
THE IMPLICATIONS OF JUSTICE KENNEDY'S OPINION IN
*UNITED STATES v. WINDSOR*¹

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INTRODUCTION

This paper discusses the implications of the Supreme Court's decision in *United States v. Windsor*.³ My particular focus will be to assess whether Justice Kennedy's opinion will be a durable precedent that will result in invalidating state laws that restrict marriage to relationships between a man and a woman. In my view (and this is not the first time this point has been made), Justice Kennedy's opinion in *Windsor* is a disaster in terms of judicial craftsmanship. In this respect, his *Windsor* opinion has much in common with two other Supreme Court rulings on important social issues: Justice Kennedy's own opinion in *Lawrence v. Texas*⁴ and Justice Blackmun's opinion in *Roe v. Wade*.⁵ Those opinions, despite their status as "landmarks," have not had the sort of broad impact that some claim. Because these opinions are so weak, they have not had the broad impact that they would have had if they had been clearly and more securely rooted in accepted constitutional doctrine. *Windsor* shares these same flaws, and in my view, that suggests that the opinion will not have a major impact. The Court may, of course, later invalidate state laws that restrict marriage to relationships between a man and a woman. If that happens, it will likely be due to a broader social acceptance of homosexual relationships. I do not believe that such a cultural shift is inevitable. And Justice Ken-

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³ 570 U.S. ___, 133 S. Ct. 2675 (2013).

⁴ 539 U.S. 558 (2003).

⁵ 410 U.S. 113 (1973).

ney's opinion in *Windsor* has created an opening for defenders of traditional marriage.

This paper will proceed in this fashion. I will first begin with a brief description of Justice Kennedy's opinion in *Windsor*, with a particular focus on its weaknesses. I will then briefly discuss two other "landmark" Supreme Court cases: *Roe v. Wade* and *Lawrence v. Texas*. I will focus on the weaknesses in these two decisions and then note that these two decisions have not had the sort of broad impact that some claim. I will then make the case that the same sort of dynamic is likely to play out after *Windsor*. Developments in this area of the law are more likely to be influenced by broader cultural trends than by Justice Kennedy's opinion. This creates an opportunity for defenders of traditional marriage in much the same way that the weaknesses in *Roe v. Wade* created an opportunity for those in the pro-life movement to continue to advance their views.

I. *UNITED STATES V. WINDSOR*

In *United States v. Windsor*, the Court held unconstitutional⁶ Section 3 of the Defense of Marriage Act (DOMA), which defined "marriage" and "spouse" for purposes of federal law.⁷ Section 3 stated: "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."⁸ The Court, in an opinion by Justice Kennedy, concluded that DOMA's "demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law."⁹ According to the Court, "DOMA writes inequality into the entire United States Code."¹⁰ Therefore, Justice Kennedy concluded, DOMA "is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."¹¹

⁶ 133 S. Ct. at 2695 ("DOMA is unconstitutional as a deprivation of the liberty protected by the Fifth Amendment of the Constitution.").

⁷ Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419, 2419, *invalidated by Windsor*, 133 S. Ct. 2675.

⁸ 1 U.S.C. § 7 (2012), *invalidated by Windsor*, 133 S. Ct. 2675.

⁹ *Windsor*, 133 S. Ct. at 2693-94.

¹⁰ *Id.* at 2694.

¹¹ *Id.* at 2696.

The doctrinal basis for Justice Kennedy's opinion is opaque. The opinion emphasized at considerable length that DOMA dealt with an area (marriage) that has been the traditional responsibility of the states.¹² Chief Justice Roberts's dissenting opinion, in an effort to limit the scope of the ruling, noted that the "judgment is based on federalism."¹³ Justice Kennedy's opinion said, however, that "it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance."¹⁴ Justice Kennedy also noted, "[t]he State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism."¹⁵ Although the Court invoked *Lawrence v. Texas* on a couple of occasions,¹⁶ Justice Kennedy did not clearly rely on substantive due process. Perhaps this was because, as the dissenting opinions by Justices Scalia and Alito noted, the notion that there was a fundamental right to same-sex marriage was difficult to justify under the Court's traditional methodology for identifying fundamental rights.¹⁷ Justice Kennedy seemed to rely principally on equal protection,¹⁸ yet the doctrinal justification for this conclusion was not clearly stated. As Justice Scalia noted, "[t]he opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality."¹⁹ In the end, Justice Kennedy's opinion rests on his "accusations"²⁰ that DOMA was based on animus and bigotry and "a bare desire to

¹² *See id.* at 2689-93.

¹³ *Id.* at 2697 (Roberts, C.J., dissenting).

¹⁴ *Id.* at 2692 (majority opinion).

¹⁵ *Id.*

¹⁶ *See id.* at 2692, 2694.

¹⁷ *Id.* at 2706-07 (Scalia, J., dissenting) (citations omitted) ("The majority never utters the dread words 'substantive due process,' perhaps sensing the disrepute into which that doctrine has fallen Yet the opinion does not argue that same-sex marriage is 'deeply rooted in this Nation's history and tradition,' a claim that would of course be quite absurd. So would the further suggestion (also necessary, under our substantive-due-process precedents) that a world in which DOMA exists is one bereft of "ordered liberty.'""). Justice Alito noted that "[i]t is beyond dispute that the right to same-sex marriage is not deeply rooted in this Nation's history and tradition." *Id.* at 2715 (Alito, J., dissenting).

¹⁸ *Id.* at 2693-97 (majority opinion).

¹⁹ *Id.* at 2706 (Scalia, J., dissenting).

²⁰ *Id.* at 2708.

harm[,]”²¹ a conclusion he reached without seriously examining the justifications for DOMA.²²

There has, of course, already been much commentary about the Court’s opinion in *Windsor*.²³ John McGinnis’s critique²⁴ was perhaps the most strongly worded. Professor McGinnis said that Justice Kennedy’s opinion in *Windsor* was deficient “as a matter of craft”²⁵ because it failed the “basic requirement of the rule of law . . . to articulate a rule of decision.”²⁶ He concluded that *Windsor* “was as singular a failure as I’ve seen in the history of the Supreme Court.”²⁷ I think that this critique—that the opinion is opaque—is widely shared. A recent essay by Professor Colin Starger noted the “common frustration—expressed by supporters and opponents of same-sex marriage alike—at what may be called Kennedy’s ‘doctrinal obscurity.’”²⁸ I should note that Professor Starger considers the “doctrinal obscurity” of Justice Kennedy’s opinion to be a virtue.

II. *ROE* AND *LAWRENCE*

In *Roe v. Wade*,²⁹ the Court, in an opinion by Justice Blackmun, issued a sweeping ruling that effectively held unconstitutional the abortion laws of every state in the country.³⁰ The opinion has been subjected to withering criticism since it was first announced.³¹ A good

²¹ *Id.* at 2696 (Roberts, C.J., dissenting).

²² *Id.* at 2707 (Scalia, J., dissenting) (“The majority . . . conceal[s] from the reader the arguments that exist in justification. It makes only a passing mention of the ‘arguments put forward’ by the Act’s defenders, and does not even trouble to paraphrase or describe them.”).

²³ See, e.g., *Elon Law Review* Symposium 2013: The Implications of *United States v. Windsor* and *Hollingsworth v. Perry* for Family Law, Constitutional Law, Tax Law, and Society (2013).

²⁴ Kevin C. Walsh, “As Singular a Failure as I’ve Seen in the History of the Supreme Court?” *McGinnis on Windsor, Not Shelby County*, WALSHSLAW (July 8, 2013), <http://walshslaw.wordpress.com/2013/07/08/as-singular-a-failure-as-ive-seen-in-the-history-of-the-supreme-court-mcginnis-on-windsor-not-shelby-county/>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Colin Starger, *The Virtue of Obscurity*, 59 VILL. L. REV. TOLLE LEGE 17, 17 (2013).

²⁹ 410 U.S. 113 (1973).

³⁰ Richard S. Myers, *The Supreme Court and Abortion: The Implications of Gonzales v. Carhart*, in LIFE AND LEARNING XVII: THE PROCEEDINGS OF THE SEVENTEENTH UNIVERSITY FACULTY FOR LIFE CONFERENCE 103, 103-05 (Joseph W. Koterski ed., 2008).

³¹ For a catalogue of some of the critical commentary, see Clarke D. Forsythe & Stephen B. Presser, *Restoring Self-Government on Abortion: A Federalism Amendment*, 10 TEX. REV. L. & POL. 301, 313-15 (2006).

account of many of the errors in *Roe v. Wade* is contained in Clarke Forsythe's recent book entitled *Abuse of Discretion*.³²

This is not the place for a full discussion of *Roe*'s many errors. I will mention just a few of them here in order to highlight the weakness of Justice Blackmun's opinion. The Court's treatment of the doctrine of substantive due process was shockingly weak. The Court didn't explain why the Due Process Clause had a substantive component. Even if the doctrine were accepted, the *Roe* Court did not explain why the decision to have an abortion ought to be treated as a fundamental right.³³ In the end, the Court "simply announces that the right of privacy 'is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.'"³⁴ The Court's treatment of the history of abortion was an embarrassment; as John Keown noted, "*Roe*'s invention of a constitutional right to abortion represented a radical rejection of America's long-standing history and traditions."³⁵ The Court's treatment of how the unborn are regarded in other areas of the law was fundamentally flawed; an accurate account would have undermined the Court's conclusions.³⁶ The Court's treatment of the personhood of the unborn was incredibly weak. A recent article by Professor Michael Paulsen concludes that "the clear plausibility of personhood suggests at the very least that *Roe*—on this point as on so many others—is indefensible."³⁷ The Court's treatment of the origins and value of human life also contained major inadequacies.³⁸

In the end, the Court just announced the existence of a right to abortion in an opinion that has been savagely critiqued since 1973 by scholars with varying views on abortion. As Professor Paulsen stated,

³² See CLARKE D. FORSYTHE, *ABUSE OF DISCRETION: THE INSIDE STORY OF ROE V. WADE* 57-60 (2013).

³³ See Richard S. Myers, *Re-Reading Roe v. Wade*, 71 WASH. & LEE L. REV. __ (forthcoming 2014) (discussing some of the more notable errors in Justice Blackmun's opinion in *Roe*). The rest of this paragraph is drawn from my article in the *Washington & Lee Law Review*.

³⁴ John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 932 (1973) (quoting *Roe v. Wade*, 410 U.S. 113, 153 (1973)).

³⁵ John Keown, *Back to the Future of Abortion Law: Roe's Rejection of America's History and Traditions*, 22 ISSUES IN L. & MED. 3, 37 (2006).

³⁶ See Myers, *supra* note 33.

³⁷ Michael Stokes Paulsen, *The Plausibility of Personhood*, 74 OHIO ST. L.J. 14, 72 (2012).

³⁸ See Myers, *supra* note 33, at 5.

“*Roe*’s reasoning is utterly laughable, a running joke in constitutional law circles.”³⁹

Roe v. Wade was, of course, an incredibly important decision. It has had an enormous impact in opening the door to a staggering number of abortions over the last forty years. Of course, many of these abortions would have happened without *Roe*, but it is important and tragic that these over fifty million abortions⁴⁰ have occurred with the imprimatur of the United States Supreme Court. *Roe* has been limited in some minor ways by subsequent decisions, but its core holding has remained secure.⁴¹

But *Roe* has not been accepted; this is due to the opinion’s weaknesses and the decision’s departure from existing law and public opinion. *Roe* is regularly challenged by state and federal legislators, and only a relatively small percentage of the public accept the abortion-on-demand regime that *Roe* brought about.⁴² Young people are increasingly pro-life.⁴³ Despite the Court’s effort to settle the matter, the legality of abortion is still in play forty years after *Roe v. Wade*.⁴⁴ *Roe* is, in

³⁹ Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1011 (2003).

⁴⁰ Steven Ertelt, *55,772,015 Abortions in America Since Roe v. Wade in 1973*, LIFE NEWS.COM (Jan. 18, 2013, 1:13 PM), <http://www.lifenews.com/2013/01/18/55772015-abortions-in-america-since-roe-vs-wade-in-1973/?pr=1>.

⁴¹ See generally *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). *Casey* did modify *Roe* but the changes were not as significant as some suggest. *Id.* *Casey* preserved “the central holding of *Roe v. Wade*[.]” *Id.* at 879. Under *Casey*’s undue burden framework, states have more freedom to regulate abortion but still do not have the power to proscribe abortion at any time during pregnancy. For a discussion of the later developments, see Richard S. Myers, *Reflections on the Twentieth Anniversary of Planned Parenthood v. Casey*, in LIFE AND LEARNING XXII: THE PROCEEDINGS OF THE TWENTY-SECOND UNIVERSITY FACULTY FOR LIFE CONFERENCE (Joseph W. Koterski ed., 2012) (forthcoming), available at <http://ssrn.com/abstract=2150241>.

⁴² See FORSYTHE, *supra* note 32, at 295 (“What makes abortion uniquely controversial is that the Justices have sided with a small sect—7 percent of Americans—who support abortion for any reason at any time. And the Justices have for forty years prevented the 60-70 percent of Americans in the middle from deciding differently. The conflict between public opinion and the Supreme Court’s nationwide policy is one key reason why *Roe* is uniquely controversial.”).

⁴³ See Michael J. New, *Young People Increasingly Pro-Life, Although You’d Never Know it by the New York Times*, NAT’L RIGHT TO LIFE NEWS TODAY (Aug. 10, 2012), <http://www.nationalrighttolifenews.org/news/2012/08/young-people-increasingly-pro-life-although-you-d-never-know-it-by-the-new-york-times/>.

⁴⁴ See Richard S. Myers, *A Comment on “The Constitutional Law and Politics of Reproductive Rights,”* in LIFE AND LEARNING XX: THE PROCEEDINGS OF THE TWENTIETH UNIVERSITY FACULTY FOR LIFE CONFERENCE 9-10 (Joseph W. Koterski ed., 2012) (forthcoming), available at <http://ssrn.com/abstract=2150236>; Myers, *supra* note 33, at 11-12.

fact, somewhat of an outlier. The most significant substantive due process case is *Washington v. Glucksberg*,⁴⁵ in which the Supreme Court rejected the *Roe* Court's approach to substantive due process.⁴⁶ In other areas of the law, unborn children have increasingly been accorded legal protection. The federal Unborn Victims of Violence Act⁴⁷ is just one significant example. In fact, in a 2013 decision that held that Alabama's chemical endangerment statute protected unborn children, Justice Parker of the Alabama Supreme Court concluded:

The decision of this Court today is in keeping with the widespread legal recognition that unborn children are persons with rights that should be protected by the law. Today, the only major area in which unborn children are denied legal protection is abortion, and that denial is only because of the dictates of *Roe*.⁴⁸

Roe has increasingly become isolated on this point, as on many others.

In *Lawrence v. Texas*,⁴⁹ the Court, in an opinion by Justice Kennedy, invalidated a Texas law that proscribed "deviate sexual intercourse" between persons of the same sex. The *Lawrence* opinion is also a disaster in terms of judicial craftsmanship.⁵⁰ The Court's opinion was a mix of substantive due process and equality themes, but the Court did not engage at all *Washington v. Glucksberg*—the leading substantive due process precedent.⁵¹ The Court didn't make it clear whether the case involved a fundamental right or what level of scrutiny applied. Here is the conclusion of Professors Lund and McGinnis about *Lawrence*: "Justice Kennedy's opinion for the Court, . . . simply abandons

⁴⁵ 521 U.S. 702 (1997).

⁴⁶ See Myers, *supra* note 33.

⁴⁷ 18 U.S.C. § 1841 (2013). For information about the Unborn Victims of Violence Act of 2004, see *Unborn Victims of Violence*, NAT'L RIGHT TO LIFE (2013), http://www.nrlc.org/archive/Unborn_Victims/index.html.

⁴⁸ *Ex parte* Ankrom, 2013 Ala. LEXIS 8, at *89 (Ala. Jan. 11, 2013) (Parker, J., concurring).

⁴⁹ 539 U.S. 558 (2003).

⁵⁰ See Richard S. Myers, *Pope John Paul II, Freedom, and Constitutional Law*, 6 AVE MARIA L. REV. 61, 70 (2007).

⁵¹ See Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1578-79 (2004) ("Another striking manifestation of *Lawrence's* haughtiness toward the kind of legal analysis that had become conventional in the case law is its treatment of *Glucksberg*, which had articulated, just six years earlier, the governing test for expansions of substantive due process protection. Without so much as citing *Glucksberg*, *Lawrence* abandons both of its core requirements: that a fundamental right be carefully described and that there be objective evidence that the right is deeply rooted in our nation's history and tradition. The rejection of the *Glucksberg* test is not only unacknowledged and unexplained, but it is total rejection.").

legal analysis. Freed from the chains even of rational argument, the *Lawrence* Court issued an ukase wrapped up in oracular riddles.”⁵²

In part because of its lack of clarity, the *Lawrence* opinion has not had the broad impact that Justice Scalia forecast in his dissent. Justice Scalia’s dissent argued that the Court’s view “effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, [laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity] can [not] survive rational-basis review.”⁵³ Yet, that has not happened.⁵⁴ The end result is still not clear, of course. *Lawrence* has been relied upon in certain cases (including *Windsor*⁵⁵), but it has not brought about the revolution that some hoped and others feared. After reviewing post-*Lawrence* decisions several years ago, I concluded:

Certain judges have read *Lawrence* seriously and have tried to apply it in new contexts. [One court even invalidated the federal obscenity statute on substantive due process grounds, although that holding was reversed on appeal.⁵⁶] But most judges have been more cautious and seem inclined to let the Supreme Court take responsibility for pushing the underlying logic of *Casey* and *Lawrence* to its limits. I think that explains decisions upholding laws prohibiting adult incest and bigamy, even though one need not push *Lawrence* too far to conclude that these laws are in trouble, as Justice Scalia noted in his *Lawrence* dissent.⁵⁷

Interestingly, some of these lower court opinions read as if *Lawrence* had never been decided.⁵⁸ Others acknowledge *Lawrence* but read the opinion narrowly in part because of the *Lawrence* Court’s failure to follow conventional methods of doctrinal analysis.⁵⁹ Professor Steven Calabresi noted several years ago that *Lawrence* “is itself an outlier that

⁵² *Id.* at 1575.

⁵³ *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting).

⁵⁴ See Myers, *supra* note 50, at 74-77.

⁵⁵ See *United States v. Windsor*, 570 U.S. ___, ___, ___, 133 S. Ct. 2675, 2692, 2694 (2013).

⁵⁶ *United States v. Extreme Assocs., Inc.*, 352 F. Supp. 2d 578, 592 (W.D. Pa.), *rev’d*, 431 F.3d 150, 162 (3d Cir. 2005); see Myers, *supra* note 50, at 74-75.

⁵⁷ Myers, *supra* note 50, at 76-77.

⁵⁸ *Id.* at 75.

⁵⁹ *Id.* at 76 n.88. An instructive example of this approach is the decision of the Alabama Supreme Court to uphold an Alabama statute prohibiting the sale of sexual devices. See *1568 Montgomery Highway, Inc. v. City of Hoover*, 45 So. 3d 319 (Ala. 2010). After noting that the Fifth and Eleventh Circuits had issued conflicting rulings on the issue, the Alabama Supreme Court went on to discuss the continuing debate about how to interpret *Lawrence*, and mentioned that the *Lawrence* Court did not apply the framework set forth in *Glucksberg*. The Alabama court then stated: “In sum, the Fifth Circuit interpreted *Lawrence* broadly, and the Eleventh Circuit interpreted it narrowly. It is the Eleventh Circuit’s view of *Lawrence* that we embrace.” *Id.* at 340.

neither the Supreme Court nor the lower federal and state courts are following.”⁶⁰

III. IMPLICATIONS OF *WINDSOR*

I think that *Windsor* will have limited impact. This is due in part to the doctrinal obscurity of the opinion, although I recognize that scholars have praised this aspect of Justice Kennedy's opinion.⁶¹ Although the Court was “rootless and shifting [in] its justifications[,]”⁶² Justice Kennedy ultimately relied on his view that DOMA was passed with unconstitutional animus. But because Justice Kennedy avoided a more sweeping and clearer doctrinal ruling, the opinion will not control in subsequent cases involving the constitutionality of state laws prohibiting same-sex marriage.

Professor Reva Siegel maintains that the *Windsor* opinion was “plainly designed to influence, without deciding, deliberations about the constitutionality of state laws that restrict same-sex unions.”⁶³ This comment echoes the view that Supreme Court Justices are participants in a national conversation about important social issues. Some described *Lawrence* in just that fashion—as an “opening bid”⁶⁴ in an ongoing national conversation about these issues. Others have described *Windsor* in a similar fashion—as “keep[ing] the Court in the national conversation without needlessly stirring the pot.”⁶⁵ This is a different sort of conversation than one engages in with colleagues or neighbors. It is a conversation in which one participant has the power to enshrine its views in constitutional law. As one article stated about *Lawrence*, “[t]his is a ‘conversation’ in which the Court issues commands, and those who disagree must obey.”⁶⁶

⁶⁰ Steven G. Calabresi, *Substantive Due Process After Gonzales v. Carhart*, 106 MICH. L. REV. 1517, 1541 (2008).

⁶¹ See Starger, *supra* note 28.

⁶² United States v. Windsor, 570 U.S. ___, ___, 133 S. Ct. 2675, 2705 (2013) (Scalia, J., dissenting).

⁶³ Reva B. Siegel, *The Supreme Court, 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1, 77 (2013).

⁶⁴ Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 104 (2003).

⁶⁵ Starger, *supra* note 28, at 26.

⁶⁶ Lund & McGinnis, *supra* note 51, at 1588.

Yet, there is something to this conversation metaphor. Despite the Court's extravagant claims to supremacy,⁶⁷ the people ultimately decide on important social issues. And the space for conversation and debate increases when the Court issues rulings that are doctrinally obscure or weak.

I think that is in part why Justice Kennedy wrote his *Windsor* opinion in the way he did. There has been much discussion from sitting Justices, including Justice Kennedy, about the Court having moved too far and too fast in *Roe v. Wade*.⁶⁸ The Court wanted, it seems, to avoid the same sort of charge when it had an opportunity to address the constitutionality of Section 3 of DOMA.⁶⁹

Justice Kennedy, it seems apparent, wanted to avoid getting out too far ahead of the country's evolving views on same-sex marriage. The Court had done just that in *Roe* when it effectively struck down the abortion laws of all fifty states, even recent liberal abortion laws. The Court had avoided that error when it decided *Washington v. Gluck-*

⁶⁷ In deciding that the *Windsor* case was justiciable, the Court made some sweeping claims to having a primary role in interpreting the Constitution. These comments prompted this response by Justice Scalia: "It is an assertion of judicial supremacy over the people's Representatives in Congress and the Executive. It envisions a Supreme Court standing (or rather enthroned) at the apex of government, empowered to decide all constitutional questions, always and everywhere 'primary' in its role." *Windsor*, 133 S. Ct. at 2698 (Scalia, J., dissenting). Another example of the Court asserting an extravagant claim to supremacy occurred in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (plurality opinion). For critical commentary about this aspect of *Casey*, see Paulsen, *supra* note 39, at 1036-38.

⁶⁸ This was certainly an important part of the public discussion before the Court's June 2013 rulings in the same-sex marriage cases. See Adam Liptak, *Shadow of Roe v. Wade Looms Over Ruling on Gay Marriage*, N.Y. TIMES, Mar. 23, 2013, http://www.nytimes.com/2013/03/24/us/roes-shadow-as-supreme-court-hears-same-sex-marriage-cases.html?_r=0. After the June 2013 rulings, Justice Ginsburg claimed that the Court was correct to take a more limited approach in the gay marriage rulings than the Court did in *Roe v. Wade*. Greg Stohr, *Ginsburg Says Court Struck Right Balance on Gay Marriage*, BLOOMBERG (Aug. 25, 2013, 12:00 AM), <http://www.bloomberg.com/news/2013-08-24/ginsburg-says-court-struck-right-balance-on-gay-marriage.html>. Justice Kennedy made the same point after the June 2013 rulings. See Jess Braven, *Justice Kennedy Speaks Out on Gay Marriage, Shutdown*, WALL ST. J., Oct. 10, 2013, <http://online.wsj.com/news/articles/SB10001424052702304500404579125862192123886>.

⁶⁹ In a speech in October 2013, in speaking about the Court's opinions on same-sex marriage, Justice Kennedy stated: "'We come in too soon and too broad, we terminate' the democratic debate . . ." See Braven, *supra* note 68. In his dissent in *Hollingsworth v. Perry*, Justice Kennedy noted: "the Court must be cautious before entering a realm of controversy where the legal community and society at large are still formulating ideas and approaches to a most difficult subject." 570 U.S. ___, ___, 133 S. Ct. 2652, 2674 (2013) (Kennedy, J., dissenting).

sberg.⁷⁰ *Windsor* presented the Court with a situation far closer to the assisted suicide situation than it did to the situations in *Griswold* and *Lawrence*, when the Court invalidated laws that were uncommon and that were without widespread support.⁷¹ Of course, very recent developments have moved in favor of legalizing same-sex marriage,⁷² but approximately sixty percent of the states have endorsed the traditional understanding of marriage within the last twenty years.⁷³ A broad ruling by the *Windsor* Court would have effectively invalidated the laws of all of these states.

Justice Kennedy made important efforts to limit the scope of *Windsor*. The Court's reliance on the animus behind DOMA means that the ruling is fact-specific because the Court's conclusion about animus would not necessarily apply to state laws that banned same-sex marriages, especially if the Court seriously engages the rationales for traditional marriage. Moreover, the Court avoided a sweeping ruling

⁷⁰ See Myers, *supra* note 33 (footnotes omitted). In *Glucksberg*, in rejecting constitutional challenges to laws banning assisted suicide, the Court rejected the idea that there is a fundamental right to assisted suicide. The Court, in an opinion by Chief Justice Rehnquist, largely ignored *Casey*'s broad, abstract language. The Court instead asked whether the right to assisted suicide was deeply rooted in our Nation's history and tradition. The Court carefully reviewed the relevant history and stated: "we are confronted with a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults. To hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State." In *Glucksberg* (unlike in *Roe*), the Court was unwilling to take that step. The Court adopted a posture of caution and restraint and seemed disinclined to constitutionalize another area of social life. Although the context is different, I think a similar point can be made about the Court's sex discrimination cases in the 1970s. See *id.* at 11. The Court's cases in that era that elevated the level of scrutiny for sex discrimination were controversial. But because these decisions were more securely rooted in precedent (the Court used familiar doctrinal tools in identifying whether heightened scrutiny was warranted) and in current societal views (the Court's rulings were consistent with Title VII (1964) and Title IX (1972)), they have been widely accepted. As I mentioned in an earlier article, "[n]o one holds conferences reassessing *Craig v. Boren*." *Id.* *Craig v. Boren*, 429 U.S. 190 (1976), was the decision establishing that sex discrimination is subject to intermediate scrutiny.

⁷¹ See Myers, *supra* note 44, at 8.

⁷² See Lynn D. Wardle, *Equality Principles as Asserted Justifications for Mandating the Legalization of Same-Sex Marriage in American and Intercountry-Comparative Constitutional Law*, 27 BYU J. PUB. L. 489 (2013) (describing developments through the end of 2012); Daniel O. Conkle, *Evolving Values, Animus, and Same-Sex Marriage*, 89 IND. L.J. — (forthcoming 2014), available at <http://ilj.law.indiana.edu/articles/9-Conkle.pdf> (discussing more recent developments).

⁷³ Wardle, *supra* note 72, at 495; Conkle; *supra* note 72, at 7.

resting on a fundamental right to same-sex marriage or on the application of heightened scrutiny under equal protection.⁷⁴

The underlying logic of the opinion is quite broad,⁷⁵ as Justice Scalia maintained in dissent. Justice Scalia's dissent predicted that the "[t]he only thing that will 'confine' the Court's holding [when it next addresses whether there is a constitutional requirement to give formal recognition to same-sex marriage] is its sense of what it can get away with."⁷⁶ That may be true, but this delays the resolution of the issue and creates an opportunity for defenders of traditional marriage to continue to advance their views.

Even in contexts when the Court issues a more sweeping ruling, as it did in *Roe v. Wade*, the people have political avenues to keep issues alive. This is all the more likely to occur when the Court issues a ruling that acts against the views of a significant segment of the population. This happened in *Roe*, even though some may have thought that the Court's ruling was going to settle the issue by endorsing the abortion rights view. As Clarke Forsythe notes, "[t]he conventional wisdom is that the Court 'led public opinion' in 1973—that the country was moving inescapably toward legalizing abortion, and that the Court was just ahead of public opinion."⁷⁷ As Forsythe maintains, that was not an accurate reading of the situation,⁷⁸ but the conventional narrative illustrates the hazards of predicting that public opinion is inexorably moving in a particular direction.⁷⁹

⁷⁴ There are many reasons for the Court having avoided a more sweeping ruling. One key point is that it would have been difficult for the Court to justify the conclusion that there was a fundamental right to same-sex marriage. See *United States v. Windsor*, 570 U.S. ___, ___, 133 S. Ct. 2675, 2706-07 (2013) (Scalia, J., dissenting). Another is that a broader equal protection ruling would have been adventuresome and that as Justice Alito noted, the Court's equal protection framework seems "ill suited for use in evaluating the constitutionality of laws based on the traditional understanding of marriage, which fundamentally turn on what marriage is." *Windsor*, 133 S. Ct. at 2716 (Alito, J., dissenting).

⁷⁵ See Siegel, *supra* note 63, at 89 (arguing that the animus ruling likely applies beyond DOMA).

⁷⁶ *Windsor*, 133 S. Ct. at 2709 (Scalia, J., dissenting).

⁷⁷ FORSYTHE, *supra* note 32, at 290.

⁷⁸ *Id.* at 289-309.

⁷⁹ That may prove true with regard to same-sex marriage. See Conkle, *supra* note 72, at 8 (noting caution about this point). For a recent piece raising caution about polling data on same-sex marriage, see Mark Regnerus, "Right Side of History," or Primed to Say Yes?, NAT'L REV. ONLINE (Aug. 20, 2013), <http://www.nationalreview.com/article/356220/right-side-history-or-primed-say-yes-mark-regnerus#!>.

The Court is, of course, an important player in this ongoing conversation. It may be that the Court's accusations of bigotry will make it difficult for defenders of traditional marriage to make their case.⁸⁰ But, in large part because of its weaknesses, the Court's *Windsor* opinion will not likely convince many. I think this is true whenever the Justices "rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice[.]"⁸¹ as Justice Scalia memorably stated in his *Casey* opinion, or when the Court engages in decision-by-name-calling as Justice Kennedy did in *Windsor*.⁸²

IV. CONCLUSION

Windsor is a doctrinally obscure opinion that is unlikely to settle the issue of the constitutionality of state laws prohibiting same-sex marriage. The weaknesses of the opinion suggest that *Windsor* will suffer the same fate as *Roe v. Wade* and *Lawrence v. Texas*, two "landmark" opinions on important social issues that have not had the broad impact that some attribute to them. Moreover, the limited nature of the *Windsor* opinion creates an opportunity for defenders of traditional marriage to advance their views. In the end, *Windsor* leaves the broader marriage issue open; ultimately, "we the people" will decide.

⁸⁰ Justice Scalia made precisely this point in his *Windsor* dissent: "The result will be a judicial distortion of our society's debate over marriage—a debate that can seem in need of our clumsy 'help' only to a member of this institution." 133 S. Ct. at 2710 (Scalia, J., dissenting).

⁸¹ *Planned Parenthood v. Casey*, 505 U.S. 833, 983 (1992) (Scalia, J., concurring in part and dissenting in part).

⁸² See Michael W. McConnell, *2013 Supreme Court Roundup*, FIRST THINGS: RELIGION AND PUB. LIFE (Oct. 2013), available at <http://www.firstthings.com/article/2013/10/2013-supreme-court-roundup> ("Yet the Court did not trouble to engage with the rationales offered by the supporters of DOMA either in the legislative history, the national debate, or the briefs. It simply dismissed contrary views as hateful. This is not constitutional analysis; it is adjudication by name-calling.")

