

6-26-2013

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## Recommended Citation

Joanna L. Grossman, *DOMA is Dead: The Supreme Court Rules in United States v. Windsor that the Defense of Marriage Act is Unconstitutional* VERDICT (2013)

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# Verdict

June 26, 2013

[Joanna L. Grossman](#)

## DOMA is Dead: The Supreme Court Rules in *United States v. Windsor* that the Defense of Marriage Act is Unconstitutional



On the tenth anniversary of its leading gay rights decision, *Lawrence v. Texas* (<http://supreme.justia.com/cases/federal/us/539/558/case.html>), the Supreme Court ruled that the federal Defense of Marriage Act (DOMA), passed in 1996 in haste to ward off same-sex marriage in the states, is unconstitutional. As in *Lawrence*, Justice Kennedy wrote the majority opinion in *United States v. Windsor* (<http://supreme.justia.com/cases/federal/us/570/12-307/>), and the more conservative justices dissented.

The same day, the Court also issued an opinion in *Hollingsworth v. Perry* ([http://www.supremecourt.gov/opinions/12pdf/12-144\\_8ok0.pdf](http://www.supremecourt.gov/opinions/12pdf/12-144_8ok0.pdf)), a case testing the constitutionality of Proposition 8, California's voter referendum making same-sex marriage unconstitutional. In that case, however, the Court did not reach the merits question—whether a state can ban same-sex marriage without running afoul of the U.S. Constitution—but instead dismissed the case on standing grounds. Because the state of California chose not to defend Prop 8 after it was struck down by a district court judge, the voter-drafters of Prop 8 appealed the ruling instead. In *Perry*, the Court ruled that only the state had standing to defend the law. In effect, this means that Prop 8 is unconstitutional because the lower court ruling to that effect cannot be appealed. Even beyond establishing the right of same-sex marriage in California, however, this ruling is a victory for same-sex marriage advocates because the Court did not rule definitively that same-sex marriage bans, which exist in three-quarters of the states, are constitutional. To the contrary, the signal from the Court in *Windsor* is that they are constitutionally suspect on equal protection grounds.

### DOMA: 1996-2013

When Congress enacted the Defense of Marriage Act in 1996, it was a sign that the same-sex marriage wars were heating up. The controversy began in earnest in the early 1990s (after failed challenges in the 1970s) when advocates began filing lawsuits in state courts around the country challenging the validity of same-sex marriage bans on state constitutionality grounds. The heat came from Hawaii, which was poised to legalize same-sex marriage because of a ruling from the state's highest court in 1993 that the ban merited strict scrutiny and was likely to be struck down after a trial on remand. Congress acted swiftly to ward off claims of federal recognition for same-sex marriages celebrated in Hawaii or elsewhere.

DOMA's death in 2013 marks the winding down of these same wars. While the early years of DOMA were

marked by relatively few victories for same-sex marriage advocates and many losses, the tide has shifted dramatically. While at one point, same-sex marriage was legal in only a single state (Massachusetts) and expressly prohibited in forty-four, it is now expressly permitted in thirteen (including California, by virtue of the dismissal of the appeal on Prop 8 in *Perry*) and in the District of Columbia. And another half-dozen states offer a status equivalent to marriage, such as a civil union or a robust form of the domestic partnership, which differ from same-sex marriage in name only. While 13/50 may still seem like a losing ratio, the real story is in how fast the number went from one to thirteen, how many of the thirteen were the product of voluntary voter or legislative enactment, and how many people live in those thirteen states versus how few in the remaining 37. After all, almost twelve percent of the population lives just in California alone. The thirteen states together include roughly thirty percent of the American population.

Moreover, public opinion has shifted dramatically in favor of same-sex marriage. More than half of Americans now support marriage equality for same-sex couples, and support among younger adults is incredibly strong. President Obama announced his support for gay marriage before winning re-election in November 2012, and still won. Opponents of same-sex marriage lost all four state voter referendums that dealt with the issue in the most recent election. (I explain the particular referendums and results [here \(http://verdict.justia.com/2012/11/13/historic-first\)](http://verdict.justia.com/2012/11/13/historic-first).)

There will continue to be controversy about same-sex marriage, but the shifts at this point will all be in favor of same-sex marriage. And at some point, the Supreme Court will surely weigh in again and corral the stragglers, as it did in *Loving v. Virginia* (<http://supreme.justia.com/cases/federal/us/388/1/case.html>) in 1967 for the anti-miscegenation holdouts.

### Challenges to DOMA's Section Three

DOMA does two things. Section Two of the Act purports to give states the right to refuse recognition to same-sex marriages that have been celebrated in other states. This provision has never been invoked or challenged, in part because it grants a power that states have long possessed anyway. Interstate marriage recognition statutes are rooted in comity, rather than in the constitutional mandate of full faith and credit. Unless the Supreme Court rules on the merits that it is unconstitutional for a state to ban same-sex marriage (which it did not do in *Perry*), states have the power to refuse recognition to same-sex marriages from sister states.

Section Three is where the action is, and is the part of DOMA challenged in *Windsor*. It provides that, for any federal-law purpose, the word “marriage” means only a legal union between one man and one woman, and a “spouse” refers only to someone of the opposite sex. This provision has created chaos: Couples who were legally married in their home states were nevertheless treated as single by the federal government for purposes ranging from immigration, to taxes, to Social Security. Accordingly, Section Three has been repeatedly challenged in court. (As the *Windsor* opinion notes, the definition of marriage is relevant to over 1000 federal laws.) In the past two years, four federal courts ruled that the federal-law provision of DOMA is unconstitutional. Litigation in each of these cases was complicated by the decision of the Obama Administration ([declared \(http://www.justice.gov/opa/pr/2011/February/11-ag-222.html\)](http://www.justice.gov/opa/pr/2011/February/11-ag-222.html) in the “Holder Memo,” in February 2011) to cease defending Section Three in litigation because it believed the provision to be unconstitutional. The Bipartisan Legal Advisory Group of the United States House of Representatives (BLAG) took up the mantle instead and defended DOMA in court, including in the *Windsor* case just decided by the Supreme Court. But meanwhile, the Executive Branch has continued to enforce Section Three.

### *United States v. Windsor*: The Perfect Test for DOMA

*Windsor* illustrates a typical federal-state law conflict. In that case, the widow of a same-sex spouse, who had been married in Canada, sought (and won) a refund of estate taxes that would not have been owed had the federal government given effect to the couple's same-sex marriage. (Transfers to a legal spouse at death are exempted from the estate tax.) The IRS denied *Windsor*'s request for a refund on the grounds that she was not a “surviving spouse” for estate tax purposes. At the time, New York did not allow for the celebration of valid same-sex marriages, but it did give effect to those that were validly celebrated elsewhere. Subsequently, the New York legislature passed a law to legalize same-sex marriage (a development I discuss [here](#)

<http://verdict.justia.com/2011/06/27/same-sex-marriage-is-legal-in-new-york-the-in-state-and-national-ramifications> ).

Edith Windsor challenged the estate tax assessment on the ground that the federal-law provision of DOMA was unconstitutional. A federal district judge ruled in her favor, reasoning that Congress had no legitimate reason for refusing to recognize marriages based solely on the sexual orientation of the parties. She ordered, without a stay of the judgment, that the Internal Revenue Service refund over \$350,000 to the decedent spouse's estate.

The ruling was appealed to the Second Circuit, but before a decision came from that court, both parties petitioned for certiorari before judgment—asking the Supreme Court to take the case immediately. While the petition was pending, the Second Circuit did issue its ruling. It affirmed the trial court's ruling in favor of the plaintiffs, holding that sexual orientation classifications merit heightened scrutiny and that the government did not have sufficiently good reasons for this one.

The question presented by the petitioner to the Supreme Court was this: "Whether Section 3 of DOMA violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State." In its order granting review, the Supreme Court asked the parties to brief and argue not only the question presented, but also the question whether BLAG has standing to defend DOMA in court.

### **The Supreme Court's Ruling in *United States v. Windsor*: The Standing Issue**

The Court first ruled on the standing issue it had asked the parties to brief. Federal courts can only hear a "justiciable controversy." One question was whether the federal government's agreement with Windsor's position—that Section Three of DOMA is unconstitutional—meant there was no such controversy. But the majority in *Windsor* reasoned that there was still a controversy because while the Obama Administration refused to defend its constitutionality in court, its Executive Branch was continuing to enforce Section Three at the agency level. The executive agency in question was the IRS, which was still refusing to give Windsor back her estate taxes despite sharing her view that it should not have collected them in the first place. As Justice Kennedy explained, "Windsor's ongoing claim for funds that the United States refuses to pay thus establishes a controversy sufficient for Article III jurisdiction."

The Court was still concerned that the controversy would not be sharply fought if both sides agreed from the start. But this sort of concern falls in the category of "prudential" limits on standing – ones that allow, but do not force, the Court to decline review. And although the majority wrote that the "prudential grounds do not lack substance," it concluded that the "capable defense of the law by BLAG ensures that these prudential issues do not cloud the merits question, which is one of immediate importance to the Federal Government and to hundreds of thousands of persons." The Court explained that BLAG's "substantial argument" for the constitutionality of Section Three and its "sharp adversarial presentation of the issues satisfies the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree." (A reasonable reader might disagree about how sharply or capably BLAG's brief presented the issues, although defending this provision of DOMA was a tough task.)

### ***United States v. Windsor*: The Ruling on the Merits**

The standing issue was a sideshow. The real question in this case was whether the United States has the constitutional authority to refuse recognition to marriages based solely on the sex or sexual orientation of the parties. The majority said no—it is a violation of equal protection principles and an infringement on state sovereignty for the federal government to take such a position. Justice Kennedy was joined in the opinion by Justices Breyer, Ginsburg, Kagan, and Sotomayor.

Justice Kennedy's opinion reads much like his opinion in *Lawrence v. Texas* (<http://supreme.justia.com/cases/federal/us/539/558/case.html>) (2003), in which the Court ruled 6-3 that state criminal bans on same-sex sexual behavior violate the right to privacy protected in the Due Process Clause of the Fourteenth Amendment. (An analysis of *Lawrence* when it was first decided is available [here](#)

(<http://writ.news.findlaw.com/grossman/20030708.html>.) The majority opinion in that case was sensitive to the developing social norms about gay rights and relationships and nuanced in its analysis of relevant constitutional principles.

Kennedy's analysis of the constitutional claim in *Windsor* begins by noting that "until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage." And the belief that a man and woman are "essential to the very definition" of marriage "became even more urgent, more cherished when challenged." At the same time, however, other people responded to the suggestion of same-sex marriage with "the beginnings of a new perspective, a new insight." In a relatively short period of time, the "limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen in New York and certain other States as an unjust exclusion." The opinion also notes that New York's decision to legalize same-sex marriage in 2011 came after "a statewide deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage" and to "correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood."

Justice Kennedy then launched into a discussion of the traditional regulation of marriage. Although "by history and tradition" marriage has been "treated as being within the authority and realm of the separate states," Congress has the authority to "make determinations that bear on marital rights and privileges" when acting "in the exercise of its own proper authority." Congress thus can, for example, refuse to grant citizenship rights to the non-citizen spouse in a sham marriage (one entered into solely for purposes of procuring immigration rights) even if the marriage would be valid for state-law purposes. Congress can also make its own determinations about marriage, if it chooses to, when doling out Social Security benefits, or impose special protections on spouses under pension plans regulated by ERISA.

What makes DOMA different from these examples—and unconstitutional? Justice Kennedy writes of its "far greater reach," a "directive applicable to over 1,000 federal statutes and the whole realm of federal regulations." Moreover, DOMA is targeted at a single class of persons, a class that a dozen states have sought specifically to protect. But its reach alone does not dictate its validity. The majority opinion notes that marriage has traditionally been the province of the states. State laws must conform to constitutional rights (a principle applied in *Loving*, mentioned above), but within those parameters, states have largely been left to determine the rules regarding entry into, conduct of, and exit from marriage. The federal government, Kennedy notes, "through our history, has deferred to state-law policy decisions with respect to domestic relations." As a general matter, this is certainly true. Whether or not the federal government has the power to define marriage (or other aspects of family status), it has largely chosen not to. The vast majority of federal laws that turn on marital status rely on state definitions, rather than supplying their own. And those state laws vary, although not to the degree that they once did.

It is against this background, Justice Kennedy writes, that "DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each States, though they may vary, subject to constitutional guarantees, from one State to the next." But, as he correctly notes, the background is descriptive, but not necessarily prescriptive. Can the federal government choose to act against this longstanding tradition of deference to the states? The majority did not rule on this issue per se. Kennedy wrote that the Court did not have to decide whether "this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance." Instead, the majority concluded, the problem is in the nature of this particular intrusion.

Quoting *Romer v. Evans* (<http://supreme.justia.com/cases/federal/us/517/620/case.html>), in which the Court struck down a voter referendum in Colorado that had prevented the legislature from passing any law designed to prevent discrimination against gays and lesbians, Kennedy wrote: "Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." In other words, the federal government's departure from the longstanding tradition of deference to state regulation of marriage makes it suspect, but not necessarily invalid. And the fact that the federal government acted for the "opposite purpose" of a state like New York, which acted to protect same-sex relationships, makes it even more suspect.

The states, Kennedy wrote, are better situated to define marriage because the “dynamics of state government” are designed “to allow the formation of consensus respecting the way the members of discrete community treat each other in their daily contact and constant interaction with each other.” And when they define marriage, they are doing more than imposing a “routine classification for purposes of certain statutory benefits.” They are, rather, giving further “protection and dignity” to the bond between two people engaged in an intimate relationships. It was recognition of these personal bonds that gave rise to the Court’s ruling in *Lawrence*, and the shift towards gay rights that the decision triggered.

New York’s legalization of same-sex marriage reflects “both the community’s considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.” Yet DOMA, according to Kennedy’s opinion, “seeks to injure the very class New York seeks to protect. And, by doing so, “it violates basic due process and equal protection principles applicable to the Federal Government.” (Equal protection challenges against state laws are rooted in the Fourteenth Amendment; challenges against federal laws come under the Fifth Amendment, which has been interpreted to protect both due process and equal protection rights.) The Court wrote in *Romer* that the guarantee of equality “must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot justify disparate treatment of that group.” The more unusual a discriminatory law is, the more likely it is the product of animus. DOMA falls squarely into this trap. As Kennedy wrote, “DOMA’s unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class.” With DOMA, the “avowed purpose and practical effect” are to “impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.” The very title of the act—the *Defense of Marriage Act*—shows the federal government’s desire to exclude, and clear language in the legislative history shows Congress’ moral disapproval of homosexuality.

Kennedy concludes his opinion with a long and pointed critique of DOMA and its impact on same-sex married couples. The law diminishes “the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect.” It “undermines both the public and private significance of state-sanctioned marriages” by telling couples “and all the world” that “their otherwise valid marriages are unworthy of federal recognition.” It imposes upon them a “second-tier marriage.” It “humiliates tens of thousands of children now being raised by same-sex couples” and “makes it even more difficult for the children to understand the integrity and closeness of their own family its concord with other families in their community and in their daily lives.” Same-sex couples “have their lives burdened . . . in visible and public ways.” The law touches “many aspects of married and family life, from the mundane to the profound.” And it does all this under the guise of a law whose “principal purpose and necessary effect” are to “demean those persons who are in a lawful same-sex marriage.”

The Court thus holds “that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.” The statute “is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.” Then, in the last sentence, the majority wrote that its “opinion and holding are confined to those lawful marriages,” preempting any argument that *Windsor*, alone, invalidates state bans on same-sex marriage.

Three separate dissents to the opinion were filed by Justices Roberts, Scalia and Alito. Two of these opinions focused primarily on the question of standing. Both Justices Scalia and Roberts argued that the Court lacked jurisdiction to review the lower court decision in *Windsor*. They both also wrote and argued that the law was constitutional on the merits. Justice Roberts wrote that “interests in uniformity and stability amply justified Congress’s decision to retain the definition of marriage that, at that very point, had been adopted by every State in our Nation, and every nation in the world.” Justice Scalia argues that the majority’s decision and reasoning “spring forth from the same diseased root: an exalted conception of the role of this institution in America.” This comment is ironic given Scalia’s joining of the majority opinion in *Shelby County v. Holder* (<http://supreme.justia.com/cases/federal/us/570/12-96/>) earlier this week, in which the Court struck down the core component of the Voting Rights Act as unconstitutional despite the express delegation of authority to Congress under the Fifteenth Amendment. Justice Alito wrote to argue that the Constitution has no opinion about the

validity of same-sex marriage: “It leaves the choice to the people, acting through their elected representatives at both the federal and state levels.”

## Conclusion

The ruling in *Windsor* brings a chaotic and sordid chapter of our national history to an end. Regardless of diverging views about the desirability of same-sex marriage, the administrative chaos and arbitrary unfairness wrought by DOMA had to end. While Congress had considered bills to repeal DOMA, it did not appear close to passing one. The Court has now saved Congress the trouble and, in the course of doing so, has also protected the dignity and equality of couples who have been singled out for disadvantage.



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