CHECKING THE BALANCES: An Examination of Separation of Powers Issues Raised by the *Windsor* Case

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INTRODUCTION

The legal definition of marriage is currently a prominent issue in political debates and courtrooms across the nation. Up until the late 1990s, state and federal law universally defined marriage as between a man and a woman.[1] The push for recognition of same-sex marriages began to gain momentum in 2000, when Vermont became the first state in the U.S. to legalize same-sex civil unions and registered partnerships.[2] In the next few years, several other states across the nation changed their definitions of marriage to include same-sex couples.[3] Nevertheless, the federal definition of marriage under the Defense of Marriage Act ("DOMA"), enacted in 1996, continued to define marriage as meaning only a legal union between a man and a woman as husband and wife.[4]

As more and more states changed their definitions of marriage, same-sex marriage advocates criticized the federal definition of marriage, arguing it

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1. *See Marriage*, GALLUP.COM, http://www.gallup.com/poll/117328/marriage.aspx (last visited Dec. 20, 2014).

2. *See Timeline: Milestones in the American Gay Rights Movement*, PBS.ORG, http://www.pbs.org/wgbh/americanexperience/features/timeline/stonewall/ (last visited Oct. 28, 2014); *Gay Marriage Timeline: History of the Same-sex Marriage Debate*, PROCON.ORG, http://gaymarriage.procon.org/view.timeline.php?timelineID=000030 (last visited Oct. 28, 2014); *History and Timeline of the Freedom to Marry in the United States*, FREEDOMTOMARRY.ORG, http://www.freedomtomarry.org/pages/history-and-timeline-of-marriage (last visited Oct. 28, 2014).

3. *See Timeline: Milestones in the American Gay Rights Movement*, *supra* note 2; *Gay Marriage Timeline: History of the Same-sex Marriage Debate*, *supra* note 2; *History and Timeline of the Freedom to Marry in the United States*, *supra* note 2.

4. 1 U.S.C.A. § 7 (West 2014) ("In determining the meaning of any Act of Congress, or of 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 word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.").

was unfair and outdated.[5] A few members of Congress proposed legislation in both the House and Senate repealing the federal definition of marriage set forth in Section 3 of DOMA ("Section 3").[6] However, neither bill reached the House or Senate floors.[7] Meanwhile, President Obama determined that Section 3 violated the Equal Protection Clause of the Constitution.[8] The Department of Justice ("DOJ") declared that the executive branch would no longer defend the law if DOMA was challenged in court, but would continue to enforce the law until the judiciary declared the law unconstitutional.[9]

Edith Windsor subsequently challenged DOMA in federal court on equal protection grounds, and, as instructed by the President, the DOJ refused to defend the statute.[10] When it became apparent that the DOJ would not actively defend the law in court, the Bipartisan Legal Advisory Group of the House of Representatives ("BLAG") voted to appoint counsel to defend Section 3, and the district court allowed BLAG's counsel to intervene as an interested party.[11] The district court held that Section 3 was unconstitutional, and the court of appeals affirmed.[12] Although both the DOJ and Windsor agreed with the court of appeals' opinion, the federal government continued to deny Windsor her refund and the DOJ appealed.[13] The Supreme Court granted certiorari and, despite the apparent lack of adversity between the parties, determined that it had jurisdiction to reach the merits of the case.[14] The

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5. *See, e.g.*, Gautam Raghavan, *Repealing the Discriminatory Defense of Marriage Act*, WHITEHOUSE.GOV, https://petitions.whitehouse.gov/response/repealing-discriminatory-defense-marriage-act (last updated May 10, 2012).

6. *See* H.R. 1116, 112th Cong. (2011), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-112hr1116ih/pdf/BILLS-112hr1116ih.pdf; S. 598, 112th Cong. (2011), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-112s598rs/pdf/BILLS-112s598rs.pdf.

7. H.R. 1116 was referred to committee, and S. 598 was reported by committee, but neither bill progressed any further. *See H.R. 1116 (112th): Respect for Marriage Act*, GOVTRACK.US, https://www.govtrack.us/congress/bills/112/hr1116 (last visited Dec. 20, 2014); *S. 598 (112th): Respect for Marriage Act of 2011*, GOVTRACK.US, https://www.govtrack.us/congress/bills/112/s598 (last visited Dec. 20, 2014). However, H.R. 1116 was recently reintroduced as H.R. 2523 on June 26, 2013, and has been once again referred to committee. *See H.R. 1116 (112th): Respect for Marriage Act*, GOVTRACK.US, https://www.govtrack.us/congress/bills/112/hr1116 (last visited Dec. 20, 2014); *H.R. 2523 (112th): Respect for Marriage Act*, GOVTRACK.US, https://www.govtrack.us/congress/bills/113/hr2523 (last visited Dec. 20, 2014).

8. DEP'T OF JUSTICE, STATEMENT OF THE ATTORNEY GENERAL ON LITIGATION INVOLVING THE DEFENSE OF MARRIAGE ACT 11-222 (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-222.html.

9. *Id.*

10. United States v. Windsor, 133 S.Ct. 2675, 2683 (2013).

11. *Id.* at 2684.

12. *Id.*

13. *Id.* at 2688, 2700.

14. *Id.* at 2687–88.

Supreme Court agreed with the lower courts and declared Section 3 unconstitutional, extending the scope of the lower court judgments to the entire nation and effectively voiding the federal definition of marriage.[15]

Under the United States Constitution, the legislative branch is granted the power to make and change policy by passing laws,[16] the executive is granted the power to enforce and defend the laws,[17] and the judiciary is granted the power to resolve cases and controversies by interpreting laws.[18] Additionally, the judiciary has the power to declare laws that violate the Constitution null and void.[19] The parameters and procedures for making, enforcing, and challenging laws were designed to prevent tyranny by separating power among the several branches and providing each branch with the ability to check abuse of power by the other branches.[20] Commenting upon the importance of maintaining this system of checks and balances, James Madison observed, "[a] people . . . who are so happy as to possess the inestimable blessing of a free and defined constitution cannot be too watchful against the introduction, nor too critical in tracing the consequences, of new principles and new constructions, that may remove the landmarks of power."[21]

This Article analyzes the *Windsor* scenario and concludes that, as the *Windsor* case progressed, new principles and constructions were introduced that shifted important landmarks of power. More specifically, this Article argues that, because Congress failed to resolve the problems with DOMA through legislative action, the executive and judicial branches were invited and/or forced to become instruments of policy change and, in the process, expanded their spheres of influence and upset the traditional balance of power. Thus, the *Windsor* case provides a fascinating illustration of how congressional inaction and gridlock can render the traditional system of checks and balances ineffective, and create a situation where efficient policy change can only be accomplished by circumventing the traditional lawmaking process. Additionally, this Article traces the consequences of

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15. *Id.* at 2694.
16. U.S. CONST. art. I, § 1.
17. U.S. CONST. art. II, § 3; U.S. CONST. art. II, § 1, cl. 7.
18. U.S. CONST. art. III, § 2, cl. 1.
19. Marbury v. Madison, 5 U.S. 137, 176–77 (1803).
20. *See* ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, THE FEDERALIST PAPERS 298 (Clinton Rossiter ed., 2003) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."); *see also infra* Part I.
21. ALEXANDER HAMILTON & JAMES MADISON, THE PACIFICUS-HELVIDIUS DEBATES OF 1793–1794, at 85 (Morton J. Frisch ed., 2007).

each branch's action in the *Windsor* scenario and concludes that, although the balance of power was upset, balance can be restored if, in the future, Congress makes a concerted effort to reconsider federal legislation whenever significant changes in related state law and public norms render a law's justifications outdated. In this manner, policy change can take place in the future without disrupting the system of checks and balances established by the Constitution.

BACKGROUND

I. GENERAL SEPARATION OF POWERS PRINCIPLES[22]

As early as 1748, the political philosopher Charles de Secondat, Baron de Montesquieu ("Montesquieu") outlined basic separation of powers principles in his work *The Spirit of Laws*.[23] Montesquieu posited that every government contains a legislative power, an executive power with respect to the law of nations, and an executive power with respect to matters of civil law, which is now commonly referred to as the judicial power.[24] As explained by Montesquieu, the legislative power enacts and amends laws,[25] the executive power deals with foreign policy and matters of war,[26] and the judicial power punishes criminals and resolves civil disputes between individuals.[27] Montesquieu argued that when these three powers are united in the same person or political body, liberty is no longer secure.[28]

During the founding era of American history, James Madison further developed Montesquieu's ideas in *The Federalist Papers*.[29] He agreed with Montesquieu that "[t]he accumulation of all powers, legislative, executive,

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22. In an effort to be concise, this Article only discusses separation of powers on a very general level. For an in-depth discussion of the separation of powers systems established by the U.S. Constitution, see Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1258–72 (1988). For a discussion of the historical underpinnings of separation of powers theory, see generally Hon. D. Brooks Smith, *Because Men Are Not Angels: Separation of Powers in the United States*, 47 DUQ. L. REV. 687 (2009). For a discussion of how separation of powers theory has evolved over time, see Martin H. Redish, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 456–74 (1991).

23. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 151 (Prometheus Books 2010) (1748).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 151–52.

29. *See* HAMILTON ET AL., *supra* note 20 at 297–310, 317–22.

and judiciary, in the same hands" was "the very definition of tyranny."[30] However, Madison argued that the powers of the three branches of government did not need to be completely separate, as long as no single department was granted control over the whole power of another department.[31] Madison believed that "mere demarcation[s] on parchment" could not effectively guard against departments or individuals with great political influence aggrandizing power from other departments or the people.[32] Instead, Madison's solution was to set up a system of checks and balances so that the departments themselves could be "the means of keeping each other in their proper places."[33] By giving each department both "the necessary constitutional means" and the "personal motives to resist encroachments of the others," ambition would counteract ambition, and no single department would have absolute power.[34] However, in order for such a system to be effective, a delicate balance must be maintained. The departments must "be so far connected and blended as to give to each a constitutional control over the others," but the control must be balanced so that no single department possesses "an overruling influence over the others."[35]

The American people embraced Madison's proposals. Consequently, under the United States Constitution, the powers of government are divided and distributed to three co-equal branches of government.[36] The duties of the legislative, executive, and judicial branches overlap and create friction between the branches, preventing each branch from exercising unfettered control over the people.[37] The Constitution does not permit any of the branches to unilaterally alter the distribution of departmental powers established by the Constitution.[38] Instead, the division of powers between the

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30. *Id.* at 298.
31. *Id.* at 299.
32. *Id.* at 310.
33. *Id.* at 317–18.
34. *Id.* at 319.
35. *Id.* at 305. For example, Madison proposed that each department "should have as little agency as possible in the appointment of the members of the others . . . [and] should be as little dependent as possible on those of the others, for the emoluments annexed to their offices." *Id.* at 318.
36. *See* U.S. CONST. art. I, § 1; U.S. CONST. art. II, § 1; U.S. CONST. art. III, § 1.
37. *See* Myers v. United States, 47 S.Ct 21, 85 (1926) (observing that "[t]he doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency, but to preclude the exercise of arbitrary power")
38. *See* HAMILTON ET AL., *supra* note 20, at 311 ("The several departments being perfectly co-ordinate by the terms of their common commission, none of them . . . can pretend to an exclusive or superior right of settling the boundaries between their respective powers.").

branches can only be changed if the people formally adopt a Constitutional amendment.[39]

Accordingly, the structural safeguards set forth in the Constitution remain effective as long as each branch respects the parameters established by the Constitution, regularly asserts its constitutional powers, and resists encroachments by other branches.[40] However, if one of the branches lacks the will to assert its interests and/or fails to fulfill its primary functions under the Constitution, the delicate equilibrium can be disrupted, and any resulting imbalance of power will likely persist until the passive branch reasserts its powers under the Constitution.[41]

II. THE LAWMAKING PROCESS UNDER THE U.S. CONSTITUTION

Article I of the United State Constitution declares "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[42] Thus, Congress is the government body concerned with drafting laws and passing legislation.[43] Members of Congress are expected to represent the interests of their local constituents[44] and also take an oath to uphold the Constitution while performing the duties of their office.[45]

As an internal check on the legislative power, Congress is divided into two houses, the House of Representatives and the Senate.[46] In order for a legislative proposal, or "bill," to become a law, the exact language of a bill must be approved by a majority vote in both the House and the Senate.[47] The

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39. *See* U.S. CONST. art. V; *see also* HAMILTON ET AL., *supra* note 20, at 468 ("Until the people have, by some solemn and authoritative act, annulled or changed the established form [of government] . . . no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it.").

40. *See, e.g.*, Smith, *supra* note 22, at 702.

41. *See id.*

42. U.S. CONST. art. I, § 1.

43. ROGER H. DAVIDSON & WALTER J. OLESZEK, CONGRESS AND ITS MEMBERS 5 (14th ed. 2013).

44. *Id.* at 4.

45. U.S. CONST. art. VI, cl. 3.

46. *See* THE FEDERALIST NO. 50, at 319 (James Madison) (Clinton Rossiter ed. 1961).

47. U.S. CONST. art. I, § 7, cl. 2. This is sometimes called a "meeting of the minds" of the two legislative chambers. WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 35 (4th ed. 2007). Each bill must also overcome numerous other hurdles (e.g., legislative committees, debates, and proposed amendments) to be presented to the full legislative body (the House or Senate, respectively) for approval. *Id.* at 27–34. For a comprehensive discussion of how a bill becomes a law, see *id.* at 24–38.

proposed law is then presented to the President.[48] If the President approves the proposal, the bill becomes law; however, if the President returns the bill to Congress unsigned,[49] Congress must then re-pass the law by a two-thirds majority in both houses before the bill becomes law.[50] Because "[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes,"[51] the President must veto a bill in its entirety and may not selectively strike-out lines from legislation before signing a bill into law.[52]

In addition to the veto power, the President can influence the nation's political agenda by recommending legislation to Congress and actively participating in the legislative process.[53] The Constitution instructs the President to raise awareness of important policy issues by periodically "giv[ing] to the Congress Information on the State of the Union."[54] The President is also directed to "recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient."[55] In recent years, Congress has passed broad legislation allowing executive agencies to promulgate rules and make important policy decisions when enforcing laws.[56]

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48. "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States." U.S. CONST. art. I, § 7, cl. 2.

49. *Id.* If the President takes no action, a bill that has passed both houses becomes a law after ten days. ESKRIDGE, *supra* note 47, at 38. However, if Congress ends up adjourning before the ten days have passed, the bill does not become a law. *Id.* This is called a "pocket veto." *Id.*

50. U.S. CONST. art. I, § 7, cl. 2.

51. Clinton v. City of New York, 524 U.S. 417, 438 (1998).

52. This concept is often referred to as a "line item veto." Congress attempted to grant the President limited line item veto powers by passing the Line Item Veto Act (2 U.S.C.§§ 691–692), but the Supreme Court struck down the law because it did not conform to the lawmaking procedure required by the Constitution. *See generally Clinton*, 524 U.S. 417; J. Stephen Kennedy, *How a Bill Does Not Become a Law: The Supreme Court Sounds the Death Knell of the Line Item Veto*, 20 MISS. C. L. REV. 357 (2000); Matthew Thomas Kline, *The Line Item Veto Case and the Separation of Powers*, 88 CALIF. L. REV. 181 (2000); Thomas Charles Woodward, *Meet the Presentment Clause: Clinton v. New York*, 60 LA. L. REV. 349 (1999).

53. JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 23 (2d ed. 2003). *But see* ESKRIDGE, *supra* note 47, at 26 (observing that, although the President oftentimes has the ability to set the political agenda, the President does not necessarily have control over which policy alternative ultimately carries the day once Congress begins to debate the matter in question).

54. U.S. CONST. art. II, § 3.

55. *Id.* Up until the nineteenth century, presidents rarely, if ever, attempted to recommend legislative agendas to Congress; however, since that time "presidents assumed a more active role in legislation" and "[i]n recent decades, Congress has usually allowed presidential initiatives to define its legislative agenda," although "this is not always the case when Congress and the Presidency are controlled by different parties." 1 RALPH A. ROSSUM & G. ALAN TARR, AMERICAN CONSTITUTIONAL LAW 179 (8th ed. 2010).

56. 1 ROSSUM & TARR, *supra* note 55, at 179. The Supreme Court has declared that "Congress is not permitted to abdicate or to transfer to others the essential legislative functions

Moreover, in certain areas of law, Congress has created statutory duties that require the President to regularly submit reports and proposed programs to Congress.[57] These statutory duties "creat[e] additional opportunities for presidential leadership in the legislative process."[58]

Once a bill becomes a law, the executive branch is charged with the task of enforcing the law. The President takes an oath to "preserve, protect and defend the Constitution of the United States"[59] and has a duty to "take Care that the Laws be faithfully executed."[60] The amount of discretion afforded to the President in executing laws has been debated since the early days of the United States,[61] and the Supreme Court has not expressly resolved the exact nature of the relationship between the President's responsibilities to uphold the Constitution and take care that laws are faithfully executed. Most scholars agree that the President's oath to preserve and protect the Constitution qualifies the President's duty to take care that laws are faithfully executed.[62]

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with which it is thus vested." A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935). If a particular delegation of power "does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure . . . the code-making authority thus conferred is an unconstitutional delegation of legislative power." *Id.* at 541–42. However, if Congress elects to "perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits," delegation is permissible. *Id.* at 530. The Supreme Court has not declared any federal laws to be unconstitutional delegations of legislative power since 1935. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 343 (3d ed. 2009).

57. 1 ROSSUM & TARR, *supra* note 55, at 179.

58. *Id.*

59. U.S. CONST. art. II, § 1, cl. 8.

60. *Id.* at § 3. This language is admittedly vague and has been interpreted in many ways. The Supreme Court has never fully explained the meaning of the clause and some commentators argue that it is "an assignment of power," while others maintain that it is simply "a designation of a duty." *See* Thomas P. Crocker, *Presidential Power and Constitutional Responsibility*, 52 B.C. L. REV. 1551, 1576 (2011). One commentator has suggested that "the Constitution's Framers and Ratifiers did not intend to empower the President to distinctively shape the law to suit his policy preferences or those of his party" but instead "envisioned a model of 'disinterested leadership' serving rule-of-law values." David M. Driesen, *Toward A Duty-Based Theory of Executive Power*, 78 FORDHAM L. REV. 71, 71 (2009).

61. For example, in the *Pacificus-Helvidius Debates of 1793–1794* between Alexander Hamilton and James Madison, Hamilton argued that "the Executive Power of the Nation is vested in the President; subject only to the *exceptions and qu[a]lifications* which are expressed in the [Constitution]." HAMILTON & MADISON, supra note 21, at 13. In response, Madison contended that "[t]he natural province of the executive magistrate is to execute laws, as that of the legislature is to make laws . . . . [The President's] acts, therefore, properly executive, must presuppose the existence of the laws to be executed." *Id.* at 59.

62. *See, e.g.*, Dalena Marcott, *The Duty to Defend: What Is in the Best Interests of the World's Most Powerful Client?*, 92 GEO. L.J. 1309, 1320 (2004) ("The Take Care Clause, however, does not require the Executive to unquestioningly support the dictates of Congress: the Executive also takes an oath to defend the Constitution. When construed in light of this oath, the

For example, some scholars maintain that the duty to "preserve, protect and defend the Constitution" imposes an obligation upon the President to both defend laws upheld as constitutional by the judiciary and refuse to enforce laws that manifestly disregard constitutional rulings issued by the judiciary.[63] Additionally, in the absence of binding judicial precedent, scholars have suggested that "the President, as the leader of a co-equal branch of government, has an independent duty to interpret and apply the Constitution" and can therefore refuse to enforce a law that the executive branch determines is unconstitutional.[64] Alternatively, some scholars have posited that the executive branch's "willingness to defend the constitutionality of Acts of Congress" is simply a "well-entrenched" feature of DOJ practice that amounts to nothing more than a non-binding "accommodation."[65] To make matters more complicated, throughout the course of American history, executive administrations have approached the defense of laws in contradictory fashion.[66] In any event, the Constitution directs the President to

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Take Care Clause should not be treated as an unqualified insistence that the Executive support congressional Acts' validity in court.").

63. *See* Carlos A. Ball, *When May a President Refuse to Defend a Statute? The Obama Administration and DOMA*, 106 NW. U.L. REV. COLLOQUY 77, 80–81 (2011).

64. *Id.* at 81.

65. Marcott, *supra* note 62, at 1314–15 (observing that "[a]lthough mention of the duty to defend is infrequent, and references to it are scattered, the inconsistent formulations that Attorneys General and Solicitors General have presented suggest that the doctrine is more fluid and open to individual interpretation than might otherwise be acknowledged"); *see also* Parker Rider-Longmaid, *Take Care that the Laws Be Faithfully Litigated*, 161 U. PA. L. REV. 291, 301 (2012) (arguing that "constitutional structure and scholarship, Supreme Court dicta, past presidential practice, and congressional acquiescence all point to the conclusion that Presidents often have discretionary authority—subject to political pressure—to choose whether to defend, and at times enforce, duly enacted statutes").

66. As summarized by Neal Devins and Saikrishna Prakash,

> The approaches of different administrations are dizzying in their number and, occasionally, in their complexity. Some executives have claimed that the President should never enforce (much less defend) laws the President believes to be unconstitutional, no matter what the courts might say. Early practice well reflects this belief. At the other extreme is the claim that the President cannot raise constitutional objections after a bill has become law, the implication being that he has to enforce (and presumably) defend every single federal statute. In between are a multitude of approaches, including: that the executive should decline to enforce a law it believes is unconstitutional unless and until a court has concluded that it is constitutional; that it may (or must) decline to enforce or defend any law that impinges upon presidential power; that it may (or must) decline to enforce or defend when a law is clearly unconstitutional or lacks reasonable defenses; that it must enforce and defend unless the President believes that the law is unconstitutional and that the Supreme Court would agree; and that sometimes it should enforce, but not defend, a law it believes is unconstitutional.

execute, and possibly defend, laws passed by Congress; however, the exact nature and extent of the President's obligations have not been definitively established.

Although the judicial branch is not directly involved in drafting and passing legislation, the judiciary plays an important role in the lawmaking process. Article III declares "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."[67] When interpreting the laws of the United States, the judicial branch often invokes the power of judicial review to declare laws that conflict with constitutionally established principles null and void.[68]

Although the Constitution does not explicitly mention this power or grant it to the judiciary,[69] judicial review has been firmly established in American jurisprudence and utilized by the judiciary to a great extent throughout the course of American history.[70] The power of judicial review is founded upon the principle that "every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void."[71] Under this principle "[n]o legislative act . . . contrary to the Constitution, can be valid."[72] Since "[t]he interpretation of the laws is the proper and peculiar province of the courts," the judicial branch is the branch of government that must ultimately determine whether a law violates the Constitution and is void.[73] The Court

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Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 520 (2012).

67. U.S. CONST. art. III, § 2, cl. 1.

68. *See* 1 ROSSUM & TARR, *supra* note 55, at 50–51. Members of the judiciary are, however, required to take an oath to uphold the Constitution. *See* U.S. CONST. art. VI, cl. 3.

69. The Constitution does require members of the judiciary to take an oath to uphold the Constitution. U.S. CONST. art. VI, cl. 3.

70. 1 ROSSUM & TARR, *supra* note 55, at 50–51. The origin, scope and nature of the power of judicial review is frequently a subject of scholarly debate, and multiple theories have been posited throughout the history of the nation. Dean Alfange, Jr., Marbury v. Madison *and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 SUP. CT. REV. 329, 329 (1993); *see also* Robert F. Nagel, Marbury v. Madison *and Modern Judicial Review*, 38 WAKE FOREST L. REV. 613, 613–14 (2003); William G. Ross, *The Resilience of* Marbury v. Madison*: Why Judicial Review Has Survived So Many Attacks*, 38 WAKE FOREST L. REV. 733, 733–34 (2003). However, such theories and critics are beyond the scope of this paper. For purposes of this discussion, it is enough to simply recognize the fundamental concept that the Court has the power to declare laws void if they are contrary to the Constitution.

71. THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

72. *Id.*

73. *Id.* This does not mean that the judiciary may void simply because it disagrees with a law policy. Rather, "[i]t only supposes that . . . where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former." *Id.* at 468.

reinforced the foregoing principles in *Marbury v. Madison*[74] and maintained that Congress could not circumvent the Constitution by merely passing a legislative act.[75] Accordingly, the judiciary has the power to declare a law null and void if the law conflicts with constitutionally established principles.[76] The power of judicial review allows the judiciary to correct "immediate mischiefs" caused by existing laws and also discourages Congress from passing laws that are contrary to the Constitution.[77]

While judgments issued by the judiciary, and in particular, the Supreme Court, can often shape public policy in significant ways,[78] Constitutional limitations theoretically prevent the judiciary from becoming too involved in the lawmaking process. Article III states that the federal judiciary power only extends to certain enumerated "cases" and "controversies."[79] Thus, as a general matter, the judiciary does not have the power to amend existing law or create new law.[80] Any policy choices made by the judiciary must be "framed as interpretations of existing law" and expressed as "an interpretation of the legal issues in [a specific] dispute."[81]

More specifically, throughout the course of American jurisprudence, courts have invoked the "case and controversy" language and imposed a number of particular constitutional and prudential limitations that define the proper scope of judicial power.[82] These limitations are often referred to as "justiciability doctrines."[83]

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74. Marbury v. Madison, 5 U.S. 137 (1803).

75. *Id.* at 176–77.

76. 1 ROSSUM & TARR, *supra* note 55, at 50–51.

77. THE FEDERALIST NO. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

78. *See* LAWRENCE BAUM, THE SUPREME COURT 2–5, 161–232 (8th ed. 2004) (discussing the Supreme Court's role as an important policy maker).

79. *See* U.S. CONST. art. III, § 2, cl. 1. This "affirmative grant of power" has been interpreted as implying a negative (i.e., that the federal judicial power does not extend to anything by a case or controversy). KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 34 (18th ed. 2013).

80. BAUM, *supra* note 78, at 2–3.

81. *Id.; see also* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 95 (Harvey C. Mansfield & Delba Winthrop eds. & trans., University of Chicago Press 2002) (1835) ("The American judge can only pronounce when there is litigation.")

82. CHEMERINSKY, *supra* note 56, at 49–50. Justiciability doctrines ensure that federal courts do not become involved in matters that are more appropriately addressed by other branches. *Id.* at 51. They also help courts conserve judicial resources and produce quality opinions by limiting the business of federal courts to concrete controversies questions presented in adversary context. *Id.*

83. CHEMERINSKY, *supra* note 56, at 49. At a fundamental level, justiciability may be defined as "[t]he quality or state of being appropriate or suitable for adjudication by a court." BLACK'S LAW DICTIONARY 943 (9th ed. 2009). However, as a practical matter, the exact parameters of justiciability are not always clear. In fact, the Supreme Court has observed

One of the most significant justiciability limitations is the doctrine of standing.[84] The doctrine of standing encompasses both constitutional and prudential requirements.[85] However, the Supreme Court has explained that, "the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III."[86] To satisfy constitutional standing requirements, a party seeking judicial remedies must satisfy three basic conditions.[87] First, the case must involve an injury that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical."[88] Second, the injury must be "fairly trace[able] to the challenged action of the defendant" and must not be caused by "the independent action of some third party not before the court."[89] Lastly, it must be "likely," and not "merely speculative," that a favorable decision will redress the injury.[90]

"[j]usticiability is itself a concept of uncertain meaning and scope" and "[i]ts utilization is the resultant of many subtle pressures." Flast v. Cohen, 392 U.S. 83, 95 (1968).

84. *See* Allen v. Wright, 468 U.S. 737, 750 (1984). There are numerous other justiciability limitations on the scope of the judiciary's power (e.g. the prohibition of advisory opinions, the doctrine of ripeness, the doctrine of mootness, and the political question doctrine), but these additional justiciability requirements are beyond the scope of this paper. For a comprehensive discussion of justiciability requirements and prudential considerations, see CHEMERINSKY, *supra* note 56, at 49–143.

85. CHEMERINSKY, *supra* note 56, at 63; *see also* Craig R. Gottlieb, *How Standing Has Fallen: The Need to Separate Constitutional and Prudential Concerns*, 142 U. PA. L. REV. 1063, 1066–68 (1994).

86. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Some commentators have observed that the definitions of "case" and "controversy" are applied inconsistently and that courts are oftentimes confused as to whether a particular standing bar is constitutional or prudential. *See, e.g.*, Susan Bandes, *The Idea of A Case*, 42 STAN. L. REV. 227, 230–58, 318 (1990); Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 466–67 (2008); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 221 (1988); Gottlieb, *supra* note 85, at 1066, 1090–112, 1142–43; Craig A. Stern, *Another Sign from Hein: Does the Generalized Grievance Fail a Constitutional or a Prudential Test of Federal Standing to Sue?*, 12 LEWIS & CLARK L. REV. 1169, 1198–99 (2008). In fact, the Court itself has observed that "the concept of 'Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it" and admitted that "the concept cannot be reduced to a one-sentence or one-paragraph definition." Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982).

87. CHEMERINSKY, supra note 56, at 63.

88. *Lujan*, 504 U.S. at 560 (internal quotation marks omitted).

89. *Id.*

90. *Id.* at 561 (internal quotation marks omitted); *see also* Hollingsworth v. Perry, 133 S.Ct. 2652, 2661 (2013) ("[Standing] requires the litigant to prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision."); *Allen*, 468 U.S. at 751 ("A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."). For a detailed discussion of how the doctrine of standing has evolved over time, see 1 ROSSUM & TARR, *supra* note 55, at 59–64.

Additionally, the Supreme Court has instructed that the standing doctrine includes consideration of the broader Article III principle that "federal courts may exercise power 'only in the last resort, and as a necessity.'"[91] Thus, in order for the judiciary to take action, "adjudication [must be] 'consistent with a system of separated powers'" and the dispute must be "capable of resolution through the judicial process.'"[92] Because these requirements are founded upon the Court's interpretation of the Constitution's text, they may not be altered by statute[93] and may only be changed through Constitutional amendment.[94]

In addition to the foregoing Constitutional limitations, the Supreme Court has articulated certain "principles of avoidance" that prevent the judiciary from addressing constitutional issues when it is not absolutely necessary to do so to resolve the case and controversy in question.[95] For example, the judiciary will normally not consider the constitutionality of a statute in a "friendly, nonadversary, proceeding."[96] Additionally, the judiciary will generally not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."[97] Even if a court has serious doubts with respect to a statute's constitutionality, the court should first ascertain whether a fair construction of the statute exists that would avoid the

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91. *Allen*, 468 U.S. at 752 (citation omitted).

92. *Id.* (citation omitted); *see also* Flast v. Cohen, 392 U.S. 83, 95 (1968) (explaining that the words "cases" and "controversies" in Article III (1) "limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process" and (2) "define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government").

93. CHEMERINSKY, *supra* note 56, at 40, 45.

94. *See* U.S. CONST. art. V. In contrast, prudential standing requirements are "essentially matters of judicial self-governance." Warth v. Seldin, 422 U.S. 490, 500 (1975). Prudential standing requirements are generally characterized as threefold, and consist of the "general prohibition on a litigant's raising another person's legal rights," the "rule barring adjudication of generalized grievances more appropriately addressed in the representative branches," and the "requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Allen*, 468 U.S. at 751; *see also Warth*, 422 U.S. at 500–01; CHEMERINSKY, *supra* note 56, at 45–46; Stern, *supra* note 86, at 1199–202. Because prudential standing is solely "based upon prudent judicial administration" Congress may supersede it by passing legislation. CHEMERINSKY, *supra* note 56, at 45; *see also Warth*, 422 U.S. at 501 ("Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules.").

95. CHEMERINSKY, *supra* note 56, at 41; *see also* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring). Some of these "principles of avoidance" overlap with other justiciability and jurisdictional requirements. For a detailed discussion of the *Ashwander* avoidance principles, see generally Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003 (1994).

96. *Ashwander*, 297 U.S. at 346 (Brandeis, J., concurring).

97. *Id.* at 347.

constitutional question.[98] The avoidance doctrine is "most commonly classified as a prudential rule of judicial self-restraint," meaning courts are not bound to follow the avoidance doctrine in every instance.[99] The judiciary often invokes these prudential requirements when it is "called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions" and when, under the circumstances of the particular case, "judicial intervention may be unnecessary to protect individual rights."[100]

III. THE *WINDSOR* CASE: FACTS AND PROCEDURAL HISTORY

In 2007, two women, Edith Windsor and Thea Spyer, who were residents of New York, were married in Ontario, Canada.[101] Spyer passed away in 2009 and left her entire estate to Windsor.[102] Windsor sought to claim the estate tax exemption provided in law for surviving spouses, but was barred from doing so because she did not qualify as a "spouse" under Section 3 of DOMA, which did not recognize same-sex partners as legal spouses.[103] Thus, despite New York's recognition of Windsor and Spyer's Canadian union, Windsor was forced to pay a federal estate tax of $363,053.[104] Windsor sought a refund, but the IRS denied her request.[105] Windsor then commenced a refund suit in the United States District Court for the Southern District of New York, contending that DOMA violated the constitutional guarantee of equal protection.[106]

The Attorney General of the United States notified the Speaker of the House of Representatives that the DOJ would not defend the constitutionality of Section 3 of DOMA in Windsor's pending tax refund suit.[107] The Attorney General's report informed the House that the President had concluded that classifications based on sexual orientation should be subject to a heightened

98. *Id.* at 348.

99. Kloppenberg, *supra* note 95, at 1009.

100. Warth v. Seldin, 422 U.S. 490, 500 (1975).

101. United States v. Windsor, 133 S.Ct. 2675, 2682 (2013).

102. *Id.* at 2682–83.

103. *Id.* The definitions of "marriage" and "spouse" set forth in Section 3 of DOMA also applied to over 1,000 federal laws addressing marital or spousal status. *Id.* at 2683.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* The House was informed pursuant to 28 U.S.C. § 530D. *Id.* This was somewhat unusual, because normally a § 530D letter is not sent until a federal court has rejected the Government's defense of a statute and rendered an adverse judgment against the Government. *Id.* The § 530D letter in the *Windsor* case relied instead on the President's own legal conclusions regarding matters that were still being debated in federal courts. *Id.*

standard of scrutiny, and that Section 3 did not survive such scrutiny.[108] However, the President also decided that the executive branch would continue to enforce Section 3 until the Court issued a judgment that the law was unconstitutional, to ensure the judiciary was the final arbiter of constitutional claims.[109] The Attorney General invited any members of Congress who believed the law should be defended to become involved in the lawsuit.[110] When the House learned that the Executive branch would not be defending Section 3, BLAG voted to intervene in the litigation and appointed counsel to defend Section 3.[111]

The district court ultimately determined that Section 3 of DOMA was unconstitutional and ordered the Treasury to refund the tax with interest.[112] Both the DOJ and BLAG appealed the judgment; however, BLAG sought to defend the constitutionality of Section 3, whereas the DOJ urged the court of appeals to adopt the heightened scrutiny rule applied by the district court.[113] The Second Circuit Court of Appeals affirmed the district court's ruling.[114] However, the United States did not grant Windsor her refund and the President continued to enforce Section 3 of DOMA.[115] Once again, both the DOJ and BLAG appealed, and the Supreme Court granted certiorari to determine whether it had jurisdiction to reach the merits and, if so, whether Section 3 violated the Constitution.[116] The Court determined that it had

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108. *Id.* at 2683–84; *see also* U.S. DEP'T. OF JUSTICE, *supra* note 8. Under President Obama's administration, the Attorney General had defended Section 3 in federal courts on several occasions. *Id.* The key difference in Windsor's case, according to the Attorney General, was that the previous cases were in "jurisdictions in which binding circuit court precedents hold that laws singling out people based on sexual orientation, as DOMA does, are constitutional if there is a rational basis for their enactment." *Id.* In contrast, Windsor's claim was brought in "the Second Circuit . . . which [had] no established or binding standard for how laws concerning sexual orientation should be treated." *Id.*

109. *Windsor*, 133 S.Ct. at 2684.

110. *See* U.S. DEP'T OF JUSTICE, *supra* note 8 ("I have informed Members of Congress of this decision, so Members who wish to defend the statute may pursue that option.").

111. *Windsor*, 133 S.Ct. at 2684. The district court denied BLAG's motion to enter the suit as a matter of right, because the DOJ already represented the United States. *Id.* However, the district court did allow BLAG to intervene as an interested party, under Federal Rules of Civil Procedure 24(a)(2). *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* The parties in the *Windsor* case came before the Supreme Court in a unique posture. Both the DOJ and Windsor maintained that the Supreme Court had jurisdiction to hear the case and argued that the Court should affirm the court of appeals and district court holdings on the merits. BLAG also maintained that the Court had jurisdiction to hear the case, but argued that the Court should uphold Section 3 as constitutional. Because none of the parties before the Court challenged the Court's jurisdiction and the case involved serious jurisdictional questions, the

jurisdiction to hear Windsor's case because the refund owed to Windsor amounted to a "real and immediate economic injury"[117] to the interests of the United States and the Government's willingness to pay the refund did not eliminate that economic injury.[118] The Court ultimately held that Section 3 violated the Fifth Amendment's "prohibition against denying to any person the equal protection of the laws."[119]

ANALYSIS

IV. SEPARATION OF POWERS, SHIFTING LANDMARKS OF POWER, AND CONGRESSIONAL INACTION

As discussed in Part II, supra, under the United States Constitution, each branch of government is assigned a particular role in the lawmaking process. The legislative branch makes policy,[120] the executive participates in the legislative process[121] and executes the laws,[122] and the judiciary interprets laws and determines if they violate the Constitution.[123] When the lawmaking process set forth in the Constitution is adhered to, each branch has an opportunity check the other branches without exercising powers reserved to the other branches. For example, if Congress passes a new law that appears to be unconstitutional, the President can veto the law.[124] Alternatively, if Congress overrides the veto, courts can strike the unconstitutional law down using the power of judicial review.[125] In this fashion, unconstitutional laws can be thwarted without upsetting the system of checks and balances set forth in the Constitution.

The *Windsor* case involved a law that all three branches of government considered to be constitutional when it was initially passed in 1996. Congress passed DOMA by large, bipartisan majorities in both the House and the

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Court appointed an independent attorney as an amicus to argue the position that the Court lacked jurisdiction under the circumstances. *Id.*

117. *Id.* at 2686 (citation omitted).

118. *Id.* The Court did suggest that "[i]t would [have been] 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." *Id.*

119. *Id.* at 2695. For a detailed account of the Court's reasoning concerning the merits of Windsor's claims, see *id.* at 2689–96 (2013).

120. *See* U.S. CONST. art. I, § 1; U.S. CONST. art. I, § 7, cl. 2.

121. *See* U.S. CONST. art. I, § 7, cl. 2.

122. *See* U.S. CONST. art. II, § 3.

123. *See* U.S. CONST. art. III, § 2, cl. 1; Marbury v. Madison, 5 U.S. 137, 177 (1803).

124. *See* U.S. CONST. art. I, § 7, cl. 2.

125. *See Marbury,* 5 U.S. at 177 (1803).

Senate.[126] President Clinton did not attempt to veto the bill and did not express any constitutional concerns about DOMA.[127] Moreover, up until the *Windsor* case, federal courts had consistently upheld DOMA as constitutional.[128]

Nevertheless, by the time Windsor filed her suit, President Obama had determined that Section 3 was both bad policy and unconstitutional.[129] Interestingly, instead of seeking to change federal policy by publicly petitioning Congress to amend or repeal Section 3, President Obama openly invited renewed judicial challenges to DOMA by publicly refusing to defend the law in court.[130] Although the Supreme Court expressed that it did not condone such a method of policy change on a regular basis,[131] it accepted certiorari and definitively struck down Section 3 on a national scale.[132]

One possible explanation of President Obama's choice of the judicial forum over the legislative forum is Congress's failure to reconsider DOMA in light of changes in state law and public perception of same-sex marriage. Bills repealing Section 3 were drafted and proposed in both the House and Senate,[133] but were never seriously debated or put to a floor vote.[134] This may have led President Obama, and later on, the Supreme Court, to conclude that Congress's refusal to reconsider DOMA signified express Congressional

126. DOMA passed the House by a 342–67 majority in the House and a 85–14 majority in the Senate. *See* 142 CONG. REC. 17,094 (1996); 142 CONG. REC. 22,467 (1996).

127. *See* Bill Clinton, *President on Signing Same Gender Marriage Ban 09/20/96,* The White House Office of Communications, 1996 WL 533626, at *1 (Sept. 22, 1996).

128. *See* DEP'T OF JUSTICE, *supra* note 8.

129. *Id.*

130. *Id.*

131. *See* United States v. Windsor, 133 S.Ct. 2675, 2689 (2013) (observing that it is inappropriate "for the Executive as a matter of course to challenge statutes in the judicial forum rather than making the case to Congress for their amendment or repeal" because "[t]he integrity of the political process would be at risk if difficult constitutional issues were simply referred to the Court as a routine exercise.").

132. *Id.* at 2695.

133. *See* H.R. 1116, 112th Cong. (2011), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-112hr1116ih/pdf/BILLS-112hr1116ih.pdf; S. 598, 112th Cong. (2011), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-112s598rs/pdf/BILLS-112s598rs.pdf.

134. H.R. 1116 was referred to committee, and S. 598 was reported by committee, but neither bill progressed any further. *See H.R. 1116 (112th): Respect for Marriage Act*, GOVTRACK.US, https://www.govtrack.us/congress/bills/112/hr1116 (last visited Dec. 20, 2014); *S. 598 (112th): Respect for Marriage Act of 2011*, GOVTRACK.US, https://www.govtrack.us/congress/bills/112/s598 (last visited Dec. 20, 2014). However, H.R. 1116 was recently reintroduced as H.R. 2523 on June 26, 2013, and has been once again referred to committee. *See H.R. 1116 (112th): Respect for Marriage Act*, GOVTRACK.US, https://www.govtrack.us/congress/bills/112/hr1116 (last visted Dec. 20, 2014); *H.R. 2523 (112th): Respect for Marriage Act*, GOVTRACK.US, https://www.govtrack.us/congress/bills/113/hr2523 (last vistited Dec. 20, 2014).

approval of the status quo and therefore any appeal to the legislative branch to amend or repeal DOMA would be a futile exercise.

While such a hypothesis provides a straightforward, reasonable explanation of situations like the *Windsor* case, where Congressional silence persists despite high profile political debate, changes in state law, and shifting public norms, it is not entirely satisfactory because Congressional inaction does not necessarily denote Congressional approval of the status quo. The lawmaking process under the United States Constitution was not designed with efficiency in mind, and the emergence of political parties has increased the difficulties inherent in the legislative process.[135] Accordingly, checks and balances make it "impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice."[136]

Alternatively, even if President Obama and the Supreme Court did not interpret Congressional inaction as express approval of the status quo, they may have determined that recent trends of partisan politics and Congressional gridlock rendered a legislative remedy unlikely, if not impossible.[137] Scholars have identified multiple factors that have purportedly contributed to increased Congressional gridlock in recent years, such as partisan primaries, gerrymandered congressional districts, the filibuster and other congressional rules, and an increasingly polarized electorate.[138]

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135. *See* Josh Chafetz, *The Phenomenology of Gridlock*, 88 NOTRE DAME L. REV. 2065, 2075 (2013) ("The United States federal government has a relatively more cumbersome process for enacting laws than most other democracies. Not only does lawmaking require bicameralism and presentment, but it is also the case that the three actors—House, Senate, and President—have different electoral cycles and different (but cross-cutting) constituencies, making it likely that, at any given time, power will be shared by actors with markedly different agendas. Our staggered electoral system means that a single election--even a single 'transformative' election—is unlikely to result in unified government.").

136. Johnson v. Transp. Agency, Santa Clara Cnty., Cal., 480 U.S. 616, 672 (1987) (Scalia, J., dissenting); *see also* Alan B. Morrison, *The Sounds of Silence: The Irrelevance of Congressional Inaction in Separation of Powers Litigation*, 81 GEO. WASH. L. REV. 1211, 1225 (2013) (observing that "[e]ven when a sufficient number of Members (in both Houses) agree that there is a problem, they may not be of one mind as to the proper solution").

137. *See* Michael J. Teter, *Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction*, 88 NOTRE DAME L. REV. 2217, 2220–21 (2013) ("[G]ridlock prevents Congress . . . from fulfilling its functional role as the primary lawmaking body of our national government. The 112th Congress, for example, enacted only 283 laws, far fewer than past Congresses. The 111th Congress enacted 383 laws; the 110th passed 460. Indeed, if you look back at the period from 1973–1993, Congress enacted an average of 629 laws each session. The closest any Congress has come to the futility of the current Congress was in 1995–1997, when it enacted 333 laws.").

138. *See, e.g.*, Chafetz, *supra* note 135, at 2085. As one scholar has observed, there have been "far fewer laws enacted during recent Congresses than in the past; the percentage of nominees for

In any event, determining the particular reason for Congress's failure to reconsider DOMA is not the aim of this Article. Rather, this Article is concerned with how Congressional inaction and/or gridlock can cause separation of powers problems. Because Congress's main checking power is "the power to legislate," Congressional refusal (or inability) to assert itself as the primary policy maker invites the executive and judicial branches to expand their spheres of influence as Congress's expense.[139] Accordingly, even if the executive and judicial branches would normally prefer to respect traditional landmarks of power, Congressional silence may prompt the other branches to step outside of their normal spheres to resolve a particularly important policy matter that appears to require immediate attention and action.[140]

For example, in the *Windsor* scenario, Congress's failure to reconsider DOMA created a situation where the executive and judicial branches believed that a policy change needed to take place and that a legislative remedy would not be forthcoming in the near future. This situation prompted several violations of basic separation of powers principles. For example, instead of recommending legislative action, the President decided to invite renewed judicial challenges by publicly refusing to defend the law in court.[141] By declaring DOMA unconstitutional before any Federal court had issued such a ruling, the executive branch appeared to be taking the lead in interpreting the law, a role normally reserved to the judicial branch.[142] Because the executive branch refused to defend DOMA, the House sought to intervene to defend the law from constitutional attack, a role normally performed by the executive branch.[143] Finally, the Supreme Court dismissed jurisdictional concerns and struck DOMA down on a national scale.[144] In doing so, the Court arguably exceeded its Article III power to resolve cases and

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whom the Senate takes no action is increasing; the number of cloture votes is at record highs; and Congress is routinely turning to new legislative procedures and gimmicks to overcome gridlock, but those often serve only to allow Congress to avoid making substantive policy decisions." Teter, *supra* note 137 at 2218–19 (footnotes omitted).

139. *See* Teter, *supra* note 137 at 2221–22 (2013) ("Congress's check comes through its power to legislate: to set the nation's agenda through policymaking, to override presidential vetoes and judicial statutory interpretations, and to provide meaningful oversight of the executive branch. Congress cannot perform this checking function if it cannot make deliberative decisions.").

140. *Id.* at 2222 (observing that the "other two branches are well aware of the gridlock gripping Congress and, at least in some instances, this emboldens the other branches to fill in the power vacuum because they know that no inter-branch conflict will arise.").

141. *See* DEP'T OF JUSTICE, *supra* note 8.

142. *See* Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

143. *See* U.S. CONST. art. II, § 3.

144. United States v. Windsor, 133 S.Ct. 2675, 2695 (2013).

controversies because both parties to the lawsuit (i.e. the DOJ and Windsor) agreed with the lower court decision,[145] and Windsor had already been granted relief by the lower courts.[146]

V. "TRACING THE CONSEQUENCES"

The Constitution requires that the President, members of Congress, and Supreme Court Justices all take oaths to uphold the Constitution.[147] The Constitution also guarantees equal protection under the laws; however, it does not state that any particular branch has the sole power and duty to provide the guaranteed protection.[148] Thus, each branch theoretically has a constitutional duty to provide protection to minorities, such as same-sex couples, who are being denied equal treatment. While it is tempting to applaud any actions taken by the branches of government that remedy injustice and grant protection to injured minorities, it also important to remember that maintaining the landmarks of power established by the Constitution prevents arbitrary government action and protects the liberty of all.[149] Accordingly, when branches of government assert broad discretion and resort to unconventional methods in order to effectuate policy change, it is important to trace the consequences and assess the difficulties created when the branches take action without express Constitutional authority.

The *Windsor* case involved three unconventional governmental actions. First, President Obama asserted that the executive branch had the power to interpret a law, determine that it is unconstitutional, and refuse to defend the law in court while continuing to enforce it.[150] Although President Obama's decision to enforce, but not defend, a law was not unprecedented,[151] it created a situation where the executive branch openly supported an interpretation of the Constitution that was in direct conflict with existing federal court decisions, and the Supreme Court ratified the conflicting interpretation.[152]

While some might interpret the Supreme Court's acceptance of President Obama's interpretation of the Constitution as a shift in the landmarks of power, a closer examination of the *Windsor* case reveals that the Court expressly communicated its intent to resist any further encroachment by the

145. *See id.* at 2698 (Scalia, J., dissenting).

146. *See id.*

147. *See* U.S. CONST. art. VI, cl. 3; U.S. CONST. art. II, § 1, cl. 7.

148. *See* U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

149. *See* THE FEDERALIST NO. 46, at 298 (James Madison) (Clinton Rossiter ed., 2003).

150. *See* DEP'T OF JUSTICE, *supra* note 8.

151. *See* Stacy Pepper, *The Defenseless Marriage Act: The Legitimacy of President Obama's Refusal to Defend Doma § 3*, 24 STAN. L. & POL'Y REV. 1, 4 (2013).

152. *See* United States v. Windsor, 133 S.Ct. 2675, 2688 (2013).

executive upon the powers of the judiciary. Although the *Windsor* majority ultimately agreed with the President's legal position, the Court adamantly asserted that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[153] The Court also expressed that executive refusal to defend a law "based on a constitutional theory not yet established in judicial decisions" would very rarely be entertained by the Court.[154] Thus, it appears that, in the future, the Court will not allow presidents to utilize the "enforce, but not defend" approach on a regular basis, and therefore President Obama's unorthodox approach in the *Windsor* case likely will not upset the balance of power between the executive and judicial branches in any lasting or permanent manner.

The second unorthodox action occurred when BLAG of the House of Representatives asserted the right to defend DOMA before the courts. Normally, the executive branch defends laws in court; however, the Constitution does not expressly assign the duty of defending laws to the executive branch.[155] The *Windsor* majority avoided ruling upon legislative standing by determining that the DOJ had standing to appeal the lower court decisions.[156] In dissent, Justice Alito argued that BLAG had standing because Congress had suffered an institutional injury when the President refused to defend Section 3 of DOMA and the district court subsequently invalidated the statute.[157] In particular, he argued that because the House of Representatives, as an institution, had been a "necessary party to DOMA's passage" when the law was struck down, the district court effectively nullified the House's decision to pass the law.[158] Thus, Justice Alito concluded that, "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."[159]

Because the *Windsor* court refused to consider BLAG's arguments that it had standing to defend DOMA, it remains unclear whether Congress will be allowed to fill the executive's role of defending laws in the future. Accordingly, an analysis of the long-term implications of BLAG's attempt to

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153. *Id.* (quoting Marbury v. Madison, 5 U.S. 137, 177 (1803)).

154. *Id.* at 2688–89. Justice Scalia went even further than the majority and maintained that the President should have chosen "neither to enforce nor to defend the statute he believed to be unconstitutional," leaving the matter to be resolved in a political "tug of war" with Congress. *See id.* at 2702 (Scalia, J., dissenting).

155. *See supra* Part II.

156. *See Windsor*, 133 S.Ct. at 2688.

157. *Id.* at 2712 (Alito, J., dissenting).

158. *Id.* at 2713 .

159. *Id.*

fill the executive's role of defending laws would necessarily require a great deal of speculation and would likely be premature. While some might consider BLAG's decision to intervene in *Windsor* to be an overt attempt by Congress to aggrandize executive powers, the *Windsor* court's refusal to recognize legislative standing effectively checked any legislative encroachment upon the executive's role of defending laws.[160] Thus, it appears that, for the time being, the Court remains unwilling to recognize legislative standing, even in instances where the executive branch refuses to defend a law.[161] Accordingly, although BLAG's efforts in *Windsor* threatened to shift landmarks of power, in the end, BLAG's intervention is probably more appropriately characterized as the legislative branch's failed attempt to check the executive branch.[162]

The third and final unconventional action in *Windsor* was the Supreme Court's decision to accept jurisdiction in spite of an apparent lack of adversity between the parties. As discussed in Part II, above, Article III standing "enforces the Constitution's case-or-controversy requirement" and demands that a party seeking judicial relief suffer a concrete injury that is actual or imminent, fairly traceable to the challenged action of the defendant, and likely to be redressed by a favorable decision from the court.[163]

In *Windsor*, the Court held that the lower court judgments ordering the United States to pay Windsor the tax refund offered a sufficient basis for recognizing standing.[164] The Court reasoned that "[a]n order directing the Treasury to pay money is 'a real and immediate economic injury'" to the

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160. Even so, BLAG's decision to intervene is, at the very least, noteworthy because it demonstrates that at least some members of Congress are willing to resist executive refusal to defend laws. If BLAG's efforts in the *Windsor* case prompt more concerted efforts from Congress to assert the right to defend laws in the future, it may be more difficult for the Supreme Court to avoid the question of legislative standing.

161. For a critique of Justice Alito's theory of jurisdiction, see *id.* at 2703–05 (Scalia, J., dissenting). Justice Scalia argued that legislative standing is improper because it would provide endless "opportunities for dragging the courts into disputes hitherto left for political resolution." *Id.* at 2704. For scholarly discussions of the pros and cons of legislative standing, see generally Abner S. Greene, *Interpretive Schizophrenia: How Congressional Standing Can Solve the Enforce-but-Not-Defend Problem*, 81 FORDHAM L. REV. 577 (2012); Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571, 573 (2014); Matthew I. Hall, *How Congress Could Defend DOMA in Court (and Why the BLAG Cannot)*, 65 STAN. L. REV. ONLINE 92 (2013); Simon P. Hansen, *Whose Defense Is It Anyway? Redefining the Role of the Legislative Branch in the Defense of Federal Statutes*, 62 EMORY L.J. 1159 (2013).

162. Additionally, it may not be appropriate to characterize BLAG's intervention as a Congressional response to executive action, because, under the Constitution, when acting as an institution, the houses of Congress generally must act in unison to satisfy bicameralism requirements. *See* Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 955–56 (1983).

163. *See Windsor*, 133 S.Ct. at 2685.

164. *Id.* at 2686.

United States, even if the President welcomes the constitutional ruling supporting the order.[165] Thus, the Court concluded that "Windsor's ongoing claim for funds that the United States refuse[d] to pay" established "a controversy sufficient for Article III jurisdiction."[166]

Next, the Court recognized that, although past cases had established that "[a] party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it," this principle was a prudential limitation, not a constitutional limitation, and was therefore "more flexible" than Article III standing requirements.[167] The Court then observed that, although the President's legal position created a significant risk that the named parties before the Court would not present the issues in a balanced manner, adversarial presentation was sufficiently assured by BLAG and other amicus curiae seeking to defend the statute's constitutionality.[168] Additionally, the majority pointed out that refusing to accept the case would result in extensive litigation across the nation and that "the cost in judicial resources and expense of litigation for all persons adversely affected would be immense."[169] Accordingly, the Court concluded that "unusual and urgent circumstances" justified ignoring traditional prudential limitations on jurisdiction.[170]

In dissent, Justice Scalia challenged the majority's interpretation of Article III standing. Justice Scalia argued that the Constitution only grants the judiciary power to resolve "real, concrete 'Cases' and 'Controversies'" and that the courts exceed their Constitutional powers when they consider "abstract questions" presented by non-adverse parties.[171] Accordingly, he determined that the Article III requirements of standing were not satisfied under the circumstances because Windsor's injuries had already been remedied by the lower court judgments declaring Section 3 unconstitutional and ordering the Government to pay Windsor a tax refund.[172] For Justice Scalia, the legal posture of the Government was the critical factor in assessing

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165. *Id.* (citations omitted).

166. *Id.*

167. *Id.* at 2686–87 (internal citations omitted).

168. *Id.* at 2687–88.

169. *Id.* at 2688.

170. *Id.*

171. *Id.* at 2698 (Scalia, J., dissenting). In particular, Justice Scalia defined the judicial power as "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." *Id.* at 2699. Justice Scalia also challenged the majority's characterization of prudential standing, and maintained that the "prudential discretion" invoked by the majority was actually "the discretion to *deny* an appeal even when a live controversy exists—not the discretion to *grant* one when it does not." *Id.* at 2702.

172. *Id.* at 2698.

injury.[173] Although Justice Scalia recognized that "in ordinary circumstances, the United States is injured by a directive to pay a tax refund," he maintained that "[w]hen a private party has a judicial decree safely in hand to prevent his injury, additional judicial action requires that a party injured by the decree *seek to undo it*."[174] Because the United States was asking the Court to affirm the lower court judgment—an action that "[would] not cure the Government's injury, but carve it into stone"—Justice Scalia believed that the Court should have dismissed the appeal for lack of jurisdiction.[175]

Additionally, Justice Scalia argued that the Court should not have reached the merits in *Windsor* because the majority's determination that Section 3 of DOMA was unconstitutional foreclosed legislative and democratic resolutions of the underlying policy issues.[176] He maintained that, under the circumstances, the Court's intervention was premature because "[s]ince DOMA's passage, citizens on all sides of the question have seen victories and they have seen defeats[,] . . . [t]here have been plebiscites, legislation, persuasion, and loud voices—in other words, democracy."[177] In Justice Scalia's opinion, the Court did not need to accept jurisdiction and consequently impose its views upon the entire nation; rather, the Court should have exercised restraint and sent a message to "all sides of this debate that it was theirs to settle and that we would respect their resolution."[178] Instead, Justice Scalia averred that the Court "cheated both sides, robbing the winners of an honest victory, and the losers of the peace that comes from a fair defeat."[179]

The Court's assertion of jurisdiction over a non-adversary proceeding is probably the most concerning of the unconventional actions taken by the branches during the *Windsor* case. Although Supreme Court judgments often incidentally influence national policy in significant ways, the *Windsor* court arguably crossed the line between the judicial and legislative realms when it deemphasized the non-adversarial relationship between the parties and

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173. *Id.* at 2699.

174. *Id.* at 2700.

175. *Id.* at 2699. Justice Alito also concluded in dissent that the United States was not the proper petitioner in the case because the United States was asking the Court to affirm an adverse judgment on appeal and "to review [] a decision at the sole behest of a party that took such a position . . . would be to render an advisory opinion, in violation of Article III's dictates." *Id.* at 2711–12 (Alito, J., concurring).

176. In fact, Justice Scalia went so far as to declare that "[t]he 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 United States." *Id.* at 2700 (Scalia, J., dissenting).

177. *Id.* at 2710.

178. *Id.* at 2711.

179. *Id.*

focused on whether the lower court decisions should be adopted and extended to the entire nation as a matter of public policy.

Such judicial encroachment into the legislative sphere is problematic for several reasons. First, Supreme Court justices are unelected and appointed for life.[180] They may only be removed from office if they commit "Treason, Bribery, or other high Crimes and Misdemeanors."[181] Accordingly, when making policy decisions that impact the entire nation, Supreme Court justices can ignore or misinterpret the will of the people without jeopardizing their positions of influence.

Second, courts should, at least theoretically, only be brought into the policymaking realm by chance, as the Constitution contemplates that the scope of the judiciary's power will be limited to resolving concrete cases and controversies.[182] However, as a practical matter, "[t]here are in fact very few laws of a nature to escape judicial analysis for long, for there are very few that do not hurt an individual interest and that litigants cannot or will not invoke before the courts."[183] Given the expanded scope of the nation today and its diverse population with innumerable interests, the Court has the opportunity to consider a variety of cases that touch upon many areas of law.[184] Over the course of a few terms, it is not unrealistic for the Court to have an opportunity to select a case on any issue that is of current importance to the nation; indeed, the cases taken up by the Court often "reflect the broad political issues confronting the nation."[185] Thus, if the Court decides to be more proactive in addressing matters of national policy, it has the ability to select cases from a broad spectrum of national issues.

Lastly, when the Court issues opinions that influence national policy on behalf of individuals throughout the entire nation, as opposed to the particular parties before the Court, it sends a message to the other branches of government—and to the people—that, under the right circumstances, the democratic process can be circumvented.[186] If the Court makes a habit of resolving matters of national policy, the executive and legislative branches

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180. *See* U.S. CONST. art. II, § 2, cl. 2 (providing that Supreme Court justices shall be appointed by the President and approved by a two-third majority in the Senate); U.S. CONST. art. III, § 1 (providing that judges "shall hold their Offices during good Behavior").

181. *See* U.S. CONST. art. II, § 4.

182. *See* U.S. CONST. art. III, § 2, cl. 1; TOCQUEVILLE, *supra* note 81, at 96–97.

183. TOCQUEVILLE, *supra* note 81, at 96.

184. Indeed, in the last decade, "7,500 to 8,900 petitions seeking Supreme Court review have been filed every term." Richard Wolf, *About 2,000 Petitions Await Supreme Court's Return*, USA TODAY (Sept. 23, 2013, 2:59 PM), http://www.usatoday.com/story/news/nation/2013/09/23/supreme-court-petitions-prisoners-clerks/2843401/.

185. 1 ROSSUM & TARR, *supra* note 55 at 34.

186. *See* United States v. Windsor, 133 S.Ct. 2675, 2710 (2013) (Alito, J., concurring).

may begin to shirk their lawmaking responsibilities and rely upon the judiciary to avoid the political risks associated with addressing controversial issues. Additionally, if the people begin to perceive the Court as the most efficient source of policy change, they may begin give up on the democratic process altogether. And if the people stop petitioning Congress and holding their representatives accountable, Congressional inaction will likely persist, prompting more judicial intervention.

While the consequences of the *Windsor* characterization of standing requirements remain to be seen, Congress retains the power to restore traditional landmarks of power. If Congress reasserts itself as a responsible and active policy maker, the *Windsor* interpretation of prudential standing requirements will likely be used rarely, if ever. Conversely, if Congressional gridlock persists, the Court may be tempted to use prudential standing to circumvent the traditional lawmaking process and resolve controversial issues that are not being adequately addressed by Congress. Although this may seem desirable under certain circumstances, if the Court is permitted to exercise additional powers in unchecked fashion, the peoples' rights to influence the lawmaking process and hold their government accountable may ultimately be forfeited in the pursuit of efficient equality.

VI. CONCLUSION: RESTORING BALANCE

In order for separation of powers to be effective, the branches of government must responsibly exercise the full extent of their powers and defend against encroachments by the other branches by utilizing the checks and balances at their disposal.[187] When a branch lacks the will or capacity to defend its sphere of influence, the other branches may seek to aggrandize power by taking advantage of the weaker branch.[188] Alternatively, when a branch fails to fulfill its proper role, and the other branches are unsatisfied with the status quo, the other branches may be tempted to step outside their

187. *See* THE FEDERALIST NO. 51, at 319 (James Madison) (Clinton Rossiter ed., 2003) ("[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others . . . . Ambition must be made to counteract ambition.")

188. *See id.* at 317 (arguing that "contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places" is the proper method for "maintaining in practice the necessary partition of power among the several departments"); *see also* Redish & Cisar, *supra* note 22, at 463 ("[T]o be meaningful, the separation of powers must be institutionalized in a manner that provides each branch with the formal tools necessary to limit the excesses of its rivals."); Teter, *supra* note 137, at, 2222.

traditional roles to effectuate policy change.[189] If checks and balances are not enforced and structural safeguards are ignored, the people's liberty may be threatened by concentrated, arbitrary power.[190]

The *Windsor* scenario provides an apt example of how one branch's failure to fulfill its Constitutional role can upset the balance of power among the branches. However, the *Windsor* case may simply represent a single battle in a much broader war of checks and balances. Congress can prevent the *Windsor* scenario from recurring in the future by reasserting itself as an effective and active policy maker. If Congress makes a concerted effort to reconsider federal legislation whenever significant changes in related state law and public norms render a law's justifications outdated, policy change can take place in the future without disrupting the system of checks and balances established by the Constitution. Whether Congress will be willing or able to do so remains to be seen.

189. *See* Smith, *supra* note 22, at 702–03 (2009).

190. *See* THE FEDERALIST NO. 47, at 298 (James Madison) (Clinton Rossiter ed., 2003) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.").