CASE COMMENT

Religious Values and Two Same-Sex Marriage Cases Decided by the Supreme Court of the United States

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On 26 June 2013, the Supreme Court of the United States rendered judgment in two cases involving same-sex marriage. United States v Windsor, 570 US __, 2013 WL 3196928, No 12-307, invalidated a provision of a federal law, Section 3 of the Defense of Marriage Act (DOMA), which defined marriage as the union of a man and a woman for all purposes in federal law. Hollingsworth v Perry, 570 US __, 2013 WL 3196927, No 12-144, held that the official sponsors of a California state constitutional amendment [Proposition 8 (Prop 8)], which defined marriage as the union of a man and a woman for purposes of state law, lacked standing to seek judicial review of a federal district court judgment that ruled Prop 8 was unconstitutional. Both cases were decided on 5-4 votes.

The Windsor case was filed by Edith Windsor, who had entered into a same-sex marriage in Canada that was deemed valid in New York, where she and her partner lived. New York is one of 12 American states which, at the time of the Windsor ruling, had legalized same-sex marriage. Her same-sex spouse died in 2009 leaving Ms Windsor her entire estate. Ms Windsor’s claim for a federal estate tax exemption as the surviving ‘spouse’ was denied under Section 3 of DOMA, adopted by Congress in 1996. Ms Windsor paid the federal estate tax allegedly owing ($363,053) but filed a claim for a refund, which also was denied by the Internal Revenue Service. Ms Windsor then sued in federal court. While her suit was pending, President Obama and his Attorney General took the unusual step of announcing that the administration would no longer defend DOMA. The House of Representatives thereupon voted to allow some of their members, the Bipartisan Legal Advisory Group (BLAG), to intervene

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in the case to defend DOMA, which the district court permitted. However, the district court found DOMA to be unconstitutionally violative of both federalism and equal protection principles, and granted Ms Windsor’s claim for a tax refund. The Second Circuit Court of Appeals affirmed on the same grounds. In the Supreme Court, the majority opinion for five justices, written by Justice Kennedy, affirmed the ruling of the Second Circuit that Section 3 of DOMA is unconstitutional.

Four separate opinions were rendered in the Windsor case: the majority opinion (by Justice Kennedy, joined by Justices Ginsburg, Breyer, Sotomayor and Kagan); and three dissenting opinions—by Chief Justice Roberts (alone); by Justice Scalia (joined by Justice Thomas and in part by Chief Justice Roberts); and by Justice Alito (joined in part by Justice Thomas).

The majority opinion was broadly rationalized, but in the end made a relatively narrow and specific holding. Part I reviewed the case history. Part II found that the appeal by BLAG was justiciable even though President Obama’s executive branch refused to defend DOMA. The refund Ms Windsor sought threatened a real injury to the federal fisc, and the congressional BLAG had legitimate interest and adversarial competence to defend the law they had enacted. Thus, there was a justiciable ‘case and controversy’ which the Court could hear.

Part III of the majority opinion focused on the principle of federalism in family law. The regulation of domestic relations, including marriage, is constitutionally ‘reserved to the States’. While Congress may adopt ‘limited federal laws that regulate the meaning of marriage’ differently from the states, Section 3 of DOMA, ‘applicable to over 1,000 federal statutes and the whole realm of federal regulation’, swept too broadly. DOMA Section 3 also improperly denied marital status and benefits to ‘a class of persons [same-sex couples deemed married by state law] that the laws of New York and 11 other States have sought to protect’. It meant that within the same state (in the 12 states that had legalized same-sex marriage) the definition of marriage varied internally (for purposes of state law and federal law). This was an ‘unusual deviation from the traditional principles of recognizing and accepting state definitions of marriage’ for purposes of federal law. Further, denial in federal law of marital status conferred by state law was a deprivation of ‘an essential part of the liberty protected by the Fifth Amendment’ because DOMA was designed to injure the very class (same-sex married couples) that state marriage law in New York protected.

Part IV of the majority opinion in Windsor began with the declaration that ‘DOMA seeks to injure [same-sex married couples]’, and emphasized the accusation that DOMA was ‘motivated by an improper animus or purpose’, by a ‘desire to harm a politically unpopular group’, to ‘impose a disadvantage, a separate status, and so a stigma’ upon same-sex couples who married, ‘treat[s] as second-class marriages’ state-legalized same-sex marriages. DOMA moreover wrote ‘inequality into the entire United States Code’, had the ‘principal effect’ to ‘make [legal same-sex marriages] unequal, and was intended to deny ‘the equal dignity of same-sex marriages’, ‘diminishing the stability and predictability of basic personal relations and ‘humiliat[ing] tens of thousands of
children now being raised by same-sex couples’. The majority underscored that it was not addressing the issue of whether a state could define marriage as the union of a man and a woman (prohibit same-sex marriage); rather, its analysis was confined solely to whether Congress could deny federal recognition to same-sex marriages that a state had chosen to legalize. Declaring that the ‘principal purpose’ of DOMA Section 3 was ‘to demean those persons who are in a lawful same-sex marriage’, to ‘impose [on them] a disability’, further to instruct all persons that ‘their marriage is less worthy’ than other marriages, and ‘to disparage and injure’ such persons, the majority held that DOMA Section 3 was ‘unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution’.

Four justices dissented in three opinions. Chief Justice Roberts (for himself alone) asserted that the Court lacked jurisdiction to hear the appeal dispute, agreeing with the first part of Justice Scalia’s dissenting opinion that there was no justiciable ‘case or controversy’ for the Court to hear because the plaintiff, who asserted that DOMA was unconstitutional, and the President, who also believed DOMA was unconstitutional and refused to defend it, ‘agree that the court below got it right’. The Chief Justice also chided the majority for seeing a phantom ‘sinister motive’ behind DOMA, argued that Congress did not violate federalism principles but acted constitutionally in enacting DOMA Section 3, and emphasized that nothing in the majority opinion held that it was unconstitutional for a state to refuse to permit same-sex marriage.

Justice Scalia’s dissent (joined in part by Thomas and joined in the first part by Chief Justice Roberts) first argued that that the Court lacked jurisdiction to hear the appeal because the government and Ms Windsor ‘agree entirely’ that ‘the court below got it right’, so there was no genuine case or controversy. Then (joined by Justice Thomas), Justice Scalia criticized what he called the majority’s ‘scatter gun’ opinion on the merits, stressing that the majority’s discussion of federalism in marriage law was false federalism, unnecessary and misleading because the majority said that it decided the case ‘quite apart from principles of federalism’ and because the majority would not faithfully defer to states who choose not to allow same-sex marriage. Justice Scalia asserted that the real basis of the majority decision was its distortion of equal protection principles, which eventually will fall like a ‘second shoe’ to require the states to legalize same-sex marriage. He also faulted the majority for failing to indicate what standard of review applies to the analysis of the equal protection issue, and he mocked the majority’s ‘hand-waving’ invocation of discredited substantive-due-process arguments. In extended analysis, Justice Scalia challenged the majority’s claim that DOMA Section 3 was motivated by ‘animus’, by a ‘bare…desire to harm a politically unpopular group’, and rebuked the majority for ‘formally declaring anyone opposed to same-sex marriage an enemy of human decency’, and for relying on pejorative labelling while ignoring (‘affirmatively concealing from the reader’) the real arguments that were actually asserted to support passage of Section 3 of DOMA. The issue was not about morals but about constitutional principles, and the Constitution did not enshrine any substantive moral position about same-sex marriage. Scalia also predicted that the majority opinion will be used to legalize
same-sex marriage by court decree, stating: ‘The only thing that will “confine” the Court’s holding is its sense of what it can get away with.’ Finally, Justice Scalia castigated the majority for ‘cheat[ing] both sides’ in the same-sex marriage policy debate by imposing a judicial preference instead of ‘let[ting] the People decide’ the issue by democratic processes.

Justice Alito’s dissenting opinion (joined by Justice Thomas except as to its discussion of standing) began by emphasizing that the Constitution ‘does not dictate’ whether same-sex marriage must be legalized or recognized, but ‘leaves the choice to the people, acting through their elected representatives at both federal and state levels’. While the standing question is ‘close’, BLAG had standing under Chadha because the court of appeals impaired the legislative power of Congress by invalidating DOMA Section 3, and the Executive refused to defend the law. Alito explained that the constitutional claim for a right to same-sex marriage fails the test for substantive due process because it is not deeply rooted in the traditions of the nation, because ‘the Constitution simply does not speak to the issue of same-sex marriage’, since experts disagree over whether legalizing same-sex marriage will undermine or strengthen the institution of marriage, and ‘judges are certainly not equipped to make such an assessment’. Justice Alito also refuted the equal protection claim, repudiating the claim for heightened scrutiny and noting that such claims ‘are really seeking to have the Court resolve a debate between two competing views of marriage’. Same-sex marriage should be resolved at the state level, and since DOMA Section 3 does not prevent any state from recognizing or permitting same-sex marriage, but merely regulates federal law, it does not violate federalism principles.

It is noteworthy that none of the five justices in the Windsor majority filed a concurring opinion or opinion concurring in the judgment arguing that the Court should have gone further or ruled more broadly (as happens not infrequently). No opinion in Windsor asserted that DOMA Section 3 was unconstitutional on equality principles alone (untethered from federalism interests, for example). The emphasis specifically upon Section 3 of DOMA and upon its legislative history makes the holding in Windsor quite narrow—limited specifically to Section 3.

However, the strong, repeated attribution of ‘animus’ on the part of and, using several pejorative terms, the immorality of persons who believe that homosexual relations are immoral (a belief long associated with many religious communities) and to persons who supported DOMA because of their belief that male-female marriage is uniquely beneficial to society and merits unique legal status exclusive of same-sex couples (beliefs also associated with, but not exclusive to, religious communities) is not without serious implication for religious liberty. Kennedy’s ‘animus’ accusations have provoked some criticism of the majority opinion, beginning with the dissenting opinions of Justices Scalia and Alito for three of the four dissenting justices. Chief Justice Roberts, who has some special responsibility for the institutional integrity and standards of the Court, separately and specifically repudiated the majority’s finding of a ‘sinister motive’ for the enactment of DOMA, and he noted disapprovingly that the attribution of evil motives to supporters of DOMA directly applies to the
more than 80% of the members of Congress (342 members of the House of Representatives and 85 Senators), and to President Clinton (a Democrat) who signed DOMA into law. However, the Chief Justice did not join in any parts of the other dissenting opinions that sharply rebuked the majority’s use of intemperate language disparaging the decency of DOMA supporters.

The strong moralistic language in the Windsor majority opinion may cause mischief. Certainly, it will be used by advocates to support other claims to mandate legalization of same-sex marriage (as Justice Scalia suggested in dissent). Legally, it provides some rhetorical support for litigants seeking to have courts order states to legalize same-sex marriage. However, the Windsor majority’s emphasis on federalism limits its use in marriage ‘equality’ claims, and the 38—after Perry 37—states that refuse to allow same-sex marriage will claim the same respect for their state marriage policies as the Supreme Court gave to New York’s decision to permit same-sex marriages.

Justice Kennedy’s strong rhetoric also may be invoked to try to strike down the remaining provision of DOMA (Section 2), which provides that each state may decide for itself whether to recognize or refuse to recognize same-sex marriages from other states. However, the power of Congress (specifically) to determine what ‘effects’ states give to laws, records and judgments from other states is explicitly authorized in Article IV, Section 1 of the Constitution, and the power of states to refuse to recognize marriages that violate their strong public policy is well-established.

Hollingsworth v Perry, decided the same day as Windsor, involved equal protection and due process claims for same-sex marriage that could have resolved whether same-sex marriage must be legalized in all of the states. However, the Supreme Court in Perry did not undertake any discussion of the merits of those claims but addressed only a complex procedural question of justiciability, specifically the standing of private citizens to defend state laws, specifically a California constitutional amendment adopted by citizen petition-and-initiative, which the petitioners had officially sponsored and which had been enacted by the state citizens through the initiative-ballet process, but which state officials refused to defend.

Just months after the California Supreme Court ruled in 2008 that the state constitution required legalization of same-sex marriage in California, citizens dissatisfied with that ruling gathered enough signatures on petitions to get a proposed amendment to the California Constitution, Prop 8 on the ballot. In November 2008 California voters approved Prop 8, overturning the California Supreme Court ruling and changing California constitutional law to reestablish that only the union of a man and woman could be recognized as a valid marriage in California. When same-sex couples sued in state court asking the court to strike down Prop 8, government officials (who favoured same-sex marriage) appeared but made only tepid defense of the proposition. The official sponsors of Prop 8 moved to intervene, and the California Supreme Court held that the sponsors had standing to defend and, on the merits, upheld the validity of Prop 8.

Same-sex marriage advocates also filed suit in federal court asking the court to strike down Prop 8 on federal constitutional grounds. California officials
appeared but declined to defend the proposition. The federal district court allowed the leaders of the Prop 8 petition-initiative procedure to intervene to defend. On the merits, the federal district judge ruled in a lengthy, controversial opinion that Prop 8 violated several US constitutional provisions and doctrines, principally the Due Process Clause (finding a right to same-sex marriage) and the Equal Protection Clause (finding no constitutionally permissible justification for denying equal marriage status to same-sex couples). In part, the court based its judgment on its ‘finding’ that religious beliefs that homosexual behaviour is immoral harm gays and lesbians, that the belief that marriage is only the union of a man and a woman is primarily a religious belief, that the support of Prop 8 by some churches and their members was constitutionally suspect, and that Prop 8 was unconstitutionally tainted by religiosity.

California officials declined to appeal the district court ruling, but the Prop 8 official-sponsors-interveners appealed. The Ninth Circuit certified the question of the sponsors’ standing to the California Supreme Court, which responded that under California state law the official sponsors had standing to defend the proposition when state officials declined to do so. The Ninth Circuit unanimously then held that the petitioners had standing to defend Prop 8 on appeal in federal court. On the merits, the Court of Appeals affirmed by 2-1 vote the judgment of the district court that Prop 8 was unconstitutional, holding more narrowly that it violated equal protection because it ‘singles out same-sex couples for unequal treatment by taking away from them alone the right to marry’ after the state had previously legalized same-sex marriage.

Again, state officials declined to seek review of that judgment, and again the official proponents sought review—this time in the Supreme Court of the United States. In Perry, the Supreme Court ruled 5-4 that those petitioners lacked standing to defend Prop 8 in federal courts, even though state officials declined to do so and even though the petitioners clearly had standing to defend under California law. The Court vacated the Ninth Circuit judgment and remanded to have the district court judgment reinstated (because the state officials had appeared in the district court but not thereafter).

Chief Justice Roberts (author of a dissenting opinion in Windsor) wrote the majority opinion in Perry for five justices—himself and Justices Scalia, Ginsburg, Breyer and Kagan—holding that federal court standing doctrine is not necessarily the same as California state court standing doctrine. Petitioners’ special role in regard to Prop 8 ended when it was enacted; they had no ‘personal stake’ in its enforcement or defence, so no standing under Article 3 to defend Prop 8 on appeal in federal court. They suffered no ‘personal injury’ by the invalidation of Prop 8; they had no more interest in defending a law than lawmakers who have been voted out of office; they were not ‘agents of the people’ like government officials are. Justice Kennedy (author of the majority opinion in Windsor) wrote the sole dissenting opinion for four Justices (himself and Justices Thomas, Alito and Sotomayor), arguing here that Article 3 justiciability principles do not deny standing to the official proponents of popular petition-initiative laws (such as the official sponsors of California Prop 8) when government officials will not defend those laws. Since the core
purposes of the citizen petition-initiative process in California (and the 26 other states with similar popular-democracy processes) is to allow citizens to circumvent hostile government officials and agencies and to vindicate the core principle of popular democracy, and since those purposes could be totally undermined and frustrated if government officials refused to defend those laws and the official sponsors of them were unable to defend them, the official sponsors of popular initiatives have standing in federal court to defend those laws when government officials will not defend them. The ruling of the California Supreme Court that petitioners had standing in California courts established the Petitioners’ legal interest in defending Prop 8.

It might be seen as ironic that the leading outspoken conservative on the Court (Justice Scalia) and the moderately conservative Chief Justice both voted with the majority in Perry, the result of which was to reinstate the unusually dubious opinion of the district court that invalidated Proposition 8. Both Scalia and Roberts had filed strong dissenting opinions in Windsor specifically repudiating the suggestions in the majority opinion that constitutional equality or liberty or federalism principles mandated federal recognition of state-approved same-sex marriage (the holding of the district court in Perry).

It seems likely that the controversial nature of the merits could have influenced the analysis of the jurisdictional-standing issue, especially in Perry. Some of the justices who joined the majority opinion holding that the California petitioners lacked standing may have been influenced by a desire to avoid having the Court take any position on the controversial-political question of whether the Constitution mandates legalization of same-sex marriage.

It remains to be seen whether the Windsor and Perry results, rewarding federal and state executive refusal on political grounds to enforce laws enacted by their political opponents, might lead to more state and federal executive branch officials refusing to defend laws passed by lawmakers from the other political party. The implications of such a trend for the rule of law would not be insignificant.