

IF HER NAME WERE THEO, THERE WOULD BE NO TAX¹: *WINDSOR V. UNITED STATES*, DOMA, AND THE FEDERAL TAX CODE

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Image Credit: Alliance for Justice

What, how, and when a country chooses to tax says a lot about its values. Almost all United States citizens interact with the Federal government through that tax code every year, so it has tremendous power to shape and enforce certain values. It might come as a surprise to many that one of the biggest civil rights cases of our generation arose out of a tax dispute,³ but that just underestimates the impact the tax code has on taxpayers, especially those in marginalized communities.

Edith Windsor and Thea Spyer were a loving couple living together in New York for forty-four years.⁴ They were engaged in 1967, but did not finally marry until May of 2007.⁵ Edith and Thea married in Canada because New York had not yet legalized same-sex marriage.⁶ In 2009, Thea passed away from complication from multiple sclerosis, leaving Edith with a summer cottage in Southampton, New York worth \$550,000 and an apartment on Fifth Avenue worth \$1.3 million.⁷ After Thea's death, Edith was hit with a \$363,053 federal estate tax bill, for a combined state and federal tax bill of \$600,000.⁸ To pay the federal estate tax, Edith had to "sell a lot of stuff."⁹ Although the federal tax code largely exempts assets from the estate tax when they are left to a surviving spouse,¹⁰ Edith was not eligible for the marital deduction because the federal government did not recognize her marriage, even though it was recognized by the state of New York, her state of domicile.¹¹ For tax purposes, marriage was traditionally defined by the state of domicile; however, the Defense of Marriage Act (DOMA) changed how marriage is defined for all federal purposes.¹² DOMA defines marriage as between one man and one woman, which limits spouse to include opposite-sex spouses only, and thus prohibits the Internal Revenue Code (IRC) from extending spousal benefits, and other tax benefits, to include same sex spouses.¹³

Edith sued the federal government for a tax refund.¹⁴ The District Court for the Southern District of New York held that DOMA violated Edith's equal protection of the laws, and that she was entitled to a refund, plus interest.¹⁵ The Second Circuit Court of Appeals affirmed the lower court, holding that sexual orientation was a quasi-suspect class, and DOMA was an unconstitutional violation of the Equal Protection Clause of the Fifth Amendment.¹⁶ The Court also

upheld the tax refund, plus interest.¹⁷ On December 12, 2012, the Supreme Court of the United States granted certiorari.¹⁸

This paper will discuss how DOMA is not in line with our tax code because it does not allow for a fair, uniform, or simplistic means by which to assess ability to pay. Part I will explain the relationship between the Internal Revenue Code and Marriage.¹⁹ Specifically, this part discusses section 2056(a), the marital deduction for the estate tax, and the language and effect of DOMA.²⁰ Part II will outline the *Windsor* case as it moved up through the courts, from the Southern District of New York, to the Second Circuit Court of Appeals, to the United States Supreme Court.²¹ Part III will discuss the three main purposes of our tax code, which are equity, uniformity, and simplicity, and how DOMA is not serving those purposes.²² Part IV will look forward to what will happen if DOMA is found unconstitutional or if it is upheld, and how the financial and tax planning industry is already preparing.²³ This paper ends with the conclusion that DOMA is not properly serving our tax code and should be overturned.²⁴

I. The Internal Revenue Code and Marriage

At issue in the *Windsor* case is section 2056(a) of the Internal Revenue Code, which provides for the allowance of a marital deduction upon the death of a spouse.²⁵ Section 2056 states:

(a) Allowance of marital deduction. For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsection (b), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.²⁶

This section constitutes an unlimited marital deduction for property that passes to a widow or widower from the deceased spouse.²⁷ Section 2056(a)

usually results in a surviving spouse being spared from paying the federal estate tax on property inherited from his or her deceased spouse.²⁸ Marriage is not defined in this section, nor is it defined anywhere else in the tax code.²⁹ The Internal Revenue Service (IRS) promulgated rulings to define marriage for federal tax purposes.³⁰ Traditionally, the marital status of individuals is determined by the state of domicile; therefore, if the state of domicile recognizes common law marriages, common law spouses are recognized as married for federal tax purposes.³¹ In 1996, Congress broke with tradition by usurping traditional state powers to define marriage and imposing a definition of marriage for all federal purposes.³² DOMA states:

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.³³

Under DOMA, marriage is defined as between one man and one woman, and spouse is defined as an opposite-sex spouse only.³⁴ This limited definition of spouse and marriage impacts over 1,000 different federal laws, and thus creates a differential in how these laws are applied, including in the application of the estate tax.³⁵ The estate tax is applied differently to same-sex couples than it is to similarly situated opposite-sex couples because the unlimited marital deduction is applied to property that passes to a similarly situated widow through her husband’s estate, while the deduction is not applied to the property that passes to a similarly situated widow through her wife’s estate.³⁶ This creates a tax differential between similarly situated opposite-sex couples and same-sex couples. This difference in how the marital deduction is applied to similarly situated same-sex surviving spouses led to Edith Windsor’s lawsuit against the federal government, as well as massive confusion and increased complexity in federal tax law.³⁷

II. The Windsor Case

In 2010, Edith Windsor sued the federal government for a refund of her estate tax payment of \$363,053.³⁸ She also challenged DOMA, which required Edith to pay the federal estate tax on her same-sex spouse's estate, a tax from which a similarly situated opposite-sex couple is exempt from paying, which denies her of the equal protection of the laws.³⁹ DOMA has been found unconstitutional by both the District Court for the Southern District of New York and the Second Circuit Court of Appeals.⁴⁰

The District Court held that Windsor is entitled to a refund and that DOMA violates the Equal Protection Clause of the Fifth Amendment.⁴¹ The court explained that, "equal protection requires that the government treat all similarly situated persons alike."⁴² The court decided the equal protection question under rational basis review, which requires that the law be rationally related to a legitimate government interest.⁴³ The court determined that DOMA did not pass rational basis review because the law was not rationally related to any of the interests advanced by the government.⁴⁴

The federal government, represented by the Department of Justice, advanced four interests protected by DOMA.⁴⁵ The first interest advanced by the government was that the federal government should exercise caution in drastically changing the legal landscape.⁴⁶ The Court concluded that this was not a legitimate interest because DOMA does not affect state laws governing marriage, and it does not grant a fundamental right to marry.⁴⁷ The government also argued that DOMA protected child-rearing and procreation.⁴⁸ The court decided that these interests were not furthered by DOMA because DOMA does not address heterosexual couples who have children outside of marriage.⁴⁹ Additionally, the court found that the intent of Congress was too far removed from the actual law to uphold it.⁵⁰ The government argued that DOMA created uniformity in how federal benefits were administered.⁵¹ The court held that the interest in uniformity was not furthered because the states have historically defined marriage for purposes of receipt of benefits, not the federal government.⁵² DOMA, the court found, is acting as a federal review of state laws, which violates the basic principles of federalism.⁵³ Finally, the government argued that DOMA protected the federal fisc.⁵⁴ The

court concluded that an interest in protecting the federal fisc, without more, is insufficient to justify this classification in allocating those resources.⁵⁵ Since there was no rationally related or legitimate government interest furthered by the law, the District Court held that DOMA failed to pass rational basis review, and thus violated the equal protection of the laws.⁵⁶ Consequently, the court awarded a refund of Windsor's estate tax payment, plus interest.⁵⁷

The Second Circuit Court of Appeals affirmed the ruling of the District Court, holding that DOMA was an unconstitutional violation of equal protection; however, the court determined that sexual orientation constituted a quasi-suspect class,⁵⁸ and thus DOMA warranted heightened scrutiny.⁵⁹ Heightened, or intermediate, scrutiny requires that the classification must be substantially related to an important government interest.⁶⁰ The court held that DOMA did not withstand heightened review.⁶¹ The first interest advanced by the government, now represented by the Bipartisan House Legal Advocacy Group, or BLAG, was that DOMA created uniformity in how federal benefits were administered.⁶² The court concluded that because marriage was a province of the states, the law actually creates more discord than uniformity.⁶³

The government again argued that DOMA protected the federal fisc.⁶⁴ The Court decided that DOMA did not protect the federal fisc because DOMA actually withdrew benefits when it eliminated the traditional recognition of marriage under state laws.⁶⁵ In addition, the court found that DOMA was too broad to protect the federal fisc because it touches on several other laws that are unrelated to the federal fisc.⁶⁶ The government argued that DOMA preserved a traditional understanding of marriage,⁶⁷ but the court held that this was not an important federal interest because marriage is traditionally a province of state law.⁶⁸ Accordingly, it is not the duty of the federal government to uphold a tradition that never existed in the federal government.⁶⁹ Finally, the government argued that DOMA encouraged responsible procreation.⁷⁰ The court concluded that DOMA did not encourage responsible procreation because DOMA does not provide anything to encourage opposite-sex couples to procreate responsibly; it only addresses same-sex couples.⁷¹ In the absence of a substantially related government interest, the court held that DOMA failed to pass intermediate scrutiny,

and was thus an unconstitutional violation of equal protection of the laws.⁷² The Court also affirmed the lower court determination that Windsor was entitled to a refund of her estate tax payment, plus interest.⁷³

In 2011, the Obama Administration instructed the Department of Justice not to defend DOMA in court because it views the law as an unconstitutional denial of equal protection of the laws.⁷⁴ In 2012, the Supreme Court granted certiorari to hear the Windsor case and the Proposition 8 case together.⁷⁵ The Bipartisan Legal Advocacy Group (BLAG) of the House of Representatives is taking the place of the Department of Justice and defending DOMA before the Supreme Court because the Department of Justice withdrew from the case.⁷⁶ Before the Court can decide the case on the merits, the Court must decide whether BLAG has standing to defend DOMA.⁷⁷ If the Court finds that BLAG have standing, the case will go forward and the Court will decide on the merits.⁷⁸ If the Court finds that BLAG does not have standing, it will leave in place the decision of the Second Circuit Court of Appeals, which found DOMA unconstitutional.⁷⁹ Oral arguments took place on March 27, 2013, and it appears that DOMA is in trouble.⁸⁰

III. Purposes of the Tax Code and DOMA

The United States tax code aims to measure an individual's ability to pay based on his or her income. The tax code was written to serve three main purposes in determining an individual's ability to pay: equity, uniformity, and simplicity. Equity means that similarly situated individuals are not paying different amounts of income tax to the government and that all taxpayers are treated fairly.⁸¹ Uniformity means the tax code is applied in the same manner across the United States without regard to the differences in state laws throughout the country.⁸² Simplicity means the code is applied in a way that is easy for taxpayers, and government employees who handle tax payments, to understand and allows taxpayers to file their returns without additional complications.⁸³ These three interests are key to determining an individual's ability to pay.⁸⁴

These important interests are still valued as the main objectives of our tax code today by the two integral financial institutions in the United States

government: The Federal Reserve and the Department of the Treasury. Former Federal Reserve Chairman Alan Greenspan extolled the need for uniformity and simplicity in the tax code in his testimony before the President's Advisory Council on Federal Tax Reform.⁸⁵ Chairman Greenspan explained,

“A principle that I believe is important now . . . is predictability in the tax code. By this I mean creating a tax system in which households and businesses can look into the future and have some reasonable degree of certainty about the future tax implications of decisions made today. [S]ome semblance of predictability in the tax code . . . would facilitate better forward-looking economic decisionmaking by households and businesses.”⁸⁶

In lay-mans terms, predictability is a key principle of our tax code because it allows U.S. taxpayers to make the best economic decisions for themselves, their families, and their businesses.⁸⁷ Uniformity ensures that the tax code remains predictable, as Chairman Greenspan emphasizes in his testimony. Chairman Greenspan went on to say that, “[G]reater simplicity would, in and of itself, engender a better use of resources.”⁸⁸ Keeping the tax code simple allows people to use their resources uninhibited by the need to plan around unnecessary complexities.

The Department of the Treasury also continues to value these principles. For example, in a treasury letter to Representative Fattah, the Department agreed with the Representative that taxes should be simple and fair, providing only the revenue needed to meet our economic needs.⁸⁹ As illustrated by Chairman Greenspan and the Department of the Treasury, equity, uniformity, and simplicity remain central interests in how our government taxes its people.

DOMA not only fails to further and adhere to these central tax objectives, it actually stops them from being effective concerns in taxing those in states that recognize same-sex marriage. DOMA's prohibition on the marital deduction for the estate tax for same-sex couples fails to promote equity because similarly situated same-sex and opposite-

sex couples are treated differently under the law.⁹⁰ DOMA's prohibition on the marital deduction for the estate tax for same-sex couples fails to promote uniformity because it treats the laws of states who recognize same-sex marriage differently than those that do not.⁹¹ DOMA's prohibition on the marital deduction for the estate tax for same-sex couples fails to promote simplicity because it creates additional criteria for federal recognition of marriage beyond the traditional adherence to state laws.⁹²

A. DOMA Fails to Promote Equity in the Tax Code

DOMA's definition of marriage as between one man and one woman, and its limited definition of spouse as only opposite-sex spouses, treat same-sex couples unequally under federal law.⁹³ Opposite-sex widows or widowers are allowed a 100% marital deduction for property passed to them from his or her deceased spouse.⁹⁴ Similarly situated same-sex couples do not qualify for the deduction because DOMA refuses to recognize their marriage, even though their state does.⁹⁵ This results in same-sex widows or widowers paying more in taxes to the federal government, even though they are no different under their state's marriage laws. This does not just apply to the estate tax deduction; similarly situated same-sex couples cannot file joint federal income tax returns, cannot obtain certain personal exemptions for their spouse,⁹⁶ and cannot take deductions for children of their spouse, even if the taxpayer adopts the child.⁹⁷ Since DOMA disallows the taking of these and other deductions and exemptions, taxpayers in same-sex marriages recognized by their state of domicile pay more,⁹⁸ and are thus not treated as equals to similarly situated taxpayers in opposite-sex marriages.

DOMA also results in unequal treatment of taxpayers in same-sex marriages because it essentially withdraws benefits.⁹⁹ As the Court of Appeals pointed out, DOMA functionally eliminates the longstanding federal recognition of all marriages properly ratified and recognized under state law.¹⁰⁰ In denying federal recognition of state recognized marriages, the federal government denies, and essentially takes away, any and all federal benefits that come with the recognition of any marriage that does not fit in with DOMA's definition of marriage.¹⁰¹ Thus, married same-sex couples end up paying more in taxes and receive fewer benefits than similarly situated opposite-sex couples

do. While Edith had to pay a huge amount in federal estate taxes, a similarly situated opposite-sex widow would have been able to keep that money. DOMA perpetuates unequal treatment of same-sex spouses, which undermines the value of equity in the tax code.

If DOMA is found unconstitutional, these equity concerns will go away. Married same-sex couples will be treated as equals to similarly situated opposite-sex married couples under federal law. Similarly situated same-sex couples will be able to file joint tax returns and will be able to receive the same deductions and exclusions as opposite-sex couples.¹⁰² Same-sex married couples will no longer have their benefits taken away by the federal government. The tax code will promote equity again.

B. DOMA Fails to Promote Uniformity in the Tax Code

DOMA treats state laws that recognize same-sex marriage differently than state laws that do not recognize same-sex marriage because it refuses to recognize the laws that recognize same-sex marriage.¹⁰³ Traditionally, marriage is a province of the states – the states determined their laws regarding marriage rights, and the federal government applied federal laws in accordance with each state's laws.¹⁰⁴ There is no traditional federal family law.¹⁰⁵

DOMA usurps the power of the states to determine their own marriage laws by defining marriage as between one man and one woman and limiting spouse to opposite-sex spouses only,¹⁰⁶ essentially invalidating any state law that recognizes same-sex marriage under the guise of a compelling government interest.¹⁰⁷ Since there is no longer a blanket respect for state marriage laws, the tax code is no longer applied consistently to married couples – an opposite-sex married couple receives the estate tax deduction for any property passed to them from a deceased spouse, as well as several other deductions, while a similarly situated same-sex married couple does not.¹⁰⁸ Therefore, DOMA results in tax laws being applied in an inconsistent way regarding married couples,¹⁰⁹ which undermines the importance of uniformity in the tax code.¹¹⁰

If DOMA is found unconstitutional, the tax laws will be applied in a uniform manner again. The federal government will most likely start recognizing all marriages recognized and ratified by

state laws, for all federal purposes, including taxes and other benefits.¹¹¹ This means that tax laws will be consistently applied to all married couples without regard to whether they are opposite-sex couples or same-sex couples. The tax code will have uniformity again.

C. *DOMA Fails to Promote Simplicity in the Tax Code*

DOMA's definition of marriage as between one man and one woman and its limited definition of spouse as opposite-sex spouses only creates complexities for tax purposes.¹¹² DOMA essentially adds extra criteria for federal marriage recognition. Where the federal government traditionally respected and recognized the marriage laws of each state, the government must now "identify and exclude all same-sex marital unions from federal recognition."¹¹³ This requires not only more work on the administrative end,¹¹⁴ but married same-sex couples are subject to greater complications as well.¹¹⁵ Married same-sex couples must prepare several tax returns – individual returns for federal tax purposes, and joint returns for state purposes.¹¹⁶ They cannot list certain deductions on their federal returns that they can list on their state returns.¹¹⁷ Additionally, same-sex widows and widowers must prepare to pay the government full taxes on the property left to them by deceased spouses, which leads to more complicated planning for life after the death of his or her spouse. Therefore, DOMA creates additional complexities for the tax code on the personal end and the administrative end,¹¹⁸ which undermines the importance of simplicity in the tax code.

If DOMA is found unconstitutional, these additional complexities disappear. The federal government will no longer be required to identify and exclude same-sex couples from federal marriage recognition.¹¹⁹ Instead, the government will most likely return to how they traditionally recognized marriage – based on state marriage laws.¹²⁰ Additionally, tax season will be easier for same-sex couples because they will no longer have to prepare different forms for federal and state tax returns.¹²¹ They could file both state and federal forms jointly, individually, or as head of household (however they wish to file), and can list the same deductions on both forms. Simplicity will return to the tax code.¹²²

IV. Looking Forward

Even before the Supreme Court decides whether DOMA stands or falls, tax professionals, lawmakers, and same-sex couples throughout the country are looking forward and are starting to plan for the future.¹²³ The possible outcomes present different challenges and benefits for the groups affected by the potential change in the law.¹²⁴ If the law is upheld, there will be no changes for how taxes are prepared and dealt with for married same-sex couples.¹²⁵ However, this will not be the end of the road for those fighting for equality – they will continue to challenge the validity of DOMA until it is finally either repealed or struck down by the Court.

A. *If DOMA is Found Unconstitutional*

If DOMA is found unconstitutional by the Supreme Court, or if the Supreme Court dismisses for lack of standing and the Second Court of Appeals decision stands,¹²⁶ the implications will affect several groups, including the federal government (represented by the IRS), tax professionals, and married same-sex couples.¹²⁷ If DOMA is overturned, the federal government would have to recognize stated-recognized same-sex marriages for all federal purposes, but no other state would be required to recognize same-sex marriages performed in a state of recognition.¹²⁸ If the Supreme Court dismisses for lack of standing or case or controversy, the ruling of the Second Circuit Court of Appeals may stand; however, since BLAG would not have had standing in the Supreme Court, it means they did not have standing in the Court of Appeals.¹²⁹ The question remains whether the Court of Appeals ruling or the District Court ruling would stand.

1. The Federal Government

If DOMA is found unconstitutional either by a decision on the merits or a dismissal for lack of standing, the federal government will be greatly effected.¹³⁰ Tax professionals are already instructing their married same-sex clients to prepare protective claims for refunds and overpayments, and to file them as soon as the decision comes down.¹³¹ If DOMA is found unconstitutional, it means it was always unconstitutional, and the government will owe millions of dollars in refunds and overpayments

to married same-sex individual taxpayers.¹³² This will result in an immediate revenue loss for the government.¹³³

Even though the immediate effect on the government is a loss in revenue and more administrative work to handle refunds,¹³⁴ if the Supreme Court finds DOMA unconstitutional, the long-term effect on the government is beneficial. DOMA is actually costing the government money, so if the law is struck down, there will be a large savings for the government.¹³⁵ DOMA's additional criteria required the government to "identify and exclude all same-sex marital unions from federal recognition," which only made tax season more complex on the administrative end.¹³⁶ Without DOMA, the government no longer has to adhere to this requirement – the government will most likely go back to the traditional way of doing things, which means using state marriage laws to apply federal laws affecting marriage.¹³⁷ Although there will be an immediate revenue loss for the government due to refunds to same-sex taxpayers who file protective claims, this revenue loss is short term.¹³⁸ In a 2004 report, the Congressional Budget Office actually reported an increase in federal revenue if DOMA is repealed or found unconstitutional.¹³⁹ Overall, the government benefits greatly in the long term if DOMA is found unconstitutional.

2. Tax Professionals

Tax professionals are already looking forward. They are advising their clients in same-sex marriages to prepare special tax forms so if DOMA is found unconstitutional, they can immediately file for tax refunds.¹⁴⁰ Right now, taxpayers in married same-sex couples are filing individually or as heads of household, and are denied several benefits and deductions that come with federal marriage recognition.¹⁴¹ If DOMA is found unconstitutional, this will change.

Tax professionals are now strongly advising their married same-sex clients to prepare protective claims for refunds and overpayments, which taxpayers should file immediately, pending a ruling by the Supreme Court finding DOMA unconstitutional.¹⁴² Other tax professionals are advising their clients to file their regular individual or head of household returns, and then file an amended married filing jointly return with an explanation provided in the appropriate place on the form.¹⁴³ Married same-sex

taxpayers cannot expect to receive a refund if they do not heed the advice of tax professionals.¹⁴⁴ They must file immediately because ". . . there is a three-year statute of limitations on tax refund claims, [so] it is imperative that claims be filed as soon as possible to protect any potential refunds for returns dating back as far as 2009."¹⁴⁵

3. Married Same-Sex Couples

Married same-sex couples will be most affected if the Supreme Court finds DOMA unconstitutional. If the Court finds DOMA unconstitutional, that means it was always unconstitutional, and the federal government must pay back any additional taxes received as a result of DOMA.¹⁴⁶ If taxpayers in states that recognized same-sex marriages follow the advice of tax professionals and file protective claims or amendments to their tax returns, they are expected to receive refunds for the overpayments.¹⁴⁷ This means the amount of any deductions and exclusions that could have been taken since DOMA was enacted must be refunded to married same-sex taxpayers.¹⁴⁸ This means that Edith Windsor, and all others like her who had to pay the estate tax on property that passed to them from their deceased spouses, will receive a refund of that estate tax payment.¹⁴⁹

Married same-sex taxpayers will also be able to file joint tax returns.¹⁵⁰ Additionally they will be able to take all of the deductions and exclusions similarly situated opposite-sex couples can take.¹⁵¹ Same-sex couples would no longer have to file under the community property ruling.¹⁵² The greatest benefit for married same-sex couples is in estate planning.¹⁵³ If the Supreme Court finds DOMA unconstitutional, married same-sex couples will be able to benefit from tax-advantaged estate planning because they will be eligible to receive the 100% marital deduction for any property that passes to them from their deceased spouse.¹⁵⁴ It will be easier to plan their wills in a advantageous way, tax-wise, because they could pass property to their spouses without worrying about their spouse having to pay a hefty tax on it.¹⁵⁵ Same-sex widows and widowers will not have to find themselves in the same position as Edith Windsor.¹⁵⁶

Some same-sex couples have expressed concern that without federal recognition of marriage under DOMA, there is no federal recognition of

divorce under DOMA.¹⁵⁷ If the Supreme Court finds DOMA unconstitutional, same-sex couples will now know how to divorce and divide up property for tax purposes, and for other federal purposes.¹⁵⁸ For example, under current federal law, property transferred at divorce may be treated as a taxable sale or gift, but if DOMA is found unconstitutional, property transferred at divorce will not be taxable.¹⁵⁹ Additionally, any alimony paid to ex-spouses will now be tax deductible.¹⁶⁰ Finally, they will be able to receive all of the benefits the federal government offers married opposite-sex couples, not just tax benefits.¹⁶¹ Overall, if DOMA is found unconstitutional, married same-sex couples have a lot to gain.

V. Conclusion

The United States tax code is based on the principles of equity, uniformity, and simplicity.¹⁶² DOMA not only fails to further these values, but actually acts to undermine them regarding married same-sex couples.¹⁶³ Unequal treatment of married same-sex couples, inconsistent application of the tax code, and unnecessary complications are the results of the limiting definitions of marriage and spouse under DOMA.¹⁶⁴ If the Supreme Court finds DOMA unconstitutional, these issues will disappear.¹⁶⁵

If DOMA is found unconstitutional, the interested groups will all be positively affected.¹⁶⁶ Tax professionals are already advising their married same-sex clients to file protective claims or amendments now to be able to receive a refund of their overpayments if the Court strikes down DOMA.¹⁶⁷ Married same-sex couples will also be able to claim the deductions and exclusions they were barred from taking under DOMA, and will be able to plan for their estates in a tax-advantageous way.¹⁶⁸ While married same-sex couples have the most to gain, the federal government will see increased revenue and less administrative costs in the long run.¹⁶⁹

In the end, the federal government used DOMA to unfairly tax Edith Windsor. She and millions of other married same-sex couples, widows, and widowers deserve to be treated in the manner the tax code intended. If the Supreme Court finds DOMA unconstitutional this summer, the Edith Windsor's of the world will no longer have to worry about unfair treatment when they go to file their taxes. But even

with growing public support and a strong case for equality, it is hard to predict how the Supreme Court will rule on this issue. One can only hope the Court decides in favor of equal treatment for all.

(Endnotes)

¹ Peter Applebome, *Reveling in Her Supreme Court Moment*, N.Y. TIMES (Dec. 10, 2012) (quoting Edith Windsor), available at <http://www.nytimes.com/2012/12/11/nyregion/edith-windsor-gay-widow-revels-in-supreme-court-fight.html?pagewanted=all&r=0>.

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³ *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012); Bob Van Voris, *Defense of Marriage Act Faces Widow's Tax Case Appeal*, BUSINESSWEEK (Sept. 27, 2012), available at <http://www.businessweek.com/news/2012-09-27/defense-of-marriage-act-faces-widow-s-tax-case-appeal>.

⁴ *Windsor v. United States: Edie Windsor Challenges DOMA*, American Civil Liberties Union, available at <http://www.aclu.org/lgbt-rights/windsor-v-united-states-thea-edie-doma> (last visited Feb. 12, 2013).

⁵ Applebome, *supra* note 1.

⁶ *Id.*

⁷ Peter Applebome, *A Doubly Trying Tax Season for Same Sex Couples*, N.Y. TIMES (Feb. 9, 2013), available at <http://www.nytimes.com/2013/02/10/business/yourtaxes/same-sex-couples-may-find-tax-time-doubly-trying.html?emc=tnt&tntemail0=y&r=0>.

⁸ *Id.*; Van Voris, *supra* note 2.

⁹ Eric W. Dolan, *Edith Windsor: Case against Defense of Marriage Act 'went beautifully'*, THE RAW STORY (Mar. 27, 2013), <http://www.rawstory.com/rs/2013/03/27/edith-windsor-case-against-defense-of-marriage-act-went-beautifully>.

¹⁰ 26 U.S.C.A. § 2056(a).

¹¹ Lila Shapiro, *Edie Windsor Responds to Supreme Court Agreeing to Hear Her DOMA Case*, Huffington Post (Dec. 10, 2012), available at http://www.huffingtonpost.com/2012/12/07/edith-windsor-doma-supreme-court_n_2259916.html; Robert F. McFadden, *State Court Recognizes Gay Marriages from Elsewhere*, N.Y. TIMES (Feb. 2, 2008), <http://www.nytimes.com/2008/02/02/nyregion/02samesex.html> (explaining the controversy and support surrounding the decision by the state appellate court recognizing same-sex marriages performed elsewhere).

¹² Defense of Marriage Act, 1 U.S.C.A. § 7; *Supra* note 6.

¹³ *Id.*

¹⁴ See *supra* note 3. In cases like Edith's, where the taxpayer has to pay a tax that is a wrong payment or an overpayment, the taxpayer has to first pay the tax to avoid the consequences of not

paying the tax. After he or she pays the tax, he or she must sue the government for a tax refund to get the money back. See About the Court, <https://www.ustaxcourt.gov/about.htm> (last visited Mar. 31, 2013). Edith is only challenging section three of DOMA, which defines marriage as between one man and one woman and limits spouse to opposite-sex spouses only. *Accord* 1 U.S.C. § 7(3); *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012); *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012). This case does not discuss section two of DOMA, which permits to deny recognition to marriages performed in other states. See 1 U.S.C. § 7(2).

¹⁵ *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012).

¹⁶ *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012).

¹⁷ *Id.*

¹⁸ *United States v. Windsor*, 133 S. Ct. 786 (2012) (granting certiorari). At the same time, the Supreme Court granted certiorari in another same-sex marriage case, *Hollingsworth v. Perry*. See Petition for Writ of Certiorari, *Hollingsworth v. Perry*, 133 S. Ct. 786 (2012) (No. 12-144) (petition for certiorari granted). The Perry case (formerly Perry v. Schwarzenegger) challenges Proposition 8 in California, a ballot initiative that amended the state constitution to define marriage as between one man and one woman for state purposes. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010); *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012). The United States District Court for the Northern District of California and the United States Ninth Circuit Court of Appeals both found that Proposition 8 was unconstitutional. See *id.* The questions before the Supreme Court are: (1) Whether Proposition 8 violates that Equal Protection clause of the Fourteenth Amendment, and (2) whether petitioners have standing. See *Hollingsworth v. Perry*, 133 S. Ct. 786 (2012) (No. 12-144).

¹⁹ See *infra* Part I.

²⁰ *Id.*

²¹ See *infra* Part II.

²² See *infra* Part III.

²³ See *infra* Part IV.

²⁴ See *infra* Part V.

²⁵ 26 I.R.C. § 2056(a); *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012).

²⁶ 26 I.R.C. § 2056(a).

²⁷ *Id.*

²⁸ Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805, 822 (2008) (In 1981, Congress increased the marital deduction to 100%).

²⁹ 26 I.R.C. § 2056(a).

³⁰ Rev. Rul. 58-66, C.B. 60 (1958).

³¹ *Id.* (“The marital status of individuals as determined under state law is recognized in the administration of the Federal income tax laws. Therefore, if applicable state law recognizes common-law marriages, the status of individuals living in such relationship that the state would treat them as husband and wife is, for Federal income tax purposes, that of husband and wife”).

³² Rev. Rul. 58-66, C.B. 60 (1958); Defense of Marriage Act, 1 U.S.C. § 7.

³³ Defense of Marriage Act, 1 U.S.C. § 7.

³⁴ Defense of Marriage Act, 1 U.S.C. § 7; Deborah L. Jacobs, *Supreme Court Agrees to Hear Two Gay Marriage Cases*, FORBES (Dec. 7, 2012), <http://www.forbes.com/sites/deborahljacobs/2012/12/07/supreme-court-agrees-to-hear-two-gay-marriage-cases>.

³⁵ U.S. Gov’t Accountability Office, GAO-04-353R, Defense of Marriage Act: Update to Prior Report (2004) (identifying 1,169 laws that are impacted by the definition of spouse in DOMA); Defense of Marriage Act, 1 U.S.C.A. § 7; Peter Applebome, *A Doubly Trying Tax Season for Same Sex Couples*, N.Y. TIMES (Feb. 9, 2013), available at <http://www.nytimes.com/2013/02/10/business/yourtaxes/same-sex-couples-may-find-tax-time-doubly-trying.html?emc=tnt&tntemail0=y&r=0>.

³⁶ Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805, 822 (2008) (“The plain meaning of DOMA is that for federal tax purposes, same-sex spouses will be excluded from all tax rules that apply to spouses”).

³⁷ *Windsor v. United States*, 699 F.3d 169, 186 (2d Cir. 2012); Peter Applebome, *A Doubly Trying Tax Season for Same Sex Couples*, N.Y. TIMES (Feb. 9, 2013), available at <http://www.nytimes.com/2013/02/10/business/yourtaxes/same-sex-couples-may-find-tax-time-doubly-trying.html?emc=tnt&tntemail0=y&r=0>.

³⁸ *Windsor v. United States*, 833 F. Supp. 2d 394, 397 (S.D.N.Y. 2012).

³⁹ *Id.*

⁴⁰ *Id.* at 406; *Windsor v. United States*, 699 F.3d 169, 176 (2d Cir. 2012).

⁴¹ *Windsor v. United States*, 833 F. Supp. 2d 394, 406 (S.D.N.Y. 2012).

⁴² *Id.* at 400.

⁴³ *Id.* at 400, 402.

⁴⁴ *Id.* at 406.

⁴⁵ *Id.* at 403.

⁴⁶ *Id.*

⁴⁷ *Id.* at 403-04.

⁴⁸ *Id.* at 404-05.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 405-06.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 406.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Windsor v. United States*, 699 F.3d 169, 181-82 (2d Cir. 2012) (“In this case, all four factors justify heightened scrutiny: A) homosexuals as a group have historically endured persecution and discrimination; B) homosexuality has no relation to aptitude or ability to contribute to society; C) homosexuals are a discernible group with non-obvious distinguishing characteristics, especially in the subset of those who enter same-sex marriages; and D) the class remains a politically weakened minority.”).

⁵⁹ *Id.* at 176, 181-82.

⁶⁰ *Id.* at 185.

⁶¹ *Id.* at 188.

⁶² *Id.* at 185-86.

⁶³ *Id.* at 186 (explaining that DOMA does not simplify the law because it would be more consistent and simpler for “the federal government to ask whether a couple was married under the law of the state of domicile, rather than ‘adding an additional criterion, requiring the federal government to identify and exclude all same-sex marital unions from federal recognition.’”).

⁶⁴ *Id.* at 186-87.

⁶⁵ *Id.* at 187 (“DOMA is properly considered a benefit withdrawal in the sense that it functionally eliminated longstanding federal recognition of all marriages that are properly ratified under state law—and the federal benefits (and detriments) that come with that recognition”).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 187-88.

⁷¹ *Id.* at 188.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Letter from Eric Holder, Attorney Gen., Dep’t of Justice, to John Boehner, Speaker of the House of Representatives (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

⁷⁵ Brief for Writ of Certiorari before Judgment, *United States v. Windsor*, 133 S. Ct. 786 (2012) (No. 12-307); *Hollingsworth v. Perry*, 130 S. Ct. 786 (2012). Since the Court granted certiorari, several prominent names have filed amicus briefs urging the Court to strike down DOMA, or have come out in favor of same-sex marriage. See Anjali Sareen, *Obama Administration Urges Supreme Court to Strike Down DOMA*, HUFFINGTON POST (Feb. 22, 2013), available at http://www.huffingtonpost.com/2013/02/22/obama-supreme-court-doma_n_2745594.html; Sheryl Gay Stolberg, *Prominent Republicans Sign Brief in Support of Gay Marriage*, N.Y. TIMES (Feb. 25, 2013), available at <http://www.nytimes.com/2013/02/26/us/politics/prominent-republicans-sign-brief-in-support-of-gay-marriage.html?hp&r=0>; Erik Eckholm, *Corporate Call for Change in Gay Marriage Case*, N.Y. TIMES (Feb. 27, 2013), available at <http://www.nytimes.com/2013/02/28/business/companies-ask-justices-to-overturn-gay-marriage-ban.html?emc=eta1&r=0>; *Bill Clinton: DOMA Should be Overturned by Supreme Court*, HUFFINGTON POST (Mar. 7, 2013), available at http://www.huffingtonpost.com/2013/03/07/bill-clinton-doma_n_2833020.html.

⁷⁶ See Brief for Petition of Certiorari, *Windsor*, 133 S. Ct. 786 (No. 12-307); Matthew I. Hall, *How Congress Could Defend DOMA in Court (and Why BLAG Cannot)*, 65 STAN. L. REV. ONLINE 92 (2013), available at <http://www.stanfordlawreview.org/congress-defend-doma>.

⁷⁷ Matthew I. Hall, *How Congress Could Defend DOMA in Court (and Why BLAG Cannot)*, 65 STAN. L. REV. ONLINE 92 (2013), available at <http://www.stanfordlawreview.org/congress-defend-doma>.

⁷⁸ *Id.*

⁷⁹ See *id.*

⁸⁰ See generally Transcript of Oral Argument, *United States v. Windsor*, 133 S. Ct. 786 (2013) (No. 12-307). See also Adam

Liptak and Peter Baker, *Justices Cast Doubt on Benefits Ban in U.S. Marriage Law*, N.Y. TIMES (Mar. 27, 2013), available at <http://www.nytimes.com/2013/03/28/us/supreme-court-defense-of-marriage-act.html?hp&r=0>.

⁸¹ See BLACK’S LAW DICTIONARY (9th ed. 2009) (defining equity as “[f]airness; impartiality; evenhanded dealing.”).

⁸² See BLACK’S LAW DICTIONARY (9th ed. 2009) (defining uniform as “[c]haracterized by a lack of variation; identical or consistent.”).

⁸³ See MIRIAM-WEBSTER DICTIONARY (2013) (defining simplicity as the state of being uncomplicated or uncompounded).

⁸⁴ Efficiency is also an important theme of the tax code because it limits distortionary effects. Testimony of Jared Bernstein, Senior Fellow, Center on Budget and Policy Priorities, before the Senate Budget Committee (Mar. 5, 2013), available at <http://www.cbpp.org/cms/?fa=view&id=3916>. Efficiency in the tax code ensures that taxpayers are not in the marketplace chasing tax benefits, but that they are in the marketplace because it is a sound investment or choice. See *id.* The importance of efficiency is still debated in the tax world, so I will not go into a total explanation at this time.

⁸⁵ Alan Greenspan, Chairman, Fed. Reserve Sys., Testimony on the Tax System before the President’s Advisory Panel on Federal Tax Reform (Mar. 3, 2005).

⁸⁶ *Id.*

⁸⁷ See *id.*

⁸⁸ *Id.*

⁸⁹ Letter from David P. Vandivier, Acting Assistant Sec’y for Legislative Affairs, Dep’t of the Treasury, to Representative Chaka Fattah (June 30, 2009) (“We agree with you that our tax code should be simple and fair. In addition, it should provide necessary revenue while meeting the needs of today’s economy.”).

⁹⁰ See *supra* Part III.A.

⁹¹ See *supra* Part III.B. Uniformity and equity are similar and related objectives of the tax code.

⁹² See *supra* Part III.C.

⁹³ 1 U.S.C. § 7.

⁹⁴ 26 I.R.C. § 2056(a); Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805, 822 (2008).

⁹⁵ 1 U.S.C. § 7.

⁹⁶ 26 C.F.R. § 1.151-1.

⁹⁷ See Peter Applebome, *A Doubly Trying Tax Season for Same Sex Couples*, N.Y. TIMES (Feb. 9, 2013), available at <http://www.nytimes.com/2013/02/10/business/yourtaxes/same-sex-couples-may-find-tax-time-doubly-trying.html?emc=tnt&tntemail0=y&r=0>.

⁹⁸ But see Peter Applebome, *A Doubly Trying Tax Season for Same Sex Couples*, N.Y. TIMES (Feb. 9, 2013) available at <http://www.nytimes.com/2013/02/10/business/yourtaxes/same-sex-couples-may-find-tax-time-doubly-trying.html?emc=tnt&tntemail0=y&r=0> (stating that some same-sex couples save money by filing separately because they are not hit by the marriage penalty in the tax code).

⁹⁹ See *Windsor v. United States*, 699 F.3d 169, 187 (2d Cir. 2012).

¹⁰⁰ See *id.*

¹⁰¹ See *id.*

¹⁰² See *infra* note 121.

¹⁰³ See 1 U.S.C. § 7; Keeva Terry, *Same-Sex Relationships, DOMA, and the Tax Code: Rethinking the Relevance of DOMA to Straight Couples*, 20 COLUM. J. GENDER & L. 384, 386 (2011) (“In effect, DOMA precludes the recognition of same—sex marriage for purposes of federal law.”).

¹⁰⁴ Peter Applebome, *A Doubly Trying Tax Season for Same Sex Couples*, N.Y. TIMES (Feb. 9, 2013) available at <http://www.nytimes.com/2013/02/10/business/yourtaxes/same-sex-couples-may-find-tax-time-doubly-trying.html?emc=tnt&tntemail0=y&r=0>.

¹⁰⁵ See generally *Ecclus v. C.I.R.*, 19 T.C. 1049 (1953) (explaining the marriage is particularly within the province of the state).

¹⁰⁶ 1 U.S.C. § 7.

¹⁰⁷ Keeva Terry, *Same-Sex Relationships, DOMA, and the Tax Code: Rethinking the Relevance of DOMA to Straight Couples*, 20 COLUM. J. GENDER & L. 384, 386 (2011). DOMA can also be viewed as violating the principles of federalism, an idea espoused by Justice Kennedy during oral arguments in the Windsor case. Transcript of Oral Argument at 20-25, *United States v. Windsor*, 133 S. Ct. 786 (2013) (No. 12-307) (. . . when it has 1,100 laws . . . you are at a real risk of running in conflict with what has always been thought to be the essence of the State police power, which is to regulate marriage, divorce, custody.”).

¹⁰⁸ See Peter Applebome, *A Doubly Trying Tax Season for Same Sex Couples*, N.Y. TIMES (Feb. 9, 2013). See also Keeva Terry, *Same-Sex Relationships, DOMA, and the Tax Code: Rethinking the Relevance of DOMA to Straight Couples*, 20 COLUM. J. GENDER & L. 384, 389-94 (2011).

¹⁰⁹ See *id.*

¹¹⁰ During oral arguments, Justice Kennedy explained how uniformity is not promoted by DOMA overall. Transcript of Oral Argument at 20-25, *United States v. Windsor*, 133 S. Ct. 786 (2013) (No. 12-307) (“Well, but it’s not really uniformity because it regulates only one aspect of marriage. It doesn’t regulate all of marriage.”).

¹¹¹ See *infra* note 121.

¹¹² 1 U.S.C. § 7; Peter Applebome, *A Doubly Trying Tax Season for Same Sex Couples*, N.Y. TIMES (Feb. 9, 2013).

¹¹³ See *Windsor v. United States*, 699 F.3d 169, 186 (2d Cir. 2012).

¹¹⁴ Erik Eckholm, *Corporate Call for Change in Gay Marriage Case*, N.Y. TIMES (Feb. 27, 2013) available at <http://www.nytimes.com/2013/02/28/business/companies-ask-justices-to-overturn-gay-marriage-ban.html?emc=eta1&r=0> (quoting the amicus brief, which explains how DOMA creates additional administrative complexities).

¹¹⁵ Peter Applebome, *A Doubly Trying Tax Season for Same Sex Couples*, N.Y. TIMES (Feb. 9, 2013) (explaining how tax time is a complicated time for married same—sex couples because of the additional complexities in the tax code).

¹¹⁶ Peter Applebome, *A Doubly Trying Tax Season for Same Sex Couples*, N.Y. TIMES (Feb. 9, 2013) available at <http://www.nytimes.com/2013/02/10/business/yourtaxes/same-sex-couples-may-find-tax-time-doubly-trying.html?emc=tnt&tntemail0=y&r=0> (“For same-sex couples in states that recognize their marriages, couples must prepare two sets of federal returns — one that they will actually file, and another prepared as if they were married, to help prepare their state tax return.”).

¹¹⁷ See *id.*

¹¹⁸ See *supra* notes 103, 104.

¹¹⁹ See *infra* note 121.

¹²⁰ See *id.*

¹²¹ See *infra* Part IV.A.iii.

¹²² See *id.*

¹²³ See Michael Cohn, *Supreme Court to Hear DOMA Case with Tax Implications*, ACCOUNTING TODAY (Dec. 10, 2012) available at <http://www.accountingtoday.com/news/Supreme-Court-Hear-DOMA-Case-Tax-Implications-64958-1.html> (“ . . . we are strongly urging our LGBT clients to immediately file protective claims for refunds of any overpayments, pending the court’s ruling.”).

¹²⁴ See *id.*; Albert S. Johnson, CPA, MBA, *A Taxpayer’s Guide to the Fall of DOMA*, <http://www.albertsjohnsoncpa.com/newrules/page32/page32.html> (last visited Mar. 14, 2013)

¹²⁵ See Amy I. Kinkaid, *Advising Clients Amid Constitutional Challenges to the Defense of Marriage Act*, AMERICAN INSTITUTE OF CPAs (published Dec. 1, 2012) available at <http://www.aicpa.org/publications/taxadviser/2012/december/pages/clinic-story-08.aspx?action=print>.

¹²⁶ See *supra* notes 71, 72. See *supra* note 74 (finding DOMA to be an unconstitutional denial of the equal protection of the laws).

¹²⁷ See Michael Cohn, *Supreme Court to Hear DOMA Case with Tax Implications*; Albert S. Johnson, CPA, MBA, *A Taxpayer’s Guide to the Fall of DOMA*.

¹²⁸ See Adam Liptak and Peter Baker, *Justice Cast Doubt on Benefits Ban in U.S. Marriage Law*, N.Y. TIMES (Mar. 27, 2013) available at <http://www.nytimes.com/2013/03/28/us/supreme-court-defense-of-marriage-act.html?hp&r=0>.

¹²⁹ See *id.*

¹³⁰ See Amy S. Elliott, *IRS’s Definition of Marriage – Where It Stands Now*, <http://law.scu.edu/blog/samesextax/file/Amy%20Elliott%20story%20on%20DOMA.pdf> (last visited Mar. 14, 2013).

¹³¹ See Michael Cohn, *Supreme Court to Hear DOMA Case with Tax Implications*, ACCOUNTING TODAY (Dec. 10, 2012).

¹³² See Amy S. Elliott, *IRS’s Definition of Marriage – Where It Stands Now*.

¹³³ See *id.*

¹³⁴ See *id.*

¹³⁵ See Anna North, *10 Things Legalized Gay Marriage Could Pay For*, BUZZFEED (Mar. 21, 2013), <http://www.buzzfeed.com/annanorth/10-things-legalized-gay-marriage-could-pay-for>.

¹³⁶ See *supra* notes 74, 75.

¹³⁷ See *supra* note 97.

¹³⁸ See Amy S. Elliott, *IRS’s Definition of Marriage – Where It Stands Now*, <http://law.scu.edu/blog/samesextax/file/Amy%20Elliott%20story%20on%20DOMA.pdf> (last visited Mar. 14, 2013).

¹³⁹ See *id.*

¹⁴⁰ See *id.*; Michael Cohn, *Supreme Court to Hear DOMA Case with Tax Implications*, ACCOUNTING TODAY (Dec. 10, 2012) available at <http://www.accountingtoday.com/news/Supreme-Court-Hear-DOMA-Case-Tax-Implications-64958-1.html>.

¹⁴¹ See *supra* Part III.

¹⁴² See Michael Cohn, *Supreme Court to Hear DOMA Case with Tax Implications*.

¹⁴³ See Amy S. Elliott, IRS's Definition of Marriage – Where It Stands Now, <http://law.scu.edu/blog/samesextax/file/Amy%20Elliott%20story%20on%20DOMA.pdf> (last visited Mar. 14, 2013).

¹⁴⁴ See *id.*; Michael Cohn, *Supreme Court to Hear DOMA Case with Tax Implications*. Tax professionals give additional advise on how to file to take advantage of an advantageous ruling by the Supreme Court. See Amy I. Kinkaid, *Advising Clients Amid Constitutional Challenges to the Defense of Marriage Act*, AMERICAN INSTITUTE OF CPAs (published Dec. 1, 2012) available at <http://www.aicpa.org/publications/taxadviser/2012/december/pages/clinic-story-08.aspx?action=print>.

¹⁴⁵ See Michael Cohn, *Supreme Court to Hear DOMA Case with Tax Implications* (quoting Nanette Lee Miller, national leader of Marcum's LGBT practice group and Partner-in-Charge of Assurance Services for the firm's California offices).

¹⁴⁶ See *supra* note 115.

¹⁴⁷ See *supra* Part IV.A.ii.

¹⁴⁸ See *id.*; *supra* Part III.

¹⁴⁹ See *id.*

¹⁵⁰ Kathleen Pender, *Same-Sex Taxes if DOMA Dies*, SFGATE (Dec. 15, 2012) available at <http://www.sfgate.com/business/networth/article/Same-sex-taxes-if-DOMA-dies-4120470.php>.

¹⁵¹ See *supra* Part III.

¹⁵² See Albert S. Johnson, CPA, MBA, A Taxpayer's Guide to the Fall of DOMA, <http://www.albertsjohnsoncpa.com/newrules/page32/page32.html> (last visited Mar. 14, 2013) (explaining that under the community property ruling, same sex couples still filed as single but had to divide the community income between the two partners, creating more confusion and difficulty for married same-sex couples at tax time).

¹⁵³ See Michael Cohn, *Supreme Court to Hear DOMA Case with Tax Implications*, ACCOUNTING TODAY (Dec. 10, 2012) available at <http://www.accountingtoday.com/news/Supreme-Court-Hear-DOMA-Case-Tax-Implications-64958-1.html>.

¹⁵⁴ See *id.*; Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805, 822 (2008); Albert S. Johnson, CPA, MBA, A Taxpayer's Guide to the Fall of DOMA (explaining that the estate tax could be entirely avoided upon the death of the first spouse).

¹⁵⁵ See Michael Cohn, *Supreme Court to Hear DOMA Case with Tax Implications*; Albert S. Johnson, CPA, MBA, A Taxpayer's Guide to the Fall of DOMA.

¹⁵⁶ See *id.*; Peter Applebome, *Reveling in Her Supreme Court Moment*, N.Y. TIMES, (Dec. 10, 2012), available at <http://www.nytimes.com/2012/12/11/nyregion/edith-windsor-gay-widow-revels-in-supreme-court-fight.html?pagewanted=all&r=0>.

¹⁵⁷ Peter Applebome, *A Doubly Trying Tax Season for Same Sex Couples*, N.Y. TIMES (Feb. 9, 2013) available at <http://www.nytimes.com/2013/02/10/business/yourtaxes/same-sex-couples-may-find-tax-time-doubly-trying.html?emc=tnt&cntemail0=y&r=0> (“We need to have marriage recognized, so we can know how to do divorce.”).

¹⁵⁸ See *id.*

¹⁵⁹ Albert S. Johnson, CPA, MBA, A Taxpayer's Guide to the Fall of DOMA.

¹⁶⁰ See *id.*

¹⁶¹ *Id.* (explaining that if DOMA is found unconstitutional, married same-sex couples will receive social security benefits, pension benefits, employer medical coverage, etc...).

¹⁶² See *supra* Part III.

¹⁶³ See *id.*

¹⁶⁴ See *id.*

¹⁶⁵ See *id.*; *Supra* Part IV.

¹⁶⁶ See *supra* Part IV.

¹⁶⁷ See *supra* Part IV.B.

¹⁶⁸ See *supra* Part IV.C.

¹⁶⁹ See *supra* Part IV.