

# Supreme Court: Defense of Marriage Act Unconstitutional

By Jessica Summers

With a 5-4 decision in the case of *U.S. v. Windsor* (available [here](#)), the U.S. Supreme Court has held that the federal Defense of Marriage Act (DOMA) is unconstitutional under the Fifth Amendment. DOMA, which was enacted in 1996, established that, for the purposes of all federal laws and programs, “marriage” is defined as “only a legal union between one man and one woman as husband and wife” and “spouse” is defined as only “a person of the opposite sex who is a husband or a wife.” The primary impact of DOMA was that any federal rights or privileges dependent on marital status were not available to same-sex couples regardless of whether they were legally married in a state which has legalized same-sex marriage.

The facts of the Windsor case center on the lives of Edith Windsor and Thea Spyer, two women who were legally married under the laws of New York. In 2009, when Mrs. Spyer died, she left her entire estate to Mrs. Windsor. Under federal law (26 U.S.C. § 2056), any portion of an individual decedent’s estate which “passes or has passed from the decedent to his [or her] surviving spouse” is exempt from federal estate tax. Mrs. Windsor sought to take advantage of this law and requested that the Internal Revenue Service (IRS) refund the \$363,053 in taxes that had been paid on Mrs. Spyer’s estate. The IRS denied this request determining that, per the definition set forth in DOMA, Mrs. Windsor and Mrs. Spyer were not “spouses” for the purposes of the spousal estate tax exemption. In an interesting turn of events, while Mrs. Windsor’s suit was pending, the Obama Administration instructed the Department of Justice to cease defending DOMA in the Windsor case. In response to this decision, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives elected to intervene in the litigation and defend the constitutionality of DOMA. The Windsor case was considered first by the U.S. District Court for the Southern District of New York and then by the U.S. Court of Appeals for the Second Circuit, both of which held that DOMA was unconstitutional.

The Supreme Court’s decision in Windsor considered not only whether DOMA was unconstitutional but also whether BLAG had standing to appeal the District Court’s and Second Circuit’s decisions when the administration had chosen not to do so. Joining with Justice Kennedy who wrote the opinion, a majority of the Justices considered the unique circumstances surrounding the case and concluded that BLAG could make the appeals. Proceeding to consider the constitutionality of DOMA, the decision focuses on the manner in which DOMA conflicts with the principles underlying the state laws allowing same-sex marriages. Justice Kennedy concluded that “[DOMA] 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 provision and treating those persons as living in marriages less respected than others the federal statute is in violation of the Fifth Amendment.” The Court took care to emphasize that its decision is confined to same-sex marriages which are already recognized as legal on the state level. It is therefore not completely clear yet how this decision will play out for same-sex couples who are legally married in one state but who reside in, or move to, another state which does not recognize same-sex marriage.

The implications of the Windsor decision will extend far beyond the estate tax context. Thousands of federal laws and programs make distinctions based on marital status; these include among many others, social security rates and survivor benefits, federal tax filings and benefits, estate taxes and estate planning options, veteran and military benefits, federal employee benefits and immigration options. With thirteen states and the District of Columbia now recognizing same sex marriage, the Court’s holding will have a significant impact on the widespread application and administration of federal laws and programs. On the tax front alone, unless the IRS issues a determination that the Windsor decision is not retroactively applicable, it appears likely that married same-sex couples will be able to amend any income, estate, or gift tax returns, for which the period allowing amendment is still open, in order to reflect their married status.