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**“I PRONOUNCE YOU MAN AND MAN. YOU MAY NOW FILE
JOINTLY FOR BANKRUPTCY”: DOMA’S
UNCONSTITUTIONALITY AND ITS EFFECT ON JOINT
BANKRUPTCY FILINGS FOR SAME-SEX COUPLES**

*Michael S. Tomback**

ABSTRACT

Bankruptcy courts are no longer constrained by the mantra: “Bankruptcy is for Adam and Eve, not Adam and Steve.” In 2013, Windsor v. United States marked the erosion of the Defense of Marriage Act of 1996. Post-Windsor, the operative definition sections of that Act—defining “marriage” and “spouse” for “any Act of Congress”—no longer control. The meaning of marriage and spouse under federal law and, specifically, the Bankruptcy Code is now unclear. This lack of clarity affects interpretation of important provisions of the Bankruptcy Code that provide for joint bankruptcy filings.

What is the outcome when lawfully married couples, same-sex couples in particular, file jointly for bankruptcy in a state that does not recognize their marriage? Now that the Defense of Marriage Act’s definitions no longer apply in the bankruptcy context, this Article argues that lawfully married same-sex couples should be allowed to file for bankruptcy jointly under 11 U.S.C. § 302 in all bankruptcy courts, even if the couple files jointly in a state that does not recognize their union. Under federalism principles, the Bankruptcy Code

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This summer, the Supreme Court is expected to decide *Obergefell v. Hodges*, 576 U.S. ___ (2015). The disposition of *Obergefell* will likely affect the applicability of arguments set forth in this Article. However, this Article touches on much more than the issues at play in *Obergefell*—a case focused on the equal protection and due process guarantees of the Fourteenth Amendment.

This Article seeks to balance state sovereignty and federal authority in the context of marriage. The task of balancing tradition, fundamental rights, and federalism is as old as the Republic and will remain relevant in a bankruptcy context no matter how the Court rules in *Obergefell*. It is our hope that readers will find the following discussion informative and enlightening both before and after any anticipated rulings this summer.

should apply the definitions of marriage and spouse from the state of celebration to provide same-sex couples equal access to the federal bankruptcy system.

While the full impact of Windsor on the Bankruptcy Code remains to be seen, this Article proposes an interpretive framework that permits same-sex couples to file for bankruptcy jointly in any state while leaving state-level restrictions on marriages between same-sex couples untouched.

INTRODUCTION

Following the decision in *United States v. Windsor*,¹ the Bankruptcy Code (the “Code”) is no longer limited to the narrow definitions of spouse and marriage in the Defense of Marriage Act (“DOMA”).² The Code now allows for an interpretation that will give married same-sex couples³ equal access to the bankruptcy system.⁴

The impact of *Windsor*⁵ has been, and will likely continue to be, felt in almost every field of law.⁶ The Supreme Court’s decision in *Windsor* sparked a major shift towards equality for same-sex couples in the United States.⁷ Soon the Court will determine whether that shift is permanent.⁸ Practically speaking, the *Windsor* ruling correctly shifts the definition of marriage and marital rights back to the authority of the states under their police powers, subject to constitutional guarantees.⁹ This in turn opens the door for same-sex couples to enjoy the same rights and privileges as their heterosexual counterparts at the federal level.¹⁰ *Windsor* signals an important societal change towards equal

¹ 133 S. Ct. 2675, 2684 (2013).

² Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2012)), *invalidated by* *United States v. Windsor*, 133 S. Ct. 2675 (2013).

³ This Article will adopt the assumption that, when speaking of a married same-sex couple, the marriage is legal and recognized in the couple’s state of celebration. This premise is necessary because the same-sex couple should have the same standing as heterosexual couples.

⁴ While some states have recognized civil unions, which grant same-sex couples similar rights to their heterosexual counterparts, for the purpose of this Article, same-sex marriage will be the focus.

⁵ *Windsor*, 133 S. Ct. 2675.

⁶ Some of these other areas of law include, but are not limited to, federal tax treatment, estate planning, choice-of law, etc. See LEON GABINET, TAX ASPECTS OF MARITAL DISSOLUTION §3:12 (2d ed., rev. 2012); Meghan V. Alter, *The High Price for Leveling the Playing Field: The Socioeconomic Divide in Estate Planning for Same-Sex Couples*, 25 QUINNIPIAC PROB. L.J. 32 (2011); William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 STAN. L. REV. 1371 (2012).

⁷ Since the Supreme Court decided *Windsor* and as of March 2, 2015, four circuit courts of appeals have struck down state bans on marriage between same-sex couples, leading to an exponential increase in the number of states that authorize performance and recognition of those marriages. See generally *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014), *petition for cert. filed*, 83 U.S.L.W. 3589 (U.S. Dec. 31, 2014) (No. 14-765), and *petition for cert. filed sub nom.*, *Idaho v. Latta*, 83 U.S.L.W. 3589 (U.S. Jan. 2, 2015) (No. 14-788); *Baskin v. Bogan*, 766 F.3d 648, 663 (7th Cir.), *cert. denied*, 135 S. Ct. 316 (2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir.), *cert. denied*, 135 S. Ct. 308 (2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014). At this point, with those circuit court rulings intact, marriage between same-sex couples is legal in thirty-seven states and the District of Columbia. *Same-Sex Marriage Laws*, NAT’L CONF. ST. LEGIS. (Mar. 19, 2015), <http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx>.

⁸ See *Obergefell v. Hodges*, No. 14-556 (U.S. argued Apr. 28, 2015).

⁹ See *Windsor*, 133 S. Ct. at 2692.

¹⁰ See, e.g., *Implementing United States v. Windsor for Purposes of Entitlement and Enrollment in Medicare Hospital Insurance and Supplementary Medical Insurance*, 80 Fed. Reg. 7975, 7975–76 (Feb. 13, 2015) (citing Social Security Act, 42 U.S.C. §§ 416, 426, 426–1, 1395i–2, 1395p, 1395r (2012)), *available at*

rights for homosexual couples. Specifically, in the context of bankruptcy filings, the finding that DOMA's definitions of spouse and marriage are unconstitutional allows married same-sex couples to avail themselves of a legal process long embedded in our nation's history.

Through DOMA, Congress imposed a federal limitation on the rights of same-sex couples and individuals in those same-sex relationships. Notably, and most importantly for this Article, DOMA defined marriage as "only a legal union between one man and one woman as husband and wife," and spouse as "only to a person of the opposite sex who is a husband or a wife."¹¹ 1 U.S.C. § 7, also known as § 3 of DOMA, broadly applied these definitions when "determining the meaning of any Act of Congress, of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States."¹² Given the expansive language of 1 U.S.C. § 7, if there was an "Act of Congress" that used either the term marriage or spouse in the text, § 7 definitions would apply.¹³ In bankruptcy, that meant that any use of spouse or marriage in the Code became limited to heterosexual couples. As a result, lawfully married same-sex couples were prevented from using the bankruptcy system for a "fresh-start."¹⁴ For sixteen years, these definitions acted as a discriminatory ceiling, preventing married same-sex couples from enjoying the traditional rights and privileges enjoyed by their heterosexual counterparts.

However, following *Windsor*, the over 1,000 federal statutes that DOMA's limited definitions had a binding effect on are now left undefined and

<http://www.cms.gov/Regulations-and-Guidance/Guidance/Rulings/Downloads/CMS4176R.pdf> (instructing the Centers for Medicaid and Medicare Services to look to the state of domicile to determine marital status under §§ 416, 426, 426-1 because § 416 explicitly invokes the state of domicile but to look to the state of celebration to determine marital status under §§ 1395i-2, 1395p, 1395r to treat "same-sex marriages on the same terms as opposite-sex marriages to the greatest extent reasonably possible . . ."); see also *The Supreme Court Ruling on the Defense of Marriage Act: What It Means*, LAMBDA LEGAL, <http://www.lambdalegal.org/publications/after-doma-summary> (last visited Mar. 27, 2015).

¹¹ 1 U.S.C. § 7, *invalidated by Windsor*, 113 S. Ct. 2675. DOMA also prevented same-sex couples from filing joint tax returns and severely limited same-sex spouses of governmental employees from Social Security survivor benefits and prevented the sharing of medical benefits. See 26 U.S.C. § 1(a)-(c); 42 U.S.C. § 402(f)(i). See generally Lynn D. Wardle, *Who Decides? The Federal Architecture of DOMA and Comparative Marriage Recognition*, 41 CAL. W. INT'L. L.J. 143 (2010) (discussing the federal and state architecture of the ramification of DOMA on individual state recognition of same-sex marriage).

¹² 1 U.S.C. § 7. See generally Heather Hamilton, *The Defense of Marriage Act: A Critical Analysis of its Constitutionality Under the Full Faith and Credit Clause*, 47 DEPAUL L. REV. 943 (1998) (discussing the history of DOMA and its reading under the Full Faith and Credit clause); Sherri L. Toussaint, *Defense of Marriage Act: Isn't It Ironic . . . Don't You Think? A Little Too Ironic*, 76 NEB. L. REV. 924 (1997) (discussing the history of DOMA and its effect on homosexuals).

¹³ 1 U.S.C. § 7.

¹⁴ See generally *Bone v. Allen (In re Allen)*, 186 B.R. 769 (Bankr. N.D. Ga. 1995).

susceptible to multiple meanings.¹⁵ The ramifications of finding § 3 of DOMA unconstitutional are far reaching. Since, under the holding in *Windsor*, the Supreme Court found the definitions of 1 U.S.C. § 7 unconstitutional, any act that adopted such definitions as a premise for the provisions of that title now must be re-evaluated to determine how married same-sex couples fall into those provisions. Due to the unconstitutionality of the federal definitions of spouse and marriage under DOMA, this Article asserts that same-sex couples should now be permitted to jointly file for bankruptcy under chapters 7 and 13, regardless of the state in which the bankruptcy petition is filed. In addition, these same-sex couples should be able to use, at the minimum, the allowable federal exemptions, as long as the couple is lawfully married in a state that recognizes such unions.

Part I of this Article explains the background of DOMA, its interaction with the Code, and the holding of *Windsor*. Part II.A argues that federalism principles and the Tenth Amendment require the Code to read same-sex couples into the definitions of marriage and spouse in the Code provisions. Part II.B asserts that this reading furthers the goals of 11 U.S.C. § 302(a), the section of the Code permitting filing of joint cases. Part II.C argues that same-sex couples filing jointly must, at a minimum, be able to use the federal exemptions of 11 U.S.C. § 522(d). Part II.D outlines some potential ramifications that may result if same-sex couples are able to file jointly under the framework proposed. Lastly, Part II.E describes the possible alternatives that would allow same-sex couples to file jointly even if this Article's framework is not adopted.

I. BACKGROUND

A. *DOMA and the Bankruptcy Code*

The passage of DOMA represented the federal government's attempt to define and limit the rights of homosexuals on a national scale. Congress passed DOMA in response to *Baehr v. Lewin*, a 1993 case in Hawaii that concerned the issuance of same-sex marriage licenses and the effect these licenses would have on both federal and state levels.¹⁶

¹⁵ *Windsor*, 133 S. Ct. at 2690.

¹⁶ 852 P.2d 44 (Haw. 1993). The *Baehr* court suggested that marriage licenses that are limited to heterosexual couples may discriminate against homosexuals and could be a violation of equal protection. *Id.* at 69.

Concerned about the potential impact of homosexual couples getting married and attempting to get recognition by other states—in addition to the issue of federal benefits for homosexual couples—Congress passed DOMA.¹⁷ Congress’s stated purposes in passing DOMA were to: (1) “defend the institution of traditional heterosexual marriage;” and (2) “protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions”¹⁸

DOMA had two operative sections: (1) choice-of-law provisions; and (2) federal definitions provisions.¹⁹ The choice-of-law provisions skew the full faith and credit requirement by allowing states to deny credit “to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws. . . .”²⁰ DOMA’s definitions provisions, however, have a much more dramatic effect.²¹

DOMA, in attempting to accomplish the broad purpose of “defend[ing] the institution of traditional heterosexual marriage,” narrowly tailored the definitions of spouse and marriage to only include heterosexual couples.²² DOMA defined marriage as “only a legal union between one man and one woman as husband and wife.”²³ Spouse in DOMA is defined as “only [married] to a person of the opposite sex who is a husband or a wife.”²⁴ Examining the legislative history of DOMA, it seems that the motivating factor for DOMA’s passage came about as reinforcement of a historical

¹⁷ See generally Susan E. Hauser, *More Than Abstract Justice: The Defense of Marriage Act and the Equal Treatment of Same-Sex Married Couples Under Section 302(a) of the Bankruptcy Code*, 85 AM. BANKR. L.J. 195, 215–16 (2011) (discussing the purpose of Congress passing DOMA).

¹⁸ H.R. REP. NO. 104-664, at 2 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2906.

¹⁹ Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2012); 28 U.S.C. § 1738C); see Jackie Gardina, *The Perfect Storm: Bankruptcy, Choice of Law, and Same-Sex Marriage*, 86 B.U. L. REV. 881, 893–94 (2006).

²⁰ 28 U.S.C. § 1738C (2012). Traditional full faith and credit requires states to recognize and respect each other’s laws. See generally Mark D. Rosen, *Why the Defense of Marriage Act is Not (Yet?) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors that Determine What the Constitution Requires*, 90 MINN. L. REV. 915 (2006).

²¹ 1 U.S.C. § 7, invalidated by *United States v. Windsor*, 113 S. Ct. 2675 (2013). While the choice-of-law provision of DOMA is substantial, for the purposes of this Article and the Code, the definitions outlined in 1 U.S.C. § 7 more definitively affect homosexual couples from jointly filing for bankruptcy under the Code.

²² H.R. REP. NO. 104-664, at 2, reprinted in 1996 U.S.C.C.A.N. 2905, 2906; see 1 U.S.C. § 7.

²³ 1 U.S.C. § 7.

²⁴ *Id.*

understanding of marriage and spouse.²⁵ To ensure that these limited definitions had a far-reaching and pervasive impact, Congress drafted 1 U.S.C. § 7 so that the definitions of spouse and marriage applied in “determining the meaning of any Act of Congress,” making its influence substantial in federal law.²⁶

Bankruptcy law and procedures are defined and outlined in title 11 of the United States Code.²⁷ The essence of bankruptcy is “grounded upon the public policy of freeing the honest, but unfortunate debtor from the financial burdens of prepetition indebtedness and thereby allowing the debtor to make an unencumbered fresh start.”²⁸ 11 U.S.C. § 101 sets out the definitions for the terms used in title 11 and in bankruptcy proceedings.²⁹ The Code does not, in 11 U.S.C. § 101 or anywhere else, specifically define spouse or marriage as it would apply to the Code individually.³⁰

The Code uses the terms spouse and marriage over sixty times in both operative and definitional sections.³¹ The Code, in 11 U.S.C. § 302(a), outlines how joint cases work within the bankruptcy system.³² 11 U.S.C. § 302(a) states that a joint case is “commenced by the filing with the bankruptcy court of a single petition . . . by an individual that may be a debtor . . . and such individual’s spouse.”³³ The definition of joint case applies to filings under chapter 7 liquidation bankruptcies, chapter 13 restructuring bankruptcies, and chapter 11 restructuring bankruptcies.³⁴ Section 302 “was designed for ease of

²⁵ See, e.g., *A Bill to Define and Protect the Institution of Marriage: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong. 27 (1996) (written statement of Lynn D. Wardle, Professor of Law, Brigham Young University) (“Section 3 [of DOMA] appears to embody quite accurately the actual historical intent and expectation of Congress and federal law generally that when these marriage terms are used in federal laws, same-sex couples were not intended to be included.”); 142 Cong. Rec. 16,969 (1996) (statement of Rep. Charles Canady) (“But now, it is necessary to make explicit in the federal code Congress’ well-established and unquestionable intention that ‘marriage’ is limited to unions between one man and one woman. Section 3 [of DOMA] changes nothing; it simply reaffirms existing law.”).

²⁶ 1 U.S.C. § 7.

²⁷ See generally 11 U.S.C. § 101 (2012).

²⁸ George H. Singer, *Section 523 of the Bankruptcy Code: The Fundamentals of Nondischargeability in Consumer Bankruptcy*, 71 AM. BANKR. L.J. 325, 325 (1997) (citing U.S. Dep’t of Health & Human Servs. v. Smith, 807 F.2d 122, 123–24 (8th Cir. 1986)).

²⁹ 11 U.S.C. § 101.

³⁰ *Id.*

³¹ See generally, Jackie Gardina, *The Defense of Marriage Act, Same-Sex Relationships and the Bankruptcy Code* 14–35 (Vt. Law Sch., Paper No. 04-12 2011), available at <http://ssrn.com/abstract=1850926>.

³² 11 U.S.C. § 302(a).

³³ *Id.*

³⁴ *Id.*

administration and to permit the payment of only one filing fee.³⁵ By allowing this consolidation, the bankruptcy system reflected more clearly the reality of marital relations as it concerns debt and property ownership.³⁶ Additionally, joint cases aid in the efficiency of the court by consolidating the cases to single hearings and meetings to save cost and ensure ease.³⁷

Through the application of 1 U.S.C. § 7 to the Code, only opposite-sex couples were permitted to file joint cases.³⁸ Courts reaffirmed this application by barring same-sex couples from seeking relief as joint debtors under 11 U.S.C. § 103(a).³⁹ Interestingly, in 2011, the United States Trustee's Office, a division of the Department of Justice whose sole responsibility is monitoring the bankruptcy system, released a statement that the office would no longer oppose same-sex couples filing jointly.⁴⁰ This is significant because it signals that the federal office in charge of enforcing the Code no longer finds the joint filing of same-sex couples to violate the purpose of the bankruptcy system.⁴¹

³⁵ *In re Stuart*, 31 B.R. 18, 19 (Bankr. D. Conn. 1983); *see also In re Knobel*, 167 B.R. 436 (Bankr. W.D. Tex. 1994); *In re Birch*, 72 B.R. 103 (Bankr. D.N.H. 1987); *In re Hulk*, 8 B.R. 444 (Bankr. D. Conn. 1981).

³⁶ S. REP. NO. 95-989, at 32 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5818.

³⁷ *See* 2 COLLIER ON BANKRUPTCY ¶ 302.02[1] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2010) ("A joint case will facilitate the efficient administration of [the debtors' estates] and decrease the costs associated with administration, thereby benefiting both the debtors and their creditors."); *see also Stuart*, 31 B.R. at 19.

³⁸ 11 U.S.C. § 302(a).

³⁹ *See, e.g., In re Wilkerson*, No. 05-54096-JDW, 2006 WL 3694638 (Bankr. M.D. Ga. Mar. 29, 2006); *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wisc. 2004); *see generally* Hauser, *supra* note 17 (discussing the effect of DOMA on 11 U.S.C. § 302(a) prior to *Massachusetts v. U.S. Dep't. of Health and Human Services*, 682 F.3d 1 (1st Cir. 2012)). However, there have been cases in which same-sex couples were allowed such filings, specifically in California. *See, e.g., In re Balas*, 449 B.R. 567 (C.D. Cal. 2011) (court denied a motion to dismiss filed by the U.S. Trustee on the grounds that DOMA barred a same-sex couple from filing for bankruptcy jointly because a dismissal would not serve an important governmental interest).

⁴⁰ *See U.S. Shifts Policy on Same-Sex Bankruptcies*, REUTERS.COM (July 8, 2011), <http://www.reuters.com/assets/print?aid=USTRE76770020110708>.

⁴¹ *See id.* Additionally, other federal government programs and benefits have started recognizing same-sex marriages, permitting these married same-sex couples access to the same benefits and programs as their heterosexual counterparts. These include immigration benefits, veteran/military benefits, and certain tax benefits. *See* Kathleen Michon, *Federal Marriage Benefits Available to Same-Sex Couples*, NOLO, <http://www.nolo.com/legal-encyclopedia/same-sex-couples-federal-marriage-benefits-30326.html> (last visited May 7, 2015).

B. Windsor v. United States

On June 16, 2013, the Supreme Court issued its ruling in *Windsor*,⁴² holding that § 3 of DOMA is “unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.”⁴³

Windsor concerned a taxpayer whose same-sex partner had passed away and was denied the benefit of spousal deduction because of DOMA.⁴⁴ Under the federal tax law, the benefits of a spousal deduction were limited to spouses as defined by 1 U.S.C. § 7, and thus were only available to heterosexual couples.⁴⁵

In 2007, Edith Windsor and Thea Spyer were married in a lawful ceremony in Ontario, Canada.⁴⁶ New York law recognized and deemed their Ontario marriage to be valid.⁴⁷ In February 2009, Spyer passed away and left her entire estate to Windsor.⁴⁸ Under DOMA, Windsor and Spyer’s marriage did not receive federal recognition and, therefore, Windsor did not qualify for the federal estate tax marital exemption.⁴⁹ Under the exemption, Windsor would have been able to exclude from taxation “any interest in property which passes or has passed from the decedent to his surviving spouse”⁵⁰ The Internal Revenue Service denied the refund on the basis that Windsor was not a “surviving spouse” under DOMA’s limited definition.⁵¹ Windsor paid the tax and then subsequently commenced a refund suit in the United States District Court for the Southern District of New York arguing that DOMA violated equal protection under the Fifth Amendment.⁵²

⁴² United States v. Windsor, 133 S. Ct. 2675 (2013).

⁴³ *Id.* at 2695.

⁴⁴ *Id.* at 2682.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 2683 (citing Windsor v. United States, 699 F. 3d 169, 177–78 (2d Cir. 2012)).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ 26 U.S.C. § 2056(a) (2012).

⁵¹ *Windsor*, 133 S. Ct. at 2683.

⁵² *Id.* While the suit was pending at the District Court, the Attorney General of the United States notified the Speaker of the House of Representative that the Department of Justice would not defend the constitutionality of § 3 of DOMA. *Id.* The Attorney General did this through a 28 U.S.C. § 530D letter. In this case, it was unusual “because the §530D letter was not preceded by an adverse judgment.” *Id.* Instead, the letter “reflected the Executive’s own conclusion, relying on a definition still being debated and considered in the courts, that heightened equal protection scrutiny should apply to laws that classify on the basis of sexual orientation.” *Id.* at 2683–84. In response, the Bipartisan Legal Advisory Group of the House of Representatives (BLAG) voted to intervene in the pending suit to defend § 3 of DOMA. While the Department of Justice did not oppose the limited intervention by BLAG, the District Court denied BLAG’s motion to enter

The District Court ruled against the United States, holding that § 3 of DOMA is unconstitutional and ordered that the Treasury refund the tax with interest to Windsor.⁵³ The Second Circuit affirmed the District Court’s ruling, applying “heightened scrutiny to classifications based on sexual orientation, as both the Department of Justice and Windsor had urged.”⁵⁴

The Supreme Court granted certiorari on the question of the constitutionality of § 3 of DOMA.⁵⁵ The Court started its discussion with a brief history of same-sex marriage in the country, noting that states started recognizing these marriages so these same-sex couples could “have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons.”⁵⁶

The Court moved on to analyze the “design, purpose, and effect of DOMA.”⁵⁷ The Court stated that “by history and tradition the definition and regulation of marriage . . . ha[d] been treated as being within the authority and realm of the separate States.”⁵⁸ However, the Court continued that “Congress, in enacting discrete statutes, can make determinations that bear on marital rights and privileges” and that “Congress has the power both to ensure efficiency in the administration of its programs and to choose what larger goals and policies to pursue.”⁵⁹

The Court relied on the fact “there is no federal law of domestic relations”⁶⁰ and that “federal courts, as a general rule, do not adjudicate issues of marital status even when there might otherwise be a basis for federal jurisdiction.”⁶¹ Additionally, the Court noted, “for ‘when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.’”⁶²

the suit as of right but did grant intervention by BLAG as an interested party. *Id.* (citing FED. R. CIV. P. 24(a)(2)).

⁵³ *Id.* at 2684.

⁵⁴ *Id.* This was the first time heightened scrutiny was used for homosexuals as a class. *See Romer v. Evans*, 517 U.S. 620, 635 (1996).

⁵⁵ *Windsor*, 133 S. Ct. at 2684.

⁵⁶ *Id.* at 2689.

⁵⁷ *Id.*

⁵⁸ *Id.* at 2689–90.

⁵⁹ *Id.* at 2690.

⁶⁰ *Id.* at 2691 (quoting *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956)).

⁶¹ *Id.* (citing *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992)).

⁶² *Id.* (quoting *Ohio ex. rel. Popovici v. Agler*, 280 U.S. 379, 383–84 (1930)).

Before beginning its analysis, the Court started with its conclusion that “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.”⁶³

Once the Court cemented that marriage and domestic relations are within the realm of the individual states, the Court attacked DOMA as “reject[ing] the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next.”⁶⁴ Looking to same-sex couples, the Court concluded that “the State’s decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import.”⁶⁵ After establishing this background, the Court framed the question on the constitutionality of DOMA as “whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment.”⁶⁶

The first part of the Court’s analysis concentrated on the two diverging purposes between the New York marriage law and DOMA.⁶⁷ To frame the differences, the Court juxtaposed the two against each other: “What the state of New York treats as alike federal law deems unlike by a law designed to injure the same class the State seeks to protect.”⁶⁸

In discussing DOMA, the Court found “DOMA’s unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage” highlighted that its “avowed purpose and practical effect . . . are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.”⁶⁹ With this conclusion, the Court held “DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.”⁷⁰

⁶³ *Id.* at 2693 (citing *Bolling v. Sharpe*, 347 U.S. 497 (1954)).

⁶⁴ *Id.* at 2692.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 2692–93.

⁶⁸ *Id.* at 2692.

⁶⁹ *Id.* at 2693.

⁷⁰ *Id.* at 2695.

While never explicitly saying so, the Court seemed to apply a heightened level of scrutiny to find DOMA unconstitutional, closely aligned with the intermediate scrutiny test.⁷¹ The Court in its opinion, however, did not classify same-sex couples as any type of class or identify what level of scrutiny it was applying. While the exact scope and impact of *Windsor* on the classification of homosexuals remains unknown, *Windsor* does make one thing certain—§ 3 of DOMA no longer binds federal statutes to the heteronormative definitions of marriage and spouse.

II. FOLLOWING *WINDSOR*, LAWFULLY MARRIED SAME-SEX COUPLES SHOULD BE ALLOWED TO FILE JOINTLY FOR BANKRUPTCY UNDER 11 U.S.C. § 302(A)

Following the rulings in *Windsor*, married same-sex couples are now left with two questions: (1) whether their marriage will allow them to jointly file for bankruptcy under 11 U.S.C. § 302(a) and (2) whether they can use the federal exemptions outlined in the Code. With the state definition of marriage controlling, married same-sex couples fall within the scope of potential joint debtors under 11 U.S.C. § 302(a) and should be given the same rights and privileges as heterosexual couples in bankruptcy.

A. *A State's Definitions of Spouse and Marriage Are Now Controlling When Reading and Interpreting the Bankruptcy Code*

If DOMA no longer applies, where would one look for the definitions of marriage and spouse as they apply to the Code? This query raises the significant question of whether a same-sex couple that has been recognized in

⁷¹ In analyzing the level of scrutiny applied by the Court in *Windsor*, it is important to understand the traditional levels of constitutional scrutiny. *Id.* at 2683–84. The lowest form of scrutiny, the rational basis test, looks to whether a law is rationally related to a legitimate purpose. *See, e.g., Ry. Express Agency v. New York*, 336 U.S. 106 (1949). If an act does not have a legitimate purpose rationally related to the act, the Court would find that the law is unconstitutional under the Due Process Clause and Equal Protection Clause. *See, e.g., id.* Rational basis is typically applied in cases where there are no fundamental rights or suspect classifications at issue. The intermediate scrutiny test looks to whether a law furthers an important government interest by means that are substantially related to that interest. *See, e.g., Craig v. Boren*, 429 U.S. 190 (1976). If an act does not have an important government interest that is substantially related to that interest, then the law in question is unconstitutional under Due Process Clause and Equal Protection Clause. *See, e.g., id.* Classically, intermediate scrutiny has been applied by the Court to analyze laws that impact or involve gender or other quasi-suspect classes such as children or the socially vulnerable. *See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). Under strict scrutiny, an act is constitutional only if the act furthers a compelling governmental interest that is narrowly tailored the law to achieve that interest. *See, e.g., Korematsu v. United States*, 323 U.S. 213 (1944). This level of scrutiny has been reserved for laws that impact race or fundamental liberties such as marriage, individual autonomy, free speech, and the exercise of religious liberties. *See, e.g., Lawrence v. Texas*, 539 U.S. 558 (2003); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

a state can use that state's definition for the purposes of bankruptcy. Based on federalism principles and Tenth Amendment considerations, if a same-sex couple is lawfully married in a state that recognizes such a union, then—regardless of the state in which the same-sex couple files for bankruptcy—the bankruptcy court must recognize the marriage for purposes of bankruptcy and allow the couple to file jointly.⁷²

1. Federalism Policy and Choice-of-Law Concerns

The essential question that is left following *Windsor* is a choice-of-law problem: Which definitions of marriage and spouse now control the Code?⁷³ Without the Code defining marriage and spouse, the meanings of these words remain unresolved until a definitive answer can be given on whether these terms now include married same-sex couples.⁷⁴

In his pre-*Windsor* article, *Beyond DOMA: Choice of State Law in Federal Statutes*, William Baude offers a framework in which the states' definitions of marriage and spouse may be adopted by the Code.⁷⁵ Baude explained that the most difficult choice that Congress faces, a choice that is still relevant after *Windsor*, is which state's law it will adopt for federal purposes.⁷⁶ Should a bankruptcy court look to the law of the state in which the marriage is celebrated or the state of the couple's domicile? If the court looks to the law of the state of domicile, should the court look to the couple's domicile at the time of marriage or the domicile at the time of filing?⁷⁷ Resolution of these issues requires speculation about Congress's intent and the potential for forcing states that do not recognize same-sex unions to recognize such marriages.⁷⁸

As Baude noted, “[m]arried couples expect that, legal quirks aside, when they marry they will remain married unless and until they formally divorce.”⁷⁹

⁷² What may result is a return to a pre-DOMA status in which a same-sex couple married in one state should be able to file jointly in any state. *See* *Bone v. Allen (In re Allen)*, 186 B.R. 769, 773 (Bankr. N.D. Ga. 1995) (suggesting, pre-DOMA, that a same sex couple may be able to file jointly under the Code if their marriage is recognized in the state of celebration).

⁷³ *See, e.g.*, 11 U.S.C. § 302 (2012) (joint filing for spouses).

⁷⁴ Without the controlling definitions of 1 U.S.C. § 7, the Bankruptcy Code lacks an explicit definition for marriage and spouse.

⁷⁵ Baude, *supra* note 6.

⁷⁶ *Id.* at 1417.

⁷⁷ *Id.* at 1394–97 (discussing application of *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1931), and other cases involving conflict of laws between different states in federal courts).

⁷⁸ *Id.* at 1417.

⁷⁹ *Id.*

The only way to ensure that such a mentality and traditional understanding of marriage prevails to both married opposite-sex and same-sex couples is to interpret and apply a liberal definition of marriage as used in a state that recognizes same-sex marriages.⁸⁰ Baude argues that all lawful marriages should be recognized in any state, regardless of whether that state would be willing to issue a marriage license for the couple, advocating for a federal choice-of-law rule that would respect all lawful marriages.⁸¹

In the context of bankruptcy, applying this rule to federal provisions in the Code would require a bankruptcy court sitting in State *A*, which does not recognize same-sex marriage, to accept the otherwise valid joint petition of a same-sex couple lawfully married in State *B*.⁸² State *A*, though, would not be compelled to allow the couple access to the benefits or rights that State *A* only allows to opposite-sex couples under its own law.⁸³ This interpretation rule would require every bankruptcy court to look to the state of celebration of the marriage to recognize lawful marriages, both opposite-sex and same-sex, but not necessarily for other applications of state law.⁸⁴

Baude explains that this rule should prevail by stating: “Same-sex couples may not have the same guarantees with respect to state law, but at least with respect to nationwide federal law, they can and should.”⁸⁵ Furthermore, this rule ensures balance between state and federal law because it does not allow federal law to be unfairly and disjunctively applied on a state-by-state basis but instead allows every citizen to avail themselves of federal processes and laws.⁸⁶ Under any other interpretation, the result would be an unfair distribution of federal rights and, in the case of bankruptcy, would lead to a geographic barrier to same-sex joint filings. For instance, a same-sex couple filing in the state of celebration would be able to avail themselves of the federal bankruptcy system but would be barred from filing if they move to a state that does not recognize same-sex marriage.⁸⁷ Such a result is fundamentally inequitable.

⁸⁰ *Id.*

⁸¹ *See id.* at 1415–17.

⁸² *See supra* note 10. *See generally*, *In re Matson*, 509 B.R. 860 (Bankr. E.D. Wis. 2014).

⁸³ 11 U.S.C. § 302(a) (2012); *see also* Baude, *supra* note 6 at 1416–17.

⁸⁴ Baude, *supra* note 6 at 1416–17.

⁸⁵ *Id.* at 1417.

⁸⁶ *See id.*

⁸⁷ *Cf.* Gigi Douban, *Some Same-Sex Couples Still Struggle at Tax Time*, MARKETPLACE (Mar. 16, 2015), <http://www.marketplace.org/topics/economy/some-same-sex-couples-still-struggle-tax-time> (describing the difficulty some couples face when they move to a state that does not recognize their marriage).

The Code, as it currently stands, does have some inherent geographic preferences based on the state in which the debtors file, such as state exemptions for those domiciled in that state.⁸⁸ However, these preferences do not affect the bankruptcy process such that they would potentially disallow an entire class of people from filing.⁸⁹ Fixing this variation in state policies into the Code, in contrast, forces same-sex couples who wish to file jointly and want to utilize federal exemptions to move to a different state so that the domicile requirement of 11 U.S.C. § 522 does not apply.⁹⁰ On a practical level, at the very least, this causes upheaval for the personal lives of same-sex couples and their families.

On choice-of-law issues under the Baude framework, a rule that adopts the definition of marriage and spouse from the state of celebration would be the most legal and equitable as it applies to the Code.⁹¹ This would create a balance that would allow states to continue to define marriage and spouse within their own borders without limiting the definitions given by other states.⁹² In terms of bankruptcy, this means that a marriage celebrated in one of the thirty-seven states that recognize same-sex marriage should be recognized under the Code.⁹³ This would result in allowing same-sex couples to file jointly under 11 U.S.C. § 302(a).⁹⁴

A rule that defines marriage and spouse for the purpose of filing a bankruptcy petition does not infringe on the individual rights of the states to define marriage within their own borders.⁹⁵ The states would retain authority to manage the issuance of marriage licenses. The federal and state balance would remain while allowing same-sex couples the ability to file jointly for bankruptcy.

2. Tenth Amendment and Legislative Interpretation

The Tenth Amendment offers a framework from which to base the assertion that the definitions of marriage and spouse from the state of

⁸⁸ See 11 U.S.C. § 522(b); Tarvin, *Bankruptcy, Relocation, and the Debtor's Dilemma: Preserving Your Homestead Exemption Versus Accepting the New Job Out of State*, 43 LOY. U. CHI. L.J. 141, 149 (2011).

⁸⁹ See Tarvin, *supra* note 88 at 149.

⁹⁰ 11 U.S.C. § 522; *see also infra* Part II.C.

⁹¹ See Baude, *supra* note 6 at 1418.

⁹² See *id.* at 1416–17.

⁹³ See *id.* at 1418; *see also* NAT'L CONF. ST. LEGIS., *supra* note 7.

⁹⁴ 11 U.S.C. § 302(a) (listing requirements for joint filing).

⁹⁵ See Baude, *supra* note 6 at 1418.

celebration should now be read into the Code.⁹⁶ By doing so, individual states would retain control over their own definitions of marriage and spouse for purposes of marriage licensing and similar issues. However, they would be prevented from barring same-sex couples access to a federal institution, such as the bankruptcy system, through those definitions.

The Tenth Amendment provides: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People.”⁹⁷ It is a well-established principle that states have traditionally been given the authority to regulate marriages within their own borders.⁹⁸ The Constitution does not, in any article, grant Congress the power to define marriage or any marital rights. There has been some argument that Congress, under either the Spending Clause or the Commerce Clause, may be able to define marriage and spouse because of the economic ramifications that these definitions may have on interstate commerce or federal taxation.⁹⁹ However, these rationales try to shroud moral motivations in an economic mask and do not trump the overwhelming precedent and tradition that has granted states the right to control the terms of marriages within their own borders.¹⁰⁰

Given the substantial amount of case law concerning the longstanding state right to define marriage and the lack of case law that has adopted the purported economic reasoning for a federal definition of marriage, arguments in favor of Congress’s power to define marriage arguably would not survive.¹⁰¹ Federalism principles seem to dictate that Congress must give deference to the

⁹⁶ U.S. CONST. amend. X.

⁹⁷ *Id.*

⁹⁸ See *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (“Insofar as marriage is within temporal control, the States lay on the guiding hand. ‘The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.’” (quoting *In re Burrus*, 136 U.S. 586, 593–94 (1890))); see also *Loving v. Virginia*, 388 U.S. 1, 7 (1967) (“[T]he State does not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment. Nor could it do so”); *Massachusetts v. U.S. Dep’t of Health and Human Servs.*, 682 F.3d 1, 11–13 (1st Cir. 2012) (reasoning that, while DOMA did not violate the Tenth Amendment, it violated the Equal Protection Clause after infringement on an area of law traditionally governed by states).

⁹⁹ See, e.g., Grant S. Nelson, *A Commerce Clause Standard for the New Millennium: “Yes” to Broad Congressional Control Over Commercial Transactions; “No” to Federal Legislation on Social and Cultural Issues*, 55 ARK. L. REV. 1213, 1241 (2003).

¹⁰⁰ *Id.*

¹⁰¹ See, e.g., *Pennoyer v. Neff*, 95 U.S. 714, 734–35 (1878) (“The State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved.”).

states when defining marriage and spouse.¹⁰² The Tenth Amendment reinforces this premise.¹⁰³ It follows that any federal statute that uses terms that are defined by the states should be interpreted to allow all citizens equal access to federal statutory schemes and rights.¹⁰⁴

Legislative interpretation techniques further support the argument that the definitions of marriage and spouse in the Code should respect state definitions of marriage and spouse.¹⁰⁵ Typically, in order for Congress to impede on a traditionally held state right, a clear statement is required.¹⁰⁶ This clear statement requirement arises from the substantive federalism canon of legislative interpretation.¹⁰⁷ The purpose of the federalism canon is to protect state sovereignty and autonomy.¹⁰⁸

DOMA arguably acted as Congress's clear statement that it wished to supplant, in some respects, the state's traditionally exclusive power governing marriage and to apply a federal definition to federal programs.¹⁰⁹ However, *Windsor* invalidated Congress's preemption of the use of state definitions on the federal level by finding § 3 of DOMA unconstitutional.¹¹⁰ With this invalidation of § 3, the federal government may no longer use its own definitions of marriage and spouse in the Code and other affected statutes.¹¹¹ Without this federal directive in place, the choice-of-law analysis requires that the states' definitions of marriage and spouse govern.¹¹²

The spirit of the Tenth Amendment leads us to the conclusion that states should have dominion over the issuance and control of marriage within their

¹⁰² See *supra* Part II.A.1.

¹⁰³ See U.S. CONST. amend. X. But see *Massachusetts*, 682 F.3d at 11–13 (“In our view, neither the Tenth Amendment nor the Spending Clause invalidates DOMA . . .”).

¹⁰⁴ See *infra* Part II.C.1.

¹⁰⁵ See generally Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 MD. L. REV. 791 (2010) (discussing the canons of construction).

¹⁰⁶ See *Gregory v. Ashcroft*, 501 U.S. 452, 461, 464, 467 (1991) (refusing to broaden federal powers to impede on traditional state powers without clear statement from Congress).

¹⁰⁷ See *id.*

¹⁰⁸ See Slocum, *supra* note 105, at 813 (“[S]everal federalism canons are based on the assumption that Congress is concerned with federalism issues and desires to preserve local authority.”).

¹⁰⁹ See 1 U.S.C. § 7 (2012), *invalidated by* *United States v. Windsor*, 133 S. Ct. 2675 (2013); H.R. REP. NO. 104-664, at 1–18 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906 (describing the history behind the perceived need for DOMA and the governmental interests offered to support its passage).

¹¹⁰ *Windsor*, 133 S. Ct. at 2695; *cf.* Baude, *supra* note 6, at 1415–18 (discussing and suggesting a system of choice-of-law concerning DOMA).

¹¹¹ See *Windsor*, 133 S. Ct. at 2695.

¹¹² See *supra* Part II.A.1.

own borders. However, this dominion does not grant an individual state the authority to block its citizens from access to a federal process. To respect the states' authority to regulate marriage while protecting citizens' access to bankruptcy, the Code should be interpreted to adopt the same definitions of marriage and spouse of the state of celebration, not the state of domicile. This interpretation would permit same-sex couples to file for joint bankruptcies under 11 U.S.C. § 302(a), regardless of the state in which the same-sex couple files.

B. Allowing Same-Sex Couples to Jointly File Furthers the Goals of 11 U.S.C. § 302(a) by Easing the Bankruptcy Process

When enacting § 302(a), Congress noted that, due to the fact that married couples tend to have joint debts and joint property, the bankruptcy system should reflect that reality by allowing married couples to file jointly.¹¹³ The Senate Judiciary Committee explained, “A joint case will facilitate consolidation of their estates, to the benefit of both the debtors and the creditors, because the cost of administration will be only one filing fee.”¹¹⁴ The purpose of § 302(a), read along with the purpose of the overall bankruptcy system to “provide a fresh start for the honest debtor” and “to protect the rights of creditors by creating an organized system that governs the repayment of debts,”¹¹⁵ would be furthered by allowing same-sex couples to file jointly.

Courts have construed literally the marriage requirement of § 302(a), thus limiting joint filings to couples that are lawfully married.¹¹⁶ With this limited reading, the bankruptcy courts would have to recognize same-sex couples as married under the language of the Code.¹¹⁷

Under the framework proposed in this Article, the purpose of § 302(a) would further be satisfied because it would allow lawfully married same-sex

¹¹³ See S. REP. NO. 95-989, at 32 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5818; *supra* text accompanying notes 31–37.

¹¹⁴ S. REP. NO. 95-989, at 32 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5818.

¹¹⁵ Jill C. Rush, *Unequal Treatment and Creditor Frustrations: The Limited Impact of Legalizing Same Sex Marriage*, 21 EMORY BANKR. DEV. J. 743, 745–46 (2005).

¹¹⁶ See Hauser, *supra* note 17 at 200–12 (describing the history of § 302(a) and how courts would not allow “unmarried debtors who live together,” “an adult child,” and “a corporation and its sole shareholder” to file jointly under § 302(a)) (citing *In re Lucero*, 408 B.R. 348 (Bankr. C.D. Cal. 2009); *In re Jephunneh Lawrence & Assocs. Chartered*, 63 B.R. 318 (Bankr. D.D.C. 1986); *In re Malone*, 50 B.R. 2 (Bankr. E.D. Mich. 1985); *In re Jackson*, 28 B.R. 559 (Bankr. E.D. Pa. 1983); *In re Coles*, 14 B.R. 5 (Bankr. E.D. Pa. 1981)).

¹¹⁷ See *id.*

couples who have incurred joint debt to consolidate their bankruptcies for the sake of efficiency.¹¹⁸ By allowing same-sex couples to file jointly, creditors would now have access to a larger estate to satisfy their claims.¹¹⁹ Furthermore, a smaller administrative fee would be incurred in a joint filing, preserving some, albeit marginal, wealth for the bankruptcy estate.¹²⁰ Since an overarching purpose of bankruptcy is to protect creditors' rights to repayment of debts, by interpreting the Code to allow married same-sex couples to file jointly under § 302(a), creditors would now have a far better chance of getting a higher rate of return on their debt than if same-sex couples had to file separately and the spouses were not jointly liable for the debt.¹²¹

C. Same-Sex Couples Filing Jointly Can Avail Themselves of Either Federal or State Exemptions

With the adoption of the above interpretative framework, which would allow same-sex couples that are lawfully married to file jointly, the issue now becomes which exemptions the jointly-filing couple may use.¹²² First, under federalism principles, the same-sex couple should be able to, at a minimum, use the federal exemptions outlined in 11 U.S.C. § 522(d) even if an individual state, under its police power, chooses to provide access to those exemptions only to heterosexual couples.¹²³ Second, the Code should be amended to guarantee availability of each state's exemptions to all lawfully married couples even if such state does not recognize the marriage under its law.

1. Under Federalism Principles, Jointly Filing Same-Sex Couples Should Be Able to Avail Themselves of at Least the Federal Exemptions of 11 U.S.C. § 522(d)

Jointly filing same-sex couples permitted to apply the exemptions of a state that recognizes their marriage would be able to apply either federal exemptions—if that state permits—or the state's exemptions.¹²⁴ However, under the federalism framework offered by this Article, a state that does not

¹¹⁸ 11 U.S.C. § 302 (2012).

¹¹⁹ *See id.* § 541.

¹²⁰ *See In re Stuart*, 31 B.R. 18, 19 (Bankr. D. Conn. 1983); *see also In re Knobel*, 167 B.R. 436 (Bankr. W.D. Tex. 1994); *In re Birch*, 72 B.R. 103 (Bankr. D.N.H. 1987); *In re Hulk*, 8 B.R. 444 (Bankr. D. Conn. 1981).

¹²¹ *See* 11 U.S.C. § 302.

¹²² *See id.* § 522.

¹²³ *See id.* § 522(d).

¹²⁴ *See id.*

recognize same-sex marriage should not have to allow same-sex couples filing jointly in that state to take advantage of its bankruptcy exemptions.¹²⁵

Under the Code, a state is authorized to “opt-out” of the federal exemptions and require that its citizens use that state’s individual exemptions.¹²⁶ Staying true with the federalism argument, states remain sovereign over the marital systems within their borders, which means that they do not have to allow same-sex couples to use their exemptions.¹²⁷ For example, an individual state may limit its own exemptions to only heterosexual married couples. So if a state does not recognize same-sex marriages within its borders that state would not have to offer to a jointly filing couple the exemptions that are offered to a heterosexual couple.¹²⁸ This distinction would create an additional burden for same-sex couples by limiting their ability to file jointly because, without access to any exemptions, the entire estate would be vulnerable to creditors. However, the state would not be able to completely bar same-sex couples from filing individually and then applying the state’s exemptions as individual filers.

While a state’s ability to limit access to its exemptions may seem counter to the federalism analysis, it in fact further reinforces the separation of state and federal powers and the need for equal access of all citizens to federal laws and protections.¹²⁹ The Code applies to all citizens regardless of residency.¹³⁰ Exemptions, however, may be either from the federal code itself or supplemented or substituted by the laws of individual states.¹³¹ If a state chooses to have its own exemptions for bankruptcies, then the state has the authority to apply them under the definitions it has set.¹³² So, if State *A*’s exemption is limited to a “married couple,” and State *A* does not recognize same-sex marriages, then, if federalism is the exclusive concern, a jointly filing lawfully married same-sex couple ought not be able use the exemption.

However, state exemptions should be read to allow jointly filing same-sex couples to use the federal exemptions listed in 11 U.S.C. § 522 if a state does

¹²⁵ See *id.* § 522(b).

¹²⁶ See *id.*; Tarvin, *supra* note 88, at 149.

¹²⁷ See 11 U.S.C. § 522(b)(3)(A); *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 12 (1st Cir. 2012).

¹²⁸ See 11 U.S.C. § 522(b)(3)(A).

¹²⁹ See *supra* Part II.A.

¹³⁰ See 11 U.S.C. § 109(a).

¹³¹ *Id.* § 522(b).

¹³² See *id.*

not recognize their marriage for state law exemptions.¹³³ If the state is an opt-out state that only allows its own exemptions to apply and does not recognize same-sex marriages, it must allow same-sex couples that are lawfully married in other states to use the federal exemptions. For the same reasons that the Code should be read to include same-sex couples, states should not, under the guise of federalism, be able to limit same-sex couples' access to the federal exemptions that are available to all citizens.

This suggested framework concerning state exemptions versus federal exemptions satisfies state sovereignty because it does not require the state to change its own policy to accommodate the decisions of a sister state. It satisfies federalism principles because it gives all U.S. citizens equal access to exemptions, either through state exemptions or, if excluded from state exemptions, federal exemptions. This balance resembles the legal constructions that require the Code terms marriage and spouse be read according to a state that recognizes same-sex marriage because it focuses on the need for a balance between state and federal power.

2. *Amendment to 11 U.S.C. § 522*

To ensure that this proposed framework does not create a power shift where states would be able to unjustly prohibit same-sex couples filing jointly from using both state exemptions and federal exemptions, 11 U.S.C. § 522(b) should be amended.¹³⁴ Such an amendment could either create a carve out giving same-sex couples access to the federal exemptions if a state limits access to its exemptions only to heterosexual couples or restructure the exemptions in the Code to a federal floor system in which states can then supplement by authorizing more exemptions than federally mandated.¹³⁵

Section 522 of the Code sets forth the various exemptions a debtor may take in his or her petition.¹³⁶ Section 522(b) represents a compromise between the Senate and the House concerning whether federal exemptions or state

¹³³ See generally *id.* § 522. Interestingly, 11 U.S.C. § 522(b)(1) discusses the inability of joint filers to each choose different exemptions on their petition. This restriction is of note because the Code, when discussing an involuntary filing of a spouse, defines marriage as a “husband and wife.” *Id.* A strict textual reading of the section arguably limits the scope of the “husband and wife” phrase to cases involuntarily filed under 11 U.S.C. § 303.

¹³⁴ Where debtors are domiciled in a state that does not recognize their marriage, when applying certain provisions of the Code, a bankruptcy court may be constrained by that state's definitions of marriage. See Defense of Marriage Act, Pub. L. No. 104-199, § 2(a), 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C).

¹³⁵ See generally 11 U.S.C. § 522(b).

¹³⁶ *Id.* § 522.

exemptions should be controlling on a debtor's petition.¹³⁷ Essentially, 11 U.S.C. § 522(b)(1)¹³⁸ gives the debtor two options: 1) the debtor may use the federal exemptions outlined in § 522(d); or 2) the debtor may use the exemptions of the applicable state law.¹³⁹ However, these options can be limited if the state in which the debtor files has opted out of the federal exemptions.¹⁴⁰

The language of 11 U.S.C. § 522(b)(2) gives states the option to opt-out of the federal exemptions of § 522(d), which limits a debtor filing in that state to the exemptions of that state alone.¹⁴¹ The relevant language in § 522(b)(2) states: “[P]roperty listed in this paragraph is property that is specified under subsection (d), *unless the State law that is applicable to the debtor under paragraph (3)(A) specifically does not so authorize.*”¹⁴² For a state to opt out of 11 U.S.C. § 522(d), a state would need to pass a statute to bar citizens from using the federal exemptions.¹⁴³ To date, thirty-four states have enacted legislation that has limited debtors to the state exemptions.¹⁴⁴

For a debtor to use these state exemptions, the Code has a domicile prerequisite that requires that the debtor file in

¹³⁷ James B. Haines, Jr., *Section 522's Opt-Out Clause: Debtors' Bankruptcy Exemptions in a Sorry State*, 1983 ARIZ. ST. L.J. 1, 6 n.26 (1983).

¹³⁸ Section 522(b)(1) states:

Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (2) or, in the alternative, paragraph (3) of this subsection. In joint cases filed under section 302 of this title and individual cases filed under section 301 or 303 of this title by or against debtors who are husband and wife, and whose estates are ordered to be jointly administered under Rule 1015(b) of the Federal Rules of Bankruptcy Procedure, one debtor may not elect to exempt property listed in paragraph (2) and the other debtor elect to exempt property listed in paragraph (3) of this subsection. If the parties cannot agree on the alternative to be elected, they shall be deemed to elect paragraph (2), where such election is permitted under the law of the jurisdiction where the case is filed.

11 U.S.C. § 522(b)(1).

¹³⁹ *Id.* § 522(b)(1), (d).

¹⁴⁰ *Id.* § 522(b)(1).

¹⁴¹ Richard E. Mendales, *Rethinking Exemptions in Bankruptcy*, 40 B.C. L. REV. 851, 859 (1999).

¹⁴² 11 U.S.C. § 522(b)(2) (emphasis added).

¹⁴³ Haines, *supra* note 137, at 8.

¹⁴⁴ *Id.* at 4 & n.13. These states are Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Missouri, Montana, Nevada, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming. *See, e.g.*, NY DEBT. & CRED. LAW § 284 (Consol. 2014) (“In accordance with the provisions of section five hundred twenty-two (b) of title eleven of the United States Code, debtors domiciled in this state are not authorized to exempt from the estate property that is specified under subsection (d) of such section.”) (example of an opt-out statute).

the place in which the debtor's domicile has been located for the 730 days immediately preceding the date of the filing of the petition or if the debtor's domicile has not been located in a single State for such 730-day period, the place in which the debtor's domicile was located for 180 days immediately preceding the 730-day or for longer portion of such 180-day period than in any other place.¹⁴⁵

If the debtor qualifies as being domiciled in a state under § 522(b)(3)(A), and that state has an opt-out statute, then that debtor is limited to that state's exemptions.¹⁴⁶ If the debtor is unable to meet the domicile requirement of § 522(b)(3)(A), the debtor may use the exemptions in § 522(d).¹⁴⁷ Thus, debtors who are unable to claim a residency under any of the domicile requirements of § 522(b)(3)(A) default into the exemptions of § 522(d), regardless of whether the state in which the debtors currently reside has an opt-out statute.¹⁴⁸ Cases, both prior to and after the enactment of Bankruptcy Abuse Prevention and Consumer Prevention Act, have found that "federal exemptions [are] available under the exemption saving sentence where a debtor is not residing in the state under whose law the debtor's exemptions are determined, even when those states have opted out of the federal exemptions."¹⁴⁹

Under the proposed federalism framework allowing lawfully married same-sex couples to file jointly for bankruptcy in any state, § 522 would need to be amended to ensure that same-sex couples can avail themselves of the federal exemptions.¹⁵⁰ To ensure that a state does not try to circumvent the application of the allowance of same-sex couples from jointly filing for bankruptcy under the proposed interpretation of the Code, 11 U.S.C. § 522 should have language that would reframe the opt-out powers of the states to limit them so as to not

¹⁴⁵ 11 U.S.C. § 522(b)(3)(A).

¹⁴⁶ *Id.* § 522(b)(1).

¹⁴⁷ *Id.* § 522(b)(3) ("If the effect of the domiciliary requirement under subparagraph (A) is to render the debtor ineligible for any exemption, the debtor may elect to exempt property that is specified under subsection (d).").

¹⁴⁸ *See, e.g., In re Underwood*, 342 B.R. 358, 362 (Bankr. N.D. Fla. 2006).

¹⁴⁹ *In re Fabert*, No. 06-21539, 2008 WL 104104, at *1, *20 (D. Kan. Jan. 9, 2008); *see also In re Chandler*, 362 B.R. 723, 726-27 (Bankr. N.D. W. Va. 2007); *In re Battle*, 366 B.R. 635, 637 (Bankr. W.D. Tex. 2006) ("[T]he Court holds that a non-Florida-resident debtor, forced into using Florida exemption law by section 522(b)(3)(A), may elect to use the federal exemptions under section 522(b)(2), because Florida's opt-out law does not bar non-residents from claiming federal exemptions."); *In re Schulz*, 101 B.R. 301, 302 (Bankr. N.D. Fla. 1989) (finding that, pre-BAPCPA, the non-resident was not bound by an opt-out state's statute and was allowed to use the federal exemptions).

¹⁵⁰ *See generally* 11 U.S.C. § 522(b).

bar same-sex couples from both state and federal exemptions when filing jointly.¹⁵¹

As discussed above,¹⁵² § 522 needs an interpretation that would permit a state to retain its authority to legislate its own exemptions while ensuring that same-sex couples are still able to use the federal bankruptcy system.¹⁵³ Under this interpretation, in order to ensure that a state can retain its police power in controlling the exemptions available to its residents, § 522(b) should add a subparagraph that would carve out an exception to the opt-out authority for the state that would still allow same-sex couples to use § 522(d) exemptions.¹⁵⁴

As it stands now, § 522(b) enables a state to prevent all of its citizens from accessing the federal exemptions of § 522(d).¹⁵⁵ This blanket limitation would allow the state to limit jointly filing same-sex couples from any spouse exemptions that would be available to similarly situated heterosexual couples.¹⁵⁶ Without an amendment to § 522, a state would be able to make a DOMA-like barricade on same-sex couples wishing to file jointly by severely limiting their options for exemptions.¹⁵⁷

To place a safeguard so that states do not attempt to use this apparent loophole to limit and deter same-sex couples from filing within its border, Congress should add a paragraph at the end of § 522(b). This paragraph would exempt jointly filing same-sex couples from having solely to use an opt-out state's exemptions if the state's joint exemptions apply only to heterosexual couples. A state is well within its police powers to determine those exemptions and limitations within its borders, but those powers should not have the ability to unfairly limit the access of same-sex couples to the bankruptcy system.¹⁵⁸ A proposed amendment that would create the balance between state sovereignty and equal access to exemptions for same-sex couples would be:

If the effect of paragraph (3) is to render jointly filing debtors ineligible for certain exceptions or limits their access to certain exceptions due to state or local law concerning sexual orientation, the state exemption is to be read as including lawfully married same-sex

¹⁵¹ See generally *id.* § 522(b).

¹⁵² See *supra* Part II.C.1.

¹⁵³ See generally 11 U.S.C. § 522(b).

¹⁵⁴ See *id.* § 522(b), (d).

¹⁵⁵ *Id.*

¹⁵⁶ See *id.*

¹⁵⁷ See *id.*

¹⁵⁸ See *supra* Part II.C.1.

couples. A state or local law limits or renders jointly filing debtors ineligible from certain exemptions if the state or local law actually or constructively bars same-sex couples from applying state or local exemptions based solely or in part on the debtors' sexual orientation.

This proposed amendment would allow the state to remain in control of its own exemptions under the opt-out powers of § 522(b), but would impair it from using that power to limit the access to married same-sex couples.¹⁵⁹

Alternatively, some commentators have proposed getting rid of the opt-out system of § 522 and instead enacting a federal floor that states would then have the option of supplementing.¹⁶⁰ James B. Haines, Jr., in his piece *Section 522's Opt-Out Clause: Debtors' Bankruptcy Exemptions in a Sorry State*, argues that enacting a federal floor provision instead of an opt-out ability would enable Congress to "enact a *federal* provision effecting *federal* fresh start objectives."¹⁶¹ This provision would not only reinforce the federalism equal access framework where a minimum standard is available to all citizens, but would also streamline the exemptions available to debtors.¹⁶²

However, this system would have a more limiting effect on the ability for states to police their social policies by not allowing them to have complete control over their own exemptions. While states would be able to alter the exemptions to supplement the federal floor, the states would be unable to have complete control over the access to these exemptions. Compared to the suggestion of amending § 522 to add a carve out of the opt-out option, the federal floor gives a universal base that all states would have to follow.¹⁶³ This floor would ease the bankruptcy process because it would place every debtor at the same starting point concerning exemptions. In contrast, the current opt-out system is inherently confusing due to exemptions that vary by state.¹⁶⁴

It is worth noting that while § 522(b) does cite to Federal Rules of Bankruptcy Procedure Rule 1015(b) as one of the possible conflicts that may

¹⁵⁹ See 11 U.S.C. § 522(b).

¹⁶⁰ Haines, *supra* note 137, at 41; see H.R. 8200, 95th Cong., § 522(b) (1977). See generally W. Homer Drake, Jr., *The Judges' Bankruptcy Bill and the Commission's Bill: A Question of Access to the Judicial Process*, 26 MERCER L. REV. 1009, 1027–28 (1975); Joe Lee, *A Critical Comparison of the Commission Bill and the Judges' Bill for the Amendment of the Bankruptcy Act*, 49 AM. BANKR. L.J. 1, 22–24 (1975) (discussing the difference between the Commission's Bill and Judges' Bill with respect to their treatment of state exemptions vis-à-vis federal exemptions).

¹⁶¹ Haines, *supra* note 137, at 41–42.

¹⁶² See *id.* at 41.

¹⁶³ See Haines, *supra* note 137, at 41; *supra* Part II.C.1.

¹⁶⁴ See Haines, *supra* note 137, at 41.

arise when determining whether state or federal exemptions apply to joint filing spouses, the fact that it is limited to “husband and wife” debtors does not adversely affect the options in amending or changing § 522(b).¹⁶⁵ This provision is narrowly tailored for the cases that are an involuntary consolidation of individual cases of a husband and wife.¹⁶⁶ It would be preferable for Rule 1015 and § 522(b) of the Code to be amended to change the language from “husband and wife” to “spouses,” but, under the interpretation of this Article, it does not create an issue with which exemptions would apply.¹⁶⁷

Either of these options—(1) amending § 522(b) with the carve out or, (2) replacing the opt-out provision with a federal floor—would ensure that under the post-*Windsor* interpretation of the Code, all citizens would have fair and equal access to the bankruptcy process.¹⁶⁸ The revision of § 522(b) to have a federal floor would better serve the Code and federalism principles, though, because it integrates into the Code the minimum that each state must offer,

¹⁶⁵ Section § 522(b)(1) states:

In joint cases filed . . . against debtors who are husband and wife, and whose estates are ordered to be jointly administered under Rule 1015(b) of the Federal Rules of Bankruptcy Procedure, one debtor may not elect to exempt property listed in paragraph (2) and the other debtor elect to exempt property listed in paragraph (3) of this subsection. If the parties cannot agree on the alternative to be elected, they shall be deemed to elect paragraph (2), where such election is permitted under the law of the jurisdiction where the case is filed.

11 U.S.C. § 522(b)(1) (2012). FED. R. BANKR. P. 1015(b) states:

If a joint petition or two or more petitions are pending in the same court by or against (1) a husband and wife, or (2) a partnership and one or more of its general partners, or (3) two or more general partners, or (4) a debtor and an affiliate, the court may order a joint administration of the estates. . . . An order directing joint administration of individual cases of a husband and wife shall, if one spouse has elected the exemptions under § 522(b)(2) of the Code and the other has elected the exemptions under § 522(b)(3), fix a reasonable time within which either may amend the election so that both shall have elected the same exemptions. The order shall notify the debtors that unless they elect the same exemptions within the time fixed by the court, they will be deemed to have elected the exemptions provided by § 522(b)(2).

FED. R. BANKR. P. 1015(b).

¹⁶⁶ See 11 U.S.C. § 303.

¹⁶⁷ *Id.* § 522(b); FED. R. BANKR. P. 1015.

¹⁶⁸ A third approach would be to have a same-sex married couple move their residency if they are currently located in an opt-out state in order to make the couple fail the domicile requirement of § 522(b)(3)(A) and default into the federal exemptions. See 11 U.S.C. § 522(b)(3)(A). This approach would allow the debtors to get around the limiting provision of § 522(b)(2), which bars debtors from using the federal exemptions, by making the same-sex debtors not domiciled under the Code. See *id.* § 522(b). By not being domiciled to any particular state, only the federal exemptions of § 522(d) would apply to the same-sex couple jointly filing, and same-sex couples in bankruptcy would avoid unfair treatment from the exemptions of an opt-out state. See *id.* § 522(b)(3)(A).

including allowing jointly filing same-sex couples to use exemptions, while still giving the states the ability to supplement the exemptions based on that state's individual prerogatives.¹⁶⁹ Additionally, if Congress were to amend § 522 to have a federal floor, it would create a smoother understanding of exemptions across state borders instead of the current disjunctive nature of states having the option to implement their own individual exemptions.¹⁷⁰

D. Ramifications of Same-Sex Joint Filings

Under the post-*Windsor* interpretation of the Code discussed above, same-sex couples now have the ability to file joint bankruptcies with the exact same rights and powers as jointly filing heterosexual couples.¹⁷¹ Nevertheless, this does present new issues for same-sex couples wanting to file jointly. Now that same-sex couples would have the same posture as heterosexual couples, they would be subject to the same limitations that the Code places on married couples.

Under the DOMA definitions, 11 U.S.C. § 1322(d) did not apply to same-sex couples, and an individual who was in a same-sex marriage but was filing for a chapter 13 bankruptcy individually was not required to disclose the income of his or her spouse because the Code and 1 U.S.C. § 7 did not recognize same-sex spouses.¹⁷² Now, though, under the scheme proposed above, the debtor would need to disclose the same-sex spouse's income, regardless of whether they were filing jointly. This may result in the filing spouse becoming an above-median debtor under 11 U.S.C. § 1322(d)(1), triggering the five-year plan requirement.¹⁷³ Additionally, this may result in a higher projected disposable income, which would lead to higher monthly payments under the plan.¹⁷⁴

Debt limitations may also become problematic for same-sex couples now wanting to file jointly under chapter 13 of the Code. Under 11 U.S.C. § 109(e):

an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts

¹⁶⁹ See Haines, *supra* note 137, at 41.

¹⁷⁰ See *id.*

¹⁷¹ See *supra* Parts II.A–C.

¹⁷² 11 U.S.C. § 1322(d) (“If the current monthly income of the debtor and the debtor’s spouse combined . . .”) (emphasis added).

¹⁷³ *Id.* § 1322(d)(1).

¹⁷⁴ *Id.* § 1325(b)(2) (defining disposable income).

that aggregate less than \$383,175 and noncontingent, liquidated, secured debts of less than \$1,149,525 may be a debtor under chapter 13 of this title.¹⁷⁵

The aggregation limitation of § 109(e) may now prove troublesome for same-sex couples who want to file jointly because they may not qualify for a chapter 13 when the couple's debts are aggregated together. Prior to the option to jointly file, same-sex couples did not necessarily have to worry about the aggregate collection of their debts because they were limited to filing individually. Under the framework proposed in this Article however, if a same-sex couple wishes to file jointly under chapter 13, their aggregated debt may not allow them to utilize the personal restructuring of chapter 13. If a same-sex couple chooses to file jointly with an aggregate amount of debt that exceeds either or both the secured or unsecured debt limitations of § 109(e), the couple may only have the option of voluntarily dismissing the case and filing individually or completely liquidating under a joint chapter 7 bankruptcy.

Furthermore, the recognition of same-sex marriage under the Code could have ramifications on both chapter 7 and chapter 13 liabilities because the assets of the marital unit may become larger. Sections like 11 U.S.C. § 1325(a)(4), which requires debtors to estimate the value of a liquidated estate under chapter 7 in order for a chapter 13 plan to be confirmed, may substantially increase the confirmation threshold because the Code would now require the debtor to consider their same-sex spouse.¹⁷⁶ Ultimately, this may actually exclude some same-sex couples from the bankruptcy system due to high payments or over-exempt assets when, under DOMA, they would not have been limited in such ways.

With same-sex couples being able to file jointly under this proposed framework, the property of the estate also changes form. 11 U.S.C. § 541 defines property of the estate for bankruptcy proceedings.¹⁷⁷ Section 541(a) defines property of the bankruptcy estate as, "all legal or equitable interests of the debtor in property as of the commencement of the case," "all interests of the debtor and the debtor's spouse in community property as of the

¹⁷⁵ *Id.* § 109(e).

¹⁷⁶ *Id.* § 1325(a)(4). See generally Robert F. Kidd & Frederick C. Hertz, *Partnered in Debt: The Impacts of California's New Registered Domestic Partner Law on Creditors' Remedies and Debtors' Rights, Under California Law and Under Federal Bankruptcy Law*, 28 FED. CAL. BANKR. J. 148 (2006) (discussing the ramifications of the California law which has analogous ties to the arguments set out in the article but just on a state level scale).

¹⁷⁷ 11 U.S.C. § 541.

commencement of the case,” and “[p]roceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earning from services performed by an individual debtor after the commencement of the case.”¹⁷⁸ Under this framework, which allows married same-sex couples to jointly file, the property of the estate will increase to include any property that the same-sex couple jointly owns because of § 541(a)(2).¹⁷⁹ Property of the estate includes:

[a]ll interests of the debtor and the debtor’s spouse in community property as of the commencement of the case that is under the sole, equal, or joint management and control of the debtor; or liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and allowable claim against the debtor’s spouse, to the extent that such interest is so liable.¹⁸⁰

Thus, the allowance of same-sex couples to be recognized as married under the Code affects the scope of the bankruptcy estate, even if the same-sex couple does not file jointly.¹⁸¹

Those states that have community property laws for married couples will now be faced with an interesting change in policy under the proposed framework of the Code.¹⁸² In particular, California’s community property law offers an excellent example of how the recognition of same-sex marriages in the Code can substantially alter the estate under § 541(a). Robert Kidd and Frederick Hertz explored these issues.¹⁸³ Kidd and Hertz asserted that, while same-sex domestic partners under California law may have community property that “significantly expands creditors’ rights in the assets of registered domestic partners,” under DOMA, the Code did not afford such rights to creditors.¹⁸⁴ However, under the framework suggested in this Article, the community property would then be available to creditors under the Code as long as the couple is both registered as domestic partners in California and lawfully married in a state that allows same-sex unions.¹⁸⁵ So, under California’s community property laws and the framework of this Article, a

¹⁷⁸ *Id.* § 541(a).

¹⁷⁹ *Id.* § 541(a)(2).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *See* Kidd & Hertz, *supra* note 176, at 148–53.

¹⁸³ *Id.* at 148.

¹⁸⁴ *Id.* at 157.

¹⁸⁵ *See* Kidd & Hertz, *supra* note 176, at 155–58; *supra* Part II.A.

married same-sex couple that files, either jointly or individually, will have their estate expanded under the new reading of § 542(a).¹⁸⁶

With this ability to file joint petitions under the Code, other limitations arise with the expanded definitions of marriage and spouse. For same-sex couples to be truly equal to their heterosexual couple counterparts, they also must face the same limitations of the Code.

E. Alternatives to State Recognition of Same-Sex Couples Joint Filing Under 11 U.S.C. § 302(a)

If the above framework is rejected, there still may be the possibility for same-sex couples wishing to file jointly to access the bankruptcy system. In states such as California and New York where same-sex couples can lawfully marry, the bankruptcy courts in those jurisdictions have allowed same-sex couples to file jointly.¹⁸⁷ Courts finding that same-sex couples could file jointly,¹⁸⁸ even with DOMA's limiting definitions of marriage and spouse controlling the reading of 11 U.S.C. § 302(a), justified their decisions on the bankruptcy court's equitable powers, specifically concerning the overarching purposes of the bankruptcy system.¹⁸⁹ With the bankruptcy court's power originating from equity, the courts have the ability to weigh the equitable considerations of a fresh start for debtors against the necessary protections of creditors to circumvent certain barriers that would bar a joint filing.¹⁹⁰

An example of this use of equitable powers is in the case of *In re Somers* where the court found that the United States Trustee's motion to dismiss under § 707(a)¹⁹¹ because of DOMA required dismissal was not "in the best interests

¹⁸⁶ Kidd & Hertz, *supra* note 176, at 186.

¹⁸⁷ See, e.g., *In re Ziviello-Howell*, No. 2:11CV00916, 2011 U.S. Dist. LEXIS 57838 (E.D. Cal. May 31, 2011); *In re Somers*, 448 B.R. 677, 682–83 (Bankr. S.D.N.Y. 2011); Hauser, *supra* note 17, at 196.

¹⁸⁸ See, e.g., *Ziviello-Howell*, 2011 U.S. Dist. LEXIS 57838; *Somers*, 448 B.R. at 682–83.

¹⁸⁹ See Rush, *supra* note 115, at 745–46 (discussing the purposes of the bankruptcy system: "to provide a fresh start for the honest debtor" and "to protect the rights of creditors by creating an organized system that governs the repayment of debts").

¹⁹⁰ See *id.*

¹⁹¹ 11 U.S.C. § 707 (2012). Section 707(a) states:

(a) The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including—

- (1) unreasonable delay by the debtor that is prejudicial to creditors;
- (2) nonpayment of any fees or charges required under chapter 123 of title 28; and
- (3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information

of all parties” and thus allowed the case to continue as a joint filing.¹⁹² The court reasoned that since failure to abide by DOMA did not fall under any of the provisions of § 707(a) that would permit dismissal, the Trustee’s motion was improper.¹⁹³ The court continued and explained that when determining whether a § 707(a) motion for dismissal should be granted, the court “has substantial discretion in ruling on a motion to dismiss under section 707(a), and in exercising that discretion [it] *must consider any extenuating circumstances*, as well as the interests of the various parties.”¹⁹⁴ Particularly, the court noted that when a § 707(a) motion is “not premised upon one of the enumerated reasons” the court must give a “case-by-case analysis to determine ‘whether dismissal would be in the best interest of *all* parties’”¹⁹⁵ If the above framework were not adopted, moving forward, bankruptcy courts may be able to frame the allowance of the same-sex joint filing as an equitable remedy for the “best interests of all parties.”¹⁹⁶

Along this same line of reasoning, a bankruptcy court may find that under 11 U.S.C. § 105(a), the court could allow the joint filing of a bankruptcy for a same-sex couple.¹⁹⁷ 11 U.S.C. § 105 describes the powers of the court in bankruptcy proceedings.¹⁹⁸ In relevant part, 11 U.S.C. § 105(a) states: “The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”¹⁹⁹ If courts were to adopt the premise that one of the “provisions of this title”²⁰⁰ is to administer a bankruptcy proceeding in “the best interests of all parties,”²⁰¹ then the court may have substantial leeway in allowing same-sex couples to file jointly if doing so would be “appropriate to carry out the provisions of this title.”²⁰²

Then, much like the court in *Somers*, the circumstances surrounding joint cases filed by same-sex couples may be positioned in such a way that it would

required by paragraph (1) of section 521(a), but only on a motion by the United States trustee.

Id. at § 707(a).

¹⁹² 448 B.R. at 683.

¹⁹³ *Id.* at 682–83.

¹⁹⁴ *Id.* at 682 (quoting 6 COLLIER ON BANKRUPTCY, *supra* note 37, ¶ 707).

¹⁹⁵ *Id.* at 682–83 (quoting *In re Dinova*, 212 B.R. 437, 442 (2d Cir. B.A.P. 1997)).

¹⁹⁶ *Id.* at 683.

¹⁹⁷ 11 U.S.C. § 105 (2012).

¹⁹⁸ *Id.* § 105(a).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Somers*, 448 B.R. at 683.

²⁰² 11 U.S.C. § 105(a).

be to the benefit of both the creditors and the debtors to allow the joint case to proceed. This is because, as discussed earlier, allowing same-sex couples to file jointly would most likely increase the assets available in the bankruptcy estate.²⁰³ With this increase in estate property, the creditors, theoretically, would be able to receive a greater return on their claims from the joint debtors' estate than if they were to receive distributions from an individual's estate. In this formulation of court authority, it would be within the bankruptcy court's power to allow same-sex couples to file jointly if it were to the best interests to all the parties.

While the Supreme Court has found DOMA's definitional section unconstitutional, the bankruptcy court has alternatives to ensure fair and equitable administration of a same-sex couple's estate if all states are not required to allow same-sex couples to file jointly under the framework argued for in this Article.

CONCLUSION

Following *Windsor*, same-sex couples who are lawfully married in a state that recognizes such unions can now file joint bankruptcies in any state and apply either federal exemptions or allowable state exemptions because of the unconstitutionality of DOMA and its definitions of "spouse" and "marriage." The definitions of "spouse" and "marriage" in the Code should be read to respect marriages lawfully performed in the state of celebration in light of traditional federalism principles, which have left the definitions of marital rights to the state. All citizens should have equal access to the Code no matter what state of origin or sexual orientation. With multiple states now recognizing same-sex marriages, the Code must also recognize these marriages in order to truly be available to all citizens.

The writing is on the wall. Marriage may soon be recognized as a fundamental right for all citizens—homosexual and heterosexual alike. The Supreme Court heard *Obergefell v. Hodges* on April 28, 2015, with a decision expected sometime in June, which looks to finally answer the question of whether the Fourteenth Amendment requires states to include same-sex couples in their definition of "marriage." If the recent trend in federal courts is any indication of the likelihood of how the Supreme Court will hold, the right for same-sex couples to marry will be nationally recognized. The potential that

²⁰³ See *supra* Part II.D.

questions will remain unanswered is also present. Even if state bans on same-sex marriages stand, federal schemes and systems—bankruptcy included—must adapt.

Moving forward, the interpretation proposed in this Article would potentially result in more joint filings under chapter 7 and chapter 13 of the Code. While some may claim that, with this increase of joint filings, creditors may be harmed, this does not necessarily hold true. The same limitations that governed heterosexual couples jointly filing would also apply to the joint filings of same-sex couples. So the same safeguards that are instituted in the Code would ensure that creditors' interests are protected will continue to stand. This reading of the Code would allow the estates of same-sex couples to have more assets available to disburse to creditors because of the provisions of the Code that view marital property as an asset of the estate, whether filing jointly or not. This larger estate would increase the disbursement each individual creditor would get in either a chapter 7 or chapter 13 joint filing or individual filing, putting the creditors in a better posture post-discharge.

Even if the framework propped in this Article is not adopted, bankruptcy courts still have alternatives that would allow same-sex couples to file jointly through the court's equity powers. While bankruptcy courts have notably limited their use of equity powers under 11 U.S.C. § 105, the benefit of these joint filings for administrative ease and benefit to all interested parties overcomes this hesitation. This not only further promotes the "fresh start" for the same-sex debtors but also ensures efficiency and consolidation for the bankruptcy court. By further streamlining the bankruptcy process to promote efficiency, the resources of the bankruptcy court can now be focused on finding the best outcome for both the debtors and creditors rather than having the court enter a highly political debate on same-sex marriage. It will allow the court to focus on furthering the purposes of the Code.

Overall, the framework proposed in this Article will allow bankruptcy filings by same-sex couples to actually reflect the realities of their economic condition rather than creating a legal fiction through the illusion of individual filings. When DOMA controlled the Code, same-sex couples had to file individually and contour their finances to fit within the individual filing requirements of the Code. However, under this Article's framework, same-sex couples would be able to file a joint bankruptcy petition that outlines more precisely their joint property, debts, accounts, etc. The ability to file jointly, as a marital unit, would be a true image of the debtors' finances as compared to

forcing the debtors to file individually because of discriminatory definitions of “marriage” and “spouse.” Essentially, this framework allows for more truthful filings, which in turn would further promote the purposes of the bankruptcy system.

Same-sex marriage will continue to sit, at least for the foreseeable future, at the center of heated moral, political, and legal debates in this nation. These debates, though, should not be so construed as to deny lawfully married couples the right and opportunity to jointly access the bankruptcy system. The protections of the Code have become increasingly more important in a time of economic crisis. With stories of home foreclosures and harassment by debt collectors on the rise, it is essential for citizens to have the chance to enjoy a federal system that could alleviate the burden of debt that has become far too common. The interpretation presented in this Article would ensure that each citizen would be able to utilize the Bankruptcy Code for the purpose of a “fresh start.”