

■ *United States v. Windsor*

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Author: Justice Anthony Kennedy, with dissents by Chief Justice John Roberts and Justice Antonin Scalia

Genre: court opinion

Summary Overview

The Supreme Court's ruling in *United States v. Windsor* was widely welcomed by liberals, civil rights organizations, and LGBTQ+ advocates. The case challenged the Defense of Marriage Act (DOMA), which federally defined marriage as between one man and one woman, thereby denying federal recognition to same-sex marriages. The Court agreed with the claimants that the law, at least in part, was not supportable constitutionally.

The legal issue of same-sex marriage has come before various judicial bodies at least since the time that *Baker v. Nelson* (blocking same-sex marriage) was decided by the Minnesota Supreme Court in 1971. However, in 1993 the Supreme Court of Hawaii ruled to allow same-sex marriage (in *Baehr v. Lewin*). The various cases and their differing opinions reflect the fact that, historically, the institution of marriage has fallen under state jurisdiction. With the legalization of same-sex marriage in Hawaii, the other forty-nine states, as well as the federal government, began to be faced with the issue of how to treat marriages that are valid in one jurisdiction but not in another. At the federal level in 1996, a Republican-controlled Congress passed the Defense of Marriage Act (DOMA), which stated that same-sex marriages would not be recognized as valid for any federal program or regulation. In 2010, Edith Windsor of New York filed a suit against the U.S. government to receive spousal tax benefits from her deceased same-sex spouse's estate. This was the case for which Justice Anthony Kennedy wrote the majority opinion in *United States v. Windsor*, which essentially declared DOMA to be unconstitutional, thus requiring the federal government to recognize any marriage that has been performed in accordance with state laws.

Defining Moment

Public acceptance of same-sex marriage, and the resulting pressure for its legalization, had been increasing ever since the early 1990s. When DOMA was adopted in 1996, conservative and moderate members of Congress were seeking to deal with what had been perceived as possible legal problems emerging from the state court decision in Hawaii. The Constitution essentially states, in Article IV, Section 1, that states must accept legal transactions sanctioned by another state. As regards marriage, if a couple is married in a ceremony performed in one state, they can expect not to be required to hold another ceremony if they happen to move to another state. Thus, if a same-sex marriage has been performed in Hawaii, the normal assumption is that that marriage would be accepted as valid by the other forty-nine states, as well as by the federal government. However, the second part of Article IV, Section 1

of the Constitution gives power to Congress to "prescribe the manner" in which legal documents are recognized, and the "effect thereof." Thus, those hoping to block legal recognition of same-sex marriages used this section, along with others, to support the passage of DOMA and mandate that no federal agency accept same-sex marriage as valid as regards federal laws and programs.

When the Supreme Court announced that it was accepting the *Windsor* case, many observers thought that the Court would be likely to uphold DOMA's constitutionality. However, Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan all agreed that DOMA created a situation in which legally performed marriages were treated differently by different authorities depending on the genders of the partners in the marriage. In a number of pivotal cases over the years, Justice Anthony Kennedy had shown himself to

be a key “swing vote” in creating a five-vote majority. That seems to have been the situation in *U.S. v. Windsor*, as Kennedy sided with the more liberal members of the Court and, moreover, was selected to write the majority opinion in the case. The outcome, overturning DOMA, was greeted with great enthusiasm by most liberals, who generally support the right to same-sex marriage, and yet was so upsetting to conservatives as to see the resurrection among them of the idea of passing a constitutional amendment defining marriage as being only between a man and a woman. It was duly noted by Justice Antonin Scalia, in his dissenting opinion, that the *Windsor* ruling would likely lead to additional court cases by those seeking to expand the right to same-sex marriage to more states. And Justice Scalia was apparently right, as the landmark case that ultimately legalized same-sex marriage throughout the land was filed less than four weeks after the *Windsor* ruling.

Author Biography

The 2012 Term of the Supreme Court had members who had been appointed by Presidents Reagan (Scalia, 1986; Kennedy, 1988), George H.W. Bush

(Thomas, 1991), Clinton (Ginsburg, 1993; Breyer, 1994), George W. Bush (Roberts, 2005; Alito, 2006), and Obama (Sotomayor, 2009; Kagan, 2010). While these justices represent a wide range of conservative and liberal judicial/political philosophies, their training prior to being appointed to the Court is much less diverse. Of the nine justices, five are graduates of Harvard Law School, three are graduates of Yale Law School, and one is a graduate of Columbia Law School. The *Windsor* case came during the eighth term of the Roberts Court, which generally was and remains a conservative Court, yet one with some startlingly surprising rulings, as in the case of *Windsor*.

Associate Justice Anthony M. Kennedy (b. 1936) is from California, having practiced law there as well as serving as a law professor. Prior to his appointment to the Supreme Court, he served as a judge on the Court of Appeals. Chief Justice John Roberts, Jr. (b. 1955) is from New York and previously served as counsel in numerous governmental positions, prior to becoming an appeals court judge in 2003. Associate Justice Antonin Scalia (b. 1936), a native of New Jersey, was a law professor and counsel in government agencies prior to becoming a court of appeals judge in 1982.



Historical Document

United States v. Windsor

Justice Kennedy delivered the opinion of the Court.

Two women then resident in New York were married in a lawful ceremony in Ontario, Canada, in 2007. Edith Windsor and Thea Spyer returned to their home in New York City. When Spyer died in 2009, she left her entire estate to Windsor. Windsor sought to claim the estate tax exemption for surviving spouses. She was barred from doing so, however, by a federal law, the Defense of Marriage Act, which excludes a same-sex partner from the definition of “spouse” as that term is used in federal statutes. Windsor paid the taxes but filed suit to challenge the constitutionality of this provision. The United States District Court and the Court of Appeals ruled that this portion of the statute is unconstitutional and ordered the United States to pay Windsor a refund. This Court granted certiorari and now affirms the judgment in Windsor’s favor.

I

In 1996, as some States were beginning to consider the concept of same-sex marriage, and before any State had acted to permit it, Congress enacted the Defense of Marriage Act (DOMA). DOMA contains two operative sections: Section 2, which has not been challenged here, allows States to refuse to recognize same-sex marriages performed under the laws of other States. Section 3 is at issue here. It amends the Dictionary Act in Title 1, §7, of the United States Code to provide a federal definition of “marriage” and “spouse.” Section 3 of DOMA provides as follows: “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.”

The definitional provision does not by its terms forbid States from enacting laws permitting same-sex marriages or civil unions or providing state benefits to residents in that status. The enactment’s comprehensive definition of marriage for purposes of all federal statutes and other regulations or directives covered by its terms, however, does control over 1,000 federal laws in which marital or spousal status is addressed as a matter of federal law.

Edith Windsor and Thea Spyer met in New York City in 1963 and began a long-term relationship. Windsor and Spyer registered as domestic partners

when New York City gave that right to same-sex couples in 1993. Concerned about Spyer's health, the couple made the 2007 trip to Canada for their marriage, but they continued to reside in New York City. The State of New York deems their Ontario marriage to be a valid one.

Spyer died in February 2009 and left her entire estate to Windsor. Because DOMA denies federal recognition to same-sex spouses, Windsor did not qualify for the marital exemption from the federal estate tax, which excludes from taxation "any interest in property which passes or has passed from the decedent to his surviving spouse." Windsor paid \$363,053 in estate taxes and sought a refund. The Internal Revenue Service denied the refund, concluding that, under DOMA, Windsor was not a "surviving spouse." Windsor commenced this refund suit in the United States District Court for the Southern District of New York. She contended that DOMA violates the guarantee of equal protection, as applied to the Federal Government through the Fifth Amendment.

While the tax refund suit was pending, the Attorney General of the United States notified the Speaker of the House of Representatives that the Department of Justice would no longer defend the constitutionality of DOMA's §3. Noting that "the Department has previously defended DOMA against... challenges involving legally married same-sex couples," the Attorney General informed Congress that "the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny."

Although "the President... instructed the Department not to defend the statute in Windsor," he also decided "that Section 3 will continue to be enforced by the Executive Branch" and that the United States had an "interest in providing Congress a full and fair opportunity to participate in the litigation of those cases." The stated rationale for this dual-track procedure (determination of unconstitutionality coupled with ongoing enforcement) was to "recogniz[e] the judiciary as the final arbiter of the constitutional claims raised."

In response to the notice from the Attorney General, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives voted to intervene in the litigation to defend the constitutionality of §3 of DOMA. The Department of Justice did not oppose limited intervention by BLAG....

On the merits of the tax refund suit, the District Court ruled against the United States. It held that §3 of DOMA is unconstitutional and ordered the Treasury to refund the tax with interest. Both the Justice Department and BLAG filed notices of appeal, and the Solicitor General filed a petition for certiorari before judgment. Before this Court acted on the petition, the Court of Appeals for the Second Circuit affirmed the District Court's judgment. It applied heightened scrutiny to classifications based on sexual orientation, as

both the Department and Windsor had urged. The United States has not complied with the judgment. Windsor has not received her refund, and the Executive Branch continues to enforce §3 of DOMA.

In granting certiorari on the question of the constitutionality of §3 of DOMA, the Court requested argument on two additional questions: whether the United States' agreement with Windsor's legal position precludes further review and whether BLAG has standing to appeal the case. All parties agree that the Court has jurisdiction to decide this case....

II

It is appropriate to begin by addressing whether either the Government or BLAG, or both of them, were entitled to appeal to the Court of Appeals and later to seek certiorari and appear as parties here....[The Court finds it has jurisdiction to reach the merits.]

III

When at first Windsor and Spyer longed to marry, neither New York nor any other State granted them that right. After waiting some years, in 2007 they traveled to Ontario to be married there. It seems fair to conclude 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. For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization. That belief, for many who long have held it, became even more urgent, more cherished when challenged. For others, however, came the beginnings of a new perspective, a new insight. Accordingly some States concluded that same-sex marriage ought to be given recognition and validity in the law for those same-sex couples who wish to define themselves by their commitment to each other. 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.

Slowly at first and then in rapid course, the laws of New York came to acknowledge the urgency of this issue for same-sex couples who wanted to affirm their commitment to one another before their children, their family, their friends, and their community. And so New York recognized same-sex marriages performed elsewhere; and then it later amended its own marriage laws to permit same-sex marriage. New York, in common with, as of this writing, 11 other States and the District of Columbia, decided that same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons....

Against this background of lawful same-sex marriage in some States, the design, purpose, and effect of DOMA should be considered as the beginning point in deciding whether it is valid under the Constitution. By history and tradition the definition and regulation of marriage, as will be discussed in more detail, has been treated as being within the authority and realm of the separate States....

Though these discrete examples establish the constitutionality of limited federal laws that regulate the meaning of marriage in order to further federal policy, DOMA has a far greater reach; for it enacts a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations.... In order to assess the validity of that intervention it is necessary to discuss the extent of the state power and authority over marriage as a matter of history and tradition. State laws defining and regulating marriage, of course, must respect the constitutional rights of persons, see, e.g., *Loving v. Virginia* (1967); but, subject to those guarantees, “regulation of domestic relations” is “an area that has long been regarded as a virtually exclusive province of the States.”

Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations....

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.” Marriage laws vary in some respects from State to State. For example, the required minimum age is 16 in Vermont, but only 13 in New Hampshire. Likewise the permissible degree of consanguinity can vary (most States permit first cousins to marry, but a handful—such as Iowa and Washington—prohibit the practice). But these rules are in every event consistent within each State.

Against this background DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next. Despite these considerations, it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance. The State’s power in defining the marital relation is of central relevance in this case quite apart from principles of federalism. Here the State’s decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community. DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage.

Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.

The Federal Government uses this state-defined class for the opposite purpose—to impose restrictions and disabilities. That result requires this Court now to address whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment. What the State of New York treats as alike the federal law deems unlike by a law designed to injure the same class the State seeks to protect.

In acting first to recognize and then to allow same-sex marriages, New York was responding “to the initiative of those who [sought] a voice in shaping the destiny of their own times.” These actions were without doubt a proper exercise of its sovereign authority within our federal system, all in the way that the Framers of the Constitution intended. The dynamics of state government in the federal system are to allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other.

The States’ interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits. Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form “but one element in a personal bond that is more enduring.” *Lawrence v. Texas* (2003). By its recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages, New York sought to give further protection and dignity to that bond. For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages. It 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.

IV

DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government. The Constitution’s 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.. In determining whether a law is motivated by an improper animus or purpose, discriminations of an unusual character especially require careful consideration. DOMA cannot survive under these principles. The responsibility of the

States for the regulation of domestic relations is an important indicator of the substantial societal impact the State's classifications have in the daily lives and customs of its people. 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 the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question 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 history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence. The House Report announced its conclusion that "it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage.... H. R. 3396 is appropriately entitled the 'Defense of Marriage Act.' The effort to redefine 'marriage' to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage." The House concluded that DOMA expresses "both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." The stated purpose of the law was to promote an "interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws." *Ibid.* Were there any doubt of this far-reaching purpose, the title of the Act confirms it: *The Defense of Marriage*.

The arguments put forward by BLAG are just as candid about the congressional purpose to influence or interfere with state sovereign choices about who may be married. As the title and dynamics of the bill indicate, its purpose is to discourage enactment of state same-sex marriage laws and to restrict the freedom and choice of couples married under those laws if they are enacted. The congressional goal was "to put a thumb on the scales and influence a state's decision as to how to shape its own marriage laws." The Act's demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law. This raises a most serious question under the Constitution's Fifth Amendment.

DOMA's operation in practice confirms this purpose. When New York adopted a law to permit same-sex marriage, it sought to eliminate inequality; but DOMA frustrates that objective through a system-wide enactment with no identified connection to any particular area of federal law. DOMA writes inequality into the entire United States Code. The particular case at hand concerns the estate tax, but DOMA is more than a simple determination of what should or should not be allowed as an estate tax refund. Among the over 1,000 statutes and numerous federal regulations that DOMA controls are

laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits.

DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and responsibilities. By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect. By this dynamic DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. 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, and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways. By its great reach, DOMA touches many aspects of married and family life, from the mundane to the profound. It prevents same-sex married couples from obtaining government healthcare benefits they would otherwise receive. It deprives them of the Bankruptcy Code's special protections for domestic-support obligations. It forces them to follow a complicated procedure to file their state and federal taxes jointly.

For certain married couples, DOMA's unequal effects are even more serious. The federal penal code makes it a crime to "assault, kidnap, or murder... a member of the immediate family" of "a United States official, a United States judge, or a Federal law enforcement officer," with the intent to influence or retaliate against that official. Although a "spouse" qualifies as a member of the officer's "immediate family," DOMA makes this protection inapplicable to same-sex spouses.

DOMA also brings financial harm to children of same-sex couples. It raises the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses. And it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security....

The power the Constitution grants it also restrains. 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.

What has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.

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. While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.

The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment. This opinion and its holding are confined to those lawful marriages.

Chief Justice Roberts, dissenting.

I agree with Justice Scalia that this Court lacks jurisdiction to review the decisions of the courts below. On the merits of the constitutional dispute the Court decides to decide, I also agree with Justice Scalia that Congress acted constitutionally in passing the Defense of Marriage Act (DOMA). Interests in uniformity and stability amply justified Congress's decision to retain the definition of marriage that, at that point, had been adopted by every State in our Nation, and every nation in the world....

Justice Scalia, with whom Justice Thomas joins, and with whom The Chief Justice joins as to Part I, dissenting.

This case is about power in several respects. It is about the power of our people to govern themselves, and the power of this Court to pronounce the law. Today's opinion aggrandizes the latter, with the predictable consequence of diminishing the former. We have no power to decide this case. And even if we did, we have no power under the Constitution to invalidate this democratically adopted legislation. The Court's errors on both points spring forth from the same diseased root: an exalted conception of the role of this institution in America....

The Court is eager—hungry—to tell everyone its view of the legal question at the heart of this case. Standing in the way is an obstacle, a technicality of little interest to anyone but the people of *We the People*, who created it as a barrier against judges' intrusion into their lives. They gave judges, in Article III, only the “judicial Power,” a power to decide not abstract questions but real, concrete “Cases” and “Controversies.” Yet the plaintiff and the Government agree entirely on what should happen in this lawsuit. They agree that the court below got it right; and they agreed in the court below that the court below that one got it right as well. What, then, are we doing here?....

For the reasons above, I think that this Court has, and the Court of Appeals had, no power to decide this suit. We should vacate the decision below and remand to the Court of Appeals for the Second Circuit, with instructions to dismiss the appeal. Given that the majority has volunteered its view of the merits, however, I proceed to discuss that as well.

There are many remarkable things about the majority's merits holding. The first is how rootless and shifting its justifications are. For example, the opinion starts with seven full pages about the traditional power of States to define domestic relations—initially fooling many readers, I am sure, into thinking that this is a federalism opinion. But we are eventually told that “it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution,” and that “[t]he State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism” because “the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import.” But no one questions the power of the States to define marriage (with the concomitant conferral of dignity and status), so what is the point of devoting seven pages to describing how long and well established that power is? Even after the opinion has formally disclaimed reliance upon principles of federalism, mentions of “the usual tradition of recognizing and accepting state definitions of marriage” continue. What to make of this? The opinion never explains. My guess is that the majority, while reluctant to suggest that defining the meaning of “marriage” in federal statutes is unsupported by any of the Federal Government's enumerated powers, nonetheless needs some rhetorical basis to support its pretense that today's prohibition of laws excluding same-sex marriage is confined to the Federal Government (leaving the second, state-law shoe to be dropped later, maybe next Term). But I am only guessing....

Few public controversies touch an institution so central to the lives of so many, and few inspire such attendant passion by good people on all sides. Few public controversies will ever demonstrate so vividly the beauty of what our Framers gave us, a gift the Court pawns today to buy its stolen moment in the spotlight: a system of government that permits us to rule ourselves. Since DOMA's passage, citizens on all sides of the question have seen victories and they have seen defeats. There have been plebiscites, legislation, persuasion, and loud voices—in other words, democracy. Victories in one place for some are offset by victories in other places for others...

In the majority's telling, this story is black-and-white: Hate your neighbor or come along with us. The truth is more complicated. It is hard to admit that one's political opponents are not monsters, especially in a struggle like this one, and the challenge in the end proves more than today's Court can handle. Too bad. A reminder that disagreement over something so fundamental as marriage can still be politically legitimate would have been a fit task for what in earlier times was called the judicial temperament. We might have covered ourselves with honor today, by promising all sides of this debate that it was theirs to settle and that we would respect their resolution. We might have let the People decide.

But that the majority will not do. Some will rejoice in today's decision, and some will despair at it; that is the nature of a controversy that matters so much to so many. But the Court has cheated both sides, robbing the winners of an honest victory, and the losers of the peace that comes from a fair defeat. We owed both of them better. I dissent.



Glossary

animus: a spirit of dislike; animosity

certiorari: from Latin “to be more fully informed,” a term indicating that an appeals court has accepted a case for review

enumerated powers: government powers as listed in the Constitution

Document Analysis

The ruling, here, that DOMA, Section 3, is unconstitutional represents a major victory for the LGBTQ+ rights movement. It represents the first time that the U.S. Supreme Court ruled in favor recognizing same-sex marriages. Because only Section 3 is contested (mandating that no federal agency would grant spousal privileges to a same-sex spouse), the *Windsor* ruling does not force individual states to grant marriage licenses to same-sex couples, or to recognize a couple's marriage certificate from another state. Rather, the ruling narrowly addresses the question of whether the federal government must recognize marriages that are considered legal under a state's laws. Kennedy's majority opinion notes that, since marriages are traditionally handled by states, the federal government has no business trying to define marriage in such a way as to undermine a state's laws and create a class of married persons who are in effect discriminated against as regards the status of their marriage. Since the marriage of Edith Windsor and Thea Spyer had been recognized by the state of New York (Spyer's death created the legal situation that initiated the case), it, and similar marriages, argues Kennedy, should be recognized by the federal government. Kennedy observes that "DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment."

Kennedy presents not only a description of the situation with respect to Edith Windsor, but also a short history of her marriage, including how the state of New York viewed it. While President Clinton, he notes, may have told the U.S. Justice Department not to defend the law, the president also said that the law should be enforced pending the Court's ruling. Thus, while the dissenting justices in *Windsor* state that the president's lack of defense makes the case moot (since the law has no teeth, as it were), Kennedy asserts that because the law is being enforced the case is legitimate. Affirming the fact that not all states have identical marriage laws, Kennedy notes that the federal government accepts all heterosexual marriages that have been recognized by the states. He accepts the idea that the federal courts can overrule state marriage laws (as when it overturned state laws denying

couples of different races the right to marry, in *Loving v. Virginia*). However, he believes this is only to end discrimination, not to support it. As DOMA makes same-sex marriage a "second-tier marriage," Kennedy believes that this result is contrary to the intentions of the state of New York and to the meaning of the Fifth Amendment.

In his dissent, Chief Justice Roberts objects by arguing that the Court has no jurisdiction; therefore, it should not rule in the case. In his own dissent, Justice Scalia also points to a lack of jurisdiction, stating that the executive branch has admitted that it no longer supports the enforcement of DOMA. However, Scalia expands his dissent by discussing the role that the judiciary should play in the American system of government, which he believes should be minimal.

Essential Themes

When the judicial doctrine of "separate but equal" was overturned in the 1950s, it was replaced by a principle of inclusiveness and fairness to all. The ruling in *U.S. v. Windsor* expands on this principle and applies it to same-sex marriage and, one might argue, to gay rights generally. Individual liberty as guaranteed under the Fifth Amendment, and as supported under the Fourteenth Amendment, must not, in Kennedy's view, be limited—unless there is a clear reason for such a restriction. Any arguments about how the institution of marriage would be harmed by the overturning of DOMA, or about how same-sex marriages are, or should be, treated differently under the law, are seen as invalid by the majority of justices in this case. Kennedy states that marriage discrimination aimed at same-sex couples, and the harm that can result from such discrimination, offers no basis for federal support; in fact, it runs counter to the principle of the equality of all people. For the majority on the Court, the threshold for differentiating between two groups is much higher than it was in the past. Equality, it is argued, should be preserved as applied to marriages as it is applied to other areas of life. Although *Windsor* was not a ruling on same-sex marriage itself, but rather on the constitutionality of DOMA, the case did have the effect of advancing the interests of the LGBTQ+ community.

Kennedy affirmed that there are distinct powers given to state and federal governments in the Constitution. Thus, he did not attempt to create a federal definition of marriage or to impose any undue burdens on the states. Instead, he continued a trend associated with the Roberts Court in ruling relatively narrowly on specific points of law. On the other hand, the ruling was not so narrow as to apply only to states that had formally recognized same-sex marriages, or to deal solely with the issue of spousal benefits under the tax code. The fact that the ruling was broad enough to apply nationally and to cover the entirety of Section 3 of DOMA, made the ruling a landmark case for gay rights.

—Donald A. Watt, PhD

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