

The Constitutionality of the Defense of Marriage Act and State Bans on Same-Sex Marriage: Why They Won't Survive

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As of February 2010, a Washington Post poll indicated that “[a]mong individuals ages [eighteen] to [twenty-nine], an estimated [sixty-five] percent support marriage equality.”¹ These statistics are significant. A majority of the United States Supreme Court has made clear that, in determining the constitutional rights of individuals, the Court considers today’s societal views, national and global trends, contemporary values, and an emerging recognition of new positions on an issue.²

I. AN OVERVIEW AND SUMMARY OF CONSTITUTIONAL CHALLENGES TO DOMA AND STATE BANS ON SAME-SEX MARRIAGE

This Article addresses, among other things, the issue of whether state bans denying same-sex couples the right to obtain a marriage license—along with its more than one thousand combined federal and state benefits—and various aspects of the federal Defense of Marriage Act (“DOMA” or the “Act”) violate the fairness, liberty, and equality rationales underlying the Due Process and Equal Protection Clauses of the United States Constitution.

The right to marry a person of one’s own choosing, regardless of gender, has become an issue of national significance. In the summer of 2010, three federal district court decisions—two in Massachusetts and one in California—affirmed that the Constitution protects an individual’s choice of a marital partner regardless of gender. On July 8, 2010, in the case of Gill v. Office of Personnel Management,³ the

1. John D. Podesta & Robert A. Levy, Marriage for All: It’s up to the Courts to Defeat Prop. 8, WASH. POST, June 8, 2010, at A17, available at LEXIS (search for source) (citing to a February 2010 Washington Post poll).

2. See, e.g., Graham v. Florida, 130 S. Ct. 2011, 2033-34 (2010) (noting that evidence of “contemporary values” and “the laws and practices of other nations” are relevant); Roper v. Simmons, 543 U.S. 551, 563 (2005) (highlighting that “inquir[ing] into our society’s evolving standards of decency” is appropriate); Roper, 543 U.S. at 566 (taking into consideration trends); Id. at 567 (looking to evidence of “today[’s] . . . societ[al] views”); Roper, 543 U.S. at 575-76 (noting that the court will consult “the laws of other countries” and especially “nations that share our Anglo-American heritage . . . and . . . leading members of the Western European community”); Lawrence v. Texas, 539 U.S. 558, 571-72 (2003) (considering whether society has begun to embrace an “emerging awareness” or an “emerging recognition” of a new position on an issue).

3. Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010).

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United States District Court for the District of Massachusetts invalidated Section 3 of DOMA.⁴ The court held that DOMA violated the United States Constitution's Fifth Amendment Due Process Clause (and its Equal Protection component).⁵ On the same day, in the companion case of *Commonwealth v. Department of Health and Human Services*, the same court struck down Section 3 of DOMA under the Tenth Amendment⁶ and the Spending Clause of Article 1, Section 8 of the U.S. Constitution.⁷

On August 4, 2010, in the case of *Perry v. Schwarzenegger*, a federal district court in California invalidated the State of California's voter referendum ban on same-sex marriage, known as Proposition 8,⁸ under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution.⁹ Additionally, several state supreme courts have held that their particular state's ban against same-sex marriage violated the due process and equal protection guarantees of their respective state constitutions.¹⁰

While there are some important distinctions between the Massachusetts cases (involving DOMA's non-substantive federal definition of marriage) and the California case (involving a state substantive prohibition against same-sex marriage), each decision held that discriminatory laws that treat same-sex couples differently from hetero-

4. See 1 U.S.C. § 7 (2006) ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.").

5. The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V. In *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), the Supreme Court recognized that an equal protection component existed under the Fifth Amendment's Due Process Clause. The Fifth Amendment's Due Process Clause applies to the federal government. The Due Process and Equal Protection Clauses of the Fourteenth Amendment only apply to the states, not to the federal government.

6. The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people." U.S. CONST. amend. X.

7. *Commonwealth v. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010). The Spending Clause of the United States Constitution provides, in pertinent part: "The Congress shall have Power to Lay and collect Taxes, Duties, Imposts and Excises, to pay Debts and provide for the Common Defense and general Welfare of the United States; but all Duties, Imposts, and Excises shall be uniform throughout the United States." U.S. CONST. art. I, § 8, cl. 1.

8. CAL. CONST. art. I, § 7.5 (outlawing same-sex marriage in California via ballot initiative).

9. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

10. See, e.g., *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Goodridge v. Dep't of Pub. Health* 798 N.E.2d 941 (Mass. 2003).

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sexual couples violate the United States Constitution's guarantee of due process and equal protection under the law. Accordingly, the underlying rationale of the cases is the same.¹¹

Civil marriage is actually a secular, non-religious, government-operated licensing regime.¹² This seems to genuinely surprise many individuals.¹³ Civil marriage empowers the government to issue a license that entitles a couple to over one thousand combined state and federal property rights and benefits.¹⁴ Nevertheless, courts located in jurisdictions permitting same-sex marriages have repeatedly emphasized that religious organizations and disapproving members of the public are free to voice their moral outrage of these marriages and that they are not required to perform or sanction same-sex marriages.¹⁵ The Massachusetts Supreme Judicial Court expressed this sentiment in *Goodridge v. Department of Public Health*.¹⁶ In *Goodridge*, the court held

11. There are some distinctions between the Massachusetts cases and the California case. The Massachusetts cases involve the non-substantive federal definition of marriage contained in Section 3 of DOMA. Section 3 of DOMA does not prevent same-sex couples from getting married in states that permit it. However, it discriminates between lawfully married same-sex couples in a state and heterosexual couples in the same state for purposes of federal property rights and other benefits based on a marriage relationship. The California case, on the other hand, involves a California state substantive ban against same-sex marriage known as Proposition 8. Proposition 8 prohibits same-sex couples in California from getting married after the effective date of the law. The two Massachusetts decisions were decided on July 8, 2010 by the United States District Court for the District of Massachusetts. See *Commonwealth v. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010). The California case was decided on August 4, 2010 by the United States District Court for the Northern District of California. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010). The *Perry* case involves a substantive definition of marriage as embodied in a voter referendum known as Proposition 8 which prohibited same-sex couples from being married after the effective date of the Proposition (as interpreted by the California Supreme Court in *Horton v. Strauss*, 207 P.2d 48, 75 (Cal. 2009)). *Id.*

12. See, e.g., *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 952, 955 (D. Mass. 2003). As the *Goodridge* court pointed out, "The marriage license grants valuable property rights to those who meet the entry requirements, and who agree to what might otherwise be a burdensome degree of government regulation of their activities." *Id.* at 955.

13. See *id.*

14. For example, in *Goodridge*, the Supreme Judicial Court of Massachusetts listed several of these state property rights and benefits available only to married persons under Massachusetts law. *Id.* at 957. With respect to federal property rights and benefits, the General Accounting Office has identified over 1138 federal statutory provisions in which marital status is a factor in determining eligibility for or entitlement to federal benefits, rights and privileges. *Id.*; see CONGRESSIONAL BUDGET OFFICE, THE POTENTIAL BUDGETARY IMPACT OF RECOGNIZING SAME-SEX MARRIAGES (June 21, 2004), available at <http://www.cbo.gov/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf>; Complaint, *Commonwealth v. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010) (No. 1:09-11156-JLT); see also discussion *infra* Part III.B.2 (dealing with Massachusetts' challenge to the Defense of Marriage Act under the Tenth Amendment and the Spending Clause of Article I, Section 8 of the United States Constitution).

15. See *Varnum v. Brien*, 763 N.W.2d 862, 905-06 (Iowa 2009); *Goodridge*, 798 N.E.2d at 965.

16. *Goodridge*, 798 N.E.2d at 952, 955.

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that same-sex couples in Massachusetts were entitled to a marriage license under the Massachusetts Constitution.¹⁷ The court stated:

Our decision in no way limits the rights of individuals to refuse to marry persons of the same sex for religious or any other reasons. It in no way limits the personal freedom to disapprove of, or to encourage others to disapprove of, same-sex marriage. Our concern, rather, is whether historical, cultural, religious, or other reasons permit the State to impose limits on personal beliefs concerning whom a person should marry.¹⁸

The *Goodridge* decision presents an excellent case to analyze the reasoning underlying state court decisions that have invalidated prohibitions on same-sex marriage. The court in *Goodridge* noted that the Massachusetts marriage restriction impermissibly “identify[d] persons by a single trait and then denie[d] them protection across the board.”¹⁹ The *Goodridge* court went to great lengths to make clear that civil marriage is a non-religious bestowal of property rights on two people who agree to legalize their relationship.²⁰ The decision allowed persons in same-sex relationships to get married on an equal basis with heterosexual couples as a matter of right under the Massachusetts Constitution.²¹ A similar ruling by the United States Supreme Court that interprets the United States Constitution to permit same-sex marriage would definitively settle the issue as to the property and other rights of persons in same-sex relationships pursuant to the mandates of the Supremacy Clause of the United States Constitution.²²

The Massachusetts Supreme Judicial Court laid out several important points to support its decision. First, the court noted that civil marriage is a wholly secular institution.²³ In particular, the court noted that there are three partners to every civil marriage—two willing spouses and an approving State.²⁴ Second, the Massachusetts Supreme Judicial Court reasoned that Massachusetts’ failure to extend civil marriage to same-sex couples was incompatible with the constitu-

17. *Id.* at 965.

18. *Id.*

19. *Id.* at 963 (citing to *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

20. *See id.* at 955.

21. *See id.*

22. U.S. CONST. art. VI, cl. 2.

23. *Goodridge*, 798 N.E.2d at 954.

24. *Id.*

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tional principles of respect for private autonomy²⁵ and equality under law.²⁶

The Massachusetts Supreme Judicial Court sought to insulate its decision from review by the United States Supreme Court by grounding its decision on the Massachusetts State Constitution. As the *Goodridge* court correctly noted, the Massachusetts Constitution can accord greater protections to individual rights than do similar provisions of the United States Constitution.²⁷ The court, thereafter, proceeded to invalidate Massachusetts' same-sex marriage ban. The court held that Massachusetts' same-sex marriage restriction had no rational basis for due process or equal protection purposes under the Massachusetts Constitution and constituted an unwarranted government intrusion into protected spheres of life.²⁸ Specifically, the court held that the Massachusetts ban on same-sex marriage violated individual liberty and equality safeguards under the state Constitution.²⁹

Moreover, the court determined that the purported rational basis for the ban—that the primary purpose of marriage is procreation—is a fallacy since Massachusetts law does not contain a requirement that the applicants for a marriage license attest to their ability or intention to conceive children by coitus.³⁰ The court noted that “people who have never consummated their marriage, and never plan to, may be and stay married” and that “[p]eople who cannot stir from their deathbed may marry.”³¹ The court then turned its attention to a variety of state property rights only available to married heterosexual couples.³² The court also listed a number of benefits only available to

25. *Id.* at 958 n.17 (reiterating the rationale of *Lawrence v. Texas*, 539 U.S. 558 (2003)).

26. *Id.* at 957 n.15 (comparing the issues involving same-sex marriage to those involved in *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

27. *Id.* at 959 (citing *Arizona v. Evans*, 514 U.S. 1, 8 (1995)).

28. *Id.*

29. *Id.*

30. *Id.* at 961.

31. *Id.*

32. *Id.* at 955-56. A few examples of these property rights include: (a) joint income tax filing, (b) tenancy by the entirety, (c) homestead protection to one's spouse and children, (d) automatic rights to inherit property of a deceased spouse who does not leave a will, (e) rights of elective share and of dower, (f) entitlement to wages owed to a deceased employee, (g) eligibility to continue certain businesses of a deceased spouse, (h) the right to share the medical policy of one's spouse, (i) thirty-nine week continuation of health coverage for the spouse of a person who is laid off or dies, (j) preferential options under Massachusetts' pension system, (k) preferential benefits in Massachusetts' medical program, (l) access to veterans' spousal benefits and preferences, (m) financial protections for spouses of certain Massachusetts employees; (n) the equitable division of marital property on divorce, (o) temporary and permanent alimony rights, (p) the right to separate support on separation of the parties that does not result in a divorce, and (q)

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heterosexual married couples that were not directly tied to property rights.³³

Beyond the Massachusetts ruling and the recent federal district court rulings handed down during the summer of 2010, DOMA³⁴ and state bans on same-sex marriage³⁵ are vulnerable to attack under no less than six separate provisions in the United States Constitution. Indeed, the United States Supreme Court laid the groundwork for invalidating bans against same-sex marriage in two significant cases (which the *Goodridge* court cited)—the 1996 case of *Romer v. Evans*³⁶ and the 2003 decision in *Lawrence v. Texas*.³⁷

The Court's decision in *Lawrence*—which invalidated a state statute allowing prosecutions of private homosexual conduct—makes clear that even a profound and deep moral conviction by a majority of a state's citizens cannot serve as a basis for upholding a law that otherwise violates the Due Process Clause of the United States Constitution.³⁸ And, in an often repeated quote, the Court in *Lawrence* emphasized that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”³⁹ Conservative Justice Antonin Scalia, in dissent, noted: “[W]hat [remaining] justifica-

the right to bring claims for wrongful death and loss of consortium and for funeral and burial expenses and punitive damages in resulting from tort actions. *Id.* at 956.

33. *Id.* at 956-57. The court listed the following benefits: (a) the presumptions of legitimacy and parentage of children born to a married couple; (b) evidential rights, such as the prohibition against spouses testifying against one another about their private conversations, applicable in both civil and criminal cases; (c) qualification for bereavement and medical leave to care for individuals related by blood or marriage; (d) application of predictable rules of child custody, visitation, support, and removal out-of-state when married parents divorce; (e) priority rights to administer the estate of a deceased spouse who dies without a will and the requirement that a surviving spouse must consent to the appointment of any other person as administrator; and (f) the right to interment in the lot or tomb by one's deceased spouse. *Id.*

34. Section 3 of DOMA, for example, states that:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7 (2006). Additionally, Section 2 of DOMA, 28 U.S.C. § 1738C, appears to permit state courts to deny enforcement of final judgments of other state courts to the extent that the judgment is based on a law recognizing same-sex marriage. See discussion *infra* in Part III.C.

35. For example, the California Voter Referendum know as Proposition 8, which deprived prospective same-sex couples of their right to marry in California simply provides that, “[o]nly marriage between a man and a woman is valid or recognized in California.” CAL. CONST. art. I, § 7.5.

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

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

38. See *id.* at 571.

39. *Id.* at 560 (Stevens, J., dissenting) (citing *Bowers v. Hardwick*, 478 U.S. 186, 215 (1986)).

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tion could there possibly be for denying the benefits of marriage to homosexual couples exercising “[t]he liberty protected by the Constitution?”⁴⁰ Justice Scalia was correct in his assessment that, in light of the rationale for the Supreme Court majority’s decision in *Lawrence*⁴¹ the issue of the unconstitutionality of state bans against same-sex marriage and DOMA cannot be seriously doubted. The Court’s earlier decision in *Romer*⁴² only buttresses this view.

In *Romer*, an amendment to the Colorado Constitution “prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect . . . a class . . . [consisting of] homosexual persons or gays and lesbians.”⁴³ The Supreme Court held, among other things, “that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”⁴⁴ The Court noted that “laws singling out a certain class of citizens for disfavored legal status or general hardships” in which it is “more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”⁴⁵

The United States Supreme Court noted in *Bolling v. Sharpe* that the “concepts of equal protection and due process . . . stem[] from [the] American *ideal of fairness*”⁴⁶ Therefore, it is critically important to make clear at the outset that the rights of same-sex couples to more than one thousand property rights and benefits of “civil” marriage are at stake. Even more important is understanding that the right to partake in “civil” marriage is a secular, nonreligious matter. Religious organizations are not required to recognize same-sex civil marriages nor perform them.⁴⁷ This is a crucial point that is not articulated enough nor understood by many.

40. *Id.* at 604-05 (Scalia, J., dissenting) (citation omitted); see also Theodore B. Olson, *The Conservative Case for Gay Marriage: Why Same Sex Marriage is an American Value*, NEWSWEEK, Jan. 18, 2010, at 48, available at <http://www.newsweek.com/2010/01/08/the-conservative-case-for-gay-marriage.html> (citing Justice Scalia’s dissenting opinion in *Lawrence v. Texas*).

41. See generally *Lawrence*, 539 U.S. 558 (invalidating under the Due Process Clause of the Fourteenth Amendment, a Texas sodomy statute that, among other things, criminalized consensual sex between homosexuals in the privacy of their home).

42. *Romer v. Evans*, 517 U.S. 620, 633 (1996).

43. *Id.* at 634.

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

45. *Id.* at 633.

46. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (emphasis added).

47. See, e.g., *Varnum v. Brien*, 763 N.W.2d 862, 905-06 (Iowa 2009); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003).

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This Article contains six parts. Part II discusses the background of DOMA. Part III addresses various constitutional provisions under which state bans on same-sex marriage and various aspects of DOMA are potentially unconstitutional. Those constitutional provisions are as follows: (1) the Fourteenth Amendment's Due Process and Equal Protection Clauses (as to state bans against same-sex marriage); (2) the equal protection component of the Fifth Amendment's Due Process Clause (as to Section 3 of DOMA); (3) the Tenth Amendment to the United States Constitution (as to Section 3 of DOMA); (4) the Spending Clause of Article I, Section 8 (as to Section 3 of DOMA); (5) the Full Faith and Credit Clause of Article IV, Section 1, (as to Section 2 of DOMA insofar as it permits courts to deny enforcement of judgments based on same-sex laws rendered by sister states); and (6) the Establishment Clause of the First Amendment (as to state bans on same-sex marriage Section 3 of DOMA). Part IV explains why tradition is not a justification for denial of same-sex marriage. Part V discusses the Supreme Court's evolving standards in the interpretation of the Constitution and argues that contemporary attitudes of liberty, fairness, justice, and equality will ultimately culminate in a rejection of DOMA and state bans on same-sex marriage on constitutional grounds.

This Article maintains throughout that there is no rational justification for states to deny same-sex couples the property rights afforded by civil marriage. Finally, this Article concludes in Part VI that the constitutionality of DOMA and state bans against same-sex marriage appear to be in grave doubt. The time is rapidly approaching when we shall all know whether this Article's prediction—that the Supreme Court will rule that DOMA and state bans against same-sex marriage are unconstitutional—will become a reality.

II. BACKGROUND OF DOMA

In 1996, Congress enacted DOMA in reaction to the possibility that a state—specifically Hawaii—might authorize same-sex marriage. In *Baehr v. Lewin*, the Supreme Court of Hawaii became the first court in the United States to recognize same-sex marriage.⁴⁸ However, a subsequent amendment to the Hawaii Constitution effectively

48. *See Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (holding that denial of a marriage license to a same-sex couple constituted sex-based discrimination in violation of the equal protection clause of the Hawaii Constitution).

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nullified the decision.⁴⁹ The events in Hawaii sparked a storm of controversy, and in response, a majority of states amended their marriage laws to prohibit same-sex marriage.⁵⁰

With respect to the effect of federal law on interstate recognition of same-sex marriage, Section 2 of the DOMA provides in pertinent part:

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.⁵¹

The language of the Act makes clear that there is no mandate under federal law for one state to recognize a same-sex marriage formed in another state. The House Judiciary Committee Report on DOMA acknowledged that federalism constrained Congress' power and that "[t]he determination of who may marry in the United States is uniquely a function of state law."⁵² In this regard, Section 2 of DOMA was entirely unnecessary and instead appears to be primarily an exercise in political posturing. This is because neither state conflict of law rules nor federal law construing the Full Faith and Credit Clause (Article IV, Section 1) of the United States Constitution have ever required a state to give full faith and credit to the laws of another state when the laws of the other state violate the state's strong public policy.⁵³

49. The decision of the Supreme Court of Hawaii in *Baehr v. Lewin* did not last. See National Conference of State Legislatures, *Same-Sex Marriage Overview*, <http://www.ncsl.org/default.aspx?tabid=4240> (last visited Oct. 21, 2010). In 1998, the people of Hawaii approved a constitutional amendment permitting the legislature to define marriage as a relationship between a man and a woman. *Id.*

50. See, e.g., KAN. STAT. ANN. §§ 23-101, 23-115 (1996); S.C. CODE ANN. §§ 20-1-15, 20-1-10 (2009).

51. Defense of Marriage Act § 2, 28 U.S.C. § 1738C (2006).

52. H.R. REP. NO. 104-664 at 2905 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906-07, 1996 WL 391835 at *3.

53. Section 2 of DOMA seems to have been completely unnecessary since states can deny recognition to state laws (e.g., marriage statutes) that violate the local public policy of the forum state (at least when the public policy of the state does not violate the United States Constitution). See 28 U.S.C. § 1738C (2006); *infra* Part III.C.4. See generally *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233-34 (1998) ("A court may be guided by the forum State's 'public policy' in determining the law applicable to a controversy") (citing *Nevada v. Hall*, 440 U.S. 410, 421-24 (1979)).

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DOMA, however, may have a discriminatory and unfair bite to the extent that the statute does not require a state to honor final judgments of other states when the judgment of the rendering court was based on a law recognizing same-sex marriage. Arguably, Section 2 of DOMA is unconstitutional under Article IV, Section 1 of the United States Constitution, as applied to final judgments of sister states.⁵⁴

The House Judiciary Committee Report on DOMA exhibited a substantial amount of anti-gay animus. The House Report candidly stated that Congress' purpose in proposing the Act was to reflect Congress' "moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality."⁵⁵ In the floor debate, members of Congress repeatedly voiced their disapproval of homosexuality, calling it "immoral,"⁵⁶ "depraved,"⁵⁷ unnatural,⁵⁸ "based on perversion,"⁵⁹ and an attack upon God's principles.⁶⁰ They argued that the marriage of gays and lesbians would "demean" and "trivialize" heterosexual marriage⁶¹ and might be "the final blow to the American family."⁶²

54. As previously mentioned, the United States Supreme Court has made clear that a court may be guided by the forum State's public policy in determining the law applicable to a controversy. *See Hall*, 440 U.S. at 421-24. The Court's decisions, however, support no roving public policy exception to the full faith and credit due judgments. *See Baker*, 522 U.S. at 233-34 (citing *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908)). Yet, it appears that Congress intended for DOMA to empower state courts to exercise just this sort of roving public policy exception to the full faith and credit due judgments of state courts. *See generally* Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 *YALE L.J.* 1965, 2002-03 (1997) (discussing possible interpretations of the Effects Clause). Some commentators have argued that Congress lacks power under the Effects Clause of the Full Faith and Credit Clause to empower states to disrespect the laws of other states. *Id.* Under this line of reasoning, the Framers of the Constitution arguably only gave Congress the power to implement the Full Faith and Credit Clause, not the power to destroy it by amending its basic premise. *See id.*; *see also infra* Part III.C.1.

55. H.R. REP. NO. 104-664 at 2920 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906-07, 1996 WL 391835, at *16.

56. 142 CONG. REC. H7444 (daily ed. July 11, 1996) (statement of Rep. Coburn).

57. *Id.* at H7486 (daily ed. July 11, 1996) (statement of Rep. Buyer).

58. *See id.* at H7441 (daily ed. July 11, 1996) (statement of Rep. Canady) (stating "that the traditional family structure—centered on a lawful union between one man and one woman—comports with nature and with our Judeo-Christian moral tradition").

59. *Id.* at H7444 (daily ed. July 11, 1996) (statement of Rep. Coburn).

60. *See id.*; *see also id.* at H7486 (daily ed. July 12, 1996) (statement of Rep. Buyer); *id.* at H7494 (statement of Rep. Smith).

61. *Id.* at H7494 (daily ed. July 12, 1996) (statement of Rep. Smith). There were many similar statements. *See, e.g., id.* at H7275 (daily ed. July 11, 1996) (statement of Rep. Barr) (stating that marriage is "under direct assault by the homosexual extremists all across this country").

62. *Id.* at H7276 (daily ed. July 11, 1996) (statement of Rep. Largent); *see also id.* at H7495 (daily ed. July 12, 1996) (statement of Rep. Lipinski) ("Allowing for gay marriages would be the final straw, it would devalue the love between man and a woman and weaken us as a Nation.").

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Section 3 of DOMA also created definitions of the terms “marriage” and “spouse” for purposes of federal law. In this regard, the statute states:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.⁶³

Ironically, the Congressional Budget Office has estimated that if marriages between same-sex couples were recognized in all fifty states and the federal government, the federal budget would benefit by \$500 million to \$900 million annually.⁶⁴ Therefore, the often-repeated argument that DOMA protects scarce resources appears to be a myth. Moreover, conservation of scarce resources is never a justification for discrimination against persons who qualify as a suspect or quasi-suspect class.⁶⁵

Additionally, the federal General Accounting Office has identified 1138 federal statutory provisions in which marital status is a factor in determining eligibility for or entitlement to federal benefits, rights, and privileges.⁶⁶ DOMA denies federal benefits to same-sex couples legally married in those states. However, it permits federal benefits to eligible heterosexual couples that reside in states that also recognize same-sex marriages. These facts raise the question as to whether such blatant government-sponsored discrimination against same-sex couples is fair. It certainly does not seem fair, especially in view of scientific findings indicating that gays and lesbians do not choose to be homosexual anymore than others choose to be heterosexual.

63. Defense of Marriage Act § 3, 1 U.S.C. § 7 (2006).

64. See CONGRESSIONAL BUDGET OFFICE, THE POTENTIAL BUDGETARY IMPACT OF RECOGNIZING SAME-SEX MARRIAGES (June 21, 2004), <http://www.cbo.gov/ftpdocs/55xx/doc5559/06-21.Marriage.pdf>.

65. See *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality) (holding that conservation of time and money can never justify discrimination against persons comprising a suspect or quasi-suspect class). For a discussion of suspect classes and judicial review of discriminatory government laws, see discussion *infra* Part III.A.

66. Complaint at 34, *Commonwealth v. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010) (No. 1:09-11156-JLT).

*Howard Law Journal*III. STATE BANS AGAINST SAME-SEX MARRIAGE AND
CERTAIN ASPECTS OF DOMA VIOLATE THE
UNITED STATES CONSTITUTION

A. Due Process and Equal Protection

The Due Process Clause of the Fourteenth Amendment to the United States Constitution protects persons against arbitrary deprivations of life, liberty, and property on the part of *state and local* governments.⁶⁷ The Due Process Clause of the Fifth Amendment provides similar limitations on the *federal* government.⁶⁸ The United States Supreme Court, in *Loving v. Virginia*, held that the Due Process Clause protects “the freedom to marry” a person of one’s choice.⁶⁹ The Court stated that marriage “has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness” and is a “fundamental right.”⁷⁰ The issue, with respect to same-sex marriage, is whether the Due Process Clause protects an individual’s choice of a marital partner regardless of gender.

With respect to the Equal Protection Clause of the Fourteenth Amendment and the United States Constitution’s equal protection component of the Fifth Amendment, the Supreme Court has made clear that the United States Constitution neither knows nor tolerates discriminatory classifications that treat one group of citizens differently than others.⁷¹ The Supreme Court has repeatedly stated that government classifications based on a “suspect” classification, such as race,⁷² or which impinge on some “fundamental right,”⁷³ must pass the strictest judicial scrutiny to survive analysis under either the Equal Protection Clause of the Fourteenth Amendment,⁷⁴ or the equal protection component of the Due Process Clause of the Fifth Amendment.⁷⁵

Fairness in the government’s distribution of property rights is the real point of debate underlying the various constitutional issues. The

67. See *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (“The [Due Process] Clause . . . provides heightened protection against government interference with certain fundamental rights and liberty interests.”).

68. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

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

70. *Id.*

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

72. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 9 (1967).

73. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969) (discussing the fundamental right of interstate travel).

74. See *Loving*, 388 U.S. at 9.

75. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

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United States Constitution requires that state and local governments justify any differential treatment of persons pursuant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment.⁷⁶ The United States Constitution similarly demands that the federal government justify any differential treatment of persons pursuant to the equal protection component inherent in the Fifth Amendment's Due Process Clause.⁷⁷

The obligation of fairness, however, does not stop with the United States Constitution's Equal Protection Clause. The United States Constitution prohibits both state and federal governments from denying any person of life, liberty, and property without due process of law. But what exactly is the definition of "property"—this vitally important interest protected by the Due Process Clause of the United States Constitution? The answer is simple. Property is anything of value that the law permits one to acquire.⁷⁸ It is law that determines what is property and who can own it.⁷⁹ Moreover, the concept of property is more expansive than some may realize. Property refers to more than mere objects and things. The Supreme Court has stated that property also confers a bundle of rights on its lawful owners.⁸⁰ Those rights include the right to possess, use, exclude, and dispose of one's property.⁸¹ DOMA discriminates between persons in lawfully recognized same-sex marriages and persons in heterosexual mar-

76. The United States Supreme Court has created three basic standards to analyze whether a state or its local subdivisions have met their burden under the Equal Protection Clause of the United States Constitution to justify the fairness of state laws that require discriminatory treatment of a class of persons. This Article briefly discusses these three standards—the strict scrutiny or compelling government interest standard, the intermediate scrutiny/substantial relationship test, and the rational relationship test. *See infra* Part III.A.

77. *See supra* text accompanying note 76. The United States Supreme Court uses the same standards referred to in the preceding note to analyze whether the federal government has met its burden under the Fifth Amendment's Due Process Clause to justify the fairness of federal laws that require discriminatory treatment of a class of persons. *Id.* Section 3 of DOMA is an example of a federal law that requires discrimination against a group of persons—same-sex couples legally married in a state that recognizes same-sex marriages. *See* 1 U.S.C. § 7 (2006).

78. *See* JEREMY BENTHAM, *THEORY OF LEGISLATION* 111-13 (4th ed. 1882) ("Property and laws are born together, and die together. Before laws were made there was no property; take away laws and property ceases.").

79. For example, the Thirteenth Amendment to the United States Constitution removed the ability of a person to lawfully own another person as property. U.S. CONST. amend. XIII.

80. *See, e.g.,* *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); *Superior Bath House Co. v. McCarroll*, 312 U.S. 176, 180-81 (1941).

81. *See generally* *Moore v. Regents of Univ. of California*, 793 P.2d 479, 509 (Cal. 1990) (Mosk, J., dissenting) (explaining that the bundle of property rights surrounding one's bodily tissue could be broken up into component rights rather than using the all-or-nothing analysis of the majority).

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riages.⁸² It accomplishes this result by preventing individuals in same-sex marriages from acquiring a host of federal property rights and benefits available to their heterosexual counterparts.⁸³

DOMA is vulnerable under both heightened scrutiny and rational basis review under both the Due Process and equal protection component of the Fifth Amendment to the United States Constitution. Analysis reveals that DOMA (1) cannot be justified as a basis for protecting or encouraging procreation nor does it enhance child-rearing activities, (2) cannot be justified as preserving “traditional” marriage, (3) undermines rather than protects state sovereignty, (4) does not conserve scarce resources, and (5) explicitly expresses moral disapproval of homosexuality which is not a valid interest in view of Supreme Court precedent.⁸⁴ In short, there is no rational justification for the federal government to discriminate against same-sex marriages under Section 3 of DOMA. Similarly, there is no rational basis that can justify state bans against same-sex marriage.

1. The Fourteenth Amendment Analysis: Equal Protection and Due Process in the Context of State Bans Against Same-Sex Marriage

On August 4, 2010, in *Perry v. Schwarzenegger*,⁸⁵ Judge Vaughn R. Walker of the United States District Court for the Northern District of California invalidated the California same-sex marriage ban, known as Proposition 8, as a violation of the Due Process and Equal Protection Clauses of the United States Constitution. Selected background information leading to the *Perry* case provides an excellent vehicle to explain the underlying issues common to the decisions of the federal district courts in Massachusetts and California. In particular, this background information gives the rationale which lies at the core of the aforementioned decisions which have ruled that DOMA as well as state bans against same-sex marriage violate the U.S. Constitution.⁸⁶

82. See generally 1 U.S.C. § 7 (2006).

83. See *supra* notes 14, 32-33 and accompanying text.

84. See, e.g., Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (2010) (citing Lawrence v. Texas, 539 U.S. 558 (2003)).

85. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010).

86. For a discussion of Judge Walker's decision in *Perry*, see *infra* Part III.A.1.ii.

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In the *In Re Marriage Cases*,⁸⁷ the California Supreme Court held that under Article 1, § 7 of the California Constitution⁸⁸ gays and lesbians were a suspect class, discriminatory laws adversely affecting gays and lesbians were subject to strict scrutiny judicial review,⁸⁹ and that same-sex couples had a fundamental right to enter into civil marriages to the same extent as heterosexual couples.⁹⁰ However, Proposition 8, a California ballot initiative,⁹¹ prospectively nullified the decision of the California Supreme Court in these cases. Proposition 8 states that “[o]nly marriage between a man and a woman is valid or recognized in California.”⁹²

The Supreme Court of California subsequently upheld the constitutionality of Proposition 8 in *Strauss v. Horton*⁹³ as a narrow and limited exception to the state constitutional protection that gays and lesbians currently receive under the holding in the *In Re Marriage Cases*.⁹⁴ The court, however, unanimously held that the state would continue to recognize the marriages of the estimated 18,000 same-sex couples married before the November election.⁹⁵ Furthermore, the *Strauss* decision did not alter the holding in the *In Re Marriage Cases* that gay and lesbian couples are a suspect class and that any law that discriminates on the basis of sexual orientation is constitutionally subject to strict scrutiny judicial review.⁹⁶

i. The Plaintiffs’ Claims in *Perry v. Schwarzenegger*

On May 22, 2009, a legal team spearheaded by Theodore B. Olson and David Boies filed a lawsuit known as *Perry v. Schwarzenegger*.⁹⁷ The lawsuit challenged Proposition 8 as a denial of “basic liberties and equal protection under the law that are guaranteed by

87. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

88. CAL. CONST. art. I, § 7 (“Only marriage between a man and a woman is valid or recognized in California.”).

89. See generally discussion *infra* Part III (discussing strict scrutiny of gays and lesbians under the Equal Protection Clause).

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

91. CAL. CONST. art. I, § 7.5.

92. *Id.*

93. *Strauss v. Horton*, 207 P.3d 48, 75, 78 (Cal. 2009).

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

95. *Strauss*, 207 P.3d at 119-22 (holding that Proposition 8 should be interpreted to apply prospectively and not to invalidate retroactively the marriages of same-sex couples performed prior to its effective date); see also *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010) (noting that California had issued over 18,000 marriage licenses to same-sex couples prior to the passage of Proposition 8).

96. *Id.* at 75-76, 78.

97. *Perry*, 704 F. Supp. 2d at 921.

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the Fourteenth Amendment of the United States Constitution.”⁹⁸ The lawsuit also asserted that, “California relegates same-sex unions to the separate-but-unequal institution of domestic partnership.”⁹⁹

In *Perry*, the plaintiffs contended that Proposition 8 “impinges on fundamental liberties by denying gay and lesbian individuals the opportunity to marry civilly and enter into the same officially sanctioned family relationship with their loved ones as opposite-sex individuals.”¹⁰⁰ They also alleged that the motivation for Proposition 8 was animus against gays and lesbians and a desire to harm them as members of a politically unpopular group in violation of the Equal Protection Clause of the Fourteenth Amendment.¹⁰¹ With respect to the equal protection claim, the plaintiff’s asserted that “Prop. 8 withdrew from gays and lesbians, but no others, specific legal protections afforded by the California Supreme Court” in the *In Re Marriage Cases*¹⁰² and the subsequent legal protections afforded them by the California Constitution. As a result, the plaintiffs in *Perry* argued that “[Proposition 8] violates the Equal Protection Clause of the Fourteenth Amendment because it singles out gays and lesbians for a disfavored legal status, thereby creating a category of ‘second-class citizens.’”¹⁰³

The plaintiffs in *Perry* also based their constitutional challenge on a state law denial, via Proposition 8, of fundamental liberties protected by the Due Process Clause of the Fourteenth Amendment¹⁰⁴ and the right to be free from irrational government discrimination protected by the Equal Protection Clause of the Fourteenth Amendment.¹⁰⁵ Plaintiffs also raised a statutory civil rights cause of action for injunctive relief against the individual state defendants pursuant to the Civil Rights Act of 1871.¹⁰⁶ The court held that Proposition 8 violated the constitutional rights of same-sex couples under the Due Pro-

98. Complaint at 1, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 3:09-CV-02292-VRW).

99. *Id.*

100. *Id.* at 39.

101. *Id.* at 43.

102. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

103. Complaint at 43, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 3:09-CV-02292-VRW).

104. *See id.* at 38-39.

105. *See id.* at 41-44.

106. *Id.* at 46-49 (citing Civil Rights Act of 1871, 42 U.S.C. § 1983 (2006)).

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cess¹⁰⁷ and Equal Protection Clauses¹⁰⁸ of the United States Constitution.

a. Due Process

The *Perry* court stated that the Fourteenth Amendment's Due Process Clause protects individuals against arbitrary governmental deprivations of life, liberty, and property.¹⁰⁹ Moreover, the court held that the right to marry protects an individual's choice of marital partner regardless of gender,¹¹⁰ that domestic partnerships do not satisfy California's obligation to allow plaintiffs to marry,¹¹¹ and that Proposition 8 is unconstitutional because it denied plaintiffs a fundamental right without a legitimate (which is much less than a compelling) reason.¹¹²

b. Equal Protection

The *Perry* court also noted that equal protection is a "pledge of the protection of equal laws."¹¹³ The court stated that Proposition 8 operated to restrict Ms. Perry's choice of a marital partner because of her sexual orientation and her partner's gender¹¹⁴ and that the Equal Protection Clause rendered Proposition 8 unconstitutional under any standard of review.¹¹⁵

With regard to the standard of review, the court held that the six rationales¹¹⁶ advanced by the Proposition 8 proponents did not indicate a rational basis related to any legitimate state interest.¹¹⁷ The court addressed the six rationales argued by the proponents in support of Proposition 8 individually. The rationales which purportedly set forth a rational basis for Proposition 8 are as follows: (1) the need to reserve marriage as a union between a man and a woman and to exclude any other relationship from marriage in order to preserve the traditional institution of marriage as the union of a man and a wo-

107. *Id.* at 991.

108. *Id.* at 993.

109. *Id.* at 991.

110. *Id.* at 993.

111. *Id.*

112. *Id.* at 998-1003.

113. *Id.* at 995 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

114. *Id.* at 996.

115. *Id.* at 1003.

116. *Id.* at 998-1002.

117. *Id.* at 1002.

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man;¹¹⁸ (2) the need to proceed with caution when implementing social change which could radically transform the fundamental nature of a bedrock institution;¹¹⁹ (3) the need to promote opposite-sex parenting over same-sex parenting to increase stability and responsibility in naturally procreative relationships;¹²⁰ (4) the need to protect the freedom of those who oppose marriage for same-sex couples to accommodate the First Amendment rights of persons and entities to oppose same-sex marriage on religious and moral grounds;¹²¹ (5) the need to treat same-sex couples differently from opposite sex couples in order to maintain flexibility in separately addressing the needs of different relationships, in order to ensure that California marriages are recognized in other jurisdictions, and to be able to conform California's definition of marriage to federal law;¹²² and finally, (6) for "any other conceivable interest."¹²³

The *Perry* court held that the first argument of the Proposition 8 proponents—the need to reserve marriage as a union between a man and a woman and to exclude any other relationship from marriage to preserve the traditional institution of marriage as the union of a man and a woman—did not further any state interest. Rather, the court held that the evidence produced at trial indicated "Proposition 8 harms the state's interest in equality because it mandates that men and women be treated differently based only on antiquated and discredited notions of gender."¹²⁴

Next, the court held that the second argument of the Proposition 8 proponents—the need to proceed with caution when implementing social change which could radically transform the fundamental nature of a bedrock institution—did not further any state interest. Specifically, the court held that "[b]ecause the evidence shows same-sex marriage has and will have no adverse effects on society or the institution of marriage, California has no interest in waiting and no practical need to wait to grant marriage licenses to same-sex couples."¹²⁵ Accordingly, the court found that "Proposition 8 is . . . not rationally related to [the] proponents' purported interests in proceeding with

118. *Id.* at 998.

119. *Id.* at 998-99.

120. *Id.* at 999-1000.

121. *Id.* at 1000-01.

122. *Id.* at 1001.

123. *Id.* at 1001-02.

124. *Id.* at 998.

125. *Id.* at 999.

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caution when implementing social change.”¹²⁶ The court also noted that California had already issued “18,000 marriage licenses to same-sex couples,” that California “ha[d] not suffered any demonstrated harm as a result,” and that “California officials ha[d] chosen not to defend Proposition 8 in these proceedings.”¹²⁷

The *Perry* court also found that the third argument of the Proposition 8 proponents—the need to promote opposite-sex parenting over same-sex parenting to increase stability and responsibility in naturally procreative relationships—failed to advance any legitimate identified interest. To the contrary, the court found that the evidence of record supported the opposite conclusion. Accordingly, the court determined that the evidence of record not only failed to support the proponents’ contention but, rather, showed that “same-sex parents and opposite-sex parents are of equal quality” and that “Proposition 8 does not make it more likely that opposite-sex couples will marry and raise biologically conceived children related to both parents.”¹²⁸

The court held that the fourth argument of the Proposition 8 proponents—the need to protect the freedom of opponents to same-sex marriage in order to accommodate their First Amendment rights to challenge same-sex marriage on religious and moral grounds—failed “as a matter of [California state] law.”¹²⁹ The court also noted that in *Lawrence v. Texas*,¹³⁰ the Supreme Court clearly held that a majority of citizens in a state could not use the power of the state to enforce “profound and deep convictions accepted as ethical and moral principles” if those moral principles, as applied, violated the liberty interest of individuals protected by the Due Process Clause of the United States Constitution.¹³¹

Furthermore, the *Perry* court held that the fifth argument of the Proposition 8 proponents—the need to treat same-sex couples differently from opposite sex couples in order to maintain flexibility in separately addressing the needs of different relationships, to ensure that California marriages are recognized in other jurisdictions, and to conform California’s definition of marriage to federal law—was also not

126. *Id.*

127. *Id.* at 1003.

128. *Id.* at 999-1000.

129. *Id.* at 1000 (citing *In re Marriage Cases*, 183 P.3d 384, 451-52 (Cal. 2008); *Koebke v. Bernardo Heights Country Club*, 115 P.3d 1212, 1217-18 (Cal. 2005)).

130. *Lawrence v. Texas*, 539 U.S. 558, 571 (2003).

131. *Perry*, 704 F. Supp. 2d at 1002 (quoting *Lawrence*, 539 U.S. at 571).

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rationality related to a legitimate state interest.¹³² The court noted that the evidence produced at trial thoroughly rebutted this premise. Rather than being different, the court noted that “same-sex couples and opposite-sex unions are, for all purposes relevant to California law, exactly the same.”¹³³ The court also held that the “evidence shows conclusively that moral and religious views form the only basis for a belief that same-sex couples are different from opposite-sex couples.”¹³⁴ Accordingly, the court held that the evidence “fatally undermine[d] any purported state interest in treating couples differently.”¹³⁵

The *Perry* court held that the sixth argument of the Proposition 8 proponents—the catch-all interest (i.e., “for any other conceivable interest”)—similarly failed to establish a rational basis to support Proposition 8.¹³⁶ The court found “that, by every available metric, opposite-sex couples are not better than their same-sex counterparts; instead as partners, parents, and citizens, opposite-sex couples and same-sex couples are equal.”¹³⁷ The court also cited to several United States Supreme Court cases for the proposition that a private moral view that same-sex couples are inferior to opposite sex couples is not a proper basis for legislation.¹³⁸

ii. The District Court’s Conclusion and Holding in *Perry v. Schwarzenegger*

The *Perry* court noted that the unsubstantiated evidence produced by the Defendants at trial showed that Proposition 8 played on the fear that exposure to homosexuality would turn children into homosexuals and that parents should dread having children who are

132. *Id.* at 1003.

133. *Id.* at 1001.

134. *Id.*

135. *Id.*

136. *Id.* at 1001-02.

137. *Id.* at 1002.

138. *See id.* at 1002 (citing to *Romer v. Evans*, 517 U.S. 620, 633 (1996)); *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (noting that a profound and deep moral conviction of a majority of a state’s citizens cannot serve as a basis for upholding a law that violates the Due Process of the United States Constitution); *Lawrence*, 539 U.S. at 560 (“[T]he fact that a State’s governing majority has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice”); *Lawrence*, 539 U.S. at 582 (O’Connor, J., concurring) (“Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.”); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (“The Constitution cannot control [private biases], but neither can it tolerate them.”).

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not heterosexual.¹³⁹ Citing to *Romer v. Evans*, the court held that moral disapproval alone is an improper basis on which to deny rights to gay men and lesbians.¹⁴⁰ The court concluded by holding that:

Proposition 8 fails to advance any rational basis in singling out gay men and lesbians for denial of a marriage license. Indeed, the evidence shows Proposition 8 does nothing more than enshrine in the California Constitution the notion that opposite-sex couples are superior to same-sex couples. Because California has no interest in discriminating against gay men and lesbians, and because Proposition 8 prevents California from fulfilling its constitutional obligation to provide marriages on an equal basis, the court concludes that Proposition 8 is unconstitutional.¹⁴¹

2. The Fifth Amendment Analysis as Applied to Section 3 of DOMA

DOMA is “a radical blot on the American constitution.”¹⁴² As one advocate stated, “it singles out a particular group for discrimination”¹⁴³ and denies gays and lesbians their right to liberty protected by the Due Process Clause of the Fifth Amendment to the United States Constitution. Accordingly, it is not surprising that on July 8, 2010, in *Gill v. Office of Personnel Management*,¹⁴⁴ United States District Judge Joseph L. Tauro ruled that DOMA was unconstitutional.

i. The Fifth Amendment Claim in *Gill v. Office of Personnel Management*

The plaintiffs in *Gill* maintained that Section 3 of DOMA unconstitutionally denied them a variety of federal benefits in violation of the Equal Protection guarantee of the Fifth Amendment via the Amendment’s Due Process Clause.¹⁴⁵ They asserted, among other things, that DOMA (1) does not pass constitutional muster under either heightened scrutiny or rational basis review,¹⁴⁶ (2) has nothing to

139. *Perry*, 704 F. Supp. at 988.

140. *Id.* at 1003 (citing *Romer v. Evans*, 517 U.S. 620, 634 (1996)).

141. *Id.*

142. Sandhya Somashekhar, *Courts Weighing in on Same-Sex Marriage; Two Sides Watch for Appeal in Mass. Case, Ruling in California*, WASH. POST, July 10, 2010, at A2, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/09/AR2010070905499.html> (quoting Evan Wolfson, director of the gay advocacy group Freedom to Marry).

143. *Id.*

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

145. *See id.* at 376-77.

146. *See Memorandum in Opposition to Defendants’ Motion to Dismiss and in Support of Plaintiffs’ Motion for Summary Judgment* at 12-26, *Gill v. Office of Pers. Mgmt.* 669 F. Supp. 2d

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do with procreation and child-rearing,¹⁴⁷ (3) cannot be justified as preserving “traditional” marriage,¹⁴⁸ (4) undermines rather than protects state sovereignty,¹⁴⁹ (5) that DOMA does not conserve scarce resources,¹⁵⁰ and (6) the expression of moral disapproval of homosexuality contained in the statute is not a valid state interest.¹⁵¹

ii. The District Court’s Decision in *Gill v. Office of Personnel Management*

The decision in the *Gill* case only affected the rights of seven gay couples and three survivors of same-sex spouses.¹⁵² Judge Tauro’s decision held that the federal government had unfairly denied these individuals valuable marriage-related federal benefits, including a variety of benefits available under Social Security legislation.¹⁵³

In this case, Judge Tauro ruled that because DOMA had denied plaintiffs the right to federal benefits that they would have otherwise been entitled to if they were in heterosexual marriages,¹⁵⁴ DOMA violated the Equal Protection component of the Fifth Amendment under even the highly deferential rational basis test, which typically results in courts sustaining the constitutionality of challenged legislation.¹⁵⁵ The court stated that it was “convinced” that there was no conceivable set of facts that could ground a rational basis between DOMA and any legitimate government objective.¹⁵⁶ Further, the court stated that the government’s purported objectives in enacting DOMA were to: (1) encourage responsible procreation and child-bearing, (2) defend and nurture the institution of traditional heterosexual marriage, (3) defend traditional notions of morality, and (4) preserve scarce resources.¹⁵⁷

377 (D. Mass. 2010) (No. 109 CV 10930), 2009 WL 5803679 (discussing heightened scrutiny); *id.* at 26-39 (discussing a rational basis standard of review).

147. *Id.* at 34.

148. *Id.* at 36.

149. *Id.* at 37.

150. *Id.* at 38.

151. *Id.* at 39.

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

153. See Somashekhar, *supra* note 142.

154. In *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), the Supreme Court recognized that an equal protection component existed under the Fifth Amendment’s Due Process Clause.

155. Memorandum in Opposition to Defendants’ Motion to Dismiss and in Support of Plaintiffs’ Motion for Summary Judgment at 21, *Gill v. Office of Pers. Mgmt.* 669 F. Supp. 2d 377 (D. Mass. 2010) (No. 109 CV 10930).

156. *Gill*, 699 F. Supp. 2d at 388.

157. *Id.* at 389.

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In response to the government's procreation argument, the court specifically noted that Supreme Court Justice Antonin Scalia's dissent in *Lawrence v. Texas*¹⁵⁸ pointed out that the ability to procreate is not now nor has it ever been a precondition to marriage in any state in the country. The *Gill* court also stated that Congress could not accomplish its objective to defend and nurture heterosexual marriage by punishing same-sex couples who exercise their rights under state law.¹⁵⁹ Additionally, the court noted that the Supreme Court has made "abundantly clear" that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law."¹⁶⁰ Furthermore, the district court in *Gill* could discern no principled reason for Congress to prohibit government expenditures to same-sex married couples "apart from Congress' desire to express disapprobation of same-sex marriage."¹⁶¹

The court also addressed the government's argument that Congress intended for DOMA to provide a uniform structure for distributing federal benefits tied to marriage. The court found that DOMA did not provide a structure that was intended to legitimately address state-to-state inconsistencies in the distribution of federal marriage-based benefits. Instead, the court held that Congress' intent in passing DOMA was to deny to same-sex married couples in a particular state the same federal marriage-based benefits that the state made available to heterosexual couples.¹⁶² Accordingly, the court found that Congress had enacted DOMA for one purpose—"to disadvantage a group of which it disapproves."¹⁶³ Therefore, the court held that since "irrational prejudice plainly *never* constitutes a legitimate government interest . . . Section 3 of DOMA as applied to Plaintiffs violate[d] the equal protection principles embodied in the Fifth Amendment to the United States Constitution."¹⁶⁴

158. See *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting).

159. *Gill*, 699 F. Supp. 2d at 389.

160. *Id.* at 389-90.

161. *Id.* at 390.

162. *Id.* at 394.

163. *Id.* at 396.

164. *Id.* at 397.

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B. Federalism, State Sovereignty, and Section 3 of DOMA

1. Background Cases

The United States Supreme Court has repeatedly recognized that the subject of family law and determinations of marital status are an attribute of state sovereignty that the Constitution reserves to the states. For instance, in *Haddock v. Haddock*, the court stated that “[n]o one denies that the states, at the time of the adoption of the Constitution, possessed full power over the subject of *marriage* and divorce [and] that the Constitution delegated no authority to the government of the United States on [that] subject”¹⁶⁵ Similarly, in *Boggs v. Boggs*,¹⁶⁶ the Court noted that “[a]s a general matter, [t]he subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.”¹⁶⁷ Moreover, the Court has made clear that the whole area of family law—which includes “declarations of status, e.g., *marriage*, annulment, divorce, custody and paternity”¹⁶⁸—is a matter of local concern “subject to the State’s police power.”¹⁶⁹

i. The Tenth Amendment

Under the Tenth Amendment “powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or the people.”¹⁷⁰ The Tenth Amendment has indeed been recognized as the basis of “Our Federalism.” The Supreme Court in *Younger v. Harris*¹⁷¹ expressed the obligations of the Tenth Amendment, requiring that the federal government, “anxious though it may be to vindicate and protect federal rights and federal interests, always endeavor[] to do so in ways that will not unduly interfere with the legitimate activities of the States” and local governments.¹⁷² The Tenth Amendment and “Our Federalism,” according to *Younger*, recognize that “the entire country is made up of a Union of separate state

165. *Haddock v. Haddock*, 201 U.S. 562, 575 (1906) (emphasis added), *overruled on other grounds* by *Williams v. North Carolina*, 317 U.S. 287 (1942).

166. *Boggs v. Boggs*, 520 U.S. 833, 848 (1977) (citing *In re Burrus*, 136 U.S. 586, 593-94 (1890)).

167. *Id.* at 848 (quoting *In re Burrus*, 136 U.S. 586, 593-94).

168. *Ankenbrandt v. Richards*, 504 U.S. 689, 716 (1992) (Blackmun, J., concurring) (emphasis added).

169. *Loving v. Virginia*, 388 U.S. 1, 7 (1967).

170. U.S. CONST. amend. X.

171. *Younger v. Harris*, 401 U.S. 37 (1971).

172. *See id.* at 44.

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governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.”¹⁷³ In essence, the Tenth Amendment requires a “proper respect for state functions.”¹⁷⁴ Despite a recognized commitment to the principles underlying federalism, the Court has not hesitated to invalidate discriminatory state laws regulating civil marriage that violate the United States Constitution.¹⁷⁵

ii. Spending Clause of Article I, Section 8

The Spending Clause of Article I, Section 8 authorizes Congress to “lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”¹⁷⁶ Under the Supreme Court’s decision in *South Dakota v. Dole*, congressional legislation violates the Spending Clause of Article I, Section 8, among other things, if the legislation is “barred by other constitutional provisions” or if it imposes “conditions . . . ‘unrelated to the federal interest in particular national projects or programs’ funded under the challenged legislation.”¹⁷⁷ In *South Dakota v. Dole*, the Supreme Court held that Spending Clause legislation must satisfy five requirements: (1) it must be in pursuit of the ‘general welfare’; (2) conditions of funding must be imposed unambiguously so states are cognizant of the consequences of their participation; (3) conditions must not be ‘unrelated to the federal interest in particular

173. *Id.* Some of the legal doctrines that are grounded on Tenth Amendment concerns are (a) state concurrent jurisdiction to hear federal causes of action; (b) the Rules of Decision Act, 28 U.S.C. 1652 (2006); (c) the full faith and credit due to state court judgments by even federal courts (28 U.S.C. § 1738); (d) the various abstention doctrines, (e) the Eleventh Amendment; and (f) the independent and adequate state ground doctrine with respect to a federal court’s ability to review decisions of state courts. Additionally, the Supreme Court, on federalism grounds, will generally refuse to hear cases involving domestic relations, actions *in rem* involving property already in state custody, and probate cases, even though the court otherwise has diversity jurisdiction to hear the claim. *See generally Ankenbrandt*, 504 U.S. 689 (holding that the court lacked jurisdiction because of the domestic relations exception to diversity jurisdiction). In *Ankenbrandt*, the Court reaffirmed this court-created exception to diversity jurisdiction in cases involving divorce, alimony, and child custody decrees although the Court did not find any exception to be applicable on the facts of that case. *See id.* at 690.

174. *Younger*, 401 U.S. at 44.

175. *See Loving v. Virginia*, 388 U.S. 1, 12 (1967) (striking down a Virginia law prohibiting interracial marriage (i.e., a miscegenation statute) under the Equal Protection and Due Process Clauses of the Fourteenth Amendment). The first state court to recognize that miscegenation statutes violate the Equal Protection Clause was the California Supreme Court in the case of *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948).

176. U.S. CONST. art I, § 8.

177. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

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national projects or programs' funded under the challenged legislation; (4) the legislation must not be barred by other constitutional provisions; and (5) the financial pressure created by the conditional grant of federal funds must not rise to the level of compulsion.¹⁷⁸

2. *Commonwealth v. Department of Health and Human Services*

In *Commonwealth v. Department of Health and Human Services*, Massachusetts challenged the constitutionality of Section 3 of DOMA.¹⁷⁹ Massachusetts, in its Tenth Amendment challenge to DOMA, argued that Congress' unprecedented decision to enact a federal definition of marriage, which limits marriage to a union between a man and a woman, rejected the long standing practice of deferring to each state's definition of marriage and contravened the constitutional designation of exclusive authority to the states.¹⁸⁰ The suit maintained that (a) Congress lacked authority under the Tenth Amendment to regulate the field of domestic relations, including marriage;¹⁸¹ (b) Section 3 of DOMA ran afoul of the Constitution's principles of federalism by creating an extensive regulatory scheme that interfered with and undermined Massachusetts' sovereign authority to define marriage and to regulate the marital status of its citizens;¹⁸² and (c) Section 3 of DOMA unconstitutionally commandeered Massachusetts and its employees to facilitate implementation of a discriminatory federal policy.¹⁸³

Massachusetts also asserted that, in passing DOMA, Congress violated the Spending Clause by exercising its spending power in a manner that induced Massachusetts to violate the constitutional rights of its own citizens.¹⁸⁴ Massachusetts' lawsuit asserted that DOMA penalized Massachusetts because the federal government would not provide matching funds under a variety of federal-state programs in which same-sex couples qualified under Massachusetts law.¹⁸⁵ "For

178. *Dole*, 483 U.S. at 207.

179. *Commonwealth v. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010).

180. *Dep't of Health & Human Servs.*, 698 F. Supp. 2d at 246.

181. Complaint at 84, *Commonwealth v. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010) (No. 1:09-11156-JLT).

182. *Id.* at 85.

183. *Id.* at 86.

184. *Id.* at 88. Massachusetts Attorney General Martha Coakley alleged that DOMA required the state to discriminate against its own. *Id.* at 43.

185. *Id.* at 46-79 (citing Medicaid and other federal benefits for veterans administered by the Massachusetts State Cemetery Grants Program). Additionally, the suit maintained that DOMA prevents legally married same-sex couples in Massachusetts from having access to hundreds of

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example, the state would have risked losing federal funding if it had granted the request of a gay war veteran who had asked to be buried in a federally subsidized veteran's cemetery with his spouse."¹⁸⁶

The court found the evidentiary record to be replete with allegations of past and ongoing injuries to Massachusetts for standing purposes.¹⁸⁷ The court held that DOMA mandated that Massachusetts violate its own MassHealth Equality Act¹⁸⁸ and the Massachusetts Constitution¹⁸⁹ as a prerequisite for eligibility to receive matching grants for its Medicaid and State Cemetery Grants programs.¹⁹⁰ For example, the Department of Veterans Affairs informed Massachusetts that the Department would be entitled to recapture millions of dollars in federal grants if Massachusetts permitted a same-sex spouse of a military veteran to be buried in one of two cemeteries eligible for federal matching funds under the State Cemetery Grants Program.¹⁹¹ Consequently, Massachusetts incurred \$640,661 in additional costs and as much as \$2,224,018 in lost federal funding.¹⁹² The court also noted that DOMA prevented Massachusetts from receiving federal matching funds for Medicaid benefits paid to same-sex spouses entitled to coverage under the MassHealth Equality Act.¹⁹³

The court also found that DOMA required Massachusetts to pay an additional \$122,607 in Medicare taxes between 2004 and 2009.¹⁹⁴ Under federal Medicare law, Massachusetts must pay a Medicare tax of 1.45% of each employee's taxable income to the federal government.¹⁹⁵ This is significant because the federal government considers Massachusetts' provision of health benefits to same-sex spouses of employees to constitute extra income.¹⁹⁶ Accordingly, the district court held that the federal government had effectively penalized Mas-

rights and protections afforded to heterosexual couples because of DOMA's definition of marriage. *Id.* at 32-45. Moreover, Massachusetts' suit also noted that the federal General Accounting Office has identified 1138 federal statutory provisions in which marital status is a factor in determining eligibility for or entitlement to federal benefits, rights, and privileges. *Id.* at 34.

186. Somashekhar, *supra* note 142; *see also* discussion *supra* Part III.B.2.

187. *Dep't of Health & Human Servs.*, 698 F. Supp. 2d at 245.

188. *Id.* at 241.

189. *Id.* at 239 (citing *Goodridge v. Dep't of Pub. Health*, 798 N.E. 2d 941, 959-61, 968 (Mass. 2003)).

190. *Id.* at 239-41.

191. *Id.* at 240.

192. *Id.* at 253.

193. *Dep't of Health & Human Servs.*, 698 F. Supp. 2d at 242.

194. *Id.* at 244.

195. *Id.* at 243.

196. *Id.*

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sachusetts for adhering to its Constitution and laws banning discrimination against same-sex married couples.¹⁹⁷

With respect to the Spending Clause, the court agreed with Massachusetts' assertion that "DOMA impermissibly conditions the receipt of federal funding . . . by requiring that the state deny certain marriage-based benefits to same-sex married couples."¹⁹⁸ The court held that "DOMA plainly conditions receipt of federal funding on the denial of marriage-based benefits to same-sex married couples, though the same benefits are provided to similarly situated heterosexual couples."¹⁹⁹

The court's July 8, 2010 Memorandum and Order containing its ruling on the merits also canvassed the overwhelming evidence of state control over determinations of marital status. The court observed that state control over marital status predated the United States Constitution.²⁰⁰ In view of these findings, the court held that DOMA exceeded the scope of congressional power under both the Spending Clause, as interpreted by the Supreme Court in *South Dakota v. Dole*²⁰¹ and the Tenth Amendment to the United States Constitution. The court further noted that its holding—that DOMA violated the Tenth Amendment—was "not a close call."²⁰²

The holding in *Commonwealth* strongly indicates that Section 3 of DOMA is an unconstitutional usurpation of the authority of the states to regulate marriage and domestic relations in violation of the United States Constitution. Moreover, the cases evidence the likelihood that DOMA will not withstand a Tenth Amendment or Spending Clause challenge if brought before the United States Supreme Court.

197. *Id.* at 252.

198. *Id.* at 248. The Court also held that DOMA is independently barred by the equal protection component of the Fifth Amendment's Due Process Clause. *Id.*

199. *Id.* at 248. Amie Breton, a spokeswoman for Massachusetts' Attorney General Martha Coakley's office, stated "that as a result of the ruling, gay married couples in Massachusetts were immediately eligible to apply for Social Security and other federal benefits for their spouses." See Somashekhar, *supra* note 142.

200. *Dep't of Health & Human Servs.*, 698 F. Supp. 2d at 236-50.

201. *Id.* at 247 (citing *South Dakota v. Dole*, 483 U.S. 203, 207 (1987)).

202. *Id.* at 252.

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C. The Relationship Among the States

This Section lays out the reasons why Congress exceeded its authority under Article IV, Section 1²⁰³ in enacting Section 2 of DOMA as applied to final judgments. The argument is that Congress' power under the Effects Clause of Article IV, Section 1 is not plenary but more akin to its power to legislate under the Commerce Clause and the Fourteenth Amendment.²⁰⁴ Furthermore, DOMA encourages states to disrespect final judgments of sister states, a position counter to the intent of the Full Faith and Credit Clause.

The common thread or rationale underlying the subject of conflict of laws and several important provisions of the United States Constitution is the obligation imposed on state courts to be fair to outsiders. The outsiders, to whom the several states owe an obligation of fairness, include other states, other sovereigns (e.g., the United States federal government and foreign countries), and non-residents of the state. The United States Constitution imposes this fairness obligation under a number of constitutional provisions. The most common of these provisions are the Full Faith and Credit Clause of Article IV, Section 1, the Due Process Clause of the Fourteenth Amendment, the Privileges and Immunities Clause of Article IV, Section 2,²⁰⁵ the Commerce Clause,²⁰⁶ the Equal Protection Clause of the Fourteenth Amendment, and the Supremacy Clause of Article VI, Clause 2.²⁰⁷ The courts have also created other concepts to ensure fairness to outsiders on the part of the states (as well as the U.S. gov-

203. The Full Faith and Credit Clause of Article IV, Section 1 provides that, "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." U.S. CONST. art. IV, § 1.

204. See Kramer, *supra* note 54.

205. The Privileges and Immunities Clause provides, in pertinent part, that, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1.

206. The Commerce Clause provides that, "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, cl. 3.

207. The Supremacy Clause provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

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ernment) through legal precepts such as the doctrine of international comity.²⁰⁸

1. The Full Faith and Credit Clause

The Supreme Court has recognized that the Full Faith and Credit Clause was intended to unify the nation with regard to the respect the states were to have for each other.²⁰⁹ The Clause requires that a state give appropriate respect and deference to the public acts, records, and judicial proceedings of every other state.

2. The Privileges and Immunities Clause

The Privileges and Immunities Clause of Article IV, Section 2, Clause 1 requires that each state give the citizens of other states “all” of the privileges and immunities that it affords to its own citizens. In other words, it requires that a state be fair and respectful in its treatment of citizens of other states.

The Framers of the United States Constitution intended the Privileges and Immunity Clause to “fuse into one Nation a collection of independent, sovereign States.”²¹⁰ Thus, the Supreme Court has repeatedly found that “one of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with citizens of the State.”²¹¹ However, the Clause only protects those rights of citizens, which are “fundamental” to the promotion of interstate harmony. The Supreme Court, for example, has held that rights which merely involve recreation, rather than a “means of livelihood,” are not fundamental to the promotion of interstate harmony.²¹² On the other hand, in *Hicklin v. Orbeck*,²¹³ the Court invalidated a state statute containing a resident hiring pref-

208. See, e.g., *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993) (citing international comity as the basis for determining whether to apply a federal statute to the conduct of an alien who allegedly committed an act in violation of a federal statute while in his or her home country when the act did not violate the laws of the foreign country); *Hilton v. Guyot*, 159 U.S. 113, 164, 193 (1895) (citing comity as the basis for courts in the United States to enforce judgments of courts in foreign countries).

209. See *Hughes v. Fetter*, 341 U.S. 609 (1951); see also *Allstate v. Hague*, 449 U.S. 302 (1981) (Stevens, J., concurring).

210. *Toomer v. Witsell*, 334 U.S. 385, 395 (1948).

211. *Id.* at 396.

212. See *Baldwin v. Montana Fish & Game Comm’n*, 436 U.S. 371, 383 (1978) (approving charging non-residents more than residents for elk-hunting licenses).

213. *Hicklin v. Orbeck*, 437 U.S. 518 (1978).

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erence for all employment related to the development of the state's oil and gas resources.

3. The Commerce Clause

The Commerce Clause of Article I, Section 8, Clause 3, was derived, like the Privileges and Immunities Clause, from the Articles of Confederation. The Framers of the Constitution intended the Commerce Clause to create a national economic union free of parochial interference by the individual states. Indeed, the Supreme Court has recognized the “mutually reinforcing relationship” between the Commerce Clause and the Privileges and Immunities Clause.²¹⁴ This is why the Framers of the United States Constitution gave Congress the power to regulate commerce among the several states.

The Court has held that a state is not allowed to project its legislation into other states and directly regulate commerce in other states.²¹⁵ Thus, the Commerce Clause does not allow a state to control prices and other aspects of commerce in other states. When a state law only indirectly affects interstate commerce, the Supreme Court has examined it to determine whether the state's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.²¹⁶ In short, the Commerce Clause requires that a state be fair and respectful in its dealings with other states.

The United States Supreme Court has occasionally invalidated acts of Congress on the grounds that Congress exceeded its authority in enacting legislation under the Commerce Clause.²¹⁷ For instance, in *United States v. Lopez*, the Supreme Court invalidated a congressional statute—the Gun-Free School Zones Act—because possession of guns in school was not, itself, a commercial activity and not part of a larger regulation of economic activity.²¹⁸ Similarly, the Supreme Court in *United States v. Morrison*²¹⁹ held that Congress had exceeded its authority under the Commerce Clause in enacting a cause of action

214. See *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 279-80 n.8 (1985) (citing *Hicklin v. Orbeck*, 437 U.S. 518, 531 (1978)).

215. See *Brown-Foreman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986).

216. See *id.* at 579.

217. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (finding that Congress exceeded its authority under Section 5 of the Fourteenth Amendment and the Commerce Clause in enacting a cause of action under 42 U.S.C. § 1981 (2006) which created a federal remedy for the victims of gender-motivated violence).

218. See *United States v. Lopez*, 514 U.S. 549, 561-65 (1995).

219. *Morrison*, 529 U.S. at 598.

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under Title 42 of the United States Code, Section 1398 that created a federal remedy for the victims of gender-motivated violence because the statute did not address commercial activity nor was it part of a larger regulation of economic activity.²²⁰ The Court also determined that Congress had no power to enact the statute pursuant to Section 5 of the Fourteenth Amendment.²²¹

4. Section 2 of DOMA is Unconstitutional Under the Full Faith and Credit Clause, Article IV, Section 1

The Supreme Court's decisions in *United States v. Lopez* and *United States v. Morrison* make clear that only the United States Supreme Court can ultimately decide whether Congress has exceeded its authority to enact legislation under a particular source of constitutional power. In light of these cases, can one safely argue that Congress has unlimited plenary authority to pass legislation under the Effects Clause of the Full Faith and Credit Clause—the power Congress utilized in enacting DOMA? The answer would seem to be no. It is not only conceivable, but likely that the Supreme Court would find it “more credible” to read the Effects Clause as authorizing Congress to enact whatever national legislation is needed to refine and implement the Full Faith and Credit Clause.²²² However, it seems unlikely that the Court would interpret the Clause to allow Congress the power to “undermine or abolish” the underlying purpose for the Clause.²²³ Accordingly, it is likely that the Supreme Court, not Congress, has the power to determine the extent of the Effects Clause.

Section 2 of DOMA seems to have been completely unnecessary because states can deny recognition to state laws (e.g., marriage statutes) that violate the local public policy of the forum state, at least when the public policy of the state does not violate the United States Constitution.²²⁴ An example of a case where the public policy of a state violated the United States Constitution is *Loving v. Virginia*.²²⁵ In *Loving*, the Court held that there was no compelling justification for Virginia's law that made it illegal “for any white person in [the] State to marry any save a white person, or a person with no other

220. *Id.* at 614-19.

221. *See id.* at 619-27.

222. *See id.*

223. *See Kramer, supra* note 54, at 2002-03.

224. *See supra* note 53.

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

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admixture of blood than white and American Indian”²²⁶ since it was obviously “designed to maintain white Supremacy.”²²⁷

However, as a general proposition, the United States Supreme Court in *Baker v. General Motors* made clear that while a “court may be guided by the forum State’s ‘public policy’ in determining the *law* applicable to a controversy²²⁸ . . . our decisions support no roving ‘public policy exception’ to the full faith and credit due *judgments*.”²²⁹ Yet, it appears that Congress intended that DOMA precisely allow state courts to exercise this sort of “roving public policy exception to the full faith and credit due *judgments*” of state courts.²³⁰

A plausible argument can be made that Section 2 of DOMA is unconstitutional under Article IV, Section 1 as applied to final judgments because Congress only has the power to implement the provision, not to undermine it. The express purpose of the Full Faith and Credit Clause was to give Congress the power to foster respect by one state of “the public Acts, Records, and judicial Proceedings of every other State.”²³¹ Instead, DOMA seems to be an act of Congress designed to empower the states to disrespect the laws of other states.

5. Hypothetical Situation in Which Section 2 of DOMA Appears to Violate Article IV, Section 1

Rosie, a Massachusetts citizen, obtained a final judgment for loss of consortium in a Massachusetts state court against George Wallace and George’s employer, Wallace Enterprises, Inc., for injuries caused by George to Rosie’s same-sex spouse, Ellen. Ellen is also a citizen of Massachusetts. The accident resulted from George’s negligent driving, which occurred in Massachusetts. Both George and his employer, Wallace Enterprises, Inc., are citizens of Alabama. It is undisputed that George was operating the vehicle in the scope of his employment for Wallace Enterprises, Inc. at the time of the accident. Rosie now seeks to enforce the Massachusetts judgment in a state court of appropriate venue and jurisdiction in Alabama against George and his employer, Wallace Enterprises, Inc. The Alabama legislature has enacted a statute patterned after DOMA. The Alabama statute states

226. *Id.* at 5 n.4.

227. *Id.* at 11.

228. *Baker*, 522 U.S. at 233.

229. *Id.* at 233 (citing *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908)).

230. *Id.*

231. U.S. CONST. art. IV, § 1.

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that the Alabama courts shall not enforce any judgments rendered by courts of a sister state, to the extent that such judgments are based on rights stemming from a law that recognizes the legality of same-sex marriages.

The question is whether this statute lawfully empowers the Alabama state courts to deny the final judgment rendered by the Massachusetts state court. Arguably, the answer is no, based on the aforementioned discussion. Section 2 of DOMA seems to be an act of Congress designed to empower the states to disrespect the laws of other states with respect to final judgments entered by those states. To argue that Congress has plenary authority to enact laws that encourage disrespect for the final judgments of another state appears to be an unreasonable interpretation of the Effects Clause of Article IV when viewed in light of its purpose.²³² Therefore, it is questionable whether DOMA is constitutional under Article IV, Section 1.²³³ Accordingly, the Court would likely conclude that Congress exceeded its authority under Article IV, Section 1 in enacting Section 2 of DOMA as applied to final judgments because it only has the power to implement the provision, not to undermine it.

D. The Establishment Clause

State bans against same-sex marriage raise constitutional issues under the Establishment Clause of the First Amendment.²³⁴ Similarly, DOMA's definition of marriage in Section 3 also seems to violate the Establishment Clause of the United States Constitution. The United States Constitution guarantees the freedom of individuals to exercise their individual religious convictions. But it equally prohibits others from forcing their religious beliefs on others.²³⁵

232. However, in view of the scant information of the Framers' understanding with respect to the reach of the Effects Clause of Article IV, Section 1, there have been some who have argued in favor of a virtual plenary congressional authority to pass legislation such as DOMA. *See, e.g.,* Patrick J. Borchers, *Baker v. General Motors: Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147, 180-81, 183-84 (1998) (arguing that a broad reading of DOMA is consistent with Congress' power under U.S. CONST. art. IV, §1); Ralph U. Whitten, *The Original Understanding of Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255 (1998) (providing an originalist defense of Congress' power to enact DOMA).

233. *See generally* Kramer, *supra* note 54, at 2002-03.

234. The Establishment Clause of the First Amendment to the United States Constitution provides, in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I.

235. *See generally* Olson, *supra* note 40.

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Section 3 of DOMA provides that for all federal purposes “the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”²³⁶ As discussed, one of the purposes of DOMA was to reflect Congress’ moral disapproval of homosexuality and a moral conviction that heterosexuality better comports with traditional, especially Judeo-Christian, morality. In the floor debate on DOMA, members of Congress repeatedly voiced their disapproval of homosexuality as immoral, depraved, unnatural, based on perversion, and an attack on God’s principles.

The United States Constitution guarantees the freedom to individuals to exercise their individual religious convictions, but it equally prohibits others from forcing their religious beliefs on others.²³⁷ However,

a statute [does not] violate[] the Establishment Clause because it “happens to coincide or harmonize with the tenets of some or all religions.” That the Judaeo-Christian [sic] religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny.²³⁸

Unlike the Hyde Amendment, which denied federal funding for abortions, DOMA is no longer just a “reflection of ‘traditionalist’ values” but has become the “embodiment of the views” of people who adhere to certain religious beliefs.²³⁹ Indeed, DOMA with each passing year seems to be more of an “endorsement” of a religious view of same-sex marriage.²⁴⁰ For these reasons, DOMA seems to violate the Establishment Clause since it lacks any valid secular purpose. Indeed, the legislative history indicates that the statute was enacted with animus towards gay individuals. The same underlying rationale is also applicable in the context of state-bans prohibiting same-sex marriage.

In *Lawrence v. Texas*,²⁴¹ the United States Supreme Court explicitly repudiated the notion that the government may uniquely disadvantage gays and lesbians because of moral disapproval for same-sex intimate conduct. The Court majority in *Lawrence*, citing to Justice

236. 1 U.S.C. § 7 (2006).

237. See generally Olson, *supra* note 40.

238. Harris v. McRae, 448 U.S. 297, 319 (1980) (internal citations omitted).

239. But see *id.*

240. But see County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573 (1989).

241. Lawrence v. Texas, 539 U.S. 558, 577 (2003).

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Stevens' dissent in *Bowers v. Hardwick*, held that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."²⁴² Furthermore, it is constitutionally irrelevant that the governing majority in a state has traditionally viewed same-sex marriage as immoral as a basis for upholding a law prohibiting that practice. As the Supreme Court of Iowa stated in its decision in *Varnum v. Brien*²⁴³:

State government can have no religious views, either directly or indirectly, expressed through its legislation. This proposition is the essence of the separation of church and state. As a result, civil marriage must be judged under our constitutional standards of equal protection and not under religious doctrines or the religious views of individuals.²⁴⁴

The fact of the matter is that civil marriage is a secular, non-religious bestowal of property rights on two people—the denial of which violates the Fifth Amendment and Fourteenth Amendments to the United States Constitution. The property rights of persons in same-sex relationships is a topic of discussion in law school courses such as Property, Conflict of Laws, Family Law, and several other courses in the law school curriculum. The common thread in each of these subjects is the underlying issue of fairness in the government's distribution of property rights. Interestingly, Judeo-Christian scriptures uniformly regard "fairness" as one of the *fundamental overarching* requirements of human conduct.²⁴⁵ However, one rarely hears any mention of these passages of scripture in discussing the "fairness" of denying the secular benefits of marriage to persons solely because of the gender of the person's spouse.

Section 3 of DOMA prevents persons in legally celebrated same-sex marriages in various states of the United States from acquiring over one thousand property rights and benefits available to their het-

242. *Id.* at 599. Although some religions view a particular practice as immoral, Judeo-Christian scriptures are uniform in their emphasis on fairness as one of the three overarching principles that outweigh all others. Unfortunately, the simple and profound statements in religious teachings are often overlooked. The Hebrew scriptures clearly state that there are *only* three basic things that God requires of human beings. *See Micah* 6:8 (Living Bible). The three fundamental requirements, according to the Hebrew Scriptures, mandate that mankind be fair and just, merciful, and humble. *Id.* Christianity also recognizes fairness as one of the fundamental, overarching requirements of Christian teachings. *See Matthew* 23:23 (The Living Bible).

243. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

244. *Id.* at 905.

245. *See supra* note 242 and accompanying text.

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erosexual counterparts.²⁴⁶ This is neither a fair nor a just result under the civil marriage laws of the several states. The fact that no religious organization is required to solemnize or endorse a civil marriage between persons in same-sex relationships further supports the argument that state bans against same-sex marriage and DOMA raise constitutional issues under the Establishment Clause of the First Amendment.

IV. TRADITION IS NOT A JUSTIFICATION FOR DENIAL OF SAME-SEX MARRIAGE

A. Shifting Societal Attitudes and Acceptance of Same-Sex Relationships

Society increasingly views the denial of civil marriage to same-sex couples to be out of step with contemporary notions of fundamental fairness. During the 1960s, attitudes towards sexual relations, marriage, sexual orientation, and the role of women began to change. The 1960s witnessed the appearance of safe and effective birth control devices and medicines, a change in the attitude toward discouraging premarital sex, “no fault” divorce laws, and an increase in the number of unmarried partners living together. As part of this change in societal norms, the acceptance of same-sex relationships and the number of people openly seeking such relationships increased to the point that many states repealed their sodomy laws in the 1970s.²⁴⁷

Today’s youth attend public schools with friends and teachers who are in openly gay relationships. In light of these developments, the current generation has rightly begun to wonder why the government does not afford same-sex couples the same property rights afforded to heterosexual couples. By way of comparison, the *Washington Post* reported that the reason for the growing resistance to Iran’s ruling ayatollahs and government leaders is because “the young people who form the bulk of Iran’s population have no memory of

246. CONGRESSIONAL BUDGET OFFICE, THE POTENTIAL BUDGETARY IMPACT OF RECOGNIZING SAME-SEX MARRIAGES (2004), available at <http://www.cbo.gov/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf>.

247. See JESSE DUKEMINIER ET AL., PROPERTY 369-71, 395-418 (7th ed. 2010); see also George Painter, *The Sensibilities of Our Forefathers: The History of Sodomy Laws in the United States*, GAY & LESBIAN ARCHIVES OF THE PAC. NW. (Aug. 10, 2004), http://www.glapn.org/sodomylaws/sensibilities/new_hampshire.htm.

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those revolutionary days, and many opposition supporters favor a more open society”²⁴⁸

Similarly, today’s generation of young Americans are coming of age in a society in which same-sex relationships are considered to be a normal and uncontroversial fact of life. Such relationships are no longer a closet affair that people in the gay community downplay or deny. Indeed, it is no longer politically correct to even be perceived as homophobic or as a gay basher. And the movement is well underway towards toppling laws discriminating against persons in same-sex relationships. Accordingly, it is not at all surprising that, as of February 2010, a *Washington Post* poll found that “[a]mong individuals ages [eighteen] to [twenty-nine], an estimated [sixty-five] percent support marriage equality.”²⁴⁹

B. An Authoritative Conservative Voice in Support of Same-Sex Marriage

Even some of “the unlikeliest champion[s] of gay marriage” agree that bans on same-sex marriage are unfair. For example, Theodore Olson who represented Bush in *Bush v. Gore* is one of those unlikely champions.²⁵⁰ Additionally, Olson, “[a]s head of the Office of Legal Counsel under Ronald Reagan . . . argued for ending racial preferences in schools and hiring,” “advised Republicans in their efforts to impeach President Clinton,” and defended the Bush administration’s “claims of expanded wartime powers” as solicitor general under George W. Bush.²⁵¹

Olson wrote a cogent analysis of the issues involved in the debate on gay marriage in a *Newsweek* article entitled *The Conservative Case for Gay Marriage: Why Same Sex Marriage Is an American Value*.²⁵² The article provides an excellent, non-technical explanation of why

248. See Thomas Erdbrink & William Branigin, *In Iran, Rival Rallies Show Rift Endures: Clashes Erupt As Regime Marks 30th Anniversary of U.S. Embassy Siege*, WASH. POST, Nov. 5, 2009, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/04/AR2009110404835.html>.

249. Podesta & Levy, *supra* note 1.

250. *Bush v. Gore*, 531 U.S. 98 (2000) (resolving the disputed 2000 presidential election in favor of George W. Bush). Mr. Bois represented the “Gore” side in the case.

251. See Eve Conant, *The Conscience of a Conservative*, NEWSWEEK, Jan. 18, 2010, at 46, available at <http://www.newsweek.com/2010/01/08/the-conscience-of-a-conservative.html>.

252. Theodore B. Olson, *The Conservative Case for Gay Marriage: Why Same Sex Marriage Is an American Value*, NEWSWEEK, Jan. 18, 2010, at 48, available at <http://www.newsweek.com/2010/01/08/the-conservative-case-for-gay-marriage.html>.

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state laws that deny civil marriage to same-sex couples is fundamentally unfair. Olson noted in that article that:

California recognizes marriage between men and women, including persons on death row, child abusers, and wife beaters. At the same time, California prohibits marriage by loving, caring, stable partners of the same sex, but tries to make up for it by giving them the alternative of “domestic partnerships” with virtually all of the rights of married persons except the official, state-approved status of marriage.²⁵³

He also observed that, in the aftermath of Proposition 8, that:

[T]here are now three classes of Californians: heterosexual couples who can get married, divorced and remarried, if they wish; same-sex couples who cannot get married but can live together in domestic partnerships; and same-sex couples who are now married but who, if they divorce, cannot remarry. This is an irrational system, it is discriminatory, and it cannot stand.²⁵⁴

Olson’s essay focused on the two essential points: (1) the societal importance of marriage and why it should not be denied to persons who are in same-sex relationships and (2) the lack of any persuasive justification for denying persons in same-sex relationships the civil right to be married.²⁵⁵

1. The Societal Importance of Marriage and Why it Should Not Be Denied to Persons in Same-Sex Relationships

In his *Newsweek* article, Olson noted that marriage is a non-sectarian “civil” right in this country²⁵⁶ and “is one of the basic building blocks of our neighborhoods and our nation.”²⁵⁷ The fact that “some” religions recognize marriage as a “religious sacrament”²⁵⁸ under their teachings does not make “civil” marriage any less than what it is—an official, secular, state sanctioned relationship, which provides “special benefits”²⁵⁹ to couples. It is a “*social and economic partnership*” that “transforms two individuals into a union based on shared aspirations” and “establishes a formal investment in the well-being of society.”²⁶⁰ Society “encourage[s] couples to marry because the commitments

253. *Id.*

254. *Id.*

255. *See id.* at 48.

256. *Id.* at 49.

257. *Id.* at 48.

258. *Id.* at 49.

259. *Id.*

260. *Id.*

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they make to one another provide benefits not only to themselves but also to their families and communities.”²⁶¹ The courts in the United States, he noted, “have insisted that withholding that status . . . may not be arbitrarily denied.”²⁶²

Elaborating on this point, Mr. Olson noted that the “United States Supreme Court has repeatedly held that marriage is one of the most fundamental rights that we have as Americans under our Constitution”²⁶³ and “is a part of the Constitution’s protections of liberty, privacy, freedom of association, and spiritual identification.”²⁶⁴ He stated that, “the underlying rights and liberties that marriage embodies are not in any way confined to heterosexuals”²⁶⁵ and that “[l]egalizing same-sex marriage would . . . be . . . the culmination of our nation’s commitment to equal rights.”²⁶⁶ He noted in this regard:

No matter what you think of homosexuality, it is a fact that gays and lesbians are members of our families, clubs, and workplaces. They are our doctors, our teachers, our soldiers, (whether we admit it or not), and our friends. They yearn for acceptance, stable relationships, and success in their lives, just like the rest of us.²⁶⁷

He also observed that:

Confining some of our neighbors and friends who share the same values to an outlaw or second-class status undermines their sense of belonging and weakens their ties with the rest of us and what should be our common aspirations. Even those whose religious convictions preclude endorsement of what they may perceive as an unacceptable “lifestyle” should recognize that disapproval should not warrant stigmatization and unequal treatment.²⁶⁸

2. There Is No Rational Basis for the Denial of Marriage to Persons in Same-Sex Relationships in the 21st Century

Mr. Olson listed four justifications advanced by the proponents of California’s decision in Proposition 8 to “withdraw access to the institution of marriage for some if its citizens on the basis of their sexual orientation”²⁶⁹—(1) tradition, (2) the notion that “traditional mar-

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.* at 48.

267. *Id.* at 50.

268. *Id.* at 52.

269. *Id.* at 49-50.

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riage furthers the state's interest in procreation," (3) the argument that "gay marriage somehow does harm to heterosexual marriage," and (4) religious convictions.²⁷⁰ He then went on to explain why none of these reasons were "persuasive" or set forth a "good reason why we should deny marriage to same-sex partners."²⁷¹

3. Tradition

With regard to "tradition" as a basis for denying gay persons the right to marry under the civil marriage laws of the several states, Mr. Olson stated that, "simply because something has always been done a certain way does not mean that it must always remain that way. Otherwise we would still have segregated schools and debtors' prisons."²⁷² He also noted that:

It seems inconceivable today that only [forty] years ago there were places in this country where a black woman could not legally marry a white man. And that it was only [fifty] years ago that [seventeen] states mandated segregated public education—until the Supreme Court unanimously struck down that practice in *Brown v. Board of Education*.²⁷³

Mr. Olson observed that most Americans "are proud" that the courts have "discredited" the discriminatory state laws that led to cases such as *Loving v. Virginia* and *Brown v. Board of Education*. He also predicted that, "Americans will be equally proud when we no longer discriminate against gays and lesbians and welcome them into our society."²⁷⁴

4. The Notion that Traditional Marriage Furthers the State's Interest in Procreation

Mr. Olson noted that the "procreation argument cannot be taken seriously."²⁷⁵ No one asks heterosexual couples whether they intend to have children. Moreover, the law permits the elderly, prison inmates, and persons who do not intend to have children to be married. He also noted, "preventing gays and lesbians from marrying does not cause more heterosexuals to marry and conceive more children. Likewise, allowing gays and lesbians to marry someone of the same sex

270. *Id.* at 50-52.

271. *Id.* at 50.

272. *Id.*

273. *Id.* at 52.

274. *Id.*

275. *Id.* at 50.

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will not discourage heterosexuals from marrying a person of the opposite sex.”²⁷⁶

5. The Argument that Gay Marriage Somehow Does Harm to Heterosexual Marriage

Mr. Olson stated that he has “yet to meet anyone who can explain . . . the ways in which [gay] marriage would harm heterosexual marriage.”²⁷⁷ Moreover, he observed that when the judge asked the opposition to identify the ways same-sex marriage would harm heterosexual marriage, Olson noted that his opponent “could not think of any.”²⁷⁸

6. Religious Convictions

Mr. Olson noted that he “understands” religious teachings that view homosexuality as morally wrong, unnatural, or illegitimate.²⁷⁹ His view, however, is that “[s]cience has taught us . . . that gays and lesbians do not choose to be homosexual any more than the rest of us choose to be heterosexual.”²⁸⁰ Furthermore, he pointedly noted that:

While our Constitution guarantees the freedom to exercise our individual religious convictions, it equally prohibits us from forcing our beliefs on others. I do not believe that our society can ever live up to the promise of equality, and the fundamental rights to life, liberty and the pursuit of happiness, until we stop invidious discrimination on the basis of sexual orientation.²⁸¹

V. THE SUPREME COURT’S FOCUS ON
EVOLVING STANDARDS

The notion of the Constitution as a living document, aside from academic and ideological debate, is well established in actual practice. Moreover, a majority of the Supreme Court adheres to the “living Constitution” approach when interpreting the meaning of the United States Constitution. The living Constitution theory of interpretation was the clear underlying rationale for *Brown v. Board of Education*,²⁸² perhaps the most uniformly celebrated Supreme Court decision of the

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.* at 52.

280. *Id.*

281. *Id.*

282. *See* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

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20th Century. As former Supreme Court Justice David Souter stated in a May 2010 commencement address at Harvard, the idea that the Constitution must be construed by looking to the original intent of the Framers “has only a tenuous connection to reality.”²⁸³ Justice David Souter noted that the Supreme Court in *Brown*, reversed its decision in *Plessy v. Ferguson*,²⁸⁴ not because the language of the Equal Protection Clause changed between 1896 and 1954 but “because the nation’s understanding of race changed.”²⁸⁵

In the landmark case of *Lawrence v. Texas*,²⁸⁶ Justice Kennedy spent a good deal of his opinion casting doubt on the factual findings of the case it overruled, *Bowers v. Hardwick*.²⁸⁷ The *Bowers* decision noted that homosexual sodomy had been a widely and historically condemned practice throughout the history of Western civilization.²⁸⁸ In *Lawrence*, however, Justice Kennedy cited to a 1981 European Court of Human Rights case, *Dudgeon v. United Kingdom*,²⁸⁹ as part of the reasoning against the finding in *Bowers*. Justice Kennedy noted that the *Dudgeon* case led to the decriminalization of homosexuality in Northern Ireland.²⁹⁰ In addition, England and Wales had earlier decriminalized homosexuality.²⁹¹

Justice Kennedy cited to international law in the 2005 case of *Roper v. Simmons* as support for invalidating the application of the death penalty to juveniles.²⁹² This indicates that the Supreme Court follows international norms and will seek to determine whether the United States is substantially out of step with widely accepted views of peer nations under international customary law.²⁹³ In *Roper*, Justice Kennedy noted that between 1990 and the time of the *Roper* decision in 2005, “only seven countries other than the United States ha[d] executed juvenile offenders . . . : Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China.”²⁹⁴ However,

283. E.J. Dionne, Jr., Op-Ed., *Souter vs. the Scalias*, WASH. POST, June 3, 2010, at A17, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/02/AR2010060203496.html>.

284. *Id.*

285. *Id.*

286. *Lawrence v. Texas*, 539 U.S. 558, 567-74 (2003).

287. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

288. *See Lawrence*, 539 U.S. at 567, 571-73 (citing to the discredited findings in *Bowers*).

289. *Id.* at 539 U.S. at 573 (citing to 45 Eur. Ct. H.R. (1981)).

290. *Id.*

291. *Id.* at 572-73.

292. *See Roper v. Simmons*, 543 U.S. 551 (2005).

293. *Id.* at 575-78.

294. *Id.* at 577.

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by 2005, each of those countries had either abolished the death penalty for juveniles or made a public disavowal of the practice.²⁹⁵ Thus, the United States stood alone in allowing the execution of juvenile offenders.²⁹⁶ Justice Kennedy also noted that only the United States and Somalia had not ratified Article 37 of the United Nations Convention on the Rights of the Child, entered into force on September 2, 1990, which expressly prohibits “capital punishment for crimes committed by juveniles.”²⁹⁷

Similarly, in the May 17, 2010 case of *Graham v. Florida*,²⁹⁸ Justice Kennedy, writing for the Court, looked to national and global trends in determining that juveniles may not be sentenced to life in prison without the possibility of parole for any crime short of homicide. The court ruled five to four that denying juveniles who have not committed homicide a chance to ever rejoin society is counter to “national” and “global” consensus and violates the Constitution’s ban on cruel and unusual punishment.²⁹⁹ The decision reinforced the Court’s view that the Eighth Amendment’s protections against harsh punishment must be interpreted in light of the country’s “evolving standards of decency.”³⁰⁰ Kennedy noted that only a handful of states actually impose the penalty and that the United States is virtually alone in such sentences.³⁰¹ Justice Kennedy noted that “in continuing to impose life without parole sentences on juveniles who did not commit homicide, the United States adheres to a sentencing practice rejected the world over.”³⁰² The decision, however, did not forbid sentencing someone younger than eighteen years to life in prison; it only required the state to provide him or her with “some meaningful opportunity” to obtain release before the end of that term.³⁰³

Justice Clarence Thomas wrote a stinging dissent, making the now-familiar argument that interpreting the Eighth Amendment according to evolving societal standards is “entirely the Court’s creation.”³⁰⁴ Thomas and Kennedy sparred over what constituted a

295. *Id.*

296. *Id.* at 576.

297. *Id.*

298. *Graham v. Florida*, 130 S. Ct. 2011, 2033-34 (2010).

299. *Id.* at 2034 (stating that the Court looks to evidence of contemporary values in reasoning that “the laws and practices of other nations” are relevant).

300. *See Roper v. Simmons*, 543 U.S. 551, 563 (2005).

301. *Graham*, 130 S. Ct. at 2029.

302. *Id.* at 2033.

303. *Id.* at 2030.

304. *Id.* at 2044 (Thomas, J., dissenting).

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national and international consensus.³⁰⁵ Thomas pointed out that thirty-seven states, the federal government, and a number of foreign countries kept life without parole as an option for juveniles.³⁰⁶ But Justice Kennedy noted that only a handful of states actually impose the penalty, and that the United States is virtually alone in imposing such sentences.³⁰⁷

The principle of equality under the law “transcends the left-right divide and cuts to the core of our nation’s character.”³⁰⁸ On notable occasions, United States courts have stood up to enforce equal protection even when the executive branch, the legislative branch, and the public were unwilling to confront blatant discrimination. Indeed, at the time of the Supreme Court’s decision in *Loving v. Virginia*, seventy-four percent of the American public disapproved of interracial marriage.³⁰⁹ As two commentators observed, “Our history will soon be written by young people who are seizing the reins from the baby boomers. They seem prepared to reject laws that serve no purpose other than to deny two committed and loving individuals the right to join in a mutually reinforcing marital relationship.”³¹⁰ The constitutional rights of millions of people are at stake. The Supreme Court should once again lead the way as it did in such cases as *Loving v. Virginia* and *Brown v. Board of Education*. The concepts of equal protection and due process both stem “from our American *ideal of fairness*, [and] are not mutually exclusive.”³¹¹ The language of the United States Constitution’s guarantee of equal protection did not change between the cases of *Plessy v. Ferguson* and *Brown v. Board of Education*. What did change was the nation’s understanding of race. As was the situation in *Brown*, the nation’s understanding of what is fair in the twenty-first century supports the right of persons in same-sex relationships to marriage equality.³¹² As Justice Thurgood Marshall stated, in perhaps his most famous speech, “*We the People* no longer enslave, but the credit does not belong to the Framers. It be-

305. *Id.* at 2045 (Thomas, J., dissenting).

306. *Id.* at 2043 (Thomas, J., dissenting).

307. *Id.* at 2023.

308. Podesta & Levy, *supra* note 1, at A17.

309. *Id.*

310. *Id.*

311. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (emphasis added); *see also* *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (“Equal Protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.”).

312. *See* Dionne, *supra* note 283.

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longs to those who refused to acquiesce in outdated notions of 'liberty,' 'justice,' and 'equality,' and who strived to better them."³¹³

VI. CONCLUSION

The United States Supreme Court noted, in *Bolling v. Sharpe*,³¹⁴ that "the concepts of equal protection and due process . . . stem[] from our American *ideal of fairness*"³¹⁵ The statistics indicating that individuals ages eighteen to twenty-nine and an estimated sixty-five percent of Americans support marriage equality are significant in light of the U.S. Supreme Court's expressed consideration of today's societal views, national and global trends, contemporary values, and an emerging recognition of new positions on an issue in determining the constitutional rights of individuals.³¹⁶

Justice Scalia was clearly correct in his assessment that, in light of the rationale for the Supreme Court majority's decision in *Lawrence v. Texas*, the unconstitutionality of state bans against same-sex marriage are quite certain.³¹⁷ The Court's earlier decision in *Romer v. Evans*³¹⁸ only buttresses this view. The Defense of Marriage Act is unconstitutional under the U.S. Constitution for the same underlying reasons that the Court set forth in its decisions in *Lawrence v. Texas* and *Romer v. Evans*.

The Defense of Marriage Act denies same-sex couples the basic liberties and equal protection under the law that are guaranteed by the Fifth Amendment to the United States Constitution. The right of persons in same-sex relationships to the more than one thousand property rights and benefits of civil marriage is a secular, nonreligious matter. Religious organizations are not required to recognize same-sex civil marriages, nor are they required to perform them.³¹⁹ The Constitution's requirement of fairness demands that government af-

313. See Thurgood Marshall, *The Constitution: A Living Document*, 30 *How. L.J.* 915, 919 (1987). This address is sometimes referred to as the Maui doctrine after the place where Justice Marshall delivered the speech on May 6, 1987, during the Bicentennial of the United States Constitution. *Id.* at 915.

314. *Bolling*, 347 U.S. at 499 (emphasis added).

315. *Id.* See also *Buckley v. Valeo*, 424 U.S. 1, 93 ("Equal Protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.").

316. See *supra* note 2 and accompanying text.

317. In the wake of the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558, 604-05 (2003), conservative Justice Antonin Scalia, in his dissent, noted, "[W]hat [remaining] justification could there possibly be for denying the benefits of marriage to homosexual couples exercising 'the liberty protected by the Constitution?'"

318. *Romer v. Evans*, 517 U.S. 620, 633 (1996).

319. See, e.g., *Goodridge v. Dep't of Pub. Health*, 798 N.E. 2d 941, 954 (2003).

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ford same-sex couples the same property rights and benefits afforded to heterosexual couples. Similarly, state bans on same-sex marriage violate the fairness requirements under the Fourteenth Amendment's Due Process and Equal Protection Clauses.

Stark evidence of the blatant unfairness of laws that ban same-sex couples from receiving the same tangible and intangible property rights and benefits afforded to heterosexual couples under civil marriage laws is abundant. The state and local governments of the United States as well as the federal government collectively deny over one thousand property rights and benefits to same-sex couples solely because of their sexual orientation. This government sponsored denial of property rights and benefits to same-sex couples is especially egregious since gay and lesbian individuals do not choose to be homosexual.

Fairness in the government's distribution of property rights is the real point of debate underlying the various constitutional issues. The U.S. Constitution requires state and local governments to meet their fairness obligation by requiring that they justify any differential treatment of persons pursuant to the Equal Protection Clause of the Fourteenth Amendment.

The U.S. Constitution similarly demands that the federal government act in a fair and non-discriminatory manner by requiring that the federal government justify any differential treatment of persons pursuant to the equal protection component inherent in the Fifth Amendment's Due Process Clause.

The constitutionality of DOMA and state bans against same-sex marriage appear to be in grave doubt under (1) the Fourteenth Amendment's Due Process and Equal Protection Clauses (as to state bans against same-sex marriage); (2) the equal protection component of the Fifth Amendment's Due Process Clause (as to Section 3 of DOMA); (3) the Tenth Amendment to the United States Constitution (as to Section 3 of DOMA); (4) the Spending Clause of Article I, Section 8 (as to Section 3 of DOMA); (5) the Full Faith and Credit Clause of Article IV, Section 1, (as to Section 2 of DOMA insofar as it permits courts to deny enforcement of judgments based on same-sex laws rendered by sister states); and (6) the Establishment Clause of the First Amendment (as to both state bans and Section 3 of DOMA).

In view of Justice Kennedy's statements in landmark opinions such as *Lawrence v. Texas*, *Romer v. Evans*, *Roper v. Simmons*, and *Graham v. Florida*, it does not appear likely that DOMA will survive

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the constitutional litmus test of fairness in light of today's changing societal views, national and global "trends," "contemporary values," and "emerging recognition" of a sixty-five percent majority view in favor of marriage equality among individuals ages eighteen to twenty-nine. To reiterate a quote summarizing the burgeoning ideal of fairness: "Our history will soon be written by young people who are seizing the reins from the baby boomers. They seem prepared to reject laws that serve no purpose other than to deny two committed and loving individuals the right to join in a mutually reinforcing marital relationship."³²⁰ And so it likely shall be.

320. See Podesta & Levy, *supra* note 1, at A17.