

REGENT UNIVERSITY LAW REVIEW

Volume 24

2011–2012

Number 1

AS GOES DOMA . . . DEFENDING DOMA AND THE STATE MARRIAGE MEASURES

*Joshua Baker**
*William C. Duncan***

TABLE OF CONTENTS

INTRODUCTION.....	1
I. DOMA: CONTENT AND CONTEXT.....	5
A. <i>DOMA's Text</i>	5
B. <i>Early Challenges to DOMA</i>	8
C. <i>A Coordinated Assault</i>	16
D. <i>The Politics of Defending DOMA</i>	22
II. STANDARD OF REVIEW.....	25
A. <i>What Is the Appropriate Classification?</i>	25
B. <i>Heightened Scrutiny?</i>	29
III. IS DOMA RATIONAL?.....	31
A. <i>A New Rationale for DOMA: Preserving the Status Quo?</i>	31
B. <i>DOMA's Rational Basis Under Congress's Original Intent</i>	32
C. <i>Evaluating DOMA's Rational Basis in Light of Successful Defenses to Similar State Marriage Measures</i>	34
IV. STATE SOVEREIGNTY.....	38
A. <i>Judge Tauro's "Novel" Tenth Amendment Analysis</i>	38
B. <i>Past and Present Federal Regulation of Marriage and Family</i> ...	41
CONCLUSION.....	47

INTRODUCTION

On April 22, 2011, a commentator posting on the *Los Angeles Times* website alleged, "DOMA forces the federal government to discriminate

* Mr. Baker is a legal analyst with the National Organization for Marriage. J.D., Oak Brook College of Law and Government Policy.

** Mr. Duncan is director of the Marriage Law Foundation. J.D., J. Reuben Clark Jr. Law School, Brigham Young University.

against same-sex married couples and to treat their families as unworthy of protection or respect. A law that serves only to designate some families as second-class citizens has no principled defense.”¹ This view—not merely that the Federal Defense of Marriage Act (“DOMA”)² represents misguided public policy, but that it is a statute for which no principled defense can be made—increasingly animates the current efforts to invalidate or repeal DOMA and, at the same time, exerts an unjustified social pressure that serves to marginalize or to silence those who would defend marriage.³

By contrast, while advocates and many elite institutions assert that only irrationality or animus can explain objections to same-sex marriage, the American people have clearly taken steps in the opposite direction to defend marriage. Forty-one states have now adopted legal protections for marriage, with the vast majority having done so in the fifteen years since DOMA was adopted.⁴ Moreover, since 1998, voters in thirty states

¹ Maya Rupert, *Blowback: Nothing Defensible About DOMA*, L.A. TIMES OPINION (Apr. 22, 2011, 7:21 PM), <http://opinion.latimes.com/opinionla/2011/04/blowback-nothing-defensible-about-doma.html?cid=6a00d8341c7de353ef014e8806f111970d>. Ms. Rupert is the federal policy director for the National Center for Lesbian Rights. *Id.*

² Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 & 28 U.S.C. § 1738C (2006)). DOMA defines marriage as the union of a husband and wife for purposes of federal statutes and also protects unwilling states from being forced to recognize same-sex marriages from other jurisdictions. *Id.*

³ Particularly in today’s world of sound bites and tweets, these allegations against DOMA—and against marriage more generally—in many cases do not rise to the level of a substantive argument. Rather, allegations that DOMA is “indefensible” often stand in as a substitute for actual argument.

⁴ See ALA. CONST. art. I, § 36.03; ALASKA CONST. art. I, § 25; ARIZ. CONST. art. XXX, § 1; ARK. CONST. amend. 83, § 1; CAL. CONST. art. I, § 7.5; COLO. CONST. art. II, § 31; FLA. CONST. art. I, § 27; GA. CONST. art. I, § IV, para. I; HAW. CONST. art. I, § 23; IDAHO CONST. art. III, § 28; KAN. CONST. art. 15, § 16; KY. CONST. § 233A; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MISS. CONST. art. 14, § 263A; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; NEB. CONST. art. I, § 29; NEV. CONST. art. 1, § 21; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; OR. CONST. art. XV, § 5a; S.C. CONST. art. XVII, § 15; S.D. CONST. art. XXI, § 9; TENN. CONST. art. XI, § 18; TEX. CONST. art. I, § 32; UTAH CONST. art. I, § 29; VA. CONST. art. I, § 15-A; WIS. CONST. art. XIII, § 13; ALA. CODE § 30-1-19 (1998); ALASKA STAT. § 25.05.013 (2010); ARIZ. REV. STAT. ANN. §§ 25-101(C), 25-112 (2000); ARK. CODE ANN. §§ 9-11-107(b), 9-11-109, 9-11-208(a)–(b) (2009); COLO. REV. STAT. § 14-2-104(1)(b), (2) (2010); CONN. GEN. STAT. § 46b-38nn (2009 & Supp. 2011) (repealed 2010), *invalidated by* Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407 (Conn. 2008); DEL. CODE ANN. tit. 13, § 101(a), (d) (2009); FLA. STAT. § 741.212 (2010); GA. CODE ANN. § 19-3-3.1 (2010); HAW. REV. STAT. § 572-1 (2010); IDAHO CODE ANN. §§ 32-201, 32-209 (2006); 750 ILL. COMP. STAT. ANN. 5/212(a)(5) (West 1999); IND. CODE § 31-11-1-1 (2007); IOWA CODE § 595.2 (2001 & Supp. 2011), *invalidated by* Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); KAN. STAT. ANN. §§ 23-101(a), 23-115 (2007); KY. REV. STAT. ANN. §§ 402.005, 402.020(1)(d) (LexisNexis 2010); LA. CIV. CODE ANN. arts. 86, 89 (1999 & Supp. 2011); ME. REV. STAT. tit. 19-A, § 701 (1998 & Supp. 2010); MD. CODE ANN., FAM. LAW § 2-201 (LexisNexis 2006); MICH. COMP. LAWS ANN. § 551.1 (West 2005); MINN. STAT. § 517.03(a)(4), (b) (2006 & Supp. 2011); MISS. CODE ANN. § 93-1-1(2) (2004); MO. ANN. STAT.

have approved state constitutional amendments defining marriage, taking the strongest legal step available to them in protecting marriage against governmental redefinition.⁵ By contrast, just six states and the District of Columbia have explicitly recognized same-sex unions as “marriages,” and not once did these jurisdictions recognize same-sex marriages by popular vote.⁶

So, is DOMA defensible? Can a legitimate argument for the enduring constitutionality of DOMA be articulated? Or have circumstances changed to such an extent that the arguments made in

§ 451.022 (West 2003); MONT. CODE ANN. § 40-1-401(1)(d), (4) (2009); N.C. GEN. STAT. ANN. § 51-1.2 (West 2000); N.D. CENT. CODE §§ 14-03-01, 14-03-08 (2009); OHIO REV. CODE ANN. § 3101.01(C) (LexisNexis 2008); OKLA. STAT. ANN. tit. 43, § 3.1 (West 2001); 23 PA. CONS. STAT. ANN. §§ 1102, 1704 (West 2010); S.C. CODE ANN. § 20-1-15 (Supp. 2010); S.D. CODIFIED LAWS § 25-1-1 (1999); TENN. CODE ANN. § 36-3-113 (2010); TEX. FAM. CODE ANN. §§ 2.001(b), 6.204 (West 2006); UTAH CODE ANN. §§ 30-1-2(5), 30-1-4.1 (LexisNexis 2007); VA. CODE ANN. §§ 20-45.2, 20-45.3 (2008); WASH. REV. CODE ANN. § 26.04.010(1) (West 2005); W. VA. CODE ANN. § 48-2-603 (LexisNexis 2009); WIS. STAT. ANN. §§ 765.001(2), 765.04 (West 2009); WYO. STAT. ANN. § 20-1-101 (2011). As indicated by the citations above, among these state efforts designed to provide legal protection for marriage, only the statutes in Iowa and Connecticut and the constitutional provision in California have been invalidated by courts. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010); *Kerrigan*, 957 A.2d at 482; *Varnum*, 763 N.W.2d at 907.

⁵ See ALA. CONST. art. I, § 36.03; ALASKA CONST. art. I, § 25; ARIZ. CONST. art. XXX, § 1; ARK. CONST. amend. 83, § 1; CAL. CONST. art. I, § 7.5; COLO. CONST. art. II, § 31; FLA. CONST. art. I, § 27; GA. CONST. art. I, § IV, para. I; HAW. CONST. art. I, § 23; IDAHO CONST. art. III, § 28; KAN. CONST. art. 15, § 16; KY. CONST. § 233A; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MISS. CONST. art. 14, § 263A; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; NEB. CONST. art. I, § 29; NEV. CONST. art. I, § 21; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; OR. CONST. art. XV, § 5a; S.C. CONST. art. XVII, § 15; S.D. CONST. art. XXI, § 9; TENN. CONST. art. XI, § 18; TEX. CONST. art. I, § 32; UTAH CONST. art. I, § 29; VA. CONST. art. I, § 15-A; WIS. CONST. art. XIII, § 13.

Voters in Maine also rejected same-sex marriage in a referendum to repeal same-sex marriage adopted by the legislature, and have not been presented the opportunity to vote on a constitutional marriage amendment. See Kevin Miller & Judy Harrison, *Gay Marriage Rejected Yes on 1 Declares Victory; Repeal Opponents ‘Will Regroup,’* BANGOR DAILY NEWS, Nov. 4, 2009, at A1.

⁶ The District of Columbia, New Hampshire, New York, and Vermont have recognized same-sex marriage through legislative action. See Religious Freedom and Civil Marriage Equality Amendment Act of 2009, No. 18-248, sec. 2(b), § 1283(a), 57 D.C. Reg. 27 (Dec. 18, 2009); An Act Relative to Civil Marriage and Civil Unions, ch. 59, sec. 59:1, § 457:1-a, 2009 N.H. Laws 60; Marriage Equality Act, ch. 95, sec. 3, § 10-a, 2011-5 N.Y. Consol. Laws Adv. Legis. Serv. 29 (LexisNexis); An Act to Protect Religious Freedom and Recognize Equality in Civil Marriage, secs. 5, 6, 12(a)(5), §§ 8, 1202(2), 1201(4), 2009 Vt. Adv. Legis. Serv. 3 (LexisNexis). Meanwhile, Connecticut, Iowa, and Massachusetts have recognized same-sex marriage only by judicial mandate. See *Kerrigan*, 957 A.2d at 482; *Varnum*, 763 N.W.2d at 907; *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

support of DOMA at the time of its adoption are now left illegitimate and irrational, if indeed they were ever valid in the first place?⁷

Part One of this Article outlines the history and current controversies surrounding DOMA, focusing on the pending federal litigation seeking to strike down the law as violative of the U.S. Constitution.⁸ Parts Two and Three consider the various elements of the DOMA litigation, including the standard of review being applied by courts, the states' articulated interests in protecting marriage, and the legitimacy of federal efforts to impose a single definition of marriage across the federal statutes. In doing so, this Article suggests that despite the facial inadequacies of using sexual orientation discrimination as an analytical framework for marriage, courts have appropriately applied a rational basis standard to the marriage classification. This Article considers in depth Congress's own explanation for DOMA, a rationale that rests on neither animus nor irrationality, but on a respect for the institution of marriage and the human dignity of all people. Finally, Part Four looks historically at federal regulation and its interaction with state law, particularly in the field of domestic relations, and finds little support for the State of Massachusetts's argument that DOMA intrudes on an area of traditional state regulation.

⁷ "Changed circumstances" is an argument that seems to be gaining traction among same-sex marriage advocates. See, e.g., E.J. Graff, *15 Years After DOMA, Hearing Reveals a Nation Transformed*, THE ATLANTIC (July 20, 2011, 6:06 PM), <http://www.theatlantic.com/politics/archive/2011/07/15-years-after-doma-hearing-reveals-a-nation-transformed/242273/> ("The moral panic of the late 1980s and early 1990s left behind three major legacies: *Bowers v. Hardwick*, 'Don't Ask, Don't Tell,' and DOMA. The first two have fallen. And while states' laws and constitutional amendments have to be repealed as well, the federal DOMA is the most important brick in the wall. Today I could see that wall shaking."); see also S.598, *The Respect for Marriage Act: Assessing the Impact of DOMA on American Families: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 2-4 (2011) (statement of Joe Solmonese, President, The Human Rights Campaign); *id.* at 2-3 (statement of Evan Wolfson, Founder and President, Freedom to Marry).

⁸ As will be clear, we do not come to the arguments as neutral bystanders, having individually or jointly represented amici curiae in most of the same-sex marriage litigation of the past decade. See, e.g., Brief of *Amici Curiae* National Organization for Marriage et al., *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010) (No. 10-16696) (Duncan and Baker representing amici curiae); *Amicus Curiae* Brief of National Organization for Marriage California in Support of Intervenor Discussing International and National Consensus in Favor of Giving Democratic Institutions a Role in Making Marriage Policy, *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009) (No. S168047) (Baker and Duncan representing amicus curiae); see also *Legal Briefs*, MARRIAGE LAW FOUNDATION, <http://www.marriagelawfoundation.org/briefs.html> (providing links to briefs dating back as far as 2002).

I. DOMA: CONTENT AND CONTEXT

A. *DOMA's Text*

The Defense of Marriage Act was adopted in 1996 with overwhelming, bipartisan majorities in both the House and Senate⁹ and was signed into law by President Clinton on September 21 in the same year.¹⁰ The law was initially sparked by concerns that Hawaii might recognize same-sex marriages and that same-sex couples would attempt to export marriages performed in Hawaii to other states, creating a multitude of legal recognition conflicts.¹¹

As enacted, DOMA consists of three sections: Section 1 entitling the act, “Defense of Marriage Act”; Section 2 regarding interstate recognition of marriage; and Section 3 affirming the definition of “marriage” and “spouse” for all purposes under federal law.¹² In relevant part, the Act reads as follows:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Defense of Marriage Act”.

SEC. 2. POWERS RESERVED TO THE STATES.

.....

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or

⁹ The Defense of Marriage Act was adopted with a 342-67 majority in the House. 142 CONG. REC. 17,094 (1996). It was adopted with an even larger 85-14 majority in the Senate. 142 CONG. REC. 22,467 (1996).

¹⁰ See Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 & 28 U.S.C. § 1738C (2006)).

¹¹ In May 1993, the Hawaii Supreme Court ruled that Hawaii’s marriage law constituted sex discrimination, subjected the statute to strict scrutiny, and remanded the case to the trial court. *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993). It was not until May 1996, however, when the Hawaii Senate voted to defeat a proposed constitutional amendment on marriage, that DOMA became an urgent national priority. As David Orgon Coolidge wrote,

The failure of the proposed amendment was seen widely as presaging an almost certain victory for supporters of same-sex marriage. Alarm bells went off across the country, and within two weeks the Defense of Marriage Act was introduced in the United States Congress. Before May ended, President Clinton announced his support for the bill. By the end of summer, Congress passed the Defense of Marriage Act, and the President signed it into law.

David Orgon Coolidge, *The Hawai'i Marriage Amendment: Its Origins, Meaning and Fate*, 22 U. HAW. L. REV. 19, 38 (2000) (footnotes omitted). Ironically, after being remanded to the trial court, the *Baehr* litigation went to trial before Judge Kevin Chang on September 10, 1996, the same day DOMA was given final approval in the U.S. Senate. *Baehr v. Miike*, CIV. No. 91-1394, 1996 WL 694235, at *1 (Haw. Cir. Ct. Dec. 3, 1996), *aff'd*, 950 P.2d 1234 (Haw. 1997). Judge Chang ultimately struck down the marriage law, holding that the state had failed to meet the high burden of a strict scrutiny analysis. *Baehr*, 1996 WL 694235, at *21–22.

¹² Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 & 28 U.S.C. § 1738C (2006)).

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.

.....
 SEC. 3. DEFINITION OF MARRIAGE.

.....
 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.¹³

Anticipating today's legal challenges, the House Report on the bill set forth four specific governmental interests advanced by the legislation: "(1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce government resources."¹⁴ In particular, the Report includes a lengthy discussion regarding the first of these governmental interests advanced by Congress:

H.R. 3396, is appropriately entitled the "Defense of Marriage Act." The effort to redefine "marriage" to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage. To understand why marriage should be preserved in its current form, one need only ask why it is that society recognizes the institution of marriage and grants married persons preferred legal status. Is it, as many advocates of same-sex "marriage" claim, to grant public recognition to the love between persons? We know it is not the mere presence of love that explains marriage, for as Professor Hadley Arkes testified:

There are relations of deep, abiding love between brothers and sisters, parents and children, grandparents and grandchildren. In the nature of things, those loves cannot be diminished as loves because they are not . . . expressed in marriage.

No, as Professor Arkes continued:

The question of what is suitable for marriage is quite separate from the matter of love, though of course it cannot

¹³ *Id.* (internal quotation marks omitted).

¹⁴ H.R. REP. NO. 104-664, at 12 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2916. State legislatures have made similar observations. For instance, the Michigan legislature stated in 1996, "Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting that unique relationship in order to promote, among other goals, the stability and welfare of society and its children." MICH. COMP. LAWS ANN. § 551.1 (West 2005). *See also* ALA. CONST. art. I, § 36.03; TENN. CODE ANN. § 36-3-113(a) (2010).

be detached from love. The love of marriage is directed to a different end, or it is woven into a different meaning, rooted in the character and ends of marriage.

And to discover the “ends of marriage,” we need only reflect on this central, unimpeachable lesson of human nature:

We are, each of us, born a man or a woman. The committee needs no testimony from an expert witness to decode this point: Our engendered existence, as men and women, offers the most unmistakable, natural signs of the meaning and purpose of sexuality. And that is the function and purpose of begetting. At its core, *it is hard to detach marriage from what may be called the “natural teleology of the body”: namely, the inescapable fact that only two people, not three, only a man and a woman, can beget a child.*

At bottom, civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child-rearing. Simply put, government has an interest in marriage because it has an interest in children.

Recently, the Council on Families in America, a distinguished group of scholars and analysts from a diversity of disciplines and perspectives, issued a report on the status of marriage in America. In the report, the Council notes the connection between marriage and children:

The enormous importance of marriage for civilized society is perhaps best understood by looking comparatively at human civilizations throughout history. Why is marriage our most universal social institution, found prominently in virtually every known society? Much of the answer lies in the irreplaceable role that marriage plays in childrearing and in generational continuity.

And from this nexus between marriage and children springs the true source of society’s interest in safeguarding the institution of marriage:

Simply defined, marriage is a relationship within which the community socially approves and encourages sexual intercourse and the birth of children. It is society’s way of signaling to would-be parents that their long-term relationship is socially important—a public concern, not simply a private affair.

That, then, is why we have marriage laws. Were it not for the possibility of begetting children inherent in heterosexual unions, society would have no particular interest in encouraging citizens to come together in a committed relationship. But, because America, like nearly every known human society, is concerned about its children,

our government has a special obligation to ensure that we preserve and protect the institution of marriage.¹⁵

But, as explained in the Section below, it was not this governmental interest in promoting procreation and the formation of families that was the target for early challenges to DOMA.

B. Early Challenges to DOMA

Much of the early academic critique of DOMA centered on Section 2 of the Act, with several authors suggesting that Section 2 violated the Full Faith and Credit guarantee contained in Article IV, Section 1 of the U.S. Constitution.¹⁶ Over time, however, something of a consensus seems to have developed among scholars that Section 2 of DOMA merely restates existing conflicts of law principles with respect to interstate recognition of a legal status or license, and as such, the provision is not constitutionally problematic.¹⁷

Professor Andrew Koppelman provides one example of this shift, arguing first in 1997, “An equal protection challenge to the definitional provision of DOMA, standing alone, would be a hard case. . . . It is the choice-of-law provision, and not the definitional provision, that is unrelated to any legitimate governmental interest and thus fails the *Romer* test.”¹⁸ By 2010, however, Professor Koppelman had reversed his views, explaining,

I once wrote, on the basis of the reasoning just stated, “An equal protection challenge to the definitional provision of DOMA, standing alone, would be a hard case.” I recant, disavow what I wrote, and repent. It is not such a hard case any more. I think the plaintiffs in *Gill [v. Office of Personnel Management]* have a pretty good chance of winning if their victory is appealed. The culture has shifted, in ways I had not anticipated.¹⁹

At the same time, Koppelman now also admits that Section 2’s choice of law provision is largely uncontroversial: “The fears that prompted Congress to act [in adopting the choice of law provisions of DOMA] were based upon a massive misunderstanding of existing law. States have

¹⁵ H.R. REP. NO. 104-664, at 12–14 (1996) (footnotes omitted).

¹⁶ See, e.g., Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1, 18 (1997); Julie L.B. Johnson, *The Meaning of “General Laws”: The Extent of Congress’s Power Under the Full Faith and Credit Clause and the Constitutionality of the Defense of Marriage Act*, 145 U. PA. L. REV. 1611, 1638–43 (1997).

¹⁷ See, e.g., Patrick J. Borchers, *The Essential Irrelevance of the Full Faith and Credit Clause to the Same-Sex Marriage Debate*, 38 CREIGHTON L. REV. 353, 358–59 (2005); Mark D. Rosen, *Congress’s Primary Role in Determining What Full Faith and Credit Requires: An Additional Argument*, 41 CAL. W. INT’L L.J. 7, 28 (2010).

¹⁸ Koppelman, *supra* note 16, at 9.

¹⁹ Andrew Koppelman, *DOMA, Romer, and Rationality*, 58 DRAKE L. REV. 923, 940 (2010) (footnote omitted).

always had the power to decline to recognize marriages from other states, and they have been exercising that power for centuries.”²⁰

While academics have debated the validity of Section 2, the actual DOMA litigation to date has focused primarily on Section 3, alleging that the substantive definition of “marriage” contained in Section 3 of the Act and codified at Title 1, Section 7 of the United States Code violates various federal constitutional guarantees, including the Privileges and Immunities Clause of Article IV, Section 2, the Due Process Clause of the Fifth Amendment, the Equal Protection Guarantee of the Fifth Amendment, the Article I Spending Clause, and the reservation of powers to the states under the Tenth Amendment. Since DOMA’s adoption in 1996, there have been at least fifteen lawsuits challenging its constitutionality on these grounds.²¹ All but a handful, however, have been filed within the past three years, and at the time of this writing, at

²⁰ *Id.* at 936 (footnotes omitted). Professor Lynn D. Wardle keenly noted that the scholarship on DOMA seems to fluctuate according to the political environment in Washington, with the federal marriage amendment in 2006 temporarily moderating support for same-sex marriage as prior opponents praised DOMA for its modesty. Lynn D. Wardle, *Section Three of the Defense of Marriage Act: Deciding, Democracy, and the Constitution*, 58 DRAKE L. REV. 951, 964–65 (2010) (“The scholarship about DOMA has zigged and zagged, like the congressional politics. Some legal entities who favor interstate recognition of same-sex marriage initially opposed and criticized DOMA, suggesting it was unconstitutional under the structural provisions of the Constitution. Then, about a decade after Congress passed DOMA, proposals to amend the United States Constitution to prohibit same-sex marriage as a matter of constitutional law were introduced in Congress. . . . [T]he possibility of adoption of a marriage amendment to the Constitution of the United States banning same-sex marriage made DOMA seem like a very moderate compromise, and many of the scholars who testified or commented in opposition to the proposed marriage amendment were quick to point out DOMA provided sufficient protection against forced recognition of same-sex marriage and, therefore, there was no need for a constitutional amendment because DOMA was the law.” (footnotes omitted)).

²¹ *In re Levenson*, 587 F.3d 925, 928 (9th Cir. 2009); *Smelt v. Cnty. of Orange*, 447 F.3d 673, 676 (9th Cir. 2006); *Matthews v. Gonzales*, 171 F. App’x 120, 121 (9th Cir. 2006); *Mueller v. Comm’r*, 39 F. App’x 437, 438 (7th Cir. 2002); *Lui v. Holder*, No. 2:11-cv-01267-SVW-JCG, slip op. at 1 (C.D. Cal. Sept. 28, 2011); *Dragovich v. U.S. Dep’t of the Treasury*, 764 F. Supp. 2d 1178, 1179 (N.D. Cal. 2011); *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234, 235–36 (D. Mass. 2010), *appeal docketed*, No. 10-2207 (1st Cir. Nov. 24, 2010); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 376 (D. Mass. 2010), *appeal docketed sub nom. Massachusetts v. U.S. Dep’t of Health & Human Servs.*, No. 10-2207 (1st Cir. Nov. 24, 2010); *Torres-Barragan v. Holder*, No. 2:09-cv-08564-RGK-MLG (C.D. Cal. Apr. 30, 2010), *appeal docketed*, No. 10-55768 (9th Cir. May 13, 2010); *Bishop v. United States*, No. 4:04-cv-848-TCK-TLW, slip op. at 1 (N.D. Okla. Nov. 24, 2009); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1301 (M.D. Fla. 2005); *In re Balas*, 449 B.R. 567, 571–72 (Bankr. C.D. Cal. 2011); *In re Kandu*, 315 B.R. 123, 130 (Bankr. W.D. Wash. 2004); *Hara v. Office of Pers. Mgmt.*, No. PH-0831-08-099-I-2, 2008 MSPB LEXIS 6601 (M.S.P.B. Dec. 17, 2008), *appeal docketed*, No. 2009-3134 (Fed. Cir. Mar. 17, 2009); *Complaint for Declaratory and Injunctive Relief at 4, Pedersen v. Office of Pers. Mgmt.*, No. 3:10-cv-01750-VLB (D. Conn. Nov. 9, 2010).

least eight are still pending at various stages within the federal court system.

Prior to *Goodridge v. Department of Public Health*,²² DOMA was largely insulated from constitutional review, as no state recognized same-sex marriages, and thus no plaintiff could be held to have standing to challenge the statute that dealt only with recognition of existing marriages.²³ Put another way, an unmarried individual (even if that person is in a civil union) has no standing to sue for federal marriage recognition—unless there is a marriage to recognize. Persons are not married under federal law; DOMA simply determines whether a marriage valid under state law is recognized for purposes of federal law. If there is no valid marriage under state law, then Congress has no marriage to recognize.²⁴

All this changed in 2003 when Massachusetts became the first American jurisdiction to issue marriage licenses to same-sex couples in response to the Supreme Judicial Court ruling in *Goodridge*.²⁵ Between 2003 and 2008, there were three challenges to DOMA resulting in a judgment on the merits.²⁶ All three cases were broad challenges to the constitutionality of the law. One arose in a bankruptcy proceeding, and the other two were direct challenges to the law by couples who wanted to

²² *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

²³ As one same-sex marriage advocate posited following the *Goodridge* decision, “Now the time is ripe for a constitutional challenge to DOMA.” Note, *Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*, 117 HARV. L. REV. 2684, 2688 (2004). The author argued, “Until recently, DOMA was effectively unchallengeable by the individuals subjected to its stigma. No same-sex couple would secure a marriage license for nearly eight years after DOMA’s passage. Accordingly, no potential plaintiff had suffered an injury sufficiently ‘concrete and particularized’ to establish standing to challenge either provision of DOMA, and a stigmatizing law was insulated for years after its enactment.” *Id.* at 2687–88 (footnotes omitted).

²⁴ The Court of Appeals for the Seventh Circuit briefly addressed this point in 2002 in connection with a pro se petitioner who had filed a joint tax return with his same-sex partner:

The Defense of Marriage Act presumptively denies federal recognition of same-sex marriages should any state choose to recognize such unions. But as the Commissioner argues, Mr. Mueller did not try to have his same-sex relationship recognized as a marriage under Illinois law, and thus the Defense of Marriage Act was not implicated. Instead Mr. Mueller’s filing status depended only on whether he was legally married under Illinois law at the close of tax year 1996, which he admitted he was not. Therefore, the constitutionality of the Defense of Marriage Act is irrelevant.

Mueller, 39 F. App’x at 438 (citations omitted).

²⁵ *Goodridge*, 798 N.E.2d at 969–70 (finding that “barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution”).

²⁶ *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 880 (C.D. Cal. 2005), *aff’d in part, vacated in part, remanded*, 447 F.3d 673 (9th Cir. 2006); *Wilson*, 354 F. Supp. 2d at 1309; *In re Kandu*, 315 B.R. at 148.

marry. All were brought by private attorneys rather than advocacy organizations. Most notably, all were unsuccessful.

The first of the three early cases was a 2004 bankruptcy proceeding in Washington state involving an American same-sex couple, Lee and Ann Kandu, who had traveled to British Columbia to get married in August 2003 and then filed a joint Chapter 7 bankruptcy petition back in Washington state two months later.²⁷ When the bankruptcy court objected to the joint filing by Lee and Kandu who were unmarried according to Washington law, the pro se petitioners challenged the constitutionality of DOMA on Fourth, Fifth, and Tenth Amendment grounds.²⁸

Dealing first with the Tenth Amendment claim, the court held, “The Tenth Amendment is not implicated because the definition of marriage in DOMA is not binding on states and, therefore, there is no federal infringement on state sovereignty. States retain the power to decide for themselves the proper definition of the term marriage.”²⁹ Turning briefly to the Fourth Amendment guarantee against unreasonable searches and seizures, the court continued, “More recently, the Fourth Amendment has been applied in the civil context as well. In its expansion, however, the Supreme Court indicated that the Fourth Amendment properly applies in the civil context only when the purpose of the governmental action is within the traditional meaning of search and seizure.”³⁰

Acknowledging its limited role as a trial court, the court opted to apply a rational basis analysis to the Fifth Amendment claims, expressing caution with respect to the affirmation of a “new fundamental right” to same-sex marriage³¹ and rejecting claims for heightened scrutiny under an equal protection analysis as well.³² In its rational basis analysis, the court again acknowledged its limited jurisdiction, deferring instead to the separate jurisdiction of Congress on matters of evidence and legislative policy:

²⁷ *In re Kandu*, 315 B.R. at 130. Ann Kandu subsequently passed away in April 2004, but the litigation continued, and the court ruled that the petition was not moot in that her estate was then administered in the same way as if she were still living. *Id.* at 130 n.1.

²⁸ *Id.* at 131.

²⁹ *Id.* at 132.

³⁰ *Id.* at 134 (citations omitted).

³¹ *Id.* at 141 (“A bankruptcy court is a trial court of limited jurisdiction and must be extremely cautious before creating on its own a new fundamental right based on what the Supreme Court *might* in the future decide.”).

³² *Id.* at 143 (“There is no evidence, from the voluminous legislative history or otherwise, that DOMA’s purpose is to discriminate against men or women as a class. Accordingly, the marriage definition contained in DOMA does not classify according to gender, and the Debtor is not entitled to heightened scrutiny under this theory.”).

Authority exists that the promotion of marriage to encourage the maintenance of stable relationships that facilitate to the maximum extent possible the rearing of children by both of their biological parents is a legitimate congressional concern. This Court's personal view that children raised by same-sex couples enjoy benefits possibly different, but equal, to those raised by opposite-sex couples, is not relevant to the Court's ultimate decision. It is within the province of Congress, not the courts, to weigh the evidence and legislate on such issues, unless it can be established that the legislation is not rationally related to a legitimate governmental end. Thus, although this Court may not personally agree with the positions asserted by the [United States Trustee] in support of DOMA, applying the rational basis test as set forth by the Supreme Court, this Court cannot say that DOMA's limitation of marriage to one man and one woman is not wholly irrelevant to the achievement of the government's interest.³³

The second of the three cases, *Wilson v. Ake*, involved a lesbian couple married in Massachusetts and living in Florida who presented their marriage license to the deputy clerk for Hillsborough County, Florida, asking for "acceptance of the valid and legal Massachusetts marriage license."³⁴ When the county clerk refused, the couple petitioned a federal district court to declare both DOMA and the Florida marriage statutes unconstitutional under the Full Faith and Credit Clause, the

³³ *Id.* at 146 (citations and footnote omitted). In support of this conclusion, the bankruptcy court cited a litany of cases holding that the state has an interest in promoting childrearing in a setting that allows the child to know both its mother and its father. The series of cases relied upon by the court were as follows:

Bowen v. Gilliard, 483 U.S. 587, 614, 107 S.Ct. 3008, 3024, 97 L.E.2d 485 (1987) (Brennan J., dissenting) (noting that "[t]he optimal situation for the child is to have both an involved mother and an involved father") (quoting H. Biller, *Paternal Deprivation* 10 (1974)); *Lofton v. Secretary of the Dep't of Children and Family Servs.*, 358 F.3d 804, 819 (11th Cir. 2004) (considering the state's argument that the presence of both male and female authority figures in the home is critical to optimal childhood development, the court held that "[i]t is hard to conceive an interest more legitimate and more paramount for the state than promoting an optimal social structure for educating, socializing, and preparing its future citizens to become productive participants in civil society"); *Adams*, 486 F. Supp. at 1124 (holding that it is beyond dispute that the state has a compelling interest in providing "status and stability to the environment in which children are raise [sic]"); *Standhardt*, 77 P.3d at 462–63 (holding that the state has an interest in promoting child-rearing by opposite-sex couples); *Singer*, 522 P.2d at 1197 (holding that "marriage is so clearly related to the public interest in affording a favorable environment for the growth of children that we are unable to say that there is not a rational basis upon which the state may limit the protection of its marriage laws to the legal union of one man and one woman").

Id.

³⁴ *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1301 (M.D. Fla. 2005). The context of the request is not clear from the pleadings.

Privileges and Immunities Clause, the Commerce Clause, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.³⁵

Perhaps surprisingly, given the extent of academic debate over the Full Faith and Credit implications of DOMA, the court summarily dismissed the Full Faith and Credit argument, citing *Nevada v. Hall*,³⁶ and concluding,

The Supreme Court has clearly established that “the Full Faith and Credit Clause does not require a State to apply another State’s law in violation of its own legitimate public policy.” Florida is not required to recognize or apply Massachusetts’ same-sex marriage law because it clearly conflicts with Florida’s legitimate public policy of opposing same-sex marriage.³⁷

On the question of whether same-sex marriage constitutes a fundamental right, the Florida district court cited the analysis from *In re Kandu* with approval, also noting that the Eleventh Circuit Court of Appeals, its authority binding upon the lower court, had already held that *Lawrence v. Texas*³⁸ did not establish a new fundamental right to private sexual intimacy: “[T]he Supreme Court’s decision in *Lawrence* cannot be interpreted as creating a fundamental right to same-sex marriage. First, the Eleventh Circuit disagrees with Plaintiffs’ assertion that *Lawrence* created a fundamental right in private sexual intimacy and this Court must follow the holdings of the Eleventh Circuit.”³⁹ On the equal protection claim also, the court deferred to Eleventh Circuit precedent, holding that sexual orientation classifications were subject only to rational basis review and adopting *Kandu*’s reasoning that “DOMA does not classify according to gender.”⁴⁰

For purposes of the rational basis analysis,⁴¹ the *Wilson* court deferred once more, simply noting that “[a]lthough this Court does not express an opinion on the validity of the government’s proffered legitimate interests, it is bound by the Eleventh Circuit’s holding that

³⁵ *Id.* at 1301–02.

³⁶ 440 U.S. 410 (1979).

³⁷ *Wilson*, 354 F. Supp. 2d at 1303–04 (citation omitted).

³⁸ 539 U.S. 558 (2003).

³⁹ *Wilson*, 354 F. Supp. 2d at 1306. On appeal, the court in *Wilson* looked to the Eleventh Circuit’s binding precedent in *Lofton v. Secretary of Department of Children and Family Services*, 358 F.3d 804, 817 (11th Cir. 2004), which had concluded, “[I]t is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right.” *Wilson*, 354 F. Supp. 2d at 1306.

⁴⁰ *Id.* at 1308 (quoting *In re Kandu*, 315 B.R. 123, 143 (Bankr. W.D. Wash. 2004)).

⁴¹ *Id.* (noting the government’s two arguments in support of the rationality of DOMA that (1) “DOMA fosters the development of relationships that are optimal for procreation, thereby encouraging the ‘stable generational continuity of the United States,’” and that (2) “DOMA ‘encourage[s] the creation of stable relationships that facilitate the rearing of children by both of their biological parents.’”).

encouraging the raising of children in homes consisting of a married mother and father is a legitimate state interest.”⁴²

Smelt v. County of Orange, the final of the three DOMA cases from 2003 to 2008, arose in Southern California when Arthur Smelt and Christopher Hammer sued Orange County, California in federal court for refusing to issue the couple a marriage license.⁴³ The couple argued that both the California marriage statutes and DOMA violated multiple provisions of the U.S. Constitution, including the First, Fifth, Ninth, and Fourteenth Amendments.⁴⁴

Unlike the two earlier cases, the plaintiffs in *Smelt* were not married, but rather were domestic partners under California law.⁴⁵ The district court dismissed the couple’s challenge to Section 2 of DOMA for lack of standing, holding that the plaintiffs did not have standing to challenge the interstate recognition section of DOMA because they were not married;⁴⁶ however, the couple was still allowed to proceed with a challenge to the marriage definition of Section 3.⁴⁷ The district court held DOMA’s marriage definition to be constitutional because it did not

⁴² *Id.* at 1309.

⁴³ *Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861, 864 (C.D. Cal. 2005), *aff’d in part, vacated in part, remanded*, 447 F.3d 673 (9th Cir. 2006). Although the plaintiffs challenged both state and federal statutes, the court focused on the federal claims, abstaining from consideration of the state marriage laws given the challenge already pending in state court. *Id.* at 864–65, 868.

⁴⁴ *Id.* at 864–65.

⁴⁵ *Id.* at 870–71.

⁴⁶ *Id.* (“Plaintiffs have not shown they have standing to challenge section 2 of DOMA. . . . Because they lack a relationship treated as a marriage in any state, Plaintiffs are not injured by the fact section 2 permits states to choose not to give effect to other states’ same-sex marriages. Plaintiffs also have not shown they will suffer an imminent injury as a result of section 2. They do not claim to have plans or a desire to get married in Massachusetts or elsewhere and attempt to have the marriage recognized in California. They do not claim to have plans to seek recognition of their eventual California marriage in another state. Without definite plans to engage in an act that will cause them to suffer an injury in fact, Plaintiffs have not established an imminent injury sufficient to confer standing to challenge section 2.”).

⁴⁷ *Id.* at 871 (“Plaintiffs are registered domestic partners in California, which is a ‘legal union’ recognized by the state. For purposes of federal law, DOMA defines ‘marriage’ as a legal union between one man and one woman. Plaintiffs’ legal union is excluded from the federal definition of marriage because it is not between a man and a woman. Because of DOMA’s definition, Plaintiffs’ legal union cannot receive the rights or responsibilities afforded to marriages under federal law. This is a concrete injury personally suffered by Plaintiffs, caused by DOMA’s definition of marriage. The United States concedes, and the Court agrees, Plaintiffs have standing to challenge section 3.”) This holding was later reversed by the Ninth Circuit. *Smelt*, 447 F.3d at 686 (vacating the district court’s decision regarding the plaintiffs’ challenge to Section 3 of DOMA).

involve sex discrimination or a fundamental right and because the law had a rational basis.⁴⁸ The Court offered the following analysis:

The Court finds it is a legitimate interest to encourage the stability and legitimacy of what may reasonably be viewed as the optimal union for procreating and rearing children by both biological parents.

Because procreation is necessary to perpetuate humankind, encouraging the optimal union for procreation is a legitimate government interest. Encouraging the optimal union for rearing children by both biological parents is also a legitimate purpose of government. The argument is not legally helpful that children raised by same-sex couples may also enjoy benefits, possibly different, but equal to those experienced by children raised by opposite-sex couples. It is for Congress, not the Court, to weigh the evidence.

By excluding same-sex couples from the federal rights and responsibilities of marriage, and by providing those rights and responsibilities only to people in opposite-sex marriages, the government is communicating to citizens that opposite-sex relationships have special significance. Congress could plausibly have believed sending this message makes it more likely people will enter into opposite-sex unions, and encourages those relationships.⁴⁹

The plaintiffs' appeal to the district court's ruling in *Smelt* was dismissed—again on standing grounds—by the U.S. Court of Appeals for the Ninth Circuit,⁵⁰ and the U.S. Supreme Court denied review.⁵¹

At the time these federal lawsuits were filed in 2004, state claims were already pending in California, New York, New Jersey, Maryland, and Washington,⁵² and same-sex marriage advocates appeared optimistic that these cases would produce a wave of momentum in favor of same-sex marriage across the nation.⁵³ Yet, national strategists for recognition of same-sex marriages largely opposed these federal lawsuits, concerned that the federal litigation was premature, and that forcing a U.S. Supreme Court ruling too soon could produce a major strategic setback.⁵⁴

⁴⁸ *Smelt*, 374 F. Supp. 2d at 879 (“The Court concludes the fundamental due process right to marry does not include a fundamental right to same-sex marriage or Plaintiffs’ right to marry each other. Plaintiffs’ claimed interest is not part of a fundamental right. For due process purposes, the Court reviews DOMA’s ‘one man, one woman’ restriction for rational basis.”).

⁴⁹ *Id.* at 880.

⁵⁰ *Smelt*, 447 F.3d at 683–84.

⁵¹ *Id.*, cert. denied, 549 U.S. 959 (2006).

⁵² *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Conaway v. Deane*, 932 A.2d 571 (Md. 2007); *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006); *Andersen v. King Cnty.*, 138 P.3d 963 (Wash. 2006).

⁵³ See Joan Biskupic, *Battles Escalate Over Gay Marriage*, USA TODAY, Mar. 24, 2006, at A1 (“The ACLU and others supporting same-sex marriages hope to turn public opinion by casting the ability to marry one’s chosen partner as a basic right.”).

⁵⁴ William C. Duncan, *Avoidance Strategy: Same-Sex Marriage Litigation and the Federal Courts*, 29 CAMPBELL L. REV. 29, 39 (2006) (“Whatever the exact concerns may be,

As Evan Wolfson with the national Freedom to Marry organization explained, “Bringing the wrong suit in the wrong way, even for the right objective, could do serious injury not only to our right to marry, but also to the broader range of lesbian and gay rights. The wrong case, wrong judge, or wrong forum could literally set us all back years, if not decades.”⁵⁵ Ultimately, four of these state cases resulted in unfavorable holdings for same-sex marriage advocates (and the California ruling was effectively reversed by a state constitutional amendment⁵⁶), thus prompting advocates to pursue new strategies.⁵⁷

C. A Coordinated Assault

In the past three years alone, at least ten new challenges have been filed against DOMA.⁵⁸ Whereas earlier suits were largely uncoordinated,

worry over federal precedent, fear of unsympathetic federal plaintiffs, or some other reason, the underlying motivation is strategic: keeping the marriage cases out of federal courts until a win there seems more likely.”)

⁵⁵ Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 611 (1994).

⁵⁶ CAL. CONST. art. 1, § 7.5.

⁵⁷ *Conaway*, 932 A.2d at 635 (upholding Maryland’s state marriage protection under rational basis review); *Lewis*, 908 A.2d at 224 (“The constitutional relief that we give to plaintiffs cannot be effectuated immediately or by this Court alone. The implementation of this constitutional mandate will require the cooperation of the Legislature.”); *Hernandez*, 855 N.E.2d at 34 (“The Court ultimately concludes that the issue of same-sex marriage should be addressed by the Legislature.”); *Andersen*, 138 P.3d at 990 (upholding Washington’s state marriage protection under rational basis review).

A series of defeats at the state level prompted at least some same-sex marriage strategists to reconsider the state-by-state approach in favor of a more ambitious federal strategy. See David Crary, *Defeat in Maine a Harsh Blow to Gay-Marriage Drive*, LEWISTON SUN JOURNAL (Nov. 4, 2009, 1:01 PM), <http://www.sunjournal.com/node/430550> (“Richard Socarides, who was an adviser on gay-rights issues in the Clinton administration, said the loss in Maine should prompt gay-rights leaders to reconsider their state-by-state strategy on marriage and shift instead to lobbying for changes on the federal level that expand recognition of same-sex couples.”).

⁵⁸ *Lui v. Holder*, No. 2:11-cv-01267-SVW-JCG, slip op. at 1 (C.D. Cal. Sept. 28, 2011); *Dragovich v. U.S. Dep’t of the Treasury*, 764 F. Supp. 2d 1178, 1179 (N.D. Cal. 2011); *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234, 235–36 (D. Mass. 2010) (complaint filed July 8, 2009), *appeal docketed*, No. 10-2207 (1st Cir. Nov. 24, 2010); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 376 (D. Mass. 2010) (complaint filed March 3, 2009), *appeal docketed sub nom. Massachusetts v. Dep’t of Health & Human Servs.*, No. 10-2207 (1st Cir. Nov. 24, 2010); *Torres-Barragan v. Holder*, No. 2:09-cv-08564-RGK-MLG (C.D. Cal. Apr. 30, 2010), *appeal docketed*, No. 10-55768 (9th Cir. May 13, 2010); *In re Balas*, 449 B.R. 567, 572 (Bankr. C.D. Cal. 2011); *Hara v. Office of Pers. Mgmt.*, No. PH-0831-08-099-I-2, 2008 MSPB LEXIS 6601 (M.S.P.B. Dec. 17, 2008), *appeal docketed*, No. 2009-3134 (Fed. Cir. Mar. 17, 2009); *Complaint for Declaratory and Injunctive Relief at 4*, *Pedersen v. Office of Pers. Mgmt.*, No. 3:10-cv-01750-VLB (D. Conn. Nov. 9, 2010); *Complaint at 16*, *Windsor v. United States*, No. 1:10-cv-8435 (S.D.N.Y. Nov. 9, 2010); *Complaint at 3*, *Golinski v. Office of Pers. Mgmt.*, No. 3:10-cv-00257-JSW (N.D. Cal. Jan. 20, 2010). In addition to these cases, there is one additional DOMA challenge

individual efforts, the recent lawsuits suggest a strategic decision on the part of national same-sex marriage advocacy organizations, with two of the current DOMA challenges having been filed by Gay & Lesbian Advocates and Defenders (“GLAD”),⁵⁹ one by the American Civil Liberties Union (“ACLU”),⁶⁰ one by Lambda Legal Defense and Education Fund,⁶¹ and a fifth suit filed by the State of Massachusetts.⁶² In contrast, of the earlier DOMA lawsuits, several of the plaintiffs were represented by private counsel only.⁶³

Whether this strategic decision is simply a reflection of the geographic realities of state-by-state strategies that have already exhausted the jurisdictions most likely to be sympathetic to same-sex marriage claims, an opportunistic response to a sympathetic Obama administration’s defense of the litigation, some combination of the two, or perhaps other reasons altogether is not entirely clear.⁶⁴ What does

pending in Oklahoma. See *Bishop v. United States*, No. 04-cv-848-TCK-TLW, slip op. at 1 (N.D. Okla. Nov. 24, 2009). An additional claim was decided by Judge Reinhardt through the Ninth Circuit’s Employment Dispute Resolution Plan. *In re Levenson*, 560 F.3d 1145, 1145–46 (9th Cir. 2009).

⁵⁹ GLAD is representing the plaintiffs in separate challenges filed in Massachusetts and Connecticut. *Gill*, 699 F.Supp. 2d at 376; Complaint for Declaratory and Injunctive Relief at 46, *Pedersen*, No. 3:10-cv-01750-VLB; see also *DOMA Section 3 Challenge*, GAY & LESBIAN ADVOCATES & DEFENDERS, <http://www.glad.org/doma/> (last visited Nov. 25, 2011). GLAD is the same organization that successfully challenged Massachusetts and Connecticut marriage laws in *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 946, 969–70 (Mass. 2003) and *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407, 410, 482 (Conn. 2008).

⁶⁰ ACLU is representing the plaintiffs in *Windsor v. United States*. Complaint at 23, *Windsor*, No. 1:10-cv-8435; see also *Windsor v. United States: Edie Windsor Challenges DOMA*, ACLU, <http://www.aclu.org/lgbt-rights/windsor-v-united-states-thea-edie-doma> (last visited Nov. 25, 2011).

⁶¹ Lambda Legal is representing the plaintiffs in *Golinski v. Office of Personnel Management*. Complaint at 1, *Golinski*, No. 3:10-cv-00257-JSW. This case originated as a complaint under the Ninth Circuit’s Employment Dispute Resolution Plan but was filed in federal district court in January 2010 after the Office of Personnel Management announced that it would ignore Judge Kozinski’s order. *Id.*; see also *Golinski v. United States Office of Personnel Management*, LAMBDA LEGAL, <http://www.lambdalegal.org/in-court/cases/golinski-v-us-office-personnel-management.html> (last updated Apr. 14, 2011).

⁶² *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234, 235–36 (D. Mass. 2010), *appeal docketed*, No. 10-2207 (1st Cir. Nov. 24, 2010).

⁶³ See, e.g., *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1300 (M.D. Fla. 2005); *In re Marriage Cases*, 183 P.3d 384, 390 (Cal. 2008); *Lewis v. Harris*, 908 A.2d 196, 198 (N.J. 2006).

⁶⁴ In the immediate aftermath of the Proposition 8 vote in California, former Solicitor General Ted Olson and David Boies, famous for their *Bush v. Gore* opposition, joined forces in litigation challenging Proposition 8 as a violation of federal equal protection guarantees. See Jesse McKinley, *Bush v. Gore Foes Join to Fight California Gay Marriage Ban*, N.Y. TIMES, May 28, 2009, at A1. Their effort immediately drew massive media attention, but at the same time received a less enthusiastic response from several national same-sex marriage advocates. *Id.* (reporting that the joint suit by Olson and Boies

seem to be increasingly evident, though, is that since the adoption of California's Proposition 8 reversing the California Supreme Court ruling in *In re Marriage Cases*,⁶⁵ same-sex marriage advocates have begun to focus their attentions and energies on a federal litigation strategy rather than a state-by-state approach.

In early 2009, shortly after the inauguration of a new president who publicly committed to the repeal of DOMA,⁶⁶ GLAD filed the first suit in Massachusetts federal court in what would become a new wave of DOMA litigation. *Gill v. Office of Personnel Management* was filed on behalf of seven same-sex couples married in Massachusetts and three individuals, all alleging that DOMA unconstitutionally denies them equal protection under the Fifth Amendment by denying them access to federal employee benefits, retirement benefits, spousal survivor benefits, and other federal privileges predicated upon marital status.⁶⁷ The second suit, *Massachusetts v. United States Department of Health & Human Services*, also filed in Massachusetts federal court, was brought by the Commonwealth of Massachusetts in July 2009, arguing that DOMA exceeds Congress's enumerated powers and infringes upon the states' "exclusive prerogative" to define marital status as guaranteed by the Tenth Amendment.⁶⁸

In July 2010, a federal district judge, Joseph Tauro of Boston, ruled for the plaintiffs in both cases, holding that DOMA exceeded Congress's authority under the Spending Clause, that it infringed upon the rights of the Commonwealth of Massachusetts to regulate marital status, and

against Proposition 8 "jolted many gay rights advocates—and irritated more than a few"). The filing of DOMA challenges by GLAD and other organizations in early 2009 may represent concern that the Proposition 8 litigation might reach the Supreme Court first and a belief that another context might present a more advantageous vehicle for raising the equal protection and due process issues at the Supreme Court.

⁶⁵ *In re Marriage Cases*, 183 P.3d 384.

⁶⁶ During his 2008 presidential campaign, President Obama released an open letter to the gay and lesbian community pledging to repeal DOMA, and through April 2009, listed the repeal of DOMA on the White House website as one of his top "civil rights" priorities. See Ali Frick, *White House Eliminated Pledge to Repeal Defense of Marriage Act from Website*, THINKPROGRESS.ORG (May 4, 2009, 6:33 PM), <http://thinkprogress.org/politics/2009/05/04/38329/white-house-website-doma/>; see also OBAMA PRIDE, http://obama.3cdn.net/36ddd2f5daac41cb21_rym6bxaax.pdf (last visited Nov. 25, 2011) ("I support the complete repeal of the Defense of Marriage Act.").

⁶⁷ *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 376–83 (D. Mass. 2010), *appeal docketed sub nom. Massachusetts v. Dep't of Health & Human Servs.*, No. 10-2207 (1st Cir. Nov. 24, 2010).

⁶⁸ *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234, 235–36 (D. Mass. 2010), *appeal docketed*, No. 10-2207 (1st Cir. Nov. 24, 2010); see also Complaint at 1–2, *Massachusetts*, 698 F. Supp. 2d 234 (No. 1:09-cv-11156-JLT) ("From its founding until DOMA was enacted in 1996, the federal government recognized that defining marital status was the exclusive prerogative of the states and an essential aspect of each state's sovereignty.").

that the law lacked a rational basis and so violated the Equal Protection Clause of the Fourteenth Amendment as incorporated in the Fifth Amendment.⁶⁹ While there is much to critique in the companion rulings, we will highlight in this Article just a few observations.

First, relying heavily upon an affidavit from Professor Nancy Cott, Judge Tauro recounted the history of anti-miscegenation laws and the fact that the federal government at no time adopted a uniform policy with respect to interracial marriage, but instead deferred to the individual policy of each state.⁷⁰ He also outlined the challenges faced by Massachusetts as a result of DOMA, including administrative challenges involved in accounting for individuals treated as married under state law but as single under federal law, lost federal funds under Medicaid, and additional taxation for state employees whose same-sex spousal health benefits are not deductible under federal law.⁷¹

Analyzing the Commonwealth's Tenth Amendment and enumerated powers claims, the Massachusetts district court held,

This case requires a complex constitutional inquiry into whether the power to establish marital status determinations lies exclusively with the state, or whether Congress may siphon off a portion of that traditionally state-held authority for itself. . . .

. . . .

Since, in essence, "the two inquiries are mirror images of each other," the Commonwealth challenges Congress' authority under Article I to promulgate a national definition of marriage, and, correspondingly, complains that, in doing so, Congress has intruded on the exclusive province of the state to regulate marriage.⁷²

In *Gill*, handed down the same day, Judge Tauro turned to a rational basis analysis, discounting the justifications articulated by Congress at the time of DOMA's passage in stating, "This court can readily dispose of the notion that denying federal recognition to same-sex marriages might encourage responsible procreation, because the government concedes that this objective bears no rational relationship to the operation of DOMA."⁷³ Significantly, Judge Tauro supported his

⁶⁹ *Gill*, 699 F. Supp. 2d at 376, 396–97; *Massachusetts*, 698 F. Supp. 2d at 235, 248–49, 251, 253.

⁷⁰ *Massachusetts*, 698 F. Supp. 2d at 238–39 (noting that at one time as many as forty-one states had adopted laws banning interracial marriage). However, in *Gill*, Judge Tauro noted that the number had dropped to sixteen states by the time the Supreme Court struck down such laws in *Loving v. Virginia*, 388 U.S. 1 (1967). *Gill*, 699 F. Supp. 2d at 392. While the *Loving* analogy is typically advanced by those favoring same-sex marriage, the analogy carries a message of restraint for the Supreme Court as well, as opposition to same-sex marriage currently stands at its high water mark with 41 states having adopted legislation opposing same-sex marriage. *See supra* note 4.

⁷¹ *Massachusetts*, 698 F. Supp. 2d at 241–44.

⁷² *Id.* at 245–46.

⁷³ *Gill*, 699 F. Supp. 2d at 388.

holding with the reasoning of *Lawrence v. Texas*, noting that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law.”⁷⁴

Professor David Cruz has appropriately criticized Judge Tauro’s rulings in *Gill* and *Massachusetts* as being “somewhat circular” in their reasoning.⁷⁵ In *Massachusetts*, Judge Tauro held Congress’s enactment of DOMA invalid because it allegedly establishes an unconstitutional condition upon state Medicaid and other funding—citing *Gill*’s holding that DOMA violates the equal protection guarantee of the Fifth Amendment.⁷⁶ Yet, in *Gill*, Judge Tauro explains that the government’s asserted interests in protecting the status quo and taking an incremental response to a new social problem bear no rational relationship to DOMA—citing his opinion in *Massachusetts* for the proposition that Congress had no constitutional authority to regulate marriage in the first place.⁷⁷ So, according to Judge Tauro, DOMA is unconstitutional under the Fifth Amendment’s equal protection guarantee because Congress had no authority to regulate marriage, and Congress’s marriage regulation was invalid because it imposed an unconstitutional condition on the states, forcing them to violate constitutional guarantees of equal protection vis-à-vis their citizens. These decisions are, appropriately, now consolidated and pending on appeal in the U.S. Court of Appeals for the First Circuit.⁷⁸

After the Massachusetts trial court decisions in the First Circuit were issued in July 2010, GLAD and the ACLU both filed similar

⁷⁴ *Id.* at 389–90 (quoting *Lawrence v. Texas*, 539 U.S. 558, 577 (2003)).

⁷⁵ David B. Cruz, *The Defense of Marriage Act and Uncategorical Federalism*, 19 WM. & MARY BILL RTS. J. 805, 809–10 (2011). (“Judge Tauro’s argument rejecting the Spending Clause as a basis for Section 3 of DOMA depended upon his conclusion in the companion case *Gill v. Office of Personnel Management* that DOMA violated equal protection in its discriminatory treatment of same-sex couples and that conditioning participation in federal programs on compliance with DOMA unconstitutionally induced states to violate equal protection. *Gill*, in turn, held that DOMA had no rational basis (as applied to the plaintiff same-sex couples and survivors in Massachusetts) because Judge Tauro concluded that the federal government has no ‘interest in a uniform definition of marriage for purposes of determining federal rights, benefits, and privileges.’ The authority Tauro gives for that conclusion, besides his related categorical conclusion that ‘the subject of domestic relations is the exclusive province of the states[,]’ is his opinion in *Massachusetts*. Thus, in a somewhat circular way, Judge Tauro’s categorical federalism arguments are key to both his decisions holding the federal definition section of DOMA unconstitutional as applied to and in Massachusetts.” (alteration in original) (footnotes omitted)).

⁷⁶ *Massachusetts*, 698 F. Supp. 2d at 248–49.

⁷⁷ *Gill*, 699 F. Supp. at 390–91.

⁷⁸ Order, *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, No. 10–2207 (1st Cir. Nov. 24, 2010) (noting that *Gill* and *Massachusetts* have been consolidated into one case).

challenges to DOMA in the Second Circuit, one in Connecticut⁷⁹ and one in New York.⁸⁰ The Connecticut case was brought by GLAD and involves same-sex couples married in various northeastern states who seek to have their marriages recognized for federal law purposes.⁸¹ The New York case, brought by the ACLU, involves a New York couple married in Canada who seek to have their marriage recognized for federal estate tax purposes to the surviving partner.⁸²

Meanwhile, in California, federal constitutional challenges to DOMA have been filed in three cases. One involves a bankruptcy proceeding where the plaintiffs, represented by private attorneys, have challenged DOMA, seeking to be considered joint petitioners on their bankruptcy petition.⁸³ The bankruptcy court ruled in June 2011 that DOMA was unconstitutional, and the Department of Justice concluded it would not appeal that decision.⁸⁴ The next California case involves public employees in same-sex marriages, represented by the Legal Aid Society of San Francisco, who have sued to have their non-public employee spouses enrolled in a federally regulated insurance program.⁸⁵ Finally, the third case involves a federal court employee who has brought a claim to have her spouse added to a federal employee insurance program.⁸⁶ This latter case is pending at the trial court level.⁸⁷

With at least ten DOMA challenges pending at various stages in federal litigation,⁸⁸ the issue is likely to come before the U.S. Supreme Court within the next two to three years.⁸⁹ Of the recent cases filed

⁷⁹ Complaint for Declaratory and Injunctive Relief at 4, 46, *Pedersen v. Office of Pers. Mgmt.*, No. 3:10-cv-1750-VLB (D. Conn. Nov. 9, 2010).

⁸⁰ Complaint at 21, 23, *Windsor v. United States*, No. 1:10-cv-8435 (S.D.N.Y. Nov. 9, 2010).

⁸¹ Complaint for Declaratory and Injunctive Relief, *supra* note 79, at 44.

⁸² Complaint, *supra* note 80, at 1, 21–23.

⁸³ *In re Balas*, 449 B.R. 567, 569–72 (Bankr. C.D. Cal. 2011).

⁸⁴ *Id.* at 579.

⁸⁵ *Dragovich v. U.S. Dep't of the Treasury*, 764 F. Supp. 2d 1178, 1179–80 (N.D. Cal. 2011). The district court in *Dragovich* rejected the federal government's motion to dismiss, finding that the court had subject-matter jurisdiction and that the plaintiffs had stated a cognizable claim. *Id.* at 1192.

⁸⁶ Complaint at 1–3, *Golinski v. U.S. Office of Pers. Mgmt.*, No. 3:10-cv-00257-JSW (N.D. Cal. Jan. 20, 2010).

⁸⁷ Case Summary, *Golinski v. U.S. Office of Pers. Mgmt.*, No. 3:10-cv-00257-JSW (N.D. Cal. Jan. 20, 2010), ECF Case Summary (showing date of last filing as October 12, 2011).

⁸⁸ *See supra* note 58.

⁸⁹ Michael A. Lindenberger, *Making a Supreme Court Case for Gay Marriage*, TIME (Aug. 9, 2010), <http://www.time.com/time/politics/article/0,8599,2009335,00.html>.

against DOMA, four have been decided by a trial court,⁹⁰ and two have already been appealed.⁹¹

D. The Politics of Defending DOMA

Overwhelmingly approved by bipartisan majorities in 1996,⁹² DOMA has become increasingly controversial in recent years, at least among political elites. Emblematic of this shift—and perhaps contributing to it as well—has been the evolving position of the Obama administration on the issue of marriage. During the 2008 presidential campaign, President Obama published an open letter supporting “the complete repeal of the Defense of Marriage Act,”⁹³ while shortly thereafter explaining that he supported marriage as the union of a husband and wife, most notably during a candidate forum with Reverend Rick Warren on August 16, 2008: “I believe that marriage is the union between a man and a woman. Now, for me as a Christian . . . it is also a sacred union. God’s in the mix.”⁹⁴

Shortly after President Obama’s inauguration, the repeal of DOMA was listed as one of the new Obama administration’s top “civil rights” priorities.⁹⁵ Yet at the same time, the Obama Department of Justice

⁹⁰ Unlike the cases from 2003 to 2008, all four of the recently decided trial court cases have struck down DOMA or least recognized as cognizable the claim that DOMA is unconstitutional. *See Dragovich*, 764 F. Supp. 2d at 1192; *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234, 253 (D. Mass. 2010), *appeal docketed*, No. 10-2207 (1st Cir. Nov. 24, 2010); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 397 (D. Mass. 2010), *appeal docketed sub nom. Massachusetts v. U.S. Dep’t of Health & Human Servs.*, No. 10-2207 (1st Cir. Nov. 24, 2011); *In re Balas*, 449 B.R. 567, 579 (Bankr. C.D. Cal. 2011).

⁹¹ *Gill* and *Massachusetts* were both appealed and have been consolidated on appeal to the First Circuit. Order, *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, No. 10-2207 (1st Cir. Nov. 24, 2010).

As discussed in depth later, the House of Representatives Bipartisan Legal Advisory Group (“BLAG”) has intervened to defend DOMA in the absence of any defense from the Obama administration. BLAG does not plan to appeal every case, as explained by a spokesman for House Speaker John Boehner:

Bankruptcy cases are unlikely to provide the path to the Supreme Court, where we imagine the question of constitutionality will ultimately be decided . . . Obviously, we believe the statute is constitutional in all its applications, including bankruptcy, but effectively defending it does not require the House to intervene in every case, especially when doing so would be prohibitively expensive.

John Schwartz, *A California Bankruptcy Court Rejects U.S. Law Barring Same-Sex Marriage*, N.Y. TIMES, June 15, 2011, at A18.

⁹² *See supra* note 9.

⁹³ OBAMA PRIDE, *supra* note 66.

⁹⁴ *Saddleback Presidential Candidates Forum* (CNN television broadcast Aug. 16, 2008), <http://transcripts.cnn.com/TRANSCRIPTS/080816/se.02.html> (recording remarks by then-presidential candidate, Barack Obama).

⁹⁵ Frick, *supra* note 66.

continued to defend DOMA in briefs filed in the *Smelt* case.⁹⁶ Within a few months, however, under fire from gay marriage supporters,⁹⁷ the Department of Justice disclaimed any governmental interest in DOMA related to strengthening marriage, responsible procreation, or child well-being, failing to address these reasons but instead falling back on defenses such as maintaining the status quo or taking an incremental response to new social problems.⁹⁸

On February 23, 2011, with *Gill* and *Massachusetts* pending in the First Circuit, Attorney General Eric Holder made the controversial announcement that the Department of Justice would no longer defend DOMA in litigation based on President Obama's new position that DOMA is unconstitutional.⁹⁹ In particular, Attorney General Holder

⁹⁶ See Reply Memorandum in Support of Defendant United States of America's Motion to Dismiss at 2, 5–7, *Smelt v. United States*, No. 8:09-cv-00286-DOC-MLG (C.D. Cal. Aug. 17, 2009) (admitting the administration's lack of support of DOMA as a matter of policy but arguing that the plaintiffs' equal protection and due process claims in *Smelt* should be dismissed because DOMA survives rational basis review).

⁹⁷ See Jeremy W. Peters, *New Generation of Gay Rights Advocates March to Put Pressure on the President*, N.Y. TIMES, Oct. 12, 2009, at A12.

⁹⁸ Reply in Support of Defendants' Motion to Dismiss and Opposition to Plaintiffs' Motion for Summary Judgment at 14–16, *Gill*, 699 F. Supp. 2d 374 (No. 1:09-cv-10309-JLT).

⁹⁹ Letter from Eric H. Holder, Jr., Attorney General of the United States, to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011) [hereinafter Letter from Attorney General Holder]; Press Release, Dep't of Justice, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011) [hereinafter Press Release], <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html>. ("After careful consideration, including a review of my recommendation, the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a more heightened standard of scrutiny. The President has also concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional. Given that conclusion, the President has instructed the Department not to defend the statute in such cases. I fully concur with the President's determination. Consequently, the Department will not defend the constitutionality of Section 3 of DOMA as applied to same-sex married couples in the two cases filed in the Second Circuit. . . . The Department has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense. At the same time, the Department in the past has declined to defend statutes despite the availability of professionally responsible arguments, in part because—as here—the Department does not consider every such argument to be a 'reasonable' one. Moreover, the Department has declined to defend a statute in cases, like this one, where the President has concluded that the statute is unconstitutional."). Earlier debates over the constitutionality of DOMA had centered around Section 2 of the statute, which provides, "No 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." Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 & 28 U.S.C. § 1738C) (2006). More

explained that, with new litigation pending in the Second Circuit Court of Appeals, where no binding authority exists on the standard of review for sexual orientation discrimination, the administration was taking the position that sexual orientation deserves heightened scrutiny, and that DOMA is unable to survive such heightened scrutiny.¹⁰⁰ Attorney General Holder noted that the Department of Justice, while no longer defending DOMA in litigation, would continue to enforce the law unless or until it was repealed or struck down.¹⁰¹

But three months later, Attorney General Holder vacated a Board of Immigration Appeals ruling based on DOMA, asking the Board to reconsider deportation proceedings initiated against a man who had entered into a New Jersey civil union with an American-born partner.¹⁰² By July 2011, the Obama administration had come full circle in its legal position on DOMA, arguing in *Golinski v. United States Office of Personnel Management* that

Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7 (“DOMA”), unconstitutionally discriminates. It treats same-sex couples who are legally married under their states’ laws differently than similarly situated opposite-sex couples, denying them the status, recognition, and significant federal benefits otherwise available to married persons. Under well-established factors set forth by the Supreme Court, discrimination based on sexual orientation is subject to heightened scrutiny. Under that standard of review, Section 3 of DOMA is unconstitutional.¹⁰³

In response to the Obama administration’s withdrawal, Congress has intervened through the Bipartisan Legal Advisory Group (“BLAG”) in the lawsuits and other DOMA challenges to ensure the law receives a robust defense, both with respect to the standard of review and (especially) to the governmental interests in support of DOMA that would be advanced.

recently, however, attention has been focused on the substantive definition of marriage contained in Section 3 of DOMA, which states, “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.” *Id.*

¹⁰⁰ Letter from Attorney General Holder, *supra* note 99.

¹⁰¹ *Id.*

¹⁰² Dorman, 25 I. & N. Dec. 485, 485 (Dep’t of Justice April 26, 2011).

¹⁰³ Defendants’ Brief in Opposition to Motions to Dismiss at vi, *Golinski v. U.S. Office of Pers. Mgmt.*, 781 F. Supp. 2d 967 (N.D. Cal. 2011) (No. 3:10-cv-00257-JSW).

II. STANDARD OF REVIEW

A. *What Is the Appropriate Classification?*

In all of the pending challenges to DOMA, plaintiffs have asserted that the law discriminates on the basis of sexual orientation. As Judge Taylor wrote in *Smelt*, however,

On its face, DOMA does not classify based on sexual orientation. . . . It does not mention sexual orientation or make heterosexuality a requirement for obtaining federal marriage benefits. However, equal protection analysis is not invoked only by a facial classification. A facially neutral law may be subjected to equal protection scrutiny if its disproportionate effect on a certain class reveals a classification.¹⁰⁴

As a facial matter, Judge Taylor is undoubtedly correct. Although many analyses overlook this reality, DOMA, in common with the marriage laws of all states, contains no mention of the “orientation” of the parties. And while gays and lesbians are clearly impacted disproportionately by the law, it is also true that at least some people who experience same-sex attraction can and do marry persons of the opposite sex. This is in keeping with the procreative purpose of marriage since such couples can and do have children as a result of their union, and these children benefit from a relationship with their own mother and father.

Additionally, the category of orientation itself can be analytically problematic,¹⁰⁵ in that, as will be explained further, there is no universally accepted definition of homosexuality, there is no consensus that sexual orientation is primarily genetic in origin like race or sex, and there is broad scientific agreement that individual orientation can and does change over time. In an amici curiae brief to the California Supreme Court for *In re Marriage Cases*, attorney John Stewart addressed the fact that there is no universally accepted definition of homosexuality.¹⁰⁶ Stewart pointed out that not only are there three different “basic definitions of sexual orientation,” but also that there are “significant variations” within each definition.¹⁰⁷ Stewart also presented

¹⁰⁴ *Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861, 874 (C.D. Cal. 2005), *aff'd in part, vacated in part, remanded*, 447 F.3d 673 (9th Cir. 2006).

¹⁰⁵ See William C. Duncan, *Problems of Classification*, 4 LIBERTY U. L. REV. 465, 466 (2010).

¹⁰⁶ Brief of Amici Curiae Jews Offering New Alternatives to Homosexuality (“JONAH”), Parents and Friends of Ex-Gays & Gays (“PFOX”), and Evergreen International, in Support of Proposition 22 Legal Defense and Education Fund at 3, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (S147999).

¹⁰⁷ *Id.* at 4–5 (citing EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY* 290–97 (1994)). The different definitions of sexual orientation are based upon “sexual behavior,” “sexual attraction,” or “self-ascribed social identity.” Variations among

a compelling argument that there is no consensus that sexual orientation is primarily genetic in origin like race or sex, citing multiple sociological and psychological studies published in various academic journals to support his claim.¹⁰⁸ Drawing from the results of a recent twin study by two sociologists at Columbia University and Yale University, Stewart wrote, “[T]he efforts to establish genetic or hormonal

these three definitions raise important questions, such as if one uses a “sexual behavior” definition of sexual orientation, should any man who has had sexual relations with another man be considered gay? Based upon information from a psychological study by Edward Laumann, Stewart also asks if one should consider a certain time frame when asking this question. For example, is a man only gay if he has had sexual relations with another man in the last year? What about the past five years? Stewart highlights similar problems with the other definitions of sexual orientation. For instance, he asks whether physical or romantic attraction should be the gauge for defining sexual orientation under the “sexual attraction” definition since “attraction typically exists on a continuum with many individuals recognizing some degree of attraction to both sexes.” *Id.*

¹⁰⁸ *Id.* at 7–10. “As two scholars recently put it, ‘... [T]he assertion that homosexuality is genetic is so reductionistic that it must be dismissed out of hand as a general principle of psychology.’” *Id.* at 8 (alteration in original) (quoting RICHARD C. FRIEDMAN & JENNIFER I. DOWNEY, *SEXUAL ORIENTATION AND PSYCHOANALYSIS: SEXUAL SCIENCE AND CLINICAL PRACTICE* 39 (2002)). Stewart supported this argument by compiling various studies. In particular, Stewart pointed out that psychologists and sociologists have recognized these shortcomings in a recent study focusing on patterns of behaviors observed in identical twins:

Identical twin studies, used to tease out genetic influence, suffer from some of the same recruitment problems that other “convenience” samples face. Identical twins who are more alike are more likely to volunteer for identical twin registries, for example, and several early studies rely on one twin’s estimates of their other twin’s orientation, reports which have been shown to be unreliable. [P]rofessors Bearman and Bruckner note that “[a]s samples become more representative, concordance on sexual behavior, attraction, and orientation, as expected, declines.” . . .

Concordance rates in orientation among identical twins have varied considerably from one study to the next, ranging from 13 percent to 100 percent in the eight small-scale studies (ranging in size from 5 to 71 identical twin pairs in which at least one twin was homosexual) in one recent review of the literature. . . .

For example 1991 and 1993 studies, involving twin pairs recruited through gay publications, reported a concordance rate (similarity across the twins) of approximately 50 percent, which would suggest some heritable influence. . . . However, even a 50 percent concordance rate among identical twins suggests that genetic influences cannot be primary (or if one twin were gay 100 percent of other identical twins are gay, just as 100 percent of identical twins in which one twin is black or female, the other twin is black or female). Moreover, as sociologists Bearman and Bruckner note, using common heritability estimates suggests that many voluntary social actions show signs of genetic influence. They note a study that suggests “substantial heritability for caring for tropical fish (28%), and frequency of various behaviors such as purchasing folk music in the past year (46%), chewing gum (58%), and riding a taxi (38%).”

Id. at 8–10 (citations omitted).

effects on sexual orientation have been ‘inconclusive at best.’¹⁰⁹ Finally, there is also broad scientific agreement that an individual’s sexual orientation may change and often does change over time,¹¹⁰ particularly in cases involving women who have identified themselves as lesbians.¹¹¹

In Maryland’s same-sex marriage case, the state’s highest court noted that given “the scientific and sociological evidence currently available to the public, we are unable to take judicial notice that gay, lesbian, and bisexual persons display readily-recognizable, immutable characteristics that define the group such that they may be deemed a suspect class for purposes of determining the appropriate level of scrutiny [in this case].”¹¹² Further, the court noted that the plaintiffs “point neither to scientific nor sociological studies, which have withstood analysis for evidentiary admissibility, in support of an argument that sexual orientation is an immutable characteristic.”¹¹³

Orientation can be a vague category, encompassing sexual behavior, romantic attractions, and self-identification, among other things.

¹⁰⁹ *Id.* at 7–8 (quoting Peter S. Bearman & Hannah Brückner, *Opposite-Sex Twins and Adolescent Same-Sex Attraction*, 107 AM. J. SOC. 1179, 1180 (2002)).

¹¹⁰ To support this argument regarding changes in sexual orientation over time, Stewart again cited multiple scientific studies. *See id.* at 12–14. Stewart quotes the following in his brief:

[R]esearch that asks individuals to rate themselves on the homosexuality continuum finds considerable flux in self-identification, with some individuals reporting they are more “gay” and some becoming less “gay” in their own estimation over time. “[W]e realize that homosexuality is not some monolithic construct one moves toward or from in a linear way; . . . We also acknowledge that changes in sexual feelings and orientation over time occur in all possible directions.”

Id. at 12 (quoting Joseph P. Stokes et al., *Predictors of Movement Toward Homosexuality: A Longitudinal Study of Bisexual Men*, 43 J. SEX RES. 304, 305 (1997)).

¹¹¹ *Id.* at 12–13. Based upon sociological and psychological studies, Stewart maintains that lesbian women increasingly describe their sexual orientation as a “personal choice” instead of an “innate constraint.” *Id.* at 12 (citing Lisa M. Diamond & Ritch C. Savin-Williams, *Explaining Diversity in the Development of Same-Sex Sexuality Among Young Women*, 56 J. SOC. ISSUES 297, 298 (2000)). On this point, Stewart quoted a recent study regarding sexual identity:

As found by Diamond and Savin-Williams, “[Fifty percent] of the respondents had changed their identity label more than once since first relinquishing their heterosexual identity.’ Charbonneau and Lander interviewed 30 women who had spent half their lives as heterosexuals, married and had children and then in midlife became lesbian. Some of these women explained their lesbianism as a process of self-discovery. But a ‘second group of women . . . regarded their change more as a choice among several options of being lesbian, bisexual, celibate or heterosexual.”

Id. at 12–13 (citations omitted) (quoting Karen L. Bridges & James M. Croteau, *Once-Married Lesbians: Facilitating Changing Life Patterns*, 73 J. COUNSELING & DEV. 134, 135 (1994)).

¹¹² *Conaway v. Deane*, 932 A.2d 571, 614 (Md. 2007).

¹¹³ *Id.* at 615.

Notwithstanding, courts have been willing to analyze marriage statutes in terms of orientation discrimination by avoiding the difficult definitional questions. In the pending DOMA challenges, moreover, neither the Department of Justice nor the BLAG representing Congress has contested the assertion that an orientation classification is inherent in DOMA.¹¹⁴

In at least two of the cases, petitioners have alleged that DOMA discriminates on the basis of sex (as opposed to sexual orientation), treating men and women differently insofar as a man can marry a woman, but another woman cannot.¹¹⁵ To date, BLAG has not responded to this claim, which has been advanced among scholars,¹¹⁶ but has yet to gain much acceptance in the state and federal courts.¹¹⁷ The failure of the sex discrimination claim to gain traction is probably related to its counterintuitive premises. Marriage laws plainly treat men and women the same way, and when we speak of sex discrimination, we refer to laws or practices that disadvantage either men or women.¹¹⁸ Additionally, the legislative history of laws prohibiting sex discrimination, such as the equal rights amendments, does not disclose any intent to interfere with existing marriage definitions.¹¹⁹ It therefore seems unlikely that the sex

¹¹⁴ Letter from Attorney General Holder, *supra* note 99; Memorandum of Law of Intervenor-Defendant the Bipartisan Legal Advisory Group of the United States House of Representatives in Support of its Motion to Dismiss at 22–25, *Windsor v. United States*, (No. 1:10-cv-8435) (S.D.N.Y. Aug. 1, 2011).

¹¹⁵ *In re Kandu*, 315 B.R. 123, 143 (Bankr. W.D. Wash. 2004) (“The Debtor argues that because DOMA does not allow one woman to marry another woman, the legislation is a sex-based classification warranting strict scrutiny.”); Plaintiff’s Notice of Motion and Motion for Summary Judgment [sic]; Memorandum of Points and Authorities at 10, *Golinski v. U.S. Office of Pers. Mgmt.*, 781 F. Supp. 2d 967 (N.D. Cal. 2011) (No. 3:10-cv-00257-JSW) (“DOMA is subject to heightened scrutiny not only because it discriminates based on sexual orientation, but also because it discriminates based on sex. The undisputed facts show that Ms. Golinski has been denied spousal coverage based on her sex in relation to the sex of her spouse.” (citation omitted)).

¹¹⁶ See Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 199 (1994) (making the argument for sex discrimination).

¹¹⁷ Compare *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010) (accepting the argument), and *Baehr v. Lewin*, 852 P.2d 44, 62–63 (Haw. 1993) (accepting the argument), with *In re Marriage Cases*, 183 P.3d 384, 433–34 (Cal. 2008) (rejecting the argument), and *Conaway v. Deane*, 932 A.2d 571, 635 (Md. 2007) (rejecting the argument), *Andersen v. King Cnty.*, 138 P.3d 963, 988 (Wash. 2006) (rejecting the argument).

¹¹⁸ See *Hernandez v. Robles*, 855 N.E.2d 1, 10–11 (N.Y. 2006) (“By limiting marriage to opposite-sex couples, New York is not engaging in sex discrimination. The limitation does not put men and women in different classes, and give one class a benefit not given to the other. Women and men are treated alike—they are permitted to marry people of the opposite sex, but not people of their own sex.”).

¹¹⁹ See Paul Benjamin Linton, *Same-Sex “Marriage” Under State Equal Rights Amendments*, 46 ST. LOUIS U. L.J. 909, 961 (2002) (“Nothing in the text, history or interpretation of state equal rights provisions even remotely suggests that those provisions

discrimination line of argument will play a substantial role in the DOMA litigation.

B. Heightened Scrutiny?

Despite its difficulties, the argument that DOMA constitutes sexual orientation discrimination will clearly be an important part of the DOMA litigation. The district court in *Gill v. Office of Personnel Management* held that under DOMA “it is only *sexual orientation* that differentiates a married couple entitled to federal marriage-based benefits from one not so entitled.”¹²⁰ The next analytical step, then, is to determine what level of scrutiny applies to this type of classification. Plaintiffs in the DOMA challenges have argued that courts assessing the constitutionality of the law should apply some form of heightened scrutiny, either “intermediate” (used for classifications on the basis of sex) or “strict” (used for classifications on the basis of race).¹²¹

In his letter offering a justification for the Department of Justice’s decision to cease defending DOMA, Attorney General Holder seized on this precise legal question to explain the administration’s constructive withdrawal from the defense. The letter states, “[T]he President and I have concluded that classifications based on sexual orientation warrant heightened scrutiny.”¹²²

Contrary to the administration’s suggestion, however, the great—nearly overwhelming—weight of precedent supports application of the deferential rational basis standard to classifications involving sexual orientation rather than any form of heightened scrutiny.¹²³ Most importantly, the U.S. Supreme Court has had at least two opportunities to apply heightened scrutiny to sexual orientation classifications and has declined to do so in both instances. In 1996, the Court applied rational

should invalidate state policies against same-sex marriages. The unmistakable purpose of these provisions was to eradicate discrimination in the law in favor of men and against women, as well as discrimination in favor of women and against men.”)

¹²⁰ 699 F. Supp. 2d 374, 396 (D. Mass. 2010) (emphasis added), *appeal docketed sub nom.* Massachusetts v. Dep’t of Health & Human Servs., No. 10-2207 (1st Cir. Nov. 24, 2010).

¹²¹ See, e.g., *id.* at 387 (arguing in favor of the strict scrutiny standard); Memorandum of Law in Support of Plaintiff’s Motion for Summary Judgment at 13, Windsor v. United States, No. 1:10-cv-8435 (S.D.N.Y. June 24, 2011) (arguing in favor of intermediate scrutiny standard).

¹²² Letter from Attorney General Holder, *supra* note 99.

¹²³ For a detailed response to the Attorney General’s letter, see Paul Benjamin Linton, *A Response to the Administration’s Decision Not to Defend Section 3 of the Defense of Marriage Act*, ALLIANCEALERT.ORG, <http://www.alliancealert.org/2011/20110301.pdf> (last visited Nov. 25, 2011). Linton concludes that “the unanimous opinions of the courts of appeals that classifications based upon sexual orientation are subject only to rational basis review” is one of the strongest arguments that can be used in support of DOMA’s constitutionality. *Id.* at 20.

basis analysis in assessing the constitutionality of Colorado's Amendment Two.¹²⁴ Again, in 2003, the Court applied rational basis review to Texas's sodomy statute.¹²⁵

Like the Supreme Court, the majority of the federal appeals courts have applied rational basis scrutiny in sexual orientation cases, including the First,¹²⁶ Second,¹²⁷ Fourth,¹²⁸ Fifth,¹²⁹ Sixth,¹³⁰ Seventh,¹³¹ Eighth,¹³² Ninth,¹³³ Tenth,¹³⁴ and Eleventh¹³⁵ Circuit Courts of Appeals, as well as the Circuit Court of Appeals for the District of Columbia.¹³⁶

Tellingly, one of these cases involved a challenge to a state marriage definition like DOMA's. The Eighth Circuit in 2006 rejected this federal constitutional challenge to Nebraska's marriage amendment.¹³⁷ The court, relying on U.S. Supreme Court precedent, applied rational basis

¹²⁴ *Romer v. Evans*, 517 U.S. 620, 631–32 (1996).

¹²⁵ *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

¹²⁶ *Cook v. Gates*, 528 F.3d 42, 60–62 (1st Cir. 2008).

¹²⁷ *Able v. United States*, 155 F.3d 628, 632 (2d Cir. 1998) (applying rational basis review without deciding whether a higher standard would be warranted).

¹²⁸ *Veney v. Wyche*, 293 F.3d 726, 731–32 (4th Cir. 2002); *Thomasson v. Perry*, 80 F.3d 915, 927–28 (4th Cir. 1996) (en banc).

¹²⁹ *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (en banc).

¹³⁰ *Scarborough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006); *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261, 265–68 (6th Cir. 1995), *cert. granted, vacated, remanded*, 518 U.S. 1001 (1996).

¹³¹ *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 954 (7th Cir. 2002); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464–65 (7th Cir. 1989).

¹³² *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866–67 (8th Cir. 2006); *Richenberg v. Perry*, 97 F.3d 256, 260 n.5 (8th Cir. 1996).

¹³³ *Witt v. Dep't of the Air Force*, 527 F.3d 806, 821 (9th Cir. 2008); *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1137–38 (9th Cir. 2003); *Holmes v. California Army Nat'l Guard*, 124 F.3d 1126, 1132–33 (9th Cir. 1997); *Philips v. Perry*, 106 F.3d 1420, 1425 (9th Cir. 1997); *Meinhold v. U.S. Dep't of Def.*, 34 F.3d 1469, 1478 (9th Cir. 1994); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990). A panel decision of the Ninth Circuit held otherwise. *See Watkins v. U.S. Army*, 847 F.2d 1329, 1352 (9th Cir. 1988). This opinion was later withdrawn on rehearing without addressing the constitutional challenge addressed below. *See Watkins v. U.S. Army*, 875 F.2d 699, 705, 711 (9th Cir. 1989) (en banc).

¹³⁴ *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113–14 (10th Cir. 2008); *Walmer v. U.S. Dep't of Def.*, 52 F.3d 851, 854–55 (10th Cir. 1995); *Jantz v. Muci*, 976 F.2d 623, 628, 630 n.3 (10th Cir. 1992); *Rich v. Sec'y of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984); *Nat'l Gay Task Force v. Bd. of Educ.*, 729 F.2d 1270, 1273 (10th Cir. 1984), *aff'd by an equally divided court*, 470 U.S. 903 (1985).

¹³⁵ *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004).

¹³⁶ *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (en banc); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Padula v. Webster*, 822 F.2d 97, 104 (D.C. Cir. 1987); *Dronenburg v. Zech*, 741 F.2d 1388, 1397–98 (D.C. Cir. 1984).

¹³⁷ *Bruning*, 455 F.3d at 871.

scrutiny to the amendment's challenge.¹³⁸ Specifically, the Eighth Circuit noted, "[T]he Supreme Court has *never* ruled that sexual orientation is a suspect classification for equal protection purposes."¹³⁹

When the Eighth Circuit—as the other circuits and the U.S. Supreme Court have already done¹⁴⁰—applied rational basis scrutiny rather than a heightened scrutiny to the Nebraska marriage law, the federal appeals court acted consistently with the vast majority of state court decisions on same-sex marriage as well. In fact, only three state high courts (California, Connecticut, and Iowa) have applied any form of heightened scrutiny in analyzing their state marriage laws.¹⁴¹

III. IS DOMA RATIONAL?

A. A New Rationale for DOMA: Preserving the Status Quo?

Whatever level of scrutiny that courts apply to DOMA, the analytical process next involves examining the justifications that can be offered for the law. The push for heightened scrutiny by the Obama administration and plaintiffs challenging DOMA's constitutionality is important for just this reason. If courts determine that some form of more searching scrutiny is required in analyzing DOMA, they will be less deferential to the interests offered by Congress in support of the law. Yet, even if, as is appropriate given precedent, courts employ rational basis scrutiny, they will still examine the state interests promoted by DOMA.

Indeed, the district court in *Gill* purported to apply rational basis scrutiny to DOMA and still ruled the law unconstitutional, finding it lacked any rational justification.¹⁴² In doing so, the court noted that the Department of Justice had disavowed the interests identified by Congress as supporting DOMA when the law was enacted.¹⁴³ Instead, the Department of Justice argued essentially that DOMA had a rational basis in preserving the status quo. At least one state court had accepted a similar argument as satisfying the rational basis standard. In its opinion on the constitutionality of the state's marriage law, the California Court of Appeals concluded,

¹³⁸ *Id.* at 866–67.

¹³⁹ *Id.* at 866 (emphasis added).

¹⁴⁰ See *supra* notes 126–139 and accompanying text.

¹⁴¹ *In re Marriage Cases*, 183 P.3d 384, 401 (Cal. 2008); *Kerrigan v. Dep't of Pub. Health*, 957 A.2d 407, 427, 432 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa 2009).

¹⁴² *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 387 (D. Mass. 2010), *appeal docketed sub nom. Massachusetts v. Dep't of Health & Human Servs.*, No. 10-2207 (1st Cir. Nov. 24, 2010).

¹⁴³ *Id.* at 388; see *supra* note 99 and accompanying text.

Under the highly deferential standard of review that applies, we believe it is rational for the Legislature to preserve the opposite-sex definition of marriage, which has existed throughout history and which continues to represent the common understanding of marriage in most other countries and states of our union, while at the same time providing equal rights and benefits to same-sex partners through a comprehensive domestic partnership system.¹⁴⁴

B. DOMA's Rational Basis Under Congress's Original Intent

Now that BLAG has intervened in defending DOMA, however, it has offered much more robust justifications for the law—those that Congress itself identified when it first enacted DOMA.¹⁴⁵ Thus, a court cannot justifiably take the route the Massachusetts District Court did and rely on the disavowal of Congress's statements by the Department of Justice.¹⁴⁶

How then would the proffered interests supporting DOMA fare in the courts? In other words, does DOMA promote state interests that are rational and valid? The manifest weight of evidence from state and federal caselaw suggests that DOMA's definition of marriage is not only very defensible but has, in fact, been upheld by the great majority of American courts to have considered the question.

As a formal matter, the exact question of the constitutionality of laws defining marriage as the union of a husband and wife has already been decided by the U.S. Supreme Court. In 1972, the U.S. Supreme Court dismissed a federal constitutional challenge to Minnesota's definition of marriage as the union of a man and a woman.¹⁴⁷ Such a dismissal by the Court is a decision on the merits binding in future cases.¹⁴⁸ Whether a summary opinion handed down nearly forty years ago would be considered dispositive, however, is not essential to this

¹⁴⁴ *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 720–21 (Cal. Ct. App. 2006).

¹⁴⁵ See Letter from Jean Lin, Senior Trial Counsel, U.S. Dep't of Justice, to Judges Jones and Francis, United States District Court for the Southern District of New York (Aug. 5, 2011) (referencing a motion to dismiss filed by Intervenor-Defendant Bipartisan Legal Advisory Group of the United States House of Representatives for *Windsor v. United States*), available at <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2010cv08435/370870/64/>; H.R. REP. NO. 104-664, at 12 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2916 (describing the governmental interests in enacting DOMA); Memorandum of Law of Intervenor-Defendant the Bipartisan Legal Advisory Group of the United States House of Representatives in Support of its Motion to Dismiss at 28–31, *Windsor v. United States*, (No. 1:10-cv-8435) (S.D.N.Y. June 24, 2011) (arguing the myriad rational bases in support of DOMA).

¹⁴⁶ See *Gill*, 699 F. Supp. 2d at 388.

¹⁴⁷ *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971), appeal dismissed, 409 U.S. 810 (1972).

¹⁴⁸ See *Hicks v. Miranda*, 422 U.S. 332, 344–45 (1975).

discussion as there have been a number of subsequent decisions that have to examine the issues raised by the DOMA litigation in more detail.

For example, in the mid-1980s the U.S. Court of Appeals for the Ninth Circuit heard a case very similar to the DOMA challenges now pending. The case arose from a Colorado same-sex marriage between a citizen and non-citizen who were denied spousal immigration status because federal immigration law defined marriage as the union of a man and a woman.¹⁴⁹ The district court explained that

[f]or immigration purposes, whether one is married to another, or is the spouse of another, is governed by congressional intent. It is the congressional intent that one look to the law of the jurisdiction where the marriage was contracted to determine its validity. But that is not an absolute and totally governing criterion. If the state law (or in certain instances the foreign law) is one which offends federal public policy, Congress is deemed to have intended federal public policy to prevail.¹⁵⁰

Thus, the two men could not be considered spouses for federal purposes. The district court then rejected the men's claim that failure to recognize their purported marriage violated the Equal Protection Clause: "In traditional equal protection terminology, it seems beyond dispute that the state has a compelling interest in encouraging and fostering procreation of the race and providing status and stability to the environment in which children are raised. This has always been one of society's paramount goals."¹⁵¹

On appeal, the Ninth Circuit also upheld the law.¹⁵² The court reasoned that Congress's decision to recognize only opposite-sex couples as spouses for immigration law purposes

has a rational basis and therefore comports with the due process clause and its equal protection requirements. . . . In effect, Congress has determined that preferential status is not warranted for the spouses of homosexual marriages. Perhaps this is because homosexual marriages never produce offspring, because they are not recognized in most, if in any, of the states, or because they violate traditional and often prevailing societal mores.¹⁵³

As already noted, the U.S. Court of Appeals for the Eighth Circuit also applied rational basis scrutiny to uphold a Nebraska law with a marriage definition similar to DOMA. The court noted the following:

The State argues that the many laws defining marriage as the union of one man and one woman and extending a variety of benefits to

¹⁴⁹ *Adams v. Howerton*, 486 F. Supp. 1119, 1120–21 (C.D. Cal. 1980), *aff'd*, 673 F.2d 1036 (9th Cir. 1982).

¹⁵⁰ *Id.* at 1122.

¹⁵¹ *Id.* at 1124.

¹⁵² *Adams v. Howerton*, 673 F.2d 1036, 1042 (9th Cir. 1982).

¹⁵³ *Id.* at 1042–43.

married couples are rationally related to the government interest in “steering procreation into marriage.” By affording legal recognition and a basket of rights and benefits to married heterosexual couples, such laws “encourage procreation to take place within the socially recognized unit that is best situated for raising children.” The State and its supporting amici cite a host of judicial decisions and secondary authorities recognizing and upholding this rationale. The argument is based in part on the traditional notion that two committed heterosexuals are the optimal partnership for raising children, which modern-day homosexual parents understandably decry. But it is also based on a “responsible procreation” theory that justifies conferring the inducements of marital recognition and benefits on opposite-sex couples, who can otherwise produce children by accident, but not on same-sex couples, who cannot. . . . Whatever our personal views regarding this political and sociological debate, we cannot conclude that the State’s justification “lacks a rational relationship to legitimate state interests.”¹⁵⁴

Significantly, in its conclusion the Eighth Circuit opined, “We hold that [Nebraska’s marriage amendment] *and other laws limiting the state-recognized institution of marriage to heterosexual couples* are rationally related to legitimate state interests and therefore do not violate the Constitution of the United States.”¹⁵⁵ The reasoning of this recent circuit court ruling is echoed by state courts.

C. Evaluating DOMA’s Rational Basis in Light of Successful Defenses to Similar State Marriage Measures

In addition to the direct challenges to DOMA and other federal cases outlined previously, a body of state caselaw has been developed over two decades on the constitutionality of marriage laws that recognizes marriage as only a union between a man and woman.¹⁵⁶ These cases have consistently ruled that the challenged marriage laws advance a valid interest, linking marriage and procreation.

This, of course, is one of the interests specified by Congress in passing DOMA.¹⁵⁷ In the district court decision in *Adams v. Howerton*, the court described this interest not only as rational, but as “compelling”¹⁵⁸—the type of interest that would overcome even the highest level of scrutiny.

Within just the past ten years, at least thirteen federal and state appellate courts have considered constitutional challenges to state

¹⁵⁴ *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867–68 (8th Cir. 2006) (citations omitted).

¹⁵⁵ *Id.* at 871 (emphasis added).

¹⁵⁶ See *infra* note 159.

¹⁵⁷ See *supra* note 14 and accompanying text.

¹⁵⁸ 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff’d*, 673 F.2d 1036 (9th Cir. 1982).

marriage laws, with nine of the thirteen courts affirming the marriage laws and ruling that there is a rational relation between the state or federal government's definition of marriage and procreation.¹⁵⁹ The Eighth Circuit's decision has already been noted, as have the three federal district court decisions.

Perhaps the clearest judicial articulation to date comes from the New York Court of Appeals. There, the state's highest court considered the New York legislature's reasons for adopting laws protecting and promoting marriage:

[T]he Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships. Heterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not. Despite the advances of science, it remains true that the vast majority of children are born as a result of a sexual relationship between a man and a woman, and the Legislature could find that this will continue to be true. The Legislature could also find that such relationships are all too often casual or temporary. It could find that an important function of marriage is to create more stability and permanence in the relationships that cause children to be born. It thus could choose to offer an inducement—in the form of marriage and its attendant benefits—to opposite-sex couples who make a solemn, long-term commitment to each other.¹⁶⁰

The New York court noted further,

The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like. It is obvious that there are exceptions to this general rule—some children who never know their fathers, or their mothers, do far better than some who grow up with parents of both

¹⁵⁹ See, e.g., *Bruning*, 455 F.3d at 871 (8th Cir. 2006); *Smelt v. Orange Cnty.*, 374 F. Supp. 2d 861, 880 (C.D. Cal. 2005), *aff'd in part, vacated in part, remanded*, 447 F.3d 673 (9th Cir. 2006); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005); *Standhardt v. Superior Court*, 77 P.3d 451, 465 (Ariz. Ct. App. 2003); *Morrison v. Sadler*, 821 N.E.2d 15, 27 (Ind. Ct. App. 2005); *Conaway v. Deane*, 932 A.2d 571, 630 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1, 10 (N.Y. 2006); *Andersen v. King Cnty.*, 138 P.3d 963, 983 (Wash. 2006). Some courts reached the opposite result. See, e.g., *In re Marriage Cases*, 183 P.3d 384, 432–34 (Cal. 2008); *Kerrigan v. Dep't of Pub. Health*, 957 A.2d 407, 476–78 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003); *Lewis v. Harris*, 908 A.2d 196, 217–18 (N.J. 2006) (taking the position that the exclusion of same-sex couples from the legal incidents of marriage was constitutionally problematic but stopping short of striking down the marriage law so long as the legislature created a parallel structure of benefits for same-sex couples).

¹⁶⁰ *Hernandez*, 855 N.E.2d at 7.

sexes—but the Legislature could find that the general rule will usually hold.¹⁶¹

In another case involving the constitutionality of a state law favoring the union of man and woman in marriage, the Maryland Court of Appeals reached a similar conclusion as the New York court:

[S]afeguarding an environment most conducive to the stable propagation and continuance of the human race is a legitimate government interest.

The question remains whether there exists a sufficient link between an interest in fostering a stable environment for procreation and the means at hand used to further that goal, i.e., an implicit restriction on those who wish to avail themselves of State-sanctioned marriage. We conclude that there does exist a sufficient link. . . . This “inextricable link” between marriage and procreation reasonably could support the definition of marriage as between a man and a woman only, because it is that relationship that is capable of producing biological offspring of both members (advances in reproductive technologies notwithstanding).¹⁶²

Likewise, the Washington Supreme Court also upheld the state’s marriage law.¹⁶³ In concurrence, one justice aptly explained,

A society mindful of the biologically unique nature of the marital relationship and its special capacity for procreation has ample justification for safeguarding this institution to promote procreation and a stable environment for raising children. Less stable homes equate to higher welfare and other burdens on the State.

Only opposite-sex couples are capable of intentional, unassisted procreation, unlike same-sex couples. Unlike same-sex couples, only opposite-sex couples may experience unintentional or unplanned procreation. State sanctioned marriage as a union of one man and one woman encourages couples to enter into a stable relationship prior to having children and to remain committed to one another in the relationship for the raising of children, planned or otherwise.¹⁶⁴

In an earlier appellate case, an Indiana court similarly concluded the state’s marriage law had a rational basis: “The State, first of all, may legitimately create the institution of opposite-sex marriage, and all the benefits accruing to it, in order to encourage male-female couples to procreate within the legitimacy and stability of a state-sanctioned relationship and to discourage unplanned, out-of-wedlock births resulting from ‘casual’ intercourse.”¹⁶⁵ Likewise, an Arizona appellate decision held that “the State has a legitimate interest in encouraging procreation and child-rearing within the marital relationship, and that

¹⁶¹ *Id.*

¹⁶² *Conaway*, 932 A.2d at 630–31.

¹⁶³ *Andersen*, 138 P.3d at 990.

¹⁶⁴ *Id.* at 1002 (J.M. Johnson, J., concurring).

¹⁶⁵ *Morrison v. Sadler*, 821 N.E.2d 15, 24 (Ind. Ct. App. 2005).

limiting marriage to opposite-sex couples is rationally related to that interest.”¹⁶⁶

This nearly overwhelming consensus on the linkage of marriage and procreation is in keeping with earlier federal and state jurisprudence. In articulating the human right to marry, the U.S. Supreme Court has repeatedly pointed to the link between marriage and procreation. In *Skinner v. Oklahoma*, the Court noted that “[m]arriage and procreation are fundamental to the very existence and survival of the race.”¹⁶⁷ Even earlier in *Maynard v. Hill*, in speaking generally of marriage, the Court linked marriage to the very existence of civilization: “[Marriage] is the foundation of the family and of society, without which there would be neither civilization nor progress.”¹⁶⁸ The Court echoed this view in *Loving v. Virginia*, writing, “Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”¹⁶⁹

It is difficult to see how marriage could be considered fundamental to our very existence and survival if it were not understood to be related to making and caring for the next generation. Historically, American courts have declared procreation to be the primary *public* purpose—as opposed to varying and diverse individual, private purposes—of marriage.¹⁷⁰ In the words of the California Supreme Court, “[T]he first purpose of matrimony, by the laws of nature and society, is procreation.”¹⁷¹

In his amici curiae brief with the Legal and Family Scholars for *In re Marriage Cases*, James Q. Wilson aptly characterized as “difficult to credit” the plaintiffs’ claim that “this link between marriage as a male-female sexual bond and procreation is today so irrational that no sane or well-intentioned legislator could ever entertain it and that procreation is *merely a pretext* for other, more invidious and undeclared motives.”¹⁷² Along the same lines, the New York Court of Appeals once remarked, regarding the “accepted truth” that marriages could only be between

¹⁶⁶ *Standhardt v. Superior Court*, 77 P.3d 451, 463–64 (Ariz. Ct. App. 2003).

¹⁶⁷ 316 U.S. 535, 541 (1942).

¹⁶⁸ 125 U.S. 190, 211 (1888).

¹⁶⁹ 388 U.S. 1, 12 (1967) (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) and *Maynard v. Hill*, 125 U.S. 190 (1888)).

¹⁷⁰ *Gard v. Gard*, 169 N.W. 908, 909 (1918) (“As has been already stated, one of the leading and most important objects of the institution of marriage under our laws is the procreation of children.” (quoting *Reynolds v. Reynolds*, 85 Mass. 605, 610 (1862))); *see also Skinner*, 316 U.S. at 541 (“Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects.”).

¹⁷¹ *Baker v. Baker*, 13 Cal. 87, 103 (1859).

¹⁷² Brief Amici Curiae of James Q. Wilson et al., Legal and Family Scholars in Support of the Appellees at 33, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999).

participants of opposite sex, “A court should not lightly conclude that everyone who held this belief was irrational, ignorant or bigoted.”¹⁷³

IV. STATE SOVEREIGNTY

In addition to the key arguments related to equal protection described in the previous Section, opponents of DOMA have focused on the alleged novelty of Congress’s decision to decline using state same-sex marriage laws when applying federal laws. In other words, those who have challenged DOMA have alleged that the federal law violates states’ sovereignty.

A. Judge Tauro’s “Novel” Tenth Amendment Analysis

The plaintiffs in *Gill* made such an argument: “Because it represents such a dramatic departure from federalist tradition, and implicates the core State power to govern domestic relations, DOMA should be subjected to more searching constitutional scrutiny than that applicable to conventional social or economic legislation.”¹⁷⁴ The plaintiffs went on to claim the following: “Under the basic structure of our constitutional scheme, the power to establish criteria for marriage, and to issue determinations of marital status, lies at the very core of the States’ sovereign authority.”¹⁷⁵

Judge Tauro accepted this argument in both *Gill* and *Massachusetts*, concluding that the Tenth Amendment created an obligation for the national government to employ state law definitions in administering programs.¹⁷⁶ In Judge Tauro’s opinion, “DOMA plainly intrudes on a core area of state sovereignty—the ability to define the marital status of its citizens,” and thus “the statute violates the Tenth Amendment.”¹⁷⁷

¹⁷³ *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006) (speaking of the belief that marriage could only be between a man and woman).

¹⁷⁴ Memorandum of Law in Opposition to Defendants’ Motion to Dismiss and in Support of Plaintiffs’ Motion for Summary Judgment at 12, *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010) (No. 1:09-cv-10309 JLT).

¹⁷⁵ *Id.* at 13.

¹⁷⁶ *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234, 253 (D. Mass. 2010) (“The federal government, by enacting and enforcing DOMA, plainly encroaches upon the firmly entrenched province of the state, and, in doing so, offends the Tenth Amendment.”), *appeal docketed*, No. 10-2207 (1st Cir. Nov. 24, 2011); *Gill*, 699 F. Supp. 2d at 377 n.4 (“In the companion case of *Commonwealth of Mass. v. Dep’t of Health and Human Servs., et al.*, No. 09-cv-11156-JLT, 698 F. Supp. 2d 234 (D. Mass. July 8, 2010) (Tauro, J.) this court holds that the Defense of Marriage Act is additionally rendered unconstitutional by operation of the Tenth Amendment and the Spending Clause.”), *appeal docketed sub nom. Massachusetts v. U.S. Dep’t of Health & Human Servs.*, No. 10-2207 (1st Cir. Nov. 24, 2011).

¹⁷⁷ *Massachusetts*, 698 F. Supp. 2d at 249 (emphasis added). Thus far, however, Judge Tauro is the only judge to have accepted this argument. Similar claims were made in

As Professor Richard Epstein has noted, this is a “novel” understanding of the Tenth Amendment.¹⁷⁸ Some same-sex marriage advocates have been even less kind. Professor Andrew Koppelman has described Judge Tauro’s Tenth Amendment analysis as “silly and potentially mischievous,”¹⁷⁹ stating that the ruling “does not make much sense.”¹⁸⁰ David Cruz, another proponent of same-sex marriage, writes that Judge Tauro’s federalism argument is “somewhat circular” and “deeply problematic.”¹⁸¹

As this Section describes, the plaintiffs’ novel Tenth Amendment argument and the Massachusetts District Court’s acceptance of it is only possible if large swaths of legal history are ignored. Columnist Charles Lane charitably suggested a possible reason for the court’s conclusion: “In fairness to the judge, the Justice Department seems not to have presented these facts to the court, and they aren’t mentioned in the only historical document in the record before him, an affidavit from Harvard historian Nancy Cott from which [Judge] Tauro quotes frequently.”¹⁸²

Whatever the origin of the fundamental misunderstanding of the scope of the Tenth Amendment, Judge Tauro’s ruling turned the Tenth

In re Kandu, where the court reached the opposite conclusion, reasoning simply: “The Tenth Amendment is not implicated because the definition of marriage in DOMA is not binding on states and, therefore, there is no federal infringement on state sovereignty. States retain the power to decide for themselves the proper definition of the term marriage.” 315 B.R. 123, 132 (Bankr. W.D. Wash. 2004).

¹⁷⁸ Richard A. Epstein, *Judicial Offensive Against Defense of Marriage Act*, FORBES.COM (July 12, 2010, 1:28 PM), <http://www.forbes.com/2010/07/12/gay-marriage-massachusetts-supreme-court-opinions-columnists-richard-a-epstein.html>.

¹⁷⁹ Koppelman, *supra* note 19, at 926.

¹⁸⁰ *Id.* at 923.

¹⁸¹ David B. Cruz, *The Defense of Marriage Act and Uncategorical Federalism*, 19 WM. & MARY BILL RTS. J. 805, 810 (2011). Cruz continues,

Even on its own terms, however, Judge Tauro’s legal reasoning on this point is unpersuasive. Admitting that ‘Tenth Amendment caselaw does not provide much guidance,’ the opinion in Massachusetts turned to *United States v. Bongiorno*, a 1997 decision from the First Circuit not cited by Massachusetts in its motion for summary judgment, to extract a doctrinal test to govern Massachusetts’s challenge to DOMA. The reliance on *Bongiorno* is surprising, for that case involved an *unsuccessful* Tenth Amendment challenge to the federal Child Support Recovery Act (CSRA). In particular, the defendant there argued ‘that the CSRA [fell] beyond Congress’ competence because it concerns domestic relations (an area traditionally within the states’ domain).’ But the Court of Appeals ‘reject[ed] the claim out of hand.’ *Bongiorno* thus is an inauspicious basis for a decision arguing that an act passed by Congress (DOMA) is unconstitutional (again under the Tenth Amendment) because it regulates in the area of domestic relations (specifically, marriage).

Id. (alteration in original) (footnotes omitted).

¹⁸² Charles Lane, *Judge Tauro’s Questionable Past*, WASHINGTON POST (July 9, 2010, 3:57 PM), http://voices.washingtonpost.com/postpartisan/2010/07/judge_tausos_questionable_past.html.

Amendment on its head. Rather than protecting against federal usurpation of powers reserved to the states, Judge Tauro would allow each state to impose its own definition of marriage on the federal government in a sort of reverse Supremacy Clause. While Congress may adopt state classifications for purposes of federal law, it is under no compulsion to do so. Indeed, when it comes to matters of immigration, Congress has long applied its own definition of marriage for purposes of identifying fraudulent marriages, neither imposing its definition on the states nor deferring to state law to determine whether immigrant status predicated upon a marriage is valid or fraudulent.¹⁸³ Though immigration is but one example, as will be explained further, it is no different with respect to DOMA. Congress is not infringing upon the powers of any state to define or regulate matters of family law.

Similarly, the challenges to DOMA do not suggest that Congress lacks authority to legislate in the subject matter areas for which marriage is used to classify (e.g., taxation, immigration, etc.), but only that Congress must defer to each state in defining classifications and eligibility.¹⁸⁴ Thus, under such reasoning, Congress may unquestionably legislate in the area of taxation, but must defer to each state in determining who is permitted to file a joint return.¹⁸⁵ This same argument would suggest that Congress may regulate immigration status, but must defer to individual state marriage laws in determining whether to grant certain visa or citizenship applications.¹⁸⁶ If implemented, such reasoning would create a patchwork effect in which federal statutes are applied differently to residents of different states and thus creating additional potential conflict in matters involving more than one state.

¹⁸³ *E.g.*, Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, § 2(g), 100 Stat. 3537, 3541 (codified at 8 U.S.C. 1186a(g) (2006)) (defining a “qualifying marriage” for immigration purposes).

¹⁸⁴ *See, e.g.*, Memorandum of Law in Opposition to Defendants’ Motion to Dismiss and in Support of Plaintiffs’ Motion for Summary Judgment at 15–16, *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010) (No. 1:09-cv-10309-JLT) (“[F]ederal reliance on State determinations of marital status is a longstanding tradition—implemented in federal common law, countless federal statutes, and federal regulations. . . . Indeed, even in the absence of such express incorporation, the well-established rule has been that *federal law affords recognition to familial status determinations* as governed by the law of the relevant State.” (emphasis added)).

¹⁸⁵ *See id.* (quoting *Dunn v. Comm’r of Internal Revenue*, 70 T.C. 361, 366 (1978) (“[W]hether an individual is ‘married’ is, for purposes of the tax laws, to be determined by the law of the State of the marital domicile.”), *aff’d*, 601 F.2d 599 (7th Cir. 1979)).

¹⁸⁶ *See id.* at 17 (“[E]ven in the area of immigration, where the federal government’s power is arguably at its most extensive, immigration law ‘does not directly regulate who may marry.’” (citing Kerry Abrams, *Immigration Law and The Regulation of Marriage*, 91 MINN. L. REV. 1625, 1668 (2007))).

B. Past and Present Federal Regulation of Marriage and Family

Contrary to Judge Tauro's suggestion, Congress regularly defines terms for purposes of federal law, including definitions which may differ from the definitions given by one or more states to those same terms. Specifically relevant in this context, there is abundant precedent for congressional regulation of family and of marriage for purposes of federal law, including some which the U.S. Supreme Court itself has explicitly upheld. Like DOMA, the congressional ban on polygamy was challenged in federal court.¹⁸⁷ That issue was eventually resolved by the Court in a landmark decision, *Reynolds v. United States*.¹⁸⁸ As to marriage, the Court wrote,

Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. . . .

In our opinion, the statute immediately under consideration is within the legislative power of Congress. It is constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control.¹⁸⁹

The Poland Act considered by the Court in *Reynolds* facilitated prosecutions under the Morrill Act by giving jurisdiction over all cases arising in Utah to the federal courts.¹⁹⁰ The reason for making cohabitation a crime was to aid prosecutions since the government could more easily show cohabitation occurred than prove that a marriage existed because at that time religious marriage records were not made available to the government.¹⁹¹

¹⁸⁷ Perhaps the most obvious historic DOMA analogy is to Congress's extensive regulation of polygamy in the Nineteenth Century. Between 1862 and 1894, Congress passed five separate statutes intended to repress the development of polygamy as a recognized marriage system in the United States, including the Morrill Anti-Bigamy Act of 1862, ch. 126, 12 Stat. 501 (amended 1874, 1983); the Poland Act of 1874, ch. 3, 18 Stat. 1039; the Edmunds Anti-Polygamy Act of 1882, ch. 47, 22 Stat. 30 (partially repealed 1983); the Edmunds-Tucker Act of 1887, ch. 397, 24 Stat. 635 (partially repealed 1978); and the Utah Enabling Act of 1894, ch. 138, 28 Stat. 107 (amended 1929).

The Morrill Anti-Bigamy Act criminalized polygamy, and it also established in federal law the common law standard that a spouse who has been missing for a prescribed number of years is "judicially dead" for the purpose of remarriage. Morrill Anti-Bigamy Act of 1862, ch. 126, § 1, 12 Stat. 501, 501. Both standards are clear examples of regulating marriage for the purpose of federal law.

¹⁸⁸ 98 U.S. 145, 166 (1878).

¹⁸⁹ *Id.* at 165–66.

¹⁹⁰ Poland Act of 1874, ch. 3, § 5352, 18 Stat. 1039, 1039.

¹⁹¹ See *United States v. Snow*, 9 P. 501, 501, 504 (Utah 1886), *aff'd*, 9 P. 686 (Utah 1886), and *aff'd*, 9 P. 697 (Utah 1886). *Snow* involved an indictment against prominent Mormon leader Lorenzo Snow, a known polygamist who admitted at the commencement of

In *Murphy v. Ramsey*, the U.S. Supreme Court upheld the Edmunds Act, a federal law which made bigamy a felony and created a misdemeanor of “unlawful cohabitation,”¹⁹² against a challenge arguing that the law criminalized behavior *ex post facto*.¹⁹³ The U.S. Supreme Court reasoned instead that the law criminalized continuing cohabitation rather than past marriages.¹⁹⁴ When Congress allowed Utah to be admitted as a state, the Enabling Act specified that while religious liberty would be protected “polygamous or plural marriages are forever prohibited.”¹⁹⁵

Presumably, some will object to this analogy because Congress has plenary authority over the law of territories while DOMA allows Congress to apply federal law rather than *state* law. This objection, however, draws the wrong parallel. Both federal actions—control over territories and defining terms in the United States Code—are areas of federal jurisdiction.¹⁹⁶ In both polygamy regulation and DOMA contexts, Congress has adopted and promulgated a substantive definition of marriage. In the case of DOMA, Congress has enacted a substantive definition of marriage in an area of federal jurisdiction—the definition of terms used in federal law.¹⁹⁷ In the case of its historic precedent regarding polygamy, Congress also enacted a substantive definition of marriage in an area of federal jurisdiction—plenary authority over federal territories.¹⁹⁸

At any rate, Congress’s use of definitions of marriage for federal law purposes is not confined to this one instance. In fact, as Professor Lynn D. Wardle has documented, the argument that the exercise of Congress’s

the trial that “he had married each of the seven women named in the indictment.” *Id.* at 501, 505–06. Despite Snow’s reputation as a polygamist, the prosecution apparently found it more advantageous to indict and convict him of cohabitation. *See id.*

¹⁹² Edmunds Anti-Polygamy Act of 1882, ch. 47, 22 Stat. 30 (partially repealed 1983).

¹⁹³ *Murphy v. Ramsey*, 114 U.S. 15, 42–43 (1885).

¹⁹⁴ *Id.* at 43. The Edmunds Act was also addressed by the Supreme Court in *In re Snow*, 120 U.S. 274, 283 (1887), which said a defendant could only be charged once with unlawful cohabitation and in *Cannon v. United States*, 116 U.S. 55, 72 (1885), which said a defendant’s promise not to engage in sexual intercourse does not preclude prosecution. The Court in *Cannon* stated, “Compacts for sexual non-intercourse, easily made and as easily broken, when the prior marriage relations continue to exist, with the occupation of the same house and table and the keeping up of the same family unity, is not a lawful substitute for the monogamous family which alone the statute tolerates.” *Cannon*, 116 U.S. at 72.

¹⁹⁵ Utah Enabling Act of 1894, ch. 138, § 3, 28 Stat. 107, 108 (amended 1929).

¹⁹⁶ U.S. CONST. amend. XVI; 1 U.S.C. § 1 (2006).

¹⁹⁷ Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006)) (defining marriage as “only a legal union between one man and one woman as husband and wife”).

¹⁹⁸ Poland Act of 1874, ch. 3, § 5352, 18 Stat. 1039.

power to define marriage for federal law purposes is unprecedented and *ultra vires* is inconsistent with hundreds of years of precedent and practice in our nation's history.¹⁹⁹ Professors Linda Elrod and Robert Spector have also noted,

Probably one of the most significant changes over the past fifty years [in American family law] has been the explosion of federal laws . . . and cases interpreting them. As families have become more mobile, the federal government has been asked to enact laws in numerous areas that traditionally were left to the states, such as . . . domestic violence, and division of pension plans.²⁰⁰

In a recent article, Professor Wardle provided a number of examples of current and historical congressional enactments of laws relating to domestic relations.²⁰¹ For instance, the Naturalization Act of 1802, which gave automatic citizenship to children of naturalized parents.²⁰² An 1855 immigration law allowed citizenship to women who married citizens and to children of citizens.²⁰³ In 1803, Congress provided that homestead land south of Tennessee would be given only to heads of families or individuals over twenty-one.²⁰⁴ An 1804 law protected the land interest of "an actual settler on the lands so granted, for himself, and for his wife and family."²⁰⁵ The Homestead Act of 1862 specified grants would be limited to "any person who is the head of a family, or who has arrived at the age of twenty-one years."²⁰⁶

Professor Wardle notes that U.S. Supreme Court precedent from this era upheld the application of federal law definitions and terms to family disputes that were brought under these laws, rather than deferring to state law.²⁰⁷ For example, in a 1905 case, *McCune v. Essig*, the Court resolved a dispute between a daughter and her mother and stepfather over a land grant.²⁰⁸ The daughter argued that state inheritance law should be applied to provide her an interest in the property, but the Court concluded that "[t]he words of the [Federal

¹⁹⁹ See Wardle, *supra* note 20, at 974–82.

²⁰⁰ Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law 2007–2008: Federalization and Nationalization Continue*, 42 FAM. L.Q. 713, 713 (2009).

²⁰¹ Wardle, *supra* note 20, at 976–82. The research that follows, until the conclusion, is adapted from Professor Wardle's article, though that article is much more comprehensive and detailed.

²⁰² Naturalization Act of 1802, ch. 28, § 4, 2 Stat. 153, 155.

²⁰³ Act of Feb. 10, 1855, ch. 71, § 2, 10 Stat. 604, 604.

²⁰⁴ Act of Mar. 3, 1803, ch. 27, § 2, 2 Stat. 229, 229.

²⁰⁵ Land Act of 1804, ch. 38, § 14, 2 Stat. 283, 288–89.

²⁰⁶ Homestead Act of 1862, ch. 75, § 1, 12 Stat. 392, 392.

²⁰⁷ Wardle, *supra* note 20, at 977–78.

²⁰⁸ 199 U.S. 382, 386 (1905).

Homestead Act] statute are clear” and rejected the daughter’s claim that state law, rather than federal, should apply.²⁰⁹

Furthermore, in 1836, Congress enacted legislation bolstering pensions awarded to widows of Revolutionary War soldiers.²¹⁰ The 1890 Dependent and Disability Pension Act also provided for widows and other family members of veterans.²¹¹ Federal courts interpreting military benefits laws have used federal interpretations of “family,” even at times where the definitions did not accord with state law.²¹² The federal Employment Retirement and Income Security Act (“ERISA”) and other federal pension laws have consistently been held to control the marital incidents of pensions.²¹³ For purposes of the 1850 Census, Congress included the following definition of “family”:

By the term family is meant, either one person living separately in a house, or a part of a house, and providing for him or herself, or several persons living together in a house, or in part of a house, upon one common means of support, and separately from others in similar circumstances. A widow living alone and separately providing for herself, or 200 individuals living together and provided for by a common head, should each be numbered as one family.

The resident inmates of a hotel, jail, garrison, hospital, an asylum, or other similar institution, should be reckoned as one family.²¹⁴

²⁰⁹ *Id.* at 389, 390.

²¹⁰ Act of July 4, 1836, ch. 362, §§ 1–3, 5 Stat. 127, 127–28.

²¹¹ Act of June 27, 1890, § 1, ch. 634, 26 Stat. 182, 182.

²¹² See *United States v. Jordan*, 30 C.M.R. 424, 430 (1960) (finding that the military could limit the defendant’s right to marry abroad because of special military concerns), *aff’d*, 30 C.M.R. 424 (1960); *United States v. Richardson*, 4 C.M.R. 150, 158–59 (1952) (holding a marriage valid for purposes of military discipline, although it would have been invalid in the state where the marriage began); *United States v. Rohrbaugh*, 2 C.M.R. 756, 758 (1952) (noting, *inter alia*, that common law marriages are specifically recognized for federal purposes “in relation to a variety of matters”).

²¹³ See, *e.g.*, *Boggs v. Boggs*, 520 U.S. 833, 835–36 (1997) (holding that pensions are governed by ERISA, which preempts community property law); *Mansell v. Mansell*, 490 U.S. 581, 584, 594–95 (1989) (holding that military retirement pay waived in order to collect veterans’ disability benefits is governed by Uniformed Services Former Spouses’ Protection Act (USFSPA) not community property law); *McCarty v. McCarty*, 453 U.S. 210, 232, 233, 236 (1981) (citing *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 590 (1979)) (holding that military retirement pay is governed by federal law not community property law) *superseded by statute*, Uniformed Services Former Spouses’ Protection Act, Pub. L. No. 97-252, § 1002(a), 96 Stat. 718, 730 (1982) (codified as amended at 10 U.S.C. § 1408(c)(1) (2006)); *Hisquierdo*, 439 U.S. at 590 (holding that railroad retirement assets are governed by federal law not community property law); *Yiatchos v. Yiatchos*, 376 U.S. 306, 309 (1964) (noting that United States Savings Bonds are governed by federal law, not community property law, unless fraud is involved); *Wissner v. Wissner*, 338 U.S. 655, 658 (1950) (noting that the National Service Life Insurance Act governs the beneficiary of the policy not community property laws).

²¹⁴ U.S. CENSUS BUREAU, POL/02-MA, MEASURING AMERICA: THE DECENNIAL CENSUSES FROM 1790 TO 2000, at 9 (2002), available at <http://www.census.gov/prod/2002pubs/pol02-ma.pdf>.

Professor Wardle's research confirms the same to be true in relation to federal regulation of marriage and the family in the context of copyright and bankruptcy laws.²¹⁵ In 1831, Congress enacted a law allowing a child or widow to inherit a copyright.²¹⁶ In 1956, the U.S. Supreme Court held in *De Sylva v. Ballentine* that, in the *absence* of a federal definition, state law controlled the question of who counted as a child for copyright law.²¹⁷ In 1978, Congress effectively reversed this decision by enacting a definition of "child" to include a "person's immediate offspring, whether legitimate or not, and any children legally adopted by that person" so as to ensure that—regardless of state law—copyright law would not exclude illegitimate children.²¹⁸ Furthermore, bankruptcy law determines the meaning of alimony, support, and spousal maintenance using federal law rather than state law.²¹⁹ This has often been recognized in federal court decisions.²²⁰

In addition to these examples of more general domestic relations matters, there is also ample precedent for specifically employing federal definitions of marriage. The Immigration and Naturalization Act provides that marriages contracted for the purpose of gaining preferential immigration status are not valid for federal law purposes.²²¹ Some states, to the contrary, recognize immigration marriages as valid or voidable.²²² To defer to state law on marriage for immigration purposes would allow one state to circumvent the entire federal policy. Federal tax law considers a couple who is married under state law but

²¹⁵ Wardle, *supra* note 20, at 975, 980.

²¹⁶ Act of Feb. 3, 1831, ch. 16, § 2, 4 Stat. 436, 436.

²¹⁷ 351 U.S. 570, 581 (1956).

²¹⁸ 17 U.S.C. § 101 (2006); *see also* KENNETH R. REDDEN, FEDERAL REGULATION OF FAMILY LAW § 6.4 (1982).

²¹⁹ H.R. REP. NO. 95-595, at 364 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6320.

²²⁰ *In re Swate*, 99 F.3d 1282, 1286 (5th Cir. 1996) ("Whether a particular obligation constitutes alimony, maintenance, or support within the meaning of this section is a matter of federal bankruptcy law, not state law." (quoting *In re Joseph*, 16 F.3d 86, 87 (5th Cir. 1994))); *In re Strickland*, 90 F.3d 444, 446 (11th Cir. 1996) ("The issue of whether the attorney fees award in this case constituted 'support' within the meaning of § 523(a)(5) is a matter of federal law." (citing *In re Harrell*, 754 F.2d 902, 904–05 (11th Cir. 1985))).

²²¹ *See* 8 U.S.C. § 1154(a)(2)(A) (2006); 8 U.S.C. § 1255(e) (2006).

²²² *See* *Lutwak v. United States*, 344 U.S. 604, 612 (1953); *In re Appeal of O'Rourke*, 246 N.W.2d 461, 462 (Minn. 1976); *Kleinfield v. Veruki*, 372 S.E.2d 407, 410 (Va. Ct. App. 1988); *see also* *Adams v. Howerton*, 673 F.2d 1036, 1040 (9th Cir. 1982) (stating that even if same-sex marriage was valid under state law, it did not count as a marriage for federal immigration law purposes); *Garcia-Jaramillo v. INS*, 604 F.2d 1236, 1238 (9th Cir. 1979) (deeming "frivolous" petitioner's argument based upon the validity of his marriage under New Mexico law because of INS's authority to independently inquire into marriage for immigration purposes); *United States v. Sacco*, 428 F.2d 264, 269–70 (9th Cir. 1970) (holding that a marriage conducted for immigration purposes may be valid under Massachusetts law but nevertheless invalid under federal law's added requirements).

living separately as unmarried for tax purposes.²²³ Along those same lines, a couple who consistently obtains a divorce at the end of each year to obtain single status for tax filing could be considered unmarried for state purposes but married for purposes of federal tax law.²²⁴

The 2010 Census included same-sex marriages in its statistical report of marriages in the United States.²²⁵ Thus, the same-sex couples from states defining marriage as the union of a man and a woman who get married in a state that allows same-sex couples to marry will be counted as “married” for Census purposes, even though the state in which they live considers them unmarried.

Moreover, Professor Wardle keenly observes that actions taken by DOMA opponents in recent years clearly contradict their arguments regarding DOMA’s alleged violation of federalism principles.²²⁶ Indeed, pending federal legislation makes clear that members of Congress continue to recognize a role for the national government in marriage and domestic relations. A bill proposed in 2009 would have allowed same and opposite-sex domestic partners of federal government employees to access the employment benefits currently given to married spouses.²²⁷ The proposed repeal of DOMA, H.R. 3567, would consider same-sex marriages as valid for federal law purposes, even if they are not so recognized in a same-sex couple’s home state.²²⁸ Ironically, the sponsor of this latter bill hailed Judge Tauro’s decision on DOMA, though its import would invalidate his own legislation aiming to repeal DOMA.²²⁹

To reiterate, the argument that Congress lacks authority to define marriage for purposes of federal statutes is clearly contrary to long precedent and practice. If the central holding of the Massachusetts district court (that federal law cannot define marriage or family independent of state definitions) were applied consistently, then the holding would likely require the invalidation of current immigration,

²²³ I.R.C. § 7703(a)(2), (b) (promulgating rules for determining marital status).

²²⁴ Rev. Rul. 76-255, 1976-2 C.B. 40, 40–41. For additional examples of federal law defining aspects of marriage and divorce for tax purposes, see Elrod & Spector, *supra* note 200 (summarizing IRS regulations and tax court decisions affecting child custody, alimony, and spousal relief as these issues relate to tax deductions).

²²⁵ U.S. CENSUS BUREAU & THE WILLIAMS INSTITUTE, 2010 CENSUS FACT SHEET FOR LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PERSONS (2010), *available at* http://2010.census.gov/partners/pdf/factSheet_General_LGBT.pdf.

²²⁶ Wardle, *supra* note 20, at 982–85.

²²⁷ Domestic Partnership Benefits and Obligations Act of 2009, H.R. 2517, 111th Cong. § 2(a) (2009).

²²⁸ Respect for Marriage Act of 2009, H.R. 3567, 111th Cong. §§ 2–3 (2009).

²²⁹ Press Release, Congressman Jerrold Nadler, Chair of the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, Nadler Hails Federal Court Ruling Against the Defense of Marriage Act (July 8, 2010), *available at* http://nadler.house.gov/index2.php?option=com_content&do_pdf=1&id=1517.

tax, bankruptcy, census, copyright, and taxation laws and would be clearly contrary to federal precedent, including judgments by the Supreme Court, upholding federal laws even when they conflict with state laws.

CONCLUSION

When a presidential administration formally opposed to DOMA took office, proponents of same-sex marriage apparently believed the time was right to launch a concerted attack through litigation on the law's constitutionality. It must have appeared, particularly at first, that they chose their timing well—that they could count on the Department of Justice not to put forward a strong defense of the law. Such a weak policy by the branch of government tasked with defending DOMA would seem to have made a court victory against the law much easier.

But with the entrance of BLAG into the DOMA litigation, that scenario is no longer the reality. While the executive branch has refused to do so, the House of Representatives is making strong and substantive arguments in favor of DOMA. There are compelling reasons to conclude that BLAG's position is far better supported in logic and precedent than the arguments by DOMA's challengers and prior efforts by the Department of Justice. Perhaps DOMA's attackers will find more sympathetic judicial listeners, but with the weight of the law on the other side, that should be unlikely.

Should, because the duty of the courts is to faithfully apply the law. As we have laid out in this Article, such a faithful application by the courts will result in a decision favorable to the constitutionality of DOMA.