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The Defense of Marriage Act and  
Uncategorical Federalism

David B. Cruz\*

\*University of Southern California, [dcruz@law.usc.edu](mailto:dcruz@law.usc.edu)

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# The Defense of Marriage Act and Uncategorical Federalism

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## **Abstract**

This paper addresses federalism objections to Section 3 of the Defense of Marriage Act (DOMA). Ordinarily, the federal government accepts state's determinations of what couples are validly married. Section 3 of DOMA, however, fashions a broad exception for same-sex couples, who are definitionally deemed not to be in "marriages." In addition to equal protection and full faith and credit challenges to DOMA, litigants have made constitutional federalism arguments. In *Massachusetts v. United States Department of Health and Human Services*, the federal trial court accepted one such argument, though in a form that seemingly categorically denies the federal government authority over marital status. This paper critiques such categorical federalism arguments and finds more plausible a more nuanced, uncategorical federalism argument against DOMA Section 3 based on existing constitutional precedents, an argument that relies on a confluence of factors to conclude that this provision of federal law is unconstitutional.

# THE DEFENSE OF MARRIAGE ACT AND UNCATEGORICAL FEDERALISM

David B. Cruz\*

## ABSTRACT

This Essay addresses federalism objections to Section 3 of the Defense of Marriage Act (DOMA). Ordinarily, the federal government accepts states' determinations of what couples are validly married. Section 3 of DOMA, however, fashions a broad exception for same-sex couples, who are definitionally deemed not to be in "marriages." In addition to equal protection and full faith and credit challenges to DOMA, litigants have made constitutional federalism arguments. In *Massachusetts v. United States Department of Health and Human Services*, the federal trial court accepted one such argument, though in a form that might be read to categorically deny the federal government authority over marriage. This Essay critiques that categorical federalism argument, as well as the district court's specific doctrinal argument, and offers a more nuanced, uncategorical federalism argument against DOMA section 3 based on existing constitutional precedents, an argument that relies on a confluence of factors to conclude that this provision of federal law is unconstitutional.

## INTRODUCTION

The U.S. movement for marriage equality for same-sex couples has of late seen numerous victories. Since 2004, Massachusetts, Iowa, Connecticut, Vermont, and New Hampshire, as well as the District of Columbia, have all allowed same-sex

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couples to marry civilly.<sup>1</sup> Other states such as New York and Maryland recognize marriages of same-sex couples validly entered in other jurisdictions.<sup>2</sup>

Despite this progress, one significant barrier to equality for same-sex couples remains the so-called Defense of Marriage Act<sup>3</sup> or “DOMA.” Adopted by Congress in 1996, DOMA contains two operative provisions. Section 2 of the Act purports to authorize states to refuse to recognize marriages of same-sex couples from other states.<sup>4</sup> Section 3 of DOMA defines “marriage” for most federal law purposes to “mean[] only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ [to] refer[] only to a person of the opposite sex who is a husband or a wife.”<sup>5</sup>

In the view of many scholars, DOMA is unconstitutional. Section 2’s interstate nonrecognition authorization has been argued to exceed Congress’s power to enforce the Full Faith and Credit Clause of the Constitution<sup>6</sup> by purporting to grant authority to states to deny *any* effect to such marriages from other states in a profoundly anti-Union fashion.<sup>7</sup> Moreover, both section 2 and section 3 with its federal

<sup>1</sup> See H.B. 436, 2009 Leg., 161st Sess. (N.H. 2009); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 481 (Conn. 2008); *Varnum v. Brien*, 763 N.W. 2d 862, 906-07 (Iowa 2009); *Goodridge v. Dep’t of Pub. Health*, 798 N.E. 2d 941, 969 (Mass. 2003); Keith L. Alexander & Ann E. Marimow, *For Gays, A D.C. Day to Treasure*, WASH. POST, Mar. 4, 2010 at A1; Abby Goodnough, *Rejecting Veto, Vermont Backs Gay Marriage*, N.Y. TIMES, Apr. 8, 2009, at A1.

<sup>2</sup> See Aaron C. Davis & John Wagner, *Md. To Recognize Gay Marriages from Other Places*, WASH. POST, Feb. 25, 2010, at A1; Jeremy W. Peters, *New York Backs Same-Sex Unions From Elsewhere*, N.Y. TIMES, May 29, 2008, at A1.

<sup>3</sup> Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C).

<sup>4</sup> *Id.* § 2 provides:

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>5</sup> *Id.* § 3.

<sup>6</sup> U.S. CONST. art. IV, § 1. The Full Faith and Credit Clause, and sometimes separately designated Effects 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 the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

*Id.*

<sup>7</sup> See *Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong. 43–46 (1996) (statement of Cass R. Sunstein, Karl N. Llewellyn Professor of Jurisprudence, Univ. of Chi.); Letter from Laurence H. Tribe to Edward M. Kennedy (May 24, 1996) [hereinafter Tribe Letter], in 142 CONG. REC. S5931 (1996); *cf.*

definition of “marriage” have been persuasively argued to violate constitutional equal protection principles.<sup>8</sup> In addition, section 3 has been attacked on Tenth Amendment/constitutional federalism grounds.<sup>9</sup>

On July 8, 2010, the United States District Court for the District of Massachusetts held in two different lawsuits that section 3 of DOMA was unconstitutional in certain of its applications. In *Gill v. Office of Personnel Management*,<sup>10</sup> a case brought by married same-sex couples and surviving members thereof, Judge Tauro held that DOMA’s denial of certain federal benefits to same-sex couples violated equal protection.<sup>11</sup> In *Massachusetts v. United States Department of Health and Human Services*,<sup>12</sup> the same judge held that section 3 also violated constitutional federalism limitations embodied in the Tenth Amendment because “the authority to regulate marital status is a sovereign attribute of statehood.”<sup>13</sup> I believe that Judge Tauro was correct to conclude in *Gill* that section 3 of DOMA violates equal protection.<sup>14</sup> However, his rather categorical federalism approach in *Massachusetts* is problematic. This Essay critiques that categorical approach to the Tenth Amendment and state sovereignty and offers instead a more nuanced, uncategorical approach relying not on “traditional governmental functions” analysis<sup>15</sup> but instead the coincidence of a number of factors arguably rendering DOMA section 3 improper on federalism grounds.

First, however, a brief note about the scope of this project. I am not herein advocating my view about the best way to approach constitutional federalism. I subscribe to a view of federalism different from those predominating in the Supreme

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Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1, 18 (1997) (addressing § 3 and arguing “that Congress probably has no power to do what it has done in DOMA”).

<sup>8</sup> See, e.g., Koppelman, *supra* note 7, at 9 (“Because the invidious intent that is inferable under *Romer* [*v. Evans* and its equal protection analysis] infects both provisions of [DOMA], the entire statute is unconstitutional.”).

<sup>9</sup> See Memorandum of Law in Opposition to Defendants’ Motion to Dismiss Complaint and in Support of Commonwealth’s Motion for Summary Judgment at 14 *Massachusetts v. U.S. Dep’t of Health and Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010) (Civ. Action No. 1:09-cv-11156-JLT), (“DOMA violates the Tenth Amendment to the U.S. Constitution, which prohibits Congress from intruding on areas of exclusive State authority, of which the definition and regulation of marriage is perhaps the clearest example.”).

<sup>10</sup> 699 F. Supp. 2d 374 (D. Mass. 2010).

<sup>11</sup> *Id.* at 387.

<sup>12</sup> 698 F. Supp. 2d 243 (D. Mass. 2010).

<sup>13</sup> *Id.* at 251. This decision also held that Section 3 was an impermissible exercise of Congress’s power under the Spending Clause of the Constitution, though this holding depended on the court’s conclusion in *Gill* that DOMA violated equal protection principles. *Id.* at 248–49.

<sup>14</sup> See also Koppelman, *supra* note 7, at 24–32.

<sup>15</sup> *Massachusetts*, 698 F. Supp. 2d at 252.



Court of late, one that attaches great consequence to the Civil War and the irregular process by which the Fourteenth Amendment was imposed upon the southern states.<sup>16</sup> In my view, United States courts generally have inadequately grappled with the transformation in federal-state relations flowing from the war and Reconstruction. But there are federalism arguments that can be made against section 3 of DOMA in light of the current judicial adherence to dual sovereignty,<sup>17</sup> and those are what I explicate in the second Part of this Essay.

Part I of this Essay examines the district court opinion in *Massachusetts v. United States Department of Health and Human Services* and its reliance on the notion that our constitutional federalism arrangements deny the federal government authority over marriage. Although this argument attempts to build upon Supreme Court and Circuit Court federalism precedents, it overreads those precedents, and its seeming reliance on a categorical federalism argument is problematic.

But somewhat related federalism arguments can be made against section 3 of DOMA in light of the current case law without recourse to a categorical claim that the federal government simply lacks authority over a particular sphere of activity such as marriage. Part II of the Essay further critiques the district court's more categorical federalism arguments but explicates how the confluence of several factors could be argued to invalidate DOMA's section 3 on constitutional federalism grounds without recourse to a categorical claim of federal regulatory disability.

I. MASSACHUSETTS V. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES AND CATEGORICAL FEDERALISM ARGUMENTS AGAINST SECTION 3 OF DOMA

In July of 2009, the Attorney General of Massachusetts sued the United States Department of Health and Human Services in federal district court,<sup>18</sup> arguing that section 3 of DOMA is unconstitutional as applied to Massachusetts and its

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<sup>16</sup> See generally Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992 (2003) (arguing federalism principles must be viewed in light of the conditions surrounding the Civil War and Reconstruction to reach a true reading of constitutional structure).

<sup>17</sup> See, e.g., *Printz v. United States*, 521 U.S. 898, 918-19 (1997) (avowing that "the Constitution established a system of 'dual sovereignty'"); *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) ("As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government. This Court also has recognized this fundamental principle.").

<sup>18</sup> Martin Finucane, *Mass. Challenges Federal Defense of Marriage Act*, BOSTON GLOBE (July 8, 2009 3:23 PM), [http://www.boston.com/news/local/breaking\\_news/2009/07/mass\\_to\\_challen.html](http://www.boston.com/news/local/breaking_news/2009/07/mass_to_challen.html).



residents,<sup>19</sup> violating the Tenth Amendment.<sup>20</sup> In particular, the complaint alleged that “Congress lacks the authority under Article I of the United States Constitution to regulate the field of domestic relations, including marriage.”<sup>21</sup> In its motion for summary judgment, Massachusetts argued that “States have the exclusive sovereign prerogative to define and regulate marriage.”<sup>22</sup> Massachusetts’s argument was categorical:

DOMA violates the Tenth Amendment to the U.S. Constitution, which prohibits Congress from intruding on areas of exclusive State authority, of which the definition and regulation of marriage is perhaps the clearest example. Contrary to Defendants’ arguments, the States’ authority to define marriage is not limited to application under State law. Rather, the Commonwealth—like all States—has the authority to issue marriage licenses that determine *marital status* for all purposes, State and federal.<sup>23</sup>

District Judge Joseph Tauro “agreed.”<sup>24</sup> As he framed the core federalism issue, the “case require[d] a complex constitutional inquiry into whether the power to establish marital status determinations lies exclusively with the state, or whether Congress may siphon off a portion of that traditionally state-held authority for itself.”<sup>25</sup> Judge Tauro recognized that a Tenth Amendment violation would occur if Congress purported to pass a law beyond the authority delegated it by the Constitution (because that Amendment reserves to the states those powers not granted to Congress).<sup>26</sup> Besides concluding that DOMA section 3 was not a valid exercise of

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<sup>19</sup> Complaint at 1, *Massachusetts*, 698 F. Supp. 2d 234 (No. 1:09-11156-JLT), available at [http://www.mass.gov/Cago/docs/press/2009\\_07\\_08\\_doma\\_complaint.pdf](http://www.mass.gov/Cago/docs/press/2009_07_08_doma_complaint.pdf).

<sup>20</sup> *Id.* at 22.

<sup>21</sup> *Id.*; see also *id.* at 3 (“Section 3 of DOMA exceeds congressional authority and interferes with the Commonwealth’s sovereign authority to define marriage, in violation of the Tenth Amendment to the United States Constitution, Congress’s Article I powers, and the Constitution’s principles of federalism.”).

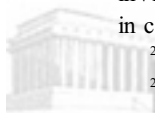
<sup>22</sup> Memorandum of Law in Opposition to Defendants’ Motion to Dismiss Complaint & in Support of Commonwealth’s Motion for Summary Judgment at 13 *Massachusetts*, 698 F. Supp. 2d 234 (No. 1:09-cv-11156-JLT).

<sup>23</sup> *Id.* at 14 (emphasis in original).

<sup>24</sup> *Massachusetts*, 698 F. Supp. 2d at 236 (“The Commonwealth contends that DOMA violates the Tenth Amendment of the Constitution, by intruding on areas of exclusive state authority, as well as the Spending Clause, by forcing the Commonwealth to engage in invidious discrimination against its own citizens in order to receive and retain federal funds in connection with two joint federal-state programs. . . . [T]his court agrees . . .”).

<sup>25</sup> *Id.* at 245.

<sup>26</sup> *Id.* at 246–47.



Congress's power under the Spending Clause of the Constitution,<sup>27</sup> on which the government had relied,<sup>28</sup> Judge Tauro further concluded that section 3 of DOMA was unconstitutional because it invaded states' authority to regulate domestic relations.<sup>29</sup>

The district court's categorical argument that Congress cannot regulate domestic relations was perhaps stronger than Judge Tauro's lack of enumerated power argument as a way of defending the conclusion that DOMA violated constitutional federalism principles. Tauro's argument rejecting the Spending Clause as a basis for Section 3 of DOMA depended upon his conclusion in the companion case *Gill v. Office of Personnel Management* that DOMA violated equal protection in its discriminatory treatment of same-sex couples,<sup>30</sup> and that conditioning participation in federal programs on compliance with DOMA unconstitutionally induced states to violate equal protection.<sup>31</sup> *Gill*, in turn, held that DOMA had no rational basis (as applied to the plaintiff same-sex couples and survivors in Massachusetts) because Judge Tauro concluded that the federal government has no "interest in a uniform definition of marriage for purposes of determining federal rights, benefits, and privileges."<sup>32</sup> The authority Tauro gives for that conclusion, besides his related conclusion that "the subject of domestic relations is the exclusive province of the states[,]"<sup>33</sup> is his opinion in *Massachusetts*.<sup>34</sup> Thus, in a somewhat circular way, Judge Tauro's categorical federalism arguments are key to both his decisions holding the federal definition section of DOMA unconstitutional as applied to and in Massachusetts.

Those categorical federalism arguments are, however, deeply problematic, as explicated further in Part II. Even on its own terms, however, Judge Tauro's legal reasoning on this point is unpersuasive. Admitting that "Tenth Amendment caselaw does not provide much guidance,"<sup>35</sup> the opinion in *Massachusetts* turned to *United States v. Bongiorno*,<sup>36</sup> a 1997 decision from the First Circuit not cited by Massachusetts in its motion for summary judgment, to extract a doctrinal test to govern Massachusetts's challenge to DOMA.<sup>37</sup> The reliance on *Bongiorno* is surprising, for that case involved an *unsuccessful* Tenth Amendment challenge to the federal Child

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<sup>27</sup> *Id.* at 248–49.

<sup>28</sup> *Id.* at 247.

<sup>29</sup> *See id.* at 249.

<sup>30</sup> *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 387 (D. Mass. 2010).

<sup>31</sup> *Massachusetts*, 698 F. Supp. 2d at 248.

<sup>32</sup> *Gill*, 99 F. Supp. 2d at 391.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 391 n.121 (providing a "see, generally," cite to *Massachusetts*).

<sup>35</sup> *Massachusetts*, 698 F. Supp. 2d at 252. Judge Tauro's statement was more narrowly limited to the third prong of the test he chose to apply, see *id.*, but is true more generally.

<sup>36</sup> 106 F.3d 1027 (1st Cir. 1997).

<sup>37</sup> *Massachusetts*, 698 F. Supp. 2d at 249.





Support Recovery Act (CSRA).<sup>38</sup> In particular, the defendant there argued “that the CSRA [fell] beyond Congress’ competence because it concerns domestic relations (an area traditionally within the states’ domain).”<sup>39</sup> But the Court of Appeals “reject[ed] the claim out of hand.”<sup>40</sup> *Bongiorno* thus is an inauspicious basis for a decision arguing that an act passed by Congress (DOMA) is unconstitutional (again under the Tenth Amendment) because it regulates in the area of domestic relations (specifically, marriage).

The First Circuit panel judges in *Bongiorno* adhered to the view that the Tenth Amendment does not reserve certain matters to the state thereby cutting off otherwise valid exercises of federal power.<sup>41</sup> Rather, following Supreme Court precedent, the Court of Appeals held in *Bongiorno* that the Tenth Amendment “is not applicable to situations in which Congress properly exercises its authority under an enumerated constitutional power.”<sup>42</sup> The question for Judge Tauro under established circuit doctrine thus should have been whether DOMA section 3 is a proper exercise of a power or powers allocated to Congress by the Constitution.

In *Massachusetts*, the federal government argued that section 3 of DOMA was an exercise of Congress’s power under the Spending Clause of the Constitution.<sup>43</sup> That might theoretically be sufficient to sustain section 3 in litigation attacking its constitutionality on the ground that Congress lacked an enumerated power allowing DOMA to apply to federal assistance programs, such as Medicaid and the State Cemetery Grants Program challenged in *Massachusetts*.<sup>44</sup> But it is patently inadequate to support DOMA in a facial challenge, for as the district court noted,

DOMA’s reach is not limited to provisions relating to federal spending. The broad sweep of DOMA, potentially affecting the application of 1,138 federal statutory provisions in the United States Code in which marital status is a factor, impacts, among other things, copyright

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<sup>38</sup> *Bongiorno*, 106 F.3d at 1033-34.

<sup>39</sup> *Id.* at 1033.

<sup>40</sup> *Id.*

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

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

<sup>43</sup> *Massachusetts*, 698 F. Supp. 2d at 247. The Spending Clause provides that “[t]he Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . .” U.S. CONST. art. I, § 8.

<sup>44</sup> Massachusetts argued that in order to comply with federal laws concerning the state-federal cooperative venture Medicaid and so avoid bearing the whole cost of administering its public health program for low-income persons, and with federal laws concerning money granted to states for burying eligible veterans and their children, and not have to pay back millions of dollars, it would have to discriminate against lawfully married same-sex couples in violation of Massachusetts constitutional law. See *Massachusetts*, 698 F. Supp. 2d at 240-43.



protections, provisions relating to leave to care for a spouse under the Family and Medical Leave Act, and testimonial privileges.<sup>45</sup>

Accordingly, something more than the Spending Clause seems necessary since the state of Massachusetts argued not just that DOMA was unconstitutional as regards those two programs; more broadly, Massachusetts's complaint sought a declaration "that section 3 of DOMA, codified at 1 U.S.C. § 7, is unconstitutional."<sup>46</sup>

Congress's need for constitutionally delegated authority to enact DOMA section 3, however, is unlikely to render the law unconstitutional, for in form DOMA closely resembles another statute the constitutional basis for which the Supreme Court seems to have assumed. The Religious Freedom Restoration Act of 1993 (RFRA)<sup>47</sup> applies to nearly everything the federal government might do, requiring the government to pass a compelling governmental interest test if it substantially burdens someone's exercise of religion.<sup>48</sup> The House Committee on the Judiciary relied on the Necessary and Proper Clause of Article I of the Constitution<sup>49</sup> for congressional authority to make RFRA applicable to the federal government.<sup>50</sup> The Necessary and Proper Clause seems a slender reed for upholding RFRA or DOMA section 3, either of which might resemble a shotgun (to mix metaphors) in its indiscriminate applicability to all federal action. Nevertheless, while everything the federal government does requires a basis of authority in the Constitution; RFRA might be and has been understood as simultaneously amending all federal laws that authorize the government to act.<sup>51</sup> Likewise, DOMA Section 3 could be understood,

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<sup>45</sup> *Id.* at 247.

<sup>46</sup> Complaint, *supra* note 19, at 3 (emphasis added).

<sup>47</sup> Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. § 2000bb et. seq. (2006)).

<sup>48</sup> *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 424 & n.1 (2006) (asserting that "[u]nder RFRA, the Federal Government may not, as a statutory matter, substantially burden a person's exercise of religion, 'even if the burden results from a rule of general applicability'" and noting that the Court had "held the application [of RFRA] to States to be beyond Congress' legislative authority under § 5 of the Fourteenth Amendment" (quoting 42 U.S.C. § 2000bb-1(a)(2006)).

<sup>49</sup> U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

<sup>50</sup> *See* H.R. Rep. No. 103-88, at 9 (1993) ("Finally, the Committee believes that Congress has the constitutional authority to enact [RFRA]. Pursuant to Section 5 of the Fourteenth Amendment and the Necessary and Proper Clause embodied in Article I, Section 8 of the Constitution, the legislative branch has been given the authority to provide statutory protection for a constitutional value . . .").

<sup>51</sup> *See, e.g., Guam v. Guerrero*, 290 F.3d 1210, 1220 (9th Cir. 2002) ("Congress derives its ability to protect the free exercise of religion from its plenary authority found in Article I of the Constitution; it can carve out a religious exemption from otherwise neutral, generally

as its definitional terms suggest, as relying upon each grant of authority that allows the federal government to act (in ways dependent on marriage) in the first place. *Bongiorno*, with its reading of the Tenth Amendment as co-extensive with the requirement that the federal government exercise only delegated powers, thus cannot do the service into which Judge Tauro attempted to press it.

Moreover, *Bongiorno* does not even state that it was announcing a test sufficient to identify Tenth Amendment violations. After rejecting the defendant's Tenth Amendment challenge because Congress had the constitutional authority to enact the CSRA, the Court of Appeals offered an alternative basis for rejecting the argument.<sup>52</sup> *Bongiorno* insisted that "a Tenth Amendment attack on a federal statute cannot succeed without three [specified] ingredients[,]” one of which the case clearly lacked.<sup>53</sup> The court thus had no occasion to hold that those three *necessary* elements would *suffice* to establish a Tenth Amendment violation. Nor should this conclusion of logic be dismissed as mere hairsplitting, particularly because *Bongiorno*'s only authority for those necessary elements was the Supreme Court's 1981 decision in *Hodel v. Virginia Surface Mining and Reclamation Association*,<sup>54</sup> whose analysis the Supreme Court repudiated four years later (almost twelve years before *Bongiorno*) in *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>55</sup> to which I shall return in Part II.

## II. UNCATEGORICAL FEDERALISM ARGUMENTS AGAINST SECTION 3 OF DOMA

In contrast to the problematic categorical federalism arguments made by the district court in *Massachusetts v. United States Department of Health and Human Services*,<sup>56</sup> there are uncategorical federalism arguments that can be made against DOMA section 3. These arguments are plausible in light of continued judicial adherence to dual sovereignty. Starting under the late Chief Justice Rehnquist, the Supreme Court of the United States has been engaged in a campaign of federalism revitalization, curtailing federal power in the name of state sovereignty in a variety of doctrinal arenas: the extent of Congress's Commerce Clause power;<sup>57</sup> the scope of Congressional power to enforce the Fourteenth Amendment pursuant to Section

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applicable laws based on its power to enact the underlying statute in the first place.”).

<sup>52</sup> *United States v. Bongiorno*, 106 F.3d 1027, 1033.

<sup>53</sup> *Id.* at 1033–34.

<sup>54</sup> 452 U.S. 264, 287–88 (1981).

<sup>55</sup> 469 U.S. 528, 537–47 (1985).

<sup>56</sup> 698 F. Supp. 2d 243 (D. Mass. 2010).

<sup>57</sup> *See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 602 (2000) (invalidating civil suit provision of Violence Against Women Act as exceeding Congress's power over interstate commerce); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (invalidating Gun-Free School Zones Act as exceeding Congress's power over interstate commerce).



5;<sup>58</sup> the circumstances under which there is federal authority to overcome state sovereign immunity protected by the Eleventh Amendment and, the Court has said, our constitutional structure more generally;<sup>59</sup> and the impermissibility of federal commandeering of the legislative or executive branches of state governments under the Tenth Amendment.<sup>60</sup>

I am not claiming that current case law ineluctably compels the conclusion that section 3 of DOMA violates constitutional federalism principles. Precedents can often be distinguished,<sup>61</sup> or even largely ignored if it's the Supreme Court deciding a case, as illustrated by the Court's decision in *Gonzales v. Carhart*,<sup>62</sup> upholding the federal Partial-Birth Abortion Ban Act of 2003<sup>63</sup> in the face of the Court's own invalidation of Nebraska's ban on so-called partial birth abortions seven years

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<sup>58</sup> See, e.g., *Morrison*, 529 U.S. at 601-02 (invalidating civil suit provision of Violence Against Women Act as exceeding Congress's enforcement power); *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997) (invalidating applicability of Religious Freedom Restoration Act to state and local governments as exceeding Congress's enforcement power). *But cf.* *Tennessee v. Lane*, 541 U.S. 509, 520 (2004) (sustaining public accommodations title of Americans with Disabilities Act under Congress's enforcement power as applied to court access); *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 725 (2003) (sustaining Family and Medical Leave Act under Congress's enforcement power).

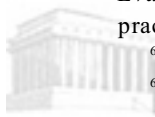
<sup>59</sup> See, e.g., *Bd. of Tr. of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 373 (2001) (holding that employment discrimination provisions of the Americans with Disabilities Act are not a valid exercise of Congress's enforcement powers and do not abrogate state sovereign immunity); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 67 (2000) (holding that the Age Discrimination in Employment Act is not a valid exercise of Congress's enforcement powers and does not abrogate state sovereign immunity); *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 630 (1999) (holding that state sovereign immunity is not overcome by the Patent and Plant Variety Protection Remedy Clarification Act enacted pursuant to Patent Clause and Interstate Commerce Clause); *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999) (holding that state sovereign immunity is not overcome by the Trademark Remedy Clarification Act enacted under Congress's commerce power); *Alden v. Maine*, 527 U.S. 706, 712 (1999) (holding state sovereign immunity valid even in state court against suit brought under the Fair Labor Standards Act passed by Congress under its commerce power).

<sup>60</sup> See, e.g., *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that Congress cannot commandeer state and local executive officers and force them to enforce federal laws); *New York v. United States*, 505 U.S. 144, 161 (1992) (holding that Congress cannot "commandeer" state legislatures and force them to enact laws according to federal standards).

<sup>61</sup> Cf. David B. Cruz, "The Sexual Freedom Cases"? *Contraception, Abortion, Abstinence, and the Constitution*, 35 HARV. C.R.-C.L. L. REV. 299, 327 (2000) ("*Romer v. Evans* may indicate that *Hardwick* is on its way to being overruled or distinguished into practical oblivion." (footnote omitted)).

<sup>62</sup> 550 U.S. 124, 132-33 (2007).

<sup>63</sup> 18 U.S.C. § 1531 (2006).



earlier in *Stenberg v. Carhart*.<sup>64</sup> But where things stand now, there is ample room, whether in the public eye, legislative halls, or even litigation, to advance an interpretation of the Constitution and federalism that would hold section 3 of DOMA to lie beyond Congress's constitutional authority. In their most modest and thus probably most plausible forms, the arguments would tend to be less categorical in nature than that in *Massachusetts v. United States Department of Health and Human Services* appears.<sup>65</sup> Instead, the argument would rely on a confluence of features about section 3 to adjudge it unconstitutional. There are additional federalism-related arguments against the constitutionality of various applications of section 3, such as arguments that it works in tandem with certain federal programs to violate limits on conditional spending by Congress, which were made by the state in *Massachusetts v. United States Department of Health and Human Services*.<sup>66</sup> But this Essay primarily addresses arguments about the possible facial unconstitutionality of section 3. So, then, what are the concerns that may render section 3 unconstitutional on federalism grounds?

First and foremost, as the Massachusetts plaintiffs and the district court argued, section 3 of DOMA operates within the sphere of "domestic relations."<sup>67</sup> Section 3 provides that for the purposes of any Congressional Act or "any ruling, regulation, or interpretation" of administrative agencies, "'marriage' means only a legal union between one man and one woman as husband and wife, [while] 'spouse' refers only

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<sup>64</sup> 530 U.S. 914, 922 (2000).

<sup>65</sup> 698 F. Supp. 2d 234 (D. Mass. 2010).

<sup>66</sup> *Id.* at 247; *South Dakota v. Dole*, 483 U.S. 203 (1987), held that for conditional spending measures enacted by Congress to be constitutional,

(1) it must be in pursuit of the "general welfare," (2) conditions of funding must be imposed unambiguously, so states are cognizant of the consequences of their participation, (3) conditions must not be "unrelated to the federal interest in particular national projects or programs" funded under the challenged legislation, (4) the legislation must not be barred by other constitutional provisions, and (5) the financial pressure created by the conditional grant of federal funds must not rise to the level of compulsion.

*Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 128 (1st Cir. 2003) (citing *Dole*, 483 U.S. at 207–08, 211), *quoted in Massachusetts*, 698 F. Supp. 2d at 247. The commonwealth of Massachusetts argued that the interaction of DOMA and spending programs such as Medicaid and the State Cemetery Grants Program impermissibly induces states to deny same-sex couples equal protection, in violation of the fourth listed requirement from *Dole*. *Massachusetts*, 698 F. Supp. 2d at 248 (citing *Dole*, 483 U.S. at 210). The strength of such narrow as-applied arguments is beyond the scope of this Essay.

<sup>67</sup> *See, e.g.*, Complaint, *supra* note 19, at 22 ("Congress lacks the authority under Article I of the United States Constitution to regulate the field of domestic relations, including marriage."); *Massachusetts*, 698 F. Supp. 2d at 249–50 & n.156 (supporting this point with quotations from or citations to *United States v. Morrison*, 529 U.S. 598, 616 (2000), *Boggs v. Boggs*, 520 U.S. 833, 848 (1997), *Haddock v. Haddock*, 201 U.S. 562, 575 (1906) *overruled in part by Williams v. North Carolina*, 317 U.S. 287, 287 (1942)).

to a person of the [so-called] opposite sex who is a husband or a wife.”<sup>68</sup> It thereby defines the status relationships “marriage” and “spouses” and the status of being “married” for a sweeping range of federal laws. Yet marriage is one of the central relationships in “domestic relations” law.<sup>69</sup> And, as the district court recognized in *Massachusetts*,<sup>70</sup> “domestic relations” have long been said to be the proper province of the states.<sup>71</sup>

Recall that at the time of adoption of the Constitution the states were governments of general jurisdiction; exercising their recognized “police” power, they could enact any statutes (not forbidden by state or later the federal Constitution) that they judged to serve the public health, safety, welfare, or morals.<sup>72</sup> The federal government, in contrast, however enhanced as its powers were under the Constitution compared to the Articles of Confederation,<sup>73</sup> was still a government only of delegated powers.<sup>74</sup> It enjoyed no general federal police power, no all-purpose authority

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<sup>68</sup> Defense of Marriage Act § 3(a), 1 U.S.C. § 7 (2006).

<sup>69</sup> *Ankenbrandt v. Richards*, 504 U.S. 689, 716 (1992) (Blackmun, J., concurring) (“‘Domestic Relations’ actions are loosely classifiable into four categories. The first, or ‘core’ category involves declarations of status, e.g., marriage, annulment, divorce, custody, and paternity.”).

<sup>70</sup> 698 F. Supp. 2d at 249-50 (stating that family law “is often held out as the archetypal area of local concern”).

<sup>71</sup> *Elk Grove United Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (“One of the principal areas in which this Court has customarily declined to intervene is the realm of domestic relations.”); *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383-84 (1930) (“If when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States, there is no difficulty in construing the instrument accordingly and not much in dealing with the statutes.”); *Simms v. Simms*, 175 U.S. 162, 167 (1899) (“Within the States of the Union, the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the State, and not to the laws of the United States.” (citing *In re Burrus*, 136 U.S. at 593-94)); *In re Burrus*, 136 U.S. 586, 593-94 (1890) (“The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.”); *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1859) (“We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of an alimony. . . .”).

<sup>72</sup> *See, e.g., Lochner v. New York*, 198 U.S. 45, 53 (1905), *overruled in part by Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963) (“There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public.”).

<sup>73</sup> *See, e.g., New York v. United States*, 505 U.S. 144, 166 (1992) (recounting that “the Framers” of the Constitution “provid[ed] for a stronger central government” than obtained under the Articles of Confederation).

<sup>74</sup> *Screws v. United States*, 325 U.S. 91, 109 (1945) (plurality opinion) (“Our national government is one of delegated powers alone. Under our federal system the administration

to pass whatever laws seemed sensible for the benefit of the national people.<sup>75</sup> All power the federal government exercises must be traced to an express or implied grant of authority in the Constitution.<sup>76</sup> And as the Tenth Amendment states, “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>77</sup> The system of government contemplated by the Constitution is said to be one of dual sovereignty;<sup>78</sup> within the scope of its delegated authority, the national government would be sovereign, supreme, but within the scope of their retained authority, the states (or the people) would be sovereign.<sup>79</sup>

And one of the still paradigmatic cases of matters said to lie properly with the states have been domestic relations. As James Madison put it in *The Federalist* papers: “The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people . . . .”<sup>80</sup> In the mid-Nineteenth Century, the Supreme Court decided

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of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States.”); THE FEDERALIST NO. 45, at 328 (James Madison) (Benjamin Fletcher Wright ed., 1961) (“The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people . . .”).

<sup>75</sup> *United States v. Lopez*, 514 U.S. 549, 566 (1995) (“The Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation.” (citing U.S. CONST. art. I, § 8)).

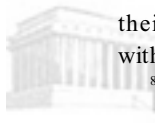
<sup>76</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952).

<sup>77</sup> U.S. CONST. amend. X.

<sup>78</sup> David J. D’Addio, Comment, *Dual Sovereignty and the Sixth Amendment Right to Counsel*, 113 YALE L.J. 1991, 1993 (explaining the concept of dual sovereignty).

<sup>79</sup> See, e.g., *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) (“[U]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government . . . .”); *Hammer v. Dagenhart*, 247 U.S. 251, 275 (1918) *overruled in part by* *United States v. Darby*, 312 U.S. 100, 115 (1941) (“The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the Nation by the Federal Constitution.”); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405–06 (1819) (“[T]he government of the Union, though limited in its powers, is supreme within its sphere of action. . . . The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, ‘any thing in the constitution or laws of any State to the contrary notwithstanding.’” (quoting the Supremacy Clause, U.S. CONST. art. VI, § 1)); THE FEDERALIST NO. 39, *supra* note 73, at 285 (James Madison) (“[T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them, within its own sphere.”).

<sup>80</sup> THE FEDERALIST NO. 45, *supra* note 73, at 328 (James Madison).



cases taken as evidence that family law “has long been regarded as a virtually exclusive province of the States.”<sup>81</sup> And then in a frequently quoted assertion, the Court stated near the end of that century that “[t]he whole subject of . . . domestic relations . . . belongs to the laws of the States and not to the laws of the United States.”<sup>82</sup>

And this view is not merely a relic of the Nineteenth Century. As World War II was ending, the Supreme Court said in *Williams v. North Carolina* that the judiciary must pay “due regard” to the “most important aspect of our federalism whereby ‘the domestic relations of husband and wife . . . were matters reserved to the States,’ and do not belong to the United States.”<sup>83</sup> More recently, in *United States v. Lopez* in 1995, the Supreme Court invalidated part of the federal Gun-Free School Zones Act as exceeding Congress’s commerce power.<sup>84</sup> In explaining that it could not accept the dissent’s reasoning because that would convert the Commerce Clause into a general-purpose federal police power, the majority emphasized that, for example, Congress would have plenary authority over “family law (including marriage, divorce, and child custody)” on the dissent’s approach.<sup>85</sup> And for those who are more concerned with litigation and therefore head-counting than a more pure constitutional theory, it bears mention that Justice Kennedy’s concurring opinion in *Lopez* insisted that if Congress attempted to exercise power in ways that verge on asserting a general police power, “at the least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern.”<sup>86</sup> Even the *Lopez* dissenting Justices were at pains to reject the conclusion that it was interpreting the Constitution in a way to give the federal government authority over such domestic relations issues as “marriage, divorce, and child custody.”<sup>87</sup> And sliding into this century, the pro-federalism majority of the Court for the same reasons as in *Lopez* invalidated the civil suit provision of the Violence Against Women Act in 2000 in *United States v. Morrison*, again rejecting the dissent’s view because it would extend congressional authority to “family law and other areas of traditional state regulation . . . .”<sup>88</sup>

The idea that the Tenth Amendment reserves certain subject matters to the states, acting as a constitutionally independent restriction on exercise of authority

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<sup>81</sup> *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (citing *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1859)).

<sup>82</sup> *In re Burrus*, 136 U.S. 586, 593–94 (1890).

<sup>83</sup> *Williams v. North Carolina*, 325 U.S. 226, 233 (1945) (internal citation omitted).

<sup>84</sup> *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>85</sup> *Id.* at 564.

<sup>86</sup> *Id.* at 580 (Kennedy, J., concurring).

<sup>87</sup> *Id.* at 624 (Breyer, J., dissenting) (“To hold this statute constitutional is not . . . to hold that the Commerce Clause permits the Federal Government . . . to regulate marriage, divorce, and child custody . . . .” (internal quotation marks omitted)).

<sup>88</sup> *United States v. Morrison*, 529 U.S. 598, 615 (2000).





that the federal government otherwise would seemingly be given by the Constitution, has had a checkered past. It was this view that animated the Supreme Court's short-lived effort in *National League of Cities v. Usery* to stop federal law from reaching into "integral operations in areas of traditional governmental functions . . . ."<sup>89</sup> Thereafter the Justices of the Supreme Court as well as lower federal court judges were not able to agree on what such functions were or how they should be identified.<sup>90</sup>

*Hodel v. Virginia Surface Mining and Reclamation Association*<sup>91</sup> relied on by the First Circuit in *United States v. Bongiorno*<sup>92</sup> in 1997, the decision upon which the district court in *Massachusetts* grounded its Tenth Amendment ruling,<sup>93</sup> was decided during the years following *National League of Cities*. Summarizing the dictates of *National League of Cities*, *Hodel* held that

four conditions must be satisfied before a state activity may be deemed immune from a particular federal regulation under the Commerce Clause. First, . . . the federal statute at issue must regulate the States as States. Second, the statute must address matters that are indisputably attributes of state sovereignty. Third, state compliance with the federal obligation must directly impair [the States'] ability to structure integral operations in areas of traditional governmental functions. Finally, the relation of state and federal interests must not be such that the nature of the federal interest . . . justifies state submission.<sup>94</sup>

Ultimately, however, *National League of Cities* was overruled in 1985 in *Garcia v. San Antonio Metropolitan Transit Authority*.<sup>95</sup> In particular, *Garcia* specifically repudiated *National League of Cities*' cloaking of states with immunity from federal power over integral operations in areas of states' "traditional governmental functions."<sup>96</sup> *Garcia* confirmed the impropriety "of making immunity turn on a purely

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<sup>89</sup> *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976).

<sup>90</sup> *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 539 (1985) ("We find it difficult, if not impossible, to identify an organizing principle [distinguishing lower court decisions holding certain functions do or do not meet *National League of Cities* test]."); *id.* ("Thus far, this Court itself has made little headway in defining the scope of the governmental functions deemed protected under *National League of Cities*.").

<sup>91</sup> 452 U.S. 264 (1981).

<sup>92</sup> 106 F.3d 1027, 1033 (1st Cir. 1997).

<sup>93</sup> *Massachusetts v. Dept. of Health & Human Servs.*, 698 F. Supp. 2d 234, 249 (D. Mass. 2010).

<sup>94</sup> *Garcia*, 469 U.S. at 537 (1985) (quoting and citing *Hodel*, 452 U.S. at 287–88 & n.29) (internal quotation marks and alterations made by *Garcia* omitted).

<sup>95</sup> *Id.* at 557.

<sup>96</sup> *Id.* at 537–38.



historical standard of ‘tradition . . . .’<sup>97</sup> In the majority’s view, based on past experience with related doctrines, “[a] nonhistorical standard for selecting immune governmental functions is likely to be just as unworkable as is a historical standard.”<sup>98</sup>

More fundamentally, the Court reasoned,

neither the governmental/proprietary distinction nor any other that purports to separate out important governmental functions can be faithful to the role of federalism in a democratic society. The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else—including the judiciary—deems state involvement to be. Any rule of state immunity that looks to the “traditional,” “integral,” or “necessary” nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes.<sup>99</sup>

*Garcia*, therefore,

reject[ed], as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is “integral” or “traditional.” Any such rule leads to inconsistent results at the same time that it disserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles.<sup>100</sup>

Current doctrine thus does not recognize the Tenth Amendment as a font of categorical free-floating subject matter limitations on federal power. To the extent the district court in *Massachusetts*<sup>101</sup> read *Bongiorno*<sup>102</sup> to hold to the contrary,<sup>103</sup> it was mistaken, and its categorical approach thus without adequate foundation in contemporary constitutional law.<sup>104</sup>

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<sup>97</sup> *Garcia*, 469 U.S. at 543.

<sup>98</sup> *Id.* at 545.

<sup>99</sup> *Id.* at 545–46.

<sup>100</sup> *Id.* at 546–47.

<sup>101</sup> *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234, 247 (D. Mass. 2010).

<sup>102</sup> *United States v. Bongiorno*, 106 F.3d 1027, 1033 (1st Cir. 1997).

<sup>103</sup> See *Massachusetts*, 698 F. Supp. 2d at 249 (relying on *Bongiorno* for “traditional governmental functions” test).

<sup>104</sup> *Massachusetts* recognized that the Supreme Court repudiated “traditional governmental



It is true that in *Gregory v. Ashcroft* the Supreme Court subsequently held that because application of federal law to displace state limitations on the age of state judges would “alter the ‘usual constitutional balance between the States and the Federal Government,’ [Congress] must make its intention to do so ‘unmistakably clear in the language of the statute.’”<sup>105</sup> This clear statement rule was designed to protect state sovereignty, but, importantly, it did so only through the Court’s approach to interpreting federal statutes.<sup>106</sup> Indeed, the *Gregory* majority explicitly

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functions” analysis in *Garcia*, yet it claimed that *New York v. United States*, 505 U.S. 144, 159 (1992), and *United States v. Morrison*, 529 U.S. 598, 615–16 (2000), “revive the concept of fusing the Tenth Amendment to police intrusions on the core of sovereignty retained by the state.” *Massachusetts*, 698 F. Supp. 2d at 252 n.154. This is a flat overreading of those cases. *New York*, to the extent that it preserves some “core of sovereignty retained by the States under the Tenth Amendment,” 505 U.S. at 159, does so not by staking out a categorical subject matter as lying beyond federal power, *cf. id.* (noting that those challenging the Act of Congress did “not contend that Congress lacks the power to regulate the disposal of low level radioactive waste”), but by interpreting the Constitution to impose a process limitation that forbids the federal government from commandeering state legislatures. *New York*, 505 U.S. at 161. *New York*’s reliance on *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264 (1981), went no further than reading that case to insist that federal laws not “commandeer” state governments to enact regulation or enforce federal laws. *New York*, 505 U.S. at 161. It did not resuscitate “traditional governmental functions” analysis.

Likewise, neither *Morrison* nor *United States v. Lopez*, 514 U.S. 549 (1995), on which *Morrison* built, purports to identify in the Constitution any subject matters over which Congress is deprived of the power to regulate if doing so would interfere with state regulations. Although *Lopez* rejects expansive interpretations that would effectively transform the Commerce Clause into a police power letting Congress pass any law it deems prudent, *Lopez*, 514 U.S. at 564 (“Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power . . . .”); *id.* at 566 (“The Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation.”), even “in areas such as criminal law enforcement or education where States historically have been sovereign,” *id.* at 564, it does not categorically hold that Congress may not regulate states in such areas if it interferes with their regulations. Rather, *Lopez* holds that Congress may not aggregate the effect on interstate commerce of non-economic, violent criminal activity. *Lopez*, 514 U.S. at 561, 567; *United States v. Morrison*, 529 U.S. 598, 617-18 (“We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local.”) (citing, *inter alia*, *Lopez*, 514 U.S. at 568)).

<sup>105</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

<sup>106</sup> *Id.*; *accord* *United States v. Lopez*, 514 U.S. 549, 610 (1995) (Souter, J., dissenting) (“[W]hen faced with two plausible interpretations of a federal criminal statute, we generally will take the alternative that does not force us to impute an intention to Congress to use its full commerce power to regulate conduct traditionally and ably regulated by the States.” (citing, *inter alia*, *United States v. Enmons*, 410 U.S. 396, 411–12 (1973))); *id.* at 610–11 (“These clear statement rules, however, are merely rules of statutory interpretation, to be



adhered to the view that “[a]s long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States. Congress may legislate in areas traditionally regulated by the States.”<sup>107</sup>

In addition to the foregoing, it remains a fact that over our nation’s history the federal government has adopted various laws that do regulate particular aspects of family law.<sup>108</sup> Hence, it is probably best under current law to conceive of the relevance of the fact that section 3 of DOMA operates in the area of domestic relations, an area traditionally subject to state regulation, as merely a factor or consideration in assessing section 3’s constitutionality—that is how Justice Souter’s dissent in *United States v. Morrison*<sup>109</sup> understood the majority to be treating it in that case<sup>110</sup>—rather than a categorical bar to federal authority.

Current Tenth Amendment doctrine does recognize certain categorical limitations on federal authority that are conceptually separate from the fact that grants of congressional power have their own definitions and therefore inherent limits. In *New York v. United States*, the Supreme Court held that the Tenth Amendment affirmatively prohibited Congress from exercising its commerce power (or other delegated powers) in ways that would commandeer a state legislature, forcing it to legislate to federal liking.<sup>111</sup> And in *Printz v. United States*, a majority of the Court held that the Tenth Amendment likewise prohibited Congress from exercising its powers in ways that commandeered state executive officers, commanding them to enforce or administer federal programs.<sup>112</sup> Hence, wholly aside from the subject matter of an act of Congress, the *form* that federal legislation takes is, under current law, a relevant and important factor in analyzing such legislation for consistency with the Constitution’s federalism limitations.

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relied upon only when the terms of a statute allow, and in cases implicating Congress’s historical reluctance to trench on state legislative prerogatives or to enter into spheres already occupied by the States. They are rules for determining intent when legislation leaves intent subject to question.” (citations omitted)).

<sup>107</sup> *Gregory*, 501 U.S. at 460.

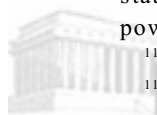
<sup>108</sup> Many of these areas are usefully addressed in Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1373–76 (1998). In this article, Professor Hasday concludes “that federal Reconstruction massively intervened into family law[.]” *id.* at 1299, and that even “in the years since” Reconstruction, “a survey of just a few prominent examples of modern federal regulation reveals that federal family law is far-reaching . . . .” *Id.* at 1300.

<sup>109</sup> 529 U.S. 598 (Souter, J., dissenting) (2000).

<sup>110</sup> *Id.* at 654 (Souter, J., dissenting) (“Where such decisions [as, for example, *National League of Cities*] once stood for rules, today’s opinion points to considerations [of traditional state regulation] by which substantial effects [on interstate commerce, and thus Congress’s power under the Commerce Clause,] are discounted.”).

<sup>111</sup> *New York v. United States*, 505 U.S. 144, 175, 188 (1992).

<sup>112</sup> *Printz v. United States*, 521 U.S. 898, 935 (1997).



Here then is another point of constitutional vulnerability of section 3 of DOMA. It does not take a particular federal power, such as authority over immigration (an unenumerated federal power, by the way<sup>113</sup>), and decide to adopt a particular federal vision of social and legal relations for purposes of some discrete enactment. Prior to 1996 and DOMA, Congress had never enacted a law that purported to define family status for the purpose of all federal law.<sup>114</sup> With the enactment of section 3 of DOMA, Congress created a type of federal family law that is very different from the definitional sections of individual statutes, which apply only within the boundaries of those statutes.<sup>115</sup>

Although the statutory language of section 3 is blunt, comprehensive, and fairly clear, the clear statement approach to protecting state sovereignty from *Gregory v. Ashcroft* is still instructive as to the constitutionality vel non of that section of DOMA. *Gregory* presupposes that a statute cannot be taken to upset deep-seated balances of authority between federal and state governments absent reassurance that Congress has deliberately concluded that a particular disregard of state sovereignty is justified by an overarching federal need in that particular context.<sup>116</sup> That is plainly not the case with section 3. In discussing DOMA, Congress did not separately take up each of the hundreds of federal laws that turn on marital status, or even functionally similar federal laws, and decide that in each one there was a federal need to disregard some aspect of the state laws that had in most instances always provided the definition of marriage used by the federal government. Rather, DOMA's asserted purpose is to provide a clear definition of marriage and to protect the "institution of traditional heterosexual marriage."<sup>117</sup>

This in turn implicates further factors that might be judged relevant to assessing the consistency or lack thereof of section 3 with our constitutional federalism. Although one can point to numerous federal statutes that touch on domestic relations, they have generally done so in somewhat limited ways. As Justice Blackmun summarized in a concurring opinion in *Ankenbrandt v. Richards*, a 1992 Supreme

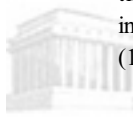
<sup>113</sup> See, e.g., *Chae Chan Ping v. United States*, 130 U.S. 581, 603–09 (1889) (inferring federal authority over immigration from nature of national sovereignty).

<sup>114</sup> Matthews Fry, Comment, *One Small Step for Federal Taxation, One Giant Leap for Same-Sex Equality: Revising § 2702 Of The Internal Revenue Code To Apply Equally To All Marriages*, 81 TEMP. L. REV. 545, 555 (2008) ("The 1996 DOMA provided, for the first time in our nation's history, a federal definition of 'marriage' and 'spouse.'").

<sup>115</sup> See, e.g., Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 (2006) (defining "parent" specifically for the purposes of the Act at 29 U.S.C. § 2611 (limiting definitions to "[a]s used in this subchapter.")).

<sup>116</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) ("In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." (quoting *Will v. Michigan Dep't of St. Police*, 491 U.S. 58, 65 (1989)) (internal quotation marks omitted)).

<sup>117</sup> H.R. REP. NO. 104-664, at 2 (1996).



Court decision about the scope of the domestic relations exception from federal court jurisdiction (another piece of evidence of the proper allocation of domestic relations in our constitutional order):

“Domestic relations” actions are loosely classifiable into four categories. The first, or “core” category involves declarations of status, *e.g.*, marriage, annulment, divorce, custody, and paternity. The second, or “semicore,” category involves declarations of rights or obligations arising from status (or former status), *e.g.*, alimony, child support, and division of property. The third category consists of secondary suits to enforce declarations of status, rights, or obligations. The final, catchall category covers the suits not directly involving status or obligations arising from status but that nonetheless generally relate to domestic relations matters, *e.g.*, tort suits between family or former family members for sexual abuse, battering, or intentional infliction of emotional distress.<sup>118</sup>

Section 3 is a definitional statute adopted by Congress to operate in the “core” of the area of domestic relations, not just for one or more specific federal programs, but for all purposes, both present and future. For that reason, it might be seen as a greater upset of the prevailing balance of federal and state authority and thus more likely unconstitutional on federalism grounds.

Moreover, it may matter that Congress is acting to try to *define* “marriage” with section 3 of DOMA. Section 3 is dramatically in tension with section 2, the interstate non-recognition portion of DOMA. Section 2 purports to authorize states to deny any faith or credit

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>119</sup>

It was justified in Congress as a pro-state, pro-federalism measure, designed to ensure the primacy of each state over marriage.<sup>120</sup> Yet section 3 selectively disre-

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<sup>118</sup> Ankenbrandt v. Richards, 504 U.S. 689, 716 (1992) (Blackmun, J., concurring).

<sup>119</sup> Defense of Marriage Act § 2, 28 U.S.C. § 1738C (2006).

<sup>120</sup> H.R. REP. NO. 104-664, at 2, 12 (1996) (asserting that one “primary purpose[]” of DOMA “is to protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions”).

gards the very state definitions of marriage supposedly safeguarded by section 2,<sup>121</sup> substituting a national marriage definition for virtually any federal purpose insofar as a same-sex couple lawfully married by a state is concerned.<sup>122</sup>

Section 3 leaves in place state marriage definitions for federal purposes regardless of how young or old a putative spouse is. It leaves in place state marriage definitions regardless of what diseases or genetic conditions a person might have. It leaves in place state marriage definitions regardless of how closely related the two spouses might be. But if a state marriage definition embraces a same-sex couple, section 3 means that the federal government will suddenly and across-the-board refuse to use the state definition. Indeed, section 3 *defines* such a couple as not married.<sup>123</sup> And herein lies another vice that could be argued to contribute to the conclusion that section 3 is unconstitutional on federalism grounds.

Massachusetts argued in court that “Congress is not required to make marital status relevant to federal law. Having chosen to do so, however, it must take marital status as the States define it; it cannot declare that some marriages valid under State law are federally valid whereas others are not.”<sup>124</sup> What section 3 in tandem with section 2 in effect arguably does is to engage the federal government in a constitutional charade, whereby it accepts that the definition of marital status or relationships is properly a matter of state competence and so governs for almost all federal purposes but then pretends that certain couples are not married when the same competent state law has allowed a same-sex couple to marry. This is akin to one understanding of the vices of vintage Supreme Court decisions, *Chisholm v. Georgia*<sup>125</sup> from the Eighteenth Century and *United States v. Klein*<sup>126</sup> from the Nineteenth.

*Chisholm* was the 1793 Supreme Court case that led to the adoption of the Eleventh Amendment (about the limited reach of federal judicial power over states in diversity suits, later interpreted as being about state sovereign immunity). In *Chisholm*, the Supreme Court basically held that a creditor could sue Georgia on a Georgia state law contract claim in federal court because of diversity jurisdiction, and that Georgia could not interpose sovereign immunity as a defense to such suit.<sup>127</sup>

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<sup>121</sup> *Id.* at 25, 30.

<sup>122</sup> *Id.* at 30.

<sup>123</sup> See Defense of Marriage Act § 3(a), 1 U.S.C. § 7 (2006).

<sup>124</sup> Memorandum of Law in Opposition to Defendants’ Motion to Dismiss Complaint and in Support of Commonwealth’s Motion for Summary Judgment, at 14 Massachusetts v. U.S. Dep’t of Health and Human Servs. (Feb. 18, 2010) (Civ. Action No. 1:09-cv-11156-JLT) (defining “marriage” as “only a legal union between one man and one woman as husband and wife” but making no mention of age requirements).

<sup>125</sup> 2 U.S. (2 Dall.) 419 (1793).

<sup>126</sup> 80 U.S. (13 Wall.) 128 (1872).

<sup>127</sup> *Chisholm*, 2 U.S. (2 Dall.) at 451–52 (opinion of Blair, J.) (reaching this conclusion, in the first of four seriatim opinions upholding a private suit against Georgia in federal court).

One objection to this that scholars have raised is that the Court was basically allowing suits to enforce state law, but only highly selectively: the state law cause of action (contract) was enforceable federally, but the state law defense (sovereign immunity) was not federally enforceable.<sup>128</sup>

The Eleventh Amendment was rapidly adopted to reverse the outcome of *Chisholm*.<sup>129</sup> Its interpretation has been a matter of dispute. What has been termed “the diversity interpretation” of the amendment reads it in a way that limits the power of the federal judiciary to pick and choose among elements of state law by eliminating (at least part of) the diversity jurisdiction employed in *Chisholm* to allow suit against the state of Georgia. This diversity approach to the Eleventh Amendment, although probably only currently subscribed to by a minority of Justices, is thus limited in a way that makes it responsive to the state law selectivity objection, and this view is the one with the most academic and historical support.<sup>130</sup>

*United States v. Klein*<sup>131</sup> offers another precedent for this kind of objection to the constitutionality of section 3 of DOMA. *Klein* is a case most familiar to federal courts scholars and perhaps those with substantial litigation practices challenging congressional action on federalism grounds. *Klein* involved a statute passed by Congress in the wake of the civil war to deny rights to seized property or compensa-

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<sup>128</sup> PETER W. LOW & JOHN CALVIN JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 779 (1987) (recounting the view of Eleventh Amendment as limiting federal judicial power because in *Chisholm*, “in enforcing a state-created cause of action, the Court set aside the accompanying state law of sovereign immunity”).

<sup>129</sup> For an extensive historical account of the context, including the decision in *Chisholm*, of the adoption of the Eleventh Amendment, see JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY 12-27 (1987).

<sup>130</sup> See, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985) (Brennan, J., dissenting); *Employees of the Dep’t of Pub. Health & Welfare v. Dep’t of Pub. Health & Welfare*, 411 U.S. 279, 298 (1973) (Brennan, J., dissenting); ORTH, *supra* note 128, at 12-27; Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1473 (1987); Martha Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1978); Martha Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. PA. L. REV. 1203 (1978); William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261, 1262-64 (1989); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 44 (1988); James E. Pfander, *History and State Suability: An “Explanatory” Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1329, 1336, 1339 (1998); Suzanna Sherry, *The Eleventh Amendment and Stare Decisis: Overruling Hans v. Louisiana*, 57 U. CHI. L. REV. 1260, 1261 (1990).

<sup>131</sup> 80 U.S. (13 Wall.) 128 (1872).





tion to those claiming loyalty to the Union only by virtue of presidential pardon.<sup>132</sup> Congress had not changed the underlying property compensation act, which the Supreme Court had interpreted to render such persons eligible for compensation.<sup>133</sup> Instead, Congress attempted specifically to rule certain kinds of loyalty (legal loyalty) out of bounds.<sup>134</sup>

As Dean Larry Sager of the University of Texas School of Law summarized it:

What seems to worry the Court in *Klein* is that Congress left standing the operative rule (persons who did not give aid and comfort to the rebellion are entitled to recover), but stipulated how the Court was to construe the receipt of a presidential pardon (as conclusive proof that the recipient gave aid and comfort).<sup>135</sup>

And this was a problem because, in Sager's words:

In effect, Congress attempted to conscript the judiciary in a constitutional charade. The Supreme Court and the Court of Claims were to behave as though they regarded recipients of presidential pardons as convicted rather than cleansed of the delict of aiding and abetting the rebellion by their very acceptance of the pardon, notwithstanding the Court's diametrically opposed judgment. . . . At the heart of the *Klein* decision was the Justices' refusal to allow Congress to cast them in this false light.<sup>136</sup>

Section 3 of DOMA acts analogously. In conjunction with Section 2, it commits the federal government to act as though state law determines marriage, but it redefines certain couples from Massachusetts, California (where same-sex couples were able to marry civilly for several months in 2008), Iowa, Connecticut, Vermont, New Hampshire, and the District of Columbia as unmarried. And it attempts to do so for nearly any federal purpose. It effectively deploys the power of the federal government to try to keep people from viewing same-sex couples as married, regardless of the state law that makes them so, law that the federal government generally embraces. It does so even though marriage is a matter long and widely said to remain primarily and properly under state authority;<sup>137</sup> even though Congress

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<sup>132</sup> *Id.* at 143; accord Lawrence G. Sager, *Klein's First Principle: A Proposed Solution*, 86 GEO. L.J. 2525, 2525 (1998).

<sup>133</sup> *Id.* at 131.

<sup>134</sup> *Id.*

<sup>135</sup> Klein, *supra* note 131, at 2526.

<sup>136</sup> *Id.* at 2528.

<sup>137</sup> See *Williams v. North Carolina*, 317 U.S. 287, 298 (1942) (stating, in the context of divorce, "[e]ach state as sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders").

was unwilling to amend DOMA in proffered ways to deal with arguably greater “threats” to marriage than same-sex couples committing their lives to each other;<sup>138</sup> and even though Congress did not when adopting DOMA detail the federal legal landscape and make considered choices about the precise circumstances under which continuing its age-old reliance on state law definitions in the domestic relations arena was intolerable. And in doing so, it casts Massachusetts state law in a false light, as if it did not really allow same-sex couples to marry, particularly where state/federal cooperative programs may be at issue.<sup>139</sup>

Section 3 of DOMA is thus marked by several features that render it constitutionally suspect. It is a federal law that operates in the core of the field of domestic relations, an arena historically and to this day still frequently said to be the near-exclusive preserve of state authority. It operates not in discrete operational settings carefully judged by Congress to require federal displacement of state law definitions of marital status, but across the board in virtually any area in which the federal government acts. It purports to be a definitional statute, but it selectively defines as not married couples (of the same-sex) who are in fact married under state laws that the federal government otherwise uses for determining people’s marital status,<sup>140</sup> thus casting egalitarian state laws and couples who have taken advantages of them in a false light. Taken all together, these factors arguably establish that DOMA violates constitutional federalism principles, even if not for the categorical reason seemingly relied on by the District Court in *Massachusetts v. United States Department of Health and Human Services*<sup>141</sup> and to a perhaps lesser extent by the state of Massachusetts in that case.

#### CONCLUSION

The so-called Defense of Marriage Act is an unconstitutional Act of Congress. As one who understands the United States, its Constitution, and our political order under that constitution to be deeply if yet to a significant degree aspirationally egalitarian, I would lay stress on the way in which DOMA inflicts gratuitous injury on same-sex couples, marking lesbian and gay persons and their relationships as inferior to heterosexually identified Americans and their relationships in the service of sectar-

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<sup>138</sup> See, e.g., David B. Cruz, “Just Don’t Call It Marriage”: *The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 949–50 (2001) (recounting rhetoric of “threats” and “attacks” in congressional debates over DOMA).

<sup>139</sup> See *supra* note 44 and accompanying text (describing programs at issue before Judge Tauro).

<sup>140</sup> *Massachusetts v. U.S. Dep’t of Health and Human Servs.*, 698 F. Supp. 2d 234, 250 (D. Mass. 2010) (“There is a historically entrenched tradition of federal reliance on state marital status determinations.”).

<sup>141</sup> *Id.* at 253.



ian religious views<sup>142</sup> and bare prejudices.<sup>143</sup> The statute thus dramatically derogates from the equal protection principles binding upon the federal government under the Due Process Clause of the Fifth Amendment.

Yet the discrimination against lesbian people is not the only way that DOMA deviates from prevailing constitutional arrangements, and even people who are not as committedly egalitarian as I am may have constitutional reasons to object to it. Section 3 is perhaps perversely anti-federalist in its terms and operation, particularly now that such a significant portion of the United States populace lives in states (and the District of Columbia) that allow same-sex couples to marry civilly or recognize such marriages from other jurisdictions. This unprecedented statutory provision may well violate constitutional federalism principles. If it is so adjudged, though, it should not be because of a categorical claim that only states and not the federal government can regulate domestic relations in general or marriage in particular. Rather, as this Essay has shown, the intrusion into the field of domestic relations is just one of multiple factors that together can uncategorically suggest that section 3 of DOMA, the federal definition portion of the Act, offends constitutional federalism limitations.

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<sup>142</sup> See, e.g., 142 CONG. REC. H7486 (1996) (statement of Rep. Buyer) (“We as legislators and leaders for the country are in the midst of a chaos, an attack upon God’s principles.”).

<sup>143</sup> See, e.g., 142 CONG. REC. H7482 (1996) (statement of Rep. Barr) (“The very foundations of our society are in danger of being burned. The flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundations of our society: the family unit.”).

