

# WINDSOR AND ITS PROGENY

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## I. INTRODUCTION

Following *Windsor v. United States*,<sup>1</sup> plaintiffs across the country challenged state same-sex marriage bans. To date, several district courts have struck down either state refusals to recognize same-sex marriages validly celebrated in other states or state refusals to permit such marriages to be celebrated locally, and several circuits have issued opinions on the constitutionality of same-sex marriage bans, all but one of which holding that such bans violate federal constitutional guarantees.<sup>2</sup> Other circuits will be considering challenges in the coming months.

Whether because of the importance of the issue or because of a split in the circuits, the United States Supreme Court has granted certiorari to decide whether the United States Constitution protects the right to marry a same-sex partner.<sup>3</sup> While it seems safe to assume that some of the Justices will answer in the affirmative and others will not, one cannot be certain about how many will vote to affirm that the Federal Constitution protects the right of same-sex couples to marry. Nonetheless, it is assumed here that the Court will hold that the right to marry a same-sex partner is protected, and this article will address the changes, if any, that might be expected in family law were such a ruling to be issued.

Part II of this article discusses *Windsor* as well as the decisions issued by the Fourth and Tenth Circuits. Part III discusses what the hypothesized decision would likely say, and the kinds of changes that such a decision is likely to cause. The article concludes that were the Court to hold that the right to marry is protected under the federal Constitution, the likely effects on

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1. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

2. *See generally* *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, 135 S. Ct. 1040 (2015) (upholding constitutionality of same-sex marriage bans).

3. *See* *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015) (granting certiorari to address the constitutionality of same-sex marriage bans); *Tanco v. Haslam*, 135 S. Ct. 1040 (2015); *DeBoer v. Snyder*, 135 S. Ct. 1040 (2015); *Bourke v. Beshear*, 135 S. Ct. 1041 (2015).

family law in particular are relatively minor and the likely effects on particular families will be quite positive.

## II. THE EVOLVING RIGHT TO MARRY

In *United States v. Windsor*, the United States Supreme Court struck down section three of the Defense of Marriage Act (DOMA).<sup>4</sup> Since that decision was issued, several courts have addressed the constitutionality of same-sex marriage bans, sometimes specifically striking down the refusal to recognize such marriages when validly celebrated elsewhere and sometimes striking down the state's ban more generally. It seems likely that the United States Supreme Court will address the constitutionality of same-sex marriage bans on the merits, and *Windsor* and these circuit cases give some clues about what such a decision might say.

### A. *Windsor*

The *Windsor* Court offered several reasons to justify its holding that the DOMA section at issue violated federal constitutional guarantees. Some of those reasons would also undermine the power of a state to refuse to recognize same-sex marriages, while others would not. Precisely because of the numerous reasons offered in support of DOMA's unconstitutionality, federal district and circuit court judges have come to very different conclusions about whether and why same-sex marriage bans violate constitutional guarantees.

Section three of the DOMA reads:

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.<sup>5</sup>

The *Windsor* Court noted that "[b]y history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States."<sup>6</sup> However, *Windsor* should not

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4. See generally *Windsor*, 133 S. Ct. 2675.

5. Defense of Marriage Act (DOMA) of 1996, Pub. L. No. 104-199, 1996 U.S.C.C.A.N. (110 Stat.) 2419, *invalidated by* *United States v. Windsor*, 133 S. Ct. 2675 (2013).

6. *Windsor*, 133 S. Ct. at 2689-90.

be understood as merely underscoring the power of the states to regulate domestic relations as they see fit. The Court explained that Congress is authorized by the Constitution to supplant state law in certain instances: “Congress, in enacting discrete statutes, can make determinations that bear on marital rights and privileges.”<sup>7</sup> For example, the Court recently “upheld the authority of the Congress to preempt state laws, allowing a former spouse to retain life insurance proceeds under a federal program that gave her priority, because of formal beneficiary designation rules, over the wife by a second marriage who survived the husband.”<sup>8</sup> An additional reason that the decision should not be understood as underscoring the state’s plenary power to define marriage is that the Court expressly noted that “State laws defining and regulating marriage . . . must respect the constitutional rights of persons.”<sup>9</sup>

The plaintiffs in this case, Edith Windsor and Thea Spyer, had “married in a lawful ceremony in Ontario, Canada.”<sup>10</sup> Their domicile, New York, recognized the marriage.<sup>11</sup> But the federal government did not recognize the marriage because of DOMA, which meant that a whole host of federal benefits associated with marriage were not accorded to Windsor and Spyer. The Court noted that DOMA’s “comprehensive definition of marriage for purposes of all federal statutes and other regulations or directives covered by its terms . . . does control over 1,000 federal laws in which marital or spousal status is addressed as a matter of federal law.”<sup>12</sup> Thus, in enacting DOMA, Congress targeted a specific group and denied them a wide range of benefits to which they would otherwise be entitled.

DOMA undermined “the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State.”<sup>13</sup> While such language might be construed as suggesting that Congress when passing DOMA overstepped the federalism limitations imposed by the Constitution, the Court expressly disavowed that federalism was the basis upon which the opinion was being decided: “it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance.”<sup>14</sup> Instead, the Court

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7. *Id.* at 2690.

8. *Id.* (citing *Hillman v. Maretta*, 133 U.S. 1943 (2013)).

9. *Id.* at 2691 (citing *Loving v. Virginia*, 388 U.S. 1 (1967)).

10. *Id.* at 2682.

11. *Id.* at 2683 (“The State of New York deems their Ontario marriage to be a valid one.”).

12. *Id.* at 2683 (citing D. SHAH, U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT I (2004)).

13. *Id.* at 2692.

14. *Id.*

explained that “DOMA seeks to injure the very class New York seeks to protect . . . . [and] [b]y doing so it violates basic due process and equal protection principles applicable to the Federal Government.”<sup>15</sup>

Equality guarantees were implicated because “DOMA’s principal effect is to identify a subset of state-sanctioned marriages and make them unequal.”<sup>16</sup> One of the difficulties caused by this second-class status was that it made individuals married for certain purposes but not for others. “By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law . . . .”<sup>17</sup> An effect of such a refusal was to “diminish[] the stability and predictability of basic personal relations.”<sup>18</sup> The message sent by the refusal to recognize such unions is clear: “DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition.”<sup>19</sup> Same-sex couples are thereby stigmatized: “[t]he differentiation demeans the couple, whose moral and sexual choices the Constitution protects.”<sup>20</sup> In addition, the lack of recognition “humiliates tens of thousands of children now being raised by same-sex couples,”<sup>21</sup> and “makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”<sup>22</sup>

The *Windsor* Court explained that although “Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment.”<sup>23</sup> Because it violated the Fifth Amendment’s guarantees, the Court struck down the challenged DOMA section.<sup>24</sup>

Lest one think that the decision had no implications for the states, the Court went out of its way to warn that “[w]hile the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the Equal Protection guarantee of the Fourteenth Amendment

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15. *Id.* at 2693 (alteration in original).

16. *Id.* at 2694.

17. *Id.*

18. *Id.* (alteration in original).

19. *Id.*

20. *Id.* (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)).

21. *Id.*

22. *Id.*

23. *Id.* at 2695.

24. *Id.* (“DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.”).

makes that Fifth Amendment right all the more specific and all the better understood and preserved.”<sup>25</sup> If the Fourteenth Amendment Equal Protection guarantees are informing the analysis of the Fifth Amendment protections, then the Fifth Amendment’s precluding the Congress from passing a law whose “purpose and effect [were] to disparage and to injure”<sup>26</sup> might mean that the Fourteenth Amendment will similarly be interpreted to prevent states from enacting laws whose “purpose[s] and effect[s] [are] to disparage and to injure.”<sup>27</sup>

Marriage confers a variety of benefits under state law.<sup>28</sup> Same-sex couples are being denied a whole host of benefits by virtue of state refusals to recognize marriages validly celebrated elsewhere or by virtue of their refusal to permit those marriages to be celebrated locally. While that fact does not end the inquiry with respect to whether such bans are constitutionally permissible, it will certainly be a factor to be considered. Just as the denial of marriage recognition by the federal government might be thought stigmatizing, the state refusal to afford such recognition might be thought stigmatizing as well.<sup>29</sup> Just as children being raised by same-sex couples might be harmed in tangible and non-tangible ways by the federal government’s refusal to recognize same-sex marriage, such children might be harmed in similar ways by state refusals to recognize such marriages. In short, *Windsor* provides several arguments that would also seem applicable to the states. While the *Windsor* Court did not hold state same-sex marriage bans unconstitutional, it is not plausible to suggest that the decision supports the constitutionality of such bans, claims of one member of the United States Supreme Court to the contrary notwithstanding.<sup>30</sup>

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25. *Id.*

26. *Id.* at 2696 (alteration in original).

27. *Id.* (alteration in original).

28. *See Baker v. State*, 744 A.2d 864, 883–84 (Vt. 1999) (listing some of the benefits of marriage under state law).

29. *Cf. Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 482 (Conn. 2008)

Interpreting our state constitutional provisions in accordance with firmly established equal protection principles leads inevitably to the conclusion that gay persons are entitled to marry the otherwise qualified same sex partner of their choice. To decide otherwise would require us to apply one set of constitutional principles to gay persons and another to all others.

30. *See Windsor*, 133 S. Ct. at 2697 (Roberts, C.J., dissenting)

[W]hile ‘[t]he State’s power in defining the marital relation is of central relevance’ to the majority’s decision to strike down DOMA here . . . that power will come into play on the other side of the board in future cases about the constitutionality of state marriage definitions. So too will the concerns for state diversity and sovereignty that weigh against DOMA’s constitutionality in this case.

## B. *The Circuit Decisions*

Both the Fourth and Tenth Circuits have struck down same-sex marriage bans. While the results are compatible with *Windsor*, their reasoning has differed somewhat from what the *Windsor* Court suggested, and those differences may have import insofar as one tries to predict the effects of the hypothesized Supreme Court decision.

### 1. *The Tenth Circuit Decisions*

The Tenth Circuit struck down same-sex marriage bans in Utah and Oklahoma in two different decisions. While the reasoning in these cases was similar in important respects, there was a concurrence in one of the opinions and not in the other, and the discussion in the concurrence may hold a key to what we might expect in the envisioned Supreme Court opinion.

In *Kitchen v. Herbert*, the Tenth Circuit noted that “the right to marry is a fundamental liberty.”<sup>31</sup> While acknowledging that the previous right to marry cases like *Loving v. Virginia* and *Zablocki v. Redhail* involved different-sex couples,<sup>32</sup> the *Kitchen* court rejected the contention<sup>33</sup> that the right to marry should only be construed as applying to such couples.<sup>34</sup> The *Kitchen* court’s finding that the right to marry includes the right to marry a same-sex partner was quite important, because statutes adversely affecting fundamental rights trigger strict scrutiny.<sup>35</sup>

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*But see id.* at 2705 (Scalia, J., dissenting)

My guess is that the majority, while reluctant to suggest that defining the meaning of ‘marriage’ in federal statutes is unsupported by any of the Federal Government’s enumerated powers, nonetheless needs some rhetorical basis to support its pretense that today’s prohibition of laws excluding same-sex marriage is confined to the Federal Government (leaving the second, state-law shoe to be dropped later, maybe next Term).

31. *Kitchen v. Herbert*, 755 F.3d 1193, 1209 (10th Cir. 2014).

32. *Id.* (“It is true that both *Loving* and *Zablocki* involved opposite-sex couples.”) (citing *Loving v. Virginia*, 388 U.S. 1 (1967); *Zablocki v. Redhail*, 434 U.S. 374 (1978)).

33. *Kitchen*, 755 F. 3d at 1208 (“[T]hat right is limited . . . appellants contend, to those who would wed a person of the opposite sex.”).

34. *Id.* at 1218 (“[W]e conclude that plaintiffs possess a fundamental right to marry and to have their marriages recognized.”); see also *Latta v. Otter*, 771 F.3d 456, 477 (9th Cir. 2014) (Reinhardt, J., concurring) (“I would also hold that the fundamental right to marriage, repeatedly recognized by the Supreme Court, in cases such as *Loving v. Virginia*, *Zablocki v. Redhail*, and *Turner v. Safley*, is properly understood as including the right to marry an individual of one’s choice.”) (citations omitted).

35. *Id.* (“The Due Process Clause ‘forbids the government to infringe certain fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.’”) (citing *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

The *Kitchen* Court recognized that different-sex couples “may be naturally procreative,”<sup>36</sup> which presumably meant that many of those couples can reproduce coitally. However, a separate question was whether the right to marry was predicated on the ability or, perhaps, the willingness to reproduce coitally or even to have children in the household at all. After all, the United States Supreme “Court has . . . described the fundamental right to marry as separate from the right to procreate.”<sup>37</sup> For example, in *Turner v. Safley*, the Court described several constitutionally significant aspects of marriage.<sup>38</sup> In *Turner*, these “personal elements inherent in the institution of marriage”<sup>39</sup> centered on the relationship between the adults rather than on the relationship between parent and child.<sup>40</sup> But focusing on the relationship between the adults suggests that one of the purposes of marriage has nothing to do with producing or raising children.

Basing the fundamental right to marry on its link to procreation is “undermined by the fact that individuals have a fundamental right to choose against reproduction.”<sup>41</sup> It was also undermined by states when they permit different-sex couples to marry regardless of their ability to procreate.<sup>42</sup> If a state claims to have a particular purpose behind its marriage regulations, but restricts the marriages of only one subset of those to whom that purpose might apply,<sup>43</sup> there may be reason to think that the regulations have not been adopted to promote legitimate ends but, instead, for other reasons.<sup>44</sup>

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36. *Id.* at 1210.

37. *Id.*

38. *Id.* (quoting *Turner v. Safley*, 482 U.S. 78, 95–96 (1987)).

39. *Id.*

40. *Id.* (“[R]eject[ing] appellants’ efforts to downplay the importance of the personal [as opposed to procreative] elements inherent in the institution of marriage, which they contend are ‘not the principal interests the State pursues by regulating marriage.’”) (alteration in original).

41. *Id.* at 1214 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972)).

42. *Id.* at 1219

Utah citizens may choose a spouse of the opposite sex regardless of the pairing’s procreative capacity. The elderly, those medically unable to conceive, and those who exercise their fundamental right not to have biological children are free to marry and have their out-of-state marriages recognized in Utah, apparently without breaking the ‘conceptual link between marriage and procreation.

43. *Cf. id.* (“The elderly, those medically unable to conceive, and those who exercise their fundamental right not to have biological children are free to marry and have their out-of-state marriages recognized in Utah, apparently without breaking the ‘conceptual link between marriage and procreation.’”).

44. *See United States v. Windsor*, 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)).

Suppose that one focuses on the importance of providing a setting in which children can be raised. The Tenth Circuit noted that same-sex couples are raising children,<sup>45</sup> and that “childrearing, a liberty closely related to the right to marry, is one exercised by same-sex and opposite-sex couples alike, as well as by single individuals.”<sup>46</sup> But denial of recognition of the parents’ marriage “den[ies] to the children of same-sex couples the recognition essential to stability, predictability, and dignity,”<sup>47</sup> as the *Windsor* Court had noted.<sup>48</sup> Many couples are raising children who are not biologically related to both adults.<sup>49</sup> Blended families, adoptive families, and families who have made use of advanced reproductive techniques all might include children not biologically related to one or both parents.<sup>50</sup>

The *Kitchen* court rejected Utah’s claim that “a parade of horrors”<sup>51</sup> would result from recognition of same-sex marriage, suggesting that “it is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples.”<sup>52</sup> The court did not question that the state had a legitimate interest in promoting committed relationships, but instead, suggested that the “state’s interest in developing and sustaining committed relationships between childbearing couples is simply not connected to its recognition of same-sex marriages.”<sup>53</sup> The court rejected as implausible that the state recognition of “same-sex marriages would affect the decision of a member of an opposite-sex couple to have a child, to marry or stay married to a partner, or to make personal sacrifices for a child.”<sup>54</sup> Thus, while numerous factors might plausibly be thought to lead to a breakdown in a

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45. *Kitchen*, 755 F.3d at 1214 (“[N]early 3,000 Utah children are being raised by same-sex couples.”).

46. *Id.*

47. *Id.* at 1215.

48. *See id.* (citing *Windsor* 133 S. Ct. at 2694–95).

49. Victoria Degtyareva, Note, *Defining Family in Immigration Law: Accounting for Nontraditional Families in Citizenship by Descent*, 120 YALE L.J. 862, 864 (2011) (discussing “the emergence and growth of nontraditional families—including those in which children are raised by nonbiological parents and those in which children are born through assisted reproductive technologies (ART).”).

50. Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 697 (2008) (“Over five million children live with a step-parent and another 3.8 million live in households in which one of their biological or adoptive parents cohabits with another adult.”).

51. *Kitchen*, 755 F.3d at 1222.

52. *Id.* at 1223.

53. *Id.* at 1224.

54. *Id.*

marriage, e.g., adultery or abuse,<sup>55</sup> whether someone else could marry a same-sex partner would not be among them.

Suppose, however, that one could imagine that some different-sex couples would choose not to marry because same-sex couples could.<sup>56</sup> Would that be enough of a reason to deny same-sex couples the right to marry, thereby establishing the analog of a heckler's veto with respect to marriage regulation?<sup>57</sup> If one were to say, for example, that it would be better not to dissuade one different-sex couple from marrying or remaining married than to permit same-sex couples to wed, that would certainly suggest a kind of prioritizing and imposition of "second-class status."<sup>58</sup>

The *Kitchen* Court discussed the state's interest in promoting gendered parenting styles. Absent from that discussion was any examination of whether the state should or even may promote such styles insofar as they represent stereotypical assertions about the abilities of the sexes.<sup>59</sup> That said, it was unsurprising that there was relatively little discussion of equal protection guarantees, given that the focus of the decision was on the fundamental right to marry.

While no one on the *Kitchen* Court discussed whether or the degree to which it is permissible for the state to promote gendered parenting roles rather than, for example, good parenting by individuals of either gender,<sup>60</sup> Judge Kelly discussed in his dissent why same-sex marriage bans do not discriminate on the basis of gender. He noted that "Utah's constitutional and statutory provisions . . . simply define marriage as the legal union of a man and a woman and do not recognize any other domestic union, i.e., same-gender marriage . . . [and] apply to same-gender male couples and same-gender female couples alike."<sup>61</sup> His discussion was short,<sup>62</sup> which may be one

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55. Elizabeth S. Scott, *Rational Decision Making About Marriage and Divorce*, 76 VA. L. REV. 9, 92 n.207 (1990) ("Behavior by one spouse that may destroy the value of the marriage for the other might include infidelity, abandonment, physical abuse, criminal conviction, or even mental illness or alcoholism.").

56. See *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1016 (D. Nev. 2012).

57. See Mark Strasser, *State Constitutional Amendments Defining Marriage: On Protections, Restrictions, and Credibility*, 7 FLA. COASTAL L. REV. 365, 367 (2005) ("To permit such a threat to drive social policy would be to recognize an analog of a heckler's veto for marriages."); see also *Latta v. Otter*, 771 F.3d 456, 470 (9th Cir. 2014) ("[T]he fear that an established institution will be undermined due to private opposition to its inclusive shift is not a legitimate basis for retaining the status quo.").

58. *Plyler v. Doe*, 457 U.S. 202, 233 (1982) (Blackmun, J., concurring).

59. *Cf. United States v. Virginia*, 518 U.S. 515, 533 (1996) (warning that states should not rely "on overbroad generalizations about the different talents, capacities, or preferences of males and females").

60. *Cf. Nancy E. Dowd, Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19, 38 (1995) ("As parenting has moved toward an equality model, gender seems to be disappearing from the characteristics of good parenting.").

61. *Kitchen v. Herbert*, 755 F.3d 1193, 1233 (10th Cir. 2014) (Kelly, J., dissenting).

of the reasons that he failed to take into account the implications of a case cited in the majority opinion in both *Kitchen* and *Windsor—Loving v. Virginia*.<sup>63</sup> Indeed, the *Windsor* Court noted that “State laws defining and regulating marriage, of course, must respect the constitutional rights of persons,” citing *Loving*.<sup>64</sup>

While *Loving* establishes the fundamental right to marry,<sup>65</sup> most of that opinion was focused on the equal protection aspect of the interracial marriage ban.<sup>66</sup> Yet, Judge Kelly’s analysis would suggest that Virginia was not discriminating on the basis of race, since it could not be shown that either race was harmed by being precluded from marrying outside of the race. Indeed, Virginia had claimed that its goal was to preserve the racial purity of its citizens.<sup>67</sup> The *Loving* Court interpreted this rationale as “an endorsement of the doctrine of White Supremacy,”<sup>68</sup> and thus as impermissible.<sup>69</sup>

Suppose that a different state wanted to preserve racial integrity and there was no evidence that its policies were designed to promote the superiority or inferiority of a particular race. Would that mean that a law restricting individuals to intra-racial marriage<sup>70</sup> would not trigger a high level of scrutiny because it could not be shown which race was harmed? The *Loving* Court made clear that such a racial classification would still be

62. See *id.* (discussing gender discrimination in two paragraphs).

63. *Loving v. Virginia*, 388 U.S. 1 (1967).

64. *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013) (citing *Loving*, 388 U.S. at 1 (1967)).

65. See *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (“The leading decision of this Court on the right to marry is *Loving v. Virginia*.”) (citation omitted).

66. *Loving*, 388 U.S. at 1–12 (focusing on equal protection); *cf. id.* at 12 (in contrast, the due process discussion was only on one page).

67. *Id.* at 7 (“In *Naim*, the state court concluded that the State’s legitimate purposes were ‘to preserve the racial integrity of its citizens,’ and to prevent ‘the corruption of blood,’ ‘a mongrel breed of citizens,’ and ‘the obliteration of racial pride.’”) (quoting *Naim v. Naim*, 87 S.E.2d 749 (Va. 1955)).

68. *Id.* (citing *Naim*, 87 S.E.2d at 756 (Va. 1955)).

69. *Id.* at 11 (“There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification.”).

70. A separate issue would involve how different races should be defined. The one-drop rule? See Daniel J. Sharfstein, *Crossing the Color Line: Racial Migration and the One-Drop Rule, 1600–1860*, 91 MINN. L. REV. 592, 593 (2007) (discussing “the ‘one-drop rule’—the idea that anyone with any African ‘blood’ is legally black.”). The third generation rule? See Julie Novkov, *Racial Constructions: The Legal Regulation of Miscegenation in Alabama, 1890–1934*, 20 LAW & HIST. REV. 225, 252 (2002) (“The statute, as described above, expanded this definition to include mulattoes down to the third generation, which meant that a person would be considered black for purposes of the anti-miscegenation statute as long as one of his or her great-grandparents was a ‘Negro.’”). The fourth generation rule? *Cf.* Courtney Megan Cahill, *The Genuine Article: A Subversive Economic Perspective on the Law’s Procreationist Vision of Marriage*, 64 WASH. & LEE L. REV. 393, 438 (2007) (discussing a definition involving “one who is ‘descended from negro ancestors to the fourth generation inclusive, though one ancestor of each generation may have been a white person.’”).

“repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the ‘integrity’ of all races.”<sup>71</sup>

Consider as well *McLaughlin v. Florida*,<sup>72</sup> where Florida’s prohibitions on interracial cohabitation were at issue. The statute read:

Any negro man and white woman, or any white man and negro woman, who are not married to each other, who shall habitually live in and occupy in the nighttime the same room shall each be punished by imprisonment not exceeding twelve months, or by fine not exceeding five hundred dollars.<sup>73</sup>

The Court struck it down:

Because the section applies only to a white person and a Negro who commit the specified acts and because no couple other than one made up of a white and a Negro is subject to conviction upon proof of the elements comprising the offense it proscribes, we hold § 798.05 invalid as a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment.<sup>74</sup>

Yet, this statute did not burden one race more than another, just as same-sex marriage bans are argued not to burden one sex more than another. The statute at issue in *McLaughlin* nonetheless violated equal protection guarantees, and the importance of the *Windsor* Court’s allusion to the “the equal protection guarantee of the Fourteenth Amendment”<sup>75</sup> should not be underestimated.

*Kitchen* addressed the gendered parenting argument not by focusing on its equal protection implications, but instead on whether the state really had an important interest in promoting gendered parenting styles. The court noted that the “state does not restrict the right to marry or its recognition of marriage based on compliance with any set of parenting roles, or even parenting quality.”<sup>76</sup> When the state claimed that promoting gendered parenting roles was an important interest, but then restricted the marriage rights of only one particular subset of individuals who allegedly did not

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71. *Loving*, 388 U.S. at 11 n.11.

72. *McLaughlin v. Florida*, 379 U.S. 184 (1964).

73. FLA. STAT. § 798.05 (1961), *repealed by* 1969 Fla. Laws ch. 69-195, § 1.

74. *McLaughlin*, 379 U.S. at 184.

75. *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013).

76. *Kitchen v. Herbert*, 755 F.3d 1193, 1224–25 (10th Cir. 2014) (Kelly, J., dissenting).

promote those roles, the state suggested at the very least that the state's means were not narrowly tailored to promote its alleged goals.<sup>77</sup>

The *Kitchen* court discussed *Windsor*, explaining that the decision should not be understood solely as a federalism case. "Although it is true that *Windsor* resolved tension between a state law permitting same-sex marriage and a federal non-recognition provision, the Court's description of the issue indicates that its holding was not solely based on the scope of federal versus state powers."<sup>78</sup> Indeed, the *Kitchen* court noted the *Windsor* Court's recognition that it is sometimes permissible for the federal government to supplant state law<sup>79</sup> and, more importantly, that the *Windsor* holding was based on the Fifth Amendment's due process protections rather than on federalism.<sup>80</sup>

In *Bishop v. Smith*,<sup>81</sup> the Tenth Circuit addressed the constitutionality of Oklahoma's same-sex marriage ban. Because this was the same panel that had addressed the constitutionality of the Utah law,<sup>82</sup> the court saw no need to address arguments in the same detail that had been used in *Kitchen*.<sup>83</sup> Nonetheless, the Tenth Circuit did consider some arguments as to why Oklahoma's same-sex marriage ban allegedly passed constitutional muster. For example, the court addressed the assertion that "children have an interest in being raised by their biological parents."<sup>84</sup> But, the court noted that Oklahoma has various policies and practices that resulted in children not being raised by both of their biological parents, e.g., ART or adoption.<sup>85</sup> The "State thus overlooks the interests of children being raised by their biological parents in a wide variety of contexts,"<sup>86</sup> but offers no explanation as to "why

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77. *See id.* at 1221. ("Under strict scrutiny, the state must justify the specific means it has chosen rather than relying on some other characteristic that correlates loosely with the actual restriction at issue.").

78. *Id.* at 1206.

79. *Id.* at 1207 ("Congress can preempt state marriage laws dealing with insurance proceeds in a federal program, reject sham marriages for immigration purposes even if the marriage is valid under state law, and recognize common-law marriage for the purpose of establishing income-based Social Security benefit eligibility regardless of state law.") (citing *Windsor*, 133 S. Ct. at 2690).

80. *Id.* at 1206.

81. *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014).

82. *Id.* at 1074 ("Recognizing that the ruling in the Utah case would likely control the disposition of her appeal, the Oklahoma appellant asked that we assign these cases to the same panel. Our court did so.").

83. *Id.* at 1079 ("Our consideration of the merits of the Bishop couple's appeal is largely controlled by our decision in *Kitchen*. As explained more fully in that opinion.").

84. *Id.* at 1080.

85. *Id.* at 1081.

86. *Id.*

same-sex marriage poses a unique threat such that it must be treated differently from these other circumstances.”<sup>87</sup>

The *Bishop* Court also noted that “[a]s with opposite-sex couples, members of same-sex couples have a constitutional right to choose against procreation.”<sup>88</sup> The court concluded that “Oklahoma’s ban on same-sex marriage sweeps too broadly in that it denies a fundamental right to all same-sex couples who seek to marry or to have their marriages recognized regardless of their child-rearing ambitions.”<sup>89</sup> The court’s holding the Oklahoma ban unconstitutional was unsurprising, given the *Bishop* Court’s following the *Kitchen* holding that a fundamental right was at issue.<sup>90</sup> Nonetheless, there was an interesting difference between the two cases in that Judge Holmes wrote a concurrence in *Bishop* and did not in *Kitchen*.<sup>91</sup>

Judge Holmes in his *Bishop* concurrence decided to “to focus on one significant thing that the district court wisely did *not* do in rendering its substantive ruling on the same-sex marriage ban . . . [it] declined to rely upon animus doctrine.”<sup>92</sup> He discussed the rational basis with bite cases<sup>93</sup>—*Romer v. Evans*,<sup>94</sup> *Cleburne v. Cleburne Living Center*,<sup>95</sup> and *United States Department of Agriculture v. Moreno*<sup>96</sup>—and noted “the hallmark of animus jurisprudence is its focus on actual legislative  *motive*.”<sup>97</sup> In an effort to promote “analytical precision,”<sup>98</sup> Judge Holmes tried “to clarify exactly what types of legislative motive may be equated with animus.”<sup>99</sup>

The motivations falling within the relevant category fall “somewhere on a continuum of hostility,”<sup>100</sup> ranging from a “*desire to harm* a politically unpopular group” to “a legislative motive . . . to simply exclude a particular group from one’s community for no reason other than an ‘irrational

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87. *Id.*

88. *Id.* (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

89. *Id.*

90. *See id.* at 1079 (“Our consideration of the merits of the Bishop couple’s appeal is largely controlled by our decision in *Kitchen*.”); *see also id.* at 1081 (“Oklahoma’s ban on same-sex marriage sweeps too broadly in that it denies a fundamental right to all same-sex couples who seek to marry or to have their marriages recognized.”).

91. *See infra* notes 97–126 and accompanying text (discussing Judge Holmes’s *Bishop* concurrence).

92. *Bishop*, 760 F.3d at 1096 (Holmes, J., concurring).

93. *Id.* at 1099.

94. *Romer v. Evans*, 517 U.S. 620 (1996).

95. *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

96. *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973).

97. *Bishop*, 760 F.3d at 1099 (Holmes, J., concurring).

98. *Id.* (Holmes, J., concurring).

99. *Id.*

100. *Id.*

prejudice' harbored against that group."<sup>101</sup> For example, "animus may be present where the lawmaking authority is motivated solely by the urge to call one group 'other,' to separate those persons from the rest of the community (i.e., an 'us versus them' legal construct)."<sup>102</sup>

How will one know that legislation was motivated by animus as defined within the jurisprudence? Judge Holmes discussed two different kinds of legislation that might qualify: "(1) laws that impose wide-ranging and novel deprivations upon the disfavored group; and (2) laws that stray from the historical territory of the lawmaking sovereign just to eliminate privileges that a group would otherwise receive."<sup>103</sup>

*Romer* is a paradigmatic example of the first category. There, the Court "struck down a Colorado constitutional amendment that prohibited all state entities from promulgating civil-rights protections specifically designated for homosexuals (or bisexuals) in *any* context."<sup>104</sup> The second category was exemplified in *Windsor v. United States* where the Court addressed the constitutionality of the Defense of Marriage Act.<sup>105</sup>

Judge Holmes noted that "prior to passage of DOMA, Congress had deferred to the States' definitional authority over marriage, an authority they enjoyed as part of their traditional police power in the domestic-relations sphere."<sup>106</sup> He reasoned that "the federal government had gone beyond the federalism pale and intruded into a province historically monopolized by the States, and, what is more, that the federal government had done so solely to restrict the rights that would have otherwise been afforded to gay and lesbian individuals."<sup>107</sup>

A few points might be made about Judge Holmes's analysis. First, he is undoubtedly correct that *Romer* is a paradigmatic example in this particular jurisprudence of a law that fails rational basis review because of its invidious motivation.<sup>108</sup> The *Romer* Court had noted that Amendment 2 was "at once

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101. *Id.* at 1100 (Holmes, J., concurring) (quoting *Moreno*, 413 U.S. at 534 (emphasis added)).

102. *Id.* (Holmes, J., concurring) (citing *Romer v. Evans*, 517 U.S. 620, 635 (1996); *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985)).

103. *Id.*

104. *Id.* at 1102.

105. *See generally* *United States v. Windsor*, 133 S. Ct. 2675 (2013).

106. *Bishop*, 760 F.3d 1070, 1102 (10th Cir. 2014) (Holmes, J., concurring) (citing *Windsor*, 133 S. Ct. at 2691).

107. *Id.*

108. Justice Scalia contested this characterization. *See Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) ("The constitutional amendment before us here is not the manifestation of a 'bare . . . desire to harm' homosexuals, but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws.") (citations omitted).

too narrow and too broad. . . . [I]t identifie[d] persons by a single trait and then denie[d] them protection across the board.”<sup>109</sup> Such a law “raise[d] the inevitable inference that the disadvantage imposed [wa]s born of animosity toward the class of persons affected,”<sup>110</sup> and the Court concluded that “Amendment 2 classifie[d] homosexuals not to further a proper legislative end but to make them unequal to everyone else.”<sup>111</sup> The only cautionary note about Judge Holmes’s analysis is that it is not necessary to deny benefits across the board in order for the Court to infer animus and then invalidate the measure because it was improperly motivated. Two cases cited by Judge Holmes as involving the relevant kind of animus—*Moreno* and *Cleburne*—did not involve the kind of across-the-board impediment that was at issue in *Romer*.

Second, while Judge Holmes is correct that part of the *Windsor* analysis spoke to federalism considerations, much of the analysis spoke to the stigmatization and practical harms that the law at issue imposed on same-sex couples and their families.<sup>112</sup> He also fails to note the Court’s warning in a few different places that the state power to define marriage was limited by the Constitution.<sup>113</sup> The difficulty pointed to here is that the failure to attend to some of these underemphasized elements of the differing opinions might lead one to overstate what is necessary to trigger a finding of animus. Thus, Judge Holmes summarized his position by noting that:

a law falls prey to animus only where there is structural evidence that it is aberrational, either in the sense that it targets the rights of a minority in a dangerously expansive and novel fashion . . . or in the sense that it strays from the historical territory of the lawmaking sovereign just to eliminate privileges that a group would otherwise receive.<sup>114</sup>

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109. *Id.* at 633 (alteration in original).

110. *Id.* at 634 (alteration in original).

111. *Id.* at 635.

112. *See* *United States v. Windsor*, 133 S. Ct. 2675, 2694–96 (2013).

113. *See id.* at 2691 (“State laws defining and regulating marriage, of course, must respect the constitutional rights of persons.”) (citing *Loving v. Virginia*, 388 U.S. 1 (1967)); *id.* at 2692 (discussing “the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next.”); *id.* (“The States’ interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits.”); *see also id.* at 2695 (“[T]he equal protection guarantee of the Fourteenth Amendment [which applies to the states] makes that Fifth Amendment right all the more specific and all the better understood and preserved.”).

114. *Bishop v. Smith*, 760 F.3d 1070, 1104 (10th Cir. 2014) (Holmes J., concurring) (citing *Romer v. Evans*, 517 U.S. 620, 631–35 (1996); *Windsor*, 133 S. Ct. at 2689–95) (citations omitted).

He believed that because Oklahoma law did not suffer from either of these difficulties, it had not been motivated by animus.<sup>115</sup>

The Oklahoma constitutional amendment was “not nearly as far-reaching as the state constitutional amendment that *Romer* invalidated.”<sup>116</sup> Further, the amendment “only made explicit a tacit rule that until recently had been universal and unquestioned for the entirety of our legal history as a country: that same-sex unions cannot be sanctioned as marriages by the State,”<sup>117</sup> which allegedly showed that Oklahoma had not engaged in the structural tampering that *Windsor* represented.

Nonetheless, an open question is whether the Oklahoma “lawmaking authority [wa]s motivated solely by the urge to call one group ‘other,’ to separate those persons from the rest of the community (i.e., an ‘us versus them’ legal construct).”<sup>118</sup> For example, Oklahoma’s desire not to recognize same-sex marriages was so great that it not only passed laws to that effect but passed constitutional amendments assuring that same-sex couples would not be able to marry within the state and would not be able to have those marriages validly celebrated elsewhere recognized within the state.<sup>119</sup>

Individuals may disagree about whether Oklahoma’s focus on same-sex marriage is prompted by animus or, instead, reflective of good public policy. The point here is merely that Oklahoma seems to be treating such marriages in a sufficiently distinct way that its laws might qualify as having been prompted by animus (as the Court has been using that term), notwithstanding that the state has not enacted an across-the-board measure like the one at issue in *Romer* or the kind of structural difficulty that in Judge Holmes’s view was represented by *Windsor*.

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115. *Bishop*, 760 F.3d at 1104.

116. *Id.*

117. *Id.* at 1105.

118. *Id.* at 1100 (Homes, J., concurring) (citing *Romer*, 517 U.S. at 635 and *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985)).

119. See OKLA. CONST. art. II, § 35, *invalidated by Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252, 1258 (N.D. Okla.), *aff’d sub nom. Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014):

A Marriage in this state shall consist only of the union of one man and one woman. Neither this Constitution nor any other provision of law shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups . . . . A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage.”

*Id.* See also OKLA. STAT. ANN. tit. 43, § 3.1 (“A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage.”); and OKLA. STAT. ANN. tit. 43, § 3(A) (“Any unmarried person who is at least eighteen (18) years of age and not otherwise disqualified is capable of contracting and consenting to marriage with a person of the opposite sex.”)

Judge Holmes noted that “once animus is detected, the inquiry is over: the law is unconstitutional.”<sup>120</sup> Of course, it is also true that in cases in which fundamental rights are at issue, the state bears a very heavy burden to justify overriding such a right.<sup>121</sup> If no fundamental interest is implicated and no protected class targeted, the law will be upheld as long as it is designed to serve a legitimate purpose.<sup>122</sup> But that would mean that if one rejected that the right to marry includes the right to marry a same-sex partner and one believed that Oklahoma’s law was not motivated by animus, then one would expect the law’s constitutionality to be upheld.<sup>123</sup>

## 2. *The Fourth Circuit Decision*

After both of the Tenth Circuit decisions had been issued, the Fourth Circuit examined whether Virginia’s same-sex marriage ban violated federal Constitutional guarantees. The Fourth Circuit reached a conclusion about Virginia law similar to the Tenth Circuit’s conclusion about Utah and Oklahoma law, namely, that because the right to marry a same-sex partner implicates a fundamental interest, the challenged law was not sufficiently closely tailored to promote a compelling interest to pass constitutional muster.

In *Bostic v. Schaefer*, the Fourth Circuit explained that “the right to marry is an expansive liberty interest that may stretch to accommodate changing societal norms.”<sup>124</sup> The court refused to characterize the contested right as the right to same-sex marriage, noting that in the past marriage cases the Supreme Court had not characterized “the rights in question as ‘the right to interracial marriage,’ ‘the right of people owing child support to marry,’ and ‘the right of prison inmates to marry.’”<sup>125</sup> The court further noted:

*Lawrence* and *Windsor* indicate that the choices that individuals make in the context of same-sex relationships enjoy the same constitutional protection as the choices accompanying opposite-sex relationships . . . [and that there

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120. *Bishop*, 760 F.3d at 1103 (Holmes, J., concurring).

121. Randal S. Jeffrey, *Equal Protection in State Courts: The New Economic Equality Rights*, 17 LAW & INEQ. 239, 248 (1999) (“[C]ourts apply strict scrutiny when state action burdens a fundamental right.”).

122. *See Romer*, 517 U.S. at 631 (“[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.”) (citing *Heller v. Doe*, 509 U.S. 312, 319–20 (1993)).

123. *See Bishop*, 760 F.3d at 1109 (Kelly, J., concurring and dissenting) (“I would apply rational basis review and uphold Oklahoma’s definition of marriage.”).

124. *Bostic v. Schaefer*, 760 F.3d 352, 376 (4th Cir. 2014).

125. *Id.* at 376.

is] no reason to suspect that the Supreme Court would accord the choice to marry someone of the same sex any less respect than the choice to marry an opposite-sex individual who is of a different race, owes child support, or is imprisoned.<sup>126</sup>

Because the *Windsor* Court discussed the same-sex “couple, whose moral and sexual choices the Constitution protects,”<sup>127</sup> the *Bostic* court was confident that the United States Supreme Court would also treat the right to treat a same-sex partner as constitutionally protected.

The *Bostic* Court noted the *Windsor* Court’s concern that DOMA created “two classes of married couples within states that had legalized same-sex marriage: opposite-sex couples, whose marriages the federal government recognized, and same-sex couples, whose marriages the federal government ignored.”<sup>128</sup> However, the court did not read this as privileging federalism principles, instead noting that “injury to same-sex couples served as the foundation for the Court’s conclusion that section 3 violated the Fifth Amendment’s Due Process Clause.”<sup>129</sup> The *Bostic* Court explained: “*Windsor* does not teach us that federalism principles can justify depriving individuals of their constitutional rights; it reiterates *Loving*’s admonition that the states must exercise their authority without trampling constitutional guarantees. Virginia’s federalism-based interest in defining marriage therefore cannot justify its encroachment on the fundamental right to marry.”<sup>130</sup>

The *Bostic* Court discussed whether recognizing a right to marry a same-sex partner would “sever the link between marriage and procreation.”<sup>131</sup> Those supporting the ban had argued that “if same-sex couples who cannot procreate naturally []are allowed to marry, the state will sanction the idea that marriage is a vehicle for adults’ emotional fulfillment, not simply a framework for parenthood,”<sup>132</sup> apparently fearing that “if adults are the focal point of marriage, ‘then no logical grounds reinforce stabilizing norms like sexual exclusivity, permanence, and monogamy,’ which exist to benefit children.”<sup>133</sup> Such an argument is surprising, because it suggests that married individuals who choose not to have children have no reason to stay together long-term.

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126. *Id.* at 377 (alteration in original).

127. *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)).

128. *Bostic*, 760 F.3d at 378 (citing *Windsor*, 133 S. Ct. at 2692).

129. *Id.* (citing *Windsor*, 133 S. Ct. at 2693).

130. *Id.* at 379.

131. *Id.* at 380.

132. *Id.*

133. *Id.*

The *Bostic* Court accepted that some of the recent changes in family law have had an effect, noting that “no-fault divorce certainly altered the realities of married life by making it easier for couples to end their relationships.”<sup>134</sup> However, the court was unpersuaded that “legalizing same-sex marriage will have a similar destabilizing effect.”<sup>135</sup> On the contrary, “it is more logical to think that same-sex couples want access to marriage so that they can take advantage of its hallmarks, including faithfulness and permanence, and that allowing loving, committed same-sex couples to marry and recognizing their out-of-state marriages will strengthen the institution of marriage.”<sup>136</sup>

The court was similarly unconvinced that the state really believed that permitting same-sex couples to marry would somehow promote irresponsible procreation, at least in part, “[b]ecause same-sex couples and infertile opposite-sex couples are similarly situated,”<sup>137</sup> and the latter could marry within the state. Thus, if the state really believed that it had a compelling interest in preventing individuals from marrying if they could not reproduce coitally, then the state would have much different marriage regulations than it in fact had.

The court noted that same-sex couples are having and raising children.<sup>138</sup> Ironically, while same-sex marriage ban proponents argued that permitting same-sex couples to marry would somehow promote or embrace irresponsible parenting, they also argued that there was no reason to permit same-sex couples to marry because “same-sex couples ‘bring children into their relationship[s] only through intentional choice and pre-planned action.’”<sup>139</sup> Thus, it seems that same-sex couples are such responsible parents that they have no need for marriage, even though the ban proponents believe that those having and raising children would benefit from marriage because it promotes permanence in the relationships.<sup>140</sup> Certainly, it is fair to suggest that couples who adopt or who use ART must do more planning than other couples who might conceive as a result of sudden passion. But parenting involves much more than creating the child—it also involves raising the child—and those who will be raising a child over a period of years might benefit from the structure and stability that marriage might provide.

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134. *Id.* at 381.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 382 (“Although same-sex couples cannot procreate accidentally, they can and do have children via other methods.”).

139. *Id.*

140. *See generally id.* at 380–82.

Individuals get and remain married for many reasons, and it is mistaken to believe that there is only one valid reason to marry. Some wish to raise children and others do not. States neither should nor do require an ability or willingness to have children as a condition of marriage, and states undercut their own credibility when claiming that such an interest justifies or even explains their refusal to permit same-sex couples to marry.

### III. THE HYPOTHESIZED DECISION AND ITS LIKELY EFFECTS

Several circuits have addressed the constitutionality of state same-sex marriage bans and other circuits will likely be issuing opinions relatively soon. Whether because of the importance of the issue, a split in the circuits, or both, it seems likely that the United States Supreme Court will address the constitutionality of same-sex marriage bans on the merits, and thus it may be helpful to address what such a decision is likely to hold and what effects such a decision will likely have on family law in particular and on families more generally.

#### A. *The Hypothetical Decision*

While *Windsor* and the circuit court decisions are helpful in pointing to some of the issues that the Court will likely consider, it is nonetheless dangerous to try to predict what the Court will say, especially because what will be at issue will not only be *whether* same-sex marriage is constitutionally protected but *why*. It is thus with some trepidation that this section goes “where angels fear to tread.”<sup>141</sup> Nonetheless, the focus of this section is on what the Court will likely say, assuming that it will hold that the Federal Constitution precludes the states from banning same-sex marriage.

While both the Fourth and Tenth Circuits held that the right to marry a same-sex partner falls within the fundamental right to marry, the *Windsor* Court did not, although it is also true the Court was not addressing that precise issue.<sup>142</sup> So, too, in *Lawrence v. Texas*, the Court expressly stated that it was not addressing whether the right to marry a same-sex partner is protected by the Federal Constitution.<sup>143</sup>

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141. See *United States v. Summers*, 414 F.3d 1287, 1300 (10th Cir. 2005) (“[W]e are left to go where angels and even Justices fear to tread.”) (citing *Noble v. White*, 996 F.2d 797, 800 (5th Cir. 1993)).

142. Cf. *United States v. Windsor*, 133 S. Ct. 2675, 2697 (2013) (Roberts, C.J., dissenting) (“We may in the future have to resolve challenges to state marriage definitions affecting same-sex couples. That issue, however, is not before us in this case.”).

143. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“The present case does not involve . . . whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”).

There are a variety of explanations that might be offered for the Court's reticence on the subject including that the issue was not before the Court,<sup>144</sup> at least where the Court had jurisdiction to address the issue on the merits.<sup>145</sup> It may be that the Court has not yet decided whether the Constitution protects that right.<sup>146</sup> Or, even if it has decided, it may not be clear about the basis for such an opinion.

One of the noteworthy aspects of both *Windsor*<sup>147</sup> and *Lawrence*,<sup>148</sup> for that matter, is that the Court never specified the level of scrutiny that it was employing to strike down the statutes at issue. For example, the *Lawrence* Court noted that the "Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."<sup>149</sup> But that does not establish that the state had no legitimate interest, but merely what whatever legitimate interest the state had was insufficient, as a matter of constitutional law, to overcome the burden that had been placed on individuals' private lives. Such a holding is compatible with the rational basis test if the state had no legitimate interest when passing that law or if the statute at hand was not rationally related to the promotion of a legitimate interest.<sup>150</sup> But that holding is also compatible with a heightened rational basis test,<sup>151</sup> although that test has been used in equal protection analyses and the *Lawrence* Court struck down the Texas same-sex sodomy prohibition as a violation of due process guarantees.<sup>152</sup>

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144. See *Windsor*, 133 S. Ct. at 2697 (Roberts, C.J., dissenting).

145. See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013) (holding that the Court did not have jurisdiction in that case to decide whether the Federal Constitution protected a right to marry a same-sex partner).

146. But see *Windsor*, 133 S. Ct. at 2709 (Scalia, J., dissenting) ("In my opinion, however, the view that *this* Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today's opinion.").

147. *Id.* at 2706 (Scalia, J., dissenting) ("The majority opinion need not get into the strict-vs.-rational-basis scrutiny question.").

148. In Justice Scalia's dissent in *Lawrence*, he was the only one who claimed that the Court was employing the rational basis test. See *Lawrence*, 539 U.S. at 594 (Scalia, J., dissenting) ("[H]aving failed to establish that the right to homosexual sodomy is 'deeply rooted in this Nation's history and tradition,' the Court concludes that the application of Texas's statute to petitioners' conduct fails the rational-basis test, and overrules *Bowers*' holding to the contrary.") (citing *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986)).

149. *Lawrence*, 539 U.S. at 578.

150. Cf. *Romer v. Evans*, 517 U.S. 620, 633 (1996) ("[T]he classification [must] bear a rational relationship to an independent and legitimate legislative end.") (alteration in original).

151. See *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.").

152. *Id.* at 578 ("Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.").

Yet, *Lawrence* might also have been decided using a higher level of scrutiny than even rational basis with bite review. *Zablocki v. Redhail* is instructive with respect to how that might be so.<sup>153</sup> When examining Wisconsin's limitations on the marriage rights of indigent, noncustodial parents, the *Zablocki* Court announced the following test: "When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."<sup>154</sup> But the language "sufficiently important" is not part of the strict scrutiny test. So, too, saying that a state does not have a legitimate interest that *justifies* an intrusion would seem to be another way of saying that that state does not have a sufficiently important interest to overcome the burden that the state must bear to establish the validity of its law.

The point here is not to assert that *Lawrence* recognized a fundamental right to same-sex sodomy, but merely that it is not clear what level of scrutiny was being employed. That said, at least one other point might be made about *Lawrence*.<sup>155</sup> Traditionally, the Constitution has afforded more protection to marriage than to sexual relations, and it would be surprising for the Court to say that the Constitution protects same-sex relations but not same-sex relationships.<sup>156</sup> Still, the questions at hand involve both the level of scrutiny that will be used, and whether the decision will be based on due process grounds, equal protection grounds, or both.

Certainly, the Court could find, following the Fourth and Tenth Circuit opinions, that the right to marry a same-sex partner falls within the fundamental right to marry. Such a holding would be important because it would establish that the right to marry a same-sex partner must be given the same kind of respect and protection that other marriage rights are given.

Yet, if *Lawrence* and *Windsor* are any guide, the Court will not announce that the right to marry a same-sex partner is a fundamental interest. Nor will the Court announce that the right to marry a same-sex partner falls within the fundamental right to marry that is already protected by the Constitution. Rather, the Court will strike down the same-sex marriage ban before it

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153. See *Zablocki v. Redhail*, 434 U.S. 374 (1978).

154. *Id.* at 388.

155. But see generally Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004).

156. See Mark Strasser, *Same-Sex Marriage and the Right to Privacy*, 13 J. L. & FAM. STUD. 117, 128 (2011) ("Traditionally, the Constitution has prioritized relationships over sexual relations—marital relations were found to be constitutionally protected in 1964 [in *Griswold*], and marriage itself was found to be a fundamental right in 1967 in *Loving*. However, the right to have sexual relations outside of marriage was not recognized until 2003 in *Lawrence*." (alteration in original)).

without expressly discussing whether the implicated interest is fundamental or even what level of scrutiny is being employed to reach the decision.

In discussing the right to marry a same-sex partner, the Court might also discuss equal protection issues. Various state courts have held that same-sex marriage bans trigger heightened scrutiny either because of discrimination on the basis of gender<sup>157</sup> or on the basis of sexual orientation.<sup>158</sup> The United States Supreme Court might hold that same-sex marriage bans trigger heightened scrutiny either as a sex-based or as an orientation-based classification. Such a holding would also be important, both because of its implications for same-sex marriage in particular, and because of its possible implications more generally for classifications that target on the basis of orientation.

Again, however, if *Lawrence* and *Windsor* provide any guide, the Court is likely to say that same-sex marriage bans offend equal protection guarantees, and probably are motivated by animus. However, the Court seems unlikely to announce that classifications targeting orientation as a general matter either fall within protections against sex discrimination or themselves trigger a higher level of scrutiny.<sup>159</sup>

That is not to say that the Court will likely announce that it is employing the rational basis test or even rational basis with bite review. Instead, the Court will simply refrain from announcing which particular level of scrutiny is being employed.

The Court will cite some of the factors in *Windsor*—the importance of marriage for both practical and symbolic reasons and the stigma imposed by a state’s refusal to accord legal recognition to the relationships of same-sex couples. Justice Scalia will argue in his dissent that the state’s refusal to recognize such unions is rationally related to a legitimate interest, implicitly or explicitly underscoring that the Court is employing some kind of heightened form of review when striking down such bans.

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157. See *Baehr v. Lewin*, 852 P.2d 44, 64 (Haw. 1993) (“HRS § 572–1, on its face and as applied, regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants’ sex.”); see also *Latta v. Otter*, 771 F.3d 456, 473 (9th Cir. 2014) (Berzon, J., concurring) (“Idaho and Nevada’s same-sex marriage bans discriminate on the basis of sex and so are invalid unless they meet this ‘demanding’ standard.”).

158. See *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 431–32 (Conn. 2008) (“[S]exual orientation meets all of the requirements of a quasi-suspect classification.”); see also *Latta*, 771 F.3d at 473 (9th Cir. 2014) (“Because Idaho and Nevada’s laws discriminate on the basis of sexual orientation, that level is heightened scrutiny.”).

159. Cf. *Baskin v. Bogan*, 766 F.3d 648, 656 (7th Cir. 2014) (“The discrimination against same-sex couples is irrational, and therefore unconstitutional even if the discrimination is not subjected to heightened scrutiny, which is why we can largely elide the more complex analysis found in more closely balanced equal-protection cases.”).

### B. *The Decision's Likely Effects*

Suppose that the Court were to hold that same-sex marriage bans violate federal constitutional guarantees. What effects on family law or on families might be expected?

To some extent, the effects might differ depending upon the basis for the decision. If the right to marry a same-sex partner is considered fundamental, then it will of course be true that all states would have to recognize same-sex marriages. The focus of litigation might then shift, depending upon whether states tried in other ways to treat same-sex marriages as inferior in some way, perhaps by according different incidents to different marriages. Yet, states are already on notice that such attempts may well be viewed with suspicion. The *Windsor* Court noted “the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State.”<sup>160</sup> While that observation does not establish as a constitutional matter that states cannot distinguish among the incidents of marriage, it at least suggests that unusual distinctions, e.g., ones that seem to target same-sex relationships, will be viewed “with skepticism, if not a jaundiced eye.”<sup>161</sup>

Same-sex marriage opponents sometimes recount a “parade of horrors”<sup>162</sup> that might be expected to occur were the Court to hold that such marriages are protected by the Federal Constitution. But these dire results are unlikely to occur if only because the recognition of same-sex marriage is more plausibly thought a reflection than a rejection of contemporary societal values and practices. First, many same-sex couples are raising children, and the legal recognition of same-sex marriage reinforces the traditional notion that a home involving a married couple can provide a setting in which children can thrive. While the children raised by same-sex couples are not genetically related to both parents, society has long accepted that adults can provide a home in which children will flourish even when the children do not have such a relationship with one or both of the adults. We live in a world in which children are being raised in blended families and adoptive families, so it is hardly revolutionary to recognize marriages where one or both of the parties to the marriage will not have a genetic connection to at least one of the children that the couple might be raising.

Many individuals who marry do not plan to raise children. It hardly undermines current values and practices to recognize that same-sex couples

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160. *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013).

161. *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 43 (1995) (citing *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 873 (1994)).

162. *Kitchen v. Herbert*, 755 F.3d 1193, 1214 (10th Cir. 2014).

might also want to marry, even though they, too, have no plans to raise a child within their home. Marriage is thought to provide a variety of benefits for the adults in the relationship, and permitting same-sex couples to marry will do nothing to undermine the perceived value of marriage even for those who do not wish to raise the next generation.

Recognizing same-sex marriage will help many same-sex couples and their children, both practically and symbolically. Members of such families will now be entitled to benefits to which they otherwise would not have been, and many families can use all of the help that they can get. State validation of the relationships will help remove perceptions of second-class citizenship. In short, while family law is unlikely to change significantly after the recognition of same-sex marriage, individual families are likely to change, and for the better.

#### IV. CONCLUSION

Various challenges to same-sex marriage bans have been filed across the country. Thus far most of the federal circuits addressing the constitutionality of such bans have held such bans unconstitutional. Other circuits will soon address the constitutionality of such bans. Whether because of a split in the circuits or the importance of the issue, the United States Supreme Court is likely to address the constitutionality of same-sex marriage bans this year. While it is unclear what the Court will do when ultimately addressing this issue, this paper assumes that the Court will hold that the Federal Constitution protects such marriages, and the question then becomes what effect such a ruling will have.

First, family law has long recognized and taken account of the existence of differing kinds of families, so the recognition of same-sex marriage will not revolutionize family law. It is of course true that some individuals marry when they cannot or will not have children. Other individuals marry, intending to raise a child who will be genetically related to, at most, one of them.

The law can readily accommodate extending marriage to same-sex couples, as is evidenced by those states already recognizing such unions. Further, recognizing same-sex marriage will permit the state to stop offering such contradictory messages about marriage. When a state suggests that the primary purpose of marriage is to provide a setting in which children can thrive, but then denies marriage to those raising children while permitting marriage for those who cannot or will not have children, the state undermines its own credibility. When the state implies that same-sex couples are too irresponsible to be permitted to marry and also implies that same-sex couples

are too responsible to be benefited by marriage, the state undermines its own credibility.

Same-sex couples and their children will benefit by having access to marriage, just as different-sex couples and their children benefit by having access to that institution. If the United States Supreme Court were to hold that same-sex couples have the right to marry, we likely would not see great changes in family law, although we might see great changes in the circumstances of individual families.