FEDERALISM OR EXTREME MAKEOVER OF STATE DOMESTIC REGULATIONS POWER? THE RULES AND THE RHETORIC OF *WINDSOR* (AND *PERRY*)

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The opinion of the Supreme Court of the United States in *United States v. Windsor*[1] is express in its affirmation of the right of states to regulate family law; it affirms state power at least twenty-nine times.[2] In repudiating the federal definition of marriage, Windsor seems to uphold state regulation of family law.[3] At the same time, *Hollingsworth v. Perry*[4] provides a background for considering democratic involvement in the process of state regulation of family law and, in effect, invalidates, by lack of standing, a voter-approved state referendum defining marriage for California.[5] Thus, the characterization of federalism in *Windsor* seems to conflict with the actual outcome of *Perry*.

In light of this apparent contradiction, this article considers whether "the traditional power of States to define domestic relations"[6] is affected by the mandate that the federal government refrain from

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[1] 570 U.S. ___, 133 S. Ct. 2675 (2013).

[2] *Id.* at 2690-94. *See also infra* notes 13, 15-33 (highlighting particular references to state power).

[3] *Id.* at 2675.

[4] 570 U.S. __, 133 S. Ct. 2652 (2013).

[5] *Windsor*, 133 S. Ct. at 2668.

[6] *Id.* at 2705 (Scalia, J., dissenting) (referring to the opinion's opening seven pages).

intervening in marriage entry regulation[7] when one state's ability to define marriage was effectively denied in *Perry*.[8] An overview of some collateral effects of both the rules and rhetoric of *Windsor* and *Perry* on state family law regulation illuminates this question. Such an overview reveals that these cases do more than simply uphold and clarify federalism; at least to some extent, they impede the ability of states to define domestic relations, with practical and ideological ramifications for family law and liberty interests.[9] First, Part I provides a background on the dicta of *Windsor* heralding state regulation of marriage. Part II considers and examines collateral effects of *Windsor* and *Perry* on family law in three categories. Those categories include federal conflicts with state regulations, interstate conflicts, and family law policy. Part III discusses an ideological shift *Windsor* and *Perry* promote in family law and the effects of the Supreme Court's endorsement of this new ideology upon personal liberty interests and marriage regulation.

Numerous potential future implications arise from these two cases, from heightened scrutiny for sexual orientation,[10] to the fate of the rest of the Defense of Marriage Act ("DOMA"), particularly Section 2,[11] to the particular application of a stated equal protection analysis,[12] to the Court's emphasis on cultural stigma as a legal concern.[13] All these changes come at a time when marriage appears to be declining in popularity.[14] This article, however, focuses only on the effects on state regulation of domestic relations. The traditional power of states

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[7] *Id.*; *see also id.* at 2692 ("The State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism . . . .").

[8] *See Perry*, 133 S. Ct. at 2657, 2659.

[9] Similar analyses were published more than a decade ago in two separate forums. *See* Lynne Marie Kohm, *How Will the Proliferation and Recognition of Domestic Partnerships Affect Marriage?*, 4 J. FAM. STUD. 105 (2002); Lynne Marie Kohm, *The Collateral Effects of Civil Unions on Family Law*, 11 WIDENER J. PUB. L. 451 (2002). This article revisits some of those predictions, which apparently form the basis for the substance of this thesis. Professor Margaret Brinig presents another perspective of the effects of these cases on family law in her article entitled *The Effects of* Hollingsworth *and* Windsor *on Family Law*, 6 ELON L. REV. __ (2014).

[10] *See Windsor*, 133 S. Ct. at 2684 (affirming the ruling from the Court of Appeals for the Second Circuit, which affirmed the district court's judgment, which "applied heightened scrutiny to classifications based on sexual orientation"). Notably, gender has yet to receive heightened strict scrutiny. *See* Craig v. Boren, 429 U.S. 190 (1976) (finding intermediate scrutiny for gender).

[11] *See, e.g.*, Mark Strasser, *What's Next After* Windsor*?*, 6 ELON L. REV. __ (2014).

[12] *Windsor,* 133 S. Ct. at 2693.

[13] *Id.*

[14] Katrina Trinko, *Today's Bachelorettes*, NAT'L REV., Aug. 5, 2013 (citing 2011 Pew Research Center Study, which noted declining rates of marriage).

to define domestic relations has been affected by the rulings in *Windsor* and *Perry*, and this article details those collateral effects. It discusses the rules and the rhetoric used by the Supreme Court of the United States to determine whether federalism prevails or whether state power has been infringed, finding that the Court's decisions may signal an extreme makeover of state marriage law.

I. Background: A Review of the Case Language on State Regulation of Family Law

Windsor struck down Section 3 of DOMA, stating the federal government overstepped its bounds when it passed that portion of the Act.[15] The Justices reasoned that the decision about marriage should be left up to each state, and they did so expressly.[16] The first reference to state regulation of domestic relations appears on the second page of the opinion, where the Court states that DOMA's definitional provision does not "forbid States from enacting laws permitting same-sex marriages or civil unions or providing state benefits to residents of that status."[17] The Court makes additional statements that specifically affirm state power to expand marriage,[18] and it also makes some general statements that could be taken to defend state decisions to maintain a traditional definition of marriage as well as those that expand its definition.[19]

Many of the Court's express statements on a state's ability to regulate marriage specifically uphold a state's ability to enact laws permitting marriage expansion. Referring to that regulatory direction as "a new perspective, a new insight" for state regulation,[20] the Court pronounces that this course of action is based on "status and dignity."[21] Those various state laws expanding marriage's definition are set forth in a lengthy paragraph in the text of the case.[22] The Court declares that "[t]he recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens,"[23] the "definition

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[15] *Windsor*, 133 S. Ct. at 2696.

[16] *Id.* at 2691.

[17] *Id.* at 2683.

[18] *See, e.g.*, *id.* at 2691.

[19] *See, e.g.*, *id.* at 2680 ("By history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States.").

[20] *Id.* at 2689.

[21] *Id.*

[22] *Id.* at 2690.

[23] *Id.* at 2691 (citing Williams v. North Carolina, 317 U.S. 287, 298 (1942)).

of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities,'"[24] and the "states . . . possessed full power over the subject of marriage and divorce."[25] The Court opines further that, "[c]onsistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations,"[26] noting further that even the Copyright Act requires "'a reference to the law of the State which created those legal relationships' because 'there is no federal law of domestic relations.'"[27] The Court continues expressing respect for this principle by stating that it prohibits federal courts from adjudicating "issues of marital status even when there might otherwise be a basis for federal jurisdiction."[28]

The notion that state regulation controls is important enough for the Court to point out that the "significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for 'when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.'"[29] The Court takes note of the fact that "[m]arriage laws vary in some respects from State to State," and gives several examples.[30] Furthermore, the Court proclaims the "State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism,"[31] and DOMA "departs from this history and tradition of reliance on state law to define marriage."[32] Clearly, the state power over marriage is a matter of history and tradition, according to the Court.[33]

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[24] *Id.* (quoting *Williams*, 317 U.S. at 298).

[25] *Id.* (quoting Haddock v. Haddock, 201 U.S. 562, 575 (1906)).

[26] *Id.*

[27] *Id.* (quoting DeSylva v. Ballentine, 351 U.S. 570 (1956)).

[28] *Id.* (citing Ankenbrandt v. Richards, 504 U.S. 689, 703 (1992)).

[29] *Id.* (quoting Ohio *ex rel.* Popovici v. Agler, 280 U.S. 379, 383-84 (1930)).

[30] *Id.* (acknowledging the age requirement differences between Vermont and New Hampshire and the consanguinity variances between Iowa and Washington, and noting the welcomed qualification that "these rules are in every event consistent within each State.").

[31] *Id.* at 2692.

[32] *Id.*

[33] *Id.* at 2689-90 ("By history and tradition the definition and regulation of marriage as will be discussed in more detail, has been treated as being within the authority and realm of the separate States."). *See also id.* at 2691.

The Court seems to understand that state marriage regulation decisions enhance the dignity of its participants,[34] since a "State's interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits."[35] The Court clarifies that the "responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact the State's classifications have in the daily lives and customs of its people,"[36] which "reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality."[37] According to the Court, the Bipartisan Legal Advisory Group (BLAG), by its defense of DOMA, has interfered "with state sovereign choices about who may be married."[38]

Although some of the dicta in *Windsor* regarding state power could, on its face, apply to both state preservation and expansion of traditional marriage, the factual scenario of *Windsor* deals with marriage expansion, and the dicta of *Windsor* likewise only explicitly deals with marriage expansion.[39] Since the case defends strong federalism in the context of marriage expansion, it is unclear whether those principles are applied as strongly for state jurisdictions defining marriage traditionally.[40] It is therefore possible that strong federalism is consistent with the ruling in *Windsor* only if it expands marriage.

Perry, however, has no dicta protecting state authority over marriage.[41] Rather, that case's language details the judicial history of the case and holds a lack of jurisdiction to enforce state authority by democratic referendum.[42] Though this holding is procedural and in principle applies to democratic referendums irrespective of whether they seek to limit or expand marriage, it functions to prohibit a limitation on marriage within a state, and it will likely have the same effect in

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[34] *Id.* at 2692; *see also id.* at 2693 (discussing DOMA's interference with State efforts to provide equal "dignity conferred by the States in the exercise of their sovereign power"); *id.* at 2696 (discussing "a status the State finds to be dignified and proper"); *id.* (noting New York's law "sought to protect personhood and dignity").

[35] *Id.* at 2692 (quoting Lawrence v. Texas, 539 U.S. 558, 567 (2003)).

[36] *Id.* at 2693.

[37] *Id.* at 2692-93.

[38] *Id.* at 2693.

[39] *See id.* at 2693-94.

[40] *See infra* notes 99-145 and accompanying text.

[41] *See* Hollingsworth v. Perry, 570 U.S. __, 133 S. Ct. 2652 (2013).

[42] *Id.* at 2661, 2667.

other states, as referendums supporting traditional marriage have been more common than those advancing same-sex marriage.[43]

As indicated above and discussed more fully in Part II, the collateral effects of these two cases call into question state authority to regulate marriage if that regulation could conflict with efforts toward marriage expansion.[44] As long as some states continue to implement the traditional definition of marriage, these rulings will introduce multiple conflicts of law. Given that the majority opinion in *Windsor* characterized DOMA as "writ[ing] inequality into the entire United States Code,"[45] it is not surprising that the effects of these cases are far-reaching. Because family law extends into almost every other area of law, these effects take shape in various federal conflicts with states, state conflicts with other states, and family law policy issues within states, as Part II describes.

II. Collateral Effects of *Windsor* (and *Perry*) on State Family Law

A. *Federal Versus State*

Broad implications for federal benefits and how states apply those benefits arise from the ruling in *Windsor*. The opinion is clear that federal authorities "can make determinations that bear on marital rights and privileges,"[46] particularly "to further federal policy."[47] Such federal determinations made subsequent to *Windsor* present several new conflicts of law, while leaving many pre-*Windsor* conflicts unresolved.[48] These conflicts are further complicated by discrepancies resulting from the inconsistent federal agency responses to *Windsor*.[49] Agency responses currently divide along the lines of how marriage definitions are determined, with some agencies relying on "place of cele-

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[43] *Same-Sex Marriage and Domestic Partnerships on the Ballot*, Nat'l Conf. of St. Legislatures, http://www.ncsl.org/research/elections-and-campaigns/same-sex-marriage-on-the-ballot.aspx (last updated Nov. 7, 2012).

[44] *See infra* notes 46-84 and accompanying text.

[45] United States v. Windsor, 570 U.S. __, __, 133 S. Ct. 2675, 2694 (2013).

[46] *Id.* at 2690.

[47] *Id.* (qualifying that DOMA had a "far greater reach" in its directive approach to what the Court saw as a directed class of persons).

[48] *The Legal Implications of* United States v. Windsor, Withers LLP (July 4, 2013), http://www.withersworldwide.com/news-publications/the-legal-implications-of-united-states-v-windsor—4.pdf.

[49] Annie Lowrey, *IRS to Recognize All Gay Marriages Regardless of State*, N.Y. Times, Aug. 30, 2013, http://www.nytimes.com/2013/08/30/us/politics/irs-to-recognize-all-gay-marriages-regardless-of-state.html.

bration"[50] and others on "place of residence."[51] These differences have interesting implications.

1. IRS Regulation Versus State Law

Marriage is essential to the tax code.[52] The IRS uses the place of celebration to determine the existence and validity of marriage.[53] According to these rules, regardless of where a same-sex couple resides, if their marriage was validly entered or "celebrated" in a state recognizing same-sex marriage, that marriage is valid for federal purposes.[54] Thus, federal tax law diverges from the tax law of the state in which the couple resides if that state does not recognize same-sex marriages entered into in other states.

2. Social Security Versus State Law

This IRS interpretation, however, is in direct contradiction to the Social Security requirement. According to Social Security regulations, in order for a same-sex couple to claim marriage benefits under Social Security, they must be validly married and currently residing in a state

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[50] *Id.*

[51] *Id.*

[52] *See generally* Patricia Cain, *Did the IRS Get it Right in Revenue Ruling 2013-17?*, 6 ELON L. REV. __ (2014) (noting that marriage is integral to the Internal Revenue Code, but expressing also that "[t]here is nothing in the tax code defining marriage;" the rules rely on previous case law that Professor Cain spells out in detail).

[53] *See* Rev. Rul. 2013-17, IRS, http://www.irs.gov/pub/irs-drop/rr-13-17.pdf. (IRS ruling on recognition of same-sex marriages). This regulation states that for federal tax purposes the terms "spouse," "husband and wife," "husband," and "wife" include individuals of the same sex who are validly and lawfully married under any such state law, regardless of the recognition of the validity of the marriage in the state they currently reside in. *Id.* So for example, under this Revenue Rule, a same-sex couple married in New York who moves to Virginia, which does not recognize same-sex marriage, will for federal IRS purposes be allowed to file jointly.

[54] *See* David Herzig, *Intersections of the* Windsor *Decision and Revenue Ruling 2013-17 and the State Tax Implications*, *Elon Law Review*: Symposium 2013: The Effects of *Windsor* and *Perry* on Constitutional Law, Family Law, Tax Law, and Society (2013); Jennifer Bird-Pollan, *Electing Fairness: A Proposal for a Check-the-Box Style Regime for Same-Sex Couples' Filing Status*, 6 ELON L. REV. __ (2014). It is also interesting that private insurance companies are taking note of *Windsor*, claiming that the ruling will affect pensions, annuity contracts, and life insurance benefits because "[a]ll contract provisions will be interpreted and administered in accordance with the requirements of the IRS." *Retirement Plan Insights,* METLIFE: RETIREMENT PLAN INSIGHTS, https://www.metlife.com/retirement-plan-insights/issues/2013-Q3/same-sex-marriage.html (last visited Jan. 31, 2014). *See also Metropolitan Life Insurance Company Supplement to the Prospectus*, SEC. & EXCH. COMM'N (Sept. 30, 2013), http://www.sec.gov/Archives/edgar/data/931779/000119312513383974/d600882497.txt.

that recognizes same-sex marriage; therefore, the Social Security rule for marriage recognition is place of residence.[55] The discrepancy in these two definitions (place of celebration used by the IRS for marriage validity and place of residence used by the Social Security Administration for marriage validity) is significant in that together they create a fundamental disagreement within the federal government as to the interpretation of *Windsor* for federal benefits purposes.

The *Windsor* opinion itself gives little to no guidance to either the federal government or to the states regarding the proper application of marriage legality in its ruling. Challenges await those same-sex couples filing married and jointly or married and separately for federal purposes in states that do not recognize their (out-of-state) marriage, for they will be forced to file individually for state purposes.[56] The extensive nature of the rulings in *Windsor* and the collateral effects the case has on federal rules are apparent.[57] Such lack of clarity will likely lead to further litigation and more debate on the state of family law.

It is implied that to the extent the place of celebration approach is used, it infringes on the traditional authority of the state of residence to define marriage, since that state's marriage policy is overridden.[58] This ties back to our thesis in that *Windsor* sends two messages: states' authority controls, but that authority is uncertain if the state does not recognize same-sex marriage. This causes *Windsor* to potentially undermine state authority. Ironically, to the extent the place of celebration principle is applied – the very complication proponents of Windsor's

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[55] Currently, Social Security is determined by place of residency. *See Information You Need to Apply for Widow's, Widower's, or Surviving Divorced Spouse's Benefits*, SOC. SEC. ADMIN., http://www.socialsecurity.gov/online/ssa-10.html (last visited Nov. 3, 2014) (stating that the SSA will ask applicants for "[t]he State or foreign country of the worker's fixed permanent residence at the time of death"); *cf. Supreme Court Decision About Defense of Marriage Act*, SOC. SEC. ADMIN. (Aug. 23, 2013), http://faq.ssa.gov/link/portal/34011/34019/Article/3536/When-will-Social-Security-begin-paying-benefits-to-same-sex-married-couples-and-surviving-spouses ("Social Security is now processing some retirement spouse claims for same-sex couples and paying benefits where they are due. In the coming weeks and months, we will work with the Department of Justice to develop and implement additional policy and processing instructions. If you believe you may be eligible for Social Security benefits, we encourage you to apply now to protect you against the loss of any potential benefits. We will process claims as soon as additional instructions become finalized.").

[56] *See* Lowrey, *supra* note 49.

[57] *Id.* (discussing the tremendous discrepancy in defining marriage according to the place of celebration or the place of residence standard).

[58] Larry E. Ribstein, *A Standard Form Approach to Same Sex Marriage*, U. ILL. L. & ECON. WORKING PAPER SERIES (2004), *available at* http://works.bepress.com/ribstein/3.

position sought to avoid, that of couples filing for and receiving state and federal benefits according to different marital statuses – it now applies to same-sex spouses residing in a state that does not recognize such marriages.[59] Further, the *Windsor* decision creates this new conflict without extinguishing all conflict between federal law and the law of states that recognize same-sex marriages. When federal place of residence rules apply, they prevent the decision of states to recognize same-sex marriages from having full and continuing effect since, under the standard, federal agencies must cease to recognize the marriages of same-sex spouses who relocate to a state that does not recognize same-sex marriages.[60] Continuity and consistency are thus compromised; as Chief Justice Roberts noted in his dissent, the majority opinion defeated the "interests in uniformity and stability" that DOMA furthered.[61] This is apparent in the way the federal government is now conflicted—with different agencies using different rules of marriage recognition—and also in the way state laws are pitted against each other in determining eligibility for federal marriage benefits.

3. Immigration Versus State Definitions of Marriage

Secretary of Homeland Security Janet Napolitano issued a statement in the wake of *Windsor*:[62]

> After last week's decision by the Supreme Court holding that Section 3 of the Defense of Marriage Act (DOMA) is unconstitutional, President Obama directed federal departments to ensure the decision and its implication for federal benefits for same-sex legally married couples are implemented swiftly and smoothly. To that end, effective immediately, I have directed U.S. Citizenship and Immigration Services (USCIS) to review immigration visa petitions filed on behalf of a same-sex spouse in the same manner as those filed on behalf of an opposite-sex spouse.[63]

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[59] Brief of The Partnership for New York City as Amicus Curiae Supporting Respondent Windsor and for Affirmance of the Second Circuit at 17-19, United States v. Windsor, 570 U.S. __, 133 S. Ct. 2675 (2013) (No. 12-307), *available at* http://www.scotusblog.com/case-files/cases/windsor-v-united-states-2/ (highlighting several ways that DOMA burdens New York businesses, including bookkeeping complications arising from federal and state marriage law dissimilarities).

[60] Roberton Williams, *Same-Sex Couples After DOMA*, FORBES (Aug. 18, 2013), http://www.forbes.com/sites/beltway/2013/08/18/same-sex-couples-after-doma/.

[61] United States v. Windsor, 570 U.S. __, __, 133 S. Ct. 2675, 2696 (2013) (Roberts, C.J., dissenting).

[62] *Implementation of the Supreme Court Ruling on the Defense of Marriage Act*, DEP'T OF HOMELAND SEC., http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act (last visited Nov. 3, 2013).

[63] *Id.*

The Department of Homeland Security further clarified in its "Frequently Asked Questions" that it would follow the place of celebration theory in determining whether a same-sex marriage is valid or not for immigration purposes.[64] According to the Department of Homeland Security, a U.S. citizen or legal permanent resident in a same-sex marriage to a foreign national can now sponsor his or her spouse for a family-based immigrant visa by filing a Form I-130 with the applicable accompanying application.[65] Furthermore, if an applicant and his or her spouse were married in a state that recognizes same-sex marriage but live in a state that does not, they are still eligible to file an immigration petition based on marriage.[66]

4. Family Military and Veterans' Benefits Versus State Law

The *Windsor* ruling will have an impact on veterans' benefits as well, particularly when viewed in light of other recent federal case law that challenged application of Title 38 and Section 3 of DOMA.[67] Federal and state funds provide veterans' benefits.[68] Married same-sex couples cannot be denied state veterans' spousal benefits based on the ruling from the United States District Court for the Central District of California in *Cooper-Harris v. United States*, which granted the plaintiff's Motion for Summary Judgment alleging the unconstitutionality of Section 3 of DOMA and Sections 101(3) and 101(31) of Title 38.[69] The ruling stated that though the standard of scrutiny of sexual orientation is unsettled in the Ninth Circuit,[70] a rational basis analysis was sufficient

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[64] *Id.*

[65] *Id.* ("Your eligibility to petition for your spouse, and your spouse's admissibility as an immigrant at the immigration visa application or adjustment of status stage, will be determined according to applicable immigration law and will not be automatically denied as a result of the same-sex nature of your marriage.").

[66] *Id.* ("In evaluating the petition, as a general matter, USCIS looks to the law of the place where the marriage took place when determining whether it is valid for immigration law purposes. That general rule is subject to some limited exceptions under which federal immigration agencies historically have considered the law of the state of residence in addition to the law of the state of celebration of the marriage. Whether those exceptions apply may depend on individual, fact-specific circumstances. If necessary, we may provide further guidance on this question going forward.").

[67] *Attorney General Holder Announces Move to Extend Veterans Benefits to Same-Sex Married Couples*, U.S. DEP'T OF JUST.: OFF. OF PUB. AFF. (Sept. 4, 2013), http://www.justice.gov/opa/pr/2013/September/13-ag-991.html.

[68] *See State Veteran's Benefits*, MILITARY.COM, http://www.military.com/benefits/veteran-state-benefits/state-veterans-benefits-directory.html (last visited Dec. 1, 2013).

[69] Cooper-Harris v. United States, No. 2:12-00887-CBM (AJWx), 2013 WL 4607436, at *3 (C.D. Cal. Aug. 29, 2013).

[70] *Id.*

in that case because there was not even a rational basis to uphold Title 38,[71] and Section 3 was declared unconstitutional by *Windsor*.[72] The court determined "the exclusion of spouses in same-sex marriages from veterans' benefits is not rationally related to the goal of gender equality."[73] Furthermore, that court found, "[t]he denial of benefits to spouses in same-sex marriages is not rationally related to any of these military purposes."[74] *Cooper-Harris* involves Cooper-Harris, a female veteran who in 2003 was honorably discharged after serving in Iraq and in 2008 was validly married to a woman.[75] Cooper-Harris receives monthly U.S. Department of Veterans Affairs ("VA") disability checks for her multiple sclerosis; she currently receives $1,478 per month and argued that her marriage ought to be recognized by the VA, allowing her to receive $124 more each month.[76] Per the decision, veterans' spousal benefits cannot be denied to same-sex spouses, regardless of state law on marriage.[77] "Each state manages its own benefits,"[78] and it is unclear how *Windsor* will work to require more states to provide state benefits to spouses of veterans of same-sex marriages.

Several states are refusing to process federally ordered benefits for same-sex couples based on the fact that state agencies must abide by state laws. In Texas, for example, a Texas Army National Guard officer who was validly married to her female partner in California in 2008 was told the State of Texas would not issue her spouse a military spousal identification card, and she must obtain that card at a federal military base to "register for the same federal marriage benefits provided to wives and husbands of heterosexual service members."[79]

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[71] *Id.*

[72] *Id.* at *2.

[73] *Id.* at *4.

[74] *Id.*; *see also* Adam Serwer, *Gay Couple Deserves Veterans' Benefits, Court Rules*, MSNBC (Aug. 29, 2013), http://www.msnbc.com/msnbc/gay-couple-deserves-veterans-benefits-court.

[75] M. Alex Johnson, *Federal Judge Orders the VA to Obey Supreme Court on Same-Sex Benefits*, NBCNEWS (Aug. 30, 2013), http://usnews.nbcnews.com/_news/2013/08/30/20251949-federal-judge-orders-va-to-obey-supreme-court-on-same-sex-benefits?lite.

[76] *Id.*

[77] *See* Charlie Savage, *V.A. to Provide Spousal Benefits to Gays, Administration Says*, N.Y. TIMES, Sept. 4, 2013, http://www.nytimes.com/2013/09/05/us/va-to-provide-spousal-benefits-to-gays-administration-says.html?_r=0.

[78] *State Veteran's Benefits*, *supra* note 68.

[79] Richard A. Oppel, Jr., *Texas and 5 Other States Resist Processing Benefits for Gay Couples*, N.Y. TIMES, Nov. 10, 2013, http://www.nytimes.com/2013/11/11/us/texas-and-5-other-states-resist-processing-benefits-for-gay-couples.html?hp&_r=0.

> Texas is one of six states [along with Georgia, Louisiana, Mississippi, Oklahoma, and West Virginia] refusing to comply with Defense Secretary Chuck Hagel's order that gay spouses of National Guard members be given the same federal marriage benefits as heterosexual spouses. Mr. Hagel's decree, which applies to all branches of the military, followed the Supreme Court's ruling in June that struck down part of the Defense of Marriage Act that had prohibited the federal government from recognizing same-sex marriages . . . . Each [state] has cited a conflict with state laws that do not recognize same-sex marriages. While the president has the power to call National Guard units into federal service — and nearly all Guard funding comes from the federal government — the states say the units are state agencies that must abide by state laws. Requiring same-sex Guard spouses to go to federally owned bases "protects the integrity of our state Constitution and sends a message to the federal government that they cannot simply ignore our laws or the will of the people," Gov. Mary Fallin of Oklahoma said last week. But the six states are violating federal law, Mr. Hagel told an audience recently. "It causes division among the ranks, and it furthers prejudice," he said. Mr. Hagel has demanded full compliance, but Pentagon officials have not said what steps they would take with states that do not fall in line.[80]

Windsor has altered VA regulations in a manner helpful for veterans such as Cooper-Harris, and it will certainly bring to fruition the desired outcomes for similar rulings, as at least one district has set the precedent that Title 38 can no longer be used to deny benefits.[81]

5. ERISA Versus State Law

The Employee Retirement Income Security Act ("ERISA") is a federal law that requires private employers to abide by minimum standards regarding employee retirement accounts.[82] Based on general principles of conflict of law theory, a family matter requires state law to apply in cases of regulatory conflict.[83] An administrative or incidental issue under a law like ERISA should work to apply federal law.[84] Integrating the *Windsor* ruling with ERISA could work to force a state that recognizes the conjugal definition of marriage only to, for ERISA purposes, also provide for retirement benefits for same-sex married couples.

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[80] *Id.*

[81] Cooper-Harris v. United States, No. 2:12-00887-CBM (AJWx), 2013 WL 4607436 (C.D. Cal. Aug. 29, 2013).

[82] *See The Employee Retirement Income Security Act (ERISA)*, U.S. DEP'T. OF LABOR, http://www.dol.gov/compliance/laws/comp-erisa.htm (last visited Nov. 3, 2013).

[83] *See generally* W. Burlette Carter, *The Federal Law of Marriage: Deference, Deviation, & DOMA*, 21 AM. U. J. GENDER, SOC. POL'Y & L. 705 (2013).

[84] *Id.*

These are just a few basic problems of federal law in conflict with state law that have arisen under *Windsor*. Other conflicts also exist, as the following parts set forth.

B. *State Versus State*

The Supreme Court ruling in *Windsor* will have a collateral effect on how states work together with each other's differing laws.[85] How this effect plays out will be based on an application of conflicts of laws principles and will focus on two key areas: recognition of out-of-state marriages and interstate mobility.

1. Recognition of Out-of-State Marriages

The Full Faith and Credit Clause of the United States Constitution requires that each state afford full faith and credit to the laws and regulations of every other state.[86] How full faith and credit will work between the states in the wake of *Windsor* is a significant question; as Professor Strasser discusses, this is particularly important in light of the continuing validity of DOMA's Section 2.[87] At minimum, traditional issues of full faith and credit and state social policy[88] have not been settled by *Windsor*, and the extent to which they have been disturbed, especially by the Court's dicta regarding marriage,[89] remains to be seen.

2. Interstate Mobility

Couples moving from state to state may face concerns regarding the interstate mobility of their marriages. As discussed above, the *Windsor* ruling creates the issue of whether federal benefits follow domiciliary state law when couples move interstate.[90] Similarly, since Section 2 of DOMA remains in place, same-sex couples risk losing

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[85] Avoidance of this type of conflict underlies the DOMA provision struck down by the Court, as articulated in Justice Scalia's dissent. "To choose just one of the defender's arguments, DOMA avoids difficult choice-of-law issues that will now arise absent a uniform federal definition of marriage." United States v. Windsor, 570 U.S. __, __, 133 S. Ct. 2675, 2708 (2013) (Scalia, J., dissenting).

[86] U.S. CONST. art. IV, § 1.

[87] *See* Strasser, *supra* note 11, at __.

[88] *See generally* Note, *The Full Faith and Credit Clause and Conflicts of Social Policy*, 43 YALE L.J. 648 (1934).

[89] *E.g. Windsor*, 133 S. Ct. at 2696 (noting the importance of recognizing state-conferred dignity).

[90] *See id.* at 2708 (Scalia, J., dissenting).

eligibility for state benefits.[91] When a couple moves from a state that recognizes their marriage to a state that does not, it is quite likely that state benefits they enjoyed in the original state will not continue in the new state of residence.[92] For example, State A recognizes the Smith same-sex marriage and affords that couple special auto insurance discounts because of their marriage. When the Smiths move to State B, however, which does not recognize same-sex marriage, they will not be able to enjoy those auto insurance discounts. Whether their originally state-granted marital benefits will follow them to the new non-recognizing state is a legitimate question, and one that will likely bring further litigation. Another example might include kinship relationships, as Professor Fitzgibbon discusses.[93] The relationships of consanguinity recognized by State A, such as the parent of a parent being recognized as a child's grandparent, may not transfer to State B that does not recognize same-sex marriages.[94] These relationships can be important for custody petitions in a family court, where State A may endorse those relationships, while State B does not find those interests to be supportive of the public policy of the state or in the best interests of a child.[95] Another clear example encompasses the residency requirements for divorce.[96]

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[91] *See* Jill Di Sciullo, *Recent Trends Affecting Same-Sex Marriage in the United States*, *in* Understanding the Legal Issues Surrounding Same-Sex Marriage: Leading Lawyers on Adapting to Recent Supreme Court Decisions Impacting Family Law 158, 159 (2013).

[92] *Id.*

[93] *See generally* Scott Fitzgibbon, *The Implications of* United States v. Windsor *and* Hollingsworth v. Perry *for the Sustenance of the American Kinship System*, *Elon Law Review* Symposium 2013: The Effects of *Windsor* and *Perry* on Constitutional Law, Family Law, Tax Law, and Society (2013).

[94] *Id.*

[95] For example, Virginia's person of legitimate interest concept provides an avenue for grandparents to pursue a custody or visitation petition. That petitioner must generally be one of a list of kin to pursue a claim to a child's best interests based on being a person of legitimate interest. Va. Code Ann. § 20-124.2(B) (West 2013). What qualifies as a grandparent for Virginia is not the same as what qualifies as a grandparent for New York. This becomes all the more salient when a parent objects to a grandparent petition for visitation. *See generally* Dennis M. Hottell & Allyssa D. Emery, *Grandparent and Third Party Custody Litigation*, Hottell Malinowski Group, P.C. (Nov. 6, 2010), http://www.hottell.com/Articles/Grandparent_CLE_Outline_101510.pdf.

[96] *See* Rebecca Perry, *North Carolina Same-Sex Wedlock: The Intersection of* United States v. Windsor *With North Carolina's Statutory and Constitutional Prohibitions on Same-Sex Marriage*, 6 Elon L. Rev. __ (2014) (describing the state residency requirements for divorce).

These two areas of conflict, state versus federal and state versus state, expose the ways that *Windsor* fails to unequivocally advance or substantially simplify federalism. Regarding state-federal conflict, *Windsor* shifts the points of conflict with federal law from states that recognize same-sex marriage to those that do not, while adding additional inconsistencies within the federal government as to which state's law will control.[97] In the state-state arena, *Windsor* leaves full faith and credit and accompanying state benefit issues unresolved for couples traveling interstate.[98] Matters become all the more entangled when considered in light of a state's strong public policy regarding family law.

C. *Family Law Policy: Can States Still Define Marriage as One Man and One Woman?*

The foregoing parts lay out the federalism complications that result from the holdings of *Windsor* and *Perry*. However, since *Perry* did not reach the merits, and the holding of *Windsor* leaves states legally free to define marriage as between one man and one woman, as discussed below,[99] much of the actual impact of these cases upon state power derives from the rhetoric, or rationale, of the cases, rather than their formal holdings. The impact of the rhetoric is particularly salient for the thirty-six states that have policy supporting conjugal marriage,[100] especially considering the lawsuits that have been filed against state marriage amendments[101] and the challenge to legalized same-sex marriage that has been dropped because of the political pressure of *Windsor*.[102] This part first addresses what the Court said about continu-

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[97] *See supra* Part II.A.

[98] *See supra* Part II.B.

[99] *See infra* Part II.C.1.a.

[100] Thirty states have formal constitutional definitions for marriage as between one man and one woman; six more states have public policy supporting marriage between one man and one woman in code, case law, or common law. *See* Lynn D. Wardle, *Sticks and Stones:* Windsor*, the New Morality, and its Old Language*, 6 ELON L. REV. __, __ (2014) (setting out the variety of state law on marriage).

[101] *See, e.g.*, Plaintiff's First Amended Complaint for Declaratory, Injunctive, and Other Relief, Bostic v. Rainey, No. 2:13-cv-395 (E.D. Va. Sept. 3, 2013); *see also* Brief of Professors Lynn D. Wardle et al. as Amici Curiae Supporting Defendants' Motions for Summary Judgment, Bostic v. Rainey, __ F. Supp. 2d ___ (Oct. 29, 2013) (proffering the importance for Virginia's families to be a place where a child will not be denied the benefits of having a father or a mother).

[102] See David Masci, *Supreme Court's DOMA Decision Driving Same-Sex Marriage Efforts in States*, PEW RES. CTR. (Oct. 21, 2013), http://www.pewresearch.org/fact-tank/2013/10/21/supreme-courts-doma-decision-driving-same-sex-marriage-efforts-in-states (compar-

ing state power to define marriage, looking separately at its rule and its rhetoric. Next, this part examines the implications of the Court's statements for state family law policy, considering both the consequent legal and political pressures that states choosing to sanction traditional marriage will face and the impact of a resultant spread of same-sex marriage upon family law.

1. What the Court Said About State Power

a. *The Rule*

Nothing in the express holding in *Windsor* prohibits states from continuing to define marriage as a union of one man and one woman.[103] As described in Part I, the majority went to great lengths to highlight the federalism aspects of the case.[104] Further, to the extent it applied a due process analysis, the majority stopped short of declaring same-sex marriage an inherent or fundamental right, instead basing its decision on the fact that same-sex marriage is a dignity conferred by states.[105] From an equal protection standpoint, the Court bemoans that classes of state-sanctioned marriages, not of couples generally, received disparate treatment.[106] Whether the holding depends on equal protection or due process, the Court is explicit about one thing: "[t]his opinion and its holding are confined to those lawful [state-sanctioned] marriages."[107]

Thus, the case technically allows for states to define marriage as a heterosexual union if they so choose. Remarkably, the Court's majority opinion did not even address "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."[108] Though the majority did not expressly choose a standard, the cases it cited as authority all applied the rational basis test, which gives some indication that rational basis is the standard the

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ing state differences in marriage policy and noting particularly New Jersey Governor Chris Christie's decision "to drop the state's challenge" to its high court ruling legalizing same-sex marriage in *Garden State Equality v. Dow*, 82 A.3d 336 (N.J. Super. Ct. 2013)).

[103] United States v. Windsor, 570 U.S. __, 133 S. Ct. 2675 (2013).

[104] *See supra* Part I.

[105] *See Windsor*, 133 S. Ct. at 2695-96.

[106] *Id.*

[107] *Id.* at 2696.

[108] *Id.* at 2706 (Scalia, J., dissenting).

Court settled on.[109] The Court similarly neglected to address the reasons proffered by the litigants for the existence of a rational basis or higher interest.[110] The Court cited the imposition of inequality as the primary motivation for DOMA,[111] refusing to look a step deeper and consider why that inequality was imposed. Many of the reasons articulated by DOMA's proponents relate directly to the family and remain available, though controversial, justifications for states upholding traditional marriage.[112]

b. *The Rhetoric*

The rationale employed by the Court in *Windsor* is strong, and it would have powerful effect if applied to states. Though challenging to identify clearly, the rationale of the case is chiefly discernible in its dicta or rhetoric. The Court proclaims that, boiled down, Section 3 of DOMA "demeans" the couples affected,[113] has "no legitimate purpose [which] overcomes the purpose and effect to disparage and to injure" those couples, and is therefore unconstitutional.[114] The implications of this rationale for states is unclear, as evidenced by the different conclusions Chief Justice Roberts and Justice Scalia come to on the matter.[115]

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[109] *See id.* Alternatively, this could indicate an opinion that the law would fail even a rational basis test and thus invocation of a higher standard would be unnecessary. *See, e.g.*, Order Granting Plaintiff's Motion for Summary Judgment at 3, Cooper-Harris v. United States, No. 2:12-00887-CBM (AJWx), 2013 WL 4607436 (C.D. Cal. Aug. 29, 3013) ("'[W]e do not need to decide whether heightened scrutiny might be required' because as discussed below Title 38 is unconstitutional under rational basis scrutiny.") (quoting Diaz v. Brewer, 656 F.3d 1008, 1012, 1015 (9th Cir. 2011)). Also, the district court opinion, which the circuit court affirmed in its opinion later affirmed by the Supreme Court, applied heightened scrutiny. *See Windsor*, 133 S. Ct. at 2684.

[110] *See Windsor*, 133 S. Ct. at 2675.

[111] *See id.* at 2695.

[112] *See, e.g.*, Brief on the Merits of The Partnership for New York City as Amicus Curiae Supporting Respondent and Affirmance of the Second Circuit at 17-19, United States v. Windsor, 570 U.S. __, 133 S. Ct. 2675 (2013) (No. 12-307); Brief of the States of Indiana, Alabama et al. as Amici Curiae Supporting Intervenor-Appellant at 23-36, Windsor v. United States, 699 F.3d 169 (2d Cir. 2012) (Nos. 12-2335, 12-2435); Brief of American College of Pediatricians as Amicus Curiae Supporting Intervenor-Appellant at 3, Windsor v. United States, 699 F.3d 169 (2d Cir. 2012) (offering "important evidence suggesting children derive substantial benefits from the unique contributions of both men and women, mothers and fathers, as opposed to just any two adults"); *Windsor*, 133 S. Ct. at 2720 (Alito, J., dissenting) (indicating Justice Alito's assumption that Congress passed DOMA "in part . . . because it viewed marriage as a valuable institution to be fostered").

[113] *Windsor*, 133 S. Ct. at 2694.

[114] *Id.* at 2696.

[115] *See infra* notes 116-19 and accompanying text.

Chief Justice Roberts accepts the Court's profession that the opinion applies only to state-recognized marriages, asserting that "[t]he Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States, in the exercise of their 'historic and essential authority to define the marital relation,' may continue to utilize the traditional definition of marriage."[116] He expresses confidence that "state power to define marriage, state sovereignty, and state diversity," federalism-based arguments relied on by the Court in reaching its determination, will support state choices to recognize only heterosexual marriage in the future.[117] In contrast, Justice Scalia's opinion exudes far less optimism. Scalia sees the Court's seven-page tribute to states' power to define marriage as a farce, since the Court ends up saying, "[I]t is unnecessary to decide whether this federalism intrusion on state power is a violation of the Constitution."[118] He speculates that the majority has relied on the federalism rhetoric to shield the reality that it has laid the groundwork to extend its holding to state laws excluding same-sex marriage at a later date.[119] Distrusting the Court's assertion that "[t]his opinion and its holding are confined" to state-sanctioned marriages, he discusses how *Lawrence*[120] was expanded to justify *Windsor*, though the *Lawrence* Court explicitly said its holding was not related to any official recognition of homosexual relationships.[121]

Only time will tell if Roberts or Scalia has more accurately assessed the future construction of *Windsor*'s dicta and rhetoric in regard to whether states may continue creating a separate status for heterosexual unions. Two considerations weigh in Scalia's favor, however. First, it is not a far leap, logically, to apply the dicta to states. For instance, the rationale that "[t]he avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon *all who enter into same-sex marriages*"[122] can be used to invalidate state marriage laws simply by applying it to "all who [seek to]

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[116] *Windsor*, 133 S. Ct. at 2696 (Roberts, C.J., dissenting) (citation omitted).

[117] *Id.* at 2697. Note that Alito seems to share this sentiment, as he also emphasizes preexisting state recognition as key to the Court's holding, *id.* at 2720 (Alito, J., dissenting), and says the Court relied (at least in part) on "the States' sovereign prerogative to define marriage" in reaching its conclusion. *Id.* at 2719.

[118] *Id.* at 2692 (Scalia, J., dissenting).

[119] *Id.*

[120] Lawrence v. Texas, 539 U.S. 558 (2003).

[121] *Windsor*, 133 S. Ct. at 2709 (Roberts, C.J., dissenting) (emphasis added) (quoting Kennedy, J., writing for the majority, at 2696).

[122] *Id.* at 2693 (majority opinion) (emphasis added).

enter into same-sex marriages."[123] Further, although the logic of the case happens to be applied to the case of state-sanctioned marriages, the opinion is void of any explicit reason why it should be limited to those marriages.[124] As *Windsor* did not directly address whether states have a rational basis for adopting a heterosexual conception of marriage,[125] litigation rehashing many of the arguments presented to the Court in *Windsor* can be expected to continue. The Court clearly protected states' rights to expand marriage,[126] and while it did not directly strip states of the right to define marriage traditionally, it left states that choose to do so exposed to legal and political challenges.

2. What This Means for State Family Law Policy

a. *Legal and Political Pressure Upon States to Redefine Marriage*

The indirect impacts of *Windsor* will be evident in the coming months as challenges to state laws defining marriage as a heterosexual union are fielded by courts and ballot boxes across the country. At least seventeen lawsuits have been filed against state marriage amendments, many of them just in the two months since the U.S. Supreme Court handed down its historic ruling on marriage in the summer of 2013.[127] Marriage amendments in the following states have been challenged: Arkansas, Hawaii, Illinois, Kentucky, Louisiana, Michigan, Missouri, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Utah, and Virginia.[128] In South Carolina, the latest to be added to that list, a lesbian couple is challenging a constitutional amendment approved by voters in

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[123] *Id.* at 2681. Scalia provides similar examples of slight substitutions within the legal framework presented by the majority in *Windsor* that result in states being required to recognize same-sex marriages. *Id.* at 2709-10 (Scalia, J., dissenting). He introduces these examples by positing, "[T]he real rationale of today's opinion . . . is that DOMA is motivated by 'bare . . . desire to harm' couples in same-sex marriages. How easy is it, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status." *Id.* at 2709 (citation omitted).

[124] The majority provides no guidance as to why, when the federal government cannot promote heterosexual marriage by putting "a thumb on the scales" of state policy dilemmas because they think heterosexual marriage is good for society, *id.* at 2693 (quoting Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 12-13 (1st Cir. 2012)), states may still be permitted to make a parallel policy judgment.

[125] *Windsor*, 133 S. Ct. at 2675.

[126] *Id.* at 2692.

[127] Kim Trobee, *Lawsuit Challenges State Marriage Amendment*, CITIZENLINK (Sept. 4, 2013), http://www.citizenlink.com/2013/09/04/lawsuits-test-the-constitutionality-of-marriage-laws/.

[128] *Id.*

2006.[129] The complaint states that the state's marriage amendment infringes on the couple's right to due process and equal protection and violates the Full Faith and Credit Clause because it does not recognize same-sex marriage licenses from other states.[130] *Windsor*'s likely impact on these suits, as well as upon legislative initiatives, can be seen by looking at how the Court's rules and rhetoric together encourage states to expand marriage. Even though the holdings do not directly impact the authority of states to define marriage traditionally, the rhetoric and rationale of the cases work to functionally erode their ability to do so.

Windsor lent the weight of the nation's highest court to the arguments favoring marriage expansion, and the Court applied further pressure on states by hinting, if not effectively promising, that it would deliver a ruling requiring states to recognize same-sex marriage if given the opportunity.[131] At least, then, the Court's rhetoric arms proponents of same-sex marriage with legal arguments that, while not binding, are backed by the dignity of the Supreme Court and are easily transferable to the state law context.[132] Such arguments may interject a new precariousness into the stance of states that have resisted marriage expansion and may nudge states that have been on the fence with reasons to go ahead and switch over.[133] At most, the Court offered a

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[129] Verified Complaint for Declaratory, Injunctive, and Other Relief, Bradacks v. Nimrata, No. 3:13-cv-02351-JFA (D.S.C. Sept. 23, 2013).

[130] Trobee, *supra* note 127.

[131] *See supra* notes 118-19, 121 and accompanying text.

[132] United States v. Windsor, 570 U.S. __, __, 133 S. Ct. 2675, 2710 (2013) (Scalia, J., dissenting) ("[T]he majority arms well every challenger to a state law restricting marriage to its traditional definition.").

[133] *See, e.g.*, Bishop v. United States *ex rel.* Holder, No. 04-CV-848-TCK-TLW, 2014 WL 116013 (N.D. Okla. Jan. 14, 2014). The court declared, "There is no precise legal label for what has occurred in Supreme Court jurisprudence beginning with *Romer* in 1996 and culminating in *Windsor* in 2013, but this Court knows a rhetorical shift when it sees one." *Id.* at *66. The court not only recognized the rhetorical import of *Windsor*, but responded to it, as evidenced by the way it arrived at its holding that "Oklahoma's constitutional amendment limiting marriage to opposite-sex couples violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution." *Id.* at *1. While acknowledging that *Windsor* is not determinative because it does not address a state marriage law, *id.* at *35, the court cited *Windsor* for the principle that "courts . . . must be wary of whether 'defending' traditional marriage is a guise for impermissible discrimination against same-sex couples." *Id.* at *37-38. On its way to finding that Oklahoma's law was impermissible discrimination, the court relied on *Windsor* to demonstrate defense of morality is not a sufficient reason for restricting marriage, *id.* at *53, and excluding same-sex couples from marriage is not rationally related to the state's interest in promoting "ideal" family situations, *id.* at *62.

promise of things to come.[134] Such a promise was not explicit, and indeed Justice Kennedy declared in his dissenting opinion in *Perry*, "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."[135] However, at least two of the dissenting Justices in *Windsor* expressed doubt in the Court's future restraint.[136] Since the logic of the Court lends itself to application of state laws defining marriage,[137] and since the Court at a minimum hinted at how it would rule if confronted with a state law case such as *Perry*,[138] the Court has applied legal pressure upon states to allow same-sex marriage.

Some state authorities may be convinced by the Court's logic and rationale that state preclusion of same-sex marriage violates the United States Constitution, and others may be induced to allow same-sex marriage merely because they are convinced that the Supreme Court would overrule an alternative law. Such impacts of *Windsor*'s exertion of legal pressures that extend beyond its holding are only beginning to become evident, as demonstrated by the post-*Windsor* proliferation of challenges to state marriage amendments described previously.[139]

The rhetoric of *Windsor* can be expected to impact state definitions of marriage in a second way, in addition to through legal pressure, by promoting public support for state-recognition of same-sex marriage—support that, in the legislative context, manifests as political pressure. Legal validation of a practice sends a powerful message to

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[134] *See supra* notes 118-19, 121 and accompanying text.

[135] Hollingsworth v. Perry, 570 U.S. __, __, 133 S. Ct. 2652, 2674 (2013) (Kennedy, J., dissenting).

[136] Scalia called out the Court for a supposed "pretense that today's prohibition of laws excluding same-sex marriage is confined to the Federal Government," a pretense which, he said, left "the second, state-law shoe to be dropped later, maybe next Term." *Windsor*, 133 S. Ct. at 2705 (Scalia, J., dissenting). Alito apparently shared that apprehension, for he thought it necessary to express, "To the extent that the Court takes the position that the question of same-sex marriage should be resolved primarily at the state level, I wholeheartedly agree. I hope that the Court will ultimately permit the people of each State to decide this question for themselves." *Id.* at 2720 (Alito, J., dissenting). Even Roberts implicitly recognized the potential for expansion of the opinion in one form or another when he specified that he wrote "to highlight the limits of the majority's holding and reasoning today, lest its opinion be taken to resolve . . . a question that all agree, and the Court explicitly acknowledges, is not at issue." *Id.* at 2697 (Roberts, C.J., dissenting).

[137] *Id.* at 2689-92 (majority opinion).

[138] *Id.*

[139] *See, e.g.*, Trobee, *supra* note 127 (discussing those cases).

society.[140] The professed purpose of *Windsor* was to decrease stigma against homosexual couples, and the opinion recognized that the state's power to define marriage enhances dignity, status, and protection for those it includes.[141] Even *Perry* furthered the cause of marriage expansion, for, although any doctrinal legacy of the Supreme Court's disposition is negligible for purposes of this article, the case fed a recent surge of public support for same-sex marriage.[142] Proponents of

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[140] Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 397-98 (1997) ("[L]aw can strengthen a norm merely by 'expressing' it, without providing any enforcement. . . . That law has an 'expressive' or symbolic function is an old idea. This view resists the simple claim that law directs behavior only because the state inflicts a cost on violators. Of course, law alters behavior when the state threatens to enforce its rules, at least ultimately, by force. But law also expresses normative principles and symbolizes societal values, and these moralizing features may affect behavior."); Jean Bethke Elshtain, *"There Oughta Be A Law"—Not Necessarily*, 58 EMORY L.J. 71, 72 (2008) (noting that "[l]aw helps to habituate human beings to virtue" and highlighting St. Thomas Aquinas's "high view of law and of law's normative function"); *see also* Paul Rock, *Rules, Boundaries and the Courts: Some Problems in the Neo-Durkheimian Sociology of Deviance*, 49 BRIT. J. OF SOC., 586, 589-90 (1998) (relating the deliberate solemnity and formality of court proceedings to the role of courts, particularly criminal courts, as "*signifying* institutions" that "may have done much to redefine the formally-accepted meanings of gender, age, reason, causality and life itself"); *cf.* Allison Linn, *For First Time, Voters Back Gay Marriage in Statewide Votes*, NBC POLITICS (Nov. 6, 2012, 9:51 PM), http://nbcpolitics.nbcnews.com/_news/2012/11/07/14978747-for-first-time-voters-back-gay-marriage-in-statewide-votes (sharing remarks from a vice president of the Human Rights Campaign, vigorous supporters of marriage expansion, who credited, at least partially, President Obama's public support of same-sex marriage for the groundbreaking popular vote wins for same-sex marriage in 2012).

[141] *Windsor*, 133 S. Ct. at 2692.

[142] Susan Page, *Poll: Support for Gay Marriage Hits High After Ruling*, USA TODAY (July 1, 2013), http://www.usatoday.com/story/news/politics/2013/07/01/poll-supreme-court-gay-marriage-affirmative-action-voting-rights/2479541/ ("The court's decisions that opened the door to gay marriage in California and struck down a law that barred federal benefits for same-sex couples may well have boosted support in a country that was already moving in favor of same-sex marriage. 'Neither one of those decisions is as a legal matter a huge gay rights victory,' says Tom Goldstein, a Harvard Law School professor and publisher of SCOTUSblog, which analyzes the high court. 'But it's the moral message from the court that these unions are entitled to equal respect . . . that is probably the lasting legacy of the decisions and is probably going to play a significant role in public opinion.'"); Diana Richmond, Hollingsworth v. Perry *and* U.S. v. Windsor*: After Jubilation, What?*, LEXISNEXIS EMERGING ISSUES ANALYSIS (2013) (commenting that the rise in public support "may be the real accomplishment of the *Hollingsworth* case"); *see also* Brynn Gelbard & Lavi Soloway, *Winning the Future, LGBT Americans Produce Groundswell of Support for Marriage Equality in Advance of Supreme Court Rulings*, HUFFPOST GAY VOICES (Mar. 20, 2013, 8:25 PM), http://www.huffingtonpost.com/brynn-gelbard/marriage-equality-support_b_2917388.html (highlighting the remarkable shift in public opinion); Rich Morin, *Study: Opposition to Same-Sex Marriage May be Understated in Public Opinion Polls*, PEW RES. CTR. (Sept. 30, 3013), http://www.pewresearch.org/fact-tank/

all manner of marriage expansion recognize that public acceptance is a crucial first step to legal validation.[143] The goals of advocates who look to the legalization of same-sex marriage to "help de-sexualize and de-horrify adult gay identity to the masses" and "perform the cultural work of rendering [gays and lesbians] 'socially normal,'"[144] will likely be realized, at least in part, as a result of *Windsor*. This effect of dignifying same-sex marriage in the public mind is a consequence of both the direct holding and the dicta of *Windsor*, but the impact of this greater public support could push states beyond the bounds of *Windsor*'s holding by prompting the needed support for state legislatures to redefine marriage.[145]

Viewed together, the ruling and rhetoric of *Windsor* indicate that states are permitted to continue upholding traditional marriage, if they choose, but to actually do so they must overcome some serious hurdles, specifically the increased legal and political pressures described above.[146]

2013/09/30/opposition-to-same-sex-marriage-may-be-understated-in-public-opinion-polls/ (reporting findings that "pre-election surveys consistently underestimated opposition to [same-sex marriage] laws by 5 to 7 percentage points," presumably due to "'social desirability' bias—the tendency of people to give what they believe is the socially acceptable view rather than disclose their true feelings about sensitive topics").

[143] *See, e.g.*, Emanuella Grinberg, *Polyamory: When Three Isn't a Crowd*, CNN (Oct. 26, 2013, 10:01 AM), http://www.cnn.com/2013/10/26/living/relationships-polyamory/index.html ("We want to promote the idea that any relationship is valid as long as it is a choice made by consenting adults . . . . In this regard, and as in most things, promoting public acceptance is the first step.").

[144] Helen M. Alvaré, *The Turn Toward the Self in the Law of Marriage & Family: Same-Sex Marriage & Its Predecessors*, 16 STAN. L. & POL'Y REV. 135, 174 (2005) (referencing research conclusions drawn from interviews with dozens of same-sex couples).

[145] *E.g.*, Act 1, 2013 Haw. 2d Sp. Sess. L. (S.B. 1) (legalizing same-sex marriage in Hawaii and offering explicit recognition of the *Windsor* decision); *see also* Mark Z. Barabak, *Movement to Expand Gay Marriage Tested in Several More States*, L.A. TIMES, Oct. 24, 2013, 11:32 AM, http://www.latimes.com/nation/politics/politicsnow/la-pn-movement-to-expand-gay-marriage-tested-20131024,0,71704.story#axzz2j1t789qW (reporting movements on marriage expansion legislation in Illinois and Hawaii in the months following *Windsor* and *Perry* and remarking that "the shift in the political dynamic has been striking").

[146] 133 S. Ct. 2675. *Windsor* exerted additional pressures upon states beyond those discussed. For instance, in addition to recognizing that "*Windsor* is of interest because of what it suggests about how federal courts will rule on any constitutional challenge to a state's refusal of legal marriage recognition for same-sex couples," Professor James Dwyer notes it is also of interest because of "the additional pressure on currently non-recognizing states it creates by substantially increasing the practical benefits for same-sex couples of receiving state legal recognition of their unions." Federal benefit eligibility is now at stake in each state's marriage debate, and Professor Dwyer attributes the

b. *Consequences for Peripheral Aspects of Family Law*

The direct impacts of *Windsor* and *Perry* upon family law have been discussed in terms of resultant and residual state-federal and state-state complications and in terms of the implications of the underlying rhetoric for states' ability to choose whether to define marriage traditionally or more expansively. Yet, the discussion of the impact of *Windsor* and *Perry* upon family law remains incomplete. If same-sex marriage becomes more widespread as a consequence of *Windsor* and *Perry*, either through judicial intervention based on *Windsor*'s legal pressures or through legislative action resulting from anticipatory acquiescence to legal pressure or increased political pressure arising from new public acceptance, changes will follow. These changes will be evident in family and society, as well as in family law.

Change to family and society as a consequence of marriage expansion is inevitable, but the specifics of that change are unpredictable. As Justice Alito stated, "change in family structure and in the popular understanding of marriage and the family can have profound effects," and yet, if acceptance of same-sex marriage becomes widespread, "[t]he long-term consequences of this change are not now known and are unlikely to be ascertained for some time to come."[147]

It is generally recognized that continued expansion of marriage will affect marriage as an institution, either strengthening or weakening it.[148] Justice Alito referenced several sources arguing that marriage expansion bolsters the institution.[149] On the other hand, advocates on both sides of the same-sex marriage debate maintain that marriage expansion undermines the institution of marriage.[150] The exact way mar-

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September 2013 expansion of New Jersey's marriage law to that *Windsor*-induced pressure. E-mail from James Dwyer, Arthur B. Hanson Professor of Law, William and Mary Law School, to author (Dec. 31, 2013) (on file with author).

[147] *Windsor*, 133 S. Ct. at 2715 (Alito, J., dissenting) (citing to a study demonstrating a drastic rise in divorce rates following the application of no-fault divorce rates and analyzing the effects of that policy on society decades later).

[148] *Id.*

[149] *Id.* at 2716 (citing ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY 202–03 (1996); JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA 94 (2004)).

[150] *Id.* at 2715 n.6 (citing Victoria A. Brownworth, *Something Borrowed, Something Blue: Is Marriage Right for Queers?*, *in* I DO/I DON'T: QUEERS ON MARRIAGE 53, 58–59 (G. Wharton & I. Phillips eds., 2004) ("Former President George W. 'Bush is correct . . . when he states that allowing same-sex couples to marry will weaken the institution of marriage. It most certainly will do so, and that will make marriage a far better concept than it previously has been'") and Ellen Willis, *Can Marriage Be Saved? A Forum*, THE NATION, July 5,

riage will be affected is uncertain, yet it will unquestionably be altered, and the reverberations of those changes will be felt throughout society for generations.

The changes to family law peripheral to marriage that will come as a result of more widespread recognition of same-sex marriages are likewise difficult to predict with precision. States that have already legalized same-sex marriages have seen changes in adoption law;[151] how many parents a child can have;[152] kinship, with less focus on biological family ties;[153] divorce and its incidents;[154] and artificial reproductive technology ("ART") and parentage.[155] As same-sex marriages become more prevalent, demand for ART will naturally rise, which will bring

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2004, at 16 ("celebrating the fact that 'conferring the legitimacy of marriage on homosexual relations will introduce an implicit revolt against the institution into its very heart'").

[151] *See* Karel Raba, *Recognition and Enforcement of Out-of-State Adoption Decrees Under the Full Faith and Credit Clause: The Case of Supplemental Birth Certificates*, 15 ST. MARY'S L. REV. & SOC. JUST. 293, 311-14 (2013) (tracing the development of same-sex adoption law across the states and noting that inability to marry remains a barrier to certain types of adoption in some states); *see also* Bernard Vaughan, *N.Y. Court Allows 'Close Friends' to Adopt Child*, REUTERS (Jan. 8, 2014, 4:07 PM), http://www.reuters.com/article/2014/01/08/us-usa-adoption-newyork-idUSBREA071FO20140108.

[152] 2013 Cal. Legis. Serv. Ch. 564 (S.B. 274) (West) (allowing a judge to find a child has more than two parents).

[153] David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 125-26 (2006) (discussing changes in family law regarding family structure and the expansion of parent-like obligations to those "formerly thought to be outside the circle of family"); *see also* June Carbone & Naomi Cahn, *Which* Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty, 11 WM. & MARY BILL RTS. J. 1011 (2003) (discussing, before the legalization of same-sex marriage, the shift from a biological focus of kinship).

[154] For instance, the Supreme Court of Rhode Island held in *Chambers v. Ormiston*, 935 A.2d 956 (R.I. 2007), that its state family court lacked jurisdiction to hear a divorce case of a couple married out-of-state, but that would no longer be the case since Rhode Island legalized same-sex marriage in 2013.

[155] *Compare In re* Adoption of Sebastian, 879 N.Y.S.2d 677 (Sur. Ct. 2009) (holding, before New York legalized same-sex marriage, that it was appropriate for the genetic mother to adopt the child to establish parentage when she was married to the child's gestational mother), *with* Della Corte v. Ramirez, 961 N.E.2d 601 (Mass. App. Ct. 2012) (holding that a former same-sex spouse was a legal parent despite no biological connection and the statute's use of the term "husband"). *See also* Tiffany L. Palmer, *The Winding Road to the Two-Dad Family: Issues Arising in Interstate Surrogacy for Gay Couples*, 8 RUTGERS J.L. & PUB. POL'Y 895, 907 (2011) (pointing out "legislative restrictions on the recognition of same-sex marriages mean that same-sex couples - even those legally married in a state that allows same-sex marriage - cannot rely upon marital presumptions to confer parental rights," and discussing the interplay of marriage and surrogacy laws).

with it a host of parentage and custody implications.[156] Some state jurisdictions may find they wish to encourage conjugal marriage to deal with plummeting birthrates, something that has become an emerging trend in international family regulation.[157] These are actual implications of *Windsor* that may be experienced by states as a result of the legal and political pressures resulting from the Court's rhetoric.

3. Ideological Shifts in Family Law Under *Windsor* and *Perry*

The most profound effects of *Windsor* upon family law may prove to lie in neither the holding nor the legal and political pressures evoked by its rhetoric. The impact upon family law effectuated by the acceptance of the underlying ideology may far surpass the effects so far discussed. In discussions on the influence of ideological viewpoints on society, "ideas have consequences" resounds as an oft-quoted refrain.[158] Yet, perhaps more of Richard Weaver's seminal work applies here than merely the title. Weaver declared, for instance, "[w]e have for many years moved with a brash confidence that man had achieved a position of independence which rendered the ancient restraints needless."[159] Though some would consider the Court's decision brash, and others would consider it a much-needed, well-reasoned liberation, it is clear

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[156] Palmer, *supra* note 155, at 895-98; *see also* Alvaré, *supra* note 144, at 159-60 nn.129, 131-33 (citing to numerous sources noting the physical, psychological, and social risks of artificial insemination, including the following: Laura Schieve et al., *Low and Very Low Birth Weight in Infants Conceived with Use of Assisted Reproductive Technology*, 346 NEW ENG. J. MED. 731, 731 (2002) ("finding ART to be 'an important contributor to rate of low birth weight in U.S. because it is associated with a higher rate of multiple birth"); Gerald F. Cox et al., *Intracytoplasmic Sperm Injection May Increase the Rise of Imprinting Defects*, 71 AM. J. HUM. GENETICS 162 (2002); E.R. Maher et al., *Beckwith-Wiedemann Syndrome and Assisted Reproduction Technology (ART)*, 40 J. MED. GENETICS 62 (2003); B. Strömberg et al., *Neurological Sequelae in Children Born After In-vitro Fertilization: A Population-based Study*, 359 LANCET 461 (2002) (finding that IVF children face increased risk of cerebral problems—i.e., cerebral paralysis); BENOIT BAYLE, L'EMBRYON SUR LE DIVAN: PSYCHOPATHOLOGIE DE LA CONCEPTION HUMAINE (THE EMBRYO ON THE COUCH: PSYCHOPATHOLOGY OF HUMAN CONCEPTION) 133-41 (2003) (finding that some children born as a result of IVF experience "survivors' syndrome" on reflecting about the fates of their embryonic siblings); *Why I Need to Find My Father*, W. DAILY PRESS, Jan. 23, 2004, at 8 (citing "'feelings of revulsion at the clinical method by which we were produced; a sense of loss and grief for deliberately severed relationships with unknown biological kinfolk; a fear of accidental incest; anger and frustration at the lack of respect shown for our missing genetic origins . . . .'")).

[157] *See, e.g.*, Su-Hyun Lee, *Mom Wants You Married? So Does the State*, N.Y. TIMES, Aug. 4, 2013, http://www.nytimes.com/2013/08/05/world/asia/mom-wants-you-married-so-does-the-state.html.

[158] RICHARD M. WEAVER, IDEAS HAVE CONSEQUENCES (1948).

[159] *Id.* at 2.

the Supreme Court in *Windsor* adopted a view of marriage that supplants ancient, and in its view needless, restraints with a call for independence, the championing of adult autonomy as the basis for marriage.[160] For better or for worse, such a shift will indeed have consequences. To the extent this ideological shift regarding the meaning of marriage takes root, other elements of the definition of marriage will become negotiable, and radical change will become apparent in various other aspects of family law, as well.

The ideological shift embodied in *Windsor* centers on the conception of the meaning of marriage. Both Kennedy's majority opinion and Alito's dissent discuss the two alternative views of marriage, which Alito terms the "conjugal" view and the "consent-based" view.[161] Under the conjugal view, "the institution of marriage was created for the purpose of channeling heterosexual intercourse into a structure that supports child rearing."[162] The link between marriage and procreation is a hallmark of the conjugal view,[163] a view that fundamentally represents society's interest in the ordering of adult relationships for the benefit of children and therefore society as a whole.[164] Thus, the focus of marriage, indeed its very essence, is the family, and consequently children

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[160] United States v. Windsor, 570 U.S. __, 133 S. Ct. 2675 (2013).

[161] *Id.* at 2689 (referring to the "new insight" that leads to state validation of lawful marriage for those "who wish to define themselves by their commitment to each other"); *Id.* at 2718 (Alito, J., dissenting). Others call the majority's perspective the "revisionist view," Sherif Girgis, Ryan T. Anderson, & Robert George, *What is Marriage?*, 34 HARV. J.L. PUB. POL'Y 245, 246 (2010), or "companionate marriage," MARY ANN GLENDON, THE NEW FAMILY AND THE NEW PROPERTY 14-15 (1981).

[162] *Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting).

[163] *See id.* ("While modern cultural changes have weakened the link between marriage and procreation in the popular mind, there is no doubt that, throughout human history and across many cultures, marriage has been viewed as an exclusively opposite-sex institution and as one inextricably linked to procreation and biological kinship."); *see also* Girgis, *supra* note 161, at 255-56 (addressing questions such as how infertility or childlessness for other reasons factor into a conjugal view of marriage).

[164] *See* Girgis, *supra* note 161, at 256 ("Marriage is a comprehensive union of two sexually complementary persons who seal (consummate or complete) their relationship by the generative act—by the kind of activity that is by its nature fulfilled by the conception of a child. So marriage itself is oriented to and fulfilled by the bearing, rearing, and education of children." (citation omitted)); *see also* Katherine Shaw Spaht, *The Last One Hundred Years: The Incredible Retreat of Law from the Regulation of Marriage*, 63 LA. L. REV. 243, 250-51 (2003) (evaluating the historical view of marriage of as an institution "in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society") (quoting Hurry v. Hurry, 144 La. 877, 885 (1919)).

and family are a prominent concern in conjugal marriage-based family law and policy.[165]

The consent-based view of marriage "defines marriage as the solemnization of mutual commitment—marked by strong emotional attachment and sexual attraction—between two persons."[166] Since procreation is not central to this view of marriage, the sex of partners is irrelevant to the definition, and thus, "exclusion of same-sex couples from the institution of marriage is rank discrimination."[167] Rather than procreation, the consent-based conception of marriage centers on adult autonomy and commitment.[168] Statements such as President

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[165] *See, e.g.*, Alvaré, *supra* note 144, at 173 n.201 (citing Lehr v. Robertson, 463 U.S. 248, 257 (1983) for the proposition that "the marital family plays a 'critical' role in assuring a democratic society" and quoting the characterization of marriage in Murphy v. Ramsey, 114 U.S. 15, 45 (1885) as "the sure foundation of all that is stable and noble in our civilization . . . the best guarantee of that reverent morality which is the source of all beneficent progress").

[166] *Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting).

[167] *Id.*

[168] *See, e.g.*, *id.* at 2689 (majority opinion) (setting "commitment to each other" as a defining element of marriage); *see also supra* note 140 ("The hearts and minds of the American public have changed . . . . For years now we've been having a long extended conversation and connecting with them about how marriage equality is about love, family and commitment, which are common human factors.") (quoting Fred Sainz, Vice President of Communications with the Human Rights Campaign). Professor Helen Alvaré's discussion of three adult-centered themes of same-sex marriage advocacy is also illustrative of how commitment-based marriage is foundationally adult-centered. She writes, "The premiere place occupied by adults' interests in the argument for same-sex marriage is apparent in several ways: First, it is found in the sheer amount of language about adult wants, interests, and desires . . . compared to the relative paucity of airtime devoted to the children." Alvaré, *supra* note 144, at 172. "Second," observes Alvaré, "when children are discussed, two themes are common." *Id.* "[C]ourts and legislators are willing to rely on demonstrably inadequate research for conclusions about the fate of children raised in homosexual households; and courts use children as a wedge by insisting that gay marriage opponents are 'punishing' children already present in gay households by withholding marriage from their parents." *Id.* At least two elements of her three-part framework stand out in *Windsor*. First, the *Windsor* decision fixates on the "status," "dignity," and "choices" of adults. *See Windsor*, 133 S. Ct. at 2692, 2694. The presence of the second element is unclear in *Windsor*, for while research assessing the relative benefits of same- and opposite-sex parenting upon child outcomes remains inadequate, *see, e.g.*, Lynne Marie Kohm, *Rethinking Mom and Dad*, ___CAP. U. L. REV. __ (forthcoming) (discussing best interests concerns for fatherless children), neither the Supreme Court nor the lower courts referenced such research, although it was proffered throughout the litigation and may have been informally relied on, *see, e.g.*, Brief of The American Academy of Pediatrics as Amicus Curiae at 12-23, Windsor v. United States, 699 F.3d 169 (2d Cir. 2012). Lastly, the *Windsor* opinion's references to children explicitly railed on DOMA for its "humiliat[ing]" and deprivational effect on children living with same-sex couples. 133 S. Ct. at 2694. This is problematic because

Obama's declaration in his second inaugural address that America's "journey is not complete until our gay brothers and sisters are treated like anyone else under the law for if we are truly created equal, then surely the love we commit to one another must be equal as well," reflect this view.[169]

The language of *Windsor* and the lower court opinions in *Perry* make it clear that these two competing views of marriage were at issue. In *Perry*, both sides presented expert testimony at trial on the meaning of marriage.[170] A definition of marriage as "a couple's choice to live with each other, to remain committed to one another, and to form a household based on their own feelings about one another, and their agreement to join in an economic partnership and support one another in terms of the material needs of life,"[171] competed with "'a socially-approved sexual relationship between a man and a woman' with a primary purpose to 'regulate filiation.'"[172] "A couple's choice" won.[173] Similarly, the majority opinion in *Windsor* is replete with language consonant with the consent-based view,[174] and language harkening to the conjugal view's essential link between marriage and children is scarce.[175] Moreover, the Court explicitly contrasted insistence on

"[a]rguments about marriage and family law largely featuring adult interests but giving far less attention to children . . . fail to satisfy a widely acknowledged duty to put the interests of vulnerable persons first, a duty constantly affirmed—in recent years quite loudly—by family law experts." Alvaré, *supra* note 144, at 186.

[169] *See* President Barack Obama, Inaugural Address by President Barack Obama at the United States Capitol (Jan. 21, 2013).

[170] *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom.* Hollingsworth v. Perry, 570 U.S. __, 133 S. Ct. 2652 (2013).

[171] *Perry*, 704 F. Supp. 2d at 933.

[172] *Id.*

[173] The court found the testimony of the advocate of the conjugal definition of marriage unreliable and concluded, "The trial evidence provides no basis for establishing that California has an interest in refusing to recognize marriage between two people because of their sex." *Id.* at 934.

[174] *See, e.g.*, United States v. Windsor, 570 U.S. __, __, 133 S. Ct. 2675, 2692 (2013) (recognizing same-sex marriage as granting dignity to the sexual union of homosexuals); *Id.* at 2694 (emphasizing the protection of "moral and sexual choices" guaranteed in *Lawrence*).

[175] The opinion does reference family and children; however, these matters are approached in a manner reflecting a consent-based rather than conjugal view of marriage. The Court references children in the context of status and dignity, *id.* at 2694, and of state benefits that are denied to families when marriage status is withheld. *Id.* at 2695. However, the Court did not discuss marriage's inherent benefits to children that precede and indeed justify state recognition of marriage, according to the conjugal view, but rather considered only the indirect benefits derived from state recognition. *See*

seeing "marriage as between a man and a woman . . . [as] essential to the very definition of that term and to its *role and function throughout the history of civilization*"[176] with a "new insight" that allows "same-sex marriage . . . to be given recognition and validity in the law for those same-sex couples who wish to *define themselves by their commitment to each other*."[177] Of course, the Court went on to rule that the Constitution forbids the federal government from holding exclusively to a conjugal view.[178]

Since family law policies reflect the ideologies upon which they are built, changes to various aspects of family law can be expected as the adult-centered approach that underlies a consent-based view of marriage takes root.[179] First, full acceptance of the consent-based theory of marriage allows for the legal definition of marriage to continue to be expanded. That is not to say all advocates for same-sex marriage would like to see other requirements for entry into marriage loosened. That would simply not be true.[180] Rather, the following discussion is an

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Brief of The American Academy of Pediatrics as Amicus Curiae at 6, Windsor v. United States, 699 F.3d 169 (2d Cir. 2012); Brief of Professors Lynn D. Wardle et al., *supra* note 101, at 4-11 (presenting evidence that children benefit from the unique parenting contributions of both men and women).

[176] *Windsor*, 133 S. Ct. at 2689 (emphasis added).

[177] *Id.* (emphasis added).

[178] *See id.* at 2718-19 (Alito, J., dissenting) ("The silence of the Constitution on this question should be enough to end the matter as far as the judiciary is concerned. Yet, Windsor and the United States implicitly ask us to endorse the consent-based view of marriage and to reject the traditional view, thereby arrogating to ourselves the power to decide a question that philosophers, historians, social scientists, and theologians are better qualified to explore. Because our constitutional order assigns the resolution of questions of this nature to the people, I would not presume to enshrine either vision of marriage in our constitutional jurisprudence.").

[179] *See* Alvaré, *supra* note 144 (tracking how arguments exalting adult desires over the interests of children and the good of society have affected family law in terms of permitting no-fault divorce and virtually unrestrained use of ART, and exploring how these same self-focused arguments underlie the advancement of same-sex marriage).

[180] *See, e.g.*, Harry Cheadle, *After Gay Marriage Why Not Polygamy?*, VICE (May 29, 2013), http://www.vice.com/read/after-gay-marriage-why-not-polygamy ("Many gay marriage advocates dislike that comparison [of polyamory with homosexuality]—they don't want the public to draw comparisons between gay relationships and 'weird' potentially abusive multiwife [sic] setups."). *But see id.* ("For as long as they could get away with it, [marriage-equality advocates] disingenuously denied that we polyamorists even exist and swore that it was and would forever be a nonissue . . . . 'This was all politics as usual, of course, but it was pretty disappointing for us to be thrown under the bus that way, especially since the polyamory community has always supported marriage equality.'") (quoting Anita Wagner Illig, a polyamorous relationships advocate who runs the *Practical Polyamory* website).

exploration of how substituting adult concerns such as love, commitment, and rights for procreation as the basis of marriage can logically lead to greater marriage expansion.[181]

Though legalization of polygamous marriages may not be an imminent possibility, advocates are actively challenging the "one at a time" requirement for marriage at the societal acceptance level, and their rhetoric mirrors that of same-sex marriage advocates. For instance, a polyamory advocate, his wife, their daughter, and the couple's male partner joined the Atlanta Pride Parade in 2013 to normalize polyamory,[182] seeking to "promote the idea that any relationship is valid as long as it is a choice made by consenting adults," adding, "in this regard, and as in most things, promoting public acceptance is the first step."[183] The appeals to consenting, adult choices and the necessity of public acceptance are redolent of *Windsor*.[184] Another polyamory advocate said she saw *Windsor* as indicative of society's growing acceptance of "other kinds of relationships."[185] Though she acknowledged most polyamorists are not seeking legal recognition of their relationships, but only the freedom to enjoy such relationships without being judged,[186] legal recognition might be closer than she expects,[187] for it would be consistent with the ideology expressed in *Windsor*: couples can define themselves by their commitment to one another.[188]

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[181] Both consent-based and conjugal marriage supporters typically value love, commitment, and rights as well as procreation in marriage; these values are not mutually exclusive. Thus, it is not a matter of substituting these aspects completely, but of substituting them as the primary basis and justification for civil marriage.

[182] Grinberg, *supra* note 143.

[183] *Id.* CNN reported on the parade and noted that "[e]ven among a crowd as colorful as the Pride Parade, the giggles and questions suggest polyamory is still a way of life that's on the fringes." *Id.*

[184] *E.g.*, United States v. Windsor, 570 U.S. __, __, 133 S. Ct. 2675, 2689 (2013).

[185] Grinberg, *supra* note 143 (quoting polyamory advocate, Wagner Illig).

[186] *Id.*

[187] *See* Brown v. Buhman, 947 F. Supp. 2d 1170 (D. Utah 2013); *see also* Bill Mears, *Judge Strikes Down Part of Utah Polygamy Law in 'Sister Wives' Case*, CNN (Dec. 16, 2013, 11:03 AM), http://www.cnn.com/2013/12/14/justice/utah-polygamy-law/ (reporting on the judicial invalidation of the cohabitation portion of Utah's ban on polygamy and noting its relation to *Windsor*).

[188] In addition to the ideology expressed in *Windsor*, the new legal standard for defining marriage, that of exclusions that demean or stigmatize, with little consideration of countervailing government interests, appears conducive to extending marriage benefits to multiple partners. The nuances of establishing such a new rule is beyond the scope of this paper and shall be left to the Constitutional Law experts. *See, e.g.*, William C. Duncan, *Animus as Undue Burden*, 6 ELON L. REV. __ (2014); Richard S. Myers, *The Implications of Justice Kennedy's Opinion in* United States v. Windsor, 6 ELON L. REV. __

Other requirements for entry into marriage remain well established in American culture, but they are not unshakable. Although same-sex advocates may try to distance themselves, often successfully, from proponents of these adjustments to the cultural or legal conception of marriage, the fact that further expansion movements rely on the patterns established by the same-sex marriage movement and adopted in *Windsor* is clear.[189] In each aspect of marriage expansion, cultural acceptance of behavior prior to insistence on legal approval and reliance on choice, autonomy, and adult desires is key.[190] The movement to normalize "minor attraction" and sex with children is likewise grounded in the consent-based language represented in *Windsor* and *Perry*.[191] Consanguinity does not appear to be such a problem

(2014); Strasser, *supra* note 11; Robert A. Destro, *The Power to Define Democracy and the Culture of Pluralism After* Windsor *and* Perry, *Elon Law Review* Symposium 2013: The Effects of *Windsor* and *Perry* on Constitutional Law, Family Law, Tax Law, and Society (2013).

[189] *See* Cheadle, *supra* note 180; *see also infra* notes 190-91, 194 and accompanying text.

[190] The attorney who argued for the Canadian Polyamory Advocacy Association issued an open letter in 2012 in which he said:

> Polyamorous cohabitation is so new that society has not yet worked out how to apply the rights that monogamous couples enjoy to a multiparty cohabitation. These rights are going to have to be worked out on a case-by-case basis over time. Gay couples won their battles that way. Over a period of a couple of decades they litigated many cases dealing with child custody, pensions, tax issues, etc. It was only after those other rights and obligations were established—allowing gay relationships to become mainstream—did gay couples ultimately gain the privilege to participate in institutionalized monogamous marriage.

Cheadle, *supra* note 180. In 2013, responding to *Windsor*, he called the ruling "a major step forward for our community to gain social acceptance and become more integrated into mainstream culture." *Id.*

[191] Advocates of adult-child sex frequently emphasize choice and consent on the part of the child as justification for the behavior. *E.g.*, David Thorstad, Speech During Mexico City's Lesbian and Gay Cultural Week (June 26, 1998), *available at* http://nambla.org/pederasty.html (questioning opposition to "freedom of sexual expression for minors" and the logic of some who "deny young people the right to enjoy sexual pleasure with the person of their own choice"); *see also* Kurt Eichenwald, *On the Web, Pedophiles Extend Their Reach*, N.Y. Times, Aug. 21, 2006, http://www.nytimes.com/2006/08/21/technology/21pedo.html?pagewanted=1&_r=1 (quoting statements made on an online conversation board for practicing pedophiles, such as "My daughter and I . . . have been in a 'consensual sexual relationship' almost two months now" and "The only reason I'm charged with rape is that no one believes a child can consent to sex"). From an academic, policy-setting perspective, B4U-ACT lobbied the American Psychiatric Association to distinguish those who are sexually attracted to children from those who engage in sexual activity with them. Letter from B4U-ACT to the Bd. of Trs. of the Am. Psychiatric Ass'n (July 13, 2011), *available at* http://b4uact.org/ref/b4uact-20110713.pdf; Comment from B4U-ACT on *DSM-5* Entry for Pedophilia (June 11, 2012), *available at* http://b4uact.org/ref/b4uact-20120611.pdf. If the distinction had been adopted, it likely

for marriage entry when mutual procreation is not a possibility (as with marriage partners of the same sex), which could easily lead to a dismissal of consanguinity laws for all.[192] Of course, under a commitment-based definition, the requirement of voluntariness in order to enter into marriage remains intact.[193] As the defining boundaries of marriage are challenged, moral repulsion is not a defense to expansion, according to the Supreme Court's rhetoric in *Windsor*; cultural stigma and humiliation were employed in *Windsor* as reasons *to allow* legitimation of unpopular choices.[194] Thus, acceptance of the rhetoric of *Windsor*, including the ideology of consent-based marriage, leaves other elements of the definition of marriage more vulnerable.

In addition to continued marriage expansion, widespread acceptance of the adult-centered rhetoric of *Windsor* will have ramifications for various aspects of family law and for those persons, especially professionals, who interact with it. Adult-centered approaches, such as the consent-based understanding of marriage, "view marriage as more of a self-seeking than a self-giving institution, and thus steer marriage and

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would have prevented sustained sexual interest in children from being classified as a "disorder." *See DSM-5 Development*, AM. PSYCHIATRIC ASS'N (2013), http://www.dsm5.org/Pages/Default.aspx. B4U ACT's website, while not encouraging "minor attracted persons" to act upon their desires, stresses the inappropriateness of social stigma directed against such individuals on account of their "sexual orientation" and gives no indication that the orientation should be viewed as negative or undesirable. *See generally* B4U-ACT, http://b4uact.org (last visited Jan. 31, 2014).

[192] *See, e.g.*, Barend Vlaardingerbroek, *Marriage Rites: What's Blood Got to Do with It*, MERCATORNET (Nov. 18, 2013), http://www.mercatornet.com/articles/view/marriage_rites_whats_blood_got_to_do_with_it (suggesting the ease of legal change to consanguinity rules for marriage entry, based on what "has come about as a result of the redefinition of marriage").

> [T]he biological rationale for the consanguinity rules makes no sense in the context of two women or two men, as there simply can be no progeny produced between them, and hence there is no possibility of in-breeding. To apply the restrictions to homosexual couples is accordingly absurd. So why do we do it? I hear someone saying, "Because they have to be treated the same as hetero couples, dummy – marriage equality, remember? What a minute, though. There are two ways of treating the two kinds of couples equally – one is by applying the consanguinity rules to both, and the other is by applying them to neither.

Id. Vlaardingerbroek accordingly sets out the litigation strategy to remove any consanguinity limitations on marriage in the wake of marriage revision, and then recaps, "The very existence of consanguinity restrictions is a compelling reminder that marriage is, by definition, heterosexual. . . . The dilemma is a secondary absurdity arising from the primary absurdity of amending marriage law to encompass same-sex couples." *Id.*

[193] *Marriage Legal Definition*, DUHAIME.ORG, http://www.duhaime.org/LegalDictionary/M/Marriage.aspx (last visited Jan. 31, 2014).

[194] *See* United States v. Windsor, 570 U.S. __, 133 S. Ct. 2675 (2013).

families in a direction precisely opposite that which is needed to reconnect these institutions to children and to the larger society."[195] Practically, the effects of exchanging a best interest of the child mindset for an adults-oriented approach would ripple through parentage determinations, child custody determinations, and child support—areas of family law that have traditionally been dominated by the best interest of the child standard.[196]

In addition to the ramifications upon family law of the adult-centered ideology underlying the consent-based view of marriage adopted by the Supreme Court, the fact that the Court specifically sanctioned the consent-based view may have consequences for those who confront the marriage definition debate in their professional lives. Although not explicit in the holding, which applied only to the federal government in its recognition of state-sanctioned marriages,[197] the finding that only the consent-based view was rational in that context may be applied in other contexts where the freedom of individuals to express and act upon alternative views of marriage is challenged.[198] Whether an individual is a photographer being sued for not covering a homosexual commitment ceremony,[199] or a Fox Sports analyst fired for his

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[195] Alvaré, *supra* note 144, at 136.

[196] *See id.* at 187. ("[M]arriage is not a tool for adults to feel better about being different, but an important element to express state interests in the well-being of children. Parents' interests are not unimportant; marital happiness is a terribly important component of adult happiness. Yet in the eyes and on the scales of the law, the state is more vigorously protective of children's interests and looks to strong marital unions as the way of assuring these. This is why the state can interfere with parents in cases of child abuse, why divorcing parties may never have the last word about child support or custody, why adoption procedures attend so much more closely to the interests of the child than even the deepest longings of would-be parents, and why recent federal and state lawmaking efforts about marriage, divorce, and welfare all have children as their rallying cry.").

[197] *Windsor*, 133 S. Ct. at 2696.

[198] Helen M. Alvaré, *A "Bare . . . Purpose to Harm"? Marriage and Catholic Conscience Post-*Windsor 1 (2014) (unpublished manuscript), *available at* http://works.bepress.com/helen_alvare/5 (arguing that because "*Windsor* strongly suggested that any view of marriage which excludes the possibility of same-sex unions is irrational and even hateful," religious exemptions that allow religious individuals and groups to avoid violating the tenets of their faith by "cooperating with laws implicating recognizing same-sex marriage" may be unavailable in the future).

[199] For instance, when Elaine Huguenin declined to apply her professional photography skills to a lesbian commitment ceremony in New Mexico, she found herself facing a lawsuit. *See* Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013). Although New Mexico recognized neither same-sex marriages nor same-sex civil unions, the judge ruled against her on discrimination grounds. *Id.*; *see also* Adam Liptak, *Weighing Free Speech in Refusal to Photograph Lesbian Couple's Ceremony*, N.Y. Times, Nov. 18, 2013, http:/

views on marriage,[200] the ramifications of *Windsor* jeopardize liberty and free expression.[201] Attacks of this type on religious liberty coupled with the added impetus of the *Windsor* decision posed a serious enough threat to prompt introduction of H.R. 3133, the Marriage and Religious Freedom Act, to protect free speech regarding marriage.[202] When marriage is redefined, language is altered; word meanings have changed with *Windsor*.[203] Freedom to express the meanings may wane

/www.nytimes.com/2013/11/19/us/weighing-free-speech-in-refusal-to-photograph-ceremony.html?_r=0 (describing how the value of equal treatment of same-sex couples clashed with and trumped Huguenin's claim that "the government should not be allowed to compel her to say something she does not believe — that same-sex weddings should be celebrated").

[200] Cheryl K. Chumley, *Craig James: Fox Sports Firing for Gay Marriage Comment a 'Terrible Mistake,'* WASH. TIMES, Sept. 24, 2013, http://www.washingtontimes.com/news/2013/sep/24/craig-james-fires-legal-team-over-religious-firing/ (reporting that former NFL running back and sportscaster for ESPN and CBS, Craig James, was fired from his position at FOX Sports because of the views on homosexuality and same-sex marriage that he expressed months before taking the job with Fox).

[201] *See* Maggie Gallagher, *Banned in Boston: The Coming Conflict Between Same-Sex Marriage and Religious Liberty*, THE WEEKLY STANDARD, May 15, 2006, *available at* http://www.weeklystandard.com/Content/Public/Articles/000/000/012/191kgwgh.asp?page=2

> Generally speaking the scholars most opposed to gay marriage were somewhat less likely than others to foresee large conflicts ahead—perhaps because they tended to find it 'inconceivable,' as Doug Kmiec of Pepperdine law school put it, that 'a successful analogy will be drawn in the public mind between irrational, and morally repugnant, racial discrimination and the rational, and at least morally debatable, differentiation of traditional and same-sex marriage.' That's a key consideration. For if orientation is like race, then people who oppose gay marriage will be treated under law like bigots who opposed interracial marriage. Sure, we don't arrest people for being racists, but the law does intervene in powerful ways to punish and discourage racial discrimination, not only by government but also by private entities . . . . By contrast, the scholars who favor gay marriage found it relatively easy to foresee looming legal pressures on faith-based organizations opposed to gay marriage, perhaps because many of these scholars live in social and intellectual circles where the shift Kmiec regards as inconceivable has already happened.

[202] The Bill's co-sponsor, Representative Steve Scalise (R-La.), explained:

> [T]he Supreme Court's ruling on marriage may embolden those in government who want to impose their views of marriage on faith-based organizations. We need this strong legislation to protect freedom of conscience for those who believe marriage is the union of one man and one woman. [Rep. Labrador's] bill does exactly that, ensuring respect and tolerance for those who affirm traditional marriage.

Labrador Leads Bipartisan Coalition in Introducing Marriage and Religious Freedom Act, CONGRESSMAN RAÚL LABRADOR (Sept. 19, 2013), http://labrador.house.gov/press-releases/labrador-leads-bipartisan-coalition-in-introducing-marriage-and-religious-freedom-act/.

[203] *See, e.g.*, Ryan T. Anderson, *Redefine Marriage, Debase Language?*, NAT'L REV. ONLINE, (Aug. 8, 2013, 4:00 AM), http://www.nationalreview.com/article/355295/redefine-marriage-debase-language-ryan-t-anderson (discussing the consequences of the marriage meaning alteration to expand to include same sex couples, more than two parties to a marriage, and a potential for built-in limited duration).

as a result, as acceptance and ensuing insistence on consent-based ideology may bring a growing pressure on courts, public officials, and private institutions to "regard the traditional understanding of marriage as a form of irrational prejudice that should be purged from public life."[204]

The aftermath of *Windsor*'s espousal of a consent-based view of marriage in terms of marriage expansion, family law, and religious liberty will take time to play out. Undoubtedly, however, just as the Court recognized "the substantial societal impact the State's classifications have in the daily lives and customs of its people,"[205] the Supreme Court's sanctioning of a particular viewpoint on the meaning of marriage will impact people's lives. *Windsor*'s endorsement of the ideological shift from conjugal marriage to an expanded view of marriage jeopardizes other definitional boundaries of marriage, has broad implications for family law, and erodes public and legal tolerance for views contrary to the Court's.

Conclusion

This article has provided an overview of just some of the collateral effects of *Windsor* and *Perry* on state family law regulation. These effects are revealed by an exploration of the conflicts between federal and state law and between the laws of states, of the political and legal pressures emerging from the rules and the rhetoric of the cases, and of the import of the ideological shift from conjugal marriage to an expanded view of marriage advanced by these cases. Collaterally abridged liberty interests will inevitably lead to future uncertainty. A future demise of state domestic relations law governing marriage entry is also a very real possibility. This demise could certainly involve requirements to enter into marriage, but it could also entail that state law will give way to federal and the federal government may soon determine who is legally married.[206] It is questionable under *Windsor*

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[204] Thomas M. Messner, *Same-Sex Marriage and the Threat to Religious Liberty*, The Heritage Found. (Oct. 30, 2008), http://www.heritage.org/research/reports/2008/10/same-sex-marriage-and-the-threat-to-religious-liberty.

[205] United States v. Windsor, 570 U.S. __, __, 133 S. Ct. 2675, 2693 (2013).

[206] *See, e.g.*, Statement by Attorney General Eric Holder on Federal Recognition of Same-Sex Marriages in Utah (Jan. 10, 2014), *available at* http://www.justice.gov/opa/pr/2014/January/14-ag-031.html (referencing the "letter and spirit" of the law established in *Windsor* in defense of the Administration's decision to recognize same-sex marriages officiated in Utah despite the state's refusal to grant those marriages recognition).

whether state marriage laws that do not expand marriage to include same-sex couples will be able to stand for long under the federal influence exerted in *Windsor*, and be severely weakened because of *Perry*.

Despite a facially inconsequential holding, the collateral effects of *Windsor* and *Perry* on state regulation of family law are significant. When both the rule and rhetoric are considered, it is fairly clear that "the traditional power of States to define domestic relations"[207] is affected by the federal intervention into family law in *Windsor*,[208] when the states' ability to define family law was effectively denied in *Perry*,[209] and the results might qualify as an extreme makeover of family law, rather than as a simple affirmation of federalism.

[207] *Windsor*, 133 S. Ct. at 2705 (Scalia, J., dissenting), referring to the opinion's opening seven pages.

[208] *Id.* at 2693 (majority opinion) ("The State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism.").

[209] Hollingsworth v. Perry, 558 U.S. 183, 199 (2010).