Yesterday was a historic day for advocates of marriage equality. Section 3 of the Defense of Marriage Act ("DOMA") (Pub. L. 104-199, 110 Stat. 2419, enacted September 21, 1996, 1 U.S.C. §7 and 28 U.S.C. §1738C) that provided the definition of marriage for federal purposes being a man and a woman was struck down as unconstitutional in U.S. v. Windsor (full opinion available at http://www.supremecourt.gov/opinions/12pdf/12-307_g2bh.pdf). Section 3 of DOMA had prospectively invalidated marriages of same-sex couples for purposes of federal laws regardless if those laws were enacted prior to or subsequent of DOMA. More specifically, it provided:

[i]n determining the meaning of any Act of Congress, or any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the term “spouse” refers only to a person of the opposite sex who is a husband or a wife.

In Windsor, the Court, in an opinion by Justice Kennedy, rendered a 5-4 decision that opined: (1) that the Petitioner had standing to bring the case and (2) most importantly, for our purposes, that Section 3 of DOMA was unconstitutional because it denied same-sex couple “equal liberty” guaranteed by the Fifth Amendment.

While in Hollingsworth v. Perry (the "Prop 8" case), (full opinion available at http://www.supremecourt.gov/opinions/12pdf/12-144_8ok0.pdf), the Court in 5-4 decision (with a different composition of Justices) held essentially that the proponents of Prop 8 had no standing to challenge the California Supreme Court decision and thus essentially remanded the case to the 9th Circuit with instructions to dismiss the case for lack of standing. For the purposes of this post, the Prop 8 case is not as important.

The question that I was asked to discuss here is the impact that these cases have regarding the federal tax code (the “Code”). Unfortunately, I have more questions than answers at this point. Regardless, I will focus on the federal income tax implications to the ruling and endeavor to frame the issues that result from the decision. Essentially, DOMA was intended to avoid the questions that we are going to be faced with now regarding, among other things, the full-faith and credit issues between states. First, I will discuss the proper definition of marriage that should

1 Justice Kennedy also wrote the Court's historic gay rights cases, Romer v. Evans, 517 U.S. 620 (1996) and Lawrence v. Texas, 539 U.S. 558 (2003).
2 For constitutional law scholars, this is not an insignificant point.
apply for the Code. Second, I will discuss how the Code might need to be modified. Finally, I will discuss some of the implications of the decision for taxpayers.

I. Marriage Definition

Section 3 of DOMA created a definition of marriage for the purposes of the United States Code. That definition overrode any state law definition. The Court in deciding that Section 3 of DOMA was unconstitutional stated

DOMA writes inequality into the entire United States Code. The particular case at hand concerns the estate tax, but DOMA is more than a simple determination of what should or should not be allowed as an estate tax refund. Among the over 1,000 statutes and numerous federal regulations that DOMA controls are laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits. DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency.

After Windsor, every federal statute that refers to marriage will no longer be tied to the unconstitutional Section 3 definition. A starting point for a post-Windsor world is a brief discussion of what definition will apply to marriage. As I have previously discussed in law review articles, prior to the adoption of the DOMA in 1996, the federal government of the United States recognized that the authority to create and regulate marital status was the exclusive prerogative of the states. The


The scope of a federal right is, of course, a federal questions, but that does not mean that it is content is not to be determined by stat, rather than federal law . . . This is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern.
federal government consistently deferred to the state definition of marriage for eligibility for a right, responsibility or protection under the law. The general rule gives way when states’ marriage laws fail to conform to constitutional guarantees. A question for another day, as the Court also punted on this issue, is whether same-sex marriage rises to the level of a constitutional guarantee.

For now, we are in a world that has wildly different marriage laws. For almost 200 years, states have adjudicated their differences regarding marriage laws. There have been significant policy differences between states in the arena of civil marriage laws. A large body of case law exists which demonstrates the ability of states whether to give effect to out of state marriages regarding “racially mixed marriages, consanguineous or incestuous relationships, marriages involving minors, and other contentious relationship categories, . . .”

To avoid these issues, Thirty-seven states enacted legislation (so-called mini-DOMAs) to define marriage as a union between a man and a woman. The Prop

For example states can decide marriage age and familiar relationships.

For example, in applying the 198 marriage provisions of the Internal Revenue Code of 1986, as amended, state or tribal recognition is the determining factor. See Rev. Rul. 83-183, 1983-2 C.B. 220 (“[t]ax payers who meet the requirements in their state of residence for a valid marriage may file a joint return even though they have never been legally declared married by a court of law.”)(citing Ross v. Comm’r, TC Memo 1972-122 and Rev. Rul. 58-66, 1958-1 C.B. 60); Eccles v. Comm’r, 19 TC 1049, 1051 (1953) aff’d per curiam, 208 F.2d 796 (4th Cir. 1953)(for federal income tax purposes, the determination of marital status must be made in accordance with the law of the State of the marital domicile); Robert Calhoun, Jr., TC Memo 1992-246 (citing Eccles, supra, and Sosna v. Iowa, 419 U.S. 393, 404 (1975)(domestic relations is an “area that has long been regarded as virtually exclusive province of the States”).


Id. at 2216.

Case and its prodigy will be important in the future to determine the constitutionality of these mini-DOMAs. Importantly for the discussion at hand, Section 2 of DOMA was not decided unconstitutional by Windsor. The second purpose of the DOMA was to provide that Congress has the authority to give parameters to the Full Faith and Credit Clause by permitting states to not recognize same sex marriages valid in other states. This purpose's constitutionality has yet to be decided. Specifically, Section 2 of DOMA provides:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory or possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.9

The enacting of DOMA did not eliminate the question of the Full Faith and Credit Clause on same sex marriage. It created additional questions about the constitutional validity of the act. Several members of Congress as well as most commentators, expressed doubts about the constitutionality for a litany of reasons,10 including the failure of Congress to define marriage and traditionally the full faith and credit clause has been used to require enforcement of a mandate not restrict one.11 Therefore, the next round of challenges will most likely focus on this

9 Section 2 of DOMA. Congress relied on its “express grant of authority” under the second sentence of the Constitution’s Full Faith and Credit Clause “to prescribe the effect that public acts, records, and proceedings from on State shall have in sister States.” H.R. Rep. No. 104-664 at 2 reprinted in 1996 U.S.C.C.A.N. 2905, 2906.

10 See e.g., Statement of Sen. John Kerry, July 8, 2009 available at http://kerry.senate.gov/press/release/?id=c2ea21e6-4e00-4726-9925-90fe9c24ff4c (“In 1996, I voted against the so-called Defense of Marriage Act not just because I believed it was nothing more than a fundamentally political ploy to divide Americans, but because it is unconstitutional. Thirteen years later, I still defy you to find a single Senator who can credibly argue that it is within the Senate’s power to strip away the word or spirit of a constitutional clause by simple statute.”)

11 See e.g., Kerry, supra note 10,

But it seems to me that what Congress is doing is allowing a State to ignore another State’s acts, and every law that Congress has ever passed has invoked the full faith and credit of another State’s legislation.

All of these laws share a basic common denominator. They all implement the full faith and credit mandate. They do not restrict it Not once has it been restricted in that way. For example, the Parental Kidnapping Prevention Act of 1999 provided the States have to
issue. Until then, for the purposes of the Code, marriage should be defined by the state in which the taxpayer is a resident. Although, this is not a given.

II. Implications to Tax Code

In theory, the elimination of the federal definition of marriage combined with the historic application of the marriage definition should provide a smooth transition in the tax code. This may not be the case, some provisions operate based on policy, some require changes in through rule making and some provisions such as Social Security will require Congressional action.

I would argue, for example, that regulations should be issued to clarify the marriage issue. Are you married for the purposes of the Code if you were validly married in any state or foreign jurisdiction (the so-called state of celebration test)? Or are you married for federal purposes only if you currently live in a state that recognizes that marriage (the state of residence test)? A simple regulation would seem to be necessary to resolve this matter.

This is very important because this impacts, payroll taxes (employer benefits), gift and estate taxes, IRS contributions, Social Security benefits among others. Also, it not only impacts the taxpayer but also the employer.

III. Taxpayer Implications

There are many different areas that now impact the lives of taxpayers. Those issues range from the very important: do you need to go back and amend your prior returns? To the more mundane: now I have a marriage penalty apply to me? I will try to discuss some of the more important implications. A majority of the changes will actually result in more tax owed by married same-sex couples.

A. No More Gaming!

One of the unintended consequences of DOMA was the gaming that could result because two related parties were not treated as such for purposes of the Code. For example, the prior gaming that was permitted because same-sex couples were not considered related parties under 267 must now end. Professors Ted Seto and Pat Cain have set out how easily basic rules could be upended in great law

enforce child custody determinations made by other States. ... It did not say you could not do it. It did not say you could avoid it. It did not diminish it. It said you have to enforce it.

12 These are not new as the Taxpayer Advocate has reported to Congress on this issue. See http://www.taxpayeradvocate.irs.gov/userfiles/file/Full-Report/Status-Updates-Federal-Tax-Questions-Continue-to-Trouble-Domestic-Partners-and-Same-Sex-Spouses.pdf
Moreover, gone are the days of both spouses claiming of the adoption tax credit. All gaming, including the avoidance of the marriage penalty, is now gone.

B. Obama Care

Because the same-sex couple will be treated as a married taxpayer for purposes of federal statutes, all marriage penalties will apply. For example, in the Patient Protection and Affordable Care Act for 2013, the threshold for applying the additional tax is $200,000 for an individual or $250,000 for a married taxpayer. Now, the validly married same-sex couple will have to earn less than $250,000 not $400,000.

C. Progressive Rate Schedules.

Along the same theme, the stacking of income, moves same-sex couples into higher tax rates. In 2013 to cover the fiscal cliff, these rates have increased to 39.5% for ordinary income and 20% for capital gains and long-term dividends. This is also true of the limits related to personal exemptions and itemized deductions.

D. Social Security

Social Security provides better benefits for married persons than single persons. You only have to be married more than one year to obtain these spousal benefits and only nine months to receive survivor benefits. This should not be ignored as the social security trust fund is already underfunded and now will see additional beneficiaries.

E. Payroll Taxes

Many employers include the same-sex partner or spouse of an employee in their health insurance plans. These health plan benefits are tax-exempt when extended to an employee’s spouse. However, until Windsor, the same-sex spouse did not count (although they should have under the dependent definition). To the extent that institutions took this position, employees are going to want refunds. For example, Yale taxed the same-sex partner on the benefits extended to same-sex spouses.14 How does the employee and employer get back these payroll taxes?


F. Retirement Accounts

Spousal contributions to individual retirement accounts count toward the contribution limitation and if the spouse participates in an employer-sponsored plan, the deductible amount to traditional IRAs is phased-out at a certain income levels. On a go forward basis, these rules will now apply. But once again, what about prior years?

G. Gift and Estate Tax

The Windsor case was an estate tax case. Where Ms. Windsor was claiming a marital deduction as the surviving spouse. Because the IRS applied the definition of DOMA to deny the deduction, she challenged DOMA. Now, the portable credit will apply to same-sex couples and the unlimited gift tax deduction between spouses will apply. But once again, what about amendments to prior years?

H. Amending Returns

The Court held that section 3 of DOMA was unconstitutional. This holding means that from inception the statute was flawed. Thus, should taxpayers go back and amend returns? In Ms. Windsor’s case, the answer would be clearly yes. Same for taxpayers who filed 709’s that paid gift tax based on the non-recognition of the marriage.

A harder question is: are returns that were filed and accurate as filed based on the above referenced gaming, now required to be amended? Although the position was correct as filed, the taxpayer is now in possession of information that changes that reporting position. I would guess that closed years are closed. But as far as open years, this seems to be a potential question. I know a lot of protective returns were filed so now we will have to face what to do with those returns. My guess is that if it helps taxpayers will amend and if not they will just leave it be.

IV. Conclusion

Congress enacted the DOMA in 1996 to preempt the argument that states would have to recognize same-sex unions from other states. “Overwhelming margins of both the House (342 to 67) and the Senate (84-14) approved the [Defense of Marriage] Act” which was signed into law by President Clinton on September 21, 1996. Yesterday, the Court concluded that Section 3 of DOMA was unconstitutional. For the purposes of the Code, now we are left with state law definitions of marriage. Further, we are going to have to contemplate the fallout from the Court declaring Section 3 of DOMA unconstitutional. It should have never existed, thus, all returns, payroll taxes, denials of benefits, refunds, etc. were improper ab initio. The rulings yesterday are not the end of the road but the beginning.