Marriage equality before the US Supreme Court

Jonathon Redwoood reports on *United States v Windsor* and *Hollingsworth v Perry*

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Introduction

In the nineteenth century de Tocqueville observed, 'Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.'[1] And so, perhaps sooner than expected, on 26 June 2013 the Supreme Court handed down two decisions that, taken together, have important consequences for the resolution of the gay marriage debate in the United States. Apart from its topical significance, to the constitutional lawyer, the decisions address significant issues of federalism, equality and due process and the nature of judicial power.

In *Windsor* a majority of the court (5 to 4) struck down the federal Defence of Marriage Act which denied a wide range of federal benefits to gay couples lawfully married under state law. The court split on largely entrenched ideological lines with the majority opinion authored by Justice Kennedy (joined by Justices Ginsburg, Breyer, Sotomayor and Kagan), so often the court's decisive 'swing vote' on constitutional issues of great importance.

The *Hollingworth* decision was more prosaic in its holding but had the important consequence of leaving in place the decision at first instance striking down California's ban on same-sex marriage. The vote in the California case was also 5 to 4, but with a different and unusual alignment of Justices. Chief Justice Roberts wrote the majority opinion and was joined by Justices Scalia, Ginsburg, Breyer and Kagan.

Whilst the decision in *Windsor* turned upon unique features of the U.S. constitutional law, both decisions address important issues about the scope and legitimacy of judicial power that should be of interest and relevance to Australian constitutional lawyers.

Background

As noted by Chief Justice Roberts and Justice Alito, the public in the United States, as in Australia, is currently engaged in an active political debate about whether same-sex couples should be allowed to marry. At its core, that debate is about the nature of the institution of marriage. In the United States, that political debate has resulted in some states, whether by legislative action or community plebiscite but in either cases through democratic political processes, deciding to extend the institution of marriage to gay couples. Others have acted to confine the institution to its traditional understanding as exclusively between a man and a woman. Along the way, there have been various judicial decisions that have struck-down as unconstitutional, as in violation of equal protection, state laws denying the institution of marriage to gay couples. Until recently, however, the

Supreme Court has not been thrust into the vortex of this controversy.

United States v Windsor

The facts in *Windsor* may be briefly stated. Two women then resident in New York were married in a lawful ceremony in Ontario, Canada, in 2007. Edith Windsor and Thea Spyer returned to their home in New York City. When Spyer died in 2009, she left her entire estate to Windsor. Windsor sought to claim the estate tax exemption for surviving spouses. She was barred from doing so, however, by a federal law, the Defense of Marriage Act (DOMA), which excluded a same-sex partner from the definition of 'spouse' as that term is used in federal statutes. Windsor paid the taxes but filed suit to challenge the constitutionality of that provision. The United States District Court and the Court of Appeals ruled the statute unconstitutional and ordered the United States to repay Windsor a refund.

The majority opinion by Justice Kennedy

Justice Kennedy, joined by Justices Ginsberg, Breyer, Sotomayor and Kagan, held DOMA unconstitutional. The constitutional basis for striking down the federal law appears to combine an amalgam of constitutional rationales: elements of federalism, equal protection and due process.

The Article III separation of powers issue

Before addressing the merits of DOMA's validity, Justice Kennedy had to overcome a threshold Article III objection to the court deciding this issue. This arose because the Obama administration continued to enforce the federal law, but it urged the justices to strike it down as unconstitutional. This promoted House Republicans to step in and defend the law. It was this unusual procedure posture that raised a basic objection that the 'case' and 'controversy' requirement of Article III of the U.S. Constitution had not been met. Article III requires 'concrete adverseness' between the parties to enliven a federal court's jurisdiction and authority to decide. There are clear parallels, yet differences, between this requirement and the notion of 'matter' under Ch III of the Australian Constitution.[2]

Justice Kennedy was satisfied that this requirement was met for three reasons. First, he said that the U.S. Government retained a stake in the case because an order directing the national Treasury to pay money is a real and immediate economic injury, even if the Executive may welcome the order to pay the refund. Secondly, the adversarial presentation of the issues was ensured by the participation of *amici curiae*, renowned constitutional scholar, Professor Vicki Jackson, to vigorously defend DOMA's constitutionality. Finally, Justice Kennedy relied on so-called 'prudential' considerations of 'judicial self-governance'. Because the 'rights and privileges of hundreds of thousands of persons' were at stake, Justice Kennedy wrote, it was urgent that the court act. The cost in judicial resources and expense of litigation for all persons adversely affected would be immense. Federal courts throughout the nation, said Justice Kennedy, would be without precedential guidance in cases involving over 1,000 federal statutes. He also considered it would undermine the separation of powers and the court's emphatic duty to what the law is (citing *Marbury v Madison*) for the Executive at any moment to be able to nullify Congress' enactment solely on its own initiative and without any determination from the court.

The validity of DOMA

Justice Kennedy commenced his analysis on the constitutionality of DOMA by noting that until recent times marriage between a man and a woman had no doubt been thought of by most people as essential to the very definition of that term and its role and function throughout the history of civilization. However, reflective of a 'new perspective, a new insight', some states had concluded that same-sex marriage should be given recognition and validity to those same-sex couples that wished to define themselves by their commitment to one another. New York, for example, 'after a statewide deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage,' decided to enlarge the definition of marriage to remedy the contemporary injustice of denying marriage to same-sex couples. The State of New York had thus acted to give further protection and dignity to that bond by granting it an important lawful status. Justice Kennedy emphasised:

> This status is 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. It reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.

Importantly, and in sharp contradistinction to Australia, Justice Kennedy noted, as a matter of federalism, that by history and tradition the definition and regulation of marriage and domestic relations had been treated as virtually the exclusive province of the states. Against this background, DOMA rejected the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each state, though they may vary, subject to constitutional guarantees, from one state to the next. Rather, DOMA operated to deny recognition of the state's definition of the class of persons entitled to marriage to impose a set of restrictions and disabilities on a sub-set of the class. This constituted a deprivation of the liberty and due process protected by the Fifth Amendment because '[w]hat the State of New York treats as alike the federal law deems unlike by a law designed to injure the same class the state seeks to protect.'

Turning to the equal protection analysis, central to Justice Kennedy's reasoning was his conclusion that DOMA was motivated by a desire to harm gay couples and their families thereby demeaning the 'moral and sexual choices' of such couples and treating their lawful unions under state law as 'second-class marriages for purposes of federal law.' Under U.S. constitutional law equal protection doctrine has adopted a three-tiered standard of review of laws that have disparate treatment of a group: rational-basis review, intermediate scrutiny and strict scrutiny. Laws subject to heightened scrutiny under a strict scrutiny or intermediate standard a compelling or important state interest to justify differential treatment. Justice Kennedy, however did not analyse DOMA along this settled framework of analysis. Rather, as with the Texan law proscribing homosexual conduct struck down in *Romer v Evans*,[3] he concluded DOMA violated a more basic precept of U.S. equal protection jurisprudence: a law which is motivated by a bare desire, an improper *animus* or purpose, to harm a politically unpopular group cannot justify disparate treatment.

Justice Kennedy concluded that was 'strong evidence' the purpose and effect of DOMA was to disapprove of same-sex couples as a class. What was this strong evidence? He pointed to the title of the Act itself and made selective reference to certain congressional reports expressing moral disapproval of homosexuality.

It followed that the avowed purpose and practical effect of the DOMA was to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the states. It identified a subset of state-sanctioned marriages and made them unequal by writing inequality into the entire United States Code of over 1,000 statutes. It thereby burdened them in a visible and public way by, for example, preventing them obtaining government health care benefits and special bankruptcy protection to denying them and their families tax benefits. He concluded:

> DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and responsibilities. By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect. By this dynamic DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence*, 539 U. S. 558, and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

The dissenting opinions

Chief Justice Roberts wrote briefly only to emphasise that the majority's decision was based on federalism and does not decide whether states may validly

enact laws denying the institution of marriage to homosexuals consistently with the Fourteenth Amendment and the Fifth Amendment. He and Justice Thomas otherwise joined in Justice Scalia's dissent.

Justice Scalia

Not uncharacteristically, Justice Scalia read a blistering dissent from the bench. He plainly regarded the majority's reasons for invoking the court's jurisdiction to decide the merits of the case as self-indulgent sophistry. He said:

> The Court is eager—*hungry*—to tell everyone its view of the legal question at the heart of this case. Standing in the way is an obstacle, a technicality of little interest to anyone but the people of We the People, who created it as a barrier against judges' intrusion into their lives. They gave judges, in Article III, only the 'judicial Power,' a power to decide not abstract questions but real, concrete 'Cases' and 'Controversies.' Yet the plaintiff and the Government agree entirely on what should happen in this lawsuit. They agree that the court below got it right; and they agreed in the court below that the court below that one got it right as well. What, then, are we doing here?

Justice Scalia said that the proceedings had been a 'contrivance' to elevate the matter to Supreme Court because the petitioner's position, the United States, was precisely aligned with Windsor. There was, therefore, no real controversy before the court. He said that 'judicial power' is not, as the majority asserted, the power to 'say what the law is', giving the Supreme Court the primary role in determining the constitutionality of laws. Judicial power is the power to adjudicate, with conclusive effect, disputed government claims (civil or criminal) against private persons, and disputed claims by private persons against the government of other private persons. Sometimes, Justice Scalia observed, the parties agree as to the fact but disagree as to the applicable law, and it is only in that event that it becomes 'the province and duty of the judicial department to say what the law is.' Courts perform that role 'incidentally' only when it is necessary to quell the dispute before them, so Justice Scalia explained:

> The majority brandishes the famous sentence from *Marbury v. Madison*, 1 Cranch 137, 177 (1803) that '[i]t is emphatically the province and duty of the judicial department to say what the law is.' Ante, at 12 (internal quotation marks omitted). But that sentence neither says nor implies that it is always the province and duty of the Court to say what the law is—much less that its responsibility in that regard is a 'primary' one. The very next sentence of Chief Justice Marshall's opinion makes the crucial qualification that today's majority ignores: 'Those who apply the rule to particular cases, must of necessity expound and interpret that rule.' 1 Cranch, at 177 (emphasis added). Only when a 'particular case' is before us—that is, a controversy that it is our business to resolve under Article III—do we have the province and duty to pronounce the law…There is, in the words of Marbury, no 'necessity [to] expound and interpret' the law in this case; just a desire to place this Court at the center of the Nation's life.

Consequently, Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito, concluded the court had no jurisdiction to hear the case and characterised the majority's decision was an impermissible assertion of judicial supremacy.

As to the merits of the constitutional attack on DOMA, Justice Scalia took aim at the majority for assigning an unjustified animus and 'hateful' collective motive to Congress based on 'snippets' of legislative history and the 'banal' title to the Act. He said:

> 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. To hurl such accusations so casually demeans this institution. In the majority's judgment, any resistance to its holding is beyond the pale of reasoned disagreement… 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.

He rebuked the majority for simplifying a complex question that should be decided democratically, and not by judges. According to the majority, wrote Scalia, the story is 'black-and-white: Hate your neighbor or come along with us.' 'The truth is more complicated', he said.

Justice Alito

In Justice Alito's view the Constitution was silent on the issue of gay marriage and did not dictate Congressional choice on the nature of the institution of marriage. Same-sex marriage 'presents highly emotional and important questions of public policy' and any change on a question so fundamental should be made by the people, where ultimate sovereignty rests.

The court was being asked to resolve a debate between two competing views of marriage. The first or 'traditional' view, which views marriage as an intrinsically opposite-sex institution created for the purpose of 'channeling heterosexual intercourse into a structure that supports child rearing'. Justice Alito observed that 'throughout human history and across many cultures, marriage has been viewed as an exclusively opposite-sex institution and as one inextricably linked to procreation and biological kinship.' He described the competing and 'newer' view of marriage as one that defined marriage as the 'solemnization of mutual commitment'. He said that popular culture is infused with this understanding of marriage and that, so understood, gender differentiation is irrelevant making the exclusion of same-sex couple from the institution of marriage 'rank discrimination'. He said that the Constitution does codify or enshrine either view and leaves it to the people to decide through their elected representatives.

Hollingsworth v Perry

In 2008, the California Supreme Court held that limiting the official designation of marriage to opposite-sex couples violated the equal protection clause of the California Constitution.[4] Later that year, California voters passed the ballot initiative, known as Proposition 8. That proposition amended the California Constitution to provide that only marriage between a man and a woman is valid and recognized in California. The California Supreme Court subsequently observed that Proposition 8 was validly enacted pursuant to California law and did not disturb the constitutional requirement that same-sex couples enjoy the same rights, protections and benefits of marriage but reserved the official 'designation' only of the term 'marriage' to the union of opposite-sex couples. The respondents, same-sex couples who wished to marry, filed suit in federal court, challenging Proposition 8 under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and naming as defendants California's Governor and other state and local officials responsible for enforcing California's marriage laws. The officials refused to defend the law, so the District Court allowed petitioners—the initiative's official proponents (private citizens who had acted under the voting initiative process provide for by California law)—to intervene to defend it. After a bench trial, the court declared Proposition 8 unconstitutional and enjoined the public officials named as defendants from enforcing the law. Those officials elected not to appeal, but the petitioners, who initiated Proposition 8, did. The Ninth Circuit certified a question to the California Supreme Court: whether official proponents of a ballot initiative have authority to assert the state's interest in defending the constitutionality of the initiative when public officials refuse to do so. After the California Supreme Court answered in the affirmative, the Ninth Circuit concluded that petitioners had standing under federal law to defend Proposition 8's constitutionality. On the merits, the court affirmed the District Court's order. The Ninth Circuit concluded that 'taking away the official designation' of 'marriage' from same-sex couples, while continuing to afford those couples all the rights and obligations of marriage, did not further any legitimate interest of the state. Proposition 8, in the court's view, violated the Equal Protection Clause because it served no purpose 'but to impose on gays and lesbians, through the public law, a majority's private disapproval of them and their relationships.'

Majority opinion by Chief Justice Roberts

Chief Justice Roberts authored the majority opinion holding that the petitioners did not have standing to appeal the District Court's order.

Chief Justice Robert's commenced his opinion by emphasizing the importance of the 'case' and 'controversy' requirement in ensuring that the courts only decide real controversies and act as judges and not engaging in policymaking properly left to the elected representatives. For the case or controversy requirement to be satisfied, the party must have standing which requires that they have suffered a concrete and particularised injury.[5] According to Chief Justice Roberts, the petitioners had no 'direct

stake' in the outcome of their appeal. Their only interest in having the District Court decision reversed was a generalized one concerned with the validity of generally applicable California law. They had no interest in defending the law that was distinguishable from every citizen of California. That was a not a sufficiently particularized injury necessary to engage the 'case' and 'controversy' requirement of Article III.

He also rejected the petitioners' argument that their ongoing participation in the proceeding was authorised by state law. The petitioners held no political office and had always participated in the litigation solely as private parties. The petitioners were also plainly not agents of the state. The basic features of an agency relationship were missing. Agency requires more than the mere authorization conferred by California law to assert a particular interest in the subject-matter of the litigation. They were not subject to the control of any principal and they owed no fiduciary relationship to anyone.

Dissenting opinion by Justice Kennedy

In a respectful dissent, Justice Kennedy, joined by Justices Thomas, Alito and Sotomayor, would have found standing was satisfied and answered the question of whether Proposition 8 is constitutional. He acknowledged that 'the court must be cautious before entering a realm of controversy where the legal community and society at large are still formulating ideas and approaches to a most difficult subject' but, said Justice Kennedy, 'it is shortsighted to misconstrue principles of justiciability to avoid that subject'. He concluded that the majority had failed to respect the California initiative process, a process which embodies the very essence of democracy that the right to make law rests in the people and flows to the government.

Comment

The distinguished former Solicitor-General for the United States, Archibald Cox, observed:[6]

> Constitutional adjudication depends, I think, upon a delicate, symbiotic relation. The Court must know us better than we know ourselves. Its opinions, may, as I have said, sometimes be the voice of the spirit, reminding us of our better selves. In such cases the Court has an influence just the reverse of what Thayer feared; it provides a stimulus and quickens moral education. But while the opinion of Court can help to shape our national understanding of ourselves, the roots of its decisions must already be in the nation. The aspirations voiced by the Court must be those the community is willing not only to avow but in the end to live by. The legitimacy of great constitutional decisions rests upon an accuracy of the Court's perception of this kind of common will and upon the Court's ability, by expressing its perception, ultimately to command consensus.

The decisions, no doubt, will play an important role in shaping the 'national understanding' and moral debate on the divisive issue of gay marriage. And whether those decisions, ultimately, like previous seminal rulings of the Supreme Court on equal protection, command an enduring acceptance will likely depend upon the extent to which the court has captured what Dworkin has described as 'ethical attitudes that are widespread in the community' reflective of a 'deep and dominant contemporary opinion',[7] as well as whether it has acted within the structural restraints imposed on the exercise of judicial power by Article III of the US Constitution.

Several other brief observations may be noted. First, as Chief Justice Roberts was at pains to emphasise, the decision did not address the central question of whether states may pass laws that confine the institution of marriage to a man and a woman. As Justice Scalia observed, much of the reasoning though could readily be transplanted to that question which is likely to be before the court in the next Term.

Second, recourse to the decision in *Windsor* can have no footing under Australian constitutional law where the federalism issue on marriage is the inverse of the United States and where the Australian Constitution has no explicit guarantee of equal protection and an implied doctrine of legal equality of the kind advanced by Deane and Toohey JJ in *Leeth v the Commonwealth*[8] has not been accepted.[9] For better or for worse, the issue of gay marriage in Australia is a question that can only be resolved by the Australian Parliament.

Third, the reasoning of Justice Scalia, notwithstanding its caustic tone, on the separation of powers issue in *Windsor*, has force. For the court to have decided such an important issue on the back of such an illusory controversy is ultimately damaging to

the court's institutional integrity which hinges on deciding real controversies impartially and within the institutional constraints of judicial power. The majority's invocation of 'prudential' considerations, appears opportunistic and inverted. As Justice Scalia rightly observed, to the extent such nebulous considerations have any role to play, they are institutional considerations for declining to exercise jurisdiction where a real controversy exists, not the other way around.

Fourth, the legal recognition (or non-recognition) of marriage, and by parity of reasoning divorce, in a federal structure such as the United States presents difficult issues of choice of law and full faith and credit.

Fifth, it is initially tempting to be persuaded by Justice Alito's reasoning that the issue of gay marriage is a complex issue of social policy with reasonably arguable competing viewpoints that should be resolved through political processes by the people; *a fortiori*, where the Constitution is conspicuously silent on the issue. Yet this reasoning overlooks that the open-textured language of the Fifth Amendment and Fourteenth Amendment do not specifically address *any* concrete issue of equal protection. It says nothing about racial discrimination, denying women the vote or proscribing homosexual conduct. Rather, it establishes a broad principle of equality to be applied to a myriad of circumstances across time in an evolving society. There is assuredly room for degrees of judicial deference to the political branches in answering questions provoked by the equal protection clause, yet it is no answer by the judicial branch to avoid the question of gay marriage because it involves assessments of moral judgment, as if the universe between moral and legal judgments is hermetically divided.[10] Every decision by the court about equal protection is a decision necessarily requiring moral judgments for the equal protection clause itself lays down a deeply moral principle and, therefore, invites judgments as to the conformity of governmental conduct with that broad principle of natural law origins.

Finally, the majority in *Windsor* arguably overreached in ascribing a hostile animus to Congress in enacting DOMA. The evidence of such an animus, by Congress *as whole*, was not strong, as the majority concluded. Such a sweeping and damning conclusion should not be lightly attributed to the legislature and is calculated to fan division within the community rather than persuade the competing protagonists that a principled, dare I say moral, alternative is to be preferred. The majority may have been driven to this line of reasoning because its established doctrine otherwise provided no straightforward path home. As Justice Alito observed, it is difficult to see how the right of gay couples to marry can be characterised as a 'fundamental right' because settled doctrine requires the right to be 'deeply rooted in the Nation's history and tradition'. And rational basis review is a standard of review that is otherwise deferential to the political branches.

But it is open to contend that denying gay couples the institution of marriage cannot be sustained on any rational basis, or more precisely, no state legitimate state interest can justify the differential treatment. Afterall, it is avowedly the objective human characteristic of being homosexual that is the predominant explanation for *why* gay people have historically, and continue, to be denied the status of having their union described and treated as marriage. The court would be on a more principled and enduring course were it to address, and persuasively refute, the competing explanations (historical, traditional, practical or otherwise) that seek to justify this ongoing differential treatment in contemporary society, instead of condemning those with a competing viewpoint as just mean-spirited.

Endnotes

1. De Tocqueville, Democracy in America (1956, reprint), p 280.
2. See *Truth About Motorways v Macquarie* (2000) 200 CLR 591 at [171]-[175].
3. 517 U.S. 620 (1996).
4. In re *Marriage Cases,* 43 Cal. 4th 757, 183 P. 3d 384.
5. Cf, *Croome v Tasmania* (1997) 191 CLR 119.
6. Cox, *The Role of the Supreme Court in American Government* (1976, Oxford University Press), pp 117-118.
7. Dworkin, *Law's Empire* (1986), p 388.
8. (1992) 174 CLR 455 at 484.
9. *Kruger v The Commonwealth* (1997) 190 CLR 1 at 63-68.
10. See Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries, Constitutionalism: Philosophical Foundations* (1998, Cambridge University Press), p 152.