THE ISSUE OF STANDING IN *UNITED STATES V. WINDSOR*: A CONSTITUTIONAL ERROR THAT IMPACTED THE INTEGRITY OF THE JUDICIAL PROCESS

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[E]very constitutional error may be said to raise questions as to the "appearance of justice" and the "integrity of the judicial process."

Justice Thurgood Marshall[1]

I. INTRODUCTION

In 2013 the Supreme Court struck down section 3 of the Defense of Marriage Act (DOMA),[2] which defined marriage as legal only "between

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1. Vasquez v. Hillery, 474 U.S. 254, 270–71 (1986).

one man and one woman."[3] The case, *United States v. Windsor*, was embroiled in heated political debate between supporters and opponents of same-sex marriage,[4] but beneath all of the politics was an interesting legal issue—did the Court actually have the authority to hear the case?[5] Compared to the due process issue of the case, the jurisdiction issue may seem unimportant, but such a thought could not be further from the truth.

The issue of whether the Supreme Court had jurisdiction to hear the case not only has major separation of powers implications,[6] but also calls into question whether the Court should eagerly step into heated political issues, as it did here.[7] This Note will explore these considerations and argue that in finding that it had authority to hear *United States v. Windsor*, the Supreme Court overstepped both its Article III constitutional authority[8] and the prudential jurisdiction limits that the Court has voluntarily placed on itself.[9]

II. BACKGROUND

A. Case or Controversy Clause

At the heart of this issue is the Case or Controversy Clause of the United States Constitution. The relevant portion of this clause states, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . to Controversies to which the United States shall be a Party . . . ."[10] At the district court level, the case or controversy requirement is met if the issue(s) presented to the court are done so in an "adversary context" and can be resolved by the judicial system.[11] If this requirement is not met,

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2. Defense of Marriage Act, 1 U.S.C.A. § 7 (West 2014).

3. United States v. Windsor, 133 S. Ct. 2675, 2683 (2013) (quoting 1 U.S.C.A. § 7).

4. *See Live Analysis of the Supreme Court Decisions on Gay Marriage*, N. Y. TIMES, http://projects.nytimes.com/live-dashboard/2013-06-26-supreme-court-gay-marriage (last updated June 26, 2013, 4:36 PM).

5. *Windsor*, 133 S. Ct. at 2684 ("It is appropriate to begin by addressing whether either the Government or BLAG, or both of them, were entitled to appeal to the Court of Appeals and later to seek certiorari and appear as parties here."). This Note purposefully makes no statement regarding support or opposition against same-sex marriage; such statements tend to bias readers and have a clouding effect on the legal arguments discussed.

6. *See infra* Part III.D.1.

7. *See infra* Part III.D.2.

8. *See infra* Part III.B.1.

9. *See infra* Part III.B.2.

10. U.S. CONST. art. III, § 2, cl. 1.

11. Flast v. Cohen, 392 U.S. 83, 95 (1968).

the court cannot hear the case.[12] The case or controversy requirement applies during the entire life of the case, including on appeal.[13]

In *Camreta v. Greene*, the Supreme Court laid out what is necessary for an appeal to meet the requirements of the Case or Controversy Clause.[14] First, litigants must have a "personal stake" in the suit;[15] in order to have such a stake in the litigation, "[t]he petitioner must show that he has 'suffered an injury in fact' that is caused by 'the conduct complained of' and that 'will be redressed by a favorable decision.'"[16] The respondent must also "have an ongoing interest" in the case in order to meet the requirements of Article III.[17]

The Court noted in *Camreta* that even though the petitioner had won in courts below, he still showed "injury, causation, and redressability," and the injury could only be remedied "by overturning the ruling on appeal[.]"[18] While the petitioner had prevailed on procedural grounds of qualified immunity, he would still have to change how he performed his job in order to avoid future liability, meaning that he was effectively still injured, and only a ruling in his favor, on the merits, could remedy that injury.[19] Because there was still adverseness between the parties,[20] and the petitioner had an injury that could only be remedied by a further appeal, the Court held that Article III did not bar it from adjudicating the case.[21]

B. Prudential Limitations on Jurisdiction

In addition to the Case or Controversy Clause, the Supreme Court has established prudential limitations on jurisdiction. In *Deposit Guaranty National Bank, Jackson, Mississippi v. Roper*, the Supreme Court noted that typically, "only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal[.]"[22] While the United States Supreme Court has not laid out an explicit test for what makes one an "aggrieved" party, the Connecticut Supreme Court applies a two-prong test: "(1) does the allegedly aggrieved party

12. Baker v. Carr, 369 U.S. 186, 198–99 (1962).
13. *See* Lewis v. Cont'l. Bank Corp., 494 U.S. 472 (1990).
14. Camreta v. Greene, 131 S. Ct. 2020, 2028–30 (2011).
15. *Id.* at 2028.
16. *Id.* (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)).
17. *Id.*
18. *Id.* at 2029.
19. *Id.*
20. *Id.* at 2028 (quoting Los Angeles v. Lyons, 461 U.S. 95, 101 (1983)).
21. *Id.* at 2029.
22. Deposit Guar. Nat'l. Bank, Jackson, Miss. v. Roper, 445 U.S. 326, 333 (1980).

have a specific, personal and legal interest in the subject matter of a decision; and (2) has this interest been specially and injuriously affected by the decision"?[23] Corpus Juris Secundum adopted the first prong of the Connecticut test in its definition of "aggrieved."[24]

C. Immigration and Naturalization Service v. Chadha

The leading case for analyzing the standing issue in *Windsor* is *INS v. Chadha*.[25] In that case the Supreme Court dealt with the issue of whether the National Immigration and Nationality Act's[26] provision for a one-House congressional veto was unconstitutional;[27] however, before the Court could address the substantive issue of the case, it first had to decide whether it had proper authority over the case.[28]

To understand the standing issue in *Chadha*, some brief background information on the case is necessary. Jagdish Rai Chadha was an immigrant whose visa had expired, and he had submitted an application for suspension of his deportation.[29] The National Immigration and Nationality Act contained a provision that allowed the Attorney General to suspend deportation under certain circumstances.[30] If he decided to suspend deportation, the Attorney General had to submit a report to Congress, and "either the Senate or the House" could pass a resolution disapproving of the suspension, forcing the Attorney General to deport the immigrant.[31] The House of Representatives passed such a resolution pertaining to Chadha, and he appealed the order for deportation to the Board of Immigration Appeals, arguing that the one-House veto was unconstitutional.[32] The Board of Immigration Appeals dismissed the appeal, so Chadha appealed to the Ninth Circuit Court of Appeals,[33]

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23. Gladysz v. Planning and Zoning Comm'n of Plainville, 773 A.2d 300, 305 (Conn. 2001).

24. 4 C.J.S. *Appeal and Error* § 251 (2015).

25. Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983).

26. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in 8 U.S.C.A. §§ 1101, 1151–1157, 1181–1182, 1201, 1254–1255, 1259, 1322, 1351 (West 2014)).

27. *Chadha*, 462 U.S. at 923, 929.

28. *Id.*

29. *Id.* at 923–24.

30. *Id.*

31. *Id.* at 924–25.

32. *Id.* at 926–28.

33. Pursuant to section 106(a) of the Immigration and Nationality Act of 1952, an order for deportation had to be appealed to the court of appeals, not the district court; thus, there was no district court ruling between the Board of Immigration Appeals' decision and the Ninth Circuit's decision. *See id.* at 937.

where the Immigration and Naturalization Service (INS) agreed with Chadha's position on the unconstitutionality of the provision.[34] The Ninth Circuit allowed both the House of Representatives and Senate to intervene in the case.[35] The court of appeals held that the one-House veto was unconstitutional and ordered the Attorney General to stop the deportation process.[36]

When the INS appealed the case to the Supreme Court, both congressional parties filed motions to dismiss the case based on a variety of reasons.[37] The congressional parties argued that the Supreme Court did not have jurisdiction under 28 U.S.C. § 1252 to rule on the appeal, arguing that under *Deposit Guaranty*, "[a] party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it."[38] Because the INS was asking the Court to invalidate the one-House veto provision, and the Ninth Circuit had already done that, the INS had "already received what it sought from the Court of Appeals, [was] not an aggrieved party, and therefore [could not] appeal from the decision of the Court of Appeals."[39] The Court rejected the argument, holding that because the INS was still enforcing the statute, it was "sufficiently aggrieved" by the Ninth Circuit's ruling, as it would stop the INS from following the course of action that it would have taken devoid of the ruling; thus the INS fell under the term "any party" as used in 28 U.S.C. § 1252.[40] The Court went on to give a broad holding that could apply to future cases:

> When an agency of the United States is a party to a case in which the Act of Congress it administers is held unconstitutional, it is an aggrieved party for purposes of taking an appeal under § 1252. The agency's status as an aggrieved party under § 1252 is not altered by the fact that the Executive may agree with the holding that the statute in question is unconstitutional.[41]

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34. *Id.* at 928.

35. *Id.* at 930 n.5.

36. *Id.* at 928.

37. *Id.* at 929–30. The reasons were that the Court lacked appellate jurisdiction, the one-House veto was not severable from the overall statute, Chadha lacked standing, Chadha had an alternative relief provided to him statutorily, the court of appeals lacked jurisdiction, there was no case or controversy, and the question was a nonjusticiable political question. *Id.* at 929–44.

38. *Id.* at 929–30 (quoting Deposit Guar. Nat'l. Bank, Jackson, Miss. v. Roper, 445 U.S. 326, 333 (1980)).

39. *Id.* at 930.

40. *Id.*

41. *Id.* at 931.

The congressional parties also argued that there was no "genuine controversy,"[42] but merely "a friendly, non-adversary, proceeding."[43] The congressional parties argued that because Chadha and the INS fell on the same side of the constitutionality issue, there was not a genuine controversy for the courts to solve.[44] The Court rejected this argument as well, noting that there was "concrete adverseness" from the point at which the congressional houses intervened.[45] The Court went on to say that there had been "adequate Art. III adverseness" even before Congress's intervention, because the fact that the INS agreed with the Ninth Circuit's ruling did not eradicate its status as an aggrieved party.[46] Regardless of the INS's legal arguments presented to the Court, the agency would have deported Chadha had the Ninth Circuit not ruled as it did, and the Supreme Court held that this was sufficient to establish a genuine controversy.[47]

The Court concluded the issue of its authority to decide the case by holding that the issues of standing and justiciability did not preclude it from ruling on the substantive issue of the appeal.[48] It closed the section on this issue with a quote from an opinion by Chief Justice John Marshall: "Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty."[49] This quote makes for an ironic segue into the *Windsor* case, where the Court was as bifurcated as possible regarding whether it wanted to avoid the question or tackle it head on.

D. United States v. Windsor

1. The Majority's Opinion

The substantive issue behind the *Windsor* case was whether section 3 of DOMA was unconstitutional.[50] DOMA, among other things, established a definition of marriage for federal agency purposes as

42. *Id.* at 939.
43. *Id.* (quoting Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346 (1936) (Brandeis, J., concurring)).
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 939–40.
48. *Id.* at 943.
49. *Id.* at 944 (quoting Cohens v. Va., 19 U.S. (6 Wheat.) 264, 404 (1821)).
50. United States v. Windsor, 133 S. Ct. 2675, 2683 (2013).

exclusively "between one man and one woman."[51] Respondent Edith Windsor and her same-sex partner were married in Canada, and the State of New York recognized their marriage as valid.[52] When Windsor's partner died, she left her entire estate to Windsor, but because section 3 of DOMA did not recognize same-sex marriages, she did not fall under the marital exception to the federal estate tax.[53] She paid the taxes and sought a refund; however, the Internal Revenue Service (IRS) denied her refund due to DOMA's prohibition on allowing the IRS to declare Windsor to be a "surviving spouse."[54] Windsor responded by filing a refund suit in the United States District Court for the Southern District of New York, arguing that DOMA violated the Fifth Amendment's equal protection guaranty.[55]

While the suit was pending,[56] Attorney General Eric Holder informed Speaker of the House John Boehner that President Barack

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51. 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.").

52. *Windsor*, 133 S. Ct. at 2683.

53. *Id.* The exception excludes "any interest in property which passes or has passed from the decedent to his surviving spouse" from taxation. 26 U.S.C.A § 2056(a) (West 2014).

54. *Windsor*, 133 S. Ct. at 2683.

55. *Id.* While the Fifth Amendment has no express language regarding "equal protection," the Court has held that it imposes on the federal government some of the restrictions that the Fourteenth Amendment's Equal Protection Clause imposes on states. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) ("The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process."); *see also* Picard v. Connor, 404 U.S. 270, 279 n.2 (1971) ("The overlap is, of course, not total. But the extent to which the two concepts merge has been a subject of debate since Representative John A. Bingham of Ohio, an architect of the Fourteenth Amendment, used the phrases 'due process' and 'equal protection' interchangeably on the floor of Congress." (citations omitted)); Griswold v. Connecticut, 381 U.S. 479, 486 n.1 (1965) (Goldberg, J., concurring) ("[T]his Court, for example, in Bolling v. Sharpe, . . . while recognizing that the Fifth Amendment does not contain the 'explicit safeguard' of an equal protection clause, nevertheless derived an equal protection principle from that Amendment's Due Process Clause." (citation omitted)); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 540 (1973) (discussing "the conception of equal protection that is implicit in the Due Process Clause of the Fifth Amendment").

56. *Windsor*, 133 S. Ct. at 2683.

Obama had directed him to no longer defend legal challenges against section 3 of DOMA, because the President and Attorney General deemed it unconstitutional; however, the executive branch would continue to enforce it.[57] The Bipartisan Legal Advisory Group (BLAG) of the House of Representatives responded by voting to intervene in the case to defend DOMA; however, the district court denied the motion to enter as of right, because the United States was already represented by the Department of Justice.[58] The district court did, however, allow BLAG to intervene as an interested party.[59]

The district court ruled in favor of Windsor, declaring section 3 of DOMA unconstitutional.[60] The Court of Appeals for the Second Circuit affirmed the judgment, and all three parties filed petitions for certiorari; the Supreme Court granted the United States' petition (filed through the Solicitor General) and denied the others.[61] The Court also appointed Professor Vicki Jackson as amicus curiae to argue that the Court lacked jurisdiction to hear the case.[62] As of the time the Court gave its ruling, the United States had not yet complied with the Second Circuit's judgment, as the executive branch was still fully enforcing DOMA.[63]

Similar to *Chadha*, before the Court in *Windsor* could address the substantive issues, it had to determine whether BLAG or the Government (or both) legitimately appealed the case to the court of appeals.[64] The Court easily found that Windsor had standing to file the suit in the first place, because she was clearly injured by having to pay taxes that she allegedly should not have been forced to pay.[65] The Court then said that the executive branch's nondefense of the statute had no effect on the

57. Press Release, Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/letter-attorney-general-congress-litigation-involving-defense-marriage-act.

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

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* The Court appointed Jackson because neither Windsor nor the Government was arguing that the Court lacked jurisdiction to hear the case. Linda Greenhouse, *Standing and Delivering*, N.Y. TIMES (Dec. 12, 2012, 9:00 PM), http://opinionator.blogs.nytimes.com/2012/12/12/standing-and-delivering/. While BLAG had committed to arguing that the Court lacked jurisdiction, at the time that the Court granted the petition for certiorari, the issue of whether BLAG had standing to intervene had not been determined. Nicholas P. Fandos, *Law School Professor to File Brief on DOMA Case*, HARV. CRIMSON (Dec. 13, 2012), http://www.thecrimson.com/article/2012/12/13/jackson-doma-brief-court/.

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

64. *Id.* at 2684–85.

65. *Id.*

standing issue at the district court level, because there was still a "justiciable controversy between the parties"; up through this point, all of the parties agreed.[66]

However, the parties and Jackson diverged from their consensus on the standing issue when the Supreme Court reached the issue as applicable to the court of appeals.[67] Jackson argued that once the President and Department of Justice agreed with Windsor from a legal standpoint, there was no longer any adversity, and "the United States was a prevailing party below"; thus the court of appeals should have dismissed the appeal, and the Supreme Court should have denied certiorari.[68]

The Court disagreed with Jackson, noting a distinction between the principles of "the jurisdictional requirements of Article III and the prudential limits on its exercise," characterizing the latter as "essentially matters of judicial self-governance."[69] The Court stressed that the two must be distinguished; Article III applies the Case or Controversy Clause, while prudential standing is merely "judicially self-imposed limits on the exercise of federal jurisdiction."[70] According to the Court, Article III jurisdiction was satisfied because the United States had been ordered to pay Windsor, resulting in "a real and immediate economic injury."[71] The Court noted that it did not matter if the executive branch would be happy with the ruling; as long as the government was paying money to Windsor, the United States was an injured party.[72]

The Court went on to analyze *Chadha*—likening *Windsor* to it—and addressed the issue of Article III jurisdiction.[73] The Court concluded its analysis of *Chadha* by saying:

> The necessity of a "case or controversy" to satisfy Article III was defined as a requirement that the Court's "decision will have real meaning . . . ." This conclusion was not dictum. It was a necessary predicate to the Court's holding that "prior to Congress' intervention, there was adequate Art. III adverseness." The holdings of cases are instructive, and the words of *Chadha* make clear its holding that the refusal of the Executive to

66. *Id.* at 2685.
67. *Id.*
68. *Id.*
69. *Id.* (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975)).
70. *Id.* (citations omitted) (internal quotation marks omitted).
71. *Id.* at 2686 (quoting Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 599 (2007)).
72. *Id.*
73. *Id.*

> provide the relief sought suffices to preserve a justiciable dispute as required by Article III. In short, even where "the Government largely agree[s] with the opposing party on the merits of the controversy," there is sufficient adverseness and an "adequate basis for jurisdiction in the fact that the Government intended to enforce the challenged law against that party."[74]

The Court then went on to discuss the issue of the Court's own prudential limits on its power.[75] It noted the rule established in *Deposit Guaranty* but said that it is not based on Article III limitations; where appropriate, such an "appeal may be permitted . . . at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying the requirements of Art. III."[76] Such prudential limits are different from Article III requirements because prudential limits can be outweighed by various factors, such as the presence of amici curiae to ensure adequate adversity and parties who will "defend with vigor the constitutionality of the legislative act."[77] Here, the presence of BLAG soothed these prudential concerns by ensuring a "sharp adversarial presentation[.]"[78] If it were to dismiss the case, the Court contended, the result would be litigation across the country, and thousands would be adversely affected.[79] The Court further held that because the prudential concerns were satisfied, it did not need to decide whether BLAG had standing to challenge the ruling.[80]

The Court concluded by cautioning that turning executive non-defense-with-enforcement into a regular pattern would result in difficulties in the future.[81] The Court pointed out that it may not be appropriate for the executive branch to enter into a suit with a party that it does not disagree with on the legal matters instead of just paying the party.[82] The Court noted that if such a move were to preclude the Court from hearing such claims, this would shift the separation of powers, and the President would have more power regarding the unconstitutionality of laws than the Court.[83] Furthermore, it would not be appropriate for the

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74. *Id.* at 2686–87 (citations omitted).
75. *Id.*
76. *Id.* at 2687 (quoting Deposit Guar. Nat'l. Bank, Jackson, Miss. v. Roper, 445 U.S. 326, 333–34 (1980)).
77. *Id.*
78. *Id.* at 2687–88.
79. *Id.* at 2688.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*

executive branch to begin challenging laws passed by Congress in the courts instead of pushing for a revision to the law.[84] "The integrity of the political process would be at risk if difficult constitutional issues were simply referred to the Court as a routine exercise. But this case is not routine."[85] The Court noted that BLAG's defense of DOMA further guaranteed that the prudential concerns were satisfied.[86] Thus, the Court held that it could rule on the merits of the case.[87]

2. Justice Scalia's Dissent

Overall, Justice Scalia had the most substantial dissent in *Windsor*; for the most part, the other justices who agreed with him did not address his reasoning and merely pointed out that they concurred in his rationale and conclusion on the issue.[88] Justice Scalia began with an impassioned characterization of the majority's holding as a grave overstep of judicial boundaries:

> The Court is eager—*hungry*—to tell everyone its view of the legal question at the heart of this case. Standing in the way is an obstacle, a technicality of little interest to anyone but the people of We the People, who created it as a barrier against judges' intrusion into their lives. They gave judges, in Article III, only the "judicial Power," a power to decide not abstract questions but real, concrete "Cases" and "Controversies." Yet the plaintiff and the Government agree entirely on what should happen in this lawsuit. They agree that the court below got it right; and they agreed in the court below that the court below that one got it right as well. What, then, are we *doing* here?[89]

In Justice Scalia's view, the majority's holding will tip the balance of power, making the judiciary more powerful than the executive and legislative branches.[90] He argued that the power of the judiciary in

84. *Id.*
85. *Id.* at 2689.
86. *Id.*
87. *Id.*
88. *Id.* at 2696, 2711 (Roberts, C.J., dissenting; Alito, J., dissenting).
89. *Id.* at 2698 (Scalia, J., dissenting).
90. *Id.* ("The answer lies at the heart of the jurisdictional portion of today's opinion, where a single sentence lays bare the majority's vision of our role. 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

America is to "adjudicate, with conclusive effect, disputed government claims . . . against private persons, and disputed claims by private persons against the government or other private persons."[91] Sometimes parties agree on the facts but disagree on the law, and this, Scalia argued, is why the Court looks at the constitutionality of laws; "it is not a separate, free-standing role[,]" but merely a role that is incidental to the task that the Court has been given.[92]

Justice Scalia argued that the Court's authority is only "to adjudge the rights of an injured party who stands before us seeking redress" and that such a party was missing in the *Windsor* case.[93] Windsor's injury was remedied, and while the United States may still be injured by having to pay Windsor, Justice Scalia pointed out that the injury would not be lessened if the Court ruled in the way that the United States had asked it to; because both parties agreed with the district court's judgment, the case should have ended there.[94]

Justice Scalia then went on to discuss the similarities and differences between *Windsor* and *Chadha*.[95] He distinguished *Windsor* from *Chadha* by saying that in *Chadha*, both congressional Houses were allowed to intervene because the suit directly threatened to destroy a power that they had.[96] He pointed out that when the *Chadha* Court said that there was adversity even without Congress, this was only true because the case originated at the court of appeals as a challenge to an agency action; to apply that to all appeals would be not only applying dictum, but incorrect

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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." (citations omitted)).

91. *Id.* at 2699.

92. *Id.*

93. *Id.* (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).

94. *Id.*

95. *Id.* at 2700.

96. *Id.* ("The closest we have ever come to what the Court blesses today was our opinion in *INS v. Chadha*, 462 U.S. 919, 103 S. Ct. 2764, 77 L.Ed.2d 317 (1983). But in that case, two parties to the litigation disagreed with the position of the United States and with the court below: the House and Senate, which had intervened in the case. Because *Chadha* concerned the validity of a mode of congressional action—the one-house legislative veto—the House and Senate were threatened with destruction of what they claimed to be one of their institutional powers. The Executive choosing not to defend that power, we permitted the House and Senate to intervene. Nothing like that is present here." (footnotes omitted)).

dictum.[97] He concluded his *Chadha* discussion by saying, "When 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. In *Chadha*, the intervening House and Senate fulfilled that requirement. Here no one does."[98]

Justice Scalia next argued that it was irrelevant if the prudential concerns of standing were met because there was no Article III controversy.[99] Adverseness is more than simply a "prudential" aspect of Article III.[100] He pointed out that in *Deposit Guaranty*, there was still a continuing disagreement on one issue between the parties; this was also true with *Camreta*.[101]

Justice Scalia concluded by addressing the policy issues that would result from his opinion. He noted that if Presidents decide that laws are unconstitutional, the Court may not get the chance to hear the issue; however, he believes that it should be this way, and only when the President enforces an unconstitutional statute should the case come before the Court.[102] Here, he concluded, it was absolutely unnecessary for the Court to hear the case, and the majority did so solely because it wanted to.[103]

3. Justice Alito's Dissent

Justice Alito agreed with Justice Scalia regarding the Government's standing to appeal; however, he believed that BLAG's standing was more complicated.[104] Justice Alito argued that the *Chadha* Court was correct in holding that Congress had standing to appeal in that case because finding the one-House veto unconstitutional directly "limited Congress' power to legislate."[105] The *Chadha* Court had noted that "Congress is the proper party to defend the validity of a statute" when the executive branch, as a defendant, agrees that a statute is unconstitutional.[106] Justice Alito disagreed with attempts to distinguish

97. *Id.* at 2700–01.
98. *Id.* at 2701 (emphasis omitted).
99. *Id.*
100. *Id.*
101. *Id.* at 2701–02.
102. *Id.*
103. *Id.* at 2703.
104. *Id.* at 2711–12 (Alito, J., dissenting).
105. *Id.* at 2712.
106. *Id.* at 2712–13 (quoting INS v. Chadha, 462 U.S. 919, 940 (1983)).

Chadha, arguing that overturning a statute would impair Congress's power just as finding the one-House veto to be unconstitutional did.[107]

Justice Alito referenced *Coleman v. Miller*, where the Court held that individual state senators had standing to appeal a decision that upheld changes to procedures for ratifying a Federal Constitution amendment.[108] In *Coleman*, the Court noted that the senators had standing because their votes "would have been sufficient" to defeat the amendment had they prevailed on the merits of the case.[109] Justice Alito compared BLAG to the senators, noting that the House's support was necessary to pass DOMA, and "the House's vote would have been sufficient to prevent DOMA's repeal if the Court had not chosen to execute that repeal judicially."[110]

Justice Alito also referenced *Raines v. Byrd*, where the Court held that individual Congressmen who had voted against the Line Item Veto Act[111] lacked standing to challenge the act's constitutionality in federal court.[112] He distinguished *Raines* from *Windsor* for two reasons: (1) the *Raines* Court addressed individual members' lack of standing and used the fact that the members did not have support from their respective chambers as a whole as evidence that they lacked standing,[113] and (2) the congressional members in *Raines* did not have the votes sufficient to cause the act's passage to fail, whereas in *Windsor*, the House's support was necessary for DOMA to pass.[114]

Justice Alito again referenced the *Chadha* Court's statement that "'Congress is the proper party to defend the validity of a statute' when the Executive refuses to do so on constitutional grounds."[115] He concluded by saying that where a court holds a statute to be unconstitutional and the executive branch refuses to defend the law, "Congress both has standing to defend the undefended statute and is a proper party to do so."[116]

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107. *Id.* at 2713.
108. *Id.* (citing Coleman v. Miller, 307 U.S. 433, 438, 446 (1939)).
109. *Id.* (quoting *Coleman*, 307 U.S. at 446).
110. *Id.*
111. Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (1996).
112. *Windsor*, 133 S. Ct. at 2713 (Alito, J., dissenting) (citing Raines v. Byrd, 521 U.S. 811, 829 (1997)).
113. *Id.* (citing *Raines*, 512 U.S. at 829).
114. *Id.* at 2714 (citing *Raines*, 512 U.S. at 823).
115. *Id.* (quoting INS v. Chadha, 462 U.S. 919, 940 (1983)).
116. *Id.*

III. ANALYSIS

A. The United States Was Not an Aggrieved Party Under the Case or Controversy Clause

Because the United States, through the Department of Justice, had already received all that it wanted from the district court, the Supreme Court should have held that it (and the Second Circuit Court of Appeals) did not have jurisdiction to hear the Government's appeal. The Government was correct in arguing that it met the Article III injury requirement.[117] The Government was injured by (1) the lower court's requirement that it pay Windsor the tax refund,[118] (2) the invalidation of DOMA,[119] and (3) the preclusion of enforcement of DOMA that would have taken place sans the lower court's decision.[120] The Government was also correct in asserting that the lower courts caused those injuries and that "they would be redressed by reversal of those decisions";[121] however, a reversal of those decisions would not be a "favorable decision."[122] *The American Heritage Dictionary* defines "favorable" as "[g]ranting what has been desired or requested: *a favorable reply*."[123] Because the Solicitor General, arguing for the Government on the merits of the case, concluded his brief to the Supreme Court by saying that "the judgment of the court of appeals should be affirmed,"[124] it is quite clear

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117. Brief for the United States on the Jurisdictional Questions at 18–19, *Windsor*, 133 S. Ct. 2675 (No. 12-307), 2013 WL 683046.

118. *See* Franchise Tax Bd. of Cal. v. Alcan Aluminum Ltd., 493 U.S. 331, 336 (1990) (holding that "actual financial injury" is sufficient to establish Article III standing).

119. *See* Maine v. Taylor, 477 U.S. 131, 136–37 (1986) (holding that "conclusive adjudication that [a statute] is unconstitutional" gives a state a "substantial" stake in the case sufficient to establish Article III standing).

120. *See id.* (holding that "a State clearly has a legitimate interest in the continued enforceability of its own statutes," sufficient to establish Article III standing); *see also* City of Erie v. Pap's A.M., 529 U.S. 277 (2000) (holding that a municipality precluded from enforcing an ordinance on constitutional grounds has Article III standing).

121. Brief for the United States on the Jurisdictional Questions, *supra* note 117, at 19.

122. *See supra* note 16 and accompanying text.

123. *The American Heritage Dictionary*, HOUGHTON MIFFLIN HARCOURT PUBLISHING CO., http://www.ahdictionary.com/word/search.html?q=favorable&submit.x=42&submit.y=24 (last visited March 17, 2015) (The full list of definitions is "1. Advantageous; helpful: *favorable winds*. 2. Encouraging; propitious: *a favorable diagnosis*. 3. Manifesting approval; commendatory: *a favorable report*. 4. Winning approval; pleasing: *a favorable impression*. 5. Granting what has been desired or requested: *a favorable reply*. 6. Indulgent or partial: *listened with a favorable ear*." The fifth definition is the most applicable to the phrase "favorable decision.").

124. Brief for the United States on the Merits Question at 54, United States v. Windsor, 133 S. Ct. 2675 (No. 12-307), 2013 WL 683048.

that the Government's injuries would not be redressed by granting the Government's desired decision. On the contrary, as Justice Scalia pointed out in his dissent, such a decision would "not cure the Government's injury, but carve it into stone."[125]

In holding that the Government had a sufficient stake to maintain Article III standing, the Court focused on the wrong portion of the test. The Court focused on the fact that the Government was injured and that a reversal by the Court would have remedied this injury;[126] however, as already established, it was not the lack of injury that should have precluded the Government from being able to appeal, but rather the lack of a "favorable decision" having the capability of redressing that injury.[127]

The Court also erred by relying on *Chadha* to support its Article III standing rationale.[128] The Court in *Chadha* first pointed out that there

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125. *Windsor*, 133 S. Ct. at 2699 (Scalia, J., dissenting).

126. *Id.* at 2686 (majority opinion) ("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. The judgment orders the United States to pay money that it would not disburse but for the court's order. The Government of the United States has a valid legal argument that it is injured even if the Executive disagrees with § 3 of DOMA, which results in Windsor's liability for the tax. Windsor's ongoing claim for funds that the United States refuses to pay thus establishes a controversy sufficient for Article III jurisdiction." (citations omitted)).

127. *See supra* notes 103–124 and accompanying text.

128. *See Windsor*, 133 S. Ct. at 2700–01 (Scalia, J., dissenting) ("To be sure, the Court in *Chadha* said that statutory aggrieved-party status was 'not altered by the fact that the Executive may agree with the holding that the statute in question is unconstitutional.' But in a footnote to that statement, the Court acknowledged Article III's separate requirement of a 'justiciable case or controversy,' and stated that this requirement was satisfied 'because of the presence of the two Houses of Congress as adverse parties.' Later in its opinion, the *Chadha* Court remarked that the United States' announced intention to enforce the statute also sufficed to permit judicial review, even absent congressional participation. That remark is true, as a description of the judicial review conducted in the Court of Appeals, where the Houses of Congress had not intervened. (The case originated in the Court of Appeals, since it sought review of agency action under 8 U.S.C. § 1105a(a) (1976 ed.).) There, absent a judgment setting aside the INS order, Chadha faced deportation. This passage of our opinion seems to be addressing that initial standing in the Court of Appeals, as indicated by its quotation from the lower court's opinion. But if it was addressing standing to pursue the appeal, the remark was both the purest dictum (as congressional intervention at that point made the required adverseness 'beyond doubt'), and quite incorrect. When 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

was a case or controversy because "from the time of Congress' formal intervention . . . the concrete adverseness [was] beyond doubt."[129] The Court went on to say, "Second, prior to Congress' intervention, there was adequate Art. III adverseness even though the only parties were the INS and Chadha";[130] however, it is unclear what the Court meant by this. If the Court was addressing the issue of whether the Ninth Circuit had jurisdiction to hear the case, then the Court was correct, because Chadha was the petitioner at that time and had a sufficient stake in the litigation.[131] If, on the other hand, the Court was simply saying that even without Congress's intervention there would be adequate adverseness, this would be both dictum and incorrect—dictum because it was unnecessary to the holding of the case because Congress had in fact intervened,[132] and incorrect for the same reasons that the Court in *Windsor* was incorrect.[133] The majority in *Windsor* concluded that this was not dictum, but necessary to the Court's holding that there was Article III standing before Congress intervened, and thus, "the refusal of the Executive to provide the relief sought suffices to preserve a justiciable dispute as required by Article III."[134] The problem with this logic is that prior to Congress's intervention, the petitioner in *Chadha* clearly had standing as an injured party;[135] such was not the case with *Windsor*.[136]

In order to have Article III standing, the Government's desired outcome needed to be able to redress its injury.[137] If the Government wished to remain "injured," as it implied by its brief on the merits,[138] it

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seek to *undo it*. In *Chadha*, the intervening House and Senate fulfilled that requirement. Here no one does." (citations omitted)).

129. Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 939 (1983).

130. *Id.*

131. *Id.* at 936 (quoting Duke Power Co. v. Carolina Envtl. Study Grp., 438 U.S. 59, 79 (1978)) (holding that "Chadha has demonstrated 'injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury'"); *see also* Chadha v. Immigration & Naturalization Serv., 634 F.2d 408 (9th Cir. 1981).

132. *See* BLACK'S LAW DICTIONARY 1177 (9th ed. 2009) (defining obiter dictum as a "judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision of the case and therefore not precedential (although it may often be considered persuasive). — Often shortened to *dictum*").

133. *See supra* notes 125–126 and accompanying text.

134. United States v. Windsor, 133 S. Ct. 2675, 2686 (2013).

135. *See supra* note 129 and accompanying text.

136. Had Windsor lost at the district court level and been the petitioner at the Ninth Circuit, this analysis would have applied to the *Windsor* case, but only at the circuit court level, and the Government would have not met the Article III standing requirements to appeal to the Supreme Court for the reasons already stated.

137. *See supra* note 18 and accompanying text.

138. Brief for the United States on the Merits Question, *supra* note 124, at 54.

could have done so without the intervention of the court. If both parties agree entirely on the outcome, there is no controversy, and there is no need for a case. Because the Government could not remedy its injury through its desired outcome, both the Ninth Circuit and Supreme Court lacked Article III jurisdiction, and the Court should have held as such.

B. Prudential Limitations on Jurisdiction Also Should Have Barred the Court from Hearing the Case

A general prudential rule in the United States judicial system is that a party may not appeal a decision in its favor.[139] This is the *Deposit Guaranty* rule that only an aggrieved party has a right to appeal, and as the Court in *Deposit Guaranty* pointed out, this is a prudential rule created by the courts that limits jurisdiction, not a constitutional rule.[140] The Court established this general rule so that courts could better allocate resources to cases that actually warranted appellate review.[141] To fully understand the *Deposit Guaranty* rule, a review of the cases leading up to its creation is warranted. The rule was based on the holding in *Electrical Fittings Corp. v. Thomas & Betts Co.*, where the Court said, "A party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree."[142] The *Electrical Fittings* holding was

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139. *See* Dalle Tezze v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor, 814 F.2d 129, 133 (3d Cir. 1987) (citing Pub. Serv. Comm'n v. Brashear Freight Lines, Inc. 306 U.S. 204 (1939)) ("[A] party has no right to appeal from a favorable judgment."); *see also* Byron v. Clay, 867 F.2d 1049, 1050 (7th Cir. 1989) ("[Y]ou can't appeal from a judgment entirely in your favor.").

140. Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper, 445 U.S. 326, 333–34 (1980) ("Ordinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom. A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it. The rule is one of federal appellate practice, however, derived from the statutes granting appellate jurisdiction and the historic practices of the appellate courts; it does not have its source in the jurisdictional limitations of Art. III." (citations omitted)).

141. Camreta v. Greene, 131 S. Ct. 2020, 2030 (2011) ("As a matter of practice and prudence, we have generally declined to consider cases at the request of a prevailing party, even when the Constitution allowed us to do so. Our resources are not well spent superintending each word a lower court utters en route to a final judgment in the petitioning party's favor." (citations omitted)).

142. Elec. Fittings Corp. v. Thomas & Betts Co., 307 U.S. 241, 242 (1939) (The Court went on to say, "But here the decree itself purports to adjudge the validity of claim 1, and though the adjudication was immaterial to the disposition of the cause, it stands as an adjudication of one of the issues litigated. We think the petitioners were entitled to have this portion of the decree eliminated, and that the Circuit Court of Appeals had jurisdiction, as we have held this court has, to entertain the appeal, not for the purpose of passing on the merits, but to direct the reformation of the decree." (footnotes omitted)).

based on *Lindheimer v. Illinois Bell Telephone Co.*, where the Court held that a company could not appeal the ruling of a lower court simply because it miscalculated the value of the company's property when the value was not necessary for the court to reach the ruling that it did.[143] Although the *Lindheimer* Court did not address Article III standing, it appears as if the party met the requirements: (1) it was injured in that its property was incorrectly valued, (2) by the lower court, and (3) it could only be remedied by overturning that specific finding of fact.[144] Even though the petitioner seems to have met the Article III requirements, the Court dismissed the appeal.[145] The reason seems quite obvious—appellate courts should not waste their time on issues that are insignificant to the trial court's ultimate decision, even if the party was technically injured in some way.[146]

While the Supreme Court has not adopted a specific definition of "aggrieved," the Connecticut Supreme Court's definition fits well with the history behind the *Deposit Guaranty* rule. The Connecticut rule requires "a specific, personal and legal interest in the subject matter of the decision" that has "been specifically and injuriously affected by the decision."[147] In reading that rule, it only makes sense to require that there be injury both to the personal and legal interest; to hear a case where one's legal interest has not been injured does not make sense when keeping in mind that the Supreme Court established the prudential rule to ensure proper allocation of judicial resources.

In *Windsor*, while the Government correctly argued that it was aggrieved due to being precluded from enforcing DOMA and having to pay Windsor a tax refund,[148] the Government lost this aggrieved status when it relinquished its legal interest in the case by asking for the Second Circuit's decision to be upheld.[149] The Second Circuit could not possibly have injuriously affected the Government's legal interest if the Government then went on to ask the Court to uphold that decision. It

143. Lindheimer v. Illinois Bell Tel. Co., 292 U.S. 151, 176 (1934) ("The company was successful in the District Court and has no right of appeal from the decree in its favor. The company is not entitled to prosecute such an appeal for the purpose of procuring a review of the findings of the court below with respect to the value of the company's property or the other findings of which it complains.").

144. *Id.* at 176; *see supra* notes 14–17 and accompanying text.

145. *Lindheimer*, 292 U.S. at 176.

146. *See supra* note 142.

147. *See supra* note 23 and accompanying text.

148. Brief for the United States on the Jurisdictional Questions, *supra* note 117, at 17–18 ("Indeed, in some ways, the United States may be more aggrieved here than the INS was in *Chadha*. The judgment not only precludes the United States from enforcing a statute, but also requires the payment of more than $360,000 in federal Treasury funds.").

149. *See supra* note 124 an accompanying text.

would make no sense for the Court to establish a rule to ensure efficient allocation of court resources that allows a party to use court resources just to achieve the same result that was achieved at the lower court.

The *Windsor* majority was also incorrect in relying on *Chadha* to support its holding that prudential limitations did not bar the Court from hearing the case. The majority focused on the fact that there was adverseness between the parties because amici curiae were defending the constitutionality of DOMA;[150] however, a lack of adverseness was not the issue. Reliance on *Chadha* was also problematic because similar to its Article III jurisdiction analysis, the Court in *Chadha* made the same mistake as the Court in *Windsor*; the *Chadha* Court should have held that the INS was not an aggrieved party, because its legal interest was no longer injuriously affected once it agreed with Chadha on the merits of the case.[151]

For these reasons, the *Windsor* Court should not have heard the appeal from the Government. Instead, it should have held that it, and the Second Circuit, did not have standing to hear the appeal. Because BLAG also petitioned for a writ of certiorari,[152] the question would then arise whether the Court could have ruled on the case had it granted BLAG's petition.[153]

C. BLAG Would Not Have Had Standing Even if the Court Had Granted Its Appeal

If the Court had considered the issue,[154] it should have held that BLAG did not have standing to intervene in the case, because BLAG was not an injured party. Parties without Article III standing cannot litigate in court.[155] The Article III standing requirements are not met by

150. United States v. Windsor, 133 S. Ct. 2675, 2687 (2013).

151. *See supra* notes 149–50 and accompanying text. Had the *Chadha* Court held this, it still would have been proper to hear the appeal since Congress was a proper petitioner. *See infra* notes 157–158 and accompanying text. The *Chadha* Court should have held that only Congress had standing to appeal.

152. Petition for a Writ of Certiorari, *Windsor*, 133 S. Ct. 2675 (No. 12-785), 2012 WL 6755143.

153. *See* Bipartisan Legal Advisory Group of the United States House of Representatives v. Windsor, 133 S. Ct. 2885 (2013) ("Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.").

154. *See Windsor*, 133 S. Ct. at 2688 ("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.").

155. Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 475–76 (1982).

citizens who simply allege an "abstract injury in nonobservance of the Constitution."[156] In *Chadha*, the Court stated that Congress is the proper party to defend a statute when the executive branch and plaintiffs are in agreement that it is unconstitutional.[157] In actuality, Congress's standing in *Chadha* existed because ruling that the one-House veto was unconstitutional would directly harm it.[158] The holding in *Chadha* has not been extended beyond the legislative veto,[159] making it clear that for Congress to intervene, it must have an actual stake in the litigation, not just an "abstract injury."[160] Because the only interest BLAG had was an "abstract injury in nonobservance of the Constitution,"[161] there was no reason to treat BLAG any more special than all other citizens. For this reason, *Coleman* was inapplicable, contrary to Justice Alito's argument.[162] At issue in *Windsor* was not the holding of a congressional vote, but enforcement of the statute.[163] Once the House had voted to pass DOMA, it completed its part of the legislative process, and whether the House could have stopped repeal of DOMA was irrelevant because that was not the issue before the Court.

Furthermore, individual members of Congress do not have the sufficient "personal stake" to be deemed to have standing regarding constitutional challenges to statutes.[164] Not all of Congress had intervened in *Windsor*, because BLAG only represented the House of

156. *Id.* at 482 (quoting Schlesinger v. Reservist Comm. to Stop the War, 418 U.S. 208, 223, n. 13 (1974)).

157. Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 939 (1983).

158. Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 FORDHAM L. REV. 1541, 1548 (2012).

159. *Id.*

160. *See Valley Forge*, 454 U.S. at 482 (quoting *Schlesinger*, 418 U.S. at 223 n.13).

161. *See Schlesinger*, 418 U.S. at 223 n.13.

162. *See supra* notes 108–10 and accompanying text.

163. *See supra* notes 50–55 and accompanying text.

164. Raines v. Byrd, 521 U.S. 811, 829–830 (1997) ("In sum, appellees have alleged no injury to themselves as individuals . . . , the institutional injury they allege is wholly abstract and widely dispersed . . . , and their attempt to litigate this dispute at this time and in this form is contrary to historical experience. We attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit. We also note that our conclusion neither deprives Members of Congress of an adequate remedy (since they may repeal the Act or exempt appropriations bills from its reach), nor forecloses the Act from constitutional challenge (by someone who suffers judicially cognizable injury as a result of the Act). Whether the case would be different if any of these circumstances were different we need not now decide. We therefore hold that these individual members of Congress do not have a sufficient 'personal stake' in this dispute and have not alleged a sufficiently concrete injury to have established Article III standing." (citations omitted)).

Representatives, not the Senate.[165] For this reason, Justice Alito's first objection to the applicability of *Raines* was incorrect.[166] Justice Alito was also incorrect in distinguishing *Raines* from *Windsor* on the grounds that the congressional members in *Raines* "were not the pivotal figures whose votes would have caused the Act to fail absent some challenged action."[167] In *Windsor* there simply was no vote to repeal DOMA, so the issue of whose votes were sufficient was irrelevant. Because BLAG spoke only for one chamber of Congress and had only an abstract injury due to the pending invalidation of DOMA, if the Court had needed to address the issue, it should have held that BLAG did not have standing to intervene.

D. Why Does the Jurisdiction Issue Matter?

1. The Constitutional Issue

The Court's most significant error in the *Windsor* case was in finding that the Case or Controversy Clause did not bar the Court from hearing the case. As the Court noted in *Allen v. Wright*, "The case-or-controversy doctrines state fundamental limits on federal judicial power in our system of government."[168] The limitation placed on the judiciary by the Clause is two-fold: it limits the federal courts to hearing "questions presented in an adversary context" that can be resolved by the judiciary, and it "define[s] 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."[169] The mere fact that the majority thought that it was correctly resolving an important issue does not mean

165. Even BLAG's representation of the House of Representatives was shaky, at best. In 2011, BLAG voted to recommend that counsel be retained to conduct DOMA litigation "on behalf of the BLAG," not on behalf of the House of Representatives. Chris Geidner, *House Republicans Vote to Defend DOMA in Court on Party Line 3-2 Vote*, METRO WEEKLY (Mar. 9, 2011, 6:14 PM), http://www.metroweekly.com/poliglot/2011/03/house-republicans-vote-to-defe.html. It was not until early 2013, nearly a month after the Court had granted certiorari, that the House of Representatives voted to give BLAG the authority to speak for the entire House in front of the Supreme Court. Chris Johnson, *House Approves Rules Affirming Commitment to DOMA*, WASHINGTON BLADE (Jan. 4, 2013), http://www.washingtonblade.com/2013/01/04/house-approves-rules-affirming-commitment-to-doma/.

166. *See supra* note 113 and accompanying text.

167. *See supra* note 114.

168. Allen v. Wright, 468 U.S. 737, 750 (1984), *abrogated on other grounds by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014).

169. Flast v. Cohen, 392 U.S. 83, 95 (1968).

that it can ignore the constitutional limitations on the Court. No matter how important the question at the heart of a case is, the constitutional limits on the judiciary must be preserved.[170] The ends cannot justify the means when it comes to the judiciary; to do so would render the Case and Controversy Clause meaningless and destroy the limitations of the judiciary entirely.

2. The Prudential Issue

While not constitutionally mandated, consistency in the law is desirable.[171] For this reason, the majority should have followed the *Deposit Guaranty* rule and held that even if the Article III requirements were met, the Government could not appeal, because the lower court ruled in favor of the Government's arguments in its briefs.[172] The majority gave no meaningful explanation for why the prudential limitations on its jurisdiction should be ignored; it simply pointed out that the case was not "routine" and moved on.[173] By doing this, the majority opened up the door for a problem that it warned about: making it seem "appropriate for the Executive as a routine exercise to challenge statutes in court instead of making the case to Congress for amendment or repeal."[174] In holding that the prudential limitations could be ignored in *Windsor*, the majority sacrificed consistency in the law in order to rule on the substantive issue. This will not only cause confusion for future litigants, but politicized the Court by unnecessarily drawing it into the middle of a heated political battle.

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170. Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1316 (1988) ("In sum, the case or controversy requirement marks the boundary of the judiciary's power in our system of separated powers. Just as the bicameralism, presentment, and appointments clause provisions restrict the authority of Congress and the executive, the article III limitations confine the judiciary. Efforts to vest the judiciary with greater power—whether through acts of Congress, requests of the President, or judicial instigation—should therefore be invalidated regardless of the potential political benefits such arrangements could bring. The constitutional structure presupposes that, over time, insulating the judiciary from too great an involvement in the political affairs of its coordinate branches best preserves judicial independence and individual liberty.").

171. Martinez v. Craven, 429 F.2d 18, 20 (1970) ("Consistency in legal rulings is desirable, but inconsistency is not unconstitutional.").

172. *See supra* Part III.B.

173. *See supra* note 85 and accompanying text.

174. United States v. Windsor, 133 S. Ct. 2675, 2689 (2013).

IV. CONCLUSION

The Court made a mistake when it held that the Government had standing to appeal the decision of the Second Circuit.[175] Whether the Court reached the proper conclusion on the merits should not be more important than whether the Court used the proper procedure to get to that conclusion. By failing to wait to decide the issue until it had proper jurisdiction, the Court overstepped its constitutional limits.[176] The Court also promoted inconsistency in the law by failing to adhere to the prudential limits that have been set down in past decisions, without expressly overruling them.[177] Such mistakes have a broader impact than on the issue of marriage; they impact the entire American legal system going forward, and by making such mistakes, the Court turned its decision into one that calls into question the "integrity of the judicial process."[178]

175. *See supra* Part III.B.
176. *See supra* Part III.D.1.
177. *See supra* Part III.D.2.
178. *See supra* note 1 and accompanying text.