2013 SUPPLEMENT TO

FEDERAL INCOME TAX

A PROBLEM-SOLVING APPROACH

CASES AND MATERIALS

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Since the 2007 publication date of this text, Congress has passed more than 30[1] major bills that include tax provisions. Most of these laws include some tax and some nontax provisions. As 2012 ended, there was concern that Congress would fail to address a number of other tax items that required congressional action including: (1) the setting of tax rates for 2013 and beyond, (2) the continuation and rates of the federal estate tax, and (3) an extension of the AMT patch. Congress finally acted: the Senate in the early hours of January 1, and the House followed late in the day, and the President signed the American Taxpayer Relief Act of 2012, P.L. 12-240 on January 2, 2013 (the "2012 Act). (Note that 2013 marks the 10th anniversary of the income tax.)

The provisions that appear below come from a number of the bills that have become law since 2007. They represent those which, in our view, are relevant to your study in the fall of 2013 of Federal Income Tax. This list is meant to assist you in preparing answers to questions based on the most recent version of the Internal Revenue Code (hereinafter the "Code"). (The Table of Internal Revenue Code Sections on page xvii of the text will direct you to the pages where these provisions are discussed.)

Please note that Congress amended a number of provisions more than once during the period from 2007 until the present. Therefore, different rules may apply depending on the tax year to which a provision is applicable. Your required CCH Code and Regulations Selected Sections volume (the "Code" book), reflects the statute as amended by most of these laws, but it does not contain historic information. Therefore, if a new provision changes the old, you may have to refer to the older version that appeared in the U.S. Code or an earlier unabridged version of the Code from another source. Also note that this summary is not meant as a substitute for a careful reading of the Code. Rather, it is meant to call your attention to those provisions in the bills that we think may be important to you this semester.

The year 2012 was an important year for the tax system because of the confluence of the expiration of the 2001/2003 changes that affected many provisions in the Code, in addition to tax rates, the mandatory reductions in spending under the 2011 Budget Control Act, and a seeming growing interest in Congress and the country for re-examining the entire income tax structure. In a May 4th, 2012 Tax Briefing entitled, "Sunset of 2001 & 2003 Tax Cuts and Benefits," CCH editors noted that the "added demand on resources, together with a still fragile economy and a ticking clock on entitlement reform, is creating what [was] termed a 'fiscal cliff' by some, and

[1] The 2011 agreement to increase the debt ceiling, the 2011 Budget Control Act, P. L. 112-25 (hereafter the 2011 Budget Control Act), resulted in the creation of a special Congressional committee charged with recommending additional budget cuts or automatic cuts would ensue. If enacted, the spending cut measure would have contained many tax provisions. Congress failed to agree. Moreover, the Act did not deal with the problems of continuation of the Bush era tax cuts, the many expiring tax provisions, or the AMT. The Act mandates reductions in federal spending beginning in 2013. The CBO has estimated that the reductions will total $109 billion per year beginning in January, 2013. Congress postponed the effective date of the Budget Control Act of 2011 (the "BCA") that was initially set to begin on January 1, 2013. The 2012 Act postponed the effective date until March 1 when this law went into effect. The CBA also estimated that continuation of the Bush era tax cuts would cost $2.84 trillion over 10 years. The Joint Committee on Taxation estimated that the tax cuts contained in the 2012 Act will cost $3.9 trillion over ten years.

'taxmageddon' or 'taxopocalypse' by others." By any name, the confluence presented difficult choices for a divided Congress. Special Report, Tax Briefing, at 1 (May 4, 2012).

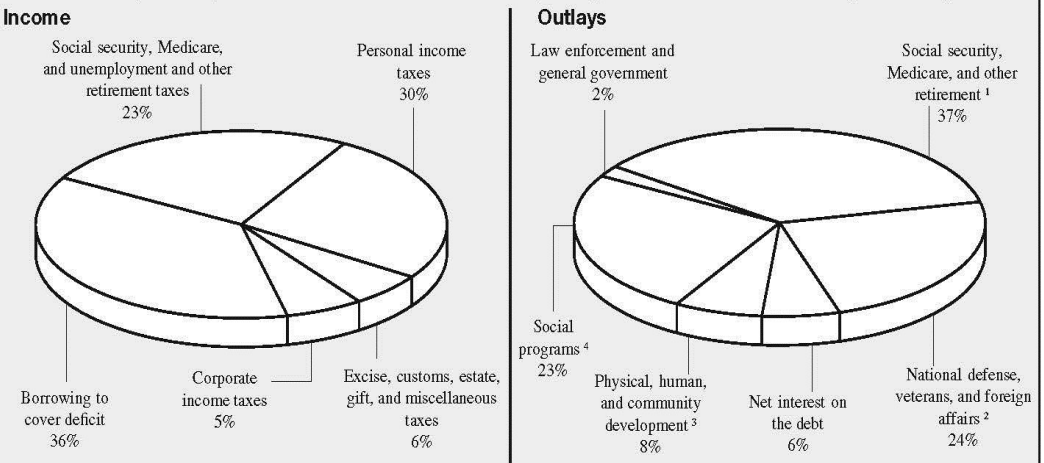
Congress averted the tax side of the fiscal cliff through its eleventh hour enactment of the 2012 Act. On the spending side, however, Congress failed to reach an agreement leading to the so-called "sequestration" beginning on March 1, 2013. The sequestration requires an across the board cut in federal spending with some types of programs excluded, over a period of nine years (through 2021).

The following changes appear in the order in which the applicable explanation appears in the textbook. Although your current Code book appears to include most of these changes, the reason for including them in this supplement is that subsequent legislation made changes, amended sunset dates, or requires explanation or emphasis. In most cases, however, we have included changes in this supplement because they change statements made in the text at the pages listed. We have also added edited versions of a few cases that we believe are important to your study of certain substantive areas of tax law.

Page 5 Compare the following pie chart from 2011 with the two in your book:

Major Categories of Federal Income and Outlays for Fiscal Year 2011

Income and Outlays. These pie charts show the relative sizes of the major categories of federal income and outlays for fiscal year 2011.



On or before the first Monday in February of each year the President is required by law to submit to the Congress a budget proposal for the fiscal year that begins the following October. The budget plan sets forth the President's proposed receipts, spending, and the surplus or deficit for the Federal government. The plan includes recommendations for new legislation as well as recommendations to change, eliminate, and add programs. After receipt of the President's proposal, the Congress reviews the proposal and makes changes. It first passes a budget resolution setting its own targets for receipts, outlays, and surplus or deficit. Next, individual spending and revenue bills that are consistent with the goals of the budget resolution are enacted.

In fiscal year 2011 (which began on October 1, 2010, and ended on September 30, 2011), Federal income was $2.303 trillion and outlays were $3.603 trillion, leaving a deficit of $1.3 trillion.

Footnotes for Certain Federal Outlays

1. **Social security, Medicare, and other retirement:** These programs provide income support for the retired and disabled and medical care for the elderly.

2. **National defense, veterans, and foreign affairs:** About 20% of outlays were to equip, modernize, and pay our armed forces and to fund national defense activities; about 3% were for veterans benefits and services; and about 1% were for international activities, including military and economic assistance to foreign countries and the maintenance of U.S. embassies abroad.

3. **Physical, human, and community development:** These outlays were for agriculture; natural resources; environment; transportation; aid for elementary and secondary education and direct assistance to college students; job training; deposit insurance, commerce and housing credit, and community development; and space, energy, and general science programs.

4. **Social programs:** About 15% of total outlays were for Medicaid, food stamps, temporary assistance for needy families, supplemental security income, and related programs; and the remaining outlays were for health research and public health programs, unemployment compensation, assisted housing, and social services.

Note. The percentages shown here exclude undistributed offsetting receipts, which were $86 billion in fiscal year 2011. In the budget, these receipts are offset against spending in figuring the outlay totals shown above. These receipts are for the U.S. Government's share of its employee retirement programs, rents and royalties on the Outer Continental Shelf, and proceeds from the sale of assets.

Add to paragraph following the pie chart: The recent decision in *National Federation of Independent Business et al. v. Sebelius*, 567 U.S. 1 (2012), affirming in part the Patient Protection and Affordable Care Act of 2010), P.L. 111-148, has engendered new interest in the power of Congress to impose a tax.

For those who are interested in Chief Justice Roberts' discussion of Article I, section 8, see sections III-B and -C of the majority opinion.

Page 8 Add to footnote 21: the applicable rates of tax were scheduled to return to their pre-2001 levels in 2011 without additional Congressional action. On December 17, 2010, President Obama signed the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010, P.L. 111-312 (hereafter the Tax Relief Act of 2010). Section 101(a)(1) of the Act extended the 2001 and 2003 tax cuts for two years. The rates were scheduled to sunset at the end of 2012 without additional Congressional action. Congress then passed the 2012 Act. The new Act amended the rate schedule, raising the highest rate of tax to 39.6% [see section 1(i)]. Other changes will appear throughout this Supplement.

Page 9 Make the following changes to the chart for the CALCULATION OF INCOME TAX PAYABLE BY INDIVIDUALS: STEP 1: Exclusions now go through section 139(D)[E]; STEP 2: Deductions now go through section 62(a)(21).

The Joint Committee on Taxation published an explanation and summary of the federal tax system as in effect for 2013 as a result of the 2012 Act.[2] An excerpt from that Report appears below. The changes described in the excerpt clarify the chart on page 9: Calculation of Income Tax Payable by Individuals, the so-called "taxing formula."

I. SUMMARY OF PRESENT-LAW FEDERAL TAX SYSTEM

A. Individual Income Tax

In general

A United States citizen or resident alien generally is subject to the U.S. individual income tax on his or her worldwide taxable income. (Note 3) Taxable income equals the taxpayer's total gross income less certain exclusions, exemptions, and deductions. Graduated tax rates are then applied to a taxpayer's taxable income to determine his or her individual income tax liability. A taxpayer may face additional liability if the alternative minimum tax applies. A taxpayer may reduce his or her income tax liability by any applicable tax credits.

Adjusted gross income

Under the Internal Revenue Code of 1986 (the "Code"), gross income means "income from whatever source derived" except for certain items specifically exempt or excluded by statute.

[2] Joint Committee on Taxation, *Overview of the Federal Tax System as in Effect for 2013* (JCX-2-13R), January 8, 2013.

Sources of income include compensation for services, interest, dividends, capital gains, rents, royalties, alimony and separate maintenance payments, annuities, income from life insurance and endowment contracts (other than certain death benefits), pensions, gross profits from a trade or business, income in respect of a decedent, and income from S corporations, partnerships, (Note 4) trusts or estates. (Note 5) Statutory exclusions from gross income include death benefits payable under a life insurance contract, interest on certain State and local bonds, employer-provided health insurance, employer-provided pension contributions, and certain other employer-provided benefits.

An individual's adjusted gross income ("AGI") is determined by subtracting certain "above-the-line" deductions from gross income. These deductions include trade or business expenses, capital losses, contributions to a qualified retirement plan by a self-employed individual, contributions to individual retirement arrangements ("IRAs"), certain moving expenses, certain education-related expenses, and alimony payments.

Taxable income

To determine taxable income, an individual reduces AGI by any personal exemption deductions and either the applicable standard deduction or his or her itemized deductions. Personal exemptions generally are allowed for the taxpayer, his or her spouse, and any dependents. For 2013, the amount deductible for each personal exemption is $ 3,900. This amount is indexed annually for inflation. Additionally, the personal exemption phase-out ("PEP") reduces a taxpayer's personal exemptions by two percent for each $ 2,500 ($ 1,250 for married filing separately), or fraction thereof, by which the taxpayer's AGI exceeds $ 250,000 (single), $ 275,000 (head-of-household), $ 300,000 (married filing jointly) and $ 150,000 (married filing separately). (Note 6) These threshold amounts are indexed for inflation.

A taxpayer also may reduce AGI by the amount of the applicable standard deduction. The basic standard deduction varies depending upon a taxpayer's filing status. For 2013, the amount of the standard deduction is $ 6,100 for single individuals and married individuals filing separate returns, $ 8,950 for heads of households, and $ 12,200 for married individuals filing a joint return and surviving spouses. An additional standard deduction is allowed with respect to any individual who is elderly or blind. (Note 7) The amounts of the basic standard deduction and the additional standard deductions are indexed annually for inflation.

In lieu of taking the applicable standard deductions, an individual may elect to itemize deductions. The deductions that may be itemized include State and local income taxes (or, in lieu of income, sales taxes), real property and certain personal property taxes, home mortgage interest, charitable contributions, certain investment interest, medical expenses (in excess of 10 percent of AGI), casualty and theft losses (in excess of 10 percent of AGI and in excess of $ 100 per loss), and certain miscellaneous expenses (in excess of two percent of AGI). Additionally, the total amount of itemized deductions allowed is reduced by $ 0.03 for each dollar of AGI in excess of $ 250,000 (single), $ 275,000 (head-of-household), $ 300,000 (married filing jointly)

and $ 150,000 (married filing separately). (Note 8) These threshold amounts are indexed for inflation.

Table 1. 2013 Standard Deduction and Personal Exemption Values

Standard Deduction and Personal Exemption	
Married Filing Jointly	$ 12,200
Head of Household	$ 8,950
Single and Married Filing Separately	$ 6,100
Personal Exemptions	$ 3,900

Tax liability

In general

A taxpayer's net income tax liability is the greater of (1) regular individual income tax liability reduced by credits allowed against the regular tax, or (2) tentative minimum tax reduced by credits allowed against the minimum tax. The amount of income subject to tax is determined differently under the regular tax and the alternative minimum tax, and separate rate schedules apply. Lower rates apply for long-term capital gains; those rates apply for both the regular tax and the alternative minimum tax.

Regular tax liability

To determine regular tax liability, a taxpayer generally must apply the tax rate schedules (or the tax tables) to his or her regular taxable income. The rate schedules are broken into several ranges of income, known as income brackets, and the marginal tax rate increases as a taxpayer's income increases. Separate rate schedules apply based on an individual's filing status. For 2013, the regular individual income tax rate schedules are as follows:

Table 2. Federal Individual Income Tax Rates for 2013

If taxable income is:	**Then the income tax equals:**
Single Individuals	
Not over $ 8,925	10% of the taxable income

Over $ 8,925 but not over $ 36,250	$ 892.50 plus 15% of the excess over $ 8,925
Over $ 36,250 but not over $ 87,850	$ 4,991.25 plus 25% of the excess over $ 36,250
Over $ 87,850 but not over $ 183,250	$ 17,891.25 plus 28% of the excess over $ 87,850
Over $ 183,250 but not over $ 398,350	$ 44,603.25 plus 33% of the excess over $ 183,250
Over $ 398,350 but not over $ 400,000	$ 115,586.25 plus 35% of the excess over $ 398,350
Over $ 400,000	$ 116,163.75 plus 39.6% of the excess over $ 400,000

Heads of Households

Not over $ 12,750	10% of the taxable income
Over $ 12,750 but not over $ 48,600	$ 1,275 plus 15% of the excess over $ 12,750
Over $ 48,600 but not over $ 125,450	$ 6,652.50 plus 25% of the excess over $ 48,600
Over $ 125,450 but not over $ 203,150	$ 25,865 plus 28% of the excess over $ 125,450
Over $ 203,150 but not over $ 398,350	$ 47,621 plus 33% of the excess over $ 203,150
Over $ 398,350 but not over $ 425,000	$ 112,037 plus 35% of the excess over $ 398,350
Over $ 425,000	$ 121,364.50 plus 39.6% of the excess over $ 425,000

Married Individuals Filing Joint Returns and Surviving Spouses	
Not over $ 17,850	10% of the taxable income
Over $ 17,850 but not over $ 72,500	$ 1,785 plus 15% of the excess over $ 17,850
Over $ 72,500 but not over $ 146,400	$ 9,982.50 plus 25% of the excess over $ 72,500
Over $ 146,400 but not over $ 223,050	$ 28,457.50 plus 28% of the excess over $ 146,400
Over $ 223,050 but not over $ 398,350	$ 49,919.50 plus 33% of the excess over $ 223,050
Over $ 398,350 but not over $ 450,000	$ 107,768.50 plus 35% of the excess over $ 398,350
Over $ 450,000	$ 125,846 plus 39.6% of the excess over $ 450,000

Married Individuals Filing Separate Returns	
Not over $ 8,925	10% of the taxable income
Over $ 8,925 but not over $ 36,250	$ 892.50 plus 15% of the excess over $ 8,925
Over $ 36,250 but not over $ 73,200	$ 4,991.25 plus 25% of the excess over $ 36,250
Over $ 73,200 but not over $ 111,525	$ 14,228.75 plus 28% of the excess over $ 73,200
Over $ 111,525 but not over $ 199,175	$ 24,959.75 plus 33% of the excess over $ 111,525
Over $ 199,175 but not over $ 225,000	$ 53,884.25 plus 35% of the excess

	over $ 199,175
Over $ 225,000	$ 62,923 plus 39.6% of the excess over $ 225,000

An individual's marginal tax rate may be reduced by the allowance of a deduction equal to a percentage of income from certain domestic manufacturing activities. (Note 9)

Alternative minimum tax liability

An alternative minimum tax is imposed on an individual, estate, or trust in an amount by which the tentative minimum tax exceeds the regular income tax for the taxable year. For 2013, the tentative minimum tax is the sum of (1) 26 percent of so much of the taxable excess as does not exceed $ 179,500 ($ 89,750 in the case of a married individual filing a separate return) and (2) 28 percent of the remaining taxable excess. The taxable excess is so much of the alternative minimum taxable income (“AMTI”) as exceeds the exemption amount. The breakpoint between the 26-percent and 28-percent bracket is indexed for inflation. The maximum tax rates on net capital gain and dividends used in computing the regular tax are used in computing the tentative minimum tax. AMTI is the taxpayer's taxable income increased by the taxpayer's tax preferences and adjusted by determining the tax treatment of certain items in a manner that negates the deferral of income resulting from the regular tax treatment of those items.

The exemption amounts for 2013 are: (1) $ 80,800 in the case of married individuals filing a joint return and surviving spouses; (2) $ 51,900 in the case of other unmarried individuals; (3) $ 40,400 in the case of married individuals filing separate returns; and (4) $ 23,100 in the case of an estate or trust. The exemption amounts are phased out by an amount equal to 25 percent of the amount by which the individual's AMTI exceeds (1) $ 153,900 in the case of married individuals filing a joint return and surviving spouses, (2) $ 115,400 in the case of other unmarried individuals, and (3) $ 76,950 in the case of married individuals filing separate returns or an estate or a trust. These amounts are indexed for inflation.

Among the preferences and adjustments applicable to the individual alternative minimum tax are accelerated depreciation on certain property used in a trade or business, circulation expenditures, research and experimental expenditures, certain expenses and allowances related to oil and gas and mining exploration and development, certain tax-exempt interest income, and a portion of the amount of gain excluded with respect to the sale or disposition of certain small business stock. In addition, personal exemptions, the standard deduction, and certain itemized deductions, such as State and local taxes and miscellaneous deductions, are not allowed to reduce AMTI.

Special capital gains and dividends rates

In general, gain or loss reflected in the value of an asset is not recognized for income tax purposes until a taxpayer disposes of the asset. On the sale or exchange of a capital asset, any gain generally is included in income. Any net capital gain of an individual is taxed at maximum

rates lower than the rates applicable to ordinary income. Net capital gain is the excess of the net long-term capital gain for the taxable year over the net short-term capital loss for the year. Gain or loss is treated as long-term if the asset is held for more than one year.

Capital losses generally are deductible in full against capital gains. In addition, individual taxpayers may deduct capital losses against up to $ 3,000 of ordinary income in each year. Any remaining unused capital losses may be carried forward indefinitely to another taxable year.

A maximum rate applies to capital gains and dividends. For 2013, the maximum rate of tax on the adjusted net capital gain of an individual is 20 percent on any amount of gain that otherwise would be taxed at a 39.6 rate. In addition, any adjusted net capital gain otherwise taxed at a 10- or 15-percent rate is taxed at a zero-percent rate. Adjusted net capital gain otherwise taxed at rates greater than 15-percent but less than 39.6 percent is taxed at a 15 percent rate. These rates apply for purposes of both the regular tax and the alternative minimum tax. Dividends are generally taxed at the same rate as capital gains.

Credits against tax

An individual may reduce his or her tax liability by any available tax credits. In some instances, a permissible credit is “refundable”, *i.e.*, it may result in a refund in excess of any credits for withheld taxes or estimated tax payments available to the individual. Two major credits are the child tax credit and the earned income credit.

An individual may claim a tax credit for each qualifying child under the age of 17. The amount of the credit per child is $ 1,000. (Note 10) The aggregate amount of child credits that may be claimed is phased out for individuals with income over certain threshold amounts. Specifically, the otherwise allowable child tax credit is reduced by $ 50 for each $ 1,000 (or fraction thereof) of modified adjusted gross income over $ 75,000 for single individuals or heads of households, $ 110,000 for married individuals filing joint returns, and $ 55,000 for married individuals filing separate returns. To the extent the child credit exceeds the taxpayer's tax liability, the taxpayer is eligible for a refundable credit (Note 11) (the additional child tax credit) equal to 15 percent of earned income in excess of $ 3,000. (Note 12)

A refundable earned income tax credit (“EITC”) is available to low-income workers who satisfy certain requirements. The amount of the EITC varies depending upon the taxpayer's earned income and whether the taxpayer has one, two, more than two, or no qualifying children. In 2013, the maximum EITC is $ 6,044 for taxpayers with more than two qualifying children, $ 5,372 for taxpayers with two qualifying children, $ 3,250 for taxpayers with one qualifying child, and $ 487 for taxpayers with no qualifying children. The credit amount begins to phaseout at an income level of $ 17,530 ($ 7,970 for taxpayers with no qualifying children). The phaseout percentages are 15.98 for taxpayers with one qualifying child, 17.68 for two or more qualifying children, and 7.65 for no qualifying children.

Tax credits are also allowed for certain business expenditures, certain foreign income taxes paid or accrued, certain education expenditures, certain child care expenditures, and for certain elderly or disabled individuals. Credits allowed against the regular tax are allowed against the alternative minimum tax.

Tax on net investment income

For taxable years beginning after December 31, 2012, a tax is imposed on net investment income in the case of an individual, estate, or trust. In the case of an individual, the tax is 3.8 percent of the lesser of net investment income or the excess of modified adjusted gross income over the threshold amount. (Note 13) The threshold amount is $ 250,000 in the case of a joint return or surviving spouse, $ 125,000 in the case of a married individual filing a separate return, and $ 200,000 in any other case. (Note 14)

Net investment income is the excess of (1) the sum of (a) gross income from interest, dividends, annuities, royalties, and rents, other than such income which is derived in the ordinary course of a trade or business that is not a passive activity with respect to the taxpayer or a trade or business of trading in financial instruments or commodities, and (b) net gain (to the extent taken into account in computing taxable income) attributable to the disposition of property other than property held in the active conduct of a trade or business that is not in the trade or business of trading in financial instruments or commodities, over (2) deductions properly allocable to such gross income or net gain.

For purposes of this tax, modified adjusted gross income is AGI increased by the amount excluded from income as foreign earned income under *section 911(a)(1)* (net of the deductions and exclusions disallowed with respect to the foreign earned income).

In the case of an estate or trust, the tax is 3.8 percent of the lesser of undistributed net investment income or the excess of adjusted gross income (as defined in *section 67(e)*) over the dollar amount at which the highest income tax bracket applicable to an estate or trust begins. (Note 15)

FOOTNOTES:

1. This document may be cited as follows: Joint Committee on Taxation, *Overview of the Federal Tax System as in Effect for 2013* (JCX-2-13), January 8, 2013.

2. If certain requirements are met, certain entities or organizations are exempt from Federal income tax. A description of such organizations is beyond the scope of this document.

3. Foreign tax credits generally are available against U.S. income tax imposed on foreign source income to the extent of foreign income taxes paid on that income. A nonresident alien

generally is subject to the U.S. individual income tax only on income with a sufficient nexus to the United States.

4. In general, partnerships and S corporations are treated as pass-through entities for Federal income tax purposes. Thus, no Federal income tax is imposed at the entity level. Rather, income of such entities is passed through and taxed to the owners at the individual level. A business entity organized as a limited liability company ("LLC") under applicable State law generally is treated as a partnership for Federal income tax purposes.

5. In general, estates and most trusts pay tax on income at the entity level, unless the income is distributed or required to be distributed under governing law or under the terms of the governing instrument. Such entities determine their tax liability using a special tax rate schedule and are subject to the alternative minimum tax. Certain trusts, however, do not pay Federal income tax at the trust level. For example, certain trusts that distribute all income currently to beneficiaries are treated as pass-through or conduit entities (similar to a partnership). Other trusts are treated as being owned by grantors in whole or in part for tax purposes; in such cases, the grantors are taxed on the income of the trust.

6. A taxpayer thus has all personal exemptions completely phased out at incomes of $ 372, 501 (single), $ 397,501 (head-of-household), $ 422,501 (married filing jointly) and $ 211,251 (married filing separately).

7. For 2013, the additional amount is $ 1,200 for married taxpayers (for each spouse meeting the applicable criterion) and surviving spouses. The additional amount for single individuals and heads of households is $ 1,500. If an individual is both blind and aged, the individual is entitled to two additional standard deductions, for a total additional amount (for 2013) of $ 2,400 or $ 3,000, as applicable.

8. This rule is sometimes referred to as the "Pease limitation." A taxpayer may not lose more than 80 percent of his or her deductions as a result of this provision.

9. This deduction is described in more detail below in the summary of the tax rules applicable to corporations.

10. A child who is not a citizen, national, or resident of the United States cannot be a qualifying child.

11. The refundable credit may not exceed the maximum credit per child of $ 1,000.

12. Families with three or more children may determine the additional child tax credit using an alternative formula, if this results in a larger credit than determined under the earned income formula. Under the alternative formula, the additional child tax credit equals the amount by which the taxpayer's social security taxes exceed the taxpayer's earned income tax credit.

13. The tax is subject to the individual estimated tax provisions. The tax is not deductible in computing any tax imposed by subtitle A of the Code (relating to income taxes).

14. These amounts are not indexed for inflation.

15. The tax does not apply to a nonresident alien or to a trust in which all the unexpired interests are devoted to charitable purposes. The tax also does not apply to a trust that is exempt from tax under *section 501* or a charitable remainder trust exempt from tax under *section 664*.

Page 19 Add to footnote 14: for example, the OASDI wage base for 2013 is $113,700.

Page 20 Amend footnote 15 to add the following sentences: Section 3101(b)(2) of the Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act of 2010, P.L. 111-152, imposed an addition of 0.9% to the Medicare Tax contribution for individual taxpayers with wages from employment in excess of $200,000 ($250, 00 in the case of a joint return, $125,000 for married filing separately). The increase applies only to the excess portion of the employee's wages. In contrast to the current law, the employee's total wage income for this purpose includes the income of the spouse. But, the employer does not have to collect and pay over the extra 0.9% portion on the wages of the spouse. Thus, the new law changes the Medicare tax from a flat tax for all wage earners to one that imposes a higher rate on higher wage earners.

The new law, for the first time, also applies the Medicare Tax to non-wage (unearned) income for tax years beginning after December 31, 2012. New Code section 1411(a)(1), added by section 1402(a)(1) of the Health Care and Educational Reconciliation Act of 2010, P.L. imposes a 3.8% Medicare Tax on the lesser of an individual's net investment income for the year or the excess of modified adjusted gross income over $200,000 ($250,000 for joint filers, $125,000 for married filing separately filers), that is, the same thresholds as for wage earners. Therefore, a taxpayer who has both wage income and net investment income can be subject to the 0.9% Medicare Tax on excess wage income and the 3.8% Medicare Tax on net investment income.

Page 25 Add a new sentence to the text: After passage of the 2012 Act, section 1 provides for seven rates of tax: 10%, 15%, 25%, 28%, 33%, 35%, and 39.6%.

Add to the end of the first paragraph of footnote 4 on page 26: Congress extended the 2001 and 2003 tax cuts for two years as part of the Tax Relief Act of 2010. The 2012 Act extended the lower rate for most taxpayers but added a 39.6% top rate for single taxpayers whose taxable incomes exceed $400,000 and married taxpayers whose taxable incomes exceed $450,000.

Add to the end of the second paragraph of footnote 4 on page 26: Congress also extended the rates on capital gains and qualified dividends applicable in 2010 for two years as part of the Tax Relief Act of 2010. The 2012 Act made the rates permanent for taxpayers whose taxable incomes do not exceed $400,000 for single taxpayers and $450,000 for married taxpayers. For these latter taxpayers, the rate on capital gains and qualified dividends applicable to assets that would have produced tax at the rate of 15%, is 20%.

Page 26 Insert at the end of the last sentence of the first paragraph: On February 6, 2009. President Obama established the President's Economic Recovery Advisory Board, chaired by former fed chairman Paul A. Volcker. (Executive Order 13501.) The mission of the Board was to "enhance the strength and competitiveness of the Nation's economy and the prosperity of the American people by ensuring the availability of information, analysis, and advice to the President as he formulates and implements his plans for economic recovery." The genesis of the Board (called "PERAB") was the economic downturn of 2008. It issued a report on tax reform options in August, 2010, entitled 'The Report on Tax Reform Options: Simplification, Compliance, and Corporate Taxation."

On February 18, 2010, President Obama, in response to the debt crisis, established The National Commission on Fiscal Responsibility and Reform, chaired by Senator Alan Simpson, former senator from Wyoming, and Erskine Bowles, former chief of staff to President Clinton. (Executive Order 13531.) The Board described its mission in two parts: to bring the budget into balance (excluding interest costs) in 2015, and to meaningfully improve the fiscal outlook. In December of 2010, the Commission issued its final report, The Moment of Truth, which set forth a six-part plan. two parts of which were discretionary spending cuts and comprehensive reform of the tax system. The Commission released a report on December 1, 2010. But, the Report did not achieve the requisite support of 14 or 18 members necessary to formally endorse the blueprint and send it to Congress for Congressional approval. Proponents of the plan praised it

Page 27 For an excellent introduction to tax reform proposals, *see* Understanding the Tax Reform Debate: Background, Criteria, & Questions, GAO-05-1009SP (Sept. 2005). On May 6, 2013, the Congressional Research Service issued a report

entitled "Tax Reform in the 113th Congress: An Overview of Proposals." CRS Report R43060. See pages 325-333 of the text for a more complete discussion of tax reform proposals.

Page 41 Amend footnote 10 to provide: Exclusive Tax Court Jurisdiction Over CDP Hearings. Section 855 of the Pension Protection Act of 2006 (P.L. No. 109-280), modified the jurisdiction of the Tax Court, providing it with exclusive jurisdiction over all appeals of collection/due process determinations.

Page 42 Amend footnote 11 to provide: Section 406 of the Tax Relief and Health Care Act of 2006, P.L. 109–432, amends section 7623 of the Code (not in the Code book), to modify and increase the rewards available to "whistleblowers," those who provide information to the Service regarding taxpayers in violation of the Code.

Page 44 Add to footnote 22: In her 2009 Annual Report to Congress, the National Taxpayer Advocate, Nina Olson, identified the CDP hearing as the number one most litigated issue for the year. Two years later it had dropped to number three where it remains. *See* 2011 and 2012 Annual Reports to Congress of the National Taxpayer Advocate.

Page 71 Add to the end of footnote 46: The rates set forth in section 1(h) were scheduled to sunset at the end of 2012. As a result of the 2012 Act, the rates provided before the 2012 Act on capital gains and qualified dividends continue to apply to taxpayers whose taxable incomes do not reach the 39.6% threshold (that is, $400,000 for single taxpayers and $450,000 for joint returns). For these latter taxpayers, the rate on capital gains and qualified dividends will be 20%.

Page 107 Add to footnote 66: See also, Andrew D. Appleby, "Ball Busters: How the IRS Should Tax Record-Setting Baseballs and Other Found Property Under the Treasure Trove Regulation," 33 Vt.L.Rev.43 (2008).

Page 112 Add new paragraph at the end of footnote 67: Fans catching record-setting baseballs continue to face potential tax consequences. See e.g., John Leland, "Returning Jeter's Big Hit: No Good Deed Goes Untaxed (Perhaps)," N.Y. Times, July 11, 2011.

Page 123 Add to the carryover paragraph of footnote 7: The estate tax did, in fact, expire at the end of 2009 without additional Congressional action. This would have resulted in a return to the rates and exclusions applicable before 2001. Section 301 of the Tax Relief Act of 2010 revived the estate tax for decedents dying after December 31, 2009. The maximum estate tax rate under the Act was 35% and the applicable exclusion amount was $5 million. The revival of the estate tax was temporary; the tax was set to sunset at the end of 2012. (The Act also provided a special option for decedents dying in 2010. Their estates could elect to apply the

new rates and exclusions with stepped-up basis, or no estate tax with the modified carryover rules of the 2001 Act.)

The 2012 Act made the estate tax permanent with a top rate of 40% and an annually adjusted exclusion beginning at $5 million.

Page 146 Add to the end of the third paragraph of footnote 16: As noted on page 123, the federal estate tax expired as of December 31, 2009. For estates of decedents dying in 2010 who elect no estate tax, section 1014(f) providing for a step-up in basis to fair market value was inapplicable. These beneficiaries would have determined their bases in assets received under section 1022. If, however, the estate elected to have the new rates and exclusions apply, section 1014(a) again allowed the step-up.

Page 180 Section 211 of P.L. 110–343, which encompasses three separate acts: the Emergency Economic Stabilization Act of 2008, the Energy Improvement and Extension Act of 2008, and the Tax Extenders and the Alternative Minimum Tax Relief Act of 2008, amended section 132(f). It provides for Extension of Transportation Fringe Benefits to Bicycle Commuters. Section 211 of the Act amends section 132(f) to include "Any qualified bicycle commuting reimbursement."

Page 192 Amend footnote 8 to provide: P.L. 110–343 in section 201extended through 2009 the deduction for state and local sales taxes in lieu of the deduction for state and local income taxes. Section 722(a) of the Tax Relief Act of 2010 extended it further through 2011. Congress did not extend this deduction for 2012. Congress may consider it for revival as part of its work during the lame duck session following the 2012 election.

Section 205(a) of the 2012 Act extended the election to deduct state and local sales taxes in lieu of the deduction for state and local income taxes through 2013.

Page 193 Amend Paragraph 1 to provide that section 62(a) now describes 21 categories of expenses that qualify as "above the line" deductions.

Page 197 Add a parenthetical after the reference section 1(h)(11) to note that section 1(h)(11) was scheduled to sunset at the end of 2012. But, the 2012 Act made it permanent.

Page 198 Add to the end of footnote 22: The four largest tax expenditures for the 5-year period spanning FY 2013-2017 are: $760.4 billion for the exclusion from gross income of employer-provided health benefits; $616.2 billion for the reduced rate of tax on dividends and long-term capital gains; $547.8 billion for the exclusion from gross income of pension contributions and earnings in employer plans; and

$379 billion for the deduction of mortgage interest on owner-occupied residences. Table 1, Joint Committee on Taxation, *Estimates of Federal Tax Expenditures for Fiscal Years 2012-2017* (JCS-1-13), February 1, 2013.

For an informative short piece on tax expenditures, go to: www.youtube.com/watch?v=ZwAn2swtXOk.

Some legal professionals disagree with the view of those who treat these items as "expenditures." *See*, for example, the short piece written by Professor Charles Fried of Harvard that appeared in the Washington Post on January 1, 1995, entitled: "Whose Money Is It? One Side's Tax Cut Is The Other Side's Grant." The writer, a professor at Harvard Law School, was solicitor general from 1985 to 1989.

On July 2, 2013, Senators Max Baucus and Orrin Hatch proposed what Burce Bartlett has termed "zero-based tax reform." Their idea is to abolish every tax expenditure, requiring tax expenditure supporters to justify each one as though it were being proposed for the first time. Mr. Bartlett states "the idea that we can wipe the slate clean and start from scratch is ridiculous pie in the sky thinking . . . Certain tax expenditures are so popular that it is inconceivable that they would ever be abolished." "Zero-Based Tax Reform," N.Y. Times, July 2, 2013.

Page 207 Note in connection with section 213(a) that Congress is increasing the floor for calculation of the medical expense deduction from 7.5% to 10% for tax years beginning after December 31. 2012. Section 9013(a) of the Patient Protection and Affordable Care Act, P.L. 111-148. The Act also added new section 213(f) which will return the floor to 7.5% for tax years 2013–2016 for taxpayers or their spouses who have attained age 65. Section 9013(b).

Page 212 Commencing July 24, 2007, the Tax Court heard the case of the taxpayer, Rhiannon O'Donnabhain, who was the subject of Chief Counsel Advice 200603025. On February 2, 2010, the Tax Court rendered a decision in the case, *O'Donnabhain v. Commissioner*, 134 T.C. 34 (2010). A small portion of the extensive decision follows. Those students who take the time to read the entire decision will be rewarded with an interesting view into the difficulty that Tax Court judges face in dealing with non-tax issues. Note that this case is one of the rare instances in which more than one Tax Court judge published a concurrence or dissent.

O'DONNABHAIN v. COMMISSIONER

UNITED STATES TAX COURT

134 T.C. 34

February 2, 2010, as amended February 12, 2010.

GALE, *Judge*: [T]he issue for decision is whether petitioner may deduct as a medical care expense under *section 213* amounts paid in 2001 for hormone therapy, sex reassignment surgery, and breast augmentation surgery that petitioner contends were incurred in connection with a condition known as gender identity disorder.

OPINION

I. *Medical Expense Deductions Under Section 213*

. . .

B. *Definition of Medical Care*

Congress first provided an income tax deduction for medical expenses in 1942. See Revenue Act of 1942, ch. 619, sec. 127(a), 56 Stat. 825. The original provision was codified as *section 23(x)* of the 1939 Internal Revenue Code and read as follows:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

. . .

(x) Medical, Dental, Etc., Expenses.—Except as limited under paragraph (1) or (2), expenses paid during the taxable year . . . for medical care of the taxpayer . . . . The term "medical care", as used in this subsection, shall include amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body . . . .

At the time, the Senate Committee on Finance commented on the new deduction for medical expenses in relevant part as follows:

> The term "medical care" is broadly defined to include amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body. It is not intended, however, that a deduction should be allowed for any expense that is not incurred primarily for the prevention or alleviation of a physical or mental defect or illness.

S. Rept. 1631, 77th Cong., 2d sess. 95-96 (1942), *1942-2 C.B. 504, 576-577* (emphasis added); see *Stringham v. Commissioner, 12 T.C. 580, 583-584 (1949)* (medical care is defined in broad

and comprehensive language, but it does not include items which are primarily nondeductible personal living expenses), affd. *183 F.2d 579 (6th Cir. 1950)*.

The core definition of "medical care" originally set forth in *section 23(x)* of the 1939 Code has endured over time and is currently found in *section 213(d)(1)(A)*, which provides as follows:

> *SEC. 213 (d)*. Definitions.—For purposes of this section --
> (1) The term "medical care" means amounts paid—
> (A) for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body. . . .

Thus, since the inception of the medical expense deduction, the definition of deductible "medical care" has had two prongs. The first prong covers amounts paid for the "diagnosis, cure, mitigation, treatment, or prevention of disease" and the second prong covers amounts paid "for the purpose of affecting any structure or function of the body".

The regulations interpreting the statutory definition of medical care echo the description of medical care in the Senate Finance Committee report accompanying the original enactment. The regulations state in relevant part:

> (e) Definitions—(1) General. (i) The term "medical care" includes the diagnosis, cure, mitigation, treatment, or prevention of disease. Expenses paid for "medical care" shall include those paid for the purpose of affecting any structure or function of the body or for transportation primarily for and essential to medical care. . . .
> (ii) . . . Deductions for expenditures for medical care allowable under *section 213* will be confined strictly to expenses incurred primarily for the prevention or alleviation of *a physical or mental defect or illness*. . . . *[Sec. 1.213-1(e)(1), Income Tax Regs.*; emphasis added.]

Notably, the regulations, mirroring the language of the Finance Committee report, treat "disease" as used in the statute as synonymous with "a physical or mental defect or illness." The language equating "mental defect" with "disease" was in the first version of the regulations promulgated in 1943 and has stood unchanged since. See T.D. 5234, 1943 C.B. 119, 130. In addition, to qualify as "medical care" under the regulations, an expense must be incurred "primarily" for alleviation of a physical or mental defect, and the defect must be specific. "[A]n expenditure which is merely beneficial to the general health of an individual, such as an expenditure for a vacation, is not an expenditure for medical care." *Sec. 1.213-1(e)(1)(ii), Income Tax Regs.*

Given the reference to "mental defect" in the legislative history and the regulations, it has also long been settled that "disease" as used in *section 213* can extend to mental disorders. See, e.g., *Fischer v. Commissioner, 50 T.C. 164, 173 n.4 (1968)* ("That mental disorders can be

'disease' within the meaning of *[section 213(d)(1)(A)*] is no longer open to question."); *Starrett v. Commissioner, 41 T.C. 877 (1964)*; *Hendrick v. Commissioner, 35 T.C. 1223 (1961)*.

In *Jacobs v. Commissioner, 62 T.C. 813 (1974)*, this Court reviewed the legislative history of *section 213* and synthesized the caselaw to arrive at a framework for analysis of disputes concerning medical expense deductions. Noting that the medical expense deduction essentially carves a limited exception out of the general rule of *section 262* that "personal, living, or family expenses" are not deductible, the Court observed that a taxpayer seeking a deduction under *section 213* must show: (1) "the present existence or imminent probability of a disease, defect or illness—mental or physical" and (2) a payment "for goods or services directly or proximately related to the diagnosis, cure, mitigation, treatment, or prevention of the disease or illness." *Id. at 818*. Moreover, where the expenditures are arguably not "wholly medical in nature" and may serve a personal as well as medical purpose, they must also pass a "but for" test: the taxpayer must "prove both that the expenditures were an essential element of the treatment and that they would not have otherwise been incurred for nonmedical reasons." *Id. at 819*.

. . .

C. *Definition of Cosmetic Surgery*

The second prong of the statutory definition of "medical care", concerning amounts paid "for the purpose of affecting any structure or function of the body", was eventually adjudged too liberal by Congress. The Internal Revenue Service, relying on the second prong, had determined in two revenue rulings that deductions were allowed for amounts expended for cosmetic procedures (such as facelifts, hair transplants, and hair removal through electrolysis) because the procedures were found to affect a structure or function of the body within the meaning of *section 213(d)(1)(A)*. See *Rev. Rul. 82-111, 1982-1 C.B. 48* (hair transplants and hair removal); *Rev. Rul. 76-332, 1976-2 C.B. 81* (facelifts); see also *Mattes v. Commissioner, 77 T.C. 650 (1981)* (hair transplants to treat premature baldness deductible under *section 213*). In 1990 Congress responded to these rulings by amending *section 213* to include new subsection (d)(9) which, generally speaking, excludes cosmetic surgery from the definition of deductible medical care. See Omnibus Budget Reconciliation Act of 1990, Pub. L. 101-508, sec. 11342(a), 104 Stat. 1388-471. A review of the legislative history of *section 213(d)(9)* shows that Congress deemed the amendment necessary to clarify that deductions for medical care do not include amounts paid for "an elective, purely cosmetic treatment". H. Conf. Rept. 101-964, at 1031 (1990), *1991-2 C.B. 560, 562*; see also 136 Cong. Rec. 30485, 30570 (1990) (Senate Finance Committee report language on Omnibus Budget Reconciliation Act of 1990).

Section 213(d)(9) defines "cosmetic surgery" as follows:

> *SEC. 213(d)*. Definitions.—For purposes of this section—
> (9) Cosmetic surgery. --
> (A) In general.—The term "medical care" does not include cosmetic surgery or other similar procedures, unless the surgery or procedure is

> necessary to ameliorate a deformity arising from, or directly related to, a congenital abnormality, a personal injury resulting from an accident or trauma, or disfiguring disease.
>
> (B) Cosmetic surgery defined.—For purposes of this paragraph, the term "cosmetic surgery" means any procedure which is directed at improving the patient's appearance and does not meaningfully promote the proper function of the body or prevent or treat illness or disease.

In sum, *section 213(d)(9)(A)* provides the general rule that the term "medical care" does not include "cosmetic surgery" (as defined) unless the surgery is necessary to ameliorate deformities of various origins. *Section 213(d)(9)(B)* then defines "cosmetic surgery" as any procedure that is directed at improving the patient's appearance but excludes from the definition any procedure that "meaningfully [promotes] the proper function of the body" or "[prevents] or [treats] illness or disease". There appear to be no cases of precedential value interpreting the cosmetic surgery exclusion of *section 213(d)(9)*.

II. *The Parties' Positions*

Respondent contends that petitioner's hormone therapy, sex reassignment surgery, and breast augmentation surgery are nondeductible "cosmetic surgery or other similar procedures" under *section 213(d)(9)* because they were directed at improving petitioner's appearance and did not treat an illness or disease, meaningfully promote the proper function of the body, or ameliorate a deformity. Although respondent concedes that GID is a mental disorder, respondent contends, relying on the expert testimony of Dr. Dietz, that GID is not a disease for purposes of *section 213* because it does not arise from an organic pathology within the human body that reflects "abnormal structure or function of the body at the gross, microscopic, molecular, biochemical, or neurochemical levels." Respondent further contends that the procedures at issue did not treat disease because there is no scientific proof of their efficacy in treating GID and that the procedures were cosmetic surgery because they were not medically necessary. Finally, respondent contends that petitioner did not have GID, that it was incorrectly diagnosed, and that therefore the procedures at issue did not treat a disease.

Petitioner maintains that she is entitled to deduct the cost of the procedures at issue on the grounds that GID is a well-recognized mental disorder in the psychiatric field that "falls squarely within the meaning of 'disease' because it causes serious, clinically significant distress and impairment of functioning." Since widely accepted standards of care prescribe hormone treatment, sex reassignment surgery, and, in appropriate circumstances, breast augmentation surgery for genetic males suffering from GID, expenditures for the foregoing constitute deductible "medical care" because a direct or proximate relationship exists between the expenditures and the "diagnosis, cure, mitigation, treatment, or prevention of disease", petitioner argues. Moreover, petitioner contends, because the procedures at issue treated a "disease" as used in *section 213*, they are not "cosmetic surgery" as defined in that section. (Footnote 30)

III. *Analysis*

The availability of the medical expense deduction for the costs of hormonal and surgical sex reassignment for a transsexual individual presents an issue of first impression.

A. *Statutory Definitions*

Determining whether sex reassignment procedures are deductible "medical care" or nondeductible "cosmetic surgery" starts with the meaning of "treatment" and "disease" as used in *section 213*. Both the statutory definition of "medical care" and the statute's exclusion of "cosmetic surgery" from that definition depend in part upon whether an expenditure or procedure is for "treatment" of "disease". Under *section 213(d)(1)(A)*, if an expenditure is "for the . . . treatment . . . of disease", it is deductible "medical care"; under *section 213(d)(9)(B)*, if a procedure "[treats] . . . disease", it is not "cosmetic surgery" that is excluded from the definition of "medical care".

Because the only difference between the quoted phrases in these two subparagraphs is the use of the noun form "treatment" versus the verb form "treat", we see no meaningful distinction between them. "Code provisions generally are to be interpreted so congressional use of the same words indicates an intent to have the same meaning apply". *Elec. Arts, Inc. v. Commissioner, 118 T.C. 226, 241 (2002)*; see also *Commissioner v. Keystone Consol. Indus., Inc., 508 U.S. 152, 159, 113 S. Ct. 2006, 124 L. Ed. 2d 71 (1993)*; *United States v. Olympic Radio & Television, Inc., 349 U.S. 232, 236, 75 S. Ct. 733, 99 L. Ed. 1024, 131 Ct. Cl. 814, 1951 C.B. 376, 1955-1 C.B. 376 (1955)*; *Zuanich v. Commissioner, 77 T.C. 428, 442-443 (1981)*. Consequently, the determination of whether something is a "treatment" of a "disease" is the same throughout *section 213*, whether for purposes of showing that an expenditure is for "medical care" under *section 213(d)(1)(A)* or that a procedure is not "cosmetic surgery" under *section 213(d)(9)(B)*. A showing that a procedure constitutes "treatment" of a "disease" both precludes "cosmetic surgery" classification under *section 213(d)(9)* and qualifies the procedure as "medical care" under *section 213(d)(1)(A)*.

Congress's reuse of the terms "treat" and "disease" in defining "cosmetic surgery" in *section 213(d)(9)(B)* triggers a second principle of statutory construction. Given that the phrase "treatment . . . of disease" as used in the *section 213(d)(1)(A)* definition of "medical care" had been the subject of considerable judicial and administrative construction when Congress incorporated the phrase into the definition of "cosmetic surgery" in 1990, it "had acquired a settled judicial and administrative interpretation". *Commissioner v. Keystone Consol. Indus., Inc., supra at 159*. In these circumstances "it is proper to accept the already settled meaning of the phrase". *Id.* Therefore, the pre-1990 caselaw and regulations construing "treatment" and "disease" for purposes of the *section 213(d)(1)(A)* definition of "medical care" are applicable to the interpretation of those words as used in the *section 213(d)(9)(B)* definition of "cosmetic surgery".

B. *Is GID a "Disease"?*

Petitioner argues that she is entitled to deduct her expenditures for the procedures at issue because they were treatments for GID, a condition that she contends is a "disease" for purposes of *section 213*. Respondent maintains that petitioner's expenditures did not treat "disease" because GID is not a "disease" within the meaning of *section 213*. Central to his argument is respondent's contention that "disease" as used in *section 213* has the meaning postulated by respondent's expert, Dr. Dietz; namely, "a condition . . . [arising] as a result of a pathological process . . . [occurring] within the individual and [reflecting] abnormal structure or function of the body at the gross, microscopic, molecular, biochemical, or neuro-chemical levels."

On brief respondent cites the foregoing definition from Dr. Dietz' expert report and urges it upon the Court as the meaning of "disease" as used in *section 213*; namely, that a "disease" for this purpose must have a demonstrated organic or physiological origin in the individual. Consequently, GID is not a "disease" because it has "no known organic pathology", respondent argues. (Footnote 33)

However, this use of expert testimony to establish the meaning of a statutory term is generally improper. "[E]xpert testimony proffered solely to establish the meaning of a law is presumptively improper." *United States v. Prigmore, 243 F.3d 1, 18 n.3 (1st Cir. 2001)*. The meaning of a statutory term is a pure question of law that is "exclusively the domain of the judge." *Nieves-Villanueva v. Soto-Rivera, 133 F.3d 92, 99 (1st Cir. 1997)*; see also *United States v. Mikutowicz, 365 F.3d 65, 73 (1st Cir. 2004)*; *Bammerlin v. Navistar Int'l Transp. Corp., 30 F.3d 898, 900 (7th Cir. 1994)*; *Snap-Drape, Inc. v. Commissioner, 105 T.C. 16, 19-20 (1995)*, affd. *98 F.3d 194, 198 (5th Cir. 1996)*. Closely analogous is *S. Jersey Sand Co. v. Commissioner, 30 T.C. 360, 364 (1958)*, affd. *267 F.2d 591 (3d Cir. 1959)*, where this Court refused to consider the expert testimony of a geologist concerning the meaning of the term "quartzite" as used in the Internal Revenue Code.

While the Court admitted Dr. Dietz' expert report and allowed him to testify over petitioner's objection, the use to which respondent now seeks to put his testimony is improper, and we disregard it for that purpose. (Footnote 34) The meaning of "disease" as used in *section 213* must be resolved by the Court, using settled principles of statutory construction, including reference to the Commissioner's interpretive regulations, the legislative history, and caselaw precedent. (Footnote 35)

As a legal argument for the proper interpretation of "disease", respondent's position is meritless. Respondent cites no authority, other than Dr. Dietz' expert testimony, in support of his interpretation, and we have found none. To the contrary, respondent's interpretation is flatly contradicted by nearly a half century of caselaw. Numerous cases have treated mental disorders as "diseases" for purposes of *section 213* without regard to any demonstrated organic or physiological origin or cause. See *Fay v. Commissioner, 76 T.C. 408 (1981)*; *Jacobs v. Commissioner, 62 T.C. at 818*; *Fischer v. Commissioner, 50 T.C. 164 (1968)*; *Starrett v. Commissioner, 41 T.C. 877 (1964)*; *Hendrick v. Commissioner, 35 T.C. 1223 (1961)*; *Sims v.*

Commissioner, T.C. Memo. 1979-499. These cases found mental conditions to be "diseases" where there was evidence that mental health professionals regarded the condition as creating a significant impairment to normal functioning and warranting treatment. . . .

See also *Jacobs v. Commissioner, supra at 818* (taxpayer's "severe depression" as evidenced by his psychiatrist's testimony is "disease" for purposes of *section 213*); *Hendrick v. Commissioner, supra at 1236* ("emotional insecurity" of child is a "disease" for purposes of *section 213*); *Sims v. Commissioner, supra* ("disease" for purposes of *section 213* found although "record does not contain a precise characterization of . . . [the taxpayer's son's] condition in medical terminology, there is ample evidence to support a finding that he suffered from some sort of learning disability, accompanied by emotional or psychiatric problems"). We have also considered a condition's listing in a diagnostic reference text as grounds for treating the condition as a "disease", without inquiry into the condition's etiology. In *Starrett v. Commissioner, supra at 878 & n.1, 880-882*, a reviewed opinion, we treated "anxiety reaction" as a "disease" for purposes of *section 213*, pointing to the condition's recognition in the American Medical Association's Standard Nomenclature of Diseases and Operations (5th ed. 1961).

The absence of any consideration of etiology in the caselaw is consistent with the legislative history and the regulations. Both treat "disease" as synonymous with "a physical or mental defect", which suggests a more colloquial sense of the term "disease" was intended than the narrower (and more rigorous) interpretation for which respondent contends.

In addition, in the context of mental disorders, it is virtually inconceivable that Congress could have intended to confine the coverage of *section 213* to conditions with demonstrated organic origins when it enacted the provision in 1942, because physiological origins for mental disorders were not widely recognized at the time. As Dr. Dietz confirmed in his testimony, the physiological origins of various well-recognized mental disorders—for example, panic disorder and obsessive-compulsive disorder—were discovered only about a decade ago. Moreover, Dr. Dietz confirmed that bulimia would not constitute a "disease" under his definition, because bulimia has no demonstrated organic origin, nor would post-traumatic stress disorder. Dr. Dietz was unable to say whether anorexia would meet the definition because he was uncertain regarding the current state of scientific knowledge of its origins. Petitioner's expert, Dr. Brown, testified without challenge that most mental disorders listed in the DSM-IV-TR do not have demonstrated organic causes. Thus, under the definition of "disease" respondent advances, many well-recognized mental disorders, perhaps most, would be excluded from coverage under *section 213*—a result clearly at odds with the intent of Congress (and the regulations) to provide deductions for the expenses of alleviating "mental defects" generally.

In sum, we reject respondent's interpretation of "disease" because it is incompatible with the stated intent of the regulations and legislative history to cover "mental defects" generally and is contradicted by a consistent line of cases finding "disease" in the case of mental disorders without regard to any demonstrated etiology.

Having rejected respondent's contention that "disease" as used in *section 213* requires a demonstrated organic origin, we are left with the question whether the term should be interpreted to encompass GID. On this score, respondent, while conceding that GID is a mental disorder, argues that GID is "not a significant psychiatric disorder" but instead is a "social construction"—a "social phenomenon" that has been "medicalized". Petitioner argues that GID is a "disease" for purposes of *section 213* because it is well recognized in mainstream psychiatric literature, including the DSM-IV-TR, as a legitimate mental disorder that "causes serious, clinically significant distress and impairment of functioning".

For the reasons already noted and those discussed below, we conclude that GID is a "disease" within the meaning of *section 213*. We start with the two caselaw factors influencing a finding of "disease" in the context of mental conditions: (1) A determination by a mental health professional that the condition created a significant impairment to normal functioning, warranting treatment, see *Fay v. Commissioner, 76 T.C. 408 (1981)*; *Jacobs v. Commissioner, 62 T.C. 813 (1974)*; *Fischer v. Commissioner, 50 T.C. 164 (1968)*; *Hendrick v. Commissioner, 35 T.C. 1223 (1961)*, or (2) a listing of the condition in a medical reference text, see *Starrett v. Commissioner, 41 T.C. 877 (1964)*. Both factors involve deference by a court to the judgment of medical professionals.

As noted in our findings, GID is listed as a mental disorder in the DSM-IV-TR, which all three experts agree is the primary diagnostic tool of American psychiatry. (Footnote 37) . . . .

Even if one accepts respondent's expert Dr. Schmidt's assertion that the validity of the GID diagnosis is subject to some debate in the psychiatric profession, the widespread recognition of the condition in medical literature persuades the Court that acceptance of the GID diagnosis is the prevailing view. Dr. Schmidt's own professed misgivings about the diagnosis are not persuasive, given that he continues to employ the diagnosis in practice, believes that psychiatrists must be familiar with it, and recently gave a GID diagnosis as an expert in another court proceeding. (Footnote 39) On balance, the evidence amply demonstrates that GID is a widely recognized and accepted diagnosis in the field of psychiatry.

Second, GID is a serious, psychologically debilitating condition. Respondent's characterization of the condition on brief as a "social construction" and "not a significant psychiatric disorder" is undermined by both of his own expert witnesses and the medical literature in evidence. All three expert witnesses agreed that, absent treatment, GID in genetic males is sometimes associated with autocastration, autopenectomy, and suicide. Respondent's expert Dr. Schmidt asserts that remaining ambiguous about gender identity "will tear you apart psychologically". Petitioner's expert Dr. Brown likewise testified that GID produces significant distress and maladaption. Psychiatric reference texts, established as reliable authority by Dr. Brown's testimony, confirm the foregoing.

Ms. Ellaborn [Petitioner's psychotherapist] concluded that petitioner exhibited clinically significant impairment from GID, to the extent that she designated petitioner's condition as "severe" under the DSM-IV-TR standards. Her diagnosis was supported by another doctoral-

level mental health professional and by Dr. Brown. The severity of petitioner's impairment, coupled with the near universal recognition of GID in diagnostic and other medical reference texts, bring petitioner's condition in line with the circumstances where a mental condition has been deemed a "disease" in the caselaw under *section 213*.

Third, respondent's position that GID is not a significant psychiatric disorder is at odds with the position of every U.S. Court of Appeals that has ruled on the question of whether GID poses a serious medical need for purposes of the *Eighth Amendment*, which has been interpreted to require that prisoners receive adequate medical care. See *Estelle v. Gamble, 429 U.S. 97, 103, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)*. In *Estelle v. Gamble, supra at 104*, the U.S. Supreme Court held that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' . . . proscribed by the *Eighth Amendment*." The U.S. Courts of Appeals have accordingly interpreted *Estelle v. Gamble, supra*, as establishing a two-prong test for an *Eighth Amendment* violation: it must be shown that (1) the prisoner had a "serious medical need" which (2) was met with "deliberate indifference" by prison officials. See, e.g., *Cuoco v. Moritsugu, 222 F.3d 99, 106 (2d Cir. 2000)* (applying the *Eighth Amendment* test to a pretrial detainee); *White v. Farrier, 849 F.2d 322, 325-327 (8th Cir. 1988)*.

Seven of the U.S. Courts of Appeals that have considered the question have concluded that severe GID or transsexualism constitutes a "serious medical need" for purposes of the *Eighth Amendment*. See *De'lonta v. Angelone, 330 F.3d 630, 634 (4th Cir. 2003)*; *Allard v. Gomez, 9 Fed. Appx. 793, 794 (9th Cir. 2001)*; *Cuoco v. Moritsugu, supra*; *Brown v. Zavaras, 63 F.3d 967, 970 (10th Cir. 1995)*; *Phillips v. Mich. Dept. of Corr., 932 F.2d 969 (6th Cir. 1991)*, affg. *731 F. Supp. 792 (W.D. Mich. 1990)*; *White v. Farrier, supra*; *Meriwether v. Faulkner, 821 F.2d 408, 411-413 (7th Cir. 1987)*; see also *Maggert v. Hanks, 131 F.3d 670, 671 (7th Cir. 1997)* (describing gender dysphoria as a "profound psychiatric disorder"). No U.S. Court of Appeals has held otherwise.

Deliberate indifference "requires that a prison official actually know of and disregard an objectively serious condition, medical need, or risk of harm." *De'lonta v. Angelone, supra at 634*. Many of the foregoing opinions either found that "deliberate indifference" had not been shown or remanded to the District Court for further proceedings regarding that point, but they reflect a clear consensus that GID constitutes a medical condition of sufficient seriousness that it triggers the *Eighth Amendment* requirement that prison officials not ignore or disregard it.

In view of (1) GID's widely recognized status in diagnostic and psychiatric reference texts as a legitimate diagnosis, (2) the seriousness of the condition as described in learned treatises in evidence and as acknowledged by all three experts in this case; (3) the severity of petitioner's impairment as found by the mental health professionals who examined her; (4) the consensus in the U.S. Courts of Appeal that GID constitutes a serious medical need for purposes of the *Eighth Amendment*, we conclude and hold that GID is a "disease" for purposes of *section 213*.

C. *Did Petitioner Have GID?*

. . .

We find that petitioner's GID diagnosis is substantially supported by the record. Ms. Ellaborn was licensed under State law to make such a diagnosis. A second licensed professional concurred, as did petitioner's expert, a recognized authority in the field. Ms. Ellaborn's testimony concerning her diagnosis was persuasive. She considered and ruled out comorbid conditions, including depression and transvestic fetishism, and she believed her initial diagnosis was confirmed by petitioner's experience with the steps in the triadic therapy sequence.

. . .

D. *Whether Cross-Gender Hormones, Sex Reassignment Surgery and Breast Augmentation Surgery "Treat" GID*

1. *Cross-Gender Hormones and Sex Reassignment Surgery*

Our conclusions that GID is a "disease" for purposes of *section 213*, and that petitioner suffered from it, leave the question of whether petitioner's hormone therapy, sex reassignment surgery, and breast augmentation surgery "[treated]" GID within the meaning of *section 213(d)(1)(A)* and *(9)(B)*.

In contrast to their dispute over the meaning of "disease", the parties have not disputed the meaning of "treatment" or "treat" as used in *section 213(d)(1)(A)* and *(9)(B)*, respectively. We accordingly interpret the words in their ordinary, everyday sense. . . .

"Treat" is defined in standard dictionaries as: "to deal with (a disease, patient, etc.) in order to relieve or cure", Webster's New Universal Unabridged Dictionary 2015 (2003); "to care for or deal with medically or surgically", Merriam Webster's Collegiate Dictionary 1333 (11th ed. 2008); "5 a: to care for (as a patient or part of the body) medically or surgically: deal with by medical or surgical means: give a medical treatment to * * * b: to seek cure or relief of * * *", Webster's Third New International Dictionary 2435 (2002).

The regulations provide that medical care is confined to expenses "incurred primarily for the prevention or alleviation of a physical or mental defect or illness". *Sec. 1.213-1(e)(1)(ii), Income Tax Regs.* (emphasis added). A treatment should bear a "direct or proximate therapeutic relation to the . . . condition" sufficient "to justify a reasonable belief the . . . [treatment] would be efficacious". *Havey v. Commissioner, 12 T.C. 409, 412 (1949)*. In *Starrett v. Commissioner, 41 T.C. at 881*, this Court concluded that the taxpayer's psychoanalysis was a treatment of disease because the taxpayer was "thereby relieved of the physical and emotional suffering attendant upon" the condition known as anxiety reaction.

Hormone therapy, sex reassignment surgery and, under certain conditions, breast augmentation surgery are prescribed therapeutic interventions, or treatments, for GID outlined in the Benjamin standards of care. The Benjamin standards are widely accepted in the psychiatric profession, as evidenced by the recognition of the standards' triadic therapy sequence as the

appropriate treatment for GID and transsexualism in numerous psychiatric and medical reference texts. Indeed, every psychiatric reference text that has been established as authoritative in this case endorses sex reassignment surgery as a treatment for GID in appropriate circumstances. No psychiatric reference text has been brought to the Court's attention that fails to list, or rejects, the triadic therapy sequence or sex reassignment surgery as the accepted treatment regimen for GID. Several courts have accepted the Benjamin standards as representing the consensus of the medical profession regarding the appropriate treatment for GID or transsexualism. See *Gammett v. Idaho State Bd. of Corr., No. CV05-257-S-MHW, 2007 U.S. Dist. LEXIS 55564 (D. Idaho, July 27, 2007)* (memorandum decision and order); *Houston v. Trella, No. 2:04-CV-01393 (D.N.J., Sept. 25, 2006)* (opinion); *Kosilek v. Maloney, 221 F. Supp. 2d 156, 158 (D. Mass. 2002)*; *Farmer v. Hawk-Sawyer, 69 F. Supp. 2d 120, 121 n.3 (D.D.C. 1999)*.

Nonetheless, respondent's expert Dr. Schmidt contends in his report that "physician acceptance of the . . . [Benjamin standards] is limited" and that the standards are guidelines and are only "accepted as more than guidelines by professionals who advocate for hormonal and surgical treatment of Gender Identity Disorder". However Dr. Schmidt conceded on cross-examination his prior sworn statement to the effect that he agreed with the Benjamin standards (except that psychotherapy should be mandatory rather than recommended) and was unaware of any significant disagreement with the Benjamin standards in the psychiatric field, other than those who believe that sex reassignment surgery is unethical, (Footnote 47) a position that Dr. Schmidt characterized as a minority one. Dr. Schmidt also acknowledged that all GID patients at the sexual disorders clinic at Johns Hopkins where he practices are advised to become familiar with the Benjamin standards of care and he concedes that cross-gender hormone therapy and sex reassignment surgery "have recognized medical and psychiatric benefits" for persons suffering from GID. Dr. Schmidt also observed in his report that most physicians—indeed, most psychiatrists—know very little about GID or its treatment and shun GID patients, which may explain why the acceptance of the Benjamin standards is not broad based in American medicine. In any event, given his own acceptance of the standards and their use in his clinic, to the extent Dr. Schmidt is suggesting that the standards have limited acceptance among professionals knowledgeable regarding GID, he is unpersuasive. The widespread recognition of the Benjamin standards in the medical literature in evidence strongly supports the conclusion that the standards enjoy substantial acceptance.

Moreover, petitioner's expert Dr. Brown contends that in the case of severe GID, sex reassignment surgery is the only known effective treatment; indeed, Dr. Brown was unaware of any case where psychotherapy alone had been effective in treating severe GID. The U.S. Court of Appeals for the Seventh Circuit and the highest courts of two States have reached similar conclusions. See *Maggert v. Hanks, 131 F.3d at 671*; *Sommers v. Iowa Civil Rights Comm., 337 N.W.2d 470, 473 (Iowa 1983)*; *Doe v. Minn. Dept. of Pub. Welfare, 257 N.W.2d 816, 819 (Minn. 1977)*. (Footnote 49)

. . .

However, even assuming some debate remains in the medical profession regarding acceptance of the Benjamin standards or the scientific proof of the therapeutic efficacy of sex reassignment surgery, a complete consensus on the advisability or efficacy of a procedure is not necessary for a deduction under *section 213*. See, e.g., *Dickie v. Commissioner, T.C. Memo. 1999-138* (naturopathic cancer treatments deductible); *Crain v. Commissioner, T.C. Memo. 1986-138* (holistic cancer treatments deductible but for failure of substantiation); *Tso v. Commissioner, T.C. Memo. 1980-399* (Navajo "sings" (healing ceremonies) deductible); *Rev. Rul. 72-593, 1972-2 C.B. 180* (acupuncture deductible); *Rev. Rul. 55-261, 1955-1 C.B. 307* (services of Christian Science practitioners deductible). It is sufficient if the circumstances "justify a reasonable belief the . . . [treatment] would be efficacious". *Havey v. Commissioner, 12 T.C. at 412*. That standard has been fully satisfied here. The evidence is clear that a substantial segment of the psychiatric profession has been persuaded of the advisability and efficacy of hormone therapy and sex reassignment surgery as treatment for GID, as have many courts.

Finally, the Court does not doubt that, as respondent's expert Dr. Schmidt points out in his report, some medical professionals shun transsexual patients and consider cross-gender hormone therapy and sex reassignment surgery unethical because they disrupt what is considered to be a "normally functioning hormonal status or destroy healthy, normal tissue." However, the Internal Revenue Service has not heretofore sought to deny the deduction for a medical procedure because it was considered unethical by some. See, e.g., *Rev. Rul. 73-201, 1973-1 C.B. 140* (cost of abortion legal under State law is deductible medical care under *section 213*); *Rev. Rul. 55-261*, *supra* (services of Christian Science practitioners deductible). Absent a showing of illegality, any such ground for denying a medical expense deduction finds no support in *section 213*.

In sum, the evidence establishes that cross-gender hormone therapy and sex reassignment surgery are well-recognized and accepted treatments for severe GID. The evidence demonstrates that hormone therapy and sex reassignment surgery to alter appearance (and, to some degree, function) are undertaken by GID sufferers in an effort to alleviate the distress and suffering occasioned by GID, and that the procedures have positive results in this regard in the opinion of many in the psychiatric profession, including petitioner's and respondent's experts. Thus, a "reasonable belief" in the procedures' efficacy is justified. See *Havey v. Commissioner, supra at 412*. Alleviation of suffering falls within the regulatory and caselaw definitions of treatment, see *Starrett v. Commissioner, supra*; *sec. 1.213-1(e)(1), Income Tax Regs.*, and to "relieve" is to "treat" according to standard dictionary definitions. We therefore conclude and hold that petitioner's hormone therapy and sex reassignment surgery "[treated] . . . disease" within the meaning of *section 213(d)(9)(B)* and accordingly are not "cosmetic surgery" as defined in that section.

While our holding that cross-gender hormone therapy and sex reassignment surgery are not cosmetic surgery is based upon the specific definition of that term in *section 213(d)(9)(B)*, our conclusion that these procedures treat disease also finds support in the opinions of other courts that have concluded for various nontax purposes that sex reassignment surgery and/or hormone therapy are not cosmetic procedures. See, e.g., *Meriwether v. Faulkner, 821 F.2d at 411-413* (rejecting, in an *Eighth Amendment* case, the District Court's conclusion that a transsexual

inmate's requested hormone therapy was "'elective medication' necessary only to maintain 'a physical appearance and life style'" and noting that numerous courts have "expressly rejected the notion that transsexual surgery is properly characterized as cosmetic surgery, concluding instead that such surgery is medically necessary for the treatment of transsexualism"); *Pinneke v. Preisser, 623 F.2d 546, 548 (8th Cir. 1980)* (State Medicaid plan may not deny reimbursement for sex reassignment surgery on grounds that it is "cosmetic surgery"); *Rush v. Parham, 440 F. Supp. 383, 390-391 (N.D. Ga. 1977)* (to same effect), revd. on other grounds *625 F.2d 1150 (5th Cir. 1980)*; *J.D. v. Lackner, 80 Cal. App. 3d 90, 145 Cal. Rptr. 570, 572 (Ct. App. 1978)* (sex reassignment surgery is not "cosmetic surgery" as defined in State Medicaid statute; "We do not believe, by the wildest stretch of the imagination, that such surgery can reasonably and logically be characterized as cosmetic."); *G.B. v. Lackner, 80 Cal. App. 3d 64, 145 Cal. Rptr. 555, 559 (Ct. App. 1978)* (to same effect); *Davidson v. Aetna Life & Cas. Ins. Co., 101 Misc. 2d 1, 420 N.Y.S.2d 450, 453 (N.Y. Sup. Ct. 1979)* (sex reassignment surgery is not "cosmetic surgery" within meaning of medical insurance policy exclusion; sex reassignment surgery "is performed to correct a psychological defect, and not to improve muscle tone or physical appearance. . . . [It] cannot be considered to be of a strictly cosmetic nature."). But see *Smith v. Rasmussen, 249 F.3d 755, 759-761 (8th Cir. 2001)* (denial of reimbursement for sex reassignment surgery proper where State Medicaid plan designated sex reassignment surgery as "cosmetic surgery" and alternate GID treatments available).

2. *Breast Augmentation Surgery*

We consider separately the qualification of petitioner's breast augmentation surgery as deductible medical care, because respondent makes the additional argument that this surgery was not necessary to the treatment of GID in petitioner's case because petitioner already had normal breasts before her surgery. Because petitioner had normal breasts before her surgery, respondent argues, her breast augmentation surgery was "directed at improving . . . [her] appearance and [did] not meaningfully promote the proper function of the body or prevent or treat illness or disease", placing the surgery squarely within the *section 213(d)(9)(B)* definition of "cosmetic surgery". Petitioner has not argued, or adduced evidence, that the breast augmentation surgery ameliorated a deformity within the meaning of *section 213(d)(9)(A)*. Accordingly, if the breast augmentation surgery meets the definition of "cosmetic surgery" in *section 213(d)(9)(B)*, it is not "medical care" that is deductible pursuant to *section 213(a)*.

For the reasons discussed below, we find that petitioner has failed to show that her breast augmentation surgery "[treated]" GID. The Benjamin standards provide that breast augmentation surgery for a male-to-female patient "may be performed if the physician prescribing hormones and the surgeon have documented that breast enlargement after undergoing hormone treatment for 18 months is not sufficient for comfort in the social gender role." The record contains no documentation from the endocrinologist prescribing petitioner's hormones at the time of her surgery. To the extent Ms. Ellaborn's or Dr. Coleman's recommendation letters to Dr. Meltzer might be considered substitute documentation for that of the hormone-prescribing physician, Ms. Ellaborn's two letters are silent concerning the condition of petitioner's presurgical breasts, while Dr. Coleman's letter states that petitioner "appears to have significant breast development

secondary to hormone therapy". The surgeon here, Dr. Meltzer, recorded in his presurgical notes that petitioner had "approximately B cup breasts with a very nice shape." (Footnote 51) Thus, all of the contemporaneous documentation of the condition of petitioner's breasts before the surgery suggests that they were within a normal range of appearance, and there is no documentation concerning petitioner's comfort level with her breasts "in the social gender role".

Dr. Meltzer testified with respect to his notes that his reference to the "very nice shape" of petitioner's breasts was in comparison to the breasts of other transsexual males on feminizing hormones and that petitioner's breasts exhibited characteristics of gynecomastia, a condition where breast mass is concentrated closer to the nipple as compared to the breasts of a genetic female. Nonetheless, given the contemporaneous documentation of the breasts' apparent normalcy and the failure to adhere to the Benjamin standards' requirement to document breast-engendered anxiety to justify the surgery, we find that petitioner's breast augmentation surgery did not fall within the treatment protocols of the Benjamin standards and therefore did not "treat" GID within the meaning of *section 213(d)(9)(B)*. Instead, the surgery merely improved her appearance.

The breast augmentation surgery is therefore "cosmetic surgery" under the *section 213(d)(9)(B)* definition unless it "meaningfully [promoted] the proper function of the body". The parties have stipulated that petitioner's breast augmentation "did not promote the proper function of her breasts". Although petitioner expressly declined to stipulate that the breast augmentation "did not meaningfully promote the proper functioning of her body within the meaning of *I.R.C. section 213*", we conclude that the stipulation to which she did agree precludes a finding on this record, given the failure to adhere to the Benjamin standards, that the breast augmentation surgery "meaningfully [promoted] the proper function of the body" within the meaning of *section 213(d)(9)(B)*. Consequently, the breast augmentation surgery is "cosmetic surgery" that is excluded from deductible "medical care".

E. *Medical Necessity*

Finally, respondent argues that petitioner's sex reassignment surgery was not "medically necessary", which respondent contends is a requirement intended by Congress to apply to procedures directed at improving appearance, as evidenced by certain references to "medically necessary" procedures in the legislative history of the enactment of the cosmetic surgery exclusion of *section 213(d)(9)*. (Footnote 54) Respondent in effect argues that the legislative history's contrast of nondeductible cosmetic surgery with "medically necessary" procedures evidences an intent by Congress to impose a requirement in *section 213(d)(9)* of medical necessity for the deduction of procedures affecting appearance. We find it unnecessary to resolve respondent's claim that *section 213(d)(9)* should be interpreted to require a showing of "medical necessity" notwithstanding the absence of that phrase in the statute. That is so because respondent's contention would not bar the deductions at issue, inasmuch as we are persuaded, as discussed below, that petitioner has shown that her sex reassignment surgery was medically necessary.

The mental health professional who treated petitioner concluded that petitioner's GID was severe, that sex reassignment surgery was medically necessary, and that petitioner's prognosis without it was poor. Given Dr. Brown's expert testimony, the judgment of the professional treating petitioner, the agreement of all three experts that untreated GID can result in self-mutilation and suicide, and, as conceded by Dr. Schmidt, the views of a significant segment of knowledgeable professionals that sex reassignment surgery is medically necessary for severe GID, the Court is persuaded that petitioner's sex reassignment surgery was medically necessary.

IV. *Conclusion*

The evidence amply supports the conclusions that petitioner suffered from severe GID, that GID is a well-recognized and serious mental disorder, and that hormone therapy and sex reassignment surgery are considered appropriate and effective treatments for GID by psychiatrists and other mental health professionals who are knowledgeable concerning the condition. Given our holdings that GID is a "disease" and that petitioner's hormone therapy and sex reassignment surgery "[treated]" it, petitioner has shown the "existence . . . of a disease" and a payment for goods or services "directly or proximately related" to its treatment. See *Jacobs v. Commissioner, 62 T.C. at 818*. She likewise satisfies the "but for" test of Jacobs, which requires a showing that the procedures were an essential element of the treatment and that they would not have otherwise been undertaken for nonmedical reasons. Petitioner's hormone therapy and sex reassignment surgery were essential elements of a widely accepted treatment protocol for severe GID. The expert testimony also establishes that given (1) the risks, pain, and extensive rehabilitation associated with sex reassignment surgery, (2) the stigma encountered by persons who change their gender role and appearance in society, and (3) the expert-backed but commonsense point that the desire of a genetic male to have his genitals removed requires an explanation beyond mere dissatisfaction with appearance (such as GID or psychosis), petitioner would not have undergone hormone therapy and sex reassignment surgery except in an effort to alleviate the distress and suffering attendant to GID. Respondent's contention that petitioner undertook the surgery and hormone treatments to improve appearance is at best a superficial characterization of the circumstances that is thoroughly rebutted by the medical evidence.

Petitioner has shown that her hormone therapy and sex reassignment surgery treated disease within the meaning of *section 213* and were therefore not cosmetic surgery. Thus petitioner's expenditures for these procedures were for "medical care" as defined in *section 213(d)(1)(A)*, for which a deduction is allowed under *section 213(a)*.

. . .

Reviewed by the Court.

COLVIN, COHEN, THORNTON, MARVEL, WHERRY, PARIS, and MORRISON, JJ., agree with this majority opinion.

FOOTNOTES:

30. Petitioner also argues that the expenditures for the procedures at issue are deductible because they affected a structure or function of the body (within the meaning of *sec.213(d)(1)(A)*) and were not "cosmetic surgery" under *sec. 213(d)(9)* because they were not "directed at improving the patient's appearance" and because they "meaningfully [promoted]the proper function of the body" (within the meaning of *sec.213(d)(9)(B)*). Given our conclusion, discussed hereinafter, that the expenditures for petitioner's hormone therapy and sex reassignment surgery are deductible because they "[treated] . . .disease" within the meaning of *sec. 213(d)(1)(A)* and *(9)(B)*, we need not resolve the foregoing issues with respect to those expenditures. We consider petitioner's arguments with respect to the breast augmentation surgery more fully *infra*.

33. The experts all agree and the Court accepts, for purposes of deciding this case, that no organic or biological cause of GID has been demonstrated.

34. In contrast, the testimony of the other two experts presents specialized medical knowledge concerning the nature of GID. These facts bear upon whether GID should be considered to qualify as a "disease," as the Court interprets that term.

35. Dr. Dietz' testimony as a forensic psychiatrist is proper and useful regarding other matters, such as the state of knowledge concerning organic origins of mental conditions, and the Court relies on the testimony for certain other purposes, as discussed *infra*.

37. We recognize that the DSM-IV-TR cautions that inclusion of a diagnostic category therein "does not imply that the condition meets legal or other non-medical criteria for what constitutes mental disease, mental disorder, or mental disability." For purposes of our decision in this case, GID's inclusion in the DSM-IV-TR (and its predecessors) evidences widespread recognition of the condition in the psychiatric profession. Indisputably, the issue of whether GID is a "disease" for purposes of *sec. 213* is for this Court to decide, and we do so on the basis of a range of factors, including GID's inclusion in the DSM-IV-TR.

39. Dr. Schmidt attributed his misgivings in part to the "lack of a scientifically supported etiology of the condition", but as petitioner's expert Dr. Brown pointed out, the same could be said of most mental disorders listed in the DSM.

47. Dr. Schmidt cited an article by Dr. Paul McHugh as evidence of the view of sex reassignment surgery as unethical and not medically necessary. On cross-examination, Dr. Schmidt acknowledged that the McHugh article was not published in a peer-reviewed medical journal but instead in a religious publication. See McHugh, "Surgical Sex", First Things, The Institute on Religion and Public Life (November 2004), http://www.firstthings.com/index.php (online edition). Respondent likewise cites the McHugh article on brief as medical opinion, without disclosing the source of its publication.

49. Judge Posner wrote in *Maggert v. Hanks, 131 F.3d at 671*:

> The cure for the male transsexual consists not of psychiatric treatment designed to make the patient content with his biological sexual identity—that doesn't work—but of estrogen therapy designed to create the secondary sexual characteristics of a woman followed by the surgical removal of the genitals and the construction of a vagina-substitute out of peniletissue. [Citations omitted.]
>
> . . .

51. Even petitioner conceded in her testimony that she had "a fair amount of breast development . . . from the hormones" at the time of her presurgical consultation with Dr. Meltzer.

54. Respondent relies upon the following excerpts from the report of the Senate Finance Committee issued in connection with the enactment of the cosmetic surgery exclusion of *sec.213(d)(9)*:

> Expenses for purely cosmetic procedures that are not medically necessary are, in essence, voluntary personal expenses, which like other personal expenditures (e.g., food and clothing) generally should not be deductible in computing taxable income.
>
> . . .
>
> . . . [E]xpenses for procedures that are medically necessary to promote the proper function of the body and only incidentally affect the patient's appearance . . . continue to be deductible . . . [136 Cong. Rec.30485, 30570 (1990).]

The Senate Finance Committee report is set out more fully *supra* note 27. We note that the discussion of *sec. 213(d)(9)* in the conference report issued with respect to the agreed final version of *sec. 213(d)(9)* contains no reference to "medical necessity" or any variant of the phrase. See H. Conf. Rept. 101-964, at 1031(1990), *1991-2 C.B. 560, 562*.

Page 251 Amend Paragraph 1 to note that section 303 of the Heroes Earnings Assistance and Relief Tax Act of 2008, P.L. 110-245, amended section 6651(a) to provide an increase to $135 in the minimum penalty for failure to file a tax return.

Page 262 Note in connection with the carryover paragraph discussion of the rules under Circular 230 for advising a client concerning a tax return position: On May 31,

2011, the Service adopted final revisions to section 10.34(a) of Circular 230 to conform with recent changes to the return preparer penalty under section 6694(a). 2011 TNT 105-1 (June 1, 2011). Section 6694(a) imposes a penalty on a tax return preparer who "prepares any return or claim of refund with respect to which any part of an understatement of liability is due to" an "unreasonable" position. A tax return position is unreasonable unless there is either (a) substantial authority for that position, or (b) the preparer discloses the position and there is a reasonable basis for the position.

Page 264 The Ninth Circuit affirmed the Tax Court's decision in *Sklar v. Commissioner*, 549 F. 3d 1252 (9th Cir. 2008). See, Allan J. Samansky, "Deductibility of Contributions to Religious Institutions," 24 Va.Tx. Rev. 65 (2004). Professor Samansky analyzes quid pro quo contributions to religious institutions. Under the framework he develops in the article. Professor Samansky takes the position that amounts paid by Scientologists for auditing, an intangible religious benefit, should be deductible, but that amounts paid for training, a form of religious education, should not be.

Page 290 Add to Paragraph 2 of number 5: Section 202 of the Emergency Economic Stabilization Act of 2008, Energy Improvement and Extension Act of 2008, and Tax Extenders and the Alternative Minimum Tax Act of 2008, P.L. 110-343, extended the above-the-line deduction for higher education expenses under section 222 through 2009. Congress extended the deduction through 2011 as part of the Tax Relief Act of 2010. Sec. 724(b). Congress again extended the deduction through 2013 as part of the 2012 Act. Sec. 207(a).

Page 290 Add also to Paragraph 2 of number 5: Section 1004(a) of the American Recovery and Reinvestment Act of 2009, P.L. 111-5, modifies and increases the Hope Credit for tax years 2009 and 2010 only, naming it for those two years the "American Opportunity Tax Credit." Look at new section 25A(i). The Tax Relief Act of 2010, section 103(d), extends the American Opportunity Tax Credit through 2012. The 2012 Act extended section 25A(i) for five years through 2017. Sec. 103(a)(1).

Page 318 Add to footnote 138: Section 1201(a) of the American Recovery and Reinvestment Act of 2009, P.L. 111–5, extended bonus depreciation under section 168(k) through 2009. The Economic Stimulus Act of 2008 had only extended it through 2008. This extension also applies to the calculation of the maximum allowable first-year deduction on luxury cars place in service in 2009. The Small Business Jobs Act of 2010, P.L. 111–312, extended 50% first-year bonus depreciation through 2010. The Tax Relief Act of 2010 increased 50% bonus depreciation to 100% for qualified investments made after September 8, 2010 and before January 1, 2012. Section 401(e)(2). The Act also allows 50% bonus depreciation for qualified property placed in service during 2012.

The 2012 Act extended the 50% bonus depreciation for property placed in service before January 1, 2014. Section 331(a).

Page 324 Add to the carryover paragraph in connection with section 280F: The changes noted above regarding bonus depreciation under section 168(k) also apply to the allowable first-year amount under section 280F for passenger automobiles. That is, section 168(k)(2)(F) (not in the Code book), provides an increase of $8,000 in the amount of depreciation allowed on passenger automobiles governed by section 280F.

Page 325 See amendment above to page 27, citing the GAO Report: Understanding the Tax Reform Debate: Background, Criteria, & Questions (Sept. 2005). *See also* amendment to page 333 below, citing The Moment of Truth: Report of the National Commission on Fiscal Responsibility and Reform (Dec. 2010), the Commission's final report.

Page 333 Add new paragraph to the end of footnote 157: On February 18, 2010, President Obama signed an executive order establishing the bipartisan National Commission on Fiscal Responsibility and Reform chaired by Erskine Bowles and Alan Simpson. The Committee issued its report and recommendations on December 1, 2010: The Moment of Truth: Report of the National Commission on Fiscal Responsibility and Reform. You can find this report at www.fiscalcommission.gov. The Committee recommended a combination of discretionary spending cuts, comprehensive tax reform, health care cost containment, mandatory savings, social security reform, and process changes. The Committee failed to reach agreement with the requisite vote of 14 members to send the Report to Congress; rather, the vote was 11 to 7.

Page 365 Add to the end of footnote 14: section 1(h)(11) was scheduled to sunset at the end of 2012. As a result of the 2012 Act, the rates provided before the 2012 Act on qualified dividends continues to apply to taxpayers whose taxable incomes do not reach the 39.6% threshold (that is, $400,000 for single taxpayers and $450,000 for joint returns). For these latter taxpayers, the rate on qualified dividends will be 20%.

Page 408 Omit *Mueller v. Commissioner*, and the questions following it, and replace it with the following case:

UNITED STATES v. WINDSOR

SUPREME COURT OF THE UNITED STATES

133 S. Ct. 2675*; *2013 U.S. LEXIS 4921*; *81 U.S.L.W. 4633*; *2013-2 U.S. Tax Cas. (CCH) P50,400*; *111 A.F.T.R.2d (RIA) 2385

June 26, 2013

JUSTICE KENNEDY delivered the opinion of the Court.

Two women then resident in New York were married in a lawful ceremony in Ontario, Canada, in 2007. Edith Windsor and Thea Spyer returned to their home in New York City. When Spyer died in 2009, she left her entire estate to Windsor. Windsor sought to claim the estate tax exemption for surviving spouses. She was barred from doing so, however, by a federal law, the Defense of Marriage Act, which excludes a same-sex partner from the definition of "spouse" as that term is used in federal statutes. Windsor paid the taxes but filed suit to challenge the constitutionality of this provision. The United States District Court and the Court of Appeals ruled that this portion of the statute is unconstitutional and ordered the United States to pay Windsor a refund. This Court granted certiorari and now affirms the judgment in Windsor's favor.

I

In 1996, as some States were beginning to consider the concept of same-sex marriage, see, *e.g.*, *Baehr v. Lewin, 74 Haw. 530, 852 P. 2d 44 (1993)*, and before any State had acted to permit it, Congress enacted the Defense of Marriage Act (DOMA), 110 Stat. 2419. DOMA contains two operative sections: *Section 2*, which has not been challenged here, allows States to refuse to recognize same-sex marriages performed under the laws of other States. See *28 U. S. C. §1738C.*

Section 3 is at issue here. It amends the Dictionary Act in *Title 1, §7, of the United States Code* to provide a federal definition of "marriage" and "spouse." *Section 3 of DOMA* provides as follows:

> "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." *1 U. S. C. §7.*

The definitional provision does not by its terms forbid States from enacting laws permitting same-sex marriages or civil unions or providing state benefits to residents in that status. The enactment's comprehensive definition of marriage for purposes of all federal statutes and other regulations or directives covered by its terms, however, does control over 1,000 federal laws in

which marital or spousal status is addressed as a matter of federal law. See GAO, D. Shah, Defense of Marriage Act: Update to Prior Report 1 (GAO-04-353R, 2004).

Edith Windsor and Thea Spyer met in New York City in 1963 and began a long-term relationship. Windsor and Spyer registered as domestic partners when New York City gave that right to same-sex couples in 1993. Concerned about Spyer's health, the couple made the 2007 trip to Canada for their marriage, but they continued to reside in New York City. The State of New York deems their Ontario marriage to be a valid one. See *699 F. 3d 169, 177-178 (CA2 2012)*.

Spyer died in February 2009, and left her entire estate to Windsor. Because DOMA denies federal recognition to same-sex spouses, Windsor did not qualify for the marital exemption from the federal estate tax, which excludes from taxation "any interest in property which passes or has passed from the decedent to his surviving spouse." *26 U. S. C. §2056(a)*. Windsor paid $363,053 in estate taxes and sought a refund. The Internal Revenue Service denied the refund, concluding that, under DOMA, Windsor was not a "surviving spouse." Windsor commenced this refund suit in the United States District Court for the Southern District of New York. She contended that DOMA violates the guarantee of equal protection, as applied to the Federal Government through the *Fifth Amendment*.

While the tax refund suit was pending, the Attorney General of the United States notified the Speaker of the House of Representatives, pursuant to *28 U. S. C. §530D*, that the Department of Justice would no longer defend the constitutionality of DOMA's *§3*. Noting that "the Department has previously defended DOMA against . . . challenges involving legally married same-sex couples," App. 184, the Attorney General informed Congress that "the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny." *Id., at 191*. The Department of Justice has submitted many *§530D* letters over the years refusing to defend laws it deems unconstitutional, when, for instance, a federal court has rejected the Government's defense of a statute and has issued a judgment against it. This case is unusual, however, because the *§530D* letter was not preceded by an adverse judgment. The letter instead reflected the Executive's own conclusion, relying on a definition still being debated and considered in the courts, that heightened equal protection scrutiny should apply to laws that classify on the basis of sexual orientation.

Although "the President . . . instructed the Department not to defend the statute in *Windsor*," he also decided "that *Section 3* will continue to be enforced by the Executive Branch" and that the United States had an "interest in providing Congress a full and fair opportunity to participate in the litigation of those cases." *Id., at 191-193*. The stated rationale for this dual-track procedure (determination of unconstitutionality coupled with ongoing enforcement) was to "recogniz[e] the judiciary as the final arbiter of the constitutional claims raised." *Id., at 192*.

In response to the notice from the Attorney General, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives voted to intervene in the litigation to defend the constitutionality of *§3 of DOMA*. The Department of Justice did not oppose limited intervention by BLAG. The District Court denied BLAG's motion to enter the suit as of right, on the rationale that the United States already was represented by the Department of Justice. The District Court,

however, did grant intervention by BLAG as an interested party. See *Fed. Rule Civ. Proc. 24(a)(2)*.

On the merits of the tax refund suit, the District Court ruled against the United States. It held that *§3 of DOMA* is unconstitutional and ordered the Treasury to refund the tax with interest. Both the Justice Department and BLAG filed notices of appeal, and the Solicitor General filed a petition for certiorari before judgment. Before this Court acted on the petition, the Court of Appeals for the Second Circuit affirmed the District Court's judgment. It applied heightened scrutiny to classifications based on sexual orientation, as both the Department and Windsor had urged. The United States has not complied with the judgment. Windsor has not received her refund, and the Executive Branch continues to enforce *§3 of DOMA*.

. . . [The Court's discussion of standing issues is omitted.]

III

When at first Windsor and Spyer longed to marry, neither New York nor any other State granted them that right. After waiting some years, in 2007 they traveled to Ontario to be married there. It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage. For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization. That belief, for many who long have held it, became even more urgent, more cherished when challenged. For others, however, came the beginnings of a new perspective, a new insight. Accordingly some States concluded that same-sex marriage ought to be given recognition and validity in the law for those same-sex couples who wish to define themselves by their commitment to each other. The limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen in New York and certain other States as an unjust exclusion.

Slowly at first and then in rapid course, the laws of New York came to acknowledge the urgency of this issue for same-sex couples who wanted to affirm their commitment to one another before their children, their family, their friends, and their community. And so New York recognized same-sex marriages performed elsewhere; and then it later amended its own marriage laws to permit same-sex marriage. New York, in common with, as of this writing, 11 other States and the District of Columbia, decided that same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons. After a statewide deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage, New York acted to enlarge the definition of marriage to correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood. See Marriage Equality Act, 2011 N. Y. Laws 749 (codified at *N. Y. Dom. Rel. Law Ann. §§10-a*, *10-b*, *13* (West 2013)).

Against this background of lawful same-sex marriage in some States, the design, purpose, and effect of DOMA should be considered as the beginning point in deciding whether it is valid under the Constitution. By history and tradition the definition and regulation of marriage, as will be discussed in more detail, has been treated as being within the authority and realm of the

separate States. Yet it is further established that Congress, in enacting discrete statutes, can make determinations that bear on marital rights and privileges. Just this Term the Court upheld the authority of the Congress to pre-empt state laws, allowing a former spouse to retain life insurance proceeds under a federal program that gave her priority, because of formal beneficiary designation rules, over the wife by a second marriage who survived the husband. *Hillman v. Maretta, 569 U. S. ___, 133 S. Ct. 1943, 186 L. Ed. 2d 43 (2013)*; see also *Ridgway v. Ridgway, 454 U. S. 46, 102 S. Ct. 49, 70 L. Ed. 2d 39 (1981)*; *Wissner v. Wissner, 338 U. S. 655, 70 S. Ct. 398, 94 L. Ed. 424 (1950)*. This is one example of the general principle that when the Federal Government acts in the exercise of its own proper authority, it has a wide choice of the mechanisms and means to adopt. See *McCulloch v. Maryland, 17 U.S. 316, 4 Wheat. 316, 421, 4 L. Ed. 579 (1819)*. Congress has the power both to ensure efficiency in the administration of its programs and to choose what larger goals and policies to pursue.

Other precedents involving congressional statutes which affect marriages and family status further illustrate this point. In addressing the interaction of state domestic relations and federal immigration law Congress determined that marriages "entered into for the purpose of procuring an alien's admission [to the United States] as an immigrant" will not qualify the noncitizen for that status, even if the noncitizen's marriage is valid and proper for state-law purposes. *8 U. S. C. §1186a(b)(1) (2006 ed. and Supp. V)*. And in establishing income-based criteria for Social Security benefits, Congress decided that although state law would determine in general who qualifies as an applicant's spouse, common-law marriages also should be recognized, regardless of any particular State's view on these relationships. *42 U. S. C. §1382c(d)(2)*.

Though these discrete examples establish the constitutionality of limited federal laws that regulate the meaning of marriage in order to further federal policy, DOMA has a far greater reach; for it enacts a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations. And its operation is directed to a class of persons that the laws of New York, and of 11 other States, have sought to protect. See *Goodridge v. Department of Public Health, 440 Mass. 309, 798 N. E. 2d 941 (2003)*; An Act Implementing the Guarantee of Equal Protection Under the Constitution of the State for Same Sex Couples, 2009 Conn. Pub. Acts no. 09-13; *Varnum v. Brien, 763 N. W. 2d 862 (Iowa 2009)*; *Vt. Stat. Ann., Tit. 15, §8* (2010); *N. H. Rev. Stat. Ann. §457:1-a* (West Supp. 2012); Religious Freedom and Civil Marriage Equality Amendment Act of 2009, 57 D. C. Reg. 27 (Dec. 18, 2009); *N. Y. Dom. Rel. Law Ann. §10-a* (West Supp. 2013); *Wash. Rev. Code §26.04.010* (2012); Citizen Initiative, Same-Sex Marriage, Question 1 (Me. 2012) (results online at http://www.maine.gov/sos/cec/elec/2012/tab - ref-2012.html (all Internet sources as visited June 18, 2013, and available in Clerk of Court's case file)); *Md. Fam. Law Code Ann. §2-201* (Lexis 2012); An Act to Amend Title 13 of the Delaware Code Relating to Domestic Relations to Provide for Same-Gender Civil Marriage and to Convert Existing Civil Unions to Civil Marriages, 79 Del. Laws ch. 19 (2013); An act relating to marriage; providing for civil marriage between two persons; providing for exemptions and protections based on religious association, 2013 Minn. Laws ch. 74; An Act Relating to Domestic Relations--Persons Eligible to Marry, 2013 R. I. Laws ch. 4.

In order to assess the validity of that intervention it is necessary to discuss the extent of the state power and authority over marriage as a matter of history and tradition. State laws defining

and regulating marriage, of course, must respect the constitutional rights of persons, see, *e.g., Loving v. Virginia, 388 U. S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967)*; but, subject to those guarantees, "regulation of domestic relations" is "an area that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa, 419 U. S. 393, 404, 95 S. Ct. 553, 42 L. Ed. 2d 532 (1975)*.

The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens. See *Williams v. North Carolina, 317 U. S. 287, 298, 63 S. Ct. 207, 87 L. Ed. 279 (1942)* ("Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders"). The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the "[p]rotection of offspring, property interests, and the enforcement of marital responsibilities." *Ibid*. "[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce." *Haddock v. Haddock, 201 U. S. 562, 575, 26 S. Ct. 525, 50 L. Ed. 867, 4 Ohio L. Rep. 69 (1906)*; see also *In re Burrus, 136 U. S. 586, 593-594, 10 S. Ct. 850, 34 L. Ed. 500 (1890)* ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States").

Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations. In *De Sylva v. Ballentine, 351 U. S. 570, 76 S. Ct. 974, 100 L. Ed. 1415 (1956)*, for example, the Court held that, "[t]o decide who is the widow or widower of a deceased author, or who are his executors or next of kin," under the Copyright Act "requires a reference to the law of the State which created those legal relationships" because "there is no federal law of domestic relations." *Id., at 580, 76 S. Ct. 974, 100 L. Ed. 1415*. In order to respect this principle, the federal courts, as a general rule, do not adjudicate issues of marital status even when there might otherwise be a basis for federal jurisdiction. See *Ankenbrandt v. Richards, 504 U. S. 689, 703, 112 S. Ct. 2206, 119 L. Ed. 2d 468 (1992)*. Federal courts will not hear divorce and custody cases even if they arise in diversity because of "the virtually exclusive primacy . . . of the States in the regulation of domestic relations." *Id., at 714, 112 S. Ct. 2206, 119 L. Ed. 2d 468* (Blackmun, J., concurring in judgment).

The significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for "when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States." *Ohio ex rel. Popovici v. Agler, 280 U. S. 379, 383-384, 50 S. Ct. 154, 74 L. Ed. 489 (1930)*. Marriage laws vary in some respects from State to State. For example, the required minimum age is 16 in Vermont, but only 13 in New Hampshire. Compare *Vt. Stat. Ann., Tit. 18, §5142* (2012), with *N. H. Rev. Stat. Ann. §457:4* (West Supp. 2012). Likewise the permissible degree of consanguinity can vary (most States permit first cousins to marry, but a handful—such as Iowa and Washington, see *Iowa Code §595.19* (2009); *Wash. Rev. Code §26.04.020* (2012)—prohibit the practice). But these rules are in every event consistent within each State.

Against this background DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next. Despite these considerations, it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance. The State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism. Here the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community. DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage. "'[D]is-criminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'" *Romer v. Evans, 517 U. S. 620, 633, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996)* (quoting *Louisville Gas & Elec. Co. v. Coleman, 277 U. S. 32, 37-38, 48 S. Ct. 423, 72 L. Ed. 770 (1928))*.

The Federal Government uses this state-defined class for the opposite purpose--to impose restrictions and disabilities. That result requires this Court now to address whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the *Fifth Amendment*. What the State of New York treats as alike the federal law deems unlike by a law designed to injure the same class the State seeks to protect.

In acting first to recognize and then to allow same-sex marriages, New York was responding "to the initiative of those who [sought] a voice in shaping the destiny of their own times." *Bond v. United States, 564 U. S. ___, ___, 131 S. Ct. 2355, 180 L. Ed. 2d 269 (2011) (slip op., at 9*). These actions were without doubt a proper exercise of its sovereign authority within our federal system, all in the way that the Framers of the Constitution intended. The dynamics of state government in the federal system are to allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other.

The States' interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits. Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form "but one element in a personal bond that is more enduring." *Lawrence v. Texas, 539 U. S. 558, 567, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003)*. By its recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages, New York sought to give further protection and dignity to that bond. For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages. It reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.

IV

DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government. See *U. S. Const., Amdt. 5*; *Bolling v. Sharpe, 347 U. S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954)*. The Constitution's guarantee of equality "must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot" justify disparate treatment of that group. *Department of Agriculture v. Moreno, 413 U. S. 528, 534-535, 93 S. Ct. 2821, 37 L. Ed. 2d 782 (1973)*. In determining whether a law is motived by an improper animus or purpose, "'[d]iscriminations of an unusual character'" especially require careful consideration. *Supra,* at 19 (quoting *Romer, supra, at 633, 116 S. Ct. 1620, 134 L. Ed. 2d 855*). DOMA cannot survive under these principles. The responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact the State's classifications have in the daily lives and customs of its people. DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.

The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence. The House Report announced its conclusion that "it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage. . . . H. R. 3396 is appropriately entitled the 'Defense of Marriage Act.' The effort to redefine 'marriage' to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage." H. R. Rep. No. 104-664, pp. 12-13 (1996). The House concluded that DOMA expresses "both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." *Id.,* at 16 (footnote deleted). The stated purpose of the law was to promote an "interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws." *Ibid.* Were there any doubt of this far-reaching purpose, the title of the Act confirms it: The Defense of Marriage.

The arguments put forward by BLAG are just as candid about the congressional purpose to influence or interfere with state sovereign choices about who may be married. As the title and dynamics of the bill indicate, its purpose is to discourage enactment of state same-sex marriage laws and to restrict the freedom and choice of couples married under those laws if they are enacted. The congressional goal was "to put a thumb on the scales and influence a state's decision as to how to shape its own marriage laws." *Massachusetts, 682 F. 3d, at 12-13*. The Act's demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law. This raises a most serious question under the Constitution's *Fifth Amendment*.

DOMA's operation in practice confirms this purpose. When New York adopted a law to permit same-sex marriage, it sought to eliminate inequality; but DOMA frustrates that objective through a system-wide enactment with no identified connection to any particular area of federal law. DOMA writes inequality into the entire United States Code. The particular case at hand concerns the estate tax, but DOMA is more than a simple determination of what should or should not be allowed as an estate tax refund. Among the over 1,000 statutes and numerous federal regulations that DOMA controls are laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits.

DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and responsibilities. By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect. By this dynamic DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence, 539 U. S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508*, and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways. By its great reach, DOMA touches many aspects of married and family life, from the mundane to the profound. It prevents same-sex married couples from obtaining government healthcare benefits they would otherwise receive. See *5 U. S. C. §§8901(5)*, *8905*. It deprives them of the Bankruptcy Code's special protections for domestic-support obligations. See *11 U. S. C. §§101(14A)*, *507(a)(1)(A)*, *523(a)(5)*, *523(a)(15)*. It forces them to follow a complicated procedure to file their state and federal taxes jointly. Technical Bulletin TB-55, 2010 Vt. Tax LEXIS 6 (Oct. 7, 2010); Brief for Federalism Scholars as *Amici Curiae* 34. It prohibits them from being buried together in veterans' cemeteries. National Cemetery Administration Directive 3210/1, p. 37 (June 4, 2008).

For certain married couples, DOMA's unequal effects are even more serious. The federal penal code makes it a crime to "assaul[t], kidna[p], or murde[r] . . . a member of the immediate family" of "a United States official, a United States judge, [or] a Federal law enforcement officer," *18 U. S. C. §115(a)(1)(A)*, with the intent to influence or retaliate against that official, *§115(a)(1)*. Although a "spouse" qualifies as a member of the officer's "immediate family," *§115(c)(2),* DOMA makes this protection inapplicable to same-sex spouses.

DOMA also brings financial harm to children of same-sex couples. It raises the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses. See *26 U. S. C. §106*; *Treas. Reg. §1.106-1*, *26 CFR §1.106-1 (2012)*; IRS *Private Letter Ruling 9850011 (Sept. 10, 1998)*. And it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security. See Social Security Administration, Social Security Survivors Benefits 5 (2012) (benefits available to a surviving spouse caring for the couple's child), online at http://www.ssa.gov/pubs/EN-05-10084.pdf.

DOMA divests married same-sex couples of the duties and responsibilities that are an essential part of married life and that they in most cases would be honored to accept were DOMA not in force. For instance, because it is expected that spouses will support each other as they pursue educational opportunities, federal law takes into consideration a spouse's income in calculating a student's federal financial aid eligibility. See *20 U. S. C. §1087nn(b)*. Same-sex married couples are exempt from this requirement. The same is true with respect to federal ethics rules. Federal executive and agency officials are prohibited from "participat[ing] personally and substantially" in matters as to which they or their spouses have a financial interest. *18 U. S. C. §208(a)*. A similar statute prohibits Senators, Senate employees, and their spouses from accepting high-value gifts from certain sources, see *2 U. S. C. §31-2(a)(1)*, and another mandates detailed financial disclosures by numerous high-ranking officials and their spouses. See *5 U. S. C. App. §§102(a)*, *(e)*. Under DOMA, however, these Government-integrity rules do not apply to same-sex spouses.

* * *

The power the Constitution grants it also restrains. And though Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the liberty protected by the *Due Process Clause of the Fifth Amendment*.

What has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the *Fifth Amendment of the Constitution*.

The liberty protected by the *Fifth Amendment's Due Process Clause* contains within it the prohibition against denying to any person the equal protection of the laws. See *Bolling, 347 U. S., at 499-500, 74 S. Ct. 693, 98 L. Ed. 884*; *Adarand Constructors, Inc. v. Peña, 515 U. S. 200, 217-218, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995)*. While the *Fifth Amendment* itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the *Fourteenth Amendment* makes that *Fifth Amendment* right all the more specific and all the better understood and preserved.

The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and

proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and [*49] effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the *Fifth Amendment*. This opinion and its holding are confined to those lawful marriages.

The judgment of the Court of Appeals for the Second Circuit is affirmed.

It is so ordered.

. . .

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, and with whom THE CHIEF JUSTICE joins as to Part I, dissenting.

This case is about power in several respects. It is about the power of our people to govern themselves, and the power of this Court to pronounce the law. Today's opinion aggrandizes the latter, with the predictable consequence of diminishing the former. We have no power to decide this case. And even if we did, we have no power under the Constitution to invalidate this democratically adopted legislation. The Court's errors on both points spring forth from the same diseased root: an exalted conception of the role of this institution in America.

. . . [The portion of Justice Scalia's dissent discussing jurisdictional issues has been omitted.]

II

. . . Given that the majority has volunteered its view of the merits, however, I proceed to discuss that as well.

A

There are many remarkable things about the majority's merits holding. The first is how rootless and shifting its justifications are. For example, the opinion starts with seven full pages about the traditional power of States to define domestic relations—initially fooling many readers, I am sure, into thinking that this is a federalism opinion. But we are eventually told that "it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution," and that "[t]he State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism" because "the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import." *Ante,* at 18. But no one questions the power of the States to define marriage (with the concomitant conferral of dignity and status), so what is the point of devoting seven pages to describing how long and well established that power is? Even after the opinion has formally disclaimed reliance upon principles of federalism, mentions of "the usual tradition of recognizing and accepting state definitions of marriage" continue. See, *e.g., ante,* at 20. What to make of

this? The opinion never explains. My guess is that the majority, while reluctant to suggest that defining the meaning of "marriage" in federal statutes is unsupported by any of the Federal Government's enumerated powers, (Footnote 4) nonetheless needs some rhetorical basis to support its pretense that today's prohibition of laws excluding same-sex marriage is confined to the Federal Government (leaving the second, state-law shoe to be dropped later, maybe next Term). But I am only guessing.

Equally perplexing are the opinion's references to "the Constitution's guarantee of equality." *Ibid*. Near the end of the opinion, we are told that although the "equal protection guarantee of the *Fourteenth Amendment* makes [the] *Fifth Amendment* [due process] right all the more specific and all the better understood and preserved"—what can *that* mean?—"the *Fifth Amendment* itself withdraws from Government the power to degrade or demean in the way this law does." *Ante,* at 25. The only possible interpretation of this statement is that the *Equal Protection Clause*, even the *Equal Protection Clause* as incorporated in the *Due Process Clause*, is not the basis for today's holding. But the portion of the majority opinion that explains why DOMA is unconstitutional (Part IV) begins by citing *Bolling v. Sharpe, 347 U. S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954)*, *Department of Agriculture v. Moreno, 413 U. S. 528, 93 S. Ct. 2821, 37 L. Ed. 2d 782 (1973)*, and *Romer v. Evans, 517 U. S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996)*—*all* of which are equal-protection cases. (Footnote 5) And those three cases are the *only* authorities that the Court cites in Part IV about the Constitution's meaning, except for its citation of *Lawrence v. Texas, 539 U. S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003)* (not an equal-protection case) to support its passing assertion that the Constitution protects the "moral and sexual choices" of same-sex couples, *ante,* at 23.

Moreover, if this is meant to be an equal-protection opinion, it is a confusing one. The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the *Equal Protection Clause*, laws restricting marriage to a man and a woman are reviewed for more than mere rationality. That is the issue that divided the parties and the court below, compare Brief for Respondent Bipartisan Legal Advisory Group of U. S. House of Representatives (merits) 24-28 (no), with Brief for Respondent Windsor (merits) 17-31 and Brief for United States (merits) 18-36 (yes); and compare *699 F. 3d 169, 180-185 (CA2 2012)* (yes), with *id., at 208-211* (Straub, J., dissenting in part and concurring in part) (no). In accord with my previously expressed skepticism about the Court's "tiers of scrutiny" approach, I would review this classification only for its rationality. See *United States v. Virginia, 518 U. S. 515, 567-570, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996)* (SCALIA, J., dissenting). As nearly as I can tell, the Court agrees with that; its opinion does not apply strict scrutiny, and its central propositions are taken from rational-basis cases like *Moreno*. But the Court certainly does not *apply* anything that resembles that deferential framework. See *Heller v. Doe, 509 U. S. 312, 320, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993)* (a classification "'must be upheld . . . if there is any reasonably conceivable state of facts'" that could justify it).

The majority opinion need not get into the strict-vs.-rational-basis scrutiny question, and need not justify its holding under either, because it says that DOMA is unconstitutional as "a deprivation of the liberty of the person protected by the *Fifth Amendment of the Constitution*,"

ante, at 25; that it violates "basic due process" principles, *ante,* at 20; and that it inflicts an "injury and indignity" of a kind that denies "an essential part of the liberty protected by the *Fifth Amendment*," *ante,* at 19. The majority never utters the dread words "substantive due process," perhaps sensing the disrepute into which that doctrine has fallen, but that is what those statements mean. Yet the opinion does not argue that same-sex marriage is "deeply rooted in this Nation's history and tradition," *Washington v. Glucksberg, 521 U. S. 702, 720-721, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997)*, a claim that would of course be quite absurd. So would the further suggestion (also necessary, under our substantive-due-process precedents) that a world in which DOMA exists is one bereft of "'ordered liberty.'" *Id., at 721, 117 S. Ct. 2258, 138 L. Ed. 2d 772* (quoting *Palko v. Connecticut, 302 U. S. 319, 325, 58 S. Ct. 149, 82 L. Ed. 288 (1937))*.

Some might conclude that this loaf could have used a while longer in the oven. But that would be wrong; it is already overcooked. The most expert care in preparation cannot redeem a bad recipe. The sum of all the Court's nonspecific hand-waving is that this law is invalid (maybe on equal-protection grounds, maybe on substantive-due-process grounds, and perhaps with some amorphous federalism component playing a role) because it is motivated by a "'bare . . . desire to harm'" couples in same-sex marriages. *Ante,* at 20. It is this proposition with which I will therefore engage.

B

As I have observed before, the Constitution does not forbid the government to enforce traditional moral and sexual norms. See *Lawrence v. Texas, 539 U. S. 558, 599, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003)* (SCALIA, J., dissenting). I will not swell the U. S. Reports with restatements of that point. It is enough to say that the Constitution neither requires nor forbids our society to approve of same-sex marriage, much as it neither requires nor forbids us to approve of no-fault divorce, polygamy, or the consumption of alcohol.

However, even setting aside traditional moral disapproval of same-sex marriage (or indeed same-sex sex), there are many perfectly valid—indeed, downright boring—justifying rationales for this legislation. Their existence ought to be the end of this case. For they give the lie to the Court's conclusion that only those with hateful hearts could have voted "aye" on this Act. And more importantly, they serve to make the contents of the legislators' hearts quite irrelevant: "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien, 391 U. S. 367, 383, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968)*. Or at least it *was* a familiar principle. By holding to the contrary, the majority has declared open season on any law that (in the opinion of the law's opponents and any panel of like-minded federal judges) can be characterized as mean-spirited.

The majority concludes that the only motive for this Act was the "bare . . . desire to harm a politically unpopular group." *Ante,* at 20. Bear in mind that the object of this condemnation is not the legislature of some once-Confederate Southern state (familiar objects of the Court's scorn, see, *e.g.*, *Edwards v. Aguillard, 482 U. S. 578, 107 S. Ct. 2573, 96 L. Ed. 2d 510 (1987))*, but our respected coordinate branches, the Congress and Presidency of the United States. Laying such a charge against them should require the most extraordinary evidence, and I would have thought

that every attempt would be made to indulge a more anodyne explanation for the statute. The majority does the opposite—affirmatively concealing from the reader the arguments that exist in justification. It makes only a passing mention of the "arguments put forward" by the Act's defenders, and does not even trouble to paraphrase or describe them. See *ante,* at 21. I imagine that this is because it is harder to maintain the illusion of the Act's supporters as unhinged members of a wild-eyed lynch mob when one first describes their views as *they* see them.

To choose just one of these defenders' arguments, DOMA avoids difficult choice-of-law issues that will now arise absent a uniform federal definition of marriage. See, *e.g.,* Baude, Beyond DOMA: Choice of State Law in Federal Statutes, *64 Stan. L. Rev. 1371 (2012)*. Imagine a pair of women who marry in Albany and then move to Alabama, which does not "recognize as valid any marriage of parties of the same sex." *Ala. Code §30-1-19(e)* (2011). When the couple files their next federal tax return, may it be a joint one? Which State's law controls, for federal-law purposes: their State of celebration (which recognizes the marriage) or their State of domicile (which does not)? (Does the answer depend on whether they were just visiting in Albany?) Are these questions to be answered as a matter of federal common law, or perhaps by borrowing a State's choice-of-law rules? If so, *which* State's? And what about States where the status of an out-of-state same-sex marriage is an unsettled question under local law? See *Godfrey v. Spano, 13 N. Y. 3d 358, 920 N. E. 2d 328, 892 N.Y.S.2d 272 (2009)*. DOMA avoided all of this uncertainty by specifying which marriages would be recognized for federal purposes. That is a classic purpose for a definitional provision.

Further, DOMA preserves the intended effects of prior legislation against then-unforeseen changes in circumstance. When Congress provided (for example) that a special estate-tax exemption would exist for spouses, this exemption reached only *opposite-sex* spouses—those being the only sort that were recognized in *any* State at the time of DOMA's passage. When it became clear that changes in state law might one day alter that balance, DOMA's definitional section was enacted to ensure that state-level experimentation did not automatically alter the basic operation of federal law, unless and until Congress made the further judgment to do so on its own. That is not animus--just stabilizing prudence. Congress has hardly demonstrated itself unwilling to make such further, revising judgments upon due deliberation. See, *e.g.,* Don't Ask, Don't Tell Repeal Act of 2010, 124 Stat. 3515.

The Court mentions none of this. Instead, it accuses the Congress that enacted this law and the President who signed it of something much worse than, for example, having acted in excess of enumerated federal powers—or even having drawn distinctions that prove to be irrational. Those legal errors may be made in good faith, errors though they are. But the majority says that the supporters of this Act acted with *malice*--with *the "purpose"* (*ante,* at 25) "to disparage and to injure" same-sex couples. It says that the motivation for DOMA was to "demean," *ibid.*; to "impose inequality," *ante,* at 22; to "impose . . . a stigma," *ante,* at 21; to deny people "equal dignity," *ibid.*; to brand gay people as "unworthy," *ante,* at 23; and to "*humiliat*[*e*]" their children, *ibid.* (emphasis added).

I am sure these accusations are quite untrue. To be sure (as the majority points out), the legislation is called the Defense of Marriage Act. But to defend traditional marriage is not to condemn, demean, or humiliate those who would prefer other arrangements, any more than to

defend the Constitution of the United States is to condemn, demean, or humiliate other constitutions. To hurl such accusations so casually demeans *this institution*. In the majority's judgment, any resistance to its holding is beyond the pale of reasoned disagreement. To question its high-handed invalidation of a presumptively valid statute is to act (the majority is sure) with *the purpose* to "disparage," "injure," "degrade," "demean," and "humiliate" our fellow human beings, our fellow citizens, who are homosexual. All that, simply for supporting an Act that did no more than codify an aspect of marriage that had been unquestioned in our society for most of its existence—indeed, had been unquestioned in virtually all societies for virtually all of human history. It is one thing for a society to elect change; it is another for a court of law to impose change by adjudging those who oppose it *hostes humani generis*, enemies of the human race.

* * *

The penultimate sentence of the majority's opinion is a naked declaration that "[t]his opinion and its holding are confined" to those couples "joined in same-sex marriages made lawful by the State." *Ante,* at 26, 25. I have heard such "bald, unreasoned disclaimer[s]" before. *Lawrence, 539 U. S., at 604, 123 S. Ct. 2472, 156 L. Ed. 2d 508*. When the Court declared a constitutional right to homosexual sodomy, we were assured that the case had nothing, nothing at all to do with "whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id., at 578, 123 S. Ct. 2472, 156 L. Ed. 2d 508*. Now we are told that DOMA is invalid because it "demeans the couple, whose moral and sexual choices the Constitution protects," *ante,* at 23--with an accompanying citation of *Lawrence*. It takes real cheek for today's majority to assure us, as it is going out the door, that a constitutional requirement to give formal recognition to same-sex marriage is not at issue here--when what has preceded that assurance is a lecture on how superior the majority's moral judgment in favor of same-sex marriage is to the Congress's hateful moral judgment against it. I promise you this: The only thing that will "confine" the Court's holding is its sense of what it can get away with.

I do not mean to suggest disagreement with THE CHIEF JUSTICE's view, *ante,* p. 2-4 (dissenting opinion), that lower federal courts and state courts can distinguish today's case when the issue before them is state denial of marital status to same-sex couples--or even that this Court could *theoretically* do so. Lord, an opinion with such scatter-shot rationales as this one (federalism noises among them) can be distinguished in many ways. And deserves to be. State and lower federal courts should take the Court at its word and distinguish away.

In my opinion, however, the view that *this* Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today's opinion. As I have said, the real rationale of today's opinion, whatever disappearing trail of its legalistic argle-bargle one chooses to follow, is that DOMA is motivated by "'bare . . . desire to harm'" couples in same-sex marriages. *Supra,* at 18. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status. Consider how easy (inevitable) it is to make the following substitutions in a passage from today's opinion *ante*, at 22:

> "~~DOMA's~~ *This state law's* principal effect is to identify a subset of ~~state-sanctioned marriages~~ *constitutionally protected sexual relationships,* see *Lawrence,* and make

> them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And ~~DOMA~~ *this state law* contrives to deprive some couples ~~married under the laws of their State~~ *enjoying constitutionally protected sexual relationships*, but not other couples, of both rights and responsibilities."

Or try this passage, from *ante*, at 22–23:

> "~~[DOMA]~~ *This state law* tells those couples, and all the world, that their otherwise valid ~~marriages~~ *relationships* are unworthy of ~~federal~~ *state* recognition. This places same-sex couples in an unstable position of being in a second-tier ~~marriage~~ *relationship*. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence*, ..."

Or this, from *ante*, at 23—which does not even require alteration, except as to the invented number:

> "And it humiliates ~~tens of~~ thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."

Similarly transposable passages—deliberately transposable, I think—abound. In sum, that Court which finds it so horrific that Congress irrationally and hatefully robbed same-sex couples of the "personhood and dignity" which state legislatures conferred upon them, will of a certitude be similarly appalled by state legislatures' irrational and hateful failure to acknowledge that "personhood and dignity" in the first place. *Ante*, at 26. As far as this Court is concerned, no one should be fooled; it is just a matter of listening and waiting for the other shoe.

By formally declaring anyone opposed to same-sex marriage an enemy of human decency, the majority arms well every challenger to a state law restricting marriage to its traditional definition. Henceforth those challengers will lead with this Court's declaration that there is "no legitimate purpose" served by such a law, and will claim that the traditional definition has "the purpose and effect to disparage and to injure" the "personhood and dignity" of same-sex couples, see *ante,* at 25, 26. The majority's limiting assurance will be meaningless in the face of language like that, as the majority well knows. That is why the language is there. The result will be a judicial distortion of our society's debate over marriage—a debate that can seem in need of our clumsy "help" only to a member of this institution.

As to that debate: Few public controversies touch an institution so central to the lives of so many, and few inspire such attendant passion by good people on all sides. Few public controversies will ever demonstrate so vividly the beauty of what our Framers gave us, a gift the Court pawns today to buy its stolen moment in the spotlight: a system of government that permits us to rule *ourselves*. Since DOMA's passage, citizens on all sides of the question have seen victories and they have seen defeats. There have been plebiscites, legislation, persuasion,

and loud voices--in other words, democracy. Victories in one place for some, see North Carolina Const., Amdt. 1 (providing that "[m]arriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State") (approved by a popular vote, 61% to 39% on May 8, 2012), are offset by victories in other places for others, see Maryland Question 6 (establishing "that Maryland's civil marriage laws allow gay and lesbian couples to obtain a civil marriage license") (approved by a popular vote, 52% to 48%, on November 6, 2012). Even in a *single State*, the question has come out differently on different occasions. Compare Maine Question 1 (permitting "the State of Maine to issue marriage licenses to same-sex couples") (approved by a popular vote, 53% to 47%, on November 6, 2012) with Maine Question 1 (rejecting "the new law that lets same-sex couples marry") (approved by a popular vote, 53% to 47%, on November 3, 2009).

In the majority's telling, this story is black-and-white: Hate your neighbor or come along with us. The truth is more complicated. It is hard to admit that one's political opponents are not monsters, especially in a struggle like this one, and the challenge in the end proves more than today's Court can handle. Too bad. A reminder that disagreement over something so fundamental as marriage can still be politically legitimate would have been a fit task for what in earlier times was called the judicial temperament. We might have covered ourselves with honor today, by promising all sides of this debate that it was theirs to settle and that we would respect their resolution. We might have let the People decide.

But that the majority will not do. Some will rejoice in today's decision, and some will despair at it; that is the nature of a controversy that matters so much to so many. But the Court has cheated both sides, robbing the winners of an honest victory, and the losers of the peace that comes from a fair defeat. We owed both of them better. I dissent.

FOOTNOTES:

4. Such a suggestion would be impossible, given the Federal Government's long history of making pronouncements regarding marriage--for example, conditioning Utah's entry into the Union upon its prohibition of polygamy. See Act of July 16, 1894, ch. 138, §3, 28 Stat. 108 ("The constitution [of Utah]" must provide "perfect toleration of religious sentiment," "*Provided*, That polygamous or plural marriages are forever prohibited").

5. Since the *Equal Protection Clause* technically applies only against the States, see *U. S. Const., Amdt. 14*, *Bolling* and *Moreno*, dealing with federal action, relied upon "the equal protection component of the *Due Process Clause of the Fifth Amendment*," *Moreno, 413 U. S., at 533, 93 S. Ct. 2821, 37 L. Ed. 2d 782*.

JUSTICE ALITO, with whom JUSTICE THOMAS joins as to Parts II and III, dissenting.

Our Nation is engaged in a heated debate about same-sex marriage. That debate is, at bottom, about the nature of the institution of marriage. Respondent Edith Windsor, supported by the United States, asks this Court to intervene in that debate, and although she couches her argument in different terms, what she seeks is a holding that enshrines in the Constitution a particular

understanding of marriage under which the sex of the partners makes no difference. The Constitution, however, does not dictate that choice. It leaves the choice to the people, acting through their elected representatives at both the federal and state levels. I would therefore hold that Congress did not violate Windsor's constitutional rights by enacting *§3* of the Defense of Marriage Act (DOMA), 110 Stat. 2419, which defines the meaning of marriage under federal statutes that either confer upon married persons certain federal benefits or impose upon them certain federal obligations.

. . . [Justice Alito's discussion of standing is omitted.]

II

Windsor and the United States argue that *§3 of DOMA* violates the equal protection principles that the Court has found in the *Fifth Amendment's Due Process Clause*. See Brief for Respondent Windsor (merits) 17-62; Brief for United States (merits) 16-54; cf. *Bolling v. Sharpe, 347 U. S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954)*. The Court rests its holding on related arguments. See *ante*, at 24-25.

Same-sex marriage presents a highly emotional and important question of public policy—but not a difficult question of constitutional law. The Constitution does not guarantee the right to enter into a same-sex marriage. Indeed, no provision of the Constitution speaks to the issue.

The Court has sometimes found the *Due Process Clauses* to have a substantive component that guarantees liberties beyond the absence of physical restraint. And the Court's holding that "DOMA is unconstitutional as a deprivation of the liberty of the person protected by the *Fifth Amendment of the Constitution*," *ante*, at 25, suggests that substantive due process may partially underlie the Court's decision today. But it is well established that any "substantive" component to the *Due Process Clause* protects only "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,'" *Washington v. Glucksberg, 521 U. S. 702, 720-721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997)*; *Snyder v. Massachusetts, 291 U. S. 97, 105, 54 S. Ct. 330, 78 L. Ed. 674 (1934)* (referring to fundamental rights as those that are so "rooted in the traditions and conscience of our people as to be ranked as fundamental"), as well as "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Glucksberg, supra, at 721, 117 S. Ct. 2258, 138 L. Ed. 2d 772* (quoting *Palko v. Connecticut, 302 U. S. 319, 325-326, 58 S. Ct. 149, 82 L. Ed. 288 (1937))*.

It is beyond dispute that the right to same-sex marriage is not deeply rooted in this Nation's history and tradition. In this country, no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution. See *Goodridge v. Department of Public Health, 440 Mass. 309, 798 N. E. 2d 941*. Nor is the right to same-sex marriage deeply rooted in the traditions of other nations. No country allowed same-sex couples to marry until the Netherlands did so in 2000. (Footnote 4)

What Windsor and the United States seek, therefore, is not the protection of a deeply rooted right but the recognition of a very new right, and they seek this innovation not from a legislative body elected by the people, but from unelected judges. Faced with such a request, judges have cause for both caution and humility.

The family is an ancient and universal human institution. Family structure reflects the characteristics of a civilization, and changes in family structure and in the popular understanding of marriage and the family can have profound effects. Past changes in the understanding of marriage—for example, the gradual ascendance of the idea that romantic love is a prerequisite to marriage—have had far-reaching consequences. But the process by which such consequences come about is complex, involving the interaction of numerous factors, and tends to occur over an extended period of time.

We can expect something similar to take place if same-sex marriage becomes widely accepted. The long-term consequences of this change are not now known and are unlikely to be ascertainable for some time to come. (Footnote 5) There are those who think that allowing same-sex marriage will seriously undermine the institution of marriage. See, *e.g.,* S. Girgis, R. Anderson, & R. George, What is Marriage? Man and Woman: A Defense 53-58 (2012); Finnis, Marriage: A Basic and Exigent Good, 91 The Monist 388, 398 (2008). (Footnote 6) Others think that recognition of same-sex marriage will fortify a now-shaky institution. See, *e.g.,* A. Sullivan, Virtually Normal: An Argument About Homosexuality 202-203 (1996); J. Rauch, Gay Marriage: Why It Is Good for Gays, Good for Straights, and Good for America 94 (2004).

At present, no one—including social scientists, philosophers, and historians—can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be. And judges are certainly not equipped to make such an assessment. The Members of this Court have the authority and the responsibility to interpret and apply the Constitution. Thus, if the Constitution contained a provision guaranteeing the right to marry a person of the same sex, it would be our duty to enforce that right. But the Constitution simply does not speak to the issue of same-sex marriage. In our system of government, ultimate sovereignty rests with the people, and the people have the right to control their own destiny. Any change on a question so fundamental should be made by the people through their elected officials.

III

Perhaps because they cannot show that same-sex marriage is a fundamental right under our Constitution, Windsor and the United States couch their arguments in equal protection terms. They argue that *§3 of DOMA* discriminates on the basis of sexual orientation, that classifications based on sexual orientation should trigger a form of "heightened" scrutiny, and that *§3* cannot survive such scrutiny. They further maintain that the governmental interests that *§3* purports to serve are not sufficiently important and that it has not been adequately shown that *§3* serves those interests very well. The Court's holding, too, seems to rest on "the equal protection guarantee of the *Fourteenth Amendment*," *ante,* at 25—although the Court is careful not to adopt most of Windsor's and the United States' argument.

In my view, the approach that Windsor and the United States advocate is misguided. Our equal protection framework, upon which Windsor and the United States rely, is a judicial construct that provides a useful mechanism for analyzing a certain universe of equal protection cases. But that framework is ill suited for use in evaluating the constitutionality of laws based on the traditional understanding of marriage, which fundamentally turn on what marriage is.

Underlying our equal protection jurisprudence is the central notion that "[a] classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" *Reed v. Reed, 404 U. S. 71, 76, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971)* (quoting *F. S. Royter Guano Co. v. Virginia, 253 U. S. 412, 415, 40 S. Ct. 560, 64 L. Ed. 989 (1920))*. The modern tiers of scrutiny—on which Windsor and the United States rely so heavily—are a heuristic to help judges determine when classifications have that "fair and substantial relation to the object of the legislation." *Reed, supra, at 76, 92 S. Ct. 251, 30 L. Ed. 2d 225*.

So, for example, those classifications subject to strict scrutiny—*i.e.,* classifications that must be "narrowly tailored" to achieve a "compelling" government interest, *Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U. S. 701, 720, 127 S. Ct. 2738, 168 L. Ed. 2d 508 (2007)* (internal quotation marks omitted)—are those that are "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy." *Cleburne v. Cleburne Living Center, Inc., 473 U. S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985)*; cf. *id., at 452-453, 105 S. Ct. 3249, 87 L. Ed. 2d 313* (Stevens, J., concurring) ("It would be utterly irrational to limit the franchise on the basis of height or weight; it is equally invalid to limit it on the basis of skin color. None of these attributes has any bearing at all on the citizen's willingness or ability to exercise that civil right").

In contrast, those characteristics subject to so-called intermediate scrutiny—*i.e.,* those classifications that must be "'substantially related'" to the achievement of "important governmental objective[s]," *United States v. Virginia, 518 U. S. 515, 524, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996)*; *id., at 567* (SCALIA, J., dissenting)—are those that are *sometimes* relevant considerations to be taken into account by legislators, but "generally provid[e] no sensible ground for different treatment," *Cleburne, supra, at 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313*. For example, the Court has held that statutory rape laws that criminalize sexual intercourse with a woman under the age of 18 years, but place no similar liability on partners of underage men, are grounded in the very real distinction that "young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse." *Michael M. v. Superior Court, Sonoma Cty., 450 U. S. 464, 471, 101 S. Ct. 1200, 67 L. Ed. 2d 437 (1981)* (plurality opnion). The plurality reasoned that "[o]nly women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity." *Ibid.* In other contexts, however, the Court has found that classifications based on gender are "arbitrary," *Reed, supra, at 76, 92 S. Ct. 251, 30 L. Ed. 2d 225*, and based on "outmoded notions of the relative capabilities of men and women," *Cleburne, supra, at 441, 105 S. Ct. 3249, 87 L. Ed. 2d 313*, as when a State provides that a man must always be preferred to an

equally qualified woman when both seek to administer the estate of a deceased party, see *Reed, supra, at 76-77, 92 S. Ct. 251, 30 L. Ed. 2d 225*.

Finally, so-called rational-basis review applies to classifications based on "distinguishing characteristics relevant to interests the State has the authority to implement." *Cleburne, supra, at 441, 105 S. Ct. 3249, 87 L. Ed. 2d 313*. We have long recognized that "the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantages to various groups or persons." *Romer v. Evans, 517 U. S. 620, 631, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996)*. As a result, in rational-basis cases, where the court does not view the classification at issue as "inherently suspect," *Adarand Constructors, Inc. v. Peña, 515 U. S. 200, 218, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995)* (internal quotation marks omitted), "the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued." *Cleburne, supra, at 441-442, 105 S. Ct. 3249, 87 L. Ed. 2d 313*.

In asking the Court to determine that *§3 of DOMA* is subject to and violates heightened scrutiny, Windsor and the United States thus ask us to rule that the presence of two members of the opposite sex is as rationally related to marriage as white skin is to voting or a Y-chromosome is to the ability to administer an estate. That is a striking request and one that unelected judges should pause before granting. Acceptance of the argument would cast all those who cling to traditional beliefs about the nature of marriage in the role of bigots or superstitious fools.

By asking the Court to strike down DOMA as not satisfying some form of heightened scrutiny, Windsor and the United States are really seeking to have the Court resolve a debate between two competing views of marriage.

The first and older view, which I will call the "traditional" or "conjugal" view, sees marriage as an intrinsically opposite-sex institution. BLAG notes that virtually every culture, including many not influenced by the Abrahamic religions, has limited marriage to people of the opposite sex. Brief for Respondent BLAG (merits) 2 (citing *Hernandez v. Robles, 7 N. Y. 3d 338, 361, 855 N. E. 2d 1, 8, 821 N.Y.S.2d 770 (2006)* ("Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex")). And BLAG attempts to explain this phenomenon by arguing that the institution of marriage was created for the purpose of channeling heterosexual intercourse into a structure that supports child rearing. Brief for Respondent BLAG 44-46, 49. Others explain the basis for the institution in more philosophical terms. They argue that marriage is essentially the solemnizing of a comprehensive, exclusive, permanent union that is intrinsically ordered to producing new life, even if it does not always do so. See, *e.g.*, Girgis, Anderson, & George, What is Marriage? Man and Woman: A Defense, at 23-28. While modern cultural changes have weakened the link between marriage and procreation in the popular mind, there is no doubt that, throughout human history and across many cultures, marriage has been viewed as an exclusively opposite-sex institution and as one inextricably linked to procreation and biological kinship.

The other, newer view is what I will call the "consent-based" vision of marriage, a vision that primarily defines marriage as the solemnization of mutual commitment—marked by strong

emotional attachment and sexual attraction—between two persons. At least as it applies to heterosexual couples, this view of marriage now plays a very prominent role in the popular understanding of the institution. Indeed, our popular culture is infused with this understanding of marriage. Proponents of same-sex marriage argue that because gender differentiation is not relevant to this vision, the exclusion of same-sex couples from the institution of marriage is rank discrimination.

The Constitution does not codify either of these views of marriage (although I suspect it would have been hard at the time of the adoption of the Constitution or the *Fifth Amendment* to find Americans who did not take the traditional view for granted). The silence of the Constitution on this question should be enough to end the matter as far as the judiciary is concerned. Yet, Windsor and the United States implicitly ask us to endorse the consent-based view of marriage and to reject the traditional view, thereby arrogating to ourselves the power to decide a question that philosophers, historians, social scientists, and theologians are better qualified to explore. Because our constitutional order assigns the resolution of questions of this nature to the people, I would not presume to enshrine either vision of marriage in our constitutional jurisprudence.

Legislatures, however, have little choice but to decide between the two views. We have long made clear that neither the political branches of the Federal Government nor state governments are required to be neutral between competing visions of the good, provided that the vision of the good that they adopt is not countermanded by the Constitution. See, *e.g., Rust v. Sullivan, 500 U. S. 173, 192, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991)* ("[T]he government 'may make a value judgment favoring childbirth over abortion'" (quoting *Maher v. Rue, 432 U. S. 464, 474, 97 S. Ct. 2376, 53 L. Ed. 2d 484 (1977))*. Accordingly, both Congress and the States are entitled to enact laws recognizing either of the two understandings of marriage. And given the size of government and the degree to which it now regulates daily life, it seems unlikely that either Congress or the States could maintain complete neutrality even if they tried assiduously to do so.

Rather than fully embracing the arguments made by Windsor and the United States, the Court strikes down *§3 of DOMA* as a classification not properly supported by its objectives. The Court reaches this conclusion in part because it believes that *§3* encroaches upon the States' sovereign prerogative to define marriage. See *ante,* at 21–22 ("As the title and dynamics of the bill indicate, its purpose is to discourage enactment of state same-sex marriage laws and to restrict the freedom and choice of couples married under those laws if they are enacted. The congressional goal was 'to put a thumb on the scales and influence a state's decision as to how to shape its own marriage laws'" (quoting *Massachusetts v. United States Dept. of Health and Human Servs., 682 F. 3d 1, 12-13 (CA1 2012))*. Indeed, the Court's ultimate conclusion is that DOMA falls afoul of the *Fifth Amendment* because it "singles out a class of persons deemed *by a State* entitled to recognition and protection to enhance their own liberty" and "imposes a disability on the class by refusing to acknowledge a status *the State finds* to be dignified and proper." *Ante*, at 25 (emphasis added).

To the extent that the Court takes the position that the question of same-sex marriage should be resolved primarily at the state level, I wholeheartedly agree. I hope that the Court will ultimately permit the people of each State to decide this question for themselves. Unless the

Court is willing to allow this to occur, the whiffs of federalism in the today's opinion of the Court will soon be scattered to the wind.

In any event, *§3 of DOMA,* in my view, does not encroach on the prerogatives of the States, assuming of course that the many federal statutes affected by DOMA have not already done so. *Section 3* does not prevent any State from recognizing same-sex marriage or from extending to same-sex couples any right, privilege, benefit, or obligation stemming from state law. All that *§3* does is to define a class of persons to whom federal law extends certain special benefits and upon whom federal law imposes certain special burdens. In these provisions, Congress used marital status as a way of defining this class--in part, I assume, because it viewed marriage as a valuable institution to be fostered and in part because it viewed married couples as comprising a unique type of economic unit that merits special regulatory treatment. Assuming that Congress has the power under the Constitution to enact the laws affected by *§3*, Congress has the power to define the category of persons to whom those laws apply.

* * *

For these reasons, I would hold that *§3 of DOMA* does not violate the *Fifth Amendment*. I respectfully dissent.

FOOTNOTES:

4. Curry-Sumner, A Patchwork of Partnerships: Comparative Overview of Registration Schemes in Europe, in Legal Recognition of Same-Sex Partnerships 71, 72 (K. Boele-Woelki & A. Fuchs eds., rev. 2d ed., 2012).

5. As sociologists have documented, it sometimes takes decades to document the effects of social changes—like the sharp rise in divorce rates following the advent of no-fault divorce—on children and society. See generally J. Wallerstein, J. Lewis, & S. Blakeslee, The Unexpected Legacy of Divorce: The 25 Year Landmark Study (2000).

6. Among those holding that position, some deplore and some applaud this predicted development. Compare, *e.g.,* Wardle, "Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation, 24 Harv. J. L. & Pub. Pol'y 771, 799 (2001) ("Culturally, the legalization of same-sex marriage would send a message that would undermine the social boundaries relating to marriage and family relations. The confusion [*108] of social roles linked with marriage and parenting would be tremendous, and the message of 'anything goes' in the way of sexual behavior, procreation, and parenthood would wreak its greatest havoc among groups of vulnerable individuals who most need the encouragement of bright line laws and clear social mores concerning procreative responsibility") and Gallagher, (How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman, *2 U. St. Thomas L. J. 33, 58 (2005)* ("If the idea of marriage really does matter—if society really does need a social institution that manages opposite-sex attractions in the interests of children and society—then taking an already weakened social institution, subjecting it to radical new redefinitions, and hoping that there are no consequences is probably neither a wise nor a compassionate idea"), with Brownworth, Something Borrowed, Something Blue: Is

Marriage Right for Queers? in I Do/I Don't: Queers on Marriage 53, 58-59 (G. Wharton & I. Phillips eds. 2004) (Former President George W. "Bush is correct . . . when he states that allowing same-sex couples to marry will weaken the institution of marriage. It most certainly will [*109] do so, and that will make marriage a far better concept than it previously has been") and Willis, Can Marriage Be Saved? A Forum, The Nation, p. 16 (2004) (celebrating the fact that "conferring the legitimacy of marriage on homosexual relations will introduce an implicit revolt against the institution into its very heart").

Page 411–412 Insert following *Windsor*: Until the Defense of Marriage Act ("DOMA"), federal recognition of marital status had always depended upon state rules. DOMA changed that rule in two ways. First, DOMA provided that federal law would not recognize same-sex marriage. Second, DOMA provided that no state had to recognize a same-sex marriage recognized by another state.

In the years since enactment of DOMA, a number of states and the District of Columbia have approved same-sex marriage. Those states include California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington. California permitted same-sex marriage for a time based on a decision based on a decision of the California Supreme Court. That decision was overturned in November, 2008, by a referendum known as Proposition 8. But, the Ninth Circuit, after reviewing the decision of the Federal District Court in California, affirmed the lower court's ruling that Proposition 8 was unconstitutional. *Perry v. Brown*, 671 F.3d 1052 (9th Cir.2012). On June 26, 2013, the United States Supreme Court found that the challengers to the Ninth Circuit decision had no standing. *Hollingsworth v. Perry*, 570 U.S. , 133 S.Ct. 2562, 2013 U.S. Lexis 4919 (2013). Thus, on June 28, 2013, the Ninth Circuit issued an order dissolving the stay of the decision of the California Supreme Court. Its action, therefore, resulted in a reinstatement of the Supreme Court's decision, thereby setting the stage for resumption of same-sex marriage in California. An effort by the challengers to postpone the resumption until the expiration of the period for seeking reconsideration of the United States Supreme Court's decision failed. The *Windsor* case returned federal law to its historical roots, that is, for couples legally married in their home states, *Windsor* provides federal recognition.

Despite the growing number of states that have recognized same-sex marriage, federal law may not recognize same-sex marriages of those who reside in states that do not recognize same-sex marriage, even those that were legal under state law or the law of other countries from which those residents came. The Supreme Court's decision in *Windsor v. United States* leaves many unanswered questions, as described in the article below:

The IRS's Gay-Marriage Tax Problem[3]

During the runup to the Supreme Court's June 26 ruling on the Defense of Marriage Act, one number kept recurring: The government's refusal to recognize same-sex marriages meant gay couples were denied more than 1,000 federal benefits that straight couples enjoy. Now that the justices have struck down DOMA, gays can look forward to equality under U.S. tax laws. That is, just as soon as the IRS can figure out how to make equality happen. The tax agency has promised to "move swiftly" to recognize gay unions, but for many couples it won't be as simple as checking the "married" box on their 1040.

Those living in Washington, D.C., or the 13 states that allow same-sex marriages can file a federal tax return next April just like other married couples. Not so for the thousands of gay couples who took their vows in one of those states but who live in one of the 37 others where same-sex marriage isn't recognized. It's not yet clear whose definition of marriage the IRS is supposed to follow in evaluating their taxes—the state where the couple got married, or the one in which they reside. And will the federal government recognize gay couples in civil unions who file a joint return?

To avoid confusion, a single nationwide rule makes the most sense, says Patricia Cain, a tax law professor at Santa Clara University in California. "The IRS has the power to construe the Internal Revenue Code," she says. "So for them it's, 'What does the word spouse mean?' " President Obama has weighed in, saying it's his "personal belief" that same-sex couples should get the same federal benefits as married couples regardless of where they live. He's asked federal agencies to research legal issues that might stand in the way. Such a ruling, though, could cause headaches for the IRS, which until now has typically followed states' definitions of marriage, says David Herzig, a tax law professor at Valparaiso University. "You may solve this problem," he says, "but you may open up another."

Many gay couples might not like what marriage equality looks like on a tax form. Until now, they've been able to take advantage of their separate status to maximize tax savings—claiming multiple capital-loss deductions unavailable to opposite-sex married couples or multiple tax credits for adopting children. Straight married spouses with roughly equal incomes typically pay a marriage penalty under the tax code, because more of their income is subject to higher marginal tax rates. Gay couples would get hit with the same penalty. And unless the IRS exempts them from paying back taxes, some same-sex married couples could owe penalties for underwithholding during the time they've been married, even though the federal government didn't recognize their unions until now.

[3] Richard Rubin, "The IRS's Gay-Marriage Tax Problem," BloombergBusinessweek, July 18, 2013.

On the other hand, gay couples with unequal incomes would get the same marriage bonus as straight couples and could seek a refund for the extra taxes they paid in recent years.

Page 438 Note that Section 1409(b) of the Health Care and Education Reconciliation Act of 2010 added Code sections 6662(b)(6) imposing a 20% penalty for an underpayment of tax resulting from the disallowance of claimed tax benefits because the transaction lacked economic substance. Section 7701(o) defines "economic substance." Section 6662(i) increases the penalty to 40% if the noneconomic substance is not disclosed.

Page 459 Question 7 should read: "why did the Commissioner determine that the proper amount of the income of the Cowdens was less than the face value of the note?"

Page 463 Question 3, second sentence should read "the court also states that the Board of Tax Appeals (predecessor to the United States Tax Court), had refused to follow that decision in three of its cases."

Page 554 Insert at the end of Paragraph 2: Section 102(a) of the Tax Relief Act of 2010 extended the lower capital gains rate through 2012. Section 102(a) of the Tax Relief Act also extended the lower tax on qualified dividends under section 1(h)(11) through 2012. As a result of the 2012 Act, the rates provided before the 2012 Act on capital gains and qualified dividends continue to apply to taxpayers whose taxable incomes do not reach the 39.6% threshold (that is, $400,000 for single taxpayers and $450,000 for joint returns). For these latter taxpayers, the rate on capital gains and qualified dividends will be 20%.

Page 592 Amend last paragraph to delete from second line, "in fact, until 2010, the recipient will enjoy…." Replace that phrase with, "the recipient receives…."

Replace footnote 12: Section 1014. The estate tax expired at the end of 2009 Section 301 of the Tax Relief Act of 2010 revived the estate tax for decedents dying after December 31, 2009. The maximum estate tax rate under the Act was 35% and the applicable exclusion amount was $5 million. The revival of the estate tax was temporary; the tax was set to sunset at the end of 2012. (The Act also provided a special option for decedents dying in 2010. Their estates could elect to apply the new rates and exclusions with stepped-up basis, or no estate tax with the modified carryover rules of the 2001 Act.)

Page 595 Amend last sentence of penultimate paragraph (beginning with "The result. . . .") to read: A taxpayer subject to a tax rate on ordinary income of 15% or more but less than 39.6%, will pay a maximum rate of 15% on NCG; a taxpayer subject to a tax rate on ordinary income of 39.6%, will pay 20% on NCG; and, a taxpayer subject to a rate of tax on ordinary income below 15%, will pay a rate of 0% on NCG.

Page 651 Add to Paragraph 2 of Question 1: Section 3092 of the Housing and Economic Recovery Act of 2008, P.L. 110-289, amended section 121 to provide that a taxpayer may not exclude from gross income gain from the sale or exchange of a principal residence allocated to periods of non-qualified use. See section 121(b)(4)[5].

Page 698 Add to footnote 12: Section 2 of the Mortgage Forgiveness Debt Relief Act of 2007, P.L. 110–142, added section 108(a)(1)(E) which excludes income from a discharge before 2010 of qualified principal residence indebtedness. Section 303 of the Emergency Economic Stabilization Act of 2008, Energy Improvement and Extension Act of 2008, and Tax Extenders and the Alternative Minimum Tax Act of 2008, P.L. 110–343, extended the provision to discharges occurring through 2012. Section 202(a) of the 2012 Act extended the provision to discharges occurring through 2013.

Page 731 Amend footnote 2: Section 1004 of the American Recovery and Reinvestment Act of 2009, P.L. 111–5, further extends through 2009 the right of a taxpayer to use non-refundable credits to offset the alternative minimum tax. The Tax Relief Act of 2010, section 202(b), extended this right through 2011. The Emergency Economic Stabilization Act of 2008, the Energy Improvement and Extension Act of 2008, and the Tax Extenders and Minimum Tax Relief Act of 2008, P.L. 110–343, had earlier extended the provision through 2008 Section 104(c)(1) of the 2012 Act amends section 26(a) made this provision permanent. Note also the change to section 25A described above as a change to page 290 of the text.

Page 732 Note the change to section 25A described above as a change to page 290 of the text. Note the change to section 222 described above as a change to page 290 of the text.

Page 735 Add to footnote 10: The original version of the AMT did not provide for inflation adjustments to the exemption amount. The result was that each year Congress would enact a "patch" to increase the exemption amount to reflect inflation. (This problem was the origin of the effect that David Cay Johnston called the "stealth Tax." See footnote 13. The 2012 Act increased the exemption amount provided by section 55(d) with annual increases for inflation. Section 104(a).

Add to the first sentence of footnote 12: The 2012 Act extended and made permanent the right of the taxpayer to use non-refundable credits to offset the AMT. Section 104(c).

Page 739 Add after the second sentence of question 3: In the 2012 Act, Congress made permanent the increased credit percentages and higher income limits under section 21. Section 101(a).

Page 739 Add to last part of Question 5: Section 1003 of the American Recovery and

Reinvestment Act of 2009 provided a different floor for calculating the amount of the section 24 child credit that is refundable. For 2009 and 2010 only, the refund equaled 15% of the taxpayer's income in excess of $3,000. The Tax Relief Act of 2010, section 103(b), extended the $3,000 threshold through 2012. (The Tax Relief Act, however, stopped indexation for inflation of the $3,000 earnings threshold.) This refundable amount was further limited, however. The maximum was the amount of the child credit. The 2012 Act extends the $3,000 earnings threshold through 2017.

The 2012 Act also made permanent the $1,000 per child credit per "qualifying child," the repeal of the AMT offset applicable to the additional child credit for families with 3 or more children, and the repeal of the supplemental child credit under the earned income credit rules. Sections 101(a) and 103(b).

Page 757 Add to Question 5: Section 403 of the Emergency Economic Stabilization Act of 2008, the Energy Improvement and Extension Act of 2008, and the Tax Extenders and Minimum Tax Relief Act of 2008, P.L. 110-343, requires that every broker required to file a return under section 6045(a), reporting the gross proceeds from the sale of a covered security, must include in the return: (1) the customer's adjusted basis in the security, and (2) whether any gain with respect to the security is long-term or short-term.

Page 767 Note the change to section 25A described above as a change to page 290 of the text. Note the change to section 222 described above as a change to page 290 of the text.

Page 768 Note the change to section 25A described above as a change to page 290 of the text.

Page 769 Amend Paragraph 3 of Question 11: Note the change to section 25A described above as a change to page 290 of the text.