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"Till Death (or DOMA) Does Us Part": How
DOMA Imposes an Unconstitutional Classifying
and Coercive Condition on Federal Funding in the
Wake of *Massachusetts v. United States
Department of Health and Human Services*

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COMMENT

“TILL DEATH (OR DOMA) DOES US PART”:
HOW DOMA IMPOSES AN UNCONSTITUTIONAL
CLASSIFYING AND COERCIVE CONDITION ON FEDERAL
FUNDING IN THE WAKE OF *MASSACHUSETTS V. UNITED
STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES*

*Erin Bender**

I. INTRODUCTION

Imagine that you are employed by the Massachusetts Department of Veterans’ Services (“DVS”) as one of many staff members responsible for administering federal funding received from the United States Department of Veterans Affairs (“VA”) for the administration of the two veterans’ cemeteries within Massachusetts. These cemeteries are strictly used for the burial of veterans, their spouses, and their children. As part of your position, you review applications for burial submitted by Massachusetts residents to determine if the applicants are eligible for burial in one of the two cemeteries. However, Massachusetts’ receipt of this funding is conditioned on its compliance with all the regulations promulgated by the Secretary of the VA.

Currently on your desk is an application submitted by Jane and Rhonda Smith. Jane and Rhonda have been in a valid marriage (under Massachusetts law) since 2005. Jane is a retired United States Army lieutenant who honorably served ten years in South Korea, seven years in

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1. The example above, while fictional, is based on one of the factual situations presented by the Commonwealth of Massachusetts as reason to find DOMA unconstitutional in *Massachusetts v. U.S.*

Guam, three years in Germany, and a year in Kuwait during Operation Gulf Storm. She is highly decorated, having earned two Army Commendation Medals, three Bronze Stars, and six Good Conduct Medals. Jane's wife Rhonda did not serve in a branch of the military but wishes to be buried with her spouse. According to Massachusetts, Jane and Rhonda are validly married and, therefore, you should be able to approve their application with ease. However, there is one problem—the VA has informed DVS that, according to the federal definition of marriage under the Defense of Marriage Act (“DOMA”), VA is entitled to recapture any federal funds if DVS should decide to bury a non-independently eligible same-sex spouse of a veteran in the cemetery. You must make a choice: (1) either grant Jane and Rhonda's application and risk having DVS lose federal grant money provided by the VA for maintenance of the military cemeteries, or (2) deny Jane and Rhonda's application and, effectively, refuse to honor the validity of their marriage under Massachusetts law.¹

Current Spending Clause jurisprudence provides that Congress can attempt to obtain objectives not within its Article I enumerated powers “through the use of the spending power and the conditional grant of federal funds.”² However, this power is not unlimited; instead, the Supreme Court has recognized four limitations imposed upon congressional spending power.³ One of these is that “other constitutional provisions may provide an independent bar to the conditional grant of federal funds.”⁴ Unfortunately, the Supreme Court's current interpretation of the Spending Clause falls short because it allows Congress to coerce states into accepting federal funding in areas where Congress could not directly commandeer the states and state officials.⁵ This Note suggests that the Court adopt a new test that would look at a condition attached to federal funding and determine whether it is a classifying condition or a coercive condition.⁶ Under this new test, a classifying condition will be deemed constitutional unless it violates equal protection principles; a coercive condition, on the other hand, will usually implicate the unconstitutional conditions doctrine.⁷

1. The example above, while fictional, is based on one of the factual situations presented by the Commonwealth of Massachusetts as reason to find DOMA unconstitutional in *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234, 241 (D. Mass. 2010).

2. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

3. *Id.* at 207–08.

4. *Id.* at 208.

5. Kristian D. Whitten, *Section Three of the Defense of Marriage Act: Is Marriage Reserved to the States?*, 26 HASTINGS CONST. L.Q. 419, 457–58 (1999).

6. *E.g.*, Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1114 (1987).

7. *Id.* at 1116.

On July 8, 2010, in *Massachusetts v. United States Department of Health and Human Services*, Judge Tauro of the United States District Court for the District of Massachusetts granted Massachusetts' motion for summary judgment by determining that Section Three of DOMA, as applied to Massachusetts, violates the Tenth Amendment and Congress' power under the Spending Clause.⁸ According to Judge Tauro, Section Three violates Congress' power under the Spending Clause by "induc[ing] [Massachusetts] to violate the equal protection rights of its citizens" in order to receive federal funding such as that provided by the VA to maintain state veterans' cemeteries.⁹ The Federal Government has appealed Judge Tauro's decision to the United States Court of Appeals for the First Circuit,¹⁰ and the Supreme Court will most likely grant certiorari to the appellate decision. Therefore, *Massachusetts* presents an opportunity for the Court to reconsider its Spending Clause jurisprudence and adopt this new test for unconstitutional conditions.

Part II of this Note provides a short legislative history of DOMA and an overview of Spending Clause jurisprudence. Part III provides an overview of Judge Tauro's opinion in *Massachusetts*. Finally, Part IV of this Note analyzes Section Three of DOMA under the proposed classifying/coercive condition approach to the Spending Clause and concludes that Section Three of DOMA would be unconstitutional as either type of condition.

II. SAME-SEX MARRIAGE AND SPENDING: AN OVERVIEW OF DOMA AND SPENDING CLAUSE JURISPRUDENCE

A. A Brief History of DOMA's Enactment

As early as 1890, the Supreme Court recognized that the "whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States, and not to the law of the United States."¹¹ Therefore, because no established body of federal domestic relations law exists, when determining who can receive federal benefits under a federal statute, the federal government will defer to state laws regarding domestic relations "unless Congress clearly mandates otherwise."¹² Essentially, Section Three of DOMA purports to displace this practice of deferring to state law by

8. *Massachusetts v. U.S. Dep't of Health and Human Servs.*, 698 F. Supp. 2d 234, 236 (D. Mass. 2010).

9. *Id.* at 248 (alterations in original).

10. *Massachusetts v. U.S. Dep't of Health and Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010), appeal docketed, No. 10-2204 (1st Cir. Oct. 12, 2010).

11. *In re Burrus*, 136 U.S. 586, 593-94 (1890).

12. MARK STRASSER, LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION 149 (1997).

establishing a federal definition of marriage.¹³ In order to understand why the 104th Congress determined it necessary to establish a federal definition of marriage, one must look to the events occurring in Hawaii during the early 1990s.

In 1993, the Hawaii Supreme Court determined that sex is a suspect category for equal protection purposes and that Hawaii's marriage statute limiting marriage to one man and one woman is unconstitutional, unless the state could show "that (a) the statute's sex-based classification is justified by compelling state interests and (b) the statute is narrowly drawn to avoid unnecessary abridgments of . . . constitutional rights."¹⁴ Three years later, and fearful that recognition of same-sex marriage was "imminent" in Hawaii, Congress enacted DOMA,¹⁵ whereupon President Clinton signed it into law on September 21, 1996.¹⁶ Section Three of DOMA provides:

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.¹⁷

The Judiciary Committee of the House of Representatives ("Judiciary Committee") claimed that four governmental interests were advanced by the passage of DOMA: "(1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce government resources."¹⁸ Members of the 104th

13. See generally Defense of Marriage Act, Pub. L. No. 104-199, § 3(a), 110 Stat. 2419, 2419 (1996) (codified as amended at 1 U.S.C. § 7 (2006)).

14. *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993). The Hawaii Supreme Court determined the trial court erred in granting Lewin's motion for judgment on the pleadings and dismissing the plaintiffs' complaint. *Id.* at 68. The court remanded the case to the trial court for a determination of whether the state could overcome the presumption that its marriage statute is unconstitutional. *Id.*

15. ANDREW KOPPELMAN, *SAME SEX, DIFFERENT STATES* 116-17 (2006). However, according to the dissenting legislators on the Judiciary Committee of the House of Representatives, recognition of same-sex marriage was not imminent in Hawaii because the trial court was not scheduled to start hearing the remanded case until September of 2006. H.R. REP. NO. 104-664, at 36 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2939. Therefore, the dissenters stressed that there was "plenty of time to legislate with more thought and analysis." *Id.* In a somewhat ironic twist, Hawaii voters, one year after DOMA was enacted, voted to amend Hawaii's constitution so that the Hawaiian "legislature shall have the power to reserve marriage to opposite-sex couples." HAW. CONST. art. I, § 23.

16. See Whitten, *supra* note 5, at 440.

17. Defense of Marriage Act § 3(a), 110 Stat. at 2419.

18. H.R. REP. NO. 104-664, at 12, reprinted in 1996 U.S.C.C.A.N. at 2916. Arguably, the fourth governmental interest advanced by the committee—preserving scarce government resources—seems to be the one that would be most considered in a constitutional challenge of DOMA relying on the Spending Clause. According to the Judiciary Committee, the Federal Government "currently provides an array of material and other benefits to married couples in an effort to promote, protect, and prefer the

Congress believed that recognition of same-sex marriages by Hawaii would also have “profound implications for federal law” because the word “marriage” appears in over 800 federal statutes and regulations and the word spouse appears over 3,100 times.¹⁹ Before the “dawn” of same-sex marriages, the Federal Government simply relied on state law marriage definitions because there was no federal definition of marriage.²⁰ Overall, the Judiciary Committee believed that the federal definition of marriage set forth in Section Three of DOMA only constituted a “narrow federal requirement” and that the “federal government [would] continue to determine marital status in the same manner it does under current law.”²¹ Essentially, Section Three of DOMA codifies Congress’ intent to prohibit same-sex couples from receiving federal benefits conditioned on marital status.²²

B. A Brief Overview of Spending Clause Jurisprudence

The Constitution allows Congress to “provide for the common Defence and general Welfare of the United States.”²³ From this clause, commonly referred to as the Spending Clause, derives Congress’ spending power. “Much of federal policy is implemented through spending legislation, which disburses funds to states upon certain conditions.”²⁴ The following is an overview of two of the seminal Supreme Court cases determining whether Congress can attach conditions to money provided to the states.

“[N]ot surprisingly, challenges to the spending power came soon after Congress began enacting social programs.”²⁵ In 1936, the Court considered whether provisions of the Agricultural Adjustment Act of 1933 (“AAA”) violated the Constitution.²⁶ According to the Court, the provision of the AAA authorizing the expenditure of funds raised by a processing tax on

institution of marriage.” H.R. REP. NO. 104–664, at 18, *reprinted in* 1996 U.S.C.C.A.N. at 2922. Therefore, the Judiciary Committee seems to imply that Congress can condition the provision of benefits to married couples on states’ compliance with DOMA’s federal definition of marriage.

19. H.R. REP. NO. 104–664, at 10, *reprinted in* 1996 U.S.C.C.A.N. at 2914.

20. *Id.*

21. *Id.* at 31, *reprinted in* 1996 U.S.C.C.A.N. at 2935 (alteration in original).

22. STRASSER, *supra* note 12, at 150.

23. U.S. CONST. art. I, § 8, cl. 1.

24. Terry Jean Seligmann, *Muddy Waters: The Supreme Court and the Clear Statement Rule for Spending Clause Legislation*, 84 TUL. L. REV. 1067, 1068 (2010).

25. James V. Corbelli, Note, *Tower of Power: South Dakota v. Dole and the Strength of the Spending Power*, 49 U. PITT. L. REV. 1097, 1101 (1988).

26. See *United States v. Butler*, 297 U.S. 1, 53 (1936). At issue in *Butler* was whether the AAA could levy processing taxes against agricultural commodities. *Id.* at 55. The AAA also provided that money raised from the processing tax could be used by the Secretary of Agriculture for various expenditures, including expanding markets, providing tax refunds, and removing surplus agricultural products. *Id.* at 56.

agricultural products was allowable under the Spending Clause.²⁷ The Court further determined that because Congress did not have direct power to enforce commands on farmers, it could not “indirectly accomplish those ends by taxing and spending to purchase compliance.”²⁸ In considering the constitutionality of the AAA, the Court found it necessary to consider interpretations of the Spending Clause put forth by two Framers—James Madison and Alexander Hamilton.²⁹ Madison believed Congress’ spending power “must be confined to the enumerated legislative fields committed to the Congress . . . Hamilton, on the other hand, maintained the clause . . . [is] limited only by the requirement that it shall be exercised to provide for the general welfare of the United States”³⁰ and, thus, not constrained by the enumerated powers of Congress listed in Article I. Accordingly, the Court adopted the Hamiltonian view of the Spending Clause.³¹

Forty-one years later, the Court “confirmed *Butler*’s broad vision of the federal spending power.”³² In *South Dakota v. Dole*, the Court considered the constitutionality of a federal statute that directed the Secretary of Transportation to withhold a percentage of federal highway funding from states that did not change their minimum drinking age to twenty-one.³³ The Court ruled that the statute was “within constitutional bounds even [though] Congress [could] not regulate drinking ages directly.”³⁴ The *Dole* Court identified four limitations on Congress’ power under the Spending Clause: (1) the power must be exercised for the general welfare; (2) Congress must fashion conditions on states’ receipt of federal money unambiguously so that states can knowingly choose whether or not to accept the money; (3) conditions on federal grants must be germane to the purpose served by the

27. *Id.* at 62.

28. *Id.* at 74.

29. *See id.* at 65–66.

30. *Id.* (alteration in original).

31. *Id.* at 66. However, the Court’s discussion of the two competing views on the Spending Clause was dicta because of its decision to hold the AAA unconstitutional as a violation of the Tenth Amendment. Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1927 (1995). Ironically, even though the Court gave its unanimous approval to Hamilton’s interpretation of the Spending Clause, it found the AAA unconstitutional in a manner that “seemed logically consistent only with Madison’s approach.” Rosenthal, *supra* note 6, at 1112; *see also* David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 3 (1994).

However, the majority Justices in *United States v. Butler*, the 1936 case that first explicitly endorsed Hamilton’s view, manifestly did not [understand Hamilton’s view] . . . [T]hey declared that Hamilton had it right but so misunderstood him that they actually decided the case according to the contrary, restrictive Madisonian view.

Id.

32. Celestine Richards McConville, *Federal Funding Conditions: Bursting Through the Dole Loopholes*, 4 CHAP. L. REV. 163, 168 (2001).

33. 483 U.S. 203, 205 (1987).

34. *Id.* at 206 (alterations in original).

national programs; and (4) “other constitutional provisions may provide an independent bar to the conditional grant of federal funds”³⁵ The Court also suggested a fifth limitation: Congress cannot set a condition that coerces states into complying.³⁶ Since *Dole*, the Court has never found a spending condition unconstitutional because it is barred by another constitutional provision.³⁷

III. RULING DOMA UNCONSTITUTIONAL: AN OVERVIEW OF JUDGE TOURO’S OPINION IN *MASSACHUSETTS*

A. Underlying Facts Involved in Massachusetts

On July 8, 2009, the Commonwealth of Massachusetts (“Massachusetts”) filed a complaint in the United States District Court for the District of Massachusetts challenging the constitutionality of Section Three of DOMA as applied to Massachusetts.³⁸ Specifically, Massachusetts alleged that “DOMA interferes with the Commonwealth’s exclusive authority to determine and regulate the marital status of its citizens.”³⁹ Furthermore, Massachusetts argued that “Section 3 of DOMA imposes conditions on the Commonwealth’s participation in certain federally funded programs that require the Commonwealth to disregard marriages validly solemnized under Massachusetts law.”⁴⁰

35. *Id.* at 207–08. *Dole* is considered to be the “leading case dealing with the constitutionality of conditional spending by Congress.” Earl M. Maltz, *Sovereignty, Autonomy and Conditional Spending*, 4 CHAP. L. REV. 107, 108 (2001).

36. *Dole*, 483 U.S. at 211. According to the Court, a grant becomes coercive when it “pass[es] the point at which ‘pressure turns into compulsion.’” *Id.* at 211 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

37. See Angel D. Mitchell, Comment, *Conditional Federal Funding to the States: The New Federalism Demands a Close Examination for Unconstitutional Conditions*, 48 U. KAN. L. REV. 161, 178 (1999); see also Rosenthal, *supra* note 6, at 1162. In 2003, the Court considered the constitutionality of the Children’s Internet Protection Act (“CIPA”), which required public libraries to adopt a policy of using Internet filters as a condition of receiving federal funding. *United States v. Am. Library Ass’n*, 539 U.S. 194, 201 (2003). Specifically, the Court considered whether the conditions set forth in CIPA would require public libraries to violate the First Amendment in order to receive federal funding. *Id.* at 203. The Court determined that CIPA did not impose an unconstitutional condition on the receipt of federal funding by public libraries because “‘when the Government appropriates public funds to establish a program it is entitled to definite the limits of that program.’” *Id.* at 211 (quoting *Rust v. Sullivan*, 500 U.S. 173, 194 (1991)).

38. Complaint at 1, *Massachusetts v. U.S. Dep’t of Health and Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010) (No. 1:09-cv-11156-JLT).

39. *Id.* at 2.

40. *Id.* at 2–3.

In its Complaint, Massachusetts alleged that the federal definition of marriage contained in Section Three of DOMA affects two major programs operated by the Commonwealth. First, Massachusetts argued the definition of marriage set forth in DOMA affected the commonwealth's administration of its Medicaid program known as MassHealth.⁴¹ MassHealth is "jointly funded by the federal government and the Commonwealth" but is "administered solely by Massachusetts."⁴² After Massachusetts began recognizing same-sex marriages,⁴³ the Federal Government informed Massachusetts that "it must apply the federal definition of marriage, as provided in DOMA, when assessing eligibility for Medicaid benefits."⁴⁴ Currently, Massachusetts is required to cover the entire cost of MassHealth coverage provided to those individuals in same-sex marriages who, but for DOMA, would qualify for Medicaid benefits but are still covered by MassHealth.⁴⁵ Overall, Massachusetts alleged that about \$2.37 million in federal funding is unavailable for MassHealth costs because of DOMA.⁴⁶ According to Massachusetts:

DOMA creates an unconstitutional dilemma . . . by requiring MassHealth to choose between . . . violating the Equal Protection Clause . . . by applying DOMA's federal definition of marriage in order to receive federal funding and . . . losing [federal funding participation] for otherwise eligible individuals and risking enforcement for non-compliance . . . if MassHealth continues to treat all married individuals equally in assessing . . . eligibility.⁴⁷

Second, Massachusetts alleged that DOMA's federal definition of marriage affects the "operations of veterans' cemeteries at Agawam and Winchendon, Massachusetts, by the Massachusetts Department of Veterans Services ("DVS")."⁴⁸ Only veterans, their spouses, and their children are eligible for burial at these two cemeteries.⁴⁹ The two cemeteries have been maintained and improved through the receipt of federal funding provided by the United States Department of Veterans Affairs ("VA").⁵⁰ After Massachusetts began to recognize same-sex marriages, the VA informed Massachusetts that it would be entitled to recapture federal funding provided to DVS if Massachusetts should decide to bury the same-sex

41. *See id.* at 14–15.

42. *Id.* at 14.

43. *See generally* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) (holding that barring recognition of same-sex civil marriage violates the Massachusetts Constitution).

44. Complaint, *supra* note 38, at 16.

45. *Id.* at 17.

46. *Id.*

47. *Id.* at 18 (alteration in original).

48. *Id.*

49. *Id.*

50. *Id.*

spouse of a veteran at the cemeteries.⁵¹ When Massachusetts filed its complaint, DVS had already pre-approved an application for burial submitted by a veteran and his non-independently eligible same-sex spouse.⁵² According to Massachusetts:

DOMA creates an unconstitutional dilemma for the Commonwealth by requiring DVS to choose between . . . violating the Equal Protection Clause . . . by refusing burial of the same-sex spouse of Massachusetts veterans in a Massachusetts veterans' cemetery and . . . risking enforcement for non-compliance by the VA if DVS continues to apply the state definition of marriage in assessing eligibility for burial in a veterans' cemetery.⁵³

In its Complaint, Massachusetts alleged that Section Three of DOMA violates both the Tenth Amendment and the Spending Clause of the Constitution.⁵⁴ Because of these alleged violations, Massachusetts sought both “declaratory and injunctive relief for the narrow but critical purpose of enabling [the Commonwealth] to define marriage within its own boundaries.”⁵⁵

B. Motion for Summary Judgment

In arguing for summary judgment, Massachusetts challenged Section Three of DOMA under both the Tenth Amendment and the Spending Clause.⁵⁶ Specifically, Massachusetts argued that DOMA violates the Spending Clause because Section Three is independently barred by the Equal Protection Clause and DOMA’s treatment of same-sex marriages does not relate to the purposes served by MassHealth and the veterans’ cemetery programs.⁵⁷

51. *See id.* at 20. The only way that a same-sex spouse would be eligible for burial is if he or she was “independently eligible;” that is, if he or she was also a veteran. *See id.*

52. *Id.* at 21.

53. *Id.*

54. *See id.* at 22, 24. For purposes of this Note, Massachusetts’ argument that Section Three of DOMA violates the Tenth Amendment will not be analyzed.

55. *Id.* at 3 (alteration in original).

56. *See* Memorandum of Law in Opposition to Defendants’ Motion to Dismiss Complaint and in Support of Commonwealth’s Motion for Summary Judgment at 2, *Massachusetts v. U.S. Dep’t of Health and Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010) (No. 1:09-cv-11156-JLT) [hereinafter Memorandum of Law].

57. *See generally id.* at 22–39. Included in this argument is Massachusetts’ claim that the court should apply “heightened scrutiny” to classifications based on sexual orientation. *See id.* at 31–36. In *Gill v. Office of Personnel Management*, Judge Tauro determined that DOMA does not even meet the “highly deferential rational basis test.” 699 F. Supp. 2d 374, 387 (D. Mass. 2010). Therefore, this Note will not address Massachusetts’ argument that a heightened standard of review is necessary.

1. DOMA Requires Massachusetts to Violate the Equal Protection Clause

As stated previously, Congress' power to impose spending conditions upon the states is not absolute because spending conditions may not independently violate another provision of the Constitution.⁵⁸ Massachusetts contended that "[t]he fact that [it] has chosen to sacrifice federal funding by violating the terms of federal programs, rather than violate the Constitution, *reinforces* the fact that DOMA conditions federal spending on a constitutional violation."⁵⁹ Specifically, Massachusetts claimed that Section Three of DOMA violates the Equal Protection Clause because it upsets the previous status quo of "federal incorporation of state marital status determinations," because it "permanently denies same-sex married couples [all] federal marriage-based . . . benefit[s], because it actually makes administration of relevant federal programs more difficult, and because DOMA was enacted based on animus against homosexuals."⁶⁰

2. DOMA's Treatment of Same-Sex Marriages Has No Relation to the Purposes Served by MassHealth and the Veterans' Cemetery Programs

Additionally, Congress' power to impose spending conditions upon the states is not absolute because any conditions imposed must be sufficiently related to the specific purpose(s) of the federal spending.⁶¹ According to Massachusetts, Medicaid's purpose is to provide medical coverage for individuals with low incomes, yet DOMA undermines this purpose by requiring MassHealth to treat "married individuals in same-sex couples as single" and therefore requiring "coverage of individuals in high-income families."⁶² Similarly, the State Cemetery Grants Program provides burial sites for veterans and their spouses, yet "DOMA precludes DVS from

58. *South Dakota v. Dole*, 483 U.S. 203, 210-11 (1987).

59. Memorandum of Law, *supra* note 56, at 25 (alteration in original).

60. *Id.* at 27-29 (alteration in original). *But see* Consolidated Memorandum of Points and Authorities in Further Support of Defendants' Motion to Dismiss and In Opposition to Plaintiff's Motion for Summary Judgment at 14 n.5, *Massachusetts*, 698 F. Supp. 2d 234 (D. Mass 2010) (No. 1:09-cv-11156-JLT) [hereinafter Consolidated Memorandum] (arguing that DOMA is consistent with the Equal Protection Clause because, *inter alia*, Congress had a legitimate interest in preserving consistency in distributing federal benefits based on marital status).

61. *Dole*, 483 U.S. at 208; *see also* *New York v. United States*, 505 U.S. 144, 167 (1992) (noting that conditions Congress attaches to federal funds given to states need to "bear some relationship to the purpose of the federal spending; otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority").

62. Memorandum of Law, *supra* note 56, at 37.

burying same-sex spouses in its cemeteries.”⁶³ Overall, Massachusetts claimed that pursuant to DOMA, public funds were being allocated in discriminatory ways unrelated to the purposes of the federal programs.⁶⁴

C. Judge Tauro’s Opinion- DOMA Violates the Spending Clause

Judge Tauro granted Massachusetts’ motion for summary judgment on July 8, 2010, exactly one year after Massachusetts filed its Complaint.⁶⁵ In determining that Congress exceeded the scope of its power under the Spending Clause by enacting DOMA, Judge Tauro recognized that all federal laws must be based on one or more enumerated powers because Congress’ powers are limited.⁶⁶ Under the Spending Clause, Judge Tauro reasoned, Congress has broad, but not unlimited, power to condition states’ receipt of federal moneys.⁶⁷ With these principles in mind, Judge Tauro addressed Massachusetts’ contention for why DOMA “impermissibly conditions the receipt of federal funding on the state’s violation of the Equal Protection Clause . . . by requiring that the state deny certain marriage-based benefits to same-sex married couples.”⁶⁸

Judge Tauro first addressed Massachusetts’ argument that DOMA is unconstitutional because it conditions the receipt of federal funding on a state’s violation of the Equal Protection Clause by requiring states to deny benefits based on marital status to same-sex couples validly married under state law.⁶⁹ Relying on his decision in *Massachusetts’* companion case of *Gill v. Office of Personnel Management*,⁷⁰ Judge Tauro determined that “DOMA plainly conditions the receipt of federal funding on the denial of marriage-based benefits to same-sex married couples, though the same benefits are provided to similarly-situated heterosexual couples.”⁷¹

63. *Id.*

64. *See id.* at 38. *But see* Consolidated Memorandum, *supra* note 60, at 6–8 (arguing that DOMA does not impose conditions on federal aid received by Massachusetts because eligibility limits placed on federal programs are *per se* germane to the purposes served by those programs).

65. *Massachusetts v. U.S. Dep’t of Health and Human Servs.*, 698 F. Supp. 2d 234, 253 (D. Mass. 2010).

66. *Id.* at 246.

67. *Id.* at 245–46.

68. *Id.* at 248. Because of his determination that “DOMA imposes an unconstitutional condition on the receipt of federal funds,” Judge Tauro did not address the question of whether DOMA was germane to the “specific purposes of Medicaid or the State Cemetery Grants Program.” *Id.* at 249.

69. *Id.*

70. 699 F. Supp. 2d 374 (D. Mass. 2010).

71. *Massachusetts*, 698 F. Supp. 2d at 248. Because Judge Tauro ruled in *Gill* that DOMA fails to pass the rational basis test, *see Gill*, 699 F. Supp. 2d. at 387, he found that analysis equally applicable in *Massachusetts* to determine that DOMA conditions receipt of federal moneys by the states on states’ violations of the Equal Protection Clause, *see Massachusetts*, 698 F. Supp. 2d at 248.

Therefore, because DOMA imposes an unconstitutional condition on states' receipt of federal funding, Congress exceeded the scope of its Spending Clause power by ignoring established restrictions on this authority.⁷²

Judge Tauro explicitly relied on his opinion in *Gill* to determine that DOMA imposed an unconstitutional condition on states' receipt of federal funding.⁷³ In *Gill*, the government specifically “disavowed Congress’s stated justifications for [DOMA].”⁷⁴ Instead, the government claimed that the Constitution allowed Congress to enact DOMA to preserve the status quo and that DOMA was only an “incremental response to a new social problem which Congress may constitutionally employ in the face of a changing socio-political landscape.”⁷⁵ Overall, Judge Tauro determined these two asserted justifications failed to fulfill the deferential rational basis test.⁷⁶

Regarding the government’s first assertion—that the Constitution permitted Congress to enact DOMA to preserve the status quo—Judge Tauro determined that this justification “relie[d] on a conspicuous misconception of what the status quo was *at the federal level* in 1996” because before DOMA, the Federal Government recognized any marriage valid under state law for federal purposes.⁷⁷ Furthermore, even if one assumes that DOMA succeeded in preserving the federal status quo, this assumption merely describes what DOMA does instead of providing a justification.⁷⁸

Judge Tauro also rejected the government’s other assertion that DOMA is only an incremental response to a growing social problem. Instead of providing incremental “relief” DOMA constitutes a “comprehensive sweep across the entire body of federal law” and it is impossible to believe that a desire for consistency provides a sufficient justification for its enactment.⁷⁹ As Judge Tauro stated, “Federal agencies are not burdened with the administrative task of implementing changing state marriage laws—that is a job for the states themselves. Rather, federal agencies merely distribute federal marriage-based benefits to those couples that have already obtained state-sanctioned marriage licenses.”⁸⁰ Therefore, according to Judge

72. *Massachusetts*, 698 F. Supp. 2d at 248–49.

73. *Id.* at 248.

74. *Gill*, 699 F. Supp. 2d at 388 (alteration in original).

75. *Id.* at 390.

76. *See id.* at 387, 390.

77. *Id.* at 393.

78. *Id.*

79. *Id.* at 395.

80. *Id.*

Tauro's conclusion that "irrational prejudice" was the only motivation for distinguishing between opposite-sex and same-sex marriages, Section Three of DOMA as applied to Massachusetts violated the "equal protection principles embodied in the Fifth Amendment."⁸¹

On October 12, 2010, the government filed a notice of appeal of Judge Tauro's opinion in the United States District Court for the District of Massachusetts.⁸² The appeal will be heard by the Court of Appeals for the First Circuit.⁸³

IV. DOES SECTION THREE OF DOMA CLASSIFY OR COERCE?: A CALL FOR A NEW VIEW OF THE SPENDING CLAUSE IN THE WAKE OF *MASSACHUSETTS*

As mentioned above, Judge Tauro determined that DOMA, through its definition that for federal purposes a marriage only exists between one man and one woman, induced Massachusetts to violate its citizens' equal protection rights in order to receive federal funding and therefore imposed an unconstitutional condition.⁸⁴ In so determining, Judge Tauro relied on the *Dole* Court's conclusion that Congress may not enact legislation under the Spending Clause that imposes unconstitutional conditions on the receipt of federal funding.⁸⁵ Since the Court's decision twenty-three years ago in *Dole*, many commentators have suggested that it is time for the Court to reconsider its interpretation of the Spending Clause, particularly in the wake of the Court's decisions in *New York v. United States*⁸⁶ and *Printz v. United States*.⁸⁷ After all, if Congress cannot directly commandeer states and state officials to execute federal laws, why should Congress be able to indirectly commandeer states through Spending Clause legislation?⁸⁸ According to

81. *Id.* at 397. Of course, the Fifth Amendment lacks an Equal Protection Clause like the one included in the Fourteenth Amendment. However, the Supreme Court has noted that "the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive." *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

82. *Massachusetts v. U.S. Dep't of Health and Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010), *appeal docketed*, No. 10-2204 (1st Cir. Oct. 12, 2010).

83. *Id.*

84. *Massachusetts*, 698 F. Supp. 2d at 248-49.

85. *Id.* at 249. *See generally* *South Dakota v. Dole*, 483 U.S. 203, 208 (1987).

86. *See generally* 505 U.S. 144, 188 (1992) (holding that monetary and access incentives provided to states through the Low-Level Radioactive Waste Policy Act were constitutional but that the Act's "take-title" provision, which required states to either accept ownership of their radioactive waste or enact regulations according to Congress' instructions, violated the Tenth Amendment).

87. *See generally* 521 U.S. 898, 934-35 (1997) (holding that Congress could not commandeer state officers to execute Brady Handgun Violence Prevention Act by requiring them to conduct background checks on prospective handgun purchasers).

88. *See* Whitten, *supra* note 5, at 458 (arguing that Congress' use of "back-door commandeering" through Spending Clause legislation is similar to the "coercive congressional regulation condemned in

some commentators, there are actually two types of conditions when referring to constitutional limitations on federal spending—classifying conditions and coercive conditions.⁸⁹ This Part examines Section Three of DOMA as both a classifying and coercive condition and determines that if the Court were to adopt this new view of the Spending Clause, the condition presented by DOMA would still be unconstitutional.

Of the two types of conditions—classifying and coercive—the latter “tends to implicate the doctrine of unconstitutional conditions” while the former does not.⁹⁰ Professor Albert Rosenthal refers to classifying conditions as those that specify the “eligible recipients of the federal grant in terms at least partly beyond their control;” conversely, coercive conditions are those that have “the likely effect (and usually the purpose as well) of influencing [recipients’] conduct.”⁹¹ As mentioned before, DOMA provides that when determining the meaning of any federal statute or regulation, the word “marriage” means “only a legal union between one man and one woman as husband and wife,” and the word “spouse” is used to denote “only [] a person of the opposite sex who is a husband or wife.”⁹²

A. DOMA Unconstitutionally Classifies Based on Sexual Orientation

At first glance, it appears that Section Three of DOMA only sets forth a classifying condition to be applied to all statutes implicating federal funding⁹³—in other words, for those funding statutes that consider marital or spousal status, only those marriages between a man and wife and those spouses who are opposite-sex are to be considered. Rosenthal argues that “[a]ny constitutional difficulties that arise with [classifying conditions] will generally relate to questions of equal protection.”⁹⁴ Here, DOMA’s federal definition of marriage in Section Three does give rise to equal protection issues because it directly distinguishes between heterosexual and homosexual marriages.⁹⁵ Therefore, the Court should consider whether this

New York and Printz”).

89. *E.g.*, Rosenthal, *supra* note 6, at 1114.

90. *Id.* at 1116. *But cf.* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1496 (1989) (“Unconstitutional conditions inherently classify potential beneficiaries into two groups: those who comply with the condition and thereby get better treatment, and those who do not.”).

91. Rosenthal, *supra* note 6, at 1114 (alteration in original).

92. 1 U.S.C. § 7 (2006) (alteration in original).

93. *See* Defense of Marriage Act, Pub. L. No. 104–199, § 3(a), 110 Stat. 2419, 2419 (1996) (codified as amended at 1 U.S.C. § 7 (2006)).

94. Rosenthal, *supra* note 6, at 1116 (alteration in original).

95. *See* Defense of Marriage Act, § 3(a), 110 Stat. at 2419.

classifying condition satisfies equal protection principles; if not, then it should serve as an independent constitutional bar to Congress' Spending Clause power.

Anytime an equal protection violation is alleged, the Court must determine which standard of review to apply to the classification. According to Judge Tauro, Section Three of DOMA “fails to pass constitutional muster even under the highly deferential rational basis test.”⁹⁶ Furthermore, he was “convinced that ‘there exists no fairly conceivable set of facts that could ground a rational relationship’ between DOMA and a legitimate government objective.”⁹⁷ If the Court eventually grants certiorari to *Massachusetts* and *Gill*, it will need to determine which standard of review to apply to the classification set forth in Section Three of DOMA. The Court has only considered an equal protection challenge to a classification based on sexual orientation once, when it considered the constitutionality of “Amendment 2” to Colorado’s state constitution.⁹⁸ Amendment 2 repealed all ordinances prohibiting discrimination on the basis of sexual orientation and also “prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect [homosexuals].”⁹⁹ The Court ruled that Amendment 2 failed to meet even the rational basis test, stating:

Amendment 2 fails, *indeed defies*, even this conventional inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and . . . invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but an animus toward the class it affects; *it lacks a rational relationship to legitimate state interests*.¹⁰⁰

96. *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 387 (D. Mass. 2010).

97. *Id.* (quoting *Medeiros v. Vincent*, 431 F.3d 25, 29 (1st Cir. 2005)) (internal citation omitted).

98. *Romer v. Evans*, 517 U.S. 620, 623 (1996). In 2003, the Court was presented with an equal protection challenge to a “Texas statute making it a crime for two persons of the same sex to engage in certain intimate conduct.” *Lawrence v. Texas*, 539 U.S. 558, 562 (2003). However, the Court declined to address the equal protection argument because it determined the issue should be resolved with reliance on the Due Process Clause of the Fourteenth Amendment. *Id.* at 564. Notably, in her concurrence, Justice O’Connor argued that the Texas statute was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment because “[a] law branding one class of persons as criminal based solely on the State’s moral disapproval of that class . . . runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review.” *Id.* at 585 (O’Connor, J., concurring).

99. *Romer*, 517 U.S. at 624 (alteration in original).

100. *Id.* at 632 (emphasis added).

Here, the definition of marriage codified in Section Three of DOMA is a classifying condition based on sexual orientation because it classifies between heterosexual and homosexual marriages.¹⁰¹ Furthermore, as discussed above, the legislative history seems to suggest that the primary reason Congress enacted DOMA was because of animus toward homosexuals.¹⁰² Section Three of DOMA is analogous to Colorado's Amendment 2 at issue in *Romer*—which the *Romer* Court found failed even the deferential rational basis test.¹⁰³ Both provisions specifically single out a specific group of people—homosexuals—and essentially impose “a broad and undifferentiated disability.”¹⁰⁴ In *Romer*, Colorado's Amendment 2 left homosexuals open to discrimination on any basis with no remedy to provide recourse.¹⁰⁵ Similarly, Section Three of DOMA forecloses homosexuals in same-sex marriages from receiving federal benefits conditioned on marital status, even if those same-sex marriages are valid under state law.¹⁰⁶ Therefore, if the Court chooses to uphold Judge Tauro's application of the rational basis test, it could directly rely on its decision in *Romer* for support.

However, two federal courts of appeals have suggested that the Court should apply a heightened standard of review to classifications involving sexual orientation.¹⁰⁷ Furthermore, there are two different approaches to applying strict scrutiny under equal protection analysis. First, a court can determine that classifications discriminating based on sexual orientation are “suspect” and that homosexuals constitute a “suspect class.”¹⁰⁸ If the Court chooses to apply strict scrutiny in this fashion to Section Three of DOMA, it would need to determine whether homosexuals constitute a class that has experienced a history of “purposeful unequal treatment.”¹⁰⁹ At least two lower courts have already recognized that homosexuals as a group have

101. See Whitten, *supra* note 5, at 440–41.

102. See *supra* Part II.A.

103. *Romer*, 517 U.S. at 632.

104. *Id.*

105. *Id.* at 624–25.

106. See Defense of Marriage Act, Pub. L. No. 104–199, § 3(a), 110 Stat. 2419, 2419 (1996) (codified as amended at 1 U.S.C. § 7 (2006)).

107. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010) (“All classifications based on sexual orientation appear suspect, as the evidence shows that California would rarely, if ever, have a reason to categorize individuals based on their sexual orientation. Here, however, strict scrutiny is unnecessary. Proposition 8 fails to survive even rational basis review.”); cf. *Witt v. Dep't of the Air Force*, 527 F.3d 806, 821–22 (9th Cir. 2008) (concluding that heightened scrutiny should apply to substantive due process claims involving the military's “Don't Ask, Don't Tell” policy).

108. *Witt*, 527 F.3d at 824 (Canby, J., concurring in part and dissenting in part). *But see* HOWARD BALL, *THE SUPREME COURT IN THE INTIMATE LIVES OF AMERICANS* 61 (2002) (arguing that homosexuals do not constitute a suspect class for which is needed a compelling state interest to uphold a statute classifying on the basis of sexual orientation).

109. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976).

experienced discrimination and prejudice solely because of their sexual orientation.¹¹⁰ Second, “[c]lassifications that impinge on a fundamental right are subject to strict scrutiny when challenged as a violation of equal protection.”¹¹¹ In *Gill*, the plaintiffs argued for strict scrutiny because “DOMA burdens Plaintiffs’ fundamental right to maintain the integrity of their existing family relationships.”¹¹² They reasoned that DOMA violates their rights to maintain the integrity of their marriages—and the Court has already held that marriage is a fundamental right.¹¹³ Therefore, if the Court chooses to apply strict scrutiny in this fashion, it is highly likely the Court will uphold Judge Tauro’s decision that Section Three of DOMA is unconstitutional under the equal protection principles of the Fifth Amendment.

In sum, if the Court views the federal definition of marriage set forth in Section Three of DOMA as a classifying condition, it is likely to find it violates equal protection principles whether rational basis, heightened scrutiny, or strict scrutiny is applied. If the Court chooses to apply rational basis, it can defer to the findings of two federal district courts.¹¹⁴ Similarly, if it chooses heightened or strict scrutiny, it can defer to the findings of two lower courts.¹¹⁵ Accordingly, finding a violation of equal protection principles automatically triggers *Dole*’s fourth limitation on Congress’ Spending Clause power—Congress cannot enact spending legislation when another constitutional provision provides an “independent bar to the conditional grant of federal [money].”¹¹⁶ Therefore, when DOMA’s federal definition of marriage is viewed as a classifying condition, it presents a “constitutional difficulty” based on equal protection and therefore is beyond Congress’ power to enact under the Spending Clause.¹¹⁷

110. *Witt*, 527 F.3d at 824–25 (Canby, J., concurring in part and dissenting in part) (“Suffice it to say that homosexuals have “experienced a history of purposeful unequal treatment [and] been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.” (quoting *Murgia*, 427 U.S. at 313)) (internal quotation marks omitted); *Perry*, 704 F. Supp. 2d at 996 (“The evidence at trial shows that gays and lesbians experience discrimination based on unfounded stereotypes and prejudices specific to sexual orientation.”).

111. *Witt*, 527 F.3d at 825 (Canby, J., concurring in part and dissenting in part) (citing *Dunn v. Blumstein*, 405 U.S. 330, 338–39 (1972)).

112. *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 387 (D. Mass. 2010).

113. *See Loving v. Virginia*, 388 U.S. 1, 12 (1967) (The “freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”). *But see* BALL, *supra* note 108, at 61 (arguing that there is no fundamental right to same-sex marriage).

114. *Perry*, 704 F. Supp. 2d at 997; *Gill*, 699 F. Supp. 2d at 387.

115. *Witt*, 527 F.3d at 824–26 (Canby, J., concurring in part and dissenting in part); *Perry*, 704 F. Supp. 2d at 997.

116. *South Dakota v. Dole*, 483 U.S. 203, 208 (1987) (alteration in original) (citations omitted).

117. *See Rosenthal*, *supra* note 6, at 1116.

B. DOMA's Definition of Marriage Impermissibly Coerces States To Accept Federal Grants

Even though the argument above establishes that Section Three of DOMA presents an unconstitutional classifying condition, it can also be labeled as a coercive condition because it “has the likely effect . . . of influencing their conduct, with the promised carrot of federal funds for those who avoid the type of activity that Congress seeks to discourage or the threatened stick of denial of funds for those who refuse.”¹¹⁸ Therefore, because the Court could determine that Section Three of DOMA does not violate equal protection principles under whichever standard of review the Court chooses, it is necessary to determine whether DOMA is the equivalent of an unconstitutional coercive condition.

1. The Problems of Current Spending Clause Jurisprudence Concerning Coercion

Under current Spending Clause jurisprudence, “Congress can remain within the limits of the spending power simply by conditioning the receipt of federal grants on the state’s compliance with federal mandates. A condition . . . cannot actually coerce a state, which always has the opportunity to decline the benefit and avoid the accompanying federal regulation.”¹¹⁹ However, *Dole* suggests that when analyzing federal spending legislation, coercion occurs when states simply cannot afford to “resist the lure of federal funding.”¹²⁰ Furthermore, the Court has indicated that a determination of whether coercion exists turns on the amount of federal grant money available.¹²¹ Realistically, the observation that states always have the opportunity to decline federal funding can “readily be rejected if the condition is deemed oppressive” because “the budgets of state and local governments [are] now so greatly dependent on federal money.”¹²² Therefore, courts should not just defer to Congress’ extensive

118. *Id.* at 1114.

119. Donald J. Mizerk, Note, *The Coercion Test and Conditional Federal Grants to the States*, 40 VAND. L. REV. 1159, 1180 (1987); see also Derek C. Araujo, *A Queer Alliance: Gay Marriage and the New Federalism*, 4 RUTGERS J.L. & PUB. POL’Y 200, 240 (2006) (“A state that accepts federal funds to which Congress has attached conditions might be thought to offer its *consent* to congressional regulation. After all, the state retains the ability to make a political decision not to accept the funds.”); Erwin Chemerinsky, *Protecting the Spending Power*, 4 CHAP. L. REV. 89, 103 (2001) (“The use of the spending power is different because states always retain a choice, unpleasant as it may be to give up the federal funds.”).

120. McConville, *supra* note 32, at 172.

121. *South Dakota v. Dole*, 483 U.S. 203, 211–12 (1987).

122. Rosenthal, *supra* note 6, at 1162 (alteration in original); see also Araujo, *supra* note 119, at 243 (“In practical terms, asking states to reject even small amounts of federal funding is often asking the impossible.”).

spending power whenever funding represents an extensive source of state revenue; instead, courts must determine whether the condition at issue impermissibly coerces the states to comply.¹²³

Furthermore, current Spending Clause jurisprudence undermines federalism.¹²⁴ Specifically, it causes reductions in “states’ responsiveness to the preferences of their inhabitants and . . . competition between states to become more attractive to inhabitants.”¹²⁵ The *Dole* Court’s view of the Spending Clause negatively impacts federalism because it causes aggregate social welfare to decline.¹²⁶ This broad interpretation of congressional spending authority provides Congress with the authority to drive the states toward a single nationwide policy and essentially ignore those states who adopt differing public policies.¹²⁷ Therefore, when determining whether a specific federal spending condition impermissibly coerces the states, meaningful, judicially-enforceable limitations on the spending power are needed to “provide[] ‘outlier’ or ‘minority’ states protection from federal homogenization in areas in which they deviate from the national norm, *whether that deviation is to the left or right of the political center.*”¹²⁸

2. A New Test to Determine When a Funding Condition is Unconstitutionally Coercive

To combat these effects, several commentators have suggested variations on a new test to determine if a condition attached to federal funding is

123. See Mitchell, *supra* note 37, at 184.

124. See Douglas A. Wick, Note, *Rethinking Conditional Federal Grants and the Independent Constitutional Bar Test*, 83 S. CAL. L. REV. 1359, 1387 (2010).

125. *Id.*

126. See Lynn A. Baker & Mitchell N. Berman, *Getting off the Dole: Why the Court Should Abandon its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 471 (2003). Baker and Berman believe that “in the absence of a nationwide consensus, permitting state-by-state variation will almost always satisfy more people than would the imposition of a uniform national policy.” *Id.*

127. *Id.* at 472.

128. *Id.* at 470. *But see* Baker, *supra* note 31, at 1951 (“Of course, increased diversity among the states is not always a good thing. Some states, for example, might have laws expressing a moral preference that a majority of Americas consider unacceptable, and which a conditional offer of federal funds might persuade these states to repeal.”). According to Baker’s argument, one could argue that because five states (Connecticut, Iowa, Massachusetts, New Hampshire, and Vermont) and the District of Columbia recognize same-sex marriage, Congress enacted DOMA and its federal definition of marriage in order to persuade these jurisdictions to repeal their laws by conditioning the receipt of federal funding on the application of this definition of marriage. See generally HUMAN RIGHTS CAMPAIGN, MARRIAGE EQUALITY AND OTHER RELATIONSHIP RECOGNITION LAWS (2010), available at http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf (identifying that Connecticut, the District of Columbia, Iowa, Massachusetts, New Hampshire, and Vermont issue marriage licenses to same-sex couples).

impermissibly coercive and therefore violates the Constitution.¹²⁹ This new test states that any offers of federal funding to the states that would regulate them in ways that Congress cannot directly legislate through its enumerated powers would be presumed invalid.¹³⁰ This version of the unconstitutional conditions test would only apply when analyzing funding the government is permitted to distribute, not when analyzing those benefits the government is compelled to provide.¹³¹ Essentially, a court considering whether a condition attached to a grant of federal money is coercive must compare that condition to the Constitution.¹³² If the action required by the condition “would be unconstitutional when undertaken directly by the federal government,” it is presumed to violate the independent constitutional provision limitation established by the *Dole* Court.¹³³ According to Professor Baker, this presumption can be overcome if the government sufficiently shows that the condition constitutes “reimbursement spending” rather than “regulatory spending.”¹³⁴ Finally, any conditional grants that burden either individual or states’ rights must be analyzed with “exacting judicial scrutiny.”¹³⁵

3. Applying the New Test to Section Three of DOMA

When considering Section Three of DOMA under this new test, a court must determine whether DOMA’s definition of marriage applies to funding “the government is permitted... not compelled,” to distribute.¹³⁶ Massachusetts argued that Section Three of DOMA, as applied to 38 U.S.C.

129. See Baker, *supra* note 31, at 1933.

130. See *id.* at 1962–63; Corbelli, *supra* note 25, at 1118, 1121; Wick, *supra* note 124, at 1362.

131. Sullivan, *supra* note 90, at 1422. However, the reality is that most federal benefits are permissive under the current scheme. *Id.*

132. Wick, *supra* note 124, at 1379.

133. *Id.*

134. Baker, *supra* note 31, at 1963.

“Reimbursement spending” legislation specifies the purpose for which the states are to spend the offered federal funds and simply reimburses the states . . . for their expenditures Most “regulatory spending” legislation thus includes a simple spending component which, if enacted in isolation, would be unproblematic under the proposed test.

Id.

135. Wick, *supra* note 124, at 1372; see also Baker, *supra* note 31, at 1923 (“[T]he critical variable is whether the condition attached to the offered funds, taken alone, impinges on a constitutional right of the claimant. Conditions that do not affect the claimant’s exercise of a constitutional right are unproblematic; conditions that do, however, may or may not be.”); cf. Sullivan, *supra* note 90, at 1419 (discussing how the “central challenge” of the unconstitutional conditions doctrine is “explain[ing] why conditions that ‘indirectly’ pressure preferred liberties should be as suspect as ‘direct burdens’ imposed on those same rights”). Sullivan also believes the unconstitutional conditions doctrine only protects those rights depending on the right-holder’s exercise of some autonomous choice, and only then to those rights that are recognized and usually subject to strict scrutiny. *Id.* at 1426.

136. See Sullivan, *supra* note 90, at 1422.

§ 2408 (the State Cemetery Grants Program (“Program”)), required Massachusetts to violate equal protection principles in order to receive federal funding.¹³⁷ Under the Program, “the Secretary [of the VA] may make a grant to any State for . . . establishing, expanding, or improving a veteran’s cemetery owned by the State” and for “operating and maintain such a cemetery.”¹³⁸ A plain reading of this statute suggests that a state is not obligated to accept this funding; rather, receiving federal funding is discretionary because the Secretary “may” provide grants to any state applying under the program.¹³⁹ This argument would also apply to Massachusetts’ contention that DOMA, as applied to 42 U.S.C. §§ 1396 *et seq.* (“the Medicaid statute” or “Medicaid”), requires Massachusetts to violate equal protection principles by distinguishing between individuals in same-sex marriages and individuals in opposite-sex marriages for Medicaid eligibility determinations.¹⁴⁰ According to the Medicaid statute, “sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary [of Health and Human Services (“HHS”)], State plans for medical assistance.”¹⁴¹ Looking at the plain language of the Medicaid statute, it appears that Medicaid is a voluntary program because states must choose to submit plans and have them approved by the Secretary of HHS before receiving federal funding.¹⁴² Therefore, Section Three of DOMA does meet the first part of the test for coercion.

Second, a court must consider whether Section Three of DOMA, when applied to federal spending statutes, purports to “regulate the states in ways that Congress could not directly mandate.”¹⁴³ Here, Section Three does “not actually [direct] the states how to define ‘marriage’ and ‘spouse’”; instead, Congress is coercing the states to adopt similar definitions to continue to receive federal funding conditioned on marital status.¹⁴⁴

137. Complaint, *supra* note 38, at 23.

138. 38 U.S.C. § 2408(a)(1)(A)-(B) (Supp. III 2010) (alteration in original).

139. *See id.*

140. Complaint, *supra* note 38, at 23.

141. 42 U.S.C. § 1396-1 (Supp. III 2010) (alteration in original).

142. *See id.*; cf. Sidney D. Watson, *From Almshouses to Nursing Homes and Community Care: Lessons from Medicaid’s History*, 26 GA. ST. U. L. REV. 937, 954 (2010) (“Medicaid built on the statutory framework of the prior cooperative federal/state medical vendor programs but finally succeeded, through a combination of financial carrots and sticks, in enticing all the states—even the poorest—into the new program.”).

143. *E.g.*, Baker, *supra* note 31, at 1962–63.

144. Whitten, *supra* note 5, at 457–58 (alteration in original); *see also* Araujo, *supra* note 119, at 232 (“In particular, Congress might coax the states into adopting a federal, heterosexual definition of marriage by threatening to revoke some part of gay-friendly states’ federal funds.”). Araujo’s statement basically sums up Massachusetts’ argument because it must either lose federal funding or choose to violate equal protection principles by applying DOMA’s federal definition of marriage to receive

However, the “whole subject of domestic relations of husband and wife, parent and child, belongs to the law of the states, and not to the law of the United States.”¹⁴⁵ When determining who can receive federal benefits under a federal statute, the federal government will defer to state laws regarding domestic relations “unless Congress clearly mandates otherwise.”¹⁴⁶ Congress has no enumerated power to direct the states to recognize certain types of marriages as valid and others as invalid;¹⁴⁷ therefore, Section Three of DOMA presumptively violates the independent constitutional bar limitation on federal funding propounded by the *Dole* Court.

Finally, a court must consider whether this presumption of unconstitutional coercion can be rebutted by a showing that the condition constitutes “reimbursement spending” rather than “regulatory spending.”¹⁴⁸ Again, reimbursement spending only “specifies the *purpose* for which the states are to spend the offered federal funds and simply reimburses the states ... for their expenditures.”¹⁴⁹ When considering whether Section Three of DOMA specifies the purpose for which the funds are to be used, a court must consider the substantive federal statute authorizing the federal funding. Under the State Cemetery Grants Program, the VA can provide grants for states to use to maintain, expand, and construct veterans’ cemeteries if the states submit applications for this grant money.¹⁵⁰ Congress has not specifically specified how the states are to use the grant money to maintain these cemeteries; however, to qualify for a grant a state must operate the cemetery for veterans, veterans’ spouses, and minor and disabled adult children.¹⁵¹ Therefore, the State Cemetery Grants Program appears to set only a general purpose for the use of the funds. However, it does not simply reimburse the states for their expenditures because states submit plans to receive grant money, and any money not used within three years can be recovered by the United States.¹⁵² Therefore, a showing of reimbursement spending as applied to the State Cemetery Grants Program should not rebut Section Three of DOMA.

funding. *See* Complaint, *supra* note 38, at 14–21.

145. *In re Burrus*, 136 U.S. 586, 593–94 (1890).

146. STRASSER, *supra* note 12, at 149.

147. *Cf. In re Burrus*, 136 U.S. at 593–94.

148. Baker, *supra* note 31, at 1963.

149. *Id.* (emphasis added).

150. *See* 38 U.S.C. § 2408(b) (2006).

151. *See* 38 C.F.R. § 39.10(a) (2010). “In order to qualify for a grant, a State veterans cemetery must be operated solely for the interment of veterans, their spouses, surviving spouses, minor children, and unmarried adult children who were physically or mentally disabled and incapable of self-support.” *Id.*

152. *See* 38 C.F.R. § 39.10(d) (2010).

Determining whether Section Three of DOMA as applied to MassHealth sets a reimbursement spending condition rather than a regulatory spending condition requires a bit more analysis. MassHealth is jointly funded by Massachusetts and the Federal Government but is administered exclusively by Massachusetts.¹⁵³ Massachusetts has admitted that “[i]n general, the federal government reimburses half of the qualifying health benefits paid out by MassHealth.”¹⁵⁴ Therefore, from this concession it appears that a finding of coercion would be rebutted. However, because the Federal Government has specifically informed MassHealth that it must apply DOMA’s definition of marriage when determining eligibility for Medicaid benefits and because this mandate has caused Massachusetts not to receive about \$2.37 million in federal funding,¹⁵⁵ a court should still consider whether this is reimbursement or regulatory spending.

According to the Medicaid statute, the purpose of providing funds to those states that have submitted plans for medical assistance is to enable those states to provide medical assistance to eligible individuals who do not have the income or resources to cover the costs of necessary medical services.¹⁵⁶ When considering the eligibility of a married individual, MassHealth combines the assets and income of that individual with those of his or her spouse.¹⁵⁷ Under federal law, Massachusetts must assess married individuals in same-sex relationships as though they were single rather than married, yet MassHealth continues to make eligibility determinations without regard to whether the marriage is between two individuals of the same sex or two of different sexes.¹⁵⁸ Therefore, while the purpose of Medicaid is to enable states to assist those individuals who do not have sufficient resources to meet medical costs,¹⁵⁹ Congress is not meeting that purpose by conditioning states’ receipt of funding for medical assistance programs on the acceptance of DOMA’s definition of marriage. Furthermore, while the Federal Government does reimburse half of the benefits paid by MassHealth,¹⁶⁰ it does not reimburse Massachusetts for those benefits paid to qualifying individuals who happen to be married to a

153. Complaint, *supra* note 38, at 14.

154. *Id.* at 15.

155. *Id.* at 16–17.

156. 42 U.S.C. § 1396 (2006); *see also* Complaint, *supra* note 38, at 14.

157. Complaint, *supra* note 38, at 15.

158. *Id.* at 15, 17.

159. *See* 42 U.S.C. § 1396 (2006).

160. Complaint, *supra* note 38, at 15.

spouse of the same sex.¹⁶¹ Based on these observations, Section Three of DOMA, as applied to Medicaid benefits, should be classified as an unconstitutional coercive condition.

C. Distinguishing Congressional Regulation of Polygamy from Congressional Regulation of Same-Sex Marriage Through DOMA

Supporters of the constitutionality of Section Three of DOMA may argue that there is no difference between Congress attempting to regulate state recognition of same-sex marriage and Congress' many attempts to regulate and prohibit the practice of polygamy in the Western territories in the nineteenth century.¹⁶² In his opinion in *Massachusetts*, Judge Tauro failed to discuss the congressional history regarding the regulation of polygamy and how this serves as one instance of Congress attempting to trump the states' abilities to define marriage for themselves.¹⁶³ Therefore, because the Court could conceivably determine that Congress' attempt to regulate same-sex marriage through DOMA is permissible because of Congress' past regulation of polygamy, this Note analyzes how, even when compared to the regulation of polygamy, Section Three of DOMA still creates an unconstitutional coercive condition for the receipt of federal funding.

Congress began to regulate the practice of polygamy in the nineteenth century as "Mormon theology evolved" in the Western territories, especially Utah.¹⁶⁴ In 1862, Congress enacted a law prohibiting the practice of polygamy in all U.S. territories.¹⁶⁵ Twenty years later, Congress made cohabitation a crime and prohibited those individuals practicing polygamy from sitting on juries or holding office.¹⁶⁶ Five years later, Congress enacted the Edmunds-Tucker Act, which mandated that plural wives testify against their husbands and dissolved the Church of Jesus Christ of Latter-day Saints as a corporation to allow the Federal Government to seize church property.¹⁶⁷ In 1878, the Court upheld the constitutionality of these anti-polygamy laws when it ruled that Congress lacked the power under the Free

161. *See id.* at 17.

162. *Cf.* Hema Chatlani, *In Defense of Marriage: Why Same-Sex Marriage Will Not Lead Us Down a Slippery Slope Toward the Legalization of Polygamy*, 6 APPALACHIAN J.L. 101, 110–12 (2006) (summarizing Congress' attempts to regulate the practice of polygamy in the territories, especially the Utah Territory, during the nineteenth century).

163. *See Massachusetts v. U.S. Dep't of Health and Human Services*, 698 F. Supp. 2d 234 (D. Mass. 2010).

164. Chatlani, *supra* note 162, at 110–11.

165. Morrill Act, ch. 126, § 1, 12 Stat. 501 (repealed 1910).

166. Edmunds Act, ch. 47, §§ 1, 5, 8, 22 Stat. 30, 30–32 (repealed 1983).

167. Edmunds-Tucker Act, ch. 397, §§1, 17, 24 Stat. 635, 635–38 (repealed 1978). The Supreme Court upheld the constitutionality of the Edmunds-Tucker Act in 1890. *See generally* *Late Corp. of Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1 (1890).

Exercise Clause to legislate concerning religious opinion and belief but is free to “reach actions which were held in violation of social duties or subversive of good order.”¹⁶⁸ Finally, in order for Arizona, New Mexico, Oklahoma, and Utah to gain statehood admission to the United States, Congress required that they enact anti-polygamy provisions within their state constitutions.¹⁶⁹

As previously mentioned, the Court has recognized that the field of law regulating domestic relations belongs to the states and not the Federal Government.¹⁷⁰ Yet the multiple laws enacted by Congress during the nineteenth and early twentieth centuries targeting practitioners of polygamy clearly demonstrate one major instance where Congress trumped the states’ ability to define marriage. Even though Congress did condition statehood for Arizona, New Mexico, Oklahoma, and Utah on the inclusion of anti-polygamy provisions in their state constitutions,¹⁷¹ this condition placed upon statehood can be distinguished from the unconstitutional coercive condition placed on states’ receipt of federal money by Section Three of DOMA.

First, polygamy and same-sex marriage, as institutions, “are distinguishable because there are a number of social ills historically present in polygamy that are not present in same-sex marriages.”¹⁷² Looking at the history of polygamous marriages in the United States reveals a “pattern of underage wives.”¹⁷³ Usually, polygamous males “marry [girls] between the ages of fourteen and sixteen.”¹⁷⁴ Sexual abuse and child molestation are often prevalent in polygamous households.¹⁷⁵ Female children do not

168. *Reynolds v. United States*, 98 U.S. 145, 164 (1878). According to the *Reynolds* Court, “there has never been a time in any State of the Union when polygamy has not been an offence against society.” *Id.* at 165; *see also id.* at 164 (“Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.”).

169. *See* Arizona Enabling Act, ch. 310, 36 Stat. 557, 569 (1910); New Mexico Enabling Act, ch. 310, 36 Stat. 557, 558 (1910); Oklahoma Enabling Act, ch. 3335, 34 Stat. 267, 269 (1906); Utah Enabling Act, ch. 138, 28 Stat. 107 (1894). According to one scholar, the portions of these Enabling Acts requiring the prohibition of polygamy would likely be unenforceable today. *See* Laura Elizabeth Brown, Comment, *Regulating the Marrying Kind: The Constitutionality of Federal Regulation of Polygamy Under the Mann Act*, 39 MCGEORGE L. REV. 267, 276 n.73 (determining that “a portion of the Oklahoma Enabling Act [was] invalid” because Congress could not constitutionally “require that Oklahoma’s state capital be in a particular city”) (citing *Coyle v. Smith*, 221 U.S. 559, 574–75 (1911)).

170. *See In re Burrus*, 136 U.S. 586, 593–94 (1890).

171. *See supra* note 169 and accompanying text.

172. Chatlani, *supra* note 162, at 128.

173. *Id.* at 129.

174. Joseph Bozzutti, *The Constitutionality of Polygamy Prohibitions After Lawrence: Is Scalia a Punchline or a Prophet?*, 43 CATH. LAW. 409, 436 (2004) (quoting Maura Strassberg, *The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS. L. REV. 353, 366 (2003)).

175. Chatlani, *supra* note 162, at 130.

receive the same level of education as male children receive, and females “are raised to believe that women are inferior to men.”¹⁷⁶ Also, many polygamous families are impoverished because polygamist wives often do not work outside the home and therefore “the responsibility for family finances falls entirely on the patriarchs of the community.”¹⁷⁷ Finally, “polygamy undermine[s] the basic tenants of a monogamous heterosexual marriage”—unity and partnership.¹⁷⁸ None of these concerns are present in a marriage between two consenting individuals of the same sex. Instead, a same-sex marriage, like a monogamous heterosexual marriage, “remains focused on unity and partnership; that is, on the exclusive commitment of two individuals.”¹⁷⁹ Therefore, both the federal and state governments have a legitimate interest in prohibiting polygamy to protect women and children from being exploited through polygamous relationships.

Second, the congressional regulation of polygamy should not be considered a coercive condition like the condition Section Three of DOMA places on states’ receipt of federal spending should be. As an initial matter, Congress can constitutionally make rules and regulations respecting all U.S. territories.¹⁸⁰ Therefore, Congress could validly prohibit the practice of polygamy in the Western territories. Conceivably, those territories that eventually became Arizona, New Mexico, Oklahoma, and Utah actively sought admission to the Union in order to enjoy whatever benefits of statehood the Constitution and laws of the United States provide. Therefore, an argument could be made that these territories that were reaching out to Congress for statehood could only do so by accepting the condition that their state constitutions contain anti-polygamy provisions.

On the other hand, Section Three of DOMA’s definition of marriage as being between one man and one woman conditions the states’ receipt of federal funding in order to run federal programs such as Medicaid.¹⁸¹ For example, Congress enacted Medicaid in 1965 as a “cooperative federal/state medical assistance program for the ‘worthy poor’—public assistance recipients and the medically needy.”¹⁸² Even though states had the choice of opting into Medicaid, they essentially had no choice “if they wanted to

176. *Id.* at 131.

177. *Id.* at 132.

178. Elizabeth Larcano, Note, *A “Pink” Herring: The Prospect of Polygamy Following the Legalization of Same-Sex Marriage*, 38 CONN. L. REV. 1065, 1080 (2006).

179. *Id.*

180. U.S. CONST. art. IV, § 3 (“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the territory or other Property belonging to the United States . . .”).

181. See Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419, 2419 (1996) (codified as amended at 1 U.S.C. § 7 (2006)); Rosenthal, *supra* note 6, at 1158.

182. Watson, *supra* note 142, at 953.

continue to take advantage of federal matching assistance” because the matching programs Medicaid replaced ended on December 31, 1969.¹⁸³ Medicaid is a classic example of congressional legislation enticing the states to opt into participating in federal programs to receive federal assistance—assistance that the states cannot afford to forego in today’s society. Therefore, unlike those territories which actively sought admission to the Union as states, the current nature of federal programs and federal benefits means that states essentially do not have a choice between accepting conditional federal funding or foregoing it and still attempting to provide the same level of assistance to their citizens.¹⁸⁴

According to Professor Rosenthal, state decisions regarding marriage and marital status are largely immune from governmental regulation, but he does acknowledge that certain decisions relating to marriage could alter states’ receipt of federal funding.¹⁸⁵ Rosenthal views any conditions based on marital status attached to the receipt of federal funding as classifying conditions instead of coercive conditions because “the amounts of money at stake are not generally large enough to be decisive with respect to fundamental choices concerning personal and family life.”¹⁸⁶ However, Section Three of DOMA is an exception to this observation. Because receipt of federal funding is attached to states’ acceptance of DOMA’s definition of marriage as between one man and one woman, Massachusetts has not been able to claim about \$2.37 million in federal funding for MassHealth and faces a decision by the VA to recapture millions in federal grants should Massachusetts decide to bury a non-independently eligible same-sex spouse of a veteran in one of the two veterans’ cemeteries.¹⁸⁷

In sum, Section Three of DOMA should be treated as both a classifying and coercive condition placed on federal funding and therefore is unconstitutional under both theories. By classifying recipients of federal funding based on sexual orientation, states that recognize same-sex marriages must violate equal protection principles to continue to receive this funding. Even if the Court were to determine, by applying either strict scrutiny or rational basis, that Section Three of DOMA does not violate equal protection principles, it still violates the Spending Clause because it impermissibly coerces states to abide by the federal definition of marriage as between one man and one woman in order to receive federal funding for programs such as Medicaid. Supporters of DOMA may argue that

183. *See id.* at 955.

184. *See id.*

185. Rosenthal, *supra* note 6, at 1158.

186. *Id.*

187. *See* Complaint, *supra* note 38, at 17–18, 20.

Congress was allowed to regulate the marriage relationship in the nineteenth century by prohibiting the practice of polygamy in the Western territories;¹⁸⁸ however, the condition the federal definition of marriage places on states' receipt of federal funding provides states with less choice than the territories had because the states serve as conduits for federal programs and cannot adequately support their citizens without federal funding. Therefore, under this proposed reformulation of Spending Clause jurisprudence, Section Three of DOMA unconstitutionally classifies and coerces.

V. CONCLUSION

Under the law as articulated in *Dole*, Congress might exert financial pressure on the states to force them to conform state law to DOMA's definition of marriage. Such a move might be entirely constitutional under the Supreme Court's reading of the Spending Clause, even though Congress may not meddle with the states' treatment of marriage through its enumerated power under the Commerce Clause.¹⁸⁹

Unfortunately, this statement describes exactly what Congress has attempted to persuade the states to do since the enactment of DOMA in 1996. According to the *Dole* Court's Spending Clause interpretation, Congress can attach any condition it wishes to states' receipt of federal funding as long as that condition is not independently barred by another constitutional provision.¹⁹⁰ Currently, Congress can attempt to create a single nationwide policy by passing legislation authorizing federal funding only for states complying with that policy.¹⁹¹ Therefore, current Spending Clause jurisprudence defies federalism because Congress can essentially ignore those states with differing public policies.

The Supreme Court is almost certain to grant certiorari to *Massachusetts* and *Gill* because of Judge Tauro's determination that Section Three of DOMA, as applied to Massachusetts, exceeded Congress' power under the Spending Clause,¹⁹² the Tenth Amendment,¹⁹³ and the "equal protection principles embodied in the Fifth Amendment."¹⁹⁴ This would present the Court with an opportunity to reformulate its Spending

188. See Chatlani, *supra* note 162, at 111.

189. Araujo, *supra* note 119, at 235.

190. *South Dakota v. Dole*, 483 U.S. 203, 208 (1987).

191. Baker & Berman, *supra* note 126, at 472.

192. *Massachusetts v. U.S. Dep't of Health and Human Services*, 698 F. Supp. 2d 234, 248–49 (D. Mass. 2010).

193. *Id.* at 252–53.

194. *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 397 (D. Mass. 2010).

Clause jurisprudence so that Congress cannot continue to indirectly commandeering states through spending legislation when it cannot directly commandeering states and state officials to execute federal laws.¹⁹⁵ Under a reformulation of the Spending Clause, a court would consider whether a condition attached to the receipt of federal funding is either an unconstitutional classifying condition or an unconstitutional coercive condition.¹⁹⁶ Under this view, a court is highly likely to find that the definition of marriage as a union between one man and one woman as set forth in Section Three of DOMA is an unconstitutional classifying and coercive condition.

The Court last interpreted the Spending Clause in 1987—twenty-three years ago.¹⁹⁷ In the wake of decisions like *New York* and *Printz* that reaffirmed a commitment to federalism, it is high time for the Court to again address the Spending Clause. If the Court affirms Judge Tauro’s opinion and determines that Section Three of DOMA is unconstitutional under the Spending Clause, not only would the Court demonstrate a commitment to federalism by prohibiting Congress to use the “carrot and stick” of money to influence states where it could not do so directly, but it would also demonstrate a commitment to equality for gay men and lesbians across America.

195. See Whitten, *supra* note 5, at 458 (arguing that Congress’ use of “back-door commandeering” through Spending Clause legislation is similar to the “coercive congressional regulation condemned in *New York* and *Printz*”).

196. Rosenthal, *supra* note 6, at 1114–15.

197. See *South Dakota v. Dole*, 483 U.S. 203, 207–08, 211–12 (1987) (holding that Congress had authority under the Spending Clause to legislate to encourage states to enact a uniform drinking age of 21 and discussing four limitations on Congress’ Spending Clause authority).