

Henry Forum: “Enemies of Mankind: Religion and Morality in the Supreme Court’s Same-Sex Marriage Jurisprudence”

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I. Introduction

[Written and delivered by co-presenter]

II. Philosophic antecedents of *Windsor*

[Written and delivered by co-presenter]

III. Elucidation of *Windsor*

A. DOMA

As [co-presenter] mentioned, the Supreme Court’s decision in *United States v. Windsor* concerned the constitutionality of the federal Defense of Marriage Act, or DOMA. Congress enacted DOMA in 1996. At that time, no State had yet permitted same-sex marriage. But the possibility that a State would eventually recognize same-sex marriage was foreseeable, and so Congress acted in anticipation.

Section 2 of the Act allowed States to refuse to recognize same-sex marriages performed under the laws of other States. That section was not challenged in the *Windsor* case.

Section 3 of the Act was challenged in *Windsor*. That section created a uniform definition of “marriage” and “spouse” for federal statutes that did not include their own definition. It defined “marriage” as “only a legal union between one man and one

woman as husband and wife” and defined “spouse” as “only . . . a person of the opposite sex who is a husband or wife.” Section 3 did not, however, forbid States from permitting same-sex marriage or civil unions or from extending benefits to same-sex partners.

The reasons for the law were both moral and practical. On a practical level, if some States began recognizing same-sex marriage but others did not—so that a couple that was considered legally married in New York would not be considered legally married if they moved to North Carolina—that would raise numerous choice-of-law problems when it came time to figure out whether the couple was married for purposes of federal law. In addition, a uniform definition would provide stability and preserve the intended effects of prior federal legislation against unforeseen changes in circumstances. DOMA also, however, explicitly stated that its purpose was “protecting the traditional moral teachings reflected in heterosexual-only marriage laws.” The congressional record indicated that DOMA reflected “moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.”

DOMA passed with broad support: it received 342 votes in the House of Representatives, 85 votes in the Senate, and President Clinton signed it into law.

B. Summary of the Case

The *Windsor* case began when two women who lived in New York—Edith Windsor and Thea Spyer—were married in Ontario in 2007 and then returned home to New York. Although New York did not permit same-sex marriage until 2011, the State considered Windsor’s and Spyer’s marriage in Canada to be valid.

When Spyer died two years later, she left her estate to Windsor, and Windsor sought to claim the federal estate tax exemption for surviving spouses. DOMA prevented her from doing so because it excluded same-sex partners from the definition of “spouse” as used in the estate tax exemption. Windsor paid the taxes and filed a lawsuit to challenge the constitutionality of DOMA.

The federal district court, where the case began, and the federal Court of Appeals for the Second Circuit both ruled that Section 3 of DOMA was unconstitutional because it violated equal protection, which we’ll talk about in a bit more detail in a moment. Those courts ordered the United States to pay Windsor a refund of her estate taxes.

One complicating procedural feature of the case was that the President decided, before any court had ruled, that the executive branch would not defend the law in court. The President believed that Section 3 of DOMA was unconstitutional, so he instructed the Department of Justice not to defend the law. This was unusual for two reasons. *First*, although presidents have previously advised Congress that they will no longer enforce or defend laws that courts have held to be unconstitutional or that infringe on presidential powers, neither was the case here. *Second*, although the President believed that the law was unconstitutional, the executive branch still enforced the law against Windsor by refusing to refund her estate taxes. This was done in an attempt to get the courts to rule on the law—if the executive branch had agreed to give Windsor what she asked for, there would have been no conflict for the courts to decide and no binding court decision on the topic of same-sex marriage. In any event, after the President’s announcement, the Bipartisan Legal Advisory Group of the

House of Representatives stepped in to defend the constitutionality of the law.

As you know by now, the Supreme Court held Section 3 of DOMA unconstitutional by a vote of 5 to 4. Justice Kennedy wrote the majority opinion on behalf of himself and Justices Ginsburg, Breyer, Sotomayor, and Kagan. The four dissenters were the Chief Justice and Justices Scalia, Thomas, and Alito.

The direct consequence of the decision was that Windsor received a refund of her estate taxes and Section 3 of DOMA was no longer in force, meaning that the federal government could no longer define “marriage” and “spouse” in exclusively heterosexual terms for purposes of federal laws without their own definition of those words, including laws about federal taxes and benefits, immigration, and federal crimes, to name a few. But the broader implications of the decision are found in the Court’s reasoning.

C. Reasoning of the Opinion of the Court

We will focus on the Court’s equal protection analysis, which was the most plausible constitutional route to its decision.

1. A brief overview of equal protection may be helpful. The Equal Protection Clause says that “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” It is located in the Fourteenth Amendment, which applies to the States, not the federal government. But the Supreme Court has previously held that the same equal protection principles that apply to the States via the Fourteenth Amendment also apply to the federal government. So although Section 3 of DOMA concerned the federal government, lawyers and judges would understand the Court’s discussion of equal protection to apply to States too.

Equal protection does not mean that the law has to treat every person the same for every purpose and cannot distinguish between people. Courts recognize that treating differently situated people differently is usually legitimate, so courts review most laws that treat people differently simply for *rationality*. So if a law concerns a legitimate governmental purpose and is rationally related to that purpose, it is constitutional at least as far as equal protection is concerned, no matter what the actual motivation for the law was. On the other hand, courts require much more support and important purposes for laws that treat people differently on the basis of race, because race is so rarely a legitimate ground for the government to treat people differently. In between those two extremes are distinctions based on sex and illegitimacy, because those characteristics are sometimes, but not usually, valid bases for the government to treat people differently.

The central question in the *Windsor* litigation until it reached the Supreme Court had been whether laws restricting marriage to a man and a woman should be reviewed for more than mere rationality. For example, the court of appeals in *Windsor* decided that distinctions based on sexual orientation must be justified by more than a rational basis and that DOMA could not satisfy that heightened standard. The Supreme Court had never identified the level of scrutiny applicable to laws that distinguish on the basis of sexual orientation, so *Windsor* was its opportunity to do so.

2. That does not mean, however, that the Supreme Court had never decided cases involving homosexuality—it certainly had, and those decision trace the change that [co-presenter] was discussing from approval of laws based on morality to rejection of

the principle that morality and religion are valid bases for laws. We should briefly look at three forbearers to *Windsor*.

The first noteworthy decision is *Bowers v. Hardwick* (1986). In that case, the Court upheld the constitutionality of state laws criminalizing certain same-sex sexual practices. The centerpiece of the Court's ruling was that the Constitution did not confer a "fundamental right" to engage in such practices, so States could outlaw them if they wished. The challengers of the law also asserted that there was no rational basis for such laws other than the belief that homosexual sex is immoral, and they argued that that rationale was inadequate to uphold the law. The Supreme Court rejected that reasoning, stating: "The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree"

A decade later, the court decided *Romer v. Evans* (1996). In that case, the Court ruled that a Colorado constitutional amendment that prevented state actors from recognizing homosexuals as a special class entitled to legally protected status was unconstitutional under the Equal Protection Clause. *Romer* signaled the conflict that later played out in *Windsor*, with Justice Kennedy writing for the majority, in language the Court would later quote in *Windsor*, that the amendment was born of a "bare...desire to harm a politically unpopular group." Justice Scalia wrote for the dissenting Justices and took issue with that characterization,

viewing the amendment instead as an attempt by citizens of Colorado “to preserve traditional sexual mores against . . . efforts . . . to revise those mores through use of the laws.”

Most recently, in 2003 the Court decided *Lawrence v. Texas*. In that case, the Court overruled its prior decision in *Bowers* and held that consensual sexual conduct is a liberty protected by the constitution and therefore cannot be prohibited by state law. In reaching that decision, the majority expressly stated that laws may not be used to enforce particular moral and ethical views on society, at least not through criminal laws. Justice Scalia wrote the main dissent and argued that if the Court were not prepared to uphold laws based on moral choices, as it had done in *Bowers*, then state laws against same-sex marriage, bigamy, incest, prostitution, and obscenity, among others, would ultimately not be sustainable.

3. In light of the Court’s trajectory in *Romer* and *Lawrence*, it was not necessarily surprising that the Court would hold that DOMA’s restriction of the definition of marriage to heterosexual marriage was unconstitutional. What was surprising, and important for us to understand, was the Court’s reasoning about *why* DOMA was unconstitutional.

Rather than apply traditional equal protection principles, the Supreme Court began and ended its analysis with the assertion that Section 3 of DOMA was “*designed to injure*” homosexual couples. From that beginning assumption about the motivation for the law, the Court concluded that DOMA was unconstitutional because its purpose was to injure a class of people that New York State sought to protect.

The Court had no doubt that DOMA’s definition of marriage as between one man and one woman was motivated by nothing

other than “*a bare congressional desire to harm a politically unpopular group.*” The Court did not identify anything in the text or history of DOMA stating that its supporters were actually motivated by a desire to harm homosexual couples. Nor did the Court mention the practical concerns served by the law when it was enacted in 1996. Instead, the Court focused on the moral motivation for the law and made clear that “*moral disapproval*” of same-sex marriage is itself a constitutionally impermissible “purpose and effect.” The Court emphasized that DOMA expressed “*moral disapproval* of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.” For the Court, this purpose was evidence that the law was unconstitutional and that the law was designed to “impose inequality.”

The Court did not cite much case law, but when it did, it relied principally on *Lawrence v. Texas*. The Court cited that case for the proposition that “*the Constitution protects*” the “*moral and sexual choices*” of homosexual couples,” and so, by extension, moral disapproval of homosexual marriage could not be a legitimate basis for the law.

D. Clash of Worldviews in the Court’s Opinions

To understand the way the Court viewed this issue, it is worth a few more minutes to observe the conflicting worldviews presented by the majority and dissenting opinions.

As we’ve observed, the majority of the Court in *Windsor* believed that the only basis for a law like DOMA that distinguishes between heterosexual and homosexual marriage is bigotry, or a hateful desire to injure homosexuals. Although the five Justices in the majority acknowledged that the concept of homosexual

marriage was a new phenomenon in human history, they considered modern thought on the subject more enlightened than that of previous generations. As the majority put it: “[M]arriage between a man and a woman no doubt ha[s] 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.*” The majority would go on to decide that only this new insight was valid; the old morality was no longer a valid basis for law.

For the dissenting Justices, on the other hand, the fact that DOMA codified the definition of marriage that had prevailed throughout most of human history and, at the time of DOMA’s enactment, had been adopted by every State in the nation and every nation in the world, was evidence that the law did have a valid basis, or at least explained how lawmakers could enact such a law motivated by something other than hatred.

Most interestingly, the dissenters observed that the majority could have decided the case on legal principles that would have accused DOMA’s supporters simply of making a legal error, which is an error that one could make in good faith. But instead, the majority chose to write the opinion in a unique way that calls it bigotry to believe that homosexuality does not comport with Judeo-Christian morality. As Justice Scalia wrote for the dissenting Justices:

“[T]he majority says that the supporters of this Act acted with malice—with the “purpose” “to disparage and to injure” same-sex couples. It says that the motivation for

DOMA was to “demean,” to “impose inequality,” to “impose . . . a stigma,” to deny people “equal dignity,” to brand gay people as “unworthy,” and to “humiliat[e]” their children.

. . . *In the majority’s judgment, any resistance to its holding is beyond the pale of reasoned disagreement. To question its high-handed invalidation of a presumptively valid statute is to act (the majority is sure) with the purpose to “disparage,” “injure,” “degrade,” “demean,” and “humiliate” our fellow human beings, our fellow citizens, who are homosexual. All that, simply for supporting an Act that did no more than codify an aspect of marriage that had been unquestioned in our society for most of its existence—indeed, had been unquestioned in virtually all societies for virtually all of human history. It is one thing for a society to elect change; it is another for a court of law to impose change by adjudging those who oppose it hostes humani generis, enemies of the human race.*

This phrase, *hostes humani generis*, harkens back to the perception of Christians in first-century Rome, during their persecution by Nero. Tacitus, the Roman historian, described Christians during the reign of Nero as *hostes humani generis*, enemies of the human race. That classification made their beliefs irrelevant and their persecution permissible. By using that phrase, Justice Scalia pointed out that citizens who disagree with same-sex marriage on religious or moral grounds have now been marked by the Court’s opinion as motivated by hatred of their fellow man.

D. The Impact of *Windsor* Going Forward

Finally, a word about the impact of the *Windsor* decision going forward. The Court went out of its way in *Windsor* to emphasize

that DOMA was a federal law and that questions about marriage and the family are typically the province of state law. That principle could suggest that the rule the Court announced applies only to the federal government. But the same due process and equal protection principles that were the heart of the Court's opinion are equally applicable to the federal government and the States. Indeed, in light of the Court's reasoning that there can be no valid purpose for a law limiting marriage to opposite-sex couples, it is difficult to see how the Court's opinion would not also apply to state laws distinguishing between heterosexual and homosexual relationships.

Already litigants are using the *Windsor* decision to argue that state laws banning same-sex marriage are unconstitutional. For example, currently pending in the federal Court of Appeals for the Ninth Circuit are cases challenging the constitutionality of laws banning same-sex marriage in Nevada and Hawaii. The district courts upheld the constitutionality of the laws, and the Ninth Circuit stayed the appeals while *Windsor* was pending. Just last week, the attorneys general of fourteen States and D.C. filed a friend-of-the-court brief in those cases urging the Ninth Circuit to find the laws unconstitutional for the same reasons articulated by the Supreme Court in *Windsor*. Relying on *Windsor*, the attorneys general argue that the only purpose of Nevada's and Hawaii's laws is a hateful one, an intention to disparage homosexuals. According to that brief, if empirical evidence shows that the marriages and families of same-sex couples are no worse than those of opposite-sex couples, then there can be no rational basis for banning such marriages—morality is no longer relevant. Obviously, that reasoning would apply to every State in the Union.

IV. How are Christians to understand these developments?

[Written and delivered by co-presenter]