ISSUE ANALYSIS

Understanding *Windsor*: What the Supreme Court Ruling on the Defense of Marriage Act Did—and Did Not—Say

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BACKGROUND:

Reason for the Law

In 1993, a court in Hawaii issued a preliminary ruling that suggested that state might become the first to order that civil marriage licenses be issued to same-sex couples. *Baehr v. Lewin*, 74 Haw. 530, 852 P. 2d 44 (1993). Since marriages in one state had usually been recognized as legal by all states and by the federal government, this raised concern that a redefinition of marriage in one state might effectively impose this radical change on all fifty states and the federal government.

The Defense of Marriage Act (DOMA)

In response, Congress in 1996 passed the federal Defense of Marriage Act (DOMA) by overwhelming bipartisan majorities in both houses of Congress, and President Bill Clinton signed it into law.[1] DOMA had two substantive provisions: Section 2 provided that states would not be required to recognize same-sex "marriages" from other states, and Section 3 provided that for all purposes under *federal* law, marriage would be defined only as the union of one man and one woman.

The Case: United States v. Windsor

The 2013 Supreme Court case of *United States v. Windsor* involved two women, New York residents Edith Windsor and Thea Spyer. Windsor and Spyer had obtained a same-sex "marriage" in Canada and returned home to New York. Although New York did not yet issue marriage licenses to same-sex couples,[2] the state began recognizing such "marriages" from other jurisdictions in 2008. When Spyer died in 2009, she left her estate to Windsor, who then sought a spousal exemption from the federal estate tax. Because of DOMA, the exemption was denied. Windsor then challenged Section 3 of DOMA as unconstitutional. *United States v. Windsor*, 133 S. Ct. 2675, 2682-84 (2013).

Obama Administration Position

President Obama had always opposed the Defense of Marriage Act and supported its repeal by Congress. Nevertheless, in the first two years of his administration the Justice Department had defended its *constitutionality* in court. However, in February of 2011 President Obama and Attorney General Eric Holder reversed position, announcing that they believed the law to be unconstitutional and would no longer defend it. In response, the Bipartisan Legal Advisory

Group (BLAG) of the House of Representatives (consisting of the top leadership of the House, with Republicans in the majority) voted to step in and defend DOMA.[3]

MAJORITY OPINION:

In a 5-4 decision, with the majority opinion authored by Justice Anthony Kennedy, the Supreme Court held that Section 3 of DOMA was unconstitutional.

Federalism
Although Chief Justice Roberts dissented from the majority opinion, he summarized its "dominant theme:"

> The dominant theme of the majority opinion is that the Federal Government's intrusion into an area "central to state domestic relations law applicable to its residents and citizens" is sufficiently "unusual" to set off alarm bells. I think the majority goes off course, as I have said, but it is undeniable that its judgment is based on federalism (*Windsor*, 133 S.Ct. at 2697) (Roberts, C.J., dissenting).

Specifically, the Court found DOMA to offend the Constitution because it represented an "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage…" (*Windsor*, 133 S.Ct. at 2693). The Court stated, "By history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States" (*Windsor*, 133 S.Ct. at 2689-90).

"Consistent with this allocation of authority," the Court continued, "the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations" (*Windsor*, 133 S.Ct. at 2691).[4] The Court went on to affirm, "The State's power in defining the marital relation is of central relevance in this case" and emphasized that states possess the "historic and essential authority to define the marital relation" (*Windsor*, 133 S.Ct. at 2692). DOMA, on the other hand, "departs from this history and tradition of reliance on state law to define marriage."

"Due Process and Equal Protection" Claims
Although DOMA's departure from the tradition of federal deference to state marriage definitions was central to the Court's holding in *Windsor,* Justice Kennedy also asserted that the law "violates basic due process and equal protection principles applicable to the federal government" (*Windsor*, 133 S.Ct. at 2693). Its "principal purpose is to impose inequality," he argued, because it "contrives to deprive some couples married under the laws of their State [that is, same-sex ones], but not other couples [i.e., opposite-sex ones] of both rights and responsibilities" (*Windsor*, 133 S.Ct. at 2694). The Court even condemned the very motive behind the law, making the startling charge that "the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage" (*Windsor*, 133 S.Ct. at 2695).

DISSENTS:

Chief Justice John Roberts, Justice Antonin Scalia, and Justice Samuel Alito all wrote dissenting opinions.[5]

The Powers of Congress and Congressional Justification for the Law
Justice Alito said, "Assuming that Congress has the power under the Constitution to enact the laws affected by [Section 3 of DOMA], Congress has the power to define the category of persons to whom those laws apply" (*Windsor*, 133 S.Ct. at 2720).

Chief Justice Roberts stated, "Interests in uniformity and stability amply justified the 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" (*Windsor*, 133 S.Ct. at 2696).

Justice Scalia noted that "there are many perfectly valid—indeed, downright boring—justifying rationales for this legislation. Their existence ought to be the end of this case" However, he pointed out, the majority opinion "makes only a passing mention of the 'arguments put forward' by the Act's defenders, and does not even trouble to paraphrase or describe them" (*Windsor*, 133 S.Ct. at 2707).

The Attack on the Law's Motive
Dissenting justices criticized the majority for its attack upon the motives behind the law. Chief Justice Roberts said that the facts are "hardly enough to support a conclusion that the 'principal purpose' of the 342 Representatives and 85 Senators who voted for it, and the President [Bill Clinton] who signed it, was a bare desire to harm" (*Windsor*, 133 S.Ct. at 2696).

Justice Scalia likewise warned, "Laying such a charge against [Congress and the President] should require the most extraordinary evidence" (*Windsor*, 133 S.Ct. at 2707), and explained that

> to defend traditional marriage is not to condemn, demean, or humiliate those who would prefer other arrangements, any more than to defend the Constitution of the United States is to condemn, demean, or humiliate other constitutions (*Windsor*, 133 S.Ct. at 2708).

"Due Process" and "Equal Protection" Arguments
Justice Scalia also decried "how rootless and shifting" the majority's constitutional justifications for its ruling were (*Windsor*, 133 S.Ct. at 2705). Although ostensibly based upon "due process and equal protection principles," the majority never applied the type of analysis that is customary for *either* due process or equal protection cases.

For example, Scalia noted that the majority "does not argue that same-sex marriage is 'deeply rooted in the Nation's history and tradition,'" although that is one of the key criteria for identifying a "liberty protected by the [due process clause of the] Fifth Amendment." In the end, Justice Scalia lamented, the majority's legal arguments amounted to little more than "nonspecific hand-waving" (*Windsor*, 133 S.Ct. at 2707).

IMPLICATIONS OF *WINDSOR*:

The Court was clear in saying that the federal government may not adopt a blanket policy, like that in Section 3 of DOMA, which refuses recognition to *any* same-sex couples as "married." However, it left two key related questions unanswered:

1) Exactly *which* same-sex couples should the federal government now recognize as "married"?

The *Windsor* case involved a same-sex couple who "were married in a lawful ceremony," then "continued to reside" in a state which "deems their . . . marriage to be a valid one" (*Windsor*, 133 S.Ct. at 2682-83). Therefore, the Court's holding is *only* binding in situations where *all three* of those conditions are present—that is, not only a "lawful ceremony," but *also* continued residence in a *state* which treats the couple as married.

"State of Celebration" or "State of Domicile"?

In his dissent, Justice Scalia pointed to the possibility of other scenarios for which the Court majority gave no clear guidance:

> Imagine a pair of women who marry in Albany and then move to Alabama, which does not "recognize as valid any marriage of parties of the same sex." When the couple files their next federal tax return, may it be a joint one? Which State's law controls, for federal law purposes: their State of celebration (which recognizes the marriage) or their State of domicile (which does not)? (*Windsor*, 133 S.Ct. at 2708)

Executive agencies within the Obama administration have already given their answer to this question. Most have adopted the more expansive, "State of celebration" rule, which recognizes same-sex couples as "married" if they entered into a lawful "marriage" anywhere—even if they remain *un*married according to the laws of their state of legal residence (or "domicile").

A strong argument can be made, however, that this broad interpretation actually *conflicts* with some of the key principles articulated in the *Windsor* opinion, and that a "State of domicile" rule would be more compatible with it. The Court even cited the case of *Williams v. North Carolina*, which stated, "Each state as a sovereign has a rightful and legitimate concern in the marital status of persons *domiciled* [emphasis added] within its borders" (*Windsor*, 133 S.Ct. at 2691). Under the logic of *Windsor,* the federal government's decision to ignore *any* state's determination of the marital status "of persons domiciled within its borders" would constitute "interference with . . . the States in the exercise of their sovereign power" (*Windsor*, 133 S.Ct. at 2693).

The Court condemned DOMA for "creating two contradictory marriage regimes within the same State" (*Windsor*, 133 S.Ct. at 2694); yet, as Justice Scalia pointed out, a "State of celebration" rule would have the same effect. Furthermore, the *Windsor* Court condemned DOMA for seeking "to influence or interfere with state sovereign choices about who may be married" and "to put a thumb on the scales and influence a state's decision as to how to shape its own marriage laws" (*Windsor*, 133 S.Ct. at 2693). Yet the Obama administration commits the same offense by treating some couples as "married" who are not married in the eyes of the state where they live.

The State Marriage Defense Act
Legislation has now been introduced in both houses of Congress which would correct this erroneous application of the *Windsor* decision. The "State Marriage Defense Act," introduced in the House (H.R. 3829) by Rep. Randy Weber (R-TX) and in the Senate (S. 2024) by Senators Ted Cruz (R-TX) and Mike Lee (R-UT), would mandate use of a "State of domicile rule" in determining marital status for purposes of federal law, by stating that the federal government will not recognize any person as "married" if that person's state of domicile does not also recognize them as married.

Enactment of this bill would ensure that the federal government continues to respect the "historic and essential authority" of states "to define the marital relation" (*Windsor*, 133 S.Ct. at 2692)—not only in those states which have *re*defined marriage to include same-sex unions, but also in the majority of states which retain the historic one-man-one-woman definition.

2) Must individual states now recognize or perform civil "marriages" of same-sex couples?

Since *Windsor* was decided in June of 2013, several federal district court judges have attempted to use it as precedent for rulings striking down *state* definitions of marriage as the union of one man and one woman. However, this clearly goes beyond—and in some ways contradicts—anything required by either the holding or the reasoning in *Windsor.*

The Power of States
The Court majority stated, "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 interaction and constant interaction with each other" (*Windsor*, 133 S.Ct. at 2692). The "formation of consensus" that only the union of a man and a woman should be recognized as "marriage" is precisely what the "discrete communit[ies]" within a majority of states have done by passing laws or amending their state constitutions to that effect.

Windsor*'s Limited Scope*
As Chief Justice Roberts explained in his dissent:

> The Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States, in the exercise of their "historic and essential authority to define the marital relation," may continue to utilize the traditional definition of marriage.
>
> The majority goes out of its way to make this explicit in the penultimate sentence of its opinion. It states that "[t]his opinion and its holding are confined to those lawful marriages,"—referring to same-sex marriages that a State has already recognized . . . . (*Windsor*, 133 S.Ct. at 2696, citation omitted).

Interstate Recognition of Same-Sex "Marriages"
Also not at issue was whether states should be compelled to recognize same-sex "marriages" from other states. The *Windsor* majority noted, "Section 2 [of DOMA], which has not been challenged here, allows States to refuse to recognize same-sex marriages performed under the

laws of other States" (*Windsor*, 133 S.Ct. at 2682-83). Not only is Section 2 still in effect, but it is consistent with the federalism principles set forth in *Windsor*. *Windsor* recognized the sovereignty of states to regulate marriage and domestic relations for the people in their state. Section 2 of DOMA prevents other States from imposing a marriage definition within a state that conflicts with that state's public policy.

CONCLUSION

Family Research Council believes that in defining the meaning of the word "marriage" in federal law as the union of one man and one woman, Congress was acting fully in accordance with its constitutional powers. Therefore, we believe that the Supreme Court's decision in *United States v. Windsor* was erroneous.

Furthermore, we do not believe the federal deference to a diversity of state marriage definitions articulated in *Windsor* necessarily represents the ideal national policy on marriage. We believe that the definition of marriage as the union of one man and one woman is so central to this fundamental social institution that it should be uniform across the country. Therefore, we have endorsed a Marriage Protection Amendment to the U.S. Constitution to codify the one-man-one-woman definition nationwide.

However, even according to the current precedent set by *Windsor*, we believe that:

1) The "state of domicile" rule articulated in the State Marriage Defense Act is more consistent with *Windsor* than the "state of celebration" rule being applied by the Obama administration; and

2) Continued deference to state definitions of marriage—in all states, including the majority which still define marriage as the union of one man and one woman—is more consistent with *Windsor* than are court rulings overturning such definitions.

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[1] Hawaii went on to amend its state constitution to reserve to the legislature the right to define marriage.
[2] New York enacted a law redefining marriage to include same-sex couples in 2011.
[3] The failure of the Justice Department to defend the law led to questions about whether the Supreme Court even had jurisdiction to hear the case, but a majority on the Court ruled that it did.
[4] The federal government, however, has always reserved the right not to recognize as legal *every* marriage that may be legal in a state. For example, if the federal government determines that a person has entered into a marriage for the purpose of committing immigration fraud, it will not recognize that "marriage" as legal, even if the state in which it took place *does* recognize it.
[5] Justice Clarence Thomas did not write separately, but joined in portions of both Scalia's and Alito's dissents.