2013

Interstate Recognition of Same-Sex Marriage After Windsor

William Baude

NEW YORK UNIVERSITY
JOURNAL OF LAW & LIBERTY

INTERSTATE RECOGNITION OF SAME-SEX MARRIAGE AFTER *WINDSOR*

William Baude*

INTRODUCTION

Last June, the headlines said that the Supreme Court's decision in *United States v. Windsor*[1] struck down the Defense of Marriage Act.[2] But that is only half true. The Defense of Marriage Act had *two* important provisions. Section Three defined "marriage" for purposes of federal law as being limited to the union of one man and one woman.[3] It was invalidated in *Windsor*. But the Act's other section, Section Two, says that states are not required to recognize one an-

* Neubauer Family Assistant Professor of Law, University of Chicago Law School (starting January 1, 2014). Thanks to Sam Bray, Chad Flanders, Randy Kozel, Michael Stokes Paulsen, Steve Sachs, and James Stern for comments on a draft.

[1] United States v. Windsor, 133 S. Ct. 2675, 2682 (2013).

[2] *See, e.g.*, Eyder Peralta, *Court Overturns DOMA, Sidesteps Broad Gay Marriage Ruling*, NPR NEWS (June 26, 2013, 1:05 PM), http://www.npr.org/blogs/thetwo-way/2013/06/26/195857796/supreme-court-strikes-down-defense-of-marriage-act; Megan Slack, *Supreme Court Strikes Down Defense of Marriage Act*, WHITE HOUSE BLOG (June 26, 2013, 2:30 PM), http://www.whitehouse.gov/blog/2013/06/26/supreme-court-strikes-down-defense-marriage-act.

[3] Defense of Marriage Act, ch. 3, 110 Stat. 2419 (1996), codified at 1 U.S.C. § 7.

other's same-sex marriages.[4] Section Two was not invalidated, but it may be soon.

Indeed, the validity of Section Two is a natural question after *Windsor*. Putting it more generally, the question is whether states are constitutionally required to recognize same-sex marriages that were celebrated elsewhere.

One federal court has already answered "yes," relying on *Windsor* to hold that interstate recognition is constitutionally required. In *Obergefell v. Kasich*, a federal district judge granted a temporary restraining order requiring the state of Ohio to recognize a marriage between two Ohio men who had briefly traveled to Maryland to marry.[5] There is more to come: It seems likely that the court will issue a final decision soon enough, and another plaintiff has already been added to the *Obergefell* suit.[6] Many other courts will soon confront the same question.[7]

Windsor does not address this question directly. The decision contains two different strands of reasoning, one of which supports interstate recognition, and one of which does not. It is not obvious which of these strands is supposed to control or how to reconcile them. I offer one theory for reconciling them, under which many same-sex couples would have a right to have their marriages recognized. Nonetheless, I argue, the district court's order in *Obergefell* went too far.

---

[4] Defense of Marriage Act, ch. 2, 110 Stat. 2419, codified at 28 U.S.C. § 1738C (1996). Section One was the title.

[5] Order Granting Plaintiffs' Motion for a Temporary Restraining Order, Obergefell v. Kasich, No. 13-501 (S.D. Ohio July 22, 2013), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2013/07/Judge-Black-ruling-on-marriage-7-22.pdf. The recognition was for the sad occasion of issuing a death certificate.

[6] Amended Complaint, Obergefell v. Kasich, No. 13-501 (S.D. Ohio Sep. 3, 2013).

[7] *See, e.g.*, Complaint, Palladino v. Corbett, No. 13-5641 (E.D. Pa. Sep. 26, 2013).

I. BEFORE *WINDSOR*

Under current doctrine, states are not constitutionally required to recognize one another's marriages. That is, when a couple gets married in State A but lives in State B (either during the marriage or later on), State B has the power to treat the couple as unmarried. Most of the time, the issue does not arise. States usually *choose* to recognize one another's marriages out of comity, though they reserve the right to refuse when they have a strong "public policy" against that type of marriage. Many states have adopted so-called "mini-DOMAs" which express a strong public policy against the recognition of same-sex marriages from other states.[8]

The Full Faith and Credit Clause of the Constitution[9] does little to force states to recognize out-of-state same-sex marriages. The Clause empowers "Congress" to decide what "effect" public acts shall be given, and in Section Two of DOMA, Congress has provided that states do not have to recognize same-sex marriages from other states. Section Two of DOMA was probably unnecessary, because even without the statutory exception, states have traditionally not been required to implement legislative rights (as opposed to judicial judgments) from other states that they find objectionable.[10]

Before *Windsor*, the Due Process and Equal Protection Clauses had not been held to stop this either. Section Two of DOMA was controversial because some thought it to be problematic under the Full Faith and Credit Clause. Others thought it to be mostly redun-

---

[8] ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES 137-141 (2006).

[9] U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State; And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.").

[10] *See* William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 STAN. L. REV. 1371, 1390-93 (2012).

dant with the longstanding state power to decline to recognize foreign marriages. Constitutional challenges were not common, and not successful. In *Wilson v. Ake*, for example, a federal district court rejected due process and equal protection claims by a couple seeking to have their Massachusetts marriage recognized in Florida.[11] A few years later, a Texas appellate court rejected a constitutional challenge to its anti-recognition law.[12] After *Windsor*, however, plaintiffs are likely to argue that all of that has changed.

II. *WINDSOR*

The Supreme Court's decision in *Windsor* does not directly address the interstate recognition question. About Section 2 of DOMA, the Court noted only that it "has not been challenged here."[13] To be sure, the facts of the case did present a potential recognition question—Ms. Windsor and Ms. Spyer had been married in Canada in 2007 at a time when New York did not allow same-sex marriage. But the Court was apparently satisfied with the fact that New York (where the couple lived during and after the marriage) "deems their Ontario marriage to be a valid one."[14] The Court did not say what would have happened if New York had not deemed the marriage valid.

---

[11] Wilson v. Ake, 354 F. Supp. 2d 1298 (M.D. Fla. 2005).

[12] *In re* Marriage of J.B. & H.B., 326 S.W.3d 654, 681 (Tex. App. 2010) (review granted Aug. 23, 2013).

[13] *Windsor*, 133 S. Ct. at 2682.

[14] *Id.* at 2683 (citing Windsor v. United States, 699 F.3d 169, 177–78 (2d Cir. 2012)). It is not 100% clear, though it is likely, that New York law recognized a foreign same-sex marriage at the time, Brief of States of New York, et al., United States v. Windsor, 2013 WL 840031, at 26-27 & n.10, and it is not *at all* clear whether the marriage would *need* to be recognized by New York to be valid for federal purposes, Baude, *supra* note 10, at 1392-98. Perhaps the Court did not elaborate because it was sensitive to the difficulty of the issue.

It is difficult to tell what *Windsor* says indirectly, because it is not framed in a way that easily tracks existing doctrine. It declines to pick a "level of scrutiny" for discrimination on the basis of sexual orientation and does not even clarify whether the decision is ultimately rooted in "equal protection" principles or in so-called "substantive due process" principles.[15] But taking the decision on its own terms, *Windsor* uses two lines of reasoning in invalidating Section 3 of DOMA, one of which provides some support for a right to interstate recognition, and one of which does not—and may even cut against it.

The latter line of reasoning is the opinion's much-debated references to federalism. Over the course of several paragraphs, the Court observes that "by history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States."[16] It says that "'regulation of domestic relations' is 'an area that has long been regarded as a virtually exclusive province of the States,'" and that this authority includes "the recognition of civil marriages,"[17] and so on.

The federalism theme does not support a right to interstate recognition. Recognizing the traditional role of states in defining and recognizing marriage says very little about *which* state's definition ought to control when two states are in conflict. Moreover, *Windsor* approvingly quotes *Williams v. North Carolina*'s statement that "each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders."[18] This would suggest that when a couple becomes domiciled in a new state, that new state has a "rightful and legitimate concern" in deciding whether to recognize their marriage.

---

[15] *See generally Windsor*, 133 S. Ct. at 2705-2707 (noting these ambiguities).
[16] *Id.* at 2689-2690.
[17] *Id.* at 2691 (quoting Sosna v. Iowa, 419 U.S. 393, 404 (1975)).
[18] *Id.* (quoting Williams v. North Carolina, 317 U.S. 287, 298 (1942)).

Yet the opinion in *Windsor* contains a second theme as well, holding that "the State's power in defining the marital relation is of central relevance in this case *quite apart from principles of federalism*."[19] The idea is that a state law recognizing or creating a marriage also creates a constitutional liberty interest. As the Court puts it, "the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import."[20] The theme is repeated: The state-law marriage "enhanced the recognition, dignity, and protection of the class in their own community" and gave the couple's "lawful conduct a lawful status . . . a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages."[21] By doing so, "the state has sought to dignify" the marriage and has "sought to protect in personhood and dignity" the couple.[22]

As a matter of doctrine, the connection of the liberty interest to state law is a little confusing. The Court's so-called "procedural due process" cases have sometimes said that a "liberty interest" can be created by state law, as in the case of state innocence procedures,[23] good-time credits,[24] conditional parole,[25] restricted sentencing discretion,[26] or involuntary transfer from prison to a mental hospital.[27] But *Windsor* does not appear to have been a procedural due process case.

---

[19] *Id.* at 2692 (emphasis added).

[20] *Id.*

[21] *Id.*

[22] *Id.* at 2694-96.

[23] *See* Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 67-68 (2009).

[24] *See* Ponte v. Real, 471 U.S. 491, 495 (1985); Wolff v. McDonnell, 418 U.S. 539, 557 (1974).

[25] *See* Morrissey v. Brewer, 408 U.S. 471, 480-82 (1972).

[26] *See* Hicks v. Oklahoma, 447 U.S. 343, 346 (1980).

[27] *See* Vitek v. Jones, 445 U.S. 480, 487-88 (1980).

By contrast, the Court's "substantive due process" cases have tended to ask whether a liberty was fundamental in a historical or emerging sense. This inquiry does not look to a specific state's law.[28] Nor do the Court's equal protection cases normally ask the federal government to defer to the choices made by a state's law. However, one can articulate reasons that state law might be relevant to the equal protection claim. In particular, the Court suggested that DOMA was constitutionally suspicious because the federal government usually defers to state marital classifications but did not do so here.[29] Hence, the argument goes, the unusual treatment can be explained only by hostility to that class of marriages.

In any event, the same ideas—that marriage is a state-created liberty, and that once it is created, it is entitled to equal treatment—can be used to argue for an interstate recognition right. States are bound by the Fourteenth Amendment's Due Process Clause just as the federal government is bound by the Fifth Amendment's. If the important part of *Windsor* is the state's decision to "confer[] . . . a dignity and status of immense import," one might say that states, like the federal government, cannot disfavor that status and dignity once it has been granted.

III. AFTER *WINDSOR*

Applying *Windsor* is in part a question of how to reconcile these two elements of *Windsor*'s holding—or which of them to privilege.

---

[28] *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (noting that the Court looks to "Our Nation's history, legal traditions, and practices...."); Lawrence v. Texas, 539 U.S. 558, 571-72 (2003) ("[W]e think that our laws and traditions in the past half century are of most relevance here.").

[29] *Windsor*, 133 S. Ct. at 2692 ("DOMA, because of its reach and extent, departs from [the] history and tradition of reliance on state law to define marriage."); *see also* Baude, *supra* note 10, at 1378-80 (anticipating these arguments).

If the language about state-conferred status and dignity is paramount, then a court faithfully applying the logic of *Windsor* should say that states must recognize same-sex marriages celebrated under another state's law. If the language about the federal government's limited role is paramount, then courts should leave the current law of recognition alone.[30]

So what is the effect of *Windsor* on interstate recognition? Perhaps the most honest answer is that while it is not binding authority, it is nonetheless a form of persuasive authority.[31] This means that there is a much *better* argument for requiring interstate recognition of same-sex marriage after *Windsor* than there was before it. But the decision in *Windsor* cannot do all of the work. As Professor Randy Kozel has put it, "Regardless of how future courts read *Windsor*, they will still need to ask whether principles of federalism and sovereignty justify a state's refusal to recognize same-sex marriages despite the resulting harm to same-sex couples."[32]

All of that said, even if courts conclude that some form of interstate recognition is constitutionally required, not all recognitions are the same. One important distinction is between already-married couples who move to a new state that does not recognize their marriage (a "migratory" marriage) and couples who live in a state that does not allow them to marry, but get married on a brief trip outside of that state (an "evasive" marriage).[33]

---

[30] *See* Randy J. Kozel, *Holdings, Dicta, and the Paradigms of Precedent*, 50-52 (Notre Dame Legal Studies Paper No. 1443, 2013), *available at* http://ssrn.com/abstract=2312581 50-52 (making similar observation about *Windsor*).

[31] *See generally* Chad Flanders, *Toward a Theory of Persuasive Authority*, 62 OKLA. L. REV. 55 (2009) (explaining the concept of persuasive authority).

[32] Kozel, *supra* note 30, at 51.

[33] KOPPELMAN, *supra* note 8, at 100-13.

There is a much stronger tradition of recognizing "migratory" marriages than "evasive" ones.[34] From a state's point of view, there is a greater interest in regulating the conduct of people who are domiciled there. At the time that a couple creates the marriage, it is not yet too late to affect their behavior or change their mind. From the couple's point of view, there is a greater claim of reliance if their marriage was plainly lawful in their home state when they started it. They may have made arrangements to entwine their lives with no reason to believe that their marriage would later be questioned. By contrast, a couple that must travel elsewhere to begin their marriage should know that their marriage starts under a legal cloud.

The district court in *Obergefell*, however, extended a constitutional requirement of recognition to a marriage at the far end of the evasion spectrum. The couple in that case flew from Ohio to Maryland in a private jet, "whereupon Plaintiffs were married in the jet as it sat on the tarmac in Anne Arundel County, Maryland. They returned to Cincinnati that same day."[35] One member of the couple was sufficiently ill that it appears that they did not even get out of the airplane. The only way that the couple could have had more fleeting contact with the territory of Maryland is if they had imitated the extreme limits of tag jurisdiction and gotten married as the plane flew *over* Maryland, without landing.[36]

It is not clear that even a generous reading of *Windsor* should extend so far. Unfortunately, the district judge in *Obergefell* did not explain why he thought the evasiveness of the marriage was irrele-

---

[34] *Id.* at 12-19; Steve Sanders, *The Constitutional Right to (Keep Your) Same-Sex Marriage*, 110 MICH. L. REV. 1421, 1433, 1479 (2012).

[35] Obergefell v. Kasich, No. 13-501, 2013 WL 3814262 at *2 (S.D. Ohio Sep. 3, 2013).

[36] *See* Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959) (upholding personal jurisdiction and service in Arkansas because defendant was flying over Arkansas when he was served).

vant. Indeed, the judge claimed (implausibly) "This is not a complicated case."[37]

Perhaps this points toward one possible way to give some weight to both strands of *Windsor*: When a same-sex couple gets married in their home state and then moves elsewhere, the new state is constitutionally required to recognize their marriage. This would be what Professor Steve Sanders has called a "right to keep your same-sex marriage."[38] At the same time, when a couple lives in a state that does not recognize same-sex marriage, they do not have a constitutional right to force that state to recognize a marriage celebrated during a brief trip. *Windsor* did not recognize a right to same-sex marriage, though of course the Court might do so in the future. Instead, it recognized a *contingent* right to have one's marriage recognized. The right is contingent on an interested state having dignified the relationship through positive law.

To be sure, this is not a perfect way to do justice to both parts of *Windsor*, nor is it the only way. Rather, it is a compromise that is consistent with traditional elements of choice of law. When a couple tries to enter into an evasive marriage, it knows that there are serious questions about whether another state has the power to marry them. The couple has also been warned by the Court that their home state may have a special interest: Remember *Windsor*'s remark that "each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders"?[39] By allowing states to continue to make their own judgment about evasive marriages, while perhaps requiring them to recognize migratory marriages, courts would give weight to the dignity created by a state's decision to marry a couple while also recognizing

---

[37] *Obergefell*, 2013 WL 3814262 at* 1.

[38] Sanders, *supra* note 34, at 1479.

[39] *Windsor*, 133 S. Ct. at 2691 (quoting Williams v. North Carolina, 317 U.S. 287, 298 (1942)).

that other states, unlike the federal government, have a potentially legitimate reason for disregarding the marriage.

Potentially legitimate, that is, unless and until the Court recognizes a right to same-sex marriage.