AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 11: The Contemporary Era—Judicial Power and Constitutional Authority

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U.S. v. Windsor, ___ U.S. ___ (2013) **(standing only)**

Edith Windsor and Thea Clara Spyer were a same-sex couple who obtained a Canadian marriage license in 2007. Shortly thereafter, they moved to New York, where Spyer died in 2009. Windsor was subsequently informed that she could not take the spousal deduction for federal estate taxes because, under Section 3 of the Defense of Marriage Act (DOMA), the Internal Revenue Service did not regard her marriage with Spyer as valid, even though all parties agreed that her marriage was lawful in New York. The relevant provision in DOMA stated, "In determining the meaning of any Act of Congress . . . the word 'marriage' means only a legal union between one man and one woman as husband and wife." Windsor filed suit in federal court. She claimed that Section 3 of DOMA violated the due process clause of the Fifth Amendment, which has been held to require the federal government to adhere to the same standards in most instances as states must under the equal protection clause of the Fourteenth Amendment. Shortly after the suit was filed, the Obama administration endorsed Windsor's position, refused to defend against her lawsuit, and filed an amicus brief asking the court to declare Section 3 unconstitutional. DOMA's defense was taken up by the Bipartisan Legal Advisory Group (BLAG) of the U.S. House of Representatives. The local federal district court declared DOMA unconstitutional and that decision was affirmed by the Court of Appeals for the Second Circuit. BLAG, acting on behalf of the United States, appealed to the Supreme Court of the United States.

The Supreme Court by a 6–3 vote held that the case met constitutional standing requirements and by a 5–4 vote ruled that Section 3 of DOMA was unconstitutional. Both the Obama administration and Windsor agreed that Section 3 was unconstitutional. Why, then, did Justice Kennedy maintain that the parties to the lawsuit were sufficiently adversarial to meet constitutional standards for a case or controversy? Why did Justice Alito think the case justiciable? Why did Justice Scalia disagree? To what extent do you think the votes on justiciability were driven by sincere interpretations of Article III standing or by the desire to rule on the constitutionality of DOMA (or same-sex marriage)? Suppose Justice Kennedy had decided that Section 3 of DOMA was constitutional. Would that have changed how other justices might have voted on the standing issue?

JUSTICE KENNEDY delivered the opinion of the Court.

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The requirements of Article III standing are familiar: "First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural or hypothetical."' Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" Rules of prudential standing, by contrast, are more flexible "rule[s] . . . of federal appellate practice," designed to protect the courts from "decid[ing] abstract questions of wide public significance even [when] other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights."

In this case the United States retains a stake sufficient to support Article III jurisdiction on appeal and in proceedings before this Court. The judgment in question orders the United States to pay Windsor the refund she seeks. An order directing the Treasury to pay money is "a real and immediate economic injury," indeed as real and immediate as an order directing an individual to pay a tax. That the Executive may welcome this order to pay the refund if it is accompanied by the constitutional ruling it wants does not eliminate the injury to the national Treasury if payment is made, or to the taxpayer if it is not. . . . It would be a different case if the Executive had taken the further step of paying Windsor the refund to which she was entitled under the District Court's ruling.

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While these principles suffice to show that this case presents a justiciable controversy under Article III, the prudential problems inherent in the Executive's unusual position require some further discussion. The Executive's agreement with Windsor's legal argument raises the risk that instead of a "'real, earnest and vital controversy,'" the Court faces a "friendly, non-adversary, proceeding . . . [in which] 'a party beaten in the legislature [seeks to] transfer to the courts an inquiry as to the constitutionality of the legislative act.'" Even when Article III permits the exercise of federal jurisdiction, prudential considerations demand that the Court insist upon "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Unlike Article III requirements—which must be satisfied by the parties before judicial consideration is appropriate—the relevant prudential factors that counsel against hearing this case are subject to "countervailing considerations [that] may outweigh the concerns underlying the usual reluctance to exert judicial power." One consideration is the extent to which adversarial presentation of the issues is assured by the participation of amici curiae prepared to defend with vigor the constitutionality of the legislative act. . . . In the case now before the Court the attorneys for BLAG present a substantial argument for the constitutionality of § 3 of DOMA. BLAG's sharp adversarial presentation of the issues satisfies the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree. Were this Court to hold that prudential rules require it to dismiss the case, and, in consequence, that the Court of Appeals erred in failing to dismiss it as well, extensive litigation would ensue. The district courts in 94 districts throughout the Nation would be without precedential guidance not only in tax refund suits but also in cases involving the whole of DOMA's sweep involving over 1,000 federal statutes and a myriad of federal regulations. . . . For these reasons, the prudential and Article III requirements are met here; and, as a consequence, the Court need not decide whether BLAG would have standing to challenge the District Court's ruling and its affirmance in the Court of Appeals on BLAG's own authority.

The Court's conclusion that this petition may be heard on the merits does not imply that no difficulties would ensue if this were a common practice in ordinary cases. The Executive's failure to defend the constitutionality of an Act of Congress based on a constitutional theory not yet established in judicial decisions has created a procedural dilemma. On the one hand, as noted, the Government's agreement with Windsor raises questions about the propriety of entertaining a suit in which it seeks affirmance of an order invalidating a federal law and ordering the United States to pay money. On the other hand, if the Executive's agreement with a plaintiff that a law is unconstitutional is enough to preclude judicial review, then the Supreme Court's primary role in determining the constitutionality of a law that has inflicted real injury on a plaintiff who has brought a justiciable legal claim would become only secondary to the President's. This would undermine the clear dictate of the separation-of-powers principle that "when an Act of Congress is alleged to conflict with the Constitution, '[i]t is emphatically the province and duty of the judicial department to say what the law is.'" Similarly, with respect to the legislative power, when Congress has passed a statute and a President has signed it, it poses grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress' enactment solely on its own initiative and without any determination from the Court.

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CHIEF JUSTICE ROBERTS, dissenting.

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JUSTICE SCALIA, with whom JUSTICE THOMAS joins, and with whom THE CHIEF JUSTICE joins [in part], dissenting.

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The Court says that we have the power to decide this case because if we did not, then our "primary role in determining the constitutionality of a law" (at least one that "has inflicted real injury on a plaintiff") would "become only secondary to the President's." But wait, the reader wonders—Windsor won below, and so cured her injury, and the President was glad to see it. True, says the majority, but judicial review must march on regardless, lest we "undermine the clear dictate of the separation-of-powers principle that when an Act of Congress is alleged to conflict with the Constitution, it is emphatically the province and duty of the judicial department to say what the law is."

That is jaw-dropping. It is an assertion of judicial supremacy over the people's Representatives in Congress and the Executive. It envisions a Supreme Court standing (or rather enthroned) at the apex of government, empowered to decide all constitutional questions, always and everywhere "primary" in its role.

This image of the Court would have been unrecognizable to those who wrote and ratified our national charter. They knew well the dangers of "primary" power, and so created branches of government that would be "perfectly co-ordinate by the terms of their common commission," none of which branches could "pretend to an exclusive or superior right of settling the boundaries between their respective powers." The people did this to protect themselves. They did it to guard their right to self-rule against the black-robed supremacy that today's majority finds so attractive. . . .

For this reason we are quite forbidden to say what the law is whenever (as today's opinion asserts) "'an Act of Congress is alleged to conflict with the Constitution.'" We can do so only when that allegation will determine the outcome of a lawsuit, and is contradicted by the other party. The "judicial Power" is not, as the majority believes, the power "'to say what the law is,'" giving the Supreme Court the "primary role in determining the constitutionality of laws." . . . The judicial power as Americans have understood it (and their English ancestors before them) is the power to adjudicate, with conclusive effect, disputed government claims (civil or criminal) against private persons, and disputed claims by private persons against the government or other private persons. . . .

In other words, declaring the compatibility of state or federal laws with the Constitution is not only not the "primary role" of this Court, it is not a separate, free-standing role at all. We perform that role incidentally—by accident, as it were—when that is necessary to resolve the dispute before us. Then, and only then, does it become "'the province and duty of the judicial department to say what the law is.'" . . . Our authority begins and ends with the need to adjudge the rights of an injured party who stands before us seeking redress.

That is completely absent here. Windsor's injury was cured by the judgment in her favor. . . . What the petitioner United States asks us to do in the case before us is exactly what the respondent Windsor asks us to do: not to provide relief from the judgment below but to say that that judgment was correct. And the same was true in the Court of Appeals: Neither party sought to undo the judgment for Windsor, and so that court should have dismissed the appeal (just as we should dismiss) for lack of jurisdiction. Since both parties agreed with the judgment of the District Court for the Southern District of New York, the suit should have ended there. The further proceedings have been a contrivance, having no object in mind except to elevate a District Court judgment that has no precedential effect in other courts, to one that has precedential effect throughout the Second Circuit, and then (in this Court) precedential effect throughout the United States.

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It may be argued that if what we say is true some Presidential determinations that statutes are unconstitutional will not be subject to our review. That is as it should be, when both the President and the plaintiff agree that the statute is unconstitutional. Where the Executive is enforcing an unconstitutional law, suit will of course lie; but if, in that suit, the Executive admits the unconstitutionality of the law, the

litigation should end in an order or a consent decree enjoining enforcement. This suit saw the light of day only because the President enforced the Act (and thus gave Windsor standing to sue) even though he believed it unconstitutional. He could have equally chosen (more appropriately, some would say) neither to enforce nor to defend the statute he believed to be unconstitutional, in which event Windsor would not have been injured, the District Court could not have refereed this friendly scrimmage, and the Executive's determination of unconstitutionality would have escaped this Court's desire to blurt out its view of the law. The matter would have been left, as so many matters ought to be left, to a tug of war between the President and the Congress, which has innumerable means (up to and including impeachment) of compelling the President to enforce the laws it has written. Or the President could have evaded presentation of the constitutional issue to this Court simply by declining to appeal the District Court and Court of Appeals dispositions he agreed with. Be sure of this much: If a President wants to insulate his judgment of unconstitutionality from our review, he can. What the views urged in this dissent produce is not insulation from judicial review but insulation from Executive contrivance.

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. . . . Heretofore in our national history, the President's failure to "take Care that the Laws be faithfully executed" could only be brought before a judicial tribunal by someone whose concrete interests were harmed by that alleged failure. Justice ALITO would create a system in which Congress can hale the Executive before the courts not only to vindicate its own institutional powers to act, but to correct a perceived inadequacy in the execution of its laws. . . . That would be replaced by a system in which Congress and the Executive can pop immediately into court, in their institutional capacity, whenever the President refuses to implement a statute he believes to be unconstitutional, and whenever he implements a law in a manner that is not to Congress's liking.

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To be sure, if Congress cannot invoke our authority in the way that Justice Alito proposes, then its only recourse is to confront the President directly. Unimaginable evil this is not. Our system is designed for confrontation. That is what "[a]mbition . . . counteract[ing] ambition" is all about. If majorities in both Houses of Congress care enough about the matter, they have available innumerable ways to compel executive action without a lawsuit—from refusing to confirm Presidential appointees to the elimination of funding. (Nothing says "enforce the Act" quite like " . . . or you will have money for little else.") But the condition is crucial; Congress must care enough to act against the President itself, not merely enough to instruct its lawyers to ask us to do so. Placing the Constitution's entirely anticipated political arm wrestling into permanent judicial receivership does not do the system a favor. And by the way, if the President loses the lawsuit but does not faithfully implement the Court's decree, just as he did not faithfully implement Congress's statute, what then? Only Congress can bring him to heel by . . . what do you think? Yes: a direct confrontation with the President.

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JUSTICE ALITO, with whom JUSTICE THOMAS joins in part, dissenting.

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A party invoking the Court's authority has a sufficient stake to permit it to appeal when it has "'suffered an injury in fact' that is caused by 'the conduct complained of' and that 'will be redressed by a favorable decision.'" In the present case, the House of Representatives, which has authorized BLAG to represent its interests in this matter, suffered just such an injury.

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I appreciate the argument that the Constitution confers on the President alone the authority to defend federal law in litigation, but in my view . . . it is certainly contrary to the . . . principle that "Congress is the proper party to defend the validity of a statute" when the Executive refuses to do so on constitutional grounds. Accordingly, in the narrow category of cases in which a court strikes down an Act of Congress and the Executive declines to defend the Act, Congress both has standing to defend the undefended statute and is a proper party to do so.