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## Leveling Up After DOMA

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## Leveling Up After DOMA

DEBORAH A. WIDISS\*

So let's say three soldiers are injured and they are all in same-sex relationships, and in each instance the other partner in this relationship wants to visit the soldier in—in a hospital.

The first is a spouse in a State that allows same-sex marriage, the second is a domestic partner in a State that an [sic] allows that, but not same-sex marriage, the third is in an equally committed loving relationship in a State that doesn't involve either. Now, your argument is that, under Federal law, the first would be admitted—should be admitted, but the other two would be kept out?

—Justice Samuel Alito to Solicitor General Donald Verrilli, Jr., Transcript of Oral Argument in *Windsor v. United States*<sup>1</sup>

### INTRODUCTION

*Windsor v. United States*<sup>2</sup> ended one form of federal marriage discrimination—the refusal to recognize any same-sex marriages—and simultaneously created a *new* form of federal marriage discrimination. Under the Defense of Marriage Act (DOMA), same-sex couples were simply categorically denied federal rights.<sup>3</sup> Now that this section of DOMA has been held unconstitutional, same-sex couples are sorted into three tiers, with married same-sex couples who live in states that recognize their marriages receiving the full panoply of federal marriage rights; married same-sex couples who live in states that refuse to recognize their marriages receiving some, but not all, federal rights; and unmarried same-sex couples receiving none of the federal rights.<sup>4</sup> This new discrimination is different from DOMA and from the bans on same-sex marriage that remain in place in more than thirty states. These older bans distinguish (I believe unfairly and unconstitutionally)<sup>5</sup> between same-sex and different-sex couples, but they treat

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1. Transcript of Oral Argument at 85, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307).

2. 133 S. Ct. 2675 (2013).

3. Pub. L. No. 104-199, 110 Stat. 2419 (1996).

4. See *infra* text accompanying notes 45, 47, and 49.

5. See Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375 (2010) (discussing arguments under the fundamental rights branch of

same-sex couples consistently.<sup>6</sup> By contrast, under the new regime, the federal government—a single sovereign entity—is now treating committed same-sex couples who live in states in which they cannot marry quite differently from their married counterparts. Because of this “derivative” discrimination, a product of the interaction of federal policy with state marriage bans, the majority of gay and lesbian couples remain ineligible for full federal marriage rights.<sup>7</sup> *Windsor* was an important step forward, but we need to finish the process of “leveling up.”

In the initial aftermath of the *Windsor* decision there has been significant discussion of one aspect of this “new” marriage discrimination: the question of whether various federal statutory regimes will adopt a place-of-celebration rule—recognizing any marriage that is valid in the jurisdiction where the ceremony occurred—or a domicile rule—recognizing only those marriages that are valid in the jurisdiction where the couple resides.<sup>8</sup> This has largely been analyzed as a matter of statutory and regulatory analysis, looking statute by statute at whether, and how, “marriage” is defined, or applying general choice-of-law and conflicts rules.<sup>9</sup> Leading advocacy groups, major newspapers, and even President Obama have urged adoption of a uniform place-of-celebration rule,<sup>10</sup> and many federal agencies have announced that they will recognize all legal marriages, even if the couple lives in a state that does not.<sup>11</sup>

I applaud this recognition that committed same-sex couples who live in states with marriage bans should have access to the federal rights that are premised on marriage. But there are some serious problems with relying solely on a place-of-celebration approach to address the current inequity. It requires that these couples travel out-of-state (and often significant distances) to marry simply to claim federal benefits, imposing an unfair burden on same-sex couples and one which will likely further exacerbate class-based variation in marriage rates. It also all but guarantees that many same-sex couples will be unable to celebrate their marriage in the

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equal protection law); Deborah A. Widiss, Elizabeth L. Rosenblatt & Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461 (2007) (discussing sex discrimination arguments).

6. This is a slight oversimplification. There have been a few states that have recognized out-of-state same-sex marriages even when refusing to license same-sex marriages themselves, but generally only for a relatively short period of time before expanding marriage rights within their own states. *See, e.g., Windsor*, 133 S. Ct. at 2689 (discussing New York’s evolution on the issue). In October 2013, Oregon began recognizing out-of-state marriages, but Oregon does not (yet) permit same-sex couples to marry within the state. *See* Richard Gonzales, *How a County Clerk Ignited the Gay Marriage Debate in N.M.*, NPR (Oct. 22, 2013).

7. *See infra* note 44.

8. *See infra* Part II.A.

9. *See infra* text accompanying notes 47–49 (discussing guidance provided by relevant agencies regarding specific federal policies); *see also* William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 STAN. L. REV. 1371 (2012) (discussing how general choice-of-law principles should apply in this context); Hillel Y. Levin, *Resolving Interstate Conflicts Over Same-Sex Non-Marriage*, 63 FLA. L. REV. 47 (2011) (discussing how conflicts principles should apply to interstate recognition of civil unions or domestic partnerships, as well as marriage).

10. *See infra* notes 51–53 and accompanying text.

11. *See infra* text accompanying notes 47–49.

company of their friends and family. And some couples who *do* go out-of-state to marry may later discover a separate—hidden, but very significant—cost: an inability to divorce if the marriage does not unfold as they hope. The reason? Generally, a couple can divorce only in their home state, and many states refuse to recognize same-sex marriages even to dissolve them.

For couples who live in states in which they cannot marry, these costs might be preferable to the alternative of being denied federal rights entirely under a domicile rule. But this is a false choice, because it simply accepts, as a given, that state-licensed marriages will, and implicitly should, continue to be the exclusive mechanism for accessing core federal rights. In this Essay, I challenge that underlying assumption. (In a separate working paper, I discuss the related question of whether, consistent with equal protection principles, the federal government *may* continue to use marriage as the sole dividing line.)<sup>12</sup> As suggested by Justice Alito’s question opening this Essay, it is rather odd, to say the least, that same-sex couples’ rights and obligations under key *federal* statutory provisions now depend on the state in which they happen to live.<sup>13</sup> Rather than accept the serious problems implicit in a place-of-celebration rule, I argue that the federal government should develop its *own* mechanism—a federal domestic partner or “marriage” registry—for identifying committed couples.<sup>14</sup> Although this would involve some logistical challenges, the success of state and local registries suggest that this could provide a workable, and fundamentally fairer, vehicle for providing access to federal benefits, rights, and obligations.

Of course, it is widely expected that sooner or later (and many think sooner), the Supreme Court will hold that state bans on same-sex marriage are unconstitutional. If same-sex couples were permitted to marry in *all* states, the problem of derivative federal discrimination would disappear entirely. I would celebrate a decision that led to marriage equality in all states, but it also might signal a lost opportunity.

DOMA and the *Windsor* litigation highlighted the extraordinary variety of federal rights, benefits, and obligations that are currently premised on marriage. The current uneven treatment of same-sex couples continues that conversation. If same-sex couples are truly treated identically to different-sex couples under federal and state law, pressure for rethinking federal marriage law more generally may decrease. This would be unfortunate. While not my primary focus in this Essay, I agree with other commentators that it would be preferable to replace the use of marriage as an all-or-nothing gateway to benefits (for both different-sex and same-sex couples) with more tailored policies that can better achieve specific underlying

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12. Deborah A. Widiss, Federal Marriage Discrimination, Take Two (working draft) (on file with author).

13. The factual predicate for Justice Alito’s question is actually incorrect, *see infra* text accompanying note 104, but his more general point that federal rights for these three couples would vary significantly is undeniably true. There are other areas of law where federal rights turn on variation in state law. *See, e.g., Astrue v. Caputo*, 132 S. Ct. 2021, 2032 & fn.9 (2012) (discussing variation in state law regarding intestacy rights for posthumously conceived children, which in turn affects eligibility for Social Security survivor benefits). However, marriage is probably unique in the number of distinct federal right and obligations affected and in the number of individuals affected.

14. *See infra* Part II.C.

objectives.<sup>15</sup> Thus, my hope is that efforts to “level up” marriage policy to treat committed same-sex couples equally regardless of their state of residence will not undermine efforts to also “broaden out” and “focus in” marriage policy. Indeed, a federal domestic partner registry could serve as a vehicle for such future tailoring.

Part I of this Essay suggests that although federal law generally uses marriage as an imperfect but workable proxy for identifying committed couples with integrated finances, variation in state marriage rights means that reliance on marriage does not effectively serve this purpose for same-sex couples. Part II explores the relative strengths and weaknesses of two different approaches to “leveling up”—adopting place-of-celebration rules and creating a federal domestic partner or “marriage” registry—and advocates the latter approach. Part III briefly discusses how this “new” federal discrimination fits into broader discussions of changing family forms and the need to reconsider federal marriage policy in general.

### I. FEDERAL “MARRIAGE” LAW

As is now familiar, the General Accounting Office has identified more than 1000 provisions of the federal code that use marriage as a factor in determining rights, benefits, and obligations, spanning the gamut from intellectual property to immigration.<sup>16</sup> A comprehensive review of federal marriage law is beyond the scope of this Essay, but, generally, federal laws use marriage, or sometimes marriage plus other factors, to identify “real” relationships that Congress has determined should be protected, encouraged, or otherwise recognized, sometimes as a means of supporting children born to such marriages.<sup>17</sup> For a wide range of benefits—such as family medical leave rights, federal civilian and military employee benefits, and immigration purposes—federal law limits availability to married couples as a way both to foster marital relationships and to protect the government and private employers from being “duped” into providing these kinds of privileges in the absence of (what the government recognizes as) a bona fide significant relationship. In other contexts, ranging from joint tax returns, to government ethics rules, to eligibility for means-tested poverty supports and student loans, federal laws use marriage as a means of identifying individuals who are likely to have integrated finances, such that the failure to identify individuals as part of a collective unit could either invite abuse or fail to appropriately recognize presumptively available resources.<sup>18</sup> Indeed, as I have discussed elsewhere, the structure of many aspects of federal (and state) marriage law not only responds to

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15. *See infra* Part III.

16. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT (2004).

17. *See generally* Kerry Abrams, *Marriage Fraud*, 100 CALIF. L. REV. 1 (2012) (providing a detailed analysis of marriage fraud doctrines in various areas of law).

18. *See, e.g.*, Windsor v. United States, 133 S. Ct. 2675, 2695 (2013) (discussing government ethics rules and student financial aid); Abrams, *supra* note 17, at 18–19, 28–29 (discussing means-tested programs); Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63 (1993) (discussing tax).

integrated finances but also *encourages* couples to specialize into distinct caregiving and breadwinning roles.<sup>19</sup>

For many couples there are important financial benefits to being recognized as married under the federal code. These include exemptions from paying tax on the imputed value of health insurance received through a spouse's employment,<sup>20</sup> eligibility for Social Security spousal benefits,<sup>21</sup> and, as highlighted in *Windsor*, the ability to inherit from a spouse without paying estate tax.<sup>22</sup> Although Edie Windsor's \$363,000 tax bill<sup>23</sup> was rather unusual, large sums may be at stake for typical middle class couples as well. For example, because of Social Security spousal benefits, which permit a dependent spouse to receive benefits based on contributions made by a breadwinning spouse, a married couple with a sole breadwinner making \$44,600 (the national average wage) will likely receive at least \$500,000 more in Social Security and Medicare benefits than an unmarried individual earning that *same* \$44,600, even though the married couple pays exactly the same amount as the unmarried individual in total payroll taxes.<sup>24</sup> Couples who earn significantly different amounts also pay less in taxes if they are married than they would pay collectively if they were single (this is usually called the "marriage bonus").<sup>25</sup> And federal civilian or military employees receive generous spousal benefits.<sup>26</sup> Federal rights premised on marriage may be immeasurably important to individuals for reasons other than their pocketbooks. If one's partner is a foreign

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19. Deborah A. Widiss, *Changing the Marriage Equation*, 89 WASH. U. L. REV. 721, 747–57 (2012).

20. See, e.g., M.V. LEE BADGETT, WILLIAMS INST., *UNEQUAL TAXES ON EQUAL BENEFITS: THE TAXATION OF DOMESTIC PARTNER BENEFITS* (2007) (estimating that an employee with a domestic partner receiving health insurance pays on average \$1069 per year more in taxes than a comparable married employee with a spouse receiving the same benefits).

21. 42 U.S.C. § 402(b), (c) (2006); see also Peter W. Martin, *The Case for Reforming the Program's Spouse Benefits While "Saving Social Security"* (Cornell Law Sch., Working Paper No. 12-67), available at <http://library2.lawschool.cornell.edu/facib/faculty.asp?facid=21&show=online> (providing detailed history of spousal benefits).

22. 26 U.S.C. § 2056(a) (2006); *Windsor*, 133 S. Ct. at 2683 (discussing this provision).

23. *Windsor*, 133 S. Ct. at 2683.

24. See C. EUGENE STEUERLE & CALEB QUAKENBUSH, URBAN INST., *SOCIAL SECURITY AND MEDICARE TAXES AND BENEFITS OVER A LIFETIME* (2012), available at <http://www.urban.org/UploadedPDF/412660-Social-Security-and-Medicare-Taxes-and-Benefits-Over-a-Lifetime.pdf>. For more on Social Security spousal benefits, see *infra* text accompanying notes 98–102.

25. See, e.g., Stephanie Hunter McMahon, *To Have and to Hold: What Does Love (of Money) Have to Do with Joint Tax Filing?*, 11 NEV. L.J. 718, 719–20 (2011).

26. See, e.g., KATELIN P. ISAACS, CONG. RESEARCH SERV., RS21029, *SURVIVOR BENEFITS FOR FAMILIES OF CIVILIAN FEDERAL EMPLOYEES AND RETIREES* (2012) (summarizing civilian spouse survivor benefits); Matthew Alex Ward, *The Military Must Lead in Advocating for Marriage Equality*, 37 N.Y.U. REV. L. & SOC. CHANGE 457 (2013) (summarizing military spousal benefits); *Healthcare Eligibility*, OFF. PERSONNEL MGMT., <http://www.opm.gov/healthcare-insurance/healthcare/eligibility/> (federal employees' spouses are eligible for health insurance).

national, marriage provides a pathway to citizenship.<sup>27</sup> If one's partner is seriously ill, marriage provides, for many employees, a right to hold onto a job while taking time off to provide care.<sup>28</sup>

But not all couples benefit by being considered married for federal purposes. Beyond the lowest tax brackets, married couples who earn relatively equal incomes pay more in taxes than they would if they were single.<sup>29</sup> Within days of the decision in *Windsor*, there were numerous articles in the popular press cautioning same-sex couples to be wary of this "marriage penalty,"<sup>30</sup> an issue made particularly relevant by the fact that same-sex couples have historically been more likely than different-sex couples to earn relatively similar amounts.<sup>31</sup> Marriage (to a wage-earner) may also raise an individual above eligibility levels for means-tested programs such as the Earned Income Tax Credit or Temporary Assistance for Needy Families.<sup>32</sup> And remarriage by a widow or a divorcee generally cuts off eligibility for Social Security spousal benefits.<sup>33</sup>

My deeper point is not that a given couple will always want to be considered married for federal purposes, but rather that federal law makes judgments about how to fairly distribute and apportion government resources, benefits, and obligations among various family structures, and it uses marriage as a proxy for identifying couples who have made a long-term commitment to each other, who may well be raising children together, and who have integrated their finances.<sup>34</sup> Same-sex (and different-sex) couples in *all* states form these kinds of relationships, and the federal government should strive to treat such couples, whatever their state of residence, relatively equally.

There is at least one prominent past example of reform efforts spurred by variation in *state* family law that resulted in similar couples being treated significantly differently under *federal* law. Until the 1940s, married couples filed

27. See, e.g., *Policy Manual*, U.S. CITIZENSHIP & IMMIGR. SERVICES 202 (June 10, 2013), <http://www.uscis.gov/policymanual/PDF/PolicyManual.pdf>.

28. See 29 U.S.C. § 2612(a)(1)(C) (2006).

29. See, e.g., McMahon, *supra* note 25, at 719–20.

30. See, e.g., Blake Ellis, *Same-Sex Couples: Beware the Marriage Penalty*, CNNMONEY (June 27, 2013, 7:07 AM), <http://money.cnn.com/2013/06/27/pf/same-sex-marriage-penalty/index.html>; Susanna Kim & Lauren Pearle, *Many Same-Sex Couples May Pay More in Taxes After Marriage*, ABC NEWS (June 27, 2013), <http://abcnews.go.com/Business/sex-couples-pay-taxes-marriage/story?id=19505554&singlePage=true>; Robertson Williams, *DOMA's Demise Means Higher Taxes for Some Same-Sex Couples*, FORBES (June 26, 2013, 2:27 PM), <http://www.forbes.com/sites/beltway/2013/06/26/domas-demise-means-higher-tax-bills-for-some-same-sex-couples/>.

31. See, e.g., Dan A. Black, Seth G. Sanders & Lowell J. Taylor, *The Economics of Lesbian and Gay Families*, 21 J. ECON. PERSP. 53, 63 (2007).

32. See, e.g., Gregory Acs & Elaine Maag, *Irreconcilable Differences? The Conflict Between Marriage Promotion Initiatives for Cohabiting Couples with Children and Marriage Penalties in Tax and Transfer Programs*, in NEW FEDERALISM, at 2 (Urban Inst., Ser. No. B-66, 2005).

33. See, e.g., Martin, *supra* note 21, at 14.

34. As I discuss in a working paper, as applied to different-sex couples, marriage is an imperfect proxy but probably not so under- or over-inclusive as to be unconstitutional. As applied to same-sex couples, it may be. Widiss, *supra* note 12.

taxes as individuals (or a joint return taxed at individual rates, which was usually disadvantageous). This meant that couples living in community property states, who were required to share both earned and investment income and thus fell within lower tax brackets, generally paid far less federal income tax than comparable couples in common law title states, who were not permitted to share or transfer earned income. This result was considered profoundly unfair, and the joint return for married couples, with a separate rate structure from individual returns, was put in place to address this inequity.<sup>35</sup>

The potential injustice of federal rights for same-sex couples varying dramatically based on the state in which they live was a persistent theme in the oral argument in *Windsor*. It was pursued by Justices Alito and Scalia in their questioning of Solicitor General Donald Verrilli, Jr. and Edie Windsor's attorney Roberta Kaplan and emphasized by BLAG attorney Paul Clement in his arguments in support of DOMA.<sup>36</sup> In the *Windsor* opinion, however, the issue receded almost into invisibility.<sup>37</sup> The reasons for that change are not hard to surmise. In a world *with* DOMA, the expectation that the federal government would treat same-sex couples consistently was an argument for upholding the law. Paul Clement, and Justices Scalia and Alito—both of whom ultimately dissented in *Windsor*—might have believed that the argument could garner some sympathy from other justices more inclined to strike DOMA down. In the post-DOMA world, however, the argument immediately flips. Now, state-based variation in marriage rights calls for a more general rethinking of the federal government's reliance on state marriage definitions as the sole mechanism for qualifying for important federal benefits and obligations.

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35. See, e.g., Lily Kahng, *One Is the Loneliest Number: The Single Taxpayer in a Joint Return World*, 61 HASTINGS L.J. 651, 653–55 (2010) (discussing this history); Julie A.D. Manasfi, Joint Federal Income Tax Returns: If DOMA Dies and Even if It Lives the Weak Case for Distinguishing Between Same-Sex and Different-Sex Married Couples 14–19 (Mar. 14, 2013) (unpublished paper), available at [http://works.bepress.com/julie\\_manasfi/2/](http://works.bepress.com/julie_manasfi/2/) (discussing this history and quoting a Senate Report stating that the joint return was intended to “produce substantial geographical equalization”).

36. In addition to the quotation from Justice Alito, *supra* text accompanying note 1, see, e.g., Transcript of Oral Argument, *supra* note 1, at 87 (question of Justice Scalia to Solicitor General Verrilli) (“So you think that’s bad as well, that all three of those [couples] have to be treated the same, despite State law about marriage[?]”); *id.* at 100–02 (Justice Alito posing questions to Roberta Kaplan regarding a potential equal protection claim brought by a same-sex couple living in North Carolina denied a waiver of the estate tax); *id.* at 111–12 (BLAG attorney Paul Clement) (“And we heard today that there’s a problem when somebody moves from New York to North Carolina, they can lose their benefits. The Federal government . . . can say, well, that doesn’t make any sense . . . We don’t want somebody, if they are going to be transferred in the military from West Point to Fort Sill in Oklahoma, to resist the transfer because they are going to lose some benefits. *It makes sense to have a uniform Federal rule for the Federal government.*”) (emphasis added).

37. The majority opinion does not touch on the issue at all. Justice Scalia’s dissent highlights some of the choice-of-law questions that will arise if a couple moves from a marriage-recognition state to a non-recognition state. *Windsor*, 133 S. Ct. 2708 (Scalia, J., dissenting).

Justice Kennedy's majority opinion in *Windsor*, however, fails to take up that invitation, stating explicitly that "[t]his opinion and its holding are confined to" only "those persons who are joined in same-sex marriages made lawful by the State."<sup>38</sup> As a matter of legal doctrine, this limitation is reasonable, since that was the question actually at issue in the case. And of course, the statement is a calculated response to the charge, argued vociferously by Justice Scalia in dissent, that *Windsor* effectively decided the larger question of whether state bans on same-sex marriage were similarly unconstitutional.<sup>39</sup> But in thus circumscribing the holding, *Windsor* leaves unaddressed a deeper inequality. That is, *Windsor* speaks stirringly of the significant tangible and intangible harms DOMA caused to same-sex married couples who were unfairly denied federal rights ranging from "the mundane to the profound."<sup>40</sup> The opinion fails to even acknowledge, however, that so long as the federal government continues to simply rely on state marriage classifications, existing bans on marriage in more than thirty states have similar pernicious effects.

Of course, even if state bans were eliminated, not every same-sex couple would marry. But when states *do* legalize marriage, an average of 30% of identified same-sex couples marry within the first year alone.<sup>41</sup> This suggests that a significant number of same-sex couples living in non-recognition states would marry if they could—and, more centrally, that a significant number of such couples make personal and financial commitments to each other that are functionally indistinguishable from those made by (different-sex and same-sex) married couples.

## II. LEVELING UP

Census data suggests that there are approximately 646,000 same-sex couples living together in the United States.<sup>42</sup> At the time *Windsor* was litigated, approximately 114,000 of these same-sex couples were married, with about 76,000 living in a state that recognized their marriage and another 38,000 living in a state that did not.<sup>43</sup> In other words, when DOMA was held unconstitutional, only a small

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38. *Id.* at 2695, 2696 (majority decision).

39. *Id.* at 2709–10 (Scalia, J., dissenting).

40. *Id.* at 2694 (majority opinion).

41. M.V. LEE BADGETT & JODY L. HERMAN, WILLIAMS INST., PATTERNS OF RELATIONSHIP RECOGNITION BY SAME-SEX COUPLES IN THE UNITED STATES 11–12 (2011).

42. Brief of Gary J. Gates as Amicus Curiae Supporting Respondent *Windsor* at 15–16, *Windsor*, 133 S. Ct. 2675.

43. *See id.* at 25–26 (estimating that there were 114,000 same-sex couples in the United States who were married); Press Release, Williams Inst., Supreme Court Rulings Strike Down DOMA and Prevent Enforcement of California's Proposition 8 (June 26, 2013), available at <http://williamsinstitute.law.ucla.edu/press/press-releases/supreme-court-rulings-26-jun-2013/> (estimating 76,000 married couples live in states that recognize the union and 38,000 live in states that do not); *see also* Drew DeSilver, *How Many Same-Sex Marriages in the U.S.? At Least 71,165, Probably More*, PEW RESEARCH CTR. (June 26, 2013), <http://www.pewresearch.org/fact-tank/2013/06/26/how-many-same-sex-marriages-in-the-u-s-at-least-71165-probably-more> (documenting at least 71,165 same-sex marriages by reviewing state marriage records, but noting the actual number was almost certainly far

fraction—approximately one-eighth—of identified same-sex couples actually received full federal marriage rights. That number has since grown considerably: California, Delaware, Hawaii, Illinois, Minnesota, New Jersey, and Rhode Island have all legalized marriage by same-sex couples since *Windsor* was decided. But even with these recent additions, more than half of the nation’s same-sex couples live in non-recognition states.<sup>44</sup> Federal policy should be changed so that couples, whatever their state of residence, who are willing to make formal commitments to each other comparable to those made by married couples can access the rights, benefits, and obligations of marriage under federal law.

#### A. Three Tiers of Federal Marriage Rights

Now that section three of DOMA has been struck down, federal marriage policy sorts same-sex couples into three tiers. Couples who are lawfully married and live in states that recognize their marriages receive all of the federal benefits and obligations of marriage. Couples who are lawfully married but live in states that do not recognize their marriage receive *some* of the federal benefits and obligations of marriage. Same-sex couples who are unmarried—including, most likely, those in state-created civil unions or domestic partnerships—receive none of the federal benefits and obligations of marriage.<sup>45</sup>

The key question for married couples living in non-recognition states is whether the relevant statute, regulation, or agency policy indicates that marriages will be

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higher since many states had not yet reported data from 2012 or 2013).

44. In October 2013, immediately after New Jersey legalized same-sex marriage, the Williams Institute at UCLA estimated that 40% of the nation’s estimated 646,000 same-sex couples were living in a state where they could marry. Press Release, Williams Inst., Almost 17,000 Same-Sex Couples Now Eligible for Marriage Benefits in New Jersey (Oct. 21, 2013), available at <http://williamsinstitute.law.ucla.edu/press/press-releases/almost-17000-same-sex-couples-now-eligible-for-marriage-benefits-in-new-jersey/>. The 40% number pre-dated the addition of Hawaii and Illinois, but Illinois has been estimated to have approximately 23,000 same-sex couples, *Infographic: Illinois*, WILLIAMS INSTITUTE (Nov. 2013), <http://williamsinstitute.law.ucla.edu/headlines/infographic-extending-marriage-to-same-sex-couples-in-il/>, and Hawaii certainly has far fewer same-sex couples, *Infographic: Hawai’i*, Williams Institute (Nov. 2013), <http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/infographic-hi-snapshot/>, meaning that still fewer than 44% of same-sex couples live in a state with marriage equality. Additionally, Oregon recently began recognizing out-of-state same-sex marriages, *see supra* note 6, but even with this addition, well over 50% of same-sex couples live in non-recognition states, and thus are categorically barred from some key federal rights premised on marriage.

45. Several federal agencies have indicated that individuals in civil unions or domestic partnerships will not be considered “married” for federal purposes. *Garden State Equal. v. Dow*, No. L-1729-11, 2013 WL 5397372, at \*7–8 (N.J. Super. Ct. Law Div.) (Sept. 27, 2013) (collecting agency statements on the matter). This is not surprising, since the relevant federal statutes typically use words such as “marriage,” “spouse,” “wife,” or “husband.” Citing this trend, a New Jersey lower court decision held that refusing to permit same-sex couples to marry (rather than just form civil unions) violated the state constitution because it deprived couples of significant federal rights. *Id.* at \*24. In October 2013, Governor Chris Christie decided not to appeal this ruling, and same-sex marriage became available statewide in New Jersey. Kate Zernike and Marc Santora, *As Gays Wed in New Jersey, Christie Yields*, N.Y. TIMES, Oct. 22, 2013, at A1.

judged based on a place-of-celebration rule—that is, whether it was valid within the jurisdiction where the couple married—or a domicile rule—that is, whether it is valid within the jurisdiction where the couple resides. Until DOMA was held unconstitutional, variation among federal standards on this issue was relatively unimportant. States generally have fairly similar rules (other than those concerning same-sex marriage) regarding who may get married, and, where there are differences (again, other than those concerning same-sex marriage), most states will recognize an out-of-state marriage as valid even if they would not have authorized it directly.<sup>46</sup> Therefore, for different-sex couples, application of a “place-of-celebration” or a “domicile” rule will generally lead to the same result: a couple who has lawfully married in one state is considered married wherever they reside for both federal and state purposes. For same-sex couples, that is certainly not the case.

Thus, the domicile or place-of-celebration question must be answered for *each* of the 1000-plus distinct federal statutory provisions that address marriage. Relevant agencies have announced that tax, immigration, military and civilian federal employee benefits, and private benefits governed by ERISA will follow a place-of-celebration rule.<sup>47</sup> (Some of these legal interpretations, however, may be challenged.)<sup>48</sup> Social Security, by contrast, will follow a domicile rule, and most likely so will veterans’ benefits and the federally-protected right of many nonfederal employees to take time off from work to care for a spouse with a serious

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46. See, e.g., Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433, 435, 442–44 (2005). Most states recognize a “public policy” exception to this general rule but, at least since the Supreme Court held that anti-miscegenation laws were unconstitutional, it has been little invoked in any context other than same-sex marriage. See *id.*; see also Andrew Koppelman, *Same-Sex Marriage and Public Policy: The Miscegenation Precedents*, 16 QUINNIAC L. REV. 105 (1996).

47. See OFFICE OF PERS. MGMT., BENEFITS ADMINISTRATION LETTER NO. 13-203, COVERAGE OF SAME-SEX SPOUSES (2013) (discussing federal employee benefits); Press Release, U.S. Dep’t of Def., DOD Announces Same-Sex Spouse Benefits (Aug. 14, 2013), available at <http://www.defense.gov/Releases/Release.aspx?ReleaseID=16203> (discussing military benefits); Press Release, U.S. DEP’T OF THE TREASURY, All Legal Same-Sex Marriages Will Be Recognized for Federal Tax Purposes, (Aug. 29, 2013), available at <http://www.treasury.gov/press-center/press-releases/Pages/j12153.aspx> (discussing tax); U.S. Dep’t of Labor, Technical Release No. 2013-04, *Guidance to Employee Benefit Plans on the Definition of “Spouse” and “marriage” under ERISA and the Supreme Court’s Decision in United States v. Windsor* (Sept. 18, 2013) (discussing ERISA); *Implementation of the Supreme Court Ruling on the Defense of Marriage Act*, DEP’T OF HOMELAND SEC., <http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act> (discussing immigration rights).

48. See, e.g., Alberto R. Gonzales & David N. Strange, Op-Ed., *What the Court Didn’t Say*, N.Y. TIMES, July 18, 2013, at A23 (arguing that same-sex married couples are still not eligible for spousal rights under immigration law); see also Richard A. Oppel, Jr., *3 States End Resistance to Spousal Benefits Order*, N.Y. TIMES, Nov. 28, 2013, at A24 (reporting that nine states initially refused to process benefits paperwork for same-sex of National Guard members on the grounds that doing so would violate state law, but that as of late-November 2013 only three states continued their opposition to the new rule).

medical condition.<sup>49</sup> For many other policies, it is still unclear which approach will be adopted. Federal agencies are presumably working to provide additional guidance as soon as possible. Nonetheless, without a comprehensive statutory fix, there will be confusion and uncertainty for individuals, regulators, and courts for months and years to come—and some significant federal benefits will remain categorically unavailable to same-sex couples who live in states that refuse to recognize same-sex marriages.

*B. A Place-of-Celebration Rule—And Its Significant Weaknesses*

The most frequently discussed solution to the “new” marriage discrimination—that is, the uneven treatment of same-sex couples based on their state of residence—is that the federal government should pass legislation adopting a uniform place-of-celebration rule that would apply to all federal rights and obligations of marriage. This approach has been proposed in Congress<sup>50</sup> and endorsed by leading advocacy groups,<sup>51</sup> prominent news organizations,<sup>52</sup> and

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49. See 29 C.F.R. § 825.113 (2013) (“Spouse [for purposes of the Family and Medical Leave Act] means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides.”); *Program Operations Manual System—GN 00210 BASIC: Windsor Same-Sex Marriage Claims*, SSA.GOV (Aug. 9, 2013), <https://secure.ssa.gov/apps10/public/reference.nsf/links/08092013111040AM> (providing that spousal claims will be permitted when claimant “was married in a state that permits same-sex marriage” and “is domiciled at the time of the application, or while the claim is pending a final determination, in a state that recognizes same-sex marriage”); Press Release, Dep’t of Justice, Attorney General Holder Announces Move to Extend Veterans Benefits to Same-Sex Married Couples (Sept. 4, 2013), available at <http://www.justice.gov/opa/pr/2013/September/13-ag-991.html>. Further analysis may be found in a detailed set of fact sheets developed by a group of advocacy organizations, discussing the likely applicability of various federal statutes to couples who are married but live in states that do not recognize the marriage and providing updates as agencies have provided more definitive guidance. These are available on the coalition’s members’ websites. See *After DOMA: What It Means for You* [hereinafter *After DOMA Fact Sheets*], HUM. RTS. CAMPAIGN (July 9, 2013), <http://www.hrc.org/blog/entry/what-do-the-doma-decisions-mean-for-you/> (fact sheet for “Veteran’s Spousal Benefits”) (discussing likelihood that place of domicile rule will apply).

50. Respect for Marriage Act, H.R. 2523, 113th Cong. (2013) (as of July 25, 2013, 165 cosponsors); S. 1236, 113th Cong. (2013) (as of July 26, 2013, 42 cosponsors). As introduced, this bill would both establish a uniform place-of-celebration rule and repeal Section 2 of DOMA, which provides that states need not recognize other states’ same-sex marriages. See *id.* If the bill passed with both provisions intact, and if states did in fact begin to recognize out-of-state marriages, my concerns below regarding divorce would be mitigated. But both of those “ifs” are far from certain, since many state constitutions preclude such recognition and any change to that policy would probably be far more controversial than adopting a place-of-celebration rule for federal purposes. Moreover, even if other states *did* recognize the marriages, the up-front burdens, in terms of travel costs and dignity injury, would remain a problem with a place-of-celebration rule.

51. The coalition of the leading LGBT advocacy groups characterizes “the movement’s next steps on DOMA” as a “commit[ment] to working until every single legally married same-sex couple receives the same protections, responsibilities, and programs as all other married couples—regardless of where they live—and to securing the freedom to marry

President Obama.<sup>53</sup> Even without statutory reform, advocates and the administration have aggressively pushed individual agencies to adopt a place-of-celebration approach in any context in which it is viable under existing statutory language. This has been successful, and many key federal marriage rights are now available to same-sex married couples even if they live in states with marriage bans.<sup>54</sup>

I applaud this development. It obviously mitigates the substantive unfairness discussed above by making it at least theoretically possible for same-sex couples to receive the federal rights and benefits of marriage wherever they live. The place-of-celebration approach has some other clear strengths. It is easy to apply and retains the familiar assumption that marriage is a gateway to benefits. It also allows the federal government to continue to piggyback on state procedures for licensing, recording, and dissolving marriages (though with some significant problems when it comes to divorce, as discussed below). And, for many areas of federal law, it does not require congressional action.

But the place-of-celebration approach has some very significant weaknesses that have been little discussed.

First, for some same-sex couples, requiring travel to a state where they can marry puts federal benefits literally out of reach. For example, a couple who lives in southern Florida would currently need to travel about 1000 miles to reach Maryland, the closest state with marriage equality. Although the military recognizes this problem and offers service members extra time off,<sup>55</sup> most private employers will not do so. Nor will they pay the costs of such a trip. Already, marriage rates are highly skewed by educational achievement, class, and race.<sup>56</sup> A place-of-celebration rule magnifies such disparities for same-sex couples.

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nationwide.” *After DOMA Fact Sheets*, *supra* note 49 (fact sheet for “General” at 2). If the movement were actually successful in *both* these goals (that is, a uniform place-of-celebration rule *and* securing the freedom to marry nationwide), the derivative discrimination problem would be eliminated. But again, at this point, the first goal is more politically viable than the second, and as discussed in the text, it has some significant weaknesses.

52. *See, e.g.*, Editorial, *Equal Marriages—and Now Equal Benefits*, WASH. POST (July 21, 2013), [http://articles.washingtonpost.com/2013-07-21/opinions/40713630\\_1\\_federal-benefits-federal-government-nationalized-gay-marriage](http://articles.washingtonpost.com/2013-07-21/opinions/40713630_1_federal-benefits-federal-government-nationalized-gay-marriage); Editorial, *How Obama Can Make Same-Sex Marriage Meaningful*, BLOOMBERG (June 27, 2013, 6:00 PM), <http://www.bloomberg.com/news/2013-06-27/how-obama-can-make-same-sex-marriage-meaningful.html> (both endorsing a place-of-celebration rule).

53. *See* Colleen McCain Nelson, *Obama Hails DOMA Ruling, Sees Work Ahead*, WALL ST. J. WASH. WIRE (June 27, 2013, 8:33 AM), <http://blogs.wsj.com/washwire/2013/06/27/obama-hails-doma-ruling-sees-work-ahead/> (quoting President Obama as stating his “personal belief . . . that if you’ve been married in Massachusetts and you move somewhere else, you’re still married and that, under federal law, you should be able to obtain benefits like any lawfully married couple”).

54. *See supra* text accompanying note 47.

55. *See* U.S. Dep’t of Def., *supra* note 47.

56. *See, e.g.*, PEW RESEARCH CTR., *THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES* 22–23, 28–29 (2010), *available at* <http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf>; Andrew J. Cherlin, *Demographic Trends in the United States: A Review of Research in the 2000s*, 72 J. MARRIAGE & FAM. 403, 404–05 (2010).

Even for couples with the financial means to travel, there may be a significant dignitary harm. *Windsor* speaks in stirring tones of the importance of marriage as a means for couples to “affirm their commitment to one another before their children, their family, their friends, and their community.”<sup>57</sup> Absent a holding that state marriage bans violate the Federal Constitution, the federal government cannot require states to allow same-sex couples to marry under state law in their own community. But same-sex couples in one part of the United States should not be forced to marry in a different part of the United States, which for many will necessarily be far from family and friends, simply to claim *federal* rights.

And for some couples, the most serious problem with marrying out-of-state to obtain federal benefits will come later, if they ultimately decide they would like to dissolve their relationship. States will generally permit nonresident couples to marry, but they usually will not permit nonresident couples to *divorce*. Same-sex married couples who live in non-recognition states have already found (often to their shock and horror) that their home state will not grant them a divorce, and, in many instances, neither will the state that married them.<sup>58</sup> In the best circumstances, this imposes considerable additional legal cost and complexity by requiring the couple to litigate a divorce in a jurisdiction where neither of them lives. In the worst cases, a couple is actually trapped in a marriage, for both state and federal purposes, that one or both would like to end but unable to obtain a divorce.<sup>59</sup>

Divorce for same-sex couples living in non-recognition states was already a problem before *Windsor*. The demise of DOMA and the greater incentives that now exist for couples to go out-of-state to marry will make it worse. Adoption of a uniform place-of-celebration rule would raise the stakes even higher. So long as state marriage bans remain in place, federal policy should not require same-sex couples to run the risk of being literally “wedlocked”<sup>60</sup> simply because they seek to access federal benefits.

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57. *Windsor v. United States*, 133 S. Ct. 2675, 2689 (2013).

58. This problem has been partially addressed for some couples: some states that permit same-sex marriage now permit same-sex couples who cannot divorce in their home state to seek a divorce in the state that married them. See NAT'L CTR. FOR LESBIAN RIGHTS, DIVORCE FOR SAME-SEX COUPLES WHO LIVE IN NON-RECOGNITION STATES: A GUIDE FOR ATTORNEYS (2013), available at [http://www.nclrights.org/site/DocServer/Divorce\\_in\\_DOMA\\_States\\_Attorney\\_Guide.pdf](http://www.nclrights.org/site/DocServer/Divorce_in_DOMA_States_Attorney_Guide.pdf). Other couples, however, continue to be trapped. See, e.g., Mary Patricia Byrn & Morgan L. Holcomb, *Wedlocked*, 67 U. MIAMI L. REV. 1 (2012); Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. REV. 1669 (2011) (both discussing these issues in detail).

59. For a discussion specifically of the federal tax consequences of the inability to divorce, see Anthony Infanti, *Why Gay Couples Hate the IRS*, BLOOMBERG (Aug. 9, 2013, 9:00 AM), <http://www.bloomberg.com/news/2013-08-06/why-gay-couples-hate-the-irs-more-than-you-do.html>. For a more general discussion of state and federal law consequences, see generally Byrn & Holcomb, *supra* note 58; Joslin, *supra* note 58.

60. I borrow this term from Mary Patricia Byrn and Morgan L. Holcomb. See Byrn & Holcomb, *supra* note 58.

*C. A Federal Domestic Partner—or Marriage?—Registry*

It would be better for the federal government to develop its *own* mechanism for identifying committed couples who should be entitled to what are now considered federal marital benefits. This could be in addition to, or in place of, place-of-celebration rules.<sup>61</sup> That is, the federal government should respond to the problem of dramatically different state rules regarding who may marry by creating a registry that would permit (at least) same-sex couples to receive the *federal* rights and benefits of marriage regardless of their state of residence.

Prior to DOMA being struck down, the military was developing a domestic partner registry that would have made many benefits that otherwise flow solely from marriage available to service members in same-sex relationships;<sup>62</sup> the military has since (unfortunately I believe) abandoned this project and replaced it with a place-of-celebration rule.<sup>63</sup> Likewise, also prior to *Windsor*, the Federal Office of Personnel Management advocated providing spousal benefits to same-sex partners of federal employees.<sup>64</sup> The registry I suggest would go further than these proposals by providing, like state civil union and domestic partner analogues, the full panoply of federal marriage rights, or, as discussed in Part III, serving as a vehicle for better tailoring such rights for *both* same-sex and different-sex couples. Such a registry would address the core inequality left in DOMA's wake without imposing front-end travel costs or back-end divorce challenges on same-sex couples. It would not, however, implicate rights and obligations—such as those concerning property distribution, spousal support, or custody—under *state* marriage law.<sup>65</sup>

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61. If the registry were developed in the absence of a uniform place-of-celebration rule, it should be structured in such a way as to include married couples living in non-recognition states, ideally through definitional provisions that would automatically include such marriages.

62. See Karen Parrish, *Same-Sex Couples Can Claim New Benefits by October*, U.S. DEP'T OF DEF. (Feb. 11, 2013), <http://www.defense.gov/News/NewsArticle.aspx?ID=119260>.

63. See Memorandum from Chuck Hagel, Sec'y of Def., to Sec'ys of Military Dep'ts (Aug. 13, 2013) available at <http://www.defense.gov/home/features/2013/docs/Extending-Benefits-to-Same-Sex-Spouses-of-Military-Members.pdf> (stating that “the extension of benefits to the same-sex domestic partners of military members is no longer necessary to remedy the inequity that was caused by section 3 of the Defense of Marriage Act”); U.S. Dep't of Def., *supra* note 47.

64. The OPM proposal included different-sex partners as well. See Eric Katz, *OPM Proposes Extending Fed Health Benefits to Same Sex Partners*, GOV'T EXECUTIVE (Apr. 11, 2013), <http://www.govexec.com/pay-benefits/2013/04/opm-proposes-extending-federal-health-benefits-same-sex-partners/62439/>. Bills have been introduced that would make the same policy change. See Domestic Partnership Benefits and Obligations Act, H.R. 3485, 112th Cong. (2011); S. 1910, 112th Cong. (2011); H.R. 2517, 111th Cong. (2009); S. 1102, 111th Cong. (2009) (would provide “marriage”-based employment benefits and obligations to federal employees in domestic partnerships); see also Social Security Equality Act, H.R. 3050, 113th Cong. (2013) (would provide Social Security “spousal” benefits to same-sex couples in state-recognized legal statuses such as domestic partnerships or civil unions).

65. There are areas of federal law, including pension benefits and bankruptcy, where

State, local, and private employer domestic partner and civil union registries could provide a template for a federal registry.<sup>66</sup> Most such registries require couples to affirm that the couple meets the jurisdiction's requirements for marriage, other than being different-sex, and that they are in—and intend to remain in—a long-term committed relationship. Often, couples must affirm that they live together and/or have integrated financial responsibilities,<sup>67</sup> standards that are not explicitly required for individuals who choose to marry<sup>68</sup> but which articulate the assumptions regarding marriage that are embedded in federal law.<sup>69</sup> Generally, they provide that partnerships may be ended simply upon notice to the relevant entity and the other person, although, as discussed below, more formal dissolution procedures might be required for a federal registry.

If the federal government were to create a federal registry, it would face some different questions than those addressed by state, local, or private registries. A threshold question is whether such a registry would be constitutional. The short answer, I believe, is probably “yes.” In the *Windsor* litigation, some claimed that DOMA exceeded Congress's enumerated powers, since states historically have had primary responsibility for licensing marriages.<sup>70</sup> *Windsor*, while recognizing this history, explicitly declined to base its holding on these federalism arguments.<sup>71</sup> And for good reason. Although the Supreme Court has sometimes characterized marriage as primarily a matter of state law, federal policy has long been integrally

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federal marriage law intertwines with state marriage law and where careful thought would be required to determine how best to achieve the underlying objective of providing same-sex couples equal access to federal marital benefits without intruding unreasonably into what is properly considered state divorce law. *See infra* note 84 (discussing issues related to pension benefits in more detail).

66. The Human Rights Campaign maintains a list with links to dozens of different domestic partner registries. *City and County Domestic Partner Registries*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/entry/city-and-county-domestic-partner-registries>.

67. For example, the Dayton, OH registry requires partners to affirm that they “share a common residence” and “have a committed relationship and share responsibility for each other's common welfare.” *Domestic Partner Registry*, CITY OF DAYTON, <http://www.daytonohio.gov/cco/Pages/Registry.aspx>.

68. *See* Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1772–73 (2005) (noting that marriage “in many respects licenses greater flexibility and less state intrusion into family life” than domestic partnership requirements and critiquing domestic partnerships on those grounds); *see also* Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. (forthcoming 2014), *draft available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2286320](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2286320) (showing how domestic partnerships were modeled on marriage, although ultimately they also helped redefine marriage).

69. To the extent that a registry that required such affirmations could provide a better proxy for achieving the objectives of certain federal policies, it theoretically could be used in place of “marriage” for both different-sex and same-sex couples. *See infra* Part III.

70. These arguments were advanced most fully in an amicus brief submitted to the Court by several prominent federalism scholars. *See* Brief of Federalism Scholars as Amici Curiae in Support of Respondent Windsor, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 860459.

71. *Windsor*, 133 S. Ct. at 2692 (“[I]t is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance.”).

involved in family matters.<sup>72</sup> It seems clear that the federal government has power to define familial relationships for the purposes of developing and administering federal law.<sup>73</sup> Notably, during oral argument in *Windsor*, the parties and several justices suggested that the federal government could extend the benefits to same-sex couples through a registry along the lines I propose.<sup>74</sup>

A second, I think harder, question is whether such a registry would be available only to same-sex couples and perhaps even only to same-sex couples who live in states in which they cannot marry. *If* the primary impetus behind the registry is simply to respond to the current inequities caused by the variation in state marriage rights for same-sex couples, it might be reasonable to limit its availability. On the other hand, there are some strong arguments for making such a status more generally available.<sup>75</sup> In several other countries and in some U.S. states, domestic partnerships or civil unions are available as an alternative to marriage for both different-sex and same-sex couples; in France they have become almost as common as marriages (likely in part a reflection of the relative ease with which they may be dissolved compared to marriages).<sup>76</sup> Colorado, Hawaii, and Vermont have created

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72. See, e.g., Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297 (1998).

73. See generally Courtney G. Joslin, *Windsor, Federalism, and Family Equality*, 113 COLUM. L. REV. SIDEBAR 156 (2013) (discussing and critiquing federalism arguments in *Windsor*).

74. See Transcript of Oral Argument, *supra* note 1, at 81 (question of Chief Justice Roberts to Solicitor General Verrilli) (Q: “[Y]ou agree that Congress could go the other way, right? Congress could pass a new law today that says . . . [w]hen we say ‘marriage’ in Federal law, we mean same—committed same-sex couples as well, and that could apply across the board?” . . . A: “I don’t think it would raise a federalism problem.”); *id.* at 96–99 (similar questions by Chief Justice Roberts and Justices Scalia and Alito to Roberta Kaplan, counsel for Edith Windsor, in which Kaplan likewise opined that Congress could do so at least if the status were called something other than marriage); *cf. id.* at 76 (answer by Paul Clement, BLAG attorney to a question by Justice Kennedy concerning arguments that DOMA violated federalism principles) (“I think there is so clearly is [sic] a Federal power because DOMA doesn’t define any term that appears anywhere other than in a Federal statute that we assume there is Federal power for.”).

75. See, e.g., NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE* 146–207 (2008) [hereinafter POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE*] (arguing for reconsidering the use of marriage as a prerequisite for receipt of many government benefits, rights, and obligations); Elizabeth M. Glazer, *Civil Union Equality*, 2012 CARDOZO L. REV. DE NOVO 125, 133–36, <http://www.cardozolawreview.com/Joomla1.5/content/denovo/Glazer.DOMA.2012.Final.PDF> (discussing personal or religious reasons why different-sex couples stated they preferred to form a domestic partnership under Illinois law than to marry); Nancy D. Polikoff, “*Two Parts of the Landscape of Family in America*”: *Maintaining Both Spousal and Domestic Partner Employee Benefits for Both Same-Sex and Different-Sex Couples*, 81 FORDHAM L. REV. 735 (2012) (arguing that domestic partner benefits should be available for both different-sex and same-sex couples).

76. See William N. Eskridge Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEORGETOWN L.J. 1881, 1943–44 (2012) (cataloging available statuses by state); Jessica R. Feinberg, *Avoiding Marriage Tunnel Vision*, 88 TULANE L. REV. (forthcoming 2014), *draft available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2247552](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2247552), at 50 (discussing ease of

“reciprocal” or “designated” beneficiary statuses that provide some “marital” rights to close family members, such as siblings or parents and children, who cannot marry, or, in Colorado’s case, to any pair of unmarried adults, whether or not they are related or in a romantic relationship.<sup>77</sup> And, even more surprising to American sensibilities, in many other countries, cohabiting couples without any formal status receive many of the same rights as married couples.<sup>78</sup> Creating a federal registry could invite more general reconsideration of the singular reliance on marriage under U.S. federal law. As discussed in Part III, particularly if a future Supreme Court decision grants same-sex couples the right to marry anywhere, a federal domestic partner registry could be a vehicle to better tailor federal policies for all families, so long as it was structured to treat comparable same-sex and different-sex couples equally.

A related question would be what the registry should be called. As the fight over same-sex marriage has made clear, the word “marriage” carries immense symbolic weight. Some state supreme courts have held that it is so significant that calling same-sex unions anything else violates core principles of equality.<sup>79</sup> If same-sex couples, wherever they live, could “marry” federally, they would gain access not only to the rights, benefits, and obligations of marriage under federal law but also to the respect for marital relationships that undergirds those federal policies. That said, calling the status marriage would undoubtedly be more controversial politically and it would seem to more squarely implicate federalism concerns. It also would signal strongly that federal policy remains focused exclusively on “marital” status. For both these reasons, I would suggest that, in this context, the word might not be worth the fight, although I recognize that there are compelling arguments on the other side.

Additional technical issues would need to be resolved. Would there be a single federal standard for other aspects of marriage eligibility (e.g., minimum age rules or consanguinity) or would the federal registry simply follow the rules of the

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ending a French civil union); Scott Sayare & Maia de la Baume, *Bliss for Many French Couples Is Now Less Marital Than Civil*, N.Y. TIMES, Dec. 16, 2010, at A1 (reporting civil unions could soon outnumber marriages in France, and that they are also available in several other countries).

77. COLO. REV. STAT. ANN. § 15-22-101, *et seq.* (West 2011); HAW. REV. STAT. § 572C-4 (2008); VT. STAT. ANN. tit. 15, § 1301. For a detailed description of these state laws, and how they relate to legal statuses for same-sex and different-sex couples, see Feinberg, *supra* note 76, at 6–16.

78. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE, *supra* note 75, at 110–22. In the United States, most governmental benefits premised on marriage are not available to cohabiting couples who lack legal status, but courts may hold that one member of the couple owes support to the other under contract or equitable theories. See Eskridge, *supra* note 76, at 1929–35.

79. See, e.g., Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407, 480 (Conn. 2008); Ops. of the Justices to the Senate, 802 N.E.2d 565, 571 (Mass. 2004) (both concluding separate status was impermissible). *But see*, e.g., Lewis v. Harris, 908 A.2d 196, 221 (N.J. 2006) (concluding separate status was permissible). A more recent New Jersey case held that now that the different *state* terminology deprives couples of *federal* rights, the state was required to permit same-sex couples to marry. Garden State Equal. v. Dow, No. L-1729-11, 2013 WL 5397372, at \*24 (N.J. Super. Ct. Law Div. Sept. 27, 2013).

couple's domicile state?<sup>80</sup> Or, as suggested above, would eligibility be extended beyond couples with a romantic affiliation? Would it create any kind of "parental" relationship with a partner's children for purposes of federal law, even in the absence of a recognized parental relationship under state law?<sup>81</sup> And how would dissolution be handled? This last question is somewhat less difficult than it might appear at first blush. The primary objective of much of state marriage and divorce law is the regulation of a couple's obligations *to each other*, and property distribution, spousal support, and custody laws typically call for a subjective assessment of multiple factors as applied to a *particular* couple.<sup>82</sup> Federal "marriage" law, by contrast, generally regulates the relationship of the government or private entities *to the marital unit*. Moreover, as discussed above (albeit critiqued below), federal law generally uses marriage as an all-or-nothing proxy for commitment and interdependence, rather than requiring a specific inquiry into the nature of the relationship *between* the members of the couple.<sup>83</sup> Thus, the kind of detailed fact-finding—and contentiousness—that typifies state divorce proceedings would be far less necessary in the context of dissolving a relationship that simply affects federal marriage rights.<sup>84</sup> Nonetheless, it certainly would be important to

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80. Existing proposals for federal registries, see *supra* text accompanying notes 62 & 64, suggest incorporating the couple's domicile's rules on such matters. However, sometimes it may be difficult to determine whether a *couple* has a *single* domicile and, if so, what it is. See Susan Frelich Appleton, *Leaving Home? Domicile, Family, and Gender*, 47 U.C. DAVIS L. REV. (forthcoming 2014).

81. My thanks to Courtney Joslin for flagging this issue for me. See also Courtney G. Joslin, *Marriage, Biology, and Federal Benefits*, 98 IOWA L. REV. 1467 (2013) (providing detailed discussion of Social Security and military benefits that flow to children through, in part, recognition of marital relationships).

82. But several states have simplified divorce procedures that are available to couples with limited assets and no children. See, e.g., CAL. FAM. CODE § 2400 (West 2004); MINN. STAT. 518.195 (2012).

83. There are some federal policies that require a showing of marriage "plus" other factors to further confirm that the marriage is legitimate. See Abrams, *supra* note 17, at 15–22.

84. Although in most instances federal "marriage" law doesn't directly affect distribution of marital property, pension plans are a partial exception. A federal law, the Employee Retirement Income Security Act (ERISA), requires most pension plans to provide survivor annuities to the spouse of an employee in the plan, unless the spouse and the employee both sign a waiver. See 26 U.S.C. § 417 (2006); 29 U.S.C. § 1055 (2006). This rule would presumably apply to same-sex relationships in the federal registry. A separate provision of ERISA permits state courts to award part or all of an employee's retirement plan to a spouse or former spouse, which generally occurs as part of the division of marital property in a divorce. See 29 U.S.C. § 1056(d)(3)(B)(ii) (2006). The standard rule is that such orders must be made by a state court under state domestic relations law, see *id.*, which would likely be unavailable to same-sex couples living in non-recognition states (unless their divorce is being handled by a different state, see *supra* note 58). This suggests two possible resolutions. The first would be to amend ERISA to state that a federal forum with authority to dissolve the federal relationship would also be empowered to divide or assign pension benefits (but not other property, which would remain a matter of state law). The second would be to simply accept that division of such pension plans remains exclusively a matter of state divorce law and accordingly unavailable to many same-sex couples. As a practical

have a clear process by which this federal status could be terminated and an administrative or judicial forum in which any disputes could be resolved.<sup>85</sup>

Although a full discussion of these implementation questions is outside the scope of this essay, the success of state and local programs suggests that it would not be unduly difficult to create and maintain such a registry. That said, there is no question that it would be somewhat more challenging to establish a new system than simply adopting agency-specific place-of-celebration rules, or even enacting a uniform place-of-celebration rule. On balance, I believe these logistical hurdles are preferable to the deep-rooted problems implicit in relying on place-of-celebration rules to “level up” federal policy. Additionally, under *either* approach, many same-sex couples would be considered married for purposes of federal laws and unmarried for purposes of state law. For example, now that the IRS has adopted a place-of-celebration rule, married couples living in non-recognition states generally need to prepare and file two completely different tax returns: a federal return as a married couple, and two separate state returns as unmarried individuals. So long as state variation in marriage rights remains, such inconsistent statuses—the inversion of those that existed under DOMA—are the price of equality at the federal level.

#### D. Ending State Marriage Bans

The cleanest way to “level up” federal marriage policy for same-sex couples would be to permit same-sex couples, wherever they live, to marry under state law. In the months since *Windsor* was decided, many states have legalized same-sex marriage; additional litigation and legislative efforts are underway to further expand the number of states with marriage equality.<sup>86</sup> And, although in *Hollingsworth v. Perry*,<sup>87</sup> the Supreme Court declined to reach the plaintiffs’ substantive claim that bans on marriage by same-sex couples violate the Federal Constitution, sooner or later, the Supreme Court will return to the question. It is widely believed that in that future case, the Court will hold that such laws are unconstitutional. This would not only address the current inequities in state law—it would end the derivative federal discrimination as well.

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matter, it would mean that an individual who had named a same-sex partner as a beneficiary for a retirement plan could simply remove the partner subsequent to the dissolution. There are pros and cons to each approach that would require careful consideration if such a registry were developed—and, indeed, require careful consideration under existing law because the Department of Labor has indicated that generally ERISA will employ a place-of-celebration rule in determining valid marriages. *See supra* note 47.

85. Since this federal status would implicate a couple’s status only under federal law and concern only federal rights and obligations, federal courts or agencies presumably would have jurisdiction to dissolve it. *Cf.* *Ankenbrandt v. Richards*, 504 U.S. 689, 704 (1992) (stating that the “domestic relations exception [to federal jurisdiction] encompasses only cases involving the issuance of a divorce, alimony, or child custody decree”).

86. *See, e.g.*, Gonzales, *supra* note 6; James Esseks, *Expanding the Freedom to Marry: Here’s What’s Next*, ACLU (July 9, 2013), <http://www.aclu.org/blog/lgbt-rights/expanding-freedom-marry-heres-whats-next> (announcing the ACLU’s goal of increasing the number of states permitting same-sex marriage to twenty by the end of 2016).

87. 133 S. Ct. 2652 (2013).

## III. BROADENING OUT AND FOCUSING IN

I would enthusiastically celebrate a Supreme Court decision that granted same-sex couples the right to marry in any state. I believe that same-sex and different-sex couples should enjoy equal rights under both federal and state law. But the current debate over place-of-celebration rules versus domicile rules, like DOMA and the *Windsor* case that led up to it, shines a spotlight on the staggering breadth and variety of federal policies that reference marriage. And I admit that I am troubled by the fact that any solution that effectively “levels up” the rights of same-sex couples will almost certainly reduce the pressure for rethinking whether “marriage” itself should continue to serve as the exclusive or primary gateway to more than 1000 federal rights and benefits. Already, in the wake of *Windsor*, the military has abandoned efforts to create a domestic partner registry in favor of relying solely on a uniform place-of-celebration rule.<sup>88</sup> Similarly, several states that had created civil unions or domestic partnerships as a means of providing marital rights to same-sex couples abrogated this option when they began permitting same-sex couples to marry,<sup>89</sup> and states that had established domestic partnerships providing a subset of marital rights and obligations eliminated the possibility of affirmatively choosing such a status when they modified the status to provide full marital rights.<sup>90</sup> In other words, in many jurisdictions, such statuses came to be understood simply as stepping stones to same-sex marriage, rather than as options that might be preferred by some same-sex *and* different-sex couples.

This is unfortunate because the current mismatch between “marriage” and “committed long-term interdependent relationships” for same-sex couples is only the tip of a much larger iceberg. The growth in marriage rights for same-sex couples comes at a time when family structures more generally are changing significantly. In 1960, 72% of the adult population was married; in 2008, barely half of the adult population was married, with rates falling particularly sharply for the poor and African Americans.<sup>91</sup> Unmarried couples with and without children live together, as an alternative to marriage, a precursor to marriage, or in the aftermath of divorce.<sup>92</sup> And 40.8% of *all* children born in the United States are born

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88. *See supra* note 63.

89. Feinberg, *supra* note 76, at 25.

90. *Id.* at 27. As Melissa Murray observes, there was a significant spike in domestic partner dissolutions immediately prior to the effective date of California’s expansion of the status to full marriage rights, suggesting that some couples preferred the more limited option and did not want to commit to full marriage rights and obligations. Melissa Murray, *Paradigms Lost: How Domestic Partnership Went from Innovation to Injury*, 37 N.Y.U. REV. L. & SOC. CHANGE 291, 302–03 (2013).

91. PEW RESEARCH CTR., *supra* note 56, at i, 22–23, 28–29.

92. *See, e.g.*, CASEY E. COPEN, KIMBERLY DANIELS & WILLIAM D. MOSHER, U.S. DEP’T OF HEALTH & HUMAN SERVS., NATIONAL HEALTH STATISTICS REPORTS NO. 64, FIRST PREMARITAL COHABITATION IN THE UNITED STATES: 2006–2010 (2013) (finding nearly one-half of women cohabit prior to marriage); PAULA Y. GOODWIN, WILLIAM D. MOSHER & ANJANI CHANDRA, U.S. DEP’T OF HEALTH & HUMAN SERVS., VITAL AND HEALTH STATISTICS SER. 23 NO. 28, MARRIAGE AND COHABITATION IN THE UNITED STATES: A STATISTICAL PORTRAIT BASED ON CYCLE 6 (2002) OF THE NATIONAL SURVEY OF FAMILY GROWTH 11 (2010) (collecting data showing various sequences of cohabitation and marriage).

to unmarried parents.<sup>93</sup> Furthermore, the easy availability of no-fault divorce and the growth of prenuptial agreements means that couples who *do* marry may not, in fact, have formed the kind of long-term committed relationship with integrated finances that federal law assumes.

As others have observed, the use of marriage as an all-or-nothing gateway for federal (and state) benefits, rights, and obligations designed to support and protect families is increasingly out-of-step with reality.<sup>94</sup> Developing a federal domestic partner registry could offer the opportunity for rethinking the justifications for premising various federal rights and obligations solely on marital status for both same-sex and different-sex couples. That is, if same-sex couples were permitted to marry in all states, a domestic partner registry could play a valuable role not as a marriage *substitute*, but instead as a marriage *alternative*.<sup>95</sup> There are many ways such a registry (or registries) could be structured. The key would be to identify the underlying purpose of the federal policy at issue and then tailor the requirements for inclusion in the registry appropriately.

In some instances, it might be appropriate to *broaden-out* marital benefits. For example, the Family and Medical Leave Act permits eligible employees to take up to twelve weeks off work to care for a family member with a serious health condition, but limits eligible “family members” to the employee’s spouse, son, daughter, or parent.<sup>96</sup> This probably works well for many employees. But some employees might wish to provide care for—or need to receive care from—a romantic partner other than a spouse, a sibling, or a close friend. Perhaps, rather than limiting such benefits to a “spouse,” it would be fairer and better policy to simply permit all employees to designate one adult individual (beyond parents or children) for whom she would provide care in the event of a serious health condition.<sup>97</sup>

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93. JOYCE A. MARTIN, BRADY E. HAMILTON, STEPHANIE J. VENTURA, MICHELLE J.K. OSTERMAN, ELIZABETH C. WILSON & T.J. MATHEWS, U.S. DEP’T OF HEALTH & HUMAN SERVS., NATIONAL VITAL STATISTICS REPORT VOL. 61 NO. 1, BIRTHS: FINAL DATA FOR 2010 (2012).

94. For proposals to retool at least aspects of federal marriage benefits to better match the variety of family forms and other close relationships, see generally, e.g., MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 226–36 (1995); POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE, *supra* note 75, 123–214; Abrams, *supra* note 17, at 54–67; Laura A. Rosenbury, *Friends with Benefits*, 106 MICH. L. REV. 189, 220–33 (2008); Robin West, *The Incoherence of Marital Benefits*, 161 U. PA. L. REV. ONLINE 179 (2012), <http://www.pennlawreview.com/online/161-U-Pa-L-Rev-Online-179.pdf>.

95. See *supra* text accompanying notes 76–78 (discussing jurisdictions that have adopted marriage alternatives). For similar arguments endorsing a “menu” of options for families, see, e.g., POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE, *supra* note 75, at 132–45; Eskridge, *supra* note 76, at 1979–87; Feinberg, *supra* note 76, at 37–61; Murray, *supra* note 90, at 303–05.

96. 29 U.S.C. § 2612(a)(1)(C) (2006).

97. In this context, there would be no reason why this would have to be a reciprocal obligation. For an insightful discussion of the arguments for and viability of recognizing “friendship” within family law more generally, see Rosenbury, *supra* note 94.

For other federal policies it might be appropriate to *focus-in*. Social Security permits a dependent spouse to claim spousal benefits, equal to 50% of the primary breadwinner's benefits; divorcees may likewise claim these benefits if the marriage lasted at least ten years. These spousal benefits are not funded by any additional contribution by the wage earner into the system; they are, as Peter Martin characterizes it, "quite simply additional payments based on marriage," subsidized by the Social Security tax-paying base generally.<sup>98</sup> Spousal benefits have the greatest value to a spouse whose *own* earnings are considerably lower than her spouse's, and, although the program is now gender neutral, the vast majority of recipients are women.<sup>99</sup> As discussed above, a typical married couple with a sole breadwinner will receive more than \$500,000 in spousal benefits.<sup>100</sup>

There are various justifications for spousal benefits, including the presumptive greater needs of married couples, relative to unmarried individuals, after retirement of a primary wage earner; the role that domestic work by a nonbreadwinning spouse may have played in the primary breadwinner's earnings; or a desire to support spouses who forego paid work to raise children.<sup>101</sup> But spousal benefits are available even if the spouse has ample other sources of support; to couples that marry long after the breadwinner earned the bulk of his income; and to couples that never had children.<sup>102</sup> On the other hand, they are not available to single parents who may likewise forego or reduce market work to care for children or to an individual who divorces a breadwinning spouse at any point before ten years. Rather than using marriage as a categorical on-off switch for benefits, Social Security could be redesigned to replace marriage with more tailored measures that respond to the core needs spousal benefits are intended to address.<sup>103</sup>

In this respect, it is helpful to return to the question posed by Justice Alito during oral argument in *Windsor* that introduced this essay. The *spirit* of his question was correct—that is, similarly-situated couples *are* now treated very differently under federal law—but the specific factual predicate was flawed. The injured soldier's partner would almost certainly be allowed to visit the hospital regardless of whether the couple was married, in a domestic partnership, or unmarried. Historically, hospitals often barred visitors who were not related to a patient by blood or marriage, and this was a significant problem for gay and lesbian

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98. See Martin, *supra* note 21, at 1; see also Goodwin Liu, *Social Security and the Treatment of Marriage: Spousal Benefits, Earnings Sharing, and the Challenge of Reform*, 1999 WIS. L. REV. 1 (discussing the history and rationales of spousal benefits and proposing reforms).

99. See Martin, *supra* note 21, at 2.

100. See *supra* text accompanying note 24.

101. See *id.* at 4–7.

102. See, e.g., *id.*; Liu, *supra* note 98 (both making similar critiques).

103. In a rather ironic twist, several states that created domestic partnerships or civil unions that were generally available only to same-sex couples also made them available to different-sex couples over age 62. See Feinberg, *supra* note 76, at 15–16. This approach, designed so that couples can access state-level benefits of marriage without ending eligibility for federal Social Security spousal benefits stemming from a former spouse, is an implicit recognition that many state-level marriage rights serve different purposes than federal Social Security spousal benefits.

couples. But since 2011, a federal rule has required virtually all hospitals to permit *patients* to choose the individuals—including a spouse, domestic partner, family members, and friends—who will receive visitation rights.<sup>104</sup>

Federal policymakers would do well to undergo this exercise more generally. For some federal policies it likely makes sense to continue to require a showing of marriage or comparable commitment. For others, marriage or comparable status might be a good default rule, but made subject to modification. And for others, it might be reasonable to permit, as hospitals now do, individuals to simply designate family or friends whom they would like to receive a given benefit. A more tailored approach would allow the federal government to better and more fairly meet the needs of *real* individuals—gay and straight, married and unmarried—rather than those of an idealized and imaginary “typical” American family.

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104. See 42 C.F.R. § 482.13(h)(1)–(4) (2012); Brian Bond, *New Rules Require Equal Visitation Rights for All Patients*, WHITE HOUSE BLOG (Nov. 17, 2010), <http://www.whitehouse.gov/blog/2010/11/17/new-rules-require-equal-visitation-rights-all-patients>. There is a comparable policy specifically for the military. See Memorandum from Chuck Hagel, Sec’y of Def., to Sec’ys of the Military Dep’ts (Feb. 11, 2013), *available at* <http://www.defense.gov/news/Same-SexBenefitsMemo.pdf>.