

SECTION THREE OF THE DEFENSE OF MARRIAGE ACT: DECIDING, DEMOCRACY, AND THE CONSTITUTION

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I. INTRODUCTION: DOMA AND SELF-GOVERNMENT

The Defense of Marriage Act (DOMA) was enacted by Congress and signed into law by President Clinton in 1996.¹ It contains two operative sections. Section Two provides, in pertinent part, no state “shall be required to give effect to” same-sex marriages from any other state.² Section Three provides, in relevant part, for purposes of federal law, “the word ‘marriage’ means only a legal union between one man and one woman as husband and wife.”³

DOMA was primarily enacted to answer the question: *Who decides?*⁴ In another article focusing on the horizontal—interstate marriage-recognition—aspects of DOMA, I explain Section Two of DOMA is primarily a structural act, addressing the question of which state will decide whether, when, and to what extent same-sex marriages created in one state will be recognized in another state.⁵ This Article will explain that Section Three of DOMA also is primarily and most significantly a structural provision designed to resolve the “*who decides*” question of which unit of government will decide whether, when, and to what extent same-sex marriages created in an American state, or elsewhere, will be recognized by the federal government. DOMA was a specific congressional response to threats to the constitutional structure of the allocation of power to decide public policy, including the allocation of power to Congress to decide such policy issues.⁶ By 1996, numerous legal theories, claims, and litigation strategies were being widely advanced to produce judicial rulings compelling state governments to recognize same-sex marriage without the approval of those state governments and to convince federal judicial and administrative agency officials to force the federal government to recognize state-created same-sex marriages before and without the approval of Congress.⁷ DOMA was designed to confirm and protect the horizontal and

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

2. 28 U.S.C. § 1738C.

3. 1 U.S.C. § 7.

4. See, e.g., 142 CONG. REC. 22,438 (1996) (statement of Sen. Lott).

5. See Lynn D. Wardle, *Who Decides? The Federal Architecture of DOMA and Comparative Marriage Regulation*, 41 CAL. W. INT'L L.J. (forthcoming 2010) [hereinafter *The Federal Architecture of DOMA*].

6. See 142 CONG. REC. 22,437–38 (1996) (statement of Sen. Lott).

7. E.g., Deborah M. Henson, *Will Same-Sex Marriages Be Recognized in Sister States?: Full Faith and Credit and Due Process Limitations on States' Choice of Law Regarding the Status and Incidents of Homosexual Marriages Following Hawaii's*

vertical allocation of authority to Congress—for the federal government—and to the individual states to decide the interjurisdictional same-sex marriage-recognition issue. This Article will focus on Section Three and emphasize it has both federalism and separation of powers dimensions, which protect the federal government from encroachment by aggressive state governments and protect the power of the politically accountable Congress from encroachment by aggressive federal judges and executive branch officials.

In addition to reviewing Section Three's federalism and separation of powers dimensions, this Article looks beyond DOMA's obvious structural dimension to the foundational "*who decides*" question that lies behind and beyond DOMA's structural arrangements. Whether Congress, the judiciary, or the executive branch decides whether, when, where, or how same-sex marriages created in a state will be recognized in federal laws, regulations, and programs is significant not just for reasons of constitutional power allocation and good governmental structure. The constitutional structure that is protected by DOMA is also important because it protects and gives effect to the core concept of self-government. DOMA is important because it vindicates Thomas Jefferson's first principle of self-government, "the consent of the governed."⁸ That is the reason the constitutional structure protected by DOMA is important and that is the ultimate answer to the question of "*who decides*" whether same-sex marriages validly created in sister states will be recognized in a particular state or federal American jurisdiction.

Part II reviews five layers of policy controversy implicated in the debate over the Defense of Marriage Act. Some confusion can result when these separate issues are conflated. In Part III, three levels or sites of politics in the contest over DOMA are considered. DOMA is properly the creation of, and its survival is properly at the mercy of, legislative politics. Two other sites of political involvement in the DOMA controversy are also noted and discussed. Part IV reviews and rejects the arguments that DOMA is unconstitutional under the structural principles of federalism and the Full Faith and Credit Clause. While those arguments once were popular, they have little traction in most courts now—for good reason. Part V discusses the relevance of popular sovereignty and constitutional consensus to the vertical marriage-recognition issue. In conclusion, Part VI

Baehr v. Lewin, 32 U. LOUISVILLE J. FAM. L. 551, 558 (1994); Mark Strasser, *Domestic Relations Jurisprudence and the Great Slumbering Baehr: On Definitional Preclusion, Equal Protection, and Fundamental Interests*, 64 FORDHAM L. REV. 921, 951–86 (1995).

8. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

notes DOMA makes a significant contribution to protecting government “of the people” in America and reflects on the importance of letting “the people” decide the same-sex marriage-recognition issue.

II. FIVE DIMENSIONS OF THE CONTROVERSY OVER DOMA

DOMA implicates simultaneously at least five important and controversial public policy issues. Recognizing those issues are separate, albeit related, and analyzing them independently is important for analytical and intellectual integrity. It also serves to avoid confusion by preventing distinctive legal concepts from bleeding together in argument in a way that obfuscates issues and understandings that would be clear if viewed independently.

First, the substantive marriage policy issue attracts most of the attention: Should same-sex marriage be legal? Certainly, that is a very important policy question, but that is not a principal issue in DOMA. Section Two of DOMA does not speak to the definition of marriage at all but addresses the conflict-of-laws issue of interstate marriage recognition.⁹ Section Three of DOMA does address the definition of marriage in federal law, but since the federal government does not have any constitutional authority to directly regulate *domestic relations, including marriage and marital status*,¹⁰ and because family laws are overwhelmingly enacted by and are a major component of the policy and jurisprudence of the states, Section Three is not about marriage *qua* marriage. Rather, it is about extending eligibility for federal programs and benefits to certain groups of persons.¹¹ It is about eligibility for certain federal “incidents” of marriage provided by federal law.¹² Thus, DOMA is not directly about the legalization of same-sex marriage at all.

Nevertheless, how the choice-of-law and federal-benefit-eligibility issues are decided casts a significant shadow on the meaning of marriage, so DOMA clearly implicates the marriage issue. Choice-of-law rules and federalism principles can facilitate or impede the legalization of same-sex

9. See 28 U.S.C. § 1738C (2006).

10. See generally Lynn D. Wardle, *The Proposed Federal Marriage Amendment and the Risks to Federalism in Family Law*, 2 U. ST. THOMAS L.J. 137, 158–86 (2004) (examining federalism in family law); Lynn D. Wardle, *Tyranny, Federalism, and the Federal Marriage Amendment*, 17 YALE J.L. & FEMINISM 221, 224–55 (2005) (same).

11. See H.R. REP. NO. 104-664, at 30–31 (1996), reprinted in 1996 U.S.C.A.N. 2905, 2934–35 [hereinafter H.R. REP. NO. 104-664].

12. See *id.*

marriage. For example, some conflict-of-laws scholars have noted the apparent desire of some courts to circumvent various in-state or otherwise applicable unpopular legal policies such as guest statutes, spousal immunity, and married women's disabilities. This explains some of the creative development of conflict-of-laws rules, analysis, escape devices, and reforms—adoption of governmental interest analysis, for example.¹³ So, it should come as no surprise enterprising advocates and legislative-minded judges today might try to stretch or bend established conflict-of-laws and federalism doctrines in order to promote a substantive policy they prefer, such as same-sex marriage. Indeed, critics of DOMA assert—plausibly, but erroneously—that is what Congress and the President did in enacting

13. See Friedrich K. Juenger, *Choice of Law: How It Ought Not to Be*, 48 MERCER L. REV. 757, 761 (1997) (“The large majority of cases in which courts adopted the new learning [interest analysis in choice of law] dealt with guest statutes (or their functional equivalent, intrafamily immunity) and caps on wrongful death recovery. In most of these cases, the courts skillfully employed interest analysis or other modern approaches to avoid application of [old rules they considered to be] ‘drags on the coattails of civilization.’” (quoting *Clark v. Clark*, 222 A.2d 205, 209 (N.H. 1996))); *id.* at 761–62 (“By manipulating such easily manipulatable concepts as ‘interests’ and ‘policies,’ judges readily avoided applying substandard foreign rules that offended their sense of justice. In other words, the new approaches furnished a convenient escape device.”); William M. Richman & David Riley, *The First Restatement of Conflict of Laws on the Twenty-Fifth Anniversary of Its Successor: Contemporary Practice in Traditional Courts*, 56 MD. L. REV. 1196, 1205 (1997) (“[M]ost of the dissatisfaction with the traditional system arose in cases involving guest statutes, intrafamily immunity, and contributory negligence. Yet these doctrines are rapidly disappearing, leaving reform-oriented courts with cumbersome, modern choice-of-law systems that produce mischief long after the substantive-law evils that provoked them have disappeared.”); Michael E. Solimine, *The Impact of Babcock v. Jackson: An Empirical Note*, 56 ALB. L. REV. 773, 786 (1993) (noting linkage between tort reform and choice-of-law revolution; “in embracing new theories of tort liability, state courts apparently found it convenient to utilize new choice-of-law doctrine to discard disfavored substantive tort doctrine”); see also *Paul v. Nat’l Life*, 352 S.E.2d 550, 551–53 (W. Va. 1986) (choice-of-law reform was driven, and driven off course, by desire to evade rules like guest statutes); Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 962–64 (1983) (guest statutes and their analogy to intrafamily immunities facilitated the choice-of-law revolution); Erin A. O’Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1182–83 (2000) (describing the “race to the bottom” and adoption of choice-of-law rules to maximize competition of litigation business and state self-interests); Robert A. Sedler, *Interest Analysis, “Multistate Policies,” and Considerations of Fairness in Conflicts Torts Cases*, 37 WILLAMETTE L. REV. 233, 240 (2001) (noting Professor Friedrich Juenger argued “substandard” tort rules such as guest statutes and spousal immunities should not be applied in choice of law) (citing Friedrich Juenger, *General Course on Private International Law*, 193 RECUEIL DES COURS 119, 286–322 (1983)).

DOMA—use conflicts and federalism principles to promote their preferred substantive policy against recognizing same-sex marriage.¹⁴ Despite its symbolic and practical significance for marriage, marital benefits, and the marriage debates, DOMA simply does not regulate the creation of marriage or govern state domestic relations law.

Second, DOMA involves the conflict-of-laws issue of interjurisdictional marriage recognition—should, must, or may states and the federal government recognize same-sex marriages legally formed in other states that allow same-sex marriage? That substantive issue is not directly addressed by DOMA in the interstate horizontal context. Section Two of DOMA does not take a position on what the answer to that substantive question should be—DOMA does not say the states must or should recognize same-sex marriages from other states nor does it say the states must not or should not recognize same-sex marriages from other states. Rather, Section Two of DOMA is simply a “neutrality provision” that leaves it up to the states to decide whether they will recognize this particular controversial form of marriage that is legal in some other state(s), as they have done from the beginning of the Republic.

Section Three, by contrast, does take a substantive position on the vertical same-sex marriage-recognition choice-of-law issue—it states same-sex marriages will not be recognized as marriages in federal law.¹⁵ That, of course, was the existing rule when DOMA was enacted: No federal law or program recognized same-sex marriages for purposes of any federal benefits. So DOMA did not change the prior federal marriage-recognition rule; DOMA merely codified the long-settled, historic, status quo rule as a convenient, consistent “place-holder” rule until Congress determines the country is ready for and wants a change of policy in particular or general contexts. Thus, Section Three of DOMA did not attempt to forbid future recognition of same-sex marriage; it did not attempt to settle the issue once and for all, like the Supreme Court of the United States has, with mixed results, occasionally tried to settle once and for all some hot public policy

14. See, e.g., Stanley E. Cox, *DOMA and Conflicts Law: Congressional Rules and Domestic Relations Conflicts Law*, 32 CREIGHTON L. REV. 1063, 1065 (1999). This claim is erroneous insofar as DOMA did not alter, change, or modify—but preserved—the existing choice-of-law rules regarding interstate recognition of marriage, or the existing federalism principles concerning what branch decides whether same-sex marriages will be recognized in federal law, or the existing federal substantive rule that recognized in federal law only male–female marriages.

15. See 1 U.S.C. § 7 (2006).

controversies.¹⁶ Section Three continues the prior, federal substantive policy against recognition of same-sex marriage, as the *status quo ante*, but it makes no attempt to make permanent the policy of federal nonrecognition of same-sex marriage.

The third issue is *who decides* the same-sex marriage-recognition issue—what unit of government should decide the issue of interjurisdictional recognition of same-sex marriage? That is the primary focus of both sections of DOMA. Section Two statutorily confirms the prior, long-settled rule of interstate marriage recognition by explicitly preserving the right of each state to decide for itself the same-sex marriage-recognition issue.¹⁷ Thus, under DOMA, each state decides whether and to what extent it will recognize same-sex marriages created in other jurisdictions in its own territory and for purposes of its own domestic relations law, free of compulsion from other states and from federal coercion or preemption.

Similarly, Section Three primarily preserves the authority of the federal Congress to decide the marriage-recognition-in-federal-law issue against intrusion by the states.¹⁸ Section Three clearly preserves the authority of the federal government to independently decide what state-created “marriages” it will extend benefits to and reconfirms the federal government is not bound by state domestic relations policies in deciding the scope of eligibility for particular federal benefits. It did this by confirming through codification the status quo rule—no federal recognition of same-sex marriage—and the historic and constitutional power alignment—Congress makes the rule—until Congress decides to change the rule, which, at least initially, will probably be done subject-by-subject. Today, it is easy to forget in 1787 the Founders—at least the Federalists, who supported the proposed United States Constitution—were more concerned it would “be far more easy for the State governments to encroach upon the national authorities, than for the national government to encroach upon the State authorities.”¹⁹ Since the days of the New Deal—or, arguably, the Civil War—the greatest concern has been about federal encroachment upon the states. DOMA is a rare contemporary example of the kind of threat to the constitutional structure of decision

16. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973).

17. See 28 U.S.C. § 1738C (2006).

18. See 1 U.S.C. § 7.

19. THE FEDERALIST NO. 17, at 103 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

making that was the prevailing concern when the Constitution was drafted, and of the 104th Congress's response to it.

Fourth, DOMA also answers the question of which branch of government shall decide the same-sex marriage-recognition issue at the federal level.²⁰ Section Three of DOMA prohibits federal judges and federal executive branch officials from interpreting federal law so as to recognize same-sex marriages for purposes of federal law.²¹ It asserts the power of Congress—the legislative branch—to make the policy decision about whether, when, and how far to go in treating same-sex relationships the same as marriages.²² Section Three is thus a separation-of-powers provision staking out the marriage-recognition rule as a rule for Congress to decide. While some scholars and state litigators dislike the rule that Congress decides what marriages will be recognized for federal purposes under federal law,²³ that is the long-settled rule.²⁴ It is consistent with—if not compelled by—the democratic theory of self-government upon which the American constitutional government is founded.²⁵

Finally, the fifth aspect of the debate over DOMA implicates the principle of popular sovereignty. Between the competing levels of government, DOMA keeps the issue for decision at the level of government closest to the people affected—the states. As Professor Korn

20. Section Two recognizes legislative supremacy by giving state legislatures the opportunity to declare the marriage-recognition choice-of-law rule for their state. 28 U.S.C. § 1738C. Also, DOMA was enacted by Congress, whose legislative power to decide what “effects” a marriage in one state has in another state is established by the Constitution of the United States. U.S. CONST. art. IV, § 1, cl. 2.

21. See 1 U.S.C. § 7.

22. See *id.*

23. See *infra* Part III.C (discussing DOMA litigation in Massachusetts).

24. See *infra* Part IV.A (discussing the congressional definition of marriage for federal law).

25. See generally Steven H. Hobbs, *Love on the Oregon Trail: What the Story of Maynard v. Hill Teaches Us About Marriage and Democratic Self-Governance*, 32 HOFSTRA L. REV. 111 (2003) (examining patterns of interrelated lives and processes individuals use to shape their relationships and lives); Lynn D. Wardle, *The Bonds of Matrimony and the Bonds of Constitutional Democracy*, 32 HOFSTRA L. REV. 349 (2003) (examining marriage's influence on governmental form and the impact on our constitutional system when alternative forms of relationships are recognized); Kevin J. Worthen, *Who Decides and What Difference Does It Make?: Defining Marriage in “Our Democratic, Federal Republic,”* 18 BYU J. PUB. L. 273, 278–306 (2004) (describing the main components of our republic and evaluating the merits of determining the same-sex marriage issue as compatible with main components of our governmental system).

explained, “[M]uch of family law [is] a domain traditionally governed by domicile law,” and “the domicile is ‘the only state in which the parties can, by participation in the legislative processes, effect a change’ in the law.”²⁶ Likewise, Section Three articulates the branch of the federal government that will decide marriage recognition for the national government is the branch of government that is closest to, and most directly accountable to, the people—Congress. Both sections of DOMA reflect deference to the principle of popular sovereignty. Ultimately, the decision about whether same-sex marriage should be legalized in a specific jurisdiction, and whether particular same-sex marriages created in other jurisdictions will be recognized in any other particular state or by the federal government, should reflect the will of the people who are subject to those laws. When a legal rule affects the deconstruction and fundamental reconstitution of a basic social institution, it is most important such restructuring represents and implements the will of the people. It is upon that “*who decides*” issue all of the other facets of the DOMA controversy turn. It is upon this issue this Article focuses.

III. THE POLITICS OF DOMA

The Defense of Marriage Act was enacted by Congress to create federal protection against the growing threat that legalization of same-sex marriage in one state would open the door for judges and other government officers to interpret federal law—particularly full faith and credit doctrines—as forcing other states and the federal government to recognize same-sex marriage over the objection of the people and lawmakers in those other jurisdictions.²⁷ Section Two of DOMA—the “horizontal” interstate recognition provision—confirms no state is required to recognize same-sex marriages from other states.²⁸ The purpose of Section Two has been thoroughly discussed elsewhere.²⁹ Section Three of

26. Korn, *supra* note 13, at 963–64 (quoting *Emery v. Emery*, 289 P.2d 218, 223 (Cal. 1955)).

27. *Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong. 28–32 (1996) [hereinafter *Hearing*] (statement of Lynn D. Wardle, Professor, Brigham Young University); H.R. REP. NO. 104-664, *supra* note 11, at 2, 6–12.

28. 28 U.S.C. § 1738C (2006).

29. See, e.g., Patrick J. Borchers, *Baker v. General Motors: Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147 (1998); Maurice J. Holland, *The Modest Usefulness of DOMA Section 2*, 32 CREIGHTON L. REV. 395 (1998); Michael E. Solimine, *Competitive Federalism and Interstate Recognition of Marriage*, 32 CREIGHTON L. REV. 83, 96–102 (1998); *The*

DOMA—the “vertical” recognition provision—establishes for purposes of federal law, until Congress otherwise decides, marriage terms include only male–female marriages.³⁰ Similarly, Section Three was enacted to protect congressional authority to determine when and to what extent to recognize same-sex marriages federally against the threat that legalizing same-sex marriage in Hawaii, or any other state, would open the door for federal judges and executive branch officials to interpret federal laws as recognizing same-sex marriages in the context of federal laws, regulations, and programs before Congress decided that was appropriate.³¹

DOMA is both a child and the father of politics. Some of it is legitimate political contest involving disputes about policy made in the democratic branches. Some of it is legitimate academic or intellectual politics involving efforts to promote the point of view popular with the keepers of culture and education by reason and argument. And some of it is the less-than-noble effort by elites to use their powers to create a taboo to silence, drown out, or shout down those who have different, minority views.³² Some politics, however, such as judicial politics, are of dubious legitimacy and impair trust in and respect for the integrity of the political system. Thus, in the long-run such politics weaken the judicial branch and our system of self-government.

A. *The Legislative and Popular Politics of DOMA*

DOMA was enacted by a Republican Congress and signed into law by a Democratic President, Bill Clinton, in 1996.³³ The vote in both houses

Federal Architecture of DOMA, *supra* note 5; Lynn D. Wardle, *DOMA: Protecting Federalism in Family Law*, 45 *FED. LAW.* 30, 30 (1998); Lynn D. Wardle, *Williams v. North Carolina, Divorce Recognition, and Same-Sex Marriage Recognition*, 32 *CREIGHTON L. REV.* 187 (1998) [hereinafter *Divorce and Same-Sex Marriage Recognition*]; Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 *CREIGHTON L. REV.* 255 (1998). *But see* Mark Strasser, *DOMA and the Two Faces of Federalism*, 32 *CREIGHTON L. REV.* 457 (1998) (questioning whether there was any congressional purpose behind DOMA).

30. 1 U.S.C. § 7 (2006).

31. *Hearing*, *supra* note 27, at 32–35 (statement of Lynn D. Wardle, Professor, Brigham Young University); H.R. REP. NO. 104-664, *supra* note 11, at 10–11.

32. The Drake Constitutional Law Center—Professor Mark S. Kende, in particular—and the *Drake Law Review* are to be commended for not only welcoming, but specifically inviting divergent views and making room for the viewpoints that are less than popular in academia today on this issue. That is in the highest tradition of good scholarship and great universities.

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

of Congress in favor of DOMA was bipartisan and overwhelming. In the House of Representatives, DOMA passed by a vote of 342 to 67;³⁴ in the Senate, DOMA passed by a vote of 85 to 14.³⁵ President Clinton signed DOMA “with no talk of a veto.”³⁶

Today, there is certainly more political opposition to DOMA than there was in 1996. Indeed, a bill to repeal both sections of DOMA is pending in Congress. House Bill 3567, the “Respect for Marriage Act of 2009,” was introduced in the House of Representatives on September 15, 2009, by Representative Jerrold Nadler of New York.³⁷ It originally was cosponsored by over ninety other members of the House of Representatives—none from Iowa—and now has 113 cosponsors.³⁸ On October 19, 2009, it was assigned to the House Judiciary Committee’s Subcommittee on the Constitution, Civil Rights, and Civil Liberties.³⁹ It is still pending in that subcommittee, but there have not yet been any hearings on the bill.⁴⁰ This bill would repeal both sections of DOMA. Section 2 of House Bill 3567 explicitly provides: “Section 1738C of title 28, United States Code, is repealed”⁴¹ Section 3 of House Bill 3567 would effectively repeal Section Three of DOMA by providing, in relevant part, “[f]or the purposes of any Federal law in which marital status is a factor, an individual shall be considered married if that individual’s marriage is valid in the State where the marriage was entered into”⁴² It also provides for recognition, for federal law purposes, of valid foreign same-sex marriages if “the marriage could have been entered into in a State.”⁴³

Thus, under House Bill 3567, DOMA’s statutory protection against federal or state judges interpreting federal choice-of-law rules or full faith

34. 142 CONG. REC. 17,094–95 (1996).

35. 142 CONG. REC. 22,467 (1996).

36. Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1186 (2009).

37. Respect for Marriage Act of 2009, H.R. 3567, 111th Cong. (2009).

38. Bill Summary & Status, 111th Congress (2009–2010), H.R.3567, Cosponsors, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR03567:@@@P> (last visited Sept. 13, 2010). The cosponsors include twenty-two members from California districts and none from Iowa.

39. *Id.*

40. *Id.*

41. H.R. 3567, § 2. Lest there be any uncertainty, this provision is entitled: “Repeal of Section Added to Title 28, United States Code, by Section 2 of the Defense of Marriage Act.” *Id.*

42. *Id.* § 3.

43. *Id.*

and credit principles as compelling states to recognize same-sex marriages validly performed in other states—the threat to protect against which Section Two of DOMA was enacted—is entirely eliminated. The elimination of that explicit congressional protection will be interpreted at the very least as permission to so interpret federal doctrines, but it could be read not unreasonably as sending a message that Congress wants all states to recognize same-sex marriages performed in other states. Thus, the misleading official description of the Bill as intended to “ensure respect for State regulation of marriage” is ironic.⁴⁴ It ensures respect only for the right of the state of celebration to regulate marriages performed in its borders, but it strips all statutory protection for the right of all other states to regulate the recognition in their own borders and in their own laws of marriages performed in other states, even if they are against the strong public policy of the second state. Likewise, Section 3 of House Bill 3567 would repeal Section Three of DOMA and require recognition of same-sex marriages in all federal laws and programs. Surprisingly—and inconsistently for the federalism argument for repeal of DOMA—the Nadler bill also requires federal recognition of same-sex marriage even if it is not valid in the state of the parties’ domicile if it was “entered into outside any State, if the marriage is valid in the place where entered into and the marriage could have been entered into in a [i.e., *any*] State.”⁴⁵

Representative Nadler is to be commended for his effort to repeal DOMA directly by legislation. While there certainly is room to disagree with him about what policy regarding federal recognition of same-sex marriages generally—for across-the-board application—is the wisest, most prudent, and most compassionate for the people of this nation, he deserves respect for raising the issue for public debate in Congress and for seeking to resolve the issue by the elected representatives of the people rather than seeking to achieve his objective by judicial fiat. The same-sex marriage-recognition issue is an important policy, as well as political, issue. It should be resolved by the political process in the political branches.

DOMA was born in an environment of electoral politics, and whether it lives or dies will and should depend upon the democratic politics of the legislative branch. As Professor Patricia Cain has noted, DOMA was born during a presidential election year, can be traced to the political importance of the issue of same-sex marriage in the Republican caucuses in Iowa in February 1996, and was able to achieve passage in just four and

44. H.R. 3567.

45. *Id.* § 3 (emphasis and explanation added).

one-half months due to the powerful manifestation of popular political opposition to same-sex marriage that year and widespread concerns that legalization of same-sex marriage in Hawaii would force states to recognize Hawaiian same-sex marriages.⁴⁶ Professor Cain writes:

By April of 1996, polls clearly favored the Democrats and Clinton was so far ahead of Senator Bob Dole, the likely Republican nominee, that it seemed unlikely the Republicans would regain the White House. The Republicans needed an issue to sidetrack the voting public, something emotional that would capture their attention and would cast the Republicans as firmly in control of a major issue. Same-sex marriage became that issue. . . . The House and Senate hearings are replete with complaints from witnesses that a handful of unelected judges from Hawaii were about to determine the meaning of marriage for the entire country.

The polls on same-sex marriage at this time showed at least 70% of the voters were opposed to the idea. The issue was so volatile that most politicians, even those well ahead in the polls, wanted to avoid being tainted as someone who supported same-sex marriage. As a result, even President Clinton, a president who had been more supportive of the lesbian and gay community than any other president before, readily acknowledged his willingness to sign such a bill if it passed the Congress. All of these conditions set the stage for the introduction of DOMA in May 1996 and its subsequent passage. DOMA was passed by the House of Representatives on July 12, by the Senate on September 10, and signed by President Clinton on September 21.⁴⁷

Thus, DOMA was introduced, went through hearings in both the House and Senate, passed both houses of Congress, and was signed by the President in a total of just four and one-half months during the height of the federal election campaign season—including the presidential election campaign—of 1996. Clearly, DOMA is the child of election-year politics. It might be said election year politics are the most democratic and occur when politicians are immediately influenced by and most accountable to the people.

The political pedigree of DOMA is a strength and a crown of honor. In a democratic republic, which has a “government of the people, by the

46. Patricia A. Cain, *DOMA and the Internal Revenue Code*, 84 CHI.-KENT L. REV. 481, 486–88 (2009).

47. *Id.*

people, for the people,”⁴⁸ DOMA is a modern example of self-government. The United States of America is founded upon the fundamental belief that public policy issues affecting such fundamental issues—the things that matter most—should be decided by democratic processes, by the people and their elected representatives.

B. *The Academic Politics of DOMA*

While popular support for DOMA has been strong and consistent, opposition to DOMA within the legal academy has also been strong and consistent and seems to be increasing.⁴⁹ The scholarship about DOMA has zigged and zagged, like the congressional politics. Some legal entities who favor interstate recognition of same-sex marriage initially opposed and criticized DOMA, suggesting it was unconstitutional under the structural provisions of the Constitution.⁵⁰ Then, about a decade after Congress passed DOMA, proposals to amend the United States Constitution to prohibit same-sex marriage as a matter of constitutional law were introduced in Congress.⁵¹ Congress twice voted on the so-called Federal

48. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), in LOUIS A. WARREN, LINCOLN'S GETTYSBURG DECLARATION: "A NEW BIRTH OF FREEDOM" 104 (1964).

49. It is my anecdotal impression there may be more opposition to DOMA among law professors today than there was fourteen years ago, as support for the gay rights movement—including same-sex marriage—has resulted in a very strong taboo against expressing opposition to legal recognition of same-sex marriages in universities. Certainly, it was easier to engage in scholarly discussion of such issues a dozen or half-dozen years ago than it is today.

50. See Barbara J. Cox, *Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033, 1041 n.23; Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 970–1001 (1998); Seth F. Kreimer, *Territoriality and Moral Dissensus: Thoughts on Abortion, Slavery, Gay Marriage and Family Values*, 16 QUINNIPIAC L. REV. 161, 171–73 (1996); Mark Strasser, *For Whom Bell Tolls: On Subsequent Domiciles' Refusing to Recognize Same-Sex Marriages*, 66 U. CIN. L. REV. 339, 374 (1998); Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 612 n.196 (1994); Habib A. Balian, Note, *'Til Death Do Us Part: Granting Full Faith and Credit to Marital Status*, 68 S. CAL. L. REV. 397, 415 (1995); Jennie R. Shuki-Kunze, Note, *The "Defenseless" Marriage Act: The Constitutionality of the Defense of Marriage Act as an Extension of Congressional Power Under the Full Faith and Credit Clause*, 48 CASE W. RES. L. REV. 351, 371–75 (1998). See generally *Divorce and Same-Sex Marriage Recognition*, *supra* note 29, at 234–38 (list of law review articles discussing—and overwhelmingly supporting—interjurisdictional recognition of same-sex marriage).

51. See H.R.J. Res. 88, 109th Cong. (2006); H.R.J. Res. 106, 108th Cong.

Marriage Amendment or Federal Marriage Protection Amendment.⁵² In 2006, the proposed amendment received approval from majorities in *both* houses of Congress, but the vote was less than the two-thirds required by the Constitution to send a proposed amendment to the states for ratification.⁵³ Nevertheless, the possibility of adoption of a marriage amendment to the Constitution of the United States banning same-sex marriage made DOMA seem like a very moderate compromise, and many of the scholars who testified or commented in opposition to the proposed marriage amendment were quick to point out DOMA provided sufficient protection against forced recognition of same-sex marriage and, therefore, there was no need for a constitutional amendment because DOMA was the law.⁵⁴

Now, the political wheel has turned, and the political party that particularly embraces and woos a small but now popular and strong constituency of gays and lesbians controls the White House and both houses of Congress. It is not surprising to find academic supporters of same-sex marriage are once again arguing DOMA is unconstitutional, or at least very bad policy, and must be congressionally repealed or judicially invalidated.⁵⁵

C. *The Judicial Politics of DOMA Litigation*

There also is more litigation challenging DOMA today. Between 2004 and June 30, 2010, there were at least five federal court decisions in four different federal court cases challenging Section Three of DOMA, and

(2004).

52. 152 CONG. REC. H5320–21 (daily ed. July 18, 2006); 152 CONG. REC. S5534 (daily ed. June 7, 2006); 150 CONG. REC. H6612–13 (daily ed. July 22, 2004).

53. 152 CONG. REC. H5320–21 (daily ed. July 18, 2006); 152 CONG. REC. S5534 (daily ed. June 7, 2006).

54. Indeed, some senators and congressmen against legalizing same-sex marriage opposed the proposed constitutional amendment, cited DOMA, and argued it provided valid protection. *See, e.g.*, Orrin Hatch, *Like It or Not . . . The Marriage Amendment Is the Democratic Way*, NAT'L REV. ONLINE, July 8, 2004, <http://www.nationalreview.com/articles/211405/it-or-not/orrin-g-hatch> (explaining the conservative case against passing a constitutional amendment and then refuting such an argument).

55. *See generally* Andrew Koppelman, *DOMA, Romer, and Rationality*, 58 DRAKE L. REV. 923 (2010); Gary L. Simson, *Religion, Same-Sex Marriage, and the Defense of Marriage Act*, 41 CAL. W. INT'L L.J. (forthcoming 2010); *see also* Emily J. Sack, *The Retreat from DOMA: The Public Policy of Same-Sex Marriage and a Theory of Congressional Power Under the Full Faith and Credit Clause*, 38 CREIGHTON L. REV. 507, 511–17 (2005).

all five court decisions—four district court decisions and one federal court of appeals decision—upheld DOMA as constitutional.⁵⁶ (However, an administrative decision in 2009 by the very capable—and very activist and liberal—Judge Reinhardt, acting on behalf of the Ninth Circuit’s Standing Committee on Federal Public Defenders in *In re Levenson*, subjected DOMA Section Three to heightened scrutiny and found “no rational basis for” it.)⁵⁷

In 2009, two more well-supported and aggressively pursued suits challenging Section Three of DOMA were filed in federal court in Massachusetts, where same-sex marriage is legal. Both cases were decided in July 2010 when Judge Tauro ruled for the plaintiffs in both cases and held Section Three was unconstitutional—in Massachusetts, for now.⁵⁸ In *Gill v. Office of Personnel Management*, the district court held Section Three of DOMA violates the Equal Protection Clause of the Fifth Amendment, as claimed by various plaintiffs who were denied or ineligible to receive certain federal benefits because the federal government would not recognize their same-sex marriages, although valid in Massachusetts, as marriages for purposes of particular federal programs.⁵⁹ Following a disparaging description of the enactment of DOMA, the court briefly reviewed the facts, which the Department of Justice simply declined to dispute, and included a detailed and sympathetic narrative about some of the federal benefits available to married parties, including certain health

56. See *Smelt v. County of Orange*, 447 F.3d 673, 686 (9th Cir. 2006), *aff g* 374 F. Supp. 2d 861 (C.D. Cal. 2005) (affirming the district court’s dismissal of a Section Two claim, rejecting equal protection and due process claims, and remanding to dismiss a Section Three claim on the merits); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1303–09 (M.D. Fla. 2005) (finding DOMA does not violate the Full Faith and Credit Clause, Equal Protection, or Due Process); *In re Kandu*, 315 B.R. 123, 131–48 (Bankr. W.D. Wash. 2004) (finding DOMA does not violate comity, the Fourth Amendment’s protection against unlawful seizure, the Fifth Amendment’s guarantees of due process and equal protection, or the Tenth Amendment’s reservation to the states of the power to regulate marriage); see also *Smelt v. United States*, No. SACV 09-00286 DOC (MLGx), slip op. at 1, 7 (C.D. Cal. Aug. 24, 2009), available at <http://oldsite.alliancedefensefund.org/userdocs/SmeltDismissal.pdf> (dismissing DOMA challenge on jurisdictional grounds).

57. *In re Levenson*, 560 F.3d 1145, 1149 (9th Cir. 2009) (“[T]here is no rational basis for denying benefits to the same-sex spouses of [Federal Public Defender] employees while granting them to the opposite-sex spouses . . .”).

58. See *Gill v. Office of Pers. Mgmt.*, No. 09-10309-JLT (D. Mass. July 8, 2010); *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, No. 1:09-11156-JLT (D. Mass. July 8, 2010).

59. *Gill*, No. 09-10309-JLT at 36.

benefit programs, Social Security benefit programs, and federal tax effects.⁶⁰ Some plaintiffs had been denied or were ineligible to claim the benefits because their same-sex marriages, though valid in Massachusetts, were not recognized as marriages by the federal government, arguably due to Section Three.⁶¹ The court concluded Section Three failed judicial scrutiny “under the highly deferential rational basis” standard of equal protection analysis.⁶² Because the Department of Justice—perhaps fatally—had “disavowed Congress’s stated justifications for the statute,” the court summarily rejected the Government’s interest in protecting children by recognizing only conjugal marriages because the Government conceded—again, perhaps fatally, or at least carelessly—“this objective bears no rational relationship to the operation of DOMA.”⁶³ The court reduced this and other government interests to mere quips which it was satisfied to refute with mere slogans,⁶⁴ and assumed there are no differences between same-sex and dual-gender marriages.⁶⁵ Rejecting the feeble status quo, scarce resource, incrementalism, and consistency arguments the Justice Department had made, the court concluded DOMA was motivated by “animus” and granted summary judgment for the plaintiffs.⁶⁶

In *Massachusetts v. United States Department of Health and Human Services*, (hereinafter DHHS), the court accepted the Commonwealth’s claim Section Three of DOMA violates the Tenth Amendment and constitutional principles of federalism.⁶⁷ Relying primarily on one affidavit, the emphasized (erroneously) that historically the federal government has “consistently accepted all state marital status determinations for the

60. *Id.* at 2–14. The court also found most but not all of the plaintiffs had standing. *Id.* at 14–17. The court rejected the claim that extension of at least some benefits to same-sex married partners was statutorily required, finding DOMA to clearly bar such. *Id.* at 17–19.

61. *Id.* at 7–14.

62. *Id.* at 21.

63. *Id.* at 23.

64. *Id.* at 26, 37. The original justification for DOMA may not be dismissed so easily. See, e.g., Lynn D. Wardle, “Multiply and Replenish”: *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL’Y 771, 813–14 (2001).

65. *Gill*, No. 09-10309-JLT at 38.

66. *Id.* at 26–28, 34–38.

67. *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, No. 1:09-11156-JLT, slip op. at 1–2 (D. Mass. July 8, 2010).

purposes of federal law.”⁶⁸ The court reviewed some examples of the financial losses and costs to the commonwealth resulting from its inability to obtain federal funds, or recover costs it incurs, when it recognizes same-sex marriages under state law, but the federal government—arguably due to Section Three of DOMA—denies federal recognition of those marriages.⁶⁹ The heart of the court’s analysis is that it is beyond the power of Congress to define the meaning of the term *marriage* for purposes of federal law; Congress is constitutionally required to always accept and use the states’ definition(s) of marriage in federal law.⁷⁰ The court concluded that by defining marriage for purposes of federal law, DOMA impermissibly interfered with state family law, undermined a central attribute of state sovereignty, and interfered with state ability in a core area of traditional government function.

As the history reported in Part IV.B shows, the *DHHS* opinion blatantly misreports the record of federal law treatment of state marriages for purposes of federal law.⁷¹ Judge Tauro’s refusal to even acknowledge—let alone consider—the long history of numerous exceptions to that general rule is disappointing and undermines the credibility of his conclusions. Moreover, the *DHHS* opinion confuses a general federal policy practice of usual incorporation of state definition of marriage with a special, mandatory constitutional requirement. There is a difference that cannot be dismissed with an erroneous assumption. The attempt to conclude that, constitutionally and historically, only the states have had and exercised the power to define marriage—and that their definitions have always been, and constitutionally must be, adopted by and incorporated into federal law for purposes of federal programs—is completely wrong as a matter of legal history and constitutional principle. The analysis in *DHHS* is inaccurate factually, inadequate legally, and over-the-top rhetorically.

Both opinions are surprisingly weak as a matter of factual findings, legal analysis, and constitutional doctrine.⁷² Overall, they contradict and

68. *Id.* at 5–6.

69. *Id.* at 8–18 (discussing state cemetery grants, health expenses, and Medicare taxes). The court also concluded the plaintiffs had standing and discussed the Spending Clause. *Id.* at 19–22.

70. *Id.* at 22–34. The court also linked into the *Gill* analysis by arguing that DOMA unconstitutionally “induces the Commonwealth to violate the equal protection rights of its citizens.” *Id.* at 27; *see also Gill*, No 09-10309-JLT at 32 (“The states alone are empowered to determine who is eligible to marry . . .”).

71. *See infra* Part IV.B.

72. Jack M. Balkin, a Yale Law School professor, said, “What an amazing set

trip over each other.⁷³ For example, *DHHS* insisted the federal government has no interest in regulating marriage, while *Gill* concluded the federal interest is so strong it must recognize same-sex marriages.⁷⁴ The clear implication of *Gill* is that states must recognize same-sex marriages as a matter of federal equal protection doctrine. This mocks the holding in *DHHS* that only the states, and not the federal government, have valid constitutional interests in regulating marriage. To the extent both rest in part on the assumption that without Section Three of DOMA, the federal government would grant the benefits and funds desired, there may be serious standing issues because it is not clear that without DOMA terms such as *marriage* and *spouse*—when used in the particular federal program statutes—would be interpreted to include same-sex partners considered married by state law. Before DOMA was enacted, same-sex unions had never been treated as marriages in any federal programs and so it seems dubious to assume if Section Three did not exist they would be interpreted to include same-sex married partners today. Both opinions evade or simply ignore, rather than address and engage, all facts and arguments that do not support their outcomes. Both opinions joust with straw men throughout, and both are filled with obvious errors and misstatements concerning the legal history of DOMA and the history of federal regulations concerning domestic relations.⁷⁵ While Judge Tauro's strong political leanings are apparent, so that even a competent defense zealously presented may not have changed the outcome in this court, it also is apparent a large share of credit for the ruling against DOMA must be given to the Department of Justice and what even the *Washington Post* charitably called the Obama Administration's "tepid defense of the

of opinions . . . [n]o chance they'll be held up on appeal." Abby Goodnough & John Schwartz, *Judge Topples U.S. Rejection of Gay Unions*, N.Y. TIMES, July 9, 2010, at A1, available at http://www.nytimes.com/2010/07/09/us/09marriage.html?_r=1.

73. *Id.* ("These two opinions are at war with themselves.")

74. Compare *Gill v. Office of Pers. Mgmt.*, No. 09-10309-JLT, slip op. at 17–23 (D. Mass. July 8, 2010) (noting *all* similarly situated citizens are due equal protection under the law (citation omitted)), with *DHHS*, No. 1:09-11156-JLT at 23–28 (finding Congress exceeded its authority regarding DOMA's condition on receiving federal funds).

75. See, e.g., *Gill*, No. 09-10309-JLT at 27 ("[P]rior to DOMA, federal law simply incorporated each state's marital status determinations."); *id.* at 30 ("DOMA marks the *first* time that the federal government has ever attempted to legislatively mandate a uniform federal definition of marriage . . ."); *DHHS*, No. 1:09-11156-JLT at 5, 8 ("consistently deferred" and "consistently relied on"); *id.* at 30 ("[P]rior to DOMA, every effort to establish a national definition of marriage met failure . . .").

statute.”⁷⁶ As noted above, the government lawyers for the current Administration conceded critical facts; declined to use the congressional history of the need for DOMA; abandoned defenses that had been successfully used in the prior successful defenses of DOMA; and the Justice Department’s lawyer, “when arguing the case on behalf of the government in May, opened by acknowledging the administration’s opposition to the act, but saying he was still obliged to defend its constitutionality.”⁷⁷ Thus, it would be inaccurate to say the Obama Administration’s Justice Department presented a high quality or serious defense like previous administrations had given when defending DOMA in earlier cases. Rather, this time the government’s lawyers were uncommitted to defending DOMA, and by the positions they took, tacitly invited the court to strike it down.

There are some obvious political advantages to having a court compel adoption of policies that are controversial and unpopular with the voting public. Legislators and presidents, who must stand for election, may be reluctant to vote for repeal of DOMA, even if that is their preferred policy position, because it may cost them votes in the next election.⁷⁸ If a court mandates the repeal of DOMA and strikes it down under some confusing constitutional doctrine, the politically accountable lawmakers are off the hook. It is important to not let elected representatives of state and federal legislatures “pass the buck” by inviting federal and state judges, or agency officials and executive branch appointees, to decide that issue.⁷⁹

76. See Editorial, *A Defense of Fairness Act*, WASH. POST, July 11, 2010, at A16, available at http://www.washingtonpost.com/wp-dyn/content/article/2010/07/10/AR2010071002534_pf.html; see also Carrie Johnson, *Obama Says Marriage Law Should Be Repealed*, WASH. POST, Aug. 18, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/17/AR2009081702722.html> (nothing critics suggest the Obama Administration was not zealous in its defense of DOMA).

77. Goodnough & Schwartz, *supra* note 71; see also Gill, No. 09-10309-JLT at 14 (“the Parties do not dispute the material facts”); *id.* at 23 (“the government has distanced itself from Congress’ previously asserted reasons for DOMA”); *id.* (“the government concedes that [responsible procreation] bears no rational relationship to the operation of DOMA”); DHHS, No. 1:09-11156-JLT at 30 (“the government does not dispute the accuracy of this evidence”).

78. See Schacter, *supra* note 36, at 1154 (“backlash measures have been a mainstay of the [same-sex marriage] controversy”).

79. Kevin J. Worthen, *Who Decides and What Difference Does It Make?: Defining Marriage in “Our Democratic, Federal Republic,”* 18 BYU J. PUB. L. 273, 290–306 (2004) (declaring the most preferable methods for resolving the same-sex marriage debate are by state statutes or state constitutional amendments).

Democracy would be one of the long-term casualties of a judicial decision invalidating either Section of DOMA.

Likewise, there are some advantages to a court moving to promote a preference for legalizing same-sex marriage indirectly. A judicial ruling mandating interstate recognition of same-sex marriage or exporting state same-sex marriages into federal law has tactical appeal to advocates of same-sex marriage at any cost. While it is not as direct and immediate as a ruling like *Varnum*, which immediately compelled legalization of same-sex marriage, it also—for exactly that reason—is not as potentially controversial or offensive.⁸⁰ Most people get a little glassy-eyed when issues arise in the context of horizontal conflict of laws, vertical federalism, or separation of powers. So a ruling that effectively compels both the states to recognize same-sex marriages from other states and the federal government to recognize same-sex marriages for purposes of federal programs, benefits, and laws can probably be made without provoking the kind of popular reaction that comes from rulings directly upon the substantive issue of whether to legalize same-sex marriage.

However, judicial activism is problematic for many reasons—practical as well as conceptual. For example, judicial activism often produces public backlash. Professor Michael J. Klarman has suggested three factors trigger public backlash against controversial judicial decisions. He writes: “Court rulings such as *Brown* and *Goodridge* produce political backlashes for three principal reasons: They raise the salience of an issue, they incite anger over ‘outside interference’ or ‘judicial activism,’ and they alter the order in which social change would otherwise have occurred.”⁸¹ Professor Jane S. Schacter adds to Professor Klarman’s list that the legal, political, and cultural context within a given *polis* also significantly affects the nature, scope, and extent of public backlash to controversial policymaking judicial decisions.⁸² The backlash to judicial activism can reflect distrust of

80. See *Varnum v. Brien*, 763 N.W.2d 862, 906–07 (Iowa 2009).

81. Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 473 (2005) (analyzing *Lawrence v. Texas*, 539 U.S. 558 (2003); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003)).

82. See Schacter, *supra* note 36, at 1197–1216 (noting differences in public opinion on the subject of the controversy, the law invoked (federal or state), the number of states with the controversial policy, the level of partisanship, the popularity of the anti-judicial-activism principle, and the mobilization of both sides in the culture war explain the lack of public backlash to the *Perez* decision invalidating anti-miscegenation laws and the strong public backlash to the *Baehr*, *Goodridge*, and *In re Marriage Cases* decisions mandating same-sex marriage (analyzing *In re Marriage*

the integrity of the judiciary and weaken the role and influence of the courts.

Judges must follow the rules laid down by the Constitution because they are only the agents of the people, and they must act within the scope of their agency. The limits on judges' agency power to make laws for the people are set forth in the Constitution, which is the agency-granting organic document of our government wherein "we the people" defined the powers of our lawmakers and the limits of those powers. The power of our judges to interpret the Constitution is a limited "agency power," just like the power of our legislators to enact law. Judicial power is *not* the power to invent new constitutional rights, for the Court has no more power to amend the Constitution by judicial interpretation than the legislature may amend it by mere legislation. Interpretation is a very particular and disciplined legal process, as Chief Justice John Marshall went to pains to point out in *Marbury v. Madison*.⁸³ That is a very different process than constitutional amendment by judicial manipulation of the process of interpretation. When a court declares the Constitution protects a particular right that is not mentioned in the Constitution, "deeply rooted in our history and traditions," or "fundamental to our concept of constitutionally ordered liberty," the court has acted illegitimately and exercised the power of constitutional amendment, which is not a judicial power under our Constitution.⁸⁴ The constitutionalization of same-sex marriage or marriage recognition by judicial interpretation runs the significant risk of fostering judicial illegitimacy.⁸⁵

Attempting to repeal DOMA by judicial fiat in civil litigation is conceptually very troubling for persons who care about constitutionalism

Cases, 183 P.3d 384 (Cal. 2008), *superseded by* CAL. CONST. art. I, § 7.5, *invalidated by* *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010); *stay granted*, 2010 WL 3212786 (9th Cir. Aug. 16, 2010); *Goodridge*, 798 N.E.2d 941; *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948)).

83. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–78 (1803).

84. *Washington v. Glucksberg*, 521 U.S. 702, 727 (1997); see also *Lawrence*, 539 U.S. at 593 n.3 (noting the same requirements for constitutionally protected rights).

85. The classic example of the Court "creating" a new constitutional right by substantive due process ungrounded in the "history and tradition" standard is *Roe v. Wade*, a ruling that has done more to undermine the integrity and credibility of the Supreme Court than any other in the past half-century and continues to plague the Court, the judicial nomination process, and even electoral politics. *Roe v. Wade*, 410 U.S. 113 (1973). *Roe* has had a profoundly distorting effect upon the American political system. Neither the Court nor our government needs another illegitimate landmark like *Roe* in order to constitutionalize same-sex marriage.

and principles of self-government. It raises the serious dilemma of subjective countermajoritarianism.⁸⁶

In passing, it deserves mention the decision of the Iowa Supreme Court in *Varnum v. Brien*, judicially mandating the legalization of same-sex marriage in Iowa, made no effort to establish the legitimacy of its interpretation of the Iowa constitution or its mandate compelling the legalization of same-sex marriage by reference to any manifestation of the consent of the governed. It simply ignored—and the decision certainly would fail—the “deeply rooted in our traditions” or “essential to the concept of ordered liberty” tests for legitimate substantive due process.⁸⁷ For constitutional purposes, it is remarkable for a court to brush aside the fact the institution of marriage has been protected historically for millennia; it is overwhelmingly considered by past courts, many scholars, and nations worldwide to be the foundation of the basic unit of society; and it is deeply cherished by the overwhelming majority of men and women who comprise the American polis today as the union of a man and a woman, not merely any relationship that intertwines new-age, self-awareness rhetoric and self-gratification.⁸⁸

IV. THE CONSTITUTIONALITY OF DOMA SECTION THREE UNDER STRUCTURAL FEDERALISM AND SEPARATION OF POWERS PRINCIPLES

Constitutional doctrine attacks on Section Three of DOMA once were popular, but they seldom are asserted now, and for good reason, as the awkwardly incapable analysis in the *Gill* and *DHHS* opinions illustrate. First, they fly in the face of centuries of substantive marriage-recognition law.⁸⁹ Second, they fly in the face of centuries of federal law defining the

86. See generally Lynn D. Wardle, *Restructuring Democracy or Lawlessness? Critical Reflections on In re Marriage Cases*, 14 NEXUS 91 (2009) (examining the consequences of judicial legislation and comparing judicial lawlessness with mob lawlessness).

87. See, e.g., *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 503–04 (1977); *Griswold v. Connecticut*, 381 U.S. 479, 487 (1965) (Goldberg, J., concurring).

88. See Candice A. Garcia-Rodrigo, *An Analysis of and Alternative to the Radical Feminist Position on the Institution of Marriage*, 11 J.L. & FAM. STUD. 113, 116–17 (2008). See generally Karl M. Rodman, *A Brief History of Marriage and Divorce*, 23 OR. L. REV. 249 (1944) (chronicling the history of marriage and divorce); Julie Ewing, Book Note, 4 J.L. & FAM. STUD. 199 (2002) (reviewing NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* (2000)) (same).

89. See, e.g., Patrick J. Borchers, *The Essential Irrelevance of the Full Faith and Credit Clause to the Same-Sex Marriage Debate*, 38 CREIGHTON L. REV. 353, 357 (2005); L. Lynn Hogue, *Examining a Strand of the Public Policy Exception with*

meaning, incidents, and scope of marriage and other domestic relations for purposes of federal laws and programs. It is too late in the legal history of the nation to claim such practices—and Section Three of DOMA—are unconstitutional.

A. *Section Three and Federalism Doctrine*

The definition of legislative terms for purposes of federal statutes is undeniably a proper function of Congress. The argument Congress constitutionally lacks the power to define marriage, as that term is used in and for purposes of federal law, is meritless. Congress has, and for two centuries has exercised, the power to define terms used in federal law, including terms of marriage and family relationships, for purposes of federal programs' benefits. Not infrequently, Congress has defined terms of domestic relationships, including marriage, and their incidents in federal law inconsistently with some states' definitions of those domestic relationships and incidents in state law. For example, while some states recognize immigration marriages—marriages for the purpose of facilitating immigration—as valid, or merely voidable, marriages for purposes of state marriage law,⁹⁰ Congress has amended the Immigration and Naturalization Act to clarify such marriages are not considered valid for purposes of immediate relative priority in federal immigration law.⁹¹ Thus, a couple married for immigration purposes may have a valid marriage in a state, yet they may not be considered married for purposes of federal visa preference.⁹²

Constitutional Underpinnings: How the "Foreign Marriage Recognition Exception" Affects the Interjurisdictional Recognition of Same-Sex "Marriage," 38 CREIGHTON L. REV. 449, 450–53 (2005); Mark D. Rosen, *Why the Defense of Marriage Act Is Not (Yet?) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors That Determine What the Constitution Requires*, 90 MINN. L. REV. 915, 953–57 (2006); Linda J. Silberman, *Can the Island of Hawaii Bind the World? A Comment on Same-Sex Marriage and Federalism Values*, 16 QUINNIPIAC L. REV. 191, 202 (1996); Linda Silberman & Karin Wolfe, *The Importance of Private International Law for Family Issues in an Era of Globalization: Two Case Studies—International Child Abduction and Same-Sex Unions*, 32 HOFSTRA L. REV. 233, 254–56 & nn.102–04, 258–60 (2003); Ralph U. Whitten, *Full Faith and Credit for Dummies*, 38 CREIGHTON L. REV. 465, 479–83 (2005).

90. See *In re O'Rourke*, 246 N.W.2d 461, 463 (Minn. 1976); *Kleinfield v. Veruki*, 372 S.E.2d 407, 410 (Va. Ct. App. 1988).

91. See 8 U.S.C. §§ 1154(a)(2)(A), 1255(e) (2006).

92. *Lutwak v. United States*, 344 U.S. 604, 611 (1953); *id.* at 620–23 (Jackson, J., dissenting); see also *Adams v. Howerton*, 673 F.2d 1036, 1040–41 (9th Cir. 1982) (even if same-sex marriage was valid under state law, it did not count as a marriage for

Likewise, Congress has established a taxation system that gives particular benefits to married couples, and it is federal law that defines what married means for purposes of the federal tax system. Often, the state meaning of marriage is incorporated into the federal tax laws as a matter of federal choice, but that is not always, or necessarily, the case. For example, persons who are deemed married under state law, but are legally separated, are not treated as married for purposes of federal income tax law,⁹³ and a couple who consistently obtains a divorce at the end of the year to obtain single status for tax filing, but remarries early in the following year, will be considered married even if they are deemed unmarried for purposes of state domestic relations laws.⁹⁴ In bankruptcy law, it is well-established what constitutes alimony, support, or maintenance will be determined under federal bankruptcy law, not state law.⁹⁵ Likewise, numerous federal statutes and cases involving ERISA and other federal pensions follow the federal law governing those marital incidents, not state law.⁹⁶ Thus, a long line of statutes and cases involving federal programs have rejected application of state community property law—part of domestic relations law.⁹⁷

federal immigration law purposes); *Garcia-Jaramillo v. INS*, 604 F.2d 1236, 1238 (9th Cir. 1979) (the possibility of marriage being a sham was irrelevant because a valid New Mexico marriage was deemed “frivolous” because of INS’s authority to inquire into marriage for immigration purposes); *United States v. Sacco*, 428 F.2d 264, 267–68 (9th Cir. 1970) (ruling, *inter alia*, a bigamous marriage did not count as a marriage for federal law purposes).

93. 26 U.S.C. §§ 7703(a)(2), (b) (2006) (definitions of marital status); *id.* § 71(b) (definitions of alimony).

94. Rev. Rul. 76-255, 1976-2 C.B. 40. *See generally* Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law 2007–2008: Federalization and Nationalization Continue*, 42 FAM. L.Q. 713, 714–15 (2009) (discussing *Nihiser v. Comm’r*, 95 T.C.M. (CCH) 1531 (2008); *Perkins v. Comm’r*, 95 T.C.M. (CCH) 1165 (2008); *Proctor v. Comm’r*, 129 T.C. 92 (2007); 73 Fed. Reg. 37,997 (July 2, 2008)).

95. H.R. REP. NO. 95-595, at 364 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6320; *see also* *Shaver v. Shaver*, 736 F.2d 1314, 1316 (9th Cir. 1984) (bankruptcy courts look to federal—not state—law to determine whether an obligation is in the nature of alimony, maintenance, or support (citing *Stout v. Prussel*, 691 F.2d 859, 861 (9th Cir. 1982))).

96. *See, e.g.*, Elrod & Spector, *supra* note 93, at 751.

97. *See, e.g.*, *Boggs v. Boggs*, 520 U.S. 833, 854 (1997) (pensions governed under ERISA, which preempts community property law); *Mansell v. Mansell*, 490 U.S. 581, 594–95 (1989) (military retirement pay waived in order to collect veterans’ disability benefits governed by Uniformed Services Former Spouses’ Protection Act (USFSPA), not community property law); *McCarty v. McCarty*, 453 U.S. 210, 232–33, 236 (1981) (citing *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 590 (1979), *superseded by*

In recent decades, there has been a revival of congressional legislation defining domestic relationships and their incidents for purposes of federal law.⁹⁸ Distinguished family law experts, Professors Linda Elrod and Robert Spector, have recently declared:

Probably one of the most significant changes over the past fifty years [in American family law] has been the explosion of federal laws . . . and cases interpreting them. As families have become more mobile, the federal government has been asked to enact laws in numerous areas that traditionally were left to the states, such as . . . domestic violence, and division of pension plans.⁹⁹

B. *A Short Primer on the History of Federal Regulation of the Meaning and Incidents of Family Relations for Purposes of Federal Law*

That congressional statutes, not state domestic relations law, govern and control the meaning of domestic relations terms used in federal statutes has long been acknowledged and is deeply rooted in American jurisprudence. The history of federal regulation of federal aspects, dimensions, and definitions of “family law” for purposes of federal law is as old as our nation. For example, federal immigration laws have used domestic relations terms since at least the Naturalization Act of April 14, 1802, which provided children of parents who have been naturalized will also automatically become citizens, unless the fathers have never been naturalized.¹⁰⁰ The Act of February 10, 1855, provided women would be deemed citizens if they married a citizen of the United States, and children of men who were United States citizens were likewise given citizenship.¹⁰¹ Thus, Congress adopted national immigration policies—independent of

Uniformed Services Former Spouses’ Protection Act, Pub. L. No. 97-252, 96 Stat. 718 (1982) (codified as amended at 10 U.S.C. § 1408 (2006)) (military retirement pay governed by federal law, not community property law)); *Hisquierdo*, 439 U.S. at 582, 590 (railroad retirement assets governed by federal law, not community property law); *Yiatchos v. Yiatchos*, 376 U.S. 306, 309 (1964) (United States Savings Bonds governed by federal law, not community property law, unless fraud involved); *Wissner v. Wissner*, 338 U.S. 655, 658 (1950) (beneficiary of policy governed by National Service Life Insurance Act, not community property laws).

98. See, e.g., KENNETH R. REDDEN, *FEDERAL REGULATION OF FAMILY LAW* § 1.2(B)(1)(b) (1982); see also DAVID CLAYTON CARRAD, *THE COMPLETE QDRO HANDBOOK: DIVIDING ERISA, MILITARY, AND CIVIL SERVICE PENSIONS AND COLLECTING CHILD SUPPORT FROM EMPLOYEE BENEFIT PLANS* 19–20 (3d ed. 2009).

99. Elrod & Spector, *supra* note 93, at 713.

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

101. Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604, 604.

state family law—that restricted naturalization around a clear, federally-defined family structure.

Federal regulation of familial interests in land conveyed by the federal government has long been common practice. In the Act of March 3, 1803, Congress restricted homestead land grants to people who were either heads of families or over twenty-one years of age.¹⁰² The Land Act of 1804 did not explicitly limit grants to heads of families, although it did protect the land interest of “an actual settler on the lands so granted, for himself, and for his wife and family”¹⁰³ Like the 1803 Act, the Homestead Act of 1862 (hereinafter Homestead Act) was limited to “any person who is the head of a family, or who has arrived at the age of twenty-one years”¹⁰⁴ This Act also provided in the event both the settler and his wife were killed after lawfully securing a homestead, a guardian selling the land must give the proceeds to the children of the marriage.¹⁰⁵

For most of the past two centuries, it has been clear the federal meaning of family law terms control for purposes of those federal land laws. Well over a century ago, disputes arose under the Homestead Act when succession to, or ownership of, an interest in the homestead property arose between disputing family members. In the 1905 case of *McCune v. Essig*, a mother and daughter disputed land settled by the husband/father under the homestead law.¹⁰⁶ The father died shortly after making his homestead claim, and his widow and daughter continued to reside on the land. The widow remarried, filed proof of compliance, and received a homestead patent to the property.¹⁰⁷ The daughter later contested her mother, invoking the state law doctrine of relation, under which a beneficial interest would have passed to her and would have had to have been recognized under state probate law.¹⁰⁸ The Supreme Court rejected application of state law because “[t]he words of the [Homestead Act] are clear,” and even though the Act was contrary to state law, it was controlling on the issue.¹⁰⁹ Citing cases going back to 1839, the Court rejected the daughter’s claim that under state law she was entitled to a

102. Act of Mar. 3, 1803, ch. 27, § 3, 2 Stat. 229, 229–30 (applicable only to a certain region south of Tennessee).

103. Land Act of 1804, ch. 38, § 14, 2 Stat. 283, 289.

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

105. *Id.* § 2.

106. *McCune v. Essig*, 199 U.S. 382, 386 (1905).

107. *Id.* at 387.

108. *Id.* at 388.

109. *Id.* at 389.

share of the homesteaded property:

[Her argument] is but another way of asserting the law of the State against the law of the United States, and imposing a limitation upon the title of the widow which section 2291 of the Revised Statutes does not impose. It may be that appellant's contention has support in some expressions in the state decisions. If, however, they may be construed as going to the extent contended for, we are unable to accept them as controlling.¹¹⁰

Likewise, federal regulation of military pensions and benefits is as old as the United States of America. In 1780, Congress passed a law that awarded pensions to widows and children of soldiers who had died in the Revolutionary War.¹¹¹ This act was renewed after the ratification of the Constitution,¹¹² and an 1836 act further bolstered widows' pensions.¹¹³ In 1890, Congress passed the Dependent and Disability Pension Act, providing for not only the veteran, but also for his dependent parents, widow, or children if they survived him.¹¹⁴ When necessary to effectuate the federal purposes of these military benefits, courts have not been bound by state domestic relations law. For example, for purposes of the War Risk Insurance Act, the federal government specifically recognized common law marriages as forming valid husband-wife relationships, independent of the validity of the marriage in the state where the couple cohabited.¹¹⁵ Federal courts—including military courts—have given their own federal interpretation to military family law issues.¹¹⁶ Additionally, private relief

110. *Id.* at 390; *see also* *Bernier v. Bernier*, 147 U.S. 242, 247 (1893) (homestead land passes to all children, not just minors); *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498, 517 (1839) (after title under federal law passes and is established under federal law, its conveyance and related ownership questions are governed by state law); *Maynard v. Hill*, 125 U.S. 190, 215 (1888) (rejecting children's claim to homestead land because recognition of father's *ex parte* territorial legislative divorce "will carry out the intent of Congress.")

111. 17 JOURNALS OF THE CONTINENTAL CONGRESS: 1774-1789, at 773 (1910).

112. The USGenWeb Archives Project, Revolutionary War: Classes of Revolutionary Pensioners, <http://www.usgwarchives.net/pensions/revwar/classes.htm> (last visited Sept. 1, 2010).

113. Act of July 4, 1836, ch. 362, § 1, 5 Stat. 127, 127-28.

114. Dependent and Disability Pension Act of 1890, ch. 634, § 3, Stat. 182, 182-83.

115. *United States v. Rohrbaugh*, 2 C.M.R. 756, 758 (1952).

116. *See United States v. Jordan*, 30 C.M.R. 424, 429-30 (1960) (finding the military could limit the defendant's right to marry abroad because of special military

bills have granted benefits generally available only to family members to persons not otherwise qualified under state domestic relations law to receive such benefits.¹¹⁷

The federal census provides another example. In the legislation enabling the 1850 census, Congress defined family for the purpose of the census:

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

The resident inmates of a hotel, jail, garrison, hospital, an asylum, or other similar institution, should be reckoned as one family.¹¹⁸

For 2010, the census included same-sex marriages in its count of marriages, again reflecting a new federal policy decision regarding definition of marriage for purposes of a particular federal program or activity.¹¹⁹

concerns); *United States v. Richardson*, 4 C.M.R. 150, 158–59 (1952) (holding a marriage valid for purposes of military discipline, although it would have been invalid in the state where the marriage began); *Rohrbaugh*, 2 C.M.R. at 758 (noting, *inter alia*, common law marriages are specifically recognized “in relation to a variety of matters” (citations omitted)).

117. S. REP. NO. 44-560 (1877) (pension to woman not lawfully married to veteran); H.R. REP. NO. 37-146 (1862) (pension to second wife of veteran who was not married to him while he served); H.R. REP. NO. 26-132 (1840) (pension to widow of man who did not serve in Revolutionary War but maintained constant communication with the American Army).

118. U.S. CENSUS BUREAU, *MEASURING AMERICA: THE DECENNIAL CENSUS FROM 1790 TO 2000*, at 9 (2002), available at <http://www.census.gov/prod/2002pubs/pol02-ma.pdf>; see also Lucille M. Ponte & Jennifer L. Gillan, *From Our Family to Yours: Rethinking the “Beneficial Family” and Marriage-Centric Corporate Benefit Programs*, 14 COLUM. J. GENDER & L. 1, 28 (2005) (“Couple-centric families, described by the [1950] Census as ‘families with both the head and his wife present,’ were apparently the norm, accounting for 87.1% of households.” (quoting U.S. CENSUS BUREAU, *GENERAL CHARACTERISTICS OF FAMILIES 2A-7* (1955))).

119. *Census Bureau Urges Same-Sex Couples to Be Counted*, USA TODAY, Apr. 6, 2010, available at http://www.usatoday.com/news/nation/census/2010-04-05-census-gays_N.htm; *Census to Recognize Same-Sex Marriages in '10 Count*, N.Y. TIMES, June 21, 2009, at A20, available at <http://www.nytimes.com/2009/06/21/us/>

Federal law also controls interests of family in copyright law. An 1831 copyright act provided a child or widow would inherit a copyright after the expiration of the original copyright term.¹²⁰ The Act did not define “child” and ostensibly left open the question of whether an illegitimate child would be able to inherit. In 1956, the Supreme Court in *De Sylva v. Ballentine* held state law controlled the question of who counted as a child for purposes of copyright law.¹²¹ However, Congress overturned that decision in the 1978 revision of the copyright law and enacted a federal definition of child to eliminate the risk a state’s definition would exclude illegitimate children.¹²² The Copyright Act today defines a person’s “children” as “that person’s immediate offspring, whether legitimate or not, and any children legally adopted by that person.”¹²³

The federal polygamy laws and cases are well established,¹²⁴ and while most dealt with polygamy in the territories, the Utah Enabling Act of 1894 granted Utah statehood on the express stipulation Utah include in its state constitution “polygamous or plural marriages are forever prohibited.”¹²⁵ The antipolygamy clause is one of four provisions that is “irrevocable without the consent of the United States.”¹²⁶ Moreover, during the long pre-*Erie v. Thompkins* period of broad federal court determination of general common law, federal courts often decided questions about common law marriage and property incidents of marriage as matters of general common law.¹²⁷ For example, in *Patterson v. Gaines*, the Supreme

21census.html?_r=1.

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

121. *De Sylva v. Ballentine*, 351 U.S. 570, 582 (1956).

122. REDDEN, *supra* note 97, § 6.4.

123. 17 U.S.C. § 101 (2006).

124. *E.g.*, The Edmunds–Tucker Act of 1887, ch. 396, 24 Stat. 635; The Edmunds Act of 1882, ch. 47, 22 Stat. 31; The Poland Act of 1874, ch. 409, 18 Stat. 253; The Morrill Anti-Bigamy Act of July 1862, ch. 126, 12 Stat. 501, 501 (“An Act to punish and prevent the Practice of Polygamy in the Territories of the United States and other Places, and disapproving and annulling certain Acts of the Legislative Assembly of the Territory of Utah.”); *see also* *Davis v. Beason*, 133 U.S. 333, 341 (1890) (noting polygamy is a crime in the United States); *In re Snow*, 120 U.S. 274, 285 (1887) (examining a statute that prohibited any male from cohabiting “with more than one woman”); *Murphy v. Ramsey*, 114 U.S. 15, 42–43 (1885) (noting the crime of polygamy is a continuing offense, not simply one that occurs at the time the illegal marriage is entered); *Reynolds v. United States*, 98 U.S. 145, 165 (1878) (noting in every “State of the Union,” polygamy has always “been an offence against society”).

125. Act of July 16, 1894, ch. 138, § 3, 28 Stat. 107, 108.

126. *Id.*

127. *See* Lynn D. Wardle, *Loving v. Virginia and the Constitutional Right to*

Court addressed the question of what level of evidence is needed to prove a bigamous relationship, deciding as a matter of general—federal—common law, without reference to any state law or state court holding.¹²⁸

Recognizing the federal government lacks constitutional authority to directly regulate domestic relations, and out of respecting the reserved sovereign power of the states to regulate domestic relations, federal courts have long indulged in a presumption that references to family relations in federal law are not intended to preempt state domestic relations law as a principle of comity. As the Supreme Court noted in *Hisquierdo v. Hisquierdo*: “On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has ‘positively required by direct enactment’ that state law be pre-empted.”¹²⁹ Likewise, in *McCarty v. McCarty*, the Court reiterated, “[s]tate family and family-property law must do ‘major damage’ to ‘clear and substantial’ federal interests before the Supremacy Clause will demand that state law be overridden.”¹³⁰ Moreover, “[a] mere conflict in words is not sufficient”; the question remains whether the ‘consequences [of that community property right] sufficiently injure the objectives of the federal program to require nonrecognition.’¹³¹ But Congress’s constitutional authority to direct the application of federal law to supersede and displace state domestic relation law in interpreting federal law is clear; the question usually is whether congressional intent to preempt is clear. In fact, in both these cases—*Hisquierdo* and *McCarty*—in which the Court expressed caution, it concluded federal law governing interests of family members in federal benefits superseded the otherwise applicable state domestic

Marry, 1790–1990, 41 How. L.J. 289, 290–98 (1998) (noting three dozen pre-1923 Supreme Court decisions mentioning a “right” to marry, but mostly as a matter of general common law).

128. *Patterson v. Gaines*, 47 U.S. (6 How.) 550, 597 (1848) (“A bigamist may be proved so, in a civil suit, by any of those facts from which marriage may be inferred.”).

129. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (citing *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904)).

130. *McCarty v. McCarty*, 453 U.S. 210, 220 (1981) (citing *Hisquierdo*, 439 U.S. at 581).

131. *Id.* at 232 (citing *Hisquierdo*, 439 U.S. at 581–83). Justice Rehnquist noted in his dissent in *McCarty* he could find only five instances in which that kind of preemption—forcing federal standards upon state law—had occurred in the history of community property disposition. *Id.* at 238 (Rehnquist, J., dissenting).

relations law.¹³²

C. Federalism Self-Contradictions by Opponents of Section Three of DOMA

The logic behind the constitutional argument Section Three of DOMA violates federalism doctrines is curiously betrayed by two bills currently pending in Congress. The Domestic Partnership Benefits and Obligations Act (DPBOA), House Bill 2517, would authorize payment of government benefits to registered same-sex domestic partners of government employees equivalent to those paid to married spouses.¹³³ While the Act would not change the definition of marriage to include same-sex couples, it would create, federally, a new domestic relationship called domestic partnership that would include same-sex partners who are in legal same-sex marriages, as well as other same-sex couples who register as partners, and would extend, effectively, the full scope of marital spouse employment benefits to the same-sex spouses and same-sex non-spouse partners of government employees who registered under the Act as domestic partners.¹³⁴

If Section Three of DOMA is unconstitutional because Congress lacks the authority to independently create or define domestic relationships such as marriage, Congress also lacks the authority to independently create and define in the DPBOA a new, separate, functionally-equivalent-to-marriage domestic relationship called something else—domestic partnership—and to extend to parties in those relationships all of the same federal government employment benefits extended to marriage. If the definition of domestic relationships by the states was constitutionally binding in federal law and Congress were without power to define and regulate for purposes of federal law domestic relationships, not only would Section Three be invalid, but so would House Bill 2517. Yet, the very same persons who are arguing Section Three is unconstitutional are supporting House Bill 2517, even though it could not be enacted by Congress if Congress lacked the authority to enact Section Three. In other words, the

132. *Id.* at 236; *Hisquierdo*, 439 U.S. at 590.

133. Domestic Partnership Benefits and Obligations Act of 2009, H.R. 2517, 111th Cong. (2009).

134. *Id.* The House Committee Report explicitly states the Act would not affect DOMA: “Same sex partners may only get married in a handful of states. Even in these cases, the federal government does not recognize the marriage because of the Defense of Marriage Act (DOMA). *H.R. 2517 does not affect DOMA.*” H.R. REP. NO. 111-400, pt. 1, at 26 n.6 (2010) (emphasis added).

attack upon the constitutionality of Section Three is simply about politics, not constitutional principles. The implausibility of constitutional challenges to Section Three is underscored by the strong and conceptually inconsistent support—by those who oppose DOMA—for the DPBOA. However, Congress does have the authority to define, for purposes of federal law, the terms it uses in federal law, such as marriage and domestic partnership. Thus, just as a federalism challenge to DOMA must fail, so also would a federalism challenge to the DPBOA.

Similarly, Section Three of Mr. Nadler’s bill to repeal DOMA, House Bill 3567, contains a section conceptually identical to Section Three of DOMA.¹³⁵ In addition to articulating a general rule that a marriage valid in a state where performed will be considered a valid marriage for purposes of federal law, it contains an additional provision addressing the marital status of persons residing in a state who left the state to enter into a same-sex marriage in another country where such marriages are valid—such as Canada or The Netherlands—and then returned to their American state of residence.¹³⁶ Thus, House Bill 3567 provides “in the case of a marriage entered into outside any State, if the marriage is valid in the place where entered into and the marriage could have been entered into in a State,” it is to be considered a marriage “[f]or the purposes of any Federal law in which marital status is a factor,” even if the individuals are *not* considered married in the state in which they reside, have domicile, or have citizenship.¹³⁷ If Section Three of DOMA violates federalism because application of state law governing marriage validity is the mandatory rule for determining marriage validity for purposes of federal law, so too does this part of the very provision of House Bill 3567 designed to repeal Section Three of DOMA. It establishes a rule different than “look to state law” to determine validity of some same-sex marriages and would treat as valid marriages that were not valid in the party’s state or nation of domicile at the time of the marriage, or at the time of the application for recognition of the marriage for purposes of federal law.¹³⁸

Moreover, the test of House Bill 3567 is substantively biased to circumvent state policies that do not allow or recognize same-sex marriage.

135. Respect for Marriage Act of 2009, H.R. 3567, 111th Cong. (2009).

136. *Id.* § 3.

137. *Id.*

138. There may be another constitutional basis for this provision of House Bill 3567—congressional power to regulate international aspects of America’s relations with other nations. *See* U.S. CONST. art. I, § 8, cl. 3. However, that is separate from the question of compliance with constitutional principles of federalism.

It provides the state law to which reference is made to determine the validity of a foreign same-sex marriage is not the state of domicile or residence of either or both of the parties at the time of marriage, or their state of domicile or residence at the time of applying for a federal benefit dependent upon marriage.¹³⁹ Rather, if the marriage is valid in *any* state—even thousands of miles away to which neither of the parties has any connection and in which neither party has ever set foot—it is considered valid.¹⁴⁰ If the purpose of federalism is to respect the profound state interests of the state most interested in the regulation of domestic relationships—marriage, same-sex marriage, and same-sex domestic partnerships—the test provided by House Bill 3567 is senseless because it circumvents the interests of such a state in an attempt to treat as marriages same-sex unions that would not be treated as marriages in any interested state.

Thus, the test for validity of a same-sex marriage in federal law under Section Three of the Nadler bill is not whether the marriage is valid in the state in which the party or parties resided or were domiciled when married; yet, marriage validity in many countries, including some that allow same-sex marriage, depends upon the law of the jurisdiction in which the parties reside or are domiciled.¹⁴¹ So, under the bill that would repeal Section Three of DOMA, if parties engage in calculated behavior to evade the marriage law of their own state of residence by going to a foreign jurisdiction and entering into a same-sex marriage that would be void and not recognized in their own state of residence or domicile, immediately after they return to their own state—even if a state court rules that they are not married—House Bill 3567 will require all federal agencies, programs, and officials in that state recognize and treat the marriage as valid for purposes of all federal benefits in direct rejection of the state's marriage and marriage-recognition policies, as well as in defiant disregard of the direct ruling of a court of their home state on the issue of marriage validity.¹⁴²

Certainly, the policy of House Bill 3567 may seem flawed, foolish, and bad policy. Just as certainly, though, it is *not* unconstitutional under federalism doctrines or principles for the same reasons DOMA is not unconstitutional under federalism doctrines or principles. Neither DOMA

139. See H.R. 3567, § 3.

140. See *id.*

141. See *id.*

142. See *id.*

nor House Bill 3567 purport or attempt to define marriage for purposes of state law or state domestic relations. Both DOMA and House Bill 3567 address only the federal law issue of what relationships will be treated as marriages “[f]or the purposes of any Federal law in which marital status is a factor,”¹⁴³ or domestic partnerships “[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States.”¹⁴⁴

V. POPULAR SOVEREIGNTY, CONSTITUTIONAL CONSENSUS, AND SAME-SEX MARRIAGE RECOGNITION

Ultimately, the question of “*who decides*” boils down to whether “the people” in a democratic constitutional government should be empowered to decide for themselves—directly or through democratically elected representatives—whether and to what extent same-sex marriages validly created in another jurisdiction should be recognized in their own jurisdiction. DOMA answers that question with the statutory command of responsible respect for democratic processes and popular sovereignty.¹⁴⁵ DOMA’s protection of the allocation of constitutional authority to each state to decide whether to recognize same-sex marriages from other states for purposes of internal state law, as well as to Congress to decide whether to recognize same-sex marriages from states for purposes of federal law, preserves a critical dimension of popular sovereignty on an issue in which the will of the people is extremely important.¹⁴⁶

The first principle of the American legal system and the founding principle of political legitimacy was declared by Thomas Jefferson in the Declaration of Independence—governments “deriv[e] their just powers

143. *Id.*

144. 1 U.S.C. § 7 (2006).

145. H.R. REP. NO. 104-664, *supra* note 11, at 5–6.

146. The new substantive constitutional attacks on DOMA are shallow and meritless. *See supra* Part III.C. Article IV of the Constitution explicitly authorizes congressional legislation precisely like DOMA—declaring the standards for interstate recognition of acts, records, and judicial proceedings from other states. *See* U.S. CONST. art. IV, § 1. The precedents of nearly two centuries—including many contemporary examples of federal legislation defining marriage and other domestic relationships—and their legal incidents in ways that differ from, and at times are directly incompatible with, state domestic relations law, confirm the constitutionality of Section Three of DOMA. In protecting the basic social institution of marriage and recognizing the distinctiveness of that institution, DOMA is consistent with and justified by—if not compelled by—substantive due process and equal protection standards.

from the consent of the governed.”¹⁴⁷ As applied to family law, it means family policy issues should be decided by the people who will be subject to them. The merits of what family regulation is wise or unwise, good or bad, effective, efficient, moral, or prudent are considered, debated, and decided by the ordinary democratic processes—by the elected representatives of the people who have to live under such regulation.

A. *Popular Sovereignty and Institutional Re-Constitution*

DOMA keeps the matter of defining and fundamentally regulating the basic and foundational institution of society within the principal sphere of influence of “the people.” It does so by preserving state control over the horizontal marriage-recognition issue and Congress’s control of the vertical marriage-recognition issue. This vindicates the principle of popular sovereignty and mirrors the pattern followed in the creation of the institution of government for the United States of America.

Thus, the delegates who gathered in Philadelphia in the spring and summer of 1787 to revise and amend the Articles of Confederation went far beyond the charge some—including some of them—believed was theirs. Rather than proposing mere amendments and alterations to the existing institution of government established by the Articles of Confederation, the Founders proposed a new institution and form of government with a profoundly different structure and profoundly greater authority than the institution of government under the old Articles. When the drafting work on the Constitution of the United States of America was completed, the Founders faced a difficult dilemma about how to get their proposed new institution of government approved. Some advocated sending the new Constitution to the federal Congress to be approved.¹⁴⁸ Others argued for sending it to state legislatures or to both Congress and state legislatures.¹⁴⁹ But Madison, the “Father of the Constitution,” convinced the delegates such a basic organic change in the institution could not be adopted by the agents of the people authorized under the government of the old institution; rather, the new institution would not have legitimacy unless it were adopted by conventions that drew their authority from the ground up—from the people, from the sovereign.¹⁵⁰ They had to go to the people

147. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

148. See Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 515 (1995).

149. See *id.* at 516–17.

150. See *id.* at 517 (noting Madison’s proposed changes concerning where constitutional ratification take place were eventually adopted—but to a lesser degree

themselves and have them choose delegates to represent them in a convention to decide democratically upon whether to adopt the new institution. The new institution would not have legitimacy if it was created by any other means. The delegates at the Constitutional Convention of 1787 were convinced. So, despite the political risks of circumventing the legislatures and irritating and alienating the powerful political establishment, empowered politicians, and existing political structure in each state, the Founders insisted upon popular ratification—ratification in popular constitutional conventions—in each state and required ratification by a supermajority of nine of the thirteen states before the old institution would be replaced and the new institution would become legitimate and valid.¹⁵¹

Similarly, while it is indisputable ordinary legislation is competent to enact and effectuate *ordinary* legislative changes in marriage regulations, when the change proposed to the institution of marriage is *organic* change, reconstituting the foundation of and basic constitution of the institution of marriage itself, it is more than a matter of mere legislation. Such organic change to the core constitution, composition, and meaning of a fundamental social institution arguably is beyond the scope of legitimate legislative authority. Organic change to an institution requires resort to the people—the source and protectors of the fundamental institutions of society. Organic change to the institution of marriage, like organic change to the institution of government, requires approval or ratification by the people of the society themselves, whose institution is proposed for basic reconstitution.

B. *Constitutional Consensus and Same-Sex Marriage Recognition*

A plausible claim to special constitutional protection for, or a fundamental constitutional right to, same-sex marriage might be made if it could be shown there existed a deep and sustained constitutional superconsensus for recognition of such a right or special status. Because the consent of the governed is the ultimate and exclusive source for all legitimate constitutional authority,¹⁵² political superconsensus is the method provided in the Constitution for amending the Constitution,¹⁵³ and

than Madison proposed—by Congress).

151. ARTICLES OF CONFEDERATION art. X (U.S. 1781) (stating ratification by nine states was required for the Congress to pass any act).

152. U.S. CONST. pmb.; THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776); THE FEDERALIST NO. 22 (Alexander Hamilton), NO. 49 (James Madison).

153. U.S. CONST. art. V.

the established tests for recognizing unwritten constitutional rights by interpretation of substantive due process—deeply rooted in history or essential to the ordered liberty of the nation—are tests for secure, sustained, super-majoritarian support,¹⁵⁴ it is worth examining whether there is a demonstrable, sustained consensus to give extraordinary constitutional protection to same-sex marriage. In other contexts, the Supreme Court has acknowledged it looks to whether a “national consensus” exists to determine the “evolving standards” that inform the identification of fundamental normative values embodied in the Bill of Rights.¹⁵⁵ The establishment or alteration of a Constitution in the absence of a clear expression of the strong will of the great majority of the people contradicts fundamental principles of our constitutional government.¹⁵⁶ If a deep, abiding, and overwhelming consensus for recognition of such a right is shown, it could be argued constitutional morality mandates recognition of such a right. In the absence of such a showing, however, constitutional morality demands rejection of such constitutional-rights claims.¹⁵⁷

Of course, the evidence is clear that in the United States generally, and even in Iowa specifically, there is a super-consensus *opposed* to same-sex marriage and in favor of preserving marriage exclusively as the union of one man and one woman. As Appendix I shows, in thirty-one states the issue of legalization or recognition of same-sex marriage has come before voters, and in all thirty-one states the voters have rejected same-sex marriage and chosen to preserve the institution of marriage as the conjugal, dual-gender union of husband and wife.¹⁵⁸ Even in California, where the

154. See *supra* note 84 and accompanying text.

155. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 493–96 (1965) (Goldberg, J., concurring) (discussing the Ninth Amendment’s relevance in indicating other fundamental rights); see also *Stanford v. Kentucky*, 492 U.S. 361, 368–71 (1989) (discussing the evolution of the Eighth Amendment); see also *Loving v. Texas*, 389 U.S. 576, 579–80 (1968) (noting historical and contemporary decriminalization of sodomy relevant to constitutionality).

156. See Raymond Ku, *Consensus of the Governed: The Legitimacy of Constitutional Change*, 64 *FORDHAM L. REV.* 535, 535–37 (1995); Lynn D. Wardle, “Time Enough”: *Webster v. Reproductive Health Services and the Prudent Pace of Justice*, 41 *FLA. L. REV.* 881, 937–39 (1989).

157. See WILLMOORE KENDALL & GEORGE W. CAREY, *THE BASIC SYMBOLS OF THE AMERICAN POLITICAL TRADITION* 142–52 (1970) (the Constitution requires government by consensus and is threatened by impatient action taken before a consensus develops).

158. *Infra* app. I; Glenn Adams, *Maine Voters Reject Gay-Marriage Law*, *THE GUARDIAN*, Nov. 4, 2009, available at <http://www.guardian.co.uk/world/feedarticle/8789627>.

gay and lesbian community is powerful and influential, voters have twice voted against same-sex marriage, most recently with Proposition 8.¹⁵⁹ Nationally, polls show consistent opposition to same-sex marriage.¹⁶⁰ The overall percentage of the popular vote in those thirty-one states against same-sex marriage is sixty-three percent.¹⁶¹ In all but five states and the District of Columbia, same-sex marriage is explicitly prohibited by law.¹⁶² In Iowa, polls have consistently shown a strong majority of citizens reject legalization of same-sex marriage.¹⁶³ So the claim to fundamental-right

159. Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, Nov. 6, 2008, at A1, available at http://www.nytimes.com/2008/11/06/us/politics/06marriage.html?_r=1.

160. Nationally, public opinion experts underscore there has been no big trend supporting the legalization of same-sex marriage. Two political scientists noted in a paper presented at the 2009 American Political Science Association Annual Meeting: “A slender but stable majority has labeled homosexual sex ‘morally wrong’ in polls throughout the past quarter-century. In 22 Gallup polls since 1977, the percentage saying homosexual relations should be illegal has fluctuated around 45% rather than trending strongly downward.” Gregory B. Lewis & Charles W. Gossett, *Why Did Californians Pass Proposition 8?* 5 (APSA 2009 Toronto Meeting Paper), available at http://papers.ssrn.com/Sol3/papers.cfm?abstract_id=1451709. They further explained: “Opposition to same-sex marriage is strong and reasonably stable—55% to 65% oppose it and only 30% to 35% favor it. . . . [F]rom the early 1990s to the present . . . there is no sign of a dramatic trend toward greater support.” *Id.* (citations omitted).

161. See *infra* app. I (overall affirmative vote of 65.9%).

162. See D.C. CODE ANN. § 46-401(a) (LexisNexis Supp. 2010); N.H. REV. STAT. ANN. § 457:1-a (LexisNexis Supp. 2009); VT. STAT. ANN. tit. 15, § 8 (Supp. 2009); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 481 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 907 (Iowa 2009); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 1004–05 (Mass. 2003).

163. See Jason Clayworth & Thomas Beaumont, *Iowa Poll: Iowans Evenly Divided on Gay Marriage Ban*, DES MOINES REG., Sept. 21, 2009, available at <http://www.desmoinesregister.com/article/20090921/NEWS10/909210321/Iowa-Poll-Iowans-evenly-divided-on-gay-marriage-ban>. Public opinion polling immediately following the *Varnum* decision showed Iowans opposed same-sex marriage by nearly a two-to-one ratio. See Kyle Smith, *Gay Marriage’s Earned Victory*, N.Y. POST, Apr. 12, 2009, available at http://www.nypost.com/p/news/opinion/opedcolumnists/item_MBF1Tu1JNdkxZt8VSreRGK;jsessionid=20C5B320B194F590C2A92C7442C587B5 (mentioning poll showing statewide support for gay marriage in Iowa at only 36%). A Des Moines Register poll conducted September 14, 2009, nearly six months after the *Varnum* decision, stated: “The polls shows that 26 percent of Iowans favor April’s unanimous court ruling legalizing same-sex marriage, 43 percent oppose it and 31 percent don’t care much or are not sure.” Clayworth & Beaumont, *supra*. The same poll showed if Iowans could vote on a constitutional amendment to ban same-sex marriage, “forty-one percent say they would vote for a ban, and 40 percent say they would vote to continue gay marriage.” *Id.* The report further noted: “The most intensity about the issue shows up among opponents. The percentage of Iowans who

status for same-sex marriage because of a superconsensus in favor of same-sex marriage is untenable. As Appendix I illustrates, the constitutional superconsensus is clearly against legalizing same-sex marriage and for preserving the institution of marriage for male-female couples exclusively.

VI. CONCLUSION: "CAPTURING" MARRIAGE TO PROMOTE POLITICAL AGENDAS—WHY "WHO DECIDES" MATTERS

The sociologist Peter Berger once remarked that if the people of India are the most religious people in the world, and the people of Sweden are the least, then America is a nation of Indians ruled by Swedes.¹⁶⁴ Part of the humor of his observation depends upon recognition of a dichotomy between the values of "rulers"—government officials, judges, and cultural elites—on the one hand and the values of the ordinary American people—the common men and women, mothers and fathers, husbands and wives, parents and families who live under the laws made by the "rulers." On an issue that would organically redefine the institution of marriage, our Constitution requires the will of the people, not their rulers, be respected.

Things that matter most, like the meaning of marriage, matter differently to different groups with dissimilar value sets and world-views. The issue of same-sex marriage is inappropriate for judicial resolution because marriage policies reflect deeply important, differing, and fundamental value assumptions upon which political cultures are founded. David Bradley, of the London School of Economics and Political Science, has noted legal policies regulating or defining family relations are the product of political cultures or ideologies, and they are meant to have significant socialization impacts upon society.¹⁶⁵ Different political value systems compete to control the law in order to establish different concepts of marriage that are reflected in the laws governing marriage. The differences between the marriage laws of different political societies can be very significant. Marriage laws reflect choices between competing world-

say they strongly oppose gay marriage (35 percent) is nearly double the percentage who say they strongly favor it (18 percent)." *Id.*

164. Stephen Prothero, *A Nation of Faith and Religious Illiterates*, L.A. TIMES, Jan. 12, 2005, available at <http://articles.latimes.com/2005/jan/12/opinion/oe-prothero12>.

165. See David Bradley, *A Family Law for Europe? Sovereignty, Political Economy and Legitimation*, 4 GLOBAL JURIST FRONTIERS 1, 5–7 (2004); David Bradley, *Comparative Law, Family Law and Common Law*, 23 OXFORD J. LEGAL STUD. 127, 129–32 (2003); David Bradley, *Politics, Culture and Family Law in Finland: Comparative Approaches to the Institution of Marriage*, 12 INT'L J.L. POL'Y & FAM. 288, 294–97 (1998).

views and associated political ideologies. They have far-reaching implications regarding the preferred, permitted, and prohibited roles and expectations of marriage in society.

For example, the antimiscegenation laws prohibiting interracial marriage, which spread after the Civil War, reflected the values of a particular political culture. Racial eugenicists believed in a hierarchy of human races, and to preserve the superior races from being contaminated by the inferior races, interracial marriage between members of the “superior” white race and the “inferior” black race, as they saw it, had to be forbidden.¹⁶⁶ They used the law to capture and instrumentalize the institution of marriage not just to effectuate their views, but to promote the spread of their particular set of social and political values.

Today, advocates of same-sex marriage are using the same tactic to achieve their own social and political objectives. They seek to capture and instrumentalize the institution of marriage to promote the spread of their particular set of values and world-views about the normalcy and propriety of homosexual relations.¹⁶⁷

Sadly, the Iowa Supreme Court has taken up, and a federal district court in Massachusetts has endorsed, that cause and that tactic—the tactic soundly repudiated by the Supreme Court of the United States in *Loving v. Virginia*. At least the Virginia antimiscegenation law was adopted by an accountable legislative process; the people of Virginia are accountable for that stain upon the history of their commonwealth. Unlike the racial eugenicists of Virginia, however, the Iowa Supreme Court in *Varnum* was impatient, unwilling to wait for the people of the state to accept the policy the members of the court preferred. So, by judicial fiat, the state court decreed the capture and instrumentalization of marriage law in Iowa for the promotion and advancement of the same-sex marriage-movement ideology.

Opponents of DOMA seek to carry out the capture of marriage

166. *Loving v. Virginia*, 388 U.S. 1, 7 (1966) (stating the Virginia court’s conclusion “that the State’s legitimate purposes [in prohibiting interracial marriage] were ‘to preserve the racial integrity of its citizens,’ and to prevent ‘the corruption of blood,’ ‘a mongrel breed of citizens,’ and ‘the obliteration of racial pride,’ obviously an endorsement of the doctrine of White Supremacy” (quoting *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955))).

167. See Lynn D. Wardle, Presentation at the 1999 NARTH Conference, When Dissent Is Stifled: The Same-Sex Marriage and Right-to-Treatment Debates, available at <http://www.narth.com/docs/wardle.html>.

without approval of the people subject to the law. One method of doing so is by seeking to force all other states to recognize same-sex marriages created in one of the five American states or the District of Columbia where same-sex marriage is legal.¹⁶⁸ They seek to judicially force unwilling states to import same-sex marriages over popular and legislative objection. They also seek to forcibly export same-sex marriages into federal laws and programs before the accountable members of Congress decide if, when, where, or how that is appropriate.

The words of Winston Churchill are poignantly applicable to the issue of recognition of same-sex marriage and are appropriate to conclude this discussion:

Many forms of Government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that *democracy is the worst form of Government except all those other forms that have been tried* from time to time; but there is the broad feeling in our country that the people should rule, continuously rule, and that public opinion, expressed by all constitutional means, should shape, guide, and control the actions of Ministers who are their servants and not their masters.¹⁶⁹

Certainly, in Iowa and throughout the United States, the will of the people regarding recognition of same-sex marriage, “expressed by all constitutional means, should shape, guide and control the actions of [judicial and legislative lawmakers] who are their servants and not their masters.”¹⁷⁰ That is *who decides* the matter under DOMA, and that is why DOMA is both wise and constitutional.

168. See Lynn D. Wardle, *From Slavery to Same-Sex Marriage: Comity Versus Public Policy in Inter-jurisdictional Recognition of Controversial Domestic Relations*, 2008 BYU L. REV. 1855, 1908–09 (2008).

169. 444 PARL. DEB., H.C. (5th ser.) (1947) 207 (emphasis added). Churchill said this as Leader of the Opposition in a speech before the House of Commons on the afternoon of November 11, 1947, concerning a bill to reduce the delaying period of the House of Lords from two years to one. *Id.*

170. *Id.*

APPENDIX 1

THIRTY (30) STATE MARRIAGE AMENDMENTS & MAINE
QUESTION 1: LANGUAGE, VOTES, AND ORIGINS

MAY 4, 2010

*William C. Duncan, Marriage Law Foundation**

<i>State</i>	<i>Text</i>	<i>Vote</i>	<i>Origination</i>
Alabama	(a) This amendment shall be known and may be cited as the Sanctity of Marriage Amendment. (b) Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting this unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state.	For: 697,591 (81.2%) Against: 161,694 (18.8%) ¹	Legislature

* Used with permission. Based on data presented to the Law Professor's Roundtable Discussion of State Marriage amendments, at The Catholic University of America, Columbus School of Law, January 4, 2007. Updated and recalculated by Christine Beck, J. Jacob Goringe, and Lynn D. Wardle (last updated August 9, 2010).

1. ELECTIONS DIV., ALA. SEC'Y OF STATE, 2006 PRIMARY ELECTION RESULTS: PROPOSED CONSTITUTIONAL AMENDMENTS 2 (2006), available at <http://www.sos.state.al.us/downloads/election/2006/primary/ProposedAmendments-OfficialResultsCertification-06-28-2006.pdf>.

State	Text	Vote	Origination
	<p>(c) Marriage is a sacred covenant, solemnized between a man and a woman, which, when the legal capacity and consent of both parties is present, establishes their relationship as husband and wife, and which is recognized by the state as a civil contract.</p> <p>(d) No marriage license shall be issued in the State of Alabama to parties of the same sex.</p> <p>(e) The State of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license was issued.</p> <p>(f) The State of Alabama shall not recognize as valid any common law marriage of parties of the same sex.</p> <p>(g) A union replicating marriage of or between persons of the same sex in the State of Alabama or in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state as a marriage or other union replicating marriage. ALA. CONST. art. I, § 36.03.</p>		
Alaska	To be valid or recognized in this State, a marriage may exist only between one man and one woman. ALASKA CONST. art. I, § 25.	For: 152,965 (68.11%) Against: 71,631 (31.89%) ²	Legislature
Arizona**	Only a union of one man and one woman shall be valid or recognized as a marriage in this state. ARIZ. CONST. art. XXX, § 1.	For: 1,258,355 (56.2%) Against: 980,753 (43.8%) ³	Legislature

2. ELECTION SUMMARY REPORT: STATE OF ALASKA 1998 GENERAL ELECTION 6 (1998), available at <http://www.elections.alaska.gov/results/98GENR/results.pdf>; see also Kevin G. Clarkson, David Oregon Coolidge & William C. Duncan, *The Alaska Marriage Amendment: The People's Choice on the Last Frontier*, 16 ALASKA L. REV. 213, 214 n.2 (1999) (listing vote results from proposal through ratification).

3. ARIZ. SEC'Y OF STATE, STATE OF ARIZONA OFFICIAL CANVASS 15 (2008), available at <http://www.azsos.gov/election/2008/General/Canvass2008GE.pdf>.

State	Text	Vote	Origination
Arkansas	<p>§ 1. Marriage. Marriage consists only of the union of one man and one woman.</p> <p>§ 2. Marital Status. Legal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized in Arkansas, except that the legislature may recognize a common law marriage from another state between a man and a woman.</p> <p>§ 3. Capacity, rights, obligations, privileges, and immunities. The legislature has the power to determine the capacity of persons to marry, subject to this amendment, and the legal rights, obligations, privileges, and immunities of marriage. ARK. CONST. amend. 83, §§ 1-3.</p>	<p>For: 753,770 (74.95%) Against: 251,914 (25.05%)⁴</p>	Initiative
California	<p>Only marriage between a man and a woman is valid or recognized in California. CAL. CONST. art. 1, § 7.5, <i>invalidated by</i> Perry v. Schwarzenegger, No. C-09-2292-VRW, slip op. at 135-36 (N.D. Cal. Aug. 5, 2010); <i>stay granted</i> 2010 WL 3212786 (9th Cir. Aug. 16, 2010).</p>	<p>For: 7,001,084 (52.3%) Against: 6,401,482 (47.7%)⁵</p>	Petition- Initiative
Colorado	<p>Only a union of one man and one woman shall be valid or recognized as a marriage in this state. COLO. CONST. art. II, § 31.</p>	<p>For: 855,206 (55.0%) Against: 699,030 (45.0%)⁶</p>	Initiative

4. ARK. SEC'Y OF STATE, INITIATIVE AMENDMENTS 1938-2006, at 20, http://www.sosweb.state.ar.us/elections/elections_pdfs/initiatives_amendments_1938-2006.pdf (last visited Sept. 17, 2010).

5. CAL. SEC'Y OF STATE, STATEMENT OF VOTE: NOVEMBER 4, 2008, GENERAL ELECTION 13 (2008), *available at* http://www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf.

6. COLO. SEC'Y OF STATE, OFFICIAL PUBLICATION OF THE ABSTRACT OF VOTES CAST 143, 156 (2006), *available at* <http://www.sos.state.co.us/pubs/elections/main.htm> (follow "Elections Archive" hyperlink; then follow "2006 Election Information: Abstract of Votes Cast" hyperlink).

State	Text	Vote	Origination
Florida	Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized. FLA. CONST. art. 1, § 27.	For: 4,890,883 (61.9%) Against: 3,008,026 (38.1%) ⁷	Petition- Initiative
Georgia	(a) This state shall recognize as marriage only the union of man and woman. Marriages between persons of the same sex are prohibited in this state. (b) No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage. This state shall not give effect to any public act, record, or judicial proceeding of any other state or jurisdiction respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state or jurisdiction. The courts of this state shall have no jurisdiction to grant a divorce or separate maintenance with respect to any such relationship or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such relationship. GA. CONST. art. 1, § IV, ¶ I.	For: 2,454,930 (76.2%) Against: 768,716 (23.8%) ⁸	Legislature
Hawaii	The legislature shall have the power to reserve marriage to opposite-sex couples. HAW. CONST. art. I, § 23.	For: 285,384 (69.2%) Against: 117,827 (28.6%) ⁹	Legislature
Idaho	A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state. IDAHO CONST. art. III, § 28.	For: 282,386 (63.35%) Against: 163,384 (36.65%) ¹⁰	Legislature

7. Fla. Dep't of State, Election Results November 4, 2008, General Election Official Results, <http://election.dos.state.fl.us/elections/resultsarchive/Index.asp?ElectionDate=11/4/2008&DATAMODE=> (select Amendments" in the "Select Office:" drop down menu) (last visited Sept. 20, 2010).

8. Ga. Sec'y of State, General Election Results, Official Results of the November 2, 2004 General Election, http://sos.georgia.gov/elections/election_results/2004_1102/295.htm (last visited Sept. 21, 2010); see Ga. Sec'y of State, Proposed Constitutional Amendments, http://sos.georgia.gov/elections/2004_constitutional_amendments.htm (last visited Sept. 21, 2010) (examining Amendment 1, the proposed amendment defining marriage in Georgia).

9. STATE OF HAW., SUMMARY REPORT 4 (1998), available at <http://hawaii.gov/elections/results/1998/general/98swgen.pdf>.

State	Text	Vote	Origination
Kansas	(a) The marriage contract is to be considered in law as a civil contract. Marriage shall be constituted by one man and one woman only. All other marriages are declared to be contrary to the public policy of this state and are void. (b) No relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage. KAN. CONST. art. 15, § 16.	For: 417,627 (70.0%) Against: 179,432 (30.0%) ¹¹	Legislature
Kentucky	Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. KY. CONST. § 233a.	For: 1,222,125 (74.6%) Against: 417,097 (25.4%) ¹²	Legislature
Louisiana	Marriage in the state of Louisiana shall consist only of the union of one man and one woman. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman. LA. CONST. art. 12, § 15.	For: 619,908 (77.8%) Against: 177,067 (22.2%) ¹³	Legislature

10. Idaho Sec'y of State, November 7, 2006 General Election Results, http://www.sos.idaho.gov/elect/RESULTS/2006/general/tot_stdw.htm (last visited Sept. 20, 2010).

11. Kan. Sec'y of State, Election Statistics, http://www.kssos.org/elections/elections_statistics.html (follow "2005 Constitutional Amendment Results by County (Excel)" hyperlink) (last visited Sept. 21, 2010); see KAN. SEC'Y OF STATE, SENATE CONCURRENT RESOLUTION NO. 1601 (2005), available at <http://www.kssos.org/other/sos-english.pdf> (examining the proposed amendment defining marriage in Kansas).

12. Ky. State Bd. of Elections, Report of "Official" Election Night Tally Results, <http://elect.ky.gov/NR/rdonlyres/3A2A50FF-35A2-44ED-BCFD-EFA7028E14EC/0/2004state.txt> (last visited Sept. 20, 2010).

13. La. Sec'y of State, MultiParish Election Results, <http://electionresults.sos.louisiana.gov/graphical/#1904319> (select "Sept. 18, 2004" in the drop down menu; then select "MultiParish" tab) (last visited Sept. 21, 2010).

<i>State</i>	<i>Text</i>	<i>Vote</i>	<i>Origination</i>
Michigan	To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose. MICH. CONST. art. 1, § 25.	For: 2,698,077 (58.6%) Against: 1,904,319 (41.4%) ¹⁴	Initiative
Mississippi	Marriage may take place and be valid under the laws of this state only between a man and a woman. A marriage in another state or foreign jurisdiction between persons of the same gender, regardless of when the marriage took place, may not be recognized in this state and is void and unenforceable under the laws of this state. MISS. CONST. art. 14, § 263A.	For: 957,104 (86.01%) Against: 155,648 (13.09%) ¹⁵	Legislature
Missouri	That to be valid and recognized in this state, a marriage shall exist only between a man and a woman. MO. CONST. art. 1, § 33.	For: 1,055,771 (70.6%) Against: 439,529 (29.4%) ¹⁶	Legislature
Montana	Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. MONT. CONST. art. XIII, § 7.	For: 295,070 (66.6%) Against: 148,263 (33.4%) ¹⁷	Initiative
Nebraska	Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska. NEB. CONST. art. I, § 29.	For: 477,571 (70.1%) Against: 203,667 (29.9%) ¹⁸	Initiative

14. Mich. Dep't of State, Election Results, <http://miboeofr.micusa.com/election/results/04GEN/90000002.html> (last visited Sept. 21, 2010).

15. MISS. SEC'Y OF STATE, TOTAL VOTES REPORTED BY COUNTY FOR 2004 GENERAL ELECTION 7 (2004), available at <http://www.sos.state.ms.us/elections/2004/General/HC56.pdf>.

16. Mo. Sec'y of State, Ballot Issues, <http://www.sos.mo.gov/enrweb/ballotissuereults.asp?eid=116&arc=1> (last visited Sept. 21, 2010).

17. MONT. SEC'Y OF STATE, 2004 STATEWIDE GENERAL ELECTION RESULTS (2004), available at <http://sos.mt.gov/Elections/archives/2000s/2004/2004-GenState.pdf>.

18. NEB. SEC'Y OF STATE, GENERAL ELECTION RESULTS 21 (2000), available at http://www.sos.ne.gov/elec/prev_elec/2000/pdf/416_and_417.pdf; NEB. SEC'Y OF STATE, SAMPLE BALLOT (2000), available at http://www.sos.ne.gov/elec/prev_elec/2000/pdf/ballot_amendments_general.pdf (providing an example of the marriage initiative—Initiative Measure Number 416).

<i>State</i>	<i>Text</i>	<i>Vote</i>	<i>Origination</i>
Nevada	Only a marriage between a male and female person shall be recognized and given effect in this state. NEV. CONST. art. 1, § 21.	2000 For: 412,688 (69.6%) Against: 180,077 (30.4%) ¹⁹ 2002 For: 337,197 (67.2%) Against: 164,573 (32.8%) ²⁰	Initiative
North Dakota	Marriage consists only of the legal union between a man and a woman. No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect. N.D. CONST. art. XI, § 28.	For: 223,572 (73.2%) Against: 81,716 (26.8%) ²¹	Initiative
Ohio	Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage. OHIO CONST. art. XV, § 11.	For: 3,329,335 (61.7%) Against: 2,065,462 (38.3%) ²²	Initiative
Oklahoma	A. Marriage in this state shall consist only of the union of one man and one woman. Neither this Constitution nor any other provision	For: 1,075,216 (75.6%) Against: 347,303 (24.4%) ²³	Legislature

19. Nev. Sec'y of State, Official 2000 General Election Results, <http://nv.sos.gov/SOSelectionPages/results/2000General/ElectionSummary.aspx> (last visited Sept. 21, 2010); see Jennifer Crowe, *Question 2 Highlights Nevadans' Divisions*, RENO GAZETTE-JOURNAL, Oct. 22, 2000, at 1A (examining Question 2, the proposed amendment defining marriage in Nevada).

20. Nev. Sec'y of State, Official 2002 General Election Results, <http://nv.sos.gov/SOSelectionPages/results/2002General/ElectionSummary.aspx> (last visited Sept. 21, 2010).

21. N.D. Sec'y of State, General Election November 2, 2004, <http://web.apps.state.nd.us/sec/emspub/gp/electionresultsearch.htm?electionDate=11022004&searchType=STATE&officeElectionNo=M2161&cmd=Search&showMap=N&resultType=ConstitutionalMeasureNo.1&legislativeDistrictNo=&countyNo=&showJudDistricts=Y> (last visited Sept. 21, 2010).

22. Ohio Sec'y of State, State Issue 1: November 2, 2004, <http://www.sos.state.oh.us/SOS/elections/electResultsMain/2004ElectionsResults/04-1102Issue1.aspx> (last visited Sept. 21, 2010).

23. OKLA. SEC'Y OF STATE, STATE QUESTION 711, at 137-38 (2004), available at <http://www.ok.gov/elections/documents/04sq.pdf>.

State	Text	Vote	Origination
	<p>of law shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.</p> <p>B. A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage.</p> <p>C. Any person knowingly issuing a marriage license in violation of this section shall be guilty of a misdemeanor. OKLA. CONST. art. 2, § 35.</p>		
Oregon	<p>It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage. OR. CONST. art. XV, § 5a.</p>	<p>For: 1,028,546 (56.6%) Against: 787,556 (43.4%)²⁴</p>	Initiative
South Carolina	<p>A marriage between one man and one woman is the only lawful domestic union that shall be valid or recognized in this State. This State and its political subdivisions shall not create a legal status, right, or claim respecting any other domestic union, however denominated. This State and its political subdivisions shall not recognize or give effect to a legal status, right, or claim created by another jurisdiction respecting any other domestic union, however denominated. Nothing in this section shall impair any right or benefit extended by the State or its political subdivisions other than a right or benefit arising from a domestic union that is not valid or recognized in this State. This section shall not prohibit or limit parties, other than the State or its political subdivisions, from entering into contracts or other legal instruments. S.C. CONST. art. XVII, § 15.</p>	<p>For: 830,081 (78%) Against: 234,464 (22%)²⁵</p>	Legislature
South Dakota	<p>Only marriage between a man and a woman shall be valid or recognized in South Dakota. The uniting of two or more persons in</p>	<p>For: 172,305 (51.8%) Against: 160,152 (48.2%)²⁶</p>	Legislature

24. OR. SEC'Y OF STATE, NOVEMBER 2, 2004, GENERAL ELECTION ABSTRACT OF VOTES: STATE MEASURE NO. 36, at 1 (2004), available at <http://www.sos.state.or.us/elections/nov2004/abstract/m36.pdf>.

25. S.C. ELECTION COMM'N, ELECTION REPORT 2005-2006 (2006), available at http://www.scvotes.org/files/ElectionReports/Election_Report_2006.pdf.

State	Text	Vote	Origination
Tennessee	<p>a civil union, domestic partnership, or other quasi-marital relationship shall not be valid or recognized in South Dakota. S.D. CONST. art. XXI, § 9.</p> <p>The historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state. Any policy or law or judicial interpretation, purporting to define marriage as anything other than the historical institution and legal contract between one (1) man and one (1) woman, is contrary to the public policy of this state and shall be void and unenforceable in Tennessee. If another state or foreign jurisdiction issues a license for persons to marry and if such marriage is prohibited in this state by the provisions of this section, then the marriage shall be void and unenforceable in this state. TENN. CONST. art. XI, § 18.</p>	<p>For: 1,419,434 (81.2%) Against: 327,536 (18.8%)²⁷</p>	Legislature
Texas	<p>(a) Marriage in this state shall consist only of the union of one man and one woman. (b) This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage. TEX. CONST. art. 1, § 32.</p>	<p>For: 1,723,782 (76.2%) Against: 536,913 (23.8%)²⁸</p>	Legislature
Utah	(1) Marriage consists only of the legal union between a man and a woman.	<p>For: 593,297 (65.9%) Against: 307,488 (34.1%)²⁹</p>	Legislature

26. S.D. SEC'Y OF STATE, 2006 SOUTH DAKOTA BALLOT QUESTIONS (2008), available at <http://www.sdsos.gov/electionsvoteregistration/electvoterpdfs/BalotQuestions1890-2008.pdf>.

27. TENN. SEC'Y OF STATE, GENERAL ELECTION: CONSTITUTIONAL AMENDMENT QUESTIONS 1, 3 (2006), available at <http://state.tn.us/sos/election/results/2006-11/RptCityConlandCon2.pdf>.

28. Office of the Sec'y of State, 2005 Constitutional Amendment Election, <http://elections.sos.state.tx.us/elchist.exe> (select "2005 Constitutional Amendment Election" in the drop down menu) (last visited Sept. 21, 2010).

29. Results from Utah's Vote on Constitutional Amendment 3, http://elections.utah.gov/2004_canvass_amendments.pdf (last visited Sept. 21, 2010); see GAYLE MCKEACHNIE, LIEUTENANT GOVERNOR, UTAH VOTER INFORMATION PAMPHLET 34 (2004), available at http://www.voterlink.utah.gov/Voter%20Information%20Pamphlet_web.pdf (providing analysis of Constitutional Amendment Number 3, the proposed amendment defining marriage in Utah).

State	Text	Vote	Origination
Virginia	<p>(2) No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect. UTAH CONST. art. I, § 29.</p> <p>That only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions.</p> <p>This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage. VA. CONST. art. I, § 15-A.</p>	<p>For: 1,328,537 (57.06%) Against: 999,687 (42.94%)³⁰</p>	Legislature
Wisconsin	<p>Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state. WIS. CONST. art. XIII, § 13.</p>	<p>For: 1,264,310 (59.4%) Against: 862,924 (40.6%)³¹</p>	Legislature
Overall State Marriage Amends. Vote*		<p>For: 40,114,107 (63.25%) Against: 23,305,330 (36.75%) Total Voters in All Thirty States: 63,419,437</p>	11 Initiative, 19 Legislature

30. Commonwealth of Va., November 7th 2006—General Election, Official Results, <http://www.sbe.virginia.gov/ElectionResults/2006/Nov/htm/index.htm> (last visited Sept. 21, 2010).

31. WIS. STATE ELECTION BD., STATEWIDE REFERENDUM: DEFINITION OF MARRIAGE 4 (2006), available at <http://elections.state.wi.us/docview.asp?docid=10049&locid=47>.

Maine Question 1	Question 1: People's Veto "Do you want to reject the new law that lets same-sex couples marry and allows individuals and religious groups to refuse to perform these marriages?" Me. Bureau of Corps., Elections & Comm'ns., Maine Citizen's Guide to the Referendum Election, http://www.maine.gov/sos/cec/elec/2009/intent09.htm (last visited Sept. 21, 2010).	For: 300,848 (52.9%) Against: 267,828 (47.1%) ³²	Legislature
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**** ONE STATE REJECTED A MARRIAGE AMENDMENT, BUT TWO YEARS LATER ADOPTED ONE:**

In addition to the above votes for amendments against same-sex marriage, in 2006, Arizona voters surprisingly rejected Proposition 107, a proposed ban on same-sex marriage and other unions—allegedly including social security cohabitation by senior widows and widowers—48% (721,489) to 52% (775,498).³³ Two years later, as noted above, the voters passed an amendment prohibiting same-sex marriage 56% (1,258,355) to 44% (980,753).³⁴

CUMULATIVE TOTAL OF ALL VOTES ON SAME-SEX MARRIAGE:

Adding the 2006 votes for and against failed Arizona Proposition 107 into the compilation, a total of 64,916,424 votes have been cast in all elections from 1998 to 2009 on the issue of permitting or prohibiting same-sex marriage. The total votes for prohibition of same-sex marriage—and in some cases equivalent same-sex unions—is 40,835,596 (62.9%). The total votes against prohibition of same-sex marriage—and in some cases equivalent same-sex unions—is 24,080,828 (37.1%).

32. Me. Bureau of Corps., Elections & Comm'ns., November 3, 2009 Referendum Tabulations, <http://www.maine.gov/sos/cec/elec/2009/referendumbycounty.html> (last visited Sept. 21, 2010).

33. ARIZ. SEC'Y OF STATE, STATE OF ARIZONA OFFICIAL CANVASS 15 (2006), available at <http://www.azsos.gov/election/2006/General/Canvass2006GE.pdf>.

34. ARIZ. SEC'Y OF STATE, STATE OF ARIZONA OFFICIAL CANVASS 15 (2008), available at <http://www.azsos.gov/election/2008/General/Canvass2008GE.pdf>.