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Constitutionally Defending Marriage: The Defense of Marriage Act, Romer v. Evans and the Cultural Battle They Represent

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CONSTITUTIONALLY DEFENDING MARRIAGE: The Defense of Marriage Act, Romer v. Evans and the Cultural Battle They Represent

I. INTRODUCTION.

There is a battle raging in America as real as any military battle fought by American soldiers in the jungles of Vietnam or on the deserts of Iraq. It is a battle pitting brother against sister, parents against children, American against American. The objective: "the domination of one cultural and moral ethos over all others." This domination occurs in the law when one group wins a court decision consistent with that group's view of what truth is. This comment will first examine the clash of two views of truth. Then this conflict over truth will be examined by evaluating the constitutionality of the Defense of Marriage Act (DOMA) recently adopted by Congress.

1. I wish to thank the people who served as sounding boards for many of the ideas expressed in this comment. I am especially grateful to Professor William Woodruff for his input regarding the applicability of the Defense of Marriage Act to one's sexual orientation, to Professor Richard Bowser for his helpful editorial comments, and to my wife, Amy.


1 U.S.C.A. § 7. Definition of "marriage" and "spouse"

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

28 U.S.C.A. § 1738C. Certain acts, records, and proceedings and the effect thereof

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
signed into law by President Clinton and the impact of Romer v. Evans on the Act.

The question of first importance when conducting a constitutional analysis is whose view of truth will judges and legislators use when deciding cases and enacting laws. The lens through which one looks at the Constitution, legislative enactments, city ordinances or even a posted speed limit is the lens of world view. Noted intellectual, apologist, and moral philosopher Francis A. Schaeffer writes:

People have presuppositions, and they will live more consistently on the basis of these presuppositions than even they themselves may realize. By presuppositions we mean the basic way an individual looks at life, his basic world-view, the grid through which he sees the world. Presuppositions rest upon that which a person considers to be the truth of what exists. People's presuppositions lay a grid for all they bring forth into the external world. Their presuppositions also provide the basis for their values and therefore the basis for their decisions.5

As a result, how one views the world will dictate one's decisions, conclusions, and arguments. To begin the debate over homosexual marriage with a constitutional analysis misses this most basic question of world view. For neither side in this war will be able to understand the other side's arguments until they understand what that side's presuppositions are that lead to their view of what truth is.

The cultural war which homosexual marriage represents pits two world views in stark conflict, illuminating each side's view of the truth. One side views truth as subjective and pliable by changes in the culture. The other side views truth as tied to an objective standard. How one aligns along either of these two sides determines how one argues a legal position or judges a dispute.

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A. World View #1 — Truth is subjective.

The world view that truth is subjective is displayed in the writings of many same-sex marriage and gay rights proponents. Ms. Deborah Henson provides an insight into the view many gay rights proponents have concerning what standard should be used to decide policy issues involving homosexuality. She writes:

"enacting legislation or deciding cases based on majoritarian morality is specious at best. First, the moral code changes with the times. Second, majoritarian morality is simply an inequitable and illogical basis on which to support lawmaking that pertains to such an important and personal institution as marriage." Ms. Henson's world view is based on the belief that truth is subjectively molded by the current culture and is demonstrative of same-sex marriage proponents.

She goes on to conclude that moral neutrality is the best approach and that, "judges should abandon moral bases in judicial decision-making" based on her claim of increased acceptance of "alternatives to the traditional heterosexual lifestyle." Ms. Henson's world view is based on the belief that truth is subjectively molded by the current culture and is demonstrative of same-sex marriage proponents.

B. World View #2 — Truth is tied to an objective standard.

The other view of truth is that it is tied to an objective standard. The Congressional Record is replete with comments made by congressmen and senators referring to an objective standard of truth. The Congressional Record reflects that this traditional moral basis is one of the strongest impetuses for the promulgation of the DOMA. Congressman Talent emphasizes "standards" of right and wrong "sanctioned by millennia of tradition" and supported by Judeo-Christian teachings. Congressman Barr emphasizes that "we must maintain a moral [and ethical] foundation" in America. Congresswoman Seastrand says the bill will "fortify marriage against the storm of revisionism."

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7. Id. at 596.
These comments are demonstrative of persons expressing the view that homosexuality is morally wrong and should not be encouraged by the state. This group believes that truth is objective and the standard is not societal relevance but traditional religious teachings of morality.

C. Clash of world views in Romer v. Evans.\textsuperscript{11}

These two world views are in constant conflict. One of the clearest examples of this conflict in the courts is the recent decision of \textit{Romer v. Evans}. The distance between the reasoning in \textit{Romer} and the reasoning in \textit{Bowers v. Hardwick},\textsuperscript{12} decided only ten years earlier, provides an example of judges taking sides in the cultural battle.\textsuperscript{13} The Supreme Court in \textit{Romer}, declared a Colorado Constitutional Amendment (Amendment 2) prohibiting special rights for homosexuals invalid because it “seems inexplicable by anything but animus towards the class it affects.”\textsuperscript{14} The majority opinion written by Justice Kennedy, however, did not address how this “animus” applied to uphold the State of Georgia’s anti-sodomy law determined to be constitutional in \textit{Bowers}.\textsuperscript{15}

In \textit{Bowers v. Hardwick} the Court declared that a majority belief that homosexuality is immoral and unacceptable constituted a rational basis for upholding Georgia’s anti-sodomy law.\textsuperscript{16} On the other hand, the \textit{Romer} majority opined, “[b]y requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.”\textsuperscript{17} In Justice Kennedy’s view, a legitimate legislative end does not include an activity seen by a majority of the voters as immoral.

Justice Kennedy never clearly states what he means by “animus.” However, later in the opinion he does dismiss the “primary rationale” of “religious objections to homosexuality” as being so far

\begin{footnotesize}
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\item \textsuperscript{11} 116 S. Ct. 1620 (1996).
\item \textsuperscript{12} 478 U.S. 186 (1986) (upholding Georgia anti-sodomy laws as constitutional).
\item \textsuperscript{13} For an insightful examination of Romer v. Evans see Richard F. Duncan, \textit{Wigstock and Kulturkampf: Supreme Court Storytelling, the Culture War, and Romer v. Evans}, 72 \textit{NOTRE DAME L. REV.} 345 (1997).
\item \textsuperscript{14} 116 S. Ct. at 1627.
\item \textsuperscript{15} Bowers v. Hardwick, 478 U.S. 186 (1986).
\item \textsuperscript{16} \textit{Id.} at 196.
\item \textsuperscript{17} Romer, 116 S. Ct. at 1627.
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removed from Amendment 2 that they warrant no credit.\footnote{Id. at 1629.} The only valid rationale is the “changing” view of some accepting homosexuality as an “alternative lifestyle.”

Justice Scalia, on the other hand, in his dissent to \textit{Romer} seems to accurately discern what the “animus” Justice Kennedy refers to is. Justice Scalia writes that the “only sort of ‘animus’ at issue here [is] moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in \textit{Bowers}.”\footnote{Id. at 1633.} Justice Scalia’s view that truth is tied to an objective standard is evidenced throughout his dissent by references to “traditional moral values,”\footnote{Id. at 1636.} and “our moral heritage.”\footnote{Id. at 1633.}

\textit{Romer} presents a clear battle over truth expounded by the majority and the dissent. The majority sees truth as pliable by culture and not tied to any objective standard. The dissent views truth as tied to an objective standard of right and wrong. In fact, Justice Scalia recognizes the reality of the battle when he states, “... I think it no business of the courts (as opposed to the political branches) to take sides in this culture war”\footnote{Id. at 1637 (Scalia, J., dissenting). Justice Scalia is referring to a quote from Murphy v. Ramsey, 114 U.S. 15, 45 (1885), which rejected a constitutional challenge to a federal statute denying recognition of statehood if those in the territory engaged in polygamy. The Murphy court stated: [C]ertainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement. \textit{Id.} Justice Scalia refused to apply this quote as praise for homosexual monogamy.} and later, “[w]hen the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars, reflecting the view and values of the lawyer class...”\footnote{Romer, 116 S. Ct. at 1637.}

With an understanding of these two prepositional views of truth we now turn to examine one skirmish in this cultural war.
the issue of homosexual marriage in the context of the constitutionality of the Defense of Marriage Act. Specifically, this comment will examine the DOMA to determine whether it is constitutional under the Full Faith and Credit Clause and whether it denies homosexuals equal protection of the law in light of the recent Supreme Court decision in *Romer v. Evans*.

II. EVENTS LEADING UP TO THE ENACTMENT OF THE DEFENSE OF MARRIAGE ACT.

Not since Plato's recommendation that the institution of marriage and the family be replaced by the state has our concept of what marriage means been challenged as it is today by same-sex marriage proponents. The Hawaii Supreme Court recently declared that a Hawaii statute denying people of the same sex the right to marry amounted to denial of equal protection of the law, specifically gender based sexual discrimination. The court held the statute to be unconstitutional under the Hawaii Constitution unless the state could demonstrate "that (a) the statute's sex-based classification is justified by compelling state interests and (b) the statute is narrowly drawn to avoid unnecessary abridgment of the applicant couples' constitutional rights." In an attempt to prevent the Hawaii Supreme Court from redefining marriage for every state Congress recently passed the Defense of Marriage Act.

Those expressing opinions on the constitutionality of DOMA break down into two groups. The first group believes the act is unconstitutional because it intrudes into a problem best handled

24. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST art. IV § 1.


28. Id. at 64.

29. On December 3, 1996, the Circuit Court of Hawaii determined that the State did not meet the requirements of a narrowly tailored and compelling government interest necessary to satisfy the strict scrutiny test and therefore found that it was unconstitutional as a matter of law to deny homosexual couples a marriage license. Baehr v. Miike, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. (1996)).
by the states,\textsuperscript{30} it is an unprecedented use of the Full Faith and Credit Clause,\textsuperscript{31} and it violates Equal Protection\textsuperscript{32} when analyzed under the framework of \textit{Romer v. Evans}.\textsuperscript{33} This group also believes that DOMA is unnecessary. The second group believes DOMA is constitutional for three principle reasons: DOMA protects the autonomy of both the individual states and of the federal government; Congress clearly has the power to legislate the Act using the Full Faith and Credit Clause; and the recent Supreme Court decision in \textit{Romer v. Evans}\textsuperscript{34} does not provide grounds for dismissing DOMA as unconstitutional.\textsuperscript{35}

I will examine the following arguments: the power of Congress to use the Full Faith and Credit Clause to enact this legislation; the effect of DOMA on the right of States to allow or prohibit same sex marriage; the fate of DOMA under \textit{Romer v. Evans};\textsuperscript{36} and whether DOMA is a necessary piece of legislation.

III. DOMA IS NOT UNCONSTITUTIONAL UNDER THE FULL FAITH AND CREDIT CLAUSE OF THE CONSTITUTION.

Professor Lawrence Tribe, Professor of Constitutional Law at Harvard Law School, argues that DOMA is an exception to the Full Faith and Credit Clause and therefore is, "plainly unconstitutional, both because of the basic 'limited-government' axiom that ours is a National Government whose powers are confined to those that are delegated to the federal level in the Constitution itself, and because of the equally fundamental 'states'-rights' postulate that all powers not so delegated are reserved to the states and their people."\textsuperscript{37} Professor Tribe, along with Professor Sunstein, take issue with the "negative" rather than "unifying" or affirmative language of DOMA. These eminent professors' rejection,
based upon their categorization of DOMA as an exemption to the Full Faith and Credit Clause, is not warranted, in fact, their concern for limited government is more fully guaranteed by the Act.

A. Congress has the power to enact §2 of DOMA using "negative" phrasing.

Critics of DOMA argue that §2 is invalid because it is an exception to the purpose of full faith and credit, or that it is invalid as an unprecedented use of the Full Faith and Credit Clause. They claim it is an exception to full faith and credit because it allows a state not to give full faith and credit to a same-sex marriage recognized in another state and is therefore a negative rather than affirmative use of the clause. They go so far as to say this "negative" use of full faith and credit is unprecedented. However, it is not unprecedented and has already withstood constitutional scrutiny by the Supreme Court in its analysis of the Parental Kidnapping Prevention Act (PKPA).

Under the Full Faith and Credit Clause, Congress can either affirmatively or negatively define the effect that acts, records, and judgments from one state have upon another state. The PKPA is an example of such a negative effect. The PKPA limits states to only three jurisdictional bases upon which they may afford full faith and credit to custody decrees of another state. Therefore, states cannot give full faith and credit to custody decrees based upon any other jurisdictional base. This statute was challenged in Thompson v. Thompson, where the Supreme Court stated, "As the legislative scheme suggests, and as Congress explicitly specified, one of the chief purposes of the PKPA is to 'avoid jurisdic-

38. Id.
39. Id.
40. Id.
42. These jurisdictional bases are: (1) the State exercising jurisdiction must be the home state of the child on the date of commencement of the proceeding, or the child's home must have been in the state within six months before the date of commencement of the proceeding and the contestant continues to live in the state; (2) no other state would have jurisdiction under (1) and it is in the best interest of the child that the court assume jurisdiction; (3) child is physically present in the State and the child has been abandoned or there exists the threat of abuse. 28 U.S.C.A. § 1738A(c)(2)(A-D) (West 1996).
tional competition and conflict between State courts.' 44 This same statement by the Court applies to DOMA in the context of avoiding jurisdictional competition and conflicts between state courts. Under DOMA there would be no jurisdictional competition or conflicts between states as to the effect of same-sex marriages because the right of states to not "be required to give effect to...[same-sex marriage]...under the laws of such other state" 45 is explicitly protected.

The Supreme Court has consistently searched for the purpose of legislation without concerning itself with whether the language is affirmative or negative. In University of Tennessee v. Elliott, 46 a unanimous Court indicated that the intent of Congress is the issue. Elliott, a black employee of the University of Tennessee, was informed that he was to be discharged as a result of inadequate work performance and misconduct on the job. Elliott requested a hearing under the Tennessee Administrative Procedure Act which resulted in a finding that his discharge was not motivated by racial discrimination. Elliott also filed suit in the United States District Court seeking relief under Title VII for racial discrimination. The University of Tennessee contended that Elliott's claim was precluded as to Title VII due to the full faith and credit requirement that federal courts must give to the acts of state administrative agencies under 28 U.S.C. 1738. 47 However, the Supreme Court held that full faith and credit only governs judgments and records of state courts that have been reviewed by a federal court. In reaching this conclusion the Court

44. Thompson, 484 U.S. at 175.
46. 478 U.S. 788, 797 (1986).
47. 28 U.S.C. § 1738 (West 1996) states:

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.
stated, "invoking the presumption against implied repeal, petitioner distinguishes Chandler as involving a federal agency determination not entitled to full faith and credit under § 1738. [citations omitted]. . . The question actually before us is whether a common-law rule of preclusion would be consistent with Congress' intent in enacting Title VII." As demonstrated by Justice White's opinion in Elliott, critics promulgating an argument based upon affirmative and negative language miss the point of the Court's analysis, being, congressional intent.

Finally, as Professor Wardle notes in his remarks to the Senate Judiciary Committee, the distinction between affirmative and negative language is basically meaningless - a negative may be made affirmative by the use of different words. Any rule, including §2 of DOMA, may be stated in affirmative or negative language. To state §2 affirmatively, "marriages between a man and a woman that are valid in the state where performed must be recognized in other states, or all marriages valid where performed must be recognized unless they violate the strong public policy of the other state." As a result, the negative/affirmative argument is not persuasive.

B. The DOMA protects states' autonomy by allowing them to choose whether they wish to recognize same-sex marriages.

Professor Tribe also dismisses DOMA based on a states' rights argument. He and Professor Sunstein agree that DOMA is an, "ill-advised intrusion into a problem [meant to be] handled at the state level." However, a reading of the plain language of DOMA contradicts these assertions. DOMA is not an intrusion by the federal government into an area reserved for the states, to the contrary, it is necessary to protect the autonomy of states.

Section 2 of DOMA uses the words, "No State . . . shall be required." These five words clearly show that Congress does not
intend to require a state to do anything. Congress is merely recognizing an already existing state right to disregard an act, judgment, or decree when it violates a state's legitimate public policy. While Professor Tribe may be correct in his assertion that DOMA is redundant in that it reiterates a right that states already possess, he is incorrect to assert that as a result DOMA is unnecessary. In fact, given recent decisions by the Supreme Court espousing "elitist" views of societal values, Congress is being prudent in passing this act and reinforcing the constriction of judicial discretion in the interpretation of the laws.

The principle of federalism "protects the integrity of the states from possible overreaching by the national government, while the Full Faith and Credit Clause protects the states from possible overreaching by each other." DOMA protects states that do not wish to recognize same-sex marriage from forced recognition under the Full Faith and Credit Clause instigated by individuals desiring to advance a gay rights agenda. In the wake of recent Supreme Court decisions like Romer v. Evans, and United States v. Virginia, DOMA is a timely piece of legislation that protects states' autonomy by prohibiting pro-same-sex marriage states from forcing their policy on other states. It is no secret that gay marriage advocates see Hawaii's Baehr v. Lewin

53. See Nevada v. Hall, 440 U.S. 410, 422 (1979) ("[T]he Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy.").
58. 116 S. Ct. 1620.
59. 116 S. Ct. 2264 (1996) (finding no "exceedingly persuasive justification" for state's action in funding all male military college).
60. See Healy v. Beer Inst., 491 U.S. 324, 335 (1989) (Constitution has a "special concern" for protecting "the autonomy of the individual States within their respective spheres."); Bonaparte v. Tax Court, 104 U.S. 592, 594 (1881) ("No state can legislate except with reference to its own jurisdiction.").
61. 852 P.2d 44 (Haw. 1993).
decision as a mechanism with which to introduce same sex marriage in every state.

Gay marriage advocates unashamedly advance their agenda. Ms. Deborah M. Henson outlines a detailed argument on how homosexuals, married in a state recognizing homosexual marriage, may gain incidents of marriage and recognition of the marriage in a state not recognizing homosexual marriage by using the Full Faith and Credit Clause. Ms. Henson recognizes that in order to accomplish this revolution courts must “revitalize” the Full Faith and Credit Clause towards the purpose of states not being able to apply their own laws, “even if it had the requisite ‘contact’...if, in so doing it would impair a predominant interest of a sister state or violate a national interest.” A more blatant attack on state autonomy is difficult to conceive. Not only would DOMA protect states who do not desire to recognize homosexual marriages, but it would prevent gay rights proponents from abusing the federal judicial system to advance their agenda, and it would clearly define the “national interest” as being in support of heterosexual marriage.

DOMA would prevent gay rights proponents from using the federal judiciary to advance causes that are best suited for the legislature. The place of the judiciary has been to expound upon the Constitution, not to substitute the will of the members of the Supreme Court for the will of the people. This abuse of the judicial system to advance countermajoritarian agendas defeats the ability of the American people to let their voices be heard in state legislatures and in the Congress of the United States. Americans have demonstrated this aversion to judicial replacement of the legislative will by their poignant reaction to the Hawaii Supreme Court’s likely decision to recognize gay marriage. Currently ten states have passed statutes banning same-sex marriage and

62. Henson, supra note 6, at 584-91.
63. Id. at 588 (citing EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS §13.1-2 n.5, at 102 (2d ed. 1992)).
64. See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
twenty-three states have introduced legislation to ban same-sex marriage. Likewise, DOMA provides a semblance of restraint on the Federal Judiciary by defining the meaning of marriage and displaying the intent of Congress to protect the traditional meaning of the word from those that wish to redefine it.

The legislative history of DOMA also clearly defines the defense of the traditional marriage as a substantial government interest. The national interest in protecting traditional marriage is both pragmatic and central to the definition of a family. DOMA is pragmatic because it protects the definition of "marriage" that permeates federal law and benefit programs. A redefinition, especially by the judicial branch, would not coincide with the legislative intent of the passage of numerous prior laws. DOMA is central to the definition of a family because it statutorily protects the traditional definition of the family and prevents it from further breakdown.

The Supreme Court has recognized that Congress has a "substantial interest" in "balancing the interests" of states by "prevent[ing] [one state's] policy from dictating" what the legal policy of other states will be. In United States v. Edge Broadcasting Company, the Supreme Court upheld a restriction on free speech embodied in 18 U.S.C. §1304, forbidding broadcasters from carrying advertisements for lotteries if lotteries were forbidden in

66. The following states have introduced legislation banning same-sex marriage: Alabama, Alaska, Colorado, Florida, Hawaii, Illinois, Kansas, Kentucky, Maryland, Michigan, Mississippi, Missouri, New Jersey, New Mexico, New York, North Carolina, Pennsylvania, South Carolina, Tennessee, Washington, West Virginia, Wisconsin, Wyoming. Two states have introduced legislation designed to recognize homosexual marriage, they are: Delaware and Nebraska.

67. However, this has been done with the Fourteenth Amendment originally enacted to prohibit discrimination based on race. It now has been interpreted to apply to everything from homosexuality (Romer v. Evans, 116 S. Ct. 1620 (1996)) to debasement of votes (Baker v. Carr, 369 U.S. 186 (1962)).

68. Hearings on S.1740 Before the Senate Comm. on the Judiciary, 104th Cong., 2nd Sess. (July 10, 1996) (statement of Gary L. Bauer, "[o]ften I am asked, what does it matter if two men or two women down the street want to call what they have 'marriage?' Why does that hurt you or your marriage? Well it doesn't — unless they bring the law into it. Then the fiction is imposed on everyone and the counterfeit will do great harm to the special status that the genuine institution has earned...marriage is a unique bonding of the two sexes, with the probable expectation of procreation of children. It is the core of civilization and is universally honored.").

70. Id.
the state in which the broadcaster was located. The broadcaster who challenged the law was located in North Carolina, which prohibited lotteries, but 90% of the listeners lived in Virginia, where lotteries were legal.\textsuperscript{71} Even though the overwhelming majority of listeners lived in a state where allowing lottery advertisements would not violate its public policy, the Court held that the "congressional policy of balancing the interests of lottery and non-lottery states" was a "substantial governmental interest" that justified even the prohibition of free speech.\textsuperscript{72} A "substantial government interest" existed in \textit{Edge} because Congress had passed a statute expressing the interest.

Similarly, DOMA establishes a "substantial government interest" that recognizes a non-homosexual marriage state's right to have its laws honored.\textsuperscript{73} DOMA sets out this government interest in the plain meaning of Section 1738C by stating, "No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . ."\textsuperscript{74} Congress unequivocally recognizes the autonomous State's interest that justifies the prohibition of same-sex unions. As a result, Professor Tribe's rejection is unwarranted. He extols the virtues of limited government while at the same time rejecting an Act that guarantees limited government and state autonomy.

C. DOMA legitimately defines the meaning of "marriage" for the purpose of distributing federal benefits.

Another reason that DOMA is not "pointless" or "irrelevant" is that it closes a back door through which homosexual marriage proponents could enter and render a state's policy on marriage irrelevant. This back door is the redefinition of marriage in order to obtain federal benefits that would be available even in states that do not recognize homosexual marriage. Apart from DOMA it

\textsuperscript{71} The summary of the case is taken from Professor Wardle's statement to the Senate Judiciary Committee.

\textsuperscript{72} \textit{Edge}, 509 U.S. at 428.

\textsuperscript{73} See Thomas v. Washington Gas Light Co., 448 U.S. 261, 272 (1980) ("to vest the power of determining the extraterritorial effect of a State's own laws and judgments in the [first] State itself risks the very kind of parochial entrenchment on the interests of other States that it was the purpose of the Full Faith and Credit Clause . . . to prevent").

\textsuperscript{74} Section 2. Powers Reserved of the States. See \textit{supra} note 3.
would be possible for a homosexual couple to marry in a state recognizing homosexual marriage, move to a state where the marriage is not recognized, and then collect federal benefits of the marriage, but not enjoy the state benefits of the marriage. Section 3 of DOMA would shut the door on this loophole.

Case law is clear that Congress may use federal law to regulate federal benefits.\(^{75}\) DOMA is not directing states to accept the federal definition of marriage in §3, it is merely defining the historic definition of marriage under federal law and clarifying who is eligible to receive federal benefits when previously unambiguous words like "marriage" and "spouse" are used.\(^{76}\) Therefore, it is difficult to see how defining marriage as one man and one woman is unconstitutional\(^{77}\) unless one considers Romer's equal protection analysis or the arguments claiming that men and women who wish to marry someone of the same-sex are somehow being sexually discriminated against.\(^{78}\)

As a result, it is evident that DOMA is not pointless. It addresses an important void in the law created by attempts to redefine marriage. DOMA does not impinge on states' rights but in fact protects states from the possible undermining of their laws prohibiting homosexual marriage. Finally, DOMA does not abuse the use of the Full Faith and Credit clause because Congress has demonstrated and the Supreme Court has affirmed that using the Clause in a non-affirmative manner is legitimate.

IV. IMPACT OF ROMER V. EVANS ON THE DOMA.

In 1992 the citizens of the State of Colorado adopted an amendment to their constitution, commonly referred to as Amendment 2, in an attempt to prohibit homosexuals from gaining special rights including preferential treatment as a class.\(^{79}\) Various


\(^{76}\) See discussion infra Part IV C 2.

\(^{77}\) Even Professor Sunstein does not believe §3 would be found unconstitutional.

\(^{78}\) See Baehr v. Lewin, 852 P.2d 44 (Haw. 1993); Henson, supra note 6.

\(^{79}\) The amendment reads:

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groups initiated litigation in order to have Amendment 2 declared unconstitutional. The Colorado District Court enjoined enforcement of the amendment and the State of Colorado appealed to the Colorado Supreme Court which affirmed the District Court injunction. The Supreme Court of the United States affirmed the Colorado Supreme Court and held that Amendment 2 violated the Equal Protection Clause because it was too broad, and because it served no state interest or legitimate purpose. The *Romer* decision does nothing to impair the constitutionality of DOMA.

DOMA differs from the Colorado Constitutional amendment of *Romer* in at least three distinct ways: (A) DOMA applies no matter what one's "orientation" is. DOMA applies to homosexuals and heterosexuals alike. (B) DOMA is much more limited in scope than Amendment 2. DOMA only applies to the area of marriage, it does not extend to laws of general applicability. (C) DOMA is consistent with our constitutional tradition and protects a compelling government interest of the highest order.

A. **DOMA applies irrespective of an individual's sexual orientation.**

The Supreme Court rejected Amendment 2 in *Romer*, because it was "a status based enactment...[and] a classification of persons undertaken for its own sake." DOMA, on the other hand, is a conduct based piece of legislation. DOMA was not undertaken for its own sake, but was enacted to protect the historical definitions of marriage and spouse. While DOMA creates a disparate impact on homosexuals the impact does not make DOMA unconstitutional.

Proponents of same sex marriage would correctly argue that DOMA creates a disparate impact on the class of people who are of

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No protected status based on homosexual, lesbian, or bisexual orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

COLO. CONST. art II, § 30b.
81. *Id.*
82. *See* discussion *infra* Part IV C.
the same sex and desire to marry. However, laws creating a disparate impact are not per se unconstitutional. Congress and states regularly make policy decisions that cause a disparate impact on one group.83

For example, if a person is an alcoholic, and arguably an alcoholic because of a genetic predisposition towards alcoholism, the person belongs to the “class of alcoholics.” But being a member of the class of alcoholics does not give him or her the right to drive while intoxicated. Society has determined that those alcoholics belonging to the class of alcoholics who drive under the influence of alcohol can be discriminated against with not only societal disapproval, but through fines, suspension of the license to drive and even imprisonment. To say that the alcoholic has a right to drink and drive because he or she is a member of a class of alcoholics is obviously misguided. However, this same reasoning is sometimes used by same sex marriage proponents. They claim that because of one’s sexual “orientation,” as a result of a genetic predisposition, a right to marry another of the same sex is somehow realized.84 Like the alcoholic claiming a right to drink and drive, they are claiming a right that does not exist and has never existed.

DOMA is also similar to the employment field. Employers can enforce policies that deprive people of a job based on conduct. For example, two employees of the New York City Transit Authority challenged the Transit Authority’s policy against employing persons who use narcotic drugs as being in violation of, among other things, the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The Supreme Court noted that the regulation did not violate equal protection.

83. In addition to the two examples given below the Equal Access to Justice Act is also insightful. The Act allows a monetary award for a prevailing party in an adjudication before an agency of the United States Government to recover fees and expenses involved in the action. 5 U.S.C.A. § 504(a)(1) (West 1996). The act goes on to exclude those whose net worth is more than $2 million. Federal Reserve System Hearing Rules, 12 CFR § 263.103(b)(1) (1996). Therefore, Congress made a policy decision, not to discriminate against the rich, but to determine a point at which one is able to pay for their own defense before a government agency. The class of people whose net worth is over $2 million clearly suffer a disparate impact by being denied the right of recovery under the Equal Access to Justice Act.

84. This conclusion presents another stark conflict of world views. If one views right and wrong as relative to cultural acceptance or disapproval, then the result of approving of homosexual behavior naturally follows. However, if one views right and wrong as resting on absolute standards that do not change then homosexuality cannot be encouraged.
"because it does not circumscribe a class of persons characterized by some unpopular trait or affiliation, [and] it does not create or reflect any special likelihood of bias on the part of the ruling majority."85 The Court recognized that the transit authority did create a class but the conduct discrimination was justified. The United States Code also provides clear evidence that Congress can make policy decisions that discourage certain kinds of behavior and encourage others.86

Additionally, the Constitution poses no barriers to Congress defining marriage in the traditional sense of one man and one woman, and the Supreme Court has recognized that the Constitution provides no right to homosexuals to engage in sodomy.87 In the final analysis DOMA does not conflict with the Court's rejection of Amendment 2 because DOMA was not undertaken for its own sake, and the Constitution does not bar Congress' definition of marriage. DOMA still allows individual states to adopt policies accepting same-sex "marriage." DOMA, in essence, merely states a Federal policy and prevents the Hawaii Supreme Court from redefining marriage for every state and federal purpose.

B. DOMA is much more limited in scope than Amendment 2.

Justice Kennedy, writing for the majority in Romer, raises new questions of constitutional interpretation by stating,

'Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.' [citations omitted] Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. 'The guarantee of 'equal protection of the laws is a pledge of the protection of equal laws.'88

Sandwiched between two citations to traditional equal protection analysis is a new element of jurisprudence, and one could argue

88. Romer, 116 S.Ct. at 1628 (citations omitted) (emphasis added).
that this language may reach whatever end one desires. The first sentence focuses on the rarity of laws that single out a class of people for disfavored treatment. The second sentence focuses on the generality of a law that pre-empts the ability of the class to seek aid from the government through other established laws. These two sentences could lead to different results depending on which sentence receives the focus.

A focus on the first statement, "laws singling out a certain class of citizens for disfavored legal status or general hardships are rare," could be used to argue against DOMA. If one rejects the argument that DOMA's disparate impact upon homosexuals is constitutional, then one could say that because DOMA restricts same-sex partners from receiving federal benefits, then it is a law "singling out a certain class of citizens for disfavored legal status." Therefore, DOMA denies the equal protection of the laws in the most literal sense. However, this position presupposes that a right already exists for homosexual couples to receive benefits in the same way that married heterosexual couples do. Since no such rights exist, there is no constitutional prohibition on disallowing homosexual couples the same benefits as married heterosexuals.

Justice Kennedy's statements are best understood by a focus on the generality of the law and as a result lead to a different conclusion than the analysis discussed above. DOMA is not a general law denying people fundamental rights. It is true that "[m]arriage and procreation are fundamental to the very existence and survival of the race" and as such are fundamental rights. However, a fundamental right to same-sex "marriage" has never been found by any court. Even the Hawaii Supreme Court in Baehr v. Lewin held that "the applicant couples do not have a fundamental constitutional right to same sex marriage arising out of the right to privacy or otherwise." A fundamental right is one that is "implicit in the concept of ordered liberty" or is "deeply rooted in

90. Zablocki v. Redhail, 434 U.S. 374, 376 (1978) (statute burdening fundamental right to marry must pass strict scrutiny test). See also Maynard v. Hill, 125 U.S. 190, 205, 211 (1888) ([M]arriage is "the most important relation in life" and "the foundation of the family and society, without which there would be neither civilization nor progress.); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (recognizing right "to marry, establish a home and bring up children").
this Nation's history and tradition." There is no argument to make for same-sex marriage being a fundamental right unless one uses the standard of cultural relativism. There is no record of homosexual activity being "implicit in the concept of ordered liberty" or of homosexuality being "deeply rooted in our Nation's history and tradition." In fact the opposite is true, homosexuality violates both tests, and as a result homosexuals cannot claim a fundamental right to marry.

Amendment 2 allegedly nullified specific legal protections across a broad spectrum, from housing, real estate, insurance and health benefits, to the "protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings." However, DOMA is very specific, even its harshest critics would agree that it does not nullify the protection of general laws to homosexuals. Since DOMA is not a general law depriving a group of a fundamental right, it does not violate the equal protection clause. In addition to applying Justice Kennedy's analysis, examining DOMA under a strict scrutiny analysis validates its constitutionality.

C. DOMA is consistent with our constitutional tradition and is narrowly tailored to further a compelling government interest of the highest order.

Justice Kennedy refers to Amendment 2 as a "sweeping and comprehensive" change to the legal status of homosexuals. Critics join this observation to the DOMA by taking a later statement of Justice Kennedy that, "[i]t is not within our constitutional tradition to enact laws of this sort," and charging that DOMA is based solely on "animus" because it draws explicitly on sexual orientation. The critics' argument may be answered by examining the compelling government interest of Congress in enacting

93. Id. at 192 (citing Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (Powell, J., concurring)).
94. For a discussion on the historical prohibitions against homosexuality see Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity, 40 U. MIAMI L. REV. 521, 525 (1986).
95. Romer, 116 S. Ct. at 1626.
96. General laws would include those such as housing and real estate. Justice Kennedy completely avoids mentioning the Court's analysis in Bowers, 478 U.S. at 186, decided only 10 years earlier and validating a Georgia anti-sodomy law as constitutional. This type of analysis will be further examined infra Part III.
97. Romer, 116 S. Ct. at 1625.
DOMA. An examination of this interest will show that the law was not enacted as a result of animus. In addition, DOMA survives strict scrutiny analysis because it advances a compelling state interest of the highest order and is "narrowly tailored to further [that] compelling state interest." Evaluating DOMA under the strict scrutiny test shows that DOMA was passed to advance a compelling government interest in at least three ways. DOMA protects state sovereignty, it protects the legislative intent in regulations and laws passed throughout the past 200 years mentioning the words "marriage" or "spouse," and it upholds the historical definition of marriage understood from the traditional moral beliefs of many Americans. DOMA is also narrowly tailored to achieve this government interest.

1. The decision of BMW of North America v. Gore, handed down the same day as Romer, shows how essential it is for each state to be able to decide important legal policy issues for itself.

After Gore purchased a new BMW automobile from an authorized Alabama dealer, he discovered that the car had been repainted. He brought suit for compensatory and punitive damages against the American distributor of BMWs, alleging, that the failure to disclose the repainting constituted fraud under Alabama law. At trial, BMW acknowledged that it followed a nationwide policy of not advising its dealers, and therefore their customers, of pre-delivery damage to new cars when the cost of repair did not exceed 3 percent of the car's suggested retail price. Gore's vehicle fell into that category. The jury returned a verdict finding BMW liable for compensatory damages of $4,000, and assessing $4 million in punitive damages. The trial judge denied BMW's post-trial motion to set aside the punitive damages award, holding, among other things, that the award was not "grossly excessive" and thus did not violate the Due Process Clause of the Fourteenth Amendment. The Alabama Supreme Court agreed, but reduced the

100. While the Romer court makes poignantly clear the fact that legislation may not be enacted based on "animus," the opinion does not go so far as to throw out the rational basis test and even implies that if the Court could have found a rational basis for Colorado's Amendment 2 then it would have passed the test. See Romer, 116 S. Ct. at 1627-29.
award to $2 million on the ground that, in computing the amount, the jury had improperly multiplied Gore’s compensatory damages by the number of similar sales in all States, not just those in Alabama.\textsuperscript{102}

The U.S. Supreme Court held that the award was grossly excessive and therefore violated the constitutional limit. The court reasoned that the inquiry begins by examining the interest of the state the award was designed to serve. The Court concluded that, “while we do not doubt that Congress has ample authority to enact such a policy for the entire Nation, it is clear that no single State could do so, or even impose its own policy choice on neighboring States.” “No State can legislate except with reference to its own jurisdiction. Each State is independent of all the others in this particular.”\textsuperscript{103} Additional examples abound, clearly showing that states only have the power to legislate and adjudicate with regard to their own territory.\textsuperscript{104}

Considering both \textit{Gore} and \textit{Romer} leads to the conclusion that DOMA should be found constitutional because it protects states from infringements resulting from other states’ public policies. However, this infringement upon the public policy of other states is precisely what many same-sex marriage proponents seek.\textsuperscript{105} Critics of DOMA are challenging Chief Justice White’s observation in \textit{New York Life Ins. Co. v. Head},\textsuperscript{106} that it is “obvious” a

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{102}] The facts are taken from the syllabus of the case and the parenthetical explanations contained in the third paragraph, as well as \textit{infra} note 105, are those written by the court in \textit{Gore}, 116 S. Ct. at 1597 n.16.
\item[\textsuperscript{103}] \textit{Gore}, 116 S. Ct. at 1596-97 (citing Bonaparte v. Tax Court, 104 U.S. 592, 594 (1881)).
\item[\textsuperscript{104}] See \textit{Bigelow v. Virginia}, 421 U.S. 809, 824 (1975) (“A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State.”); \textit{New York Life Ins. Co. v. Head}, 234 U.S. 149 (1914):
\begin{quote}
It would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that state . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority, and upon the preservation of which the government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question, and hence authorities directly dealing with it do not abound.
\end{quote}
\textit{Id.} at 161. See also \textit{Huntington v. Attrill}, 146 U.S. 657, 669 (1892) (“Laws have no force of themselves beyond the jurisdiction of the state which enacts them, and can have extra-territorial effect only by the comity of other states.”).
\item[\textsuperscript{105}] \textit{Henson}, \textit{supra} note 6 at 561.
\item[\textsuperscript{106}] 234 U.S. 149, 162 (1914).
\end{enumerate}
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state's statute cannot operate beyond the bounds of the state where the statute is enacted.

2. **DOMA protects the legislative intent in regulations and laws passed throughout the past 200 years which mention the words “marriage” or “spouse.”**

Until very recently no one would have questioned the intent of a legislative body when they enacted a law which included the words “marriage” or “spouse” in it.\(^{107}\) Persons reading the law would immediately know that marriage meant the union of one man and one woman. Additionally one would know that “spouse” meant either the male husband or the female wife of the marriage. DOMA protects these definitions contained in federal and state laws enacted since the founding of this country.

For example, 26 U.S.C.A. § 22, originally passed in 1954 as part of the Internal Revenue Code, uses the words “spouse” and “marriage” to refer to a marriage made up of a husband and wife.\(^{108}\) 5 U.S.C.A. §8901, passed in 1966 and relating to employees’ health insurance, provides certain rights for those who are former spouses, or unremarried former spouses.\(^{109}\) When these pieces of legislation were passed it is highly unlikely that those voting imagined that some day people would seek to apply those same words of spouse and marriage to homosexual couples. In fact the legislature’s intent of a one man one woman marriage is clear in most of these acts by including terms such as husband and wife when referring to the marriage union.\(^{110}\) The legislative intent of these acts may easily be thwarted without DOMA due to

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\(^{107}\) Over 1,000 references are made to “spouse” or “marriage” in the United States Code.


\(^{110}\) See 8 U.S.C.A. § 1101(a)(35) (West 1996) (“The term ‘spouse’, ‘wife’, or ‘husband’ do not include a spouse, wife, or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated.”); 22 U.S.C.A. § 4044(13) (West 1996) (“‘surviving spouse’ means the surviving wife or husband of a participant or annuitant who, was married to the participant or annuitant for at least 9 months immediately preceding his or her death or is a parent of a child born of the marriage . . . .”); 38 CFR § 3.50 (c), reprinted in 38 U.S.C.A. App. (West 1996) (“‘Spouse’ means a person of the opposite sex who is a wife or husband and the term ‘surviving spouse’ means a person of the opposite sex who is a widow or widower...”); 42 U.S.C.A. § 416(h)(1)(B)(i) (West 1996) (“a valid marriage if the insured individual and the person entitled to benefits as the wife or husband of the insured individual ...”).
the probability that the Hawaii Supreme Court will redefine marriage to include persons of the same sex. As a result of this redefinition the intent of the legislature to provide benefits for traditional marriage partners would be made irrelevant and considered out of touch with the current culture.

The holding in *Gore* and the protection of legislative intent when using the words marriage and spouse, however, are not the only grounds supporting DOMA. It is also clear from the Congressional Record that DOMA has a compelling government interest and is not being enacted out of pure animosity towards homosexuals.

3. DOMA upholds the historical definition of marriage derived from the common moral beliefs of many Americans.

A review of the debates over DOMA in the Senate and the House of Representatives contained in the Congressional Record shows that there is a compelling state interest involved and not merely “animus” directed towards homosexuals. This compelling state interest enables DOMA to survive review when tested by the courts. Although Romer used rational basis review, DOMA would survive a strict scrutiny analysis. A review of the debates over DOMA demonstrates compelling government interests and objectives.

The re-introduction of the DOMA by Senator Nickles to the Senate outlines the purposes of the bill. Mr. Nickles suggests that the bill is necessary because of the concern among several states that another state’s recognition of same-sex marriage will compromise their own laws, to “help the Federal Government defend its own traditional and commonsense definitions of “marriage” and “spouse,” and to recognize in law what has been the common understanding of marriage throughout recorded history.111 Senator Nickles says the bill is justified because, “it is based on common understanding rooted in our nation's history, it merely reaffirms what each Congress and every executive agency have meant for 200 years when using the words “marriage” and “spouse”. . . [and] [t]he bill does not change state law . . .[nor] revoke[ ] rights.”112

112. Id.
In *Romer*, the majority emphasizes that, "[i]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." Unlike Colorado’s Amendment 2, nothing in Senator Nickles’ remarks, or the remarks made in the House of Representatives, indicates any bare desire to harm homosexuals. Instead the desire is to protect the institution of marriage and the integrity of federal statutes. One poignant demonstration of the true purpose of the Act is evidenced in Congressman Talent’s support.

In the House of Representatives, Congressman Talent answers those who claim that the bill unjustifiably discriminates against “loving homosexual partners.”

[T]his bill maintains the standards of our society; and whenever you maintain a standard, you necessarily place a burden on those who don’t meet the standard. Our society has a standard against ...polygamy... [and] incest... Our society is hurting so badly that I’m for almost any kind of real love or commitment. But there is a limit to how much we can change the organic institutions of our society in response to the alienation some people feel. We live in a free country, where people can live pretty much as they want. It is free precisely because we have standards... Those who oppose this bill are either seeking no standards or a standard vastly different from that sanctioned by millennia of tradition, the teachings of all the monotheistic religions, and in particular the teachings of Judeo-Christian religion on which our culture is based... Those who support this [homosexual] agenda [in opposition to the bill] are attacking the marriage institution in support of their cultural goals.

Congressman Talent makes clear that the impetus behind the bill is not an attempt to harm homosexuals. The beliefs of many Americans and the motivation behind DOMA are clearly

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113. *Romer*, 116 S.Ct. at 1628 (citing Department of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

114. See also *Romer*, 116 S.Ct at 1628 (“laws enacted for broad and ambitious purposes often can be explained by reference to legitimate public policies which justify the incidental disadvantages they impose on certain persons.”) (emphasis added).

expressed by Congressman Barr's statement that, "the flames of self-centered morality are licking at the very foundations of our society: the family unit . . . we must maintain a moral foundation, an ethical foundation for our families and ultimately the United States of America."116 This belief is evidenced by the flurry of activity in the states to pass statutes invalidating same sex marriage in their states.117 The purpose of DOMA then, is to maintain a standard, a standard that has been historically recognized throughout the world.118

4. DOMA is narrowly tailored to advance a compelling governmental interest.

In order for a statute to pass strict scrutiny analysis it must be "drawn in narrow terms to accomplish those interests [for which it was adopted]."119 A statute demonstrates its narrowness by having no less restrictive means available with which to accomplish the compelling government interests.120 If DOMA is held to be subject to strict scrutiny, there are no less restrictive means to accomplish the compelling government interest of maintaining the traditional definition of marriage than what DOMA provides. Any statute that defines marriage as less than "the union between one man and one woman as husband and wife" would fall short of accomplishing the compelling government interests explained in the previous sections. DOMA does not go so far as to expressly forbid same-sex marriage but acknowledges that the States may still recognize such "marriages." Because any statute requiring less than DOMA would fall short of the compelling government interest and because states may make their own laws in regards to homosexual marriage the Act is therefore narrowly tailored.

D. The future of DOMA.

It would seem clear from the compelling government interests DOMA protects that the courts would have no trouble finding DOMA constitutional. However, the Congressional Record is not

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117. See supra notes 65 and 66.
silent with respect to those opposing DOMA and who view it as a gay-bashing, homophobic piece of legislation. 121 This minority would have the courts redefine marriage if their attempt fails in the open debate of the legislature. This is the same minority that propelled the overturn of a Colorado State Constitutional Amendment approved by a majority of the voters. 122

Since there are both adamant proponents and opponents to the Act, and both emphasize distinct and diametrically opposed world views, the final question comes down not to the best legal analysis or argument, but to which world view courts will adopt. In order to deem homosexual marriage a fundamental right by judicial fiat begs the question that marriage can be defined differently than how it has been defined for millennia. 123 Although marriage has undergone some changes, the changes have always occurred by a consensus of the community and reflected their shared values. The changes were not imposed by a group of elite judges. However, should courts decide to wield their power to examine DOMA they should find compelling government interests to uphold its constitutionality even if they view it as disadvantageous to one group.

The Supreme Court recently recognized that, "laws enacted for broad and ambitious purposes often can be explained by reference to legitimate public policies which justify the incidental disadvantages they impose on certain persons." 124 It would be an overstatement to proclaim DOMA an "ambitious" policy since it merely seeks to define a traditional term in its traditionally understood way. However, Senator Nickles' remarks explain and justify any "incidental disadvantages" DOMA imposes on certain homosexuals. If the definition of marriage along traditional guidelines in order to protect 200 years of congressional intent


122. Romer, 116 S. Ct. at 1629. (Scalia, J., dissenting).

123. See Bowers, 478 U.S. at 194 ("claim that right to engage in...[homosexual behavior] is 'deeply rooted in the Nations history and tradition' or implicit in the concept of ordered liberty' is, at best, facetious").

124. Romer, 116 S. Ct. at 1628.
when legislating using the terms "spouse" and "marriage" is not enough to justify DOMA then it is hard to imagine what could justify it. Additionally, the remarks of the congressmen and congresswomen speaking in defense of DOMA point towards "traditional" notions of morality and definitions of the family as the underpinnings of DOMA.

If courts adopt the world view of "truth as tied to an absolute standard" then DOMA will be found constitutional. If courts adopt the world view that truth is whatever society says it is then DOMA may very well be declared unconstitutional. Unfortunately, DOMA's reliance on morality may be its biggest weakness in the eyes of many on the Supreme Court. One could envision a court throwing moral arguments to the wind and trying to justify the unconstitutionality of DOMA using the "animus" theory advanced in Romer, or something along the lines of the recently invented "exceedingly persuasive justification" test for discrimination based on sex. 125 The evidence from the Congressional Record appears overwhelmingly in favor of DOMA based on protection of the traditional definition of marriage, but unfortunately this protection is viewed by those "incidentally disadvantaged," and others, 126 as animus.

V. CONCLUSION

In conclusion, it would be appropriate to remember a sage observation made by Chief Judge Wilkerson of the 4th Circuit Court of Appeals in Thomasson v. Perry. 127 Judge Wilkerson wrote, "Whether members of the judicial branch agree or disagree with that [legislative] choice is irrelevant, for the Constitution envisions the rule of law, not the reign of judges." 128 This debate over homosexual marriage is ultimately not a legal issue. It is a challenge to whether majoritarian principles of morality, truth tied to an objective standard, can inform public policy. If one de-links traditional moral principles from public policy we sever the constitution from its anchor and are left adrift in a sea of relativism.

126. Those "incidentally damaged" are persons desiring to "marry" someone of the same sex. See also infra note 121.
127. 80 F.3d 915 (4th Cir. 1996).
128. Thomasson, 80 F.3d at 929.
The battle lines have been drawn. Truth as an objective standard and truth as determined by culture are mutually exclusive positions. One view will prevail, and the one that does will shape policy and judicial decisions regarding homosexual marriage. Clearly, the most equitable place for people to voice their opinion is in the legislature where each side is entitled to express their views through their representatives. The people have spoken by overwhelmingly supporting DOMA. However, the courts will most likely end up being the final arbitrators of this issue. If the judges decide to reign, DOMA may easily be shipwrecked on the rocks of revisionism and found unconstitutional. If judges choose the rule of law, DOMA has no legitimate enemies.

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