CHALLENGES TO THE DEFENSE OF MARRIAGE ACT

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Abstract

The Defense of Marriage Act (DOMA) became Public Law 104-199 on September 21, 1996 when signed by President Clinton. The law states (in part) that “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 of a wife.” The law also provides that a marriage under the laws of one state need not be recognized by other state or federal governments if the marriage does not meet the terms of DOMA. This had a direct effect upon same-sex couples who were legally married in one state but not considered married in states that did not recognize same-sex marriage. Such couples’ marital status was also not recognized for federal purposes. There have been several challenges to DOMA in various courts. On June 26, 2013, the United States Supreme Court held that DOMA’s definition of marriage was unconstitutional (U.S. v. Windsor, 2013). This paper will explore the background of DOMA, discuss the significant cases involved, and consider the effects of Windsor.
Challenges to the Defense of Marriage Act

On September 21, 1996, the Defense of Marriage Act (DOMA) became Public Law 104-199 when signed by President Clinton. DOMA’s primary purpose was to define the terms “marriage” and “spouse”. The major provisions provided that no state, territory or possession of the United States (including Indian tribe) must respect the marriage of a same-sex couple who are legally married under the laws of another jurisdiction.

The Act goes on to define marriage as a legal union between one man and one woman as husband and wife. The term “spouse” refers only to a person of the opposite sex who is a husband or a wife. Thus, a same-sex couple legally married in one state need not be considered married in another state and need not be considered legally married under federal law. This lack of recognition of marital status led to a denial of rights to many types of benefits generally granted to a heterosexual married couple.

This denial of rights led to the filing of lawsuits over denial of benefits such as employee benefits, military benefits and federal tax benefits, to name a few. Eventually, one case (U.S. v. Windsor, 2013) was heard by the United States Supreme Court. The Court held in Windsor that the portion of DOMA defining “marriage” and “spouse” is unconstitutional. This paper will explore the background of DOMA, discuss significant cases involved, and consider the effects of the Windsor ruling.

Background of DOMA

Gutis (1989) reported in the New York Times that the issue of same-sex marriage (which had received little attention since the early 1970’s) had received renewed interest due to the AIDS epidemic. Questions of inheritance and death benefits for survivors of same-sex relationships came to the surface. Gutis also noted that “several European countries, including Sweden and the Netherlands, were beginning to grant rights to unmarried couples” and that Denmark was allowing same-sex couples to form partnerships that gave them many marital rights.

Meanwhile, opponents of same-sex marriage such as Gary L. Bauer (head of the Family Research council in Washington) voiced concern that same-sex marriage would “undermine deeply held and broadly accepted ideas of normalcy” (Gutis, 1989). Bauer went on to say that 2,000 years of Western civilization discouraged such relationships and predicted that same-sex marriage would become a major battleground in the 1990s.

Bauer’s prophesy came to pass as more and more same-sex marriage issues ended up being decided by the court. Bankruptcy, recognition of marital status, spousal health benefits, and estate tax were among the issues decided.

In the landmark case of Baehr v. Lewin (1993), the Hawaiian Supreme Court ruled that the state could not deny the right to marry to same-sex couples without a compelling reason for the denial. The court referred the issue back to the legislature which then voted to ban gay marriage. This case became the impetus for DOMA.
In Report 104-664: Defense of Marriage Act (1996), the House of Representatives Committee on the Judiciary reported that the Defense of Marriage Act has two primary purposes: to defend the institution of traditional heterosexual marriage and to protect the right of the states to formulate their own public policy regarding the recognition of same-sex marriage. The report goes on to state that H.R. 3396 was a response to “a very particular development in the State of Hawaii.” The Committee feared that if one state recognized same-sex marriage, other states (whether they recognized same-sex marriage or not) would have to decide if they were obligated under the U.S. constitution to recognize such a marriage.

The Committee believed that legislation was necessary to combat “the orchestrated legal assault being waged against traditional heterosexual marriage by gay rights groups and their lawyers” (United States House of Representatives Committee on the Judiciary, 1996, p. 3). While acknowledging that marital law is a function of state law, which could vary among states, one unbroken rule has been that only heterosexual couples could marry. Same-sex marriage had not been legal in any state up to this point. The Committee noted that “same-sex ‘marriage’ has been an explicit goal of many in the gay rights movement for at least twenty-five years” (United States House of Representatives Committee on the Judiciary, 1996, p. 3).

The Report also stated that the Baehr ruling could conceivably force other states to follow suit and that DOMA is an effort to clarify a situation that could result from one state’s recognition of same-sex marriage. The Act is inspired by the “implications that lawsuit threatens to have on the other states and on federal law” (United States House of Representatives Committee on the Judiciary, 1996, p. 7).

The Defense of Marriage Act became law in 1996, defining marriage as between one man and one woman. DOMA effectively denied federal benefits to same-sex couples even if they were married in a state that recognized same-sex marriage. States that did not recognize same-sex marriage need not recognize such a marriage that took place in a state that sanctioned same-sex marriage. Yet the passage of DOMA did not end the debate on gay marriage.

Castillo (2013) reported “5 Turning Points in Gay Marriage Debate” as the following:

2. 1996: Passage of DOMA.
3. 2004: President Bush called for a constitutional amendment against same-sex marriage to stop “activist judges” from redefining marriage.
4. 2012: For the first time, voters could approve same-sex marriage statewide. Same-sex marriage was already legalized in six states through court decisions or the legislatures.
5. 2013: The Justice Department filed a brief in the California Supreme Court to strike down Proposition 8. California’s 2008 Proposition 8 banned same-sex marriage.
In *Hollingsworth v. Perry* (2013), a same-sex couple sued state and local officials in an attempt to strike down Proposition 8. The District Court in California declared Proposition 8 unconstitutional. The state and local officials did not appeal this order. Proponents of Proposition 8 appealed the District Court order, but the U.S. Supreme Court held that those proponents did not have standing. Therefore, the appeal was dismissed.

A new turning point was the decision in *U.S. v. Windsor* declaring Section 3 of DOMA to be unconstitutional. While the decision settled the issue for federal purposes, it did little to settle state issues by leaving Section 2 of DOMA intact.

**The Landmark Windsor Case**

**Facts and Judicial History**

On June 26, 2013, the U.S. Supreme Court held, in a 5-4 decision, that Section 3 of DOMA is unconstitutional in *U.S. v. Windsor*. *Windsor* will have far-reaching effects because DOMA affected over 1,000 federal statutes and a large number of federal regulations (U.S. v. Windsor, 2013).

The *Windsor* case is an estate tax case that arose from the marriage of Edith Windsor and Thea Spyer, a same-sex couple who resided in New York. Windsor and Spyer had a relationship that spanned more than four decades, and they were legally married in Ontario, Canada, in 2007. The State of New York recognized this as a legal marriage. Spyer died in 2009, and Windsor was Spyer’s only heir and the Executor of Spyer’s estate (U.S. v. Windsor, 2013).

Although the “value of any interest in property which passes or has passed from the decedent to his surviving spouse” is generally excluded from the gross estate that is subject to the estate tax (26 U.S.C. § 2056 (a)), Windsor was required to pay $363,053 in estate taxes because Section 3 of DOMA did not define her as a spouse. DOMA defined “spouse” for purposes of federal law and regulation as “a person of the opposite sex who is a husband or a wife” (1 U.S.C. § 7). Windsor requested a refund from the Internal Revenue Service of the estate tax, but this was denied (U.S. v. Windsor, 2013).

Windsor, as the Executor on behalf of the Estate of Spyer, filed a refund suit in the United States District Court for the Southern District of New York, arguing that Section 3 of DOMA violates the equal protection guarantee of the of the U.S. Constitution. (Windsor v. U.S. 2011). The Fourteenth Amendment to the U.S. Constitution provides in part that “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.” The Fifth Amendment to the U.S. Constitution provides in part that “No person shall … be deprived of life, liberty, or property, without due process of law.” The U.S. Supreme Court in *Windsor* explains that “[w]hile the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved” (U.S. v. Windsor, 2013).
While *Windsor* was pending in the District Court, the U.S. Attorney General stated that the Department of Justice would not defend DOMA against such constitutional challenges because “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” (*U.S. v. Windsor*, 2013). Normally, this type of proclamation by the Attorney General would only occur after a defeat of the Department of Justice in the District Court. The President did agree to continue enforcing the DOMA definition of “spouse,” and the President also agreed to allow Congress to intervene in cases that challenge the constitutionality of DOMA. Therefore, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives was permitted to intervene as an interested party in the *Windsor* case to continue the defense against the taxpayer’s constitutional attack on DOMA (*U.S. v. Windsor*, 2013).

The *Windsor* District Court held that Section 3 of DOMA is unconstitutional (*Windsor v. U.S.* 2011), and the Second Circuit Court of Appeals affirmed the District Court’s decision (*Windsor v. U.S.* 2012). Under the Equal Protection clause of the U.S. Constitution, courts typically examine challenged laws with one of the following three standards of review: (a) Strict scrutiny, which applies to laws that treat persons differently based upon race; (b) Intermediate scrutiny, which applies to laws that treat persons differently based upon gender; and (c) Minimal scrutiny, which applies to most other laws such as laws that regulate economic and social relationships. The Second Circuit Court of Appeals determined that a law that classifies persons based upon homosexuality is entitled to “intermediate scrutiny” which means that the “classification must be ‘substantially related to an important government interest’” (*U.S. v. Windsor*, 2012; Clark v. Jeter, 1988). The Second Circuit based this determination in part on the fact that “homosexuals are not in a position to adequately protect themselves from the discriminatory wishes of the majoritarian public” (*U.S. v. Windsor*, 2012). BLAG argued that DOMA was substantially related to the following important government interests: “maintaining a consistent federal definition of marriage,” “sav[ing] government resources by limiting the beneficiaries of government marital benefits,” “preserving traditional marriage as an institution,” and “encouraging responsible procreation.” (*U.S. v. Windsor*, 2012). However, the Second Circuit held that DOMA was not substantially related to an important government interest. (*U.S. v. Windsor*, 2012). Also, during the same year as the Second Circuit opinion in *Windsor*, the First Circuit Court of Appeals, in an unrelated case involving Department of Health and Human Services regulations, held that Section 3 of DOMA is unconstitutional (*Mass. v. U.S. Dept. of Health and Human Svcs.*, 2012).

After the Second Circuit affirmed the District Court in *Windsor*, the United States still did not pay a refund to Windsor, so the U.S. Supreme Court granted certiorari for appeal of *Windsor*. First, the Supreme Court considered whether the parties had standing and whether the Supreme Court had jurisdiction over the case. Second, the Supreme Court considered whether Section 3 of DOMA violates the equal protection clause of the U.S. Constitution (*U.S. v. Windsor*, 2013).

The Standing and Jurisdiction Arguments in the U.S. Supreme Court

An appointed *amicus curiae* argued that the *Windsor* case should have ended after the U.S. District Court decision in *Windsor*. Article III of the U.S. Constitution requires that there must be a “case or controversy” for jurisdiction of the court to exist. The U.S. government and
Windsor both agreed that Section 3 of DOMA is unconstitutional. Therefore, the *amicus* argued that there was no real case or controversy for a court to address (*U.S. v. Windsor*, 2013).

The Supreme Court held that the *Windsor* case satisfied the following three requirements for a “case or controversy” as required for jurisdiction under Article III of the U.S. Constitution: (a) a “concrete,” “particularized,” “actual” or “imminent” (not “hypothetical”) “injury in fact” to the plaintiff; (b) a “causal connection” between the injury and the defendant’s activity that is the subject of the complaint; and (c) a likelihood that the court’s decision, if favorable to the plaintiff, will provide a remedy for the injury (*U.S. v. Windsor*, 2013; *Lujan v. Defenders of Wildlife*, 1992). Even though the U.S. Department of Justice and Windsor both agreed that Section 3 of DOMA is unconstitutional, the Supreme Court held that there would be a real, not hypothetical injury to Windsor if the U.S. did not refund the payment of estate taxes to Windsor, and there would be an injury to the U.S. Treasury if they were required pay the refund to Windsor (*U.S. v. Windsor*, 2013).

The Supreme Court then turned to the risk of “prudential problems” that arise when both plaintiff and defendant disagree with a law enacted by Congress and therefore approach the Court not as adversaries, but both seeking a declaration by the Court that the law enacted by Congress is unconstitutional. In other words, in *Windsor*, both the U.S. Department of Justice and Windsor agreed that Section 3 of DOMA should be declared unconstitutional, and this agreement could eliminate the adversarial nature of the alleged controversy. Judges are supposed to decide real cases and controversies between adversaries and not serve as legislators (*U.S. v. Windsor*, 2013).

The Court determined that these prudential problems were not sufficient to eliminate the Court’s jurisdiction in *Windsor*. The Court stated that BLAG was a sufficient adversary to Windsor to alleviate the Court’s concerns. In addition, the Court noted the large amount of litigation that would occur involving a large number of statutes and a large number of courts should the Court fail to rule on the constitutionality of DOMA Section 3 in 2013. The *Windsor* Court further noted that the judiciary, not the President, should determine whether Section 3 of DOMA is constitutional. The Supreme Court in *Windsor* said “there is no suggestion here that it is appropriate for the Executive as a matter of course to challenge statutes in the judicial forum rather than making the case to Congress for their amendment or repeal.” However, because *Windsor* was not a routine case and BLAG provided a strong adversarial position to Windsor, the Supreme Court determined that jurisdiction did exist in *Windsor* (*U.S. v. Windsor*, 2013).

**Constitutionality of DOMA Section 3 in the U.S. Supreme Court**

In *Windsor*, the Supreme Court examined the traditions of state law as the primary governing force over issues of marriage. Each state’s laws about private domestic matters such as marriage evolve and change as a result of changing societal norms and understandings in that state. Such laws may differ in each of the 50 states, but they are generally uniform within each state’s borders. As a general rule, “the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations” unless those laws violate the guarantees of individual rights in the U.S. Constitution (*U.S. v. Windsor*, 2013). At the time of the *Windsor* decision twelve states (including New York) and the District of Columbia recognized same-sex marriage (*U.S. v. Windsor*, 2013).
In the past, Congress enacted federal laws affecting domestic relations, but those laws have a much narrower effect than DOMA. For example, federal law provides that a person will not qualify for citizenship if he or she marries for the purpose of qualifying for citizenship. (8 U.S.C. § 1186a(b)(1)), and common-law marriages are recognized for Social Security benefits, even when not recognized by state law (42 U.S. C. § 1382c(d)(2)). In contrast, DOMA affected more than 1,000 federal statutes and a very large number of federal regulations (U.S. v. Windsor, 2013).

The Supreme Court in Windsor held that DOMA’s “demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law” (U.S. v. Windsor, 2013). According to the Supreme Court in Windsor, DOMA’s enactment was an attempt to promote the very inequality that New York and other states have tried to prevent. In addition, DOMA does so in a sweeping manner by “writ[ing] inequality into the entire United States Code” (U.S. v. Windsor, 2013).

In Windsor the Supreme Court held that Section 3 of DOMA is not valid because it violates the Fifth Amendment of the Constitution and “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” (U.S. v. Windsor, 2013).

Criticisms of U.S. v. Windsor

The Supreme Court’s majority opinion in Windsor has its critics, both in connection with the jurisdiction and standing issue and in connection with the constitutionality issue.

Chief Justice Roberts, Justice Scalia, and Justice Thomas believe that the Supreme Court lacked jurisdiction to hear the Windsor case. Justice Scalia wrote in his dissent that “[i]n the more than two centuries that this Court has existed as an institution we have never suggested that we have the power to decide a question when every party agrees with both its nominal opponent and the court below on that question’s answer” (U.S. v. Windsor, 2013).

In addition, Justice Scalia (with whom Justice Thomas joins) in his dissent notes that the Supreme Court opinion is unclear in connection with the Equal Protection clause. As Justice Scalia writes, “The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality” (U.S. v. Windsor, 2013). Justice Scalia further notes that it is not clear whether the Supreme Court’s holding in Windsor is based upon the Equal Protection clause, protection of liberties under substantive Due Process arguments (which has not been a favored argument in recent years), or arguments about states’ authority to regulate marriage under our federal system of government (U.S. v. Windsor, 2013).

Both Justice Roberts and Justice Scalia note in their dissents that the majority opinion in Windsor accuses the proponents of DOMA of bigotry and a “bare…desire to harm a politically unpopular group.” However, Justice Scalia points out that by providing uniformity, choice-of-law issues are much simpler. Justice Scalia provides this example:
Imagine a pair of women who marry in Albany and then move to Alabama, which
does not “recognize as valid any marriage of parties of the same sex.”...When the
couple files their next federal tax return, may it be a joint one? Which State’s law
controls, for federal-law purposes: their State of celebration (which recognizes
the marriage) or their State of domicile (which does not)? (Does the answer
depend on whether they were just visiting in Albany?) Are these questions to be
answered as a matter of federal common law, or perhaps by borrowing a State’s
choice-of-law rules? If so, which State’s? And what about States where the
status of an out-of-state marriage is an unsettled question under local law? …
DOMA avoided all of this uncertainty by specifying which marriages would be
recognized for federal purposes. This is a classic purpose for a definitional
provision.

In addition, Justice Scalia notes that “DOMA’s definitional section was enacted to ensure
that state-level experimentation did not automatically alter the basic operation of federal
law, unless and until Congress made the further judgment to do so on its own” (U.S. v.
Windsor, 2013).

Justice Alito in his dissent (with whom Justice Thomas joined in part) noted that the
Constitution does not contain a guarantee the right to same-sex marriage. Therefore,
“[a]ny change on a question so fundamental should be made by the people through their
elected officials” and not by the courts (U.S. v. Windsor, 2013). He further noted that
DOMA does not prevent states from permitting same-sex marriage, but simply “define[s]
a class of persons to whom federal law extends certain special benefits and upon whom
federal law imposes certain special burdens” (U.S. v. Windsor, 2013).

Conclusion

DOMA’s definitions of “marriage” and “spouse” applied to all federal laws, not just those
involving taxation. The Government Accountability Office (formerly the General Accounting
Office) (GAO) issued a report in 1997 that identified 1,049 federal laws that were impacted by
DOMA. (U.S. General Accounting Office, 1997) The GAO revised this study in 2004, and
identified 1,138 federal laws that included marital status as a factor. (U.S. General Accounting
Office, 2004). The GAO’s 2004 report identified 22 sections that refer to marital status and had
been added to Title 26 of the United States Code between September 21, 1996 and December 31,
2003. (U.S. General Accounting Office, 2004, pp. 5-6). These sections involved credits; tax
rates; itemized deductions; fringe benefits and exclusions from income; estate, gift, and
generation skipping transfer taxes; and administrative procedures dealing with returns and
refunds. The Treasury Department has indicated there are over 200 sections and regulations that
deal with marriage. (Treasury Department, 2013).

Perhaps the most immediate result of the Windsor decision is that same-sex married couples will
now be able to file joint returns. The Treasury Department recognized this and issued Revenue
Ruling 2013-17 on August 29, 2013. In this document, the Service concludes that marriage
includes the marriage of same-sex individuals if they were married under state law. It still does
not include civil unions or other state law relationships that are not considered marriage under
state law. The Service will recognize as married individuals who were legally married under the laws of one state even when one or both of those individuals reside in a state (such as Arkansas) that does not recognize same-sex marriages. Some commentators refer to this as the “state of celebration” rule. In many instances, the IRS (and the federal courts) have based their rules on the taxpayer’s state of domicile. The use of the state of celebration is somewhat of a departure from IRS tradition, and poses unique problems for some taxpayers. However, this is likely the only decision that the Treasury could have made and still retained some consistency in the tax law. Justice Scalia remarked on the possibility of different marital statuses based on a couple’s state of residence in his dissent in Windsor (U.S. v. Windsor, 2013, p. 2708). Others have speculated further that taxpayers might change their states of residence depending on whether they wished to file jointly or singly. Taxpayers with dependent children could also have the choice of head of household in some circumstances. This potential to choose one’s filing status by choosing one’s state of residence is not available to heterosexual couples, and the IRS acted in the only way they could to eliminate it.

Revenue Ruling 2013-17 is effective on September 16, 2013 and states that it will be applied prospectively. However, the Revenue Ruling also states that taxpayers may file amended returns in reliance of the ruling for open years. Same-sex couples are no different from heterosexual couples. Some married couples benefit financially from filing a joint return, while others suffer the marriage penalty. Since taxpayers are only permitted to amend returns, it is likely that taxpayers expecting a refund from open years would file amended returns, while most or all taxpayers who would have to pay would not amend prior returns.

Ms. Windsor and Ms. Speyer were married in Canada, but New York recognized their marriage. Revenue Ruling 2013-17 includes foreign marriages. Secretary of State John Kerry has announced that the State Department will recognize same-sex marriages that were legally performed outside the U.S., but will not recognize polygamous marriages. (U.S. Department of State, 2013).

The tax issues involving same-sex marriage go beyond simply filing status. If a couple can be considered married for federal tax purposes, there is also the possibility that the marriage may end through divorce for federal tax purposes. This means that some same-sex couples will have to deal with the federal tax rules involving alimony, child support, and separate maintenance. Some may even have to deal with the rules regarding innocent spouse relief.

The Windsor decision involved the federal estate tax. One very complicated area of tax and financial planning has been the planning for unmarried, committed, same-sex couples. This type of planning has been especially complicated in the states that do recognize same-sex marriages, because the state law rules of inheritance and descent did not match the federal rules regarding estate and gift taxes. The federal estate and gift tax cannot be called simple, but now the same techniques can be used for all families in those states that do recognize same-sex marriages.

Because the Windsor decision did not repeal Section 2 of DOMA, states can rely on its language allowing them to refuse to recognize same-sex marriages. The rules of Section 2 of DOMA come together with the place of celebration rule of Rev. Rul. 2013-17 to create an anomaly. There will be taxpayers in states like Arkansas who are considered married for all federal tax
purposes, but are not considered married for state tax purposes. Arkansas, like Mississippi to the east, has an individual income tax return that requires the taxpayer to enter information directly on the return. These taxpayers will be required to file single at the state level and married filing jointly or married filing separately at the federal level. Arkansas has the unusual filing status of married filing separately on the same return. This status will not be available to same-sex couples, but this state has a history of taxpayers filing using a different status for state purposes than they use at the federal level.

Many states begin the calculation of state taxable income with federal gross income, adjusted gross income, or taxable income. The Tax Foundation has calculated that 24 states have a constitutional ban on same-sex marriages or all same-sex unions and begin the calculation of state taxable income with the amount shown on one line or another of the federal tax return (Henchman, 2013). These states include Louisiana, Missouri, and Oklahoma. In their report, the Tax Foundation concludes that some further advice is needed from the 24 states.

Ruth Mason, citing Hellerstein and Hellerstein, uses the term “decouple” to describe the situation where a state tax base is changed so that it is no longer linked to the related federal tax base (Mason, 2013, p. 1271). In this article, Prof. Mason illustrates some of the advantages and disadvantages of decoupling a given state tax base from the federal tax base. She indicates that the traditional theory behind linking the two is administrative convenience and cost savings. (Mason, 2013, p. 1269). Prof. Mason also points out that when multiple states link their tax bases to the related federal tax bases, the states are conforming one to another. This is a boon to multistate businesses, reduces the risk of double taxation, and restricts the risk that taxpayers may use domicile to reduce overall state taxes (Mason, 2013, p. 1270).

What might the states that restrict same-sex marriage do? They could decouple from the federal tax base, which will be costly in the short run. There is even a risk in moderate states that public opinion could change in the next few years, making the decoupling action unnecessary. They could simply ignore the problem. This potentially means that some taxpayers will file jointly when state law does not permit it. Tax returns do not require the taxpayer to identify his or her gender, they are often processed electronically, and the revenue office may simply not know that an incorrect filing status was claimed. Assuming that standing is proven, states may challenge the Rev. Rul. Revenue Rulings do not carry the same weight as Regulations, and are not entitled to the same deference by the courts. States might argue that the choice of the place of celebration rule exceeds the Treasury’s authority. Much of the first part of the Revenue Ruling is devoted to explaining why the Treasury has the authority to define the terms associated with marriage, so perhaps the Treasury anticipates such a challenge.

As noted above, marriage is relevant in many federal statutes, not just tax ones. For example, the Department of Labor has redefined spouse for the Family and Medical Leave Act to mean “…a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including ‘common law’ marriage and same-sex marriage” (Department of Labor, 2013). The Department of Labor chose to use a residence based rule, which means that there will be some inconsistencies between how individuals are treated for federal purposes. An Arkansas resident could be married for federal income tax purposes, but single for the FMLA and Arkansas income tax purposes.
The *Windsor* decision impacts employers as well. Wal-Mart, one of the world’s largest retailers, recently announced plans to soon offer benefits to its employees’ domestic partners, including same-sex partners. This plan will go into effect in 2014 and will include changes to health insurance policies that will provide coverage for “any spouse or domestic partner” regardless of gender (Goehring, 2013).

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