

DOMA Damages Same-Sex Families and Their Children

BY MARY L. BONAUTO



JUSTICE GINSBURG FAMOUSLY NOTED IN 1996, THE HISTORY OF our constitution is the history of extending constitutional protections to those who were once ignored or excluded from American society. *United States v. Virginia*, 518 U.S. 515 (1996). That journey to citizenship is well under way for gay, lesbian, bisexual, and transgender Americans as well. The first efforts to secure legal respect for committed relationships, inspired by the U.S. Supreme Court's crucial 1967 decision in *Loving v. Virginia*, 388 U.S. 1 (1967), striking down state "anti-miscegenation" laws, were summarily dismissed, a mark of gay people's outsider status at that time. See, e.g., *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971).

Over the years, however, the larger community has come to understand that gay people are part of the fabric of American life, a perception confirmed by a historical review of polling information. See Karlyn Bowman & Adam Foster, *Attitudes About Homosexuality & Gay Marriage*, American Enterprise Institute for Public Policy Research (June 3, 2008), available at <http://www.aei.org/docLib/20080603-Homosexuality.pdf>. In addition to issues such as hate crime laws, nondiscrimination in employment, housing and public accommodations, and parenting issues, same-sex couples also are seeking to take on the legal obligations and commitments of marriage. Inaugurated by the Hawaii marriage litigation in the early 1990s, state courts and legislatures have been examining anew the question of what legal rights and protections should be extended to committed same-sex couples.

Currently, same-sex couples have dramatically different legal protections depending on their state of residence. Twelve states and Washington, D.C., have some sort of comprehensive statewide recognition of the relationships of same-sex couples. Beginning with Massachusetts in 2004, five states now allow same-sex couples to marry: Connecticut,

Iowa, Massachusetts, New Hampshire, and Vermont. Maine's and California's marriage laws were reversed in voter referenda. New York, New Jersey, and the District of Columbia are moving forward with attempts to allow same-sex couples to join in marriage.

Another six jurisdictions—California, the District of Columbia, New Jersey, Nevada, Oregon, and Washington—provide comprehensive protections for same-sex couples through some alternative status, such as a civil union, comprehensive domestic partnership, or reciprocal beneficiary. See, e.g., Relationship Recognition Map, Gay & Lesbian Advocates & Defenders, <http://www.glad.org/uploads/images/news/relationship-recognition.png> (see also page 12).

In addition, one state, New York, and the District of Columbia recognize same-sex marriages performed under the laws of other jurisdictions, although neither presently issues marriage licenses to same-sex couples. See D.C. Code § 46-405.01; *Martinez v. County of Monroe*, 50 A.D.3d 189 (N.Y. App. Div. 2008). Still other states—Colorado, Hawaii, Maryland, and Wisconsin—offer piecemeal protections. Rhode Island offers some authority for recognizing mar-

riages from other jurisdictions, as do some Native American tribes, some of which also permit marriages between two people of the same sex.

While the numbers continue to grow, at least 35,000 same-sex couples have married in the United States. Same-Sex Couples in the 2008 American Community Survey, the Williams Institute (Sept. 2009), at 2, available at http://www.law.ucla.edu/WilliamsInstitute/pdf/ACS2008_WEB-POST_FINAL.pdf.

A highly unusual federal law

In 1996, eight years before same-sex couples began marrying anywhere in the United States, Congress passed, and President Clinton signed, the Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996). The law was enacted as state courts in Hawaii were considering whether the state had sufficient justification for excluding same-sex couples from joining in marriage under the Hawaii State Constitution. *Baehr v. Lewin*, 852 P.2d 44, 59–67 (Haw. 1993), on remand *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

The DOMA is an extraordinary law that does two things. First, it invites states to disrespect the expected marriages of same-sex couples—a subject previously governed by state comity law—and purports to allow states to refuse to recognize valid marriages of same-sex couples. Secondly, it excludes married couples of the same sex from all federal laws and programs in which marital status is a factor for eligibility, even though the federal government has long deferred to a state’s determination that a couple is married.

Congress stated two purposes in enacting DOMA: “defend[ing] the institution of traditional heterosexual marriage,” and “protect[ing] the right of States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any constitutional implications...” H.R. Rep. No. 104-199 (1996), reprinted at 1996 U.S.C.C.A.N. at 2905, 2906.

To those ends, the official House Report on DOMA states that Congress intended to advance four governmental interests in passing the legislation: “(1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic governance; and (4) preserving scarce government resources.” H.R. Rep. No. 104-664, reprinted at 1996 U.S.C.C.A.N. at 2916–2922.

The congressional floor debates on DOMA did not show our elected representatives at their best. The remarks of former Congressman Henry Hyde, then-chairman of the House Judiciary Committee, are as blunt as they are typical: “Most people do not approve of homosexual conduct...and



they express their disapprobation through the law.... It is...the only way possible to express this disapprobation.” 142 Cong. Rec. H7501 (daily ed. July 12, 1996).

Throughout the floor debate, members of Congress repeatedly described their own disapproval of homosexuality, calling it “immoral,” “depraved,” “unnatural,” “based on perversion” and “an attack upon God’s principles.” 142 Cong. Rec. H7444 (daily ed. July 11, 1996) (statement of Rep. Coburn); 142 Cong. Rec. H7486 (daily ed. July 12, 1996) (statement of Rep. Buyer); *id.* at H7494 (statement of Rep. Smith). Even the official House Report declared that DOMA was meant to reflect Congress’s “moral disapproval of homosexuality.” 1996 U.S.C.C.A.N. at 2920. The unusual nature of the legislation, along with the open dis-

play of animosity toward gay people, strongly suggests that Congress was enacting DOMA “because of” and not merely ‘in spite of’ its adverse effects upon a particular group.” *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279, n. 24 (1979).

DOMA section 2

To accomplish these various ends, section 2 of DOMA, denominated “Powers Reserved to the States,” adds section 1738C to title 28 of the United States Code as follows:

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.

28 U.S.C. § 1738C.

Legislating under the Full Faith and Credit Clause, U.S. Const., art. IV, § 1, Congress authorized states to prescribe the legal effect of marriage certificates issued in one state in other states so that “no State shall be required to accord full faith and credit to a marriage license issued by another State if it relates to a relationship between persons of the same-sex.” 1996 U.S.C.C.A.N. at 2906.

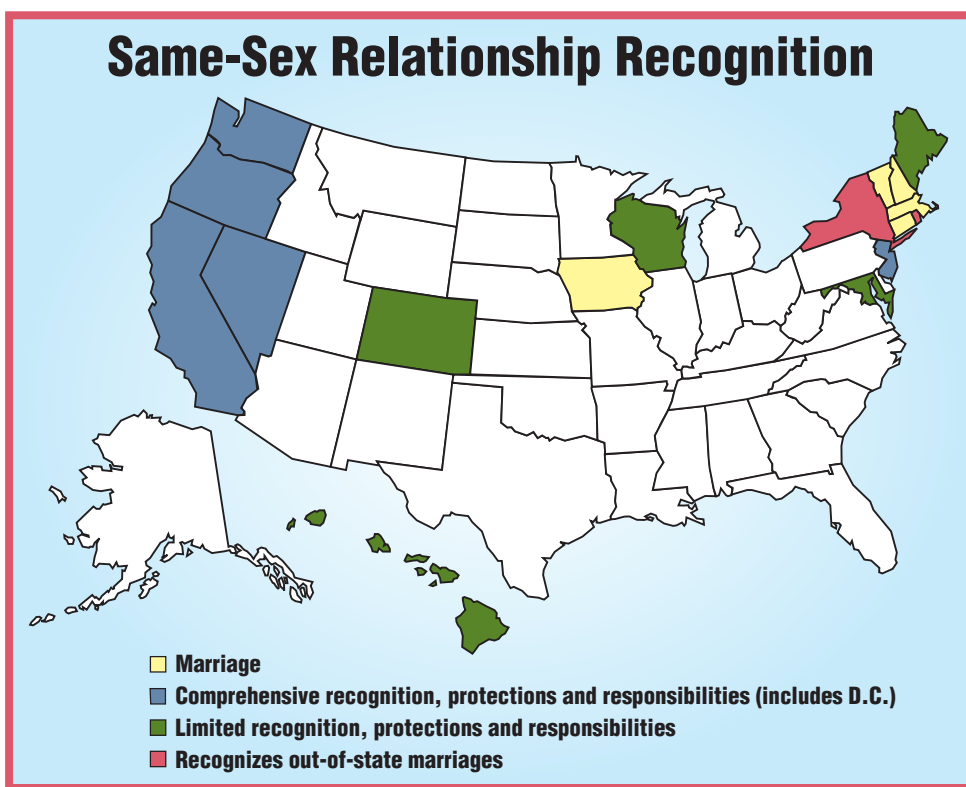
This is an extraordinary provision, even setting aside the debate about whether section 2 is proper legislation under art. IV, sec. 1. See, e.g., 1996 U.S.C.C.A.N. at 2929–2934 (majority report); 2940–2946 (dissenting report). For starters, Congress could not have been clearer in singling out, and in inviting states to single out, the relationships of same-sex couples for different treatment. Bob Barr, the author of DOMA, now supports the law’s repeal, acknowledging recently in an opinion piece that “DOMA was indeed designed to thwart the then-nascent move in a few state courts and legislatures to afford partial or full recognition to same-sex couples.” Bob Barr, “No Defending the Defense of Marriage Act,” *Los Angeles Times*, January 5, 2009, available at <http://www.latimes.com/news/opinion/commentary/la-oe-barr5-2009jan05,0,1855836.story>.

States accepted the federal invitation to thwart recognition, including Hawaii, which amended its constitution in 1998. As of this writing, 36 states have statutes (adopted legislatively or by referendum) limiting marriage and/or denying protections to same-sex couples, and 29 states have

enacted such constitutional amendments. State Anti-Gay Constitutional Amendments & Laws, Freedom to Marry (June 5, 2009), http://www.freedomtomarry.org/maps/anti-marriage_amendments-laws.pdf.

State comity and marriage recognition law

Section 2 of DOMA also is surprising in light of the fact that states have long possessed the power to decide which marriages they would respect from elsewhere, a power that both proponents and opponents of DOMA agree existed before and after DOMA. Patrick J. Borchers, “*Baker v. General Motors*: Implications for Interjurisdictional Recognition of Non-Traditional Marriages,” 32 *Creighton L. Rev.* 147, 180 (1998) (favoring the law); Mark Strasser, “Some Observations About DOMA, Marriages, Civil Unions and Domestic Partnerships,” 30 *Cap. U. L. Rev.* 363, 370–371 (2002) (opposing the law).



As the House report noted, most states have long observed the rule of *lex loci celebrationis*, that is, the common law rule of recognizing all marriages as valid where celebrated. 1996 U.S.C.C.A.N. at 2912 (majority report); 2941 (dissenting opinions). Out-of-state marriages have essentially not been recognized only where they are deemed “odious” as violative of the “laws of nature” or where the state legislature has acted in derogation of the common law to positively address the validity of certain marriages. See, e.g., *id.* at 2942 (dissenting opinions); Restatement (Second) of Conflicts of Law § 283(2) (1971). As a practical matter, states did not need congressional authorization to enact public policies relating to marriage.

This federal invitation to establish a blanket rule of non-recognition for marriages of same-sex couples is singular in American history. As the historical record shows, even states at one time hostile to interracial marriage sometimes recognized such a marriage for particular purposes. For example, in *Miller v. Lucks*, 36 So. 2d 140 (Miss. 1948), a marriage was validated at least for the purpose of allowing the surviving spouse to inherit property. While no state authorizes marriages of multiple spouses, courts have allowed the distribution of an estate between two surviving wives of a polygamous marriage. *In re Dalip Singh Bir's Estate*, 83 Cal. App. 2d 256, 188 P.2d 499 (1948). In addition, there is wide support for the proposition that a court can consider whether a marriage is valid for a particular purpose, or incident, of marriage—something seemingly foreclosed by the blanket nonrecognition rules adopted in many states. See Russell J. Weintraub, *Commentary on the Conflict of Laws*, § 5.1C, pp. 312–13 (5th ed. 2006); Herma Hill Kay, “Same-Sex Divorce in the Conflict of Laws,” 15 *Kings Coll. L.J.* 63, 71 (2004).

Full faith and credit

While Congress justified DOMA section 2, based on fears of constitutional compulsion under the Full Faith and Credit Clause of the Constitution of the United States, art. IV, § 1 (as well as the Full Faith and Credit Act, 28 U.S.C. § 1738), no state has yet been required to recognize the validity of a marriage celebrated in another jurisdiction, whether of a same-sex or different-sex couple. The Supreme Court’s interpretation of both the clause and the act require a state to afford the “exacting” obligations of full faith and credit only to a final judgment from a judicial proceeding issued by a court of competent jurisdiction. *Baker v. General Motors Corp.*, 522 U.S. 222, 233 (1998). The Full Faith and Credit Clause “does not compel ‘a State to substitute the statutes of other States for its own statutes dealing with a subject matter concerning which it is competent to legislate.’” *Franchise Tax Bd. of California v. Hyatt*, 538 U.S. 488, 488–89 (2003).

Apart from the clause’s command to enforce judgments, the Full Faith and Credit Clause requires states to have sufficient contacts and state interests when applying its law, rather than the law of another state. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985). This has been applied in divorce actions to mean that a divorce court must have personal jurisdiction over at least one party to grant the divorce, and over both parties to provide support or equitably divide property. Cf. *Sosna v. Iowa*, 419 U.S. 393, 407–408 (1975); *Williams v. State of North Carolina*, 325 U.S. 226, 229 (1945).

Legal challenges to section 2 of DOMA have been few, and none have succeeded, at least in part because it is the state’s nonrecognition law that presents the impediment to recognition, not section 2 itself. See, e.g., *Wilson v. Ake*, 354

F. Supp. 2d 1298 (M.D. Fla. 2005); see also, *Bishop et al. v. United States of America*, No. 04-CV-TCK-TLW (N. Dist. Okla. filed Aug. 10, 2009) (challenging on federal constitutional grounds both the denial of marriage to same-sex couples and the state’s refusal to recognize marriages valid where solemnized).

Practitioners in each state must consult their own laws to determine what protections are available to same-sex couples. Some states provide protections notwithstanding state antimarriage laws, such as Oregon’s and Washington’s domestic partner laws. In other states, the existence of a state law or amendment has been held to preclude the most modest protections for same-sex couples. In Nebraska, a bill that would have given same-sex couples the right to make burial arrangements for their partners was never submitted for a full vote by the legislature when the attorney general opined that the bill was in conflict with the state constitutional amendment. The amendment was upheld in a subsequent constitutional equal protection challenge. *Citizens for Equal Protecting v. Bruning*, 455 F.3d 859 (8th Cir. 2006).

Codified at 1 U.S.C. § 7, DOMA, section 3 places a “federal” definition of “marriage” and “spouse” in title 1 of the United States Code. At that time, there were only six other “Rules of Construction”—defining “[w]ords denoting number, gender, and so forth”; “county”; “vessel”; “vehicle”; “company”; and “products of American Fisheries.” 1 U.S.C., ch. 1. Section 3 of DOMA, denominated “Definition of ‘marriage’ and ‘spouse,’” provides as follows:

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

1 U.S.C. § 7.

DOMA’s intent

DOMA’s clear purpose was to ensure that if states began licensing marriages of same-sex couples in the future, those married same-sex couples would be denied the full protections, benefits, and responsibilities of marriage. As the controlling House report explained, “to the extent that federal law has simply accepted state law determinations of who is married, a redefinition of marriage in Hawaii to include homosexual couples could make such couples eligible for a whole range of federal rights and benefits.” 1996 U.S.C.C.A.N. at 2914. The House report acknowledged the federalist imperatives constraining its powers—“[t]he determination of who may marry in the United States is uniquely a function of state law,” 1996 U.S.C.C.A.N. at 2907—but enacted DOMA because it was not “supportive of (or even indifferent to) the notion of same-sex ‘marriage.’” *Id.* at 2916.

DOMA section 3's amendment of federal laws

Reports issued after DOMA's enactment reveal 1,138 federal laws in which marital status is a factor. U.S. Gov. Accountability Office, GAO-04-353R Defense of Marriage Act (2004), available at <http://www.gao.gov/new.items/d04353r.pdf> (updating U.S. Gen. Accounting Office, GAO/OGC-97-16 Defense of Marriage Act (1997), available at <http://www.gao.gov/archive/1997/og97016.pdf>).

DOMA imposes a variety of consequences on same-sex couples that are married. The federal programs to which same-sex married couples are denied represent some of the critical legal safety nets that couples count on when they marry, as they plan their lives and futures together, as they raise children and deal with difficult times, and for which they contribute their American tax dollars. These include:

- Social Security spousal protections that ground a family's economic security in old age and upon disability and death;
- Protections for one spouse's essential monetary resources and ability to stay in the family home when a spouse needs Medicaid for nursing home care;
- Inclusion in a family health insurance policy, and, if receiving that family coverage, to be free of income tax on its value;
- Use of "Married Filing Jointly" status for federal income tax purposes to save the family money;
- Family medical leave from a job to care for a seriously ill spouse;
- Disability, dependency, or death benefits for spouses of veterans and public safety officers;
- Employment benefits for federal employees, including access to family health insurance benefits, as well as retirement and death benefits for surviving spouses;
- Estate/death protections that allow a spouse to bequeath assets to a spouse—including the family home—without incurring any taxes; and
- The ability of a citizen to obtain a visa for a non-citizen spouse and sponsor that spouse for purposes of citizenship.

Of course, with marital protections also come responsibilities. Financially, some two-earner same-sex married couples would pay more in taxes if their marriages were respected. In means-tested programs, such as Medicaid's long-term care for nursing home coverage, the government could account for both spouses' resources, incomes, and assets in determining when a person is qualified for government payments for care. Even eligibility for federal student financial aid requires an assessment of a married student's and his/her spouse's incomes because the married couple is rightly consolidated as a legal economic unit.

For these types of reasons, DOMA section 3 reduces revenues available to the United States Government. A

Congressional Budget Office (CBO) report in 2004 opined that recognition of marriages of same-sex couples by all fifty states and the federal government would increase revenue by \$1 billion a year. Letter and report from Douglas Holtz-Eakin, director, Congressional Budget Office, to Steve Chabot, chairman, Subcommittee on the Constitution, Committee on the Judiciary (June 21, 2004) available at <http://www.cbo.gov/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf>.

Equal protection and federalism issues

Given that Congress has made "marriage" the gateway for particular benefits or obligations under federal law, DOMA section 3 provides a "gay exception" to those rules, providing that state-licensed marriages of same-sex couples are not "marriages" for purposes of federal law. This is a historic first. Never before has Congress decided to override a state's determination that a class of marriages is valid or rendered a class of valid marriages a nullity for all federal purposes.

By defining "marriage" and "spouse" for purposes of all federal laws and programs, DOMA, 1 U.S.C. § 7, regulates domestic relations. Yet, both Tenth Amendment jurisprudence and federalist history demonstrate that "domestic relations" are "an area that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *In re Burrus*, 136 U.S. 586, 593–94 (1890)(same). It is difficult to conceive of any area of the law closer to the core powers of the States, and further from the enumerated powers of the federal government, than the "core" family law jurisdiction to define and regulate family relationships and status. See *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992); *id.* at 716 (Blackmun, J., concurring).

Legal challenges to DOMA section 3

Since same-sex marriage has been available in the United States only since 2004, only a few legal challenges have been filed to section 3. None has yet succeeded. In two cases, lower federal courts upheld DOMA, holding that government interests related to procreation and childrearing supported the federal definition of marriage. *Wilson v. Ake*, 354 F. Supp.2d 1298 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004). A California couple has twice challenged DOMA and lost, in the first case on standing grounds since they were not married, *Smelt v. County of Orange*, 447 F.3d 673 (9th Cir. 2006), and, in the second case, for suing the wrong defendant, *Smelt v. United States of America*, No. SACV 09-00286, slip op. (C.D. Cal. Aug. 24, 2009).

On the other hand, Judge Reinhardt of the Ninth Circuit Court of Appeals, considering a claim of sexual orientation discrimination under internal employment dispute resolution rules in that court, and acting in his capacity as designee of the chair of the Ninth Circuit's Standing Committee on

Federal Public Defenders, suggested that DOMA should be subject to heightened scrutiny, and found that its denial of federal benefits to the same-sex spouse of a federal employee had “no rational basis” and therefore “contravene[d] the Fifth Amendment.” *In re Levenson*, 560 F.3d 1145, 1149 (9th Cir. Jud. Council 2009) (Reinhardt, J.).

A case pending in the Massachusetts Federal District Court, *Gill et al. v. Office of Pers. Mgmt.*, No. 1:09-cv-10309, Amended Complaint (D. Mass. July 31, 2009), squarely addresses the equal protection issue of DOMA’s disparate treatment of identically situated married persons. For more information, see <http://www.glad.org/doma>. The plaintiffs—seven couples and three surviving spouses—are all married persons who have applied for and been denied particular protections only because of DOMA section 3. The equal protection theory of the case is that Massachusetts has only one class of marriages, but by operation of DOMA section 3, that one class is divided into two classes, with same-sex married couples being denied all federal protections, while other married persons receive federal protections, without sufficient justification.

Several of the plaintiffs seek spousal protections based on their employment with, or their spouse’s employment with, the United States Government. Plaintiff Nancy Gill, a 22-

spouse has health coverage through his employment, such coverage costs more and provides less than Martin’s plan. The couple also worries that Martin’s spouse may be unable to continue working because of severe asthma, and that there will be a dramatic loss of household income when Martin dies because his spouse will have no access to the “survivor annuity.”

Dean Hara is the surviving spouse of Gerry Studds, now deceased, a federal employee for 27 years who served for 24 of those years as a member of Congress. Hara has been denied both health insurance and the survivor annuity (pension) normally available to surviving spouses.

Different tax treatment

Several of the plaintiffs in the *Gill* case have been denied spousal protections available under the Internal Revenue Code and, thus, pay more in federal income taxes than other similarly situated married couples in Massachusetts. In filing their federal income-tax returns, each of these plaintiffs seeks to file as “married filing jointly,” rather than as “single” or “head of household.” Among these plaintiffs are Mary Ritchie, a Massachusetts State Police sergeant, and her spouse, Kathleen Bush, who cares for their children and is deeply involved in the community. In addition to paying almost \$15,000 extra in federal income taxes in the last four years, Mary has been unable to establish a “spousal IRA” for Kathleen, her “non-working” spouse, as other working married people routinely do to provide for the well being of their spouses.

Another plaintiff, Mary Bowe, seeks relief from payment of federal income taxes on the value of health insurance her employer (the Commonwealth of Massachusetts) provides for her spouse, Dorene Shulman, a cancer survivor and parent to their two children. Mary has paid as much as \$1,200 a year in federal income taxes on the value of that insurance and believes she, like all other spouses, should not be required to pay income tax on such employer-provided health benefits. Each plaintiff filed an amended return with the IRS asking to be recategorized as a married taxpayer and requesting a refund. Each amended tax return and accompanying request for a refund was rejected by the Internal Revenue Service based on DOMA section 3.

Several of the plaintiffs seek spousal protections afforded by the Social Security Administration. Three widowers, together with their partners for as many as 60 years, and already distressed by the death of their spouses, seek the lump-sum death benefit normally available upon the death of a spouse to help pay funeral costs. One of the widowers, a musician and music teacher, Herbert Burtis, also seeks Social Security survivor benefits that would allow him to

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plus year employee of the United States Postal Service, already receives “Self and Family” health insurance coverage for herself and the couple’s two children through her job. Yet, she is unable to add her spouse to that plan or to the vision plan, as other married postal workers routinely do. Instead, the family must pay for another health plan for her spouse, spending money that could be used to meet household needs or saved for the children’s college.

Martin Koski, a retiree from the Social Security Administration, has been denied health insurance coverage for his spouse of 33 years, even though other retired employees add their spouses to such coverage. Although Martin’s

substitute his deceased spouse's higher benefit for his own, as is standard for spouses, and resulting in an additional \$700 a month. Jo Ann Whitehead, another retiree, seeks to increase her monthly Social Security payment to the standard one-half of her higher-earning spouse's payment.

Recent activity in *Gill*

The United States Department of Justice recently moved to dismiss the *Gill* case, but not on any of the grounds originally asserted in the House Report on DOMA. Significantly, the United States has expressly disavowed the purported interests in "responsible procreation and child-rearing" as set forth in the House report. 1996 U.S.C.C.A.N. at 2916–17. As the United States observed in its memorandum:

Since the enactment of DOMA, many leading medical, psychological, and social welfare organizations have issued policies opposing restrictions on lesbian and gay parenting upon concluding, based on numerous studies, that children raised by gay and lesbian parents are as likely to be well-adjusted as children raised by heterosexual parents.... Furthermore, in *Lawrence v. Texas*, 539 U.S. 558, 605 (2003), Justice Scalia acknowledged in his dissent that encouraging procreation would not be a rational basis for limiting marriage to opposite-sex couples under the reasoning of the *Lawrence* majority opinion—which, of course, is the prevailing law—because "the sterile and the elderly are allowed to marry." Thus, the government does not believe that DOMA can be justified by interests in "responsible procreation" or "child-rearing."

Gill, No. 1:09-cv-10309, U.S. Memo. in Support of Motion to Dismiss at 19, n.10.

The United States now relies on a notion of "adjust[ing] national policy incrementally" and "preserving consistency" to defend section 3 and its denial of marital protections only to married persons of the same sex:

Given the evolving nature of this issue, Congress was constitutionally entitled to maintain the status quo pending further evolution in the states. Otherwise, "marriage" and "spouse" for the purposes of federal law would depend on the outcome of this debate in each State, with the meanings of those terms under federal law potentially changing with any change in the status of the debate in a given State. Federal rights would vary dramatically from State to State. Congress could reasonably have concluded that there is a legitimate government interest in maintaining the status quo and preserving nationwide consistency in the distribution of marriage-based federal benefits.

Id. at 18.

Given the federal government's consistent deference to a

state's determination that a couple is married, it is obvious that it is the United States that has changed the status quo by denying recognition of a class of valid marriages. Certainly, this defense still fails to explain why only married same-sex couples have been denied the marital protections ordinarily available to married couples. *Commonwealth of Massachusetts v. United States Dep't of Health and Human Serv., et al.*

The Commonwealth of Massachusetts also filed its own case challenging DOMA on two different theories. *Commonwealth of Massachusetts v. United States Dep't of Health and Human Serv., et al.*, No. 1:09-cv-11156, Complaint (D. Mass July 8, 2009), available at http://www.mass.gov/Cago/docs/press/2009_07_08_doma_complaint.pdf. First, relying on the Tenth Amendment and federalism principles, it seeks to invalidate section 3 as an unprece-

Efforts are underway in Congress to repeal DOMA, no doubt bolstered by President Obama's position that "the Administration does not support DOMA"

dent intrusion by the federal government: "the Commonwealth's sovereign authority to define and regulate marriage" and "regulate the marital status of its citizens." *Id.* at 1.

Second, the complaint contends that DOMA violates the spending clause in that it "imposes conditions on the Commonwealth's participation in certain federally funded programs that require the Commonwealth to disregard marriages" of same-sex couples. *Id.* at 2–3. The suit points both to increased costs borne by the Commonwealth because of DOMA as well as correspondence with federal agencies warning of financial consequences and recoupment of federal monies spent if Massachusetts treats married same-sex couples as married in programs with federal financial participation. The United States has moved to dismiss this case on standing grounds and failure to state a claim. *Commonwealth of Mass. v. United States Dep't of Health and Human Serv., et al.*, No. 1:09-cv-11156, United States Motion to Dismiss (D. Mass. Oct. 30, 2009).

Current legislation before Congress

In addition to litigation, efforts are underway in Congress to repeal DOMA in whole or in part, no doubt bolstered by President Obama's position that "the Administration does not support DOMA as a matter of policy, believes that it is

discriminatory, and supports its repeal.” See *Gill*, No. 1:09-cv-10309, Memorandum of United States in Support of Motion to Dismiss at 1. On September 15, 2009, Rep. Gerald Nadler and 90 additional original cosponsors introduced the “Respect for Marriage Act,” H.R. 3567, 111th Cong. (1st Sess. 2009) to repeal DOMA in its entirety.

The bill does not obligate any state to license marriages of same-sex couples, but it does return the issue of recognition to its status prior to DOMA. The bill also would provide federal protections and responsibilities not only to persons who are married in their state of residence, but also to those who marry in a state and then return home or move or travel to another state where their marriage may not be recognized. The same “certainty” protections apply to foreign marriages, as long as the marriage is one that could be performed in any state of the United States.

Also of note are bills that would effectively repeal DOMA section 3 for particular purposes. The “Domestic Partner Benefits and Obligations Act of 2009” would extend all benefits available to employees of the federal government, such as health and life insurance and retirement and disability benefits, to a federal employee’s “domestic partner.” Domestic partners certify that they are a committed couple living in the same household and sharing responsibilities. S. 1102, 111th Cong. (1st Sess. 2009); H.R. 2517, 111th Cong. (1st Sess. 2009). The “Family and Medical Leave Inclusion Act” would amend that law to entitle, among

others, a “same-sex spouse, [or] domestic partner” to family medical leave. H.R. 2132, 111th Cong. (1st Sess. 2009).

Conclusion

DOMA departs from federalist traditions of leaving states to determine whether a person is married. DOMA section 2 invites and legitimizes discrimination against same-sex couples, and section 3 deprives tax-paying American families of the federally created economic safety nets for married people. These laws not only create and sanction a system of first- and second-class marriages—even as same-sex couples take on the commitment and duties of their legal marriage vows—but also deny a range of protections to these couples and their children. **FA**



Mary L. Bonauto has been the Civil Rights Project Director at Gay & Lesbian Advocates & Defenders (GLAD), working in the six New England states, since 1990. She has litigated widely in state and federal courts and agencies of the six New England states since 1990 on issues of employment discrimination, parental rights, free speech and marriage. She has litigated marriage cases in Vermont (1999), Massachusetts (2003), Connecticut (2008), and is currently counsel in a constitutional challenge to the “federal definition” portion of the federal Defense of Marriage Act.

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➔ *Heroic Parenting*
Choose to love your children more than you hate your ex

“I’m not even sure I am the father!”

➔ *When “Daddy” Is Full of Doubt*
How to challenge the paternity presumption

“Custody guidelines don’t begin to address my child’s needs!”

➔ *Getting Your Special Children All the Help They Need*

“He’s acting crazy. How can I protect myself?”

➔ *Are You Safe?*
Your first choice must be to protect your children and yourself

Answers to these questions and many more are available in this “print on demand” PDF. To order, go to <https://www.abanet.org/family/advocate/client.html> and click on PC51311003201PDF. FLS member: \$250; Nonsection member: \$350