Seton Hall Legislative Journal

Volume 36 | Issue 2 Article 12

8-31-2012

Health Care Reform: Seeking the Cure for Tax and Social Justice on the Landscape of Changing Familial Norms

Julia Higgins Foresman

Follow this and additional works at: http://erepository.law.shu.edu/shlj

Recommended Citation

Foresman, Julia Higgins (2012) "Health Care Reform: Seeking the Cure for Tax and Social Justice on the Landscape of Changing Familial Norms," *Seton Hall Legislative Journal*: Vol. 36: Iss. 2, Article 12.
Available at: http://erepository.law.shu.edu/shlj/vol36/iss2/12

This Note is brought to you for free and open access by Seton Hall Law eRepository. It has been accepted for inclusion in Seton Hall Legislative Journal by an authorized administrator of Seton Hall Law eRepository. For more information, please contact lawlibdigital@shu.edu.

HEALTH CARE REFORM: SEEKING THE CURE FOR TAX AND SOCIAL JUSTICE ON THE LANDSCAPE OF CHANGING FAMILIAL NORMS

Julia Higgins Foresman*

I. INTRODUCTION 343
II. THE PPACA, DOMA, AND THE CHANGING AMERICAN FAMILY 347
III. SPECIFIC CONTEMPORARY REGULATIONS AND THE PERSISTING VULNERABILITY OF LGBT FAMILIES 352
IV. THE FRUSTRATED GOALS OF THE PPACA: ACCESSIBILITY AND QUALITY OF CARE 362
V. FOCUS ON BRIDGING THE DISPARITY: ECONOMIC PARITY BEFORE SOCIAL? 367
VI. THE STAGNANT TAX EQUITY FOR DOMESTIC PARTNER AND HEALTH PLAN BENEFICIARIES ACT ... 369
VII. A FUTURE WITH DOMA? 372
VIII. CONCLUSION 377

I. INTRODUCTION

President Barack Obama signed the Patient Protection and Affordable Care Act ("PPACA" or "the Act") into law on March 23, 2010 amid a swirl of controversy. Health care reform figured prominently among the issues of the 2008 Presidential Election. During his candidacy, President Obama proposed a plan to cover the millions of Americans who go without health insurance each year.[1] Once elected, President Obama undertook to create what constitutes the greatest change to the nation's social welfare programs in recent history.

* J.D. Candidate, 2012, Seton Hall University School of Law; B.S. in Foreign Service, Georgetown University, 2006. I would like to thank Professor John Jacobi for his invaluable help and guidance, my family for their tireless patience and support, and especially Tim Higgins and John Galdieri.

[1] Sen. Barack Obama, The First Presidential Debate in Oxford, MS (Sept. 26, 2008) (transcript available at http://elections.nytimes.com/2008/president/debates/transcripts/first-presidential-debate.html)

Goals of health care reform under the PPACA fall broadly under four categories: cost containment, affordability, improved access and quality of care.[2] The PPACA contains many expansions to the nation's health care delivery systems for individuals and families alike. For example, insurers are generally prohibited from excluding pre-existing medical conditions and parents may keep dependents on their insurance plans until the age of twenty-six.[3] Furthermore, Medicare Part D will undergo a dramatic facelift, as seniors anticipate a post-doughnut-hole retirement with their prescription drug plans.[4] Moreover, Medicaid is an enormous platform for expansion, as individuals, including those without children, will now be eligible for enrollment and coverage if they are 133% above the poverty line.[5] Any person who was not eligible for Medicaid on December 1, 2009, and meets these and citizenship requirements will qualify for the expanded program.[6]

---

[2] *See* Patient Protection and Affordable Care Act, H.R. 3590, Pub. L. No. 111-148, 124 Stat. 119 (2010) (amended by Health Care and Education Reconciliation Act of 2010, H.R. 4872, Pub. L. No. 111-152) (now codified in various sections of 42 U.S.C.); *see also* Posting of Don McCanne, MD to Physicians For a National Health Program, *Hijacked – Stolen health care reform V: Overall assessment of the Patient Protection and Affordable Care Act of 2010 (PPACA)*, (July 28, 2010), http://pnhp.org/blog/2010/07/28/john-geymans-hijacked/; see also U.S. Dep't of Health & Human Servs., *In Focus: Health Disparities and the Affordable Care Act*, http://www.healthcare.gov/law/infocus/disparities/index.html (last visited Dec. 27, 2010) (stating that the PPACA will rein in insurance abuses, cap premiums and prohibit denial of coverage, and make health insurance affordable for middle class Americans, among other things).

[3] 42 U.S.C. 1396a(a)(10)(A)(i)(IX); *see Proposed Changes in the Final Healthcare Bill*, N.Y. TIMES (Mar. 22, 2010), http://www.nytimes.com/interactive/2010/03/19/us/politics/20100319-health-care-reconciliation.html. *See also* Tara Parker-Pope, *Consumers' Big Question: What's In It for Me?*, N.Y. TIMES (Mar. 29, 2010), http://www.nytimes.com/2010/03/30/health/30well.html?pagewanted=1&_r=1&ref=health.

[4] HENRY J. KAISER FAMILY FOUND, THE MEDICARE PART D COVERAGE GAP: COSTS AND CONSEQUENCES IN 2007 1 (2008), *available at* http://www.kff.org/medicare/upload/7811.pdf (discussing the alarming growth of coverage gaps of Medicare Part D beneficiaries).

[5] 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) (2011); *see Proposed Changes in the Final Healthcare Bill*, N.Y. TIMES Mar. 22, 2010, *available at* http://www.nytimes.com/interactive/2010/03/19/us/politics/20100319-health-care-reconciliation.html.; *see also* Parker-Pope, *supra* note 3.

[6] 42 U.S.C. § 1396d(y)(2)(A) (defining "newly eligible" to mean, "with respect to an individual described in subclause (VIII) of section 1902(a)(10)(A)(i), an individual who is not under 19 years of age (or such higher age as the State may have elected) and who, as of December 1, 2009, is not eligible under the State plan or under a waiver of the plan for full benefits or for benchmark coverage described in subparagraph (A), (B), or (C) of section 1937(b)(1) or benchmark equivalent coverage described in section 1937(b)(2) that has an aggregate actuarial value that is at least actuarially equivalent to benchmark coverage described in subparagraph (A), (B), or (C) of section 1937(b)(1), or is eligible but not enrolled (or is on a waiting list) for such benefits or coverage through a waiver under the

While the magnitude of the PPACA will continue to unfold over the next several years, the limitations of the PPACA in meeting its goals will become gravely apparent for the growing number of non-traditional families comprised of gay and lesbian couples and their children. The Defense of Marriage Act ("DoMA"), signed into law by President Clinton in 1996, defines marriage for federal purposes as a legal union between a man and woman as husband and wife.[7] While DoMA purports to relinquish to states the decision of whether to allow gay marriages and civil unions, the legislation excludes same-sex couples and their families from spousal benefits included in federal directives.[8] Moreover, no state is required to recognize out-of-state same sex marriages, marking the first time that Congress has applied the Full Faith and Credit Clause of the Constitution in a negative fashion.[9]

The implications of the struggle for same-sex couples are manifold.[10] For instance, unlike married couples, domestic partners must pay federal and sometimes state taxes on health care benefits when they are covered under a spouse's policy.[11] The Internal Revenue Service counts the value of the domestic partner's benefit as income for the employee.[12] The scene becomes murkier when one partner in a same-sex couple gives birth to or adopts a child, or if one of the partners becomes ill. For example, under the Family Medical Leave Act ("FMLA"), larger employers must provide employees job-protected unpaid leave due to a serious health condition rendering the employee unable to perform his or her job, or to care for a sick family member, or for a new child.[13]

---

plan that has a capped or limited enrollment that is full"); *see Proposed Changes in the Final Healthcare Bill*, N.Y. TIMES (Mar. 22, 2010), http://www.nytimes.com/interactive/2010/03/19/us/politics/20100319-health-care-reconciliation.html.

[7] Defense of Marriage Act, 1 U.S.C. § 7 (2011).

[8] *Id.*

[9] Dominick Vetri, *Laboratories of Democracy: Federalism and State Law Independency: Article: The Gay Codes: Federal & State Laws Excluding Gay & Lesbian Couples*, 41 WILLAMETTE L. REV. 881, 898 (2005).

[10] *See* Walecia Konrad, *For Gay Couples, Obstacles to Health Insurance*, N.Y. TIMES (May 8, 2009), http://www.nytimes.com/2009/05/09/health/09patient.html. To date, DoMA precludes same-sex couples from seeking the same health care benefits as heterosexual couples. In 2009, about one-third of companies that employed more than 500 people offered domestic partner benefits. *Id.* While this number grows each year, it continues to lag for smaller employers. *Id.* Even if the relationship is formalized with the state by marriage, this does not always obligate the employer to cover a same-sex spouse. *Id.*

[11] *Id.*

[12] *Id.*

[13] Family Medical Leave Act, 29 U.S.C. § 2601 (2011).

DoMA sharply limited the reach of the FMLA by excluding same-sex partners from caring for one another or for a child who is not the biological offspring of the employee partner in states in which gay marriage is prohibited.[14] Similar limitations apply in the long-term care and hospital proxy settings, which have become particularly distressing for older LGBT couples unable to plan for retirement.[15]

The PPACA creates new programs and provides new federal resources to promote health and provide access to affordable healthcare for American families.[16] Yet, the Department of Health and Human Services failed to interpret the Act's references to family, child, spouse, parent, dependent, and other terms to connote familial relationships in ways that would recognize diverse family structures.[17] This gap is problematic because American family structures are increasingly varied. For example, the 2000 U.S. Census reported 5.5 million couples were living together who were not married, up from 3.2 million in 1990.[18] The majority of unmarried-partner households had partners of the opposite sex, while an estimated 594,000 households reported partners of the same sex.[19] Other research indicates that approximately two million American children under the age of eighteen are being raised by parents in a same-sex relationship.[20]

For health care reform to achieve its goals, it will need to recognize the diversity of American families.[21] The PPACA includes numerous references to family, child, spouse, parent, dependent, and other terms meant to connote familial relationships.[22] As one prominent advocate noted, "how these terms are defined will determine who has access to

[14] Alana M. Bell & Tamar Miller, Note, *When Harry Met Larry and Larry Got Sick: Why Same-Sex Families Should be Entitled to Benefits Under the Family Medical Leave Act*, 22 HOFSTRA LAB. & EMP. L.J. 276, 281 (2004).

[15] *Id.*

[16] *See* HENRY J. KAISER FAMILY FOUND, FOCUS ON HEALTH REFORM: SUMMARY OF THE NEW HEALTH REFORM LAW, *available at* http://www.statecoverage.org/files/KFF%20-%20PPACA%20Summary%206.18.10.pdf (last visited Apr. 17, 2012).

[17] Kellan Baker, National Coalition for LGBT Health, *Recommendations for Implementing the Affordable Care Act*, http://lgbthealth.webolutionary.com/sites/default/files/7%2014%20NBI%20Recommendations%20for%20ACA%20(2).pdf (last visited Jan. 15, 2012).

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

the new benefits and programs created by health care reform, such as insurance market protections; premium assistance; family-provided home-and-community-based services; and family caregiver support services."[23]

While the PPACA is momentous, the legislation's victories will be offset by its limits in the family context. Achieving universal coverage depends, in part, on remedying inequalities in state and federal marriage-related rules, which are intimately tied to the Internal Revenue Code ("IRC"). DoMA conflicts with an efficient and comprehensive adoption of the goals of the PPACA. State marriage and civil union statutes create new families for many purposes and coherent family structures will be central to success in the financial aspects of health reform.

This Note will explore the myriad of ways in which LGBT couples struggle with inequalities in the healthcare context against the backdrop of the IRC's treatment of the American family. This Note will first contextualize the PPACA and DoMA on the federal landscape against the backdrop of changing familial norms. Next, this Note will undertake a closer study of DoMA by exploring the political climate in which it was passed more than fifteen years ago and how it continues to ensure inequality among a growing number of couples. This Note will then consider several special challenges homosexual individuals and couples face in accessing health care that were not contemplated by the PPACA. The coverage goals of the PPACA are frustrated in part because the legislation relies on the IRC for its definition of "spouse" and "dependent" which in turn are dictated by DoMA. As a result, the PPACA addresses little if any of these challenges. This Note will end by reflecting on the future of DoMA, possible solutions, and the constitutional challenges that may result in its repeal.

II. THE PPACA, DOMA, AND THE CHANGING AMERICAN FAMILY

In contrast to the media fanfare surrounding passage of the PPACA, the Defense of Marriage Act elicited murmurs by comparison on Capitol Hill. DoMA was signed into law in 1996 by President Clinton in response to political outcry over the Hawaii Supreme Court's 1993 decision in *Baehr v. Lewin*, which stated that same-sex couples

[23] Baker, *supra* note 17.

might be entitled to marry under the state's constitution.[24] *Lewin* raised the possibility that same-sex couples could begin to obtain state-sanctioned marriage licenses, a notion that spooked the conservative sensibilities within Congress.[25]

DoMA contains two parts: 1) No state is required to recognize out-of-state same sex marriages; and 2) Marriage is defined for all federal statutes as 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.[26] In permitting states to forego recognizing same-sex marriage performed in other states, Congress relied on its "express grant of authority,"[27] under the second sentence of the Constitution's Full Faith and Credit Clause, "to prescribe the effect that public acts, records, and proceedings from one State shall have in sister States."[28]

In the House Report on DoMA, the now legal director for Gay And Lesbian Advocates and Defenders ("GLAD"), Gary Buseck, stated that, at the time DoMA was passed, federalism constrained Congress' power, and "[t]he determination of who may marry in the United States [wa]s uniquely a function of state law."[29] Nonetheless, Buseck asserted that Congress was not "supportive of the notion of same-sex 'marriage,'" and, therefore, embraced DoMA as a step toward furthering Congress's interests in "defending the institution of traditional heterosexual

[24] Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

[25] Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 395 (D. Mass. 2010) (citing the Aff. of Gary D. Buseck, Ex. D, H.R. Rep. No. 104-664 at 2-3 (1996)), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906-07 referencing the House Judiciary Committee's Report on DoMA referencing the *Baehr* decision as the beginning of an "orchestrated legal assault being waged against traditional heterosexual marriage," and expressed concern that this development "threaten[ed] to have very real consequences . . . on federal law." Specifically, the Report warned that "a redefinition of marriage in Hawaii to include homosexual couples could make such couples eligible for a whole range of federal rights and benefits." And so, in response to the Hawaii Supreme Court's decision, Congress sought a means to both "preserve each State's ability to decide" what should constitute a marriage under its own laws and to "lay down clear rules" regarding what constitutes a marriage for purposes of federal law.); Aff. of Gary D. Buseck, Ex. D, H.R. Rep. No. 104-664 at 2-3 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906-07 ("H. Rep.")) *Id*; *see also* Michelle D. Layser, Note, *Tax Justice and Same-Sex Domestic Partner Health Benefits: An Analysis of the Tax Equity For Health Plan Beneficiaries Act*, 32 HAWAII L. REV. 73, 78 (2009).

[26] Defense of Marriage Act, 1 U.S.C. § 7, 28 U.S.C. § 1738(c) (2011).

[27] U.S. CONST. art. IV, § 1.

[28] *Gill*, 699 F. Supp. 2d at 378.

[29] *Id*.

marriage."[30] The House Report on DoMA further justified the enactment of the statute as a means to encourage responsible procreation and child-rearing, conserve scarce resources, and preserve traditional notions of Judeo-Christian morality.[31]

Although DoMA drastically amended the eligibility criteria for a vast number of federal benefits, rights, and privileges that depend upon marital status, the relevant committees did not engage in a thorough examination of the scope or effect of the law.[32] For example, as noted in a recent case, "Congress did not hear testimony from agency heads regarding how DoMA would affect federal programs nor was there testimony from historians, economists, or specialists in family or child welfare."[33] Instead, the House Report simply observed that the terms "marriage" and "spouse" appeared hundreds of times in various federal laws and regulations, and that those terms were defined, prior to DoMA, only by reference to each state's marital status determinations.[34] Still, as of December 2003, 1,138 federal laws turned on federal marital status, including those governing the health benefits of most employers.[35]

After the passage of DoMA, LGBT couples who get married in a state that legally recognizes such marriages are broadly denied coverage from federal statutes that have marriage and spousal provisions. Gay marriages are not recognized for federal purposes, including filing joint tax returns, though couples may file joint returns on the state level if the state permits same-sex marriage, requiring output of more time and money in tax preparation.[36] Presumptively, such discrimination fully

---

[30] *Id.* at 378.

[31] *Id.*; *see also* Symposium, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805, 843 (2008).

[32] *Gill*, 699 F. Supp. 2d at 379 (citing Aff. of Gary D. Buseck, Ex. D, H.R. Rep. No. 104-664 at 2-3 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906-07 ("H. Rep.").

[33] *Id.*

[34] *Id.* at 379.

[35] *Id.* at 377. It is often cited that there are 1,138 federal statutory provisions under "which marital status is a factor in determining or receiving benefits, rights, and privileges." Letter from Dayna K. Shah, Associate General Counsel, United States General Accounting Office, to Honorable Bill Frist, Majority Leader, United States Senate (Jan. 23, 2004), http://www.gao.gov/new.items/d04353r.pdf. *Id.*

[36] Layser, *supra* note 25, at 83; *see also* Human Rights Campaign, New York Marriage/Relationship Recognition Law, http://www.hrc.org/issues/1496.htm (last visited Sept. 19, 2010) (noting that only New York officially recognizes out of state marriages); *see also* Liz Robbins, *Washington, D.C., Council Approves Recognition of Out-of- State Gay Marriage*, N.Y. TIMES (May 5, 2009), http://www.nytimes.com/2009/05/06/us/06district.html (noting that the Washington, D.C. City Council approved a

extends to all familial references and underpinnings within the PPACA.[37] Same sex couples who marry under state law or who enter into domestic partnerships or civil unions are effectively treated as unrelated third parties for federal tax purposes.[38] For instance, such partners are ineligible for any tax benefit conferred upon spouses. Among the most significant of these benefits are the exclusions for employer-provided health benefits and medical care reimbursements.[39]

While these disparities may have been relative anomalies fifteen years ago, the number of families confronting tax rules and regulations that do not accommodate them is growing. The American family structure is evolving into a construct that focuses less on biology and more on community.[40] Still, modern families have had to tailor themselves to current norms and laws in a way that places the individual before the family unit. [41] As one scholar noted, "although the familial structure has changed dramatically in the last several decades, gays and lesbians are still denied the same basic rights that are given freely to their heterosexual counterparts."[42] Yet slowly, same-sex couples are being recognized as capable of forming long lasting relationships.[43] However, with DoMA still in place, these legal triumphs scarcely affect any federal employment benefits as gays and lesbians are denied the basic familial rights given to heterosexual American families.[44]

Such denial of equal treatment in the civil rights and tax contexts of these basic familial rights contravenes a premise on which the PPACA was passed: to provide affordable universal healthcare for all.[45] Despite DoMA's restriction on same-sex marriage for the purposes of

bill to recognize out-of-state same-sex marriages in the District of Columbia).

[37] Layser, *supra* note 25, at 83.

[38] *Id.* at 123.

[39] *Id.*

[40] Bell, *supra* note 14, at 287. Starting with the Family Medical Leave Act (FMLA) of 1993, Congress began to acknowledge the evolving dynamic of the modern family. The FMLA was designed with the attitude that men and women should be able to gain access to the legal, social, and economic benefits that a family structure has to offer regardless of their sexual orientations. *Id. See also* BRIAN POWELL ET AL., COUNTED OUT: SAME-SEX RELATIONS AND AMERICANS' DEFINITION OF FAMILY (2010); *see also* Mary Patricia Treuthart, *Adopting a More Realistic Definition of "Family*," 26 GONZ. L. REV. 91 n.1 (1991).

[41] Bell, *supra* note 14, at 288.

[42] *Id.* at 294.

[43] *Id.*

[44] *Id.* at 294-95.

[45] Layser, *supra* note 25, at 73.

federal benefits, the benefits of the PPACA should still apply to same-sex couples because modern definitions of family are increasingly less typified by the conventions of husband and wife. As a recent study suggests, the perception of modern "family" embraces function over structure.[46] Remarkably enough, the 2000 Census materials even referred to gay and lesbian couples as "families."[47] Still, one of the barriers to granting same-sex couples marriage rights (certainly one that was cited by the House Report on DoMA in 1996), or to even considering same-sex couples "families", is the belief that a main function of marriage and family is procreation.

Despite the belief that procreation is exclusively a function of heterosexual marriage, the District Court of Massachusetts in *Goodridge v. Department of Public Health* acknowledged that LGBT couples can raise children and that having a set of heterosexual parents is not the only means to guarantee an "optimal" child rearing setting.[48] As the court noted, "restricting marriage to opposite sex couples cannot further the policy of protecting the welfare of the children."[49] The court further recognized "the adverse effects and undue burden placed on children of unwed parents."[50] The court also acknowledged that "there is a sizable class of parents raising children who have absolutely no access to civil marriage and its protections because they are forbidden to procure a marriage license."[51] Thus, the notion that preventing same-sex marriage will strengthen the family unit is implausible because, as the *Goodridge* court pointed out, the government penalizes children of same-sex couples by depriving them of state benefits.[52]

The structure of the American family continues to evolve as LGBT couples form families that are increasingly recognized by states choosing to abandon traditional conventions of marriage and family.[53]

---

[46] POWELL, *supra* note 40, at 69.

[47] Bell, *supra* note 14, at 301-02 (referencing data on the statutory and agency-recognized allowances for new kinds of families).

[48] *Id.* at 302; *see also* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 941 (Mass. 2003).

[49] Bell, *supra* note 14, at 302.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.* at 303; *see* Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws, NAT'L CONFERENCE ON STATE LEGISLATURES, Feb. 24, 2012, http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx. For years, Massachusetts stood alone as the only state to permit same-sex marriage, while others

As a result, supporters of DoMA who defend the statute's purpose of protecting families are losing ground amid liberalizing socio-political sentiment. Indeed, while the "universal" scope of the PPACA appears to want to embrace the inclusionary notion of family, DoMA continues to do great a disservice by discriminating against those whose conception of family fails to comport with the Act's definition.

III. SPECIFIC CONTEMPORARY REGULATIONS AND THE PERSISTING VULNERABILITY OF LGBT FAMILIES

There are thousands of federal laws that impact family law issues, including tax laws such as Social Security, federal income, gift and estate, and health benefits.[54] It is common for Congress to reference familial relationships in establishing federal benefits and programs.[55] On

merely allowed civil unions or domestic partnerships. As of April 2012, Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, New York and the District of Columbia permit same-sex marriage. Legislation passed in Washington and Maryland in February 2012 will allow same-sex marriages, but those laws have not yet taken effect. In California, a federal appeals court found that the state constitution's restriction on same-sex marriage was invalid, but has postponed enforcement pending appeal. *See also* Carol Marbin Miller, *Appeals Court: Florida Ban on Gay Adoption Unconstitutional*, THE MIAMI HERALD (Sept. 23, 2010), http://www.miamiherald.com/2010/09/22/1836756/appeal-court-florida-ban-on-gay.html#; *see also* Richard Morin & Claudia Deane, *Poll Finds Growing Support for Gay Civil Unions*, WASH. POST, Mar. 10, 2004, at A06 (explaining that, "about half the country - 51 percent - favors allowing gay couples to form civil unions with the same basic rights as married couples."); *see also* Baker v. State, 170 Vt. 194, 218 (Vt. 1999) (noting that there are a significant and growing number of children being conceived and raised today by same-sex couples; gays and lesbians are creating families without any kind of federal backing to support the family unit); *see also* Lawrence v. Texas, 539 U.S. 558, 574 (U.S. 2003) (overruling *Bowers v. Hardwick*, emphasizing that "our laws and the tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" and recognizing that "persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexuals persons do…").

[54] Vetri, *supra* note 9, at 897.

[55] *Id.* n. 64. The Federal General Accounting Office did an electronic search of all U.S. statutes in which marital status is relevant and found 1,049 such statutes on the books. They classified these statues into the following thirteen categories: Social Security and Related Programs; Housing, and Food Stamps; Veterans' Benefits; Taxation; Federal Civilian and Military Service Benefits; Immigration, Naturalization, and Aliens; Indians; Trade, Commerce, and Intellectual Property; Financial Disclosure and Conflict of Interest; Crimes and Family Violence; Loans, Guarantees, and Payments in Agriculture; Federal Natural Resources and Related Laws. *See* OFFICE OF THE GENERAL COUNSEL, U.S. GENERAL ACCOUNTING OFFICE, DEFENSE OF MARRIAGE ACT, LETTER REPORT 2, 3 (1997), *available at* http://www.gao.gov/archive/1997/og97016.pdf. A far broader search would be necessary to find all of the laws related to children, parents, and siblings.

occasion, Congress has deliberately established its own relationship rules to eliminate unfairness or inequity. For example, in the Copyright Act of 1976, Congress defined "children" as all "immediate offspring, whether legitimate or not, and any [adopted] children."[56] With DoMA, however, Congress employed federal relationship rules negatively.[57] The government agencies responsible for administering the relevant program must invoke DoMA's mandate that the federal government recognize only those marriages between one man and one woman.[58]

As described below, DoMA is at odds with the goals of the PPACA. Unfortunately, this tension is also manifest in other areas of health and welfare law. For instance, Social Security exemplifies how federal law directly impacts the way people structure their legal family relationships.[59] The Social Security Act provides benefits to surviving spouses and surviving divorced spouses based on the earnings record of the deceased spouse.[60] The Social Security statute's provisions govern who qualifies as a spouse, a divorced spouse, and a child for benefit purposes regardless of the individual's status under state law.[61] The statute, in turn, takes many of its definitional cues from the IRC.

Thus, unsurprisingly, one of the key difficulties in adapting to changing social norms is contending with the definition of family that underscores the IRC. Tax law typically uses state definitions of marriage but may also adhere to federal norms, as it does with DoMA. While the IRC is merely the vehicle by which familial definitions have taken shape, the complexity and relative intractability of the IRC is part of what frustrates efforts to broaden the definition of an American family.[62] The tax regulations and rulings promulgated by the Internal Revenue Service will be discussed in more detail later, but for now it

[56] The Copyright Act, 17 U.S.C. § 101 (2011). This provision established a federal definition of "children" for copyright law purposes as opposed to deference to state family law, which was the practice under the earlier copyright law. *See, e.g.*, De Sylva v. Ballentine, 351 U.S. 570, 580-81 (1956) (holding that California's definition of "children" controls where federal copyright law's definition is vague).

[57] Vetri, *supra* note 9, at 898.

[58] *Gill*, 699 F. Supp. 2d 374, 379.

[59] Social Security Act, 42 U.S.C.S. § 416 (2011).

[60] *Id.*; *see also* Vetri, *supra* note 9, at 898.

[61] Vetri, *supra* note 9, at 898.

[62] For example, as aforementioned, employer benefits for domestic same-sex partners are counted as gross income that the employee must pay and children of the same sex partners are denied the benefit of parents who are unable to take advantage federally administered social programs within the protective structure of a family unit.

suffices to establish that tax law has long bedeviled all taxpayers.[63] For example, many view marriage as a penalizing factor because high-earning married couples face higher income taxes than two single co-inhabitants earning the same, but filing separately.[64] Still, joint filing is but one aspect of the income tax code and there are numerous other provisions that involve marital status such deductions for medical expenses of a spouse and exemptions for dependents.[65]

As one scholar noted, "one significant tax rule excludes the value of employer-provided health benefits for the employee and spouse from the income of the employee."[66] This benefit does not apply to domestic partner couples, and by extension, LGBT couples, which means that an employee with a domestic partner has the fair market value of employer-paid benefits included in his or her taxable income.[67] This remains true even where one must pay the health insurance premium out-of-pocket for his partner under the employer's group insurance.[68] The premium typically consists of the excess of the market value of the benefit over the premiums and must be included in the employee's gross income.[69]

The IRS is no stranger to arguably discriminatory federal tax treatment of same-sex couples. Pursuant to IRC § 106, the value of employer-provided health benefits is excluded as long as the benefits are provided to the employee, the employee's spouse, or the employee's dependents.[70] This section provides the dual advantages of permitting an employee to exclude from income any employers' contributions to the health plan.[71] Furthermore, an employee is permitted to make any employee contributions to the health plan from pre-tax salary reductions.[72] Same-sex partners will not be eligible for those benefits unless they fit the § 106 definition of "spouse" or qualify as

[63] Vetri, *supra* note 9, at 902.
[64] *Id.*
[65] *Id.*
[66] *Id.*; *see also* Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129 (1998).
[67] Vetri, *supra* note 9, at 903.
[68] *Id.*
[69] *Id.*
[70] Contributions By Employer to Accident and Health Plans, I.R.C. § 106(a) (LexisNexis, 2011).
[71] Contributions By Employer to Accident and Health Plans Treas. Reg. § 1.106-1 (LexisNexis, 2011).
[72] *Id.*

"dependents" of the employee.[73]

Not surprisingly, the federal standard for a "dependent" is stringent. To qualify as a dependent, § 152 of the IRC requires that the same-sex partner reside with the taxpayer as part of the taxpayer's household.[74] The partner's gross income must be less than the exemption amount of $3,650 and over one-half of the partner's financial support must come from the taxpayer.[75] In most cases, domestic partners benefits will fail to qualify for the § 106 exclusion, often because both partners are gainfully employed to some extent. Thus, the fair market value of the domestic partner benefits must be included in the employee's income and will be taxed as such. Furthermore, salary reduction attributable to domestic partner benefits must also be included in gross income.[76]

In addition to § 106, § 105 of the IRC controls the tax treatment of disability payments, medical reimbursements, and dismemberment payments.[77] Disability payments cover lost wages for time away from work due to accident or sickness.[78] Since no exclusion is available for any taxpayer with respect to disability payments, there is no discrimination between the tax treatment of opposite sex and same-sex couples.[79] However, § 105(b) and § 105(c) of the IRC cover medical care reimbursements and dismemberment payment, which are excludable if they are for the benefit of the employee, the employee's spouse, or the employee's dependents. Same-sex spouses and partners typically do not fall within the ambit of these provisions. Thus, the value of medical care reimbursements and dismemberment payments to same-sex spouses and partners almost always must be included in income.[80]

Furthermore, the rules governing Health Flexible Spending Accounts ("FSAs"), controlled by § 125 of the Cafeteria Plan Rules of the IRC, also treat LGBT couples unfairly. FSAs are employer-sponsored health benefit programs that provide employees with

[73] *Id.*
[74] Dependent Defined, I.R.C. § 152 (LexisNexis, 2010).
[75] *Id.*
[76] Layser, *supra* note 25, at 88.
[77] *Id.* at 91.
[78] I.R.C. § 105(a) (2012).
[79] § 105.
[80] Layser, *supra* note 25, at 92.

coverage reimbursements for specified, incurred expenses.[81] Employees contribute through salary reductions and employers may make contributions for coverage.[82] Sections 105 and 106 limit the health FSA exclusions to benefits provided to a spouse or dependent that may not be made to a domestic partner.[83] Once again, the discriminatory effect of unequal access to health FSAs increases the tax burden of same-sex couples and consequently their access to affordable healthcare.

The adverse benefit consequences affect not only LGBT employees, as they are a frustration for many employers as well. As explained, unequal tax treatment of domestic partners increases the tax burden for employees and employers through payroll taxes, which the employer pays based on an employee's wages (Social Security Tax and Federal Insurance Contributions Act).[84] Since domestic partner benefits cause employee wages to increase, employers who offer domestic partner benefits are liable for increased payroll taxes.[85] Domestic partner benefits constitute wages for the purposes of Social Security taxes and unemployment taxes. Thus, employers who offer domestic partner benefits are likely to have greater payroll tax liability than employers who do not offer the benefits.[86] In other words, while tax exclusion reduces the tax burden on individuals by lowering their taxable income, tax exclusion also reduces costs to employers by reducing payroll taxes and compensation expectations.[87] This, of course, has many concerning potential effects. For instance, increased payroll tax burdens on employers could encourage them to hire heterosexual workers over equally qualified LGBT workers.[88] Moreover, an aggregate increase in payroll tax deters employers from offering domestic partner benefits at all.[89]

To add insult to injury, unequal filing statuses among same-sex

[81] *Id.*
[82] *Id.*; *see also* Prop. Treas. Reg. § 1.125-5.
[83] Layser, *supra* note 25, at 92.
[84] *Id.* at 93.
[85] *Id.*
[86] *Id.*
[87] *Id.* at 73
[88] *Id.* at 96; *see also* Gary Fealk, *Sexual Orientation Discrimination and the Employment Non-discrimination Act*, HR HERO, (Jan. 9, 2009, 1:16 p.m.), http://www.hrhero.com/hl/010909-lead-employment_nondiscrimination_act.html (stating that no federal law outlaws employment or workplace discrimination on the basis of sexual orientation).
[89] Layser, *supra* note 25, at 96.

taxpayers remains unresolved. In the case of a heterosexual and homosexual worker earning the same amount, the tax system will often put them in different brackets. Heterosexual spouses are permitted to file joint federal returns and use the married tax rate schedule, while same-sex spouses are required to file as single individuals and use the single individual tax rate schedule.[90] Since the joint federal tax schedule is generally more favorable than the individual tax rate schedule, same-sex couples will be taxed at a higher rate because of their individual filing statuses.[91]

What is perhaps most striking with respect to unequal filing is how clearly the tax treatment of same-sex partners violates the fundamental principle of fairness underlying the American tax system.[92] Congress intended the tax system to achieve vertical equity and horizontal equity among taxpayers.[93] Under vertical equity, taxpayers with unequal incomes pay amounts of tax that are sufficiently unequal to fairly reflect the differences of income.[94] Under horizontal equity, taxpayers with equal incomes pay equal amounts. Neither vertical nor horizontal equity can be achieved in light of the progressive, ability-to-pay tax system purportedly in place so long as the IRS continues to distinguish couples on the basis of their sexual preferences.[95]

Some argue that there is a certain method to the madness of tax policy, aspects of which founded the basis for the passage of DoMA. For example, married couples are taxed at a lower rate because public policy favors enabling a family structure to facilitate the assumed expenditures of child-rearing.[96] However, the rationale for excluding same-sex couples from this treatment is questionable in light of the increasing numbers of same-sex couples choosing to raise children.[97] Once again, as the *Goodridge* court suggested, there is no reason to assume that same-sex couples have any lesser or greater ability to care

---

[90] *Id.* at 97.

[91] *Id.*; *see also* William P. Kratzke, *The Defense of Marriage Act (DOMA) is Bad Income Tax Policy*, 35 U. MEM. L. REV. 399, 405-12 (2005).

[92] *See* J. Clifton Fleming, Jr. & Robert J. Peroni, *Reinvigorating Tax Expenditure Analysis and Its International Dimensions*, 27 VA. TAX. REV. 437, 452 (2008).

[93] *Id.* at 453.

[94] *Id.*

[95] *Id.*

[96] Layser, *supra* note 25, at 101; *see also* Joel S. Hollingsworth, *Save the Cleavers: Taxation of the Traditional Family*, 13 REGENT U. L. REV. 29, 44 (2000-01).

[97] *See* Layser, *supra* note 25, at 101-02.

for their children. Policy goals that justify the progressive tax system thus require equal tax treatment of same-sex partnerships. Eliminating inequities with respect to domestic partner benefits will begin to ensure that similarly situated same sex and opposite sex couples are treated equally.[98]

While the IRC highlights many inequalities experienced by LGBT households, some demographics within the LGBT community are more vulnerable than others. For example, many of the legal disabilities imposed on LGBT individuals are greatly magnified when applied to LGBT elders.[99] Acts of discrimination or intimidation can take on an especially menacing hue when directed at a closeted elder who finds herself in poor health, dependent on others, or confined to an institutional setting.[100] For such individuals, although the recognition of same-sex partners is important, it will be insufficient to ensure the security of their family so long as DoMA exists.[101] Non-partner members of a same-sex family will continue to be legal strangers, which means that LGBT elders in states that do not sanction same-sex partnerships must rely on contract and estate planning documents to delineate rights and responsibilities. However, as one scholar remarked, "even the most comprehensive contract and planning documents are insufficient to imbue chosen family with all the legal attributes of the next of kin."[102]

While the public discussion has focused on the range of spousal benefits that are denied to same-sex couples, of particular concern to LGBT elders are the spousal provisions of Social Security and Medicaid.[103] Social Security and Medicare provide special benefits applicable to spouses for which same-sex partners are not eligible, regardless of whether the couple is legally married in their state of residence.[104] The repeal of DoMA would solve this problem for the thousands of couples in the states that currently recognize same-sex marriage.[105] An alternative would be to allow the designation of a beneficiary other than a legal spouse. As one scholar noted, "this type of

[98] *Id.* at 101.
[99] Nancy Knauer, Note, *LGBT Elder Law, Toward Equity in Aging*, 32 HARV. J.L. & GENDER 1, 40 (2009).
[100] *Id.*
[101] *Id.* at 43.
[102] *Id.* at 41.
[103] *Id.*
[104] *Id.* at 46.
[105] Knauer, *supra* note 99, at 46,

targeted reform would provide relief to all same-sex couples regardless of where they reside and, if the beneficiary definition is sufficiently broad, it could include chosen family as well as unmarried partners."[106] This type of reform was recently successful, for instance, in the pension area.[107] Tax-free rollover on death is not limited to spouses, but is available to all beneficiaries,[108] as the Pension Protection Act of 2006 extends the tax-free rollover privilege to non-spouses.[109] Reforms of this nature – those that administer benefits to a broad class of beneficiaries instead of between "spouses" – are logical steps toward LGBT equality despite DoMA.

Nonetheless, recent reforms barely begin to address the social welfare gap, which is becoming increasingly evident because Social Security is a major source of income for a rapidly growing class of baby boomer seniors. The amount that an individual is entitled to receive under Social Security typically reflects the length of time one worked and the amount he or she earned as income.[110] Upon the death of a spouse, the surviving spouse, depending on his or age, is entitled to receive up to the entirety of his or her deceased spouse's Social Security benefit if that benefit was larger than the surviving spouse's individual benefit.[111] Similar rules exist in the event of disability of the primary earner.[112] As a result of the Government's failure to adopt inclusive partnership definitions, "same-sex partners are not entitled to a portion of their partner's Social Security benefit upon the death or disability of their partner even if they are legally married under state law."[113] The Human Rights Campaign estimates that this exclusion of surviving same-sex partners costs LGBT elders $124 billion annually in foregone benefits.[114] This raises additional questions of equity and uniformity because the amount of the survivor's benefit is determined by the amount the deceased partner paid into the program.[115] Thus, as one scholar noted, "a worker in a same-sex relationship who pays the same

[106] *Id.*
[107] Pension Protection Act, 26 U.S.C. § 402(c)(11) (2011).
[108] Knauer, *supra* note 99, at 46 n.302.
[109] *Id.*
[110] *Id.* at 47.
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] Knauer, *supra* note 99, at 47.
[115] *Id.*

amount as a similarly situated worker in a heterosexual marriage is entitled to fewer benefits because his or her partner is not eligible for survivor benefits."[116]

Medicare and Medicaid provide health insurance coverage for most seniors and are two of the largest federal programs.[117] Both have their own pitfalls for LGBT couples. Medicare, for example, generally requires all seniors age sixty-five years and older to enroll in coverage, unless they are enrolled in insurance through their employer or the employer of a spouse.[118] Because the definition of "spouse" is predicated on the federal definition according to the IRC, this exemption does not extend to married LGBT seniors, who, like all other seniors who mistakenly fail to enroll in Medicare upon their sixty-fifth birthdays, must pay a lifelong and often steep penalty.[119] All too common in states allowing gay marriage is the story of a legally married gay senior who refuses Medicare in favor of his or her spouse's private coverage.[120] Once that spouse stops working, the senior who waived coverage must wait for Medicare's open enrollment period to receive coverage; Social Security then assesses an ongoing penalty above his or her premiums. Currently the senior must pay a higher premium for every year he or she could have had coverage, but did not sign up.[121]

For low-income seniors, Medicaid's means-tested coverage covers certain expenses not fully covered by Medicare, such as nursing home long-term care and home health care.[122] Given the skyrocketing costs of healthcare generally, it should come as little surprise that Medicaid is

---

[116] *Id.*; *see also* the 2005 Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Disability Insurance Trust Funds 2-3 (2005), *available at* http://www.ssa.gov/OACT/TR/TR05/.

[117] Knauer, *supra* note 99, at 48.

[118] *See* HENRY J. KAISER FAMILY FOUND., TALKING ABOUT MEDICARE: YOUR GUIDE TO UNDERSTANDING THE PROGRAM: MEDICARE AT A GLANCE, http://www.kff.org/medicare/7067/ataglance.cfm (last visited Apr. 14, 2012).

[119] *See* Dep't of Health and Human Servs., *Medicare and You* 23-24 (2012), *available at* http://www.medicare.gov/publications/pubs/pdf/10050.pdf.

[120] I managed one such case in 2010 at Greater Boston Legal Services. The client was about to turn sixty-five and was receiving care through her wife's employer. Social Security mistakenly thought she was in a heterosexual marriage and advised her she could waive coverage. When her wife lost her job in 2009, the client was unable to receive COBRA and was told she needed to wait until the next general enrollment period, at which time she was assessed the penalty.

[121] Dep't of Health and Human Servs., *Medicare and You* 28 (2012), *available at* http://www.medicare.gov/publications/pubs/pdf/10050.pdf.

[122] Knauer, *supra* note 99, at 48.

increasingly the only option for middle-class earners in need of long-term care.[123] The income and asset thresholds imposed by Medicaid have given rise to a new method of middle class estate planning, referred to as a the Medicaid "spend down," in which individuals "spend or transfer" their assets to meet specified income and asset requirements, referred to as the Medicaid "spend down" because individuals have to spend or transfer their assets in order to qualify under the asset and income limitations imposed by the regulations.[124] One exception to the Medicaid asset limits is a provision that allows a spouse to remain in a jointly-owned home.[125] The regulations exclude the value of a jointly-owned marital home when determining eligibility.[126] This means that, unlike married heterosexual couples, same-sex couples who jointly own their home will have to sell their home in order to allow the partner to qualify for Medicaid.[127] On the other hand, there is the benefit for LGBT couples that their "joint" assets are not automatically counted equitably as to both individuals.[128]

One recent and pertinent example of the interplay among these various benefit inequities is illustrated by the repeal of Don't Ask, Don't Tell in 2011,[129] the military policy mandating that LGBT military personnel stay in the closet on threat of discharge. While repeal of the law was certainly a hard-fought victory for advocates, DoMA undercuts its purpose as LGBT members and veterans of the military must continue to maintain their secrecy under the threat of losing their federal benefits.[130] Because DoMA prohibits the Pentagon from providing federally financed benefits to same-sex married couples, benefits such

---

[123] *Id.*; *see also* John A. Miller, *Voluntary Impoverishment to Obtain Government Benefits*, 13 CORNELL J. L. & PUB. POL'Y 81, 86-97 (2004) (discussing "spend down strategy").

[124] Knauer, *supra* note 99, at 48.

[125] *Id.*

[126] *Id.*

[127] *Id.* at 49.

[128] Editorial, *Obamacare's Marriage Penalty*, WASH. TIMES (Jan. 14, 2010), http://www.washingtontimes.com/news/2010/jan/14/obamacares-marriage-penalty/.

[129] Ed O'Keefe, *U.S. Military Prepares for End of 'Don't Ask, Don't Tell,'* WASH. POST, Sept. 19, 2011, http://www.washingtonpost.com/politics/us-military-prepares-for-end-of-dont-ask-dont-tell/2011/09/19/gIQA5ABDgK_story.html.

[130] Knauer, *supra* note 99, at 53; *see also* Gary J. Gates, *Gay Veterans Top One Million*, URBAN.ORG (July 9, 2003), *available at* http://www.urban.org/publications/900642.html; *see also* Garrance Burke, *A Call for Eternal Equality: Seeking Acceptance, Gay Veterans Group Pushes for Memorial at SE Cemetery*, WASH. POST, Sept. 13, 2003, at C1 ("1.3 million of the 25.1 million living veterans of U.S. wars are gay men or lesbians.")

as base housing, health insurance, and certain death benefits will continue to be off limits.[131] Furthermore, it is estimated that there are more than one million LGBT veterans,[132] and, given the high rate of military service when seniors reach retirement age, it is likely that a large number of LGBT veterans are seniors.[133] One of the benefits of military service is life-long veterans' benefits, including health care, disability compensation, survivor benefits, and burial benefits. In addition, veterans' health benefits are also more comprehensive than those available under Medicare or Medicaid.[134] Thus, while the repeal of Don't Ask, Don't Tell is an encouraging bellwether of liberalizing sentiment in Washington toward LGBT rights generally, its implications while DoMA continues to exist reflect the same shortcomings inherent in the PPACA.

IV. THE FRUSTRATED GOALS OF THE PPACA: ACCESSIBILITY AND QUALITY OF CARE

As grave as the implications of DoMA are for numerous laws, the PPACA itself betrays a broader lack of understanding for many health issues particular to the LGBT population. This lack of understanding is symptomatic of the social discrimination that the existence of DoMA perpetuates. For example, the PPACA fails to realistically contain costs or deliver more affordable health care to most same-sex individuals because there are grave accessibility and quality of care problems many same-sex individuals encounter due to widespread discrimination, lack of information due to inadequate surveying methods, and insufficient cultural competency.[135] Without directly excluding same-sex individuals from its scope, health care reform shuns many of those it was designed to assist: uninsured individuals who have encountered difficulties accessing medical care. LGBT individuals and couples form a significant part of this group.

Before exploring its deficiencies, it is worth noting that the PPACA includes several provisions aimed at tracking and addressing

[131] James Dao, *Same-Sex Marriage Faces Military Limits*, N.Y. TIMES (July 17, 2011), http://www.nytimes.com/2011/07/17/us/17military.html?pagewanted=all.

[132] Knauer, *supra* note 99, at 53.

[133] *Id.*; *see also* Anya Olsen, Military Veterans and Social Security, 66 Soc. Security Bull. 2 (2005/2006), http://www.ssa.gov/policy/docs/ssb/v66n2/v66n2p1.html.

[134] Knauer, *supra* note 99, at 53.

[135] Baker, *supra* note 17.

the health concerns of those the Government considers to be underserved populations. For example, the law requires the Secretary of Health and Human Services to support the development of quality measures for use in federal health programs, including measures focused on the equity of health services and health concerns across underserved populations.[136] Likewise, the law requires the Secretary to collect and report data in health disparities in federally supported health programs, public health programs, and surveys.[137] However, in spite of the fact that the PPACA purports to give all Americans increased and improved access to health care, there are several crucial areas in which legislators came up short. For instance, although the law requires the collection and reporting of specific disparities-related data in health programs and surveys and authorizes the Secretary of State and Human Resources to identify and require additional disparities-related demographic data to be collected and reported, most federally funded health and demographic surveys do not collect information on sexual orientation and gender identity.[138]

Without this data, efforts to track and address LGBT health disparities are extremely limited and the LGBT community is disadvantaged in seeking funding for health research and interventions to target disparities.[139] Though research is limited, available data reflects significant health disparities between the LGBT population and the general population.[140] For instance, the Center for Disease Control and Prevention estimates that while gay and bisexual men account for four percent of the male U.S. population, the rate of new HIV diagnosis among gay and bisexual men in the U.S. is forty-four times that of other men.[141] LGBT health disparities also include chronic conditions. For example, Black and Latina lesbians are more likely to be overweight than their heterosexual peers, which leads to higher incidences of heart disease and diabetes.[142] Furthermore, approximately twenty percent of LGBT youth report having been the victim of physical assault at

[136] 42 U.S.C. § 299b-31; *see also* Baker, *supra* note 17, at 5.
[137] 42 U.S.C. § 300kk.
[138] Baker, *supra* note 17, at 8.
[139] *Id.* at 6.
[140] *Id.* at 8.
[141] CENTERS FOR DISEASE CONTROL AND PREVENTION: LGBT HEALTH, http://www.cdc.gov/lgbthealth/ (last visited Oct. 15, 2010).
[142] *Id.*

school.[143]

In defining essential health benefits under the PPACA, the Secretary of Health and Human Services is required to take into account the health care needs of diverse segments of the population.[144] Although in many instances the health care needs of LGBT individuals mirror the needs of heterosexual and non-transgender people, there are health care issues and health services unique to or that disproportionately impact the LGBT community.[145] For example, as this Note has suggested, widespread employment discrimination and a lack of consistent relationship recognition by both states and the federal government contribute to LGBT people being twice as likely as the general population to be without insurance coverage.[146]

LGBT individuals often lack health insurance for several reasons, none of which are properly addressed within the scope of the PPACA. For one, persistent workplace discrimination and harassment means that LGBT people are more likely to lose or quit their jobs or to not get hired in the first place.[147] Indeed, transgender people consistently report being verbally or physically harassed, removed from direct contact with clients, or fired without cause.[148] Because most people get their health insurance through their employers, these employment gaps also create insurance coverage gaps.[149]

Furthermore, as already outlined in detail, most workplaces do not provide health insurance benefits for the same-sex domestic partners of their employees. Given the high cost of purchasing private individual health insurance and administrative barriers to accessing coverage, many LGBT people must go without insurance.[150] Research shows that if all employers offered domestic partner benefits, the uninsured rates for same-sex and different-sex unmarried couples would decrease by as

[143] *Id.*

[144] Baker, *supra* note 17, at 4.

[145] *Id.* at 5.

[146] Jeff Krehely, *How to Close the LGBT Health Disparities Gap*, CENTER FOR AMERICAN PROGRESS (Dec. 21, 2009), http://www.americanprogress.org/issues/2009/12/lgbt_health_disparities.html.

[147] *Id.* (citing a study by the National Gay and Lesbian Task Force and the National Center for Transgender Equality shows that 97% of transgender people report being mistreated at work because of their gender identity or expression).

[148] *Id.*

[149] *Id.*

[150] *Id.*

much as forty-three percent.[151] As it is, most insurance plans do not cover the specific care that LGBT people need and transgender individuals are often unable to access even basic preventative and primary care due to insurance exclusions.[152] Similarly, because discriminatory health care practices lead LGBT people to either not seek preventative treatment or to receive low-quality treatment, they are more likely than others to have HIV/AIDS or certain cancers.[153]

Being uninsured hinders access to preventative, primary, and specialized care and can lead to more severe late-stages diagnoses.[154] The lack of LGBT cultural competency in the healthcare system and the bias LGBT individuals often encounter from providers can make even routine care difficult to access.[155] For example, as a prolific advocate of the National Coalition for LGBT Health noted, "LGBT individuals also suffer disproportionately from the adverse health effects of living in the shadow of stigma . . . which leads to a greater need for services in areas such as mental health, substance abuse treatment, and sexual health."[156]

Given the social stigma and attendant harassment and discrimination, members of the LGBT population tend not to disclose their minority status to health care providers, doctors and others are often unaware of their LGBT patient's specific needs.[157] According to the National Coalition of LGBT Health, "this ignorance results in conditions going undiagnosed as well as doctors being unable to educate their patients about risky behaviors or other physical or mental health concerns."[158] Moreover, it is no secret that LGBT individuals are often met with repugnance or acrimony upon attempting to seek routine care from providers; indeed, one study reflected that nearly two-fifths of LGBT people are met with discrimination in this context.[159]

In the absence of complete equality before the federal government, starting with the repeal of DoMA, same-sex individuals and couples will continue to struggle for equal access in the healthcare market. A number of think tanks and special interest groups have suggested that

[151] *Id.*
[152] Krehely, *supra* note 146.
[153] *Id.*
[154] Baker, *supra* note 17, at 5.
[155] *Id.* at 2.
[156] *Id.* at 5.
[157] Krehely, *supra* note 146.
[158] *Id.*
[159] *Id.*

the Secretary of Health and Human Services should survey healthcare providers, particularly community health centers that focus on the LGBT population.[160] These groups argue that identifying health systems that provide explicitly LGBT-inclusive services will assist in identifying LGBT health needs to ensure that these needs are addressed in the essential health benefits package.[161]

General bias against same-sex individuals thwarts equal access to health care in many ways, but employer-provided insurance is an especially fertile area for health care inequality.[162] Yet, one would not get this impression studying the PPACA, which contains provisions that seek broadly to rectify the injustices against special populations. For instance, the PPACA creates the National Health Care Workforce Commission to make recommendations on national health care workforce priorities, including issues affecting special populations.[163] Furthermore, the law creates a health care workforce development grant program to support comprehensive health care workforce strategies at the state and local levels, including strategies for improving the diversity of regional health care workforces.[164] Moreover, the PPACA allows for certain health professions training dollars to be used to prepare health professionals for placement in underserved areas and with health disparities populations.[165]

The PPACA recognizes that expanding access to high quality health care requires building a well-trained workforce.[166] As the National Coalition for LGBT Health observed, the PPACA "invests in workforce training and in recruiting a diverse workforce to better meet patients' needs."[167] The Coalition further noted that "[f]ar too often . . . LGBT people who disclose their sexual orientation and/or gender identity encounter poorly informed or biased providers."[168] Indeed, it is likely that reductions in barriers to care can be achieved if health care workers are more attuned with the needs of the LGBT community.[169] Without

[160] Baker, *supra* note 17, at 5.
[161] *Id.*
[162] *Id.*
[163] 42 U.S.C. § 294q.
[164] § 294r.
[165] § 294a.
[166] § 294q; s*ee also* Baker, *supra* note 17.
[167] Baker, *supra* note 17.
[168] *Id.*
[169] *Id.*

fear of hostile treatment, LGBT individuals are more likely to be comfortable speaking with health care providers about their lives, including sexuality and gender identity issues. Opening these channels of communication is key to eliminating disparities, improving care, and bettering overall health statuses of LGBT individuals.

V. FOCUS ON BRIDGING THE DISPARITY: ECONOMIC PARITY BEFORE SOCIAL?

The frustration of the PPACA's goals is largely a result of persisting legislative adherence to conventional definitions of family. As one scholar noted, "the number of gays and lesbians affected by this unequal treatment continues to increase as more states permit same-sex marriages, civil unions, and domestic partnerships" and as more employers offer coverage for same-sex partners.[170] Yet, even as the public debate over reconciling the PPACA with the needs of same-sex families continues, some have argued that spousal references currently harm heterosexual married couples and should be deleted altogether in favor of considering individuals alone or all couples (not just married) who have pooled their resources to become an economic unit. In one sense, inclusion of marriage and spousal references in the PPACA actually harms married couples. For instance, if a dual-earning couple is married, the law counts their income jointly and the higher income would lower a married couple's health care subsidies.[171] Of course, this argument ignores, among other factors, the benefits to spouses in an employer-provided health benefit program. The PPACA creates a subsidy for people who have to buy their own insurance.[172] As one blogger for the Alternatives to Marriage Project noted, "in some cases that subsidy would be lower for a married couple than for two identical unmarried people because the eligibility threshold for a married couple

[170] Layser, *supra* note 25, at 74; *see* Defining Marriage, *supra* note 53; s*ee also* Goodridge v. Mass. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. App. Ct. 2003); *see also* Pam Belluck, *Marriage by Gays Gains Big Victory in Massachusetts*, N.Y. TIMES, Nov. 19, 2003, http://www.nytimes.com/learning/teachers/featured_articles/20031120thursday.html.

[171] Robert Rector, *The New Federal Wedding Tax: How Obamacare Would Dramatically Penalize Marriage*, THE HERITAGE FOUNDATION, http://www.heritage.org/Research/Reports/2010/01/The-New-Federal-Wedding-Tax-How-Obamacare-Would-Dramatically-Penalize-Marriage (last visited Feb. 15, 2011).

[172] Posting of Nicky Grist to the Unmarried Blog at the Alternatives to Marriage Project, Jan. 27, 2010, http://unmarried.org/blog/2010/01/27/exploring-marriage-penalties-in-health-reform/.

is less than twice that for a single person."[173]

Subsidy calculation is linked to the way the federal government calculates eligibility for subsidies generally: married couples are assumed to share all of their income and expenses, unmarried people are assumed not to share any at all.[174] The result, thus, is that marital status is often responsible for widely disparate treatment of similarly situated couples.[175] In addition to this "equivalency" problem, using marital status to determine subsidy eligibility can also thwart fair administration of subsidies.[176] Typically, subsidies are granted to assist lower to moderate income wage earners.[177] As the Alternatives to Marriage Project observed, "the amount of money a couple might save by sharing resources is often much less than the amount they stand to lose in subsidies if they expose their relationship by getting legally married."[178] It does not make sense to treat all people in relationships as if they were isolated individuals. Instead, perhaps the Government should determine which people have combined their income and expenses to create an economic unit that should be subsidized or taxed at a different rate than an individual.

At least one commentator has elucidated upon two alternatives to marriage penalty relief that might properly embrace the spectrum of the modern family.[179] One approach proposes to broaden the definition of "family" under the IRC while the other focuses on the individual as an

[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] Grist, *supra* note 172.
[179] Although it is outside the scope of this paper, some scholars have questioned where, if anywhere, the Government can and should draw the line in defining "family." In their recent study, *Counted Out*, sociologist Brian Powell and his colleagues reported on and analyzed a series of surveys they gave to 1,500 people on their views including (among others) marriage, homosexuals, parenthood, and legal rights of unmarried partners between 2003 and 2006. Though the authors found the standard bearer for public conceptions of family to be a married heterosexual couple with children, more than half of Americans also consider same-sex couples with children as family. Those numbers increased between 2003 and 2006. Less than 30 percent of Americans view heterosexual cohabiting couples without children as family, while similar couples with children count as family for nearly 80 percent. Many Americans, however, are conflicted over whether living arrangements count as family, particularly same-sex couples without children. And nearly all reject the idea that housemates, for example, are family. As the public views of family become more expansive, the authors acknowledged that the question of "limits" figure prominently in the debate. *See* POWELL, *supra* note 40.

economic unit.[180] Under the first approach, policymakers would amplify the concept of "family" away from solely heterosexual, married units to include potentially all permutations of cohabitants; this includes married LGBT couples, unmarried LGBT and heterosexual couples, and cohabitating family members.[181] The justification for this policy is that there is no reason the tax system ought to treat various family-type units sharing the same expenses differently.[182] As a commentator for the Alternatives to Marriage Project explained, "under an expanded definition of the family unit, 'marriage' penalties would become 'family' penalties, and doubling tax brackets for families would benefit all multi-person households."[183]

Alternatively, policymakers might dispense with the definitional premise of a "family" unit altogether in favor of individual tax treatment.[184] Under this policy, the concern of marriage tax penalties would virtually disappear.[185] As the Alternatives to Marriage Project noted, "individual filing would eliminate the secondary-earner bias in the tax system that currently taxes the first dollar earned of the lesser-earning spouse. . .at the higher rates associated with the last dollar earned of the primary-earning spouse."[186]

VI. THE STAGNANT TAX EQUITY FOR DOMESTIC PARTNER AND HEALTH PLAN BENEFICIARIES ACT

In addition to the debate surrounding the general wisdom of continuing to include marriage and spousal references in federal legislation, a compromise bill has been circulating on Capitol Hill for nearly a decade. The Tax Equity for Domestic Partner and Health Plan Beneficiaries Act ("HPBA") is a bill that has been languishing on Capitol Hill in various forms since 2003 and is broadly designed to equalize tax treatment for employer-provided health coverage for

[180] Dennis J. Ventry, Jr., *Presidential Candidates Offer More Tax Cuts for "Traditional" Families*, ALTERNATIVES TO MARRIAGE PROJECT, http://www.unmarried.org/opinion-presidential-candidates-offer-more-tax-cuts-for-traditional-families.html (last visited Dec. 27, 2010).

[181] Ventry, *supra* note 180.

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *Id.*

domestic partners and other non-spouse, non-dependent beneficiaries.[187] Though the bill is supported by several major U.S. employers and was incorporated into the Affordable Health Care for America Act, it was removed from the PPACA and the Health Care and Education Reconciliation Act of 2010 due to concerns that the same-sex couples would partake in the benefits as domestic partners.[188]

Greater efficiency and civil equality are at the heart of the HPBA. As proposed by the House Reform Committee, the HPBA would eliminate the discriminatory federal tax treatment experienced by same-sex couples who receive employer-provided health benefits by "grossing up" the salaries of employees who receive the benefits.[189] The HPBA effectively charges the employer with paying the tax on behalf of the employee. However, as one scholar noted, "grossing up does not eliminate the tax inequity; it merely shifts the tax incidence to the employer that provided domestic partner benefits."[190]

Still the scope and effect of the HPBA contained a compromise underscoring its efficiency as a solution. Proponents of the bill were prepared to leave DoMA intact so long as gay couples would no longer encounter barriers to healthcare and tax benefits on par with heterosexual couples in domestic partnerships. Indeed, the HPBA leaves the "spouse" definition in DoMA untouched, and instead creates a class of "domestic partner" so broadly defined that it would include almost anyone to whom an employer extends health benefits pursuant to a plan, regardless of the relationship between the health plan beneficiary and the employee.[191] Furthermore, the HPBA would extend the § 106 and § 105(b) exclusions to certain domestic partner benefits provided to "qualifying beneficiaries,"[192] eliminate the payroll tax on domestic partner benefits, and amend IRC § 3401(a) (definition of "wages")[193] so

[187] Tax Equity for Domestic Partner and Health Plan Beneficiaries Act, H.R. 3962, § 571, 111th Cong. (2009) [hereinafter "HPBA"]; *see also* Layser, *supra* note 25, at 73.

[188] *Chuck Colbert*, As pro-gay provisions stripped from health reform, pressure grows for votes on ENDA, DADT, *SAN DIEGO GAY AND LESBIAN NEWS (Mar. 19, 2010), http://www.sdgln.com/news/2010/03/19/pro-gay-provisions-stripped-health-reform-pressure-grows-votes-enda-dadt.*

[189] Layser, *supra* note 25, at 73.

[190] *Id.* at 107.

[191] *Id.* at 112.

[192] *Id.*

[193] 26 U.S.C. § 3401(a) (defining wages as "all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration (including benefits) paid in any medium other than cash…").

that benefits for eligible beneficiaries would no longer be considered taxable earnings.[194] Also, sections of the IRC pertaining to Social Security and unemployment "would be amended to exempt from payroll tax benefits provided to the employee's eligible beneficiary,"[195] and "adjust the rules governing flexible spending arrangements, health reimbursement arrangements, and health savings accounts to permit payments to same-sex partners."[196]

The beneficial implications to the gay and lesbian community if HPBA gains enough support to pass would be manifold, even without the repeal of DoMA. For example, the "strategy of amending the payroll tax" would likely "encourage a greater number of employers to offer domestic partner benefits," making [such] benefits available to a larger portion of the gay. . . community."[197] Extending benefits to a larger class of beneficiaries ensures that LGBT individuals in states that do not recognize same-sex partnerships will nonetheless "be able to receive tax-free benefits when partner benefits are available."[198] Spousal benefits are often already a given for employers in states recognizing gay marriage. The expanded notion of "domestic partner" would enable gay partners to partake in partner benefits without necessitating any formal sanctioning from the state.[199] Admittedly, granting of these benefits would depend largely on how a given employer defined "domestic partner" for the purposes of their own benefits plans. However, employers looking to remain competitive may be well advised to adopt a liberal notion of "domestic partner" to attract and retain talent.[200]

Social policy aside, fiscal concerns figure prominently in the backdrop of the debate. The HPBA could become quite costly to the Treasury if access to employer-provided health benefits is overbroad. If unmarried people, same-sex or opposite-sex, can all receive employer-provided health benefits and then exclude the income, at some point the HPBA may become too costly.[201] Yet, the cost to the Government should not require more restrictive exclusions. First, employers themselves are likely to limit plan eligibility. While it is tempting to imagine scenarios

[194] Layser, *supra* note 25, at 110.
[195] *Id.*
[196] *Id.* at 111.
[197] *Id.* at 118.
[198] *Id.*
[199] *Id.* at 119.
[200] Layser, *supra* note 25, at 119.
[201] *Id.* at 118.

under which employees elect to receive coverage for their five closest friends, the reality is that employers are scaling back their health plans, not expanding them to ever growing classes of beneficiaries.[202] Profit-conscious employers are unlikely to offer health coverage for overly broad classes of beneficiaries.

Furthermore, although detractors argue the HPBA would legitimize same-sex marriage, the HPBA may be acceptable to some would-be opponents. First, because the HPBA is broadly written to extend the exclusion to certain unmarried opposite-sex partners, the HPBA may be viewed as an effort to offer favorable tax treatment of health benefits available to a greater number of Americans, a goal which has garnered bi-partisan support for the last half-century. Second, given the liberalizing sentiments of Americans toward the LGBT community, even moderately conservative opponents to same-sex marriage may support broad notions of healthcare equality for all types of families.[203]

Given the staying power DoMA has exhibited, passage of the HPBA is appropriate. To begin, the HPBA would likely encourage more employers to offer domestic partner benefits in the context of broad agreement that same-sex families have the same medical needs as heterosexual families.[204] It follows that passage of the HPBA would increase the number of people eligible for employer-provided health coverage, easing the financial burden so many LGBT couples now experience.[205] As one scholar noted, "[s]ince employers are the primary source of health insurance in America, and since private health insurance is expensive and often has prohibitive eligibility requirements, it represents sound [and efficient] policy to extend eligibility to greater numbers of people."[206]

VII. A FUTURE WITH DOMA?

Notwithstanding proposed changes to the IRC, the HPBA, and increasing public sentiment against DoMA, the Constitution may have

[202] *Id.* at 118; *see also* Phred Dvorak & Scott Thurm, *Slump Prods Firms to Seek New Compact with Workers*, WALL ST. J., (Oct. 20, 2009), *available at* http://www.stanford.edu/class/msande247s/2009/1020%202009%20posting/WSJ%201020%202009%20Slump%20Prods%20Firms%20to%20Seek%20New%20Compact%20With%20Workers.pdf.

[203] Layser, *supra* note 25, at 118.

[204] *Id.* at 123.

[205] *Id.*

[206] *Id.* at 118.

the last word if the recent actions of private parties succeed. There are a number of constitutional issues with DoMA centering on the scope of Congress' power under the Spending Clause and, as one court has noted, the Tenth Amendment.[207] DoMA set states on a collision course with the federal government in the field of domestic relations, and the PPACA accentuates this conflict. With DoMA, Congress attempted to define marriage for all federal law purposes as excluding same-sex marriages.[208] "This [has presented courts] with the question of whether Congress has the power to define marriage or whether it must leave this. . .definition in domestic relations law to the individual states."[209] Bearing in mind that Congress' powers are defined and limited, and that every federal law "must be based on one or more of its powers enumerated in the Constitution,"[210] courts have historically expressed the belief that "marriage and other domestic relations issues are matters solely within the province of the states."[211] Despite such expressions, Congress has enacted many laws that touch on issues of domestic relations.[212]

When state family law has conflicted with a federal statute, courts have inquired whether marital status determinations lie exclusively with the state, or whether Congress may siphon off a portion of that traditionally state-held authority for itself.[213] For example, in *Massachusetts v. United States HHS*, the United States District Court for the District of Massachusetts determined in 2010 that Congress exceeded the scope of its authority under Spending Clause and the Tenth Amendment through DoMA by inducing the Commonwealth of Massachusetts to violate equal protection rights of its citizens and by interfering with the Commonwealth's ability to define marital status of

[207] Massachusetts v. United States HHS, 698 F. Supp. 2d 234, 236 (D. Mass. 2010).

[208] Layser, *supra* note 25.

[209] Vetri, *supra* note 9, at 915.

[210] United States v. Morrison, 529 U.S. 598, 607 (2000).

[211] Vetri, *supra* note 9, at 915*; see also Morrison*, 529 U.S. at 607.

[212] Vetri, *supra* note 9, at 916 ("The historical examples relating to the marriages of Black Americans during the Reconstruction era, polygamy in the Utah Territory, and plural marriage practices in Native American tribes do not provide any precedent for the sweeping action Congress took with DoMA. The historical examples occurred in the exercise of Congress's war powers, its power over federal territories, and its power in dealing with Indian tribes. Moreover, in each of those cases, Congress was seeking to protect minority and oppressed groups of persons rather than singling out a minority group for disfavored treatment.").

[213] Massachusetts v. United States HHS, 698 F. Supp. 2d 234, 234 (D. Mass. 2010).

its citizens.[214]

The Government continues to assert that DoMA is within the scope of Congress' authority under the Spending Clause to promote the "general welfare" of the public.[215] However, as illustrated, DoMA's reach is not limited to provisions relating to federal spending. The broad sweep of DoMA currently affects the application of 1,138 federal statutory provisions in the United States Code in which marital status is a factor.[216]

It is true that "Congress has broad power to set the terms on which it disburses federal money to the States" pursuant to its spending power.[217] But that power is not unlimited. For example, in *South Dakota v. Dole*, the Supreme Court held:

> Spending Clause legislation must satisfy five requirements: (1) it must be in pursuit of the 'general welfare,' (2) conditions of funding must be imposed unambiguously, so states are cognizant of the consequences of their participation, (3) conditions must not be 'unrelated to the federal interest in particular national projects or programs' funded under the challenged legislation, (4) the legislation must not be barred by other constitutional provisions, and (5) the financial pressure created by the conditional grant of federal funds must not rise to the level of compulsion.[218]

Based on the criteria advanced in *Dole*, the District Court of Massachusetts held that "DoMA imposes an unconstitutional condition

---

[214] *Id.* at 246.

> (It is a fundamental principle underlying our federalist system of government that 'every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.' And, correspondingly, the *Tenth Amendment* provides that 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' The division between state and federal powers delineated by the Constitution is not merely 'formalistic.' Rather, the *Tenth Amendment* 'leaves to the several States a residuary and inviolable sovereignty.' This reflects a founding principle of governance in this country, that 'states are not mere political subdivision of the United States,' but rather sovereigns unto themselves).

[215] *Id.* at 248.

[216] *An Overview of Federal Rights and Protections Granted to Married Couples*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/resources/entry/an-overview-of-federal-rights-and-protections-granted-to-married-couples (last visited Apr. 4, 2012).

[217] Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006) (internal citation omitted).

[218] *Massachusetts v. United States HHS*, 698 F. Supp. 2d at 247 (quoting South Dakota v. Dole, 483 U.S. 203, 210 (1987)).

on the receipt of federal funding" by improperly conditioning the receipt of federal funding on the denial of marriage-based benefits to same-sex married couples, though the same benefits are provided to similarly-situated heterosexual couples.[219] In this way, DoMA contravenes the Fourteenth Amendment's requirement that "all persons subjected to legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed."[220] And in the case of homosexual and heterosexual couples, for "those who appear similarly situated [but] are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to assure that all persons subject to legislation or regulation are indeed being treated alike."[221]

Even if the court's argument that Congress exceeded its authority under the Spending Clause fails, compliance with DoMA impairs the Commonwealth's ability to structure integral operations in areas of traditional governmental functions. This line of analysis is particularly interesting in light of the PPACA's aims of delivering cost-efficient medical services to all Americans. For example, it is clear from *Massachusetts v. United States HHS* that DoMA penalizes the state in the context of Medicaid and Medicare. Since the passage of the MassHealth Equality Act, "the Commonwealth is required to afford same-sex spouses the same benefits as heterosexual spouses."[222] However, the HHS Centers for Medicare and Medicaid Services informed "the Commonwealth that the federal government [would] not provide federal funding participation for same-sex spouses because DoMA precludes the recognition of same-sex couples."[223] "As a result, the Commonwealth has incurred at least $640,661 in additional costs and as much as $2,224,018 in lost federal funding."[224] Furthermore, the court noted that "the Commonwealth has incurred a significant additional tax liability since it began to recognize same-sex marriage in

[219] *Id.* at 248.

[220] *Id.*

[221] *Id.* ("By way of example, the Department of Veterans Affairs informed the Commonwealth in clear terms that the federal government is entitled to 'recapture' millions in federal grants if and when the Commonwealth opts to bury the same-sex spouse of a veteran in one of the state veterans cemeteries, a threat which, in essence, would penalize the Commonwealth for affording same-sex married couples the same benefits as similarly-situated heterosexual couples that meet the criteria for burial.").

[222] *Id.* at 253

[223] *Id.*

[224] *Massachusetts v. United States HHS*, 698 F. Supp. 2d at 253.

2004 because, as a consequence of DoMA, health benefits afforded to same-sex spouses of Commonwealth employees must be considered taxable income."[225]

In addition to costing states more, the Government faces its own dilemma regarding federal income taxes of same-sex spouses. For instance, it is not clear how the exclusion of same-sex spouses from federal tax laws is rationally related to defending heterosexual marriage or protecting scarce government resources, two important goals advanced in support of DoMA. As one scholar noted, "[i]f marriage created only tax benefits, one might see a nexus between limiting the beneficial rules to heterosexual couples and defending their marriages."[226] However, the tax law has become attuned to the financial interdependencies of married couples over time and has developed special rules that "attempt to tax them correctly, but not necessarily by giving them benefits."[227] Indeed, the special tax rules for spouses often create additional burdens.[228] Under the current system, DoMA appears to reduce scarce government resources by yielding less tax revenue, directly negating the benefit cited by proponents of the legislation.[229]

The recent decisions by District Court of Massachusetts illustrate how an inclusive approach to a broader definition of family creates conflict between DoMA and the PPACA in recognizing cores of sovereignty retained by the States. The court determined that it is clearly within the authority of the Commonwealth to recognize same-sex marriages among its residents, and to afford those individuals in same-sex marriages any benefits, rights, and privileges to which they are entitled by virtue of their marital status. By enforcing DoMA, the Government encroaches upon the province of the state, and, in doing so, thwarts the ability of LGBT couples to partake in the PPACA as freely, fairly, and as cost-efficiently and their heterosexual counterparts.

Repeal of DoMA would presumably cause federal law to defer to state law determinations of otherwise valid marriages. Assuming this to be the case, the federal laws pertaining to benefit plans would require equal treatment among employers of all employees and their spouses.[230]

---

[225] *Id.*

[226] *Taxing Families Fairly*, *supra* note 31, at 843.

[227] *Id.* at 844.

[228] *Id.*

[229] *Id.*

[230] Joseph S. Adams, *Court Decisions on Gay Marriage May Impact Benefit Plans*, EMPLOYMENT BENEFIT NEWS. Aug. 13, 2010, *available at* http://ebn.benefitnews.com/

For example, as one article noted, "in the retirement plan context, employers with pension and 401(k) plans would be required to recognize same-sex spouses for purposes of determining surviving spouse annuities or death benefits under their retirement plans."[231] Similarly, "employees would no longer have to be taxed on the income imputed for the employer's contribution to the same-sex spouse's coverage and COBRA continuation would be required to be offered to same-sex spouses."[232] Furthermore, "[e]mployers would also be required to permit employees to take family and medical leave to care for the illness of a same-sex spouse."[233]

Yet, in light of the prevalence of constitutional amendments on the state level banning same-sex marriage and the conservative makeup of the Supreme Court, it is questionable whether DoMA could be judicially overturned anytime soon. If DoMA is repealed, the tax and familial rights inequities will give way to greater recognition on the state level of same sex couples. Furthermore, there may be added pressure on states to move toward same-sex marriage in order to avoid harming their own citizens relative to gay and lesbian residents of other states. Until then, DoMA prevents legally married and civilly unionized same-sex couples from properly benefitting from the federal benefits to which they would otherwise be entitled.

VIII. CONCLUSION

The Patient Protection and Affordable Care Act is a compromise, the legacy of which may be a relatively toothless attempt to fix a broken healthcare system.[234] Among its failings is the lack of accommodation for and recognition of increasingly unconventional family structures across the country. The Act conveniently uses existing platforms and maintains the essential family structure as defined in the Internal

eletter/profile/14/841.html.

[231] *Id.*

[232] *Id.*

[233] *Id.*

[234] As of this writing, the fate of the PPACA hangs in the balance as the U.S. Supreme Court concluded oral arguments on March 28, 2012 on the issues of whether the individual mandate section -- requiring nearly all Americans to buy health insurance by 2014 or face financial penalties -- is an improper exercise of federal authority and, if so, whether the mandate is severable from the rest of the bill. *See* Stuart Taylor, Jr., *The Health Law and The Supreme Court: A Primer for the Upcoming Oral Arguments*, KAISER HEALTH NEWS, Mar. 26, 2012, http://www.kaiserhealthnews.org/Stories/2012/March/15/supreme-court-curtain-raiser.asp?gclid=CIXW3KvZm68CFYEQNAod2Fnecw.

Revenue Code because it is less disruptive and broadly palatable to most citizens and employers. Indeed, the intractability of the nation's tax structure makes sweeping change nearly impossible. Still, such timidity may be costly. The baby steps toward progress are riddled with injustices that render much of the PPACA a pyrrhic victory.

While the PPACA is the nation's largest overhaul of social welfare legislation in the last forty years, the PPACA's victories on behalf of uninsured individuals will be offset by the limits it will encounter in how families are defined and treated vis-à-vis individuals. DoMA conflicts with an efficient and comprehensive adoption of the goals of the PPACA. State marriage and civil union statutes create new families for many purposes. Coherent family structures will ultimately be central to success of health reform. DoMA stands in the way of accommodating the new family definitions emerging from the states.