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Amending the Defense of Marriage Act: A Necessary Step Toward Gaining Full Legal Rights for Same-Sex Couples

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AMENDING THE DEFENSE OF MARRIAGE ACT: A NECESSARY STEP TOWARD GAINING FULL LEGAL RIGHTS FOR SAME-SEX COUPLES

NANCY KUBASEK, CHRISTY GLASS, AND KATE COOK*

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I. INTRODUCTION

Since passage of the first Domestic Partners Ordinance in California in 1982, advocates of equal rights for same-sex couples have been primarily

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focusing their efforts at the local and state levels, making significant gains in many states, and even attaining the right for same-sex couples to marry in six states:¹ Massachusetts,² Connecticut,³ Iowa,⁴ Vermont,⁵ New York,⁶ and New Hampshire.⁷ But even where same-sex couples have the legal right to marry, they do not have the same marriage rights as opposite sex couples who marry in those same states because of the Defense of Marriage Act (DOMA), passed in 1996.⁸ In accordance with this Act, Title 1, Section 7 of the United States Code now provides:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and

1. See Keven Miller & Judy Harrison, *Gay Marriage Repealed in Maine*, BANGOR DAILY NEWS, Nov. 6, 2009, available at <http://www.bangordailynews.com/detail/128048.html>. The number of states allowing the performance of same-sex marriages would be seven if not for voter rejection of the legislative establishment of same-sex marriage in one state. In April of 2009, the Maine legislature passed legislation extending marriage to same-sex couples, but shortly afterwards, opponents of same-sex marriage gathered enough signatures to trigger a “people’s veto” referendum on the new law. On November 4, 2009, the referendum to overturn same-sex marriage in the state passed with 53% of the vote versus 47%.

2. See *Goodridge v. Mass. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (holding that barring individuals from same-sex marriage violates the Massachusetts constitution).

3. See *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 411 (Conn. 2003) (asserting that the state failed to provide sufficient justification for barring same-sex couples from marrying).

4. By a unanimous state supreme court ruling, Iowa became the third state to legalize same-sex marriage. There was no appeal of that decision, although opponents indicated when it passed that they would most likely attempt to amend the state’s constitution, a process that would eventually require a public vote along with approval by two consecutive legislative assemblies, and thus would be neither quick nor easy to obtain. See *Varnum v. Brien*, 763 N.W.2d 862, 907 (Iowa 2009) (invalidating Iowa’s statute prohibiting same-sex marriage); see also Jeff Eckhoff & Grant Schulte, *Unanimous Ruling: Iowa Marriage No Longer Limited to One Man, One Woman*, DESMOINESREGISTER.COM, April 3, 2009, <http://www.desmoinesregister.com/article/20090403/NEWS/90403010/Unanimous-ruling—Iowa-marriage-no-longer-limited-to-one-man—one-woman>.

5. Same-sex marriage became legal in Vermont on April 7, 2009. The initial vote on Vermont’s same-sex marriage law was 94–52, but the final vote a week later was a veto-proof 100–49. See Keith B. Richburg, *Vermont Legislature Legalizes Same-Sex Marriage*, WASH. POST, Apr. 7, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/07/AR2009040701663.html>.

6. Same-sex marriage became legal in New York on June 24, 2011. See Nicholas Confessore & Micheal Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. TIMES, June 25, 2011 at A1 (noting that the law passed in the Senate by a 33–29 vote).

7. As of January 1, 2010, civil unions were replaced by same-sex marriages in New Hampshire as a result of HB 79, which was signed into law on June 3, 2009. See N.H. REV. STAT. ANN. § 457:1-a (2010) (defining marriage as a legally recognized union of two people regardless of gender); see also Abby Goodnough, *New Hampshire Legalizes Same-Sex Marriage*, N.Y. TIMES, June 4, 2009, at A19.

8. See Defense of Marriage Act, 1 U.S.C. § 7, 28 U.S.C. § 1738C (2006); see also Federal Defense of Marriage Act, DOMAWATCH.ORG, <http://www.domawatch.org/about/federaldoma.html> (last visited Oct. 25, 2010) [hereinafter DOMAWATCH.ORG].

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.⁹

This provision denies even legally married same-sex couples important federal rights that opposite-sex married couples enjoy.¹⁰ Thus, as the federal law currently stands, even when same-sex couples secure the right to marry in every state of the union, their status will not be equal to that of opposite-sex married couples. According to government estimates, there are at least 1,113 federal statutory provisions for which marital status is a factor in determining whether an individual is eligible for federal benefits and, therefore, at least 1,113 situations wherein legally married same-sex couples are not eligible to receive the benefits to which their legal status should entitle them.¹¹

Two routes are available to remedy this situation and pave the way for same-sex marriages to be truly equal to other marriages: challenging the constitutionality of DOMA or working to obtain an amendment of DOMA to provide that Title 1, Section 7 shall read,

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 two parties sanctioned by a state law as a marriage, civil union, or domestic partnership, and the word “spouse” refers only to a person who is a legally recognized marital or domestic partner in a state-sanctioned marriage, domestic partnership, or civil union.

For reasons explored in this Article, the authors advocate this latter legislative approach.

This Article begins with a brief history of the legal treatment of same-sex relationships in the United States. It then provides detailed discussions of the federal benefits that are denied to married same-sex partners because of DOMA. By iterating the provisions in the United States Code that refer to spouses or marriage and identifying all the benefits that same-sex marital partners are denied by their current exclusion from federal benefits linked to these terms, this Article is an attempt to clarify the need to move forward on this issue. The next section examines the alternative approaches to eliminating the harmful effects of DOMA, highlighting the strengths and

9. 1 U.S.C. § 7.

10. *Id.*

11. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT (2004) [hereinafter GAO, DEFENSE OF MARRIAGE ACT: UPDATE] (updating a report that identifies the number of federal statutory provisions in which receiving benefits or rights depends on marital status).

weaknesses with each approach. The final section explains why the authors believe that the most expeditious approach is to work to amend DOMA.

II. HISTORY OF THE TREATMENT OF SAME-SEX RELATIONSHIPS IN THE UNITED STATES

Recognition of same-sex relationships began with municipal recognition of domestic partnerships, thereby giving some same-sex couples some of the legal benefits of marriage.¹² Recognition of domestic partnerships then progressed to the state levels, and the benefits began including more and more of the benefits associated with opposite-sex marriage, with some states' domestic partnership law actually giving same-sex couples all of the state-conferred benefits of marriage except the ability to call their relationship a marriage.¹³ California started this trend by passing a domestic partnership registry in 1999¹⁴ and expanding it in 2003.¹⁵ Maine passed a domestic partnership bill in 2004,¹⁶ as did New Jersey in 2006. Oregon¹⁷ and Washington¹⁸ followed suit in 2007. The District of Columbia has recognized domestic partnerships since 1992.¹⁹ Taking a slightly different approach, in 1997, Hawaii passed a reciprocal benefits

12. See S.F., CAL., ADMIN. CODE ch. 62 (2004), available at <http://www.sfgov.org/index.aspx?page=29>. San Francisco was the first municipality to legally recognize same-sex relationships with its domestic partnership ordinance that granted both same- and different-sex couples the opportunity to register as domestic partners. The purpose of the statute was "to recognize intimate committed relationships, including those of same-sex couples who otherwise may be denied the right to marry under California law, and to afford to domestic partners, to the fullest extent legally possible, the same rights, benefits, responsibilities, obligations, and duties as spouses." See generally DIANE WHITACRE, *WILL YOU BE MINE?: DOMESTIC PARTNERSHIP* (1992) (outlining a history of San Francisco's domestic partnership ordinance).

13. Compare CAL. FAM. CODE § 297.5(a) (West 2008) (expanding the rights of domestic partners in California by granting them the "same rights, protections, and benefits" given to married couples under the state's "statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses"), with ME. REV. STAT. ANN. tit. 22, §§ 2710, 2843-A (2010); ME. REV. STAT. ANN. tit. 18-A §§ 2-102, 5-309, 5-311 (2010) (Maine's more limited domestic partnership statute, providing a registry for domestic partners and allowing them to make funeral and burial arrangements and to be named a guardian or conservator if their partner becomes incapacitated).

14. Act of October 10, 1999, ch. 588, 1999 Cal. Stat. 93 (1999).

15. Domestic Partners Rights and Responsibilities Act, ch. 421, 2003 Cal. Stat. 2586 (2003).

16. An Act to Promote the Financial Security of Maine's Families and Children, ch. 672, 2003 Me. Laws 2126 (2003).

17. Oregon Family Fairness Act, ch. 99, 2007 Or. Laws 425 (2007).

18. Act of April 23, 2007, ch. 256, 2007 Wash. Sess. Laws 1118 (2007).

19. See Health Care Benefits Expansion Act, D.C. CODE § 32-701 (2010); 53 D.C. REG. 1035, (Feb. 17, 2006). The District of Columbia first recognized domestic partnerships with its Health Care Benefits Expansion Act of 1992, but it only funded the bill in 2006 with its Domestic Partnership Equality Amendment Act of 2006.

statute, allowing couples who were prohibited from marriage to register and then be treated as spouses for purposes of Hawaiian domestic violence laws, tort liability including wrongful death claims, and loan eligibility, along with some other benefits.²⁰ Colorado similarly allows same-sex partners to enter into designated beneficiary agreements, granting them limited rights including making funeral arrangements for each other, receiving death benefits, and inheriting property without a will.²¹

The next step in the evolution of the treatment of same-sex relationships was the closely related adoption of civil unions in four states: Vermont,²² Connecticut,²³ New Hampshire,²⁴ and New Jersey—after New Jersey’s highest court determined that same-sex couples were entitled to the same equal protection as heterosexual couples under the state constitution and that they were not receiving that equal protection under the domestic partnership statute.²⁵ Connecticut was the first state to adopt a civil union without a court order.

Today, same-sex marriage is recognized in six states—Massachusetts, Connecticut, Iowa, Vermont, New York, and New Hampshire—none of which, except New Hampshire, have any residency requirement, and four of which evolved from civil unions. Additionally, at least one Native American tribe performs same-sex marriage ceremonies.²⁶ In 2011, Rhode Island considered legalizing same-sex marriage;²⁷ but instead, passed a bill allowing civil unions.²⁸

20. See Act of July 8, 1997, no. 383, 1997 Haw. Sess. Laws. 1211 (1997) (allowing registered partners to inherit from their partner without a will, consent to postmortem examinations, own property as joint tenants, and have the same rights as spouses to hospital visitations and making health care decisions).

21. See COL. REV. STAT. § 15-22 (2010) (providing for Colorado’s Designated Beneficiaries law to go into effect in April of 2009).

22. Act Relating to Civil Unions, 2000 Vt. Acts & Resolves 91 (codified at VT. STAT. ANN. tit. 15, §§ 1201- 1207 (Supp. 2000)).

23. Act Concerning Civil Unions, 2005 Conn. Pub. Acts 05-10 (codified at CONN. GEN. STAT. §§ 46b-38aa to 46b-38pp (2009)).

24. Act of May 31, 2007, ch. 58, 2007 N.H. Laws (2007).

25. See *Lewis v. Harris*, 908 A.2d 196, 200 (N.J. 2006) (ordering the state’s legislature to amend the marriage statutes to include same-sex couples or provide a “parallel statutory structure” giving them the same rights and benefits as married couples).

26. See Julie Bushyhead, *The Coquille Indian Tribe, Same-Sex Marriage, and Spousal Benefits: A Practical Guide*, 26 ARIZ. J. INT’L & COMP. L. 509, 509 (2009) (adding that the Coquille Tribe, residing in the state of Oregon, has codified the definition of marriage as a fundamental right regardless of the biological sex of the parties).

27. Act Relating to Domestic Relations—Persons Eligible to Marry, 2009-S0147, R.I. Gen. Assem. Jan. Sess. (2009). The bill is modeled after AB 0147, available at <http://www.rilin.state.ri.us/BillText09/SenateText09/S0147.pdf>.

28. See Abby Goodnough, *Rhode Island Senate Approves Civil Unions Bill*, NY TIMES, June 30, 2011, at A16 (recognizing that supporters could not get enough votes

Judges in three states—Massachusetts, Connecticut, and California—held banning same-sex marriage unconstitutional under their states' constitutions.²⁹ However, California voters responded in 2009 by amending the state constitution to prohibit same-sex marriage. In July 2009, Washington, D.C. passed a bill that allowed the District to recognize same-sex marriages made in states that recognize same-sex marriage.³⁰ In the fall of 2009, the New York Court of Appeals upheld the validity of policies granting spousal benefits to same-sex couples legally married in states that authorized same-sex marriage.³¹

Of course, not all has gone smoothly at the state level, with forty-one states restricting the ability of same-sex couples to marry, either by statute, constitutional amendment, or judicial decision.³² Some of these restrictions

to pass a bill legalizing same-sex marriage).

29. See *In re Marriage Cases*, 183 P.3d 384, 400 (Cal. 2008) (emphasizing that the California constitution must be read to guarantee the right to marriage to all, including same-sex couples); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 407 (Conn. 2003); *Goodridge v. Mass. Dep't of Pub. Health*, 798 N.E.2d 941, 941 (Mass. 2003).

30. Associated Press, *Gay Marriage Bill Takes Effect in Nation's Capital*, USA TODAY, July 7, 2009, available at http://www.usatoday.com/news/nation/2009-07-07-gay-marriage-dc_N.htm.

31. See Robert D. McFadden, *State Court Recognizes Gay Marriages from Elsewhere*, N.Y. TIMES, Feb. 2, 2008, available at <http://www.nytimes.com/2008/10/11/nyregion/11marriage.html>; see also Jeremy W. Peters, *New York to Back Same-Sex Unions from Elsewhere*, N.Y. TIMES, May 29, 2009, available at <http://www.nytimes.com/2008/05/29/nyregion/29marriage.html> (providing that shortly after the ruling, Governor Patterson directed all state agencies to begin to revise their policies and regulations to recognize same-sex marriages performed in other jurisdictions).

32. Thirty-eight states recognize laws that ban same-sex marriage. They include: Alabama (passed a constitutional marriage amendment in 2006 and had already passed a Defense of Marriage Act), Alaska (passed a constitutional amendment March 11, 1998 and also adopted a Defense of Marriage Act), Arizona (passed a constitutional ban on same-sex marriage in 2008, after having rejected such a ban in 2006; state already had Defense of Marriage law), Arkansas (passed a constitutional marriage amendment on Nov. 1, 2004 and also has a Defense of Marriage Act), California (approved Defense of Marriage Act in 2000, which was overturned in 2008. Voters approved Proposition 8, a constitutional amendment prohibiting same-sex marriage in 2008. The California courts initially upheld Proposition 8, but also ruled that same-sex couples married before the ban were still married. In 2010, the California Court of Appeals ruled that Proposition 8 was unconstitutional, and as of September, 2010, the California Court of Appeals refused to order state officials to defend Proposition 8 in an appeal. But California does have a domestic partners statute.), Colorado (2006), Delaware (passed a Defense of Marriage Act in 1996), Florida (passed a constitutional amendment banning same-sex marriage, civil unions, and domestic partnerships in 2008 and already had a Defense of Marriage Act.), Georgia (passed a constitutional amendment banning same-sex marriage in 2004 that was struck down in May 2006 and reinstated in July 2006 by the state supreme court and had previously adopted a Defense of Marriage Act), Hawaii (passed a constitutional amendment prohibiting the courts from authorizing same-sex marriages and preserving that right for the legislature in 1998, who had promptly banned same-sex marriage, although Hawaii has limited reciprocal benefits law), Idaho (passed a state constitutional amendment banning same-sex marriage in 2006), Illinois (passed a Defense of Marriage Act in 1996), Indiana (passed a Defense of Marriage Act in 1997, but several public referenda on a

have even been imposed during the last couple of years, at a time when other states were just beginning to recognize marriage between same-sex couples. So much still remains to be done on a state level, but as we are just starting to secure the right to marry in a number of states, we must move forward to make sure that securing the right to marry entails securing all the legal benefits that should flow with that status, not just rights from the state.

III. LOSSES IMPOSED ON SAME-SEX COUPLES BY FEDERAL DOMA

As significant as these historic victories have been, the impact of state-level laws granting marriage rights to same-sex couples are limited in their benefits because these marriages lack federal recognition. As noted in the Introduction, the 1996 DOMA limits federal recognition of marriage to

constitutional ban on gay marriage have failed), Kansas (passed a constitutional marriage amendment on April 6, 2005 and also has a Defense of Marriage Act), Kentucky (passed a constitutional marriage amendment in 2004 and also has a Defense of Marriage Act), Louisiana (passed a constitutional marriage amendment on Sept. 18, 2004 and also has a Defense of Marriage Act), Maine (passed a Defense of Marriage Act in 1997, but does have a limited domestic partners law), Maryland became the first state to define marriage as between a man and a woman in 1973, with a law that was struck down in 2006 by a Maryland Circuit Court, but that decision was overturned and the statute reinstated by the state supreme court in 2007), Michigan (passed a constitutional marriage amendment in 2004 and also has a Defense of Marriage Act), Minnesota (passed a Defense of Marriage Act in 1997), Missouri (passed a constitutional marriage amendment 2004; previously, their Defense of Marriage Act had been overturned by the state supreme court), Mississippi (passed a constitutional marriage amendment on Nov. 2, 2004; also has a Defense of Marriage Act), Nebraska (passed a constitutional amendment banning recognition of all same-sex relationships in 2000, which was overturned by a federal district court in 2005 as overly broad, but reinstated by the Eighth Circuit Court of Appeals in July of 2006), Montana (passed a constitutional amendment on Nov. 2, 2004 and also has a Defense of Marriage Act), North Carolina (passed a Defense of Marriage Act in 1996), North Dakota (passed a constitutional marriage amendment on November 2, 2004 and also has a Defense of Marriage Act), Ohio (passed a constitutional marriage amendment in 2004 and also has a Defense of Marriage Act), Oklahoma (passed a constitutional marriage amendment on Nov. 2, 2004 and also has a Defense of Marriage Act), Pennsylvania (passed a Defense of Marriage Act in 1996, but subsequent attempts to pass a constitutional amendment banning same-sex marriage have failed), South Carolina (passed a constitutional marriage amendment in 2006 and already had a Defense of Marriage Act), South Dakota (passed a constitutional amendment in 2006 that bans gay marriage as well as prohibits civil unions and domestic partnerships, and also has a Defense of Marriage Act), Tennessee (passed a constitutional marriage amendment in 2006 and already had a Defense of Marriage Act), Texas (passed a constitutional marriage amendment on Nov. 9, 2005 and also has a Defense of Marriage Act), Utah (passed a constitutional marriage amendment on Nov. 2, 2004 and also has a Defense of Marriage Act), Virginia (passed a constitutional marriage amendment in 2006 and already had a Defense of Marriage Act), Washington (1998), West Virginia (passed a Defense of Marriage Act in 2000), Wisconsin (passed a constitutional marriage amendment in 2006 and also has a Defense of Marriage Act.), and Wyoming (passed state law banning same-sex marriage in 2003). State by State, *The Battle Over Gay Marriage*, NPR, <http://www.npr.org/templates/story/story.php?storyId=112448663> (last updated Dec. 15, 2009).

different-sex legal unions.³³ DOMA limits benefits to same-sex couples through two provisions.³⁴ The first defines marriage as a legal union between one man and one woman.³⁵ The second specifically relieves any state from having to recognize same-sex marriages performed in another state.³⁶ Thus, while recognition of same-sex marriage rights at the state level represents an important step toward extending marriage rights to same-sex couples, state-recognized marriages lack all of the federal rights and benefits granted to different-sex couples and do not provide rights that are transferrable from one state to another. As a result, married and unmarried same-sex couples experience significant losses in terms of financial benefits and protections compared to married different-sex couples.

33. See Defense of Marriage Act, 1 U.S.C. § 7, 28 U.S.C. § 1738C (2006); see also DOMAWATCH.ORG, *supra* note 8. The Defense of Marriage Act was authored by Bob Barr, a Republican representative from Georgia, and signed into law by President Clinton. Several scholars have argued that political mobilization in support of the federal DOMA, as well as the state-level support for DOMA, was a response to fears surrounding *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), a case that held the potential for the Hawaiian Constitution to require recognition of same-sex marriage rights. Several scholars have identified this political mobilization aimed at restricting marriage to one man and one woman as the “marriage movement” or “defense of marriage movement.” According to Bernstein, for example, the premise of this movement is that marriage, assumed to be socially desirable, is under threat and in need of protection. See Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129, 140 (2003); see also Judith Stacey, *Family Values Forever: In the Marriage Movement, Conservatives and Centrists Find a Home Together*, THE NATION, Jul. 9, 2001, at 26. This movement has found support among social conservative political actors as well as scholars. For an example of a scholarly report that supports the premise of the marriage movement, see MARRIAGE IN AMERICA: A REPORT TO THE NATION, THE COUNCIL ON FAMILIES IN AMERICA, 293-318 (1995), available at <http://www.eric.ed.gov/PDFS/ED383446.pdf>. Sociologist David Popenoe and colleagues have formed the National Marriage Project, now housed at the University of Virginia and directed by sociologist W. Bradford Wilcox, to document the factors leading to the decline of marriage and traditional family life. The stated mission of the center is “to provide research and analysis on the health of marriage in America.” National Marriage Project, UNIVERSITY OF VIRGINIA, <http://www.virginia.edu/marriageproject/history.html> (last visited Oct. 23, 2010).

34. See Defense of Marriage Act, 100 Stat. at 2419. In her analysis of the legal implications of current marriage law including DOMA, Bernstein notes how anomalous the so-called marriage movement has been in its insistence on distinguishing men from women. In so many other areas of social policy and law, including employment, the military, prisons, and education, the movement has been away from sex or gender-based distinctions. Bernstein, *supra* note 33, at 6.

35. See 1 U.S.C. § 7 (2006) (“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.”).

36. See 28 U.S.C. § 1738C (2006) (“No state, territory, or possession of the United States, or Indian tribe, shall be required to give effect of any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between person 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.”).

According to a report by the U.S. Government Accountability Office (GAO), there are at least 1,138 federal statutory provisions that grant federal benefits, rights, and privileges to couples whose marriages are recognized at the federal level.³⁷ Because same-sex couples cannot marry in most states and because marriages even in those states granting marriage rights are not recognized at the federal level, same-sex couples are barred from or ineligible for more than a thousand federal benefits and protections.

Both original and updated reports group federally provided benefits and protections available to different-sex married couples into thirteen broad categories ranging from social security, veterans' benefits, and taxation to criminal law, loan guarantees, and immigration.³⁸ As this list makes clear, the range of federal benefits and protections available to married couples is diverse and extensive. Rather than review all categories of benefits, this Article will concentrate on those federal laws that provide financial benefits and protections, as these arguably represent the deepest losses to same-sex couples barred from marriage rights and affect the greatest number of couples.³⁹

37. See GAO, DEFENSE OF MARRIAGE ACT: UPDATE, *supra* note 11. The original report was prepared at the request of Congressional Representative Henry Hyde who wanted a full review of the benefits of marriage in the wake of DOMA's passage. He asked the General Accounting Office "to identify federal laws in which benefits, rights and privileges are contingent on marital status." In response to this request, the GAO's original report identified 1,049 federal "statutory provisions classified to the United States Code in which benefits, rights and privileges are contingent on marital status or in which marital status is a factor." The GAO updated its report in 2004 and identified 1,138 benefits available only to married couples. The original report included only laws enacted prior to the date DOMA was passed into law. However, the updated report includes all statutory provisions enacted between 1996 and the end of 2003.

38. See *id.* The thirteen categories are: (1) social security and related programs, housing, and food stamps; (2) veterans' benefits; (3) taxation; (4) federal civilian and military service benefits; (5) employment benefits and related laws; (6) immigration, naturalization, and aliens; (7) Indians; (8) trade, commerce, and intellectual property; (9) financial disclosure and conflict of interest; (10) crimes and family violence; (11) loans, guarantees, and payments in agriculture; (12) federal natural resources and related laws; and (13) miscellaneous laws.

39. Focusing on financial benefits and protections does not diminish the other important rights and protections available to different-sex married couples. For example, the Family and Medical Leave Act passed in 1993 grants unpaid leave to workers who wish to care for a spouse. Care for unrelated adults, including same-sex partners and cohabitators, is not granted under this statute. See 29 U.S.C. §§ 2601-2654 (2000). Furthermore, focusing on direct financial benefits and protections does not imply that other benefits and protections do not have indirect financial implications. For example, immigration rights tied to marriage provide significant protections from deportation and loss of work. Residency status for resident alien workers automatically grants special status to spouses. While immigration rights do not directly provide financial benefits or protections, the indirect financial benefits of these laws are substantial. See 8 U.S.C. § 1153 (2000).

A. *Federal Welfare Benefits*

Federal financial benefits provided to individuals based on marital status ranges from Social Security retirement and disability to food stamps, poverty assistance, Medicare, and Medicaid.⁴⁰ Providing benefits and protections based on marital status is not incidental to these programs. Rather, as the 1997 GAO report indicates, for most federal welfare programs, “recognition of the marital relationship is integral to the design of the program.”⁴¹ For example, nearly all Social Security programs identify the rights of individual recipients as well as the rights to recipients’ current and former spouses.⁴² Eligibility for payments as well as the level of payments is determined by marital status. More concretely, Social Security rewards marriage as well as marital duration through a variety of financial transfers.⁴³

Under the Social Security Act, married individuals have access to both their own and their living and deceased spouses’ benefits. In fact, the law provides rights to widows and widowers—as well as divorced spouses under certain conditions⁴⁴—to payments based on marriage rather than their own earnings.⁴⁵ Obviously, same-sex partners—even those married under state laws—are ineligible for any non-contributory survivor payments whatsoever. The denial of these benefits to same-sex partners represents substantial losses to same-sex couples and their children.⁴⁶

40. These laws, with the exception of food stamps, are found in Title 42 of the United States Code, The Public Health and Welfare. 42 U.S.C. §§ 1-16991 (2006). Food stamp laws are found in Title VII, Agriculture. 7 U.S.C. §§ 1-8069 (2006).

41. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/OGC-97-16, DEFENSE OF MARRIAGE ACT (1997) [hereinafter GAO, DEFENSE OF MARRIAGE 1997]; see also GAO, DEFENSE OF MARRIAGE ACT: UPDATE, *supra* note 11 (providing an updated report).

42. See 42 U.S.C. § 402 (2006). In fact, the Social Security Act that governs all Old Age, Survivors, and Disability Insurance (OASDI) programs specifically uses the terms “husband” and “wife.”

43. See *id.* Financial transfers covered under the Social Security Act include retirement and disability benefits, food stamps, poverty assistance, Medicare and Medicaid, and state enforcement of child support. Marital status and duration impact the eligibility as well as the level of financial transfers available. For example, the Supplemental Security Income program bases the amount of the transfer on whether the applicant has a spouse or not. Furthermore, eligibility for Medicaid is determined by an individual’s income *or* marital status. Spouses of eligible recipients are eligible for medical coverage themselves irrespective of their income.

44. See Madonna Harrington Meyer, *Making Claims as Workers or Wives: The Distribution of Social Security Benefits*, 61 AM. SOC. REV. 449, 462 (1996) (providing that divorced spouses are eligible for support if they have been married to a covered worker for 10 years or more and remain unmarried).

45. See *id.* at 451 (stating that two thirds of American women aged 62 and older receive non-contributory spouse and widow benefits. Since 1973, widow benefits have been equal to 100% of the deceased spouse’s benefit).

46. *Id.* Social Security benefits—both contributory and non-contributory—represent the primary source of income for older Americans. Specifically, Social

B. Tax Benefits

Federal tax law includes nearly 200 provisions that distinguish between married and unmarried individuals.⁴⁷ The most basic marital status-related distinction is that the law allows married taxpayers to file jointly or separately while non-married individuals are required to file separately. Thus, while federal tax law provides married individuals the option of being taxed as a single economic unit, the law treats cohabitating individuals as strangers, financially speaking.⁴⁸ By doing so, tax law provides a variety of tax advantages and subsidies to couples' whose marriages are recognized by federal law – different sex couples, including the ability to pool itemized deductions, to file jointly, and to protect widows and widowers against financial loss upon the death of a spouse.

There are fifty-nine provisions in the federal income tax code that specifically contribute to a marriage premium or subsidy.⁴⁹ In the past, joint filing of taxes has been somewhat of a mixed blessing for married couples in that, depending on the differences between spouses' incomes, joint filing could mean a tax bonus *or* penalty.⁵⁰ The so-called "marriage penalty" has been significantly overstated, and recent amendments to federal tax law have sought to remove any potential penalty related to joint filing.⁵¹ Today, even though married couples are not required to file

Security benefits account for 51% of the annual income of Americans aged 62 and over. Furthermore, survivor benefits assist not only surviving spouses and former spouses but children of married couples as well. See Evan Wolfson, *For Richer, For Poorer: Same-Sex Couples and the Freedom to Marry as a Civil Right*, DRUM MAJOR INSTITUTE FOR PUBLIC POLICY (June 2, 2003), <http://www.drummymajorinstitute.org/library/article.php?ID=5518>.

47. See GAO, DEFENSE OF MARRIAGE ACT 1997, *supra* note 41, at 33 (providing, in its initial report, that state and federal tax law includes the largest category of provisions that distinguish between married and unmarried individuals).

48. I.R.C. § 6013(a) (2006).

49. See James Alm et al., *Policy Watch: The Marriage Penalty*, 13 J. ECON. PERSP. 193, 195 (1999); see also James Alm & Leslie Whittington, *For Love or Money?: The Impact of Income Taxes on Marriage*, 66 ECONOMICA 297 (1999) (finding that the tax consequence of marriage continue to be substantial and diverse).

50. See CONG. BUDGET OFFICE, FOR BETTER OR WORSE: MARRIAGE AND THE FEDERAL INCOME TAX 1, 29-30 (June 1997). Previously, if both married individuals earned similar incomes, then filing jointly with a standard deduction brought both individuals into a higher tax bracket than if they had filed individually and thus paid a penalty. However, if one of the individuals made significantly more than the other, the higher-earning individual was brought into a lower tax bracket and thus received a tax subsidy. In its 1997 report, the Congressional Budget Office estimated that over 40% of married individuals were at risk for a tax penalty due to joint filing. However, the same report concluded that over 50% of married couples received a tax subsidy. Those receiving tax subsidies saved approximately \$1,300 annually as a result of filing jointly.

51. See Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. 108-27, 117 Stat. 752 (2003). In 2001, Congress passed the Economic Growth and Tax Relief Reconciliation Act (EGTRRA), which among other things, lowered taxes on most married couples by increasing the standard deduction for those filing jointly. Title III

jointly, nearly all married couples choose to do so as a way of reducing their tax liabilities.⁵²

Furthermore, federal tax law provides financial benefits to married couples beyond joint filing. For example, any earnings used to pay for one's own or one's spouse's health insurance are not included in taxable income, while health insurance for non-married partners—including employer-provided domestic partner benefits—are taxable as income.⁵³ Furthermore, estate and gift tax laws allow property transfers and gifts to be deductible, which allows married couples to exchange substantial amounts of wealth without any tax liability. Wealth transfers between non-married individuals are not deductible, however, thus imposing potentially substantial tax penalties on same-sex couples.

C. Additional Benefits

In addition to the benefits available to married couples in the areas of social welfare and taxation, there are numerous other areas of federal law that provide direct transfers based on marital status. For example, Title 11 of the United States Code grants priority to former spouses making claims against a debtor in bankruptcy proceedings over many other classes of creditors.⁵⁴ Title 29 of the Code provides for the continuation of employer-sponsored health benefits following the death or divorce of the employee.⁵⁵ Titles 5 and 38 provide a variety of rights and benefits to spouses of veterans, including access to pensions, compensation for service-related death, medical care, nursing home care, as well as educational and housing assistance.⁵⁶ Finally, there are fourteen statutes in the Code that prevent

of EGTRRA, titled "Marriage Penalty Relief," eliminated marriage penalties in standard deductions, phased out marriage penalties in certain tax brackets, and provided penalty relief for the earned income tax credit by restricting "earned income" to gross income, thus relieving tax penalties for low-income married couples. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107-16, 115 Stat. 38 (2001). In 2003, Congress went further and increased the benefits available to married couples who file jointly. The Jobs and Growth Tax Relief Reconciliation Act eliminated the marriage penalty for lower-income couples, where joint filing had been most disadvantageous. Section 103 of the Act is titled "Acceleration of increase in standard deduction for married taxpayers filing joint returns." As a result of these and other initiatives, couples with non-comparable incomes will face lower tax liabilities than if they filed independently.

52. See Bernstein, *supra* note 33, at 169-70) (citing EDWARD MCCAFFERY, TAXING WOMEN 16 (1997)) (stating that nearly all married couples choose to file jointly because doing so almost always reduces tax liability).

53. Liz Pulliam Weston, *The Myth of the Marriage Penalty*, MSN.COM, (Nov. 17, 2010), <http://articles.moneycentral.msn.com/CollegeAndFamily/LoveAndMoney/TheMythOfTheMarriagePenalty.aspx?page=1>.

54. 11 U.S.C. §§ 101-1114 (2006).

55. 29 U.S.C. § 432 (2006).

56. 5 U.S.C. § 2108 (2006); 38 U.S.C. §§ 101-8521 (2006).

discrimination on the basis of marital status.⁵⁷

Taken together, the range of financial benefits and protections available to married couples suggests, as legal scholar Anita Bernstein argues, that “the United States government subsidizes marriage through transfer payments and other supports that . . . constitute a reward that taxpayers as a group bestow on a class of individuals based solely on these person’s being, or having been, married.”⁵⁸ In doing so, and by restricting marriage to the union between one man and one woman as DOMA currently does, the federal government imposes significant financial losses on same-sex couples, including those married under state law.

IV. ALTERNATIVE APPROACHES TO REMEDYING THE PROBLEM

A. The Judicial Approach: Challenge the Constitutionality of DOMA

There are two avenues through which Americans could remove the harmful effects of DOMA: challenge its constitutionality in the court system, or amend the piece of legislation in Congress. The following paragraphs will explore the pros and cons of taking the judicial path to removing the harmful components of the legislation. As we will explain, although there are several solid constitutionally-based arguments that could be acceptable or persuasive to judges, and some American citizens seem ready to take on the task of challenging DOMA in the courts, taking a case against DOMA to the Supreme Court is not the best way to eliminate DOMA’s harmful effects in the interests of both efficiency and certainty.

Using the court system could be a viable avenue toward eliminating the harmful effects of DOMA because there are several solid and convincing arguments that DOMA is unconstitutional. There are multiple arguments that conclude that DOMA could be found unconstitutional: DOMA violates standards of federalism protected by the Tenth Amendment;⁵⁹ it denies a population of the community the fundamental right to marry without the due process required by the Fifth Amendment, which is applied to the states through the fourteenth Amendment;⁶⁰ and, it does not provide

57. See GAO, DEFENSE OF MARRIAGE ACT, *supra* note 41.

58. See Bernstein, *supra* note 33, at 140. Note that Bernstein does not necessarily endorse the argument we make here, namely that marriage rights should be extended to same-sex couples. Instead, she explores the possibility of abolishing marriage as a legal category altogether. See *id.*

59. See Nancy Kubasek & Christy M. Glass, *A Case Against the Federal Protection of Marriage Amendment*, 16 TEX. J. WOMEN & L. 1, 21-27 (2007) (arguing that amendments like the Marriage Protection Act would infringe on the states’ power to establish the requirements for marriage and interfere with basic principles of federalism).

60. See Tyler S. Whitty, *Eliminating the Exception? Lawrence v. Texas and the Arguments for Extending the Right to Marry to Same-Sex Couples*, 93 KY. L.J. 813,

adequate equal protection under the law guaranteed by the Fifth Amendment.⁶¹ With these logical, constitutionally-based arguments against DOMA, it should be easy for judges to find that DOMA cannot remain a law.

The United States has long operated under principles of federalism. Even though Congress has attempted to stretch the Commerce Clause to its breaking point, the Court has been very transparent in its insistence that state powers remain with the states. Perhaps no other area of political power has been so adamantly designated to the states as domestic relations, which includes the definition of marriage.⁶² The Court stated in 1878, “[A state] has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved,” and reaffirmed that sentiment in 1975.⁶³

The Rehnquist Court strengthened state autonomy by setting powerful precedent with New Federalism. In many significant cases, the Rehnquist Court made it nearly impossible for Congress to enact legislation interfering with state treatment of marriage.⁶⁴ In *United States v. Morrison*, the Court struck down portions of the Violence Against Women Act

821 (2005) (stressing that marriage is already a fundamental right that should be extended to same-sex couples); see also *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (holding that equal protection applies to the federal government through the Due Process Clause of the Fifth Amendment, even though that amendment does not contain an express equal protection guarantee).

61. See Bobbie L. Stratton, *A Prediction of the United States Supreme Court's Analysis of the Defense of Marriage Act*, After *Lawrence v. Texas*, 46 S. TEX. L. REV. 361, 377-79 (2004) (discussing the Virginia Supreme Court's decision in *Loving v. Virginia*, where the Court struck down a statute prohibiting and criminalizing interracial marriage as a violation of the Fourteenth Amendment).

62. See *In re Burrus*, 136 U.S. 586, 593-94 (1890) (“The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States.”).

63. See *Pennoy v. Neff*, 95 U.S. 714, 734-35 (1878); see also *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (reaffirming the sentiment expressed in *Pennoy v. Neff* and expanding the state's dominion over domestic relations in 1975, stating, “[D]omestic relations [is] an area that has long been regarded as a virtually exclusive province of the States. Cases decided by the Court over a period of more than a century bear witness to this historical fact.”).

64. See Derek C. Araujo, *A Queer Alliance: Gay Marriage and the New Federalism*, 4 RUTGERS J.L. & PUB. POL'Y 200, 262 (2006) (finding that neither the Commerce Clause, the Spending Clause, nor Congress' section 5 enforcement powers under the Fourteenth Amendment can be used to prohibit states from legalizing same-sex marriage). No federal attempt to regulate same-sex marriage other than DOMA has passed. One could make the argument that DOMA does not infringe upon states rights at all, but instead, defines marriage for federal purposes only, leaving the task of defining marriage to the states. However, this argument makes little sense when one views the previously cited Supreme Court cases, which provide the states with the absolute right to decide who can be married and under what conditions. See also *Pennoy*, 95 U.S. at 734-35 (declaring that the states have the right to choose which people shall be married and receive the federal benefits designated to them through that state-sanctioned marriage).

because those portions overstepped the boundaries of power between the federal government and state governments.⁶⁵ In *United States v. Lopez*, the Court struck down the Gun Free Safety Zone Act, a federal law that attempted to make schools safer by banning the possession of a gun within 1,000 feet of schools.⁶⁶ In both cases, the Court decided that Congress could not use the Commerce Clause to encroach on powers designated to state governments. The Court was very clear in these cases, as well as many others,⁶⁷ that the federal government cannot govern in realms that are reserved by the states. Defining marriage should be no exception. Because of this powerful federalist precedent, any federal definition of marriage cannot be constitutionally valid.

DOMA is clearly a violation of federalism as defined and relied upon by federal courts in the past, and this constitutional violation has significant harmful effects.⁶⁸ Despite many attempts to federalize marriage law,⁶⁹ courts have consistently held that the administration of marriage and family

65. See 529 U.S. 598, 619 (2000) (“With its careful enumeration of federal powers and explicit statement that all powers not granted to the Federal Government are reserved, the Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate.”).

66. See 514 U.S. 549, 577 (1995) (“Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.”).

67. See *Goodridge v. Mass. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (outlawing the banning of marriage for same-sex couples in Massachusetts); see also *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997) (finding that the Religious Freedom Restoration Act exceeded Congress’ enforcement powers); *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996) (holding that Article I of the U.S. Constitution does not give Congress the power to abrogate the sovereign immunity of the states). See generally *Bd. of Tr. of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001); *Solid Waste Agency of N. Cook Cnty. v. U.S.*, 531 U.S. 159 (2001); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Printz v. United States*, 521 U.S. 898 (1997). The Rehnquist Court left a distinctive trail of federalist precedent. Many of the Court’s decisions greatly expanded state powers or removed federal power over the states. In *Seminole*, *Kimel*, and *University of Alabama*, the Court expanded state sovereign immunity by saying that neither Article I of the Constitution nor the Fourteenth Amendment could be used to limit state sovereign immunity. Essentially, the Court limited the federal government’s power to abrogate a state right guaranteed by the Eleventh Amendment of the Constitution. *Boerne* limited Congress’s enforcement powers under the Fourteenth Amendment, and *Printz* struck down the portion of the Brady Bill that required states to take measures to ensure the identity of a handgun buyer and his criminal background. In all of these cases, the Rehnquist court ensured the sovereignty of state governments and greatly increased federalist precedent for future courts.

68. See *infra* Section III, Losses Imposed on Same-Sex Couples by Federal DOMA.

69. Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 82 WASH. U. L. Q. 611, 637, 666 (2004) (explaining that there have been fifty-nine proposed amendments seeking to give Congress power to make standard marriage and divorce laws, but all have failed because they were seen as an unnecessary and unjustifiable removal of state power).

law is within control of the states. Courts have reserved domestic relations to the states because of the distinct and important purpose federalism has in the way the United States functions. The states are provided extensive freedom to govern so that they can be laboratories of experimentation.⁷⁰ However, DOMA does not allow for states to conduct an untainted experiment with same-sex marriage.⁷¹ DOMA creates difficulties and inequalities that make a comparable marital system impossible. A same-sex couple married in Boston is married in the state of Massachusetts, but not in the United States.⁷² A same-sex couple married in Boston cannot receive the same governmental treatment by the federal government as a different-sex couple who also married in Boston. Therefore, same-sex marriages cannot have the same social status as different-sex marriages, and DOMA creates conditions under which it may not be possible to compare a same-sex marriage with a different-sex marriage.⁷³

Additionally, DOMA violates the Fourteenth Amendment of the United States Constitution because DOMA denies a fundamental right to same-sex couples. The Supreme Court has been setting the foundation for recognizing marriage as a fundamental right for the past 150 years.⁷⁴

70. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

71. Different-sex couples reap certain economic and social benefits from marriage. Even when same-sex couples receive the same state benefits as different-sex couples, DOMA prevents them from receiving equal federal benefits and obligations. Therefore, any conclusions we draw from social “experiments” with marriage law in the states are flawed and do not properly reflect what life would be like with perfectly equal marriages.

72. Pamela J. Lannutti, *Attractions and Obstacles While Considering Legally Recognized Same-Sex Marriage*, 4 J. GLBT FAM. STUD. 245, 255 (2008) (recounting how one partner in a Massachusetts same-sex marriage said in a study, “[W]hen people ask if we’re married, we say ‘Yeah, but not when we’re away on vacation.’” The same study found that ten percent of couples that married or were engaged to be married in Massachusetts thought that the top obstacle to marrying was limited legal recognition of their marriage. In the state of Massachusetts, same-sex marriages are equal, but are not equal according to the federal government, so the Defense of Marriage Act must be the reason that these couples feel that their marriage is limited legally).

73. *Resolution on Sexual Orientation and Marriage*, AM. PSYCHOLOGICAL ASS’N (2004), <http://0-www.apa.org/maurice.bgsu.edu/pi/lgbc/policy/marriage.pdf>. The APA has found that gay, lesbian, bisexual, and transgender people experience significant “minority stress” that is linked to the stigma and negative treatment associated with their minority status. A source of this minority stress, according to the APA, is the lack of equal marriage law for same-sex couples and lack of portability in their marriages. Because same-sex couples experience a larger amount of anxiety due to their unequal treatment under DOMA, there is no way that a state could possibly run a perfect laboratory for experimentation with marriage law while DOMA remains fully intact.

74. Joseph A. Pull, *Questioning the Fundamental Right to Marry*, 90 MARQ. L. REV. 21, 24-26 (2006) (citing *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) for the Court’s reference to marriage as one of the “basic civil rights of man”).

Marriage was finally held, for the first time,⁷⁵ as a fundamental right in the 1967 landmark case *Loving v. Virginia*, which declared anti-miscegenation laws unconstitutional.⁷⁶ The Court specifically held that marriage is “fundamental to our very existence and survival” and that “[t]o deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law.”⁷⁷ The Court further held that the fundamental right to marry could not be restricted on the basis of race.⁷⁸ This sentiment can easily be extended to the right to marry any consenting adult of one’s choosing. DOMA restricts this right in the absence of any compelling government interest. If the right to marry is a fundamental right, that right must be protected by the laws of the United States, and DOMA cannot stand.

The Court has previously used the Equal Protection Clause to strike down legislation because it is discriminatory against homosexuals as a group. In *Romer v. Evans*, the Court decided that a voter-approved Colorado constitutional amendment (“Amendment 2”) prohibiting gays, lesbians, and bisexuals from any anti-discriminatory protection was invalid under the federal Constitution.⁷⁹ According to the Court, “the amendment imposes a special disability upon [homosexuals] alone,” and “withdraws from homosexuals, but not others, specific legal protection.”⁸⁰ The Court found Amendment 2’s blatant discrimination particularly harmful and odious. Following from that determination, the Court concluded: “If the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”⁸¹ The Supreme Court in *Romer* made very clear that legislation based solely on animus against gays and lesbians is unacceptable.

The arguments the Court put forth in *Romer* to strike down Amendment 2 can easily be applied to DOMA, because Amendment 2 and Section 3 of DOMA have similar qualities.⁸² Just as Amendment 2 was discriminatory,

75. *Id.* at 24.

76. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

77. *Id.* at 12.

78. *Id.* at 12 (“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.”).

79. *See Romer v. Evans*, 517 U.S. 620, 623 (1996).

80. *Id.* at 627, 631.

81. *Id.* at 634 (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

82. Julia Halloran McLaughlin, *DOMA and the Constitutional Coming Out of*

exclusionary, and negatively affected gays and lesbians, DOMA excludes same-sex couples from “a fundamental right based on a discriminatory classification.”⁸³ Like Amendment 2, DOMA is based on “animus,” and when legislation is based on animus rather than legitimate interests of the state, the legislation is constitutionally invalid.⁸⁴ Finally, just like Amendment 2, DOMA cannot be connected to any important state interests, like protecting children or the institution of heterosexual marriage.⁸⁵ Therefore, because of DOMA’s important common characteristics with Amendment 2, the Court should hold DOMA unconstitutional under the equality component of the Fifth Amendment.

Although Congress has made little effort to amend DOMA,⁸⁶ American citizens are taking action. Gay & Lesbian Advocates & Defenders (GLAD) filed a suit challenging the constitutionality of DOMA on March 3, 2009, and recently won a motion for summary judgment.⁸⁷ On July 8, 2009, Massachusetts filed a lawsuit challenging DOMA as well, becoming the first state in the union to formally challenge the statute.⁸⁸ If quickly removing DOMA’s discriminatory policy is the most important goal, then using the court system may be the best plan of action.⁸⁹ Despite a

Same-Sex Marriage, 24 WIS. J.L. GENDER & SOC’Y 145, 178 (2009) (characterizing Colorado’s Amendment 2 and DOMA Section 3 as “suffer[ing] from the same deficit”).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Contra* Bernie Becker, *House Dems Take Aim at Marriage Law*, N.Y. TIMES—THE CAUCUS BLOG (Sept. 15, 2009, 11:58 AM), <http://thecaucus.blogs.nytimes.com/2009/09/15/house-dems-take-aim-at-doma/>. On September 15, 2009, Representatives Jerrold Nadler, Tammy Baldwin, and Jared Polis announced the introduction of the Respect for Marriage Act, a repeal of DOMA. This introduction, with over 90 cosponsors, indicates that Congress may at least consider a DOMA repeal. However, Speaker of the House Nancy Pelosi stated that amending DOMA would “not be a top priority.” *See id.* With the health care reform debate taking center stage in the 2010 congressional agenda, and the Republicans taking back the House and five seats in the Senate in the 112th Congress, it is safe to say that amending DOMA will not receive proper attention for quite some time.

87. *Gill v. Office of Pers. Mgmt.*, 2010 U.S. Dist. LEXIS 67874 (D. Mass. July 8, 2010) (granting plaintiffs’ motion for summary judgment except as to one plaintiff who lacked standing); *see also GLAD Challenges DOMA Section 3*, GAY & LESBIAN ADVOCATES & DEFENDERS, <http://www.glad.org/doma/lawsuit> (last visited Nov. 24, 2010). GLAD has filed the suit on behalf of eight married same-sex couples and three surviving spouses, all from Massachusetts.

88. Martin Finucane, *Mass. Challenges Federal Defense of Marriage Act*, BOSTON GLOBE, July 8, 2009, http://www.boston.com/news/local/breaking_news/2009/07/mass_to_challen.html.

89. *See* Ken Rudin, *Gays, Obama, and the 1996 Defense of Marriage Act*, NATIONAL PUBLIC RADIO, June 30, 2009, http://www.npr.org/blogs/politicaljunkie/2009/06/the_1996_senate_vote_on_the_de.html (explaining that in 1996, every Republican voted for the Defense of Marriage Act). Thirty-two Democrats also voted for DOMA, while fourteen Democrats opposed it. Of those who voted for the passage of DOMA, sixteen are still senators. If all current

Democratic supermajority in the Senate,⁹⁰ and a President who supported a full repeal of DOMA during his campaign,⁹¹ there was little effort in 2009 or 2010 to make the change from either the President or Congress.⁹² Congress's hesitancy can be expected because members of Congress must vote in such a way to please the voters that might reelect them.⁹³ And after the Republicans took control of the House of Representatives in the mid-term elections in 2010, and the Democrats lost their supermajority, in the Senate, there may be even greater reluctance on the part of Congress to move to amend DOMA.

Taking a case against DOMA to federal court might not be an ideal way to eradicate DOMA's harmful effects. There are many reasons to avoid using the court system to overturn DOMA: the poor track record of anti-DOMA lawsuits in lower courts; the amount of time it takes for a suit to be heard and decided by the federal courts; the possibility of judicial bias; the seemingly legitimate pro-DOMA arguments; and, most importantly, the risky gamble associated with taking a case against DOMA to the Supreme Court. The following paragraphs will detail each of these reasons for avoiding the court system when attempting to remove DOMA's harmful effects.

Despite the seemingly unshakable arguments that DOMA is unconstitutional, those who have challenged DOMA in the courts have predominantly been met with disappointment. Until July of 2010,⁹⁴ every

Republicans vote against a repeal or amendment of DOMA, and all Democrats who voted in favor of the Defense of Marriage Act in 1996 also vote against an amendment of DOMA, then the amendment will be defeated 56-44. *Id.*

90. Tom Baldwin, *Obama Secures Senate Super-majority After Republican Arlen Specter Defects*, THE TIMES (London), April 28, 2009, http://www.timesonline.co.uk/tol/news/world/us_and_americas/article6187663.ece.

91. Calvin Woodward, *Where Obama Stands on the Issues*, ASSOCIATED PRESS, November 5, 2008, available at http://www.realclearpolitics.com/news/ap/politics/2008/Nov/05/where_obama_stands_on_the_issues.html.

92. Frank Rich, *La Cage aux Democrats*, N.Y. TIMES, May 23, 2009, <http://www.nytimes.com/2009/05/24/opinion/24rich.html?scp=1&sq=democrat%20DOMA&st=cse>.

93. See Jeffrey M. Jones, *Majority of Americans Continue to Oppose Gay Marriage*, GALLUP, May 27, 2009, <http://www.gallup.com/poll/118378/Majority-Americans-Continue-Oppose-Gay-Marriage.aspx>. On the other hand, the amended legislation we propose in this article can hardly be considered controversial. The legislation does not demand that same-sex marriage be legalized for all the states in the union, but merely honors the marriages that states have sanctioned. This unobtrusive legislation paired with growing public support for same-sex marriage and the benefits for same-sex couples that marriage entails.

94. On July 8, 2010, the federal district court in Massachusetts struck down DOMA in a pair of cases, finding that DOMA violated the Tenth Amendment to the Constitution by intruding into an area that has been traditionally left to the states. *Massachusetts v. U.S. Dep't of Health and Human Servs.*, 2010 U.S. Dist. Lexis 67927 (D. Mass. July 8, 2010); *Gill v. Office of Pers. Mgmt.*, 2010 U.S. Dist. LEXIS 67874 (D. Mass. July 8, 2010).

single attempt to challenge DOMA's constitutionality had failed.⁹⁵ Three lawsuits were filed in January 2005, all of them were unsuccessful.⁹⁶ A federal judge upheld DOMA in another 2005 case.⁹⁷ In *Smelt v. Orange County*, a gay male couple in California filed suit claiming that DOMA violates the United States Constitution on a myriad of grounds.⁹⁸ The petition was dismissed because the couple lacked standing to file a suit, a decision that seriously limited the number of people who can challenge the constitutionality of DOMA.⁹⁹ The Supreme Court later denied their petition for writ of certiorari.¹⁰⁰ With consistent failed attempts to challenge DOMA in court, it is likely that other courts will follow suit.

Another of the more glaring reasons why using the court system is not the best route, is that taking a suit through the judicial system is a long and arduous process. A case often takes many years to move through the system from the day the suit is filed to the day a final opinion is rendered. For example, the monumental case of *Lawrence v. Texas* spent three years, seven months, and twelve days in the judicial system before the Supreme Court finally rendered its opinion.¹⁰¹ *Romer v. Evans* took three years, five months, and five days.¹⁰² Because lawsuits challenging the

95. Memorandum of Points and Authorities in Support of Defendant United States of America's Motion to Dismiss, *Smelt v. Orange County*, 549 U.S. 959 (No. SACV09-00869).

96. Vickie Chachere, *Gay Couples Drop Challenge to Defense of Marriage Act*, MIAMI HERALD, Jan. 26, 2005, at B5 (reporting that a Florida federal judge dismissed two of these cases, and the couples filing the third suit later dropped their charges).

97. *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005).

98. 447 F.3d 673, 677 (9th Cir. 2006). These grounds include that Section 2 of DOMA violates the right to due process and equal protection under the law guaranteed by the Fifth Amendment, the to right privacy, and the Full Faith and Credit Clause. *Smelt* and *Hammer* claimed that Section 3 of DOMA violates the Fifth Amendment, discriminates on the basis of gender and sexual orientation, as well as the right to privacy.

99. *Id.* at 683-84 (“[Concerning Section 3 of DOMA,] as with Section 2 of DOMA, *Smelt* and *Hammer* are not even married under any state law, or, for that matter, under the law of any foreign country. No doubt they wish they could be, but, again, they are not. We, therefore, do not see how they can claim standing to object to Congress’ definition of marriage for federal statutory and regulatory purposes. It certainly is not a question of Congress’s refusal to recognize *their* status. DOMA itself simply does not injure them or exclude them from some undefined benefit to which they might have been or might someday be entitled. In fact, they do not suggest that they have applied for any federal benefits, much less been denied any at this point.”). *Smelt* and *Hammer* could not file a suit against DOMA because they could not get married in the first place. DOMA harms married same-sex couples. Therefore, any couple that is not already married cannot file a suit against DOMA according to this opinion, which seriously limits the number of people who can file a suit against DOMA. *Id.*

100. *Smelt v. Orange County*, 549 U.S. 959 (2006).

101. *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down Texas’s sodomy law).

102. *Romer v. Evans*, 517 U.S. 620 (1996) (holding that a Colorado constitutional amendment preventing municipalities in the state from recognizing gays and lesbians as a protected class was unconstitutional).

constitutionality of DOMA are civil suits, they could be pushed back for the sake of more pressing criminal trials and take longer than expected.¹⁰³ For couples and their counsel, pursuing a case against DOMA could take years of their time and copious amounts of energy and financial resources, a price many would not be willing to pay.

Not only is the process of pursuing a lawsuit long and tedious process, but same-sex married couples who file a lawsuit may face discrimination in the courtroom. Unlike Congress, which can create policy about same-sex marriage without ever having to come face-to-face with LGBT people, federal judges must decide cases filed by same-sex couples, and therefore, must battle any internal bias they may have that is inflamed by dealing directly with LGBT people. Although LGBT people do not need to disclose their sexuality in criminal cases and civil cases not directly related to their sexual orientation, LGBT people do not have that choice in cases about same-sex marriage law. Although judges cannot discriminate outright, judges are human and have internal biases that could affect the outcomes of their decisions.¹⁰⁴ Thus, Congressional action is a way to avoid bias in the courts.

Another serious roadblock to using the judicial system to challenge DOMA has been the Department of Justice's (DOJ) surprising support under the Obama Administration. In June 2009, the Administration released a statement supporting DOMA, much to the dismay of the American Civil Liberties Union and LGBT advocacy groups across the nation.¹⁰⁵ The DOJ released a brief in response to *Smelt v. Orange County*, and objected to the lawsuit on procedural grounds,¹⁰⁶ but these procedural objections were not the DOJ's only arguments for dismissing the case. The DOJ also defended DOMA by claiming that it does not violate any

103. The Honorable Robert E. Payne, *Austin Owen Lecture: Difficulties, Dangers & Challenges Facing the Judiciary Today*, 32 U. RICH. L. REV. 891, 895 (1998) (recounting that, according to the Speedy Trial Act, 18 U.S.C. § 3174 (2006), all criminal trials must be heard before civil trials, and this creates a situation in which "civil dockets are backlogged, and judges have less time to devote to civil matters.").

104. Jennifer Gerarda Brown, *Homophobia in the Halls of Justice: Sexual Orientation Bias and Its Implications Within the Legal System: Adjudication According to Codes of Judicial Conduct*, 11 AM. U. J. GENDER SOC. POL'Y & L. 67, 82 (2002).

105. *LGBT Legal and Advocacy Groups Decry Obama Administration's Defense of DOMA*, ACLU, June 12, 2009, available at http://www.aclu.org/lgbt-rights_hiv-aids/lgbt-legal-and-advocacy-groups-decry-obama-administrations-defense-doma (declaring, "We are very surprised and deeply disappointed in the manner in which the Obama administration has defended the so-called Defense of Marriage Act," and also describing the reasoning in the DOJ brief as "the same flawed legal arguments that the Bush administration used.").

106. See Memorandum of Points and Authorities in Support of Defendant United States of America's Notice of Motion and Motion to Dismiss, *supra* note 95, at 18 (indicating that the Department of Justice filed to dismiss *Smelt* for reasons similar to the reasons provided by the Ninth Circuit in 2006).

person's right to equal protection or due process, nor does it violate any right to privacy or free speech.¹⁰⁷ Until recently, with the DOJ staunchly defending DOMA, it would have been more difficult for DOMA to be challenged in the court system because of the DOJ's power and influence.¹⁰⁸

This obstacle has been removed, however, by a recent change in the DOJ's position. In mid-February of 2010, President Obama concluded that Section 3 of DOMA, as applied to same sex couples who are legally married under state law, violates the Equal Protection Component of the Fifth Amendment.¹⁰⁹ In notifying the speaker of the House of the change of position, a letter from the Justice Department explained that in previous cases where the DOJ defended DOMA, the cases were being heard in Circuit Courts that had already ruled that the standard of review for classifications based on sexual orientation was a rational basis standard, and under that binding standard of review the DOJ could make valid arguments. However, in the new cases, the DOJ would have to take a position on the standard of review, and the President and the Attorney General believe that classifications based on sexual orientation require a heightened level of scrutiny, and under that higher standard, DOMA is unconstitutional.¹¹⁰

Not only have lawsuits against DOMA fared poorly in the past, there are also cogent constitutionally-based arguments in favor of DOMA. Depending on the point of view of a specific judge, these pro-DOMA arguments could be more convincing than the anti-DOMA arguments. For example, a person in favor of DOMA could argue that it does not violate the Tenth Amendment because the statute protects a state's autonomy, rather than infringing upon it, by ensuring that the state's laws addressing same-sex marriage are upheld.¹¹¹ In states where same-sex marriage is permitted, recognition of the marriage by the state is not infringed upon, and the state can still distribute its marriage benefits to married same-sex

107. *Id.* at 22-23. Some of the reasoning the Department of Justice uses to argue that DOMA does not infringe upon same-sex couples' right to due process and equal protection under the law is that same-sex marriage "has not been recognized as a fundamental right." If same-sex marriage is not traditionally a fundamental right, then DOMA cannot infringe on that right. The brief also claims that DOMA allows for maximum federalist behavior because the law allows the states to explore new forms of marriage other than traditional marriage between a man and a woman. *Id.*

108. *Obama: DOM Unconstitutional, DOJ Should Stop Defending in Court*, HUFFINGTON POST, June 24, 2011, http://www.huffingtonpost.com/2011/02/23/obama-doma-unconstitutional_n_827134.html.

109. *Id.*

110. *Id.*

111. Leonard G. Brown III, *Constitutionally Defending Marriage: The Defense of Marriage Act, Romer v. Evans and the Cultural Battle They Represent*, 19 CAMPBELL L. REV. 159, 172-73 (1996).

couples. In states where same-sex marriage is not permitted, DOMA prevents same-sex couples from finding a loophole around the state's law and still receiving federal marriage benefits.¹¹² If DOMA did not exist, same-sex couples could marry in a state that allows same-sex marriage, and then move to a state that forbids same-sex marriage and still collect federal marriage benefits.¹¹³ Therefore, DOMA does not impede states from making autonomous decisions, but rather enforces state autonomy, and does not violate the Tenth Amendment.

Another argument that DOMA does not violate the Tenth Amendment is that it only restricts federally distributed benefits, and in no way does it prevent a state from distributing its own marriage benefits.¹¹⁴ There is precedent that it "is clear that Congress may use federal law to protect federal benefits."¹¹⁵ The Supreme Court currently allows these federal benefits even though domestic relations is a power that is reserved for the states' control. Because the federal marriage benefits are federal benefits and not considered unconstitutional, they do not violate the Tenth Amendment. Section 3 of DOMA only affects federally distributed benefits, and therefore, does not violate the Tenth Amendment.

Although the *Lawrence* and *Romer* decisions provide support for an argument that DOMA is unconstitutional, it is actually unclear whether the current Supreme Court will overturn it. If one assumes that each judge will vote similarly to how she or he voted in *Lawrence v. Texas*, with Sotomayor and Kagan voting to protect the rights of LGBT people, as their predecessors Souter and Stevens did in *Lawrence*, then it is possible that the Court will strike DOMA down.¹¹⁶ However, this prediction does not

112. *Id.* at 173 (explaining that Congress has a clear authority to use federal law to regulate federal benefits and that choosing a particular definition of "marriage" in order to clarify eligibility is well within Congress's power).

113. *Id.*

114. *Id.* (noting that DOMA does not violate the Full Faith and Credit Clause because this use is "non-affirmative," which has been sanctioned by the Supreme Court).

115. *Id.*; see, e.g., *Mansell v. Mansell*, 490 U.S. 581 (1989) (explaining that Congress may create federal benefits and limit states' authority over the benefits); *Hisquidero v. Hisquidero*, 439 U.S. 572 (1979) (holding that control and division of federal pensions and employment benefits are governed by federal laws).

116. Toni Lester, *Adam and Steve vs. Adam and Eve: Will the New Supreme Court Grant Gays the Right to Marry?*, 14 AM. U. J. GENDER SOC. POL'Y & L. 253, 307 (2006) ("I believe that if each member of the Court renders a decision that is in line with his or her views in the *Lawrence* decision, or in views expressed elsewhere as just discussed, the final decision will be that gay marriage is a fundamental right guaranteed under the Constitution. That is because even if Justices Scalia, Roberts, Alito, and Thomas all vote against such a position, there is a strong chance that Justices Kennedy, Ginsburg, Souter, Stevens, and Breyer will do just the opposite."). Assuming that the newest additions to the Supreme Court, Sonia Sotomayor, and Elena Kagan, will vote similarly to the justices they are replacing, and the rest of the justices vote similarly to the way they did in *Lawrence*, then Lester's prediction still stands, and DOMA may be

take into account Justice Kennedy's comment in *Lawrence* that the opinion "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."¹¹⁷ Justice Kennedy explicitly excluded same-sex marriage from his opinion, and could possibly decide against same-sex marriage in future cases because he made this caveat. When one also considers Justice Kennedy's voting with the majority in *Boy Scouts of America v. Dale*, a Court decision that allowed the Boy Scouts to continue banning gay men from being scoutmasters, it is difficult to predict how he would vote in another case that discusses LGBT rights, especially a challenge to DOMA.¹¹⁸ Therefore, taking a case to the Supreme Court is a risky gamble. If Justice Kennedy were to vote with the conservative members of the Court in a decision about the constitutionality of DOMA, the only remaining plan of action is to wait until the Supreme Court changes its line-up to a more sympathetic set of justices.

In fact, more recent cases indicate that Justice Kennedy will vote with the more conservative members of the Court and uphold DOMA. Although, the Rehnquist Court set a strong precedent in favor of maintaining states' rights to govern, the Court in recent years has been less reluctant to inhibit states' rights when the nation's morality is in question. In *Gonzales v. Raich*, the Rehnquist Court determined that Congress may ban growing medical marijuana under the Commerce Clause.¹¹⁹ While eight states prior to *Gonzales v. Raich* permitted the growth and sale of marijuana,¹²⁰ the Court's decision removed those states' rights to determine if marijuana should continue to be used for medical purposes. Instead, the federal government has the power to make that decision. In *Gonzales v. Carhart*, the Roberts Court upheld the Partial Birth Abortion Ban Act, a federal statute that banned intact dilation and extraction abortion procedures in all states for any reason.¹²¹ Instead of leaving the decision to perform the procedure to individual states discretion, the Roberts Court found that it was in the best interests of the United States to continue to federalize legislation about that procedure. Justice Kennedy wrote in the *Carhart* opinion that the federal government could regulate the procedure because the federal government had "legitimate interests" in protecting the health of a mother, the life of an unborn child, and in "regulating the medical profession in order to promote respect for life, including life of the

considered unconstitutional by the newest Supreme Court.

117. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

118. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

119. *Gonzales v. Raich*, 545 U.S. 1 (2005).

120. *Id.* at 32.

121. *Gonzales v. Carhart*, 550 U.S. 125 (2008).

unborn.”¹²² If the Roberts Court finds legitimate state interests in these moral ideologies, then the Roberts Court is likely to extend this thinking to questions about same-sex marriage. If the Roberts Court tends to accept federal regulation of social or moral issues, then overturning DOMA may not be possible until the current Court changes its combination of justices again.

In conclusion, using the court system to repeal DOMA is a long and arduous process with many roadblocks. The Supreme Court could even set back the progress advocates of same-sex marriage have made in a very serious way. If the Court were to find DOMA constitutional, then same-sex marriages would be unequal to different-sex marriages for years to come. If a proposed amendment to DOMA were to fail in Congress, an amendment or repeal of DOMA could always be attempted again. Using the court system first has no such built-in back up plan. Taking a case against DOMA into federal courts is a gamble, and a safer and faster route to eradicate this harmful legislation may be for Congress to attempt to amend DOMA first.

B. The Legislative Approach: Amend DOMA

An alternative to using the courts is using the legislative process. A legislative approach requires Congress to amend Section 3 of DOMA, which currently provides:

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.¹²³

When considering amending the statute, there are two alternative approaches that could be taken, both of which would terminate this federal usurpation of state power. The first is the approach advocated by several sections of the American Bar Association, and that is to simply repeal the offending section.¹²⁴ The second approach would be to amend that section

122. *Id.* at 158-59. According to Justice Kennedy, these legitimate state interests are in line with the standards set in *Planned Parenthood of Southeast Pa. v. Casey*, 505 U.S. 833, 852-53 (1992). Justice Kennedy wrote that “[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child” and that the State has legitimate interests in making sure that abortion procedures are do not infringe on this respect for life.

123. 1 U.S.C. § 7 (2006).

124. See Richard Podell, *ABA House Delegates Report*, AMER. BAR ASSOC., Aug. 2010, <http://www.abanet.org/leadership/2010/annual/docs/111.doc>; see also Killian Melloy, *Bar Association Vows to Fight DOMA*, EDGE BOSTON.COM, Aug. 10, 2009, <http://www.edgeboston.com/index.php?ch=news&sc=&sc2=news&sc3=&id=94810> (reporting that the ABA House of Delegates approved a resolution urging repeal of the

to read,

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 two parties sanctioned by a state law as a marriage, civil union, or domestic partnership, and the word “spouse” refers only to a person who is a legally recognized marital or domestic partner in a state-sanctioned marriage, domestic partnership, or civil union.

Both of these legislative actions would accomplish the important goal of restoring the proper and historically recognized distribution of authority between the states and federal governments with respect to family law and domestic relations. Since the nineteenth century, courts have recognized this distribution of power, with the only exception being a case where a state law defining marriage violated citizens’ constitutional right to marry, as was the case when a state law attempted to limit access to marriage based on financial status¹²⁵ or attempted to deny prisoners the right to marry.¹²⁶ As the Supreme Court stated in 1878, the state has the “absolute right to prescribe the conditions on which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved.”¹²⁷ More recently, in 2004, the Court stated that “[t]he 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.”¹²⁸

Even when it comes to distributing federal benefits based on a familial relationship, the federal government has always deferred to the state because, as the Supreme Court stated in 1956:

[t]he scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law This is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern.¹²⁹

portion of the federal Defense of Marriage Act that defines marriage as between a man and a woman).

125. *Zablocki v. Redhail*, 434 U.S. 374, 406 (1978) (Stevens, J., concurring) (finding that a state law limiting marriage based on financial status was unconstitutional under the Equal Protection Clause).

126. *Turner v. Safley*, 482 U.S. 78, 81 (1987) (holding that a state law denying prisoners the ability to marry was unconstitutional).

127. *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1878).

128. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (citing *In re Burrus*, 136 U.S. 586, 593-94 (1890)).

129. *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956) (interpreting the copyright statute with respect to the rights of an “illegitimate” child to obtain the rights of a copyright renewal after his father’s death).

If we look to how federal statutes and programs treated matters related to marital status prior to the enactment of DOMA, we see that they have consistently deferred to the states' and Indian tribes' definitions. Amending DOMA to eliminate a federal definition for marriage for purposes of federal law would therefore not be making some kind of radical change; it would just be returning the several laws that involve federal benefits based on marital status to the way they had been interpreted for decades. It would mean returning to the principle that while the federal government accords some benefits to individuals based on familial status, that status is determined by the states.

In fact, when we look at the way several of these statutes are written, DOMA expressly conflicts with a number of existing statutes. Had it not been for the passage of DOMA, many same-sex couples would now be enjoying a significant number of federal benefits that they would have been entitled to based on their legal status as marital partners. For example, the Social Security Act specifically provides that a "[d]etermination of family status" must be made with reference to the law of the state in which the applicant lived at the time he or she applied for benefits.¹³⁰ Thus, the Social Security Act itself mandates that the laws of the state of domicile determine marital status and any other familial statuses that affect a party's eligibility for benefits.

Likewise, under the United States Tax Code, there are at least 198 provisions that require determination of a person's marital status, and, under that Code, marital status is determined by whether a person's marriage is valid under the law of the state where the person resides.¹³¹ Historically, federal law has always relied on state law to determine marital status. By passing DOMA, Congress has in effect overturned hundreds of years of legal precedent. By amending DOMA, Congress could simply return federal law to the way it had always been.

There is significant support for amending DOMA. Both the American Bar Association and the National Education Association support equal rights for same-sex couples.¹³² According to the official website of the

130. 42 U.S.C § 416(h)(1)(A)(i) (2006).

131. See Rev. Rul. 83-183, 1983-2 C.B. 220 (explaining that "[t]axpayers who meet the requirements in the state of residence for a valid marriage may file a joint return even though they have never been legally declared married by a court of law.") (internal citations omitted); see also *Eccles v. Comm'r*, 19 T.C.M. (CCH) 1049, 1051 (1953), *aff'd per curiam*, 208 F.2d 796 (4th Cir. 1953) (holding that for federal income tax purposes, the determination of marital status must be made by reference to the law of the state of the marital domicile); *Calhoun v. Comm'r*, 64 T.C.M. (CCH) 222 (1992) (citing *Eccles*, 19 T.C.M. at 1051 and *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (referring to domestic relations as "an area that has long been regarded as a virtually exclusive province of the States.")).

132. Michael A. Jones, *From the ABA to NEA, Professional Organizations Support Marriage Equality*, CHANGE.ORG (last visited Nov. 24, 2010),

White House, President Obama supports federal rights for LGBT couples,¹³³ which one could interpret as meaning he might be supportive of amending DOMA in this manner.

The American Bar Association supports simply amending DOMA by eliminating Section 3. Amending the law to include domestic partners and civil union partners, however, seems to do a much better job of reflecting the intent of the states. Because federal laws are intended to effectuate state law in terms of marital status, it makes sense that when a state status is intended to grant members the benefits of marriage, federal law should likewise extend to those same persons the federal benefits intended for marital partners.

V. CONCLUSION: WHY THE LEGISLATIVE APPROACH IS THE BEST ALTERNATIVE

Clearly, DOMA is an unconstitutional statute. As explained in Section IV, it violates same-sex couples' constitutional rights. It also violates basic principles of federalism, in that family law and the determination of marital status have always been a matter of state law. Thus, one approach against the legislation is legal action challenging the statute's constitutionality. Seeking to have the law overturned by the Court, however, is a lengthy process. Additionally, given the history of the Supreme Court's rulings in the areas of privacy and federalism, as well as the current makeup of the Court, a successful outcome is not guaranteed.

Perhaps more importantly, while striking down DOMA would certainly help those same-sex couples fortunate enough to reside in states that allow them to marry, it would do nothing to provide additional benefits for those living in states that recognize only domestic partnerships and civil unions. Unfortunately, given current attitudes, in many states civil unions or domestic partnerships may be the best that same-sex couples can hope for in the near future. Only by amending DOMA to include both civil unions and domestic partners as being entitled to federal marital benefits can we ensure that the broadest range of same-sex couples receive the federal benefits to which they should be entitled. Therefore, the best approach is to amend DOMA to explicitly grant same-sex marital partners, domestic partners, and partners in civil unions, all the federal rights and privileges that accompany marriage.

http://gayrights.change.org/blog/view/from_the_aba_to_the_nea_professional_organizations_support_marriage_equality.

133. See *Civil Rights*, THE WHITE HOUSE (last visited Nov. 24, 2010), <http://www.whitehouse.gov/issues/civil-rights> (stating that the President "supports full civil unions and federal rights for LGBT couples and opposes a constitutional ban on same-sex marriage.").