
“STICKS AND STONES”:
WINDSOR, THE NEW MORALITY, AND ITS OLD LANGUAGE

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I. INTRODUCTION: PROMOTING SAME-SEX MARRIAGE IN BOTH STATE
AND FEDERAL LAW

On June 26, 2013, the Supreme Court of the United States announced its decisions in two cases involving same-sex marriage, *United States v. Windsor*² and *Hollingsworth v. Perry*.³ Both cases were closely divided, 5-4, decisions.⁴ In both cases, the opinions for the majority of the Court invoked, flirtatiously, arguments that could have appeal to conservatives.⁵ However, in both cases, the Court found a way to invali-

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

³ 570 U.S. ___, 133 S. Ct. 2652 (2013).

⁴ *Windsor*, 133 S. Ct. at 2681 (majority: Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan; dissent: Roberts, Scalia, Thomas, and Alito); *Hollingsworth*, 133 S. Ct. at 2658 (majority: Roberts, Scalia, Ginsburg, Breyer, and Kagan; dissent: Kennedy, Thomas, Alito, and Sotomayor).

⁵ See, e.g., *Windsor*, 133 S. Ct. at 2689-92 (suggesting a federalism basis for the Court’s decision); see also *Hollingsworth*, 133 S. Ct. at 2659, 2661, 2667 (emphasizing the important role standing plays in constraining judges so as to prevent judicial policymaking and suggesting that a finding of standing in this case would be in conflict with the proper role of the federal judiciary). See generally Ernest A. Young, *The Conservative Case for Federalism*, 74 GEO. WASH. L. REV. 874, 874 (“(C)onservatives like federalism. That . . . is the conventional wisdom.”); Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 HOWARD L.J. 1, 81 (1995) (“Political conservatives are thought to favor judicial restraint precisely because judicial policymaking is viewed as less defensible than policymaking by politically accountable bodies.”).

date (conservative) laws that prevented legal recognition of same-sex marriage.⁶

In *Windsor*, the Court invalidated a provision of federal law, Section 3 of the Defense of Marriage Act (herein “DOMA”), which amended the “Dictionary” section of the Federal Code (1 U.S.C.) by adding Section 7, to provide that:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.⁷

In *Perry*, the Supreme Court found a way to uphold a remarkably unconvincing and disturbingly tilted opinion of a federal district court,⁸ which had invalidated “Prop 8.” Prop 8 was a simple, fourteen-word amendment to the Constitution of California approved by the majority of the voters of California in 2008, which provided that: “Only mar-

⁶ *Windsor*, 133 S. Ct. at 2696 (“The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.”); *Hollingsworth*, 133 S. Ct. at 2668 (vacating the judgment of the Ninth Circuit Court of Appeals based on lack of standing); see also Babak Siavoshi, *The Supreme Court’s Decision in Hollingsworth v. Perry Effectively Renders Prop 8 Unconstitutional*, CONCURRING OPINIONS (June 26, 2013), <http://www.concurringopinions.com/archives/2013/06/the-supreme-courts-decision-in-hollingsworth-v-perry-effectively-renders-prop-8-unconstitutional.html> (“The Supreme Court dismissed the defendants’ appeal [in *Hollingsworth v. Perry*] on standing grounds, thereby reinstating a district court ruling that held Prop 8 violates the Due Process and Equal Protection Clauses of the U.S. Constitution, thereby reinstating a 2008 California Supreme Court ruling that effectively created a state constitutional right to same-sex marriage.”).

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

⁸ *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*, 133 S. Ct. 2652. Concerns about possible judicial bias in the *Perry* case were exacerbated by the revelation that Chief District Judge Vaughn R. Walker who decided the *Perry* case failed to make timely disclosure that he was involved in a long-term same-sex relationship at the time. Yet that was held not to be disqualifying. *Perry v. Schwarzenegger*, 790 F. Supp. 2d 1119 (N.D. Cal. 2011) (denying motion to vacate and recuse), *aff’d sub nom.*, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012); see, e.g., Bob Egelko, *Prop. 8 Challenge to Gay Judge’s Ruling Rejected*, S.F. CHRON. (June 14, 2011, 5:05 PM), <http://www.sfgate.com/nation/article/Prop-8-challenge-to-gay-judge-s-ruling-rejected-2368107.php> (discussing Chief Judge Ware’s decision denying Prop 8 proponents’ motion with respect to former Chief Judge Walker’s ruling).

riage between a man and a woman is valid or recognized in California.”⁹ Ironically, the most outspoken conservative on the Court, Justice Scalia, and the Republican-appointed, moderately conservative Chief Justice Roberts, both voted with the majority to deny review with the direct result of preserving the dubiously thin and biased opinion of the district court which had declared that it was unconstitutional for the state to ban same-sex marriages.¹⁰

The June 26 Supreme Court decisions advanced same-sex marriage in both levels of American government – i.e., in *state law* (by procedurally barring review of a state constitutional amendment defining marriage as the union of a man and a woman that was declared by a federal trial court to be unconstitutional under the Constitution of the United States),¹¹ and in *federal law* (by invalidating a federal statute on both federalism and equal protection grounds, categorically barring recognition of same-sex marriage for purposes of federal law).¹²

This paper focuses upon the *Windsor* decision. Part II reviews *Windsor* and provides some general criticisms of it. Part III reviews and criticizes as inappropriate the extensive use of pejorative language by the Court (majority opinion) in *Windsor*. Part IV explains why *Windsor* is equivalent to *Roe v. Wade* in slow motion – it is the first, big step to Supreme Court-mandated legalization of same-sex marriage throughout the United States.

II. WINDSOR AND SOME OF ITS FLAWS

In *United States v. Windsor*,¹³ the Supreme Court affirmed the rulings of two lower federal courts (a district court judgment affirmed on appeal) granting injunctive relief to Edith Windsor.¹⁴ Ms. Windsor had married another woman in Canada; that foreign same-sex marriage

⁹ CAL. CONST., art. I, § 7.5, held unconstitutional by *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*, 133 S. Ct. 2652.

¹⁰ *Hollingsworth*, 133 S. Ct. at 2658 (majority: Roberts, Scalia, Ginsburg, Breyer, and Kagan; dissent: Kennedy, Thomas, Alito, and Sotomayor).

¹¹ *Id.* at 2668 (“Because petitioners have not satisfied their burden to demonstrate standing to appeal the judgment of the District Court, the Ninth Circuit was without jurisdiction to consider the appeal. The judgment of the Ninth Circuit is vacated, and the case is remanded with instructions to dismiss the appeal for lack of jurisdiction.”). See Siavoshy, *supra* note 6, for further explanation.

¹² *United States v. Windsor*, 570 U.S. ___, ___, 133 S. Ct. 2675, 2693 (2013).

¹³ 133 S. Ct. 2675.

¹⁴ *Id.* at 2682.

was deemed valid in New York.¹⁵ Ms. Windsor's same-sex partner died, leaving her entire estate to Ms. Windsor.¹⁶ However, Windsor's claim for a federal estate tax exemption as the surviving "spouse" was denied under Section 3 of DOMA, the federal Defense of Marriage Act provision that recognized only a union of a man and a woman as a marriage for purposes of any federal law,¹⁷ which applied to all (over one thousand) federal laws.¹⁸

Ms. Windsor paid the tax of \$363,053 and then sued in federal court for a refund.¹⁹ While her suit was pending in the trial court, President Barack Obama announced that he would no longer defend DOMA,²⁰ and the district court granted Ms. Windsor a refund, finding DOMA unconstitutional.²¹ The Second Circuit Court of Appeals affirmed, agreeing that Section 3 of DOMA is unconstitutional.²² The Supreme Court also affirmed.²³ There were four opinions in *Windsor*: the majority opinion by Justice Kennedy (joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan)²⁴ and three dissenting opinions—by Chief Justice Roberts (alone);²⁵ by Justice Scalia (joined by Justice Thomas and in part by Chief Justice Roberts);²⁶ and by Justice Alito

¹⁵ *United States v. Windsor*, 699 F.3d 169, 176 (2d Cir.), *cert. granted*, 133 S. Ct. 786 (U.S. 2012), *aff'd*, 12-307, 2013 WL 3196928 (U.S. June 26, 2013), *cert. denied*, 12-63, 2013 WL 3213546 (U.S. June 27, 2013), *cert. denied*, 12-785, 2013 WL 3213547 (U.S. June 27, 2013).

¹⁶ *Windsor*, 133 S. Ct. at 2682.

¹⁷ Defense of Marriage Act of 1996, Pub. L. No. 104-199, § 3(a), U.S.C.A.N. 110 Stat. 2419 (1996), *invalidated by Windsor*, 133 S. Ct. 2675. Section 3 of DOMA provided: In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

1 U. S. C. § 7 (1996); *see Windsor*, 699 F.3d at 175-76.

¹⁸ U.S. Gov't Accountability Off., D. Shah, Defense of Marriage Act: Update to Prior Report 1, GAO-04-353R Defense of Marriage Act (2004), *available at* <http://www.gao.gov/new.items/d04353r.pdf>.

¹⁹ *Windsor*, 699 F.3d at 176.

²⁰ *United States v. Windsor*, 833 F. Supp. 2d 394, 397 (S.D.N.Y. 2012). Letter from the Attorney General to Congress regarding litigation on the Defense of Marriage Act, Att'y Gen. Op. No. 11-223 (Feb. 23, 2011), *available at* <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

²¹ *Windsor*, 833 F. Supp. 2d at 406.

²² *Windsor*, 699 F.3d at 176.

²³ *United States v. Windsor*, 570 U.S. ___, ___, 133 S. Ct. 2675, 2696 (2013).

²⁴ *Id.* at 2675.

²⁵ *Id.*

²⁶ *Id.*

(joined in part by Justice Thomas).²⁷ The majority opinion contains some unusual pejorative language and repeatedly tars opponents of same-sex marriage—supporters of DOMA in particular—with the broad brush of bigotry and intolerance.

The majority opinion in *Windsor* contains four parts. Part I of the majority opinion recounted the history of the case.²⁸ In Part II, the Court addressed whether the case was properly before it for review.²⁹ Some opponents of DOMA argued that the appeal was non-justiciable because President Obama refused to defend the law.³⁰ However, because the congressional Bipartisan Legal Advisory Group (“BLAG”) stepped up to defend DOMA, and because the congressional members of BLAG had sufficient interest in the issue and adequate adversarial competence, the Court concluded that there was a genuine “case and controversy” among interested parties.³¹

On the merits, in Part III the majority asserted that DOMA Section 3 violated the principles of federalism in family law.³² The Court emphasized the primacy of state authority in regulating domestic relations; regulation of marriage is a matter “reserved to the States.”³³ Section 3 of DOMA meant that within the same state (in the twelve states that, at that time, had legalized same-sex marriage), the definition of marriage varied for purposes of state law and federal law.³⁴ This was an “unusual deviation from the traditional principles of recognizing and accepting state definitions of marriage” for purposes of federal law.³⁵ Further, denial in federal law of marital status conferred by state law was a deprivation of “an essential part of the liberty protected by the

²⁷ *Id.*

²⁸ *Id.* at 2682-84.

²⁹ *Id.* at 2684.

³⁰ *Id.* at 2685.

³¹ *Id.* at 2684-87. While there are relevant distinctions between the two cases, the finding of *standing* in Justice Kennedy’s majority opinion in *Windsor* might seem somewhat inconsistent with the majority opinion’s holding in the companion case of *Hollingsworth v. Perry*, 570 U.S. ___, 133 S. Ct. 2652 (2013) that the California citizen initiative leaders *lacked standing* to defend Prop 8. Justice Kennedy and Justice Sotomayor (who found standing in *Windsor*) consistently dissented in *Perry*, asserting that the petitioners had standing. *See Hollingsworth*, 133 S. Ct. at 2668 (Kennedy, J., dissenting). Chief Justice Roberts and Justice Scalia consistently saw no standing in either case. *See Hollingsworth*, 133 S. Ct. at 2662-64 (majority opinion); *Windsor*, 133 S. Ct. at 2699 (Scalia, J., dissenting).

³² *See Windsor*, 133 S. Ct. at 2689-90 (majority opinion).

³³ *Id.* at 2691 (quoting *Ohio ex. rel. Popovici v. Agler*, 280 U.S. 379, 383-84 (1930)).

³⁴ *Id.* at 2680, 2690.

³⁵ *Id.* at 2693.

Fifth Amendment” because DOMA intentionally “injured” the very class (same-sex couples) that state marriage law in New York sought to protect, in violation of equality principles.³⁶ But the Court indicated that a definitive ruling that DOMA Section 3 violated federalism in family law was unnecessary because the statute was unconstitutional upon another ground.³⁷

Part IV of Justice Kennedy’s majority opinion in *Windsor* found DOMA Section 3 to be an unconstitutional violation of “equal liberty” under the due process provision of the Fifth Amendment, especially (possibly specifically) in the context and light of the federalism principles reviewed in Part III.³⁸ In Part IV of the majority opinion in *Windsor*, the Court asserted repetitively that the enactment of Section 3 of DOMA was motivated by “animus,” a “desire to harm a politically unpopular group,” and to “impose a disadvantage, a separate status, and so a stigma” upon same-sex couples who married.³⁹ Justice Kennedy asserted that DOMA intended to deny “the equal dignity of same-sex marriages” and wrote “inequality into the entire United States Code.”⁴⁰ Likewise, the effect of DOMA Section 3 was to diminish the stability and predictability of a class of marriages that the State of New York had found it proper to recognize and protect.⁴¹ Noting, however, that it was not addressing the separate issue of whether *a state* could define marriage as the union of a man and a woman and thus prohibit same-sex marriage (which was at least implied strongly by Part III of the *Windsor* opinion),⁴² the Court confined its analysis to explaining why Congress could not refuse to recognize, for purposes of federal law, same-sex marriages that some states had decided to allow.⁴³

The four dissenters filed three dissenting opinions. Chief Justice Roberts first asserted that the Court lacked jurisdiction to hear the appeal dispute (agreeing in part with Justice Scalia’s dissenting opinion that because the government and the plaintiff agreed with the district court and Second Circuit that DOMA Section 3 was not constitutional, there was no genuine “case or controversy” before the Court).⁴⁴ Next,

³⁶ *Id.* at 2692-93.

³⁷ *See id.* at 2692.

³⁸ *Id.* at 2680, 2689-93.

³⁹ *Id.* at 2693.

⁴⁰ *Id.* at 2693-94.

⁴¹ *See id.* at 2690, 2694-95.

⁴² *Id.* at 2692.

⁴³ *Id.* at 2692.

⁴⁴ *Id.* at 2696 (Roberts, C.J., dissenting).

he agreed (again citing Justice Scalia’s dissent) that Congress had properly exercised its constitutional power in defining the meaning of marriage for purposes of federal law in DOMA Section 3.⁴⁵ Further, the Chief Justice rebuked the majority for claiming to find a “sinister motive”⁴⁶ behind the enactment of DOMA. Noting that the overwhelming majority of the members of both the House of Representatives and of the Senate voted for DOMA, and that the bill was signed into law by President Bill Clinton, Roberts emphasized that it is improper for the majority opinion to “tar the political branches with the brush of bigotry.”⁴⁷ Finally, and at some length, he especially stressed that the majority opinion had not held that it is unconstitutional for a state to refuse to allow same-sex marriage; instead, the majority only held that it was unconstitutional for Congress to restrain the federal government from recognizing same-sex marriages which had legally been formed in a state.⁴⁸

Justice Scalia’s dissent (joined in part by Thomas and Roberts) also emphasized that the Court lacked jurisdiction to hear the appeal.⁴⁹ He further criticized and responded to what he called the majority’s “scatter gun” opinion, stressing that the majority’s discussion of federalism in marriage law is false federalism, unnecessary and misleading because the majority said that it decided the case “quite apart from principles of federalism.”⁵⁰ On the merits of equality or equal dignity, he asserted that the majority decision’s distorted equal protection principles would later fall like a “second shoe” to require the states to legalize same-sex marriage.⁵¹ Moreover, he criticized the majority for failing to indicate what standard of review it applied to that question,⁵² and he repudiated the majority’s invocation of discredited substantive due process arguments.⁵³

As to the majority’s claim that Section 3 of DOMA was motivated by “animus,” by a “bare . . . desire to harm a politically unpopular group[,]”⁵⁴ and for “formally declaring [that] anyone opposed to

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 2696-97.

⁴⁹ *Id.* at 2698 (Scalia, J., dissenting).

⁵⁰ *Id.* at 2705.

⁵¹ *Id.* at 2710.

⁵² *Id.* at 2706-07.

⁵³ *Id.*

⁵⁴ *Id.* at 2707 (quoting *Windsor*, 133 S. Ct. at 2693 (majority opinion)).

same-sex marriage [is] an enemy of human decency,”⁵⁵ he severely reproved the majority for relying on pejorative labeling instead of legal analysis, and rebuked the majority for “affirmatively concealing from the reader,” rather than considering, the legitimate arguments that actually were asserted to support passage of DOMA Section 3.⁵⁶ Scalia’s dissent also predicted that the majority opinion was intended to be used, and will be used, in other courts to judicially impose same-sex marriage.⁵⁷ He predicted that the Supreme Court would eventually legalize same-sex marriage in constitutional jurisprudence: “I promise you this: The only thing that will ‘confine’ the Court’s holding is its sense of what it can get away with.”⁵⁸ Finally, the Scalia dissenting opinion also criticized the majority for “cheat[ing] both sides” in the same-sex marriage policy debate by imposing a judicial preference instead of “let[ting] the People decide” the issue by democratic processes.⁵⁹

Justice Alito’s dissenting opinion (joined in part by Justice Thomas) emphasized that “the Constitution . . . does not dictate” whether same-sex marriage must be legalized or recognized, but “leaves the choice to the people, acting through their elected representatives”⁶⁰ BLAG had standing under *Chadha*⁶¹ because the Second Circuit Court of Appeals impaired Congress’ legislative power by invalidating DOMA Section 3 and the Executive refused to defend the law.⁶² The constitutional claim for a right to same-sex marriage fails the test for substantive due process because it is not deeply rooted in the traditions of the nation and “the Constitution simply does not speak to the issue of same-sex marriage.”⁶³ The equal protection claim failed; it was not subject to heightened scrutiny.⁶⁴ Justice Alito agreed that same-sex marriage should be resolved at the state level, but found that DOMA Section 3 merely defined “the category of persons” to

⁵⁵ *Id.* at 2710 (Roberts, C.J., dissenting) (discussing the majority’s opinion concerning DOMA).

⁵⁶ *Id.* at 2707.

⁵⁷ *Id.* at 2700.

⁵⁸ *Id.* at 2709.

⁵⁹ *Id.* at 2711.

⁶⁰ *Id.* (Alito, J., dissenting).

⁶¹ *See generally* *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983).

⁶² *Windsor*, 133 S. Ct. at 2713-14 (Alito J., dissenting) (citing *Chadha*, 462 U.S. at 919).

⁶³ *Id.* at 2715-16.

⁶⁴ *Id.* at 2717-18 (“In asking the court to determine that § 3 of DOMA is subject to and violates heightened scrutiny, *Windsor* and the United States thus ask us to rule that the presence of two members of the opposite sex is as rationally related to marriage as white skin is to voting or a Y-chromosome is to the ability to administer an estate. This is a striking request and one that unelected judges should pause before granting.”).

whom some federal laws apply and as such did not encroach on the authority or prerogatives of the states to regulate domestic relations, and thus did not violate federalism principles.⁶⁵

III. THE INAPPROPRIATE USE OF DISRESPECTFUL, PEJORATIVE LANGUAGE IN THE *WINDSOR* OPINION

Justice Kennedy’s opinion of the Court in *Windsor* contains at least two dozen pejorative terms describing the Act and the intents, purposes, and motives of the members of Congress who enacted Section 3 of DOMA. They “seek to injure” or have caused “injury,”⁶⁶ inflicted “indignity,”⁶⁷ caused “deprivation of an essential . . . liberty,”⁶⁸ had a “desire to harm,”⁶⁹ “imposed a disadvantage,”⁷⁰ had the “avowed purpose . . . to impose a disadvantage,”⁷¹ to impose “a stigma upon all who enter into same-sex marriages,”⁷² they “interfere[d] with the equal dignity of same-sex marriages,”⁷³ intended to “discourage enactment of state same-sex marriage laws,”⁷⁴ and “to restrict the freedom of choice of [same-sex] couples,”⁷⁵ “to put a thumb on the scales,”⁷⁶ to cause persons in same-sex marriages to “be treated as second-class marriages,”⁷⁷ “to impose inequality,”⁷⁸ “contrive[d] to deprive” married couples of their rights and responsibilities,⁷⁹ “diminish[ed] the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect,”⁸⁰ “undermines both the public and private significance of state-sanctioned same-sex marriages,”⁸¹ declared that

⁶⁵ *Id.* at 2720 (“Section 3 does not prevent any state from recognizing same-sex marriage or from extending to same-sex couples any right, privilege, benefit, or obligation stemming from state law. All that § 3 does is to define a class of persons to whom federal law extends certain special benefits and upon whom federal law imposes certain special burdens.”).

⁶⁶ *Id.* at 2693, 2696 (majority opinion).

⁶⁷ *Id.* at 2692.

⁶⁸ *Id.*

⁶⁹ *Id.* at 2693.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 2693-94.

⁷⁸ *Id.* at 2694.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

same-sex marriages “are unworthy” of recognition in federal law,⁸² made such marriages “second-tier,”⁸³ “humiliates tens of thousands of children,”⁸⁴ “have . . . burdened” the lives of same-sex marriage couples,⁸⁵ has brought “financial harm to children of same-sex couples,”⁸⁶ “denies or reduces benefits . . . that are an integral part of family security,”⁸⁷ “divests married same-sex couples of the duties and responsibilities” of marriage,⁸⁸ “demeans”⁸⁹ and “degrades”⁹⁰ “single[s] out” same-sex married persons,⁹¹ “imposes a disability,”⁹² tells all persons that same-sex marriages are “less worthy,”⁹³ and had the “purpose and effect to disparage and injure” same-sex couples allowed to marry in some of the states.⁹⁴ This list does not include the use of typical critical (but non-pejorative) terminology normally used when a court finds that a statute is unconstitutional.⁹⁵

The strongly moralistic tone and the high volume of rhetorical slams against opponents of same-sex marriage in the Opinion for the Court suggest the impatience of the majority with the general American population that remain legally, politically, and morally opposed to legalization of same-gender marriage. However, there are at least five problems with use of such strong verbal censorship of opposition to same-sex marriage by the Court. First, the verbal assault is off target, the barrage is misdirected, and the criticisms are inapt. As Justice Scalia explained:

[t]o defend traditional marriage is not to condemn, demean, or humiliate those who would prefer other arrangements To hurl such accusations so casually demeans this institution. In the majority’s judgment, any resistance to its holding is beyond the pale of reasoned disagreement. . . . All that, simply for supporting an Act that did no more than codify an

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 2695.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 2695-96.

⁹³ *Id.* at 2696.

⁹⁴ *Id.*

⁹⁵ *See, e.g., id.* (DOMA Section 3 is “invalid” and serves “no legitimate purpose”); *see also id.* at 2693 (DOMA Section 3 is an “unusual deviation” that “interfere[s] with state sovereign choices”); *id.* at 2694 (DOMA § 3 “frustrates” state same-sex marriage law objectives); *id.* at 2695 (DOMA Section 3 imposes “restraints”).

aspect of marriage that had been unquestioned in our society for most of its existence—indeed, had been unquestioned in virtually all societies for virtually all of human history. It is one thing for a society to elect change; it is another for a court of law to impose change by adjudging those who oppose it *hostes humani generis*, enemies of the human race.⁹⁶

Second, such language is highly inappropriate in a court opinion and impairs the credibility and reputation of the Court.⁹⁷ Indeed, such a verbal tantrum is almost unprecedented in modern Supreme Court annals. For over two centuries, the Court has managed to speak respectfully of and about persons with whom it disagrees on all variety of issues and behaviors.⁹⁸ The Court has shown decorum and respect when dealing with persons who have committed terrible crimes and abuses, including violations of fundamental human rights, from slavery, to religious bigotry, to racial discrimination, to gender discrimination, to sexism, and to horrible and evil acts, without unleashing the kind of pejoratives it used to describe opponents of legalizing same-sex marriage.⁹⁹ Treating parties with respect and speaking respectfully seem to be required by several judicial standards. For example, Canon 1 of the Code of Conduct provides, “[a] judge should uphold the in-

⁹⁶ *Id.* at 2708-09 (Scalia, J., dissenting); see generally Ryan T. Anderson, *The Supreme Court and the Future of Marriage*, THE CHRISTIAN POST (Aug. 12, 2013), <http://www.christianpost.com/news/the-supreme-court-and-the-future-of-marriage-102107>.

⁹⁷ See, e.g., *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 676 (1985) (O'Connor, J., dissenting) (“Lawyers [and no less judges] are professionals, and as such they have greater obligations.”); *Ky. Bar Ass’n v. Prewitt*, 4 S.W.3d 142 (Ky. 1999) (“[A]ttorney’s dissemination of press release, accusing circuit judge and two Court of Appeals judges of accepting bribes from electric utility warranted two-year suspension.”); *Office of Disciplinary Counsel v. Ferreri*, 710 N.E.2d 1107 (Ohio 1999) (“[J]udge’s derogatory remarks in various media concerning various court officers warranted 18-month suspension from practice of law with final 12 months stayed, and 6-month suspension without pay from his position as judge.”). See generally Catherine Therese Clarke, *Missed Manners in Courtroom Decorum*, 50 MD. L. REV. 945 (1991); Donald E. Campbell, *Raise Your Right Hand and Swear to Be Civil: Defining Civility as an Obligation of Professional Responsibility*, 47 GONZ. L. REV. 99 (2011-2012).

⁹⁸ See *infra* note 99.

⁹⁹ See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (racial hate speech); *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (school prayer and moment of silence); *Chambers v. Mississippi*, 410 U.S. 284 (1973) (overturning murder conviction of person who allegedly killed a police officer); *Miranda v. Arizona*, 384 U.S. 436 (1966) (overturning conviction for rape and kidnapping of a seventeen-year-old girl); *Engel v. Vitale*, 370 U.S. 421 (1962); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (racial segregation in schooling); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (racially restrictive covenants); *Reynolds v. United States*, 98 U.S. 145 (1878) (polygamy).

tegrity and independence of the judiciary.”¹⁰⁰ Judicial integrity includes speaking respectfully of the parties to the case and the witnesses and others impacted by the case.¹⁰¹ Canon 2 of the Code of Conduct states, “[a] judge should avoid impropriety and the appearance of impropriety in all activities.”¹⁰² Berating and speaking disparagingly of lawmakers and attributing to them evil motives because the law they passed displeases the court is improper and does not avoid the appearance of impropriety, but exemplifies impropriety. Canon 1 of the Model Code combines the aspirational principles of Canons 1 and 2 of the Code of Conduct, providing, “[a] judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”¹⁰³ The extensive use of derogatory language in the opinion of the Court in *Windsor* failed to “uphold and promote” the “impartiality” of the Court but, rather, presented “the appearance” of bias and impropriety.¹⁰⁴ Likewise, Canon 3 of the Code of Conduct states, “[a] judge should perform the duties of the office fairly, impartially and diligently.”¹⁰⁵ Again, the use of name-calling in the majority opinion in *Windsor* to disparage the drafters and supporters of DOMA breaches this duty to impartiality. Similarly, Canon 2 of the Model Code provides, “[a] judge shall perform the duties of judicial office impartially, competently, and diligently.”¹⁰⁶ The language used by Justice Kennedy and endorsed by four other justices who joined his majority opinion in *Windsor* compromised both the fact and the appearance of impartiality and competence in that case.¹⁰⁷

¹⁰⁰ CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 1 (2011), available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02A-Ch02.pdf>.

¹⁰¹ *Id.*

¹⁰² CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 2 (2011), available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02A-Ch02.pdf>.

¹⁰³ MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2010).

¹⁰⁴ *Id.* See generally *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675 (2013).

¹⁰⁵ CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3 (2011), available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02A-Ch02.pdf>.

¹⁰⁶ MODEL CODE OF JUDICIAL CONDUCT Canon 2 (2010). See Katharine Traylor Schaffzin, *The Great and Powerful Oz Revealed: The Ethics and Wisdom of the SCOTUS Leaks in National Federation of Independent Business v. Sebelius*, 7 CHARLESTON L. REV. 317, 336 n.108 (2012-2013).

¹⁰⁷ See generally *Windsor*, 133 S. Ct. at 2675.

The rhetorical overkill in *Windsor* suggests that the majority was aware that many American citizens, including many lawyers and judges, might not intuitively agree with its conclusion that refusing to allow same-sex marriage was immoral, so it had to press the point vigorously to discourage persons from disagreeing (perhaps intended to intimidate them into silence by a display and harsh rhetorical assault). However, while the use of intimidation, silencing, and suppression are techniques that may not be uncommon in the political arena, such tactics fly in the face of the core qualities of a free, open, and honorable judicial system.

Third, such violent language sets the tone and example for all American citizens to follow. It invites intolerance in discussions of one of the most controversial and important public policy issues of this generation. The Court’s intemperate rhetoric invites and exemplifies nasty, demonizing language and tactics. Such violent language invites and leads to violent behavior. There already have been acts of violence against organizations and individuals who oppose same-sex marriage,¹⁰⁸ so the harsh language of the majority opinion in *Windsor* is like playing with matches in a dynamite factory.

Fourth, the strong normative language in the majority opinion suggests an intent to motivate (pressure) the states to legalize same-sex marriage – to politicize the Court. The Court is trying to influence the political process to achieve the adoptions by the states, a political policy that is preferred by at least five of the Justices.¹⁰⁹ For at least Justice Kennedy, the author of *Romer v. Evans*¹¹⁰ and *Lawrence v. Texas*,¹¹¹ and perhaps some other members of the majority, the judicial protection

¹⁰⁸ Just last year a man entered the offices of the Family Research Council with a loaded handgun and many extra rounds of ammunition intending to kill personnel there because he disagreed with their political views. See Carol Cratty, *Suspect Charged in Washington Family Research Council Shooting*, CNN (Aug. 16, 2012), <http://www.cnn.com/2012/08/16/us/dc-shooting/index.html>. He was stopped by a security guard who was shot by the perpetrator. *Id.*

¹⁰⁹ *Windsor*, 133 S. Ct. 2675.

¹¹⁰ 517 U.S. 620 (1996) (striking down, under rational basis review, a Colorado state constitutional amendment that prohibited giving a “preference” to homosexuals).

¹¹¹ 539 U.S. 558 (2003) (invalidating a Texas sodomy law on broad constitutional grounds that effectively decriminalized homosexual behavior throughout the United States).

and expansion of (and promotion of mainstream acceptance of) homosexual rights appears to be viewed as a “legacy” issue.¹¹²

Fifth, such pejorative language is not without troubling implications for our constitutional system of government. Besides the impropriety of disrespectful language by a court directed toward any party, when it is directed toward a co-equal branch of government it inflicts additional harm upon the balance of respect and authority that sustains our tri-partite system of republican government.

A “legacy” impact seems to be developing. As of October 2013, at least twenty-nine separate cases seeking judicial orders to legalize or recognize same-sex marriage were pending in eighteen states and at least one federal agency.¹¹³ Actions have been taken already by several federal agencies including the Internal Revenue Service (“IRS”),¹¹⁴ the Labor Department, etc.¹¹⁵ To accommodate same-sex marriage, the California legislature has altered parent-child law of millennia to provide that a child may have more than two parents (including two parents of the same gender).¹¹⁶

Remember that all of this has occurred since and in spite of the fact that thirty states have (until *Perry* thirty-one states had) constitutional amendments approved by majorities that explicitly define mar-

¹¹² See Joan Biskupic, *Gay-Marriage Cases to Define Supreme Court Legacy*, REUTERS (Mar. 22, 2013, 10:14 AM), <http://www.reuters.com/article/2013/03/22/us-usa-court-gaymarriage-idUSBRE92L03Q20130322>.

¹¹³ See Appendix II, Same-Sex Marriage Litigation: 29 Post-*Windsor* cases in 18 states + Federal Agencies as of Sept. 30, 2013 (Rose Lewis & Lynn Wardle, supplementing William C. Duncan). See also *Status of the States on Same-Sex Marriage, The Big Story*, ASSOCIATED PRESS (June 28, 2013, 7:14 PM), <http://bigstory.ap.org/article/status-states-same-sex-marriage> (last visited Dec. 3, 2013).

¹¹⁴ Internal Revenue Serv., *Treasury and IRS Announce That All Legal Same-Sex Marriages Will Be Recognized for Federal Tax Purposes; Ruling Provides Certainty, Benefits and Protections Under Federal Tax Law for Same-Sex Married Couples*, IRS-2013-72 (Aug. 29, 2013), <http://www.irs.gov/uac/Newsroom/Treasury-and-IRS-Announce-That-All-Legal-Same-Sex-Marriages-Will-Be-Recognized-For-Federal-Tax-Purposes;-Ruling-Provides-Certainty,-Benefits-and-Protections-Under-Federal-Tax-Law-for-Same-Sex-Married-Couples>.

¹¹⁵ U.S. Dep’t of Labor, *New Guidance Issued by US Labor Department on Same-Sex Marriages and Employee Benefit Plans*, Release No. 13-1720-NAT (Sept. 18, 2013), <http://www.dol.gov/ebsa/newsroom/2013/13-1720-NAT.html>.

¹¹⁶ Patrick McGreevy & Melanie Mason, *Brown Signs Bill to Allow Children More than Two Legal Parents*, L.A. TIMES, Oct. 4, 2013, <http://articles.latimes.com/2013/oct/04/local/la-me-brown-bills-parents-20131005>.

riage as the union of a man and a woman only.¹¹⁷ As Appendix I indicates, the average voter approval cumulatively in all states where this issue has been on the ballot is over sixty percent.

IV. COMPARING *WINDSOR* WITH *ROE*

Windsor has had a significant impact to validate, promote, advance, and boost efforts to legalize same-sex marriage. In fact, it seems like that was the purpose of Justice Kennedy’s majority opinion in *Windsor*. Thus, it is not surprising that some commentators have compared *Windsor* to *Roe*.¹¹⁸ That comparison is not flattering (nor is it intended to be flattering), as *Roe v. Wade* is generally acknowledged to have been one of the most incompetently-decided, troubling, disturbing, and controversial decisions in the history of the United States Supreme Court,¹¹⁹ and while the lasting power of *Roe* and its legal doctrines are undisputed now, forty years after it was decided, the contro-

¹¹⁷ See Appendix I, *infra*. See also Lynn D. Wardle, *The Proposed Minnesota Marriage Amendment in Comparative Constitutional Law: Substance and Procedure*, 34 *HAMLIN J. PUB. L. & POL’Y* 141, 144 (2013).

¹¹⁸ See, e.g., David Upham, *DOMA, the Hyde Amendment, and the Missouri Compromise: Windsor as the Reversal of Harris v. McRae and Renewal of Dred-Scott Federalism*, *LIBR. OF L. & LIBERTY* (June 30, 2013), <http://www.libertylawsite.org/2013/06/30/doma-the-hyde-amendment-and-the-missouri-compromise-windsor-as-the-reversal-of-harris-v-mcrae-and-renewal-of-dred-scott-federalism/> (“Some conservative commentators have decried the *Windsor* case as the new *Roe v. Wade*.”); Alex Lundry, *Gay Marriage Cases Different from Roe v. Wade*, *THE DAILY CALLER* (May 31, 2013, 1:29 PM), <http://dailycaller.com/2013/05/31/gay-marriage-cases-different-from-roe-v-wade/> (“Recently, several prominent voices on both sides of the same-sex marriage debate have made comparisons between the Supreme Court’s controversial 1973 decision in *Roe v. Wade* and the forthcoming Supreme Court rulings that could overturn the Defense of Marriage Act (*United States v. Windsor*) and legalize marriage for same-sex couples in all 50 states (*Hollingsworth v. Perry*).”); Richard Land, Op-Ed., *The Supreme Court and Same-Sex Marriage (Part I)*, *THE CHRISTIAN POST* (Mar. 18, 2013), <http://www.christianpost.com/news/the-supreme-court-and-same-sex-marriage-part-1-91995> (“Just like in *Roe v. Wade*, a case widely discredited by legal scholars as poor law and credited by conservatives as the spark that ignited Christian activism, the court [in *Perry* and *Windsor*] has a massive challenge ahead of it – threading the needle between state’s rights and the press of coastal public opinion.”).

¹¹⁹ See generally Michael W. McConnell, *Ways to Think About Unenumerated Rights*, 2013 *U. ILL. L. REV.* 1985, 1989-90 (2013) (“by far the most important and controversial – *Roe v. Wade*”); Sarah Primrose, *An Unlikely Feminist Icon?: Justice Harry A. Blackmun’s Continuing Influence on Reproductive Rights Jurisprudence*, 19 *CARDOZO J.L. & GENDER* 393, 393 (2013) (“one of the most controversial Supreme Court decisions of all time”); Robert F. Nagel, Essay, *Partiality and Disclosure in Supreme Court Opinions*, 17 *Nw. J. L. & SOC. POL’Y* 116, 129 (2012) (“one of the two most controversial, divisive, and significant decisions of the twentieth century.”).

versy surrounding the *Roe* decision also remains very animated and active – four decades after the case was decided.

A. *The Roe Decision*

Numerous commentators sharply criticized *Roe* for judicial overreaching.¹²⁰ Such criticism was made immediately after *Roe* was decided in 1973, and that particular criticism has continued to be noted and asserted for forty years.¹²¹ Within months, *Roe* was criticized by scholars for the inaccuracy of its reporting of the “facts” underlying the decision, for the inadequacy of its constitutional analysis, for its resurrection of discredited “substantive due process,”¹²² for its absence of any principled reasoning, and for its effort to judicially manipulate a judicial solution to the complex political controversy.¹²³ “[L]egal scholars began to criticize the [*Roe*] decision shortly after its release. [Justice Blackmun’s] Biographer Tinsley Yarbrough wrote, ‘*Roe*’s rationale has been subjected to more sustained and scathing scholarly and popular criticism than any other Supreme Court opinion, even by those supportive of the Court’s recognition of a constitutional abortion right.’”¹²⁴ For example, Yale Law School Professor Alexander Bickel commented: “One of the most curious things about *Roe* is that, behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found.”¹²⁵

¹²⁰ Dave Adrusko, *Pro-Abortionists Harshly Criticize Roe*, NAT’L RIGHT TO LIFE NEWS, at 21 (Jan. 2006), <http://www.nrlc.org/archive/news/2006/NRL01/HTML/ProAbortsPage21.html>.

¹²¹ *Id.* See also Timothy P. Carney, *The Pervading Dishonesty of Roe v. Wade*, WASH. EXAMINER, Jan. 23, 2012, <http://washingtonexaminer.com/article/1080661>.

¹²² Laurence Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 2 (1973) (“[I]n *Roe v. Wade* and *Doe v. Bolton*, when the Court had its most dramatic opportunity to express its supposed aversion to substantive due process, it carried that doctrine to lengths few observers had expected . . .”).

¹²³ See, e.g., Robert Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CALIF. L. REV. 1250 (1975); John Witherspoon, *Impact of the Abortion Decisions Upon the Fathers Role*, 35 JURIST 32 (1975); JOHN T. NOONAN, JR., *A PRIVATE CHOICE, ABORTION IN AMERICA IN THE SEVENTIES* (1979); LYNN D. WARDLE, *THE ABORTION PRIVACY DOCTRINE: A COMPENDIUM AND CRITIQUE OF FEDERAL COURT ABORTION CASES* (1980); LYNN D. WARDLE & MARY ANNE Q. WOOD, *A LAWYER LOOKS AT ABORTION* 4 nn.8-11 (1982); *ABORTION AND THE CONSTITUTION* (Dennis J. Horan, Edward R. Grant & Paige C. Cunningham eds., 1987).

¹²⁴ Primrose, *supra* note 119, at 415 (2013) (quoting TINSLEY E. YARBROUGH, *HARRY A. BLACKMUN: THE OUTSIDER JUSTICE* xi (2008)).

¹²⁵ Tribe, *supra* note 122, at 7. See also ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 27-29 (1975) (“Should not the question then have been left to the political process . . .?”).

Harvard Law School Professor (and Watergate Special Prosecutor) Archibald Cox wrote that “the [*Roe*] opinion fails even to consider what I would suppose to be the most compelling interest of the state in prohibiting abortion: the interest in maintaining respect for the paramount sanctity of human life which has always been at the center of western civilization”¹²⁶ Liberal Professor Mark V. Tushnet wrote: “[i]t seems to be generally agreed that, as a matter of simple craft, Justice Blackmun’s opinion for the Court was dreadful.”¹²⁷ Likewise, Fordham Law School Professor Robert Byrn wrote: “*Roe v. Wade* is in the worst tradition of a tragic judicial aberration that periodically wounds American jurisprudence”¹²⁸ Professor John Hart Ely accused the Supreme Court of “mistak[ing] a definition for a syllogism,”¹²⁹ and declared, “[w]hat is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers’ thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation’s governmental structure.”¹³⁰ Professor Ely concluded that “[*Roe*] is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be.”¹³¹ University of Chicago Professor Richard Epstein criticized: “*Roe v. Wade* is symptomatic of the analytical poverty possible in constitutional litigation,”¹³² and he stated, “in the end we must criticize both Mr. Justice Blackmun in *Roe v. Wade* and the entire method of constitutional interpretation that allows the Supreme Court in the name of Due Process both to ‘define’ and to ‘balance’ interests on the major social and political issues of our time.”¹³³ Harvard Law Professor Mary Ann Glendon asserted that *Roe* imposed a rule of abortion-on-demand that made American abortion law the most extreme of any Western nation and similar to the kinds of abortion laws found in nations with

¹²⁶ ARCHIBALD COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 53 (1976).

¹²⁷ Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 820 (1983).

¹²⁸ Robert Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 807, 809 (1973).

¹²⁹ John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 924 (1973).

¹³⁰ *Id.* at 935-36.

¹³¹ *Id.* at 947.

¹³² Richard Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159, 184 (1973).

¹³³ *Id.* at 185.

which the United States had little in common in terms of values and protection for legal process.¹³⁴

Opposition to the [privacy justification use in *Roe*] began almost immediately. In 1981, a Justice Department memo written by a young attorney named John Roberts openly mocked the “so-called ‘right to privacy’” as unfounded. His criticism reverberated in the Justice Department’s Guidelines on Constitutional Litigation, in the halls of academia, and in the High Court, in Justice Scalia’s dissent in *Lawrence v. Texas*. But complaints were not lodged only by those who opposed abortion; even those in support of the right questioned the “abstract” concept of “privacy.” Perhaps most illustrative was Justice Ruth Bader Ginsburg’s criticism of the way privacy was used within *Roe* as an “incomplete justification.”¹³⁵

To apply constitutional protection of “privacy” to a medical procedure that requires the consent of one person, the professional medical services of a second person, and then results in the killing of a third human being seems significantly inapt.¹³⁶ Thus, it is not surprising that “[m]any scholars and commentators criticized *Roe* for applying the right to privacy to actions that had little to do with common understandings of the term.”¹³⁷

A dozen years after *Roe* was decided, then-Professor and ACLU attorney (now Justice) Ruth Bader Ginsburg declared: “*Roe*, I believe, would have been more acceptable as a judicial decision if it had *not gone beyond a ruling on the extreme statute before the Court*. The political process was moving in the early 1970s. . . . *Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict.*”¹³⁸

Forty years after *Roe* was decided, the criticism of it continues unabated.¹³⁹ Four decades after *Roe* was decided, “[t]he assaults [on *Roe*] have not abated; scholars continue to characterize the constitutional

¹³⁴ MARY ANN GLENDON, *ABORTION AND DIVORCE IN AMERICAN LAW passim* (1987).

¹³⁵ Victoria Baranetsky, *Aborting Dignity: The Abortion Doctrine After Gonzales v. Carhart*, 36 HARV. J.L. & GENDER 123, 131 (2013).

¹³⁶ See generally Ely, *supra* note 129, at 929.

¹³⁷ Justin Gillette, Comment, *Pregnant and Prejudiced: The Constitutionality of Sex- and Race-Selective Abortion Restrictions*, 88 WASH. L. REV. 645, 665 (2013).

¹³⁸ Ruth Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 385-86 (1985) (emphasis added).

¹³⁹ See, e.g., *Showcase Panel IV: An Examination of Substantive Due Process and Judicial Activism*, 17 TEX. REV. L. & POL. 315, 327 (2013) (“The embarrassment grew greater . . . with Justice Harry Blackmun’s 1973 opinion in *Roe v. Wade*, which my friend Judge Wilkinson just mentioned and very rightly criticized. *Roe v. Wade* was, if anything, an even more embarrassingly, badly crafted opinion . . .”).

right to privacy as a dead letter”¹⁴⁰ *Roe* continues to be criticized (by both conservatives and liberals) as an example of unprincipled judicial excess.¹⁴¹ For example, Justice Ruth Bader Ginsburg, a strong supporter of the result in *Roe*, still believes that “the *Roe* decision in 1973 went ‘too far, too fast.’”¹⁴² She believes that the Court in *Roe* should have struck down the Texas abortion law (the law before the Court in *Roe v. Wade*) only, without ruling broadly and reaching out to also strike down the abortion laws in effect in all other forty-nine states, as well.¹⁴³

¹⁴⁰ Baranetsky, *supra* note 135, at 132.

¹⁴¹ See, e.g., Yvonne Lindgren, *The Rhetoric of Choice: Restoring Healthcare to the Abortion Right*, 64 HASTINGS L.J. 385, 385 (2013) (“[S]cholarship has uniformly criticized the *Roe* analysis”); J. Harvie Wilkinson, III, *Of Guns, Abortions, and the Unraveling of the Rule of Law*, 95 VA. L. REV. 254, 254 (2009); Neil S. Siegal, *The New Textualism, Progressive Constitutionalism, and Abortion Rights: A Reply to Jeffrey Rosen*, 25 YALE J. L. & HUMAN. 55, 58-59 (2013) (“Rosen does not explicitly counsel progressives to call for *Roe*’s and *Casey*’s abandonment, but he intimates as much. . . . For Rosen, apparently, *Roe* is an example of ‘free-floating textualism,’ If *Roe* is as lawless as Rosen seems to think”); Michael F. Moses, *Institutional Integrity and Respect for Precedent: Do They Favor Continued Adherence to an Abortion Right?*, 27 NOTRE DAME J. L. ETHICS & PUB. POL’Y 541, 564-65 (2013) (“*Roe*’s treatment of the legal history of abortion is seriously mistaken, and its reasoning has been roundly criticized by commentators on both sides of the issue. Experience has only pointed up *Roe*’s shortcomings; *Roe* and later abortion cases are internally inconsistent and irreconcilable with each other, resulting in shifting rules on, and justifications for, an abortion right. Abortion would seem to be a prime candidate for an area of law in which the Court regularly engaged in ‘jury-rigging’ to create ‘new and different justifications to shore up the original mistake.’”) (citing *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 921 (2010) (Roberts, C.J., concurring)).

¹⁴² Video: *Justice Ginsburg on DOMA and Roe v. Wade*, CONST. DAILY (Sept. 9, 2013), <http://blog.constitutioncenter.org/2013/09/video-justice-ginsburg-on-doma-and-roe-v-wade/>.

“In *Roe v. Wade*, I should be very clear, the result was absolutely right. Texas had the most extreme law in the nation. A woman could not get an abortion unless it was necessary to save her life. It didn’t matter whether she would be left infirm; whether the conception was the result of rape or incest. *The Court could have decided that case before it, which is how it usually operates. It should have said that law, Texas law, is unconstitutional. It didn’t; there was no need to declare every law in the country, even most liberal, unconstitutional. That’s not the way the court usually operates,*” she said. “*It doesn’t take giant steps.* This was an issue that was in flux all over the country in state legislatures. Sometimes the women were winning, sometimes they were losing. They were getting political experience, which was a good organizing tool. And then the Supreme Court said, ‘you won.’ And it gave the opposition one single target to hit at.”

Id. (emphasis added).

¹⁴³ A *Conversation with Justice Ruth Bader Ginsburg*, 25 COLUM. J. GENDER & L. 6, 16 (2013) (“In my view, the Court reached the right decision about the Texas law, which took a position most States had rejected. *Instead, the Court moved too far too fast*, and it also relied on once discredited substantive due process argument instead of stressing

Similarly, Justice Anthony Kennedy has a reputation for preferring to move carefully, to avoid going “too far too fast.”¹⁴⁴ Justice Kennedy is known to favor moving by taking “incremental steps.”¹⁴⁵ This seems to be a significant element of Justice Kennedy’s jurisprudential approach generally, not limited to the same-sex marriage controversy.¹⁴⁶ “Justice Kennedy [has been] motivated by a concern that the Court was moving too far and too fast” in other contexts, as well.¹⁴⁷

Virtually all of the criticism leveled at *Roe v. Wade* could be applied to the decision of the Court in *Windsor*. It constitutionalizes a subject best left to legislative regulation.¹⁴⁸ It judicializes a subject best left to political compromise in the politically accountable branches of government.¹⁴⁹ It federalizes a subject that is squarely within state court au-

the women’s equality dimension of the matter. The *Roe v. Wade* decision emphasizes the doctor’s right to recommend to his patient what he thinks his patient needs. The constant picture is of the woman in consultation with her physician, not of the self-standing woman seeking to take charge of her life’s course. We continue to have the annual Right to Life March in D.C. on *Roe v. Wade*’s anniversary. I appreciate that others hold different views and that we’ll never know whether I’m right or wrong, that things might have played out differently if the Court’s opinion had been more restrained.” (emphasis added). See also Debra Cassens Weiss, *Justice Ginsburg: Roe v. Wade Decision Came Too Soon*, ABA J. ONLINE (Feb. 13, 2012), http://www.abajournal.com/news/article/justice_ginsburg_roe_v_wade_decision_came_too_soon/ (on file with the *McGeorge Law Review*) (“Speaking at a Columbia Law School symposium on Friday, Ginsburg said the court could have delayed hearing the case while state law evolved on the issue, the Associated Press reports. ‘It’s not that the judgment was wrong, but it moved too far too fast,’ she said.”).

¹⁴⁴ Lawrence C. Levine, *Justice Kennedy’s “Gay Agenda”: Romer, Lawrence, and the Struggle for Marriage Equality*, 44 McGEORGE L. REV. 1, 25 (2013) (“The Court in general and Justice Kennedy in particular believe in incremental steps.”); *id.* (“The Justices, including Justice Kennedy, might find this sentiment persuasive, especially in light of the fierce debate currently raging about marriage equality.”).

¹⁴⁵ *Id.* One might argue that the opinion for the Court in *Windsor* is an exception to Justice Kennedy’s slow-deliberate approach to judicially-imposed socio-legal change. See *infra* note 152 and accompanying text.

¹⁴⁶ See generally Dawn Johnsen, “The Essence of a Free Society”: *The Executive Powers Legacy of Justice Stevens and the Future of Foreign Affairs Deference*, 106 NW. U. L. REV. 467 (2012).

¹⁴⁷ Michael J. O’Connor, *Legitimate Defence of Civil Rights or Raw Congressional Power Grab? The Constitutionality of the Freedom of Choice Act*, 32 WHITTIER L. REV. 1, 30 (2010).

¹⁴⁸ See generally Robert E. Rains, *A Minimalist Approach to Same-Sex Divorce Respecting States That Permit Same-Sex Marriage and States That Refuse to Recognize Them*, 2012 UTAH L. REV. 393, 393 (2012) (explaining that regulation of marriage is not delegated to the United States by the Constitution and is therefore reserved to the states).

¹⁴⁹ See generally Lynn D. Wardle, *The Judicial Imposition of Same-Sex Marriage: The Boundaries of Judicial Legitimacy and Legitimate Redefinition of Marriage*, 50 WASHBURN L.J. 79 (2011) (discussing the *Perry v. Schwarzenegger* same-sex marriage case and the conflict between judicial authority and other branches of government).

thority.¹⁵⁰ It defies history, tradition, and precedent.¹⁵¹ It over-reaches. It tries to impose a judicially preferred policy position upon lawmakers and those who elected them.

To say that *Windsor* is more moderate, more restrained, more cautious, or more “conservative” than *Roe* is to put form over substance in some ways. For example, if one compares the substance of Supreme Court abortion jurisprudence with its new and recent same-sex marriage jurisprudence, *Windsor* seems to be much further along the ideological-doctrinal road for the time of the decision than *Roe* was. *Roe* dealt only with liberating a woman’s decision to access abortion from state laws restricting abortion.¹⁵² *Windsor*, the first Supreme Court case dealing with same-sex marriage, dealt with federal law defining marriage for purposes of federal programs, agencies, laws, and regulations – an issue not dealt with in the abortion jurisprudence until nearly a decade after *Roe* was decided.¹⁵³ Moreover, when the Court addressed the issue of federal laws impacting abortion, it upheld those laws (federal laws prohibiting the use of federal funds to pay for abortions).¹⁵⁴

However, the federal laws barring the use of federal funds to pay for abortion that were upheld by the Supreme Court involved specific federal programs – not all federal programs, agencies, and laws are like the broader Section 3 of DOMA.¹⁵⁵ The Hyde Amendment broadly prohibited “the use of any federal funds to reimburse the cost of abortions under the Medicaid program except under certain specified circumstances.”¹⁵⁶ It applied specifically to Medicaid and to all other programs administered under the Department of Labor, the Department of Education, and the Department of Health and Human Ser-

¹⁵⁰ *Contra* Ernest A. Young & Erin C. Blondel, *Federalism, Liberty, and Equality in United States v. Windsor*, 2012-13 CATO SUP. CT. REV. 117, 117-18 (2013).

¹⁵¹ *See* *Roe v. Wade*, 410 U.S. 113, 174-78 (1973) (Rehnquist, J., dissenting).

¹⁵² *See id.* at 117 (majority opinion).

¹⁵³ *See* *Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding federal law barring use of federal funds to pay for abortions in Title X family-planning services); *Harris v. McRae*, 448 U.S. 297 (1980) (upholding federal Hyde Amendment abortion funding restrictions); *Williams v. Zbaraz*, 448 U.S. 358 (1980) (finding that Title XIX does not require funding medically necessary abortions not covered by federal reimbursement, and Illinois funding restrictions similar to the Hyde Amendment do not violate the Equal Protection Clause).

¹⁵⁴ *See, e.g., Rust*, 500 U.S. at 173; *Harris*, 448 U.S. at 297; *Williams*, 448 U.S. at 358.

¹⁵⁵ *See, e.g., Rust*, 500 U.S. at 173; *Harris*, 448 U.S. at 297; *Williams*, 448 U.S. at 358.

¹⁵⁶ *Harris*, 448 U.S. at 302.

vices.¹⁵⁷ Prior to the Hyde Amendment, federal funds had paid for about 300,000 abortions a year (in 1976), but within a few years the number dropped to 232 (in 1986).¹⁵⁸ So, in terms of broad impact upon the federal laws, programs, and agencies, it is hard to distinguish the scope of Section 3 of DOMA that was invalidated by the Supreme Court in *Windsor* from the scope of the Hyde Amendment that was upheld in *Harris*.¹⁵⁹

The legalization of same-sex marriage is not a narrow legal reform, but will impact over one thousand federal laws (reportedly 1,138 federal laws)¹⁶⁰ and hundreds of state laws (reportedly about 500 laws per state).¹⁶¹ Professor Hugues Fulchiron, distinguished French family

¹⁵⁷ *The Hyde Amendment*, NAT'L COMMITTEE FOR HUM. LIFE AMENDMENT (Apr. 2008), <http://www.nchla.org/datasource/ifactsheets/4FSHydeAm22a.08.pdf>.

¹⁵⁸ *Id.* at 3. In fiscal year 2004, the number of federally funded abortions was only 159. *Id.*

¹⁵⁹ Moreover, the subjects regulated by Section 3 of DOMA and the Hyde Amendment are not quite commensurable, and that explains some apparent distinctions between the Court's gay rights jurisprudence and the abortion jurisprudence. A few specific federal programs include the vast majority of federal funding that might cover abortion, so a funding restriction applicable to all of the programs administered by or through the Department of Labor, the Department of Education, and the Department of Health and Human Services would cover the vast majority of the federally-funded activities that Congress sought to restrict in the Hyde Amendment. On the other hand, the relationship of spouses (marriage, husband, wife, spouse, etc.) encompasses terms and concepts that are not localized in any federal department, agency, or area of federal law; rather, those spousal relationship terms are used throughout virtually all of the federal laws, regulations, agencies, and programs, so to achieve the consistent preservation of the meaning of marriage that Congress sought to achieve in DOMA Section 3 required a dictionary definition that would apply to all of the federal code.

¹⁶⁰ U.S. GEN. ACCT. OFF., GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT 1 (2004), available at <http://www.gao.gov/new.items/d04353r.pdf> ("identif[y]ing] a total of 1,138 federal statutory provisions classified to the United States Code in which marital status is a factor in determining or receiving benefits, rights, and privileges"). See generally *An Overview of Federal Rights and Protections Granted to Married Couples*, HUM. RTS. CAMPAIGN RESOURCES, <http://www.hrc.org/resources/entry/an-overview-of-federal-rights-and-protections-granted-to-married-couples> (last visited Dec. 4, 2013) ("There are 1,138 benefits, rights and protections provided on the basis of marital status in Federal law."); Barbara J. Cox, "The Tyranny of the Majority is No Myth": *Its Dangers for Same-Sex Couples*, 34 *HAMLIN J. PUB. L. & POL'Y* 235, 252 n.75 (2013); Kerry Abrams, Essay, *Citizen Spouse*, 101 *CALIF. L. REV.* 407, 410 (2013).

¹⁶¹ See generally Lynn D. Wardle, *Marriage and Other Domestic Relationships: Comparative and Critical Equality Analysis of Differences in Form and Substance*, 26 *J. CIV. RTS. & ECON. DEV.* 663, 694-95 (2012) ("[I]n each state, terms like marriage, and spouse are used in hundreds of state laws (Hawaii counted over 300 laws; Washington state over 400; a national lesbian organization says 500 in the average state) covering everything from contracts to torts, wills to medical treatment, property to taxes, and parenting to ali-

law professor, Director of the Center for Family Law, the former President of the University of Jean Moulin Lyon III, and past President of the International Society of Family Law, has warned against the dangerous and deceptive illusion that one can merely change the definition of marriage to include same-sex couples without experiencing profound reverberating impacts upon the rest of family law.¹⁶² A comprehensive consideration of reform of family law as a whole rather than piece-meal revisions is preferable.

Whatever may be the position that the one or the other can have on the very principle of the opening of the marriage and kinship to same-sex couples, it therefore seems essential to take a step back for in understanding the implications on the whole of the law of persons and the family. . . . Touch to the LDCS in the context of the law on marriage for all, without assessing the impact on the whole of the matter can only lead to serious inconsistencies. More generally, it is the whole law of the filiation, adoptive filiation and biological filiation which must be rethought from this new design of the kinship. And such a reflection has meaning only if it is part of a global vision of the kinship and the alliance.¹⁶³

Commenting on the (then-pending, now passed) bill that legalized same-sex marriage in France, Professor Fulchiron observed that it “is a genuine revolution” because “the opening of the marriage and filiation to same-sex couples marks a genuine break social and anthropological.”¹⁶⁴ He explained: “The new definition of marriage leads to rethink the whole law of the conjugality . . . the access to adoption and perhaps to the LDCS, for the same-sex couples disrupted the complex construction, and fragile, of the right of the filiation, and would require a real reconstruction of the kinship”¹⁶⁵

Thus, it comes as no surprise that since *Windsor*, the IRS and the Department of Labor have announced that they will treat same-sex marriages as valid marriages if celebrated in a state that permits same-sex marriage even if the parties are domiciled in a state that does not allow and would not recognize as valid a same-sex marriage celebrated

mony.”); Charles P. Kindregan, Jr., *The Evolution of Same-Sex Marriage*, 32 FAM. ADVOC. 8, 8 (2010) (“Federal law and the laws of every state confer hundred[s] of specific benefits that flow from marriage; examples include the economic protections of domestic relations law, tax benefits, land titles, descent and distribution of property, family leave benefits, protection of marital communications, homestead rights, workers’ compensation and personal injury claims, and numerous other benefits.”).

¹⁶² Hugues Fulchiron, *The Recognition of the Homosexual Family: Impact Study 11* (2013) (unpublished manuscript) (on file with author).

¹⁶³ *Id.* at 11.

¹⁶⁴ *Id.* at 1.

¹⁶⁵ *Id.*

elsewhere.¹⁶⁶ Largely overlooked in the reaction to that announcement is how radical the change in choice of law adopted by the Department of Labor is.¹⁶⁷ For two hundred years, federal courts have followed the “American” rule of marriage validity – that the marriage is valid in other states if valid in the state where it was celebrated *unless it would violate the strong public policy* of a state with a stronger connection to the parties, such as the state of their domicile.¹⁶⁸ The only explanation for abandoning the long-established domicile rule in favor of a place-of-celebration rule is that it results in treating “evasive” same-sex marriages that would not be recognized as marriages in the parties’ domicile as marriages for purposes of federal laws, programs, and benefits. That distorts the settled principles of American marriage recognition law.

Administrative burden/convenience of disparate treatment in federal/state laws will give incentive to legalize same-sex marriage. Pejorative and prejudicial treatment by the Court and courts will pressure states to legalize same-sex marriage. The Court would prefer to avoid a direct *Roë*-like ruling mandating legalization of same-sex marriage. However, if necessary, the Court eventually will drop the “second shoe” and compel reluctant states to legalize same-sex marriage, as Scalia predicted.¹⁶⁹

B. *Windsor Has Had Serious and Immediately Detrimental Impact Upon Religious Liberty*

Same-sex marriage is not an insignificant issue on which there is no difference of opinion. Rather, it implicates deeply held values of morality, ethics, society, family, sociology, child development, and adult relationships, to mention just a few of the areas affected. Polls have consistently shown that there are strongly-held beliefs and that opinion varies widely not only within the United States, but significant variations exist from one region of the country to another.¹⁷⁰

¹⁶⁶ See Internal Revenue Serv., *supra* note 114; see also U.S. Dep’t of Labor, *supra* note 115. This is just the tip of the iceberg, of course.

¹⁶⁷ See U.S. Dep’t of Labor *supra* note 115.

¹⁶⁸ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971).

¹⁶⁹ United States v. Windsor, 570 U.S. ___, ___, 133 S. Ct. 2675, 2705 (2013) (Scalia, J., dissenting).

¹⁷⁰ See Land, *supra* note 118; David Masci, *Supreme Court’s DOMA Decision Driving Same-Sex Marriage Efforts in States*, PEW RES. CENTER (Oct. 21, 2013), <http://www.pewresearch.org/fact-tank/2013/10/21/supreme-courts-doma-decision-driving-same-sex-marriage-efforts-in-states/> (“Wide Regional Differences in Support for Gay Marriage”).

Other scholars have documented the actual and conceptual threat to religious liberty from the legalization of same-sex marriage.¹⁷¹ States in which same-sex marriage has been legalized by judicial fiat provide no specific protection for religious liberty.¹⁷² States in which same-sex marriage has been legalized by legislation have almost uniformly inadequate, grudging, skimpy protection for religious liberty.¹⁷³

The legalization of same-sex marriage almost universally has provoked significant conflict with, and subordination of, religious liberty in the states in which same-sex marriage has been legalized.¹⁷⁴ Scholars on both sides of the same-sex marriage issue have long predicted this.¹⁷⁵ Even liberal, pro-same-sex marriage scholars have acknowledged that if same-sex marriage is legalized, it will lead to curtailment of some religious liberties.¹⁷⁶ For example, Georgetown Law Professor and same-sex marriage advocate Chai Feldblum (who later served in the Obama Administration as an Equal Employment Opportunity Commission [“EEOC”] commissioner) correctly and publicly predicted that legalization of same-sex marriage (and gay rights generally) would result in conflicts with, and subordination of, religious liberty.¹⁷⁷

¹⁷¹ See, e.g., SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 189 (Douglas Laycock, Anthony R. Picarella, Jr. & Robin Fretwell Wilson eds., 2008) (herein “SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY”).

¹⁷² Lynn D. Wardle, *Marriage and Religious Liberty: Comparative Law Problems and Conflict of Laws Solutions*, 12 J.L. & FAM. STUD. 315 (2010); see generally SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 171, at 189; Anthony Michael Kreis & Robin Fretwell Wilson, *The Overlooked Benefit of Minimalism: Perry v. Brown and the Future of Marriage Equality*, 37 N.Y.U. REV. L. & SOC. CHANGE 35, 37-45 (2013).

¹⁷³ Baird Helgeson, *Same-Sex Marriage Opponents Call Religious Protection Efforts a ‘Big Lie,’* STARTRIBUNE (May 6, 2013), <http://www.startribune.com/politics/statelocal/206315491.html>; Douglas Laycock, Thomas C. Berg, Bruce Ledewitz, Christopher C. Lund & Michael J. Perry, *Gay Marriage Bill Should Be Passed After More Religious Liberty Protections Are Included*, HAWAII REP. (Oct. 28, 2013), <http://www.hawaiireporter.com/gay-marriage-bill-should-be-passed-after-more-religious-liberty-protections-are-included/123> (“Senate Bill 1 should be amended to include far more robust protections for religious liberty”); Matthew Brown, *Hawaii’s Largest Faiths Oppose Same-Sex Marriage Mill*, DESERET NEWS (last updated Nov. 14, 2013), <http://www.deseretnews.com/article/865588398/Hawaiis-largest-faiths-oppose-same-sex-marriage-bill.html?pg=all> (one church complains that “the protections offered in the current draft are completely inadequate to safeguard constitutionally guaranteed religious freedoms”).

¹⁷⁴ Helgeson, *supra* note 173; Laycock, *supra* note 173; Brown, *supra* note 173.

¹⁷⁵ Helgeson, *supra* note 173; Laycock, *supra* note 173; Brown, *supra* note 173.

¹⁷⁶ See Chai R. Feldblum, *Moral Conflicts and Conflicting Liberties*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 171, at 123-25.

¹⁷⁷ *Id.*

Speaking at a Becket Fund Symposium in December 2005, Professor Feldblum also stated:

The facts now support those predictions. For example, in July, it was reported that a Colorado baker who refused to bake a wedding cake for a gay wedding faced up to a year in jail and civil damages.¹⁷⁸ In August, the New Mexico Supreme Court affirmed that a private, Christian photographer who, for reasons of personal religious conscience, turned down a request to photograph a lesbian commitment ceremony, was liable for \$6,637.94 in attorneys' fees for violating the state anti-discrimination law.¹⁷⁹ In September, an Oregon bakery that declined on religious grounds to bake a wedding cake for a same-sex wedding closed; the lesbian who requested the cake filed a complaint and the bakery was being investigated by the state for an alleged viola-

[L]et us postulate, for the moment, that in some number of years an overwhelming majority of jurisdictions in this country will have changed their laws so that LGBT people will have full equality in society, including access to civil marriage. Or, indeed, let us postulate that the entire country is governed – as a matter of federal statutory and constitutional law – on the basis of full equality for LGBT people. . . .

Assume for the moment that these beliefs ultimately translate into the passage of laws that prohibit discrimination based on sexual orientation and that provide same-sex couples the same societal supports currently available to opposite-sex couples, including access to civil marriage. . . . [G]ranting this justified liberty and equality to gay people will likely put a burden on those religious people who believe acting on one's same-sex sexual orientation is a sin and who may feel they are aiding and abetting sin if they rent an apartment to a gay couple, allow a gay couple to eat at their restaurant, or provide health benefits to a same-sex spouse. . . . Let me be very clear . . . in almost all the situations . . . I believe the burden on religious people that will be caused by granting gay people full equality will be justified. . . . That is because I believe granting liberty to gay people advances a compelling government interest, that such an interest cannot be adequately advanced if "pockets of resistance" to a societal statement of equality are permitted to flourish, and hence that a law that permits no individual exceptions based on religious beliefs will be the least restrictive means of achieving the goal of liberty for gay people

Laurie Higgins, *Obama's Controversial Recess Appointment to the EEOC: Lesbian Chia Feldblum*, ILL. FAM. INST. (Mar. 30, 2010), <http://illinoisfamily.org/homosexuality/obamas-controversial-recess-appointment-to-the-eeoc-lesbian-chai-feldblum/>.

¹⁷⁸ Joe Newby, *Colorado Baker Faces Year in Jail for Refusing to Make Cake for Gay Wedding*, EXAMINER.COM (July 8, 2013), <http://www.examiner.com/article/colorado-baker-faces-year-jail-for-refusing-to-make-cake-for-gay-wedding> ("In June, the Advocate said the Colorado Attorney General's office filed a discrimination complaint against the owners of Masterpiece Cakeshop in Denver after the bakers refused to bake a cake for Dave Mullins and Charlie Craig, a Denver area gay couple, last year. But Jack Phillips, one of the owners, declined to make the cake citing his Christian beliefs. 'We would close down the bakery before we compromised our beliefs,' he told KCNC").

¹⁷⁹ *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), cert. denied 572 U.S. __ (Apr. 7, 2014); see also *Elane Photography v. Willock*, ALLIANCE DEFENDING FREEDOM (Dec. 16, 2013), <http://www.adfmedia.org/News/PRDetail/5537>.

tion of the Oregon Equality Act.¹⁸⁰ In Massachusetts, after same-sex marriage was legalized there, “at least twelve dissenting . . . justices of the peace [were] forced to resign for refusing to perform same-sex marriages despite their willingness to continue solemnizing husband-wife marriages.”¹⁸¹ When California first legalized same-sex marriage, many deputy county clerks objected to performing same-sex marriages; some were given case-by-case exemptions while others were not.¹⁸² Legal actions have been taken against religious organizations in other states for declining to rent facilities for same-sex ceremonies, for firing a minister who performed a same-sex union ceremony in violation of church doctrine, for declining on grounds of religious doctrine to give married-student housing to same-sex couples, for denying same-sex couples “family” membership status, etc.¹⁸³ Catholic Charities in Illinois, Massachusetts, and the District of Columbia ceased providing adoption services when laws in each of those jurisdictions required those agencies to place children for adoption with same-sex couples, forcing those religious adoption agencies to choose between their religious beliefs and continuing to provide dual-gender adoptive homes for parentless Catholic children.¹⁸⁴ Last year a New Jersey judge ruled that a Christian retreat house must allow same-sex civil unions on its premises.¹⁸⁵ A Washington State florist was sued by the attorney general for refusing to provide flowers to a gay wedding due to her relig-

¹⁸⁰ Evan Sernoffsky, *Gresham Bakery That Denied Wedding Cake Closes*, KGW.COM (Sept. 1, 2013, 11:45 AM), <http://www.kgw.com/news/Gresham-bakery-that-denied-same-sex-wedding-cake-closes—222004711.html>.

¹⁸¹ Roger Severino, *Or for Poorer? How Same-Sex Marriage Threatens Religious Liberty*, in *WHAT’S THE HARM?* 325, 341 (Lynn D. Wardle ed., 2008).

¹⁸² See generally Wardle, *supra* note 172, at 339-41. Also, Catholic fertility doctors were sued and found liable in California for refusing to provide artificial reproductive treatment to a lesbian couple. *Id.* at 343.

¹⁸³ *Id.* at 342-43.

¹⁸⁴ Douglas Laycock & Thomas C. Berg, *Protecting Same-Sex Marriage and Religious Liberty*, 99 VA. L. REV. IN BRIEF 1 (2013). If children are regularly placed with married couples, the legalization of same-sex marriage strengthens the claim that gay and lesbian couples might assert if they are not allowed to adopt, especially applicable to children in state custody. See also Father Robert Carr, *Boston’s Catholic Charities to Stop Adoption Service Over Same-Sex Law*, CATH. ONLINE (Mar. 10, 2006), http://www.catholic.org/national/national_story.php?id=19017.

¹⁸⁵ Ben Johnson, *Judge Rules Christian Facility Cannot Ban Same-Sex Civil Union Ceremony on Its Own Premises*, LIFESITENEWS.COM (Jan. 13, 2012, 8:48 PM), <http://www.lifesitenews.com/news/judge-rules-christian-facility-cannot-ban-same-sex-civil-union-ceremony-on/>.

ious beliefs.¹⁸⁶ Catholic owners of a privately owned inn in Vermont were forced to pay \$30,000 and cease holding any weddings as part of a settlement resulting from(?) a lawsuit brought when they declined on religious grounds to host a same-sex couple's reception.¹⁸⁷ A Hawaii bed and breakfast was sued when the owner refused to violate her religious views and host a lesbian couple.¹⁸⁸ These are just a few of the *dozens of examples* of persecution of persons of faith and of religions that already have occurred and will continue to occur as a result of the legalization of same-sex marriage in other states.

It should come as no surprise that just two months after *Windsor*, the New Mexico Supreme Court ruled in *Elane Photography LLC v. Willock* that a Christian photographer who declined on reasons of religious beliefs to shoot a lesbian commitment ceremony had no religious liberty defense to a complaint filed under the state non-discrimination law by the lesbian potential clients.¹⁸⁹ Nor should it be surprising that less than a week later, a New Mexico trial court held that under the state constitution the state must allow same-sex marriage.¹⁹⁰

With cases like *Elane Photography*, it is no wonder that religious leaders of many denominations feel seriously threatened by the movement to legalize same-sex marriage. For example, in October:

[A] Baptist leader [told students at the Mormon university, BYU,] that while Mormons and evangelicals are divided theologically, they share "common concerns and urgencies" about "unprecedented and ominous" attacks on religious freedom. "I do not believe that we are going to heaven together, but I do believe we may go to jail together," said R. Albert Mohler during a speech to nearly 400 students and faculty [at BYU].¹⁹¹

¹⁸⁶ Scott Ferguson, *Washington State Suing Florist Who Refused to Supply Gay Wedding*, THE RAW STORY (Apr. 10, 2013, 3:28 PM), <http://www.rawstory.com/rs/2013/04/10/washington-state-suing-florist-who-refused-to-supply-gay-wedding/>.

¹⁸⁷ Dave Gram, *Vermont's Wildflower Inn Settles Gay Marriage Lawsuit with Lesbian Couple*, HUFFINGTON POST (Aug. 23, 2012), http://www.huffingtonpost.com/2012/08/23/wildflower-inn-vermont-gay-marriage-lawsuit_n_1826218.html.

¹⁸⁸ Jennifer Kelleher, *Gay Couple Sue Hawai'i B&B, Claim Discrimination*, YAHOO! NEWS (Dec. 20, 2011), <http://news.yahoo.com/gay-couple-sue-Hawai'i-b-b-claim-discrimination-230124597.html>.

¹⁸⁹ *Elane Photography, LLC v. Willock*, 309 P.3d 53, 75 (N.M. 2013), *cert. denied* 572 U.S. ___ (Apr. 7, 2014).

¹⁹⁰ *Greigo v. Oliver*, No. D 202 CV 2013 2757, 2013 WL 4716361 (N.M. Dist. Ct. Aug. 26), *aff'd*, 316 P.3d 865 (N.M. 2013).

¹⁹¹ Tad Walch, *At BYU, Baptist Says Mormons and Evangelicals "May Go to Jail Together,"* DESERET NEWS (Oct. 21, 2013, 10:20 PM), <http://www.deseretnews.com/article/865588850/At-BYU-Baptist-says-Mormons-and-evangelicals-may-go-to-jail-together.html?pg=all>.

Legal scholarship has clearly shown that most religious exemption laws enacted in states that have legalized same-sex marriage have been inadequate.¹⁹² National legal expert Professor Robin Fretwell indicates that such religious exemptions are narrow, thin, and stingy and offer less than full protection for religious liberty.¹⁹³ The threats to religious liberty from legalization of same-sex marriage are real, and a “nominal” exemption for religions is unworthy of persons of goodwill and may well be unconstitutional under the First Amendment.

C. *The “Collateral Damage” to Children and Families from Legalizing Same-Sex Marriage*

The legalization of same-sex marriage portends significant detriment and disadvantages for children. Recent studies are beginning to document the disadvantages to children of being raised by two women or two men instead of by both a mother and a father.¹⁹⁴ I will mention just four recent examples of this research.

A study published online in *Demography* in late 2012 by three economists found significant difference in *educational progress* of children raised by parents in same-sex relationships.¹⁹⁵ Professors Douglas W. Allen, Catherine Pakaluk, and Joseph Price re-examined a study published in 2010 by Professor Michael J. Rosenfeld, which had concluded that school progress by children raised by same-sex couples was statistically indistinguishable from the progress made by children raised by heterosexual married couples.¹⁹⁶ Professors Allen, Pakaluk, and Price re-ran the study using the same data as Dr. Rosenfeld, but using alternative (arguably less biased) comparison groups or alternative (less biased) sample restrictions and found that children raised by same-sex

¹⁹² Robin Fretwell Wilson & Jana Singer, *Same-Sex Marriage and Conscience Exemptions*, 12 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 12, 12 (2011).

¹⁹³ Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417 (2012).

¹⁹⁴ Mark Regnerus, *How Different Are the Adult Children of Parents Who Have Same-Sex Relationships? Findings From the New Family Structures Study*, 41 SOC. SCI. RES. 752, 764 (2012).

¹⁹⁵ Douglas W. Allen, Catherine Pakaluk & Joseph Price, *Nontraditional Families and Childhood Progress Through School: A Comment on Rosenfeld*, 50 DEMOGRAPHY 955, 960-61 (2012).

¹⁹⁶ Michael J. Rosenfeld, *Nontraditional Families and Childhood Progress Through School*, 47 DEMOGRAPHY 755, 770 (2010) (In terms of normal progress through primary school, “children of same-sex couples cannot be distinguished with statistical certainty from children of heterosexual married couples.”). *Id.* at 772 (“[C]hildren raised by same-sex couples have no fundamental deficits in making normal progress through school.”).

parents were twenty-six to thirty-five percent more likely to *not make the same normal school progress* as children raised by married heterosexual parents.¹⁹⁷ They concluded, “[w]ith respect to normal school progress, children residing in same-sex households can be distinguished statistically from those in traditional married homes and in heterosexual cohabiting households.”¹⁹⁸ A review of data that was earlier interpreted as supportive found that, compared with traditional married households . . . children being raised by same-sex couples are thirty-five percent less likely to make normal progress through school; this difference is statistically significant at the one percent level.¹⁹⁹

Another 2012 study by Daniel Potter, published in the *Journal of Marriage and Family*, reported that children raised by same-sex parent families scored lower on math assessment tests than their peers raised in married, biological-parent homes.²⁰⁰ The difference was deemed to be reflective of the effect of disruptive family transitions associated with same-sex parenting, rather than “any inherent deficiencies in these family structures.”²⁰¹ The pregnant implication (verified by other data) is that same-sex parent households are less stable and that the children in those families experience or have experienced more “transitions” (such as break-ups, new partners coming in, etc.) that negatively impact their math performance than do children in households headed by their married biological parents.²⁰² The study also noted “important similarities between same-sex and opposite-sex parent non-traditional families” (such as cohabiting, divorced, stepparent, and single heterosexual parent homes),²⁰³ as have several other studies.²⁰⁴ In other words, children being raised by same-sex parents in at least some

¹⁹⁷ Allen, Pakaluk & Price, *supra* note 195, at 959-60.

¹⁹⁸ *Id.* at 960.

¹⁹⁹ *Id.*

²⁰⁰ Daniel Potter, *Same-Sex Parent Families and Children's Academic Achievement*, 74 J. MARR. & FAM. 556, 568 (2012) (children in same-sex parent families scored lower than their peers in married, two-biological parent households, but results can be explained by other factors).

²⁰¹ *Id.* at 567 (however, if disruptive family transitions are common in same-sex family structures, are they not examples of “inherent deficiencies?”).

²⁰² *Id.* at 567 (“Same-sex parent families are often created to and transitions in children’s family structure . . .”).

²⁰³ *Id.* at 567, 562-66.

²⁰⁴ See, e.g., Regnerus, *supra* note 194, at 759; Loren Marks, *Same-Sex Parenting and Children's Outcomes: A Closer Examination of the American Psychological Association's Brief on Lesbian and Gay Parenting*, 41 SOC. SCI. RES. 735, 737 (2012); Walter R. Schumm, *Are Two Lesbian Parents Better than a Mom and Dad? Logical and Methodological Flaws in Recent Studies Affirming the Superiority of Lesbian Parenthood*, 10 AVE MARIA L. REV. 79, 99 (2011).

ways appear to be more similar to being raised by non-marital cohabitants, or by divorced parents, than to being raised by married biological parents.

Moreover, a recent study published in fall 2013 based on a twenty percent sample of the 2006 Census-relevant population in Canada found that children raised by gay and lesbian couples are only about sixty-five percent as likely to graduate from high school as children from married, opposite-sex couples.²⁰⁵ Thus, it is very clear that the outcomes for children raised by gay and lesbian couples are significantly disadvantaged and negative compared to the outcomes for children raised by married mom-and-dad parents.

In 2012, an extensive study by University of Texas Sociologist Mark Regnerus found that children of mothers who had same-sex relationships were significantly disadvantaged as young adults on twenty-five of the forty child outcome measures (sixty-three percent), compared to children who spent their entire childhood with both their married, biological parents.²⁰⁶ Children raised by lesbians had the highest percentage of sexual touching by a parent, highest percentage forced to have sex, highest percentage of having affairs, highest percentage on welfare, lowest rate of employment, highest percentage of cohabitation, etc.²⁰⁷ It is worth noting that Professor Regnerus has been viciously “smeared” and become the subject of “inquisitions and witch hunts,” treated as “a heretic, a traitor,” and subject to severe “vigilante attacks” and “political attacks” – all because he dared to publish data that shed light on some deficiencies of same-sex parenting that appear to detrimentally impact the welfare of children raised in such relationships when they become adults.²⁰⁸

²⁰⁵ Douglas W. Allen, *High School Graduation Rates Among Children of Same-Sex Households*, 10 REV. ECON. HOUSEHOLD 1007 (2013), available at <http://link.springer.com/article/10.1007/s11150-013-9220-y/fulltext.html>.

²⁰⁶ Regnerus, *supra* note 194.

²⁰⁷ *Id.*

²⁰⁸ Christian Smith, *An Academic Auto-da-Fe*, THE CHRONICLE OF HIGHER EDUC. (July 23, 2012), <http://chronicle.com/article/An-Academic-Auto-da-F-/133107/>. Professor Smith notes:

Regnerus’s study was based on a nationally representative sample of adult Americans, including an adequate number of respondents who had parents with same-sex relationships to make valid statistical comparisons. His data were collected by a survey firm that conducts top studies, such as the American National Election Survey, which is supported by the National Science Foundation. His sample was a clear improvement over those used by most previous studies on this topic. . . . But never mind that. None of it matters. Advocacy groups and academics who support gay marriage view Regnerus’s

On the other hand, substantial methodological flaws have been identified in many studies purporting to show that there is “no difference” between developmental outcomes for children raised by lesbian and gay parents and those raised by married biological parents.²⁰⁹ In fact, the results of such comparisons give grave cause for concern about the potential detrimental impacts upon children raised by a parent in a same-sex relationship.

V. CONCLUSION

Abraham Lincoln reportedly asked a heckler: “How many legs would a calf have if you called the tail a leg?”²¹⁰

The heckler responded: “Five.”²¹¹

“No,” said Lincoln, “calling a tail a leg a doesn’t make it a leg.”²¹²

That same simple logic applies to the debate over same-sex marriage. In fact, in reality and in life, men and women are different in profound, important ways that enrich society. Likewise, the union of a man and woman is different from unions of two men or two women in profound, important ways that uniquely enrich society.

Preserving the dual-gender, gender-integrating qualities of marriage is important to society; it is essential to preserve the unique and distinctive contributions of dual-gender (gender-integrating) marriage for society. To create other forms of domestic relationships such as same-sex civil unions, *pactes civiles*, domestic partnerships, etc., may create competitive family structures, but it does not directly jeopardize the institution of marriage or its core, essential meaning. To create same-sex marriage does directly alter the core social understanding of marriage and changes the essential content of the basic social institution of marriage. That is a social experiment we would be foolish to endorse or undertake. Calling the union of two men or two women a marriage doesn’t make it a marriage – conferring the “marriage” label on such

findings as threatening. (As an aside, that is unnecessary, since his findings can be interpreted to support legal same-sex marriage, as a way to counter the family instability that helps produce the emotional and social problems Regnerus and others have found.)

Id.

²⁰⁹ Marks, *supra* note 204.

²¹⁰ See REMINISCENCES OF ABRAHAM LINCOLN BY DISTINGUISHED MEN OF HIS TIME 242 (Allen Thorndike Rice ed., Harper & Brothers 1909).

²¹¹ *Id.*

²¹² *Id.*

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relationships does not confer on the parties, the relationship, or on society the valuable qualities of marriage.

Despite the highly controversial nature of the same-sex marriage issue – or perhaps (especially) because of it – we must guard against, reject, and repudiate the use of pejorative language in public discussions of the subject. That is especially important for the judiciary and particularly important for the Supreme Court. As Dean Erwin Chemerinsky put it: “Codes of judicial ethics require that judges avoid even the appearance of impropriety. Nowhere is that more important than for the most visible court in the country – the U.S. Supreme Court.”²¹³

²¹³ Sande L. Buhai, *Federal Judicial Disqualification: A Behavioral and Quantitative Analysis*, 90 OR. L. REV. 69, 111 (2011) (quoting Erwin Chemerinsky, *A Supreme Court Above Reproach*, DAILY J., Feb. 15, 2011, at 1).

*Appendix I**The Legal Status of Same-Sex Unions in the USA and Globally*

Lynn D. Wardle

15 January 2014²¹⁴

(# = law passed but not yet in effect)

*A. Legal Allowance of Same-Sex Unions in the USA (50 states + DC + 566 Indian Tribes):***Same-Sex Marriage Legalized in Seventeen (17-19) US States** (+ DC +8 of 564 U.S. Indian tribes)

Massachusetts (2004), Connecticut (2008), Iowa (2009), Vermont (2009), New Hampshire (2010), New York (2011), Maine (2012), Maryland (2012), Washington (2012), Delaware (2013), California (2013), Minnesota (2013), Rhode Island (2013), New Jersey (*de facto* 10/21/2013), Hawaii (2013), New Mexico (2013), and soon Illinois (effective June 2014); and Oregon and Kentucky (*barring appeal*) recognize same-sex marriage (herein "SSM") performed in other states; and some states recognize SSM for limited purposes only: Ohio (for birth and death certificate purposes) and Missouri (for joint tax filing purposes); *plus possibly Utah (2013 – order stayed on appeal), Oklahoma (2013 – order stayed on appeal), and Virginia (2013 – order stayed on appeal)* plus the District of Columbia (2010). (Also by the Coquille Tribe in Oregon (2009), the Suquamish Tribe in Washington (2011), the Tribal Council of the Little Traverse Bay Bands of Odawa Indians in Michigan (2013), the Pokagon Band of Potawatomi Indians in Michigan (2013), the Santa Ysabel Tribe in California (2013), the Colville Tribal Council of the Confederated Tribes of the Colville Nation in Washington, the Cheyenne and Arapaho Tribes in Oklahoma, and the Leech Lake Tribal Court in Minnesota (2013)).²¹⁵ (SSM is likely to be legalized in Hawaii in 2013; possibly also Illinois.)

²¹⁴ Compare Jennifer C. Pizer & Sheila James Kuehl, *Same-Sex Couples and Marriage, Model Legislation for Allowing Same-Sex Couples to Marry or All Couples to Form a Civil Union*, THE WILLIAMS INSTITUTE (Aug. 2012), and *Status of Same-Sex Relationships Nationwide*, LAMBDA LEGAL (Aug. 19, 2011), <http://www.lambdalegal.org/publications/articles/nationwide-status-same-sex-relationships.html>; See *Recognition of Same-Sex Couples Worldwide, Recognition of Same-Sex Couples in the United States*, LAMBDA LEGAL (Sept. 12, 2011), http://data.lambdalegal.org/publications/downloads/fs_recognition-of-same-sex-couples-worldwide.pdf; Bea Verschraegen, *The Impact of European Family Law on National Legal Systems*, in 2 CENTRAL AND EUROPEAN COUNTRIES AFTER AND BEFORE THE ACCESSION 63-65 (2011).

²¹⁵ Voters approved SSM in three states in 2012 (ME, MD, & WA). In five of the states where SSM now is legal it was the result of judicial decree or initiative (MA, IA, CA, CN,

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Same-Sex Civil Unions Equivalent to Marriage Legal in Three (3) Additional US States:Oregon (2008), Nevada (2009), and Colorado (2013).²¹⁶**Same-Sex Unions Registry & Specific, Limited Benefits in One (1) More US Jurisdiction:**Wisconsin. *Some States with SSM or CU also allows limited benefit relations – see, e.g., HI (1997).****B. Legal Rejection of Same-Sex Unions in the USA:*****Same-Sex Marriage Prohibited by State Constitutional Amendment (SMA) in Thirty (30) States (60%) (plus, previously, California):**Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Hawaii, Idaho, Kentucky, Kansas, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma,* Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah,* Virginia,* and Wisconsin.²¹⁷ (* = pending appeal)**Same-Sex Civil Unions Equivalent to Marriage Prohibited by State Constitutional Amendment in Twenty (20) US States (40%):**

Alabama, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Nebraska, North Carolina, North Dakota, Ohio,

VT). A trial court in New Jersey ruled that it was unconstitutional for the state to not permit same-sex marriage; the state supreme court denied a stay pending appeal on grounds that the state was unlikely to prevail on appeal, and then the Governor withdrew the state's appeal. *See* Garden State Equal. v. Dow, 216 N.J. 314 (2013).

²¹⁶ Some states – including HI, IL, NV & DC – also allow heterosexual couples to enter CUs. Washington offers both SSM and SSCU until June 2014 when it will be available only to persons over 62. Several states that had civil unions now have SSMs instead. VT, CN, NH, RI & DE. *See Defining Marriage: State Defense of Marriage Acts and Same-Sex Marriage Laws*, NCSL (July 26, 2013), <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx>.

²¹⁷ SMA passed in May 2012 in NC (61%); SMA rejected for first time by voters in MN in 2012; initiatives or referenda legalizing SSM approved by voters in ME, MD, and WA in 2012). Voters have constitutionally banned SSM in thirty-one states by adopting SMAs. (In AZ voters first rejected SMA in 2006 then approved SMA in 2008; in ME voters first rejected SSM in 2009 then approved in 2012). In seventeen of the twenty-six “blue states” that voted for Obama in 2012, only male-female marriage was then legal: Hawaii, California, Oregon, Nevada, Colorado, New Mexico, Minnesota, Wisconsin, Illinois, Michigan, Ohio, Pennsylvania, Rhode Island, New Jersey, Delaware, Virginia, and Florida. Bill to legalize SSM in IL fails 130530. In 2008, voters in California passed Prop 8, a constitutional amendment barring SSM, but it was ruled unconstitutional in a dubious by a federal district court opinion. State officials refused to appeal and the Supreme Court of the United States ruled that the sponsors of Prop 8 lacked standing to appeal. *Hollingsworth v. Perry*, 570 U.S. ___, 133 S. Ct. 2652 (2013).

Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and Wisconsin.

The total vote rejecting same-sex marriage in votes on the thirty one state marriage amendments combined was OVER 61% (as of November 2012).

*C. Legal Allowance of Same-Sex Unions Globally (of 193 Nations/UN).*²¹⁸

Same-Sex Marriage Generally Legalized in Fourteen (Stretched to Sixteen) (14-16) of 193 Nations*:

The Netherlands (2000), Belgium (2003), Canada (2005), Spain (2005), *South Africa** (2006), Norway (2009), Sweden (2009), Portugal (2010), Iceland (2010), Argentina (2010), Denmark (2012), Uruguay (2013), New Zealand (2013), France (2013), and *Brazil** (2013), [plus England/Wales# (eff. 2014)].²¹⁹ (* = pending appeal(?))

Same-Sex Non-Marital Unions Mostly Equivalent to Marriage Allowed in Eleven* (11) Other Nations (of 193):

Ecuador, Finland, Germany, Luxembourg, Slovenia, Andorra, Switzerland, Australia, Austria, Ireland, and Liechtenstein.²²⁰ (* = pending appeal(?))

Same-Sex Partnerships (Formal, Limited But Not Equal to Marriage) Allowed in at Least Five (5) More Nations: Colombia, Croatia, Czech Republic, Hungary, and Israel.

²¹⁸ See *Gay Marriage Around the World*, THE PEW F. ON RELIGION AND PUB. LIFE (Feb. 8, 2013), <http://www.pewforum.org/Gay-Marriage-and-Homosexuality/Gay-Marriage-Around-the-World-2013.aspx>. The British House of Commons voted to legalize SSM on February 5, 2013. It is expected to pass another vote in the House of Commons and in the House of Lords by summer 2013. *Id.*

²¹⁹ Categorization of some nations is difficult. For example, South Africa legalized "Civil Unions" which can be created by way of "marriage" and can be called "marriages," but the Marriage Act was not amended and still only allows male-female marriage. See *Civil Union Act 17 of 2006*, GOV'T GAZETTE, Nov. 17, 2006. Likewise, same-sex marriage is permitted in Brazil in ten of twenty-six states, and since May 2013 civil registrars were directed to perform same-sex marriages, but the legal status of that directive of the National Judicial Council is debatable. SSM is allowed in sub-jurisdictions of some other nations (e.g., seventeen states in the USA, Mexico (City)).

²²⁰ See *supra* note 219. SSM/CUs in South Africa and Brazil. Some nations with SSM also allow SSCUs. Some local jurisdictions as Greenland and in some states or provinces in Mexico, the USA, and Venezuela allow SSCUs.

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D. Legal Rejection of Same-Sex Marriage Globally:***At Least Forty-Seven (47) of 193 Sovereign Nations (24%) Have Constitutional Provisions Explicitly or Implicitly Defining Marriage as Union of Man and Woman:***

Constitutions of: Armenia (art. 32), Azerbaijan (art. 34), Belarus (art. 32), Bolivia (art. 63), Brazil (art. 226), Bulgaria (art. 46), Burkina Faso (art. 23), Burundi (art. 29), Cambodia (art. 45), China (art. 49), Colombia (art. 42), Cuba (art. 35), Democratic Republic of the Congo (art. 40), Ecuador (art. 67), Eritrea (art. 22), Ethiopia (art. 34), Gambia (art. 27), Honduras (art. 112), Hungary (art. L, Constitution/Basic Law of Hungary (25 Apr. 2011) (*effective Jan. 2012*), Japan (art. 24), Latvia (art. 110 - Dec. 2005), Lithuania (art. 38), Malawi (art. 22), Moldova (art. 48), Mongolia (art. 16), Montenegro (art. 71), Namibia (art. 14), Nicaragua (art. 72), Panama (art. 58), Paraguay (arts. 49, 51, 52), Peru (art. 5), Poland (art. 18), Romania (art. 44), Rwanda (art. 26), Serbia (art. 62), Seychelles (art. 32), Somalia (art. 28, draft Constitution 2012), Sudan (art. 15), Suriname (art. 35), Swaziland Constitution (art. 27), Tajikistan (art. 33), Turkmenistan (art. 27), Uganda (art. 31), Ukraine (art. 51), Venezuela (art. 77), and Vietnam (art. 36). (At least 12 of these imply dual-gender (“men and women have/may”). *See also* Hong Kong Bill of Rights of 1991 (art. 19); Spain (art. 32, but 2005 SSM law upheld Nov. 2012). *Examples:* Article 24, Constitution of **Japan**: “Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis” Article 110, Constitution of **Latvia**: “The State shall protect and support marriage—a union between a man and a woman” Article 42, Constitution of **Colombia**: the family is formed “by the free decision of a man and woman to contract matrimony” **Uganda** Constitution, Art. 31: “Marriage between persons of the same sex is prohibited.” **Nigeria** passed a law criminalizing SSM on May 30, 2013 – (<http://jurist.org/paperchase/2013/05/nigeria-house-approves-bill-criminalizing-same-sex-marriage.php>). Homosexual conduct is illegal in 87 globally - 37 in Africa + 50 other nations globally. (<http://www.globalequality.org/component/content/article/166> (130601)).

= law is not yet in full effect.

* * * * *

Appendix II
Same-Sex Marriage Litigation: 29 Post-Windsor cases in 18 states +
Federal Agencies
as of Sept. 30, 2013 (Rose Lewis & Lynn Wardle, supplementing
William C. Duncan)

<i>Arkansas 1 & 2</i>	
<i>Case Name</i>	Wright v. Arkansas AND Jernigan v. Crane
<i>Court</i>	Ark. Super. Ct. (Pulaski Cnty.) AND U.S. Dist. Ct., E. Dist. of Ark.
<i>Date Filed</i>	July 3, 2013 AND July 15, 2013
<i>Group Involved</i>	Private attorney
<i>Legal Claim</i>	Arkansas marriage amendment violates state and federal constitution.
<i>Status</i>	Awaiting answer
<i>Board of Immigration Appeals</i>	
<i>Case Name</i>	Matter of Oleg B. Zeleniak, Benef. of Visa Pet. Filed by Serge v. Polajenko, Petitioner, 26 I&N Dec. 158 (BIA), Interim Decision 3787, 2013 WL 3781298.
<i>Court</i>	Executive Office for Immigration Review, Board of Immigration Appeals
<i>Date Filed</i>	July 17, 2013
<i>Legal Claim</i>	U.S. Citizen filed petition for visa for Alien Relative, same-sex husband who he was legally married to in Vermont.
<i>Status</i>	Held: Same-sex marriages are valid for immigration purposes if lawful in the state where performed; therefore, Petitioner's appeal is sustained in light of Windsor and the record has been remanded to the Director for further consideration consistent with this opinion.
<i>California</i>	
<i>Case Name</i>	Cooper-Harris v. United States, 2013 U.S. Dist. LEXIS 125030, 2013 WL 4607436 (C.D. Cal. Aug. 29, 2013).
<i>Court</i>	U.S. Dist. Ct., C. Dist. of Cal.
<i>Group Involved</i>	Private Attorneys
<i>Date Filed</i>	Aug. 29, 2013
<i>Legal Claim</i>	Plaintiff says that Section 3 of DOMA and Title 38, which excluded same-sex spouses from veteran benefits, are unconstitutional.
<i>Status</i>	Court holds that Title 38 is not rationally related to military purposes, and thus plaintiff is granted summary judgment and defendants are permanently enjoined from relying on DOMA and Title 38 to deny recognition of plaintiff's same-sex marriage recognized by California.
<i>Ninth Circuit</i>	
<i>Case Name</i>	Golinski v. United States Office of Pers. Mgmt., 724 F.3d 1048, 2013 U.S. App. LEXIS 15631 (9th Cir. 2013).
<i>Court</i>	U.S. Ct. of App., 9th Cir.
<i>Date Filed</i>	July 23, 2013
<i>Group Involved</i>	Lambda and too many other organizations to list on both sides of the issue.

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<i>Legal Claim</i>	Plaintiff wanted to enroll same sex wife (married under CA law) in family health benefit plan for insurance purposes.
<i>Status</i>	Appeal dismissed because in light of <i>Windsor</i> , the permanent injunction granted in the Dist. Ct. and held in abeyance is now active.
<i>Hawaii</i>	
<i>Case Name</i>	Jackson v. Abercrombie, 884 F. Supp. 2d 1065, 2012 U.S. Dist. LEXIS 111376, 2012 WL 3255201 (D. Haw. 2012).
<i>Court</i>	U.S. Dist. Ct., Dist. of Haw.
<i>Date Filed</i>	Dec. 7, 2011; Aug. 8, 2012
<i>Group Involved</i>	Private attorneys and Hawaii Family Forum (intervener for Defendants)
<i>Legal Claim</i>	Hawaii marriage law unconstitutional under federal constitution.
<i>Status</i>	The U.S. District Court, District of Hawaii, ruled the Hawaii marriage amendment was constitutional. Pending on appeal in Ninth Circuit.
<i>Illinois</i>	
<i>Case Name</i>	Darby v. Orr
<i>Court</i>	Ill. Cir. Ct. (Cook Cnty.)
<i>Date Filed</i>	May 30, 2012; Sept. 27, 2013
<i>Group Involved</i>	Lambda Legal Defense and Education Fund
<i>Legal Claim</i>	Illinois marriage law unconstitutional under state constitution.
<i>Status</i>	Circuit Court granted motion to dismiss all but equal protection and due process claims under the IL Constitution, which are allowed to go forward. The case was dismissed when the Illinois legislature passed a bill making same-sex marriage legal. The law goes into effect June 1, 2014.
<i>Internal Revenue Ruling</i>	
<i>Case Name</i>	Rev. Rul. 2013-17, 2013 IRB LEXIS 437, 2013-38 I.R.B. 201 (I.R.S. 2013).
<i>Court</i>	U.S. Internal Revenue Service
<i>Date Filed</i>	Aug. 29, 2013
<i>Legal Claim</i>	Post- <i>Windsor</i> interpretation of gender-specific terms in the IRC to exclude same-sex spouses would raise serious constitutional questions that were properly avoided.
<i>Status</i>	Rev. Rul. 58-66, 1958-1 C.B. 60 was clarified and amplified to provide for gender neutral interpretation of federal income tax law including to permit same-sex couples to utilize “married” tax filing status provided that the couple was validly married in a state whose laws authorized such marriages even if domiciled elsewhere.
<i>Kentucky -I</i>	
<i>Case Name</i>	Bourke v. Breshear
<i>Court</i>	U.S. Dist. Ct., W. Dist. of Ky.
<i>Date Filed</i>	July 26, 2013
<i>Group Involved</i>	Private attorneys
<i>Legal Claim</i>	KY marriage law unconstitutional under federal constitution.
<i>Status</i>	On Feb. 12, 2014, the court held that Kentucky’s “denial of recognition for valid same-sex marriages violated the United States Constitution’s guarantee of equal protection under the law.”

<i>Kentucky-2</i>	
<i>Case Name</i>	Ky. Equal. Fed'n v. Beshear
<i>Court</i>	Ky. Cir. Ct. (Franklin Cnty.)
<i>Date Filed</i>	Sept. 13, 2013
<i>Group Involved</i>	KY Equality Federation
<i>Legal Claim</i>	KY marriage law unconstitutional under both KY law and federal constitution. Federal constitution requires same-sex marriage or equivalent status.
<i>Status</i>	Awaiting answer
<i>Louisiana</i>	
<i>Case Name</i>	Robicheaux v. Caldwell
<i>Court</i>	U.S. Dist. Ct., E. Dist. of La.
<i>Date Filed</i>	July 16, 2013
<i>Group Involved</i>	Private attorneys
<i>Legal Claim</i>	Louisiana marriage amendment violates U.S. Constitution.
<i>Status</i>	Suit was dismissed for lack of jurisdiction on Nov. 27, 2013. The parties refilled an amended complaint. Awaiting answer.
<i>Federal Circuit</i>	
<i>Case Name</i>	Hara v. OPM, 2013 U.S. App. LEXIS 19114 (Fed. Cir. Sept. 16, 2013) (Note: Decision is unpublished and nonprecedential).
<i>Court</i>	U.S. Ct. of App., Fed. Cir.
<i>Group Involved</i>	Private Attorneys
<i>Date Filed</i>	Sept. 16, 2013
<i>Legal Claim</i>	Petitioner Hara was married to Studds, a Massachusetts congressman who subsequently retired. After the Congressman's death, Petitioner filed with the Office of Personnel Management ("OPM") for spousal survivor annuity benefits based upon the Congressman's federal service.
<i>Status</i>	Initially OPM denied the request based upon DOMA, but following SCOTUS decision in <i>Windsor</i> , the board's decision has been vacated and remanded for proceedings consistent with <i>Windsor</i> .
<i>Michigan-1</i>	
<i>Case Name</i>	Bassett v. Snyder, No. 12-10038, 2013 WL 3285111 (E.D. Mich. June 28, 2013).
<i>Court</i>	U.S. Dist. Ct., E. Dist. of Mich., S. Div.
<i>Date Filed</i>	June 28, 2013
<i>Group Involved</i>	ACLU and private attorneys suing Governor and Attorney General
<i>Legal Claim</i>	Prohibition of benefits for same-sex partners of public employees is unconstitutional based upon equal protection for sex and sexual orientation and substantive due process.
<i>Status</i>	Court held: No viable substantive due process claim but plaintiffs can proceed with equal protection claim and a preliminary injunction against act is granted.

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<i>Michigan-2</i>	
<i>Case Name</i>	Deboer v. Snyder, 2013 U.S. Dist. LEXIS 98382, 2013 WL 3466719 (E.D. Mich. July 1, 2013).
<i>Court</i>	U.S. Dist. Ct., E. Dist. of Mich.
<i>Date Filed</i>	September 7, 2012; July 1, 2013
<i>Group Involved</i>	Private attorneys
<i>Legal Claim</i>	The suit was initially a challenge to Michigan’s adoption statutes but was amended on the above date to add a claim that Michigan’s marriage amendment violates the U.S. Constitution.
<i>Status</i>	Plaintiffs equal protection claim has enough merit to proceed based upon <i>Windsor</i> . Motion to dismiss rejected.
<i>Nevada</i>	
<i>Case Name</i>	Sevcik v. Sandoval, 911 F. Supp. 2d 996, 2012 U.S. Dist. LEXIS 169643, 2012 WL 5989662 (D. Nev. 2012).
<i>Court</i>	U.S. Dist. Ct., Dist. of Nv.
<i>Date Filed</i>	Apr. 10, 2012; Nov. 26, 2012
<i>Group Involved</i>	Lambda Legal Defense and Education Fund
<i>Legal Claim</i>	Nevada marriage amendment unconstitutional under federal constitution.
<i>Status</i>	The U.S. District Court, District of Nevada ruled the marriage amendment was constitutional. Pending on appeal in Ninth Circuit (consolidated with Hawaii).
<i>New Jersey</i>	
<i>Case Name</i>	Garden State Equal. v. Dow
<i>Court</i>	N.J. Super. Ct. (Mercer Cnty.)
<i>Date Filed</i>	June 29, 2011; Sept. 27, 2013
<i>Group Involved</i>	Lambda Legal Defense and Education Fund
<i>Legal Claim</i>	New Jersey’s civil union statute violates the New Jersey and U.S. Constitutions because it stops short of redefining marriage.
<i>Status</i>	The court held that New Jersey’s denial of marriage to same-sex couples violates the equal protection clause of the New Jersey Constitution as interpreted in <i>Lewis v. Harris</i> . The court granted summary judgment to the plaintiffs and ordered the state to permit same-sex couples to marry starting October 21.
<i>New Mexico</i>	
<i>Case Name</i>	Griego v. Oliver
<i>Court</i>	N.M. Sup. Ct.
<i>Date Filed</i>	Mar. 21, 2013
<i>Group Involved</i>	ACLU-New Mexico and National Center for Lesbian Rights
<i>Legal Claim</i>	The New Mexico Constitution requires the state to redefine marriage.
<i>Status</i>	The New Mexico Supreme Court took the case and legalized same-sex marriage on Dec. 19, 2013.
<i>North Carolina</i>	
<i>Case Name</i>	Fisher-Borne v. Smith
<i>Court</i>	U.S. Dist. Ct., M.D. N.C.
<i>Date Filed</i>	July 9, 2013 (originally June 13, 2012)

<i>Group Involved</i>	ACLU
<i>Legal Claim</i>	Federal constitutional challenge to North Carolina marriage amendment.
<i>Status</i>	Earlier case on second-parent adoption amended to include constitutional challenge to marriage law.
<i>Ohio</i>	
<i>Case Name</i>	Obergefell v. Kasich, 2013 U.S. Dist. LEXIS 102077, 2013 WL 3814262 (S.D. Ohio July 22, 2013).
<i>Court</i>	U.S. Dist. Ct., S. Dist. of Ohio
<i>Date Filed</i>	July 9, 2013 (originally June 13, 2012); July 22, 2013
<i>Group Involved</i>	Private attorney
<i>Legal Claim</i>	Federal constitutional challenge Ohio law barring interstate recognition of SSM.
<i>Status</i>	Court issues TRO requiring state to list marriage on death certificate and preliminary injunction.
<i>Oklahoma</i>	
<i>Case Name</i>	Bishop v. United States <i>ex rel.</i> Holder, No. 04-CV-848-TCK-TLW, 2014 WL 116013 (N.D. Okla. Jan. 14, 2014).
<i>Court</i>	U.S. Dist. Ct., N. Dist. of Okla.
<i>Date Filed</i>	Nov. 3, 2004; Nov. 24, 2009
<i>Group Involved</i>	Private attorneys
<i>Legal Claim</i>	Oklahoma marriage amendment and interstate recognition provision of DOMA violate the federal constitution.
<i>Status</i>	Pending in trial court. Update: As to DOMA, only the equal protection and substantive due process challenges survived, the rest were dismissed for standing. On appeal, only the state section 2 amendment was at issue. The Tenth Circuit found that because plaintiffs failed to name a defendant having a causal connection to their alleged injury that was redressable by a favorable court decision, the couple did not have standing. The plaintiffs' claims were dismissed for lack of subject matter jurisdiction. Plaintiffs next sued the Court Clerk for Tulsa County. The court held Oklahoma's constitutional amendment limited marriage to opposite-sex couples violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.
<i>Pennsylvania-1</i>	
<i>Case Name</i>	Cozen O'Connor, P.C. v. Tobits, No. 11-0045, 2013 WL 3878688 (E.D. Pa. July 29, 2013).
<i>Court</i>	U.S. Dist. Ct., E. Dist. of Pa.
<i>Date Filed</i>	July 29, 2013
<i>Group Involved</i>	ACLU was one of the movants, but the parties were private attorneys.
<i>Legal Claim</i>	Does Windsor require recognition of valid Canadian same-sex marriage for purposes of benefits under the federal statute ERISA?
<i>Status</i>	Because Illinois, the couple's domicile, would have found the Canadian same-sex marriage valid, it is valid for spousal benefits under ERISA.

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<i>Pennsylvania-2, 3, & 4</i>	
<i>Case Name 2</i>	Dep't of Health v. Hanes
<i>Court</i>	Harrisburg Commw. Ct.
<i>Date Filed</i>	Sept. 25, 2013
<i>Group Involved</i>	
<i>Legal Claim</i>	Failure to recognize marriage licenses issued by county clerk in contravention of state law violates state and federal constitution.
<i>Status</i>	Awaiting answer
<i>Case Name 3</i>	Palladino v. Corbett
<i>Court</i>	U.S. Dist. Ct., E. Dist. of Pa.
<i>Date Filed</i>	Sept. 25, 2013
<i>Group Involved</i>	Equality Forum
<i>Legal Claim</i>	Failing to recognize Massachusetts same-sex marriage violates the federal constitution.
<i>Status</i>	Awaiting answer
<i>Case Name 4</i>	Whitewood v. Corbett
<i>Court</i>	U.S. Dist. Ct., M. Dist. of Pa.
<i>Date Filed</i>	July 9, 2013
<i>Group Involved</i>	ACLU
<i>Legal Claim</i>	Federal constitutional challenge to Pennsylvania marriage statute.
<i>Status</i>	Awaiting answer
<i>South Carolina</i>	
<i>Case Name</i>	Bradacs v. Haley
<i>Court</i>	U.S. Dist. Ct., Dist. of S.C.
<i>Date Filed</i>	Aug. 28, 2013
<i>Group Involved</i>	Private attorneys
<i>Legal Claim</i>	Federal constitutional challenge to South Carolina marriage amendment.
<i>Status</i>	Awaiting answer
<i>Utah</i>	
<i>Case Name</i>	Kitchen v. Herbert
<i>Court</i>	U.S. Dist. Ct., Dist. of Utah, Cent. Div.
<i>Date Filed</i>	Mar. 25, 2013
<i>Group Involved</i>	Private attorneys
<i>Legal Claim</i>	Utah's marriage amendment violates the federal constitution.
<i>Status</i>	Utah law denied plaintiffs their right to exercise fundamental right to marry; Plaintiffs' motion for summary judgment granted.
<i>Virginia 1 & 2</i>	
<i>Case Name</i>	Harris v. McDonnell AND Bostic v. Rainey
<i>Court</i>	U.S. Dist. Ct., W. Dist. of Va. AND U.S. Dist. Ct., E. Dist. of Va.
<i>Date Filed</i>	Aug. 1, 2013; AND July 18, 2013
<i>Group Involved</i>	ACLU & Lambda AND Private attorneys

<i>Legal Claim</i>	Federal constitutional challenge to Virginia marriage amendment.
<i>Status</i>	Motion for summary judgment filed in both cases.
<i>West Virginia</i>	
<i>Case Name</i>	McGee v. Cole
<i>Court</i>	U.S. Dist. Ct., S. Dist. of W. Va.
<i>Date Filed</i>	Oct. 1, 2013
<i>Group Involved</i>	Lambda Legal
<i>Legal Claim</i>	West Virginia marriage law violates federal constitution.
<i>Status</i>	Plaintiffs' claims pertaining to West Virginia Code Section 48-2-603 dismissed; Plaintiffs' claims as to the other portions of the marriage ban may proceed and are awaiting answer.