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The Legal Status Of Same-Sex Married Couples In Pennsylvania After The U.S. Supreme Court Decision In The DOMA Case[1]

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ABSTRACT

The U.S. Supreme Court's landmark 2013 decision in United States *v.* Windsor,[3] *striking down Section 3 of the federal Defense of Marriage Act (DOMA),*[4] *which had barred the federal government from recognizing otherwise valid same-sex marriages, has created legal complexities at the state and federal levels. For example, the Social Security Administration and the Internal Revenue Service have enacted differing rules on recognition of same-sex marriages that will lead to inconsistent treatment of Pennsylvanians who have entered into such marriages.* Windsor *has likewise spawned on-going litigation in both state and federal courts, challenging Pennsylvania's state DOMA.*[5] *There is a direct challenge on federal constitutional grounds pending in the U.S. District Court for the Middle District of Pennsylvania (*Whitewood*). There is an appeal to the Pennsylvania Supreme Court concerning the legality of the Montgomery County Clerk of Court's issuance of marriage licenses to same-sex couples (*Hanes*). A group of recipients of those licenses who had marriage ceremonies in Pennsylvania have sued in the Pennsylvania*

1. This article is adapted from a CLE presentation at the Pennsylvania State University Dickinson School of Law Alumni Weekend in September 2013.
2. Robert E. Rains is a professor emeritus at the Pennsylvania State University Dickinson School of Law. He co-authored an amicus brief to the United States Supreme Court on behalf of the National Organization of Social Security Claimants' Representatives (NOSSCR) in support of the respondent in *U.S.* v. *Windsor*. All efforts have been made to make this article current as of mid-December, 2013, but this is a rapidly changing field of law and the reader should accordingly exercise caution in relying upon it.
3. *United States* v. *Windsor*, 133 S. Ct. 2675, 186 L.Ed.2d 808 (2013).
4. 1 U.S.C. §7.
5. 23 Pa.C.S. §§1102, 1704.

Commonwealth Court seeking a declaratory judgment that their marriages are valid and challenging Pennsylvania's DOMA on both state and federal constitutional grounds (Ballen). Finally, there is the unsettled question of the availability of divorce in Pennsylvania for Pennsylvania residents who entered into same-sex marriages in same-sex marriage states (Kern).

INTRODUCTION

In the early 1970's, activists began to challenge the paradigm that marriage can only be between a man and a woman. After two decades of unbroken defeats, the activists won a major victory in the Hawaii Supreme Court in 1993 in the case of *Baehr* v. *Lewin*.[6] In the political backlash to *Baehr*, the U.S. Congress and many states—including Pennsylvania—enacted "Defense of Marriage Acts," seeking to block same-sex marriage. After the U.S. Supreme Court's 2013 decision in *Windsor*, many difficult legal issues remain. In contemplating those issues, consider three different scenarios involving same-sex couples:

1. Couple A: Carole and Robin were long-time Massachusetts residents who married in Massachusetts after that state legalized same-sex marriage in 2004.[7] In 2013, they moved to Pennsylvania where one of them took a job as president of a small liberal arts college.

The IRS and SSA have issued inconsistent rules for the treatment of same-sex couples in PA who have been legally married elsewhere; and the constitutionality of Pennsylvania's DOMA is under attack in state and federal court.

2. Couple B: Carole and Robin are long-time Pennsylvania residents who went to Massachusetts in 2004 for one week to get married and immediately returned to their home in Pennsylvania.

3. Couple C: Carole and Robin, long-time Pennsylvania residents, obtained a marriage license in Pennsylvania from a county registrar of wills who had decided that Pennsylvania's DOMA is unconstitutional. They were married by a local member of the clergy.

This article will examine the state and federal statuses of such couples in Pennsylvania today.

BACKGROUND TO ENACTMENT OF THE FEDERAL DOMA

The early 1970's saw a series of cases challenging— in different ways—the concept that marriage must be between a man and a woman. The first reported case, *Anonymous* v. *Anonymous*,[8] involved a man who assertedly had married someone he believed to be a woman but who, he discovered on the wedding night, "had male sexual organs." The plaintiff left the next morning, and the parties "never had any type of sexual relationship." Plaintiff sought a declaration as to his marital status in New York. In a brief opinion, the Queens County Division of the New York Supreme Court ruled that, "The law makes no provision for a 'marriage' between persons of the same sex," hence the "marriage ceremony was a nullity."

Unquestionably, the most legally significant, unsuccessful challenge to laws prohibiting same-sex marriage occurred in Minnesota. In *Baker* v. *Nelson*,[9] two men who had been denied a marriage license appealed to the Minnesota Supreme Court, alleging both statutory and federal constitutional rights to be married. In a brief decision, the Minnesota Supreme Court denied all claims and specifically held that Minnesota's prohibition on same-sex marriage "does not offend the First, Eighth, Ninth, or Fourteenth Amendments to the United States Constitution."

6. *Baehr* v. *Lewin*, 74 Haw. 530, 852 P.2d 44 (1993).

7. *Goodridge* v. *Dept. of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003); *Opinions of the Justices to the Senate*, 440 Mass. 1201, 802 N.E.2d 565 (2004).

8. *Anonymous* v. *Anonymous*, 67 Misc.2d 982, 325 N.Y.S.2d 499 (1971). It should be remembered that in New York a "supreme court" is a trial level court.

9. 291 Minn. 310, 191 N.W.2d 185 (Minn. 1971).

On direct appeal to the U.S. Supreme Court, that Court issued an opinion, without dissent, which read in its entirety, "The appeal is dismissed for want of a substantial federal question."[10] The Court has repeatedly instructed that a dismissal for want of a substantial federal question constitutes a summary decision on the merits and that "the lower courts are bound by summary decisions by this Court, until such time as the Court informs [them] that [they] are not."[11]

Subsequent decisions in Kentucky and Washington State[12] also rejected a right to same-sex marriage. Additionally, in an immigration proceeding, *Adams* v. *Howerton*, the United States District Court for the Central District of Colorado rejected a claim that a man became the "immediate relative" of another man by virtue of their having procured a marriage license and having gone through "a purported ceremony of marriage, performed by a minister in Colorado."[13] The district court, bolstered by an informal opinion of the Colorado Attorney General, determined that the marriage was of no legal effect under Colorado law. Even if Colorado were to recognize such a marriage, it would violate federal public policy. Finally, based on *Baker* v. *Nelson*, the district court held that the refusal of Colorado and the United States to recognize same-sex marriage did not violate equal protection or due process. On appeal, the Ninth Circuit affirmed.[14] The Ninth Circuit found it unnecessary to decide whether the marriage was valid under Colorado law. Rather, the court determined that Congress never intended to include a same-sex spouse as a legal spouse under the Immigration and Nationality Act of 1952, and the exclusion of same-sex spouses does not violate the due process clause and its equal protection requirements.

The procedurally oddest case in this series was brought in Pennsylvania. In *DeSanto* v. *Barnsley*,[15] a plaintiff male filed a complaint in divorce, seeking alimony, equitable distribution, and other financial relief, against another man, asserting that they had entered into a common law marriage. The trial court found that the plaintiff "had not met the burden of proof sufficient to establish a common-law marriage, even if two persons of the same sex could establish a marriage relationship." On appeal, the Superior Court ruled that, as a matter of law, two persons of the same sex cannot enter into a common law marriage.[16]

Given this unbroken line of cases from various American jurisdictions summarily denying the possibility of same-sex marriage, it is hardly surprising that when several same-sex couples in Hawaii sued in May 1991 for the right to be married, the trial court granted the state officials' motion for judgment on the pleadings and dismissed the action with prejudice for failing to state a claim on which relief could be granted.[17] But, on appeal to the Hawaii Supreme Court, that court dropped a legal bombshell. The Court found that judgment on the pleadings had been erroneously granted and that the applicant couples were entitled to an evidentiary hearing on whether the state's prohibition on same-sex marriage violated their rights under the Equal Protection Clause of the Hawaii State Constitution. The Court set an almost impossibly high burden on the state:

> On remand, in accordance with the "strict scrutiny" standard, the burden will rest on (the state defendants) to overcome the presumption that (the statutory prohibition) is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly tailored to avoid unnecessary abridgements of constitutional rights.

Thus, for the first time, it appeared that same-sex marriage might well become legally available in an American jurisdiction. The political/legal reaction was strong (some might say, strident) and multi-faceted. At the federal level, Congress enacted the Defense of Marriage Act (DOMA), signed into law by President Clinton on Sept. 21, 1996.[18]

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10. 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972).
11. *See Hicks* v. *Miranda*, 422 U.S. 322, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975) and authorities cited therein.
12. *Jones* v. *Hallahan*, 501 S.W.2d 588 (KY 1973).
13. *Adams* v. *Howerton*, 486 F.Supp. 1119 (C.D. Colo. 1980).
14. *Adams* v. *Howerton*, 673 F.2d. 1036 (9th Cir. 1982).
15. *DeSanto* v. *Barnsley*, 328 Pa.Super. 181, 476 A.2d 952 (Pa.Super. 1984).
16. A decade later, the General Assembly eliminated the ability of opposite-sex couples to enter into a common-law marriage after January 1, 2005. 23 Pa.C.S. §1103.
17. *Baehr* v. *Lewin*, 74 Haw. 530, 852 P.2d 44 (Haw. 1993).
18. Public Law 104-199, 110 Stat. 2419.

THE FEDERAL DEFENSE OF MARRIAGE ACT (DOMA)

Federal DOMA consists of three short sections, the first being its name, "The Defense of Marriage Act." Section 2 provides that no state is required to give effect to a same-sex marriage entered into in another state or other American jurisdiction. [19] Section 2 was purportedly enacted under Congressional authority to implement the Full Faith and Credit Clause of the U. S. Constitution: "And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."[20] Until recently, Section 2 has not been the subject of much litigation.[21]

The main focus of litigation concerning federal DOMA has been Section 3, which provides that valid same-sex marriages will not be recognized for any federal purpose:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union of a man and a woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.[22]

At the time that DOMA was enacted, no state in the United States permitted same-sex marriage. Ironically, shortly after the enactment of DOMA, Hawaiians voted by a large margin to amend the Hawaii State Constitution to bar same-sex marriage, which resulted in the ultimate defeat of same-sex marriage in that state.[23] But, seven and a half years later, in 2004, Massachusetts became the first state to authorize same-sex marriage.[24] Thus DOMA in effect became operative; a same-sex couple legally married in Massachusetts could not file joint federal tax returns, make claims on each other's Social Security account, nor partake in any other federal benefits normally accorded to married couples. As of the date of the Supreme Court's decision in *Windsor*, there were thirteen same-sex marriage states—California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington State—plus the District of Columbia.[25] Same-sex couples married in those states, or whose marriages were recognized in those states, were blocked by Section 3 of DOMA from federal recognition of their marriages.

Subsequent to the *Windsor* decision, New Jersey legalized same-sex marriage as a result of litigation.[26] Hawaii did an about-face and legalized same-sex marriage through legislative enactment effective in early December 2013.[27] The Illinois legislature has also authorized same-sex marriage effective June 1, 2014.[28] On December 19, 2013, the New Mexico Supreme Court unanimously held that same-sex couples are guaranteed the right to marry under the New Mexico Constitution.[29] On December 20, 2013, a federal district court judge ruled Utah's ban on same-sex marriage to be unconstitutional, but the Supreme Court has stayed that decision pending review by the Tenth Circuit Court of Appeals.[30]

BACKGROUND TO THE WINDSOR DECISION

Edith Windsor and Thea Spyer began a life-long lesbian relationship in the 1960's.[31] New York City residents, they registered as domestic partners when that status became available

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19. 28 U.S.C. 1738C.

20. U.S. Const. Art. IV, Sect. 1, Cl. 2.

21. *But see Wilson* v. *Ake*, 354 F.Supp.2d 1298 (M.D.Fla. 2005), upholding Section 2 of DOMA.

22. 1 U.S.C. Sect. 7.

23. *See* Robert E. Rains, *The Evolving Status of Same-Sex Unions in Hawaii, Alaska, Vermont and Throughout the United States*, 71 [2000] Contemporary Issues in Law (UK).

24. *See, supra*, n. 7.

25. *See Garden State Equality* v. *Dow*, 2013 N.J. Super. Unpub. Lexis 2585 (Law Div. Sept. 27, 2013); stay denied 2013 N.J. Lexis 1091, 2013 WL 5687193.

26. *Id. See also Same-Sex Marriages Celebrated in NJ As Governor Drops Appeal from Court Ruling*, p.1584, BNA Family Law Reporter, Vol. 39, No. 48 (10-22-13).

27. AP, *Hawaii: Same-sex Marriage Becomes Law*, NY Times, Nov. 13, 1013 available at http://www.nytimes.com/2013/11/14/us/hawaii-same-sex-marriage-becomes-law.html?_r (last visited 11/21/13).

28. Sophia Tareen, *Illinois Governor Signs Same-Sex Marriage Into Law*, ABC News, 11/21/2013, available at http://abcnews.go.com/US/wireStory/illinois-governor-signs-sex-marriage-law-20956746 (last visited 11/21/13).

29. *Griego* v. *Oliver*, 2013 WL 6670704 (N.M. 2013).

30. *Kitchen* v. *Herbert*, 2013 WL 6697874, D. Utah, Dec. 20, 2013, (No. 2:13-CV-217), stay granted, 2014 U.S. Lexis 1 (Jan. 6, 2014).

31. For a compelling recounting of their relationship and the strategy that took Windsor's case to the Supreme Court, see Ariel Levy, *The Perfect Wife*, p. 54, The New Yorker, Sept. 30, 2013.

in the city in 1993.[32] In 2007, as Spyer's health was failing, the couple travelled to Ontario, Canada, where they entered into a legal marriage. Although New York State had not yet authorized same-sex marriage, the federal courts later found that New York would have recognized their Canadian marriage. Spyer died in February 2009 and left her entire estate to Windsor. Because DOMA precluded federal recognition of their marriage, Windsor did not qualify for the marital exemption from the federal estate tax. Accordingly, Windsor was compelled to pay $363,053 in federal estate tax. She sought a refund from the Internal Revenue Service, but was denied on the ground that she was not a "surviving spouse."

Windsor filed suit in the United States District Court for the Southern District of New York seeking a refund and challenging Section 3 of DOMA as violating the guarantee of equal protection, applied to the Federal Government through the Fifth Amendment. While the suit was pending, Attorney General Eric Holder notified Congress[33] that the U. S. Department of Justice would no longer defend the constitutionality of Section 3, as both he and President Obama deemed that section to be unconstitutional. Nevertheless, the executive branch continued to enforce Section 3, and the IRS continued to deny Windsor her refund. The Bipartisan Legal Advisory Group (BLAG) of the United States House of Representatives sought, and was granted, leave to intervene to defend the constitutionality of Section 3.

The district court granted Windsor summary judgment.[34] Judge Barbara S. Jones held that: 1) Windsor had standing because New York would have recognized her Ontario marriage as of the year in which she paid the federal estate taxes; 2) *Baker* v. *Nelson* was not controlling because it addressed a different issue; 3) the case could be disposed of applying rational basis review, so the court need not decide whether a heightened standard should apply to discrimination against homosexuals; 4) none of Congress' justifications for Section 3 (caution and the traditional institution of marriage, childbearing and procreation, consistency and uniformity of federal benefits, or conserving the public fisc) provides a rational basis for Section 3 of DOMA; and 5) therefore Section 3 is unconstitutional as applied to Windsor and she is awarded judgment in the amount of $363,053 plus interest and costs. Again, although the United States agreed with the decision, the IRS did not process the refund.

BLAG filed a notice of appeal to the Second Circuit, as did the United States as a "nominal defendant."[35] A divided panel of the Second Circuit affirmed. The majority opinion, authored by Chief Judge Jacobs held that: 1) Windsor had standing as the State of New York would have recognized her marriage in 2009; 2) Windsor's suit is not foreclosed by *Baker* v. *Nelson*; 3) Section 3 of DOMA is subject to heightened scrutiny because homosexuals constitute a quasi-suspect class for equal protection purposes; and 4) Section 3 does not withstand heightened scrutiny. Whereas the district court had struck down Section 3 as applied to Windsor, the Second Circuit and simply held that "Section 3 of DOMA violates equal protection and is therefore unconstitutional." The majority opinion ended with this thought:

> Our straightforward legal analysis side-steps the fair point that same-sex marriage is unknown to history and tradition. But law (federal *or* state) is not concerned with holy matrimony. Government deals with marriage as a civil status—however fundamental—and New York has elected to extend that status to same-sex couples. A state may enforce and dissolve a couple's marriage, but it cannot sanctify or bless it. For that, the pair must go next door.

The IRS still did not proffer a refund to Windsor. Rather, the case proceeded. Both BLAG and the United States filed for certiorari. The Supreme Court granted "cert" on the question of the constitutionality of Section 3 and also requested briefing on whether the United States' agreement with Windsor's legal position precluded further review and whether BLAG had standing to appeal the case. The Court also appointed an amica, Vicki Jackson, to argue the position that the Court lacked jurisdiction to hear the case.

THE SUPREME COURT SPEAKS: *U.S.* v. *WINDSOR*

On June 26, 2013, by a vote of five-to-four, the Supreme Court affirmed the Second Circuit.[36] Justice Kennedy (who had also authored the gay rights decisions in *Romer* v. *Evans*[37]

32. *See supra*, n. 3.
33. *See* 28 U.S.C. 530D.
34. *Windsor* v. *United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012).
35. *Windsor* v. *United States*, 699 F.3d 169 (2nd Cir. 2012).
36. 133 S. Ct. 2675, 186 L.Ed.2d 808 (2013).
37. 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996).

and *Lawrence* v. *Texas*[38]) wrote for the majority, joined by Ginsburg, Breyer, Sotomayor, and Kagan. Justice Kennedy began the majority's analysis by noting that, "The State of New York deems their marriage to be a valid one."[39] Addressing the jurisdictional issue, the majority concluded that, "the prudential and Article III requirements are met here; and, as a consequence, the Court need not decide whether BLAG would have standing to challenge the District Court's ruling and its affirmance by the Court of Appeals on BLAG's own authority."[40] The majority next embarked on a lengthy discussion of how Section 3 intrudes on the traditional right of the States to define and regulate marriage, but declined to resolve the case on that basis. "[I]t is unnecessary to decide whether this federal intrusion on state power is a violation of the federal system because it disrupts the federal balance."[41]

Instead the majority focused on the actions of New York State first to recognize and then to allow same-sex marriage. New York sought to give "further protection and dignity" to the personal bond between same-sex couples who choose to marry.[42] "DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the federal government."[43] Interestingly, the majority never addressed the standard of equal protection review it applied in reaching this ground-breaking conclusion.

Finally, the majority ended with a significant caveat: "This opinion and its holding are confined to those lawful marriages."[44] The implication certainly is that couples (same-sex or opposite-sex) who are in state-recognized marital-type relationships, such as civil unions or domestic partnerships, are not included in the holding or rationale of the majority opinion.

The dissenting justices, Chief Justice Roberts and Justices Scalia, Thomas, and Alito, filed three separate opinions. Chief Justice Roberts opined that the Court lacked jurisdiction, but in any event Congress had acted constitutionally in enacting Section 3.[45] Justice Scalia, joined by Justice Thomas and joined in part by Chief Justice Roberts, undoubtedly filed the most colorful opinion in the case.[46] He agreed with Chief Justice Roberts that the Court lacked jurisdiction and, in any event, Section 3 is constitutional.[47] Regarding the majority's analysis of the merits, Justice Scalia wrote, "Some might conclude that this loaf could have used a while longer in the oven. But that would be wrong; it is already overcooked. The most expert care in preparation cannot redeem a bad recipe."[48] And, more provocatively, "the real rationale of today's opinion (is) a disappearing trail of legalistic argle-bargle. . . ."[49] Justice Alito, joined by Justice Thomas, would have found that BLAG had standing although the United States did not. On the merits, he would have reversed the Second Circuit and upheld the constitutionality of Section 3.[50]

PENNSYLVANIA'S DEFENSE OF MARRIAGE ACT

In the aftermath of the Hawaii Supreme Court's *Baehr* decision, Pennsylvania, like the great majority of states, passed its own state DOMA.[51] A study published in the BNA Family Law Reporter found that as of June 2010, 45 states prohibited same-sex marriage.[52] Although some of those states have abandoned their state DOMA and even legalized same-sex marriage, Pennsylvania has not seen fit to do so.

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38. 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003).
39 133 S. Ct. at 2683.
40. *Id.*, at 2688.
41. *Id.*, at 2692.
42. *Id.*
43. *Id.*, at 2693.
44. *Id.*, at 2696.
45. *Id.*, at 2696.
46. *Id.*, at 2697.
47. *Id.*, at 2697-8.
48. *Id.*, at 2707.
49. *Id.*, at 2709. This reference sent your author to the on-line Oxford English Dictionary, where he learned that "argle-bargle" is a variant of "argy-bargy" and means "disputatious argument, bandying of words, wrangling." http://www.oed.com/view/Entry/10640?redirectedFrom=argle-bargle (last visited 9/18/2013).
50. *Id.*, at 2711.
51. Act 124 of 1996, codified at 23 Pa.C.S. §§1102 and 1704.
52. Matthew J. Eickman, *Same-Sex Marriage: DOMA and the States' Approaches*, 36 Family L. Rep. (BNA) 1383, 1385 (2010).

The Pennsylvania DOMA, enacted in 1996, has two short operative provisions. 23 Pa.C.S. §1102 defines "marriage" as:

> A civil contract by which one man and one woman take each other for husband and wife.

23 Pa.C.S. §1704 goes further and mandates non-recognition of lawful out-of-state same-sex marriages:

> It is hereby declared to be the strong and longstanding policy of this Commonwealth that marriage shall be between one man and one woman. A marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth.

The obvious issues, then, are the combined effect of the *Windsor* decision and Pennsylvania's DOMA on same-sex couples in Pennsylvania who have entered into marriages and the continuing validity of Pennsylvania's DOMA.

DEATH AND TAXES

Social Security Benefits Based on Marriage

In direct response to *Windsor*, the Social Security Administration (SSA) promulgated a new section in its Policy Operations Manual System (POMS), applicable to all claims filed on or after June 26, 2013, (the date of the *Windsor* decision) or pending final decision on that date. SSA will now approve **some** wife's and husband's claims involving same-sex marriages if all other conditions for entitlements to benefits are met.[53] More specifically, POMS GN 00210.100 authorizes payment of claims to same-sex spouses who meet all other eligibility requirements where the "number holder" (NH), i.e. the spouse on whose earnings record the claim is being made, "was married in a state that permits same-sex marriage" **and** "is domiciled at the date of application, or while the claim is pending a final determination, in a state that recognizes same-sex marriage."

Under this rule, if a same-sex couple had been legally married in a same-sex marriage state and then moved to Pennsylvania and one of them dies, the other is still barred from receiving survivor's benefits on the account of the deceased wage earner, even if all other eligibility requirements are met. This is because, under Pennsylvania's DOMA, Pennsylvania does not recognize the marriage. Nor can the surviving spouse change the result by moving to a same-sex marriage state while the claim is pending because the issue is the deceased's final state of residence, not the survivor's state of residence. Thus none of our three hypothetical Carole and Robin couples could receive Social Security survivors' benefits in this situation.

While it may seem odd that eligibility for federal Social Security benefits would depend on the family law of the state of residency of the deceased, this result is in fact mandated by the Social Security Act itself, and is consistent with how the Act treats the validity of any marriage. The Act specifies:

> An applicant is the wife, husband, widow, or widower of a fully or currently insured individual for purposes of this subchapter if the courts of the State in which such insured individual is domiciled at the time such applicant files an application, or, if such individual is dead, the courts of the State in which he was domiciled at the time of death, or, if such insured individual is or was not so domiciled in any State, the courts of the District of Columbia, would find such applicant and such insured individual were validly married at the time such applicant files such application or, if such insured individual is dead, at the time he died.[54]

Accordingly, it would require an Act of Congress to change this result for same-sex married couples who reside in any state—such as Pennsylvania—that continues to refuse to permit or recognize same-sex marriage.

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53. POMS GN 00210.011 *et seq.*, available at https://secure.ssa.gov/apps10/public/reference.nsf/links/08092013 (last visited 9/18/2013). GN 00210.100 contains a very clear chart showing for each same-sex marriage state the date that it started recognizing same-sex marriages from other states and the date it started permitting same-sex marriage within the state.

54. 42 U.S.C. §416(h).

Federal Taxes: IRS Revenue Ruling 2013-17

Shortly after the Social Security Administration issued its initial post-*Windsor* guidance, the Internal Revenue Service released Revenue Ruling 2013-17, addressing the federal tax status of same-sex couples.[55] Under Rev. Ruling 2013-17, "the terms 'husband and wife,' 'husband,' and 'wife' include an individual married to a person of the same sex if they were lawfully married in a state whose laws authorize the marriage of two individuals of the same sex, and the term 'marriage' includes such marriages of individuals of the same sex." For this purpose, "the term 'state' means any domestic or foreign jurisdiction having the legal authority to sanction marriages." But, in contrast to the Social Security Administration's position, the IRS applies this rule "even if the married couple is domiciled in a state that does not recognize the validity of same-sex marriages." Indeed the IRS goes on at some length to discuss the impracticality of applying a rule, like SSA's, where validity could change with the couple's state of residency or domicile. Again, considering our three hypothetical Carole and Robin couples, Couples A & B who were married in Massachusetts but reside in Pennsylvania are considered married by the IRS notwithstanding Pennsylvania's state DOMA, even though SSA considers them not to be married. Couple C who got married in Pennsylvania despite our state DOMA, will fail the first part of the IRS test.[56]

Significantly, IRS Rev. Rul. 2013-17 specifically excludes couples "who have entered into a registered domestic partnership, civil union, or other similar formal relationship recognized under state law that is not denominated as a marriage under the laws of that state." This is fully consistent with the conclusion of the *Windsor* majority that, "This opinion and its holding are confined to those lawful marriages."

It is worth noting that the IRS rule will not always work to the financial benefit of married same-sex couples. In August the Congressional Research Service issued a report concluding that married same-sex couples with minor children may well face higher taxes.[57] They may lose some or all of the Earned Income Tax Credit and could face a phase-out of the child tax credit. There might be other negative tax consequences for them, as well.

The Pennsylvania Marital Tax Exemption: *Himmelberger*

In *Himmelberger* v. *Com. Dept. of Revenue*, a case decided **before** *Windsor* struck down Section 3 of the federal DOMA, the Pennsylvania courts addressed the significance of an out-of-state civil union for Pennsylvania Inheritance Tax purposes.[58] Two women had entered into a civil union in New Jersey in 2008. Subsequently one died testate in Pennsylvania in 2010, leaving a considerable estate to the survivor. The survivor filed an inheritance tax return asserting that she should be taxed as a civil union partner of the decedent at the zero percent spousal rate. She also claimed a family exemption of $3,500. The survivor argued that a New Jersey civil union is not the equivalent of a marriage between persons of the same sex, but the trial court disagreed. Accordingly, the court found that 23 Pa.C.S. §1704, barring recognition of out-of-state same-sex marriages, operated to void the marriage qualities of the civil union. Moreover, the Full Faith and Credit Clause did not require Pennsylvania to recognize New Jersey law relative to taxation. The result, affirmed by the Superior Court, was that the survivor was neither a spouse nor a relative of the deceased for Pennsylvania inheritance tax purposes.

In one sense, *Himmelberger* is consistent with current IRS federal tax policy, as the IRS would not recognize a civil union as a marriage. But, if the parties had entered into a marriage in, for example, Massachusetts, the IRS would now treat them as having been married although *Himmelberger* would dictate the opposite result under Pennsylvania inheritance tax law because of Pennsylvania's DOMA.

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55. Rev. Rul. 2013-17, 2013 IRB Lexis 437, 2013-38 I.R.B. 201 (Aug. 29, 2013).

56. As will be seen *supra*, the validity of such marriages in Pennsylvania is currently in litigation.

57. Margot L. Crandall-Hollick, Molly F. Sherlock, Carol A. Pettit, *The Potential Federal Tax Implications of* United States *v.* Windsor *(Striking Section 3 of the Defense of Marriage Act (DOMA)): Selected Issues*, CRS-2013-GVF-0338, available at HTTP://congressional.proquest.com/congressional/docview/t21.d22.crs-2013-gvf-0338?accountid=13158 (last visited 11/12/13). *See also Married Same-Sex Couples With Kids May Face Higher Taxes After* Windsor, p. 1464, BNA Family Law Reporter, Vol. 39, No. 38 (8-13-13).

58. 47 A.2d 160 (2012), affirming 2011 Pa. Dist. & Cnty. Dec. Lexis 565.

It was, of course, inevitable that *Windsor* would quickly lead to challenges to Pennsylvania's DOMA, and those challenges began quite promptly.

THE FEDERAL CHALLENGE TO THE PA DOMA: *WHITEWOOD*

Two weeks after the Supreme Court's decision in *Windsor*, the ACLU of Pennsylvania filed suit in the U. S. District Court for the Middle District on behalf of 21 named plaintiffs against various state officials including Gov. Corbett and Attorney General Kane, challenging Pennsylvania's DOMA as being violative of the Equal Protection and Due Process Clauses of the 14th Amendment.[59] Plaintiffs in the suit, originally captioned *Whitewood* v. *Corbett*, include: several same-sex couples who wish to marry in Pennsylvania, several same-sex couples who have married in other states and wish their marriages to be recognized in Pennsylvania, a widow "who lost her spouse after 29 years together (and) because her spouse was a woman, their marriage is not recognized by the Commonwealth of Pennsylvania and she is not provided the protections afforded to widows under Pennsylvania law," and two children of one of the same-sex couples whose parents are not permitted to marry.[60] Within days, Attorney General Kane announced, "I cannot ethically defend the constitutionality of Pennsylvania's version of DOMA where I believe it to be wholly unconstitutional."[61]

On Sept. 30, Gov. Corbett and Secretary of Health Wolf filed a Motion to Dismiss for lack of jurisdiction and failure to state a cause of action.[62] In a supporting brief filed in early October, Governor Corbett argued first that the claims against him are barred by the Eleventh Amendment.[63] Both the governor and secretary of health argued that the court lacks subject matter jurisdiction by virtue of the Supreme Court's 1972 summary dismissal in *Baker* v. *Nelson*.[64] In a reply brief, plaintiffs contested both points, but, on November 1, plaintiffs voluntarily dismissed both Gov. Corbett and Attorney General Kane as defendants.[65] On November 7, plaintiffs filed a First Amended Complaint omitting as defendants both Attorney General Kane and Governor Corbett.[66] The suit, recaptioned *Whitewood* v. *Wolf*, names as defendants Secretary of Health Wolf, Secretary of Revenue Meuser, and Donald Petrille, Jr., Register of Wills and Clerk of Orphans' Court of Bucks County.[67] On November 15, Middle District Judge John E. Jones, III denied the defendants' motions to dismiss. Not surprisingly, he found that *Baker* v. *Nelson* was not controlling because of doctrinal developments in the four decades since that case was decided.[68] *Whitewood* is expected to go to trial in June 2014.[69]

PA MARRIAGE LICENSES: *HANES*

In another direct challenge to Pennsylvania's DOMA, D. Bruce Hanes, Clerk of the Orphan's Court of Montgomery County, announced in late July 2013 that he would begin to issue marriage licenses to same-sex couples based on his belief that the state DOMA is unconstitutional.[70] Reportedly, he began issuing same-sex marriage licenses on July 24, and also waived the statutory three-day waiting period for obtaining a license after application, as

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59. *Whitewood* v. *Corbett*, M.D.PA., No. 13-cv-01861-JEJ.
60. *Id.*, Complaint for Declaratory and Injunctive Relief, ¶¶ 2-5.
61. *Attorney General Kane will not defend DOMA*, PA. Attorney General Press Release, July 11, 2013, available at http://www.attorneygeneral.gov/press.aspx?id=7043 (last visited 9/26/2013).
62. N. 57, *supra*, Motion to Dismiss.
63. *Id.*, Brief of Defendants Corbett and Wolf in Support of Motion to Dismiss, p. 5.
64. *Id.*, p. 19.
65. *Id.*, Notice of Voluntary Dismissal of Defendant Kathleen Kane; Stipulation and Notice of Dismissal.
66. *Id.*, Amended Complaint.
67. *Id.*
68. *Id.*, Memorandum and Order, Nov. 15, 2013, pp.4-6.
69. Rich Lord, *Trial set for June to determine legality of Pa.'s gay marriage ban*, Pittsburgh Post-Gazette, Nov. 22, 2013, available at http://www.post-gazette.com/local/region/2013/11/22/Trial-set-for-June-to-determine-leg (last visited 11/26/2013.
70. *See Shapiro and Richards Support Marriage Equality*, Montgomery County Office of Communications, July 23, 2013, available at http://www.montcopa.org/civicalerts.aspx?aid=390 (last visited 11/13/2013).

mandated by 23 PA.C.S. §1303(a), apparently asserting the statutory exception for "extraordinary circumstances" per 23 PA.C.S. §1303(b).[71] Same-sex couples from Montgomery County, as well as other counties, obtained marriage licenses from Hanes, and at least some of them then participated in marriage ceremonies within the state.[72]

On August 5, the Commonwealth Department of Health filed a "Petition for Review in the Nature of an Action in Mandamus against Hanes in the Pennsylvania Commonwealth Court, praying for a cease and desist order.[73] Hanes raised three arguments in his defense: 1) that he is a "judicial officer" and hence not subject to the jurisdiction of the Commonwealth Court, 2) that the Department of Health lacks standing, and 3) that mandamus relief is not available because he has discretion to determine that the state DOMA is unconstitutional.[74] In an opinion originally filed on September 12, 2013, and subsequently amended on September 23, President Judge Pellegrini rejected Hanes' defenses, and ruled that Hanes lacks discretion to decide on his own that a statute he is charged with implementing is unconstitutional.[75] Nor does Hanes have standing to raise the alleged unconstitutionality of the state DOMA as a defense in a mandamus action.[76] Accordingly President Judge Pellegrini ordered Hanes to cease and desist issuing marriage licenses to same-sex couples and waiving the mandatory three-day waiting period.[77] Hanes filed a Notice of Appeal to the PA Supreme Court on October 1.[78]

While the case was pending in Commonwealth Court, a group of 32 same-sex couples petitioned for leave to intervene, alleging that Hanes had granted them marriage licenses, that they have either been married in the Commonwealth or intend to be married, and that the court's judgment in the case "may substantially impact their rights and the validity of their marriages and marriage licenses."[79] President Judge Pellegrini dismissed their petition as moot, reasoning that "any purported rights obtained thereby are not at issue and may not be established in the instant mandamus action."[80] He noted, "[T]here are no obstacles preventing those adversely affected by provisions of the Marriage Law or putatively possessing rights based on Hanes' actions, such as Putative Intervenors, from asserting their own rights in an appropriate forum."[81]

MONTGOMERY COUNTY SAME-SEX MARRIAGES: *BALLEN*

Not surprisingly, a group of 21 same-sex couples who had obtained marriage licenses from Hanes in Montgomery County and "were married" did, in fact, promptly file a new lawsuit, *Ballen* v. *Corbett*, in Commonwealth Court per President Judge Pellegrini's invitation to do so.[82] Named as defendants are Gov. Corbett, Attorney General Kane, and Secretary of Health Wolf.[83] Plaintiffs assert that Pennsylvania's DOMA violates their rights to equal protection and due process under the 14th Amendment to the United States Constitution, and to equal protection and due process under Article I, Sections 1, 26, and 28 of the Pennsylvania Constitution.[84] They seek a declaratory judgment that their marriages are valid under Pennsylvania law.[85] Corbett and Wolf filed Preliminary Objections on October 31, but plaintiffs filed an Amended Petition for Review on November 8, so that the Preliminary Objections to the original Petition were stricken.[86] The case is pending.

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71. *Comm. Dept. of Health* v. *Hanes*, Pa. Cmwlth. Ct., No. 379 M.D. 2013, Complaint, ¶¶40-43.
72. *Id.*, ¶¶44-45.
73. *Id.*, Wherefore Clause.
74. *Comm. Dept. of Health* v. *Hanes*, 78 A.3d 676, 681-2 (Pa. Cmwlth. 2013).
75. *Id.*, at 685, 687, 689.
76. *Id.*, at 691-2.
77. *Id.*, at 694.
78. *Id.*, Miscellaneous Docket Sheet, p. 101.
79. *Hanes, supra* n.74, at 683, n.16.
80. *Id.*, at 692.
81. *Id.*, at 693.
82. *Ballen* v. *Corbett*, PA Commonwealth Court, No. 481 MD 2013, filed Sept. 26, 2013, ¶¶. 10-30.
83. *Id.*, ¶¶ 31-33.
84. *Id.*, ¶¶ 57-85.
85. *Id.*, ¶¶ 86-90.
86. *Id.*, Miscellaneous Docket Sheet, pp. 47-52.

SAME-SEX DIVORCE: *KERN*

Just as opposite-sex couples may decide to terminate their marriages for various reasons, so do same-sex couples, even those who have fought for years for the right to marry. Indeed, it is widely reported that the named plaintiffs in *Goodridge*, the Massachusetts case that started legalized same-sex marriage in the United States, separated two years after their groundbreaking marriage and subsequently filed for divorce.[87] It was thus practically inevitable that sooner or later a Pennsylvania court would be faced with a same-sex divorce action.

In October 2009, Carole Kern brought a no-fault divorce action under 23 PA.C.S. §3301(c) against Robin Taney in the Court of Common Pleas of Berks County, alleging that the two women had been married in Massachusetts a few months previously.[88] There is no indication that Kern sought any sort of financial relief from the court.[89] Although Taney did not participate in the case, Kern's counsel notified the Attorney General, who intervened in the matter to defend the constitutionality of Pennsylvania's DOMA.[90]

In March 2010 (three years before the *Windsor* decision), the trial court denied the uncontested divorce. Judge Lash reasoned that "relief under the Divorce Code can only be obtained by parties who are recognized to be married."[91] Pennsylvania limits marriage to opposite-sex couples, and 23 PA.C.S. §1704 renders the Massachusetts marriage void.[92] Moreover, section 2 of federal DOMA, the section that was not before the U. S. Supreme Court in *Windsor*, specifically permits states not to give full faith and credit to out-of-state same-sex marriages.[93] Judge Lash also rejected Kern's contention that Pennsylvania's DOMA infringed her constitutional right to marry under the U.S. and Pennsylvania Constitutions.[94]

Judge Lash acknowledged that his decision would create a conundrum because the parties apparently did not meet the one-year residency requirement to commence a divorce action in Massachusetts.[95] Thus, although legally married in Massachusetts and no longer wishing to remain married, they could not get divorced in either Massachusetts or Pennsylvania.[96] The judge suggested that Kern could seek relief in Pennsylvania under 23 PA.C.S. §1704 "requesting the Court to have her marriage declared void."[97] No appeal was taken in the case, and there is no appellate authority on the issue of same-sex divorce in Pennsylvania.[98]

CONCLUSIONS

It is difficult to imagine a more confused and volatile legal situation than that facing same-sex couples in Pennsylvania who have entered into marriages in same-sex marriage states. With regard to taxes, the IRS considers our hypothetical Couples A and B, who were married in Massachusetts, to be legally married for tax purposes (IRS Rev. Rul. 2013-17), but the Pennsylvania Department of Revenue deems them not to be married (*Himmelberger*). While Pennsylvania's DOMA remains in force, Couple C, who got married in Pennsylvania pursuant to a license issued by Montgomery County, will not be deemed married for either state or federal tax purposes since their marriage is in contravention of the *lex loci celebrans* (the law of the place of celebration).

The Social Security situation is perhaps more confusing. If the relevant wage earner is domiciled in Pennsylvania at death, there are no benefits for a surviving spouse or a surviving divorced spouse of any of our couples. But, what about a surviving divorced spouse of a

87. *See Julie, Hillary Goodridge To Divorce, Couple Led Gay Marriage Fight In Massachusetts*, AP, 02/3/09, available at http://www.huffingtonpost.com/2009/02/03/julie-hillary-goodridge-t_n_163721.html (last visited 11/15/13).
88. *Kern* v. *Taney*, 2010 Pa. Dist. & Cnty. Dec. Lexis 95, 11 Pa.D.&C. 5th 558, 559 (C.P. Berks 2010).
89. *Id.*
90. *Id.*
91. *Id.*, at 562.
92. *Id.*, at 562-563.
93. *Id.*, at 563.
94. *Id.*, at 564-576.
95. *Id.*, at 560, n.2.
96. *Id.*, at 576.
97. *Id.*
98. For cases on this subject from other jurisdictions, see Robert E. Rains, *A Minimalist Approach to Same-Sex Divorce*, 2012 Utah L. Rev. 393.

wage earner where the parties have lived in both a same-sex marriage state and a mini-DOMA state? Under Title II of the Social Security Act, a surviving divorced spouse of a wage earner can get benefits on the deceased ex-spouse's account if, among other requirements, the marriage lasted at least 10 years.[99] What if a same-sex couple got married in Massachusetts in May 2004 when same-sex marriage became available there, lived there 8 years, then moved to Pennsylvania for 1 year, then returned to Massachusetts for one year, get divorced in June 2004, and then the primary wage earner dies while domiciled in Massachusetts? Could the surviving divorced spouse get benefits if all other criteria were met? They were married for 10 years, but only 9 years in a state which allows or recognizes same-sex marriage. The POMS is far from clear on this issue.

It is unquestionably a dangerous, if not outright foolhardy, undertaking to predict the outcome of litigation. But any of the three current pending cases challenging Pennsylvania DOMA has the potential to change the legal situation for same-sex couples who live in Pennsylvania and have purported to get married here or in another jurisdiction.

The case which appears to have the clearest likely outcome is D. Bruce Hanes' appeal to the PA Supreme Court of the order barring him from issuing marriage licenses to same-sex couples in direct contravention of Pennsylvania law. No matter what one's personal opinion of the propriety of same-sex marriage, it is difficult to envision a marriage law that varies from county to county within a state, especially when the state law is crystal clear on the issue. The mischief that such a "system" could cause would be enormous. For example, Pennsylvania law proscribes marriage between first cousins although many states do allow such marriages.[100] If the clerk of court or register of wills in, for example, Cumberland County, were to decide that first cousins have a constitutional right to marry and acted on that belief, surely this would create statewide havoc.

There is direct precedent in California for Mr. Hanes' situation. In February 2004, when same-sex marriage was not permitted under California law, San Francisco Mayor Gavin Newsom decided that San Francisco would start issuing marriage licenses to same-sex couples.[101] Within a brief period of time, San Francisco had issued more than 3,500 licenses to same-sex couples and approximately 4,000 same-sex marriages ultimately took place pursuant to such licenses.[102] In the ensuing litigation, *Lockyer* v. *City and County of San Francisco*, the California Supreme Court unanimously issued a writ of mandate compelling city officials to comply with the state's marriage law.[103] The Court also directed the city defendants to identify same-sex couples who had been given licenses, notify those couples that same-sex marriages performed pursuant to those licenses were "void from their inception and a legal nullity," and offer the couples refunds of fees paid.[104] The lead opinion in *Lockyer* was written by California Chief Justice George, who was surely not an opponent of gay rights. Indeed, four years later, he wrote the lead opinion in *In re Marriage Cases*, striking down as unconstitutional the same statutory prohibition on same-sex marriage.[105] It is difficult to envision the Pennsylvania Supreme Court reaching a different result in *Hanes* than did the California Supreme Court in *Lockyer*.

The *Whitewood* litigation in the Middle District faces almost as difficult an uphill battle. Admittedly the precedential effect of the 1971 decision in *Baker* v. *Nelson* is highly attenuated, at best. That one-line decision was issued over 40 years ago before the U. S. Supreme Court had ever recognized any rights of gays and lesbians. It was before *Romer* v. *Evans* (1996) striking down an amendment to the Colorado constitution barring antidiscrimination laws protecting gays and lesbians,[106] before *Lawrence* v. *Texas* prohibiting states from criminalizing private consensual homosexual conduct,[107] and, of course, before *Windsor*. In *Hicks* v. *Miranda*, the Court stated, that "if the Court has branded a question as unsubstantial, it remains so ex-

99. 20 C.F.R. §404.336(a)(2).
100. 23 PA.C.S. §1304(e).
101. *Lockyer* v. *San Francisco*, 95 P.3d 459, 464 (Cal. 2004).
102. *Id.* at 465.
103. *Id.* at 499.
104. *Id.*
105. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).
106. 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed.2d 855 (1996).
107. 539 U.S. 558, 123 S. Ct. 2472, 156 L.Ed.2d 508 (2003).

cept when doctrinal developments indicate otherwise."[108] Clearly, *Romer*, *Lawrence*, and especially *Windsor* constitute enormous doctrinal developments for the rights of gays and lesbians in the United States since *Baker* was decided. Judge Jones has already ruled that *Baker* is not controlling, and it can be expected that that ruling will stand on appeal.

On the other hand, there is significant language in the majority opinion in *Windsor* which undercuts the plaintiffs' case in *Whitewood*. As noted above, the *Windsor* majority emphasized the traditional authority of the states, subject to constitutional restriction, to regulate marriage. The majority opinion is peppered with statements such as, "By history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States."[109] Nowhere in the majority opinion is there any suggestion that a state may not continue to restrict marriage to persons of the opposite sex. Clearly, the dissenting justices, who would have upheld Section 3 of federal DOMA, would allow the states to continue that restriction. In short, none of the nine justices has suggested that a state DOMA is unconstitutional. To the extent that a state DOMA merely codifies the pre-existing status quo, it is difficult to make the argument that it runs afoul of the *Romer* rule that, "Discriminations of an unusual character especially suggest careful consideration to determine if they are obnoxious to the constitutional provision."[110]

This leaves the *Ballen* case, brought by same-sex couples who participated in marriage ceremonies in Pennsylvania pursuant to Montgomery County licenses, as the most likely vehicle for a successful challenge to the Pennsylvania DOMA. The *Ballen* plaintiffs have challenged Pennsylvania's DOMA under both federal and state constitutional theories. The federal constitutional theories face great obstacles as noted immediately above. But, there remains the somewhat remote possibility that when this case eventually gets to the Pennsylvania Supreme Court, that Court might rule that our state DOMA violates the Pennsylvania Constitution. Should our Court make such a bold ruling, it would be following the leads of the Supreme Courts of Massachusetts,[111] Iowa,[112] California,[113] Connecticut,[114] and New Mexico.[115]

If advocates of same-sex marriage fail in all three cases, it is not the end of the issue. Public opinion is changing rapidly, not just in the United States in general, but also within Pennsylvania. A recent Franklin & Marshall College Poll indicated that, as of May 2013, 54% of Pennsylvania respondents favored legalizing same-sex marriage, while 41% were opposed.[116] Four years earlier, only 42% of Pennsylvanians favored legalizing same-sex marriage, while 57% were opposed.[117] If these trends continue, as appears likely, sooner or later Pennsylvania's lawmakers will catch up with the electorate and legalize same-sex marriage.

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108. *Hicks* v. *Miranda*, 422 U.S. 332, 344 (1975).
109. 133 S. Ct. at 2689-90.
110. *Id.*, at 2692, quoting *Romer* v. *Evans*, 517 U.S. 620, 633, 116 S.Ct. 1620, 134 L. Ed. 2d 855 (1996).
111. *Goodridge*, 798 N.E.2d 941 (Mass. 2003).
112. *Varnum* v. *Brien*, 763 N.W.2d 862 (Iowa 2009).
113. *In re Marriage Cases*, 183 P. 3d 384 (Cal. 2008).
114. *Kerrigan* v. *Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008).
115. *Griego, supra*, n.29.
116. Franklin & Marshall College Poll, *Survey of Pennsylvanians, Summary of Findings*, Released May 8, 2013, p. 15, available at https://docs.google.com/viewer?url=https%3A%2F%2Fedisk.fandm.edu%2FFLI%2Fkey (last visited 11/21/13).
117. *Id.*, at 16.