

**PREEMPTION OF PUBLIC BENEFITS IN THE SHADOW OF DOMA:  
WHEN STATE AND FEDERAL LAW COLLIDE**

*Sarah R. Sullivan\* and Martha Pardo\*\**

**I. INTRODUCTION: THE EVOLUTION OF MARRIAGE EQUALITY**

The road to marriage equality in the United States is long and winding.<sup>1</sup> While on the same journey, the states and the federal government choose different paths with different destinations and very different impacts on their citizens.<sup>2</sup> This Article discusses the impact of the United States Supreme Court's recent abrogation of the Defense of Marriage Act ("DOMA"), in *United States v. Windsor*,<sup>3</sup> on eligibility for and access to public benefits by same-sex couples and their families.

---

\* Sarah R. Sullivan is an associate professor of Professional Skills at Florida Coastal School of Law. She leads FCSL's Disability and Public Benefits Clinic and teaches professional skills courses. Ms. Sullivan was formerly a senior staff attorney at Jacksonville Area Legal Aid, Inc., where she practiced family, elder and health care law. She also worked as counsel for the South Carolina Department of Social Services, the Clekis Law Firm, and her own solo practice, Sarah R. Sullivan, LLC. She serves on the Executive Council of the Public Interest Law Section and the Family Law Section as well as several state and local bar committees. She earned her Bachelor of Arts degree from the University of Florida in Gainesville and her Juris Doctor degree from Florida State University College of Law in Tallahassee. Ms. Sullivan is a member of the Florida and South Carolina Bar Associations.

\*\* Martha Pardo serves as a supervising attorney at Florida Rural Legal Services, Inc. at the West Palm Beach office. Her main areas of practice include federally subsidized housing, private housing, social security, and consumer law. During her career, Ms. Pardo has successfully challenged a housing authority for violating tenants' due-process rights. Prior to relocating to South Florida, Ms. Pardo was a solo practitioner. She began practicing law in 2006 when she started her career at Jacksonville Area Legal Aid, Inc. in the Fair Housing and Medicaid Reform Unit. Ms. Pardo is admitted to practice law in Florida. She is also admitted in the Federal Middle and Southern Districts of Florida. Ms. Pardo obtained her Bachelor of Arts degree in Psychology from Florida International University and graduated from Florida Coastal School of Law in 2006 with a Juris Doctor degree.

<sup>1</sup> See Dorothy Samuels, *A Long, Winding Road to Marriage Equality*, N.Y. TIMES, Nov. 12, 2011, available at [http://www.nytimes.com/2011/11/13/opinion/sunday/a-long-winding-road-to-marriage-equality.html?\\_r=0](http://www.nytimes.com/2011/11/13/opinion/sunday/a-long-winding-road-to-marriage-equality.html?_r=0).

<sup>2</sup> See *id.*

<sup>3</sup> *United States v. Windsor*, 133 S. Ct. 2675 (2013).

The Stonewall riots of New York City in June 1969 propelled the gay rights movement into the American conscience.<sup>4</sup> While some civil rights activists took to the streets, others brought the fight to the courts.<sup>5</sup> Prior to the 1990s, most states' constitutions and statutes ambiguously defined marriage, domestic partnerships, or both without regard to gender.<sup>6</sup> In many jurisdictions, the ambiguity gave gay couples an opportunity to challenge laws by seeking marriage licenses.<sup>7</sup> Even in states with a statutory or constitutional prohibition of same-sex marriage, couples challenged the constitutionality of same-sex marriage bans beginning in the mid-1990s.<sup>8</sup> Hawaii's decision in *Baehr v. Lewin* thrust same-sex marriage into the national spotlight with the challenge that statutes limiting marriage to opposite-sex couples violated Hawaii's equal protection clause.<sup>9</sup> Because the Hawaii Supreme Court identified same-sex partners as a protected class, the State of Hawaii was then compelled to show that the statute was justified by a compelling state interest and narrowly tailored.<sup>10</sup> The Hawaii Supreme Court's remand back to the trial court triggered passage of a constitutional amendment restricting marriage as between a man and a woman on the state level and the ultimate passage of DOMA

---

<sup>4</sup> Elvia R. Arriola, *Faeries, Marimachas, Queens, and Lezzies: The Construction of Homosexuality Before the 1969 Stonewall Riots*, 5 COLUM. J. GENDER & L. 33, 33 (1995).

<sup>5</sup> *E.g.*, *Adams v. Howerton*, 486 F. Supp. 1119, (C.D. Cal. 1980), *aff'd*, 673 F.2d 1036 (9th Cir. 1982).

<sup>6</sup> *See, e.g., id.* at 1122. The petitioners had a marriage license issued in Colorado. *Id.* at 1120-21. When Adams, the plaintiff, petitioned the federal government on behalf of his same-sex spouse, the Immigration and Naturalization Service denied his petition. *Id.* The district court held that, because Colorado's statute was vague, federal law would define whether the marriage was valid if the state law was contrary to public policy. *Id.* at 1123. Thus, Adams and his same-sex partner were not "spouses" in the context of the Federal Immigration and Nationality Act. *Id.* at 1125. The Ninth Circuit affirmed that same-sex marriage does not make one a "spouse." *Adams v. Howerton*, 673 F.2d 1036, 1043 (9th Cir. 1982).

<sup>7</sup> *E.g.*, *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. Ct. App. 1973).

<sup>8</sup> *E.g.*, *Baehr v. Lewin*, 852 P.2d 44, 48-49 (Haw. 1993).

<sup>9</sup> *Baehr*, 852 P.2d 44; James M. Patten, *The Defense of Marriage Act: How Congress Said "No" to Full Faith and Credit, and the Constitution*, 38 SANTA CLARA L. REV. 939, 939 (1998).

<sup>10</sup> *Baehr*, 852 P.2d at 67.

on the national level.<sup>11</sup> After *Baehr*, states began to grapple with same-sex marriage, civil unions, and domestic partnerships in varying aspects of individual rights.<sup>12</sup>

The right to marry signaled the starting point and not the endgame as to legal issues confronting same-sex couples.<sup>13</sup> Cases concerning inheritance rights, federal and state benefits, taxation, and even the right to be present at a same-sex partner's deathbed meandered through the court system until the landmark case of *Windsor* became the missing keystone to federal recognition of same-sex marriage.<sup>14</sup> Although *Windsor* is touted as a victory for gay-rights activists, and abrogates the inherent discrimination in DOMA, *Windsor* stands more for state supremacy and falls short of dictating a national definition of marriage.<sup>15</sup> Before contemplating the future effects of the *Windsor* decision, it is necessary to understand the history of DOMA.

## II. HISTORY OF DOMA

“As a general rule, [federal courts] do not adjudicate issues of marital status even when there might otherwise be a basis for federal jurisdiction.”<sup>16</sup> Throughout history, states have had the authority to define and regulate marriage within their boundaries.<sup>17</sup> Yet, Congress can make determinations that influence marital rights and privileges.<sup>18</sup>

Congress enacted DOMA in 1996.<sup>19</sup> The Act has two sections relevant to this discussion.<sup>20</sup> The first relevant section, section 2, gives

---

<sup>11</sup> Patten, *supra* note 9, at 943-44.

<sup>12</sup> *See id.*; SECTION OF FAMILY LAW, AMERICAN BAR ASSOCIATION, AN ANALYSIS OF THE LAW REGARDING SAME-SEX MARRIAGE, CIVIL UNIONS, AND DOMESTIC PARTNERSHIPS 16-37 (2005), <http://www.americanbar.org/content/dam/aba/migrated/family/reports/WhitePaper.pdf>.

<sup>13</sup> *See* SECTION OF FAMILY LAW, *supra* note 12, at 16-22.

<sup>14</sup> *See* United States v. Windsor, 133 S. Ct. 2675, 2688 (2013).

<sup>15</sup> *Id.* at 2691.

<sup>16</sup> *Id.* (citing Ankenbrandt v. Richards, 504 U.S. 689, 703 (1992)).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 2690.

<sup>19</sup> 1 U.S.C. § 7 (2012); 28 U.S.C. § 1738C (2012); Defense of Marriage Act of 1996, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

<sup>20</sup> *Windsor*, 133 S. Ct. at 2682-83.

each state the discretion to recognize same-sex marriages performed in other states.<sup>21</sup> This state discretion departs from the Full Faith and Credit Clause of the United States Constitution, which requires states to give full faith and credit to other states' public acts, records, and court proceedings.<sup>22</sup> During the debate on the passage of DOMA, proponents of DOMA argued the need for section 2 because the absence of such a provision would "threaten[] to have very real consequences both on federal law and the laws (especially the marriage laws) of the various States."<sup>23</sup> Congress used its power under the Full Faith and Credit Clause to "enact legislation prescribing what (if any) effect shall be given by the States to the public acts, records, or proceedings of other States relating to homosexual 'marriage.'"<sup>24</sup>

The second relevant section, section 3, defines marriages for purposes "of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States . . . ."<sup>25</sup> Section 3 defines marriage as "a legal union between one man and one woman . . . ."<sup>26</sup> The word spouse "refers only to a person of the opposite sex who is a husband or a wife."<sup>27</sup>

*Windsor* challenged the constitutionality of DOMA after the State of New York had not only offered full faith and credit to same-sex marriages but had also passed its own legislation legalizing New York same-sex marriages.<sup>28</sup> Edith Windsor, who was legally married to her

---

<sup>21</sup> See 28 U.S.C. § 1738C (explaining that no state is required to recognize a same-sex marriage from another state).

<sup>22</sup> U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.").

<sup>23</sup> H.R. REP. NO. 104-664, at 2 (1996). The house report went on to say that, if a state "recognizes same-sex 'marriages,' other States that do not permit homosexuals to marry would be confronted with the complicated issue of whether they are nonetheless obligated under the Full Faith and Credit Clause of the United States Constitution to give binding legal effect to such unions." *Id.*

<sup>24</sup> *Id.* at 25.

<sup>25</sup> 1 U.S.C. § 7 (2012).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> See N.Y. DOM. REL. LAW § 10-a (McKinney 2011) (showing that, prior to *Windsor*, New York passed legislation legalizing same-sex marriages).

lifelong partner, Thea Spyer, in Canada in 2007, brought the case.<sup>29</sup> They lived as a legally recognized married couple in the State of New York.<sup>30</sup> When Spyer died in 2009, even the most sophisticated estate planning could not relieve Windsor of the federal tax liability Spyer's estate incurred because the IRS failed to recognize their marriage under DOMA.<sup>31</sup> In *Windsor*, the Supreme Court ruled that "DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution."<sup>32</sup>

The Supreme Court rendered DOMA invalid because there is "no legitimate purpose . . . to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."<sup>33</sup> According to the Supreme Court, DOMA departed from the history and tradition of reliance on state law.<sup>34</sup>

Although the United States no longer prohibits same-sex marriages, the U.S. Supreme Court's abrogation of DOMA paints a gray area for those administrative social programs meant to act as safety nets for families having state and federal ties.<sup>35</sup> This Article identifies current entitlement programs, explores how the relationship between the state and federal governments affects the Supremacy Clause of the U.S. Constitution, and interprets, in light of DOMA's abrogation, how a state's definition of marriage affects those entitlement programs for same-sex couples.

### III. REGULATION AND RELATIONSHIP: FEDERAL VERSUS STATE AGENCIES

Many of the pre-*Windsor* courts that addressed the issue of same-sex marriage delegated the definition of marriage to state legislatures or state constitutional referendums.<sup>36</sup> Since 1998, thirty-

---

<sup>29</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2682 (2013).

<sup>30</sup> *Id.* at 2683.

<sup>31</sup> *Id.* at 2682.

<sup>32</sup> *Id.* at 2695.

<sup>33</sup> *Id.* at 2696.

<sup>34</sup> *Id.* at 2692.

<sup>35</sup> *See infra* Parts III-IV.

<sup>36</sup> *See Windsor*, 133 S. Ct. at 2689-91; *see, e.g., Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 391 (D. Mass. 2010).

two states have passed, by popular vote, a ban on same-sex marriage.<sup>37</sup> Only Arizona's proposed ban referendum failed the popular vote in 2006.<sup>38</sup> Two years later, a narrower measure passed in Arizona that banned same-sex marriage but not civil unions.<sup>39</sup> Statutes limiting marriage as between members of the opposite sex exist in five states: Hawaii, Indiana, Pennsylvania, West Virginia, and Wyoming.<sup>40</sup> DOMA's demise, although a policy win for proponents of marriage equality, hands power back to the states to define marriage for their citizens.<sup>41</sup> As a result, an already overwhelming quagmire of entitlement programs that run the spectrum regarding federal oversight and funding may now become even more complicated by states' definitions of family and marriage.<sup>42</sup>

### A. *Public Benefits: State, Federal, and Hybrid*

Exploring the doctrines of supremacy and preemption requires an all-or-nothing approach to resolving conflict between state and federal law.<sup>43</sup> However, in the administrative context of entitlement

---

<sup>37</sup> Pamela M. Prah, *Historic Gay Marriage, Marijuana Measures Win Approval*, PEW CHARITABLE TR. (Nov. 7, 2012), <http://www.pewstates.org/projects/stateline/headlines/historic-gay-marriage-marijuana-measures-win-approval-85899428364>; Rachel Weiner, *Why Does Gay Marriage Keep Losing at the Ballot Box?*, WASH. POST (May 9, 2012, 1:44 PM), [http://www.washingtonpost.com/blogs/the-fix/post/why-does-gay-marriage-keep-losing-at-the-ballot-box/2012/05/09/gIQAzhlNDU\\_blog.html](http://www.washingtonpost.com/blogs/the-fix/post/why-does-gay-marriage-keep-losing-at-the-ballot-box/2012/05/09/gIQAzhlNDU_blog.html).

<sup>38</sup> *Same-Sex Marriage and Domestic Partnerships on the Ballot*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/same-sex-marriage-on-the-ballot.aspx> (last updated Nov. 7, 2012).

<sup>39</sup> *See id.*

<sup>40</sup> *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/human-services/same-sex-marriage-overview.aspx> (last updated Oct. 21, 2013).

<sup>41</sup> *See Windsor*, 133 S. Ct. at 2689-93.

<sup>42</sup> *See infra* Part III.A.

<sup>43</sup> *See* U.S. CONST. art. VI, cl. 2; *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 109 S. Ct. 1262, 1273 (1989) ("Congress has the power under the Supremacy Clause of Article VI of the Constitution to pre-empt state law. . . . In the absence of explicit statutory language signaling an intent to pre-empt, [courts] infer such intent where Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law, or where the state law at issue conflicts with federal law, either because it is impossible to comply with both, or because the state law stands as an obstacle to the accomplishment and execution of

programs that coexist with varying degrees of state and federal regulation, how will DOMA's demise affect public benefits for same-sex couples?

Programs such as Social Security and Medicare are purely federal, and, thus, will now recognize same-sex marriages.<sup>44</sup> The U.S. Code and Code of Federal Regulations as well as agency policies will govern the operations of such programs.<sup>45</sup> Other federal programs, such as the Supplemental Nutrition Assistance Program (formerly known as food stamps), are funded by the federal government but administered by the states.<sup>46</sup> Although legislative and regulatory provisions are handed down by the federal government for these programs, states determine eligibility for and administration of the programs.<sup>47</sup> Likewise, federal housing programs, such as the Department of Housing and Urban Development ("HUD") and Section 8 Housing Choice Voucher ("Section 8") programs, are federally funded and administered by municipalities (cities and counties) within the states, adding additional layers of regulatory confusion.<sup>48</sup>

A true blend of federal and state lawmaking power and funding exists in the Medicaid and Temporary Assistance to Needy Families programs.<sup>49</sup> The federal government provides some funding and some statutory and regulatory powers, but the states have concurrent funding obligations, statutory and regulatory powers, and, in most cases, responsibility for the day-to-day operations of the programs.<sup>50</sup> These hybrid programs provide the greatest opportunity for differing interpretations of marriage and family in the context of DOMA's recent

---

congressional objectives." (citations omitted)).

<sup>44</sup> See *infra* Part III.B.1-2.

<sup>45</sup> See *Social Security Program Rules*, SOC. SEC. ADMIN., <http://www.ssa.gov/regulations/#a0=2> (last visited Jan. 24, 2014) ("Our current program rules include the law; regulations; Commissioner rulings; and, employee operating instructions.").

<sup>46</sup> See 7 U.S.C. § 2027 (2012); 7 C.F.R. § 271.4(a) (2013).

<sup>47</sup> See 7 C.F.R. § 271.1(b) (2013).

<sup>48</sup> See 24 C.F.R. § 982.1 (2013); 24 C.F.R. § 982.101 (2013).

<sup>49</sup> See Liz Schott, *Policy Basics: An Introduction to TANF*, CTR. ON BUDGET & POL'Y PRIORITIES 1-5 (Dec. 4, 2012), <http://www.cbpp.org/files/7-22-10tanf2.pdf>.

<sup>50</sup> See *id.*

abrogation.<sup>51</sup>

### **B. Means Testing and Taxation**

Entitlement programs for the poor derive eligibility through means-testing<sup>52</sup> in addition to other requirements set by state, federal, or municipal governments.<sup>53</sup> Income, estate, and gift taxes affect individuals based on marital and family status.<sup>54</sup> The DOMA decision frees same-sex spouses to file federal joint tax returns as “married” when, previously, same-sex partners were prohibited.<sup>55</sup> States impose income, estate, and gift taxes based on their own definitions of marriage and family.<sup>56</sup> Prior to DOMA’s abrogation, it was possible for a same-sex married couple from a jurisdiction that recognized same-sex marriage to file a joint tax return in the couple’s state of residency and separate federal tax returns.<sup>57</sup> For same-sex spouses with children in common, filing separate tax returns further complicates tax benefits, such as dependent designations, tax credits, and exemptions.<sup>58</sup> In August 2013, the IRS issued Revenue Ruling 2013-17 and departed from over fifty years of policy—but embraced the *Windsor* opinion—by determining filing status based on “state of celebration” rather than “state of domicile.”<sup>59</sup> The IRS defined “state” broadly to include one of the fifty states, the District of Columbia, a U.S. territory, or a foreign country.<sup>60</sup>

---

<sup>51</sup> See *supra* notes 41-42 and accompanying text.

<sup>52</sup> According to the Department of Health and Human Services, “a program is considered ‘means-tested’ if eligibility for the program’s benefits, or the amount of such benefits, or both, are determined on the basis of income or resources of the eligibility unit seeking the benefit.” 62 Fed. Reg. 45,256, 45,257 (Aug. 26, 1997).

<sup>53</sup> See *Vaughn v. Sullivan*, 83 F.3d 907, 908 (7th Cir. 1996).

<sup>54</sup> See *U.S. v. Windsor*, 133 S. Ct. 2675, 2694-95 (2013).

<sup>55</sup> See *id.* at 2695-96; I.R.S. News Release IR-2013-72, 2013 WL 4607596 (Aug. 29, 2013).

<sup>56</sup> See *Goodridge v. Dep’t of Pub. Health*, 789 N.E.2d 941, 954-56 (Mass. 2003).

<sup>57</sup> Joseph Henchman, *IRS Issues “State of Celebration” Guidance for Same-Sex Couples: Further Guidance by 24 States May Be Required*, FISCAL FACT (Tax Foundation, Washington, D.C.), Aug. 29, 2013, at 2, available at <http://taxfoundation.org/sites/taxfoundation.org/files/docs/ff393.pdf>; see I.R.S. News Release, *supra* note 55.

<sup>58</sup> See *Windsor*, 133 S. Ct. at 2695.

<sup>59</sup> Rev. Rul. 2013-17, 2013-38 I.R.B. 201; Henchman, *supra* note 57, at 1.

<sup>60</sup> Rev. Rul. 2013-17, 2013-38 I.R.B. 201, *supra* note 59, at n.1 (“For purposes of this



As was the case in *Windsor*, a same-sex couple married in Canada, but living in the United States, may file a federal joint tax return.<sup>61</sup> Beyond income, estate, and gift taxes, the revenue ruling also affects same-sex spouses' ability to receive employer refunds for previously taxed health insurance and fringe benefits as well as tax consequences of cafeteria plans and qualified retirement plans.<sup>62</sup>

Civil unions or domestic partnerships, in states where they are recognized as such, are not included in the term "same-sex marriage" for purposes of the new tax benefit.<sup>63</sup> Additionally, the revenue ruling forces states that fail to recognize same-sex marriages to create policy to guide same-sex spouses on how to file the state tax returns when the state requires reference to the federal tax return upon filing the state return.<sup>64</sup> For example, a state may create policy to allow same-sex married couples a special filing status on state returns short of "married, filing jointly" status.<sup>65</sup>

#### 1. Medicare

Medicare is a federal health-insurance program for individuals age sixty-five or older and individuals with disabilities receiving Social

---

ruling, the term 'state' means any domestic or foreign jurisdiction having the legal authority to sanction marriages."); see I.R.S. News Release IR-2013-72, 2013 WL 4607596 (Aug. 29, 2013) ("Any same-sex marriage legally entered into in one of the 50 states, the District of Columbia, a U.S. territory or a foreign country will be covered by the ruling."). Jacob J. Lew, Secretary of the U.S. Department of the Treasury commented, "This ruling also assures legally married same-sex couples that they can move freely throughout the country knowing that their federal filing status will not change." Press Release, U.S. Dep't of the Treasury, *All Legal Same-Sex Marriages will be Recognized for Federal Tax Purposes* (Aug. 29, 2013), available at <http://www.treasury.gov/press-center/press-releases/Pages/jl2153.aspx>.

<sup>61</sup> See *Windsor*, 133 S. Ct. at 2682; I.R.S. News Release IR-2013-72, 2013 WL 4607596 (Aug. 29, 2013).

<sup>62</sup> See Rev. Rul. 2013-17, 2013-38 I.R.B. 201.

<sup>63</sup> See *id.*

<sup>64</sup> See Henchman, *supra* note 57, at 2 (recognizing the following options: "permitting taxpayers to reference a 'dummy' federal return reflecting single filing status for their state return, or permitting taxpayers to 'split' a joint federal return down the middle, using one-half for each single state return, or creating a new filing status permitting any taxpayer that files a joint federal return to file a joint state return, especially if the state presently recognizes civil unions or domestic partnerships").

<sup>65</sup> See *id.* at 2, 5.

Security disability insurance benefits.<sup>66</sup> Medicare's original purpose was to provide older Americans with healthcare services.<sup>67</sup> Medicare did not add disabled individuals to the program until 1972, and, to date, disabled individuals have to wait two years after their Social Security disability determination to begin receiving Medicare coverage.<sup>68</sup> The only two exceptions are end-stage renal disease and amyotrophic lateral sclerosis, also known as Lou Gehrig's disease.<sup>69</sup> All other disabled individuals must wait the twenty-four-month period for Medicare coverage, and, unfortunately, an average of four percent of these individuals will die waiting for Medicare coverage.<sup>70</sup>

Medicare includes hospital insurance ("Part A"),<sup>71</sup> doctors' visits ("Part B"),<sup>72</sup> Medicare Advantage Plans ("Part C"),<sup>73</sup> and prescription-drug coverage ("Part D").<sup>74</sup> All eligible Medicare beneficiaries are automatically enrolled in Part A and do not have to pay monthly premiums.<sup>75</sup> Some individuals that are not eligible may opt into Medicare Part A by paying a premium.<sup>76</sup>

Premiums for Parts B and D are based on income and marital status.<sup>77</sup> The invalidity of DOMA requires that same-sex spouses who

---

<sup>66</sup> See 42 U.S.C. §§ 426(a)-(b), 1395c (2006).

<sup>67</sup> See Marian E. Gornick et al., *Thirty Years of Medicare: Impact on the Covered Population*, HEALTH CARE FINANCING REV., Winter 1996, at 179, available at <http://www.socialsecurity.gov/history/pdf/ThirtyYearsPopulation.pdf>.

<sup>68</sup> See 42 U.S.C. § 426(f); Gornick, *supra* note 67, at 181.

<sup>69</sup> See 42 U.S.C. §§ 426(h), 1395c.

<sup>70</sup> See *Medicare Two-Year Waiting Period*, CHRISTOPHER & DANA REEVE FOUND., [http://www.christopherreeve.org/site/c.ddJFKRNoFiG/b.6676367/k.3F82/Medicare\\_TwoYear\\_Waiting\\_Period.htm](http://www.christopherreeve.org/site/c.ddJFKRNoFiG/b.6676367/k.3F82/Medicare_TwoYear_Waiting_Period.htm) (last visited Nov. 7, 2013).

<sup>71</sup> 42 U.S.C. § 1395c; see SOC. SEC. ADMIN., SSA PUB. NO. 05-10043, MEDICARE 4 (2013) [hereinafter MEDICARE], available at <http://www.ssa.gov/pubs/EN-05-10043.pdf>.

<sup>72</sup> 42 U.S.C. § 1395j (2006); see MEDICARE, *supra* note 71, at 5.

<sup>73</sup> 42 U.S.C. § 1395w-21 (2006 & Supp. V 2011); see MEDICARE, *supra* note 71, at 5.

<sup>74</sup> 42 U.S.C. § 1395w-101 (2006 & Supp. V 2011); see MEDICARE, *supra* note 71, at 5.

<sup>75</sup> See MEDICARE, *supra* note 71, at 5-6.

<sup>76</sup> *Id.* at 5-7, 10.

<sup>77</sup> SOC. SEC. ADMIN., SSA PUB. NO. 05-10536, MEDICARE PREMIUMS: RULES FOR HIGHER-INCOME BENEFICIARIES 5 (2013) [hereinafter MEDICARE PREMIUMS], available at <http://www.ssa.gov/pubs/EN-05-10536.pdf>.

file federal tax returns as “married, filing jointly” now have to combine their incomes to determine the premiums for Parts B and D.<sup>78</sup> While most individuals pay standard premiums, those with higher incomes pay higher Part B and Part D premiums.<sup>79</sup> However, the benefits of marriage recognition by Medicare far outshine the increase of Medicare premiums for higher-income, same-sex spouses.<sup>80</sup> For example, as part of post-*Windsor* implementation, the Department of Health and Human Services now mandates that skilled nursing facilities covered by Medicare Advantage Plans must guarantee coverage for both spouses in the facility.<sup>81</sup> This policy removes the dilemma that a same-sex spouse might have in choosing between receiving coverage in a nursing home away from his or her same-sex spouse or disenrolling from the Medicare Advantage Plan and receive nursing home coverage at a higher cost.<sup>82</sup>

## 2. Social Security

The purposes of the Social Security Act are “[t]o provide for the material needs of individuals and families,” to protect the aged and disabled from medical expenses caused from illness, to protect families, and to give children the opportunity to grow up safe and secure.<sup>83</sup> The Social Security Act provides various benefits including insurance for

---

<sup>78</sup> See *supra* note 56 and accompanying text; MEDICARE PREMIUMS, *supra* note 77, at 5, 8.

<sup>79</sup> MEDICARE PREMIUMS, *supra* note 77, at 8. Couples filing taxes as “married, filing jointly” with a modified adjusted gross income greater than \$170,000 will pay higher premiums for Part B and Medicare prescription-drug coverage. *Id.* Individuals with a modified adjusted gross income greater than \$85,000 will pay higher premiums for Part B and Medicare prescription-drug coverage. *Id.* See generally 20 C.F.R. § 418.1115 (2013) (describing the 2007 modified adjusted gross income ranges and how those ranges will be adjusted in the future).

<sup>80</sup> See SOC. SEC. ADMIN., SSA PUB. NO. 05-10084, SURVIVORS BENEFITS 5, 8-9 (2013) [hereinafter SURVIVORS BENEFITS], available at <http://www.ssa.gov/pubs/EN-05-10084.pdf> (describing the benefits a surviving spouse is allowed to receive).

<sup>81</sup> Press Release, U.S. Dep’t of Health & Human Servs., HHS Announces First Guidance Implementing Supreme Court’s Decision on the Defense of Marriage Act (Aug. 29, 2013), <http://www.hhs.gov/news/press/2013pres/08/20130829a.html>.

<sup>82</sup> *Id.*

<sup>83</sup> SOC. SEC. ADMIN., SSA HANDBOOK § 100.1 (2006), available at [http://www.socialsecurity.gov/OP\\_Home/handbook/handbook.01/handbook-0100.html](http://www.socialsecurity.gov/OP_Home/handbook/handbook.01/handbook-0100.html).

retirement, survivors, and disabilities.<sup>84</sup> The Social Security Act also provides benefits for surviving spouses.<sup>85</sup> In order to qualify for retirement benefits, a worker must accumulate forty credits.<sup>86</sup> An individual accumulates one credit for every \$1,160 of earned income.<sup>87</sup> However, a person can only accumulate four credits per year.<sup>88</sup> The Social Security retirement program is federally funded and provides retirement, spousal, and survivor benefits.<sup>89</sup>

A spouse may be eligible for spousal retirement benefits even if the spouse has never worked.<sup>90</sup> The Social Security Administration may award benefits to a spouse if that spouse is at least sixty-two years old and the other spouse or ex-spouse is receiving or eligible for retirement or disability benefits.<sup>91</sup> A spouse may also qualify for Medicare at age sixty-five.<sup>92</sup> Benefits may also extend to a spouse who is caring for children even if the spouse does not have enough credits.<sup>93</sup> Further, Social Security benefits offer lump-sum death benefits for a surviving spouse.<sup>94</sup> The Social Security Administration is encouraging same-sex couples to apply for benefits (through the date of this Article's publication) since they may be eligible for benefits.<sup>95</sup> The Social Security Administration is also working with the Department of Justice in order to determine how to implement the rules for same-sex

---

<sup>84</sup> *Id.* § 100.2.

<sup>85</sup> SURVIVORS BENEFITS, *supra* note 80, at 4.

<sup>86</sup> SOC. SEC. ADMIN., SSA PUB. NO. 05-10035, RETIREMENT BENEFITS 4 (2013) [hereinafter RETIREMENT BENEFITS], *available at* <http://www.ssa.gov/pubs/EN-05-10084.pdf>. The forty-credit requirement applies to all individuals born after 1929. *Id.*

<sup>87</sup> SOCIAL SECURITY ADMINISTRATION, SSA PUB. NO 05-10024, UNDERSTANDING THE BENEFITS 8 (2013) [hereinafter UNDERSTANDING THE BENEFITS], *available at* <http://www.ssa.gov/pubs/EN-05-10024.pdf>.

<sup>88</sup> *Id.*

<sup>89</sup> RETIREMENT BENEFITS, *supra* note 86, at 8-10.

<sup>90</sup> *Id.* at 9.

<sup>91</sup> UNDERSTANDING THE BENEFITS, *supra* note 87, at 13.

<sup>92</sup> *Id.* at 19.

<sup>93</sup> *Id.* at 13.

<sup>94</sup> *Id.* at 14.

<sup>95</sup> SOC. SEC. ADMIN., *Do I Qualify for Benefits if I Live in a Place That Prohibits or Does Not Recognize Same-Sex Marriages or Other Legal Same-Sex Relationships?*, <https://faq.ssa.gov/ics/support/KBAnswer.asp?questionID=3547&hitOffset=85+84+25+24+19+18&docID=4930> (last updated Feb. 3, 2014).

2014]

*Sullivan and Pardo*

237

couples.<sup>96</sup>

“[I]n establishing income-based criteria for Social Security benefits, Congress decided that although state law would determine in general who qualifies as an applicant’s spouse, common-law marriages also should be recognized, regardless of any particular State’s view on these relationships.”<sup>97</sup> “[DOMA] denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security.”<sup>98</sup>

The Social Security Administration is already working towards clarifying how it provides benefits to same-sex couples.<sup>99</sup> So far, it seems that same-sex beneficiaries will be able to enjoy the benefits offered by Social Security.<sup>100</sup>

### 3. Military benefits

Although federal law governs military benefits, DOMA’s abrogation has a limited effect on active-duty and veterans’ benefits.<sup>101</sup> For active-duty service members, repeal of the “don’t ask, don’t tell” policy marked a significant shift in military policy regarding openly gay service members.<sup>102</sup> Even prior to the *Windsor* decision, the Department of Defense identified and offered benefits to same-sex partners and their families.<sup>103</sup> Without the need for civil union, domestic partnership, or same-sex marriage certificates, the Department

---

<sup>96</sup> *Id.*

<sup>97</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2690 (2013) (citing to 42 USC § 1382c(d)(2)).

<sup>98</sup> *Id.* at 2695.

<sup>99</sup> See Eric Yoder, *Social Security Administration Now Processing Same-Sex Marriage Benefit Claims*, WASH. POST, (August 12, 2013, 2:50 PM), <http://www.washingtonpost.com/blogs/federal-eye/wp/2013/08/12/ssa-now-processing-same-sex-marriage-benefit-claims//?print=1>.

<sup>100</sup> *See id.*

<sup>101</sup> *See infra* notes 113-16 and accompanying text.

<sup>102</sup> See Carl Hulse, *Senate Repeals Ban Against Openly Gay Military Personnel*, N.Y. TIMES, Dec. 18, 2010, <http://www.nytimes.com/2010/12/19/us/politics/19cong.html?pagewanted=all>.

<sup>103</sup> Leon Pannetta, *Memorandum for Secretaries of the Military Departments Acting Under Secretary of Defense for Personnel and Readiness*, U.S. SEC’Y OF DEF., (Feb. 11, 2013), available at <http://www.defense.gov/news/same-sexbenefitsmemo.pdf>.

of Defense allowed gay military service members to obtain benefits for their nonmilitary dependents by declaration.<sup>104</sup> The Department of Defense identified twenty member-designated benefits, such as life insurance, travel and transportation allowance, and hospital visitation privileges.<sup>105</sup> Further, the Department of Defense identified who may be eligible to receive the personal effects of deceased service members.<sup>106</sup> All of these benefits now apply in the context of a same-sex relationship.<sup>107</sup> Post-*Windsor*, the Department of Defense began providing same-sex spouse benefits for military members and eligible civilian employees beginning September 3, 2013.<sup>108</sup> Some state National Guard installations attempted to block same-sex married couples from getting military identification, which prompted a response from the Department of Defense directing compliance with *Windsor* and Department of Defense policy.<sup>109</sup> The Department of Defense policy dictates that other benefits afforded to nonmilitary dependents such as commissary privileges, transportation, childcare, and legal assistance extend to same-sex partners, spouses, and their children.<sup>110</sup>

Veterans' benefits for former military service members include disability payments for service-related injuries, healthcare, and survivor death benefits.<sup>111</sup> The eligibility and amount of benefit is directly related to marital status.<sup>112</sup> Even with the abrogation of DOMA, the

---

<sup>104</sup> *Id.* at Attachment 3.

<sup>105</sup> *Id.* at Attachment 1.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Press Release, U.S. Dep't of Defense, DOD Announces Same-Sex Spouse Benefits (Aug. 14, 2013), <http://www.defense.gov/releases/release.aspx?releaseid=16203>.

<sup>109</sup> Richard A. Oppel, Jr., *Texas and Five Other States Resist Processing Benefits for Gay Couples*, New York Times, Nov. 10, 2013, [http://www.nytimes.com/2013/11/11/us/texas-and-5-other-states-resist-processing-benefits-for-gay-couples.html?\\_r=0](http://www.nytimes.com/2013/11/11/us/texas-and-5-other-states-resist-processing-benefits-for-gay-couples.html?_r=0); Press Release, U.S. Dep't of Defense, Statement by Secretary of Defense Chuck Hagel on Same-Sex Benefits (Dec. 13, 2013), <http://www.defense.gov/releases/release.aspx?releaseid=16422>;

<sup>110</sup> Panetta, *supra* note 103, at Attachment 2.

<sup>111</sup> *Federal Benefits for Veterans Dependents and Survivors*, U.S. DEP'T OF VETERANS' AFFAIRS 1, 30, 111-20, [http://www.va.gov/opa/publications/benefits\\_book/2013\\_Federal\\_Benefits\\_for\\_Veterans\\_English.pdf](http://www.va.gov/opa/publications/benefits_book/2013_Federal_Benefits_for_Veterans_English.pdf) (last visited Jan. 28, 2014).

<sup>112</sup> See *id.* at 31, 111-20; see also *LGBT Organizations Fact Sheet Series: After DOMA What It Means for You*, CTR. FOR AM. PROGRESS, (2013),

Department of Veterans Affairs limited benefits to same-sex spouses based on title 38 of the U.S. Code, which defined “marriage” as between a man and a woman.<sup>113</sup> Since *Windsor* did not address title 38,<sup>114</sup> the U.S. District Court for the Central District of California in *Cooper-Harris v. United States* determined that title 38 was unconstitutional under the rational-basis test.<sup>115</sup> The unconstitutionality of title 38 may be reconsidered on appeal, making the district court victory for same-sex couples fleeting.<sup>116</sup>

#### 4. Housing

While there are several types of housing assistance, the most prevalent are public housing and Section 8 assistance.<sup>117</sup> Congress designated public housing to provide safe and affordable housing for the elderly, the disabled, and low-income families.<sup>118</sup> Congress established public housing under the United States Housing Act of 1937; prior to 1998, public housing programs gave priority to households with more than one person as well as to households with elderly, disabled, and displaced single individuals.<sup>119</sup> Since then, the provision giving priority

---

[http://www.americanprogress.org/wp-content/uploads/2013/06/Post-DOMA\\_FSS\\_Veterans-Spousal-Benefits\\_v2.pdf](http://www.americanprogress.org/wp-content/uploads/2013/06/Post-DOMA_FSS_Veterans-Spousal-Benefits_v2.pdf).

<sup>113</sup> *Id.*; see 38 U.S.C. § 101(3), (31) (2006).

<sup>114</sup> See *United States v. Windsor*, 133 S. Ct. 2675, 2694-95 (2013).

<sup>115</sup> *Cooper-Harris v. United States*, No. 2:12-00887-CBM AJWX, 2013 WL 4607436, \*2 (C.D. Cal. Aug. 29, 2013) (finding that “exclusion of spouses in same-sex marriages from veterans’ benefits is not rationally related to the goal of gender equality”).

<sup>116</sup> See *id.*; Chris Johnson, *Court Rules Against Law Barring Gay Couples from Veterans Benefits*, WASH. BLADE (Aug. 30, 2013), <http://www.washingtonblade.com/2013/08/30/court-rules-law-barring-veterans-gay-couples/>.

<sup>117</sup> See *Housing Choice Vouchers Fact Sheet*, U.S. DEP’T OF PUB. HOUS. & URBAN DEV.,

[http://portal.hud.gov/hudportal/HUD?src=/topics/housing\\_choice\\_voucher\\_program\\_section\\_8](http://portal.hud.gov/hudportal/HUD?src=/topics/housing_choice_voucher_program_section_8) (last visited November 5, 2013); *HUD’s Public Housing Program*, U.S. DEP’T OF PUB. HOUS. & URBAN DEV., [http://portal.hud.gov/hudportal/HUD?src=/topics/rental\\_assistance/phprog](http://portal.hud.gov/hudportal/HUD?src=/topics/rental_assistance/phprog) (last visited November 5, 2013).

<sup>118</sup> *HUD’s Public Housing Program*, *supra* note 117.

<sup>119</sup> THE NATIONAL HOUSING LAW PROJECT, *HUD HOUSING PROGRAMS: TENANT’S RIGHTS* 1/23 (3d ed. 2004).

to certain households has been deleted.<sup>120</sup> The federal government provides funding to local public housing authorities in order to support the administration of public housing programs.<sup>121</sup> Local public housing authorities (“PHAs”), which are created by state statute, own and operate public housing projects.<sup>122</sup> Local PHAs are subject to federal regulations and state law.<sup>123</sup> The Department of Housing and Urban Development (“HUD”) is the federal agency responsible for ensuring that local PHAs operate public housing projects in accordance with federal and state law.<sup>124</sup> Originally, public housing funding came from bonds backed by the federal government, which were paid through an annual contribution contract from HUD to PHAs.<sup>125</sup>

Congress enacted the Section 8 program in 1974 as part of the U.S. Housing Act.<sup>126</sup> HUD administers the program at the federal level, and the local PHAs administer the program locally.<sup>127</sup> PHAs have a set number of vouchers to use each year.<sup>128</sup>

Once a PHA has issued a voucher to a participant, the participant locates and moves into a unit after obtaining approval from the PHA.<sup>129</sup> The tenant may use the voucher in any jurisdiction that offers a voucher program.<sup>130</sup> Thus, the Section 8 program is highly desirable because participants may use the voucher in different locations and not a specific property.<sup>131</sup>

Federal regulations governing the housing programs define

---

<sup>120</sup> *Id.*

<sup>121</sup> *Public Housing*, NAT’L HOUS. LAW PROJECT, <http://nhlp.org/resourcecenter?tid=34>, (last visited on October 26, 2013).

<sup>122</sup> THE NATIONAL HOUSING LAW PROJECT, *supra* note 119, at 1/23.

<sup>123</sup> *Id.* at 1/24.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 1/23 (referencing HUD Consolidated Annual Contribution Contract, Part A, HUD Form No. 53012A § 5 (July 1995)).

<sup>126</sup> *The Housing Choice Voucher Program*, NAT’L HOUS. LAW PROJECT, <http://nhlp.org/resourcecenter?tid=121> (last visited on October 26, 2013).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *See id.*

<sup>130</sup> *Id.*

<sup>131</sup> *See id.*



2014]

*Sullivan and Pardo*

241

family as a single person, who may be elderly, disabled, or displaced.<sup>132</sup> A family can also be “[a] group of persons residing together.”<sup>133</sup> The regulations’ definition of family disregards “actual or perceived sexual orientation, gender identity, or marital status.”<sup>134</sup> Thus, these housing programs will recognize a same-sex couple the same way they recognize heterosexual or nonmarried couples.<sup>135</sup>

The federally subsidized housing programs are strictly federally funded, although administered through local, state-created PHAs.<sup>136</sup> The definition of family in the federal regulations includes all kinds of families without regard to marital status.<sup>137</sup> Thus, DOMA’s invalidity may not impact housing beneficiaries.

## 5. Medicaid

Congress created the Medicaid program under title XIX of the Social Security Act and gives federal grants to states in order to provide medical services.<sup>138</sup> Medicaid provides medical health coverage for low-income individuals who are sixty-five and over, blind, disabled, or family members with dependent children.<sup>139</sup> Qualified pregnant women or children may also qualify for Medicaid.<sup>140</sup>

The Federal and state governments jointly fund the Medicaid program, but the states administer the program exclusively.<sup>141</sup> Each participating state must have a state plan setting forth what services it will provide under Medicaid.<sup>142</sup> The states determine group eligibility,

---

<sup>132</sup> See 24 C.F.R. § 5.403 (2013).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> See *id.* (defining family as any single person or group of persons regardless of their perceived sexual orientation or marital status).

<sup>136</sup> See *supra* note 121 and accompanying text.

<sup>137</sup> 24 C.F.R. § 5.403 (2013).

<sup>138</sup> 42 C.F.R. § 430.0 (2013).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> 42 C.F.R. § 430.1; Megan Waugh, Comment, *A Broke(n) System: Comment on the Supreme Court’s Decision to Rule on the Equal Access Provision in Douglas v. Independent Living Center, and its Potential Impact on the Affordable Care Act*, 32 J. Nat’l Ass’n Admin. L. Judiciary 855, 860 (2012).

what services to provide, and the payment levels for the services.<sup>143</sup> Each state also implements its administrative and operating procedures.<sup>144</sup> Some states offer coverage for those that are medically needy.<sup>145</sup> States can deviate from the mandatory services, known as state plans, via waivers.<sup>146</sup>

Although a state's participation in the Medicaid program is voluntary, once a state decides to participate in the Medicaid program, it must comply with the federal statute and regulations.<sup>147</sup> While a state can design its own plan, the plan must comply with the "scope and nature of the state's Medicaid program."<sup>148</sup>

A state may lose its federal funding if it does not comply with Medicaid's requirements.<sup>149</sup> States may modify their Medicaid programs through waivers, with the approval of the Secretary of the Department of Health and Human Services, if their programs offer services beyond those services authorized under the current law.<sup>150</sup> Congress designed waivers to encourage states to develop ways to deliver Medicaid services to their recipients effectively.<sup>151</sup>

Medicaid offers some additional benefits to married couples.<sup>152</sup>

---

<sup>143</sup> 42 C.F.R. § 430.0.

<sup>144</sup> *Id.*

<sup>145</sup> Office of Ret. and Disability Policy, *Annual Statistical Supplement, 2011—Medicaid Program Description and Legislative History*, U.S. SOC. SEC. ADMIN. 57 (2011), <http://www.ssa.gov/policy/docs/statcomps/supplement/2011/medicaid.html>.

<sup>146</sup> DIV. OF MED. ASSISTANCE PROGRAMS, *THE IMPACT OF FEDERAL POLICY ON OREGON'S HEALTH CARE REFORM EFFORTS: OPPORTUNITIES AND BARRIERS WITHIN MEDICAID AND THE STATE CHILDREN'S HEALTH INSURANCE PROGRAM 2* (2008), *available at* [http://www.oregon.gov/oha/OHPR/HFB/federal\\_laws/dmapimpactoffederalpolicyonoregonshealthcarereform.pdf](http://www.oregon.gov/oha/OHPR/HFB/federal_laws/dmapimpactoffederalpolicyonoregonshealthcarereform.pdf).

<sup>147</sup> Waugh, *supra* note 142, at 859.

<sup>148</sup> *Id.* at 860 (quoting Rosemary B. Guiltinan, Note, *Enforcing a Critical Entitlement: Preemption Claims as an Alternative Way to Protect Medicaid Recipients' Access to Healthcare*, 51 B.C. L. REV. 1583, 1590 (2010)).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 861.

<sup>151</sup> *Id.* at 861-62.

<sup>152</sup> *A State Advocacy Guide for Understanding Spousal Impoverishment Protections, Medicaid and Same-Sex Couples*, SERVS. & ADVOCACY FOR GLBT ELDERS 5 (2012), [http://sageusa.org/files/SAGE%20SIPI\\_booklet\\_web.pdf](http://sageusa.org/files/SAGE%20SIPI_booklet_web.pdf).

Generally, elderly persons are required to spend down their assets and income on long-term care services before Medicaid will provide payments.<sup>153</sup> Marital status becomes important in Medicaid when one spouse needs institutionalization due to ailing health.<sup>154</sup> Medicaid's spousal impoverishment provisions offer exemptions to Medicaid's asset limit and spend-down rules.<sup>155</sup> Spousal impoverishment rules were implemented to keep the noninstitutionalized spouse from becoming poor.<sup>156</sup> Under the spousal impoverishment rules, states that offer this protection allow the noninstitutionalized spouse to keep "one-half of the couple's combined assets, up to a maximum of \$115,920."<sup>157</sup> In some states, if the assets are less than the allowance, then the noninstitutionalized spouse may keep all the assets.<sup>158</sup> Under the spousal impoverishment protections, a community spouse (i.e., the spouse still living at home in the community) can protect up to \$2,898 of income per month.<sup>159</sup>

A state may impose a claim against property in order to recover the costs of long-term medical care provided by the Medicaid program—commonly known as a Medicaid lien.<sup>160</sup> Medicaid can take a partial or complete interest in the property unless the couple meets certain criteria.<sup>161</sup> Further, Medicaid can force the sale of the property

---

<sup>153</sup> *Id.*

<sup>154</sup> Nancy J. Knauer, *Gay and Lesbian Elders: Estate Planning and End of Life Decision Making*, 12 FLA. COASTAL L. REV. 163, 201 (2010).

<sup>155</sup> *Id.*

<sup>156</sup> *A State Advocacy Guide for Understanding Spousal Impoverishment Protections, Medicaid and Same-Sex Couples*, *supra* note 152, at 1.

<sup>157</sup> *Considerations for Married People*, LONGTERMCARE.GOV, <http://longtermcare.gov/medicare-medicare-more/medicaid/medicaid-eligibility/considerations-for-married-people/> (last visited on October 26, 2013). This amount is for 2013. *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> This is to allow the community spouse to protect at least some portion of the institutionalized spouse's income. *Id.* The state will consider any additional income of the community spouse in determining how much of the institutional spouse's income to protect up to the maximum amount. *Id.*

<sup>160</sup> *A State Advocacy Guide for Understanding Spousal Impoverishment Protections, Medicaid and Same-Sex Couples*, *supra* note 152, at 3. The average costs for long-term care facility can average more than \$68,000 per year. *Id.* at 2.

<sup>161</sup> *Id.* at 3.

and may recover proceeds from a sale even after the person's death.<sup>162</sup> Oftentimes, spousal impoverishment protections exempt the marital home from a Medicaid lien until the death of the institutionalized spouse.<sup>163</sup> A community spouse is also protected from impoverishment by having an allowance of one-half of the couple's joint assets.<sup>164</sup> Since 1993, the federal government has mandated estate recovery of Medicaid expenditures for long-term care and related drug and hospital benefits of deceased beneficiaries.<sup>165</sup> States also have the option of recovering Medicaid expenditures beyond long-term care.<sup>166</sup> Federal regulation protects surviving spouses by prohibiting estate recovery during the surviving spouse's lifetime.<sup>167</sup>

While DOMA's reversal may allow same-sex couples to take advantage of this protection, some states, like Florida, will remain unaffected because they do not recognize same-sex marriages.<sup>168</sup> Florida defines marriage as a legal union between a man and a woman.<sup>169</sup> A spouse is a member of a legal union.<sup>170</sup> Florida specifically states that it does not recognize same-sex unions for any purpose.<sup>171</sup> Because Medicaid receives funds from states and the federal government, a possible challenge exists as to whether Medicaid benefits should extend to same-sex couples in states that do not recognize same-sex marriages.<sup>172</sup> On the one hand, the federal government provides a large portion of Medicaid funding to the states; however, on the other hand, the federal government may implement

---

<sup>162</sup> *Id.*

<sup>163</sup> Knauer, *supra* note 154, at 201.

<sup>164</sup> *Id.*

<sup>165</sup> 42 U.S.C. § 1396p(a) (2006); Jan Ellen Rein, Misinformation and Self-Deception in Recent Long-Term Care Policy Trend, 12 J.L. & Pol. 195, at 223 (Spring 1996).

<sup>166</sup> See § 1396p(a); Rein, *supra* note 165, at 223.

<sup>167</sup> § 1396p(a); *Medicaid Estate Recovery*, U.S. DEP'T OF HEALTH AND HUMAN SERVS. 6 (Apr. 2005), <http://aspe.hhs.gov/daltcp/reports/estaterec.pdf>.

<sup>168</sup> Knauer, *supra* note 154, at 201-02.

<sup>169</sup> FLA. STAT. § 741.212(3) (2013). "[T]he term 'marriage' means only a legal union between one man and one woman as husband and wife." *Id.*

<sup>170</sup> *Id.* "[T]he term 'spouse' applies only to a member of such a union." *Id.*

<sup>171</sup> § 741.212(1). "Marriages between persons of the same sex entered into in any jurisdiction . . . between persons of the same sex which are treated as marriages in any jurisdiction . . . are not recognized for any purpose in this state." *Id.*

<sup>172</sup> 42 C.F.R. § 430.0 (2013); Knauer, *supra* note 154, at 201-02.

restrictions or conditions on its funding, to states that have traditionally enjoyed the ability to define marriage.<sup>173</sup> The responsibility of states to administer the Medicaid program will further present challenges to beneficiaries who live in states that do not recognize same-sex marriages.<sup>174</sup>

Should the federal government condition its funding on states recognizing same-sex marriages, those states that do not recognize same-sex marriage may either opt out of accepting federal funds for Medicaid or may challenge the constitutionality of the conditions of the funding.<sup>175</sup> Because legislating marriage is a power generally vested to the states and because Florida does not recognize same-sex marriages, Florida may not be willing to offer married benefits for same-sex couples unless the federal government gives further guidance on this issue.<sup>176</sup>

## 6. Supplemental Nutrition Assistance Program

The Supplemental Nutrition Assistance Program (“SNAP”), previously known as the Food Stamp Program, is a nutrition program governed by the U.S. Department of Agriculture.<sup>177</sup> It is a federal program whose administration is delegated to the states.<sup>178</sup> The entire cost of SNAP falls within the federal budget, but the states share in the cost of administering the program with the federal government.<sup>179</sup> States determine eligibility based on federal criteria.<sup>180</sup>

---

<sup>173</sup> See § 430.0. “By history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States.” *United States v. Windsor*, 133 S. Ct. 2675, 2689-90 (2013).

<sup>174</sup> See § 430.0.

<sup>175</sup> See §§ 430.0-430.1, 430.3; *A State Advocacy Guide for Understanding Spousal Impoverishment Protections, Medicaid and Same-Sex Couples*, *supra* note 152, at 4.

<sup>176</sup> See §§ 430.0-430.1; *A State Advocacy Guide for Understanding Spousal Impoverishment Protections, Medicaid and Same-Sex Couples*, *supra* note 152, at 4.

<sup>177</sup> Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 4001(b), 122 Stat. 1651, 1853 (codified as amended at 7 U.S.C. §§ 2011-2036a (2012)).

<sup>178</sup> 7 C.F.R. § 271.4(a) (2013).

<sup>179</sup> *Policy Basics: Introduction to the Supplemental Nutrition Assistance Program (SNAP)*, CTR. ON BUDGET & POL’Y PRIORITIES 1 (Mar. 28, 2013), <http://www.cbpp.org/cms/index.cfm?fa=view&id=2226>.

<sup>180</sup> *Id.* at 2.

A person's eligibility for SNAP benefits hinges on the person's household, not family or marriage.<sup>181</sup> A "household" eligible for SNAP consists of individuals who live together in the same residence and who purchase and prepare food together.<sup>182</sup> Inclusion of same-sex spouses into the definition of marriage, either at state or federal level, has no effect on SNAP eligibility if spouses live in the same household.<sup>183</sup>

States may exercise flexibility under the federal SNAP guidelines.<sup>184</sup> Although income and asset guidelines remain federal, states have attempted to regulate the types of foods recipients may purchase with SNAP benefits.<sup>185</sup>

## 7. Temporary Assistance to Needy Families

Temporary Assistance to Needy Families ("TANF") provides cash assistance to the extremely poor.<sup>186</sup> Benefits are limited, in most cases to forty-eight months, and the program requires most enrollees that are capable of working to seek employment while receiving cash assistance.<sup>187</sup> TANF's creation overhauled the previous Aid to Families with Dependent Children program through the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, also known as the

---

<sup>181</sup> See *SNAP Food Stamps: General Eligibility*, MASSRESOURCES.ORG, <http://www.massresources.org/snap-general-eligibility.html#household> (last visited Nov. 7, 2013).

<sup>182</sup> *Id.*

<sup>183</sup> Josh Barro, *Dear Gay Couples: Here are the 22 Big Ways Your Life is About to Change*, BUS. INSIDER (June 26, 2013), <http://www.businessinsider.com/big-changes-for-gay-couples-after-doma-2013-6>.

<sup>184</sup> *Supplemental Nutrition Assistance Program (SNAP)*, FEEDING AMERICA, <http://www.feedingamerica.org/how-we-fight-hunger/advocacy-public-policy/policy-center/federal-anti-hunger-programs-and-policies/supplemental-nutrition-assistance-program.aspx> (last visited Nov. 7, 2013).

<sup>185</sup> See Richard Fausset, *Food Stamp Bills Seek to Restrict Junk Food*, L.A. TIMES, Jan. 29, 2012, <http://articles.latimes.com/2012/jan/29/nation/la-na-food-stamps-20120130>.

<sup>186</sup> *After DOMA-What it Means for You: Temporary Assistance for Needy Families (TANF)* [hereinafter *TANF*], AM. PROGRESS, [http://www.americanprogress.org/wp-content/uploads/2013/06/Post-DOMA\\_TANF\\_v2.pdf](http://www.americanprogress.org/wp-content/uploads/2013/06/Post-DOMA_TANF_v2.pdf) (last visited Nov. 3, 2013).

<sup>187</sup> See Liz Schott & LaDonna Pavetti, *Many States Cutting TANF Benefits Harshly Despite High Unemployment and Unprecedented Need*, CTR. ON BUDGET & POL'Y PRIORITIES 6 (Oct. 3, 2011), <http://www.cbpp.org/files/5-19-11tanf.pdf>.

2014]

*Sullivan and Pardo*

247

Welfare Reform Act.<sup>188</sup> Through TANF, the federal government requires states to meet the following goals:

- (1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives;
- (2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage;
- (3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and
- (4) encourage the formation and maintenance of two-parent families.<sup>189</sup>

A major shift from the previous cash-assistance program, TANF's helping hand includes strict "strings" attached to work and self-sustainability.<sup>190</sup> States have broad discretion in meeting the four goals.<sup>191</sup> As with other state-federal entitlement programs, eligibility post-DOMA may depend on whether the state recognizes same-sex marriages.<sup>192</sup> TANF eligibility will flow to same-sex spouses and their families if the state recognizes same-sex marriages.<sup>193</sup> TANF eligibility may or may not flow to states that only recognize civil unions or domestic partnerships.<sup>194</sup> TANF will most likely not be available to same-sex spouses who live in states not recognizing same-sex marriages, civil unions, or domestic partnerships.<sup>195</sup>

---

<sup>188</sup> Liz Schott, *Policy Basics: An Introduction to TANF*, CTR. ON BUDGET & POL'Y PRIORITIES 1, 1 (Dec. 4, 2012), <http://www.cbpp.org/cms/?fa=view&id=936>.

<sup>189</sup> 42 U.S.C. § 601(a) (2006).

<sup>190</sup> See Schott & Pavetti, *supra* note 187, at 6; Schott, *supra* note 188, at 4-5.

<sup>191</sup> Schott, *supra* note 188, at 1, 3.

<sup>192</sup> See *TANF*, *supra* note 186.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

#### IV. MARRIAGE, CIVIL UNION & PROHIBITION: HOW STATES' RECOGNITION OF MARRIAGE EQUALITY AFFECTS ACCESS TO BENEFITS

In addition to the tug-of-war between state and federal administration of public benefits programs, each state's level of recognition of same-sex marriage also affects eligibility and receipt of certain entitlement programs.

##### A. California

California not only gives full faith and credit to foreign same-sex marriages, it also allows the issuance of same-sex marriage licenses.<sup>196</sup> DOMA's abrogation opens up federal benefits such as Medicare and Social Security to same-sex spouses.<sup>197</sup> Those entitlement programs that depend on both state and federal policy are now aligned in same-sex marriage states such as California now that relevant parts of DOMA no longer apply.<sup>198</sup> Residents of California and other states that recognize same-sex marriage enjoy the full benefits of marriage equality.<sup>199</sup>

##### B. Colorado

The State of Colorado recognizes civil unions as of May 1, 2013.<sup>200</sup> The Colorado Civil Union Act distinguishes between spouses and partners to a civil union.<sup>201</sup> The Colorado state constitution defines marriage as between one man and one woman.<sup>202</sup> Although the statute confers rights "granted to or imposed upon spouses,"<sup>203</sup> parties to civil

---

<sup>196</sup> CAL. FAM. CODE § 308(a) (West 2010); *see* Hollingsworth v. Perry, 570 U.S. \_\_\_\_ [2-5, 17 / 2659-61, 2668] (2013) (upholding the district court's order finding Proposition 8 unconstitutional, which, as a result, effectively recommenced the granting of same-sex marriages in California).

<sup>197</sup> *See* United States v. Windsor, 133 S. Ct. 2675, 2694-95 (2013).

<sup>198</sup> *Id.* at 2695-96.

<sup>199</sup> *Id.*

<sup>200</sup> COLO. REV. STAT. § 14-15-102 (2013)

<sup>201</sup> *Id.* § 14-15-103(5)-(6).

<sup>202</sup> COLO. CONST. art. II, § 31 (2007).

<sup>203</sup> COLO. REV. STAT. § 14-15-107(1) (2013).



unions must apply for Medicaid as separate households<sup>204</sup> and must file taxes separately.<sup>205</sup> However, any entitlement program that requires *marriage* before extending benefits to a *spouse* disqualifies individuals in civil unions.<sup>206</sup> Although the Department of Treasury and the IRS broadened their criteria to include spouses based on “state of celebration,” domestic or civil union partners may not be allowed to file joint federal tax returns unless they have entered into a marriage in a state recognizing same-sex marriage regardless of their state of residence.<sup>207</sup> Although the Colorado Civil Union Act affords parties to the civil union expanded rights, it falls short of marriage equality and, thus, full access to public benefits under state and federal law.<sup>208</sup>

### C. *Florida*

With a constitutional ban on same-sex marriage and an affirmative definition of marriage restricted to a relationship between a man and a woman, states such as Florida will face a challenge and will have the most power over whether same-sex couples receive benefits through entitlement programs.<sup>209</sup> With section 3 of DOMA stricken, and section 2 remaining intact and giving states the power to legislate the rights of same-sex couples, Florida may use its policy power to deny benefits to same-sex couples.<sup>210</sup> Benefits to federal employees including retirement and pensions, according to federal policy, will include same-sex spouses, but Florida will exercise its power to restrict benefits such as Social Security, Medicare, Medicaid, SNAP, and cash

---

<sup>204</sup> COLO. DEP’T OF HEALTH CARE POLICY & FIN., CIVIL UNIONS AND MEDICAID ELIGIBILITY, HCPF-14-003 (2014), *available at* <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251936998193&ssbinary=true>.

<sup>205</sup> COLO. REV. STAT. § 14-15-117(1) (2013). The law has recently been revised to allow “[p]artners in a civil union who have their federal taxable income determined on a joint federal tax return [to] have their state taxable income determined based on their joint federal taxable income.” 2014 Colo. Legis. Serv. Ch. 10 (S.B. 14-019) (West).

<sup>206</sup> See Richard A. Wilson, *A Guide to the New Illinois Civil Union Law*, 99 ILL. B.J. 232, 232 (2011), *available at* <https://www.isba.org/ibj/2011/05/aguidetotheneillinoiscivilunionlaw>.

<sup>207</sup> See *supra* notes 55, 59 and accompanying text.

<sup>208</sup> See *supra* notes 200-206 and accompanying text.

<sup>209</sup> See *supra* notes 168-72 and accompanying text.

<sup>210</sup> See *supra* Part II and note 176 and accompanying text.

assistance to heterosexual marriages.<sup>211</sup> With the effects of DOMA's abrogation still yet to be fully realized, states that prohibit same-sex marriage are ripe for legal challenges to state administration of federal benefit programs.<sup>212</sup>

## V. CONCLUSION

DOMA's demise marks the beginning of policy shifts in the states and the federal government.<sup>213</sup> Whether or not DOMA's abrogation creates more access to benefits is unclear.<sup>214</sup> States now have the power to define marriage equality without federal preemption.<sup>215</sup> Strictly federally funded programs, such as Social Security and subsidized housing, stand the greatest chance of increasing access for same-sex spouses and their families.<sup>216</sup> However, access to state and federal "hybrid" programs such as Medicaid and TANF hinges now on state policies and administration.<sup>217</sup> For the states that recognize same-sex marriages, benefits to same-sex couples may expand; for states that prohibit or fail to recognize same-sex marriages, current eligibility policies will remain static.<sup>218</sup> The evolution of state and federal policy regarding marriage equality and recognition by administrative policy makers will remain dynamic for years to come.

---

<sup>211</sup> See *supra* Part III.A.

<sup>212</sup> See *supra* Part III.A.

<sup>213</sup> See *supra* note 42 and accompanying text.

<sup>214</sup> See *supra* note 36 and accompanying text.

<sup>215</sup> See *supra* note 42 and accompanying text.

<sup>216</sup> See *supra* Part III.A.

<sup>217</sup> See *supra* Part III.A.

<sup>218</sup> See *supra* Part IV.A.