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W. Burlette Carter
George Washington University Law School, bcarter@law.gwu.edu

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THE "FEDERAL LAW OF MARRIAGE": DEFERENCE, DEVIATION, AND DOMA

W. BURLETTE CARTER*

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* Professor of Law, George Washington University Law School. J.D., Harvard Law School; B.A., Agnes Scott College; former associate Hughes Hubbard & Reed. My thanks to my research assistants Sam Cowin, Michael Dal Santo, Jeffrey Higgins, Patricia Klanke, and Keith Del Prete, to Professor Paul Butler, to participants in the GW University faculty workshops and those in the Northeastern Women of Color Workshops, to Dr. Rasanjali Wickrema, and to various other colleagues and persons who provided comments and criticisms that contributed greatly to this work at its various stages and incarnations. I thank also the American University Journal of Gender, Social Policy and the Law for their editorial assistance. The statements and opinions expressed herein are solely my own.

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I. INTRODUCTION

On June 26, 2013, the Supreme Court held in *United States v. Windsor*, that the federal Defense of Marriage Act ("DOMA") is unconstitutional.[1] DOMA defined marriage as solely between one man and one woman for every purpose under federal law.[2] Consequently, it required that same-sex couples who are legally married under state law be denied both federal recognition of their marriages and a host of federal benefits (and burdens) that apply to heterosexual married couples. DOMA had been challenged in federal courts across the country as a violation of the U.S. Constitution. Plaintiffs claimed, *inter alia*, that it violated the Spending Clause, Equal Protection under the Fifth Amendment, and federalism under the Tenth Amendment.[3] The First and Second U.S. Circuit Courts of Appeal, had previously concluded that DOMA violates Equal Protection, affirming district court grants of summary judgment.[4] *Windsor* was decided as this

1. United States v. Windsor, No. 12-307 (U.S. June 26, 2013); Jeremy W. Peters, *Cold, Wet Wait for Tickets to Supreme Court's Same-sex Marriage Cases*, N.Y. TIMES, Late Edition, Mar. 26, 2013, at 14; *see also* The Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

2. 1 U.S.C. § 7 (2006) (defining marriage for purposes of federal law); 28 U.S.C. § 1738C (2006) (providing that no state is required to recognize same-sex marriages performed in another state).

3. *See, e.g.*, Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 376-77 (D. Mass. 2010) (contending an Equal Protection challenge against DOMA, as embodied in the Due Process Clause of the Fifth Amendment), *aff'd*, 682 F.3d 1 (1st Cir. 2012); Mass. v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234, 235-36 (D. Mass. 2010) (challenging DOMA under the Spending Clause and the Tenth Amendment), *aff'd*, 682 F.3d 1 (1st Cir. 2012); *see also* Windsor v. United States, 833 F. Supp. 2d 394, 396 (S.D.N.Y. 2012) (asserting DOMA violates Equal Protection), *aff'd*, 699 F.3d 169 (2d Cir. 2012), *aff'd*, 12-307, 2013 WL 3196928 (June 26, 2013).

4. *See* Mass. v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 17 (1st Cir. 2012), *cert. denied*, No. 12-97 (June 27, 2013); *Windsor*, 699 F.3d at 188.

article went to press. In a five to four decision, the Supreme Court determined that in passing DOMA and banning same-sex couples married under state law from receiving *any* federal marriage benefits, Congress had interfered with the rights of states to define marriage and thereby, had violated the rights of Windsor and other couples to Equal Protection. At press time, the Court still had not yet formally determined the fate of several other certiorari petitions seeking review of DOMA-related issues, although some might argue that *Windsor* is practically determinative.[5] And on the same day that it decided *Windsor*, the Supreme Court also decided a case challenging a *state's* right to limit the term "marriage" to heterosexual couples.[6]

This article focuses on the issues raised by DOMA and the federal recognition of state-approved same-sex marriages. While the Supreme Court invalidated DOMA, its decision in *Windsor* reserved judgment on some key questions that DOMA raised. For example, the Court stated that "by history and tradition" the states controlled marriage, but it did not define that control itself as a constitutional restriction. The Court also expressly acknowledged that the federal government can sometimes deviate from the states on marriage when federal policy is as at issue. While indicating the instances were limited, the Court did not identify the

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5. *See* United States v. Windsor, No. 12-307 (U.S. June 26, 2013). The *Windsor* plaintiff argued that the denial of a federal marital estate tax deduction (allowing one to give an unlimited amount to a spouse free from estate and gift taxes) on the ground that she was married to a person of the same-sex, violated her Equal Protection rights under the Due Process Clause of the Fifth Amendment. *Windsor*, 699 F.3d at 175-76; *see also* Petition for Writ of Certiorari at 1, Dep't of Health & Human Servs. v. Mass., No. 12-15 (July 3, 2012) [hereinafter HHS v. Mass. Cert. Pet.], *available at* http://www.justice.gov/osg/briefs/2012/2pet/7pet/2012-0015.pet.aa.pdf (filing for certiorari with *Gill*); Petition for Writ of Certiorari at 1, Bipartisan Legal Advisory Grp. of the U.S. House of Representatives v. Gill, No. 12-13 (U.S. June 29, 2012), [hereinafter BLAG v. Gill Cert. Pet.] *available at* http://www.glad.org/uploads/docs/cases/gill-v-office-of-personnel-management/06-29-2012-gill-v-opm-blag-certiorari-petition.pdf (challenging the finding of an Equal Protection violation in *Gill*); Petition for Writ of Certiorari Before Judgment at 1, Office of Pers. Mgmt. v. Golinsky, No. 12-16 (U.S. July 3, 2012) [hereinafter OPM v. Golinsky Cert. Pet.] *available at* http://www.justice.gov/osg/briefs/2012/2pet/7pet/2012-0016.pet.aa.pdf (seeking to bypass the Court of Appeals); Petition for Writ of Certiorari Before Judgment at 1, Pedersen v. Office of Pers. Mgmt., No. 12-231 (U.S. Aug. 21, 2012) [hereinafter Pedersen v. OPM Cert. Pet.], *available at* http://www.glad.org/uploads/docs/cases/pedersen-v-opm/pedersen-plaintiffs-cert-petition-08-21-12.pdf; Petition for Writ of Certiorari Before Judgment at 1, Office of Pers. Mgmt. v. Pedersen, No. 12-302 (U.S. Sept. 11, 2012) [hereinafter OPM v. Pedersen Cert. Pet.], *available at* http://www.justice.gov/osg/briefs/2012/2pet/7pet/2012-0302.pet.aa.pdf.

6. Hollingsworth v. Perry, 12-144 (U.S. June 26, 2013) (holding that given the state official's refusal to defend the statute before the Supreme Court, the Court has no jurisdiction to hear a challenge to the California revision of the state constitution to ban same-sex marriage, and the lower federal court decision invalidating the revision stands).

line between state and federal power. In support of its claim that DOMA made same-sex couples second-class citizens in violation of Equal Protection, the majority did list several benefits that same-sex couples were denied. But it did no serious examination of the purposes of these underlying statutes to find what the federal policy vindicated by those statutes was, nor did counsel for either side. The Court also did not settle the debate over the purpose of marriage in the United States—whether it is primarily to support procreation as DOMA defenders argued or whether government support of marriage is to facilitate the formation of consensual family relationships irrespective of procreation as the DOMA challengers claimed. Indeed, the word "procreation" did not even appear in the majority opinion, probably because it relied solely upon DOMA's scope to invalidate the statute. And finally, and relatedly, the Court expressly declined to say whether the federal government was required to grant uniform benefits to same-sex couples and heterosexual couples as a matter of Equal Protection if states recognizing such marriages did not distinguish the two groups of couples. Thus, we are left to ask whether procreation is a legitimate basis for the distribution of some federal benefits? Is biological difference a legitimate basis for distinguishing funding among the married? If so, can heterosexuality alone be a marker for procreation or biological difference? Would a regime for same-sex couples that does not use the term "marriage," but provides federal benefits satisfy Equal Protection? Do the benefits provided have to be exactly equal? Do same-sex couples have a *constitutional right* to have their marriages called "marriage" at the federal level if their respective state uses that term? And if some differentiation in the treatment of marriage is allowed either on the basis of procreational status or otherwise, what standard of review applies to denials of marriage-related benefits to same-sex couples?[7]

While all litigation is partisan, the political battle over same-sex marriage has made the legal cases quite so. While the Department of Justice once defended DOMA, President Barack Obama has now ordered them to cease doing so, asserting that he believes that DOMA is

7. *See* United States v. Windsor, No. 12-307 slip op. at 14-15 (U.S. June 26, 2013) (stating that states control marriage under history and tradition but that the federal government can effect federal policy through marriage rules); *id.* at 22-25 (mentioning benefits denied to same-sex couples as evidence of second-class status marital status under DOMA); *id.* at 16 (referring again to "history and tradition"); *id.* at 17 (declaring that it is unnecessary to decide whether federal benefits must be uniform as state benefits are for same-sex couples and heterosexual couples); *id.* at 20 (noting that DOMA seeks to injure the very class New York state seeks to protect); *see id.* at 17-18 (Scalia, J., dissenting) (criticizing the majority for conveniently ignoring the question of the standard of scrutiny or any discussion of substantive due process); *id.* at 8-10 (Alito, J., dissenting) (asserting that the Court should not decide whether or not procreation or consent is the basis of marriage).

unconstitutional.[8] Before that, the Obama Administration abandoned one of the key reasons that Congress put forth for passing DOMA: that it is related to a federal interest in responsible procreation.[9] Although Congress passed DOMA by a wide margin, members are now backpedaling wildly from the legislation.[10] Commentators on all sides have imposed pressure to achieve their desired outcomes.[11] Law professors, historians, and advocacy groups, have all chimed in with *amicus* briefs for their favored sides.[12] There is a pressing need for a sound historical record on past federal inroads into marriage and for proposals that recognize both the long history of discrimination against gay and lesbian Americans and Congress' right to

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8. However, the Administration has said it will still enforce DOMA. *See* Letter from Eric H. Holder, Attorney Gen., to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html. The Republican members of the Bipartisan Legal Advisory Group of the U.S. House of Representatives ("BLAG") then intervened. Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 12-14, *Windsor*, 133 S. Ct. at 786 (2012) [hereinafter "BLAG Windsor Merits Brief"].

9. In 2010, in a reply brief in *Smelt v. County of Orange*, the Department of Justice ("DOJ") first indicated the retreat. It stated, "[T]he government does not contend that there are legitimate government interests in creating a legal structure that promotes the raising of children by both of their biological parents or that the government's interest in 'responsible procreation' justifies Congress's decision to define marriage as a union between one man and one woman." It said further,a "[T]he United States does not believe that DOMA is rationally related to any legitimate government interests in procreation and child-rearing and is therefore not relying upon any such interests to defend DOMA's constitutionality." Reply Memorandum in Support of Defendant United States of America Motion to Dismiss at 6-7, Smelt v. Cnty of Orange, 447 F.3d 673, 683 (9th Cir. 2006), *cert. denied*, 549 U.S. 959 (2006). The brief was filed on August 17, 2009. This abandonment of the procreation support position was continued in subsequent cases. *See, e.g.*, *Gill*, 699 F. Supp. 2d at 388 (discussing the government's abandonment of Congress's justifications for DOMA), *aff'd*, 682 F.3d 1 (1st Cir. 2012).

Notably, Justice Kagan was Solicitor General at the time that the government filed its brief in *Smelt*. *Compare Obama Said to Pick Solicitor General for the Court*, N.Y. TIMES, May 10, 2010, at 1, *with* Lyle Denniston, *Kagan, DOMA and Recusal*, SCOTUSblog, (Nov. 2, 2012, 4:59 PM), www.scotusblog.com/2012/11/kagan-doma-and-recusal/ (suggesting that the Solicitor General must have been involved in the decision to abandon argument that procreation is not key to marriage policy).

10. *See Mass. v. HHS*, 682 F.3d at 6 (noting the "strong majorities" in both houses when DOMA was passed and that President Clinton signed it); Brief of 172 Members of the U.S. House of Representatives and 40 U.S. Senators as *Amici Curiae* in Support of Respondent Edith Schlain Windsor, Urging Affirmance on the Merits, *Windsor*, 133 S. Ct. at 786; Peter Baker, *Now in Defense of Gay Marriage, Bill Clinton*, N.Y. TIMES, Mar. 25, 2013, at 1.

11. The Obama Administration's initial defense of DOMA upset same-sex marriage advocates; the abandonment of the procreation argument angered conservatives. *Compare* Frank Rich, *40 Years Later, Still Second-Class Americans*, N.Y. TIMES, June 28, 2009, at 8, *with* Ed Whelan, *The Massachusetts DOMA Rulings—Some Commentary on* Gill v. OPM, NAT'L REV. ONLINE (July 9, 2010, 12:10 PM), http://www.nationalreview.com/bench-memos/230892/massachusetts-doma-rulings-some-commentary-i-gill-v-opm-i/ed-whelan.

12. For a listing of briefs filed in the key cases see website of the Gay and Lesbian Advocates and Defenders ("GLAD") at http://www.glad.org/doma/documents/.

set priorities in public funding decisions, including those related to marriage.

This article seeks to contribute to those ends. Part II considers the historical origins of American notions that some matters are “local” issues, including marriage. It argues that the notions arise out of (1) the American colonial experience, (2) the notion that "the people" (not merely states) rule in a democracy, and (3) conflict of laws theory. I point out that conflict of laws theory has historically differentiated between the law governing the *validity* of a marriage and that governing the *incidents* that flowed from that marriage.

Part III offers five cases in which the federal government has deviated from state or local laws on the validity of a marriage: (1) the recognition of marriages according to slave custom for purposes of providing military pensions to the families of black soldiers during the Civil War; (2) the federal government’s authorization and oversight of marriages among ex-slaves during and after the Civil War; (3) the treatment of polygamy in Utah Territory; (4) the treatment of polygamy and fraudulent marriages in immigration; and (5) the treatment of American Indian marriages. Items 1 and 2—the federal recognition of slave marriages and federal oversight of the marrying of ex-slaves—have either been not mentioned or mischaracterized in DOMA litigation. They are extremely important to understanding the extent and limits of federal power. The government’s efforts to end polygamy in Utah are often couched as tale of moral judgment or religious intolerance. I will demonstrate that the Supremacy Clause played a significant role in the government's actions, although other factors also contributed. Part III then discusses cases in which Congress recognized the *validity* of the marriage, but applied different *incidents* than state or local law would have advised. I offer but two of many examples: (1) the decision to give married women a legal share of land in Oregon Territory, separate from their husbands under the Oregon Donation Law of 1850 and (2) Congress’ decision to abandon deference to state marital property rules in the income tax controversy over community property states versus separate property states in the 1930s and 1940s. To this writer’s knowledge, the Oregon Donation law has not been discussed in DOMA cases and the income tax history that I discuss has been referenced peripherally and for other points.

Part IV summarizes the findings with respect to what history says about the federal law of marriage. I argue that federal conflict of law rules are likely a key source of the history and tradition of deference to local (not merely state) law on marriage that the Supreme Court identified in *Windsor*. These rules join with limited federal constitutional powers to produce the pattern of deference. Traditionally, under those conflict of law rules, the *validity* of a marriage has been governed by local law (not merely

state law), subject to serious public policy concerns. However, the *incidents* that a government chooses to attach to a marriage have not been consistently subject to such a rule of deference. Federal deviations from state and local determinations of validity or with respect to what incidents should flow from a marriage have historically fallen into three categories. Congress has deviated (1) to vindicate Constitutional interests; (2) to vindicate statutory, rule, or treaty interests; and (3) to vindicate non-constitutional, non-statutory interests. In these decisions, Congress has also considered the role of the majority of the states and the common law's traditional approach. The central question for courts is, then, what is the purpose of Congress' deviation.

Part V recognizes that there are really three DOMAs. One DOMA bundled all of marriages' benefits making them impervious to same-sex couples married under state law. That DOMA is now dead. Another DOMA collapsed into the underlying statutes that it defined. That DOMA may very well still live, at least in part. And the third DOMA was merely an exercise of the right of the federal government to define its own terms. This DOMA as a restrictive definition applicable to all marriage benefits is effectively dead, but it may survive in effect in individual instances in which the second DOMA also survives. Then, focusing on the second "unbundled" DOMA, Part V argues that if there is legitimate authority for the approach of DOMA as a substantive statute, that authority must be found in the underlying statutes; there too one must look for evidence of purpose. Neither the Supreme Court nor the lower courts did this analysis in DOMA litigation nor did the parties signal in any serious way that such an analysis was necessary. The section makes its point by examples, discussing four groups of statutes and their relationship to procreation: the Employee Retirement Income Security Act ("ERISA"), the Social Security statutes, income tax treatment of marital income, and the estate and gift tax marital deduction at issue in *Windsor*. This section provides evidence that some federal statutes seek to respond to the unique biological imbalance in the heterosexual couple and a unique history of discrimination through marriage policy. It concludes that the first three of these sets of statutes do indeed evidence a defensible federal interest in procreation support. The marital deduction at issue in *Windsor*, however, cannot be justified on any ground reasonably related to procreation.

Part VI then proposes a framework for analyzing DOMA. I suggest that the Supreme Court should borrow from the division in conflict of law rules between the validity of a marriage and its incidents. Under the proposal, federal benefits that directly affect the right to be a marital family (*e.g.*, "family rights") should be assessed by looking to state law designations of who is married. Denials of this class of federal benefits should be subject to intermediate scrutiny for purposes of federal Equal Protection review.

On the other hand, I propose that benefits that do not directly affect the family relationship that is marriage, should be guided by spending priorities set in federal law. These benefits are akin to the "incidents" of a marriage in conflict of laws theory. I also call these rights “branch” rights. Denials of these rights should be subject to a rational basis test, not merely because they are incidents, but also because, as I will show, although they have suffered rank family discrimination by way of the denial of marriage, same-sex couples have not historically suffered by way of the denial of marriage rank economic discrimination of the type that has traditionally been covered by Equal Protection. Of course, in cases of plenary power, federal law must control even when family rights are affected and a rational basis test should apply.

I argue that the federal government is not required to use the term "marriage" for same-sex couples or any couples simply because a state does. Indeed, employing the broader principle of looking to state law for designations of "family," the federal government could reasonably base the extension of federal benefits beyond same-sex marriages to other forms of state and local recognition of committed same-sex families such as civil unions, domestic partnerships and possibly in some cases, unique contracts designed to replicate the legal relationships that follow from marriage.

In Part VII, I return to the three DOMAs. The first DOMA, the one that bundled all federal statutes together would, under the proposal, be subjected to intermediate scrutiny and should be seen as violating Equal Protection because it prevented same-sex couples from having family rights that their state intended to confer through marriage. The second "unbundled DOMA," the one that collapses into the statutes that it defines, may violate Equal Protection in some cases but not in others. The applicable level of scrutiny for Equal Protection purposes should depend upon the nature of the rights affected in the statute at issue, that is whether the denial of the right burdens the state-conferred right to be a marital family. The third "definitional DOMA" mimics the other two. If applicable to all marital rights, it is too broad but it might be defended in individual cases of benefits.

In Part VIII, I apply these notions to the Windsor case. I conclude that the Court correctly held that she should receive the marital deduction and a tax refund. However, I argue that if state embrace of the marriage is the basis of the federal recognition, it is reasonable for the federal government to require that a state clearly signal its intention to grant a comparable tax refund in all such cases when the case involves, as Windsor's does, retroactive recognition of a marriage that was entered into at a time when the state had not embraced it.13

[13] For a discussion of the “standing” concern, see *infra* note 351.

And finally in Part IX, I conclude that Congress has the right to create "lanes of interest" with respect to federal marriage policy, given that families and groups of families and individuals have varying interests and compete for a limited purse of federal benefits. Such an approach allows Congress appropriate freedom to differentiate a wide range of interests and allows it to specifically consider these interests in deciding how federal dollars will support families. Because the heterosexual couple is unique both in its biological imbalance and in the long history of gender discrimination against women through heterosexual marriage, Congress should be free to decide, independent of the states, whether natural procreation should guide federal spending to support families or should otherwise be treated uniquely. Indeed, a procreation-based policy can likely only survive if such lanes exist. I do not say whether such a procreation-based policy is wise or unwise, but rather that it is permissible. The question for the courts is whether the distinction Congress draws is based upon procreation, a permissible aim, or whether it is really merely a means of sexual orientation discrimination. If Congress can exclude unmarried couples based on procreational status then it seems permissible but not necessary that "heterosexual marriage" be a lane. Congress could also adopt other designations and sub designations for different types of families. I believe that Congress also has the right to differentiate among different types of procreation in its spending. The job of the Court is to recognize and require remedies for the long history of family discrimination against same-sex couples, but also to recognize that it is Congress that has the constitutional right to set the priorities for expenditures from the public purse.

II. AMERICAN NOTIONS OF "LOCAL" MATTERS

This Part investigates how notions that some matters are to be locally determined may have emerged. I explain that local deference was afforded not only to states, but also to U.S. Territories, a fact that indicates that conflict of laws played a major role.

A. Origins

Three ideas likely shaped the early nation's notions of what matters should be "local." First is the experience of the states as English colonies. Second is the notion that the people should have some input on the laws that most directly affected them. Third is the body of conflict of law rules that determined when the law of a foreign jurisdiction would apply in a forum state.

1. The Colonial Experience

When the Framers were drafting the Constitution, they had in mind their experiences as English subjects and later as English and British colonists.[14] They would have known that, though a monarchy, England certainly recognized the need for some local governance.[15] In the feudal age, English kings had a system of feudal councils. These councils ultimately evolved into the English and later British Parliament.[16] The Magna Carta reflected notions that the people should have some rights to decide issues affecting them.[17] In his discussion of English approaches, Blackstone also spoke of subordinate magistrates who act in "an inferior secondary sphere" regarding matters affecting only defined issues and groups of persons.[18] He referenced local issues as "depending entirely upon the domestic Constitution of their respective franchises."[19]

With the American colonies, the Crown gave the colonists authority to establish rules relating to education, criminal and civil laws, marriage, probate and inheritance, local courts, and other matters.[20] Such freedom

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14. *Compare* THE FEDERALIST NO. 69 (Alexander Hamilton) (discussing the difference between British crown and Presidency), *with* THE FEDERALIST NO. 45 (James Madison) (referencing the feudal system).

15. *See generally* ROBERT C. RITCHIE, THE DUKE'S PROVINCE: A STUDY OF NEW YORK POLITICS AND SOCIETY, 1664-1691, 34-36 (1977) (discussing the basic structure of the local government).

16. *See* J.R. MADICOTT, THE ORIGINS OF THE ENGLISH PARLIAMENT, 924-1327, 158-59 (2010); *see also* Akhil Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1432, 1436 (1987) (noting that colonists understood English/British law to reveal sovereignty rights in "people" that superseded the King).

17. *See* J.C. HOLT, MAGNA CARTA 23-24 (2d ed. 1992) (describing the power struggle between the English Monarchy and the people that developed their rights); A.E. DICK HOWARD, MAGNA CARTA: TEXT AND COMMENTARY 4 (rev. ed. 1998) (explaining that the Magna Carta was a source of inspiration for American colonists).

18. 2 WILLIAM BLACKSTONE, COMMENTARIES *327-28. On Subordinate Magistrates, he refers to "mayors and aldermen, or other magistrates of particular corporations" as having mere private jurisdiction affecting "strictly municipal rights, depending entirely upon the domestic constitution of their respective franchises" and also speaking of a view that "the people should choose their own magistrates," although all rules had to be consistent with the crown's dictates. *Id.*

19. *Cf. id.* at *337.

20. For example, the 1629 Charter of the Massachusetts Bay Company expressly provided for a council of Governor and other local officials to be chosen from among free men on the plantation. This "assembly" had the authority to establish local laws. *The Charter of Massachusetts Bay: 1629*, AVALON PROJECT, http://avalon.law.yale.edu/17th_century/mass03.asp (last visited Mar. 5, 2013). Minutes of the Massachusetts Bay Company reflect such rules related to matters we now deem typically local: criminal and civil law, local courts, probate and intestate succession, and rules for marriage. *See id.* (granting authority to govern). The Charter of Carolina (Charles II) granted "full and absolute power . . . for the good and happy government of the said province . . . according to their best discretion, of and with the advice, assent and approbation of the freemen of the said province . . . ." It allowed for the creation of "penalties, imprisonment or any other punishment;" the establishment of "subordinate officers and judges, justices, magistrates;" the power to amend laws or

may have been a practical necessity both because of distance and because of the need to give incentive to adventurism in a faraway land. Still, the royal charters had one key proviso. Any laws adopted had to be consistent with the laws and interests of the Crown.[21]

As the colonies began to pass local laws, they also began to develop unique personas and a sense of their own sovereignty. Their rules expanded to regulate admiralty and trade.[22] When their leaders gathered to write the Articles of Confederation in 1777 and to ratify it in 1781, they styled themselves the "United States of America," a clear hint to the notion that those joined together were independent "states," not mere subjects of a king.[23]

2. The Notion That the People Rule

Notions that all governmental power derived from the people likely also would have affected American views of what issues were "local." Again, for colonists the Magna Carta would have stood as a prime early example of the notion.[24] The writings of many early political thinkers, including John Locke and Rousseau, propounded notions that people should have some say over matters directly affecting their lives.[25] And the notion that

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pardon offenses, and also to determine the "actions, suits and causes" obtaining in such courts, civil, criminal or otherwise. *Charter of Carolina – March 24, 1663*, AVALON PROJECT, http://avalon.law.yale.edu/17th_century/nc01.asp (last visited Mar. 5, 2013). The 1606 Charter of Virginia provided for a local council of thirteen in Virginia but also a "Council of Virginia" in England. The English council was to "have the superior Managing and Direction, only of and for all Matters that shall or may concern the Government, as well of the said several Colonies." *The First Charter of Virginia; April 10, 1606*, AVALON PROJECT, http://avalon.law.yale.edu/17th_century/va01.asp (last visited Mar. 5, 2013). The Charter gave colonists the power to mine precious metals and keep the profits and to coin money. The second Charter in 1609 created a local council and the power to "have full and absolute Power and Authority to correct, punish, pardon, govern, and rule" English subjects who arrived there, to establish "Orders, Ordinances, Constitutions, Directions, and Instructions," affecting civil, criminal, "marine" and other matters. *The Second Charter of Virginia; May 23, 1609*, AVALON PROJECT, http://avalon.law.yale.edu/17th_century/va02.asp (last visited Mar. 5, 2013).

21. *E.g.*, *Charter of Carolina*, *supra* note 20; *The Charter of Massachusetts Bay*, *supra* note 20; *The First Charter of Virginia*, *supra*, note 20.

22. *See* Amar, *supra* note 16, at 1447-48 (noting states negotiated with foreign nations long before the Constitution); *see generally* THE FEDERALIST NO. 11 (Alexander Hamilton) (urging common Navy and admiralty jurisdiction for the new nation).

23. ARTICLES OF CONFEDERATION OF 1781, art. I, para. 1.

24. *See* HOWARD, *supra* note 17.

25. *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 9 (1690), *available at* http://ebooks.adelaide.edu.au/l/locke/john/l81s/complete.html (explaining that political rights emerged from the natural law that gives men the right to "order their actions"); JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 21-22 (G.D.H. Cole trans. 1913) (1762), *available at* http://mongolianmind.com/wp-content/uploads/2012/11/Rousseau_contrat-social-1221.pdf (declaring that nature gives man absolute power over himself). *See generally* THOMAS HOBBES, LEVIATHAN (Karl

the people, not a monarch, control was central to the very core of the American enterprise.[26] These principles ultimately made their way into the American Constitution. Article IV, Section 4 ensured each state a republican form of government.[27] The Tenth Amendment expressly reserves powers not granted to the federal government to the states "*or to the people*."[28] Indeed, the Constitution's Preamble began, "We the People."[29]

The Framers also left hints of the types of matters that might usually be considered "local." These too reflect the notion of the people having control of that which immediately affects them. In addressing the concern that the people under the new government might owe more allegiance to the federal government than to the states, Hamilton made specific reference to "the ordinary administration of criminal and civil justice" as a state role. Hamilton also dismissed fears of a transfer of primary allegiance from state to federal arguing that the state would regulate "those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake."[30] James Madison described the constitutional design as allocating "the great and aggregate interests . . . to the national, the local and particular to the State legislatures."[31] Hamilton also stated that "the variety of more minute interests, which [would] necessarily fall under the superintendence of the local administrations . . . cannot be particularized, without [delving into tedium not worth the time of instruction]."[32] This dichotomy of "particular and limited" versus "general and broad" is also reflected in the fact that the early founders commonly referred to the federal government as the "general government."[33]

Schuhmann et al. ed., Bristol 2003) (1651).

26. *Accord* BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 9 (1998).

27. U.S. CONST. art. IV, § 4.

28. U.S. CONST. amend. X (emphasis added).

29. U.S. CONST. pmbl.

30. THE FEDERALIST NO. 17 (Alexander Hamilton).

31. THE FEDERALIST NO. 10 (James Madison).

32. THE FEDERALIST NO. 17 (Alexander Hamilton).

33. THE FEDERALIST NOS. 14, 41, 43, 45 (James Madison). Madison used the term "general government" in the debates of the Constitutional Convention. *See, e.g.*, *Madison Debates – August 18, 1787*, AVALON PROJECT, http://avalon.law.yale.edu/18th_century/debates_818.asp (last visited Mar. 5, 2013) (discussing enumerated powers of the general government). Hamilton used it as well. *E.g.*, THE FEDERALIST NOS. 17, 27, 28 (Alexander Hamilton); *Variant Texts of the Plan Presented by Alexander Hamilton to the Federal Convention – Text. B*, AVALON PROJECT, http://avalon.law.yale.edu/18th_century/hamtextb.asp (last visited Mar. 5, 2013). The Supreme Court has also used the term. *See, e.g.*, United States v. Kagama, 118 U.S. 375, 385 (1886); McCullough v. Maryland, 17 U.S. (4 Wheat.) 316, 435 (1819); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); Chisolm v. Georgia, 2 U.S. (2 Dall.) 419, 435 (1793); *see also* Arizona v. United States, 132 S. Ct. 2492, 2512 (2012) (Scalia, J., dissenting) (using the term as reference to federal government).

3. Conflict of Laws Theory

The theory of conflict of laws also must have informed early American notions of what matters were "local." Rules of "comity"—or voluntary recognition of a foreign jurisdiction's laws as a sign of respect for that jurisdiction's sovereignty—have long been a part of the law of nations. In his famous article, *The Comity Doctrine*, Hessel Ytema traced the doctrine back to Dutch jurists in the latter part of the Seventeenth Century and specifically, theorist Ulrik Huber.[34] According to Professor Kurt Nadelman, the English courts formally embraced of the notion of conflict of laws in Lord Mansfield's opinion in *Robinson v. Bland*.[35]

The early American bar would certainly have known of Mansfield's opinion and of the doctrine.[36] Nadelman notes that at least by 1788, the domestic doctrine of international comity was referenced by a Pennsylvania state court considering whether to enforce a debt.[37] He adds that in 1797 the preface to the United States Supreme Court opinion in *Emory v. Grenough* quoted Huber extensively, although the court dismissed the case for failure of plaintiff to plead diversity of jurisdiction.[38] The doctrine was solidified in American Jurisprudence by Justice Joseph Story's famous 1834 treatise on Conflict of Laws.[39]

Rules of comity were subject to one major exception. Such rules were suspended when following the foreign rule would violate a sovereign's public policy.[40]

Under the common law, marriage was considered a contract, but it had

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34. Hessel Ytema, *The Comity Doctrine*, 65 MICH L. REV. 9-32 (1966). *See also* Kurt H. Nadelman, *The Comity Doctrine: An Introduction*, 65 MICH. L. REV. 1 (1961) (noting at the introduction to *Michigan Law Review* the memorial reprinting of Ytema's article and discussing the importance of Ytema's work).

35. *See* Nadelman, *supra* note 34, at 2; Robinson v. Bland, 6 Eng. Rep. 129 (King's Bench 1760). In *Robinson*, a plaintiff sued an intestate's estate on alleged contracts entered into in England to repay funds advanced for gambling in France. The Court found that the agreements were governed by English, not French law and were unenforceable.

36. *Accord* Nadelman, *supra* note 34, at 2.

37. Camp v. Lockwood, 1 Dall. 393, 401 (Phila. Co. 1788) (distinguishing case from the law of nations, and declining to enforce a Connecticut debt that Connecticut deemed plaintiff had forfeited as an enemy of the United States, citing the states' unique relationship and their common interest in the War); *see also* Nadelman, *supra* note 34, at 2.

38. Emory v. Grenough, 3 U.S. (3 Dall.) 368, 369 n.(a) (1797); Nadelman, *supra* note 34, at 2. Nadelman also notes that Samuel Livermore launched an attack on the general American acceptance of the doctrine in 1829. *See id.* at 3-4.

39. JOSEPH STORY & MELVIN MADISON BIGELOW, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS AND REMEDIES (1834). *See e.g.*, Kurt H. Nadelmann, Joseph Story's Contributions to American Conflicts Law, A Comment, 5 AM. J. LEGAL HIST. 230, 230-32 (1961).

40. *See* STORY, *supra* note 39, at 8 (showing that nations apply foreign laws pursuant to own public policy); *see also id.* at 207.

special rules.[41] While the place where the marriage was celebrated generally controlled the validity of the marriage, rules applying "the incidents of marriage" were subject to more variations. Often the domicile –or the jurisdiction with the closest contact—controlled these "incidents."[42] The distinction between "validity" and "incidents" of marriage was significant enough that Joseph Story devoted separate chapters to "validity" on the one hand and "incidents" on the other.[43] Story did not live in a time of broad governmental programs providing economic support to marriage. Instead, in his day, government supported marriages by placing its power on the side of the husband as against the wife and children and on the side of preferred races and classes. Thus, he described the "incidents" of marriage as the (1) rights and disabilities of a wife and (2) the obligations of a husband.[44] Under the common law the domicile of a wife was considered that of her husband irrespective of her travels or the law of the place of celebration.[45] Sometimes states used public policy grounds to balk at recognizing foreign law on issues such as capacity to be married (in particular, age limits) and divorce.[46]

On the other hand, there is little evidence that the subject matter of marriage was understood at the time to be so *uniquely* local that federal

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41. *E.g.*, Dalrymple v. Dalrymple, Consistory Court of London (1811) *reprinted in* Beale at 41-43 (referring to marriage as a contract); JOSEPH STORY & MELVIN MADISON BIGELOW, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS AND REMEDIES (Bigelow, ed. 1884). The Bigelow edition is a reprint of the Third Edition of Story's work. *Id.* at iii.

42. *See* Yarborough v. Yarborough, 290 U.S. 202, n. 10 (1933) (applying Georgia law to refuse to require a father to provide maintenance to child and noting, "Without denying the validity of marriage in another state, the privileges flowing from the marriage may be subject to the local law"); Headen v. Pope, 252 F.2d 739, 742-43 (3d Cir. 1958). Despite fact that marriage occurred in Maryland, Pennsylvania was the domicile and the state primarily concerned with the legal incidents of this union, including the support of wife after husband died. *See also* discussion of *Lutwak v. United States*, *infra* at p. 146. *Compare* Barber v. Root, 10 Mass. 260 (Sup. Ct. Mass. 1813) (upholding Vermont divorce as entitled to full faith and credit and determining that in considering the relationship of the parties to each other and their conduct including divorce, one looks to the law of the domicile which was Vermont, not the law where the marriage was originally contracted which was Massachusetts).

43. *See* STORY, *supra* note 39, at 184-226 (discussing marriage); *see also id.* at 227-274 (discussing incidents to marriage, *e.g.*, property rights etc.).

44. *See id.* at 233 (dividing chapter on incidents into (1) disabilities and powers of wife and (2) rights of husband).

45. *See id.*

46. *E.g.*, Metro. Life Ins. Co. v. Chase, 294 F.2d 500, 504 (3d Cir. 1961) (finding that New Jersey did not have to recognize common law marriage because it was against the state's public policy); Wilkins v. Zelichowski, 140 A.2d 65, 67-68 (N.J. Super. Ct. App. Div. 1957) (stating that recognizing underage marriage in another state would be against New Jersey public policy); *see* 15 Johns. 121, 146 (N.Y. Sup. Ct. 1818) (noting that even if Vermont would recognize a divorce procured by fraud and without notice to all parties, New York would not); STORY, *supra* note 39, at 275-314 (discussing recognition of foreign divorces).

power could not touch it to the same degree as it could other local issues.[47]

The federal government's approach to slavery, often shuttered away in a closet during historical discussions of domestic relations law, offers quite important insights into the federal approach to local domestic relations. At the time of the Constitution's signing, slavery in America was considered local in several senses. First, slaves were treated as under the jurisdiction of households; indeed, each time they were sold, their last names were changed to that of the new masters as a brand of ownership.[48] Second, state laws determined slave holder/slave rights. Third, unlike other servants, slaves were not only persons but also legally property. Fourth, as property under the law, slaves could be made the subject of contract, intestate succession, wills, trusts or dower. At the same time, because of objections on public policy grounds, nations and American states that did not endorse slavery often did not afford comity on that subject to jurisdictions that did.[49]

According to Story, early Courts saw the full faith and credit clause as a compliment to conflict of laws doctrine. It did not alter general conflict of law rules.[50]

B. The Local Powers of U.S. Territories

In dealing with U.S. Territories, the Americans appear to have adopted the English approach of allowing local sovereignty so long as federal interests were not jeopardized. The approach was also consistent with conflict of law rules.

Usually, Congress would pass an "organic statute" that organized the territory along republican (representative majority rule) lines. Each

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47. *See generally* Kristin A. Collins, *Federalism's Fallacy: The Early Tradition of Federal Family Law and the Invention of State's Rights*, 26 CARDOZO L. REV. 1761 (2005) (reviewing prior federal interventions into allegedly traditional state areas and arguing that state's rights is a recent invention); Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297 (1998) (rejecting "localism" theories that argue family law always as the province of states); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2001) (demonstrating that areas traditionally seen as local have long been subject to federal rulemaking).

48. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 527 (1857) (Campbell, J., concurring) (insisting that a slave is part of a master's "family" both "in name and in fact"), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

49. *See* STORY, *supra* note 39, at 153-54.

50. U.S. CONST. art. IV, §1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."); STORY, *supra* note 39, at 802-03 (explaining that the clause is thought not to alter the general principle that in procedural matters *lex loci* was to govern); *id.* at 831-32 (stating that the clause does not alter jurisdictional rules).

territory was allowed to establish its own laws with respect to marriage and other traditionally local issues, consistent with the laws of the United States.[51] This restriction seems to parallel England's requirement of the colonies.[52] The statutes also prohibited the territory from distributing its own land.[53]

Today, we think it indisputable that Congress has plenary power in the territories. In fact, however, the notion of whether plenary power extended to the right to decide traditionally local concerns in the territories was hotly debated in earlier times, despite modern expressions that downplay the debate.[54]

III. INSTANCES OF FEDERAL DEVIATION FROM LOCAL MARRIAGE LAW

There are only a few instances in which the federal government (1) deviated from state marriage law to recognize a marriage that the state in which the marriage took place rejected; or (2) refused to recognize a marriage that a state or territory accepted. This section considers those early cases.

A. Deviation to Recognize Marriages That a State or Local Government Rejected as Invalid

Apart from American Indian cases, there are only two instances in which the federal government ignored the states and recognized marriages that the states refused to recognize. Both involved the nation's battle over slavery.

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51. *E.g.*, An Act to Provide a Temporary Government for the Territory of Colorado, ch. 59, § 6, 12 Stat. 172, 174 (1861); An Act to Establish a Territorial Government for Utah, ch. 51, § 6, 9 Stat. 453, 454 (1850). *Cf.* Cope v. Cope, 137 U.S. 682, 684 (1891) (remarking that polygamy aside, Utah territorial legislature has (had) plenary power as would a state over local issues of inheritance).

52. *See* discussion *supra* p. 116.

53. *Id.*

54. See, for example, the discussion of efforts to affect marriage in Utah territory. *Infra* at p. 741, 743 (Congress arguing about whether marriage is a local, territorial, or federal issue). In *Dred Scott v. Sandford*, the Supreme Court, held that the constitutional provision giving Congress's plenary power over federal territories was limited to lands ceded by the Crown and did *not* include such power over territory later obtained through expansion and conquest. The Court also narrowly read the scope of congressional powers over territories to apply only to the most needful legislation that had to be executed in acquiring and holding territories for the benefit of the states. 60 U.S. (19 How.) at 393. Excluded from that power were domestic relations matters, like slavery. Later, cases began to reject the notion that plenary power over the territories is limited. *See* Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 42 (1890) ("The power of Congress over the Territories of the United States is general and plenary, arising from and incidental to the right to acquire the Territory itself."); *see also* Downes v. Bidwell, 182 U.S. 244, 267-68 (1901). *Downes* asserted that *Dred Scott*'s logic was contrary even to the prevailing understanding of congressional power at the time. *Downes*, 182 U.S. at 250. However, the evidence suggests that there was indeed vigorous debate on the subject.

First, the federal government recognized "slavery custom" marriages for the purpose of dispensing black Civil War military pension claims. Second, the federal government authorized military officers and others to perform marriages among ex-slaves during the Civil War and afterward, when rebel states refused to perform them.

1. The Slave Marriage Statutes: Context

Some background is necessary to understand the authority for and purpose of these actions. When news of the Civil War spread, slaves escaped and headed toward Union lines, often offering themselves as scouts and information brokers. In May of 1861, General Benjamin Butler refused to return a group of slaves to their owners, adopting the position that slaves of rebels were "contraband" and could be applied to work for the Union Army.[55] On August 6, 1861, Congress passed the first of several Confiscation Acts. The Act allowed the army to confiscate rebel "property," expressly including, slaves.[56]

The Confiscation Act was strategically important because slavery was the economic backbone of the Southern economy. Southern states, facing pressure to give it up before the War, had demanded compensation.[57] Those whites who owned few or no slaves benefitted from the social status that it bestowed.[58] Indeed, by purchasing a slave or two and using free or cheap land grants to build a plantation a poor white person could rise. Manufacturing northern states benefitted too, relying upon products produced from slave labor.[59]

By the time of *Dred Scott* in 1857, slaves were the most valuable form of

55. The term was apparently coined and status first designated by Gen. Benjamin Butler. *Slaves Contraband of War*, N.Y. TIMES, May 27, 1861, at 4. By June 12, 1861, Prof. Theophilus Parsons at Harvard Law School had opined that Butler's claim had merit in a state of war. *Slaves as Contraband of War: Professor Parsons' Opinions—Four Ways of Dealing with the Subject*, CHI. TRIB., June 12, 1861, at 2.

56. An Act to Confiscate Property Used for Insurrectionary Purposes, ch. 60, § 1, 12 Stat. 319, 319 (1861).

57. *E.g.*, 1 ANNALS OF CONGR. 338 (1789) (statement of Mr. Jackson) (asking who will compensate Virginia if slavery ended); 2 ANNALS OF CONGR. 1204 (1790) (statement of Sen. Gerry (Mass.)) (saying he has calculated slavery as worth ten million dollars); CONG. GLOBE, 36th Cong., 1st Sess. App. 38 (1859) (statement of Rep. Moore (AL)) (noting that ending African slavery would result in an economic loss of property to the South exceeding in value two billion dollars).

58. *See* CONG. GLOBE, 34th Cong., 3d Sess. App. 94 (1856) (statement of Sen. A.G. Brown (MS)) (opining that non-slaveholding southern whites "may have no pecuniary interest in slavery but they have a social interest at stake that is worth more to them than all the wealth that is in the Indies").

59. CONG. GLOBE, 34th Cong., 1st Sess. App. 483-84 (1856) (statement of Sen. Henry Clay (KY)) (discussing how the North is dependent upon slavery too and upon the Southern agricultural production).

personal property in some southern states.[60] Land, which often was given for free under bounty statutes, was useless in the agricultural south without labor to work it.[61] Owners exploited slaves not only for themselves but also rented their slaves to others.[62] A second Confiscation Act followed on July 17, 1862, establishing the penalty for treason against the United States as jail time and the freeing of the guilty party's slaves.[63]

The number of slaves escaping to Union lines swelled as the War continued.[64] Often, they arrived in families and groups of loved ones.[65] Slaves were not allowed to marry legally, and since they did not constitute a separate political entity under law, their customs during slavery were disregarded. Legal marriage would have given a slave father and husband power over his wife and children, and that would have been contrary to the slaveholder's rights. As abolitionist William Lloyd Garrison noted, by usurping the black male's right of patrimony in the prevailing paternalistic

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60. *Dred Scott*, 60 U.S. (19 How.) at 524 (speaking of value in Louisiana); *see also*, Gimon v. Baldwin, 38 Ala. 60, 60 (1861) (valuing a male slave at $1500); Drake v. Glover, 30 Ala. 382, 383-84 (1857) (estimating $2800 for two Negro men).

61. For more on bounty statutes see, for example, note 237.

62. The value lay not only in the slave itself but in the rental value. Bryan v. Walton, 33 Ga. Supp. 11, 11 (1864) (valuing Negro female slave Patience, about 28 years old, and her six children, ages fourteen to six at the aggregate value of $9000, and with a "hire" value of $3000); Evans v. Lipscomb, 31 Ga. 71, 76 (1860) (listing prices of slaves of various genders and ages).

63. An Act to Suppress Insurrection, to Punish Treasons and Rebellion, to Seize and Confiscate the Property of Rebels, and for Other Purposes, ch. 195, § 2, 12 Stat. 589, 590 (1862).

64. *Contraband Statistics*, CHI. TRIB., Sept. 25, 1861, at 3 (noting that more than 100 slaves a day escaped Missouri for Kansas, and contrary to the desires of federal army generals, they were not returned). Letter from Maj. Gen. John Peck to Maj. Gen. John Dix, Dec. 7, 1862 *in* THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL HISTORY OF THE UNION AND CONFEDERATE ARMIES, ser. I, vol. XVIII, 474 (1887), *available at* http://ebooks.library.cornell.edu/m/moawar/waro.html ("To-day an old contraband came in from a plantation just this side of Franklin to get his liberty."); Letter from Brig. Gen. George Crook to Brig. Gen. James Garfield, May 27, 1863, *in* THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL HISTORY OF THE UNION AND CONFEDERATE ARMIES, ser. I, vol. XXIII, pt. II, 366 (1890), *available at* http://ebooks.library.cornell.edu/m/moawar/waro.html (noting large numbers of contraband women). This Four series multivolume set includes, among other records, officer reports on the numbers of escaped slaves flowing into union camps. *See also*, *Negro Slaves as Contraband of War*, CHI. TRIB., June 3, 1861, at 2.

65. *See, e.g.*, Letter from Maj. Gen. John Dix to E.M. Stanton, Sec. of War, Sept. 12, 1862, *in* THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL HISTORY OF THE UNION AND CONFEDERATE ARMIES, ser. I, vol. XVIII, 391 (1887), *available at* http://ebooks.library.cornell.edu/m/moawar/waro.html (noting some 2000 men, women, and children were held at Old Point Comfort in Virginia); Letter from Maj. Gen. John Dix to E.M. Stanton, Sec. of War, Dec. 13, 1862, *in* THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL HISTORY OF THE UNION AND CONFEDERATE ARMIES, ser. I, vol. XVIII, 480-81 (1887), *available at* http://ebooks.library.cornell.edu/m/moawar/waro.html (suggesting soldier abuse and noting the need to remove "contraband" women and children from camps for their safety).

society, slave holders asserted ownership to all slave children and could thereby control slave families and communities into multiple generations.[66] When a husband died, his wife could inherit his slaves and, if she remained single, could also assert this privilege. With the consent of owners, some slaves could enter into a form of marriage with other slaves, sometimes referenced by legal authorities as contubernium.[67] But contubernium marriage did not give the rights of legal marriage.[68] Because slaves were property, an owner could break up a slave family for sale when economic interests or punishment needs so dictated. He or she could insist that a slave, his wife, daughter, or son perform sexual services.[69] The evidence

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66. In 1835 Garrison noted in his newspaper, *The Liberator*:

> The . . . disuse of legal marriage is *necessary to sustain the slave holder's right of property in the children*. The laws give to the owner of a woman a property in her children, whether the father be bond or free, black or white. The father may be a slave to the same planter, or to another; he may be a colored or a white free man of the neighborhood; he may be the owner of the mother himself or his hopeful son. The law is the same in every case; *the children of a colored female follow the condition of their mother*. This claim on children as property must be legally maintained or slavery could not be perpetuated or "entailed" on successive generations . . . .
>
> No the code of laws must not contradict itself. It must not take away by one enactment what it secures by another. But a legal marriage constitutes the father of the children, the *slave holder* of these children during their minority. He has the legal right to command them, to keep them with him, to educate them, to require their service, and toil for his benefit and their own. No other man can possess any right or authority over them . . . . If a man slave were the legal father and slave holder of his own children, he could reject the claims of the white man who is the owner of their mother. He could prevent his working them, punishing them, or selling them. He could pronounce his own children free from all control but his own and that of his mother. She too would have with her husband a joint legal authority over her children; and in the event of his decease, the law would still sustain his prerogatives and secure guardians to her offspring.

William Lloyd Garrison, The Liberator, Oct. 31 1835, at 1.

67. The term appears to have been borrowed from Roman slave marriage laws. *E.g.*, WILLIAM L. BURDICK, THE PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW 232 (The Lawbook Exch., Ltd., 2004) (1938) (discussing Roman contubernium).

68. *E.g.*, Malinda v. Gardner, 24 Ala. 719, 723-24 (1854) (indicating that slave marriage called "contubernium" afforded no inheritance rights for children).

69. *E.g.*, discussion *infra* p. 744 (in polygamy discussion, Congressman claiming hypocrisy and noting "unlimited concubinage" practices of slaveholders). EUGENE GENOVESE, ROLL JORDAN ROLL, 414 (1974) (suggesting that three quarters of blacks in the U.S. have some white ancestry; the percentage of mulattos in the South was twice as high as that in the North and that in 1850 an estimated thirty-seven percent of the Negro population in the South was half white). *See also* Rachel L. Swarns. *Meet Your Cousin, the First Lady: A Family Story, Long Hidden*, N.Y. TIMES, June 16, 2012 http://www.nytimes.com/2012/06/17/us/dna-gives-new-insights-into-michelle-obamas-roots.html (noting the recent discovery of Michelle Obama's multiracial DNA, the prevalence of rape and sexual coercion in slavery); Richard Steckel, *Slavery, Marriage and the Family*, 11 J. FAM. HIST. 251_(1980) (using multiple regression analysis to estimate instances of mulatto children during slavery and patterns); DAVID BERRY GASPAR & DARLENE CLARK HINE, MORE THAN CHATTLE: BLACK WOMEN AND

on plantations was clear from the number of "mulattos" being born on slave plantations. Slaves had no legal rights of their own under the law, and slave fathers and husbands had no legal right to defend their families against harm. Indeed, some posit that so-called contubernium marriages were supported by some slave holders in part because such relationships provided a means of controlling of slaves through threats of family separation or physical harm to a loved one.[70] The denial of marriage rights during slavery, coupled with the economic disadvantages of broad scale race discrimination and segregation after it, barred black male ex-slaves from a host of other rights the prevailing patriarchal culture required in order to protect oneself and one's family. And such denials rendered black female slaves breeders for a system that deprived them and the children to whom they gave birth of the legal and physical protections that marriage provided to white women and children.[71] It is no surprise that the federal government concluded that marriage rights and promises of family stability would be a key means of recruitment for the U.S. military.

In September 1862, President Lincoln issued the Emancipation Proclamation in preliminary form. By its terms, it became effective one hundred days later, on January 1, 1863. Notably, the final version of the Proclamation stated that the action was compelled by military necessity and expressly authorized the enlistment of black soldiers. These key items were not in the Proclamation's preliminary version.[72] The Proclamation only purported to free those slaves in the states *that were still in rebellion*.[73]

SLAVERY IN THE AMERICAS (1996). There were certainly interracial couples who wanted to be married, but allowing *legal* marriage between whites and blacks, much less between slave and free, would have threatened a racially based slave system.

70. *Accord* JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 154 (4th ed. 1974); HARVARD SITKOFF, THE ENDURING VISION: A HISTORY OF THE AMERICAN PEOPLE 356 (2008).

71. One finds in the reports of the abuse of black women and girls during slavery the same biases against recognizing female injury as one finds in the stories of other women victimized when rape, sexual abuse, and separation from children were employed as physical and psychological weapons of terror. Slave narratives offer a more personal account, but even those sometimes arrive through multiple hearsay levels. *See* JEAN FAGAN YELLIN, HARRIET JACOBS, A LIFE (2005) (explaining the story of a female slave's life). Adult black men and children were also subjected to sexual slavery. WILMA KING, STOLEN CHILDHOOD: SLAVE YOUTH IN 19TH CENTURY AMERICA, 24, 61, 64-65, 108-110, 199, n.165 (1997); Thomas A. Foster, *The Sexual Abuse of Black Men Under American Slavery*, 20 J. HIST. SEXUALITY 445-464 (2011) (discussing abuse of black men and the forcing of black men to sexually abuse black women).

72. *Compare Preliminary Emancipation Proclamation, Sept. 22, 1862*, NAT'L ARCHIVES & RECS. ADMIN., http://www.archives.gov/exhibits/american_originals_iv/sections/transcript_preliminary_emancipation.html (last visited Mar. 10, 2013), *with The Emancipation Proclamation, Jan. 1, 1863*, NAT'L ARCHIVES & RECS. ADMIN., http://www.archives.gov/exhibits/featured_documents/emancipation_proclamation/transcript.html (last visited Mar. 10, 2013).

73. *The Emancipation Proclamation, Jan. 1, 1863*, is available online at Library of Congress website at http://memory.loc.gov/ammem/alhtml/almgall.html. In the

It left slavery in place in the states that stayed loyal or had already submitted to Union control.[74] Those enlistments would be compelled later.[75]

Some have attempted to distinguish such Civil War statutes relating to marriage with the suggestion that these actions occurred when or because there was no state government in place.[76] But by no stretch of the imagination were the Union Army and Freedmen's Bureau just filling in to help out the exhausted rebelling states while they took a "little breather" from governance. Indeed, the legislative bodies of the Confederate states met and strategized during the War, they coined their own money and passed laws on various subjects.[77] Southern leaders were continuing to command soldiers. Whites continued to marry and the local laws recognized their marriages.[78] And the reason these marriages took place in

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intervening time, states in rebellion could indicate surrender by having their representatives show up in Congress on January 1.

74. *Id.* Maryland, Delaware, Kentucky, and Missouri, though slaveholding, did not secede.

75. *See* discussion *infra* p. 729.

76. Brief on the Merits of *Amici Curiae* Historians, American Historical Association, Peter W. Bardaglio et al. in Support of Respondents Affirmance of the Judgment Below at 35-36, Windsor v. United States, 133 S. Ct. at 786 [hereinafter "Windsor Historians' Amici Brief"] *available at* http://www.glad.org/uploads/docs/cases/gill-v-office-of-personnel-management/2011-11-03-gill-v-opm-amici-historians.pdf (describing these slave marriages as occurring when Confederate governments "collapsed," arguing there were "no state governments in the occupied South" and stating that when the state governments were reconstituted the federal government "ceded its authority" back to them and they "resumed their jurisdiction over marriage law" subject to the 14th Amendment). *See* Golinsky v. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 1000 (N.D. Cal. 2012) (federal government has only legislated in domestic relations when there has been a failure or absence of state government); Windsor v. United States, 833 F. Supp. 2d 394, 406 (S.D.N.Y.) (citing *Golinsky* for both points), *aff'd*, 699 F.3d 169 (2d Cir.), *aff'd*, 12-307, 2013 WL 3196928 (June 26, 2013).

77. *See, e.g.*, STATUTES OF GEORGIA PASSED BY THE GENERAL ASSEMBLY OF 1864, available on Hein Online, 1864 5 1864; ACTS OF THE CALLED SESSION AND OF THE FOURTH ANNUAL REGULAR SESSION OF THE GENERAL ASSEMBLY OF ALABAMA, available on Hein Online, 1864 4; SC STATUTES AT LARGE (1861), available on Hein Online, 1864; 1861 1 1861. Slaveholding states refused to recognize the Emancipation Proclamation as immediate law. *E.a.*, Hall v. Keese (The Emancipation Cases), 31 Tex. 504, 514 (1868) (calling the Emancipation a war measure, although slavery, in fact, continued undisturbed until Union General Granger entered Texas and ordered Negros free); Weaver v. Lapsley 42 Ala. 601, 614 (1868) (describing Emancipation as merely a "war-measure" that was not law until enforced by force of arms). One might distinguish these cases on the theory that the states had withdrawn from the union and no longer existed; however, that theory is a stretch as well because the alleged point of the War from Lincoln's perspective was to save the union, and so the right to secede was never conceded by the Northern states. It must be then that War Powers—not the absence of state government—was the situation that gave rise to the action. It would be odd indeed to allow the federal government to define state authority as "absent" merely because it disagreed with the position an acting state government had taken.

78. *See* J. David Hacker et al., *The Effect of the Civil War on Southern Marriage Patterns*, 76 J. S. HIST. 39, 44 (2010). The biggest obstacle to wartime marriages for whites was finding eligible mates given the large numbers of Southern white males

federal space is because the federal government had commandeered it in War, not because the states were hospitable. The federal government was in direct conflict with state governments when it recognized these marriages and decided what incidents would flow from them.

2. Recognition of Existing Marriages According to Slave Custom for Black Civil War Military Pension Purposes When States Would Not Recognize Them[79]

One example of Congress' stepping out to touch domestic relations matters was its decision to accept slave marriages as valid for military pension purposes. The approach was adopted to encourage black men to join the military and to ease the burden of the War on Union soldiers and their families.

Congress had long recognized military pensions as a recruitment tool. Three days before the second Confiscation Act, on July 14, 1862, but before the preliminary Emancipation Proclamation was signed in September of that year, Congress passed an act regarding pensions for disabled union soldiers and the dependents of soldiers dying in battle for the Union.[80] The act expressly denied a pension to any dependent who had aided in the rebellion or in any way manifested sympathy with its cause.[81]

To secure the enlistment of blacks, Congress adopted several approaches. On July 17, 1862 (before the Emancipation Proclamation), Congress provided that if male slaves from rebelling states escaped and joined the Union Army, they could gain freedom for their mothers, wives, and children but only if the slave and those family members to be freed were slaves of rebels.[82] Of course, slaves were not allowed to marry but the law was silent on recognizing marriages performed according to slave custom. They were allowed monthly pay and rations but at a lesser rate

killed in the Civil War. *Id.*

79. Counsel for BLAG specifically referenced the slave military pension statute in oral argument. Windsor Sup. Ct. Trans. at 73 (regarding authority for DOMA, stating that there was a reason Congress specifically wanted to provide benefits for spouses of freed slaves who fought for the Union) *available at* http://www.supremecourt.gov/oral_arguments/argument_audio_detail.aspx?argument=12-307. *See also supra* note 12 (noting that earlier drafts were shared with parties and *amici*). The Law Professors brief lists the July 4, 1864 and March 3,1865 Acts with other statutes as examples that Congress can affect marriage, but it does not discuss their context. Brief of Amici Curiae Law Professors in Support of Respondent Windsor v. United States, 133 S. Ct. at 786 (referencing two acts regarding slaves or ex slaves as evidence that Congress can touch upon marriage).

80. An Act to Grant Pensions, ch. 166, § 2, 12 Stat. 566, 567 (1862) (providing pension to surviving spouses, but if there was no spouse, then to the child until the child reached age sixteen).

81. *Id.* § 4, 12 Stat. at 568.

82. Act of July 17, 1862, ch. 201, § 13, 12 Stat. 597, 599. The Act did not affect slaves held in so-called "loyal" states. *Id.*

than non-blacks.[83] The Act also expressly authorized the President to enlist blacks in the military specifically in low-level service positions.[84]

The Emancipation Proclamation allowed ex-slaves to enlist without such slaveholder consent, provided they could reach Union Army lines. On October 26, 1863, the War Department expressly declared that the "exigencies of war" required that "colored" troops in the slaveholding states—Maryland, Missouri, and Tennessee—that did not secede, as well as blacks of any status in any rebelling states, be enlisted into the army. Under the new law, slaves in the three loyal states could be forcibly enlisted by their slaveholders. To compensate for property loss, in 1864, Congress authorized up to $300 to be paid to slave holders *in each state that had a representative* in Congress (i.e., not the rebel states) for the delivery of each age-eligible slave to the Union army. State commissions were to decide the value of the slave. Although Congress referred to these black men as "volunteers," in fact, the slaves in loyal states had no choice and were only free upon enlistment.[85] The families of these drafted slaves from loyal states were *not* set free.[86] Congress also specifically provided that black soldiers would be segregated as "Colored Troops."[87]

In July of 1864, Congress decided to recognize marriages that slaves had entered into according to slave custom, if states refused to recognize them or refused to allow black marriages. It did this *solely for the purpose of making black soldiers' families eligible for military pensions*.[88] While abolitionists cheered these Acts, the coalition that made them possible included those war wearied who wanted the government to use more blacks to fight in the Army.[89]

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83. *Id.*

84. *Id.*

85. Act of Feb. 24, 1864, ch.13, § 24, 13 Stat. 6, 11. *See* CONG. GLOBE, 38th Cong., 1st Sess. 626-631 (1864). *But see id.* at 629 (comments of Sen. Cole) (voting "no" because he could not justify giving compensation to the slave holder but not to the slave who served). The $300 was a heavily discounted value for a military eligible black male slave, justifiable, no doubt in light of the uncertainty of what war would bring. *See supra* note 62 and accompanying text.

86. *E.g.*, CONG. GLOBE, 38th Cong., 1st Sess. at 629 (comments of Sen. Grinnell) (reluctantly voting yes, but stating that his support had been contingent upon the entire family being given freedom, which was not reflected in the final bill).

87. Act of Feb. 24, 1864, ch.13, § 24, 13 Stat. 6, 11.

88. An Act Supplementary to an Act Entitled "An Act to Grant Pensions Approved July Fourteenth, Eighteen Hundred and Sixty-Two," ch, 247, § 14, 13 Stat. 387, 389 (1864) (supplementing the 1862 pension act).

89. In 1862, Horace Greeley, Editor of the *New York Tribune* and a noted abolitionist, recognized the nation's war weariness and encouraged Lincoln to recruit blacks for the War. He said "We must have scouts, guides, spies, cooks, teamsters, diggers and choppers from the Blacks of the South, whether we allow them to fight for us or not, or we shall be baffled and repelled." Letter from Horace Greeley to the President, Aug. 19, 1862. In his famous response to Greeley, Lincoln made it clear that his goal was to save the Union and that if he could have saved it by continuing slavery

The first pension law allowed only the *free* wives of "colored soldiers" (or their descendants) or children *who were also free* to apply for pensions based on living as married couples during slavery.[90] In other words, once again, Congress did not end the enslavement of families in the so-called "loyal" states. On March 3, 1865, Congress finally addressed slave families. It declared that "to encourage enlistments" and military "efficiency," the "wife and children, if any he have" of any person mustered on military rolls would be "forever free, any law, usage, custom, or whatever, to the contrary notwithstanding."[91] The accepted evidence of the marriage and of children was that couple had cohabitated together as husband and wife or that they participated in some sort of ceremony indicating marriage "whether such marriage was or was not recognized or authorized by law."[92]

On June 6, 1866, after the War ended, Congress extended the slave marriage recognition to black sailors, in addition to soldiers, and extended the application rights to include "pensions, bounty and back pay" just as white soldiers already had, but not in equal amounts. Evidence of the marriage required was that satisfactory to the Commissioner of Pensions that the parties had habitually lived together as husband and wife. A

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he would have done so. *A Letter from President Lincoln; Reply to Horace Greeley. Slavery and the Union The Restoration of the Union the Paramount Object*, N.Y. TIMES (Aug. 24, 1862), http://www.nytimes.com/1862/08/24/news/letter-president-lincoln-reply-horace-greeley-slavery-union-restoration-union.html. *Accord* Robert Fabrikant, *Lincoln Legal Acolytes, A Comment On Professor Akhil Reed Amar's The American Constitution: A Biography (2005), and Judge Frank J. Williams' "Doing Less" and "Doing More": The President and the Proclamation—Legally, Militarily, and Politically, in the Emancipation Proclamation, Three Views (2006)*, 49 AM. J. LEGAL HIST. 169, 178 (2007) (explaining Lincoln's goal to strip the South of key military assets).

90. The language of the original Military Pension Act provided that the widow and children of a soldier who died in the line of duty:

> shall be entitled to receive the pensions now provided by law, *without other proof of marriage* than that the parties had habitually recognized each other as man and wife, and lived together as such for a definite period next preceding the soldier's enlistment, not less than two years, to be shown by the affidavits of credible witnesses: *Provided, however,* That such widow and children are *free* persons: *Provided, further,* That if such parties resided in any State in which their marriage may have been *legally solemnized*, the *usual evidence* shall be required.

An Act Supplementary to an Act Entitled "An Act to Grant Pensions," Approved July Fourteenth, Eighteen Hundred and Sixty-Two, ch. 247, § 14, 13 Stat. 387, 389 (1864) (emphasis modified). *See also In re* Minor Children of Joseph Crain, *in* 4 DECISIONS OF THE DEPARTMENT OF THE INTERIOR IN CASES RELATING TO PENSION CLAIMS 358, 362-63 (George Baber ed. 1891). The *Crain* decision offers an elaborate discussion of the history of Congress's Acts with respect to black and slave marriages not recognized in the Southern states.

91. A Resolution to Encourage Enlistments and to Provide for the Efficiency of the Military Forces of the United States, 13 Stat. 571 (1865).

92. *Id.*

child's recognition depended upon a husband asserting that they were his own.[93]

On June 15, 1866, it further extended the rights of black soldiers to bounty and provided additional security to their heirs. It provided that the soldiers would be presumed free despite the absence of any notation on muster rolls and once again set forth how their marriages would be proven.[94] It recognized a ceremony "deemed by them to be obligatory" and their living together as husband and wife, and it extended protections to children "born of any such marriage."[95] The next day Congress approved the Fourteenth Amendment to the United States Constitution for submission to the states for ratification.[96]

Legislation on June 6, 1866 and March 3, 1873 used different language regarding proof of marriage as a basis of benefits. The proof had to be proof of cohabitation and a ceremony "*satisfactory to the Commissioner of Pensions*."[97] The latter act allowed a black soldier's wife or heirs to file claims for "arrears" of pensions, bounties and allowances, and declared that the children of the slave marriages were lawful children and heirs for purposes of federal law. American Indian soldiers were also included.[98]

The pension statutes reveal that all support for procreation flowed from the male's status and from heterosexual marriage. The earliest slave marriage pension statute simply used the term "children" in referencing a soldier's dependents.[99] In the 1865 statute giving freedom to dependents, the language provided that children "born of that marriage" would be presumed to be those of the soldier whether or not the parents were still

93. An Act Supplementary to the Several Acts Relating to Pensions, ch. 106, § 15, 14 Stat. 56, 58 (1866). Given the realities of slave life it is likely that many men stepped into fatherhood for children who were not biologically theirs and that many children rebuked for being the children of owners had no fathers through whom they could claim support. *See supra* note 70.

94. A Resolution Respecting Bounties to Colored Soldiers and the Pensions, Bounties and Allowances to Their Heirs, 14 Stat. 357 (1866).

95. *Id.*

96. *Compare* Joint Resolution Proposing an Amendment to the Constitution of the United States, 14 Stat 358-59 (1866) (passed June 16, 1866), *with* A Resolution Respecting Bounties to Colored Soldiers and the Pensions, Bounties and Allowances to Their Heirs (passed June 15, 1866).

97. An Act Supplementary to the Several Acts Relating to Pensions, ch. 106, § 14, 14 Stat. 56, 58 (1866) (emphasis added).

98. *In re* Minor Children of Joseph Crain, *supra* note 90. *See also* An Act to Revise, Consolidate, and Amend the Laws Relating to Pensions, ch. 234, § 11, 17 Stat. 566, 570 (1873) (providing benefits and referencing "Colored or Indian soldiers").

99. An Act Supplementary to an Act Entitled "An Act to Grant Pensions Approved July Fourteenth, Eighteen Hundred and Sixty-Two," 13 Stat. at 389 (requiring, in section 14, marriage, but not specifying when or how children must be born to qualify as a soldier's children for pension purposes).

married at the time of enlistment.[100] By 1866, the pension statutes protected only children "born of the marriage." This tightening of the language reinforced the government's view that marriage should be the primary source of dependent benefits and adult female support.

At the same time, Congress knew full well that black slave women did not possess the basic legal right to control of their own bodies and that in many cases the biological fathers of their children would be white men. Those men would not or, if they wanted to, could not, legally marry the mothers or openly claim the children.[101] Women's future and that of their children was, therefore tied to black men whose earning power was, in turn, crippled by racial injustice. A widow's pension ended if she remarried (and presumably gained a new source of support).[102] Similarly, when in 1873 the laws provided for an additional two dollars per month for a widow with children, they also provided that additional amount ended when the children became sixteen.[103] These approaches to spousal support are reflected in the structure of Social Security spousal benefits today.[104]

Certainly, the slave marriage pension statutes did not recognize slave marriages for all purposes, not even for all federal purposes. Congress followed state law in doling out other federal benefits. It did not grant pensions in the case of interracial marriages if the relevant states or localities banned them.[105] But the reason may not have been mere deference to individual state law. The action would not have been popular with the public since the majority of states in the union banned interracial marriage, and given the likely disruption that would follow upon such a policy, Congress could not justify it on military necessity grounds.[106] Moreover, race discrimination was not inconsistent with federal policy as it was made by the very same people who made up the states. The U.S. continued to racially segregate blacks in the military for another hundred years.[107] In so doing, it greatly restricted advancement opportunities for

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100. A Resolution to Encourage Enlistments and to Provide for the Efficiency of the Military Forces of the United States, 13 Stat. at 571.

101. *E.g.*, A Resolution Respecting Bounties to Colored Soldiers and the Pensions, Bounties and Allowances to Their Heirs, 14 Stat. at 358 (using "born of the marriage").

102. An Act Supplementary to an Act Entitled "An Act to Grant Pensions Approved July Fourteenth, Eighteen Hundred and Sixty-Two," ch, 247, § 7, 13 Stat. at 388.

103. An Act to Revise, Consolidate, and Amend the Laws Relating to Pensions, ch. 234, § 9, 17 Stat. at 570.

104. *See* discussion *infra* at p. 773.

105. *E.g.*, *In re* Ann Cahal, *in* 9 DECISIONS OF THE DEPARTMENT OF THE INTERIOR IN CASES RELATING TO PENSION CLAIMS 127, 127-28 (John W. Bixler ed. 1898) (rejecting the widow's claim because her husband was white, although he was claimed to be black, and expressing that interracial marriage was contrary to Mississippi law).

106. Perez v. Sharp, 198 P.2d 17 (Cal. 1948) (declaring state restraints on interracial marriage unconstitutional).

107. *E.g.*, John W. Finney, *Segregated Units Ended By The Services*, WASH. POST,

black men because they could never command companies that had white troops, and that race discrimination, in turn, made them less able to support families financially through marriage.

In one sense, the federal Civil War pension statutes and their supporting legislation were broad in that they recognized marriages that states did not. Indeed, it was very clear that if a state *allowed* blacks to marry, the couple could not use the standards for marriage set forth in these statutes.[108] But the statutes were also narrow in that they deviated for particular federal purposes, when following state law did not serve federal interests.

In fact, many years later, the Department of Interior stressed that the federal statutes were understood to be *contrary* to state law. The justification was that they were required to meet "the peculiar conditions of those who, having been held to "involuntary servitude" were thereby *denied marital rights under State law*."[109] But in fact, they were clearly closely tied to military recruitment.

The Department of Interior also rejected any characterization of the slave pension statutes as statutes establishing new marriage laws.

> It is obvious from the language of the section that Congress did not intend to enact a *law of marriage* for persons of color—neither to supply the lack of any *State or local statute* on the subject, nor to make a general law affecting marital rights, *beyond claims for pension.* An intention to regulate marital rights in general, if entertained by Congress, might well be held as an encroachment upon the authority of the State which, having marital laws of its own might properly assert exclusive jurisdiction over the subject. While not interfering with local enactments, Congress intended, by section 4805, to establish grounds for *title to pension* in behalf of certain persons—the widows and children of *colored* and Indian soldiers and sailors for whom no provision had theretofore been made in the pension system.[110]

The source of the power to recognize slave marriages as qualifying marriages for federal pension purposes (and to recognize the children of former slaves as legitimate dependents) had to lie in Congress' War Powers under the Constitution, both directly and under the Necessary and Proper Clause.[111] The Thirteenth Amendment freeing the slaves and the

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Oct. 31, 1954, at M6.

108. *E.g.*, *In re* Fanny Curtis, *in* 2 DECISIONS OF THE DEPARTMENT OF THE INTERIOR IN CASES RELATING TO PENSION CLAIMS 159, 161 (George Baber ed. 1889) (finding that the Act was not intended to validate cohabitation of free black couples who had not been slaves and could be married where they resided).

109. *In re Minor Children of Joseph Crain*, *supra* note 90, at 361.

110. *Id.* at 362.

111. U.S. CONST. art. I, § 8 (giving Congress *inter alia*, the power "[t]o declare War," "[t]o raise and support Armies," "[t]o provide and maintain a Navy," and "[t]o make Rules for the Government of Regulation of the land and naval Forces").

Fourteenth Amendment declaring them citizens of the United States later added additional authorization for the federal government to assume the work of transitioning blacks out of the law of servitude against the will of rebel governments.

3. Secretary of War Marriage Directives During the Civil War and Reconstruction

The Civil War pension statutes recognized the existing customary slave marriages. There is yet another example of federal forays into marriage from the Civil War period. The U.S. Secretary of War authorized military officers, local clergymen, and others to perform marriages for black soldiers and so called "contraband." Of course, military officers were already performing marriages for white military men.[112] The newly authorized marriages occurred in areas of military occupation, but often within the boundaries of rebel states. Unlike U.S. bases today, Civil War military encampments were not preexisting federal properties, but were often established on commandeered lands.

The earliest official record of "contraband" marriages appears to be from October 11, 1861, in a report of marriages performed by Rev. Lewis C. Lockwood at Camp Hamilton, Virginia. Lockwood married 32 couples.[113] On March 28, 1864, John Eaton, then Superintendent of contrabands for Department of Tennessee and Arkansas, issued Special Order 15 ordering Union Army clergy to "'solemnize the rite of marriage among Freedmen.'"[114] And again the report notes that "Special Order 176, issued by the Department of the Gulf (July 4, 1864), ordered clergy in that Department 'to unite in marriage, free of charge, such colored soldiers as may be recommended to them . . . with the women whom such soldiers may select to be their wives.'"[115]

By the Act of March 3, 1865, weeks before the South's surrender, Congress established the Bureau of Refugees, Freedmen, and Abandoned Lands (the "Freedmen's Bureau").[116] At the time, both houses of Congress

112. War obligations, it seemed, led military men to want to marry. *Military Matrimony*, N. Y. TIMES, Dec. 26, 1861, at 4.

113. NAT'L ARCHIVES & RECORDS ADMIN., MARRIAGE RECORDS OF THE OFFICE OF THE COMMISSIONER, WASHINGTON HEADQUARTERS OF THE BUREAU OF REFUGEES, FREEDMEN AND ABANDONED LANDS, 1861-1869, at 3 (2002) [hereinafter NATIONAL ARCHIVES FREEDMEN'S BUREAU SUMMARY], *available at* http://www.archives.gov/research/microfilm/m1875.pdf.

114. *Id.*

115. *Id.*

116. *See* An Act to Establish a Bureau for the Relief of Freedmen and Refugees, ch. 90, § 1, 13 Stat. 507, 507 (1865) (committing the supervision and management of all abandoned lands, refugees, and freedman to the newly formed bureau); *see also The Surrender: Full Details of the Great Event From an Eyewitness*, N.Y. TIMES, Apr. 14, 1865, at 1.

had adopted the Thirteenth Amendment (with rebel states not represented), but it had not been ratified.[117] The Freedmen's Bureau was another federal foray into traditionally local activity, one compelled by the expansiveness of the effort to organize the slaves into communities.[118] The original authorization provided for blacks to have access to forty acres of land for farming at a small rent and later, if available, for the Bureau to make the land available for purchase.[119] As blacks had been excluded from many of the free land grants previously offered to whites,[120] this provision was a comparably modest way to provide a way for them to start their own farms.[121] The promise faltered under protest when the claimed original owners returned and challenged the Act.[122] Nevertheless, the Bureau helped blacks and whites to establish schools and financial institutions for ex-slaves.[123] It had been a felony to teach a slave to read and write in many slaveholding states.[124] The Bureau tried to track vigilante groups' terrorism

117. The Amendment was passed by the Senate on April 8, 1864, by the House on January 31, 1865, and adopted on December 6, 1865. *See 13th Amendment to the U.S. Constitution: Abolition of Slavery (1865)*, http://www.ourdocuments.gov/doc.php?flash=true&doc=40 (last visited Mar. 26, 2013).

118. Letter of the Freedmen's Aid Societies to President Lincoln (Dec. 1, 1863) ("[T]he question is too large for anything short of government authority.").

119. An Act to Establish a Bureau for the Relief of Freedmen and Refugees, § 1, 13 Stat. at 508. In General Order No. 110, President Andrew Johnson ordered lands abandoned in War to be turned over to the Bureau. *The Freedmen's Bureau: Important Official Order by the President*, N.Y. TIMES, June 18, 1865, at 1; *see also* William H. Burkes, The Freedmen's Bureau, Politics, and Stability Operations During Reconstruction in the South 42 (Dec. 6, 2009) (unpublished Slave holder of Military Art and Science thesis, U.S. Army Command and General Staff College), *available at* http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA501927 (noting that access to land for farming was also granted to loyal white refugees); W. E. Burghardt Du Bois, *The Freedmen's Bureau*, ATLANTIC MONTHLY, March 1901, at 354, 357, *available at* http://www.theatlantic.com/past/docs/issues/01mar/dubois.htm (stating former male slaves had the opportunity to lease and eventually own abandoned property).

120. *See* discussion *infra* p. 753; *see also infra* pp. 751-52 (discussing restrictions to "white men only" or American Indians with white male fathers in Utah and Oregon land grant laws).

121. *See infra* p 147-48 (discussing restrictions in the Oregon Land Donation Law).

122. Freedmen's Affairs, *First Official Report of General Howard*, N.Y. TIMES, Dec. 20, 1865 at 3 (stating some distribution had occurred but most had been suspended after persons claimed a right to those lands). President Johnson, he began to back away from the promises and vetoed reauthorization of the bill. His veto was immediately overridden. *Washington News: The President's Message Vetoing the Freedmen's Bureau Bill*, N.Y. TIMES, July 17, 1866, at 1.

123. *See* Martin Abbott, *The Freedmen's Bureau and Negro Schooling in South Carolina*, 57 S.C. HIST. MAG. 56, 67 (1956) (stating the Bureau performed many vital tasks including providing resources to schools and funding building repairs); *see also* NATIONAL ARCHIVES FREEDMEN'S BUREAU SUMMARY, *supra* note 113, at 1 (stating that the Bureau established hospitals, supervised tenements for the homeless, and operated employment offices).

124. *See, e.g.*, An Act for the Better Ordering and Governing of Negroes and Other Slaves in this Province, 1740, *reprinted in* 7 THE STATUTES AT LARGE OF SOUTH CAROLINA 397, 413 (David J. McCord ed., 1840), *available at*

of blacks after the War, including lynchings.[125]

Bureau officers issued marriage licenses and certificates and registered the marriages.[126] "On June 24, 1865, John W. Sprague, Assistant Commissioner for Arkansas, whose jurisdiction covered both the States of Arkansas and Missouri (June 1865 until January 1866), issued Circular Number 3 instructing his subordinates 'to keep and preserve a record of marriages of freed people, and by whom the ceremony was performed.'"[127] Sprague sent regular reports to Washington of the marriages performed.[128] In August of 1865, General Edict No. 8 set up a system for marriages affecting Florida, South Carolina, and Georgia.[129] The edict addressed who was eligible to be married, how marriages were to be performed, the rights and obligations of husbands and wives, and the rights of children and divorce. It addressed the difficult topic of those who had been separated by forced sale during slavery, had married a second person, but now wanted to be reunited with the first. It even provided forms for marriage certificates.[130]

The Freedmen's Bureau was reauthorized and its authority expanded by subsequent Acts. However, criticisms that the job was too costly, complaints that the now freed blacks should be required to stand on their own and continuing racism combined to end its work.[131] The Bureau finally succumbed to politics three years after the end of the War in

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http://archive.org/details/statutesatlargeo07edit (imposing a money penalty for teaching a slave how to write).

125. *See generally Freedmen's Bureau Records Relating to Murders and Outrages*, FREEDMEN'S BUREAU ONLINE, http://freedmensbureau.com/outrages.htm (last visited Mar. 5, 2013) (reflecting murders, lynchings, and questionable rape accusations against black men and young boys).

126. NATIONAL ARCHIVES FREEDMEN'S BUREAU SUMMARY, *supra* note 113, at 5.

127. *Id.* at 3.

128. *Id.*

129. *See Marriage Rules: General Order No. 8, August 11, 1865*, HIST. ST. AUGUSTINE, http://www.drbronsontours.com/bronsongeneralrufussaxtongeneralordersno8august111865.html (last visited Mar. 6, 2013) (acknowledging the Bureau's commitment to protect the "sacred institution of marriage").

130. *Id.; see also Rules for Marriage in the State of South Carolina*, FREEDMEN'S BUREAU ONLINE, http://freedmensbureau.com/southcarolina/marriagerules.htm (last visited Mar. 5, 2013) (stating that each couple shall be issued a marriage certificate by the minister who marries them).

131. *See* Du Bois, *supra* note 119, at 364 (postulating that a permanent Freedmen's Bureau might well have solved persistent and perplexing "negro" problems); *see also* CONG. GLOBE, 38th Cong., 2d Sess. 1307 (1865) (statement of Mr. Powell) (objecting to the original bill stating, "this bill will involve an expense of millions upon millions of dollars"); *The Situation*, N.Y. TIMES, Feb. 22, 1866, at 4 (stating that an institution charged with "educat[ing] the negro into fitness for freedom" would inevitably grow into permanence—a result which should be carefully guarded against); *A Word for the Freedmen and the Freedmen's Friends*, N.Y. TIMES, Mar. 11, 1866, at 4 (objecting to those pleading for Bureau's work to continue, arguing that the scope of its task is too monumental).

1868.[132] The ex-slaves, largely illiterate and poverty stricken, surrounded by racial tensions, and with their families scattered were left to find their own way with the help of what private philanthropists would and could give and little protection from state authorities. In this void, the Southern states' leadership engrained racial oppression in the notorious "black codes," laws applicable only to blacks that attempted to recreate the economically and socially valuable structure that slavery had once secured for whites.[133]

It is very clear that when Congress provided for the federal licensing of marriages for the ex-slaves, it intended for their marital rights to be recognized in *all* of the states. Moreover, its actions did not facilitate state action, but rather operated directly contrary to the will of those in the Confederacy and others who rejected the notion of affording blacks the right to marry.[134] This extraordinary step flowed from its War Powers and, again, from the Constitutional Amendments relating to the newly freed slaves.

B. Deviating to Reject a Class of Marriages Deemed Valid Under State or Local Law

1. Prohibiting Polygamous Marriages in the Territory of Utah

DOMA defenders have often cited the U.S. treatment of polygamy in Utah as an example of federal inroads into marriage and an example that the federal government's use of marriage rules to express moral viewpoints. Those critical of the comparison have sought to distinguish the Utah case in a variety of ways: that the case involved a territory and plenary power, that polygamy affects families differently than same-sex marriage, etc.[135] Prior writers on both sides have failed to grasp the

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132. *See The End of the Freedmen's Bureau*, N.Y. TIMES, Dec. 13, 1868, at 4 (claiming that the exigency which gave rise to the Bureau ceased to exist and thus the Bureau became a drain on national resources).

133. *See* W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 1860 - 1880, at 325 (The Free Press 1998) (1935) (noting that the South was willing to use "black codes" to restore the capital it lost with the abolition of slavery); JOHN HOPE FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR 47 (2d ed. 1994) (stating that enacting "black codes" was the greatest concern of Southern legislatures in the year following the Civil War); *see also Black Codes*, HISTORY.COM, http://www.history.com/topics/black-codes (last visited Mar. 6, 2013) (listing, for example, a "black code" which required blacks to sign yearly labor contracts or risk being arrested and forced into labor).

134. CONG. GLOBE, 38th Cong., 1st Sess. 3341-50 (1864) (objecting to Freedmen's Bureau Bill on grounds that Jefferson Davis claimed that blacks are inferior and bill overlooks white man's rights).

135. *E.g.*, Adrienne Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 1993-97 (2010) (arguing that binary same-sex marriage is more consistent with modern trends of equality in family law than polygamy and that the latter runs contrary to that trend with frequently

significant role that the Supremacy Clause played in federal decisions relating to polygamy in Utah. The battle over supremacy laid the predicate for federal action in Utah, and makes Utah a case of not simply mere moral reproach (although some actors held this view), but also a case of a vindication of a federal interest in establishing federal power as the supreme power in accordance with both the U.S. Constitution and the organic statute that created the territory.

Utah came into the territory of the U.S. through the 1848 Treaty of Guadalupe Hidalgo with Mexico.[136] At the time, members of the Church of Jesus Christ of Latter Day Saints (the "Mormons") were already living there. Facing resistance, they had moved from place to place to find territory where they could peaceably practice their religious tenets, including, but not limited to, polygamy.[137]

In 1850, Congress adopted the organic act that established a territorial legislature, affording Utah all local governance powers consistent with the federal Constitution, with a few exceptions. One was that locals had no power to dispose of the land.[138] President James Buchanan appointed Brigham Young as the territory's first governor. Buchanan had to know that Young was the head of the Mormon Church and a polygamist but apparently did not attach significance to the fact.[139] According to one source, at the time of that appointment Young had fourteen wives.[140]

The tensions between Mormon local officials and non-Mormon federal officials began almost immediately. By December 1851, the Chief Justice of the Supreme Court of the Territory, one of the two Associate Justices, and the Secretary for the Territory had resigned and left the territory.[141]

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changing family structures that heighten vulnerability of family members); *see also* Windsor Historians' Amici Brief at 37-39 (Congress' campaign to end polygamy was so intense because Congress knew it could not affect polygamy once Utah became a state).

136. *Treaty of Guadalupe Hidalgo, February 2, 1848*, AVALON PROJECT, http://avalon.law.yale.edu/19th_century/guadhida.asp (last visited Mar. 6, 2013).

137. *See* 1 HISPANIC AMERICAN RELIGIOUS CULTURES 375 (Miguel de la Torre ed. 2009); *see also* Martha M. Ertman, *Race Treason: The Untold Story of America's Ban on Polygamy*, 19 COLUM. J. GENDER & L. 287, 298 (2010) (discussing the intense evangelism, and other religious doctrines that prompted the Mormons to seek their own territory within the United States).

138. An Act to Establish a Territorial Government for Utah, ch. 51, § 1, 9 Stat. 453, 453 (1850).

139. James Buchanan, State of the Union Address, Dec. 8, 1857, *in* STATE OF THE UNION ADDRESSES BY JAMES BUCHANAN 3, 25-26 (2003), http://www2.hn.psu.edu/faculty/jmanis/poldocs/uspressu/SUaddressJBuchanan.pdf (discussing the difficulty of Young's dual roles).

140. *Accord* CONG. GLOBE, 42nd Cong., 3rd Sess. 1804 (1873) (noting difficulty that Young had fourteen wives when appointed Governor, and Congress later allowed polygamy to stand for some ten to twelve years before doing something about it).

141. CONG. GLOBE, 32nd Cong., 1st Sess. App. 91 (1852).

Upon hearing of the uproar in Utah, the House of Representatives asked the Executive Branch to deliver a report. In 1852, President Millard Fillmore relayed to Congress a report from Secretary of State Daniel Webster. That report was delivered a full ten years before Congress banned polygamy. The documents that it contained reveal extensive information of, at least, the U.S. government's view of what was happening in Utah.

Essentially, in a lengthy letter, the judges claimed that Utah had become a theocracy and the Mormon Church had usurped the federal government's role. They accused the Church of controlling the opinions, actions, property, and lives of its members; "usurping and exercising the functions of legislation and judicial business in the Territory" (including conducting its own trials without a jury); "organizing and commanding the military; disposing of the public lands, upon its own terms; coining money, stamped, 'Holiness to the Lord,' and forcing its circulation at a standard fifteen or twenty percent above its real value; openly sanctioning and defending polygamy . . . extracting the tenth part of everything from members, under the name of tithing, and enormous taxes, from citizens, not members."[142] Of Brigham Young they said that he exacted absolute obedience and "[h]is opinions and wishes were [the people's] opinions and wishes."[143]

They further accused Young of insisting that only Mormons be appointed to public office in Utah, of insulting the government of the United States and government officials in his speeches, and of riling up citizens to threaten federal officials both generally and in particular, with physical harm.[144] They accused him of using federal funds for purposes other than those Congress had authorized, of producing a fraudulent census, and of conducting elections in which aliens were allowed to vote.[145] They claimed that Young refused to meet with them and claimed that Young told them that federal judges would never try a single case in Utah territory.[146] The judges also pointed out that while bigamy was a crime under common law, it would, in their view, be impossible to find anyone who would convict, for all of the local judges and jurypersons would also be Mormon.[147] They ended by stating that the Mormons were "living upon

142. *Id.* at 86.

143. *Id.*

144. *Id.* at 86-87; *see also id.* at 87 (articulating that the officials felt endangered, but also that they felt insulted; one letter relates Young stating in a public speech that President Zachery Taylor, then dead, was "in hell," and that "I prophesy in the name of Jesus Christ, by the power of the Priesthood that's upon me, that any President of the United States who lifts his finger against this people shall die an untimely death and go to hell").

145. *Id.* at 87, 88.

146. *Id.* at 86-87.

147. CONG. GLOBE, 32nd Cong., 1st Sess. App. 89 (1852).

the soil of the United States and drawing their sustenance from it free of charge," and that their officers, including Governor Young, were paid for with monies provided by the federal government.[148] And yet they added, "[i]t is impossible for any [federal] officer to perform his duty or execute any law, not in sympathy with their views as the Territory is at present organized."[149]

The federally appointed Secretary of the territory, who had also resigned, submitted a report as well. It indicated controversy over the handling of spending and elections. The Secretary accused Young of disregarding Utah's Organic Act. He included copies of correspondence that appeared to indicate that Young had attempted to order the Secretary as to how to handle federal monies in the territory rather than conceding Utah's obligation to follow federal law.[150]

Utah's sole Congressional delegate, John Milton Bernhisel, wrote a letter too. He reported that his community denied that they mistreated federal officers or insulted the government. Acknowledging that he left the territory on travel before the events allegedly occurred, he asked for a committee investigation.[151]

The sole remaining judge wrote an oddly short letter. He stated that he had decided to remain and that the others could explain for themselves their reasons for departure. But he also cryptically pointed out that delegate Bernhisel (whose letter denied that Utah residents had been discourteous) was not present in the territory when the events in question occurred.

The report also included a short letter from Governor Brigham Young to President Fillmore. It simply informed the President that with the resignations, Young had appointed a new Secretary pro temp and that the territorial legislature had redistricted the territory into one district and assigned the cases to the sole remaining judge, all this to fill a void until the President could act.[152] It said nothing about the reasons for the judges' resignations or Young's reactions.

The leading Utah Newspaper, *The Deseret News*, was largely a religious vehicle, dominated by sermons, speeches, and testimonies. It did not then

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148. *Id.* at 90.

149. *Id*.

150. *Id.*

151. *Id.* at 85, 91.

152. *See* CONG. GLOBE, 32nd Cong., 1st Sess. App. 86 (1852) (describing Young's decision to appoint a new Secretary; it is not clear whether, in doing so, he was filling a void or taking advantage of an opportunity to arrange affairs more suitable to his preferences); *see also* An Act to Establish a Territorial Government for Utah, ch. 51, §§ 1-2, 9 Stat. 453, 453 (1850) (appearing to have given Young the authority to redistrict, though not to appoint federal officials). For other expressed concerns about Young see CONG. GLOBE, 42nd Cong., 3d Sess. App. 31 (1873) (claiming Young had driven from competition every Gentile company that attempted to build a railroad in Utah).

address the conflicts, perhaps an indication that the Mormons did not want to provide fuel for a federal fire.[153]

Despite resignations that indicated clear signs of trouble in Utah, Congress did not focus in on banning polygamy in this period. Four years later, in 1854, the matter of Utah came up again. Congress was considering a bill relating to the appointment of a Surveyor General for Utah and the distribution of territorial lands.[154] Under the proposed bill, "white" married men were to receive twice the lot of "white" single men (a total of 640 acres versus 320).[155] At the last minute, an Ohio Congressman inserted a provision that excluded polygamists from allotments.[156] Utah's delegate, Bernhisel, moved to strike the limitation. That motion set off a furious debate over polygamy and more directly the power of Congress to affect religion, marriage, and domestic issues in the territories. Some Congressmen expressed surprise at learning of the extent of polygamy in Utah. But while Utah statutes did not mention it, polygamy prevailed in Utah and had been an open secret.[157]

Some of the arguments presented are similar to the arguments in same-sex marriage cases. Defenders of Utah's rights to practice polygamy argued that religion and marriage were local matters outside of Congress' enumerated powers and consequently, despite Congress' power over territorial lands, any marriage-based federal condition on the receipt of the land was void.[158] They asked why, if polygamists were to be excluded, adulterers in other territories were not excluded as well and why any

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153. The Deseret News is available digitally online through the University of Utah at http://digitalnewspapers.org/newspaper/?paper=Deseret+News.

154. *See* CONG. GLOBE, 33rd Cong., 1st Sess. 1091-92 (1854) (proposing that the authority to grant the final disposition of the land rested with the U.S. government). *Compare* An Act to Regulate Surveyors and Surveying, 1851-52 Utah Territory Acts 1st Sess. 94, 94-96 (1852) (noting the ability of officials in Utah to appoint surveyors), *with* An Act to Establish a Territorial Government for Utah §§ 15-17, 9 Stat. at 457-58 (discussing the boundary of Utah's territory and emphasizing that the laws of the Constitution extend over it).

155. *See* CONG. GLOBE, 33rd Cong., 1st Sess. 1091-92 (1854) ("[T]he benefits of this act shall not extend to any person who shall now, or at any time hereafter, be the husband of more than one wife."). The statute left ambiguity as to whether Mormon authorities desired a husband to claim land for each marriage; however, it still appeared to allow only one lot per male applicant. *See also id.* at 1092 (noting that when asked about the damage the restriction would bring, Rep. Bernhisel stated that the more wives a man has the more land he needs).

156. *Id.* at 1091-92.

157. *See id.* at 1091, 1095 (noting that the territorial statutes had no mention of polygamy or the Mormon Church); *see also* discussion *infra* at p. 742 and note 164; *supra* note 140 (Congressman arguing that President and Congress had knowledge of polygamy at time of Utah founding).

158. *See* CONG. GLOBE, 33rd Cong., 1st Sess. 1093 (1854) (citing Congressman Phillips when he states that "Congress has nothing whatever to do with this transaction" as it is "not necessary or proper" to impose the condition); *see also id.* at 1092 (noting the comments of Mr. Bernhisel when striking to amend the proposal).

number of bad acts did not block eligibility for land grants.[159] They argued that the terms for Utah should be the same as the terms for other territories.[160] They argued that Congress had no power to touch moral issues such as religion and that if "discrimination" against the Mormons was allowed, other religions would be next.[161] They also made a public safety argument that the Mormons had suffered significant discrimination in their history, that they would take great offense to this condition, and that upsetting them would come at a price.[162] They argued that the Mormons were conscientious and hard workers and truly believed that their faith authorized and encouraged polygamy.[163] They argued that Congress knew about the practice of polygamy when Utah became a territory but did nothing to prevent it.[164] They argued that polygamy was not yet a crime because it was legal under Utah law, Congress had not outlawed it, and Congress had no basis for infringing local rights.[165] They argued that it was unfair to exclude Mormons when land grants were given to "'outcasts from Europe" and "fugitives from justice."[166]

Supporters of the restriction on polygamy had their own arguments: that Congress had sweeping power to issue any laws deemed necessary with respect to the territories;[167] that marriage between one man and one woman was ordained by God;[168] that states where polygamy was practiced were "heathen and have not flourished;"[169] that allowing polygamists to have bounty lands would attract to Utah licentious individuals and advance the degradation of women as married men legally pursued multiple

159. *See id.* at 1093 (noting where Congressman Phillips asks why adultery or murder was not excluded).

160. *See id.* at 1094 (noting the comments of Congressman Stephens of Georgia, who argued that Congress cannot treat religions differently in these territories).

161. *See id.* at 1094 (highlighting the comments of Congressman Stephens of Georgia, who argued that such unequal treatment was unconstitutional).

162. *See id.* at 1097 (emphasizing the comments of Mr. Walsh noting that "good precepts, and persuasion, will do more to remove polygamy . . . than all the laws you can pass here").

163. *Id.* at 1092.

164. *Id.* at 1097; *accord* CONG. GLOBE, 42nd Cong., 3rd Sess. 1804 (1873) (documenting Mr. Carpenter's comments noting knowledge of polygamy when Brigham Young appointed and that Congress allowed polygamy to stand for some ten to twelve years before doing something about it).

165. *See id.* at 1097 (referencing the comments of Mr. Kerr who argued that the way to deal with the "crime" was to directly outlaw it, not address it indirectly).

166. *See id.* (highlighting the comments of Mr. Kerr,); *see also* 1 ANNALS OF CONG. 338 (1789) (referencing import of prison labor or "white slaves" from Europe).

167. *See* CONG. GLOBE, 33rd Cong., 1st Sess. 1101 (1854) (noting the comments of Mr. Lyon on this issue when he cites the Constitutional authority for Congress' power).

168. *See id.* at 1094 (noting the comments of Mr. Smith of Tennessee that this reference is singular and not plural).

169. *Id.* at 1101.

paramours;[170] that affording land to polygamists would constitute the federal government's approval of the practice and by reward lead to its increase in the territories;[171] that the role of the federal government was to fit territories to become republican states and that polygamy was inconsistent with this task;[172] that every state in the union banned polygamy;[173] that denying benefits would encourage Mormons to give up the practice;[174] that polygamy broke up the family circle;[175] that the matter was not local at all; that not excluding polygamists would give them a "bonus" in bounty lands not available to those who adhered to the dominant common law approach to marriage; that Congress was giving a federal gift and that it had every right to impose the terms of that gift consistent with the rules recognized by the states in common.[176]

At the time of the 1854 debates, at least one person insisted that the federal government would have no power to hinder polygamy in this way if Utah territory were in fact a state.[177] Of course, were Utah a state, disposition of federal land or federal supremacy would not have been an issue—and all the states had outlawed polygamy.

Representatives from slaveholding states were split on the question of polygamy. One proposed that polygamists should even be required to forfeit lands that they already held.[178] But others saw Congressional intervention to ban polygamy as a breach of a local jurisdiction's right to determine its own domestic relations—a breach that might broaden to lead the federal government up to the slaveholder's doorstep. Said Mr. Keitt from South Carolina:

> Now, if Congress has a right to say that no man in the Territories shall

170. *See id.* at 1100 (noting that such an allowance would disrupt the "virtuous quiet in the unbroken wilderness of the West").

171. *Id.* at 1096; *see also id.* at 1095 (noting the comments of Mr. Simmons on his concern about western expansion and the potential for the spread of polygamy when settlers interact with Mormons).

172. *Id.* at 1095 (referencing the statement Congressman Simmons made when he articulated that Congress in the past had determined that "religion and morality" were "the basis of free republication institutions" in schooling).

173. *See id.* at 1093 (noting the comments of Congressman Campbell when he stated that in every state polygamy was "a high offense").

174. *See id.* at 1098 (referencing the comments of Mr. Goodrich when he stated that if it was not possible to reach Mormon's on this issue through "moral considerations," it would become necessary to affect their interests in other ways).

175. *See id.* at 1095 (noting that Mr. Simmons also stated that it "spoils the domestic relations").

176. *See id.* at 1098 (noting Mr. Campbell and Mr. Taylor's comments that those practicing polygamy would receive increased benefits); *see also id.* at 1101 (identifying the comments of Mr. Cobb on the power of Congress to condition the grant of federal lands).

177. *Id.* at 1092.

178. *Id.* at 1099.

> have more than one wife, may it not say that no man shall have a wife at all? If it can prescribe the number of wives, may it not altogether abrogate the marital relation?[179]

Mr. Davis of Rhode Island, referring to the limitation of the land to white men, responded by posing his own question: "I would ask the gentleman where Congress gets the power to insert the word 'white' in this bill?"[180] His question emphasized that federal racial restrictions on land grants did not actually have an obvious constitutional basis, especially since citizenship was not even a requirement. He also cried hypocrisy against slaveholders challenging polygamy, saying that at least Mormons acknowledge their wives and children unlike slaveholders who practice "unlimited concubinage" and "sell their children."[181]

It appears the matter was set aside and for a year, Utah continued without a federal Surveyor General. Settlers (many of whom were polygamists) effectively squatted on land.[182] In February 1855, over the objections of a vocal minority, Congress finally passed a statute appointing the Surveyor General, without any restrictions on polygamists.[183] But a year later, the appointed Surveyor General of Utah abandoned his post. He alleged hostilities from the Mormons.[184] Still, Congress did not act to ban polygamy.

The tense environment was made incendiary by frequent, often bloody, skirmishes between Mormon and non-Mormon settlers moving through Utah territory. A notable one occurred in September 1857, when a band of armed men murdered more than one hundred Arkansans traveling through Utah. The incident became known as the "Mountain Meadows Massacre."[185] Later that same year, a party of travelers was attacked and

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179. *Id.* at 1099.

180. *See id.* at 1100 (referencing Mr. Davis's responsive question about Congress' authority). Davis did not ask about the exclusion of women. Although married women could access land through their husbands, or children through their fathers, marriage remained the key to women's access. *See also id.* at 1092 (mentioning Congressman Giddings' of Ohio statement that Southerners have denounced all attempts to interfere with slavery in the territories as a domestic institution but are now in favor of interfering with the "domestic institution of marriage in Utah, among the Mormons"); *id.* at 1093 (recognizing that Congressman Campbell came to a similar conclusion regarding the Southerners' discussions about centralization in this context but not within the context of slavery).

181. *Id.* at 1092. Of course, employing the word "concubinage" presents the female slave experience only from the male point of view.

182. CONG. GLOBE, 35th Cong., 1st Sess. App. 14 (1857).

183. An Act to Establish the Office of Surveyor-General of Utah, and to Grant Land for School and University Purposes, ch. 117, § 1, 10 Stat. 611, 611 (1855).

184. CONG. GLOBE, 35th Cong., 1st Sess. App. 14 (1857).

185. *See* RONALD W. WALKER, ET AL., MASSACRE AT MOUNTAIN MEADOWS, at IX, 191 (2008) (stating the emigrants were en route to California).

killed in the "Aiken Massacre."[186] Prosecutors could not secure convictions of Mormons alleged to be involved. It was claimed that Mormons would not vote to convict a fellow Mormon. The first Mountain Meadows trial resulted in a hung jury.[187] The second finally resulted in a conviction twenty years after the massacre, and after Congress allowed challenges to strike jurors who were polygamists.[188]

For his part, President James Buchanan replaced Governor Brigham Young and sent new federal agents there. In his December 1857 State of the Union address, he explained his actions, essentially alleging that Utah was a theocracy that did not respect federal rule and stating that the troops were necessary for protection of federal officers, as so many had resigned in fear of their personal safety.[189] Ironically, Senator Jefferson Davis—who would later lead the states of the Confederacy that seceded from the Union—commented that it was "palpably absurd" that the President could not call upon the predominantly Mormon Utah militia to defend U.S. interests in Utah.[190] The U.S. military remained in Utah until 1858.[191] Mormon newspapers began to strike back in their own defense.[192]

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186. *See The Judiciary vs. the Administration—Mormon Complicity in Recent Massacres*, DAILY EVENING BULL., Sept. 17, 1859 (reporting attempts to collect evidence regarding Massacres for trials and request for military aid).

187. *See The Second Trial of John D. Lee, the Mormon Elder, for the Massacre of Emigrants, Known as the "Mountain Meadow Massacre," Has Just Begun at Beaver, Utah*, LOWELL DAILY CITIZEN, Sept. 18 1876, at col. A (stating the three or four Mormons on the jury refused to return a guilty verdict).

188. *See John D. Lee, the Mormon Who Was Found Guilty of Complicity in the Mountain Meadows Massacre, and Condemned to Be Shot Last Month, Is Still Alive, with Some Prospect of Escaping Punishment Altogether, Through Technicalities*, MILWAUKEE SENTINEL, Feb. 8, 1877, at 4; *Execution of John D. Lee, the Mormon Leader in the Mountain Meadows Massacre*, FRANK LESLIE'S ILLUSTRATED NEWSPAPER, Apr. 7, 1877, at 79. For trial transcripts and other papers related to the Massacre see the website at the University of Missouri, Kansas City *available at* http://law2.umkc.edu/faculty/projects/ftrials/mountainmeadows/leetrial.html.

189. Buchanan, *supra* note 139, at 25-26 (noting Brigham Young was head both of Church and state and in a conflict, the people of Utah would side with Young and the Church; stating Young desires the conflict; noting all the federal officers except for two Indian agents found it necessary to withdraw from the territory to protect their personal safety; the only government in Utah was the despotism of Brigham Young). *See also* Report of the Secretary of War, CONG. GLOBE, 35th Cong., 1st Sess. 33-34 (1857) (reporting to the Joint Session that the people of Utah had established a theocracy and rejected the laws of United States; discussing alleged incitement of Brigham Young, blaming Mormons for nearby American Indian unrest against United States; expressing attempts to negotiate with the Mormons discussing provisions for expedition).

190. CONG. GLOBE, 35th Cong., 1st Sess. 408 (1858) (Sen. Jefferson Davis (MI)) (calling the notion that the state militia of Utah could not be called upon to enforce United States law against the Mormons a "palpably absurd" situation).

191. *End of the Mormon Rebellion*, FAYETTEVILLE OBSERVER, May 24, 1858 (reporting the end of the "rebellion" without bloodshed).

192. Mormon reactions in newspapers tended to be encased in larger sermons. *See, e.g.*, *Discourse By Pres. Brigham Young, Oct. 7, 1857*, DESERET NEWS, Dec. 30, 1857, at 340 (stating "hell cannot overthrow us, even with the United States to help them,"

In 1858, President Buchanan also used the Utah turmoil and Mormon resistance to federal power to call for more funding for a larger Army.[193] Congressional debates focused primarily on whether a larger army was needed and the question of respect for federal power in Utah, not on polygamy.[194] Some accused the President of levying war upon the Mormons or using their situation as an excuse to get money for an Army.[195] The debates indicate just how strongly some Congressmen of that era felt about federal respect for local powers, even in the territories.

By the mid-1800s, an invigorated Women's Movement had provided a new argument against polygamy: that it was harmful to women and families.[196] The debates over slavery also provided fuel for those opposing

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and telling U.S. Captain Stewart Van Vliet that Young does not care how many troops the government has because "before they get through they will want to let the job to sub-contractors"); *Expedition Against Utah*, *id.* at 244-45 (speaking of past religious discrimination over decades and stating Mormons respect federal government but will resist attempts to supplant territorial local control or end polygamy); *Discourse of Elder O. Hyde*, DESERET NEWS, Dec. 30, 1857 at 342-43 (accusing others of inciting violence against Mormons, accusing the U.S. government and Buchanan of anti-Mormon behavior and inciting conflicts); *Discourse By Elder Geo. A. Smith, Nov. 29*, DESERET NEWS, Dec. 30, 1857, at 343 (arguing that the United States never extended protection to Mormons); *id.* at 341 (referring to the "vile and illegal" crusade of Buchanan and the U.S. against Utah). Some argue that the Mormons failed to acknowledge any responsibility for tensions or for the Mountain Meadow murders. *Accord* Kristine W. Fredrickson, *Scholars Discuss Massacre at Mountain Meadows*, DESERET NEWS (June 9, 2010, 3:00 PM), www.deseretnews.com/article /705384706/Scholars-discuss-Massacre-At-Mountain-Meadows.html (discussing scholars who note that Mormons at that time refused to take responsibility and considered it an individual problem). In 2007, the Mormon Church acknowledged that some of its former leaders played a role in recruiting Paiute Indians for the massacre and it publicly apologized. Jessica Ravitz, THE SALT LAKE TRIBUNE, Sept, 11, 2007, at 1.

193. CONG. GLOBE, 35th Cong., 1st Sess. 406-07 (1858) (discussing the request).

194. *Id.*

195. *Id.* at 407 (Statement of Mr. Toombs (GA)) (articulating that the President has no power to make war and some Congressmen "may believe it unnecessary to carry vast bodies of troops over the Rocky Mountains, in order to murder those people who are called Mormons"); *id.* at 407-08 (Statement of Jefferson Davis) (denying the sole reason for troop request was Mormon War, agreeing no War exists, and saying President was not levying War upon the Mormons); *id.* at 412-13 (Statement of Mr. Seward) (asserting that Congress is not taking threat in Utah seriously enough; "Utah stands out entirely distinct from the whole line of our past experience;" Mormons unlike others who have settled territories who are "men trained up under our own Constitution . . . accustomed to the principles and habits of the American republican society . . . educated to govern themselves, and maintain their rights and liberties; and men also accustomed by habit to submit with loyalty to the Federal Government in exercise of its proper jurisdiction over them . . . .").

196. Hamilton Ward (NY) argued the alleged plight of women and noted that Women's Rights Activist, Anna Dickenson, visited Utah's Mormon women. CONG. GLOBE, 41st Cong., 2d Sess. 2144-45 (1870). Ironically, the Mormons gave women the vote before the United States did, but Congressmen argued that the action was merely an attempt to increase Mormon voting power and that the women were controlled by their men and the Church. CONG. GLOBE, 42nd Cong., 3d Sess. App. 31 (1873). Not surprisingly, women's groups argued that the vote should be kept secure for Utah's women. 2 CONG. REC. 522 (1874) (Memorial from New York Woman Suffrage

polygamy. Even before Utah was formed, abolitionists had tied together toleration of slavery and polygamy in foreign affiliated churches.[197] Hearkening to this link, the Republican Party, in 1856, branded polygamy and slavery, the "twin relics of barbarism."[198]

Those whose primary concern was the supremacy of federal law began to lose patience with Utah. They allowed morality objections and anti-Mormon animus to grow to full bloom. On February 23, 1857, Republican J.S. Morrill made an extended speech in the House of Representatives attacking the Mormon Church and polygamy as morally repugnant.[199] It did not help that after leaving the Mormon Church, one of Brigham Young's ex-wives wrote a book attacking Young and polygamy.[200]

The debates over "The Morrill Act" began in 1860. The Act was passed in 1862.[201] Although the Act applied to all U.S. territories, the target was known widely to be Utah. The Act dismantled the Territorial legislature of the state of Utah and revoked a certificate of incorporation that the territorial legislature had issued to the Mormon Church. Congress seized those lands.[202] The Act stated that it was not intended to prevent anyone from worshipping God according to conscience, but rather only to "annul all acts and laws which establish, maintain, protect or countenance the practice of polygamy, evasively called spiritual marriage, however

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Society) (asking Congress not to take away Utah women's vote).

197. *See Polygamy*, EMANCIPATOR, July 29, 1846, at col. D (discussing arguments to justify polygamy similar to those to justify slavery and attacking American Board of Foreign Missionaries for tolerating polygamy, slavery, and caste systems in churches abroad); *The American Board of Commissioners for Foreign Missions—Polygamy*, LIBERATOR, Nov. 13, 1846, at col. E (criticizing the Board's tolerant stance on polygamy and slavery).

198. *See* Kelly Elizabeth Phipps, Note, *Marriage and Redemption: Mormon Polygamy in the Congressional Imagination, 1862-1887*, 95 VA. L. REV. 435, 438 (2009).

199. J.S. Morrill, Address to the House of Representatives: Utah Territory and Its Laws—Polygamy and Its License (Feb. 23, 1857), *reprinted in* CONG. GLOBE, 34th Cong., 3d Sess. App. 284, 284-90 (1857).

200. ANN ELIZA YOUNG, WIFE NO. 19, at 574 (1876), *available at* http://books.google.com/books?id=0ngFAAAAQAAJ. Young also testified before Congress. *See also* Martha M. Ertman, *The Story of* Reynolds v. United States: *Federal "Hell Hounds" Punishing Mormon Treason*, in FAMILY LAW STORIES 51, 51 (Carol Sanger ed., 2008).

201. The Morrill Anti-Bigamy Act of 1862, ch. 126, § 1, 12 Stat. 501, 501; *see also* Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 9 (1890). For another history on the federal government's approach to polygamy see Hasday, *supra* note 47, at 1357-65; Mary K. Campbell, *Mr. Peays Horses: The Federal Response to Polygamy, 1854-1887*, 13 YALE J.L. & FEMINISM 29 (2001).

202. The Morrill Anti-Bigamy Act of 1862, § 1, 12 Stat. at 501 ("An act to punish and prevent the Practice of Polygamy in the Territories of the United States and other Places, and disapproving and annulling certain Acts of the Legislative Assembly of the Territory of Utah").

disguised . . . ."[203] The Act made polygamy a felony in all U.S. territories and other places over which the U.S. has exclusive jurisdiction. Polygamy was already prohibited in every other state and territory. The Act also provided that bigamists convicted as felons could not vote.[204]

In 1872, Congressman Blair of Missouri unsuccessfully argued for a bill to legalize all polygamous marriages in Utah and to cease all polygamy prosecutions. He argued that such legalization was consistent with "principles of republican government."[205]

In 1873, Utah sought admission to the Union.[206] Once again, polygamy became a subject of discussion. Despite the 1862 Act banning it, and even subsequent Acts, the Mormons, including Utah's Congressional delegates, had continued to practice it.[207] Challengers to Utah's admission charged the Mormons with placing tolls on public roads, charging exorbitant fees to travelers, and impeding travel.[208] They claimed that Governor Young had driven out of competition all "Gentile" railroad companies hoping to build there.[209]

Utah's delegate, W.H. Hooper, denied that Utah had impeded others' rights and said any actions taken were consistent with local rights exercised by other states and the freedoms exercised by other religions.[210] He argued that Mormons were the victims of bias and misrepresentations.[211]

In 1874, Congress passed the Poland Act.[212] The Act drew back the expansive jurisdiction that the Mormons had given to their Probate Courts.[213] It also provided rules for women seeking to divorce on the

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203. *Id.* § 2, 12 Stat. at 501.

204. *Id.*

205. CONG. GLOBE, 42nd Cong., 2nd Sess. 1096-1100 (1872).

206. CONG. GLOBE, 42nd Cong., 3rd Sess. 944 (1873).

207. *See, e.g.*, 1 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 491-500 (1907) (discussing various challenges over several years to seating Utah House delegates on the grounds, *inter alia*, that they practiced polygamy in violation of U.S. laws). These challenges were usually not successful unless other actions contrary to U.S. interests were also proven.

208. CONG. GLOBE, 42nd Cong., 3rd Sess. 947 (1873).

209. *Id.* at 948.

210. *Id.* at 945-46; *see also* CONG. GLOBE, 42nd Cong., 3d Sess. App. at 29-31 (1873) (rebutting various allegations).

211. CONG. GLOBE, 42nd Cong., 3d Sess. App. at 945 (1873) (noting bias in newspapers and comparing Mormon approaches to others that invoke no concern); CONG. GLOBE, 42nd Cong., 3d Sess. App. at 31 (1873) (calling attacks on Mormons "slander" and noting that they evoke applause on the floor); *id.* at 29 (alleging that those seeking to attack Mormons were forced to go back six to sixteen years and "grope in the twilight of fable for causes of complaint").

212. The Poland Act of 1874, ch. 469, 18 Stat 253.

213. *Id.* § 3, 18 Stat. at 254 (defining probate court jurisdiction as not including civil chancery or criminal jurisdiction); CONG. GLOBE, 42nd Cong., 3rd Sess. 946 (1873) (noting expensive chancery and common law jurisdiction was given to probate courts).

ground that they were in plural marriages. It appointed the U.S. Marshall of the territory to attend all court sessions in the territory, the U.S. Attorney to prosecute all actions, and afforded three juror challenges in criminal trials: adultery, bigamy, and polygamy.[214] The passage of the Poland Act and its predecessors laid the groundwork for the successful conviction in the Mountain Meadows case.

The early statutes banning polygamy prevented a married person from marrying a subsequent time without divorce. But technically the language of the statute still allowed multiple marriages *if they occurred all at one time*. In 1882, Congress passed the Edmunds Act, amending the earlier statute to close that loophole.[215] It also reached back to legitimize the then living children of polygamous marriages that with their mothers had been rudely tossed out of inheritance and support lines. The local laws of the Utah territorial legislature had protected the children of polygamous marriages, but that body was now disassembled.

In 1887, the Edmunds-Tucker Act allowed a willing wife to waive the marital testimonial privilege in bigamy cases to testify against her husband, except as to marital confidences.[216] This privilege alteration was contrary to the common law, which allowed a spouse to prevent even a willing spouse from testifying against him.[217] It also defined adultery as applicable to both married women and married men, banned sexual relationships with relatives within the fourth degree of consanguinity, punished fornication, and required marriage licenses.[218]

Court challenges to restrictions on the Mormons would fall on deaf ears. In rejecting the claims, federal courts not only relied upon Supremacy, but also adopted the moralistic view of Mormonism and the "twin relics of barbarism" mantra.[219]

Utah was ultimately admitted to the union as a state in 1896. As a condition, it was required to ban the recognition of polygamy "forever" in its state constitution. Even today, the prohibition can only be changed by the consent of the United States.[220] After Congress suppressed the

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214. *Id.* §§ 1-2, 18 Stat. at 253.

215. The Edmunds Anti-Polygamy Act of 1882, ch. 47, 22 Stat. 30.

216. The Edmunds-Tucker Act of 1887, ch. 397, § 2, 24 Stat. 635, 635.

217. Trammel v. United States, 445 U.S. 40, 53 (1980). *Trammel* subsequently reversed the common law rule in federal courts allowing a willing spouse to testify except as to communications covered by the marital communications privilege. By that time, many other states had already abandoned the common law rule. *Id.* at 48.

218. The Edmunds Anti-Polygamy Act of 1882 § 2, 22 Stat. at 30; The Edmunds-Tucker Act of 1887 § 4, 24 Stat. at 636.

219. *See* Cleveland v. United States, 329 U.S. 14, 19 (1946) (equating polygamy with barbarism); Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 48-49 (1890) (to the same effect).

220. UTAH CONST. art. III.

Mormons, outlawed polygamy, and disbanded the territorial legislature, the federal government resumed the approach of looking to the local law of the Utah Territory, to the extent not inconsistent with U.S. law.[221]

In banning polygamy, Congress rejected a category of marriages recognized under local law, a category that it had in fact previously expressly embraced when it accepted that polygamous marriages could be the basis of land claims and implicitly embraced when it did not act to eliminate polygamy for more than a decade.

Utah polygamy cases involved federal territory and plenary power. But plenary power was not the reason the federal government invaded traditional provinces of local law there. Instead, the reasons were perceived federal interests that made some believe that polygamy was incompatible with the American system.

2. Immigration Based Rejections

Congress has plenary power to prescribe the rules for immigration.[222] Numerous marital benefits are attached to immigration.[223] While the rejection of immigration benefits might be seen as the denial of an incident of marriage, because the rejection essentially means that the individual cannot remain in the country, the rejection of marriages benefits based on immigration rules is essentially a rejection of the marriage's validity overall.

i. Declining to Recognize Polygamous Marriages in Immigration

Congress refused to allow immigration benefits to flow from polygamous marriages though such marriages were sanctioned in other countries where the marriages took place.[224] The immigration ban differs from the Utah situation because it lacks the context of an immediate threat to federal authority or anti-Mormon animus. But there was a different kind of animus present. Polygamy was often cited as one reason to bar the Chinese as a class from immigrating to the U.S., whether or not they individually practiced it.[225]

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221. Cope v. Cope, 137 U.S. 682, 688-89 (1891) (finding that the Utah territorial law allowing child of polygamous marriage to inherit should be followed). In 1890, the Court held that despite a polygamous marriage, the marital privilege banned a wife from testifying against her husband in a state polygamy prosecution.

222. Congress has the power to adopt uniform laws on naturalization. U.S. CONST. art. I, § 8, cl. 4. *See also* Arizona v. United States, 132 S. Ct. 2492, 2498 (2012) (noting federal government's broad power over immigration).

223. Claire A. Smearman, *Second Wives' Club: Mapping the Impact of Polygamy in U.S. Immigration Law*, 27 BERKELEY J. INT'L L. 382, 382-83 (2009); *see, e.g.*, Kerry Abrams, *Immigration and the Regulation of Marriage*, 91 MINN. L. REV. 1625 (2007).

224. Smearman, *supra* note 223, at 382-83.

225. An Act to Execute Certain Treaty Stipulations Relating to Chinese, 22 U.S. Stat

Still, the ban on polygamy was not a new ban. Bigamy had long been banned under the common law and repudiated in the states.[226] In recognizing the marriages of ex slaves, Congress and the states insisted that if they had multiple spouses either due to separation by sales or otherwise, they had to choose which spouse they desired.[227] Arguably, in the polygamy cases involving immigrants, the moral objection to polygamy was often an excuse for racism, but racism was not the sole reason for the objection to polygamy.

ii. Rejecting "Fraudulent" Marriages in Immigration

The federal government has refused to acknowledge marriages entered into solely for the purpose of gaining access to the United States.[228] On the other hand, in a variety of contexts, some states have refused to annul "sham marriages," on the theory that to ignore the marriage vows that individuals enter would do violence to the essence of what it means to be "married."[229]

Congress' power to prosecute marriages undertaken solely to gain

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58 (May 6, 1882) (limiting the number of Chinese citizens coming into the country). The Act stated that the "the coming of Chinese laborers to this country endangers the good order of certain localities." The order authorized the suspension of Chinese immigration for ten years. *See also* Ertman, *supra* note 137, at 306; Ming-sung Kuo, *The Duality of Federalist Nation-Building: Two Strains of Chinese Immigration Cases Revisited*, 67 ALB. L. REV. 27, 28 (2003); Smearman, *supra* note 223, at 391-95.

226. BLACKSTONE, *supra* note 18, at *56.

227. *See supra* note 136-37 and accompanying text.

228. *See* Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (codified as amended at 8 U.S.C. §§ 1154, 1184, 1186a (1994)); *see also* H.R. REP. NO. 99-906, at 6 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5978, 5978. Marriage fraud has been prosecuted, *inter alia*, under 8 U.S.C. § 1325 (prohibiting marriage fraud) and 18 U.S.C. §1546(a) (outlawing fraud and misuse of visas and other permanent documents). An "individual who knowingly enters into a marriage for the purpose of evading any provision of the immigration laws" faces a penalty of five years imprisonment and/or a $250,000 fine. 8 U.S.C. § 1325(c) (2006).

229. Hanson v. Hanson, 191 N.E. 673, 674 (Mass. 1934); *see also* Schibi v. Schibi, 69 A.2d 831, 834 (Conn. 1949) (denying annulment where parties married only to give a name to a prospective child); De Vries v. De Vries, 195 Ill. App. 4 (Ill. App. Ct. 1915) (denying annulment where parties entered into marriage to prevent nullification of husband's employment contract); Bishop v. Bishop, 308 N.Y.S.2d 998, 998 (Sup. Ct. 1970); Erickson v. Erickson, 48 N.Y.S.2d 588, 589 (N.Y. App. Div. 1944) (holding similarly to *Schibi*); Delfino v. Delfino, 35 N.Y.S.2d 693, 696 (N.Y. App. Div. 1942) (denying annulment where purpose of marriage was to protect the girl's name and there was an understanding that the parties would not live together as man and wife); Bove v. Pinciotti, 46 Pa. D. & C. 159, 164 (Ct. Com. Pl. 1942); Campbell v. Moore, 1 S.E.2d 784, 790 (S.C. 1939) (refusing an annulment where parties entered marriage for the purpose of legitimizing a child); Chander v. Chander, No. 2937-98-4, 1999 WL 1129721, at * 2 (Va. Ct. App. June 22, 1999) (denying annulment where wife married husband to get his pension with no intention to consummate marriage because husband knew that was the purpose of the marriage). *See generally* Kerry Abrams, *Marriage Fraud*, 100 CAL. L. REV. 1, 7-14 (2012) (discussing when misrepresentations between parties would lead to annulment).

immigration benefits was recognized in *Lutwak v. United States*. Congress had passed the War Brides Act in 1945 in order to allow service members who had married alien brides to bring their spouses to the U.S. with them.[230] Several persons were prosecuted for entering into marriages solely to obtain, or helping others to obtain, the benefit of immigration. At the time of the decision there was no specific federal statute barring marriage fraud. All plaintiffs had satisfied the technical requirements of the state laws for marriage. Still, the federal government balked at providing immigration benefits based upon these marriages. The Supreme Court agreed, stating that to hold otherwise would undercut the statutory purposes behind the War Brides Act:

> Congress intended to make it possible for veterans who had married aliens to have their families join them in this country without the long delay involved in qualifying under the proper immigration quota. Congress did not intend to provide aliens with an easy means of circumventing the quota system by fake marriages in which neither of the parties ever intended to enter into the marital relationship[.][231]

The *Lutwak* Court asserted that in making its determination, Congress could rely upon a "common understanding" of the term "marriage."[232] For the Court, under federal law, this meant "the two parties have undertaken to establish a life together and assume certain duties and obligations."[233]

The Supreme Court rejected the view that it or Congress was infringing upon state authority. The Court expressly acknowledged "the general American rule of conflict of laws that a marriage valid where celebrated is valid everywhere unless it is incestuous, polygamous, or otherwise declared void by statute."[234] However, it declared that denying immigration benefits did not in fact involve the validity of a marriage, but rather involved vindication of the laws of the United States.

> We do not believe that the validity of the marriages is material. No one is being prosecuted for an offense against the marital relation. We consider the marriage ceremonies only as a part of the conspiracy to defraud the United States and to commit offenses against the United States. In the circumstances of this case, the ceremonies were only a step in the fraudulent scheme and actions taken by the parties to the conspiracy.[235]

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230. Lutwak v. United States, 344 U.S. 604, 611 (1953).

231. *Id.*

232. *Id.*

233. *Id*. Under current regulations, parties may prove a valid marriage under federal law by providing proof of integrated finances, shared domicile, intimacy and publicly holding oneself out to others as married. *See, e.g.*, 8 C.F.R. § 216.4(a)(5) (2009).

234. *Id.*

235. Lutwak, 344 U.S. at 611; *see also* United States v. Yum, 776 F.2d 490 (4th Cir.

The *Lutwak* case is consistent with the conflict of laws notion that a forum has greater flexibility when the question is affording the "incidents" of a marriage. However, the practical effect of Congress' decision not to recognize a marriage in immigration is to completely bar the marriage from recognition within the United States. The Court did not cite plenary power as the basis for its rejection of the marriage. Instead, it relied upon the need to vindicate the policies of a federal statute.

It is worth noting, however, that these cases likely pose very few problems by way of federalism concerns. While states might refuse to annul such marriages based on local policy,[236] they are not likely unhappy when the federal government determines that those who did not take the vows of marriage seriously should not be allowed into the country as "married" persons.

C. Deviating From the Incidents of Local Marriage Policy, Though Still Recognizing the Marriage as Valid Overall

In the overwhelming number of cases, Congress' deviation from local marriage law is not complete. That is, Congress recognizes the marriage, but overlooks some incidents of state law with respect to the marriage. I would argue that these examples are but differences in degree from broader deviations, tailored to meet the perceived federal interest at stake.

1. The Oregon Donation Law's Provision for Separate Property Rights for Married Women in Oregon Territory

A historical example of this narrower approach is found in Oregon Donation law.[237] Congress and the states regularly used a system of free or very cheap land grants to encourage white settlers to move beyond the original colonies and ultimately from sea to shining sea. It was common to limit those who could take such grants to white males.[238] Typically, the

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1985); Johl v. United States, 370 F.2d 174 (9th Cir. 1966); Chin Bick Wah v. United States, 245 F.2d 274 (9th Cir. 1957). *But see* United States v. Lozano, 511 F.2d 1 (7th Cir. 1975); United States v. Diogo, 320 F.2d 898 (2d Cir. 1963). *Cf.* United States v. Sarantos, 455 F.2d 877 (2d Cir. 1972). Nor does it matter that the subversion of federal purposes was unintentional in DOMA cases. *Cf.* Lucas v. Earl, 281 U.S. 111 (1930) For income tax purposes, the government would not recognize the couple's contract to recharacterize community property as joint property even though it was not done many years prior because the husband was ill and in the event of death, the couple wanted property to pass outside of probate.

236. *See* discussion *supra* p. 751; *supra* note 229.

237. Donation Land Claim Act of 1850, ch. 76, 9 Stat. 496 (Oregon land); *see infra* note 344.

238. Regardless of parentage, those considered black were expressly excluded from the Oregon land grants discussed herein, as were American Indians unless they had white fathers. Oregon passed its own married women's property act in 1866. *See Oregon History: Minorities*, OR. BLUE BOOK, http://bluebook.state.or.us/cultural/history/history18.htm (last visited Mar. 4, 2013).

grants also provided that if the applicant were married, he would receive an extra portion to support his family. The "Oregon Donation Law" was unique because it provided that a wife would receive that extra portion as her own *separate legal* share, subject, of course, to her husband's control.[239] The reason for deviating from the common law seems obvious. Congress wanted to attract *female* mates for the men who would settle there (or encourage existing wives to take the trip), thus encouraging procreation and populating the land with white settlers.[240]

In *Maynard v. Hill*,[241] the Supreme Court confronted the question of whether a husband could apply as a married man for a double portion, obtain a divorce from the local legislature in his wife's absence, remarry, and then perfect title through a new bride, thus depriving the first wife of her share under the statute. David Maynard did just that. Promising his wife he would later send for their family, he left Ohio for California but ended up in Oregon where he met a new love and high-powered friends. He used his influence to obtain a decree of divorce from the territorial legislature and then married his new girlfriend. His wife was not entitled to be served with notice because, under the common law, a wife's domicile was wherever her husband's was, but Lydia Maynard found out somehow and sued. The Court followed Oregon Law to a point, accepting that David Maynard was "divorced" for purposes of federal law. But that's where the deference ended. Although he was also "married" under local law, the Court declined to consider him "married" within the meaning of the federal statute. For purposes of federal law, the Maynard was treated as a single, divorced man. By the time of the Court's decision, Maynard and his first wife had died. His new wife secured his portion; his children by his first wife, then adults, got nothing. The short shrift given to Maynard's first wife and her descendants establishes that the goal of the Oregon Donation statute's spousal provisions was increasing the population of Oregon through white families, not recognizing women's rights or protecting all children.[242]

See also note 344.

239. Donation Land Claim Act of 1850, ch. 76, 9 Stat. 496.

240. *Id*.

241. Maynard v. Hill, 125 U.S. 190 (1888).

242. *See* Fields v. Squires, 9 F. Cas. 29, 33 (C.C. Or. 1868) (No. 4,776) ("The evident policy of the law was to give to husband and wife an equal quantity of land . . . . The settlement of a married man is intended for the benefit of his wife as well as himself—to enable her to obtain her equal share of the bounty of the grantor."). For an article considering the logic of this provision, *see* Steven H. Hobbs, *Love on the Oregon Trail: What the Story of* Maynard v. Hill *Teaches Us About Marriage and Democratic Self-Governance*, 32 HOFSTRA L. REV. 111, 117 (2003) (providing more of the backstory for *Maynard v. Hill* and surmising that population growth was the intent of the statute).

2. Adoption of a Unique Marital Property Characterization for Fair Income Tax Treatment of Community Property and Separate Property States

Another example of deviation as to incidents appears in Congress' efforts to settle differences in income tax treatment between citizens in community property states compared with those in separate property states.[243] Before 1947, taxpayer couples in community property states with only one spouse working outside of the home had a financial advantage over married couples in separate property states. Couples in the community property states were able to split the income between the paycheck and stay-at-home spouses in filing their taxes. Consequently, under a progressive tax system, the community property state couple ended up in a lower tax bracket than a similarly situated couple in a separate property state. The latter was forced to attribute all income to only the spouse who received a paycheck. This result occurred because federal law followed state law on the definition of marital property. The U.S. Supreme Court ruled in *Poe v. Seaborn* that community property couples could seize their advantage in the absence of contrary federal law.[244]

This issue was more complex than merely "good" community property states that respected women versus "bad" separate property states that didn't. Despite celebrating the "fairness" and wisdom of their system to women,[245] most community property states had divested the wife of a key aspect of ownership by placing control of the community property with the husband. And while claiming that the community property system was a sham to avoid taxes, men in separate property states were using the Married Women's Property Acts to shift property to their spouses, thus claiming lower taxes on the theory that the property or income earned from that property was not and never was theirs.[246] Whatever rule Congress came up

243. Windsor v. United States, 133 S. Ct. at 786 (grant of petition for *writ of certiorari*) (In creating the marital deduction, Congress assumed a couple made up of a man and a woman.); Brief On The Merits Of *Amici Curiae* United States Senators Orrin G. Hatch, et al, at 14-15.

244. Poe v. Seaborn, 282 U.S. 101, 118 (1930).

245. *See Community Property Income: Hearings on H.R. 8396 Before a Subcomm. of the H. Comm. on Ways and Means*, 73rd Cong. 37 (1934) (statement of Sen. Henry F. Ashurst) (praising his state of Arizona's system as "chivalry" and "gentlemanly").

246. *See* Revenue Act of 1948, Pub. L. No. 80-471, 62 Stat. 110 (dismissing the idea that control undercut community property rule); *Community Property Income: Hearings on H.R. 8396 Before a Subcomm. of the H. Comm. on Ways and Means*, 73rd Cong. 61, 64 (1934) (statement of Helen Carloss, Department of Justice); *Community Property Income: Hearings on H.R. 8396 Before a Subcomm. of the H. Comm. on Ways and Means*, 73rd Cong., 184-92 (1934) (statement of Sen. Tom Connally); *see also Community Property Income: Hearings on H.R. 8396 Before a Subcomm. of the H. Comm. on Ways and Means*, 73rd Cong. 38-40 (1934) (statement of Benjamin H. Bartholow, Special Assistant to the Secretary of the Treasury) [hereinafter Bartholow Statement] (noting that in some states, a husband could alienate property without the

with, states were adjusting their laws to try to ensure that their citizens received at least as much advantage as citizens in other states.[247]

Around 1934, Rep. Allen Treadway of Massachusetts, a separate property state, proposed a bill to attribute the income to the spouse who controlled it under state law. The 1934 congressional hearings on the subject turned into a debate about the federal government's power to affect marriage laws.[248] The Chief of Staff to the Joint Committee on Internal Revenue Taxation noted that among lawyers everywhere there was a "great deal of controversy" over the question of whether the federal government could ignore state definitions and tax community property income.[249]

The concern that federal officials expressed was the need for uniform treatment among similarly situated groups. General Counsel for the IRS, E. Barrett Prettyman, wrote a letter underscoring the role that marriage laws played in this outcome. Looking to who controlled the property was fair, he said, because the local laws "make it possible for the taxpayer to surrender title to another and to keep dominion for himself, or if not technical dominion, at least the substance of enjoyment."[250] Of course, Prettyman's view depended upon a rejection of the "marital partnership" theory of the community property system. Treasury's Bartholow stated, "[a]s time went on, it was felt that the right of husband and wife in these community-property states to divide, the income which, in the usual case, is earned by the husband as the breadwinner, ran counter to the principle of imposing graduated rates on large incomes."[251]

Eventually, Congress decided that it was impractical to force what was in effect a common law rule upon community property states, but it did not adopt a partnership theory of marriage nor did it continue to allow each state to go its own way. Instead, to accomplish the goal of uniform treatment, Congress adopted language that allowed any couple the option of income splitting, essentially affording to all the choice of treating property as community property for income taxation purposes.[252] This new

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wife's consent although he had to use the income for her benefit).

247. *See generally* Stephanie Hunter McMahan, *To Save State Residents: States' Use of Community Property for Federal Tax Reduction*, 1939-1947, 27 LAW & HIST. REV. 585 (2009).

248. *See generally Community Property Income: Hearings on H.R. 8396 Before a Subcomm. of the H. Comm. on Ways and Means*, 73rd Cong. (1934).

249. *Community Property Income: Hearings on H.R. 8396 Before a Subcomm. of the H. Comm. on Ways and Means*, 73rd Cong. 10-11 (1934) (statement of Lovell H. Parker, Chief of Staff, Joint Comm. on Internal Revenue Taxation).

250. *Community Property Income: Hearings on H.R. 8396 Before a Subcomm. of the H. Comm. on Ways and Means*, 73rd Cong. 24 (1934) (letter from E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue).

251. Bartholow Statement, *supra* note 246, at 31.

252. Revenue Act of 1948, Pub. L. No. 80-471, § 303, 62 Stat. 110, 111-14 (1948).

rule deviated from the past practice of looking to state law.

There are numerous other examples of partial deviation involving marital property rules. In 1979, in *Hisquierdo v. Hisquierdo*, the Supreme Court held that benefits under the Railroad Retirement Act of 1974 were not subject to community property rules.[253] In *Egelhoff v. Egelhoff*, the Court determined that Congress had preempted state community property rules to define retirement rights under ERISA.[254]

D. The Unique Case of American Indian Tribal Marriages

The final case of federal intervention into local marriage laws that this article considers is the federal handling of American Indian tribal marriages. The relationship between the Indians and the federal government was and is far different than the relationship between the federal government and its states or territories. First, Indians were not parties to the Constitutional compact; instead they were objects of it for the Constitution gave Congress plenary power over matters concerning Indian tribes.[255] Second, in earlier history, tribal members were not deemed American citizens.[256] Third, Indian sovereignty, though asserted, was not consistently respected. As early as 1830 the Supreme Court rejected the Indians' claims that they should be treated like "foreign nations" vis a vis the states.[257] Instead, the Court said they were "in a state of pupilage," and "their relation to the United States resembles that of a ward to his guardian."[258] And, while Congress' oversight of U.S. territories often involved fitting these territories to become states, Congress' early intentions were far less clear with respect to how the American Indian peoples' would fit into the populace. Congress eventually allowed individual citizenship but only after the Indians had been forced to cede a

253. Hisquierdo v. Hisquierdo, 439 U.S. 572, 590 (1979).

254. Egelhoff v. Egelhoff, 532 U.S. 141, 151-52 (2001); *see also* Boggs v. Boggs, 520 U.S. 833, 853 (1997) (stating that preemption of state law is required to avoid diversion of retirement benefits).

255. *See* U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. art. IV, § 3, cl. 1 (the "Commerce Clause").

256. Act of June 2, 1924, 43 Stat. 253, Pub. L. No. 175 codified as amended as 8 USC § 1401(b) (1982) (authorizing Indians to become citizens). Some Indians became citizens pursuant to other laws. For example, the Act of 1890, which applied Arkansas to Indian Territory, allowed tribal members to apply to become American citizens but retain their Indian citizenship. *See* Act of May 9, 1890, (Oklahoma Organic Act), ch. 182, §§ 1, 29, 26 Stat. 81, 93 (1890).

257. *E.g.*, Cherokee Nation v. Georgia, 30 U.S. 1,17-18 (1831). Indians could not sue in federal court under diversity statute because they were neither citizens of the United States nor foreign states despite their claims of the latter.

258. *Id.* For a thorough discussion of federal treatment of their status see Judith Resnik, *Dependent Sovereigns: Indian Tribes, States and the Federal Courts*, 56 U. Chi. L. Rev. 671 (1989).

great deal of their lands and culture.[259]

Still, despite the fact that the Indians were not treated as full sovereigns, courts did see the Indians as distinct political communities entitled to local governance under traditional conflict of law rules.[260] Congress generally treated tribal marriage as a local issue, unless a federal interest compelled a contrary result.[261]

States also sometimes had occasion to interpret tribal marriage issues. They too applied conflict of law principles to their decisions.[262] Polygamy was one notable exception.[263] However, sometimes even in polygamous

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259. The government made numerous attempts to force assimilation of the Indian tribes into American western culture. These efforts, which were primarily a response to desires of white settlers for more lands then occupied by Indians, tended to have disastrous consequences. *See e.g.*, Hodel v. Irving, 481 U.S. 704, 706-09 (1987) (discussing disastrous federal policies intended to force American Indians to adopt farming and private land ownership approaches of whites in order to speed assimilation and to free land for white use). In the late nineteenth and early twentieth centuries, officials also encouraged Indians to send their children away from reservations and to educate them in government sponsored boarding schools that stressed white and Eurocentric culture. *See The Broken Crucible of Assimilation: Forest Grove Indian School and the Origins of Off-Reservation Boarding-School Education in the West*, 101 OREGON HIST. QUARTERLY, Vol. 101, No. 4 (Winter, 2000), pp. 466-507. It is clear, however, that early on Indians valued their sovereignty and did not want either citizenship or assimilation. *Cherokee Nation*, 30 U.S. at 17-18.

260. Worscester v. Georgia, 31 U.S 515 (1832) (entitling Indians to local governance authority as in Law of Nations); *Cherokee Nation*, 30 U.S. at 17-18.

261. A 1909 Governmental report explained federal approaches tried to summarize federal approaches to Indian marriage law between 1867-1906. It describes the approach as treating Indian statutes like the marriage statutes of states, if that custom could be proved by congressional standards and was not in conflict with federal law or policy. If local custom could not be proved to satisfaction, then the court followed the common law. Department of Commerce and Labor, Bureau of the Census, Special Report, Marriage and Divorce 1867-1906, Summary Laws, Foreign Statistics (1909).

262. *E.g.*, Wall v. Williamson, 8 Ala. 48, 1845 (1845) (showing that customary marriage contracted among tribe in own territory should have been considered valid under Alabama law); Weatherford v. Weatherford, 20 Ala. 548 (1852) (declining to recognize marriage where no proof conducted according to custom); Compo v. Jackson Iron Co., 50 Mich. 578 (1883) (stating at the time in question in lawsuit, Indian tribes were sovereigns and absent US law to the contrary, "they have as complete power to determine their own domestic relations as any other organized community would have"); Buck v. Branson, 34 Okla. 807 (1912) (recognizing a long tradition of states abiding by Indian marriage laws both between the Indians and in cases of intermarriage); McBean v. McBean, 37 Ore. 195 (1900) (declaring that a marriage valid in the place contracted is valid everywhere). There was also the view that the matter was a federal, not state matter; *e.g.*, Boyer v. Diveley, 58 Mo. 510 (1875) (noting that an Indian marriage and inheritance subject to federal not state jurisdiction).

263. Regarding public policy see Boyer v. Diveley, 58 Mo. 510 (1875) (referencing marriages as between "opposite sex" although that issue not specifically raised). Despite the rule of local deference, "when an alleged marriage does not contain the essential elements of a marriage as known to our laws, it ought not to be enforced as it is "no marriage." Wall, 8 Ala. at 48 (excepting incestuous or polygamous marriages despite the rule of comity); Tower v. Towie, 368 P.2d 488 (Okla. 1961) (recognizing marriage according to Cherokee custom, and noting strong policy in favor of presuming legitimacy from the cohabitation); Henson v. Johnson, 246 P. 868 (Okla. 1926) (recognizing Arkansas law applicable by Act of Congress and that the same would look to Indian law but refusing to recognize polygamous marriage as contrary to

marriages, courts would find a way to accept the marriage if the context involved the inheritance of or legitimacy of an Indian child.[264]

The federal treatment of Indian marriage (and even the Indians' own treatment of intermarriage with whites) also became intricately tied up with white settlers' quest for land and Indian attempts to preserve their unique culture. Marriage to an Indian woman often conferred tribal membership and property rights upon a white husband.[265] To prevent the hemorrhaging of land and culture and to discourage temporary marriages to Indian women merely for the sake of obtaining land, the Indians themselves began to seek limits on marriages between white men and Indian women. Some of these restrictions came in the form of limitations on tribal rights flowing from female marriage to one outside of the tribe.[266] In 1897, the federal government reversed this trend by declaring that Indian women who married "white" men would have the same rights to property as any other member of the tribe.[267] They did not consistently offer the same rights to Indian women who married black men.[268]

In 1890, as part of the Oklahoma Organic Act, an act to establish a temporary American government for what was to become the state of Oklahoma, Congress specifically declared that all marriages then existing pursuant to Indian custom were valid.[269] It recognized as legitimate the

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federal law and denying attendant inheritance rights); *see also*, James v. Adams, 155 P. 1121, 1122 (Okla 1915); Cyr v. Walker, 116 P. 931, 934 (Okla. 1911).

264. Earl v. Godley, 44 N.W. 254 (Minn. 1890) (focusing on Indians separate and capable of managing own domestic relations and children are not illegitimate); Ortley v. Ross, 110 N.W. 982 (Neb. 1907) (declaring that children of polygamous marriage treated as legitimate); Kobogum v. The Jackson Iron Company, 43 N.W. 602 (Mich. 1889) (noting that absent federal law, Indian laws control their domestic relations).

265. Act of Aug. 9, 1888, 23 Stat. 392 and June 7, 1897, *reprinted in* 1 INDIAN AFFAIRS: LAWS AND TREATIES 38 (Charles J. Kappler ed., 1902) (referencing tribal and land rights gained through marriage).

266. *See* Compiled Laws of the Cherokee Nation, Article XV, §70 *in* 1 JOHN L. ADAIR, COMPILED LAWS OF THE CHEROKEE NATION 246, 276 (1881) (noting the importance of tribal cohesion and requiring a white man desiring to marry a Cherokee bride to pay a fee, show evidence that he was not previously married, and be supported by a group of other Cherokees); *see also* Act of Aug. 9, 1888, 23 Stat. 392 and June 7, 1897, *reprinted in* 1 INDIAN AFFAIRS: LAWS AND TREATIES 38 (Charles J. Kappler ed., 1902) (discussing a white man who married an American Indian woman outside of "five civilized tribes" and who did not gain property rights of tribal members or rights to her land; an American Indian woman who properly married a white man gained U.S. citizenship and also the status of a married woman, but reserved her title in tribal property).

267. Act of June 7, 1897, ch. 3, 30 Stat. 90l; *see also* FELIX COHEN, HANDBOOK ON FEDERAL INDIAN LAW 4 (1942) (discussing the Act and effects upon children of mixed marriages with whites or blacks).

268. COHEN at 4 (noting mixed precedents on effect of Indian woman marrying black man).

269. Act of May 9, 1890, (Oklahoma Organic Act), ch. 182, §§ 1, 29, 26 Stat. 81, 93 (1890); *see also* Sperry Oil & Gas v. Chisolm, 264 U.S. 488 (1924) (discussing the Oklahoma Organic Act which made Oklahoma territory); Bartlett v. Okla. Oil Co., 218

children of prior marriages, however constituted, thus securing inheritance and other rights for them under U.S. law. But *at the same time*, Congress, for the future, adopted the state substantive law of Arkansas as the law for "Indian Territory, insofar as those laws did not conflict with Congressional intent." The Act exempted that portion of land actually *occupied* by the "Five Civilized Tribes" and certain others of the Indians.[270] The Indians retained power to punish Indians for violations of Indian laws. The laws also required that U.S. citizens desiring to marry an Indian woman had to attend to the customary preliminaries of such marriages as prescribed by the relevant tribe.[271] The Act purported not to change Indian rights; however, some argued that it did alter existing treaties but that the tribes had little power to prevent it.[272] In the Curtis Act of 1898, Congress determined that state law should govern Indians with respect to all matters, including marriage.[273] But sometimes, courts held these statutes to not apply when the cases only involved Indians.[274]

In a modern era, the United States has given greater respect to the Indians' right to determine their own domestic relations.[275] That deference

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F. 380 (1914).

270. Oklahoma Organic Act, *supra*, note 269. "Five Civilized Tribes" was the name whites used for Indians who joined in early treaties with Americans. *See* Nevada v. Hicks, 533 U.S. 353, 282 (2001) (Souter, J. Concurring) (noting the Treaty with the Cherokees, (1835), U.S.-Cherokee Nation, 7 Stat. 478. Treaty with the Choctaws and Chickasaws, Art. 7, 11 Stat. 612 (1855), and Treaty with the Creeks and Seminoles, Art. 15, 11 Stat. 703 (1856)). Under these treaties the Indians often ceded land and local governance rights for peace; *see, e.g.*, Treaty with the Cherokees, Dec. 9, 1835, U.S.-Cherokee Nation, 7 Stat. 478.

271. Act of May 2, 1890, § 38, c. 182, 26 Stat. 81, 98: *see, e.g*, Johnson v. Slate, 60 Ark. 308 (1895). Prior to 1890, Indian law applied. For a general discussion of treatment of Indian marriage laws see DEPARTMENT OF COMMERCE AND LABOR, BUREAU OF THE CENSUS, SPECIAL REPORT, MARRIAGE AND DIVORCE 1867-1906, SUMMARY LAWS, FOREIGN STATISTICS, 215-17 (1909) [hereinafter COMMERCE MARRIAGE REPORT] (discussing application of Arkansas law to Indian territory); 1-4 Cohen's Handbook of Federal Indian Law, §4.01 (Inherent Indian Sovereignty).

272. 21 CONG. REC. 3712, 3715 (1889) (statement by Mr. Butler) (arguing Oklahoma Organic bill breaches treaty, referencing mild letter from Cherokee delegation that asked for only two changes though it also noted surprise that offer is not worse and saying that the Indians are in the position of "powerless and helpless" people and "are simply constrained from force of circumstances to accept this as a choice of evils").

273. Act of June 28, 1898; *see also* Marlin v. Lawallen, 276 U.S. 58 (1928).

274. *See* COMMERCE MARRIAGE REPORT, *supra* note 271, at 215-17 (discussing federal control of Indian Territory, acknowledgement of customs and application of state law); *see also* Barnett v. Prarie Oil & Gas, 19 F.2d 504 (8th Cir. 1927) recognizing applicability of Oklahoma law but applying "exclusive and mandatory" local ordinance of Creek Indians as well to determine inheritance).

275. *See* Montana v. United States, 450 U.S. 544, 564 (1981) ("Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members."); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56 (1978) ("Although no longer possessed of the full attributes of sovereignty, they remain a separate people, with the power of regulating their internal and social relations and laws restricting rights of children born

is now being tested for shortly before it issued the *Windsor* opinion, the Supreme Court issued a narrow interpretation of the Indian Child Welfare Act.[276]

While Congress had plenary power over the Indians, when Congress deviated the reason was not the plenary power itself. The reason was a determination that respecting Indian local rule conflicted with a perceived federal interest. Very often that federal interest was the desire for land and expansion. Deference to local custom with respect to Indian customary marriages was also made easier by the fact that there was no fear that recognition of *Indian* local customs would lead to alteration of *state or federal* marriage customs.

As with the history of other minority groups that have faced broad scale racial or cultural discrimination, an analysis of marriage that focuses solely on the narrow lens of "marriage rights," sells American Indian history far short, dismissing racial and cultural discrimination as unrelated to marriage. Actions that weakened the community as a whole—such as forcibly removing Indians from lands they occupied and or requiring that they adhere to majority cultural norms including marriage norms—likely posed as much or even more difficulties for the security of Indian marriages, families, and communities, than rules determining whether or not a particular marriage was valid or not.[277] Such actions magnify the impact of unfair marriage rules and restrict the ability of a targeted minority community to resist, modify or adjust to them. It also must not be forgotten that those we call in retrospect the "Indians" were in fact many tribes with distinctive domestic relations traditions and cultures.

IV. SUMMARIZING THE FEDERAL GOVERNMENT'S APPROACH TO

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to female tribal member when the mothers marry outside the tribe are valid."); US v. Jarvison, 409 F.3d 1221 (10th Cir. 1979) (finding that marriage is consistent with Navajo customs and therefore marital privilege shields a wife from testifying in a child abuse case against the husband even though exception might apply in non-Indian case). *But see* Antoinette Sedillo Lopez, *Evolving Indigenous Law: Navajo Marriage-Cultural Traditions and Modern Challenges*, 17 ARIZ. J. INT'L & COMP. L. 283, 292 (2000) (criticizing the government approaches to cultural norms in particular polygamy).

276. Adoptive Couple v. Baby Girl, 12-399 (U.S. June 25, 2013) (holding that the Act did not apply to bar a white couple's adoption of a part Cherokee child when the Cherokee father had declined to support the child, had not exercised parental rights before adoption, and had never had custody of the child). In this case, the baby's mother requested that the father waive his parental rights to avoid child support but did not inform the father of plans to put the child up for adoption to any willing couple. Only the child's father is a member of the Cherokee Nation.

277. *See, e.g.*, The Indian Removal Act of 1830, 4 Stat 411 (1830) (authorizing removal of Indians from lands in the Southeastern United States into Western US territories). *See generally* John W. Ragsdale, Jr., *Values In Transition: The Chiricahua Apache From 1886-1914*, 35 AM. INDIAN L. REV. 39, 46-82 (2010) (discussing the Removal Act and other actions that drove Indians off of lands).

MARRIAGE

A. Deference to Local Rule as the General Approach

The federal government has historically looked to local laws to determine the validity of a marriage (not merely to state laws). It has done so even when acting pursuant to its enumerated Constitutional powers and even when its power was plenary. Of course, deference in the case of states does involve unique questions of federalism, but federalism is not the sole reason for deference. It should be noted that deference also might have resulted from a kind of "practical federalism," that is a concession that given the circumstances and despite federal authority, it is simply easier to follow state law. That law is already well developed; those who it would affect are familiar with it; adopting state law may encourage the states to buy what the federal government is peddling that week; and often there is simply no conflict with federal interests even if deference results in variation in application of local laws among the several states. The same practicalities can restrict federal action even when there is a need for it. Such was the case, I would argue, in the early termination of the Freedman's Bureau work and the failed promises of Reconstruction.

When acting pursuant to its enumerated powers, the federal government has deviated from local deference when deference would conflict with an important federal policy. In some cases, it has rejected the *validity* of the marriage completely for all purposes, such as Utah polygamy laws and immigration law barring entry of immigrant "spouses" engaged in fraudulent marriages. These two instances involved assertions of plenary power, although the matter of power over the local actions of territories was then debated.

Congress has also accepted marriages completely for *all* purposes, contrary to state law. The ex-slave marriages conducted under the oversight of the Freedmen's Bureau and U.S. military are examples.[278] That case involved War Powers and, at the appropriate times, the authority of amendments to the Constitution with respect to the ex-slaves.

When federal interests so dictated, Congress has also granted a narrow set of *incidental* rights to marriages even when the state deemed those marriages *invalid*. The recognition of "slave custom" marriages solely for pension purposes when rebel states would not recognize them is such a case. In that situation, the federal interest was recruiting for the U.S. military in the context of the Civil War.[279]

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278. *See* discussion *supra* pp. 751-53.

279. This construction does not negate the possibility that some Congressmen voted for the policy because they wanted to end slavery.

Finally, Congress has also adopted different *incidents* for marriage than state or local law would normally suggest, while still recognizing the marriages' *validity*. Such was the case with Oregon Donation law and the settlement of conflict over the income taxation of marital property.[280]

It appears that Congress has deviated only to the extent necessary to vindicate the perceived federal interest. History thus advises caution in federal determinations relating to marriage and family. It also suggests that the central question that Courts should consider in reviewing federal deviations from state law is whether a legitimate federal *purpose* is served by the deviation, a question that presumes an appropriate federal power.

B. Three Historical Justifications for Deviation

I would argue that we can classify the justifications for deviation that emerge from history into three categories. In some cases, more than one has applied to a given case.

1. Fulfilling a Constitutional Duty

Deviation has occurred when the federal government claimed that following local law would conflict with a perceived constitutional duty. Here we can place both instances of recognizing slave marriages, to the extent that they vindicated a "duty" to save the union or were an execution of the promises of the Civil War amendments.[281] We can also place here the attack on polygamy in Utah, but only to the extent that it was triggered by Supremacy Clause concerns or Congress' constitutional obligations to prepare the territories for statehood. A third example is the rejection of state marital property rules for income taxation, to the extent that Congress felt the deviation fulfilled a constitutional duty to treat the states uniformly as part of its charge to protect the general welfare. It is doubtful that DOMA is needed to fulfill a constitutional duty.

2. Preserving a Purpose or Scheme in Existing Statutes, Rules, or Treaties

The second justification of deviation is that following local law would undercut an existing statutory purpose or scheme, federal rule, or treaty. Here we can place the decision to reject "fraudulent marriages" for immigration purposes in vindication of the immigration statute.[282] Here one can place the deviation from local marital property rules in taxation, on the theory that following local law would undercut the predetermined progressive taxation scheme or run counter to the implicit statutory

280. *See supra* p. 753 (Oregon); *supra* p. 754 (taxes).
281. *See* discussion *supra* pp. 721-37.
282. *See* discussion *supra* pp. 750-51.

assumption in then-existing income tax laws that only those who received a paycheck earned the marital income.[283] Here, too, belongs the Supreme Court's rejection of David Maynard's second marriage in *Maynard v. Hill*, on the ground that Congress did not intend a husband to apply for land while married to one wife, divorce and marry a second wife, and still claim, as a "married" man, a double portion of territorial land.[284] Those who argue that DOMA supports procreation are essentially arguing that DOMA was intended to preserve a purpose or scheme in existing statutes, rules, or treaties. As I will explain later, there is some merit to the argument that procreation is linked to federal statutes affecting marriage, although the broadest DOMA went beyond that which is required to preserve that link.

3. Preserving a Federal Policy That is Neither Already Rooted in an Existing Statute, Rule, or Treaty Nor Constitutionally Compelled

The third justification for deviation is that following local law would jeopardize a federal policy that stands apart from any specific statute, rule, or treaty and is not constitutionally compelled, but is argued to be authorized and appropriate.[285] This justification contains the potential for the most mischief because the policies, by definition, have not been vetted by public processes, as have Constitutional provisions or statutes. Specific historical examples in this category include the attacks on polygamy, but only to the extent that they were based upon an antipathy toward Mormonism or polygamy. We can place here rejection of state community property characterizations, if based upon conclusions that separate property regimes are better for society or even that women, by gender, should not be afforded equal ownership in marital property. In DOMA cases, Plaintiffs would claim that the federal policy is anti-homosexual animus. Defendants would argue that DOMA was designed to preserve the institution of traditional marriage. Claims that question the appropriateness of same-sex parenting also belong here.

C. The Role of the "Majority of States," Uniformity and of the Common Law

In times of interstate conflict that affected desired federal outcomes, the federal government has tended to follow the approach of the majority of states and/or the common law. At the start of the union, slaveholding states

283. *See* discussion *supra* pp. 754-57.

284. *See* discussion *supra* pp. 753-54.

285. Reynolds v. United States, 98 U.S. 145, 166 (1878) ("[U]nless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.").

were in the majority, but by the time that the federal government recognized slave marriages during the Civil War,[286] slaveholding states were in the minority.[287] Courts have approved of the approach and have taken it themselves.[288] Thus, while the Supreme Court made history in *Loving v. Virginia* by striking down such laws criminalizing the act of interracial marriage, by the time it did so, as the Court specifically noted, "only" sixteen of the fifty states continued to have such bans.[289] At press time, thirteen states and the District of Columbia license same-sex marriages.[290]

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286. S*ee* discussion *supra* p. 721-33.

287. S*ee* CONG. GLOBE, 36th Cong., 1st Sess. App. 230 (1860) (lamenting change in union and noting slave states were seceding to "check" the "evil of overgrowth of the free states."). It is well known that until the decade prior to the Civil War, Congress had taken pains through a number of compromises to keep the number of slave and free states *exactly equal* as a measure to preserve the union. In 1852, slaveholding states argued that the "general government" had abdicated its role as the "common agent." *Confederate States of America – Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union*, AVALON PROJECT, http://avalon.law.yale.edu/19th_century/csa_scarsec.asp (last visited Mar. 5, 2013).

288. *See, e.g.*, Jaffee v. Redmond, 518 U.S. 1 (1996) (with reference to claims under 42 U.S.C. § 1983, finding that the fact that all fifty States and the District of Columbia have recognized some form of psychotherapist privilege is relevant to the appropriateness of federal embrace of that privilege); *id.* (policy decisions of the states bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one); Lutwak v. United States, 344 U.S. 604, 644 (1953) (noting that Congress was entitled to rely upon the "common" definition of marriage in rejecting fraudulent marriages intended to procure immigration benefits); Maynard v. Hill, 125 U.S. 190, 205 (1888) (deciding whether to recognize a legislative divorce for federal purposes, by looking at the common law and the approaches of several common law states); *Reynolds*, 98 U.S. at 164-65 (affirming Congressional rejection of polygamy and noting that English common law and the laws of the several states found polygamy "odious"). *But see Jaffee*, 518 U.S. 1, 30-31 (Scalia, J., dissenting) (rejecting the notion of looking to the majority of states when the psychotherapist-privilege had no common law origins). In early DOMA cases, when it was defending the statute rather than attacking it, the Justice Department made the argument that DOMA followed the majority of states and was a fair and was a constitutionally defensible approach until a national consensus developed. *See* Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 389-90 (D. Mass. 2010), *aff'd*, 682 F.3d 1 (1st Cir. 2012). *See also*, *supra* p. 105, note 8 (Justice Department abandonment of defense of DOMA.)

289. *See* Loving v. Virginia, 388 U.S. 1, 6 n.5 (1967) (noting by contrast that in 1955, a majority of states had such restrictions); Naim v. Naim, 87 S.E.2d 749, 753 (Va. 1955) (noting [m]ore than half of the States of the Union have miscegenation statutes" and that "[w]ith only one exception they have been upheld in an unbroken line of decisions in every State in which it has been charged that they violate the Fourteenth Amendment").

290. At press time, the licensing jurisdictions are California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, Washington state, and the District of Columbia. *See* D.C. CODE § 46-401 (2010); ME. REV. STAT. tit.19-A §§ 650-A, 650-B (2013), *available at* http://www.mainelegislature.org/legis/statutes/19-a/title19-Ach23.pdf; MD. CODE ANN., FAM. L. § 2-201 (West Supp. 2013); N.H. REV. STAT. ANN. § 457:1-a (2010); N.Y. DOM. REL. LAW § 10-a (McKinney 2011); VT. STAT. ANN. tit. 15, § 8 (West 2009); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 415 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862, 872 (Iowa 2009); Goodridge v. Dep't of Public Health, 798 N.E.2d 941, 948 (Mass. 2003). The California story is complex and may not be over.

This approach of looking to the majority and to the common law seems consistent with the founders' vision of federal power. Alexander Hamilton suggested a federal government was needed in times of conflict among the states, to be an "umpire or common judge to interpose between the contending parties."[291] Madison defended constitutional emphasis on federal sovereignty by noting that states act as "partisans of their respective States, than of impartial guardians of a common interest . . . ."[292] This constitutional obligation to "umpire" for the whole seems to be found in the obligation of Congress to "provide for the general welfare" and the "common defense" of the United States,[293] and in specific obligations to create uniform laws.[294] It seems inherent in the obligation to "regulate commerce . . . among the several states."[295] It is indicated in the very nature of a national or "general" government in a federalist system.

At the same time, the powers reserved to the states in the Tenth Amendment are local powers; it clearly is *not* the case that a given state's

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California recognized them for a time but then amended its Constitution by voter's referendum to define marriage as between one man and one woman with respect to future couples. A California state court upheld the referendum as valid under the state's constitution. *See* Srauss v. Horton, 207 P.3d 48, 59 (2009) (rejecting the challenge solely under California constitution). Plaintiffs then filed in federal court challenging the referendum change under the federal constitution. In the district court, California's governor and Attorney General at first defended the Constitutional change, but later they reversed course and argued against it. Others intervened to defend the referendum change. The district court hel the change unconstitutional. The Ninth Circuit affirmed. The U.S. Supreme Court granted a writ of certiorari and the case was argued on March 26, 2013, the same day *Windsor* was heard. On June 26, 2013, the same day that *Windsor* was decided, the Supreme Court held that it had no jurisdiction to address the California question given that key authorities with responsibility to defend the state's Constution had refused to do so. Hollingsworth v. Perry, slip op. No. 12-144 (June 26, 2013). *See also* 19-A § 650-A B (2013) *available at* http://www.mainelegislature.org/legis/statutes/19-a/title19-Ach23.pdf; 19-A MAINE REV. STAT., DOMESTIC RELATIONS § 19-A §650-A & B (2013); *available at* mainelegislature.orghttp://www.mainelegislature.org/legis/statutes/19-a/title19-Ach23.pdf; MD. D FAM. L. § 2-201 (2012); N.Y. DOM. REL. LAW § 10-a (McKinney 2011); N.H. REV. STAT. § 457:1-a (2010); D.C. § 46-401 (2010); VT. STAT. ANN. tit. 15, § 8 (2009). *See also* Varnum v. Brien, 763 N.W.2d 862, 872 (Iowa 2009); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 415 (Conn. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); Goodridge v. Dep't of Public Health, 798 N.E.2d 941, 948 (Mass. 2003). At press time, Delaware, Rhode Island and Minnesota had recently approved of same-sex marriages. Katharine Seelye, *Rhode Island Joins States That Allow Gay Marriage*, N.Y. TIMES, May 2, 2013, at 15; Delaware, *Continuing a Trend, Becomes Eleventh State to Allow Same-Sex Unions*, N.Y. TIMES, May 7, 2013, at 14; *Minnesota Clears Way for Same-sex Marriage*, N.Y. TIMES, May 14, 2013, at 12.

291. THE FEDERALIST NO. 7 (Alexander Hamilton).

292. THE FEDERALIST NO. 46 (James Madison).

293. U.S. CONST. art. I, § 8; *see also id.* pmbl.

294. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 4 ("To establish a uniform Rule of Naturalization, and uniform Laws on the subject of bankruptcies throughout the United States.").

295. U.S. CONST. art. I, §8.

authority to decide what marriage is within its boundaries must be subject to a majority vote of the other states. By its breadth, the "first" of the three DOMAs places tension on these two types of powers over marriage, the power of the federal government to decide policies incidentally affecting marriage for the good of the country and the power of the states (and the people of a given state) to determine what marriage means at the local level.

V. DOMA'S PURPOSE AND AUTHORITY: THE SIGNIFICANCE OF THE UNDERLYING STATUTES

Despite the fact that same-sex marriage plaintiffs, including Windsor, challenged DOMA on an "as applied" basis, courts have not considered the underlying statutes at issue in each DOMA case.[296] The notion that the underlying statutes might be relevant to DOMA's analysis was first referenced at oral argument in *Windsor*—after this writer circulated an earlier draft of this article to counsel for the parties and certain *amici.*[297] There are in fact three DOMAs. One DOMA bundles all marriage statutes

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296. *E.g.*, Edith Schlaine Windsor, Amended Complaint, Prayer for Relief, ¶1 ("Declare DOMA, 1 U.S.C. § 7, unconstitutional as applied to the plaintiff, Edith Schlain Windsor."); ¶85, p. 21 (supporting that DOMA "as applied by the IRS" requires disparity of treatment of plaintiff and singles out her valid marriage); Gill Complaint, ¶10, p. 5 ("It seeks a determination that DOMA, 1 U.S.C. § 7, as applied to plaintiffs, violates the United States Constitution."); Golinsky v. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 975-76, 980, 1002-03 (discussing "as applied to plaintiff" circumstances and involving spousal health coverage).

297. The discussion is in the following colloquy:

JUSTICE SOTOMAYOR: But what gives the Federal Government the right to be concerned at all at what the definition of marriage is?

MR. CLEMENT: Well, at least two—two responses to that, Justice Sotomayor. First is that one interest that supports the Federal Government's definition of this term is whatever Federal interest justifies the underlying statute in which it appears. So, in every one of these statutes that affected, by assumption, there's some Article I Section 8 authority.

JUSTICE SOTOMAYOR: So they can create a class they don't like—here, homosexuals—or a class that they consider is suspect in the marriage category, and they can create that class and decide benefits on that basis when they themselves have no interest in the actual institution of marriage as married. The states control that.

MR. CLEMENT:—the Federal Government has sort of two sets of authorities that give it sort of a legitimate interest to wade into this debate. Now, one is whatever authority gives rise to the underlying statute.

Transcript of Oral Argument at 67-69, Windsor v. United States (No. 12-307) (U.S. filed March 27, 2012) *available at* http://www.supremecourt.gov/oral_arguments/argument_audio_detail.aspx?argument=12-307. *See also supra* note 10. In Massachusetts v. HHS, the state of Massachusetts has made a general Spending Clause argument that DOMA is not germane to the spending programs to which it applied. Brief for the Plaintiff-Appellee Commonwealth of Massachusetts at 56-59, Mass, 682 F.3d at 1 (explaining that DOMA is not germane to spending and Congress has made no attempt to investigate application to each federal statute).

together making them impervious to same-sex couples. Another DOMA collapses into the underlying statutes that it defines and thus must be judged in the context of each statute. And a third DOMA is merely an exercise of Congress' undisputed right to issue definitions for its own statutes and, I would argue, affirm the status quo. Under this DOMA, that status quo is the constitutional concern. I address the validity of these three DOMAs in Part VII. In this Part, I look more closely at the second incarnation of DOMA—the one that collapses into its underlying statutes—to explain how the underlying statutes provide DOMA's authority if any and state its purposes, if any. In particular, I show that some, though not all of these underlying statutes do indeed provide evidence that procreation support is a key part of federal marriage policy.

A. DOMA's Underlying Statutes as Evidence of Authority

One interpretation of DOMA is that it draws its authority, if any, from every statute to which it applies. One must then ask whether or not DOMA was within the authority supporting the original legislation and its purpose. That question brings us back to the question of the purposes of DOMA's underlying statutes. Assuming those purposes to be valid, as we must, DOMA must be tied to those purposes.[298]

B. DOMA's Underlying Statutes as Evidence of Marital Procreation Support Through Economic Policy

The argument that DOMA supports procreation has been variously stated: that the federal government has an interest in children being raised by their biological parents, that it wants to discourage out-of-wedlock pregnancies, that the government has an interest in ensuring that children are raised by their biological parents etc.[299] Plaintiffs and supporting *amici* in same-sex marriage cases have challenged the notion that procreation has any relationship to federal statutes relating to marriage.[300] As noted, the

298. It may also be necessary to go further, however. For example, as to statutes passed pursuant under an enumerated power plus the necessary and proper clause, a challenge might be that DOMA was not a necessary and proper part of the statute. *Compare* Nat'l Fed. of Indep. Bus. v. Sebelius, 132 Sup. Ct. 2566, 2591-2601 (2012) (while noting the permissive nature of necessary and proper clause in rejecting the argument that individual mandate is an integral part of a comprehensive scheme of economic legislation that is the Affordable Care Act, but concluding individual mandate can be defended as a tax). That inquiry brings us back to ascertaining DOMA's purpose and the purposes of federal statutes affecting marriage.

299. BLAG Windsor Merits Brief at 43-49.

300. *See* Brief of *Amici Curiae* Family and Child Welfare Law Professors Addressing the Merits in Support of Respondents, 4-7 (asserting procreation not an essential part of marriage); *id.* at 8-11 (maintaining that the right to marry and the right to procreate are distinct); *id.* at 11- 16 (arguing that marriage serves other purposes, the majority of which are not related to procreation, and the majority of which foster a

Obama Administration has abandoned the argument that DOMA advances a federal interest in encouraging responsible procreation.[301] Courts have also rejected the theory sometimes reducing the argument to a claim that same-sex couples are not acceptable parents.[302] The Second Circuit conceded that procreation support *could*, properly framed, be an acceptable reason for the government's support of traditional marriage but concluded that the parties had not shown that DOMA advances it.[303]

In this section, I want to couch the procreation argument a bit differently. I will argue that the statutes evidence an understanding that the heterosexual couple is unique because of the biological imbalance between them and because of a history of gender discrimination through marriage. Challenges to DOMA have largely been treated as facial challenges. No one has put before the courts evidence that procreation *is* a theme present in

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relationship between the couple); *id.* 16-25 (contending government does not favor biological over other parenthood); *id.* at 25-29 (stating that the government favors all families).

301. *See supra* pp. 709-10, notes 8 & 9 (abandoning the of defense of DOMA); *see also* Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 388 (1st Cir. 2012) (noting that the government, for this litigation, has disavowed the House Report's stated justifications for DOMA including (1) encouraging responsible procreation and child-bearing, (2) defending and nurturing the institution of traditional heterosexual marriage, (3) defending traditional notions of morality, and (4) preserving scarce resources); *see also* The Defense of Marriage Act: Hearings on H. 3396 Before the House of Rep. Comm. on the Judiciary, 1996 WL 256695 (May 15, 1996) (offering justifications).

302. *See Mass.*, 682 F.3d at 15 (noting controversy over whether same-sex couples would make best parents, stating "DOMA cannot preclude same-sex couples in Massachusetts from adopting children or prevent a woman partner from giving birth to a child to be raised by both partners" and minimizing broader potential procreation concerns); Windsor v. United States, 699 F.3d 169, 183, 185 (2d. Cir. 2012) (noting that defenders of DOMA virtually conceded that the responsible procreation argument "may not withstand intermediate scrutiny" but urge that "same-sex couples have a diminished ability to discharge family roles in procreation and the raising of children" and dismissing the notion that argument is broader).

Although all sides' arguments underwent evolution, the BLAG defendants provided the following justifications: (1) that DOMA was a placeholder and that Congress Acted Cautiously in Facing the Unknown Consequences of a Novel redefinition of a foundational social institution; (2) that Congress was protecting the public fisc and preserving the balances struck by earlier Congresses; (3) that Congress was seeking to maintain uniformity in eligibility for federal marital benefits; (4) that DOMA furthers the government's interest in encouraging responsible procreation; (5) that Congress rationally desired to preserve the social link between marriage and children; (6) that Congress rationally desired to encourage childrearing by parents of both sexes. *See* Brief For Intervenor-Appellant The Bipartisan Legal Advisory Group of the United States House of Representatives at 39-58, Mass. v. U.S. Dep't of Health & Human Servs., 682 F.3d 1 (1st Cir. 2012) (Nos. 102204/102207/10-2214). In *Windsor*, BLAG added that Congress can rationally retain the definition of marriage for the same reasons the states can. *See* Brief on the Merits for Respondent The Bipartisan Legal Advisory Group of the United States of Representatives at 25-49, Windsor v. United States, 133 U.S. at 786, *available at* http://www.glad.org/uploads/docs/cases/windsor-v-united-states/windsor-blag-brief-1-22-13.pdf.

303. *E.g.*, *Windsor*, 699 F.3d at 188 (noting the "promotion of procreation can be an important governmental objective").

the design of DOMA's *underlying statutes*. I contend that if one looks at the underlying statutes, for which DOMA supplies the definition, one does indeed see persistent themes regarding procreation. On the other hand, these themes are not prevalent in *all* of the statutes that DOMA affects. To illustrate the procreation point, I discuss a few examples here: ERISA, Social Security spousal provisions, marital income taxation, and the marital deduction at issue in *Windsor*. These examples show that both procreation and historical gender discrimination play significant roles in our federal statutes relating to marriage.

1. ERISA

Initially, ERISA had no spousal provisions and considered only a model of employment uninterrupted by births and childcare. It took ten years of lobbying for supporters of women to have the statute amended through the Retirement Equity Act ("REA"). The REA added provisions that considered women's work, pregnancy and caretaking patterns, and the need for spousal protections.[304] The legislative history of those provisions is full of discussions of (1) the effect of procreation and caretaking on women's ability to qualify for retirement benefits; (2) the imbalance between men and women (in heterosexual relationships) that allow a husband to continue working and obtain promotions, throughout his wife's pregnancy and childcare while the wife must defer some part of the same; and (3) a husband's resulting ability to control retirement assets, to the wife's detriment. That legislative history offers little doubt that the procreation concerns (and in particular, the procreative imbalance existing in the heterosexual couple) played a significant role in the design of the REA.[305] The concern was not unwed pregnancies but rather, if marriage was to be a primary means of procreation, the unique imbalance in the heterosexual

304. Retirement Equity Act of 1984, Pub. L. No. 98-397, 26 U.S.C. § 402, 98 Stat. 1448.

305. *Retirement Equity Act of 1983: Hearing on S. 19 Before the Subcomm. on Labor of the S. Comm. on Labor and Human Resources*, 98th Cong. 6 (1983); S. REP. NO. 98-575 (1984). *See* 129 CONG. REC. 28,458-59 (1983) (statement of Sen. Robert Dole) (observing that while men can do childcare, women bear a disproportionate burden; a woman devoting time to childcare may find herself unable to access husband's retirement plan); 129 CONG. REC. 17,039 (1983) (statement of Sen. Peter Domenici) (noticing that childbirth and childcare hinder women's retirement access, creating inequities); 129 CONG. REC. 30,369-70 (1983) (statement of Rep. Marge Roukema) ("The jobs of childrearing and homemaking are now recognized as being of equal importance to those jobs which require a woman to leave the home." However women are disproportionately at risk of old age poverty.); 129 CONG. REC. 34,359 (1983) (statement of Sen. Robert Byrd); *see also* 129 CONG. REC. 28,465 (1983) (statement of Sen. Daniel Patrick Moynihan) (stating that existing pension, tax, and retirement laws do not accommodate the special needs of women and homemakers); 129 CONG. REC. 28,467-68 (1983) (statement of Sen. Lincoln Chafee) ("Women often have shorter job tenure than men, and they are more likely to leave their jobs to raise children or take on other traditional family responsibilities.").

couple had to finally be addressed in a modern time.

While ERISA gave women more protections, scholars have criticized the ERISA structure as promoting sexism because the statute gave spouses only a *beneficiary* right and rejected the notion of equal partnership with respect to the earnings, even when state law did. As a result, before retirement or death arrives, the wage earner (disproportionately the husband) has the right to control retirement assets completely.[306]

ERISA's provisions signal how carefully Congress has to be if it wishes to maintain a procreation-through-marriage policy. ERISA is not merely a benefit; it also poses a significant burden upon the higher wage-earning spouse, one that some couples have sought to avoid through waivers and prenuptial agreements. Congress has to be careful that it does not create a regime that allows easier and cheaper cherry-picking of benefits such that an overall scheme designed to offset the costs of child bearers and child rearers ends up in fact placing them lower on the economic totem pole and even risks a loss of protections because persons who have no need for it are positioned to lobby against it.

2. Social Security

As with ERISA, spousal benefits were not a part of the original legislation we now know as Social Security. They were added in 1939 along with benefits for spouses, spouses with minor children, dependent single children, and dependent single parents of a wage earner.[307] The reasons for these amendments were set forth in a memorandum from the Director of the Bureau of Old Age and Survivor's Insurance to Regional Directors and Field Office Personnel:

> Against what are we trying to make our society secure? We are trying to make it secure against at least two tangible, concrete things; namely, 1. A large proportion of the members of that society becoming dependent on society for its support—without resources of its own; 2. Loss of the purchasing power of this same large proportion of the

306. *E.g.*, Paula A. Monopoli, *Marriage, Property and [In]Equality: Remedying ERISA's Disparate Impact on Spousal Wealth*, 119 YALE L.J. ONLINE 61, 63 (2009), http://yalelawjournal.org/2009/11/4/monopoli.html (describing ways that ERISA discriminates against women as childbearers, childrearers, and caretakers). Some gay marriage advocates have argued that denial of same-sex marriage is, or is tied to, gender discrimination but they have largely focused only on how heterosexual marriage generally promotes male hegemony and on gender stereotyping. *E.g.*, Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 249 (1994); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 231; *see also* Nancy Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1549 (1993).

307. Social Security Amendments of 1939, Pub. L. No. 37, ch. 666, 53 Stat. 1634-36 (stating spousal, widow, and children's benefits).

American people.[308]

Who were the people who would not have resources of their own about which the Director spoke? They were understood to be overwhelmingly women and children. Under the original law, a man could accrue Social Security benefits, then draw them and use them for his family. But if he died prematurely, his wife and children, and dependent parents were left with nothing. At the same time, in 1939, married women were discouraged from working outside the home, pregnant women even more so. When women worked outside the home, as many did, they were not entitled to the same pay as men.[309] This discrimination hurt not only women, but also men and families that needed two earners for economic stability. The Act reflects both the fact that women were in fact the nation's child bearers and child rearers and the national government's stamp on discrimination to ensure that women's careers remained disproportionately centered around children compared to men and their economic futures remained tied to marriage.

Although the statute is now interpreted to apply to both male and female spouses, the basic design of Social Security is still the same that was adopted in 1939. Biology also has not changed. The spousal benefits design still assumes that one person in a marriage will not have worked enough in a paying job to have earned Social Security in his or her own right and thus must rely upon a spousal work record. A spouse must be married to her eligible spouse for ten years before she becomes eligible for spousal benefits. A widow receiving Social Security benefits upon her deceased husband's record (or vice versa) loses those benefits if she remarries before age 60.[310] In *Bowen v. Owens*, the Supreme Court, applying a rational basis test, held that such refusals to grant benefits to divorced spouses when they remarry do not constitute gender discrimination.[311] Indeed it stated that, "*Congress was using marital status as a general guide to dependency on the wage earner*." And it drew the same conclusion with respect to the discontinuance of benefits upon

308. John J. Corson, Bureau of Old Age and Survivor's Insurance, Director's Bulletin No. 35, Reasons for the 1939 Amendments to the Social Security Act, *available at* http://www.socialsecurity.gov/history/reports/1939no3.html (reflecting that Corson's views "*are a significant expression of the viewpoint of the Social Security Board on the '39 law and his remarks should be understood as reflecting the views of the top administrative officials of his day*").

309. Not until 1965 was the right of a married couple to use birth control assured. Griswold v. Connecticut, 381 U.S. 479, 480, 485-86 (1965) (finding that preventing married couples from accessing birth control violates Fourteenth Amendment). Griswold, a director of a Planned Parenthood clinic, was criminally prosecuted for providing birth control advice as an accessory.

310. 42 U.S.C. §402(e)(1)(A); *id.* (g). 42 U.S.C. §§ 402(b)(1)(C), (b)(1)(H), (c)(1)(C), (c)(1)(H) (2006).

311. Bowen v. Owens, 106 S. Ct. 1881 (1986).

remarriage stating that the remarriage rule was based on the assumption that remarriage altered the status of dependency on the wage earner.[312] Also applying a rational basis test, the Court has held that it does not violate Equal Protection or Due Process for Social Security to deny an unmarried *mother* separate mother's or parental benefits based on the work record of her minor child's undisputed deceased father.[313] In so holding, it stated that the relevant provision was "intended to permit women to elect not to work and to devote themselves to care of children."[314]

If her work record is insufficient in her own right, a spouse does not draw exactly what her husband draws. Nor does she receive what she would have made had she not taken the economic hit of childbearing or, for older women still living today, suffered extensive gender discrimination. Her benefits are limited to not more than half of what her husband draws based on his record. If she is a widow with minor children, she receives the independent parental benefit but only so long as she has children who under the age of sixteen. The remarriage provision and the child age limitation for widow's benefits both reflect a pattern found in the early Civil War military pension provisions discussed in Part III(A)(1).[315] Race also played a role historically in this benefit because if her husband suffered job discrimination, a wife received less or nothing.

It is true that, except for older women, Social Security cannot today be justified as a remedy for the effects of past broad-scale discrimination that threatened to put women on the streets when their husbands died and threatened to deny a heterosexually headed family of modest means a decent quality of life. But it can still be explained as tied to procreation by its other leg: that Congress wishes to make it possible for one parent (today, male or female) to stay at home and that childbearing and childcare may affect the ability of the female in the heterosexual family to earn sufficiently in her own right. The first of these theories argues strongly in favor of giving same-sex couples with children the right to receive spousal benefits, assuming parenthood is established. The second is not generally applicable to same-sex couples, although those with children could potentially face a similar situation by mutual choice. They too could suffer disproportionate childcare responsibilities within the couple as so called gendered childcare models reflect the reality of caretaking economics in

312. *Id.* (*emphasis added*).

313. Califano v. Boles, 443 U.S. 282 (1979).

314. *Id.* at 288 ("The animating concern was the economic dislocation that occurs when the wage earner dies and the surviving parent is left with the choice to stay home and care for the children or to go to work, a hardship often exacerbated by years outside the labor force. 'Mother's insurance benefits' were intended to make the choice to stay home easier.").

315. *See* discussion *supra* p. 732.

our American system.

3. Marital Income Taxation

A federal interest in supporting procreation also plays a role in the income taxation of marriages. Much has been made of the fact that some married couples, if they file jointly, can receive a lower tax rate than singles. But this so-called "marriage bonus" comes only to those spouses whose incomes are disproportionate. Why would Congress structure benefits so? Such a structure makes sense if one assumes that childbearing and childrearing will interrupt one of the partner's work patterns.[316] It also makes sense in a context of gender discrimination that inhibits women's economic opportunities.

4. The Estate/Gift Tax Marital Deduction in Windsor

The argument that procreation support lies at the heart of the marital deduction is a harder sell. Our modern deduction arises directly out of the debate between separate property and community property states discussed earlier.[317] Separate property states attribute all earnings to the spouse who receives the paycheck. Under the theory, the nonpaid spouse is entitled to "support" from the paid one, and during marriage does not own any part of the income the paid spouse brings home. By contrast, community property states consider the couple to be partners and attribute half of the marital property ownership to each, no matter which received a paycheck. Consequently, in community property states, only half of the marital property passes upon the death of one spouse and thus, only half is subject to estate taxation at that death. The other spouse controls the other half. But in separate property states, when the spouses have disproportionate income, the higher paid spouse owns the higher share of marital property. That person is usually the husband, who is also likely to die first.[318] Because of the drastically progressive nature of estate and gift taxation, married men in separate property states tended to pay more taxes at death, while those in community property states had, in effect, the benefit of

316. Couples with middle to lower incomes are least likely to benefit from the "bonus" because they are more likely to need two spouses working outside the home. Disproportionately, these couples are black, another fact demonstrating the link between racial prejudice which suppressed the ability of black males to support their families in such a patriarchial system and marital benefits. Dorothy Brown, *Racial Equality In The Twenty-First Century: What's Tax Policy Got To Do With It?*, 21 U. ARK. LITTLE ROCK L. REV. 759, 760-61 (1999).

317. *E.g.*, *Major Estate and Gift Tax Issues: Hearings on S. 395, S. 404, S. 574, and S. 858 Before the Subcomm. on Estate and Gift Taxation of the S. Comm. on Finance*, 97th Cong., pt. 1, at 11 (1981) [hereinafter 1981 Sen. Marital Ded. Rept.]; *see* discussion *supra* p. 754-57.

318. 1981 Sen. Marital Ded. Rept., *supra* note 317, at 11.

income splitting that placed them in lower tax brackets. This held true even though many community property states that split ownership of marital property still gave the husband the right to *control* all marital property. While some men in separate property states gave property to their wives, they risked that she might not give it back when desired, might not concede control, or even worse that after death another man might ultimately become its owner or controller.

Congress tried to remedy this perceived unfairness but it never adopted the community property system of taxation. For example, in 1942, Congress tried to attribute all of community property to the husband at his death, unless it could be proven the wife earned it. This posed a "tracing" problem.[319] Moreover, men in separate property states adopted the practice of giving the wife only a *life estate* and then passing the remainder to children or others. Because a life estate expired at death, there was no transfer tax on property passing upon the wife's demise. On the other hand, in community property states a husband could not control the entire estate in this way at death because he technically only owned half of it, even if he was the only wage earner.[320]

To address these concerns, at the same time that Congress allowed married couples to elect to file jointly, Congress created the marital deduction at issue in *Windsor*.[321] In 1981, it removed all limits.[322] Now spouses can leave an unlimited amount to each other free of estate and gift taxes. But in the instance of a couple of biologically imbalanced procreators, the law offers many opportunities for the man, who, again, is likely to die first, to exercise power over the entire marital assets.[323]

One could theorize that the purpose for not taxing property passing at death between spouses is that the man will likely die first and the woman will need support for herself and, more importantly from Congress' viewpoint, their children. Indeed, when Congress made the marital deduction unlimited in 1981, the rules required one to give an outright gift to a spouse in order to qualify for the marital deduction. The surviving spouse had the right to use the property as she wished. But that theory of leaving the spouse a nest egg for children was shot to pieces when

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319. Revenue Act of 1948, Pub. L. No. 80-471, 62 Stat. 111 (1948).

320. *Id.* at 27-28.

321. *See, e.g.*, H.R. REP. NO. 94-1515, at 609 (1976) (Conf. Rep.) (increasing marital deduction amount for lower income couples).

322. *See* Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 403(a)-(b), 95 Stat. 172, 301; *see also* 1981 Sen. Marital Ded. Rept., *supra* note 317, at 11.

323. *See, e.g.*, JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, WILLS, TRUSTS, AND ESTATES, at 510-11 (2009) (discussing the evolution of the "widow's election" whereby one spouse can force the other to place her assets in a joint trust by denying her access to his half of the community property at his death).

Congress decided to amend the terminable gift restriction and adopt Qualified Terminable Interest Property ("QTIP") treatment. Under QTIP treatment, a husband can give a wife a *life estate* only and still have the estate qualify for the marital deduction.[324] Thus, a husband could control property from the grave, passing it after his wife's death to children *or others*. While theoretically the QTIP approach is gender neutral, in context it is far from it. As mentioned above, the use of spousal life estate gifts for tax avoidance and retention of control dated back to before 1948.

The justification for allowing the QTIP approach was expressly stated to be children. It was argued that without the QTIP, a man had to choose between leaving property directly to his wife to get the deduction or leaving it to his children but lose it.[325] It was pointed out the arrangement helps persons who may be in second marriages and want to ensure that children from a prior marriage or relationship receive a legacy but still want to leave support for a present spouse.[326] But others argued that an overwhelmingly male Congress had offered men a legal way to strip their wives of control over devises under the guise of doing what is best for the children. Indeed, some have criticized the QTIP arrangements as sexist and a return to "dower."[327]

For better or worse, in fashioning the estate tax marital deduction and related provisions, Congress *was* aware of the unique imbalance existing in a great many heterosexual married couples. That imbalance was imposed both by biology but also by a history of government supported employment discrimination and gender stereotyping in work and family life. The marital deduction does not seem to be rooted in any modern sense in the federal government's interest in supporting "procreation." First, it kicks in only at death, but when the large majority of parents die, their children are already grown up. Indeed, in the case of the QTIP, the property only passes *after the surviving spouse's death*, further ensuring that the children

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324. 26 U.S.C. § 2056 (2006). *See Major Estate and Gift Tax Issues: Hearings on S. 23, S. 395, S. 404, S. 557, S. 574, S. 858, and S. 995 Before the Subcomm. on Estate and Gift Taxation of the S. Comm. on Finance*, 97th Cong., pt. 2, at 179 (1981) [hereinafter 1981 Sen. QTIP Rpt.]. For a discussion of the evolution of the QTIP see Irene A. Vlissides, Estate of Clack v. Commissioner: *An End to the Conflict Over Contingent QTIP Elections?*, 6 GEO. MASON L. REV. 163 (1997) (discussing history and subsequent efforts of taxpayers to diminish even further the control holders of the life estate would have in QTIP Trust property).

325. 1981 Sen. QTIP Rpt., *supra* note 324, at 179.

326. *Id.*

327. Joseph M. Dodge, *A Feminist Perspective on the QTIP Trust and the Unlimited Marital Deduction*, 76 N.C.L. REV. 1729 (1988); Wendy C. Gerzog, *The Marital Deduction QTIP Provisions: Illogical and Degrading to Women*, 5 UCLA WOMEN'S L.J. 301, 305-06 (1995); Mary Moers Wenig, *"Taxing Marriage,"* 6 S. CAL. REV. L. & WOMEN'S STUD. 561, 572-74 (1997) (arguing that the law of dower was reborn via QTIP).

will be well into adulthood. Second, it cannot be said to offset childrearing costs because the person who would allegedly have paid the costs is already dead when the benefit is awarded. Third, the QTIP provisions do not restrict the passage of the property only to children. Fourth, the by-product of the arrangement is not procreation support but rather that a wife and mother who has assumed a traditional family role at the government's urging is then denied any control over marital assets (and thus of the valuable opportunity to favor those beneficiaries who *she* prefers), save by her husband's consent. All of this under the guise of saving taxes. Thus, the deduction cannot be said to be designed to offset the effects of the unique history of gender discrimination against women. And fifth, it benefits only a small amount of people, those with estates of greater than the amount of the federal exemption, roughly five million dollars.[328] Finally, there is little evidence that well-off men benefitting from it would not marry or financially support the children they create or the mothers they impregnate without such a deduction.

C. Summarizing Federal Procreation Support Through Federal Marriage Policy

It is possible then to see in federal policies and benefits related to marriage, a pattern of federal support for procreation. That these benefits or burdens are not afforded to parents who do not marry indicates a preference for procreation within marriage, the so-called "responsible procreation" position. Congress does not ignore unmarried parents but provides benefits to children born to them in a different way. Marriage statutes go beyond merely giving awards (and indeed even the benefits have been grossly overstated). They also regulate the relationship between uniquely biologically imbalanced heterosexual couple. It is rarely recognized that the combination of biology and family economic needs may drive what some refer to as gendered caretaking patterns. Families may be deciding that it makes no sense to have both parents lose valuable opportunities for advancement and promotion, which could help the entire family. Moreover, if one has already taken time off, purely financially speaking, that one is likely to be the best candidate to take even *more* time off, except in rare cases in which the woman actually out earns the man. Many couples may simply be making choices that answer to their own economic realities.

Using marriage for supporting procreation, even within the context of discrimination, dates back to the common law. It makes sense that, in an earlier time, government required a married man to have fathered a child in

328. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, § 302(a), Pub. L. No. 111-312, 124 Stat. 3296 (2010).

order to receive courtesy (the right to a life estate in his deceased wife's property). If he didn't have a child to support and who could inherit her assets, then he did not need that financial resource which presumably could be returned to the man who provided it, her father.[329]

It is not through bouts of forgetfulness that the U.S. government has not imposed a national system of paid maternity leave and has resisted the broad social welfare systems found in European nations. Witness the cries of "socialism" when the Affordable Health Care Act, a step toward a national health care program, was being debated.[330] By contrast, the countries that led the way in adopting a legally recognized status for committed same-sex couples are also characterized by extensive social welfare systems that do not rely heavily upon "marriage" for supporting procreation but do rely on very high taxation. I would contend that the unvarnished truth is that governmental support of marriage has long been used—and still is used—as a regime for the private (rather than public) financing of childbearing and childrearing, so that one man's dependents do not end up being paid for by other men. That the regime has not been totally successful given the number of failed marriages and unmarried procreators does not make it unconstitutional with respect to same-sex couples.

At home, it is noteworthy that the first U.S. state to adopt same-sex marriage for gays and lesbians, Massachusetts, also thereafter became the first in the nation to require health insurance for all of its citizens. In rejecting bans on same-sex marriage, Massachusetts' high court opined that supporting procreation was not the purpose of marriage in that state.[331] That choice reflects a local perspective that is different from perspectives in other parts of the country. Yet, the irony is that despite the embrace of "marriage equality" for same-sex couples, Massachusetts continues to maintain a separate property regime for marriage, it does not have a system of paid maternity leave for pregnant employees, and does not offset the costs of pregnancy not covered by insurance, except in the form of social services for the very poor. All this leads one to conclude that it must intend

329. Under state law, "Curtesy" gave a man a life estate in all of his wife's property, real or personal, but only if he had a child. Grimball V. Patton, 70 Ala. 626 (Sup. Ct. Ala 1881) (finding that the husband was not a tenant in curtesy because he had no children, thus could not claim any part of wife's estate covered by trust established by her father's will).

330. *See, e.g.*, Affordable Care Act, 29 U.S.C. § 2601(b)(5) (2006); Michael McAuliff & Sara Kenigsberg, *Obamacare Is Socialism: Reps. Louie Gohmert, Steve King Attack*, THE HUFFINGTON POST, (March 27, 2012, 7:54 PM), *available at* http://www.huffingtonpost.com/2012/03/27/obamacare-socialism-louie-gohmert-steve-king_n_1383973.html. *See also* Nat'l Fed'n of Indep. Bus., 132 Sup. Ct. at 2566 (upholding provisions of Affordable Care Act against Constitutional challenge).

331. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003) (rejecting notion that in Massachusetts, marriage is for supporting procreation).

that husbands support their wives during the inefficiency of pregnancy, and that unmarried women eat the costs or go on public assistance, since child support is not compensation for a mother's lost earning and earning power.[332] The point is not that Massachusetts must now become Europe, but rather that governmental support of marriage is often an attempt (however successful or ill conceived) to ensure that procreation burdens remain on identifiable, private shoulders. It is a way government seeks to hold people accountable for their own. That this is not a good model for community in some people's eyes does not make the model unconstitutional. And same-sex couples are not the only group that has been excluded by the design of marriage. Working parents who need two incomes also find that the design of many of marriages' benefits filtered through the tax system are available only to those who can afford to have one partner in the couple stay at home, as in the case of spousal income tax treatment discussed in Part III(C)(2).

In 2003, the General Accountability Office ("GAO") identified "some 1100 laws in the United States Code in which marital status is a factor.[333] What GAO did not consider was the extent to which procreation in marriage—though encouraged and supported by the government through these benefits—contributes to the baseline costs of the parties receiving those benefits or whether Congress was trying to offset that cost. Nor was GAO asked to consider how other benefits available to those who are not married measure against those given to the married. Consider, for example, that no one compensates a birth mother (or her partner if she is part of a couple) for her forbearance from economic opportunities in pursuit of having a healthy baby. Stillbirths and miscarriages carry a huge cost as well, despite the tragic end. Those who bring home a bundle of joy from a hospital often also bring home a hefty portion of their bill that is not covered by insurance. On the other hand, if one adopts there is a $13,000

332. *See* Website of the Massachusetts Commission Against Discrimination, *available at* http://www.mass.gov/mcad/maternity1.html (last visited May 16, 2013) (guaranteeing eight weeks of maternity leave to women for adoption or birth, but not requiring paid leave; suggesting Massachusetts law may require men to receive identical leave regardless of birth status of parents); *see also* Global NAPs, Inc. v. Awiszus, 930 N.E.2d 1262 (Mass. 2010) (interpreting Massachusetts pregnancy leave statute to find that a woman not covered by federal leave act who took leave more than eight weeks could be terminated).

333. In 1997 the General Accountability Office identified "all those laws in the United States Code in which marital status is a factor, even though some of these laws may not directly create benefits, rights, or privileges." U.S. Gen. Accounting Office, Defense of Marriage Act, GAO/OGC-97-16 at 1-2 (1997), *available at* http://www.gao.gov/archive/1997/og97016.pdf. The number of instances was 1049. Letter from Barry R. Bedrick, Assoc. Gen. Counsel to Hon. Henry Hyde, Chairman S. Judiciary Comm., Jan. 31, 1997. In a followup memorandum it updated that number to 1138 as of 2003. Letter from Danya K. Shah, Assoc. Gen. Counsel to Hon. Bill Frist, Maj. Leader, U.S. Senate, Jan. 23, 2004.

federal tax credit to offset the expenses of procuring the child (a credit available to same-sex couples who adopt).[334] There may be good reasons to distinguish between heterosexual couples and adoptive couples in funding the costs of procuring a child, but the point remains that GAO was asked to consider marriage's benefits in a vacuum. Congress does not have that privilege. It must consider the benefits of the married and unmarried, of those with children and those without, of the single and the coupled and cohabitating with no children, and of single parents. Its failure has not been that it has failed to establish marriage equality for gays and lesbian couples, but rather that it has largely failed to consider the rights of same-sex couples in marriage and family policy at all.

VI. USING CONFLICT OF LAWS THEORY TO RECONCILE A PROCREATION-BASED MARITAL BENEFITS REGIME AND SAME-SEX MARRIAGE

I have argued that procreation support is a key factor in the federal government's support of marriage. The broad scale attack on procreation that has been launched in the same-sex marriage cases seems to assume that procreation and same-sex marriage cannot exist in the same system. In this section, I argue that courts should use conflicts of laws doctrines to reconcile Congress' authorized choice to use procreation as a key component of marriage policy and the legal rights of same-sex couples.

From the start, it should be noted that this is not a proposal that seeks to accomplish "marriage equality," that is, all married persons receive exactly the same rights. It is better described as a proposal for "marriage for all." That is, everyone should have the right to be married, but Congress has the right to decide that marriages should receive different taxpayer funded economic support based on rational criteria. This writer agrees with those who opine that the only reason that the state should be involved in marriage policy is to support procreation and its effects on earning power for the couple. If children could be plucked from trees and came with buds attached to their bellybuttons that bloomed into twenty-five-year "your baby only" support trust funds, no woman or married couple would have to experience the economic inefficiency of pregnancy, and heterosexual couples could have sex without worrying about birth control and accidental pregnancies. Government would then have no need to be involved in marriage support because only people who want and are ready for children would have them, and parents would have more than enough money to raise them. People don't need government to form family relationships. But children are part of the nation's economic juggling act and procreation (bearing and raising) is both inefficient and expensive. Marriage is one

334. 26 U.S.C. § 23.

major way that the government ensures that the larger portion of procreation's costs—birthing and raising—are borne by identifiable private parties. While the government provides some initial carrots to sweeten the pot, the truth is that, from the public's point of view, marriage without a national plan for maternity care is a relatively cheap way to finance the necessary work of procreation as a capitalist system moves forward. And the government uses heterosexuality as a marker because that marker identifies all of the people it wishes to reach and pregnancy, even today, remains unpredictable. It's an unromantic system for sure.

The American model has funneled access to legal recognition of family largely through marriage. Our repeated historical error has been that access to those family rights often has been made to depend upon *who* was being married, what kind of children they might produce or indeed whether they would produce at all. Blacks procreated the wrong type of children; women were too inefficient at procreation; the poor and the ummarried procreated at the wrong time (when they were not rich or when they were not married); and same-sex couples did not procreate at all. Thus, no legally recognized family rights for you! All the while government continued to attach benefits for those who were entitled by law to the legal recognition that is marriage. Thus, same-sex marriage advocates are right that because marriage centered on procreation and the right kind, marriage became the key to access to many incidents that bore very little relationship to procreation.

Conflict of law rules help to resolve the dilemma over when a procreation standard can be legitimate public policy and when it must bow to the rights of individuals to form families as they choose.[335] As discussed in Part II, under state conflict of law rules, the law of the place where the marriage was celebrated governed the validity of a marriage. On the other hand, the incidents that flowed from that marriage were often governed by the state where the couple lived. The logic makes sense. The incidents, especially if they are economic in nature, are far more likely to affect the home jurisdiction's policy interests and coffers. If the marriage fails, it is the forum state that must deal with the financial failures that may follow as well. Similarly, considering federal conflict of law rules, it makes sense that while recognizing marriages, Congress has, as discussed in Part III(C)(2), declined to apply state community property rules to some federal benefits. Indeed, the Supreme Court has recognized that reasonable restrictions may be imposed as to the incidents of marriage.[336]

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335. While my focus is marriage, with adaptations, the proposal I offer here could apply to state recognitions of marriages and also to government's treatment of non-marital family benefits.

336. While declaring unconstitutional a restriction on marriage by persons who are behind in child support payments, the court stated "[W]e do not mean to suggest that

I suggest then that we categorize the federal rights related to state sanctioned marriage along conflict of laws lines into two categories: the validity of the marriage on the one hand, the incidents on the other. [337] Marriage confers the legal right to call an unrelated other one's most intimate family. The marital bundle includes the right to be treated like spouses by government both in private relations and in public ones, and for a whole host of reasons including social, medical, and legal. I will call this bundle of rights that marriage confers simply "family" rights. I suggest that we place the other benefits that government attaches to marriage in the category of "incidents" or branch rights. These branch rights are not core to the family relationship—indeed, some are quite new—and they largely comprise economic benefits from the public purse. Congress could take these rights away from all couples without altering the traditional notions that a person is "married" to another.

A. "Family" Rights

Through the incidents that it attaches to marriage and family life, the federal government can burden or facilitate family life. Think of granting one couple a government-subsidized right to bring one's spouse on an overseas trip while denying another, granting one the right to live in a government-subsidized home but not another, granting one a right to be buried next to each other in a government-funded cemetery but not another, granting one federal marital privilege but not another. Such denials burden the right to be a family, elevating one party's access to family rights granted by government over another party's rights.

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every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed." Zablocki v. Redhall, 434 U.S. 374, 386-87 (1978).

337. Other scholars have proposed using incidents theory in the context of *interstate* recognition of same-sex marriages. These theories generally propose that a marriage would be deemed valid but only with respect to certain incidents. The downside of such an approach of course is that the validity status of a marriage constantly changes, tested as each incident arises. I propose to conceptually separate the notions of validity and incidents, as a conflicts of law policy has traditionally done. *E.g.*, Barbara J. Cox, *Using an Incidents of Marriage Analysis When Considering Interstate Recognition of Same-Sex Couples' Marriages, Civil Unions, and Domestic Partnerships*, 13 WID. L.J. 699, 718-58 (2003-2004); Barbara Cox, *Same-Sex Marriage And Choice-Of-Law: If We Marry In Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033 (1995). Yet another approach would provide all couples the economic benefits of marriage but allow differences with respect to rights that could be replicated by contract. *See* ERIN O'HARA & LARRY RIBSTEIN, THE LAW MARKET 164-65 (2009). Domestic partnership statutes also reflect a different "incidents" approach. While those statutes do not use the term "marriage" for committed same-sex relationships, they provide a legal status to such relationships and some or all of the incidents traditionally associated with marriage.

1. State Law Should Control Who is "Married" for Purposes of Federal Incidents that Affect a Couple's Right To Be a Family.

State law should govern the question of whether a marriage is valid and who is marital family. The approach is consistent with longstanding federal conflicts of law policy. Some would argue it is constitutionally mandated. Whatever its source, as I have shown, deviation from state or local custom is an extraordinary path for Congress to take.

Courts must determine when Congress' asserted reasons for deviating from local law are valid and when they are not. In the context of same-sex marriages, the holdings of *Lawrence v. Texas* and *Windsor* confirm that the mere fact that a couple is of the same-sex should not alone constitute sufficient public policy to reject marital family status at the federal level when states recognize it.[338] Moreover, though unnoticed by other legal scholars and litigants, the several states now expressly recognize at a minimum the right of intimate same-sex couples to contract with respect to family life: to enter into cohabitation agreements, to designate each other as personal agents for making health care decisions over otherwise legal next of kin and the like. That move is huge. In an earlier era, a resounding majority would have considered such relationships an abomination, so immoral that the state considered any agreements to secure them void.[339] Add those states to the thirteen that have adopted same-sex marriage and the seven or so that have adopted domestic partnerships or civil unions, and one finds a firm majority of states that have embraced some form of legally cognizable way to allow individuals to choose relationships and families that they wish. This writer believes it likely that many other states would

338. Lawrence v. Texas, 539 U.S. 558 (2003). In *Lawrence* the court struck down a Texas state sodomy statute criminalizing intimate relations between consenting adults as unconstitutional. The sexual relationship that was at the heart of the felony charge in Lawrence—and rejected as a basis for criminal sanctions—is also at the heart of historical objections to marriage.

339. The states expressly stating that such contracts are valid are Georgia, Florida, Pennsylvania, Indiana, Ohio, North Carolina, South Carolina, and Texas. *See, e.g.*, *Crooke v. Gilden*, 414 S.E.2d 645 (Ga. 1992) (upholding the contract); *Posik v. Layton*, 695 So. 2d 759 (Fla. Dist. Ct. App. 1997) (upholding the contract); *Swails v. Haberer*, No. 02-7095, 2004 U.S. Dist. Lexis 17727 (E.D. Pa. 2004) (upholding the contract applying state law); *Boyle v. King*, 2010 Pa. Dist. & Cnty, No. GD07-021569, Dec. LEXIS 313 (2010) (agreeing the contract would be enforceable but finding none and applying other state law instead of divorce code to lesbian couple for property separation on breakup of relationship); *Cherkis v. Curzi*, No. 1989-CE-6173 (Pa. Ct. C.P. Aug. 30, 1991) (upholding the contract); *Anderson v. Anderson*, No. 43CO1-9105-CP-269 (Kosciusko Cir. Cr., Indiana, 1992) (upholding the contract); *Seward v. Mentrup*, 622 N.E.2d 756 (Ohio Ct. App. 1993) (finding that mere cohabitation would not give rise to any benefits, but a written agreement might do so); N.C. CONST. ART. XIV, §6 (banning same-sex marriage while upholding the contract); SC CONST. ART. XVII, §15 (banning same-sex marriage while upholding the contract); Ross v. Goldstein, 203 S.W.3d 508, 514 (Tex. App. 2006) (banning same-sex marriage while upholding the contract).

also recognize same-sex cohabitation agreements and other documents solidifying the relationship between same-sex couples. Cohabitation agreements are not marriage, but the moral objections to the underlying relationship in both cases are the same.

Consequently, there is no reason in the cases of same-sex marriage for the federal government not to follow state or local law with respect to who is in a marital family. These marital family relationships exist independent of procreation. From state designations, the government can then decide how to allocate the benefits it chooses to attach to those relationships.

2. For Equal Protection Purposes, Courts Should Apply Intermediate Scrutiny to Denials of Federal Benefits that Affect Family Rights.

In the case of same-sex couples, courts should review refusals to provide benefits that affect family rights under intermediate scrutiny. The reason is that, as to these types of rights, same-sex couples constitute a quasi-suspect class. They satisfy the traditional concerns that compel heightened scrutiny: (1) they have historically endured persecution and discrimination in pursuing their family rights both within and outside of marriage; (2) homosexuality has no relation to aptitude or ability to contribute to society; (3) with respect to these rights, the class remains a politically weakened minority; and (4) when they exercise the right to form families they become visible and identifiable.[340]

B."Branch" Rights

1. Federal Law Should Control Who Receives the Federal Branch Rights That Flow From State-Designated Marriages.

Branch rights are the benefits and burdens that government attaches to marriage in order to effect specific governmental public policy objectives. Most of them will be economic. Because of their significant impact upon the federal purse and the state's lack of power with respect to federal expenditures, who receives branch rights in the federal context should be governed by federal law.

2. For Equal Protection Purposes, Courts Should Apply Rational Basis

340. Windsor v. United States, 699 F.3d 169, 181-82 (2d Cir. 2012) (noting Supreme Court has applied these factors in determining whether heightened scrutiny is needed and citing *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987)); City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985); *id.* at 440-41; *id.* at 442 n.10, 472 n.24. By contrast, under *Loving v. Virginia*, heterosexual blacks are "suspect" with respect to both family rights and incidents. Indeed, as a heterosexual couple, the Lovings met the presumed ability to procreation requirement and were still denied access to marriage, precisely *because* of their presumed ability to procreate.

Scrutiny to Federal Denials of Branch Rights.

Generally, the denial of branch rights to same-sex married couples should be subject to a rational basis level of scrutiny in an Equal Protection challenge. The key inquiry will be whether or not the statute was intended to advance a legitimate interest in supporting natural procreation through marriage or address the unique imbalance in the married heterosexual couple with respect to it. I submit that rational bases other than these will be few or nonexistant.

The rational basis test makes sense for branch rights. These rights have never been considered at the core of the right to be married and conflict of laws policy has never dictated that one sovereign should follow another sovereign's policies on them. Second, gay and lesbian Americans as a group are not a suspect or a quasi-suspect class with respect to the branch rights that are attached to marriage. Instead, regarding these rights, they are like many others who are excluded from marriage's economic benefits by Congressional priorities. Third, such a standard allows the government the needed flexibility to make the policy choices it has a right to make in spending federal tax dollars. Fourth many of these incidents involve economic legislation as to which the courts have long extended deference to Congress' decisions.[341] Fifth, branch rights by definition do not involve state power over the family or other significant federalism issues. Sixth, a rational basis standard recognizes that in making funding decisions Congress considers far more interests than merely those of same-sex couples versus opposite sex couples.

An example using the Oregon Donation law discussed in Part III(C)(1) will explain why suspect or quasi-suspect status for same-sex couples should not apply to branch rights and why a rational basis standard makes sense. The Oregon law allowed only white men, Indians who had white fathers and white women married to white men to take a share of Oregon land.[342] Despite the fact that the law was linked to procreation and marriage, it did not *economically* disadvantage gay white men; indeed, white males of all orientations were economically favored under law. They could get the essentially free land grant and, unlike women, had the power to apply for it in their own right. The "incidents" of marriage in that day which Justice Story identified as discussed in Part II(A)(3)—the disability of the wife, the rights of the husband—were of no aid to gay men because those disabilities hobbled one of the parties economically without the offsetting responsibility or benefit of procreation.[343] Two (white) men

341. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955).

342. *See* discussion *supra* at p. 753, notes 237-38.

343. Thus, Justice Story noted the incidents of marriage were the disabilities of a wife and the rights of husband. *See* discussion *supra* p. 719. As the Oregon statute

could work and travel far more widely than other groups. Each member of a gay white male couple could take a lot of land with each partner controlling his share. They could live together and farm it together. If "economic benefits" is the concern as has been emphasized in media, why trade the economic situation of two white males for the economic rights of a white heterosexual married man holding all power within his home but aided by a legally hobbled wife and facing repeated accidental and expensive pregnancies? Indeed, this sole option for marital arrangements in earlier centuries—coupled with the fact that gay men could only have and legally claim biological children through marriage and intimacy with women—was likely a key reason we have so little evidence that gay men tried legally to marry other gay men in that era. Even if there were no barriers on same-sex relationships, legal marriage would have made *no* economic sense for gay men in prior centuries because it was riddled with sexism that economically crippled one of the partners. But marriage law *did* significantly disadvantage gay men in terms of family rights. They could not publicly proclaim themselves as in love, or "married" or as an intimate family. Consequently, they could not secure their connection into old age and beyond. Even publicly pursuing the relationship outside of marriage could, in some communities, bring serious criminal penalty.

Women in contrast had no right to land, unless they were married to a white man or, after 1853, unless they were once married to one and widowed.[344] This requirement—to marry a white man—denied lesbian women family rights. If they married white men (which only white women could do) they got the economic benefit and likely children, but they lost out on the family benefit that they very much desired. Black women in most jurisdictions, regardless of orientation, could either not marry at all (due to slavery) or, if free, could often not legally marry white men.

Two groups had no chance of getting Oregon land under any circumstances. One was women of any orientation who never married, straight or lesbian. The second was blacks. Male, female, straight, or gay, married or unmarried—all blacks, not merely slaves—were disqualified from getting Oregon land by statute on the basis of race.[345] Poor people's

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demonstrates, marriage based economic benefits at the federal level essentially followed this model. Indeed, arguably one goal of such a structure was to place the married man on par with the single one and thus encourage marriage in a regime that crippled the wife from making significant economic contributions.

344. In 1853, Congress allowed widows to claim through husbands who had applied for the land, but died. Donation Land Claim Act of 1853, 10 Stat. 158, §8.

345. Donation Land Claim Act of 1850, ch. 76, §4, 9 Stat. at 496 (1850) (defining racial and gender restrictions). At that time, blacks were, by far, the largest group of those classified as non-whites. Given how many Spaniards and Mexicans occupied these areas, many Latinos were considered "white" and, thereby, would have qualified for land. Those considered non-white would not have qualified. This writer has found no evidence yet of other groups being denied land or applying for it probably because

right to the land depended largely upon their race and their gender, *not* upon their class or economic status.

Some land grant statutes did later allow white women to apply for less desirable land,[346] and the end of slavery helped ease racial restrictions and improve black access. But the Oregon design (which, remember, was novel for its time in allowing married women to have even a share of land) demonstrates why the strictest standard of scrutiny should not be applied to the denial of branch benefits relating to marriage of same-sex couples. The example demonstrates the need to have standards of review that reflect and remedy the *discriminatory history in question*. The outcome I suggest is also consistent with the Supreme Court's holding in *Loving*. To discuss *Loving* as merely about the right to marry is, to mix a metaphor, to whitewash the case and then to neuter it. *Loving* was a case about the freedom to marry and form a family as one chooses, but it was also a case about race discrimination and about race procreational discrimination.[347]

Any approach that ignores this history reduces the "marriage-equality" battle to a simple uncomfortable question: Which white men have the most economic rights? Is it those who prefer the company of women? Or is it those who prefer the company of men?[348]

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their numbers in the U.S. were quite small in 1850. On gays and lesbians, I do not deny the possibility that they suffered discrimination uniquely as gays and as well as whatever else they were (*e.g.*, race, gender etc.). The notion is called intersectionality. *See, e.g,* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 Stan. L. Rev. 1241 (1991) (introducing notion of intersectionality); Darren Rosenblum, *Queer Intersectionality and the Failure of Recent Lesbian and Gay "Victories,"* 4 LAW & SEXUALITY 83 (1994) (applying the intersectionality theory to gay and lesbian experiences). Indeed, intersectionality advances my argument that one needs to be careful in assuming that all experiences fit into the same box.

346. *The Advantage of Having an Administration that is Posted on Whisky—Married Women May Now Buy Land*, LOS ANGELES TIMES, July 19, 1887, at 5. The Secretary of Interior decided that women, including married women, may purchase timber and stone lands in states of Mississippi, Louisiana, California, Oregon, Nevada, and Washington Territory, provided that land is not suitable for agriculture.

347. The Virginia Supreme Court in *Loving* relied primarily upon its earlier holding in *Naim v. Naim.* That case held that the policy behind the anti-miscegenation statute was to prevent interracial procreation and the creation of a "mongrel breed of citizens." Naim v. Naim, 87 S.E.2d 749, 756 (Va. 1955), *overruled by* Loving, 388 U.S. at 1. *See also Loving* v. Virginia, 147 S.E.2d 78 (Va. 1966) (stating that *Naim* is controlling and there is no need to reconsider it), *rev'd by* Loving, 388 U.S. at 1 (referring to state's desire not to create a "mongrel breed of citizens" to and to preserve white supremacy). *Loving* was but one brick in a large complex of race discrimination and indeed, but considered out of context, the right to marry white people was among the least of black people's historical racial hurdles. The case did not, of course, open marriages' doors for either black or interracial same-sex couples.

348. Lesbian scholars have criticized the battle for "marriage" arguing that a marriage-based regime for social support will not protect all families or meet the needs of all gay and lesbian couples. *See* Paula L. Ettlebrick, *Domestic Partnership, Civil Unions, or Marriage: One Size Does Not Fit All*, 64 Alb. L. Rev. 905 (2001) (noting same-sex parenting always requires three people and arguing for recognition of broader relationships other than marriage and questioning attempt to mainstream gay and

One could argue that same-sex couples who are *parents* under state law should have the benefit of intermediate scrutiny when *procreation* is the claimed reason for the benefit. Under this view the denials of ERISA, Social Security benefits and income tax benefits mentioned in Part V(B) should be subject to the intermediate review standard for married same-sex couples who are parents under state law. The issue requires more attention than this article can provide. However, brief treatment can outline some of the issues. Arguments in favor are that the federal government has traditionally incorporated state law on parenting definitions, the federal government *does* benefit when two parties rather than one commit to supporting a child as parents. Moreover the economics of a family unit might still dictate that one parent will need to disproportionately tend to the child's needs for the entire unit to move forward most efficiently, rather than each taking the economic hit of parenting equally. Some same-sex parents do have natural births although always involving third parties. Notably, benefits allegedly targeted for procreation go to opposite sex parents who adopt and use reproductive technologies toward parenthood as well as those who never have procreated and cannot procreate. And finally, gays and lesbians have faced opposition as parenting couples, not merely as individuals, even when they have taken the traditional path of being adoptive parents.

On the other hand, there are also arguments against intermediate scrutiny as the standard of review for marriage-related branch benefits relating to parenting. Traditionally, married parents under law commit to supporting not only the child *but also each other*. It might be argued that the presence of the biological tie and the biological imbalance that normally exists in the heterosexual couple—and even past gender discrimination within heterosexual marriage—are key assumptions in statutes that provide or impose marital obligations or benefits tied to parenting through marriage (as opposed to providing the benefits *outside* of marriage). Moreover, when the issue is procreation-related benefits based on a Congressional assumption that having biological children within a marriage is preferred, with respect to branch benefits same-sex couples do not stand much differently than committed unmarried couples or single parents. On the

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lesbian families); Paula L. Ettlebrick, *Since When is Marriage a Path to Liberation?*, in SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE (Robert M. Baird & Stuart E. Rosenbaum eds., 1997); NANCY POLIKOFF, BEYOND STRAIGHT AND GAY MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW (2008) (arguing gay and lesbian couples are no more disadvantaged by a marital regime for benefits than other non-married groups).

Other authors have similarly criticized using marriage and "intimacy" as a basis for affording family benefits. *See e.a.*, MARTHA FINEMAN, THE NEUTURED MOTHER: THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995) (asking why marriage or intimacy should be the gateway to providing benefits).

question of over-inclusion, some heterosexuals who use surrogates or other reproductive technologies also have children or might have them biologically. Notably, we are speaking here of the standard of scrutiny, not of the ultimate decision on whether or not same-sex couples should be treated exactly like opposite sex ones. I conclude that the rational basis standard should be considered sufficient – for now.

Moreover, as I have discussed in Part V, even modern statutes appear to be designed to cover the negative economic effects of a pregnancy as to which both parties played a central biological role. When the biological imbalance assumed by the statutes is *not* present, the parties have greater bargaining power vis á vis each other with respect to procreation. With lesbians, if birth is their choice, either can have the child. With gay men, because neither forgoes economic activity to give birth, they have greater economic freedom to choose who among them will be the primary caretaker. Moreover, as discussed in Part V(B)(2), rational basis scrutiny has been applied to denials of benefits to *unmarried* heterosexual biological parents under state law who without question are biologically unbalanced vis á vis each other, may even be cohabitating, and who may be committed to parenting. In those cases, the man does *not* legally commit to financially supporting the mother though one pregnancy or several that he may well have consented to. Courts generally enforce a father's commitment to supporting the child, not the mother. Surely, using heterosexuality as a marker is over-inclusive. The over inclusion however, could be said to be a function of a legal assumption as to the unpredictability of procreation, a legal indulgence of the fertile octogenarian fiction, the impracticality of testing for procreation given privacy interests, and possibly a recognition of the long term financial impact of procreation. It is not a conclusion that how one procreates or whether one procreates does not matter.

It can reasonably be argued, especially given the newness of the issue, that the federal government has a right to weigh in on how the federal tax dollars it confers affect the third party rights that are regularly at issue in reproductive technology cases for both same-sex couples and for heterosexual ones, the trends in reproductive technologies themselves, and as on how federal funding will affect the rights of the children or potential children at issue. Finally, one could argue that parenting discrimination is a matter not specific to same-sex couples or to marriage, and responses should, therefore, be handled outside of it.

It is true that sexism has long been and continues to be perpetrated through marriage policy. However, there is zero evidence that including same-sex couples who did not suffer that history of marriage as a vehicle for gender discrimination as same-sex couples will alleviate gender discrimination within and through marriage. Indeed, one could argue that policies that make the gender discrimination imbalance less invisible also

make it easier to accomplish discrimination.

The author does not dispute that same-sex couples have been discriminated against in parenting or that they can make wonderful parents. But other couples excluded from procreation-related benefits (the unmarried, in particular) and their children have also faced unique historical discrimination with respect to asserting their parental rights. A rational basis standard for dispensing of benefits *through marriage* would give Congress more freedom to consider the rights of *all* couples excluded from marriage's non-familial benefits. Moreover the standard would not preclude a challenge that Congress should have provided certain procreation-based benefits *outside* of marriage. So long as the United States continues to use marriage as a primary means of supporting natural procreation, I believe that Congress is entitled to use heterosexual procreation as a lane marker for for procreation-related benefits, subject to a rational basis test.. Indeed, the founders likely did not have in mind many of the reproductive technologies that can result in parenthood under some state laws.

C. The Plenary Power Exception

If the Constitution places exclusive or plenary power in the federal government to make the relevant decision, even if the restriction directly affects family rights, the test must, of course, be rational basis. Courts are clear that in such cases a finger should be placed on the scale in favor of federal decision-making even when suspect classes are otherwise involved.[349] Three obvious instances of plenary power come to mind: immigration, the U.S. military, and Congress' power over American Indian Affairs.

D. The Difficulty of Line Drawing

Surely some cases of line drawing to identify whether the denied right affects a marital family right or is a merely a branch right may be harder than in others. Every federal marital benefit in some way affects the family. In close cases, courts should employ a balancing test to decide the primary operation of the right. A court could also decide that some rights should be treated as affecting family rights for some purposes but not others, or that government may not block all benefits, but it may offer a different level of economic benefit based upon constitutionally defensible

349. *E.g.*, U.S. v. Mirza, 454 Fed. Appx. 249 (5th Cir. 2011), 132 S. Ct. 1725 (2012) (discussing immigration); United States v. Llamas-Gonzalez, 414 F. Appx. 936 (9th Cir. 2011), *cert. denied*, 131 S. Ct. 3047 (2011) (discussing immigration); Delaware Tribal Business Committee v. Weeks, 470 U.S. 73 (1977) (discussing Indian affairs); Morton v. Mancari, 417 U.S. 535, 555 (1974) (discussing Indian affairs).

public priorities.

Another case of line drawing difficulty may arise in determining whether or not a statute advances procreation—and how. This determination will often be the tipping point on rational basis review. It may lead to exclusion of same-sex couples that do not have children or the inclusion of those who do. The question of who is a parent will also likely be one that will invite controversy, especially in the case of reproductive technologies in which third party rights are involved. Congress and the Courts will have to sort out when a statute is merely advancing male hegemony and/or sexual orientation discrimination and when it advances procreation or another legitimate state interest.

E. Is the Federal Government Required to Use The Word "Marriage?"

This analysis does not require that the government use the term marriage. The federal government obviously has the right to define the terms to be used in its own statutes. DOMA actually does not prevent the government from using a neutral term for *all* intimate relationships simply for the purpose of designating who gets federal benefits. Take for example, a term like "federally recognized intimate partnerships."[350] However, if Congress used a single term, if it wished to preserve a procreation-based regime, it would *still* have to create subclasses. That could be done on a basis other than sexual orientation, but I cannot see that the division with respect to branch rights is compelled. Moreover, it is a fact that marriage is uniquely a state-created notion. Employing that name at the federal level may help states that embrace same-sex marriage, but it could also negatively affect the rights of those states that have declined to do so, including those that use alternative names for the relationships.

In fact, not being wed to the term "marriage" for same-sex couples will also allow government to expand some benefits that are currently marriage related to those couples in jurisdictions that do *not* recognize marriage. The general principle of following state law in making federal policy on *family* matters, could justify the federal government recognizing marriage substitutes that some states have adopted in lieu of same-sex marriage such

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350. At oral argument in *Windsor*, Justice Alito raised a similar question adding to his hypothetical that the government defines the word to include same-sex couples.

> JUSTICE ALITO: Well, let me get to the question I asked Mr. Clement. It just gets rid of the word "marriage," takes it out of the U.S. Code completely. Substitutes something else, and defines it as same-sex—to include same-sex couples. Surely it could do that.

Transcript of Oral Argument at 99, Windsor v. United States (No. 12-307) (U.S. filed Mar. 27, 2012) *available at* http://www.supremecourt.gov/oral_arguments/argument_audio_detail.aspx?argument=12-307.

as civil unions and domestic partnerships. Domestic partnerships run the gamut in the degree of rights they allow, but they generally allow at least some rights that mirror family rights, even if they deny branch incidents. The federal government might even be able to base family-related benefits upon contracts creating ties that states have agreed to recognize in lieu of marriage if such contracts are designed to create the types of legal relationships that are consistent with the federal statutory purposes establishing the benefit.

VII. APPLYING THE STANDARDS TO THE THREE DOMAS

How does this scheme relate to the three DOMAs? One DOMA bundles all marriage rights together, making them impervious to same-sex couples. This is the DOMA that has dominated attention in same-sex marriage litigation. The argument supporting this DOMA, if any, is that DOMA is an integral part of a comprehensive legislative scheme supporting procreation by heterosexual couples. The problem is that, as I have shown, not all federal statutes vindicate the procreation goal, and this DOMA also burdens rights traditionally reserved to the states while denying same-sex couples fundamental rights affecting the family. Because it bundles family rights with other rights, this DOMA should be subjected to heightened scrutiny and should fall under Equal Protection, as it did in *Windsor*.

The second DOMA is a statute that collapses into each underlying statute that it defines. The argument supporting this DOMA is that it is authorized by and it is integral to each of those underlying statutes. More likely, this DOMA would survive in some cases, but fail in others. Whether or not the second DOMA stands—the one that collapses into the underlying statutes—depends upon which federal policy is at issue.

Then there is the third DOMA. This DOMA is definitional. This DOMA does not tell Congress how to allocate marital benefits. It simply limits how Congress can use the term "*marriage*." As applied to all statutes this DOMA, should also fail because the definition cannot be sustained in all cases, especially without an alternative regime. However, this DOMA may be valid in some circumstances where Congress intended to uniquely addresses historical gender discrimination through marriage or the procreational situation of the heterosexual couple.

VIII. APPLYING THE STANDARDS TO THE *WINDSOR* CASE

How does the *Windsor* case come out under this proposal? The plaintiff sought a refund of federal estate taxes paid because she was denied the estate tax marital deduction after the death of her spouse. The *Windsor* case is complicated by several facts. First, she was married in Canada and at the time of her spouse's death, her domicile of New York did not

recognize same-sex marriages either directly or under its conflict of law rules. Second, opinions indicate that neither litigants nor the federal courts focused upon whether she had already applied for a refund of *state* estate taxes or whether New York had already determined that it would retroactively apply its own same-sex marriage laws and grant the tax refund. The Second Circuit simply assumed that New York law would control whether or not she was "married" and predicted New York would conclude that she was based on New York precedent recognizing foreign same-sex marriages for inheritance purposes. It may not be that easy.[351]

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351. Below, BLAG challenged Windsor's Article III standing and lost, but seemed to concede that state law controlled the question of whether her marriage was valid at the relevant time. *See* Windsor v. United States, 833 F. Supp. 2d. 394, 398 (2012), *aff'd* 699 F.3d. 169, 176, 177-78, *cert. granted*, 133 S. Ct. 786 (2012); Brief in Opposition at 18-19, United States v. Windsor, 133 S. Ct at 786 (opposing the petition to writ of certiorari before judgment and discussing state law as controlling). The Second Circuit looked to New York law to determine whether or not New York would retroactively consider them married at the time of the spouse's death, and it decided that New York would. Windsor v. United States, 699 F.3d 169, 176, 177-78 (2012). It did not mention whether or not Windsor had filed an original claim or refund with respect to her New York state estate taxes as "married" under New York law. Neither the district court nor the Second Circuit considered that *federal law* might well determine retroactivity *e.g.*, the time as to which a requirement to be satisfied under state law is to be met for purposes of federal law, even if state law would govern whether a same-sex marriage is cognizable.

Windsor's complaint stated that New York "recognizes [the couple's] marriage" and that it "provided them with the same status, responsibilities and protections, as other married people." Windsor Complt. at ¶4, p. 2. In her brief to the Supreme Court, Windsor stated that the *IRS* denied her claim because both spouses were women and the deduction did not apply due to DOMA. Brief on the Jurisdictional Questions for Respondent Edith Schlain Windsor, at 5, Windsor, 133 S. Ct. at 786. The brief also asserted that New York denied her the state marital deduction because that "[a]t the time, New York State for purposes of imposing its own estate, calculated the value of a decedent's estate by reference to the estate's federal tax liablility" and that "[t]hus the IRS's decision meant" that Windsor owed New York state estate taxes. *Id.* at 5, n.2. It said that Windsor has filed a "protective" claim in New York. It did not indicate that a copy of the claim was a part of the Appendix filed with the Supreme Court or part of the record below and this author does not have access to all of those records.

While many states do *choose* look to federal law with reference to their own estate taxes, at the time, New York *also* still had the right to calculate her liability with reference to whether *New York* considered her married or not. New York was not required to follow federal law on that marriage determination. Thus it is important to know whether New York denied the request to treat her as married when she filed her return, or whether Windsor only asserted it at a later point. The question of retroactivity for *state* estate tax purposes is a New York question. If state law governs retroactivity, as the parties suggested to the Second Circuit and as it then opined, then New York's decision governs in both cases. Moreover, a state determination should arguably be a *prerequisite* to a federal determination. Otherwise, a state could later say "no retroactivity for purposes of state law" and then the very basis for a filer's win on the merits would be ripped from under her—but the filer might already have been paid the federal refund. A federal court has the means to certify the question to the state's highest court or to require that a taxpayer ask the state tax authorities to rule. To predict state law in that circumstance in such a political context, affects the ability of a state to determine to the contrary later as it has a right to do. If federal law governs retroactivity then the question is whether even if DOMA is unconstitutional, that ruling should be retroactively applied in the tax context to a marriage that even a state itself

Nevertheless, assuming one can validly reach the merits, claims likeWindsor's Equal Protection claim should likely be reviewed under a rational basis test. I concede some good arguments that taxation of inheritances presents a "hybrid" case and should have the favor of a heightened standard. Descent and distribution are traditionally state areas of interest. While the actual passing of property is not hindered, the tax reduces the amount of property that can pass at death and the government taxes some property that is normally within the power of the state to control. Thus, a higher tax on inheritances between same-sex spouses straddles the line between denying family rights and denying economic rights. Moreover the tie to procreation appears distant, at least as the deduction is presently designed. On the other hand, the federal government has always had broad power to determine taxation. It needs that flexibility; and, despite claims of some that the rational basis standard is too watered down to be meaningful, absent a procreational interest, a rational basis test *should* be sufficient to determine a case like Windsor's in her favor with respect to both state and federal property.

As I have argued, in Part V(B)(4), there is no demonstrable link between the modern marital deduction and procreation and, I would argue, no rational basis for denying the claim. Awarding the deduction is also otherwise not contrary to federal public policy. Indeed, while the impact of the deduction for Windsor is quite large, the impact on the federal purse will be relatively small because so few married couples of any orientation

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did not recognize at the relevant time. The timing of Windsor's claim with New York state—how she filed at first and when she filed for a refund—may also matter to standing.

The impact of a decision on retroactivity relates to more couples than those like Windsor who went ahead and married despite law. It is reasonable to ask why retroactivity should not also be applied to those couples who wanted desperately to marry but concluded the act of legal marriage would be legally fruitless or who could not afford to travel to abroad or to another state to be married, or who entered into civil unions or domestic partnerships, some prior to their state later adopting marriage in fact. What of those who *still* cannot marry under state law? How far back should retroactivity go? Both state and federal governments must also consider whether the retroactivity principle is limited to estate taxes (and if so, why?) or whether it applies more broadly to other areas of taxation.

Another approach to the question, considering conflict of laws theory and the Constitution, is to consider whether the U.S. is required to retroactively recognize a *Canadian* same-sex marriage—which is the place that recognized the marriage as a valid marriage ceremony at the relevant time. If the answer is that the federal government should have recognized the Canadian marriage as qualifying at the time of death (*e.g.*, the application of DOMA should be seen as violating Equal Protection at the time), the retroactivity problem disappears because the marriage was current at time of the spouse's death. But this case has the wrinkle that the state of domicile would *not* have recognized the marriage at the time, federal tax laws do normally look to the state of domicile for defining marriage in the tax context, and so the argument exists that the federal government should recognize it for the purpose of branch rights only if the several states would or if the state of domicile would have at the relevant time—unless, of course, following state law would be deemed to be violating the federal Constitution.

have estates large enough to qualify for it. Finally, while the deduction does not restrain the ability of the couple to be a family, it touches upon inheritances within families, thereby burdening the state's attempt to have Windsor treated just like other families within the state. Consequently, on the merits, if the home state would grant a marital deduction refund based on retroactive recognition of a marriage, Windsor and those like her should get the federal refund.

IX. CONCLUSION

The battle over same-sex marriage is, broadly viewed, not merely a battle over marriage but a battle over families: Who can form them? Whose will be most financially and socially successful? Whose receives the most publicly funded benefits? But it is also a theoretical battle over what burdens we in the United States believe should be publicly supported and which ones we think should be privately borne. At the center of that latter battle is procreation. Many different groups are competing for financial benefits out of the public purse. Same-sex couples comprise only one such group. Beyond the treatment of same-sex couples one can criticize our current procreation centered approach for biases against the middle and lower classes, biases against women, and biases against minority groups. Not all of these biases are illegal under current law.

As I have argued, support of procreation has long been a part of federal marriage policy. It remains so today. If a procreation policy is to survive, Congress must be able to reserve lanes of legal space for the funding of differently situated families within that regime. Heterosexual married couples are marked generally by the risk of accidental pregnancies, a history of gender discrimination through marriage, and an imbalance in procreational position between them. The more that parties who do not share the same interests or concerns are added to the procreation lane, the more rapidly legal precedent will erase or dramatically transform any protection or benefits intended to deal with that unique situation. While current federal marriage policy continues to discriminate against procreating women, abandoning a procreation based marriage regime will not resolve those problems. Indeed, it may make the situation worse.

So long as the United States continues to use marriage as a primary means of supporting natural procreation, I believe that Congress is entitled to use heterosexuality as a lane marker for procreation-related benefits, subject to a rational basis test. Congress has a right to design a scheme that does not make heterosexual marriage less favored by those it wishes to encourage to undertake because the financial benefits measured against the financial costs of procreation within marriage are not compelling in a larger market. Congress is also entitled to address gender inequality in

heterosexual marriage uniquely given the long history of the same and its distinction from sexual orientation discrimination. It is constitutionally defensible, if not wise, for Congress to create zones of interest in family policy in order to give voice to the different interest groups, remedy the ills of concern, and in order to give voice the very procreation-related concerns that are, this writer believes, the only legitimate reason for state or federal governments to be involved in financing marriage. Overinclusiveness of heterosexual couples who do not procreate or have not shown they can is not desirable, but may be unavoidable. The issue here is not who will receive financial benefits (which may be dispersed within or without marriage), but rather who will receive those benefits through financial policies that are tied to marriage. The arrangement disadvantages the children of same-sex couples, but no more so than the children of unmarried heterosexual couples, the latter of whom definitely procreate naturally but do not receive for their children benefits related to marital procreation.

It is not correct to suggest, as some have, that adding new couples to an economic benefit does not diminish the rights of those already enjoying the benefit.[352] Economic benefits operate in a larger marketplace, and a benefit given to one group repositions the actors in that marketplace *vis-à-vis* others. Indeed, that repositioning in the economic marketplace is the very *point* of the benefit.

The history of marriage in the United States has been both a history of using marriage to support procreation and using marriage to promote discrimination. Both strands are present in DOMA and the Court wisely struck its broadest variation down. But as discussion of what Congress can do now moves forward, the courts should strive hard to respect Congress' right to set the priorities for public funding that "the people" favor, while still requiring Congress to adhere to the principles of federalism and Equal Protection in the Constitution. Congress' failure is not that it has not given *exactly* the same benefits to same-sex couples and opposite sex couples but rather, that in marital and family funding policy, it has not considered the rights of same-sex couples at all. The courts should require it to do so, but also give Congress the leeway to consider not just the narrow theater of litigation where those with time and resources contend, but also the entire landscape of families and individuals, all of whom should be considered as Congress makes family funding decisions.

352. *See, e.g.*, Mass. v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 3 (1st Cir. 2012) (suggesting that DOMA does not increase benefits for heterosexual couples nor do its defenders show how denying same-sex couples benefits would encourage heterosexual ones to marry).