

# Section Three of the Defense of Marriage Act: Is Marriage Reserved to the States?

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## I. Introduction

The State of Louisiana recently enacted a statute creating the “covenant marriage,” a union in which “one male and one female . . . agree that the marriage between them is a lifelong relationship.”<sup>1</sup> The parties to a covenant marriage sign a declaration of intent acknowledging that they “understand that a Covenant Marriage is for life,” and that they “commit [themselves] to take all reasonable efforts to preserve [their] marriage, including marital counseling.”<sup>2</sup> Substantively, a covenant marriage terminates the right under Louisiana law to a “no fault” divorce; indeed, a non-breaching party may bring a divorce action “only where there has been a complete and total breach of the marital covenant.”<sup>3</sup> The option to enter a covenant marriage is available both to couples applying for a marriage license and to those already married. Following Louisiana’s lead, at least eighteen other states have introduced similar “covenant marriage” laws.<sup>4</sup>

Let us suppose that Congress and the President decide that it is in the best interest of the nation as a whole to encourage “no fault” divorce. The federal government, in turn, might enact a statute denying

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1. LA. REV. STAT. ANN. § 272(A) (1998).

2. *Id.* § 273. See generally Melissa Lawton, *The Constitutionality of Covenant Marriage Laws*, 66 FORDHAM L. REV. 2471 (1998); J. Herbie DiFonzo, *Alternatives to Marital Fault: Legislative and Judicial Experiments in Cultural Change*, 34 IDAHO L. REV. 1, 56-57 (1997).

3. LA. REV. STAT. ANN. § 272(A).

4. See Lawton, *supra* note 2, at 2472 n.5.

all federal benefits to people married under state laws that require a showing of fault to obtain a divorce. Such a law might state:

In determining the meaning of any Act of Congress, or 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 persons who may terminate that legal union without a showing of fault by either party to the legal union, and the word 'spouse' refers only to the parties to a 'marriage' as defined herein.

Does the Constitution of the United States grant the Congress and President such power, or is the whole subject of "marriage" reserved to the states?<sup>5</sup> The answer to this question will rest on the Supreme Court's interpretation of the Tenth Amendment and, specifically, the extent to which Congress can regulate the area of domestic relations.

Ratified by the states in 1789, the Constitution contemplated a federal government of enumerated powers<sup>6</sup> which are "few and defined."<sup>7</sup> The powers retained by the states, on the other hand, are "numerous and indefinite,"<sup>8</sup> including the power to define the "marriage" relationship for their citizens.<sup>9</sup> When the Bill of Rights was adopted by the first Congress and ratified by the states in 1791, the Tenth Amendment further confirmed that those "powers not delegated to the [federal government,] nor prohibited by [the Constitution] to the states, are reserved to the states respectively, or to the people."<sup>10</sup>

In the last twenty years, however, United States Supreme Court opinions have differed widely in their approach to the protection of rights "reserved" to the states by the Tenth Amendment. In the late 1970s, the Court announced that the Tenth Amendment plays a "fundamental role" in allowing the states to "function effectively in [the] federal system[,]" and that it was the Court's responsibility to proscribe congressional action which intruded into areas "reserved to the

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5. See generally U.S. CONST. amend. X ("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.").

6. See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 218 (1987) (O'Connor, J., dissenting).

7. THE FEDERALIST No. 45, at 236 (James Madison) (Bantam Classics ed., 1982). Most of these powers are contained in Article I, Section 8 of the Constitution.

8. *Id.*

9. See *Haddock v. Haddock*, 201 U.S. 562, 575 (1906), *overruled on other grounds by Williams v. North Carolina*, 317 U.S. 287 (1942), ("No one denies that the States, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce [and that] the Constitution delegated no authority to the Government of the United States on [that subject].").

10. U.S. CONST. amend. X.

States.”<sup>11</sup> Fewer than ten years later, the Court rejected that approach and held that the Constitution’s Framers contemplated that Congress and the President would themselves regulate their relationships with the states, without interference from the Court.<sup>12</sup> More recently, the Court has returned to an approach wherein, at least in some circumstances, it determines whether or not Congress and the President have acted properly in light of the Tenth Amendment.<sup>13</sup>

It is in this constitutional context that, in September of 1996, Congress passed and the President signed the Defense of Marriage Act (“DOMA”).<sup>14</sup> DOMA purports to prevent one state from “exporting” its same-sex “marriage” to another, and for the first time defines the terms “marriage” and “spouse” for all federal laws, programs, and actions. Though the Supreme Court has yet to review this congressional attempt to regulate domestic relations, this article concludes that Section 3 of DOMA seriously impairs a state’s power to define the “marriage” relationship for its people. It is therefore proscribed by the Tenth Amendment.

Section two of this article provides a brief survey of the Supreme Court’s Tenth Amendment jurisprudence. Additionally, it examines several lower federal court opinions addressing domestic relations issues and proposed constitutional amendments which relate to Congress’ power to enact uniform marriage and divorce laws. Section three examines how the Supreme Court has treated cases specifically involving domestic relations. Moreover, it explores Congress’ own constitutional authority to legislate in the area of domestic relations. Section four introduces the DOMA, while section five looks at the Tenth Amendment and the effect of pervasive federal regulation on DOMA’s impact. Section six is a brief analysis of the Sixteenth and Seventeenth Amendments which underscores DOMA’s unconstitutionality. Finally, I conclude that, although Section 3 of the DOMA

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11. *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), (“insofar as the challenged [Congressional actions] operate to directly to displace the States’ freedom to structure integral operations in an areas of traditional governmental functions, they are not within the authority granted Congress by [the Commerce Clause].”).

12. *See Garcia*, 469 U.S. at 550 (“[W]e have no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause.”) *Id.*

13. *See, e.g., New York v. United States*, 505 U.S. 144 (1992); *United States v. Lopez*, 514 U.S. 549 (1995); *Printz v. United States*, 521 U.S. 898 (1997).

14. 28 U.S.C. § 1738C (1996) and 1 U.S.C. § 7 (1996). Congress and the President have also enacted federal legislation related to child support (Federal Child Support Recovery Act, 18 U.S.C. § 228 (1992)) and domestic violence (Federal Violence Against Women Act, 42 U.S.C. § 13981(c) (1994), and 18 U.S.C. § 2261 (1994)).

purports to define “marriage” and “spouse” only for federal programs, in practice it unconstitutionally imposes Congress’ definitions of “marriage” and “spouse” on the states.

## II. The Tenth Amendment Jurisprudence of the Supreme Court

Congress enacted and the states ratified the Tenth Amendment to insure that the Constitution expressed the Framers’ intent to grant the federal government “few and defined” powers.<sup>15</sup> Indeed, the first ten Amendments—the Bill of Rights—were meant to allay the concerns of Anti-federalists who feared that the new federal government would usurp the power of the states. The Tenth Amendment thus states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>16</sup>

This final version of the Tenth Amendment was itself the product of substantial controversy. During congressional debate, it was suggested that the word “expressly” be added before the word “delegated,” so that the amendment would read, “[t]he powers not expressly delegated by the Constitution . . .” James Madison objected to this proposed change because he believed it necessary to allow the government powers implied from the Constitution, “unless the Constitution descend to recount every minutia.”<sup>17</sup> In light of these concerns, Congress adopted the Tenth Amendment as it presently reads.<sup>18</sup>

15. THE FEDERALIST, *supra* note 7, at 236.

16. U.S. CONST. amend. X.

17. 5 THE FOUNDERS’ CONSTITUTION 403 (Phillip B. Kurland and Ralph Lerner eds., 1989).

18. See John R. Vile, *Truism, Tautology or Vital Principle? The Tenth Amendment Since United States v. Darby*, 27 CUMB. L. REV. 445, 450 (1997). But see W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 691 (1953). Crosskey proffers that the true meaning of the Tenth Amendment was that:

a state law could be invalid under the Constitution, only if “*the people* of the state had *alienated* to the government of the United States their *whole* original power over the subject matter of the law . . . . The rule of construction was [that] every power was reserved to the states that was not, either in express terms, or by necessary implication, *taken away from them*, and *vested exclusively* in the federal head.”

*Id.* (emphasis in original) (citation omitted). Crosskey also believes that the first eight amendments, as originally drafted, applied to the states, unless, like the first, they specifically apply only to Congress, and that Chief Justice Marshall’s opinion in *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), “appears to have been a sham.” CROSSKEY, *supra* at 1081.

Alexander Hamilton provided an early opinion as to what type of federal law would exceed the “few and defined” powers delegated to the federal government:

The propriety of a law in a constitutional light, might always be determined by the nature of the powers upon which it is founded. Suppose by some forced construction of its authority (which indeed cannot easily be imagined) the Federal Legislature should attempt to vary the law of descent in any State; would it not be evident that in making such an attempt it had exceeded its jurisdiction and infringed upon that of the State?<sup>19</sup>

### A. The Early Court

The early Supreme Court decisions addressing federal authority over domestic relations treated marriage and divorce much the same as Hamilton’s example of states’ “law of descent;” in *dicta* they denied any federal right to regulate in that area.<sup>20</sup> This power was, however, never a bright line bar to any legislation not specifically sanctioned in the Constitution. In *McCulloch v. Maryland*,<sup>21</sup> for instance, Chief Justice Marshall affirmed Congress’ power under the “Necessary and Proper” Clause<sup>22</sup> to exercise “implied” powers, and create a Bank of the United States. However, Justice Marshall later commented that “[i]n no single instance does the court admit the unlimited power of congress to adopt any means whatever, and thus to pass the limits prescribed by the constitution.”<sup>23</sup>

Under Chief Justice Taney, the Court took a narrower view of Congress’ power, holding that “the commerce clause left states free to regulate as they wished so long as their actions did not conflict with

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19. THE FEDERALIST No. 33, at 157 (Alexander Hamilton) (Bantam Classics ed., 1982).

20. See *Ex Parte Burrus*, 136 U.S. 586, 593-94 (1890).

21. 17 U.S. 316 (1819).

22. U.S. CONST. art. I, § 8, cl. 18.

23. Vile, *supra* note 18, at 454 (citing JOHN MARSHALL’S DEFENSE OF *McCulloch v. Maryland* 186-87 (Gerald Gunther ed., 1969)). See generally Gary Larson & Patricia B. Granger, *The ‘Proper’ Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 331-32 (1993) (questioning *McCulloch v. Maryland*, and disagreeing with *Wickard v. Filburn*, 317 U.S. 111 (1942)); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 824-26 (1996) (arguing that Congress must “balance the advantages and disadvantages of its proposed course of action from a federalism perspective,” which the Court should scrutinize under the “hard look” doctrine); William Eskridge & John Ferejohn, *The Elastic Commerce Clause: A Political Theory of Federalism*, 47 VAND. L. REV. 1355, 1369-72 (1994) (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheaton) 1 (1824); *McCulloch v. Maryland*; *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. 245 (1829), and *Dartmouth College v. Woodward*, 17 U.S. (4 Wheaton) 518 (1819)).

validly enacted federal legislation.”<sup>24</sup> Even after the Civil War, and the ratification of the 13th, 14th, and 15th Amendments, the Supreme Court struck down congressional attempts to regulate privately owned inns, public conveyances, and theaters on Tenth Amendment grounds.<sup>25</sup>

## B. The New Deal

The Great Depression prompted the federal government to enact more expansive federal economic regulation. Eventually, the Supreme Court validated these more robust assertions of federal

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24. LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 405 (1987). The Supreme Court under Chief Justice Taney “generally allowed states to pursue local development objectives, even in cases where the Marshall Court might have considered those objectives to have trenched upon national authority . . . .” Eskridge & Ferejohn, *supra* note 23, at 1373 (citing *The Mayor of New York v. Miln*, 36 U.S. 102 (1837); *Cooley v. Board of Wardens*, 53 U.S. 299 (1851); and *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837)). The authors also cite *Dred Scott v. Sandford*, 60 U.S. 393 (1857), as showing that the justices “fragmented on the issue of slavery.” *Id.* at 1375.

25. See *The Civil Rights Cases*, 109 U.S. 3, 14-15 (1883). See also *Slaughter-House Cases*, 83 U.S. 36 (1873) (refusing to strike down Louisiana’s slaughterhouse monopoly in New Orleans); *United States v. Cruikshank*, 92 U.S. 542 (1876) (limiting the application of the Civil Rights Act to states action). See generally Eskridge & Ferejohn, *supra* note 23, at 1376-80. Thus, it has been held that the Fourteenth Amendment does not give Congress power to set the voting age for state elections, see *Oregon v. Mitchell*, 400 U.S. 112 (1970), nor the ability to affirmatively legislate what standard states must apply in First Amendment “free exercise” cases. See *City of Boerne v. Flores*, 521 U.S. 507 (1997). The Tenth Amendment was also invoked to strike down several federal laws which were held to be beyond Congress’ commerce power. See, e.g., *The Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871), *overruled by* *Graves v. New York ex rel. O’Keefe*, 306 U.S. 466 (1939) (rejecting application of a federal tax to the income of state judges); *Child Labor Tax Case*, 259 U.S. 20 (1922) (striking down Congressional regulation of child labor); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating the National Industrial Recovery Act); *United States v. Butler*, 297 U.S. 1 (1936) (striking down the Agricultural Adjustment Act). In *Hammer v. Dagenhart*, 247 U.S. 251 (1918), the Court struck down federal laws which purported to regulate child labor at factories which shipped manufactured goods in interstate commerce. The Court held that child labor was a “purely local” issue and beyond Congress’ control. See *id.* at 276. In *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), the Court held unconstitutional a federal law which purported to regulate the coal industry, distinguishing between creating products and “commerce,” in holding that Congress’ power to regulate interstate commerce did not include the power to regulate the mining of coal.

Addressing Congress’ power to lay and collect taxes, in *The Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871), the Court held that the post-Civil War federal income tax could not be imposed on the salary of a state judge because if the states cannot tax instrumentalities of the federal government, the federal government cannot tax instrumentalities of the state. Both propositions rest “upon necessary implication[s].” *Id.* at 127. In reaching its conclusion, the Court stated: “The government of the United States . . . can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given by necessary implication.” *Id.* at 124.

power, and brought to a temporary end the Court's citation of the Tenth Amendment as a curb on Congress' commerce power.<sup>26</sup> In *Helvering v. Gerhardt*,<sup>27</sup> for instance, the Court upheld the federal income tax as applied to employees of the New York Port Authority. Justice Stone's opinion for the Court held that, since the federal tax on the Port Authority employees did not "threaten[ ] unreasonably to obstruct any function essential to the continued existence of the state government,"<sup>28</sup> it did not improperly invade New York's sovereignty.<sup>29</sup>

In *United States v. Darby*,<sup>30</sup> Justice Stone once again wrote for the Court and upheld the Fair Labor Standards Act's prohibition of the shipment in interstate commerce of goods which were produced "under labor conditions . . . which fail to conform to [wage and hour] standards set up by the Act."<sup>31</sup> In upholding the Act, the Court held

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26. See Paul J. Mishkin, *The Current Understanding of The Tenth Amendment*, in *THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING* 465 (Eugene Hickok ed., 1991). In *Wickard v. Filburn*, 317 U.S. 111 (1942), the Court held that Congress' commerce power allowed it to regulate an individual farmer's production of wheat for his family's consumption, because the cumulative effect of those farmers' home consumption might "reasonably be thought to alter the supply-and-demand relationships of the interstate commodity market." *TRIBE*, *supra* note 24, at 310 (citing *Wickard*, 317 U.S. at 127-28). Four years later, in *New York v. United States*, 326 U.S. 572 (1946), the Court upheld a nondiscriminatory federal tax on mineral water sold by the State of New York, with no opinion attracting a majority of the Court. The Court upheld the tax because it applied to all persons, including the State, equally. See *id.* at 583-84 (opinion of Frankfurter, J.). Chief Justice Stone's opinion collected four votes to uphold the tax, but he was "not prepared to say that the national government may constitutionally lay a non-discriminatory tax on every class of property and activities of States and individual alike." *Id.* at 586 (Stone, C.J., concurring). Justices Black and Douglas dissented on the ground that the tax clearly violated the Tenth Amendment. See *id.* at 596 (Douglas, J., dissenting). Justice Douglas denied the view that "the sovereign position of the States must find its protection in the will of a transient majority of Congress," and referring to the Tenth Amendment, stated that reciprocal state and federal tax immunity is consistent with *McCulloch v. Maryland*. *Id.* at 594-97 (Douglas, J., dissenting); see also Vile, *supra* note 18, at 481-82. Thus, the Court continued to permit expansion of Congress' commerce and taxing powers, but some Justices expressed concern that federal regulation had exceeded its constitutional limit, and that the states' sovereignty was being violated.

27. 304 U.S. 405 (1938).

28. *Id.* at 424.

29. In *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939), the Court upheld the imposition of New York's income tax on the salary of a federal employee. The Court upheld incorrect the assumption that an income tax burden on state or federal employees justified "the implied Constitutional tax immunity of the government by which [the employee] is employed," and overruled *The Collector v. Day*. Three years later the Supreme Court overruled *Hammer v. Dagenhart* and limited *Carter v. Carter Coal Company*. For discussion of these three cases see *supra* note 25.

30. 312 U.S. 100 (1941).

31. *Id.* at 109.

that Congress may properly control wholly intrastate activities which affect interstate commerce,<sup>32</sup> and characterized the Tenth Amendment as, “but a truism that all is retained which has not been surrendered.”<sup>33</sup> He proceeded to state that:

There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers. From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.<sup>34</sup>

Thirty-three years after *Darby*, the *Maryland v. Wirtz*<sup>35</sup> Court upheld an Act extending the Fair Labor Standards Act to state employees.<sup>36</sup> Similarly, in *Fry v. United States*,<sup>37</sup> the Court upheld application to state employees of the temporary federal wage and salary controls in the Economic Stabilization Act of 1970. While the *Fry* Court concluded that states are not immune from all federal regulation under the Commerce Clause because of their sovereign status,<sup>38</sup> it noted that:

[w]hile the Tenth Amendment has been characterized as a ‘truism’ . . . [citing *Darby*] it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States’ integrity or their ability to function effectively in a federal system.<sup>39</sup>

### C. National League of Cities

In 1974, Congress again amended the Fair Labor Standards Act, extending its provisions to all state employees. This gave a newly con-

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32. *See id.* at 122.

33. *Id.* at 124.

34. *Id.*

35. 392 U.S. 183 (1968).

36. *See id.* Justice Douglas strenuously dissented, writing that “what is done here is . . . a serious invasion of state sovereignty protected by the Tenth Amendment that is in my view not consistent with our constitutional federalism.” *Id.* at 201 (Douglas, J., dissenting).

37. 421 U.S. 542 (1975).

38. *See id.* at 548.

39. *Id.* at 547 n.7. Justice Rehnquist dissented, asserting that states have a constitutional right as states “to be free from such congressionally asserted authority.” *Id.* at 553 (Rehnquist, J., dissenting).



stituted Court the opportunity to overrule *Maryland v. Wirtz*. In *National League of Cities v. Usery*,<sup>40</sup> Justice Rehnquist cited Justice Marshall's majority opinion in *Fry v. United States*<sup>41</sup> for the proposition that, "Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."<sup>42</sup> He thus rejected Justice Stone's "truism" description of the Tenth Amendment in *Darby*, by stating:

We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.<sup>43</sup>

Though *National League of Cities* seemed to revive the Tenth Amendment's pre-*Darby* prominence, subsequent opinions continued to uphold federal regulation of state activity. In *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*,<sup>44</sup> for example, the Court upheld a statute which regulated states' surface coal mining operations. The *Hodel* Court explained that the regulations govern the activities of only private individuals, and not the "States as States," and also determined that states were not compelled to enforce the federal standards, so Congress had not "commandeer[ed] the legislative processes of the States . . . ."<sup>45</sup> In *Federal Energy Regulatory Comm'n v. Mississippi*,<sup>46</sup> the Court upheld federal regulations requiring the states' public utility regulating authorities to implement federal rules, and requiring the states to consider federally-suggested energy-saving measures. Again, the Court found that the Act only required the states to consider the federal standards, and Congress could preempt the field, so the federal regulations "do not threaten the States' 'sepa-

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40. 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

41. 421 U.S. 542 (1975). The Court declined to overrule *Fry*, citing the temporary nature of the Federal regulations at issue there and the national economic "emergency." *National League of Cities*, 426 U.S. at 852-53.

42. *Id.* at 833 (quoting *Fry*, 421 U.S. at 547).

43. *Id.* at 845. The Court signaled that it would closely scrutinize Congressional action which affects the "States as States," and would reject legislation otherwise authorized by the Commerce Clause which affects "functions essential to [a state's] separate and independent existence." *Id.* (quoting *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869)). The Court was careful to limit its holding to the Commerce Clause, leaving open whether there were similar limitations on Congress' spending, or Fourteenth Amendment powers. *See id.* at 852 n.17, 855 n.18.

44. 452 U.S. 264 (1981).

45. *Id.* at 278-88.

46. 456 U.S. 742 (1982).

rate and independent existence.’”<sup>47</sup> Then, in *EEOC v. Wyoming*,<sup>48</sup> the Court permitted the application to state employees of the Age Discrimination In Employment Act. The *EEOC* Court once again read *National League of Cities* narrowly, holding that the Act as applied did not “directly impair the States’ ability ‘to structure integral operations in areas of traditional governmental functions.’”<sup>49</sup>

Nine years after providing the fifth “self-consciously doubtful”<sup>50</sup> vote for the majority in *National League of Cities*, Justice Blackmun changed his mind. He expressed this transformation in his opinion for the Court in *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>51</sup> which overruled *National League of Cities*. Writing for the 5-4 majority, Justice Blackmun wrote that *National League of Cities* had become unworkable. Instead, *Garcia* held that the structure of the federal government itself ensured the proper balance of states and federal powers.<sup>52</sup> In his dissenting opinion, Justice Powell expressed concern that the majority has left virtually no limit on Congress’ commerce power.<sup>53</sup>

#### D. The Rehnquist Court

Six year after *Garcia*, in *Gregory v. Ashcroft*,<sup>54</sup> the Court implicitly limited its holding. While never directly repudiating *Garcia*, the majority rejected a federal prohibition on a mandatory retirement age for state judges because Congress had not made its intention to apply

47. *Id.* at 765 (citing *Lane County*, 74 U.S. (7 Wall.) at 76).

48. 460 U.S. 226 (1983).

49. *Id.* at 239 (citing *Virginia Surface Mining*, 452 U.S. at 287-88).

50. William W. Van Alstyne, Comment, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1713 (1985) (“Justice Blackmun only fretfully and barely concurred”).

51. 469 U.S. 528 (1985).

52. *See id.* at 550. *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). *But see* John C. Woo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997).

53. *See Garcia*, 469 U.S. at 560 (Powell, J., dissenting). Two other *Garcia* dissenters predicted that the majority’s apparently total reliance on the elected branches of government to regulate themselves would be short lived. *See id.* at 580 (Rehnquist, J., dissenting); *id.* at 589 (O’Connor, J., dissenting). Two years after *Garcia*, in *South Carolina v. Baker*, 485 U.S. 505 (1988), the Court held that a state was precluded from judicially invoking the Tenth Amendment unless it could assert “it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless.” *Id.* at 513. Justice O’Connor warned that the congressional regulation of state bond interest at issue in *Baker* was dangerous, and that if this “nibbl[ing] away at state sovereignty [went unchecked] someday essentially nothing [will be] left [of state sovereignty] but a gutted shell.” *Id.* at 533 (quoting TRIBE, *supra* note 24, at 381).

54. 501 U.S. 452 (1991).

the Federal Age Discrimination in Employment Act of 1967 (“ADEA”) “unmistakably clear in the language of the statute.”<sup>55</sup> Thus, because judges are “important government officials” whose selection is at “the heart of representative government,”<sup>56</sup> Justice O’Conner held that the power to determine their qualifications is “reserved to the States under the Tenth Amendment,” and part of the Constitution’s “guarantee to every State in this Union a Republican Form of Government.”<sup>57</sup>

The next year, in *New York v. United States*,<sup>58</sup> the remaining *Garcia* dissenters, along with newly-appointed Justices Souter and Thomas, held unconstitutional portions of the federal Low-Level Radioactive Waste Policy Amendments Act of 1985,<sup>59</sup> which imposed on the states an obligation to provide for the disposal of radioactive waste generated within their borders. The Act provided three “incentives” to states in order to comply with that obligation: (1) financial incentives which rewarded states for developing sites to receive radioactive waste from other states; (2) “access” incentives which allowed states with waste sites to gradually increase the cost of access to their sites, and ultimately deny access to waste from states that do not meet federal deadlines; and (3) “take title” incentives that require a state which does not provide for the disposal of all internally generated radioactive waste to “take title,” and become liable for all damages suffered as a result of, that waste.<sup>60</sup>

The State of New York filed suit against the United States contending that these “incentives” were in violation of the Tenth Amendment. The Court held that while the monetary and “access” incentives were consistent with the Tenth Amendment, the “take title” incentives were not.<sup>61</sup> Justice O’Connor’s majority opinion noted the Court’s role in determining the limits of Congress’ power under the Tenth Amendment. Justice O’Connor stated that:

[W]hile the Tenth Amendment makes explicit that “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[;]” the task of ascertaining the

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55. *Id.* at 460. See also *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 65 (1989).

56. *Gregory*, 501 U.S. at 461.

57. *Id.* (quoting U.S. CONST. art. IV, § 4).

58. 505 U.S. 144 (1992).

59. 42 U.S.C. § 2021(b).

60. See *New York*, 505 U.S. at 152-54.

61. See *id.* at 185-86.

constitutional line between federal and State power has given rise to many of the Court's most difficult and celebrated cases.<sup>62</sup>

Noting *Darby's* reference to the Tenth Amendment as a "truism,"<sup>63</sup> and *Garcia's* recognition that the states "retain a significant measure of sovereign authority,"<sup>64</sup> she wrote that:

[t]he Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve powers to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of State sovereignty is protected by a limitation on an Article I power.<sup>65</sup>

Since *New York* did not involve congressional subjection of states to generally applicable laws, the Court had no occasion to revisit its holding in *Garcia*.<sup>66</sup>

In striking down the "take title" incentives, the Court reiterated that "Congress may not simply 'commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'"<sup>67</sup> Justice O'Connor reasoned that "[a] choice between two unconstitutionally coercive regulatory techniques is no choice at all."<sup>68</sup> She noted that even *Garcia* admitted that the Tenth Amendment set some limits on Congress' power to compel states to regulate on behalf of federal interests,<sup>69</sup> and that allowing the federal government to "commandeer" the states diminishes the accountability of both state and federal officials. Accordingly, Justice O'Connor stated that:

[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.<sup>70</sup>

Justice O'Connor continued to write that:

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62. *Id.* at 155.

63. *Id.* at 156.

64. *Id.* (citing *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985)).

65. *Id.* at 157.

66. *See id.* at 160.

67. *Id.* at 161 (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981)).

68. *Id.* at 175-76 (citing *Hodel*, 452 U.S. at 288).

69. *See id.* at 162.

70. *Id.* at 169.

Some truths are so basic that, like the air around us, they are easily overlooked. . . . But the Constitution protects us from our own best intentions. It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day. . . . States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to the several States a residuary and inviolable sovereignty," reserved explicitly to the States by the Tenth Amendment.<sup>71</sup>

Less than three years later, in *United States v. Lopez*,<sup>72</sup> the Court held that Congress had legislated beyond its commerce power when it enacted the provision of the Gun-Free School Zones Act of 1990, which made it a Federal offense for "any individual knowingly to possess a firearm at a place that individual knows, or has reasonable cause to believe, is a school zone."<sup>73</sup> In *Lopez*, Alfonso Lopez, a 12th grade student at Edison High School in San Antonio, Texas, was convicted of possessing a handgun and five bullets.<sup>74</sup> Lopez challenged his conviction by arguing that the statute under which he was convicted "exceeded Congress' power to legislate under the Commerce Clause."<sup>75</sup> Though it noted Congress' broad power under the Commerce Clause, the Court agreed that the statute under which Lopez was convicted "has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."<sup>76</sup> In a footnote, Chief Justice Rehnquist noted that when President Bush signed the Act, he stated his belief that the section under which Lopez was convicted "inappropriately overrides legitimate state firearms laws with a new and unnecessary Federal law."<sup>77</sup> He maintained that "when Congress criminalizes conduct already denounced as criminal by the States, it effects 'change in the sensitive relation between federal and state criminal jurisdiction.'"<sup>78</sup>

Commenting on the Court's role in Tenth Amendment challenges to acts of Congress, Justice Kennedy in his concurring opinion noted

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71. *Id.* at 187-88.

72. 514 U.S. 549 (1995).

73. 18 U.S.C. § 922(q)(2)(A) (1994).

74. *See Lopez*, 514 U.S. at 552.

75. *Id.*

76. *Id.*

77. *Id.* at 561 n.3.

78. *Id.*

that “one conclusion that could be drawn from The Federalist Papers is that the balance between national and state power is entrusted in its entirety to the political process.”<sup>79</sup> But, he concluded that “the absence of structural mechanisms to require those [elected] officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role.”<sup>80</sup>

Two years later, in *Printz v. United States*,<sup>81</sup> the five Justices who decided *Lopez* struck down provisions of the Brady Hand Gun Violence Prevention Act (the “Brady Bill”).<sup>82</sup> The Brady Bill commanded state law enforcement officers to perform background checks and file reports concerning prospective hand gun purchasers.<sup>83</sup> The Court held that the Supremacy Clause of the Constitution “permit[ted the] imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power.”<sup>84</sup> However, relying on its holding in *New York*, the Court in *Printz* “conclude[d] categorically . . . [that] [t]he Federal Government may not compel the States to enact or administer a federal regulatory program.”<sup>85</sup> Justice Scalia’s majority opinion in *Printz* concluded that the Framers of the Constitution “rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people—who were, in Hamilton’s words, ‘the only proper objects of government.’”<sup>86</sup> Justice Scalia further concluded that the structural separation between the states and the federal government “reduces the risk of tyranny and abuse from either front.”<sup>87</sup>

In his concurring opinion, Justice Thomas asserted his “revisionist view” that:

Although this Court has long interpreted the Constitution as ceding Congress extensive authority to regulate commerce (interstate or otherwise), I continue to believe that we must “temper our Commerce Clause jurisprudence” and return to an

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79. *Id.* at 577 (Kennedy, J., concurring).

80. *Id.* at 577-78 (Kennedy, J., concurring).

81. 521 U.S. 898 (1997).

82. 18 U.S.C. § 922.

83. *See Printz*, 521 U.S. at 903.

84. *Id.* at 907.

85. *Id.* at 933 (citing *New York v. United States*, 505 U.S. 144, 188 (1992)).

86. *Id.* at 919-20.

87. *Id.* at 921 (citing *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

interpretation better rooted in the Clause's original understanding.<sup>88</sup>

Thus, the current majority of the Supreme Court appears to have rejected *Garcia's* rationale that protection of the powers reserved to the states by the Tenth Amendment is best left entirely to the elected branches of the Federal government.

### III. The Supreme Court and the Specific Case of Domestic Relations

Does the fact that Congress has purported to limit its definitions of "marriage" and "spouse" in Section 3 of the DOMA to federal law exempt it from Tenth Amendment scrutiny? Can Congress define marriage at all, when the Framers of the Constitution so clearly believed that marriage was reserved to the states? Asked another way: do Congress' "few and defined" powers, such as its power to tax and spend allow it to undermine state marriage laws? To answer these questions it is important to review how the Court has treated cases specifically involving issues of domestic relations.

#### A. The Tenth Amendment and the Domestic Relations Exception

Though the Supreme Court's Tenth Amendment rulings have not expressly declared "off limits" any particular category of state regulation, they have in a variety of cases suggested that the area of domes-

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88. *Id.* at 937 (Thomas, J., concurring). See *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998) (holding that the Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-2725 (1994), ("DPPA") enacted under the Commerce Clause and Section 5 of the Fourteenth Amendment to regulate dissemination and use of information contained in state motor vehicle records, is not a law of general applicability under *Garcia* (Commerce Clause), and does not protect a recognized constitutional right (Fourteenth Amendment). Thus, the DPPA violates the Tenth Amendment and is unconstitutional). See also *Oklahoma v. Reno*, 161 F.3d 126 (10th Cir. 1998) (DPPA upheld as valid exercise of Congress' commerce power); *Travis v. Reno*, 163 F.3d 1000 (7th Cir. 1998) (DPPA upheld); *Pierce v. King*, 918 F. Supp. 932 (E.D.N.C. 1996), *aff'd*, 131 F.3d 136 (4th Cir. 1997), *vacated and remanded*, 119 S. Ct. 33 (1998) (Congress does not have power under either the Commerce Clause or the Fourteenth Amendment to create a federal cause of action under the Americans with Disabilities Act, 42 U.S.C. § 12101, ("ADA"), for inmates in state prisons). In *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998), the decision that led to *Pierce v. King* being vacated and remanded, the Supreme Court expressly reserved the question of whether application of the ADA to state prisons is constitutional exercise of Congress' Commerce Clause or Fourteenth Amendment powers. See *id.* See generally *Amos v. Maryland Dep't of Public Safety*, 126 F.3d 528 (4th Cir. 1997), *vacated and remanded*, 118 S. Ct. 2339 (1998); *Clark v. California*, 123 F.3d 1267 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 2340 (1998). See also Emily Alexander, *The Americans With Disabilities Act and State Prisons: A Question of Statutory Interpretation*, 66 FORDHAM L. REV. 2233 (1998).

tic relations is reserved to the states. The early case of *In re Burrus*<sup>89</sup> is a notable example of this approach. In *Burrus*, a district court granted a writ of *habeas corpus* to the father of a child held by his grandparents. After the grandfather refused to return the child, the court held him in contempt and imprisoned him. The grandfather appealed the contempt citation, contending that the district court had no jurisdiction to issue the writ in the first place. The Supreme Court agreed, holding that “[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States.”<sup>90</sup>

In the 1906 case *Haddock v. Haddock*,<sup>91</sup> a New York State court refused to give full faith and credit to a Connecticut divorce judgment which the husband had obtained without personal service on the wife. The Supreme Court affirmed, holding that the wife was not “constructively present” in Connecticut, and therefore that the Connecticut court did not acquire jurisdiction over her.<sup>92</sup> In the course of its lengthy decision, the Court noted that:

[n]o one denies that the states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce. . . . [Moreover], it must be conceded that the Constitution delegated no authority to the government of the United States on the subject of marriage and divorce.<sup>93</sup>

The 1930 case *Ohio ex rel. Popovici v. Agler*<sup>94</sup> concerned a Romanian diplomat who claimed that the Ohio State courts did not have jurisdiction over his divorce proceedings, because Article III, Section 2 of the Constitution vests jurisdiction over all proceedings involving “Ambassadors, other public Ministers and Counsels” exclusively in the federal courts. Citing *Burrus*, Justice Holmes held that neither Article III nor the federal jurisdictional statutes granted fed-

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89. 136 U.S. 586 (1890).

90. *Id.* at 593-94. Recently, in *Boggs v. Boggs*, 520 U.S. 833, 848 (1997), the Court cited *Burrus* with approval.

91. 201 U.S. 562 (1906), *overruled on other grounds* by *Williams v. North Carolina*, 317 U.S. 287 (1942).

92. *Haddock*, 201 U.S. at 572.

93. *Id.* at 575. The actual holding in *Haddock* was overruled in *Williams v. North Carolina*, which held that a state court may, when acting in accordance with procedural due process, grant a judgment of divorce against an absent spouse, and that judgment is entitled to full faith and credit in another state. The Court there did not reach the question of whether North Carolina could refuse to recognize another state’s divorce judgment if a North Carolina court found that the divorcing party was not properly domiciled in the sister state. That question was answered in the affirmative in *Williams v. North Carolina*, 325 U.S. 226 (1945). See generally Lynn D. Wardle, *Williams v. North Carolina, Divorce Recognition and Same Sex Marriage Recognition*, 32 CREIGHTON L. REV. 187 (1998).

94. 280 U.S. 379 (1930).



eral courts jurisdiction over a divorce proceeding.<sup>95</sup> He observed that, although the language of the Constitution and federal jurisdictional statutes were “pretty sweeping,”<sup>96</sup> it “must be taken to refer to ordinary civil proceedings and not to include what formerly would have belonged to the ecclesiastical Courts.”<sup>97</sup> Indeed, “[i]f when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States, there is no difficulty in construing the instrument accordingly and not much in dealing with the statutes.”<sup>98</sup>

*United States v. Lopez*<sup>99</sup> further illustrates Congress’ lack of authority over domestic relations. In *Lopez*, the Court struck down a statute which made it a federal offense for any individual to knowingly possess a firearm in a school zone. It is essential to note that Chief Justice Rehnquist’s majority opinion, Justice Thomas’ concurring opinion, and Justice Breyer’s dissenting opinion all stated that the regulation of domestic relations is reserved to the states.<sup>100</sup> Although these references are dicta, they suggest that all of the current members of the Supreme Court believe that domestic relations is an area of law which the Framers believed was among the “numerous and indefinite” powers reserved to the states.<sup>101</sup> Indeed, Justice Thomas ex-

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95. *See id.* at 383.

96. *Id.*

97. *Id.* at 384.

98. *Id.* at 383-84. *See also* Sherrer v. Sherrer, 334 U.S. 343, 363 (1948) (Frankfurter, J., dissenting) (“[G]overnmental power over domestic relations is not given to the central government.”); *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1877) (“The State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created”).

99. 514 U.S. 549 (1995).

100. *See id.* at 564-65 (Rehnquist, C.J.); *see id.* at 585 (Thomas, J., concurring); *see id.* at 624 (Breyer, J., dissenting). *See also* Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. Rev. 1787, 1789 (1995) (concluding that, “[*Lopez* united the Court] around the principle that family law constitutes a clearly defined realm of exclusive state regulatory authority.”).

101. *See* Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. Rev. 1297 (1998). Using a definition of “family law” much broader than the “domestic relations” addressed by the Supreme Court, Professor Hasday argues that Reconstruction and the Fourteenth Amendment provided a “consensus that the federal government had jurisdiction over family law.” *Id.* at 1350. She suggests that sexism may be at the root of *Lopez*’s “sing[ling] out family law as indissolubly, trans-historically equated with the states[.]” because “[t]he past shows us how the language of federalism can mask a discourse about status . . . .” *Id.* at 1399.

By defining “family law” to “include[ ] some of the rights that particularly concerned the congressional authors of Reconstruction . . . . [.]” *id.* at 1372, Professor Hasday expands her definition well beyond that of the Supreme Court’s: “the domestic relations of husband and wife, parent and child.” *Id.* at 1309 (citing *Ex Parte Burrus*, 136 U.S. 586, 593-94 (1890)). Her argument that the Fourteenth Amendment grants Congress plenary power

plicitly wrote that “the power to regulate ‘commerce’ can by no means encompass authority . . . to regulate marriage . . . . Our Constitution quite properly leaves such matters to the individual States, notwithstanding those activities’ effects on interstate commerce.”<sup>102</sup>

Professor Sharon Rush has further argued that *Erie Railroad Co. v. Tompkins*<sup>103</sup> rejection of a federal “common law” for diversity cases also places domestic relations beyond Congress’ reach.<sup>104</sup> As Rush states, if the Tenth Amendment proscribes any areas of law to Congress, domestic relations would surely be among them.<sup>105</sup>

The Court has not, however, been consistent in applying its procedural “domestic relations exception” to federal court jurisdiction. In the 1992 case of *Ankenbrandt v. Richards*,<sup>106</sup> for instance, the Court held that a district court was not foreclosed from exercising diversity jurisdiction in a tort action brought by a mother and children against the ex-husband/father. According to the Court, “[Article III of] the Constitution does not exclude domestic relations cases from the jurisdiction otherwise granted by statute to the federal courts.”<sup>107</sup> However, under *Erie* such diversity actions are decided based upon state law.

## B. Federal Law and the Definition of Marriage

The few cases that directly concern federal attempts to effect states’ marriage laws present an unclear precedent. In *Cleveland v. United States*,<sup>108</sup> the Court upheld the convictions of polygamous men for transporting their “wives” across state lines in violation of the

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over “family law” is at odds with the Supreme Court’s treatment of that Fourteenth Amendment power “as corrective or preventative, not definitional,” see *City of Boerne v. Flores*, 521 U.S. 507, 525 (1997), and ignores comments by state and federal legislators during the ratification process which undercut her broad reading of that Amendment’s reach. See also Kristian D. Whitten, *Religious Freedom and the Fourteenth Amendment: Justice Bradley’s Twentieth Century Legacy*, 29 CUMB. L. REV. 143 (1998). The Supreme Court has declined to consider such Congressional comments in determining the Fourteenth Amendment’s impact on state domestic relations law, finding them “at best . . . inconclusive.” *Loving v. Virginia*, 388 U.S. 1, 9 (1967).

102. *United States v. Lopez*, 514 U.S. 549, 585 (Thomas, J., concurring).

103. 304 U.S. 64 (1938).

104. See Sharon Elizabeth Rush, *Domestic Relations Law: Federal Jurisdiction and State Sovereignty In Perspective*, 60 NOTRE DAME L. REV. 1, 16 (1984).

105. See *id.* at 18.

106. 504 U.S. 689 (1992).

107. *Id.* at 695. See *Nasca v. Peoplesoft (In re Nasca)*, 160 F.3d 578 (9th Cir. 1999) (concerning a state divorce action removed to federal court under the Federal Employee Retirement Income Security Act, 29 U.S.C. § 1003 (1996) (“ERISA”)).

108. 329 U.S. 14 (1946).

Mann Act,<sup>109</sup> which made it a federal crime to transport a female across state lines for “immoral purposes.” Though Justice Douglas’ opinion for the Court recognized that regulation of the marriage relationship was a state matter, he found that Congress’ exercise of its “plenary” power to regulate interstate commerce only incidentally interfered with this right. He thus held that the Mann Act was constitutionally permissible.<sup>110</sup> In *Cleveland*, the Court drew a distinction between Congress’ power to regulate the interstate aspects of domestic relations, and the states’ power to define those relationships.

Rather than regulating the interstate aspects of a state-defined marriage, DOMA purports to define marriage for all federal programs. Does Congress also have that “plenary” power? The cases which have held that the “whole subject of . . . domestic relations . . . belongs to the laws of the states”<sup>111</sup> suggest that while Congress may regulate the interstate effects of domestic relations, it may not impose its own definition of marriage on the states. Because Section 3 of the DOMA has the practical effect of doing just that, it amounts to an unconstitutional condition attached to federal funds and has the unconstitutional effect of “commandeering” state officers and functions.

Twenty years after *Cleveland*, in *Loving v. Virginia*,<sup>112</sup> the Supreme Court reversed the state law convictions of an African-American woman and a White man who had violated Virginia’s statutory ban on interracial marriages. The Court rejected the State’s argument that the anti-miscegenation law applied equally to Blacks and Whites, holding that “[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States,”<sup>113</sup> and that “[u]nder our Constitution, the freedom to marry or not to marry, a person of another race resides with the individual and cannot be infringed by the State.”<sup>114</sup> However, Congress’ power under the Fourteenth Amendment “[does] not authorize [it] to pass ‘general legislation upon the rights of the citizens . . . .’”<sup>115</sup> Thus, whether or not Congress agrees with a state’s definition of “marriage,” absent a Supreme Court holding that a state’s marriage laws violate the Constitution, the Four-

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109. 18 U.S.C. § 398 (1910).

110. See *Cleveland*, 329 U.S. at 19.

111. *Ex Parte Burrus*, 136 U.S. 586, 593-94 (1890).

112. 388 U.S. 1 (1967).

113. *Id.* at 10.

114. *Id.* at 12.

115. *City of Boerne v. Flores*, 521 U.S. 507, 525 (1997) (quoting *Civil Rights Cases*, 109 U.S. 3, 13-14 (1883)).

teenth Amendment does not give it the power to define that relationship for the states.<sup>116</sup>

Several federal appellate courts have also addressed congressional legislation which affects marriage. In *Anetekhai v. Immigration & Naturalization Service*,<sup>117</sup> the Court of Appeals for the Fifth Circuit rejected a claim that Section 5(b) of the Immigration Marriage Fraud Amendments of 1986<sup>118</sup> had the effect of regulating marriages in Louisiana. Section 5(b) requires that an alien must be married to the U.S. resident outside of the United States for at least two years before the federal government will grant him or her “immediate relative status.”<sup>119</sup> The Court of Appeals found that the two-year residency requirement “does not in any way affect the legal status of . . . marriage under state law.”<sup>120</sup> Thus, it does not purport to define or regulate “marriage,” but only the scope of federal benefits arising out of a state law marriage, pursuant to Congress’ express constitutional power to regulate immigration and naturalization.<sup>121</sup> Section 3 of the DOMA, however, goes much further by defining “marriage” and “spouse” for all federal programs. Moreover, the coercive effect of those definitions in areas where they are inconsistent with state definitions will be much greater than the INS regulations challenged in *Anetekhai*.

Other federal appellate courts have upheld congressional regulation of the interstate effects of child support<sup>122</sup> and domestic violence<sup>123</sup> against Tenth Amendment challenges. However, one *en banc* federal circuit court has struck down congressional legislation proscribing violence against women, where the essential elements of the

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116. *See id.* at 527.

117. 876 F.2d 1218 (5th Cir. 1989).

118. 8 U.S.C. § 1154(h) (1986).

119. *Id.*

120. *Anetekhai*, 876 F.2d at 1224.

121. *See* U.S. CONST. art 1, § 8, cl. 4; *see also* *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (“over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.”). *See also* Hasday, *supra* note 101, at 1379-80 (citing examples of immigration law’s intrusion into “family law.”).

122. *See, e.g.*, *United States v. Williams*, 121 F.3d 615 (11th Cir. 1997); *United States v. Parker*, 108 F.3d 28 (3d Cir. 1997); *United States v. Mussari*, 95 F.3d 787 (9th Cir. 1996); *United States v. Sage*, 92 F.3d 101 (2nd Cir. 1996). *See also* *United States v. Ballek*, 1999 Daily Journal DAR 2325 (9th Cir. 1999) (Federal Child Support Recovery Act, 18 U.S.C. § 228, upheld against Thirteenth Amendment challenge). *See generally* Federal Full Faith and Credit for Child Support Orders Act, 28 U.S.C. § 1738B (1996), and Federal Parental Kidnapping Act, 28 U.S.C. § 1738A (1998).

123. *See generally* *United States v. Bailey*, 112 F.3d 758 (4th Cir. 1997). *See also* *United States v. Page*, 167 F.3d 325 (6th Cir. 1999) (equally divided *en banc* court affirmed conviction under the Federal Violence Against Women Act, 18 U.S.C. § 2261).

wrongful conduct did not directly involve interstate commerce.<sup>124</sup> That court cited the Tenth Amendment in holding that the challenged federal law “assumes a general power to regulate health and safety—the very essence of the sort of police power the Constitution denies to the federal government and reserves to the States,”<sup>125</sup> and “for objectives unquestionably laudable, [Congress] sought to reach conduct quintessentially within the exclusive purview of the States.”<sup>126</sup>

### C. Congress and Domestic Relations

Evidence of Congress’ Constitutional authority to legislate in the area of domestic relations is not limited to Supreme Court decisions. Congress itself has addressed the issue of its power to legislate in the area of marriage and divorce. Although Congress has proposed seventy<sup>127</sup> constitutional amendments which would have empowered it to enact uniform, national marriage and divorce laws, none of those efforts have succeeded.<sup>128</sup>

This outcome suggests that Congress has doubted its constitutional authority to enact legislation concerning domestic relations.<sup>129</sup> In an 1892 report rejecting one of these proposed Constitutional amendments, the Judiciary Committee of the House of Representatives assumed that Congress did not have the power to legislate in the area of marriage and divorce. Indeed, the report found that if Con-

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124. See *Brzonkala v. Virginia Polytechnic Inst. & Univ.*, 169 F.3d 820 (4th Cir. 1999). The Court held that Congress exceeded its commerce and Fourteenth Amendment enforcement powers in “this most traditional area of State concern . . .” *Id.* at 843.

125. *Id.* at 851.

126. *Id.* at 889. An analogous federal statute proscribing “violence” against women, the Mann Act has been held to be a constitutional exercise of Congress’ Commerce Power. See *Cleveland v. United States*, 329 U.S. 14, 19 (1946). Its legislative history, however, makes clear Congress’ awareness that *intrastate* “violence” against women is “within the proper and exclusive domain of state law.” *United States v. Beach*, 324 U.S. 193, 198 (1945) (Murphy, J., dissenting). See also *Doe v. Hartz*, 134 F.3d 1339 (8th Cir. 1998). See also *Doe v. Mercer*, U.S. Dist. LEXIS 2010, at \*7 (D. Mass. 1999) (citing U.S. district court opinions upholding the constitutionality of the VAWA). At least one U.S. district court has upheld the VAWA (referring to it as the Gender-Motivated Violence Act) in the context of spousal abuse during marriage. See *Ziegler v. Ziegler*, 28 F. Supp. 2d 601 (E.D. Wash. 1998).

127. See *Sherrer v. Sherrer*, 334 U.S. 343 (1947); Proposed Amendments to the Constitution of the United States Introduced In Congress From December 4, 1889-July 2, 1926 (U.S. Gov’t. Printing Office, 1926).

128. See *Sherrer*, 334 U.S. at 364-66 n.13 (Frankfurter, J., dissenting).

129. See *Ankenbrandt v. Richards*, 504 U.S. 689, 712, 711-13 (1992) (Blackmun, J., concurring) (construing Congressional action in light of *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379 (1930), as suggesting that Congress’ failure to include domestic relations actions among those the federal courts can hear on diversity grounds, “as simply a construction of the diversity statute.”).

gress were given such power “it would soon undertake to legislate upon the main body of domestic and local interests of the people which have always belonged to and been exercised by the States.”<sup>130</sup> The Committee’s Minority Report expressed concern that men would be able to legally marry more than once by virtue of different state marriage and divorce laws.<sup>131</sup> Thus, they believed that the compelling need for uniform laws “that fix and determine the status of the citizens of the nation in this most important and sacred particular . . . .” offset the proposed amendment’s “infringe[ment] upon the present rights of the States.”<sup>132</sup> Yet even the minority conceded that “[w]hen the Constitution was adopted it was not contemplated by its framers that such a diversity of statutes as are now found would exist in the various States on the subject of marriage and divorce.”<sup>133</sup> Thus, both the majority and minority of that House Judiciary Committee assumed that the Constitution would need to be amended before Congress could properly legislate on the subject of marriage and divorce.

#### IV. Defense of Marriage Act

On September 21, 1996, President Clinton signed the Defense of Marriage Act (“DOMA”) into law.<sup>134</sup> DOMA was essentially a Congressional response to the opinion of two members of the five judge Hawaii Supreme Court who suggested that Hawaii’s State constitution requires the recognition of same-sex marriages.<sup>135</sup> The Judiciary Committee of the House of Representatives stated that the DOMA has two primary purposes: “(1) [to] defend the institution of traditional heterosexual marriage; and (2) [to] protect the right of States to formulate their own public policy regarding legal recognition of same-

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130. H.R. REP. NO. 1290, at 1 (1892). The Committee also found that Congress had more than enough to do:

The jurisdiction of Congress is already so extended that if the two Houses were to sit in continuous session it would be quite impossible to pass upon all the bills which are now presented. There would be more wisdom in an amendment to the Constitution remitting to the States some of the powers now exercised by Congress . . . .

*Id.*

131. *See id.* at 3-6. The specter of abandoned women and children, and multiple wives and sets of children making claims to a man’s estate did not persuade the majority of the Committee to report the Bill to the full House.

132. *Id.* at 5.

133. *Id.* at 3.

134. 28 U.S.C. § 1738C; 1 U.S.C. § 7. *See generally* Scott Ruskay-Kidd, *The Defense of Marriage Act and The Overextension Of Congressional Authority*, 97 COLUM. L. REV. 1435 (1997).

135. *See* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (opinion of Levinson, J.).

sex marriages.”<sup>136</sup> In his opening statement before the Senate Judiciary Committee, the Chairman of that Committee stated:

The Defense of Marriage Act would accomplish two goals: First, it would make clear that one State’s definition of marriage need not be accepted by other States; second, the Defense of Marriage Act also would define the term “marriage” for purposes of Federal law as meaning only the legal union between one man and one woman as husband and wife. That definition would preclude any court from construing Federal law as treating same-sex unions as a “marriage.”<sup>137</sup>

Section 2 of the DOMA states:

No State, Territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record or judicial proceeding of any other State, Territory, possession or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.<sup>138</sup>

Section 3 of the DOMA states:

In determining the meaning of any Act of Congress, or any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or wife.<sup>139</sup>

During its hearings on DOMA, the House Judiciary Committee devoted considerable attention to Section 2, which was enacted pursuant Congress’ authority under the “full faith and credit” clause to “prescribe the Manner in which . . . Acts, Records, and Proceedings [of one state] shall be proved, and the Effect thereof [in another state].”<sup>140</sup> The Committee found that “[t]he fact that [several] States are sufficiently concerned about their ability to defend their marriage laws against the threat posed by the Hawaii situation is enough to persuade the Committee that federal legislation is warranted.”<sup>141</sup> In his opening statement before the Senate Judiciary Committee, Senator Hatch indeed stated that:

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136. H.R. REP. NO. 104-664, at 2 (1996) *reprinted in* 1996 U.S.C.C.N. 2905, 2906 (hereinafter House Report).

137. *The Defense of Marriage Act: Hearing on S. 1740 Before the Senate Comm. on the Judiciary*, 104th Cong. 1 (1996) (opening statement of Honorable Orrin G. Hatch) (hereinafter Hatch Statement).

138. 28 U.S.C. § 1738C.

139. 1 U.S.C. § 7.

140. U.S. CONST. art. IV, § 1.

141. House Report, *supra* note 136, at 10.

The Defense Of Marriage Act ensures that each state can define for itself the concept of marriage and not be bound by decisions made by other States. The Defense Of Marriage Act also makes clear that no Federal law should be read to treat a same-sex union as a "marriage."<sup>142</sup>

This article focuses, however, on the question of whether Congress was within its constitutional power when it enacted Section 3 of the DOMA, defining "marriage" and "spouse" for purposes of "any Act of Congress, or of any ruling, regulation or interpretation of the various administrative bureaus and agencies of the United States."<sup>143</sup> This article does not focus on Section 2, by which Congress purports to exercise its power under the Full Faith and Credit Clause to designate which state judgments must be granted full faith and credit by sister states.<sup>144</sup>

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142. Hatch Statement, *supra* note 137, at 2.

143. 1 U.S.C. § 7.

144. Some opponents of Section 2 of the DOMA, argue that it is unnecessary because states already have constitutional authority to reject a sister state's same-sex marriage as being against its public policy. *See, e.g.,* Ruskay-Kidd, *supra* note 134, at 1438-40 (the Full Faith and Credit Clause does not play "a formal, explicit role in the treatment of extra state marriages" because a marriage is a "license" rather than a "judgment"); *The Defense of Marriage Act: Hearing on S. 1740 Before the Senate Comm. on the Judiciary*, 104th Cong. 42-48 (1996) (statement of Professor Cass R. Sunstein). Others contend it is "plainly unconstitutional." 142 CONG. REC. S 5931-33 (June 6, 1996) (letter from Professor Laurence Tribe); *see* Ruskay-Kidd, *supra* note 134, at 1466-67. Ruskay-Kidd states that:

Radical changes in the relations between states, and in the lives of individuals, could result if the Full Faith and Credit Clause is interpreted to allow Congress a 'discretionary power to carve out such exceptions as it deems appropriate.' To the extent that Congress does possess an untapped power to enact full faith and credit legislation, its power must be limited.

*Id.* Enforcement of Section 2 may also be held to violate the constitutional "privacy" right found to exist in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and/or the equal protection clause of the Fifth and Fourteenth Amendments under *Loving v. Virginia*, 388 U.S. 1 (1967). *See also* *The Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcommittee on the Constitution of the Comm. on the Judiciary House of Representatives*, 104th Cong. 9-31 (1996) (statement of Lambda Legal Defense and Education Fund).

Supporters of Section 2 view it as a constitutional exercise of Congress' power under the Full Faith and Credit Clause. *See also* *The Defense of Marriage Act: Hearing on S. 1740 Before the Senate Comm. on the Judiciary*, 104th Cong. 29-32 (statement of Professor Lynn D. Wardle); Leonard G. Brown III, *Constitutionally Defending Marriage: The Defense of Marriage Act, Romer v. Evans and the Cultural Battle They Represent*, 19 CAMPBELL L. REV. 159, 172 (1996). Since no state has yet recognized same-sex marriages the question has not, and may never, become ripe. The *real* effect of the DOMA may be to keep states from recognizing same-sex marriage for fear of running afoul of the glacial federal taxing and spending bureaucracy. Since all federal taxes and benefits are now tied to a federal definition of "marriage" in Section 3 of the DOMA, Section 2 may become irrelevant.

If Congress chooses to disfavor Louisiana's "covenant marriage" law, it may be a more likely casualty of Section 2 of the DOMA, since it purports to establish a prohibition



Although most of the legislative history in the Senate and House focuses on Section 2 of the DOMA, Professor Lynn D. Wardle of the Law School at Brigham Young University provided testimony and statements to both the House and Senate Judiciary Committees regarding Section 3. He emphasized that states have “the sole and exclusive authority to regulate domestic relations within the state,”<sup>145</sup> and that “[I]f Congress were attempting to impose the definition of “marriage” upon the states, to make them use that definition in their marriage and domestic relations laws, a serious constitutional issue would arise.”<sup>146</sup>

The House Judiciary Committee’s report, which seems to heed this warning, states:

The most important aspect of Section 3 is that it applies to federal law only; in the words of the statute, these definitions apply only “[i]n determining the meaning of any Act of Congress, or any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States.”<sup>147</sup>

That report concludes:

If Hawaii or some other State eventually recognizes homosexual “marriage,” Section 3 will mean simply that “marriage” will not be recognized as a “marriage” for purposes of Federal law. Other than this narrow Federal requirement, the Federal government will continue to determine marital status in the same manner it does under current law. Whether and to what extent benefits available to married couples under state law will be available to homosexual couples is purely a matter of state law, and Section 3 in no way affects that question.<sup>148</sup>

The House Judiciary Committee’s conclusion that Section 3 is a “narrow Federal requirement” is puzzling in light of the pervasive nature and supremacy of federal regulation. Characterizing Section 3 of the DOMA as a “narrow Federal requirement” is like calling a federal tax on all state marriage licenses “constitutionally insignificant.”<sup>149</sup> The reasoning belies the statute’s effect on all federal laws and regula-

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on “no fault” divorce for couples who agree to be in a “covenant marriage.” A spouse in such a marriage may try to “export” the “covenant marriage” agreement if his/her spouse files for divorce in another state. *See generally* Mark Strasser, *Baker and Some Recipes for Disaster: On DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence*, 64 *BROOK. L. REV.* 307 (1998).

145. Wardle Statement, *supra* note 144, at 37.

146. *Id.* at 39.

147. House Report, *supra* note 136, at 30 (quoting H.R. 3396, 104th Cong. § 3 (1996)).

148. *Id.* at 31; *see also* James Donovan, *DOMA: An Unconstitutional Establishment of Fundamentalist Christianity*, 4 *MICH. J. GENDER & LAW* 335 (1997).

149. *See* *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) (holding that “given the basic position of the marriage relationship in this society’s hierarchy of values [.]” a state may

tions, which, in turn, substantially affect all states and virtually all Americans. As one recent critic of the DOMA points out:

Ultimately, the evaluation of DOMA requires an exercise of judgment about the appropriate Federal and state roles in regulating marriage. Recent years have witnessed an increasing federalization of domestic relations as Congress has become more conscious of the way social legislation can effectuate family policy. This trend raises the question: Are there core aspects of state family law which the Federal government cannot displace?<sup>150</sup>

## V. DOMA, Federal Regulation, and Comandereing

The DOMA is just one example of a continuing congressional effort to control actions of the states. For more than thirty years Congress has been “federalizing” state governments and laws in a process that has “[obligated] subnational legislators and executive officials to enact statutes or adopt administrative regulations according to the design and standards set by the federal government.”<sup>151</sup>

Before DOMA, in cases where domestic relations issues have impacted federal benefits, the Supreme Court has always relied upon the states’ domestic relations law to determine the underlying domestic relationship. In *De Sylva v. Ballentine*,<sup>152</sup> for example, the Court held that state law should decide whether an illegitimate child falls within the definition of “child” for purposes of a federal copyright statute.<sup>153</sup>

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not constitutionally deny indigents who cannot pay the filing fee the right to sue for divorce).

150. Ruskay-Kidd, *supra* note 134, at 1475 (citation omitted). The one federal circuit court opinion which cites DOMA is *Shahar v. Bowers*, 114 F.3d 1097, 1110 (11th Cir. 1997), *on rehearing*, 120 F.3d 211 (1997), *cert. denied*, 118 S. Ct. 693 (1998). *Shahar* upheld the Georgia Attorney General’s right to withdraw a job offer made to a female lawyer, when he learned she had participated in a “marriage” ceremony with another woman. The court cited the fact that DOMA was supported by both of Georgia’s U.S. Senators, and ten of its twelve Members of the House of Representatives as confirming the “Attorney General’s sense that Georgia’s people, in general, are set against equating in some way a relationship between persons of the same sex with traditional marriage . . . .” *Id.* at 1110 n.24. The court also noted that *Bowers v. Hardwick*, 478 U.S. 186 (1986), upheld Georgia’s statute criminalizing homosexual sodomy, and the fact that *Romer v. Evans*, 517 U.S. 620 (1996), did not limit, or even cite, *Bowers*. See *Shahar*, 114 F.3d at 1110 n.25. Since *Shahar*, the Georgia Supreme Court has held that Georgia’s sodomy statute, as applied to the private acts of consenting adults, is unconstitutional. See *Powell v. State*, 510 S.E.2d 18 (Ga. 1998). See also *Miller v. Vesta*, 946 F. Supp. 697, 711-12 (E.D. Wis. 1996) (citing DOMA as a congressional expression of repugnance toward homosexuality).

151. Lewis B. Kaden, *Politics, Money and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 870 (1979).

152. 351 U.S. 570 (1955).

153. *Id.* at 580.

In *De Sylva*, the Court determined that the illegitimate child of an author was a “child” of that author under state law, and was therefore able to take advantage of the Federal Copyright Act’s provision granting the children of a deceased author the right to renew a copyright.<sup>154</sup> The Court stated that “[t]his does not mean that a State would be entitled to use the word ‘children’ in a way entirely strange to those familiar with its ordinary usage, but at least to the extent that there are permissible variations in the ordinary concept of ‘children’ we deem state law controlling.”<sup>155</sup>

*De Sylva* suggests that the Court might deem it permissible for Congress to exclude people who had been married for a limited amount of time from benefits under the copyright laws, but since the making and administration of copyright laws is one of the “few and defined” powers<sup>156</sup> expressly delegated to Congress by the Constitution,<sup>157</sup> such congressional action would be consistent with the Framers’ intent. However, if the effect of the congressional statute was tantamount to compelling the states to adopt Congress’ definition of “marriage,” the Tenth Amendment would clearly be implicated.

The *De Sylva* Court did not address that issue, nor does it appear that a contrary holding in that case would have seriously impacted state domestic relations law. The number of copyright holders’ children is not significant enough to coerce states to adopt a federal definition of “child.” Furthermore, it is insignificant compared to the millions of people impacted by the DOMA’s new definitions of “marriage” and “spouse” in the 3,900 federal laws and regulations affected.<sup>158</sup>

In *United States v. Yazell*,<sup>159</sup> the Court determined that state domestic relations law would decide whether a wife was liable on a Federal Small Business Administration loan taken out by her husband,<sup>160</sup> expressly reserving the question of Congress’ power to override state domestic relations law.<sup>161</sup> In *Yazell*, a Texas man had taken out a disaster loan from the Federal Small Business Administration (“SBA”), but died before it was fully paid off. The SBA attempted to collect the balance from his widow, but she pleaded that Texas law precluded her

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154. *See id.*

155. *Id.* at 581.

156. THE FEDERALIST, *supra* note 7, at 236.

157. *See* U.S. CONST. art. I, § 8, cl. 8.

158. *See* House Report, *supra* note 136, at 10.

159. 382 U.S. 341 (1956).

160. *See id.* at 352-53.

161. *See id.* at 352.

from becoming obligated on a contract without her first obtaining a court decree removing her disability to contract, which she had not done. The Supreme Court held that Texas law controlled, and Mrs. Yazell was not liable on her late husband's SBA contract. The Court stated that "We decide only that this Court, in the absence of specific Congressional action, should not decree in this situation that implementation of federal interests requires overriding the particular state rule involved here."<sup>162</sup>

The Court did not consider "the question of the constitutional power of the Congress to override state law in these circumstances by direct legislation."<sup>163</sup> In those cases where the Court has held distribution of federal benefits to be governed by federal law,<sup>164</sup> neither Congress nor the Court has questioned the state law determination of the parties' marital status.

As the legislative history of the DOMA suggests, there has never before been a congressional statute which purported to define "marriage." In light of the findings of the House Judiciary Committee in the 52nd Congress that it did not have constitutional authority to enact uniform marriage and divorce laws,<sup>165</sup> the DOMA appears to test the limits of Congress' constitutional authority without the constitutional amendment Congress has been unable to pass.<sup>166</sup>

In determining the constitutionality of Section 3 of the DOMA it is important to remember that if Congress has the power to proscribe homosexual marriages, it also has the power to disfavor Louisiana's "covenant marriage" or people who are married after being divorced, widowed or widowered. Similarly, Congress might exclude marriages where a U.S. citizen married a resident alien from a country which was currently disfavored by the United States, or where one of the spouses has been convicted of a crime, or has obtained or assisted in

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162. *Id.*

163. *Id.*

164. *Ridgeway v. Ridgeway*, 454 U.S. 46 (1981) (federal servicemen's group life insurance benefits); *McCarty v. McCarty*, 453 U.S. 210 (1981) (military retirement benefits); *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979) (federal railroad retirement benefits).

165. *See supra* text accompanying notes 130-33.

166. One commentator has suggested that the DOMA's proscription of same-sex marriages should be tested under the rule which requires that before a state law governing domestic relations will be deemed overridden by the Supremacy Clause it must be found to do "major damage" to "clear and substantial federal interests." *Ruskay-Kidd*, *supra* note 134, at 1478-79. However, this test only comes into play if it is unclear whether Congress has "positively required [a departure from state law] by direct enactment . . ." *Rose v. Rose*, 481 U.S. 619, 625 (1987) (citations omitted). It is hard to see how Congress could have been clearer in its directive to depart from inconsistent state law than the language of Section 3 of the DOMA.

obtaining an abortion. Thus, the potential impact of a congressional power to define "marriage" reaches far beyond the question of homosexual marriage.

How will the DOMA's definitions of "marriage" and "spouse" affect the states' ability to exercise their reserved power over domestic relations? The available evidence suggests that if a state decides to use a definition of "marriage" or "spouse" different from those adopted by Congress, the pervasive nature of federal regulation will make it practically impossible for a state to operate with those different definitions, and Section 3 of the DOMA will have the effect of coercing states into using the federal definitions, for fear of losing the federal money and other benefits to which those definitions are attached.

One commentator has concluded that in such circumstances "the States confront a system of federalism more coopting than cooperative, in which the basic values of pluralism, creativity, participation and liberty are progressively undermined."<sup>167</sup> Thus, "[m]aintaining clear lines of political accountability at the federal and state levels has emerged as a primary way of ensuring the integrity of the Constitution's structural design."<sup>168</sup>

### A. The ACIR Reports

The United States Advisory Commission on Intergovernmental Relations ("ACIR") was a nonpartisan group created by Congress in 1959 to monitor the operation of our federal system, and to recommend improvements. It was composed of twenty-six members: nine representing Congress and the Executive Branch, four state governors, three state legislators, four mayors, three elected county officials, and three private citizens.<sup>169</sup> Since its establishment, ACIR has published numerous reports and findings on the status of intergovernmental relations. These reports have been frequently cited by the Supreme Court.<sup>170</sup>

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167. Kaden, *supra* note 151, at 868.

168. Note, *Federalism, Political Accountability and the Spending Clause*, 107 HARV. L. REV. 1419, 1422 (1994).

169. See 42 U.S.C. §§ 4271-4273. Congress disbanded ACIR in late 1996. Pub. L. 104-328, § 1(a).

170. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 n. 12, 553 n.14 (1985); *id.* at 565 n.9 (Powell J., dissenting); *FERC v. Mississippi*, 456 U.S. 742, 788 n.19 (1982) (O'Connor, J., dissenting); *Shapiro v. Thompson*, 394 U.S. 618, 645 (1969) (Warren, C.J., dissenting); *Reynolds v. Sims*, 377 U.S. 533, 573 n.52; see *id.* at 583 n.65; but see *id.* at 610 n.69 (Harlan, J., dissenting).

In February 1984 ACIR issued a Report entitled *Regulatory Federalism: Policy, Process, Impact and Reform*, in which it detailed “the emergence of a host of federal regulatory programs aimed at or implemented by state and local governments.”<sup>171</sup> This ACIR Report notes several examples of federal programs that compel states to participate on terms dictated by Congress. The unemployment insurance component of the Social Security Act is one such example. The 1984 Report, commenting on *Steward Machine Company v. Davis*,<sup>172</sup> a Supreme Court case that upheld the Act as a mere “temptation” from which states were free to refrain,<sup>173</sup> states:

Of course, legality and philosophy aside, no state could practically have refused to participate since its business employers would not have received the [unemployment tax] credit. The tax-credit was thus an expedient way of avoiding Constitutional objections to a direct compulsion of state action under the commerce power.<sup>174</sup>

In making its recommendations, the 1984 ACIR Report “urges reconsideration . . . of current interpretations of the commerce and spending powers as they apply to the newer and more intrusive form of federal regulation . . . .”<sup>175</sup> Moreover,

[G]iven the substantial fiscal reliance of state and local governments upon federal financial aid and the often intrusive nature of regulations attached to modern federal grants, the Commission expresses its further hope that the federal judiciary, when judging grantor-grantee disputes, will recognize that “compulsion” rather than “voluntariness” and “coercion” rather than “inducement” now characterize many federal grants-in-aid and their requirements.<sup>176</sup>

The 1984 ACIR Report also characterizes the congressional mandates to the states as “back-door commandeering,” and finds that it borders on “mandating,” rather than “disallowing,” state activity.<sup>177</sup>

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171. U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, REGULATORY FEDERALISM: POLICY, PROCESS, IMPACT AND REFORM ii (1984) (hereinafter 1984 ACIR Report).

172. 301 U.S. 548 (1937).

173. *Id.* at 589-90; 1984 ACIR Report, *supra* note 171, at 31.

174. *Id.* (citing Kaden, *supra* note 151, at 884). One state supreme court has held that the federal unemployment insurance scheme is, in fact, a “federal mandate.” *City of Sacramento v. State*, 50 Cal. 3d 51, 74 (1990) In complying, the state “simply did what was necessary to avoid certain and severe federal penalties upon its resident businesses. *Id.* The alternatives were so far beyond the realm of practical realities that they left the state ‘without discretion’ to depart from the federal standards.” *Id.*

175. 1984 ACIR Report, *supra* note 171, at 269.

176. *Id.* at 270.

177. *Id.* at 271.

Finally, the 1984 ACIR Report recommends that the courts participate in restoring constitutional balance to intergovernmental relations,<sup>178</sup> and refrain from treating “back-door-commandeering” as congressional “commerce-power-as-usual.”<sup>179</sup>

The “coercive” effect of federal regulation chronicled in the 1984 ACIR Report is strikingly similar to the “commandeering” of state officials which the Supreme Court held violates the Tenth Amendment in *New York v. United States*.<sup>180</sup> As the Court noted in *New York*: “the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.”<sup>181</sup>

In September 1992 ACIR issued another report entitled *Federal Statutory Preemption of State and Local Authority*<sup>182</sup> in which it traced the exercise of Congress’ power to actually preempt state law under the Supremacy Clause.<sup>183</sup> The ACIR noted that “[t]he supremacy clause does not mean that the federal government is supreme in all things; it means only that federal law is supreme within the realms of power delegated to it by the people of the states through the U.S. Constitution,”<sup>184</sup> and that

[o]ver the years, as congressional powers (e.g. the commerce clause) have been interpreted more broadly, the scope of federal preemption of state and local authority has broadened as well because conflicting state law or administrative policy must yield to federal law enacted pursuant to the delegated powers of the Congress.<sup>185</sup>

That Report goes on to list 439 federal statutes that, in whole or in part, preempt state authority.<sup>186</sup> It further notes the “general rulemaking by federal agencies, which, in turn, have adopted regulations that preempt state and local government authority as well . . . .”<sup>187</sup> Finally, the 1992 ACIR Report notes that federal pre-

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178. *See id.* at 269.

179. *Id.* at 271.

180. 505 U.S. 144 (1992).

181. *Id.* at 187.

182. U.S. ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, FEDERAL STATUTORY PREEMPTION OF STATE AND LOCAL AUTHORITY: HISTORY, INVENTORY, AND ISSUES (1992) (hereinafter 1992 ACIR Report).

183. *See* U.S. CONST. art. VI, § 2.

184. 1992 ACIR Report, *supra* note 182, at 5 (citing THE FEDERALIST No. 33 (Alexander Hamilton)).

185. *Id.*

186. *See id.* at Appendix A.

187. *Id.* at 14.

emption increased from 1978 to 1991, "rivaling grants-in-aid as the most significant facet of intergovernmental relations," and that "the forces that seem to be encouraging preemption point to a continued expansion of federal preemption for the foreseeable future."<sup>188</sup>

The 1992 ACIR Report recites several reasons for the increased federal preemption, including "the loosening of constitutional restraints on the exercise of congressional powers,"<sup>189</sup> Congress' obligation to enforce individual Constitutional rights uniformly, and "the reduced fiscal capability of the federal government, [which require it to turn] more to regulatory powers to accomplish policy objectives."<sup>190</sup>

The 1992 ACIR Report also notes that both liberals and conservatives find federal preemption "to be a useful tool,"<sup>191</sup> and that "the sheer scope of federal preemption . . . suggests an increasingly coercive system of intergovernmental relations."<sup>192</sup> Ultimately,

[T]he unprecedented increase in federal statutory preemption of state and local powers since the late 1960s raises questions about the adequacy of our understanding and appreciation of the constitutional balance of power in the federal system, particularly in light of the supremacy clause. The supremacy clause does not make the federal government "supreme" in all matters of public policy, nor does it make the U.S. government dominant in our federal system. The clause simply means that the limited powers delegated to the U.S. government by the people may be exercised by the federal government without interference from or dependence upon the states. The point is to make sure that the U.S. government is not swallowed up by the states.

. . . .

The supremacy clause, therefore, is a balance-of-power provision in the Constitution, not a provision that makes the federal government supreme or sovereign. The supremacy clause must be read in light of other provisions of the Constitution, especially the republican guarantee clause and the Tenth Amendment.<sup>193</sup>

In 1993 ACIR issued a follow-up Report to its 1984 Report on Regulatory Federalism. Entitled *Federal Regulation of State and Local Governments: The Mixed Record of the 1980s*, this document examined whether the federal government's "coercive techniques to

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188. *Id.* at 37.

189. *Id.*

190. *Id.*

191. *Id.* at 38.

192. *Id.* at 40.

193. *Id.* at 41.



regulate state and local governments” enacted during the 1960s and 1970s had abated with the election of President Ronald Reagan.<sup>194</sup> The 1993 ACIR Report found that, although there was some relief for state and local governments in the early 1980s, “by 1990, substantial measurable growth in burdens on state and local governments had occurred.”<sup>195</sup>

The 1993 ACIR Report found that between 1981 and 1990, Congress had enacted 27 new statutes imposing new regulatory burdens on state and local governments or significantly expanding the burdens from existing programs.<sup>196</sup> That Report also found that, as a practical matter, conditions attached by Congress to its grant programs to states became federal mandates, because no state can opt out of a multi-billion dollar program like Medicaid because it objected to expanded federal requirements.<sup>197</sup> These federal programs “generally impose greater costs on [the states] than on the federal government, [and] represent, in federal budgetary terms, a relatively low-cost method of responding to issues and problems.”<sup>198</sup> The 1993 ACIR Report cites a Johnson Administration Official’s observation as pertinent today:

Congressmen see themselves as having been elected to legislate. Confronted with a problem . . . their strong tendency is to pass a law. Ten years ago, money was Washington’s antidote for problems. Now, the new fiscal realities . . . mean that Congress provides fewer dollars. Still determined to legislate against problems, Congress uses sticks instead of carrots.<sup>199</sup>

Thus, the “back door commandeering” noted in the 1984 ACIR Report continued throughout the 1980s, and the coercive and preemptive effect of federal regulation on the states continues to grow. Congress’ obvious political preference for a federal solution to perceived problems, together with interest groups’ understandable economic interest in national, rather than state by state, answers to their constituents’ demands explains why federal regulatory mandates have become so pervasive. The cumulative effect of these federal mandates has been to strip state governments of the right to exercise those “numer-

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194. U.S. ADVISORY COMM’N ON INTERGOVERNMENT RELATIONS, FEDERAL REGULATION OF STATE AND LOCAL GOVERNMENTS: THE MIXED RECORD OF THE 1980s 1 (1993) (hereinafter 1993 ACIR Report).

195. *Id.*

196. *See id.* at 2.

197. *See id.* at 48.

198. *Id.* at 54.

199. *Id.* (citing SAMUEL HALPERIN, FEDERAL TAKEOVER, STATE DEFAULT OR FAMILY PROBLEMS, IN FEDERALISM AT THE CROSSROADS: IMPROVING EDUCATIONAL POLICYMAKING 19 (1976)).

ous and indefinite” powers reserved to the states by the Constitution.<sup>200</sup>

With Section 2 of the DOMA, Congress grants states the right to avoid ratifying a sister state’s same-sex marriage, but then in Section 3 takes away that state’s ability to define “marriage” and “spouse” for itself. Rather than restoring balance to the relationship between the states and the federal government, Section 3 of the DOMA invades an “area of primary state responsibility” which the Constitution reserves to the states. The following examples of particular federal regulations further illustrate the scope of the DOMA’s affect on the states.

### B. The Internal Revenue Code

One of the most pervasive federal regulatory schemes is the Internal Revenue Code. Until the DOMA was enacted, “[C]ongress had given nearly exclusive control over access to the tax benefits of marriage to the states, through their regulation of marriage.”<sup>201</sup> The benefits granted “married” persons under the Internal Revenue Code are so attractive that, notwithstanding the so-called “marriage penalty,”<sup>202</sup> “most taxpayers would readily file jointly in order to receive these benefits.”<sup>203</sup> Since state taxing schemes must not be in conflict with the Internal Revenue Code,<sup>204</sup> the DOMA provides a strong incentive for states to define “marriage” and “spouse” in accord with Congress’ definition. For instance, many states impose income, gift and estate taxes in addition to those imposed by the Internal Revenue Code.<sup>205</sup> The 40 states with personal income taxes use the taxpayer’s federal adjusted gross income as the “computational starting point” for determining state taxable income.<sup>206</sup> That computation uses the Internal Revenue Code’s determination of marital status.<sup>207</sup> Since

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200. THE FEDERALIST, *supra* note 7, at 236.

201. Christopher J. Hayes, Note, *Married Filing Jointly: Federal Recognition of Same-Sex Marriages Under the Internal Revenue Code*, 47 HASTINGS L.J. 1593, 1602 (1996) (concluding that the DOMA is an unconstitutional violation of the Equal Protection Clause and exceeds Congress’ power under the Full Faith and Credit Clause).

202. *Id.* at 1599 n.18. The “marriage penalty” results when both spouses in a marriage work, resulting in a higher tax bracket for a joint return than would have been realized if each spouse filed individually. *See also* Hasday, *supra* note 101, at 1376 n.306.

203. Hayes, *supra* note 201, at 1602.

204. *See* U.S. CONST. art. VI, § 2.

205. *See generally* J. HELLERSTEIN & W. HELLERSTEIN, STATE TAXATION ¶¶ 20 & 21 (1992).

206. *Id.* at ¶ 20.02.

207. *See generally* M. ROSE & J. CHOMMIE, FEDERAL INCOME TAXATION 778-89 (3d ed. 1988). By deciding to file as a married couple, the spouses combine their incomes for the purpose of determining adjusted gross income. If a “marriage” is not recognized by the

Congress has never before defined “marriage” or “spouse,” and no state has yet adopted definitions of those terms which are contrary to the DOMA, no conflict presently exists. But, if Hawaii, or some other state decides to issue marriage licenses to homosexual couples, or suppose Congress later decides to exclude “covenant marriages,” and/or previously widowed/widowed, divorced or criminally convicted people from its definitions of “marriage” and “spouse,” the DOMA’s impact will be significant.

Indeed, as a practical matter, states must coordinate their taxing laws with the Internal Revenue Service. Thus, the cost and administrative difficulty of a state taxing scheme which defines marriage differently from the Internal Revenue Code would be prohibitive. As the 1984 ACIR Report states: “legality and philosophy aside, no state could practically [define “marriage” and “spouse” differently than the DOMA].”<sup>208</sup>

### C. Federally Funded Programs

Benefits under the Federal Social Security System will also be impacted by DOMA.<sup>209</sup> Since state “entitlement” programs which receive money from Congress—unemployment insurance for instance—are subject to federal regulation,<sup>210</sup> the DOMA’s definitions of “marriage” and “spouse” will control. For instance, in deciding which wages are subject to unemployment insurance tax, states must not include any payment by an employer “which may be excluded from the gross income of an employee, [or] his *spouse* . . . .”<sup>211</sup> “Employment” is defined to include: “services performed by an individual in the employ of his son, daughter or *spouse*.”<sup>212</sup>

These basic definitions governing unemployment insurance incorporate Congress’ definitions of “marriage” and “spouse,” and demon-

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Internal Revenue Code, the taxpayers would not have the option of combining their incomes to determine the taxable adjusted gross income.

208. 1984 ACIR Report, *supra* note 171, at 208.

209. *See, e.g.*, 42 U.S.C. § 402 (b), (c), (e) & (f) (1998) (granting old age and death benefits to non-working spouses and children); 42 U.S.C. § 1320b-1 (1998) (same regarding death benefits). *See* Ruskay-Kidd, *supra* note 134, at 1467-69; Hasday, *supra* note 101, at 1382-85 (showing how the Social Security System distributes benefits based upon marital status).

210. *See Federal-State Unemployment Compensation System, Committee on Ways and Means, U.S. House of Representatives, 100th Cong., 2d Sess., 18-19* (U.S. Gov’t Printing Office 1988) [hereinafter *Unemployment Compensation*] (concluding that Federal Social Security System controls revenue sources and benefits for state unemployment compensation programs).

211. 26 U.S.C. § 3306(b)(12) (1994) (emphasis added).

212. *Id.* § 3306(c)(5).

strate that trying to operate with different state definitions would be practically impossible if a state wants its people to participate in the broad range of federal funding and other benefits available. Since federal law provides a broad framework to which each state program must conform in areas where uniformity is considered essential,<sup>213</sup> state/federal programs based on “cooperative federalism,” with the federal government providing the money in exchange for the states’ compliance with federal regulation,<sup>214</sup> will also serve to compel states to adopt the federal definitions of “marriage” and “spouse” as a condition of participation.

Effective July 1, 1997, Congress repealed the Aid to Families with Dependent Children program (“AFDC”), except as to state(s) that “opt out[,]” and replaced it with a program of Block Grants to states for Temporary Assistance for Needy Families (“Block Grant Program”).<sup>215</sup> Among the stated purposes of the Block Grant Program is “to end the dependence of needy parents on government benefits by promoting . . . marriage[;]”<sup>216</sup> “to prevent and reduce the incidence of out-of-wedlock pregnancies[;]”<sup>217</sup> and to “encourage the formation and maintenance of two-parent families.”<sup>218</sup> Under the “cooperative federalism” AFDC program, families with children are automatically eligible for some aid, but under the Block Grant Program, in order to receive any money a state must first submit a plan which indicates, among other things, how the state intends to “establish goals and take action to prevent and reduce the incidents of out-of-wedlock pregnancies.”<sup>219</sup>

The Block Grant Program also provides a “bonus” of between \$20,000,000 and \$25,000,000 to states which demonstrate a net decrease in out-of-wedlock births.<sup>220</sup> Thus, Congress has overtly stated that it is using Block Grants to promote its definition of “marriage,” and has offered a substantial reward to those states that conform. Given Congress’ stated purposes for the Block Grant Program, it is

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213. See Unemployment Compensation, *supra* note 210, at 12.

214. See James C. Fontana, *State Regulations Implementing Federal AFDC Provisions Are Constitutional Despite Conclusive Presumptions Concerning an Applicant's Income Availability*, 56 TEMP. L.Q. 773, 774 n.3 (1983).

215. 42 U.S.C. §§ 601-679 (1998). See also Hasday, *supra* note 101, at 1381-82 (citing AFDC as an example of benefits based on marital status).

216. *Id.* § 601(a)(2).

217. *Id.* § 601(a)(3).

218. *Id.* § 601(a)(4).

219. 42 U.S.C. § 602(a)(1)(A)(v).

220. See *id.* § 603(a)(2).

doubtful a state would qualify if it used a definition of “marriage” different from that of Congress.<sup>221</sup>

#### D. Labor Law and Other Examples

“Congress has broad constitutional authority to preempt state authority over all aspects of the employment relationship.”<sup>222</sup> In the Employee Retirement Income Security Act (“ERISA”),<sup>223</sup> which covers virtually all employee benefit plans, Congress has expressly preempted state law.<sup>224</sup> Thus, DOMA’s Section 3 definition of “marriage” and “spouse” control in virtually all employee benefit plans. As pointed out in a recent commentary on the DOMA: “[l]aws that treat married persons in a different manner than they treat single persons permeate nearly every field of social regulation in this country.”<sup>225</sup>

DOMA also changes the definition of “marriage” and “spouse” in numerous other areas of federal law that affect states;<sup>226</sup> including bankruptcy,<sup>227</sup> consumer credit,<sup>228</sup> education,<sup>229</sup> health,<sup>230</sup> housing,<sup>231</sup>

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221. A lesbian couple whose child was conceived by artificial insemination would be considered an “out-of-wedlock” birth under the DOMA’s definition of “marriage,” even if the couple was deemed married under State law. The same would be true for a gay male couple who arranged for a surrogate mother to bear their child. If Congress amended its definitions of “marriage” and “spouse” to exclude other people, such as those in a “covenant marriage” or those who have been divorced, widowed, widowed, convicted of a crime or participated in an abortion, children of those unions would also be deemed to be “out-of-wedlock.”

222. Henry Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution In the Law of the American Workplace*, 62 *FORDHAM L. REV.* 469, 536 (1993).

223. 29 U.S.C. § 1003 (1994). *See also* Hasday, *supra* note 101, at 1384 n.344 (noting that ERISA regulates retirement plans worth trillions of dollars).

224. *See* 29 U.S.C. § 1144(a).

225. Ruskay-Kidd, *supra* note 134, at 1468 (quoting David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 *MICH. L. REV.* 447 (1996)); Joseph W. Hovermill, *A Conflict of Laws and Morals: The Choice of Law Implications of Hawaii’s Recognition of Same-Sex Marriages*, 53 *MD. L. REV.* 450, 451 (1994) (noting that a legally recognized marriage confers “income tax advantages, health care benefits and the right to make health-care decisions for an incapacitated spouse”); Robert L. Cordell, *Same-Sex Marriage: The Fundamental Right of Marriage and An Examination of Conflict of Laws and the Full Faith and Credit Clause*, 26 *COLUM. HUM. RTS. L. REV.* 247, 255-57 (1994) (noting that a legal marriage confers tax advantages, inheritance rights, health benefits, and the right to enter into pre-marital agreements).

226. *See* Ruskay-Kidd, *supra* note 134, at 1467-68.

227. *See, e.g.*, 11 U.S.C. § 507(a)(7) (1994). *See* Tisha Morris Federico, Note, *The Impact of the Defense of Marriage Act on Section 302 of the Bankruptcy Code and the Resulting Renewed Interest in the Equitable Doctrine of Substantial Consolidation*, 103 *COM. L.J.* 82, 90 (1998).

228. *See, e.g.*, 15 U.S.C. § 1673(b)(2)(A) (1994).

the military,<sup>232</sup> veterans benefits,<sup>233</sup> and welfare.<sup>234</sup> It is further significant to consider the difficulty in handling state court lawsuits which are removed to federal court. As state substantive and federal procedure law would apply, a couple could be considered “married” for rulings on substantive matters going to the merits of the case, but unmarried for procedural matters, such as the spousal testimonial privileges.<sup>235</sup> The obvious chaos resulting from different state and federal definitions of “marriage” and “spouse” would ultimately force the state to either challenge Congress’ power to enact different federal definitions, or adopt those definitions as its own. The Supremacy Clause leaves a state no other realistic choice. Thus, the “narrow Federal requirement” referred to in DOMA’s legislative history is, in fact, a huge shift to federal control over state domestic relations law.<sup>236</sup>

The power exercised by Congress in Section 3 of the DOMA is a significant escalation of the tension between Congress and the states as independent sovereigns;<sup>237</sup> and it flies in the face of the Supreme Court’s statement that “[t]he whole subject of the domestic relations, belongs to the laws of the States and not to the laws of the United States.”<sup>238</sup> The House Judiciary Committee acknowledged that Congress is taking sides in a “culture war”<sup>239</sup> by purporting to protect under Section 2 of the DOMA a state’s “right” define “marriage,” and then take away any real ability to exercise that “right” by defining “marriage” and “spouse” in Section 3. Although Section 3 does not directly “commandeer” state officials into federal service,<sup>240</sup> it is the

229. See, e.g., 20 U.S.C. § 1087nn(b)(1)(A) (1998).

230. See, e.g., 42 U.S.C. § 1396r(c)(3)(B) (1998).

231. See, e.g., 38 U.S.C. § 3712(a)(4)(A)(vi)(III) & (a)(4)(C) (1998).

232. See, e.g., 10 U.S.C. § 1784 (1998); 37 U.S.C. § 427 (1998).

233. See, e.g., 38 U.S.C. §§ 3501(a)(1)(B), (C), and (D) & 3511 (1998).

234. See, e.g., 42 U.S.C. § 1382b (1998).

235. See *Ankenbrandt v. Richards* 504 U.S. 689 (1992). Rule 501 of the Federal Rules of Evidence provides that the State law of privilege applies as a general rule. The Historical Notes to that section state that Congress believed that State law should apply to privileges, “absent a compelling reason” to apply federal law. FED. R. EVID. 501. DOMA appears to supply that compelling reason.

236. See Kaden, *supra* note 151, at 876.

237. Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism’s Trojan Horse*, 1988 SUP. CT. REV. 85, 89-90 (1988) (“It was inevitable from the start that dual sovereignty, despite its advantages, would give rise to tensions over the respective spheres of state or national governance . . . . In such an environment, pressures for national control increase, and it is all too easy to forget the values that flow from local governance.”).

238. *Ex Parte Burrus*, 136 U.S. at 593-94.

239. The Committee refers to Justice Scalia’s dissent in *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

240. See *New York v. United States*, 505 U.S. 144, 161 (1992).

“back-door commandeering” condemned in the 1984 ACIR Report by coercing, “or otherwise motivating,” states to regulate in an area at the “core of state sovereignty reserved by the Tenth Amendment.”<sup>241</sup> Since Congress itself has determined that it cannot directly define “marriage” or “spouse” for the states, its not-so-subtle attempt to accomplish that end with Section 3 of the DOMA and the over 3,900 federal statutes and regulations affected<sup>242</sup> should not be mistaken for anything other than the invasion of an area of law reserved to the states. As the dissenting minority of the House Judiciary Committee stated:

If Hawaii or any other state were to allow people of the same sex who were deeply and emotionally attached to each other to regularize that relationship in a marriage, this bill says that the federal government would refuse to recognize it. Note that this is the case whether such decision is made by a State Supreme Court, a referendum of the state’s population, a vote of the state’s legislature, or some combination thereof. Thus, the bill is exactly the opposite of a states rights measure: The only real force it will have will be to deny a state and the people of that state the right to make decisions on the question of same sex marriage.<sup>243</sup>

Although Section 2 of the DOMA may be struck down on other constitutional grounds, the basis for striking down Section 3 may be found in Justice O’Connor’s majority opinion for the Court in *New York v. United States*.<sup>244</sup> According to that decision, Congress did not present a case where it was “encourag[ing] state regulation rather than compelling it,” and where “state governments remain responsive to the local electorate’s preferences; state officials remain accountable to the people.”<sup>245</sup> Rather, the federal government was compelling the State of New York to regulate. This was unacceptable because “it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.”<sup>246</sup>

In Section 3 of the DOMA, Congress is not actually directing the states how to define “marriage” and “spouse.” Rather, it is using its

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241. *Id.* at 177. See also *United States v. Lopez*, 514 U.S. 549, 564-65 (1995); see also *id.* at 585 (Thomas, J., concurring); but see *id.* at 624 (Breyer, J., dissenting).

242. See House Report, *supra* note 136, at 10.

243. *Id.* at 42.

244. 505 U.S. 144 (1992).

245. *Id.* at 168.

246. *Id.* at 169.

coercive regulatory and economic power in the more than 3,900 federal regulations where the new definitions are effective to compel compliance with its definitions.<sup>247</sup> Though states can theoretically refuse to follow the federal lead, no state can practically “opt-out” of all federally funded and regulated programs.<sup>248</sup> Thus, this “back-door commandeering” is like the coercive congressional regulation condemned in *New York* and *Printz*. Rather than a “narrow Federal requirement,” the effect of Section 3 of the DOMA is to “infring[e] upon the core of state sovereignty reserved by the Tenth Amendment,”<sup>249</sup> by coercing the states into defining “marriage” and “spouse” Congress’ way.<sup>250</sup>

## VI. Federalism and the Sixteenth and Seventeenth Amendments

Why does Congress now believe it can regulate marriage? Since the Tenth Amendment was ratified, and Congress determined it would have to amend the Constitution to enact marriage and divorce laws, two amendments to the Constitution have altered the balance of economic power between the states and the federal government, and eliminated state governments’ direct participation in Congress. The following brief review of the Sixteenth and Seventeenth Amendments and two recent U.S. Supreme Court cases highlights the continuing limits on Congress’ power, and underscores the unconstitutionality of DOMA.

In 1913, the Sixteenth Amendment to the Constitution was adopted. It established the “unapportioned” federal income tax as we know it today, “effectively [giving] the national government unlimited control of the nation’s wealth and, consequently, a virtually unlimited spending power.”<sup>251</sup> “By extracting money from the now-defenseless states and offering to return it with strings attached, the national government is able to control by promises of reward—some would say

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247. See House Report, *supra* note 136, at 10.

248. See *supra* text accompanying note 197-200. See also Todd J. Zywicki, *Beyond the Shell and Husk of History: The History of Seventeenth Amendment and Its Implications For Current Reform Proposals*, 45 CLEV. ST. L. REV. 165, 224 (1997) (“the underlying problem [is] the intrusiveness and unlimited power of the federal government to redistribute wealth to favored interest groups.”).

249. *New York*, 505 U.S. at 177.

250. See *id.*

251. Lino A. Graglia, *From Federal Union to National Monolith: Mileposts In the Demise of American Federalism*, 16 HARV. J.L. & PUB. POL’Y. 119, 130-31 (1993). See also David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 33-34 (1994).



bribery—whatever it might be unable or unwilling to control by threat of punishment.”<sup>252</sup>

In *United States v. Butler*,<sup>253</sup> the Court held that the taxing and spending scheme contained in the 1933 Agricultural Adjustment Act was an unconstitutional invasion of reserved state powers. That Act increased the price of certain farm products by decreasing the quantities produced. The decrease in quantity was accomplished by paying farmers to let their land lay fallow for a period of time. To pay those farmers for the fallow land a tax was levied on the processing of the commodities derived from the farm products being regulated.<sup>254</sup> The Court held the tax was a “mere incident” to a program designed to regulate agricultural production,<sup>255</sup> which was beyond Congress’ enumerated powers. The Court found that the federal government did not try to sustain the Act under the Commerce Clause,<sup>256</sup> but also said that Congress’ power to tax and spend “is not limited by direct grants of legislative power found in the Constitution.”<sup>257</sup>

Even granting Congress a taxing and spending power broader than its enumerated powers, the Court found the Agricultural Adjustment Act to be an unconstitutional invasion of reserved state powers, holding that the

power of taxation, which is expressly granted, may, of course, be adopted as a means to carry into operation another power also expressly granted. But resort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible. Congress is not empowered to tax for those purposes which are within the exclusive province of the States.<sup>258</sup>

The Court cited *Butler* in *South Dakota v. Dole*,<sup>259</sup> where the Court upheld Congress’ requirement that states raise their minimum drinking age to 21 in order to receive federal highway funds. The Court rejected the State’s contention that the Twenty-First Amendment to the Constitution grants “virtually complete control” over the regula-

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252. *Id.* (citing *South Dakota v. Dole*, 483 U.S. 203 (1987) (holding that Congressional withholding of highway funds to encourage establishment of a minimum drinking age is a valid use of the spending power)).

253. 297 U.S. 1 (1936).

254. *See id.* at 54-55.

255. *Id.* at 61.

256. *See id.* at 64.

257. *Id.* at 66.

258. *Id.* at 69.

259. 483 U.S. 203, 212 (1987) (citing *United States v. Butler*, 297 U.S. 1 (1936)).

tion of liquor distribution to states,<sup>260</sup> and held that a “Tenth Amendment limitation on congressional regulation of state affairs [does] not concomitantly limit the range of conditions legitimately placed on federal grants.”<sup>261</sup> The Court concluded that:

[Our precedent] establishes that the ‘independent constitutional bar’ limitation on the spending power is not, as petitioner suggests, a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly. Instead, we think that the language in our earlier opinions stands for the unexceptional proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional.<sup>262</sup>

The Chief Justice, however, proceeded to note, “our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’”<sup>263</sup>

In determining that Congress’ condition on highway spending was not unconstitutional, the Chief Justice emphasized that if South Dakota chose to set its minimum drinking age below 21, it would lose only five percent of the federal funds otherwise obtainable.<sup>264</sup> Rather than “compulsion,” the *Dole* majority characterized the congressional condition on federal highway funds as “mild encouragement” to the states.<sup>265</sup>

In her *Dole* dissent, Justice O’Connor disagreed with the majority’s reading of *Butler*, and found that the regulation was outside of Congress’ power because it falls “within the ambit of . . . the Twenty-first Amendment.”<sup>266</sup> She noted that:

If the spending power is to be limited only by Congress’ notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives ‘power to the Congress to tear down the barriers, to invade the states’ jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.’<sup>267</sup>

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260. *Id.* at 205 (citing *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)).

261. *Id.* at 210.

262. *Id.*

263. *Id.* at 211 (citing *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1947)).

264. *See id.*

265. *Id.*

266. *Id.* at 212 (O’Connor, J., dissenting).

267. *Id.* at 217 (O’Connor, J., dissenting) (citing *United States v. Butler*, 297 U.S. 1, 78 (1936)).

Justice O'Connor concluded that "Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent,"<sup>268</sup> stressing that, "[t]he immense size and power of the Government of the United States ought not obscure its fundamental character. It remains a Government of enumerated powers."<sup>269</sup>

In *New York v. United States*,<sup>270</sup> Justice O'Connor once again addressed Congress' power to condition federal spending in upholding the financial incentives offered to states which developed sites to receive radioactive waste from other states.<sup>271</sup> She noted that the state did not have to participate in the financial incentives, and did not contend that Congress had exceeded its spending power as enunciated in *Dole*, but contended that the form of the expenditure was constitutionally objectionable.<sup>272</sup> New York claimed that the money actually spent by Congress had been collected from the state in the first place, and was, therefore, not actually "federal funds" to which federal conditions might properly attach.<sup>273</sup> Justice O'Connor found that the Spending Clause "has never been construed to deprive Congress of the power to structure federal spending in this manner,"<sup>274</sup> concluding "that the States are able to choose whether they will receive federal funds does not make the resulting expenditures any less federal; indeed, the location of such a choice in the States is an inherent element in any conditional exercise of Congress' spending power."<sup>275</sup>

In Section 3 of the DOMA, Congress has attached a significant condition to all federal spending: that "marriage" and "spouse" be defined Congress' way. States are compelled to accept these definitions if they want federal money in much the same way that they are compelled to set their drinking age at 21 if they want federal highway funds, but all applicable federal funds are tied to this condition rather than the five percent at issue in *Dole*. Although Section 3 of the

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268. *Id.* at 216 (O'Connor, J., dissenting).

269. *Id.* at 218 (O'Connor, J., dissenting) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheaton) 316, 405 (1819)). Justice Brennan, a staunch supporter of the Court's opinion in *Garcia*, also dissented in *Dole*, agreeing with Justice O'Connor that Congress cannot condition federal spending in a manner that abridges a constitutional power which is reserved to the states. *See id.* at 212 (Brennan, J., dissenting). *See also* Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1989 (1995).

270. 505 U.S. 144 (1992).

271. *See id.* at 188.

272. *See id.* at 172.

273. *See id.*

274. *Id.* at 173.

275. *Id.*

DOMA does not directly mandate that each state legislature define “marriage” and “spouse” Congress’ way, unlike the financial incentives in *New York*, its practical effect is to give states no realistic choice but to accede to Congress’ definitions for state law. The financial inducement offered by Congress is “so coercive as to pass the point at which ‘pressure turns to compulsion.’”<sup>276</sup> In addition, the DOMA’s definitions attached to the federal purse strings invade the states’ jurisdiction in an area which is clearly outside the “enumerated power” of Congress.

Justice Brennan’s brief dissent in *Dole* may provide a key to how the Court will address Section 3 of DOMA. In *Dole*, he agreed with Justice O’Connor that the Twenty-First Amendment reserved to the states the power to set the drinking age, notwithstanding the interstate relationship between the State’s drinking age and federal highway funds.<sup>277</sup> Thus, Justice Brennan argued that in an area of power which is clearly reserved to the states by the Constitution, “Congress cannot condition a federal grant in a manner that abridges this right.”<sup>278</sup> Since all of the current Justices on the Court apparently agree that regulating domestic relations is reserved to the states,<sup>279</sup> even those who agree with Justice Brennan’s views on Congress’ power to regulate the states generally may also agree that in the area of domestic relations Congress may not condition the receipt of federal funds on a state’s acquiescence in federal definitions of “marriage” and “spouse.”<sup>280</sup> Thus, Congress’ power to attach conditions to its spending should not overcome a Tenth Amendment challenge to Section 3 of the DOMA.

In 1913, the states also ratified the Seventeenth Amendment, removing their legislatures’ power to appoint United States Senators and giving it to the people.<sup>281</sup> It has been said that the Seventeenth Amendment, “eliminat[ed] the primary device relied on by the Framers to protect the constitutionally reserved zone of state sovereignty,

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276. *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (citing *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1947)).

277. *See id.* at 212 (Brennan, J., dissenting).

278. *Id.* (Brennan, J., dissenting). *See generally* Kristian D. Whitten, *Conditional Federal Spending and the States “Free Exercise” of the Tenth Amendment*, 21 CAMPBELL L. REV. 5, 20-21 (1998).

279. *See United States v. Lopez*, 514 U.S. 549, 564-65 (1995); *id.* at 585 (Thomas, J., concurring); *but see id.* at 624 (Breyer, J., dissenting).

280. *See* David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 61 n.252 (1994) (asserting that Justice Brennan’s *Dole* dissent aligns him with the majority in *Butler*).

281. *See* U.S. CONST. amend. XVII; *see also* Graglia, *supra* note 251, at 131.

[and] rendered dubious the presumption that state sovereignty would be properly respected in every federal statute or regulation.”<sup>282</sup>

In his opinion for the Court in *Garcia*, Justice Blackmun noted that the Seventeenth Amendment “alter[ed] the influence of the States in the Federal political process[.]”<sup>283</sup> but nevertheless found “that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the states as states’ is one of process rather than one of result.”<sup>284</sup> In his *Garcia* dissent, Justice Powell wrote that, prior to the Seventeenth Amendment,

the view that the structure of the Federal Government sufficed to protect the States might have had a somewhat more practical, although not a more logical, basis, [however,] . . . [t]he adoption of the Seventeenth Amendment (providing for direct election of Senators), the weakening of political parties on the local level, and the rise of national media, among other things, have made Congress increasingly less representative of state and local interests, and more likely to be responsive to the demands of various national constituencies.<sup>285</sup>

In her *Garcia* dissenting opinion, Justice O’Connor also refers to the Seventeenth Amendment stating that: “[t]hese changes may well have lessened the weight Congress gives to the legitimate interests of States as States.”<sup>286</sup> Thus, as a result of their ratifying these two Amendments as a practical matter the states have ceded substantial economic and political power to the Congress. The Sixteenth Amendment greatly enlarged Congress’ power to assert its supremacy in extracting tax revenue from the states’ people, returning that money to the states with conditions it could not otherwise constitutionally impose, and the Seventeenth Amendment removed state legislative supervision of United States Senators.<sup>287</sup> But, there is nothing in the

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282. Roger G. Brooks, Comment, *Garcia, The Seventeenth Amendment, And The Role of The Supreme Court In Defending Federalism*, 10 HARV J.L. & PUB. POL’Y. 189, 208 (1987); see also Zywicki, *supra* note 248; Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1379-80 (1996); THE FEDERALIST, NO. 26, at 129-30 (Alexander Hamilton) (Bantam Classics ed., 1982) (“[T]he state Legislatures . . . will always be . . . suspicious and jealous guardians of the rights of the citizens, against encroachments from the federal government[.]”).

283. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985).

284. *Id.*

285. *Id.* at 565 (Powell, J., dissenting) (citing 1984 ACIR Report, *supra* note 171).

286. *Id.* at 584 (O’Connor, J., dissenting).

287. See Zywicki, *supra* note 248, at 233; THE FEDERALIST, NO. 62, at 313 (James Madison) (Bantam Classics ed., 1982) (“giving to the state governments such an agency in the formation of the federal government, as must secure the authority of the former; and may form a convenient link between the two systems.”).

legislative history of either Amendment to suggest an intent to alter the system of dual sovereignty contemplated by the Constitution. And, though the political landscape has changed since 1892, when Congress determined it would need to amend the Constitution in order to enact uniform marriage and divorce laws, there is nothing to suggest a Constitutional change eliminating the need for such an amendment. Indeed, Congress' failure to act in this area until now may be evidence of "the persistent view that our federal system in its very design contemplates that the states shall possess regulatory authority over the realm of family relations."<sup>288</sup>

## VII. Conclusion

As articulated by Congress, Section 3 of the DOMA does not announce itself as a condition attached to federal spending or a directive to state executive and legislators. Rather, it is disguised as a "narrow Federal requirement" denying federal marital benefits to same-sex couples, not unlike federal statutes which allocate those benefits to spouses of armed forces personnel and railroad retirees. However, DOMA's restriction applies to all federal statutes and regulations, not just federal employees' benefits, and it actually defines who is and is not married for purposes of federal law. Until now, federal law has accepted the states' determination of marital status, even though different state laws led to inconsistent federal benefit determinations.<sup>289</sup>

That it is, in fact, a condition attached to all federal spending, and a not-so-subtle directive to state executives and legislators becomes clear by examining whether it is possible for a state to function if it chooses not to adopt Congress' definitions of "marriage" and "spouse." The Supremacy Clause, together with the Internal Revenue Code, Social Security, ERISA and the myriad other federal laws and regulations included in the 3,900 affected by DOMA, make such a choice a practical impossibility.

With Section 3 of the DOMA, Congress has created the "compulsion" against which Chief Justice Rehnquist warned in *South Dakota v. Dole*,<sup>290</sup> and imposed a motivation to regulate which is outside the scope of Congress' enumerated powers as announced in *New York v.*

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288. Daily, *supra* note 100, at 1824.

289. See *United States v. Yazell*, 382 U.S. 341, 355-56 (1956); A. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 253-54 (1987).

290. 483 U.S. 203 (1987) (citing *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1947)).

*United States*.<sup>291</sup> In the same way Congress' commerce, taxing and spending powers have expanded, the pervasive nature of federal regulation resulting from that expansion has caused an inevitable intrusion into areas of state sovereignty to the point that Congress is now regulating matters at the core of that state sovereignty: domestic relations. Such federal regulation was not envisioned by the Framers; that it is outside Congress' power is underscored by the legislative history of the DOMA itself, which notes that a serious constitutional problem would arise if Congress were to direct the states to define "marriage" and "spouse" in a particular way. Since that is the practical effect of Section 3 of the DOMA, Congress' own findings should assist a serious constitutional challenge to the federal definitions of "marriage" and "spouse."

The Congressional majority's testimonial legal expert, Professor Lynn Wardle, continues to assert that the DOMA does not improperly impose Congress' definitions of "marriage" and "spouse" on the states. To support this view he cites federal immigration laws which do not recognize certain marriages which are valid under state laws.<sup>292</sup> But Professor Wardle's analogy is not on point. While it is true that federal courts of appeals have upheld such federal immigration legislation, they did not address a federal law actually imposing definitions of "marriage" and "spouse" across the board on *all* federal statutes and regulations. Thus, even if the Supreme Court ultimately finds it constitutional for Congress to deny a visa or automatic citizenship to certain aliens who are married under state law, that is a far cry from Congress disallowing all federal benefits to all people married under state domestic relations laws which do not conform to the will of Congress. As in *De Sylva v. Ballentine*,<sup>293</sup> which dealt with copyright law, with immigration law the Court would be interpreting federal rights, the creation and allocation of which are expressly delegated to Congress by the Constitution.<sup>294</sup> This is the circumstance in which the Framers intended that federal law would be supreme.<sup>295</sup> In short, what may be a constitutional restriction on marital benefits in a limited regulatory area expressly delegated to Congress by the Constitution, becomes unconstitutional when imposed beyond the scope of

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291. 505 U.S. 144 (1992).

292. See Lynn D. Wardle, *DOMA: Protecting Federalism in Family Law*, 45 *FED. LAW* 30, 33 (Feb. 1998).

293. 351 U.S. 570 (1955).

294. See U.S. CONST. art. I, § 8, cl. 4 (immigration and naturalization); U.S. CONST. art. I, § 8, cl. 8 (copyrights).

295. See U.S. CONST. art. VI, § 2.

Congress' enumerated powers and in an area of law reserved to the states, especially where the Congressional legislation inhibits the effective and efficient operation of state law.<sup>296</sup>

Professor Wardle himself recognizes the states' interest in domestic relations as "one of the clearest boundary lines of our federalism," in a "constitutional equilibrium between the [federal] and State government."<sup>297</sup> What he fails to acknowledge is that by defining "marriage" and "spouse" for all federal programs, Congress has upset that constitutional equilibrium." Given Congress' recent proclivity for "federalizing" areas of law previously left to the states, it is not at all unreasonable to suppose that if its power to define "marriage" and "spouse" goes unchallenged, a future congressional majority may side with politically powerful groups like the American Civil Liberties Union, who oppose "covenant marriage,"<sup>298</sup> and define "marriage" and "spouse" to exclude people in those marriages. Congress may also determine that people who have been divorced or have participated in obtaining an abortion are not "married" under federal law.

Since the *Lopez* Court strongly suggests that regulation of domestic relations is reserved to the states as part of a "core" of their

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296. See *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (finding that a federal gun control law improperly effects "change in the sensitive relations between federal and state criminal jurisdiction") (quoting *United States v. Enmons*, 410 U.S. 396, 411-12 (1973)); *New York v. United States*, 505 U.S. 144, 169 (1992) (holding that the federal nuclear waste "take title" requirement improperly diminished the accountability of Congress "when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in manners not pre-empted by federal regulation."). See generally *Clinton v. City of New York*, 524 U.S. 417 (1998) (holding that the President may not constitutionally "cancel" a portion of a bill passed by both houses of Congress, even though he could constitutionally veto that portion if it were sent to him as a separate bill.)

297. Wardle, *supra* notes 93, at 221-22. Wardle states:

Since 1789, the broad, general authority of the States to regulate family relations in the absence of virtually any authority of the federal government to directly regulate family relations, has been one of the clearest boundary lines of our federalism. The regulation of family relations historically has been, and as a matter of constitutional law still remains, primarily a matter of state law. Indeed, the Supreme Court of the United States has observed, not infrequently, that the 'regulation of domestic relations [is] an area that has long been regarded as a virtually exclusive province of the states.' Behind the practices of federalism are strong policy values such as respect for the value and appreciation of the need to preserve what Alexander Hamilton described as 'the constitutional equilibrium between the general and State governments' the desire to preserve and foster pluralism, the belief that laws regulating families should reflect local values, respect for the expertise of state courts, and the belief that the federal government has more than enough other important problems to address.

*Id.* & nn. 252-53.

298. Lawton, *supra* note 2, at 2508 (asserting that the American Civil Liberties Union opposes "covenant marriage" as "an impermissible joinder of church and state").



sovereignty, Congress' definitions of "marriage" and "spouse" for all federal spending runs afoul of the Court's proscription against using the spending power to coerce a state into complying with regulations which do not stem from one of Congress' enumerated powers. Thus, Congress' actions have the practical effect of mandating how state officials exercise the "numerous and indefinite" power reserved to the states.

Although many do not support same-sex marriages, those who value a state's right to operate under marriage laws which are in conformance with the will of its people should remember Justice O'Connor's admonition that "the erosion of state sovereignty is likely to occur a step at a time." "If there is any danger, it lies in the tyranny of small decisions—in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell."<sup>299</sup>

As of this writing, no state has formally recognized same-sex marriages,<sup>300</sup> and in light of Section 3 of the DOMA none may ever do so. A contemporary and cynical version of the "Golden Rule" may be at work here: "Those with the gold make the rules." But if its real effect on the states' ability to define the marriage relationship for their people is fully considered, Section 3 of the DOMA will be seen to invade the "core of state sovereignty reserved by the Tenth Amendment."<sup>301</sup>

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299. *South Carolina v. Baker*, 485 U.S. at 533 (O'Connor, J., dissenting) (quoting TRIBE, *supra* note 24, at 381).

300. See Wardle *supra* note 292, at 32. See also Charles J. Butler, *The Defense of Marriage Act: Congress' Use of Narrative in the Debate Over Same-Sex Marriage*, 73 N.Y.U. L. REV. 841, 863 n.136 (1998). On November 3, 1998 the people of Hawaii approved a state constitutional amendment that allows Hawaii's legislature to refuse marriage licenses to same-sex couples, and a case pending before the Hawaii Supreme Court which seeks to compel the issuance of such a marriage license is about to start another round of briefing. See Ellen Goodman, *For Gays Seeking Marriage, A Long Wait Before "I Do,"* THE BOSTON GLOBE, Jan. 3, 1999, at E7. On the same day Alaska's voters approved a state constitutional amendment which limits marriage licenses to heterosexual couples. Meanwhile, an Alaska state court lawsuit claiming equal protection and privacy violations for gay and lesbian couples who are denied marriage licenses must be "harmonized" with the new amendment. See Liz Ruskin, *Gay Marriage Ban Approved*, ANCHORAGE DAILY NEWS, Nov. 4, 1998, at A1. In Vermont, that state's supreme court recently heard oral argument in a case which seeks to compel the issuance of marriage licenses to same-sex couples. Harvard law Professor Lawrence Tribe has described Vermont's legal argument in that case as "insane." Lois R. Shea, *Same Sex Marriage Hopes Go North*, THE BOSTON GLOBE, Nov. 17, 1998, at B1. See generally J. Wiggins, *Maine's "Act To Protect Traditional Marriage and Prohibit Same-Sex Marriage: Questions of Constitutionality Under State and Federal Law*, 50 MAIN L. REV. 345, 393-94 (1998).

301. *New York v. United States*, 505 U.S. 144, 177 (1992).

