

DOMA AND THE CONSTITUTIONAL COMING OUT OF SAME-SEX MARRIAGE

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INTRODUCTION

The Federal Defense of Marriage Act (“DOMA”), designed to protect the heterosexual married, reflects the federal sovereign’s decision to discriminate against same-sex couples seeking to marry, rather than to apply one marriage standard across sexual-orientation lines. Such a facially discriminatory statute fails constitutional review, an example of majoritarian, discriminatory bias. The Constitution protects, as a bedrock principle, the individual’s right to autonomy and self-determination in matters of marriage without regard to sexual orientation. Should the right to marry depend upon sexual orientation or upon broader concepts of equality and self-determination? This article answers these questions by using and extending the concept of structural reasoning.

The first part of this article examines the content and legislative history of DOMA. Part two reviews the role that structural reasoning plays in identifying and defining unenumerated constitutional rights. Part three examines the existing precedent addressing the constitutionality of DOMA. Parts four and five argue that the existing constitutional precedent and analysis, interpreting the First and Fifth Amendments, secures to the lesbian, gay, bisexual, and transgendered community (“GLBT community”)¹ the fundamental right to marry the person of his or her choice as a matter of the liberty of conscience. Part six argues that the existing constitutional precedent and analysis, interpreting the Full Faith and Credit Clause requires cross-border recognition of otherwise valid same-sex marriages as a matter of the liberty of democracy. The seventh and final part of this article proposes a holistic test to consider together the multiple injuries to liberty balanced against the public policies DOMA advances.

This article adds to the DOMA scholarship by applying structural reasoning and extending it to develop a unique constitutional test. The proposed test adopts the Madisonian Balancing Approach, proposed by Professor Faigman, and seeks to identify and aggregate the harm to the individual in comparison to the harm to the governmental interests allegedly advanced. Although the numerous constitutional infirmities, when analyzed in isolation,

1. I use this term GLBT purposely, recognizing that the definition of marriage as between one man and one woman deprives each of these groups of the right to marry in most jurisdictions, including, in some states, post-operative transsexuals. See e.g., *Kantaris v. Kantaris*, 884 So.2d 155, 161 (Fla. 2004) (holding that Florida marriage between woman and post-operative transsexual (female to male) *void ab initio*).

may leave room for differing opinions as to DOMA's constitutionality, when the injuries inflicted by DOMA are aggregated and examined in relationship to the structure of the constitution and its aspirational goals, DOMA falls because the state cannot bear its burden to justify the many intrusions. This paper concludes that DOMA is unconstitutional because the aggregated harm to the individual's rights outweighs the government's interest in prohibiting such marriages.

I. DOMA

In 1996 Congress enacted DOMA.² It is comprised of three sections. The first section sets forth the short title of the act.³ The second section is entitled, "Powers Reserved to the States."⁴ The third and final section is entitled, "Definition of Marriage."⁵ Section Three of DOMA defines marriage for federal purposes as follows: "[i]n determining the meaning of any act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word spouse refers only to a person of the opposite sex who is a husband or wife."⁶ Thus, the federal government is free to continue to deny federal benefits otherwise available to spouses to one or both members of a same-sex union.⁷

Section Two of DOMA provides guidance to states in terms of the duty to recognize same-sex marriages performed in other states by providing, "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."⁸

2. Pub. L. 104-199, Sept. 21, 1996, 110 Stat. 2419, H.R. 3396, 104th Cong. (1996).

3. *Id.*

4. *Id.*

5. *Id.*

6. 1 U.S.C.A. §7 (2007).

7. See Benjamin G. Ledsham, *Means to Legitimate Ends: Same-Sex Marriage through the Lens of Illegitimacy-based Discrimination*, 28 CARDOZO L. REV. 2373, 2377, n.28 (2007). These federal rights number over one thousand according to Ledsham who noted, "[a] General Accounting Office study in 1997 found 1,049 federal rights, responsibilities, and privileges denied to same-sex couples because they could not marry." U.S. Gen. Accounting Office, GAO/OGC-97-16 Defense of Marriage Act (1997), available at <http://www.gao.gov/archive/1997/og97016.pdf>. A follow-up study in 2004 found 1,138 such federal rights, responsibilities, and privileges. U.S. Gen. Accounting Office, GAO-04-353R Defense of Marriage Act (2004), available at <http://www.gao.gov/new.items/d04353r.pdf> (last visited Mar. 15, 2008).

8. 28 U.S.C.A. § 1738C (2007).

The legislation was presented to the House and passed on July 12, 1996.⁹ The proposed legislation was accompanied by a House Report issued by the Judiciary Committee on July 9, 1996.¹⁰ The report characterizes the Hawaii Supreme Court decision in *Baehr v. Lewin* as an “unprecedented” example of “judicial activism.” The report sheds light on the purpose and governmental interests animating the legislation. The language of the report reveals a belligerent attitude toward the proponents of same-sex marriage and the judiciary.

The title of the legislation is bellicose in its defense of marriage. The report identifies the primary purposes of DOMA in war-like terms: “to defend the institution of traditional heterosexual marriage”¹¹ and “to protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions.”¹² The plaintiffs requesting recognition of same-sex marriage are described as “mounting a campaign”¹³ “waged on religious, cultural and legal fronts”¹⁴ to “win by judicial fiat,”¹⁵ by “foist[ing]”¹⁶ and “forcing”¹⁷ same-sex marriage upon a majority preferring “the holy state of matrimony; the sure foundation of all that is stable and noble in our civilization.”¹⁸ The authors of the report recast the discussion of personal autonomy and equality as a morality debate.

In addition to invoking the politics of fear through language of war, the authors marginalize the proponents of same-sex marriage by describing them as radical,¹⁹ immoral,²⁰ imprudent,²¹ and as proponents of an “inherently flawed social experiment.”²² Thus, the animus underlying the legislation, limiting a fundamental right based upon sexual orientation, permeates the House Judiciary Committee’s Report and undermines the legitimacy of the legislation on numerous constitutional grounds, including the Full Faith and Credit

9. H.R. REP. NO. 664 (1996), reprinted in 1996 U.S.C.C.A.N. 2905. On June 11th and 12th the Committee reported favorably on H.R. 3396 by a vote of 20 in favor and 10 opposed. *Id.* at 2927.

10. H.R. REP. NO. 664 (1996), reprinted in 1996 U.S.C.C.A.N. at 2905.

11. *Id.* at 2906. When the Committee uses the modifier same-sex before the word marriage, quotes are used to enclose the word “marriage,” further marginalizing and alienating the GLBT community. *Id.* at 2906.

12. *Id.*

13. *Id.* at 2907.

14. *Id.*

15. *Id.* at 2911.

16. *Id.* at 2910.

17. *Id.* at 2912.

18. *Id.* at 2916.

19. *Id.*

20. *Id.* at 2920.

21. *Id.* at 2919.

22. *Id.*

Clause,²³ the First Amendment,²⁴ the Fifth Amendment,²⁵ and the separation of powers concepts embodied in the Ninth and Tenth Amendments.²⁶

The government uses language of patriotism and tradition to rally support for the interests undergirding the legislation. The first interest identified is that of "defending and nurturing the institution of traditional heterosexual marriage."²⁷ This section justifies heterosexual union on the basis of "the unimpeachable lesson of human nature" and the "teleology of the body."²⁸ Thus, it seems procreation is the penultimate state interest at stake.²⁹

The problem is that after identifying the interest—children—the proponents of the legislation fail to identify how same-sex marriage threatens the state's interest in promoting the birth of children to heterosexual married couples.³⁰ Clearly, marriage is not a precondition for parenting as demonstrated by the rich variety of single parents, GLBT individuals, GLBT couples, unmarried heterosexual individuals and unmarried heterosexual couples raising children with an abundance of love, energy, and statistical success.³¹ Legalizing

23. U.S. CONST. art. IV, § 1.

24. U.S. CONST. amend. I.

25. U.S. CONST. amend. V.

26. U.S. CONST. amend. IX, X.

27. 1996 U.S.C.C.A.N. at 2916. See also Note, *Litigating the Defense of Marriage Act: The Next Battleground for Same-sex Marriage*, 117 HARV. L. REV. 2684, 2702 (2004) (characterizing Congressional comments as ranging from "paranoid to preposterous").

29. H.R. REP. NO. 664 (1996), as reprinted in 1996 U.S.C.C.A.N. 2905. The Committee wrote, "[w]here it not for the possibility of begetting children inherent in heterosexual unions, society would have no particular interest in encouraging citizens to come together in a committed relationship." *Id.* at 2918. The reasoning seems to be that because you do not bear children in the traditional manner, we will deny to you the rights of marriage without regard to whether you become parents in a non-traditional manner.

30. The Committee, indeed, recognizes that some married heterosexual couples never procreate. It justifies the protections afforded to this class on the grounds that it would be "offensive and unworkable" to require heterosexual couples to sign a pledge to procreate before marrying. *Id.* at 2918. It is somewhat of a relief that the Committee recognizes as unworkable such an intrusion into a couple's procreative decision process. At the same time, it remains very troubling that the Committee fails to recognize that the ban on GLBT marriage raises an equally troubling and offensive incursion into the privacy rights of this community.

31. For example, there are between 4 and 6 million Americans who self-identify as gay men or lesbians in the U.S. More than 39% are raising approximately 250,000 children under the age of 18. Of these children, over 46% are children-of-color. Same-sex couples have lower household incomes, lower homeownership rates and lower education levels than do their heterosexual counterparts. R. Bradley Sears, Gary Gates, & William B. Rubenstein, "Same-sex Couples Raising Children in the United States," The William Project on Sexual Orientation Law and Public Policy (Sept. 2005), www.law.ucla.edu/williamsinstitute/publications/USReport.pdf (last visited Feb. 28, 2009). See also 2000 Census Statistics, <http://www.census.gov/population/www/cen2000/briefs/index.html> (last visited Feb. 28, 2009). Additionally, the Supreme Court has recognized the changing composition of the American family: "[t]he demographic changes of the past century make it difficult to speak of an average American family. The composition of households differs greatly from household to household." *Troxel v. Granville*, 530 U.S. 57, 63 (2000). One state court

same-sex marriage has a zero-sum impact on the goal of promoting the birth of children to married heterosexual couples. Although expressing concern for the majoritarian view that same-sex marriage trivializes and demeans heterosexual marriage, the Committee ignores the marginalizing impact of DOMA upon the GLBT community, an insular minority.

The second interest is the government's role in defending traditional notions of morality. This justification openly embraces anti-GLBT animus and impermissibly intertwines religious beliefs with public legislation. The authors assert, "[t]his judgment [banning same-sex marriage] entails both moral disapproval of homosexuality and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality."³² The morality argument ultimately fails because statutes based upon morality are typically grounded in our criminal statutes.³³ Unless the conduct is illegal, majoritarian moral disapproval is, by constitutional design, irrelevant to highly personal conduct related to intimacy and autonomy.³⁴

The third interest—to protect state sovereignty³⁵—is equally unconvincing given that state autonomy is a balance between comity and sovereignty, established by the Constitution.³⁶ The authors marginalize the court's obligation to interpret the civil rights guarantees of the constitution by dismissing the abortion precedent³⁷ as judicial activism.

recognized that: "[e]xcluding same-sex couples from civil marriage will not make children of opposite sex marriages more secure," although it does deprive children of the GLBT community the "immeasurable advantages that flow" from marriage. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). Although subject to methodological critique, there is a wealth of social science research concluding there is no difference between children raised in a GLBT household and children raised in a straight home. See e.g., Richard Wilkins, Trent Christiansen, & Eric Selden, *Adult Sexual Desire and the Best Interests of the Child*, 18 ST. THOMAS L. REV. 543, nn.237-38 (2005).

32. 1996 U.S.C.C.A.N. at 2920.

33. Despite DOMA, the paucity of criminal prosecution of adultery, heartbalm and tortious interference with marital relationship claims arguably demonstrates the state's retreat from policing the bedroom. See e.g., Phyllis Coleman, *Who's been Sleeping in My Bed? You and Me, and the State Makes Three*, 24 IND. L. REV. 61 (1991); Jill Jones, *Fanning an Old Flame: Alienation of Affection and Criminal Conversion Revisited*, 26 PEPP. L. REV. 61 (1999); Deana A. Pollard, *Sex Torts*, 91 MINN. L. REV. 769 (2007).

34. See *infra* notes 84-103 and accompanying text.

35. 1996 U.S.C.C.A.N. at 2920.

36. See *infra* notes 287-99 and accompanying text.

37. The reference to abortion jurisprudence is strikingly out of place in the report justifying DOMA. While authors of the report might join the issues because both raise issues related to state autonomy, the intermingling of anti-GLBT marriage rhetoric and anti-abortion rhetoric serves as a partisan reminder of the Christian right-wing agenda that ushered George Bush into office in 2000. For example, one scholar cited the *Washington Post* in support of this assertion. Diana Hassel, *Sex and Death: Lawrence's Liberty and Physician-assisted Suicide*, 9 U. PA. J. CONST. L. 1003, 1016, n.78 (2007). See e.g., Alan Cooperman, *Same-Sex Bans Fuel Conservative Agenda*, WASH. POST, Nov. 4, 2004, at A39, available at <http://www.washingtonpost.com/wp-dyn/articles/A23672-2004Nov3.html> (last visited Mar. 15, 2008) (noting "[S]ome social conservatives contended that a desire to defend the traditional definition of marriage drew millions of evangelical Christians to the

The Committee is struck by the fact that this entire issue of same-sex marriage, like so much of the debate related to matters of sexual morality, is being driven by the courts. Of course, by declaring the right to an abortion to be constitutionally protected, the federal courts have largely assumed control over the course of abortion law in this country. And whether one agrees or disagrees with the Court's jurisprudence in that area, all must concede that as the degree of court involvement increases, to that extent democratic self-governance over such matters is diminished.

In some contexts, of course, it is legitimate for courts to take precedence over decision-making by the representative branches of government. But what is most troubling in a representative democracy is the tendency of the courts to involve themselves far beyond any plausible constitutionally-assigned or authorized role. As Professor Arkes testified before the Subcommittee on the Constitution, in the area of sexual morality, 'we have a campaign [being] waged to transform the culture through the law, or through the control of the courts.'³⁸

While chastising the courts for overstepping the constitutional boundaries of judicial review in matters of personal autonomy, the authors advocate the passage of law that arguably violates numerous provisions of the Constitution. By eliminating the requirement that sister states grant full faith and credit to out of state marriages, DOMA permits states to forego the traditional choice of law balancing test in reliance upon the federal legislation.³⁹ Thus, as a result of DOMA, state governments will not be required to identify the local interests

polls and provided President Bush's margin of victory."). In 2006, referenda banning same-sex marriage passed in Colorado, Idaho, South Carolina, South Dakota, Tennessee, Virginia, and Wisconsin and only Arizona rejected a ban on same-sex marriage. *America Votes 2006*, CNN.com, <http://www.cnn.com/ELECTION/2006/pages/results/ballot.measures/> (last visited Mar. 16, 2008).

39. Traditionally, a marriage valid where celebrated is valid across state lines unless recognition would violate the public policy of the state with the most significant relationship to the spouses and the marriage at the time of the marriage. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (2007). In *Loughren v. Loughren*, the Supreme Court held:

In first marriages not polygamous or incestuous, or otherwise declared void by statute, will, if valid by the law of the state where entered into, be recognized as valid in every other jurisdiction. *Meister v. Moore*, 96 U.S. 76, 24 L. Ed. 826; *Travers v. Reinhardt*, 205 U.S. 423, 440, 27 S. Ct. 563, 51 L. Ed. 865. The mere statutory prohibition by the State of the domicile either generally of the remarriage of a divorced person, or of remarriage within a prescribed period after the entry of the decree, is given only territorial effect. Such a statute does not invalidate a marriage solemnized in another state in conformity with the laws thereof. *Loughren*, 292 U.S. 216, 223 (1934).

that are challenged by same-sex marriage, nor will they be required to determine whether the perceived harm is not only real but also sufficiently damaging to justify eschewing principles of comity. In choice of law parlance, this test is typically formulated to ask whether by applying the otherwise applicable law, the result would substantially undermine a fundamental public policy of the state with the significant interest at stake.⁴⁰ By eliminating this analysis, DOMA impermissibly interferes with the balance between interstate comity and state sovereignty.⁴¹

The fourth and final justification advances the need to preserve scarce government resources.⁴² This argument loses its sheen of credibility given the existing federal deficit estimated to be 4.9 trillion on December 29, 1995 and is over 11 trillion as of March 27, 2009.⁴³ Clearly, spending has gone unchecked in other areas. Moreover, the projected cost of providing federal benefits in a fair and impartial manner cannot justify the disparate treatment of similarly situated individuals.⁴⁴

40. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (providing “(1) The validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage under the principles stated in § 6. (2) A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.”).

41. See *infra* notes 254-295 and accompanying text.

42. H.R. REP. NO. 664 (1996), as reprinted in 1996 U.S.C.C.A.N. 2905, 2922.

43. See TreasuryDirect, *The debt to the Penny and who Holds It*, <http://www.treasurydirect.gov/NP/BPDLLogin?application=np> (last visited Mar. 27, 2009).

44. For example, the Supreme Court has invalidated state statutes imposing a minimum residency requirement in order to qualify for welfare and medical benefits. See *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969) (Supreme Court invalidated state durational residency requirements for eligibility to receive welfare assistance); *Dunn v. Blumstein*, 405 U.S. 330, 353 (1972) (Supreme Court invalidated a one-year state residency requirement to vote); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 254 (1974) (Supreme Court invalidated state statute requiring twelve months residency to qualify for indigent nonemergency medical care). In these cases the courts reasoned that the individuals have a property right in these payments that is protected by substantive due process. Marital rights to share in health, insurance and retirement benefits are equally valuable and DOMA absolutely deprives members of the GLBT community from marrying, and thus qualifying for such rights. See also Charles A. Reich, *The Liberty Impact of the New Property*, 31 WM & MARY L. REV. 295 (1990). Charles Reich's New Property theory was recently described in the following manner:

During the contagious optimism and idealism of the Great Society era, Charles Reich wrote *The New Property*. From his 1964 vantage point, Reich attempted to describe the emerging 'new society.' He focused particularly upon government largess--forms of wealth dispensed by the government to its citizens, including income, benefits, jobs, occupational licenses, franchises, contracts, subsidies, and services. Reich observed that these new government benefits were 'steadily taking the place of traditional forms of wealth--forms which are held as private property.' But Reich worried that these new benefits failed to incorporate sufficient safeguards for their recipients. Instead, he feared, the government had broad discretion to withdraw these intangible rights at any time.

In response to *Baehr v. Lewin*, DOMA passed the Committee by a vote of 20 in favor and ten opposed.⁴⁵ Subsequently, both houses of Congress approved the legislation and it became law. At the time DOMA was passed, 14 states had enacted laws to protect heterosexual marriage.⁴⁶ As of May 15, 2009, approximately 13 years later,⁴⁷ 44 states and the District of Columbia⁴⁸ have common law, statutory or constitutional laws in place limiting marriage to one man and one woman. Of these 44 jurisdictions, 30 have defined marriage as one man and one woman in their respective state constitutions.⁴⁹ Of the remaining 14 jurisdictions, ten states have passed statutes defining marriage as between one man and one woman.⁵⁰ Three states rely on common law to limit

Reich accepted that the new 'public interest state' was part of a 'great and necessary movement for reform.' He saw the 'revised social contract' as a government promise to protect its citizens from 'the extremes of economic dislocation.'

Christine A. Klein, *The New Nuisance: An Antidote to Wetland Loss, Sprawl, and Global Warming*, B.C.L. REV. 1155, 1181-3 (2007).

45. Representatives voting in favor of DOMA included: Hyde, Moorhead, Sensenbrenner, McCollum, Gekas, Coble, Smith, Gallegly, Canady, Goodlatte, Buyer, Hoke, Bono, Heineman, Bryant, Chabot, Flanagan, Barr, Boucher and Reed. Representatives voting against DOMA included: Conyers, Schroeder, Frank, Berman, Nadler, Scott, Watt, Becerra, Lofgren, Jackson-Lee. H.R. REP. NO. 664 (1996), as reprinted in 1996 U.S.C.C.A.N. 2905, 2927.

46. *Id.* at 2913.

47. The summary of same-sex marriage law is based upon the information available as of May 15, 2009. At the time of publication, numerous bills legalizing same-sex marriage were pending in state legislatures across the country.

48. The District of Columbia limits marriage to one man and one woman according to common law interpretation of the marriage statute. *Dean v. D.C.*, 653 A.2d 307, 318 (D.C. 1995).

49. 50 *State Survey of Family Law Marriage*, (Thompson West Jan. 2008). See ALA. CONST. art. I, § 36.03 (2009); ALASKA CONST. art. I, § 25 (2007); ARK. CONST. amend. 83, §§ 1-3 (2009); ARIZ. CONST. art. 30, § 1 (2009); CAL. CONST. art. I, § 7.5 (2009) (constitutional challenges pending in California Supreme Court *Strauss v. Horton*, S168047; *Tyler v. State of California*, S168066; *City and County of San Francisco v. Horton*, S168078 (oral argument held on March 4, 2009)); COLO. CONST. art. II § 31 (2009); FLA. CONST. art. I, § 27 (2009); GA. CONST. art. I § 4 (2007); HAW. CONST. art. I, § 23 (2007); IDAHO CONST. art. III, § 28 (2009); KAN. CONST. art. XV, § 16 (2009); KY. CONST. § 233A (2007); LA. CONST. art. XII, § 15 (2007); MICH. CONST. art. I, § 25 (2007); MISS. CONST. art. XIV, § 263A (2007); MO. CONST. art. I, § 33 (2007); MONT. CONST. art. XIII, § 7 (2007); NEB. CONST. art. I, § 29 (2007); NEV. CONST. art. I, § 21 (2007); N.D. CONST. art. 11, § 28 (2007); OHIO CONST. art. XV, § 11 (2007); OKLA. CONST. art. 2, § 35 (2007); OR. CONST. art. XV, § 5a (2007); S.C. CONST. art. XVII § 15 (2009); S.D. CONST. art. XXI, § 9 (2007); TENN. CONST. art. XI, § 18 (2009); TEX. CONST. art. I, § 32 (2007); UTAH CONST. art. I, § 29 (2007); VA. CONST. art. I, § 15-A (2007); WIS. CONST. art. XIII, § 13 (2007). By amending the state constitutions, these states have insulated the question of the constitutionality of same-sex marriage bans from state court judicial review.

50. DEL. CODE ANN. tit. 13 §§101 & 104 (2007); ILL. COMP. STAT. ANN. § 5/212 (2007); IND. CODE ANN. § 31-11-1-1 (2007); MD. CODE ANN. [FAM. LAW] § 2-201 (2007); MINN. STAT. ANN. § 517.03 (2007); N.C. GEN. STAT. ANN. § 51-1.2 (2007); 23 PA. STAT. ANN. § 1704 (2007); WASH. STAT. §§ 26.04.010 & 26.04.020 (2007); WEST VA. CODE ANN. § 48-2-401 (2007); WYO. STAT. ANN. § 20-1-101 (2007).

the right to marry to one man and one woman.⁵¹ One state, New Mexico, remains entirely silent on the validity on same-sex marriage.⁵² Currently, only Massachusetts,⁵³ Connecticut,⁵⁴ Iowa,⁵⁵ Vermont,⁵⁶ Maine⁵⁷ and New Hampshire⁵⁸ permit same-sex marriage. Additionally, New Hampshire,

51. These three states include: New Jersey, New York, and Rhode Island. See *Thompson West 50 State Statutory Surveys Family Law Marriage* (2008). See also *Seymore v. Holcomb*, 811 N.Y.S.2d 134, 135, 26 A.D.3d 661, 662 (N.Y. 2006) (marriage is between one man and one woman); *Lewis v. Walker*, 875 A.2d 259 (N. J. Super. 2005) (marriage is between one man and one woman); *Chambers v. Ormiston*, 935 A.2d 956 (R.I. 2007) (marriage is between one man and one woman).

52. New Mexico law, both statutory and common, remains silent on the issue.

53. *Goodridge v. Dep't Pub. Health*, 798 N.E.2d 941 (Mass. 2003). Four states fleetingly permitted GLBT marriage until the right was revoked. These include Hawaii, Alaska, California and most recently Iowa. On August 30, 2007, Judge Robert B. Hanson of the Fifth Judicial District of Iowa invalidated Iowa Code section 595.2(1), the Iowa Defense of Marriage Act, on the basis that '[c]ouples, such as Plaintiffs, who are otherwise qualified to marry one another may not be denied licenses to marry or certificates of marriage or in any other way prevented from entering into a civil marriage pursuant to Iowa Code Chapter 595 by reason of the fact that both persons comprising such a couple are of the same sex.' *Varnum v. Brien*, No. CV5965, 2007 WL 2468667 (D. Iowa Aug. 30, 2007). Following the same-sex marriage of one couple, the order invalidating the same-sex marriage bar was stayed pending appeal. The Maryland Court of Appeals recently upheld the constitutionality of its state DOMA statute. *Conaway v. Deane*, 932 A.2d 571, 635 (Md. 2007) (same-sex marriage prohibition survived rational basis review under Maryland Constitution).

54. *Kerrigan v. Comm. Pub. Health*, 957 A.2d 407, 482 (2008).

55. IOWA CODE ANN. § 595.2 (2007) (*But see Varnum*, 2007 WL 2468667, *aff'd* 763 N.W.2d 862 (Iowa 2009) (*affirming* trial court decision holding Iowa one man one woman marriage statute unconstitutional).

56. Vermont legislative Bill S. 115 entitled, "An Act Relating to Civil Marriage" adopted by both the Vermont House and Senate on April 7, 2009 overriding the Governor's previous veto and invalidating the one man and one woman definition of marriage set forth in VT. STAT. ANN. tit. 15 § 8 (2007).

57. ME. REV. STAT. ANN. § 650A (2009).

58. N.H. REV. STAT. ANN. § 457:1-3 (2009).

Vermont, and Connecticut recognize Civil Unions.⁵⁹ New Jersey, Maryland, Oregon, and California have passed domestic partnership laws.⁶⁰

DOMA raises numerous constitutional concerns related to the First Amendment, the Fifth Amendment, Tenth Amendment and the Full Faith and Credit Clause of the United States Constitution. The Supreme Court has the ultimate authority to interpret the Constitution. This includes the power to identify unenumerated rights and to define the scope of protection.

II. TRADITIONAL STRUCTURAL REASONING

While enumerated rights are expressly protected in the text of the Constitution, the definition and identity of unenumerated rights is a continuing source of controversy among lawyers, legal scholars, and the bench. While most agree that the Constitution protects a bundle of unenumerated rights to give meaning to the "matrix value" of liberty,⁶¹ agreement ends there. Between originalists and penumbralists, interpretative variety abounds. Consider the phrase, "penumbral reasoning." For some, it conjures up images of a self-serving logic employed to justify judicial activism, an evil Justice Scalia eschews.

For example, in *Romer v. Evans*,⁶² Justice Kennedy, writing for the majority, observed: "

It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that

59. CONN. GEN. STAT. § 46b-38bb (2007); N.H. REV. STAT. ANN. § 457-A: 1 (2007). Under the recent New Hampshire same-sex marriage law, parties to a valid New Hampshire civil union shall be deemed married by operation of law on January, 2011. N.H. REV. STAT. ANN. § 457:46 (2009). 15 VER. STAT. ANN. § 1201. Vermont will have to address the continuing utility of civil union law and create rules for those who wish to transition from a civil union to a marriage. See also Greg Johnson, *Civil Union a Reappraisal*, 30 VT. L. REV. 891, 894 (2006) (arguing the GLBT community, gay, lesbian, bi-sexual, and transgendered community should welcome civil union as alternative to marriage); Nancy K. Kubasek, Alex Fondorf, & Kevin J. Minnick, *Civil Union Statutes: A Shortcut to Legal Equality for Same-sex Partners in Landscape Littered With Defense of Marriage Acts*, 15 U. FLA. J. L. & PUB. POL'Y 229, 258 (2004) (Civil Unions should be viewed as a viable alternative to same-sex marriage). See also Carlos A. Ball, *The Backlash Thesis and Same-sex Marriage: Learning from Brown v. Board of Education and Its Aftermath*, 14 WM. & MARY BILL RTS. J. 1493, 1531 (2006) (suggesting same-sex marriage litigation paved the way for rising support of civil union as a mainstream alternative).

60. See CAL. FAM. CODE § 297 (2009); MD CODE, Tax-Property § 12-101 (2009); N.J. STAT. ANN. § 26:8A-2 (2009); OR. REV. STAT. tit. 11, ch. 106 (2009).

61. See James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 35 (1995) (using the term "matrix value" in relationship to liberty).

62. 517 U.S. 620 (1996).

government and each of its parts remain open on impartial terms to all who seek its assistance.”⁶³

In his dissent Justice Scalia chastised the *Romer* majority for invalidating the Colorado Constitutional amendment prohibiting the state and local legislators from enacting any laws that would permit the GLBT population to claim “minority status, quota preference, protected status or claim of discrimination” as follows:

The Court has mistaken a Kulturkampf for a fit of spite. When the Court takes sides in the culture wars, it tends to be with the knights rather than the villains -and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court’s Members are drawn. How that class feels about homosexuality will be evident to anyone who wishes to interview job applicants at virtually any of the Nation’s law schools. The interviewer may refuse to offer a job because the applicant is a Republican; because he is an adulterer; because he went to the wrong prep school or belongs to the wrong country club; because he eats snails; because he is a womanizer; because she wears real-animal fur; or even because he hates the Chicago Cubs. But if the interviewer should wish not to be an associate or partner of an applicant because he disapproves of the applicant’s homosexuality, *then* he will have violated the pledge which the Association of American Law Schools requires...”⁶⁴

Justice Scalia’s impatience may stem, perhaps, from his perception that the majority has invaded the realm of the legislature and has relied upon personal values to invalidate the state constitutional provision, a theoretical danger associated with penumbral reasoning.⁶⁵

The resolution of this debate turns upon whether the majority properly exercised its authority to interpret the Constitution. The phrase “penumbral reasoning” is attributable to the majority opinion written by Justice Douglas in *Griswold v. Connecticut*, locating the right to privacy in this penumbral zone.⁶⁶ Although locating the right to privacy in the penumbras of the Constitution may seem tenuous to Justice Scalia and others, the recognition of a zone of privacy encompassed in the express protection of liberty continues to resonate with the court, the legislature, and the public.⁶⁷ Some scholars suggest that a better way to identify and analyze unenumerated rights is to use structural reasoning.⁶⁸

63. *Id.* at 633.

64. *Id.* at 653.

65. Brannon P. Denning & Glenn Harlan Reynolds, *Comfortably Penumbral*, 77 B.U. L. REV. 1089, 1091 (1997).

66. 381 U.S. 479, 484 (1965).

67. In *Roe v. Wade*, 410 U.S. 113, 152 (1973), the court traces the recognition and evolution of the right to privacy:

As early as 1969, the same year in which *Griswold* was decided, Professor Charles Black uses the term structural reasoning⁶⁹ to explain the vitality of three concepts: federalism, separation of powers and majoritarianism.⁷⁰ These three core concepts, although absent from the express text of the constitution, shaped the text and remain vital to our democratic government. They are derived implicitly from an understanding of how different parts of the constitutional text work together to create a complex matrix of rights and

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); in the Fourth and Fifth Amendments, (1968), *Katz v. United States*, 389 U.S. 347, 350 (1967); *Boyd v. United States*, 116 U.S. 616 (1886), see *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, *Griswold v. Connecticut*, 381 U.S. 479, 484-485; in the Ninth Amendment, *id.*, at 486 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, *Loving v. Virginia*, 388 U.S. 1, 12 (1967); procreation, *Skinner v. Oklahoma*, 316 U.S. 535, 541-542 (1942); contraception, *Eisenstadt v. Baird*, 405 U.S., at 453-454; family relationships, *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); and child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

Id.

68. CHARLES BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 137-179 (2d ed. 2000).

69. The utility of "Structural Reasoning" remains a divisive topic among students of the law. For works advocating its use see e.g., David Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 NW. U. L. REV. 641 (1994); Fleming, *supra* note 61; Denning & Reynolds, *supra* note 65; Laurence Tribe, *Seanz...Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future - Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 196 (1999). For works advocating originalism see e.g., ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 187-221 (1990); EARL M. MALTZ, RETHINKING CONSTITUTIONAL LAW: ORIGINALISM, INTERVENTIONISM, AND THE POLITICS OF JUDICIAL REVIEW (1994); CHRISTOPHER WOLFE, HOW TO READ THE CONSTITUTION: ORIGINALISM, CONSTITUTIONAL INTERPRETATION, AND JUDICIAL POWER (1996); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999); Aileen Kavanagh, *Original Intention, Enacted Text, and Constitutional Interpretation*, 47 AM. J. JURIS. 255 (2002); Richard S. Kay, "Originalist" Values and Constitutional Interpretation, 19 HARV. J.L. & PUB. POL'Y 335 (1996); Vasani Kesavan & Michael Stokes Paulsen, *The Interpretative Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 113 (2003); Jonathan R. Macey, *Originalism as an "Ism,"* 19 HARV. J.L. & PUB. POL'Y 301 (1996).

70. BLACK, *supra* note 68, at 137.

duties.⁷¹ Black argues that in addition to reasoning from the words of the text and the precedent interpreting the text, there is a third type of reasoning: reasoning based on the structure of the Constitution designed to achieve "the highest purpose of government, to create and protect individual national rights."⁷² Black urges the "wider use of inference from relation and structure in the intellectual processes of constitutional law."⁷³ Thus, when faced with general language in the Constitution applied to very specific facts, reasoning based on the structure of and relationship between relevant constitutional provisions is preferable to a strained originalist interpretation of otherwise seemingly irrelevant words in the text of the Constitution.⁷⁴

In his 1995 article, James Fleming dedicates his work to what he describes as the "unfinished business of Charles Black."⁷⁵ Fleming focuses on the theme of deliberative autonomy rooted in the language and construct of the U.S. Constitution to identify the existence and scope of the personal liberties it secured.⁷⁶ Fleming identifies the twin rights of deliberative democratic rule and deliberative personal rule as overarching first principles of the Constitution.⁷⁷ According to Fleming, deliberative personal autonomy includes unenumerated fundamental rights protecting privacy and autonomy.⁷⁸ Despite the potential danger of the judiciary sitting as a super-legislature, associated with the decisions of the *Lochner* era,⁷⁹ Fleming urges an interpretation of the Constitution, free from "caricatures" and "illiteracy," faults Fleming attributes to the originalist camp of Constitutional interpreters.⁸⁰ He skillfully illuminates the reflexive relationship between rights secured by the First Amendment and rights associated with substantive due process,⁸¹ traditionally protected by the Fifth and Fourteenth Amendments. His focus on the interrelationship between the First, Fifth and Fourteenth Amendments reveals and emphasizes a protected zone of personal sovereignty, further legitimizing the protection of unenumerated rights. He describes his approach as "constitutional constructivism."⁸²

71. *Id.*

72. *Id.* at 140.

73. *Id.* at 141.

74. *Id.*

75. Fleming, *supra* note 61, at 4.

76. *Id.* at 3.

77. *Id.*

78. *Id.*

79. *Id.* at 4.

80. *Id.* Fleming notes the disconnect between the willingness of the originalists Bork and Scalia to rely upon structure and relationship to discern the constitutionally mandated precepts of the separation of powers, federalism and the republican form of government, while eschewing this form of reasoning to discern individual rights, arguably those rights already in existence and forming the basis upon which the Constitution was built. *Id.* at 4-5.

81. *Id.* at 6.

82. *Id.* at 15. Fleming compares his approach to Rawls' political constructivism with its focus upon free and equal citizens participating in a pluralistic democracy. *Id.* at 2 n.7.

Fleming's approach revolves around two basic precepts: every citizen is entitled to freedom and equality and the purpose of society is to create and sustain a fair system of social cooperation.⁸³ Basic liberties are preconditions for the evolution and growth of the twin moral imperatives of equality and fairness. Fleming views the U.S. Constitution as securing the fundamental rights necessary to achieve the complementary goals of deliberative autonomy and deliberative democracy.⁸⁴ Fleming posits that government serves the purpose of protecting preexisting individual fundamental rights. According to Fleming, the Constitution recognizes three separate and independent sources of sovereignty: federal, state and individual.⁸⁵ The Ninth Amendment protects the unenumerated fundamental rights of the individual creating a zone of personal sovereignty.⁸⁶ The parallel between Fleming's focus on federal, state and individual autonomy and Black's recognition of the founding precepts of federalism, separation of powers and majoritarianism demonstrate the importance of diffusing state power both horizontally and vertically with the shared goal of creating and protecting a zone of personal autonomy, immune from majoritarian creep.

Thus, fundamental rights do not emanate from the individual conscience of the presiding judge. They are not a matter of individual judicial morality and values, but rather must be derived from the liberties necessary to develop and exercise deliberative democracy⁸⁷ and deliberative autonomy.⁸⁸ In other words, fundamental rights protect two bedrock principles: the right to participate equally in matters of democratic governance (deliberative democracy) and the right to self-determination in highly personal decisions (deliberative autonomy).⁸⁹ Same-sex marriage arguably constitutes the type of highly personal decision⁹⁰ that ought to be freely made, without unwarranted government intrusion as a matter of deliberative autonomy.

Fleming describes his article as further developing the work he began in his prior article. *Id.* See also James E. Fleming, *Construing the Substantive Constitution*, 72 TEX. L. REV. 211 (1993).

83. Fleming, *supra* note 61, at 18.

84. *Id.* at 20.

85. *Id.* at 49.

86. *Id.* at 51. In contrast to relying upon the Ninth Amendment, freedom of association and bedrock principles underlying and supporting the Constitution, Laurence Tribe explores "transplanting (fundamental) rights from their current substantive due process soil, however, barren, to the heady mountains of the privileges and immunities." Tribe, *supra* note 69 at 196. Tribe suggests that the recent Supreme Court decisions imply that when issues are framed in terms of denying equal citizenship through discrimination, stratification or exclusion, the majority of the court demonstrates a willingness to rely upon structural reasoning to invalidate the state action. *Id.* at 178.

87. Fleming, note 61, at 52-53. Deliberative democracy is protected by the unenumerated precepts of federalism and separation of powers.

88. *Id.* at 40.

89. *Id.* at 32.

90. *Id.* at 10. This is especially true when the highly personal decision is unpopular as Justice Jackson noted:

According to Fleming, these fundamental, bedrock rights include: liberty of conscience and freedom of thought, freedom of association, family privacy, the right to travel, the right to marry, the right to procreate, the right to use contraceptives, the right to terminate a pregnancy, the right to direct the education and rearing of children, the right to bodily integrity and the right to die.⁹¹ These rights arise out of the liberty of conscience and the freedom of association, both “matrix values that undergird deliberative autonomy.”⁹² The judiciary is the designated protector of both.

In its role as protector, the court, through judicial review, is obligated to check state and federal lawmakers, who may, from time to time, exceed their legislative authority. The expanding importance of judicial review is due in part to the vanishing “exit option.”⁹³ While individuals who disagreed with the law were formerly able to escape majoritarian pressure by moving to the frontier, this option is no longer available. Thus, the court’s role as defender of deliberative autonomy has become even more vital.⁹⁴ By defining the scope and nature of fundamental rights and defining the extent of protection required, the Court preserves individual sovereignty, in keeping with the aspirational quality of the U.S. Constitution. These rights are, by definition, fundamental.

Fleming describes the United States Supreme Court’s past approach to identifying fundamental rights as spanning a continuum. At one end, representing a broad and aspirational approach, some courts ask whether the asserted unenumerated right is “of the very essence of a scheme of ordered liberty.”⁹⁵ Some adherents of this approach described the Constitution as a “living thing.”⁹⁶ At the other end of the continuum is the historical approach, asking whether the asserted right is a “principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental and essential to the concept of ordered liberty.”⁹⁷

Despite the intense debate between jurists advancing competing tests to identify unenumerated fundamental rights, most jurists desire the same end: to identify the correct balance between individual rights and democratic rule required by the Constitution. Thus, structural reasoning offers an avenue of constitutional reasoning that identifies these competing interests and affords to

[W]e apply the limitations of the Constitution with no fear that that freedom to be intellectually spiritually diverse or even contrary will disintegrate the social organization. [F]reedom to differ is not limited to things that do not matter much. That would be a shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641-42 (1943).

91. Fleming, *supra* note 61, at 7.

92. *Id.* at 36.

93. *Id.* at 54.

94. *Id.* at 55.

95. *Id.* at 57.

96. *Id.* (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan J., dissenting)).

97. *Id.* (quoting *Palko v. Conn.*, 302 U.S. 319, 325 (1937)).

jurists a more direct line of reasoning when individual and majority interests collide.⁹⁸

Fleming comments that depending solely upon historical practices to identify fundamental rights stifles the "promise of liberty" embodied in the covenant between the U.S. government and its citizens.⁹⁹ Fleming proposes a structural interpretation of the U.S. Constitution that presupposes the existence of fundamental rights, rights which the federal and state governments are designed to protect and advance. Thus, the challenge that these rights are not enumerated is dulled:

Constitutional constructivism provides a guiding framework within which to fulfill the responsibility not to retreat from interpreting the full meaning of our covenant of aspirational principles. Only through such a holistic reading of the Constitution can we guarantee the promise of liberty rather than merely enforcing historical practices that may have failed to live up to that promise.¹⁰⁰

Fleming equates his approach to that of interpreting the Constitution in light of a living and changing tradition, focusing on the "significant preconditions for deliberative autonomy."¹⁰¹

Other scholars have, likewise, highlighted the increasing use and utility of structural reasoning by the United States Supreme Court between 1996 and 1997.¹⁰² In one article, the authors focus on "the Court's willingness to supplement the text, precedent, and history with inferences derived from related constitutional provisions, the overall structure of the Constitution and the principles that animated its framing."¹⁰³ Clearly, the weight and persuasiveness of structural reasoning will depend upon whether the inferences advanced are logical and principled. The authors stress that both liberals and conservatives employ penumbral, structural reasoning to fill in gaps and resolve ambiguities.¹⁰⁴ Thus, structural reasoning is not, by definition conservative or liberal, but rather it offers an analytical approach to interpret the Constitution as a whole, taking into consideration the separation of powers between the federal

98. Faigman, *supra* note 69, at 644 (1994).

99. Fleming, *supra* note 61, at 59-60.

100. *Id.* at 60.

101. *Id.* at 62.

102. Denning & Reynolds, *supra* note 65, at 1090.

103. *Id.*

104. *Id.* at 1092. The authors note that, "[c]onservatives on the Court have found penumbral reasoning as a useful tool to advance several favored causes ... in the areas of federalism and sovereign immunity." *Id.* See also Tribe, *supra* note 69, at 168. Although using different terminology, other scholars have also advocated the Court's authority to identify new implied fundamental rights based upon the express language of the Constitution creating "meta principles" of "substantive fundamental rights" embodied in the concepts of Equality, Liberty, Citizenship and Privileges or Immunities, which in turn lead to more specific rights applicable to concrete cases." Stephen Kanter, *The Griswold Diagrams: Toward a Unified Theory of Constitutional Rights*, 28 CARDOZO L. REV. 623, 703 (1996).

government, the state government and the individual, arguably three separate sovereign entities engaged in a power-sharing coalition.

The Constitution has been interpreted, through structural reasoning to encompass a right to privacy and a right to marriage, creating a sphere of marital privacy. Structural analysis is particularly relevant to the issue of whether the GLBT population, an anonymous and insular minority,¹⁰⁵ is entitled to exercise the fundamental right to marry the individual of his or her choice. The United States Supreme Court has not yet decided whether a structural and principled interpretation of the Constitution supports the right to same-sex marriage.

In summary, structural reasoning offers the court an analytical framework to resolve constitutional disputes guided by the following three goals in hierarchical order:

1. Preserve deliberative autonomy,
2. Preserve deliberative democracy, and
3. Preserve the ideals of federalism and separation of powers.¹⁰⁶

Therefore, structural reasoning is particularly well suited to determine the constitutionality of DOMA because the issue has a broad range of federal, state and individual implications.

III. CASES ADDRESSING THE CONSTITUTIONALITY OF DOMA

To date, the United States Supreme Court has not determined the validity of DOMA. Between 1996 and December 31, 2007, research revealed six federal decisions addressing the constitutionality of the federal DOMA under the U.S. Constitution.¹⁰⁷ None of the litigants succeeded in invalidating

105. As opposed to a discrete and insular minority, Bruce Akerman refers to the homosexual population as an "anonymous and insular minority" and writes:

It will be a tragedy, however, if the progress we have made serves to justify a refusal to develop and extend *Carolene's* concern with the integrity of pluralist process to contemporary conditions. Long after discrete and insular minorities have gained strong representation at the pluralist bargaining table, there will remain many other groups who fail to achieve influence remotely proportionate to their numbers: groups that are discrete and diffuse (like women), or anonymous and somewhat insular (like homosexuals), or both diffuse and anonymous (like the victims of poverty). If we are to treat *Carolene* as something more than a tired formula, constitutional lawyers must develop paradigms that detail the systematic disadvantages that undermine our system's legitimacy in dealing with the grievances of these diffuse or anonymous groups.

Bruce A. Akerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 742 (1985).

106. The hierarchy represents the importance of the individual to the society and of the society to the government.

107. *Smelt v. County of Orange*, 447 F.3d 673 (9th Cir. 2006) (same-sex couple lacked standing to challenge federal DOMA), reversing *Smelt v. County of Orange*, 374 F.Supp. 2d 861 (C.D. Cal. 2005); *Mueller v. Comm. of IRS*, 39 Fed. Appx. 437 (7th Cir. 2002) (petitioner lacked standing to challenge federal DOMA); *Bishop v. Okla.*, 447 F.Supp. 2d

DOMA. Most courts dismissed on lack of standing grounds,¹⁰⁸ and few courts reached the merits of the claims.¹⁰⁹ For example, even when the existence of a concrete injury arising out of disparate treatment can be established, the federal DOMA statute remains immune from challenge because the IRS adopts the state definition of marriage, so long as it is one man and one woman, "thus the Defense of Marriage Act was not implicated."¹¹⁰ Thus, same-sex married couples are barred at the door of the federal courthouse as a matter of the federal heterosexual definition of marriage.

Florida federal courts have twice decided cases related to DOMA. In *Wilson v. Ake*, the court ruled on five claims. With respect to the argument that DOMA violates the Full Faith and Credit Clause of the Constitution because it is beyond the scope of Congressional power, the court held that Congress acted within its authority to regulate conflicts between states.¹¹¹ In relationship to an individual's fundamental right to marry a person of the same sex, the court held that the fundamental right to marry did not extend to individuals of the same sex.¹¹² In response to the argument that the court should apply strict scrutiny on equal protection grounds and invalidate the statute, the court ruled that homosexuality is not a suspect class and the statute survived rational basis.¹¹³ Finally regarding the assertion that DOMA violated the Commerce Clause and the Privileges and Immunities Clause of the Constitution, the court dismissed both arguments as without merit in a footnote.¹¹⁴ The *Wilson* case is disappointing because the court fails to examine the state's interest in prohibiting same-sex marriage under even the rational basis standard; therefore, the question of animus is not addressed.

1239 (N.D. Okla. 2006) (lesbian couple married in Canada lacked standing to challenge federal DOMA definition of marriage, had standing to challenge section 3 of DOMA based on the Full Faith and Credit Clause and the Privileges and Immunities Clause); *Wilson v. Ake*, 354 F.Supp. 2d 1298 (M.D. Fla. 2005) (court applied rational basis to uphold federal DOMA based on equal protection and substantive due process challenges); *Taylor v. Sullivan*, 2004 WL 3142552, 18 Fla. L. Weekly 125 (2004) (petitioners, all citizens of Florida, denied standing to sue for declaratory relief staying same-sex couple's constitutional challenge to federal DOMA); *In re Kandu*, 315 B.R. 123 (W.D. Wash. 2004). On March 3, 2009, petitioners filed an action for declaratory judgment to invalidate DOMA. See *Gill v. Office of Personnel Management*, available at http://dockets.justia.com/docket/court-madce/case_no-1:2009cv10309/case_id-120672/. (last visited Mar. 24, 2009).

108. *Smelt*, 447 F.3d at 684; *Mueller*, 39 Fed. Appx. at 438; *Bishop*, 477 F.Supp. 2d at 1247.

109. *Wilson*, 354 F.Supp. 2d at 1298.

110. *Mueller*, 39 Fed. Appx. at 438.

111. *Wilson*, 354 F.Supp. 2d at 1303. Arguably, the court erred by concluding without analysis that the Florida public policy prohibiting same-sex marriage was legitimate, rather than applying the favorable summary judgment standard to permit the parties to develop the record on this issue. *Id.* at 1304.

112. *Id.* at 1306.

113. *Id.* at 1308.

114. *Id.* at 1309.

The second Florida case presented a twist on the typical parties involved in DOMA litigation.¹¹⁵ The clerk of courts and several Florida churches asked the court to declare DOMA constitutional. In *Taylor v. Sullivan*, the court dismissed the action for lack of a concrete injury.¹¹⁶

In *Smelt v. County of Orange*, the court dismissed constitutional challenges to DOMA on the basis that two individuals of the same-sex may not enter into marriage, thus the plaintiffs failed to allege a legal injury.¹¹⁷ In *Bishop v. Oklahoma*,¹¹⁸ a petitioner's substantive attack on DOMA survived justiciability claims. In *Bishop*, the court reversed to permit a same-sex couple married under Canadian law and having entered into a Vermont civil union to challenge the constitutionality of Section Three of DOMA on equal protection and due process grounds.¹¹⁹ Although the court did not decide the merits, it did remand in order to permit the parties to proceed to trial to better develop the record.¹²⁰

In *In re Kandu*, the United States Bankruptcy Court for the Western District of Washington upheld the constitutionality of DOMA.¹²¹ The petitioners entered into a valid same-sex marriage in British Columbia and subsequently filed jointly for bankruptcy.¹²² In response to the government's objection to the joint filing based on the DOMA definition of marriage, the Plaintiffs raised Fourth Amendment, Fifth Amendment and Tenth Amendment challenges.¹²³ The court rejected the plaintiff's claim that DOMA usurped the state's authority to legislate domestic relations as a matter of reserved power because the states are not bound by the federal definition of marriage.¹²⁴ The court dismissed the plaintiff's substantive due process argument on the basis that there is no fundamental right to same-sex marriage.¹²⁵ The court ruled the parties were not entitled to heightened equal protection scrutiny¹²⁶ and upheld the constitutionality of DOMA, for purposes of substantive due process and equal protection, under the rational basis standard.¹²⁷

115. *Taylor v. Sullivan*, 2004 WL 3142552, 6, 18 Fla. L. Weekly 125 (2004).

116. *Id.*

117. *Smelt v. County of Orange*, 447 F.3d 673, 684 (9th Cir. 2006). In reaching this decision, the Ninth Circuit rejected the lower district court's determination, "Plaintiff's legal union cannot receive the rights or responsibilities afforded to marriage under federal law. This is a concrete injury personally suffered by Plaintiffs, caused by DOMA's definition of marriage." *Smelt v. County of Orange*, 374 F.Supp. 2d 861 (C.D. Cal. 2005).

118. *Bishop v. Okla. ex rel. Edmondson*, 447 F.Supp. 2d 1239 (N.D. Okla. 2006) (issues raised in underlying complaint include whether section 3 of DOMA applied to Civil Unions and if so, whether such application violates equal protection and due process).

119. *Id.* at 1259.

120. *Id.*

121. *In re Kandu*, 315 B.R. 123, 130 (W.D. Wash. 2004).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 140.

126. *Id.* at 143.

127. *Id.* at 146.

Federal courts are understandably hesitant to decide same-sex marriage disputes claims, given the traditional deference to state law in this arena. The traditional deference to state law on family law matters is undermined by the passage of DOMA by Congress. Additionally, federal courts have traditionally policed cross-border disputes between states, striking a balance to protect each state's autonomy, while facilitating commerce, travel and justice.¹²⁸ Nevertheless, the actionable injuries associated with denying recognition to same-sex marriages across state lines, such as the denial of spousal health insurance, life insurance, tax benefits and rights upon death and divorce, creates a concrete injury. When those validly married in, for example, Massachusetts, Connecticut, Iowa, Vermont, Maine and for short periods in Hawaii, California, and Alaska, relocate to another state that refuses to recognize same-sex marriage, injuries are surely suffered. Nevertheless, petitioners are likely to encounter trouble overcoming the standing requirement, particularly if the federal court defer to the state heterosexual definition of marriage to resolve the impasse.

Although ruling as a matter of New York state law, not federal law, the *C.M. v. C.C.*¹²⁹ court held:

The purpose of the full faith and credit provision of the constitution and the doctrine of comity is to accord parties, especially in today's mobile society, the ability to ensure that if they were married in another state, they can enforce the civil contract of marriage in New York. This Court's research and the cases cited by the parties provide no reason to carve out a unique exception for the parties here simply because they are of the same gender or because of their sexual orientation. As the Court of Appeals noted in *Gotlib v. Ratsutsky*, 83 N.Y.2d 696, 700 (1994), "[t]he comity doctrine is also pragmatically necessary to deal properly and fairly with the millions of relational and transactional decrees and determinations that would otherwise be put at risk, uncertainty and undoing in a world of different people, Nations and diverse views and policies." Accordingly, for all the reasons set forth above, no basis exists to decline to exercise jurisdiction over the dissolution of the parties' Massachusetts marriage and this New York divorce action can proceed.

Thus, some state courts are beginning to deal with the issue of same-sex migratory divorce. For all of the reasons cited above, comity, fairness, and certainty, federal courts should remain available to resolve sister state disputes

128. *Williams v. N.C.*, 17 U.S. 287, 304 (1942) (*Williams I*) (granting full faith and credit to Nevada divorce in North Carolina court despite forum public policy conflict); *Williams v. North Carolina*, 325 U.S. 226, 239 (1945) (*Williams II*) (forum court free to determine foreign court correctly exercised jurisdiction before full faith and credit obligation attached).

129. 867 N.Y.S.2d 884 (N.Y. Sup. Ct. 2008).

regarding the cross-border recognition of same-sex marriage based on the traditional choice of law rules for reasons more fully discussed in Section VI of this paper.¹³⁰

In one of the first state court actions to challenge the heterosexual definition of marriage, predating DOMA by more than 20 years, two men challenged as unconstitutional the Minnesota decision to refuse to grant to them a marriage license.¹³¹ The parties argued violation of the First, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution.¹³² They were unsuccessful and appealed. The Minnesota Supreme Court rejected their claims of error based upon the traditional definition of marriage as the union of one man and one woman.¹³³ The plaintiffs next filed an appeal of right with the Supreme Court.¹³⁴ The Supreme Court dismissed the appeal for want of a substantial federal question.¹³⁵

More than 20 years later after *Baker* was decided, DOMA was passed. Following the passage of DOMA, in 2002, the Georgia Court of Appeals¹³⁶ upheld a provision in a custody order prohibiting the mother from exercising her visitation rights if she was cohabiting with someone other than a person to whom she was legally married or related.¹³⁷ The mother introduced evidence that she and her same-sex partner had entered into a civil union in Vermont; however, this evidence did not permit the mother to exercise her visitation rights for two reasons.¹³⁸ First, the Georgia court relied upon the Georgia definition of marriage to be limited to individuals of the opposite sex.¹³⁹ Secondly, the court relied upon the federal DOMA statute to support the assertion that it was under no full faith and credit obligation to recognize the Civil Union as a marriage.¹⁴⁰

130. See *infra* notes 333-375 and accompanying text.

131. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *app. dismissed*, 409 U.S. 810 (1972).

132. 191 N.W.2d at 186.

133. *Id.*

134. Until 1988, litigants could appeal final state court orders to the Supreme Court as a matter of right under 28 U.S.C.A. § 1257 (1987). According to the Commentary on the 1988 revision:

The appeal route meant that Supreme Court review was mandatory: the Court would have to review the case on its merits. The certiorari route is discretionary: in effect it's a petition for permission to appeal. The Court grants the petition only if it finds that the case presents issues that warrant its attention. ... Congress in 1988 eliminated the mandatory route altogether. Cases seeking access to the U.S. Supreme Court from a state court will no longer get to the Supreme Court with an outright appeal; they will have to petition for certiorari.

135. *Baker v. Nelson*, 409 U.S. 810 (1972).

136. *Burns v. Burns*, 560 So.2d 47 (Ga. Ct. App. 2002).

137. *Id.* at 48.

138. *Id.*

139. *Id.*

140. *Id.*

Thus, the federal DOMA statute remains constitutionally valid according to state and federal court precedent, virtually immune from attack due to the heterosexual definition of marriage,¹⁴¹ creating a circular argument, and rendering the GLBT community unable to establish an injury in fact to survive standing challenges.

IV. FUNDAMENTAL RIGHT TO MARRY AND STRUCTURAL REASONING

In fact, the current constitutional marriage analysis owes its genesis to structural reasoning. The Constitution does not expressly refer to the right to marry. Rather, this fundamental right has been inferred through the process of structural reasoning. Therefore, structural reasoning is of central importance in analyzing the validity of DOMA because it defines marriage for federal law purposes and authorizes non-recognition of same-sex marriage across state lines. Thus, the underlying theory of structural reasoning and its application to marriage is instructive.

Initially, in *Meyer v. Nebraska*, the Supreme Court invalidated a law that prohibited public school teachers from teaching in any language other than English because it violated the liberty interest protecting family autonomy.¹⁴² In reaching its decision, the Supreme Court defined the liberty interest protected by the Fourteenth Amendment broadly to include more than just the right to be free from unwarranted bodily restraint, but also other rights associated with personal autonomy and free-thinking:

Without doubt [liberty] connotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home, bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men (emphasis added).¹⁴³ The *Meyer* court derived the listed rights from a variety of sources:

141. The power to define membership in a group is awesome and is the prerogative of the majority exercising political power. This power has historically been used to deprive individuals of equal rights and the definition of marriage alone should not be sufficient to overcome the numerous arguments asserting constitutional infirmities.

142. 262 U.S. 390, 399 (1923).

143. *Id.* See also *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (describing marriage "as creating the most important relation in life, as having more to do with morals and civilization of a people than any other institution.") *Id.* *Skinner v. Okla.*, 316 U.S. 535, 541 (1942) (court invalidated mandatory sterilization for two or more crimes of moral turpitude, exempting white collar crimes, as violative of the Equal Protection Clause of the Fourteenth Amendment because the right to marry and procreate is fundamental and cannot be arbitrarily and indiscriminately impeded by the state); *Griswold v. Conn.*, 381 U.S. 479, 486 (1965) (invalidating a statute prohibiting the use of birth control as an invalid interference with marriage relationship, protected by the a right of privacy "older than the Bill of Rights").

The right to bodily integrity is guaranteed by the Fourth and Fifth Amendment. The right to contract flows from the Fourteenth Amendment. The right to acquire knowledge flows from the First Amendment freedom of speech and association. The freedom to marry and rear children is a common law right essential to the orderly pursuit of happiness. The freedom to worship according to conscience is guaranteed by the First Amendment guarantee of freedom of religion. These rights are reserved for the people. The constitution entrusts the judicial branch with the duty and obligation to protect these rights from unwarranted interference by federal and state government.¹⁴⁴

The foregoing quote from *Meyer* captures the essence of structural reasoning, the approach advanced by Black and others to discern the existence and scope of fundamental rights in keeping with the Constitution.

With the decision of *Loving v. Virginia*,¹⁴⁵ the right to marry evolved from language contained in the dicta of *Maynard*¹⁴⁶ and *Meyer*,¹⁴⁷ to a full-fledged fundamental right protected by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.¹⁴⁸ In *Loving*, the Supreme Court invalidated a Virginia law that denied recognition to interracial marriages entered outside of Virginia and in violation of Virginia's antimiscegenation statute.¹⁴⁹ The court relied upon both the Equal Protection

144. *Meyer*, 262 U.S. at 399.

145. 388 U.S. 1 (1967) (holding invalid state law prohibiting individuals from interracial marriages, even if entered out of state: "[l]eaving State to evade law.-If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in s 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage."). Similarly, DOMA permits a state to refuse to recognize a same-sex marriage validly entered in another jurisdiction.

146. *Maynard*, 125 U.S. at 205. ("Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature.").

147. *Meyer*, 262 U.S. at 399 ("While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.").

148. *Loving*, 388 U.S. at 12.

149. PETER WALLENSTEIN, *TELL THE COURT I LOVE MY WIFE, RACE MARRIAGE AND LAW AN AMERICAN HISTORY* (2002) (tracing history on miscegenation laws in the United States).

Clause and the Due Process Clause of the Fourteenth Amendment to support its decision:

To deny this fundamental right [to marry] on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all of the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry, or not to marry, a person of another race resides within the individual and cannot be infringed by the state.¹⁵⁰

Loving relies upon structural arguments, invoking the principle of equality at the heart of the Fourteenth Amendment, to ground its decision that the statute violated the fundamental right to marry. Thus, *Loving* stands for the principle that marriage, a fundamental right, is entitled to strict scrutiny protection to justify significant state infringement.¹⁵¹

From the early cases of *Meyer*, culminating in *Loving*, the Supreme Court has relied upon the text of the Constitution, the intent of its drafters, the aspirational goal of equality, and the structure of the Constitution creating a zone of personal freedom and autonomy to support the fundamental right to marry.¹⁵² Principled structural reasoning also arises in cases dealing with alienage and becomes central to the reasoning when constitutional arguments related to alienage and marriage merge.

One might predict that an individual who is illegally present in the United States forfeits the Constitutional protections guaranteed to citizens and aliens legally present in the United States. Illegal conduct is often relied upon as a basis upon which to limit or deprive individuals of the state benefit of marriage. Examples include incest, polygamy and, in some states, individuals imprisoned for life without possibility of parole.¹⁵³ Incest is variously defined and punished

150. *Loving*, 388 U.S. at 12.

151. *Id.* at 12 ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."). *Id.* In *Zablocki v. Redhail*, 434 U.S. 374 (1978), the Supreme Court invalidated a state statute that prohibited a person under a court order of child support from marrying without judicial permission because the means selected to achieve the legitimate and substantial interest in collecting child support unnecessarily infringed upon the fundamental right to marry. *Id.* at 388. The Supreme Court observed that not all regulations dealing with marriage must satisfy strict scrutiny. "To the contrary, reasonable regulations that do not significantly interfere with the decisions to enter into the marital relationship may legitimately be imposed." *Id.* at 386.

152. See generally EVAN GERSTMANN, SAME-SEX MARRIAGE AND THE CONSTITUTION 83 (2004) (noting the Supreme Court has "repeatedly and unequivocally held that there is a constitutionally protected fundamental right to marry"). *Id.*

153. See e.g., MCKINNEY'S CON. LAWS OF NEW YORK ANN. Ch. 6 § 79-a. ("... a person sentenced to imprisonment for life is thereafter deemed civilly dead; provided, that such a person may marry while on parole, or after he has been discharged from parole, if otherwise capable of contracting a valid marriage."). See also *Ferrin v. N.Y. State Dept. of*

in the U.S.¹⁵⁴ In the case of *Singh v. Singh*,¹⁵⁵ the parties' petition to open the annulment decree was denied on the basis of consanguinity. In *Bronson v. Swenson*,¹⁵⁶ the court upheld the state's denial of a marriage license based upon a prior existing marriage.

In contrast, despite one party's illegal entry into the U.S., courts have consistently upheld the validity of a marriage contracted by undocumented aliens. For example, on April 17, 2007, Heather Buck, a U.S. citizen, and Jose Guadalupe Arias-Maravilla, a Mexican citizen who entered the U.S. without documentation prior to October 2005, began to live together in their home in Pennsylvania.¹⁵⁷ Approximately two months later, Heather gave birth to the parties' son named Xavier Jose Arias.¹⁵⁸ In April 17, 2007, the parties applied for a marriage license from the Deputy Register of Wills in Wilkes-Barre, Pennsylvania.¹⁵⁹ Although lacking a visa evidencing his lawful presence in the United States, Jose presented his birth certificate, along with an English translation, his Mexican passport, and documents from his immigration proceeding, including an order granting his application to extend the date of his voluntary departure until May 12, 2007.¹⁶⁰ The Deputy Register of Wills denied the couple a marriage license because Jose lacked a valid visa evidencing his lawful presence in the U.S.¹⁶¹ The couple initiated an action in federal district court requesting a temporary restraining order prohibiting Luzerne County from requiring Plaintiff Arias to prove his lawful presence in the United States as a condition of obtaining a marriage license.¹⁶²

The court examined the constitutional implications of the Luzerne County requirement that a non-citizen show proof of lawful presence in the United States by presenting a valid green card or visa.¹⁶³ In addressing this question, the court relied upon both equal protection and substantive due process legal precepts. Initially, the court recognized that Buck possessed the constitutionally

Correctional Serv., 517 N.E.2d 1370, 1371 (N.Y. App. Ct. 1987) (marriage of inmate while in prison serving life sentence void).

154. See Leigh B. Bienen, *Defining Incest*, 2 Nw. U. L. REV. 1501 (1998).

155. 569 A.2d 1112 (Conn. 1990).

156. 2005 WL 1310482 (D. Utah 2005).

157. *Buck v. Stankovic*, 485 F. Supp. 2d 579 (M.D. Pa. 2007).

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* Defendants raised the defense of abstention, which the court rejected. The court next proceeded to address the merits of whether plaintiffs were entitled to relief based on the following four-factor test: 1) whether the movant has demonstrated a reasonable probability of success on the merits, 2) whether the movant has demonstrated irreparable harm if relief is denied, 3) whether granting the relief will result in even greater harm to the non-moving party; and 4) whether granting preliminary relief will be in the public interest. *Id.*

protected right to marry.¹⁶⁴ The court next addressed the issue of whether an undocumented alien possesses the same fundamental right to marry as a citizen. Relying upon precedent reaching back to 1896, the *Buck* court ruled that excludable aliens, present in the United States, are entitled to Fourteenth Amendment protection.¹⁶⁵ The court did not address the potential conflict between extending fundamental rights to undocumented aliens, in light of authority depriving them of suspect classification protection.¹⁶⁶ Nevertheless, the court clearly ruled that aliens, in the state in violation of federal law, are entitled to the fundamental right to marry.

Having determined the right of an undocumented alien to marry to be fundamental, the court applied a strict scrutiny standard derived from *Zablocki v. Redhail*¹⁶⁷ to the policy of requiring foreign nationals to prove their lawful presence in the country in order to obtain a marriage license. Under this standard, "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may be imposed. . . . Rather when a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."¹⁶⁸

According to the court, the policy of requiring proof of lawful presence in the U.S. "1) absolutely prohibited undocumented aliens . . . from marrying and 2) absolutely prohibited U.S. citizens . . . from marrying undocumented

164. *Id.* at 582. (citing *Zablocki v. Redhall*, 434 U.S. 374, 386 (1978); *Meyer v. Neb.*, 262 U.S. 390, 399 (1923)).

165. *Id.* (citing *Theck v. Warden, INS*, 22 F.Supp. 2d 1117, 1122 (C.D. Cal. 1998)). In turn, the *Theck* court cited *Wong Wing v. U.S.*, 163 U.S. 228, 238 (1896) for the proposition that the Fourteenth Amendment protections apply to all within the boundaries of a state, including aliens. Thus, the *Theck* court applied a precedent dealing generally with aliens and construed it broadly to encompass undocumented aliens as well as the documented. The *Theck* court ruled in a case in which the undocumented alien wished to marry a Spanish citizen, not an American citizen, thus issues related to rewarding illegal conduct with the right to marry and seek citizenship were not raised as they are in the *Buck* case.

166. The court was clearly aware of this potential conflict because it cited *Plyler v. Doe*, 457 U.S. 202, 210, 223 (1982) for the proposition that undocumented aliens are not entitled to be treated as a suspect class because they are in this country in violation of federal law.

167. 434 U.S. 374, 375 (1978).

168. *Buck v. Stankovic*, 485 F.Supp. 2d 576, 583 (M.D. Pa. 2007) (citing *Zablocki*, 434 U.S. at 375). The *Zablocki* court describing the right to marry as fundamental, ruled the statute at issue to be "subject to critical examination" and required the state to demonstrate that the statute was "supported by sufficiently important state interests and . . . closely tailored to effectuate only those interests." *Zablocki*, 434 U.S. at 383, 388. The *Zablocki* court relied upon prior cases employing strict scrutiny and critical examination to support its ruling. *Id.* Subsequent courts, including the *Buck* court, cite *Zablocki* for the proposition that regulations that substantially interfere with marriage must withstand strict scrutiny. *Buck*, 485 F.Supp. 2d at 583. See also *Wright v. MetroHealth Ctr*, 58 F.3d 1130, 1135 (6th Cir. 1995); *Lofton v. Sec'y of Dep't of Children and Family Serv.*, 377 F.3d 1275, 1310 (11th Cir. 2004).

aliens.¹⁶⁹ The policy created a significant obstacle to marriage, thus triggering strict scrutiny.¹⁷⁰ Thus, the court next examined the state interests advanced by the visa requirement. The defendant identified the need to confirm the identity of the parties marrying and the need to deter immigration fraud as sufficiently compelling to justify the policy. With respect to the visa requirement, the court opined that a passport supplied sufficient evidence of identity and that the visa requirement served only to block undocumented aliens from marriage, providing no identification of superior reliability.¹⁷¹ As to the policy of discouraging marriage fraud, the court found that the defendants did not have enforcement authority and were in no fear of prosecution for abetting marriage fraud.¹⁷² Thus, this policy, although facially compelling, also failed to rise to the compelling level necessary to support the statute.¹⁷³ Because the policies were not closely tailored, the Plaintiffs satisfied the first prong of the injunction test by demonstrating likely success on the merits.¹⁷⁴ With respect to the remaining elements, irreparable harm, balance of hardships and public interest, the court ruled in the Plaintiffs' favor.

The court entered an order that enjoined and restrained the Luzerne County Register of Wills from requiring the Plaintiff, Jose Guadalupe Arias-Maravilla, to produce a visa or other proof of lawful presence in the United States as a precondition of marriage.¹⁷⁵ Although framed as a preliminary injunctive action, the order was in the form of a permanent injunction, paving the way for the parties to marry as the litigation proceeded through the appellate process, furthering the converging constitutional protections afforded under the Equal Protection and Substantive Due Process Clause of the Constitution through structural reasoning. Not only did early courts employ structural reasoning to infer the right of both documented and undocumented aliens to claim the protections afforded by the Fourteenth Amendment, structural reasoning also provides the basis for the determination that the right to marry is fundamental.

It is ironic indeed that an individual illegally present in the United States enjoys the fundamental right to marry the individual of his or her choice, while GLBT Americans are deprived of this fundamental right. To the extent that illegal aliens¹⁷⁶ enjoy equal protection of the laws, it is certainly colorable for GLBT people to enjoy the same protection. Despite the strong arguments that demonstrate a fundamental right to marriage, reinforced by the Equal

169. *Buck*, 285 F.Supp. 2d at 583.

170. *Id.*

171. *Id.* at 584.

172. *Id.* at 585.

173. *Id.*

174. *Id.*

175. *Id.* at 587.

176. The term "illegal alien" is charged with nativist prejudice and creates a second-class status. The GLBT community confronts a similar prejudice embodied in DOMA. See Kevin R. Johnson, *Aliens and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 276 (1997).

Protection Clause, the GLBT community struggles to attain parity in the marriage arena. Perhaps the disjointed analysis of each isolated constitutional claim creates doubt, rather than certainty as to the unlawful and injurious nature of DOMA. Thus, the question raised in the twentieth century, continuing to press into the twenty-first, is whether the fundamental right to marry, as a matter of constitutional law, encompasses same-sex marriage.

V. STRUCTURAL REASONING, LIBERTY OF AUTONOMY, AND DOMA

When structural reasoning is applied to DOMA, it demonstrates that same-sex marriage is a fundamental right as a matter of substantive due process, equal protection, freedom of religion, and freedom of association. Although many scholars have questioned the constitutionality of DOMA and similar state laws,¹⁷⁷ none have focused on the constitutional infirmities of DOMA in relationship to both enumerated rights and unenumerated rights, with a focus on the role of structural reasoning in relationship to each sub-group and in toto.

Under structural reasoning, the central question is whether same-sex marriage is protected as part of deliberative autonomy and, therefore, entitled to strict protection from state interference. In order to answer this question, the court must determine whether the asserted right to same-sex marriage is significant to the development of deliberative autonomy. This determination requires a showing that the asserted right contributes to the liberty of conscience or the liberty of association, the two indispensable conditions securing deliberative autonomy.¹⁷⁸ The following three sub-sections explore the degree of protection the Constitution affords to the liberty of conscience as a matter of substantive due process, followed by the degree of protection required as a matter of equal protection and, lastly, the degree of protection afforded to the liberty of association under the First Amendment.

A. Liberty of Conscience and Substantive Due Process

The Fifth Amendment expressly provides, "No person . . . shall be deprived of life, liberty or property, without due process of law."¹⁷⁹ This provision has been interpreted to require not only procedural protections¹⁸⁰ but

177. MARK STRASSER, THE CHALLENGE OF SAME-SEX MARRIAGE FEDERALIST PRINCIPLES AND CONSTITUTIONAL PROTECTIONS 181-224 (1999); Mark Strasser, "Defending" Marriage in Light of the *Moreno-Cleburne-Lawrence* Jurisprudence, 38 CREIGHTON L. REV. 421 (2005); *Litigating the Defense of Marriage Act: The Next Battleground for Same-sex Marriage*, 117 HARV. L. REV. 2684 (2004); Larry Kramer, *Same-sex Marriage, Conflict of Laws and the Unconstitutional Public Policy Exception*, 106 YALE L. J. 1965 (1997).

178. Fleming, *supra* note 61, at 36.

179. U.S. CONST. amend. V.

180. See *Meyer v. Neb.*, 262 U.S. 390, 399 (1923) ("Without doubt, it [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry,

also substantive protections¹⁸¹ requiring the state to identify compelling reasons that justify the interference with rights associated with the express matrix values.¹⁸² The Due Process Clause of the Fifth Amendment has been interpreted coextensively with the Fourteenth Amendment.¹⁸³

Three cases, *Planned Parenthood of Southwest Pennsylvania v. Casey*,¹⁸⁴ *Lawrence v. Texas*,¹⁸⁵ and *Washington v. Glucksberg*,¹⁸⁶ employ structural reasoning to define the attendant rights of liberty under the Fifth Amendment. In addressing the constitutionality of Pennsylvania abortion laws, the court in *Casey* addressed the constitutional foundation of the liberty of conscience in relationship to deliberative autonomy. The *Casey* plurality, composed of Justice O'Connor, Justice Kennedy, and Justice Souter, grounded its reasoning on the premise that there is no bright-line test in the Constitution that "marks the outer limits of the substantive sphere of liberty."¹⁸⁷ Quoting Justice Harlan with approval, the court agreed that, "The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution."¹⁸⁸

The *Casey* court concluded that the Constitution places limits on "a State's right to interfere with a person's most basic decisions about family, and parenthood, as well as bodily integrity."¹⁸⁹ In further defining the liberty interest, the *Casey* court noted,

Our law affords constitutional protection to personal decisions relating to marriage . . . [and] family relationships. . . . [These] matters involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the

establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.").

181. *Id.*

182. Fleming, *supra* note 61, at 35.

183. See, e.g., *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 543 (1983) ("The Due Process Clause imposes on the Federal Government requirements comparable to those that the Equal Protection Clause of the Fourteenth Amendment imposes on the states."). *Id.*

184. 505 U.S. 833 (1992).

185. 539 U.S. 558 (2003).

186. *Wash. v. Glucksberg*, 521 U.S. 702 (1997).

187. *Casey*, 505 U.S. at 834.

188. *Id.*

189. *Id.* at 848.

attributes of personhood were they formed under the compulsion of the State.¹⁹⁰

The *Casey* court employed structural reasoning in reaching its decision. It identified the enumerated right of liberty and relied upon existing precedent giving shape and substance to the right. The court buttressed its decision by relying upon the separation of powers and the judiciary's role of protector. By design, courts are entrusted with the duty to secure substantive due process rights, thus protecting the individual from state over-reaching. The *Casey* Court reconceived *Roe v. Wade* and applied a balancing test, preferring the mother's right to be free from undue state burdens prior to viability and preferring the state's right to prohibit abortions unless necessary to preserve the health or life of the mother after viability.¹⁹¹ Thus, *Casey* exemplifies constitutional structural reasoning in relationship to liberty.

In 2003, the Court extended the line of liberty-delineating cases by invalidating a Texas statute outlawing deviate sexual contact defined to include same-sex sexual contact.¹⁹² The court framed the liberty-related interest at stake in the following terms: "[W]hether the petitioners were free as adults to engage in the [outlawed] private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution."¹⁹³ The *Lawrence* Court characterized the laws involved as having "far-reaching consequences, touching upon the most private human conduct, sexual behavior, in the most private of places, the home."¹⁹⁴

In addition to invalidating the Texas law, the Court overruled *Bowers v. Hardwick*, decided seventeen years earlier. The court rejected *Bowers*' assertion that there was a long-standing tradition criminalizing homosexual sodomy. The *Lawrence* Court opined that it was not until the 1970's that the States began to single out same-sex sexual contact as illegal.¹⁹⁵ Until then, the laws prohibited sodomy without regard to sexual orientation and the laws were not enforced, thus demonstrating the outdated nature of legislating morality in relationship to private, consensual adult conduct.¹⁹⁶ In addition to the line of

190. *Id.* at 851.

191. *Id.* at 860-61. ("An entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions; no erosion of principle going to liberty or personal autonomy has left *Roe*'s central holding a doctrinal remnant; *Roe* portends no developments at odds with other precedent for the analysis of personal liberty; and no changes of fact have rendered viability more or less appropriate as the point at which the balance of interests tips. Within the bounds of normal *stare decisis* analysis, then, and subject to the considerations on which it customarily turns, the stronger argument is for affirming *Roe*'s central holding, with whatever degree of personal reluctance any of us may have, not for overruling it.").

192. *Lawrence v. Tex.*, 539 U.S. 558, 564 (2003).

193. *Id.* at 567.

194. *Id.*

195. *Id.* at 572.

196. *Id.*

cases defining privacy and autonomy already mentioned, the *Lawrence* Court also relied on the *Casey* Court's formulation of the liberty protection.¹⁹⁷

The *Lawrence* court also relied upon *Romer v. Evans*¹⁹⁸ as support for the conclusion that a law attributable to animosity against the GLBT community is impermissible because it is "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."¹⁹⁹ Given the holdings in *Casey* and *Romer*, the *Lawrence* court expressly overruled *Bowers v. Hardwick*²⁰⁰ and ultimately held, "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."²⁰¹ The *Lawrence* majority relied upon the liberty clause of the Fourteenth Amendment to invalidate the statute.

In his dissent, Justice Scalia criticized the majority for its self-serving application of *stare decisis*, embracing it only when expedient.²⁰² He also chastised the court for departing from the *Washington v. Glucksberg*²⁰³ two-part test requiring that to qualify as a fundamental right, "the right must be deeply rooted in the Nation's history and tradition and implicit in the concept of ordered liberty so that neither liberty nor justice would exist if [it] were sacrificed."²⁰⁴ Scalia further criticized the court because it did not deal directly with the question of whether the fundamental right to privacy embraced same-sex sexual relations, but rather set aside the Texas legislation because it was irrational.²⁰⁵ The *Lawrence* case highlights the difficulty the Court faces when it agrees to analyze statutes implicating unenumerated liberty interests.

Although Justice Scalia presents the deeply rooted values and tradition test as divergent from structural reasoning,²⁰⁶ the approaches are in fact similar and share the aspirational matrix values of equality and liberty. Both the *Casey* test and the *Glucksberg* test use general language to describe the characteristics of a

197. *Id.* at 574.

198. 517 U.S. 620 (1996).

199. *Lawrence*, 539 U.S. at 575.

200. 478 U.S. 186 (1986).

201. *Lawrence*, 539 U.S. at 578.

202. *Id.* at 591.

203. 521 U.S. 702 (1997).

204. *Lawrence*, 539 U.S. at 588.

205. *Id.* at 586. Arguably, the Court relied upon rational basis because the law was so imperfectly drafted that a higher standard of review was not needed to invalidate the statute.

206. *Id.* See also Robert C. Post, *Forward: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 92-93 (2003) (contrasting the autonomy substantive due process analysis in *Roe v. Wade* and embracing the "rational continuum" of liberty to the "traditional restrained methodology" of *Washington v. Glucksberg*). While Post characterizes the *Lawrence* analysis "as a break with the traditional and autonomy approaches to substantive due process because it focuses on respect and stigma as the driving constitutional values," and although Post suggests that these values "have not heretofore found their natural home in the Due Process Clause," *id.* at 97, arguably both values are core to both the traditional and autonomy approaches to identifying fundamental rights. Respect and legal equality provide the foundation for individual autonomy and for the traditional sphere of protected liberties.

fundamental right. Both focus on securing these values by creating a haven of personal autonomy into which the state may not intrude. Thus, within the framework of the liberty interest defined under existing precedent, the question arises: Does the right to marriage include the right to same-sex marriage. Arguably, the liberty of conscience, vital to the democratic process, requires a sphere in which each individual can define personhood free from state compulsion.

Assuming the precepts of structural reasoning are deemed legitimate, liberty of conscience concerns lead to the inexorable conclusion that marriage, without regard to sexual orientation, is a fundamental right. Once so established, one may further reason that Section Three of DOMA, limiting marriage in the federal context to heterosexual couples, deprives the entire GLBT community of the federal rights associated with marriage to the individual of his or her choice, even those validly married under state law. According to existing marriage infringement jurisprudence, the government bears the burden of establishing both a compelling state interest and demonstrating that the infringement is necessary to achieve the state interest and is sufficiently narrowly tailored.²⁰⁷

B. Liberty of Conscience and the Equal Protection Clause

Not only does the Constitution implicitly protect the individual's right to marry, it also expressly prohibits disparate and intentionally harmful treatment of minorities. The Fifth Amendment provides in relevant part, "No person shall be . . . deprived of life, liberty or property without due process of law[.]"²⁰⁸ This provision has been interpreted to include an equal protection guarantee, co-extensive with that applied to the states through the Fourteenth Amendment.²⁰⁹ In *Romer v. Evans*, the court addressed the constitutionality of Amendment Two to the Colorado Constitution providing,

Neither the State of Colorado . . . nor any of its agencies . . . shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any

207. *Buck v. Stankovic*, 485 F.Supp. 2d 576, 579 (M.D. Pa. 2007); *Zablocki v. Redhall*, 434 U.S. 374, 374 (1978); *Loving v. Va.*, 388 U.S. 1, 1 (1967).

208. U.S. CONST. amend. V.

209. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) ("The Fifth Amendment does not contain an Equal Protection Clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. . . . [I]t would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.").

minority status, quota preference, protected status or claim of discrimination.²¹⁰

In addressing the validity of the amendment, the *Romer* court characterized the statute as one that “withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.”²¹¹ The *Romer* court commented on the double injury inflicted by the legislation nullifying existing anti-discrimination protection and barring the group from seeking future protection.²¹²

The court further reasoned that the state may not deprive the group of protection under existing general laws prohibiting arbitrary discrimination in public and private settings.²¹³ Applying the rational basis test to the classification, the Court invalidated the Constitutional Amendment on the basis that the Amendment demonstrated animus toward homosexuals by imposing a broad and undifferentiated disability on a single named group.²¹⁴

Having identified the state interest as animus, the Court ruled it irrational and invalidated the amendment, noting: “If the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”²¹⁵ According to the court, the status-based classification divorced from a factual limiting context and was, thus, unrelated to any legitimate state interest. The court ruled the statute, “obnoxious to the prohibitions of the Fourteenth Amendment.”²¹⁶

Writing for the majority, Justice Kennedy implicitly employed structural reasoning by observing that Amendment Two perverts the structure and operation of modern anti-discrimination laws.²¹⁷ Given the separation of powers precept limiting Congressional power to prohibit discrimination related to public accommodations, states have stepped into the breach by enacting detailed anti-discrimination protections. The municipality ordinances invalidated by Amendment Two fell into this category.²¹⁸ The local code provided protection to homosexuals from discrimination in public accommodations. It nullified antidiscrimination protections enacted at the local level. By isolating homosexuals from anti-discrimination protection in

210. *Romer v Evans*, 517 U.S. 620, 620 (1996) (quoting COL. CONST. art. II, § 30b (1993)).

211. *Id.* at 627.

212. *Id.* at 629.

213. *Id.* at 630.

214. *Id.* at 631.

215. *Id.* at 634 (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (government purpose to discriminate against “hippies” deemed illegitimate)).

216. *Id.* at 635 (quoting *Civil Rights Cases*, 109 U.S. 3, 24 (1883)).

217. *Id.* at 627.

218. See BOULDER REV. CODE § 12-1-1 (j) (1987); DENVER REV. MUNICIPAL CODE, art. IV, § 28-92 (1991).

Colorado, the state made this group a "stranger to its laws."²¹⁹ Thus, based on federalism and the Court's responsibility to enforce the Constitution, the Court invalidated Amendment Two fell because it violated the basic tenet of fairness and the role of government to deter discrimination against insular minorities, rather than harbor it.

Section Three of DOMA suffers from the same deficit as did Amendment Two. It denies equal protection to homosexuals by defining marriage in an exclusionary and discriminatory manner. When legislation is fueled by animus, its legitimacy falters. The DOMA proponents declared war on same-sex marriage and the animus pervades every page of the Congressional report. Just as Amendment Two denied protection from discrimination to Colorado's GLBT citizens, DOMA excludes the GLBT citizenry from exercising the rights and shouldering the obligations associated with the institution of marriage, depriving them of a fundamental right based on a discriminatory classification. Just as the policy interests advanced by the State of Colorado rang hollow to the *Romer* Court, the DOMA justifications, likewise, fail to establish the link between prohibiting same-sex marriage and the goals of strengthening heterosexual marriage, protecting children and preserving the state purse.

C. Liberty of Conscience and the First Amendment

This part of the article examines the language of the Constitution protecting religious freedom and association rights in the First Amendment. Both of the foregoing matrix rights are defined by antecedent rights, identified through precedent. Both of the foregoing guarantees find expression through marriage to an individual of one's choice. Each is discussed separately below in relationship to Section Three of DOMA limiting marriage to one man and one woman.

1. Freedom of Religion

The First Amendment provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the free exercise thereof; or abridging the freedom of speech."²²⁰ This section focuses on the scope of religious freedom guaranteed by these words. The free exercise clause and the establishment clause are often described as working in tandem together to secure the "wall of separation between church and state" envisioned by the Framers.²²¹ Although the religious bias in laws

219. *Romer v Evans*, 517 U.S. 620, 635 (1996).

220. U.S. CONST. amend. I.

221. For example, in 1774, James Madison wrote the following to his friend William Bradford: "Union of Religious Sentiments begets a surprising [sic] confidence and Ecclesiastical Establishments tend to great ignorance and Corruption all of which facilitate the Execution of mischievous Projects." See letter from James Madison to William Bradford (Jan. 24, 1774), in JAMES MADISON ON RELIGIOUS LIBERTY 47 (Robert S. Alley ed. 1985). In some instances, the Supreme Court rejected the metaphor of erecting a wall between church and state. See e.g., *McCullom v. Bd. of Educ.*, 33 U.S. 203, 213 (1948).

prohibiting same-sex marriage may not be readily apparent, an analogy to the parochial school funding cases helps to clarify the breach of the boundary between church and state, resulting in impermissible entanglement by providing state marriage benefits based upon a traditional Judeo-Christian definition of marriage.

Scholars have plumbed the potential Establishment Clause violation inherent in DOMA.²²² For example, Gordon Babst argues that laws defining marriage as between one man and one woman create a shadow establishment that violates the First Amendment:

Put differently, the notion of the shadow establishment, a First Amendment violation, provides a lense to identify those accepted and assumed lawful practices that burden the enjoyment of fundamental rights and liberties by some American citizens, ultimately for reason of a still-present sectarian bias in the law, without the saving grace of a legitimate public secular purpose.²²³

Embracing the one man and one woman rule arguably adopts a religious definition of the civil status of marriage. In *Everson v. Board of Education*,²²⁴ the Court addressed the question of whether a New Jersey municipality violated the Establishment Clause by providing free public transportation to the children attending area parochial schools. The majority characterized the legislation as "extending public welfare legislation to all citizens, without regard to belief."²²⁵ The dissent argued the legislation crossed the line by aiding children in the acquisition of religious training.²²⁶

The *Everson* court debate highlights the tension between extending the public benefit of free transportation to public schools to those attending private religious schools. Clearly, a law providing public transportation only to private religious schools would have failed the separation test by promoting attendance at only religious institutions. In 1971, the Court in *Lemon v. Kurtzman*²²⁷ addressed the constitutionality of a state law supplementing the salaries of teachers who taught secular subjects in religious schools. Given the competing interests of permitting individual worship without establishing a state mandated

222. One author advocates a free exercise analogy to promote same-sex marriage rights, arguing this analysis is more helpful than the line of case law establishing race as a suspect classification. Carmen M. Butler, *Victimhood to Agency: Constructionist Comparison of Sexual Orientation to Religious Orientation*, 4 SEATTLE J. FOR SOC. JUST. 147, 165 (2005).

223. GORDON ALBERT BABST, LIBERAL CONSTITUTIONALISM, MARRIAGE, AND SEXUAL ORIENTATION 78-9 (2002)(Babst argues that the Supreme Court's reliance upon Christian values in court rulings with respect to interracial, polygamous, and same-sex marriage bars, demonstrates a "shadow establishment" of religion in U.S. judicial practice).

224. 330 U.S. 1 (1947).

225. *Id.* at 16.

226. *Id.* at 58.

227. 403 U.S. 602 (1971).

religion, the court relied upon structural reasoning to create a balancing test devised to consider the totality of the circumstances. The court created a three-part test to assess the purpose and effect of a law raising entanglement concerns: 1) the statute must have a secular legislative purpose, 2) its primary effect must be one that neither advances nor inhibits religion, and 3) it must not create an excessive government entanglement with religion.²²⁸ The court struck down the statute because, even if secular in its purpose, to insure neutrality in effect would require constant government monitoring, thus resulting in excessive government entanglement and creating political divisiveness along religious grounds.²²⁹

In 1992, the Court ruled that the practice of beginning public school graduation with a benediction or prayer offered by clergy crossed the line of impermissible state entanglement in matters of religion.²³⁰ Justices Blackmun, Stevens, and O'Connor joined in a concurring opinion and wrote, "It is not enough that the government restrain from compelling religious practices: it must not engage in them either [To] that end, our cases have prohibited government endorsement of religion, its sponsorship, and involvement in religion, whether or not citizens were coerced to conform."²³¹ Justice Souter wrote separately to concur and added that, "Indeed Jefferson and Madison opposed any political appropriation of religion, [and] saw that even without the tax collector's participation, an official endorsement of religion can impair religious liberty."²³²

Given the historic focus on creating a wall between church and state, to prevent entanglement and to avoid divisiveness, Section Three of DOMA invites *Lemon* review in order to focus on the totality of the circumstances: purpose, effect and degree of entanglement. The institution of marriage, like the institution of public education, is supported by a network of public welfare

228. *Id.* at 612.

229. *Lemon v. Kurtzman*, 403 U.S. 602, 627 (1971).

230. *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (declining the invitation to revisit *Lemon*). Although critiqued by some members of the court, the *Lemon* test has not been expressly overruled and is advanced in this article as the most helpful test in relationship to analyzing the constitutionality of DOMA because it embodies a totality of the circumstances approach. The *Lemon* test was applied as recently as 1997 in *Agostini v. Felton*, 521 U.S. 203, 218, 223 (1997). More recent cases have applied one of the following three cases derived from precedent: 1) the historical test, 2) the endorsement test and 3) the coercion test. Mark Strasser, *The Protection and Alienation of Religious Minorities: On the Evolution of the Endorsement Test*, 2008 MICH. ST. L. REV. 667, 670 (2008). See also *Cent. Sch.*, 533 U.S. 98 (2001); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Mitchell v. Helms*, 530 U.S. 793 (2000).

231. *Lee*, 505 U.S. at 604 (Blackmun, Stevens, & O'Connor, J., concurring).

232. *Id.* at 621 (Souter, J., concurring). See also Note, *Religion and the State*, 100 HARV. L. REV. 1606, 1648 (1987) ("If the test is governed by the prospective of the majority, it will be inadequately sensitive. ... [If] the establishment clause is to prohibit the government from sending the message to religious minorities or non-adherents that the state favors certain beliefs and that as non-adherents they are not fully members of the political community, its application must turn on the message received by the *minority or non-adherent*." (emphasis added)).

legislation and tax dollars to implement the statutory scheme of benefits and burdens. Therefore, the delivery of services and the distribution of benefits and burdens must be accomplished without undo entanglement of church and state. Legislation, such as Section Three of DOMA, limiting marriage to one man and one woman, based upon a traditional Judeo Christian religious definition demands scrutiny under the Establishment Clause.

As to the first requirement that the statute must have a secular legislative purpose, the government identifies three interests that DOMA affects. The first—to protect the heterosexual institution of marriage—appears to be secular on its face, so long as the source of the heterosexual requirement is not examined. However, the second purpose, to defend “traditional notions of morality” sheds light on the search for the heterosexual prerequisite and locates it firmly in the traditional Judeo-Christian—and perhaps many other—religious traditions,²³³ thus triggering Establishment concerns. The final justification of state sovereignty embraces the one-man, one-woman definition of marriage, thus relegating those with a broader definition to non-recognition. Thus, the first prong of *Lemon* raises a concern that Section Three of DOMA may serve impermissible religious purposes.

The second prong of the test requires that the statute’s primary effect must be one that neither advances nor inhibits religion. Under the second prong of the *Lemon* case, there is additional doubt as to the validity of Section Three of DOMA because the primary purpose of the legislation is to exclude those with a different religious or non-religious definition of marriage. DOMA rejects a definition that is inclusive, rather than exclusive; one that does not rely upon the Bible, Koran, or Torah as its source. Therefore, both the first and second prongs of the *Lemon* test trigger alarms pointing to the breach of the wall separating church and state.

The final prong requires that the statute must not create an excessive government entanglement with religion. Section Three of DOMA fails this prong because DOMA creates a clearly preferred group, without regard to religious affiliation, based upon the traditional religious definition of marriage and provides to them all of the many benefits and burdens of marriage, while excluding a minority of non-traditional adherents and non-believers from this entitlement. Consider this analogy. Section Three of DOMA subsidizes a free bus ride for only those attending parochial schools, while denying public transportation to all other schools. Because the state endorses marriage and supports the institution, just like providing a free ride to parochial school, it must do so in a way that treats all potential candidates fairly, without regard to religious affiliation or notions of orthodoxy. DOMA fails the third prong as

233. This reliance is on the majority, mainstream religious definition of marriage. It is important to note the growing number of Judeo-Christian institutions willing to marry same-sex couples, further buttressing the religious freedom concerns. For example in 2005, the United Church of Christ, became the first major church in the U.S., with more than 1,000,000 members, to support same-sex marriage. <http://news.bbc.co.uk/2/hi/Americas/4651830.stm> (last visited Mar. 15, 2008).

well. Therefore, Section Three of DOMA fails the *Lemon* test and violates the Establishment Clause.²³⁴

2. Liberty of Association, DOMA and the First Amendment

In addition to religious concerns, Section Three of DOMA interferes with intimate associational rights traditionally protected under the first Amendment. In *Roberts v. United States Jaycees*,²³⁵ the Court relied upon structural reasoning to define the scope of the First Amendment freedom of association, an unenumerated right guaranteed under the right to liberty. The Jaycees challenged as unconstitutional the Minnesota Human Rights Act provision prohibiting the denial of membership on the basis of sex as an “unfair discriminatory practice.”²³⁶ The Court recognized the vital importance of intimate association because “certain kinds of personal bonds have played a critical role in the culture and tradition of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the state.”²³⁷

According to the court, only some types of personal affiliations are entitled to strict protection—relatively small in number, selective in membership, and seclusive.²³⁸ Other groups with large numbers and open enrollment fall at the other end of the continuum and are entitled to lesser protection.²³⁹ By creating a continuum of associational groups and recognizing a sliding scale of protection, strict protection for intimate association and minimal protection for large public groups, the Court introduced and applied a balancing test illustrative of structural reasoning. The approach recognized that all rights, like the resulting injuries are not created equal, but rather depend upon the surrounding facts and circumstances. The Court compared the degree of importance and tailoring of the governmental interest to the degree of harm suffered by the group asserting injury.

Because the local chapter of the Jaycees was a large and non-selective group, it fell toward the less protected end of the continuum.²⁴⁰ In applying the balancing test, the court noted that the state had demonstrated both a compelling state interest, assuring equal access to goods and services,²⁴¹ and had achieved the interest through the least restrictive means, by prohibiting gender discrimination in the availability of goods and services to women, a historically disadvantaged group.²⁴² Thus, the burden of proof shifted to the

234. See also Justin R. Pasfield, *Confronting America's Ambivalence Towards Same-sex Marriage: A Legal and Policy Perspective*, 108 W. VA. L. REV. 267, 289 (2005).

235. 468 U.S. 609 (1984).

236. *Id.* at 615.

237. *Id.* at 619.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* at 625.

242. *Id.* at 626.

Jaycees to demonstrate harm. The Court ruled that they had failed to demonstrate any serious burden of the male rights of the membership.²⁴³ Moreover, the Court observed that the admission of women did not seriously burden the members' "ability to engage in these protected activities or to disseminate its preferred views."²⁴⁴ The court further opined that expressive activities producing "special harm distinct from their communicative impact, such practices are entitled to no constitutional protection."²⁴⁵ The *Roberts* court relied upon structural reasoning to define a range of associational relationships, suggesting that intimate relationships are entitled to the highest degree of protection from government oversight.²⁴⁶

Additionally, the court engaged in a balancing analysis. It faulted the Jaycees for failing to demonstrate that the Act imposed "any serious burdens on the members' freedom of expressive association."²⁴⁷ Thus, when the right to exclude is advanced, the harm to the group arising out of forced association must be weighed against the compelling interest in inclusion advanced by the state. Finally, the court recognized that, "Acts of invidious discrimination in the distribution of publicly available goods, services and other advantages cause unique evils that government has a compelling interest to prevent."²⁴⁸ Thus, expressive activities producing special harms are not entitled to constitutional protection.²⁴⁹

Although not immediately apparent, the application of *Roberts* to the DOMA debate is instructive. Arguably, Section Three of DOMA creates a group, heterosexual married individuals, entitled to associational protection and also creates harm to a group, the GLBT community members who desire to marry. Although state created, the group may not be defined through invidious discrimination, particularly because Section Three of DOMA denies benefits to those in the disfavored group. Finally, even if the right of married heterosexuals to limit membership in the group is implicated, it must be balanced against the interests of the harmed group and may in fact be deemed unprotected if it produces special harms distinct from the communicative impact upon the harmed group. Thus, Section Three of DOMA violates the GLBT community's freedom of intimate association.

243. *Id.*

244. *Id.* at 627.

245. *Id.* at 628.

246. *Id.* at 620.

247. *Id.* at 626.

248. *Id.* at 628.

249. Some might agree that groups favoring heterosexual values, like the Scouts, have a right to determine the sexual orientation of entrants. However, the same rationale cannot be applied to marriage. There is arguably no more intimate relationship than marriage. Thus, entrants into marriage should be free to choose one mate, without regard to sexual orientation, absent state regulation driven by animus. Like race restrictions before, sexual orientation restrictions violate the associational rights of the couple. See *Loving v. Va.*, 388 U.S. 1, 1 (1967).

Additionally, the Jaycees, like the heterosexual majority, claimed the right to define membership in the community as a First Amendment associational right. Thus, the Jaycees argued that they owned the definition of membership as part of their associational rights.²⁵⁰ The Court rejected this argument because the Jaycees were a large and non-selective group bound by the non-discrimination laws of the state.²⁵¹ Thus, the right to discriminate in membership was tested by a balancing test weighing the harm to the majority members against the state interest in squelching discrimination.²⁵² Therefore, *Roberts* suggests that any associational rights advanced by the majority preferring to define marriage as heterosexual only will be subject to a balancing test in which the harm to the injured group, coupled with the state interest in proscribing discrimination, clearly outweighs the stated interest in protecting families, an interest which is not advanced by the prohibition in any event. This assertion gains even more traction when the entity employing a discriminatory test for membership is the state itself. Arguably, the injured GLBT community members asserting the right to marry are "entitled to strict protection of their highly personal right to define family as an intrinsic element of personal freedom."²⁵³ Thus, DOMA may be perceived as an unconstitutional exercise of majoritarian authority, especially if the association of homosexuality with immorality, absent concrete evidence of such, is deemed by courts to be an unsubstantiated stereotype, in keeping with impermissible gender stereotypes.

VI. STRUCTURAL REASONING, LIBERTY OF DEMOCRACY AND DOMA

This section is divided into two parts. The first discusses the role of Full Faith and Credit in preserving our deliberative democracy. The second part examines horizontal and vertical separation of powers in relationship to deliberative democracy. Both sections illustrate, through structural reasoning, the constitutional infirmity of Section Two of DOMA in relationship to cross-border non-recognition of same-sex marriages.

A. DOMA and Full Faith and Credit

In addition to undermining the express provisions of the Constitution protecting individual rights, DOMA undermines several bedrock principles of democratic rule reflected in the language and structure of the U.S. Constitution.

250. 468 U.S. at 633. See also KENNETH KARST, *BELONGING TO AMERICA* 4 (1989) (the harm to individuals by exclusion from full citizenship is "magnified" when the instrument of exclusion is the law because the law "is seen to embody the community's values").

251. *Roberts*, 468 U.S. at 621.

252. *Id.* at 628.

253. *Id.* at 620. Somewhat ironically, this close associational distinction was applied by the Court in *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) to permit the group to deny membership to GLBT applicants on the basis that state compelled "acceptance would derogate from the organization's expressive message", *id.* at 661, that a Scout is "morally straight." *Id.* at 652. The *Dale* Court distinguished *Roberts* on the basis that the organization's First Amendment rights were not violated. *Id.* at 658.

These precepts include comity and separation of powers. These divisions of power and protected spheres of democratic autonomy are also critical to the proper implementation of the constitutional balance among federal, state and individual actors.

The Full Faith and Credit Clause provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State."²⁵⁴ Subsequently, Congress passed U.S.C. § 1379²⁵⁵ to require "that the public acts of every state shall be given the same effect by the courts of another state that they have by law and usage at home."²⁵⁶ Thereafter, the Supreme Court has interpreted the provision broadly, in accord with 28 U.S.C. § 1379 to require full faith and credit to sister state public acts and records.²⁵⁷

Given the word "shall" contained in the first sentence of the Full Faith and Credit Clause, scholars have clashed regarding the meaning of the second sentence providing that, "Congress may by general laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the effect thereof."²⁵⁸ Some argue this provision prevents Congress from legislating the substantive effect of the acts, records and proceedings of every other state in a way that delimits full faith and credit or contradicts Supreme Court precedent.²⁵⁹ Others posit that, because the first sentence is entirely limited to authentication, Congress controls exclusively the substantive effect of acts,

254. U.S. CONST. amend. IV, § 1.

255. 28 U.S.C. § 1379 (2007) ("[a]ll nonjudicial records or books kept in any public office of any State, Territory or Possession of the United States," and then declares: "[s]uch records or books, or copies thereof, so authenticated, shall have the same full faith and credit in every court and office within the United States and its Territories and Possessions as they have by law or usage in the courts or offices of the State, Territory, or Possession from which they are taken."). See also William A. Reppy, *The Framework of Full Faith and Credit and Interstate Recognition of Same-sex Marriages*, 3 AVE MARIA L. REV. 393, 400 (2005).

256. Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255, 343 (1998) (quoting *Chi. & Alton R.R. v. Wiggins Ferry Co.*, 119 U.S. 615, 622 (1887)). Travis Christopher Barham, *Congress Gave and Congress Hath Taken Away: Jurisdiction Withdrawal and the Constitution*, 62 WASH. & LEE L. REV. 1139 (2005).

257. See generally *Chi. & Alton R.R. v. Wiggins Ferry Co.*, 119 U.S. 615, 622 (1887); *Loughren v. Loughren*, 292 U.S. 216, 223 (1934).

258. U.S. CONST. art. IV, § 1. See e.g., authors advocating that DOMA is an unconstitutional exercise of congressional power: Paige E. Chabora, *Congress' Power Under the Full Faith and Credit Clause and the Defense of Marriage Act of 1996*, 76 NEB. L. REV. 604 (1997); Heather Hamilton, Comment, *The Defense of Marriage Act: A Critical Analysis of Its Constitutionality Under the Full Faith and Credit Clause*, 47 DEPAUL L. REV. 943 (1998); Kramer, *supra* note 177, at 1965; but see authors advocating that DOMA is a constitutional exercise of congressional power: Daniel A. Crane, *The Original Understanding of the "Effects Clause" of Article IV, Section 1 and Implications for the Defense of Marriage Act*, 6 GEO. MASON L. REV. 307 (1998); Timothy Joseph Keefer, Note, *DOMA As A Defensible Exercise of Congressional Power Under the Full-Faith-and-Credit Clause*, 54 WASH. & LEE L. REV. 1635 (1997).

259. Chabora, *supra* note 258, at 650-51.

records and proceedings across state lines.²⁶⁰ Recognizing that marriage licenses fall within the definition of public records,²⁶¹ the validity of Section Two of DOMA under the Full Faith and Credit Clause turns upon which reading of the text controls.

Many scholars²⁶² advocate a broad application of the word "shall" in the Full Faith and Credit Clause as imposing upon Congress an affirmative obligation to promote credit for public acts across state lines, thus furthering comity precepts. One proponent of this interpretation refers to Justice Brennan's footnote ten of *Katzenbach v. Morgan*²⁶³ to borrow and apply the "one-way ratchet theory"²⁶⁴ to the DOMA Full Faith and Credit debate and concludes that the effects power afforded to Congress in the second sentence of the clause "delegates no power to weaken the imperative of full faith and credit."²⁶⁵

Others embrace a historical interpretation and construe Congressional power broadly²⁶⁶ to either expand or contract full faith and credit. Even if an expansive definition of Congressional rulemaking is acknowledged, such

260. Crane, *supra* note 258, at 336.

261. Reppy, *supra* note 255, at 401-02.

262. Joseph William Singer, *Same sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. CIV. RTS. & CIV. LIBERTIES 1, 49 (2005); Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-sex Marriage in the Aftermath of Lawrence v. Texas*, 88 MINN. L. REV. 1184, 1205 (2004) (arguing the fundamental right to marry is a state created right thus imposing upon the state an affirmative obligation to recognize marriage in accordance with the Constitution); Andrew Koppleman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1, 14 (1997) (arguing DOMA is unconstitutional not because it singles out the LGBT community for disparate treatment and lacks any legitimate policy justification, but rather is motivated by a desire to harm the minority group); Kramer, *supra* note 177, at 1965 (arguing that the public policy doctrine violated the Full Faith and Credit Clause); Paige Chabora, *Congress' Power Under the Full Faith and Credit Clause and the Defense of Marriage Act*, 76 NEB. L. REV. 604, 639 (1997) (suggesting "DOMA's clash with the plain language and basic constitutional precepts underlying the FFC Clause illustrates why Congress' power is indeed subject to a one-way ratchet.").

263. *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

264. Chabora, *supra* note 262, at 605 n.9 ("Conceiving of congressional power as subject to a one-way ratchet is not new. The United States Supreme Court noted how Congress' constitutionally derived power can operate in one direction in the voting rights case, *Katzenbach v. Morgan*, 384 U.S. 641 (1966). Congress may act only "affirmatively" to expand equal protection rights under the Equal Protection Clause, and Congress has no power to act "negatively" to restrict rights.) Chabora suggests that "DOMA's clash with the plain language and basic constitutional precepts underlying the Full Faith and Credit Clause illustrates why Congress' power is indeed subject to a one-way ratchet."). *Id.* at 639.

265. *Id.* at 652.

266. Gillian Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1527 (2007); Mark D. Rosen, *Why the Defense of Marriage Act is Not (Yet?) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors that Determine What the Constitution Requires*, 90 MINN. L. REV. 915 (2006); Daniel Crane, *The Original Understanding of the "Effects Clause" of Article IV, Section 1 and Implications for the Defense of Marriage Act*, 6 GEO. MASON L. REV. 307 (1998).

power is limited by other parts of the Constitution, including the Fifth and the Fourteenth Amendments.²⁶⁷

Although no Supreme Court case addressing the validity of a federal statute lessening the degree of respect due to a sister state record exists,²⁶⁸ the Supreme Court has addressed the scope of finality constitutionally owed to a valid marriage when the couple crosses state lines. A clear rule has emerged, through Supreme Court precedent, requiring states, as a matter of comity, to recognize as valid out of state marriages so long as the marriage was valid in the state of celebration.²⁶⁹ This rule even applies with respect to common law marriages.²⁷⁰ The general rule admits two exceptions. First, if a resident of state A contracts an extraterritorial marriage in another state that is prohibited and void in state A, the marriage is void, as if entered in state A.²⁷¹ Second, if an individual resides and weds in state B and becomes a resident of state A, then cross-border recognition is not required if to recognize the marriage would undermine the fundamental public policy of state A.²⁷² These exceptions are limited in scope and should be applied in harmony with the Full Faith and Credit Clause policy favoring such cross-border recognition. Arguably, if the state interest underlying the law or policy is motivated by animus, then neither exception applies.

For example, the Court has relied specifically on the Full Faith and Credit Clause to determine the validity of a foreign marriage. In *Loughran v.*

267. Metzger, *supra* note 266, at 1528. (noting that “the Fourteenth Amendment rights’ simultaneous protection through the Fifth Amendment does not render the Fourteenth Amendment superfluous as a limit upon Congress. But such simultaneous protection does provide strong support for the conclusion that Congress lacks power to authorize violation of these rights by the states.”). *Id.*

268. Kramer, *supra* note 177, at 2005.

269. See e.g., *id.*

270. See e.g., *Meister v. Moore*, 96 U.S. 76, 82 (1877) (“Whatever the form of ceremony, or even if all ceremony was dispensed with, if the parties agreed presently to take each other for husband and wife, and from that time lived together professedly in that relation, proof of these facts would be sufficient to constitute proof of a marriage binding upon the parties, and which would subject them and others to legal penalties for a disregard of its obligations. *This has become the settled doctrine of the American courts*; the few cases of dissent, or apparent dissent, being borne down by the great weight of authority in favor of the rule as we have stated it; citing a large number of authorities, and concluding, ‘such being the law of this State.’ We cannot regard this as mere *obiter dicta*. It is rather an authoritative declaration of what is the law of the State, notwithstanding the statute regulating marriages.” (Emphasis added)). See also *Travers v. Reinhardt*, 205 U.S. 423, 440 (1907) (“The views we have expressed find support in the authorities. In *Meister v. Moore*, 96 U. S. 76, 79 (1877), it was said that an informal marriage by contract *per verba de proesenti* constituted a marriage at common law, and that a statute simply requiring ‘all marriages to be entered into in the presence of a magistrate or clergyman, or that it be preceded by a license, or publication of banns, or be attested by witnesses,’ may be construed ‘as merely directory, instead of being treated as destructive of a common-law right to form the marriage relation by words of present assent.’”).

271. RUSSELL J. WEINTRAUB, COMMENTARY ON CONFLICT OF LAWS 290 (2001).

272. *Id.* (in order to offend fundamental public policy, the marriage will typically have to be bigamous, polygamous or incestuous).

Loughran, the Court addressed a marriage validity question in determining whether an extraterritorial marriage was valid, thus permitting the petitioner to receive survivorship rights.²⁷³ The petitioner, a resident of D.C., committed adultery.²⁷⁴ Her first husband was granted a fault divorce.²⁷⁵ Under the District's laws, she was prohibited from remarrying.²⁷⁶ Following the divorce, she relocated to Florida and married in accord with Florida laws.²⁷⁷ The couple subsequently relocated to Virginia, where her second husband died while the parties were married.²⁷⁸ Trustees of the decedent's estate initiated an action in the D.C. District Court where decedents' real property was located and they argued that the Florida marriage was not entitled to Full Faith and Credit in D.C. because it was entered into in violation of D.C. law prohibiting former spouses guilty of adultery from remarrying within the district:

[M]arriages not polygamous or incestuous, or otherwise declared void by statute, will, if valid by the law of the state where entered into, be recognized as valid in every other jurisdiction. The mere statutory prohibition by the State of the domicile either generally of the remarriage of a divorced person, or of remarriage within a prescribed period after the entry of the decree, is given only territorial effect. Such a statute does not invalidate a marriage solemnized in another state in conformity with the laws thereof.²⁷⁹

Ultimately, the court determined that the Florida marriage was valid and entitled to Full Faith and Credit creating spousal survivorship rights under D.C. law, the decedent's domicile at the time of death. The Court held:

The suit at bar was brought after termination of the marriage by death to enforce existing property rights growing out of the marriage in Florida and the decree entered in Virginia. It was not brought to enforce any transaction had within the District; nor was it brought to enforce an illegal contract; or to further an illegal relation. Equity does not demand that its suitors shall have led blameless lives. Neither the doctrine of clean hands, nor any kindred principle on which courts refuse relief, is applicable here. The decree of the Court of Appeals is vacated and the cause remanded to it for further proceedings not inconsistent with this opinion.²⁸⁰

273. 292 U.S. 216, 221 (1934).

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.* at 223.

280. *Id.* at 229-30.

The *Loughran* case addressed the marriage-morality question applying 1934 standards. Instead of a same-sex marriage prohibition, D.C. imposed a bar to remarriage by spouses guilty of infidelity. Thus, the Court addressed the extra-territorial effect of a valid Florida marriage in the context of a D.C. estate action. The trustees argued that although the alleged widow had remarried the decedent in Florida, District law, the situs of the decedent's real property, controlled to decide the validity of the marriage. The Court reversed the D.C. Appellate Court decision refusing to grant full faith and credit to the Florida marriage and remanded the matter to the D.C. court with instructions to recognize the marriage as valid. The Court provided some guidance to practitioners in determining the validity of a marriage:

The mere statutory prohibition by the state of the domicile either generally of the remarriage of a divorced person, or of remarriage within a prescribed period after the entry of the decree, is given only territorial effect. Such a statute does not invalidate a marriage solemnized in another state in conformity with the laws thereof.²⁸¹

Thus, in a case pitting the public policy favoring the recognition of marriages across state lines against the state sovereign's right to control the incidents of marriage subject to moral legislation, the policy favoring the validation of marriages across state lines won out. The *Loughran* case captures the tension in the Full Faith and Credit Clause between the need to unify the states through federal law and the need to protect state sovereignty.

DOMA stands in an uneasy relationship to Supreme Court cross-border marriage precedent. In light of the existing conflicts precedent, Congress arguably acted beyond its authority by passing legislation that provides a state "shall not be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between two persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right arising from such relationship."²⁸² In effect, Section Two of DOMA is akin to a judicial ruling, similar to a declaratory judgment, authorizing a state's right to deny full faith and credit to same-sex marriages without examining the underlying equities.²⁸³

Section Two of DOMA encourages discrimination at two levels, the individual level and between states. Arguably, Section Two of DOMA subverts the federalist system²⁸⁴ by carving out an exception, borne of animus, to the full

281. *Id.* at 223.

282. 28 U.S.C. § 1738C (2008). Metzger answers this question affirmatively; however, she concludes DOMA is invalid under the Fourteenth Amendment. Metzger, *supra* note 266, at 1522-32.

283. This raises separation of powers concerns. See *infra* notes 323-332 and accompanying text.

284. Not only does DOMA have an impact on comity and the uniform recognition of marriage, but by defining marriage for federal purposes Section Three also presents a state sovereignty issue because it constitutes back-door commandeering. See Kristian Whitten,

faith and credit afforded to marriages across state lines, reinforced by Supreme Court precedent. By interjecting the rule undermining comity, Congress signals federal approval of state nonrecognition of sister-state same-sex marriages. Congress has ignored Supreme Court precedent requiring courts to recognize as valid out of state marriages so long as the marriage was valid in the state of celebration.

Additionally, the statute itself remains subject to Constitutional attack because it conflicts directly with the pre-existing precedent interpreting the Full Faith and Credit Clause by permitting the sweeping invalidation of sister-state sanctioned same-sex marriage without requiring the forum state to establish the substantial state interest at stake that is substantially furthered by nonrecognition. Certainly, the federal government possesses the necessary expertise to identify the federal policies at stake favoring recognition of sister state laws; however, Congress lacks the constitutional authority to circumvent Supreme Court precedent to permit nonrecognition of a sister state record, applied on a case-by-case basis.*

In addition to the full faith and credit argument, the substantive content of Section Two of DOMA is also vulnerable based on the perquisites of the First Amendment, Fourteenth Amendment, Ninth Amendment and the Tenth Amendment. When characterized not as a general choice of law statute, but rather as an attempt to create a federal public policy rejecting same-sex marriage and imposing it upon the states, Section Two of DOMA becomes

Section Three of the Defense of Marriage Act: Is Marriage Reserved to the States, 26 HASTINGS CONST. L. Q. 419, 458 (1999). By defining marriage as one man and one woman, the federal government has limited the ability of states to expand the definition to embrace same-sex couples at the risk of losing federal funding under the Block Grant Program. *Id.* at 453.

²⁸⁵ Fearful that DOMA may be deemed unconstitutional by the Supreme Court, opponents of same-sex marriage are advancing the Federal Marriage Amendment, "providing Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman." S. J. Res. 30, 108th Cong. § 2 (2004) (amendment defeated on July 14, 2004). The amendment has been described as "ill-fitting with our constitutional structure and inconsistent with our constitutional traditions." Ronald J. Krotoszynski & E. Gary Spitko, *Navigating Dangerous Constitutional Straits: A Prolegomenon on the Federal Marriage Amendment and the Disenfranchisement of Sexual Minorities*, 76 U. COLO. L. REV. 599, 601 (2005). See also Laura N. Fellow, *Congressional Striptease: How the Failures of the 108th Congress Jurisdiction-stripping Bills Were Used for Political Success*, 14 WM. & MARY BILL RTS. J. 1121, 1150 (2005) (suggesting that Congressional proponents of the Marriage Protection Act recognized it was doomed to fail, but hoped it would keep the issue at the forefront of the political agenda and insure the turnout of conservative candidates in the 2004 elections). The last successful amendment of the Constitution occurred in 1972 was the Twenty-sixth Amendment granting to 18-year-olds the right to vote. U.S. CONST. amend. XXVI (2007). One scholar suggests that "the character of amendment proposal has changed significantly since the Founding. We appear to have moved from generally independently-motivated amendment proposing to the stagnant modern era of promiscuous careerism." Darren Latham, *The Historical Amendability of the American Constitution: Speculations on an Empirical Problematic*, 55 AM. UNIV. L. REV. 145, 262 (2005).

more suspect²⁸⁵ from a structural vantage point. At the very least, Section Two of DOMA stands alone in terms of creating a law advancing non-recognition of extra-territorial marriages through a federal law that ironically promotes state autonomy, rather than national unity.

1. Separation of Powers

Both sections of DOMA must also be tested to confirm that they comport with Ninth and Tenth Amendment precepts limiting Congressional power to regulate outside of its enumerated powers. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."²⁸⁶ The Tenth Amendment provides: "The 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."²⁸⁷ Construed together, these amendments create zones of state sovereignty and individual private autonomy into which the federal government may not stray, absent compelling reason. Traditionally, the subject of marriage regulations has been reserved to the several states, subject to constitutional limitations.²⁸⁸ Rarely has Congress encroached into this zone of family law legislative, reserved to the several states, for example, by passing laws related to child custody jurisdiction²⁸⁹ and child support.²⁹⁰

Like DOMA, these statutes seek to regulate interstate relations and were arguably enacted under the authority of the Full Faith and Credit Clause. The similarities between DOMA and other federal family law legislation end with this shared characteristic. The Federal Prevention of Parental Kidnapping Act designates the home state of the child for purposes of resolving jurisdictional disputes between parents seeking custody of the same child in different states.²⁹¹ Likewise, the federal child support legislation requires that sister states afford full faith and credit to foreign child support orders and provides federal assistance in collecting back child support by authorizing IRS tax refund intercepts and other federal support.²⁹² The foregoing legislation provides federal support to state efforts to protect the interests of children by reducing custody litigation and facilitating the collection of child support across state lines. The legislation promotes comity among states and between the federal government and the states.

286. U.S. CONST. amend. IX.

287. U.S. CONST. amend. X.

288. *Haddock v. Haddock*, 201 U.S. 562, 575 (1906) (when the Constitution was adopted, states possessed full power over marriage and divorce rules).

289. Federal Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (2007).

290. Federal Child Support Recovery Act, 18 U.S.C. § 228 (2007); Federal Full Faith & Credit for Child Support Orders Act, 28 U.S.C. § 1738 B (2007).

291. 28 U.S.C. § 1738A.

292. 18 U.S.C. § 228; 28 U.S.C. § 1738B.

292. 28 U.S.C. § 1738A.

In contrast, DOMA promotes state autonomy to the detriment of individual rights and sister-state comity. DOMA is at odds not only with the limited role of the federal government in matters regulating marriage, but it is even more puzzling when its substance, promoting state autonomy, is compared to the substance of other domestic relations laws enacted by Congress to promote comity and cross-border cooperation. In fact, Congress, recognizing its lack of legislative authority, has proposed in excess of fifty constitutional amendments seeking to expand its authority to pass uniform domestic relations laws.²⁹³ DOMA is startling because it does not advance comity and recognition of sister state acts, but rather protects state autonomy, a role typically assumed by each state's attorney general and sorted out through the judicial system.

DOMA is problematic for another reason: it interferes with interstate autonomy and comity relationships by signaling federal approval of state isolationist behavior and discriminatory treatment of sister state same-sex marriages. DOMA undermines the aspiration that the states will be bound together by the invisible threads of comity in the promotion of travel, trade and development. DOMA disrupts state experimentation by promoting nonrecognition. The language of DOMA is so broad; it may be applied to not only same-sex marriages, but also to Civil Unions and Domestic Partnerships. The result of nonrecognition is ironic in relationship to divorce and death rights because these rights and obligations could be created as a matter of private contract. Thus, while those who marry draft premarital agreements to opt out of the applicable economic regime of rights and duties, those same-sex couples desirous of them are denied the right to opt into a default framework of rights and responsibilities through marriage.

In addition to the separate roles of state and federal government and the separate roles of three branches of the federal government, a sphere of personal privacy and democratic autonomy is also constitutionally mandated. Even when exercising its authority under the Effects Clause of the Full Faith and Credit Clause, Congress remains subject to the constraints of the United States Constitution as interpreted by the United States Supreme Court.²⁹⁴ Thus, courts have an affirmative obligation to review the constitutionality of DOMA and to preserve the tenuous balance of power shared by the federal government, the states and the individual.

VII. A NEW APPROACH

Sometimes multiple and varied constitutional claims must be viewed structurally, that is in relationship to one another, to fully grasp the manifold harm of the statutory scheme at issue. DOMA presents such a scheme.

293. *Scherer v. Scherer*, 334 U.S. 343, 364-66 n.13 (1947). See Derek C. Araujo, *A Queer Alliance: Gay Marriage and the New Federalism*, 4 RUTGERS J. L. & PUB. POL'Y 200, 201 (2006) (seventy proposed amendments to the Constitution of the United States to federalize family law were introduced to Congress and failed between December 4, 1889-July 2, 1926).

294. *Marbury v. Madison*, 1803 WL 893 (U.S. 1803).

Principled structural reasoning provides an analytical framework to assist the court in identifying unenumerated rights and protecting them. Given the failure of U.S. courts to apply structural reasoning in relationship to DOMA in recognition of the interdependent nature of the provisions of the Constitution, including the separation of powers both vertically and horizontally, perhaps the bench and bar are in need of a more concrete and explicit formulation of structural reasoning in relationship to DOMA. This need calls for the development of an overarching analytical approach to evaluate the constitutionality of DOMA, a statute that impacts both First and Fifth Amendment liberty interests, as well as separation of powers and comity concerns. Currently, no test of constitutional harm takes into account numerous intrusions into the wide variety of individual rights and separation of power concerns, both vertical and horizontal and proposes aggregated balancing.²⁹⁵

The closest analytical approach is the Madisonian balancing approach.²⁹⁶ It is sometimes used in relationship to Establishment Clause claims,²⁹⁷ commercial speech analysis,²⁹⁸ and commerce clause analysis.²⁹⁹ Richard Fallon describes the balancing approach in this way:

Balancing Tests. In paradigmatic balancing tests, the Court explicitly assesses competing considerations to determine whether a challenged statute or action is constitutionally permissible. The Court first identifies constitutional values threatened by governmental action; next it assesses the degree of their implication in a particular case; then the Court weighs the harm to protected values against the interests that the government has endeavored to promote. The Court may also consider alternative means by which the government might achieve its ends at less cost to constitutional values.³⁰⁰

295. Faigman, *supra* note 69, at 662 (unconstitutional government action may pass scrutiny when the infringement on multiple individual rights is analyzed separately).

296. *Id.* at 641. According to Faigman, Madisonian balancing “begins with the premise that a constitutional injury caused by some government action cannot be described in a piecemeal fashion. . . . A court’s evaluation of the constitutionality of a challenged government action must entail a full assessment of the constitutional costs of that action.” *Id.* at 634-43. Faigman proposes a comprehensive balancing methodology to replace the existing tiered spectrum that exists. *Id.* at 646.

297. Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L. REV. 65, 72 (1996).

298. *Id.*

299. *Id.*

300. See e.g., Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 U.C.L.A. 1267, 1302-03 (2007) (Richard Fallon notes: “[a] concrete example is the test applied by the Supreme Court last Term in *Timmons v. Twin Cities Area New Party* to determine the permissibility under the First and Fourteenth Amendments of Minnesota ‘anti-fusion’ statutes that prohibit candidates from being nominated for the same elective office by more than one party. Writing for the majority, Chief Justice Rehnquist concluded that the state’s interest in maintaining the ‘integrity, fairness, and efficiency’ of its ballots by preventing their use as

The proposed "Meta Approach" requires aggregating all harm to the petitioner and all of the governmental interests advanced by the state and comparing them. In this way, the court decides the matter based on the totality of the circumstances. This Meta Approach permits the court to aggregate the separate claims of constitutional harm in order to conduct one comprehensive analysis. If this approach is employed, the court, could consider the entirety of the claimed constitutional harm in relationship to all of the governmental justifications. Currently, no precedent expressly permits a court to apply this type of meta balancing test in relationship to aggregated constitutional harms arising out of a statutory provision. Instead, courts conduct a compartmentalized right by right approach, recycling the same state interests to justify the intrusion without regard to the number of separate constitutional injuries identified. The lack of a Meta Approach results in inequity. For example, the court in *Wilson v. Ake*³⁰¹ considered each alleged constitutional injury separately and justified based on the same set of state interests. The court rejected the Full Faith and Credit challenge based upon the state's legitimate public policy of opposing same-sex marriage.³⁰² The same policy justification is used to satisfy the rational basis test in overcoming the petitioners' claims that DOMA violated both the Substantive Due Process Clause and the Equal Protection Clause.³⁰³

Absent any standard adopting an overarching review, the degree and severity of the harm to liberty interests can be minimized through a series of separate and compartmentalized analyses. Under the current scheme, when a Petitioner raises numerous constitutional injuries, the state may rely repeatedly upon the same complement of governmental interests to justify the erosion of multiple constitutional protections.

A. *New Standard Proposed*

When multiple fundamental rights are arguably burdened, if not entirely denied, it seems only fair to apply a searching level of scrutiny to confirm that the state has not overstepped its legislative authority. When a searching level of scrutiny is applied, the burden of proof is on the state to prove that the substantial and important state interests are substantially furthered by the statute under challenge and the multiple burdens to the variety of fundamental rights is no greater than needed to attain the sufficiently important state goals.³⁰⁴

'billboards for political advertising' was 'sufficiently weighty' to justify the prohibition against fusion candidacies. The majority also found that the state had a legitimate interest in 'the stability of [its] political system[],' which it was entitled to support by 'enact[ing] reasonable election regulations that [tend to] favor the traditional two-party system.'").

301. *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1304, 1308-9 (M.D. Fla. 2005).

302. *Id.*

303. *Id.*

304. *U.S. v. Va.*, 518 U.S. 515, 533 (1996) (burden of proof shifts to the state to establish important governmental interests).

The existing three-tiered approach has been critiqued as an imprecise attempt to describe Supreme Court precedent using a “categorical methodology,”³⁰⁵ to explain what, in fact, is a process of striking a constitutional balance between individual rights and governmental intrusions. For example, in his concurring and dissenting opinion in *City of Cleburn v. Cleburn Living Center*,³⁰⁶ Justice Marshall, joined by Chief Justice Burger and Justice Blackmun, wrote:

The Court’s opinion approaches the task of principled equal protection adjudication in what I view as precisely the wrong way. The formal label under which an equal protection claim is reviewed is less important than careful identification of the interest at stake and the extent to which society recognizes the classification as an invidious one. Yet in focusing obsessively on the appropriate label to give its standard of review, the Court fails to identify the interests at stake or to articulate the principle that classifications based on mental retardation must be carefully examined to assure they do not rest on impermissible assumptions or false stereotypes regarding individual ability and need.³⁰⁷

Justice Marshall’s insight is relevant not only to equal protection analysis, but also to liberty deprivation claims. While some justices advocate originalism as the best form of constitutional analysis,³⁰⁸ United States Supreme Court precedent is composed of a rich, complex, and evolving variety of analytical approaches. Admittedly, using the three-tiered standard of review is a logical way to introduce and discuss the differing levels of constitutional scrutiny, scholars have noted that strict scrutiny, intermediate scrutiny and rational basis review come packaged in differing standards within each tier.

For example, one author identified three degrees of strict scrutiny: a nearly categorical approach, a weighted balancing approach and an illicit motive approach.”³⁰⁹ Additionally, Justice Scalia also recognizes differing standards within each tier. He refers to cases in which multiple fundamental rights are

305. Gressman & Carmella, *supra* note 298, at 84.

306. *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 478 (1985).

307. *Id.*

308. According to Justice Scalia, “Originalists have nothing to trade! We can’t do horse-trading! Our view is what it is, and we write our dissents.” JEFFREY TOOBIN, *THE NINE* 55-6 (2007).

309. Fallon, *supra* note 301, at 1302-3. Fallon persuasively notes that “[i]n view of these differences among these interpretations, it is little exaggeration to say that there are three strict scrutiny tests, not one, though all bear the same label. Not surprisingly, uncertainty and confusion have arisen about which version the Court will apply in cases in which the differences among the tests would result in different outcomes. Indeed, the coexistence of three versions of strict scrutiny has not infrequently occasioned confusion among the justices themselves.”

implicated and balanced against state interests as "hybrid" cases.³¹⁰ In *Smith*, Justice Scalia observed:

The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections...³¹¹

The hybrid approach referenced by Justice Scalia acknowledges that the Supreme Court is more likely to invalidate legislation that interferes with multiple fundamental rights. A review of the "Hybrid Cases" identified by Justice Scalia reveals the Court's implicit recognition of the interdependent nature of the freedoms of religion, speech and association; however, the rights are identified and analyzed together in relationship to the state interests advanced. No attempt is made to aggregate and quantify the separate harms and the separate state interests. Additionally, no thought is given to shifting the burden of proof to the state when multiple harms are alleged.

Thus, a Meta Approach, derived from existing precedent, resembles a weighted balancing test. It offers an analytical tool to identify multiple constitutional harms, identify the importance of the state's interests, and analyze the likelihood of achieving the goals through the chosen statutory scheme. It extends and combines structural reasoning with the hybrid approach by considering additional constitutional infirmities, such as Full Faith and Credit harms, not just harms to individual rights.

Assuming the legitimacy of the Meta Approach is accepted, the next question becomes, how could such an analysis be implemented in a fair and

310. *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 883 (1990).

311. *Id.* at 881-82. (citing *Cantwell v. Conn.*, 310 U.S. 296, 304-307 (1940) (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); *Murdock v. Penn.*, 319 U.S. 105 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); *Follett v. McCormick*, 321 U.S. 573, 575 (1944) (same), or the right of parents, acknowledged in *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925), to direct the education of their children, see *Wis. v. Yoder*, 406 U.S. 205, 205-06 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school). Some of our cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion, cf. *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (invalidating compelled display of a license plate slogan that offended individual religious beliefs); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, (1943) (invalidating compulsory flag salute statute challenged by religious objectors). And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns. Cf. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed."). *Id.*

impartial manner to secure an acceptable balance between individual and state interests?³¹² The Meta Approach is needed only when the regulation under scrutiny arguably violates several constitutional guarantees. For example, when the petitioner asserts the deprivation of multiple fundamental rights or where multiple principles of federal and state power sharing are implicated, the Meta Approach is justified. Thus, only cases advancing a constellation of constitutional harms to either the individual or multiple principles of federal and state power sharing qualify for this type of review. If the necessary constellation of claims exists, then the petitioner should be permitted to advance the Meta Approach under which the court would aggregate the harm to the petitioner and compare it to the aggregated interests advanced by the state.

Under the Meta Approach, the court would conduct the following analysis:

- 1) Aggregate and quantify the degree of harm to all constitutionally protected interests, including but not limited to equal protection and fundamental rights or the individual and state rights protected by the separation of powers;³¹³
- 2) Aggregate and quantify the degree of value of the public policy interests advanced;³¹⁴
- 3) Determine whether the harm to the individual's preferred rights is greater than the benefit to the state;³¹⁵
- 4) If the harm to the individual's preferred rights outweighs the value of the public policy interests advanced, then the offending portion of the statute is invalid;

312. The court is obligated to develop and justify analytical approaches on an ongoing basis. Fallon notes, "Much more often than is commonly recognized, a gap exists between constitutional norms and the doctrine crafted by courts to implement those norms. Shaping doctrine successfully requires an acute sense of institutional, sociological, and psychological dynamics, as well as good judgment about how to balance competing values. The Justices are statespersons as well as truth-tellers. The measure of their success often lies in the practical effect of the doctrines that they develop." Fallon, *supra* note 301, at 150.

313. It is certainly no easy task to define, aggregate and weigh the harm to those denied the right to marry; nevertheless, this is the task of judges who listen to testimony and consider other evidence and exercise discretion to reach a just result on a daily basis.

314. Likewise, it is certainly no easy task to define, aggregate and weigh the intended societal goals of legislation and the likelihood of achieving the goals; nevertheless, this is the task of a judge who listens to testimony, considers the evidence and exercises discretion on a daily basis to reach a just result.

315. The Supreme Court has employed balancing tests in the following cases dealing with individual autonomy: *Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833, 871 (1992) (court adopts viability as the point in time when state's interest in preserving unborn life outweighs woman's liberty interest to terminate an unwanted pregnancy absent medical emergency); *Wis. v. Yoder*, 406 U.S. 205, 214 (1972) (court balanced state's interest in compulsory education against individual's interest in free exercise); *Cantwell v. Conn.*, 310 U.S. 296, 307 (1940) (court weighs individual's right to free exercise of speech and religion against state's interest in "the preservation and protection of peace and good order within her borders").

- 5) Alternatively, if the harm to preferred rights is roughly equivalent to the value of the public policy advanced, then the government must prove by clear and convincing evidence:³¹⁶
 - a) That no discriminatory purpose animates the legislation;
 - b) The government harm is substantially related to a sufficiently important government interests; and
 - c) The infringement is closely tailored and no greater than needed to attain the government interests.³¹⁷

As previously noted, the foregoing test is comprised of a variety of analytical tests currently employed by the Supreme Court.

While the element requiring the court to aggregate claims is novel, the use of a balancing test is not. Balancing tests are particularly helpful when competing constitutional claims are at issue. In cases related to the free exercise of religion and the establishment clause, the *Lemon*³¹⁸ balancing test enjoyed prominence until recently. In *Roberts*, the court recognized a sliding scale of protection, with the greater deference due to intimate association.³¹⁹ Likewise, Justice Marshall advocated an interest-based analysis of legislation challenged as discriminatory in *Cleburn* which also employed a balancing approach.³²⁰ The Meta Approach set forth above employs a form of critical examination, places the burden of proof upon the state to justify intrusions into the sphere of personal autonomy, and implements a least restrictive means standard. The proposed test combines elements from all of the foregoing approaches to craft a test that permits the court to make a determination based on the totality of the circumstances.

Given the numerous constitutional infirmities of DOMA, the foregoing Meta Approach enables a court to evaluate not just one right at a time, as most precedent does, but to examine the comprehensive impact of the legislation by examining the aggregated harms to the individual weighing those injuries against the importance of all of the state's policy objectives.

316. *Penn. Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104 (1978). The *Penn Central* Court applied a three-factor "ad hoc" test to apply in deciding regulatory takings claims: 1) the character of the government action; 2) the extent to which a regulation has interfered with a landowner's reasonable investment-backed expectations; and 3) the economic impact of a regulation. The *Penn Central* Court described the test as an "ad hoc, case-by-case inquiry, not subject to any set formula." *Id.* at 124.

317. In relationship to free speech, the Supreme Court devised and applies the *O'Brien* balancing test in relationship to time place and manner restrictions on expressive conduct, deemed speech. *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (content-neutral restrictions on symbolic speech, unrelated to the suppression of expression, must satisfy four-prong test: 1) the restriction is within the constitutional power of the government, 2) the restriction furthers an important or substantial governmental interest; 3) the government interest is unrelated to the suppression of free expression and 4) the incidental restriction on the alleged First Amendment rights is no greater than is essential to the furtherance of that interest).

318. *Lemon v. Kurtzman*, 403 U.S. 602, 602 (1971).

319. *Roberts U.S. Jaycees*, 468 U.S. 609, 609, 622 (1984).

320. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 460 (1985).

B. New Standard Applied

In order to avoid confusion as to the constitutional infirmities and asserted government justifications, the analysis of Section Three defining marriage will be addressed separately from the analysis of Section Two dealing with Full Faith and Credit.

1. DOMA Section Three-Marriage Definition

The first step is to identify and examine the harm to a member of the GLBT community who is denied the right to marry in reliance upon the federal definition of marriage. With regard to the Fifth Amendment, both substantive due process and equal protection concerns arise. With regard to due process, the right to marry the individual of one's choice, free from substantial state interference, has historically been recognized and has been deemed to encompass the right of undocumented aliens to marry and the right of individuals to marry without regard to race. Clearly, the prohibition of same-sex marriage substantially interferes with members of the GLBT community and their fundamental right to marry.³²¹

Not only does DOMA impermissibly burden this right, it violates the Equal Protection Clause by creating a classification between heterosexual and homosexual individuals, granting to the former a host of state and federal benefits and responsibilities. Thus, the disparate treatment is uncontested.

In addition to Fifth Amendment harms, DOMA also runs afoul of the First Amendment. It contradicts the tenet that the state remains neutral in its treatment of individuals based on religious affiliation by enshrining a Judeo-Christian definition of marriage based on "the teleology of the body"³²² into the definition of civil marriage. Additionally, the First Amendment protects a highly personal zone of intimate association, clearly encompassing the marital association. Given these bedrock rights of marriage, equality, religious freedom, and associational liberty, DOMA leaves constitutional wreckage in its wake. One might reasonably conclude that the stated harms far outweigh the stated interests of protecting marriage, morality, and the state purse. Assuming the fact-finder views the degree of harm to the individual to be roughly proportionate to the interests at stake, the burden of proof shifts to the state to demonstrate that the asserted harm is closely related to achieving the stated government interests and the infringement is no greater than needed to achieve the asserted interests.

Thus, under the Meta Analysis, the focus shifts to the stated governmental interests, which also must be analyzed and weighed in relationship to the harms left in DOMA's path. The interest of protecting the dignity of marriage seems insubstantial. Certainly, denying a valuable set of rights and obligations to a group based upon sexual orientation hardly seems related to reinvigorating and solemnizing marriage. While the legislature is free to make laws reflecting

321. *See supra* notes 158-195 and accompanying text.

322. H.R. REP. NO. 664 (1996), as reprinted in 1996 U.S.C.C.A.N. at 2917.

morality, these laws are always subject to the requirements of the Constitution. Thus, even the stated goal of advancing societal mores may not be born of animus, nor may it single out a group for disparate treatment based on status.³²³ Thus, the morality justification fails to withstand constitutional review.³²⁴ Finally, preserving scarce government resources seems an ill-conceived justification because the policy underlying most of the laws relating to spouses is to insulate a widowed or a divorced spouse from becoming a ward of the state.³²⁵ To the extent the concern is the subsequent increased financial, judicial, and ministerial demands, such a concern cannot justify the deprivation of such services based upon discriminatory stereotypes and animus. DOMA falters because it is built upon impermissible assumptions and false stereotypes. Even if the asserted governmental interests are legitimate and rise to the level of sufficiently important, the stated goals are not furthered by DOMA and, in fact, DOMA may undermine them. Because it interferes with multiple constitutional right guaranteed to the GLBT community, is not supported by sufficiently important state interests and is not closely tailored, Section Three of DOMA is unconstitutional.

2. DOMA Section Two-Full Faith and Credit

As in the prior analysis, the first step is to identify and examine the harm to a member of the GLBT community who celebrates a valid marriage in one state, moves to another state that has embraced the Section Two precepts of DOMA, and suffers the injuries associated with having the pre-existing marriage invalidated. The injury to the individual is clear. The rights and obligations enjoyed by spouses are wiped out as a result of the move across state lines. The injury is a complete deprivation of all marital rights.

In addition to undermining the legitimate expectations of married couples, Section Two of DOMA undermines horizontal and vertical power sharing rules established by the Constitution. Section Two is arguably outside of the scope of Congress's powers under the Full Faith and Credit Clause,³²⁶ stands in direct contravention of existing Supreme Court precedent,³²⁷ and undermines the existing conflicts analysis requiring an analysis of competing state interests.³²⁸

One might reasonably conclude that the stated harms to the individual and the balance of power far outweigh the stated interests of protecting marriage, morality, and the state purse. Assuming the fact-finder views the degree of harm to the individual to be roughly proportionate to the interests at stake, the burden of proof shifts to the state to demonstrate that the asserted harm is closely related to achieving the stated important government interests and the

323. *Romer v. Evans*, 517 U.S. 620, 644 (1996).

324. The third justification of protecting state sovereignty seems more relevant in relationship to Section Two of DOMA and will be discussed in the next section.

325. Divorce and death rights to prevent burden upon state coffers.

326. *Supra* notes 288-302 and accompanying text.

327. *Supra* notes 303-318 and accompanying text.

328. *Supra* notes 319-321 and accompanying text.

infringement is no greater than needed to achieve the asserted interests. Thus, the focus shifts to the quality of the government's interests in the balance, and the sufficiency of the tailored relationship between the degree of infringement, total in this case, and the likelihood that the statute will achieve the desired goals.

The stated goal of Section Two is to promote state sovereignty. In fact, Section Two of DOMA values nonrecognition over recognition and provides federal legislative support to state conduct that divides, rather than unifies, the several states. Thus, Section Two of DOMA undermines the power sharing structure of the Constitution by permitting Congress to exercise far more authority than is structurally permissible, thus encroaching upon the authority of the judiciary and the several states to apply the Constitution and the precedent interpreting it. It is a naked power grab that becomes transparent upon close examination. For the foregoing reasons, Section Two of DOMA is unconstitutional.

Even if a Meta Analysis is ultimately embraced, litigants must overcome difficult standing barriers to challenge DOMA. Scholars have noted that until Massachusetts recognized same-sex marriage, DOMA was immune from challenge.³²⁹ The most likely avenue of Supreme Court review will arise from a same-sex married couple's decision to challenge DOMA under the United States Constitution raising a full panoply of constitutional arguments under the First, Fifth, Ninth, and Tenth Amendments,³³⁰ supplemented by a strong separation of powers argument informed by the limited authority given to Congress under the Full Faith and Credit Clause.³³¹ When, and if, these cases are appealed to the United States Supreme Court with enough regularity that the Court deems the issue ripe for review, the Court will certify the question of the constitutionality of DOMA.

Assuming the Court eventually invalidates one or both sections of DOMA, the repercussions are many. If the court invalidates Section Three of DOMA, embracing a traditional definition of marriage, and interprets the fundamental right to marry to include same-sex marriage, then same-sex marriage must be recognized across the country. Alternatively, the Supreme Court could limit its holding to invalidate only Section Two of DOMA and require sister states to recognize marriages if valid in the jurisdiction of celebration, subject to a limited public policy exception requiring more than simply public disapprobation of homosexuality. This could result in requiring courts to afford full faith and credit to any marriage valid in the state of

329. See, e.g., Strasser, *Defending Marriage*, *supra* note 177, at 436-37 (stating that "it is not clear that anyone had standing to challenge [DOMA] before Massachusetts recognized same-sex marriages"); Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage*, 84 OREGON L. REV. 433, 459 n.128 ("Until Massachusetts began to permit same-sex couples to marry, no one had standing to challenge DOMA.").

330. U.S. CONST. amend. I; U.S. CONST. amend. V; U.S. CONST. amend. IX; U.S. CONST. amend. X.

331. U.S. CONST. art. IV, § 1.

celebration. Ultimately, the Supreme Court will be the final arbiter of DOMA's validity.

CONCLUSION

DOMA creates many constitutional harms. Its legislative history reveals a degree of stereotyping and animosity toward a minority group that is very troubling. Because the Constitution is silent regarding the constitutional protection, if any, due to same-sex marriage, structural reasoning provides a framework to determine the identity and scope of unenumerated rights in keeping with overarching constitutional themes and principles. Although DOMA has withstood several attacks in federal district court, neither the Circuits nor the Supreme Court has decided the ultimate issue. One reason that DOMA survives may be due to the court's willingness to segregate and individually analyze each claim, on an injury by injury basis. Historically, courts have relied upon structural reasoning to identify and shape the fundamental right to marry. Structural interpretation of the First, Fifth and Fourteenth Amendments requires courts to legally recognize the fundamental right to same-sex marriage and the constitutional imperative cross-border recognition of such marriages.

Alternatively, should structural reasoning alone fail to lead courts to the unalterable conclusion that same-sex marriage is a fundamental right, then perhaps a more concrete and explicit test is needed. The Meta Approach permits courts to examine the aggregated impact of the statute on individuals, states, and the federal government in relationship to DOMA. Under the proposed Meta Approach, the court would be free to consider the interference with the fundamental right to marry, to associate freely, to be free from state-imposed religion, to be free from classifications based on animus and the loss of personal autonomy when federal law denies to the individual the guaranteed rights of citizenship and the resulting injury caused by a federal statute denying full faith and credit to foreign acts or records. Thus, injury to the individual's right to marry, right to equality in the eyes of the law, right to religious and associational freedom, coupled with the important goals of interstate comity and constraining Congressional exuberance in accord with the Full Faith and Credit Clause and the Ninth and Tenth Amendments all weigh heavily in favor of invalidating DOMA. The interests identified by the state in support of DOMA, to protect heterosexual marriage, protect morality, and save money do not enjoy the presumption of validity in light of the animus surrounding the legislation and seem insignificant in relationship to the weighty Constitutional protections that DOMA tramples. Even if insufficient when each injury is analyzed separately, when all injuries are aggregated and balanced against the policies advanced by DOMA, both Section Two and Section Three fail.

Our Constitution, although "just words," embodies the goals and aspirations of a people seeking freedom and equality. It should be interpreted in light of these bedrock rights, in its complex and interrelated entirety to achieve its ends. Thus, courts should consider the utility of the Meta Approach in determining the validity of DOMA. Alternatively, courts should rely upon existing precedent and structural reasoning to do so. Under both the existing

precedent and the Meta Approach, DOMA violates the bedrock principles of deliberative autonomy and deliberative democracy and should be invalidated.

