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Marriage, the Constitution, and the Future of Family Law

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Marriage, the Constitution, and the Future of Family Law

Mark Strasser*

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I. Introduction

Suppose that the United States Supreme Court were to hold that same-sex marriage is protected by the Federal Constitution. What implications might such a ruling have for marriage or family law more generally? Answering such a question is difficult, at least in part, because an important component of such an analysis would focus on the specific reasoning of the Court, and there are clear dangers in making predictions about possible changes in family law based on an opinion that has not yet been written.

Discussing the implications of the Court's imagined ruling is daunting for yet another reason. The Court's recent opinions analyzing the constitutionality of laws targeting on the basis of sexual orientation do not provide clear guidance with respect to the reach of the protections actually recognized, which makes discussing the likely reach of an imagined opinion even more dangerous. Nonetheless, this article will not only assume that the Court will find same-sex marriage protected by the Federal

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Constitution, but will also make some assumptions about what the opinion will (and will not) say and do.

Part II of this article focuses on two of the Court's recent decisions involving laws targeting on the basis of orientation, and then makes some predictions regarding how the Court might craft a decision holding that state same-sex marriage bans violate constitutional guarantees. This part then discusses how some states might try to treat same-sex marital couples differently from other couples with respect to the rights and benefits to which they are entitled under state law, and whether such attempts would likely pass constitutional muster. Part III focuses on a different way that states might react to the Court's finding that the Federal Constitution protects the right to marry a same-sex partner—they might emphasize (or perhaps deemphasize) marital status when determining individuals' rights and responsibilities, e.g., by modifying their approaches to the rights and obligations of cohabitating couples. The article concludes that a holding that the right to marry a same-sex partner is constitutionally protected is unlikely to cause significant changes in family law, although states reacting to such a decision are more likely to diverge than converge with respect to the degree to which they distinguish between marital and non-marital couples.

II. Family, Orientation, and the Constitution

Two recent Supreme Court cases—*Lawrence v. Texas*¹ and *Windsor v. United States*²—are helpful to examine when seeking to determine what a decision striking down same-sex marriage bans might look like. While the Court in both cases struck down laws disadvantaging same-sex couples, the analyses offered neither specified the level of scrutiny employed nor whether the rights at issue were fundamental rather than mere liberty interests. That failure to specify has led to some confusion about the reach of the protections recognized by the Court, a result that is likely to be repeated if the Court remains silent about the level of scrutiny employed or the nature of the liberty interest protected in the envisioned decision regarding same-sex marriage.

1. 539 U.S. 558 (2003).

2. 133 S. Ct. 2675 (2013).

A. Lawrence

Lawrence involved a challenge to “a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.”³ The Court made clear that the “petitioners were adults . . . [and that] [t]heir conduct was in private and consensual.”⁴ The question presented was whether “the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.”⁵

In analyzing whether substantive due process protects the right of adults of the same sex to engage in intimate relations, the *Lawrence* Court discussed⁶ a number of cases including *Griswold v. Connecticut*,⁷ *Eisenstadt v. Baird*,⁸ *Roe v. Wade*,⁹ *Carey v. Populations Services International*,¹⁰ *Bowers v. Hardwick*,¹¹ and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.¹² The Court’s inclusion of these cases in the context of assessing whether Texas’s same-sex sodomy ban passed constitutional muster sent mixed messages. On the one hand, by discussing cases involving interests such as contraception and abortion that are protected by the right to privacy,¹³ the Court implied that adult, consensual intimacy was also protected by the right to privacy. Indeed, after discussing these cases involving contraception and abortion rights, the Court explained that *Bowers*, in which the Court had upheld a Georgia law criminalizing sodomy,¹⁴ “was not correct when it was decided, and it is not correct today,”¹⁵ which presumably means that the privacy jurisprudence existing

3. *Lawrence*, 539 U.S. at 562.

4. *Id.* at 564.

5. *Id.*

6. *Id.* at 564–78.

7. 381 U.S. 479 (1965).

8. 405 U.S. 438 (1972).

9. 410 U.S. 113 (1973).

10. 431 U.S. 678 (1977).

11. 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

12. 505 U.S. 833 (1992).

13. *See* *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (noting that the Due Process Clause protects the rights to marry, to have children, and to contraception and abortion).

14. *See* *Bowers*, 478 U.S. at 196 (“We do not agree . . . that the sodomy laws of some twenty-five States should be invalidated.”).

15. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

at the time *Bowers* was decided required a different result.¹⁶ Yet, even after overruling *Bowers*,¹⁷ the Court neither stated that adult consensual intimacy was a fundamental interest nor that strict scrutiny was being employed to strike down the Texas statute.¹⁸ But if adult consensual intimacy is a mere liberty interest, then a state can prohibit such intimacy as long as the state's doing so is rationally related to a legitimate state interest.¹⁹ Whether or not Texas had a legitimate interest in prohibiting same-sex intimacy,²⁰ the rational basis test hardly sets a high bar to overcome insofar as states wish to impose other burdens on members of the LGBT community.²¹

Lawrence sent a mixed message in yet another respect. On the one hand, the *Lawrence* Court chided the *Bowers* Court for having misapprehended the nature of the injury imposed by a statute criminalizing same-sex sodomy. "To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."²² The Court explained that sodomy prohibitions "seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."²³ Here, while refusing to comment about whether same-sex relationships must be formally recognized, the Court implies that such relationships have worth.²⁴

16. The Court also suggested that cases decided subsequent to *Bowers* further undermined that holding. *See id.* at 573 ("Two principal cases decided after *Bowers* cast its holding into even more doubt.").

17. *See id.* at 578 ("Bowers v. Hardwick should be and now is overruled.").

18. *See id.* at 586 (Scalia, J., dissenting) ("[N]owhere does the Court's opinion declare that homosexual sodomy is a 'fundamental right' under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy were a 'fundamental right.'").

19. *See* *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) ("[O]ur decisions lead us to conclude that the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause. The Constitution also requires, however, that Washington's assisted-suicide ban be rationally related to legitimate government interests.") (citing *Heller v. Doe*, 509 U.S. 312, 319–20 (1993)).

20. Justice Scalia believed that the Texas law was rationally related to a legitimate state interest. *See Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting).

21. *Cf.* *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 816–17 (11th Cir. 2004) (suggesting that the burden imposed by *Lawrence* is rather easy to overcome).

22. *Lawrence*, 539 U.S. at 567.

23. *Id.*

24. *See* Mark Strasser, *Lawrence, Mill, and Same-Sex Relationships: On Values, Valuing, and the Constitution*, 15 S. CAL. INTERDISC. L.J. 285, 293 (2006) ("By suggesting

So, too, when explaining why sodomy laws were unconstitutional, the Court explained that “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.”²⁵ But the fact that sexual conduct may be part of relationship that is more enduring would hardly be a reason militating in favor of striking down the prohibition unless the more enduring relationship were itself of worth.²⁶ That said, however, the Court not only expressly declined to address whether same-sex marriage was constitutionally protected,²⁷ but the Court also failed to include the right-to-marry cases when discussing the right to privacy.²⁸ It was simply unclear whether the Court was directing attention away from same-sex marriage because it had not yet decided whether same-sex marriage was protected by the Federal Constitution or whether, instead, it had already decided but simply did not wish to bring attention to its having already done so.²⁹

The *Lawrence* Court also mentioned *Romer v. Evans*,³⁰ in which “the Court struck down class-based legislation directed at homosexuals as a violation of the Equal Protection Clause.”³¹ While suggesting that a challenge to the Texas statute on equal protection grounds was “tenable,”³² the *Lawrence* Court feared that its striking down the law on that basis would lead some to believe that “a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.”³³ The Court reasoned that “[e]quality of

that this enduring personal bond provides one of the reasons that the same-sex relations are protected, the Court is attributing positive constitutional weight to same-sex relationships.”).

25. *Lawrence*, 539 U.S. at 567.

26. See J. Richard Broughton, *The Criminalization of Consensual Adult Sex after Lawrence*, 28 NOTRE DAME J.L. ETHICS & PUB. POL’Y 125, 158 (2014) (discussing “the language in *Lawrence* . . . that the right is (or might be) predicated upon the existence of an intimate relationship or upon conduct designed to promote emotional intimacy between people”).

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

28. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Turner v. Safley*, 482 U.S. 78 (1987).

29. Cf. *Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting) (“This case ‘does not involve’ the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court.”).

30. 517 U.S. 620 (1996).

31. *Lawrence*, 539 U.S. at 558, 574.

32. *Id.*

33. *Id.* at 575.

treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.”³⁴ Thus, by striking down the Texas prohibition on due process grounds, the Court was both affirming the value of same-sex relationships and the dignity of members of the class, whose relationships could not be demeaned.³⁵

Traditionally, relationships have been accorded more constitutional weight than sexual relations, so a finding that same-sex adult consensual relations are protected suggests that same-sex relationships may also be protected.³⁶ That conclusion was given further support by *Windsor v. United States*,³⁷ in which the Court addressed whether the federal government could define marriage as a union of one man and one woman for federal purposes.³⁸

B. Windsor

In *Windsor*, the Supreme Court held that section 3 of the Defense of Marriage Act was unconstitutional.³⁹ When holding that the section violated Fifth Amendment guarantees,⁴⁰ the Court did not make clear whether the

34. *Id.*

35. *Cf.* *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (DOMA “tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects.”) (citing 539 U.S. 558 (2003)).

36. *See* Mark Strasser, *State Marriage Amendments and Overreaching: On Plain Meaning, Good Public Policy, and Constitutional Limitations*, 25 *LAW & INEQ.* 59, 110 (2007) (“By analogizing same-sex relationships to marital relationships and holding that adult, consensual, same-sex relations are constitutionally protected . . . the Lawrence Court implies that same-sex relationships have constitutional protection.”).

37. 133 S. Ct. 2675 (2013).

38. *See* 1 U.S.C. § 7 (1996), *invalidated by* *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013) (“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.”).

39. *Windsor*, 133 S. Ct. at 2695 (“DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.”).

40. *See id.* (“And though 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.”).

law offended substantive due process, equal protection, or both kinds of guarantees. Clarification of the basis upon which *Windsor* was decided might have important implications for any opinion striking down state same-sex marriage bans.⁴¹

The Fifth Amendment to the United States Constitution does not contain an equal protection clause⁴² but, instead, incorporates those guarantees within the due process component of that amendment.⁴³ But that means that DOMA's incompatibility with due process guarantees does not establish whether the statute failed to pass muster as a matter of substantive due process or as a matter of the unstated but incorporated equal protection guarantees.⁴⁴

Sometimes, the *Windsor* Court seemed to be discussing due process and sometimes equal protection. Thus, part of the opinion focused on the nature of the implicated liberty interest at issue.⁴⁵ But the Court also noted that the federal provision's "principal effect [wa]s to identify a subset of state-sanctioned marriages and make them unequal."⁴⁶ By suggesting that "the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage,"⁴⁷ the Court suggested that equal protection guarantees had been violated.

The envisioned opinion striking down state same-sex marriage bans might focus on some of the language in *Windsor* discussing the nature of the interest at issue and emphasize the *Windsor* point that "marriage is more

41. Indeed, were Chief Justice Roberts's interpretation of *Windsor* correct, that opinion would seem to provide little if any basis upon which courts could strike down state same-sex marriage. *See id.* at 2696 (Roberts, C.J., dissenting) ("The Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States, in the exercise of their 'historic and essential authority to define the marital relation,' may continue to utilize the traditional definition of marriage.") (internal citations omitted).

42. U.S. CONST., amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law.").

43. *See Windsor*, 133 S. Ct. at 2695 (2013) ("The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws.") (citing *Bolling v. Sharpe*, 347 U.S., 497, 499–500 (1954); *Adarand Constr., Inc. v. Peña*, 515 U.S. 200, 217–18 (1995)).

44. *Cf. Windsor*, 133 S. Ct. at 2707 (Scalia, J., dissenting) ("The sum of all the Court's nonspecific hand-waving is that this law is invalid (maybe on equal-protection grounds, maybe on substantive-due-process grounds, and perhaps with some amorphous federalism component playing a role).").

45. *See id.* at 2695 ("DOMA divests married same-sex couples of the duties and responsibilities that are an essential part of married life and that they in most cases would be honored to accept were DOMA not in force.").

46. *Id.* at 2694.

47. *Id.* at 2695.

than a routine classification for purposes of certain statutory benefits,”⁴⁸ thereby emphasizing the unique nature of the interest at issue. Perhaps the Court will simply state that “the decision to marry is a fundamental right”⁴⁹ and then will explain that same-sex couples cannot be precluded from exercising that right.⁵⁰ If the Court were to adopt that approach, there might be a number of implications, depending upon what the right to marry includes.

Suppose, for example, that a state were to recognize same-sex marriage but were to accord fewer benefits and obligations to marriages involving same-sex couples than it did to marriages involving different-sex couples. Just as some states tried to accord a special status to different-sex marriage by creating a separate civil union status for same-sex couples that involved the same rights and obligations of marriage but was nonetheless called something else,⁵¹ states might try to accord a special status to different-sex marriage by recognizing same-sex marriage but according fewer rights and obligations to that status.

The *Windsor* Court discussed the “States’ interest in defining and regulating the marital relation, subject to constitutional guarantees.”⁵² Here, the court seemed to recognize that “the incidents, benefits, and obligations of marriage . . . may vary, subject to constitutional guarantees, from one State to the next.”⁵³ A state might claim that as long as it recognizes the right of same-sex couples to marry, it has no constitutional obligation to treat those marriages in exactly the same way as it treats other marriages. After all, it might be argued, some states have two kinds of marriages—marriages and “covenant marriages”⁵⁴—so states deciding to create more than one kind of marriage should not pose any constitutional difficulties.

48. *Id.* at 2692.

49. *Turner v. Safley*, 482 U.S. 78, 95 (1987).

50. *Cf. Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 992–993 (N.D. Cal. 2010) (stating that when same-sex “plaintiffs seek to exercise the fundamental right to marry under the Due Process Clause” they are exercising a fundamental right that has always existed).

51. *See, e.g.*, 15 VT. STAT. ANN. § 1204 (a) (2010) (“Parties to a civil union shall have all the same benefits, protections, and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law, or any other source of civil law, as are granted to spouses in a civil marriage.”).

52. *Windsor*, 133 S. Ct. at 2692.

53. *Id.*

54. *See* Allison Gerli, Comment, *Living Happily Ever After in a Land of Separate Church and State: Treatment of Islamic Marital Contracts*, 26 J. AM. ACAD. MATRIM. LAW. 113, 114 (2013) (“In the late 1990s and early 2000s, Louisiana, Arkansas, and Arizona enacted covenant marriage statutes encouraging long-term marriage as countermeasures to the enactment of no-fault divorce statutes.”).

When discussing “the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State,”⁵⁵ the *Windsor* Court likely did not have in mind the difference between covenant marriages and other marriages and presumably would have no objection to states creating more than one kind of marriage as long as all those eligible to marry were permitted to choose which kind of marriage they wished to celebrate. However, just as section 3 of DOMA was unconstitutional because it “identif[ie]d a subset of state-sanctioned marriages and ma[d]e them unequal,”⁵⁶ a state attempting to create a separate subset of marriages (with fewer rights and responsibilities) solely comprised of same-sex couples would also likely be found constitutionally deficient. Thus, the *Windsor* Court implies that were a state to distinguish among the benefits afforded to married couples by refusing to afford to same-sex couples the same options that different-sex couples had, the Court would examine that differentiation “with skepticism, if not a jaundiced eye.”⁵⁷

What of civil unions? Both because the *Windsor* Court expressly refused to characterize marriage simply as “a routine classification for purposes of certain statutory benefits”⁵⁸ and because the *Windsor* Court confined its “opinion and its holding . . . to . . . lawful marriages,”⁵⁹ it seems likely that the Court would not find that the relevant constitutional guarantees had been met were a state to afford same-sex couples the option of entering into civil unions but not of celebrating marriages. Such a compromise would “undermine[] both the public and private significance of state-sanctioned same-sex . . . [unions].”⁶⁰ But the state does not do constitutional harm when it affords the option of entering into a civil union to all couples eligible to marry. Thus, *Windsor* should not be understood to preclude the states from recognizing civil union status but merely to preclude the states from reserving civil union status for same-sex couples and marriage for different-sex couples.

While *Windsor* suggests that marriage is a special status that dignifies relationships and thus involves an important liberty interest,⁶¹ the opinion

55. *Windsor*, 133 S. Ct. at 2692.

56. *Id.* at 2694.

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

58. *Windsor*, 133 S. Ct. at 2692 .

59. *Id.* at 2696.

60. *Id.* at 2694.

61. *Id.*

also had a strong equal protection component. For example, the Court explained that “the principal purpose and the necessary effect of this law [section 3 of DOMA] are to demean those persons who are in a lawful same-sex marriage,”⁶² and expressly noted that the “liberty protected by the Fifth Amendment’s Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws.”⁶³ The Court’s suggestion that the DOMA section offended equal protection guarantees was important, at least in part, because equal protection guarantees also constrain the states. Indeed, the Court’s suggestion that “the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved”⁶⁴ was important for a few reasons. First, lest there be any doubt, it suggests that equal protection was one of the bases upon which the federal statute was struck down, even if not the only basis. Second, it seems to be offering a warning to the states. Because the Fourteenth Amendment equal protection guarantees apply to the states,⁶⁵ the Court seems to be providing notice that state marriage amendments are also constitutionally vulnerable.⁶⁶ It would be unsurprising for any opinion striking down state same-sex marriage bans to quote *Windsor’s* comment about the Fourteenth Amendment’s equal protection guarantees.

One confusing element of *Windsor* is that it never articulates the standard of review being used to strike down the statute at issue.⁶⁷ Perhaps the Court is subjecting the statute to intermediate scrutiny, although it might instead be using a less deferential form of rational basis review.⁶⁸

62. *Id.* at 2695.

63. *Windsor*, 133 S. Ct. at 2695 (citing *Bolling v. Sharpe*, 347 U.S., 497, 499–500 (1954); *Adarand Constr. Inc. v. Peña*, 515 U.S. 200, 217–18 (1995)).

64. *Windsor*, 133 S. Ct. at 2692.

65. U.S. CONST., amend. XIV, § 1 (“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.”).

66. *Cf. Windsor*, 133 S. Ct. at 2705 (Scalia, J., dissenting) (“My guess is that the majority . . . 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).”).

67. *Id.* at 2706 (Scalia, J., dissenting) (“The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality.”).

68. *See id.* (Scalia, J., dissenting) (“But the Court certainly does not *apply* anything that resembles that deferential framework.”) (citing *Heller v. Doe*, 509 U.S. 312, 320 (1993)). However, the Court may be applying rational basis with bite scrutiny. *See*

Regardless of the level of scrutiny that *Windsor* is inferred to be employing, *Lawrence* and *Windsor* raise the distinct possibility that the Court when striking down state same-sex marriage bans will neither state what standard of review is being employed nor even whether the guarantees violated are due process, equal protection, or both.

The difficulty posed by the Court's failure to articulate the level of review is *not* that the determination of the constitutionality of the state marriage bans depends upon whether, for example, heightened scrutiny or a less deferential rational basis is used, because it is assumed for purposes of this article that such bans will be struck down.⁶⁹ But there are other family issues associated with marital status, and whether states will be permitted to make certain legal distinctions may well depend upon the analysis used to strike down state same-sex marriage bans.

C. Targeting Orientation

The Court could strike down state same-sex marriage bans as a violation of due process or equal protection guarantees. Further, whether basing the decision on due process or equal protection, the Court might strike down such laws using some sort of rational basis review or, instead, some higher level of scrutiny. The difficulty that both legislators and courts will likely face is that the Court's (probable) refusal to spell out the level of scrutiny employed and the Court's (probable) discussion of both equal protection and due process issues will almost guarantee great confusion with respect to the breadth or depth of the protections thereby accorded.

Suppose that the Court were to hold that the fundamental right to marry⁷⁰ includes the right to marry a same-sex partner.⁷¹ That would be

Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in the judgment) ("[S]ome objectives, such as 'a bare . . . desire to harm a politically unpopular group,' are not legitimate state interests. When a law exhibits such a desire . . . , we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.") (internal citations omitted).

69. If indeed the *Windsor* Court is employing heightened rational basis review to strike down section 3 of DOMA, then it may well be that the same level of rational basis review would result in the Court's striking down state same-sex marriage bans. The Court suggests that the Fourteenth Amendment equal protection guarantees are at least as robust as those contained in the Fifth Amendment. See *U.S. v. Windsor*, 133 S. Ct. 2675, 2695 (2013).

70. See *Turner v. Safley*, 482 U.S. 78, 83 (1987) (discussing "the fundamental right to marry").

71. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 994 (N.D. Cal. 2010)

important because state same-sex marriage bans would be subjected to strict scrutiny.⁷² But it would be important for purposes here for a very different reason, namely, that statutes targeting other interests that did not trigger strict scrutiny might not be so readily invalidated.

Consider adoption rights. Neither the right to adopt nor the right to be adopted has been viewed as a fundamental interest triggering strict scrutiny.⁷³ That a statute targeting a fundamental right had been struck down would not suggest that a statute targeting a mere liberty interest would also be constitutionally infirm. That said, a statute's constitutionality will not be upheld if there is no legitimate basis for the statute.⁷⁴ If the Court were to find, for example, that a statute limiting or burdening the adoption rights of same-sex married couples was designed "to identify a subset of state-sanctioned marriages and make them unequal,"⁷⁵ the Court might well strike down such a statute because in effect it created "a second-tier marriage."⁷⁶ For this very reason, a state distinguishing among marital couples by restricting stepparent adoptions to different-sex spouses of individuals with children would presumably trigger *Windsor's* preclusion of differentiating among marital couples within a state.

III. Non-Marital Rights

The analysis of the envisioned decision would presumably protect the rights of same-sex married couples, but a separate issue would involve the degree to which such a decision would impact the rights of non-marital cohabitants. States might react in very different ways were the Court to hold that the Federal Constitution protects the right to marry a same-sex partner. Some states would likely (continue to) expand the rights of non-

(suggesting that the fundamental right to marry includes the right to marry a same-sex partner).

72. *Id.* ("Because plaintiffs seek to exercise their fundamental right to marry, their claim is subject to strict scrutiny.") (citing *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978)).

73. *See* *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 812 (11th Cir. 2004) ("[T]here is no fundamental right to adopt or to be adopted").

74. *See* *Florida Dep't. of Children & Families v. Adoption of X.X.G.*, 45 So. 3d 79, 91 (Fla. Dist. Ct. App. 2010) ("[H]omosexual persons are allowed to serve as foster parents or guardians but are barred from being considered for adoptive parents ... even where, as here, the [would-be] adoptive parent is a fit parent and the adoption is in the best interest of the children ... [T] here is no rational basis for the statute.").

75. *U.S. v. Windsor*, 133 S. Ct. 2675, 2694 (2013).

76. *Id.*

marital couples, while others might not only refuse to expand those rights but might instead contract them.

A. Cohabitant Rights

Some states impose rights and obligations on members of cohabiting couples, whereas other states reserve marriage-like benefits for marital couples. A variety of state interests are implicated in such decisions. On the one hand, states may believe that restricting such benefits will increase the number of individuals who marry or remain married.⁷⁷ On the other, states may recognize that growing numbers of individuals are cohabiting,⁷⁸ and may believe as a matter of public policy that the longevity and stability of such relationships should also be promoted by awarding such couples benefits.⁷⁹

Some states already protect cohabiting relationships and provide for a “marital-like property distribution following a cohabitative relationship.”⁸⁰ While an important factor in such distributions involves the parties’ intent,⁸¹ it is not necessary for the parties to have specified with particularity their intentions in writing. “[W]hen the parties have demonstrated through their actions that they intend to share their property in a marriage-like relationship, a court does not need to find specific intent by each cohabitant as to each piece of property.”⁸²

Other states permit cohabiting individuals to “lawfully contract concerning property, financial, and other matters relevant to their

77. See, e.g., *State v. Schmidt*, 323 P.3d 647, 664 (Alaska 2014) (“[W]e can assume that providing benefits to spouses promotes marriage among adults who can marry.”).

78. See, e.g., Courtney Thomas-Dusing, Note, *The Marriage Alternative: Civil Unions, Domestic Partnerships, or Designated Beneficiary Agreements*, 17 J. Gender Race & Just. 163, 163–64 (2014) (noting that “cohabitation [is] increasing in popularity”); see also Diana Adams, *Equality for Unmarried America: Expanding Legal Choice for America's Diverse Families*, 4 CHARLOTTE L. REV. 231, 232–233 (2013) (“Living with a partner without marriage has also become common in both different-sex and same-sex couples.”).

79. See Adams, *supra* note 78, at 248 (“All Americans would benefit from having a ... domestic partnership plan that could allow two people to share a household, share health insurance, and acknowledge their status as family without welcoming the government into their division of finances and the question of whether they are in a romantic relationship.”).

80. *Boulds v. Nielsen*, 323 P.3d 58, 62–63 (Alaska 2014).

81. *Id.* at 63 (stating that “[t]he first step in dividing an unmarried couple's property is to examine the couple's intent”).

82. *Id.* at 64.

relationship.”⁸³ Such agreements are enforceable as long as they do not violate public policy, as they would if “sexual services [were to] constitute the only, or dominant, consideration for the agreement.”⁸⁴ Some states impose additional limitations on cohabitation contracts, for example, New Jersey requires not only that such agreements be in writing but that the parties have had advice of counsel.⁸⁵

Will states be more willing to enforce cohabitation agreements or, perhaps, impose marriage-like rights and obligations on cohabiting couples? Perhaps. Legislatures may decide to impose such obligations if sufficient need is established, especially if state courts have announced that they will not impose such obligations but will instead defer to the legislature.⁸⁶ However, other legislatures may decide that awarding benefits to non-marital couples might undermine the special nature of marriage or, at any rate, might induce fewer couples to either marry or remain married.⁸⁷

A different but related issue involves whether the state or private employers will afford benefits to individuals living in non-marital relationships. At least some employers have offered benefits to non-marital couples, at least in part, because same-sex couples did not have access to marriage benefits.⁸⁸ Both public and private employers may feel less of a need to provide those benefits for non-marital partners if indeed marriage equality is recognized within the state.⁸⁹ While some commentators suggest

83. *Wilcox v. Trautz*, 693 N.E.2d 141, 146 (Mass. 1998).

84. *Id.* at 146.

85. *See* *Maeker v. Ross*, 62 A.3d 310, 316 (N.J. Super. App. Div. 2013) (“[E]nforcement of palimony agreements may only occur in those instances where the agreement has been reduced to writing and the parties have each had the benefit of independent counsel.”).

86. *See* *Davis v. Davis*, 643 So.2d 931, 934–35 (Miss. 1994) (“We are of the opinion that public policy questions of such magnitude are best left to the legislative process, which is better equipped to resolve the questions which inevitably will arise as unmarried cohabitation becomes an established feature of our society.”).

87. *Cf.* *Adams*, *supra* note 78, at 241 (“As marriage is laden with public policy incentives to get citizens married, such as health insurance and immigration status, couples sometimes get married for practical reasons other than a desire to create a commitment to lifelong romance.”).

88. *See* Nancy D. Polikoff, *What Marriage Equality Arguments Portend for Domestic Partner Employee Benefits*, 37 N.Y.U. REV. L. & SOC. CHANGE 49, 52 (2013) (“Employee benefits limited to same-sex partners . . . were framed as an equity issue for same-sex couples who could not marry.”).

89. *See* Armin U. Kuder & Marcia Kuntz, *Understanding the Legal Issues Surrounding Same-Sex Marriage Leading Lawyers on Adapting to Recent Supreme Court Decisions Impacting Family Law: Legal Challenges of Divorce for Same-Sex Couples*,

that the revocation of such benefits would occur because of the employers' belief that such benefits would not be desired,⁹⁰ it seems at least as likely that some employers would suggest that although they recognize that some individuals would still like to have domestic partnership (rather than marital) benefits, the unfairness concerns⁹¹ implicated by same-sex marriage bans are not present when same-sex couples are permitted to marry.

Many same-sex and different-sex couples would prefer not to marry and would nonetheless like to receive those benefits, and it may be thought unjust to require couples to marry in order to receive such benefits.⁹² However, at least as a matter of federal constitutional mandate, it seems unlikely that the Court would hold that public employers must accord the same benefits to marital and non-marital couples.⁹³ Further, state constitutional law may prohibit according marital benefits to non-marital couples,⁹⁴ and there may be insufficient popular support to amend the state constitution to permit or require treating marital and non-marital couples equally, especially if same-sex marriage is not at issue. That said, if trends continue and it remains true that "fewer people are marrying,"⁹⁵ then perhaps there will be sufficient support to amend a state constitution to permit or require equal benefits for marital and non-marital couples.

B. Parenting Rights

ASPATORE, 2013 WL 4391623, *4 n.49 (2013) ("A consequence ... of the ... rapid growth in the number of states permitting same-sex marriage is that employers that previously offered benefits to same-sex domestic partners...might reexamine those policies and require couples . . . [to] get married . . . in order to continue receiving employer-provided benefits.").

90. See Adams, *supra* note 78, at 246 ("Unfortunately, when same-sex marriage passes in a state, domestic partnership and civil union options are sometimes lost This is a dramatic presumption that these citizens would prefer marriage.").

91. Cf. Carlin Meyer, *Who Cares?: Reflections on Law, Loss, and Family Values in the Wake of 9/11*, 46 N.Y.L. SCH. L. REV. 653, 658 (2002–2003) (discussing "the unfairness of excluding domestic partners").

92. See generally Polikoff, *supra* note 88.

93. Cf. *supra* notes 58–60 and accompanying text (noting that the Court seems to distinguish between marital and non-marital relationships for constitutional purposes).

94. See *Nat'l Pride at Work, Inc. v. Governor of Mich.*, 748 N.W.2d 524, 538 (Mich. 2008) ("[I]f there were any residual doubt regarding whether the marriage amendment prohibits the recognition of a domestic partnership for the purpose at issue here, this language makes it clear that such a recognition is indeed prohibited 'for any purpose,' which obviously includes for the purpose of providing health-insurance benefits.").

95. Amy L. Wax, *The Family Law Doctrine of Equivalence*, 107 MICH. L. REV. 999, 1017 (2009).

If same-sex marriage were recognized as federally protected, then certain parenting rights would also presumably be recognized, for example, the presumption of parentage that arises when a child is born into a marital relationship.⁹⁶ A separate question, however, is whether states will be more expansive with respect to the parental rights of unmarried adults who have adopted parental roles.

First, it should be noted that several states recognize functional parents,⁹⁷ i.e., adults who are accorded some sort of parental status, lack of adoptive or biological tie to the child notwithstanding.⁹⁸ The focus here is on the recognition of non-marital functional parents rather than, for example, functional parents who are stepparents.⁹⁹

Recognizing functional parents can have a variety of benefits.¹⁰⁰ Precisely because individuals take on functional parenting roles in a variety of contexts, the recognition of same-sex marriage will not end the need for or the usefulness of recognizing functional parents.¹⁰¹ Nonetheless, the recognition of same-sex marriage *may* have a role in whether or the degree to which courts will recognize functional parentage, as the following series of Vermont cases helps illustrate.

96. *See* Wendy G-M. v. Erin G-M., 985 N.Y.S.2d 845, 861 (N.Y. Sup. Ct. 2014) (“The pervasive and powerful common law presumptions that link both spouses in a marriage to a child born of the marriage—the presumption of legitimacy within a marriage and the presumption of a spouse’s consent to artificial insemination—apply to this [same-sex] couple.”).

97. *See* Joanna L. Grossman, *The New Illegitimacy: Tying Parentage to Marital Status for Lesbian Co-Parents*, 20 AM. U.J. GENDER SOC. POL’Y & L. 671, 677 (2012) (“In some states, courts or the legislature have recognized either full parental or quasi-parental status based on a functional parent-child relationship.”).

98. *See* Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*, 20 GEO. MASON L. REV. 419, 422–23 (2013) (“Functional parents are people who function in parental roles without having any formal legal status as parents.”).

99. *See id.* at 424 (noting that functional parents might be cohabiting with or married to the biological or adoptive parent).

100. *See id.* at 438 (“[T]here are three bases given for justifying the need for functional parenthood: (1) for the benefit of children; (2) for the benefit of formal parents; and (3) for the benefit of functional caregivers”).

101. *See* Jason D. Hans & Martie Gillen, *Social Security Survivors Benefits: The Effects of Reproductive Pathways and Intestacy Law on Attitudes*, 41 J.L. MED. & ETHICS 514, 515 (2013) (“This functional parenthood approach . . . allows legal parentage to be awarded based on the role an adult takes in a child’s life [N]on-traditional parents, such as stepparents and same-sex partners of genetic parents, can gain legal recognition in the absence of biological ties or legal adoption.”).

C. Vermont on Functional Parentage

Vermont was one of the first states to recognize second parent adoption,¹⁰² which permits a parent's non-marital partner to adopt his or her child,¹⁰³ assuming that no one else has parental rights with respect to that child.¹⁰⁴ That way, each member of a same-sex couple raising a child could establish legal ties to that child.¹⁰⁵

*Titchenal v. Dexter*¹⁰⁶ involved a custody dispute “between two women who had both participated in raising a child adopted by only one of them.”¹⁰⁷ At issue was whether Chris Titchenal would be recognized as a functional parent, where “[f]or the first three and one-half years of [the child]Sarah's life, . . . [Chris] cared for the child approximately 65% of the time.”¹⁰⁸ Chris had never adopted Sarah because she had mistakenly believed that she was precluded by law from doing so.¹⁰⁹ The Vermont Supreme Court suggested that it did not have the power to grant Titchenal a remedy,¹¹⁰ noting that “[e]quity generally has no jurisdiction over imperfect

102. See Grossman, *supra* note 97, at 675.

103. See Jennifer Sroka, Note, *A Mother Yesterday, But Not Today: Deficiencies of the Uniform Parentage Act for Non-Biological Parents in Same-Sex Relationships*, 47 VAL. U. L. REV. 537, 538 n.5 (2013) (“The process of second parent adoption allows a non-biological parent to become a legal parent through adoption, while the natural or first adoptive parent retains legal parental status.”) (quoting DENIS CLIFFORD, FREDERICK HERTZ & EMILY DOSKOW, *A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES* 84 (Emily Doskow ed., 15th ed. 2010)).

104. See J. Herbie DiFonzo & Ruth C. Stern, *Breaking the Mold and Picking up the Pieces: Rights of Parenthood and Parentage in Nontraditional Families*, 51 FAM. CT. REV. 104, 111 (2013) (“Even in states permitting second-parent adoption, consent of the noncustodial biological parent is required.”).

105. See *In re Adoption of B.L.V.B.*, 628 A.2d 1271 (Vt. 1993) (allowing same-sex partner of parent to adopt that parent's child).

106. 693 A.2d 682 (Vt. 1997).

107. *Id.* at 683.

108. *Id.*

109. *Id.* at 686–87.

[P]laintiff contends that she did not attempt to adopt Sarah at the time defendant did because the parties believed that Vermont's then-current adoption laws would not permit it. ‘A person or husband and wife together . . . may adopt any other person’” (citing 15 VT. STAT. ANN. § 431 (repealed 1996)). The language of the statute, however, certainly did not preclude plaintiff from seeking to adopt Sarah; indeed, as of December 1991, when Sarah was only five months old, at least one Vermont probate court had allowed the female partner of a child's adoptive mother to adopt the child as a second parent.

110. *Id.* at 684 (“We find no legal basis for plaintiff's proposal. Courts cannot exert equitable powers unless they first have jurisdiction over the subject matter and parties.”)

rights arising from moral rather than legal obligations; not every perceived injustice is actionable in equity—only those violating a recognized legal right.”¹¹¹ While recognizing that “there are public-policy considerations that favor allowing third parties claiming a parent-like relationship to seek court-compelled parent-child contact,”¹¹² the court explained that “these considerations are not so clear and compelling that they require us to acknowledge that de facto parents have a legally cognizable right to parent-child contact, thereby allowing the superior court to employ its equitable powers to adjudicate their claims.”¹¹³ The court concluded that “absent statutory authority extending the family court’s jurisdiction to adjudicate third-party visitation requests,¹¹⁴ . . . legal parents retain the right to determine whether third-party visitation is in their children’s best interest.”¹¹⁵

The Vermont functional parent jurisprudence *may* have changed in *Miller-Jenkins v. Miller-Jenkins*¹¹⁶ in which a biological parent challenged the parentage of her former civil union partner.¹¹⁷ Lisa and Janet entered into a civil union in December, 2000,¹¹⁸ while they were still living in Virginia.¹¹⁹ Lisa was artificially inseminated with sperm provided by an anonymous donor, resulting in the birth of IMJ.¹²⁰ When IMJ was about four months old, the family moved to Vermont.¹²¹ A little less than a year later, Lisa and Janet separated.¹²² Lisa moved back to Virginia but filed in a Vermont court to end their civil union.¹²³ The court granted Lisa temporary physical and legal custody but also granted Janet parent-child contact.¹²⁴

(citing *In re Marriage of Ryall*, 201 Cal. Rptr. 504, 512 (Cal. App. 1984)).

111. *Id.* at 684 (citing *In re E.C.*, 387 N.W.2d 72, 77 (Wis. 1986)).

112. *Id.* at 689.

113. *Titchenal v. Dexter*, 693 A.2d 682, 689 (Vt. 1997).

114. *Id.* at 690 (citing OR.REV STAT. § 109.119(1)(1989)).

115. *Id.* (citing *Finck v. O’Toole*, 880 P.2d 624, 627 (Ariz. 1994)).

116. 912 A.2d 951 (Vt. 2006).

117. *See id.* at 955 (“Lisa Miller–Jenkins appeals a family court decision finding her ex[-]partner, Janet Miller–Jenkins, to be a parent of their three-year-old child conceived via artificial insemination.”).

118. *Id.* at 956.

119. *See id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *See Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 956 (Vt. 2006) (“After the separation, in September 2003, Lisa moved to Virginia with IMJ. . . . On November 24, 2003, Lisa filed a petition to dissolve the civil union in the Vermont family court in

Although Lisa permitted Janet and IMJ to have parent-child contact at first, she later refused to do so.¹²⁵ In addition, Lisa filed in Virginia to establish IMJ's parentage.¹²⁶ The Virginia and Vermont courts were in contact with each other,¹²⁷ although they were unable to reach a resolution and each court claimed to have jurisdiction to decide the matters before it.¹²⁸ Ultimately, the Vermont Supreme Court held that the Parental Kidnapping Prevention Act and the Vermont version of the Uniform Child Custody Jurisdiction Act established that Vermont rather than Virginia had jurisdiction over the case,¹²⁹ and the Virginia Supreme Court held that Lisa was bound by the first Virginia appellate court ruling deferring to the Vermont ruling that Vermont rather than Virginia should be deciding the parentage issues.¹³⁰

For purposes here, the *Miller-Jenkins* Vermont Supreme Court decision is relevant because of how it treated parentage. First, the court noted that Janet was a presumptive parent by virtue of her having been Lisa's civil union partner.¹³¹ Yet, Janet's presumptive parentage by virtue of her civil union status might have been problematic in this case. At the time,

Rutland.”).

124. *See id.* at 955.

125. *Id.* (“Although Lisa permitted the first court ordered parent-child-contact weekend, she did not allow Janet to have parent-child contact after that date, nor did she allow Janet to have telephone contact with IMJ, as the family court had ordered.”).

126. *Id.*

127. *See id.* at 957 (“[T]he Vermont and Virginia courts consulted by telephone . . .”).

128. *See id.* at 956–57 (Vt. 2006). (“[O]n July 19, 2004, the Vermont court reaffirmed its ‘jurisdiction over this case including all parent-child contact issues,’ stated that it would not ‘defer to a different State that would preclude the parties from a remedy,’ and made clear that the temporary order for parent-child contact was to be followed.”). *But see id.* at 957 (“On September 9, the Virginia court held it had jurisdiction to determine the parentage and parental rights of IMJ and that any claims of Janet to parental status were ‘based on rights under Vermont’s civil union laws that are null and void under VA. CODE § 20–45.3.”).

129. *See id.* at 959.

130. *See Miller-Jenkins v. Miller-Jenkins*, 661 S.E.2d 822, 825 (Va. 2008) (“The Court of Appeals further held in the first Virginia appeal that Vermont law governed the parties’ dispute, and that the courts of Virginia were bound by Vermont’s interpretation of its own law.”); *id.* at 827 (“[T]he Court of Appeals’ holding in the first Virginia appeal is binding under the ‘law of the case’ doctrine.”).

131. *See Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 967 (Vt. 2006) (“If we were to . . . conclude biology controlled, a child born from artificial insemination would have no second parent . . . unless the putative second parent adopted the child. . . [S]uch a holding would be wrong.”). *See id.* at 970 (“Many factors are present here that support a conclusion that Janet is a parent, including, first and foremost, that Janet and Lisa were in a valid legal union at the time of the child’s birth.”).

Virginia refused to recognize any rights arising from a civil union,¹³² which presumably would have precluded the state from recognizing any presumptive rights arising from such a relationship. Yet, that might mean that if Janet were a parent by virtue of factors having nothing to do with a civil union, then Virginia would have less reason to refuse to give effect to that status.¹³³

Whether or not the Vermont Supreme Court was motivated by such reasoning to provide a different rationale upon which Janet's parental status might be based, the court explained why Janet qualified as a functional parent.

It was the expectation and intent of both Lisa and Janet that Janet would be IMJ's parent. Janet participated in the decision that Lisa would be artificially inseminated to bear a child and participated actively in the prenatal care and birth. Both Lisa and Janet treated Janet as IMJ's parent during the time they resided together, and Lisa identified Janet as a parent of IMJ in the dissolution petition. Finally, there is no other claimant to the status of parent, and, as a result, a negative decision would leave IMJ with only one parent.¹³⁴

The *Miller-Jenkins* court expressly declined to address which factors were necessary or sufficient for a finding that someone was a functional parent,¹³⁵ leaving that issue for another day. Nonetheless, the Vermont court at least seemed to recognize a status that it was unwilling to recognize in *Titchenal*. Was the court recognizing this additional basis for Janet's status as a parent because there would then be less reason for Virginia to refuse to recognize her parentage? That is unclear, especially because Virginia did and does not recognize de facto parents.¹³⁶ Nonetheless, a refusal to

132. See VA. CODE ANN. § 20-45.3, *invalidated by* *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014) (“Any ... civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.”).

133. See Mark P. Strasser, *DOMA and the Constitution*, 58 *DRAKE L. REV.* 1011, 1016 (2010) (“A parental relationship established in another way, e.g., because one of the individuals is a legal parent by virtue of being a functional parent, does not trigger DOMA and is not subject to the same arguments for non-recognition.”).

134. See *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d at 970.

135. *Id.* at 971 (“Because so many factors are present in this case that allow us to hold that the non-biologically-related partner is the child's parent, we need not address which factors may be dispositive on the issue in a closer case.”).

136. See *Stadter v. Siperko*, 661 S.E.2d 494, 498–99 (Va. App. 2008) (“We note that no appellate court in Virginia has ever so applied the de facto parent doctrine, despite numerous opportunities under analogous circumstances to do so. We likewise decline to do so now.”) (citing *Surles v. Mayer*, 628 S.E.2d 563 (Va. App. 2006)); see also Rachel E. Shoaf, Note,

recognize functional parent status under Virginia law might not be dispositive in a case in which the question was whether to recognize a de facto status granted in a different jurisdiction.¹³⁷

The Vermont Supreme Court recently addressed functional parent status in *Moreau v. Sylvester*¹³⁸ in which the court addressed the parental status of a former partner of a mother with children.¹³⁹ Christopher Moreau had “played a significant, father-figure role in both of the children's lives,¹⁴⁰ He and Noel Sylvester had “an on-again-off-again relationship for eight to ten years, [although] they never married.”¹⁴¹

There was an existing “relief-from-abuse (RFA) order denying him visitation with the children.”¹⁴² Moreau had had custody of the children when Sylvester’s residence had been rendered uninhabitable due to flooding,¹⁴³ and she had testified that on at least one occasion during the period his refusal to return the children to her had “created a dangerous situation.”¹⁴⁴ Sylvester was aware that Moreau owned a gun,¹⁴⁵ and he would sometimes arrive at her house uninvited after he had first made sure that the person with whom Sylvester was currently living was still at work.¹⁴⁶ To make matters even more frightening, Sylvester had testified that Moreau had sent her “a text message stating ‘I promise you, for the rest of my life, I will find my girls and I will never stop, ever.’”¹⁴⁷

The *Moreau* court discussed Vermont functional parent jurisprudence, noting that the *Titchenal* court had found “no legal basis”¹⁴⁸ for “claims

Two Mothers and Their Child: A Look at the Uncertain Status of Non-biological Lesbian Mothers Under Contemporary Law, 12 WM. & MARY J. WOMEN & L. 267, 294 (2005) (“While Virginia strictly adheres to a ‘traditional’ one mother and one father model, based on a biological link, other states recognize the potential for functional parenthood to better serve the needs of the parties seeking recognition of a parent-child relationship.”).

137. See *Debra H. v. Janice R.*, 14 N.Y.3d 576, 601 (N.Y. 2010) (“New York will recognize parentage created by a civil union in Vermont.”).

138. 95 A.3d 416 (Vt. 2014).

139. See *id.* at 422 (“Defendant contends that he is the children's de facto parent and entitled to assert and be heard on custody, parentage and visitation rights.”).

140. See *id.* at 417.

141. *Id.*

142. *Id.*

143. *Id.* at 417–418 (Vt. 2014).

144. *Moreau v. Sylvester*, 95 A.3d 416, 417–418 (Vt. 2014).

145. *Id.* at 418.

146. See *id.*

147. *Id.*

148. *Id.* at 420.

brought by putative de facto parents.”¹⁴⁹ The Vermont court then addressed its *Miller-Jenkins* reasoning, distinguishing the cases because “there is no civil union, or any other legally recognized domestic relationship between the parties [in *Moreau*] as [there had been] in *Miller-Jenkins*.”¹⁵⁰ After noting that “the children in this case are not the product of mutually-agreed-upon artificial insemination,”¹⁵¹ the court summed up its position by suggesting that “the parental rights recognized in *Miller-Jenkins* were based upon statutory rights of civil union partners, not on any general judicial endorsement of de facto parenthood.”¹⁵² The court denied that its decision in *Moreau* foreclosed the possibility of de facto parentage recognition in a case in which “two persons agree to conceive a child through artificial insemination,”¹⁵³ although the *Miller-Jenkins* court had never implied that the agreement to conceive through artificial insemination was key to a finding of functional parenthood.¹⁵⁴

In dissent, Justice Robinson noted that the *Miller-Jenkins* court had “identified a host of factors other than biology and a legal relationship with an acknowledged parent as relevant to the question of who is a parent.”¹⁵⁵ Justice Robinson worried that *Moreau* seemed to stand for the proposition that “if faced with facts identical to those presented in *Miller-Jenkins*, except with parents who were not joined in a legally recognized status at the time the child was conceived, this Court could deny the nonbiological mother’s claim out of hand.”¹⁵⁶

The characterization of *Moreau* offered by the majority was rather unsympathetic, although Justice Robinson offered a much different view.

[The] putative father has alleged that both children call him “daddy or papa,” that he was in the delivery room when M.S. was born and was one of the first people to hold her; he has been involved in L.M.’s life since she was six months old and M.S.’s since birth—participating in their respective first steps, first words, and other developmental

149. *Id.*

150. *Moreau v. Sylvester*, 95 A.3d 416, 422 (Vt. 2014).

151. *Id.*

152. *Id.*

153. *Id.* at 423 n.10.

154. *See Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 971 (Vt. 2006). (“Because so many factors are present in this case that allow us to hold that the nonbiologically-related partner is the child’s parent, we need not address which factors may be dispositive on the issue in a closer case.”)

155. *Moreau v. Sylvester*, 95 A.3d at 435 (Robinson, J., dissenting).

156. *Id.*

milestones; even before moving in with the children's mother, he visited L.M. and M.S. almost every day during the first six months of M.S.'s life; he lived with mother and the children from the time M.S. was about six months old, in August 2006, through March 2009; he changed diapers, tended to them when they cried in the middle of the night, and did all the things a good father does when needed by his or her child; he was involved with M.S.'s preschool programming; he went to all school and ballet performances in which either child was involved; he provided all the basic necessities for the children such as food, shelter and clothing, and also paid for ballet lessons and school supplies; *after* mother and the children moved out in March 2009 until April 2011, he spent about 600 days of the next 730 days with the children; in April 2011, their mother voluntarily left them to live with him at least six days a week for nearly a year until March 2012; mother frequently cancelled or no-showed for her regular scheduled visits with the children during that time period; and mother abruptly removed the children from the schools they were attending while living with putative father with only three months remaining in the term.¹⁵⁷

Needless to say, the two characterizations of Moreau are very different and might yield very different determinations with respect to whether the children would be benefited or, instead, harmed by his having visitation rights.¹⁵⁸ Such a determination did not have to be made because Moreau's parental status was not recognized, although Justice Robinson pointed out some of the possible detrimental effects of a refusal to recognize functional parent status in her appeal to the Vermont Legislature to recognize that status.

[T]he Legislature has the power to pass laws to ensure that other children in L.M. and M.S.'s circumstances are not denied the continuing financial, emotional, and developmental support of one of their actual parents because their biological parent has 'pulled rank' and denied the other's parental status after promoting and cultivating that parent's relationship with the child for most or all of the children's lives.¹⁵⁹

It is not clear what to make of *Moreau*. Perhaps unsympathetic facts drove the decision, including the potential for domestic violence.¹⁶⁰ However, it might be noted that domestic violence did not preclude recognition of functional parent status in the California case *In re Nicholas*

157. *Id.* at 446 (Robinson, J., dissenting).

158. *See id.* ("If the majority's analysis were to stand, the consequences for some children, potentially including L.M. and M.S., would be nothing short of tragic.")

159. *Id.*

160. *See supra* notes 141–46 and accompanying text.

H.,¹⁶¹ notwithstanding that both the mother¹⁶² and the functional father¹⁶³ had been violent with each other.

Nicholas H. involved a man, Thomas, who admittedly was not the biological father of a boy named Nicholas,¹⁶⁴ although both Thomas and the boy's mother, Kimberly, wanted Thomas "to act as a father to Nicholas."¹⁶⁵ Thomas "provided a home for Kimberly and Nicholas for several years."¹⁶⁶ Further, Thomas had a strong bond with the boy, while the boy's biological father had played no role in Nicholas's life.¹⁶⁷

The juvenile court found that Thomas's presumptive parenthood of Nicholas had not been rebutted.¹⁶⁸ The California Supreme Court affirmed, confident that permitting Thomas to have parental status would greatly benefit Nicholas both because of the strong bond between the two and because the child would otherwise be homeless.¹⁶⁹

Nicholas H. and *Moreau* are distinguishable in that there was no suggestion in the *Moreau* majority opinion that the children would face dire consequences were *Moreau's* parentage not recognized,¹⁷⁰ although the dissent suggested that the children might indeed thereby be harmed.¹⁷¹ An additional consideration that might have been telling was that *Moreau* never adopted the children, even though Vermont law had permitted such an

161. 28 Cal. 4th 56 (Cal. 2002).

162. *Id.* at 59 ("Most recently, the two fought over Nicholas during a holiday visit in December 1999 at the home of Thomas's mother, Carol, who lives in Lakewood, California. Kimberly attacked and bit Thomas. The police were called and Kimberly was arrested for felony assault.")

163. *See id.* at 60 ("Kimberly gave police a copy of a Los Angeles County protective order dated September 3, 1998, restraining Thomas from having contact with Kimberly or Nicholas until March 2, 2001.")

164. *Id.* at 61.

165. *Id.*

166. *Id.*

167. *See In re Nicholas H.*, 28 Cal. 4th 56, 58 (Cal. 2002) ("While his presumed father is providing a loving home for him, his mother has not done so, and his biological father, whose identity has never been judicially determined, has shown no interest in doing so.")

168. *See id.* at 61.

169. *See id.* (discussing the strong bond between them); *see also id.* at 59 ("[T]his child will be rendered fatherless and homeless.")

170. *See Moreau v. Sylvester*, 95 A.3d 416, 437 (Vt. 2014) (suggesting that there were no dire circumstances at issue that might justify placing children with a non-parent).

171. *See id.* at 446 (Robinson, J., dissenting) ("If the majority's analysis were to stand, the consequences for some children, potentially including L.M. and M.S., would be nothing short of tragic.")

adoption.¹⁷² Indeed, the Vermont court likened what was at issue in *Moreau* to what had been at issue in *Titchenal*, reasoning that “[p]artners of heterosexual or same-sex couples could ‘protect their interests’ in potential parentage through existing procedures.”¹⁷³

One of the confusing aspects of the Vermont jurisprudence is that one cannot tell whether it is *Miller-Johnson* rather than *Moreau* that is an outlier or whether, instead, the cases are quite compatible.¹⁷⁴ Further, one cannot tell whether *Miller-Johnson* was recognizing functional parent status for a limited time only¹⁷⁵—one would not expect a court to announce that it was adopting a temporary, alternative basis for parenthood to circumvent a different state’s refusal to recognize parental status, even were that an accurate depiction of what was happening. That said, the mere possibility that the *Miller-Johnson* court was doing this does not establish that the court in fact was temporarily offering another basis for parentage to help protect a Vermont citizen’s parental rights.

Interestingly, a California court might have adopted a strategy analogous to the (possible) strategy employed in *Miller-Johnson* to protect a California citizen’s parental rights, although that court never stated that it was doing so. Consider *Charisma R. v. Kristina S.*,¹⁷⁶ which involved a same-sex couple who entered into a California domestic partnership¹⁷⁷ before having a child.¹⁷⁸ The couple broke up a few months after the child’s birth,¹⁷⁹ and the issue before the intermediate appellate court was whether

172. *See id.* at 425 (majority opinion) (“Heterosexual couples could then and now, as same-sex couples can now, achieve parentage rights through marriage or adoption.”).

173. *See id.*

174. *See id.* at 422 (“But the differences between *Miller-Jenkins* and the present case far exceed their singular similarity of a now-estranged partner who shared child rearing with the biological mother.”).

175. *Cf.* Richard Aborn & Marlene Koury, *Toward a Future, Wiser Court: A Blueprint for Overturning* *District of Columbia v. Heller*, 39 *FORDHAM URB. L.J.* 1353, 1376 (2012) (“*Bush v. Gore* . . . fashioned a unique, one-time-only reading of the Equal Protection Clause to resolve a case of bottomless political import.”).

176. 96 Cal. Rptr. 3d 26 (Cal. App. 2009).

177. *See id.* at 31–32 (“Charisma R. (Charisma) and Kristina S. (Kristina) were a same sex couple who began dating in July 1997, moved in together in August 1998, and registered as domestic partners with the State of California in January 2002.”).

178. *See id.* at 32 (“Kristina became pregnant by artificial insemination and gave birth to Amalia in April 2003.”).

179. *See id.* (“In July 2003, Kristina moved out of the home she shared with Charisma, taking Amalia with her.”).

Charisma was a presumed parent. The court affirmed the lower court ruling that she was.¹⁸⁰

It might seem surprising that the *Charisma R.* court decided the case entirely on presumed parent status and did not base the parentage decision at least in part on the domestic partnership status of the parties¹⁸¹ mentioned in the opinion,¹⁸² just as *Miller-Johnson* had based its parentage decision partially¹⁸³ or wholly¹⁸⁴ on the civil union status of the parties. Kristina having been living in Texas at the time of the decision¹⁸⁵ might have played some role in the framing of the opinion. Texas refuses to give effect to rights arising out of civil unions,¹⁸⁶ and the *Charisma R.* court might have feared that parentage based on a domestic partnership status would be less likely to be enforced in Texas.¹⁸⁷ Both *Charisma R.* and *Miller-Johnson* emphasized functional parentage where doing so seemed less likely to provoke a non-recognition response in a sister state.

180. *See id.* at 34 (“Charisma bore the burden of proving she is a presumed parent under section 7611(d) by a preponderance of the evidence.”); *see also id.* at 45 (“The trial court’s decision is well-supported by the evidence.”).

181. *Cf. In re J.N.*, No. B235505, 2012 WL 2019891, at *1 (Cal. App. 2012) (“Rachel N. is the biological mother of J.N., who was conceived with a sperm donor and was born in 2004. Rachel N. was in a registered domestic partnership with Kris F. at the time, and Kris F. is therefore considered J.N.’s other parent.”) (citing CAL. FAM. CODE, §§ 297, 297.5(d); *Elisa B. v. Superior Court*, 37 Cal. 4th 108, 119 (2005)).

182. *See Charisma R.*, 96 Cal. Rptr. 3d at 31–32.

183. *See Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 967 (Vt. 2006) (“We find that Janet has status as a parent, even beyond her stepparent status . . .”).

184. *See Moreau v. Sylvester*, 95 A.3d 416, 422 (Vt. 2014) (“[T]he parental rights recognized in *Miller-Jenkins* were based upon statutory rights of civil union partners, not on any general judicial endorsement of de facto parenthood . . .”).

185. *See Charisma R.*, 96 Cal. Rptr. 3d at 52.

186. *See TEX. FAM. CODE ANN.* § 6.204(c), *invalidated by De Leon v. Perry*, 975 F. Supp. 2d 632 (W. Tex. 2014) (“The state . . . not give effect to a: (1) public act . . . that creates . . . a marriage between persons of the same sex . . . or (2) . . . claim to any legal protection . . . asserted as a result of a marriage between persons of the same sex . . . in this state or in any other jurisdiction.”).

187. *Cf. Suzanne B. Goldberg et al., Family Law Scholarship Goes to Court: Functional Parenthood and the Case of Debra H. v. Janice R.*, 20 COLUM. J. GENDER & L. 348, 356 n.25 (2011) (“*Charisma R.* did not address the manner in which an out-of-state civil union factors into recognizing parental rights.”); *see also Rena M. Lindevaldsen, Same-Sex Relationships and the Full Faith and Credit Clause: Reducing America to the Lowest Common Denominator*, 16 WM. & MARY J. WOMEN & L. 29, 35–36 (2009) (“Kristina, a Texas resident since summer 2005, faces the question of whether Texas courts, despite a state defense of marriage act and constitutional amendment, will permit Charisma to register and enforce the California custody order in the state of Texas.”).

The claim here is not that the functional parent status was recognized in *Charisma R.* as a way to circumvent non-recognition, because California had already recognized that status in the context of same-sex parenting prior to the case.¹⁸⁸ Further, Charisma and Kristina had planned to have a child together and then did, which supported a finding of functional parent status.¹⁸⁹ The only potential difficulty for such a finding in this case involved the amount of time that Charisma had parented Amalia before the couple had broken up, although the intermediate appellate court did not find that an insuperable difficulty.¹⁹⁰

Did the *Charisma R.* court refuse to address the parental presumption arising from the domestic partnership precisely because it did not want to raise an issue that might jeopardize recognition of Charisma's parenting rights in another jurisdiction? That is unclear. The suggestion here is merely that courts might adopt particular legal approaches out of a belief that certain legal options have been unfairly denied to a particular group of people, either within the state or in other states where local parties' rights might be at issue.¹⁹¹ If that is so and if states are precluded from refusing to recognize same-sex marriage in light of the envisioned opinion, then one might expect some courts to be less willing to provide equitable remedies in certain kinds of cases.

IV. Conclusion

188. See *Elisa B. v. Superior Court*, 117 P.3d 660, 668 (Cal. 2005) ("We conclude that the present case, like *Nicholas H.* and *Salvador M.*, is not 'an appropriate action' in which to rebut the presumption of presumed parenthood with proof that Elisa is not the twins' biological parent.").

189. See *Charisma R.*, 96 Cal. Rptr. 3d at 32 ("In December 2001, the couple decided they wanted to have children and Kristina would be the first to try to become pregnant. Following several months of effort, Kristina became pregnant by artificial insemination and gave birth to Amalia in April 2003.").

190. See *id.* ("We reject Kristina's contentions that Charisma did not parent Amalia for a sufficient period of time to be declared a presumed parent.").

191. In *Frazier v. Goudschaal*, 295 P.3d 542 (Kan. 2013), the Kansas Supreme Court upheld the enforceability of a parenting agreement. See *id.* at 558 ("the coparenting agreement in this case does not violate public policy and is not unenforceable."). Enforcement was sought before the biological parent moved to Texas with the two children. See *id.* at 545 ("A few months after the couple separated, Goudschaal notified Frazier that she was taking the children to Texas, prompting Frazier to file this action, seeking *inter alia* to enforce the coparenting agreement."). Perhaps the concerns raised here played a role in that decision as well.

Suppose that the United States Supreme Court were to hold that the Federal Constitution protects the right to marry a same-sex partner. How might such a ruling affect marriage and family law more generally?

States might try to create two differing marital statuses, affording certain rights and obligations to one but not the other status. Were states to do that and were they to reserve one of the statuses for different-sex and the other status for same-sex couples, such a law would likely be struck down in light of the guarantees recognized in *Windsor* and in the envisioned opinion striking down same-sex marriage bans.

What effects would such a decision have on the rights of non-marital couples? It seems likely that we will continue to have a divergence among the states with respect to such rights. Some as a matter of public policy will accord non-marital couples more rights and obligations, whereas others will try to preserve or possibly increase the difference between marital and non-marital status. Further, at least in the eyes of some, there will no longer be a need to remedy the injustice that had been implicated in refusing to permit same-sex couples to marry, thereby providing less incentive to mitigate the differences between marital and non-marital couples.

We have not seen monumental changes in family law in those states that recognize same-sex marriage whether as a matter of statute or of state constitutional guarantees, which undermines the plausibility of the claim that federal constitutional protection of the right to marry a same-sex partner will bring about monumental changes. While family law will continue to develop, federal constitutional protection of same-sex marriage is unlikely to bring about the changes that some commentators had hoped for and others had feared.¹⁹²

192. Cf. Douglas Nejaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CAL. L. REV. 87, 97 (2014) (“[C]ommunities where marriage lawsuits emerged . . . understood them as [reflecting] radical gay politics and critiques of marriage. [Both] Baker and McConnell suggested . . . their lawsuit might turn marriage ‘upside down.’”); see also Elizabeth B. Wydra, *Reading the Opinions--and the Tea Leaves--in United States v. Windsor*, 2013 CATO SUP. CT. REV. 95, 99 (2012–2013) (“In passing DOMA, the report from the House . . . concluded, . . . ‘The effort to redefine marriage to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage.’”) (quoting H.R. REP. NO. 104-664, at 12–13 (1996)).