I. THE SUPREME COURT STRUCK DOWN § 3 OF DOMA BY A 5-4 DECISION

a. The Majority in Windsor held that it is primarily in the province of the States to define marriage and that there is no legitimate purpose for Congress to have defined a marriage as between only a man and a woman.

In 2009, Edythe Windsor filed an estate tax for her same sex spouse, Thea Spyer, claiming the marital estate tax exemption for surviving spouses. US v. Windsor, 133 S. Ct. 2675, 2682 (2013). Even though they were lawfully married in Canada, at the time Edythe Windsor filed an estate tax return on behalf of her then deceased spouse, New York had legalized gay marriage. Id. at 2683. However, the Internal Revenue Service ("IRS") denied her request under § 3 of the Defense of Marriage Act ("DOMA") which states that for purposes of federal law, a marriage is defined as a legal union between one man and one woman as husband and wife. Id. at 2682-83. Edythe Windsor then brought suit against the United States in the Southern District of New York. At issue in Windsor were whether either Edythe Windsor or the United States had standing to litigate the case and whether § 3 of DOMA violated the equal protection clause of the Fifth Amendment. Id. at 2683.

Prior to the District Court hearing the merits of the case, the Attorney General of the United States informed the Speaker of the House of Representatives that the Department of Justice would no longer defend the constitutionality of § 3 of DOMA. Id. at 2683. The Attorney General further informed Congress that the President believed that classifications based on sexual orientation require a heightened standard of scrutiny. Id. However, even though the Executive Branch would not defend the legality of § 3 of DOMA, they would still continue to enforce it until Congress had a "full and fair opportunity to participate in the litigation of those cases." Id. at 2684. In response, the House of Representatives voted to intervene by appointing

the Bipartisan Legal Advisory Group ("BLAG") to defend the constitutionality of § 3 of DOMA. Id.

The District Court refused to allow BLAG as a party as of right, but did allow them to join as an interested party. Id. at 2684. The District Court subsequently held that § 3 of DOMA was unconstitutional and applied a heightened level of scrutiny to classifications based on sexual orientation. Id. Both the Department of Justice and BLAG filed notices of appeal in which the 2nd circuit affirmed the District Court's holding. Id. The Solicitor General then filed a petition for certiorari on behalf of the United States in which the Supreme Court accepted. Id.

The Supreme Court first determined whether the parties had standing to bring suit against the United States. The Supreme Court has previously held that a taxpayer has standing to challenge the collection of a specific tax assessment because being forced to pay such a tax causes a real and immediate economic injury. Id. at 2685. Edythe Windsor suffered a redressable injury when she was required to pay estate taxes. On the other side, even though the government agreed with Edythe Windsor's legal contention, they still refused to give it effect, resulting in a justiciable controversy between the parties. Id. at 2685. Several amicus briefs argued that because both parties agree as to the legality of § 3 of DOMA, they are no longer adverse and thus lack standing. Id. The Supreme Court responded to this contention by explaining the difference between "jurisdictional requirements of Article III" and the "prudential limits on its exercise." Id. at 2685.

The Supreme Court went on to explain the "jurisdictional limits" of the Court as required by Article III of the Constitution which are as follows: 1) injury in fact; 2) actual or imminent; 3) causal connection between the injury and the conduct complained of; 4) the likelihood of injury;

and 5) the ability to be redressed by a favorable decision. Id. at 2685. Applying these elements to the United States, the Court found that having to refund the estate tax paid by Edythe Windsor is a "real and immediate economic injury" providing the United States with standing to litigate the case. Id. at 2686. Accordingly, each party had standing to bring the case creating a justiciable controversy that the Court could constitutionally hear. Id.

However, even when a case meets the constitutional requirements of Article III, which the Court calls "jurisdictional limits," the Court must still exercise "prudential considerations" which depend on the circumstances of each case. Id. at 2687. On one side, the integrity of the political process is at risk if the Executive Branch routinely challenges statutes that it finds unconstitutional in the judicial forum, undermining the authority of the Legislative Branch. Id. at 2689. On the other hand, if the Court fails to hear this case, "[r]ights and privileges of hundreds of thousands of persons would be adversely affected, pending a case in which all prudential concerns about justiciability are present." Id. at 2688. The Court found further support in "the extent to which the adversarial presentation of the issues is assured by the participation of amici curiae prepared to defend with vigor the constitutionality of the legislative act" in light of the fact that the Defendant, the United States, agrees with the legal contentions of the Plaintiff. Id. As such, the case at hand was "not routine" and the instant circumstances supported the Court's decision to hear the merits of the case. Id.

After finding that the parties had standing, the Court then turned to the merits of the case. The Court began with a brief history of the institution of marriage and the recent trend in states legalizing same sex marriage. Id. at 2689. The Court then referenced that "regulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States." Id. at 2691. As marriages are clearly within the confines of domestic relations, it

logically followed then that "recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens." Id. The Court further supported that contention by referencing that "at the time of the adoption of the Constitution, [States] possessed full power over the subject of marriage and divorce . . . and the Constitution delegated no authority to the Government of the United States on the subject . . . ." Id. Even now, federal courts will not hear divorce and custody cases since they are "virtually exclusive primacy . . . of the states in the regulation of domestic relations." Id. Accordingly, the Court determined that "DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each state" and "this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance." Id. at 2692.

The Court then turned to whether this "federal intrusion on state power" is a "deprivation of an essential part of the liberty protected by the Fifth Amendment." Id. at 2692. The Court first pointed out that New York, well within its sovereign authority, sought to protect a class of same sex couples by legalizing gay marriage. Id. As "DOMA seeks to injure the very class New York seeks to protect, . . . it violates basic due process and equal protection principles applicable to the Federal Government." Id. at 2693. The Court stated that the equal protection clause of the 5th amendment "must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot justify disparate treatment of that group." Id. "In determining whether a law is motivated by an improper animus . . ., discriminations of an unusual character especially require careful considerations." Id.

To determine whether DOMA was enacted with an "improper animus," the Court looked to the legislative history of DOMA. Id. at 2693. The Court paid special attention to the Report of House of Representatives No. 104-664, in which the House concluded that "DOMA expresses

both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional morality." Id. The Court found further support in the resulting effect DOMA has had on same sex couples. Section 3 of DOMA treated marriages of same sex couples as "second-class marriages" for purposes of federal law, which in its entirety affect over 1,000 statutes and numeral federal regulations including Social Security, housing, taxes, criminal sanctions, copyright, veterans' benefits, and of course estate tax. Id. at 2693-94. As "DOMA's principal effect is to identify a subset of state sanctioned marriages and make them unequal . . . the principal purpose is to impose inequality." Id. at 2694. The Court concluded that "the principal purpose and necessary effect of this law are to demean those persons who are in lawful same-sex marriages." Id. at 2695.

The Court summarized its holding stating that "[t]he class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State." Id. at 2695. "It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper." Id. at 2695-96. As such, "[t]he federal statute is invalid for *no legitimate purpose* overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity." Id. at 2696 (emphasis added).

b. The issue of whether the federal definition of marriage infringed upon the States sovereign authority was not properly before the Court to hear.

In his dissenting opinion, Chief Justice Roberts emphasized the lack of jurisdiction by this Court to hear the matter. Id. at 2696 (Roberts, J., dissenting). Chief Justice Roberts pointed out that the Majority's decision is based on federalism rather than the constitutionality of DOMA, which both the Majority and dissenting Justices agree is not an issue. Id. at 2697

(Roberts, J., dissenting). However, there is no real controversy regarding New York or any State's ability to regulate domestic relations as would be required before the Court could rule the way it did in Windsor. Id. at 2696 (Roberts, J., dissenting). As Chief Justice Robert indicated, States are free to recognize both traditional marriages and same sex marriages. Id. In fact, Chief Justice Roberts stated that that the proper question to be brought before the Court for the Majority to have held the way it did would be "whether the States, in their exercise of their historic and essential authority to define marital relation, may continue to utilize the traditional definition of marriage." Id. Chief Justice Roberts concluded that "while the State's power in defining the marital relation is of central relevance to the [M]ajority's decision to strike down DOMA here, that power will come into play on the other side of the board in future cases about the constitutionality of state marriage definitions," but "[t]hat issue, however, is not before us in this case." Id. at 2697 (Roberts, J., dissenting).

c. Neither the Plaintiff nor the United States had standing to bring the case, and even if they did, the Majority incorrectly held that § 3 of DOMA is unconstitutional.

In Justice Scalia's dissenting opinion, with whom Justice Thomas joined, Justice Scalia focused on the inability of the Court to hear the case. Unlike Chief Justice Roberts who argued that the requisite facts were not present in this case for the Majority to decide the way it did, Justice Scalia argued that neither party in this case had standing to even bring the case. Id. at 2697 (Scalia, J., dissenting). Justice Scalia pointed out that Edythe Windsor won in district court, thus curing her injury, which the President was glad to see. Id. at 2698 (Scalia, J., dissenting). Regardless, the Majority entertained the case because the separation of powers principle require that "when an Act of Congress is alleged to conflict with the Constitution, it is emphatically the province and duty of the judicial department to say what the law is." Id.

Justice Scalia found this view "jaw-dropping" and that it "envisions a Supreme Court standing (or rather enthroned) at the apex of government, empowered to decide all constitutional questions, always and everywhere 'primary' in its role." Id. Justice Scalia then went on to discuss that this contradicts with the intent of the Framers in "creat[ing] branches of government that would [perfectly] coordinate by the terms of their common commission" and where "none of [the] branches could pretend to an exclusive or superior right of settling the boundaries between their respective powers." Id. Accordingly, Justice Scalia stated that "judicial power is not . . . the power to say what the law is," but rather it is " the power to adjudicate, with conclusive effect, disputed government claims . . . against private persons, and disputed claims by private person against the government or other private persons." Id. at 2699 (Scalia, J., dissenting). As judicial review must be preceded by a disputed claim, "some questions of law will never be presented to this Court, because there will never be anyone with standing to bring a lawsuit." Id. Applied to the instant case, "Windsor's injury was cured by the judgment in her favor" and "[w]hat the petitioner United States asks us to do . . . is exactly what the respondent Windsor asks us to do: not to provide relief from the judgment below but to say that the judgment was correct." Id. Justice Scalia again re-iterated that "Article III requires not just a plaintiff . . . who has standing to complain but an opposing party who denies the validity of the complaint." Id. at 2701 (Scalia, J., dissenting). Furthermore, Justice Scalia clarified that the "prudential limitations" that the Majority refers to is merely the "discretion to deny an appeal when a live controversy exists – not the discretion to grant one when it does not." Id. at 2702 (Scalia, J., dissenting). Lastly, Justice Scalia found that the Majority's "notion that a case between friendly parties can be entertained as long as adversarial presentation of the issues is assured by

participation of amici curiae prepared to defend with vigor the other side of the issue[,] . . . effects a breathtaking revolution in our Article III jurisprudence." Id.

Even though Justice Scalia believed that the Court should never have entertained the case, as "the Majority has volunteered its view of the merits," Justice Scalia did as well. Id. at 2705 (Scalia, J., dissenting). Justice Scalia began by stating his confusion as to what rationale the Majority uses to strike § 3 of DOMA down. Id. at 2706 (Scalia, J., dissenting). Justice Scalia pointed out that the Majority cites to several equal protection cases, only one of which involves the rights of same sex couples, to support the assertion that the Constitution protects the moral and sexual choices of same sex couples. Id. However, if this were truly an equal protection case, the Majority failed to discuss the level of scrutiny that would apply, which the Majority and Justice Scalia would both likely agree to be a rational basis standard. Id. The Majority then went on to discuss how "DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution," which Justice Scalia explained is just a verbose way of stating substantive due process. Id. But the Majority failed to show that "same sex marriage is deeply rooted in this Nation's history and tradition" or that "a world in which DOMA exists is one bereft of ordered liberty" as a substantive due process analysis requires. Id. at 2707 (Scalia, J., dissenting). But regardless of which approach the Majority ultimately used to strike down § 3 of DOMA, Justice Scalia established that § 3 of DOMA would survive rational basis scrutiny. Id. Justice Scalia observed that "the Constitution does not forbid the government to enforce traditional moral and sexual norms" and "even setting aside traditional moral disapproval of same sex marriage. . ., there are many perfectly valid . . . justifying rationales for this legislation." Id. While the Majority concluded that the only rationale for this Act was the "bare . . . desire to harm a politically unpopular group," Justice

Scalia enumerated two other reasons to justify the classification of a married couple as one man and one woman as husband and wife: 1) it avoids difficult choice of law issues that will now arise absent a uniform federal definition of marriage; and 2) it preserves the intended effects of prior legislation against then-unforeseen changes in circumstance, or what Justice Scalia calls "stabilizing prudence." Id. at 2707-08 (Scalia, J., dissenting). As there are other rational reasons to justify the § 3 of DOMA, "the [Majority] certainly [did] not apply anything that resembles [rational basis]." Id. at 2706. Lastly and most importantly, Justice Scalia remarked on the unintended consequences of the Majority's decision of finding no "legitimate purpose" in enacting such a law in that it has basically laid the groundwork to invalidate every State's laws that prohibit same sex marriage. Id. at 2710. "By formally declaring anyone opposed to same-sex marriage an enemy of human decency, the majority arms well every challenger to a state law restricting marriage to its traditional definition." Id. Justice Scalia concluded his dissent as follows:

> We might have covered ourselves with honor today, by promising all sides of this debate that it was theirs to settle and that we would respect their resolution. We might have let the People decide. But that the Majority will not do. Some will rejoice in today's decision, and some will despair at it; that is the nature of a controversy that matters so much to so many. But the Court has cheated both sides, robbing the winners of an honest victory, and the losers of the peace that comes from a fair defeat. We owed both of them better.

Id. at 2711 (Scalia, J., dissenting).

d. Justice Alito argues that the issue of same sex marriage should be determined entirely by the States.

Lastly, in Justice Alito's dissent, with whom Justice Thomas joined in part, Justice Alito first pointed out that while the United States is not a proper petitioner to bring the case, Congress was the proper party to defend the validity of § 3 of DOMA when the Executive branch refused to do so, which it did through the inclusion of BLAG

as an interested party. Id. at 2714 (Alito, J., dissenting). Justice Alito then went on to mimic Justice Scalia in that he referred to the Majority's alternation of an equal protection analysis and a substantive due process analysis. Id. at 2715 (Alito, J., dissenting). Justice Alito keenly pointed out that neither standard applies as what both Edyth Windsor and the United States seek "is not the protection of a deeply rooted right [granted by the Constitution or deeply rooted in this Nation's history and tradition] but the recognition of a very new right, and they seek this innovation not from a legislative body elected by the people, but from unelected judges." Id. Justice Alito then expressed his agreement with the Majority's discussion on federalism and stated that "the question of same sex marriage should be resolved primarily at the state level" and "the Court [should] ultimately permit the people of each State to decide this for themselves." Id. at 2720 (Alito, J., dissenting). Justice Alito concluded by remarking that "[s]ection 3 [of DOMA] does not prevent any State from recognizing same-sex marriage or from extending to same-sex couples any right, privilege benefit, or obligation stemming from State law . . . . All that § 3 does is to define a class of persons to whom federal law extends special benefits and upon whom federal law imposes certain burdens." Id. Accordingly, Justice Alito holds that § 3 of DOMA does not violate the Fifth Amendment. Id.

II. GOVERNMENT BENEFITS ARE NOW EXTENDED TO SAME SEX COUPLES.

a. The IRS now recognizes same sex marriages but only if the marriage is lawful where celebrated.

So what does this mean? Fortunately, the IRS issued Revenue Ruling 2013-17 which clarified the impact Windsor had for federal tax purposes.[1] The IRS begins by an analyzing the Internal Revenue Code ("Code") and determining that the Code refers to the terms "spouse," "marriage," and "husband and wife" in gender neutral terms. Accordingly, for those terms to now include same sex spouses and same sex marriage would not conflict with the Code's pre-existing interpretations. Furthermore, in light of Windsor, the IRS believes that restricting federal benefits to opposite sex couples would violate the Constitution as the Majority in Windsor explained. Thus, the IRS concludes that for federal tax purposes, same sex couples are within the penumbra of "marriage," "spouse" and "husband and wife."

The IRS then goes on to eliminate a potential conflict of law issue by applying the general rule the IRS applies in determining the validity of a marriage: "for Federal tax purposes, [the IRS will] [recognize] the validity of a same-sex marriage that was valid in the state where it was entered into, regardless of the married couple's place of domicile." The alternative, a state-of-domicile rule, would result in a revolving attribution of property interests pending on whether that State recognizes same sex marriages. In addition, it would burden employers with employees in more than one state with different marriage recognition rules. "This would lead to uncertainty for both taxpayers and the Service" and would result in "plan administration [growing] increasingly complex and

[1] http://www.irs.gov/pub/irs-drop/rr-13-17.pdf

certain rules . . . would become essentially challenging." Thus, the state-of-celebration rule is the better alternative as it provides a uniform rule for both taxpayers and the IRS to apply.

Lastly, as recognition of sovereign authority, the IRS limits the recognition of same sex couples for federal tax purposes, by excluding same sex couples who are in domestic partnerships or civil unions. While the IRS does not expound the rationale for this, it is likely to recognize the federalist argument made by the Majority in Windsor. By allowing the States to decide whether same sex couples can be lawfully married under the auspices of that State, it comports with the Majority's decision that domestic relations, including the acceptance of same sex marriage, should be primarily left to the States. However, with the growing trend of State recognition of same sex marriage, a State that seeks to retain the "traditional definition of marriage" can be easily obviated by the state-of-celebration rule. Lastly, the IRS concludes that the inclusion of lawfully married same sex couples in the definition of "spouse," "marriage," and "husband and wife," shall be applied prospectively, *and retroactively* provided the applicable limitations period for filing such claim under section 6511 has not expired.[2]

b. Federal benefits are also extended to same sex couples in several other aspects.

It is clear that Windsor applies to estate and gift tax as well as federal income tax. But what else? As the Majority in Windor stated, § 3 of DOMA affected over 1,000 statutes and numeral federal regulations. US v. Windsor, 113 S. Ct at 2693-94. Post Windsor, same sex spouses can now file a claim for retirement benefits based on a

[2] Section 6511 states that a claim for credit or refund must be filed within 3 years from the time the original return was filed or 2 years from the time the tax was paid, whichever was later. 26 U.S.C. § 6511(a).

deceased spouse's earnings with the Social Security Administration.[3] Furthermore, a same sex spouse may now take advantage of their spouse's employee benefit plans including retirement plans, IRAs, and health insurance.[4] Similarly, military benefits will now be extended to same sex spouses of eligible military or civilian employees.[5] Likewise, federal benefits will now be extended for same sex spouses of eligible federal employees.[6] Lastly, same sex spouses of a visa applicant authorized to enter the United States or of a US citizen may now be granted a derivative visa and/or sponsorship to enter the United States.[7]

III. CONCLUSION

Looking at the amalgamation of all the rights now extended to same sex couples, it is imperative for all same sex couples to become lawfully married in a State that recognizes it. While the Social Security Administration has not explicitly stated how it will determine if a same sex couple is lawfully married, the remaining government entities have all adopted the state-of-celebration rule. As of today, fifteen states have legalized same sex marriage: Massachusetts[8], California[9], Connecticut[10], Iowa[11], Vermont[12], New Hampshire[13], District of Columbia[14], New York[15], Maine[16], Maryland[17],

[3] http://socialsecurity.gov/same-sexcouples/
[4] http://www.dol.gov/ebsa/newsroom/tr13-04.html
[5] http://www.defense.gov/releases/release.aspx?releaseid=16203
[6] http://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2013/13-203.pdf
[7] http://travel.state.gov/visa/frvi/frvi_6036.html; http://www.uscis.gov/family/same-sex-marriages
[8] Goodridge v. Dep't of Pub. Health, 440 Mass. 309 (Mass. 2003).
[9] Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).
[10] Kerrigan v. Comm'r of Pub. Health, 289 Conn. 135 (Conn. 2008).
[11] Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).
[12] Vt. Stat. Ann. tit. 18, § 5131 (West).
[13] N.H. Rev. Stat. Ann. § 457:1-a (West).
[14] D.C. Code § 46-401 (West).
[15] N.Y. Dom. Rel. Law § 10-a (McKinney).
[16] Me. Rev. Stat. tit. 19-A, § 650-A (West).

Washington[18], Rhode Island[19], Delaware[20], Minnesota[21], New Jersey[22], Hawaii[23], and a bill is currently on the floor of the Illinois State Senate after being approved by the State House of Representatives[24]. While this is amazing news for all same sex couples, these benefits will not be awarded by inaction. Please take advantage of these benefits by becoming lawfully married in any of the above mentioned States, and then see the respective government entity or professional to obtain all of the newly extended benefits available to you.

[17] Md. Code Ann., Fam. Law §§ 2-201, 2-202 (West).
[18] Wash. Rev. Code Ann. § 26.04.010 (West).
[19] R.I. Gen. Laws Ann. § 15-1-1 (West).
[20] Del. Code Ann. tit. 13, § 101 (West).
[21] Minn. Stat. Ann. §§ 517.01, 517.03 (West).
[22] N.J. Stat. Ann. § 37:1-1 (West).
[23] Haw. Rev. Stat. § 572-B (West).
[24] 2011 Illinois House Joint Resolution No. 95, Illinois Ninety-Seventh General Assembly - Second Regular Session.