
**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT
APPEAL NO. 11-17-70**

**M. Louise Ciccone, in her official
capacity as Director of the OFFICE OF
PERSONNEL MANAGEMENT, UNITED
STATES OF AMERICA**

Defendant – Appellant

v.

**REGINALD K. DWIGHT, Bernard J.
Taupin, Nigel Olsson, David Johnstone,
Raymond Cooper, and all others
similarly situated,**

Plaintiffs – Appellees

**Appeal from the United States District
Court for the District of Middlesex,
Sitting at East End**

OPINION OF THE COURT

Mercury, F., Circuit Judge.

This appeal presents constitutional challenges to the Defense of Marriage Act (“DOMA”), 1 U.S.C. § 7, which denies federal economic and other benefits to same-sex couples lawfully married in Middlesex and to surviving spouses from couples thus married. Rather than challenging the right of states to define marriage as they see fit, the appeals contest the right of Congress to undercut the choices made by same-sex couples and by individual states in deciding who can be married to whom.

I. THE FACTS AND HISTORY OF THIS CASE

Multiple same-sex couples married in Middlesex and three surviving spouses of such marriages brought suit in federal district court to enjoin pertinent federal agencies and officials from enforcing DOMA to deprive the couples of federal benefits available to opposite-sex married couples in Middlesex. The state of Middlesex brought a

companion case because of its concern that DOMA will revoke federal funding for programs tied to DOMA's opposite-sex marriage definition, such as Middlesex' state Medicaid program and veterans' cemeteries.

By combining the income of individuals in same-sex marriages, Middlesex's Medicaid program is noncompliant with DOMA, and the Department of Health and Human Services, through its Centers for Medicare and Medicaid Services, has discretion to rescind Medicaid funding to noncomplying states. Burying a veteran with his or her same-sex spouse removes federal "veterans' cemetery" status and gives the Department of Veterans' Affairs discretion to recapture all federal funding for the cemetery.

The district court's judgment declared DOMA unconstitutional and enjoined the federal officials and agencies from enforcing it, but the court stayed injunctive relief pending appeals. The judgment included specific remedies ordered for the named plaintiffs in relation to tax, social security and like claims. The federal defendants¹ have throughout focused solely upon the district court's premise that DOMA is unconstitutional.

II. HISTORY AND BACKGROUND OF DOMA

In 1993, the Hawaii Supreme Court held that it might violate the Hawaii constitution to deny marriage licenses to same sex couples. *Baehr v. Lewin*, 852 P.2d 44, 48, 68 (Haw. 1993). Although Hawaii then empowered its legislature to block such a ruling, Haw. Const. art. I, § 23 – which it did, Act of June 22, 1994, 1994 Haw. Sess. Laws 526 (H.B. 2312) (codified at Haw. Rev. Stat. § 572-1) – the Hawaii decision was followed by legalization of same-sex marriage in a small minority of states, some by statute and a few by judicial decision; many more states responded by banning same-sex marriage by statute or constitutional amendment.

¹ Originally, the Justice Department filed a brief in this court defending Director Ciccone and DOMA against all constitutional claims. Thereafter, altering its position, the Justice Department filed a revised brief arguing that the equal protection claim should be assessed under a "heightened scrutiny" standard and that DOMA failed under that standard. A delay in proceedings followed the Justice Department's about face while defense of the statute passed to a group of Republican leaders of the House of Representatives, the House Legal Advisory Group ("the Legal Group"), who retained counsel and intervened in the appeal to support DOMA. Throughout we refer to the House Legal Group or government interchangeably.

Congress reacted with the same alarm as many state legislatures. Within three years after the Hawaii decision, DOMA was enacted with strong majorities in both Houses and signed into law by President Clinton. The statute must – having only two operative paragraphs – be one of the shortest major enactments in recent history. Section 3 of DOMA, 1 U.S.C. § 7, defines “marriage” for purposes of federal law:

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.

Section 2 absolves states from recognizing same-sex marriages solemnized in other states.

DOMA does not formally invalidate same-sex marriages in states that permit them, but its adverse consequences for such a choice are considerable. Notably, it prevents same-sex married couples from filing joint federal tax returns, which can lessen tax burdens, see 26 U.S.C. § 1(a)-(c), and prevents the surviving spouse of a same-sex marriage from collecting Social Security survivor benefits, e.g., 42 U.S.C. § 402(f), (i). DOMA also leaves federal employees unable to share their health insurance and certain other medical benefits with same-sex spouses.

DOMA affects a thousand or more generic cross-references to marriage in myriad federal laws. In most cases, the changes operate to the disadvantage of same-sex married couples in the half dozen or so states that permit same-sex marriage. The number of couples thus affected is estimated at more than 100,000. Further, DOMA has potentially serious adverse consequences, hereafter described, for states that choose to legalize same-sex marriage.

III. ANALYSIS

The Dwight plaintiffs make two claims or allegations. First, they allege that DOMA denies them equal protection of the laws. While this constitutional phrase is found in the Fourteenth Amendment (“[n]or shall any State...deny to any person within its jurisdiction the equal protection of the laws...”), the truly operative aspect of the

Constitution here is the Due Process Clause of the Fifth Amendment. Ample case law provides that the Fifth Amendment contains the principles of the equal protection clause in the language that states: “No person shall...be deprived of life, liberty, or property, without due process of law.” U.S. CONST. AMEND. V.

Second, the Dwight plaintiffs allege that DOMA violates the rights of the states to regulate, as they see fit, the definition of “marriage” and all of the incidents thereto. They say the power resides at the state, and not federal, level of our government. So, this is a claim involving “federalism” and this constitutional claim has its foundation in the Tenth Amendment, which provides: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. AMEND. X. Invoked as supporting DOMA is the “Spending Clause,” which states in part, “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States....” U.S. CONST., ART. I, SEC. 8.

We analyze the “equal protection” and “federalism” or Tenth Amendment claims separately below. Having said that, we note that this case is difficult for this reason: it couples issues of equal protection and federalism with the need to assess the rationale for a Congressional statute passed with minimal hearings and lacking in formal findings. In addition, Supreme Court precedent offers some help to each side, but the rationale in several cases is open to interpretation. We have done our best to discern the direction of these precedents, but only the Supreme Court can finally decide this unique case.

Although our decision discusses equal protection and federalism concerns separately, it concludes that governing precedents under both heads combine – not to create some new category of “heightened scrutiny” for DOMA under a prescribed algorithm, but rather to require a closer than usual review based in part on discrepant impact among married couples and in part on the importance of state interests in regulating marriage. Our decision then tests the rationales offered for DOMA, taking account of Supreme Court precedent limiting which rationales can be counted and of the force of certain rationales.

A. Equal Protection.

The Plaintiffs' equal protection argument is, at its core, simple: same-sex couples are being treated differently under DOMA (at least in terms of federal recognition of their legal relationship, and in cross-state recognition of their relationship) than opposite-sex couples, and there is no valid justification for so doing. In response, the House Legal Group says that this is an equal protection challenge to DOMA that is foreclosed by existing case law: *Baker v. Nelson*, 409 U.S. 810 (1972). There, a central claim made was that a state's refusal to recognize same-sex marriage violated federal equal protection principles. Minnesota had, like DOMA, defined marriage as a union of persons of the opposite sex, and the state supreme court had upheld the statute. On appeal, the Supreme Court dismissed summarily for want of a substantial federal question. *Id.*

Baker is precedent binding on us unless repudiated by subsequent Supreme Court precedent. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). Following *Baker*, "gay rights" claims prevailed in several well-known decisions, *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Romer v. Evans*, 517 U.S.620 (1996), but neither mandates that the Constitution requires states to permit same-sex marriages. A Supreme Court summary dismissal "prevent[s] lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (*per curiam*). *Baker* does not resolve our own case but it does limit the arguments to ones that do not presume or rest on a constitutional right to same-sex marriage.

Central to this appeal is Supreme Court case law governing equal protection analysis. The Dwight plaintiffs say that DOMA fails under the so-called rational basis test, traditionally used in cases not involving "suspect" classifications. The federal defendants said that DOMA would survive such rational basis scrutiny but now urge, instead, that DOMA fails under so-called intermediate scrutiny. In our view, these competing formulas are inadequate fully to describe governing precedent.

Certain suspect classifications – race, alienage and national origin – require what the Court calls strict scrutiny, which entails both a compelling governmental interest and narrow tailoring. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Gender-

based classifications invoke intermediate scrutiny and must be substantially related to achieving an important governmental objective. Both are far more demanding than rational basis review as conventionally applied in routine matters of commercial, tax and like regulation.

Equal protection claims tested by this rational basis standard, famously called by Justice Holmes the “last resort of constitutional argument,” *Buck v. Bell*, 274 U.S. 200, 208 (1927), rarely succeed. Courts accept as adequate any plausible factual basis, *United States v. Virginia (VMI)*, 518 U.S. 515, 532-33 (1996); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *Craig v. Boren*, 429 U.S. 190, 197 (1976); *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973) (plurality opinion); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-88 (1955), without regard to Congress’ actual motives. Means need not be narrowly drawn to meet – or even be entirely consistent with – the stated legislative ends. *Lee Optical*, 348 U.S. at 487-88.

Under such a rational basis standard, the Dwight plaintiffs cannot prevail. Consider only one of the several justifications for DOMA offered by Congress itself, namely, that broadening the definition of marriage will reduce tax revenues and increase social security payments. This is the converse of the very advantages that the Dwight plaintiffs are seeking, and Congress could rationally have believed that DOMA would reduce costs, even if newer studies of the actual economic effects of DOMA suggest that it may in fact raise costs for the federal government.

The federal defendants conceded that rational basis review leaves DOMA intact but now urge this court to employ the so-called intermediate scrutiny test used by Supreme Court for gender discrimination. Some similarity exists between the two situations along with some differences, compare *Frontiero v. Richardson*, 411 U.S. 677, 682-88 (1973) (plurality opinion) (describing criteria for categorization). But extending intermediate scrutiny to sexual preference classifications is not a step open to us.

First, most circuits, like ours, see *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008), cert. denied, 129 S. Ct. 2763 (2009), have already declined to create a major new category of “suspect classification” for statutes distinguishing based on sexual preference. *Cook* rejected an equal protection challenge to the now-superseded “Don’t Ask, Don’t Tell” policy adopted by Congress for the military, pointing out that *Romer*

itself avoided the suspect classification label. *Cook*, 528 F.3d at 61-62. This binds the panel. *San Juan Cable LLC v. P.R. Tel. Co.*, 612 F.3d 25, 33 (1st Cir. 2010).

Second, to create such a new suspect classification for same-sex relationships would have far-reaching implications—in particular, by implying an overruling of *Baker*, which we are neither empowered to do nor willing to predict. Nothing indicates that the Supreme Court is about to adopt this new suspect classification when it conspicuously failed to do so in *Romer*--a case that could readily have been disposed by such a demarche. That such a classification could overturn marriage laws in a huge majority of individual states underscores the implications.

However, that is not the end of the matter. Without relying on suspect classifications, Supreme Court equal protection decisions have both intensified scrutiny of purported justifications where minorities are subject to discrepant treatment and have limited the permissible justifications. And (as we later explain), in areas where state regulation has traditionally governed, the Court may require that the federal government interest in intervention be shown with special clarity.

In a set of equal protection decisions, the Supreme Court has now several times struck down state or local enactments without invoking any suspect classification. In each, the protesting group was historically disadvantaged or unpopular, and the statutory justification seemed thin, unsupported or impermissible. It is these decisions – not classic rational basis review – that the Dwight plaintiffs and the Justice Department most usefully invoke in their briefs (while seeking to absorb them into different and more rigid categorical rubrics).

The oldest of the decisions, *U.S. Dept. of Agric. v. Moreno*, 413 U.S. 528 (1973), invalidated Congress' decision to exclude from the food stamp program households containing unrelated individuals. Disregarding purported justifications that such households were more likely to under-report income and to evade detection, the Court closely scrutinized the legislation's fit – finding both that the rule disqualified many otherwise-eligible and particularly needy households, and a “bare congressional desire to harm a politically unpopular group.” *Id.* at 534, 537-38.

The second, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), overturned a local ordinance as applied to the denial of a special permit for operating a

group home for the mentally disabled. The Court found unconvincing interests like protecting the inhabitants against the risk of flooding, given that nursing or convalescent homes were allowed without a permit; mental disability too had no connection to alleged concerns about population density. All that remained were “mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding.” *Id.* at 448.

Finally, in *Romer v. Evans*, 517 U.S. 620 (1996), the Court struck down a provision in Colorado’s constitution prohibiting regulation to protect homosexuals from discrimination. The Court, calling “unprecedented” the “disqualification of a class of persons from the right to seek specific protection from the law,” deemed the provision a “status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests.” *Id.* at 632-33, 635.

These three decisions did not adopt some new category of suspect classification or employ rational basis review in its minimalist form; instead, the Court rested on the case-specific nature of the discrepant treatment, the burden imposed, and the infirmities of the justifications offered. Several Justices have remarked on this--both favorably, *City of Cleburne*, 473 U.S. at 451- 55 (1985) (Stevens, J., concurring), and unfavorably, *United States v. Virginia (VMI)*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting).

Circuit courts, citing these same cases, have similarly concluded that equal protection assessments are sensitive to the circumstances of the case and not dependent entirely on abstract categorizations. As one distinguished judge observed:

Judges and commentators have noted that the usually deferential “rational basis” test has been applied with greater rigor in some contexts, particularly those in which courts have had reason to be concerned about possible discrimination.

United States v. Then, 56 F.3d 464, 468 (2d Cir. 1995) (Calabresi, J., concurring) (citing *City of Cleburne* as an example).

There is nothing remarkable about this: categories are often approximations and are themselves constructed by weighing of underlying elements. All three of the cited cases--*Moreno*, *City of Cleburne* and *Romer*--stressed the historic patterns of disadvantage suffered by the group adversely affected by the statute. As with the women, the poor, and the mentally impaired, gays and lesbians have long been the

subject of discrimination. *Lawrence*, 539 U.S. at 571. The Court has in these cases undertaken a more careful assessment of the justifications than the light scrutiny offered by conventional rational basis review.

As for burden, the combined effect of DOMA's restrictions on federal benefits will not prevent same-sex marriage where permitted under state law; but it will penalize those couples by limiting tax and social security benefits to opposite-sex couples in their own and all other states. For those married same-sex couples of which one partner is in federal service, the other cannot take advantage of medical care and other benefits available to opposite-sex partners in Middlesex and everywhere else in the country.

These burdens are comparable to those the Court found substantial in *Moreno*, *City of Cleburne*, and *Romer*. *Moreno*, like this case, involved meaningful economic benefits; *City of Cleburne* involved the opportunity to secure housing; *Romer*, the chance to secure equal protection of the laws on the same terms as other groups. Loss of survivor's social security, spouse-based medical care and tax benefits are major detriments on any reckoning; provision for retirement and medical care are, in practice, the main components of the social safety net for vast numbers of Americans.

After this examination of existing precedent, we now turn to the rationales for DOMA. Despite its ramifying application throughout the U.S. Code, only one day of hearings was held on DOMA, Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 104th Cong. (1996) ("Hearing"), and none of the testimony concerned DOMA's effects on the numerous federal programs at issue. Some of the odder consequences of DOMA testify to the speed with which it was adopted.

The statute, only a few paragraphs in length, is devoid of the express prefatory findings commonly made in major federal laws. E.g., 15 U.S.C. § 80a-1; 16 U.S.C. § 1531; 20 U.S.C. § 1400; 21 U.S.C. § 801; 29 U.S.C. § 151; *id.* § 1001; 42 U.S.C. § 7401. Accordingly, in discerning and assessing Congress' basis for DOMA our main resort is the House Committee report and, in lesser measure, to variations of its themes advanced in the briefs before us. The committee report stated:

[T]he Committee briefly discusses four of the governmental interests advanced by this legislation: (1) defending and nurturing the institution of traditional,

heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce government resources.

H.R. Rep. No. 104-664, at 12 (1996).

The penultimate reason listed above was not directed to section 3--indeed, is antithetical to it--but was concerned solely with section 2, which reserved a state's power not to recognize same-sex marriages performed in other states. Thus, we begin with the others, reserving for separate consideration the claim strongly pressed by the Dwight plaintiffs that DOMA should be condemned because its unacknowledged but alleged central motive was hostility to homosexuality.

First, starting with the most concrete of the cited reasons – “preserving scarce government resources” – it is said that DOMA will save money for the federal government by limiting tax savings and avoiding social security and other payments to spouses. This may well be true, or at least might have been thought true; more detailed recent analysis indicates that DOMA is more likely on a net basis to cost the government money.

But, where the distinction is drawn against a historically disadvantaged group and has no other basis, Supreme Court precedent marks this as a reason undermining rather than bolstering the distinction. *Plyler v. Doe*, 457 U.S. 202, 227 (1982); *Romer*, 517 U.S. at 635. The reason, derived from equal protection analysis, is that such a group has historically been less able to protect itself through the political process. *Plyler*, 457 U.S. at 218 n.14; *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

A second rationale of a pragmatic character, advanced by the House Legal Group's brief, is to support child-rearing in the context of stable marriage. The evidence as to child rearing by same-sex couples is the subject of controversy, but we need not enter the debate. Whether or not children raised by opposite-sex marriages are on average better served, DOMA cannot preclude same-sex couples in Middlesex from adopting children or prevent a woman partner from giving birth to a child to be raised by both partners.

Although the House Report is filled with encomia to heterosexual marriage, DOMA does not increase benefits to opposite-sex couples--whose marriages may in any event be childless, unstable or both--or explain how denying benefits to same-sex couples will reinforce heterosexual marriage. Certainly, the denial will not affect the gender choices of those seeking marriage. This is not merely a matter of poor fit of remedy to perceived problem, *Lee Optical*, 348 U.S. at 487-88; *City of Cleburne*, 473 U.S. at 446-50, but a lack of any demonstrated connection between DOMA's treatment of same-sex couples and its asserted goal of strengthening the bonds and benefits to society of heterosexual marriage.

A third reason, moral disapproval of homosexuality, is one of DOMA's stated justifications:

Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality. This judgment entails both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality. H.R. Rep. No. 104-664, at 15-16 (emphasis added); see also, e.g., 142 Cong. Rec. 16,972 (1996) (statement of Rep. Coburn) (homosexuality "morally wrong").

For generations, moral disapproval has been taken as an adequate basis for legislation, although usually in choices made by state legislators to whom general police power is entrusted. But, speaking directly of same-sex preferences, *Lawrence* ruled that moral disapproval alone cannot justify legislation discriminating on this basis. 539 U.S. at 577-78. Moral judgments can hardly be avoided in legislation, but *Lawrence* and *Romer* have undercut this basis. *Cf. Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

B. Federalism and the Tenth Amendment.

DOMA intrudes extensively into a realm that has from the start of the nation been primarily confided to state regulation – domestic relations and the definition and incidents of lawful marriage – which is a leading instance of the states' exercise of their broad police-power authority over morality and culture. As the Supreme Court observed long ago, "[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."

Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979) (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890)); see also *Loving v. Virginia*, 388 U.S. 1, 7 (1967) (marriage).

Again, there can be no dispute that the subject of domestic relations is the exclusive province of the states. See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004) (quoting *In re Burrus*, 136 U.S. 586, 593, 10 S.Ct. 850, 34 L.Ed. 500 (1890)), and the powers to establish eligibility requirements for marriage, as well as to issue determinations of marital status, lie at the very core of such domestic relations law. The government therefore concedes, as it must, that Congress does not have the authority to place restrictions on the states' power to issue marriage licenses. And indeed, as the government aptly points out, DOMA refrains from directly doing so. Nonetheless, the government's argument assumes that Congress has some interest in a uniform definition of marriage for purposes of determining federal rights, benefits, and privileges. There is no such interest. "The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law. This is especially true where a statute deals with a familiar relationship [because] there is no federal law of domestic relations." *DeSylva v. Ballentine*, 351 U.S. 570, 580, 76 S.Ct. 974, 100 L.Ed. 1415 (1956) (internal citation omitted).

This conclusion is further bolstered by an examination of the federal government's historical treatment of state marital status determinations. Marital eligibility for heterosexual couples has varied from state to state throughout the course of history. Indeed, pursuant to the sovereign power over family law granted to the states by virtue of the federalist system, as well as the states' well-established right to "experiment[] and exercis[e] their own judgment in an area to which States lay claim by right of history and expertise," *United States v. Lopez*, 514 U.S. 549, 580-83, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (Kennedy, J., concurring) individual states have changed their marital eligibility requirements in myriad ways over time. And yet the federal government has fully embraced these variations and inconsistencies in state marriage laws by recognizing as valid for federal purposes any heterosexual marriage which has been declared valid pursuant to state law. See, e.g., *Dunn v. Comm'r of Internal Revenue*, 70 T.C. 361, 366 (1978) ("recognizing that whether an individual is `married' is, for

purposes of the tax laws, to be determined by the law of the State of the marital domicile"); 5 C.F.R. § 843.102 (defining "spouse" for purposes of federal employee benefits by reference to State law); 42 U.S.C. § 416(h)(1)(A)(i) (defining an "applicant" for purposes of Social Security survivor and death benefits as "the wife, husband, widow or widower" of an insured person "if the courts of the State" of the deceased's domicile "would find such an applicant and such insured individual were validly married"); 20 C.F.R. § 404.345 (Social Security) ("If you and the insured were validly married under State law at the time you apply for . . . benefits, the relationship requirement will be met."); 38 U.S.C. § 103(c) (Veterans' benefits); 20 C.F.R. § 10.415 (Workers' Compensation); 45 C.F.R. § 237.50(b)(3) (Public Assistance); 29 C.F.R. §§ 825.122 and 825.800 (Family Medical Leave Act); 20 C.F.R. §§ 219.30 and 222.11 (Railroad Retirement Board); 38 C.F.R. § 3.1(j) (Veterans' Pension and Compensation). Indeed, the only federal statute other than DOMA, of which this court is aware, that denies federal recognition to any state-sanctioned marriages is another provision that targets same-sex couples, regarding burial in veterans' cemeteries, enacted in 1975. See 38 U.S.C. § 101(31).

By way of one pointed example, so-called miscegenation statutes began to fall, state by state, beginning in 1948. But no fewer than sixteen states maintained such laws as of 1967 when the Supreme Court finally declared that prohibitions on interracial marriage violated the core constitutional guarantees of equal protection and due process. See *Loving v. Virginia*, 388 U.S. 1, 6 n. 5, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). Nevertheless, throughout the evolution of the stateside debate over interracial marriage, the federal government saw fit to rely on state marital status determinations when they were relevant to federal law.

The government suggests that the issue of same-sex marriage is qualitatively different than any historical state-by-state debate as to who should be allowed to marry because, though other such issues have indeed arisen in the past, none had become a topic of great debate in numerous states with such fluidity. This court, however, cannot lend credence to the government's unsupported assertion in this regard, particularly in light of the lengthy and contentious state-by-state debate that took place over the propriety of interracial marriage not so very long ago.

Importantly, the passage of DOMA marks the first time that the federal government has ever attempted to legislatively mandate a uniform federal definition of marriage—or any other core concept of domestic relations, for that matter. This is so, notwithstanding the occurrence of other similarly politically-charged, protracted, and fluid debates at the state level as to who should be permitted to marry.

Congress has contemplated regulating the marital relationship a number of times in the past, but always by way of proposed constitutional amendments, rather than legislation. And none of these proposed constitutional amendments have ever succeeded in garnering enough support to come to a vote in either the House or the Senate. See Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 82 WASH. U.L.Q. 611, 614-15 (2004). It is worthy of note that Congress' resort to constitutional amendment when it has previously considered wading into the area of domestic relations appears to be a tacit acknowledgment that, indeed, regulation of familial relationships lies beyond the bounds of its legislative powers. See *id.* at 620 (internal citations omitted) ("Advocates for nationwide changes to marriage laws typically consider amending the Constitution in part because of the widely-accepted view that, in the United States, for the most part, family law is state law. . . . Although the process of passing a law is much easier than amending the Constitution, a law may still be found unconstitutional. Advocates of federal marriage laws are worried that such laws would be in tension with the thesis that family law is state law and for this reason would be found unconstitutional. Reaching marriage laws by amending the Constitution sidesteps this tension.").

The government is certainly correct in its assertion that the scope of a federal program is generally determined with reference to federal law. But the historically entrenched practice of incorporating state law determinations of marital status where they are relevant to federal law reflects a long-recognized reality of the federalist system under which this country operates. The states alone have the authority to set forth eligibility requirements as to familial relationships and the federal government cannot, therefore, have a legitimate interest in disregarding those family status determinations properly made by the states.

IV. CONCLUSION

Invalidating a federal statute is an unwelcome responsibility for federal judges; the elected Congress speaks for the entire nation, its judgment and good faith being entitled to utmost respect. *Gregg v. Georgia*, 428 U.S. 153, 175 (1976) (plurality opinion). But a lower federal court such as ours must follow its best understanding of governing precedent, knowing that in large matters the Supreme Court will correct misreadings (and even if it approves the result will formulate its own explanation).

In reaching our judgment, we do not rely upon the charge that DOMA's hidden but dominant purpose was hostility to homosexuality. The many legislators who supported DOMA acted from a variety of motives, one central and expressed aim being to preserve the heritage of marriage as traditionally defined over centuries of Western civilization. See H.R. Rep. No. 104-664, at 12, 16. Preserving this institution is not the same as "mere moral disapproval of an excluded group," *Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring), and that is singularly so in this case given the range of bipartisan support for the statute.

The opponents of DOMA point to selected comments from a few individual legislators; but the motives of a small group cannot taint a statute supported by large majorities in both Houses and signed by President Clinton. Traditions are the glue that holds society together, and many of our own traditions rest largely on belief and familiarity--not on benefits firmly provable in court.

The desire to retain them is strong and can be honestly held. For 150 years, this desire to maintain tradition would alone have been justification enough for almost any statute. This judicial deference has a distinguished lineage, including such figures as Justice Holmes, the second Justice Harlan, and Judges Learned Hand and Henry Friendly. But Supreme Court decisions in the last fifty years call for closer scrutiny of government action touching upon minority group interests and of federal action in areas of traditional state concern.

To conclude, many Americans believe that marriage is the union of a man and a woman, and most Americans live in states where that is the law today. One virtue of federalism is that it permits this diversity of governance based on local choice, but this applies as well to the states that have chosen to legalize same-sex marriage. Under

current Supreme Court authority, Congress' denial of federal benefits to same-sex couples lawfully married in Middlesex has not been adequately supported by any permissible federal interest.

Germanotta, S. and Bailey, Y.D., Judges, concur.

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DISSENTING OPINION

Bowie, D., and Stardust, Z., Judges, dissenting.

Courts “do...and should accord a strong presumption of constitutionality to Acts of Congress. This is not a mere polite gesture. It is a deference due to deliberate judgment by constitutional majorities of the two Houses of Congress that an Act is [constitutional].” *United States v. Five Gambling Devices*, 346 U.S. 441, 449 (1953) (plurality). “The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act’s constitutionality.” *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981).

Despite this admonition, our colleagues hold the Defense of Marriage Act unconstitutional today. We must part company with them on both the equal protection and federalism issues. Before doing so, however, we discuss that which the majority treats with little or no regard: the historical background of the statute.

1. Defense of Marriage Act Enactment

The Defense of Marriage Act of 1996 “was enacted with strong majorities in both Houses [of Congress] and signed into law by President Clinton.” The House of Representatives voted 342-67 to enact DOMA, and the Senate voted 85-14 to do so. See 142 Cong. Rec. 17093-94 (1996) (House); *id.* at 22467 (Senate). In enacting DOMA, Congress acted to ensure that every sovereign—including each state and the federal government—could make its own determination about same-sex marriage.

To that end, Section 2 of the Defense of Marriage Act, which plaintiffs do not challenge here, provides that no state is required to give effect to another state’s recognition of same-sex marriages. See 28 U.S.C. § 1738C.

Section 3 defines “marriage” as the legal union of one man and one woman and “spouse” as a person of the opposite sex who is a husband or wife. These definitions apply for purposes of federal law only.

DOMA does not bar or invalidate any marriages but leaves states free to decide whether they will recognize same-sex marriage. Section 3 of DOMA simply asserts the federal government’s right as a separate sovereign to provide its own definition which “governs only federal programs and funding.”

Congress, of course, did not invent the meanings of “marriage” and “spouse” in 1996. Rather, DOMA merely reaffirmed and codified the traditional definition of marriage, i.e., what Congress itself has always meant—and what courts and the executive branch have always understood it to mean—in using those words: a traditional male-female couple. See, e.g., Revenue Act of 1921, § 223(b), 42 Stat. 227 (permitting “a husband and wife living together” to file a joint tax return; cf. 26 U.S.C. § 6013(a) (“A husband and wife may make a single return jointly of income taxes”)); Veterans and Survivors Pension Interim Adjustment Act of 1975, Pub. L. No. 94-169, Title I, § 101(31), 89 Stat. 1013, codified at 38 U.S.C. § 101 (“For the purposes of this title—* * * (31) The term ‘spouse’ means a person of the opposite sex who is a wife or husband.”); U.S. Dep’t of Labor, Final Rule, Family Medical Leave Act of 1993, 60 Fed. Reg. 2180, 2190-91 (Jan. 6, 1995) (rejecting, as inconsistent with congressional intent, proposed definition of “spouse” that would have included “same-sex relationships”); *Adams v. Howerton*, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980) (“Congress, as a matter

of federal law, did not intend that a person of one sex could be a ‘spouse’ to a person of the same sex for immigration law purposes.”), *aff’d*, 673 F.2d 1036 (9th Cir. 1982), cert. denied, 458 U.S. 1111 (1982); *Dean v. District of Columbia*, 653 A.2d 307, 314 (D.C. 1995) (Congress, in enacting the District of Columbia’s marriage statute of 1901, intended “that ‘marriage’ is limited to opposite-sex couples”).

We agree with the majority’s notation that DOMA was enacted in response to the Hawaii Supreme Court’s decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). But there is more in the in fact extensive legislative history. The majority states, incorrectly, that “only one day of hearings was held on DOMA.” There were hearings in both Houses as well as extensive floor debates. A subcommittee of the House Committee on the Judiciary held a hearing on May 15, 1996. See *Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. (1996) (“House Hrg.”). It held a mark-up session on May 30. The full Committee held mark-up sessions on June 11 and June 12. The Committee issued its report, H.R. Rep. No. 104-664, on July 9. Floor debate on DOMA and its accompanying rule took place in the House on July 11 and 12. In the Senate, the Senate Judiciary Committee held a hearing on July 11. See *Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong. (1996) (“Senate Hrg.”). Floor debate in the Senate occurred on September 10. Congress recognized that past Congresses uniformly used the words “marriage” and “spouse” to refer solely to opposite-sex couples. See House Rep. 10 (“[I]t can be stated with certainty that none of the federal statutes or regulations that use the words ‘marriage’ or ‘spouse’ were thought by even a single Member of Congress to refer to same-sex couples.”); *id.* at 30 (“Section 3 merely restates the current understanding of what those terms mean for purposes of federal law.”); 142 Cong. Rec. 16969 (1996) (Rep. Canady) (“Section 3 changes nothing; it simply reaffirms existing law.”); *id.* at 17072 (Rep. Sensenbrenner). DOMA thus was intended to ensure that the meaning of federal statutes already on the books, and the legislative judgments of earlier Congresses, would not be altered by changes in state law. See House Hrg. 32 (Rep. Sensenbrenner) (“When all of these benefits were passed by Congress—and some of them decades ago—it was assumed that the

benefits would be to the survivors or to the spouses of traditional heterosexual marriages.”).

The legislative history also demonstrates that in enacting DOMA, Congress stressed that disagreements among the states regarding which couples can marry should not be permitted to create serious geographical disparities in the applicability of federal marital duties and benefits. As Senator Ashcroft stated, having a federal definition of marriage “is very important, because unless we have a Federal definition of what marriage is, a variety of States around the country could define marriage differently * * * [and] people in different States would have different eligibility to receive Federal benefits, which would be inappropriate.” 142 Cong. Rec. 22459 (1996). Federal benefits, he observed, “should be uniform for people no matter where they come from in this country. People in one State should not have a higher claim on Federal benefits than people in another State.” *Id.*

Congress also enacted DOMA to conserve the public treasury. “Government currently provides an array of material and other benefits to married couples,” and those benefits “impose certain fiscal obligations on the federal government.” House Rep. 18. Congress believed that DOMA would “preserve scarce government resources, surely a legitimate government purpose.” *Id.*

Congress also repeatedly emphasized “[t]he enormous importance of [traditional] marriage for civilized society.” House Rep. 13 (quoting Council on Families in America, *Marriage in America: A Report to the Nation* 10 (1995)). The House Report quoted approvingly from the Supreme Court’s decision in *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885), in which the Court referred to “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.” House Rep. 12. See also 142 Cong. Rec. 16970 (1996) (Rep. Hutchinson) (marriage “has been the foundation of every human society”); *id.* at 22442 (Sen. Gramm) (“There is no moment in recorded history when the traditional family was not recognized and sanctioned by a civilized society—it is the oldest institution that exists.”); *id.* at 22454 (Sen. Burns) (“[M]arriage between one man and one woman is still the single most important social institution.”). And Congress recognized that the institution of marriage

has traditionally been defined in American law as the union of one man and one woman. See House Rep. 3 (“[T]he uniform and unbroken rule has been that only opposite-sex couples can marry.”); House Hrg. 1 (statement of Rep. Canady) (“[I]n the history of our country, marriage has never meant anything else.”); 142 Cong. Rec. 16796 (1996) (Rep. McClinnis) (“If we look at any definition, whether it is Black’s Law Dictionary, whether it is Webster’s Dictionary, a marriage is defined as [a] union between a man and a woman * * * and this Congress should respect that.”); *id.* at 22451 (Sen. Coats) (DOMA “merely restates the understanding of marriage shared by Americans, and by peoples and cultures all over the world”); *id.* at 22452 (Sen. Mikulski) (DOMA “is about reaffirming the basic American tenet of marriage”).

Congress also explained that the reason “society recognizes the institution of marriage and grants married persons preferred legal status” is that it “has a deep and abiding interest in encouraging responsible procreation and child-rearing.” House Rep. 12, 13. Congress recognized the basic biological fact that only a man and a woman can beget a child together without external assistance, and sought to encourage children to be raised by both their biological parents. See 142 Cong. Rec. 22446 (1996) (Sen. Byrd); *id.* at 22262 (Sen. Lieberman) (“I intend to support the Defense of Marriage Act because I think [it] affirms another basic American mainstream value, * * * marriage as an institution between a man and a woman, the best institution to raise children in our society.”); House Hrg. 1 (Rep. Canady) (“[Marriage] is inherently and necessarily reserved for unions between one man and one woman. This is because our society recognizes that heterosexual marriage provides the ideal structure within which to beget and raise children.”); 142 Cong. Rec. 17081 (1996) (Rep. Weldon) (“[M]arriage of a man and woman is the foundation of the family. The marriage relationship provides children with the best environment in which to grow and learn.”).

Before enacting DOMA, Congress received and considered advice on its constitutionality and determined that DOMA is constitutional. See, e.g., House Rep. 33 (DOMA “plainly constitutional”); House Hrg. 87-117 (testimony of Professor Hadley Arkes); Senate Hrg. 1, 2 (Sen. Hatch) (DOMA “is a constitutional piece of legislation” and “a legitimate exercise of Congress’ power”); *id.* at 23-41 (testimony of Professor Lynn D. Wardle); *id.* at 56-59 (letter from Professor Michael W. McConnell). Congress

specifically sought constitutional advice from the executive branch, and the Justice Department under the Clinton Administration advised Congress three times that DOMA was constitutional. See Letters from Andrew Fois, Asst. Att’y Gen., to Rep. Canady (May 29, 1996), reprinted in House Rep. 34; to Rep. Hyde (May 14, 1996), reprinted in House Rep. 33-34; and to Sen. Hatch (July 9, 1996), reprinted in Senate Hrg. 2.3

2. Equal Protection Analysis

We would find that there is no violation of equal protection and, on this point, we believe the majority’s decision conflicts with United States Supreme Court precedent. *Baker v. Nelson*, 409 U.S. 810 (1972)—and other circuits. In *Baker*, the State of “Minnesota had, like DOMA, defined marriage as a union of persons of the opposite sex, and the state supreme court had upheld the statute.” See *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971).

The plaintiffs in *Baker*, a same-sex couple, were denied a marriage license “on the sole ground that [they] were of the same sex.” *Id.* at 185. They brought an equal protection challenge to Minnesota’s statute, arguing that “restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory.” *Id.* at 186. The Minnesota Supreme Court rejected their challenge, holding that equal protection “is not offended by the state’s classification of persons authorized to marry. There is no irrational or invidious discrimination.” *Id.* at 187.

The plaintiffs appealed to the Supreme Court under former 28 U.S.C. § 1257(2). Their Jurisdictional Statement presented the question “[w]hether appellee’s refusal, pursuant to Minnesota marriage statutes, to sanctify appellants’ marriage because both are of the male sex violates their rights [to] equal protection.” Jurisdictional Statement 3, *Baker v. Nelson*, No. 71-1027 (S.Ct. Feb. 10, 1972). The plaintiffs argued to the Supreme Court that Minnesota law unconstitutionally discriminated based on both sex and sexual orientation. On the latter point, they argued that “there is no justification in law for the discrimination against homosexuals,” and that they were “similarly circumstanced to childless heterosexual couples” and therefore entitled to the same “benefits awarded by law.” *Id.* at 10, 17 (quotation marks omitted). They argued that the Minnesota marriage statute failed both heightened scrutiny and rational basis review.

See *id.* at 15 (arguing that the state’s proscription of “single sex marriage” did not “describe a legitimate government interest which is so compelling that no less restrictive means can be found” and in the alternative that “Minnesota’s proscription simply has not been shown to be rationally related to any governmental interest”).

The United States Supreme Court dismissed the appeal “for want of a substantial federal question.” *Baker*, 409 U.S. at 810. Such dismissals are, of course, decisions on the merits, and lower courts are “not free to disregard” them. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). “Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction * * *.” *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (*per curiam*).

Our colleagues’ conclusions here are contradictory. The majority recognizes the binding nature of the *Baker* precedent, and also recognizes that, unless and until the Supreme Court says otherwise, *Baker* forecloses any arguments that “presume or rest on a constitutional right to same-sex marriage.” Having recognized those things, the majority somehow concludes that *Baker* doesn’t control the outcome of this case. If *Baker* stands for the proposition that a state may use the traditional definition of marriage without violating equal protection, then it necessarily follows that Congress may use the same traditional definition of marriage for federal purposes without violating equal protection.²

Cases in other circuits underscore how novel and unprecedented the majority’s reasoning is. For instance, in *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), cert. denied, 458 U.S. 1111 (1982), the Ninth Circuit held that it was constitutional for Congress to limit a spousal immigration preference to opposite-sex spouses. The case involved a same-sex couple who “were ‘married’ by a minister” and “obtained a marriage license from the county clerk in Boulder, Colorado.” 673 F.2d at 1038. The Ninth Circuit assumed *arguendo* that the marriage was valid under state law, see *id.* at 1039, but found that “Congress intended that only partners in heterosexual marriages

² “[T]his Court’s approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217 (1995) (quotation marks omitted). Thus, the fact that *Baker* involved the Fourteenth Amendment, while this case involves the Fifth Amendment, is of no moment.

be considered spouses under section 201(b)” of the Immigration and Nationality Act. *Id.* at 1041.

The Ninth Circuit then rejected the couple’s claim that “the law violates the equal protection clause because it discriminates against them on the bases of sex and homosexuality.” *Id.* (footnote omitted). Applying the rational basis test, the Ninth Circuit held “that Congress’s decision to confer spouse status under section 201(b) only upon the parties to heterosexual marriages has a rational basis and therefore comports with the due process clause and its equal protection requirements.” *Id.* at 1042.

Finding it unnecessary to enumerate all of the rational bases Congress possibly could have had, the Ninth Circuit said that Congress rationally could have “determined that preferential status is not warranted” for same-sex marriages because such “marriages never produce offspring, because they are not recognized in most, if in any, of the states, or because they violate traditional and often prevailing societal mores.” *Id.* at 1042, 1043. Finally, although Adams arose in the immigration context, the Ninth Circuit applied ordinary rational basis review, stating that “[t]here is no occasion to consider in this case whether some lesser standard of review should apply.” *Id.* at 1042.

There is also conflict with *McConnell v. Nooner*, 547 F.2d 54 (8th Cir. 1976) (*per curiam*). That case involved the same two men who filed suit in *Baker v. Nelson*. Unlike the *Baker* case, in which the men were seeking to be married, in *McConnell* the men already had “obtained a marriage license from the Blue Earth County Court Clerk” and “were ‘married’ by a minister.” *Id.* at 55. Baker, a veteran, then petitioned for increased veteran’s education benefits “on grounds that McConnell was his dependent spouse.” *Id.* The Veterans Administration denied the request “on grounds that McConnell was not the spouse of the veteran *Baker*.” *Id.* The district court dismissed the suit “on the basis that *Baker v. Nelson*, *supra*, was dispositive of the issues.” *Id.* The Eighth Circuit agreed and affirmed. *Id.*

The list goes on and on. There are holdings in ten other circuits that sexual orientation is not a suspect classification and hence ordinary rational basis review applies to such classifications. See, e.g., *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012) (“Because this court has not recognized sexual orientation as a suspect classification, Davis’s claim is governed by rational basis review.”); *Witt v. Dep’t*

of *Air Force*, 527 F.3d 806, 821 (9th Cir. 2008); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113-14 n.9 (10th Cir. 2008) (“[T]his court, like many others, has previously rejected the notion that homosexuality is a suspect classification.”) (citing cases from the Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, District of Columbia, and Federal Circuits); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866-867 (8th Cir. 2006); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 818 & n.16 (11th Cir. 2004) (“[A]ll of our sister circuits that have considered the question have declined to treat homosexuals as a suspect class.”) (citing cases), *cert. denied*, 543 U.S. 1081 (2005); *Nabozny v. Podlesny*, 92 F.3d 446, 458 (7th Cir. 1996); *Thomasson v. Perry*, 80 F.3d 915, 927-928 (4th Cir. 1996), *cert. denied*, 519 U.S. 948 (1996); *Steffan v. Perry*, 41 F.3d 677, 684-85 (D.C. Cir. 1994) (en banc); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573-574 (9th Cir. 1990); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990); *Padula v. Webster*, 822 F.3d 97, 101-104 (D.C. Cir. 1987); *see also Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008) (applying ordinary rational basis review to, and upholding, the military’s “don’t ask, don’t tell” policy), *cert. denied sub nom. Pietrangelo v. Gates*, 129 S. Ct. 2763 (2009). Every circuit that has ruled on the issue—i.e., every circuit except the Second and Third Circuits—has held that sexual orientation classifications are not suspect and thus are reviewed under the rational basis test.

For example, *Citizens for Equal Protection v. Bruning*, *supra*, involved an equal protection challenge to Article I, § 29 of the Nebraska Constitution, which provides that “[o]nly marriage between a man and a woman shall be valid or recognized in Nebraska.” Neb. Const. art. I, § 29. The Eighth Circuit held that “§ 29 should receive rational-basis review under the Equal Protection Clause, rather than a heightened level of judicial scrutiny.” *Citizens for Equal Protection*, 455 F.3d at 866.

Similarly, as discussed above, the Ninth Circuit in *Adams v. Howerton* applied the rational basis test in reviewing a Fifth Amendment equal protection challenge to Congress’ decision to limit an immigration preference for spouses to opposite-sex spouses. *See Adams*, 673 F.2d at 1042.

In defense of its decision to eschew “classic rational basis review” in favor of “intensified scrutiny,” the majority relies heavily upon three of the Supreme Court’s cases: *Romer v. Evans*, 517 U.S. 620 (1996); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), and *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528 (1973). But none of those cases supports a deviation from the well-established three tiers of equal protection review, let alone justifies the majority’s novel federalism-based standard.

In *Romer*, the Supreme Court went out of its way to make clear that it was applying the “conventional” rational basis test to Colorado’s Amendment 2. This Court said that

if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end. See, e.g., *Heller v. Doe*, 509 U.S. 312 (1993). Amendment 2 fails, indeed defies, even this conventional inquiry.

Romer, 517 U.S. at 631-632 (emphasis added). Thus, contrary to the majority’s assertion (and the complaints of the *Romer* dissent, see *id.* at 651 (Scalia, J., dissenting)), the *Romer* Court did indeed apply “conventional rational basis review.” See also *Romer*, 517 U.S. at 635 (“[A] law must bear a rational relationship to a legitimate governmental purpose, and Amendment 2 does not.”) (citation omitted).

Nor does *Cleburne* support what the majority does here. In that case, the Fifth Circuit “erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation.” 473 U.S. at 442. Here, the majority commits a similar, but even more glaring, error in refusing to apply conventional rational basis review to DOMA while expressly acknowledging that it would survive conventional scrutiny. (“Under [the conventional] rational basis standard, the Dwight plaintiffs cannot prevail.”). In *Cleburne*, the Supreme Court applied “[t]he general rule” that “legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest,” and found the ordinance lacking under that standard. 473 U.S. at 440. The majority’s approach thus draws no support from *Cleburne*.

Finally, in *Moreno*, the only one of the three cases to involve a federal statute, the Supreme Court applied “traditional equal protection analysis.” 413 U.S. at 533. *Accord id.* at 538 (“[t]raditional equal protection analysis”). Reciting the traditional test, the Supreme Court stated that “a legislative classification must be sustained, if the classification itself is rationally related to a legitimate government interest.” *Id.* at 533. Here, the majority recognized that Section 3 of DOMA passes traditional equal protection analysis, but it struck down DOMA nonetheless. Nothing in the Supreme Court’s cases supports that counterintuitive result.

3. Federalism and the Tenth Amendment

Our colleagues in the majority, as further justification for its new form of equal protection review, relies upon and ties into purported “federalism concerns.”

In assailing DOMA, the plaintiffs rely on limitations attributed to the Spending Clause of the Constitution and the Tenth Amendment, but, in our view neither the Tenth Amendment nor the Spending Clause invalidates DOMA.

It is true that DOMA intrudes extensively into a realm that has from the start of the nation been primarily confided to state regulation – domestic relations and the definition and incidents of lawful marriage – which is a leading instance of the states’ exercise of their broad police-power authority over morality and culture. As the Supreme Court observed long ago, “[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.” *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890)); see also *Loving v. Virginia*, 388 U.S. 1, 7 (1967) (marriage).

Consonantly, Congress has never purported to lay down a general code defining marriage or purporting to bind to the states to such a regime. Rather, in individual situations – such as the anti-fraud criteria in immigration law, 8 U.S.C. § 1186a(b)(1)(A)(i) – Congress has provided its own definitions limited to the particular program or personnel involved. And, let us be clear, no precedent exists for DOMA’s sweeping general “federal” definition of marriage for all federal statutes and programs.

Nevertheless, Congress surely has an interest in who counts as married. The statutes and programs that section 3 governs are federal regimes such as social security, the Internal Revenue Code and medical insurance for federal workers; and their benefit structure requires deciding who is married to whom. That Congress has traditionally looked to state law to determine the answer does not mean that the Tenth Amendment or Spending Clause *require* it to do so.

Supreme Court interpretations of the Tenth Amendment have varied over the years but those in force today have struck down statutes only where Congress sought to commandeer state governments or otherwise directly dictate the internal operations of state government. *Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 188 (1992). Whatever its spin-off effects, section 3 governs only federal programs and funding, and does not share these two vices of commandeering or direct command.

Neither does DOMA run afoul of the "germaneness" requirement that conditions on federal funds must be related to federal purposes. *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987). The requirement is not implicated where, as here, Congress merely defines the terms of the federal benefit. In *Dole*, the Supreme Court upheld a condition by which federal funds for highway construction depended on a state's adoption of a minimum drinking age for all driving on state roadways. 483 U.S. at 205. DOMA merely limits the use of federal funds to prescribed purposes.

At its core, what federalism really means is that Congress possesses no general federal police power, no all-purpose authority to pass whatever laws seemed sensible for the benefit of the national people. All power the federal government exercises must be traced to an express or implied grant of authority in the Constitution. That much is not meaningfully challenged here. No one genuinely challenges federal authority or power to enact matters regarding, for instance, immigration or benefits programs.

But other key principles of federalism are being given short shrift by the majority here. Federalism means dual sovereignty, both state and federal. And, having acted within the scope of its authority, Congress' actions are to be considered supreme within that realm. See *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) ("[U]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government");

Hammer v. Dagenhart, 247 U.S. 251, 275 (1918) (“The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the Nation by the Federal Constitution.”), 312 U.S. 100, 115 (1941); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405–06 (1819) (“[T]he government of the Union, though limited in its powers, is supreme within its sphere of action. . . . The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, ‘any thing in the constitution or laws of any State to the contrary notwithstanding.’” (quoting the Supremacy Clause, U.S. CONST. art. VI, cl. 2)); THE FEDERALIST NO. 39, at 285 (James Madison) (“[T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them, within its own sphere.”).

4. Conclusion

This case is not a referendum on the morality of gay marriage. More importantly, and more precisely, our task is not to choose whether DOMA is a wise policy or whether DOMA sets a societal norm with which we either agree or disagree. Rather, our task is to determine if DOMA violates the United States Constitution in the manner alleged by the plaintiffs here. It does not. As intermediate court judges, we should neither ignore nor refine out of existence the precedent of *Baker v. Nelson* as the majority has. We should also not blithely ignore Congressional authority to enact statutes in this subject area simply by noting the truism that the topic has historically had significant state regulation. A person can agree or disagree with the thought that too few subject matters are left to the states these days. Yet neither the historical truism nor one’s view of state-federal relations answers the constitutional question at hand: whether it is beyond the power of Congress to enact DOMA. We believe Congress had the power. We therefore dissent.

IN THE UNITED STATES SUPREME COURT

NO. AI-DA-00

M. Louise Ciccone, in her official capacity as Director of the OFFICE OF PERSONNEL MANAGEMENT, UNITED STATES OF AMERICA

Defendant – Appellant – Petitioner

v.

REGINALD K. DWIGHT, Bernard J. Taupin, Nigel Olsson, David Johnstone, Raymond Cooper, and all others similarly situated,

Plaintiffs – Appellees – Respondents

Appeal from the United States Court of Appeals for the Fourteenth Circuit

ORDER GRANTING CERTIORARI

The petition of the Defendant for an order of certiorari to the United States Court of Appeals for the Fourteenth Circuit is hereby GRANTED. Oral argument shall be conducted on October 20, 2012, in Crawfordsville, Indiana. The argument shall be confined to the following issues:

- A. Does the Defense of Marriage Act violate equal protection of the laws principles for same-sex individuals seeking to marry?
- B. Does the Defense of Marriage Act violate federalism principles by intruding on a traditionally state-regulated subject matter?

Petitioners shall be entitled to open and close the argument.

FOR THE COURT

/s/ **Levon Alvin Tostig**

Levon Alvin Tostig, Clerk of the Court