
REMARKS

THE EFFECTS OF *HOLLINGSWORTH* AND *WINDSOR* ON FAMILY LAW

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The two cases from last term dealing with same-sex relationships, *Hollingsworth v. Perry*¹ and *United States v. Windsor*,² will each have a variety of impacts, or ripple effects, on families and family law. Some of the effects will likely be relatively small, while others could be profound. At this point, my own opinion is that neither is likely to prove cataclysmic.

Of course, thousands of couples who could not have done so before will marry following *Hollingsworth*,³ and more, who did marry during the brief period before California passed its ballot initiative,⁴

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

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

³ The state's supreme court has turned down a bid to revive Proposition 8, the ballot initiative. See Maura Dolan, *California Supreme Court Rejects Bid to Revive Prop. 8*, L.A. TIMES, Aug. 14, 2013, at AA3.

⁴ Assuming that a same-sex couple properly followed marital procedure of obtaining a marriage license, having a ceremony, and recording the certificate afterward, their California marriage entered before November 5, 2008 has continued to be a valid, recognized marriage from the date of marriage until now. Proposition 8, an amendment to the California Constitution, provided that "only marriage between a man and a woman is valid or recognized in California." CAL. CONST. art. I, § 7.5. The measure was upheld as a legitimate initiative in *Strauss v. Horton*, which also held that the initiative would be applied only retroactively. 207 P.3d 48, 111, 114, 199 (Cal. 2009). S.B. 54, 2009 Leg., Reg. Sess. (Cal. 2009), now codified at CAL. FAM. CODE § 308 (West 2010), provides that marriages contracted in other states where legal during the window before Proposition 8 would also be recognized. During the post-Proposition 8 period, the couples would, in effect, have civil unions; they would be entitled to all the responsibilities and rights of the married, but not to use the title.

will continue to enjoy that status. More thousands, who, like Edith Windsor, were legally married to same-sex partners living in states recognizing same-sex marriage, will get the benefits of federal statutes.⁵ Whether this community support will change the couples, or, sociologically, the relationship between them, is unknown. Marriage does change heterosexuals who wed, for the most part, in very positive ways.⁶ While some, like William Eskridge⁷ and Andrew Sullivan,⁸ have argued that marriage will “civilize” those who could not formerly marry, at least one sociologist finds that marriage will in fact change the way gay and lesbian couples interact—as far as their division of labor within the household, making them more specialized (and therefore more productive) and, arguably, less egalitarian.⁹ But either would be a change in families and their members, not necessarily in family law.¹⁰

⁵ *Windsor*, 133 S. Ct. at 2694-95.

⁶ LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER AND BETTER OFF FINANCIALLY* 67 (2000) (consequences for health and happiness); STEVEN L. NOCK, *MARRIAGE IN MEN’S LIVES* 130 (1998) (suggesting that even controlling for selection effects into marriage, husbands become better people).

⁷ WILLIAM ESKRIDGE, *THE CASE FOR SAME-SEX MARRIAGE* 8, 10 (1996).

⁸ ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* 185 (1995); Andrew Sullivan, *Here Comes the Groom: A (Conservative) Case for Gay Marriage*, *NEW REPUBLIC*, Aug. 28, 1989, at 20. That is, without the need to be furtive and with the social support the community gives married couples, gay couples ought to be more stable and monogamous, benefiting not only themselves but also their children. Some research on this question has begun by a team working in New England. *See, e.g.*, Esther D. Rothblum, Kimberly F. Balsam & Sondra E. Solomon, *The Longest Legal US Same-Sex Couples Reflect on Their Relationships*, 67 *J. SOC. ISSUES* 302, 312 (2011) (“Respondents referred to the civil union as providing the security, legality, and society acceptance to make childrearing feasible.”). The authors have a number of earlier studies using the same data set. *See, e.g.*, Kimberly Balsam et al., *Three-Year Follow Up of Same-Sex Couples Who Had Civil Unions in Vermont, Same-Sex Couples Not in Civil Unions, and Heterosexual Married Couples*, 44 *DEVELOPMENTAL PSYCHOL.* 102 (2008); Esther D. Rothblum et al., *Comparison of Same-Sex Couples Who Were Married in Massachusetts, Had Domestic Partnerships in California, or Had Civil Unions in Vermont*, 29 *J. FAM. ISSUES* 48 (2008).

⁹ *See* Lawrence A. Kurdek, *The Allocation of Household Labor by Partners in Gay and Lesbian Couples*, 28 *J. FAM. ISSUES* 132, 144 (2007). Kurdek finds that gay couples do specialize among various household tasks, but that lesbian couples, while sharing the work, are more apt to rotate the various tasks. *See also* Sondra E. Solomon, Esther D. Rothblum & Kimberly F. Balsam, *Money, Housework, Sex, and Conflict: Same-Sex Couples in Civil Unions, Those Not in Civil Unions, and Heterosexual Married Siblings*, 52 *SEX ROLES* 561, 572 (2005) (finding that same-sex couples were more egalitarian, inside and outside civil unions, than their married heterosexual siblings).

¹⁰ With less specialization, there would likely be a reduced need for alimony. *See, e.g.*, Elisabeth M. Landes, *The Economics of Alimony*, 7 *J. LEGAL STUD.* 35 (1978); Ira M. Ell-

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The primary implication of *Hollingsworth* for family law may be that, with the addition of California to the other states recognizing same-sex marriage,¹¹ nearly a third of all Americans live in jurisdictions with legal same-sex marriage.¹² Thus, the United States moves that much, and, perhaps, inexorably, closer to being a country where Angelina Jolie and Brad Pitt would choose to be married since everyone could.¹³

In some states, same-sex marriage was originally legalized by legislation;¹⁴ though, in a number, the original decision came from state

man, *The Theory of Alimony*, 77 CALIF. L. REV. 1 (1989); June R. Carbone, *Economics, Feminism and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 VAND. L. REV. 1463 (1990); Margaret F. Brinig, *Property Distribution Physics: The Talisman of Time and Middle Class Law*, 31 FAM. L.Q. 93 (1997).

¹¹ As of August 20, 2013, these are California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington, in addition to the District of Columbia.

¹² The proportion is 30.25%. Caitlin Stark & Amy Roberts, *By the Numbers: Same-Sex Marriage*, CNN (Aug. 29, 2013, 3:39 PM), <http://www.cnn.com/2012/05/11/politics/btn-same-sex-marriage>. In addition, seven states recognize civil unions, which grant all the rights and responsibilities of marriage. The civil union (or similar status, with a different name) states are: Colorado, COLO. REV. STAT. § 14-15-107 (2013); Hawaii, HAW. REV. STAT. § 572B-9 (2012); Illinois, 750 ILL. COMP. STAT. 75/20 (2011); Nevada, NEV. REV. STAT. § 122A.200 (2009) (domestic partnership); New Jersey, N.J. STAT. ANN. § 37:1-31 (West 2007); and Oregon, OR. REV. STAT. § 106.340 (2008) (domestic partnership). A lawsuit, *Garden State Equal. v. Dow*, 2012 WL 540608 (N.J. Super. Ct. Law Div. Feb. 21, 2012), challenging New Jersey's civil union law as unconstitutional following *Windsor*, was argued in the state supreme court.

¹³ On July 5, 2011, “[p]raising New York on passing marriage equality legislation, Pitt reaffirmed to People [magazine] that he and Jolie will not marry until all Americans are afforded marriage rights.” John Mitchell, *Brad Pitt And Angelina Jolie: A Timeline of Their Love: We Take a Look Back at the Seven-Year Relationship Between Two of the World's Biggest Movie Stars*, MTV NEWS (Aug. 12, 2013, 6:22 PM), <http://www.mtv.com/news/articles/1683124/angelina-jolie-brad-pitt-engaged-timeline.jhtml>.

¹⁴ The Maryland and Washington legislatures passed laws allowing same-sex marriage. 2012 MD. LAWS 9; 2012 WASH. SESS. LAWS 199. In both states, opponents gathered enough signatures to put the issue to a public vote on the November 2012 ballot. Voters in both states upheld the laws. See Brian M. Rosenthal & Alexa Vaughn, *A License to Marry: It's Official*, SEATTLE TIMES, Dec. 6, 2012, http://seattletimes.com/html/localnews/2019841023_samesex06m.html; *Maryland Ballot Referendums Offer a GOP Reality Check*, BALT. SUN, Nov. 7, 2012, http://articles.baltimoresun.com/2012-11-07/news/bs-ed-referendums-20121107_1_ballot-box-maryland-voters-dream-act. Maine voters approved same-sex marriage through a ballot measure. See Eric Eckholm, *As Victories Pile Up, Gay Rights Advocates Cheer 'Milestone Year'*, N.Y. TIMES, Nov. 7, 2012, http://www.nytimes.com/2012/11/08/us/same-sex-marriage-gains-cheer-gay-rights-advocates.html?_r=0. Three states—Rhode Island, Delaware, and Minnesota—enacted laws that allow same-sex marriage as recently as May 2013. Delaware's law took effect on July 1, and the laws in Rhode Island and Minnesota took effect on August 1.

courts.¹⁵ What all of this means is that there has been an accelerating shift in public opinion on same-sex marriage, so that as of July 2013, more than half (fifty-two percent) of all Americans said they favored legalizing same-sex marriage.¹⁶ Since the numbers reached nearly seventy percent for younger Americans, aged eighteen to thirty-four, the momentum at this point seems unstoppable.¹⁷

Hollingsworth's standing denial to the proponents of the original Proposition 8 ballot initiative, when the state would not contest the district court's holding,¹⁸ suggests an additional point. Those outside state government, no matter how much they are outraged by legislation, will now have a difficult time taking on the constitutionality of this—or any—moral legislation.¹⁹ From a law and economics viewpoint, this holding could be seen as the Court's jurisprudential limitation on the rights of those alleging harm from broad-based third party effects, or externalities. While arguments about morality and natural law may have tremendous force individually or through religious groups, the “destruction to the fabric of society” claims did not fare well in either Court opinion.²⁰ While Justice O'Connor's holding in *Lawrence v. Texas* striking down a criminal sodomy statute governing consenting adults in private made a distinction between what states could do in terms of intimate individual conduct and recognition of status-based relationships,²¹ high morality, perhaps like arguing the doctrines of faith, seems less available at best.

The effect of *Windsor*²² is perhaps going to be more profound. While getting the \$363,053 in estate taxes²³ refunded is very important to Ms. Windsor and perhaps her attorneys, as it would be to anyone,

¹⁵ For example, this was true in *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 968 (Mass. 2003), and *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009).

¹⁶ A poll taken in 1996 reported only twenty-seven percent in favor. Lydia Saad, *In U.S., 52% Back Law to Legalize Gay Marriage in 50 States*, GALLUP (July 29, 2013), <http://www.gallup.com/poll/163730/back-law-legalize-gay-marriage-states.aspx>.

¹⁷ *Id.* Of course, given *Windsor's* emphasis on federalism, it is very unlikely that Congress will constitutionally enact such a measure.

¹⁸ *Hollingsworth v. Perry*, 570 U.S. __, __, 133 S. Ct. 2652, 2660 (2013).

¹⁹ *Id.* at 2663.

²⁰ *Id.* at 2660 (citing *Perry v. Brown*, 671 F.3d 1052, 1083-84 (9th Cir. 2012)); *United States v. Windsor*, 570 U.S. __, __, 133 S. Ct. 2675, 2692 (2013) (“[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.” (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996))).

²¹ 539 U.S. 558, 577 (2003).

²² 133 S. Ct. 2675.

²³ *Id.* at 2683.

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the decision certainly stands for more. Clearly, benefits and obligations involved in the “1,000 federal statutes and a myriad of federal regulations”²⁴ will now need to be extended to those wedded couples living in states that recognize same-sex marriage.²⁵

The newly enunciated federal definition of marriage in *Windsor* is limited to those couples marrying in states recognizing same-sex marriage,²⁶ however, not those where couples can unite in civil union, even though the status purports to grant the same privileges and obligations as those of marriage.²⁷ But states like Colorado follow federal law for granting various state income tax benefits to couples.²⁸ Since the new civil union law in Colorado, which took effect May 1, 2013, makes it clear that the state will continue to follow federal rules for filing joint returns,²⁹ either the legislature will need to amend the statute or it will be subject to challenge as creating a clearly inferior status, or the ban on same-sex marriage will be attacked for taking away benefits once granted by other states.³⁰

²⁴ *Id.* at 2688.

²⁵ On August 28, the Internal Revenue Service issued a ruling extending tax protection for lawfully married same-sex couples residing in any state. *See* Rev. Rul. 2013-17, 2013-38 I.R.B. 201; I.R.S. News Release IR-2013-72 (Aug. 29, 2013). *See generally* Annie Lowrey, *Gay Marriages in All States Get Recognition From the I.R.S.*, N.Y. TIMES, Aug. 30, 2013, at A12.

²⁶ *See* Rev. Rul. 2013-17, 2013-38 I.R.B. 201.

²⁷ *See id.*; *see, e.g.*, N.J. STAT. ANN. § 37:1-28(f) (West 2007):

The Legislature has chosen to establish civil unions by amending the current marriage statute to include same-sex couples. In doing so, the Legislature is continuing its longstanding history of insuring equality under the laws for all New Jersey citizens by providing same-sex couples with the same rights and benefits as heterosexual couples who choose to marry.

Since this article’s writing, the New Jersey Civil Union Act, including N.J. STAT. ANN. § 37:1-28(f), was held unconstitutional under the New Jersey Constitution. *Garden State Equal. v. Dow*, 2013 WL 5397372, at *24 (N.J. Super. Ct. Law Div. Sept. 27, 2013)).

²⁸ COLO. REV. STAT. ANN. § 14-15-117 (West 2013).

²⁹ *Id.*

³⁰ New York and Illinois have both amended or interpreted their income tax statutes to allow joint filing for such couples (in same-sex marriage and civil unions, respectively). In July of 2011, the New York Department of Taxation and Finance published guidance on its website addressing the state income tax treatment for same-gender marriages. *See Information for Same-Sex Married Couples*, N.Y. ST. DEP’T OF TAX’N AND FIN. (2011), http://www.tax.ny.gov/pit/marriage_equality_act.htm. The guidance provides that, beginning with the 2011 tax year, same-gender married couples must file state income taxes as married, even though not recognized as married for federal tax purposes. Instructions from the agency clarify that employers do not need to withhold state and local income tax on the value of benefits, such as health coverage, provided to same-gender married couples.

In addition, the *Windsor* majority opinion once more makes clear that family law, that is, marriage, divorce, alimony, and custody law, belongs to the states, not the federal government.³¹ This is not a new idea, of course,³² and was repeated fairly recently in opinions dealing with the jurisdiction of federal courts in diversity to hear a tort suit by a daughter against her father,³³ and in the case alleging First Amendment issues with “under God” in the Pledge of Allegiance, ultimately decided on the basis of a state ruling giving decision-making power to the mother of the child in question.³⁴ Thus, as the Court repeats several times, each state is able to vary its marriage requisites—and they do so—as far as formalities, consanguinity, and age requirements are concerned, though they must do so in a uniform way.³⁵

In Illinois, the procedure is complex. See *IL 1040 Confuses Same-Sex Couples with “File as-if-Married” on Federal Return*, ILL. REV., Apr. 14, 2013, available at <http://illinoisreview.typepad.com/illinoisreview/2013/04/il-tax-form-denotes-same-sex-couples.html> (contains links and required forms).

At least one news source suggests that a *Hollingsworth*-type challenge to Colorado’s ban on gay marriage is now inevitable, since a same-sex couple marrying in, say, California, would have their status changed to civil union and then lose their tax benefits, as the *Hollingsworth* plaintiffs did after the passage of Proposition 8. Robert Garrison, *Legal Challenge to Colorado’s Same-Sex Marriage Ban Inevitable*, CHANNEL 9 NEWS (June 20, 2013, 9:36 PM), <http://www.9news.com/news/article/342375/339/Challenge-to-states-marriage-ban-inevitable>.

³¹ *United States v. Windsor*, 570 U.S. ___, ___, 133 S. Ct. 2675, 2691 (2013). In contrast, marriage is a federal matter in Canada. Same-sex marriage was recognized in the Civil Marriage Act of 2005, S.C. 2005, c. 33 (Can.) (full title: “An Act Respecting Certain Aspects of Legal Capacity for Marriage for Civil Purposes”).

³² According to *Ankenbrandt v. Richards*, 504 U.S. 689, 691 (1992), it dates back at least from *Barber v. Barber*, 62 U.S. (21 How.) 582 (1858).

³³ *Ankenbrandt*, 504 U.S. at 703 (“We conclude, therefore, that the domestic relations exception, as articulated by this Court since *Barber*, divests the federal courts of power to issue divorce, alimony, and child custody decrees.”). The court declined to extend the ban to this case involving a suit against a former spouse for abuse of their children.

³⁴ *Elk Grove v. Newdow*, 542 U.S. 1, 16, 17 (2004) (“Newdow’s parental status is defined by California’s domestic relations law. . . . When hard questions of domestic relations are sure to affect the outcome, the prudent course is for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law.”).

³⁵ *Windsor*, 133 S. Ct. at 2691-92.

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Windsor involved only Section 3 of the Defense of Marriage Act (“DOMA”).³⁶ What remains, though, and is the subject of suit³⁷ in a number of jurisdictions, is Section 2.³⁸ Section 2 purports to limit the effect of a marriage in one state upon those persons moving to another state.³⁹ This sort of *federal* restriction on comity is not typical, though individual states do not always recognize foreign marriages.⁴⁰ While the place of celebration normally determines the validity of marriage, the respect sometimes yields to the strong public policy⁴¹ of the forum

³⁶ *Id.* at 2682-83; Defense of Marriage Act § 3, 1 U.S.C. § 7 (1996). Section 3 provides: § 7. Definition of ‘marriage’ and ‘spouse’: 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.

³⁷ *See, e.g.*, *Obergefell v. Kasich*, No. 113-cv-501, 2013 WL 3814262 (S.D. Ohio July 22, 2013). Such a marriage has been recognized in New Mexico since 2011 by an Attorney General opinion on whether New Mexico law allows the state to respect legal out-of-state marriages between same-sex couples. *See New Mexico*, FREEDOM TO MARRY, <http://www.freetomarry.org/states/entry/c/new-mexico> (“Citing New Mexico’s lack of legislation on the freedom to marry, [New Mexico Attorney General Gary King] said, ‘While we cannot predict how a New Mexico court would rule on this issue, after review of the law in this area, it is our opinion that a same-sex marriage that is valid under the laws of the country or state where it was consummated would likewise be found valid in New Mexico. . . . Without an identifiable adverse public policy in this area, we conclude that a court addressing the issue would likely hold that a valid same-sex marriage from another jurisdiction is valid in New Mexico.’”). This was also the subject of the original lawsuit in *Alons v. Iowa District Court*, 698 N.W.2d 858 (Iowa 2005).

³⁸ Defense of Marriage Act § 2, 1 U.S.C. § 7 (1996). Section 2 provides:

(a) IN GENERAL — Chapter 115 of title 28, United States Code, is amended by adding after section 1738B the following: “§ 1738C. Certain acts, records, and proceedings and the effect thereof ‘No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.’”

³⁹ *See Windsor*, 133 S. Ct. at 2682-83. A November 2011 report by M.V. Lee Badgett and Jodie Herman of the Williams Institute notes that sixty percent of those marrying in states where they were permitted to do so came from out-of-state. M.V. Lee Badgett & Jody L. Herman, *Patterns of Relationship Recognition by Same-Sex Couples in the United States*, WILLIAMS INST. (Nov. 2011), <http://williamsinstitute.law.ucla.edu/research/marriage-and-couples-rights/patterns-of-relationship-recognition-by-same-sex-couples-in-the-united-states/>.

⁴⁰ *See Windsor*, 133 S. Ct. at 2682-83 (“Section 2 . . . allows States to refuse to recognize same-sex marriage performed under the laws of other States.”).

⁴¹ For example, consider RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971):
(2) A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates

state.⁴² Thus, if a marriage dramatically violates public policy, a state may not recognize it, such as when, in the pre-*Loving v. Virginia*⁴³ age, an interracial couple went to Virginia after a valid North Carolina wedding and Virginia refused to honor it.⁴⁴ Similarly, states have refused to honor very underage marriages,⁴⁵ polygamous marriages, and

the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.

⁴² See generally ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES (2006). Parts of the argument were extended from Andrew M. Koppelman, *Same-Sex Marriage and Public Policy: The Miscegenation Precedents*, in Symposium, "Federalism Revisited: Extraterritorial Recognition of Same-Sex Marriage," 16 QUINNIAC L. REV. 105 (1996); Emily J. Sack, *The Retreat From DOMA: The Public Policy of Same-Sex Marriage and a Theory of Congressional Power Under the Full Faith And Credit Clause*, 38 CREIGHTON L. REV. 507 (2005); Patrick J. Borchers, *Interstate Recognition of Nontraditional Marriages*, in MARRIAGE AND SAME-SEX UNIONS: A DEBATE 331 (Lynn D. Wardle et al. eds., 2003); Maurice Holland, *The Modest Usefulness of DOMA Section 2*, 32 CREIGHTON L. REV. 395 (1998); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997); and Jeffrey L. Rensberger, *Same-Sex Marriages and the Defense of Marriage Act: A Deviant View of an Experiment in Full Faith and Credit*, 32 CREIGHTON L. REV. 409 (1998).

⁴³ 388 U.S. 1 (1967).

⁴⁴ *Naim v. Naim*, 87 S.E.2d 749 (Va. 1955).

⁴⁵ For example, Kansas amended its statute, KAN. STAT. ANN. § 23-106 (West 2006), to fifteen after a pregnant fourteen-year-old drove from Nebraska to Kansas to marry her twenty-two-year-old boyfriend, Matthew Koso, who served a sentence of eighteen to thirty months, according to a plea bargain, for having sex with her since she was twelve. The girl's mother had given her permission. Koso was released in May 2007, and as of a February 2010 article in the *Lincoln (Neb.) Journal-Star*, was still married and had four children. See Colleen Kenney, *Epilogue: Koso Couple Still in Love*, LINCOLN (NEB.) JOURNAL-STAR, Feb. 8, 2010, http://journalstar.com/news/local/article_9d7bfa6a-14c8-11df-981e-001cc4c002e0.html. However, by 2012, they had lost custody of the children for neglect. See Joanne Young, *Years After Controversial Marriage Falls City Couple at Risk*, LINCOLN (NEB.) JOURNAL-STAR, July 22, 2012, http://journalstar.com/news/local/years-after-controversial-marriage-falls-city-couple-at-risk-of/article_16b4ea35-a638-5d92-923c-c9d43fcb2c31.html.

An Act of May 5, 2006 (legislation requested by then-Governor Kathleen Sebelius) sets the minimum age at fifteen in Kansas, and then the marriage is permitted only if the district judge decides it is in that person's best interests. See *Kansas Setting Minimum Marriage Age: 15*, NBC News (May 5, 2006, 12:39 PM), http://www.nbcnews.com/id/12644597/ns/us_news-life/t/kansas-setting-minimum-marriage-age. Before this, Kansas had no minimum age if the minor had parental or judicial approval under *State v. Wade*, 766 P.2d 811, 815 (Kan. 1989) (common law had no minimum and was followed). Additionally, in 2006, Georgia set sixteen as the state's minimum marriage age after a thirty-six-year-old woman married a fifteen-year-old boy (with parental consent). The act, GA. CODE ANN. § 19-3-2 (West 2006), reads:

(a) To be able to contract marriage, a person must:

(1) Be of sound mind;

(2) Except as provided in subsection (b) of this Code section, be at least 18 years of age;

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consanguineous marriages.⁴⁶

The big question, of course, is whether *Windsor* will prove to be the *Eisenstadt v. Baird*⁴⁷ for same-sex couples. Justice Scalia suggests that this may be so⁴⁸: that what the majority says about the invalidity of confining marriage for federal purposes to unions of a man and a woman will also shortly be declared true about state laws. By mentioning *Eisenstadt*⁴⁹ here, I am of course referring to the contraception case decided shortly before *Roe v. Wade*,⁵⁰ in which the Court decomposed the marital privacy right⁵¹ into its constituent individuals, thus extending it to the unmarried as well.⁵² The very next year, *Roe*, citing *Eisenstadt* for a fundamental right to contraception,⁵³ found an individ-

(3) Have no living spouse of a previous undissolved marriage. The dissolution of a previous marriage in divorce proceedings must be affirmatively established and will not be presumed. Nothing in this paragraph shall be construed to affect the legitimacy of children; and

(4) Not be related to the prospective spouse by blood or marriage within the prohibited degrees.

(b) If either applicant for marriage is 16 or 17 years of age, parental consent as provided in Code Section 19-3-37 shall be required.

⁴⁶ *In re May's Estate*, 114 N.E.2d 4 (N.Y. 1953); cf. *Petition of Lieberman*, 50 F. Supp. 121 (E.D.N.Y. 1943) (an uncle and a niece married according to Orthodox Jewish tradition in Rhode Island, where allowed to do so, then lived for many years in New York).

⁴⁷ 405 U.S. 438 (1972).

⁴⁸ In *United States v. Windsor*, 570 U.S. ___, ___, 133 S. Ct. 2675, 2709 (2013) (Scalia, J. dissenting), he writes:

I have heard such “bald, unreasoned disclaimer[s]” before. When the Court declared a constitutional right to homosexual sodomy, we were assured that the case had nothing, nothing at all to do with “whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” Now we are told that DOMA is invalid because it “demeans the couple, whose moral and sexual choices the Constitution protects.” It takes real cheek for today’s majority to assure us, as it is going out the door, that a constitutional requirement to give formal recognition to same-sex marriage is not at issue here—when what has preceded that assurance is a lecture on how superior the majority’s moral judgment in favor of same-sex marriage is to the Congress’s hateful moral judgment against it. I promise you this: The only thing that will “confine” the Court’s holding is its sense of what it can get away with.

⁴⁹ 405 U.S. 438.

⁵⁰ *Roe v. Wade*, 410 U.S. 113 (1973).

⁵¹ This right, also in the context of contraception, was enunciated in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁵² *Eisenstadt*, 405 U.S. at 453:

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

⁵³ 410 U.S. at 152-53.

ual woman (with her physician, and with some health regulations possible) had a right to decide whether or not to terminate her pre-viable pregnancy.⁵⁴ Will *Windsor* ease the way to such a dramatic change, or has it been done already in *Lawrence v. Texas*,⁵⁵ decided in 2003? Arguably, elimination of the criminal penalties for consensual sodomy may have changed the way gay and straight people view gays.⁵⁶ This was the path taken in South Africa, and same-sex marriage followed not long after.⁵⁷ My guess is that *Lawrence*, not *Windsor*, would be the necessary case to an invalidation of same-sex marriage prohibitions.

Finally, though Justice Alito in his *Windsor* dissent wrote that no one knows,⁵⁸ this “experiment” may have all kinds of consequences that people would not predict.⁵⁹ The Justice lists some of the unintended consequences of no-fault divorce.⁶⁰ Others, who are opposed to same-sex marriage, have also mentioned potential problems.⁶¹

⁵⁴ *Id.* at 163.

⁵⁵ 539 U.S. 558 (2003).

⁵⁶ Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms and Social Panoptics*, 89 CALIF. L. REV. 643 (2001).

⁵⁷ Originally, this was as a result of a judicial decision. See *Minister of Home Affairs v. Fourie* 2005 (1) SA 524 (CC) (S. Afr.). That decision required legislation within one year, culminating in The Civil Union Act, which legalized same-sex marriage. See The Civil Union Act 17 of 2006 (S. Afr.). It allows two people, regardless of gender, to form either a marriage or a civil partnership.

⁵⁸ 570 U.S. __, __, 133 S. Ct. 2675, 2715 (2013) (Alito, J., dissenting).

⁵⁹ We can expect something similar to take place if same-sex marriage becomes widely accepted. The long-term consequences of this change are not now known and are unlikely to be ascertainable for some time to come.

⁶⁰ *Windsor*, 133 S. Ct. at 2715-16 (Alito, J., dissenting); see also Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79; Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869 (1994).

⁶¹ See, e.g., Douglas W. Allen, *An Economic Assessment of Same-Sex Marriage Laws*, 29 HARV. J.L. & PUB. POL'Y 949 (2006); ROSE ANN KYDD, SAME-SEX MARRIAGE: IS THERE A LEG TO STAND ON 67-91 (Anglican Communion Alliance, 2013); Ronald J. Rychlak, *The Unintended Consequences of Gay Marriage*, CRISIS MAG. (May 1, 2008), <http://www.crisismagazine.com/2008/the-unintended-consequences-of-gay-marriage>.