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Is Full Marriage Equality for Same-Sex Couples Next? The Immediate and Future Impact of the Supreme Court's Decisions in United States v. Windsor

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IS FULL MARRIAGE EQUALITY FOR SAME-SEX COUPLES NEXT? THE IMMEDIATE AND FUTURE IMPACT OF THE SUPREME COURT'S DECISION IN *UNITED STATES V. WINDSOR*

Catherine Jean Archibald*

"No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[1]

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."[2]

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I. INTRODUCTION

As people across the political spectrum sat on the edge of their seats last summer, the Supreme Court waited until the last possible moment to

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1 U.S. CONST. amend. XIV, § 1 (emphasis added).

2 U.S. CONST. amend. V (emphasis added).

issue its two same-sex marriage decisions.[3] One, decided on a technicality, did nothing to answer the question of whether same-sex couples have a constitutional right to marry; though, it did result in the return of same-sex marriage to California, the most populous state in the nation.[4] The other, a landmark decision, struck down Section 3 of the Federal Defense of Marriage Act ("DOMA") and held that same-sex couples validly married under state law must have their marriages recognized by federal law.[5] This sweeping decision, *United States v. Windsor*,[6] issued on June 26, 2013, changed the effect of over 1000 federal statutes[7] and impacted the lives of tens of thousands of same-sex couples and their children across the country.[8]

However, the *Windsor* opinion is limited to "those [in] lawful marriages,"[9] and accordingly has no immediate effect on the laws of the more than thirty states where same-sex marriage is still prohibited.[10] Thus, its impact on future cases challenging state same-sex marriage prohibitions remains to be seen, although a growing number of courts have already relied on *Windsor* to find that various state same-sex marriage prohibitions are invalid.[11] Additionally, the basis of the

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3 The Supreme Court issued both same-sex marriage decisions on June 26, 2013, the last day of its 2012–2013 session. Jess Bravin, *Historic Win for Gay Marriage: High Court Rulings Lift Bans on Federal Same-Sex Benefits, Weddings in California*, WALL ST. J. (June 26, 2013, 8:37 PM), http://online.wsj.com/news/articles/SB10001424127887324520904578535300028771488; *Supreme Court Calendar, October Term 2012*, http://www.supremecourt.gov/oral_arguments/2012TermCourtCalendar.pdf (last visited Jan. 12, 2014).

4 *See* Hollingsworth v. Perry, 133 S. Ct. 2652, 2659 (2013) (holding that the petitioners did not have standing; therefore, the Court did not have authority to decide the case on the merits and the district court's decision requiring the return of same-sex marriage to California stands); Tony Agurto, *Governor Brown Directs California Department of Public Health to Notify Counties that Same-Sex Marriages Must Commence*, CA.GOV (June 28, 2013), http://gov.ca.gov/news.php?id=18120 (noting that California's governor directed that marriage licenses be issued to same-sex couples in light of the Supreme Court's decision in *Hollingsworth v. Perry*).

5 United States v. Windsor, 133 S. Ct. 2675, 2696 (2013).

6 133 S. Ct. 2675.

7 *See id.* at 2683 ("[DOMA's] 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.").

8 *See id*. at 2694 (describing DOMA's negative effect on same-sex couples and their children).

9 *Id*. at 2696.

10 *See Marriage Recognition*, HUM. RTS. CAMPAIGN, http://www.hrc.org/campaigns/marriage-center (last visited Aug. 17, 2014) (showing that thirty-one states still prohibit same-sex marriage); *see also Windsor*, 133 S. Ct. at 2689 (noting that, as of its holding, twelve states and the District of Columbia recognized and permitted same-sex marriage).

11 *See, e.g.*, Bostic v. Schaefer, Nos. 14-1167, 14-1169, 14-1173, 2014 U.S. App. LEXIS 14298 (4th Cir. July 28, 2014) (relying on *Windsor* and finding Virginia's ban on same-sex marriage unconstitutional under the United States Constitution, and not staying implementation of

opinion is not immediately obvious, as it contains elements of federalism, due process, and equal protection.[12] However, by extensively discussing the traditional state power over marriage,[13] and by describing New York's decision to extend marriage to same-sex couples as advancing the cause of equality,[14] the decision indicates to other states that they should likewise eliminate restrictions on same-sex marriage. If they do not, a close examination of the logic and reasoning of *Windsor* leads to the conclusion that future state and federal courts are likely to find that state same-sex marriage prohibitions are unconstitutional.

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its decision), *stayed by* Order in Pending Case (573 U.S. August 20, 2014), *available at* http://www.afer.org/wp-content/uploads/2014/08/14A196-McGuigg-v.-Bostic-Order.pdf#__utma=149406063.1720608795.1375172996.1408483621.1408585803.16&__utmb=149406063.8.10.1408585803&__utmc=149406063&__utmx=-&__utmz=149406063.1408481226.14.1.utmcsr=(direct)|utmccn=(direct)|utmcmd=(none)&__utmv=-&__utmk=231044511); Bishop v. United States ex rel. Holder, Nos. 14-5003 & 14-5006, 2014 U.S. App. LEXIS 13733 (10th Cir. July 18, 2014) (relying on *Windsor* and upholding district court's finding of unconstitutionality of Oklahoma's same-sex marriage ban, but staying implementation of the decision until any appeal to the Supreme Court is decided), *aff'g* 962 F. Supp. 2d 1252 (N.D. Okla. 2014); Kitchen v. Herbert, No. 13-4178, 2014 U.S. App. LEXIS 11935 (10th Cir. June 25, 2014) (relying on *Windsor* and upholding district court's finding of unconstitutionality of Utah's same-sex marriage ban, but staying implementation of the decision until any appeal to the Supreme Court is decided), *aff'g* 961 F. Supp. 2d 1181 (D. Utah 2013); Geiger v. Kitzhaber, Nos. 6:13-cv-01834-MC, 6:13-cv-02256-MC, 2014 U.S. Dist. LEXIS 68171 (D. Or. May 19, 2014) (relying on *Windsor* and striking down Oregon's same-sex marriage prohibitions as violations of the United States Constitution); Whitewood v. Wolf, 992 F. Supp. 2d 410 (D. Pa. 2014) (relying on *Windsor* and striking down Pennsylvania's same-sex marriage prohibitions as violations of the United States Constitution); Garden State Equal. v. Dow, 79 A.3d 1036, 1038–39 (N.J. 2013) (affirming the decision of the lower court that found New Jersey must allow same-sex marriage in light of the *Windsor* decision); *see also* Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 973, 979–82, 984, 992, 995–96 (S.D. Ohio 2013) (relying on the reasoning in *Windsor* and finding that Ohio must recognize same-sex marriages performed outside the state); Lee v. Orr, No. 13-cv-8719, 2013 U.S. Dist. LEXIS 173801, at *1–2, *7–9 (N.D. Ill. Dec. 10, 2013) (relying on *Windsor* and finding that same-sex couples in Illinois with terminal illnesses must be allowed to marry even before the Illinois marriage equality law comes into force because "[t]he putative subclass of medically critical plaintiffs here are likely to succeed on the merits of their claim that the provisions of the current Illinois law that deny them the right to marry based solely on their sexual orientation, as applied, violates their constitutional right to equal protection"); Deboer v. Snyder, No. 12-cv-10285, 2013 U.S. Dist. LEXIS 98382, at *2, *5–7 (E.D. Mich. July 1, 2013) (denying a motion to dismiss in a case challenging Michigan's same-sex marriage ban because after *Windsor*, plaintiffs' claims have "plausibility").

12 *See infra* Part III (breaking the Supreme Court's decision in *Windsor* into five separate considerations).

13 *See infra* Part III.B (discussing the role federalism played in the Supreme Court's decision).

14 *See Windsor*, 133 S. Ct. at 2694 ("When New York adopted a law to permit same-sex marriage, it sought to eliminate inequality . . . .").

Justice Ginsburg—one of the Justices signing on to the majority opinion in *Windsor*—has written that effective judicial decisions should "strive[] to persuade."[15] Furthermore, she wrote that "without taking giant strides and thereby risking a backlash too forceful to contain, the [Supreme] Court, through constitutional adjudication, can reinforce or signal a green light for a social change."[16] The Supreme Court's decision in *Windsor* adheres to these ideals.

Part II of this Article describes the background to the *Windsor* case and its rise to the Supreme Court.[17] Part III analyzes the Supreme Court's decision in *Windsor*, and the elements of federalism, due process, and equal protection present in the opinion.[18] Part IV of this Article applies the Supreme Court's decision in *Windsor* to future same-sex marriage cases involving challenges to state same-sex marriage prohibitions; it concludes that the *Windsor* decision should lead to courts finding that state prohibitions on same-sex marriage are unconstitutional, as has already begun to happen.[19]

II. *WINDSOR*'S JOURNEY TO THE SUPREME COURT

The *Windsor* case began when plaintiff Edith Windsor was assessed, and paid, more than $350,000 in federal income taxes that she would not have had to pay if her deceased spouse had been male instead of female.[20] Windsor sued in the United States District Court for the Southern District of New York, challenging Section 3 of DOMA,[21] which provided that:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.[22]

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15 Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1186 (1992).

16 *Id.* at 1208.

17 *See infra* Part II (setting forth background information to the *Windsor* decision).

18 *See infra* Part III (analyzing the *Windsor* opinion).

19 *See infra* Part IV (describing how the decision in *Windsor* will affect future decisions of state and federal courts); *see also supra* note 11 (listing a number of court cases that have already found state same-sex marriage bans unconstitutional in light of *Windsor*).

20 United States v. Windsor, 133 S. Ct. 2675, 2683 (2013).

21 Windsor v. United States, 833 F. Supp. 2d 394, 396 (S.D.N.Y. 2012).

22 1 U.S.C. § 7 (2012).

Windsor was validly married under New York state law, where she and her wife had resided at the time of her wife's death.[23] Windsor alleged that DOMA violated the constitutional guarantee of equal protection, applicable to the federal government through the Fifth Amendment, because it discriminated against her on the basis of sexual orientation.[24]

The district court ruled for Windsor, found DOMA unconstitutional, and ordered that the federal government refund Windsor the tax money she had paid.[25] The district court found that DOMA discriminated based on sexual orientation and that DOMA was not rationally related to a legitimate government interest.[26] In making its determination, the court noted that it must perform a more thorough review under the rational basis test for laws that show "a desire to harm a politically unpopular group."[27] The district court declined to decide whether sexual orientation discrimination should be subject to heightened scrutiny, as it found that the law could not even meet the more lenient rational basis test.[28]

On appeal, the Second Circuit affirmed the district court's decision, but on slightly different grounds.[29] The Second Circuit found that sexual orientation discrimination should be subject to heightened scrutiny and that DOMA could not pass heightened scrutiny.[30] The Second Circuit found it unnecessary to decide whether DOMA could pass rational basis review, as it found heightened scrutiny applied and DOMA could not meet such scrutiny.[31]

III. THE SUPREME COURT'S DECISION IN *UNITED STATES V. WINDSOR*

On appeal, the Supreme Court affirmed the Second Circuit's opinion, finding that DOMA violated the constitutional equal protection

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23 *Windsor*, 133 S. Ct. at 2683.

24 Complaint at 3, 21, Windsor v. United States, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 10 Civ. 8435 (BSJ)), *available at* http://www.aclu.org/files/assets/2010-11-9-WindsorvUS-Complaint.pdf.

25 *Windsor*, 833 F. Supp. 2d at 406.

26 *Id.* at 402.

27 *Id.* (quoting Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring)) (internal quotation marks omitted).

28 *Id.* at 401–02; *see infra* text accompanying notes 94–99 (describing the different levels of scrutiny used by courts performing equal protection review).

29 *See* Windsor v. United States, 699 F.3d 169, 181, 188 (2d Cir. 2012) (affirming the district court's decision after applying heightened scrutiny to Windsor's claim).

30 *Id.*

31 *Id.*

guarantee.[32] However, the Court, like the district court, used rational basis review to reach this conclusion.[33] The Supreme Court also found that DOMA violated the liberty interest protected by the Due Process Clause of the Fifth Amendment.[34] In the beginning of its opinion, the Court engaged in a lengthy discussion of federalism,[35] perhaps to obscure the logical conclusion that just as the federal same-sex marriage exclusion is unconstitutional, so too are the state same-sex marriage exclusions still present in most state law. The extensive discussion regarding state control over marriage also serves to encourage states that still prohibit same-sex marriage to change their laws.[36]

A. The Tone of the Supreme Court's Decision

The tone of the *Windsor* opinion is persuasive, not combative. The Court seemed acutely aware that many people would be upset by, and disagree with, its decision. Thus, the Court bent over backwards to

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[32] United States v. Windsor, 133 S. Ct. 2675, 2695–96 (2013); *see infra* Part III.E (discussing the Supreme Court's equal protection analysis).

[33] *See Windsor*, 133 S. Ct. at 2696 ("The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."); *see also supra* text accompanying note 95 (explaining rational basis scrutiny).

[34] *Windsor*, 133 S. Ct. at 2695; *see infra* Part III.D (explaining that, although the Court did not identify the specific liberty interest at stake, prior cases suggest the Court likely found that DOMA infringed upon the fundamental right to marry).

[35] *Windsor*, 133 S. Ct. at 2689–92; *see infra* Part III.B (discussing in depth the Court's federalism analysis).

[36] *See infra* Part III.A (analyzing the Court's persuasive tone in the *Windsor* opinion). In fact, in the slightly more than one year since the *Windsor* decision, same-sex marriage has been legalized in seven additional states, through court decisions, executive directives, or legislation. *See, e.g.*, Geiger v. Kitzhaber, Nos. 6:13-cv-01834-MC, 6:13-cv-02256-MC, 2014 U.S. Dist. LEXIS 68171 (D. Or. May 19, 2014) (striking down Oregon's same-sex marriage prohibitions); Whitewood v. Wolf, 992 F. Supp. 2d 410 (D. Pa. 2014) (striking down Pennsylvania's same-sex marriage prohibitions); Garden State Equal. v. Dow, 82 A.3d 336 (N.J. Super. Ct. Law Div. 2013) (finding invalid New Jersey's same-sex marriage ban in light of *Windsor*), *aff'd*, 79 A.3d 1036, 1045 (N.J. 2013); Griego v. Oliver, 316 P.3d 865, 889 (N.M. 2013) (finding that same-sex couples have the right to marry under the New Mexico Constitution); *see also* Religious Freedom and Marriage Fairness Act, 750 ILL. COMP. STAT. ANN. 80/1–997 (West, Westlaw through P.A. 98-626 of the 2013 Reg. Sess.) (legalizing same-sex marriage in Illinois); Hawaii Marriage Equality Act of 2013, S.B. 1, 27th Leg., 2013 2d Spec. Sess. (Haw. 2013) (legalizing same-sex marriage in Hawaii because Hawaii's civil unions cannot provide the same benefits as marriage in light of *Windsor*); The Associated Press, *Hawaii: Same-Sex Marriage Becomes Law*, N.Y. TIMES, Nov. 14, 2013, at A24, *available at* http://www.nytimes.com/2013/11/14/us/hawaii-same-sex-marriage-becomes-law.html?_r=0 (noting Hawaii's decision to legalize same-sex marriage); Agurto, *supra* note 4 (explaining the effects of California's law legalizing same-sex marriage); *supra* note 11 and accompanying text (citing cases that have found same-sex marriage prohibitions invalid in light of *Windsor*).

show that it understood the sincere belief of those who believe marriage should only be between a man and a woman. It noted that "marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization."[37]

The Court then used gentle persuasive language to explain why this old view is incorrect: "For others, however, came the beginnings of a new perspective, a new insight. . . . The limitation of lawful marriage to heterosexual couples . . . came to be seen in New York and certain other States as an unjust exclusion."[38] By using positive language to describe New York's decision to extend marriage to same-sex couples, the Court indirectly praised those states that have decided to permit same-sex marriage. The Court noted that when New York "used its historic and essential authority to define the marital relation[ship]" to include same-sex couples, its "decision enhanced the recognition, dignity, and protection of [same-sex couples] in their own community."[39]

The Court explained that New York, by extending marriage to same-sex couples, deemed their relationships "worthy of dignity in the community equal with all other marriages."[40] This act "reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality."[41] Furthermore, "[w]hen New York adopted a law to permit same-sex marriage, it sought to eliminate inequality."[42]

The Court's intent in writing this type of description was most likely to encourage more states to join the twelve states and the District of Columbia that had already extended marriage rights to same-sex couples at the time *Windsor* was written.[43] If states voluntarily join New York in its quest to "eliminate inequality,"[44] the Supreme Court will not have to force them to do so at a later date.[45] Even if not all states change their laws to permit same-sex marriage, the Supreme Court likely hoped that

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37 *Windsor*, 133 S. Ct. at 2689.

38 *Id.*

39 *Id.* at 2692.

40 *Id.*

41 *Id.* at 2692–93.

42 *Id.* at 2694.

43 *See id.* at 2689 (noting that, as of its writing, twelve states and the District of Columbia recognized and permitted same-sex marriage). Since *Windsor* was issued, same-sex marriage has been legalized in seven more states. *See supra* note 36 (showing that California, Hawaii, Illinois, New Jersey, New Mexico, Oregon, and Pennsylvania have legalized same-sex marriage).

44 *Windsor*, 133 S. Ct. at 2694.

45 *See infra* Part IV.A (explaining that if states do not voluntarily follow in New York's steps, the Supreme Court may force them to do so).

its opinion in *Windsor* would help turn the minority of states now permitting same-sex marriage into a majority. Then, when it does come time for the Supreme Court to pronounce that all states must allow same-sex marriage, the risk of great public outrage will be reduced, as the Court will not be overturning the law of most states.[46]

B. Federalism in the Supreme Court's Decision

The Court spent several pages describing how by history and tradition, marriage has been largely regulated by the states.[47] For example, the Court noted that "at the time of the adoption of the Constitution, [the states] possessed full power over the subject of marriage and divorce . . . [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce."[48] The Court recognized that in limited instances, such as determining what is a valid marriage for the purposes of immigration rights and determining who receives life insurance benefits under a federal program, the federal government may make laws that impact marriage.[49] However, the Court noted that whereas Congress may make these limited laws to further discrete federal policy concerning federal programs, DOMA's impact was much more far reaching than any other marriage-impacting Congressional act upheld by the Court.[50]

Thus, upon a first reading of the Court's opinion, one may have been fooled into thinking that the Court was going to decide that the federal government, in enacting DOMA, had overstepped the constitutional division of power between federal and state governments.[51] This guess would have been bolstered by the fact that partway through its discussion on the extensive and traditional state power over marriage, the Court stated: "In order to assess the validity of [DOMA's] intervention it is necessary to discuss the extent of the state power and authority over marriage as a matter of history and tradition."[52] However, at the end of the Court's lengthy discussion on the traditional state power over marriage, the Court decided not to decide whether DOMA was unconstitutional as a violation of the balance of power

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46 *See* Ginsburg, *supra* note 15, at 1199 (noting that Supreme Court decisions that get too far ahead of public opinion risk a backlash against the judiciary).

47 *Windsor*, 133 S. Ct. at 2689–92.

48 *Id.* at 2691 (quoting Haddock v. Haddock, 201 U.S. 562, 575 (1906)) (internal quotation marks omitted).

49 *Id.* at 2690.

50 *Id.*

51 *See id.* (noting that DOMA has a very broad reach that affects a class of people that certain states enacted legislation to protect).

52 *Id.* at 2691.

between federal and state governments, declaring: "[I]t is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance."[53]

Instead, the Court concluded that DOMA, by "depart[ing] from th[e] history and tradition of reliance on state law to define marriage," sets off alarm bells because "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."[54] The Court quoted *Romer v. Evans*, an equal protection case, for this proposition.[55] Thus, as discussed further below, the Court's lengthy discussion of federalism and the states' powers over marriage served simply to bolster its legal conclusion that DOMA violated the equal protection guarantee of the Fifth Amendment.[56]

However, as mentioned above,[57] the lengthy discussion on federalism may have been included by the Court for three other purposes: (1) to persuade the majority of states that still prohibit same-sex marriage that they should use their historic power to change their laws and join New York in "eliminat[ing] inequality;"[58] (2) to obscure the fact that the Court's reasoning necessarily leads to the conclusion that state same-sex marriage prohibitions are also unconstitutional; and (3) to provide a basis for courts to distinguish *Windsor* when faced with future challenges to state same-sex marriage prohibitions.[59]

C. The Supreme Court's Findings on DOMA's Purpose and Effect

After its extensive discussion on the federal division of power over marriage, the Court turned its attention to the purpose and effect of

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53 *Id.* at 2692.

54 *Id.* (quoting Romer v. Evans, 517 U.S. 620, 633 (1996)) (internal quotation marks omitted).

55 *See Romer*, 517 U.S. at 623–24, 635 (finding unconstitutional as a violation of equal protection a Colorado constitutional amendment forbidding any local law from protecting against sexual orientation discrimination because the law was not rationally related to a legitimate governmental interest).

56 *See infra* Part III.E (discussing the Supreme Court's findings on equal protection in relation to DOMA).

57 *See supra* text accompanying notes 35–36 (providing ideas as to why the Court discussed federalism at such length in *Windsor*); *see also infra* Part IV (analyzing the likely impact of *Windsor* on future cases).

58 *Windsor*, 133 S. Ct. at 2694; *see supra* Part III.A. (discussing how the Court's positive and persuasive tone in *Windsor* was likely meant to encourage other states to extend marriage rights to same-sex couples).

59 *See infra* Part IV.B (noting ways in which courts might distinguish *Windsor* in future challenges).

DOMA.[60] Examining the history and the text of DOMA, the Court found that it was passed in order to "impose restrictions and disabilities,"[61] "to injure,"[62] to promote "traditional moral teachings,"[63] "to discourage enactment of state same-sex marriage laws,"[64] and to treat same-sex marriages recognized under state law "as second-class marriages for purposes of federal law."[65]

The Court found the effects of DOMA were both financial and emotional. Among other things, DOMA prevented same-sex married couples and their families from obtaining healthcare and other benefits they would otherwise receive, and forced them to undergo a complicated procedure for filing taxes.[66] In addition, "DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others."[67] DOMA "humiliates tens of thousands of children now being raised by same-sex couples" and makes it "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."[68]

D. The Supreme Court's Findings on Due Process

After discussing the purpose and effect of DOMA, the Court concluded that DOMA violated the liberty interest protected by the Due Process Clause of the Fifth Amendment because "the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage."[69] The Due Process Clause of the Fifth Amendment provides that: "No person shall . . . be deprived of life, liberty, or property, without due process of law."[70] The *Windsor* Court did not discuss the reasoning behind its due process conclusion. However, an examination of the Court's prior due process cases reveals that the *Windsor* Court likely reasoned that DOMA impermissibly infringed upon the right to marry. In prior cases, the right to marry has

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60 *Windsor*, 133 S. Ct. at 2693–95.
61 *Id.* at 2692.
62 *Id.*
63 *Id.* at 2693.
64 *Id.*
65 *Id.* at 2693–94.
66 *Id.* at 2694.
67 *Id.* at 2696.
68 *Id.* at 2694.
69 *Id.* at 2695.
70 U.S. CONST. amend. V.

been found to be a fundamental liberty interest protected by the Due Process Clause.[71]

Under the substantive liberty protection afforded by the Due Process Clause,[72] before the government is permitted to infringe upon a fundamental liberty interest, it must demonstrate a compelling reason to do so.[73] Fundamental liberty rights have been described as those rights that are "deeply rooted in this Nation's history and tradition," "so rooted in the traditions and conscience of our people as to be ranked as fundamental," and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed."[74]

However, the Supreme Court recently held that "[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."[75] In *Lawrence v. Texas*,[76] the Supreme Court found that a state could not criminalize private, consensual homosexual conduct, even though historically, non-procreative sexual activity was often criminalized.[77] The Court in *Lawrence* noted that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[78] The Court reasoned that, examining the "laws and traditions in the past half century," there is "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[79] The Court then concluded that private, consensual, homosexual conduct should likewise be protected by the liberty interest in the Due Process Clause.[80]

Thus, the very specific right in question, private homosexual conduct, need not have been protected since the nation's beginning in order to be protected as a fundamental liberty interest under the Due

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71 *See infra* text accompanying notes 82–83 (discussing marriage as a fundamental right and explaining what that right encompasses).

72 The Due Process Clause of the Fifth Amendment, applicable to the federal government, and the Due Process Clause of the Fourteenth Amendment, applicable to the states, shall be referred to interchangeably here as they both contain the same liberty and equal protection protections. *See infra* note 116 and accompanying text.

73 Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (citing Reno v. Flores, 507 U.S. 292, 302 (1993)).

74 *Id.* at 720–21 (citations omitted) (internal quotation marks omitted).

75 Lawrence v. Texas, 539 U.S. 558, 572 (2003) (quoting Cnty. of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)) (internal quotation marks omitted).

76 539 U.S. 558.

77 *Id.* at 568–69, 578.

78 *Id.* at 574 (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992)).

79 *Id.* at 571–72.

80 *Id.* at 578.

Process Clause, so long as a more general right, freedom to "decid[e] how to conduct [one's] private li[fe] in matters pertaining to sex,"[81] has been developing in the nation's laws and traditions.

The right to marry has been found by the Supreme Court to be a fundamental right protected by the liberty interest of the Due Process Clause.[82] This right includes the right to marry and to choose one's marriage partner.[83] Thus, though it did not explicitly say so, it is likely that the Supreme Court in *Windsor* reasoned that DOMA violated the liberty interest in the Due Process Clause because it infringed the fundamental right to marry by demeaning the valid choices of marriage partner made by same-sex couples. This is so despite the fact that, like in *Lawrence*, the very specific right in question—in *Lawrence*, the right to engage in homosexual acts,[84] and in *Windsor*, the right to have one's same-sex marriage recognized[85]—has not been protected since the nation's beginning. Instead, the more general rights, the right to privacy in sex and the right to marry a person of one's choosing, have been protected and are developing in the nation's laws and traditions.[86]

The Supreme Court found that the fundamental right to marry was implicated when it ruled that prison inmates have a right to marry,[87] that people behind in child support obligations have a right to marry,[88] and that interracial couples have a right to marry.[89] This was so despite the fact that the specific rights in question—to marry when in prison, to marry while behind in child support obligations, and to marry a person of a different race—have not been protected since the nation's beginning. Similarly, the Supreme Court in *Windsor* probably reasoned that when

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81 *Id.* at 572.

82 *See, e.g.*, Turner v. Safley, 482 U.S. 78, 95 (1987) (stating that the decision to marry is a fundamental right); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639–40, (1974) ("[F]reedom of personal choice in matters of marriage . . . is one of the liberties protected by the Due Process Clause . . . ."); Loving v. Virginia, 388 US 1, 12 (1967) (finding state prohibition on interracial marriage violated the Due Process Clause).

83 *Loving*, 388 U.S. at 12.

84 *See Lawrence*, 539 U.S. at 572 (recognizing protection for "adult persons in deciding how to conduct their private lives in matters pertaining to sex"); *supra* text accompanying notes 75–81 (discussing the Court's decision and rationale in *Lawrence*).

85 *See* United States v. Windsor, 133 S. Ct. 2675, 2682–83 (2013) (invalidating Section 3 of DOMA, "which excludes a same-sex partner from the definition of 'spouse' as that term is used in federal statutes").

86 *See supra* text accompanying notes 81–83 (discussing the general liberty rights the Court has recognized to choose one's sexual and marriage partners).

87 *See Turner*, 482 U.S. at 99 (holding that an almost complete ban on prisoners' right to marry was unconstitutional).

88 *See* Zablocki v. Redhail, 434 U.S. 374, 375, 390–91 (1978) (finding that the statute limiting those behind in child support from marrying was unconstitutional).

89 Loving v. Virginia, 388 U.S. 1, 12 (1967).

same-sex couples sought to have their marriages recognized by the federal government, the fundamental right to marry was implicated, even though the specific right in question—federal recognition of same-sex marriage—has not been protected since the nation's beginning.

Another possibility is that the Court simply found no rational basis for DOMA, and that in and of itself violated the liberty interest of the Fifth Amendment. At times, the Supreme Court has found that the liberty interest protected by the Due Process Clause protects a person from arbitrary government interference with a person's liberty, even when that liberty interest is not fundamental.[90] However, this doctrine has fallen out of favor with the Supreme Court in recent years, as it has been argued that it gives too much power to courts to invalidate legislation they do not agree with.[91] Thus, it is more likely that the Supreme Court in *Windsor* simply reasoned that DOMA impermissibly infringed upon Windsor's fundamental right to marry.

E. The Supreme Court's Findings on Equal Protection

Windsor alleged that "DOMA violate[d] the [constitutional] guarantee of equal protection, as applied to the Federal Government through the Fifth Amendment."[92] She argued that DOMA, because it

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[90] *See* Cnty. of Sacramento v. Lewis, 523 U.S. 833, 845–47 (1998) (expounding on the recognition that "[s]ince the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary [government] action"); Washington v. Glucksberg, 521 U.S. 702, 766 (1997) (Souter, J., concurring in judgment) (noting that the liberty in the Due Process Clause has sometimes been interpreted to "bar statutory impositions even at relatively trivial levels when governmental restraints are undeniably irrational as unsupported by any imaginable rationale"); Lisa K. Parshall, *Redefining Due Process Analysis: Justice Anthony M. Kennedy and the Concept of Emergent Rights*, 69 ALB. L. REV. 237, 237 (2005) (noting the traditional liberty due process test of classifying rights as fundamental or non-fundamental and applying a strict scrutiny or rational basis test accordingly).

[91] *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2706 (2013) (Scalia, J., dissenting) (noting that the substantive due process protection for non-fundamental liberty interests has fallen into "disrepute"); *Glucksberg*, 521 U.S. at 721–22 (explaining that requiring the presence of a "fundamental right" before determining whether the liberty element of due process has been violated "avoids the need for complex balancing of competing interests in every case").

[92] *Windsor*, 133 S. Ct. at 2683. The Supreme Court has held that the Due Process Clause of the Fifth Amendment, which applies to the federal government, includes the obligations of the Equal Protection Clause of the Fourteenth Amendment, which applies to the states. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."); Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954) (explaining that although the Fifth Amendment to the U.S. Constitution does not contain an Equal Protection Clause, the Fifth Amendment's Due Process Clause includes an equal protection component and holding that racial segregation in public schools violates the Fifth Amendment by denying due process of law).

discriminated on the basis of sexual orientation, should be subject to heightened review under the equal protection guarantee.[93]

Under current Supreme Court equal protection jurisprudence, there are three tiers of scrutiny that apply to laws allocating different rights among individuals.[94] The most deferential level of scrutiny is "rational basis" scrutiny, which a challenged law can pass so long as it is "rationally related to a legitimate governmental interest."[95]

The other two types of scrutiny, "intermediate scrutiny" and "strict scrutiny," are collectively known as "heightened scrutiny."[96] Heightened scrutiny applies to discrimination on the basis of characteristics that require special protection, such as sex, illegitimacy, race, national origin, and alienage.[97] To pass heightened scrutiny, a law must either be substantially related to an important government interest—intermediate scrutiny[98]—or narrowly tailored to meet a compelling state interest—strict scrutiny.[99] Although many courts have decided that laws that discriminate based on sexual orientation must pass heightened review,[100] the Supreme Court thus far has used rational basis scrutiny to analyze sexual orientation discrimination.[101]

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93 Windsor v. United States, 833 F. Supp. 2d 394, 397 (S.D.N.Y. 2012).

94 *See* Clark v. Jeter, 486 U.S. 456, 461 (1988) (explaining that the Court "appl[ies] different levels of scrutiny to different types of classifications," and that "[b]etween the[] extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy").

95 Lyng v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW, 485 U.S. 360, 370 & n.8 (1988) (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 533 (1973)) (internal quotation marks omitted); *see, e.g.*, Ry. Express Agency v. New York, 336 U.S. 106, 107–08, 110 (1949) (upholding a New York traffic regulation because it was "relat[ed] to the purpose for which it [was] made").

96 Glenn v. Brumby, 663 F.3d 1312, 1315 n.4 (11th Cir. 2011).

97 *See, e.g.*, United States v. Virginia, 518 U.S. 515, 532–33 (1996) (applying heightened scrutiny to classifications based on sex); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (holding that racial classifications are subject to strict scrutiny); Lalli v. Lalli, 439 U.S. 259, 264–65 (1978) (applying heightened scrutiny to a law that discriminated on the basis of illegitimacy); Craig v. Boren, 429 U.S. 190, 197 (1976) (applying heightened scrutiny to a classification based on sex); McLaughlin v. Florida, 379 U.S. 184, 191–92 (1964) (stating that classifications based on race are "subject to the 'most rigid scrutiny'" (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944))); Oyama v. California, 332 U.S. 633, 640, 646 (1948) (applying heightened scrutiny to ancestry discrimination).

98 *Virginia*, 518 U.S. at 533.

99 *Pena*, 515 U.S. at 227.

100 *See, e.g.*, Windsor v. United States, 699 F.3d 169, 181–82 (2d Cir. 2012) (concluding that "review of . . . DOMA requires heightened scrutiny" because, among other reasons, homosexuals as a group have historically endured discrimination and remain members of "a politically weakened minority"); Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 989–90 (N.D. Cal. 2012) (applying heightened scrutiny to justifications proffered for DOMA); *In re* Marriage Cases, 183 P.3d 384, 443 (Cal. 2008) (stating that classifications

In *Windsor*, the Supreme Court did not discuss Windsor's argument that sexual orientation discrimination should be subject to heightened review. Instead the Court used the language of the lowest level of review, rational basis review, to find that DOMA violated the Fifth Amendment's equal protection guarantee.[102] The Court found that DOMA is "invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."[103] Presumably because the Court found that DOMA could not pass rational basis review, it did not decide whether DOMA should be subject to heightened scrutiny.

IV. THE FUTURE OF STATE SAME-SEX MARRIAGE PROHIBITIONS

Justice Ginsburg has criticized the Supreme Court's decision in *Roe v. Wade*,[104] opining that the Court should have declared unconstitutional the extreme Texas law at issue in the case, without going further "on that day."[105] She reasoned that by issuing a narrow decision, the Court would have avoided "displac[ing] virtually every state law then in force"[106] and would have "reduce[d] rather than . . . fuel[ed] controversy,"[107] by encouraging other branches of government to act in line with the Court's decision.[108] If Justice Ginsburg is correct that *Roe* went too far, *Windsor* was careful not to make the same mistake.

Windsor invalidated Section 3 of DOMA, the statute at issue in the case, but went no further. It explicitly limited its holding "to those [in] lawful marriages."[109] Thus, the laws of the more than thirty states that still prohibit same-sex marriage remained unchanged in *Windsor's* immediate wake.[110] However, the *Windsor* decision, by extensively

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based on sexual orientation must pass heightened review); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 431–32, 476 (Conn. 2008) (holding that sexual orientation is a quasi-suspect classification subject to heightened scrutiny); Varnum v. Brien, 763 N.W.2d 862, 896 (Iowa 2009) ("[L]egislative classifications based on sexual orientation must be examined under a heightened level of scrutiny . . . .").

101 *E.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003); Romer v. Evans, 517 U.S. 620, 635 (1996).

102 *See* United States v. Windsor, 133 S. Ct. 2675, 2696 (2013) (invalidating DOMA as the government did not have a legitimate interest in enacting the statute).

103 *Id.*

104 410 U.S. 113 (1973).

105 Ginsburg, *supra* note 15, at 1199.

106 *Id.*

107 *Id.*

108 *Id.* at 1208.

109 United States v. Windsor, 133 S. Ct. 2675, 2696 (2013).

110 *Supra* text accompanying note 10.

discussing states' historic power over marriage,[111] by using laudatory language to describe New York's extension of marriage to same-sex couples,[112] and by condemning DOMA's purpose and effect as "demean[ing],"[113] encourages states that have not yet legalized same-sex marriage to do so soon, and gives a strong basis for invalidating state same-sex marriage bans to courts adjudicating such challenges.

A. Applying Windsor *to Future Same-Sex Marriage Cases*

A close reading of *Windsor* reveals that if a state does not heed the Supreme Court's gentle nudge and legalize same-sex marriage, it may well be forced to do so in a future case before the Court, at least if the Court still contains the five Justices that joined the majority opinion in *Windsor*.[114] Although in *Windsor*, the Supreme Court comprehensively discussed the states' historic and traditional power to regulate marriage, it was careful to note that such power is "subject to constitutional guarantees."[115] States are held to the same liberty due process and equal protection requirements as the federal government, although it is the Fourteenth Amendment that applies to states and the Fifth Amendment that applies to the federal government.[116]

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111 *See supra* Part III.B (exploring the Court's federalism discussion).

112 *See supra* Part III.A (explaining that the Court's use of positive language indirectly praises those states, such as New York, that permit same-sex marriage).

113 *Windsor*, 133 S. Ct. at 2694–95.

114 *Id.* at 2681 (indicating that the majority consisted of Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan); *see id.* at 2709 (Scalia, J., dissenting) ("In my opinion . . . the view that *this* Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today's opinion."). Four Justices in *Windsor* would have found DOMA constitutional. Chief Justice Roberts authored a dissenting opinion. *Id.* at 2696 (Roberts, C.J., dissenting). Justice Scalia, joined by Justice Thomas and joined in part by Chief Justice Roberts, also authored a dissenting opinion. *Id.* at 2697 (Scalia, J., dissenting). Further, Justice Alito, joined in part by Justice Thomas, composed a separate dissenting opinion. *Id.* at 2711 (Alito, J., dissenting) .

115 *Id.* at 2692 (majority opinion).

116 *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." (citing Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975))); Hibben v. Smith, 191 U.S. 310, 325–26 (1903) (noting that the purpose of the Fourteenth Amendment is, among other things, to afford citizens the same protection for their liberty as they receive under the Fifth Amendment); Tonawanda v. Lyon, 181 U.S. 389, 391–92 (1901) ("The purpose of [the Fourteenth] Amendment is to extend to the citizens and residents of the states the same protection against arbitrary state legislation affecting life, liberty, and property, as is afforded by the 5th Amendment against similar legislation by Congress."); Inmates of Orient Corr. Inst. v. Ohio State Adult Parole Auth., 929 F.2d 233, 235 (6th Cir. 1991) ("The Due Process Clause of the Fourteenth Amendment . . . imposes the same restraints on the states that the corresponding clause of the Fifth Amendment imposes on the national government . . . .").

Most of the criticisms the Court levied against DOMA would apply equally, or very similarly, to state same-sex marriage prohibitions.[117] If DOMA's principal purpose and effect is to demean same-sex couples in lawful marriages,[118] it is hard to imagine a state same-sex marriage prohibition whose principal purpose and effect is not to demean same-sex couples desiring to enter lawful marriages. In *Windsor*, the Supreme Court found that the purpose and effect of DOMA was to treat same-sex marriages as "second-class marriages for purposes of federal law;"[119] to "write[] inequality into the entire United States Code;"[120] and to "identify a subset of state-sanctioned marriages and make them unequal."[121] It is hard to see how the Court would not also find that the purpose and effect of a state same-sex marriage prohibition is to treat same-sex relationships as "second-class," to "write inequality" into state law, and to "identify a subset" of committed-couple relationships and "make them unequal."[122]

Just as the *Windsor* Court found that DOMA "humiliates tens of thousands of children now being raised by same-sex couples" and makes it "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,"[123] a state same-sex marriage prohibition does the same. Just as DOMA "prevents same-sex married couples from obtaining government healthcare benefits they would otherwise receive"[124] and many other benefits,[125] so too does a state same-sex marriage prohibition prevent same-sex couples from obtaining myriad benefits they would receive if they were permitted to marry under state law.[126]

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117 *See Windsor*, 133 S. Ct. at 2709 (Scalia, J., dissenting) (noting "[h]ow easy it is, indeed how inevitable, to reach the same conclusion [on DOMA's purpose and effect] with regard to state laws denying same-sex couples marital status"); *see also* Michael J. Klarman, Windsor *and* Brown*: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 158 (2013) (recognizing that "it is hard to argue with [Scalia's] claim that very little change to the *Windsor* opinion would be required to extend it to forbid state bans on same-sex marriage").

118 *Windsor*, 133 S. Ct at 2695.

119 *Id.* at 2693–94.

120 *Id.* at 2694.

121 *Id.*

122 *See supra* notes 119–21 (providing citations to the relevant portions of the *Windsor* opinion).

123 *Windsor*, 133 S. Ct. at 2694.

124 *Id.*

125 *Id.* at 2694–95.

126 In addition to state benefits that same-sex couples may not be able to access without access to marriage, after *Windsor*, there are the hundreds of federal benefits only available to married same-sex couples. *See* Garden State Equal. v. Dow, 79 A.3d 1036, 1039 (N.J.

B. Possible Bases to Distinguish Windsor *in Future Same-Sex Marriage Cases*

The Court's federalism discussion concluded that DOMA, by intruding on state power, was "'[d]iscrimination[] of an unusual character'" that made an equal protection violation more likely.[127] This is one line of reasoning that lower courts faced with a challenge to a state same-sex marriage prohibition could use to distinguish *Windsor*. Whereas in *Windsor*, the federal government intruded on traditional state power to define marriage, a state is exercising its traditional state power to define marriage when it prohibits same-sex marriage.

However, the Court's federalism discussion had no obvious bearing on its conclusion that DOMA violated the liberty interest protected by the Due Process Clause because it "demean[ed] those persons who are in a lawful same-sex marriage."[128] Thus, even if a future court finds that *Windsor's* reasoning does not apply to an equal protection challenge to a state same-sex marriage prohibition, it will be harder for that court to distinguish *Windsor's* reasoning to a due process challenge to the same prohibition.

Nonetheless, it is likely that at least some state and federal courts will distinguish *Windsor* when deciding whether a state same-sex marriage prohibition is constitutional, as encouraged to do so by one dissenting Justice in *Windsor*.[129] Courts could distinguish *Windsor* by

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2013) (noting that "civil-union partners in New Jersey today do not receive the same benefits as married same-sex couples when it comes to family and medical leave, Medicare, tax and immigration matters, military and veterans' affairs, and other areas").

[127] *Windsor*, 133 S. Ct. at 2692 (quoting Romer v. Evans, 517 U.S. 620, 633 (1996)). See *supra* Part III.E for a discussion of the Court's findings on equal protection.

[128] *Windsor*, 133 S. Ct. at 2695. See *supra* Part III.D for a discussion of the Court's findings on due process.

[129] *See Windsor*, 133 S. Ct. at 2709 (Scalia, J., dissenting) (encouraging "[s]tate and lower federal courts [to] . . . distinguish away" when adjudicating challenges to state same-sex marriage prohibitions); *see also id*. at 2696 (Roberts, C.J., dissenting) (noting that the majority opinion "does not decide, the distinct question whether the States . . . may continue to utilize the traditional definition of marriage"); *id*. at 2720 (Alito, J., dissenting) ("[T]he question of same-sex marriage should be resolved primarily at the state level . . . ."). Note, however, that even if a court does distinguish *Windsor* in a future same-sex marriage case, it could still find that a state same-sex marriage prohibition is unconstitutional. *Cf.* Catherine Jean Archibald, *De-Clothing Sex-Based Classifications – Same-Sex Marriage Is Just the Beginning: Achieving Formal Sex Equality in the Modern Era*, 36 N. KY. L. REV. 1, 5–13 (2009) (arguing that same-sex marriage prohibitions are a type of sex discrimination that should be judged with strict scrutiny). *See generally* Catherine Jean Archibald, *Two Wrongs Don't Make a Right: Implications of the Sex Discrimination Present in Same-Sex Marriage Exclusions for the Next Supreme Court Same-Sex Marriage Case*, 34 N. ILL. U. L. REV. 1 (2013) (explaining how same-sex marriage prohibitions are unconstitutional because they constitute sex discrimination and cannot pass the heightened review applicable to such discrimination).

noting: its extensive discussion on how states traditionally have the power to decide who can marry supports rather than detracts from a state's decision to prohibit same-sex marriage; the *Windsor* Court specifically limited its holding to same-sex couples married under state law;[130] and the history and text of DOMA is necessarily different from a state's same-sex marriage prohibition because it is a different law.[131]

However, many more courts facing future challenges to state same-sex marriage prohibitions are likely to find that because *Windsor* held that DOMA's purpose and effect violates the equal protection and due process guarantees of the U.S. Constitution, so too do state-law same-sex marriage prohibitions, as a growing number of lower courts have already found.[132] The Supreme Court did not go so far as to say so in *Windsor*, probably in the hope of reducing rather than fueling controversy,[133] and in the hope of encouraging more states to legalize same-sex marriage on their own initiative.

V. CONCLUSION

The Supreme Court's decision in *Windsor* is a seminal decision that gave hundreds of new rights to same-sex married couples. However, the *Windsor* opinion limits its holding to "those in lawful marriages" and so has no immediate effect on the laws of the more than thirty states where same-sex marriage is still prohibited. Nonetheless, this Article has shown that the opinion in *Windsor* paves the way for more same-sex couples to be able to marry in the future by: encouraging more states to voluntarily extend marriage rights to same-sex couples; and making it more likely that courts in future cases will decide that state same-sex marriage prohibitions are unconstitutional.

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130 *Windsor*, 133 S. Ct. at 2696.

131 *See id.* at 2697 (Roberts, C.J., dissenting) (noting that the "statute-specific considerations" discussed in the majority opinion "will . . . be irrelevant in future cases about different statutes").

132 *See supra* Part IV.A (discussing *Windsor*'s application in future same-sex marriage cases). A growing number of courts have already used *Windsor's* reasoning to find invalid state same-sex marriage prohibitions and other state laws. *See* cases cited *supra* note 11 (providing recent cases in which courts have relied on *Windsor* to find same-sex marriage prohibitions invalid in their respective jurisdictions).

133 *See* Ginsburg, *supra* note 15, at 1199 (explaining that to "reduce rather than to fuel controversy," the Court should refrain from doing more than necessary to decide the constitutionality of a case).