

## CUNY Law Review Footnote Forum

September 28, 2013

### Recommended citation:

Ruthann Robson, *Case Comment: United States v. Windsor*, 17 CUNY L. REV. F. 12 (2013), <http://www.cunylawreview.org/prof-ruthann-robson-on-u-s-v-windsor/> [<https://perma.cc/NAW3-S6ME>].

---

## CASE COMMENT: UNITED STATES V. WINDSOR

*Ruthann Robson*\*

A landmark. A victory for “gay rights.” An example of judicial activism.

Each of these appellations is an accurate descriptor of the Court’s decision in *United States v. Windsor*, rendered on the last day of the 2012–2013 term. By a bare majority, the Court declared Section 3 of the Congressional Defense of Marriage Act (DOMA) prohibiting federal recognition of same-sex marriages unconstitutional. The Court resolved the threshold issue of whether it had Article III power to hear the case, given the unusual posture of the litigation, in favor of rendering a decision, unlike the outcome in the companion case of *Perry v. Hollingsworth* involving the constitutionality of California’s Proposition 8.<sup>1</sup> The Court’s reasoning included a discussion of Congressional power to pass DOMA, given that marriage and other family matters are generally within the province of the states under federalism as it has developed in the United States. Ultimately, however, the issue was not one of Congressional power. Instead, the

---

\* Professor of Law & University Distinguished Professor, City University of New York School of Law. She is the author of the newly-released book *Dressing Constitutionally* (2013) (excerpt available at <http://www.npr.org/books/titles/209874274/dressing-constitutionally-hierarchy-sexuality-and-democracy-from-our-hairstyles-?tab=excerpt>), and a collection of legal creative writing entitled *Instead*, as well as the books *Sappho Goes to Law School* (1998); *Gay Men, Lesbians, and the Law* (1996); and *Lesbian (Out)Law: Survival Under the Rule of Law* (1992), and the editor of the three volume set, *International Library of Essays in Sexuality & Law* (2011). She is a frequent commentator on constitutional and sexuality issues and the co-editor of the Constitutional Law Prof Blog, <http://lawprofessors.typepad.com/conlaw/>.

<sup>1</sup> See Caitlin Borgmann, *Case Comment: Hollingsworth v. Perry*, CUNY Law Review: Footnote Forum (forthcoming Oct. 2013).

majority concluded that DOMA's Section 3 violated the equal protection component of the Fifth Amendment.

The facts underlying *United States v. Windsor* have been subject to much media attention. Edith Windsor is a sympathetic and charismatic plaintiff, aged 83 at the time of the decision, whose monetarily specific injury consisted of the \$363,053 she paid to the federal government in federal estate taxes because of the non-recognition of her same-sex marriage to her deceased partner, Thea Syper.<sup>2</sup> The couple had been married in Canada in 2007, and their marriage was recognized by their home state of New York when Thea Syper died in 2009, although New York itself did not itself license same-sex marriages until 2011.<sup>3</sup> Thus, except for the operation of DOMA Section 3, Edith Windsor would have been considered a "spouse" under federal law and entitled to the spousal exemption from estate tax.

These clear facts establishing Windsor's standing to invoke the Article III power of the federal courts to hear cases and controversies contrast with the muddled status of the opposing party. Although the defendant in *Windsor v. United States* is nominally the United States government, the Department of Justice ceased defending the constitutionality of Section 3 of DOMA in February 2011. Reversing its previous course of a vigorous defense of DOMA,<sup>4</sup> Attorney General Holder duly notified Congress by letter pursuant to 28 USC 530D that "the President has concluded" that Section 3 of DOMA, as applied to legally married same-sex couples, is unconstitutional.<sup>5</sup> Yet Holder's letter also specifically stated that Section 3 would "continue to be enforced by the Executive Branch," noting the Executive's duty to "take care that the laws be faithfully executed" and recognizing "the judiciary as the final arbiter of the constitutional claims

---

<sup>2</sup> 26 U.S.C. § 2056(a) (excluding from taxation "any interest in property which passes or has passed from the decedent to his surviving spouse").

<sup>3</sup> N.Y. Dom. Rel. Law § 10-a. Note that New York's highest court had previously rejected a challenge to New York's ban of same-sex marriage in *Hernandez v. Robles*, 855 N.E.2d 1, 12 (N.Y. 2006).

<sup>4</sup> See, e.g., Ruthann Robson, *DOJ Defends DOMA*, Constitutional Law Prof Blog (June 12, 2009) <http://lawprofessors.typepad.com/conlaw/2009/06/doj-defends-doma.html>; Ruthann Robson, *Obama DOJ Appeals Decision that DOMA Section 3 is Unconstitutional*, Constitutional Law Prof Blog (Oct. 12, 2010), <http://lawprofessors.typepad.com/conlaw/2010/10/obama-doj-appeals-decision-that-doma-section-3-is-unconstitutional.html>.

<sup>5</sup> See Ruthann Robson, *Obama DOJ: Holder Announces DOMA Will Not be Defended Because it is Unconstitutional*, Constitutional Law Prof Blog (Feb. 23, 2011), <http://lawprofessors.typepad.com/conlaw/2011/02/obama-doj-holder-announces-doma-will-not-be-defended-because-it-is-unconstitutional.html> (summarizing and linking to letter).

raised.”<sup>6</sup> The defense of the constitutionality of the DOMA was taken up by House of Representatives’ Bipartisan Legal Advisory Group (BLAG), who intervened in *Windsor* as well as many other cases, at a cost to taxpayers estimated to be more than three million dollars. BLAG unsuccessfully argued the constitutionality of DOMA’s Section 3 in the district court and in the Second Circuit. When the United States Supreme Court granted certiorari in *Windsor*, the threshold question was whether the Court had power to hear the case given that the United States Solicitor General (who had filed the petition for certiorari before the Second Circuit had issued its decision in *Windsor*) agreed with its “opposing” party and that the statute’s constitutionality was being defended by a nongovernmental party, BLAG. In short: where was the case and controversy among the parties? The Solicitor General for the government agreed with the Second Circuit’s opinion in favor of *Windsor* that BLAG was not an actual party who could meet the classic requirements of Article III standing focusing on injury.

Justice Kennedy, writing for the majority, focused on the fact that the United States government did have a specific economic injury at stake — the \$363,053 it still had not refunded to Edith Windsor. Given this tangible issue, the majority reasoned that the question of standing was less an issue of Article III power than of “prudential problems inherent in the Executive’s unusual position.”<sup>7</sup> But while such problems should not be disregarded, any prudential problems in *Windsor* were more than addressed by “BLAG’s sharp adversarial presentation of the issues” and “capable defense of the law.”<sup>8</sup> Indeed, BLAG, as well as Windsor and the Solicitor General, all agreed that the Court had power to hear the case, a situation which led the Court to appoint an amicus curiae to argue that the Court lacked jurisdiction.<sup>9</sup> Justice Alito, otherwise dissenting, also agreed that the Court had power to hear the case given BLAG’s appearance as a party.<sup>10</sup> For Justices Scalia, Thomas, and Roberts, however, the Court was

---

<sup>6</sup> The letter states: “To that end, the President has instructed Executive agencies to continue to comply with Section 3 of DOMA, consistent with the Executive’s obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law’s constitutionality. This course of action respects the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims raised.”

<sup>7</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2687 (2013).

<sup>8</sup> *Id.* at 2688.

<sup>9</sup> *Id.* at 2684. For my discussion of Professor Vicki Jackson’s brief, see Ruthann Robson, *Daily Read: Vicki Jackson on BLAG’s Lack of Standing in Windsor, the DOMA Case*, Constitutional Law Prof Blog (Jan. 25, 2013), <http://lawprofessors.typepad.com/conlaw/2013/01/daily-read-vicki-jackson-on-blags-lack-of-standing-in-windsor-the-doma-case.html>.

<sup>10</sup> Alito concluded that “in the narrow category of cases in which a court strikes down an Act of Congress and the Executive declines to defend the Act, Congress both has

wrong to hear the case: it was being “hungry,” and hearing the case further “enthroned” the Court above the other branches.<sup>11</sup> This view would command a majority when considering California’s Proposition 8 in *Hollingsworth v. Perry*. But in *Windsor* it was a decided minority, in part because of the constitutional distinctions in the judiciary’s role in the separation of powers context and the federalism context.

Federalism was also essential to the Court’s opinion in *Windsor* in its discussion of the merits. Simply stated: marriage is generally a matter of state law and federal definitions of marriage generally rely upon validity in the state.<sup>12</sup> DOMA changed this usual arrangement by carving out a specific type of marriage in which this usual rule would not apply. For the Court, this then led to the question of whether Congressional departure from the common rule in order to “impose restrictions and disabilities” causing a “resulting injury and indignity” is unconstitutional.<sup>13</sup> The Court concluded that “DOMA seeks to injure the very class New York seeks to protect” and by doing so, the statute “violates basic due process and equal protection principles applicable to the Federal Government” under the Fifth Amendment.<sup>14</sup> The Court’s opinion describes DOMA as relegating same-sex couples to an “unstable position of being in a second-tier marriage” and most often sounds in principles of equality and equal protection.<sup>15</sup> However, Kennedy’s opinion for the Court also frequently refers to dignity and describes the purpose and effect of DOMA as demeaning. The constitutional conjunction of these concepts is specifically addressed by the Court near the end of the opinion:

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. See *Bolling*, 347 U.S., at 499–500, 74 S.Ct. 693; *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217–218, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). 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

---

standing to defend the undefended statute and is a proper party to do so.” *Windsor*, 133 S. Ct. at 2714 (Alito J., dissenting).

<sup>11</sup> Although Chief Justice Roberts wrote separately, he joined Part I of Scalia’s dissenting opinion. *Id.* at 2698 (Scalia J., dissenting).

<sup>12</sup> One exception is immigration law. See Janet Calvo, *U.S. v. Windsor’s Impact on Immigration Law*, CUNY Law Review: Footnote Forum (Sept. 2013), <http://www.cunylawreview.org/?p=812>.

<sup>13</sup> *Windsor*, 133 S. Ct. at 2692.

<sup>14</sup> The Court cites *Bolling v. Sharpe*, for the proposition that the Equal Protection Clause of the Fourteenth Amendment is applicable to the federal government through the Fifth Amendment’s Due Process Clause. *Id.* at 2693 (citing 347 U.S. 497 (1954)).

<sup>15</sup> *Windsor*, 133 S. Ct. at 2694.

Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.<sup>16</sup>

The final paragraph of the Court's opinion then concludes:

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.<sup>17</sup>

Chief Justice Roberts dissented specially to emphasize the majority's limitation to same-sex marriages valid under state law.<sup>18</sup> For Justice Scalia, dissenting, that limitation is disingenuous, with the Court's opinion "leaving the second, state-law shoe to be dropped later, maybe next Term."<sup>19</sup> Indeed, Scalia provides veritable instructions to litigants wishing to apply *Windsor* to state laws limiting same-sex marriage: he takes three passages from the Court's opinion and demonstrates their ease of alteration to apply to state laws, arguing that the similarly "transposable passages" abound. He accuses the Court of indulging in "a lecture on how superior the majority's moral judgment in favor of same-sex marriage is to the Congress's hateful moral judgment against it."<sup>20</sup> He adds: "I promise you this: The only thing that will 'confine' the Court's holding is its sense of what it can get away with."<sup>21</sup> In his dissent, Justice Alito criticizes the Court's doctrinal laxity, but also provides his own discussion of marriage.

---

<sup>16</sup> *Id.* at 2695.

<sup>17</sup> *Id.* at 2695–2696.

<sup>18</sup> *Id.* at 2696 (Roberts J., dissenting) ("The majority goes out of its way to make this explicit in the penultimate sentence of its opinion" by confining its holding to lawful same-sex marriages already recognized by a state).

<sup>19</sup> *Id.* at 2705 (Scalia J., dissenting). Justice Scalia later repeats the shoe-dropping image: "As far as this Court is concerned, no one should be fooled; it is just a matter of listening and waiting for the other shoe." *Id.* at 2710.

<sup>20</sup> *Id.* at 2709.

<sup>21</sup> *Id.*

Justice Alito advances two views of marriage, one he labels the “traditional” (or “conjugal”) view and the other he labels the “consent-based” view. He argues that legislatures, not the Court, should be deciding between these two views given that the Constitution itself “does not codify either of these views” although he quickly adds that it would be difficult to find an American at the time of the adoption of the Constitution who did not “take the traditional view for granted.”<sup>22</sup> Justice Alito also expresses his personal preference for this traditional view, perhaps most vividly in his footnote 7, discussing the district court proceedings not in *Windsor* but in *Hollingsworth v. Perry*, the Proposition 8 litigation.<sup>23</sup>

Thus, by a 5–4 decision, the Court rendered a landmark victory for “gay rights” by declaring the unconstitutionality of DOMA, a statute enacted by Congress. *Windsor*’s landmark status is assured because it marks the first time the Court has decisively entered the fray of same-sex marriage controversies, and this status is even more assured given that it refused to do so in the companion case of *Hollingsworth v. Perry*. As a victory for “gay rights,” *Windsor* builds upon the Court’s opinions in *Romer v. Evans*, decided in 1996, in which the Court held that Colorado’s Amendment 2 banning administrative and local anti-discrimination provisions for sexual minorities violated the Equal Protection Clause, and *Lawrence v. Texas*, decided in 2003, in which the Court reversed *Bowers v. Hardwick*, and held that a statute criminalizing same-sex sodomy violated the Due Process Clause. And *Windsor* meets the classic description of an activist decision, in that the Court “strikes down” a statute enacted through a democratic process.

But *Windsor* is also decidedly predictable. It shows a Court that is deeply divided and dominated by personalities. Justice Kennedy, writing for the Court in *Windsor* — as he did in *Romer* and *Lawrence* and as many predicted he would — fails to provide a rigorous analysis.<sup>24</sup> Read aside the Second Circuit’s opinion in *Windsor*, or the First Circuit’s opinion declaring DOMA unconstitutional, or various district court opinions, or even Eric Holder’s letter describing the conclusion that DOMA was unconstitutional, Kennedy’s opinion for the Court seems as vague and unfocused as the dissenting opinions criticize it for being. Justice Scalia’s dissenting opinion is as vituperative as his dissenting opinions in *Romer* and *Lawrence*, full of colorful language, dire predictions, and sounding more political than

---

<sup>22</sup> *Id.* at 2718–19 (Alito J., dissenting).

<sup>23</sup> *Id.* at 2718, n.7.

<sup>24</sup> See, e.g., Ruthann Robson, *Online Same-Sex Marriage Symposium: Toward a More Perfect Analysis*, SCOTUSblog (September 19, 2012), <http://www.scotusblog.com/2012/09/online-same-sex-marriage-symposium-toward-a-more-perfect-analysis/>.

judicial. Perhaps most disturbing are his accusations that the majority simply aggrandizes power to itself by declaring a democratically enacted law unconstitutional: this critique of judicial activism was seemingly irrelevant when he joined the Court's 5–4 decision rendered the day before *Windsor*, striking down a section of the federal Voting Rights Act.<sup>25</sup> Moreover, absent from Scalia's opinion in *Windsor* is any serious engagement with the federalism question, a notable flaw from a "states' rights" perspective. Further, Justice Alito's dissenting opinion is not balanced by a concurring opinion from Justices Ginsburg, Sotomayor, or Kagan, which might have made the Court seem more fractured, but which could have advanced the intermediate level of scrutiny for sexual orientation classifications adopted by the Second Circuit. Finally, *Windsor* is predictable in this political moment in which "rights" are too often sentimentalized rather than taken seriously as springboards for social justice and in which sexual liberation has been domesticated by marriage equality.<sup>26</sup>

The impact of *Windsor* is clear. The federal government has begun to treat bi-national same-sex couples on the same terms as opposite-sex couples, and federal benefits such as social security are already being altered. As to its effect on state laws, the precedential value of *Windsor* remains to be seen, but there is some indication that Scalia's "shoe" is already dropping. Less than a month after the decision, a federal court used the opinion to support an injunction requiring the recognition of an out-of-state same-sex marriage on a death certificate in Ohio, despite the state's statutory and state constitutional DOMA.<sup>27</sup> However, what is much more murky is whether *Windsor* will herald a new era of sexual freedom, including individual rights for persons not in married couples, and whether concerns of equality and dignity can be extended to reproductive rights, voting rights, prisoners' rights, and other matters of social justice.

\* \* \*

---

<sup>25</sup> See Frank Deale, *The VRA in the Wake of Shelby County*, CUNY Law Review: Footnote Forum (Aug. 15, 2013), <http://www.cunylawreview.org/?p=696>.

<sup>26</sup> For further elaboration of this argument, see Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 Temp. L. Rev. 709 (2002), available at [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1885031](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1885031).

<sup>27</sup> See Ruthann Robson, *Ohio Federal Judge Enjoins State-DOMA: More Aftermath of Windsor*, Constitutional Law Prof Blog (July 23, 2013), <http://lawprofessors.typepad.com/conlaw/2013/07/ohio-federal-judge-enjoins-state-doma-.html>.