Marriage is important to the Virginia domestic relations code. It is also important to a strong Virginia. The pace at which marriage has been revised around the United States may have Virginians, and even lawyers, understandably a bit uncertain about the law on marriage in Virginia. This article will clarify Virginia law on marriage, provide an overview of recent legal events surrounding marriage regulation, and discuss the effects of those events on Virginia family law.

The Current Status of Marriage in the Fifty States
Virginians defined marriage by state referendum in 2006 with a law that is now contained in Article 1, Section 15 A of the Virginia Constitution. Virginia is one of thirty states that have defined marriage. Those states are Nebraska, Nevada, Oregon, Hawaii, and Wisconsin (which define marriage as between one man and one woman but give legal rights and or status to same-sex civil unions or domestic partnerships); Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, and Utah. Five states have revised marriage judicially to expand it to same-sex couples: Massachusetts, Iowa, Connecticut, Vermont, and California. Eleven states have done
Recent Supreme Court Decisions on Marriage

In the summer of 2013 the Supreme Court of the United States handed down two major rulings on marriage. *U.S. v. Windsor*, the federal case on the application of the unlimited marital deduction to the estate of a same-sex spouse on New York, expressly held that states have the right to regulate family law (and stating that fact in dicta at least twenty-nine times). Although the ruling repudiated the definition of marriage from Section 3 of the federal Defense of Marriage Act, *Windsor* upheld state regulation of marriage.

At the same time, the California case of *Hollingsworth v. Perry* in effect invalidated a voter-approved state referendum defining marriage for that state. The merits of that case were never heard, as the litigants — California citizens standing in for their elected representatives who refused to support the law — were denied standing. The characterization of state domestic relations authority proclaimed in *Windsor* seems to directly conflict with the actual outcome of *Perry*. We will discuss the significance of these decisions on Virginia's laws on marriage.

According to a 2011 Pew Research Center study, in 1976, 72 percent of adults were married, while that number dropped dramatically to 51 percent in 2010. In the midst of a culture where marriage is clearly declining in popularity, the traditional power of states to define domestic relations has been injured by the rulings in *Windsor* (and *Perry*). These rulings have led to uncertainty in state marriage law that is worthy of discussion.

Many of the express statements of the Supreme Court on marriage regulation uphold a state's ability to enact laws. Declaring that “[t]he recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens”, and the “definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities’”, and the “states… possess full power over the subject of marriage and divorce…” [clarifying that] “there is no federal law of domestic relations.” The Court maintained that respect for the principle of state regulation of marriage by stating that federal courts are prohibited from adjudicating “issues of marital states even when there might otherwise be a basis for federal jurisdiction.” The notion that state regulation controls is important enough to the Court to remind us that the “significance of state responsibilities for the definition and regulation of marriage dates to the Nation’s beginning; for when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.”

Because family law extends into almost every other area of law, the effects that these twin rulings of *Windsor* and *Perry* will have on state marriage law will take shape in state conflicts with other states (regarding inter-state recognition of marriage, and interstate family mobility), federal conflict with states, and family law policy substance. These areas present several conflicts of law. Among these conflicts are those within and between agencies of the federal government.

Federal agencies’ responses to the removal of a federal marriage definition are inconsistent with differences within the federal government itself that currently divide along the lines of how marriage definitions are determined — based either on “place of celebration” or “place of residence.” For example, marriage is essential to the tax code. IRS rules state that marriage definition and validity are based on the place of celebration. According to these rules, regardless of where a same-sex couple resides, if their marriage was validly entered or “celebrated” in a state recognizing same-sex marriage, that marriage is valid for federal purposes. This IRS rule is in direct contradiction to the Social Security requirement.

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According to the Social Security Administration, in order for a same-sex couple to claim marriage benefits, they must be validly married and currently residing in a state that recognizes same-sex marriage; therefore the Social Security rule for marriage recognition is “place of residence.” The discrepancy in these two definitions creates a fundamental disagreement within the federal govern-
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Implications for Marriage Law in Virginia

The *Windsor* Court observed that “[m]arriage laws vary in some respects from State to State,” giving several examples. Here, the Court understands that state marriage regulation decisions are “an important indicator of the substantial societal impact the State’s classifications have in the daily lives and customs of its people.” Therefore, Virginia law on marriage remains firmly intact, even after these rulings, defining marriage as that state-sanctioned relationship between one man and one woman. Virginia’s constitutional amendment on marriage supports the ability of husbands and wives to contribute to the common good through the creation and perpetuation of the family, while simultaneously not working to prohibit same-sex couples from entering into ordinary contractual relationships.

In fact, the Virginia Supreme Court has determined that a child has a protected liberty interest in knowing and having a relationship with both his father and his mother. 18

Nothing in *Windsor* or *Perry* demands a collapse of Virginia’s marriage law; rather, they work to uphold Virginia’s ability to regulate marriage. Yet, a federal constitutional challenge has commenced against Virginia’s marriage amendment in the federal district court for the Eastern District of Virginia in *Bostic v. Rainey.* At least twenty-seven lawsuits of this type have been filed against state marriage amendments. The “right to marry” was first found to be fundamentally protected by the United States Constitution in *Loving v. Virginia.* The “right to marry a person of the same sex,” however, has not been afforded that constitutional protection, even with *Windsor* and *Perry.*

The pressure, however, from *Windsor* and *Perry* is formidable. Several states, such as New Jersey and Illinois, have dropped or amended their marriage laws because of this pressure.

Two Views of Marriage

Both the majority opinion and a dissent in *Windsor* discuss the two alternate views of marriage — the “conjugal” view and the “consent-based” or revised view of marriage. Under the conjugal view, “the institution of marriage was created for the purpose of channeling heterosexual intercourse into a structure that supports child rearing.” Indeed, the link between marriage and procreation is a hallmark of the conjugal view, inextricably linking the relationship to procreation normatively, a view that fundamentally represents society’s interest in the ordering of adult relationships for the benefit of children and therefore society as a whole. Governments support married men and women as a public structure for their unique service of creating and raising children — the future public — as necessary to the common good. This view holds romance as the spark that begins lifetime commitment and works to perpetuate society. Consequently children and family are a prominent concern in conjugal marriage-based family law and policy.

The consent-based or revisionist view of marriage “defines marriage as the solemnization of mutual commitment — marked by strong emotional attachment and sexual attraction — between two persons.” Since procreation is not central to this view of marriage, the sex of partners is irrelevant to the definition. This notion of
marriage centers on adult autonomy and commitment. In this view marriage is an emotional bond where partners seek emotional fulfillment and remain as long as they find that fulfillment. This view of marriage is ultimately subject to one’s own desires. It holds romance as perpetuating the self-focused version of heterosexual marriage that has led to its decline, something that family law divorce lawyers generally understand well. The Supreme Court explicitly contrasted the conjugal view with the “new insight” that allows “same-sex marriage . . . for couples who wish to define themselves by their commitment to each other.”26 These two views of marriage are in direct contrast—one focusing on children, the other focusing on adults.

The Court in Windsor clearly protected states’ rights to expand marriage, but also left states that choose to protect conjugal marriage free to do so. Its rhetoric, however, exposes those states to legal and political challenge by lending the weight of the nation’s highest court to the arguments favoring marriage expansion and by hinting that it would deliver a ruling requiring the weight of the nation’s highest court to the states to legal and political challenge by lending states that choose to protect conjugal marriage free to do so. Its rhetoric, however, exposes those focusing on adults.

Gal marriage will feel the effect of even if they are legally free to continue ascribing to a traditional definition of marriage post-Windsor. The pressures engendered by Windsor’s rhetoric will make it more difficult to actually do so. The federal case filings are evidence of that. Nonetheless, under the express holding in Windsor, states are authorized and empowered to define marriage as a union of one man and one woman. The majority went to great lengths to highlight state authority to regulate marriage. It also stopped short of declaring same-sex marriage an inherent or fundamental right, instead basing its decision on the fact that same-sex marriage is “a dignity conferred by states.”28 Whether that holding depends on equal protection or due process, or some new constitutional protection for “stigma,” is unclear from the language of the opinion; but the Court is explicit about one thing: “This opinion and its holding are confined to those lawful [state-sanctioned] marriages.”29

Viewed together, the ruling and rhetoric of the Supreme Court of the United States indicates that states are permitted to continue upholding traditional marriage. The evidence here seems to indicate that Virginia law remains deeply committed to children and to married men and women.

Ideological Shifts in Family Law
It is generally recognized that continued revision and expansion of marriage will affect marriage as an institution, either strengthening or weakening it. The changes to family law coming as a result of more widespread recognition of same-sex marriages are likewise difficult to predict with precision.

Family law will change dramatically for states assuming revised marriage laws. Changes in marriage law bring changes to adoption law, and to parentage. Some state jurisdictions which have revised marriage laws may need to encourage conjugal marriage to deal with plummeting birthrates, something that has become an emerging trend in international family regulation.30 George Mason Law Professor Helen Alvare contends in her article published by Stanford’s Law and Policy Review, titled The Turn Toward the Self in the Law of Marriage & Family: Same-Sex Marriage & Its Predecessors, that among other concerns over marriage revision, artificial reproductive technology (ART) will be greatly relied upon to build families for same-sex parents.31 As same-sex marriages become more prevalent, demand for ART will naturally rise, which will bring with it a host of parentage and custody implications. The most profound effects of marriage revision may lie in the impact upon family law effectuated by the acceptance of the underlying ideology. This ideological shift centers on the conception of the meaning of marriage. Both revisionists and conjugal marriage supporters value love, commitment, and rights as well as procreation in marriage; these values are not mutually exclusive. Thus, it is not a matter of substituting these aspects completely, but rather of substituting them as the primary basis and justification for civil marriage. Since family law policies reflect the ideologies they are built upon, changes to various aspects of family law can be expected.32

Additionally, full acceptance of the consent-based theory of marriage allows for the legal definition of marriage to continue to be expanded and revised in other directions. That is not to say that all advocates for same-sex marriage would like to see other requirements for entry into marriage loosened, or even that all reasoned arguments for same-sex marriage necessarily lead to other forms of marriage expansion as well. That
would simply not be true. Rather, it is important to explore how expanding the definition of marriage can logically lead to greater marriage expansion. This is evident in Brazil where a threesome sued to legalize their relationship as a legally sanctioned thruple marriage. Legal recognition for it would be consistent with the ideology expressed in Windsor, that individuals can define themselves by their commitment to one another.

The ideological shift from traditional marriage to an expanded view of marriage to protect same-sex families brought about by Windsor will change family law.

Other Implications

In addition to continued marriage revision, widespread acceptance of the adult-centered rhetoric of Windsor will have ramifications for various aspects of family law and for those, especially professionals, who interact with it. For some, conjugal marriage carries an implicit child-centered approach; adults sacrificing their own autonomy for their children’s best interests. Adult-centered approaches, such as the revisionist or consent-based understanding of marriage “view marriage as more of a self-seeking than a self-giving institution, and thus steer marriage and families in a direction precisely opposite that which is needed to reconnect these institutions to children and to the larger society.” Practically, the effects of exchanging a best interest of the child mindset for an adults-oriented approach would ripple through parentage determinations, child custody determinations, and child support, areas of family law that have traditionally been dominated by the best interest of the child standard. Professor Alvare makes this point clearly:

“[M]arriage is not a tool for adults to feel better about being different, but an important element to express state interests in the well-being of children. Parents’ interests are not unimportant; marital happiness is a terribly important component of adult happiness. Yet in the eyes and on the scales of the law, the state is more vigorously protective of children’s interests and looks to strong marital unions as the way of assuring these. This is why the state can interfere with parents in cases of child abuse, why divorcing parties may never have the last word about child support or custody, why adoption procedures attend so much more closely to the interests of the child than even the deepest longings of would-be parents, and why recent federal and state lawmakers efforts about marriage, divorce, and welfare all have children as their rallying cry.”

The ideological shift from traditional marriage to an expanded view of marriage to protect same-sex families brought about by Windsor will change family law. While the Supreme Court of the United States has confused the issue, states remain possessed with abilities to regulate marriage and their own domestic relations law. Virginia’s marriage amendment and domestic relations law provide the foundation for a strong commonwealth for the common good.


Endnotes:

6 Id. at 17.
7 Id. citing DeSylva v. Ballentine, 351 U.S. 570 (1956).


12 See IRS to Recognize All Gay Marriages Regardless of State, New York Times, Aug. 30, 2013, http://www.nytimes.com/2013/08/30/us/politics/irs-to-recognize-all-gay-marriages-regardless-of-state.html (discussing the need to file individually if a state does not recognize the marriage as valid; and discussing the tremendous discrepancy in defining marriage according to the “place of celebration” or the “place of residence” standard).

13 Cooper-Harris v. US, Case No. 2:12-00887-


15 Windsor, 570 U.S. at 18, citing the differences between age requirements for Vermont and New Hampshire, and consanguinity variances between Iowa and Washington, noting the welcomed qualification that “these rules are in every event consistent within each State.” Id.

16 Id. at 20.


21 388 U.S. 1 (1967).

22 See David Masci, Supreme Court’s DOMA decision driving same-sex marriage efforts in states, PewResearchCenter, Oct. 21, 2013, http://www.pewresearch.org/fact-tank/2013/10/21/supreme-courts-dom-a-decision-driving-...

23 Windsor, 570 U.S. at 115-16 (Alito, dissenting).

24 Id. at 115.

25 Id. at 116 (J. Alito, dissenting).

26 Id. at 29.

27 Id.

28 Id. at 41.

29 Id. at 49.


31 Helen M. Alvare, The Turn Toward the Self in the Law of Marriage & Family: Same-Sex Marriage & Its Predecessors, 16 STAN. L. & POL’Y REV. 135, 136 (2005). See also Why I Need to Find My Father, W. Daily Press (Eng.), Jan. 23, 2004, at 8 (citing “feelings of revulsion at the clinical method by which we were produced; a sense of loss and grief for deliberately severed relationships with unknown biological kinfolk; a fear of accidental incest; anger and frustration at the lack of respect shown for our missing genetic origins...”).

32 Id. (where Professor Alvare tracks how arguments exalting adult desires over the interests of children and the good of society have effected family law in terms of permitting no-fault divorce and virtually unrestrained use of artificial insemination (ART) and then exploring how these same self-focused arguments underlie the advancement of same-sex marriage).


34 Alvare, supra note 30, at 136.

35 Id. at 187.

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