

COMMENTS

THE “DETERMINATION OF MARRIAGE ACT”: A REASONABLE RESPONSE TO THE DISCRIMINATORY “DEFENSE OF MARRIAGE ACT”

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*“Our Constitution . . . neither knows nor tolerates classes among citizens.”*¹

I. INTRODUCTION²

Mary and Margaret resided in Massachusetts, and after seriously dating for several years, the couple decided to marry in 2004. Because the couple lived in Massachusetts, a state that has recognized same-sex marriage since 2003,³ Mary and Margaret were successfully married under Massachusetts law. As a result, Mary and Margaret were entitled to the same state-based rights and benefits provided by Massachusetts to opposite-sex married couples, such as state employment benefits.

Shortly after their marriage, Mary gained employment with the United States Postal Service (USPS).⁴ Mary’s new federal job provided her many federal rights and benefits, including benefits under the Federal Health Benefit Program (FEHB). At the beginning of Mary’s employment, she was told that the FEHB provides health insurance for federal civilian employees, annuitants, former spouses of employees and annuitants, and their family members.⁵ Therefore, Mary assumed the FEHB would provide health insurance for her, as well as her spouse, Margaret. However, when Mary applied for health insurance for Margaret via the FEHB, the application was denied.

1. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896).

2. The hypothetical is loosely based upon the facts in *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374 (D. Mass. 2010).

3. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (legalizing same-sex marriage in the state of Massachusetts).

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

5. *Id.* at 380 (citing 5 U.S.C. § 8905 (2000)).

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According to the Office of Personnel Management (OPM), the government agency responsible for the FEHB,⁶ Mary's application was denied because the FEHB limits health benefits to *family members*, which the FEHB defines as the *spouse* of an employee or annuitant or an unmarried dependent child under the age of 22 years.⁷ The OPM claimed that it could not recognize Margaret as Mary's spouse because they were a same-sex couple. This claim was based on the Defense of Marriage Act (DOMA), which defines a spouse as a person of the opposite sex, who is either a husband or a wife.⁸

Subsequently, Mary and Margaret left Massachusetts. The couple did not think twice about moving to Louisiana to be closer to Mary's dying mother who had no one else to care for her. Louisiana is one of the many states that does not recognize same-sex marriages, which made Mary and Margaret's marriage nonexistent in Louisiana.⁹ Thus, during the year that the couple lived in Louisiana to care for Mary's mother, they were unable to receive the state-level spousal rights and benefits that they were able to receive in Massachusetts.

Upon the death of Mary's mother, the couple moved back to Massachusetts. When it came time for the couple to file their federal and state taxes for the first time as a married couple, Mary and Margaret assumed that, because their marriage was valid in Massachusetts, it was appropriate for the couple to file their taxes jointly. The couple's accountant explained that filing taxes jointly usually results in lower taxes than filing taxes separately.¹⁰ However, after filing their taxes, the couple received a notification that their jointly filed federal taxes were rejected because the couple was not married pursuant to the definition of marriage under DOMA. Thus, Mary and Margaret were forced to re-file their federal taxes separately, incurring higher taxes.¹¹

Several months later, Mary was tragically killed by a reckless driver while delivering mail for the USPS. Stricken with

6. Gill v. Office of Personnel Management, 699 F. Supp. 2d 374, 380 (D. Mass. 2010).

7. See *id.* at 385; see also 5 U.S.C. § 8905 (2000).

8. 1 U.S.C. § 7 (1996).

9. LA. CIV. CODE ANN. art. 3520 (1999).

10. See 26 U.S.C. § 1(a)-(c) (2008).

11. However, Mary and Margaret's jointly filed state taxes were accepted.

grief, Margaret confided in a friend who was also a recent widow. The friend told Margaret that she received Social Security Survivors' Benefits, as a surviving spouse, when her husband passed away.¹² The friend's husband had held the same position at the USPS as Mary did and was employed for the same amount of time as Mary.

After speaking with a representative at the Social Security Administration, Margaret discovered that Mary had sufficient earnings at the USPS during her lifetime in order to qualify as a surviving spouse for Survivors' Benefits.¹³ However, Margaret's application for Survivors' Benefits was rejected. The Social Security Administration, governed by federal law, adheres to DOMA and its definition of "marriage" and "spouse." Thus, Margaret, a same-sex surviving spouse, was not eligible for the same benefits as her friend in a nearly identical situation because her friend was an opposite-sex surviving spouse.

Unfortunately, every same-sex married couple in the United States potentially faces the same problems that Mary and Margaret faced. Even though same-sex couples are permitted to marry in several states, their marriages are meaningless in the eyes of federal law due to the enactment of DOMA because DOMA confines the definition of marriage and spouse to include opposite-sex marriages only.¹⁴ DOMA's recognition of opposite-sex marriages, but not same-sex marriages, raises a question as to whether DOMA discriminates against persons on the basis of sexual orientation. Consequently, the topic of same-sex marriage has raised equal protection and due process concerns under the Fifth Amendment to the United States Constitution.

Since the enactment of DOMA, there has been a shift in the nation's attitude toward same-sex marriage and homosexuality.¹⁵ After DOMA was passed, a number of states legalized same-sex marriage.¹⁶ Also, several Supreme Court cases have found legislation that discriminated on the basis of sexual orientation to

12. *See, e.g.*, Gill v. Office of Personnel Mgmt., 699 F. Supp. 2d. 374, 382 (D. Mass. 2010).

13. *See generally* 42 U.S.C. § 413-414 (1994).

14. 1 U.S.C. § 7 (1996).

15. *See infra* Section III.

16. *See infra* Section III.

be unconstitutional.¹⁷ Moreover, within the past year, President Barack Obama stated that he believes Section 3 of DOMA is in violation of the equal protection principles under the Fifth Amendment and that the Department of Justice will no longer defend it in federal court.¹⁸ Several lower federal courts have also found Section 3 of DOMA unconstitutional on the same grounds,¹⁹ and the United States Supreme Court has recently granted certiorari to hear two cases concerning same-sex marriage.²⁰

This Comment contends that DOMA violates the Due Process Clause and the equal protection component of the Fifth Amendment, and should be repealed by Congress or found unconstitutional by the judiciary. The governmental interests behind DOMA's enactment fail even under rational basis scrutiny, the lowest level of judicial scrutiny.²¹ First, DOMA does not facilitate the defense and nurturing of traditional heterosexual marriage.²² Opposite-sex couples can procreate without being married, same-sex couples can "procreate" via adoption or surrogacy and be extraordinary parents, and many heterosexual marriages end in divorce.²³ Second, the country's view of morality is different now than it was in 1996.²⁴ Finally, according to a study by the Congressional Budget Office, the government can actually preserve scarce government resources

17. See *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003).

18. Statement of the Attorney General 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>.

19. See *Gill v. Office of Personnel Mgmt.*, 699 F. Supp. 2d 374, 374 (D. Mass. 2010); *Massachusetts v. U.S. Dep't of Health and Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010) (*Massachusetts I*); *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012); *Pedersen v. Office of Personnel Mgmt.*, No. 3:10-cv-1750 (VLB), 2012 WL 3113883 (D. Conn. July 31, 2012); *Golinski v. Office of Personnel Mgmt.*, 824 F. Supp. 2d 968 (N.D. Cal. 2012); *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012) (*Massachusetts II*). It should be noted that *Gill* and *Massachusetts I* are companion cases, both forming part of the appeal in *Massachusetts II*.

20. See Adam Liptak, *Justices to Hear Two Challenges on Gay Marriage*, N.Y. TIMES, Dec. 7, 2012, http://www.nytimes.com/2012/12/08/us/supreme-court-agrees-to-hear-two-cases-on-gay-marriage.html?_r=0.

21. See *infra* Section IV.B (listing the four governmental interests asserted in the enactment of DOMA).

22. See *infra* Section IV.B (discussing the first governmental interest, the protection of traditional heterosexual marriage).

23. See *infra* Section IV.B (discussing the first governmental interest).

24. See *infra* Section IV.B (discussing the first governmental interest).

more efficiently by recognizing same-sex marriages at the federal level.²⁵

In DOMA's place, this Comment proposes federal legislation that will permit same-sex marriage by providing a new definition of *marriage* and *spouse* to accommodate same-sex couples, as well as opposite-sex couples.²⁶ Like DOMA, the proposed legislation will reserve to the states the power to determine whether to permit or refuse same-sex marriage within their own states.²⁷ However, the proposed legislation will ultimately allow same-sex married couples to receive federal marriage-based rights and benefits in each state, whether the state recognizes same-sex marriage or not.²⁸ Thus, same-sex married couples will no longer feel pressured to remain in a state recognizing same-sex marriage in order to receive rights and benefits.²⁹

Section II of this Comment discusses DOMA in depth—specifically, the reasons behind the act. Section III addresses the responses to its enactment at both the state and federal level. Section IV proposes new federal legislation, which will solve the problems created by DOMA by redefining marriage and spouse. Section V provides a brief conclusion.

II. THE DEFENSE OF MARRIAGE ACT

The following section discusses DOMA itself, from its inception to recent developments. Subsection A provides the text of DOMA, as well as the effects of the legislation. Subsection B discusses the events leading up to DOMA's enactment. Subsection C addresses the implications on federal law if DOMA were repealed. Subsection D lists the four main interests asserted by the federal government in creating DOMA, as well as the government's supporting arguments for each of the interests.

A. TEXT OF THE DEFENSE OF MARRIAGE ACT

DOMA was passed on September 21, 1996 as “[a]n act to define and protect the institution of marriage.”³⁰ Pursuant to the

25. See *infra* Section IV.B (discussing the first governmental interest).

26. See *infra* Section IV.A (referencing the new definition of “marriage” and “spouse” proposed in the Determination of Marriage Act)

27. See *infra* Section IV.A (describing the proposed legislation).

28. See *infra* Section IV.A (describing the proposed legislation).

29. See *infra* Section IV.A (discussing the benefits of the proposed legislation).

30. H.R. 3396, 104th Cong. (2nd Sess. 1996).

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House Report for DOMA, the act has two main purposes.³¹ The first purpose is to “defend the institution of traditional heterosexual marriage.”³² The second purpose is to provide states with the authority to determine whether they will legally recognize same-sex marriage or unions, without running afoul of the United States Constitution.³³ DOMA provides two sections in order to facilitate these purposes.³⁴ Section 2 of DOMA states:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or 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.³⁵

Essentially, Section 2 of DOMA allows states to refuse to recognize same-sex marriages contracted in other states, despite the requirements found in the Full Faith and Credit Clause.³⁶ Congress found such authority in the second sentence of the Full Faith and Credit Clause, which gives Congress the power to enact legislation to proscribe the effect that public acts, records, and proceedings have in other states.³⁷

Under Section 3, DOMA defines marriage as “only a legal union between one man and one woman as husband and wife,” and spouse “refers only to a person of the opposite sex who is a husband or a wife.”³⁸

B. BACKGROUND OF THE DEFENSE OF MARRIAGE ACT

The House Judiciary Committee’s Report (the House Report) to DOMA notes that, typically, the decision of who may marry

31. H.R. REP. NO. 104-664, at 2 (1996).

32. *Id.*

33. *Id.*

34. *Id.*

35. 28 U.S.C. § 1738C (1996).

36. H.R. REP. NO. 104-664, at 2 (1996). The Full Faith and Credit Clause requires states to respect the acts, records, and judicial proceedings of other states. *See* U.S. CONST. art. IV, § 1.

37. H.R. REP. NO. 104-664, at 25 (1996); *see* U.S. CONST. art. IV, § 1.

38. 1 U.S.C. § 7 (1996). The House Report to the act claims that the definition used was that found in a “standard law dictionary.” *Gill v. Office of Personnel Mgmt.*, 699 F. Supp. 2d 374, 378 (D. Mass. 2010).

whom is one reserved to the states, and the decision remains with the states with the passage of DOMA.³⁹ At the time DOMA was passed, no state provided for same-sex marriage.⁴⁰ However, a large part of society believed that marriage should not be confined to one man and one woman.⁴¹ In particular, the gay rights movement had attempted to make marriage available for same-sex couples for over twenty-five years.⁴² However, the movement was to experience little success in the courts, much less the legislature.⁴³ Furthermore, many gay rights organizations did not make same-sex marriage a priority.⁴⁴

However, in 1993, the Hawaiian case of *Baehr v. Lewin* brought hope to the same-sex marriage movement.⁴⁵ The *Baehr* plaintiffs—several same-sex couples—claimed that they were denied marriage licenses in Hawaii solely because they were couples of the same sex.⁴⁶ At the time, Hawaii did not permit same-sex marriages.⁴⁷ Ultimately, the Supreme Court of Hawaii, in a plurality opinion, found the state's provision prohibiting marriage between couples of the same sex to be unconstitutional because it violated the Equal Protection Clause of the Hawaii Constitution.⁴⁸ Thus, the marriage statute would only be upheld if it could pass strict scrutiny.⁴⁹ The decision opened up the possibility of marriage between persons of the same sex in Hawaii.⁵⁰ Ultimately, *Baehr* was one of the motivating factors that influenced Congress to pass DOMA.⁵¹

The House Report emphasized its concern over *Baehr's* possible interstate implications.⁵² First, at the time of DOMA's adoption, it seemed very likely that the state of Hawaii would

39. H.R. REP. NO. 104-664, at 2 (1996).

40. *Id.*

41. *Id.* at 3.

42. *Id.*

43. *Id.*

44. *Id.*

45. H.R. REP. NO. 104-664, at 3 (1996).

46. *Baehr v. Lewin*, 74 Haw. 530, 536-37 (1993).

47. H.R. REP. NO. 104-664, at 3 (1996).

48. *Id.* at 4-5.

49. *Id.* In order for the statute to satisfy the strict scrutiny test and thus be upheld, the statute must have furthered "compelling state interests and [have been] narrowly drawn to avoid unnecessary abridgement of constitutional rights." *Id.*

50. *Gill v. Office of Personnel Mgmt.*, 699 F. Supp. 2d 374, 377 (D. Mass. 2010).

51. H.R. REP. NO. 104-664, at 4 (1996).

52. *Id.* at 5.

authorize same-sex marriage.⁵³ Second, gay rights movements, as well as gay men and women themselves, had been desperately hoping for a favorable ruling in Hawaii.⁵⁴ Third, gay rights legal organizations, such as Lambda Legal, were willing to help same-sex couples travel to Hawaii to effectuate same-sex marriages, as well as accomplish recognition of their marriages by their respective home states upon their return.⁵⁵

The House Report observed that Hawaii would be the only state authorizing same-sex marriages, luring same-sex couples from other states to travel to Hawaii to contract marriages.⁵⁶ The situation presented the difficult question of whether those same-sex marriages contracted in Hawaii would be recognized in other states.⁵⁷ According to the Full Faith and Credit Clause, it seemed as though states would be compelled to do so.⁵⁸ However, the House Report referenced a public policy exception, previously recognized by the United States Supreme Court, which allows a state to decline to give effect to another state's laws if such laws violate the public policy of the recognizing state.⁵⁹

C. IMPLICATIONS ON FEDERAL LAW IF THE DEFENSE OF MARRIAGE ACT WERE NOT ENACTED

The House Report claimed that, without DOMA, *Baehr* would dramatically impact federal law.⁶⁰ For instance, a study conducted in 1997 found that the word marriage appeared in over 800 federal statutes and regulations and that the word spouse appeared in over 3,000 federal statutes and regulations.⁶¹

53. H.R. REP. NO. 104-664, at 5 (1996).

54. *Id.* at 7 n.20.

55. *Id.* at 7.

56. *Id.*

57. *Id.*

58. *Id.* at 6-7. The Full Faith and Credit Clause in the United States Constitution provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. CONST. art. IV, § 1.

59. H.R. REP. NO. 104-664, at 9 (1996).

60. *Id.* at 10.

61. *Id.* In 2003, the report was updated. Between September 21, 1996, when the Defense of Marriage Act was enacted, and December 31, 2003, 130 statutory provisions were enacted involving marital status. During the same time period, thirty-one statutory provisions involving marital status were repealed or amended in order to remove marital status as a determinant. Thus, during the above-mentioned time period, there existed 1,138 federal statutory provisions that included marital status as a determinant in the reception of benefits, rights, and privileges.

Moreover, most of these federal statutes and regulations did not contain definitions of marriage and spouse.⁶² Accordingly, until DOMA was adopted in 1996, the federal government relied upon state definitions of marriage and spouse.⁶³ Doing so had not been problematic because every state implicitly, if not explicitly, recognized marriage as between one man and one woman only.⁶⁴

Thus, the House Report expressed concern over the prospect of Hawaii permitting same-sex couples to marry because those same-sex married couples could then be eligible for federal rights and benefits.⁶⁵ Ultimately, the federal government found it necessary to provide a federal definition of marriage and spouse to prevent same-sex spouses from receiving the same federal rights and benefits as opposite-sex spouses, thus prompting the federal definitions exhibited in DOMA.⁶⁶

D. GOVERNMENTAL INTERESTS ASSERTED

In adopting DOMA, the federal government asserted four governmental interests.⁶⁷ The first interest was the defense and nurturing of the institution of traditional heterosexual marriage.⁶⁸ The second interest was the defense of traditional notions of morality.⁶⁹ The third interest was the protection of state sovereignty and democratic self-governance, and the final interest was the preservation of scarce government resources.⁷⁰

Under the first governmental interest, the House Report

Some of the areas containing marital status as a determining factor in the reception of benefits include social security, housing, food stamps, veterans' benefits, taxation, federal civilian and military service benefits, employment benefits, immigration, naturalization, trade, commerce, intellectual property, crimes, family violence, and loans. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT (2004), available at <http://www.gao.gov/assets/100/92441.pdf>.

62. H.R. REP. NO. 104-664, at 10 (1996).

63. *Id.*

64. *Id.*

65. *Id.* at 7, 10. For example, a same-sex spouse would be provided with the right to take unpaid leave from his or her employment to take care of his or her spouse who is ill under the Family Medical Leave Act. *Id.* at 10 n.34. Another example of a right that would be provided to same-sex spouses is the right of the spouse of a veteran to receive veterans' education benefits. *Id.* at 18.

66. H.R. REP. NO. 104-664, at 8 (1996).

67. *Id.* at 12.

68. *Id.*

69. *Id.*

70. *Id.*

claimed that society has an interest in preserving and defending heterosexual marriage because it has an interest in the furtherance of responsible procreation and child-rearing, or, in other words, children.⁷¹ However, the House Report conceded that there are two common responses to this interest in heterosexual marriage.⁷² The first is that heterosexual couples may marry, even though they may not be physically able to procreate or do not plan on doing so.⁷³ The House Report rebutted this argument by stating that it would be ridiculous to require couples planning to marry to undergo testing in order to ensure they could procreate or to have the couple promise to procreate.⁷⁴ In the opinion of the House Report, to do so would be “offensive and unworkable.”⁷⁵

The second response mentioned that there were more serious threats to marriage than same-sex marriage—namely, divorce.⁷⁶ The House Report admitted that this response had merit due to the unfortunate consequences of divorce on both adults and children.⁷⁷ However, the report suggests that marriage was already suffering due to no-fault divorce and children born out of wedlock, so it was not the time to worsen the situation by permitting same-sex marriage.⁷⁸ The House Report believed that redefining marriage to include homosexual marriage would be a “radical proposal that would fundamentally alter the institution of marriage.”⁷⁹

The government’s second interest involved morality.⁸⁰ First, the House Report claimed that the government has an interest in morality because procreation and child-bearing deal with nature, and, thus, have a moral ingredient.⁸¹ Furthermore, many marriages in the United States have religious or moral aspects.⁸²

71. H.R. REP. NO. 104-664, at 13 (1996).

72. *Id.* at 14.

73. *Id.*

74. *Id.*

75. *Id.* at 14.

76. *Id.* at 15.

77. H.R. REP. NO. 104-664, at 15 (1996).

78. *Id.* (citing William J. Bennett, *But Not a Very Good Idea, Either*, WASH. POST, May 21, 1996, at A19).

79. *Id.* at 12 (citing Bennett, *supra* note 78, at A19).

80. *Id.*

81. *Id.* at 15.

82. *Id.*

Thus, the House Report determined that many Americans encounter difficulty in trying to separate the civil aspect of marriage from the religious or moral aspect of marriage.⁸³ Additionally, the House Report stated that civil laws not permitting same-sex marriage manifest a disapproval of homosexuality, as well as the opinion that heterosexuality is more traditionally moral.⁸⁴ Hence, the House Report suggested that the law should comport with those moral notions.⁸⁵

The government's third interest involved state sovereignty and democratic self-governance.⁸⁶ In particular, the House Report notes that the issue of same-sex marriage is handled in its entirety by the federal courts, as opposed to the legislature.⁸⁷ Similarly, in the past, the federal courts controlled the issue of abortion, and the United States Supreme Court declared that the right to an abortion was protected by the Constitution.⁸⁸ The House Report believed that with the increase in court involvement with the issue of same-sex marriage, there was a decrease in democratic self-governance, or, in other words, less input from the legislature.⁸⁹

While the House Report conceded that in some areas it is appropriate for the courts to exhibit more decision-making authority than the legislative branches, it noted that, in representative democracies, courts tend to exercise power beyond that authorized or allotted to them by the Constitution.⁹⁰ In order to prevent a usurpation of power by the courts, DOMA is intended to protect the power of elected officials to determine matters concerning homosexuality.⁹¹ The House Report concluded that it was unfair for a single judge in Hawaii to give new meaning to federal and state legislation concerning fundamental social policies.⁹² Accordingly, the House Report claimed that the government has a legitimate interest in preserving the ability of people to act through their legislatures

83. H.R. REP. NO. 104-664, at 15 (1996).

84. *Id.* at 15-16; *see, e.g.*, *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

85. H.R. REP. NO. 104-664, at 16 (1996).

86. *Id.* at 12.

87. *Id.* at 16.

88. *Id.*

89. *Id.*

90. *Id.*

91. H.R. REP. NO. 104-664, at 17 (1996).

92. *Id.* at 17-18.

in defining the institution of marriage.⁹³

The final government interest involved preservation of government resources.⁹⁴ The House Report noted that the government provides many benefits to married couples in order to “promote, protect, and prefer the institution of marriage.”⁹⁵ In providing such benefits, the government incurs monetary obligations.⁹⁶ If same-sex marriage were to be recognized by Hawaii or any other state or states, the House Report claimed that the government would also have to provide those same benefits to homosexual married couples, thus costing the federal government that much more money.⁹⁷ Accordingly, the House Report believed that the government has an interest in preserving its resources by creating DOMA.⁹⁸

III. RESPONSES TO THE DEFENSE OF MARRIAGE ACT

Subsection A of this part discusses the state responses to DOMA, particularly newly enacted laws authorizing same-sex marriages or similar unions. Subsection B provides the relevant law concerning equal protection claims under the Fifth Amendment, including the level of scrutiny under which DOMA and other federal laws containing classifications based upon sexual orientation are to be reviewed by the courts. This subsection also discusses several challenges to discrimination based upon sexual orientation, as well as DOMA itself. Finally, Subsection C details attempts at the federal level to eliminate or circumvent DOMA, including the proposed federal legislation entitled the “Respect for Marriage Act.”

A. NEWLY ENACTED STATE LAWS

When DOMA was passed, no states permitted same-sex marriage.⁹⁹ However, once DOMA was passed, several states responded adversely to the legislation and authorized same-sex marriage.¹⁰⁰ For example, in 1999, the Supreme Court of

93. H.R. REP. NO. 104-664, at 18 (1996).

94. *Id.* at 12.

95. *Id.* at 18.

96. *Id.* For example, surviving spouses of Armed Service veterans are paid survivorship benefits by the federal government. *Id.*

97. *Id.*

98. H.R. REP. NO. 104-664, at 18 (1996).

99. *Id.* at 3.

100. *See generally Defining Marriage: Defense of Marriage Acts and Same-Sex*

Vermont found it unconstitutional to deprive same-sex couples of the “benefits and protections” resulting from a marriage in the state of Vermont.¹⁰¹ The Vermont court left the decision to the legislature of whether to allow same-sex couples in Vermont to marry or to enter into a similar “domestic partnership.”¹⁰² Ultimately, in 2000, Vermont passed legislation that permitted same-sex couples to enter civil unions and also provided them with the same benefits and protections as married couples in Vermont.¹⁰³

In the landmark case of *Goodridge v. Department of Public Health*, Massachusetts’s highest court also found the state’s ban on same-sex marriage to be unconstitutional, thus permitting marriage between couples of the same sex.¹⁰⁴ A few years later, in *Lewis v. Harris*, the Supreme Court of New Jersey followed the example of Vermont’s Supreme Court and held that New Jersey needed to amend its marriage laws or enact a statute for same-sex couples similar to Vermont’s civil union legislation.¹⁰⁵ In response, the New Jersey legislature passed legislation, in 2006, providing for civil unions within the state.¹⁰⁶ Shortly afterward, in 2008, New Hampshire also passed comparable legislation.¹⁰⁷

California’s history is much more controversial.¹⁰⁸ Pursuant to the *In Re Marriage Cases* decision in 2008, California authorized same-sex marriage.¹⁰⁹ However, only a few months later, during the November 2008 elections, a constitutional amendment called Proposition 8 was passed by voters.¹¹⁰ Proposition 8 provided that marriage in California existed only between one man and one woman.¹¹¹ However, on February 7, 2012, the 9th Circuit ruled that Proposition 8 was

Marriage Laws, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx> (last visited Oct. 24, 2012) (discussing the negative reactions of several states to the enactment of DOMA).

101. *Baker v. Vermont*, 170 Vt. 194, 197-98 (Vt. 1999).

102. *Id.* at 197.

103. NAT’L CONFERENCE OF STATE LEGISLATURES, *supra* note 100.

104. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (2003).

105. *Lewis v. Harris*, 188 N.J. 415, 463 (2006).

106. NAT’L CONFERENCE OF STATE LEGISLATURES, *supra* note 100.

107. *Id.*

108. *See id.*

109. *See In re Marriage Cases*, 43 Cal. 4th 757 (2008).

110. NAT’L CONFERENCE OF STATE LEGISLATURES, *supra* note 100.

111. *Strauss v. Horton*, 46 Cal. 4th 364, 385 (2009).

unconstitutional,¹¹² and in December 2012, the United States Supreme Court announced that it would rule on the constitutionality of California's Proposition 8.¹¹³ Connecticut's history is interesting as well.¹¹⁴ Prior to 2008, Connecticut authorized civil unions for persons of the same sex.¹¹⁵ In 2008, in providing same-sex couples the right to marry, the Connecticut Supreme Court determined that Connecticut's current civil union law was unconstitutional.¹¹⁶

The year 2009 proved to be a big year in terms of same-sex marriage.¹¹⁷ First, the Iowa Supreme Court authorized same-sex marriage.¹¹⁸ Also in 2009, Vermont's legislature, without involvement of the judiciary, passed legislation providing for same-sex marriages, rather than just civil unions.¹¹⁹ Maine and New Hampshire followed in Vermont's footsteps shortly afterward.¹²⁰ However, Maine's legislation was repealed only a few months later.¹²¹ At the end of the year, the District of Columbia also passed same-sex marriage legislation.¹²² In 2011, New York passed legislation providing for same-sex marriage, and Rhode Island passed legislation permitting same-sex civil unions.¹²³

Finally, in 2012, Washington and Maryland passed legislation permitting same-sex marriage.¹²⁴ However, opponents

112. *Federal Appeals Court Invalidates California Ban on Same-Sex Marriage*, NAT'L CONFERENCE OF STATE LEGISLATURES (Feb. 7, 2010), available at <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx>.

113. David G. Savage, *Supreme Court to Rule on California's Prop. 8 Ban on Gay Marriage*, LOS ANGELES TIMES, Dec. 7, 2012, <http://www.latimes.com/news/politics/la-pn-supreme-court-to-rule-on-prop-8-20121207,0,6412088.story>.

114. *See generally* NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 100.

115. *Id.*

116. Robert D. McFadden, *Gay Marriage is Ruled Legal in Connecticut*, N.Y. TIMES, Oct. 10, 2008, http://www.nytimes.com/2008/10/11/nyregion/11marriage.html?pagewanted=all&_r=0.

117. *See generally* NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 100.

118. *Id.*

119. *Id.*

120. *See id.*

121. *Id.*

122. *Id.*

123. NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 100.

124. Emmarie Huetteman, *Fate of Maryland Same-Sex Marriage Ballot Measure is*

forced referendums on election day.¹²⁵ Additionally, two other states—Maine and Minnesota—asked their voters via referendum whether same-sex marriage should be legal.¹²⁶ On election day, voters approved same-sex marriage in Maine, Maryland, and Washington.¹²⁷

In addition, Delaware, Hawaii, Illinois, New Jersey, and Rhode Island allow civil unions, which provide state-level spousal rights to same-sex couples.¹²⁸ As for domestic partnerships, two differing types have emerged.¹²⁹ California, Oregon, Nevada, and Washington allow domestic partnerships that grant nearly all state-level spousal rights to unmarried same-sex couples, while Hawaii, Maine, Wisconsin, and the District of Columbia allow domestic partnerships that provide *some* of the state-level spousal rights to unmarried same-sex couples.¹³⁰

B. EQUAL PROTECTION PRINCIPLES AND JUDICIAL CHALLENGES

This section discusses in detail the law surrounding the equal protection component of the Fifth Amendment to the United States Constitution, as well as challenges made to DOMA based upon an alleged violation of the equal protection portion of the Fifth Amendment.

1. EQUAL PROTECTION PRINCIPLES, GENERALLY

“The Constitution neither knows nor tolerates classes among citizens.”¹³¹ Thus, all citizens are entitled to equal protection of

Uncertain, N.Y. TIMES, Nov. 5, 2012, <http://thecaucus.blogs.nytimes.com/2012/11/05/fate-of-maryland-same-sex-marriage-ballot-measure-is-uncertain/>.

125. Huettelman, *supra* note 124.

126. *Id.*

127. Lauren Markoe, *Election 2012 Shows a Social Sea Change on Gay Marriage*, HUFFINGTON POST, Nov. 8, 2012, http://www.huffingtonpost.com/2012/11/08/election-2012-gay-marriage-sea-change_n_2090106.html.

128. *Id.*

129. *See id.*

130. *Id.*

131. *Romer v. Evans*, 517 U.S. 620, 623 (1996) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). The Fifth Amendment to the United States Constitution, applicable to the federal government, provides in pertinent part: “No person shall . . . be deprived of life, liberty or property, without due process of law.” U.S. CONST. amend. V, § 1. Similar to the Fifth Amendment is the Fourteenth Amendment, applicable to the states, which provides: “No State shall . . . deprive any

the laws.¹³² Stated otherwise, “all persons similarly situated should be treated alike.”¹³³ However, it must be remembered that most legislation makes classifications for a particular purpose and consequently disadvantages certain groups or persons.¹³⁴ In order to reconcile the promise of equal protection of the laws with the reality of creating legislation, courts apply strict scrutiny, “the most searching of constitutional inquiries,”¹³⁵ to a legislative classification when the legislation impermissibly interferes with the exercise of a fundamental right¹³⁶ or functions to the particular disadvantage of a suspect class.¹³⁷ Under a strict scrutiny analysis, a challenged law will be upheld only if the

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

There is an important difference between the Fifth Amendment and the Fourteenth Amendment. *See generally* U.S. CONST. amend. V, § 1; U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment, unlike the Fifth Amendment, has an actual Equal Protection Clause. *See generally* U.S. CONST. amend. XIV, § 1. In 1954, however, *Bolling v. Sharpe* bridged the gap between the amendments. *See generally* *Bolling v. Sharpe*, 347 U.S. 497 (1954). In *Bolling*, the Supreme Court stated that:

The Fifth Amendment . . . does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The ‘equal protection of the laws’ is a more explicit safeguard of prohibited unfairness than ‘due process of law,’ and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

Id. at 499.

Additionally, in *Buckley v. Valeo*, the Supreme Court conceded that equal protection analysis under the Fifth Amendment is always the same as under the Fourteenth Amendment. *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (citing *Weinberger v. Weisenfeld*, 420 U.S. 636, 638 n.2 (1975)).

132. U.S. CONST. amend. XIV, § 1.

133. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).

134. *Romer v. Evans*, 517 U.S. 620, 631 (1996) (citing *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 271-72 (1979)).

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

136. *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976); *see, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973) (right of a uniquely private nature); *Bullock v. Carter*, 405 U.S. 134 (1972) (right to vote); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right of interstate travel); *Williams v. Rhodes*, 393 U.S. 23 (1968) (rights guaranteed by the First Amendment); *Skinner v. Okl. ex rel. Williamson*, 316 U.S. 535 (1942) (right to procreate).

137. *Murgia*, 427 U.S. at 312; *see, e.g.* *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage as a suspect class); *McLaughlin v. Fla.*, 379 U.S. 184 (1964) (race as a suspect class); *Oyama v. California*, 332 U.S. 633 (1948) (ancestry as a suspect class).

government can prove that the law is narrowly tailored to serve a compelling government interest.¹³⁸ Under intermediate scrutiny, as opposed to strict scrutiny, for a legislative classification to survive, it must “serve important governmental objectives and must be substantially related to achievement of those objectives.”¹³⁹ Typically, intermediate scrutiny is exercised over, for instance, laws concerning gender¹⁴⁰ and illegitimate children.¹⁴¹

Legislation that neither burdens a fundamental right nor targets a suspect class will be upheld if it survives rational basis scrutiny—in other words, the legislation has a rational relationship to a legitimate government interest.¹⁴² Notably, rational basis review “is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.”¹⁴³ Thus, legislation under rational basis review is typically accorded a strong presumption of validity.¹⁴⁴ Additionally, courts are forced to accept the rationales given by the legislature, even if there is not a perfect match between means and ends.¹⁴⁵ Courts may even speculate about a legislature’s motivations in order to find a legitimate governmental interest.¹⁴⁶

However, the rational basis standard is not a “toothless one.”¹⁴⁷ Even under such a deferential standard, the courts must be able to decipher the relationship between the classification and

138. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

139. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

140. See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996).

141. See, e.g., *Lehr v. Robertson*, 463 U.S. 248 (1983).

142. *Romer v. Evans*, 517 U.S. 620, 631 (1996). However, it should be noted that legislative gender-based classifications also deserve a heightened standard of scrutiny, sometimes referred to as intermediate scrutiny. *City of Cleburne*, 473 U.S. at 440. Thus, classifications based upon gender will fail unless the [government] can prove that the classification is substantially related to an important [government interest]. *Id.* A higher standard of scrutiny is applied to such classifications because gender does not typically provide a basis for difference in treatment. *Id.* For example, gender is not conclusive concerning the ability of a person to perform or contribute to society. *Id.* at 440-41. Such classifications often rest on stereotypes regarding outdated differences between men and women. *Id.* at 441.

143. *Heller v. Doe*, 509 U.S. 312, 319-20 (1993).

144. *Id.*

145. *Id.*

146. *Shaw v. Or. Pub. Employees' Retirement Bd.*, 887 F.2d 947, 948-49 (9th Cir. 1989).

147. *Mathews v. de Castro*, 429 U.S. 181, 185 (1976).

the object of the legislation.¹⁴⁸ Therefore, in order for the legislation to survive rational basis review, it must be “narrow enough in scope and grounded in a sufficient factual context for the court to ascertain some relation between the classification and the purpose it serves.”¹⁴⁹ Accordingly, courts must make sure that legislative classifications are not made for the purpose of harming the group that is burdened by the legislation.¹⁵⁰

To survive rational basis review, the legislative classification must have “some footing in the realities of the subject addressed by the legislation”¹⁵¹ because the Constitution does not permit classifications whose relationship to the alleged goal is so attenuated that the classification becomes “arbitrary or irrational.”¹⁵² Ultimately, legislation will fail where the alleged justifications for the difference in the government’s treatment of groups similarly situated makes no sense.¹⁵³ Therefore, in order for a claimant to succeed in his or her equal protection challenge to particular legislation, the legislation must fail to survive rational basis scrutiny.

2. CHALLENGES TO DOMA AT THE JUDICIAL LEVEL

The Supreme Court has not ruled on the appropriate level of scrutiny concerning legislative classifications based upon sexual orientation.¹⁵⁴ However, several courts have used rational basis review.¹⁵⁵ In *Romer v. Evans*, the Supreme Court found that the legislative classification based upon sexual orientation failed even under the deferential rational basis review.¹⁵⁶ However, the

148. *Romer v. Evans*, 517 U.S. 620, 632-33 (1996).

149. *Gill v. Office of Personnel Mgmt.*, 699 F. Supp. 2d 374, 387 (D. Mass. 2010) (citing *Romer*, 517 U.S. at 633).

150. *Romer*, 517 U.S. at 633.

151. *Heller v. Doe*, 509 U.S. 312, 321 (1993).

152. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).

153. *Id.* at 447-50.

154. Letter from Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), *available at* <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

155. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Gill v. Office of Personnel Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010); *Pedersen v. Office of Personnel Mgmt.*, No. 3:10-cv-1750 (VLB), 2012 WL 3113883 (D. Conn. July 31, 2012); *Massachusetts II*, 682 F.3d 1 (1st Cir. 2012).

156. *Romer*, 517 U.S. at 632. In *Romer*, the Supreme Court found that Colorado’s state statute prohibiting legislative action designed to protect homosexuals violated the Equal Protection Clause. *Id.*

Supreme Court did not discuss whether classifications based upon sexual orientation deserved more than rational basis review.¹⁵⁷

The standard of review used in *Lawrence v. Texas* is a bit more difficult to determine, but the Supreme Court appears to have employed some form of rational basis review.¹⁵⁸ In *Lawrence*, the Supreme Court refers to “fundamental propositions” and “fundamental decisions,” but does not declare that intimate conduct between homosexuals is a fundamental right.¹⁵⁹ If the Supreme Court did consider the right to be a fundamental one, strict scrutiny would have been appropriate.¹⁶⁰ Instead, according to Justice Scalia’s dissenting opinion, the majority used “an unheard-of form of rational basis review.”¹⁶¹

Over the past two years, several lower federal courts have followed *Romer*, finding that DOMA failed under rational basis scrutiny.¹⁶² However, two of the recent decisions have determined that DOMA should be reviewed under intermediate scrutiny because homosexuals are a quasi-suspect classification.¹⁶³

Further, in early December 2012, the United States Supreme Court granted petitions for writs of certiorari for two cases concerning same-sex marriage.¹⁶⁴ Certiorari was granted in the first case, *Windsor v. United States*, to determine whether Section 3 of DOMA, which defines marriage as a union between only one

157. See generally *Romer v. Evans*, 517 U.S. 620, 632 (1996). The trial court determined that homosexuals do not constitute a suspect or quasi-suspect class, and the ruling was not challenged on appeal. *Id.* at n.1. Additionally, the Supreme Court implicitly rejected the argument that Colorado’s statute infringed upon a fundamental right. *Id.*

158. See generally *Lawrence v. Texas*, 539 U.S. 558 (2003). In *Lawrence*, the Supreme Court held that the Texas law criminalizing homosexual conduct between two persons violated the Due Process Clause. *Id.* at 558.

159. *Id.* at 586 (Scalia, J., dissenting).

160. *Id.*

161. *Id.*

162. *Gill v. Office of Personnel Mgmt.*, 699 F. Supp. 2d 374, 387 (D. Mass. 2010); *Pedersen v. Office of Personnel Mgmt.*, No. 3:10-cv-1750 (VLB), 2012 WL 3113883 (D. Conn. July 31, 2012); *Massachusetts I*, 698 F. Supp. 2d 234 (D. Mass. 2010); *Massachusetts II*, 682 F.3d 1 (1st Cir. 2012).

163. See generally *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012) (arguing that homosexuals are a quasi-suspect classification); *Golinski v. Office of Personnel Mgmt.*, 824 F. Supp. 2d 968 (N.D. Cal. 2012).

164. Liptak, *supra* note 20.

man and one woman, denies same-sex married couples lawfully married under the laws of their state the equal protection of the laws guaranteed by the Fifth Amendment.¹⁶⁵ The plaintiff in the case, Edith Windsor, is a same-sex surviving spouse.¹⁶⁶ In 2007, Windsor married Thea Spyer in Canada.¹⁶⁷ In 2009, while the couple was residing in New York, Spyer died and left all of her property to Windsor.¹⁶⁸ However, because the couple's marriage was not recognized under federal law, Windsor was forced to pay nearly \$400,000 in federal estate taxes.¹⁶⁹ Windsor claimed that Section 3 of DOMA violated principles of equal protection.¹⁷⁰ The Second Circuit determined that review of Section 3 of DOMA should be subject to intermediate scrutiny.¹⁷¹ The court reasoned that homosexuality satisfies the factors used to determine whether a new classification is a quasi-suspect classification entitled to intermediate scrutiny.¹⁷² Specifically, the Second Circuit stated:

- A) homosexuals as a group have historically endured persecution and discrimination;
- B) homosexuality has no relation to aptitude or ability to contribute to society;
- C) homosexuals are a discernible group with non-obvious distinguishing characteristics, especially in the subset of those who enter same-sex marriages; and
- D) the class remains a politically weakened minority.¹⁷³

Ultimately, the Second Circuit concluded that Section 3 of DOMA fails under intermediate scrutiny.¹⁷⁴ The court rejected the Bipartisan Legal Advisory Group's (BLAG) arguments that

165. *Windsor v. United States*, SCOTUS BLOG, <http://www.scotusblog.com/case-files/cases/windsor-v-united-states/> (last visited Jan. 6, 2012).

166. *Windsor v. United States*, 699 F.3d 169, 175 (2d Cir. 2012)

167. *Id.*

168. *Id.*

169. *Id.* at 175-76.

170. *Id.* at 180.

171. *Id.* at 181.

172. *Windsor*, 699 F.3d at 181-86. In *Golinski v. Office of Personnel Management*, the Northern District of California similarly decided that DOMA should be reviewed under intermediate scrutiny. *Golinski v. Office of Personnel Mgmt.*, 824 F. Supp. 2d 968, 985-90 (N.D. Cal. Feb. 22, 2012).

173. *Windsor*, 699 F.3d at 181-82.

174. *Id.* at 182.

DOMA maintains a consistent federal definition of marriage, protects the fisc, avoids the “unknown consequences of a novel redefinition of a foundational social institution,” and encourages responsible procreation.¹⁷⁵ First, the court found that Section 3 creates more inconsistency than consistency.¹⁷⁶ Second, DOMA “transcends a legislative intent to conserve public resources” because saving money cannot justify an “invidious classification,” and it is so broad that it cannot be said that it relates to fiscal matters.¹⁷⁷ Third, the court noted that preserving a tradition does not keep legislation immune from having to survive judicial review.¹⁷⁸ Finally, the court held that DOMA provides no reason for heterosexual couples to engage in “responsible procreation.”¹⁷⁹

The second case accepted by the United States Supreme Court, *Hollingsworth v. Perry*, though not directly addressing DOMA, concerns the constitutionality of California’s Proposition 8.¹⁸⁰ More specifically, the issue to be determined is whether the Equal Protection Clause of the Fourteenth Amendment prohibits California from defining marriage as a union between one man and one woman only.¹⁸¹ The plaintiffs argue that Proposition 8 violated the Constitution when it overrode the California Supreme Court’s authorization of same-sex marriage.¹⁸² The Ninth Circuit relied upon the decision in *Romer v. Evans*, stating that Proposition 8 is similar to the discriminatory law struck down in *Romer*.¹⁸³ However, the court noted that its holding is binding only in California.¹⁸⁴ Thus, the United States Supreme Court may take one of several paths: (1) reverse the Ninth Circuit’s decision and maintain the ban on same-sex marriage; (2) affirm the decision of the Ninth Circuit, permitting same-sex marriage in California, but not requiring it in other states; or

175. *Windsor v. United States*, 699 F.3d 169,185-88 (2d Cir. 2012).

176. *Id.* at 185-86.

177. *Id.* at 186-87.

178. *Id.* at 187.

179. *Id.* at 187-88.

180. *See generally* *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012); *see also* Liptak, *supra* note 20.

181. *Hollingsworth v. Perry*, SCOTUS BLOG, <http://www.scotusblog.com/case-files/cases/hollingsworth-v-perry/> (last visited Jan. 6, 2012). The Fourteenth Amendment and the potentially discriminatory laws of the states are not within the scope of this Comment.

182. *Perry*, 671 F.3d at 1063.

183. *See generally id.* at 1052.

184. *Id.* at 1096.

(3) determine whether the Constitution requires the states to permit same-sex marriages.¹⁸⁵

C. ATTEMPTS AT THE FEDERAL LEVEL

1. STATEMENT BY PRESIDENT OBAMA

On February 23, 2011, United States Attorney General Eric Holder made an important statement on behalf of President Barack Obama.¹⁸⁶ The statement noted that “classifications based on sexual orientation should be subject to a more heightened standard of scrutiny.”¹⁸⁷ Hence, the only remaining question is whether the “more heightened standard of review” is intermediate or strict scrutiny.¹⁸⁸ In the Attorney General’s letter to Congress concerning DOMA, Holder states that, in order for legislation to survive heightened scrutiny, the classification must be “substantially related to an important government objective.”¹⁸⁹ Such a standard appears to be an intermediate scrutiny standard, rather than a strict scrutiny standard.¹⁹⁰ Therefore, President Obama suggests that an intermediate scrutiny standard be applied to legislative classifications based upon sexual orientation.¹⁹¹

2. THE RESPECT FOR MARRIAGE ACT

In 2009, United States Representative Jerrold Nadler introduced the Respect for Marriage Act—legislation that would effectively repeal DOMA. On March 16, 2011, the Respect for Marriage Act was reintroduced in the House of Representatives and the Senate, by Jerrold Nadler and Dianne Feinstein, respectively.¹⁹²

185. Liptak, *supra* note 20.

186. Statement of the Attorney General on Litigation Involving the Defense of Marriage Act, *supra* note 18.

187. *Id.*

188. *Id.*

189. Letter from Attorney General to Congress on Litigation Involving the Defense of Marriage Act, *supra* note 154 (quoting *Clark v. Jeter*, 486 U.S. 456, 461 (1988)).

190. *See Clark v. Jeter*, 486 U.S. 456 (1988).

191. *See generally* Letter from Attorney General to Congress on Litigation Involving the Defense of Marriage Act, *supra* note 154; Statement of the Attorney General on Litigation Involving the Defense of Marriage Act, *supra* note 18.

192. *Respect for Marriage Act*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/laws-and-legislation/federal-legislation/respect-for-marriage-act> (last visited Oct. 24, 2012) [hereinafter HUMAN RIGHTS CAMPAIGN].

The relevant portions of the proposed Respect for Marriage Act provide:

Section 1738C of title 28, United States Code, is repealed, and the table of sections at the beginning of chapter 115 of title 28, United States Code, is amended by striking the item relating to that section.

Section 7 of title 1, United States Code, is amended to read as follows:

For the purposes of any Federal law in which marital status is a factor, an individual shall be considered married if that individual's marriage is valid in the State where the marriage was entered into or, in the case of a marriage entered into outside any State, if the marriage is valid in the place where entered into and the marriage could have been entered into in a State.¹⁹³

Importantly, President Obama announced his support of the Respect for Marriage Act on July 19, 2011.¹⁹⁴ On July 20, 2011, the Senate Judiciary Committee held a hearing on the legislation, as well as a markup on November 10, 2011.¹⁹⁵ Ultimately, the Committee approved the bill by a vote of 10-8.¹⁹⁶ The bill has not yet become law.

IV. PROPOSING A FEDERAL "DETERMINATION OF MARRIAGE ACT" TO REPLACE THE DISCRIMINATORY "DEFENSE OF MARRIAGE ACT"

This Comment proposes that new federal legislation, the Determination of Marriage Act, be enacted by Congress in DOMA's place. Subsection A includes the express language of the proposed legislation, which expands DOMA's definition of marriage and spouse to include marriages between persons of the same sex. This subsection also discusses the interests in enacting the proposed legislation and the effects such legislation will have. In particular, the inconsistencies in the reception of federal marriage-based rights and benefits will be eliminated.

193. H.R. 116, 112th Cong. (1st Sess. 2011).

194. Colleen Curtis, *President Obama Supports the Respect for Marriage Act*, THE WHITE HOUSE BLOG (July 19, 2011), <http://www.whitehouse.gov/blog/2011/07/19/president-obama-supports-respect-marriage-act>.

195. HUMAN RIGHTS CAMPAIGN, *supra* note 192.

196. *Id.*

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Subsection B lists the numerous reasons why DOMA fails under the equal protection component of the Fifth Amendment. Next, Subsection C discusses the implication of the Full Faith and Credit provisions under the Respect for Marriage Act, and finally, Subsection D addresses potential criticisms of the proposed legislation.

A. THE PROPOSED LEGISLATION: THE DETERMINATION OF MARRIAGE ACT**1. TEXT OF THE PROPOSED LEGISLATION**

The following is the text of the proposed Determination of Marriage Act. This legislation, intended to replace DOMA as the federal definition of marriage, is based largely off of DOMA, but expands the definition of marriage and spouse to include same-sex marriage. The Determination of Marriage Act provides:

THE DETERMINATION OF MARRIAGE ACT

An Act to define and *preserve* the institution of marriage.

SECTION 1. SHORT TITLE.

This Act may be cited as The *Determination* of Marriage Act.¹⁹⁷

SECTION 2. POWERS RESERVED TO THE STATES.

Certain acts, records, and proceedings and the effect thereof

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.¹⁹⁸

SECTION 3. DEFINITION OF MARRIAGE.

Definition of marriage and spouse

197. The italicized language highlights the differences between DOMA and the Determination of Marriage Act.

198. Section 1783C of title 28 of the United States Code remains the same, as opposed to the Respect for Marriage Act, which repeals Section 1783C of title 28 of the United States Code. Section 1783C was kept intact in order to reserve as much power to the states over domestic affairs as possible.

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, *the word marriage means a legal union between two persons, of the same or opposite sex, as husband and wife (if the two persons are one male and one female), or partners (if the two persons are of the same sex). The word spouse refers to a person of the opposite sex or same sex who is a husband, wife, or partner.*¹⁹⁹

2. GOVERNMENTAL INTERESTS OF THE PROPOSED LEGISLATION

Similar to the assertion of governmental interests in support of DOMA, the Determination of Marriage Act also fosters several important governmental interests: the preservation of the institution of marriage; consistency in the receipt of marriage-based federal rights and benefits; equality under the Fifth and Fourteenth Amendments, and finally, efficiency.

The first government interest is the preservation of the institution of marriage in general, not just heterosexual marriage. At first glance, such an interest sounds counterintuitive considering the House Report's governmental interest in the preservation of heterosexual marriage.²⁰⁰ Interestingly, the House Report was correct in suggesting that marriage is currently under attack due to an increase in factors such as no-fault divorce and the birth of children out of wedlock.²⁰¹ However, this Comment reaches a different conclusion than the House Report.²⁰²

If the institution of marriage is dwindling, why prevent persons, who desire so much to be married, from marrying? By permitting same-sex marriage at the federal level, the federal government is providing same-sex couples an additional incentive to marry—the reception of federal marriage-based rights and benefits. With more rights and benefits at stake, it is likely that many same-sex couples that are not yet married will choose to get

199. The Determination of Marriage Act does not include civil unions or domestic partnerships within the definition of marriage, so as to prevent the current problem under DOMA of having different classes of marriage.

200. See H.R. REP. NO. 104-664, at 9 (1996).

201. *Id.* at 15.

202. See *id.*

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married in a state permitting same-sex marriage. Ultimately, the proposed legislation will preserve the institution of marriage by encouraging more couples to get married.

The second interest involves consistency in the reception of federal marriage-based rights and benefits. Despite the fact that DOMA creates a single, federal definition of marriage and spouse, it does anything but create consistency. Same-sex married couples are not receiving federal marriage-based rights and benefits, but opposite-sex married couples are. Under the proposed legislation, both same-sex and opposite-sex married couples will be entitled to receive marriage-based federal rights and benefits, thus providing for *actual* consistency.

The third government interest is the interest in equality as required by the Constitution. Even if there were no federal marriage-based benefits at issue, the Constitution still requires that similarly situated persons be treated equally.²⁰³ Under DOMA, at the federal level, same-sex married couples are not treated the same as opposite-sex married couples in the reception of rights and benefits based upon marital status. However, under the Determination of Marriage Act, same-sex married couples and opposite-sex married couples will receive equal treatment at the federal level due to the federal government's redefinition of marriage and spouse.²⁰⁴ Thus, the proposed legislation, unlike the current legislation, comports with the commands of the Constitution.²⁰⁵

The fourth interest supported by the Determination of Marriage Act is efficiency. Under the proposed legislation, the federal definition of marriage and spouse is expanded to cover same-sex marriages.²⁰⁶ However, in determining whether a same-sex married couple is entitled to federal marriage-based rights and benefits, the previously proposed Respect for Marriage Act refers to whether the marriage is valid in the state where it was performed.²⁰⁷ If so, the couple may receive those rights and benefits. Accordingly, the Determination of Marriage Act will be more efficient than the Respect for Marriage Act because it eliminates the unnecessary step of referencing the particular

203. *See Plyler v. Doe*, 457 U.S. 202, 216 (1982).

204. *See supra* Section IV.A.1.

205. *See generally* H.R. 3396, 104th Cong. (2nd Sess. 1996).

206. *See supra* Section IV.A.1.

207. *See supra* Section III.C.2.

state's laws on same-sex marriage. For instance, under the Determination of Marriage Act, if Mary and Margaret were living in Louisiana, reference would not need to be made to Louisiana's marriage laws.

3. EFFECTS OF THE PROPOSED LEGISLATION

The proposed legislation will have numerous positive effects for same-sex couples. Under the proposed legislation, similar to DOMA, the states retain the power to make decisions concerning domestic affairs, particularly marriage. Also similar to DOMA, the proposed legislation provides a definition of marriage for federal purposes only. Thus, states are not forced to change the definition of marriage under their laws to include same-sex marriage. However, the states are free to make such changes if they choose to do so.

The proposed legislation will serve as a vehicle for same-sex married couples to receive federal rights and benefits that are based upon marital status. Under DOMA, same-sex married couples are not eligible for federal rights and benefits because of the limiting definitions of marriage and spouse, despite the fact that a couple could be validly married in a state that permits same-sex marriage. Fortunately, DOMA allows such couples to receive state rights and benefits based upon marital status in states that permit same-sex marriage. However, under DOMA, if a same-sex married couple moves to a state that does not permit same-sex marriage, the couple is entitled to neither state rights and benefits based upon marital status, nor federal rights and benefits based upon marital status.

Recalling the hypothetical in Section I,²⁰⁸ DOMA would permit Mary and Margaret to receive state marriage-based rights and benefits while in Massachusetts—the state that recognized same-sex marriages. However, DOMA would prevent Mary and Margaret from receiving marriage-based state rights and benefits once they moved to Louisiana because Louisiana does not permit same-sex marriage, nor does it recognize same-sex marriages performed in other states.²⁰⁹ Additionally, regardless of whether Mary and Margaret lived in Louisiana or Massachusetts, DOMA would prevent the couple from receiving federal marriage-based

208. *See supra* Section I.

209. *See* LA. CIV. CODE ANN. art. 96 (1988); LA. CIV. CODE ANN. art. 3520 (1999).

rights and benefits.

On the other hand, the Determination of Marriage Act would permit Mary and Margaret to continue to receive federal marriage-based rights and benefits despite moving to Louisiana due to the proposed legislation's expansive definition of marriage and spouse.²¹⁰ Thus, for a same-sex married couple, moving to a state that does not permit same-sex marriage is not a total loss. However, Mary and Margaret would still not be able to receive state marriage-based rights and benefits upon their arrival in Louisiana under the proposed legislation. Louisiana does not recognize same-sex marriages performed in other states;²¹¹ thus, under the proposed legislation, Louisiana will not be forced to recognize Mary and Margaret's marriage at the state level.

B. WHY THE DEFENSE OF MARRIAGE ACT VIOLATES PRINCIPLES OF EQUAL PROTECTION

DOMA authorizes marriage between one man and one woman only.²¹² Hence, the law creates a classification based upon sexual orientation. In doing so, the law treats similarly situated persons differently by permitting couples of the opposite sex to marry under federal law, but not couples of the same sex. Ordinarily, a classification based upon sexual orientation would likely receive rational basis scrutiny under an equal protection analysis because the classification does not target a suspect class, such as race, national origin, or alienage.²¹³ Under rational basis scrutiny, DOMA must be rationally related to a legitimate government interest.²¹⁴ This Comment argues that under either an intermediate scrutiny analysis or even the more deferential rational basis scrutiny analysis, DOMA fails to pass constitutional muster.

As discussed, the House Report for DOMA cited four government interests.²¹⁵ However, these interests are flawed. With respect to the first interest, the House Report's claim that the purpose of marriage is to procreate, and, therefore, marriage can exist only between one man and one woman does not make

210. *See supra* Section IV.A.1.

211. *See* LA. CIV. CODE ANN. art. 3520 (1999).

212. H.R. 3396, 104th Cong. (2nd Sess. 1996).

213. *See supra* Section III.B.1 (discussing rational basis scrutiny).

214. *See supra* Section III.B.1 (discussing rational basis scrutiny).

215. *See supra* Section II.D.

sense. It is obvious that one man and one woman can procreate without being married. Additionally, some married heterosexual couples do not choose to procreate, and others are not able to do so. Importantly, if the purpose of marriage is to have children, it would make sense to have, as a prerequisite to marriage, a pledge or promise to attempt to have children, or a fertility test to make sure the woman could bear children. The House Report believed such a requirement is “offensive and unworkable.”²¹⁶ However, if the only purpose of marriage is to have children, then such a requirement is actually quite reasonable.

Most importantly, the House Report ignored the fact that same-sex couples can actually have children of their own via adoption, assisted reproductive technology,²¹⁷ or surrogacy.²¹⁸ Thus, if the purpose of marriage is to have children, same-sex couples can accomplish that purpose and should therefore be entitled to contract marriages recognized under federal law. If the government were to deny persons the ability to procreate via assisted reproductive technology or surrogacy, the government would be violating the fundamental right to have children.²¹⁹

The House Report also claimed that the government has an interest in responsible child-rearing as a justification for opposing the providing of federal benefits to same-sex married couples. In so doing, it implied that same-sex parents are incapable of raising

216. H.R. REP. NO. 104-664, at 14 (1996).

217. Assisted reproductive technology consists of all treatments or procedures that include the handling of human oocytes or embryos, including in vitro fertilization, gamete intrafallopian transfer, zygote intrafallopian transfer, and such other specific technologies as the Secretary of Health and Human Services includes in the definition. 42 U.S.C. § 263a-7 (1992).

218. There are several different arrangements that can lead to a birth from a surrogate parent. See Ardis L. Campbell, *Determination of Status as Legal or Natural Parents in Contested Surrogacy Births*, 77 A.L.R. 5th 567, § 2(a) (2000). In a traditional surrogacy arrangement, the surrogate mother is injected with sperm from her husband or partner of a female who is not able to become pregnant. *Id.* In one particular type of gestational surrogacy, a woman's eggs are retrieved and inseminated with her husband or partner's sperm, then placed in the uterus of another woman for gestation and birth. *Id.* In another type of gestational surrogacy, through egg donation, a woman can be the gestational and birth mother because the surrogate donor's egg was fertilized by the sperm of her husband or sperm donor. *Id.* Finally, in a gestational egg and sperm donor surrogacy, a surrogate mother carries an embryo that is made from a donor egg that has been fertilized by another donor sperm. *Id.*

219. See generally *Skinner v. Okl. ex rel. Williamson*, 316 U.S. 535 (1942). The fundamental right to procreation is not within the scope of this Comment.

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children responsibly, without providing any justification. Further, the House Report ignored the fact that parents of the opposite-sex are capable of being irresponsible parents.

In fact, since DOMA was enacted, there is general agreement among the medical, psychological, and social welfare professions that children raised by homosexual parents are equally as likely to be well-adjusted as children raised by heterosexual parents.²²⁰ Even if Congress believed that children raised by heterosexual parents would be better off, such a justification still does not provide a rational basis for denying marriage to same-sex couples under federal law because it does nothing to promote Congress's interest, the responsible procreation by heterosexual parents.²²¹ In other words, DOMA provides no reason for heterosexual couples to take part in "responsible childrearing."²²² Instead, the government's asserted interest essentially denies children of same-sex couples a stable family unit.²²³

The House Report continued by stating that marriage is currently embattled due to factors like divorce, couples having children out of wedlock, and the sexual revolution.²²⁴ Thus, the House Report did not want to continue to harm marriage by authorizing same-sex marriage. However, if marriage is so embattled, then Congress should permit same-sex couples who desire so much to be married to do so to help preserve marriage as an institution in the United States. Additionally, the government has not provided any evidence that its refusal to recognize same-sex marriages does anything to protect or preserve heterosexual marriage.²²⁵ Finally, since the ultimate decision of whether or not same-sex couples can marry is reserved for the states, "DOMA does not . . . 'preserve' the institution of marriage as between a man and a woman."²²⁶

Thus, the government's first interest in responsible

220. *See Gill v. Office of Personnel Mgmt.*, 699 F. Supp. 2d 374, 388 (D. Mass. 2010).

221. *Id.* 388-89.

222. *Windsor v. United States*, 699 F.3d 169, 187-88 (2d Cir. 2012).

223. *Gill*, 699 F. Supp. 3d at 389; *see Massachusetts II*, 682 F.3d 1, 14-15 (1st Cir. 2012).

224. *See supra* Section II.D.

225. *See H.R. REP. NO. 104-664*, at 9-11 (1996).

226. *Windsor v. United States*, 833 F. Supp. 2d 394, 403 (S.D.N.Y. 2012).

procreation does not support even a rational basis for DOMA.²²⁷ Specifically, there exists no rational relationship between DOMA's prohibition against same-sex marriage and responsible procreation. Additionally, the House Report's argument that the institution of marriage will be subject to greater degradation with the addition of same-sex marriage is unconvincing. Consequently, the government's first interest fails under heightened scrutiny; this is clearly demonstrated because it fails even under rational basis review.²²⁸

The government's second interest focused on the defense of traditional notions of morality.²²⁹ Since DOMA was originally enacted in 1996, the culture of the United States has changed, particularly with respect to views regarding homosexuality. The Supreme Court's decision in *Lawrence v. Texas* is evidence of this cultural change.²³⁰ In *Lawrence*, the Court found that making the private sexual conduct of homosexuals a crime is unconstitutional.²³¹ The Supreme Court's conclusion rested on the fact that the state law criminalizing private sexual conduct between consenting adults furthers no legitimate interest.²³² Similarly, DOMA does not further the so-called legitimate government interest in morality by preventing same-sex marriage because there is not a rational relationship between the asserted interest in morality and DOMA's discrimination against same-sex couples.

227. See, e.g., *Gill v. Office of Personnel Mgmt.*, 699 F. Supp. 2d 374, 388-89 (D. Mass. 2010). In *Gill*, several same-sex couples that were married in Massachusetts, as well as survivors of same-sex spouses married in Massachusetts, instituted an action against the Office of Personnel Management, claiming that DOMA violated the equal protection component of the Fifth Amendment. *Id.* at 374. Specifically, the plaintiffs alleged that DOMA prevented them from receiving particular federal marriage-based benefits that similarly situated opposite-sex married couples received. *Id.* at 376-77. Ultimately, the United States District Court for the District of Massachusetts determined that Section 3 of DOMA violated principles of equal protection because DOMA could not even survive rational basis scrutiny. *Id.* at 396-97. The decision was recently affirmed by the First Circuit. See *Massachusetts II*, 682 F.3d 1 (1st Cir. 2012).

228. See, e.g., *Gill*, 699 F. Supp. 2d at 389. The recent decision in *Massachusetts II* aptly states: "Whether or not children raised by opposite-sex marriages are on average better served, DOMA cannot preclude same-sex couples in Massachusetts from adopting children or prevent a woman partner from giving birth to a child to be raised by both partners." *Massachusetts II*, 682 F.3d 1, 14 (1st Cir. 2012).

229. H.R. REP. NO. 104-664, at 11-12 (1996).

230. See generally *Lawrence v. Texas*, 539 U.S. 558 (2003).

231. *Id.* at 578.

232. *Id.*

Lawrence also seemed to imply that such a justification for upholding a federal law is not sufficient.²³³ In a dissenting opinion in *Bowers v. Hardwick*, Justice Stevens stated: “[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”²³⁴ Although not a majority opinion, Justice Stevens’ sentiment was adopted as controlling by the majority opinion in *Lawrence v. Texas*.²³⁵ Thus, the “immoral” behavior of same-sex couples would seem to be an insufficient reason to uphold DOMA and its prohibition of same-sex marriage.

Also, as discussed previously, President Obama suggested that classifications based upon sexual orientation should be subject to a more heightened standard of scrutiny, rather than mere rational basis scrutiny.²³⁶ The statement is significant because the President of the United States is personally arguing for the constitutional support of same-sex marriage.

Furthermore, on September 20, 2011, the military’s “Don’t ask, don’t tell” policy was repealed.²³⁷ The law was enacted in 1993, around the time of the *Baehr* decision, and only three years before DOMA was put in place.²³⁸ The repealed law provided in pertinent part:

A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:

(1) That the member has engaged in, attempted to engage in,

233. *Gill v. Office of Personnel Mgmt.*, 699 F. Supp. 2d 374, 389-90 (D. Mass. 2010); *see generally Lawrence v. Texas*, 539 U.S. 558 (2003).

234. *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting).

235. *Lawrence*, 539 U.S. at 578.

236. Statement of the Attorney General on Litigation Involving the Defense of Marriage Act, *supra* note 18. According to the statement, one of the factors considered in making the determination was the history of discrimination due to sexual orientation. *Id.* It was also mentioned that sexual characteristics are not determinative of the ability of a person to contribute to society. Letter from Attorney General to Congress on Litigation Involving the Defense of Marriage Act, *supra* note 154; *see also Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

237. “Don’t ask, don’t tell” consigned to history, CBS NEWS, Sept. 20, 2011, <http://www.cbsnews.com/stories/2011/09/20/national/main20108690.shtml>.

238. *Id.*

or solicited another to engage in a homosexual act or acts . . .

(2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect . . .

(3) That the member has married or attempted to marry a person known to be of the same biological sex.²³⁹

Thus, the military can no longer prevent openly homosexual soldiers from serving in the military.²⁴⁰ The repeal of the law is further proof that homosexuality is more accepted by society today than when DOMA was enacted in 1996.

Additionally, as previously discussed,²⁴¹ several lower federal courts have found Section 3 of DOMA to be unconstitutional, and the United States Supreme Court has granted writs of certiorari for two cases challenging the constitutionality of DOMA and similar state laws.²⁴² Also, concurrent with the recent presidential election, voters in three states voted to approve same-sex marriage within those states.²⁴³

Finally, the government's interest in the preservation of scarce government resources²⁴⁴ is called into question by information provided by the Congressional Budget Office (CBO).²⁴⁵ The CBO suggests that, if same-sex marriage were legalized in all fifty states and recognized by the federal government, the budgetary situation would actually slightly improve.²⁴⁶ Specifically, the CBO estimates that slightly under one billion dollars would be saved each year for the next ten years.²⁴⁷ Admittedly, the recognition of same sex marriages would increase the outlays for federal programs such as Social Security, as well as veterans' benefits, due to the increased

239. 10 U.S.C. § 654 (1993).

240. *"Don't ask, don't tell" consigned to history, supra note 237.*

241. *See supra* Section III.A-B.

242. Liptak, *supra* note 20.

243. Markoe, *supra* note 127.

244. H.R. REP. NO. 104-664, at 12, 18 (1996).

245. CONGRESSIONAL BUDGET OFFICE, THE POTENTIAL BUDGETARY IMPACT OF RECOGNIZING SAME-SEX MARRIAGES 1 (June 21, 2004), *available at* <http://www.cbo.gov/doc.cfm?index=5559&type=0>.

246. *Id.*

247. *Id.* Although the number of same-sex couples that would marry is unknown, the 2000 census provides an estimate. The census allows people to be characterized by "partners," rather than just "housemates/roommates." *Id.* In the 2000 census, nearly 1.2 million people characterized themselves as same-sex partners. *Id.*

number of people eligible for such benefits.²⁴⁸ However, the greater amount of people receiving such benefits would reduce government spending in areas such as Medicare, Medicaid, and Supplemental Security Income.²⁴⁹

Moreover, conservation of scarce government resources could be considered a legitimate government interest,²⁵⁰ but such an interest alone cannot serve as justification for the discrimination in the allocation of government resources.²⁵¹ No rationale can be deciphered for excluding same-sex married couples from government expenditures besides Congress's desire to exude disapproval of same-sex marriage.²⁵² Additionally, as stated in *Windsor v. United States*, "DOMA is so broad, touching more than a thousand federal laws, that it is not substantially related to fiscal matters."²⁵³ Therefore, the government's interest in preserving scarce government resources must fail under heightened scrutiny because it cannot survive even rational basis review.

Thus, it is not necessary to conduct a heightened scrutiny analysis of DOMA, as suggested by the Department of Justice and the Second Circuit, because the asserted governmental interests fail even under the lower level of rational basis scrutiny.²⁵⁴ Ultimately, because DOMA is likely unconstitutional under the Fifth Amendment, Congress should repeal DOMA and replace it with legislation that comports with the principles of equal protection under the Fifth Amendment.²⁵⁵

248. CONGRESSIONAL BUDGET OFFICE, THE POTENTIAL BUDGETARY IMPACT OF RECOGNIZING SAME-SEX MARRIAGES 5-6 (June 21, 2004), available at <http://www.cbo.gov/doc.cfm?index=5559&type=0>.

249. *Id.* at 5.

250. *Windsor v. United States*, 699 F.3d 169, 187-88 (2d Cir. 2012) ("Fiscal prudence is undoubtedly an important government interest.").

251. *Massachusetts II*, 682 F.3d 1, 14 (1st Cir. 2012); *Golinski v. Office of Personnel Mgmt.*, 824 F. Supp. 2d 968, 994 (N.D. Cal. Feb. 22, 2012) ("Under heightened scrutiny, convenience and economic efficiency in the administration of governmental programs do not legitimize differential treatment."); *Gill v. Office of Personnel Mgmt.*, 699 F. Supp. 2d 374, 390 (D. Mass. 2010).

252. *Massachusetts II*, 682 F.3d at 14; *Gill*, 699 F. Supp. 2d at 390.

253. *Windsor*, 699 F.3d at 187.

254. *Gill*, 699 F. Supp. 2d at 388-90.

255. It is possible to make a fundamental rights claim against DOMA. However, it is a weak one. The Due Process Clause of the Fifth Amendment provides: "No person shall . . . be deprived of life, liberty or property, without due process of law." U.S. CONST. amend. V, § 1. Of this Comment's concern is the heightened protection the clause provides against government interference with particular fundamental rights

**C. WHY THE DETERMINATION OF MARRIAGE ACT IS SUPERIOR
TO THE RESPECT FOR MARRIAGE ACT: THE FULL FAITH AND
CREDIT CLAUSE AND SECTION 1783C**

The Full Faith and Credit Clause has interstate implications when some states recognize same-sex marriages, civil unions, and domestic partnerships, while other states do not. If DOMA *and* its companion legislation (Section 1783C of title 28 of the United States Code) are deemed unconstitutional or are repealed, which is what the Respect for Marriage Act proposes, there is no longer a federal law in place permitting states to refuse to recognize same-sex marriages contracted in other states.²⁵⁶ Section 1783C essentially contains an exception to the application of the Full Faith and Credit Clause. Thus, without DOMA and Section 1783C, it is highly possible that the Supreme Court or Congress will determine that there is no longer an obstacle preventing application of the Full Faith and Credit Clause, thus compelling states to recognize same-sex marriages contracted in other states. Domestic affairs, such as marriage, have traditionally been exclusively reserved to the states, and courts have staunchly defended state control over domestic affairs.²⁵⁷ Without Section 1783C, the states would not retain the power to determine whether to recognize same-sex marriages performed in other

and liberty interests, which is often referred to as substantive due process. *See* *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997). The Due Process Clause protects the fundamental rights and liberties that are deeply rooted in the nation's history and tradition. *Id.* at 720. Importantly, one of the rights afforded protection are personal decisions relating to family relationships. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

In *Gill*, for example, the plaintiffs claimed that DOMA should be reviewed under strict scrutiny. *Gill*, 699 F. Supp. 2d at 387. Specifically, in support of their argument, the plaintiffs argued that DOMA burdened their "fundamental right to maintain the integrity of their existing family relationships," along with the other supporting arguments that homosexuals should be considered a suspect class. *Id.* Thus, a fundamental rights argument was made in *Gill*, but the court did not further address the argument. *See id.* The court in *Gill* instead based its decision upon DOMA's violation of equal protection principles. *See id.* Ultimately, a fundamental rights argument concerning family relationships can be made, but it may be a stretch since the right is not exactly on point with same-sex marriage.

Additionally, a fundamental right to marry argument is also likely to be unsuccessful because DOMA is not preventing same-sex couples to marry. Rather, DOMA does not recognize same-sex marriages that are *already contracted*. Thus, it is states that do not permit same-sex marriages who deny their residents the fundamental right to marry. However, the argument could very likely be successful at the state level. *See infra* note 278.

256. *See* H.R. REP. NO. 104-664, at 2 (1996).

257. *See, e.g.,* *Sosna v. Iowa*, 419 U.S. 393, 404 (1975).

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states. This Comment proposes that Section 1783C remain intact, in order to give states the *choice* of recognizing such marriages.

The Full Faith and Credit Clause states:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.²⁵⁸

Additionally, 28 U.S.C. § 1738, provides:

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.²⁵⁹

Over the past few decades, several limitations on the Full Faith and Credit provisions have emerged. Section 1783C of title 28 of the United States Code is such a limitation.

In 1996, to enact DOMA, Congress found a grant of authority in the second sentence of the Full Faith and Credit Clause, to prescribe the effect, if any, to be given to public acts, records, or proceedings of other states concerning same-sex marriage.²⁶⁰ The adoption of Section 2 of DOMA amended chapter 115 of Title 28 of the United States Code by adding Section 1738C, which provides:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.²⁶¹

258. U.S. CONST. art. IV, § 1.

259. 28 U.S.C. § 1738 (1948). The Full Faith and Credit Clause provided in the Constitution and the full faith and credit statute will be collectively referred to in this Comment as the Full Faith and Credit provisions.

260. See U.S. CONST. art. IV, § 1; H.R. REP. NO. 104-664, at 17-18 (1996).

261. 28 U.S.C. § 1738C (1996).

Section 1783C gives states the power to refuse to obey the Full Faith and Credit clause by not requiring the states to recognize same-sex marriages performed in other states. In other words, retaining Section 1783C keeps domestic affairs in the hands of the states. The Determination of Marriage Act proposes to keep Section 1783C,²⁶² but the Respect for Marriage Act proposes to repeal it.²⁶³ The text of the Respect for Marriage Act implies that it will not force states to recognize same-sex marriages contracted in other states, for purposes of state law.²⁶⁴ However, by repealing Section 1783C, the Respect for Marriage Act may eventually force states to recognize same-sex marriages issued in other states, thus diminishing state sovereignty and taking the power over domestic affairs away from the states. Essentially, if the Respect for Marriage Act is implemented, it may ultimately mandate substitution of another state's laws for the laws of the recognizing state.²⁶⁵ The issue is exacerbated by the potentially large volume of same-sex marriages wanting recognition within a state not providing for same-sex marriage, thus making the recognizing state's laws against same-sex marriage without effect.

On the other hand, the Determination of Marriage Act retains Section 1783C permitting states to refuse to recognize such marriages, thus avoiding the issue of full faith and credit and its exception altogether, as well as maintaining state sovereignty. Thus, due to the flaws present in the Respect for Marriage Act discussed above, the Determination of Marriage Act is the more reasonable solution.

D. POTENTIAL CRITICISMS OF THE DETERMINATION OF MARRIAGE ACT

1. THE ISSUE OF DOMESTIC AFFAIRS HAS BEEN TRADITIONALLY RESERVED TO THE STATES

One potential counterargument to this proposal is that domestic affairs, including marriage, belong to the laws of the states.²⁶⁶ However, under the proposed legislation, the issue of

262. See *supra* Section IV.A.1.

263. See *supra* Section III.C.2.

264. See *supra* Section III.C.2.

265. See *Pac. Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501 (1939).

266. *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890).

marriage still belongs to the laws of the states.²⁶⁷ A state is free to define marriage as it sees fit for purposes of state law. For purposes of federal law, a uniform definition for marriage and spouse is necessary for consistency in the reception of federal rights and benefits that have marital status as a determining factor.

With no federal definition of marriage and spouse, reference would be made to state definitions of marriage and spouse, as was done prior to the enactment of DOMA.²⁶⁸ The House Report to DOMA noted that, before DOMA, reference to state definitions was not problematic.²⁶⁹ Importantly though, at the time DOMA was adopted, no states recognized same-sex marriage,²⁷⁰—this is no longer the case. Thus, when DOMA was adopted, all state definitions of marriage confined marriage to one man and one woman.²⁷¹ Additionally, some states now recognize civil unions or domestic partnerships, which are similar to marriage in some, but not all respects.²⁷² Finally, each state's definition of marriage, civil union, and domestic partnership is different.²⁷³

267. See *supra* Section IV.

268. H.R. REP. NO. 104-664, at 10-11 (1996).

269. *Id.* at 10.

270. *Id.* at 2. See *supra* Section III.A.

271. See H.R. REP. NO. 104-664, at 2 (1996).

272. NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 100.

273. Vermont defines marriage as “the *legally recognized union* of two people.” 15 VT. STAT. ANN. tit. 15, § 8 (2009) (emphasis added). On the other hand, Massachusetts defines it as “the *voluntary union* of two persons as spouses, to the exclusion of all others.” *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 943 (Mass. 2003) (emphasis added).

Delaware defines a civil union as “a legal union between 2 individuals of the same sex.” 13 DEL. CODE ANN. tit. 13, § 201(1) (2012). Illinois defines the term as “a legal relationship between 2 persons, of either the same or opposite sex.” 750 ILL. COMP. STAT. 75/10 (2011). New Jersey defines a civil union as “the legally recognized union of two eligible individuals of the same sex established pursuant to this act. N.J. STAT. ANN. §§ 37:1-29 (West 2007). “Parties to a civil union shall receive the same benefits and protections and be subject to the same responsibilities as spouses in a marriage.” *Id.*

Oregon recognizes domestic partnerships and defines the term as “a civil contract described in ORS 106.300 to 106.340 entered into in person between two individuals of the same sex who are at least 18 years of age, who are otherwise capable and at least one of whom is a resident of Oregon.” OR. REV. STAT. § 106.310(1) (2012). In California, “[d]omestic partners are two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring.” CAL. FAM. CODE § 297(a) (West 2012).

Differing from other states, Colorado provides for a designated beneficiary agreement, which it defines as “an agreement that is entered into pursuant to this

If there were no federal definition of marriage and spouse today, several problems would arise. First, same-sex married couples living in states that do not permit same-sex marriage will be disadvantaged not only at the state level, but also at the federal level, as they are under DOMA. In states where same-sex marriage is permitted, same-sex married couples in that state would be able to receive federal rights and benefits that are dependent upon marital status. For example, Mary and Margaret,²⁷⁴ when living in Massachusetts after their marriage, would be able to receive federal level spousal rights and benefits.

The second problem involves the status of the civil unions and domestic partnerships recognized in some states. Although civil unions and domestic partnerships are not marriages, they do receive some of the same state-level spousal rights and benefits as married couples.²⁷⁵ Without a federal definition of marriage and spouse, the question becomes whether civil unions and domestic partnerships will be recognized federally due to the federal government's reliance upon state definitions of marriage.

2. WHAT ABOUT CIVIL UNIONS AND DOMESTIC PARTNERSHIPS?

The proposed legislation does not include civil unions or domestic partnerships in its definition of marriage and spouse, nor does the legislation recognize such associations for the purpose of receiving any federal rights or benefits.²⁷⁶ The rationale behind this omission rests in the fact that permitting civil unions and domestic partnerships at the federal level will lead to the problem currently posed under DOMA—the existence of different classes of marriage and similarly situated persons being treated differently.²⁷⁷

V. CONCLUSION

Under DOMA, same-sex married couples are discriminated against on the basis of sexual orientation, and, thus, they are not

article by two people for the purpose of designating each person as the beneficiary of the other person and for the purpose of ensuring that each person has certain rights and financial protections based upon the designation.” COLO. REV. STAT. ANN. § 15-22-103(2) (West 2009).

274. *See supra* Section I.

275. NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 100.

276. *See supra* Section IV.A.1.

277. *See Plyler v. Doe*, 457 U.S. 202, 216 (1982).

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entitled to recognition of their marriage at the federal level.²⁷⁸ Consequently, such couples are not entitled to federal marriage-based benefits, resulting in the creation of two different marriage statuses—one status determined by the state in which the marriage was confected and one status determined by the federal government, which is essentially no status at all. The proposed solution of replacing DOMA with new legislation is an attempt to eliminate the inconsistencies created by DOMA, as well as to treat similarly situated persons equally under federal law. Thus, in the wake of the cultural change surrounding same-sex marriage, both the nation as a whole, and states individually, should be prepared for what is to come.

Tina C. Campbell

**APPENDIX ON SAME-SEX MARRIAGE, CIVIL UNIONS, AND
DOMESTIC PARTNERSHIPS²⁷⁹**

State	Same-Sex Marriage	Civil Unions (Provides state-level spousal rights to unmarried same-sex couples)	Domestic Partnerships (Grants nearly all state-level spousal rights to unmarried same-sex couples)	Domestic Partnerships (Provides some state-level spousal rights to unmarried same-sex couples)
CA	No ²⁸⁰	No	Yes	No

278. States with legislation containing definitions of “marriage” as between one man and one woman could be found unconstitutional at the state level, under the Fourteenth Amendment, for the same reasons that DOMA should be found unconstitutional at the federal level, under the Fifth Amendment. *See* U.S. CONST. amend. XIV, § 1.

279. NAT’L CONFERENCE OF STATE LEGISLATURES, *supra* note 100.

280. On February 7, 2012, the 9th Circuit in California ruled that Proposition 8’s ban against same-sex marriage is unconstitutional. NAT’L CONFERENCE OF STATE LEGISLATURES, *supra* note 100. In December 2012, the Supreme Court announced that it would rule on the constitutionality of California’s Proposition 8. David G. Savage, *Supreme Court to Rule on California’s Prop. 8 Ban on Gay Marriage*, LOS ANGELES TIMES, Dec. 7, 2012, <http://www.latimes.com/news/politics/la-pn-supreme-court-to-rule-on-prop-8-20121207,0,6412088.story>.

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CO	No	No	No	Designated Beneficiary Agreement ²⁸¹
CT	Yes	No	No	No
DE	No	Yes	No	No
DC	Yes	No	No	Yes
HI	No	Yes	No	Yes
IL	No	Yes	No	No
IA	Yes	No	No	No
ME	Yes	No	No	Yes
MD	Yes	No	No	No
MA	Yes	No	No	No
NV	No	No	Yes	No
NH	Yes	No	No	No
NJ	No	Yes	No	No
NY	Yes	No	No	No
OR	No	No	Yes	No
RI	No	Yes	No	No
VT	Yes	No	No	No
WA	Yes	No	Yes	No
WI	No	No	No	Yes

281. COLO. REV. STAT. ANN. §15-22-103(2) (West 2009).