TEACHING *UNITED STATES v. WINDSOR: THE DEFENSE OF MARRIAGE ACT AND ITS CONSTITUTIONAL IMPLICATIONS*

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ABSTRACT

Students are captivated by contemporary, high-profile Supreme Court cases. They recognize the litigants featured on the news, they debate the public policy, sociological and other real world implications of the arguments in school and their peers and parents prod them to discuss their opinions outside of class. I incorporate very recent and noteworthy Supreme Court cases in my legal studies courses with great success. My students are more engaged and prepared than when I assign a textbook chapter (students would rather track the law as it develops in real time). They tend to recall the arguments and legal theories well past the final examination. My approach is simple. I assign the entire opinion as well as a background article that broadly evaluates the legal and public policy issues. We then synthesize the critical issues (including the business implications) as a class where I am often forced to stop the discussion and move on. This is a professor’s dream -- especially with undergraduates enrolled in a required class. This article represents the background material I utilize to teach same sex marriage and the United States v. Windsor case.

This article explores the public policy and legal background of the Windsor case in five parts. Part I introduces the issue and evaluates how states are responding to competing pressures to legalize same sex marriage or protect traditional marriage. Part II demystifies the legal background of the case. It analyzes the Fifth and Fourteenth Amendment Due Process Clauses, the Equal Protection Clause, the constitutional doctrines of Standing, Substantive Due Process and Incorporation as well as the Defense of Marriage Act. Part III lays out the facts of the case and some background on Edith Windsor and Thea Spyer. Part IV analyzes the lower court opinions as well as the Supreme Court decision and impassioned dissents. Part V concludes. The appendix contains fifteen tough questions taken from the justices’ comments at oral argument. It is good practice to struggle through the answers as the advocates did in the courtroom that day.

In the end, Edith Windsor came out a winner. She will receive her refund and the satisfaction that her vision of how the government should treat marriage has prevailed. This is only the first step in the battle however, as the argument moves from the federal definition of marriage to state prohibitions of same sex marriage. The focus will shift to whether the five-justice majority in Windsor will hold when these tougher cases hit the high Court. Time will tell but you and your students will be more prepared for that discussion after reading and debating this article.
Students are captivated by contemporary, high-profile Supreme Court cases. They recognize the litigants featured on the news, they debate the public policy, sociological and other real world implications of the arguments in school and their peers and parents prod them to discuss their opinions outside of class. I incorporate very recent and noteworthy Supreme Court cases in my basic business law courses with great success. My students are more engaged and prepared than when I assign a textbook chapter (students would rather track the law as it develops in real time). They tend to recall the arguments and legal theories well past the final examination. My approach is simple. I assign the entire opinion as well as a background article that broadly evaluates the legal and public policy issues. We then synthesize the critical issues (including the business implications) as a class where I am often forced to stop the discussion and move on. This is a professor’s dream -- especially with undergraduates enrolled in a required class. This article represents the background material I utilize to teach same sex marriage and the United States v. Windsor case.

This article is designed to serve two primary goals. First, professors may assign it as background reading before or after a lecture on same sex marriage or Constitutional Law more generally. Distribution prior to lecture provides students with a solid background and facilitates understanding of tough concepts. Distribution after lecture allows the opinion to speak for itself, students to ponder its implications and the article to serve as reinforcement. The footnotes can easily be converted to endnotes if the references are too cumbersome. Second, professors may refer to the article as they prepare to teach same sex marriage or Constitutional Law more generally. This article is designed for professors to tailor their lectures to the constitutional law and/or ethics issues most pertinent in their syllabus. Some may choose to focus on same sex marriage and its legalization and prohibition under various ethical frameworks. To that end, this article possesses one of the most up to date reference guides on the direction each state is heading regarding same sex marriage. It is always interesting to look up the laws in jurisdictions from which students hail. This article makes this research easy and effective. Other professors may choose to focus on the Constitution and its Fifth and Fourteenth Amendments. This article discusses the Due Process and Equal Protection Clauses in depth. Also discussed are the Full Faith and Credit Clause and the standing and incorporation doctrines.

This article is ordered a bit differently from the typical facts-first law school approach. Oftentimes, it is more effective to begin with a broad policy analysis and then move to the legal background surrounding the issue. At this point, the reader possesses the context to move to the case-specific facts, judicial rulings and application of the majority opinion. This ordering allows business students (who are unlikely to become lawyers) to: (1) gain a broad policy perspective and (2) form opinions about the legal correctness of each side’s arguments before the often sympathetic or unsympathetic protagonists enter the equation. This is especially important in the Windsor case where Edith Windsor and Thea Spyer are extremely sympathetic plaintiffs and where students often enter the discussion with predetermined viewpoints on their legal battle. Also, in the interest of fairness, it is important to evaluate both the majority and dissenting opinions. The tough questions at the end of the article come from inquisitions posed by the justices at oral argument. Some questions have been enhanced to reach more business-specific issues. Students enjoy debating the same issues that the advocates actually faced and struggled with at oral argument. Because there are no “right answers,” students feel more comfortable to debate freely. Enjoy teaching the Windsor case and reaping great results as your students plug into the issue (and learn about constitutional law along the way).

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1 More specifically, students are keenly interested how the law and the real world intersect. See, e.g., William J. McDevitt, Active Learning through Appellate Simulation: A Simple Recipe for a Business Law Course, 26(2) J. OF LEGAL STUD. EDUC. 245-262, 246-47 (2009) (discussing a way to help students understand the appellate process) and Tanya M. Marcum, Sandra J. Perry, It's Not Easy Being Green: Bringing Real Life to the Undergraduate Legal Environment of Business Classroom, 27(1) J. OF LEGAL STUD. EDUC. 81-104, 81-82 (2010) (discussing the importance of using real world cases and issues in the classroom).

2 It is crucial to pick opinions that are not excessively lengthy or boringly opaque. I find that opinions less than five years old and between ten and forty pages are ideal. However, students are willing to read more when high profile cases are assigned. Finally, it is important to assign the whole opinion. The context of the case is key and students reading only a few pages or sections tend to miss the context completely.

3 There are many fine background articles on high-profile Supreme Court case that are digestible by students. The first place I look is SCOTUSBlog.com where top constitutional law scholars, Supreme Court advocates and the media post articles.
I. INTRODUCTION: SAME SEX MARRIAGE

The legalization of same sex marriage first hit the nation’s radar screen four decades ago. In 1970, two male University of Minnesota students applied for a marriage license. Minnesota’s marriage laws did not specifically exclude same sex marriages. However, the county clerk denied the license under the presumption that only heterosexual marriage was allowed under a law that had the words “husband and wife” and “bride and groom” scattered throughout. The couple sued the state arguing that the denial violated their fundamental right to marriage and their Due Process and Equal Protection rights under the federal Constitution. On appeal, the Minnesota Supreme Court denied their claims and went as far as to declare that the “institutions 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.” The case made its way to the Supreme Court of the United States (SCOTUS) where, in Baker v. Nelson, the justices unanimously dismissed the case holding that the issue did not present a “substantial federal question.” This meant that Minnesota was allowed to define marriage as it wished and the clerk was not required to issue the marriage license. This would be the last time the SCOTUS squarely deliberated the issue of same sex marriage until 2013 and the cases of United States v. Windsor and Hollingsworth v. Perry (concerning the defense of a California ballot proposition limiting marriage to heterosexual couples). But, this lack of activity at the nation’s highest court did not mean that the debate over same sex marriage had simmered.

Between the 1970s and the 1990s, most of the same sex marriage headlines were made outside of the legal system. Berkeley, California became the first city to pass a domestic partnership law in 1984. In 1987, two thousand same sex couples were married on the steps of the Internal Revenue Service Building in Washington, D.C. in part to protest unfair tax treatment. In the early 1990s, domestic partners of employees in a few states were slowly granted health benefits at some private and governmental workplaces. Throughout these decades and continuing today, supporters of traditional marriage countered these efforts, rallied public support and lobbied elected officials promoting their positions on family values, procreation and child rearing. These traditional marriage proponents include many religious organizations including the Catholic Church, the Southern Baptist Conference and Orthodox Judaism.

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4 See Baker v. Nelson, 191 N.W. 2d 185, 185 (Minn. 1971).
5 See id. (“[It is] undisputed that there were otherwise no statutory impediments to a heterosexual marriage by either petitioners” in Minnesota).
6 See Justin Dyer, The Legacy of Baker v. Nelson, FIRST THINGS (Feb. 6, 2013), http://www.firstthings.com/onthesquare/2013/02/the-legacy-of-baker-v-nelson (“As the Minnesota Supreme Court acknowledged, the state’s marriage statute didn’t say anything specifically about same-sex unions. Yet the law in question was littered with language (e.g., ‘husband and wife’ and ‘bride and groom’) that presumed marriage was a union of a man and woman.”).
7 See Baker v. Nelson, 191 N.W. 2d at 1186 (recounting arguments by the plaintiff couples that the decision violated their right to privacy under the Ninth Amendment and their due process and equal protection rights under the Fourteenth Amendment).
8 Id.
10 Id. at 810. This indicates that the justices did not believe that the federal Constitution protected same sex marriage.
13 See Same Sex Marriage Timeline, PROCON.ORG, http://gaymarriage.procon.org/view.resource.php?resourceID=003891 (last visited June 30, 2013) (stating that the marriages were, in part, designed to protest the denial of tax benefits which presages the issue in the Windsor case).
14 See id. (stating that the marriages were, in part, designed to protest the denial of tax benefits which presages the issue in the Windsor case).
15 See id. (stating that Levi Strauss & Co. were granted full medical benefits).
In the 1990s, the legal battle for same sex marriage rights reignited in the country’s newest state. That year, three same sex couples applied for marriage licenses from the Hawaii State Department of Health.  

The request was denied in writing:

This will confirm our previous conversation in which we indicated that the law of Hawaii does not treat a union between members of the same sex as a valid marriage. We have been advised by our attorneys that a valid marriage within the meaning of [Hawaii law] must be one in which the parties to the marriage contract are of different sexes. In view of the foregoing, we decline to issue a license for your marriage to one another since you are both of the same sex and for this reason are not capable of forming a valid marriage contract . . . Even if we did issue a marriage license to you, it would not be a valid marriage under Hawaii law.

The couples sued and claimed violations of their right to privacy and equal protection under state law (instead of federal law as in the Baker case). In 1993, the Hawaii Supreme Court partially agreed and ruled that denying marriage licenses to same sex couples might violate the state’s Equal Protection Clause. A plurality of justices required the state to prove that denying same sex marriage served a compelling governmental interest and “is narrowly drawn to avoid unnecessary abridgments of constitutional rights.” This was (and remains) the toughest burden for the government to meet in a case arguing about whether a law violates the Constitution. Elected officials across the country recognized the substantial burden being placed on state marriage laws and began to worry that a Hawaii court would soon legalize same sex marriages. Because the Full Faith and Credit Clause of the United States Constitution (discussed in Part II) would potentially force other states to recognize such marriages, Congress and many states soon passed legislation defending the traditional view of marriage. In states where courts appeared willing to sanction same sex marriage, opponents created a strategy to lobby elected officials for stronger legislation supporting traditional marriage and to submit ballot measures banning same sex marriage via constitutional amendment. For example, in 1998, a district
court in Alaska ruled that the denial of same sex marriage licenses violated the state constitution.\(^{26}\) Nine months later, the Alaska legislature and voters halted this judicial momentum via a constitutional amendment that declared: “To be valid or recognized in this State, a marriage may exist only between one man and one woman.”\(^{27}\) The majority of states went down this path while a minority of other states slowly began down the path of legalizing civil unions, domestic partnerships and same sex marriage.\(^{28}\)

As of August 1, 2013, thirty-five states ban same sex marriages -- twenty-seven through a constitutional amendment and legislation, three via amendment only and five via legislation only.\(^{29}\) Thirteen states have legalized same sex marriage and two states have taken no position on the issue.\(^{30}\) Washington, D.C. legalized same sex marriage in 2012.\(^{31}\) Four states recognize civil unions and three states allow domestic partnerships. Generally, a domestic partnership is the lowest legal level of relationship recognition and allows for partners to jointly own and inherit property, make health decisions and enroll in insurance plans as a couple while civil unions:

> [P]rovide the same rights and benefits to same sex couples as marriage does to heterosexual couples. This includes a wide range of benefits including alimony, child support, and equitable distribution in the context of a divorce. If a couple with a domestic partnership does not convert the partnership to a civil union, they are not entitled to the rights and benefits, which would accrue as if they had a civil union.\(^{32}\)

The following charts depict the current lay of the land as of August 1, 2013.

**Figure 1 – States Banning or Taking No Action on Same Sex Marriage**\(^{33}\)

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27. **ALASKA CONST.** art. I, § 25.
28. See **Same Sex Marriage Timeline**, supra note 13.
30. See id.
33. Thirty states have banned same sex marriage via constitutional amendment. See ALA. CONST. art. I, § 36.03; ALASKA CONST. art. I, § 25; ARIZ. CONST. art. XXX, § 1; ARK. CONST. amend. 83, §§1-3; COLO. CONST. art. II, § 31; FLA. CONST. art. I § 27; GA. CONST. art. I, § IV, P i; HAW. CONST. art. I § 23; IDAHO CONST. art. III, § 28; KAN. CONST. art. XV, § 16; KY. CONST. § 233a; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MISS. CONST. art. XIV, § 263a; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; NEB. CONST. art. I, § 29; N.C. CONST. art. 14 § 6; NEV. CONST. art. I, § 21; N.D. CONST. art. X, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; OR. CONST. art. XV, § 5a; S.C. CONST. art. XVII, § 15; S.D. CONST. art. XXI, § 9; TENN. CONST. art. XI, § 18; TEX. CONST. art. I, § 32; UTAH CONST. art. I, § 29; VA. CONST. art. I, § 15-a; WIS. CONST. art. XIII, § 13. Thirty-two states have enacted statutes reaffirming the traditional view of marriage. See ALA. CODE § 30-1-19 (LexisNexis 2004); ALASKA STAT. § 25.05.013 (2009); ARIZ. REV. STAT. §§ 12-2231-2232 (LexisNexis 2010); ARK. CODE ANN. § 9-11-208 (2012); COLO. REV. STAT. § 14-2-104 (2010); FLA. STAT. ANN. § 741.04.212 (2010); GA. CODE ANN. § 19-3-3.1 (2004); HAW. REV. STAT. ANN. §§572-1, 572-3 (LexisNexis 2010); IDAHO CODE ANN. §32-209 (2010); 750 ILL. COMP. STAT. ANN. 5/213.1 (LexisNexis 2010); IND. CODE ANN. § 31-11-1-1 (LexisNexis 2010); KAN. STAT. ANN. § 23-101 (2002); 1998 KY. REV. STAT. & R. SERV. § 402.040 (West); LA. CIV. CODE ANN. arts. 89, 96, 3520 (2009); MICH. COMP. LAWS SERV. §§ 551.1.271-272 (LexisNexis 2010); MISS. CODE ANN. § 93-1-1 (2010); MO. REV. STAT. § 451.022 (2009); MONT. CODE ANN. §§ 540-1-103, -401 (2009); N.C. GEN. STAT. § 51-1.2 (2010); N.D. CENT. CODE §§ 14-03-01, -08 (2009); OHIO REV. CODE ANN. §3101.01 (LexisNexis 2010); OKLA. STAT. tit. 43, § 3.1 (2010); 23 PA. CONS. STAT. § 1704 (2011); S.C. CODE ANN. §§ 20-1-10, -15 (2009); S.D. CODIFIED LAWS §§ 25-1-1, -38 (2010); TENN. CODE ANN. § 36-3-113 (2010); TEX. FAM. CODE ANN. §§ 2.001, 6.204 (West 2009); UTAH CODE ANN. §§ 30-1-2, -4.1 (LexisNexis 2003); VA. CODE ANN. §§ 20-45.2, -3 (2010); W. VA. CODE ANN. § 48-2-603 (LexisNexis 2011); WIS. STAT. §§ 765.001, .01 (2010); and WYO.
### Banned via State Constitutional Amendment & Legislation

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<tr>
<th>State</th>
<th>Year of Amendment</th>
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<td>Alabama</td>
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<td>S. Carolina</td>
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### Figure 2 – States Legalizing Same Sex Marriage

A few intriguing issues stand out in these charts. First, in every case where a state has banned same sex marriage by both amendment and legislation, the legislation passed first. There is generally between a five and eight year gap between the two. This is likely because it is much more difficult to amend a constitution than it is to pass a statute. Second, the two newest states, Alaska and Hawaii, were the first to approve traditional marriage amendments (1998) while one of the oldest states, North Carolina, became the most recent (2012). Third, six years passed between North Carolina’s amendment and the second most recent amendment with the bulk of the action happening between 2004-2008. This seems to be the time period when the momentum began to shift from states banning same sex marriage to its legal recognition. In fact, twelve of the thirteen states that legalized the practice did so between 2008 and today. Finally, the states that have legalized same sex marriage, civil unions or domestic partnerships tend to fall geographically on the northeast coast, the upper Midwest and the west coast (many of the so-called blue states because of how they vote politically) while the majority of states with traditional marriage amendments tend to fall in the country’s center and south (the so-called red states). The following map shows this breakdown more clearly.36

36 See Same Sex Marriage in the United States, CNN (June 28, 2013), http://www.cnn.com/interactive/us/map-same-sex-marriage/?hpt=hp_t1. It is important to note that this map changes continually as states move on same sex marriage.
This history lurks in the background in each of the Court’s 2013 same sex marriages cases. The majority opinion and many of the dissenters drew from same sex marriage’s past to make arguments about the present and the future.\textsuperscript{37} It is now appropriate to analyze the legal background relevant to \textit{United States v. Windsor}.

\section*{II. The Legal Background in the Windsor Case}

The legal issues in \textit{Windsor} seem overwhelming at first glance. Eighty \textit{amicus curiae} briefs were filed in the case by sophisticated entities and individuals providing their take on how the law should deal with same sex marriage.\textsuperscript{38} Some strongly supported the federal Defense of Marriage Act (DOMA) while others urged the Court to strike it down as unconstitutional.\textsuperscript{39} Questions began to swirl in the public consciousness:

- Which, if any, of these many arguments would the Court accept?
- Should homosexuals be protected as a group that has suffered historic discrimination as many amici argued in their briefs?
- Does the Constitution say anything about restricting marriage to heterosexuals?

\textsuperscript{37} See, e.g., \textit{United States v. Windsor}, No. 12-307, 2013 U.S. LEXIS 4921, at *9 (2013) (“In 1996, as some States were beginning to consider the concept of same-sex marriage and before any State had acted to permit it, Congress enacted the Defense of Marriage Act”) (citations omitted) and id. at *115-16 (Alito, J., dissenting) (“While modern cultural changes have weakened the link between marriage and procreation in the popular mind, there is no doubt 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.”).


\textsuperscript{39} See id.
Further complicating matters was the fact that the typical plaintiff versus defendant battle fizzled in the case. During trial, the plaintiff (Ms. Windsor) and the defendant (the Executive Branch) both agreed that DOMA was unconstitutional and that laws targeted homosexuals should be analyzed with heightened scrutiny. This led to more questions:

- Was there really a genuine legal controversy anymore?
- Is the President allowed to refuse to defend a law he finds unconstitutional?
- Is the Executive Branch injured if it has to issue a tax refund even though it desires to issue the refund?

As the case moved on, the agreement between the primary litigants opened the door for members of the United States House of Representatives to seek to intervene and defend a law that a prior Congress passed. This practice has little precedent and the courts were faced with difficult questions such as:

- Can current elected officials defend a law passed by prior elected officials?
- Does Congress have an interest in its laws being defended by the President?
- How will the current members of Congress be harmed if DOMA is struck down?

Finally, the same sex marriage cases were by far the most anticipated opinions of the 2012 term and the Court waited until the last possible day to announce the outcome. The public wondered:

- Why did the Court wait until the last moment to issue the decisions?
- What do these opinions mean for same sex marriage and for the evolution of Constitutional doctrine in this area?

This section helps provide a firm grip on the legal background of the case by introducing key legal provisions and doctrines in *Windsor*. The rest of the article helps to answer these questions in the context of the case. In brief, *Windsor* revolves around the federal Constitution (more specifically, the Fifth and Fourteenth Amendment Due Process and Equal Protection Clauses), a federal law (the Defense of Marriage Act) and two constitutional theories (Standing and Incorporation). This section tackles each in turn.

## A. THE DUE PROCESS AND EQUAL PROTECTION CLAUSES

The Fifth Amendment deals primarily with an individual’s interaction with the justice system. Along with the rest of the Bill of Rights, the Fifth Amendment restrains federal government actors. This means that all three branches of the federal government are prohibited from invading citizens’ rights in a manner prohibited by the Constitution. More specifically, the Fifth Amendment: (1) requires a grand jury to find probable cause that a particular defendant committed a felony, (2) prohibits double jeopardy, (3) permits a witness to refuse to testify against himself and (4) requires the government to pay just compensation when taking private property. Most important to the *Windsor* case, the Fifth Amendment also declares: “*No person shall be deprived of life, liberty, or property, without due process of law.*”

This is styled as the Fifth Amendment’s Due Process Clause. The Fourteenth Amendment, on the other hand, expressly limits state governments in wielding their power over individuals. This amendment also contains a Due

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40 *Id.*
41 *See* U.S. CONST. amend V, § 1, cls. 1-3 (“*No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*”) (emphasis added).
42 *See* U.S. CONST. amend. XIV, § 1, cl. 3 (“*All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*”).
Process Clause with nearly identical language as the Fifth Amendment: “nor shall any state deprive any person of life, liberty, or property, without due process of law.” The liberty interests protected in these dual Due Process Clauses are at issue in *Windsor.*

The Fifth and Fourteenth Amendment Due Process Clauses have been judicially recognized as having an identical meaning — a meaning that has taken on two interpretations. The first interpretation, called Procedural Due Process, deals with workings of the judicial system and “aims to ensure fundamental fairness by guaranteeing a party the right to be heard, ensuring that the parties receive proper notification throughout [a litigation proceeding], and ensures that the adjudicating court has the appropriate jurisdiction to render a judgment.” This means that the government must provide a fair and just legal process for those it seeks to punish in terms of potentially taking away their life, freedom or possessions. Think about procedural due process as fairness from the moment of arrest to a verdict handed down in a court of law. The American justice system has earned a reputation as one of the best in the world precisely because the government is constitutionally required to provide procedural due process.

The second interpretation, called Substantive Due Process, is a more expansive reading of the due process language (particularly the word “liberty” in both clauses) to protect rights that are not expressly enumerated in other parts of the Constitution. The idea is that the government is also prohibited from infringing upon an individual’s fundamental liberties outside of the courtroom. Substantive Due Process is not mutually exclusive from Procedural Due Process. Rather, it reaches beyond judicial process to governmental regulation more generally. Under this broad reach, the government must provide an appropriate reason for depriving someone’s liberty to act in a certain manner (to travel, to rear children, to procreate, for example). If the government does not provide an acceptable rationale, the restriction is unconstitutional. In other words, Substantive Due Process is “employed as a tool to protect a cluster of unenumerated, non-economic, personal interests from governmental restrictions and have been loosely conceptualized as privacy, autonomy, or personhood-related rights.” The Supreme Court has held that governmental actions that interfere with an individual’s fundamental rights infringe upon liberty and violate Substantive Due Process. A right becomes fundamental only if deeply rooted in the nation’s history and tradition. The Court has classified various rights as fundamental under Substantive Due Process such as the right to privacy, to travel freely and the right to educate and rear children. Courts have also identified liberty interests not deeply rooted in history or tradition to be considered fundamental but important enough to protect. Laws banning certain sexual relationships (sodomy) have been struck down in this manner. Homosexual marriages have not gained protection as fundamental rights primarily

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43 Id.
46 See, e.g., Perceptions of the U.S. Justice System, AMERICAN BAR ASSOCIATION, 6 (1999) (showing that eighty percent of respondents to a national poll believe that the United States legal system is “the best in the world”).
48 See, e.g., Modern Protection of Fundamental Rights, USLEGAL.COM, http://civilrights.uslegal.com/due-process-violation/substantive-due-process/modern-protection-of-fundamental-rights/ (last visited July 17, 2013). It is important to note that governmental regulations that do not rise to the level of interfering with a fundamental right might also violate Substantive Due Process. Regulations that “shock the conscience” or fail a rational basis review have been struck down under the doctrine. See e.g. Wong, supra note 47, at 955.
49 See id. at 955.
50 See generally Roe v. Wade, 410 U.S. 113 (1973) (discussing the fundamental right to privacy), Paul v. Virginia, 75 U.S. 168 (1869) (discussing the fundamental right to travel freely) and Santosky v. Kramer 455 U.S. 745 (1982) (discussing the fundamental right to the care, custody and management by a parent of a child).
51 See id. at 572, 578-79 (stating that there is “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”).
because same sex marriage is not deeply rooted in America’s history and tradition. The *Windsor* opinion evaluates whether same sex marriage is worthy of protection as a liberty interest under this important-enough standard.

Substantive Due Process is one of the most controversial constitutional doctrines. One commentator wrote, “Few constitutional doctrines generate more heat. Many doubt whether there is any legitimate doctrine of substantive due process, and there is a dispute among those who advocate some form of substantive due process about the scope and content of that doctrine.”

Critics of the doctrine argue that it allows unelected judges to read between the lines of constitutional provisions designed solely to provide a fair legal process and insert their own views on the limits of the law. They argue that the language of the clauses clearly refers only to Procedural Due Process and that legislatures are the proper parties to define rights not enumerated in the Constitution. Supporters, on the other hand, argue that the doctrine produces fairness that the founders intended, that “the doctrine is a simple recognition that no [legal] procedure can be just if it is being used to unjustly deprive a person of his basic human liberties and that the Due Process Clause was intentionally written in broad terms to give the Court flexibility in interpreting it.”

The Fourteenth Amendment also contains language that declares: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” The Supreme Court has interpreted this Equal Protection Clause to require “similarly situated” individuals to be treated similarly under the law. The reach of its protection covers everyone located in the United States (including undocumented aliens). Yet, federal and state laws treat people differently all the time. For example, laws in most states allow sixteen year olds to drive but ban anyone younger from obtaining driver’s licenses. The Internal Revenue Code requires people with higher incomes to pay more in taxes. The Constitution allows legislative bodies to govern in a Utilitarian manner by enacting laws that represent the greatest good for the greatest number. The majority is most often helped while minority interests may be harmed. The Fourteenth Amendment helps balance this Utilitarian governance model to protect minority groups from excessive interference with their freedoms. To this end, the Equal Protection Clause allows the government to classify and treat people differently as long as officials have a good enough reason and the reason is not discriminatory in nature.

These reasons – so-called “governmental interests” – are subject to heightened scrutiny when the classifications negatively impact groups of people that have suffered discrimination under the law. For example, classifications based on race, national origin and gender merit a closer look to insure that discrimination is not the underlying rationale for the law. The government needs a compelling reason to draw a racial classification (think affirmative action programs), an important reason to draw a gender classification (think all male military schools) but merely a legitimate reason to draw a distinction based on commercial interests (think tax brackets based scaled by income). This is why the Internal Revenue Code is allowed to treat people differently -- the government can come up with a multitude of legitimate reasons to require people with higher incomes to pay more taxes. This does not mean that the law must be popular to pass constitutional scrutiny. The IRS example proves that point. Legitimate government interests also do not need to be intelligent or effective to pass muster and courts will generally defer to Congressional judgment as to the propriety of the law -- especially when non-suspect classes are targeted.

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52 *The Heritage Guide to the Constitution*, supra note 44.
53 See, e.g., *Substantive Due Process*, STANFORD UNIVERSITY PSYCHIATRY AND LAW SEMINAR, http://www.stanford.edu/group/psylawseminar/Substantive%20Due%20Process.htm (last visited July 15, 2013) (stating that critics of Substantive Due Process “say that when the Court uses judicial review to enforce these pseudo-Constitutional rights they are stealing the legitimate law-making power from the state legislatures.”).
54 See *id.*
55 *Id.*
56 U.S. CONST. amend. XIV, § 1, cl. 4.
58 See, e.g., Yick Wo v. Hopkins, 118 U.S. 356, 368 (1886) (“The rights of the petitioners, as affected by the proceedings of which they complain, are not less because they are aliens and subjects of the emperor of China.”).
60 See 26 U.S.C. § 1 (2012) (showing the different tax brackets based on income).
Finally, the Equal Protection Clause requires that a law must actually relate to or remedy the governmental interest at stake. For example, a law targeting urban blight must actually serve to remedy urban blight. This is especially true when the law treats groups of people differently to meet its goals. The Supreme Court has created four levels of Equal Protection scrutiny that inquire into: (1) whether a law discriminates against a so-called suspect class that has suffered historic discrimination and (2) whether the law actually serves the governmental interests it was enacted to serve. Laws must satisfy both prongs to be upheld under an Equal Protection challenge brought by a party the law discriminates against.

**Figure 5 – Levels of Equal Protection Clause Scrutiny**

<table>
<thead>
<tr>
<th>Level</th>
<th>Difficulty for the Gov’t to Overcome</th>
<th>Applies To</th>
<th>Test</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rational Basis</td>
<td>Easy</td>
<td>All classifications not listed below</td>
<td>The government must prove the law is rationally related to a legitimate government interest</td>
</tr>
<tr>
<td>Rational Basis Plus</td>
<td>Tough</td>
<td>Non-suspect classes historically facing discrimination</td>
<td>The government must prove the law is rationally related to a legitimate government interest but courts more strictly define the term “legitimate”</td>
</tr>
<tr>
<td>Intermediate Scrutiny</td>
<td>Very Difficult</td>
<td>Gender, Illegitimacy</td>
<td>The government must prove that the law is substantially related to an important government interest</td>
</tr>
<tr>
<td>Strict Scrutiny</td>
<td>Nearly Impossible</td>
<td>Race, National Origin, Alienage</td>
<td>The government must prove that the law is required to serve a compelling government interest</td>
</tr>
</tbody>
</table>

So, a state law prohibiting white sixteen year olds from obtaining driver’s licenses but allows all other races to drive would violate the Equal Protection Clause. That is, unless the state could show that its classification was required to serve a compelling interest and was the least restrictive means possible to achieve that interest. This race-based classification would be subject to strict scrutiny and be struck down. A driver’s license classification based merely on age, however, would be subject to the Rational Basis test and likely be constitutional because the Court has not found that age to be a suspect classification.\(^{62}\) In relation to the *Windsor* case, homosexuality has not been categorized as a suspect class. In fact, the Court has not created a suspect or quasi-suspect class since the 1970s.\(^{63}\) Many courts subject laws classifying homosexuals to Rational Basis scrutiny where some are struck down.\(^{64}\) Other courts use Rational Basis Plus to strike down the laws and justify the higher scrutiny by showing how homosexuals have historically been subject to discrimination.\(^{65}\) This issue arises in the lower court opinions in *Windsor* to be discussed in Part IV.

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\(^{62}\) See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985) (“We have declined, however, to extend heightened review to differential treatment based on age”) (citations omitted).


\(^{64}\) See, e.g., Romer v. Evans, 517 U.S. 620, 635 (1996) (striking a state constitutional amendment on Rational Basis grounds).

B. THE DEFENSE OF MARRIAGE ACT

The constitutionality of same sex marriage was not at issue in *Windsor*. This disappointed many gay-rights advocates and commentators who wanted the Supreme Court to issue a definitive ruling on the matter.\(^6^6\) The Court took great care to grant certiorari in a more limited case. Instead of tackling same sex marriage head-on, *Windsor* evaluated the Defense of Marriage Act (DOMA) -- a law designed to protect states unwilling to recognize same sex marriages and limit federal marriage benefits to heterosexual couples.\(^6^7\) DOMA passed Congress by an overwhelming 85-14 margin in the Senate, a similarly large 342 to 57 margin in the House of Representatives and was signed by Bill Clinton in 1996.\(^6^8\) A Congressional report claimed that DOMA was passed to defend the traditional view of marriage and traditional notions of morality, protect state sovereignty and conserve resources.\(^6^9\) President Clinton might have had mixed reasons for signing the law. He was running for a second term at the time but was ahead of his opponent, Bob Dole, by eighteen points in the polls.\(^7^0\) Questions arose as to why a liberal-leaning president would sign such legislation at this point in time. The answer lies, at least partially, in the county’s strong opposition to same sex marriage in 1996 as detailed in Part I.

DOMA is an astoundingly brief federal law (less than 400 words) with two operative sections. The first operative section declares:

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.\(^7^1\)

This language was included to avoid the Constitution’s Full Faith and Credit Clause (FF&C Clause). The FF&C Clause declares, “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.”\(^7^2\) This mandate means that a legal act performed in one state must be recognized by all other states as a legal act. This is true unless Congress mandates otherwise. Though this section of DOMA was not at issue in *Windsor*, is important to briefly discuss DOMA’s Full Faith and Credit Clause implications. DOMA Section Two will likely represent the next constitutional challenge when a same sex couple

\(^{6^6}\) See Adam Winkler, *In DOMA, Prop 8 Ruling, the Supreme Court Put Procedure Over People*, THE DAILY BEAST (June 26, 2013), http://www.thedailybeast.com/articles/2013/06/26/in-domas-prop-8-ruling-the-supreme-court-put-procedure-over-people.html (stating that the *Windsor* and *Hollingsworth v. Perry* Proposition 8 decisions:

[U]ndoubtedly advance the cause of equality for LGBT individuals. Yet they do so not because the justices are fully committed to equal citizenship for all Americans regardless of sexual orientation. Instead the court’s rulings focused largely on process—either how the law was passed or how the law came up for review in the court. And by focusing on process and procedure, the court severely limits the scope and implications of its rulings.)


\(^{7^2}\) U.S. CONST. art. IV.
argues that this restriction also infringes their liberty interests or Equal Protection rights. There are two primary scenarios detailing how Section Two and the FF&C Clause may apply to a future challenge to DOMA:

**OPTION #1** -- the Supreme Court has held that states need not honor public acts, records and judicial proceedings from other states that violate their own public policy. This would make DOMA Section Two unnecessary and irrelevant. The argument would be that a state has a strong public policy against same sex marriage and the courts should not apply the FF&C Clause to require such a state to recognize same sex marriages from other jurisdictions.

**OPTION #2** -- the FF&C Clause would apply if DOMA Section Two is struck down and a majority of the Supreme Court reverses course on the public policy exception to the FF&C Clause. There may be five justices who would be willing to tweak prior precedent to exclude liberty interests such as marriage from the exception. A legal marriage comes with a marriage certificate -- a document that might be considered a public record under the Full Faith and Credit Clause. If so, states would be forced to honor same sex marriages from other states. This would allow one state to effectively set national policy on marriage by legalizing same sex marriage. For example, the Full Faith and Credit Clause would otherwise require Colorado (and potentially Colorado businesses) to provide marital benefits to a same sex couple married in Massachusetts (the first state to allow same sex marriage in 2003) but residing in Colorado.

The second operative section of DOMA (Section Three to be precise) is the statutory provision at issue in *Windsor.* This section of the law amends the federal Dictionary Act as follows:

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.

Congress limited federal marriage benefits to heterosexual married couples via this seemingly innocuous definitional provision. These benefits are scattered in over 1,000 federal statutes and regulations and include family leave, immigration, insurance, retirement and tax entitlements. For example, a legally recognized spouse is allowed to take up to twelve weeks off from work under the Family and Medical Leave Act to care for a spouse with a serious medical condition.

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73 See Lyle Denniston, *Constitution Check: If DOMA Fails Must States Opposing Gays Marriages Accept Them?, CONSTITUTION DAILY* (June 1, 2012), http://blog.constitutioncenter.org/2012/06/constitution-check-if-domas-fail-must-states-opposing-gay-marriages-accept-them/. You can bet that the *Windsor* case will serve as strong precedent supporting this future challenge.


75 See e.g., Denniston, *supra* note 73 (stating that DOMA, Section Two, “of course, is the next-phase dispute, and it definitely will arise if this decision, or any other decision providing legal protection for gay marriage, is ultimately upheld by the Supreme Court.”).

76 See generally Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (“The question before us is whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry. We conclude that it may not.”).


condition.  

DOMA’s definition of spouse makes this allowance unavailable to a same sex couple legally married under state law. As demonstrated, DOMA Section Three is short but extremely powerful. The Windsor case revolves around Section Three of DOMA, the Fifth and Fourteenth Amendments (detailed above) and the two constitutional doctrines of standing and incorporation. The next two sections analyze these doctrines in turn.

C. STANDING

Article III of the Constitution requires a case or controversy to provide a court with jurisdiction. Jurisdiction is the legal authority to adjudicate a legal matter and impose punishment (whether it be a fine, imprisonment or other legal remedy). Without jurisdiction, a court is powerless to hear a case. Standing is a major component of the jurisdictional equation and requires the plaintiff to be injured by the defendant in such a way that a court can provide a remedy. In the typical lawsuit, a plaintiff claims an injury was caused by a defendant or group of defendants and asks the court for relief. However, in some cases, the plaintiff’s claim of injury is insufficient to provide standing and, therefore, jurisdiction. For example, oftentimes the injury claimed was not legally cognizable -- this could happen if the plaintiff went through a bad break up and suffered a broken heart but no legally cognizable mental damage. Or, a defendant might not be the actual cause of the plaintiff’s injury -- this could happen if an unforeseen event such as a bridge collapse directly caused the defendant’s automobile to ram into the plaintiff’s bicycle. Finally, the plaintiff’s injury might not be redressable by a court -- this could happen if a school law applicant alleged racial discrimination and asked for a remedy of admission but, in the interim, enrolled in and graduated from another law school. With these problems in mind, the Supreme Court created a test for jurisdiction requiring the plaintiff to establish three things:

1. The plaintiff must have suffered or will imminently suffer an injury that is concrete and particularized;

2. The plaintiff’s injury must be fairly traceable to the defendant; and

3. It must be likely, as opposed to merely speculative, that a favorable ruling will redress the injury.

Standing became a major issue in the Windsor case. In her complaint, Ms. Windsor claimed that DOMA injured her by failing to recognize her legal marriage -- a decision that required her to pay over $300,000 in estate taxes when her spouse died. Paying a tax counts as a concrete and particularized injury. Prong two presented a challenge at trial, however. There is no doubt that Ms. Windsor’s marriage was legally performed in Canada -- a country that legalized same sex marriage in 2005. The issue was that the couple resided in New York at the time of Ms. Windsor’s spouse’s death -- a state that did not legalize same sex marriages until 2011. The question became whether New York
recognized same sex marriages from other jurisdictions prior to 2011. If so, the couple’s Canadian marriage would count as lawful in New York and Ms. Windsor could claim that DOMA was the “fairly traceable” cause of her injury. If not, no lawful marriage existed for DOMA to injure and prong two of the standing test would not be met. As proof, Ms. Windsor argued that the majority of New York State appellate courts and the state Attorney General recognized marriages from other jurisdictions. She argued that the New York Supreme Court (called the New York Court of Appeals out of tradition) had a chance to disagree but remained silent on the issue. Finally, on the third prong, a court could easily redress Ms. Windsor’s injury by requiring the United States government to issue a refund.

Standing must exist at trial and throughout the appellate process though it is rare for standing issues to arise as a case moves on. Generally, parties who do not settle still believe in their arguments and advocate for their positions at trial and in the appellate courts. However, standing did indeed become more complicated as the Windsor case moved forward. During the pre-trial process, the United States changed its stance on same sex marriage, took the position that DOMA was unconstitutional and advocated that laws discriminating on the basis of sexual orientation should be subject to heightened scrutiny. Attorney General Eric Holder sent a letter to Congress making it clear that the Obama Administration would enforce but no longer defend DOMA:

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 . . . now pending in the Southern District of New York . . . 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.

This meant that neither party to the proceedings was ready to strongly defend DOMA at trial or on appeal. At this point, a group of Representatives from the United States House of Representatives petitioned the trial court to intervene to defend DOMA and then advocate on the law’s behalf on appeal. This Bipartisan Legal Advocacy Group or BLAG argued that it had authority to defend its legislative prerogative even though a prior Congress enacted DOMA in 1996. The federal government appealed the trial court’s decision (even though it agreed with the outcome) in order to serve as a nominal defendant and facilitate BLAG’s intervention. Two standing questions became relevant at this point: (1) did BLAG suffer an injury that would confer standing under the Supreme Court’s test and (2) if not, did a live controversy remain for an appellate court to hear? The answers to these standing questions will be discussed in the evaluation of the court decisions in Part IV.

D. INCORPORATION

88 Id. (citations omitted).
91 Id.
The Constitution has been amended only twenty-seven times in nearly 225 years. The amendment process is politically and logistically difficult. This explains the paucity of change since the late eighteenth century.\(^3\) Some amendments were written specifically to restrict the federal government from intruding upon enumerated rights (the Bill of Rights), others restrict state governments (the Fourteenth Amendment) and a few restrict both (the Thirteenth and Fifteenth Amendments). These structural limitations mean that some important rights are left partially protected and some, like a general right of privacy, are unenumerated. For example, the Bill of Rights does not contain the same equal protection guarantee as the Fourteenth Amendment. Similarly, the First Amendment’s protection of speech and religion only protects against federal government intrusions. These distinctions theoretically allow state governments to interfere with political speech and religious freedom and the federal government to treat similarly situated citizens differently for no good reason. With so few amendments over a long period of time in an evolving nation, individuals are bound to desire expanded protections for rights that are not specifically enumerated.

As with Substantive Due Process, the Supreme Court has attempted to address this concern by interpreting specific constitutional amendments broadly. Over the past eight-five years the Court crafted the so-called Incorporation Doctrine, which borrows language from one amendment and applies it to another in order to bind either federal or state governments. The basic idea is that both the Fifth and Fourteenth Amendments contain Due Process Clauses with basically the same language. As demonstrated above, each clause is interpreted in the same broad manner to protect an individual’s liberty interests from governmental interference. Incorporation takes an amendment from the Bill of Rights (or specific clauses of such an amendment) and applies it to the states through the liberty interest inherent in the Fourteenth Amendment’s Due Process Clause. For example, each of the five protections in the First Amendment has been incorporated to apply to state governments via the Fourteenth Amendment.\(^4\) This means that plaintiffs can allege that a state government violated their First Amendment right to speech, religion, press, assembly and petition even though the First Amendment begins with the phrase “Congress shall make no law . . .” Reverse Incorporation, on the other hand, is the process of taking an amendment (or specific clauses of an amendment) that applies only to the states - such as the Equal Protection Clause - and applying it to the federal government through the liberty interest inherent in the Fifth Amendment’s Due Process Clause. This is true even though the Fourteenth Amendment states, “no state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” The same criticisms and praise heaped upon the Substantive Due Process Doctrine applies with equal force to the Incorporation Doctrine. Both theories of interpretation broadly expand constitutional language to protect rights not specifically enumerated in the document.

Reverse incorporation played a major role in the Windsor case. Ms. Windsor argued that her legal marriage was treated differently than other similarly situated legal heterosexual marriages. This is a standard Equal Protection argument. But, DOMA is a federal law and the federal government was the party allegedly causing Ms. Windsor’s injury. Ms. Windsor did not allege that a state government caused her any injury. Without the Reverse Incorporation Doctrine, she would not have been able to bring an Equal Protection challenge against the federal government. Fortunately for Ms. Windsor, the Supreme Court incorporated the Equal Protection Clause into the Fifth Amendment in 1954.\(^5\) With this legal background in mind, it is time to turn to the key facts of the case.

### III. The Key Facts in Windsor

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\(^3\) Article V of the Constitution details the amendment process, which involves supermajorities in Congress and in the states. See U.S. CONST. art. V.


Edith Schlain was “born in Philadelphia in 1929, in the midst of the Depression. Her parents lost their home and business not long after her birth.”96 She married her brother’s friend, Saul Windsor, in her early twenties but the couple divorced a year later.97 She kept her ex-husband’s last name, moved to New York City, graduated with a Master’s Degree in Mathematics from New York University and took a job with IBM.98 Ms. Windsor’s future spouse, Thea Spyer, was a child of European refugees who was described as “charismatic and intellectual.”99 Ms. Spyer received a PhD from Adelphi University and became a clinical psychologist working in New York City.

In the early 1960s, Ms. Windsor decided to make her sexual orientation public and was introduced to Ms. Spyer in Greenwich Village in 1963.100 They began to date and, in 1967, Ms. Spyer proposed. She used a diamond brooch instead of a ring so that Ms. Windsor would not have to explain an engagement ring to her colleagues at IBM.”101 Because same sex couples could not wed in New York in the 1960s, the couple put off a wedding date. Over the years the couple grew closer and Ms. Windsor described the relationship as, “a love affair that just kept on and on and on.”102 In 1997, however, Ms. Spyer was diagnosed with multiple sclerosis and, as the disease worsened and caused paralysis, Ms. Windsor became her primary caregiver.103 The couple decided that, after a forty-year engagement, they had little time left to tie the knot. So, they traveled to Ontario, Canada in 2007 and wed -- two years before Ms. Spyer’s death.104

Ms. Windsor was acting as executor of Ms. Spyer’s estate when she learned that the estate owed $363,053 in federal taxes. She believed that, since the couple was legally wed, she would qualify for the “Marital Deduction” to the estate tax. Under this deduction, all of Ms. Spyer’s property would pass to Ms. Windsor untaxed.105 The Internal Revenue Service looks to the state of residence, not the jurisdiction where a couple married, when imposing the estate tax.106 Therefore, the IRS argued that the couple was not legally married in New York and, therefore, Ms. Windsor did not qualify for the deduction. Ms. Windsor paid the tax and sued the United States in a federal district court in Manhattan.107 She asked for a refund and a declaration that section three of DOMA violated her Equal Protection rights as incorporated into the Fifth Amendment’s Due Process Clause (which now makes sense).108 On the equal protection front, Ms. Windsor alleged that discrimination based on sexual orientation should be evaluated under strict scrutiny because homosexuals constitute a suspect class.109 She argued that homosexuals as a class “present the traditional indicia that characterize a suspect class: a history of discrimination, an immutable characteristic upon which the classification is drawn, political powerlessness, and a lack of any relationship between the characteristic in question and the class’s ability to perform in or contribute to society.”110 Ms. Windsor then alleged that DOMA is

97 See id.
101 Id.
102 Gabbatt, supra note 96.
103 See id.
104 See Weddings/Celebrations, supra note 98 (“Thea Clara Spyer and Edith Schlain Windsor were married in Toronto on Tuesday. Justice Harvey Brownstone of the North Toronto Family Court officiated at the Sheraton Gateway Hotel.”).
108 See id. at 396-97.
109 See id. at 397.
110 Id. at 401.
unconstitutional under strict scrutiny because it is not narrowly tailored to serve a compelling governmental interest. At eighty-three years old Edith Windsor was headed to federal court to advocate for the unconstitutionality of a popular federal law and, of course, to claw back over $300,000 in taxes.

IV. THE LOWER COURT OPINIONS

It is common to focus on a prominent Supreme Court opinion and neglect the lower court opinions that led to the SCOTUS decision. However, these lower court opinions often provide key background information and add context to a case. They also potentially cover issues that the Supreme Court omits. This proved true with the Windsor case as the lower courts discussed issues, such as scrutiny levels and justifications for DOMA, which the Supreme Court conspicuously ignored. This section will evaluate each opinion in turn.

A. THE TRIAL COURT

Judge Barbara Jones, a federal district court judge sitting in the Southern District of New York, disposed of the Windsor case before it was tried in front of a jury. Before her was a motion for summary judgment filed by Ms. Windsor arguing that there was no dispute as to any material fact in the case and that she was entitled to a judgment as a matter of law. Judge Jones first analyzed whether Ms. Windsor had standing to sue. It was easy to show that she suffered an injury (over $300,000 paid in taxes) and that a court could redress the injury (order the government to pay the money back). The tougher question was under the second prong of standing -- whether Ms. Windsor’s established injury is fairly traceable to the challenged action of the government. As briefly discussed in Part II, this became an issue because Ms. Windsor claimed that she was legally married, that New York recognized marriages performed in other jurisdictions and the government treated that similarly situated heterosexual marriages differently and better. The government had argued that DOMA was not the cause of her tax bill because her marriage was not recognized in the state where Ms. Spyer died. The judge found that New York State did in fact recognize same sex marriages from other jurisdictions in 2009 and, therefore, Ms. Windsor met all three prongs and had standing to sue. The judge next distinguished Baker v. Nelson. She held that the case was not binding precedent because the Court did not “necessarily decide” whether Section Three of DOMA violated the Equal Protection Clause as incorporated into the Fifth Amendment. This led to an evaluation of the merits of the case. Normally a jury will deliberate on the merits of a case. However, in summary judgment motions, a judge will evaluate the merits to determine if there is any way the law allows the non-moving party to prevail. In this case, Judge Jones had to decide if there was any way that DOMA could pass any level of scrutiny under the Equal Protection Clause.

On the merits, Judge Jones declined to overrule precedent in eleven federal appeals courts and find that homosexuals should be treated as a suspect class. Those circuits use Rational Basis review for such cases and she found that Ms. Windsor’s case could be adjudicated under that standard as well. She took time to evaluate each of Congress’ and BLAG’s eight main justifications for DOMA: (1) defending and nurturing the traditional institution of marriage and promoting heterosexuality; (2) encouraging responsible procreation and childrearing; (3) preserving scarce government resources; (4) defending traditional notions of morality; (5) interests of caution; (6) maintaining consistency in

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111 See id.
112 See id. at 396. Summary judgment motions end the case at whatever point in the proceedings they are granted.
113 See id. at 398.
114 See id. at 399.
115 Id. (“Summary judgments from the Supreme Court are binding on the lower courts only with regard to the precise legal questions and facts presented in the jurisdictional statement. The case before the [federal district court] does not present the same issue as that presented in Baker.”) (citations omitted).
116 See id. at 401.
117 See id. at 402. The judge did discuss Rational Basis Plus review but did not specifically apply that standard to this case. Id. (“Regardless whether a more “searching” form of rational basis scrutiny is required [such as rational basis +] where a classification burdens homosexuals as a class and the states’ prerogatives are concerned, at a minimum, this Court must ‘insist on knowing the relation between the classification adopted and the object to be attained.’”) (citations omitted).
citizens’ eligibility for federal benefits; (7) promoting a social understanding that marriage is related to childrearing; and (8) providing children with two parents of the opposite sex. Judge Jones found either that Congress/BLAG’s justification for DOMA was illegitimate or that that law failed to advance a legitimate governmental interest. Recall that both are required for a law to be declared constitutional under Rational Basis review. The following chart summarizes the district court’s analysis of each purported justification (some of which the opinion combined):

**Figure 6 – Judge Jones’ Evaluation of Congressional / BLAG Justifications for DOMA**

<table>
<thead>
<tr>
<th>NO.</th>
<th>Congressional / BLAG Justification</th>
<th>Ruling</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1), (4), (5) AND (8)</td>
<td>Traditional Marriage &amp; Morality</td>
<td>Legitimate interest but not advanced by DOMA</td>
</tr>
<tr>
<td>(2) AND (7)</td>
<td>Childrearing &amp; Procreation</td>
<td>Legitimate interest but not advanced by DOMA</td>
</tr>
<tr>
<td>(6)</td>
<td>Consistency &amp; Uniformity of Federal benefits</td>
<td>Not a legitimate interest because the states are responsible for this under federalism</td>
</tr>
<tr>
<td>(3)</td>
<td>Preserving Scarce Government Resources</td>
<td>Not a legitimate interest because it arbitrarily excludes a group of people (homosexuals)</td>
</tr>
</tbody>
</table>

In the end, Judge Jones found DOMA Section Three unconstitutional because neither the government nor BLAG could articulate a legitimate interest that the law rationally advanced. In other words, DOMA had failed the extremely deferential Rational Basis test -- a test that usually upholds laws based on even the slightest governmental interest. The district court judge granted Ms. Windsor’s motion for summary judgment and ordered that the United States refund her $363,053 plus interest and the costs of her litigation. The United States, even though it agreed with the trial court’s ruling, appealed the decision to the federal Second Circuit Court of Appeals in order to facilitate BLAG’s intervention.

**B. The Second Circuit Court of Appeals**

The Second Circuit Court of Appeals affirmed. A three-judge appellate panel agreed with the district court that New York State would have recognized Ms. Windsor’s marriage and, therefore, she had standing. The panel then distinguished *Baker v. Nelson* for two reasons: (1) *Baker* dealt with states defining marriage and Ms. Windsor’s case dealt with the federal government defining marriage and (2) *Baker* was decided in 1971 and in “the forty years after *Baker*, there have been manifold changes to the Supreme Court’s equal protection jurisprudence.”

On the merits, the majority found that Intermediate Scrutiny review, as opposed to the Rational Basis review used by the trial court and the Strict Scrutiny review advocated by Ms. Windsor, should apply to laws that discriminate against homosexuals. The panel held that all four factors used to recognize a suspect class justify such heightened scrutiny.

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118 See id. at 402-03.
119 See id. at 406.
120 See id. at 396 & 406.
121 See generally Windsor v. United States, 699 F.3d 169 (2nd Cir. 2012).
122 See id. at 177-78.
123 See id. at 178-79.
124 See id. at 181.
First, on the question of whether homosexuals as a group have historically endured persecution and discrimination, the court declared:

It is easy to conclude that homosexuals have suffered a history of discrimination . . . Perhaps the most telling proof of animus and discrimination against homosexuals in this country is that, for many years and in many states, homosexual conduct was criminal. These laws had the imprimatur of the Supreme Court.\textsuperscript{125}

Second, on the question of whether homosexuality has any relation to aptitude or ability to contribute to society, the court declared that there are no distinguishing characteristics that inhibit a homosexual’s ability to contribute to society and that the “aversion homosexuals experience has nothing to do with aptitude or performance.”\textsuperscript{126} Third, on the question of whether homosexuals are a discernible group with non-obvious distinguishing characteristics (especially in the subset of those who enter same-sex marriages), the court declared, “sexual orientation is a sufficiently distinguishing characteristic to identify the discrete minority class of homosexuals.”\textsuperscript{127} Fourth and finally, on the question of whether homosexuals remain a politically weakened minority, the court declared that homosexuals “face pervasive, although at times more subtle, discrimination . . . in the political arena [and] are not in a position to adequately protect themselves from the discriminatory wishes of the majoritarian public.”\textsuperscript{128} Though homosexuals are subject to discrimination, the court found that the mistreatment “is not sufficient” to require Strict Scrutiny review.\textsuperscript{129} Regardless, the panel found that DOMA failed the Intermediate Scrutiny test because the law is not substantially related to an important governmental interest.\textsuperscript{130}

On appeal to the Second Circuit, BLAG had narrowed its justifications for DOMA to two: (1) the law supports unique federal interests such as maintaining a consistent definition of marriage, protecting the fisc and the unknown consequences of redefining a foundational social institution; and (2) to encourage responsible procreation.\textsuperscript{131} The court found that neither of these justifications were substantially related to an important governmental interest and affirmed the trial court’s decision to strike down DOMA Section Three.\textsuperscript{132} Judge Straub dissented from the panel’s decision and argued that DOMA passed Rational Basis scrutiny and should be upheld.\textsuperscript{133} He wrote:

Whether the “connections between marriage, procreation, and biological offspring recognized by DOMA and the uniformity it imposes are to continue is not for the courts to decide, but rather an issue for the American people and their elected representatives to settle through the democratic process. Courts should not intervene where there is a robust political debate because doing so poisons the political well, imposing a destructive anti-majoritarian constitutional ruling on a vigorous debate. Courts should not entertain claims like those advanced here . . .\textsuperscript{134}

This argument that the people should decide this issue through the ballot box is a powerful argument and one that arises in the dissents at the Supreme Court. The United States and BLAG then appealed the decision to the United States Supreme Court, which agreed to hear the case on December 7, 2012.\textsuperscript{135} The Court granted certiorari on three questions (one from the actual petition for certiorari and the other two imposed on its own initiative):

\begin{itemize}
\item \textsuperscript{125} Id. at 182.
\item \textsuperscript{126} Id. at 182-83.
\item \textsuperscript{127} Id. at 184.
\item \textsuperscript{128} Id. at 185 (citations omitted).
\item \textsuperscript{129} Id. 185.
\item \textsuperscript{130} See id. at 185.
\item \textsuperscript{131} See id.
\item \textsuperscript{132} See id. at 185-88.
\item \textsuperscript{133} See Windsor v. United States, 699 F.3d 169, 188 (2nd Cir. 2012) (Straub, J., concurring in part and dissenting in part).
\item \textsuperscript{134} Id. at 211.
\item \textsuperscript{135} See United States v. Windsor, 133 S. Ct. 786, 786 (2012).
\end{itemize}
(1) Whether Section Three of DOMA violates the Fifth Amendment’s guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State;\(^{136}\)

(2) Whether the Executive Branch’s agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction to decide this case;\(^{137}\) and

(3) Whether the Bipartisan Legal Advisory Group of the United States House of Representatives has Article III standing in this case.\(^{138}\)

V. THE SCOTUS MAJORITY OPINION

DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The 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. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment. This opinion and its holding are confined to those lawful marriages. -- Justice Kennedy’s majority opinion in \textit{Windsor}.\(^{139}\)

Anticipation for the \textit{Windsor} decision was intense as the public waited with baited breath for the end of the Supreme Court’s 2012 term.\(^{140}\) Conventional wisdom held that the Court would wait to issue the opinion until its last day -- usually the last Wednesday or Thursday of June. One news outlet described the circumstances in grandiose terms: "Wednesday morning at 10am Eastern [the Court’s last day] may be the most important day in gay civil rights history, perhaps on a par with the Stonewall Riots of 1969."\(^{141}\) Some court observers believed that the justices had their opinions finished but purposefully waited until the end of the term (standard procedure for important opinions) to add drama.\(^{142}\) Others were more practical and declared that the case was argued rather late in the term (at the end of March), that the justices would be split and that five votes would be tough to accumulate.\(^{143}\) This second theory holds that a majority would take longer to coalesce around an opinion that the liberal-leaning justices could stomach while


\(^{137}\) See \textit{Windsor}, 133 S. Ct. at 786.

\(^{138}\) See id.


\(^{141}\) John Aravosis, \textit{Tomorrow is last day for Supreme Court to issue rulings on DOMA, Prop 8}, AMERICAN BLOG (June 25, 2013), http://americanablog.com/2013/06/last-day-supreme-court-opinions-doma-prop-8.html.

\(^{142}\) See, e.g., Peter Landers, \textit{Supreme Court Leaves Biggest for Last}, WALL STREET JOURNAL WASHINGTON WIRE BLOG (May 29, 2013), http://blogs.wsj.com/washwire/2013/05/29/supreme-court-again-leaves-biggest-for-last/ ("Entering the final month of its 2012-13 term, the Supreme Court is following its custom of leaving its biggest decisions for the end. The court . . . traditionally puts off its blockbusters until the last possible day").

\(^{143}\) See, e.g., Alexander Abad-Santos, \textit{How To Wait for the Big Supreme Court Decisions Like a Pro}, ATLANTIC WIRE (June 10, 2013), http://www.theatlanticwire.com/politics/2013/06/how-wait-big-supreme-court-decisions-pro/66074/ (stating that Supreme Court "opinions are issued as they’re ready and conventional wisdom would say that opinions in cases that were heard first would probably be ready earlier than ones heard months later" and \textit{Windsor} was heard at the end of March) (citations omitted).
still roping-in Justice Kennedy as the fifth vote.144 This would also mean that there would likely be long and passionate dissents from the conservative-leaning justices that take more time to write. It is unlikely that the public will ever be told the reasoning for the delay -- the Supreme Court is notoriously good at concealing information as to its internal deliberations and preventing leaks. Regardless, on the last day of the term, the Supreme Court issued a fractured five to four opinion in *Windsor*.145 Justice Kennedy - long considered the Roberts’ Court swing vote on gay rights issues and the author of two important gay rights opinions146 - did indeed join with the four liberal-leaning justices to strike down DOMA Section Three.147

Justice Kennedy recited the facts, introduced DOMA and then moved to standing. This was a key moment in the opinion. Many believed that the Court would dismiss the case because the United States got what it wanted in the lower courts and BLAG was uninjured by having legislation passed by a prior Congress struck down. The standing discussion was lengthy (taking up nearly one third of the opinion), but thoroughly addressed the doctrine and found that the United States government had standing.148 This meant that BLAG’s standing – the issue that caused so much ink to be spilled by the media, academics and court watchers - was irrelevant.149 The majority found that Ms. Windsor clearly had standing when she sued the government for a tax refund.150 The United States government then had standing to appeal all the way to the Supreme Court when the Treasury was forced to pay Ms. Windsor a tax refund -- even though this was the result the government desired.

The majority did warn that it is very rarely appropriate for a President to refuse to defend a law, win in the lower courts (because he refused to defend the law) and then appeal the loss up the appellate chain to get a definitive and binding determination. Instead, Justice Kennedy wrote, the President should fight with Congress for the law’s amendment or repeal.151 However, the majority held that the *Windsor* case proves an exception to this rule because:

1. The district courts in 94 districts throughout the Nation would be without precedential guidance not only in tax refund suits but also in cases involving the whole of DOMA’s sweep involving over 1,000 federal statutes and a myriad of federal regulations; and

144 See, e.g., Adam Winkler, *Might Justice Kennedy Swing a Surprise on DOMA?*, L.A. TIMES (June 22, 2013), available at http://www.latimes.com/news/opinion/commentary/la-oe-winkler-doma-supreme-court-20130623,0,1653316.story (“Despite the conservative tilt of the Roberts Supreme Court, gay rights supporters expect the justices to strike down the Defense of Marriage Act this month. Their hopes are pinned on Justice Anthony M. Kennedy, the court’s usual swing vote, who has written two important pro-gay-rights opinions in the past and voiced skepticism of the law during the court’s hearing in March. If he joins the court’s four liberals, DOMA is history.”).


146 See Romer v. Evans, 517 U.S. 620, 635 (1996) (striking down a Colorado constitutional amendment under the Equal Protection Clause because it classified homosexuals “not to further a proper legislative end but to make them unequal to everyone else”) and Lawrence v. Texas, 539 U.S. 558, 578 (2003) (striking down a Texas law that criminalized same sex sodomy and declaring:

The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. . . . The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.).


148 See id. at *18 (discussing Article III Standing) and *25 (discussing Prudential Standing).

149 See id. at *25 (“For these reasons, the prudential and Article III requirements are met here; and, as a consequence, the Court need not decide whether BLAG would have standing to challenge the District Court’s ruling and its affirmance in the Court of Appeals on BLAG’s own authority.”).

150 See id. at *15.

151 See id. at *28.
(2) BLAG’s sharp adversarial presentation of the issues satisfies the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree.\textsuperscript{152}

The majority found jurisdiction to hear the case and moved to the merits.\textsuperscript{153} The merits section began by evaluating the historical state power to regulate domestic relations -- including marriage.\textsuperscript{154} The Court found that states possessed power to regulate marriage long before the constitution was ratified and that the federal government has consistently deferred to such state power.\textsuperscript{155} The issue was thus framed as one of States’ Rights (or the power of the states to determine the law in areas where the federal government lacks power to regulate). Justice Kennedy wrote that DOMA imposes “restrictions and disabilities” on same sex marriages even though states should be allowed to treat all married couples similarly if they so desire.\textsuperscript{156} This is true even though different states take different approaches to same sex marriage. The constitutional issue is not that thirty-seven states prohibit same sex marriage. Rather, the issue is the differential treatment of married couples within a particular state. For example, DOMA takes away marital benefits that same sex couples possess in the nine states that have legalized both forms of marriage. This inconsistency violates an individual’s liberty interest as protected by the Fifth Amendment’s Due Process Clause. This expansive interpretation of the term liberty is Substantive Due Process at work – though Justice Kennedy did not couch his analysis in those terms. He focused instead on the idea of liberty as a bulwark against laws that “degrade or demean” a class of people.\textsuperscript{157} He then claimed that reverse incorporation solidified this liberty interest because it carries with it “the prohibition against denying to any person the equal protection of the laws.”\textsuperscript{158} In the view of the majority, DOMA Section Three treated similarly situated people differently because of their sexual orientation and such treatment violated their protected liberty interests.

Here is how the majority answered each of the three issues certified by the Court:

(1) Whether Section Three of DOMA violates the Fifth Amendment’s guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State: YES! DOMA Section Three violates an individual’s liberty interest as protected in the Fifth Amendment’s Due Process Clause by treating similarly situated, legally married couples differently. This liberty interest is strengthened by the reverse incorporation of the Equal Protection Clause into the Fifth Amendment.

(2) Whether the Executive Branch’s agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction to decide this case: NO! The United States has standing because the Treasury has to refund Ms. Windsor’s estate tax payment (even though it desires to do so) and BLAG’s participation helps ensure an actual controversy.

(3) Whether the Bipartisan Legal Advisory Group of the United States House of Representatives has Article III standing in this case: UNCLEAR BUT IRRELEVANT! The United States has standing. Therefore, the Court did not need to delve into BLAG’s standing because only one party needs standing for a court to have jurisdiction.

\textsuperscript{152} \textit{See} id. at *23-28.

\textsuperscript{153} \textit{Id}.

\textsuperscript{154} \textit{Id} at *34 (“[I]t is necessary to discuss the extent of the state power and authority over marriage as a matter of history and tradition. State laws defining and regulating marriage, of course, must respect the constitutional rights of persons, but, subject to those guarantees, ‘regulation of domestic relations’ is ‘an area that has long been regarded as a virtually exclusive province of the States.’") (citations omitted).

\textsuperscript{155} \textit{See} Haddock v. Haddock, 201 U.S. 562 (1906) (“[T]he states, at the time of the adoption of the Constitution, 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 of marriage and divorce.”).

\textsuperscript{156} \textit{Windsor}, 2013 U.S. LEXIS 4921, at *38.

\textsuperscript{157} \textit{Id}.

\textsuperscript{158} \textit{Id} at *48.
One of the most important takeaways from the majority opinion came in its last sentence. Justice Kennedy made clear that Windsor’s holding only applied to same sex couples already in lawful marriages.\textsuperscript{159} The majority declared: “This opinion and its holding are confined to those . . . marriages [where same sex couples were legally wed or considered wed under state law].”\textsuperscript{160} This was placed in the opinion to make clear that the Court was not issuing a ruling on the overall constitutionality of same sex marriage. This was an opinion on DOMA Section Three only. In the end, a summary of the majority opinion on the merits would read as follows: The federal government cannot interfere with a couple’s state recognized marriage and the benefits that accompany that marriage. DOMA Section Three creates such interference and is thereby unconstitutional. States remain free to restrict marriage to one man and one woman as long as the regulation does not violate the Due Process or Equal Protection Clauses. The regulations in the thirty-nine states that allow only traditional marriage still stand even after Section Three is struck down.

VI. THE DISSENTERS

There are three strongly written dissenting opinions in the Windsor case. The first is a short dissent written by Chief Justice Roberts. The other two are longer and written by Justice Scalia and Justice Alito. As is typical when a case generates multiple dissents, a few of the dissenting justices joined each other’s dissents. For example, Justice Thomas joined Justice Scalia’s dissent in full while Chief Justice Roberts joined only Part One concerning standing.\textsuperscript{161} Justice Thomas also joined the two-thirds of Justice Alito’s dissent where he discussed his view of the merits.\textsuperscript{162} This section evaluates each dissent in turn.

A. THE CHIEF JUSTICE DISSENTS

“At least without some more convincing evidence that the Act’s principal purpose was to codify malice, and that it furthered no legitimate government interests, I would not tar the political branches with the brush of bigotry.” -- Chief Justice Roberts dissenting in Windsor\textsuperscript{163}

Chief Justice Roberts’ short dissent served three purposes. First, he argued that the Court did not have jurisdiction to hear the case because both the government and BLAG lacked standing.\textsuperscript{164} Second, he argued that Congress had legitimate interests in uniformity and stability when passing DOMA.\textsuperscript{165} The Chief found it hard to believe that the “342 Representatives and 85 Senators who voted for it, and the President who signed” DOMA possessed a “bare desire to harm” homosexuals.\textsuperscript{166} In one of the most compelling lines in the case, the Chief Justice declared: “At least without some more convincing evidence that the Act’s principal purpose was to codify malice, and that it furthered no legitimate government interests, I would not tar the political branches with the brush of bigotry.”\textsuperscript{167} Third, and finally, he dissented to make clear that the majority opinion did not decide in any way whether the states, when exercising their historical power over domestic relations, are constitutionally allowed to ban same sex marriage.\textsuperscript{168} In fact, the Chief Justice found, the majority opinion might have added weight to state bans because of its emphasis on each state’s authority to define marriage for its citizens.\textsuperscript{169} Chief Justice Roberts found that this is a question for another

\textsuperscript{159} See id. at *49.
\textsuperscript{160} Id.
\textsuperscript{164} See id. at *49.
\textsuperscript{165} See id.
\textsuperscript{166} Id. at *50.
\textsuperscript{167} Id.
\textsuperscript{168} See id. at *50-51 (“But while I disagree with the result to which the majority’s analysis leads it in this case, I think it more important to point out that its analysis leads no further. The Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States, in the exercise of their ‘historic and essential authority to define the marital relation,’ may continue to utilize the traditional definition of marriage.”).
\textsuperscript{169} See id. at *52-53.
case and another day -- especially since he did not believe the Court had jurisdiction to decide even the much narrower issue surrounding DOMA in this case.\footnote{170}

**B. JUSTICE SCALIA DISSENTS**

“In the majority’s telling, this story is black-and-white: Hate your neighbor or come along with us. The truth is more complicated.” -- Justice Scalia dissenting in *Windsor*\footnote{171}

Justice Scalia’s dissent in *Windsor* received a great deal of press -- some positive,\footnote{172} some negative\footnote{173} and some downright humorous.\footnote{174} He first evaluated the standing issue (finding the Court has none) and then the merits issue (finding that DOMA is constitutional). On the jurisdiction front, Justice Scalia found the case moot because Ms. Windsor received the remedy she desired, the government concurred with that outcome and both sides agreed with the decision of the Court of Appeals.\footnote{175} The live controversy ended when the Obama administration changed its position on DOMA and refused to defend the law; he referred to the case from that point as a “friendly scrimmage” which should have been dismissed.\footnote{176} On the merits front, Justice Scalia believed that Congress had a legitimate basis for passing DOMA.\footnote{177} In fact, he said that “there are many perfectly valid - indeed, downright boring - justifying rationales for this legislation” which included enforcing traditional “moral and sexual norms.”\footnote{178} He then struggled to determine which constitutional theory the majority used as the foundation for its decision (Federalism, Equal Protection, Substantive Due Process?) to strike down DOMA.\footnote{179}

Justice Scalia concluded his lengthy dissent with language skeptical of the majority’s promise that the decision only applies to same sex couples who are lawfully married by a state that allows same sex marriage. Justice Scalia uses bold language:

> The penultimate sentence of the majority’s opinion is a naked declaration that “[t]his opinion and its holding are confined” to those couples “joined in same-sex marriages made lawful by the State.” I have heard such “bald, unreasoned disclaimer[s]” before. When the Court declared a constitutional right to homosexual sodomy, we were assured [by the majority in *Lawrence v. Texas*] that the case had nothing, nothing at all to do with “whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” Now we are told

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\footnote{170} See id. at *53-54.
\footnote{172} See, e.g., Todd Beamon, Limbaugh: Scalia's Dissent on DOMA 'Breathtaking', NEWSMAX (June 26, 2013), http://www.newsmax.com/newsfront/limbaugh-scalia-dissent-breathtaking/2013/06/26/id/512157 (“Conservative radio talk-show host Rush Limbaugh on Wednesday praised Supreme Court Associate Justice Antonin Scalia’s dissent on striking down the federal Defense of Marriage Act (DOMA) as ‘breathtaking,’ saying that it demonstrated that “the law and judicial restraint, temperament and all that has evaporated” on the nation’s highest court.”).
\footnote{173} See, e.g., Larry Tribe, DOMA, Prop 8, and Justice Scalia’s Intemperate Dissent, SCOTUSBLOG (June 26, 2013), http://www.scotusblog.com/2013/06/doma-prop-8-and-justice-scalias-intemperate-dissent/ (“Having disagreed with the majority about the existence of a live case or controversy within the meaning of Article III . . . Justice Scalia went out of his way to opine at great length and with his characteristic vigor about how the Court should have decided the very controversy that he says wasn’t really before it, offering his view of the merits without the modesty that he insisted was the hallmark of proper adjudication. To accuse the majority of arrogance and then reach the merits after saying that the Court lacks jurisdiction to address the case requires no small dose of chutzpah.”).
\footnote{174} See, e.g., Andy Suszek, Justice Scalia's DOMA Dissent: Annotated, MORE THAN 20 CENTS BLOG (June 29, 2013), http://morethantwentycents.wordpress.com/2013/06/29/justice-scalias-doma-dissent-annotated/ (“Justice Scalia is the Lebron James of the Supreme Court. Most people either love him or hate him, but even those who hate him have to respect his talents - which he is probably taking down to South Beach for the Court’s summer recess, starting this weekend.”).
\footnote{175} See id. at *54-61.
\footnote{176} Id.
\footnote{177} See id. at *68.
\footnote{178} Id. at *83.
\footnote{179} See id. at *82.
that DOMA is invalid because it “demeans the couple, whose moral and sexual choices the Constitution protects,” with an accompanying citation of Lawrence. It takes real cheek for today’s majority to assure us, as it is going out the door, that a constitutional requirement to give formal recognition to same-sex marriage is not at issue here - when what has preceded that assurance is a lecture on how superior the majority’s moral judgment in favor of same-sex marriage is to the Congress’s hateful moral judgment against it. I promise you this: The only thing that will “confine” the Court’s holding is its sense of what it can get away with.\textsuperscript{180}

Justice Scalia concludes his thesis that constitutional protection of same sex marriage looms on the horizon by taking language from the majority opinion in Windsor and substituting language pertaining to state same sex marriage bans.\textsuperscript{181} For example, he predicts a future SCOTUS opinion will read: “[DOMA] This state law tells those couples, and all the world, that their otherwise valid [marriages] relationships are unworthy of [federal] state recognition. This places same-sex couples in an unstable position of being in a second-tier [marriage] relationship. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects . . .”\textsuperscript{182} Justice Scalia’s dissent ends with an admonition that the majority should have let the people work out the legality of same sex marriage through the democratic process. The role of an unelected judge, according to Justice Scalia, is to show judicial restraint and “let the People decide.”\textsuperscript{183}

\textbf{C. JUSTICE ALITO DISSENTS}

“Windsor and the United States implicitly ask us to endorse the consent-based view of marriage and to reject the traditional view, thereby arrogating to ourselves the power to decide a question that philosophers, historians, social scientists, and theologians are better qualified to explore. Because our constitutional order assigns the resolution of questions of this nature to the people, I would not presume to enshrine either vision of marriage in our constitutional jurisprudence.” -- Justice Alito dissenting in Windsor\textsuperscript{184}

Similarly to Justice Scalia, Justice Alito discussed his differences with the majority on standing as then on the merits. He found that the federal government lacked standing because it held the same position as Ms. Windsor and did not ask that the lower court’s judgment be altered in any way.\textsuperscript{185} A decision in a case of this nature, he said, would constitute more of an “advisory opinion” in violation of Article III of the Constitution as opposed to a judgment in a live controversy.\textsuperscript{186} However, Justice Alito believed that BLAG’s standing presented a closer call and that members of Congress can have standing “in the narrow category of cases in which a court strikes down an Act of Congress and the Executive declines to defend the Act” on constitutional grounds.\textsuperscript{187} Under Justice Alito’s theory of standing, Congress should be allowed to protect its general legislative powers in cases where the Executive Branch declines to protect that interest. Therefore, BLAG had standing in the case and a decision by the Court on the merits was proper.\textsuperscript{188} Of course, he dissented because he differed from the majority on the end result of such a merits evaluation.

On the merits, Justice Alito invoked philosophy, history, social science and religion to distinguish professionals more appropriately suited to explore the contours of same sex marriage from unelected judges.\textsuperscript{189} He described two competing views of marriage -- the “traditional/conjugal” view and the “consent-based” view.\textsuperscript{190} The

\begin{itemize}
\item \textsuperscript{180} \textit{Id.} at *88-89.
\item \textsuperscript{181} \textit{See id.} *90-91.
\item \textsuperscript{182} \textit{Id.}
\item \textsuperscript{183} \textit{Id.}
\item \textsuperscript{185} \textit{See id.} at *96.
\item \textsuperscript{186} \textit{Id.}
\item \textsuperscript{187} \textit{Id.} at *96-97 & *103.
\item \textsuperscript{188} \textit{See id.}
\item \textsuperscript{189} \textit{See id.} at *117.
\item \textsuperscript{190} \textit{Id.} at *115-17.
\end{itemize}
traditional/conjugal view “sees marriage as an intrinsically opposite-sex institution” that exists to solemnize “a comprehensive, exclusive, permanent union that is intrinsically ordered to producing new life, even if it does not always do so.”191 The consent-based view of marriage, on the other hand, “primarily defines marriage as the solemnization of mutual commitment - marked by strong emotional attachment and sexual attraction - between two persons.”192 Justice Alito found that twenty-first century American popular culture views the institution of marriage more through the consent-based lens. Advocates of such a view believe that because “gender differentiation is not relevant to this vision, the exclusion of same-sex couples from the institution of marriage is rank discrimination.”193

According to Justice Alito, the problem for unelected judges is that the constitution is silent when it comes to same sex marriage. This makes it improper for judges to declare either view of marriage as constitutional or unconstitutional. Justice Alito declared that “any change on a question so fundamental” as same sex marriage should be debated by philosophers, theologians, social scientists and historians and legalized/banned “by the people through their elected officials.”194 This does not mean that the political braches (legislatures and executives) must avoid making ethical judgments. The dissent stated that the Court has “long made clear that neither the political branches of the Federal Government nor state governments are required to be neutral between competing visions of the good, provided that the vision of the good that they adopt is not countermanded by the Constitution.”195 This means that a government may choose to favor childbirth over abortion or limit marital benefits to heterosexual couples with the understanding that citizens will vote for someone else if their elected representatives stray too far from popular desires.

VII. CONCLUSIONS

The decision in Windsor sets up an even bigger Supreme Court case about the constitutionality of same sex marriage. If the Court truly wishes to reach this issue, it could do itself a favor and choose a case without all the standing and jurisdictional issues inherent in Windsor and Hollingsworth. Regardless, Windsor is a watershed decision when it comes to the federal government’s ability to define marriage as it sees fit, the treatment of homosexuals as a class and the rights of the states to regulate domestic relations (including marriage). The opinion also demonstrates that standing issues have the potential to moot important cases but that courts can discover ways to find standing if they desire to reach the merits. Finally, Justice Kennedy’s opinion makes clear that Substantive Due Process is alive and well even though he never mentioned the doctrine by name. In the end, Edith Windsor will receive her refund and the satisfaction of knowing that her position on DOMA and same sex marriage prevailed. This is only the first foray into the battle however, as the argument moves from the federal definition of marriage to state prohibitions of same sex marriage. The focus will shift to whether the five-justice majority in Windsor will hold together when these extraordinary cases hit the high Court.

APPENDIX | TOUGH QUESTIONS

The following are fifteen tough questions about the Windsor case derived in part from the justices’ comments at oral argument. Take some time to ponder how you would answer each one knowing what you know now about the case. Also, be sure to recognize beforehand where each justice stands on the political and constitutional interpretation spectrum and then evaluate the justice’s potential intent behind each question. Keep in mind that sometimes the justices try to convince each other through their questions and/or speak to let it be known where they stand on the case. Therefore, there may not be a textbook answer to each question and the justice may not even seek such an answer. A lack of straightforward answers in tough legal cases is a common occurrence and especially true in cases that reach the United States Supreme Court. At the oral argument in Windsor, the advocates struggled to answer these very

191 Id. at *115 (citations omitted).
192 See id. at *116.
193 Id.
194 Id. at *109.
195 Id. at *119.
questions and were prodded by the justices with comments like, “But that’s begging the question,”196 “No, I just want your bottom line”197 and “[Your answer] is not very responsive to the concern I’m trying to get an answer to.”198 If the justices can stump a former Solicitor General and the current Solicitor General then it is acceptable for the rest of us to flub through these questions as well. The point is to wonder about the key issues in the case and eventually evolve an opinion on same sex marriage and its relationship to the law.

1. J ustice Scalia on Jurisdiction -- Why did the trial court even get to the merits of the case? Both sides agreed with the trial judge that DOMA was unconstitutional. This is a lot like the following example: Assume you have a lawsuit on a debt and the debtor admits the debt is valid but declares that he will not pay. What would happen in that indebtedness suit is that the court would enter judgment and say, “If you agree that you owe it, by God, you should pay it. And there would be a judgment right there without any consideration on the merits.”199 What stopped that from happening at the trial court level in Windsor – especially since the government admitted it owed Ms. Windsor a refund? This case should never have made it past that point, right?

2. Chie f Justice Robert s on Enforcing but not Defending DOMA -- Can the President claim that Article II requires him to execute DOMA consistent with the Constitution? In other words, a President should be able to claim that he does not have to enforce a law he believes to be unconstitutional? And, “I don’t see why he doesn’t have the courage of his convictions” and refuse to defend and refuse to execute DOMA consistent with his view of the Constitution, rather than saying, “Oh, we’ll wait until the Supreme Court tells us we have no choice?”200 Why did President Obama refuse to defend the law but still enforce it?

3. J ustice Scalia on Congress’ Legislative Power -- Congress must have the ability to defend its legislative power, right? But what happens if BLAG is denied standing and the President refuses to defend a federal law?201 Does denying BLAG standing handicap Congress in its constitutional role of the only branch capable of passing legislation?

4. J ustice Kagan on Limiting Principles -- “So let’s say that the Attorney General decides that a particular application of the statute is unconstitutional and decides to give up on that application. [Not the entire law, mind you, but only a part of the law]. Or even let’s say the Attorney General decides that the application of the statute might be unconstitutional, so decides to interpret the statute narrowly in order to avoid that application.” Could Congress then come in and defend its statute in a case where it is still constitutional outside of the application at issue?202

5. J ustice Ginsburg on Conflict between Federal and State Law -- The problem is “if we are totally for the States’ decision that there is a marriage between two people, for the Federal Government then to come in to say no joint return, no marital deduction, no Social Security benefits; your spouse is very sick but you can’t get leave . . . If that set of attributes, one might well ask, what kind of marriage is this?”203 Was the intent behind DOMA to create inferior marriages in states that have legalized same sex marriage or even domestic partnerships providing marriage-like benefits?

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197 Id. at 64 (quoting Justice Breyer).
198 Id. at 83 (quoting Chief Justice Roberts).
199 Id. at 7.
200 Id. at 12.
201 Id. at 24.
202 Id. at 39 (emphasis added).
203 Id. at 56.
6. **Justice Alito on the Estate Tax** -- “Suppose we look just at the estate tax provision that’s at issue in this case, which provides specially favorable treatment to a married couple as opposed to any other individual or economic unit. What was the purpose of that? Was the purpose of that really to foster traditional marriage, or was Congress just looking for a convenient category to capture households that function as a unified economic unit?” Did Congress, in limiting the estate tax to married couples, do so to easily capture the typical family as economic unit?

7. **Justice Sotomayor on Federalism** -- Why does the government define or care about marriage in the first place? Is the concept not more of a religious and social ritual? More specifically, if the government needs to regulate marriage in some form then is it not up to the states to determine who can marry? In other words, “what gives the Federal Government the right to be concerned at all at what the definition of marriage is? How do you get the Federal Government “to have the right to create categories of that type based on an interest that’s not there [in Article I, Section VIII], but based on an interest that belongs to the States?”

On the federalism front, Justice Sotomayor touched on the question of whether the Federal government, under our federalism scheme, has the authority to regulate marriage. Justice Kennedy told counsel for the government and Ms. Windsor that they were “insisting that we get to a very fundamental question about equal protection, but we don’t do that unless we assume the law is valid otherwise to begin with. And we are asking is it valid otherwise.” What is the Article I, Section VIII federal interest behind DOMA and is it a valid federal interest?

8. **Justice Kennedy on DOMA’s Internal Contradictions** -- It is interesting to compare the functions of Sections Two and Three of DOMA. Section Two is intended to help states adopt their own form of marriage by barring the Full Faith & Credit Clause. But, section Three of DOMA tells states that have legalized same sex marriage that the federal government will not recognize that definition. Therefore, the two sections are inconsistent, right?

9. **Justice Ginsburg on Different Treatment of Marriage** -- DOMA does not just present a question of additional benefits. Marriage benefits taken away by DOMA to same sex couples “touch every aspect of life. Your partner is sick. Social Security. I mean, it’s pervasive. It’s not as though, well, there’s this little Federal sphere and it’s only a tax question. It’s . . . 1,100 statutes, and it affects every area of life. And so [DOMA is] really diminishing what the State has said is marriage. You’re saying, no, [states can have] two kinds of marriage; the full marriage, and then this sort of skim milk marriage.” Is DOMA really just a law about the allocation of federal benefits? And, should the federal government be able to define marriage for itself when it is the party providing the benefits?

10. **Justice Kagan on Potential Discrimination in DOMA** -- The Supreme Court has decided many cases which suggest the following: “[W]hen Congress targets a group that is not everybody’s favorite group in the world, that we look at those cases with some - even if they’re not suspect -- with some rigor to say, do we really think that Congress was doing this for uniformity reasons, or do we think that Congress’s judgment was infected by dislike, by fear, by animus, and so forth? I guess the question that this statute raises, this statute that does something that’s really never been done before, is whether that sends up a pretty good red flag that that’s what was going on. . . . I’m going to quote from the House Report here -- ‘Congress decided to reflect an honor of collective moral judgment and to express moral disapproval of homosexuality.’” Is that really what DOMA was all about when enacted in 1996?

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204 Id. at 61.
205 Id. at 67-68.
206 Id. at 70, 76 & 84.
207 Id. at 70 & 76
208 Id. at 71.
209 Id. at 71-74.
11. **Justice Alito on the Word “Marriage”** -- Why does the word marriage matter to the government?

"Congress could have achieved exactly what it achieved under Section 3 by excising the term 'married' from the United States Code and replacing it with something more neutral. It could have said 'certified domestic units,' and then defined this in exactly the way that Section 3 -- exactly the way DOMA defines 'marriage.' Would that make a difference? In that instance, the Federal Government wouldn't be purporting to say who is married and who is not married; it would be saying who is entitled to various Federal benefits and burdens based on a Federal definition."" In other words, what if the state and federal governments considered both heterosexual and homosexual couples as engaged in civil unions instead of marriages? This would only matter for government benefits, divorce child custody issues, etc. Then, everyone would be treated equally and private institutions could perform marriages as they felt appropriate. The word marriage would not be found in federal law. Is this constitutionally acceptable? Is this still discriminatory towards homosexuals?

12. **Chief Justice Roberts on Federalism** -- Could Congress pass a new law today that says, "we will give federal benefits [to same sex married couples]." When Congress says “marriage” in federal law, Congress means “committed same-sex couples as well, and that could apply across the board. Or do you think that they couldn’t do that? Would a law that does exactly the opposite of DOMA interfere with the states' ability to regulate marriage?

13. **Justice Sotomayor on Equal Protection and Suspect Classes** -- Do you think “that on some level sexual orientation should be looked on an intermediate standard of scrutiny?” Chief Justice Roberts countered this question with one of his own: “So as soon as one State adopted same sex marriage, the definition of marriage throughout the Federal code had to change” because homosexuals as a class would be protected by the heightened scrutiny and would sue to strike down the state’s traditional definition? Should homosexuals as a class be protected under heightened scrutiny? Is Chief Justice Roberts correct about states having to uniformly adopt same sex marriage if heightened scrutiny applies? Additionally, do you believe that every time Congress said “marriage” in federal laws defining the term prior to the Windsor case, “they understood they were acting under the traditional definition of marriage” or did they consider same sex couples?

14. **Chief Justice Roberts on Animus** -- “So [animus] was the view of the 84 Senators who voted in favor of it and the President [the politically liberal-leaning Bill Clinton] who signed it? They were motivated by animus?” What else could have explained the overwhelming vote for DOMA in 1996?

15. **Chief Justice Roberts on Political Power** -- There is little doubt that homosexuals have gained political power and acceptance in the population since 1996. Ms. Windsor’s attorney described a “sea change” in people’s attitudes towards homosexuals and same sex marriage. Chief Justice Roberts then asked her, “I suppose the sea change has a lot to do with the political force and effectiveness of people representing, supporting your side of the case? . . . You don’t doubt that the lobby supporting the enactment of same sex-marriage laws in different States is politically powerful, do you? As far as I can tell, political figures are falling over themselves to endorse your side of the case.” Is this true? Are homosexuals as a class politically powerful enough to defend themselves in the political branches as opposed to in court?

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210 Id. at 76-77.
211 Id. at 81.
212 Id.
213 Id. at 87-89.
214 Id.
215 Id. at 88.
216 Id. at 91.
217 Id. at 107-08.