Nos. 10-2204, 10-2207, and 10-2214

United States Court of Appeals
For the First Circuit

No. 10-2204

COMMONWEALTH OF MASSACHUSETTS
Plaintiff – Appellee
v.

UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES; ET. AL.
Defendants – Appellants

and two companion cases

ON APPEAL FROM THE FEDERAL DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF AMICUS CURIAE GEORGE I. GOVERMAN IN SUPPORT OF FEDERAL DEFENDANTS

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United States Court of Appeals
For the First Circuit

No. 10-2204

COMMONWEALTH OF MASSACHUSETTS
Plaintiff – Appellee
v.

UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES; ET. AL.
Defendants – Appellants

No. 10-2207

DEAN HARA,
Plaintiff, Appellee/Cross-Appellant,

NANCY GILL; et al.
Plaintiffs-Appellees,

KEITH TONEY; ALBERT TONEY, III
Plaintiffs

v.

OFFICE OF PERSONNEL MANAGEMENT, ET AL.,
Defendants, Appellants/Cross-Appellees,

HILARY RODHAM CLINTON, in her official capacity as United States Secretary of State
Defendant

No. 2214

DEAN HARA
Plaintiff, Appellee/Cross-Appellant

NANCY GILL; ET AL.
Plaintiffs-Appellees,

KEITH TONEY ET AL.,
Plaintiffs

v.

OFFICE OF PERSONNEL MANAGEMENT, ET AL.
Defendants – Appellees

HILARY RODHAM CLINTON, in her official capacity as United States Secretary of State
Defendant

BRIEF OF AMICUS CURIAE GEORGE I. GOVERMAN
IN SUPPORT OF FEDERAL DEFENDANTS

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Identity and interest of amicus curiae

Amicus curiae George I. Goverman ("amicus") is a citizen and resident of Massachusetts and a member of the bar of the Commonwealth since 1970. He has no financial interest in the instant appeal other than the de minimis one that would result from a re-allocation of tax burdens from parties in same-sex marriages to unmarried individuals such as himself if the lower court's judgments are upheld.

Authorship and Funding

Amicus received no assistance from a party or its counsel in writing this brief and received no funds from any party or other source in connection herewith.

Argument

I. *Baker v. Nelson*, 409 U. S. 810 (1972) PRECLUDES THE LOWER COURT FROM FINDING A CONGRESSIONAL DUE PROCESS/EQUAL PROTECTION VIOLATION.

The United States Supreme Court has already considered the question of whether state statutes that deny same-sex couples the right to "marry"[1] on the same terms as opposite-sex couples are violative of the equal protection clause of the Fourteenth Amendment. In *Baker v. Nelson*, 409 U. S. 810 (1972), the Court summarily dismissed a case involving two males who wished to be married under Minnesota law, in which the court below had explicitly rejected all federal constitutional theories offered by the plaintiffs, including the equal protection/due process one that all plaintiffs rely on here. *Baker v. Nelson*, 291 Minn. 310, 191 N. W. 2d 185 (1971). This action necessarily ruled that the Constitution (i. e., equal protection) did *not* prevent Minnesota from treating same-sex couples differently

[1] Amicus puts quotation marks around "marriage" when it means something other than the traditional definition of "the legal union of a man and a woman as husband and wife." *Goodridge v Dept. of Public Health*, 440 Mass. 309 at 319 (2003). While usual practice is to drop the quotation marks after their first use, numerous decisions and arguments on same-sex "marriage" have been made in which the absence of this notation makes for confusion, e. g., the proposition "marriage is a fundamental right" is not the same as the proposition "'marriage' is a fundamental right."

from opposite-sex couples. Thus, under *Mandel v. Bradley*, 432 U. S. 173 (1977), the decision was binding precedent for the lower courts. The *Mandel* Court wrote,

> Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. *They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions.* 432 U. S. 173 at 176 (per curiam) (emphasis supplied).

See also *Lockyer v. City and County of San Francisco*, 33 Cal. 4th 1055, 17 Cal. Rptr. 3d 255, 95 P. 3d 459 (2004):

> "[*Baker*] … is a decision of the United States Supreme Court, binding on all other courts and public officials, that a state law restricting marriage to opposite-sex couples does *not* violate the federal Constitution's guarantees of equal protection and due process of law. 33 Cal. 4th 1055, at 1126 (Kennard, J., concurring in part and dissenting in part) (emphasis in original)

and *Morrison v. Sadler*, 821 N. E. 2d 15 (Ind. App. 2005):

> "There is binding United States Supreme Court precedent indicating that state bans on same-sex marriage do not violate the United States Constitution…." citing *Baker*, 821 N. E. 2d at 19.

Since the equal protection guarantees of the Fourteenth Amendment have been held to apply to Congress via the Fifth Amendment due process clause, *Bolling v. Sharpe*, 347 U. S. 497 (1954), Congress could not have been violating the Constitution by treating same-sex couples differently from opposite-sex couples pursuant to DOMA.[2]

[2] The existence of this Supreme Court precedent could explain why same-sex "marriage" advocates have pursued a state-by-state strategy ever since *Baker*, and have relied only on state constitutions, never on the federal. "In light of [*Baker*],

II. SAME-SEX COUPLES, REGARDLESS OF BEING "MARRIED" UNDER MASSACHUSETTS LAW, ARE NOT SIMILARLY-SITUATED WITH OPPOSITE-SEX MARRIED COUPLES BECAUSE THEY ARE NOT SIMILARLY SITUATED WITH RESPECT TO THE PURPOSES OF THE CONGRESSIONAL LAW.

A. To determine whether an equal protection/Fifth Amendment violation has taken place requires an understanding of the purpose of the law under consideration.

The lower court took its learning on equal protection (as enforceable against Congress via the Fifth Amendment) from *City of Cleburne v. Cleburne Living Center*, 473 U. S. 432 at 439 (1985) (Gill Memorandum, 20), writing: "[T]hat all citizens are entitled to equal protections of the laws is 'essentially a direction [to the government] that all persons similarly situated should be treated alike.'" (footnote omitted) The converse of this proposition was stated by the Court when it wrote, "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 540 (1942), citing *Tigner v. Texas*, 310 U. S. 141, 147 (1940). The lower court also quoted from *Romer v. Evans,* 517 U. S. 620 (1996) for the proposition that "[courts] insist on knowing the relation between the classification adopted and *the object to be attained*," (Gill Memorandum, 22, emphasis added). See also, *McLaughlin v. Florida*, 379 U. S. 184 at 191 (1964):

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the plaintiffs have not made a Fourteenth Amendment argument in this case." *Morrison v. Sadler*, 821 N. E. 2d. 15 at 20 (Ind. App. 2005)

"The courts must reach and determine the question whether the classifications drawn in a statute are reasonable *in light of its purpose*…" (emphasis added)

B. The purposes of DOMA are to retain the word marriage to apply to the traditional function of marriage, which is to regulate procreative activity between men and women, and to prevent federal funds from being used for purposes and a class Congress never intended

Congress has made determining the purposes of DOMA fairly easy, and the lower court found four in the legislative history: "(1) encouraging responsible procreation and child-bearing, (2) defending and nurturing the institution of traditional heterosexual marriage, (3) defending traditional notions of morality, and (4) preserving scarce resources." Gill Memorandum 23. Marriage – the states' system of registering and supporting the voluntary commitment of a man and a woman to support each other ("a marriage contract") when they wish to engage in sexual relations – was believed to be the optimal as well as the moral way of assuring the care, maintenance, and support of any child produced by those sexual relations. By "moral" is meant the obligation arising from the fact that since it takes two to produce a child, those two should be the ones responsible for the consequences of their act, that is, for supporting the child.

C. The purposes of Massachusetts "marriage" are to foster long-term sexual relationships irrespective of the sexes of the parties to them, and to reduce the stigma associated with homosexuality.

The Massachusetts legislature did not pass a same-sex "marriage" statute; rather it acquiesced in two decisions of the state's highest court that legalized "marriage" for couples of the same-sex on the same basis as couples of the opposite-sex.[3] It is thus from those two decisions that the "legislative intent" of Massachusetts's "marriage" statute must be found and the classification that is used to implement it.

1. The classification.

In the first case, *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N. E. 2d. 961 (2003) (hereinafter "*Goodridge*"), the court held that the purpose of marriage, based on its interpretation of Massachusetts law, was fostering "adult intimacy" and "creating a family."[4] In fact, the court eventually pared these two purposes down to one, which was fostering adult intimacy. The court never defined "families," nor is the word *family* or its cognates defined or even much used in the marriage statute,[5] but since the court stated that "No one disputes that

[3]Commonwealth Memorandum 8, citing pars. 18-19 of the Plaintffs' Complaint
[4] *Goodridge* 440 Mass. 309 at 331, 798 N. E. 2d 941 at 961
[5]The *Goodridge* court refers to M. G. L. c. 207 as "the marriage licensing statute"and says that it was the proper focus for interpreting the qualifications for marriage. A word search of this chapter for "famil* (i. e., "family" or "families") found only 1 use of the term, in section 25, and that refers only to getting input

the plaintiff couples are *families*.…" (emphasis supplied)[6], and made no effort to distinguish the two couples who had no children or dependents from the other plaintiff couples,[7] it is clear that the court considered a long-term ("committed") partnership of two individuals a "family." The court did not say that by "committed" it meant *sexually* committed, so that any two-person *sexual* partnership is able to "marry" under Massachusetts law, but the decision makes it clear that the sexual activity ("adult intimacy") of the partners will be the "sine qua non" of Massachusetts "marriage" henceforth. That no mere "roommates" or "housemates" need apply is implied, quite indirectly, by the court's substitution of "spouses" for "husband and wife" (i. e., sexual partners) in the common law definition of marriage ("the legal union of a man and a woman as husband and wife")[8], and by the court's holding that "marriage" is for "adult intimacy" (sex). Neither "commitment" by itself, nor nurturing of children is sufficient, either, because the court insisted that the state's incest laws remain unchanged by its decision,[9] so that a grandmother and mother, for example, who are raising the

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from a minor's family before approving a minor's marriage. "Family" is defined by statute in several chapters, e. g., c. 268A, §1 (state and municipal conflict of interest laws), c. 233, §23D. In the state's homestead act, c. 188, §1, "family" includes a single individual.

[6] *Goodridge*, 440 Mass. at 335, 798 N. E. 2d 941 at 964

[7] *Goodridge*, 440 Mass. at 313-314, 798 N. E. 2d. 941 at 313.

[8] Compare *Goodridge*, 440 Mass. at 319, 798 N. E. 2d. at 942, (traditional definition) with 440 Mass. at 343, 798 N. E. 2d at 969 (new definition)

[9] *Goodridge*, 440 Mass. at 343, n. 10, 798 N. E. 2d at 969

mother's child, would not be among the "families" who might be protected by the new "marriage." Nor can couples bound only by love, such as siblings, apply. Thus, the Massachusetts classification for its new "marriage" is couples who are (or were) engaged in sexual activity with one another, i. e., homosexuals in addition to heterosexuals.

2. The purpose.

Given that *Goodridge* held that the state's marriage statute, as thus interpreted, required that marital benefits (and responsibilities) be made available to all adult, two-person, long-term sexual partnerships that sign up for them, the question remains: what purpose did the Massachusetts legislature have when acquiesced in this classification? Since the court insisted that same-sex couples be given the same benefits as afforded to traditional marriages, it must have been to make these partnerships as stable, secure, and economically viable as those traditional marriages. Of the approximately 36 marital benefits the court cited in *Goodridge*, all but three would be useful for keeping *any* household together.[10]

[10] The SJC's list of benefits is found at 440 Mass. at 323-325, 798 N. E. 2d. 955-957. The three exceptions are (1) joint income tax filing, (2) presumption of legitimacy, and (3) predictable rules of child custody. As to (1), Massachusetts tax law has its own form of "marriage penalty," in that two single individuals can each deduct up to $3,000 from taxable income if they pay rent for their housing, whereas a married couple, whether filing jointly or separately, is also limited to a $3000 deduction. Mass. G. L. c. 62, §3.B.(9). Benefits (2) and (3) only have value to households that have produced children.

Had the Massachusetts legislature acquiesced in the court's view of marriage as envisioned in *Goodridge*, one could have assumed that the new[11] purpose of marriage under Massachusetts law was to foster and encourage any committed, two-person, sexual partnership, regardless of sexual mix, the same way it fostered and encouraged traditional opposite-sex sexual partnerships. That this was not so was answered almost immediately: When the Massachusetts legislature attempted to enact a statute that would do exactly that, except that the partnership between same-sex sexual partners would be called a "civil union" rather than a marriage,[12] the court wasn't satisfied: the new name didn't carry the same cachet as traditional marriage, and what was constitutionally required, it said, was to dispel the idea that same-sex unions might be inferior to opposite-sex unions and to erase the stigma long associated with homosexuality.[13] (Although the majority cited no evidence for believing "civil union" would necessarily connote inferiority rather than simple difference nor that "civil union" itself had a stigma attached to it, the court assumed both of these propositions.) [14]

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[11] The court acknowledged that including same-sex couples in marriage was a "change." *Goodridge*, 440 Mass. at 312, 798 N. E. 2d. 948.
[12] See *Opinions of the Justices*, 440 Mass. 1201 at 1202, 802 N. E. 2d. 565 (2004) (hereinafter "*Opinions*")
[13] *Opinions* , 440 Mass. at 1207-1210
[14] Id., cf. 440 Mass.at 1222-23 (separate opinion of Cordy, J.)

Thus the purpose of "marriage" under Massachusetts law is to foster long-term sexual partnerships, heterosexual and homosexual couples being the only ones qualified by virtue of being both "intimate" as well as willing to commit to only one sexual partner indefinitely, and the purpose of calling both unions "marriages" is to prevent people from thinking about the new unions in the wrong way.[15]

D. With different purposes, the legislatures use different classifications

It is easy to put the differing purposes side by side and see why the two different legislatures used different classifications to implement them:

1. Massachusetts wants to foster sexual partnerships, whereas Congress sees no particular benefit in sexual partnerships *per se*, but it does have an interest in those partnerships that may create the next generation of society, i. e., opposite-sex couples, and particularly in those opposite-sex couples who are making a formal commitment of mutual support, i. e., getting married. Thus Congress classifies according to whether a sexual partnership could produce children or not; Massachusetts classifies according to whether the couple intends long-term sexual relations or not.

[15] *Opinions of the Justices*, 440 Mass. 1201 at 1207-09

2. Massachusetts wants to eradicate the stigma of homosexuality by re-defining marriage so people will think, "They're just like the rest of us;" whereas Congress wants to retain the traditional meaning of marriage for whatever power it still has for inspiring the formation of the long-term relationship that Congress favors for the creation and support of children. Thus Congress classifies sexual unions in accordance with the traditional meaning of marriage; Massachusetts classifies according to what the two groups have in common, long-term sex between partners.

3. Massachusetts accords little weight to the views of a substantial portion of its population that including homosexual-based partnerships in "marriage" is offensive, confusing, and/or unwise; Congress accords more weight to those views and seeks to prevent the new ambiguity in the word from being exploited for financial and public relations purposes, so Congress retains the traditional meaning of the word.

4. Massachusetts is willing to support all committed sexual partnerships with taxpayer funds on the same basis as it had previously supported only married couples, regardless of whether these additional combinations have a potential societal impact or not; Congress sees no societal benefit to this new combination, either in general or such that the combination needs benefits identical to those

given to marriages, and so does not allocate federal taxpayer funds to support them.

E. The idea that federal resources must support a state policy is a novel one

The question of different purposes of state and federal law was highlighted in Massachusetts 30 years ago in an equally controversial context, busing to eliminate racial segregation in the public schools. At that time, Massachusetts adopted a policy of "balancing" racially-imbalanced schools, enacting Mass. G. L. c. 71, §37C, by St. 1965, c. 641, §1, whether or not an equal protection violation could be shown. Congress, to the extent it assisted the federal courts in contesting equal protection denials in the schools, only focused on state-mandated, *de jure* segregation. In some situations, federal courts ordered busing to undo this type of segregation. It was never contended, however, that Congress also had to assist programs like METCO (voluntary busing across school district lines[16]) to implement Massachusetts's policy of racially balancing schools.

Similar issues come up in other contexts: California may attempt to set mileage standards for motor vehicles; Arizona may attempt to enforce federal immigration laws; farm belt states may encourage the planting of corn for gasohol.

[16]Authorized by Mass. G. L. c. 76,§12A

Congress, and the national treasury, cannot be forced to fund these state policies; rather, if anything, the Supremacy Clause points the other way.

F. A rational legislature would regulate the sexual activity of bi-sexuals pursuant to the same analysis as it regulates same-sex unions

As a test for whether Congress is being irrational in treating same-sex unions differently from opposite-sex unions, both designated as "marriages" under Massachusetts law, this Court should consider whether a legislature is being irrational if decides how, if at all, to regulate the sexual activities of bi-sexuals, persons who are sexually attracted to persons of either sex. Should it regulate them the same when their activities are directed toward a person of the same-sex as when they are directed to a person of the opposite sex? Isn't the potential impact of a sexual encounter between the latter much more significant to society than the impact of the former? Indeed, does sexual intercourse between two persons of the same-sex have *any* social impact beyond its effect on the individuals involved? If it does, is it comparable to the effect a new member of society will have, such that the two sexual encounters should be regulated identically?

In fact, most legislatures do regulate bi-sexuals in the way suggested by the question: consensual homosexual intercourse is not regulated at all, by virtue of

Lawrence v. Texas,[17] whereas consensual heterosexual intercourse is encouraged to take place only in the context of a marriage. See, e. g., Mass. G. L. c. 272, §18, which still criminalizes sex outside of marriage as fornication.

Marriage itself is based on this distinction: the state has no need to regulate the sexual interactions of same-sex couples, but it does see a need to regulate the sexual interactions of opposite-sex couples. The latter create children, vulnerable individuals who must be cared for over many years, and who, as they grow, must be integrated into the larger society. Societies have traditionally assigned those responsibilities to their natural parents – singly, requiring each parent to support his or her child – but most have required that they act jointly, that they support each other as well, for the benefit of the children they produce. The traditional legislative response to society's desire to have natural parents act together in raising their child was to *forbid* (criminalize) the creation of children until the potential parents commit to mutual support (marry); now the usual response is to *confer benefits* that encourage living together as a unit and to remove threats that might divide that unit. This explains all the benefits listed by the court in *Goodridge*.[18] It is the potential presence of children that makes marriage different from a mere mutual aid pact between sexually-attracted adults.

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[17] 539 U. S. 558 (2003)

[18] *Goodridge*,440 Mass. at 323-325, 798 N. E. 2d at 955-957

G. The success of the next generation is a legitimate interest for Congress

While the lower court briefly suggested that Congress, as opposed to the states, had no "cognizable" interest in the objective DOMA addresses,Gill Memorandum 22, it did not follow up on the thought, and it is fairly late in American constitutional law for the proposition that fostering the next generation is not a legitimate *national* concern. This is the generation that will be voting for federal officials, serving in the military,[19] applying for patents and copyrights, paying taxes to support the national government and its social security system, and participating in, using, or underwriting all the other the functions the Constitution vests in the federal government. The nation as a whole, and not merely the states, has an interest in seeing that each new generation is nurtured to responsible adulthood. This interest could easily be characterized as "compelling." Congressional efforts to further this national interest range from subsidizing the nutritional needs of women, infants, and children, 42 U. S. C. §§1771 et seq.("WIC"), to making sure children's health insurance needs are met, 42 U. S. C. 1397aa et seq. ("CHIP," formerly "S-CHIP"). In education, Congress has funded

[19] "It is declared to be the policy of Congress, as a measure of national security, to safeguard the health and well-being of the Nation's children…" 42 U. S. C. §1751 Declaration of policy for the school lunch program. National security need not be limited to having armed forces.

everything from Head Start, 42 U. S. C. §§9831 et seq., to Pell Grants, 20 U. S. C. 1070a, et seq.

On the other hand, it is hard to make an argument that Congress has any interest whatsoever in fostering same-sex partnerships per se. Only to the extent they are *raising* children would they be considered within Congress's ambit of concern. But Massachusetts's "marriage" does not have any requirement or logical connection to children, so Congress has limited its financial commitment, at least, to the class traditionally understood as raising children.

H. Different purposes of the laws implicate different, not irrational, classifications.

Because it is the purpose of the legislation that determines whether classes of people are similarly-situated, same-sex couples may be similarly-situated with opposite-sex couples for one law but not for another. For Massachusetts, same-sex and opposite sex couples are similarly-situated because Massachusetts has embraced, or at least acquiesced in, a policy of fostering long-term sexual partnerships and of eliminating the stigma associated with homosexuality. For Congress, same-sex couples and opposite-sex couples are not similarly-situated, because its policy is to reinforce the policies underlying traditional marriage, i. e., to assist those couples likely to create the next generation and who are willing to commit to each other's support for the long term as well.

III. THE LOWER COURT ERRED IN OVERRIDING CONGRESS'S BALANCING OF THE NUMEROUS CONCERNS THAT GO INTO SOCIAL, ECONOMIC, AND EMPLOYEE BENEFIT LEGISLATION.

Convinced that DOMA was just an irrational swipe at homosexuals, the lower court gave little consideration to why social, economic, and welfare legislation was written the way it was, and why Congress might rationally want to retain the distinctions it made long before the gay rights movement began.

A. Joint income tax returns

1. History.

As with marriage itself, the joint income tax section of the Internal Revenue Code ("Code"), 26 U. S. C.§6013 had nothing to do with animosity toward homosexuals. It arose out of an inequity the Supreme Court had created in *Poe v. Seaborn*, 282 U. S. 101 (1930), which allowed married taxpayers in community property states to attribute half their income to their spouses, since an incident of marriage in community property states is that any income earned by either spouse immediately vests half in the other spouse by operation of law. With steeply graduated tax rates, it could often be quite advantageous for a married couple to be taxed at the rate of the *average* of their incomes rather than at the rate of the highest earning spouse. But this was not available in common law jurisdictions, which was most of the country, and while community property laws may have created fairness and equality within the marriage, they created unfairness and

inequality among states, in that taxpayers in community property states were not paying their fair share of taxes relative to "similarly-situated" taxpayers elsewhere. Efforts to change the law finally bore fruit in 1948, when Congress gave all married taxpayers the right to split their combined incomes and pay at the rate set for their averaged income, as community property couples could do. It added considerable complexity to the tax statutes, but was enacted to allow geographic uniformity.[20]

2. Rationale.

The underlying theory of community property was again that marriage was a partnership which licensed sexual intercourse between the parties, and that the wife would usually be disadvantaged in the partnership because of her duties as child-bearer and mother, so she needed special legal protection. It was not a coincidence that the civil law and the common law both made special arrangements for opposite-sex partnerships, but not for other partnerships; both systems were subject to the same biology.

3. Ancillary benefits.

Notwithstanding its origin to bring geographic fairness across the country, joint tax returns have had other favorable effects: first, they reinforce the idea that

[20] This account is largely taken from 3A Bittker & Lokken, *Federal Taxation of Income, Estates & Gifts* (2d Ed 2001) §§76.1 et seq.

the couple is a unit and should be sharing resources without having to think about tax consequences; second, they reduce the incentives husbands and wives had before joint filing to transfer property between themselves to minimize taxes; and third, they reduce the need for families to keep records relative to deductible expenses.

4. Similarly-situated in name only.

No doubt the plaintiffs would argue that all these positive effects should apply to them, because they are similarly situated. But that is not so. It is because they *chose* to be similarly-situated with opposite-sex couples; society did not ask them to do so to advance any public interest. Plaintiffs are anomalous in American law in that they are insisting on being "regulated" by being married, even though the state has no reason for doing so. See *Lawrence v. Texas*[21]. This apparent paradox can't even be explained by the hypothesis that the incentives to marry have become so valuable that homosexuals are willing to sacrifice some portion of their liberty to get them. If that were the case, then one would expect heterosexual couples would be resorting to marriage more also, but they aren't.[22] And

[21] 539 U. S. 558 (2003)

[22] George Will, writing in *Newsweek,* reported, "The Census Bureau found that, for the first time, there are more people in the primary marrying age (25 to 34) who have never been married than are married. The portion of adults who are married – 52 percent, compared to 72.2 percent in 1960, is the lowest in history." *Newsweek*, Jan. 10& 17, 2011, p. 20

homosexuals have consistently attacked state statutes that offer them marriage-equivalent benefits but don't call the arrangement a "marriage."[23] So the real goal is not equality of treatment, it is social acceptance – equality of regard, so to speak – and appropriating the word marriage is perceived as the way to get it.

5. Children as a red herring.

If they claim (as they do here, and the lower court unthinkingly accepted the claim[24]) that they should have the economic benefits afforded to opposite sex couples in the public interest because they are raising children, too, the first question is "Where did the children come from?" Why does a same-sex couple have children who aren't the primary responsibility of their biological parents? The second question is, "Why are same-sex couples not like any other set of adults who are raising children to whom they are not biologically related?"

In fact, same-sex couples with children are most like unmarried heterosexual couples with children who are the biological children of only one of them. In Congress's view, these households may be able to take advantage of child tax credits, earned income credits, head of household filing status, and dependency

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[23] Massachusetts: Civil unions rejected. *Opinions of the Justices*, 440 Mass. 1201, 802 N. E. 2d 565 (2004); California: domestic partnerships rejected. *In re Marriage Cases,* 43 Cal. 4th 757, 193 P. 3d 384 (2008), Connecticut: Civil unions rejected *Kerrigan v. Commissioner*, 289 Conn. 85, 957 A. 2d 407 (2008),

[24] Gill Memorandum 24 (denial of marital benefits prevents children from same sex households from enjoying a stable family structure)

exemptions. It has made numerous provisions for blended, broken, and non-traditional families, but adding same-sex couples as groups eligible to file a joint return was explicitly rejected by DOMA. Congress had nothing against children, it just didn't see a public benefit to channeling the benefits to sexual partnerships that may not have any.

6. Windfalls and omissions.

So the lower court has granted four of the seven plaintiff couples a windfall by accepting an anti-nominalist argument[25] that since Massachusetts calls them "married," Congress has to consider them married as well, and refund the taxes they overpaid because they couldn't file joint returns. Unexplained is why the court does not mention the other three couples or the three individuals who filed suit for other federal benefits. They may not have been hurt by the inability to file federal joint returns but might actually have been helped by being excused from doing so. Their increased tax liability would come from the well-known marriage penalty, which causes couples with approximately the same incomes to pay more

[25] S: (n) nominalism ((philosophy) the doctrine that the various objects labeled by the same term have nothing in common but their name, http://wordnetweb.princeton.edu/perl/webwn?s=nominalism, last accessed 1/14/11. In more down-to-earth terms, the fallacy was illustrated by a comment attributed to President Lincoln: "If you call a tail a leg, how many legs has a dog? Five. No, calling a tail a leg don't *make* it a leg." Bartlett, *Familiar Quotations*, (13th Ed. 1955) p. 542)(emphasis in the original)

than they would if they were single. If DOMA is unconstitutional, then they will have to start paying more.

The ambiguous nature of this "benefit" – that some same-sex couples will pay less taxes and others more -- makes the claim that Congress was out to "get" homosexuals, rather than retain the meaning of the word marriage, harder to make. At the same time, it confirms the idea that what the plaintiffs are really after is to appropriate the word marriage, and the benefits are a mere pretext.

7. Creating a regulatory mess.

In 1961, the tax lawyer Louis Eisenstein cynically caricatured special interest arguments addressed to Congress for ever more deductions, exemptions, or benefits, with the observation, "[E]quity is the privilege of paying as little [tax] as somebody else."[26] The lower court, with the development of equal protection jurisprudence, has now constitutionalized those arguments, which one would have thought the rational basis test would have made virtually impossible. As the Supreme Court observed, "Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Madden v. Kentucky*, 309 U.S. 83, at 88 (1940) Equitable

[26] L. Eisenstein, *The Ideologies of Taxation* (1961) , p. 163

distribution of the tax burden was what Congress thought it was doing when it allowed for joint tax returns in the first place, to eliminate the lack of nationwide uniformity caused by state laws. The lower court has undone this by using state law, against the clearly expressed will of Congress, to add to the class of taxpayers eligible for this "benefit." State law caused a lack of uniformity in 1930, Congress addressed it with a federal law in 1948, now the lower court has undone uniformity by again resorting to state law. Not only does it make for inconsistent tax policy, it opens the door for same-sex couples in other states to claim that now *they* are similarly-situated with same-sex couples in Massachusetts, only their state won't allow them to "marry." Their claim to be able to file jointly will undoubtedly follow.

The end result of ruling joint tax returns must be available to same-sex "marriages" is a windfall to some plaintiffs. Neither Congress nor the public has shown any interest in aggrandizing mere sexual partnerships in this way, and to rely on the name given to the new union to calls to mind nothing but Emerson's observation that "a foolish consistency is the hobgoblin of little minds."

B. Social security and employee benefits

The same analysis that applies to the filing of joint tax return should apply to social security and federal employee benefits. The social security system was set up in the 1930s with a general paradigm of how society was then organized,

socially and economically, and benefits were based on amount of lifetime earnings and number of quarters worked. Congress took into account that wives of that period would suffer at retirement time for having been out of the workforce to raise children. It therefore linked their retirement benefits to their husbands,' who would not have been so disadvantaged. The lower court has again taken the word marriage as used in Massachusetts law and applied it to the social security statute without considering the statute's purpose when originally enacted – "the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished." Were Congress re-writing the Social Security Act in the current social and economic environment, it is unlikely that the original formulas would be adopted. The court's award here can only be deemed a windfall to those who want to take advantage of this unfortunate and intentionally confusing [27] choice of words for embodying Massachusetts's new policy.

IV. THE LOWER COURT ERRED IN IGNORING ITS DUTY TO AVOID CONSTRUING STATUTES SO THAT THEIR CONSTITUTIONALITY IS PUT IN DOUBT

The lower court ignored the duty of courts to avoid interpretations of statutes that would cast into question their constitutionality, both in its

[27] See *Opinions*, 440 Mass. 1201 at 1208

interpretation of the Congress's intent in enacting DOMA and DOMA's alleged intrusion into state sovereignty.

A. Intrusion into state sovereignty.

One of the clearest examples of this violation was the lower court's dismissal of the government's argument that DOMA has a rational purpose in maintaining the status quo. The lower court held that the status quo at the time DOMA was enacted was a procedural one ("at the federal level"), one in which the states had the right to define marriage however they wished, so Congress was actually *changing* the status quo, and thus it was impinging on state sovereignty in violation of the Tenth Amendment. Gill Memorandum 32. The alternative interpretation would be that the status quo was a substantive one ("at the state level"), that marriage was the legal union of a man and a woman as husband and wife in all 50 states, and that was how Congress wanted to keep it for federal law purposes until a consensus emerged as to how to handle same-sex couples. Thus, to use the lower court's example, even though New Hampshire would marry opposite-sex couples at much earlier ages than would any other state, Gill Memorandum 34, the union would still involve a license (quite literally, since sex between minors is otherwise illegal in New Hampshire[28]) of a male and a female to engage in sexual intercourse. Extension of the lower court's principle would lead

[28] N.H. Statutes §632-A:3(II)

to the result that federal law would have to treat polygamous unions as "marriages" as well, if a state chose to use that word to describe them. See *Romer v. Evans,* 517 U. S. 620, at 648 et seq..(Scalia, J., dissenting)

B. Finding an invidious Congressional intent

Although the lower court was correct that only by negating all possible policy reasons for enacting DOMA could a court conclude it was violative of the equal protection/due process clauses, its interpretation in light of "the cause of [DOMA's] enactment, the mischief or imperfection to be remedied and the main object to be accomplished" was clearly erroneous.

As the lower court found, in 1996 Congress saw a concerted legal effort by a special interest group to change the definition of marriage in the several states. Gill Memorandum 3. Not only did it find this disconcerting as a matter of overall social policy, but it feared that this effort would, by appropriating a word Congress had frequently used in statutes, divert federal resources to individuals Congress saw no reason to benefit, and would further undermine the meaning of marriage in states that did not agree to this new definition. *Id.* These were "the cause of [DOMA's] enactment, the mischief or imperfection to be remedied and the main object to be accomplished."

History showed that Congress was correct that gay activists wanted to appropriate marriage-the-word. Merely getting all the rights and benefits of married couples was not enough. This was conclusively demonstrated in the Massachusetts *Opinions* decision, in which the same advocates for the plaintiffs here argued *against* a civil union statute proposed by the Massachusetts Senate that would have created a parallel institution with the same rights but a different name. In their brief to the court, the advocates argued:

> "The plaintiffs in *Goodridge* sought marriage *and not* only a bundle of legal rights precisely because the word and the institution are meaningful."[29] (emphasis in the original); and
>
> "It is only access to the same institution of marriage on the same terms as applied to others that the plaintiffs will be understood to share the love and commitment of spouses, and all the protections, benefits and obligations that flow from that culturally unique status." [30]

Moreover, this was exactly the strategy that the group's proponents were urging in the public forum:

> William Eskridge wrote in *The Case for Same Sex Marriage*, "In time, moreover, same sex marriage will likely contribute to the public acceptability of homosexual relationships…"[31]
>
> Andrew Sullivan, the editor of *Same-Sex Marriage: Pro & Con*, and a self-confessed "pro," wrote in his Introduction, "Including homosexuals within

[29] Brief of Interested Party/Amicus Curiae Gay & Lesbian Advocates & Defenders, p. 23, filed in *Opinions* (emphasis in original)
[30] Id.., p. 27
[31] W. N. Eskridge, Jr., *The Case for Same Sex Marriage*, p. 9

> marriage, after all, would be a means of conferring the highest form of social approval imaginable."[32]
>
> Jonathan Rauch, author of *Gay Marriage: Why It Is Good for Gays, Good for Straights, and Good for America*, in rejecting civil unions as an alternative, referred to the "unique government endorsement" conferred by marriage.[33]

So Congress responded with a clear direction that as far as the federal government was concerned, marriage meant what it always meant, regardless of the creativity of advocates and sympathetic state courts. One would think that bringing clarity to the interpretation of federal statutes would have been a rational basis for any legislation, such as, for example, whether "creationism" is a science for purposes of federal statutes. By and large, the nation has agreed with Congress that the goal of accepting homosexual behavior, if it happens, is not to be at the expense of the word marriage. George Orwell, whose infamous tale of a society where war was peace, freedom was slavery, and ignorance was strength, would have approved.

CONCLUSION

For the foregoing reasons, this Honorable Court should reverse the judgments of the lower court, except for the judgment that applies to the plaintiff Dean Hara's entitlement to FEHB benefits, which it should affirm.

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[32] A. Sullivan, ed., *Same-Sex Marriage: Pro & Con, A Reader*, p. xxiv
[33] J. Rauch, *Gay Marriage: Why It Is Good for Gays, Good for Straights, and Good for America*, p. 47.

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Certificate of Compliance

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 6,475 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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January 19, 2011

Certificate of Service

I hereby certify that I filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the First Circuit by delivery of nine (9) paper copies and one (1) computer diskette, in hand, in accordance with Local Rule 31.0 (b).

I certify that I have served the parties herein by mailing two (2) copies of the foregoing brief by first class mail, postage prepaid, to their attorneys of record, to wit,

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