

1-1-2013

Divorcing the Defense of Marriage Act: Judicial Tensions in Upholding the Legislated Preclusion of Federal Same-Sex Marital Rights

Linda L. Barkacs

Sherry S. Tehrani

Craig B. Barkacs

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/lelb>



Part of the [Labor and Employment Law Commons](#)

Recommended Citation

Barkacs, Linda L., Sherry S. Tehrani, and Craig B. Barkacs. "Divorcing the Defense of Marriage Act: Judicial Tensions in Upholding the Legislated Preclusion of Federal Same-Sex Marital Rights." *Labor & Employment Law Forum* 3, no. 1 (2013): 88-119.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *Labor & Employment Law Forum* by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

DIVORCING THE DEFENSE OF MARRIAGE ACT: JUDICIAL TENSIONS IN UPHOLDING THE LEGISLATED PRECLUSION OF FEDERAL SAME-SEX MARITAL RIGHTS

LINDA L. BARKACS*
SHERRY S. TEHRANI**
CRAIG B. BARKACS***

I. INTRODUCTION

On July 24, 2011, New York became the sixth and largest state in our nation to allow same-sex couples to marry.¹ Only three years earlier, California's voters prohibited their citizens from doing the same.² In Iowa, a campaign was launched that successfully unseated three of the state's Supreme Court Justices who had overturned their state's ban.³ Our nation's divide on the issue of same-sex marriage is clear. Despite this polarization and intense debate, same-sex state marital rights often overshadow their federal counterparts. The federal Defense of Marriage Act ("DOMA"), passed by Congress in 1996,⁴ defines marriage to be between one man and one woman and permits states to disregard marriages legally performed in other states.⁵ The significance of this is that all federal marital rights are tied to the definition of marriage set forth in DOMA, including significant tax, Social Security, dependency, and death

* Linda L. Barkacs, Associate Professor of Business Law, University of San Diego School of Business Administration.

** Sherry S. Tehrani, Assistant Professor of Business Law, California State University, Northridge College of Business and Economics.

*** Craig B. Barkacs, Professor of Business Law, University of San Diego School of Business Administration.

¹ Marriage Equality Act, N.Y. TAX LAW, §§ 95-96 (McKinney 2011).

² See Proposition 8 (concluding that the only marriage that is recognized as valid in California is one between a man and a woman); see also *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2009) (establishing that Proposition 8 has been upheld by the California Supreme Court despite constitutional challenges).

³ *Varnum v. Brien*, 763 N.W. 2d 862 (Iowa 2009) (concluding that the language in the statute that limited civil marriage to only a man and a woman must be stricken and the remaining language must be applied to allow gays and lesbians to have access to civil marriage).

⁴ 1 U.S.C. § 7; 28 U.S.C. § 1738C (2006).

⁵ 28 U.S.C. § 1738C (2006); *The Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 87-117 (1996) (statement of Hadley Arkes, Professor of Jurisprudence and American Institutions, Amherst College) (stating DOMA "is a constitutional piece of legislation" and "a legitimate exercise of Congress' power").

benefits.⁶

Despite the federal mandate, the business community has shown an openness towards same-sex marriage by adapting measures for increased incorporation of same-sex partners in benefits coverage and pushing for the recognition of same-sex marriage.⁷ In a sharp turn, recent court rulings have sided against the Act and declared it unconstitutional. In addition, the President and Attorney General have denounced it unconstitutional, dropped their legal defense of the Act, and called for heightened scrutiny in its evaluation.⁸

This article will evaluate the first set of federal companion cases that ruled DOMA unconstitutional,⁹ will analyze the Attorney General's letter describing the Administration's abandonment of DOMA,¹⁰ and will suggest the path of the Act's impending litigation.¹¹

II. A HASTY ENGAGEMENT: THE DEFENSE OF MARRIAGE ACT

DOMA was passed in 1996, before any states allowed same-sex marriages.¹² It was the first action by the federal government to disregard

⁶ See PATRICK PURCELL & JENNIFER STAMAN, CONG. RESEARCH SERV., RL 34443, SUMMARY OF THE EMPLOYEE RETIREMENT SECURITY ACT (ERISA) (2009) (noting that over the years, ERISA has been amended to ensure married employees and their spouses are provided with preretirement and postretirement survivor annuities).

⁷ See Christina Maisrellis Broxetman, Mark E. Schmidtke, & Laura McAlister, *The Defense of Marriage Act and Employee Benefits – Is the Tide Turning*, BENEFITS AUTHORITY (2012), available at <http://www.ogletreedeakins.com/publications/2012-06-08/defense-marriage-act-and-employee-benefits-%E2%80%93-tide-turning> (asserting that two federal courts have ruled that the provision in DOMA that prohibits same-sex marriage is unconstitutional).

⁸ See Press Release, U.S. Attorney General Eric Holder, *Statement of the Attorney General on Litigation Involving the Defense of Marriage Act* (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html> (asserting that he will advise courts to apply heightened standards of scrutiny in cases of sexual orientation classification).

⁹ See *infra* Part V-VIII.

¹⁰ See *infra* Part IV.

¹¹ See *infra* Part XIV.

¹² Currently, six states and the District of Columbia issued and recognized marriage licenses entered into in other jurisdictions, including: Connecticut, District of Columbia, Iowa, Massachusetts, New Hampshire, New York, Vermont, and, formerly, California (pending *Perry v. Schwarzeneger*, 591 F.3d 1147 (2009)). Maryland and Rhode Island, while not issuing same-sex marriage licenses, do recognize same-sex marriage licenses issued by other jurisdictions. Nine states and the District of Columbia provide the equivalent of state-level spousal rights to same-sex couples, including: California, Delaware, District of Columbia, Hawaii, Illinois, New Jersey, Nevada, Oregon, and Washington. Three states provide some state-level spousal support, including: Colorado, Maine, and Wisconsin. See *Same-Sex Relationship Recognition Laws: State by State*, HUMAN RIGHTS CAMPAIGN (June 25, 2011), available at <http://www.hrc.org/resources/entry/same-sex-relationship-laws-state-by->

state sanctioned marriages of an entire class act of people.¹³ DOMA has two key provisions.¹⁴ Section 2 says that no state “shall be required to give effect” to same-sex marriages granted by other states.¹⁵ Section 3 limits the federal definition of “marriage” to be between one man and one woman.¹⁶

Congress enacted DOMA and President Clinton signed it into law on September 21, 1996.¹⁷ It was passed in response to *Baehr v. Lewin*, the 1993 Hawaii Supreme Court ruling that declared the denial of same-sex marriages a violation of citizens’ equal protection rights under Hawaii’s constitution.¹⁸ The decision was consequently superseded by a voter-

state (last visited Feb. 28, 2013).

¹³ See “DOMA” Means Federal Discrimination Against Married Same-Sex Couples, GLAD, available at <http://www.glad.org/uploads/docs/publications/doma-overview.pdf> (last visited Feb. 28, 2013) (stating that Section 3 of DOMA overrides determinations made by states that a same-sex couple is married).

¹⁴ See Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2000)); 28 U.S.C. § 1738C (2000). In passing this Section, Congress cited its authority under the Full Faith and Credit Clause of the Constitution. See H.R. REP. 104-664 at 25 (1996). A reading of the clause, which has been questioned by many legal scholars. See 142 CONG. REC. S5931-33 (daily ed. June 6, 1996) (letter from Prof. Laurence H. Tribe to Sen. Kennedy). In the letter to Senator Kennedy, Professor Tribe stated:

The basic point is a simple one: The Full Faith and Credit Clause authorizes Congress to enforce the clause’s self-executing requirements insofar as judicial enforcement alone, as overseen by the Supreme Court, might reasonably be deemed insufficient. But the Full Faith and Credit Clause confers upon Congress no power to gut its self-executing requirements, either piecemeal or all at once.

¹⁵ Defense of Marriage Act, § 2, 110 Stat. at 2419 (1996). Certain acts, records, and proceedings and the effect thereof: “[n]o State, territory, or possession of the United States, or Indian tribe shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.” H.R. Rep. No. 104-664, at 37. The dissenters of DOMA argued that it was unnecessary to pass legislation allowing states to disregard other state marriages. They explained that “the prevailing view today is that states can, by adopting their own contrary policies, deny recognition to marriages of a type of which they disapprove, and it is incontestable that states have in fact done this on policy grounds in the past.” *Id.* In addition, they stated that the call upon the Full Faith and Credit Clause by Congress had generally been to expand the full faith and credit to state court judgments, and this was unprecedented use of the clause to limit full faith and credit. See *id.* at 40-41.

¹⁶ See Defense of Marriage Act, § 3, 110 Stat. at 2419 (“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.”).

¹⁷ See Defense of Marriage Act, Pub. L. No. 104-199, §§ 203, 110 Stat. 2419 (1996).

¹⁸ *Baehr v. Lewin*, 852 P.2d 44, 59-67 (Haw. 1993) (noting the state was given an

approved, constitutional amendment that banned same-sex marriages.¹⁹ Nonetheless, the ruling catalyzed Congress to prevent such an “orchestrated legal assault” on marriage, by same-sex couples seeking the same federal marital benefits.²⁰

Congress passed DOMA to advance the following interests:

- (1) protecting the institution of traditional, heterosexual marriage;
- (2) advancing the traditional notions of morality;²¹
- (3) protecting state sovereignty; and
- (4) preserving scarce federal resources.²²

Ironically, two of the key justifications for the legislation currently pose the greatest challenges to its constitutionality – the impingement of states’ rights and preserving scarce resources. While legislators touted the guarantee of state sovereignty, we see that DOMA mandates state discrimination of same-sex married couples in the allocation of federally-funded benefits. Reminiscent of the infamous discriminatory treatment of interracial couples and their right to marry,²³ same-sex partners are carved out from the class of married couples and denied federal, marital rights to “preserve scarce federal resources.”²⁴ We see that the legislation’s harshest effect on same-sex married couples, in fact, has served as an impetus for its passage.²⁵

opportunity to establish a compelling governmental interest justifying this discrimination, which it failed to do); *see also* Baehr v. Miike, Civ. No. 91-1394, 1996 WL 694235, at *21 (Haw. Cir. Ct. Dec. 3, 1996), *aff’d* 950 P.2d 1234 (Haw. 1997).

¹⁹ *See* Haw. Const. art. I, § 23 (1998) (concluding that the legislature has the power to disallow same-sex marriages); *see also* 149 CONG. REC. S10, 882 (daily ed. Aug. 1, 2003) (statement of Sen. Cornyn) (explaining that at least thirty-seven states have adopted “mini-DOMAs” defining marriage in a similar fashion as the federal DOMA); Andrew Koppelman, *The Difference Mini-DOMAs Make*, 38 LOY. U. CHI. L.J. 265 (2007) (discussing the effects of mini-DOMAs).

²⁰ *See e.g.*, H.R. REP. NO. 104-664, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906.

²¹ *See* 142 CONG. REC. H7501 (daily ed. July 12, 1996) (statement of Rep. Hyde) (asserting that it is demeaning when two men love each other and are allowed to get married).

²² *See* H.R. REP. NO. 104-664, at 12. Then-House Judiciary Committee Chairman Henry Hyde stated “most people do not approve of homosexual conduct . . . and they express their disapprobation through the law It is . . . the only way possible to express this disapprobation.”

²³ *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) (“There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.”).

²⁴ H.R. REP. NO. 104-663, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906.

²⁵ *See* 142 CONG. REC. H7484 (daily ed. July 12, 1996) (statement of Rep. Sensenbrenner) (asserting that Congress should not be forced by the court in Hawaii to

Excluding same-sex married couples from the federal definition of marriage precludes them from receiving 1,100 federal benefits.²⁶ Fundamental exclusions often result in the denial of benefits, including: Social Security spousal support; the protection of a spouse's assets; when the other receives Medicaid; inclusion in an untaxed family health insurance policy; the ability to file joint federal income taxes; family medical leave for a sick spouse; disability, dependency, or death benefits for veteran and public safety officer spouses; employment benefits for federal employees; protections against estate taxes for spouses; and the availability for a visa for a non-citizen spouse.²⁷

Since same-sex marriage is legally recognized in some states, the divergence of state views with the federal government's view, as imposed by DOMA, leads to numerous logistical complexities. In joint federal and

alter the definition of marriage that has been recognized for thousands of years); *see also id.* at 18. In support of DOMA, Congressman Sensenbrenner of Wisconsin links the potential legalization of same-sex marriage in Hawaii with tremendous federal government costs, as the "Federal Government currently extends benefits, rights, obligations, and privileges on the basis of marital status. These include Social Security survivor and Medicare benefits, veterans' benefits, federal health, life insurance, and pension benefits and immigration privileges." *Id.*

²⁶ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT (2004), available at <http://www.gao.gov/new.items/d04353r.pdf>. The General Accounting Office ("GAO") reported, in 2004, that there are 1,138 federal statutory provisions related to marital status. These federal provisions, as broken down by the GAO report, include thirteen main categories, namely: Social Security and related programs; housing and food stamps; veterans benefits; taxation; Federal Military and Civilian Benefits; Employment Benefits and related laws; immigration; naturalization and aliens; American Indians; trade, commerce, and intellectual property; financial disclosure and conflict of interest; crimes and family violence; loans, guarantees, and payments in agriculture; federal natural resources and related laws; and miscellaneous. *See id.*

²⁷ See Peter Reilly, *DOMA Takes the Security Out of Social Security for Married Gay Seniors*, FORBES (Aug. 20, 2012), <http://www.forbes.com/sites/peterjreilly/2012/08/20/doma-takes-the-security-out-of-social-security-for-married-gay-seniors> (explaining that the Respect for Marriage Act, which will repeal DOMA, is unlikely to pass given John Boehner's position as a BLAG member); *LGBT Older Adults and Long-Term Care Under Medicaid*, AMERICAN PROGRESS (Sep. 2010), available at http://www.americanprogress.org/wp-content/uploads/issues/2010/09/pdf/lgbt_medicare.pdf (asserting that same-sex couples who do not receive spousal impoverishment protections can become broke and homeless); Thomas Whechter, *Defense of Marriage Act: What Should Same-Sex Couples Do?*, DUANNE MORRIS (May 12, 2011), available at http://www.duanemorris.com/articles/defense_of_marriage_act_what_should_same_sex_couples_do_4082.html (concluding that Congress needs to hold the Act unconstitutional and treat married same-sex couples equally for the purpose of enforcing federal tax laws); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT (2004), available at <http://www.gao.gov/new.items/do4353r.pdf> (explaining that the definitions provided by DOMA for "marriage" and "spouse" should be used when construing meanings under federal law).

state programs, like Medicaid where a state's policy is to view same-sex married couples equally, it may be thwarted by DOMA.²⁸ Also, under the current policy divide, married same-sex couples have to file both joint and individual returns for state and federal income taxes, respectively.²⁹ And, while corporations are currently encouraged to deny their employees' same-sex spouses benefits to be in line with federal government policies, same-sex spouses of employees that do receive benefits are subject to imputed taxes based on the fair market value of their benefits.

If the federal government recognized same-sex marriage, it would relay the benefits due to same-sex couples, as well as those owed to the government.³⁰ In a report conducted by the Congressional Budget Office ("CBO") in 2004, the CBO determined had same-sex marriage been permitted nationwide, the federal government would have realized a net increase of approximately one billion dollars per year for ten years.³¹ The study calculated that while the government may incur more costs in Social Security and Federal Employee Health Benefits, it would incur less Supplemental Security Income, Medicaid, and Medicare costs and would see an increase in federal income and estate tax revenues from the newly recognized marriages.³²

The severity of DOMA's imposed inequities is felt by same-sex couples who, as a result, are denied their federal rights across the country and is reflected in the cases challenging its constitutionality. In *Pederson et al. v. Office of Personnel Management et al.*,³³ the plaintiffs sued over the denial of federal marriage-related protections in the areas of federal Family Medical Leave Act benefits, private pension plans, state pensions plans, as well as the issues addressed in *Gill v. Office of Personnel*

²⁸ Such infringement on states' rights is highlighted by Judge Tauro in the first pair of companion federal cases to rule DOMA unconstitutional. See *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010), *aff'd sub. nom. Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012) (holding that Section 3 of DOMA violates the Fifth Amendment's principles of equal protection); see also *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010) (concluding that by enforcing DOMA, the government encroaches upon states, thus offending the Tenth Amendment).fdf

²⁹ See Thomas Whechter, *supra* note 27 (arguing that until Congress or the Supreme Court hold the Act unconstitutional, same-sex couples will have to preserve their rights by filing amended joint income-tax returns).

³⁰ See Congressional Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages*, CBO (June 21, 2004), available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/55xx/doc5559/06-21-samesexmarriage.pdf> (asserting that the impact on revenue would change over time because of fluctuating incomes).

³¹ See Congressional Budget Office, *supra* note 30 (asserting that the impact on revenue would change over time because of fluctuating incomes).

³² *Id.*

³³ *Pederson v. Office Pers. Mgmt.*, 881 F. Supp. 2d 294 (D. Conn. 2012) (concluding that there is no rational basis for Section 3 of DOMA and , therefore, violates the Fifth Amendment's equal protection principles).

Management.³⁴ *Gill* addressed the issues of federal income taxation, social security benefits, and employment benefits for federal employees and retirees. In *Commonwealth of Massachusetts v. United States Department of Health and Human Services*, the state, represented by Massachusetts Attorney General Martha Coakley, sued over federally-mandated discrimination in the administration of federally-funded programs, veteran cemeteries, and Medicaid.³⁵ In *Golinski v. Office of Personnel Management*, a Ninth Circuit employee sued over the denial of federal health benefits to her same-sex spouse.³⁶ In *Dragovich v. Department of the Treasury*, three couples enrolled in California's public employee retirement system ("CalPERS") sued as DOMA precluded CalPERS from enrolling their same-sex spouses in its long-term care insurance program.³⁷ In *Windsor v. United States*, Windsor sued over the estate tax burden she would not have incurred had her spouse been male, or had the federal government recognized her same-sex marriage - \$363,000.³⁸

III. THE CORPORATE CALL TO STRAY FROM THE LEGISLATION

While the fate of federal same-sex marriage recognition and benefits has embarked upon a complex path, the subject has received corporate America's more responsive attention. Influential Fortune 500 corporations have denounced the preclusion of same-sex marriage in different states as a threat against their ability to attract industry talent.³⁹ Companies are offering their employees same-sex partnership benefits despite the federal government's enforced refusal and, in some cases, are compensating employees for the imputed federal taxes on the benefits received by their

³⁴ *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010), *aff'd sub. nom.* *Massachusetts v. U.S. Dep't of Health & Human Serv.*, 682 F.3d 1 (1st Cir. 2012) (holding that irrational prejudice is never a legitimate government interest).

³⁵ *Massachusetts v. U.S. Dep't of Health & Human Serv.*, 698 F. Supp. 2d 234 (2010) (determining that recognizing same-sex marriages is within the authority of the Commonwealth).

³⁶ *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968 (N.D. Cal. 2012), *denial hearing en banc*, 680 F.3d 1104 (9th Cir. 2012) (recognizing that DOMA discriminates against same-sex couples who are married).

³⁷ *Dragovich v. U.S. Dep't of the Treasury*, 764 F. Supp. 2d 1178 (N.D. Cal. 2011) (asserting that the laws at issue do not constitute a legitimate government interest and plaintiffs have stated a legitimate claim for violation of their substantive due process rights).

³⁸ *Windsor v. United States*, 833 F. Supp. 2d 394, 396 (S.D.N.Y. 2012) (concluding that there is no rational basis to exclude an arbitrarily chosen group of people from government programs).

³⁹ Brief of Amici Curiae in Support of Appellee, *Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968 (N.D. Cal. 2012), *available at* http://www.ca9.uscourts.gov/datastore/general/2012/07/11/12-15388_Amicus_Brief_70_Business.pdf (asserting that although it was controversial to extend health benefits to domestic partners in the beginning, the majority of Fortune 500 companies have implemented the practice).

same-sex partners.⁴⁰ In fact, this critical approach to DOMA has seemed to ripple through to the government, providing sufficient inertia for President Obama and some members of Congress to call for the federal extension of benefits to same-sex partners, despite, and in direct contrast with, DOMA.⁴¹ Nonetheless, the political hurdles that abound ensure that the business industry will continue to lead this social evolution.

Corporate America has shared its voice in regards to same-sex marriage and partnership rights and benefits. Companies have urged states to permit same-sex marriages and the judicial system to overturn DOMA.⁴² Prior to the recent passage of legislation legalizing same-sex marriages in New York, top corporate executives, including Goldman-Sachs CEO Lloyd Blankfein, Morgan Stanley chairman John J. Mack, and Revlon chairman Ronald O. Perelman, sent a letter to Governor Andrew Cuomo urging him to work with state legislators.⁴³ Their letter stated:

To remain competitive, New York must continue to contend with other world cities to attract top talent. In an age where talent determines the economic winners, great states and cities must demonstrate a commitment to creating an open, healthy, and equitable environment in which to live and work As other states, cities, and countries across the world extend marriage rights regardless of sexual orientation, it will become increasingly difficult to recruit the best talent if New York cannot offer the same benefits and protection.⁴⁴

Prior to the enactment of the Washington state bill allowing same-sex

⁴⁰ Julie Appleby, *Many Businesses Offer Health Benefits to Same-Sex Couples Ahead of Laws*, KAISER HEALTH NEWS (May 14, 2012), available at <http://www.kaiserhealthnews.org/stories/2012/may/14/businesses-move-to-offer-health-benefits-to-same-sex-couples.aspx> (explaining that the Federal Employees Health Benefits Program does not cover same-sex partners of federal workers).

⁴¹ Kristina Wong, *President Obama Extends Additional Benefits to Same-Sex Partners of Federal Employers*, ABC NEWS (June 2, 2010), available at <http://abcnews.go.com/blogs/politics/2010/06/president-obama-extends-additional-benefits-to-samesex-partners-of-federal-employees/> (explaining that federal law prevents the President from providing same-sex couples with the same amount of benefits that heterosexual couples enjoy).

⁴² See Brief of Amici Curiae in Support of Appellee, *Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d at 968.

⁴³ See *Business Leaders Endorse Same-Sex Marriage: New York State Business Leaders Characterize Marriage Equality Legislation as Good for the Economy*, N.Y. TIMES (Apr. 28, 2011), available at <http://www.nytimes.com/interactive/2011/04/29/nyregion/20110429-Business-Leaders-Letter.html?ref=nyregion> [*Business Leaders Endorse Same-Sex Marriage*] (urging New York to enact marriage equality legislation so that companies can attract the best people to the state and show a commitment to fairness).

⁴⁴ *Business Leaders Endorse Same-Sex Marriage*, *supra* note 43.

marriage, Microsoft, which is headquartered in Redmond, Washington, was among its strongest advocates.⁴⁵ In North Carolina, a ballot measure was passed to place a constitutional ban on gay marriage in the state, reinforcing its already existent legal ban.⁴⁶ Bank of America's technology chief criticized the measure, claiming it would impede companies from attracting corporate talent.⁴⁷

Akin to the corporate movement in support of same-sex marriage across the different states, business denunciation of DOMA is epitomized in the brief filed in support of *Gill v. Office of Personnel Management*.⁴⁸ The amicus brief filed by seventy major companies, cities, and professional associations, including Microsoft, Google, Aetna, Nike, Levi Strauss, Starbucks, CBS, and Time Warner Cable, clearly describes the severe effects of DOMA on corporate employers.⁴⁹ The brief details the extent of the burden placed on employers in complying with DOMA and explains that DOMA:

- (i) impedes corporate interests in attracting talented human capital;
- (ii) strains the connection between employer provided health and retirement benefits and employee loyalty;
- (iii) mandates discriminatory tax treatment of same-sex spousal health care benefits, thus compromising employer/ employee relations;
- (iv) prevents same-sex spouses from receiving retirement protections and protections in times of crisis, although

⁴⁵ See Daniel Bukszpan, *Is Gay Marriage Good for Business?*, USA TODAY (Feb. 3, 2012), available at <http://www.usatoday.com/money/economy/story/2012-02-05/cnbc-is-gay-marriage-good-for-business/529492301>. Microsoft's Executive Vice President of Legal and Corporate Affairs, Brad Smith, shared that "As other states recognize marriage equality, Washington's employers are at a disadvantage if we cannot offer a similar, inclusive environment to our talented employees, our top recruits, and their families."

⁴⁶ See Lynn Bonner and Jay Price, *N.C. to Add Marriage Amendment to its Constitution*, NEWS OBSERVER (May 8, 2012), available at <http://www.newsobserver.com/2012/05/08/2052643/marriage-amednemtn-latest-results.html> (recording that while North Carolina already has a sixteen-year old ban on gay marriage within the state, the voters felt the need to "protect marriage in our state, [and] in our country," according to voters).

⁴⁷ See, e.g., Adam O'Daniel, *Bank of America Executive Cathy Bessant on Gay Marriage Ban: Vote No*, CHARLOTTE BUS. J. (Mar. 22, 2012), available at http://www.bizjournals.com/charlotte/blog/bank_notes/2012/03/bank-of-america-executive-cathy.html?page=all (alleging the ban poses a specific risk of harm to such fields as technology and biotech).

⁴⁸ See *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2s 374, 376 (D. Mass. 2010).

⁴⁹ Brief of Amici Curiae in Support of Appellee, *Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968 (N.D. Cal. 2012), available at http://www.ca9.uscourts.gov/datastore/general/2012/07/11/12-15388_Amicus_Brief_70_Business.pdf.

- employers may provide like relief at their own cost;
- (v) prevents the attraction of foreign human capital, as same-sex spouses are precluded from receiving the same visa status;
 - (vi) causes employers to incur administrative costs in treating their married same-sex employees as married for state tax purposes and single for federal, as well as for all human resources, payroll, and benefits administration, placing a particularly onerous burden on small businesses for the dual regime; and
 - (vii) compels corporations to discriminate against employees counter to their corporate missions.⁵⁰

Such business support for same-sex marriage is not newfound but has undergone continued progression. According to the Human Rights Campaign (“HRC”), which has released its 2012 Corporate Equality Index, eight nine percent of Fortune 500 companies offer domestic partnership health benefits in 2012.⁵¹ Business practices have embraced offering domestic partnership benefits, which has resulted in nearly sixty percent of Fortune 500 companies now offering them.⁵² The United States Department of Labor released its statistics on employee benefits in the United States and reported that thirty-three percent of state and local government and twenty-nine percent of private sector employees have access to health care benefits for same-sex couples.⁵³ The Kaiser Family Foundation indicated that while approximately thirty-six percent of large companies include same-sex partners in their health coverage programs, few pay the extra costs that are imputed against same-sex couples.⁵⁴

Since health insurance benefits are essential to employee satisfaction,

⁵⁰ *Id.* at 3-5, 11, 13.

⁵¹ Human Rights Campaign, *Corporate Equality Index 2012: Rating American Workplaces on Lesbian, Gay, Bisexual and Transgender Equality*, 2011 HUMAN RIGHTS CAMPAIGN 25, available at <http://issuu.com/humanrightscampaign/docs/corporateequalityindex>_2012.

⁵² Brian Moulton, *Dep’t of Labor: New Data on Domestic Partner Benefits*, HUMAN RIGHTS CAMPAIGN BLOG (July 26, 2011), <http://www.hrc.org/entry/dept.-of-labor-new-data-on-domestic-partner-benefits> (reporting that, out of 15,000 employers surveyed nationwide, domestic partner benefits are becoming standard).

⁵³ BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, USDL-11-1112, EMPLOYEE BENEFITS IN THE UNITED STATES NEWS RELEASE (July 26, 2011), available at <http://www.bls.gov/news.release/ebs2.nr0.htm>.

⁵⁴ Tara Siegel Bernard, *Google to Add Pay to Cover a Tax for Same-Sex Benefits*, NY TIMES (June 30, 2010), available at <http://www.nytimes.com/2010/07/01/your-money/01benefits.html> (stating that Google will be a pioneer in the employee benefits by covering the additional tax burden, equaling out to approximately \$1,069 more in taxes per year, that same-sex partners suffer when they seek employer-sponsored health insurance).

the workaround some corporations have begun undertaking embodies the compelled complexities DOMA imposes and its stifling of corporate efficiency. Unlike heterosexual married couples, same-sex married couples are not recognized by the federal government as married due to DOMA and are, therefore, taxed on the imputed value of employer-provided benefits to their spouses. Thus, to specifically counter the federal tax penalty on same-sex couples created by DOMA, approximately thirty-five for-profit employers offer a “gross-up” benefit.⁵⁵ The companies increase their pay to same-sex employees that are married or in domestic partnerships, in all states, to cover their employees’ tax burden.⁵⁶ In 2012, companies like Ernst & Young, American Express, Bank of America, Microsoft, Morgan Stanley, and Yahoo joined this movement, accounting for a 300 percent increase in the number of companies that offered it as compared to 2011.⁵⁷ This benefit is estimated by the HRC to provide employees’ families with an approximate average of \$1,200 extra per year.⁵⁸

Particularly interesting is the business community’s competitive approach towards providing such benefits. Following Ernst & Young’s adoption of the “gross-up benefit,” KPMG and Pricewaterhouse Coopers also implemented this “benefit.” Deputy Director of corporate programs for HRC, Deena Fidas, noted “[i]n our observation, the changes tend to move like wildfire, because these are extremely competitive industries that watch each other very closely.”⁵⁹ According to Fidas, law, financial services, and internet, accounting, and consulting firms are among the most aggressive in tracking each other’s packages to attract top talent.⁶⁰

In fact, this pressure has spread to the government and has been felt by President Obama and some federal legislators. President Obama and some members of the Senate have attempted to extend federal benefits to employees of the federal government and their same-sex partners. The President extended some benefits in 2009 and 2010; he extended more when he issued the Presidential Memorandum-Extension of Benefits to

⁵⁵ See, e.g., *Domestic Partner Benefits: Grossing Up to Offset Imputed Income Tax*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/domestic-partner-benefits-grossing-up-to-offset-imputed-income-tax> (last visited Mar. 13, 2013) [hereinafter *Domestic Partner Benefits*] (listing approximately thirty-eight companies and one municipalities that have a gross-up policy, including Apple Inc., Barclays Capital, Google Inc., and Bank of America).

⁵⁶ See *Domestic Partner Benefits*, *supra* note 55.

⁵⁷ See, e.g., Katherine Reynolds Lewis, *Employers Boost Tax Benefits for Same-Sex Couples*, CNN MONEY (Mar. 26, 2010), <http://management.fortune.cnn.com/2012/03/26/same-sex-couple-benefits/> (explaining that the number of businesses who offer the gross-up benefit has tripled in the last year).

⁵⁸ See Lewis, *supra* note 57.

⁵⁹ *Id.*

⁶⁰ *Id.*

Same-Sex Domestic Partners of Federal Employees.⁶¹ The extension of benefits have been granted by President Obama to the “full extent of the law” and have left out the most critical health care, retirement, and survivor benefits.⁶² Senators Joseph Lieberman and Collins have reintroduced the Domestic Partnership Benefits and Obligations Act with twenty new cosponsors and the endorsement of thirty-five organizations. This legislation would expand those critical benefits denied by DOMA to same-sex partners of federal employees, but it is unlikely to garner enough support to pass both Congressional chambers.⁶³ In their call to extend benefits, both the President and Senators Lieberman and Collins reference the common business practice of extending benefits to same-sex couples as justifications for the federal government to do the same, as well as the

⁶¹ Compare *Memorandum for the Heads of Exec. Dep't & Agencies: Fed. Benefits & Non-Discrimination*, THE WHITE HOUSE (June 17, 2009), available at http://www.whitehouse.gov/assets/documents/2009fedbenefits_mem_rel.pdf (requesting executive authority to extend identified benefits to federal employees' domestic partners that they deem appropriate after a thorough review), with *Memorandum for the Heads of Exec. Dep't & Agencies: Extension of Benefits to Same-Sex Domestic Partners of Fed. Employees*, THE WHITE HOUSE (June 2, 2010), available at <http://www.whitehouse.gov/the-press-office/presidential-memorandum-extension-benefits-same-sex-domestic-partners-federal-emplo> (providing benefits that require immediate action as well as an obligation to continue researching and providing new benefits).

⁶² See Wong, *supra* note 41; see also John Berry, *Memorandum for the Heads of Exec. Dep't and Agencies: Implementation of the President's Memorandum Regarding Extension of Benefits to Same-Sex Domestic Partners of Fed. Employees*, CHIEF HUMAN CAPITAL OFFICERS COUNCIL (June 2, 2010), available at <http://www.chcoc.gov/transmittals/TransmittalDetails.aspx?TransmittalID=2982>.

⁶³ See Joseph Lieberman, *Support Builds for Domestic Partnership Bill*, U.S. Sen. Comm. on Homeland Sec. & Gov't Affairs (Mar. 29, 2010), available at <http://www.hsgac.senate.gov/media/lieberman-collins-introduce-domestic-partnership-bill> (introducing the Domestic Partnership Act first in 1997). While Lieberman and Collins are Independent and Republican party members, respectively, it is worth noting that they introduced the bill with the following co-sponsors, all Democrats and one Independent: Senators Daniel Akaka, D-Hawaii, Richard Blumenthal, D-Conn., Barbara Boxer, D-Calif., Ben Cardin, D-Md., Robert Casey, D-Pa., Dick Durbin, D-Ill., Kirsten Gillibrand, D-N.Y., Al Franken, D-Minn., Tom Harkin, D-Iowa, John Kerry, D-Mass., Amy Klobuchar, D-Minn., Frank Lautenberg, D-N.J., Patrick Leahy, D-Vt., Carl Levin, D-Mich., Jeff Merkley, D-Ore., Barbara Mikulski, D-Md., Patty Murray, D-Wash., Bernie Sanders I-Vt., Jeanne Shaheen D-N.H., and Sheldon Whitehouse D-R.I. It is also noteworthy that Lieberman has introduced the Domestic Partnership Benefits and Obligations Act in the past four Congresses, the last two with Collins, indicating the political climate likely to greet the introduction of the re-introduction of the bill. See also Joe Davidson, *Administration Moves to Advance Benefits for Same-Sex Partners of Federal Workers*, WASHINGTON POST (Feb. 22, 2012), available at http://www.washingtonpost.com/politics/administration-moves-to-advance-benefits-for-same-sex-partners-of-federal-workers/2012/02/22/gIQAyFRCUR_story.html (reporting that, regardless of whether the House would introduce the bill, the Republican majority would most likely deny the bill).

interest of attracting talented individuals to federal positions.⁶⁴

DOMA's strength in denying equal benefit distribution to employees is undoubted and the burden placed on employers is onerous. Companies and the government, alike, are hindered from smooth, uniform distribution of benefits to their employees. Instead, DOMA creates economic inefficiency, has proven costly for employers and employees to comply with the complex dual regime system, and has mandated employer discrimination in benefit administration. In reaction, in some cases, employers are undertaking the federally discriminatory tax assessment against employees for benefits distributed to their same-sex partners. As the business community pushes for progress for federal treatment of employee benefits, DOMA's downfall seems most likely to occur through judicial challenges.

IV. THE SEPARATION: THE PRESIDENT DECLARES SECTION 3 OF DOMA UNCONSTITUTIONAL AND THE DEPARTMENT OF JUSTICE DROPS ITS DEFENSE

The Department of Justice ("DOJ") took a sharp turn in its approach to DOMA, declaring it unconstitutional and withdrawing legal defense of the Act in February 2011.⁶⁵ In support of its decision to withdraw legal defense of the Act, the Administration declared that Section 3 of DOMA,⁶⁶ when applied against legally married same-sex couples, violates the equal protection guarantees of the Fifth Amendment. Determining this Act as unconstitutional, the Administration reviewed it under a standard of heightened scrutiny.⁶⁷ In cases without binding precedent on the standard

⁶⁴ See Lieberman, *supra* note 63. Lieberman and Collins both reference business practice in their announcement of the bill, with Lieberman stating that "[w]e want to attract the best people to serve in the federal government," and Collins adding that "[t]oday, health, medical, and other benefits are a major component of any competitive employment package. Indeed, private sector employers are increasingly offering these kinds of benefits as standard fare. Among Fortune 500 companies, for example, domestic partner benefits are commonplace. According to the Office of Personnel Management, nearly 60 percent of Fortune 500 companies, including some of our top federal contractors, extend employment benefits to domestic partners." *Id.* The Lieberman/Collins bill would address some of the concerns the major corporations shared in the Amicus Brief for *Gill*. Under the bill, same-sex domestic partners of federal employees living together in a committed relationship would be eligible for health benefits, long-term care, family and medical leave, and federal retirement benefits. *Id.*

⁶⁵ In an interesting twist, however, even though the Attorney General renounced its legal defense, the Executive Branch will nevertheless continue its enforcement.

⁶⁶ Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419 (1996) (codified as 28 U.S.C. § 1738C and 1 U.S.C. § 7).

⁶⁷ Eric Holder, *Letter from the Attorney General to Congress on Litigation Involving*

of review for sexual orientation classifications in which the DOJ will no longer defend the legislation, courts will be advised to apply this standard of heightened scrutiny.

On February 23, 2011, Attorney General Eric Holder sent a letter to the House of Representatives describing the Obama Administration's new stance on DOMA litigation.⁶⁸ Holder explained how in two impending cases, *Pederson v. OPM and Windsor v. United States*,⁶⁹ the jurisdictions lack precedent on the standard of review for sexual-orientation classifications, and the Administration will remain a party and allow the suit to go forward. Rather than defending the Act under the rational basis review standard, as it has done in previous cases litigated in jurisdictions with this established precedent, it will, instead, now recommend that the courts adopt the less deferential, heightened scrutiny standard.

The Supreme Court has not ruled on the standard of review for sexual orientation classification. This is unlike gender or racial classifications, which the Court has determined suspect, that warrant the more rigorous standards of intermediate and strict scrutiny, respectively.⁷⁰ This, in the two significant Supreme Court cases overruling discriminatory legislation, based on sexual orientation, *Romer v. Evans*⁷¹ and *Lawrence v. Texas*,⁷² a standard of review was not articulated. Rather, in *Romer*, the Court determined that Colorado's ban on any government action protecting homosexual individuals against discrimination could not even pass the least stringent standard of rational basis review.⁷³ In *Lawrence*, the Court did not address equal protection or the levels of scrutiny but focused on the lack of due process afforded to the subjects of the law criminalizing

the Defense of Marriage Act, U.S. DEP'T OF JUSTICE (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> [hereinafter *Holder Letter*]. Holder explains that these cases are the first to require the Administration to advocate the proper standard of review, leading to the Administration's determination that higher scrutiny should apply and its new policy towards the legislation.

⁶⁸ *Holder Letter*, *supra* note 67.

⁶⁹ *Pederson v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294 (D. Conn. 2012); *Windsor v. United States*, F. Supp. 2d 394, 396 (S.D.N.Y. 2012) (holding that the challenged section of DOMA is unconstitutional under the equal protection clause).

⁷⁰ See *United States v. Virginia*, 518 U.S. 515 (1996) (holding that the Virginia Military Institute ("VMI") has "shown no 'exceedingly persuasive justification' for excluding all women from the citizen soldier training afforded by VMI."); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (stating that, when actions are based solely on race, they must follow the narrowly tailored test to ensure constitutionality).

⁷¹ 517 U.S. 620, 635-36 (1996) (holding that an amendment to the Colorado's constitution denying protected class status based on sexual orientation was unconstitutional).

⁷² 539 U.S. 578 (2003) (invalidating a Texas law criminalizing consensual sodomy).

⁷³ *Romer*, 517 U.S. at 631 (describing rational basis review as permitting legislative classification of a non-suspect class "so long as it bears a rational relation to some legitimate end").

sodomy.⁷⁴

The Attorney General considered the characteristics outlined by the Court in *City of Cleburne v. Cleburne Living Center*⁷⁵ and *Bowen v. Gilliard*⁷⁶ in his determination that heightened scrutiny applies. Holder found that sexual orientation classifications are suspect based upon all four criteria laid out by the Court, which is whether: (1) the group has suffered a history of discrimination; (2) the individuals “exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group;” (3) the group is politically powerless or a minority; and (4) the distinguishing characteristics of the group have little relation to legitimate policy objectives of an individual’s “ability to perform or contribute to society.”⁷⁷

Heightened scrutiny is much more rigorous than the rational basis review standard, which shifts the burden of proof to the government.⁷⁸ In addition, it requires that a challenged law be more than merely rationally related to a legitimate governmental interest. In his letter, the Attorney General outlined the requisite criteria for a challenged law to pass heightened scrutiny. The government must demonstrate the law’s classification is “substantially related to an important government objective,” there must be actual state purposes for the action, and justifications for the classification must be genuine and not hypothetical.⁷⁹ It is noteworthy that while Holder references the gender discrimination case, *United States v. Virginia*,⁸⁰ in laying out the criteria for heightened scrutiny, he does not explicitly label sexual orientation classifications as warranting intermediate scrutiny. Likewise, he does not address whether

⁷⁴ See *Lawrence*, 539 U.S. at 558 (differentiating the current Court’s interpretation of liberty and due process as compared to the *Bower* Court’s interpretation of the right to practice sodomy).

⁷⁵ 473 U.S. 432, 435 (1985) (determining whether a state could deny a group home, servicing mostly handicapped individuals, a special use permit).

⁷⁶ 483 U.S. 587, 602-03 (1987) (deciding whether the amended statute requiring families requesting benefits to report the income of all parents, brothers, and sisters living in the child’s home is unconstitutional in a situation when it requires a person seeking benefits to report child support payments from a noncustodial parent).

⁷⁷ See *Holder Letter*, *supra* note 67.

⁷⁸ See *DOMA Chat with Prof. David B. Cruz*, COVER IT LIVE (Feb. 23, 2011; 6:27 p.m.), http://www.coveritlive.com/index2.php?option=com_altcaster/task=viewaltcast/altcast_code=da553d6ce2/height=800/width=420 [hereinafter *Cruz Chat*] (explaining that “[t]he term can mean ‘anything stronger than rational basis review,’ or it can mean an intermediate form of scrutiny (like the one used for sex discrimination under federal equal protection law) between rational basis review and the strict scrutiny used for race discrimination.”).

⁷⁹ See *Holder Letter*, *supra* note 67.

⁸⁰ *United States v. Virginia*, 518 U.S. 515 (1996) (holding that the Virginia Military Institute’s policy of admitting only male students violated the Equal Protection Clause of the 14th Amendment because it “failed to show exceedingly persuasive justification” for the exclusion of women).

strict scrutiny should apply, as in racial classifications.⁸¹ Holder keenly avoids any debate, as he concludes the Act cannot even pass heightened scrutiny.

Should the President's persuasive authority sway the courts and thus adhere to the heightened scrutiny standard, it is much more likely future judgments will render the Act unconstitutional. Though circuits may vary in their determinations, such a potential ruling from the Supreme Court would carry significant implications. If the high court reaches a "definitive verdict against the law's constitutionality,"⁸² this may render the question of Section 2 of DOMA's constitutionality moot.⁸³ In addition, states' "mini-DOMAs,"⁸⁴ would be unenforceable, as well as highly controversial state laws banning same-sex marriages.⁸⁵ Shortly after the release of Holder's letter, the Senate Judiciary Committee held a hearing for Senator Dianne Feinstein's the Respect for Marriage Act ("RMA"),⁸⁶ which President Obama endorsed.⁸⁷ RMA would repeal DOMA and ensure that the federal government recognizes state-authorized marriages, including same-sex marriages.⁸⁸ This federal recognition would follow same-sex couples throughout any state but would mandate any recognition by the states. It is purely reclaiming federal recognition that is prohibited by

⁸¹ David B. Cruz, *Obama DOJ Drops Federal Definition Section of DOMA*, CRUZ LINES (Feb. 23, 2011), <http://cruz-lines.blogspot.com/2011.02/obama-doj-drops-federal-definition.htm>. (speculating that the administration omitted strict scrutiny because the law would fail under the "more deferential intermediate scrutiny").

⁸² *Holder Letter*, *supra* note 67.

⁸³ *See generally* Defense of Marriage Act, Pub. L. No. 104-199, § 2, 110 Stat. 2419 (1996).

⁸⁴ *Cf.* 149 CONG. REC. S10, 882 (daily ed. Jan. 7, 2003) (explaining that mini-DOMAs are state laws limiting marriage to heterosexual couples).

⁸⁵ *See Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*, 117 HARV. L. REV. 2684, 2697 (2004) (noting that if "DOMA's restriction of marriage to opposite-sex couples is found to violate equal protection principles, the state sovereignty rationale . . . will be rendered moot."); *see also Cruz Chat*, *supra* note 78.

⁸⁶ To Repeal the Defense of Marriage Act and Ensure Respect for State Regulation of Marriage, H.R. 1116, 112th Cong. (2011). Representative Jerrod Nadler has introduced a House Companion bill to the Senate bill. *See also* Dennis McMillan, *Dumping DOMA Discussed at Senate Judiciary Hearing*, S.F. BAY TIMES (July 28, 2011), http://www.sfbaytimes.com/?sec=article&article_id=15483 (stating that the Senate held a hearing for the bill that was introduced by Dianne Feinstein on July 20, 2011).

⁸⁷ *See* McMillan, *supra* note 86, at 144. The President's Press Secretary Jay Carney shared, "The President has long called for legislative repeal of the Defense of Marriage Act. He is proud to support the Respect for Marriage Act, which would take DOMA off the books, once and for all... This legislation would uphold the principle that the federal government should not deny gay and lesbian couples the same rights and legal protections that straight couples have."

⁸⁸ *See* To Repeal the Defense of Marriage Act and Ensure Respect for State Regulation of Marriage, H.R. 1116, 112th Cong. (2011).

DOMA and will guarantee legally married same-sex couples federal benefits.

V. THE DIVORCE PROCEEDINGS: TWO FEDERAL CASES HOLD THAT DOMA IS UNCONSTITUTIONAL

In 2010, for the first time, two federal cases in Massachusetts held that DOMA is unconstitutional. In *Gill v. Office of Personnel Management*, seven same-sex couples and three survivors of same-sex spouses, all married in Massachusetts, challenged the constitutionality of Section 3 of DOMA.⁸⁹ Plaintiffs argued that denial of certain federal marriage-based benefits that were available to similarly-situated heterosexual couples was a violation of the equal protection principles embodied in the Due Process Clause of the Fifth Amendment.⁹⁰ The district court agreed.⁹¹

In *Commonwealth of Massachusetts v. United States Department of Health and Human Services*, the plaintiff argued that Section 3 of DOMA violated the Tenth Amendment and the Spending Clause, U.S. Constitution, article I, Section 8.⁹² The court held that the federal government, by enacting and enforcing DOMA, encroached upon the province of the State and was in violation of the Tenth Amendment.⁹³

Both cases are the beginning of a full frontal assault on the constitutionality of DOMA. It is important to note that prior to enacting DOMA, Congress did not engage in a meaningful examination of the scope or effect of the law.⁹⁴ There was no testimony from historians, economists, or specialists in family or child welfare,⁹⁵ despite the fact that DOMA drastically reduces the eligibility criteria for over 1,100 federal rights,

⁸⁹ *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010) (examining whether, due to DOMA, plaintiffs were denied federal marriage-based benefits in violation of the Due Process Clause of the Fifth Amendment).

⁹⁰ Though the Fifth Amendment of the U.S. Constitution does not contain an equal protection clause, as the Fourteenth Amendment does, the Fifth Amendment's Due Process Clause includes an equal protection component. U.S. CONST., amend. V; see, e.g., *Gill*, 699 F. Supp. 2d at 377 (citing *Bollinger v. Sharpe*, 347 U.S. 497, 499 (1954)).

⁹¹ See *Gill*, 699 F. Supp. 2d at 397 (finding animus to be the only explicable basis for DOMA and stating that animus alone cannot constitute a legitimate government interest).

⁹² See *Massachusetts v. U.S. Dep't of Health and Human Serv.*, 698 F. Supp. 2d 234 (D. Mass. 2010).

⁹³ See *id.* at 253 (stating that DOMA violated the Tenth Amendment by promulgating a national definition of marriage and, thereby, intruding on the exclusive power of the state to regulate marriage).

⁹⁴ See *Gill*, 699 F. Supp. 2d at 379 (finding that DOMA drastically amended the eligibility criteria for federal benefits, rights, and privileges without examining the scope of the law).

⁹⁵ *Id.*

benefits, and privileges that depend upon marital status.⁹⁶

VI. NANCY GILL & MARCELLE LETOURNEAU V. OFFICE OF PERSONNEL
MANAGEMENT

At issue in *Gill* were health benefits based on federal employment, Social Security benefits (retirement benefits, survivor benefits, and lump sum death benefits), and filing status under the Internal Revenue Code. Each plaintiff made at least one request to a federal agency or authority for treatment as a married couple, spouse, or widower with respect to federal benefits available to married individuals, and each request was denied.⁹⁷

Nancy Gill, an employee of the United States Postal Service, sought to add her spouse, Marcelle Letoumeau, as a beneficiary under Gill's existing Federal Health Benefits Program ("FEHB") and Federal Employees Dental and Vision Insurance Program ("FEDVIP"). Martin Koski, a former Social Security Administration employee, sought to change his FEHB enrollment from "self only" to "self and family" in order to provide coverage for his spouse, James Fitzgerald. Finally, Dean Hara sought enrollment in FEHB as the survivor of his spouse, former Representative Gerry Studds. Defendant, Office of Personnel Management ("OPM"), administers the FEHB and prescribes regulations necessary to carry out the program.⁹⁸ OPM also administers FEDVIP.⁹⁹

OPM regulations associated with FEHB state that an "enrollment for self and family *includes* all family members who are eligible to be covered by the enrollment."¹⁰⁰ The plaintiffs, therefore, argued that the FEHB statute gives OPM the discretion to extend health benefits to same-sex spouses.¹⁰¹ The plaintiffs contended that the FEHB statute sets a floor, not a ceiling, to coverage eligibility. The court, however, disagreed, applying rules of basic statutory construction inasmuch as the FEHB statute clearly states that "member of family" means the spouse of an employee. For the purpose of determining the meaning of any act of Congress, DOMA defines "spouse" as "a person of the opposite sex who is a husband or wife."¹⁰² Based on this conclusion, the court turned its attention to the plaintiff's argument that DOMA violates constitutional principles of equal protection.¹⁰³

⁹⁶ U.S. GOV. ACCOUNTABILITY OFFICE, *supra* note 26.

⁹⁷ *See Gill*, 699 F. Supp. 2d at 379.

⁹⁸ *See id.* at 380 (including regulations outlining time, manner, and conditions of eligibility for enrollment and dates of coverage).

⁹⁹ *See id.* at 385.

¹⁰⁰ *Id.* at 380 (citing 5 C.F.R. § 890.302(a)(1)).

¹⁰¹ *See id.* at 385.

¹⁰² *Id.* at 377 (citing 1 U.S.C. § 7).

¹⁰³ *See id.* at 386 (asserting that DOMA violates the equal protection clause by departing from the recognition that government has historically given to marriage and

VII. EQUAL PROTECTION OF THE LAWS

The Fourteenth Amendment provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the law.”¹⁰⁴ When evaluating whether a particular law violates the Fourteenth Amendment Equal Protection Clause, the court must first determine what type of right is at issue. The Supreme Court has determined that the right to marry is a fundamental right.¹⁰⁵ In 1964, the Supreme Court overturned Virginia’s miscegenation law banning interracial marriage.¹⁰⁶ The Court held that in addition to violating the Equal Protection Clause on grounds of race classifications, the law would also violate the Due Process Clause as undue interference with the “fundamental freedom” of marriage.¹⁰⁷

Laws that infringe upon fundamental rights are presumed invalid.¹⁰⁸ The Supreme Court will analyze such laws under a “strict scrutiny” standard, and they will be struck down as unconstitutional, absent a “compelling government interest.”¹⁰⁹ Conversely, a law that does not burden a suspect class or infringe upon a fundamental right will be upheld so long as it survives the mere “rational basis” inquiry, meaning it must bear a rational relationship to a legitimate government interest.¹¹⁰ State laws that ban same-sex marriage are denying a significant portion of the population their fundamental right to marriage. As previously discussed, however, there is no federal precedent dictating the standard of review for the classification of sexual orientation.¹¹¹ Nevertheless, even under the most deferential of standards, a challenged law may only survive constitutional challenge if it is “narrow enough in scope and grounded in a sufficient factual context for [the court] to ascertain some relationship

by violating plaintiffs’ rights to maintain the integrity of their family relationships).

¹⁰⁴ U.S. CONST. amend. XIV.

¹⁰⁵ See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that to deny this fundamental right on racial classification grounds deprives all the state’s citizens of liberty without due process of law).

¹⁰⁶ See *id.* at 11 (stating that the miscegenation statute adopted by Virginia was adopted solely to prevent marriages between people of different racial classifications).

¹⁰⁷ See *id.* at 12 (determining that marriage is one of the basic civil rights of man and is essential to our survival).

¹⁰⁸ See JEFFREY F. BEATTY & SUSAN S. SAMUELSON, *BUSINESS LAW AND THE LEGAL ENVIRONMENT* 119, 121 (South-Western Publishing, 2004).

¹⁰⁹ *Id.* at 121 (noting that any government interference with a fundamental right also receives strict scrutiny and will likely be void).

¹¹⁰ See *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 386 (D. Mass. 2010).

¹¹¹ One could argue that it is legally perplexing that the innate characteristic of race is held to strict scrutiny, yet the innate character of gender is only held to an intermediate standard of review. This begs the question of what standard to apply to sexual orientation. If it is indeed an innate characteristic, is it more akin to gender or race?

between the classification and the purpose it serve[s].”¹¹²

So what were Congress’ objectives in enacting DOMA? The House Report identifies four objectives: (1) advancing the government’s interest in defending and nurturing the institution of traditional, heterosexual marriage; (2) advancing the government’s interest in defending traditional notions of morality; (3) advancing the government’s interest protecting state sovereignty; and (4) advancing the government’s interest in preserving scarce government resources.¹¹³ Not surprisingly, the government disavowed Congress’ stated reasons.¹¹⁴ Instead, the government argued that “the Constitution permitted Congress to enact DOMA as a means to preserve the ‘status quo,’ pending resolution of a socially contentious debate taking place in the states over whether to sanction same-sex marriage.”¹¹⁵ Following this line of reasoning, if Congress had not passed DOMA, the definitions of “marriage” and “spouse” under federal law would change each time a state changed its definition. As such, the government argued that Congress could reasonably have concluded that DOMA was necessary to ensure consistency in the distribution of federal marriage-based benefits.

There are several problems with this argument. First, the subject of domestic relations generally and marriage, in particular, has always been the exclusive province of the states.¹¹⁶ There simply is no federal law on domestic relations. Moreover, individual states have changed their marital eligibility requirements over the years with the federal government embracing the changes in state marriage laws for purposes of heterosexual marriage.¹¹⁷ It was not until the idea of homosexual marriage was perceived as inevitable that DOMA became necessary. The government differentiates the debate over interracial and other marriage laws from that of same-sex marriage because “none had become a topic of great debate in numerous states with such fluidity.”¹¹⁸ This assertion is unsupported, yet, even if it were true; the fact that a majority of people dislike same-sex marriage is no reason to prohibit it. The Bill of Rights protects the minority against majority tyranny.¹¹⁹

¹¹² *Gill*, 699 F. Supp. 2d at 387 (citing *Romer*, 517 U.S. at 633).

¹¹³ See H.R. REP. 3396, 104th Cong. (1996).

¹¹⁴ See H.R. REP. NO. 104-664 at 2 (1996) (finding that Congress “believes that Section 2 of the Defense of Marriage Act strongly supports a proper understanding of federalism and state sovereignty”).

¹¹⁵ *Gill*, 699 F. Supp. 2d at 390.

¹¹⁶ See *id.* at 391 (citing *Elk Grove Unified Sch. Dist. V. Newdown*, 542 U.S. 1, 12 (2004)).

¹¹⁷ Beginning in 1948, miscegenation statutes began to fall. In fact, only sixteen states still banned interracial marriage in 1967, when the Supreme Court declared that such prohibitions violated equal protection and due process.

¹¹⁸ *Gill*, 699 F. Supp. 2d at 391.

¹¹⁹ See *id.* at 392 (stating that the Constitution does not tolerate classes among citizens and because of this commitment to the law’s neutrality all citizens are entitled

The passage of DOMA is the first time the federal government has ever attempted to mandate a federal definition of marriage, despite other politically charged debates on who should be permitted to marry. The question then is whether maintaining the “status quo” provides justification for the passage of DOMA. In order to answer that question in the affirmative, there must be a problem that Congress needs to resolve. The government would answer that “consistency” is the goal. DOMA, however, provides no consistency. In fact, DOMA does just the opposite by denying the same-sex married couples the federal marriage-based benefits that similarly-situated heterosexual couples enjoy.¹²⁰ By premising benefits on marriage, Congress has made a determination that married people belong to a class of similarly-situated individuals. With the passage of DOMA, Congress divides the class of married individuals into two separate groups – those with spouses of the opposite sex and those with spouses of the same sex. There is no rational basis for this division. The only seeming purpose, i.e., to disadvantage a group of which it disapproves, is unconstitutional.

VIII. COMMONWEALTH OF MASSACHUSETTS V. UNITED STATES
DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

Massachusetts sued the United States Department of Health and Human Services (“HHS”), arguing that DOMA violated the Tenth Amendment and the Spending Clause of the U.S. Constitution, article 1, section 8.¹²¹ At issue were millions of dollars in federal funding received by the state of Massachusetts.¹²² The dispute began with an application for the internment of a veteran and his same-sex spouse.

Darrell Hopkins retired from the U.S. Army in 1982, after serving thirteen months in Vietnam, three years in South Korea, seven years in Germany (including three years in occupied Berlin), and three years at the School of U.S. Army Intelligence at Fort Devens, Massachusetts. During his more than twenty years of active service, he earned two Bronze States, two Meritorious Service Medals, a Meritorious Unit Commendation, four Good Conduct Medals, and Vietnam Service Medals (1-3) and achieved the rank of Chief Warrant Officer, Second Class.¹²³ Because of both his long service in the Army and his Massachusetts residency, Darrel Hopkins is eligible for burial in Winchendon cemetery, a state veteran’s cemetery that

to equal protection).

¹²⁰ *Id.* at 392-94.

¹²¹ U.S. CONST. amend. X; U.S. CONST. art. 1, § 8; Massachusetts v. U.S. Dep’t of Health & Human Serv., 698 F. Supp. 2d 234 (D. Mass. 2010) (holding that DOMA imposes, “an unconstitutional condition on the receipt of federal funding . . .”).

¹²² *See, e.g., id.* at 245.

¹²³ *Id.* at 241.

receives federal grant funding from the Veterans Administrations (“VA”).¹²⁴

In 2004, Darrell Hopkins married Thomas Hopkins, and in 2007, they submitted an application for burial in Winchendon cemetery. VA regulations require that veterans’ cemeteries “be operated solely for the internment of veterans, their spouses, surviving spouses, [and certain of their] children”¹²⁵ A same-sex spouse is not considered a “spouse” under DOMA.¹²⁶ The VA sent a letter to the Massachusetts Department of Veterans’ Services (“DVS”), informing them that “we believe [the] VA would be entitled to recapture Federal grant funds provided to DVS for either [the Agawam or Winchendon] cemeteries should [Massachusetts] decide to bury the same-sex spouse of a veteran in the cemetery, unless that individual is independently eligible for burial.”¹²⁷

IX. HISTORY OF MARITAL STATUS DETERMINATIONS IN THE UNITED STATES

States have controlled marital status determinations since before the Constitution.¹²⁸ Colonial legislatures established rules and regulations regarding marriage in the colonies.¹²⁹ When the U.S. declared its independence from England, the founding legislation of each state included regulations regarding marital status determinations.¹³⁰ When the Constitution was drafted in 1787, the issue of marriage was not mentioned when defining the powers of the federal government.¹³¹ At that time, states were given exclusive power of marriage rules as part of the states’ “police power” – i.e., their responsibility for the health, safety, and welfare of their populations.¹³²

Over the years, the rules and regulations regarding marriage have gone through many changes. Rules have also varied significantly from state to state. Some of those differences included: (1) who was permitted to marry; (2) what steps composed a valid marriage; (3) what conditions permitted divorce; (4) common law marriage; (5) restrictions on interracial marriage;

¹²⁴ *See id.*

¹²⁵ *Id.* at 240 (citing 38 C.F.R. § 39.10(a)).

¹²⁶ *Id.*

¹²⁷ *Id.* (citing the Letter from Tim S. McClain, General Counsel to the Department of Veteran Affairs, to Joan E. O’Connor, General Counsel, Massachusetts Department of Veterans’ Services (June 18, 2004)).

¹²⁸ *See id.* at 236 (noting that in 1787, during the framing of the Constitution, states had exclusive power over marriage rules to maintain the health, welfare, and safety of citizens).

¹²⁹ *See id.* at 236-37 (citing Nancy F. Cott, Ph.D., the Jonathan Trumbull Professor of American History at Harvard University, who submitted an affidavit on the history of the regulation of marriage in the U.S.).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

(6) age at marriage; (7) what spousal roles should be; and (8) “hygiene.”¹³³ In the mid-1880s, a constitutional amendment to establish uniform regulations on marriage and divorce was proposed.¹³⁴ This first proposal failed and was followed by other unsuccessful efforts to create a uniform definition of marriage. Seemingly, these failed attempts to amend the Constitution are recognition by the federal government that, constitutionally-speaking, marriage is squarely within the domain of the states.¹³⁵

Because of DOMA, the internment of a veteran with his or her same-sex spouse is prohibited in any VA funded cemetery. If we were to return to the United States pre-1967, imagine that DOMA existed and, instead, stated that a veteran’s spouse of a different race than the veteran could not be interred with the spouse (i.e., that only a spouse of the same race as the veteran could be interred with the veteran). Most of society would be highly outraged by such a classification. Of course, it was not until 1967 that the U.S. Supreme Court held that states could no longer ban interracial marriages.¹³⁶ The question remaining is whether Darrell Hopkins and other same-sex marriages can logically or legally be treated differently without running afoul of constitutional principles.

X. DOMA’S FINANCIAL IMPACT ON MASSACHUSETTS STATE HEALTHCARE PROGRAM

As of February 2010, Massachusetts had issued marriage licenses to at least 15,214 same-sex couples.¹³⁷ Section 3 of DOMA bars federal recognition of those marriages, and Massachusetts contended that the statute has had a significant negative impact on the operation of certain state programs. In addition to the State Cemetery Grants Program (discussed previously), the defendant Massachusetts is claiming a significant funding loss for MassHealth, a public assistance program dedicated to providing medical services to needy individuals.¹³⁸ MassHealth provides health insurance or assistance in paying for private

¹³³ *Id.* at 237-38.

¹³⁴ *See id.* at 237 (finding that legislative and constitutional proposals were put before Congress in the 1880s to 1950s, particularly after World War II when there was a perception of damage to the stability of marriages).

¹³⁵ This of course presumes that the states do not violate constitutional law. While states may make laws regarding marriage, those laws may not violate the U.S. Constitution. In this case, Massachusetts argues that it is the federal government that is violating constitutional law by imposing DOMA on same-sex married couples. *See* Brief for Plaintiff-Appellee at 22, *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010) (No. 10-2204).

¹³⁶ *See* *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (stating that the freedom to marry or not to marry should be determined by the individual rather than the state).

¹³⁷ *See Massachusetts*, 698 F. Supp. 2d at 234.

¹³⁸ *See id.* at 242.

insurance to approximately one million residents of Massachusetts.¹³⁹ The U.S. Department of Health and Human Services (“HHS”) provides MassHealth with billions of dollars in federal funding every year.¹⁴⁰ Marital status is a relevant factor in determining whether an individual is entitled to coverage by MassHealth.¹⁴¹ Massachusetts asserts that because of DOMA, same-sex spouses are treated as though each were single, resulting in significant financial consequences for the state.¹⁴² Moreover, Massachusetts is prohibited from obtaining federal funding to cover same-sex spouses who do not qualify for Medicaid when assessed as single, even though they would qualify if assessed as married.¹⁴³

In addition, to lost funding from DOMA, Massachusetts asserts that there is actually a cost savings to the state from the recognition of same-sex marriages. This occurs in two easy. First, recognition of same-sex marriage leads to a denial of health benefits, resulting in a cost savings for the State.¹⁴⁴ For example, in a same-sex household where one spouse earns \$65,000, and the other spouse earns \$13,000, neither spouse would be eligible for benefits under MassHealth because the total income, \$78,000 substantially exceeds the federal poverty level of \$14,412.¹⁴⁵ Because federal law under DOMA does not recognize same-sex marriage, the spouse making \$13,000 would be assessed as single and, thus, fall below the poverty level. Second, the recognition of same-sex marriage renders certain individuals eligible for benefits for which they would otherwise be ineligible.¹⁴⁶ Suppose a same-sex couple consists of spouses who are both under the age of 65, one earning \$33,000 and the other earning \$7,000 per year. In this scenario, both spouses are eligible for healthcare under MassHealth because, as a married couple, their combined income falls below the \$43, 716 established for spouses.¹⁴⁷ Under current federal rules, only the spouse earning \$7,000 is eligible for Medicaid coverage.¹⁴⁸

¹³⁹ See Health and Human Serv., *Resources for Health Care and Insurance*, MASS.GOV, <http://www.mass.gov/chia/consumer/insurance/health-care-resources.html> (last visited Mar. 3, 2013).

¹⁴⁰ See *Massachusetts*, 698 F. Supp. 2d at 241-42 (providing Massachusetts with \$5.3 billion in federal funding).

¹⁴¹ See *id.* at 242.

¹⁴² See *id.*

¹⁴³ See *id.*

¹⁴⁴ ARTHUR S. LEONARD & PATRICIA A. CAIN, *SEXUALITY LAW: 2010 AUTHOR’S UPDATE 34* (2d Ed. 2010).

¹⁴⁵ See *Massachusetts*, 698 F. Supp. 2d at 242.

¹⁴⁶ See *id.*

¹⁴⁷ See, e.g., *id.* (articulating that in order to receive healthcare under MassHealth both spouses must show that their combined income does not exceed the established minimum threshold).

¹⁴⁸ See *Eligibility*, MEDICAID.GOV: KEEPING AMERICA HEALTHY, <http://www.medicaid.gov/Medicaid-CHIP-Program-Information.By-Topics/Eligibility/Eligibility.html> (last visited Feb. 22, 2013) (explaining that the Affordable Care Act of

MassHealth sought clarification from HHS, in 2004, as to how to implement its recognition of same-sex marriages with respect to Medicaid benefits.¹⁴⁹ MassHealth was informed that “[i]n large part, DOMA dictates the response” because “DOMA does not give [HHS] the discretion to recognize same-sex marriage for purposes of the Federal portion of Medicaid.”¹⁵⁰ Massachusetts estimates lost revenues so far at \$640,661 in additional costs and as much as \$2,224,018 in lost federal funding.¹⁵¹

XI. MASSACHUSETTS’ CHALLENGE TO DOMA UNDER THE TENTH AMENDMENT AND THE SPENDING CLAUSE OF THE CONSTITUTION

According to the district court in the *Commonwealth of Massachusetts*, the challenges to DOMA under the Spending Clause and the Tenth Amendment are “two sides of the same coin.”¹⁵² Every law enacted by Congress must be based on a power enumerated in the Constitution.¹⁵³ Moreover, the Tenth Amendment provides that all powers not delegated to the U.S. by the Constitution, nor prohibited by it to the States, are reserved to the States or the people, respectively.¹⁵⁴ States are not merely subdivisions; they are a sovereign unto themselves.¹⁵⁵ When analyzing issues concerning the boundaries of state and federal power, the Supreme Court has taken two approaches: (1) an inquiry into “whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I of the Constitution;” and (2) “whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment.”¹⁵⁶

2010, signed by President Obama in 2010, creates a national Medicaid minimum eligibility level of 133% of the federal poverty level—\$29,700 for a family of four in 2011—for nearly all Americans under age 65).

¹⁴⁹ See *Massachusetts*, 698 F. Supp. 2d at 242-43.

¹⁵⁰ *Id.* at 243. In July 2008, Massachusetts enacted the MassHealth Equality Act, which provides that even though federal financial funding is unavailable, no person who is recognized as a spouse under the laws of Massachusetts will be denied benefits otherwise available due to the provisions of DOMA or any other federal non-recognition of spouses of the same sex. See also Ethan Jacobs, *Gov. Patrick signs 1913 law repeal, MassHealth Equality bill*, MASSEQUALITY.ORG (July 31, 2008), <http://www.massequality.org/content/gov-patrick-signs-1913-law-repeal-masshealth-equality-bill>.

¹⁵¹ See *Massachusetts*, 698 F. Supp. 2d at 243 (attributing the additional costs to CMS’ refusal to provide federal funding to individuals in same-sex couples).

¹⁵² *Id.* at 246 (citing *New York v. United States*, 505 U.S. 144, 156 (1992)).

¹⁵³ See, e.g., *New York v. United States*, 505 U.S. at 187 (indicating that while there are many constitutional methods of achieving regional self-sufficiency in radioactive waste disposal, and the method Congress had chosen was not one of them).

¹⁵⁴ U.S. CONST. amend. X.

¹⁵⁵ See *New York*, 505 U.S. at 188 (quoting *The Federalist* No. 39, p.245 (c. Rossiter ed. 1961)).

¹⁵⁶ See *id.* at 155 (explaining that the “two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment

Massachusetts claims that DOMA exceeds the scope of federal power.¹⁵⁷ In the First Circuit, federal regulation of family law is only upheld when firmly rooted in an enumerated federal power.¹⁵⁸ Courts typically consider whether the challenged federal statute contains an “express jurisdictional element” tying the law to one of the federal government enumerated powers. DOMA does not contain an “express jurisdictional element.” The federal government contends that DOMA is grounded in the Spending Clause of the Constitution, which provides, in pertinent part, as follows:

The Congress shall have Power to Lay and collect Taxes, Duties, Imposts and Excises, to pay Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.¹⁵⁹

The federal government’s argument is that Section 3 of DOMA is within Congress’ authority under the Spending Clause to determine how money is best spent to promote the “general welfare” of the public. Massachusetts notes, however, that DOMA is not limited to provisions related to federal spending.¹⁶⁰ DOMA affects the application of 1,138 federal statutory provisions in the U.S. Code in which marital status is a factor, including copyright protections, provisions relating to the Family and Medical Leave Act, and testimonial privileges.¹⁶¹

Congress’ power to act pursuant to its spending power is subject to certain restrictions. The Supreme Court has held that any Spending Clause legislation must satisfy five requirements: (1) it must be in pursuit of the “general welfare;” (2) conditions of funding must be imposed unambiguously, so states are cognizant of the consequences of their participation; (3) conditions must not be “unrelated to the federal interest in particular national projects or programs” funded under the challenged

expressly disclaims any reservation of that power to the States;” however if the Tenth Amendment reserves and attributes a power to state sovereignty, “it is necessarily a power the Constitution has not conferred on Congress.”).

¹⁵⁷ See *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234, 246 (D. Mass. 2010) (the “court finds that Congress has exceeded the scope of its authority” “[b]ecause the government insists that DOMA is founded in [the] federal power,” of conditioning the receipt of federal funding on the denial of marriage-based benefits to same-sex married couples).

¹⁵⁸ See *United States v. Bongiorno*, 106 F.3d 1027 (1st Cir. 1997) (holding that the Child Support Recovery Act is a valid exercise of congressional authority pursuant to the *Commerce Clause*).

¹⁵⁹ U.S. CONSTITUTION, art. I, § 8.

¹⁶⁰ See *Massachusetts*, 698 F. Supp. 2d at 247.

¹⁶¹ *Id.* (citing Plaintiff’s Reply. Memorandum at 3).

legislation; (4) the legislation must not be barred by other constitutional provisions; and (5) the financial pressure created by the conditional grant of federal funds must not rise to the level of compulsion.¹⁶²

The state of Massachusetts' position is that DOMA impermissibly conditions the receipt of federal funding on the State's violation of the Equal Protection Clause of the Fourteenth Amendment by requiring the state to deny certain marriage-based benefits to same-sex married couples.¹⁶³ When those who are similarly-situated (i.e., married) are treated differently, the Equal Protection Clause requires at least a rational reason for the difference.¹⁶⁴ The Department of Veterans Affairs believes that the federal government is entitled to recapture millions of dollars in federal grants if Massachusetts permits the burial of a same-sex spouse of a veteran in one of its state veterans' cemeteries.¹⁶⁵ This threat penalizes Massachusetts for providing same-sex married couples the same benefits that similarly-situated heterosexual couples enjoy and arguably violates the equal protection rights of the same-sex couples. By imposing this restriction on federal funding to the state, DOMA contravenes a well-established restriction on the exercise of Congress' spending power as articulated in *South Dakota v. Dole*; restrictions on spending include that the conditions must not be "unrelated to the federal interest in particular national projects or programs' funded under the challenged legislation."¹⁶⁶

XII. DOMA AND STATE SOVEREIGNTY

Marriage and family law have traditionally been areas of local concern met with federal deference.¹⁶⁷ Beginning in 1948, States began recognizing interracial marriage.¹⁶⁸ In 1967, the U.S. Supreme Court held banning such marriages unconstitutional.¹⁶⁹ From our country's founding

¹⁶² *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987).

¹⁶³ See *Massachusetts*, 698 F. Supp. 2d at 248. The Fourteenth Amendment "requires that all persons subjected to . . . legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 602 (2008) (quoting *Hayes v. Missouri*, 120 U.S. 68, 71-72 (1887)).

¹⁶⁴ See *Engquist*, 553 U.S. at 602.

¹⁶⁵ See *Massachusetts*, 698 F. Supp. 2d at 248.

¹⁶⁶ *South Dakota*, 483 U.S. at 207 (demonstrating that "the spending power is not unlimited).

¹⁶⁷ Attempts to amend the U.S. Constitution to establish uniform regulations on marriage began in the 1880s and continued to the 1950s, but all were defeated. See *Massachusetts*, 698 F. Supp. 2d at 234 (citing Aff. Of Nancy F. Cott, Ph.D., the Jonathan Trumbull Professor of American History at Harvard University).

¹⁶⁸ California was the first state to recognize interracial marriage. See *Perez v. Lippold*, 32 Cal. 2d 711, 731 (1948) (holding that section 60 and 69 violated the U.S. Constitution by impairing the right of individuals to marry on the basis of race).

¹⁶⁹ See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (pointing out that limiting rights on

until 1966, Congress has deferred to the State's definition of marriage. For over 200 years, there has been a historically entrenched tradition of federal reliance on state marital status determination.

Congress cites the Tenth Amendment as its sole authority for enacting DOMA.¹⁷⁰ The Supreme Court, however, has repeatedly offered family law as an example of "a quintessential area of state concern" and held that "marital status determinations are an attribute of state sovereignty."¹⁷¹ In *U.S. v. Lopez*, decided one year before DOMA was enacted, the Supreme Court warned that a broad reading of the Commerce Clause could lead to federal legislation of "family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childbearing on the national economy is undoubtedly significant."¹⁷² In 2004, post-DOMA, the Supreme Court observed that 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."¹⁷³

DOMA interferes with state sovereignty. Massachusetts may not enforce its definition of marriage as it pertains to same-sex marriage without running afoul of federal regulations. If Massachusetts chooses to ignore DOMA and the warnings of the federal government as it pertains to same-sex marriage, Massachusetts will suffer the loss of millions of dollars in federal revenue.¹⁷⁴

accounts of race have been consistently considered unconstitutional and therefore limiting the freedom to marry solely because of race also violates the Equal Protection Clause).

¹⁷⁰ See 142 CONG. REC. S5931-33 (daily ed. June 6, 1996) (including a letter from Prof. Laurence H. Tribe to Sen. Kennedy stating that "[t]he basic point is a simple one: The Full Faith and Credit Clause authorizes Congress to enforce the clause's self-executing requirements insofar as judicial enforcement alone, as overseen by the Supreme Court, might reasonably be deemed insufficient. But the Full Faith and Credit Clause confers upon Congress no power to gut its self-executing requirements, either piecemeal or all at once.").

¹⁷¹ See, e.g., *United States v. Lopez*, 514 U.S. 549, 564 (1995) (noting the vastness of Congress' commerce power, however, it has been suggested there is some limitation on Congress' commerce power when it relates to, family law or certain aspects of education).

¹⁷² See *id.* (stating that with this broad interpretation, "it is difficult to perceive any limitation on federal power," and thus likely result in Congress having the power to regulate any activity by any individual).

¹⁷³ *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (quoting *In re Burrus*, 136 U.S. 586, 593 (1890)).

¹⁷⁴ See *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234, 252-253 (D. Mass. 2010). The VA claims is entitled to reimburse almost \$19 million in federal grants to Massachusetts for veterans' cemeteries if Massachusetts decides to bury a same-sex spouse in one of its two cemeteries. Moreover, Massachusetts' law requires that same-sex spouses receive the same benefits as heterosexual spouses. Given that the federal government will not provide federal funding under Medicaid and Medicare, Massachusetts has thus far incurred at least \$640,661 in additional costs and

XIII. FIRST CIRCUIT RULES THAT DOMA IS UNCONSTITUTIONAL

On May 31, 2012, the First Circuit Court of Appeals in Boston ruled that DOMA is unconstitutional.¹⁷⁵ Using precedents from decisions based on equal protection and federalism concerns, separately, the court decided not to create some new category of “heightened scrutiny” for DOMA under a prescribed algorithm but, rather, to require a closer than usual review based, in part, on discrepant impact among same-sex married couples and, in part, on the importance of state interests in regulating marriage. The court then tested the rationales offered for DOMA, taking account of Supreme Court precedent limiting which rationales can be counted and of the force of certain rationales.¹⁷⁶

The First Circuit Court of Appeals noted that without relying on suspect classifications, prior Supreme Court equal protection decisions have both intensified scrutiny of purported justifications where minorities are subject to discrepant treatment and have limited the permissible justifications.¹⁷⁷ Moreover, in areas where state regulation has traditionally governed, the Court may require that the federal government’s interest in intervention be shown with special clarity.¹⁷⁸ Citing *U.S. Department of*

as much as \$2,224,018 in lost federal funding.

¹⁷⁵ See *Massachusetts v. U.S. Dep’t of Health and Human Serv.*, 682 F.3d 1, 17 (1st Cir. 2012) (affirming the judgment of the district court. Anticipating that certiorari would be sought and that Supreme Court review was highly likely, the mandate was stayed, maintaining the district court’s stay of its injunctive judgment, pending further order of the court).

¹⁷⁶ See *id.* at 16 (reasoning that because Board waived or forfeited any objection based on the failure to elect spousal survivor coverage, and even though the Department of Justice did not concede, the Federal Circuit had to recognize Plaintiff’s annuitant status).

¹⁷⁷ See *id.* at 15; see also *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that the Texas statute did not pass the rational basis test and reasoning that a practice traditionally viewed as immoral is not sufficient for upholding a law prohibiting the practice); *Romer v. Evans*, 517 U.S. 633, 635 (1996) (finding that Amendment 2 did not bear a rational relationship to a legitimate government purpose as it inflicted “immediate, continuing, and real injuries” upon gays and lesbians “that outrun and belie any legitimate justifications that may be claimed for it.”).

¹⁷⁸ See *Massachusetts*, 682 F.3d at 13; see also *U.S. Dept. of Agric. v. Moreno*, 413 U.S. 528, 537-538 (1973) (invalidating Congress’ decision to exclude from the food stamp program households containing unrelated individuals). Disregarding purported justifications that such households were more likely to under-report income and to evade detection, the Court closely scrutinized the legislation’s fit—finding both that the rule disqualified many otherwise-eligible and particularly needy households, and a “bare congressional desire to harm a politically unpopular group.” *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (overturning a local ordinance as applied to the denial of a special permit for operating a group home for the mentally disabled). The Court found unconvincing interests like protecting the inhabitants

Agriculture v. Moreno, *Cleburne v. Cleburne Living Center*, and *Romer v. Evans*, the First Circuit “stressed the historic patterns of disadvantages suffered by the group adversely affected by the statute” and noted that the Supreme Court has, in these cases, undertaken a more careful assessment of the justifications than the light scrutiny offered by conventional rational basis review.¹⁷⁹

DOMA’s restrictions on federal benefits penalize same-sex couples by limiting federal tax and social security benefits to same-sex couples in their own, and all other, states. For those married same-sex couples of which one partner is in federal service, the other cannot take advantage of medical care and other benefits available to opposite sex partners in Massachusetts and everywhere else in the country.¹⁸⁰ The rationale for these restrictions is analogous to those in *Moreno*, *Cleburne*, and *Romer*. While not insisting on use of “heightened scrutiny” or “compelling” justifications, the court held that in cases such as these, federalism, must be considered.¹⁸¹ “Supreme Court precedent relating to federalism-based challenges to federal laws reinforce the need for closer than usual scrutiny of DOMA’s justifications and diminish somewhat the deference ordinarily accorded.”¹⁸² The court concluded that the rationales offered did not provide adequate support for section 3 of DOMA, that several of the reasons given did not match the statutes and that several other reasons were diminished by specific holdings in Supreme Court precedent.

XIV. CONCLUSION

The public’s competing attitudes on the broader topic of homosexuality have divided the nation for many years and are likely to continue doing so

against the risk of flooding, given that nursing or convalescent homes were allowed without a permit; mental disability too had no connection to alleged concerns about population density. All that remained were “mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding.” *See Romer v. Evans*, 517 U.S. 620, 632-633 (1996) (striking down legislation that prohibited regulation to protect homosexuals from discrimination). The Court, calling “unprecedented” the “disqualification of a class of persons from the right to seek specific protection from the law,” deemed the provision a “status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests.”

¹⁷⁹ *See Massachusetts*, 682 F.3d at 11 (explaining that as with women, the poor, and the mentally impaired, gays and lesbians have long been the subject of discrimination).

¹⁸⁰ *See id.* at 12.

¹⁸¹ *See id.* at 11, 12 (“DOMA intrudes broadly into an area of traditional state regulation,” a closer than usual scrutiny of DOMA’s justifications while somewhat diminishing the deference ordinary accorded relates to federalism concerns and thus calls for federalism to be considered”).

¹⁸² *Id.* at 11-12.

for the foreseeable future. What specific prevailing attitudes find their way into various forms of legislation will not only continue to be a hot topic of political debate but will also reflect shifting attitudes of public opinion. The evolution different states have undergone by passing different laws regarding same-sex marriage is a conspicuous manifestation of this very concept.

In terms of the timeframe, DOMA can be seen as the cultural cousin of the military's now defunct policy of "Don't Ask, Don't Tell" ("DADT").¹⁸³ Both DOMA and DADT came out of the Clinton Administration as attempts to balance competing public attitudes on homosexuality at that point in time in this nation's history, i.e., both DOMA and DADT were political calculations and compromises designed to fit the political realities of the times. In that sense, both DOMA and DADT were attempts to appease many while satisfying few. Political calculations and compromises, however, do not necessarily bear any correlation to constitutional principles no matter how expedient they may be. This nation's history is replete with countless example of how strong public opinion on a divisive topic led to laws being passed that were later found to be unconstitutional.

Just as unresolved and highly contentious matters of passionate public opinion quickly find their way into the political arena, they likewise often migrate to the judicial arena. As discussed previously, prior to enacting DOMA, Congress did not engage in a meaningful examination of the scope or effect of the law.¹⁸⁴ There was no testimony from agency heads regarding how DOMA would affect federal programs, nor was there testimony from historians, economists, or specialists in family or child welfare.¹⁸⁵ The failure of Congress to do its homework – in essence, instead simply choosing to do what was politically expedient – has given rise to various ways DOMA is now being challenged.

On May 9, 2012, the political landscape was forever changed when President Obama became the first president to announce his support of same-sex marriage.¹⁸⁶ Within two weeks of his announcement, opposition to same-sex marriage hit a record low.¹⁸⁷ With this shift in public opinion,

¹⁸³ See 10 U.S.C. § 652 (2006) (The policy prohibited military personnel from discriminating against or harassing closeted homosexual or bisexual service members or applicants, while barring openly gay, lesbian, or bisexual persons from military service).

¹⁸⁴ See *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 379 (D. Mass. 2010).

¹⁸⁵ See *id.*

¹⁸⁶ *Civil Rights*, THE WHITE HOUSE, available at <http://www.whitehouse.gov/issues/civil-rights> (last visited Mar. 14, 2013) ("In an interview with ABC News, the President said he believes it's important to 'treat others the way you would want to be treated'").

¹⁸⁷ See Scott Clement & Sandhya Somashekhar, *After President Obama's Announcement, Opposition to Same-Sex Marriage Hits Record Low*, THE

the potential for legislative repeal now seems less remote, as we saw with DADT. Nonetheless, should the political process stall, the irreconcilable differences between the legislation's effects and our constitutional principles are growing more cognizable to our nation as a whole – perhaps providing the impetus to bolster our eventual separation from DOMA through repeal or success of the judicial assault already underway.

WASHINGTON POST (May 22, 2012), *available at* http://www.washingtonpost.com/politics/after-president-obamas-announcement-opposition-to-gay-marriage-hits-record-low/2012/05/22/gIQAlAYRjU_story.html. (“[Fifty-three] percent of Americans say gay marriage should be legal,” a record high in support. There has been a “dramatic turnaround from just six years ago, when just [thirty-six] percent thought it should be legal. Thirty-nine percent, a new low, say gay marriage should be illegal.”).