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A SMALL STEP FORWARD IN THE LAST CIVIL RIGHTS BATTLE: EXTENDING BENEFITS UNDER FEDERALLY REGULATED EMPLOYEE BENEFIT PLANS TO SAME-SEX COUPLES

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I. INTRODUCTION

Over the last decade, the debate surrounding the legal recognition of same-sex relationships has moved to the forefront of our political agenda.¹ On one side of the debate stand those who support the legal recognition of same-sex relationships. Their efforts have borne fruit with Massachusetts's same-sex civil marriages,² Vermont's and Connecticut's same-sex civil unions,³ and other states', counties', and municipalities' enactments of domestic partnership laws.⁴

On the other side stand those who oppose legal recognition of same-sex relationships, primarily on the ground that legal recognition undermines traditional opposite-sex civil marriage and its goals of promoting procreation and child rearing within that framework.⁵ Their efforts have been more fruitful. On the federal level, in 1996 Congress enacted and President Clinton signed into law the Defense of Marriage Act (DOMA).⁶ DOMA contains two substantive provisions. Under the first provision, the words "marriage" and "spouse" are defined for purposes of federal law to include only opposite-sex couples entering into civil marriage under state law.⁷ Prior to Congress's enactment of this provision, whether a marriage existed for purposes of federal law was determined according to the laws of the local jurisdiction where the marriage occurred.⁸ Now, state-sanctioned same-sex

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1. See ABA Sec. of Fam. L., *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 38 FAM. L.Q. 339, 342 (2004) [hereinafter *A White Paper*].

2. See *infra* notes 37–43 and accompanying text.

3. See *infra* notes 44–52 and accompanying text. For a discussion of the substantive difference between same-sex marriage and civil unions, see generally Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont's Civil Unions Law, Same-Sex Marriage, and Separate but (Un)Equal*, 25 VT. L. REV. 113 (2000).

4. See *infra* notes 53–65 and accompanying text.

5. See, e.g., Robert P. George, *Judicial Usurpation and the Constitution: Historical and Contemporary Issues*, Heritage Lecture # 871 (Apr. 11, 2005), <http://www.heritage.org/research/legalissues/hl871.cfm>.

6. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2000)). Congress's enactment of DOMA under the Full Faith and Credit Clause was only the third time in history that Congress had exercised such power. Charles J. Butler, Note, *The Defense of Marriage Act: Congress's Use of Narrative in the Debate Over Same-Sex Marriage*, 73 N.Y.U. L. REV. 841, 846 (1998) (citing the Parental Kidnapping Prevention Act of 1980 and the Full Faith and Credit for Child Support Orders Act of 1994 as the only two other times where Congress enacted statutes under Article IV of the Constitution).

7. 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.

1 U.S.C. § 7 (2000).

8. See, e.g., *Ross v. Comm'r.*, T.C.M. (CCH) 488, 492 (1972); Rev. Rul. 29, 1953-1 C.B. 67; Rev. Rul. 58-66, 1958-1 C.B. 60.

civil marriages are not recognized with respect to the more than 1,138 federal rights and benefits that are normally afforded to opposite-sex civil marriages.⁹ This denial of rights and benefits covers a broad spectrum, including social security survivor benefits,¹⁰ unlimited federal estate tax marital deductions,¹¹ joint filing status for purposes of federal income tax filings,¹² and joint filings under federal bankruptcy laws.¹³ This denial affects not only the estimated 600,000 same-sex couples that share their homes and their lives,¹⁴ but also the thousands of children who are being raised in same-sex households.¹⁵

Under DOMA's second provision, states are not required to give effect to a law of another state that sanctions same-sex civil marriages.¹⁶ Historically, states have recognized the judgments and orders of their sister states unless the latter's action runs counter to strong public policy concerns of the former.¹⁷ Now, under DOMA, states can ignore out-of-state same-sex civil marriages without conducting any independent public policy assessment.

Forty-two states have, however, conducted an independent public policy assessment and have adopted similar defense of marriage acts.¹⁸ Generally, states'

9. As of December 31, 2003, the U.S. General Accounting Office had identified 1,138 federal rights and responsibilities that turn on marital status. U.S. GEN. ACCT. OFF., GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT 1 (2004), available at <http://www.gao.gov/new.items/d04353r.pdf>.

10. Social Security Act, 42 U.S.C. § 416 (2000); see also LAURA HALTZEL & PATRICK PURCELL, CONG. RESEARCH SERV., LIBRARY OF CONG., ORDER CODE RS21897, THE EFFECT OF STATE-LEGALIZED SAME-SEX MARRIAGE ON SOCIAL SECURITY BENEFITS AND PENSIONS (2004), available at http://www.opencrs.com/rpts/RS21897_20040728.pdf; U.S. SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM § GN 00305.005(B)(5) (2004), 2001 WL 1926827.

11. *A White Paper*, *supra* note 1, at 368.

12. See *Mueller v. Comm'r, T.C.M. (CCH)* 1887, 1889 (2000) (holding that distinction in the tax code between married taxpayers and unmarried economic partners is constitutionally valid), *aff'd*, No. 00-3587, 2001 WL 522388 (7th Cir. Apr. 6, 2001).

13. 11 U.S.C. § 302(a) (2000) ("[A] joint case under a chapter of this title is commenced by the filing with the bankruptcy court of a single petition under such chapter by an individual that may be a debtor under such chapter and such individual's spouse."); *In re Kandou*, 315 B.R. 123 (Bankr. W.D. Wash. 2004).

14. TAVIA SIMMONS & MARTIN O'CONNELL, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, CENSER-5, MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000, at 4 tbl. 2 (2003), available at <http://www.census.gov/prod/2003pubs/censer-5.pdf> (reporting 594,391 same-sex unmarried households in the United States and 6,818 in Puerto Rico).

15. *Id.* at 10 (stating that thirty-three percent of female same-sex households and twenty-two percent of male same-sex households contain children).

16. 28 U.S.C. § 1738C (2000). The Act provides:

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

Id.

17. *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1877) (holding that a state "has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved"), *overruled on other grounds by Shaffer v. Heitner*, 433 U.S. 186 (1977).

18. Nat'l Conference of State Legs., Same Sex Marriage (Apr. 2005), <http://www.ncsl.org/programs/cyf/samesex.htm> [hereinafter Same Sex Marriage] (identifying Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming as the forty-two states with statutes defining marriage); see ALISON M. SMITH, LIBRARY OF CONG., ORDER CODE RL31994, SAME-SEX MARRIAGES: LEGAL

“mini-DOMAs” prohibit both same-sex civil marriages within the jurisdiction and the recognition of same-sex civil marriages formed in another jurisdiction. Some of these states also ban legal recognition of civil unions, domestic partnerships, or other types of same-sex relationships.¹⁹ Taking it even one step further, eighteen states have enacted constitutional amendments that limit civil marriage to a man and a woman.²⁰ Only Connecticut, Maryland, New Mexico, New York, and Rhode Island have successfully blocked the enactment of mini-DOMAs or state constitutional amendments.²¹

Federal and state legislators justify limiting legal recognition of same-sex relationships on the ground that a majority of Americans support such limitations. That support is evidenced by recent surveys reporting the public’s strong opposition to legal recognition. Two such surveys indicate that thirty-five to forty-eight percent of Americans strongly oppose same-sex civil marriages.²²

This Article recommends amending the Employee Retirement Income Security Act of 1974 (ERISA)²³ and the Internal Revenue Code (Code) to afford same-sex couples with employee plan benefits and special federal income tax treatment where their respective states have legally recognized their relationship under civil marriage, civil union, or domestic partnership laws. There are numerous reasons for the limited nature of the recommendations. First, given the aforementioned political landscape, full federal recognition of same-sex civil marriages, civil unions, and domestic partnerships is unrealistic.²⁴ Second, full federal recognition is inappropriate given the fact that more than forty-two states have a demonstrated policy against legal recognition of same-sex relationships, and states have historically maintained autonomy in this area.²⁵ Third, the recommended amendments are generally consistent with the enumerated goals of ERISA. ERISA is designed to protect employees and their beneficiaries.²⁶ Denying pension and welfare benefits to same-sex couples frustrates that goal by failing to protect the same-sex “family unit.” ERISA is also designed to facilitate employer sponsorship

ISSUES 1–2 (2004), available at <http://shelby.senate.gov/legislation/MarriageAmendment.pdf> (identifying states that have enacted mini-DOMAs by their respective statutory provisions).

19. See, e.g., TEX. FAM. CODE ANN. § 6.204 (Vernon Supp. 2004–2005) (barring recognition of foreign same-sex marriages and civil unions).

20. Same Sex Marriage, *supra* note 18 (identifying Alaska, Arkansas, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, and Utah as the eighteen states with constitutional language defining marriage).

21. See *A White Paper*, *supra* note 1, at 402–03; *50-State Survey of Marriage Protection Amendments*, SPECIAL REP. (Traditional Values Coalition, Wash. D.C.), Oct. 2005, http://www.traditionalvalues.org/pdf_files/MarriageAmendments50States.pdf.

22. See Joshua K. Baker, *Status, Benefits, and Recognition: Current Controversies in the Marriage Debate*, 18 BYU J. PUB. L. 569, 621–22 (2004) (citing a Pew Research Center poll released in November 2003 and a National Public Radio poll from December 2003).

23. Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended at 29 U.S.C. §§ 1001–1461 (2000)).

24. See Mark E. Wojcik, *The Wedding Bells Heard Around the World: Years from Now, Will We Wonder Why We Worried About Same-Sex Marriage?*, 24 N. ILL. U.L. REV. 589, 602 (2004).

25. See *supra* notes 17–18 and accompanying text; see also The Marriage Amend. Project, *Marriage: One Man, One Woman*, <http://www.formarriage.org/states.html> (last visited Oct. 22, 2005) (identifying state legislation and constitutional amendments related to legal recognition of same-sex relationships in all fifty states).

26. 29 U.S.C. § 1001(b)–(c) (2000); see also *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983) (“ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans.”).

of employee benefit plans by providing a uniform regulatory scheme.²⁷ Undermining that goal, the denial of federal recognition to same-sex couples frustrates state and private employers' initiatives affording employee benefits to same-sex couples by subjecting employers to inconsistent federal and state law requirements. Fourth, the recommended amendments are politically feasible given the fact that federal law and proposed federal legislation have already laid the groundwork for amendments in this area.²⁸ Fifth, the recommended amendments will have a minimal impact on federal revenues.²⁹ And sixth, the recommended amendments will have either a positive or marginal effect on private employers' profitability.³⁰

Part II of this Article examines state, county, municipal, and private employer initiatives that extend rights and benefits to same-sex couples. It also examines internal limitations that negate the effectiveness of these initiatives. Part III analyzes how federal law limits the rights and benefits of same-sex couples in the area of federally regulated employee benefit plans and how our federal income tax laws serve as a disincentive to providing same-sex couples with employment-related benefits. Part IV analyzes court decisions challenging federal and state laws denying legal recognition to same-sex couples and concludes that court decisions are unlikely to extend rights to same-sex couples. Finally, Part V recommends amending ERISA and the Code to afford same-sex couples with plan benefits and special federal income tax treatment where a state has legally recognized same-sex relationships under civil marriage, civil union, or domestic partnership laws.

II. A LANDSCAPE OF INADEQUACY: STATE, LOCAL, AND PRIVATE INITIATIVES EXTENDING RIGHTS AND BENEFITS TO SAME-SEX COUPLES

While a vast majority of states have enacted legislation and constitutional amendments limiting state recognition of same-sex relationships,³¹ a few states, counties, municipalities, and private employers are recognizing the long-term commitment and shared financial interdependence of thousands of same-sex couples. They are doing so by enacting a patchwork of laws and programs that attempt to bestow on same-sex couples some of the hundreds of local rights and benefits granted to opposite-sex civil marriages.³² On the state level, legislative initiatives have taken the form of state-sanctioned same-sex civil marriages, civil unions, and domestic partnerships. With respect to same-sex civil marriages, state courts in Massachusetts,³³ Washington,³⁴ and New York³⁵ have found that the denial of state marriage licenses to same-sex couples violates state constitutional

27. See *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987).

28. See *infra* notes 227–232 and accompanying text.

29. See *infra* notes 233–236 and accompanying text.

30. See *infra* notes 237–246 and accompanying text.

31. See *supra* notes 18–20 and accompanying text.

32. *A White Paper*, *supra* note 1, at 346.

33. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003).

34. *Castle v. State*, No. 04-2-00614-4, 2004 WL 1985215 (Wash. Super. Ct. Sept. 7, 2004).

35. *Hernandez v. Robles*, 794 N.Y.S.2d 579 (Sup. Ct. 2005).

protections. To date, only the Massachusetts court decision culminated in that state's legal recognition of same-sex civil marriages.³⁶

In its 2003 ruling in *Goodridge v. Department of Public Health*,³⁷ the Supreme Judicial Court of Massachusetts found that the state's due process and equal protection clauses prohibited denying civil marriage to same-sex couples.³⁸ Further, the court found that the state constitution requires that all rights and benefits conferred on opposite-sex civil marriages be conferred on same-sex civil marriages.³⁹ Consistent with that decision, Massachusetts began issuing marriage licenses to same-sex couples in May 2004.⁴⁰ As of September 2005, about 6,600 couples had entered into same-sex civil marriages⁴¹ and are now afforded hundreds of rights and benefits granted under Massachusetts state law.⁴²

Access to Massachusetts' same-sex civil marriage is essentially restricted to Massachusetts residents. Under the state's residency requirement, nonresident couples cannot enter into a Massachusetts same-sex civil marriage if the marriage is illegal in the couples' resident state.⁴³ Because no other state recognizes same-sex civil marriages under its own laws, nonresident couples cannot enter into a Massachusetts same-sex civil marriage. Effectively, same-sex civil marriages are afforded no legal recognition outside of Massachusetts.

Taking a "separate-but-equal" approach, Vermont⁴⁴ and Connecticut⁴⁵ enacted same-sex civil union statutes in 2000 and 2005, respectively. Civil union statutes confer state-based rights and benefits but are not governed by a state's marriage laws.⁴⁶ Vermont's same-sex civil union statute is the result of a 1999 decision by the state's highest court. In *Baker v. State*,⁴⁷ the Vermont Supreme Court found that the state constitution's common benefits clause required the extension of marriage

36. In 2004, same-sex marriages took place in cities such as San Francisco, California; New Paltz, New York; and Portland, Oregon. See Robin S. Lazarow, *What Same-Sex Marriages Mean for Private Employers in Massachusetts*, BENEFITNEWS.COM, June 29, 2004, <http://www.benefitnews.com/pfv.cfm?id=6146>.

37. 798 N.E.2d 941 (Mass. 2003).

38. *Id.* at 968.

39. *Id.* at 969.

40. CARRIE EVANS, HUM. RTS. CAMPAIGN FOUND., *EQUALITY FROM STATE TO STATE: GAY, LESBIAN, BISEXUAL AND TRANSGENDER AMERICANS AND STATE LEGISLATION IN 2004* 14 (2004), available at http://www.hrc.org/Template.cfm?Section=About_HRC&Template=/ContentManagement/ContentDisplay.cfm&ContentID=24538.

41. *The Normality of Gay Marriages*, N.Y. TIMES, Sept. 17, 2005, at A14, available at 2005 WLNR 14667323.

42. Karen M. Doering, *1,500 Reasons Why We Need Marriage Equality*, NAT'L CTR. FOR LESBIAN RTS., Feb. 2004, at 1, <http://www.nclrights.org/publications/pubs/1500reasons-0304.pdf> (stating that most states provide approximately 500 rights and benefits under state laws).

43. MASS. GEN. LAWS ANN. ch. 207, § 11 (West 1998). For a discussion of the interplay between *Goodridge* and this statute, see *Cote-Whitacre v. Department of Public Health*, No. 042656G, 2004 WL 2075557 (Mass. Super. Ct. Aug. 18, 2004).

44. VT. STAT. ANN. tit. 15, §§ 1201–1207 (2000).

45. Act effective Oct. 1, 2005, No. 05-10, 2005 Conn. Acts, available at <http://www.cga.ct.gov/2005/act/pa/2005PA-00010-R00SB-00963-PA.htm>.

46. Compare VT. STAT. ANN. tit. 18, § 5131 (2000) (requiring a marriage license for those wishing to have their solemnized marriage legally recognized), with *id.* § 5160(b) (requiring that a civil union be certified). Based on this distinction, several state courts, including courts in Connecticut, Georgia, and Illinois, have issued rulings according no weight to civil union judgments in their respective states. See *Rosengarten v. Downs*, 802 A.2d 170 (Conn. App. Ct. 2002); *Burns v. Burns*, 560 S.E.2d 47 (Ga. Ct. App. 2002); *In re Marriage of Simmons*, 825 N.E.2d 303 (Ill. App. Ct. 2005).

47. 744 A.2d 864 (Vt. 1999).

rights and benefits to same-sex couples.⁴⁸ In response to that decision, the Vermont state legislature enacted the civil union statute.⁴⁹ In contrast to Massachusetts' same-sex civil marriage statute, Vermont's civil union statute does not contain a residency requirement.⁵⁰ By mid-2003, nearly 5,700 resident and non-resident couples had entered into a Vermont civil union.⁵¹

Unlike Vermont, Connecticut's civil union statute was not prompted by a state court decision. Instead, in April 2005 the Connecticut state legislature passed, and the governor signed into law, a same-sex civil union statute that confers essentially the same rights on same-sex civil unions as are afforded to opposite-sex civil marriages.⁵² With an October 2005 effective date, the popularity of Connecticut's civil union law is yet to be determined.

Representing more of a political compromise, a number of states have enacted domestic partnership laws, including California,⁵³ Hawaii,⁵⁴ Maine,⁵⁵ and New Jersey.⁵⁶ These state laws differ significantly as to both definitional requirements and the rights and benefits that they confer on registered domestic partners. With regard to the definitional requirements, there is no universal definition of what constitutes a domestic partnership. Most definitions include anything from minimum age requirements, to absence of a blood relationship, to evidence of an exclusive and committed relationship, to a showing of financial interdependence.⁵⁷ Some definitions also include opposite-sex couples over a certain age, insuring that they may continue receiving benefits such as Medicare and Social Security.⁵⁸

With respect to the rights and benefits bestowed on registrants, domestic partnership laws range from being purely symbolic, conferring no rights and

48. *Id.* at 867; see VT. CONST. ch. I, art. 7.

49. VT. STAT. ANN. tit. 15, §§ 1201-1207; see also VITAL RECS. UNIT, VT. DEP'T OF PUB. HEALTH, CIVIL UNIONS IN VERMONT (2001), available at http://www.state.vt.us/health/_hs/vitals/records/pdf/civilunion.pdf (providing that civil unions are available to two unrelated persons of the same sex who are at least eighteen years of age, are of sound mind, are not legally married or in a civil union, and have a guardian's written permission if they are under a guardianship).

50. See VT. STAT. ANN. tit. 15, § 5160(a).

51. Patricia Wen, *A Civil Tradition: Data Show Same-Sex Unions in Vermont Draw a Privileged Group*, B. GLOBE, June 29, 2003, at B1, available at 2003 WLNR 3414546.

52. *Connecticut Approves Same-Sex Civil Unions*, HUM. RTS. CAMPAIGN, Apr. 21, 2005, <http://www.schaap.hrc.org/Template.cfm?Section=Home&CONTENTID=26544&TEMPLATE=/ContentManagement/ContentDisplay.cfm>; see Act effective Oct. 1, 2005, No. 05-10, 2005 Conn. Acts, available at <http://www.cga.ct.gov/2005/act/pa/2005PA-00010-R00SB-00963-PA.htm>.

53. CAL. FAM. CODE §§ 297, 308.5 (West 2004).

54. HAW. REV. STAT. ANN. §§ 572C-1 to -7 (LexisNexis 2005).

55. ME. REV. STAT. ANN. tit. 22, § 2710 (Supp. 2005).

56. N.J. STAT. ANN. §§ 26:8A-1 to -12 (West Supp. 2005).

57. See CAL. FAM. CODE § 297 (defining "domestic partners" as those who are not related by blood, are not married or part of another domestic partnership, share a common residence, and are either same-sex couples who are at least eighteen or opposite-sex couples who are at least sixty-two); N.J. STAT. ANN. 26:8A-4(b) (defining "domestic partnership" as couples who share a common residence, are jointly responsible for each other's common welfare, and who are either at least eighteen and of the same sex or at least sixty-two and of the opposite sex); see also *Domestic Partner Benefits: Facts and Background*, FACTS FROM EBRI, (Employee Benefits Research Inst., Wash. D.C.), Mar. 2004, at 1, available at <http://www.ebri.org/pdf/publications/facts/0304fact.pdf> [hereinafter *Domestic Partner Benefits*] (discussing employer-created definitions of "domestic partnerships").

58. See, e.g., N.J. STAT. ANN. 26:8A-4(b) (allowing opposite-sex couples sixty-two years and older to enter into a domestic partnership). But see HAW. REV. STAT. ANN. § 572C-4(3) (providing that the parties must be legally prohibited from marrying one another under state law to enter into a valid reciprocal beneficiary relationship).

benefits to registrants, to extending full state rights and benefits to registrants.⁵⁹ State domestic partnership laws usually fall within a middle ground, conferring some, but not all, state rights and benefits. For example, Hawaii's Reciprocal Beneficiaries law⁶⁰ confers only a few state rights to registered same-sex couples, including rights to worker's compensation, inheritance, hospital visitation, property rights, and protection under Hawaii's domestic relations law.⁶¹ The list of conferred rights is meager, however, when compared to the more than 160 rights and responsibilities that attach to Hawaii civil marriages.⁶² In contrast, as a result of recent legislation, California's domestic partnership laws are comprehensive. Covering more than 25,000 domestic partnerships as of December 2004,⁶³ the California Domestic Partner Rights and Responsibilities Act of 2003⁶⁴ extends to domestic partners most of the state rights and duties associated with opposite-sex civil marriage.⁶⁵

Outside some form of legal recognition of same-sex relationships, some public and private employers are providing their own employees with domestic partner benefits. Public employer domestic partner benefit offerings remain meager. At the beginning of 2004, more than ten states and 166 counties and cities offered some type of domestic partner benefits to their employees.⁶⁶ These numbers, however, represent a mere 0.2% of the nation's more than 87,000 units of local government.⁶⁷ Further, future public employer domestic partner benefit offerings may be inhibited by state constitutional amendments banning legal recognition of same-sex relationships. For example, in October 2004, Michigan began requiring new contracts between the state and employee unions to include domestic partner health care coverage.⁶⁸ Following the state's November 2004 adoption of a constitutional amendment restricting marriage to a relationship between a man and a woman, Michigan Governor Jennifer Granholm removed same-sex domestic partner benefits from contracts negotiated with state employees pending a determination of the constitutionality of the amendment.⁶⁹

59. Doering, *supra* note 42, at 2.

60. HAW. REV. STAT. ANN. §§ 572C-1 to -7.

61. See *id.* § 572C-6; see also Partners Task Force for Gay & Lesbian Couples, Reciprocal Beneficiaries: The Hawaiian Approach (Apr. 2003), <http://www.buddybuddy.com/d-p-hawa.html> [hereinafter Reciprocal Beneficiaries].

62. Reciprocal Beneficiaries, *supra* note 61; see also Partners Task Force for Gay & Lesbian Couples, What Rights Come with Legal Marriage?: Hawaii (2003), <http://www.buddybuddy.com/mar-hi.html> (listing sixty-two rights and responsibilities that are triggered by Hawaii civil marriage, including accidental death benefits for surviving spouse of government employee, beneficial owner status of corporate securities, and spousal privilege and confidential marital communications under *Hawaii Rules of Evidence*).

63. Partners Task Force for Gay & Lesbian Couples, Domestic Partners Registration: The California Approach (Aug. 1, 2005), <http://www.buddybuddy.com/d-p-cal.html>.

64. Assemb. B. 205, § 3, 2003-2004 Leg., Reg. Sess. (Cal. 2003), available at http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0201-0250/ab_205_bill_20030922_chaptered.pdf.

65. CAL. FAM. CODE § 297.5 (West 2004).

66. See Baker, *supra* note 22, at 600 (citing reports by the Human Rights Campaign).

67. *Id.*

68. See Dawson Bell, *Eye on Politics: The Spin over Same-Sex Benefits Is Dizzying*, DETROIT FREE PRESS, Dec. 6, 2004, available at http://www.freep.com/news/politics/eyeonpolitics6e_20041206.htm.

69. *Gay Activists Ponder Next Move*, OCEAN COUNTY OBSERVER, Dec. 17, 2004, at A14 ("Michigan Gov. Jennifer Granholm, a Democrat, will remove same-sex partner benefits from contracts negotiated with state workers after passage of the voter-approved amendment to the Michigan Constitution that bans gay marriage and similar unions.").

Private employer domestic partner benefit offerings are a bit more substantial. As of 2004, an estimated 8,250 private sector employers, including more than 200 Fortune 500 companies, provided some type of domestic partner benefits.⁷⁰ The private employer gains, however, appear to be limited to domestic partner health care coverage, which is only a portion of the estimated \$1 trillion spent by private employers on employment-related benefits.⁷¹ Big-ticket items, such as employee pension plan benefits, generally do not include domestic partner coverage.⁷²

In some cases, state and local laws directly or indirectly mandate private employer domestic partner coverage. With respect to direct regulation, some states, counties, and municipalities are requiring that employers contracting with the governmental entity provide coverage. For example, under California's Equal Benefits in State Contracting Act,⁷³ effective for contracts executed or amended on or after January 1, 2007, an estimated 22,000 companies entering into large contracts with the state or its agencies will be required to provide benefits to registered domestic partners on the same basis as the contractors provide benefits to legally recognized spouses.⁷⁴ Similarly, under San Francisco's Domestic Partner Ordinance, city contractors providing pension and health benefits to their employees' spouses must also provide domestic partner coverage.⁷⁵ A handful of other cities, including Minneapolis, New York City, Berkeley, and Los Angeles, have adopted similar measures.⁷⁶

With respect to indirect regulation, states are increasingly requiring domestic partner coverage under state insurance laws. For example, Massachusetts' recognition of same-sex civil marriages essentially mandates that any references to "spouse" under Massachusetts' insurance laws and in insurance policies covering Massachusetts residents include same-sex spouses.⁷⁷ Vermont's insurance laws

70. HUM. RTS. CAMPAIGN FOUND., *THE STATE OF THE WORKPLACE FOR LESBIAN, GAY, BISEXUAL AND TRANSGENDER AMERICANS*: 2004, at 15 (2004), available at http://www.hrc.org/Content/ContentGroups/Publications/State_of_the_Workplace/Workplace0603.pdf.

71. See *Employer Spending on Benefits, 2002*, FACTS FROM EBRI, (Employee Benefits Research Inst., Wash. D.C.), May 2004, at 1, available at <http://www.ebri.org/pdf/publications/facts/0504fact.pdf>.

72. See *Domestic Partner Benefits*, *supra* note 57, at 1 ("Most employers that offer domestic partner benefits...offer a range of only low-cost benefits, such as family/bereavement/sick leave, relocation benefits, access to employer facilities, and attendance at employer functions.").

73. CAL. PUB. CONT. CODE § 10295.3 (West Supp. 2004).

74. Paul Hamburger et al., *Recent Domestic Partner Developments Present Challenges for Employers*, MCDERMOTT WILL & EMERY, Dec. 23, 2003, available at http://www.mwe.com/index.cfm/fuseaction/publications.nldetail/object_id/3e076c36-88eb-43a8-a27a-3f46f18e5125.cfm.

75. James P. Baker, *Equal Benefits For Equal Work? The Law of Domestic Partner Benefits*, 14 LAB. LAW. 23, 24 (1998) (citing S.F., CAL., ADMIN. CODE §§ 12B.1-12B.5.1 (1996)).

76. David Hawley, *Minneapolis Approves Domestic Partner Provision*, ST. PAUL PIONEER PRESS, Dec. 14, 2002, at 5B, available at 2002 WL 104725048; Tom Anderson, *Contracting Laws Push Domestic Partner Benefits*, EMPLOYEE BENEFITS NEWS (Oct. 1, 2004), available at 2004 WL 68205837; Hum. Rts. Campaign, *Insurance/Legal Considerations*, http://www.hrc.org/PrinterTemplate.cfm?Section=Insurance_Legal_Considerations&Temp (last visited Oct. 23, 2005); see also BERKELEY, CAL., BERKELEY ORDINANCE ch. 13.29 (2001); L.A., CAL., ADMIN. CODE div. 10, ch. 1, art. 1, § 10.8.2.1 (2004); MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200 (2003), available at http://www.ci.minneapolis.mn.us/procurement/docs/equal_benefits_ordinance.pdf; NEW YORK, N.Y., N.Y. CITY ADMIN. CODE § 6-126 (2004). A discussion of Berkeley's Equal Benefit Ordinance can be found at <http://www.ci.berkeley.ca.us/onlineservice/finance/EBOFactsheet.pdf>.

77. See Gay & Lesbian Advocates & Defenders, *Same Sex Spousal Health Benefits in Massachusetts After Goodridge*, <http://www.glad.org/rights/HealthBenefitsAfterGoodridge.html> (last visited Oct. 23, 2005).

require that insurance contracts and policies offered to married persons and their families be made available to parties in a civil union and their families.⁷⁸

The aforementioned state and private employer initiatives provide some legal rights and benefits to same-sex couples; however, as noted above, these initiatives are limited in many respects. In those states that afford some type of legal recognition to same-sex couples, the rights conferred by that recognition are limited to the states' jurisdiction. There is also no parity in public and private employer-employee benefit offerings for same-sex couples, with benefit offerings usually limited to state-mandated coverage or health-benefit coverage.

III. A LANDSCAPE OF FEDERAL INTOLERANCE: RESTRICTING SAME-SEX COUPLES' RIGHTS AND BENEFITS UNDER FEDERALLY REGULATED EMPLOYEE BENEFIT PLANS

Further limiting their scope, any state, county, municipal, or private-employer action to extend rights and benefits to same-sex couples meets a brick wall in the area of federally regulated employee benefit plans. This barrier is a function of the interplay between ERISA, the Code, and DOMA.

ERISA is the federal regulatory scheme that governs the vast majority of employee benefit plans.⁷⁹ To further the "public interest in encouraging the formation of employee benefit plans,"⁸⁰ ERISA was designed to simplify and unify the regulatory environment by restricting application of inconsistent state regulation.⁸¹ To accomplish this result, ERISA section 514(a) preempts any and all state laws relating to ERISA-covered employee benefit plans.⁸²

ERISA-covered employee benefit plans include both employee pension benefit plans and employee welfare benefit plans.⁸³ In the context of employee pension benefit plans, ERISA preemption is far-reaching. Most employee pension benefit plans are ERISA plans.⁸⁴ The non-ERISA plans in this area are few and generally include plans established by governmental entities in their role as employers.⁸⁵ Thus, ERISA preemption effectively strips states, counties, and municipalities of the ability to enact laws that extend rights and benefits under ERISA-covered employee pension benefit plans, such as state laws extending retirement plan death benefits to same-sex spouses and domestic partners.

ERISA preemption of state, county, and municipal laws regulating employee welfare benefit plans is a bit more complicated. ERISA preemption only applies to ERISA-type benefits and is not applicable to non-ERISA-type benefits, such as employer-provided family and bereavement leave, education and tuition assistance,

78. Comm'r Order, *In Re: Amendment or Endorsement of Insurance Policies and Contracts to Comply with Vermont Law Regarding Civil Unions* (Jan. 1, 2001), available at <http://www.bishca.state.vt.us/RegsBulls/insbulls/Bul127order.htm>.

79. Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended at 29 U.S.C. §§ 1001-1461 (2000)).

80. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987).

81. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987).

82. 29 U.S.C. § 1144(a) (2000).

83. *Id.* § 1002(3) (defining "employee benefit plan").

84. *See id.* § 1003.

85. *Id.* § 1003(b)(1); *see id.* § 1002(32) (defining "governmental plan").

credit union membership, relocation, and travel expenses.⁸⁶ States, counties, and municipalities could therefore regulate these types of plans. Further, under ERISA's "savings clause," ERISA preemption does not apply to any state laws that regulate insurance, banking, or securities.⁸⁷ States can therefore indirectly regulate insured employee welfare benefit plans through regulating insurance carriers under state insurance laws. As previously noted, Massachusetts and Vermont are among the list of states that are mandating domestic partner coverage under state insurance laws and, thereby, indirectly requiring that private employer domestic partner coverage is offered under insured employee welfare benefit plans where employers otherwise provide spousal coverage.⁸⁸

However, self-insured health care plans, which are a type of employee welfare benefit plan, are not subject to state insurance laws. Self-insured health care plans are funded out of the general assets of the employer.⁸⁹ Although the exact percentage is debatable, the majority of private employers sponsor this type of plan.⁹⁰ As to these employers, state laws regulating insurance cannot require coverage beyond ERISA-mandated coverage, such as domestic partner coverage, and any attempts to do so will be struck down under ERISA preemption. For example, the City of San Francisco enacted an equal benefits ordinance "barring the City from contracting with companies whose employee benefit plans discriminate between employees with spouses and employees with domestic partners."⁹¹ In 1998, the U.S. District Court for the Northern District of California held that the ordinance was preempted as to the benefits covered by ERISA plans, including employers' pension and self-funded health care plans.⁹²

Of course, ERISA preemption in the employee benefit plan area does not preclude private employers from voluntarily offering benefits above and beyond the minimum requirements afforded under ERISA and the Code. ERISA's requirements set a floor, not a ceiling. For example, while they have no ability to change the corresponding tax consequences, private employers could provide employee pension benefit plan death benefits to same-sex survivors by defining "surviving spouse" under the terms of the plan to include the survivor of a state-recognized same-sex civil marriage, civil union, or domestic partnership. Few employers,

86. See *id.* § 1002(1).

87. *Id.* § 1144(b)(2)(A) ("Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities."). Subparagraph (B) excepts ERISA-covered employee benefit plans and trusts from the definition of insurance, banking, and securities. *Id.* § 1144(b)(2)(B).

88. See *supra* notes 79–80 and accompanying text.

89. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. 2573, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN PRIVATE INDUSTRY IN THE UNITED STATES, 2002–2003, at 27 (2005), available at <http://www.bls.gov/ncs/ebs/sp/ebbl0020.pdf> (defining a self-insured plan as "[a] plan offered by employers who directly assume the major cost of health insurance for their employee" and an insured plan as "[a] plan in which the employer contracts with another organization to assume financial responsibility for the costs of enrollees' medical claims").

90. A recent survey indicates that the majority of large private employers sponsor this type of health care plan. See Kimberly Blanton, *Firms Block Gays' Benefits*, B. GLOBE, Dec. 18, 2004, at A1, available at 2004 WLNR 14420612 ("Sixty-six percent of large US employers with more than 500 workers are self-insured, according to Mercer Human Resources Consulting.").

91. *Air Transp. Ass'n of Am. v. City & County of S.F.*, 992 F. Supp. 1149, 1155 (N.D. Cal. 1998).

92. *Id.* at 1180.

however, are taking this tack. In a recent survey conducted by The Segal Company and the New England Employee Benefits Council, following Massachusetts' enactment of same-sex civil marriages, only one in three Massachusetts employers indicated that it intended to provide any pension benefits to same-sex civil marriage spouses.⁹³

Similarly, many employers of self-funded health care plans are not voluntarily providing domestic partner coverage. For example, in December 2004, General Dynamics and FedEx announced that they would not provide coverage to same-sex civil marriage spouses under their self-funded plans.⁹⁴ Fearing litigation by unmarried opposite-sex couples, other private employers are discontinuing their voluntary domestic partner coverage under self-insured health care plans as a result of states' enactments of same-sex civil marriage and civil union laws. For example, IBM, Raytheon, Northeastern University, and Boston Medical Center are phasing out their self-funded domestic partner health care benefits⁹⁵ on the ground that same-sex couples can now marry and should therefore not receive "special treatment in the form of health benefits that are not available to unmarried opposite-sex couples."⁹⁶

With the few exceptions noted above, ERISA preemption results in federal law providing the sole source of law for most private employer-sponsored employee benefit plans. It also becomes the sole source of rights and benefits. Within its framework, ERISA provides numerous protections for employee-participants, their spouses, and beneficiaries. ERISA does not, however, contain a definition of the term "spouse."⁹⁷ Likewise, the Code affords preferential income tax treatment to certain employee benefits received by plan participants' spouses but does not define the term "spouse."⁹⁸ Prior to DOMA's enactment, the determination of whether a person qualified as a spouse for purposes of ERISA and the Code was determined based on state law.⁹⁹ Vitiating the historical deference to state law, DOMA now mandates that any reference to spouse under ERISA and the Code be limited to a

93. Kimberly Blanton, *Same-Sex Retirement Benefits Lag: Only 35% of Mass. Firms Say They'll Extend Offerings*, B. GLOBE, Dec. 29, 2004, available at http://www.boston.com/business/articles/2004/12/29/same_sex_retirement_benefits_lag?m.

94. Margo Williams, *Mass. Companies Refuse to Recognize Gay Marriages*, 365GAY.COM, Dec. 18, 2004, <http://www.365gay.com/newscon04/12/121804massBens.htm>. Of course these companies are not alone:

NStar Corp., General Dynamics Corp., and Caritas Christi Health Care are among the employers that don't provide married gay workers in the state with the same health benefits available to heterosexual married couples.... The employers, which also include FedEx Corp. and Adecco temporary employment agency, provide medical care through self-insured health plans, in which the company—not an insurer—collects premiums and pays medical bills of its workers. Employer self-insured plans, which are used to save money amid skyrocketing health care costs, are regulated by federal law.

More National News: Some Mass. Firms Deny Gays Spousal Benefits, S. VOICE ONLINE, Dec. 24, 2004, http://www.sovo.com/print.cfm?content_id=3119.

95. Williams, *supra* note 94.

96. Blanton, *supra* note 93.

97. See 29 U.S.C. § 1002 (2000).

98. See, e.g., I.R.C. § 402(c)(9) (2000) (providing tax-deferred rollovers for surviving spouses); *id.* § 417 (providing survivor annuity requirements for surviving spouses).

99. See *supra* note 8 and accompanying text.

party of an opposite-sex couple who has entered into a state-sanctioned civil marriage.¹⁰⁰

Excluding same-sex spouses and domestic partners from the rights and benefits conferred under ERISA and the Code is costly. Pension plans must generally offer death benefits to surviving spouses.¹⁰¹ With defined benefit plans, married participants' benefits must be paid in the form of a qualified pre-retirement survivor annuity if the participant dies prior to retirement and in the form of a qualified joint and survivor annuity if the participant lives to retirement.¹⁰² Plan participants are restricted from taking benefits in other forms unless they attain their spouses' written consent and waiver.¹⁰³ Similarly, defined contribution plans, such as profit sharing plans with a 401(k) feature, must pay a participant's account balance to a designated beneficiary upon the participant's death.¹⁰⁴ Under these plans, a spouse is the automatic designated beneficiary, and the account balance will not be paid to anyone other than the spouse unless the spouse has consented to another beneficiary.¹⁰⁵ ERISA's and the Code's death benefit requirements only apply, however, where there is a spouse as defined by DOMA.¹⁰⁶

ERISA and the Code also mandate that pension plans provide special distribution rules for surviving spouses and dependents. For example, surviving spouses can rollover plan distributions received due to a participant's death into other qualified retirement plans or similar arrangements, such as individual retirement accounts.¹⁰⁷ No taxes are due at the time of the rollover; rather, taxes are deferred until a future date, which is generally the date that the participant would have reached the age of seventy and one-half years.¹⁰⁸ The survivor of a same-sex civil marriage, civil union, or domestic partnership does not qualify as a surviving spouse and thus has no rollover rights. Also, while ERISA and the Code contain a general prohibition against the assignment or alienation of a plan participant's pension benefits, spouses, former spouses, and dependents can reach plan benefits if there is a court-ordered qualified domestic relations order (QDRO).¹⁰⁹ A QDRO can assign all or part of an employee's pension plan benefits to the employee's spouse, former spouse, child, or dependent.¹¹⁰ In light of DOMA, a same-sex spouse cannot qualify as a spouse or former spouse. Further, few same-sex spouses or domestic partners qualify as an employee's dependent for federal income tax purposes.¹¹¹ In addition to other requirements,¹¹² to qualify as a dependent, an employee must provide over half of the same-sex spouse or domestic partner's support and the same-sex spouse

100. 1 U.S.C. § 7 (2000).

101. I.R.C. §§ 401(a)(11), 417(a).

102. *Id.*

103. 29 U.S.C. § 1055(c)(2)(A) (2000).

104. *See* I.R.C. § 401(a)(11)(B)(i)–(ii).

105. Treas. Reg. § 1.401(a)-20, A-3 (2003).

106. *See id.* § 1.401(a)-20, A-25.

107. I.R.C. § 402(c)(9).

108. *See id.* §§ 401(a)(9)(C), 402(c)(1).

109. 29 U.S.C. § 1056(d)(3) (2000); I.R.C. § 401(a)(13).

110. I.R.C. § 414(p)(1), (8).

111. *See id.* § 152 (defining "dependent").

112. *See, e.g., id.* § 152(d)(2)(H) (requiring that a "dependent" have "the same principal place of abode as the taxpayer and [be] a member of the taxpayer's household").

or domestic partner cannot independently earn more than the Code's exemption amount.¹¹³ Historically, same-sex households are dual income households.¹¹⁴ Thus, neither member of the household is likely to satisfy the Code's "dependency" requirements. Therefore, any domestic relations order transferring benefits to a same-sex spouse or domestic partner will not meet the definition of a QDRO and the plan administrator is precluded from making distributions.¹¹⁵

With regard to employee welfare benefit plans, ERISA and the Code provide certain protections for plan participants' spouses and dependents. For example, ERISA provides special health coverage enrollment rights¹¹⁶ and continuation coverage rights.¹¹⁷ Under the special health coverage enrollment rights, where an employer offers family coverage, plan participants may enroll their spouses and dependents in a group health plan upon a loss of eligibility for other coverage or when the employee acquires a new dependent.¹¹⁸ Under the continuation coverage rights, "qualified beneficiaries," who are defined as the spouse or dependent child of a covered employee,¹¹⁹ may elect coverage after certain qualifying events, such as employment termination, divorce, or legal separation of a covered employee.¹²⁰ Same-sex spouses and domestic partners do not generally qualify as dependents for purposes of the special enrollment rights.¹²¹ Furthermore, they will never meet the definition of qualified beneficiaries for purposes of the continuation coverage rights because those rights are limited to an employee's spouse and dependent children.¹²²

Additionally, within ERISA and the Code's framework, the federal tax consequences for providing same-sex spouse or domestic partner coverage are quite burdensome. As noted above, same-sex spouses and domestic partners do not qualify for tax-free rollovers from employee pension benefit plans.¹²³ Any plan distribution to a same-sex surviving spouse or domestic partner is therefore fully taxed on the date of distribution.¹²⁴ While employer-paid health care coverage costs are generally excluded from an employee's taxable income, employer-paid costs for same-sex spouse or domestic partner coverage are not excluded from the employee's gross income unless the same-sex spouse or domestic partner qualifies as the employee's dependent.¹²⁵ With few same-sex spouses or domestic partners

113. *Id.* § 152(d)(1)(B)-(C).

114. Virginia Postrel, *The (Gay) Marriage Penalty*, B. GLOBE, May 23, 2004, at L5, available at 2004 WLNR 3573763.

115. See 29 U.S.C. § 1056(d)(3) (2000); I.R.C. § 414(p)(6).

116. See 29 U.S.C. §§ 1181-1187 (enacted by the Health Insurance Portability and Accountability Act (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (1996)).

117. See 29 U.S.C. §§ 1161-1168 (enacted by the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), Pub. L. No. 99-272, 100 Stat. 82 (1996)).

118. 29 U.S.C. § 1181(f).

119. *Id.* § 1167(3)(A); see also I.R.C. § 4980B(g)(1) (2000).

120. See 29 U.S.C. § 1163.

121. See *supra* notes 114-117 and accompanying text.

122. See 29 U.S.C. § 1167(3)(A) (limiting the definition of a "qualified beneficiary" to spouses and dependent children of covered employees).

123. See *supra* notes 109-111 and accompanying text; see also I.R.C. § 402(c)(9).

124. Distributions to same-sex partners are not eligible rollover distributions and are taxed in the year distributed from the trust to the beneficiary. See I.R.C. § 402(a), (c)(9).

125. See *id.* §§ 105-106.

meeting the Code's definition of dependent,¹²⁶ the value of the employer-paid coverage for that person is included in the employee's gross income for federal income tax purposes and is therefore treated as wages for federal employment tax purposes.¹²⁷

Same-sex spouses and domestic partners face similar tax disadvantages under employer-sponsored cafeteria plans,¹²⁸ often referred to as "flexible spending accounts." Flexible spending accounts allow employees to pay for employee premiums and unreimbursed medical expenses on a pre-tax basis.¹²⁹ Unless a same-sex spouse or domestic partner qualifies under the Code's definition of a dependent,¹³⁰ employee premium payments and unreimbursed medical expenses for domestic partner coverage cannot be paid by the flexible spending account and must instead be paid by the employee with after-tax dollars.¹³¹

As a final example of federal income tax implications, certain employers can establish voluntary employees' beneficiary association (VEBA) arrangements to provide their employees with health care coverage.¹³² A VEBA must be established to provide "substantially all" of the medical benefits paid by the VEBA to employees and their spouses and dependents.¹³³ In a Private Letter Ruling, the Internal Revenue Service ruled that coverage of nondependent domestic partners would not affect the VEBA's tax exemption so long as their benefits do not exceed three percent of the total benefits paid by the fund.¹³⁴ The VEBA may fail to meet this three percent limitation if more than three percent of the total benefits of the fund are used for same-sex spouse and domestic partner coverage; thus, all benefits received under the VEBA would be taxable to all recipients.

IV. A LANDSCAPE OF ACQUIESCENCE: THE SNAIL-LIKE PACE OF JUDICIAL INTOLERANCE

For years, the denial of federal rights and benefits to same-sex couples was not susceptible to federal constitutional challenges. No state recognized same-sex civil marriages; thus, plaintiffs lacked standing to mount a challenge to DOMA and its effect on federal regulatory schemes.¹³⁵ With Massachusetts' 2004 legal recognition

126. *Id.* § 152(d) (defining a dependent as someone who resides in employee's household and who receives over half of his or her support from the employee).

127. *See id.* § 106. Addressing the issue of domestic partner health care coverage, the IRS ruled in a Private Letter Ruling that the excess of the fair market value of a non-tax dependent domestic partner over the amount paid by an employee of such coverage must be included in the employee's income and included as wages for FICA, FUTA, and income tax withholding purposes. I.R.S. Priv. Ltr. Rul. 2001-08-010 (Feb. 23, 2001), *available at* 2001 WL 175877. The IRS also ruled that the plan could rely on the employee's certification to establish that his or her domestic partner was a tax dependent. *Id.*

128. *See* I.R.C. § 125.

129. Treas. Reg. § 1.125-2T (1986).

130. *See supra* note 129.

131. *See* I.R.S. Chief Couns. Advis. 2001-17-038 (Jan. 16, 2001), *available at* 2001 WL 429802.

132. *See* I.R.C. § 505(a).

133. Treas. Reg. § 1.501(c)(9)-3(a) (1981).

134. I.R.S. Priv. Ltr. Rul. 98-50-011 (Dec. 11, 1998), *available at* 1998 WL 855396.

135. To establish standing:

First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct

of same-sex civil marriages, the Federal DOMA is now subject to constitutional attack, primarily under the Federal Constitution's Full Faith and Credit,¹³⁶ Equal Protection,¹³⁷ and Due Process Clauses.¹³⁸

With regard to the Full Faith and Credit Clause, constitutional scholars disagree as to whether Congress had the power to enact DOMA under the clause.¹³⁹ The disagreement centers on whether Congress's role under the clause is strictly procedural or is instead substantive.¹⁴⁰

If limited to a procedural role, Congress's authority is limited to enacting legislation that facilitates states' recognition of sister states' acts, judgments, and laws.¹⁴¹ Many critics argue that Congress's role under the Full Faith and Credit Clause is strictly procedural and that DOMA goes too far because it is more than just procedural legislation.¹⁴² DOMA provides that states are not required to give effect to a law of another state that sanctions same-sex civil marriages.¹⁴³ This "authorization" changes states' obligations under the Full Faith and Credit Clause. Historically, states have recognized the judgments and orders of their sister states unless the latter's actions run counter to strong public policy concerns of the former.¹⁴⁴ In the context of civil marriage, the "public policy" exception was traditionally limited to out-of-state civil marriages involving polygamy, miscegenation, consanguinity, and the like.¹⁴⁵ DOMA carves out another exception to the Full Faith and Credit Clause and empowers states to deny recognition of

complained of.... Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

United States v. Hays, 515 U.S. 737, 742-43 (1995) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

136. U.S. CONST. art. IV, § 1.

137. *Id.* amend. XIV, § 1.

138. *Id.* amend. V; see Baker, *supra* note 75, at 30 ("In addition to challenging DOMA as an unlawful abridgment of the Full Faith and Credit Clause, proponents of same-sex marriage are also likely to question DOMA's constitutionality under the equal protection clause, due process clause, right to travel, right to intimate association, and the commerce clause."); Note, *Litigating The Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*, 117 HARV. L. REV. 2684, 2687-88 (2004).

139. Compare Mark Strasser, *Baker and Some Recipes for Disaster: On DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence*, 64 BROOK. L. REV. 307, 350 (1998) (asserting DOMA unconstitutional under Full Faith and Credit Clause), with Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255, 391-92 (1998) ("DOMA may be superfluous, or even unwise, but the history of the [Full Faith and Credit] Clause indicates that it should not be held unconstitutional." (footnote omitted)).

140. See Anita Y. Woudenberg, Note, *Giving DOMA Some Credit: The Validity of Applying Defense of Marriage Acts to Civil Unions Under the Full Faith and Credit Clause*, 38 VAL. U. L. REV. 1509, 1523 (2004).

141. See Paige E. Chabora, *Congress' Power Under the Full Faith and Credit Clause and the Defense of Marriage Act of 1996*, 76 NEB. L. REV. 604, 621-35 (1997) (discussing the argument that DOMA fits neatly within Congress's procedural role because DOMA only restates the powers granted to the states by the Full Faith and Credit Clause).

142. See, e.g., 142 CONG. REC. S5931-01 (1996) (statement of Sen. Kennedy), available at 1996 WL 302425 (introducing into the record a letter from Professor Laurence H. Tribe concluding that DOMA "would be an unconstitutional attempt by Congress to limit the full faith and credit clause of the Constitution").

143. 28 U.S.C. § 1738C (2000).

144. See RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 283 (1971).

145. See Scott Ruskay-Kidd, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435, 1439-40 (1997); see also *Langan v. St. Vincent's Hosp. of N.Y.*, 765 N.Y.S.2d 411, 414 (Sup. Ct. 2003) (stating that "New York adheres to the general rule that 'marriage contracts, valid where made, are valid everywhere, unless contrary to natural laws or statutes'" (quoting *Shea v. Shea*, 63 N.E.2d 113, 113 (N.Y. 1945))), *rev'd on other grounds*, 2005 WL 2542658 (N.Y. App. Div. Oct. 11, 2005).

another state's same-sex civil marriages without employing a separate public policy analysis.¹⁴⁶ Accepting the argument that Congress's role under the Full Faith and Credit Clause is strictly procedural, DOMA would therefore be unconstitutional substantive legislation,¹⁴⁷ and any changes to the meaning of the Constitution would need to be accomplished through constitutional amendment.

If Congress's role under the Full Faith and Credit Clause is substantive, then any challenges to the Federal DOMA under the clause would likely fail. For example, in a recent article, Anita Y. Woudenberg argues that a historical analysis of the clause supports Congress's substantive role.¹⁴⁸ Under this view, "Congress is permitted to determine the effect of acts, public records, and judgments among states, provided it does so in a general fashion."¹⁴⁹ Accordingly, the clause places few limitations on Congress's power in this area.

To date, only one lower federal court has addressed DOMA's constitutionality under the Full Faith and Credit Clause. In *Wilson v. Ake*,¹⁵⁰ the U.S. District Court for the Middle District of Florida upheld DOMA's constitutionality under the clause.¹⁵¹ The court found that Congress's enactment of DOMA under the Full Faith and Credit Clause was "an appropriate exercise of its power to regulate conflicts between the laws of two different States."¹⁵² Whether other federal courts will follow suit is yet to be determined. Note, however, that states' mini-DOMAs independently lend another tier of support for denying full faith and credit. Under a state's mini-DOMA, a state can rely on its own law and public policy to deny legal recognition to another state's same-sex civil marriage. No reference need be made to the Federal DOMA.¹⁵³

With regard to the Federal Due Process and Equal Protection Clauses, constitutional challenges under these provisions are not being written on a clean slate. While the Supreme Court has recognized that the right to marry is a fundamental right under a substantive due process analysis, and therefore any laws imposing on that right are subject to strict scrutiny,¹⁵⁴ neither the Supreme Court nor any other federal court has interpreted the fundamental right to marry to extend to

146. See 28 U.S.C. § 1738C.

147. See *supra* note 146.

148. Woudenberg, *supra* note 140, at 1547-49.

149. *Id.* at 1549.

150. 354 F. Supp. 2d 1298 (M.D. Fla. 2005).

151. *Id.* at 1303.

152. *Id.*

153. See *supra* notes 18-21 and accompanying text. For example, Georgia's mini-DOMA provides:

(a) It is declared to be the public policy of this state to recognize the union only of man and woman. Marriages between persons of the same sex are prohibited in this state.

(b) No marriage between persons of the same sex shall be recognized as entitled to the benefits of marriage. Any marriage entered into by persons of the same sex pursuant to a marriage license issued by another state or foreign jurisdiction or otherwise shall be void in this state. Any contractual rights granted by virtue of such license shall be unenforceable in the courts of this state and the courts of this state shall have no jurisdiction whatsoever under any circumstances to grant a divorce or separate maintenance with respect to such marriage or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such marriage.

GA. CODE ANN. § 19-3-3.1 (2004).

154. *Zablocki v. Redhail*, 434 U.S. 374, 381 (1978).

a fundamental right to marry a person of the same sex.¹⁵⁵ Similarly, neither the Supreme Court nor any other federal court has recognized sexual orientation as a suspect class, which would warrant a strict scrutiny analysis under the Equal Protection Clause.¹⁵⁶ Higher-level scrutiny has thus been reserved for laws affecting civil marriages grounded on procreation and child rearing.¹⁵⁷

With respect to specific court rulings on the subject, the U.S. Supreme Court addressed the issue of same-sex civil marriages in 1972. In *Baker v. Nelson*,¹⁵⁸ the highest court of Minnesota ruled that a statute prohibiting same-sex marriage did not violate federal constitutional guarantees of equal protection, due process, and privacy.¹⁵⁹ The U.S. Supreme Court summarily dismissed the appeal on the ground that Minnesota's marriage law did not raise any federal constitutional issues.¹⁶⁰ Because of the summary dismissal by the U.S. Supreme Court, lower courts are bound to follow *Baker* until the Supreme Court indicates otherwise.¹⁶¹

Arguably, in the more than thirty years since the *Baker* dismissal, the Supreme Court has not indicated that denying civil marriage to same-sex couples raises federal constitutional issues. In its 1996 decision in *Romer v. Evans*,¹⁶² the Supreme Court held that class-based legislation directed against gays and lesbians violated the Federal Equal Protection Clause. In that case, an amendment adopted by referendum to the Colorado Constitution prohibited all governmental action designed to protect homosexuals from discrimination.¹⁶³ In finding that the Colorado amendment violated federal equal protection, the Court did not find that sexual orientation is a suspect class. Rather, the Court applied low-level scrutiny and, under that analysis, found that the amendment was not rationally related to any legitimate governmental purpose.¹⁶⁴

In its 2003 decision in *Lawrence v. Texas*,¹⁶⁵ the Supreme Court struck down "a state statute criminalizing certain private sexual acts between homosexuals" on the ground that the Due Process Clause protects consensual sex between adult homosexuals.¹⁶⁶ The Court did not, however, find that any fundamental right was implicated; instead, the Court applied low-level scrutiny to find that the Texas

155. *Wilson*, 354 F. Supp. 2d at 1306.

156. *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004) (holding that homosexuality is not a suspect class and noting that "all of our sister circuits that have considered the question have declined to treat homosexuals as a suspect class"), *cert. denied*, 543 U.S. 1081 (2005).

157. *See* *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942))); *Skinner*, 316 U.S. at 541 ("Marriage and procreation are fundamental to the very existence and survival of the race."); *see also Zablocki*, 434 U.S. at 386 (placing the decision to marry "on the same level as decisions relating to procreation, childbirth, child-rearing, and family relationships").

158. 191 N.W.2d 185 (Minn. 1971).

159. *Id.* at 187.

160. 409 U.S. 810, 810 (1972) (mem.) ("The appeal is dismissed for want of a substantial federal question.").

161. *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1305 (M.D. Fla. 2005) ("A dismissal for lack of a substantial federal question constitutes an adjudication on the merits that is binding on lower federal courts.").

162. 517 U.S. 620 (1996).

163. COLO. CONST. art. II, § 30b.

164. *Romer*, 517 U.S. at 634–35.

165. 539 U.S. 558 (2003).

166. *SMITH*, *supra* note 18, at 4; *see Lawrence*, 539 U.S. at 577–78.

sodomy statute was not rationally related to any legitimate state interest.¹⁶⁷ Moreover, the Court indicated that de-criminalizing same-sex sexual relations is not the same as endorsing them through civil laws.¹⁶⁸ The Court went out of its way to distinguish its finding that criminal sodomy laws used against same-sex couples were unconstitutional from the question of "whether the government must give formal recognition to any relationship that homosexual persons seek to enter."¹⁶⁹

In 2005, the Supreme Court once again signaled that it was unwilling to apply anything other than low-level scrutiny to federal and state laws restricting same-sex couples' rights and benefits. In 2004, the Eleventh Circuit held in *Lofton v. Secretary of the Department of Children & Family Services*¹⁷⁰ that a Florida law prohibiting same-sex couples from adopting children did not violate federal due process or equal protection.¹⁷¹ In so doing, the court found that the Supreme Court's ruling in *Lawrence* did not create any new fundamental rights with regard to same-sex relationships¹⁷² and that same-sex couples were not a suspect class; thus, the Florida law need be only rationally related to a legitimate state interest to survive constitutional scrutiny.¹⁷³ The court went on to find that Florida had a legitimate state interest in placing children in a traditional family structure.¹⁷⁴ Without comment or published dissent, the Supreme Court denied the petition for writ of certiorari.¹⁷⁵ Although the denial is not a ruling on the merits, it lends further support for the position that the Supreme Court is unwilling to enter this politically charged area. The Supreme Court's action is in line with its continuing reluctance to expand the list of fundamental rights or enlarge suspect classification.¹⁷⁶

The Supreme Court, however, has not explicitly ruled that same-sex civil marriage is not a fundamental right under the Due Process Clause or that sexual orientation is not a suspect class under the Equal Protection Clause. Therefore, the Court has left the door open to state court interpretation of those federal protections. Unfortunately, state courts are not going through that door. The primary reason for this is not reluctance, but plaintiffs' failure to base arguments on both state and

167. *Lawrence*, 539 U.S. at 578 ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.").

168. In particular, the Supreme Court stated:

[This case] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.

Id.

169. *Id.*

170. 358 F.3d 804 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005).

171. *Id.* at 817, 823.

172. *Id.* at 817.

173. *Id.* at 818.

174. *Id.* at 820. Moreover, although the court declined to decide the case on grounds of public morality, it noted that Florida had a legitimate state interest in its promotion. *Id.* at 819 n.17.

175. 543 U.S. 1081 (mem.) (2005).

176. See *Chavez v. Martinez*, 538 U.S. 760, 775 (2003) (expressing reluctance to expand doctrine of substantive due process); *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) (expressing reluctance to take a more expansive view of "authority to discover new fundamental rights"), *overruled on other grounds by Lawrence v. Texas*, 539 U.S. 558 (2003).

federal constitutional protections.¹⁷⁷ For example, in *Baehr v. Lewin*,¹⁷⁸ plaintiffs argued that limiting marriage to members of the opposite sex violated their right to privacy and equal protection as guaranteed by the Hawaii Constitution.¹⁷⁹ Similarly, in *Goodridge v. Department of Public Health*,¹⁸⁰ plaintiffs argued that the denial of marriage licenses to same-sex couples violated several provisions of the Massachusetts Constitution.¹⁸¹ To date, only one state's highest court has addressed both state and federal constitutional arguments. In *Baker v. State*,¹⁸² the plaintiffs argued that restricting same-sex civil marriages violated both state and federal constitutional protections.¹⁸³ The Supreme Court of Vermont found that the state constitution's common benefits clause required legal recognition of same-sex relationships, and therefore a federal constitutional analysis was unwarranted.¹⁸⁴

Collectively, these federal and state court decisions set the tone for addressing the constitutionality of the Federal DOMA and states' mini-DOMAs. With regard to the Federal DOMA, if future decisions are consistent with past decisions, the Federal DOMA will not run afoul of the Due Process and Equal Protection Clauses under low-level scrutiny if Congress could have had any rational basis for enacting the law. DOMA's legislative history indicates that it was enacted, in part, to counter the Hawaii Supreme Court's decision in *Baehr* that appeared to pave the way for same-sex civil marriages,¹⁸⁵ which could arguably be seen as a species of hostility towards homosexuals.¹⁸⁶ However, DOMA's legislative history also indicates that it was designed to protect federalism interests and state sovereignty in the area of domestic relations.¹⁸⁷ This latter justification could, in itself, provide a rational basis for enacting the law.

To date, only two federal district courts have addressed DOMA's constitutionality. As previously discussed, *Wilson v. Ake*,¹⁸⁸ a U.S. District Court opinion out of the Middle District of Florida, upheld DOMA based in part on a finding that the government had demonstrated a legitimate interest in allowing marriages to exist only between men and women.¹⁸⁹ In *Smelt v. County of Orange*,¹⁹⁰ a June 2005 U.S. District Court opinion from the Central District of California, the court upheld DOMA's denial of federal recognition of same-sex civil marriages for purposes of federal rights and benefits on the ground that the provision is rationally related to "a legitimate interest to encourage the stability and legitimacy of what may reasonably be viewed as the optimal union for procreating and rearing children

177. See, e.g., *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Baker v. State*, 744 A.2d 864 (Vt. 1999).

178. 852 P.2d 44 (Haw. 1993).

179. *Id.* at 50–51.

180. 798 N.E.2d 941 (Mass. 2003).

181. *Id.* at 950–51.

182. 744 A.2d 864 (Vt. 1999).

183. See *id.* at 870 n.2.

184. *Id.* at 870.

185. See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

186. H.R. REP. NO. 104-664, at 2, 4–6 (1996), as reprinted in 1996 U.S.C.C.A.N. 2905, 2906, 2908–10, available at 1996 WL 391835.

187. *Id.* at 29, as reprinted in 1996 U.S.C.C.A.N. 2905, 2933; see SMITH, *supra* note 18, at 3–4.

188. 354 F. Supp. 2d 1298 (M.D. Fla. 2005).

189. *Id.* at 1308–09; see *supra* notes 155–157.

190. 374 F. Supp. 2d 861 (C.D. Cal. 2005).

by both biological parents.”¹⁹¹ Both of these decisions rely on low-level scrutiny to find that DOMA is rationally related to a legitimate federal interest and is therefore constitutional.

With regard to the constitutionality of mini-DOMAs under state and federal constitutions, state courts are sending a mixed message. In 2003, the Arizona Court of Appeals upheld the state’s mini-DOMA in *Standhardt v. Superior Court ex rel. County of Maricopa*.¹⁹² Taking the limited view of *Lawrence* described herein, the Arizona Court of Appeals found that “[t]he history of the law’s treatment of marriage as an institution involving one man and one woman, together with recent, explicit reaffirmations of that view, lead invariably to the conclusion that the right to enter a same-sex marriage is not a fundamental liberty interest protected by due process.”¹⁹³ The court went on to find that Arizona had a “legitimate interest in encouraging procreation and child-rearing within the marital relationship, and that limiting marriage to opposite-sex couples [was] rationally related to that interest.”¹⁹⁴ In January 2005, the Indiana Court of Appeals ruled that Indiana’s mini-DOMA statute was constitutional under the state constitution based on similar reasoning.¹⁹⁵

In contrast, two lower state courts have struck down state mini-DOMAs. In *Castle v. State*,¹⁹⁶ a 2004 opinion issued by the Superior Court of Washington, the court held that the state’s mini-DOMA statute violated the privileges and immunities clause of the state constitution but declined to address federal constitutional issues raised by the plaintiffs.¹⁹⁷ In *Andersen v. King County*,¹⁹⁸ another superior court judge in Washington held that, under a strict scrutiny analysis, the state’s mini-DOMA statute violated the state constitution’s privileges and immunities clause and denied substantive due process rights.¹⁹⁹ Even if the decisions are upheld on appeal, however, they provide no foundation for treating same-sex civil marriages as marriages for purposes of federal rights and benefits because the decisions are grounded on state constitutional protections.

As noted above, both federal and state courts are reticent to find that the Federal DOMA or state mini-DOMAs impact a fundamental right or implicate a suspect class under a federal constitutional analysis. Even if, however, the tide turns and courts become more receptive to plaintiffs’ constitutional arguments, those victories will not be insulated from further legislative attack. Any such victories are susceptible to constitutional amendments limiting civil marriage between persons of the opposite sex. To date, two state legislatures have amended their state

191. *Id.* at 880.

192. 77 P.3d 451 (Ariz. Ct. App. 2003); *see* ARIZ. REV. STAT. ANN. § 25-101(C) (2000).

193. *Standhardt*, 77 P.3d at 460.

194. *Id.* at 463–64.

195. *See* Morrison v. Sadler, 821 N.E.2d 15, 30–31 (Ind. Ct. App. 2005); *see also* *Gay Couples Abandon Indiana DOMA Fight*, 365GAY.COM, Feb. 18, 2005, <http://www.365gay.com/newscon05/02/021805indiana.htm> (“Three same-sex couples fighting Indiana’s Defense of Marriage Act... will not take the battle to the state Supreme Court.”); *Indiana Gay Marriage Ban Upheld*, 365GAY.COM, Jan. 20, 2005, <http://www.365gay.com/newscon05/01/012005indiCourt.htm>.

196. No. 04-2-00614-4, 2004 WL 1985215 (Wash. Super. Ct. Sept. 7, 2004).

197. *Id.* at *16; *see* WASH. REV. CODE § 26.04.010(1) (2005).

198. No. 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Super. Ct. Aug. 4, 2004).

199. *Id.* at *11.

constitutions to vitiate state court decisions awarding legal recognition to same-sex couples.

In *Baehr v. Lewin*,²⁰⁰ the 1993 case in which plaintiffs argued that Hawaii's refusal to grant same-sex marriage licenses violated equal protection under the state constitution, the Hawaii Supreme Court held that sex-based classifications were subject to strict scrutiny under the Hawaii Constitution.²⁰¹ Applying the strict scrutiny standard, on remand, the Circuit Court of Hawaii held that Hawaii's prohibition against same-sex marriages violated the state constitution's equal protection clause.²⁰² Before a remedy could be fashioned, the Hawaii legislature approved and the Hawaii electorate ratified a state constitutional amendment granting the legislature the right to define marriage as between a man and a woman.²⁰³ Although Congress went forward with the Federal DOMA to counter any future threats to traditional marriage, Hawaii state residents no longer had any state constitutional challenges to the state's denial of legal recognition of same-sex civil marriages.²⁰⁴ Similarly, an Alaska Superior Court decision finding that the prohibition on same-sex civil marriage violated the state's equal protection clause²⁰⁵ was rendered moot when Alaska amended its state constitution to limit marriage to parties of the opposite sex.²⁰⁶

While not specifically linked to state court decisions, sixteen other states have enacted constitutional amendments banning same-sex civil marriages.²⁰⁷ Other states are following suit. In 2005, the Virginia legislature introduced a proposed amendment banning same-sex civil marriages and civil unions.²⁰⁸ That same year, the Texas House of Representatives passed a proposal that would amend the Texas Constitution to ban same-sex civil marriages.²⁰⁹ Even in Massachusetts, the only state whose court has legalized same-sex civil marriages, the state legislature proposed a state constitutional amendment limiting civil marriages to between a man and a woman.²¹⁰

Grassroots conservative organizations are adding fuel to the fire. For example, the Florida Coalition to Protect Marriage is currently petitioning the Florida legislature to amend the Florida Constitution to define marriage as a heterosexual

200. 852 P.2d 44 (Haw. 1993).

201. *Id.* at 50, 67.

202. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *21 (Haw. Cir. Ct. Dec. 3, 1996).

203. HAW. CONST. art. I, § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples.").

204. See HAW. REV. STAT. ANN. § 572-1 (LexisNexis 2005).

205. *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998).

206. ALASKA CONST., art. I, § 25 ("To be valid or recognized in this State, a marriage may exist only between one man and one woman.").

207. See Same Sex Marriage, *supra* note 18 (citing Alaska, Arkansas, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, and Utah as states with constitutional language defining marriage).

208. H.R.J. Res. 584, 2005 Sess. (Va. 2005), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?051+ful+HJ584+pdf>; see Chris L. Jenkins & Rosalind S. Helderman, *Stage Set for Battle Over Gay Marriage: Virginia Rights Group Plans Campaign*, WASH. POST, Jan. 14, 2005, at B04, available at <http://www.washingtonpost.com/ac2/wp-dyn/A7836-2005Jan13?language+printer>.

209. H.R.J. Res. 6, 79th Leg., Reg. Sess. 2005 (Tex. 2005).

210. S.J. Res. 5, 184th Gen. Ct., Reg. Sess. (Mass. 2005).

union and provide that “no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized” under Florida law.²¹¹

The state constitutional bans to same-sex marriage effectively leave same-sex couples with only one avenue of attack: federal constitutional protections under the Due Process and Equal Protection Clauses. Efforts are underway to even foreclose this federal avenue of attack. In 2004, the House passed the Marriage Protection Act,²¹² which would strip the federal courts of the power to rule on the constitutionality of DOMA.²¹³ Also, there is some support for a federal constitutional amendment limiting marriage to opposite-sex marriages.²¹⁴ In his 2005 State of the Union address, President Bush stated: “Because marriage is a sacred institution and the foundation of society, it should not be re-defined by activist judges. For the good of families, children, and society, I support a constitutional amendment to protect the institution of marriage.”²¹⁵ Despite a recent determination by President Bush that his political capital is better spent elsewhere,²¹⁶ members of Congress continue to push this agenda. For example, in January 2005, a constitutional ban on same-sex marriages was introduced in the U.S. Senate.²¹⁷ In March 2005, a similar amendment was introduced in the House of Representatives.²¹⁸ Although it is unlikely that the proposed amendments will meet the requisite two-thirds majority votes in both houses and state ratification requirements, if an amendment does manage to marshal the requisite support, states would no longer have the flexibility of defining marriage—even within their own borders.²¹⁹

In conclusion, Massachusetts’ legal recognition of same-sex civil marriages opened the door for challenging the Federal DOMA and states’ mini-DOMAs. Federal courts, as well as state courts, are shutting that door by providing extreme deference to Congress’s determination that DOMA is rationally related to legitimate federal interests. Thus, for the foreseeable future, legislative reform appears to be the only mechanism for same-sex couples gaining any legal recognition on the federal level.

211. Bill Cotterell, *Group Wants Marriage Defined: Proposed Amendment Would Ban Gay Unions*, TALLAHASSEE DEMOCRAT, Feb. 15, 2005, at B1, available at 2005 WLNR 2114152.

212. H.R. 3313, 108th Cong. (2004).

213. *Id.* The bill was received in the Senate and referred to the Senate Committee on the Judiciary. The Marriage Protection Act was reintroduced in the House in March 2005. H.R. 1100, 109th Cong. (2005). See Mary Fitzgerald & Alan Cooperman, *Marriage Protection Act Passes: House Bill Strips Federal Courts of Power Over Same-Sex Cases*, WASH. POST, July 23, 2004, at A04 available at <http://www.washingtonpost.com/wp-dyn/articles/A6217-2004Jul22.html>.

214. See, e.g., President George W. Bush, Remarks at the White House (Feb. 24, 2004), available at <http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html>.

215. President George W. Bush, State of the Union Address (Feb. 2, 2005), available at <http://www.whitehouse.gov/news/releases/2005/02/20050202-11.html>.

216. Leslie Hoffercker, *Bush Won't Push Ban on Gay Marriage*, STANDARD TIMES, Jan. 17, 2005, at A7, available at <http://www.southcoasttoday.com/daily/01-05/01-17-05/a07wn672.htm>.

217. S.J. Res. 1, 109th Cong. (2005); see M.E. Sprengelmeyer, *Allard to Revive Marriage Measure: Proposed Ban on Same-Sex Unions to Be Reintroduced*, ROCKY MTN. NEWS, Jan. 24, 2005, at 5A, available at 2005 WLNR 986863.

218. H.J. Res. 39, 109th Cong. (2005); see Press Release, Representative Dan Lungren, Lungren Introduces the Defense of Marriage Amendment (Mar. 17, 2005), http://www.house.gov/apps/list/press/ca03_lungren/031705DefenseofMarriage.html.

219. Melissa A. Glidden, *Federal Marriage Amendment*, 41 HARV. J. ON LEGIS. 483, 485 (2004).

V. RECOMMENDATIONS AND CONCLUSIONS

This Article recommends amending ERISA and the Code to afford same-sex couples with plan benefits and special federal income tax treatment where their respective states have legally recognized their relationship under civil marriage, civil union, or domestic partnership laws. For numerous reasons, the recommended amendments offer a palatable solution in our current conservative political climate. Extending employee benefits and tax advantages to these state-sanctioned same-sex relationships is consistent with ERISA's goals and protectionist scheme. ERISA was designed to protect not only plan participants, but also plan participants' surviving spouses, dependents, and beneficiaries.²²⁰ While ERISA does not define "spouse" and ERISA's framers did not envision a world in which the traditional meaning of "spouse" would become antiquated, ERISA clearly indicates its intent to protect employee-participants' beneficiaries.²²¹ Denying same-sex spouses and domestic partners pension and welfare benefits does not protect today's "family unit" and places a burden on society as a whole to provide similar benefits under social welfare-type programs.

Further, ERISA was enacted, in part, to provide a uniform regulatory system so that employers are not subject to inconsistent or additional requirements under state and local laws.²²² With the enactment of same-sex civil marriages, civil unions, and domestic partnerships, employers are now subjected to a dual federal and state regulatory scheme. For example, in a state that recognizes same-sex civil marriages, civil unions, or domestic partnerships and accordingly provides state tax benefits for employee benefit coverage, employers are forced to maintain a separate payroll function for their income tax withholding and payroll tax. For purposes of calculating state taxes, any income imputed to employees for federal tax purposes, such as the value of employer-provided domestic partner health care coverage, must be subtracted from employees' income for state tax purposes.²²³ Further, employers' federal payroll taxes are higher when the value of domestic partner benefits is included in employees' income.²²⁴ Amending ERISA and the Code to provide consistent tax treatment would remove this dual regulatory scheme and promote private employer sponsorship of employee benefit plans. A private employer in Massachusetts could then provide same-sex spouse health care coverage and not be burdened with defining employee income for state purposes and then defining income for federal purposes.

Federal law and proposed federal legislation are already paving the way for the recommended amendments. In 1982, ERISA was amended to provide an ERISA

220. 29 U.S.C. § 1001(b)–(c) (2000); *see also* *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983) ("ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans.").

221. *See* 29 U.S.C. § 1001.

222. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987).

223. MILLIMAN INC., BENEFITS INFO. BULL. 04-02, TO BE OR NOT TO BE: THE IMPACT OF SAME-SEX MARRIAGES ON EMPLOYEE BENEFITS 8 (2004), available at http://www.milliman.com/pubs/BIB0402_samesex.pdf.

224. Hum. Rts. Campaign Found., *The Tax Equity for Health Plan Beneficiaries Act and Domestic Partner Health Benefits Equity Act*, http://www.hrc.org/Content/NavigationMenu/HRC/Get_Informed/Federal_Legislation/Tax_Equity_for_Health_Plan_Beneficiaries_Act/Tax_Equity_Intro.htm (last visited Oct. 31, 2005).

preemption loophole for the Hawaii Prepaid Health Care Act.²²⁵ The Hawaii statute requires that employers afford their employees health care benefits pursuant to the statute's provisions. With the ERISA preemption loophole, private employers must generally comply with Hawaii's statutory scheme, even if they sponsor self-funded welfare benefit plans.²²⁶ This preemption loophole demonstrates that ERISA can be amended to extend ERISA protections where state law recognizes same-sex civil marriages, civil unions, and domestic partnerships. With regard to proposed legislation, numerous bills provide some relief on a piecemeal basis. For example, under the Tax Equity for Health Plan Beneficiaries Act²²⁷ and the Domestic Partner Health Benefits Equity Act,²²⁸ the Code would be amended to end the taxation of health insurance benefits for domestic partners and treat them the same as health benefits for legal spouses and dependents. Other examples include bills introduced in both the House and the Senate in 2003 to provide fringe benefits to domestic partners of federal employees²²⁹ and a 2004 bill introduced in the House "that would amend the Social Security Act to allow same-sex couples to have the same benefits, responsibilities, and obligations as others who pay into Social Security."²³⁰ Similarly, the recommended amendments would provide limited relief in the employee benefit plan area by affording ERISA rights and benefits and Code tax preferences to parties who have entered into state-sanctioned same-sex civil marriages, civil unions, and domestic partnerships.

The recommended amendments will have a negligible impact on federal revenues. In 2004, the Congressional Budget Office (CBO) issued a report concluding that granting *all* federal rights and benefits to same-sex civil marriages would have a minimal impact on federal revenues.²³¹ In fact, the CBO estimated that federal revenues would increase slightly, by as much as \$700 million by the years 2011 through 2014.²³² The estimated revenue increase is a function of numerous variables, including positive revenue generation resulting from the reinstatement of the marriage penalty and decreases in Supplemental Security Income, Medicaid, and Medicare spending.²³³ While there is no empirical data specifically addressing the

225. 29 U.S.C. § 1144(b)(5); see HAW. REV. STAT. ANN. §§ 393-1 to -51 (LexisNexis 2004).

226. See 29 U.S.C. § 1144(b)(5)(B). The ERISA preemption loophole does not apply to certain amendments to the Hawaii Prepaid Health Care Act enacted after ERISA's effective date.

227. H.R. 935, 108th Cong. (2003). No action has been taken after the bill was referred to the House Committee on Ways and Means in February 2003.

228. S. 1702, 108th Cong. (2003). No action has been taken since the bill was referred to the Senate Committee on Finance in October 2003.

229. See Domestic Partnership Benefits and Obligations Act of 2003, H.R. 2426, S. 1252, 108th Cong. (2003). The Congressional Budget Office estimated that the provision of federal domestic partner benefits, including "survivor annuities, health insurance, life insurance, and compensation for work-related injuries... would increase direct spending by \$137 million over the 2004-2008 period and by \$242 million over the next 10 years." CONG. BUDGET OFF., COST ESTIMATE: H.R. 2426 1 (2003), available at <http://www.cbo.gov/ftpdocs/44xx/doc4484/hr2426.pdf>. Additionally, there would also be an effect on federal revenues as a result of not taxing domestic partner benefits. See *id.*

230. Press Release, Representative Jerrold Nadler, Nadler to Announce Equal Access to Social Security Act (June 23, 2004), available at http://www.house.gov/apps/list/press/ny08_nadler/EASSA_062304.html; see H.R. 4701, 108th Cong. (2004).

231. CONG. BUDGET OFF., THE POTENTIAL BUDGETARY IMPACT OF RECOGNIZING SAME-SEX MARRIAGES (2004), available at <http://www.cbo.gov/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf>.

232. *Id.* at 2. This amount represents "less than 0.1 percent of total federal revenues." *Id.*

233. *Id.* at 5.

budgetary impact of only extending ERISA plan benefits and the corresponding federal income tax benefits to state sanctioned same-sex civil marriages, civil unions, and domestic partnerships, the CBO report indicates that the impact would be minimal because the overall impact of extending all federal rights and benefits to same-sex couples is minimal.²³⁴

The recommended amendments will likely have either a positive or marginal effect on private employers' profitability. With respect to employee pension benefit plan costs, there is little, if any, increase associated with providing death benefits to same-sex spouses or domestic partners.²³⁵ Most private employers sponsor defined contribution plans.²³⁶ Under these plans, contributions are not based on "family status," and death benefits are not normally paid in the form of an annuity.²³⁷ Private employers that sponsor defined benefit plans will only incur a slight cost from offering survivor annuities to the survivor of a same-sex civil marriage, civil union, or domestic partnership.²³⁸ With respect to employee welfare benefit plans, historically the costs have been statistically insignificant.²³⁹ The cost increases in providing health care domestic partner coverage are a function of domestic partner claims experience and domestic partner enrollment.²⁴⁰ With respect to the former variable, claims experience is equivalent to providing benefits to traditional spouses.²⁴¹ With respect to the latter, variable domestic partner health care enrollment is historically low.²⁴² A 2000 study conducted by Hewitt Associates found that, on average, 1.2 percent of eligible employees who were offered domestic partner coverage in health plans elected coverage.²⁴³ This is attributable

234. *Id.* at 2.

235. M.V. LEE BADGETT & GARY GATES, THE BUSINESS COST IMPACT OF MARRIAGE FOR SAME-SEX COUPLES, <http://www.igls.org/media/files/busimpact.pdf> (last visited Oct. 31, 2005).

236. *Id.*

237. *Id.*

238. *Id.*

239. Nat'l Lesbian & Gay Journalists Ass'n, Domestic Partner Benefits, <http://www.nlgja.org/pubs/DP/DPovrvw.html> (last visited Jan. 16, 2006) ("Typically fewer than 0.5% of employees enroll their same-sex partners; when both same-sex and opposite-sex partners are covered, usually fewer than 1% of employees sign up."). *But see* MICHAEL E. HAMRICK, CORPORATE RESOURCE COUNCIL, THE HIDDEN COSTS OF DOMESTIC PARTNER BENEFIT, at i (2002) available at http://www.corporateresourcecouncil.org/white_papers/Hidden_Costs.pdf ("Taking high-risk enrollees and same-sex medical costs into account, some employers can expect 3 to 5 percent higher costs if only 1 or 2 percent of their employees choose domestic partner benefits.").

240. HUM. RTS. CAMPAIGN FOUND., DOMESTIC PARTNER BENEFITS: COST, http://www.hrc.org/Content/NavigationMenu/Work_Life/Get_Informed2/The_Issues/Cost/Cost.htm (last visited Nov. 1, 2005).

241. *See Domestic Partner Benefits*, *supra* note 57, at 2 ("Hewitt found, in 2000, that employers are no more at risk when adding domestic partners than when adding spouses.").

242. Michael T. Burr, *Nearly Half of Fortune 500 Companies Offer Benefits for Employees' Domestic Partners, With Thousands of Same-Sex Marriages Recently Solemnized in Massachusetts, Will Domestic-Partner Benefits Become the National Norm?*, CORP. LEGAL TIMES, July 2004, available at WL 7/04 CORPLT 52 ("According to Andrew Sherman, senior vice president of Segal Co., a New York-based HR consulting firm, less than 2 percent of employees take advantage of even the most broadly defined domestic-partner benefits."); *see also Massachusetts Same Gender Marriage: Highlights of a Segal-NEEBC Survey*, SEGAL SURVEY (Segal Co., Boston, Mass., Fall 2004), at 1, available at <http://www.segalco.com/publications/surveysandstudies/fall04MApriv.pdf> (noting that sixty-four of seventy-six respondents "indicated that their organizations had enrolled fewer than five same-gender married couples. The largest number of respondents (26) indicated only one same-gender married couple had enrolled").

243. *Domestic Partner Benefits*, *supra* note 57; *see also* SALLY KOHN, POL'Y INST'T. OF THE NAT'L GAY & LESBIAN TASK FORCE, THE DOMESTIC PARTNERSHIP ORGANIZING MANUAL FOR EMPLOYEE BENEFITS 11 (1999), available at http://www.nglrf.org/downloads/dp/dp_99.pdf (citing numerous reports indicating that election of

to numerous factors, including the fact that same-sex partners are often both employed by employers that offer employee benefits and the fact that domestic partner coverage is not tax-qualified and results in imputed income and additional taxes on the federal level.²⁴⁴

If the recommended amendments are enacted, domestic partner coverage will increase over its historical levels. Equivalent tax treatment for same-sex spouses and partners will encourage employees to elect health care coverage. However, for most private employers, the marginal increase in costs should be more than offset by employer productivity gains.²⁴⁵ Experience has shown that the benefits of providing same-sex spouse and domestic partner benefit coverage are significant. Employer benefits include maintaining a competitive advantage in recruiting and retaining highly skilled employees, and increasing employee productivity by fostering a workplace environment that treats all similarly situated employees equally.²⁴⁶

In conclusion, in a perfect world, same-sex couples would receive the more than 1,138 federal rights and benefits that are normally afforded to opposite-sex civil marriages.²⁴⁷ But our world is far from perfect. Full federal recognition has become a political impossibility in an environment that is increasingly hostile to legal recognition of same-sex relationships. This hostility is evidenced by the Federal DOMA, state mini-DOMAs, state constitutional amendments restricting civil marriage to opposite-sex civil marriages, and federal and state court decisions denying legal rights and benefits to same-sex couples. Limited federal recognition, however, may be politically feasible in the employee benefit plan area for those employees who reside in states that have legally recognized the same-sex relationship for purposes of state law. This limited federal recognition is consistent with ERISA's goals of protecting employee beneficiaries and not burdening private employers with a dual regulatory scheme. It also places little, if any, burden on federal resources or private employers.

domestic partner coverage is historically low).

244. See *supra* notes 126–130 and accompanying text.

245. BADGETT & GATES, *supra* note 235 (stating that if all same-sex couples marry, then businesses with more than 500 employees would see an average increase of just under \$25,000 per year for providing additional health benefits).

246. *Id.*; see also Burr, *supra* note 242 (quoting John Sullivan, general counsel, senior vice president and corporate secretary at Imation Corp. in Oakdale, Minnesota as stating: "If you are trying to attract the best employees, you need a work environment where everyone feels that they are valued and treated equally").

247. See *supra* note 9 and accompanying text.