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Involuntary Imports: Williams, Lutwak, the Defense of Marriage Act, Federalism, and “Thick” and “Thin” Conceptions of Marriage

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**INVOLUNTARY IMPORTS: WILLIAMS, LUTWAK,
THE DEFENSE OF MARRIAGE ACT,
FEDERALISM, AND “THICK” AND “THIN”
CONCEPTIONS OF MARRIAGE**

*Lynn D. Wardle**

Profound conflicts may arise when persons enter into a same-sex marriage in one jurisdiction where such marriages are permitted and then attempt to import that marital status into another jurisdiction where same-sex marriage is not allowed. The Supreme Court established the standards for horizontal (interstate) recognition of marital status in Williams v. North Carolina I and II and the standards for vertical (state-federal, or federal-international) recognition of marriage were set in Lutwak v. United States. DOMA codifies both principles.

The 2012 First Circuit decision invalidating DOMA in Massachusetts v. U.S. Department of Health & Human Services is criticized for misrepresenting the facts and misapplying federalism principles and equality precedent. There are compelling justifications to protect the traditional “thick” conception of marriage as a gender-integrating institution rich with meaning and responsibility, and to reject the new “thin” conception of marriage with diminished requirements, duties, and more subjective content. Courts should be resistant to letting political movements distort sound judicial analysis. Prudence on the part of the same-sex movement, including an effort to accomplish its goals legislatively rather than through the courts, and respectful tolerance of differing views, may increase the value and longevity of this social movement’s contributions to the development of the law.

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INTRODUCTION

The interjurisdictional transportability of marriage status, particularly the attempted importation of same-sex marriage from jurisdictions in which it is permitted into a jurisdiction where it is prohibited, raises many profound and fascinating conflict of laws dilemmas. Conceptually, it implicates delicate and serious concerns of sovereignty, comity, choice of law, full faith and credit, and constitutional allocations of regulatory power, including federalism. More poignantly, the issue also has profound, and increasingly apparent, practical human dimensions. The marriages of tens of thousands of same-sex couples who have legitimately married in a state that permits same-sex marriage may not be recognized in other states that do not permit or recognize same-sex marriage. In addition to the complexity of the disparate recognition of marriages (a consistent, if

periodically controversial feature of the American legal landscape since at least 1789), and the frustrating policy controversy regarding whether same-sex marriage should be legalized, is the practical vexation of the uncertainty whether other jurisdictions will recognize same-sex marriages when they are legally created in one state.

Determining the legal rules that govern marriage validity and the recognition of foreign marriages is one of the most important tasks of lawmakers. As Justice Jackson famously stated in his dissent in *Estin v. Estin*,¹ “If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom.”² Justice Jackson did not say that people are entitled to expect rules that will validate whatever marriages they contract, wherever they contract them, or with whomever they contract them. Rather, he declared that the people are entitled to know the rules that will determine marriage validity and recognition.³ Such knowledge gives them the ability to plan their lives and structure their conduct with some significant measure of reliability and predictability.

Same-sex couples, as well as government officials and all citizens, deserve to know what the interjurisdictional recognition rules are, wholly apart from whether they like them or dislike them. Congress attempted to address those concerns in 1996 when it enacted the Defense of Marriage Act⁴ (DOMA), one of the key purposes of which was to clarify with bright-line lucidity the rules governing interstate and federal-state recognition of same-sex marriages. Today, ironically, DOMA itself is shrouded with uncertainty due to both political and litigation challenges.

This Article considers the dilemma of the involuntary importation of controversial forms of marriage into another state; forcing states to recognize same-sex marriages is the specific case-in-point. This Article has several parts and purposes. The connecting themes are the importance of the transportability of marital status, the importance of marital relationships, and the importance of making legal judgments and policies the right way—that is, by adhering to the rules laid down, by giving due regard to both the federalist sovereignty of different jurisdictions and the differing responsibilities of the different branches of government, and by respecting and following the structural and procedural allocations of governmental decision-making authority.

Part I considers the transportability of marriage status generally, paying particular attention to the attempt to import same-sex marriage from jurisdictions in which it is permitted into jurisdictions where it is not. The conceptual and legal significance of this issue for society and our legal

1. 334 U.S. 541 (1948).

2. *Id.* at 553 (Jackson, J., dissenting).

3. *See id.* at 553–54.

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

system is noted, and the practical significance of this issue for individuals and families is indicated as well.

Part II discusses transportability of marital status issues in the particular context of the United States. It considers the seminal U.S. Supreme Court decisions in *Williams v. North Carolina I*⁵ and *II*,⁶ and the principle of federalism in family law. It also reviews the Court's decision in *Lutwak v. United States*⁷ from nearly sixty years ago, which clarified that congressional intent governs the meaning of, and requirements for, valid marriages for purposes of interpreting federal law.

Part III then reviews DOMA, particularly section 3, and considers whether Congress's explicit legislative proclamation that same-sex unions are not deemed marriages for purposes of federal law even if they are deemed valid marriages in some states violates constitutional principles of federalism.

Next, Part IV discusses Congressional efforts to repeal DOMA and litigation efforts to have DOMA declared unconstitutional. It first notes some significant errors in the First Circuit opinion that invalidated DOMA, *Massachusetts v. U.S. Department of Health & Human Services*.⁸ Next, it discusses some of the powerful reasons why certain states justifiably insist that marriage is exclusively the union of a man and a woman (herein "marriage" or "traditional marriage"), and does not include the union of two persons of the same gender (herein "same-sex unions" or "same-sex marriage"), including some of the reasons why the "thick,"⁹ historical understanding of the meaning of marriage deserves and requires unique, special protection and exclusive recognition in our law, and why the "thin" conception of marriage that seems to be increasingly popular in some quarters of American culture today is wholly inadequate for the critical needs of families and society. The profound implications of federal legalization of same-sex marriage and the resulting forced recognition of same-sex marriages by the states, in violation of the core principles of federalism, are also discussed.

The conclusion suggests that same-sex marriage politics, just like abortion politics over the past forty years, exerts a distorting influence upon the rule of law and the performance of courts. Accordingly, it is especially important that courts guard against such political influences by giving the proper degree of respect and deference to the democratically elected legislative and executive branches, as required in our republican form of government. Likewise, it is important in the debate of these issues to show decency and respect for differing views and to protect and foster the expression of competing values and perspectives.

5. *Williams v. North Carolina (Williams I)*, 317 U.S. 287 (1942).

6. *Williams v. North Carolina (Williams II)*, 325 U.S. 226 (1945).

7. 344 U.S. 604 (1953).

8. 682 F.3d 1 (1st Cir. 2012).

9. For a discussion of this term, see *infra* Part IV.E.

I. THE TRANSPORTABILITY OF MARITAL STATUS AND THE PROBLEM OF
“INVOLUNTARY IMPORTS”

Part I examines the transportability of marriage generally, and of same-sex marriage specifically. While the general transportability of marriage plays an important role in our society, the transportability of same-sex marriage from jurisdictions where it is permitted to those where it is not presents significant legal and conceptual issues for society, the legal system, and individuals and families.

A. *The Transportability of Marital Status Generally*

It is reasonable for persons in domestic relationships to want their public relationship status to be fully transportable from their home to other jurisdictions. People moving across borders from one jurisdiction to another usually desire and expect that the marital status they enjoy in their home jurisdiction will travel with them. This is not only true internationally, but is also true within any one nation that has internal semi-sovereign states or provinces in which marriage regulations vary, such as the United States.¹⁰

Of course, it is also sometimes true that people seek to escape the marital status or rules of their home jurisdiction. Consequently, people sometimes travel away from their state of residence to another state for the very purpose of evading the marriage law of their home jurisdiction and entering into a marriage allowed in a foreign jurisdiction that was prohibited in their home state. In recent years, the flood of same-sex couples into various jurisdictions that have legalized same-sex marriage is a prime example.¹¹ It is estimated that one-third of the approximately 7,500–15,000 same-sex couples who have married in Canada have come from other nations.¹² Other nations and states that have legalized same-sex marriage have

10. See Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1969 (1997) (explaining that generally “every state recognizes the validity of a marriage valid where it was celebrated”); see also Evan Wolfson & Michael F. Melcher, *Constitutional and Legal Defects in the “Defense of Marriage” Act*, 16 QUINNIPIAC L. REV. 221, 221–22 (1996) (arguing that the Full Faith and Credit Clause of the Constitution guarantees that a marriage in one state will be recognized in another).

11. Cynthia M. Reed, *When Love, Comity, and Justice Conquer Borders: INS Recognition of Same-Sex Marriage*, 28 COLUM. HUM. RTS. L. REV. 97, 115 (1996) (“After the *Baehr* decision, people joked that “[i]f [the legalization of same-sex marriage] happens in Hawaii, gay and lesbian people will sink the island. . . . We will all arrive the same day, get married, and the island will just go under.” (quoting Brad L. Graham, *Lesbian Couple is Wed—Sort Of*, ST. LOUIS POST-DISPATCH, Mar. 2, 1994, at 5f)).

12. Enjoli Liston, *5,000 Canadian Same-Sex Marriages “Not Valid,”* INDEPENDENT (London) (Jan. 13, 2012), www.independent.co.uk/news/world/americas/5000-canadian-samesex-marriages-not-valid-6288971.html (indicating that 15,000 same-sex marriages were performed in Canada since 2004, one-third of which involved foreign couples); see also David Ljunggren, *Canada Says Marriages of Foreign Gays Invalid*, REUTERS (Jan. 12, 2012, 4:47 PM), <http://www.reuters.com/article/2012/01/12/us-marriage-idUSTRE80B20U20120112> (indicating that 7,500 same-sex marriages were performed in Canada since 2003, one-third of which involved foreign couples).

experienced similar influxes of foreigners from jurisdictions that do not allow same-sex marriage seeking to enter into such marriages.¹³ Indeed, one of the common arguments made for legalizing same-sex marriage in a particular jurisdiction is the economic benefits that will come from, among other things, the tourism from same-sex couples traveling from the many jurisdictions that forbid same-sex marriage.¹⁴ Thus, transjurisdictional movement to obtain a same-sex marriage, and its role in the legalization debate, is significant and growing.

Marriages are of such profound importance to public interests that all states regulate marriage. State control of domestic relations under the U.S. Constitution demonstrates the importance of having family law reflect local values about how the basic unit of society should be structured and regulated.¹⁵ Under our federal system, lawmakers in each state set boundaries defining what relationships they will and will not allow as marriages contracted in the state, subject to a few baseline constitutional conditions. As such, no state has a completely open-door policy when it comes to marriage recognition, and all states prohibit and restrict certain

13. In 2008, the Williams Institute at UCLA predicted that 67,513 same-sex couples would travel to California to get married after the state supreme court legalized same-sex marriage. See Brad Sears & M.V. Badgett, *The Impact of Extending Marriage to Same-Sex Couples on the California Budget*, WILLIAMS INST., 2 (June 2008), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Badgett-EconImpact-CA-Marriage-June-2008.pdf>. Relatively few out-of-state same-sex couples were married in Massachusetts, even though it was the first state to legalize (by judicial decree) same-sex marriage, because Massachusetts had a state law forbidding persons to enter into marriages that were forbidden in their home states. See *id.* at 6. The Massachusetts Supreme Judicial Court upheld this law in *Cote-Whitacre v. Department of Public Health*, 844 N.E.2d 623 (Mass. 2006). This restriction was subsequently repealed, however, in 2008. See Michael Levenson, *Governor Signs Law Allowing Out-of-State Gays to Wed*, BOSTON.COM (July 31, 2008, 1:10 PM), http://www.boston.com/news/local/breaking_news/2008/07/gov_to_sign_bil.html. Likewise, in the Netherlands, the first nation to legalize same-sex marriage, marriage-tourism has not been great because at least one partner must be Dutch or have Dutch residency status in order to enter into a marriage (same-sex or heterosexual). See *Marriage Overseas*, AUSTRALIAN MARRIAGE EQUALITY, <http://www.australianmarriageequality.com/international.htm#Netherlands> (last visited Oct. 20, 2012).

14. See, e.g., M.V. Lee Badgett et al., *The Impact on Iowa's Budget of Allowing Same-Sex Couples to Marry*, WILLIAMS INST., 1 (Apr. 2008), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Sears-Baumle-Romero-Sears-IowaFiscalImpact-Apr-2008.pdf> (“[W]e estimate that allowing same-sex couples to marry will result in a net gain of approximately \$5.3 million each year for the State.”); Angeliki Kastanis et al., *The Economic Impact of Extending Marriage to Same-Sex Couples in Washington State*, WILLIAMS INST., 1 (2012), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Kastanis-Badgett-Herman-WASalesTaxImpact-Jan-20121.pdf> (estimating that “spending on wedding arrangements and tourism by resident same-sex couples and their guests will add an estimated \$88 million boost to the state and local economy of Washington over the course of three years, with a \$57 million boost in the first year alone”); *Marriage Equality Offers Economic Advantages*, ACLU ME. (Feb. 13, 2009), <https://www.aclumaine.org/node/86> (noting that the Williams Institute study “also calculates that the direct spending on weddings and tourism will generate \$3.1 million in local and state tax revenues”).

15. See *infra* notes 47–52 and accompanying text; see also Lynn D. Wardle, *Tyranny, Federalism and the Federal Marriage Amendment*, 17 YALE J.L. & FEMINISM 221, 226–49 (2005) (reviewing the history of federalism in family law).

marriages, thereby reflecting strong local policies. Moreover, all states also draw boundary lines for the recognition of marriages contracted out-of-jurisdiction. Usually these marriage recognition rules closely reflect the major boundary lines of the domestic marriage definition rules, and implicate matters of significant public policy.¹⁶ The dilemma of disparate treatment of marriage by different states is just one of many examples of the price of decentralization and federalism in family law. As Justice Murphy, dissenting in *Williams I*, put it:

There is an element of tragic incongruity in the fact that an individual may be validly divorced in one state but not in another. *But our dual system of government and the fact that we have no uniform laws on many subjects give rise to other incongruities as well*—for example, the common law took the logical position that an individual could have but one domicile at a time, but this Court has nevertheless said that the Full Faith and Credit Clause does not prevent conflicting state decisions on the question of an individual's domicile. . . . In the absence of a uniform law on the subject of divorce, this Court is not so limited in its application of the Full Faith and Credit Clause that it must force Nevada's policy upon North Carolina, any more than it must compel Nevada to accept North Carolina's requirements. *The fair result is to leave each free to regulate within its own area the rights of its own citizens.*¹⁷

In other words, under our federal system of government, couples may properly and fairly be deemed married or divorced in one American jurisdiction but not in another.

B. The Practical Significance of Same-Sex Marriage: Transportability

Same-sex marriage is one of the dominant public policy and political battles being fought today in the United States and around the world. The movement to legalize same-sex marriage has acquired some significant political and social momentum in the United States and some foreign nations.¹⁸ As more states and nations recognize same-sex marriage, the

16. See Patrick J. Borchers, *Baker v. General Motors: Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147 (1998); L. Lynn Hogue, *State Common-Law Choice-of-Law Doctrine and Same-Sex "Marriage": How Will States Enforce the Public Policy Exception?*, 32 CREIGHTON L. REV. 29 (1998); Lynn D. Wardle, *From Slavery to Same-Sex Marriage: Comity Versus Public Policy in Inter-jurisdictional Recognition of Controversial Domestic Relations*, 2008 BYU L. REV. 1855.

17. *Williams I*, 317 U.S. 287, 311 (1942) (Murphy, J., dissenting) (emphasis added) (citations omitted).

18. For instance, President Obama has publicly declared his support for same-sex marriage, and the official platform of the Democratic party—the largest political party in America and the party that controls the White House and Senate—also endorsed the legalization of same-sex marriage. See Matt Compton, *President Obama Supports Same-Sex Marriage*, WHITE HOUSE BLOG (May 9, 2012, 6:12 PM), <http://www.whitehouse.gov/blog/2012/05/09/president-obama-supports-same-sex-marriage>; 2012 *Democratic National Platform: Moving America Forward*, DEMOCRATS.ORG, <http://www.democrats.org/democratic-national-platform> (last visited Oct. 20, 2012) (“[The Democratic Party] support[s] marriage equality and support[s] the movement to secure equal treatment under

potential for more same-sex marriages to be formed, and ultimately transported into other jurisdictions with conflicting marriage policies, increases.

As the Appendix shows, same-sex marriage is currently allowed in six American states and the District of Columbia.¹⁹ Two other state legislatures (in Maryland and Washington) have enacted laws to allow same-sex marriage that have not yet taken effect and will be subject to possible voter veto in November 2012; meanwhile, voters in Maine will decide whether to pass a petition that would legalize same-sex marriage.²⁰ Ten other states have legalized marriage-equivalent same-sex civil unions, which present potentially similar interjurisdictional domestic status transportability issues.²¹ Internationally, at least ten sovereign nations (of 193) have legalized same-sex marriage, and sixteen other countries have legalized marriage-equivalent relationships (called “domestic partnership,” “civil unions,” “*pactes civiles*,” etc.).²² As the number of these jurisdictions increases (and they have grown from zero less than fifteen years ago), the incidence of controversies regarding transportability of this marital status will also increase.

On the other hand, as the Appendix also shows, thirty-one U.S. states and at least forty-six foreign nations have provisions in, or have adopted amendments to, their state or national constitutions that facially appear to ban same-sex marriages.²³ This underscores the highly controversial and intense nature of the issues that may arise when the prospect of unwelcome importation of same-sex marriage or civil union status is presented in a jurisdiction where citizens oppose such domestic relationships.

As the number of jurisdictions permitting same-sex marriage increases, the number of same-sex marriages is also bound to increase. Because globalization of the economy, family, travel, and communication provides incentives for people to move from one state or nation to another, the issue of whether nations that prohibit same-sex marriage will recognize the imported marriage status of same-sex couples who migrate within their borders will inevitably arise with increasing frequency in the years ahead. Thus, resolution of this issue may implicate the domestic lives and marital statuses of perhaps tens of thousands of legally married same-sex couples.

law for same-sex couples.”). The recently elected government of France and the government of New Zealand have also announced their intentions to legalize same-sex marriage. See Nick Perry, *New Zealand Gay Marriage: 1st Stage of New Law Passed*, HUFFINGTON POST (Aug. 29, 2012, 10:59 AM), http://www.huffingtonpost.com/2012/08/29/new-zealand-gay-marriage-_n_1839488.html; *France to Legalise Gay Marriage in 2013*, FRANCE 24, <http://www.france24.com/en/20120629-french-government-legalise-gay-marriage-2013-homosexual-bertinotti> (last updated Oct. 20, 2012).

19. See *infra* Appendix A.

20. See *infra* Appendix A n.243.

21. See *infra* Appendix A.

22. See *infra* Appendix C.

23. See *infra* Appendix B and D.

Although it is impossible to pinpoint the exact number of married same-sex couples residing in the United States, the number is clearly not insubstantial. For example, in the 2010 U.S. Census over 130,000 same-sex couples reported that they were married.²⁴ By comparison, the Williams Institute reported in November 2011 that 46,755 same-sex couples (including 32,487 resident couples) had been married in six states and the District of Columbia, and that “approximately 80,000 [same-sex couples] are married nationwide,” including those who may have “married in Canada or another country.”²⁵ Even discounting for evasive marriages and other marriages of possibly dubious validity,²⁶ at least 32,487 same-sex couples appear to have good claims to same-sex marriages that are valid in their domicile state of celebration, which makes their claim to transportability of their marital status substantial. The total number of presumably valid same-sex marriages (32,487) may not seem particularly impressive when compared to the total number of American married-couple households (55,704,781),²⁷ but this is just the tip of the iceberg; and for many if not

24. *Census: 131,729 Gay Couples Report They're Married*, NPR.ORG (Sept. 27, 2011), <http://www.npr.org/2011/09/27/140859242/census-131-729-gay-couples-report-theyre-married> (preliminarily reporting that 131,729 same-sex couples recorded themselves as being married on the 2010 Census). While some of those marriages might not meet the requirements of non-evasive and legitimate, it is not unreasonable to assume that many of them do.

25. M.V. Lee Badgett & Jody L. Herman, *Patterns of Relationships Recognition by Same-Sex Couples in the United States*, WILLIAMS INST. 4–6 (2011), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Herman-Marriage-Dissolution-Nov-2011.pdf>. In four of the six states that reported on residency of the parties who married, 41 percent or less of the marriages were of residents of the state, so a significant percentage of the same-sex marriages in the United States may be evasive marriages, the validity of which is variable from state-to-state, and very uncertain. *See id.* at 4.

26. In the United States, the prevailing choice of law rule is that marriage validity is generally governed by the law of the place of celebration; but if another state has the most significant relationship to the parties and the marriage at the time of the marriage and also has a very strong public policy implicated by the marriage, the law of the place of celebration will give way to the law of the state with the most significant relationship. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971); *see also infra* note 51 and accompanying text. Thus, “evasive” marriages, even though apparently valid by the law of the place where the marriage was celebrated, might not be deemed valid if they would be invalid by the law of the parties’ common domicile, for example. *See generally* Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143 (2005).

27. *Selected Social Characteristics in the United States, 2010 American Community Survey 1-Year Estimates*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_1YR_DP02&prodType=table (last visited Oct. 20, 2012); *see also Marital Status, 2010 American Community Survey 1-Year Estimates*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_1YR_S1201&prodType=table (last visited Oct. 20, 2012) (48.8 percent of 248,055,946 Americans aged 15 and older are married). *But see* Sabrina Tavernise, *Married Couples Are No Longer a Majority, Census Finds*, N.Y. TIMES, May 26, 2011, at A22 (“Married couples have dropped below half of all American households for the first time, the Census Bureau says Married couples represented just 48 percent of American households in 2010, according to data being made public Thursday and analyzed by the Brookings Institution. This was slightly less than in 2000, but far below the 78 percent of households occupied by married couples in 1950.”).

most of those nearly 65,000 individuals in apparently valid same-sex marriages, the transportability issue is extremely profound. Thus, the issue of transportability of same-sex marriage status is not merely one of abstract intellectual curiosity or remote scholarly speculation. It is currently very important to potentially tens of thousands of same-sex couples, not to mention their families (including, in many cases, children).²⁸

II. THE TRANSPORTABILITY OF MARITAL STATUS, AMERICAN-STYLE

Part II examines issues raised by the transportability of marriage status within the United States. It first considers the meaning of federalism in family law in light of the Supreme Court's seminal decision in *Williams I* and *II*. It then discusses the Court's decision in *Lutwak*, which clarified that congressional intent governs the meaning and requirements of valid marriages under federal law.

A. *Williams I and II and the Importance of the Transportability of Marital Status*

Legal policies that affect the transportability of marital status from one jurisdiction to another touch upon very sensitive and, at times, very political issues. Such issues are hardly new and their importance has long been apparent. For example, seven decades ago the Supreme Court considered (in two separate decisions at two stages of one case) the transportability of marital status issue in the divorce context when it decided *Williams I* and *II*.²⁹ The cases involved two sequential prosecutions of a man and woman from a small town in rural North Carolina. These individuals left their respective spouses, traveled to Nevada where they obtained a "quickie" divorce, married each other, then returned to North Carolina where they were ultimately convicted of bigamy. The defendants raised their Nevada divorce decree in defense, to show that their marriage to each other did not overlap with their marriages to their former spouses. The defendants were ultimately convicted, however, as the North Carolina court concluded that the new state of an abandoning spouse lacked jurisdiction to adjudicate the divorce—jurisdiction instead belonged to the state where the parties had been married and where the abandoned spouse still resided.³⁰

In *Williams I*, decided in 1942, the Court held that North Carolina courts hearing a bigamy prosecution would be required to respect divorce

28. See Susan Donaldson James, *Census 2010: One-Quarter of Gay Couples Raising Children*, ABC NEWS (June 23, 2011), <http://abcnews.go.com/Health/sex-couples-census-data-trickles-quarter-raising-children/story?id=13850332&page=2#.T9dh88Xhd9Q> (reporting that the Williams Institute suggests that more than 250,000 children are being raised by lesbian and gay parents, 19 percent of such couples are adopting, but 80 percent of the children are not adopted).

29. *Williams II*, 325 U.S. 226, 239 (1945); *Williams I*, 317 U.S. 287 (1942). See generally Lynn D. Wardle, *Williams v. North Carolina, Divorce Recognition, and Same-Sex Marriage Recognition*, 32 CREIGHTON L. REV. 187 (1998).

30. *North Carolina v. Williams*, 17 S.E.2d 769, 777–78 (N.C. 1941), *rev'd*, *Williams I*, 317 U.S. 287.

judgments issued by a Nevada court if it had jurisdiction to grant divorce by virtue of the domicile of at least one of the parties, regardless of abandonment. This was the case even though the parties seeking the divorces in Nevada had long before resided in North Carolina—where they had married, lived with, and abandoned their spouses, and where their abandoned spouses and families still resided—and even though the grounds for divorce in Nevada were very permissive and inconsistent with the stricter divorce law of North Carolina.

Justice Douglas wrote a very strong majority opinion emphasizing that the differences in the divorce laws did not justify refusal to recognize and respect divorce judgments from Nevada courts that had proper jurisdiction. Accordingly, the Court reversed the bigamy convictions and remanded the case to North Carolina.³¹ Justice Frankfurter filed a cautionary concurring opinion,³² and Justices Murphy³³ and Jackson³⁴ penned blistering dissents emphasizing the feeble connection the defendants had with Nevada when they filed for divorce there, and the “acute interest to all the states of the Union and on which they hold varying and sharply divergent views, [of] the problem of how they shall treat the marriage relation.”³⁵ Justice Jackson added:

I cannot join in exerting the judicial power of the Federal Government to compel the State of North Carolina to subordinate its own law to the Nevada divorce decrees. The Court’s decision to do so . . . nullifies the power of each state to protect its own citizens against dissolution of their marriages by the courts of other states which have an easier system of divorce. It subjects every marriage to a new infirmity, in that one dissatisfied spouse may choose a state of easy divorce, in which neither party has ever lived, and there commence proceedings without personal service of process.³⁶

The concurring and dissenting justices provided the blueprint for the ultimate decision in *Williams II* just three years later.

Upon remand the parties again were convicted of bigamy, and those convictions were affirmed by the North Carolina Supreme Court. Again the defendants sought certiorari to the U.S. Supreme Court, and the case went before the Court for a second review. In 1945, in *Williams II*,³⁷ the Supreme Court affirmed the convictions and the refusal of the North Carolina court to recognize the defendants’ Nevada divorce decrees. The Court observed that the parties had merely lived in a Nevada motel for the minimum six weeks required by Nevada before filing for divorce, and they had returned to North Carolina immediately upon receipt of their respective

31. *Williams I* 317 U.S. at 304.

32. *Id.* at 304 (Frankfurter, J., concurring).

33. *Id.* at 308 (Murphy, J., dissenting).

34. *Id.* at 311 (Jackson, J., dissenting).

35. *Id.* at 308 (Murphy, J., dissenting).

36. *Id.* at 311 (Jackson, J., dissenting).

37. *Williams II*, 325 U.S. 226, 239 (1945).

divorces.³⁸ The Court agreed with the North Carolina courts below that for a court to exercise jurisdiction to adjudicate the termination of marital status, the domicile of at least one of the married parties must be located in the state of divorce. Furthermore, six weeks in a motel in a new state followed by a hasty return to the former state of residence did not suffice to show the constitutionally required “domicile” connection between the state and the married parties to empower the new state to dissolve the marital relationship.³⁹ The dissenting justices in *Williams I* were in the majority in *Williams II*, and Justice Frankfurter, author of the cautionary concurrence in *Williams I*, wrote the majority opinion for the Court in *Williams II*.

In both cases, the Court and dissenting justices emphasized the interests that the respective states had in the application of their own laws to determine marital status,⁴⁰ underscoring the conflicting state interests in issues concerning the transportability of marital status. In both cases, the Court followed the “possession is nine-tenths of the law” axiom; that is, only a state that “possesses” the parties and their marital relationship—by virtue of being the true domicile of at least one of the parties to the marriage—has jurisdiction to adjudicate petitions for divorce.⁴¹ Presumably, this is because such states at that time had the predominant state interest in the proceeding, both in terms of quality and magnitude. Also, these states are the most likely to be visited with the potential costly and burdensome social consequences of the divorce, such as the medical, emotional, and economic consequences for the parties for which the state might be responsible.⁴²

In other words, the Court decided that the state with the greatest apparent interest in deciding the issue of modification of marital status by virtue of domicile connection of one or both parties had the power to adjudicate the issue, and such determination by a court with jurisdiction was transportable to and would have to be recognized in other states (at least in the absence of any congressional direction otherwise). This was a clear deviation from the very loose “minimum contacts” standard for jurisdiction established just a few days after *Williams II* in *International Shoe Co. v. Washington*,⁴³ based upon a test that might be compared to the subsequently popular “most significant relationship” test for choice-of-law.⁴⁴ Most importantly for this Article, the *Williams* cases illustrate that the issue of transportability of

38. *See id.* at 241.

39. *Id.* at 241–42.

40. *Id.* at 241; *see also Williams I*, 317 U.S. at 308–09 (Murphy, J., dissenting).

41. *See Williams II*, 325 U.S. at 241; *see also Williams I*, 317 U.S. at 308–09.

42. *See* Lynn D. Wardle, *The Attack on Marriage as the Union of a Man and a Woman*, 83 N.D. L. REV. 1365, 1369–70 (2007) (“People are vulnerable in marriages, and when marriages fail, society must pick up the pieces and the public incurs social costs such as for increased mental health treatment, medical services, juvenile delinquency, impaired education, and reduced labor productivity.”).

43. 326 U.S. 310 (1945).

44. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6, 283 (1971). The interest analysis revolution in American choice of law occurred more than a decade after the Supreme Court decided *Williams II*.

marital status has long been important and divisive in American constitutional and marriage law jurisprudence.

*B. Federalism, Vertical Marriage Recognition Law,
and Lutwak v. United States*

The *Williams* cases, and most controversies regarding importation or exportation of marital status from one jurisdiction to another, arise in a “horizontal” dispute. The “horizontal” issue is whether marital status created or terminated in one state or nation will be recognized in another state or nation of coequal sovereignty. In nations that have a federal system,⁴⁵ such as the United States, the issue of the transportability of marital status also arises regularly in the “vertical” context, in which the national government must decide whether to recognize a marital status created or dissolved by a particular state or province, or vice versa.

Generally, the federal government and its agencies adopt and incorporate state marital status determinations because the direct regulation of domestic relations under the U.S. Constitution is left to the control and authority of the states. As the Supreme Court noted in *Sosna v. Iowa*,⁴⁶ “Regulation of domestic relations [is] an area that has long been regarded as a virtually exclusive province of the States.”⁴⁷ Thus, on the principle of comity, based on respect for the reserved sovereign power of the states to regulate domestic relations, and probably based on recognition that federal agents and agencies lack as much experience and competence as state authorities in regulating domestic relations, federal courts have long presumed that Congress intended references to domestic relations in federal law to incorporate state domestic relations law. Federal deference to state domestic relations law, however, is not absolute. As the Supreme Court noted in *Hisquierdo v. Hisquierdo*,⁴⁸ “On the rare occasion when state family law has come into conflict with the federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has ‘positively required by direct enactment’ that state law be pre-empted.”⁴⁹ Similarly, the Court reiterated in *McCarty v. McCarty*⁵⁰ that “[s]tate family and family-property law must do ‘major damage’ to ‘clear and substantial’ federal interests before the Supremacy Clause will demand that state law be overridden.”⁵¹

Congress’s authority to enact domestic relations legislation that contradicts, supersedes, and overrides state domestic relation law is clear.

45. See *infra* notes 96–97 and accompanying text (discussing international federalism).

46. 419 U.S. 393 (1975).

47. *Id.* at 404; see also *Lehman v. Lycoming Cnty. Children’s Servs. Agency*, 458 U.S. 502 (1982); *Moore v. Sims*, 442 U.S. 415 (1979); *Barber v. Barber*, 62 U.S. (21 How.) 582 (1858).

48. 439 U.S. 572 (1979).

49. *Id.* at 581 (citing *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904)).

50. 453 U.S. 210 (1981).

51. *Id.* at 220 (1981) (quoting *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979); *In re Burrus*, 136 US 586, 593–594 (1890)).

In fact, in both *Hisquierdo* and *McCarty* the Court concluded that federal statutes and rules governing the interests of family members in federal benefits were inconsistent with state domestic relations laws, and, as a result, superseded and replaced those state domestic relations laws for purposes of determining the federal benefits.

Thus, just as the states have the constitutional sovereign authority to regulate domestic relations, the national government has the constitutional sovereign authority and responsibility to regulate certain areas, such as federal taxation, the military, commerce. As to those subjects over which the federal government exercises sovereign control, Congress has the authority to refuse to recognize marital and other domestic status determinations of the states in the rational regulation of those subjects.⁵² At present, Congress has chosen to reject, limit, and qualify the transportability of marital status created by the states into federal law in some cases, based on consideration of such factors as the need for national uniformity, ease of application, concerns over federalism (including the controversial or negative impact upon the federal government or program, or upon other states), and the attainment of numerous substantive national policy objectives.⁵³

Lutwak, decided six decades ago, illustrates both horizontal and vertical marriage validity choice of law issues and principles. *Lutwak* concerned the alleged “green card” marriages of three Polish refugees (two brothers and the wife or former wife of one of them) who were living in France as refugees following World War II. The brothers’ sister, who was married and living in Illinois, allegedly arranged for three honorably discharged veterans—two women and one man—to travel to Paris, contract pretend marriages with the three refugee relatives, and then bring them into the United States under the War Brides Act. As allegedly conspired, the three refugees and their spouses celebrated their marriages properly in France, but never consummated their marriages nor lived together in the United

52. See generally Lynn D. Wardle, *Section Three of the Defense of Marriage Act: Deciding, Democracy, and the Constitution*, 58 DRAKE L. REV. 951 (2010) [hereinafter Wardle, *Section Three of DOMA*]; Lynn D. Wardle, *Who Decides?: The Federal Architecture of DOMA and Comparative Marriage Recognition*, 41 CAL. W. INT’L L.J. 143 (2010) [hereinafter Wardle, *Who Decides?*].

53. See Kristin A. Collins, *Federalism’s Fallacy: The Early Tradition of Federal Family Law and the Invention of States’ Rights*, 26 CARDOZO L. REV. 1761, 1767 (2005) (arguing that the federal government was actively regulating family relations prior to the Civil War); Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL RTS. J. 381, 390–92, 407, 430 (2007) (examining federalism in divorce jurisdiction doctrine); Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1379–86 (1998) (arguing that the federal government has heavily regulated domestic relations since Reconstruction); Lynn D. Wardle, *State Marriage Amendments: Developments, Precedents, and Significance*, 7 FLA. COASTAL L. REV. 403, 432 (2005) (explaining that federalism in the family promotes local and minority interests, pluralism, and diversity); Wardle, *supra* note 15, at 233–346 (providing a history of federalism in family law). See generally H.R. REP. NO. 104-664, at 12–18 (1996), reprinted in 1996 U.S.C.C.A.N. 2905 (analyzing the governmental interests advanced by the Act).

States.⁵⁴ They were all convicted of conspiracy to defraud the United States and of violating federal immigration laws by virtue of their gaining priority entrance into the United States on the basis of their apparent “sham” marriages.

The convicted defendants argued that their marriages were valid and persuaded the three dissenting Justices in the case. Joined by Justices Black and Frankfurter, Justice Jackson wrote a dissent in which he argued, “These marriages were formally contracted in France, and there is no contention that they were forbidden or illegal there for any reason.”⁵⁵ He added, “We start with marriages that either are valid or at least have not been proved to be invalid in their inception. . . . If the parties are validly married, even though the marriage is a sordid one, we should suppose that would end the case.”⁵⁶ Thus, the dissenters invoked horizontal marriage recognition between France and the United States.

Justice Minton, writing for the majority, acknowledged the petitioners’ “claim that the trial court erred in presuming that the French law relating to the validity of marriages is the same as American law, and [that] they further contend that even under American law these marriages are valid.”⁵⁷ Thus, as a matter of horizontal marriage law, the dissenters asserted that if the marriages were valid under French law, the general American choice of law rule regarding marriage validity, *lex loci celebrationis* (the law of the place of celebration) and respect for the coequal sovereignty of France required the courts of the United States to respect and recognize the validity of those marriages. As a matter of vertical choice of law, the petitioners also argued that, under the law of the relevant American states, their marriages were valid (perhaps because those states would recognize the validity of the French marriages).⁵⁸ Therefore, the United States was also obliged to recognize the validity of the marriages as a matter of federalism.⁵⁹

The six Justices in the majority rejected those arguments: “We do not believe that the validity of the marriages is material. . . . We consider the marriage ceremonies only as a part of the conspiracy to defraud the United

54. One couple divorced immediately, another’s divorce was pending when this case was tried, and the third couple separated immediately and remained apart for two years until the prosecution in this case commenced. *Id.* at 606, 609.

55. *Id.* at 620 (Jackson, J., dissenting); *see also id.* at 610 (majority opinion) (explaining that “[a]t the trial, it was undisputed that [the parties] had gone through formal marriage ceremonies”).

56. *Id.* at 620–21 (Jackson, J., dissenting).

57. *Id.* at 611 (majority opinion); *see also id.* at 610 (“Petitioners contended that, regardless of the intentions of the parties at the time of the ceremonies, the fact that the ceremonies were performed was sufficient to establish the validity of the marriages, at least until the Government proved their invalidity under French law. They relied on the general American rule of conflict of laws that a marriage valid where celebrated is valid everywhere unless it is incestuous, polygamous, or otherwise declared void by statute.”).

58. *See id.* at 610–11.

59. *See id.*

States and to commit offenses against the United States.”⁶⁰ For the majority, the issue was one of vertical (federal-state) marriage recognition. The controlling law was U.S. federal immigration and criminal conspiracy laws, not Illinois or French marriage laws.⁶¹ The definition of marriage for purposes of interpreting the federal immigration laws was entirely a matter for Congress to determine. Thus, the case turned on the intent of Congress, and the Court was obliged to follow Congress’s instruction about what kind of marriages were to be recognized for purposes of federal immigration and related criminal conspiracy laws. The Court observed:

By directing in the War Brides Act that ‘alien spouses’ of citizen war veterans should be admitted into this country, *Congress intended* to make it possible for veterans who had married aliens to have their families join them in this country without the long delay involved in qualifying under the proper immigration quota. *Congress did not intend* to provide aliens with an easy means of circumventing the quota system by fake marriages The common understanding of a marriage, *which Congress must have had in mind* when it made provision for ‘alien spouses’ . . . is that the two parties have undertaken to establish a life together and assume certain duties and obligations.⁶²

Lutwak continues to be not only good law, but also a definitive affirmation and example of the power that Congress and the federal government generally have to define and regulate marriage for purposes of federal law.⁶³

That approach was hardly novel in 1953 when *Lutwak* was decided. Judicial deference to congressional intent regarding the legal meaning and consequences of domestic relations status in federal law has a federal court pedigree as old as the United States itself.⁶⁴ An abundance of recent scholarship (some of it concerning the legal rights of women and minorities) has shown that the exercise of federal authority to define

60. *Id.* at 611.

61. *See id.* (“No one is being prosecuted for an offense against the marital relation.”). *But see id.* at 620–21 (Jackson, J., dissenting) (explaining that the validity of the marriage “goes to the very existence of an offense” because if the marriages “were merely voidable and had not been adjudged void at the time of the entry into this country, it was not a fraud to represent them as subsisting”).

62. *Id.* (majority opinion) (emphasis added).

63. *See* Scott C. Titshaw, *The Meaning of Marriage: Immigration Rules and Their Implications for Same-Sex Spouses in a World Without DOMA*, 16 WM. & MARY J. WOMEN & L. 537, 543 n.15 (2010) (noting that *Lutwak* still controls); Marcel De Armas, Comment, *For Richer or Poorer or Any Other Reason: Adjudicating Immigration Marriage Fraud Cases Within the Scope of the Constitution*, 15 AM. U. J. GENDER SOC. POL’Y & L. 743, 753–54 (2007) (advocating the *Lutwak* test for foreign marriage validity). *But see* Joseph A. Pull, *Questioning the Fundamental Right to Marry*, 90 MARQ. L. REV. 21, 43–44 (2006) (arguing that the right to marry should override *Lutwak*).

64. *See* Wardle, *Section Three of DOMA*, *supra* note 52, at 974–81 (citing cases back to the mid-1800s and congressional legislation back to the eighteenth century); *see also* United States v. Yum, 776 F.2d 490, 492 (4th Cir. 1985); United States v. Lozano, 511 F.2d 1, 5 (7th Cir. 1975); United States v. Sacco, 428 F.2d 264, 269–71 (9th Cir. 1970); United States v. Elzahabi, 517 F. Supp. 2d 1121, 1123–24 (D. Minn. 2007).

domestic relations and the legal incidents thereof for purposes of federal law is traceable to the earliest days of the new American republic.⁶⁵ For example, by delving into historical sources of the pre-Civil War era, Kristin Collins has shown “how national-level actors of that period exercised their authority to regulate and adjudicate matters involving domestic relations.”⁶⁶ Her research into pre-Civil War federal law

reveal[s] two important things about the early history of federal regulations concerning domestic relations. First, . . . during the pre-Civil War era all three branches of the federal government were actively engaged in creating and enforcing laws and policies that bore directly on families, whether it was the creation and administration of widows and orphans’ war pensions, the regulation of married women’s citizenship, or—perhaps most surprisingly—the resolution of an array of domestic relations issues in federal court, often pursuant to uniform federal standards. . . . [F]ederal lawmakers and jurists recognized the important connection between republicanism (as they understood that concept) and domestic relations. . . . [H]istorical sources demonstrate that national jurists and lawmakers played a role in the process, slow and halting as it was, of examining and sometimes even displacing the hierarchical principles that were part and parcel of the common law of domestic relations.⁶⁷

American legal history from the pre-Civil War era is filled with numerous examples of federal regulation of domestic relations issues in many areas over which the federal government exercises exclusive lawmaking authority including citizenship, federal pensions, and federal equity principles (which often displaced state domestic relations and inheritance laws).⁶⁸ Indeed, some have observed that “federal actors would not shy from asserting, or even creating, federal citizenship [and pension] laws and regulations [and equity principles] that directly impacted the scope and effect of domestic relations law and policy.”⁶⁹ Thus, the power of Congress to define and regulate domestic relations status, incidents, and effects for the purposes of federal laws and programs has long been exercised and is well established.

65. See generally HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 258–77 (2000); THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* (1992); Collins, *supra* note 53, at 1764–65 nn.14, 16 & 18 (2005) (citing NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 258–77 (2000)); Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 *YALE J.L. & HUMAN.* 251 (1999); Hasday, *supra* note 53; Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 *YALE L.J.* 619 (2001); Judith Resnik, “Naturally” Without Gender: *Women, Jurisdiction, and the Federal Courts*, 66 *N.Y.U. L. REV.* 1682, 1717–29 (1991); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 *HARV. L. REV.* 947, 998–1003 (2002); Wardle, *Who Decides?*, *supra* note 52, at 172–76.

66. Collins, *supra* note 53, at 1765.

67. *Id.* at 1767–68.

68. *Id.* at 1777–1843.

69. *Id.* at 1815–17.

III. THE DEFENSE OF MARRIAGE ACT

Part III considers DOMA, and section 3 in particular, and examines whether the Congressional proclamation that same-sex unions are not considered valid marriages for purposes of federal law—whatever their status under the laws of a particular state’s law—violates constitutional principles of federalism.

A. *The Purpose of DOMA to Clarify Marriage Recognition Law*

DOMA, enacted by Congress and signed into law by President Clinton in 1996,⁷⁰ was intended to provide certainty regarding the “horizontal” and “vertical” recognition of same-sex marriages, and for over a decade it did just that. Since 2008, however, a new wave of litigation has challenged the constitutionality of DOMA. The uncertainty attendant to normal litigation has been significantly compounded by the “about face” of the Department of Justice (DOJ) since 2009 which, under the Administration of President Obama, initially provided only the most reluctant, ineffective defense of DOMA,⁷¹ and ultimately announced in 2011 that it would no longer defend the Act.⁷² Ironically, the Obama Administration’s decision to take a dive in the DOMA litigation—perhaps intended to “pass the buck” to the judicial branch in hopes that if the Administration did not defend the law, the Court would invalidate DOMA and save the Democrats in Congress and in the White House from the political pain of trying to repeal the Act—seems to have compounded the confusion.

In 1996, the constitutionality of DOMA was undisputed. The votes in both houses of Congress in favor of enacting DOMA were overwhelming and bipartisan: the House of Representatives passed DOMA by a vote of 342 to 67,⁷³ and the Senate approved DOMA by a vote of 85 to 14.⁷⁴

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

71. See Wardle, *Section Three of DOMA*, *supra* note 52, at 969–70; see also *A Defense of Fairness Act*, WASH. POST, July 11, 2010, at A16 (describing the Obama Justice Department’s defense of DOMA as “tepid”); Carrie Johnson, *Obama Says Marriage Law Should Be Repealed*, *Justice Dept. Filing Distances Administration from Arguments that Angered Gays*, WASH. POST, Aug. 18, 2009, at A2; Jennifer Steinhauer, *House Republicans Step In to Defend Marriage Act and Dodge a Party Debate*, N.Y. TIMES, Mar. 5, 2011, at A16 (observing that “the Department of Justice was making a pretty tepid and halfhearted defense”).

72. Press Release, Dep’t of Justice, Statement of the Att’y Gen. on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html>. This statement is part of the Obama Administration’s multifaceted effort to promote same-sex marriage in federal law. See, e.g., Matthew Pomy, *DOJ Indicates Denying Same-Sex Couples Military Benefits Is Unconstitutional*, JURIST (February 19, 2012, 10:33 AM), <http://jurist.org/paperchase/2012/02/doj-inidcates-denying-same-sex-couples-military-benefits-is-unconstitutional.php> (“This is the latest in the Obama Administration’s fight for marriage equality. The ruling is likely to affect a suit . . . brought earlier this month over the denial of disability benefits to a same-sex spouse of a veteran.”).

73. See 142 CONG. REC. 17,094 (1996).

74. See *id.* at 22,467.

President Clinton signed DOMA without any veto threat or public criticism, and his DOJ opined that DOMA was constitutional.⁷⁵

DOMA was enacted to calm fears that if Hawaii (or any other state) legalized same-sex marriage, then some courts would force other states and federal agencies and programs to recognize those same-sex marriages.⁷⁶ Specifically, section 2 of the Act intended to provide federal protection against the growing threat that legalization of same-sex marriage in one state would lead to judicial rulings or executive decrees mandating that other states recognize same-sex marriage over objections of the people and lawmakers in those states.⁷⁷ The drafters of section 2 of DOMA wanted to prevent advocates of same-sex marriage from using federal law—particularly the Full Faith and Credit Clause of the Constitution, as well as federal statutes and choice of law doctrines—to compel recognition of same-sex marriage in resistant states.⁷⁸ The principal concern of DOMA’s drafters was to preserve the states’ authority over marriage recognition in the face of the pressures that were being exerted (under full faith and credit

75. Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1186 (2009) (contrasting the lack of public backlash to judicial decisions invalidating antimiscegenation laws with strong public backlash to judicial decisions mandating same-sex marriage).

76. See generally *The Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong. 23–42 (1996) [hereinafter *1996 Senate Hearing*] (statement of Lynn D. Wardle, Prof. of Law, Brigham Young Univ. Law Sch.); *Defense of Marriage Act, Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 225–26 (1996) [hereinafter *1996 House Hearing*] (statement of Jay Alan Sekulow, Chief Counsel, Am. Ctr. for Law and Justice).

77. See *1996 Senate Hearing*, *supra* note 76; *1996 House Hearing*, *supra* note 76; H.R. REP. NO. 104-664, at 2, 6–10 (1996), reprinted in 1996 U.S.C.C.A.N. 2905.

78. Congress was informed that many advocates of same-sex marriage were arguing that the Full Faith and Credit Clause would compel other states to recognize same-sex marriages performed in any state. See *1996 House Hearing*, *supra* note 77, at 181–83 (statement of Lynn D. Wardle, Prof. of Law, Brigham Young Univ. Law Sch.) (citing Barbara J. Cox, *Same Sex Marriage and Choice of Law: If We Marry in Hawaii Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033, 1041 n.23; Deborah M. Henson, *Will Same Sex Marriages Be Recognized in Sister States? Full Faith and Credit and Due Process Limitations on States’ Choice of Law Regarding the Status and Incidents of Homosexual Marriage Following Hawaii’s Baehr v. Lewin*, 32 U. LOUISVILLE J. FAM. L. 551, 584 (1993–94); Nancy Klingeman & Kenneth May, *For Better or For Worse, in Sickness and in Health, Until Death Do Us Part: A Look at Same-Sex Marriage in Hawaii*, 16 U. HAW. L. REV. 447 (1994); Habib A. Balian, Note, *Til Death Do Us Part: Granting Full Faith & Credit to Marital Status*, 68 S. CAL. L. REV. 397, 401, 406–08 (1995)); see also *1996 Senate Hearing*, *supra* note 77, at 3 (statement of Sen. Orrin Hatch) (a purpose of the bill is to “ensure that no one State can dictate how every other State must treat” same-sex marriages); *id.* at 24 (statement of Lynn D. Wardle, Prof. of Law, Brigham Young Univ. Law Sch.) (DOMA is necessary to prevent the “use of Federal authority to force unwilling States to recognize same-sex marriage or to impose same-sex marriage on Federal law without the approval of Congress”); *id.* at 31 (“[Q]uite a number of same-sex marriage advocates have written law review articles asserting that if Hawaii or any other state legalizes same-sex marriage, all other states would be required by the Full Faith and Credit Clause of the Constitution to recognize same-sex marriage.”); *1996 House Hearing*, *supra* note 77, at 221–27 (statement of Jay Alan Sekulow, Chief Counsel, Am. Ctr. for Law and Justice) (citing several other examples of same-sex marriage advocates asserting that they will expect same-sex marriages done in Hawaii to be recognized in other states).

and choice of law arguments) to force resistant states to recognize same-sex marriages involuntarily.⁷⁹ DOMA was intended to protect and preserve the historic and constitutionally reserved right of each state *to decide for itself* whether, and, if so, when and how, to recognize domestic relationships, including same-sex marriages.⁸⁰

The Act simply codified long settled understanding and precedents that allowed states to decide for themselves whether to recognize controversial domestic relations created in other states.⁸¹ Accordingly, section 2 of DOMA specifically preserved and protected state autonomy for marriage recognition, allowing each affected state to choose for itself whether or not to recognize same-sex marriages validly contracted in other states.⁸² It clarified the interstate marriage recognition issue that had been created when many same-sex marriage advocates had asserted, in law review articles and elsewhere, that if one state legalized same-sex marriage, all other states would be required to recognize such marriages under the Full Faith and Credit Clause or choice of law principles.

Section 3, likewise, was intended to preserve and protect the jurisdictional self-determination regarding same-sex marriage—specifically to preserve the authority of Congress to determine whether, and, if so, when and how, to recognize same-sex marriages for purposes of federal laws and programs.⁸³ Just as section 2 confirmed the authority of the individual states to determine for themselves whether to recognize same-sex marriage, section 3 reaffirmed that Congress would determine for itself whether, when, and to what extent to recognize same-sex marriages in federal laws and programs.

79. H.R. REP. NO. 104-664, at 2 (1996) (“H.R. 3396 [DOMA] is a response to a very particular development in the State of Hawaii. . . . [It] threatens to have very real consequences both on federal law and on the laws (especially the marriage laws) of the various states.”); *id.* at 6–7 (“[DOMA] is inspired . . . by the implications that [the *Baehr v. Lewin*] lawsuit threatens to have on the other States and on federal law.”); *id.* at 7 (“Simply stated, the gay rights organizations and lawyers driving the Hawaiian lawsuit have made plain that they consider Hawaii to be only the first step in a national effort to win by judicial fiat the right to same-sex ‘marriage.’ And the primary mechanism for national [same-sex marriage] . . . will be the Full Faith and Credit Clause of the U.S. Constitution.”) (citing Memorandum by Evan Wolfson, Director of the Marriage Project, Lambda Legal Defense and Education Fund, Inc., *Winning and Keeping Equal Marriage Rights: What Will Follow Victory in Baehr v. Lewin?* 2 (Mar. 20, 1996)).

80. See Wardle, *Who Decides?*, *supra* note 52, at 149.

81. See Wardle, *supra* note 16 (reviewing the history of state recognition of controversial domestic relations from other jurisdictions and of nonrecognition when deemed contrary to a strong state policy). The *Williams* cases are distinguishable because they involved interjurisdictional recognition of a judicial decree (divorce) rather than of a state administrative act (marriage), and there was no Congressional directive applicable in *Williams*.

82. See Linda J. Silberman, *Rethinking Rules of Conflict of Laws in Marriage and Divorce in the United States: What Can We Learn from Europe?*, 82 TUL. L. REV. 1999, 2002–03 (2008).

83. Wardle, *Section Three of DOMA*, *supra* note 52; Wardle, *Who Decides?*, *supra* note 52.

DOMA “did not change the existing law” regarding horizontal or vertical recognition of domestic relationships, “but merely codified the long-established federal choice of law rule and full faith and credit principle that states may choose for themselves whether to recognize” particular types, kinds, or forms of “marriages, validly contracted in other states.”⁸⁴ While Congress arguably had the power to forbid the interstate recognition of same-sex marriage, the language of both sections “underscores the structural focus of the provision as well as its neutrality.”⁸⁵ It only shielded each state and the federal government against coerced recognition of same-sex marriages; it did not prohibit any state or Congress from voluntarily recognizing same-sex marriages contracted in other states.

As Patrick Borchers, former Dean of Creighton Law School, observed, “Sometimes ideas gain momentum through repetition. The idea that the Full Faith and Credit Clause would require national recognition of a same-sex marriage solemnized by one state is apparently one of them. . . . [However,] this is a very dubious assertion.”⁸⁶ Similarly, Professor Emily Sack of Roger Williams University School of Law has noted that even “[o]pponents of [DOMA] . . . argued it was unnecessary because the Constitution itself would not require states to give the same-sex marriages recognition.”⁸⁷ There is little serious or credible argument that section 2 of DOMA is unconstitutional. The power of Congress to set standards for the interstate recognition of sister-state laws, records, and judgments (including those relating to family relations) is too clearly expressed in the Constitution, too long established, and too frequently used and approved to be brushed aside with feeble, outcome-determined arguments.⁸⁸ As Yale Law Professor Lea Brilmayer explained when she testified before Congress:

Although some people have expressed skepticism about whether DOMA is constitutional, these are mostly people whose expertise lies outside the area of conflict of laws. Even most lawyers are not fully familiar with the history of congressional implementation of the Full Faith and Credit Clause, and they underestimate the latitude it gives to adopt legislation.

84. Wardle, *Who Decides?*, *supra* note 52, at 151.

85. *Id.* at 152.

86. Patrick J. Borchers, *The Essential Irrelevance of the Full Faith and Credit Clause to the Same-Sex Marriage Debate*, 38 CREIGHTON L. REV. 353, 353 (2005).

87. Emily J. Sack, *Domestic Violence Across State Lines: The Full Faith and Credit Clause, Congressional Power, and Interstate Enforcement of Protection Orders*, 98 NW. U. L. REV. 827, 889 (2004) (“[S]ome advocates and scholars on both sides of the DOMA debate acknowledged that due to the ‘public policy exception,’ other states with connection to the parties likely would not have to recognize same-sex marriages from another state.”).

88. *See generally* U.S. CONST. art. IV; 28 U.S.C. § 1738A (2006) (granting full faith and credit to child custody determinations as part of the Parental Kidnapping Prevention Act); § 1738B (full faith and credit for child support orders); Borchers, *supra* note 16, at 147; Hogue, *supra* note 16, at 29; Ralph U. Whitten, *Full Faith and Credit for Dummies*, 38 CREIGHTON L. REV. 465 (2005).

Constitutional power to enact such legislation is found in Article IV itself.⁸⁹

B. DOMA, Federalism, and Alternatives to American-Style Federalism in Family Law

The purpose of DOMA, particularly section 3, is to preserve and support federalism.⁹⁰ Federalism serves many important purposes in our constitutional system of democratic government. It controls, restrains, and prevents abuse of government power. It promotes democracy and protects individual liberty. It respects and preserves local authority and grassroots democracy. It fosters diversity and protects minorities. Indeed, the architecture of federalism is an integral part of our constitutional system.⁹¹

The drafters of DOMA reasonably believed that federalism in family law was threatened by efforts to promote the legalization of same-sex marriage. They heard and feared claims that federal judges and other officials would interpret federal laws and programs so as to mandate the legalization and recognition of same-sex marriage in those federal laws and programs, and also in state laws and programs. They also heard and feared claims that if any state legalized same-sex marriage then all other states would have to recognize same-sex marriages performed in that state. Thus, they had concerns about both vertical and horizontal federalism and about the cognate power diffusion principle of separation of powers. Consequently, they enacted section 2 of DOMA to clarify that federal law does not require any state to recognize (or not to recognize) out-of-state same-sex marriages;

89. *Judicial Activism vs. Democracy: What are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws?: Hearing Before the Subcomm. on the Constitution, Civil Rights, & Property Rights of the S. Comm. on the Judiciary*, 108th Cong. 70 (2004) (statement of Lea Brilmayer, Prof. of Law, Yale Law Sch.), available at <http://www.access.gpo.gov/congress/senate/pdf/108hr/96924.pdf>; see also Lea Brilmayer, *Full Faith and Credit*, WALL ST. J., March 9, 2004, at A16.

90. See Wardle, *Section Three of DOMA*, *supra* note 52, at 974–76.

91. See Jonathan H. Adler, *Interstate Competition and the Race to the Top*, 35 HARV. J.L. & PUB. POL'Y 89, 89 (2012) (“Federalism is an essential part of the Constitution’s design. The division of sovereign power between the States and the federal government helps foster interjurisdictional competition, which, in turn, checks government power.”); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 428 (1998) (“Under existing doctrine, federalism acts largely as a side constraint on legislation of national scope. In contrast, in democratic experimentalism, federalism is an essential ingredient of the national framework.”); Edward A. Fallon, *Charters, Compacts, and Tea Parties: The Decline and Resurrection of a Delegation View of the Constitution*, 45 WAKE FOREST L. REV. 1067, 1074 (2010) (“[A] general distrust of centralized power is an integral part of the constitutional design. . . . [T]his recognition elevates the principles of federalism and separation of powers to the level of basic constitutional commands, even though these principles are not explicitly referenced by the text of the Constitution.”); John F. Manning, *Essay, Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 403 (2010) (noting that there are some “‘underenforced constitutional norms’—principles such as the separation of powers and federalism, which are integral to the constitutional scheme but whose details often cannot be convincingly articulated at the level of individual cases”).

that is up to the states to decide for themselves, and section 3 was enacted to clarify that federal law does not recognize same-sex marriages (at least until Congress itself chooses to change that law). They protected and reinforced the states' and Congress's respective rights to decide the interjurisdictional recognition of same-sex marriage issue, confirming that such a controversial issue should be decided by those with the proper authority within the jurisdiction most directly affected by the issue.

The most commonly discussed federalism concern regarding family law is preserving state primacy of control over the direct regulation of domestic relations. The federal regulation of domestic relations has mushroomed in recent decades as part of the ongoing shift of government powers from the states to the federal government.⁹² As University of Virginia Law Professor Kenneth R. Redden wrote nearly thirty years ago, "For two centuries American lawyers could safely rely on state law alone in their advice to clients on a domestic relations matter. This is no longer possible since a vast new body of federal law (judicial, legislative and administrative) has just been created in the last two decades."⁹³ Much recent discussion of federalism occurs as a reaction to this development.

However, the federalism issue concerning section 3 of DOMA is unique in two respects. Rather than respecting the authority of each jurisdiction to regulate domestic relations in its own sphere (e.g., Massachusetts in Massachusetts law, Utah in Utah law, the federal government in federal law), opponents of DOMA seek to impose the law of one jurisdiction upon another jurisdiction (e.g., imposing the law of Massachusetts on the federal government's agencies and programs). And rather than top down jurisdiction, such as where the federal government imposes its laws upon the citizens of the various states, it is upside down, in that a minority of states are seeking to impose their controversial redefinition of marriage upon the federal government (and sister states). This is violative of the sovereign spheres of separate governments.

It is ironic that opponents of section 3 of DOMA now are arguing that federalism is weakened or impaired by DOMA. Their goal is to pressure, coerce, and force the states into legalizing same-sex marriage by the use of federal power. They intend to have "marriage" defined to include same-sex unions for purposes of federal programs that are administered in the states. Because such federal programs are intertwined with and integral to state law and programs, the legalization of same-sex marriage for purposes of federal programs will create major administrative problems for the states (the problems complained of by the Commonwealth of Massachusetts in its

92. See generally Collins, *supra* note 53; Linda Henry Elrod, *The Federalization of Child Support Guidelines*, 6 J. AM. ACAD. MATRIMONIAL LAW. 103 (1990); Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J.L. & PUB. POL'Y 267 (2009); Hasday, *supra* note 53; Sylvia Law, *Families and Federalism*, 4 WASH. U. J.L. & POL'Y 175 (2000); Robert G. Spector, *The Nationalization of Family Law: Introduction to the Manual for the Coming Age*, 27 FAM. L.Q. 1 (1993).

93. KENNETH R. REDDEN, *FEDERAL REGULATION OF FAMILY LAW* v (1982).

challenge to DOMA).⁹⁴ Consequently, such administrative burdens may pressure some states into legalizing same-sex marriage. American federalism is designed to prevent precisely this power dynamic, wherein the national government exercises its heavy-handed influence upon the states.

However, federalism is two-edged. So long as states and the federal government can adopt different definitions of marriage for purposes of their respective laws and programs, some disparity and conflict is inevitable.⁹⁵ Currently, the burden of this discrepancy falls upon the small minority of states that have legalized same-sex marriage, who are now trying to force the national government to recognize or adopt their definitions of marriage for the purposes of federal programs. The attempt of these states to gain federal recognition of same-sex marriage occurs, at least in part, because the present difference in standards and definitions of marriage creates administrative problems for these states, which provides an incentive for those states to abandon same-sex marriage and for other states not to recognize same-sex marriage. On the other hand, if they succeed and the federal government recognizes same-sex marriages, the administrative burdens of disharmony between state marriage law and federal marriage law (which, as noted, is the core complaint of the plaintiffs in the suits against DOMA) could switch and be thrust upon the majority of states that have declined to recognize same-sex marriage, providing an incentive for them to adopt same-sex marriage for purposes of administrative convenience in interacting with federal programs.

Federalism is the source of the problem from either perspective.⁹⁶ Today, about two-dozen nations in the world employ some form of federalism,⁹⁷ but they differ widely in form, structure and substance.⁹⁸ So

94. *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234, 239–44 (D. Mass. 2010), *aff'd*, 682 F.3d 1 (1st Cir. 2012) (describing problems imposed on the state by discrepant federal-state programs for veterans and medical assistance).

95. *See supra* note 16 and accompanying text; *see also* Carlton M. Smith & Edward Stein, *Dealing with DOMA: Federal Non-Recognition Complicates State Income Taxation of Same-Sex Relationships*, 24 COLUM. J. GENDER & L. (forthcoming 2012). For further information, see Wardle, *supra* note 15, at 222–49 (discussing the history and purpose of federalism in family law).

96. “Federalism is a form of government in which sovereign powers are constitutionally divided between a central government and geographically defined, semi-autonomous levels of government.” Keith S. Rossen, *Federalism in the Americas in Comparative Perspective*, 26 U. MIAMI INTER-AM. L. REV. 1, 5 (1994). “[T]he essential characteristics of federalism can be reduced to two: (1) constitutional division of powers between the central and regional levels of government, and (2) entrenched regional representation in the central government.” *Id.*

97. *Federalism by Country*, FORUM FEDERATIONS, http://www.forumfed.org/en/federalism/by_country/index.php (last visited Oct. 20, 2012) (listing twenty-four nations as having federalist forms of government and two other nations that are transitioning to federalism).

98. John Kincaid, *Comparative Observations*, FORUM FEDERATIONS 11 (2005), available at http://www.forumfed.org/libdocs/Global_Dialogue/Book_1/BK1-C13-co-Kincaid-en.pdf. For instance, some federal governments are very centralized, while others (like India, Russia, and Nigeria) allow for concurrent regulation by the national and state or provincial governments of specific subjects, including family law. *Id.*

the real question is whether the American style of federalism—especially federalism in family law—should be preserved or replaced with a more robust form of nationalism in family law or a more robust form of states’ rights in family law. The three principal options in terms of power allocation in a federal system are: (1) to become more national; that is, to have all (or mostly all) domestic relations regulated by Congress and the federal government, such that states become more like mere administrative subdivisions of the unitary national government, forcing states to conform to and implement federal definitions and regulations of domestic relations in state laws;⁹⁹ (2) to recognize a stronger version of state sovereignty and total state supremacy in family law whereby the national government must always adopt, recognize, and apply state definitions and regulations of family law in federal laws;¹⁰⁰ or (3) to preserve the historic uneasy balance of American federalism in which states have plenary authority to define and regulate domestic relations for purposes of state law (family law), while the national government has plenary (sometimes conflicting) authority to define and regulate domestic relations for purposes of federal laws and programs (e.g., federal immigration, military benefits, social security),¹⁰¹ which has the constant potential for some conflict and inconsistency between how family is defined by the national government for purposes of federal law and how it is defined locally for purposes of state family law.

There are some advantages and disadvantages to each approach.¹⁰² The most popular form of national federalism in the world today is Option (1),¹⁰³ but Option (2) is a conceptual possibility, and some argue that the

99. This can be called “centralized federalism.”

100. This can be called “diffused federalism,” and opponents of section 3 of DOMA articulate a version of it. *See generally* Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787 (1995); Hasday, *supra* note 53.

101. This can be called “balanced federalism.” *See generally* Estin, *supra* note 92; Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825 (2004) (state and federal authorities both exist in the “family law canon”).

102. *See generally* Abe R. Gluck, Essay, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534 (2011) (focusing on federalism in statutory interpretation, and offering a very thorough and elucidating review of many federalism theories and approaches—including my favorite, “entrenchment through polycentricity”). Others, including

[William] Eskridge and [John] Ferejohn, for example, emphasize the importance of dialogic deliberation in statutory interpretation and implementation, a process they believe must be ‘complicated, polycentric, experimental, forward-looking, [and] problem-solving’ to succeed. They and other scholars have argued that federal agencies are the central players in this story, surrounded by a supporting cast of partners in Congress and the federal judiciary who engage them in dialogue along the way.

Id. at 568–69 (quoting WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 21 (2010)).

103. For example, in Canada the federal government regulates substance and the provinces regulate form. *See* Rossen, *supra* note 96, at 11–12 (noting that the Canadian Constitution, designed “to correct what they deemed a major flaw in U.S. Federalism, the weakness of the federal government,” gives the Canadian national government “the power to regulate areas traditionally regarded as reserved to the U.S. states, such as criminal law, marriage and divorce”). For Switzerland, see Barbara Graham-Sietenthaler, *International*

relative power of the states is increasing and should grow in some discrete areas of the law.¹⁰⁴ However, both of these alternatives sacrifice the unique style of balanced American federalism (Option 3) that has worked well to preserve a balance of power between the national and state governments for over two centuries, and to prevent the overconcentration of power in one branch or level of government that was a core concern and major achievement of the drafters of our Constitution.¹⁰⁵

The Supreme Court has declared, “[O]ur federalism is not Europe’s. It is ‘the unique contribution of the Framers to political science and political theory.’”¹⁰⁶ Justice Kennedy expressed it well when he noted that

[American] Federalism was our Nation’s own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.¹⁰⁷

Thus, “[w]e live under a unique concept of federalism and divided sovereignty between the nation and fifty States.”¹⁰⁸ Whether America’s unique style of federalism in family law will endure is a core conceptual constitutional question that is at issue, albeit concealed, in litigation over section 3 of DOMA.

Marriage and Divorce Regulation and Recognition, 29 FAM. L.Q. 685, 685–86 (1995) (marriage law is regulated by the Swiss Civil Code). For Australia, see AUSTRALIAN CONSTITUTION S 51 (Parliament has power to make laws concerning marriage). For Brazil, see CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 226 (Braz.) (the Brazilian Constitution gives protection to the institution of marriage). For Germany, see BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Jan. 2, 2002, BUNDESGESETZBLATT, Teil I [BGBL. I] 255–63, as amended, §§ 1297–1362, available at http://www.gesetze-im-internet.de/englisch_bgb/german_civil_code.pdf (marriage law is regulated by the German Civil Code).

104. See generally Scott Obernberger, *When Love and Abuse Are Not Mutually Exclusive: The Need for Government Intervention*, 12 ISSUES L. & MED. 355 (1997) (noting increased state intervention into family life under broadly-drafted state statutes); Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619, 1622–24 (2008) (noting the increase in state regulation of immigration); Peter Micek, Comment, *A Genealogy of Home Visits: Explaining the Relentless Search for Individualized Information Without Individual Suspicion*, 44 U.S.F.L. REV. 1007, 1015 (2010) (states have growing power over certain welfare issues).

105. See Wardle, *supra* note 15, at 224–34.

106. *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997) (quoting *United States v. Lopez*, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring)).

107. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

108. *Delaware v. Van Arsdall*, 475 U.S. 673, 704 (1986) (Stevens, J., dissenting) (quoting *State v. Ball*, 471 A.2d 347, 350 (N.H. 1983)).

IV. EFFORTS TO LEGISLATIVELY REPEAL OR JUDICIALLY INVALIDATE DOMA

Part IV provides an overview of Congressional efforts to repeal DOMA and litigation efforts to have DOMA declared unconstitutional. It begins by noting some significant errors in the First Circuit's opinion in *Massachusetts*. Next, it explains why certain states justifiably insist that marriage is exclusively the union of a man and a woman, and does not include the union of two persons of the same gender. In so doing, it asserts that the "thick" historical understanding of marriage deserves and requires special protection and exclusive recognition in our law, and that the "thin" conception of marriage, that seems to be increasingly popular in some quarters of American culture today is wholly inadequate to meet the needs of American families and society. Finally, it discusses how the federal legalization of same-sex marriage and the resulting forced recognition of same-sex marriages by the states would violate core principles of federalism.

A. Legislative Politics: Efforts to Repeal DOMA in Congress

Opponents of DOMA have expended great political effort to repeal the Act.¹⁰⁹ However, their efforts have not gotten any significant traction to date. It is clear that DOMA's detractors have never had the votes to repeal DOMA, and presently do not have the votes, even in the Democrat controlled Senate. It seems unlikely, therefore, that Congress will repeal DOMA in the near future. The Democrats, who currently generally favor repeal of DOMA, have controlled the executive branch under President Obama for nearly four years, have controlled the Senate for the same four years, and simultaneously controlled both houses of Congress for two of those years. Yet, they have not even brought a bill to repeal DOMA to the floor for a vote in the Senate,¹¹⁰ and the repeal bill in the House is idle in a subcommittee.¹¹¹ Accordingly, most political observers report that Congress is unlikely to repeal DOMA in the foreseeable future.¹¹²

109. See Wardle, *Section Three of DOMA*, *supra* note 52, at 960–64.

110. The DOMA repeal bill in the Senate was passed by the Senate Judiciary Committee and has been placed on the Senate Legislative Calendar. See *Bill Summary and Status, 112th Congress (2011–2012)*, S.598, LIBR. CONG., <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:SN00598>: (last visited Oct. 20, 2012).

111. *Bill Summary and Status, 112th Congress (2011–2012)*, H.R.1116, LIBR. CONG., <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:h.r.1116>: (last visited Oct. 20, 2012). The Subcommittee on the Constitution of the House Judiciary Committee is responsible for the DOMA repeal bill in the House of Representatives.

112. See Jessica Brady, *Democrats Eyeing DOMA Repeal*, ROLL CALL (Oct. 19, 2011, 12:00 AM), http://www.rollcall.com/issues/57_44/Democrats-Eyeing-DOMA-Repeal-209583-1.html (contrasting the unlikely DOMA repeal with the more bipartisan and strategic effort to repeal "Don't Ask Don't Tell," and noting that Senator Feinstein has admitted that the repeal does not have the votes for passage, even in the Senate); see also Constance Gilchrest, *Cobra Legislative Review Foreshadows its Future*, MANDATED HEALTH BENEFITS—THE COBRA GUIDE, Sept. 2011, at 1, 7, available at [http://service.bureaus.infinisource.com/Infinisource/Benefit_Resources/Published-Articles/Thompson%](http://service.bureaus.infinisource.com/Infinisource/Benefit_Resources/Published-Articles/Thompson%209583-1.html)

That said, the opponents of DOMA who are working to repeal the law through the legislative process deserve to be commended for their attempt to reform or repeal the law in the right way—the way it was enacted—by legislation. DOMA was created by Congress, and, if it is to be changed, it is Congress’s responsibility and prerogative to decide if, when, and how. Since Congress is accountable to the voters, the apparent reluctance of Congress to repeal DOMA suggests something about voter and popular sentiment in America regarding recognition of same-sex marriages from other jurisdictions.

B. Efforts to Invalidate DOMA in the Courts

Chances for DOMA to be judicially overturned are greater. Before 2009 (when the Obama administration took over the defense of DOMA), the DOJ had successfully defended DOMA for thirteen years. No court had invalidated DOMA, and it had been upheld as constitutional in at least five federal court decisions in four different federal court cases challenging section 3 of the Act.¹¹³ In the three and a half years since the Obama administration took over the defense of DOMA and ceased defending it competently, at least five federal courts have ruled that section 3 of DOMA is unconstitutional.¹¹⁴

2011-09%20(Connie-COBRA%20Legislative%20Review).pdf (“The chances of the . . . DOMA-repeal bills passing on their own are unlikely.”); Carolyn Lochhead, *Feinstein’s Bill to Repeal DOMA Clears Committee*, S.F. CHRON. (Nov. 11, 2011), <http://www.sfgate.com/politics/article/Feinstein-s-bill-to-repeal-DOMA-clears-committee-2323680.php> (acknowledging that, despite getting out of the Senate Judiciary Committee, the bill to repeal DOMA “stands little chance of overcoming opposition from Republicans,” not to mention the likely opposition of Democrats in conservative-leaning states); Humberto Sanchez, *DOMA Repeal Might Fail, but Backers Cite its Progress*, ROLL CALL (Nov. 1, 2011, 12:00 AM), http://www.rollcall.com/issues/57_51/Defense_of_Marriage_Act_Repeal_Vote_Set-209905-1.html.

113. See *Smelt v. Cnty. of Orange*, 447 F.3d 673 (9th Cir. 2006) (affirming dismissal of section 2 claim and remanding to dismiss section 3 claim on the merits); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004); see also *Smelt v. United States*, No. SACV 09-00286 Doc (MLGx) (C.D. Cal. Aug. 24, 2009), available at <http://www.scribd.com/doc/19079566/Order-Dismissing-Smelt-v-United-States-of-America> (Order Granting Defendant’s Motion to Dismiss). But see *In re Levenson*, 560 F.3d 1145 (9th Cir. 2009) (administrative decision holding that DOMA was improper).

114. See *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 974 (N.D. Cal. 2012) (holding DOMA unconstitutional); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 397 (D. Mass. 2010) (holding section 3 of DOMA unconstitutional under the Equal Protection Clause), *aff’d*, 682 F.3d 1 (1st Cir. 2012) (DOMA violates federalism and Equal Protection); *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234, 249, 253 (D. Mass. 2010) (holding that DOMA violates the Tenth Amendment by improperly infringing state authority to regulate marital status as a sovereign attribute of statehood), *aff’d*, 682 F.3d 1 (1st Cir. 2012) (DOMA violates federalism and Equal Protection); *In re Balas*, 449 B.R. 567, 579 (Bankr. C.D. Cal. 2011) (holding that DOMA violates the Equal Protection rights under the Due Process Clause of the Fifth Amendment); see also *Dragovich v. U.S. Dep’t of the Treasury*, No. C10-01564, 2012 WL 1909603, at *13 (N.D. Cal. 2012) (DOMA violates the Equal Protection Clause).

Sadly, the recent judicial opinions invalidating DOMA fall below the usual standard of quality of the federal courts in terms of legal writing and analysis.¹¹⁵ They are notably deficient in their historical, precedential and doctrinal thoroughness, as well as their accuracy and legal reasoning. In fairness to the courts, it must be noted that the DOJ provided only an ineffective and politically hamstrung defense of the Act,¹¹⁶ ultimately refused to defend the law altogether,¹¹⁷ and even has conceded that DOMA violates the Equal Protection Clause.¹¹⁸ Therefore, the substandard quality of the resulting judicial opinions may well be due in no small part to the current DOJ's inadequate defense of DOMA, as federal courts generally rely upon the lawyers' briefs and memoranda in reaching and writing their opinions.

C. The First Circuit's Deficient Opinion in Massachusetts v. Department of Health and Human Services

The non-defense of DOMA by the DOJ, however, does not totally explain or excuse the frustratingly deficient quality of judicial craftsmanship in the opinions holding that DOMA is unconstitutional. Indeed, as if to say that the Obama administration's abandonment of the defense of DOMA did not matter, the First Circuit in *Massachusetts* relied on its own independent exercise of judicial notice as the basis for its description of the "legislative purpose and 'legislative facts' bearing upon the rationality" of the Act.¹¹⁹ Sadly, the court's description of those legislative aims and facts does the court no credit. Although the court's opinion, affirming two lower court decisions holding that DOMA is unconstitutional under principles of equal protection and federalism, is readable and is judicially moderate in tone, it is less than moderate or credible in substance. As outlined below, the First Circuit's opinion is marred by inaccurate findings, unsupported holdings, unreliable statements, and a refusal to acknowledge or engage the critical arguments and evidence.

(1) For example, the opinion summarizes section 2 of DOMA by declaring that it "absolves states from recognizing same-sex marriages

115. For a critique of the defects of the First Circuit decision, see *infra* Part IV.C. For criticism of the two federal district court opinions in *Massachusetts* and *Gill* see Wardle, *Section Three*, *supra* note 51, at 967–73.

116. See *supra* notes 71–72 and accompanying text.

117. See *supra* notes 71–72 and accompanying text.

118. After filing a brief defending DOMA, the DOJ "filed a revised brief arguing that the equal protection claims should be assessed under a 'heightened scrutiny' standard and that DOMA failed under that standard." *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 7 (1st Cir. 2012); see also Chris Johnson, *Justice Dept. Brief Against DOMA Lauded as "Watershed Moment,"* WASH. BLADE (July 6, 2011), <http://www.washingtonblade.com/2011/07/06/justice-dept-brief-against-doma-lauded-as-watershed-moment/> (noting that the DOJ's brief argued that DOMA should be subject to heightened scrutiny and should be held unconstitutional because, in the view of the DOJ, LGBT people are a suspect class and DOMA was enacted out of animus toward LGBT individuals).

119. *Id.* at 7.

solemnized in other states.”¹²⁰ That is simply not true. To “absolve” means “to set free from an obligation.”¹²¹ The statement therefore assumes that without DOMA states are obliged to recognize same-sex marriages, a patently false description of the existing legal obligations under both conflict of laws and constitutional (Full Faith and Credit Clause) law.¹²² Moreover, section 2 of DOMA declares only that states shall not be required (forced) to recognize same-sex marriages from other states.¹²³

(2) Typical of judicial decisions that impose recognition of same-sex marriage, the First Circuit takes liberties with the data. For instance, it concludes that “[t]he number of couples thus affected [by the refusal to recognize same-sex marriages in federal law] is estimated at more than 100,000.”¹²⁴ However, as noted in Part I.D of this Article, while over 130,000 American same-sex couples self-reported as married on the 2010 Census, the Williams Institute data shows that the majority of such couples (perhaps close to 100,000) apparently entered into such marriages outside of their own state of domicile.¹²⁵ The validity of such “evasive” same-sex marriages (and of any claim they might make to federal benefits based upon them) is extremely dubious under current state law and the well-established choice of law public policy exception applicable to marriage recognition.¹²⁶ While nearly 33,000 same-sex couples with strong claims to marriage validity is enough to make the point, somehow the court, disappointingly, could not refrain from overstating the data. Alternatively, there is an even more disturbing and extreme possible implication of the court’s use of the inflated “more than 100,000” figure: it might be read to suggest that even

120. *Id.* at 6.

121. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 5 (11th ed. 2004).

122. *See, e.g.*, Borchers, *supra* note 86, at 357; L. Lynn Hogue, *Examining a Strand of the Public Policy Exception with Constitutional Underpinnings: How the “Foreign Marriage Recognition Exception” Affects the Interjurisdictional Recognition of Same-Sex “Marriage,”* 38 CREIGHTON L. REV. 449, 450–53 (2005); Mark D. Rosen, *Why the Defense of Marriage Act Is Not (Yet?) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors That Determine What the Constitution Requires*, 90 MINN. L. REV. 915, 953–57 (2006); Linda J. Silberman, *Can the Island of Hawaii Bind the World? A Comment on Same-Sex Marriage and Federalism Values*, 16 QUINNIPIAC L. REV. 191, 202 (1996); Whitten, *supra* note 88, at 479–83.

123. *See generally* 28 U.S.C. § 1738C (2006) (“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.”).

124. *Massachusetts*, 682 F.3d at 6 (citing Press Release, U.S. Census Bureau, Census Bureau Releases Estimates of Same-Sex Married Couples (Sept. 27, 2011), available at http://www.census.gov/newsroom/releases/archives/2010_census/cb11-cn181.html).

125. *See supra* notes 24–25 and accompanying text.

126. *See, e.g.*, Richard S. Myers, *The Public Policy Doctrine and Interjurisdictional Recognition of Civil Unions and Domestic Partnerships*, 3 AVE MARIA L. REV. 531 (2005); Hogue, *supra* note 122; Wardle, *supra* note 16. *But see* Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921 (1998); Kramer, *supra* note 10.

invalid, evasive same-sex marriages must be deemed valid marriages for purposes of federal law—assuming the absence or invalidation of DOMA.

(3) The court stated that DOMA “passed with minimal hearings and lacking in formal findings.”¹²⁷ However, the full Judiciary Committee of the U.S. Senate held a hearing on the bill, as did the Subcommittee on the Constitution of the Committee on the Judiciary of the U.S. House of Representatives; together both hearings produced over 300 pages of testimony and congressional commentary.¹²⁸ Additionally, the Committee on the Judiciary of the House of Representatives produced a formal report providing, among other things, a statement of the purposes of the bill, the background and need for the legislation, committee considerations, and dissenting views.¹²⁹ The published Congressional committee records thus exceed 365 pages, not counting the vigorous debate on the bill in both houses of Congress recorded in the Congressional Record.¹³⁰ The adjectives “minimal” and “lacking” seem to more appropriately characterize the First Circuit’s legal research than the congressional hearings and deliberation.

(4) Moreover, the court rather dismissively and summarily limited the precedential impact of *Baker v. Nelson*,¹³¹ in which the Supreme Court summarily dismissed for want of a substantial federal question constitutional claims to force Minnesota to recognize same-sex marriage.¹³² The First Circuit correctly noted that “*Baker* is precedent binding on us unless repudiated by subsequent Supreme Court precedent,” and the Supreme Court’s summary dismissal “prevent[s] lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided” in such a case.¹³³ So far, so good. Then the First Circuit ended its discussion of *Baker*, concluding, “*Baker* does not resolve our own case but it does limit the arguments to ones that do not presume or rest on a constitutional right to same-sex marriage.”¹³⁴ This concluding declaration, unfortunately, is only half of the truth.

In the Minnesota courts, the plaintiffs in *Baker* relied on the same constitutional doctrines as in the First Circuit’s *Massachusetts* decision—both due process (claiming a “right” to same-sex marriage) and equal protection (arguing that the refusal to legalize same-sex marriage violated equality), and the Minnesota Supreme Court explicitly ruled on and rejected both claims.¹³⁵ The same-sex couple in *Baker* then appealed to the

127. *Massachusetts*, 682 F.3d at 8.

128. *1996 Senate Hearing*, *supra* note 77, at 1–78.

129. H.R. REP. NO. 104-664, at 1–45 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905.

130. *1996 Senate Hearing*, *supra* note 77 (82 pages); *1996 House Hearing*, *supra* note 77, at 3 (247 pages); H.R. REP. NO. 104-664 (45 pages).

131. 409 U.S. 810 (1972).

132. *Id.*

133. *Massachusetts*, 682 F.3d at 8.

134. *Id.*

135. *Baker*, 191 N.W.2d 185, 186–87 (Minn. 1971).

Supreme Court. Their jurisdictional statement raised three constitutional issues:

1. Whether [the state]’s refusal to sanctify appellants’ marriage deprives appellants of their liberty to marry and of their property without due process of law under the Fourteenth Amendment.
2. Whether [the state]’s refusal, pursuant to [its] marriage statutes, to sanctify appellants’ marriage because both are of the male sex violates their rights under the equal protection clause of the Fourteenth Amendment.
3. Whether [the state]’s refusal to sanctify appellants’ marriage deprives appellants of their right to privacy under the Ninth and Fourteenth Amendments.¹³⁶

Consequently, the U.S. Supreme Court’s dismissal of the appeal in *Baker* for want of a substantial federal question held that a jurisdiction’s refusal to give marital status to same-sex couples did not violate either the Due Process Clause or the Equal Protection Clause. Yet the First Circuit in *Massachusetts* struck down DOMA as a violation of Equal Protection for refusing to recognize same-sex marriage for purposes of federal law.¹³⁷ And it did so without any analysis of or attempt to distinguish the equal protection analysis in *Baker*.

(5) While purporting to reject “heightened scrutiny” the court “require[d] a closer than usual review.”¹³⁸ The accepted legal term for “closer than usual review” is “heightened scrutiny.” Calling heightened scrutiny by another name (e.g., “closer than usual review”) does not change the nature (or smell) of it. The court conceded that “[u]nder [the traditional] rational basis standard, the *Gill* plaintiffs cannot prevail.”¹³⁹ Yet under its anonymous and unidentified, elevated standard of scrutiny, the First Circuit held that section 3 of DOMA was unconstitutional.¹⁴⁰

Courts seriously transgress the separation of powers and popular sovereignty when they create new suspect classifications, invent new fundamental rights, or otherwise apply elevated scrutiny (under any label) in the absence of some clear constitutional text or constitutional consensus in the nation that strongly supports the preferential treatment of the claimed right or classification. The fact that voters in thirty-two states have rejected same-sex marriage—thirty-one by adopting constitutional amendments banning same-sex marriage—shows the absence of the necessary constitutional consensus in the body of the sovereign people to require legal recognition of same-sex marriage. This also distinguishes the case from *Lawrence v. Texas*¹⁴¹ and *Romer v. Evans*,¹⁴² in which widespread state

136. Jurisdictional Statement for Appellants at 3, *Baker v. Nelson*, 409 U.S. 810 (1972) (No. 71-1027).

137. *Massachusetts*, 682 F.3d at 16.

138. *Id.* at 8.

139. *Id.* at 9.

140. *Id.* at 11–16.

141. 539 U.S. 558 (2003).

decriminalization of sodomy laws and the ubiquitous non-denial to gays and lesbians of usual civic and public privileges made the characterization of the Texas anti-sodomy law and the discriminatory Colorado provision glaringly isolated, marginal, and out of the mainstream of the American social consensus.

(6) The court justified its enhanced scrutiny because of the “discrepant impact among married couples.”¹⁴³ That is an oblique way of saying that it applied stricter scrutiny because the law draws a marriage distinction based on the classification of same-sex couples. While courts are certainly free to take the path less traveled, applying “closer than usual review” to same-sex marriage certainly qualifies as breaking with the precedents and leaving the beaten path. While two feeble state court efficacious rulings have held that classification based on same-sex unions requires heightened scrutiny,¹⁴⁴ as did one unreliable federal district court opinion of a potentially biased federal trial court judge in California (affirmed, nonetheless by the Ninth Circuit),¹⁴⁵ nearly all federal appellate courts have rejected the claim that enhanced or strict scrutiny should apply to legal distinctions based upon sexual orientation. As Dale Carpenter wrote in 2008:

Despite the academic consensus, and aside from some notable exceptions, like a vacated Ninth Circuit opinion more than a decade ago and a dissent from denial of certiorari by Justice Brennan in a case from the mid-1980s, federal and state judges have uniformly rejected heightened scrutiny for sexual orientation discrimination under equal protection principles.¹⁴⁶

142. 517 U.S. 620 (1996).

143. *Massachusetts*, 682 F.3d at 8.

144. *See Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008). These opinions were based on false and erroneous fundamental premises, including a “thin” description of what marriage is, and assumed that (1) the answer to the question about a right to same-sex marriage and that the desired benefits of marriage for couples and society accompany the legal label; (2) the lack of a nexus between the “thick” concept of marriage and child well-being; (3) the lack of harm to dual-gender marriage from legalizing same-sex marriage; and (4) the absence of negative impact upon religious liberties from legalizing same-sex marriage. *See Monte Neil Stewart, Jacob D. Briggs & Julie Slater, Marriage, Fundamental Premises, and the California, Connecticut, and Iowa Supreme Courts*, 2012 BYU L. REV. 193, 274–78.

145. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff’d*, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012); John Schwartz, *Conservative Jurist, With Independent Streak*, N.Y. TIMES, Aug. 6, 2010, at A10 (“Critics have argued that his sexual orientation was a source of bias . . .”); John C. Eastman, *Judge Walker Confirms Facts That Warrant Vacating Prop. 8 Ruling*, SFGATE (Apr. 11, 2011, 4:49 PM), <http://blog.sfgate.com/opinionshop/2011/04/11/judge-walker-confirms-facts-that-warrant-vacating-prop-8-ruling/> (“Not his sexual orientation, which alone would not require recusal, but the possibility that he could directly benefit from his ruling, raised the prospect that recusal may have been warranted. If the relationship was such that it gave Walker a financial or other interest in the outcome of the proceeding . . . recusal would be mandatory and non-waivable.”). The succeeding Chief Judge of the District Court denied a motion to vacate the judgment based on Judge Walker’s alleged bias. *See Perry v. Schwarzenegger*, 790 F. Supp. 2d 1119 (N.D. Cal. 2011) (Order Denying Defendant-Intervenors’ Motion to Vacate Judgment).

146. Dale Carpenter, *Sexual Orientation and Heightened Scrutiny in the California Marriage Decision*, VOLOKH CONSPIRACY (May 22, 2008, 11:02 AM), <http://www.volokh.com/posts/1211468552.shtml>. For further discussion of the standard of scrutiny applied to

As UCLA Law Professor Adam Winkler more recently noted, “Twice the Supreme Court has been asked to hold that discrimination against gay people warrants heightened scrutiny. And twice the Supreme Court has rejected that argument.”¹⁴⁷

(7) The court relied on three Supreme Court cases, *United States Department of Agriculture v. Moreno*,¹⁴⁸ *City of Cleburne v. Cleburne Living Center*,¹⁴⁹ and *Romer v. Evans*,¹⁵⁰ that applied “intensified scrutiny” “[w]ithout relying on suspect classification[.]”¹⁵¹ However, none of those cases required redefining marriage or any other preexisting social institution like marriage. All three cases are distinguishable because they all involved exclusions from existing government programs based on qualities unrelated to the purposes of the programs from which the individuals were excluded. Preserving the institution of marriage for dual-gender couples goes to the heart of what the legal recognition of marriage is all about. Legal marriage reinforces and protects the profound social benefits that flow from the stable, voluntary, gender complementary, long term unions of an unrelated man and woman in marriage.

(8) The court emphasized that in all three cases, the Supreme Court had “stressed the historic patterns of disadvantage suffered by the group adversely affected by the statute.”¹⁵² That statement takes some generous interpretative liberties with the “stressed the historic patterns” factor. For example, in *Moreno* the majority held that the “unrelated person” provision of the Food Stamp Act was both underinclusive and overinclusive in that it did not further the government purposes of preventing fraud or avoiding the subsidization of “hippie communes,”¹⁵³ but it did exclude those in need of the Food Stamp Act assistance (i.e., those the Act intended to assist) but who could not afford to change their economical shared living arrangements to become eligible.¹⁵⁴ Thus, contrary to what the First Circuit declared, the Supreme Court in *Moreno* did not, in any significant or discernible way,

same-sex marriage, see Jennie Croyle, *Perry v. Schwarzenegger, Proposition 8, and the Fight for Same-Sex Marriage*, 19 AM. U. J. GENDER SOC. POL’Y & L. 425, 430 (2011); William N. Eskridge Jr., *Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny*, 50 WASHBURN L.J. 1, 2 (2010) (“The better argument [against same-sex marriage] is that sexual orientation is not a suspect classification”); Nan D. Hunter, *Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 MICH. L. REV. 1528, 1529–30 (2004) (arguing that heightened scrutiny will involve greater intrusion into the privacy of gays and lesbians).

147. Adam Winkler, *Why Obama Is Wrong on DOMA*, HUFFINGTON POST (Feb. 24, 2011, 12:01 PM), http://www.huffingtonpost.com/adam-winkler/why-obama-is-wrong-on-dom_b_827676.html.

148. 413 U.S. 528 (1973).

149. 473 U.S. 432 (1985).

150. 517 U.S. 620 (1996).

151. *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 10 (1st Cir. 2012).

152. *Id.* at 11.

153. *See* *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534, 537 (1973).

154. *Id.* at 538.

“stress[] the historic patterns of disadvantage suffered by the group adversely affected.”¹⁵⁵

(9) The court played the rhetorical “penalty” card. DOMA’s refusal to recognize same-sex marriages in federal law, wrote the court, “will penalize those couples by limiting tax and social security benefits to opposite-sex couples.”¹⁵⁶ However, ineligibility for positive benefits and privileges conferred by federal law on valid dual-gender marriages, does not “punish” or “penalize” anyone. Those not eligible lose nothing they have or previously had. The lack of eligibility for entitlements is not a punishment or penalty. It is discrimination to be sure, but it cannot be fairly and honestly characterized as a penalty, since the ineligibility to receive a benefit or the denial of eligibility to qualify for a benefit, has no punitive or penal characteristics.

(10) The court begins its federalism analysis by declaring that “DOMA intrudes extensively into a realm that has from the start of the nation been primarily confided to state regulation.”¹⁵⁷ The last part of this statement correctly notes that under the general allocation of powers between the federal and state government, the regulation of domestic relations is constitutionally within the prescriptive jurisdiction of the states. However, the conclusory declaration that by declining to allow states to force federal government programs to treat same-sex marriages the same way that they treat dual-gender marriages DOMA “intrudes extensively” upon the state’s “realm” of regulatory authority to directly regulate “the domestic relations of husband and wife” at best raises the ultimate question, and, is simply inaccurate.¹⁵⁸ DOMA does not require (or forbid) any state to prohibit or to not recognize same-sex marriages. It does not dictate or intrude upon whether or how the states treat same-sex marriages for purposes of “the whole subject of domestic relations” that is under their regulatory authority.¹⁵⁹ Thus, marital status, and state-afforded incidents of marital status (such as benefits and privileges of state domestic relations law), obligations, and state law rights and duties of such status (e.g., support of and from spouses, co-ownership of property, interests upon divorce in marital or community property) are entirely unaffected by DOMA. It is much more accurate to state that section 3 of DOMA forbids the states from “intrud[ing] extensively into a realm that has from the start of the nation been primarily confided to [federal] regulation”—namely the determination of what persons are eligible for federal welfare, pension, tax, immigration and other federal benefits.¹⁶⁰

(11) The court tries to separate DOMA from the history of federal regulation of marriage by stating that “no precedent exists for DOMA’s

155. *Massachusetts*, 682 F.3d at 11.

156. *Id.*

157. *Id.* at 12.

158. *Id.*

159. *Id.*

160. *Id.* The substitution of “federal” here is meant to invert the court’s argument.

sweeping general ‘federal’ definition of marriage for all federal statutes and programs.”¹⁶¹ This is both historically inaccurate and misleading. Even the Supreme Court has contributed generously to a long settled, “sweeping general ‘federal’ definition of marriage,” as dual-gendered on multiple occasions.¹⁶² The Court discussed the “right to marry” in over sixty decisions in the first two centuries of Supreme Court jurisprudence.¹⁶³ Specifically, the Court has observed that marriage was “everywhere regarded as a civil contract”;¹⁶⁴ that it was “within the legitimate scope of the power of every civil government to determine” what form of marriage will be allowed within the jurisdiction of its regulatory authority;¹⁶⁵ that “necessary in the founding of a free, self-governing commonwealth” are laws that protect “the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony”;¹⁶⁶ that polygamy is proscribed in all enlightened nations because it tends “to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman, and debase man”;¹⁶⁷ that legislative regulation of marriage is important because marriage creates “the most important relation in life, [and has] more to do with the morals and civilization of a people than any other institution”;¹⁶⁸ that history and tradition are significant sources of determining legitimate definitions and regulations of marriage;¹⁶⁹ that the right to marry is among the “liberties” protected by the Fourteenth Amendment because it is one of the “privileges long recognized at common law as essential to the orderly pursuit of happiness by free men”;¹⁷⁰ that “[m]arriage and procreation are fundamental to the very existence and survival of the race”;¹⁷¹ and that

[m]arriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in [the Court’s] prior [fundamental liberty] decisions.¹⁷²

Furthermore, the Court has held that “[t]he Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not

161. *Id.*

162. *Id.*

163. See Lynn D. Wardle, *Loving v. Virginia and the Constitutional Right to Marry, 1790–1990*, 41 *How. L.J.* 289, 291 (1998).

164. *Meister v. Moore*, 96 U.S. 76, 78 (1877).

165. *Reynolds v. United States*, 98 U.S. 145, 166 (1878) (upholding the prohibition of polygamy).

166. *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885).

167. *Davis v. Beason*, 133 U.S. 341, 341 (1890).

168. *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

169. See Wardle, *supra* note 163, at 297.

170. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

171. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

172. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

marry, a person of another race resides with the individual and cannot be infringed by the State.”¹⁷³ These quotes, taken from Supreme Court decisions over the past 150 years, are only the tip of the iceberg of “sweeping and broad” general definitions and descriptions of marriage assuming or explicitly stating that it is dual-gendered. It is too late in the day to say that there has not been broad, sweeping, or even *constitutional* definitions of marriage (including the gender integration element¹⁷⁴) in federal law throughout our nation’s history.

(12) Moreover, an uncodified but long established legal tradition that only dual-gender marriages were recognized as marriages in federal (and state) law is the context for over two centuries of federal law regulating the meaning and kinds of marriage that are eligible for federal programs and benefits.¹⁷⁵ The record of federal judicial regulation is just the “tail” of the large federal “dog” of the broad and sweeping legislative and executive regulation of marriage, including the strong tradition of exclusive recognition of dual-gender marriages, for purposes of all federal programs and laws.¹⁷⁶ Congressional regulation of family relations for purposes of federal law is beyond dispute. In fact, the very next section after 1 U.S.C. § 7 (section 3 of DOMA, the provision at issue in *Massachusetts*), provides that

[i]n 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 words “person”, “human being”, “child”, and “individual”, shall include every infant member of the species homo sapiens who is born alive at any stage of development.¹⁷⁷

“Child” is a domestic relationship status normally regulated by state law. However, under DOMA, the survivor of an attempted abortion at any prenatal stage of development is defined as a “child” for purposes of all federal laws, notwithstanding any contrary state laws that may deny “child” status or protection to them. Consequently, the parents and abortion clinic

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

174. By “gender integration” is meant the integration, making one in marriage, of two persons of opposite genders. Marriage historically has been an important gender-integrating social and legal institution.

175. H.R. REP. NO. 104-664, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905 (“H.R. 3396, the Defense of Marriage Act, has two primary purposes. The first is to *defend the institution of traditional heterosexual marriage*. The second is to protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications” (emphasis added)); *see also id.* at 3 (“No State now or at any time in American history has permitted same-sex couples to enter into the institution of marriage.”).

176. Certainly the categorical descriptions of which legal determinations of parental status and rights, and “child[ren],” “child custody,” “child support,” for purposes of Full Faith and Credit are rather “sweeping” and “broad,” to mention just one similar example of federal domestic relations regulation. *See, e.g.*, 28 U.S.C. § 1738A (2006) (full faith and credit given to child custody determinations); *id.* at § 1738B (full faith and credit for child support orders). 28 U.S.C. § 1738C is section 2 of DOMA, and was not at issue in *Massachusetts*. 682 F.3d 1 (1st Cir. 2012).

177. 1 U.S.C. § 8(a) (2006).

staff who fail to provide the survivor “child” with medical assistance might be considered perpetrators of “child abuse” and “child neglect” for purposes of federal law, even if state law would not consider the survivor as a “child” (which is a relationship term, making the progenitors “parents,” for purposes of federal law, notwithstanding any state law to the contrary). Clearly, that is a “sweeping and broad” use of federal law to define a family relationship status for purposes of federal laws and programs.

(13) The First Circuit simply evaded and refused to consider the deep, long, rich, and undeniable history of federal law regulating the federal incidents, benefits, privileges, and obligations of family relationships—particularly marital status.¹⁷⁸ The failure to consider this huge body of evidence is especially disappointing. How can the court reach its conclusion that Congress has never done anything such as refuse to recognize same-sex marriage for purposes of federal law without even considering the evidence of what Congress has done in the past in deciding what kinds of marriages it will recognize for purposes of federal law? One expects from federal judges more willingness to engage the issues and evidence.

(14) The court correctly notes that in section 3 of DOMA “Congress merely defines the terms of the federal benefit.”¹⁷⁹ This concession is inconsistent with, if not a refutation of, the court’s earlier claim that DOMA “intrudes extensively” into the state realm of domestic relations regulation.¹⁸⁰ It is also inconsistent with, and a refutation of, the court’s conclusion that in DOMA “Congress [made an] effort to put a thumb on the scales and influence a state’s decision as to how to shape its own marriage laws.”¹⁸¹ In two sequential paragraphs, the court recognizes that Congress intended to (and indeed did) regulate only *federal* programs, but then it accuses Congress of really intending to nudge or coerce states into forbidding same-sex marriage.¹⁸² The court seems to lose grasp of the fact that in fulfilling its responsibilities to regulate federal programs and benefits, Congress must determine which marriages will be deemed proper and eligible for such federal programs, and that in doing so, the federal law (whatever it is) will have an unavoidable but fully legitimate, indirect influence upon parallel state programs that define marriage differently.

Consequently, there are several flaws in the court’s reasoning. First, recognizing the inevitability of DOMA’s (or any relevant federal law’s) ancillary impact on state programs is not an example of exerting illegitimate influence or putting a thumb on the scales. Second, the court refuses to consider that if Congress recognizes same-sex marriages for the purposes of federal laws and programs, then the inevitable effect of that federal policy could be to put its thumb on the scales and influence the states to adopt

178. *See supra* notes 64–65 and accompanying text.

179. *Massachusetts*, 682 F.3d at 12.

180. *Id.*

181. *Id.* at 12–13.

182. *See id.*

same-sex marriage. Meanwhile, the court's ruling is itself a big fist on the scales, and the collateral effects will be felt no matter the substance of the law. Third, certainly if Congress really had intended DOMA to nudge or pressure the states into not allowing same-sex marriage it could easily have done much more. For example, it might have provided in section 2 that same-sex marriages could not be recognized in other states (confining same-sex marriages to within state borders), rather than simply saying that the states could decide for themselves whether to recognize same-sex marriages or not.¹⁸³

(15) While expressly refusing to “rely upon the charge that DOMA’s hidden but dominant purpose was hostility to homosexuality,” the court suggests that the record shows an improper purpose, specifically to incorporate a forbidden moral viewpoint (“moral disapproval of homosexuality”) into the federal law.¹⁸⁴ A conspiracy theory lurks! And while theorizing about the immorality of basing federal laws on moral considerations (itself a moralistic endeavor), the court overlooks the fact that marriage is a moral institution; that the definition of marriage inescapably implicates profound moral concerns; and that wherever Congress draws the line regarding whether to allow or recognize same-sex marriage in federal law the line that is drawn will be a moral line, reflecting and reinforcing a moral position. Thus, the court’s ruling that Congress must recognize same-sex marriages for purposes of federal law reflects a moral position on a very important issue of public morality that underlies important federal laws and programs, no less than DOMA does. So why is Congress’s policy decision improperly “moral,” while the court’s is not?

(16) In addition, the court’s summary disposition of four of the justifications for section 3 of DOMA is surprisingly superficial. For example, it declares with unjustified certainty that whether children raised by dual-gender couples are “better served” than those raised by same-sex couples is irrelevant because Congress cannot prevent same-sex couples in Massachusetts from adopting.¹⁸⁵ But even assuming the inability of Congress to prevent same-sex Massachusetts couples from adopting,¹⁸⁶ the court misses the point: if children of same-sex couples are disadvantaged, that may be a reason for Congress to exclude same-sex couples from eligibility for the many federal programs that are intended either primarily or secondarily to support family structures that provide and promote advantageous parenting. Likewise, the court’s dismissal of “freezing” the

183. More controversially and confrontationally, Congress might have conditioned state eligibility for certain federal programs and benefits on not legalizing same-sex marriage.

184. *See Massachusetts*, 682 F.3d at 15–16.

185. *See id.* at 14.

186. Congress has enacted laws forbidding some state adoptions already. The Metzenbaum Multiethnic Placement Act of 1994 barred categorical prohibition of interracial adoptions, 42 U.S.C. § 5115a(b) (2006), and a later amendment prohibited any action to “delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.” § 1996b(1)(B).

law for a while seems to miss one important aspect of this rationale—that Congress was not changing the law but was merely codifying the status quo. Specifically, Congress preserved the long established understanding of marriage, while retaining the authority to change federal law and recognize some (or all) same-sex marriages for some (or all) purposes of federal law whenever such recognition gained popular support provided, of course, it was satisfied that the potential harms of same-sex marriage (such as to children) were not a serious risk to federal interests. Sadly, the court seemed to selectively cherry-pick and misstate the justifications for section 3 that it thought it could dismiss with only cursory discussion.

(17) The court incorrectly declared: “Despite its ramifying application throughout the U.S. Code, only one day of hearings was held on DOMA . . . and none of the testimony concerned DOMA’s effects on the numerous federal programs at issue.”¹⁸⁷ This is doubly erroneous. In fact, two days of hearings were held, not just one: one in the House, and another in the Senate.¹⁸⁸ Likewise, testimony of law professor witnesses (and others) in *both* hearings concerned federalism and DOMA’s effect on federal law and programs.¹⁸⁹ The First Circuit’s research once again proves unreliable.

(18) The court seemed frustrated that DOMA is so succinct. It complained that “[t]he statute, only a few paragraphs in length, is devoid of the express prefatory findings commonly made in major federal laws.”¹⁹⁰ It criticizes the “speed with which it was adopted.”¹⁹¹ Neither gratuitous comment is relevant to the issue. Prefatory legislative findings are not part of the law, and the record of the two hearings and House Committee Report explain in some detail the purpose and need for the law and the intent of Congress in adopting it. Brevity is a virtue, not a flaw, in legislation (and court opinions—especially those that are poorly researched).

(19) The court’s most repeated refrain is that homosexuals and same-sex couples are a “historically disadvantaged group” because of historical “moral disapproval” of homosexual relations, and that laws discriminating against such groups are therefore subject to close judicial scrutiny.¹⁹² It almost sounds like a reparations justification for striking down DOMA. Since gays were marginalized and subject to moral disapproval and legal and social discrimination for so long, the court now must bend over backwards to prove that both it and the American public are tolerant,

187. *Massachusetts*, 682 F.3d at 13.

188. *See supra* notes 77–79 and accompanying text.

189. *See, e.g., 1996 Senate Hearing, supra* note 77, at 19–23 (statement of Gary L. Bauer, Pres., Family Research Council); *id.* at 42–48 (statement of Cass R. Sunstein, Prof., Univ. of Chicago); *id.* at 23–42 (statement of Lynn D. Wardle, Prof. of Law, Brigham Young Univ. Law Sch.); *1996 House Hearing, supra* note 77, at 87–117 (statement of Hadley Arkes, Prof., Amherst Coll.); *id.* at 149–57 (statement of Maurice J. Holland, Prof. of Law, Univ. of Oregon Sch. of Law); *id.* at 214–28 (statement of Jay Alan Sekulow, Chief Counsel, Am. Ctr. for Law and Justice); *id.* at 158–87 (statement of Lynn D. Wardle, Prof. of Law, Brigham Young Univ. Law Sch.).

190. *Massachusetts*, 682 F.3d at 13.

191. *Id.*

192. *See, e.g., id.* at 14–15.

morally neutral, and accepting today by striking down DOMA, which seems to reflect the now unpopular traditional moral disapproval of homosexual relationships (at least the moral rejection of the claimed equivalence of same-sex unions and heterosexual marriages).

(20) While rejecting the plaintiffs' Tenth Amendment challenge per se, the court used its very thin conclusion that DOMA improperly intruded upon state regulation of marriage law improperly to justify its application of an intensified level of judicial scrutiny.¹⁹³ Under that elevated level of judicial review the court concluded that "Congress' denial of federal benefits to same-sex couples lawfully married in Massachusetts has not been adequately supported by any permissible federal interest."¹⁹⁴ Ultimately, the First Circuit's decision to strike down DOMA rested on its cumulative discomfort about federalism concerns relating to Congress defining "marriage" for purposes of federal law, and its discomfort with federal discrimination against a category of persons who have long been the object of strong moral disapproval and widespread social discrimination. The court's former concern, however, was ill informed and factually mistaken, and the self-conscious latter concern largely diverted the court from the legal issue it had to decide. While certainly laudable for these concerns, the opinion of the court fails to provide a coherent justification for invalidating DOMA.

(21) There are several strong justifications for section 3 of DOMA that the First Circuit did not consider carefully, or at all. Five such justifications can easily be identified. First, DOMA preserves structural federalism in a very important way: it answers the question of who decides "whether, when, and to what extent same-sex marriages created in an American state, or elsewhere, will be recognized by the Federal government."¹⁹⁵ Preservation of Congress's constitutional authority to make such important policy decisions against the efforts to have politically unaccountable courts and agencies make those decisions is a significant justification for section 3 of DOMA. Section 2 of DOMA makes clear that the states may decide for themselves whether or not to recognize same-sex marriages that are valid in other states; while section 3, in parallel clarification of structural jurisdictional boundaries between state and federal spheres of authority, demonstrates that it is for Congress to decide whether or not to recognize same-sex marriages for purposes of federal law.¹⁹⁶

Second, substantive federalism is a powerful justification for section 3 of DOMA. Preservation of some distinction between federal substantive law and state substantive law is critical. While Congress often chooses to adopt

193. "[D]isparate impact on minority interests and federalism concerns both require somewhat more in this case than almost automatic deference to Congress' will, [and] this statute fails that test." *Id.* at 15.

194. *Id.* at 16.

195. Wardle, *Section Three of DOMA*, *supra* note 52, at 952; Wardle, *Who Decides?*, *supra* note 52, at 178.

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

state domestic relations categories, statuses, and legal consequences for purposes of federal law, it is important for *Congress* to do so, and for *Congress* to distinguish and specifically consider the federal interests implicated by the state domestic status which state lawmakers are unlikely to have carefully considered, if at all.

Furthermore, preservation of the traditional federal substantive legal rule that only dual-gender unions be treated as marriages in federal law is a significant justification. History is not unimportant. It is reinforced because that traditional rule had been applied successfully and consistently for over two centuries.

Fourth, gathering more evidence about the impacts (positive and negative) that flow from same-sex marriage before adopting such a dramatic redefinition of marriage for purposes of federal law is a profound interest. While the First Circuit properly declined to “enter the debate” (i.e., consider the evidence) over the impact on children and families of legally allowing childrearing by same-sex couples,¹⁹⁷ legislatures are precisely created to consider such issues, and for Congress to decline to change policy until it has better evidence upon which to make a rational decision is certainly not irrational or improper.¹⁹⁸

Lastly, historical federalism (i.e., the well documented, long established tradition of Congress, federal agencies, federal laws and federal rules to provide their own, uniquely non-state definitions, status, and incidents of state-approved domestic relationships for purposes of federal laws) is a powerful justification for DOMA, and a major obstacle to the federalism conclusions of the First Circuit (and, hence, not surprisingly, a major lacuna in the court’s opinion). Although changes through democratic processes sometimes come more slowly than some judges may prefer, the continuity and stability of the democratic process is itself valuable and important for courts to respect.

As reasonable persons may differ, it is possible that not all of these justifications would persuade all persons of section 3’s validity. But there is no excuse for competent and unbiased federal judges to fail to thoroughly consider all (let alone any) of them.

197. *Massachusetts*, 382 F.3d at 14.

198. Indeed, on the very issue of the impact of same-sex parenting on children noted by the court, several thorough studies of extensive data by reputable scholars caution against the popular “no-difference” slogans and suggested that, indeed, children raised by same-sex couples may be disadvantaged as compared to children raised by dual-gender parents. See generally Loren Marks, *Same-Sex Parenting and Children’s Outcomes: A Closer Examination of the American Psychological Association’s Brief on Lesbian and Gay Parenting*, 41 SOC. SCI. RES. 735 (2012); Mark Regnerus, *How Different Are the Adult Children of Parents Who Have Same-Sex Relationships? Findings from the New Family Structures Study*, 41 SOC. SCI. RES. 752 (2012).

D. Judicial Efforts to Overturn DOMA Are Improper

A disturbing aspect of the First Circuit and all of the other recent DOMA decisions is how political the courts' decisions seem to have been. *Massachusetts* is only one example of the politically tainted, factually strained, and analytically inadequate opinions rendered on the Act. There are other manifestations of political influences and showmanship. For example, in a stunning show of political solidarity with the same-sex marriage movement, the decision of a federal bankruptcy judge for the Central District of California that DOMA was invalid was co-signed by nineteen other bankruptcy judges of that court.¹⁹⁹ While such extrajudicial, attention grabbing showmanship would deserve an "A" for a political action (it would be great campaign publicity for elected officials), it deserves an "F" for propriety and appropriateness for judges whose judicial impartiality and non-political neutrality were clearly compromised. It seems that since the political branches have been unwilling to repeal DOMA, some courts are willing to perform the political work for them. This raises very problematic separation of powers concerns.

Should DOMA be repealed or overturned, legal recognition in federal law of same-sex marriages would not necessarily result.²⁰⁰ However, the political waves from such a decision would support such an interpretation by executive agencies or judges, and it is likely that federal agencies would soon recognize same-sex marriages.²⁰¹ Moreover, invalidating or repealing

199. *In re Balas*, 449 B.R. 567, 579 (Bankr. C.D. Cal. 2011).

200. *See generally* Titshaw, *supra* note 63, at 610 ("If DOMA were repealed or struck down, that would not result in a clear, uniform rule recognizing all same-sex marriages under the INA."); *id.* at 537–38 ("A systematic review of the case law, however, reveals that U.S. Attorneys General, the Board of Immigration Appeals (BIA), immigration officials, and most federal courts have consistently applied the same standards to determine marriage validity under the INA. These standards have been employed in dozens of cases involving biracial marriage, marriage between close relatives, marriage involving minors, marriage involving transgender spouses, proxy marriage, polygamy, and even same-sex marriage before DOMA."). The three standards are: (1) validity of marriage where celebrated, (2) strong public policy exceptions, and (3) bona fides of the particular marriage. *Id.* at 550 ("If valid where celebrated, a marriage is generally presumed to be valid under U.S. immigration law as well. There are, however, exceptions based on both state and federal public policy. If a couple's state of domicile has a very strong public policy objection to a particular category of marriage, as expressed through criminal sanctions against the underlying relationship or sanctions against marriage in another state as an evasion of the domicile's marriage law, an exception will be recognized under the INA. Four federal public policy exceptions have also been recognized in the cases of unconsummated proxy marriages, polygamy, 'sham marriages,' and same-sex marriage, all coinciding with express provisions in relevant federal statutes indicating direct or indirect objection to a marriage or its underlying relationship."); *id.* at 610 ("If DOMA is repealed or struck down, same-sex marriages should be recognized under the INA so long as they are *bona fide* and valid where celebrated and the couple's state of domicile has no strong public policy objection.").

201. *See The Respect for Marriage Act: Assessing the Impact of DOMA on American Families: Hearing on S. 598 Before the S. Comm. on the Judiciary*, 112th Cong. 37 (2011) [hereinafter *2011 Senate Hearing*] (statement of Edward Whelan, Pres., Ethics and Pub. Policy Ctr., Washington, D.C.) ("The effect and the evident purpose of the bill is to have the Federal Government validate so-called same-sex marriage by requiring that it treat as marriage for purposes of Federal law any such union recognized as a marriage under State

DOMA would encourage (with a big “thumb on the scales”) states to recognize same-sex marriages to avoid the discrepancy between state law and federal law.²⁰²

*E. Why Protection of “Thick” Dual-Gender Marital Relationships
Exclusively As Legal Marriages Is Profoundly
Important, Rational, and Compelling*

All states regulate marriage. Proposals to get the state out of the marriage business are naïve, at best, and dishonest, at bottom, because of the serious policy implications for the state. For instance, the responsibility of the state to determine the validity of Hal’s marriage to 7-year-old Wendy, or to both Wendy and Wanda, or to Sam, or to both Sam and Wanda, or to his pet dog, and/or sheep, and/or filly for purposes of the state laws and programs (e.g., wrongful death, loss of consortium, spousal privileges and immunities, state tax exemptions, inheritance, state welfare and employment benefits, divorce education) does not go away by simply saying that the state is getting out of giving marriage licenses. The dilemma of deciding who is eligible for state benefits that have historically been associated with marriage cannot be evaded by abolishing state recognition of marriage altogether. As Edward Stein put it, “Whatever agenda the state is advancing by channeling people into marriage—whether it benefits the couple, their future children, or the state generally—would be

law. The bill would require taxpayers in the States that maintain traditional marriage laws to subsidize the provision of Federal benefits to same-sex unions entered into in other States.”); Jay Strozdas, *Trendlines: Court Decisions, Proposed Legislation, and Their Likely Impact on Binational Same-Sex Families*, 44 LOY. L.A. L. REV. 1339, 1355 (Summer 2011) (“If Congress were to repeal DOMA, same-sex binational couples would need to look no further than the INA for immigration equality. . . . A congressional repeal would show the federal government’s clear intent to recognize that all marriages are valid where they were performed.”); Tom Cohen, *Defense of Marriage Act: Senate Panel Passes Repeal of Defense of Marriage Act*, CNN (Nov. 10, 2011), http://articles.cnn.com/2011-11-10/politics/politics_senate-doma_1_defense-of-marriage-act-couples-marriage-between-one-man?_s=PM:POLITICS (repeal of DOMA would “provide equal federal benefits to legally married same-sex couples”); Larry Margasak, *DOMA Repeal Bill Clears Senate Judiciary Committee Vote*, HUFFINGTON POST, (Nov. 10, 2011, 1:31 PM), http://www.huffingtonpost.com/2011/11/10/defense-of-marriage-act-repeal-bill-democrats-_n_1086237.html.

Senator Grassley notes that DOMA repeal bill would create federal benefits for lawfully married same-sex couples and for many same-sex couples who are not lawfully married. *Id.*

202. See 2011 Senate Hearing, *supra* note 201, at 22 (answer of Thomas Minnery, Senior Vice President for Public Policy, Focus on the Family, Colorado Springs, CO to Sen. Grassley’s question) (“And if DOMA were to be repealed, presumably same-sex marriages performed elsewhere would have to be recognized in those States, those many States that have determined that marriage is what it has always been in their States. And with that comes a very forced political correctness which can get downright nasty.”); Charles P. Kindregan, Jr., *Learning From History: The Federal Union and Marriage*, 20 S. CAL. REV. L. & SOC. JUST. 67 (Winter 2011) (repeal of DOMA “would be a powerful symbol of the principle of fairness” to the states); *Bill to Repeal DOMA Demonstrates Ongoing Disregard for the American People*, ALLIANCE DEF. FUND (Sept. 16, 2009), www.adfmedia.org/news/prdetail/?cid=9046 (arguing that bill to repeal DOMA would “open[] the door for litigation that would seek to force states to recognize ‘marriages’ between members of the same sex”).

lost if marriage is deregulated.”²⁰³ Moreover, “the time and energy courts must spend dealing with the dissolution of relationships would increase dramatically under deregulation because of the countless different marriage contracts that courts would need to interpret.”²⁰⁴ Thus, it is not surprising that no state has deregulated marriage.

The meaning of marriage is changing in at least those states that allow same-sex marriage. It is morphing from a “thick” to a “thin” concept of marriage. But this is not the first “thinning” of marriage by legal reform. The adoption of unilateral no-fault divorce in the 1960s and 1970s also transformed marriage from a more robust, deep, committed relationship to a more anemic, tentative, transitory and shallow relationship.²⁰⁵

In legal policy and administration, the ideal of romanticism (“marry whomever he or she wants”) quickly devolves into incoherence. By leveling emotions, treating all forms and kinds of emotion as equal, the most socially valuable emotions are diminished and the most trivial are enhanced—equating good emotions with bad.²⁰⁶ Thus, it is not surprising that the opinion of the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health*²⁰⁷ reads like the judicial equivalent of Woody Allen’s famous self-justifying quip: “The heart wants what it wants.”²⁰⁸ That unstable, romanticized emotionalism is at the core of the new, “thin” version of marriage.

203. Edward Stein, *Looking Beyond Full Relationship Recognition for Couples Regardless of Sex: Abolition, Alternatives, and/or Functionalism*, 28 *LAW & INEQ.* 345, 360 (2010); see also *id.* at 371 (“I would reject abolition [of marriage], at least in the form of deregulation, as both impractical and theoretically problematic.”).

204. *Id.* at 360. Professor Stein also notes that deregulation generally would lead to less marriage, not more, and increase the importance of (and loss of autonomy resulting from) the application of “default rules.” *Id.* at 359.

205. See generally PATRICK PARKINSON, *FAMILY LAW AND THE INDISSOLUBILITY OF PARENTHOOD* (2011); LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY* (2000); JUDITH S. WALLERSTEIN, JULIA M. LEWIS & SANDRA BLAKESLY, *THE UNEXPECTED LEGACY OF DIVORCE* (2000); NICHOLAS H. WOLFINGER, *UNDERSTANDING THE DIVORCE CYCLE: THE CHILDREN OF DIVORCE IN THEIR OWN MARRIAGES* (2005); Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 *BYUL REV.* 79.

206. Perhaps it is the moral notion that there is a “good” and “bad” in matters of intimate, emotional life that is the real objection of romantics.

207. 798 N.E.2d 941 (Mass. 2003).

208. Charles M. Yablon, *Judicial Drag: An Essay on Wigs, Robes and Legal Change*, 1995 *WIS. L. REV.* 1129, 1129 n.1 (“‘The heart wants what it wants,’ says Woody.” (citing Ellen Goodman, *A Reel of the Real Woody Allen*, *BOSTON GLOBE*, Sept. 24, 1992, at 19)). See generally Lynn D. Wardle, *All You Need Is Love?* 14 *S. CAL. REV. L. & WOMEN’S STUD.* 51 (2004) (discussing emotion as a core ingredient in relationships today). The Woody Allen–Soon-Yi Previn affair is a notable example of the kind of destruction that results from the reign of unconstrained personal emotions. Woody Allen and Mia Farrow lived together for many years out of wedlock, had a child together, and Allen adopted at least one of Farrow’s children. Later he began an affair with another of Mia Farrow’s adopted children, teenager Soon-Yi Previn. When that relationship came to light, Allen explained his behavior with the quip, “the heart wants what it wants.” The Allen-Farrow relationship ended, and a custody dispute regarding the couple’s children resulted. A New York trial court awarded custody of Moses, Dylan, and Satchel Farrow to Mia Farrow, and granted Allen only

Increasingly, marriage has been subjectified and personalized. The personal and subjective qualities associated with or desired in marriages have come to replace the objective and socially necessary requirements that previously defined marriage. Just as subjective “intent” has become a popularly proposed (and in some cases actual decisional) basis for defining who is a legal parent,²⁰⁹ we are also seeing the replacement of objective marriage criteria with subjective criteria and the rise of intentionality as the controlling factor in defining the public status and the public trust of marriage. This is an example of the shift from public morality to private morality in family law noted decades ago by Professor Carl Schneider,²¹⁰ the privatization of family law noted by Professor Jana Singer,²¹¹ and of the even older movement from status to contract noted a century and a half ago by Professor Maine.²¹² Thus, concerns that marriage is losing its social significance and in many ways being marginalized and trivialized are not without some factual basis.²¹³

restricted visitation. Allen appealed. The New York appellate court found that Allen’s sexual relationship with Farrow’s adoptive daughter, Soon-Yi Previn, demonstrated Allen’s “tendency to place inappropriate emphasis on his own wants and needs and to minimize and even ignore those of his children” and “an absence of any parenting skills.” *Allen v. Farrow*, 611 N.Y.S.2d 859, 862 (N.Y. App. Div. 1994). In light of Farrow’s allegations that Allen sexually abused Dylan, the court found that visitation during sessions with a therapist would be in Dylan’s best interests. *Id.* at 863. In addition, the court determined that supervised visitation with Satchel was appropriate because, if unsupervised, Allen may “influence Satchel inappropriately, and disregard the impact [that] exposure to Mr. Allen’s relationship with Satchel’s sister, Ms. Previn, would have on the child.” *Id.* at 863–64. Unsupervised visitation would be “detrimental to the best interests of the children.” *Id.* at 864; *see also* Nancy S. Erickson, *The Role of the Law Guardian in a Custody Case Involving Domestic Violence*, 27 *FORDHAM URB. L.J.* 817, 821 n.17 (2000); Abbe Smith, *Carrying On In Criminal Court: When Criminal Defense Is Not So Sexy and Other Grievances*, 1 *CLINICAL L. REV.* 723, 730 n.33 (1995); Margaret Tortorella, *When Supervised Visitation Is In the Best Interests of the Child*, 30 *FAM. L.Q.* 199, 199 (1996); Richard Perez-Peña, *Woody Allen Tells of Affair as Custody Battle Begins*, *N.Y. TIMES*, Mar. 20, 1993, at A25 (Allen testified in a custody hearing that he had given “little thought” to how his affair with Farrow’s adopted daughter, Soon-Yi Previn, would affect the other children).

209. *See* K. Daniels, *Is Blood Really Thicker than Water? Assisted Reproduction and Its Impact on Our Thinking About Family*, 26 *J. PSYCHOSOMATIC OBSTETRICS & GYNECOLOGY* 265 (2005); Gillian Douglas, *The Intention to be a Parent and the Making of Mothers*, 57 *MOD. L. REV.* 636 (1994); Linda S. Maule & Karen Schmid, *Assisted Reproduction and the Courts: The Case of California*, 27 *J. FAM. ISSUES* 464 (2006); *see also* Perri Koll, Note, *The Use of the Intent Doctrine to Expand the Rights of Intended Homosexual Male Parents in Surrogacy Custody Disputes*, 18 *CARDOZO J.L. & GENDER* 199 (2011). I am indebted to my student, Rebecca N. Skabelund, whose paper stimulated these thoughts and brought these sources to my attention.

210. *See* Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 *MICH. L. REV.* 1803 (1985).

211. *See* Jana B. Singer, *The Privatization of Family Law*, 1992 *WIS. L. REV.* 1443.

212. *See* HENRY SUMNER MAINE, *ANCIENT LAW* 141 (Dorset Press 1986) (1861) (“[T]he movement of the progressive societies has hitherto been a movement from Status to Contract.”).

213. *Compare* Lynn Curwin, *Woman in Taiwan Plans to Marry Herself*, *DIGITAL J.* (Oct. 23, 2010), <http://www.digitaljournal.com/article/299295>, and Frank Lake, *Woman Marries Herself*, *WEEKLY WORLD NEWS* (Oct. 24, 2010), <http://weeklyworldnews.com/headlines/24040/woman-marries-herself/> (“The Little White Wedding Chapel in Las Vegas is

The general and legal iconization of romance and emotionalism actually undermines the socially constructed boundaries of socially-beneficial family relationships. Susan Bandes has acknowledged that “the law cannot accommodate the endless subtleties and variations that might exist among emotional states [At some point] these variables render the translation into legal context impossible.”²¹⁴

Today our society tends to paste the generic label of *love* on many different emotions, but the ancient Greeks used at least three separate words to describe different facets or kinds of love: *eros*, *agape*, and *philia*. “The *eros* tradition, of course, begins with Plato’s account of *eros* in the *Symposium* The *agape* tradition begins with the many passages in the New Testament [H]ere Jesus is the exemplar. [T]he *philia* tradition begins with Aristotle’s *Nicomachean Ethics*”²¹⁵ *Eros* has been described as

acquisitive, egocentric or even selfish; *agape* is a giving love, a love that makes even the supreme sacrifice for the sake of the beloved. *Eros* is an

reporting that women have been making arrangements to marry themselves in small ceremonies.”), and Piper Weiss, *Bride Marries Herself. Should More Singles Throw Solo Weddings?*, SHINE (Mar. 16, 2012), <http://shine.yahoo.com/love-sex/bride-marries-herself-more-singles-throw-solo-weddings-202200537.html>), with *Human-Animal Marriage*, WIKIPEDIA, http://en.wikipedia.org/wiki/Human-animal_marriage (last visited Oct. 20, 2012) (citing to cases of humans marrying cows, horses, dogs, goats, and snakes), and *Marry Your Pet: The Pet and People Wedding Specialists*, MARRYYOURPET.COM, <http://www.marryyourpet.com/> (last visited Oct. 20, 2012), and *Man Charged With Sexually Abusing Animals*, 10TV.COM (June 16, 2011), <http://www.10tv.com/content/stories/2011/06/16/story-shelby-man-charged-with-animal-abuse-sex.html> (noting that the neighbor of arrested man “recalled the day last month when she saw Bower bring his dog home from the shelter. ‘He had a sign that said, ‘Just Married,’ DeLeon said. ‘I was (thinking) who in the world did he get married to? I didn’t see it in the paper, and (I found out) he was talking about his dog, Tara.’”), and *People Marry Animals Trying to Find Happiness*, PRAVDA.RU (Apr. 4, 2008), http://english.pravda.ru/society/sex/01-04-2008/104741-marry_animals-0/ (“For example, in June 2003 a nine-year-old Indian girl married a mongrel. . . . Another incident occurred in Nepal in 2004. A 75-year-old man married a dog to provide himself a guarantee of immortality. . . . In 2005 [41-year-old British rock-concert producer Sharon Tendler] married Cindy, a 35-year-old dolphin [A]n Indian woman from Orissa decided to marry a snake.”); see also *A Vow Against Gentrification: Seattle Woman “Marries” a Warehouse*, L.A. TIMES, (Jan. 30, 2012, 11:46 AM), <http://latimesblogs.latimes.com/nationnow/2012/01/gay-marriage-warehouse-seattle-babylonia.html> (story and picture of protestor Babylonia Aivaz in wedding dress, who said “I’m doing this to show the building how much I love it”); Patrick Hickey Jr., *Seattle Woman Marries Warehouse to Protest Gentrification*, NBCCHICAGO (Jan. 31, 2012, 3:04 PM), <http://www.nbcchicago.com/news/weird/138425604.html> (Occupy Seattle protestor marries an abandoned warehouse). That is not the fault of same-sex couples but it does provide the context in which their claims for redefining marriage to include same-sex couples creates serious concerns about the impact that would have upon the essential social institution of marriage. Thus, it is not unreasonable (but, rather, may be critically important) for lawmakers now to clarify what kind and qualities of love are relevant to contemporary family law and marriage.

214. Susan A. Bandes, *Introduction*, in *THE PASSIONS OF LAW* 1, 13 (Susan A. Bandes ed., 1999).

215. Alan Soble, *An Introduction to the Philosophy of Love*, in *EROS, AGAPE AND PHILIA, READINGS IN THE PHILOSOPHY OF LOVE* xxiii (Alan Soble ed., 1989). Plato described a ladder of *erotic* love with four stages. *Id.* at xxii–xxiii.

unconstant, unfaithful love, while *agape* is unwavering and continues to give despite ingratitude. . . . *Eros* is a love that responds to the merit or value of its object, while *agape* creates value in its object as a result of loving it, and exists independently of . . . any merit or lack of merit in its object. . . . (*Philia* gets caught in the cracks between or among them.)²¹⁶

Philia, meanwhile, might be called a perfect friendship.²¹⁷

The “thin” form of marriage, based essentially on romantic or sexual attraction (*eros*), is not the foundation of the kinds of marriages that provide a solid foundation for long term parenting or a stable, strong, and free society. In the “thicker” form of marriage, romantic love (*agape*) is sustained and enriched by and grounded in other relational qualities such as constancy, fidelity, patience, kindness, long suffering, and commitment. Those qualities are the true foundation of all family relations, and those kinds of marriages and family relations comprise the foundation of our republican system of government. Family policies should reinforce those emotions that nurture stability and happiness in marriage, parenting, and families.²¹⁸

The “thick” conception of marriage is not merely a personal construct or instrument for personal romantic fulfillment, but entails the mutual assumption of a public trust. Specifically, the “thick” conception of marriage demands a mutual commitment by a complementary, gender integrated couple to a common social goal, a vision of a common endeavor, the lifelong nurturing and development of which enriches the lives of not only the spouses themselves, but also the lives of their children, their extended families, their communities, and all of their society.

CONCLUSION

These are serious and important questions of substance and structure, and deciding them should not be corrupted by (to borrow the First Circuit’s metaphor) the thumb of improper political outcome favoritism or corrupt popularity influences.²¹⁹ This has happened before. The abortion jurisprudence of the Supreme Court is one ongoing, glaring example. Moderate Justice Sandra Day O’Connor put it well when she observed, “This Court’s abortion decisions have already worked a major distortion in

216. *Id.* at xxiii.

217. *Id.* at 57.

218. See, e.g., Lynn D. Wardle, *The Bonds of Matrimony and the Bonds of Constitutional Democracy*, 32 HOFSTRA L. REV. 349, 355–61 (2003) (remarking that strong family relations are the foundation of republican government); Wardle, *All You Need Is Love?*, *supra* note 208, at 60–65 (discussing the confusion of love and romance); Wardle, *Tyranny*, *supra* note 15, at 222–49 (portraying marriage as the foundation for U.S. constitutional government).

219. See Andrew Koppelman, *Madisonian Pornography or, the Importance of Jeffrey Sherman*, 84 CHI.-KENT L. REV. 597, 601 (2009) (listing alleged distortions of scientific evidence in formulating law and regulations “such as abortion, abstinence education, and stem cell research, and issues with significant economic consequences for the President’s large corporate supporters, such as workplace safety and global warming”).

the Court's constitutional jurisprudence."²²⁰ Conservative Justice Antonin Scalia, likewise, opined in another case, "There is apparently no end to the distortion of our First Amendment law that the Court is willing to endure in order to sustain this restriction upon the free speech of abortion opponents."²²¹ Liberal philosopher Ronald Dworkin agrees, noting, "Abortion is tearing America apart. It is also distorting its politics, and confounding its constitutional law."²²² Indeed, *Roe v. Wade*,²²³ the font of the Court's abortion doctrine, was itself based upon a vast array of distortions.²²⁴ Some have described the Court's pattern of disregarding constitutional law principles and precedents when deciding abortion cases as the "abortion distortion."²²⁵

Sadly, we see the same distorting dynamics at work in some courts' and legislatures' response to legal claims and law reform efforts aimed at legalizing same-sex marriage.²²⁶ The criticisms of Professors Borchers, Brilmayer, Whitten, and others, noted above, have suggested that pro-same-sex-marriage legal commentators have misrepresented conflict of laws and

220. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting).

221. *Hill v. Colorado*, 530 U.S. 703, 753 (2000) (Scalia, J., dissenting).

222. RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 4 (1993).

223. 410 U.S. 113 (1973). For a discussion of the shortcomings of the Court's abortion jurisprudence, see Charles I. Lugosi, *Respecting Human Life in 21st Century America: A Moral Perspective to Extend Civil Rights to the Unborn from Creation to Natural Death*, 20 *ISSUES L. & MED.* 211, 241 (2005) ("Case law abounds with bizarre judicial holdings that distort precedents to avoid undermining the right to an abortion."); Elizabeth S. Saylor, *Federalism and the Family After Morrison: An Examination of the Child Support Recovery Act, the Freedom of Access to Clinic Entrances Act, and a Federal Law Outlawing Gun Possession by Domestic Violence Abusers*, 25 *HARV. WOMEN'S L.J.* 57, 123 n.347 (2002) ("Supreme Court cases concerning abortion are notoriously at odds with other precedent. Strong feelings on both sides of the abortion debate encourage judges to distort doctrine to support their own view.").

224. See generally Joseph W. Dellapenna, *Abortion and the Law: Blackmun's Distortion of the Historical Record*, in *ABORTION AND THE CONSTITUTION: REVERSING ROE V. WADE THROUGH THE COURTS* 137–58 (Dennis J. Horan et al., eds., 1987); JOSEPH W. DELLAPENNA, *DISPELLING THE MYTHS OF ABORTION HISTORY* (2006); Robert A. Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 *CALIF. L. REV.* 1250 (1975); see also Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 *SUP. CT. REV.* 159, 160–67 (describing the distortion of standing doctrine in the original abortion cases).

225. See, e.g., Jill Hamers, Note, *Reeling in the Outlier: Gonzales v. Carhart and the End of Facial Challenges to Abortion Statutes*, 89 *B.U. L. REV.* 1069, 1071 n.10 (2009) (citing Teresa Stanton Collett, *Gonzales v. Carhart and Judge Easterbrook's Pickle*, SCOTUSBLOG, (Apr. 19, 2007, 6:47 PM), <http://www.scotusblog.com/2007/04/gonzales-v-carhart-and-judge-easterbrooks-pickle/>); see also Shannen W. Coffin, *The Abortion Distortion: What the 'Pro-Choice' People Have Done to Law, Medicine, and Language*, *NAT'L REV.*, July 12, 2004, at 22.

226. See Lynn D. Wardle & Lincoln C. Oliphant, *In Praise of Loving: Reflections on the "Loving Analogy" for Same-Sex Marriage*, 51 *HOW. L.J.* 117, 165–66 (2007) ("The same tactic of 'capturing marriage' as a means of promoting a political ideology lies at the heart of the movement to legalize same-sex marriage today. The redefinition of marriage to include same-sex couples would, once again, distort the basic social institution of marriage and impress marriage law into the service of a social reconstruction (gay rights) movement.").

full faith and credit doctrines.²²⁷ Another respected law professor charges that some “conflicts scholars [are] distorting the law of the Full Faith and Credit Clause in the service of the cause of same-sex marriage.”²²⁸ Meanwhile, two other respected professors have similarly opined, “[W]e think the conflict over same-sex marriage has distorted discussion about the institution of marriage in extraordinary ways.”²²⁹

Examples of the political distortion effect of the same-sex marriage movement are numerous, and are not limited to the United States. For instance, one of the most fascinating recent examples occurred in Canada when two married lesbian women, one from the United Kingdom and the other from Florida, sought a divorce in Toronto after previously celebrating their marriage in Canada.²³⁰ The Canadian DOJ suggested that under long settled Canadian law applying *lex domicilii* to determine whether parties could contract a valid marriage, the foreign lesbian couple’s marriage was not valid,²³¹ nor were the parties eligible to file for divorce because they had not satisfied the one-year residency requirement necessary to obtain a divorce.²³² Both of those rules were uncontroversial and long-settled prior

227. See *supra* notes 86–89 and accompanying text.

228. Earl M. Maltz, *Larry Kramer, Same-Sex Marriage, and the Politics of Legal Scholarship*, 38 CREIGHTON L. REV. 533, 542 (2005).

229. Vikram David Amar & Alan Brownstein, *Why the Case for Amending the U.S. Constitution to Prohibit or Regulate Gay Marriage Is “Not Proved,”* 32 HASTINGS CONST. L.Q. 637, 648 (2005); see also Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, 6 UNBOUND: HARV. J. LEGAL LEFT 1, 58 (2010) (critiquing the “distortions produced by the idea that marriage is status,” embraced by both sides of the same-sex marriage debate).

230. See Kirk Makin, *Despite Legal About-Face, Harper Has “No Intention” of Reopening Gay Marriage*, GLOBE & MAIL (Jan. 12, 2012 3:59 AM), <http://www.theglobeandmail.com/news/politics/despite-legal-about-face-harper-has-no-intention-of-reopening-same-sex-marriage/article1358276/>; see also *Same-Sex Marriage Law Change Addresses Divorce*, CBC NEWS (Feb. 17, 2012, 7:32 AM), <http://www.cbc.ca/news/canada/story/2012/02/17/gay-marriage-loophole.html> (“The proposed changes have been prompted by a divorce case in Ontario involving a same-sex couple. The unidentified lesbian couple married in Canada in 2005 but split up in 2009. The partners are living in Florida and the United Kingdom. Both women want a divorce, but cannot get one where they now live because the state of Florida does not recognize their marriage, and though the U.K. grants civil partnerships to same-sex couples, it does not recognize the Canadian marriage.”).

231. See Makin, *supra* note 230 (“[A] Department of Justice lawyer says their marriage is not legal in Canada since they could not have lawfully wed in Florida or England, where the two partners reside.”).

232. Cameron French, *Canada to Close Loophole on Foreigner Gay Marriages*, REUTERS (Jan. 13, 2012, 3:39 PM), <http://www.reuters.com/article/2012/01/13/us-marriage-idUSTRE80B20U20120113> (“In court submissions, the [Canadian] Justice Department said the marriage of the two women was not legally valid under Canadian law because the women could not have lawfully wed in England or Florida. It also cited the Canada Divorce Act, which says any couple seeking to end a marriage in Canada must have lived there for a year.”); Makin, *supra* note 230 (“[An attorney in the Canadian Department of Justice] tied the federal position to two central propositions. First, he said, couples who came to Canada to be married must live in the country for at least a year before they can obtain a divorce. Second, same-sex marriages are legal in Canada only if they are also legal in the home country or state of the couple”); see also Liston, *supra* note 12 (“Divorce proceedings between an American woman and a British woman—who cannot be named for legal reasons—have exposed a restriction in Canadian law which says that non-Canadian same-

to their application to this same-sex couple, but nevertheless provoked a remarkable firestorm of criticism in the media.²³³ This reaction led to immediate political “damage control” public relations responses from the Canadian Justice Department,²³⁴ and quickly prompted the introduction of a bill in the Parliament of Canada to modify the well-established marriage eligibility choice of law rules, as well as the long-settled durational residency for divorce rule.²³⁵ Despite the settled, unremarkable, reasonable, and common Canadian law of marriage eligibility and divorce durational residency, Canadian politicians were almost tripping over themselves in the race to assure the country and the same-sex marriage advocates that the existing laws would surely and immediately be altered to accommodate tourist marriages in Canada by foreign same-sex couples, and to allow tourist divorces in Canada by foreign same-sex couples who had married in Canada. In short order, even before the hearing in the Canadian case that caused the furor, a bill was introduced in Parliament to ensure that foreign same-sex couples could get married in Canada, despite contrary domiciliary laws, and would be able to get divorced without residence in Canada as well.²³⁶ Since the Canadian constitutional principle under which same-sex marriage was legalized was “equality,” it seems indisputable that if foreign same-sex couples can evade their domiciliary marriage laws and get validly married in Canada, foreign heterosexual couples also must be allowed to get married in Canada in evasion of the marriage restrictions of their domiciles that would prevent them from getting married in their home states. Likewise, equality would seem to compel the conclusion that if

sex couples cannot marry unless *gay marriage* is lawful in their home states or countries.”); *supra* notes 80–82 and accompanying text.

233. See Cristin Schmitz, *Feds Fading in Face of Furor*, LAWYERS WKLY, Jan. 27, 2012, at 1, available at <http://www.lawyersweekly.ca/index.php?section=article&volume=31&number=35&article=1>; see also Makin, *supra* note 230; Janyce McGregor, *Same-Sex Divorce Options Explored by Harper Government*, CBC NEWS (Jan. 12, 2012, 10:43 AM), <http://www.cbc.ca/news/politics/story/2012/01/12/pol-harper-same-sex-marriage.html>; Laura Payton, *Conservatives to Change Civil Marriage Law*, CBC NEWS (Jan. 13, 2012, 12:56 PM), <http://www.cbc.ca/news/politics/story/2012/01/13/pol-same-sex-marriage-nicholson.html>; *Same-Sex Marriage Law Change Addresses Divorce*, *supra* note 230.

234. Josh Visser, *Justice Minister Says All Same-Sex Marriages ‘Valid’*, CTV NEWS (Jan. 13, 2012, 9:41 PM), <http://www.ctv.ca/CTVNews/QPeriod/20120113/gay-marriage-legal-nicholson-120113/>.

235. Matthew Pomy, *Canada to Change Marriage Law to Legally Recognize All Non-Resident Same-Sex Marriages*, JURIST (Jan. 15, 2012, 10:57 AM), <http://jurist.org/paperchase/2012/01/canada-to-change-marriage-law-to-legally-recognize-all-non-resident-same-sex-marriages.php>.

236. See The Civil Marriage of Non-Residents Act, House of Commons of Canada, Bill C-32, 1st Sess., 41st Parliament, 60-61 Elizabeth II (2011–2012), available at <http://parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5395919&File=24#1>; see also Cynthia Kirkby, *Legislative Summary of Bill C-32: An Act to Amend the Civil Marriage Act*, LIBRARY OF PARLIAMENT RESEARCH PUBLICATIONS (Mar. 9, 2012), http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=c32&Parl=41&Ses=1&source=library_prb&Language=E; *Same-Sex Marriage Law Change Addresses Divorce*, CBC NEWS, (Feb. 17, 2012, 7:32 AM), <http://www.cbc.ca/news/canada/story/2012/02/17/gay-marriage-loophole.html?cmp=rss> (discussing the new divorce process established by the act).

foreign same-sex couples who previously married in Canada can obtain divorces despite not having resided in Canada for one year before filing for divorce, then, so also must Canada allow foreign dual-gender couples previously married in Canada to file for divorce even though they have not resided in Canada for one year. In other words, the revision (or distortion) of the Canadian family law to accommodate “quickie” marriages and “quickie” divorces by foreign same-sex couples threatens to totally revamp and distort the Canadian marriage and divorce law system.

It was interesting to see traditionally proper Canadian leaders clamoring to quickly amend their laws in order to ensure that Canada is not only the “Reno” for same-sex marriage in North America (and for the British Commonwealth nations), but that it is also the “Reno” for divorce of foreigners who enter into Canadian same-sex marriages, as well. One cannot repress the irreverent suspicion that had such profound and hasty law changes been suggested because dual-gender foreign couples were having trouble getting into or out of marriage in Canada, the political response and legal proceedings might have been quite different.²³⁷ The same-sex marriage element immediately produced a remarkable about-face by the Canadian Justice Department and provoked a proposed amendment that would drastically distort (essentially overturn) both the marriage validity choice-of-law rule and the durational-residency-for-divorce rule.²³⁸ The ultimate outcome in the case is not yet clear; as of April 10, 2012, two months after the scheduled February hearing, the case was reportedly still “drag[ging] on,”²³⁹ and by mid-June 2012, the bill introduced to amend the Civil Marriage Act had gone no further than its first reading (on February 17).²⁴⁰ Canada seems to be satisfied for the time being with a double standard in marriage and divorce law—with the strict written law applicable only to heterosexual couples. This disconcerting stalemate hints not only of the complexity of the transportability of marital status issue but also indicates that the true course of the law and legal proceedings involving

237. The same Canadian political leaders just might have recited the virtues of their long established legal rules, and the vices of their government aiding and abetting evasive marriages of foreigners and tourist divorces, and concluded that it would be unseemly, improper, and beneath the dignity of Canadian marriage law. Instead, the world has been treated to an entertaining political farce.

238. See *supra* notes 230–35 and accompanying text.

239. Michael Woods, *Foreign Same-Sex Couple's Bid for Divorce Drags On*, THESTAR.COM (Apr. 10, 2012) <http://www.thestar.com/news/crime/article/1159390-foreign-same-sex-couple-s-bid-for-divorce-drags-on> (“The foreign same-sex couple who married in Toronto and are seeking a divorce aren’t much closer to getting their wish, the lawyer suggested Tuesday. . . . ‘My expectation was that long ago they would have withdrawn that pleading,’ McCarthy said. ‘They disavowed it in the press everywhere, so I hope they follow through with that and actually withdraw it.’”). The government lawyer suggested in court in April that “the most prudent course of action for the case would be to ‘let Parliament deal with it, because that will resolve the issue.’” *Id.*

240. See *Status of An Act to Amend the Civil Marriage Act*, LEGISINFO, <http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Mode=1&billId=5387766&Language=E> (last visited Oct. 20, 2012) (“Last Stage Completed, Introduction and First Reading in the House of Commons (2012-02-17)”; see also Woods, *supra* note 239).

some issues can be profoundly distorted and even disastrously diverted by political forces. Marital status regarding same-sex couples is one of those very vulnerable issues at the present time.

This leads to the concluding point of this article: the importance of modesty, moderation, prudence, and perspective of those who exercise and influence government authority cannot be understated. Advocates of LGBT rights, including proponents of same-sex marriage, find themselves today (after a lot of hard work and effective advocacy and complementary social developments) with significant popularity, growing political power, and notable legal influence in many jurisdictions. This seems to be the “gay moment” in the United States and in much of the western world,²⁴¹ and it probably will last for several years. But eventually, it will pass; another movement will replace it; another “moment” will arrive, as always. What will remain is the legacy of how the gay community used the power and influence it had in the “gay moment” of history. If the leaders and influential members of the gay community are gracious, considerate, reasonable, fair, tolerant and responsible, the effects and influences in law and society of this transitory “gay moment” in history will probably be long lasting and significant. On the other hand, if those leaders exercise their influence in petty, unethical, intolerant, retaliatory, or punitive ways, it will discredit the “gay moment” and the gay rights movement for generations to come, and will significantly reduce the long term impact of the legal and public policy and social changes it initiated.

Intolerance of the expression of opposing viewpoints, and indecent behavior towards those who advocate disfavored positions, arguments, and policies is socially destructive. Our constitutional system requires the ethic and practice of tolerance. As distinguished Professor William N. Eskridge put it:

The LGBT social movement wants to persuade America that gay is good, while the traditional family values (TFV) countermovement wants to persuade American that many gay rights would undermine the family, marriage, and other cherished institutions. This is a fine debate for America to have. The Court is simply insisting [and legal academics, especially, also should insist] that the players not hit below the belt and turn a fair fight into a brawl.²⁴²

Tolerance functions to protect individual rights and personal autonomy by “permitting dissent and by affirmatively protecting minorities from private violence or discrimination.”²⁴³ It “obviates the need to indulge in the collective self-deception that the state can be substantively neutral

241. See Andrew Kopkind, *The Gay Moment*, NATION, May 3, 1993, at 577; Elizabeth Kastor, *The Gay Moment: Today Just Didn't Happen. It Took a Lot of Yesterdays*, WASH. POST, Apr. 25, 1993, at F1; Richard Brookhiser, *The Gay Moment*, NAT'L REV., July 26, 1999, at 42.

242. William N. Eskridge, Jr., *Lawrence's Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1025 (2004).

243. Steven D. Smith, *The Restoration of Tolerance*, 78 CALIF. L. REV. 305, 333 (1990).

among competing values.”²⁴⁴ As the Supreme Court has acknowledged, “The[] fundamental values of ‘habits and manners of civility’ essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular.”²⁴⁵ Promoting indecency toward those who express disliked views is intolerant, dangerous, and inconsistent with the core principles and purposes of our American constitutional system and of legitimate legal scholarship.²⁴⁶

So there are significant practical and political reasons that supplement profound ethical and civic virtue reasons for the exercise of prudence by both advocates and opponents of same-sex marriage who hold positions of government authority and political influence now and in the years to come. Respect for the expression of competing viewpoints, for the essential significance of federalism, deference to Congress’s enactment of DOMA, and recognition of the integrity of the limits of judicial review would be wise and prudential principles to follow now and in the years ahead.

244. *Id.* at 332; *see also id.* at 356 (“[T]olerance is the only viable way of preserving the liberal commitment to individual freedom in a genuine political community.”).

245. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986).

246. “[D]iversity of ideas . . . is fundamental to the American system.” *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 880 (1982) (Blackmun, J., concurring in part and concurring in the judgment); Edwin Meese & Jennifer Marshall, Column, *A Summer of Intolerance*, USA TODAY (Oct. 7, 2012, 5:59 PM EST), http://www.usatoday.com/story/opinion/2012/10/07/meese-and-marshall-on-chick-fil-a/1608773/?utm_medium=newsletter&utm_campaign=culturewatch.

APPENDIX

THE LEGAL STATUS OF SAME-SEX UNIONS IN THE UNITED STATES AND GLOBALLY: LEGAL STATUS—11 AUGUST 2012²⁴⁷A. *Legal Allowance of Same-Sex Unions in the United States*²⁴⁸

Same-Sex Marriage Is Legal in Six U.S. States, the District of Columbia, and Two U.S. Indian Tribes (12%):

- Connecticut, Iowa, Massachusetts, New Hampshire, New York, Vermont; the District of Columbia; the Coquille Tribe of Oregon, and the Suquamish Tribe of Washington.²⁴⁹

Same-Sex Unions Equivalent to Marriage Are Recognized in Ten U.S. States (20%):

- California, Delaware, Hawaii, Illinois, Maryland, Nevada, New Jersey, Oregon, Rhode Island, and Washington.²⁵⁰

Same-Sex Domestic Relationships with Limited Benefits Allowed in Three U.S. States (6%):

- Colorado, Maine, and Wisconsin.²⁵¹

247. Cf. *Recognition of Same-Sex Couples Worldwide*, LAMBDA LEGAL (Sept. 12, 2011), http://www.lambdalegal.org/sites/default/files/publications/downloads/fs_recognition-of-same-sex-couples-worldwide_1.pdf; *Status of Same-Sex Relationships Nationwide*, LAMBDA LEGAL (Aug. 19, 2011), <http://www.lambdalegal.org/publications/articles/nationwide-status-same-sex-relationships.html>.

248. See *Status of Same-Sex Relationships Nationwide*, *supra* note 247; see also *Same-Sex Marriage in the United States*, WIKIPEDIA, http://en.wikipedia.org/wiki/Same-sex_marriage_in_the_United_States (last visited Oct. 20, 2012).

249. The legislatures of Washington and Maryland also have passed bills to legalize same-sex marriage, but citizen petition processes in each state have been invoked to put the measures on the ballot to allow voter approval or rejection. Unless rejected by a majority of the voters in November 2012, the bills will become law. See Matthew Brown, *Both sides of Same-Sex Marriage Debate Focusing on Family*, DESERET NEWS, (July 13, 2012, 9:24 PM), <http://www.deseretnews.com/article/print/765589755/Both-sides-of-same-sex-marriage-debate-focusing-on-family.html>. Also in November 2012, a voter petition will be on the ballot in Maine which, if it passes, will legalize same-sex marriage there. See *Maine Same-Sex Marriage Question, Question 1 (2012)*, BALLOTPEdia, http://ballotpedia.org/wiki/index.php/Maine_Same-Sex_Marriage_Question_%282012%29 (last visited Oct. 20, 2012).

250. The Maryland and Washington civil union laws may be effectively displaced or upgraded by the same-sex marriage bills currently passed but awaiting voter veto or ratification in November 2012. See *id.*

251. See COLO. REV. STAT. §§ 15-22-105, 24-50-603 (2009); ME. REV. STAT. ANN. tit. 22, §§ 2710, et seq. (2008); WIS. STAT. §§ 765, 770.01, et seq. (2010).

*B. Legal Rejection of Same-Sex Unions in the United States*²⁵²

Same-Sex Marriage Is Prohibited in Thirty-One States (62%):

- Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wisconsin.²⁵³

Same-Sex Civil Unions Equivalent to Marriage Are Prohibited in Twenty U.S. States (40%):

- Alabama, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and Wisconsin.

Same-Sex Marriage Is Denied by Constitution, Statute or Appellate Decision in At Least Forty States:

- All states prohibit same-sex marriage except the six that have legalized same-sex marriage and Maryland, New Mexico, Rhode Island, and Washington.
- In states where same-sex marriage has been on the ballot, the people have decisively rejected same-sex marriage. The total vote rejecting same-sex marriage in votes on the thirty-one state marriage amendments combined is over 60 percent.²⁵⁴

*C. Legal Allowance of Same-Sex Unions Globally*²⁵⁵

Same-Sex Marriage Is Permitted in Ten Nations:

- Argentina, Belgium, Canada, Denmark, Iceland, The Netherlands, Norway, Spain, Sweden, and Portugal.²⁵⁶

252. See *Status of Same-Sex Relationships Nationwide*, *supra* note 247; see also *Same-Sex Marriage in the United States*, *supra* note 248.

253. The most recent vote on a state marriage amendment was in May 2012 in North Carolina where voters adopted a state marriage amendment with over 61% of the popular vote. *North Carolina Same-Sex Marriage, Amendment 1 (May 2012)*, BALLOTPEdia, http://ballotpedia.org/wiki/index.php/North_Carolina_Same-Sex_Marriage,_Amendment_1_%28May_2012%29 (last visited Oct. 20, 2012). Additionally, the voters in Maine passed a “people’s veto” of a bill legalizing same-sex marriage that their legislature had enacted. See *Maine Same-Sex Marriage*, *supra* note 249.

254. Research on Same-Sex Marriage Ballot Initiatives (Sept. 2012) (on file with author).

255. See *Recognition of Same-Sex Couples Worldwide*, *supra* note 247; see also *Status of Same-Sex Marriage*, WIKIPEDIA, http://en.wikipedia.org/wiki/Status_of_same-sex_marriage (last visited Oct. 20, 2012).

Same-Sex Unions Equivalent to Marriage Are Allowed in Sixteen Other Nations:

- Andorra, Austria, Brazil, Ecuador, Finland, France, Germany, Ireland, Liechtenstein, Luxembourg, New Zealand, Slovenia, South Africa, Switzerland, United Kingdom, and Uruguay.²⁵⁷

Same-Sex Partnerships (Formal but Not Equal to Marriage) Are Allowed in Six or More Nations:

- Australia, Columbia, Croatia, Czech Republic, Hungary, and Israel.

*D. Legal Rejection of Same-Sex Marriage Globally*²⁵⁸

Forty-six of 193 Sovereign Nations (24%) Have Constitutional Provisions Explicitly or Implicitly Defining Marriage as the Union of Man and Woman:

- Armenia (art. 32), Azerbaijan (art. 34), Belarus (art. 32), Brazil (art. 226), Bolivia (art. 63), , Bulgaria (art. 46), Burkina Faso (art. 23), Burundi (art. 29), Cambodia (art. 45), China (art. 49), Colombia (art. 42), Cuba (art. 43), Democratic Republic of the Congo (art. 40), Ecuador (art. 38), Eritrea (art. 22), Ethiopia (art. 34), Gambia (art. 27), Honduras (art. 112), Hungary (art. M), Japan (art. 24), Latvia (art. 110), Lithuania (art. 31), Malawi (art. 22), Moldova (art. 48), Mongolia (art. 16), Montenegro (art. 71), Namibia (art. 14), Nicaragua (art. 72), Panama (art. 58), Paraguay (arts. 49, 51, 52), Peru (art. 5), Poland (art. 18), Romania (art. 44), Rwanda (art. 26), Serbia (art. 62), Seychelles (art. 32), Spain (art. 32),²⁵⁹ Sudan (art. 15), Suriname (art. 35), Swaziland (art. 27), Tajiksistan (art.

256. Same-sex marriage is allowed in subdivisions of some other nations (e.g., certain states in the U.S., Mexico City). A case specific ruling in Brazil recognized same-sex marriage rejecting sexual orientation discrimination. See Marilla Brocchetto & Luciani Gomes, *Same-Sex Unions Recognized by Brazil's High Court*, CNN WORLD (May 5, 2011), http://articles.cnn.com/2011-05-05/world/brazil.same.sex.unions_1_civil-unions-gay-couples-homosexual-couples?_s=PM:WORLD. South Africa enacted "Civil Unions" which can be created by way of "marriage" and can be called "marriages," but the Marriage Act was not amended and only allows male-female marriage. See Civil Union Act 17 of 2006 (S. Afr.), available at <http://www.info.gov.za/view/DownloadFileAction?id=67843>. Some nations may recognize foreign same-sex marriages but not allow domestic same-sex marriages.

257. Some subdivisions (provinces, states, territories, as in Australia, the United States, Greenland, etc.) also recognize marriage equivalent same-sex civil unions. Some nations, such as Denmark, may allow both same-sex marriage and same-sex civil unions or partnerships.

258. See *Recognition of Same-Sex Couples Worldwide*, supra note 247; see also *Status of Same-Sex Marriage*, supra note 255.

259. While the constitutional text appears to prohibit same-sex marriage, the legislature passed a law allowing same-sex marriage. The constitutionality of the law has been under judicial review for many years, calling into question the process and integrity of the system.

33), Turkmenistan (art. 25), Uganda (art. 31), Ukraine (art. 51), Venezuela (art. 77), Vietnam (art. 64).