovereignty,"[176] and the "constitutional principle of equal sovereignty."[177] On the other hand, the brief for the federal respondent does not contain any mention of federalism and discusses state sovereignty only once, when it states that it is not an invasion of state sovereignty when Congress is legitimately enforcing restrictions.[178] Instead, the brief emphasizes fundamental rights such as the right to equal treatment and the right to vote.[179] Briefs for the respondent-intervenors Earl Cunningham et al. also mention the idea of "federalism costs" only twice[180] and discuss

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describing the institutional structure of the United States. Federalism also is a key ingredient in Our Nationalism. The modern federal regulatory apparatus is increasingly attendant to questions of the state-federal allocation of responsibility, and also is dependent on state actors, in ways both practical and political. Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 1997 (2014).

[172] For descriptions of federalism, see Mark Tushnet, *Keeping Your Eye on the Ball: The Significance of the Revival of Constitutional Federalism,* 13 GA. ST. U. L. REV. 1065 (1997); Harry N. Scheiber, *Redesigning the Architecture of Federalism–An American Tradition: Modern Devolution Policies in Perspective,* 14 YALE L. & POL'Y REV. 227, 290 (1996).

[173] Brief For Petitioner, *supra* note 128, at 8, 15.

[174] *Id.* at, 8, 18, 24, 26, 31.

[175] *Id.* at 15.

[176] *Id.* at 11, 12, 40, 51, 57.

[177] *Id.* at 23.

[178] Brief for the Federal Respondent, *supra* note 136, at 13.

[179] The argument section begins with "assuring sanctity of the right to vote is essential to our democratic system of government." *Id.* at 12. This right-based discussion continues with phrases like "race is equally fundamental," *id.*, and "continue to resist minority voters' equal enjoyment of the right to participate in the political process." *Id.* at 20.

[180] Brief for Respondent-Intervenors Earl Cunningham, Harry Jones, Albert Jones, Ernest Montgomery, Anthony Vines, and William Walker at 6, 46, Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612 (2013) (No. 12-96).

instead the "right to vote on account of race,"[181] the exercise of the right to vote,[182] and the "fundamental . . . right to vote."[183] Ignoring the federalism arguments supports the position that federalism is inessential to the Court's decision. The Court, however, uses federalism as a rhetorical tool to strategically frame the case. And just as the plaintiff highlighted the principle of federalism to persuade the Court, the Court invokes this federalist principle to enhance the opinion's legitimacy.

Third, the Court discusses data in a persuasive way in its narration of the impact on states. This is especially so when it acknowledges racial discrimination in the past and contrasts it with current state-level empirical data to support its position. Concession is a rhetorical device that enhances the legitimacy and persuasiveness of the speaker by establishing him as a good character. Imagine two people. One is denying a set of facts that is clearly established by evidence, and blindly refuting a common history that almost every reader agrees has happened. Another admits to commonly agreed-upon facts presented by the other side. As an example of concession, Aristotle states "the litigant will sometimes not deny that a thing has happened or that he has done harm. But that he is guilty of injustice he will never admit" and "political orators often make any concession short of admitting that they are recommending their hearers to take an inexpedient course or not to take an expedient one."[184] This usage of concession is an effective means of persuasion because the speakers "have at their command propositions about the possible and the impossible, and about whether a thing has or has not occurred, will or will not occur."[185] Aristotle states that there are three modes of persuasion: the "personal character of the speaker," "putting the audience into a certain frame of mind," and "proof, or apparent proof, provided by the words of the speech itself."[186] Conceding an issue may signal to the reader that the speaker is a rational, reasonable, and

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[181] *Id.* at 1.
[182] *Id.* at 4.
[183] *Id.* at 5.
[184] ARISTOTLE, *supra* note 21, at pt. III.
[185] *Id.*
[186] *Id.* at pt. II.

open-minded person, and is thus credible. Strategic concession, therefore, may improve the persuasiveness of the speaker by signaling to the audience that the speaker is of a good personal character.[187]

When discussing past discrimination, the Court—breaking from its practice in other parts of the opinion—employs a personal narrative that is similar to the defendants' narrative framework. Since the Court's opinion displays this shift in the narrative toward that of the losing side, this Article refers to the Court's recognition and discussion of past discrimination as a form of concession.

The majority opinion switches its narrative from personal to institutional when discussing evidence of past discrimination and current discrimination for the purposes of evaluating the validity of the Section 4 formula.[188] The Court, like the federal respondent, uses personal narrative when describing evidence of past discrimination.[189] In the beginning of Section IA, the opinion gives historical evidence of racial discrimination in voting.[190] When discussing the past, the Court introduces a personal character, namely, an African American voter, with phrases like "other methods designed to prevent African-Americans from voting."[191] Also, in describing past discrimination, the Court states, "only 19.4 percent of African-Americans of voting age were registered to vote in Alabama, only 31.8 percent in Louisiana, and only 6.4 percent in Mississippi."[192] This narrative acknowledges and highlights personal harm to "African-Americans." Even when discussing more abstract evidence, such as voting rights, in the historical context, the Court provides a link to this personal character: "a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters."[193] Further, the Court states how past racial discrimination

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[187] *See* EDWARD P. J. CORBETT & ROBERT J. CONNORS, CLASSICAL RHETORIC FOR THE MODERN STUDENT (4th ed. 1998).

[188] Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612, 2619 (2013).

[189] *See id.*

[190] *Id.*

[191] *Id.*

[192] *Id.* at 2624.

[193] *Id.* at 2625 (emphasis added).

"denied African-Americans the most basic freedoms," which establishes a narrative based on African Americans, as people, being denied the freedom to vote.[194]

A case like *Shelby County* presents multiple issues. Most people agree that there has been serious historical racial discrimination in voting rights and that legislation like the Voting Rights Act was necessary to redress for minority voters that violation of equal protection. The Court therefore wisely acknowledged that there had been racial discrimination in the past that made the implementation of the Voting Rights Act imperative. By using a personal narrative similar to that used by *Shelby County* and discussing the evidence of past racial discrimination in a sympathetic light, the Court conceded the past justification for the enactment of the Voting Rights Act, including Section 4. Expressing its agreement allows the Court to signal to the reader that it is reasonably accepting the position of the party it ruled against. Therefore, the Court can be seen as a reasonable, fair, and unbiased arbiter. By accepting the necessity of the Voting Rights Act in the past and the grave personal consequences of discrimination against minority voters, the Court was able to ease the reader into its discussion of the current conditions and the invalidity of Section 4 of the Act.

When the Court discusses recent evidence, however, the framing shifts to again detach the emotional aspect associated with a personal narrative and instead focuses on state-level data. The Court points out that African Americans occupy a greater portion of political offices than in the past,[195] and primarily frames the evidence on a state level, discussing "voter turnout and registration rates," and "blatant discriminatory evasions of federal decrees."[196] Again, an alternative would have been to present African American voters on a personal level, thus paralleling sentence structure with the discussion of past discrimination. Similarly, although the Court references the House Report that discusses the consequences for individuals, such as "the number of African-Americans who are registered and who turn out to cast ballots has

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[194] *Id.* at 2628.

[195] *See id.* at 2621.

[196] *Id.*

increased significantly over the last 40 years, particularly since 1982" or "significant increases in the number of African-Americans serving in elected offices,"[197] it does so by referring to data on a state level, using phrases like "voter turnout."[198] In fact, the Court does not address the number of white and African American voters from the Census Bureau statistics but jumps straight to an analysis of the rates and statistics on "disparities in voter registration and turnout due to race."[199]

This is in contrast to the New York Law School Racial Justice Project amicus brief, which puts minority voters at the center of the discussion and states that "minority citizens are still denied access to the ballot and have had to struggle through increasingly ingenious discriminatory roadblocks."[200] The amicus brief also includes specific personal examples, including how David Dinkins, an African American, encountered "blatant attempts of intimidation" during his reelection campaign for mayor of New York.[201] As this alternative approach shows, the Court, if it wanted to continue its personal narrative, could have pointed to a story about an African American voter no longer facing challenges in registering to vote in Shelby County.

As demonstrated above, the Court, as in *Windsor*, engaged in strategic narration of the right in *Shelby County* to further its conceptualization of the right, and to persuade the reader of its holding.

CONCLUSION

An examination of the Supreme Court's rhetorical framings helps the reader to understand the otherwise contradictory opinions of *Windsor* and *Shelby County.* These landmark decisions have spurred criticism of the Court's inconsistent treatment of equality. This Article supplements the comparative study of the two cases by analyzing another dimension: their narrations. The rhetorical

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[197] *Id.* at 2625.

[198] *Id.*

[199] *Id.* at 2628.

[200] Brief for NYLS Racial Justice Project, *supra* note 139, at 5.

[201] *Id.* at 24.

analysis of the two cases shows that the Court approached *Windsor* using a personal narrative and *Shelby County using an* institutional narrative. This rhetorical analysis, focusing on *how* the cases were decided, reveals that the Court's decisions may be more harmonious than critics have acknowledged. It suggests that the Court conceptualized both cases in relation to the concept of "rights," albeit rights on different levels. Also, the Court in both cases engaged in strategic narration regarding its selected concepts of rights and employed various rhetorical devices to make its decisions more persuasive. This dimension, which focuses on the Court's rhetoric as opposed to mere outcomes, may be a new medium for understanding this critical time for equality.