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# DOMA, Romer, and Rationality

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## DOMA, *Romer*, and Rationality

Andrew Koppelman\*

### I. INTRODUCTION

In July, 2010, a federal court in Massachusetts held unconstitutional the provision of the federal Defense of Marriage Act (DOMA) that denies all federal benefits to same-sex spouses. The ruling relied on two arguments: that the law interfered with the rights of states guaranteed in the 10<sup>th</sup> Amendment, and that it violated the Constitution's equal protection clause. The first of these arguments doesn't make much sense, but the second, which had also persuaded two Ninth Circuit judges, is so strong that it has a good chance of being accepted by the U.S. Supreme Court.

The equal protection claim is that DOMA lacks a rational basis because it reflects a bare desire to harm a politically unpopular group. The argument has real bite, and it bites much harder now than it did in 1996, when DOMA was passed by overwhelming margins in both houses of Congress.<sup>1</sup> President Bill Clinton felt that he had no alternative but to hold his nose and sign the bill.<sup>2</sup> As this is written, another Democratic President, Barack Obama, has openly called for its repeal.<sup>3</sup>

This growing success is a window into the hidden cultural roots of law. It reveals the normative premises of rational basis analysis, at least

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<sup>1</sup> The bill passed the House by a vote of 342–67 on July 12, 1996. 142 CONG. REC. H7505–06 (daily ed. July 12, 1996). It passed the Senate by a vote of 85–14 on September 10, 1996. 142 CONG. REC. 22466–67 (1996).

<sup>2</sup> The President signed the bill at 12:50 a.m. on September 21, 1996. Peter Baker, *President Quietly Signs Law Aimed at Gay Marriages*, WASH. POST, Sept. 22, 1996, at A21.

<sup>3</sup> See Scott Wilson, *Obama Makes Explicit His Objection to DOMA*, WASH. POST, Aug. 17, 2009, [http://voices.washingtonpost.com/44/2009/08/17/obama\\_makes\\_explicit\\_his\\_objec.html](http://voices.washingtonpost.com/44/2009/08/17/obama_makes_explicit_his_objec.html).

whenever that analysis is used to invalidate a statute. The country's attitudes toward gay people have evolved rapidly, to the point where this kind of lashing out at gays looks a lot less attractive than it did only a decade ago. In 1996, otherwise reasonable people thought it a pointless waste of taxpayer dollars to look after the basic needs of gay couples and their families. This attitude was so pervasive that I myself was reluctantly convinced that the part of the statute denying federal benefits would survive rational basis challenge. That callousness no longer looks so rational, and increasing numbers are ready to recognize gay relationships.

The burden of proof now lies on those who want to defend this discrimination. It has become increasingly difficult to articulate a sensible basis for this discrimination. The shift is really one of normative priorities. The invocation of "rationality" masks the processes that are actually at work.

This shift has implications for the choice of law problem, the question of what happens when same-sex marriages cross state lines. Choice of law analysis depends on the balancing of the legitimate interests of different states in applying their own laws to a given transaction. The interest balancing exercise obviously will come out differently if some interests disappear from view. As the arguments against same-sex marriage become increasingly antiquated, the choice of law problem will gradually – I emphasize gradually – disappear.

Part I of this Article explores the doubts that have been expressed about DOMA's constitutionality, and elucidates its basis. Part II examines DOMA's origins and meanings, and reviews a plausible argument for its constitutionality – an argument that once worried me, much more than it does now. Part III examines the changing cultural context within which legal analysis takes place. Part IV shows how constitutional law is dependent on its cultural context. Part V examines a neglected argument for the unconstitutionality of DOMA: the fact that the statute overtly discriminates on the basis of sex. The conclusion considers the implications of the analysis for choice of law.

## II. THE NEW DOUBTS ABOUT DOMA

Section 3 of DOMA requires that marriage, for all federal purposes, must be defined as the union of one man and one woman. It was challenged by the Attorney General in Massachusetts, where same-sex marriage is legal, and also in a separate suit, by Gay and Lesbian Advocates and Defenders (GLAD) on behalf of seven married same-sex couples and three widowers in the state who had been in same-sex

marriages. The plaintiffs included the surviving spouse of Rep. Gerry Studds (D-Mass.). After Studds' death, his spouse was denied both health insurance and the normal survivor annuity – the only widower of a member of Congress to be refused these benefits. One of the plaintiffs in the GLAD lawsuit is a police officer whose family would receive no benefits, including the education benefit for surviving spouses, if she were killed in the line of duty.<sup>4</sup> The surviving spouse of Representative Gerry Studds, the first openly gay man to serve in Congress, was denied both health insurance and the normal survivor annuity—the only widower of a member of Congress to be refused these benefits.<sup>5</sup> Several are retired and do not have the Social Security benefits they would have received if their spouse were of the opposite sex.<sup>6</sup>

In the case brought by Massachusetts, District Judge Joseph Tauro held that DOMA intrudes on “traditional government functions,” specifically the state’s right to define what marriage is.<sup>7</sup> In the individuals’ cases, it held that there is no rational basis for denying federal benefits to same sex spouses in marriages legally recognized in their states.<sup>8</sup> The first of these arguments is silly, and potentially mischievous. But the second is very strong, and can and should carry the day if, as is likely, the case is appealed all the way to the Supreme Court.

The trouble with the states’ rights argument is its implication that whenever a federal law uses the word “marriage” to define the scope of some federal program, it is obligated to follow state law. But an obvious counterexample exists: immigration. In most states, the government doesn’t involve itself in the reasons a couple marries, even if there’s no love involved and the marriage is primarily a business transaction or a matter of convenience. But when people marry for immigration purposes, the federal government has no trouble deeming the marriage “fraudulent,” even though it remains valid under state law. The Immigration and Customs Enforcement agency doesn’t interfere with traditional state functions, because it leaves the state free to recognize, for its own

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<sup>4</sup> Complaint app. at 6, *Gill v. Office of Pers. Mgmt.*, No. 1:09-cv-10309 (D. Mass. July 31, 2009), available at <http://www.glad.org/uploads/docs/cases/gill-complaint-03-03-09.pdf>.

<sup>5</sup> *Id.* at 27-34.

<sup>6</sup> *Id.* at 69–70.

<sup>7</sup> *Massachusetts v. U.S. Dept. of Health & Hum. Svcs.*, **2010 WL 2695668**.

<sup>8</sup> *Id.*

purposes, any marriage it likes. But it won't grant legal residency to immigrants it believes married only to secure the benefit.

The other part of the court's ruling, however, held that DOMA lacked a rational basis, because none of the government's justifications for the law's blanket discrimination made sense. This same argument had previously persuaded two Ninth Circuit judges.

More than a year earlier, in January and February 2009, Judges Alex Kozinski and Stephen Reinhardt, each acting in their capacity as administrators of the courts, declared that DOMA does not preclude the extension of federal insurance benefits to the same-sex spouses of court employees. Kozinski avoided the constitutional issue—which he thought was a serious problem—by construing DOMA not to preclude the extension of benefits.<sup>9</sup> Reinhardt thought that DOMA does block such benefits, and concluded that it was therefore unconstitutional.<sup>10</sup> Until then, no federal judge had questioned the constitutionality of DOMA.<sup>11</sup> Decisions by two such respected judges, widely separated on the political spectrum—Chief Judge of the Ninth Circuit, is a Reagan appointee who often speaks to the Federalist society, and Judge Reinhardt has been called the most liberal judge on the liberal Ninth Circuit—had powerful persuasive authority.

What is the basis of this doubt about the statute's constitutionality? Start with some basic constitutional law. The Fourteenth Amendment provides in pertinent part that no state may “deny to any person . . . the equal protection of the laws.”<sup>12</sup> On this basis, the Court has struck down

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<sup>9</sup> See *In re Golinski*, 587 F.3d 901, 904 (9th Cir. 2009); see also *In re Golinski*, 587 F.3d 956, 959–60 (9th Cir. 2009) (awarding Golinski relief under the Back Pay Act, entitling her to damages equal to the amount of benefits she would have received).

<sup>10</sup> See *In re Levenson*, 560 F.3d 1145, 1147 (9th Cir. 2009); see also *In re Levenson*, 587 F.3d 925, 934–38 (9th Cir. 2009) (awarding Levenson monetary relief under the Back Pay Act). As this is written, the Office of Personnel Management (OPM) is resisting the judges' orders and disputing their authority to make them. See Joe Davidson, *OPM Defies Order on Same-Sex Benefits*, WASH. POST, Dec. 22, 2009, at A17, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/21/AR2009122103240.html>.

<sup>11</sup> There were a few earlier cases in which DOMA's constitutionality was challenged, but they were uniformly unsuccessful. *Smelt v. County of Orange*, 447 F.3d 673, 683–86 (9th Cir. 2006), *cert. denied*, 549 U.S. 959 (2006); *Matthews v. Gonzales*, 171 Fed. Appx. 120, 122 (9th Cir. 2006); *Bishop v. Oklahoma ex rel. Edmondson*, 447 F. Supp. 2d 1239, 1251–53 (N.D. Okla. 2006), *rev'd in part*, 333 Fed. Appx. 361 (10th Cir. 2009); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1305–09 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123, 130–48 (Bankr. W.D. Wash. 2004).

<sup>12</sup> U.S. CONST. amend. XIV, § 1.

laws that impose certain inequalities, such as the race discrimination that was challenged in *Brown v. Board of Education*.<sup>13</sup> But it does not make sense to condemn all inequalities imposed by the law. All laws classify—and in that way make some citizens unequal to others. A law that forbids 10-year-olds from driving or voting treats them unequally from those who are permitted to do these things. For this reason, with respect to laws that do not discriminate on the basis of race, sex, or a few other “suspect classifications,” the constitutional test is what is called rational basis review: the law will be upheld in court if it is “rationally related to a legitimate state interest.”<sup>14</sup>

In a few “rare and exceptional cases,” however, the Court has used the rational basis test to strike down laws.<sup>15</sup> In these cases, the Court deploys what scholars have called “rational basis with bite,” to distinguish it from the toothless test that is ordinarily applied.<sup>16</sup> It is this line of cases that the two Ninth Circuit judges were relying upon.

It is not always clear what the basis is for this greater severity of scrutiny. One line of decisions offers an explanation. These are the cases that hold that a law is unconstitutional if it reflects a bare desire to harm a politically unpopular group. The first of these is *USDA v. Moreno*.<sup>17</sup> It invalidated a 1971 amendment to the Food Stamp Act that excluded from participation in the food stamp program any member of a household whose members are not all related to each other.<sup>18</sup> Congress, the legislative history showed, was attempting to prevent “hippie communes” from receiving any stamps.<sup>19</sup> The Court held that this purpose was fatal to the statute: “[I]f the constitutional concept of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”<sup>20</sup> The law in *Moreno* had

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<sup>13</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 495–96 (1954).

<sup>14</sup> *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

<sup>15</sup> ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 689 (3d ed. 2006).

<sup>16</sup> See, e.g., Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18–24 (1972); CHEMERINSKY, *supra* note 11, at 680 (citing Jeffrey Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161 (1984)).

<sup>17</sup> *USDA v. Moreno*, 413 U.S. 528 (1973).

<sup>18</sup> *Id.* at 529.

<sup>19</sup> *Id.* at 534.

<sup>20</sup> *Id.*

no purpose other than to keep federal benefits out of the hands of a group Congress did not like.

*Moreno* became relevant to the gay rights question in *Romer v. Evans*, which struck down an amendment to the Colorado Constitution—referred to on the ballot as “Amendment 2”—declaring that neither the state nor any of its subdivisions could prohibit discrimination on the basis of “homosexual, lesbian or bisexual orientation, conduct, practices or relationships.”<sup>2122</sup> The Amendment, Justice Kennedy’s opinion for the Court observed, “has the peculiar property of imposing a broad and undifferentiated disability on a single named group.”<sup>23</sup> The Amendment seemed to “deprive[] gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings.”<sup>24</sup> The Court concluded that “Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.”<sup>25</sup> Quoting *Moreno*, it found that the broad disability imposed on a targeted group

raise[d] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. “[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”<sup>26</sup>

*Romer*’s holding may thus be summarized:

[I]f a law targets a narrowly defined group and then imposes upon it disabilities that are so broad and undifferentiated as to bear no discernible relationship to any legitimate governmental interest, then the Court will infer that the law’s purpose is simply to harm that group, and so will invalidate the law.<sup>27</sup>

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<sup>21</sup> *Romer v. Evans*, 517 U.S. 620, 624, 345–36 (1996).

<sup>22</sup> *Id.* at 624 (quoting COLO. CONST. art. II, § 30b).

<sup>23</sup> *Id.* at 632.

<sup>24</sup> *Id.* at 630.

<sup>25</sup> *Id.* at 635.

<sup>26</sup> *Id.* at 634 (quoting *USDA v. Moreno*, 413 U.S. 528, 534 (1973)).

<sup>27</sup> ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* 8 (2002); *see generally* Andrew Koppelman, *Romer v. Evans and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89 (1997).

All three judges relied on this line of cases to hold that DOMA is unconstitutionally irrational if it denies benefits to married same-sex couples.<sup>28</sup>

Judge Tauro observed that the House report on DOMA identified four interests that the statute advanced: “(1) encouraging responsible procreation and child-bearing, (2) defending and nurturing the institution of traditional heterosexual marriage, (3) defending traditional notions of morality, and (4) preserving scarce resources.”<sup>29</sup> The first bore no rational relationship to DOMA: children raised by same-sex couples tend to turn out just as well as those raised by heterosexuals, and in any case, denying benefits to same-sex couples is no help to heterosexual parents. Nor can it encourage heterosexual marriage, because “this court cannot discern a means by which the federal government’s denial of benefits to same-sex spouses might encourage homosexual people to marry members of the opposite sex.” After Lawrence, morality is not a sufficient basis for a law.<sup>30</sup> Finally, “a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources.”<sup>31</sup> Other justifications proffered by the Justice Department in the litigation were equally unavailing. There was no valid federal interest

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<sup>28</sup> *In re Levenson*, 560 F.3d 1145, 1149–51 (9th Cir. 2009).

<sup>29</sup> *Gill v. OPM*, 2010 WL 2695652.

<sup>30</sup> This is an overreading of Lawrence, which does not stand for such a broad proposition. The better response to this interest was offered by Judge Reinhardt: targeting same-sex couples for deprivation of benefits is “far too attenuated” a means to the desired end, and “exhibits the ‘bare desire to harm’ same-sex couples that is prohibited.” *In re Levenson*, 560 F.3d at 1150.

<sup>31</sup> This argument was relied on heavily by supporters of the measure, though they relied on delusional estimates of the cost. Senator Phil Gramm warned that the “failure to pass this bill . . . will create . . . a whole group of new beneficiaries—no one knows what the number would be—tens of thousands, hundreds of thousands, potentially more—who will be beneficiaries of newly-created survivor benefits under Social Security, Federal retirement plans, and military retirement plans.” 142 CONG. REC. 22443 (1996) (statement of Sen. Gramm). Senator Robert Byrd said that he did “not think . . . that it is inconceivable that the costs associated with such a change could amount to hundreds of millions of dollars, if not billions -- if not billions -- of Federal taxpayer dollars.” 142 CONG. REC. 22448 (1996) (statement of Sen. Byrd).

As it turns out, the fiscal consideration cuts the other way: federal recognition of same-sex marriage would produce a modest *increase* in federal revenue, amounting to a bit less than \$400 million annually. See Letter and Report from Douglas Holtz-Eakin, Director, Congressional Budget Office, to Steve Chabot, Chairman, Subcommittee on the Constitution, House Committee on the Judiciary 2 (June 21, 2004), *available at* <http://www.cbo.gov/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf>.

in a uniform national definition of marriage, or in preserving the status quo of nonrecognition of same-sex relationships.

The court followed an earlier Eleventh Circuit concurrence in interpreting *Romer* to hold that “And “when the proffered rationales for a law are clearly and manifestly implausible, a reviewing court may infer that animus is the only explicable basis. [Because] animus alone cannot constitute a legitimate government interest,”<sup>32</sup> the court found that DOMA lacks a rational basis. Judge Reinhardt’s opinion followed essentially the same reasoning.

Kozinski avoided the constitutional issue by construing the statute’s restriction of benefits to opposite-sex couples to merely dictate minimum requirements for medical plans:

Under this broader construction, OPM would also be free to contract for “family” benefits for individuals who do not qualify as spouses under federal law, but who are considered spouses under state law.

Adopting the broader construction of the statute . . . avoids difficult constitutional issues. If I were to interpret the [statute] as excluding same-sex spouses, I would first have to decide whether such an exclusion furthers a legitimate governmental end. Because mere moral disapproval of homosexual conduct isn’t such an end, the answer to this question is at least doubtful.<sup>33</sup>

This difficult problem indicated that the statute did not bar the benefits. “When a statute admits two constructions, one of which requires a decision on a hard question of constitutional law, it has long been our practice to prefer the alternative.”<sup>34</sup>

The analogy to the earlier cases makes sense. DOMA cuts off federal benefits to a targeted, politically unpopular group, just like the law in *Moreno*, and it does so in a remarkably broad and undifferentiated way, just like the law in *Romer*. Some of the government’s rationales for the law that were stated in the House Committee Report—“defending traditional notions of morality, and preserving scarce government resources”<sup>35</sup>—were presented and rejected in *Moreno* and *Romer*.

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<sup>32</sup> Quoting [\*Lofton v. Sec’y of the Dep’t of Children & Family Servs.\*, 377 F.3d 1275, 1280 \(11th Cir.2004\)](#) (Birch, J., specially concurring in the denial of rehearing en banc) (interpreting the mandate of *Romer v. Evans*).

<sup>33</sup> *In re Golinski*, 587 F.3d 901, 903 (9th Cir. 2009).

<sup>34</sup> *Id.* at 904 (citing *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 345–46 (1936) (Brandeis, J., concurring)).

<sup>35</sup> H.R. REP. NO. 104-664, at 12 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2914.

This line of cases displays the implicit normative premises of rational basis analysis. *Moreno* and *Romer* invalidated laws for lacking a rational basis, but any statute's terms suggest a purpose that the statute rationally serves.<sup>36</sup> A law that bans the driving of blue Volkswagens on Tuesdays is rationally—indeed, perfectly—related to the purpose of preventing blue Volkswagens from being driven on Tuesdays. The real issue is whether some goals are impermissible or not worth pursuing, a question that cannot be answered on the basis of “rationality.” It depends on your background assumptions about what ends are sensible or legitimate to pursue.<sup>37</sup>

What has done the work here is a shift in the culture, so that treatment of gay people that seemed reasonable in 1996 no longer seems so in 2009. It also helps that there are specific stories, some of which were recounted earlier in this Article,<sup>38</sup> of real people who are hurt by DOMA. A policy that might seem sane when stated in the abstract looks pretty stupid when applied to actual people.

### III. THE PROVENANCE, EFFECT, AND CONSTITUTIONALITY OF DOMA

#### A. *The Origins of DOMA*

The story of how DOMA was enacted has been told before, but it is relevant here, so I will review it.<sup>39</sup>

Gay rights advocates were as surprised as everyone else when a 1993 Hawaii Supreme Court decision seemed to indicate that the state would shortly have to recognize same-sex marriages.<sup>40</sup> The court held that the statute discriminated on the basis of sex, and therefore was subject to

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<sup>36</sup> See Robert W. Bennett, “*Mere*” Rationality in Constitutional Law: *Judicial Review and Democratic Theory*, 67 CAL. L. REV. 1049, 1056–57 (1979); Robert Nagel, Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123, 124 (1972); Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 345–47 (1949).

<sup>37</sup> Bennett, *supra* note 34, at 1078.

<sup>38</sup> See *supra* note \_\_\_\_.

<sup>39</sup> See Andrew Koppelman, *Same Sex, Different States: When Same-Sex Marriages Cross State Lines* 7–10, 114–36 (2006) [hereinafter *Same Sex, Different States*].

<sup>40</sup> *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993).

strict scrutiny under the equal protection clause of the state constitution.<sup>41</sup> In order to justify its discrimination against same-sex couples, the court held, the state would have to show that the discrimination is necessary for a compelling state interest.<sup>42</sup> This is a nearly impossible burden to carry, so most observers expected that the state would lose at trial—as in fact it eventually did.<sup>43</sup>

DOMA was a reaction to the Hawaii case. It declared that no same-sex marriage would be recognized for federal purposes, such as filing joint tax returns, the award of social security survivor's benefits, or medical insurance for the families of federal employees.<sup>44</sup> The Act also indicated (here basically restating existing law, though with some important and unnoticed modifications) that states were not required to recognize marriages from other states when they had strong public policies to the contrary. States also began enacting their own mini-DOMAs, declaring that they did indeed have public policies against recognizing same-sex marriages valid in other states.<sup>45</sup>

As it turned out, Hawaii never recognized same-sex marriage. While *Baehr v. Miike* was still being appealed, a state constitutional amendment was adopted, giving the legislature the right to reserve marriage to opposite-sex couples.<sup>46</sup>

Other states, however, soon moved toward recognition of same-sex couples. In 1999, the Vermont Supreme Court declared that gay couples were entitled under the state constitution to the same legal rights as married heterosexual couples.<sup>47</sup> The state constitution's "common benefits" clause, which required that government benefits be shared equally by the entire community, required that gay people not be excluded from legal benefits and protections available to heterosexuals.<sup>48</sup> The

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<sup>41</sup> *Id.* at 67.

<sup>42</sup> *Id.*

<sup>43</sup> See *Baehr v. Miike*, Civ. No. 91-1394, 1996 WL 694235, at \*22 (Haw. Cir. Ct. Dec. 3, 1996) (holding that the state had not succeeded in showing a compelling interest at trial).

<sup>44</sup> See *infra* text accompanying notes \_\_\_-\_\_\_.

<sup>45</sup> See SAME SEX, DIFFERENT STATES, *supra* note 37, at 137–48 (describing specific provisions of these statutes)

<sup>46</sup> See HAW. CONST., art. 1, § 23 (adopted 1998).

<sup>47</sup> *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999).

<sup>48</sup> *Id.*

legislature soon responded by enacting a law creating the status of “civil unions,” with all the rights of marriage but not the name.<sup>49</sup>

Same-sex *marriage*—with the name included—arrived when the Massachusetts Supreme Court decided in November 2003 that the state constitution was violated by the denial of marriage licenses to gay couples. The court held that there was no rational basis for this discrimination and gave the state six months to comply with its order.<sup>50</sup> It later explained, in response to an inquiry from the legislature, that civil unions were inadequate because they “would have the effect of maintaining and fostering a stigma of exclusion that the Constitution prohibits.”<sup>51</sup>

Massachusetts started issuing the licenses on May 17, 2004.<sup>52</sup>

Other states have followed. Four states and the District of Columbia have same-sex marriage, and five others have “civil unions” or “domestic partnerships” with all the same rights and responsibilities. As this is written, nearly a quarter of the population of the United States lives in a jurisdiction that recognizes same-sex relationships as marriages or their functional equivalent.<sup>53</sup> By the end of 2008, approximately 32,000 same-

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<sup>49</sup> 15 VT. STAT. ANN. tit. 15, § 1204 (2002 & Supp. 2009) (granting parties to a civil union “all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to a spouse in a marriage”).

<sup>50</sup> *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 960–70 (Mass. 2003).

<sup>51</sup> *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565, 570 (Mass. 2004).

<sup>52</sup> *See Same-sex couples ready to make history in Massachusetts*, CNN, May 17, 2004, <http://www.cnn.com/2004/LAW/05/17/mass.gay.marriage/index.html>.

<sup>53</sup> Based on U.S. Census population figures for 2009: United States, 307,006,550; Massachusetts, 6,593,587; Connecticut, 3,518,288; Iowa, 3,007,856; New Hampshire, 1,324,575; Vermont, 621,760; District of Columbia, 599,657; California, 36,961,664; Nevada, 2,643,085; New Jersey, 8,707,739; Oregon, 3,825,657; Washington, 6,664,195. The first six of these call the relationships “marriage,” while the others use “domestic partnerships” or “civil unions.” *See* CAL. FAM. CODE §§ 297–299.6 (West 2004 & Supp. 2010) (domestic partnership); NEV. REV. STAT. §§ 122A.010–.510 (2009) (domestic partnership); N.H. REV. STAT. ANN. §§ 457-A:1–457-A:8 (LexisNexis Supp. 2009) (marriage); N.J. STAT. ANN. §§ 26:8A-1–26:8A-13 (West 2007 & Supp. 2009) (domestic partners); N.J. STAT. ANN. §§ 37:1-28–37:1-36 (West Supp. 2009) (civil union); OR. REV. STAT. ANN. § 106.990 n.6 (West Supp. 2009) (domestic partnership); WASH. REV. CODE ANN. § 26.60.10–.901 (West Supp. 2010) (domestic partnership); VT. STAT. ANN. tit. 15, §§ 1201–1207 (2002 & Supp. 2009) (marriage); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 481 (Conn. 2008) (marriage); *Varnum v. Brien*, 763 N.W.2d 862, 907 (Iowa 2009) (marriage); *Goodridge v. Mass. Dep’t of Pub. Health*, 798 N.E.2d 941, 1004–05 (Mass. 2003) (marriage). The eleven jurisdictions combined add up to 74,468,063, or 24.25% of the United States. U.S. CENSUS BUREAU, 2009 POPULATION ESTIMATES, [http://factfinder.census.gov/servlet/GCTTable?\\_bm=y&-](http://factfinder.census.gov/servlet/GCTTable?_bm=y&-)

sex couples had married in the United States, and 80,000 more were domestic partners, reciprocal beneficiaries, or united in civil unions.<sup>54</sup> That creates a situation that did not exist immediately after DOMA's enactment: a population of actual married couples, whose rights are adversely affected by the statute.

### B. *What DOMA Does*

DOMA has two provisions. The provision that has received the greatest amount of attention is the choice of law provision, which declares: No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.<sup>55</sup>

Congress was afraid that, once same-sex marriages were recognized in Hawaii, other states would be required to recognize them, too.

This provision displays all the sober good judgment of a Congressional initiative to ward off vampires. The fears that prompted Congress to act were based upon a massive misunderstanding of existing law. States have always had the power to decline to recognize marriages from other states, and they have been exercising that power for centuries.

The supporters of DOMA feared that recognition would be required by the Full Faith and Credit clause of the United States Constitution. That clause provides:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.<sup>56</sup>

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geo\_id=01000US&-\_box\_head\_nbr=GCT-T1&-ds\_name=PEP\_2009\_EST&-lang=en&-Format=US-40&-\_sse=on.

<sup>54</sup> GARY J. GATES, WILLIAMS INSTITUTE, SAME-SEX SPOUSES AND UNMARRIED PARTNERS IN THE AMERICAN COMMUNITY SURVEY, 2008, at 2 (2009), available at <http://www.law.ucla.edu/WilliamsInstitute/pdf/ACS2008FullReport.pdf>.

<sup>55</sup> Defense of Marriage Act, Pub. L. 104-199, 110 Stat. 2419 (1996); codified at 28 U.S.C. § 1738C (2006).

<sup>56</sup> U.S. CONST. art. IV, § 1.

Congress thought by invoking the last part of the provision, it could avoid the difficulty by prescribing that same-sex marriages need not have any effect.

Full faith and credit, however, only applies to judgments—decisions of courts after adversarial litigation. It has never been held to apply to marriage. This provision of DOMA does have some effect, but the actual effects are so capricious as to be unconstitutional. The statute may have no constitutional applications. I have developed this argument elsewhere and will not repeat it here.<sup>57</sup>

Although, when the bill was being debated, most of the press’s attention focused on the choice of law provision of DOMA—sometimes implying that it was the only substantive provision of the bill—the definitional provision was and is far more important. It is the focus of Tauro’s, Reinhardt’s, and Kozinski’s opinions. It provides:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or wife.<sup>58</sup>

Given the broad range of federal laws to which marital status is relevant, the consequences of DOMA are far-reaching. Same-sex spouses may not file joint tax returns.<sup>59</sup> Same-sex spouses’s debts incurred under divorce decrees or separation agreements would be dischargeable in bankruptcy.<sup>60</sup> Same-sex spouses of federal employees are excluded from the Federal Employees Health Benefits Program,<sup>61</sup> the Federal Employees Group Life Insurance program,<sup>62</sup> and the Federal Employees Compensation Act, which compensates the widow or widower of an employee killed in the performance of duty.<sup>63</sup> Same-sex spouses are the only surviving widows and widowers who would not have automatic ownership rights in a copyrighted work after the author’s death.<sup>64</sup> Same-

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<sup>57</sup> KOPPELMAN, *supra* note 37, at 114–36.

<sup>58</sup> Defense of Marriage Act, Pub. L. 104-199; 110 Stat. 2419 (1996); codified at 1 U.S.C. § 7 (2006).

<sup>59</sup> *See* 26 U.S.C. § 6013.

<sup>60</sup> *See* 11 U.S.C. § 523(a)(5).

<sup>61</sup> *See* 5 U.S.C. § 89.

<sup>62</sup> *See* 5 U.S.C. § 87.

<sup>63</sup> *See* 5 U.S.C. § 81.

<sup>64</sup> *See* 17 U.S.C. § 304(a)(C)(ii).

sex spouses lack federal protection against enforcement of due-on-sale clauses, which allow a lender to declare the entire balance due and payable if mortgaged property is transferred, and which could compel the loss of the family home if the holder of the mortgage died and the spouse inherited the property.<sup>65</sup> Same-sex spouses are denied the benefit of the Family and Medical Leave Act of 1993, which provides for up to twelve weeks per year of unpaid leave to employees for “care for a spouse.”<sup>66</sup> Same-sex spouses are similarly unable to receive benefits under the Social Security Act’s Old Age, Survivors, and Disability Insurance Program.<sup>67</sup> Same-sex spouses are denied preferential treatment under immigration law and, therefore, are the only legally-married spouses of American citizens who face deportation.<sup>68</sup>

### C. *The Constitutional Puzzle of the Definitional Provision*

Is the definitional provision of DOMA constitutional? Congress has the power to define the terms of the United States Code. The only way to challenge this provision is to claim that it is impermissibly discriminatory. All discrimination claims allege the abuse of a power that the actor concededly possesses. Congress could not define “marriage” to mean only a legal union between persons of the same race.<sup>69</sup> But the constitutional significance of discrimination against *gays* is uncertain. The federal courts have been unwilling to give heightened scrutiny to laws that target *gays*, and the Supreme Court has not directly confronted the question.<sup>70</sup> On one occasion, however, the Court did invalidate a law that

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<sup>65</sup> See 12 U.S.C. § 1701j-3(d).

<sup>66</sup> See 29 U.S.C. § 2612(a)(1)(C).

<sup>67</sup> See 42 U.S.C. § 402(b)–(c).

<sup>68</sup> See, e.g., Julia Preston, *Bill Proposes Immigration Rights for Gay Couples*, N.Y. TIMES, June 3, 2009, at A19; Editorial, *Reunite This Family*, BOSTON GLOBE, Aug. 27, 2007, at A8.

<sup>69</sup> See *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

<sup>70</sup> A number of federal courts have reasoned that, because the Supreme Court held that a law criminalizing homosexual sodomy does not violate the Due Process Clause; see *Bowers v. Hardwick*, 478 U.S. 186, 190–96 (1986); it would be anomalous to deem *gays* a protected class under the Equal Protection Clause. This is a non sequitur. It implicitly assumes that, if there is any provision of the Constitution that a law does not violate, the law cannot violate any other constitutional command either. See Andrew Koppelman, *Gaze in the Military: A Response to Professor Woodruff*, 64 UMKC L. REV. 179, 187 (1995) (citing cases). These cases are ripe for revisiting, since *Hardwick* has been overruled. See generally Arthur S. Leonard, *Exorcising the Ghosts of Bowers v. Hardwick: Uprooting Invalid Precedents*, 84 CHI.-KENT L. REV. 519 (2009).

singled out gays for disadvantage. That is *Romer*, on which Tauro and Reinhardt rely heavily.

DOMA's definitional provision and the amendment invalidated in *Romer* have telling similarities. Like the Colorado amendment, this provision "identifies persons by a single trait [membership in a same-sex marriage] and then denies them protection across the board."<sup>71</sup> Congress does not seem to have given any specific consideration to the broad range of federal policies to which spousal status is relevant, or to have made any effort to justify the numerous specific disabilities that the statute imposed. For the first time in American history, DOMA created a set of second-class marriages, valid under state law but void for all federal purposes. The exclusion of a class of valid state marriages from all federal recognition is "unprecedented in our jurisprudence."<sup>72</sup>

A defender of the statute could reply, however, that the disability it imposes, though broad, is proportionate to the situation that called it forth. DOMA's definitions of "marriage" and "spouse," the House committee report observed, "merely restate[] the current understanding of what those terms mean for purposes of federal law."<sup>73</sup> When Congress used the term "marriage" in the United States Code, it never imagined that this term would include same-sex couples.<sup>74</sup> Hawaii's adoption of same-sex marriage "would radically alter a basic premise upon which the presumption of adoption [for federal purposes] of state domestic relations law was based— namely, the essential fungibility of the concepts of 'marriage' from one state to another."<sup>75</sup> This provision of DOMA, then, merely reaffirms "what is already known, what is already in place."<sup>76</sup> It is hard to see how a law that simply declares the status quo can be unconstitutionally discriminatory.

The *Romer* analogy does not *necessarily* devastate DOMA because there are significant disanalogies as well. Unlike Amendment 2, this law does not "outrun and belie any legitimate justifications that may be

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<sup>71</sup> *Id.* at 633.

<sup>72</sup> *Id.*

<sup>73</sup> H.R. REP. NO. 104-664 (1996) at 29, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2934 [hereinafter House Report].

<sup>74</sup> *See also* *Hearing on Defense of Marriage Act in Sen. Comm. on the Judiciary*, 104th Cong., 2d Sess. 27 (1996) [hereinafter Senate Hearing] (statement of Lynn D. Wardle, Professor, Brigham Young University).

<sup>75</sup> *Id.* at 27 n.4.

<sup>76</sup> *Id.* at 18 (statement of Don Nickles, Senator, one of the original sponsors of DOMA).

claimed for it.”<sup>77</sup> Amendment 2’s license to discriminate against gays was so broadly worded that it seemed to the Court likely to mandate some unconstitutional applications.<sup>78</sup> That fact bespoke a bare desire to harm gays. However, there is no fundamental right to file a joint tax return or to receive social security benefits. The discrimination against same-sex couples may be unprecedented, a defender of DOMA could say, but so is the situation that called forth the law. If there is any positive value to the tradition of restricting marriage to one man and one woman, then this positive value provides a rational basis for DOMA. One cannot confidently infer, simply by considering the definitional provision on its face, that its purpose is a desire to harm the group. That *might* be the purpose, but an innocent explanation is available. The Court has often been prone to credit innocent explanations of statutes, even those that harm constitutionally-protected groups.<sup>79</sup> In order for the law to be invalidated, there has to be some reason to disbelieve that explanation.

The statute’s targeting of gays, and the uniqueness of the disability imposed, provide some of the needed evidence of invidious purpose: “[l]aws singling out a certain class of citizens for disfavored legal status . . . are rare,”<sup>80</sup> and “[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.”<sup>81</sup> But where is this “careful consideration” to lead? *Romer* relied— how heavily?— on the fact that no innocent explanation of the statute seemed even facially plausible.<sup>82</sup> The Court’s opinion does not indicate what should be done if the state is able to proffer such an innocent explanation.

I once wrote, on the basis of the reasoning just stated, that “an equal protection challenge to the definitional provision of DOMA, standing alone, would be a hard case.”<sup>83</sup> I recant, disavow what I wrote, and repent. It is not such a hard case any more. I think GLAD has a

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<sup>77</sup> *Romer*, 517 U.S. at 635.

<sup>78</sup> *Id.*

<sup>79</sup> See Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989).

<sup>80</sup> *Romer*, 517 U.S. at 633.

<sup>81</sup> *Id.* (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37–38 (1928)).

<sup>82</sup> *Id.* at 626.

<sup>83</sup> Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 Iowa L. Rev. 1, 9 (1997).

pretty good chance of winning its suit. The culture has shifted, in ways that I had not anticipated.

### III. THE CHANGING CULTURAL CONTEXT

Gay rights claims of all kinds became more politically potent in the 1980s, largely as a consequence of the willingness of unprecedented numbers of gay people to come out to their friends, families, and coworkers. In 1985, only a quarter of Americans reported having a gay friend, relative, or coworker.<sup>84</sup> By 2000, that proportion had tripled, to three-quarters of the population.<sup>85</sup> Only a fifth said they did not know anyone gay.<sup>86</sup> The number who reported having a gay friend or close acquaintance rose from twenty-two percent in 1985 to fifty-six percent by 2000.<sup>87</sup> Those reporting a gay or lesbian family member rose from nine percent in 1992 to twenty-three percent in 2000.<sup>88</sup> Gay people were increasingly visible, and their claims were the claims of familiar human beings, not distant abstractions.

Pressure for recognition of same-sex relationships increased during the 1980s, historian George Chauncey observes, because of the impact of two new developments in that period: the AIDS epidemic and the lesbian baby boom.<sup>89</sup> AIDS victims often had to rely on the assistance of partners who were regarded by the law as legal strangers to them.<sup>90</sup> “Because they were not ‘next of kin,’ hospitals could refuse them the right to visit their partners, did not need to consult with them or even inform them about treatment, and could not designate them to sign forms authorizing medical treatments even if they wanted to.”<sup>91</sup> A surviving partner sometimes lost his home when his partner’s biological family contested his will or claimed a jointly-owned home or property.<sup>92</sup> The

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<sup>84</sup> GEORGE CHAUNCEY, *WHY MARRIAGE? THE HISTORY SHAPING TODAY’S DEBATE OVER GAY EQUALITY* 48 (2004).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 96–111.

<sup>90</sup> *Id.* at 98.

<sup>91</sup> *Id.* at 97–98. *See also id.* at 87–136 (explaining how marriage became a goal of the gay movement).

<sup>92</sup> *Id.* at 100.

willingness of some courts to set aside wills of gay testators sometimes led partners to settle for a fraction of their inheritance.<sup>93</sup>

At the same time, increasing numbers of lesbian couples were having children, typically through the use of donor sperm.<sup>94</sup> They worried about what would happen if the biological mother died and a relative contested the right of the surviving partner to continue to have a relationship with the child.<sup>95</sup> Difficulties also arose when a couple separated after one had given birth to a child who both had raised.<sup>96</sup> The nonbiological mother had no legal relationship with the child and no right to visitation, and the biological mother had no claim for child support.<sup>97</sup>

As horror stories accumulated, “more couples hired lawyers to prepare wills, medical powers of attorney, and other documents to provide them with some security.”<sup>98</sup> But a complete set of documents approximating the protections of marriage could cost thousands of dollars, more than many couples could afford.<sup>99</sup> And, as noted earlier, some benefits of marriage could not be achieved by any contract between the parties.<sup>100</sup> So gay couples began to campaign for some recognition of their relationship under the rubric of “domestic partnerships.”<sup>101</sup> Avoiding the term “marriage” made sense, since the experience of unsuccessful litigation in the 1970s and 1980s had made it clear that same-sex marriage was not, even distantly, on the political horizon.<sup>102</sup>

Then came Hawaii— and I have already told you the rest of that story.<sup>103</sup> Pressure for recognition has only increased since then.<sup>104</sup>

Public opinion is making marriage recognition inevitable. According to Gallup, 57% of Americans oppose same-sex marriage.<sup>105</sup>

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<sup>93</sup> *Id.* at 100–01.

<sup>94</sup> *Id.* at 105.

<sup>95</sup> *Id.* at 110–11.

<sup>96</sup> *Id.* at 108–09.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 116.

<sup>99</sup> *Id.* at 113.

<sup>100</sup> *Id.* at 100–01.

<sup>101</sup> *Id.* at 116.

<sup>102</sup> *Id.* at 119.

<sup>103</sup> *See supra* Part II. A.

<sup>104</sup> *See* CHAUNCEY, *supra* note 84, at 123–36.

There is a sharp generational divide, however. Opponents of same-sex marriage have been spectacularly unsuccessful at passing their attitudes on to their children. Among those 18 to 34 years old, 58% support same-sex marriages.<sup>106</sup> Support for same-sex marriage drops to 42% among respondents 35 to 49 years old, to 41% of those 50 to 64 years old, and only 24% of those aged 65 and older.<sup>107</sup> The effect is even noticeable among white evangelical Christians, otherwise a very conservative lot: 32% of 18 to 29 year old white evangelical Christians support some legal recognition of same-sex couples, with an additional 26% supporting marriage rights.<sup>108</sup> In other words, 58% of white young evangelical Christians support at least some legal recognition of same-sex couples.<sup>109</sup> Of white evangelical Christians 30 and older, 37% support some legal recognition of same-sex couples, and an additional 9% support full same-sex marriage rights—a total of only 46% of older white evangelical Christians who support any legal recognition of same-sex couples.<sup>110</sup> Older evangelicals also care much more about the issue: according to a Pew Forum study, 61.8% of white evangelical Christians over age 60 said that “stopping gay marriage” was very important, while only 34% of white evangelical Christians 29 and younger said so.<sup>111</sup> The case against same-

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<sup>105</sup> Jeffrey M. Jones, *Majority of Americans Continue to Oppose Gay Marriage*, GALLUP, May 27, 2009, <http://www.gallup.com/poll/118378/Majority-Americans-Continue-Oppose-Gay-Marriage.aspx>.

<sup>106</sup> Paul Steinhauser, CNN Polls: *Generations Disagree on Same-Sex Marriage*, CNN, May 4, 2009, <http://www.cnn.com/2009/us/05/04/samesex.marriage.poll/index.html>.

<sup>107</sup> *Id.* Other polls reach similar results. See e.g., Arian Campo-Flores, *A Gay Marriage Surge*, NEWSWEEK, Dec. 5, 2008, available at <http://www.newsweek.com/2008/12/04/a-gay-marriage-surge.html> (last visited June 4, 2010); Adam Nagourney, *Signs G.O.P. Is Rethinking Stance on Gay Marriage*, N.Y. TIMES, Apr. 28, 2009, available at <http://www.nytimes.com/2009/04/29/us/politics/28web-nagourney.html?>; KARLYN BOWMAN & ADAM FOSTER, AM. ENTER. INST., ATTITUDES ABOUT HOMOSEXUALITY & GAY MARRIAGE 3 (2008), available at <http://www.aei.org/docLib/20080603-Homosexuality.pdf> (showing a 2002 poll where 48% of those 18 to 29 years old said homosexual sexual relations are always wrong, and 68% of those sixty years old and over said homosexual sexual relations are always wrong).

<sup>108</sup> GREENBERG QUINLAN ROSNER RESEARCH, YOUNG EVANGELICAL CHRISTIANS AND THE 2008 ELECTION: SURVEY RESULTS 4 (2008), available at [http://www.greenbergresearch.com/articles/2251/4697\\_ren08m1\\_votePublicRelease.pdf](http://www.greenbergresearch.com/articles/2251/4697_ren08m1_votePublicRelease.pdf).

<sup>109</sup> *See id.*

<sup>110</sup> *See Id.*

<sup>111</sup> Abortion vs. Homosexuality: The Evangelical Age Gap, <http://blog.beliefnet.com/stevenwaldman/2008/07/abortion-vs-homosexuality-the.html> (July 8, 2008, 15:17 EST) (also citing similar data from Barna Research).

sex marriage has become increasingly unintelligible.<sup>112</sup> That obviously will have implications when courts go looking for a rational basis for laws that discriminate against gay people.

#### IV. THE CONSTITUTION LIVES!

All this affects the shape of constitutional law. What constrains constitutional law is not a set of rules, but a set of rhetorical norms, themselves unstable and shifting over time, that determine which moves are legitimate. Richard Posner has observed that ““thinking like a lawyer”” really means “an awareness of approximately how plastic law is at the frontiers—neither infinitely plastic . . . nor rigid and predetermined, as many laypersons think.”<sup>113</sup>

Jack Balkin emphasizes the way in which the boundaries of legitimate constitutional argument shift as culture does, so that an argument regarded as crackpot and “off the wall” at one time becomes accepted doctrine later on.<sup>114</sup> Balkin also observes that, because constitutional law is in some respects hostage to cultural shifts, social movements, such as the Civil Rights movement or, more recently, the movement for gun rights, can change the shape of constitutional law.

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<sup>112</sup> The mutual unintelligibility is evident when Monte Neil Stewart tries to make the case against same-sex marriage in *Marriage Facts*, 31 HARV. J. L. & PUB. POL’Y 313 (2008). Stewart enumerates the social goods produced by heterosexual marriage, such as its capacity to produce optimal environments for child-rearing. *Id.* at 321–22. He then alleges that these are goods “produced uniquely by the man-woman *meaning*, and that must, therefore, disappear when that meaning is deinstitutionalized.” *Id.* at 322; for similarly conclusory claims, see *id.* at 323, 351, 366. The mechanism by which this catastrophe will occur is evidently so obvious to Stewart that he feels no obligation to specify it.

<sup>113</sup> RICHARD POSNER, *THE PROBLEMS OF JURISPRUDENCE* 100 (1990).

<sup>114</sup> Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 309 (2007) [hereinafter *Abortion and Original Meaning*]; Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 577, 584, 588, 605 (2009) [hereinafter *Framework Originalism*]; Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 514 (2007) [hereinafter *Constitutional Redemption*]. The bald fact of endorsement by powerful political actors can shift the boundaries of the crackpot, as when constitutional interpretations which “would have been regarded by most lawyers and judges as off the wall” became respectable when the Supreme Court endorsed them in *Bush v. Gore*. Jack M. Balkin, *Idolatry and Faith: The Jurisprudence of Sanford Levinson*, 38 TULSA L. REV. 553, 567–68 (2003). Any suspicion that Balkin himself regards legal argument as infinitely plastic is dispelled by his appalled reaction to that decision. See generally Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407 (2001).

In practice the meaning of constitutional principles shifts over time. Some constitutional terms, such as “equal protection,” are intentionally abstract, leaving the specification to be worked out by later generations. Mobilized social movements, invoking their own interpretations of those texts, play a legitimate role in determining which specification will ultimately prevail.<sup>115</sup> The constitutional protection of sex equality, for example, is the consequence of the feminist movement of the 1970s, which changed the mind of the public in a way that eventually was reflected in the interpretation of the Constitution.<sup>116</sup> The triumph of gun rights in *District of Columbia v. Heller*<sup>117</sup> is another example.<sup>118</sup>

The idea that social movements shape constitutional law has been particularly distressing to many originalists, who are committed to the idea that the Constitution’s meaning does not shift over time.<sup>119</sup> John McGinnis and Michael Rappaport write, “it is a little difficult to see what is left of a recognizable originalism, not to mention the amendment process, if social movements have such substantial discretion to apply constitutional provisions as they see fit.”<sup>120</sup> Steven Calabresi and Livia Fine claim that Balkin’s originalism “substitutes the rule of engaged social movements for the rule of law.”<sup>121</sup>

These charges draw blood only if there is a feasible alternative to the world contemplated by Balkin—an originalism that purges adjudication of discretion and the vagaries of political change.

Balkin’s argument is both descriptive and normative. The descriptive part is an account of how constitutional interpretation is done in the United States—how constitutional interpreters in this culture make their way from the spectacularly vague commands of “equal protection” and “due process” to determinate legal outcomes. The normative part pronounces this process good. Like so many liberal legal theorists in the

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<sup>115</sup> *Abortion and Original Meaning*, *supra* note 116, at 305, 308–10; *Constitutional Redemption*, *supra* note 116, at 456–57, 504–11.

<sup>116</sup> *Framework Originalism*, *supra* note 74, at 574, 582.

<sup>117</sup> *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008).

<sup>118</sup> *See Framework Originalism*, *supra* note 74, at 584.

<sup>119</sup> This is not true of all originalists. *See, e.g.*, Lawrence B. Solum, *Semantic Originalism*, Ill. Pub. Law Research Paper No. 07-24 (Nov. 22, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1120244](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244).

<sup>120</sup> John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 381 (2007).

<sup>121</sup> Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin’s Originalism*, 103 NW. U. L. REV. 663, 687 (2009).

age of the Rehnquist and Roberts Courts, Balkin is a stodgy defender of the status quo.

Originalists are unhappy with the way that constitutional law actually operates. They propose to scrap it, and replace it with a new and untested theory. They are the real radicals. Their unhappiness with the regime as it actually operates, and has operated throughout American history, gives rise to a troubling and underexamined question: Why do originalists hate America?<sup>122</sup>

## V. THE SEX DISCRIMINATION ARGUMENT LIVES, TOO

As our culture evolves, it may even become possible for courts to notice the constitutional difficulty with DOMA that is hiding in plain sight: the fact it makes one's rights under federal law turn on one's gender.

This is exactly the situation that the Court faced in the earliest sex discrimination cases. *Frontiero v. Richardson* invalidated a law that automatically allowed male members of the Air Force to claim their wives as a dependent and therefore receive housing and medical benefits, but required female members to prove that their husbands depended on them for more than half their support.<sup>123</sup> If Sharron Frontiero had been male, she would have gotten the benefits.<sup>124</sup> *Weinberger v. Wiesenfeld* struck down a provision of the Social Security Act that allowed a widowed mother, but not a widowed father, to receive survivor's benefits based on the earnings of the deceased spouse.<sup>125</sup> If Stephen Wiesenfeld had been female, he would have gotten the benefits he was denied.<sup>126</sup>

The GLAD lawsuit and the two Ninth Circuit cases present exactly the same situation.<sup>127</sup> In each case, had the spouse been of a different sex, the benefits would automatically have been granted. For example, Congressman Studds's widower, Dean Hara, is disqualified for a federal

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<sup>122</sup> On the consternation that Balkin's constitutional theory has produced, see Andrew Koppelman, *Why Jack Balkin is Disgusting*, CONST. COMMENT. (forthcoming 2010).

<sup>123</sup> *Frontiero v. Richardson*, 411 U.S. 677, 680 (1973).

<sup>124</sup> *Id.* at 678–79.

<sup>125</sup> *Weinberger v. Wiesenfeld*, 420 U.S. 636, 653 (1975).

<sup>126</sup> *Id.* at 640–41.

<sup>127</sup> See *Gill v. OPM; In re Golinski*, 587 F.3d 901 (9th Cir. 2009); *In re Levenson*, 587 F.3d 925 (9th Cir. 2009).

pension because he is a man. If he were a woman, the problem would disappear.

All discrimination against gays is a kind of sex discrimination. I have stated and defended this argument many times before, and will not repeat it all here.<sup>128</sup> I will, however, respond to one criticism of my argument recently made by Martha Nussbaum.

Nussbaum argues that it is true that “wherever a change of a male to a female or a female to a male makes a decisive legal difference, that law involves a classification based upon sex, and such classifications deserve heightened scrutiny.”<sup>129</sup> But she objects that this argument “seems legalistic in the pejorative sense,” because “it doesn’t quite get at what is really going on;” it “doesn’t reach deeply enough to get at the real source of the discrimination.”<sup>130</sup> Antigay discrimination is about sexual orientation, not about sex.

My argument does not, however, purport to be a complete explanation of where the discrimination is coming from. Rather, it claims that sex discrimination is one of the many wrongs present in antigay discrimination.<sup>131</sup> Nussbaum’s objection mistakes a complaint for an explanation. I am not attempting to explain antigay discrimination. I am complaining that certain laws violate a specific constitutional prohibition.

Another way of reading Nussbaum’s objection is that the sex discrimination identifies a wrong, but not the most morally-salient wrong. It is like saying that Al Capone, the notorious 1920s bootlegger who ordered the St. Valentine’s Day Massacre, was guilty of tax evasion. This is a strange way to characterize the totality of his misconduct. On the other hand, if we are doing a legal rather than a moral analysis, the tax

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<sup>128</sup> See generally ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 146–76 (1996) [hereinafter ANTIDISCRIMINATION LAW]; Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994) [hereinafter *Discrimination Against Lesbians and Gay Men*]; Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988).

<sup>129</sup> MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW 115 (2010).

<sup>130</sup> *Id.*

<sup>131</sup> As Nussbaum acknowledges, *id.* at 125 n.22, I concede that the argument ignores some of the central wrongs of antigay discrimination in *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 U.C.L.A. L. Rev. 519 (2001). But I argue that this is true of every one of the constitutional arguments. Because antigay laws have so many constitutional defects, all one can do is enumerate these one at a time. See *id.* at 519-20, 538.

evasion charge is accurate: whatever else he is guilty of, he certainly is guilty of *that*. (Tax evasion is what Capone was eventually convicted of.) Similarly with the sex discrimination argument: whatever the other constitutional difficulties with DOMA, it certainly discriminates on the basis of sex.

I would also argue that my complaint is not “legalistic in the pejorative sense,” because there are deep links—not fully explanatory links, but nonetheless deep enough that this is not just a lawyer’s trick - between sexism and heterosexism.

When I developed the sex discrimination argument in a 1994 article, I emphasized that the argument does not depend on *any* claim about the connection between heterosexism and sexism.<sup>132</sup> I went on to develop such a claim, however, because I recognized that judges might wonder whether the protection of gays is consistent with the purposes of sex discrimination doctrine.<sup>133</sup> The answer depends on what one thinks sex discrimination law is for. If the purpose is to prevent the imposition of gender classifications on people’s life choices, then the argument is over; this is just what the formal argument shows that antigay discrimination does.<sup>134</sup> If, however, one thinks that sex discrimination law exists in order to end the subordination of women, then one would have to demonstrate some link between antigay discrimination and the subordination of women. For this reason, I argued at some length that sexism is an important wellspring of antigay animus, and that the homosexuality taboo functions to strengthen gender hierarchy.<sup>135</sup>

The point is not an esoteric one. Most Americans learn no later than high school that one of the nastier sanctions that one will suffer if one deviates from the behavior traditionally deemed appropriate for one’s sex is the imputation of homosexuality. The two stigmas—sex-inappropriateness and homosexuality—are virtually interchangeable, and each is readily used as a metaphor for the other.

To the extent I am relying on an explanation of homophobia, Nussbaum makes the mechanism sound too conscious when she describes it as “a way of maintaining binary divisions of the sexes and the

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<sup>132</sup> *Discrimination Against Lesbians and Gay Men*, *supra* note 133, at 237.

<sup>133</sup> *See id.* at 237–57.

<sup>134</sup> *See Mary Anne Case, Unpacking Package Deals: Separate Spheres Are Not the Answer*, 75 DENV. U. L. REV. 1305, 1305–06 (1998).

<sup>135</sup> *Discrimination Against Lesbians and Gay Men*, *supra* note 133, at 234–57.

patriarchal control of men over women.”<sup>136</sup> Rather, I am offering a story about maintenance of gender identity—one that is not all that different from the one about disgust toward markers of the mortal body that Nussbaum tells.<sup>137</sup> She argues, *against* the sex discrimination argument, that prejudice against gay men draws centrally upon “profound anxieties about bodily penetrability and vulnerability (anxieties that are felt, above all, by men).”<sup>138</sup> Is that not about maintaining gender hierarchy? Does this anxiety not presuppose that there are certain people whose penetrability, construed as subordination, is perfectly acceptable, and that it is urgently important not to be one of those people?

The deeper problem, as a matter of law, with jumping straight to the claim that sexual orientation is a suspect classification, as Nussbaum wishes to do, is that most of the laws that hurt gay people do not classify on the basis of sexual orientation. The law in *Romer* did, but it was an outlier. Even the law in *Lawrence v. Texas*, which specifically criminalized homosexual sex, did not require any state official formally to treat gay people differently from heterosexuals.<sup>139</sup> It just demanded to know the gender of the participants in the sex act. Similarly with laws that restrict marriage to heterosexual couples.<sup>140</sup>

The formalism here is not mine. It is intrinsic to the Supreme Court’s Fourteenth Amendment doctrine, which was well-suited to deal with Jim Crow (which was full of formal race discriminations; the law needed to know what race you were in order to decide whether you could drink out of that fountain), but is less suited to deal with any law that subordinates groups but does not formally classify by sex. Disparate impact does not count unless it is motivated by a malicious desire to hurt the affected group (which is very hard to prove).<sup>141</sup> Given the law’s focus on classification, which is not going away any time soon, we are probably

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<sup>136</sup> NUSSBAUM, *supra* note 86, at 115.

<sup>137</sup> See *Discrimination Against Lesbians and Gay Men*, *supra* note 133, at 241–42 (citing the work of psychologists Jessica Benjamin, Nancy Chodorow, and Dorothy Dinnerstein).

<sup>138</sup> NUSSBAUM, *supra* note 134, at 116.

<sup>139</sup> See *Lawrence v. Texas*, 539 U.S. 558, 563 (2003).

<sup>140</sup> *Id.* at 566.

<sup>141</sup> See *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 (1979) (holding that discriminatory impact violates the Constitution only when it is the result of a decision made “‘because of,’ not merely ‘in spite of,’” the impact it has on an affected group); see also ANTIDISCRIMINATION LAW, *supra* note 133, at 103–11 (proposing modification of the *Feeney* test).

going to need the sex discrimination argument even if courts accept that sexual orientation is a suspect classification.

Courts have summarily rejected the sex discrimination argument, frequently on the basis of the very sex stereotypes that sex discrimination law aims to eradicate.<sup>142</sup> Why does the logic of the sex discrimination argument not prevail? To say it once more, the bounds of legitimate legal argument are not set by rules, but by custom and usage. The sex discrimination argument proves too much: if it is accepted, the acceptance of same-sex marriage automatically follows, and courts resisted that conclusion as politically impossible. Now that same-sex marriage is thinkable, it may be possible to address the argument on its merits.

## VI. CONCLUSION

The cultural shift I have been discussing also affects interest analysis in choice of law. Choice of law today is dominated by what is called “interest analysis,” which tries to balance the legitimate interests—both territorial and personal—of different states in having their own laws apply.<sup>143</sup> In order to apply it in a case where it is not clear which state’s marriage laws apply, one must determine what the legitimate state interests are.

In my own analysis of choice of law and same-sex marriage, I have had to stipulate for the sake of the argument what I do not really believe, that states have a legitimate interest in denying same-sex couples the right to marry.<sup>144</sup> But those interests are likely to shrink. As Tobias Wolff has pointed out, after *Lawrence v. Texas*,<sup>145</sup> any purported interest in excluding gay couples from a state’s borders is illegitimate.<sup>146</sup> *Lawrence* and *Romer* together indicate that expression of moral disapproval, without more, is not a sufficient reason for denying equal treatment to same-sex

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<sup>142</sup> See Deborah A. Widiss, Elizabeth L. Rosenblatt & Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461, 462 (2007).

<sup>143</sup> SAME SEX, DIFFERENT STATES, *supra* note 37, at 15–17.

<sup>144</sup> *Id.* at xii, 155 n.2.

<sup>145</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>146</sup> Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. PA. L. REV. 2215, 2228 (2005).

couples.<sup>147</sup> *Saenz v. Roe* indicates that a state may not structure its legal entitlements for the specific purpose of dissuading people from migrating to its borders.<sup>148</sup>

This leaves some, but not a great many, legitimate interests that states can invoke. For all the reasons already canvassed, these are likely to make less and less sense to judges. The time is coming when I will no longer have to stick to my stipulation in order to be able to address the choice of law issues presented by same-sex marriage.

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<sup>147</sup> *Id.* at 2232–33.

<sup>148</sup> *Saenz v. Roe*, 526 U.S. 489, 510–11 (1999); Wolff, *supra* note 149, at 2236–37.