

Tax Decisions of the Supreme Court's 2012 Term

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In its just completed 2012 term, the Supreme Court decided only three federal tax cases. The most politically important decision was *Windsor*, which held the Defense of Marriage Act unconstitutional. One criminal case, *Davila*, marked the long, slow decline of the Warren Court's limited view of harmless error. *PPL*, addressed in an earlier article, was the only real tax decision of the term. Finally, a nontax decision, *Horne*, raises questions about state tax procedures that preclude consideration of constitutional issues in administrative hearings.

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I. Overview of the Term

In its term that began in October 2012, the Supreme Court decided only three cases directly involving federal tax and none involving state or local tax. In contrast, in the 2011 term, the Court decided four federal tax cases and one local tax case, which itself was a greatly diminished tax case load compared with earlier decades.¹ As in the 2011 term, the 2012 tax decisions included one that addressed a federal tax but involved broad political issues. This term the Court struck down part of the federal Defense of Marriage Act (DOMA) in a tax case; last term the Court upheld the 2010 healthcare act in a tax case.

The three tax decisions are summarized below, along with a fourth decision, which is not literally a tax case but is reviewed here because of its potential state tax implications:

- *PPL Corp. v. Commissioner*, 133 S. Ct. 1897 (2013), held unanimously for the taxpayer that a foreign tax with an algebraic interrelationship to the foreign corporation's book net gain or "true net income" was an income tax and therefore creditable against the U.S. income tax, even though the foreign tax appeared to be a property tax. *PPL* is the most important pure tax decision of the group (indeed the only one), but it will not be further analyzed here because it is the subject of a previously published article.²
- *United States v. Davila*, 133 S. Ct. 2139 (2013), unanimously rejected the *vacatur* of a tax identity thief's criminal conspiracy conviction. The decision has more to do with general criminal procedure than tax law, civil or criminal, although it does call into question the wisdom of the Justice Department's possible overuse of criminal conspiracy charges to enforce the tax laws.³
- *United States v. Windsor*, 133 S. Ct. 2675 (2013), held section 3 of DOMA unconstitutional, thus allowing the plaintiff to recover estate taxes

¹Jasper L. Cummings, Jr., "Tax Decisions of the Supreme Court's 2011 Term," *Tax Notes*, Oct. 1, 2012, p. 93.

²Cummings, "Form, Substance, and *PPL*," *Tax Notes*, July 22, 2013, p. 365.

³See Cummings, "DOJ Criminal Tax Overreach," *Tax Notes*, Feb. 11, 2013, p. 745.

that were refundable because her same-sex marriage to the decedent was respected by the decedent's state of residence and her inheritance was therefore subject to the marital deduction.

- *Horne v. Department of Agriculture*, 133 S. Ct. 2053 (2013), cast doubt on the procedures imposed by many states that allow consideration of constitutional defenses to state taxes only after payment of the tax. *Horne* also has an interesting historical link to the penultimate federal tax held unconstitutional by the Supreme Court (in 1936).

As usual, the three tax cases proved that the best way to move a tax case to the Supreme Court is to show a conflict in the circuits, which was true of *Davila* and *PPL*. The government was the petitioner in *Davila*; the taxpayer was the petitioner in *PPL*.

The 2012 term voting patterns were unusual, with two of the three decisions being unanimous. It was to be expected that the DOMA case would split along ideological lines, with Justice Anthony M. Kennedy supplying the swing vote (the role Chief Justice John G. Roberts Jr. played in last year's healthcare tax case). Aside from the small unanimity trend, the only other unifying feature of the term in tax cases was that both of the unanimous decisions resoundingly rejected amicus briefs filed by law professors. In my view, the Court should have agreed with the professors in *PPL* but it correctly disagreed with the professors in *Davila*.

II. *Davila*: Back to the Sixties

A. The Decision

Davila represented the second time in less than a month that the Supreme Court unanimously decided a federal income tax case contrary to the amicus arguments of law professors. The first time, in *PPL*, the professors were eminent tax professors, and they were right.⁴ In *Davila*, the professors were criminal law and ethics professors, and they were wrong. The professors supported reversal of the conviction of Anthony Davila for conspiracy to defraud the United States out of tax revenue. The Supreme Court rejected their and Davila's arguments unanimously, although justices Antonin Scalia and Clarence Thomas refused to join the majority opinion because it used legislative history (but Roberts and Justice Samuel Alito joined the majority opinion).

Davila claimed that a federal magistrate committed a per se violation of Rule 11(c) of the Federal Rules of Criminal Procedure by encouraging him,

several months before the plea, to plead guilty for the purpose of possibly receiving a reduced sentence. Rule 11(c) prohibits the court from participating in plea discussions between the defendant and the prosecutor. The government admitted the violation but argued it was harmless error. The Eleventh Circuit agreed with Davila that the violation could not be excused as harmless error, and it vacated the conviction based on the guilty plea. The Supreme Court reversed the Eleventh Circuit.

This issue was a purely procedural one: Did the magistrate's error require automatic reversal of the conviction based on the guilty plea, or should the lower court have evaluated the possibility of harmless error on the facts of the case? The Supreme Court said harmless error might apply and the facts should have been considered. How could this be so clear to nine justices and so abhorrent to large numbers of law professors?

The gulf between the views reflects divergent core beliefs about what is needed in the criminal justice system. The professors' arguments went back to the 1960s, hoping to revive what was nearly Chief Justice Earl Warren's last pro-criminal-defendant-rights opinion. They refused to concede the obvious reach of a 1983 criminal procedure rule change intended specifically to write harmless error into the plea acceptance rule.

In contrast, the Court viewed *Davila* as just another day at the office. The decision was a straightforward application of statutory (here rule) analysis, batting down yet another "hope springs eternal" effort of criminal defendants (and law professors). The Court had decided very similar cases twice before and did not see the distinction the professors and Davila tried to draw between those cases and this one.⁵ Not one but two rules said this sort of error could be a harmless error, and the Court therefore held it could not be per se grounds for reversal of the conviction.

The professors were not interested in conducting a factual analysis of the nexus between the magistrate's statements and the plea ultimately entered because they did not believe a connection could be disproved. Their view was consistent with the spirit of Warren. But the Court today is not so uncomfortable with that sort of fact finding, particularly where criminal defendants are concerned.

The professors are probably right about the inherent difficulty of the factual analysis. But the

⁴See *supra* note 2 (explaining how the amici were right).

⁵*United States v. Dominguez Benitez*, 542 U.S. 74 (2004); *United States v. Vonn*, 535 U.S. 55 (2002). Cf. *United States v. Home Concrete & Supply LLC*, 132 S. Ct. 1836 (2012), in which the Court effectively refused to reverse its earlier decision on a similar statute in *The Colony Inc. v. Commissioner*, 357 U.S. 28 (1958).

Court likely understood that precluding case-specific investigation of prejudice would rigidify one more joint in the criminal justice system. In effect, the decision holds that play in the joints is beneficial to help the system work. After all, if plea deals don't work, the criminal justice system doesn't work. However, the decision did not require any particular philosophy of the criminal justice system: As Scalia and Thomas emphasized in their concurrence, the rule says harmless error can apply, and so it can apply.

The effect of the decision is simply to resolve a split in the circuits, which is why the Court heard the case. That is no small thing, given the 30-year-long rear-guard action to limit the 1983 criminal procedure rules change. The reversal will not put Davila in jail: The Court remanded the case for the Eleventh Circuit (and presumably the trial court) to evaluate all the facts and circumstances to determine whether the violation is grounds for reversal of the conviction.

It is entirely likely that the Eleventh Circuit will reinstate the same reversal of the conviction, which will mean another start down the trial path and perhaps another plea deal with a more lenient sentence. If so, the main result of this long process will have been to give the government an argument to use in the three circuits that have applied a bright-line or per se rule in these cases.

B. The Warren Court Tax Decision

Two months and 21 days before he was replaced by Warren E. Burger as chief justice, Warren penned an opinion in a criminal tax evasion case that was one of the last of the Warren Court's long string of holdings protecting the procedural and substantive rights of criminal defendants.⁶ The defendant had failed to pay his taxes, allegedly because of alcoholism. In a deal with the prosecutor, the defendant pleaded guilty. In open court, the trial judge inquired whether the plea had been induced by threats or promises, and the defendant said no. Later the judge sentenced him to a year in prison and a \$2,500 fine and refused to suspend the sentence because the pre-sentence report indicated the failure to pay was not inadvertent.

The defendant appealed on grounds that the trial judge had failed to follow the requirements of Rule 11 that the judge address the defendant personally to determine if he understood the nature of the charge and if there was a factual basis for the plea. The Supreme Court reversed the conviction on that ground, in the Court's supervisory role. The Rule 11 requirements at issue had become effective only 15

days before the plea hearing. Thus, the trial judge reasonably might not have become accustomed to the new requirements, and the Supreme Court may have been trying to prod district judges to get with the program.

Warren's opinion did not mention the general harmless error rule, Rule 52 of the Federal Rules of Criminal Procedure. It rejected the government's argument that the proper remedy for a rule violation was to make the government prove the voluntariness of the plea, explaining that in practice defendants would have great difficulty prevailing on the facts.⁷ The opinion went on to say that any attempted findings about the defendant's state of mind would be speculative at best and in effect held that a violation of Rule 11 called for per se reversal.⁸

By 1983 the Advisory Committee on the Federal Rules, the Supreme Court, and Congress thought otherwise, and added Rule 11(h) to make clear that the Rule 52 harmless error excuse also applied to Rule 11. That was 30 years ago. Many law journal articles and some courts never agreed with the 1983 change for exactly the reasons stated in Warren's 1969 opinion: Fact finding on voluntariness is necessarily speculative. The resulting "vast disarray"

⁷"From the defendant's perspective, the efficacy of shifting the burden of proof to the Government at a later voluntariness hearing is questionable. In meeting its burden, the Government will undoubtedly rely upon the defendant's statement that he desired to plead guilty and frequently a statement that the plea was not induced by any threats or promises. This prima facie case for voluntariness is likely to be treated as irrebuttable in cases such as this one, where the defendant's reply is limited to his own plaintive allegations that he did not understand the nature of the charge and therefore failed to assert a valid defense or to limit his guilty plea only to a lesser included offense. No matter how true these allegations may be, rarely, if ever, can a defendant corroborate them in a post-plea voluntariness hearing." 394 U.S. at 469.

⁸"We thus conclude that prejudice inheres in a failure to comply with Rule 11, for noncompliance deprives the defendant of the Rule's procedural safeguards that are . . . designed to facilitate a more accurate determination of the voluntariness of his plea. Our holding that a defendant whose plea has been accepted in violation of Rule 11 should be afforded the opportunity to plead anew not only will insure that every accused is afforded those procedural safeguards, but also will help reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and are more difficult to dispose of, when the original record is inadequate. It is, therefore, not too much to require that, before sentencing defendants to years of imprisonment, district judges take the few minutes necessary to inform them of their rights and to determine whether they understand the action they are taking." 394 U.S. at 471-472.

⁶*McCarthy v. United States*, 394 U.S. 459 (1969).

in the lower courts⁹ led to the third decision of the Supreme Court in 11 years trying to enforce the 1983 rules change.

There are several issues and themes underlying the long struggle over harmless error in the criminal law¹⁰: (1) a long pulling back from the Warren Court's more strict view of criminal trial "procedural" errors that could have substantive effects; (2) the possible distinction between errors thought to be constitutional violations and those that are not¹¹; (3) the choice between using harmless error sparingly because of the court's desire to enforce proper procedure generally versus focusing on the results of the particular case¹²; (4) the differential burden of proof depending on whether the defendant first raises the issue on appeal (in which case he bears the burden of proving that the error affects substantial rights under Rule 52(b)), or raised it in the trial court (in which case the government bears the burden of proving harmless error under Rule 52(a)); and (5) the possibility that there are different varieties of Rule 11 violations requiring different standards for harmless error. That was the issue in *Davila*.

C. *Davila* Facts

A federal grand jury indicted Anthony Davila on one count of conspiracy to defraud the United States by obtaining false tax refunds, 11 counts of false claims, 11 counts of mail fraud, and 11 counts of aggravated identity theft. The psychologist, who examined Davila after the trial court granted his motion to determine his competency for trial, said he was competent but would likely be a "difficult client."¹³ That turned out to be true.

The indictments charged that Davila filed more than 120 falsified tax returns with the IRS. According to an informant, Davila would identify state prisoners on the Florida Department of Corrections website, obtain the prisoners' personal information from case files at the local courthouse, and then file federal tax refund claims in the prisoners' names to be paid into his own bank accounts. The IRS issued

refunds on 87 of the claims, and Davila banked more than \$423,500 as a result of his scheme.¹⁴

Shortly before the competency hearing, Davila wrote to the magistrate asking that his attorney be discharged because he had not offered Davila any alternative besides pleading guilty. The magistrate met with Davila and his counsel without the U.S. attorney. A transcript was made of the in camera hearing. The magistrate refused to discharge the counsel. In effect, the magistrate encouraged Davila to plead guilty as a possible way to obtain a reduced sentence. Evidently, Davila had a previous criminal record.

A month later, Davila filed a motion requesting a speedy trial, which was granted. Three months after the meeting with the magistrate, Davila pleaded guilty before the district court to the one count of conspiracy and later was sentenced to 115 months in prison. The other charges were dismissed as a result of the plea deal. In the Rule 11 hearing, Davila stated that he had not been forced or pressured to plead. The judge was not told of the in camera hearing with the magistrate, and nothing in the record indicates he was aware of it. Between the date Davila pleaded guilty and the date he was sentenced, Davila moved to vacate his plea, but not on grounds of the in camera hearing, which was not mentioned. Rather, he said his plea had been "strategic." The motion was denied.

Davila appealed pro se the conviction made upon his guilty plea. The Eleventh Circuit conducted its own independent review of the record and discovered the magistrate's statements. The Eleventh Circuit ordered the appointed attorney to brief the possible violation of Rule 11(c). The Eleventh Circuit viewed the Rule 11(c) prohibition as a bright-line rule, found that the magistrate's comments had amounted to participation in the plea discussions because they preceded the guilty plea to less than all of the charges, and remanded the case with instructions that Davila's not guilty plea be reinstated.¹⁵

The United States filed a certiorari petition with the Supreme Court.¹⁶ It wanted the Court to decide this question:

Whether the court of appeals erred in holding that any degree of judicial participation in plea

⁹Brent E. Newton, "Disarray Among the Federal Circuits: Harmless Error Review of Rule 11 Violations," 2 *J. App. Prac. & Process* 150 (2000).

¹⁰*See, e.g.*, Linda E. Carter, "The Sporting Approach to Harmless Error in Criminal Cases: The Supreme Court's No Harm, No Foul Debacle in *Neder v. United States*," 28 *Am. J. Crim. L.* 229 (2001).

¹¹The *Davila* opinion characterized the constitutional violations as "structural."

¹²Carter, *supra* note 10, at 231 ("the Court has mutated the determination of harm from an analysis of the process into an analysis of the result").

¹³*Davila*, 2010 U.S. Dist. LEXIS 28028 (S.D. Ga. 2010), adopted by district judge, 2010 U.S. Dist. LEXIS 28032 (S.D. Ga.).

¹⁴This statement appears in the petition for certiorari filed by the United States.

¹⁵*Davila*, 664 F.3d 1355 (11th Cir. 2011). After remand, Davila made a pro se motion alleging that he could not be fairly tried because the prosecutor was the victim of his alleged crime. The magistrate dismissed the motion because it was made pro se and Davila was represented. *Davila*, 2012 U.S. Dist. LEXIS 102147 (S.D. Ga. 2012).

¹⁶*Davila*, 2012 U.S. Briefs 167 (Aug. 3, 2012).

negotiations, in violation of Federal Rule of Criminal Procedure 11(c)(1), automatically requires vacatur of a defendant's guilty plea, irrespective of whether the error prejudiced the defendant.

It grounded the petition on a conflict in the circuits (five versus the Eleventh Circuit and two others).¹⁷

Davila acquired experienced D.C. appellate counsel, presumably pro bono (but they were not appointed by the Supreme Court). Fifty-seven law professors filed an amicus brief supporting Davila. The National Association of Criminal Defense Lawyers filed an amicus brief supporting Davila. Ethics scholars filed an amicus brief supporting Davila. No amicus brief was filed supporting the United States.

D. Davila's Argument

The brief filed by Davila's counsel in the Supreme Court stood on Davila's desire and right to make the government prove its case; it did not assert grounds for innocence except for the conspiracy count to which he pleaded guilty.¹⁸ It asserted that the informant was the unindicted co-conspirator and all she did was drop a few of the fraudulent returns in the mail.¹⁹ It painted the appointed counsel as inept.

The basic argument was that the harmless variances from the procedure for pleas directed by Rule 11(c) but allowed by Rule 11(h) did not encompass the judge's intrusion into the plea negotiation process; that was not a procedure but was a flat requirement that cannot be varied.

Rule 11(c) is a multipart rule specifying the steps in the plea process: (1) the parties discuss the plea; (2) the parties disclose an agreement when the plea is entered; (3) the judge considers the plea and advises the defendant of its consequences; and (4) the judge accepts or rejects the plea and advises the defendant accordingly. Within each step there are other requirements. Within the first step, the judge "must not participate in these discussions." Rule 11(h) states: "A variance from the requirements of this rule is harmless error if it does not affect substantial rights."

¹⁷The Eleventh Circuit opinion in *Davila* traced the circuit's rule back to *United States v. Corbitt*, 996 F.2d 1132 (11th Cir. 1993). But that opinion did not even mention the existence of Rule 11(h) or the possible application of the general harmless error rule, Rule 52. It is unfortunate that "circuit consistency" means that once an error is made, it takes an appeal to the Supreme Court to correct it.

¹⁸*Davila*, 2012 U.S. Briefs 167 (Mar. 15, 2013).

¹⁹Conspiracy is an overused charge in tax cases. See *supra* note 3.

Davila's brief quoted, argued, and cited not the current Rule 11(h) but a prior version that referred to a variance from "procedures required rather than "from the requirements of this rule." The brief, of course, revealed the change in the rule but curiously quoted the old rule in its initial summary of its argument, without at that point disclosing that it was not the current rule. This seems to be carrying zealous representation a little far, given that Davila's whole argument hinged in the asserted distinction between procedures and inflexible requirements like the requirement that the judge not participate in the plea discussions.

The brief's alternative principal argument was that even if Rule 11(h) could be read to literally refer to the judge's participation, it would rarely, if ever, be possible to find that the defendant's substantial rights had not been violated because of the necessarily substantial consequences of the guilty plea and the speculative nature of any finding of lack of nexus between the violation and the plea. This was exactly what Warren said about Rule 11 in 1969, before the 1983 amendments.

E. Supreme Court Reasoning in *Davila*

Justice Ruth Bader Ginsburg wrote the opinion of the Court, which reasoned:

- the United States conceded the magistrate violated Rule 11(c);
- the error here was not "structural," meaning one that violated constitutional rights;
- there is no distinction in Rule 11(c) between pre-plea errors and post-plea errors, and the case is therefore controlled by the Court's two prior holdings on post-plea errors;
- the Court has previously held that a defendant who did not raise an objection before conviction normally is subject to Rule 52(b) and must show a reasonable probability that but for the error, he would not have entered the plea;
- by holding that the magistrate's violation short-circuited all other analysis, the Eleventh Circuit failed to both (1) consider whether there was a factual reason why Rule 52(a) rather than Rule 52(b) should apply, and (2) consider the government's argument that there was no prejudice; and
- the long time between the magistrate's statements and the plea, plus the fact that the magistrate was not the judge who accepted the plea and imposed the sentence, negated the possibility that the Eleventh Circuit's error in imposing an automatic vacatur rule was harmless, and necessitated remand for the Eleventh Circuit to examine the whole record and carry out a case-specific analysis, which it had failed to carry out, based on all the facts and circumstances.

The opinion does not even mention the change in the Rule 11(h) terminology from procedures to requirements. In the course of its analysis of the rule, the Court discussed the report of the Advisory Committee on the Rules of Federal Procedure, but only in support of its analysis of the clear meaning of the words of the rule. Scalia and Thomas in concurrence registered their dislike of use of secondary sources such as the advisory committee report to aid interpretation of statutes and rules. This is a well-known view of these two justices, which is particularly odd in this case. The secondary material was not legislative reports but reports of the Supreme Court's own advisory committee on its own rules, headed by Judge Walter E. Hoffman, an eminent trial court judge.

F. Conclusion

Quite a few tax practitioners represent criminally charged nonfilers whose crimes are not so exotic as Davila's. Most of them agree to a plea deal, so Rule 11 can be important to them. However, most criminal defendants are not intent on resisting at every turn of the criminal process (if they were, it would not "work" as well as it "works" now). Davila *was* intent, perhaps believing he had nothing to lose. Turns out he was right.

III. *Windsor*: The DOMA Case

A. Summary

Although at least three other petitions for certiorari were pending involving federal laws affected by DOMA, the Court chose to review the estate tax refund case. Nevertheless, the reasoning of the majority opinion did not turn on any tax aspect of the case. Indeed, the opinion seemed not to show any appreciation for the significant tax application of the principles it discussed, which are: (1) the extent to which federal tax law incorporates state law and when and how it can reject state law, and (2) how to distinguish between a tax and a regulation, which issue was front and center in the health-care insurance tax case of 2012 but was obscured in the DOMA case.

The *Windsor* decision's effect on those principles may be more important to the tax law than the many details of pursuing refunds, filing amended joint returns, etc., that result from striking down DOMA. The Court did not discuss those details, nor are they discussed here.

In keeping with the extraordinary significance of this case (and further showing that it is not a tax

case), the petition was granted without a circuit split on the question presented for review²⁰:

Section 3 of the Defense of Marriage Act (DOMA) defines the term "marriage" for all purposes under federal law, including the provision of federal benefits, as "only a legal union between one man and one woman as husband and wife." 1 U.S.C. 7. It similarly defines the term "spouse" as "a person of the opposite sex who is a husband or a wife." *Ibid*. The question presented is: Whether Section 3 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.

The Court also directed the parties to argue the following questions:

Whether the Executive Branch's agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction to decide this case; and whether the bipartisan legal advisory group of the United States House of Representatives has Article III standing in this case.²¹

Windsor involves the marital deduction allowed in computing the taxable estate for federal estate tax purposes. The plaintiff sought a refund of tax that she claimed would not have been due if the decedent had been male and married to her. Section 2056 allows a deduction for various amounts passing to or for the benefit of a surviving spouse, which is undefined in the code and regulations. However, the lower courts and the IRS historically have applied the law of matrimony of the state in which the decedent resided at death.²² Since 1996, DOMA has required that when any federal law uses the words "marriage" or "spouse," a spouse refers "only to a person of the opposite sex who is a husband or a wife."²³ Because the devisee in *Windsor* was not of the opposite sex, the IRS denied the deduction.

²⁰The United States had filed the petition even before the Second Circuit affirmed the district court's holding that DOMA was unconstitutional (a result with which the administration agreed). *Windsor*, 833 F. Supp.2d 394 (S.D.N.Y. 2012), *aff'd*, 699 F.3d 169 (2d Cir. 2012).

²¹*Windsor*, 133 S. Ct. 786. In *Hollingsworth v. Perry*, 133 S. Ct. 2652, *vacating and remanding* 671 F.3d 1052 (9th Cir. 2012), heard three days before *Windsor*, the Court held that proponents of California's same-sex marriage ballot initiative lacked standing to appeal a district court order invalidating the initiative when the state, agreeing with that decision, declined to appeal it.

²²See *Eccles v. Commissioner*, 19 T.C. 1049, 1051, 1053-1054 (1953); Rev. Rul. 58-66, 1958-1 C.B. 60.

²³1 U.S.C. section 7, part of the Dictionary Act.

The attorney general refused to defend the suit because the administration determined DOMA was unconstitutional. The House Bipartisan Legal Advisory Group was allowed to intervene to defend the constitutionality of the statute.²⁴

Because the district court determined that New York recognized the Canadian same-sex marriage, it held that Edith Windsor had standing to contest the only law that precluded the marital deduction: DOMA. The district court found no rational basis for the distinction based on the gender of the marriage partner, and it granted summary judgment to Windsor. The court of appeals applied heightened scrutiny and affirmed, with a dissent on the merits.

B. Refusal to Defend

The procedural background is convoluted but can be relevant to state and federal tax cases generally because (1) it indirectly addresses an issue that arises in state tax controversies and was central in *Horne*: how and to what effect can the executive branch (that is, the Justice Department) determine an act of the legislature to be unconstitutional; and (2) it involves the little-known 28 U.S.C. section 530D, which can apply to federal tax cases in two ways.

When the executive decided not to defend DOMA, it notified Congress as required under 28 U.S.C. section 530D. The DOMA suits are the most significant, but not the only, litigation to involve 28 U.S.C. section 530D, which was added by the 21st Century Department of Justice Appropriations Authorization Act. This wide-ranging law was introduced before September 11, 2001, and enacted after that date. It contained amendments and additions to the DOJ's basic enabling laws, including what became 28 U.S.C. section 530D. Although the section appears to create a set of duties for the attorney general, its last subsection extends the same duties to all executive departments, including Treasury, and hence the IRS. It requires the department to report to Congress:

- any instance of a formal or informal policy to refrain from applying any federal law, rule, or policy on the grounds that it is unconstitutional; or to refrain from applying any final court “rule of decision” that would be binding in the courts of a jurisdiction respecting the laws that the department enforces (whether related to constitutionality or otherwise);

²⁴Although this group is bipartisan, it is “majoritarian,” meaning that the Republicans controlled the brief.

- any determination to contest or not defend the constitutionality of a federal law, rule, or policy; and
- the settlement of any claim against the United States for more than \$2 million that is not approved by the Joint Committee on Taxation, or the settlement of any action by the United States providing injunctive relief longer than three years.²⁵

The reports must be timely (within 30 days). The statute refers to possible action by Congress to intervene in the action. Presumably, that includes legislation, but in this case included intervention in court. It requires any formal contest of the constitutionality of a law or rule to be identified as the action of the president, evidently to preclude the interpretation that it is the action of Congress. It appears that parties and courts can and will use section 530D to force the United States to take a position on the constitutionality of federal law.²⁶ The majority *Windsor* opinion said that “many” section 530D letters have been submitted to Congress, but up to now only after a court has rejected the government’s defense of a statute against constitutional objections.

Although the part of section 530D concerning constitutional issues is unlikely to come up much in federal tax disputes, the part regarding not following a binding court rule of decision can come up relatively often. Moreover, it raises a difficult question about *stare decisis* in the Tax Court.

The IRS of course will follow Supreme Court decisions,²⁷ and it is the policy of the IRS to follow court of appeals decisions in the circuit to which a case is appealable even if it disagrees with the decision.²⁸ But it is unclear how the reporting requirement relates to *stare decisis* in the trial courts. The IRS does not view trial court decisions as having binding effect even within that court, and it will nonacquiesce to them and not follow them in applying the law, even though a taxpayer may in the future apply for relief to that trial court (for example, the Tax Court or the Court of Federal Claims). Indeed, the IRS during audit cannot know to what trial court the taxpayer might apply for

²⁵This is unlikely to apply to federal taxes because the JCT reviews court settlements of tax cases as well as settlements within the IRS audit process.

²⁶See *Log Cabin Republicans v. United States*, 2011 U.S. App. LEXIS 16311 (9th Cir. 2011) (because the United States did not want to formally take a position that the “don’t ask, don’t tell” law was unconstitutional, the court ordered it to advise whether it was going to submit a report to Congress under section 530D), *vacated in part*, 2011 U.S. App. LEXIS 16310 (9th Cir. 2011).

²⁷Internal Revenue Manual section 4.10.7.2.9.8.

²⁸IRM section 4.10.7.2.9.8.1.

relief, so it would be impossible for the IRS to completely avoid conflict with all contrary trial-level authority unless it were to always agree with all adverse trial-level decisions that were not appealed.

Section 530D should not require reporting for conflicting district court and claims court authorities because those trial courts follow the general rule that trial courts do not accord formal *stare decisis* effect to decisions of other judges or even the same judge in that trial court.²⁹ Also, the Tax Court has stated it does not treat memorandum opinions as having precedential value.³⁰

However, despite the lack of any formal rules about its own precedents, the Tax Court has said that it is controlled by its regular decisions, including one that is 68 years old.³¹ And Tax Court opinions stating that the Tax Court applies *stare decisis* effect to its own decisions go back to 1933.³² Therefore, it seems that regular Tax Court decisions are binding on the Tax Court and that if the IRS plans to disagree with an unappealed Tax Court decision, it must inform Congress.

C. Majority Opinion

1. Standing. The majority held that the DOJ could seek review of the decision even though it agreed with the result. It did so on rather tenuous grounds that have less relevance to tax than do its implications that the executive branch has no business deciding that an act of the legislature is unconstitutional. That can be relevant to state tax review procedures, as discussed below in connection with *Horne*.

The majority managed to find that the parties were adverse because Treasury still has the tax money and evidently would not refund it even though it agreed with the district court's order. Indeed, the majority opinion implied a grudging admiration for the administration's straddle approach to agreeing with the Second Circuit but continuing to enforce DOMA, an approach that was likely devised or approved by the president him-

self. Perhaps sensing that, Scalia, in dissent, viewed the straddle as an "Executive contrivance."

The majority's grudging admiration of the straddle was mostly because of the approach's compatibility with the Court's own central self-protection mechanism: the doctrine of *Marbury v. Madison* that the Supreme Court has final say about what the federal law is. Also, for the president to decide not to enforce laws that he thought were unconstitutional would upset the separation of powers by giving the president the power to effectively veto acts of Congress without exercising the constitutional veto power. The majority opinion strongly implied, without stating, that the Court thought the proper alternatives for an executive branch that disagrees with an act of Congress is to either (1) seek judicial review, as the United States did in this case or (2) encourage Congress to repeal or amend the statute.

In contrast, Scalia in dissent thought that the president should simply refuse to enforce laws he thinks unconstitutional, and that if Congress does not like it, Congress can try to impeach him. That is sort of a "burning the in basket" approach that is perhaps typical of Scalia but not of justices who are trying to help the system work.

2. Merits. The majority's reasoning on the merits is important to future tax cases because (1) it left intact the somewhat muddled system whereby tax laws implicitly incorporate state rules establishing property rights and personal relationships, subject to explicit federal override,³³ and (2) it somewhat revived Chief Justice William Howard Taft's ability to "see" when Congress was simply regulating as opposed to taxing, which could be used to undercut Congress's historic ability to make all sorts of arbitrary distinctions in taxation.³⁴ Also, there is more than a hint of the dreaded substantive due process in the Court's reasoning that same-sex marriage is protected, at least when it is protected by state law. Substantive due process was one of the first constitutional fig leaves draped over judicial attacks on federal and state regulation and taxation.³⁵

The Court recognized the fundamental dependence of federal law on state law definitions, but at the same time recognized the fundamental inability of state law to wholly control federal law.³⁶ This tension was at the heart of the constitutional issue

²⁹See 18-134 *Moore's Federal Practice — Civil* section 134.02. But as a practical matter, federal district judges in the same judicial district generally accord precedential weight to prior holdings in that district. *But see Windsor*, 133 S. Ct. 2675, in which the Supreme Court said that if it decided not to review the case and the Second Circuit decision were vacated, all 94 judicial districts would have no guidance, even though the district court decision in the case would stand.

³⁰See *Nico v. Commissioner*, 67 T.C. 647 (1977).

³¹*Swallows Holding Ltd. v. Commissioner*, 126 T.C. 96 (2006), *rev'd*, 515 F.3d 162 (3d Cir. 2008).

³²*Allen v. Commissioner*, BTA Memo. 1933-71; *AHG Investments LLC v. Commissioner*, 140 T.C. No. 7 (2013).

³³See Cummings, "Nationwide Uniformity and the Common Law of Federal Taxation," 66 *Tax Law*. 1 (2012).

³⁴See Cummings, *The Supreme Court, Federal Taxation and the Constitution*, 418 et seq. (2013) (*The Supreme Court*).

³⁵*Id.* at 471 et seq.

³⁶See Cummings, *The Supreme Court's Federal Tax Jurisprudence*, 389-393 (2010).

in *Windsor*, because the tax and other federal laws had long incorporated state law determinations of marriage, but DOMA was an exercise of the federal right to reject control by state law. However, the opinion did not discuss the interrelationship of the tax law's partial dependence on state law. It instead addressed that matter in more universal terms, in keeping with its not treating this as a tax case.

The opinion also did not treat this as a federalism case worrying about balance of powers between the states and the federal government. Rather, the Court reasoned that the usual easy preemption of state law by federal law had to be reexamined in this case because of (1) the many federal laws involved (more than 1,000) and (2) the choice of at least 11 states to protect a class of persons affected by DOMA. Point 2 is crucial. In effect, the Court reasoned that once the states (although far less than all) identify a class they wished to protect in a particular way, the United States cannot arbitrarily burden that identified class in another way by imposing "restrictions and disabilities." The restrictions and disabilities were unequal treatment in access to benefits based on marriage.

The third leg of the reasoning required bringing these restrictions and disabilities in conflict with the Fifth Amendment. The Court could have relied solely on equal protection, but seemed to go farther and invoked the plaintiff's right not to be deprived of liberty without due process of law. As Scalia pointed out in dissent, this sounds like substantive due process without using the term. Perhaps wanting to avoid that quagmire, the majority opinion segued from simply protecting liberty to the equal protection branch of due process. The equal protection requirement has previously been read into the concept of due process (it is stated in the 14th Amendment, not the Fifth Amendment).³⁷

The concept that discrimination can result from the federal government's refusal to recognize as equal what a state has declared to be equal is novel to say the least. It is the linchpin of the majority's reasoning and marks either an inflection point in the law or an example of what happens when justices compromise over the words of a difficult holding. For example, *Brown v. Board of Education* marked an inflection point in the law when Warren reasoned simply that separate was not equal. We now accept that view without discussion, but it was wholly different from the similarly well-accepted concept underlying *Plessy v. Ferguson*.

The ability of states to determine what is equal has potentially far-reaching and troubling conse-

quences. What if states recognize business enterprises to be churches? What if states declare that all private schools will be treated as public schools for funding purposes? When and how must the federal government, including the tax laws, accommodate those choices? Perhaps the answer is that marriage is different. The opinion seeks to make the marriage definition special by emphasizing the privacy elements that caused the Court to strike down a Texas sodomy law in 2003.³⁸

Next, the opinion moved to consideration of the defenses for the federal discrimination against same-sex marriages that the 11 states treated like all marriages. Unlike the lower courts, the majority opinion did not use the technique of applying a high or low standard of rationality to the federal discrimination, which this opinion was expected to clarify. Rather, it relied on finding that an unacceptable congressional purpose so predominated Congress's intent that weighing possible appropriate congressional purposes was unnecessary.

The opinion began by quoting an earlier opinion in which the Court said Congress cannot establish disparate treatment based on a "bare congressional desire to harm a politically unpopular group." The quoted opinion, written by Justice William J. Brennan Jr. and dissented to by Burger and Justice William H. Rehnquist, held that a limitation of food stamps to family members living in the same residence was unrelated to any purpose of the legislation and was aimed solely at discouraging "hippie communes."³⁹

Rather than finding there was absolutely no possible legitimate purpose for DOMA, the majority used a variety of terms: "strong evidence," "more than incidental," "principal purpose," "principal effect," and lacking any countervailing "legitimate purpose [that] overcomes" the purpose to injure those whom the states sought to protect. The opinion created a sort of heightened scrutiny by citing the historic control of states over the marital relationship and therefore finding that the "unusual deviation" reflected in DOMA provided "strong evidence of a law having the purpose and effect of disapproval of that class." Then the majority found the title and text of the law to reflect as its "essence" the purpose to deny benefits to this class, and it found the law to have that "practical effect." Finally, the majority relied on legislative history containing clear statements of the law's purpose to disadvantage those whom the states might choose to advantage.

³⁷*Bolling v. Sharpe*, 347 U.S. 497 (1954) (the District of Columbia equivalent of *Brown v. Board of Education*).

³⁸*Lawrence v. Texas*, 539 U.S. 558 (2003).

³⁹*U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

The way the opinion characterized an unconstitutional discrimination could be applied to other tax cases. Within the federal and state tax law jurisprudence, there is a strong presumption that once a levy is found to be a tax, discriminations in taxing subjects or rates will be allowed for any and no reason.⁴⁰ The major exception to this case law has been the Supreme Court's willingness from 1922 to 1936 to hold against federal taxes based on an inferred congressional intent to regulate rather than tax — a fate that nearly overcame the tax in the 2010 healthcare law.⁴¹ The first and most prominent of this small set of cases is Taft's holding that the tax in the Child Labor Tax Act was unconstitutional in 1922 because he could see that Congress intended to regulate and not to tax.⁴²

The majority's reliance in *Windsor* on "seeing" that Congress intended to hurt those participating in same-sex marriage has many similarities to Taft's 1922 decision against a different tax. The only difference is that Taft boldly asserted there was no purpose other than to regulate, whereas the *Windsor* majority couched the finding in a variety of intent-measurement terms that will be hard to apply as a standard.

D. The Dissents

Roberts disagreed fundamentally on the merits, not finding Congress guilty of bigotry. Scalia's dissent attacks almost every aspect of the majority opinion, but the dissent's most important point for purposes of future discrimination cases is that the majority did not resolve whether strict or mere rational-basis review is to be applied to this type of alleged discrimination. Scalia concludes that the majority applied the rationality test without saying so. He also questions whether the majority applied the equal protection aspect of due process at all. Scalia accuses the majority of applying what he calls "the dread words 'substantive due process.'" He correctly concluded that "bare . . . desire to harm" was the actual ground of the decision, and he then rejected both (1) holding a law unconstitutional on the basis of alleged illicit congressional intent and (2) the finding of fact that the desire to harm was the only rational grounds for the law. Scalia argued that to defend marriage is not to demean same-sex marriages, and he then accused the majority of saying just that. And, of course, it did.

Alito's dissent also suggested that the majority applied substantive due process without saying so, and that to the extent the majority applied substan-

tive due process, it necessarily exalted same-sex marriage as a fundamental liberty deeply rooted in the nation's history and traditions, a proposition with which Alito disagrees.

E. Conclusion

The most serious potential impact of the *Windsor* decision on federal taxation could be a reinvigoration on the "left" of the "know it when I see it" approach to fact finding that has been more commonly applied by the "right" to strike down taxes as regulations and not taxes. This is precisely the argument that was aimed at the healthcare tax, which escaped last year by a whisker. It may not be so easy next time, when the justices on the "right" can point back to *Windsor* as an example of how a tax can be found to have no purpose other than an illegal one.

IV. *Horne*

A. Summary

The Hornes are raisin producers who object to the federal marketing order that required them to set aside and not sell part of their crop. They won at least the procedural right to not have to pay the amount demanded under the marketing order (the value of the crop they refused to set aside) and to sue for a refund in the claims court. The Supreme Court remanded the case for consideration of the Hornes' Fifth Amendment takings claim by the lower courts without prepayment (that is, a declaratory judgment on a taking that has not occurred).

B. The Tax Connections

This is not a tax case, but it has two important tax connections. The first is historical. *Horne* is a rare procedural victory in the 60-plus-year battle waged by foes of the New Deal agriculture programs. The target is one of the acts that replaced the Agricultural Adjustment Act of 1933 (AAA). The Supreme Court had struck down the AAA tax in 1936 in *United States v. Butler*, its last decision striking down a federal tax as not authorized by Congress's constitutional taxing power.⁴³ Congress promptly reenacted the marketing order part of the AAA in the Agricultural Marketing Agreement Act of 1937 (AMAA).

The AMAA provides for marketing orders issued by the Department of Agriculture (USDA) for various agricultural products and regions, which are subject to prior approval by vote of the producers.

⁴⁰Cummings, *The Supreme Court*, *supra* note 34, at V.D.3.b.

⁴¹Cummings, "Health Insurance Tax Upheld," *Tax Notes*, July 30, 2012, p. 599.

⁴²*Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

⁴³*United States v. Butler*, 297 U.S. 1 (1936). Shortly thereafter the Court struck down the last New Deal tax it rejected, but that was defended under the commerce clause and not the taxing power. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

These orders require handlers of the crops to withhold part of the crops from the market. The producer's loss of that portion of its crops is one part of a sort of a trade-off between getting higher prices for the part sold, benefiting otherwise from the federal market regulation, and in most cases receiving at least partial payment for the withheld crops. As shown below, the Supreme Court first heard constitutional objections to the AMAA in 1939, and the objections continue to date.

Horne's second connection to taxation concerns a current issue in state taxation. The grounds of the opinion cast doubt on the remedial system used by several states that may provide for a prepayment administrative review of taxpayer protests but do not allow constitutional objections to be heard in that process. Instead, the taxpayer must pay the tax and sue for refund in order to have a venue to raise constitutional objections (a post-deprivation remedy). Many states, including North Carolina before changes in 2008, use or have used this system.⁴⁴ *Harper v. Virginia Department of Taxation* held that a state does not have to provide a pre-deprivation remedy for taxes if it provides meaningful backward-looking relief to remedy a constitutional violation.⁴⁵

The *Horne* opinion says:

In the case of an administrative enforcement proceeding, when a party raises a constitutional defense to an assessed fine, it would make little sense to require the party to pay the fine in one proceeding and then turn around and sue for recovery of that same money in another proceeding.

C. Facts

The Hornes, who produce raisins, view the raisin marketing orders as something from a "communist state" and have waged a long-running battle with the USDA. The Hornes tried to avoid the marketing order by claiming their raisin crops were not sold through a "handler," to which the orders apply. But they were found to be handlers. If they were handlers and subject to the order, they still objected

to the crop set-aside as an unconstitutional taking without just compensation.

Of course, attacks on governmental impingement on property rights as takings have exploded in recent years. In the closing days of the last term, the Court decided yet another such case in favor of the takee.⁴⁶ The issue is viewed as one involving big government overreach, even when the government is a local one, and it incites libertarian objections. These strains are reflected in *Horne*: The Hornes were represented in the Supreme Court by powerful counsel with strong conservative political credentials.⁴⁷

The Hornes were parties to three separate legal actions contesting the marketing order's application to them. First, the secretary of Agriculture initiated an enforcement action and sought penalties against the handler under 7 U.S.C. section 608c(14)(B), which included the dollar value of the raisins that the Hornes refused to turn over to the USDA. This can be viewed as a proposed assessment of taxes in the state tax context. The Hornes defended that suit in an administrative law judge enforcement proceeding and lost, and lost on appeal to a judicial officer within the USDA system. The judicial officer said a constitutional issue could not be decided in the enforcement proceeding.⁴⁸ Second, as permitted

⁴⁶*Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013).

⁴⁷From the Kirkland & Ellis website: Michael W. McConnell is Of Counsel to the Litigation Practice Group at Kirkland & Ellis LLP. He formerly served as Circuit Judge on the U.S. Court of Appeals for the Tenth Circuit and is now the Richard & Frances Mallery Professor and Director of the Constitutional Law Center at Stanford Law School. His practice focuses on all aspects of constitutional and appellate law. Judge McConnell brings many years of diverse experience to Kirkland as appellate judge, advocate, teacher and scholar. He has argued 13 cases before the U.S. Supreme Court and numerous cases in other courts, has testified many times before Congress, has held chaired professorships at three law schools, and is an author of two leading casebooks in constitutional law. His scholarly work has been cited many times by the Supreme Court and other courts. McConnell served in the Reagan administration and was appointed a judge by President George W. Bush.

⁴⁸The USDA appeals officer refused to consider the takings issue, stating:

In their appeal, Mr. Horne and partners question the constitutionality of the Raisin Order. First and foremost, I have no authority to judge the constitutionality of the various statutes administered by the United States Department of Agriculture. *Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures"); *Robinson v. United States*, 718 F.2d 336, 338 (10th Cir. 1983) ("The agency is an inappropriate forum for determining whether its governing statute is constitutional"). Therefore, Mr. Horne and partners questioning

(Footnote continued on next page.)

⁴⁴See *Great American Ins. Co. v. Gold*, 254 N.C. 168 (1961); *Gulf Oil Corp. v. Clayton*, 267 N.C. 15 (1966). See also Cummings, "New Procedures for Contested Taxes in North Carolina," *State Tax Notes*, Sept. 3, 2007, p. 635. However, eventually the North Carolina appellate courts did consider the constitutional claims that the administrative agencies refused to consider, over objections of the DOR. See Cummings, "Trademark Protection Company's Appeal Debated in Superior Court," *State Tax Notes*, Apr. 14, 2003, p. 139; *A&F Trademark Inc. v. Tolson*, 167 N.C. App. 150 (2004).

⁴⁵*Harper v. Va. Dep't of Tax'n*, 509 U.S. 86 (1992).

by the cited section, the Hornes filed a separate action in district court to review the final agency decision in the administrative action, asking the court to hold the marketing order unconstitutional as a taking without just compensation. This can be viewed as part of the original contest of the proposed assessment, akin to a Tax Court petition.

The district court considered and decided the takings claim against the Hornes.⁴⁹ The Ninth Circuit initially affirmed on the merits.⁵⁰ Then the Ninth Circuit issued an amended opinion.⁵¹ The amended opinion does not mention the original opinion and considers for the first time the government's Tucker Act argument and adopted it on March 12, 2012, saying that it was premature for the Hornes to raise the takings issue and that they had to pay and sue in the Court of Federal Claims for a refund.⁵² That is the holding that was appealed to the Supreme Court.

For some reason that the Ninth Circuit opinion does not well explain, the court held that a 7 U.S.C. section 608c(14)(B) action does not enjoy the same exception from Tucker Act jurisdiction as did the dismissed third action discussed next.⁵³ As a result of the Ninth Circuit's holding, the Hornes would have to pay the amounts due and file a refund claim under the Tucker Act in claims court based on violation of the takings clause of the Fifth Amendment.

of the constitutionality of the Raisin Order falls on legally deaf ears. I need not point out to Mr. Horne and partners that the Court of Federal Claims recently found the arguments made in this appeal to be unavailing. *Evans v. United States*, 74 Fed. Cl. 554 (2006). The United States Court of Appeals for the Federal Circuit affirmed the Court of Federal Claims Decision, 250 F. App'x 231 (2007), and the Supreme Court of the United States denied a petition for certiorari, 128 S. Ct. 1292 (2008). Until the appropriate court instructs me otherwise, I will treat the Raisin Order as constitutional, as I believe it to be.

Horne v. United States Dep't of Agric., 2012 U.S. Briefs 123, 73.

⁴⁹*Horne*, 2009 U.S. Dist. LEXIS 115464 (E.D. Cal. 2009).

⁵⁰2011 U.S. App. LEXIS 15284 (July 25, 2011).

⁵¹*Horne*, 673 F.3d 1071 (9th Cir. 2011).

⁵²The petition for certiorari is dated July 25, 2012, and it first involved McConnell.

⁵³At this point the Ninth Circuit opinion cited two other opinions that dealt only with (15)(A) cases. The Ninth Circuit read those opinions to say that a producer-handler that asserted its rights as a producer (which seemed to be the way the Hornes presented their argument) was not subject to the (15)(A) remedy, which is limited to handlers, and therefore was not entitled to enjoy its remedy in lieu of the Tucker Act. Presumably the Ninth Circuit meant to apply the same reasoning to the (14)(B) remedy, which was the one actually before it, but it did not say so. One cannot obtain further guidance from the district court opinion, because the district court considered the constitutional claim and rejected it on the merits, as did the original Ninth Circuit opinion.

Third, the Hornes also initiated an administrative proceeding under 7 U.S.C. section 608c(15)(A) contesting the marketing order as handlers, but it was dismissed for lack of standing because of an untimely filed appeal. This is like a declaratory judgment option that also does not require prepayment but clearly could have decided the constitutional claim. The Supreme Court did not review the dismissal of the third action. So the Hornes had lost their right to prepayment consideration of their constitutional claim in the section 608c(15)(A) action as a result of their own failure to perfect an appeal.⁵⁴ They were arguing to the Supreme Court that they should have an alternative prepayment remedy under section 608c(14)(B).

D. Supreme Court Opinion

Thomas, writing for a unanimous Court, reversed, reasoning as follows:

- He rejected the Ninth Circuit's confused distinction between appeals by producers and those by handlers as a grounds for the decision.
- The general rule is that the Tucker Act remedy is not exclusive if another statute provides a comprehensive remedial scheme. The AMAA does provide such a scheme in the appeal authorized by 7 U.S.C. section 608c(15) (the Hornes' third action, which was dismissed on grounds of an untimely appeal).
- Based on that conclusion, the Court found that the takings claim was not premature when presented in the Ninth Circuit, referring specifically to the section 608c(15) remedy.
- Evidently the Court realized it had to deal with the fact that the takings claim was presented to the Ninth Circuit under a different section: 7 U.S.C. section 608c(14). Therefore, it needed to decide separately that the constitutional claim could be raised in that proceeding, and it held that it could, simply because the text of the section does not bar constitutional claims (a most lenient standard).
- At this point the opinion said "it would make little sense" to require the party to pay a fine

⁵⁴On appeal from the second action in district court contesting the 7 U.S.C. section 608c(14)(B) enforcement order, the Ninth Circuit's amended opinion agreed that it was well established that a takings claim could be raised in a 7 U.S.C. section 608c(15)(A) proceeding (the third action that was dismissed) and a constitutional claim necessarily could be considered on appeal in court, because the Tucker Act jurisdiction was supplanted in that case by the full administrative remedy. Of course, this did the Hornes no good because their 7 U.S.C. section 608c(15)(A) action had been dismissed for failure to timely appeal. Therefore, the Hornes were before the Ninth Circuit solely on their 7 U.S.C. section 608c(14)(B) appeal.

levied in an administrative proceeding and turn around and sue for “the recovery of that same money” in another proceeding.

- Therefore, the constitutional claim could have been “raised” before the administrative officers and considered by the courts in the section 608c(14) proceedings. Although not entirely clear, evidently this means that a claimant can and probably must assert the constitutional claim at the administrative appeal level, even though the ALJ cannot (or will not) decide it; and then it can be considered on appeal to the courts on the merits.
- The case was remanded to the Ninth Circuit to consider the constitutional claim on the merits.

Of course the district court had considered and rejected the constitutional claim, as had the Ninth Circuit in its original opinion. Therefore, it is highly likely that on remand the Ninth Circuit will find no unconstitutional taking and the Hornes will again seek review by the Supreme Court.

The contention that it made little sense to require the Hornes to pay and then sue for a refund in the claims court was supported by a cite to *Eastern Enterprises v. Apfel*, an important takings decision.⁵⁵ There the issue was whether a declaratory judgment suit had to be dismissed so the plaintiffs could pay and sue in the claims court. The Court held it did not have to be dismissed based on the unusual nature of the so-called taking: The plaintiff had to pay monies to other private parties. The Supreme Court concluded that a Tucker Act recovery might be unavailable since nothing had been taken by the United States, and it exercised equitable discretion to allow the declaratory injunction action.⁵⁶ But on the facts of *Horne*, the value of the raisins that were “taken” was to be paid to the United States in part to run the price support program, and any left over was to be paid back to the Hornes. Therefore, there would be a taking. It is hard to see the analogy to *Eastern Enterprises*, and it is hard to see how it supports the general conclusion that it makes little sense to have to go through a proceeding and be made to pay and then sue to recover.

E. The State Tax Connection

If it makes little sense to have to pay and sue to raise constitutional defenses to the marketing order levy, the same should apply to state tax contests. Presumably the Court made this statement only in the context of a system that provides both a pre- and post-deprivation remedy but refuses to consider constitutional defenses in the pre-deprivation

remedy. If so, perhaps the statement was just an aside, a makeweight argument, in support of the Court’s prior conclusion that 7 U.S.C. section 608c(14) did not bar constitutional defenses, so it must allow them. Perhaps it carries no constitutional weight.

Nevertheless the Court logically also should say that it makes little sense for states to have an administrative prepayment process that refuses to consider constitutional or any other category of defenses; or that it makes little sense for a state to have a prepayment administrative review that cannot be appealed to a court, with a court hearing being available only if the taxpayer pays and sues. And yet in many, perhaps most, states, the DOR takes the position that it is not authorized to consider constitutional defenses to tax.⁵⁷ As a result, either the taxpayer must pay and sue for a refund or in some cases the constitutional claims can be raised in a judicial appeal from the administrative hearing.

There is nothing inherent in administrative law that precludes a government agency, other than the courts, from determining a law is unconstitutional and refusing to enforce it. Indeed, that is just what the current administration did in *Windsor* concerning DOMA. Admittedly both the majority and the dissent in *Windsor* cast doubt on the propriety of the executive effectively vetoing an act of Congress, but that problem does not arise in most state tax constitutional disputes: The issue is usually whether the state should recognize the unconstitutionality of its own laws under the Constitution of the United States. The acknowledged supremacy of the federal constitution over state laws means that state tax administrators have not just the option but the duty to abide by controlling federal law.

The state agencies take the opposite position simply as a matter of protecting the fisc. It makes life simpler for them. At minimum, the constitutional defenses should be considered in direct prepayment appeals from prepayment DOR hearings, and if the states disagree, taxpayers should cite *Horne*.

F. The Long War

Opponents of the AMAA reached the Supreme Court first in 1939.⁵⁸ The political overlay of the case is shown by this argument made by the defendant:

It is urged that to carry this principle of contribution to its logical conclusion would

⁵⁷*E.g.*, Indiana, see 20090930 Ind. Reg. 045090710NRA (Sept. 2009).

⁵⁸*United States v. Rock Royal Co-operative Inc.*, 307 U.S. 533 (1939). The Court rejected the takings claim, finding first that the marketing orders were generally constitutional as regulating interstate commerce.

⁵⁵524 U.S. 498, 520 (1998).

⁵⁶*Id.* at 521 (“potentially uncompensable damages”).

mean that the wages of the employed should be shared with the unemployed; the highly paid, with the underpaid; and the receipts of the able, the fortunate and the diligent, with the incompetent, the unlucky and the drone.⁵⁹

The Court rejected the objections. It found that Congress had the power to regulate the amount of interstate commerce in milk and that the co-op pool was a reasonable means of such regulation.

The Court rejected a second objection in 1939,⁶⁰ and a third in 1942.⁶¹ A fourth decision in 1944 held that the right to vote on the marketing order did not preclude an objection in court.⁶² A fifth decision in 1946 dismissed a government enforcement action as procedurally incorrect.⁶³ A sixth in 1952 held that an order was outside the statute.⁶⁴ A seventh in 1962

⁵⁹307 U.S. at 572.

⁶⁰*H.P. Hood & Sons Inc. v. United States*, 307 U.S. 588 (1939). This case is similar to *Rock Royal*. The milk producers were defendants in a government suit to force them to comply with the marketing order under the act, the compliance being payment of certain amounts into a fund for price equalization purposes and marketing services. It affirmed the order as to constitutionality based on the *Rock Royal* opinion.

⁶¹*United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942). This case also involved an action by the United States to enforce a marketing order requiring payment. The Court upheld the power over interstate commerce, relying on *Rock Royal*.

⁶²*Stark v. Wickard*, 321 U.S. 288 (1944).

⁶³*United States v. Ruzicka*, 329 U.S. 287 (1946). The opinion pointed out that it was clear that Congress intended for payments to be made promptly into the fund to ensure its proper operation, leaving detailed objections to later determination in the separate administrative hearing. The opinion noted that the lower court might have stayed the enforcement action pending the administrative proceeding.

⁶⁴*Brannan v. Stark*, 342 U.S. 451 (1952). This is a later appeal in *Stark v. Wickard*. It held the order at issue invalid as outside the statute.

held that an order was partly outside the statute.⁶⁵ An eighth in 1969 held that an order was outside the statute.⁶⁶ A ninth in 1984 held that consumers lacked standing to sue.⁶⁷ Another 29 years passed, but the AMAA's opponents were not at rest, as shown by *Horne*.

V. Conclusion

From the early days of the income tax through the 1960s, federal tax cases frequently composed the largest group of Supreme Court decisions. They have been replaced by cases dealing with issues thought to have a more fundamental relationship with individual rights or institutional powers. That leaves the tax system with less guidance until a sufficiently serious conflict in the circuits requires the Court's attention. If the Supreme Court is not going to hear tax cases — and that is the way it is going — the system would be better off with a national court of tax appeals that sits in parallel with the other circuit courts and has exclusive jurisdiction of all tax appeals, whether from the Tax Court, the district courts, or the claims court.⁶⁸

⁶⁵*Lehigh Valley Cooperative Farmers Inc. v. United States*, 370 U.S. 76 (1962). This case was a consolidated trial of the two types of cases described in *Ruzicka*: the secretary's enforcement action and the milk producer's administrative appeal of the terms of the marketing order. The Court found one part of the order to be outside the scope of the statute and so invalidated the order to make payment.

⁶⁶*Zuber v. Allen*, 396 U.S. 168 (1969). Milk producer plaintiffs sued to enjoin requirements of an order that they make certain payments. The Court found the marketing order to be outside the statute and enjoined its enforcement.

⁶⁷*Block v. Community Nutrition Institute*, 467 U.S. 340 (1984). Milk handlers joined with consumers to enjoin a milk marketing order. The Court held that the consumers lacked standing to sue.

⁶⁸See Cummings, "Creation of National Appellate Tax Court Will Improve Tax Law" in *Towards Tax Reform: Recommendations for President Obama's Task Force* (Tax Analysts 2009).