

* This was written after the *Windsor* holding and previous to the *Obergefell* ruling- which legalized same-sex marriage in the United States.

* I teach Family Law and the course has a final paper. Same-sex marriage was a very popular topic for a few years. Many students attempted to argue against same-sex marriage...yet their arguments were *always* faith-based and not objective. I finally decided to write an objective argument (very difficult to do here) to assist my students, at the beginning of the course when they select their topic, as to guide their subsequent research away from faith-based arguments to those grounded in objectivity. The following is what I formulated:

The following is the text of the Defense of Marriage Act (DOMA). It was passed by Congress and signed by President Clinton in 1996.

Section 1. Short title

This Act may be cited as the "Defense of Marriage Act".

Section 2. Powers reserved to the states

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Section 3. Definition of marriage (*ruled unconstitutional by the Supreme Court*)

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.

The Supreme Court, in *United States v. Windsor* (2013), struck down Section 3 as unconstitutional. The majority opinion stated that Section 3 served, "...as a deprivation of the liberty of the person protected by the Fifth Amendment". There were implications that the Equal Protection Clause influenced the decision, **yet the constitutional basis for the ruling was never clearly stated.**

How many states recognize same-sex marriage? Seventeen- when the Supreme Court ruled on the *Windsor* case. Thirty-three states banned same-sex marriage simultaneously.

The Court held that it was unconstitutional for the federal government to treat state sanctioned same-sex and heterosexual marriage differently; it "demean[ed] the couple, whose moral and sexual choices the Constitution protects". Sexual choices are protected under *Lawrence v. Texas* (2003) where the court held that consensual, sexual acts by

adults in privacy are protected. I guess that 'moral choices' are protected in a variety of amendments, such as the First and Second Amendments.

Why was this ruling activist and actually against more precedent constitutional provisions? The Supremacy Clause, Article 6 Section 2 of the constitution, holds that the laws of the federal government are the supreme law of the land. DOMA was a federal act passed by Congress, thus enabling it as the supreme law of the land. This should be controlling, not state law. DOMA does not (and cannot under the Tenth Amendment) require states to ban same-sex marriage. DOMA simply outlines what the federal government recognizes as marriage; this is within the authority of Congress under Article I, Section 8.

In summary, the Supreme Court never provided a clear constitutional authority for the *Windsor* ruling. DOMA was clear federal authority and trumped state law pursuant to the Supremacy Clause. Moreover, the Supreme Court did not rule pursuant to a majority of state laws; it catered to only 34% of the states (17 states). *Windsor* is a clear case of judicial activism in the modern Supreme Court.