

GELDING THE LILY: HOW THE BANKRUPTCY CODE'S PROMOTION OF MARRIAGE LEAVES IT IMPOTENT

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INTRODUCTION

The American institution of marriage used to be the primary means by which adults combined wealth and debt and created familial units for raising children. When marriage was the means for creating financial interdependence, the Bankruptcy Code's grant of certain benefits based upon marital status was an appropriate method for ensuring that the most vulnerable families were able to achieve a financial fresh start. However, the institution of marriage is evolving and is no longer the vehicle by which a large majority of American couples become financially interdependent. For many same-sex couples who reside in states where they are unable to legally marry, building a financially interdependent family outside of the bonds of marriage is currently the only option.¹ Many other heterosexual and same-sex couples are voluntarily choosing financial interdependence without marriage as they build families and raise children.² Thus, the Code's reliance upon marriage to identify which debtors are financially interdependent to receive certain bankruptcy benefits is antiquated and out-of-step with the evolution of American families. In turn, the Code's failure to evolve has resulted in an impotent law because it lacks the power to provide the best financial fresh start to all financially interdependent debtors and families. Congress should revise the Code to break the link between marriage and bankruptcy benefits so that all debtors who are a part of

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¹ To date, only a few states have recognized same-sex unions and granted legal status to these couples. Same-sex marriage is recognized in Connecticut, Iowa, Massachusetts, New Hampshire, New York, and Vermont. A few other states recognize civil unions or domestic partnerships between same-sex couples and grant legal rights to some couples that are similar to the rights that married couples enjoy—California, Delaware, Hawaii, Illinois, Nevada, New Jersey, Oregon, Rhode Island, and Washington. *See Same-Sex Marriage, Civil Unions and Domestic Partnerships*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=16430> (last visited Nov. 11, 2011).

² *See infra* p. 42 and notes 71–72.

financially interdependent unit can use these benefits to receive the best fresh start.

The Code currently contains several benefits that only married debtors may utilize when seeking a financial fresh start. These benefits often translate into valuable amenities that help married debtors achieve a financial fresh start in the best way possible. However, given the sharp increase in the number of American families that are financially interdependent without the bonds of marriage, these benefits fail to reach many debtors whose financial circumstances are the same as—or very similar to—financially interdependent, married debtors.

Linking bankruptcy benefits to marital status is further complicated by the Defense of Marriage Act (DOMA), which applies to all federal acts and laws, including the Code.³ DOMA limits the definitions of “spouse” and “marriage” so that only heterosexual couples are included.⁴ In light of the evolution of marriage where a growing number of states permit same-sex couples to legally marry or enter into civil unions, DOMA’s impact on the Code is two-fold. First, same-sex, legally married couples are not eligible to receive benefits under the Code that are specifically reserved for legally married debtors.⁵

³ 1 U.S.C. § 7 (2006) (applying the limited definition of marriage to “any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States”). DOMA passed both houses of Congress by large majorities. *U.S. Congress Votes Database: H.R. 3396*, WASH. POST, <http://projects.washingtonpost.com/congress/104/senate/2/votes/280/> (last visited Oct. 1, 2011) (showing that 85 senators voted to pass DOMA, 14 senators voted against DOMA, and 1 senator did not vote); *U.S. Congress Votes Database: H.R. 3396*, WASH. POST, <http://projects.washingtonpost.com/congress/104/house/2/votes/316/> (last visited Oct. 1, 2011) (showing that 342 members of the House voted to pass DOMA, 67 voted against DOMA, and 22 members did not vote). DOMA was ultimately signed into law by President William Clinton on September 21, 1996. See Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

⁴ See 1 U.S.C. § 7; 28 U.S.C. § 1738C. DOMA limited the definition of “marriage” for federal laws to “a legal union between one man and one woman as husband and wife.” 1 U.S.C. § 7. DOMA also defined “spouse” as “a person of the opposite sex who is a husband or a wife.” *Id.* Thus, DOMA’s obvious targets were same-sex couples seeking to legally marry. See H.R. REP. NO. 104-664, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906 (stating the goals of DOMA are both to protect “the institution of traditional heterosexual marriage” and allowing states to not recognize same-sex marriages conducted legally in other states). Professor Dickerson noted that Congress passed the act in anticipation of the state of Hawaii allowing same-sex couples to obtain marriage licenses. See A. Mechele Dickerson, *Family Values and the Bankruptcy Code: A Proposal to Eliminate Bankruptcy Benefits Awarded on the Basis of Marital Status*, 67 *FORDHAM L. REV.* 69, 69 n.1 (1998).

⁵ In fact, because the Code has not been revised to be consistent with the evolving institution of marriage, even some debtors who *are* legally married are unable to take advantage of the bankruptcy benefits reserved specifically for them. For example, the ability of a same-sex, legally married couple in California to file a joint bankruptcy petition, a benefit specifically reserved in the Code for married debtors, was recently challenged when a bankruptcy trustee sought to dismiss their chapter 13 petition and argued that the same-sex

Second, the reach and impact of the Code is further limited when bankruptcy benefits are restricted to heterosexual married debtors.⁶ Thus, by tying the breadth of bankruptcy relief to marital status, the Code unfairly and unnecessarily limits its ability to fulfill its mission of helping honest debtors get a fresh start. This is particularly true given the decline of marriage rates in America,⁷ and the contradiction that arises when certain legally married debtors are denied benefits awarded to other legally married debtors.

This Article challenges the logic of limiting benefits in the Code to married debtors and argues that awarding benefits based on marital status reduces the efficacy of the Code as marriage rates continue to decline in the United States.⁸ This Article also explores how the availability of these benefits is dictated by individual states' definitions of marriage and determination of which of their citizens can legally marry. Thus, the reach and force of the Code is further limited by the discrepancy between individual states' definitions of marriage and DOMA. Thus, the steady decline in marriage rates and the continued rise in nontraditional familial units leave the Code out of step with American society. After analyzing current marriage patterns and trends, this Article posits that if Congress fails to address this issue, the Code stands to become a federal act that provides the most benefits to those Americans who are most likely to marry—the wealthy and highly educated. However, the promotion of the institution of marriage is not the purpose of the Code, nor does it maximize the effectiveness of the Code, to primarily privilege married individuals. Thus, the manner in which bankruptcy benefits are awarded needs to be revamped so that these benefits fit into the new paradigm of American families while simultaneously accomplishing the Code's original purpose: to provide all honest debtors with a fresh start.⁹ As a solution, Congress can make the Code more effective, powerful, and wide-sweeping by awarding benefits to debtors based upon criteria that do not limit the Code's effectiveness or give individual states the ability to discriminate between honest debtors.

couple could not file a joint petition due to DOMA's definitions of spouse and marriage. *In re Balas*, 449 B.R. 567, 570–71 (Bankr. C.D. Cal. 2011).

⁶ *See id.* at 571.

⁷ *Social Indicators of Marital Health and Well-Being: Trends of the Past Four Decades*, in NAT'L MARRIAGE PROJECT AT THE UNIV. OF VA. & CTR. FOR MARRIAGE & FAMILIES AT INST. FOR AM. VALUES, THE STATE OF OUR UNIONS: MARRIAGE IN AMERICA 2010, at 61, 63 fig.2 (W. Bradford Wilcox ed., 2010).

⁸ *Id.*

⁹ *See Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007).

Part I briefly summarizes the goals of the Code and identifies the existing benefits that are awarded to debtors based solely upon marital status. Part II analyzes the ways that awarding bankruptcy benefits based upon marital status restricts the Code's ability to maximize its effectiveness and provide all honest debtors with the best fresh start. Part III suggests ways that the Code can be amended so that the Code is no longer impotent.

I. THE GOALS OF THE CODE AND BANKRUPTCY BENEFITS FOR MARRIED DEBTORS

The goals of the Code are few in number and have remained virtually unchanged throughout the Code's revisions since bankruptcy laws were first enacted in the United States in the 1800s.¹⁰ The Supreme Court announced as long ago as 1934 that a primary purpose of the Code is to provide honest debtors with a "fresh start" after financial difficulty.¹¹ Later courts have upheld that the fresh start, along with the equal treatment of creditors, are the main purposes of the Code.¹² These goals—providing all honest debtors with a fresh start and treating creditors equally—exist independently of, and can be achieved without any reliance upon or reference to, a debtor's marital status.¹³

The Code does not expressly encourage marriage but contains several benefits that only married debtors may utilize.¹⁴ In 1998, just after DOMA was

¹⁰ The Bankruptcy Act of 1898 was the first permanent bankruptcy law in the United States. *See generally* DAVID A. SKEEL, JR., *DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* 24–47 (2000).

¹¹ *See Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) ("One of the primary purposes of the bankruptcy act is to 'relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.' This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preëxisting debt." (citation omitted) (quoting *Williams v. U.S. Fid. & Guar. Co.*, 236 U.S. 549, 554–55 (1915))).

¹² *See Marrama*, 549 U.S. at 367 ("The principal purpose of the Bankruptcy Code is to grant a fresh start to the honest but unfortunate debtor." (quoting *Grogan v. Garner*, 498 U.S. 279, 286–87 (1991)) (internal quotation marks omitted)); *see also BFP v. Resolution Trust Corp.*, 511 U.S. 531, 563 (1994) (Souter, J., dissenting) (noting that the Supreme Court found these policies "at the core of federal bankruptcy law"); *Dickerson*, *supra* note 4, at 70 (arguing that the primary goals of bankruptcy law are to help honest debtors receive a "financial 'fresh start' . . . and to ensure that creditors receive maximum, equitable debt repayment").

¹³ *See Dickerson*, *supra* note 4, at 103–12 (arguing that the historical justifications for disparate treatment in bankruptcy of married and unmarried couples no longer exists and that awarding bankruptcy benefits based on an economic relationship instead of marital relationship would address some of these issues).

¹⁴ *See id.* at 89–101.

passed by Congress,¹⁵ Professor A. Mechelle Dickerson explored many of these benefits, including the right to file a joint petition, the ability to shield real estate held in a tenancy by the entirety from creditors, and the ability to claim a spouse as a dependent and exempt their expenses without proving actual dependency.¹⁶ Dickerson argued that, instead of granting certain bankruptcy benefits solely to married debtors, all debtors—including same-sex couples who are “economically linked” to a partner in the same household—should receive the same benefits as married debtors.¹⁷ Despite Dickerson’s argument that Congress should examine whether granting bankruptcy benefits based upon marital status is consistent with the goals of the federal bankruptcy system,¹⁸ Congress failed to incorporate Dickerson’s proposed revisions into the 2005 amendments to the Code—the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA).¹⁹ Thus, the bankruptcy benefits reserved exclusively for married debtors that remain unchanged in the latest version of the Code can positively impact a debtor’s ability to discharge debt and emerge from bankruptcy with the best chance of achieving a financial fresh start. Three of the bankruptcy benefits reserved exclusively for married debtors will be discussed below.

A. *The Joint Petition*

Under § 302 of the current Code, legally married debtors may file a joint bankruptcy case.²⁰ Filing a joint bankruptcy petition benefits married debtors because it saves them time and money. Dickerson noted that married debtors who file jointly will save money by filing one petition, thereby avoiding two separate filing fees²¹ and separate attorney’s fees for representation of each

¹⁵ See *supra* note 1 (noting that DOMA was passed on September 21, 1996).

¹⁶ See Dickerson, *supra* note 4, at 89–101.

¹⁷ *Id.* at 106–12.

¹⁸ *Id.* at 70–71.

¹⁹ See Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-8, 119 Stat. 23 (codified in scattered sections of title 11).

²⁰ 11 U.S.C. § 302(a) (2006). Section 302(a) specifically provides: “A joint case under a chapter of this title is commenced by the filing with the bankruptcy court of a single petition under such chapter by an individual that may be a debtor under such chapter and such individual’s spouse.” *Id.*

²¹ 28 U.S.C. § 1930; see also 2011 U.S. Order 0024 (C.O. 0024); 2011 U.S. Order 11 (C.O. 11). In a case under chapter 7 of the Code, each debtor must pay a \$245 filing fee, a \$39 miscellaneous fee, and a \$15 trustee surcharge. *Chapter 7: Liquidation Under the Bankruptcy Code*, U.S. COURTS, <http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter7.aspx> (last visited Oct. 15, 2011). For a chapter 13 case, each debtor must pay a \$235 filing fee and a \$39 miscellaneous fee. *Chapter 13: Individual Debt Adjustment*, U.S. COURTS, <http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter13.aspx> (last visited Oct. 15, 2011).

debtor where the subject matter is fundamentally related.²² Additionally, married debtors, where one or both spouses work, can miss less time at work because one spouse can appear on behalf of the couple while the other spouse continues to earn money for the household.²³

The bankruptcy court system also administratively benefits from joint petitions.²⁴ Bankruptcy courts enjoy more efficient case administration when debtors file jointly because the overall number of bankruptcy cases is reduced and limited court resources can be utilized in one case rather than spread between separate, related cases.²⁵

Because the benefits that both debtors and the bankruptcy court system receive from the joint petition have nothing to do with marriage, and the same benefits would be realized regardless of whether the debtors filing a joint petition were married or not, the Code should not have a preference for married debtors.²⁶ Thus, extending this benefit solely to married debtors limits the benefit's effectiveness and ability to reach more debtors while simultaneously denying bankruptcy courts increased efficiency and reduced costs and case dockets.

B. Protecting Property Held by Tenants by the Entirety from Creditors

Married debtors have the benefit of shielding and protecting real property that they hold as tenants by the entirety with their spouse from creditors and the bankruptcy trustee pursuant to § 522(b).²⁷ Tenancy by the entirety is a state law property estate that permits spouses to hold real property as a single legal person.²⁸ Under most states' tenancy by the entirety schemes, a creditor must have a claim against both spouses to seize property owned by the entirety.²⁹

²² See Dickerson, *supra* note 4, at 91 & n.119.

²³ *Id.* at 91.

²⁴ *Id.* at 90–91.

²⁵ See *id.* at 91.

²⁶ *Id.* at 93. Dickerson also argues that the joint petition benefit has nothing to do with marriage, as reducing case administration costs, attorney's fees, and filing costs for debtors can be achieved by permitting economically linked debtors to file jointly when they can show that they have "merged their financial lives." *Id.*

²⁷ 11 U.S.C. § 522(b)(1), (3) (2006); see also Dickerson, *supra* note 4, at 93–97.

²⁸ See, e.g., Niehaus v. Mitchell, 417 S.W.2d 509, 514 (Mo. App. Ct. 1967) ("[W]here land is held by the entirety the husband and wife hold it not as separate individuals but as one person . . .").

²⁹ See, e.g., MASS. GEN. LAWS ANN. ch. 209, § 1 (West 2003); Dickerson, *supra* note 4, at 95. Tenancy by the entirety requires that the couple is married and three additional conditions are met: "(1) each spouse [has] a right of survivorship in entirety property; (2) the spouses acquire the same interest in the property by the same instrument at the same time; and (3) the spouses have an undivided interest in the entire property." *Id.*

Thus, if only one spouse files for bankruptcy, the filing spouse can often exempt entirety property from their bankruptcy estate because the non-filing spouse's interest in the property is not destroyed or severed by the bankruptcy filing.³⁰

The Code also regulates when a trustee may actually sell non-exempt entirety property.³¹ Pursuant to § 363, a trustee may only sell non-exempt entirety property when the following four requirements are met:

- (1) [P]artition in kind of such property among the estate and such co-owners is impracticable;
- (2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;
- (3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and
- (4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.³²

The third requirement is the most difficult for the trustee to prove because proposing to sell a family's primary residence almost always inflicts harm upon the non-debtor spouse.³³ Thus, even when the filing spouse cannot exempt entirety property from their bankruptcy estate, such property is often still protected from the reach of the trustee and creditors.

C. The Non-Filing Spouse as a Dependent

Under § 522(d)(1) of the Code, married debtors may use federal bankruptcy exemptions to treat a non-debtor spouse as a dependent without proving that the spouse is actually dependent.³⁴ The Code's definition of "dependent" permits debtors to exempt certain property that a spouse owns or uses without proving actual dependency; this is because there are no requirements except

at 94; *see also* Benjamin C. Ackerly, *Tenants by the Entirety Property and the Bankruptcy Reform Act*, 21 WM. & MARY L. REV. 701, 702–03 (1980) (discussing the creation and legal treatment of tenancy by the entirety property).

³⁰ *See* Dickerson, *supra* note 4, at 95.

³¹ 11 U.S.C. § 363(h); *see also* Dickerson, *supra* note 4, 96–97.

³² 11 U.S.C. § 363(h).

³³ *See* Dickerson, *supra* note 4, at 96 n.146.

³⁴ 11 U.S.C. § 522(d); *see also* Dickerson, *supra* note 4, 99–100. This section of the Code permits the debtor to exempt up to \$21,625 in value for real property that the dependent uses as a residence, \$1,450 in jewelry that the dependent uses, and \$2,175 in professional books or tools of the trade of the dependent. 11 U.S.C. § 522(d)(1), (4), (6).

the dependent be a spouse.³⁵ This is a benefit because debtors can keep more property out of the bankruptcy estate and away from creditors simply by virtue of the fact that they have a spouse.

II. THE FORMULA FOR IMPOTENCY—LINKING BANKRUPTCY BENEFITS TO MARITAL STATUS

American families have evolved to the point where proof of legal marriage is no longer proof of financial interdependence.³⁶ The demographics of marriage have also changed. In 1960, 72.2% of Americans over the age of eighteen were married.³⁷ Today, that number has dwindled significantly, as barely more than 50% of American adults were married in 2009.³⁸ The economics of marital units have shifted, as women now make up the majority of college graduates³⁹ and are beginning to earn more than their husbands.⁴⁰ Furthermore, many couples are now cohabitating and raising children outside of the bonds of marriage.⁴¹ These shifts in marriage patterns have not stabilized and are still in considerable flux.⁴² Thus, the Code's reliance on the marital status of a debtor to indicate economic interdependence is misplaced and fails to account for the sharp rise in new familial structures in America.⁴³

Despite declining marriage rates and changing familial structures in America, the Code still contains a number of benefits for married debtors filing bankruptcy separately or jointly. Although the Code purports to offer a “fresh start” to all honest debtors,⁴⁴ unmarried debtors are noticeably disadvantaged

³⁵ According to the Code, “‘dependent’ includes spouse, whether or not actually dependent” 11 U.S.C. § 522(a)(1).

³⁶ See RICHARD FRY & D'VERA COHN, PEW RESEARCH CTR., WOMEN, MEN AND THE NEW ECONOMICS OF MARRIAGE 12 (2010).

³⁷ Conor Dougherty, *New Vow: I Don't Take Thee—Young Single Adults Surpass Married Peers Amid High Divorce, Cohabitation Rates*, WALL ST. J., Sept. 29, 2010, at A3.

³⁸ *Id.*

³⁹ FRY & COHN, *supra* note 36, at 2.

⁴⁰ See Allison Linn, *Rising Number of Women Earn More than Mates*, MSNBC.COM (Nov. 2, 2009, 1:29 PM), <http://www.msnbc.msn.com/id/33196583/ns/business-careers/t/rising-number-women-earn-more-mates/> (noting that 33.5% of women earn more than their partner); see also FRY & COHN, *supra* note 36, at 1–3 (concluding that trends in education and earning potential have drastically changed between men and women over the past thirty or forty years as many women begin to earn more and have more education than their husbands).

⁴¹ See *Social Indicators of Marital Health and Well-Being*, *supra* note 7, at 75 fig.7, 91 fig.12.

⁴² See generally *id.* at 61–106.

⁴³ One of the new familial structures in American society is the unmarried parental unit. See *id.* at 75 fig.7.

⁴⁴ See *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007).

because they do not qualify for the various financial benefits that are embedded in the Code and reserved for married filers.⁴⁵ When marriage rates were high and most families with children were linked by marriage, infusing bankruptcy laws with protections for married debtors was more justifiable because the vast majority of Americans would have been eligible to utilize these benefits.⁴⁶ Now, however, due to the steady decline in marriage rates coupled with the sharp increase in unmarried couples with children, lawmakers must consider revising the Code to fit into this new American paradigm. Tying bankruptcy benefits to marital status denies protection to millions of American families who are not linked by marriage and severely limits the Code's effectiveness. This section briefly explores the current state of marriage and families in America and analyzes the problems that arise when bankruptcy benefits are aligned with the institution of marriage.

A. *The Decline of Marriage in America*

Marriage rates are steadily declining among American adults. This decline cuts across all regional, gender, and racial divides.⁴⁷ In 1960, 69.3% of American men and 65.9% of American women were married.⁴⁸ In comparison, only 53.7% of American men and 50.6% of American women were married in 2009.⁴⁹ This decline represents a greater than 50% decrease “from 1970 to 2009 in the annual number of marriages per 1,000 unmarried adult women.”⁵⁰ Current marriage rates are at an all-time low and represent the lowest marriage rates in America since the United States first began tracking marriage statistics in 1880.⁵¹

⁴⁵ See *supra* Part I.

⁴⁶ Cf. *Social Indicators of Marital Health and Well-Being*, *supra* note 7, at 63 fig.2, 90 fig.11.

⁴⁷ Dougherty, *supra* note 37, at A3. While almost every region, race, gender, and age group in America has experienced steady decline in marriage rates, some groups have been affected more than others. For example, marriage rates for black women have dropped from 59.8% in 1960 all the way down to 29.6% in 2009. *Social Indicators of Marital Health and Well-Being*, *supra* note 7, at 63 fig.2. Rates of marriage among white women have also declined, slipping to just 53.6% from 66.6% over the same period. *Id.* For men, the rate of marriage during the same period decreased from 70.2% to 56% for white men and 60.9% to 36.7% for black men. *Id.* Thus, declining marriage rates appear to have disproportionately affected black men and women as their rates of marriage have decreased by larger margins than their white counterparts. See *id.* However, across all races, the rates of marriage have decreased at almost the same rate for men and women. See *id.* (showing that the total rate of marriage for all men has decreased by 15.6% while the rate for all women has decreased by 15.3%).

⁴⁸ *Social Indicators of Marital Health and Well-Being*, *supra* note 7, at 63 fig.2.

⁴⁹ *Id.*

⁵⁰ *Id.* at 66.

⁵¹ Dougherty, *supra* note 37, at A3.

One of the major shifts in American marriage patterns centers around socioeconomic status and education level. In 2010, *The State of Our Unions*, an annual publication dedicated to monitoring the health of marriage and family life in America,⁵² reported that while marriage rates among affluent Americans appear to be quite stable, marriage rates in Middle America have significantly declined.⁵³ Defining “Middle Americans” as individuals having “a high-school degree but not a four-year college degree,”⁵⁴ *The State of Our Unions* asserts that Middle Americans “have become less likely to form stable, high-quality marriages, while highly (college) educated Americans . . . have become more likely to do so.”⁵⁵ *The State of Our Unions* noted that highly educated Americans⁵⁶ currently “enjoy marriages that are as stable and happy as those four decades ago.”⁵⁷ Thus, “more affluent Americans are now doubly privileged in comparison to their moderately educated fellow citizens—by their superior socioeconomic resources and by their stable family lives.”⁵⁸

A recent *Time* article also noted that marriage patterns in America are shifting around class and educational lines.⁵⁹ People are now more likely to choose marriage partners with an educational level similar to their own.⁶⁰ In the 1960s, it was quite common for college educated Americans, especially

⁵² See generally W. Bradford Wilcox & Elizabeth Marquardt, *Executive Summary* to NAT'L MARRIAGE PROJECT AT THE UNIV. OF VA. & CTR. FOR MARRIAGE & FAMILIES AT INST. FOR AM. VALUES, *supra* note 7, at ix–xii. *The State of Our Unions* is “a joint publication of the National Marriage Project [(NMP)] at the University of Virginia and the Center for Marriage and Families at the Institute for American Values.” NAT'L MARRIAGE PROJECT AT THE UNIV. OF VA. & CTR. FOR MARRIAGE & FAMILIES AT INST. FOR AM. VALUES, *supra* note 7, at iii. The NMP's stated mission is “to provide research and analysis on the health of marriage in America, to analyze the social and cultural forces shaping contemporary marriage, and to identify strategies to increase marital quality and stability.” *Id.* at iv. The Center for Marriage and Families aims “to increase the proportion of U.S. children growing up with their two married parents.” *Id.* at v.

⁵³ See *id.* at ix (“Among the affluent, marriage is stable and appears to be getting even stronger. Among the poor, marriage continues to be fragile and weak. But the newest and perhaps most consequential marriage trend of our time concerns the broad center of our society, where marriage, that iconic middle-class institution, is foundering.”).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ “Highly educated Americans” are defined as those who have received at least a bachelor's degree. W. Bradford Wilcox, *When Marriage Disappears: The Retreat from Marriage in Middle America*, in NAT'L MARRIAGE PROJECT AT THE UNIV. OF VA. & CTR. FOR MARRIAGE & FAMILIES AT INST. FOR AM. VALUES, *supra* note 7, at 13, 16.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See Belinda Luscombe, *Who Needs Marriage? A Changing Institution*, TIME.COM (Nov. 18, 2010), <http://www.time.com/time/printout/0,8816,2032116,00.html>.

⁶⁰ *Id.* College graduates marry at a rate of 64% while Americans without higher education marry at a rate of 48%. *Id.*

men, to marry partners who had less education than they did—doctors married nurses, lawyers married secretaries, and corporate executives married teachers.⁶¹ Now, this trend has reversed, and Americans are more likely to marry partners of the same educational level and socioeconomic background. Thus, doctors are now marrying other doctors, lawyers are marrying other lawyers, and business executives are marrying other business executives.⁶² These trends indicate that the institution of marriage in America is becoming less of a middle class institution and more of a privilege enjoyed by the upper class.⁶³

The State of Our Unions attributes some of this growing “marriage gap” between middle class and upper class Americans to the changing American economy.⁶⁴ Specifically, the manual labor skills of so-called Middle Americans are valued far less in the current job market than the “intellectual and social skills” that highly educated Americans possess.⁶⁵ As a result, Middle American men “have seen the real value of their wages fall and their spells of unemployment increase with alarming frequency since the 1970s.”⁶⁶ In contrast, the wages of highly educated American men have increased since the 1970s,⁶⁷ and these men have not experienced sharp increases in unemployment like Middle American men.⁶⁸ This change in the real wages and economic stability of some men in Middle America is important to understanding the marriage rate decline because men in Middle America have become “disconnected from the institution of work [and] are also less likely to enjoy the salutary disciplines and benefits of employment, such as living by a schedule, steering clear of substance abuse, personal satisfaction with work well done, and social status.”⁶⁹ Without many of these social indicators of success, some men in Middle America view themselves as “inferior husbands”

⁶¹ *Id.*

⁶² *Id.*

⁶³ *See Id.* (“It seems that the 21st century marriage, with its emphasis on a match of equals, has brought about a surge in inequality. It’s easier for the college-educated, with their dominance of the knowledge economy, to get married and stay married. The less well off delay marriage because their circumstances feel so tenuous, then often have kids, which makes marrying even harder.”).

⁶⁴ *See Wilcox, supra* note 56, at 43.

⁶⁵ *Id.* at 42.

⁶⁶ *Id.*

⁶⁷ FRY & COHN, *supra* note 36, at 8 (showing that highly educated men were the only group of men for whom wages increased in real terms during the period studied).

⁶⁸ Wilcox, *supra* note 56, at 43 & fig.17.

⁶⁹ *Id.* at 44.

and “are thus less likely to get and stay married than are their peers who have good jobs.”⁷⁰

The sharp decline in American marriage rates may also be explained by the sharp increase in the number of couples engaging in non-marital cohabitation before marriage or without an intention of ever marrying.⁷¹ Between 1960 and 2009, the number of cohabitating, unmarried, adult couples of the opposite sex increased fifteen-fold from approximately 440,000 to 6.6 million.⁷² Additionally, around 40% of these cohabitating households have children, and thus have formed familial units that are not bound by marriage.⁷³ The correlation between education level and cohabitation has also become stronger. Cohabitation rates for moderately educated women between twenty-five and forty-four years of age rose twenty-nine percentage points from 39% in 1988 to 68% in the late 2000s, yet cohabitation rates for highly educated Americans only rose fifteen percentage points, or from 35% to 50%, during the same time period.⁷⁴ This data suggests that the more education that Americans obtain, the less likely they are to cohabitate.

Thus, given the current marriage rates and patterns, aligning bankruptcy benefits with marital status creates an over-inclusive and under-inclusive system. The system is over-inclusive because as marriage becomes more of an institution most utilized by high-earning, college-educated Americans, the Code provides benefits for some couples who may be the least likely to file for bankruptcy. Conversely, the system is under-inclusive because many couples who are not linked by marriage and have an increased chance of experiencing

⁷⁰ *Id.*

⁷¹ *Social Indicators of Marital Health and Well-Being*, *supra* note 7, at 67. Additionally, nonmarital cohabitation is also becoming more widely acceptable. For instance, Chelsea Clinton, daughter of former President Bill Clinton and Secretary of State Hilary Clinton, cohabitated with her now-husband for several years before they married in 2010. See Luscombe, *supra* note 59.

⁷² *Social Indicators of Marital Health and Well-Being*, *supra* note 7, at 75 fig.7.

⁷³ *Id.* at 95. A closely related consequence of the increase in nonmarital cohabitation rates is the sharp increase in the number of American children who are born outside of marriage. JOYCE A. MARTIN ET AL., NAT'L CTR. FOR HEALTH STATISTICS, *Births: Final Data for 2008*, in NATIONAL VITAL STATISTICS REPORTS 1, 7–8 (Dec. 8, 2010). According to the Centers for Disease Control, almost 41% of all American births are to unmarried mothers. *Id.* at 1, 8. However, nonmarital births among ethnic and racial groups vary widely: 17% of Asian-Pacific Islander births, 29% of non-Hispanic white births, 53% of Hispanic births, 66% of American Indian births, and 72% of non-Hispanic black births in 2008. *Id.* at 8. There is also a similar apparent negative correlation between educational level and nonmarital births. See Wilcox, *supra* note 56, at 23–24 & fig.5. Thus, both women of color (with the exception of Asian-Pacific Islanders) and women with no college education are most likely to have non-marital children, thereby establishing a familial unit outside of the “tradition” of wedlock.

⁷⁴ Wilcox, *supra* note 56, at 22.

financial hardship will not be able to receive these protections in the event that they file for bankruptcy.

B. The Conundrum of Same-Sex, Legally Married Couples

As noted above, bankruptcy benefits awarded based on marital status negatively impact unmarried, heterosexual, and same-sex couples who establish financially interdependent households. However, due to DOMA's restrictions on the definitions of "spouse" and "marriage," legally married same-sex couples are also prohibited from utilizing benefits that the Code reserves for married debtors. A legally married, same-sex couple recently attempted to take advantage of a bankruptcy benefit reserved for married debtors, and their attempt was met with resistance.⁷⁵ This couple's ordeal, described below, offers yet another reason as to why bankruptcy benefits should not be awarded solely based upon marital status—financially interdependent, same-sex couples who are legally married are *still* unable to utilize benefits enjoyed by similarly situated, married, heterosexual debtors. The resulting product is a Code that is unable to provide the best financial fresh start to all honest debtors.

Gene Douglas Balas and Carlos A. Morales filed a joint chapter 13 petition⁷⁶ on February 24, 2011.⁷⁷ Prior to filing their bankruptcy petition, the debtors were legally married in California on August 20, 2008, and they were still married at the time of the petition.⁷⁸ As previously discussed,⁷⁹ the ability to file a joint bankruptcy petition with a spouse is one of the benefits the Code reserves for married debtors and their spouses.⁸⁰ Yet, despite the debtors' legal marriage, the United States Trustee filed a motion to dismiss the debtors' case pursuant to § 1307(c).⁸¹ Section 1307 of the Code lists eleven different causes for dismissal of a debtor's chapter 13 bankruptcy case.⁸² However, the Trustee

⁷⁵ See *In re Balas*, 449 B.R. 567, 569 (Bankr. C.D. Cal. 2011).

⁷⁶ The debtors filed a joint petition pursuant to § 302. See 11 U.S.C. § 302(a) (2006); see also *supra* Part I.A.

⁷⁷ *In re Balas*, 449 B.R. at 569.

⁷⁸ *Id.* at 569. The debtors married in California *before* Proposition 8 was passed in November 2008. *Id.* at 570. Proposition 8 was a ballot proposition and constitutional amendment that passed in the November 2008 California state elections. See Tamara Audi et al., *California Votes for Prop 8*, WALL ST. J. (Nov. 5, 2008, 10:59 PM), <http://online.wsj.com/article/SB122586056759900673.html>. Similar to DOMA, the measure limited the definition of marriage to a union between a man and woman in the state of California. See *id.*

⁷⁹ See *supra* Part I.A.

⁸⁰ See Dickerson, *supra* note 4, at 90–91.

⁸¹ *In re Balas*, 449 B.R. at 570.

⁸² 11 U.S.C. § 1307(c)(1)–(11) (2006).

did not cite any of these causes as a basis for dismissing the debtors' case.⁸³ Instead, the Trustee argued that the debtors could not file a joint petition under chapter 13 because they were both men and DOMA's definitions of "spouse" and "marriage" excluded them from filing jointly under the Code.⁸⁴ The issue before the bankruptcy court was "whether the [d]ebtors, who are legally married and were living in California at the time of the filing of their joint petition, [were] eligible to file a 'joint petition' as defined by § 302(a)."⁸⁵

The Bankruptcy Court for the Central District of California noted that, for two debtors to file a joint petition under § 302, the filers must be an "eligible individual 'and such individual debtor's spouse.'"⁸⁶ However, this seemingly simple definition is complicated because the Code does not contain a definition for "spouse," and thus DOMA's limited definition of "spouse" applies to § 302(a) because the Code is a federal act.⁸⁷

The Trustee cited two cases in support of its position that the debtors could not file a joint bankruptcy petition because they were a same-sex couple.⁸⁸ The *Balas* court reviewed each case and determined that neither case supported the Trustee's position because none of the debtors in the cited cases were legally married when they sought to file a joint bankruptcy petition.⁸⁹

The *Balas* court noted that the issue of whether same-sex, legally married debtors may file a joint petition has been raised in several bankruptcy courts in

⁸³ *In re Balas*, 449 B.R. at 571.

⁸⁴ *Id.*; *see supra* note 1.

⁸⁵ *In re Balas*, 449 B.R. at 569.

⁸⁶ *See id.* at 570.

⁸⁷ *See supra* note 1. Specifically, DOMA states:

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

1 U.S.C. § 7 (2006) (emphasis added). Clearly, the *Balas* debtors, and all other same-sex couples like them, were purposefully excluded from Congress's definitions of marriage and spouse.

⁸⁸ *In re Balas*, 449 B.R. at 571.

⁸⁹ *See In re Jephunneh Lawrence & Assoc. Chartered*, 63 B.R. 318, 319 (Bankr. D.D.C. 1986) (holding that a professional corporation, together with the corporation's sole shareholder and employee, could not file a joint chapter 13 petition under § 302 because "[o]nly a husband and wife are entitled to file a joint petition in bankruptcy, not a corporation and its sole shareholder"); *In re Malone*, 50 B.R. 2, 3-4 (Bankr. E.D. Mich. 1985) (holding that a heterosexual couple who shared living expenses, owned property together, and raised their natural children together could not file a joint chapter 13 petition under § 302 because they did not meet the statutory requirement of being a legally married husband and wife).

the chapter 7 context.⁹⁰ These courts had to decide whether a chapter 7 case could be dismissed under § 707(a) where the debtors were a same-sex couple and thus denied protections available to spouses under federal law.⁹¹ Ultimately, those courts denied the motions to dismiss the debtors' joint bankruptcy cases because the Trustees' cited reasons for dismissal were not one of the enumerated causes for dismissal in § 707(a).⁹² However, both bankruptcy courts declined to analyze or rule upon the debtors' claims that DOMA was a violation of their constitutional rights.

The *Balas* court agreed with the analysis in the aforementioned chapter 7 cases and held that no cause for dismissal existed pursuant to § 1307(c).⁹³ For support, the court noted that the Trustee failed to cite any of the enumerated reasons for dismissal under § 1307 as a basis for its motion.⁹⁴ Moreover, the *Balas* court noted that the Trustee's motion to dismiss failed to address the debtors' compliance with any of their obligations under chapter 13.⁹⁵ The *Balas* court then went one step further and took on the challenge of analyzing and ruling upon the debtors' constitutional argument that DOMA is a violation of their equal protection rights under the Due Process Clause of Fifth Amendment of the United States Constitution.⁹⁶

Equal protection of the law is guaranteed to all people under both state and federal laws. Equal protection applies to state laws through the Fourteenth Amendment of the United States Constitution.⁹⁷ Equal protection is applied to federal laws through the Due Process Clause of the Fifth Amendment.⁹⁸ The Supreme Court has determined that the proper "approach to Fifth Amendment

⁹⁰ *In re Balas*, 449 B.R. at 571–72.

⁹¹ *See, e.g.*, Civil Minutes at 1–3, *In re Ziviello-Howell*, No. 11-22706-A-7 (E.D. Cal. May 31, 2011) (No. 44); *In re Somers*, 448 B.R. 677, 680 (Bankr. S.D.N.Y. 2011).

⁹² *See* 11 U.S.C. § 707(a); Civil Minutes, *supra* note 91, at 3 (denying trustee's motion to dismiss debtors' joint bankruptcy case for cause because motion did not contain any valid reason for dismissal under § 707(a)); *In re Somers*, 448 B.R. at 684 (denying the trustee's motion to dismiss debtors' chapter 7 case because motion did not contain any valid reason for dismissal under § 707(a)).

⁹³ *In re Balas*, 449 B.R. at 571–72.

⁹⁴ *Id.* at 571.

⁹⁵ *Id.* at 572.

⁹⁶ *Id.* at 572–79.

⁹⁷ The Fourteenth Amendment states, in pertinent part, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

⁹⁸ *See* *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954) (recognizing that equal protection guarantees apply to federal laws through the Due Process Clause of the Fifth Amendment of the United States Constitution).

equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.”⁹⁹

When analyzing laws for alleged equal protection violations, three basic questions must be asked and answered for the court to reach a decision: (1) what is the classification; (2) what is the appropriate level of scrutiny; and (3) does the government action meet the level of scrutiny?¹⁰⁰ The *Balas* court answered each of these questions during its analysis of DOMA’s constitutionality.¹⁰¹

1. What is the Classification?

The classification that the allegedly unconstitutional law uses is particularly important because all classifications do not warrant the same level of judicial scrutiny. One way to determine which classification the law is using is to evaluate whether, on its face, the law distinguishes between people based on a particular characteristic or trait.¹⁰² Thus, in *Balas*, the court had to determine if DOMA, on its face, distinguished between people based on a particular characteristic. The debtors in *Balas* argued that the language of DOMA, on its face, discriminated against legally married, same-sex couples on the basis of sexual orientation because similarly situated heterosexual couples were not singled out for differential treatment.¹⁰³ The court agreed with the debtors’ classification—discrimination based upon sexual orientation—and proceeded to determine the level of judicial scrutiny warranted by sexual orientation classification.

a. What Is the Appropriate Level of Scrutiny?

Three levels of judicial scrutiny currently exist: rational basis, intermediate scrutiny, and strict scrutiny.¹⁰⁴ The Supreme Court has determined that classifications based upon race or national origin are subject to strict scrutiny, and those based on gender and non-marital children are subject to intermediate scrutiny.¹⁰⁵ All other categorizations must be reviewed under rational basis.¹⁰⁶

⁹⁹ Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1972).

¹⁰⁰ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 670–73 (3d ed. 2006).

¹⁰¹ See *In re Balas*, 449 B.R. at 572–79.

¹⁰² CHEMERINSKY, *supra* note 100, at 670.

¹⁰³ *In re Balas*, 449 B.R. at 572.

¹⁰⁴ CHEMERINSKY, *supra* note 100, at 540–42.

¹⁰⁵ *Id.* at 541.

¹⁰⁶ *Id.* at 680.

Both strict and intermediate scrutiny subject the allegedly discriminatory law to heightened judicial review. When a law is subject to strict scrutiny, it is only upheld if it is found to be necessary to achieve a compelling governmental objective.¹⁰⁷ Under intermediate scrutiny, a law is upheld only if the government can prove that the law is “substantially related to an important government purpose.”¹⁰⁸ Under both forms of heightened scrutiny, the government has the burden of proof and must justify why its action is appropriate under the circumstances.¹⁰⁹ The government’s burden under either strict or intermediate scrutiny is difficult to [satisfy], and laws reviewed under strict scrutiny are almost always found to be invalid and unconstitutional.¹¹⁰ Therefore, a statute reviewed under either form of heightened scrutiny is more likely to be found unconstitutional than a law reviewed under rational basis.

Given this likelihood, the debtors argued that the *Balas* court should review DOMA under some form of heightened scrutiny.¹¹¹ As support for their argument, the debtors cited a letter from the U.S. Attorney General, Eric Holder, to the Speaker of the House of Representatives, John Boehner (Holder Letter), regarding the level of judicial scrutiny that should be applied to sexual orientation classifications.¹¹² In pertinent part, the Holder Letter explains that, “[a]fter careful consideration . . . President [Obama] has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny.”¹¹³ The *Balas* court agreed with the debtors’ argument and adopted the reasoning of the Holder Letter, concluding that heightened scrutiny should be used to analyze DOMA’s classifications in this situation based upon sexual orientation.¹¹⁴

b. Does the Government Action Meet the Level of Scrutiny?

In an abundance of caution, the *Balas* court analyzed DOMA under both the rational basis and heightened scrutiny tests. After its analysis, the court

¹⁰⁷ *Id.* at 671 (citing *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (citing Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)).

¹¹¹ *In re Balas*, 449 B.R. at 573–76.

¹¹² Letter from U.S. Att’y Gen. Eric Holder, to House Speaker John A. Boehner (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

¹¹³ *Id.*, quoted in *In re Balas*, 449 B.R. at 573–74.

¹¹⁴ *Id.* at 575–76.

determined that DOMA was unconstitutional under either form of scrutiny.¹¹⁵ Under rational basis, the court reviewed the government's stated purposes behind enacting DOMA and determined that DOMA did not serve these purposes.¹¹⁶ DOMA was enacted as a way of "defending and nurturing the institution of traditional heterosexual marriage, . . . defending traditional notions of morality, . . . [and] preserving scarce government resources."¹¹⁷ The *Balas* court determined that none of these stated governmental interests passed rational basis or any other level of judicial scrutiny,¹¹⁸ and it held that DOMA violated the debtors' equal protection rights because the government had no legitimate interest in the goals of DOMA.¹¹⁹

III. A FERTILE CODE—BANKRUPTCY BENEFITS BASED UPON FINANCIAL INTERDEPENDENCE

The Code is impotent because its power to provide the best financial fresh start to all honest debtors is limited when the Code's benefits are based solely upon a debtor's marital status. Thus, Congress should revise the Code in several ways to accomplish its goals: namely, making the Code more consistent with current marriage patterns, maximizing debtor utilization of the Code's benefits, and providing the best fresh start for all honest debtors.

Legal scholars have suggested ways in which the Code can be revised to eliminate the effects of bankruptcy benefits based solely upon marital status.¹²⁰ Specifically, Professor Dickerson addressed DOMA's implications for same-sex and unmarried couples filing for bankruptcy and proposed several ways to revise the Code so that bankruptcy benefits are awarded to debtors based upon

¹¹⁵ *Id.* at 573–76, 578–79.

¹¹⁶ *Id.* at 578–79.

¹¹⁷ *Id.* (citing *In re Levenson*, 587 F.3d 925, 931–33 (9th Cir. 2009)); see also H.R. REP. NO. 104-664, at 12–18, reprinted in 1994 U.S.C.C.A.N. 2905, 2916–22.

¹¹⁸ *In re Balas*, 449 B.R. at 578–79.

¹¹⁹ See *id.* at 579.

¹²⁰ See, e.g., Elizabeth Fella, Comment, *Playing Catch Up: Changing the Bankruptcy Code to Accommodate America's Growing Number of Non-Traditional Couples*, 37 ARIZ. ST. L.J. 681, 683 (2005) ("Laws discriminating on the basis of marriage should be changed because they impose traditional notions of relationships or family life that can be unfairly oppressive to couples who choose not to marry or who may be legally barred from doing so." (footnote omitted)). Fella addresses how the benefits of filing a joint petition can be extended to unmarried debtors and proposes two approaches—the economic integration approach and the partnership approach. *Id.* at 696–701. Under either approach, references to marriage would be removed from the Code, and couples seeking to file a joint bankruptcy petition would have to prove that they are either economically integrated (under the economic integration approach) or an economic partnership (under the partnership approach). *Id.*

an economic, and not marital, relationship between two individuals.¹²¹ Dickerson argued that “marital benefits” should be awarded to unmarried couples, whether heterosexual or homosexual, who can prove that they are an “economic unit.”¹²² Dickerson defined “economic unit” as “a public or private arrangement between members who have a committed relationship involving shared financial responsibilities” and argued that unmarried debtors must prove, under an objective standard, that they are an economic unit in order to receive marital benefits.¹²³ Dickerson asserted that the definition of “spouse” should be revised to include the term “economic unit” and that the definition of “dependent” should be altered to encompass any member of an economic unit, so that economic units may also exempt certain property of one of the members without proving that the member is actually a dependent.¹²⁴ Dickerson also proposed that a home owned by an economic unit should be treated like entirety property under the Code solely for the purpose of preventing the Trustee from selling it¹²⁵ so that economic units could also be protected against losing their homes in bankruptcy. Dickerson’s proposals would add definitions to the Code so that unmarried debtors who are part of an economic unit may take advantage of bankruptcy benefits reserved for married debtors.¹²⁶ Dickerson’s proposals are a step in the right direction but fail to address the abuse that occurs when married debtors who are *not* an economic unit are still able to take advantage of marital benefits simply because they are legally married.¹²⁷

¹²¹ Dickerson, *supra* note 4, at 103–12. Dickerson considered DOMA’s implications for same-sex and unmarried couples filing for bankruptcy. Using DOMA’s inherent bias against same-sex couples as a starting point, Dickerson investigated why federal bankruptcy benefits, which are subject to DOMA’s definitions of “spouse” and “marriage” because they are part of a federal act, should be granted to debtors solely based on marital status. *See generally id.*

¹²² *Id.* at 106.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* Dickerson noted that property “owned by an economic unit should be treated like entirety property—even though the unit could not characterize the property as entirety property under applicable state law.” *Id.*

¹²⁶ *See id.* at 106–08.

¹²⁷ For instance, some married couples live separately, even in different states, and have completely separate economic and financial lives. These couples should not receive marital benefits because they are not an “economic unit.” However, Dickerson’s proposal would keep the current benefits for married debtors in place without evaluating whether married debtors are actually an economic unit. *See id.* at 106–12.

The best way to combat the impotency in the Code is to eliminate any references to spouses or marriage.¹²⁸ If the Code aims to prevent abuse, then all couples should have to prove that they are financially interdependent before receiving bankruptcy benefits. The terms “financially interdependent group” (FIG) and “partner” should be substituted for “marriage” and “spouse,” respectively, in the Code. A FIG would be defined as two adults who reside in the same household or own joint residential property and are so financially interdependent that evaluating their economic circumstances separately would not be an accurate depiction of their financial health and need for relief under the Code. Partner would then be defined as a member of a FIG. Proof of financial interdependence would be required for all joint filers, regardless of their marital status under state law. For instance, partners in a FIG would likely have proof of joint debts, bank accounts, and financial obligations, such that the bankruptcy court could be satisfied that the nature of the filers’ finances indicate that they financially depend upon each other.

Section 302, which grants married debtors the right to file a joint bankruptcy petition, would be revised to remove the term “spouse.”¹²⁹ Under the revised section, partners in a FIG would be able to file a joint bankruptcy petition, so long as the FIG could show the court, or any creditors challenging their financial interdependence, proof that they are economically linked. FIGs may show proof of financial interdependence by putting forth evidence of joint debts, bank accounts, and other financial obligations going back at least thirty-six months prior to the bankruptcy petition. If the bankruptcy court is satisfied with the evidence of financial interdependence, the joint petition shall proceed. If the bankruptcy court is not convinced that the FIG is sufficiently financially integrated to warrant a joint petition under the Code, the court may sever the joint petition into two separate bankruptcy cases. This proposed revision to § 302 permits more debtors, and in particular couples who are not legally married, to file a joint petition if they can demonstrate that they are a FIG.

¹²⁸ This proposed revision to the Code would differ significantly from Dickerson’s proposal of adding “economic unit” to the Code so that unmarried debtors who are part of an economic unit could also take advantage of bankruptcy benefits reserved for married couples. Instead, this proposed revision eliminates the terms “spouse” and “marriage” completely from the Code.

¹²⁹ The proposed revision of § 302 of the Code would read as follows: “(a) a joint case under a chapter of this title is commenced by filing with the bankruptcy court of a single petition under such chapter by an individual that may be a debtor under such chapter and such individual’s *partner in a financially interdependent group*.”

Sections 363 and 522(b) would be applicable to any real property owned by the FIG, even if such property was not held in a tenancy by the entirety under state law, so long as certain requirements were met. First, any real property subject to §§ 363 and 522(b) must be jointly owned by partners in a FIG. If only one partner in the FIG legally owns the property at issue, §§ 363 and 522(b) will not apply. Second, partners in the FIG must have jointly owned, and resided in, the real property in question for at least thirty-six months prior to filing the bankruptcy petition. This “joint ownership” time requirement would help curb abuse and discourage potential filers from simply adding their partner’s or spouse’s name to the deed or mortgage immediately before filing. These revisions would enable members of a FIG to protect real property that they jointly own under a tenancy by entirety theory even though such protection may not be available to them under state law.

Adding these definitions and requirements and then applying them to the sections that grant bankruptcy benefits to joint petitioners will make the Code more powerful and protect more debtors and their families during times of financial distress. Specifically, these proposed changes will allow more debtors to take advantage of benefits in the Code without regard to their marital status. By eliminating any reference to a debtor’s marital status, the Code returns to better serving its original purpose—providing all honest debtors with a fresh start.

CONCLUSION

The Code should be amended so that it can reach its optimal impact and provide a fresh start for most, if not all, honest debtors who file for bankruptcy relief. In the current economic climate, the Code needs to be as effective as possible to help the millions of Americans suffering from financial hardship caused by a changing economy, decreased job availability, and increased cost of living. Although aligning benefits in bankruptcy with marriage used to be inclusive of most families, this is no longer the case, and the Code must be revised to remain consistent with this development in American society.

The driving goal of the Code is to provide a fresh start to all honest debtors.¹³⁰ Yet, Congress, by relying upon the institution of marriage, thwarts its own goal because a large portion of the American population cannot utilize key bankruptcy benefits since they are not married. By basing some

¹³⁰ See *supra* Part I.

bankruptcy benefits on marital status, the Code is not achieving the maximum effect of its purpose. The Code is not accomplishing what Congress intended when it enacted a federal bankruptcy law because it has severely limited who can receive bankruptcy benefits and achieve a fresh start. It is doubtful that Congress intended to limit the reach and impact of the Code in this manner, and the Code needs to be revised to no longer handicap itself.

Moving towards a Code that does not promote the institution of marriage will likely cause some alarm. However, lawmakers should not continue to award benefits to citizens based upon marital status when the majority of citizens no longer use the institution of marriage to create financial interdependence. Moreover, governments could achieve even more net financial gain by promoting all familial units, whether or not linked by marriage, which will likely enlarge the tax base. Finally, given marriage's decline along various socioeconomic and educational lines, providing benefits to debtors solely based upon marital status is akin to supporting only the wealthiest and best-educated Americans.¹³¹ This result is not consistent with a law that was enacted to assist those who are not wealthy as they climb out of financial distress and begin to build their lives anew.

Additionally, awarding benefits according to marital status has another consequence that Congress likely did not intend—individual states' lawmakers, who define marriage and decide who can legally marry in their states, are controlling who can take advantage of benefits under federal law. Prior to the passage of DOMA, no federal statutory definition of "marriage" or "spouse" was applicable to the Code. In turn, when the Code referenced "spouse" or "marriage," debtors had to rely upon state law definitions because individual state governments, not the federal government, regulated the institution of marriage. Thus, by linking bankruptcy benefits to debtors who are legally married, but not defining marriage or spouse anywhere in the Code, Congress essentially left the decision of who could utilize these benefits to the states. It is doubtful that Congress intended for individual state governments to have the power to decide who may take advantage of a federal law.

After the passage of DOMA, however, federal definitions of "marriage" and "spouse" replaced state law definitions of these terms. Yet, in light of

¹³¹ See *supra* Part II.A.

DOMA's possible demise,¹³² Congress must consider whether it should eliminate "marriage" and "spouse" from the Code or return to state law definitions. If the Code is not revised, individual states will once again be responsible for defining who can take advantage of federal bankruptcy benefits.

¹³² See, e.g., *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 397 (D. Mass. 2010) (holding that Section 3 of DOMA is unconstitutional because it violates the equal protection of the laws guaranteed by the Due Process Clause of the Fifth Amendment to the United States Constitution); see also *supra* Part II.B.1.b.