

When the Honeymoon is Over: How a Federal Court's Denial of the Spousal Privilege to a Legally Married Same-Sex Couple Can Result in the Incarceration of a Spouse Who Refuses to Adversely Testify

Will a federal court hold a legally married same-sex spouse in contempt for refusing to testify against his or her spouse? Could evidence regarding the couple's communications be offered against the accused? In this scenario, a federal court should follow the jurisprudence of determining a valid marriage through state law and extend the historically recognized spousal privileges to a same-sex spouse. However, if the court abides by the arguably unconstitutional Defense of Marriage Act (DOMA), it could dismiss the marriage as invalid and attempt to coerce testimony by holding the witness in civil contempt. The court could alternatively prosecute the witness for criminal contempt and may do so even after the witness had already been held in civil contempt. If the court compels testimony, evidence that perhaps should have been excluded may be offered against the accused resulting in a conviction. By adhering to DOMA and refusing to extend marital privileges to a same-sex spouse, the court may be upholding legislation that violates the Tenth Amendment, as well as the explicit Due Process and implied Equal Protection Clauses of the Fifth Amendment of the United States Constitution. Further, the court would be undermining the goals of spousal privilege which are to foster family peace and harmony for the benefit of the family and society as a whole.

I. INTRODUCTION

In November 2003, the Supreme Judicial Court of Massachusetts announced its ruling in the highly anticipated and publicized *Goodridge v. Department of Public Health* case.¹ The Court held that denying same-sex couples the "protections, benefits, and obligations conferred by civil marriage" was adverse to the Massachusetts Constitution, and thus the

1. 798 N.E.2d 941 (Mass. 2003).

Court legalized marriage for same-sex couples.²

Utilizing statistics from the Department of Public Health, the *Goodridge* Court stated that there are hundreds of statutory benefits exclusively reserved for married couples.³ Some of the benefits acknowledged by the Court included important property rights,⁴ rights pertaining to the legitimacy of children born to married couples, parental rights, and the opportunity to bereave a spouse.⁵ The *Goodridge* Court specifically mentioned the evidentiary right afforded by Massachusetts law that prohibits spouses from testifying against one another concerning their private conversations.⁶ The statute to which the Court referred explicitly states that a witness cannot be compelled to testify against his or her spouse in a criminal proceeding.⁷

The *Goodridge* Court was undoubtedly concerned that denying same-sex couples the right to marry would also deny them full protection of the law.⁸ However, while the *Goodridge* ruling now makes these Massachusetts statutory protections available to same-sex couples who choose to marry,⁹ federal statutes that protect married couples are not available to same-sex couples, legally married in Massachusetts in light of DOMA.¹⁰ DOMA states that in determining the meaning of a congressional act, the word “marriage” will only apply to a legal union between one man and one woman, and the word “spouse” will only refer to a person of the opposite sex who is a husband or wife.¹¹ As of December 31, 2003, the General Accounting Office reported that there were 1138 federal laws in which benefits, rights, and privileges were contingent upon marital status.¹² DOMA single-handedly and intentionally strips legally married same-sex spouses of Massachusetts of all 1138 federal rights enjoyed only by opposite sex couples.¹³ The privileges protecting communications made

2. *Id.* at 948.

3. *Id.* at 955.

4. *Id.*

5. *Id.* at 956. The Court extensively listed the many property rights afforded to married couples and other non-property rights in addition to those listed in this note. *Id.* at 955-56.

6. *Id.* at 956.

7. MASS. GEN. LAWS ANN. ch. 233, § 20 (West 2000).

8. 798 N.E.2d at 957.

9. *Id.* at 948.

10. Defense of Marriage Act, 1 U.S.C. § 7 (2000).

11. *Id.*

12. U.S. GEN. ACCOUNTING OFFICE, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT GAO-04-353R (Jan. 23, 2004) [hereinafter G.A.O. REPORT].

13. *See* 1 U.S.C. § 7 (2000).

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between spouses during marriage¹⁴ and allowing witnesses to refuse to testify against their spouses¹⁵ are two federal rights vulnerable under DOMA.¹⁶

If a federal court presiding over a criminal case refused to extend this evidentiary privilege by relying on DOMA, and a same-sex spouse refused to testify as a witness, the court could attempt to compel testimony by holding the witness in civil contempt.¹⁷ The judiciary has the statutory power to hold a witness in civil contempt for refusing to testify, without just cause, in any court or grand jury proceeding.¹⁸ The witness could also be prosecuted for criminal contempt.¹⁹ Alternatively, if the prosecution successfully compels the testimony, the accused may be convicted and incarcerated based on evidence that arguably should have been excluded.²⁰

This Note analyzes the likelihood that a federal court will refuse to extend this privilege to a same-sex spouse legally married in Massachusetts, and the consequences that may result if the witness refuses to testify. Part II discusses Federal Rule of Evidence 501 and the historically recognized federal privilege not to testify against one's spouse.²¹ This discussion includes Congress's intent to allow privilege law to evolve, as well as the legislative history which specifically discusses the adverse spousal testimony privilege and the marital communications privilege.²² Also addressed are cases that firmly root the spousal privilege in federal common law along with the reasoning behind recognizing this privilege.²³ Finally, the federal court's refusal to extend the privilege to unmarried couples is noted.²⁴

Part III observes the federal courts' application of state law when looking to invalidate a marriage.²⁵ Part IV discusses how DOMA may

14. FED. R. EVID. 501; *see* *Blau v. United States*, 340 U.S. 332, 334 (1951).

15. FED. R. EVID. 501; *see generally In re Grand Jury*, 111 F.3d 1083 (3d Cir. 1997); *see also* *United States v. Acker*, 52 F.3d 509, 511-12 (4th Cir. 1995).

16. *See* 1 U.S.C. § 7 (2000).

17. 28 U.S.C. § 1826 (2000).

18. *Id.*

19. 18 U.S.C. § 401 (2000).

20. *See* *United States v. Estes*, 793 F.2d 465 (2d Cir. 1985). The Second Circuit reversed *Estes*' conviction and remanded the case on the basis that the lower court should have excluded his wife's testimony concerning his confession to the crime. *Id.* at 466.

21. FED. R. EVID. 501.

22. H.R. REP. NO. 93-650 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 7075.

23. *See, e.g., In re Grand Jury*, 111 F.3d 1083 (3d Cir. 1997); *Trammel v. United States*, 445 U.S. 40 (1980).

24. *United States v. Acker*, 52 F.3d 509, 514-15 (4th Cir. 1995).

25. *See Acker*, 52 F.3d at 511; *United States v. Knox*, 124 F.3d 1360, 1365 (10th Cir. 1997).

affect a federal court that must determine the validity of a same-sex marriage.²⁶ This section also considers the federal courts' constitutional analysis of DOMA.²⁷

Part V addresses the consequences same-sex spouses will face for refusing to testify against their spouse once the court has refused to recognize his or her spousal privilege in a federal criminal trial.²⁸ Part VI analyzes the possibility that a constitutional challenge to DOMA would result if a same-sex spouse is incarcerated for refusing to testify against his or her spouse. Infringements upon the accused's constitutional rights are also considered. Part VI also discusses how the public policy surrounding the privilege is applicable to marriages in Massachusetts regardless of gender. Further, the public policy surrounding the protection of children of same-sex couples is also considered.

II. HISTORICAL RECOGNITION OF THE SPOUSAL PRIVILEGE

A. The Public Policy Behind Recognizing Spousal Privileges

Throughout history, federal courts have recognized two spousal privileges. The first privilege allows a spouse to refuse to adversely testify against his or her spouse; the second excludes any evidence related to spousal communications.²⁹ The Federal Rules of Evidence were developed so that "the truth may be ascertained."³⁰ However, even though testimonial privileges hinder this objective, they are recognized as exceptions to the truth-finding process because they preserve a public interest that outweighs any benefit that the evidence may have provided.³¹ In *Trammel v. United States*, the Supreme Court categorized the spousal privilege not to testify as one which promotes the public interest in marital harmony.³² Furthermore, courts have viewed the spousal privilege as one that fosters family peace and harmony and have classified domestic tranquility as a valid public interest preserved by the privilege.³³ Concerned with the impact that

26. *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004).

27. 1 U.S.C. § 7 (2000).

28. 18 U.S.C. § 401 (2000) (criminal contempt); 28 U.S.C. § 1826 (2000) (civil contempt).

29. Bruce I. McDaniel, Annotation, *Marital Privilege Under Rule 501 of Federal Rules of Evidence*, 46 A.L.R. FED. 735, 739-41 (1980).

30. FED. R. EVID. 102.

31. *See Trammel v. United States*, 445 U.S. 40, 50 (1980) (citing *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)).

32. 445 U.S. at 53.

33. McDaniel, *supra* note 29, at 747-50.

testimony would have on the marriage,³⁴ courts have illustrated the policy that the sanctity of marriage transcends the disadvantages the privilege may impose on the justice system.³⁵ John Henry Wigmore observed that there is “a *natural repugnance* in every fair-minded person to compelling a wife or husband to be the means of the other’s condemnation, and to compelling the culprit to the humiliation of being condemned by the words of his intimate life partner.”³⁶ Further, the Supreme Court viewed the testimonial privilege as beneficial not only to the husband, wife, and children, but also to the public because a marriage would likely be destroyed if the privilege was not recognized.³⁷ The courts’ refusal to recognize the testimonial privilege once the marriage has been terminated further exemplifies this rationale.³⁸

While the rationale behind the testimonial privilege is a more forward-looking concern for preserving family relationships, the purpose of the communications privilege is to endorse feelings of security within the marriage and enable spouses to confide in each other without negative consequences.³⁹ If communications occur during marriage, they remain privileged even after the marriage has terminated, but once the marriage is terminated subsequent communications are not protected by the testimonial privilege.⁴⁰

Considering that the judicial system has demonstrated respect for relationships bonded by marriage and sought to preserve family peace by recognizing these privileges, it should follow that same-sex spouses should also be offered this protection.⁴¹ The Supreme Judicial Court of Massachusetts (SJC) has ruled that same-sex couples will be accepted as married families in Massachusetts and should not be denied the protections and benefits of marriage.⁴² These married couples, regardless of gender or

34. *In re Malfitano*, 633 F.2d 276, 279 n.4 (3d Cir. 1980).

35. *See Trammel*, 445 U.S. at 50 (citing *Elkins*, 364 U.S. at 234 (Frankfurter, J., dissenting)).

36. VIII John H. Wigmore, *Evidence* § 2228, at 217 (McNaughton rev. 1961).

37. *Hawkins v. United States*, 358 U.S. 74, 77 (1958).

38. *McDaniel*, *supra* note 29, at 752.

39. *Compare In re Malfitano*, 633 F.2d at 279 & n.4 (where the testimonial privilege is described as being designed to keep the marriage itself from being undermined), *with United States v. Byrd*, 750 F.2d 585, 592-93 (7th Cir. 1984) (where the purpose of the communications privilege is described as providing a sense of security in discussing private matters with a spouse).

40. *E.g.*, *United States v. Lilley*, 581 F.2d 182, 189 (8th Cir. 1978).

41. *See Trammel v. United States*, 445 U.S. 40, 48 (1980) (stating that the privilege concerning spousal testimony is one “affecting marriage, home and family relationships . . .”).

42. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

sexual orientation, fit squarely within the rationale for recognizing spousal privileges. The public interest in preserving family peace is equally important to families of same-sex couples as it is to traditional male and female households.⁴³

The Supreme Court's observation that the privilege concerning adverse spousal testimony affects not only marriage, but also "family relationships," considers that the children of married couples also benefit from these privileges.⁴⁴ While forcing adverse spousal testimony may damage the relationship between the couple, the children would also suffer from the repercussions of the event because the family structure would likely change. Whether the testimony resulted in irreparable damage to the relationship itself or in the confinement of the accused spouse, a divorce or alienation of a parent adversely affects children's school performance.⁴⁵ Further, there is empirical evidence that "divorce significantly threatens children's economic security, besetting them with sudden and drastic reductions in standards of living and, often, with poverty."⁴⁶ As noted by the *Goodridge* Court, the number of same-sex couples raising children is "sizeable" and these children, who are no different than children of heterosexual couples, "should have the fullest opportunity to grow up in a secure, protected family unit."⁴⁷

B. Federal Rule of Evidence 501: Congressional Intent to Allow Privilege Law to Evolve

The spousal testimonial and communication privileges have a long history in American jurisprudence and were accepted prior to the adoption of the Federal Rules of Evidence (Rules).⁴⁸ The Rules were signed into law by Congress on January 2, 1975⁴⁹ as a truth finding tool and as a facilitator of just proceedings.⁵⁰ After the Rules were drafted and proposed by the

43. See *Trammel*, 445 U.S. at 53 (calling marital harmony an important public interest); see also *United States v. Saniti*, 604 F.2d 603, 604 (9th Cir. 1979) (explaining that once a court determines that a marriage is valid, the adverse spousal testimony applies unless there is evidence that the marriage is a fraud or sham).

44. See *Trammel*, 445 U.S. at 48.

45. Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 58 (1994).

46. *Id.* at 58-59.

47. 798 N.E.2d at 964.

48. Elizabeth Kimberly Penfil, *In The Light Of Reason and Experience: Should Federal Evidence Law Protect Confidential Communications Between Same-Sex Partners?*, 88 MARQ. L. REV. 815, 819 (2005).

49. Federal Rules of Evidence, Pub. L. No. 93-595, 88 Stat. 1926 (1975), available at http://www.access.gpo.gov/uscode/title28a/28a_5_.html.

50. FED. R. EVID. 102.

Judicial Conference Advisory Committee on the Rules of Evidence, they were approved by both the Judicial Conference of the United States and the Supreme Court.⁵¹ However, prior to the Rules' enactment, Congress held several meetings and subsequently amended the proposed Rules.⁵² These modifications included a significant change to rules regarding privilege law and reduced the nine specific privileges proposed to a single, general rule.⁵³ One of the proposed rules rejected was Federal Rule of Evidence 505, which defined the privilege as applicable to husbands and wives.⁵⁴ The proposed rule would have allowed a defendant to exclude spousal testimony, even if the spouse wanted to testify.⁵⁵ It would have also abolished the previously recognized privilege, which categorized marital communications as confidential and inadmissible.⁵⁶ During the hearings many witnesses testified in opposition to the abolishment of the spousal communication privilege⁵⁷ and advocated that privilege law should be determined on a case-by-case basis.⁵⁸

Congress rejected the static proposed rules and alternatively adopted Rule 501, which states in part, "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."⁵⁹ As the Supreme Court observed in *Trammel v. United States*, by "rejecting the proposed Rules and enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege."⁶⁰

The *Trammel* Court considered whether Rule 501 allowed the defendant to exclude testimonial evidence provided by his wife who had agreed to testify against him.⁶¹ The Court ruled that the privilege vested in the witness alone, and the witness could either agree or refuse to testify against the accused.⁶² The privilege of a husband to exclude the voluntary testimony of his wife had been previously upheld by the Supreme Court in *Hawkins v. United States*.⁶³ In deciding that the *Hawkins* rule was no

51. *Trammel v. United States*, 445 U.S. 40, 47 (1980).

52. Penfil, *supra* note 48, at 818.

53. *Trammel*, 445 U.S. at 47.

54. *See id.*

55. *See id.*

56. *Id.*

57. Penfil, *supra* note 48, at 827.

58. *Id.* at 825.

59. FED. R. EVID. 501.

60. 445 U.S. at 47.

61. *Id.* at 41-42.

62. *Id.* at 53.

63. 358 U.S. 74, 77-79 (1958).

longer justified,⁶⁴ the *Trammel* Court took into account Congress's intent to both allow the courts flexibility in developing privilege law⁶⁵ and "to leave the door open to change."⁶⁶ The *Trammel* Court considered social changes and determined that privilege law should develop along with these changes.⁶⁷ The Court reasoned that "[t]he ancient foundations for so sweeping a privilege have long since disappeared" because women are no longer considered property and their own legal identities are no longer denied.⁶⁸ The Court relied upon the congressional intent that privilege law should be determined by "reason and experience" and concluded that the rule pertaining to spousal testimony should be revised.⁶⁹

The Supreme Court's recognition that privilege law should develop with social changes, along with Congress's intent to allow its evolution, illustrates the acknowledgement that society will continue to develop and so should the privileges.⁷⁰ While the Court and Congress did not specifically foresee the legalization of same-sex marriage, their acknowledgement that the law should not freeze provides a good argument that the inability to predict such changes is the reason the law should not be static.⁷¹

C. Federal Common Law

Although Congress intended for privilege law to evolve, refusing to testify against one's spouse is a privilege that has consistently been recognized both before and after the codification of Rule 501.⁷² Marital communications have also been privileged if they occur during a valid marriage.⁷³ However, as illustrated in *Trammel*, the courts will continue to shape privilege law not only to reflect a changing society⁷⁴ but also in the interest of fairness and justice.⁷⁵ The adverse spousal testimonial privilege is applicable only if there is a valid marriage at the time of the assertion,

64. *Trammel*, 445 U.S. at 53.

65. *Id.* at 47.

66. *Id.*

67. *See id.* at 52.

68. *Id.*

69. *Id.* at 53 (quoting FED. R. EVID. 501).

70. *See id.* at 52.

71. *See id.*

72. *See, e.g., id.* at 53.

73. *E.g., Stein v. Bowman*, 38 U.S. (13 Pet.) 209, 223 (1839).

74. *See Trammel*, 445 U.S. at 52.

75. *See United States v. Mendoza*, 574 F.2d 1373 (5th Cir. 1978). The court refused to hold marital communications privileged which involve the joint participation of the spouses. *Id.* at 1381.

and the privilege does not survive termination of the marriage.⁷⁶ In *United States v. Lustig*, the Ninth Circuit held the defendant was not entitled to the privilege because Alaska did not recognize a common law marriage as valid, and even if it did, the relationship had been terminated, and the privilege would not have applied.⁷⁷

If the testimonial privilege does apply, it includes all relevant matters which occurred prior to the marriage,⁷⁸ unlike the privilege which protects only those spousal communications that occur during the marriage.⁷⁹ For example, the court in *United States v. Owens* ruled that the defendant's husband's testimony regarding an event that occurred prior to the marriage should have been excluded under the adverse testimony privilege, while the court in *United States v. Pensinger* held that the defendant was not entitled to the communication privilege because the conversation did not take place during the marriage.⁸⁰ However, while the privilege concerning the adverse testimony extinguishes upon termination of the marriage, any communications which take place during the marriage are privileged even after the marriage has terminated.⁸¹ In *United States v. Lilley*, the Eighth Circuit reversed the defendant's conviction reasoning that her husband's testimony regarding communications which took place during the marriage should have been excluded, notwithstanding the fact that the couple was divorced at the time of the trial.⁸²

When assessing whether evidence should be excluded under the marital communication privilege, a court must find that the evidence was both a communication and was intended to be confidential.⁸³ In *United States v. Smith*, a husband's gesture which included hiding heroin on his wife, was not protected as a marital communication because there was no intended communication.⁸⁴ The *Smith* court refused to extend the privilege to private acts done in the presence of a spouse and observed that, while the communications privilege has been expanded to include more than

76. *United States v. Lustig*, 555 F.2d 737, 747-48 (9th Cir. 1977).

77. *Id.* at 748.

78. *United States v. Owens*, 424 F. Supp. 421, 423-24 (E.D. Tenn. 1976).

79. *United States v. Pensinger*, 549 F.2d 1150, 1151 (8th Cir. 1977).

80. *Compare Owens*, 424 F. Supp. at 423 (arguing that the defendant's husband's testimony regarding a pre-marital event should have been excluded because the adverse testimony privilege applied), *with Pensinger*, 549 F.2d at 1151 (requiring that the conversation must have taken place during the marriage to make the communications privilege applicable).

81. *United States v. Lilley*, 581 F.2d 182, 189 (8th Cir. 1978).

82. *See id.*

83. *See United States v. Smith*, 533 F.2d 1077, 1079 (8th Cir. 1976); *see also Pensinger*, 549 F.2d at 1151-52.

84. 533 F.2d at 1079.

conversations and writings, the privilege has been limited to expressions or utterances which were intended to convey a message.⁸⁵

If a communication between spouses was not intended to be confidential, the court will likely refuse to exclude the evidence.⁸⁶ Because the defendant in *Pensinger* spoke to his wife about the details of a bank robbery in the presence of third parties, the Eighth Circuit held that the conversation did not fall within the scope of the communication privilege because the defendant did not intend the conversation to be confidential.⁸⁷

Using the deference provided by Congress, the courts have allowed for exceptions to the spousal privileges where the husband and wife are jointly involved in the crime. In *United States v. Bey* the United States Court of Appeals for the First Circuit upheld a conviction for importing cocaine, holding that, because the lower court found the defendant's wife was a joint participant in the crime, the adverse testimony privilege was inapplicable.⁸⁸ Further, the *Bey* court held that the lower court acted properly in allowing spousal communications because it only admitted those spousal communications which took place after Bey's wife became a participant in the criminal activity.⁸⁹ While many of the circuits have made similar determinations regarding spousal co-conspiracy, the Fifth Circuit has continued to allow its invocation notwithstanding evidence that both were involved in the criminal activity.⁹⁰

Some courts have also recognized an exception to the spousal testimonial privilege if the testimony relates to an offense committed against the testifying spouse.⁹¹ In *Wyatt v. United States*, the Supreme Court held that the lower court had properly compelled the testimony of the defendant's wife.⁹² The Court reasoned that because the defendant had prostituted his wife within his prostitution ring, she was considered a

85. *Id.* (citing *Pereira v. United States*, 347 U.S. 1, 6 (1954)).

86. *See Pensinger*, 549 F.2d at 1151-52.

87. *Id.* (citing *Pereira*, 347 U.S. at 6).

88. 188 F.3d 1, 4-5 (1st Cir. 1999).

89. *Id.* at 6.

90. *See United States v. Entrekin*, 624 F.2d 597, 598 (5th Cir. 1980) (affirming the lower court's decision that communications between the husband and wife were properly admitted because they were made in furtherance of a crime); *United States v. Price*, 577 F.2d 1356, 1365 (9th Cir. 1978) (where the court stated that statements by a spouse may be admitted if made in furtherance of a crime); *but see In re Malfitano*, 633 F.2d 276, 278 (3d Cir. 1980) (where the court ruled that the witnesses should have been allowed to claim the adversal spousal privilege even though she was allegedly involved in her husband's criminal activities).

91. *Wyatt v. United States*, 362 U.S. 525, 526-27 (1960).

92. *Id.* at 529-30.

victim and thus triggered an exception to the testimonial privilege.⁹³ In *United States v. Allery*, the Eighth Circuit used the *Wyatt* Court's rationale and expanded this exception to abolish the testimonial privilege if a crime victimizes one of either spouse's children.⁹⁴ The *Allery* court affirmed the defendant's conviction for the attempted rape of his daughter, holding that the testimonial privilege was unavailable because "a crime against a child of either spouse is a wrong against the other spouse . . ."; therefore the wife's testimony regarding her husband's actions was properly admitted.⁹⁵

The evolution of spousal privilege law has understandably caused some confusion in the federal courts.⁹⁶ In an opinion which was overturned by the Second Circuit and then resulted in the granting of certiorari by the Supreme Court, a federal district court in New York noted that privilege law is no longer categorical or simple.⁹⁷ In particular, there are differences between which spouse can invoke a spousal privilege when considering the testimonial privilege as opposed to the communication privilege.⁹⁸ Defendants can no longer unilaterally prevent their spouses from adversely testifying; however, the defendant has the right to keep out evidence pertaining to any marital communications regardless of whether the spouse wishes to testify.⁹⁹ Additionally, while the communication privilege survives the marriage, the testimonial privilege is extinguished at the time the relationship is considered beyond preservation.¹⁰⁰ However, both privileges hinge upon the spouses' involvement in a valid marriage.¹⁰¹

The *Goodridge* decision will create more confusion in the area of privilege law, particularly where the federal courts must determine the validity of the marriage in order to decide whether evidence should be admitted or excluded under the spousal privileges.¹⁰² Prior to *Goodridge* and DOMA there was no federal interference with states' legal definition of

93. *Id.* at 529.

94. 526 F.2d 1362, 1366-67 (8th Cir. 1975).

95. *Id.*

96. *See In re Grand Jury Subpoena Koecher*, 601 F. Supp. 385, 390-91 (S.D.N.Y. 1984).

97. *Id.* at 391, *rev'd sub nom. In re Grand Jury Subpoena United States*, 755 F.2d 1022 (2d Cir. 1985), *cert. granted sub nom. United States v. Koecher*, 474 U.S. 815 (1985), *vacated as moot*, *United States v. Koecher*, 475 U.S. 133 (1986).

98. *Compare Trammel v. United States*, 445 U.S. 40, 53 (1980), *with United States v. Lilley*, 581 F.2d 182, 189 (8th Cir. 1978).

99. *Trammel*, 445 U.S. at 53.

100. *Compare Lilley*, 581 F.2d at 189, *with United States v. Fisher*, 518 F.2d 836, 841 (2d Cir. 1975).

101. *United States v. Acker*, 52 F.3d 509, 514-15 (4th Cir. 1995); *see United States v. Lustig*, 555 F.2d 737, 743 (9th Cir. 1977).

102. *See Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

marriage.¹⁰³ In the past, federal courts have not been faced with resolving inconsistencies in privilege law when determining whether a marriage is valid.¹⁰⁴ Today, courts must consider congressional legislation which has announced that states can continue to define marriage for federal purposes so long as their definition fits within the federal definition enacted in 1996.¹⁰⁵

III. JURISPRUDENCE OF THE FEDERAL COURTS' VALIDATION OF A MARRIAGE

Historically, federal courts have looked to state law to determine the validity of a marriage when deciding if the marital privilege should be available.¹⁰⁶ In *United States v. Acker*, the defendant was convicted of bank robbery after her long-time boyfriend testified against her.¹⁰⁷ Catherine Acker's boyfriend testified about confidential conversations he had with her, during which she confessed to committing the robbery.¹⁰⁸ Acker appealed, asserting that her private conversations with the witness should have been privileged, unavailable testimony.¹⁰⁹ She maintained that she and the witness had lived together for twenty-five years as man and wife in New York and North Carolina.¹¹⁰ In determining if the marital privilege should have been extended and the witness's testimony regarding the confidential conversations precluded, the Fourth Circuit considered the state marriage laws of both New York and North Carolina.¹¹¹ The court ruled that because neither state recognized common law marriage, the defendant had not established the existence of a valid marriage, and therefore the privilege did not apply.¹¹²

Further, the court held that before extending the marital privilege, "the defendant must have assumed both the privileges and the responsibilities of a valid marriage under the law of the state in which the privilege is asserted."¹¹³ This reasoning suggests that federal courts could extend the

103. See 1 U.S.C. § 7 (2000); *Goodridge*, 798 N.E.2d at 948; see *United States v. Knox*, 124 F.3d 1360, 1365 (10th Cir. 1997).

104. See, e.g., *Acker*, 52 F.3d at 515.

105. 1 U.S.C. § 7.

106. See *Knox*, 124 F.3d at 1365; *Acker*, 52 F.3d at 511.

107. 52 F.3d at 512-13.

108. *Id.* at 512.

109. *Id.* at 514.

110. *Id.*

111. *Id.*

112. *Id.* at 514-15.

113. *Id.* at 515.

marital privilege to a same-sex spouse if the privilege was asserted in Massachusetts and the couple was legally married.

As stated in *United States v. Knox*, prior to asserting the privilege the defendant must prove the marriage is valid under the law, and “[b]ecause there is no federal law of marriage, . . . federal courts routinely apply state law to determine whether people are spouses for purposes of the privilege.”¹¹⁴ The Supreme Court has long recognized that laws involving marriage and domestic relations are exclusively left to the states.¹¹⁵

In *In re Allen*, the bankruptcy court considered Congress’s intention that the parties must be legally married to file a joint bankruptcy petition.¹¹⁶ The court determined that the language of the bankruptcy statute did not intend to alter the tradition of leaving marriage laws to the state’s control.¹¹⁷ Although the debtors conceded that their same-sex relationship was not recognized as a legal marriage under state law,¹¹⁸ the court stated that if state law recognized a same-sex marriage, the couple would be qualified to file a joint petition.¹¹⁹

With respect to this line of cases, it should follow that in order to determine if a same-sex marriage is valid, the federal court would look to state law to determine the validity of the marriage. However, the Defense of Marriage Act could greatly affect this jurisprudence.¹²⁰ Under DOMA, a court would still look to state law in order to validate an opposite-sex marriage, but if that marriage was between same-sex spouses, it would be held to the additional federal standard.¹²¹

IV. THE DEFENSE OF MARRIAGE ACT

The Defense of Marriage Act (DOMA) consists of two parts.¹²² The first section of the Act addresses the interstate recognition of same-sex marriages and gives states the right to refuse to acknowledge such a marriage.¹²³ This Note focuses on the second part of the Act because it defines the terms “marriage” and “spouse” for federal purposes.¹²⁴ In

114. 124 F.3d 1360, 1365 (10th Cir. 1997).

115. See, e.g., *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890); *Trammel v. United States*, 445 U.S. 40, 49-50 (1980).

116. *In re Allen*, 186 B.R. 769, 771 (Bankr. N.D. Ga. 1995).

117. *Id.* at 773.

118. *Id.* at 771.

119. *Id.* at 773.

120. See 1 U.S.C. § 7 (2000).

121. *Id.*

122. 28 U.S.C. § 1738(c) (2000); 1 U.S.C. § 7.

123. 28 U.S.C. § 1738(c).

124. 1 U.S.C. § 7.

defining these terms, the Act unambiguously denies same-sex couples federal benefits.¹²⁵

The Supreme Court has not yet addressed the constitutionality of DOMA, but many scholars argue that DOMA is unconstitutional.¹²⁶ Specifically, these authors suggest that Congress not only exceeded its power in passing DOMA,¹²⁷ but also that Congress illustrated an animus-based rationale by imposing a blanket ban instead of specifying which federal interests would be damaged if same-sex marriages were recognized.¹²⁸ Also, DOMA may raise federalism and equal protection concerns.¹²⁹ In some cases, the federal courts have ruled that DOMA is constitutional.¹³⁰ *In re Kandu* was the first federal case that ruled on the constitutionality of DOMA.¹³¹ The *Kandu* court considered whether DOMA violated the Tenth, Fourth, or Fifth Amendments of the U.S. Constitution.¹³²

A. *In re Kandu*'s Constitutional Analysis

The plaintiffs in *Kandu* were two female United States citizens who married in British Columbia, Canada and resided in the state of Washington.¹³³ The bankruptcy court ordered the couple to show cause for improper joint filing after the couple filed for joint relief under a federal bankruptcy statute.¹³⁴ The plaintiffs argued that DOMA violated the Tenth, Fourth, and Fifth Amendments of the U.S. Constitution as it applied to 11 U.S.C. § 302, which allows an individual's spouse protection when the individual files for bankruptcy.¹³⁵

125. Mark P. Strasser, "Defending" Marriage In Light of the Moreno-Cleburne-Romer-Lawrence Jurisprudence: Why DOMA Cannot Pass Muster After Lawrence, 38 CREIGHTON L. REV. 421, 437 (2005).

126. *Id.* at 445-46; Mark Tanney, Note, *The Defense of Marriage Act: A "Bare Desire to Harm" An Unpopular Minority Cannot Constitute a Legitimate Governmental Interest*, 19 T. JEFFERSON L. REV. 99 (1997).

127. Strasser, *supra* note 125, at 445.

128. *Id.* at 444.

129. *Id.* at 445-46.

130. *See generally In re Kandu* 315 B.R. 123 (Bankr. W.D. Wash. 2004).

131. *Id.* at 131.

132. *Id.* at 148.

133. *Id.* at 130.

134. *Id.*

135. *Id.* at 131.

1. *Kandu*'s Tenth and Fourth Amendment Analysis

In disposing of the *Kandu*' argument that DOMA violated the Tenth Amendment, the court took into account the legislative history surrounding DOMA's enactment.¹³⁶ The court observed that Congress had not previously defined the terms "marriage" and "spouse" for federal benefits because the state and federal definitions of the terms were consistent.¹³⁷ However, the *Kandu* court does not point to where this federal definition of marriage was located prior to DOMA.¹³⁸ The assertion that there was a federal definition of marriage directly conflicts with the Supreme Court's explanation of the federal deference to state law in *De Sylva v. Ballentine*, which stated that "there is no federal law of domestic relations, which is primarily a matter of state concern."¹³⁹

When attempting to validate a marriage for a federal purpose, the courts have looked to state law in order to ascertain if the couple was legally married and, therefore, privy to federal marital benefits.¹⁴⁰ If there had been a federal definition as the *Kandu* court asserted, the federal courts would have traditionally referred to this definition instead of considering state law.

Furthermore, asserting that the state and federal definitions were consistent until recently (referring to Hawaii's attempt to legalize same-sex marriage) is incorrect, considering that federal courts have both recognized and refused to recognize common law marriages as valid marriages, depending upon state law.¹⁴¹ The *Kandu* court stated that Congress sought to quell any possible confusion which may result from the legalization of same-sex marriage by preserving the traditional definition of marriage historically intended by Congress.¹⁴² However, given the previous deference to state law and decisions, such as *In re Allen* (which discussed that there was no evidence that Congress foresaw that a same-sex couple would try to file a joint bankruptcy petition), it seems more appropriate to view DOMA as a retroactive law that rewrites the previously passed federal

136. *Id.* at 132.

137. *Id.*

138. *See id.*

139. 351 U.S. 570, 580 (1956).

140. *See* *United States v. Acker*, 52 F.3d 509, 515 (4th Cir. 1995); *United States v. Knox*, 124 F.3d 1360, 1365 (10th Cir. 1997); *In re Frawley*, 112 B.R. 32, 33 (Bankr. D. Colo. 1990).

141. *See Frawley*, 112 B.R. at 33 (setting out the requirements for common law marriage in Colorado); *Acker*, 52 F.3d at 514 (stating that neither New York nor North Carolina recognize common law marriages).

142. 315 B.R. at 132.

laws that apply to married individuals.¹⁴³

Ultimately, the *Kandu* court ruled that because DOMA applies only to federal law and is not binding on the states, there is no federal infringement on state sovereignty and, therefore, no Tenth Amendment violation.¹⁴⁴ In making this determination, the *Kandu* court only offered case law to explain that the Tenth Amendment is implicated when Congress, acting outside its powers, infringes on powers reserved to the states, but the court offered no case law to support its conclusion that Congress had the power to enact DOMA.¹⁴⁵ Rather, the court considered the legislative history surrounding DOMA, which did not provide any constitutional law jurisprudence.¹⁴⁶ Unlike the Supreme Court's reasoning in *New York v. United States*, which concluded that Congress had the authority to regulate radioactive waste dumping, a power typically left to the states through the Commerce Clause,¹⁴⁷ the *Kandu* court did not point to anything in Article I which granted Congress the power to regulate marriage.¹⁴⁸

The court also rejected the *Kandus'* argument that DOMA improperly preempted state family law by ruling that there was no direct conflict between federal and state policy.¹⁴⁹ The court referred to cases which required specific conditions in order for federal law to trump state law, and distinguished the *Kandu* case.¹⁵⁰ The court held that, unlike in *Hisquierdo* and *Yazell*, there was no direct conflict between state and federal law in this case.¹⁵¹ The court pointed to Washington State's adoption of a "baby DOMA" which mirrored the federal DOMA, and held that preemption was not an issue.¹⁵² In light of *Goodridge*, a federal court presiding over a case involving a same-sex couple legally married in Massachusetts would be compelled to consider the preemption issue if a constitutional challenge to DOMA was raised.¹⁵³

In analyzing whether DOMA violates the Fourth Amendment, the *Kandu* court ruled that in order to successfully argue that an unlawful seizure occurred, the party must first establish ownership of the property

143. See *In re Allen*, 186 B.R. 769, 771 (Bankr. N.D. Ga. 1995).

144. 315 B.R. at 132.

145. *Id.* at 131-32.

146. *Id.* at 132.

147. 505 U.S. 144, 156-57 (1992).

148. See *id.*; but see *Kandu*, 315 B.R. at 132.

149. *Kandu*, 315 B.R. at 132-33.

150. *Id.* at 133 (citing *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979); *United States v. Yazell*, 382 U.S. 341 (1966)).

151. *Kandu*, 315 B.R. at 133.

152. *Id.*

153. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

seized.¹⁵⁴ The court held that the plaintiffs did not demonstrate a possessory interest in the federal benefits enjoyed by married opposite-sex couples and concluded there was no violation of the Fourth Amendment.¹⁵⁵

2. Fifth Amendment

In addition to arguing Tenth and Fourth Amendment violations, the *Kandu* plaintiff also argued that DOMA violated the Due Process and Equal Protection Clauses of the Fifth Amendment to the U.S. Constitution.¹⁵⁶ Ruling on this claim, the court found that rational basis review of the statute was proper, absent a holding from the Supreme Court that same-sex couples are a suspect or semi-suspect class for the purposes of an equal protection analysis.¹⁵⁷

Relying on a lack of binding precedent and the Supreme Court's caution in extending fundamental rights, the *Kandu* court concluded that there is not a fundamental right to marry a person of the same-sex, and found that a rational basis review was appropriate to determine whether DOMA violated the Due Process Clause.¹⁵⁸ Further, the court determined that a rational basis review of the statute was also proper to resolve *Kandu*'s equal protection claim.¹⁵⁹ Although the court acknowledged that the majority opinion in *Lawrence v. Texas* may suggest a shift in its treatment of same-sex couples, the *Kandu* court contended that the Supreme Court fell short of such a holding and ruled that a rational basis level of scrutiny was appropriate.¹⁶⁰

Using this level of review, the *Kandu* court considered whether DOMA was rationally related to some legitimate governmental end.¹⁶¹ The government argued that the primary interest asserted by DOMA was to encourage the development of relationships that were optimal for procreation.¹⁶² The plaintiff argued that DOMA's definition of marriage included heterosexual couples regardless of whether they could or wanted to have children.¹⁶³ The *Kandu* court held that Congress could be both over- and under-inclusive in its classification and it was not required to

154. *Kandu*, 315 B.R. at 135.

155. *Id.*

156. *Id.* at 138, 141.

157. *Id.* at 144.

158. *Id.* at 140-41.

159. *Id.* at 144.

160. *Id.*

161. *Id.*

162. *Id.* at 145.

163. *Id.*

provide equal encouragement to same-sex couples.¹⁶⁴

The *Kandu* court also rejected the plaintiff's argument that the case was analogous to *Romer v. Evans*,¹⁶⁵ and ruled that Congress had a legitimate interest which was rationally related to promoting an optimal social structure.¹⁶⁶ In *Romer*, the Supreme Court struck down a Colorado amendment which prohibited the state or local government from enacting legislation designed to protect homosexuals from discrimination.¹⁶⁷ The Court held that the amendment

is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence. The absence of precedent for Amendment 2 is itself instructive; "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."¹⁶⁸

Contrasting DOMA with the ruling in *Romer*, the *Kandu* court held that DOMA is not as exceptional and broad as the Colorado amendment, and that the motivation behind the Act was not so clearly based on animus.¹⁶⁹ However, it could be argued that DOMA is equally as broad and exceptional as Amendment 2 because it absolutely denies same-sex couples the same federal benefits available to opposite-sex couples.¹⁷⁰ There are reportedly over one thousand benefits attached to marriage,¹⁷¹ indicating that DOMA's effect is indeed broad. Likewise, the argument can be made that Congress' clear intent was to deprive same-sex couples of federal marital rights.¹⁷² During DOMA's Congressional debate, Senator Byrd acknowledged that federal marital benefits and privileges are given based on a state's definition of marriage and then went on to state: "In almost all cases at the Federal level, there is simply no definition of the terms

164. *Id.* at 147.

165. *See* 517 U.S. 620 (1996).

166. *Kandu*, 315 B.R. at 148.

167. *Romer*, 517 U.S. at 623-24.

168. *Id.* at 633 (citing *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)).

169. *Kandu*, 315 B.R. at 148.

170. Strasser, *supra* note 125, at 437.

171. *Id.* (citing Summer L. Nastich, *Questioning the Marriage Assumptions: The Justification for "Opposite-Sex Only" Marriage as Support for the Abolition of Marriage*, 21 LAW & INEQ. 114, 127 (2003)).

172. 142 CONG REC. S10100 at 10111 (daily ed. July 12, 1996) (statement of Sen. Byrd).

marriage or spouse. Until now, of course, there has never been a need to define them. Until now. That is why to debate this issue is relevant.”¹⁷³ The denial of these rights in one simple act suggests Congress was motivated by animus.¹⁷⁴ Members of Congress opposed to DOMA suggested this during the hearings including Senator Kerry who stated, “I believe that this debate is fundamentally ugly, and it is fundamentally political, and it is fundamentally flawed.”¹⁷⁵

Although the *Kandu* court found DOMA constitutional as it related to the specific facts of that case, the Act will inevitably be challenged due to Massachusetts’ legalization of same-sex marriages.¹⁷⁶ If DOMA is found unconstitutional, legally married same-sex spouses will be afforded federal privileges, including the right to refuse to testify against a spouse. Until that time a federal court could refuse to allow such a witness to invoke the privilege and could attempt to force the witness’ testimony.

V. CONSEQUENCES OF NOT EXTENDING MARITAL PRIVILEGE TO SAME-SEX SPOUSES

If a same-sex spouse is called to testify against his or her spouse in a federal criminal trial, the federal court could follow past jurisprudence and look to state law to determine if the marriage is valid. Alternatively, the court could follow DOMA and refuse to extend the federal marital privilege to the same-sex spouse. If the court refuses to extend the marital privilege, several consequences could follow if the witness then refuses to testify. Furthermore, if evidence derived from marital communications is allowed and weighs heavily toward a conviction, a same-sex spouse may be convicted and incarcerated in a circumstance where she may not have been if the evidence was privileged.

Evidentiary privileges exclude evidence, such as testimony, that would otherwise aid in truth-finding.¹⁷⁷ Courts have long recognized marital communications as privileged because the preservation of marriage outweighs the disadvantages imposed in excluding the evidence.¹⁷⁸ Although allowing such privileges has been viewed as hampering fact-finding, refusing to extend the marital privilege to a same-sex spouse may

173. *Id.*

174. Strasser, *supra* note 125, at 444.

175. 142 CONG REC. S10100 at 10107 (daily ed. July 12, 1996) (statement of Sen. Kerry).

176. *See Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

177. Anne W. Robinson, *Evidentiary Privileges and the Exclusionary Rule: Dual Justifications for an Absolute Rape Victim Counselor Privilege*, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 331, 353 (2005).

178. *Wolfe v. United States*, 291 U.S. 7, 14 (1934).

in turn force the witness to lie in order to protect his or her spouse.¹⁷⁹ This would undermine the Federal Rules of Evidence, which were established to ascertain truth and justice.¹⁸⁰ If a federal court refused to recognize this evidentiary privilege for a legally married, same-sex spouse and compelled the witness to testify, the witness could: testify accurately against his or her spouse; take the stand and commit perjury in order not to aide in the prosecution of their spouse; or refuse to testify and possibly be held in contempt.

There are two ways in which courts have dealt with witnesses who refuse to testify. The witness could be held in civil contempt pursuant to 28 U.S.C. § 1826, or the witness could be prosecuted for criminal contempt under 18 U.S.C. § 401. In *Shillitani v. United States*, the Supreme Court set out a test to distinguish criminal from civil contempt.¹⁸¹ The Court ruled that in deciding whether contempt is civil or criminal, the motivation of the court must be considered.¹⁸² If a court orders confinement in an effort to coerce testimony the witness is held in civil contempt.¹⁸³ Specifically, in civil contempt the witness will be released if she chooses to testify.¹⁸⁴ Alternatively, under criminal contempt, the court will punish the witness with a mandatory jail sentence for a specified length of time.¹⁸⁵

Under civil contempt, the judiciary has the statutory power to hold a witness for refusin`g to testify without just cause in any court or grand jury proceeding.¹⁸⁶ The court may order the witness' confinement until he or she becomes willing to testify; however, the length of confinement shall not exceed the life of the court proceeding or the term of the grand jury.¹⁸⁷ The *Shillitani* Court observed this limitation by holding that, even though the lower court compelled testimony through civil contempt, the court could not hold the witness past the grand jury stage.¹⁸⁸ Further, the Court ruled that the conditional nature of the civil contempt sentences did not constitutionally require an indictment or jury trial.¹⁸⁹ The civil contempt statute also limits the confinement to eighteen months.¹⁹⁰

179. Penfil, *supra* note 48, at 827-28.

180. FED. R. EVID. 102.

181. 384 U.S. 364, 370 (1966).

182. *Id.* at 370.

183. *Id.*

184. *Id.*

185. *Id.* at n.5.

186. 28 U.S.C. § 1826 (2000).

187. *Id.*

188. 384 U.S. at 365.

189. *Id.*

190. 28 U.S.C. § 1826 (2000).

Courts have held that civil contempt could be punished by both fines and imprisonment.¹⁹¹ In *In re Grand Jury Proceedings*, the United States Court of Appeals upheld a district court decision that fined a witness \$1,500 per day and sentenced him to prison either for six months or until he furnished records he had failed to produce.¹⁹² However, a court cannot hold a witness in contempt for refusing to testify about privileged information.¹⁹³ In *Blau v. United States*, a husband who refused to divulge the location of his wife was sentenced to six months in prison.¹⁹⁴ The Supreme Court held that the lower court erred by holding the witness in contempt, because the conversations during which his wife disclosed her location were intended to be private and, therefore, were privileged.¹⁹⁵

Alternatively, the court could prosecute a witness for criminal contempt, as opposed to holding her in civil contempt, if she refuses to testify.¹⁹⁶ If convicted, the court will sentence the witness pursuant to the Federal Sentencing Guidelines.¹⁹⁷ The Federal Sentencing Guidelines offer a base level offense number depending on the severity of the crime. The court considers that level, along with the defendant's criminal history and other factors surrounding the case, and then assigns the defendant to a criminal history category. The court compares the base level offense and criminal history category with the Federal Sentencing Manual Sentencing Table, which dictates the length of the sentence imposed.¹⁹⁸

Because there is no specific sentencing guideline for criminal contempt, the court will consider the nature and circumstances under which the contempt was committed and find the most analogous sentencing guideline to determine the length of the prison sentence.¹⁹⁹ If the court finds that there was no intent to obstruct justice by not testifying, it will likely treat the witness only as a material witness who failed to appear.²⁰⁰ This categorization is the least severe guideline the court could use and carries a Base Offense Level of 6 if the defendant failed to appear in a felony case,²⁰¹ or an Offense Level of 4 if the underlying case concerned a

191. *In re Grand Jury Proceedings*, 280 F.3d 1103, 1109-10 (7th Cir. 2002).

192. *Id.* at 1107.

193. *Blau v. United States*, 340 U.S. 332, 333 (1951).

194. *Id.*

195. *Id.* at 334.

196. 18 U.S.C. § 401 (2000).

197. U.S. SENTENCING GUIDELINES MANUAL § 2J1.1 (2004) (regarding contempt within the "Offenses Involving the Administration of Justice").

198. *Id.* at ch. 5, pt. A (sentencing table).

199. *Id.* § 2J1.1.

200. *See id.* § 2J1.5.

201. *Id.* § 2J1.5(a)(1).

misdemeanor.²⁰² According to the Guidelines, a witness with no prior criminal history could be sentenced to six months in prison for failing to testify.²⁰³

However, if the court finds that the witness obstructed justice by not testifying, the Guidelines provide for a more severe punishment.²⁰⁴ The Base Offense Level for the obstruction of justice is 14,²⁰⁵ and carries a sentence of fifteen to twenty-one months as applied to a witness with no prior record.²⁰⁶ Furthermore, if the court finds that the witness' obstruction of justice results in a substantial interference, an offense enhancement of three levels will result and raise the sentence to between twenty-one and twenty-seven months.²⁰⁷ For example, if the offense involved the destruction of a substantial number of documents or tangible objects, the offense increases by two levels.²⁰⁸ This would in turn elevate the sentence to a Level 16 and impose a twenty-one to twenty-seven month sentence.²⁰⁹ Also, if the court found that the witness both substantially obstructed justice²¹⁰ and destroyed a substantial number of documents²¹¹ the Offense Level would be raised to 19 and a witness with no prior criminal record would be sentenced for two-and-one-half to three years in prison.²¹²

VI. ANALYSIS

Federal courts can prosecute defendants for a number of charges including, for example, drug charges. If the defendant is legally married in Massachusetts and prosecuted in federal court, the defendant's same-sex spouse could be called to testify by the prosecution. The witness would attempt to invoke his or her privilege not to testify against the spouse pursuant to Rule 501. At the state level, the prospective witness would be well within his or her right to refuse to testify against the spouse under Massachusetts law.²¹³ The witness would also be within his or her right to refuse to testify at the federal level if the witness was involved in a

202. *Id.* § 2J1.5(a)(2).

203. *See id.* at ch. 5, pt. A (sentencing table).

204. *Id.* § 2J1.2.

205. *Id.* § 2J1.2(a).

206. *Id.* at ch. 5, pt. A (sentencing table).

207. *Id.* § 2J1.2(b)(2).

208. *Id.* § 2J1.2(b)(3).

209. *Id.* at ch. 5, pt. A (sentencing table).

210. *Id.* § 2J1.2(b)(2).

211. *Id.* § 2J1.2(b)(3).

212. *Id.* at ch. 5, pt. A (sentencing table).

213. MASS. GEN. LAWS ANN. ch. 233, § 20 (West 2000).

heterosexual marriage as opposed to a same-sex marriage.²¹⁴ However, if the federal court cited DOMA and refused to extend the marital privilege to the witness, the court could pursue criminal charges against the witness or attempt to compel testimony by holding the witness in contempt of court.²¹⁵

Prior to DOMA's enactment, a federal court in this situation would have looked to the state law where the marriage was celebrated in order to validate a marriage for federal purposes.²¹⁶ Under DOMA, this deference to state law would still be appropriate as long as the people involved in the marriage are not homosexuals.²¹⁷ DOMA's unprecedented attempt to define marriage in regard to all federal rights was created to specifically exclude any state-sanctioned homosexual married couples from receiving any federal benefits or privileges.²¹⁸ While the lower federal courts have upheld DOMA's constitutionality in other cases, this hypothetical case is more serious because DOMA has caused the incarceration of a person for refusing to testify against his or her spouse.

If the court went against the jurisprudence of deferring to state law to validate a marriage for the purpose of identifying the privilege,²¹⁹ the witness would likely be held in civil contempt for refusing to testify.²²⁰ The witness would be confined without an indictment or jury trial, until he or she agreed to testify. The court could ultimately confine the witness for the length of the court proceeding as long as it did not exceed the eighteen month statutory limit.²²¹ Additionally, if the court sought to punish the witness rather than to compel testimony, it could prosecute the witness for criminal contempt.²²² The witness could be tried for criminal contempt even after already being held in civil contempt.²²³ A subsequent conviction for criminal contempt after the witness was held in civil contempt pursuant to a judicial order does not violate double jeopardy.²²⁴

If the witness was subsequently convicted, the court could consider

214. FED. R. EVID. 501; *see generally In re Grand Jury*, 111 F.3d 1083 (3d Cir. 1997).

215. 18 U.S.C. § 401 (2000); 28 U.S.C. § 1826 (2000).

216. *United States v. Acker*, 52 F.3d 509, 515 (4th Cir. 1995); *United States v. Knox*, 124 F.3d 1360, 1365 (10th Cir. 1997).

217. *See Knox*, 124 F.3d at 1365 (explaining that the federal courts must look to state law in order to determine if a marriage is valid).

218. *See* 1 U.S.C. § 7 (2000); *Baehr v. Lewin*, 852 P.2d 44, 59 (Haw. 1993); H.R. REP. NO. 104-644, at 2 (1996), *as reprinted in* 1996 U.S.C.C.A.N. at 2906.

219. *See De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956).

220. 28 U.S.C. § 1826 (2000).

221. *Id.*

222. 18 U.S.C. § 401 (2000).

223. *See United States v. Marquardo*, 149 F.3d 36, 39-41 (1st Cir. 1998).

224. *See id.*

whether the witness intended to obstruct justice by not testifying,²²⁵ or whether he or she was a material witness who failed to appear.²²⁶ In order to determine the appropriate length of the prison sentence, the court could consider the nature and circumstances of the offense.²²⁷ If the witness has no criminal record, he or she could be sentenced to six months (if found only to be a material witness who failed to appear),²²⁸ or up to two-and-one-half to three years (if the witness is found to have substantially obstructed justice with the offense involving the destruction of documents or tangible objects).²²⁹ In the present situation, a longer sentence could occur if the witness destroyed electronic communications via computer between herself and her spouse, anticipating that these communications would not be found privileged by the federal court.

Whether the witness is held pursuant to a civil contempt order or imprisoned as a result of a criminal contempt prosecution, he or she could challenge the constitutionality of DOMA by arguing that it violates the Tenth Amendment as well as the Due Process and implied Equal Protection Clauses guaranteed by the Fifth Amendment.

A. DOMA's Constitutionality Under the Tenth Amendment

Congress likely acted outside its enumerated powers set forth in Article I of the U.S. Constitution when it enacted DOMA. The Constitution expressly limits the federal government's power by establishing dual sovereignty between the federal and state governments.²³⁰ The Tenth Amendment provides this division in power by articulating that powers not delegated to the federal government by the Constitution are reserved to the states.²³¹ In dealing with a constitutional issue implicating the Tenth Amendment, the court will look to the powers delegated to Congress in Article I in order to determine if a congressional act is authorized or, alternatively, if the act invades state sovereignty which is protected by the Tenth Amendment.²³²

The regulation of marriage has typically been left to the states; therefore, DOMA's regulation of marriage could be deemed as an infringement upon state sovereignty.²³³ Article I of the Constitution does not grant Congress

225. U.S. SENTENCING GUIDELINES MANUAL §§ 2J1.2 (2004).

226. *Id.* § 2J1.5.

227. *Id.* § 2J1.1 cmt. n.1.

228. *Id.* § 2J1.5 & ch. 5, pt. A (sentencing table).

229. *Id.* § 2J1.2(b)(3) & ch. 5, pt. A (sentencing table).

230. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

231. U.S. CONST. amend. X.

232. *New York v. United States*, 505 U.S. 144, 156-57 (1992).

233. *See De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956).

the power to regulate marriage nor set domestic law policies.²³⁴ The government has previously argued that there is no federal infringement on state sovereignty because DOMA does not bind the states, and states will continue to define the terms marriage and spouse for state purposes.²³⁵ However, accepting this argument will allow Congress to rewrite a state's definition of marriage for federal purposes. Congress infringes on state sovereignty when it refuses to accept a state's definition of marriage unless it coincides with the definition created by DOMA in 1996.²³⁶ Congress is acting outside its enumerated powers when it defines marriage, even if it is defining marriage for federal purposes.²³⁷ States regulate marriage through their police powers.²³⁸ Allowing Congress to redefine a state's definition of marriage is, in effect, permitting them to infringe on states' rights by controlling domestic issues traditionally left to the states.²³⁹

By enacting DOMA, Congress erroneously attempted to preempt state family law.²⁴⁰ The standard for federal preemption of state law was articulated by the Supreme Court in *United States v. Yazell* which cautioned:

Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements. They should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied.²⁴¹

This high standard applies because there is a direct conflict between DOMA, which limits the definition of marriage as between a man and a woman,²⁴² and Massachusetts state law, which extends the right to marry to same-sex couples.²⁴³ This direct conflict between state and federal policy requires the court to consider whether DOMA preempts Massachusetts

234. See U.S. CONST. art. I, § 8; see also *De Sylva*, 351 U.S. at 580; see also *New York*, 505 U.S. at 155.

235. See *In re Kandu*, 315 B.R. 123, 132 (Bankr. W.D. Wash. 2004).

236. See H.R. REP. NO. 104-664 at 10 (1996), as reprinted in 1996 U.S.C.C.A.N. 2905, 2914. In passing DOMA, Congress intended to obviate any confusion about whether they would recognize a same-sex marriage. *Id.*

237. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 7 (1967).

238. See *id.*; see also *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003).

239. See *De Sylva*, 351 U.S. at 580.

240. See *United States v. Yazell*, 382 U.S. 341, 352 (1966).

241. *Id.* at 352.

242. 1 U.S.C. § 7 (2000).

243. See *Goodridge*, 798 N.E.2d at 948.

state marriage law.²⁴⁴

The government would contend that there is no direct conflict involved because the interest of the federal government is being served while also respecting the state marriage law.²⁴⁵ Further, it will argue that this high standard is inapplicable to the present hypothetical case because DOMA does not extinguish the states' power to regulate marriage but rather intends to coexist equally with the state law and only implicate its definition for federal purposes.²⁴⁶ If the court denies those arguments and concludes that DOMA overrides state law, the court would decide if preemption was appropriate by determining whether the federal interest set forth by DOMA is substantial and would suffer major damage if the state marriage law were applied.²⁴⁷ In order to rule that preemption of state law is justified, the court first would have to acknowledge that the federal government has a substantial federal interest in preserving the traditional definition of marriage for federal purposes.²⁴⁸

While the legislative history surrounding DOMA purports that one governmental interest in passing DOMA is to preserve scarce government resources, the court should also consider documentation that supports or rebuts the government's assertion that not recognizing same-sex marriages would also preserve government resources. Congress never specified which federal interests would be damaged if same-sex couples were extended the benefits granted to opposite-sex couples.²⁴⁹ Furthermore, the Supreme Court held in *Shapiro v. Thompson* that fiscal concerns are legitimate, but the government cannot accomplish its federal purpose by "invidious distinctions between classes of its citizens."²⁵⁰

Even if the court found that preserving federal resources was a substantial federal interest, it would also have to find that recognizing same-sex marriages would cause "major damage" to the interest if state law applied.²⁵¹ Considering that many states have adopted "baby DOMAs" that limit marriage to opposite-sex couples, and Massachusetts is currently the only state that recognizes a same-sex marriage as legal, it would be difficult to argue that extending federal privileges to the 6100 legally married same-sex couples in Massachusetts would cause major damage to the federal

244. See *Yazell*, 382 U.S. at 349.

245. See *id.* at 352.

246. See *id.*

247. *Id.*

248. *Id.*; see *In re Kandu*, 315 B.R. 123, 132 (Bankr. W.D. Wash. 2004). See also H.R. REP. NO. 104-664, at 10 (1996), as reprinted in 1996 U.S.C.C.A.N. 2905, 2914.

249. Strasser, *supra* note 125, at 444.

250. 394 U.S. 618, 633 (1969).

251. See *United States v. Yazell*, 382 U.S. 341, 352 (1966).

interest.²⁵²

The court should recognize that allowing federal law to redefine marriage, even for federal purposes, would result in infringement on the states' power to regulate marriage, as it is a power not specifically delegated to the federal government and therefore left to the states.²⁵³ Also, the court should rule that there is a direct conflict between DOMA and Massachusetts state marriage law and that there would be no major damage suffered to a federal interest if DOMA did not override Massachusetts state law.²⁵⁴ Because Congress acted outside of its enumerated powers, and DOMA unjustifiably preempts Massachusetts state marriage law, the court should conclude that DOMA is unconstitutional because it violates the Tenth Amendment of the United States Constitution.²⁵⁵

Lastly, the Judiciary Committee clearly stated that its power under the Full Faith and Credit Clause gave it the authority to pass the section of DOMA that deals with interstate recognition of same-sex marriages and gives states the right to refuse to acknowledge such a marriage.²⁵⁶ However, in discussing the part of DOMA that deals with excluding same-sex marriages from federal benefits, Congress did not identify under which power it was acting.²⁵⁷ Rather, Congress stated that there was "nothing novel" about the definitions it set forth.²⁵⁸ The novelty that inevitably has arisen is an unprecedented federal definition of marriage that not only conflicts with Massachusetts' definition but also tells families with same-sex spouses that their rights will be discarded at the federal level. The Judiciary Committee did not explain which Article I power gave it the right to refuse same-sex families all the federal benefits, rights, and privileges that are contingent upon marital status.²⁵⁹ Congress avoided identifying which power it was acting under by asserting that it was only codifying a definition that was already understood.²⁶⁰ However, the question remains: what gives Congress the power to define marriage?

252. Partners Task Force for Gay & Lesbian Couples, *Massachusetts Offers Legal Marriage*, <http://www.buddybuddy.com/mar-mass.html> (statistic as of September 2005).

253. See U.S. CONST. amend. X; see also *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890).

254. See *Yazell*, 382 U.S. at 352.

255. See U.S. CONST. amend. X; see also *Burrus*, 136 U.S. at 593-94.

256. H.R. REP. NO. 104-664, at 27 (1978), as reprinted in 1996 U.S.C.C.A.N. 2905, 2931 (referring to what would later be enacted as 28 U.S.C. § 1738(c)(2000)).

257. See *id.* at 30-31.

258. *Id.* at 31.

259. See *id.*

260. *Id.*

B. DOMA's Constitutionality Under the Fifth Amendment

1. Level of Scrutiny Analysis: Due Process

When examining a Fifth Amendment claim, the court first must determine the proper level of scrutiny to assess the spouse-witness's claim that DOMA violates his or her due process and equal protection rights.²⁶¹ If the spouse-witness can demonstrate that the government interfered with a fundamental right, the court will apply a strict scrutiny analysis, which would weigh heavily in favor of the defendant.²⁶² Under the strict scrutiny analysis, the infringement must be narrowly tailored to a compelling state interest.²⁶³ Alternatively, if the court finds that DOMA did not infringe on a fundamental right or liberty interest, it will apply a rational basis level of scrutiny.²⁶⁴ This liberal test only requires that the legislation be rationally related to a legitimate government interest in order to uphold the legislation.²⁶⁵

In this hypothetical, where a same-sex spouse challenges the court's refusal to extend the spousal privilege, it is arguable that DOMA has infringed upon the fundamental right to marry, guaranteed as a liberty interest by the Due Process Clause of the Fifth Amendment of the United States Constitution.²⁶⁶ Although lower courts have refused to recognize that the fundamental right to marry includes the right to marry someone of the same sex, the Supreme Court has yet to consider this issue.²⁶⁷ The Supreme Court's opinion in *Lawrence v. Texas* protected the right of same-sex couples to engage in private sexual conduct, yet the Court explicitly stated that its decision did not mean that the government had to formally recognize any relationship that homosexuals sought to enter.²⁶⁸ However, it is important to note that the *Lawrence* case did not address the issue of same-sex marriage, but rather was a constitutional challenge to a Texas law which outlawed sodomy as between two persons of the same sex.²⁶⁹

261. See *In re Kandu*, 315 B.R. 123, 138 (Bankr. W.D. Wash. 2004).

262. See *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

263. *Id.*

264. See *id.* at 728.

265. *Id.*

266. U.S. CONST. amend. V; see *Loving v. Virginia*, 388 U.S. 1, 8-12 (1967) (striking down a ban on interracial marriage and ruling that marriage is a fundamental civil liberty). See also *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (reaffirming marriage as a fundamental right). See generally *Turner v. Safley*, 482 U.S. 78 (1987) (extending the fundamental right to marry to all persons, including those incarcerated).

267. *In re Kandu*, 315 B.R. 123, 140 (Bankr. W.D. Wash. 2004).

268. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

269. *Id.* at 562-63.

Therefore, the *Lawrence* Court's words of caution (that the holding does not address the issue of same-sex marriage) do not mean that the fundamental right to marry can not include the marriage to a person of the same-sex.²⁷⁰

When faced with the issue of whether the fundamental right to marry includes the right to marry a person of the same sex, lower courts will likely refuse to extend this right by deferring to the Supreme Court's caution regarding the extension of fundamental rights.²⁷¹ In *Glucksberg*, the Court defined fundamental rights as those which are deeply rooted in the country's history and tradition.²⁷² Using this standard, it is difficult to argue that same-sex marriage is deeply rooted in history.²⁷³ However, if the Supreme Court had used this jurisprudence in *Loving v. Virginia*, it is difficult to see how the fundamental right to marry could have been extended to an interracial couple considering that, like same-sex marriage, interracial marriage was not deeply rooted in this Nation's history and tradition.²⁷⁴ Rather than relying on *Glucksberg*, the courts can look to Supreme Court decisions such as *Zablocki v. Redhail*²⁷⁵ (which reaffirmed marriage as a fundamental right), *Loving v. Virginia*²⁷⁶ (which extended the fundamental right to marry notwithstanding that the type of marriage in question was not rooted in history) and *Turner v. Safley*²⁷⁷ (which extended the fundamental right to marry to all persons, even to those who lost some constitutional rights while incarcerated) and rule that the fundamental right to marry extends to persons regardless of their spouse's gender.

If same-sex marriage is considered a fundamental right, the court will apply a strict scrutiny analysis similar to that applied by the *Zablocki* Court.²⁷⁸ In *Zablocki*, the Court held that a law not allowing people who owed child support to marry was unconstitutional.²⁷⁹ The Court reasoned that "[w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate

270. *See id.* at 578.

271. *See Kandu*, 315 B.R. at 140 (Bankr. W.D. Wash. 2004) (citing *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)) (refusing to recognize a fundamental right to marry a person of the same-sex).

272. *Glucksberg*, 521 U.S. at 720-21.

273. *See Kandu*, 315 B.R. at 140.

274. *See generally* 388 U.S. 1 (1967).

275. *See* 434 U.S. 374, 384 (1978).

276. *See generally* *Loving*, 388 U.S. 1.

277. *See generally* 482 U.S. 78 (1987).

278. *Zablocki*, 434 U.S. at 388.

279. *Id.* at 390-91.

only those interests.”²⁸⁰ However, if the Court rules there is no fundamental right to marry a person of the same sex, the Court will use a rational basis level of scrutiny, unless it concludes that homosexuals are a “suspect class” against which DOMA is discriminating.²⁸¹

2. Level of Scrutiny Analysis: Equal Protection of a Suspect Class

The second possible way to obtain a level of scrutiny greater than the rational basis test is by illustrating that the law in question discriminates against a suspect class.²⁸² Although the Fifth Amendment does not have an explicit Equal Protection Clause as does the Fourteenth Amendment,²⁸³ the equal protection analysis used for claims under the Fifth Amendment is the same as the approach used for claims under the Fourteenth Amendment.²⁸⁴ If legislation disadvantages a suspect class, it is considered “presumptively invidious” and thereby held to a strict scrutiny level of analysis.²⁸⁵ Deciding whether illegal aliens should be regarded as a suspect class, the Supreme Court in *Plyler v. Doe* stated:

Some classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective. Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law.²⁸⁶

Specifically, when determining whether a group should be considered a suspect class the Supreme Court has considered three requirements: 1) historically, the group must have been subjected to discrimination; 2) the group must exhibit obvious, immutable, or distinguishing characteristics which defines them as a discrete group; and 3) the group must be a minority or politically powerless.²⁸⁷ Although the Ninth Circuit in *High Tech Gays v. Defense Industrial Security Clearance Office* conceded that homosexuals have historically been subjected to discrimination, it refused

280. *Id.* at 388.

281. *See Plyler v. Doe*, 457 U.S. 202, 216 (1982).

282. *See id.*

283. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

284. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995) (citing *Buckley v. Valeo*, 424 U.S. 1, 93 (1976)).

285. *Plyler*, 457 U.S. at 216.

286. *Id.* at 216-17 n.14.

287. *Lyng v. Castillo*, 477 U.S. 635, 638 (1986).

to rule that they are a suspect class because their characteristics are not immutable, and they are not a politically powerless group.²⁸⁸ It is not surprising that the *High Tech Gays* court recognized that homosexuals have historically been subjected to discrimination,²⁸⁹ particularly considering recent scholarship which has assessed the amount of antigay initiatives in the country.²⁹⁰

It has been suggested that the civil rights of lesbian, gay, and bisexual people have been put to a popular vote more than any other group of citizens.²⁹¹ Between 1959 and 1993, almost sixty percent of the initiatives and popular referenda that were put on state ballots were aimed at homosexuals' civil rights.²⁹² These antigay rights actions sought to both repeal enacted laws which protected homosexuals' civil rights, and to create new laws which would prohibit legislatures from passing any legislation that would offer protection to homosexuals.²⁹³ While some of these ballot measures never actually make it onto the ballot and others failed at the voting booth, the majority of those submitted to a popular vote came out against homosexual interests.²⁹⁴ In light of this disadvantage, proponents of gay rights have successfully used the courts to question the legality of these antigay initiatives.²⁹⁵

Because homosexuals have been forced to utilize the courts in order to fight antigay legislation, it is surprising that the *High Tech Gays* court refused to recognize the group as politically powerless.²⁹⁶ The court stated that legislatures are addressing the discrimination of homosexuals, and that because they have attracted the attention of lawmakers, they are not politically powerless.²⁹⁷ While many of the cases involving the fight against antigay legislation took place after the *High Tech Gays* ruling, the history surrounding the use of politics *against* homosexuals before the

288. *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir. 1990).

289. *Id.* at 573.

290. Ellen Ann Andersen, *Out of the Closets and into the Courts* 143 (Univ. Mich. Press 2005).

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.* at 143-46.

295. *Id.* (citing *Citizens for Responsible Behavior v. Superior Court*, 2 Cal. Rptr. 2d 648 (Cal. Ct. App. 1991); *Romer v. Evans*, 517 U.S. 620 (1996); *Lowe v. Keisling*, 882 P.2d 91 (Or. Ct. App. 1994)).

296. Andersen, *supra* note 290, at 283.

297. *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990).

High Tech Gays case is lengthy.²⁹⁸ The *High Tech Gays* court may have been right when it suggested that homosexuals have attracted the attention of lawmakers, yet it failed to consider that the attention they receive is not always positive.²⁹⁹

Even if the *High Tech Gays* court did find that homosexuals were a politically powerless group, it still would have declined a strict scrutiny analysis on the basis that homosexuality is not immutable, but rather a behavior characteristic, and therefore different than alienage, race, or gender.³⁰⁰ The Supreme Court has referred to immutability as a characteristic which has been determined “solely by the accident of birth,”³⁰¹ and “which its possessors are powerless to escape or set aside.”³⁰² The Supreme Court’s plurality opinion in *Frontiero v. Richardson* concluded that discrimination may be unfair if based on a characteristic that is both immutable and unrelated to the legitimate government purpose at hand.³⁰³ The debate over whether homosexuality is an immutable characteristic for the purposes of receiving a strict scrutiny analysis has resulted in scientific reports, which have offered theories indicating that there are biological causes for sexual orientation.³⁰⁴

However, while the immutability debate continues, two Supreme Court decisions since the *Frontiero* plurality opinion mention immutability, not as a requirement, but rather only as a factor that would lead to a class’s being offered more protection under the strict scrutiny classification.³⁰⁵ The Supreme Court in *Bowen v. Gilliard* and *Lyng v. Castillo* used the same language to determine that close relatives should not be considered a suspect class for their equal protection challenges to acts which affected their eligibility for federal aid.³⁰⁶ The Court in both cases reasoned, “[a]s a historical matter, they have not been subjected to discrimination; they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and they are not a minority or politically

298. Andersen, *supra* note 290, at 143.

299. See *High Tech Gays*, 895 F.2d at 574.

300. *Id.* at 573-74.

301. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

302. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 360 (1978).

303. *Frontiero*, 411 U.S. at 686. The *Frontiero* Court held that legislation which did not allow female members of the uniform services to claim their husbands as dependants, was a violation of the Fifth Amendment of the United States Constitution. *Id.* at 678-79.

304. Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 504 (1994).

305. See *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987); *Lyng v. Castillo*, 477 U.S. 635, 638 (1986).

306. *Bowen*, 483 U.S. at 594, 602-03; *Lyng*, 477 U.S. at 637-38.

powerless.”³⁰⁷ The word “or” in this reasoning suggests that the immutability characteristic is not a requirement for a group to be considered a suspect class.³⁰⁸

If a court was to consider the Supreme Court’s language in *Lyng*, the better argument may be that homosexuals have “distinguishing characteristics that define them as a discrete group” rather than trying to prove that they are immutable.³⁰⁹ In *Lawrence v. Texas*, the Supreme Court wrote that scholars have explained the absence of laws regarding homosexual conduct prior to the twentieth century partly because the “concept of the homosexual as a distinct category of person did not emerge until the late 19th century.”³¹⁰ This suggests that there must be some distinguishing characteristics in order to define them as a distinct group.³¹¹ It can also be argued that homosexuals exhibit distinguishing characteristics through their lifestyle choices such as with whom they live, where they reside, and where they socialize. Furthermore, if homosexuals did not exhibit distinguishing characteristics it would be difficult to imagine how they become the victims of hate crimes. The Federal Bureau of Investigations (FBI) reported that in 2004, 15.7 percent of all single-biased hate crimes occurred as a result of a bias against a particular sexual orientation.³¹²

The Supreme Court avoided the question of whether homosexuals should be considered a suspect or quasi-suspect class in both *Lawrence v. Texas* and *Romer v. Evans* by ruling that the antigay legislation in both cases could not withstand even the rational basis test which is considered the most liberal of inquiries.³¹³ Some scholars suggest that the Supreme Court will soon be forced to decide whether homosexuality qualifies as a suspect classification; however, until then federal courts will likely continue to use the rational basis standard of review.³¹⁴

307. *Bowen*, 483 U.S. at 602-03 (quoting *Lyng*, 477 U.S. at 638).

308. For further discussion regarding the immutability debates, see Halley, *supra* note 304.

309. *See Lyng*, 477 U.S. at 638.

310. *Lawrence v. Texas*, 539 U.S. 558, 568 (2003).

311. *See id.*

312. U.S. DEP’T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, HATE CRIME STATISTICS 2004, sec. 1 (2004), <http://www.fbi.gov/ucr/hc2004/section1.htm>. It is believed that many hate crimes involving homosexuals are not reported because the victims may not want to report that they are homosexual. *Id.* Further, the FBI statistics are submitted by a limited number of police agencies and even those who do submit data may not always correctly categorize crimes as hate crimes. *See Religious Tolerance Home Page, U.S. HATE CRIMES: DEFINITIONS AND FACTS*, http://www.religioustolerance.org/hom_hat3.htm.

313. *Lawrence*, 539 U.S. at 578; *Romer v. Evans*, 517 U.S. 620, 632 (1996).

314. Halley, *supra* note 304, at 504.

3. Rational Basis Review

Unless the Supreme Court rules that there is a fundamental right to marry a person of the same sex or rules that homosexuals are a suspect class, a court, when determining whether a same-sex spouse was properly held in contempt for refusing to testify, will decide whether DOMA is rationally related to a legitimate government purpose.³¹⁵ The court should consider that DOMA was passed in response to a congressional concern that “activist judges in Hawaii” would force other states to accept gay marriage.³¹⁶ At the hearings, which preceded DOMA’s enactment, many argued that the Act was unconstitutional.³¹⁷ DOMA’s supporters expressed their intent to preserve the traditional definition of marriage as a union between one man and one woman.³¹⁸ However, the legislative history reflects that the need for DOMA was predicated upon the possibility that same-sex marriage would be legalized and therefore indicates that the purpose of DOMA was to disapprove of same-sex marriage.³¹⁹ The history identifies four governmental interests that Congress intended DOMA to advance: “(1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce government resources.”³²⁰

The recent jurisprudence of “*Lawrence*, *Romer*, and *Moreno* suggest[s] that imposing unique disabilities on an unpopular group out of animus or out of a desire to establish that members of that group are somehow not as worthy as other members of society may well not pass muster under rational basis review.”³²¹ Considering this line of cases, if the court views DOMA as a moral disapproval of same-sex relationships, it may be held unconstitutional.³²²

Additionally, it could be argued that Congress demonstrated an animus-

315. See *Romer*, 517 U.S. at 635.

316. See 150 CONG. REC. H1327 (daily ed. March 23, 2004) (statement of Rep. Stearns) (referring to *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), as the catalyst for DOMA).

317. See H.R. REP. NO. 104-664, at 2 (1996), as reprinted in 1996 U.S.C.C.A.N. 2905, 2906.

318. See 142 CONG. REC. H7271 (daily ed. July 11, 1996) (statement of Rep. McInnis).

319. H.R. REP. NO. 104-664, at 2, as reprinted in 1996 U.S.C.C.A.N. at 2906 (stating that DOMA was created in direct response to the possibility that same-sex marriage would be legalized in Hawaii).

320. H.R. REP. NO. 104-664, at 12, as reprinted in 1996 U.S.C.C.A.N. at 2916.

321. Strasser, *supra* note 125, at 438. All three cases, *Lawrence v. Texas*, 539 U.S. 558 (2003), *Romer v. Evans*, 517 U.S. 620 (1996), and *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528 (1973), found statutes which impose disabilities on a politically unpopular group unconstitutional.

322. *Id.*

based rationale behind DOMA by imposing a blanket ban which single-handedly stripped legally married same-sex couples of any federal benefits enjoyed by opposite sex couples.³²³ The legislative history reflects that Congress did not examine which federal interests would be damaged and how they would be affected if same-sex marriages were recognized, but rather denied same-sex families all federal marital rights.³²⁴ The congressional intent to deprive legally married same-sex couples of 1138 federal laws³²⁵ in one simple act strongly suggests the type of animus-based rationale which the Supreme Court has found unacceptable.³²⁶ Specifically, in *Romer* the Supreme Court struck down an amendment to Colorado's state constitution which would have prohibited the state or local government from enacting legislation designed to protect homosexuals from discrimination.³²⁷ The Court reasoned that the extensiveness of the amendment was "so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects"³²⁸ The Court also considered that the amendment was both "too narrow and too broad" by identifying homosexuals by one trait and subsequently denying them a wide range of protections.³²⁹ Furthermore, the Court observed that disqualifying a class of persons from specific protections of the law is "unprecedented in our jurisprudence."³³⁰ The Court concluded that "Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do."³³¹

DOMA is analogous to Colorado's Amendment 2 in that both pieces of legislation specifically target homosexuals and deny them a wide range of protections. This could lead the Court to determine that the motivation behind DOMA is also based on animus,³³² particularly when considering the legislative history reflects Congress' clear intent to discriminate against same-sex spouses by denying federal benefits.³³³

323. See *Romer*, 516 U.S. at 635.

324. H.R. REP. NO. 104-664, at 18, as reprinted in 1996 U.S.C.C.A.N. at 2922.

325. See generally G.A.O. REPORT, *supra* note 12.

326. See *Romer*, 517 U.S. at 635.

327. *Id.* at 623-24.

328. *Id.* at 632.

329. *Id.* at 633.

330. *Id.*

331. *Id.* at 635.

332. See *id.*

333. H.R. REP. NO. 104-664, at 30, as reprinted in U.S.C.C.A.N. at 2935. The House Report pertaining to DOMA states that "[i]f Hawaii or some other State eventually recognizes homosexual marriage, Section 3 [later enacted as 1 U.S.C. § 7 (2000)] will mean simply that that marriage will not be recognized as a marriage for purposes of federal law."

The government will likely attempt to refute the animus argument by asserting that encouraging relationships optimal for the procreation and raising of children is an additional, legitimate governmental purpose in DOMA.³³⁴ While Congress did not list this specifically as a governmental purpose, it did state that “[s]imply put, government has an interest in marriage because it has an interest in children.”³³⁵ Congress did not specify why its interest in children does not extend to children of same-sex couples.³³⁶ Congress stated that by reserving marriage for a man and woman, it would be “encouraging responsible procreation and child-rearing”; however, there is no explanation for how a same-sex marriage could discourage heterosexuals from procreating.³³⁷ Since Congress described marriage’s role in raising children as “irreplaceable,” it is unknown why it chose to deprive children of same-sex parents of this opportunity.³³⁸

A court examining whether DOMA can extinguish a spouse’s privilege not to testify should conclude that, like Amendment 2 in *Romer*, there is no legitimate purpose behind DOMA and that it violates equal protection as afforded by the Fifth Amendment. Specifically the court should rule that because limiting marriage to heterosexuals is far removed from its purpose of encouraging responsible procreation and child-rearing, DOMA seeks to make homosexual spouses unequal to heterosexual spouses. DOMA has thus resulted in the incarceration of a spouse who would have been extended the spousal privilege not to testify if he or she were heterosexual.³³⁹

The government may also attempt to rely upon its lastly stated government interest: to preserve scarce government resources. However, the congressional intent surrounding DOMA fails to specify which federal interests would be impacted.³⁴⁰ This is reflected in a congressional report that states, “[w]hile the Committee has not undertaken an exhaustive examination of those benefits, it is clear that they do impose certain fiscal

Id.

334. See *In re Kandu*, 315 B.R. 123, 145 (Bankr. W.D. Wash. 2004).

335. H.R. REP. NO. 104-664, at 13, as reprinted in 1996 U.S.C.C.A.N. at 2917.

336. Thirty-three percent of female couples and twenty-two percent of male couples are raising at least one child under the age of 18. U.S. CENSUS BUREAU, MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000, Census 2000 Special Reports at 10 (Feb. 2003), <http://www.census.gov/prod/2003pubs/censr-5.pdf>.

337. H.R. REP. NO. 104-664, at 13, as reprinted in 1996 U.S.C.C.A.N. at 2917.

338. *Id.*

339. See *Romer v. Evans*, 517 U.S. 620, 635 (1996).

340. See 142 CONG. REC. S10100 at 10111 (daily ed. Sept. 10, 1996) (statement of Sen. Byrd) (estimating that the cost associated with extending federal benefits to same-sex couples could be in the hundreds of millions or billions of dollars).

obligations on the federal government.”³⁴¹ The report goes on to give one example of how the federal government may be affected by stating that a surviving spouse of an armed services veteran would be entitled to the benefits of a veteran.³⁴² In the Congressional hearings prior to the enactment of DOMA, Senator Byrd admitted that he did not have any reliable estimates of how much money it would cost the federal government if federal benefits were extended to same-sex marriages.³⁴³ Even if Congress had provided statistics of how extending federal benefits to same-sex marriages would affect a specific governmental interest such as social security, the Supreme Court has already rejected Congress’ assertion that it was entitled to pass a law which would preserve federal benefits by excluding a certain group in *United States Department of Agriculture v. Moreno*.³⁴⁴

In *Moreno*, Congress amended the Food Stamp Act in order to prevent “hippies” from benefiting from the food stamp program.³⁴⁵ The Court held that if equal protection “means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”³⁴⁶ Based on *Moreno*, even if Congress had specifically offered a federal interest that would be affected by recognizing same-sex marriage, it probably would not pass constitutional muster.³⁴⁷ Also, DOMA is much more expansive than the amended Food Stamp Act, by excluding 1138 rights, benefits, and privileges to over 12,200 individuals married to a same-sex partner in Massachusetts.³⁴⁸

DOMA promotes the unequal treatment of same-sex spouses and should not survive even a rational basis review of the Equal Protection Clause recognized in the Fifth Amendment.³⁴⁹ A law resulting in the incarceration of a homosexual for attempting to exercise a privilege extended to heterosexuals indicates equal protection concerns. In light of the clear motivation of Congress, the expansiveness of DOMA and its specific

341. H.R. REP. NO. 104-664, at 18, *as reprinted in* 1996 U.S.C.C.A.N. at 2922.

342. *Id.* Consider this example in light of a 1993 statute which provides that a member of the armed forces will be separated from the military if he or she engages, or attempts to engage, in homosexual activity, proclaims to be a homosexual, or marries or attempts to marry a person of the same sex. 10 U.S.C. § 654(b)(1) (2000).

343. 142 CONG REC. S10100 at 10111 (daily ed. July 12, 1996) (statement of Sen. Byrd).

344. *See generally* 413 U.S. 528 (1973).

345. *Id.* at 537.

346. *Id.* at 534.

347. *See id.*

348. *See* 1 U.S.C. § 7 (2000); *see also* G.A.O. REPORT, *supra* note 12.

349. *See Romer v. Evans*, 517 U.S. 620, 635 (1996).

targeting of homosexuals, DOMA should be viewed as an infringement on the equal protection guarantees of the Fifth Amendment of the United States Constitution.³⁵⁰

VII. CONCLUSION

Since same-sex marriage became legal in Massachusetts, couples have been denied all of the federal rights and privileges attached to marriage pursuant to the Defense of Marriage Act. The marital testimonial and communication privileges are among two of the most important federal benefits because denying these privileges could result in the incarceration of one or both spouses. Same-sex families fall within the public policy reasons for recognizing these privileges. Spouses, children, extended family, and society would all be affected by the incarceration of one or both spouses. Incarceration or forced testimony would disrupt the sanctity of the marriage as well as impose financial burdens on the family. Typically federal courts validate a marriage for these purposes by looking to state law. DOMA mandates that when evaluating a same-sex marriage, a court must disregard the state law and instead determine that the marriage does not fit into the federal government's definition. Congress was acting outside its Article I powers when it enacted DOMA, and further the direct conflict between the federal and Massachusetts definition suggests that federal law has wrongfully preempted state law. A spouse incarcerated for refusing to testify against his or her spouse can raise these constitutional issues along with the claim that DOMA violates the Equal Protection Clause recognized in the Fifth Amendment. A strict or heightened scrutiny analysis should be used to for the purposes of this claim because DOMA has infringed upon the fundamental right to marry or alternatively because homosexuals should be considered a suspect class. However, even under a rational basis level of scrutiny, the legislative history suggests that DOMA was based on animus toward homosexuals and this has been held to be a violation of the Equal Protection Clause.

In anticipation of a state allowing same-sex couples to marry, frantic legislators scrambled to pass DOMA without recognizing that congressional power is limited by the constitution. DOMA was passed out of prejudice and fear and singled-handedly strips tax paying United States citizens of serious rights and privileges. DOMA not only financially affects those specifically targeted by the law, but it can also deprive those people of their liberty. The federal government's refusal to acknowledge a state sanctioned marriage can devastate a family and have serious repercussions on children faced with having one or both parents incarcerated. The evidentiary privilege not to adversely testify against a spouse should be

350. *See id.*

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available to same-sex spouses in federal court. Federal courts should seriously question the constitutionality of DOMA before refusing to extend this privilege to a spouse, particularly where the court is considering incarcerating the witness for contempt.

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