Teaching the U.S. v. Windsor Same Sex Marriage/Equal Protection/DOMA Case

Corey A Ciocchetti, University of Denver

Available at: http://works.bepress.com/corey_ciocchetti/30/
Teaching the U.S. v. Windsor Same Sex Marriage / Equal Protection / DOMA Case
DUAL CONSTITUTIONAL SAFEGUARDS

STRUCTURAL SAFEGUARDS

IN THE ARTICLES:
SEPARATION OF POWERS & FEDERALISM

INDIVIDUAL RIGHTS SAFEGUARDS

IN THE BILL OF RIGHTS & OTHER AMENDMENTS
PRIMARY SOURCES

READ ARTICLE IV

READ THE 14TH AMENDMENT

EXAMINE THE FULL FAITH & CREDIT CLAUSE

EXAMINE THE EQUAL PROTECTION CLAUSE
"FULL FAITH AND CREDIT SHALL BE GIVEN IN EACH STATE TO THE PUBLIC ACTS, RECORDS, AND JUDICIAL PROCEEDINGS OF EVERY OTHER STATE."
FULL FAITH & CREDIT CLAUSE

Courts in one state must honor judgments of courts in others.

Comity principles cannot move to avoid paying judgment.

Lex loci celebrationis relevant to DOMA §2 not §3.

No FF&C if strong state public policy against SSM.

Courts in one state may be forced to apply the law of others.
“NO STATE SHALL . . .
DENY TO ANY PERSON
WITHIN ITS JURISDICTION
THE EQUAL PROTECTION
OF THE LAWS.”
EQUAL PROTECTION CLAUSE

Law must treat similarly situated people similarly...

...but laws classify people all the time & Congress needs to do its job.

So...

Legislation presumed valid unless...

It targets a suspect class or fundamental right.

And...

Courts reluctant to create new suspect classes.

As incorporated into 5th Amendment Due Process Clause.
WHAT IS INCORPORATION?

- BILL OF RIGHTS APPLIES TO FEDERAL GOV’T
- 14th AMENDMENT APPLIES TO STATES
- IMPORTANT PROTECTIONS LEFT OUT
- SCOTUS GOT CREATIVE
- SOME AMENDMENTS “INCORPORATED” TO SOVEREIGN NOT MENTIONED IN AMENDMENT
- DUE PROCESS CLAUSE - “LIFE, LIBERTY, PROPERTY” | LIBERTY INTERESTS PROTECTED BY THE BILL OF RIGHTS
- REVERSE INCORPORATION - APPLYING EQUAL PROTECTION TO FEDERAL GOVERNMENT

DOES THIS MAKE SENSE?
WHAT IS INCORPORATION?

★ IS A FUNDAMENTAL RIGHT INVOLVED?
★ IS THE ONLY WAY TO PROTECT THAT RIGHT VIA INCORPORATION?

BASIC INCORPORATION TEST
## Selective Incorporation

<table>
<thead>
<tr>
<th>1st Amendment</th>
<th>2nd Amendment</th>
<th>3rd Amendment</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>FULLY INCORPORATED</strong></td>
<td><strong>FULLY INCORPORATED</strong></td>
<td><strong>UNCLEAR</strong></td>
</tr>
<tr>
<td>RELIGION CLAUSE</td>
<td>INDIVIDUAL RIGHT TO BEAR ARMS</td>
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<tr>
<td>SPEECH CLAUSE</td>
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<td>PRESS CLAUSE</td>
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<td>ASSEMBLY CLAUSE</td>
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<td>PETITION CLAUSE</td>
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<table>
<thead>
<tr>
<th>4th Amendment</th>
<th>5th Amendment</th>
<th>6th Amendment</th>
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<tr>
<td><strong>FULLY INCORPORATED</strong></td>
<td>TAKINGS CLAUSE</td>
<td><strong>FULLY INCORPORATED</strong></td>
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<tr>
<td>SEARCH &amp; SEIZURE</td>
<td>SELF-INCRIMINATION</td>
<td>RIGHT TO COUNSEL</td>
</tr>
<tr>
<td>EXCLUSIONARY RULE</td>
<td>DOUBLE JEOPARDY</td>
<td>PUBLIC TRIAL</td>
</tr>
<tr>
<td></td>
<td>(SCOTUS REFUSED TO</td>
<td>FAIR TRIAL</td>
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<tr>
<td></td>
<td>INCORPORATE GRAND</td>
<td>CONFRONTATION</td>
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<td></td>
<td>JURY INDICTMENT)</td>
<td>IMPARTIAL JURY</td>
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<td></td>
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<td>SPEEDY TRIAL</td>
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<tr>
<td>7th Amendment</td>
<td>8th Amendment</td>
<td></td>
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<tr>
<td>---------------</td>
<td>---------------</td>
<td></td>
</tr>
<tr>
<td><strong>NOT INCORPORATED</strong></td>
<td><strong>CRUEL &amp; UNUSUAL PUNISHMENT</strong></td>
<td></td>
</tr>
<tr>
<td><em>(SCOTUS REFUSED TO INCORPORATE JURY IN CIVIL CASES)</em></td>
<td><em>(UNCLEAR ON EXCESSIVE FINES &amp; BAIL CLAUSE)</em></td>
<td></td>
</tr>
<tr>
<td>9th Amendment</td>
<td>10th Amendment</td>
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</tr>
<tr>
<td><strong>UNCLEAR</strong></td>
<td><strong>UNCLEAR</strong></td>
<td></td>
</tr>
</tbody>
</table>
INCORPORATION & SSM

14TH AMENDMENT: EQUAL PROTECTION CLAUSE

**APPLIES ONLY TO THE STATES**
“NO STATE SHALL . . . ”

5TH AMENDMENT: DUE PROCESS CLAUSE

**INCORPORATES 14TH AMENDMENT’S EQUAL PROTECTION CLAUSE WHEN FEDERAL LAW AT ISSUE**

BILL OF RIGHTS

**HELD: BILL OF RIGHTS APPLIES ONLY TO FEDERAL GOVERNMENT**

BARRON V. BALTIMORE (1833)
EQUAL PROTECTION IN THE 5TH AMENDMENT?

**PROS**

- Unthinkable that framers would expect less of federal government.
- Congress could discriminate more easily w/o this incorporation.
- States should honor Bor provisions.

**CONS**

- No word in Constitution unnecessarily used.
- No word in Constitution needlessly added.
- E.P. clause unnecessary in 14th amendment if it already existed.

**AS INCORPORATED INTO 5TH AMENDMENT DUE PROCESS CLAUSE**

**BOLLING V. SHARPE**

(U.S. 1954)
JUDICIAL SCRUTINY OF LAWS UNDER E.P.

RATIONAL BASIS SCRUTINY

LAW NEEDS RATIONAL RELATIONSHIP TO LEGITIMATE GOV’T INTEREST
- TAX, COMMERCIAL LAWS
- RATIONAL BASIS + (??)

INTERMEDIATE SCRUTINY

LAW MUST BE SUBSTANTIALLY RELATED TO AN IMPORTANT GOV’T INTEREST
- QUASI-SUSPECT CLASSES
- ILLEGALIMACY | GENDER

STRICT SCRUTINY

LAW MUST BE NARROWLY TAILORED TO COMPELLING GOV’T INTEREST
- SUSPECT CLASSES
- RACE | ALIENAGE | NATIONAL ORIGIN
LAWS GENERALLY STAND UNDER RATIONAL BASIS

RATIONAL BASIS SCRUTINY

“THE LAST RESORT OF CONSTITUTIONAL ARGUMENT”

EASY TEST TO PASS LAW USUALLY CONSTITUTIONAL

ACTUAL CONGRESSIONAL MOTIVES IRRELEVANT | LOOK TO PLAUSIBLE CONGRESSIONAL REASONS

RATIONAL BASIS + WHEN LAW TARGETS DISADVANTAGED GROUP
Adding Quasi-Suspect Classes to Intermediate Scrutiny

Courts slow to add quasi-suspect classes because laws made by elected officials are more likely to be struck down here. And Congress speaks for the entire nation & courts presume it acted in good faith.
HEIGHTENED SCRUTINY MAY APPLY . . .

#1 HAS GROUP SUFFERED HISTORY OF DISCRIMINATION?

#2 DO MEMBERS EXHIBIT OBVIOUS, IMMUTABLE OR DISTINGUISHING CHARACTERISTICS DEFINING THEM AS DISCRETE GROUP?

#3 IS THE GROUP A MINORITY OR POLITICALLY POWERLESS?

#4 DO CHARACTERISTICS DISTINGUISHING GROUP HAVE LITTLE TO DO WITH INDIVIDUAL’S ABILITY TO CONTRIBUTE TO SOCIETY?
Just the Facts

Constitution & Business
THE “OTHER” MARRIAGE CASE

CA GOVERNMENT REFUSES TO DEFEND PROP 8

CALIFORNIA PROPOSITION 8

52% OF CA CITIZENS VOTED THAT MARRIAGE IS BETWEEN ONE MAN & ONE WOMAN

AWKWARD FEDERALISM ARGUMENTS WHEN ANALYZED W/ WINDSOR

IF STATES DETERMINE MARRIAGE RIGHTS . . . THEN DOMA IS OUT

BUT . . . CA VOTERS DID JUST THIS WITH PROP 8

52% OF CA CITIZENS VOTED THAT MARRIAGE IS BETWEEN ONE MAN & ONE WOMAN

CA GOVERNMENT REFUSES TO DEFEND PROP 8

CALIFORNIA PROPOSITION 8

IF STATES DETERMINE MARRIAGE RIGHTS . . . THEN DOMA IS OUT

BUT . . . CA VOTERS DID JUST THIS WITH PROP 8
FEDERALISM

**Tenth Amendment**

**Article I §8: Enumerated Powers Over Marriage**

**Taxes & Commerce Associated With Marriage**

**Traditional State Power Over Marriage**

**People Retain Power**

**Necessary & Proper**

**Unelected Cautious Referee Presume Constitutionality**
DOMA § 2

"NO STATE . . . SHALL BE REQUIRED TO GIVE EFFECT TO ANY PUBLIC ACT, RECORD, OR JUDICIAL PROCEEDING OF ANY OTHER STATE . . . RESPECTING A RELATIONSHIP BETWEEN PERSONS OF THE SAME SEX THAT IS TREATED AS A MARRIAGE UNDER THE LAWS OF SUCH OTHER STATE . . . OR A RIGHT OR CLAIM ARISING FROM SUCH RELATIONSHIP."
**WAIT . . . WHAT????**

<table>
<thead>
<tr>
<th><strong>DOMA §2</strong></th>
<th><strong>ARTICLE IV</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;NO STATE SHALL BE REQUIRED TO GIVE EFFECT TO ANY PUBLIC ACT, RECORD, OR JUDICIAL PROCEEDING OF ANY OTHER STATE . . . RESPECTING A RELATIONSHIP BETWEEN PERSONS OF THE SAME SEX THAT IS TREATED AS A MARRIAGE UNDER THE LAWS OF SUCH OTHER STATE&quot;</td>
<td>&quot;FULL FAITH AND CREDIT SHALL BE GIVEN IN EACH STATE TO THE PUBLIC ACTS, RECORDS, AND JUDICIAL PROCEEDINGS OF EVERY OTHER STATE.&quot;</td>
</tr>
</tbody>
</table>
... AND THE CONGRESS MAY
BY GENERAL LAWS
PRESCRIBE THE MANNER IN WHICH
SUCH ACTS, RECORDS, AND
PROCEEDINGS SHALL BE PROVED,
AND THE EFFECT THEREOF.
DOMA § 3: WINDSOR’S ISSUE

CONGRESSIONAL ARGUMENTS

DEFENDING & NURTURING TRADITIONAL DEFINITION OF MARRIAGE

ENCOURAGING RESPONSIBLE PROCREATION & CHILD-REARING

DOMA PROVIDES CAUTION FOR CONGRESS TO DECIDE ON MARRIAGE

PROVIDING CHILDREN WITH OPPOSITE SEX PARENTS

CONSISTENCY IN ELIGIBILITY FOR FEDERAL BENEFITS

DEFENDING TRADITIONAL NOTIONS OF MORALITY

PROTECTING STATE SOVEREIGNTRY

PRESERVING SCARCE GOVERNMENT RESOURCES

MARRIAGE RELATED TO CHILD-REARING

BLAG ARGUMENTS

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MARRIAGE RELATED TO CHILD-REARING

BLAG ARGUMENTS
## DOMA’S IMPACT ON STATES IF UPHELD

<table>
<thead>
<tr>
<th>§2</th>
<th>CONSTITUTIONAL IMPLICATIONS</th>
<th>FEDERALISM IMPLICATIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>STATES CAN IGNORE ARTICLE IV &amp; REFUSE TO RECOGNIZE SSM FROM OTHER PLACES</td>
<td>★ STATES HAVE FREEDOM TO CRAFT SSM LAWS OR BANS</td>
</tr>
<tr>
<td></td>
<td>DOMA = EVIDENCE THAT CONGRESS DOES NOT BELIEVE THE CONSTITUTION PROTECTS SSM</td>
<td>★ SSM WILL NOT BE IMPOSED ON STATES FROM ONE STATE</td>
</tr>
<tr>
<td></td>
<td>★ STATES ALLOWING SSM WORRY ABOUT MORE FEDERAL LAWS LIKE DOMA</td>
<td>★ FEDERAL &amp; STATE MARRIAGE MAY DIFFER IN A STATE</td>
</tr>
<tr>
<td></td>
<td>★ STATES BANNING SSM HAVE POLICIES CONSISTENT WITH FEDERAL GOVERNMENT</td>
<td></td>
</tr>
</tbody>
</table>
## If DOMA Is Struck Down on E.P. Grounds

<table>
<thead>
<tr>
<th>Section</th>
<th>Constitutional Implications</th>
<th>Federalism Implications</th>
</tr>
</thead>
<tbody>
<tr>
<td>§2</td>
<td>Article IV Matters Again &amp; Might Be Forced to Recognize SSM From Other Places</td>
<td>States Still Have Freedom to Craft SSM Laws or Bans</td>
</tr>
<tr>
<td></td>
<td></td>
<td>SSM May Be Imposed on States From Other Jurisdictions</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Federal Agencies Will Define Marriage or Use State Definitions</td>
</tr>
<tr>
<td>§3</td>
<td>Striking Down DOMA Indicates That the Constitution Protects SSM From Federal &amp; State Bans</td>
<td>States Banning SSM Now Worry About Their Amendments &amp; Laws</td>
</tr>
<tr>
<td></td>
<td></td>
<td>States Legalizing SSM Gain Strength From the Equal Protection Clause</td>
</tr>
</tbody>
</table>
FACTS: MN STATUTE CLASSIFIED MARRIAGE AS BETWEEN A MAN AND WOMAN

SAME SEX COUPLE ARGUED EQUAL PROTECTION VIOLATION WHEN STATE DENIED LICENSE

STATE SUPREME COURT UPHELD STATE LAW
"THE INSTITUTION OF MARRIAGE AS A UNION OF MAN AND WOMAN, UNIQUELY INVOLVING THE PROCREATION AND REARING OF CHILDREN WITHIN A FAMILY, IS AS OLD AS THE BOOK OF GENESIS."

SUPREME COURT SUMMARILY DISMISSED CASE | NO FEDERAL QUESTION | STATE LAW ISSUE

MN STATUTE UPHELD BUT NO WRITTEN OPINION
SSM TIMELINE

1993: HAWAII S.C | DENIAL OF SSM PRESUMPTIVELY INVALID UNDER STATE CONSTITUTION

1996: HAWAII LEGISLATURE RESTRICTED MARRIAGE TO ONE MAN & ONE WOMAN

1998: HI CONSTITUTION AMENDED GIVING LEGISLATURE POWER TO RESERVE MARRIAGE TO MAN & WOMAN

WORRY THAT HAWAII WOULD LEGALIZE SSM STATES BEGAN TO DEBATE CONCEPT OF MARRIAGE (ALLOW OR BAN SSM)

1996: STOPS FF&C CLAUSE FOR MARRIAGE | DEFINES MARRIAGE AS ONE MAN & ONE WOMAN FOR FEDERAL LAW PURPOSES
TIMELINE OF THE WINDSOR CASE

2010: WINDSOR SUES U.S. FOR $363,000 REFUND & DECLARATION THAT DOMA § 3 IS INVALID

FEB. 2011: AG HOLDER TELLS SPEAKER BOEHNER THAT U.S. WILL NO LONGER DEFEND DOMA

2ND CIR. DECISION UNDER INTERMEDIATE SCRUTINY PROMPTED U.S. TO SEEK CERT. IN WINDSOR

APR. 2011: MOTION TO INTERVENE GRANTED

THE AG’S LETTER

2ND CIR. & WINDSOR CERT. PETITION

THE BLAG

DISTRICT COURT
TIMELINE: OTHER KEY SSM CASES

- 6 SS COUPLES WANTED FEDERAL BENEFITS
- MADE EQUAL PROTECTION ARGUMENT AND . . .
- SPENDING CLAUSE & 10TH AMEND. ARGUMENTS
- DOMA §3 STRUCK UNDER RATIONAL BASIS +
- STATES HAVE ALWAYS REGULATED MARRIAGE
- SO . . . “CLOSER THAN USUAL” SCRUTINY USED
- BLAG WANTED CERT. GRANTED ON THIS CASE
- KAGAN WAS LIKELY TO RECUSE IN GILL
TIMELINE: OTHER KEY SSM CASES

- **P WANTED HEALTH BENEFITS FOR SPOUSE**
- **DOMA VIOLATES EQUAL PROTECTION**
- **DOMA HAS NO RATIONAL BASIS**
- **DOMA PERHAPS NOT ENACTED WITH ANIMUS BUT PREJUDICE CAN EXIST WITHOUT ANIMUS**
- **CONGRESS RELIED ON STATE MARRIAGE VARIATIONS BEFORE DOMA & SHOULD DO SO NOW**
“THE ATTORNEY GENERAL SHALL SUBMIT TO THE CONGRESS A REPORT OF ANY INSTANCE IN WHICH THE ATTORNEY GENERAL . . . DETERMINES TO REFRAIN (ON THE GROUNDS THAT THE PROVISION IS UNCONSTITUTIONAL) FROM DEFENDING OR ASSERTING, IN ANY JUDICIAL . . . PROCEEDING, THE CONSTITUTIONALITY OF ANY PROVISION OF ANY FEDERAL STATUTE”
Dear Mr. Speaker:

After careful consideration, including review of a recommendation from me, the President of the United States has made the determination that Section 3 of DOMA as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment.

I am writing to advise you of the Executive Branch’s determination and to inform you of the steps the Department will take in two pending DOMA cases to implement that determination . . . As described more fully below, the President and I have concluded that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional.
After careful consideration, including a review of my recommendation, 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. The President has also concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional. Given that conclusion, the President has instructed the Department not to defend the statute in Windsor and Pedersen, now pending in the Southern District of New York and the District of Connecticut. I concur in this determination.
Notwithstanding this determination, the President has informed me that Section 3 will continue to be enforced by the Executive Branch. 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.
I will instruct the Department’s lawyers to immediately inform the district courts in Windsor and Pedersen of the Executive Branch’s view that heightened scrutiny is the appropriate standard of review and that, consistent with that standard, Section 3 of DOMA may not be constitutionally applied to same-sex couples whose marriages are legally recognized under state law.
If asked by the district courts in the Second Circuit for the position of the United States in the event those courts determine that the applicable standard is rational basis, the Department will state that, consistent with the position it has taken in prior cases, a reasonable argument for Section 3’s constitutionality may be proffered under that permissive standard. Our attorneys will also notify the courts of our interest in providing Congress a full and fair opportunity to participate in the litigation in those cases. We will remain parties to the case and continue to represent the interests of the United States throughout the litigation.

A motion to dismiss in the Windsor and Pedersen cases would be due on March 11, 2011. Please do not hesitate to contact us if you have any questions.

Sincerely yours | Eric H. Holder, Jr. | Attorney General | 2.23.11
INTERVENTION IN GENERAL

FEDERAL RULES OF CIVIL PROCEDURE RULE 24

ALLOWED TO INTERVENE IF PARTY MEETS ALL 4 CRITERIA:

- MAKES A TIMELY MOTION
- HAS INTEREST RELATING TO PROPERTY OR TRANSACTION INVOLVED
- DISPOSITION IMPAIRS PARTY’S ABILITY TO PROTECT ITS INTEREST
- INTEREST NOT ADEQUATELY REPRESENTED BY OTHER PARTIES
INTERVENTION IN THIS CASE

- **MAKES A TIMELY MOTION**
- **HAS INTEREST RELATING TO PROPERTY OR TRANSACTION INVOLVED**
- **DISPOSITION IMPAIRS PARTY’S ABILITY TO PROTECT ITS INTEREST**
- **INTEREST NOT ADEQUATELY REPRESENTED BY OTHER PARTIES**

- **UNDISPUTED**
- **HOUSE HAS INTEREST IN LAWS THAT PRESIDENT DOESN’T DEFEND**
- **BLAG NEEDS THIS CASE TO DEFEND DOMA**
- **DOJ NOT DEFENDING DOMA AT ALL**
State Policies on Same-Sex Marriage

Currently, same-sex marriage is or soon will be legal in 10 states and the District of Columbia, while a total of 30 states have amended their constitutions to ban it. Two states – New Jersey and New Mexico – have neither legalized same-sex marriage nor banned it.

In addition, nine states – California, Colorado, Delaware, Hawaii, Illinois, Nevada, New Jersey, Oregon and Wisconsin – have civil unions or domestic-partnership provisions for same-sex couples.

* Voters in California approved a ban on gay marriage in 2008, but a federal appeals court has found it unconstitutional. The ban remains in effect while the U.S. Supreme Court considers whether to review the appeals court decision.
STATE BY STATE

25 states banned same-sex marriage following the Sep. 21, 1996 Defense of Marriage Act (DOMA).

36 States Where Same-Sex Marriage Is Banned

12 States Where Same-Sex Marriage Is Legal

Wisconsin banned same-sex marriage in 1979.
SAME SEX MARRIAGE WORLDWIDE

World gay marriage map

New Zealand parliament voted to legalise same-sex marriage on Wednesday

- Britain*
- Iceland
- Ireland
- Belgium
- Portugal
- Spain
- France*
- Norway
- Sweden
- Finland
- Denmark
- Netherlands
- Czech Rep.
- Germany
- Switzerland
- Canada
- Mexico
- Colombia
- US
- Argentina
- Brazil
- Uruguay
- South Africa
- Australia
- New Zealand

- Legal marriage
- Civil unions
- Some states/city allow legal marriage

*Marriage legislation subject to full approval
### Allowing Gay and Lesbian Couples to Marry Legally by Religious Affiliation

<table>
<thead>
<tr>
<th>Religious Affiliation</th>
<th>Strongly Favor</th>
<th>Favor</th>
<th>DK/Refused</th>
<th>Oppose</th>
<th>Strongly Oppose</th>
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</thead>
<tbody>
<tr>
<td>Jewish (N=110)</td>
<td>44</td>
<td>32</td>
<td>5</td>
<td>12</td>
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<tr>
<td>Unaffiliated (N=960)</td>
<td>34</td>
<td>38</td>
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<td>12</td>
<td>11</td>
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<tr>
<td>Non-Christian (N=209)</td>
<td>36</td>
<td>27</td>
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<tr>
<td>White Catholic (N=844)</td>
<td>21</td>
<td>35</td>
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<td>Hispanic Catholic (N=231)</td>
<td>16</td>
<td>37</td>
<td>9</td>
<td>22</td>
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<tr>
<td>White Mainline (N=969)</td>
<td>18</td>
<td>34</td>
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<td>18</td>
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<td>All Americans (N=5,450)</td>
<td>18</td>
<td>29</td>
<td>6</td>
<td>21</td>
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<td>Black Protestant (N=337)</td>
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<td>24</td>
<td>4</td>
<td>22</td>
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<tr>
<td>Mormon (N=107)</td>
<td>5</td>
<td>18</td>
<td>2</td>
<td>27</td>
<td>48</td>
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<tr>
<td>White Evangelical (N=1,260)</td>
<td>5</td>
<td>15</td>
<td>5</td>
<td>29</td>
<td>46</td>
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Same Sex Marriage: Public Polls since 1988

- Favor
- Oppose
- Favor (Trend)
- Oppose (Trend)
## States with SSM Bans (As of May 2013)

<table>
<thead>
<tr>
<th>ALABAMA</th>
<th>HAWAII</th>
<th>MICHIGAN</th>
<th>NORTH DAKOTA</th>
<th>TENNESSEE</th>
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</thead>
<tbody>
<tr>
<td>ALASKA</td>
<td>IDAHO</td>
<td>MISSISSIPPI</td>
<td>OHIO</td>
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<td>ARIZONA</td>
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<td>MISSOURI</td>
<td>OKLAHOMA</td>
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<td>ARKANSAS</td>
<td>INDIANA</td>
<td>MONTANA</td>
<td>OREGON</td>
<td>VIRGINIA</td>
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<td>COLORADO</td>
<td>KANSAS</td>
<td>NEBRASKA</td>
<td>PENNSYLVANIA</td>
<td>WEST VIRGINIA</td>
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<tr>
<td>FLORIDA</td>
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<td>SOUTH CAROLINA</td>
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<tr>
<td>GEORGIA</td>
<td>LOUISIANA</td>
<td>NORTH CAROLINA</td>
<td>SOUTH DAKOTA</td>
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<tr>
<td>Connecticut</td>
<td>Iowa</td>
<td>Massachusetts</td>
<td>Rhode Island</td>
<td></td>
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<td>-------------</td>
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<td></td>
</tr>
<tr>
<td>Delaware</td>
<td>Maine</td>
<td>Minnesota</td>
<td>Vermont</td>
<td></td>
</tr>
<tr>
<td>New Hampshire</td>
<td>Maryland</td>
<td>New York</td>
<td>Washington</td>
<td></td>
</tr>
</tbody>
</table>
**STATES WITH CIVIL UNIONS & DOMESTIC PARTNERSHIPS**

**GREY = CIVIL UNIONS | BLUE = BROAD DOMESTIC PARTNERSHIP | YELLOW = LIMITED DOMESTIC PARTNERSHIP**

<table>
<thead>
<tr>
<th>States</th>
<th>Color</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>Blue</td>
</tr>
<tr>
<td>Fed. Appeals CT. Found SSM Ban Unconstitutional</td>
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NO EXPLICIT DEFINITIONS OF MARRIAGE (MAY 2013)

NEW JERSEY

NEW MEXICO
**KEY SCOTUS CASES**

**BOWERS V. HARDWICK**

- **Georgia Sodomy Law**
  - Held: States can criminalize sodomy
  - No fundamental right here

**LAWRENCE V. TEXAS**

- **Texas Sodomy Law**
  - Held: Cannot criminalize S.S. sodomy
  - Violates liberty component of 14th Amendment due process clause

**ROMER V. EVANS**

- Co Constitutional Amendment
  - That law cannot favor homosexuals
  - Held: Desire to harm politically unpopular group cannot pass rational basis
Arguments

★ Petitioner’s Arguments
★ Respondent’s Arguments

Constitution & Business
ISSUES

AS APPLIED CHALLENGE TO DOMA §3
DOES §3 VIOLATE 5TH AMENDMENT EQUAL PROTECTION RIGHTS OF SS COUPLES LEGALLY MARRIED UNDER STATE LAW?

DOES SCOTUS HAVE JURISDICTION CONSIDERING THAT U.S. LOST BUT AGREES WITH CIRCUIT COURT OPINION THAT §3 IS UNCONSTITUTIONAL?

DOES BLAG HAVE ARTICLE III STANDING?
(1) Key here is a valid SSM in state of residence or marriage recognized by state of residence

(2) Blag argued N.Y. did not recognize Windsor’s marriage at the time | Windsor is not similarly situated

(3) 1,138 federal laws contingent on marital status | Employment, immigration, tax laws

(4) IRS does not give marital benefits to SSM
(1) President will not defend DOMA
(2) President will enforce DOMA
(3) CA Gov’t will not defend Prop. 8
(4) Injunction on Prop. 8 in effect
“THE VALUE OF THE TAXABLE ESTATE SHALL ... BE DETERMINED BY DEDUCTING FROM THE VALUE OF THE GROSS ESTATE AN AMOUNT EQUAL TO THE VALUE OF ANY INTEREST IN PROPERTY WHICH PASSES OR HAS PASSED FROM THE DECEDENT TO HIS SURVIVING SPOUSE . . .”
PARTIES

PETITIONER
(1) UNITED STATES
(2) LOST @ TRIAL
(3) DID NOT WANT TO PAY | APPEALED
(4) NOW DOES NOT DESIRE TO DEFEND DOMA

RESPONDENT
(1) EDITH WINDSOR
(2) WON @ TRIAL | ENTITLED TO OVER $300,000

INTERVENOR
(1) BIPARTISAN LEGAL ADVISORY GROUP
(2) 5 (REALLY 3) MEMBERS OF THE U.S. HOUSE
(3) TOP HOUSE LEADERSHIP
(4) INTERVENED TO DEFEND DOMA §3
CASE FOR/AGAINST DOMA §3

PETITIONER

(1) WINDSOR NOT A “SPOUSE” UNDER DOMA OR FOR IRS
(2) DEFENDING MARRIAGE DEFINITION UNIVERSALLY ACCEPTED IN AMERICAN LAW
(3) CONGRESS RELIED ON DEFINITION IN ENACTING LAWS
(4) IDEAL FAMILY STRUCTURE FOR RAISING CHILDREN
(5) FEDERAL BENEFITS NEED TO BE GIVEN CONSISTENTLY
(6) DOMA CONSERVES GOVERNMENT RESOURCES
(7) PROTECTS STATE SOVEREIGNTY & RESOURCES

RESPONDENT

(1) WINDSOR LEGALLY MARRIED IN CANADA
(2) PROPERTY SHOULD PASS TAX FREE TO SPOUSE
(3) HOMOSEXUALS ARE A SUSPECT CLASS
(4) THEREFORE . . . ENTITLED TO STRICT SCRUTINY
(5) BUT . . . DOMA FAILS EVEN RATIONAL BASIS
STANDING

INJURY IN FACT

CAUSED BY D’S ACTIONS

REDRESSABLE BY COURT

#1 - CONCRETE & PARTICULARIZED

#2 - ACTUAL OR IMMINENT (NOT HYPOTHETICAL)

INJURY FAIRLY TRACEABLE TO D

LIKELY (NOT SPECulative) THAT INJURY WILL BE REDRESSED BY FAVORABLE DECISION
A LEG TO STAND ON

(1) U.S. has no standing because it agrees with the ruling of the appeals court.

(2) Someone needs to defend DOMA as a law validly passed by Congress & signed by the President.

(3) Avoiding heightened scrutiny for sexual orientation in future cases.
NO LEG TO STAND ON

(1) SENATE DID NOT JOIN & CONGRESS SHOULD ACT IN A BICAMERAL WAY

(2) HOUSE IS CONTROLLED BY MAJORITY PARTY LEADERSHIP WHEREAS SENATE NEEDS MORE BIPARTISAN SUPPORT TO ACT

(3) HOUSE CONSERVATIVE MAJORITY ON BLAG TOOK PART BUT LIBERAL MINORITY DID NOT

(4) DEFENSE OF LAWS = EXECUTIVE FUNCTION

(5) APPOINT AMICI TO ARGUE FOR DOMA

(6) U.S. STILL HAS STANDING TO APPEAL BECAUSE IT OWES $$

(7) BLAG UNINJURED

BLAG DOES NOT HAVE STANDING
**PROCEDURE: 2ND CIRCUIT CASE**

- FEDERAL DISTRICT COURT (SDNY)
- 2ND CIRCUIT COURT OF APPEALS
- RATIONAL BASIS REVIEW
- BLAG & GOVERNMENT FILED MTD
  - WINDSOR FILED MOTION FOR SJ
- DOMA §3 VIOLATES E.P.
  - (NO RATIONAL RELATIONSHIP TO LEGITIMATE INTEREST)
- DENIED | SUMMARY JUDGMENT FOR WINDSOR
- INTERMEDIATE SCRUTINY APPLIES
- DOMA NOT SUBSTANTIALLY RELATED TO IMPORTANT OBJECTIVE
- AFFIRMED
- DISSENT: PEOPLE SHOULD DECIDE
DISTRICT COURT OPINION

(1) WINDSOR’S SUMMARY J. MOTION GRANTED

(2) ALL 3 ELECTED EXECUTIVE N.Y. OFFICIALS RECOGNIZED SSM & EVERY STATE APPELLATE COURT IN N.Y. HAS RECOGNIZED SSM FROM OUT OF STATE

(3) THIS GIVES WINDSOR STANDING

(4) BAKER IS FACTUALLY DIFFERENT | DOESN’T APPLY

(5) NO NEED TO DECIDE WHETHER HOMOSEXUALS ARE SUSPECT CLASS | RATIONAL BASIS IS ENOUGH
THE DISTRICT COURT SAYS:

DEFENDING & NURTURING TRADITIONAL DEFINITION OF MARRIAGE

DOMA PROVIDES CAUTION FOR CONGRESS TO DECIDE ON MARRIAGE

(1) INTERESTS MAY BE LEGITIMATE
(2) BUT . . . DOMA DOES NOT ADVANCE THEM
(3) DOMA DOES NOT DISALLOW SSM
(4) IT’S JUST A DEFINITION
THE DISTRICT COURT SAYS:

- **MARRIAGE RELATED TO CHILD-REARING**
  - (1) INTERESTS MAY BE LEGITIMATE
  - (2) BUT . . . DOMA DOES NOT ADVANCE THEM
  - (3) DOMA DOES NOT INCENTIVIZE STRAIGHT COUPLES TO MARRY OR HAVE KIDS
  - (4) IMPOSSIBLE TO CREDIT CONGRESS’ JUSTIFICATION HERE

- **ENCOURAGING RESPONSIBLE PROCREATION & CHILD-REARING**
THE DISTRICT COURT SAYS:

(1) LINK HERE BETWEEN MEANS & ENDS

(2) BUT . . . THE STATES GET TO DETERMINE WHO CAN BE MARRIED UNDER FEDERALISM

(3) SO . . . THE STATES ARE DOING THE WORK HERE & FEDERAL GOVERNMENT HAS GENERALLY LEFT THEM ALONE TO DO SO

CONSISTENCY IN ELIGIBILITY FOR FEDERAL BENEFITS

PRESERVING SCARCE GOVERNMENT RESOURCES

(1) EXCLUDING ANY ARBITRARILY CHOSEN GROUP CONSERVES RESOURCES

(2) THIS IS NOT ENOUGH TO JUSTIFY THE LAW UNDER RATIONAL BASIS
CIRCUIT COURT OPINION

3 JUDGE PANEL

(1) WINDSOR WAS A SURVIVING SPOUSE BECAUSE NY WOULD HAVE HONORED HER CANADIAN MARRIAGE

(2) BAKER V. NELSON NOT DISPOSITIVE

(3) U.S. STILL AN AGGRIEVED PARTY

(4) DOMA §3 SUBJECT TO INTERMEDIATE SCRUTINITY

(5) DOMA §3 FAILS THAT ANALYSIS
THE CIRCUIT COURT SAYS:

(1) TO THE N.Y. SUPREME COURT (CALLED THE COURT OF APPEALS BUT DON’T WORRY ABOUT IT)

(3) WHEN A LEGAL ISSUE IS DECISIVE BUT UNSETTLED . . .

(4) FED. COURT CAN CERTIFY TO STATE’S HIGHEST COURT OR PREDICT STATE LAW ITSELF

(5) FED. COURT CHOSE TO PREDICT HERE

(6) FIRST CIRCUIT DID NOT WANT TO PREDICT

(7) N.Y. APPEALS COURTS RULED THAT SSM SHOULD BE RECOGNIZED IN N.Y.
THE CIRCUIT COURT SAYS:

(1) BAKER DOESN’T ANSWER THE QUESTION IN THIS CASE

(2) SUMMARY DISMISSALS BY SCOTUS ARE ONLY PRECEDENT AS FAR AS THE PRECISE ISSUES PRESENTED & NECESSARILY DECIDED

(3) BAKER ANSWERED ONLY THAT STATES CAN LIMIT MARRIAGE TO A MAN & WOMAN

(4) MANY CHANGES TO SCOTUS JURISPRUDENCE IN E.P. ARENA IN PAST 40 YEARS
THE CIRCUIT COURT SAYS:

(1) RATIONAL BASIS + DISPUTED IN PRECEDENT

(2) HEIGHTENED SCRUTINY APPLIES WHEN:
   
   (A) CLASS HISTORICALLY SUBJECT TO DISCRIMINATION & PERSECUTION
   
   (B) ABILITY OF CLASS TO PERFORM IN SOCIETY (I.E., MENTAL RETARDATION / AGE)
   
   (C) OBVIOUS, IMMUTABLE OR DISTINGUISHING CHARACTERISTIC OF GROUP THAT DEFINES IT AS DISCREET MINORITY - EVEN ONLY WHEN IT MANIFESTS ITSELF
   
   (D) CLASS IS A MINORITY OR POLITICALLY POWERLESS AGAINST THE MAJORITY
THE CIRCUIT COURT SAYS:

(1) SUBSTANTIALLY RELATED TO IMPORTANT GOVERNMENT INTEREST -- MEANS GOV’T JUSTIFICATION MUST BE EXCEEDINGLY PERSUASIVE

(A) UNIFORM DEFINITION OF MARRIAGE = THIS IS STATE TERRITORY SO NOT PERSUASIVE

(B) PROTECTING THE FISC = NOT EXCEEDINGLY PERSUASIVE REASON TO DISCRIMINATE

(C) PRESERVING TRADITIONAL MARRIAGE NOT EXCEEDINGLY PERSUASIVE AS TRADITION ITSELF IS NOT ENOUGH

(D) ENCOURAGING RESPONSIBLE PROCREATION = IMPORTANT GOV’T OBJECTIVE BUT DOMA NOT SUBSTANTIALLY RELATED TO IT
INTRODUCTION

PART I

PART II

PART III

PART IV

PART V

CONCLUSION

HOLDING & FACTS

STANDING

BAKER

SCRUTINY CLASS

SCRUTINY ANALYSIS

HOLY MATRIMONY

SUMMARY JUDGMENT AFFIRMED

BLUE = LAW | RED = DICTA

BRIEF

WINDSOR HAS STANDING

NO BEARING IN CASE

INTERMEDIATE SCRUTINY

DOMA FAILS

REQUIRES A CHURCH

WINDSOR WINS

SUMMARY JUDGMENT AFFIRMED

WINDSOR WINS
THE SCOTUS OPINION

WE SHALL SEE . . .
LET'S DEBATE PUBLIC POLICY

PROS

CONS
(1) Should President be allowed to enforce but not defend a law? Does this allow executive to decide constitutional cases via inaction... especially if Blag has no standing?

(2) Is it fair to call supporters of traditional marriage homophobes?

(3) Can homosexuals adequately protect themselves politically?

(4) Does the constitution mandate marriage redefinition? Is marriage a right or privilege?

(5) Should religious organizations be required to honor SSM ceremonies?

(6) How does SSM harm your marriage? Have heterosexuals treated marriage with reverence?

(7) Is there really a slippery slope argument here?
next: 1st Amendment (Snyder v. Phelps)

Constitution & Business