Sexuality Law

Second Edition

2010 Authors' Update

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Chapter 1 - Introduction

Page 69 - Add a new note after Note 4: Most health insurance policies and programs do not cover the costs of gender reassignment surgery, which are substantial. Insurers usually take the position that such treatments are elective and cosmetic, and thus not medically necessary. If an individual pays for those expenses out of pocket, should they be entitled to a tax deduction for coverage of a medically necessary treatment, to the extent their expenses exceed the threshold for medical deductions under the Internal Revenue Code? The Internal Revenue Service routinely denied such claimed deductions in the past, but in 2010, ruling on a case of first impression, the Tax Court disagreed with the IRS, finding that such treatment can be medically necessary for a person diagnosed with gender identity disorder. See *O'Donnabhain v. Commissioner of Internal Revenue*, 134 T.C. No. 4, Docket No. 6402-06 (U.S. Tax Court Feb 2, 2010). In light of this ruling, is it likely that private insurance companies will reconsider their opposition to paying for such procedures?

Add another new note after Note 4: May a state absolutely forbid the use of any public funds to treat gender identity disorder in the state's prisons? Wisconsin passed such a law, then notified transgender inmates that they would have to be weaned off their hormone treatments since the state would not be continuing them, and prison regulations forbid inmates from obtaining medications directly from outside the institution. Would this violate the 8th Amendment rights of inmates to be free of cruel and unusual punishment? See *Fields v. Smith*, 2010 Westlaw 1929819 (E.D.Wis., May 13, 2010) and *Konitzer v. Frank*, 2010 Westlaw 1904776 (E.D.Wis., May 10, 2010).

Page 80 – Add a final paragraph to 3. American Civil Liberties Union Lesbian and Gay Rights Project, as follows:
In the spring of 2010, the ACLU reorganized its program structure and divided the work of the organization into four centers: Liberty, Equality, Democracy, Justice. The LGBT and AIDS Projects now report to the Center for Liberty. James Esseks is the new Director of the LGBT and AIDS Projects and Matt Coles has moved to become the first Director of the Center for Equality.

Page 82-83 – Who gets to decide?

Add the following before the last paragraph in this section:

The DOMA challenge filed by GLAD is *Gill v. Office of Personnel Management*, 2010 WL 2695652 (D.Mass.), handed down on July 8, 2010. Judge Tauro, a Nixon appointee, ruled that DOMA was unconstitutional as applied to the married plaintiffs in the case, who were seeking various federal benefits that are available only to spouses. Applying low level scrutiny, he held

that DOMA violated the due process clause of the Fifth Amendment. An edited version of this case is supplied in Appendix A to this update.

On the same day, Judge Tauro also handed down a decision in *Commonwealth of Massachusetts v United States Department of Health and Human Services*, 2010 WL 2695668 (D.Mass.), holding that DOMA was unconstitutional as applied to the Commonwealth of Massachusetts. In this decision, he held that DOMA violated the Tenth Amendment and exceeded the power granted Congress under the Spending Clause. An edited version of this case is supplied in Appendix B to this update.

On the more general question of who gets to decide when and where to bring a constitutional challenge of behalf of the LGBT community, an interesting split occurred over the recent decision by Ted Olson and David Boies to bring a law suit in federal district court challenging Proposition 8 of the California Constitution. Most activists have said for years that now is not the time to bring a full-fledged marriage rights case into federal court. State litigation has proceeded and produced some victories and defeats. The national litigation firms have consistently advised against raising federal constitutional issues in any of these state cases.

However, in response to the affirmative vote in California on Proposition 8, a measure that basically repealed the California Supreme Court decision extending marriage rights to the lesbian and gay community, Olson and Boies filed suit in federal district court claiming that Proposition 8 violated the Federal Constitution. The case is styled *Perry v. Schwarzenegger* and is currently before Judge Vaughn R. Walker, Chief Judge of the Federal District Court for the Northern District of California, located in San Francisco. A decision is expected any day. For more information about the case, the public is encouraged to visit either the court's web page at https://ecf.cand.uscourts.gov/cand/09cv2292/ (some documents are available) or to visit the web page of the Foundation that is supporting the litigation for the plaintiffs, www.equalrightsfoundation.org – documents filed in the case (including transcripts of the trial) can be found at http://www.equalrightsfoundation.org/our-work/legal-filings/

An additional controversy raised by this case involved the question of whether the court could televise the trial and release the televised material to the public. Under local court rules, broadcasting of court proceedings was prohibited. The District Court attempted to revise these rules and was given permission by the Ninth Circuit to stream the broadcasts to selected federal courthouses around the country. A request to release broadcasts to You Tube was pending at the time the Proposition 8 supporters intervened and requested a stay to halt the broadcasts. Several of the intervenors were identified as witnesses scheduled to testify in the trial and they claimed that televising their testimony would discourage them from testifying. The Supreme Court granted the stay, finding that improper procedures were followed in amending the local rule (e.g., insufficient time for meaningful public comment before amending the rule) and that the threat of

televised testimony would have a chilling effect on some of the witnesses. See *Hollingsworth v. Perry*, 130 S. Ct. 705 (2010).

Chapter 2 - What is the meaning of Lawrence and Romer

Page 112-113 - add to Note 1 - In *1568 Montgomery Highway, Inc. v. City of Hoover*, 2009 WL 2903458 (2009)(not reported in So.3d), the Alabama Supreme Court rejected a constitutional challenge (state and federal) to a sex toys statute.

Page 114. Add Note 11: In *United States v. Little*, 365 Fed. Appx. 159, 2010 WL 357933 (11th Cir., Feb. 2, 2010), the court rejected on the merits the claim that federal obscenity laws were rendered unenforceable under *Lawrence v. Texas*, holding that the scope of the precedent in Lawrence was limited to the facts of that case, i.e., private consensual sexual activity between adults. The court refused to credit the broader argument that Lawrence renders laws premised primarily on moral judgments to be constitutionally suspect.

Page 114, Add Note 12: The traditional English common law of torts has long recognized a cause of action for defamation, statements either oral or written that have the tendency to harm the reputation of the person about whom they are made. Some kinds of statements are considered so inherently damaging to reputation that they give rise to damages, even without proof of any tangible economic injury. One such statement has been that a person is gay or lesbian. During the 20th century, American defamation law evolved in tandem with expanding First Amendment protection for speech, such that the alleged defamer might prevail by proving the statement was true or, in the case of a public official or public figure, that the plaintiff failed to prove that it was made with actual malice (i.e., knowing it was false when it was made, or making the statement with reckless disregard as to the truth.) The rationale for classifying such statements as defamatory per se included that the status of being gay implies engaging in gay sex, which was illegal, and the imputation of criminality is presumed to be harmful to a person's reputation. Another was that most religions teach that homosexual conduct is immoral, and that people believed to be immoral are reputationally challenged. Should *Lawrence v. Texas* make any difference to this analysis? Now that criminal punishment for consensual gay sex has been found unconstitutional, many jurisdictions have outlawed anti-gay discrimination, and a growing number of public figures – government officials, prominent business executives and professionals, and many media celebrities – are openly gay, can it justly be argued that calling somebody gay should be presumed to be harmful to their reputation? Recent federal court decisions in diversity cases are divided over the question. See *Stern v. Cosby*, 645 F.Supp.2d 258 (S.D.N.Y. 2009); *Robinson v. Radio One, Inc*., 2010 WL 606683 (N.D.Tex., Feb. 19, 2010).

Chapter 3 - Criminal Law

Page 143-4. New Note 3 - Should "indecent exposure" (i.e., exposure of the genitals in a public place) be considered a crime of "moral turpitude" for purposes of U.S. law governing grounds for deportation of non-residents? Judges of the U.S. Court of Appeals for the 9th Circuit were sharply divided over this question in *Nunez v. Holder*, 594 F.3d 1124 (9th Cir. Feb. 10, opinion amended Feb. 17, 2010). A majority of the court held that an individual subject to deportation upon conviction of indecent exposure should have a chance to prove in the deportation hearing process that the circumstances of the crime were not serious enough to merit the label of "moral turpitude," while a dissenter argued that indecent exposure necessarily involved "turpitudinous" conduct. The opinion contains an interesting discussion of the history and development of the concept of "moral turpitude."

Page 159. New Note 5. Legal scholars tend to focus on the decisions of courts without considering an important part of the aftermath: whether those opinions are appropriately translated into change in the conduct of law enforcement authorities. On page 149, the casebook notes *People v. Uplinger*, 58 N.Y.2d 936 (1983), in which the New York Court of Appeals struck down a state penal code provision making it a crime to solicit a person to engage in deviate sexual intercourse, having previously invalidated the application of the state's sodomy law to private, consensual adult sex. However, the legislature, having taken more than twenty years to amend the penal law on sodomy, had still not amended the law on loitering for the purpose of soliciting deviate sexual intercourse as of 2010. Because the law was still "on the books," it was also still in the reference materials provided to police officers and they continued to enforce it. Could a municipality whose police force continued to enforce a criminal law that had been held unconstitutional decades earlier be subject to liability to those who were arrested, even though charges against them were eventually dropped by prosecutors or dismissed by the courts? Should individual police officers be shielded from personal liability for making such unconstitutional arrests, on the ground that it is the responsibility of their employer to ensure that they are kept up-to-date on changes in the criminal law? Would such personal immunity disappear if the municipality actually undertakes to inform police officers about legal changes, but they persist in enforcing the law because it remains "on the books"? Should the legislature bear any liability for failing to modify the law in accordance with the court's opinion? See *Casale v. Kelly*, 2010 WL 1685582 (S.D.N.Y. 2010), in which a federal trial judge held New York City in contempt of court because of the continued enforcement of the loitering statute even after the city had represented to the court that it was taking steps to educate police officers about the current state of the law. See also, *Amore v. Novarro*, 2010 WL 2490017 (U.S.Ct.App., 2nd Cir., June 22, 2010), holding that a City of Ithaca police officer who made an unconstitutional arrest under the loitering statute enjoyed qualified immunity because the statute was still "on the books" and he had never been instructed otherwise by his employers.

Chapter 4 – Recognition of Same-Sex Relationships

Page 256 – At end of discussion of DOMA, add:
On July 8, 2010, a federal district court in Massachusetts struck down Section 3 of DOMA (the federal part), holding that it violated the "equal protection principles embodied in the Due Process Clause of the Fifth Amendment." See, Gill v. Office of Personnel Management, 2010 WL 2695652. See also Appendix A of this Update.

Page 260 – Add a new note 3, as follows:
3. As a general rule, relationship recognition litigation has tended to be either a claim to marriage equality or a claim to equal access to specific benefits. Vermont and New Jersey both responded to the marriage equality litigation in those states by enacting legislation that created civil unions as an alternative to marriage. In states that have constitutional provisions prohibiting recognition of marriage, it is not possible to bring a state constitutional challenge to seek marriage equality. But would it be possible in such states to bring a suit on behalf of same-sex couples seeking an alternative status, something like civil unions or domestic partnerships, which would recognize their relationships and provide some security and stability, even if not full equality? The ACLU has decided on just such a strategy and on July 22, 2010 announced the filing of a case in Montana on behalf of seven same-sex couples, seeking state recognition for their relationships. Montana has a constitutional provision prohibiting same-sex marriage. But the argument is that such a provision is limited to marriage and not to status recognition more generally. The case is *Donaldson and Guggenheim v. State of Montana.* Details about the case can be found at www.aclu.org/mtpartnerships.

Page 279 – add the following to the end of note 3:
See California Family Code §308(b), enacted in 2009, which provides:

> Notwithstanding any other provision of law, a marriage between two persons of the same sex contracted outside this state that would be valid by the laws of the jurisdiction in which the marriage was contracted is valid in this state if the marriage was contracted prior to November 5, 2008.

Page 305: Update to chart:
1. The District of Columbia now recognizes same sex marriages and should be added to Category 1. See Religious Freedom and Civil Marriage Equality Amendment Act of 2009, D.C. Code §46-401, which became effective in 2010. A group of concerned citizens sought to have the matter subjected to the D.C. initiative process, but the Board of Elections and Ethics refused to certify the matter, claiming that proposed language violated the Human Rights Act. On July 15, 2010, the District of Columbia Court of Appeals upheld the decision made by the Board to keep the issue off the ballot. See Jackson v. District of Columbia Board of Elections and Ethics, 2010 WL 2771743.

2. Maine should be removed from Category 1. The Maine voters did repeal Maine's marriage law.

3. The Hawaii legislature passed a Civil Unions Bill which would have extended marital rights to same-sex couples, but the Governor vetoed it.

Page 306: At the end of the last full paragraph on the page, add the following update about the New York cases:

The New York Court of Appeals handed down its decision in these two cases in November of 2009. See *Godfrey v. Spano*, 920 N.E.2d 328 (2009). The Court unanimously agreed that the decisions made by state administrators to recognize out of state same-sex marriages should be upheld, but the majority refused to endorse the position sought by LGBT rights advocates that New York law should recognize foreign same-sex marriages more broadly. Instead the majority (the decision was 4/3) ruled on narrow grounds relying on statutory construction and pleading rules. As a result, the status of foreign marriages in New York has not yet been fully determined. More recently, the New York State Department of Taxation and Finance issued an advisory position that same-sex marriages from other states would not be treated as marriages for purposes of New York state income taxes.

Page 314. Add to end of note 5:
But see Gill v. Office of Personnel Management, 2010 WL 2695652 (D.Mass.)(holding that DOMA does violate the Fifth Amendment) and *Commonwealth of Massachusetts v United States Department of Health and Human Services*, 2010 WL 2695668 (D.Mass.)(holding that DOMA violates the Tenth Amendment).

Page 317: Add a new note after Note 1.
More recently a Pennsylvania court has denied a divorce petition filed by a spouse in a Massachusetts same-sex marriage. The court relied in part on Section 2 of DOMA, explaining that federal law exempted same-sex marriage from full faith and credit. The court then pointed out that under Pennsylvania law, same sex marriages were void. It suggested the appropriate remedy for this couple was to file an action requesting the court to declare that the marriage is void. See *Kern v Taney*, 11 Pa. D. & C. 5th 558, 2010 WL 2510988 (Pa. Com. Pl. 2010).

Page 332: Add to the Note at the bottom of the page:
In November 2009, the Vermont court ordered that custody of the child (Isabella) be transferred to Janet (the non-biological mother) on January 1, 2010.

Page 335 – Delete the three questions and insert the following:

Note

Consistent with the reasoning excerpted above in the *Strauss* case, the California legislature amended the Family Code in 2009 to add §308(c), which provides:

> Notwithstanding any other provision of law, two persons of the same sex who contracted a marriage on or after November 5, 2008, that would be valid by the laws of the jurisdiction in which the marriage was contracted shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from the California Constitution, the United States Constitution, statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses with the sole exception of the designation of "marriage."

If Ann and Sally were married in Massachusetts in 2009 and then moved to California, how do you think they should be treated for: (a) state income tax purposes, (b) purposes of dissolving their union, (c) intestacy under the California Probate Code? If they are to be treated as married, but can't use the word marriage, how should a lawyer refer to them in legal documents such as a divorce petition or a probate proceeding?

Page 338 -- Additional countries that now recognize same-sex marriages include: Portugal, Iceland, and Argentina.

Page 377 – Add a new note 4.

4. The Supreme Court of Maine has recently recognized an adult adoption involving a lesbian couple. See *Adoption of Patricia S.*, 976 A.2d 966 (Me. 2009). The underlying issue in this litigation is whether Patricia Spado, as the adopted daughter of her prior lesbian partner, Olive Watson, will be entitled to inherit from the Watson family trust. Normally, such adoptions are not recognized under the "stranger to the adoption" rule, but that question was not before the Maine Supreme Court. The Maine court merely held that the adoption was valid and not against public policy. To determine whether Patricia is a Watson grandchild who is entitled to inherit, the appropriate probate court overseeing the trust will need to determine the trust creator's intent in naming grandchildren as beneficiaries of the trust when the trust was drafted. For a discussion of some of the issues that arise involving adult adoptions in the trust and estate context, see Terry L. Turnipseed, *Scalia's Ship of Revulsion has Sailed: Will Lawrence protect Adults Who Adopt Lovers to Help Ensure Their Inheritance from Incest Prosecution?* 32 Hamline Law Review 95 (2009).

Page 421 – Add new note 3, as follows:

3. In a recent Montana Supreme Court opinion, the court affirmed the lower court's application of the state's equitable distribution principles to divide the assets upon dissolution of a long-term

same-sex relationship. See *Kulstad v. Maniaci*, 220 P.3d 595 (Mont. 2009), also discussed *infra* at recognition of parent-child relationships.

Page 449 – at C. Taxation of Domestic Partner Benefits

Note: The taxation of spousal benefits to employees with same-sex spouses was an issue in the two DOMA challenges, *Gill v. OPM* and *Massachusetts v. U.S. Dept HHS*. See Appendices A and B.

Page 449 – d. Income from Community Property

Update Note: In May 2010, the IRS issued a new Chief Counsel Advice Memorandum, CCA 201021050, 2010 WL 214782, holding that *Poe v. Seaborn* does apply to all community income of California RDPs. This CCA is based on a private letter ruling released at the same time, PLR 201021048, 2010 WL 2147822. The CCA reasoned as follows:

> Federal tax law generally respects state property law characterizations and definitions. *U.S. v. Mitchell*, 403 U.S. 190 (1971), *Burnet v. Harmel*, 287 U.S. 103 (1932). In *Poe v. Seaborn*, 282 U.S. 101 (1930), the Supreme Court held that for federal income tax purposes a wife owned an undivided one-half interest in the income earned by her husband in Washington, a community property state, and was liable for federal income tax on that one-half interest. Accordingly, the Court concluded that husband and wife must each report one-half of the community income on his or her separate return regardless of which spouse earned the income. *United States v. Malcolm*, 282 U.S. 792 (1931), applied the rule of *Poe v. Seaborn* to California's community property law.
>
> California community property law developed in the context of marriage and originally applied only to the property rights and obligations of spouses. The law operated to give each spouse an equal interest in each community asset, regardless of which spouse is the holder of record. *d'Elia v. d'Elia*, 58 Cal. App. 4th 415 (1997).
>
> By 2007, California had extended *full community property treatment* to registered domestic partners. [Ed note: before 2007, earned community income was treated as community property for state property law purposes, but not for state income tax purposes.] Applying the principle that federal law respects state law property characterizations, the federal tax treatment of community property should apply to California registered domestic partners. Consequently, for tax years beginning after December 31, 2006, a California registered domestic partner must report one-half of the community income, whether received in the form of compensation for personal services or income from property, on his or her federal income tax return.

Notes

1. Do you agree that earned community income before 2007 cannot be split for federal tax purposes? I.e., why should state income tax law affect federal income tax law? Isn't it only state *property* law that is relevant?

2. The PLR also held that the creation of community property, even if attributable to the earnings of only one of the partners, would not be treated as a taxable gift. This ruling creates a huge advantage for wealthy community property RDPs and same-sex spouses. If partner A earns $800,000 a year as taxable income and supports partner B by providing him with high-priced assets, the "transfer" of assets worth at least $400,000 will not be viewed as a "transfer" for gift tax purposes since it will be viewed as B's income from the very beginning. See discussion of "gift tax issues" in text at pages 452-53.

3. Although both the PLR and the CCA were directed at California RDPs, the same rules should apply to RDPs in Washington and Nevada, as well as to same-sex spouses in California.

Chapter 5 – Recognition of the Parent-Child Relationship

Page 486 – Add a new note 8, as follows:
8. A recent Pennsylvania court decision reversed the trial court's application of an evidentiary presumption against a lesbian mother in its order affirming primary physical custody to the heterosexual father. To the extent the trial court had relied on earlier cases that appeared to adopt an evidentiary rule (i.e., burden on gay parent to prove no harm to child because of parent's sexuality), the appeals court overruled those earlier cases. See *M.A.T. v. G.S.T.*, 989 A.2d 11 (Penn Super. 2010).

Page 490 – Add new notes, as follows:
3. A recent decision by the Georgia Supreme Court struck down a restriction on the father's visitation that had prohibited him from "exposing the children to his homosexual partners and friends," ruling that such a provision discriminated arbitrarily on the basis of sexual orientation and was thus against public policy. There was no evidence that the father's partners or friends were a threat to the child or likely to cause harm in any way. See *Mongerson v. Mongerson*, 678 S.E.2d 891 (Ga. 2009).

4. On June 29, 2010, a Tennessee appeals court struck down a "paramour provision" that had been included by the trial court in a visitation order involving a lesbian mother. The father was married and so did not expose the children to a "paramour" in his home. But, since the mother and her partner were unable to marry, any overnight stay by the mother's partner while the children were in the home was viewed as exposing them to a paramour and thus, in the trial court's opinion, was presumptively not in the best interests of the children. The trial court cited the long history of automatically including such provisions in custody and visitation orders in the state of Tennessee, but cited no evidence to show that the presence of the mother's partner overnight caused any negative impact. Because there was no evidence of harm, the appellate

court ruled that the trial court's automatic inclusion of the provision was an abuse of discretion. See *Barker v. Chandler*, 2010 WL 2593810 (Tenn. Ct. App. 2010).

Page 507 – Add to note 1:
Gill's case is still pending before the Third District Court of Appeal and has been consolidated with two other cases that are similarly challenging the constitutionality of the Florida adoption ban. The National Center for Lesbian Rights has filed an amicus brief in the consolidated cases which can be found on their web page, www.nclrights.org.

Page 508 – At note 4:
Note: The facts in this note mischaracterize the effect of the initiative. It did not amend the Arkansas constitution, but instead was an initiative "act," which is similar to a statute. On April 16, 2010, Pulaski County Circuit Judge Christopher C. Piazza struck down the act on state constitutional grounds, finding that the act burdened the right of privacy, which is more protected under the Arkansas constitution than under the federal constitution. Applying low-level scrutiny to the federal constitutional claims, he found no violation of the Fourteenth Amendment. This holding fairly clearly answers the question as to why the ACLU filed in state court. The case is *Cole v. Arkansas Dept. of Human Services*. The Alliance Defense Fund announced several days later that it would appeal the decision.

Page 513 – Add a new paragraph to the Notes and Questions, as follows:
See also *Adar v. Smith*, 597 F.3d 697 (5th Cir. 2010), holding that the Louisiana Registrar's refusal to enforce a New York adoption by a same sex couple and to issue an amended birth certificate as requested was a violation of the Full Faith and Credit Clause.

Page 524 – Add a new note after note 7, as follows:
7A. Should a second parent be allowed to adopt the child after the relationship has ended? In *In the Interest of M.K.S.-V.*, 301 S.W.3d 460 (Tex. Ct. App. 2010), the second parent sought to adopt the child years after her relationship with the birth mother had ended. The two had decided together to have the child, had raised the child jointly until the relationship ended (approximately 1.5 years), and the birth mother arranged for the second parent to spend time with the child in her own home after the separation. The second parent tried to prove that there was an agreement to adopt, but the court found the evidence insufficient and held that without the consent of the birth mother there was no standing to assert adoption rights. The court did find that since the second parent had spent custodial time with the child that she had standing to sue for joint conservatorship.

Page 533 – Add new note 4, as follows:
4. Two related cases, recently considered by the New York Court of Appeals, were thought to be prime candidates for overruling the decision in *Alison D.* While several judges agreed that *Alison*

D. should be overruled, the majority reaffirmed the holding in the case, noting that it would be up to the legislature to adopt any new methods for creating legal parenthood. At the same time, the court ruled narrowly in one of the cases to find that the non-biological mother was in fact a parent under New York law. The couple had registered as civil union partners in Vermont before the child was born and thus under Vermont law the second parent was presumed to be a parent. Applying principles of comity, the Court held that New York should recognize the parental status as well. See *Debra H. v. Janice R.*, 14 N.Y.3d 576 (2010).

In the second case, the birth mother was seeking child support from the second parent years after the relationship had ended. The claim had been filed in Canada and was transferred to New York under the Uniform Interstate Family Support Act. The second parent claimed that because she had never adopted, and because *Alison D.* was binding precedent, she was not a parent and thus the New York court had no jurisdiction to hear the claim. The New York Court of Appeals ruled narrowly that the court did have jurisdiction but it also reaffirmed *Alison D.*, and said nothing about the possible parental status of the alleged second parent in this case. See *H.M. v. E.T.*, 14 N.Y.3d 521 (2010).

Page 549 – Add a new note after note 3, as follows:

3A. Under Montana statutory law, a non-parent may seek parental status (described as a "parental interest" in the statutes) in the courts if she has established a parent-child relationship. Upon the termination of long-term lesbian relationship, the non-legal parent sought judicial determination of her parental status under these statutes and the legal parent challenged, claiming that the statutes, as applied to her, would violate her fundamental right to parent under *Troxel*. The Supreme Court of Montana disagreed, upheld the application of the statute and of the decision below which had awarded a "parental interest" to the non-legal parent. See *Kulstad v. Maniaci*, 220 P.3d 595 (Mont. 2009)

Chapter 6 - Discrimination

Page 632 - New Note 4 on page 632. - During 2010, it appeared possible that Congress would adopt legislation conditionally repealing the "don't ask, don't tell" policy and authorizing the Defense Department to adopt a new policy allowing military service by openly lesbian and gay personnel. During the spring, the Defense Department established a study group to determine how to implement such a change. In a version of the legislation that passed the House of Representatives and received committee approval in the Senate as of mid-July, the Defense Department would be required to await the report of the study group and to certify to Congress that it was making changes to allow such service without compromising the ability of the military to meet its national security obligations. Meanwhile, yet another lawsuit challenging the constitutionality of the policy, filed years ago by the Log Cabin Republicans, a political organization of LGBT Republicans, was scheduled to go to trial before a federal district court in California on July 13, as District Judge Virginia A. Phillips (C.D. Calif.) had rejected the government's argument that the trial should be delayed pending legislative developments.

Page 681 - add to Note 3 - In *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285 (3rd Cir. 2009), the court remanded for trial a gay employee's claim of sex stereotyping harassment under Title VII.

Page 682 - add Delaware to the list of states banning sexual orientation discrimination by statute, as of July 2, 2009

Page 704 - place after *Shelton v. City of Manhattan Beach*: In *Cookson v. Brewer School Department*, 2009 ME 57, 974 A.2d 276 (Maine 2009), the court reversed a summary judgment and ordered a trial for a lesbian teacher's employment discrimination claim, pointing out that it was inappropriate for the trial court to grant summary judgment when there were disputed material facts, even though the trial judge thought one party's version of the facts alleged in the pleadings was more persuasive.

Page 746 - New Note 5: May a state university law school apply its non-discrimination policy, which forbids discrimination on account of religion and sexual orientation, to deny formal recognition and privileges to a school chapter of the Christian Legal Society, whose national charter requires that law school chapters restrict formal voting membership and eligibility to serve as officers to students who ascribe to an orthodox Christian religious belief code and to exclude from membership "unrepentant homosexuals"? Several law schools that have denied official recognition to CLS chapters have been sued on the theory that such denial violates the First Amendment associational and free exercise rights of the CLS chapters. The Supreme Court rejected this argument by a vote of 5-4 in *Christian Legal Society v. Martinez* (Hastings College of Law of the University of California), 561 U.S. ___, 2010 Westlaw 2555187 (June 28, 2010). The law school argued that it was entitled to restrict official recognition to those student organizations that were open to "all comers." On that basis, the Court found that the law school's non-discrimination policy was content-neutral. The law school also noted that it allowed the CLS chapter to meet, so students who wanted to associate with like-minded Christians were not prohibited from doing so, but they were not entitled to have formal state recognition and financing if they would not comply with the "all comers" policy. Of potential doctrinal significance was the Court's rejection of CLS's argument that its policy did not discriminate on the basis of status, because it was focused on ethical conduct. The Court said that it made no sense to distinguish between status and conduct in this connection, citing retired Justice Sandra Day O'Connor's statement to that effect in her concurrence in *Lawrence v. Texas*.

Page 820 - Addition to note 1 - Seizing on dicta in *Garcetti v. Cebalos*, some lower federal courts have found protection for speech by employees of public colleges and universities made in the course of their employment, in order to protect academic freedom, but the existence and scope of such an exception to the rule of *Garcetti* is contested. See, e.g., *Sheldon v. Dhillon*, 2009 WL 4282086 (U.S.Dist. Ct., N.D. Cal. Nov 25, 2009); *Nichols v. University of Southern*

Mississippi, 669 F.Supp.2d 684 (S.D. Miss. Oct. 26, 2009); *Savage v. Gee*, 2010 WL 2301174 (S.D. Ohio, June 7, 2010).

Chapter 7 - Free Speech and Expression

Page 815. - Add Note 3. In *United States v. Little*, 365 Fed.Appx. 159 (11th Cir., Feb. 2, 2010), the court rejected on the merits the claim that federal obscenity laws were rendered unenforceable under Lawrence v. Texas, holding that the scope of the precedent in Lawrence was limited to the facts of that case, i.e., private consensual sexual activity between adults. The court refused to credit the broader argument that Lawrence renders laws premised primarily on moral judgments to be constitutionally suspect.

Page 877. - Add Note 3. Would First Amendment rights be implicated if a high school cancelled its senior prom rather than to allow a lesbian graduating senior to attend dressed in a tuxedo accompanied by her same-sex date? Would the student's choice of male-identified formal wear, certainly a fashion statement, also be considered a political statement? See *McMillen v. Itawamba County School District*, 2010 WL 1172429 (U.S. Dist. Ct., N.D. Miss., March 23, 2010).

Page 890. - Add new Note 4. After California voters passed Proposition 8 during the 2008 general election, amending their state constitution to forbid same-sex marriages in the state, some angry same-sex marriage proponents allegedly harassed financial supporters of the Proposition 8 campaign, whose names they obtained through the list of donors published by the state on the internet. Subsequently, after Washington State passed a law expanding its domestic partnership statute to include virtually all the state law rights of marriage, opponents of the legislation undertook a petition campaign to put a repeal question on the ballot. After they obtained sufficient signatures, opponents of the ballot question sought to get copies of the petitions from the Secretary of State's office so they could publish the names and addresses of petition signers on the internet. A state law authorized disclosure of the petitions. Proponents of the ballot question sued in federal court, claiming that disclosure of the names and addresses of petition signers would violate their First Amendment rights, because it would have a deterrent effect on people signing petitions in support of ballot questions on controversial issues, thus burdening the political process. The federal district court agreed, issuing an injunction, but was reversed by the 9th Circuit. The ballot question proponents applied to the U.S. Supreme Court, seeking emergency relief pending a review on the merits of their First Amendment claim. The Supreme Court barred release of the petitions prior to the election. The ballot question was then defeated at the polls. Subsequently, the Supreme Court ruled in *Doe v. Reed*, 561 U.S. — , 2010 WL 2518466 (June 24, 2010), that petition signers generally do not have a First Amendment right to remain anonymous, but might be able to preserve their anonymity by persuading the trial court that theirs was an unusual case where serious threats to petition signers existed. Members

of the Court were divided about what standard should be used to determine that a First Amendment exception should be made to the general procedure of disclosure in a particular case.

Page 895. - Hate Crimes - On October 28, 2009, President Obama signed into law Pub. L. 111-84, the National Defense Authorization Act for Fiscal Year 2010, which included as a rider The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevent Act, which among other things amends 18 U.S.C. section 249 to add federal penalties for certain crimes committed because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity or disability of the victim. To come within the federal jurisdiction, the act in question requires that the defendant crossed state or national lines or used an instrumentality of interstate or international commerce (including a weapon that has traveled interstate) or is interfering with commercial activity affecting interstate or foreign commerce. This is the first federal statute to provide any specific protection to individuals on account of their gender identity.

Appendix A

Gill v. Office of Personnel Management
United States District Court, D. Massachusetts, 2010.
--- F.Supp.2d ----, 2010 WL 2695652.

TAURO, District Judge.

I. *Introduction*

This action presents a challenge to the constitutionality of Section 3 of the Defense of Marriage Act as applied to Plaintiffs, who are seven same-sex couples married in Massachusetts and three survivors of same-sex spouses, also married in Massachusetts. Specifically, Plaintiffs contend that, due to the operation of Section 3 of the Defense of Marriage Act, they have been denied certain federal marriage-based benefits that are available to similarly-situated heterosexual couples, in violation of the equal protection principles embodied in the Due Process Clause of the Fifth Amendment.

II. *Background*

A. *The Defense of Marriage Act*

In 1996, Congress enacted, and President Clinton signed into law, the Defense of Marriage Act ("DOMA"). At issue in this case is Section 3 of DOMA, which defines the terms "marriage" and "spouse," for purposes of federal law, to include only the union of one man and one woman. In particular, it provides 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 wife.

In large part, the enactment of DOMA can be understood as a direct legislative response to *Baehr v. Lewin,* a 1993 decision issued by the Hawaii Supreme Court, which indicated that same-sex couples might be entitled to marry under the state's constitution. That decision raised the possibility, for the first time, that same-sex couples could begin to obtain state-sanctioned marriage licenses.

The House Judiciary Committee's Report on DOMA (the "House Report") referenced the *Baehr* decision as the beginning of an "orchestrated legal assault being waged against traditional heterosexual marriage," and expressed concern that this development "threaten[ed] to have very real consequences ... on federal law." Specifically, the Report warned that "a redefinition of marriage in Hawaii to include homosexual couples could make such couples eligible for a whole range of federal rights and benefits."

And so, in response to the Hawaii Supreme Court's decision, Congress sought a means to both

"preserve[ ] each State's ability to decide" what should constitute a marriage under its own laws and to "lay[ ] down clear rules" regarding what constitutes a marriage for purposes of federal law.

*** With regard to Section 3 of DOMA, the House Report explained that the statute codifies the definition of marriage set forth in "the standard law dictionary," for purposes of federal law.

The House Report 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." Nonetheless, it asserted that Congress was not "supportive of (or even indifferent to) the notion of same-sex 'marriage,'" and, therefore, embraced DOMA as a step toward furthering Congress's interests in "defend[ing] the institution of traditional heterosexual marriage."

The House Report further justified the enactment of DOMA as a means to "encourag[e] responsible procreation and child-rearing," conserve scarce resources, and reflect Congress' "moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." In one unambiguous expression of these objectives, Representative Henry Hyde, then-Chairman of the House Judiciary Committee, stated that "[m]ost people do not approve of homosexual conduct ... and they express their disapprobation through the law."

In the floor debate, members of Congress repeatedly voiced their disapproval of homosexuality, calling it "immoral," "depraved," "unnatural," "based on perversion" and "an attack upon God's principles." They argued that marriage by gays and lesbians would "demean" and "trivialize" heterosexual marriage and might indeed be "the final blow to the American family."

Although DOMA drastically amended the eligibility criteria for a vast number of different federal benefits, rights, and privileges that depend upon marital status, the relevant committees did not engage in a meaningful examination of the scope or effect of the law. For example, Congress did not hear testimony from agency heads regarding how DOMA would affect federal programs. Nor was there testimony from historians, economists, or specialists in family or child welfare. Instead, the House Report simply observed that the terms "marriage" and "spouse" appeared hundreds of times in various federal laws and regulations, and that those terms were defined, prior to DOMA, only by reference to each state's marital status determinations.

In January 1997, the General Accounting Office issued a report clarifying the scope of DOMA's effect. It concluded that DOMA implicated at least 1,049 federal laws, including those related to entitlement programs, such as Social Security, health benefits and taxation, which are at issue in this action. A follow-up study conducted in 2004 found that 1,138 federal laws tied benefits, protections, rights, or responsibilities to marital status.

B. *The Federal Programs Implicated in This Action*

Prior to filing this action, each Plaintiff, or his or her spouse, made at least one request to the appropriate federal agency or authority for treatment as a married couple, spouse, or widower with respect to particular federal benefits available to married individuals. But each request was

denied. In denying Plaintiffs access to these benefits, the government agencies responsible for administering the relevant programs all invoked DOMA's mandate that the federal government recognize only those marriages between one man and one woman.

1. *Health Benefits Based on Federal Employment*

Plaintiffs' allegations in this case encompass three federal health benefits programs: the Federal Employees Health Benefits Program (the "FEHB"), the Federal Employees Dental and Vision Insurance Program (the "FEDVIP"), and the federal Flexible Spending Arrangement program.

Plaintiff Nancy Gill, an employee of the United States Postal Service, seeks to add her spouse, Marcelle Letourneau, as a beneficiary under Ms. Gill's existing self and family enrollment in the FEHB, to add Ms. Letourneau to FEDVIP, and to use her flexible spending account for Ms. Letourneau's medical expenses.

Plaintiff Martin Koski, a former employee of the Social Security Administration, seeks to change his "self only" enrollment in the FEHB to "self and family" enrollment in order to provide coverage for his spouse, James Fitzgerald. And Plaintiff Dean Hara seeks enrollment in the FEHB as the survivor of his spouse, former Representative Gerry Studds.

A. *Federal Employees Health Benefits Program*

The FEHB is a comprehensive program of health insurance for federal civilian employees, annuitants, former spouses of employees and annuitants, and their family members. The program was created by the Federal Employees Health Benefits Act, which established (1) the eligibility requirements for enrollment, (2) the types of plans and benefits to be provided, and (3) the qualifications that private insurance carriers must meet in order to offer coverage under the program.

The Office of Personnel Management ("OPM") administers the FEHB and is empowered to negotiate contracts with potential carriers, as well as to set the premiums for each plan. OPM also prescribes regulations necessary to carry out the program, including those setting forth "the time at which and the manner and conditions under which an employee is eligible to enroll," as well as "the beginning and ending dates of coverage of employees, annuitants, members of their families, and former spouses." Both the government and the enrollees contribute to the payment of insurance premiums associated with FEHB coverage.

An enrollee in the FEHB chooses the carrier and plan in which to enroll, and decides whether to enroll for individual, i.e. "self only," coverage or for "self and family" coverage. Under OPM's regulations, "[a]n enrollment for self and family includes all family members who are eligible to be covered by the enrollment." For the purposes of the FEHB statute, a "member of family" is defined as either "the spouse of an employee or annuitant [or] an unmarried dependent child under 22 years of age...." An employee enrolled in the FEHB for "self only" coverage may change to "self and family" coverage by submitting documentation to the employing office during an annual "open season," or within sixty days after a change in family status, "including a change in marital status."

An "annuitant" eligible for coverage under the FEHB is, generally speaking, either an employee who retires on a federal annuity, or "a member of a family who receives an immediate annuity as the survivor of an employee ... or of a retired employee...." To be covered under the FEHB, anyone who is not a current federal employee, or the family member of a current employee, must be eligible for a federal annuity, either as a former employee or as the survivor of an employee or former employee. When a federal employee or annuitant dies under "self and family" enrollment in FEHB, the enrollment is "transferred automatically to his or her eligible survivor annuitants."

B. *Federal Employees Dental and Vision Insurance Program ("FEDVIP")*

The Federal Employees Dental and Vision Insurance Program provides enhanced dental and vision coverage to federal civilian employees, annuitants, and their family members, in order to supplement health insurance coverage provided by the FEHB. *** [A[s with the FEHB generally, FEDVIP is administered by OPM, which contracts with qualified companies and sets the premiums associated with coverage. OPM is also authorized to "prescribe regulations to carry out" this program.

Persons enrolled in FEDVIP pay the full amount of the premiums, choose the plan in which to enroll, and decide whether to enroll for "self only," "self plus one," or "self and family" coverage. … The terms "annuitant" and "member of family" are defined in the same manner for the purposes of the FEDVIP as they are for the FEHB more generally.

C. *Flexible Spending Arrangement Program*

A Flexible Spending Arrangement ("FSA") allows federal employees to set aside a portion of their earnings for certain types of out-of-pocket health care expenses. The money withheld in an FSA is not subject to income taxes. ***

2. *Social Security Benefits*

The Social Security Act ("Act") provides, among other things, Retirement and Survivors' Benefits to eligible persons. The Act is administered by the Social Security Administration, which is headed by the Commissioner of Social Security. The Commissioner has the authority to "make rules and regulations and to establish procedures, not inconsistent with the [pertinent] provisions of [the Social Security Act], which are necessary or appropriate to carry out such provisions."

A number of the plaintiffs in this action seek certain Social Security Benefits under the Act, based on marriage to a same-sex spouse. Specifically, Jo Ann Whitehead seeks Retirement Insurance Benefits based on the earnings record of her spouse, Bette Jo Green. Three of the Plaintiffs, Dean Hara, Randell Lewis-Kendell, and Herbert Burtis, seek Lump-Sum Death Benefits based on their marriages to same-sex spouses who are now deceased. And Plaintiff Herbert Burtis seeks Widower's Insurance Benefits.

A. *Retirement Benefits*

The amount of Social Security Retirement Benefits to which a person is entitled depends on an individual's lifetime earnings in employment or self-employment. In addition to seeking Social Security Retirement Benefits based on one's own earnings, an individual may claim benefits based on the earnings of a spouse, if the claimant "is not entitled to old-age ... insurance benefits [on his or her own account], or is entitled to old-age ... insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of [his or her spouse]."

B. *Social Security Survivor Benefits*

The Act also provides certain benefits to the surviving spouse of a deceased wage earner. This action implicates two such types of Survivor Benefits, the Lump-Sum Death Benefit and the Widower's Insurance Benefit.

i. *Lump-Sum Death Benefit*

The Lump-Sum Death Benefit is available to the surviving widow or widower of an individual who had adequate lifetime earnings from employment or self-employment. The amount of the benefit is the lesser of $255 or an amount determined based on a formula involving the individual's lifetime earnings.

ii. *Widower's Insurance Benefit*

The Widower's Insurance Benefit is available to the surviving husband of an individual who had adequate lifetime earnings from employment or self-employment. The claimant, with a few limited exceptions, must not have "married" since the death of the individual, must have attained the age set forth in the statute, and must be either (1) ineligible for old-age insurance benefits on his own account or (2) entitled to old-age insurance benefits "each of which is less than the primary insurance amount" of his deceased spouse.

3. *Filing Status Under the Internal Revenue Code*

Lastly, a number of Plaintiffs in this case seek the ability to file federal income taxes jointly with their spouses. The amount of income tax imposed on an individual under the Internal Revenue Code depends in part on the taxpayer's "filing status." In accordance with the income tax scheme utilized by the federal government, a "married individual ... who makes a single [tax] return jointly with his spouse" is generally subject to a lower tax than an "unmarried individual" or a "head of household." "[I]f an individual has filed a separate return for a taxable year for which a joint return could have been made by him and his spouse," the couple may file a joint return within three years after the filing of the original returns. Should the amended return call for a lower tax due than the original return, the taxpayer may also file an administrative request for a refund of the difference.

III. *Discussion*

A. *Summary Judgment*

Pursuant to Federal Rule of Civil Procedure 56(a), summary judgment shall be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

D. *Equal Protection of the Laws*

"[T]he Constitution 'neither knows nor tolerates classes among citizens.' "It is with this fundamental principle in mind that equal protection jurisprudence takes on "governmental classifications that 'affect some groups of citizens differently than others.' "And it is because of this "commitment to the law's neutrality where the rights of persons are at stake" that legislative provisions which arbitrarily or irrationally create discrete classes cannot withstand constitutional scrutiny.

To say that all citizens are entitled to equal protection of the laws is "essentially a direction [to the government] that all persons similarly situated should be treated alike." But courts remain cognizant of the fact that "the promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." And so, in an attempt to reconcile the promise of equal protection with the reality of lawmaking, courts apply strict scrutiny, the most searching of constitutional inquiries, only to those laws that burden a fundamental right or target a suspect class. A law that does neither will be upheld if it merely survives the rational basis inquiry-if it bears a rational relationship to a legitimate government interest.

Plaintiffs present three arguments as to why this court should apply strict scrutiny in its review of DOMA, namely that:

- DOMA marks a stark and anomalous departure from the respect and recognition that the federal government has historically afforded to state marital status determinations;

- DOMA burdens Plaintiffs' fundamental right to maintain the integrity of their existing family relationships, and;

- The law should consider homosexuals, the class of persons targeted by DOMA, to be a suspect class.

This court need not address these arguments, however, because DOMA fails to pass constitutional muster even under the highly deferential rational basis test. As set forth in detail below, this court is convinced that "there exists no fairly conceivable set of facts that could ground a rational relationship" between DOMA and a legitimate government objective. DOMA, therefore, violates core constitutional principles of equal protection.

1. *The Rational Basis Inquiry*

This analysis must begin with recognition of the fact that rational basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." A "classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity ... [and] courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." Indeed, a court applying rational basis review may go so far as to hypothesize about potential motivations of the legislature, in order to find a legitimate government interest sufficient to justify the challenged provision.

Nonetheless, "the standard by which legislation such as [DOMA] must be judged is not a toothless one." "[E]ven in the ordinary equal protection case calling for the most deferential of standards, [courts] insist on knowing the relation between the classification adopted and the object to be attained." In other words, a challenged law can only survive this constitutional inquiry if it is "narrow enough in scope and grounded in a sufficient factual context for [the court] to ascertain some relation between the classification and the purpose it serve[s]." Courts thereby "ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law."

Importantly, the objective served by the law must be not only a proper arena for government action, but also properly cognizable by the governmental body responsible for the law in question. And the classification created in furtherance of this objective "must find some footing in the realities of the subject addressed by the legislation." That is to say, the constitution will not tolerate government reliance "on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." As such, a law must fail rational basis review where the "purported justifications ... [make] no sense in light of how the [government] treated other groups similarly situated in relevant respects."

2. *Congress' Asserted Objectives*

The House Report identifies four interests which Congress sought to advance through the enactment of DOMA: (1) encouraging responsible procreation and child-bearing, (2) defending and nurturing the institution of traditional heterosexual marriage, (3) defending traditional notions of morality, and (4) preserving scarce resources. For purposes of this litigation, the government has disavowed Congress's stated justifications for the statute and, therefore, they are addressed below only briefly.

But the fact that the government has distanced itself from Congress' previously asserted reasons for DOMA does not render them utterly irrelevant to the equal protection analysis. As this court noted above, even in the context of a deferential rational basis inquiry, the government "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."

This court can readily dispose of the notion that denying federal recognition to same-sex marriages might encourage responsible procreation, because the government concedes that this objective bears no rational relationship to the operation of DOMA. Since the enactment of DOMA, a consensus has developed among the medical, psychological, and social welfare

communities that children raised by gay and lesbian parents are just as likely to be well-adjusted as those raised by heterosexual parents. But even if Congress believed at the time of DOMA's passage that children had the best chance at success if raised jointly by their biological mothers and fathers, a desire to encourage heterosexual couples to procreate and rear their own children more responsibly would not provide a rational basis for denying federal recognition to same-sex marriages. Such denial does nothing to promote stability in heterosexual parenting. Rather, it "prevent[s] children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure," when afforded equal recognition under federal law.

Moreover, an interest in encouraging responsible procreation plainly cannot provide a rational basis upon which to exclude same-sex marriages from federal recognition because, as Justice Scalia pointed out in his dissent to *Lawrence v. Texas,* the ability to procreate is not now, nor has it ever been, a precondition to marriage in any state in the country. Indeed, "the sterile and the elderly" have never been denied the right to marry by any of the fifty states. And the federal government has never considered denying recognition to marriage based on an ability or inability to procreate.

Similarly, Congress' asserted interest in defending and nurturing heterosexual marriage is not "grounded in sufficient factual context [for this court] to ascertain some relation" between it and the classification DOMA effects. To begin with, this court notes that DOMA cannot possibly encourage Plaintiffs to marry members of the opposite sex because Plaintiffs are *already* married to members of the same sex. But more generally, this court cannot discern a means by which the federal government's denial of benefits to same-sex spouses might encourage homosexual people to marry members of the opposite sex. And denying marriage-based benefits to same-sex spouses certainly bears no reasonable relation to any interest the government might have in making heterosexual marriages more secure.

What remains, therefore, is the possibility that Congress sought to deny recognition to same-sex marriages in order to make heterosexual marriage appear more valuable or desirable. But to the extent that this was the goal, Congress has achieved it "*only* by punishing same-sex couples who exercise their rights under state law." And this the Constitution does not permit. "For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean" that the Constitution will not abide such "a bare congressional desire to harm a politically unpopular group."

Neither does the Constitution allow Congress to sustain DOMA by reference to the objective of defending traditional notions of morality. As the Supreme Court made abundantly clear in *Lawrence v. Texas* and *Romer v. Evans,* "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...."

And finally, Congress attempted to justify DOMA by asserting its interest in the preservation of scarce government resources. While this court recognizes that conserving the public fisc can be a legitimate government interest, "a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources." This court can discern no

principled reason to cut government expenditures at the particular expense of Plaintiffs, apart from Congress' desire to express its disapprobation of same-sex marriage. And "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable [by the government]" are decidedly impermissible bases upon which to ground a legislative classification.

3. *Objectives Now Proffered for Purposes of Litigation*

Because the rationales asserted by Congress in support of the enactment of DOMA are either improper or without relation to DOMA's operation, this court next turns to the potential justifications for DOMA that the government now proffers for the purposes of this litigation.

In essence, the government argues that the Constitution permitted Congress to enact DOMA as a means to preserve the "status quo," pending the resolution of a socially contentious debate taking place in the states over whether to sanction same-sex marriage. Had Congress not done so, the argument continues, the definitions of "marriage" and "spouse" under federal law would have changed along with each alteration in the status of same-sex marriage in any given state because, prior to DOMA, federal law simply incorporated each state's marital status determinations. And, therefore, Congress could reasonably have concluded that DOMA was necessary to ensure consistency in the distribution of federal marriage-based benefits.

In addition, the government asserts that DOMA exhibits the type of incremental response to a new social problem which Congress may constitutionally employ in the face of a changing socio-political landscape.

For the reasons set forth below, this court finds that, as with Congress' prior asserted rationales, the government's current justifications for DOMA fail to ground a rational relationship between the classification employed and a legitimate governmental objective.

To begin, the government claims that the Constitution permitted Congress to wait for the heated debate over same-sex marriage in the states to come to some resolution before formulating an enduring policy at the national level. But this assertion merely begs the more pertinent question: whether the federal government had any proper role to play in formulating such policy in the first instance.

There can be no dispute that the subject of domestic relations is the exclusive province of the states. And the powers to establish eligibility requirements for marriage, as well as to issue determinations of martial status, lie at the very core of such domestic relations law. The government therefore concedes, as it must, that Congress does not have the authority to place restrictions on the states' power to issue marriage licenses. And indeed, as the government aptly points out, DOMA refrains from directly doing so. Nonetheless, the government's argument assumes that Congress has some interest in a uniform definition of marriage for purposes of determining federal rights, benefits, and privileges. There is no such interest. "The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law. This is especially true where a statute deals with a familiar relationship [because] there is no federal law of domestic relations."

This conclusion is further bolstered by an examination of the federal government's historical treatment of state marital status determinations. Marital eligibility for heterosexual couples has varied from state to state throughout the course of history. Indeed, pursuant to the sovereign power over family law granted to the states by virtue of the federalist system, as well as the states' well-established right to "experiment[ ] and exercis[e] their own judgment in an area to which States lay claim by right of history and expertise," individual states have changed their marital eligibility requirements in myriad ways over time. And yet the federal government has fully embraced these variations and inconsistencies in state marriage laws by recognizing as valid for federal purposes any heterosexual marriage which has been declared valid pursuant to state law.

By way of one pointed example, so-called miscegenation statutes began to fall, state by state, beginning in 1948. But no fewer than sixteen states maintained such laws as of 1967 when the Supreme Court finally declared that prohibitions on interracial marriage violated the core constitutional guarantees of equal protection and due process. Nevertheless, throughout the evolution of the stateside debate over interracial marriage, the federal government saw fit to rely on state marital status determinations when they were relevant to federal law.

The government suggests that the issue of same-sex marriage is qualitatively different than any historical state-by-state debate as to who should be allowed to marry because, though other such issues have indeed arisen in the past, "none had become a topic of great debate in numerous states with such fluidity." This court, however, cannot lend credence to the government's unsupported assertion in this regard, particularly in light of the lengthy and contentious state-by-state debate that took place over the propriety of interracial marriage not so very long ago.

Importantly, the passage of DOMA marks the *first* time that the federal government has ever attempted to legislatively mandate a uniform federal definition of marriage-or any other core concept of domestic relations, for that matter. This is so, notwithstanding the occurrence of other similarly politically-charged, protracted, and fluid debates at the state level as to who should be permitted to marry.

Though not dispositive of a statute's constitutionality in and of itself, "a longstanding history of related federal action ... can nonetheless be 'helpful in reviewing the substance of a congressional statutory scheme,' and, in particular, the reasonableness of the relation between the new statute and pre-existing federal interests." And the *absence* of precedent for the legislative classification at issue here is equally instructive, for " 'discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the [C]onstitution [ ]....'"

The government is certainly correct in its assertion that the scope of a federal program is generally determined with reference to federal law. But the historically entrenched practice of incorporating state law determinations of marital status where they are relevant to federal law reflects a long-recognized reality of the federalist system under which this country operates. The states alone have the authority to set forth eligibility requirements as to familial relationships and the federal government cannot, therefore, have a legitimate interest in disregarding those family status determinations properly made by the states.

Moreover, in order to give any meaning to the government's notion of preserving the status quo, one must first identify, with some precision, the relevant status quo to be preserved. The government has claimed that Congress could have had an interest in adhering to federal policy regarding the recognition of marriages as it existed in 1996. And this may very well be true. But even assuming that Congress could have had such an interest, the government's assertion that pursuit of this interest provides a justification for DOMA relies on a conspicuous misconception of what the status quo was *at the federal level* in 1996.

The states alone are empowered to determine who is eligible to marry and, as of 1996, no state had extended such eligibility to same-sex couples. In 1996, therefore, it was indeed the status quo *at the state level* to restrict the definition of marriage to the union of one man and one woman. But, the status quo *at the federal level* was to recognize, for federal purposes, any marriage declared valid according to state law. Thus, Congress' enactment of a provision denying federal recognition to a particular category of valid state-sanctioned marriages was, in fact, a significant *departure* from the status quo at the federal level.

Furthermore, this court seriously questions whether it may even consider preservation of the status quo to be an "interest" independent of some legitimate governmental objective that preservation of the status quo might help to achieve. Staying the course is not an end in and of itself, but rather a means to an end. Even assuming for the sake of argument that DOMA succeeded in preserving the federal status quo, which this court has concluded that it did not, such assumption does nothing more than describe what DOMA does. It does not provide a justification for doing it. This court does not doubt that Congress occasionally encounters social problems best dealt with by preserving the status quo or adjusting national policy incrementally. But to assume that such a congressional response is appropriate requires a predicate assumption that there indeed exists a "problem" with which Congress must grapple.

The only "problem" that the government suggests DOMA might address is that of state-to-state inconsistencies in the distribution of federal marriage-based benefits. But the classification that DOMA effects does not bear any rational relationship to this asserted interest in consistency. Decidedly, DOMA does not provide for nationwide consistency in the distribution of federal benefits among married couples. Rather it denies to same-sex married couples the federal marriage-based benefits that similarly situated heterosexual couples enjoy.

And even within the narrower class of heterosexual married couples, this court cannot apprehend any rational relationship between DOMA and the goal of nationwide consistency. As noted above, eligibility requirements for heterosexual marriage vary by state, but the federal government nonetheless recognizes any heterosexual marriage, which a couple has validly entered pursuant to the laws of the state that issued the license. For example, a thirteen year-old female and a fourteen year-old male, who have the consent of their parents, can obtain a valid marriage license in the state of New Hampshire. Though this court knows of no other state in the country that would sanction such a marriage, the federal government recognizes it as valid simply because New Hampshire has declared it to be so.

More importantly, however, the pursuit of consistency in the distribution of federal marriage-

based benefits can only constitute a legitimate government objective if there exists a relevant characteristic by which to distinguish those who are entitled to receive benefits from those who are not. And, notably, there is a readily discernible and eminently relevant characteristic on which to base such a distinction: *marital status.* Congress, by premising eligibility for these benefits on marriage in the first instance, has already made the determination that married people make up a class of similarly-situated individuals, different in relevant respects from the class of non-married people. Cast in this light, the claim that the federal government may also have an interest in treating all same-sex couples alike, whether married or unmarried, plainly cannot withstand constitutional scrutiny.

Similarly unavailing is the government's related assertion that "Congress could reasonably have concluded that federal agencies should not have to deal immediately with [the administrative burden presented by] a changing patchwork of state approaches to same-sex marriage" in distributing federal marriage-based benefits. Federal agencies are not burdened with the administrative task of implementing changing state marriage laws-that is a job for the states themselves. Rather, federal agencies merely distribute federal marriage-based benefits to those couples that have already obtained state-sanctioned marriage licenses. That task does not become more administratively complex simply because some of those couples are of the same sex. Nor does it become more complex simply because some of the couples applying for marriage-based benefits were previously ineligible to marry. Every heterosexual couple that obtains a marriage license was at some point ineligible to marry due to the varied age restrictions placed on marriage by each state. Yet the federal administrative system finds itself adequately equipped to accommodate their changed status.

In fact, as Plaintiffs suggest, DOMA seems to inject complexity into an otherwise straightforward administrative task by sundering the class of state-sanctioned marriages into two, those that are valid for federal purposes and those that are not. As such, this court finds the suggestion of potential administrative burden in distributing marriage-based benefits to be an utterly unpersuasive excuse for the classification created by DOMA.

Lastly, even if DOMA succeeded in creating consistency in the distribution of federal marriage-based benefits, which this court has concluded that it does not, DOMA's comprehensive sweep across the entire body of federal law is so far removed from that discrete goal that this court finds it impossible to credit the proffered justification of consistency as the motivating force for the statute's enactment.

The federal definitions of "marriage" and "spouse," as set forth by DOMA, are incorporated into at least 1,138 different federal laws, many of which implicate rights and privileges far beyond the realm of pecuniary benefits. For example, persons who are considered married for purposes of federal law enjoy the right to sponsor their non-citizen spouses for naturalization, as well as to obtain conditional permanent residency for those spouses pending naturalization. Similarly, the Family and Medical Leave Act ("FMLA") entitles federal employees, who are considered married for federal purposes, to twelve weeks of unpaid leave in order to care for a spouse who has a serious health condition or because of any qualifying exigency arising out of the fact that a spouse is on active military duty. But because DOMA dictates that the word "spouse", as used in the above-referenced immigration and FMLA provisions, refers only to a husband or wife of the

opposite sex, these significant non-pecuniary federal rights are denied to same-sex married couples.

It strains credulity to suggest that Congress might have created such a sweeping status-based enactment, touching every single federal provision that includes the word marriage or spouse, simply in order to further the discrete goal of consistency in the distribution of federal marriage-based pecuniary benefits. For though the government is correct that the rational basis inquiry leaves room for a less than perfect fit between the means Congress employs and the ends Congress seeks to achieve, this deferential constitutional test nonetheless demands some *reasonable* relation between the classification in question and the purpose it purportedly serves.

In sum, this court is soundly convinced, based on the foregoing analysis, that the government's proffered rationales, past and current, are without "footing in the realities of the subject addressed by [DOMA]." And "when the proffered rationales for a law are clearly and manifestly implausible, a reviewing court may infer that animus is the only explicable basis. [Because] animus alone cannot constitute a legitimate government interest," this court finds that DOMA lacks a rational basis to support it.

This court simply "cannot say that [DOMA] is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which [this court] could discern a relationship to legitimate [government] interests." Indeed, Congress undertook this classification for the one purpose that lies entirely outside of legislative bounds, to disadvantage a group of which it disapproves. And such a classification, the Constitution clearly will not permit.

In the wake of DOMA, it is only sexual orientation that differentiates a married couple entitled to federal marriage-based benefits from one not so entitled. And this court can conceive of no way in which such a difference might be relevant to the provision of the benefits at issue. By premising eligibility for these benefits on marital status in the first instance, the federal government signals to this court that the relevant distinction to be drawn is between married individuals and unmarried individuals. To further divide the class of married individuals into those with spouses of the same sex and those with spouses of the opposite sex is to create a distinction without meaning. And where, as here, "there is no reason to believe that the disadvantaged class is different, in *relevant* respects" from a similarly situated class, this court may conclude that it is only irrational prejudice that motivates the challenged classification. As irrational prejudice plainly *never* constitutes a legitimate government interest, this court must hold that Section 3 of DOMA as applied to Plaintiffs violates the equal protection principles embodied in the Fifth Amendment to the United States Constitution.

IV. *Conclusion*

For the foregoing reasons, *Defendants' Motion to Dismiss* is DENIED and *Plaintiffs' Motion for Summary Judgment* is ALLOWED, ***

Appendix B

Massachusetts v. U.S. Dept. of HHS
United States District Court, D. Massachusetts, 2010
__ F. Supp.2d __ , 2010 WL 2695668

TAURO, District Judge.

I. *Introduction*

This action presents a challenge to the constitutionality of Section 3 of the Defense of Marriage Act as applied to Plaintiff, the Commonwealth of Massachusetts (the "Commonwealth"). Specifically, the Commonwealth contends that DOMA violates the Tenth Amendment of the Constitution, by intruding on areas of exclusive state authority, as well as the Spending Clause, by forcing the Commonwealth to engage in invidious discrimination against its own citizens in order to receive and retain federal funds in connection with two joint federal-state programs.

II. *Background*

A. *The Defense of Marriage Act*

Congress enacted the Defense of Marriage Act ("DOMA") in 1996, and President Clinton signed it into law. The Commonwealth, by this lawsuit, challenges Section 3 of DOMA, which defines the terms "marriage" and "spouse," for purposes of federal law, to include only the union of one man and one woman. In pertinent part, Section 3 provides:

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

As of December 31, 2003, there were at least "a total of 1,138 federal statutory provisions classified to the United States Code in which marital status is a factor in determining or receiving benefits, rights, and privileges," according to estimates from the General Accounting Office. These statutory provisions pertain to a variety of subjects, including, but not limited to Social Security, taxes, immigration, and healthcare.

B. *The History of Marital Status Determinations in the United States*

State control over marital status determinations predates the Constitution. Prior to the American Revolution, colonial legislatures, rather than Parliament, established the rules and regulations regarding marriage in the colonies. And, when the United States first declared its independence from England, the founding legislation of each state included regulations regarding marital status determinations.
In 1787, during the framing of the Constitution, the issue of marriage was not raised when

defining the powers of the federal government. At that time, "[s]tates had exclusive power over marriage rules as a central part of the individual states' 'police power'-meaning their responsibility (subject to the requirements and protections of the federal Constitution) for the health, safety and welfare of their populations."

In large part, rules and regulations regarding marriage corresponded with local circumstances and preferences. *** [S]ince the founding of the United States "there have been many nontrivial differences in states' laws on who was permitted to marry, what steps composed a valid marriage, what spousal roles should be, and what conditions permitted divorce."

In response to controversies stemming from this "patchwork quilt of marriage rules in the United States," there have been many attempts to adopt a national definition of marriage. In the mid-1880s, for instance, a constitutional amendment to establish uniform regulations on marriage and divorce was proposed for the first time. Following the failure of that proposal, there were several other unsuccessful efforts to create a uniform definition of marriage by way of constitutional amendment. Similarly, "[l]egislative and constitutional proposals to nationalize the definition of marriage were put before Congress again and again, from the 1880s to 1950s, with a particular burst of activity during and after World War II, because of the war's perceived damage to the stability of marriage and because of a steep upswing in divorce." None of these proposals succeeded, however, because "few members of Congress were willing to supersede their own states' power over marriage and divorce." ***

[T]hroughout much of American history a great deal of tension surrounded the issue of interracial marriage. But, despite differences in restrictions on interracial marriage from state to state, the federal government consistently accepted all state marital status determinations for the purposes of federal law. For that reason, a review of the history of the regulation of interracial marriage is helpful in assessing the federal government's response to the "contentious social issue" now before this court, same-sex marriage. ***

Following the abolition of slavery, many state legislatures imposed additional restrictions on interracial marriage. "As many as 41 states and territories of the U.S. banned, nullified, or criminalized marriages across the color line for some period of their history, often using 'racial' classifications that are no longer recognized." Of those states, many imposed severe punishment on relationships that ran afoul of their restrictions. Alabama, for instance, "penalized marriage, adultery, or fornication between a white and 'any negro, or the descendant of any negro to the third generation,' with hard labor of up to seven years."

In contrast, some states, like Vermont, did not bar interracial marriage. Similarly, Massachusetts, a hub of antislavery activism, repealed its prohibition on interracial marriage in the 1840s.

The issue of interracial marriage again came to the legislative fore in the early twentieth century. The controversy was rekindled at that time by the decline of stringent Victorian era sexual standards and the migration of many African-Americans to the northern states. Legislators in fourteen states introduced bills to institute or strengthen prohibitions on interracial marriage in response to the marriage of the African-American boxer Jack Johnson to a young white woman. These bills were universally defeated in northern states, however, as a result of organized

pressure from African-American voters.

In the decades after World War II, in response to the civil rights movement, many states began to eliminate laws restricting interracial marriage. And, ultimately, such restrictions were completely voided by the courts. Throughout this entire period, however, the federal government consistently relied on state determinations with regard to marriage, when they were relevant to federal law.

C. *Same-Sex Marriage in Massachusetts*

In 2003, the Supreme Judicial Court of Massachusetts held that excluding same-sex couples from marriage violated the equality and liberty provisions of the Massachusetts Constitution. In accordance with this decision, on May 17, 2004, Massachusetts became the first state to issue marriage licenses to same-sex couples. And, since then, the Commonwealth has recognized "a single marital status that is open and available to every qualifying couple, whether same-sex or different-sex." The Massachusetts legislature rejected both citizen-initiated and legislatively-proposed constitutional amendments to bar the recognition of same-sex marriages.

As of February 12, 2010, the Commonwealth had issued marriage licenses to at least 15,214 same-sex couples. But, as Section 3 of DOMA bars federal recognition of these marriages, the Commonwealth contends that the statute has a significant negative impact on the operation of certain state programs, discussed in further detail below.

D. *Relevant Programs*

1. *The State Cemetery Grants Program*

There are two cemeteries in the Commonwealth that are used for the burial of eligible military veterans, their spouses, and their children. These cemeteries, which are located in Agawam and Winchendon, Massachusetts, are owned and operated solely by the Commonwealth. As of February 17, 2010, there were 5,379 veterans and their family members buried at Agawam and 1,075 veterans and their family members buried at Winchendon.

The Massachusetts Department of Veterans' Services ("DVS") received federal funding from the United States Department of Veterans Affairs ("VA") for the construction of the cemeteries at Agawam and Winchendon, pursuant to the State Cemetery Grants Program. ***

In addition to providing funding for the construction and expansion of state veterans' cemeteries, the VA also reimburses DVS $300 for the costs associated with the burial of each veteran at Agawam and Winchendon. In total, the VA has provided $1,497,300 to DVS for such "plot allowances."

By statute, federal funding for the state veterans' cemeteries in Agawam and Winchendon is conditioned on the Commonwealth's compliance with regulations promulgated by the Secretary of the VA. If either cemetery ceases to be operated as a veterans' cemetery, the VA can recapture from the Commonwealth any funds provided for the construction, expansion, or improvement of

the cemeteries.

The VA regulations require that veterans' cemeteries "be operated solely for the interment of veterans, their spouses, surviving spouses, [and certain of their] children...." Since DOMA provides that a same-sex spouse is not a "spouse" under federal law, DVS sought clarification from the VA regarding whether DVS could "bury the same-sex spouse of a veteran in its Agawam or Winchendon state veterans cemetery without losing federal funding provided under [the] VA's state cemeteries program," after the Commonwealth began recognizing same-sex marriage in 2004. In response, the VA informed DVS by letter that "we believe [the] VA would be entitled to recapture Federal grant funds provided to DVS for either [the Agawam or Winchendon] cemeteries should [Massachusetts] decide to bury the same-sex spouse of a veteran in the cemetery, unless that individual is independently eligible for burial."

More recently, the National Cemetery Administration ("NCA"), an arm of the VA, published a directive in June 2008 stating that "individuals in a same-sex civil union or marriage are not eligible for burial in a national cemetery or State veterans cemetery that receives federal grant funding based on being the spouse or surviving spouse of a same-sex veteran." In addition, at a 2008 NCA conference, "a representative from the VA gave a presentation making it clear that the VA would not permit the burial of any same-sex spouses in VA supported veterans' cemeteries."

On July 17, 2007, Darrel Hopkins and Thomas Hopkins submitted an application for burial in the Winchendon cemetery. The couple were married in Massachusetts on September 18, 2004. Darrel Hopkins retired from the United States Army in 1982, after more than 20 years of active military service. ***

Because of his long service to the United States Army, as well as his Massachusetts residency, Darrel Hopkins is eligible for burial in Winchendon cemetery. By virtue of his marriage to Darrel Hopkins, Thomas Hopkins is also eligible for burial in the Winchendon cemetery in the eyes of the Commonwealth, which recognizes their marriage. But because the Hopkins' marriage is not valid for federal purposes, in the eyes of the federal government, Thomas Hopkins is ineligible for burial in Winchendon.

Seeking to honor the Hopkins' wishes, DVS approved their application for burial in the Winchendon cemetery and intends to bury the couple together.

2. *MassHealth*

Medicaid is a public assistance program dedicated to providing medical services to needy individuals by, providing funding (also known as "federal financial participation" or "FFP") to states that pay for medical services on behalf of those individuals. Massachusetts' Executive Office of Health and Human Services administers the Commonwealth's Medicaid program, known as MassHealth.

MassHealth provides comprehensive health insurance or assistance in paying for private health insurance to approximately one million residents of Massachusetts. The Department of Health

and Human Services ("HHS") reimburses MassHealth for approximately one-half of its Medicaid expenditures and administration costs. ***

To qualify for federal funding, the Secretary of HHS must approve a "State plan" describing the nature and scope of the MassHealth program. Qualifying plans must meet several statutory requirements. For example, qualifying plans must ensure that state-assisted healthcare is not provided to individuals whose income or resources exceed certain limits.

Marital status is a relevant factor in determining whether an individual is eligible for coverage by MassHealth. ***

The Commonwealth contends that, under certain circumstances, the recognition of same-sex marriage leads to the denial of health benefits, resulting in cost savings for the state. By way of example, in a household of same-sex spouses under the age of 65, where one spouse earns $65,000 and the other is disabled and receives $13,000 per year in Social Security benefits, neither spouse would be eligible for benefits under MassHealth's current practice, since the total household income, $78,000, substantially exceeds the federal poverty level, $14,412. Since federal law does not recognize same-sex marriage, however, the disabled spouse, who would be assessed as single according to federal practice, would be eligible for coverage since his income alone, $13,000, falls below the federal poverty level.

The recognition of same-sex marriages also renders certain individuals eligible for benefits for which they would otherwise be ineligible. For instance, in a household consisting of two same-sex spouses under the age of 65, one earning $33,000 per year and the other earning only $7,000 per year, both spouses are eligible for healthcare under MassHealth because, as a married couple, their combined income-$40,000-falls below the $43,716 minimum threshold established for spouses. In the eyes of the federal government, however, only the spouse earning $7,000 per year is eligible for Medicaid coverage.

After the Commonwealth began recognizing same-sex marriages in 2004, MassHealth sought clarification, by letter, from HHS's Centers for Medicare & Medicaid Services ("CMS") as to how to implement its recognition of same-sex marriages with respect to Medicaid benefits. In response, CMS informed MassHealth that "[i]n large part, DOMA dictates the response" to the Commonwealth's questions, because "DOMA does not give the [CMS] the discretion to recognize same-sex marriage for purposes of the Federal portion of Medicaid."

The Commonwealth enacted the MassHealth Equality Act in July 2008, which provides that "[n]otwithstanding the unavailability of federal financial participation, no person who is recognized as a spouse under the laws of the commonwealth shall be denied benefits that are otherwise available under this chapter due to the provisions of [DOMA] or any other federal nonrecognition of spouses of the same sex."

Following the passage of the MassHealth Equality Act, CMS reaffirmed that DOMA "limits the availability of FFP by precluding recognition of same sex couples as 'spouses' in the Federal program." In addition, CMS stated that "because same sex couples are not spouses under Federal law, the income and resources of one may not be attributed to the other without actual

contribution, i.e. you must not deem income or resources from one to the other." Finally, CMS informed the Commonwealth that it "must pay the full cost of administration of a program that does not comply with Federal law."

Currently, MassHealth denies coverage to married individuals who would be eligible for medical assistance if assessed as single pursuant to DOMA, a course of action which saves MassHealth tens of thousands of dollars annually in additional healthcare costs. Correspondingly, MassHealth provides coverage to married individuals in same-sex relationships who would not be eligible if assessed as single, as required by DOMA. To date, the Commonwealth estimates that CMS' refusal to provide federal funding to individuals in same-sex couples has resulted in $640,661 in additional costs and as much as much as $2,224,018 in lost federal funding.

3. *Medicare Tax*

Under federal law, health care benefits for a different-sex spouse are excluded from an employee's taxable income. The value of health care benefits provided to an employee's same-sex spouse, however, is considered taxable and must be imputed as extra income to the employee for federal tax withholding purposes.

The Commonwealth is required to pay Medicare tax for each employee hired after April 1, 1986, in the amount of 1.45% of each employee's taxable income. Because health benefits for same-sex spouses of Commonwealth employees are considered to be taxable income for federal purposes, the Commonwealth must pay an additional Medicare tax for the value of the health benefits provided to the same-sex spouses.

As of December 2009, 398 employees of the Commonwealth provided health benefits to their same-sex spouses. For those employees, the amount of monthly imputed income for healthcare benefits extended to their spouses ranges between $400 and $1000 per month. For that reason, the Commonwealth has paid approximately $122,607.69 in additional Medicare tax between 2004, when the state began recognizing same-sex marriages, and December 2009.

Furthermore, in order to comply with DOMA, the Commonwealth's Group Insurance Commission has been forced to create and implement systems to identify insurance enrollees who provide healthcare coverage to their same-sex spouses, as well as to calculate the amount of imputed income for each such enrollee. Developing such a system cost approximately $47,000, and the Group Insurance Commission continues to incur costs on a monthly basis to comply with DOMA.

III. *Discussion*

A. *Summary Judgment*

Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. ***

B. *Standing*

[The court held that the Commonwealth had suffered sufficient economic harm to constitution Article III standing.]

C. *Challenges to DOMA Under the Tenth Amendment and the Spending Clause of the Constitution*

This case requires a complex constitutional inquiry into whether the power to establish marital status determinations lies exclusively with the state, or whether Congress may siphon off a portion of that traditionally state-held authority for itself. This Court has merged the analyses of the Commonwealth challenges to DOMA under the Spending Clause and Tenth Amendment because, in a case such as this, "involving the division of authority between federal and state governments," these inquiries are two sides of the same coin.

It is a fundamental principle underlying our federalist system of government that "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." And, correspondingly, the Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The division between state and federal powers delineated by the Constitution is not merely "formalistic." Rather, the Tenth Amendment "leaves to the several States a residuary and inviolable sovereignty." This reflects a founding principle of governance in this country, that "[s]tates are not mere political subdivision of the United States," but rather sovereigns unto themselves.

The Supreme Court has handled questions concerning the boundaries of state and federal power in either of two ways: "In some cases the Court has inquired whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I of the Constitution.... In other cases the Court has sought to determine whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment."

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

1. *DOMA Exceeds the Scope of Federal Power*

[4] Congress' powers are "defined and limited," and, for that reason, every federal law "must be based on one or more of its powers enumerated in the Constitution." As long as Congress acts pursuant to one of its enumerated powers, "its work product does not offend the Tenth Amendment." ***

The First Circuit has upheld federal regulation of family law only where firmly rooted in an

enumerated federal power.[1] In many cases involving charges that Congress exceeded the scope of its authority, e.g. *Morrison*[2] and *Lopez,*[3] courts considered whether the challenged federal statutes contain "express jurisdictional elements" tying the enactment to one of the federal government's enumerated powers. DOMA, however, does not contain an explicit jurisdictional element. For that reason, this court must weigh the government's contention that DOMA is grounded in the Spending Clause of the Constitution. The Spending Clause 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 Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.[4]

The government claims that Section 3 of DOMA is plainly within Congress' authority under the Spending Clause to determine how money is best spent to promote the "general welfare" of the public.

It is first worth noting that DOMA's reach is not limited to provisions relating to federal spending. The broad sweep of DOMA, potentially affecting the application of 1,138 federal statutory provisions in the United States Code in which marital status is a factor, impacts, among other things, copyright protections, provisions relating to leave to care for a spouse under the Family and Medical Leave Act, and testimonial privileges.

It is true, as the government contends, that "Congress has broad power to set the terms on which it disburses federal money to the States" pursuant to its spending power. But that power is not unlimited. Rather, Congress' license to act pursuant to the spending power is subject to certain general restrictions.

In *South Dakota v. Dole,*[5] 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 national

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[1] *See United States v. Bongiorno,* 106 F.3d 1027 (1st Cir.1997) (the Child Support Recovery Act is a valid exercise of congressional authority pursuant to the Commerce Clause).

[2] 529 U.S. at 612, 120 S.Ct. 1740 (noting that Section 13981 of the Violence Against Women Act of 1994 "contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce").

[3] *United States v. Lopez,* 514 U.S. 549, 561-62, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (" § 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce").

[4] U.S. CONST. art. I, § 8.

[5] *South Dakota v. Dole,* 483 U.S. 203, 207, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987).

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."

The Commonwealth charges that DOMA runs afoul of several of the above-listed restrictions. First, the Commonwealth argues that DOMA departs from the fourth *Dole* requirement, regarding the constitutionality of Congress' exercise of its spending power, because the statute is independently barred by the Equal Protection Clause. Second, the Commonwealth claims that DOMA does not satisfy the third *Dole* requirement, the "germaneness" requirement, because the statute's treatment of same-sex couples is unrelated to the purposes of Medicaid or the State Veterans Cemetery Grants Program.

This court will first address the Commonwealth's argument that DOMA imposes an unconstitutional condition on the receipt of federal funds. This fourth Dole requirement "stands for the unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional."

The Commonwealth argues that DOMA impermissibly conditions the receipt of federal funding on the state's violation of the Equal Protection Clause of the Fourteenth Amendment by requiring that the state deny certain marriage-based benefits to same-sex married couples. "The Fourteenth Amendment 'requires that all persons subjected to ... legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.' " And where, as here, "those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to assure that all persons subject to legislation or regulation are indeed being treated alike, under like circumstances and conditions."

In the companion case, *Gill et al. v. Office of Pers. Mgmt. et al.,* No. 09-cv-10309-JLT, --- F.Supp.2d ---- (D.Mass. July 8, 2010) (Tauro, J.), this court held that DOMA violates the equal protection principles embodied in the Due Process Clause of the Fifth Amendment. There, this court found that DOMA failed to pass constitutional muster under rational basis scrutiny, the most highly deferential standard of review. That analysis, which this court will not reiterate here, is equally applicable in this case. DOMA plainly conditions the 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. *** Accordingly, this court finds that DOMA induces the Commonwealth to violate the equal protection rights of its citizens.

And so, as DOMA imposes an unconstitutional condition on the receipt of federal funding, this court finds that the statute contravenes a well-established restriction on the exercise of Congress' spending power. Because the government insists that DOMA is founded in this federal power and no other, this court finds that Congress has exceeded the scope of its authority.

2. *DOMA Impermissibly Interferes with the Commonwealth's Domestic Relations Law*

That DOMA plainly intrudes on a core area of state sovereignty-the ability to define the marital status of its citizens-also convinces this court that the statute violates the Tenth Amendment.

In *United States v. Bongiorno,* the First Circuit held that "a Tenth Amendment attack on a federal statute cannot succeed without three ingredients: (1) the statute must regulate the States as States, (2) it must concern attributes of state sovereignty, and (3) it must be of such a nature that compliance with it would impair a state's ability to structure integral operations in areas of traditional governmental functions." [6]

A. *DOMA Regulates the Commonwealth "as a State* "

With respect to the first prong of this test, the Commonwealth has set forth a substantial amount of evidence regarding the impact of DOMA on the state's bottom line. For instance, the government has announced that it is entitled to recapture millions of dollars in federal grants for state veterans' cemeteries at Agawam and Winchendon should the same-sex spouse of a veteran be buried there. And, as a result of DOMA's refusal to recognize same-sex marriages, DOMA directly imposes significant additional healthcare costs on the Commonwealth, and increases the state's tax burden for healthcare provided to the same-sex spouses of state employees. In light of this evidence, the Commonwealth easily satisfies the first requirement of a successful Tenth Amendment challenge.

B. *Marital Status Determinations Are an Attribute of State Sovereignty*

Having determined that DOMA regulates the Commonwealth "as a state," this court must now determine whether DOMA touches upon an attribute of state sovereignty, the regulation of marital status.

"The Constitution requires a distinction between what is truly national and what is truly local." And, significantly, family law, including "declarations of status, e.g. marriage, annulment, divorce, custody and paternity," is often held out as the archetypal area of local concern.

The Commonwealth provided this court with an extensive affidavit on the history of marital regulation in the United States, and, importantly, the government does not dispute the accuracy of this evidence. After weighing this evidence, this court is convinced that there is a historically entrenched tradition of federal reliance on state marital status determinations. And, even though the government objects to an over-reliance on the historical record in this case, "a longstanding history of related federal action ... can nonetheless be 'helpful in reviewing the substance of a congressional statutory scheme,' and, in particular, the reasonableness of the relation between the new statute and pre-existing federal interests."

State control over marital status determinations is a convention rooted in the early history of the United States, predating even the American Revolution. Indeed, the field of domestic relations was regarded as such an essential element of state power that the subject of marriage was not even broached at the time of the framing of the Constitution. And, as a consequence of continuous local control over marital status determinations, what developed was a checkerboard of rules and restrictions on the subject that varied widely from state to state, evolving throughout

[6] 106 F.3d 1027, 1033 (1st Cir.1997) (citations and internal quotation marks omitted) ***

American history. Despite the complexity of this approach, prior to DOMA, every effort to establish a national definition of marriage met failure, largely because politicians fought to guard their states' areas of sovereign concern.

The history of the regulation of marital status determinations therefore suggests that this area of concern is an attribute of state sovereignty, which is "truly local" in character.

That same-sex marriage is a contentious social issue, as the government argues, does not alter this court's conclusion. It is clear from the record evidence that rules and regulations regarding marital status determinations have been the subject of controversy throughout American history. Interracial marriage, for example, was at least as contentious a subject. But even as the debate concerning interracial marriage waxed and waned throughout history, the federal government consistently yielded to marital status determinations established by the states. That says something. And this court is convinced that the federal government's long history of acquiescence in this arena indicates that, indeed, the federal government traditionally regarded marital status determinations as the exclusive province of state government.

That the Supreme Court, over the past century, has repeatedly offered family law as an example of a quintessential area of state concern, also persuades this court that marital status determinations are an attribute of state sovereignty. For instance, in *Morrison,* the Supreme Court noted that an overly expansive view of the Commerce Clause could lead to federal legislation of "family law and other areas of *traditional state regulation* since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant." Similarly, in *Elk Grove Unified Sch. Dist. v. Newdow,* the Supreme Court observed "that '[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.' "

The government has offered little to disprove the persuasive precedential and historical arguments set forth by the Commonwealth to establish that marital status determinations are an attribute of state sovereignty. The primary thrust of the government's rebuttal is, in essence, that DOMA stands firmly rooted in Congress' spending power, and, for that reason, "the fact that Congress had not chosen to codify a definition of marriage for purposes of federal law prior to 1996 does not mean that it was without power to do so or that it renders the 1996 enactment invalid." Having determined that DOMA is not rooted in the Spending Clause, however, this court stands convinced that the authority to regulate marital status is a sovereign attribute of statehood.

C. *Compliance with DOMA Impairs the Commonwealth's Ability to Structure Integral Operations in Areas of Traditional Governmental Functions*

Having determined that marital status determinations are an attribute of state sovereignty, this court must now determine whether compliance with DOMA would impair the Commonwealth's ability to structure integral operations in areas of traditional governmental functions.

This third requirement, viewed as the "key prong" of the Tenth Amendment analysis, addresses "whether the federal regulation affects basic state prerogatives in such a way as would be likely

to hamper the state government's ability to fulfill its role in the Union and endanger its separate and independent existence." And, in view of more recent authority, it seems most appropriate for this court to approach this question with a mind towards determining whether DOMA "infring[es] upon the core of state sovereignty."

Tenth Amendment caselaw does not provide much guidance on this prong of the analysis. It is not necessary to delve too deeply into the nuances of this standard, however, because the undisputed record evidence in this case demonstrates that this is not a close call. DOMA set the Commonwealth on a collision course with the federal government in the field of domestic relations. The government, for its part, considers this to be a case about statutory interpretation, and little more. But this case certainly implicates more than tidy questions of statutory interpretation, as the record includes several concrete examples of the impediments DOMA places on the Commonwealth's basic ability to govern itself.

First, as a result of DOMA, the VA has directly informed the Commonwealth that if it opts to bury same-sex spouses of veterans in the state veterans' cemeteries at Agawam and Winchendon, the VA is entitled to recapture almost $19 million in federal grants for the construction and maintenance of those properties. The Commonwealth, however, recently approved an application for the burial of Thomas Hopkins, the same-sex partner of Darrel Hopkins, in the Winchendon cemetery, because the state constitution requires that the Commonwealth honor their union. The Commonwealth therefore finds itself in a Catch-22: it can afford the Hopkins' the same privileges as other similarly-situated married couples, as the state constitution requires, and surrender millions in federal grants, or deny the Hopkins' request, and retain the federal funds, but run afoul of its own constitution.

Second, it is clear that DOMA effectively penalizes the state in the context of Medicaid and Medicare.

Since the passage of the MassHealth Equality Act, for instance, the Commonwealth is required to afford same-sex spouses the same benefits as heterosexual spouses. The HHS Centers for Medicare & Medicaid Services, however, has informed the Commonwealth that the federal government will not provide federal funding participation for same-sex spouses because DOMA precludes the recognition of same-sex couples. As a result, the Commonwealth has incurred at least $640,661 in additional costs and as much as $2,224,018 in lost federal funding.

In the same vein, the Commonwealth has incurred a significant additional tax liability since it began to recognize same-sex marriage in 2004 because, as a consequence of DOMA, health benefits afforded to same-sex spouses of Commonwealth employees must be considered taxable income.

That the government views same-sex marriage as a contentious social issue cannot justify its intrusion on the "core of sovereignty retained by the States," because "the Constitution ... divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." This court has determined that it is clearly within the authority of the Commonwealth to recognize same-sex marriages among its residents, and to afford those individuals in same-sex

marriages any benefits, rights, and privileges to which they are entitled by virtue of their marital status. The federal government, by enacting and enforcing DOMA, plainly encroaches upon the firmly entrenched province of the state, and, in doing so, offends the Tenth Amendment. For that reason, the statute is invalid.

IV. *Conclusion*

For the foregoing reasons, Defendants' *Motion to Dismiss* is DENIED and Plaintiff's *Motion for Summary Judgment* is ALLOWED.