

IS THERE A FEDERAL DEFINITIONS POWER?

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ABSTRACT

Although the Supreme Court decided *United States v. Windsor* on equal protection grounds, that case also raised important and recurring questions about federal power. In particular, defenders of the Defense of Marriage Act (DOMA) argued that Congress may always define the terms used in federal statutes, even if its definition concerns a matter reserved to the States. As the DOMA illustrates, federal definitions concerning reserved matters that depart from state law may impose significant burdens on state governments and private citizens alike. This Article argues that there is no general, freestanding federal definitions power and that sometimes—as with marriage—federal law must incorporate state law definitions.

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INTRODUCTION

In *United States v. Windsor*,¹ the Supreme Court held that Congress may not discriminate, in the administration of federal programs, between same-sex and different-sex couples that are each legally married under state law. Writing for the Court, Justice Kennedy said that such discrimination, required by Section 3 of the federal Defense of Marriage Act (DOMA),² violated the equal protection component of the Fifth Amendment.³ This essay, however, concerns a different argument that the Court had before it but did not reach in *Windsor*—that is, that Congress lacked any *enumerated power* to define marriage in such a way as to exclude same-sex couples from the federal definition of marriage.⁴ The Court was entirely sensible not to reach this argument, but the debate in and around *Windsor* gave rise to broad claims about Congress's power to define the terms in federal statutes in ways that impose burdens on individuals and state governments.⁵

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1. 133 S. Ct. 2675 (2013).
 2. Pub. L. 104-199, 110 Stat. 2419 (Sep. 21, 1996) (codified at 1 U.S.C. § 7).
 3. See *Windsor*, 133 S. Ct. at 2693. Although the Equal Protection Clause of the Fourteenth Amendment applies only to the states, the Court has held that similar equality requirements bind the federal government under the Due Process Clause of the Fifth Amendment. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).
 4. See Brief of Federalism Scholars, *supra* note †, at 8.
 5. See, e.g., Nick Rosenkranz, *Congress Has Power to Define the Terms of Its Own Statutes*, THE VOLOKH CONSPIRACY (Mar. 6, 2013, 9:31 AM), <http://www.volokh.com/2013/03/06/congress-has-power-to-define-the-terms-of-its-own-statutes/>; Nick Rosenkranz, *There Is No Federalism Objection to Section Three of the Defense of Marriage Act*, THE VOLOKH CONSPIRACY (Mar. 24, 2013, 2:33 PM), <http://www.volokh.com/2013/03/24/there-is-no-federalism-objection-to-section-three-of-the-defense-of-marriage-act/>; see also Ed Whelan, *Badly Confused Amicus Brief on Federalism in DOMA Case*, NAT'L REV. ONLINE (Mar. 5, 2013, 6:08 PM), <http://www.nationalreview.com/bench-memos/342256/badly-confused-amicus-brief-federalism-doma-case-ed-whelan> (offering a more *ad hominem* version of the same argument). For some early responses, see Randy Barnett, *DOMA and Federalism: What are the limits of Congress's power to define terms in federal statutes? A Reply to Whelan and Rosenkranz*, THE VOLOKH CONSPIRACY (Mar. 7, 2013, 6:44 PM), <http://www.volokh.com/2013/03/07/doma-and-federalism-what-are-the-limits-of-congresss-power-to-define-terms-in-federal-statutes-a-reply-to-whelan-and-rosenkranz/> (incorporating a post by your present author); Randy Barnett, *The Chief Justice's Excellent Hypothetical: Under Our System of Federalism, Can You Be Both Married and Unmarried at the Same Time?* THE VOLOKH CONSPIRACY (Mar. 28, 2013, 8:30 AM), <http://www.volokh.com/2013/03/28/the-chief-justices-excellent-hypothetical-under-our-system-of-federalism-can->

That issue is unlikely to go away. As DOMA illustrates, Congress's ability to rule persons in or out of innumerable federal regulatory schemes and benefit programs gives it significant leverage over matters that it might well lack power to regulate directly. One can readily imagine other federal interventions into controversial aspects of family and privacy law masquerading as federal "definitions"—for example, federal definitions of "parent" or "child" that excluded same-sex adoptions, or a federal definition of "person" that included a fetus. If the arguments for Congress's "definitional" prerogative are taken seriously, they would offer a formalistic end-run around the few remaining limits on Congress's enumerated powers.

I argue here that Congress lacks any freestanding "definitions power." Most federal definitions, of course, will either fall within or be necessary and proper to the implementation of Congress's specifically enumerated powers. But the Court's recent decisions make clear that the Necessary and Proper Clause is not a blank check; there will be instances in which Congress *cannot* impose its own definition of a particular concept and must, as a matter of constitutional necessity, adopt the definition provided by state law. Federal law, in these cases, takes state law as it finds it. I submit that the definition of marriage, at least in the broad context of DOMA, is one of those instances.

The definitional issue, as I have said, transcends the immediate controversy over DOMA. In keeping with the theme of this Symposium, however, Part I offers a few thoughts about the broader relationship of federalism principles to that controversy and to the Supreme Court's decision in *Windsor*. Part II turns to the constitutional basis and limits of Congress's authority to define terms for purposes of federal law. Part III concludes with some implications of those limits.

I. FEDERALISM, EQUALITY, AND *WINDSOR*

It has become fashionable both to criticize Justice Kennedy's opinion in *Windsor* as unclear or incoherent and to discount its references to federalism.⁶ In this symposium, Andrew Koppelman's

you-be-both-married-and-unmarried-at-the-same-time/; Jonathan H. Adler, *A Final Response to Ed on DOMA*, NAT'L REV. ONLINE (Apr. 1, 2013, 9:57 AM), <http://www.nationalreview.com/bench-memos/344376/final-response-ed-doma-jonathan-h-adler>.

6. See, e.g., Sandy Levinson, *A brief comment on Justice Kennedy's opinion in Windsor*, BALKINIZATION (Jun. 26, 2013, 11:50 PM), <http://balkin.blogspot.com/2013/06/a-brief-comment-on-justice-kennedys.html> (writing off *Windsor*'s federalism arguments as "some blather about traditional state sovereignty and marriage"). Professor Marcus's contribution to this symposium goes to great ornithological lengths to disprove that *Windsor* relied on federalism. See Nancy C.

otherwise interesting discussion dismisses federalism as a “distraction” and accuses Justice Kennedy of “oddly fetishiz[ing] state law.”⁷ I find Kennedy’s opinion neither incoherent nor unclear; in fact, it is surely one of the finest examples in the United States Reports of interweaving principles of federalism with principles of equal protection. Much of the reaction to the opinion may arise because it is not what most commentators either hoped or expected to see.

It has likewise become commonplace to condemn those of us that presented federalism arguments to the Court in *Windsor* as somehow disingenuous or operating in bad faith. “Beware of conservatives bearing gifts,” Linda Greenhouse warned in a New York Times blog post.⁸ Striking down DOMA on federalism grounds, in her view, is “a truly bad idea, and the campaign for marriage equality would be worse off for it.”⁹

Part of the problem with this argument is that it is bad constitutional law. Ms. Greenhouse, who is not a lawyer, asserts that “[a] ruling that left the states to their own devices when it comes to marriage would take the equal protection guarantee out of the picture.”¹⁰ That, of course, could not be more incorrect. If the Court had said, as the Federalism Scholars’ brief argued, that Congress lacked enumerated power to enact DOMA, that would have had absolutely nothing to do with whether a *state*-level ban violated the Equal Protection Clause. And I remain mystified why Greenhouse reads that brief as an “assertion of implicitly boundless state authority over family affairs.”¹¹ Equating an argument that marriage lies within the States’ reserved power with a claim that that power is not subject to federal constitutional rights guarantees is simply an elementary mistake.

Marcus, *When Quacking Like a Duck Is Really a Swan Song in Disguise: How Windsor’s State Powers Sets the Stage for the Demise of Federalism-Based Marriage Discrimination*, 64 CASE WES. RES. U. L. REV. 1073, 1111–12 (2014). I have addressed that argument elsewhere. See Ernest A. Young & Erin C. Blondel, *Federalism, Liberty, and Equality in United States v. Windsor*, 2012–2013 CATO SUP. CT. REV. 117, 118–9 (2013); Ernest A. Young, *United States v. Windsor and the Role of State Law in Defining Rights Claims*, 99 VA. L. REV. ONLINE 39, 46 (2013).

7. Andrew Koppelman, *Beyond Levels of Scrutiny: Windsor and “Bare Desire to Harm,”* 64 CASE WES. RES. U. L. REV. 1045, 1070 (2014).
8. Linda Greenhouse, *Trojan Horse*, N.Y. TIMES (Apr. 3, 2013, 9:00 PM), http://opinionator.blogs.nytimes.com/2013/04/03/trojan-horse/?_php=true&_type=blogs&_r=0.
9. *Id.*
10. *Id.*
11. *Id.*

The Federalism Scholars' brief did argue that, because the Constitution reserves power to define marriage to the States, Congress may not assert any interest in defining marriage in a way that reflects the moral views of the national community.¹² It is true that a State *would* have such an interest, and in that sense a state same-sex marriage ban would present a somewhat tougher case. But the hornbook principle that states have a general police power interest in protecting the "health, safety, and morals" of the community is not something one can make go away simply by scrunching one's eyes closed. It is this principle, for instance, that also undergirds state laws *approving* same-sex marriage. And in the end that principle is unlikely to make any difference in a challenge to a state's same-sex marriage. The most plausible arguments against state same-sex marriage bans have always invoked levels of scrutiny that this sort of general police-power interest in morality cannot satisfy,¹³ and the Court made clear in *Lawrence v. Texas*¹⁴ that a bare interest in upholding community morality was insufficient to sustain a law that harmed gay people. In any event, acknowledging what is plainly true—that states have some interest in making moral choices on behalf of their citizens—hardly "take[s] the equal protection guarantee out of the picture," as Ms. Greenhouse asserts.¹⁵ Every assertion of a state's interesting in defining family status relationships remains subject to Fourteenth Amendment challenge; *Loving v. Virginia*,¹⁶ which Greenhouse cites, makes that absolutely clear. The fact that DOMA had constitutional problems *in addition* to equal protection doesn't change that fact.

It is worth dwelling on Ms. Greenhouse's error, moreover, because it displays a broader misunderstanding about the relationship between federalism, liberty, and equality. As someone who graduated from college in the sixties, it's not surprising that Greenhouse equates federalism with racism.¹⁷ This is a parochial perspective in terms of

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12. See Brief of Federalism Scholars, *supra* note †, at 7–8.
 13. See, e.g., Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> (outlining the Administration's view that DOMA is unconstitutional because sexual orientation is a suspect classification triggering strict equal protection scrutiny).
 14. 539 U.S. 558, 582 (2003) ("Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.").
 15. *Greenhouse*, *supra* note 8.
 16. 388 U.S. 1 (1967).
 17. See, e.g., Seth F. Kreimer, *Federalism and Freedom*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 67 (2001) ("In my formative years as a lawyer and legal scholar, during the late 1960s and 1970s, [federalism]

both time and space. It ignores not only the antebellum history, in which national power was consistently exerted to preserve slavery, often over the objection of northern state governments,¹⁸ but also the reality of contemporary American politics, in which state governments are often at the vanguard of progressive causes.¹⁹ It ignores the comparative constitutional experiences of other multi-level governance systems; the German Federal Constitutional Court, for instance, has recently reaffirmed that constitutional principles of democracy and fundamental human rights require limits on the centralization of power in the European Union.²⁰ And it ignores much of the best contemporary scholarship on constitutional structure, which lauds federalism as a way of empowering dissenting minorities.²¹

was regularly invoked as a bulwark against federal efforts to prevent racial oppression, political persecution, and police misconduct.”).

18. See, e.g., *Prigg v. Pennsylvania*, 41 U.S. 539 (1842); HENRY ADAMS, *AMERICAN STATESMEN: JOHN RANDOLPH 272–273* (John T. Morse Jr. ed.) (1882) (observing that, in the antebellum period, “[b]etween the slave power and states’ rights there was no necessary connection. The slave power, when in control, was a centralizing influence” and “states’ rights were the protection of the free [s]tates”).
19. See, e.g., Kathleen M. Sullivan, *From States’ Rights Blues to Blue States’ Rights: Federalism after the Rehnquist Court*, 75 *FORDHAM L. REV.* 799, 801 (2006) (“Gay weddings in San Francisco and Massachusetts, like popular initiatives authorizing physician-assisted suicide in Oregon and medicinal use of marijuana in California, exemplify recent progressive experimentation at the local level through policies that could not command a national majority. Under such political circumstances, liberals should hesitate before rejecting the Rehnquist Court’s new federalism.”); David J. Barron, *Reclaiming Federalism*, 52 *DISSENT* 64, 67 (2005) (discussing the Rehnquist Court’s federalism). Contemporary liberals are also rediscovering that the states have often taken the lead on progressive causes throughout our history. See, e.g., EMLY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA’S POSITIVE RIGHTS* (2013) (documenting how progressive proponents of education, labor, and environmental rights succeeded in enshrining those rights in state constitutions throughout the nineteenth and twentieth centuries).
20. See *Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 2009, 123 BVerfG 267* (Ger.); *Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 2011, 129 BVerfGE 124*; Russell Miller, *Germany vs. Europe: The Principle of Democracy in German Constitutional Law and the Struggle for European Integration*, 52 *VA. J. INT’L L.* (forthcoming 2014) (noting the German high court’s conclusion that retention of democratic authority at the Member State level “has significance for fundamental, basic individual rights including personal freedom and human dignity”).
21. See, e.g., Heather K. Gerken, *A New Progressive Federalism*, *DEMOCRACY JOURNAL* (Spring 2012, <http://www.democracyjournal.org/24/a-new-progressive-federalism.php?page=1>); Heather K. Gerken, *Dissenting by Deciding*, 57 *STAN. L. REV.* 1745 (2005).

Ms. Greenhouse appears uninterested in any of this. Instead, she asks “where have these people been for the past 17 years?”²²—as if only proven liberals are morally entitled to challenge a law like DOMA.²³ If Greenhouse had done any actual reporting on the subject, she would know better. Dale Carpenter, one of the prime movers of the brief, has advocated gay rights from a conservative perspective for over two decades.²⁴ Randy Barnett, another co-author of the brief, has not only been the leading intellectual defender of *Lawrence v. Texas*²⁵ but has also made federalism arguments in favor of other liberal causes—most notably as counsel for Angel Raich in the Supreme Court’s medical marijuana case.²⁶ My own record is similar.²⁷ It is insulting for Greenhouse to cry “hypocrisy”—especially without checking the facts.

It may be that the gratuitous nastiness of Ms. Greenhouse’s attack—“Federalism tends to emerge from under the rocks,”²⁸ like a serpent or an insect—reflects the last gasp of a dying paradigm. In

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22. Greenhouse, *supra* note 8.
 23. For a far more sensible perspective by better lawyers, see Mary Bonauto & Paul Smith, *Who’s Afraid of Federalism?*, ACSBLOG (Apr. 17 2013), <http://www.acslaw.org/acsblog/who%E2%80%99s-afraid-of-federalism> (discussing DOMA in the context of federalism).
 24. *See, e.g.*, Dale Carpenter, *A Traditionalist Case for Gay Marriage*, 50 S. TEX. L. REV. 93 (2008); Brief of *Amici Curiae* Republican Unity Coalition and the Honorable Alan K. Simpson in Support of Petitioners, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (co-author); Dale Carpenter, *A Conservative Defense of Romer v. Evans*, 76 IND. L. J. 403 (2001).
 25. *See, e.g.*, Randy E. Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, 2002–2003 CATO SUP. CT. REV. 21, 37 (2003); *see also* Brief of the Institute for Justice as *Amicus Curiae* in Support of Petitioners, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (of counsel to brief making libertarian arguments against sodomy laws).
 26. *See, e.g.*, Brief for Respondents, *Ashcroft v. Raich*, 545 U.S. 1 (2005) (No. 03-1454). Professor Barnett’s oral argument in *Raich* can be accessed here: http://www.oyez.org/cases/2000-2009/2004/2004_03_1454/ (visited Feb. 24, 2014).
 27. *See, e.g.*, Brief of Constitutional Law Scholars as *Amicus Curiae* in Support of Respondent, *Gonzales v. Raich*, 545 U.S. 1 (2005) (No. 03-1454) (making federalism arguments on behalf of medical marijuana users); Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277, 1306-07 (2004) (criticizing DOMA a decade ago); Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L. J. 75, 120–21, 154 (2001) (criticizing federal laws like DOMA as a pathology that federalism doctrine should aim to prevent and extolling state-law protection of gay rights). (Professor Baker also signed the Federalism Scholars’ brief in *Windsor*.)
 28. Greenhouse, *supra* note 8.

any event, the present symposium provides ample illustrations of the contributions federalism can make to the same-sex marriage debate. Consider some of the arguments advanced by same-sex marriage opponents in these pages. Maggie Gallagher and William Duncan, for instance, draw a sharp distinction “between a desire to harm and a desire to affirm.”²⁹ This point loses much of its force when we consider what DOMA actually does, which is to strip couples like Edith Windsor and Thea Spyer, who were legally married under state law, of their legally married status for purposes of federal law. Gallagher’s point poses a classic baseline problem, but it is no longer a problem when we remember that our Constitution empowers *states* to determine what the baseline should be.

Similarly, Robert George and Sherif Girgis contend that claims for marriage “equality” conflate two distinct strands of traditional thought about marriage.³⁰ The “romantic” view, which stresses the emotional attachment and commitment of two persons, plausibly embraces same-sex couples, but the “procreative” view, which stresses reproduction and child-rearing, does not.³¹ If this is right, then it is not obvious how a court is to choose between these competing marital traditions, either in determining whether same-sex and different-sex couples are “similarly situated” for equal protection purposes, or in giving content to a fundamental right to marry for due process purposes. Again, however, federalism resolves that dilemma in DOMA’s case. The critical point is that the Great State of New York, through its democratic processes, has made a decision in favor of the romantic view by recognizing same-sex marriage. Whether or not the Constitution itself favors one view or the other—a considerably harder question—the national political branches have no constitutional authority to displace a state’s resolution of the question.³²

More fundamentally, I have argued elsewhere that federalism has been integral to the astounding change in American attitudes toward same-sex marriage in the last decade.³³ Federalism has allowed proponents of same-sex marriage, who began as heavily outnumbered

29. See Maggie Gallagher & William C. Duncan, *The Kennedy Doctrine: Moral Disagreement and the “Bare Desire to Harm,”* 64 CASE W. RES. L. REV. 949, 951 (2014).

30. SHERIF GIRGIS, RYAN T. ANDERSON & ROBERT P. GEORGE, WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE 28–36 (2012) (discussing the romantic and procreative views of marriage).

31. *Id.*

32. See generally Young, *Role of State Law*, *supra* note 6, at 43–47.

33. See Ernest A. Young, *Exit, Voice, and Loyalty as Federalism Strategies: Lessons from the Same-Sex Marriage Debate*, 85 U. COLO. L. REV. 1133 (2014).

minorities at the national level, to “dissent by deciding” in those few jurisdictions in which they found themselves in the majority.³⁴ It may well be that the Court will soon have to confront the constitutionality of state-law restrictions on same-sex marriage, and in that event it will have to move beyond federalism to confront difficult questions of equal protection and due process of law. But as I have already explained, the Court’s reliance on federalism in *Windsor* will not prejudice arguments in favor of same-sex marriage under the Constitution’s rights provisions. And the Constitution’s federal structure will have been critical in bringing our nation to the point where a constitutional right to same-sex marriage is plausible.

II. CONGRESS’S POWER TO DEFINE MARRIAGE

I turn now to a different federalism argument that the Court did not reach in *Windsor*—that is, the claim that Congress lacked any enumerated power to enact DOMA. This argument is worth considering, despite the Court’s decision to go a different way, because the problem of federal definitions transcends the issue of same-sex marriage. I will focus on DOMA here because it affords such a good illustration of the issue, but I will also suggest other areas in which federal authorities might attempt to leverage a “definitional” power into substantive regulation that would otherwise fall outside Congress’s enumerated scope.

Section 3 of DOMA amended the Dictionary Act—the portion of Title I of the U.S. Code that defines the meaning of terms that occur in acts of Congress and other federal legal materials. It provided:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.³⁵

In so providing, DOMA amended over 1100 federal statutes that include the word “marriage” or “spouse,” and it altered the administration of innumerable federal regulations and programs.³⁶ Prior to DOMA, federal law had—absent specific exceptions tied to

34. See, e.g., Gerken, *Dissenting by Deciding*, *supra* note 21, at 1764 (arguing that federalism can empower minorities).

35. 1 U.S.C. § 7 (2012).

36. Brief of Federalism Scholars, *supra* note †, at 20, 32–40 *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), available at http://scholarship.law.duke.edu/faculty_scholarship/2858.

specific regulatory circumstances—simply taken couples to be married if they were married under state law.³⁷ Those state laws varied significantly in a number of respects, such as the age of eligibility to marry and the permissible degree of consanguinity.³⁸

It is worth noting that DOMA did not actually create a federal definition of marriage. By DOMA's terms, a "union between one man and one woman" is still only a marriage if it is "legal"—that is, if it meets whatever other requirements state law imposes.³⁹ There are no general federal age requirements, consanguinity prohibitions, or rules concerning "common law" marriages. Federal officials do not issue marriage licenses; there are no federal marriages. And federal officials attempting to determine whether persons interacting with federal programs are married must look to state law regardless of DOMA. That statute created only a federal-law constraint on state-law definitions of marriage by prohibiting federal law from recognizing same-sex unions.

If there is a federal definitions power, then, it is not at all clear that DOMA could be justified as an exercise of it. Such a power would have to be grounded in the notion that federal officials need a uniform federal definition of critical terms in order to implement federal law, but DOMA provides no such definition. If anything, the *continued* ability of federal law to operate *without* a federal definition—even during the years DOMA was in effect—shows that necessity cannot support any general definitional power.

I want to put this objection to DOMA aside for now, because the issue of federal definitions has independent significance. The power to define terms might be justified in three distinct ways. First, such definitions might fall within Congress's *enumerated* powers, such as the power to regulate interstate commerce. Second, definitional powers might be *implied* under the Necessary and Proper Clause as incidental to the accomplishment of some enumerated end. Finally, some of DOMA's defenders seem to have thought that power to define terms is somehow just *inherent*—that is, if Congress has power to enact a statutory scheme that employs certain terms, it necessarily has the power to define those terms.

37. See *id.* at 37; see also Brief on the Merits of *Amici Curiae* Family Law Professors and the American Academy of Matrimonial Lawyers in Support of Respondent Edith Schlain Windsor at 9–11, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), available at <https://www.glad.org/uploads/docs/cases/windsor-v-united-states/amicus-brief-of-family-law-professors.pdf> (providing examples).

38. See, e.g., *id.* at 8–9.

39. 1 U.S.C. § 7.

A. *Specific Enumerated Powers*

The enumerated powers point need not detain us long. One can certainly imagine situations in which providing a definition fits comfortably within an enumerated power. As part of its power to create a uniform rule of naturalization, for example, Congress might define “citizen” to include persons naturalized according to certain criteria. Congress’s power to incorporate international law into domestic law explicitly includes the power to “define” as well as “punish” offenses against the law of nations. But it is hard to think of any enumerated power that would cover defining “marriage.”

The “default” basis for federal regulation, of course, is the Commerce Clause. Although the Supreme Court continues to interpret the Commerce Clause quite broadly, the Court has nonetheless required that the regulated activity be commercial in nature.⁴⁰ Weddings, of course, can involve a great deal of commercial activity. (I know because I just helped pay for mine.) But the *marriage* at the heart of the festivities is not itself commercial in nature. The commerce power alone thus cannot confer power to define “marriage” under DOMA.

A more plausible candidate is the Spending Power, and in fact this would certainly support some applications of DOMA. If Congress created a federal tax credit for married couples, for instance, it would be entitled to determine which married couples should receive the benefit. And there are, in fact, a number of federal spending programs to which marital status is relevant.⁴¹ The Tax Power would likewise support some applications of DOMA. When Congress taxes, it has at least some power to define the persons on whom the taxes fall.

Nonetheless, neither the Taxing nor the Spending Power can support the extremely broad sweep of DOMA, which indiscriminately governs *all* federal statutes and programs—over 1100 statutes in all—many of which have nothing to do with the power of the purse. DOMA affects, for example, copyright protection, government ethics rules, and testimonial privileges.⁴² Moreover, DOMA would likely be

40. *See, e.g.*, *Gonzales v. Raich*, 545 U.S. 1, 26 (2005).

41. *See, e.g.*, CONG. BUDGET OFFICE, *THE POTENTIAL BUDGETARY IMPACT OF RECOGNIZING SAME-SEX MARRIAGES* 5 (2004), *available at* <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/55xx/doc5559/06-21-samesexmarriage.pdf> (providing a breakdown of spending programs affected by same-sex marriage).

42. *See, e.g.*, 2 U.S.C. § 31–2 (2012) (stating that spouses of senate members may not accept gifts); 17 U.S.C. §§ 101, 203(a)(2) (2012) (providing the definition of widow and widower as the surviving spouse for copyright law); 28 U.S.C. § 455(b) (2006) (stating that judges have a conflict of interest if their spouse has a financial interest in the outcome of a case); *United States v. Sims*, 755 F.2d 1239, 1242–43 (6th Cir. 1984) (discussing the federal privilege against testimony by a spouse).

unconstitutional in many of the situations where it affects the provision of federal benefits. DOMA requires States that have recognized same-sex marriage to refuse recognition to those marriages when administering federal benefit programs.⁴³ Where federal funds are provided on a matching basis, DOMA will often require states to withhold their *own* money from couples who are entitled to benefits under state law. This spending condition applies retroactively to programs in which the states have participated for decades, and there is no clear statement of the condition in the relevant statutory grants.⁴⁴ That is probably enough to render such a condition invalid under the Court's Spending Clause precedents.⁴⁵ And a condition that cuts across so many different federal programs, involving many different sources of funding, would surely be coercive.⁴⁶

Another possibility is Congress's power to enforce the Reconstruction Amendments. That might work if Congress sought to *legalize* same-sex marriage nationwide, but only if the Equal Protection Clause can be interpreted to require such a result.⁴⁷ This is why same-sex marriage advocates should not reject federalism arguments against DOMA on the ground that it would prohibit Congress from vindicating same-sex marriage rights as a matter of national law. If they are right about the Equal Protection Clause, then a federal statute would remain possible.⁴⁸ It seems extremely unlikely, however, that it is unconstitutional for a state to *recognize* same-sex marriage; hence, the Section Five power is asymmetrical in this context and cannot support DOMA's flat ban on recognition for purposes of federal law.

43. Brief of Federalism Scholars, *supra* note †, at 13–14.

44. *Id.*

45. *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2606 (2012) (holding that Congress may not “surpris[e] participating States with post-acceptance or ‘retroactive’ conditions”); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (conditions must be stated “unambiguously”); *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (discussing limitations on the Spending Power).

46. *See Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2604 (holding that the Affordable Care Act's Medicaid expansion was unconstitutionally coercive).

47. *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 517–19 (1997) (holding that Congress may legislate under Section Five of the Fourteenth Amendment only to prevent or remedy an actual constitutional violation).

48. Such a statute might seem unnecessary if the federal Constitution in fact requires recognition of same-sex marriage. But the Section Five power confers on Congress broad remedial powers once a constitutional violation is identified, *see South Carolina v. Katzenbach*, 383 U.S. 301 (1966), so there still might be advantages to federal legislation in this area.

The last relevant power is Congress's authority, under the Full Faith and Credit Clause, to "prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."⁴⁹ This provision gives Congress broad authority to enact federal choice of law rules, although it has generally chosen to leave choice of law to the states.⁵⁰ It would support, for example, the proposed Respect for Marriage Act,⁵¹ which would have federal law recognize any marriage that is legal in the state of celebration. It would even suggest a more emphatic version of that law, which would require all *states* to recognize marriages that are legal in the state of celebration (or, for that matter, one that would forbid states to recognize marriages that are *not* legal in the state of celebration). Congress has broad power over choice of law. But DOMA is not a choice of law provision. If the Full Faith and Credit power gave Congress the ability to simply substitute a federal rule of its own choosing for any otherwise-applicable state rule of decision, that would amount to an unlimited legislative power.

B. Necessary and Proper

It is considerably more plausible to ground a broad power to define terms for purposes of federal law in the Necessary and Proper Clause's provision for *implied* powers. Ever since *McCulloch v. Maryland*,⁵² the Supreme Court has recognized that Congress has broad powers under what the founding generation justly called the "Sweeping Clause."⁵³ But the Court's more recent decisions in *United States v. Comstock*⁵⁴ and *National Federation of Independent Business v. Sebelius*⁵⁵ have strongly suggested that Congress's Necessary and Proper powers are not unlimited. In particular, the Court has imposed three distinct requirements when Congress undertakes to use unenumerated powers pursuant to that provision. The first is that such legislation be "incidental" to the exercise of an enumerated

49. U.S. CONST. art. IV, § 1.

50. See generally Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992).

51. Respect for Marriage Act, S. 1236, 113th Cong. (2013). Professor Koppelman is thus wrong to suggest that striking down DOMA on enumerated powers grounds would call this bill into question. See Koppelman, *supra* note 7, at 1061–71.

52. 17 U.S. (4 Wheat.) 316, 324 (1819).

53. See Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L. J. 267, 270–71 n.10 (1993).

54. 130 S. Ct. 1949 (2010).

55. 132 S. Ct. 2566 (2012).

power.⁵⁶ The Sweeping Clause allows Congress to employ unenumerated *means* so long as they are necessary and proper to the accomplishment of an enumerated *end*.⁵⁷ But it does not allow the pursuit of unenumerated *ends* or the use of unenumerated *means* for their own sake.⁵⁸ As John Marshall warned in *McCulloch*, “should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land.”⁵⁹

Obviously, it will often be hard to tell the difference between means that are legitimately incidental, on the one hand, and those that are pretextual. Was the designation of a class of federal sex offenders in *Comstock*, for example, simply incidental to the imprisonment of offenders against federal laws, which was in turn incidental to the regulation of Commerce and other federal enumerated powers?⁶⁰ *Comstock* was a hard case, and the Court plainly struggled with it.⁶¹ But sometimes Congress is not particularly subtle. It seems safe to say that a law entitled “The Defense of Marriage Act” is there to regulate marriage *for its own sake*—not as an incidental means of making some other federal regulatory scheme more effective. And Mr. Clement’s brief defending DOMA was candid enough to argue in precisely those terms.⁶²

A more objective approach to this requirement emphasizes the *nature* of the power Congress employs. In *National Federation of*

56. See *id.* at 2591 (stating that the Necessary and Proper Clause “vests Congress with authority to enact provisions ‘incidental to the [enumerated] power, and conducive to its beneficial exercise’”) (Opinion of Roberts, C.J.) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 418); see also GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON, & GUY I. SEIDMAN, *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* 76, 83 (2010).

57. See *Comstock*, 130 S. Ct. at 1956; David Engdahl, *The Spending Power*, 44 DUKE L. J. 1, 13 (1994).

58. See, e.g., *McCulloch*, 17 U.S. (4 Wheat.) at 411 (stressing that creating a corporation is “never used for its own sake, but for the purpose of effecting something else”).

59. *Id.* at 423.

60. See *Comstock*, 130 S. Ct. at 1976 (asserting that actions by Congress were incidental and therefore within its authority).

61. See generally Ilya Somin, *Taking Stock of Comstock: The Necessary and Proper Clause and the Limits of Federal Power*, CATO SUP. CT. REV. 2009–2010, at 239 (2010).

62. Brief on the Merits for Respondent The Bipartisan Legal Advisory Group of the U.S. House of Representatives at 42, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) (Jan. 22, 2013) [hereinafter *BLAG Brief*].

Independent Business, the Chief Justice recognized that the Sweeping Clause does not “license the exercise of any ‘great substantive and independent power[s]’ beyond those specifically enumerated.”⁶³ Given the widespread agreement that marriage is one of the “bedrock institution[s]” in our society,⁶⁴ the power to define that institution is plausibly a “great substantive and independent power” that one would expect the Constitution to have separately enumerated if the Framers had meant to confer that power on Congress.⁶⁵

The second requirement, likewise traceable to *McCulloch*, is that the unenumerated means must be “plainly adapted” to Congress’s enumerated end.⁶⁶ This is a means/ends fit requirement, and the Court’s analysis is traditionally deferential.⁶⁷ But although *McCulloch* is often credited as originating the rational basis standard, Justice Kennedy recently went out of his way to insist that the hyper-deferential post-1937 version of rational basis review, employed in substantive due process and equal protection cases not involving fundamental rights or suspect classifications, does not apply to the Necessary and Proper Clause.⁶⁸ Rather, he said that “[t]he rational

63. Nat’l Fed’n of Indep. Bus. v. Sebelius 132 S. Ct. 2566, 2591 (Opinion of Roberts, C.J.) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 411); *accord id.* at 2644–50 (Scalia, Kennedy, Thomas, & Alito, JJ, dissenting).

64. BLAG Brief, *supra* note 62, at 41–42; *see also* *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (asserting that marriage is “one of the vital personal rights essential to the orderly pursuit of happiness by free men”).

65. *McCulloch*, 17 U.S. (4 Wheat.) at 411.

66. *See id.* at 421 (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”).

67. *But see Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2579 (Opinion of Roberts, C.J.) (cautioning that “deference in matters of policy cannot, however, become abdication in matters of law”); *see also* LAWSON, MILLER, NATELSON, & SEIDMAN, *supra* note 56, at 118–19 (noting agreement in the early Republic that the Necessary and Proper Clause did not expand Congress’s power beyond what would have existed by implication from the enumerated powers in any event).

68. *See United States v. Comstock*, 130 S. Ct. 1949, 1966 (2010) (“This Court has not held that the *Lee Optical* test, asking if ‘it might be thought that the particular legislative measure was a rational way to correct’ an evil, is the proper test in this context. Rather, under the Necessary and Proper Clause, application of a ‘rational basis’ test should be at least as exacting as it has been in the Commerce Clause cases, if not more so.”) (Kennedy, J., concurring in the judgment) (quoting *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 487–88 (1955)). We need not remind the gentle reader that Justice Kennedy might as well have a numeral “5” tattooed on his forehead for these purposes.

basis [required] . . . is a demonstrated link in fact, based on empirical demonstration.”⁶⁹

Any such demonstration would be difficult to make for DOMA. The Act’s definition of marriage excludes same-sex couples in the context of over 1100 different federal statutes. Often the exclusion is nonsensical: As the Court noted in *Windsor*,⁷⁰ DOMA means that a bribe offered to the same-sex spouse of a federal official would be excluded from coverage under the federal ethics and corruption rules.⁷¹ The more fundamental point, however, is that a provision that applies in shotgun fashion to over 1100 federal laws is “plainly adapted” to none. Congress was not trying to enhance the operation of the tax code or the immigration laws, for example, when it enacted DOMA. While those exercises of Congress’s enumerated powers do sometimes require the federal government to determine which state-sanctioned marriages it will recognize for specific federal purposes, DOMA was not enacted for any such purpose.

Finally, the use of an unenumerated means must be not only “necessary” to achieving some enumerated end but also “proper.”⁷² In the founding era, this meant that laws “must be consistent with principles of separation of powers, principles of federalism, and individual rights.”⁷³ But that formulation—if it is to be more than tautological—is hard to unpack. In *National Federation of Independent Business*, the Chief Justice suggested that the individual health insurance mandate was improper because it extended federal power in a way that had no obvious stopping point.⁷⁴ With respect to

69. *Id.* at 1967 (Kennedy, J., concurring in the judgment) (attributing this standard to “the Commerce Clause cases”).

70. 133 S. Ct. 2675 (2013).

71. *See id.* at 2695 (discussing 18 U.S.C. § 208(a) (prohibiting federal officials from participating in matters where their spouses have a financial interest); 2 U.S.C. § 31-2(a)(1) (prohibiting spouses of Senators and Senate employees from accepting high-value gifts from certain sources)).

72. *See, e.g.,* *Printz v. United States*, 521 U.S. 898, 923–24 (1997) (stating that when a law violates state sovereignty, it is not “proper” under the Commerce Clause); *see also Comstock*, 130 S. Ct. at 1967–68 (Kennedy, J., concurring in the judgment) (“It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause”); LAWSON, MILLER, NATELSON, & SEIDMAN, *supra* note 56, at 78.

73. Lawson & Granger, *supra* note 53, at 297.

74. 132 S. Ct. at 2588 (opinion of Roberts, C.J.); *id.* at 2646 (joint dissent); *see also* Jonathan Adler, *Judicial Minimalism, the Mandate, and Mr. Roberts*, in *THE HEALTH CARE CASE: THE SUPREME COURT’S DECISION AND ITS IMPLICATIONS* 177–80 (Nathaniel Persily, Gillian E. Metzger, & Trevor W. Morrison eds., 2013).

DOMA, the strongest argument is that Congress had appropriated a power that is reserved exclusively to the states.⁷⁵ Moreover, Congress's intrusion on that power interfered with the States' own exercise of their powers over marriage.⁷⁶

This sort of argument is likely to raise hackles, because it seems to invoke long-discredited principles of "dual federalism." Under the dual federalism doctrine, the national and state governments each enjoyed exclusive authority over particular realms of public life; the federal government could regulate foreign affairs and interstate commerce, for example, while the states reigned over family law, public education, and wholly *intrastate* commercial activity.⁷⁷ The Court rejected dual federalism as part of its famous "switch in time" after 1937, and modern constitutional doctrine generally understands federal and state regulatory authority as *concurrent* in nature.⁷⁸ But one can recognize that Congress's powers frequently and necessarily overlap with state authority without insisting that Congress may exercise every single power that the states could exercise. Just last term, the Court held in *Arizona v. Inter Tribal Council of Arizona, Inc.*⁷⁹ that while the Elections Clause authorizes Congress to regulate the time, places, and manner of federal elections, it does *not* permit Congress to set qualifications for voting.⁸⁰ In other words, although Congress and the states exercise concurrent power over the field of voting, their powers are not coextensive. So, too, with family law. Although Congress's powers over interstate commerce, immigration, and other matters can and do yield valid federal legislation touching

75. Brief of Federalism Scholars, *supra* note †, at 22–23.

76. *See, e.g., Comstock*, 130 S. Ct. at 1967–68 (Kennedy, J., concurring in the judgment) ("It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause; if so, that is a factor suggesting that the power is not one properly within the reach of federal power.").

77. *See generally* Ernest A. Young, *The Puzzling Persistence of Dual Federalism*, LV NOMOS 34–82 (2014); Alpheus Thomas Mason, *The Role of the Court, in FEDERALISM: INFINITE VARIETY IN THEORY AND PRACTICE* 8, 24–25 (Valerie Earle ed., 1968); ANTHONY J. BELLIA JR., *FEDERALISM* 183 (2011) ("The *dual federalism* paradigm understands federal and state governments to operate in different spheres of authority.").

78. *See* Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950); Ernest A. Young, "The Ordinary Diet of the Law": *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 254.

79. 133 S. Ct. 2247 (2013).

80. *Id.* at 2257 (stating that "the Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them").

on marriage, the power to *define* marriage itself is plausibly reserved to the States.⁸¹

C. Do Definitions Require an Enumerated Basis?

The remaining possibility is that definitions are just different—that they don't *need* to be grounded in either an enumerated power or the Necessary and Proper Clause. The best way of putting this claim might run as follows: When Congress enacts a statute like ERISA, or the tax code, or the bribery statute it presumably has some enumerated basis for that statute; in my examples, that basis would be the commerce power, the taxing power, and the Necessary and Proper Clause, respectively.⁸² All a federal definition does is clarify exactly what Congress is doing under each of these powers. Congress may tax married couples at a different rate than singles, and a federal definition of "marriage" simply clarifies upon whom the tax falls. No distinct "power" is needed to do this; the underlying power to enact the statutory scheme in the first place will suffice.

This argument depends, however, on definitions being fundamentally different from regulatory provisions. There are at least three good reasons to doubt that this is true. First, federal definitions frequently have legislative effects.⁸³ DOMA meant that, throughout the realm of federal law and federal programs, same-sex spouses would be treated as if they were unmarried. This affected eligibility for federal benefits and duties under federal regulatory statutes. Perhaps there are aspects of internal governmental operations that have no effects in the outside world. But most federal definitions change legal rights and obligations in ways that may profoundly impact private citizens.

It is easy to think of other examples. Consider, for example, a federal definition of "divorce" that rejected contemporary notions of "no fault" divorce. Federal law would thus continue to treat couples as married, notwithstanding a valid divorce under state law, if they did not meet the federal requirements. To take just a few examples,

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81. See *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013) ("The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations . . .").
 82. I take it that the bribery statute would be justified on the ground that, when Congress regulates pursuant to its enumerated powers, the Necessary and Proper Clause confers an incidental power to create federal executive officials to implement those regulations. A prohibition on bribery would then be incidental to making sure those officials actually did their jobs.
 83. Cf. *INS v. Chadha*, 462 U.S. 919, 952 (1983) (stating that a government action is "essentially legislative" if it "had the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch").

their federal tax obligations, eligibility for federal benefits, intellectual property rights, and survivorship rights under federal pension plans would all proceed on the assumption that the couple remained married. Imagine the complications if one or both of the individuals tried to re-marry—would federal law treat that second marriage as invalid?⁸⁴ While a federal definitional change would not sweep as broadly as a federal statute attempting to preempt state rules on divorce, it would nonetheless have pervasive regulatory consequences.

Or consider a federal definition of “property” that failed to recognize certain sorts of rights that would be valid under state law. A federal definition of property might refuse, for example, to impose the doctrine of “avulsion,” which holds that land created by a sudden event belongs to owner of the seabed (often the government). That definition would limit the rights that state property owners might otherwise have over new land adjacent to their property; for instance, owners would presumably have no right to just compensation under federal law if the state were to take the new land. Any such qualification of property rights by denying their recognition under federal law would surely diminish the economic value of the state-law rights. Again, the point is simply that formerly calling a federal law a definitional change hardly prevents it from having legislative effects.

Second, federal definitions have effects that are not confined to the federal government; in many circumstances, they may impose obligations on *state* officials and significantly interfere with the operation of state law. DOMA required state officials to disregard state law when administering federal programs. State officials administering veterans’ cemeteries, for example, had to disregard state law and exclude veterans’ same-sex spouses.⁸⁵ Second, DOMA interfered with the implementation and enforcement of state law itself and imposed substantial costs on the states. For instance, DOMA rendered state spousal-support orders arising out of divorces involving same-sex couples unenforceable in bankruptcy and precluded use of garnishment procedures ordinarily available for monies in federal

84. One implication would be serious pressure on divorcing couples to allege fault regardless of state law (with all the negative consequences that drove most states to abandon that requirement) simply to insure that their divorce would be recognized under both federal and state law.

85. *See* Massachusetts v. U.S. Dept. of Health & Human Servs., 698 F. Supp. 2d 234, 239–41 (D. Mass. 2010). The requirement that state officials disregard state definitions of marriage may be analyzed as a condition on their states’ participation in federal programs like Medicaid. From that perspective, it is unlikely that DOMA could validly apply to any programs that states elected to participate in prior to DOMA’s effective date. *See, e.g.*, Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2606–08 (2012) (striking down retroactive conditions on Medicaid participation).

hands.⁸⁶ It prevented state income tax regimes from “piggybacking” on federal forms, rules, and enforcement.⁸⁷ And it increased the taxes that states as employers pay when they extend health insurance to same-sex spouses.⁸⁸ These effects reflect DOMA’s fundamental purpose, which was to discourage states from adopting a definition of marriage that departed from Congress’s preferences.⁸⁹

Congress’s powers to legislate and to interfere with the operations of state governments are limited by Article I. I submit that *everything* Congress does—or at least those actions that have effect outside of Congress itself—must be either grounded in a specific enumerated power or justified as an implied power under the Necessary and Proper Clause. Most federal definitions will easily clear one or the other of these hurdles. But where they do not, federal law must adopt the relevant state-law definitions.

Finally, a note about *Windsor* itself: the fact that Congress lacks power to regulate the marriage relationship would be relevant to that case even if one believed in some kind of freestanding federal definitional power. Even if one concedes that Congress can define its terms, Congress’s enumerated powers limit the range of *interests* that Congress may assert in support of those definitions when they are challenged under the Constitution’s rights and equality provisions. Congress might define “marriage” so that its statutes are intelligible, but it cannot assert an interest in maintaining the traditional institution of marriage in response to an equal protection challenge. That is because maintaining that institution is not itself within any of Congress’s enumerated powers. What Congress cannot do, in other words, is exactly what the Bipartisan Legal Advisory Group did in the *Windsor* litigation: assert that it has the same interest as a state in defining who can and cannot be married.⁹⁰ And without such an interest, the discrimination inherent in the DOMA is awfully hard to defend.

86. See Brief of Federalism Scholars, *supra* note †, at 33–34.

87. See Carlton Smith & Edward Stein, *Dealing with DOMA: Federal Non-Recognition Complicates State Income Taxation of Same-Sex Relationships*, 24 COLUM. J. GENDER & L. 29, 33–41, 48–71 (2012).

88. *Massachusetts*, 698 F. Supp. 2d at 243–44.

89. See *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (DOMA’s purpose “is to discourage enactment of state same-sex marriage laws The congressional goal was ‘to put a thumb on the scales and influence a state’s decision as to how to shape its own marriage laws.’”) (quoting *Massachusetts*, 682 F.3d at 12–13).

90. BLAG Brief, *supra* note 62, at 30–33.

III. DEFINITIONS AND CONSTITUTIONAL STRUCTURE

DOMA is gone and it seems unlikely that anyone will attempt to revive it at the federal level. Nonetheless, arguments about Congress's power to define terms in federal law remain important for a number of reasons. The first is the potential to leverage "definitional" power into substantive regulation in other areas. The second has to do with the line between legislative and executive action, including in the same-sex marriage context. Finally, and most important, the absence of a general, freestanding definitions power underscores the fundamentally interstitial nature of federal law.

The risk that defining terms may unduly broaden federal power arises, of course, only in those relatively uncommon areas where Congress otherwise lacks power to act. The domestic relations context in which *Windsor* arose thus remains the most likely candidate for other federal definitional statutes. The point is not that family law is an exclusive state enclave. I am generally skeptical that such enclaves exist,⁹¹ and in any event it is easy to think of examples—interstate child abductions, for instance—in which Congress's traditional powers over interstate commerce and movement will come into play. But commercial activity is peripheral in this sphere, and enumerated federal power may often be unavailable. Moreover, the area of domestic relations and sexual privacy encompasses many of the most divisive social issues of our time; as DOMA itself illustrates, the temptation to wade into these waters will often be difficult for federal politicians to resist.

Definitions are particularly important in the family law area, because so much of that law turns on status. Typically, state law defines the basic relationships—spouse, parent, child. These definitions carry immense moral significance, and they trigger far-reaching legal consequences. Complex questions have arisen concerning these relationships: Who is the "parent" of a child created by artificial insemination and carried to term by a surrogate mother? At what point does a developing fetus become a "child"? The power to define these terms is, in a very real sense, the power to regulate the underlying relationships. And that is true even if the definition's scope purports to be limited to *federal* statutes and regulations. The danger of broad federal regulation masquerading as mere definitions did not die with DOMA.

A second implication of my argument has to do with separation of powers, not federalism. Congress lacks a general definition power because definitions sometimes amount to lawmaking, and any exercise of lawmaking must be measured by the enumerated powers. This suggests that the Executive branch lacks any general definitional

91. See, e.g., Young, *Dual Federalism*, *supra* note 77, at 59–60.

authority as well. One way to test the intuition that “defining” is different from “lawmaking” is to ask whether DOMA could have been promulgated by the Executive branch acting alone. After all, we frequently assume that administrative agencies have power to flesh out the terms of federal statutes by defining relevant terms. If President Clinton had simply issued an executive order in 1996 stating that federal agencies would not treat same-sex couples as married, it seems likely that that approach would have raised a few eyebrows. DOMA plainly made a policy choice on an important matter—it was the sort of decision that belonged to Congress. But that is because, while DOMA was framed as a definition, its proponents and opponents all understood it to be a significant *legislative* act.

This has implications for the aftermath of *Windsor*. The Obama administration has announced that it has decided to treat *all* same-sex marriages as legal. To some extent, of course, the Executive branch must make difficult choice of law judgments unless and until Congress acts to resolve those issues under Article IV. It would seem fine, for example, to adopt a general rule that federal law will rely on the law of the place of celebration. But a general policy of recognizing *all* same-sex marriages is not a choice of law rule, but a substantive one. If DOMA amounted to legislation, that more beneficent policy would as well. And it could only be justified if it were (a) within *Congress’s* enumerated power and (b) within the scope of a valid delegation from Congress to the Executive.

Finally, there is nothing surprising or disruptive about requiring federal law to incorporate state-law definitions on particular subjects. As Henry Hart argued long ago, federal law is generally “interstitial” in nature; Congress legislates against the background of state law in much the same way that a state legislature legislates against the backdrop of the common law.⁹² This is a fundamental principle of federalism in the post-New Deal era, and it is integral to the way we think about the relationship between state federal law in areas such as the *Erie* doctrine⁹³ or federal preemption of state law.⁹⁴

92. Henry M. Hart Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 492 (1954).

93. See generally *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (holding that federal courts generally must apply state law in the absence of a federal statute or constitutional provision); Ernest A. Young, *A General Defense of Erie Railroad Co. v. Tompkins*, 10 J. L., ECON. & POL’Y 17, 68–76 (2014).

94. See generally *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230–36 (1947) (adopting a presumption against preemption of state law); Young, *Ordinary Diet*, *supra* note 78, at 265 (discussing the relationship between the presumption against preemption and the general view that federal law is interstitial).

The interstitial nature of federal law means federal legislation frequently takes state law as it finds it.⁹⁵ Marriage, after all, is the quintessential example. As I have already discussed, DOMA simply ruled out for federal purposes one particular aspect of some states' laws; it offered no federal definition of that term, and instead simply incorporated state law on every other aspect of what it means to be a "lawful" marriage. So too with innumerable federal statutes. The sky will not fall if Congress is denied, in areas outside its enumerated powers, the power to alter this traditional relationship between state and federal law.

CONCLUSION

The continuing importance of policing the limits of Congress's enumerated powers, even at the margins, is evident from an argument that does not appear to have been made either in the legislative process that led to the DOMA or in subsequent debates about same-sex marriage. That is, I have not heard anyone arguing that Congress could simply ban same-sex marriages across the board by preempting state laws recognizing such unions. Progressives should pause for a moment and think about that fact. We likely can attribute this constitutional dog that didn't bark to cases like *United States v. Lopez*,⁹⁶ which reaffirmed after a very long hiatus that yes, Virginia, there *are* constitutional limits on Congress's legislative authority. Liberals derided that holding as a Sign of the Apocalypse,⁹⁷ but it may have played a key role in one of the most successful progressive social movements of our time. It is yet another example of the key role federalism plays in protecting both liberty and equality.

With that role in mind, this brief essay has sought to dispose of a particular argument for expanding Congress's authority into places that it would otherwise lack power to enter. Congress cannot regulate same-sex marriage—or adoption, abortion, or immigration—simply by "defining" key terms in federal statutes to exclude persons engaging in disfavored activity. Everything Congress does must either rest on an enumerated power or be justified as an implied means that is "necessary and proper" to an enumerated end. These powers—both enumerated and implied—are capacious, and most federal definitions will have no problem passing over this bar. But at the end of the day federal law remains interstitial in its nature; there is no federal authority to fill in all the gaps in the name of completeness. In many instances, federal law must continue to take state law as it finds it.

95. See Young, *Role of State Law*, *supra* note 6, at 39.

96. 514 U.S. 549 (1995).

97. See, e.g., Charles E. Ares, *Lopez and the Future Constitutional Crisis*, 38 ARIZ. L. REV. 825, 825–26 (1996).