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Same Sex Marriage in a Post-*Perry* and *Windsor* America

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LIFE AFTER DOMA: THE LEGAL LANDSCAPE

Professor Allison I. Connelly & Julie Butcher

We made a commitment to each other in our love and lives, and now had the legal commitment, called marriage, to match. Isn't that what marriage is? ... I have lived long enough now to see big changes. The older generation's fears and prejudices have given way, and today's young people realize that if someone loves someone they have a right to marry... I believe all Americans, no matter their race, no matter their sex, no matter their sexual orientation, should have that same freedom to marry. Government has no business imposing some people's religious beliefs over others... I support the freedom to marry for all. That's what Loving, and loving, are all about.

Mildred Loving, Loving for All, Public Statement on the 40th Anniversary of Loving v. Virginia (June 12, 2007), cited in Bostic v. Rainey, 2014 WL 561978 (E.D. Va., Feb. 14, 2014).

I. THE FAULT LINES: CONSTITUTIONAL PROVISIONS

- A. Article IV, Section 1: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."
- B. Fifth Amendment: "No person shall ... be deprived of life, liberty, or property, without due process of law ..."
- C. Fourteenth Amendment... "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
- D. Kentucky Constitution, Section One: "All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned ... The right of seeking and pursuing their safety and happiness..."
- E. Kentucky Constitution, Section Two: "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."
- F. Kentucky Constitution, Section Three: "All men, when they form a social compact, are equal; and no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men ..."

- G. Kentucky Constitution, Section 233A: "Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized."
- H. KRS 402.020(1)(d): "Marriage is prohibited and void: ... between members of the same sex."

II. TREMORS

- A. Loving v. Virginia, 388 U.S. 1 (1967)

The Court struck two statutes criminalizing miscegenation under the Due Process and Equal Protection clauses. Virginia was one of sixteen states at the time that prohibited and punished marriages on the basis of racial classifications. The lower court concluded that marriage had "traditionally been subject to state regulation without federal intervention, and, consequently, the regulation of marriage should be left to exclusive state control by the Tenth Amendment." The state gave up that argument before the Supreme Court and argued instead that Fourteenth Amendment didn't apply to its miscegenation laws.

The Supreme Court found a due process violation holding, "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." The Court also held the statutes violated the equal protection clause holding, "There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. . . There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." *Id.* at 11-12.

- B. Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), holding that the Constitution does not protect "a fundamental right" "for same-sex couples to get married." Baker appealed and on October 10, 1972, the Supreme Court ordered, "Appeal from Sup. Ct. Minn. Dismissed for want of a substantial federal question." Baker v. Nelson, 409 U.S. 810 (1972). Baker is precedent because Supreme Court review was mandatory. Therefore, the dismissal operated as a decision on the merits.
- C. Jones v. Hallahan, 501 S.W.2d 588 (Ky. App. 1973), holding there is no constitutional right to have a marriage license issued to two persons of the same sex because same sex couples are incapable of entering into a marriage as that term is defined by common usage.
- D. Bowers v. Hardwick, 478 U.S. 186, 191 (1986), holding constitutional a Georgia statute criminalizing adult same sex consensual conduct because "none of the rights announced in [prior cases] bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy ... No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has

been demonstrated... Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights. In 1868, when the Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults. Against this background, to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious." *Id.* at 193-194.

- E. Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992), holding unconstitutional a statute criminalizing consensual "homosexual sodomy" because it violates the right of privacy and equal protection under Sections 1, 2 and 3 of the Kentucky Constitution.
- F. 1993: Hawaii Supreme Court rules that a ban on gay marriage violates the Hawaii Constitution, but five years later a constitutional amendment is passed defining marriage between one man and one woman.
- G. December 1993: "Don't Ask, Don't Tell" implemented.
- H. 1995: Utah passes the first "mini-DOMA" legislation prohibiting same sex marriage. More than thirty other states will follow.
- I. Romer v. Evans, 517 U.S. 620 (1996), a 6-3 Kennedy opinion, striking down, under the Equal Protection Clause, a Colorado constitutional amendment that prevented the state and any city, county or school district from providing "official protections" based on sexual orientation.
- J. 1996: President Clinton signs the Defense of Marriage Act into law. The law defines marriage as a legal union between one man and one woman and that no state is required to recognize a same-sex marriage from out of state.
- K. April 26, 2000: Vermont becomes the first state in the U.S. to legalize civil unions and registered partnerships between same-sex couples.
- L. Lawrence v. Texas, 539 U.S. 558 (2003), a 6-3 Kennedy opinion overruling Bowers v. Hardwick, and holding unconstitutional a Texas statute that criminalized consensual, adult homosexual intercourse as illegal sodomy under the Fourteenth Amendment Due Process Clause. "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id.* at 578.
- M. Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003), the first state court decision to find that same-sex couples had the right to marry because the prohibition denied "the dignity and equality of all individuals," making them "second class citizens."

- N. November 2004: Kentucky passes Section 233A, a "mini-DOMA" constitutional amendment defining marriage as between one man and one woman.
- O. December 2010: The repeal of Don't Ask, Don't Tell becomes law.
- P. June 2013: Hollingsworth v. Perry, 133 S.Ct. 2652 (2013) and U.S. v. Windsor, 570 U.S. ____, 133 S.Ct. 2675 (2013) decided.
- Q. The Current Landscape as of April 1, 2014:
1. Since Windsor, not a single state's same sex marriage ban has survived federal court challenge. See, Human Rights Campaign, American for Marriage Equality, <http://www.hrc.org/press-releases>, visited April 14, 2014.
 2. Marriage equality has been legalized in seventeen states: California, Connecticut, Delaware, Hawaii, Iowa, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, Washington and the District of Columbia. Thirty-seven percent of the country lives in a marriage equality state. See, N. Flaherty, Marriage Equality USA, <http://www.marriageequality.org/national-map>, visited April 10, 2014.

Three states provide the equivalent of state level marriage rights to same sex couples: Colorado, District of Columbia and Oregon. *Id.*
 3. Thirty-three states have same sex marriage bans through either legislation or constitutional amendments or both.
 - a. Hawaii has an amendment that gives the legislature the authority to define marriage.
 - b. Nine states have amendments that prohibit same sex marriage only: Alaska, Nevada, Mississippi, Missouri, Montana, Oregon, Colorado, Tennessee and Arizona.
 - c. Eighteen states have amendments that prohibit same sex marriage and civil unions: Nebraska, Arkansas, Georgia, Kentucky, Louisiana, North Dakota, Ohio, Oklahoma, Utah, Kansas, Texas, Alabama, Idaho, South Carolina, South Dakota, Wisconsin, Florida, and North Carolina.
 - d. Two states prohibit same sex marriage, civil unions and other contracts: Michigan and Virginia. *Id.*
 4. Ten state constitutional amendments or statutes have been found unconstitutional or have been repealed by state supreme courts or

U.S. District Courts: California, Nevada, Michigan, Oklahoma, Virginia, Kentucky, Ohio, Texas, and Utah.

- a. Seven state attorney generals from Kentucky, Nevada, Oregon, Pennsylvania, Virginia, California and Illinois, have refused to defend marriage bans on same sex marriages.
 - b. Ohio, Tennessee and Kentucky's rulings are limited to the recognition of out of state same sex marriages.
5. Same sex marriage court cases have been filed in at least "28 states and Puerto Rico and account for 250 plaintiffs taking on state marriage bans." *Id.*
 6. There are five federal circuit courts that will rule in nine same sex marriage cases in the coming months. They are: Fourth Circuit (Virginia), Fifth Circuit (Texas), Ninth Circuit (Nevada), Tenth Circuit (separate cases from Utah, Wyoming, Kansas, Colorado, and Oklahoma) and four cases from the Sixth Circuit (Tennessee, Kentucky, Michigan and Ohio.) The Sixth Circuit is the only federal appeals court so far to consider same sex marriage cases "from all states within its jurisdiction." *Id.*
 7. Only five states, Alaska, Georgia, Montana, North Dakota and South Dakota, ban same sex marriage but have no current court cases challenging their constitutionality. See, Human Rights Campaign, Press Room, Cases, Coast to Coast, at <http://www.hrc.org/press-releases>, visited April 14, 2014.

III. THE FIRST QUAKE: PERRY

A. Hollingsworth v. Perry, 133 S.Ct. 2652 (2013)

In Perry, the Court didn't reach the question whether California's Proposition 8 violated the Equal Protection Clause of the Fourteenth Amendment by "defining marriage solely as the union of a man and a woman."

In a 5-4 opinion written by Chief Justice Roberts and joined by Scalia, Ginsburg, Breyer and Kagan, the Court held that the "proponents" of Proposition 8, five California residents, lacked standing to appeal the judgment of the U.S. District Court invalidating the state ballot initiative.

"We have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to. We decline to do so for the first time here." *Id.* at 2655. The Court found that the "proponents," who stepped in when the State refused to appeal the trial court's ruling, had only a "generalized" interest in upholding the validity of Prop. 8. "Their only interest in having the District Court order reversed was to vindicate the constitutional validity of a

generally applicable California Law. We have repeatedly held that such a generalized grievance, no matter how sincere, is insufficient to confer standing." *Id.* at 2658. In short, the proponents had no "concrete and particularized injury." *Id.*

B. Impact

Same sex couples in California can now marry. There is concern that the ruling will permit state officials "unchecked power to nullify ballot initiatives they dislike by refusing to enforce them or defend them in court." Valerie Richardson, "Critics Say Supreme Court's Prop 8 Ruling Takes Power from Voters, Gives It to State Officials," (June 30, 2013,) <http://www.washingtontimes.com/news/2013/jun/30/critics-say-supreme-courts-proposition-8-ruling-ta/#ixzz2n0AOAapi>

IV. THE EARTHQUAKE: A TALE OF TWO RATIONALES: U.S. V. WINDSOR¹

A. Facts

After living as a couple for nearly forty years, Edith Windsor and Thea Spyer, New York residents, got married in 2007 in Toronto, Canada, where same sex marriage was legal. New York recognized the marriage because they had registered as domestic partners in 1993. Spyer died in 2009. She left her entire estate to Windsor. Windsor tried to claim the federal estate tax exemption for surviving spouses, but her claim was denied by the IRS. The IRS stated that "for federal tax purposes, a 'marriage' means only a legal union between a man and a woman as husband and wife, and the word 'spouse' means a person of the opposite sex who is a husband or a wife." The regulations language was required under §3 of the Defense of Marriage Act, 28 U.S.C. 1738C, which defined "marriage" and "spouse" as legal unions between a man and a woman.

Because of DOMA's definition of marriage, the federal government imposed a \$363,053 tax on Spyer's estate. If the U.S. government had recognized the marriage, the estate would have qualified for the spousal exemption and Windsor would not have had any tax liability.

Windsor filed suit under the Fifth Amendment challenging the constitutionality of §3 of DOMA under the Equal Protection Clause. She sought a refund of the federal estate tax. The government defended DOMA at first, but changed its position and decided not to defend DOMA in court. In response, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives voted to intervene in the lawsuit and to defend the constitutionality of §3.

¹ 570 U.S. ___, 133 S.Ct. 2675 (2013) (5-4 Kennedy opinion joined by Ginsburg, Breyer, Sotomayor and Kagan with Roberts, Scalia, Thomas and Alito dissenting).

B. Threshold Holding

The Court had jurisdiction to hear the case because there was a sufficient controversy under Article III. The refund the District Court ordered the government to pay, and which the U.S. had refused to pay, constituted a "real and immediate economic injury." See, Warth v. Seldin, 422 U.S. 490 (1975). Prudential considerations – "matters of judicial self-governance" – were also met under Baker v. Carr, 369 U.S. 186 (1962). BLAG's "substantial adversarial argument for Section 3's constitutionality satisfies prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree." *Id.* at 2687-2688.

C. Merits Holding

1. "The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment." *Id.* at 2696.
2. In other words, the Court held that DOMA created a subset of state sanctioned marriages that were treated unequally to other state sanctioned marriages; and that the federal government cannot overturn a particular state's decision in defining marriage. As such, if a state decides to recognize same-sex marriages, federal law must respect that choice.
3. "By history and tradition the definition and regulation of marriage ... has been treated as being within the authority and realm of the separate States." *Id.* at 2690. "The State's power in defining the marital relation is of central relevance in this case ... Here the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community. DOMA because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage." *Id.* at 2692.
4. "DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government ... The Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group..." *Id.* at 2693.

5. "DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States." *Id.*
6. DOMA's "demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law. This raises a most serious question under the Constitution's Fifth Amendment... DOMA's operation in practice confirms this purpose ... DOMA writes inequality into the entire United States Code... DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality ..." *Id.* at 2693- 2694.

D. Two Rationales Become One: Federalism/State Sovereignty and Liberty

1. One rationale is based on federalism. The rationale is framed on the states' "historic and essential authority to define the marital relation." *Id.* at 2692. "The Court ruled that if a state exercises its sovereign power and recognizes same sex marriage, federal law "must respect that choice." The opinion notes that laws recognizing same sex marriage "eliminate inequality," but the choice to recognize the marriage is "within the realm and authority of the separate States." *Id.* Because DOMA's definition of marriage created "two contradictory marriage regimes with the same State," it was unconstitutional. Congress' definition of marriage in §3 "interfered" with "state sovereign choices" regarding marriage and relegated same sex marriages to "second tier" status.
2. In novel reasoning, the opinion uses state law to recognize a protected right or liberty within its borders against a federal statute. The Court notes that DOMA raised major concerns that it was the product of animus. First, the legislative record is clear regarding Congress' view that same-sex marriage is immoral and "un-Christian."
 - a. Second, "In determining whether a law is motivated by an improper animus or purpose, 'discriminations of an unusual character' especially require careful consideration. DOMA cannot survive under these principles." *Id.* at 2693. DOMA departs from tradition and doesn't let the states decide who is married. This "is strong evidence of a law having the purpose and effect of disapproval of that class." *Id.*

- b. The Court concluded, "The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States." *Id.*
- c. The Court said, "The congressional goal was 'to put a thumb on the scales and influence a state's decision as to how to shape its own marriage laws.' The Act's demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law. This raises a most serious question under the Constitution's Fifth Amendment." *Id.* at 2693-94.
- d. "The power the Constitution grants it also restrains. And though Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment." *Id.* at 2695.
- e. "The principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution." *Id.*

E. A Note on Dissents

- 1. Scalia predicted that Kennedy's language that DOMA's "principal purpose is to impose inequality," "would show up in future suits challenging state laws and state constitutional amendments." He's right. Seventy-five opinions have already cited Windsor.
- 2. "We have no power to decide this case. And even if we did, we have no power under the Constitution to invalidate this democratically adopted legislation. The Court's errors on both points spring forth from the same diseased root: an exalted conception of the role of this institution in America." *Id.* at 2697-2698.
- 3. "In the majority's telling, this story is black-and-white: hate your neighbor or come along with us. The truth is more complicated. It is hard to admit that one's political opponents are not monsters, especially in a struggle like this one, and the challenge in the end proves more than today's Court can handle. Too bad." *Id.* at 2711.
- 4. Roberts was more measured. He said he "would not tar the political branches with the brush of bigotry without more

convincing evidence that the Act's principal purpose was to codify malice." *Id.* at 2696.

F. What Windsor Did Not Hold or Do

1. It did not decide whether the Constitution guarantees the right to same-sex marriages or whether the Constitution forbids state bans on such marriages. "This opinion and its holding are confined to those lawful marriages," meaning those states that have recognized or may recognize in the future same sex-marriages. *Id.* at 2696.
2. The opinion does not decide "whether the States in their 'historic and essential authority to define the martial relation may continue to utilize the traditional definition of marriage." *Id.* at 2696 (Roberts dissent).
3. The opinion did not articulate a clear test or level of judicial review in judging LGBT or same-sex marriage cases.
4. The opinion did not implicitly or explicitly discuss §2 of DOMA, which gives the states the right to refuse to recognize same-sex marriages performed in other states.
5. The opinion did not reach couples who are barred from marrying in the thirty-three "mini-DOMA" states where same-sex marriage is prohibited.

V. **U.S. CONSTITUTIONAL AFTERSHOCKS**

- A. Caveat: This is only a brief sampling of cases after Windsor and does not include the many cases in the pipeline. One headline appropriately said, "Weeks after Key Part of Federal Marriage Act is Struck Down, Preliminary Findings Show Decision Could Reshape Laws." This section includes potential federal arguments that can be made. However, don't forget §§§1, 2 and 3 of the Kentucky Constitution.
- B. Full Faith and Credit: §2 of DOMA: Are states constitutionally required to recognize same-sex marriages that were celebrated in states that sanction same-sex marriages?
 1. Williams v. State of North Carolina, 317 U.S. 287, 291 (1942) holds that the purpose of the Full Faith and Credit clause is "to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation."
 2. Academics disagree on whether DOMA violates the Full Faith and Credit Clause.

Many academics say §2 is constitutional under the second sentence of the clause; "And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Since Congress has the right to control the "effect" of the Acts, Records and Proceedings, it is controlling the "effect" of same-sex marriage recognition through §2 of DOMA.

3. Other academics argue that even though Congress has the authority to define the "effect" of the Acts, Congress does not have the authority to limit the scope of the Full Faith and Credit clause.

C. Equal Protection & Due Process

1. Love v. Beshear (formerly Bourke v. Beshear), No. 3:13-cv-750-H, 2014 WL 556729, at 1 (W.D. Ky. February 12, 2014), appealed to the Sixth Circuit but holding "that Kentucky's denial of recognition for valid same-sex marriages violates the United States Constitution's guarantee of equal protection under the law, even under the most deferential standard of review. Accordingly, Kentucky's statutes and constitutional amendment that mandate this denial are unconstitutional."
2. Obergefell v. Wymyslo, 962 F.Supp.2d 968, 978, 983 (S.D Ohio, 2013), holding "where same-sex couples legally marry outside of Ohio and then reside in Ohio, a different right than the fundamental right to marry is also implicated: here, the constitutional due process right at issue is not the right to marry, but, instead, the right not to be deprived of one's already-existing legal marriage and its attendant benefits and protections. In addition to concluding that Ohio's marriage recognition bans are an impermissible and unconstitutional burden on Plaintiffs' significant liberty interest in the continued existence and recognition of their marriages under the Due Process Clause, this Court further finds and declares that Plaintiffs have also demonstrated that Ohio's same-sex marriage recognition bans further violate Plaintiffs' constitutional rights by denying them equal protection of the laws.
3. Obergefell v. Kasich, No. 1:13-cv-501, 2013 WL 3814262 (S.D Ohio, Jul. 22, 2013), holding based on Windsor, that interstate recognition is required under the Equal Protection Clause of the Fourteenth Amendment. Court granted a temporary restraining order requiring Ohio to recognize a marriage between two Ohio men who married in Maryland.
4. Henry v. Himes, No. 1:14-cv-00129TSB, 2014 WL 1418395 (S.D. Ohio, Apr. 14, 2014), holding unconstitutional Ohio's "marriage amendment" because of Ohio's refusal to recognize out of state same sex marriages. "There can be no circumstance under which

this discriminatory classification is constitutional, as it was intended to, and on its face does stigmatize and disadvantage same sex couples and their families, denying only to them protected rights to recognition of their marriages and violating the guarantee of equal protection."

5. Bassett v. Snyder, 951 F.Supp.2d 939 (E. Dist. Mich. 2013), holding that five Michigan state employee plaintiffs have a "likelihood of succeeding" on their claim under the Equal Protection Clause that the state must provide benefits to their same-sex partners.
6. Diaz v. Brewer, 656 F.3d 1008 (9th Cir. 2011), holding that LGBT state employees with committed same-sex life partners have a "likelihood of succeeding" on their claim under the Equal Protection Clause that Arizona's statute of limiting eligibility for family health care coverage to married heterosexual employees is unconstitutional.
7. Kitchen v. Herbert, 961 F.Supp.2d 1181 (D. Utah 2013); appealed to Tenth Circuit and arguments were heard on April 10, 2014. The court held that Utah's state constitutional ban on same sex marriage was unconstitutional under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. "The State's current laws deny its gay and lesbian citizens their fundamental right to marry and, in doing so demean the dignity of these same sex couples for no rational reason."
8. Bishop v. U.S. ex rel. Holder, 962 F.Supp.2d 1252, 1282 (N.D. Okla. 2014); appealed to Tenth Circuit, but holding Oklahoma's state constitutional ban on same sex marriage unconstitutional based on Windsor, and under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The ban served no rational purpose. The state's justifications, such as procreation, wasn't rationally related to a marriage ban for same sex couples. Moreover, the state's ban "intentionally discriminates against [same sex couples] – for two reasons. First, Part A's disparate impact upon same-sex couples desiring to marry is stark. Its effect is to prevent every same-sex couple in Oklahoma from receiving a marriage license, and no other couple. This is not a case where the law has a small or incidental effect on the defined class; it is a total exclusion of only one group."
9. De Leon v. Perry, No. 5:13-cv-00982-OLG, 2014 WL 715741 (W.D. Tex., Feb. 26, 2014); appealed to the Fifth Circuit. De Leon holds Texas' state constitutional ban on same sex marriage unconstitutional under the Equal Protection and Due Process Clauses. "Texas' current marriage laws deny homosexual couples the right to marry, and in doing so, demean their dignity for no legitimate reason." The ban couldn't survive under even the most deferential rational basis level of review. Moreover, under Due

Process, "By denying plaintiff's the fundamental right to marry, Texas denies their relationship the same status and dignity afforded to citizens who are permitted to marry. It also denies them the legal, social and financial benefits of marriage that opposite sex couples enjoy."

10. Bostic v. Rainey, (formerly Bostic v. McDonnell), No. 2:13cv395, 2014 WL 561978, (E.D. Va. Feb. 13, 2014); appealed to the Fourth Circuit but holding that, "Virginia's marriage laws unconstitutionally deny Virginia's gay and lesbian citizens the fundamental freedom to choose to marry. Marriage is a fundamental right under the Due Process and Equal Protection clauses, and any limitation on that right is subject to strict scrutiny."
11. DeBoer v. Snyder, No. 12–CV–10285, 2014 WL 1100794, (E.D. Mich. Mar. 21, 2014); appealed to the Sixth Circuit but holding the Michigan Marriage Amendment unconstitutional as not rationally related to the governmental interest of child rearing. Tradition and morality are not rationally based.
12. Other due process arguments.
 - a. "A person who legally marries in her home state, then pulls up stakes and moves to another state, acquires a significant liberty interest under the Fourteenth Amendment's Due Process Clause in the ongoing existence of her marriage." Steve Sanders, "The Constitutional Right to (Keep Your) Same Sex Marriage," 110 Mich. L. Rev. 1421, 1422 (June 2012).
 - b. Sanders argues that, "This liberty interest creates a right of marriage recognition that is conceptually and doctrinally distinguishable from any constitutional "right to marry... " It is a neutral principle, grounded in core Due Process Clause values: protection of normative expectations about marital and family privacy (if a state can't take away your child without due process, how can it take away your spouse?); respect for established legal and social practices (state-to-state marriage recognition is a longstanding default rule); and rejection of the idea that a state can unilaterally sever a legal family relationship without important, proven justifications." Steve Sanders, "Next on the Agenda for Marriage Equality Litigators...", SCOTUS Blog, (June 26, 2013, 5:40 p.m.) <http://www.scotusblog.com>
 - c. DOMA, Sanders argues, also implicates "horizontal federalism: the obligations states owe one another as coequal sovereigns." *Id.* "If it is intolerable to have 'two contradictory marriage regimes within the same State,'

then why is it more rational to have two contradictory marriage regimes in the same country?" *Id.*

D. Privileges and Immunities: The Right to Travel

The Right to Travel "found in the Privileges and Immunities Clause ... is 'fundamental' and includes the right to 'migrate,' and the State may not impose a penalty upon those who exercise [that] right." Dunn v. Blumstein, 405 U.S. 330 (1972).

1. The Right to Travel requires the use of strict scrutiny without the need of a suspect class. Any law "serving to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." Shapiro v. Thompson, 394 U.S. 618, 634 (1969).
2. Tanco v. Haslam, (M.D. Tenn., October 21, 2013): Four legally married same-sex couples have filed suit challenging Tennessee's laws that prevent the state from recognizing their marriages and treating them the same as all other legally married couples in Tennessee. The lawsuit argues that Tennessee's laws prohibiting recognition of the couples' marriages violate the federal Constitution's guarantees of equal protection and due process and the constitutionally protected right to travel between states and to move to other states.

VI. ON THE HORIZON IN KENTUCKY: SOME FUTURE CHALLENGES & AFTERSHOCKS

A. Pending Kentucky Lawsuits (from Marriage Equality USA at <http://www.marriageequality.org/lawsuits>)

1. Commonwealth v. Bobbie Jo Clary, Jefferson Circuit Court, Case No. 11-CR-003329: Bobbie Jo Clary is charged with murder of a neighbor in Louisville, Kentucky. In July 2013, prosecutors wanted Geneva Case to testify against her wife, Bobbie Jo Clary, in the murder trial. Prosecutors say Case heard Clary admit to the murder. Case invoked Kentucky's marital privilege, KRE 504. The Commonwealth is refusing to recognize Clary's and Case's 2004 Vermont civil union, which in 2009 could be automatically converted to a Vermont marriage (although Clary and Case never applied for a marriage license.) On September 23, 2013, a judge ruled that Ms. Case must testify against her own spouse, reasoning was that since Clary and Case are in a civil union, they are not considered married in Vermont, so even if Kentucky's marriage ban were unconstitutional, it would not allow the couple to invoke spousal privilege. Nevertheless, the court said that it's "abundantly clear" that Kentucky doesn't recognize same-sex marriages within the state or from other states.

2. Kentucky Equality Federation v. Governor Steve Beshear, et al.: On September 10, 2013, a lawsuit was filed in Franklin Circuit Court challenging §233A, the 2004 constitutional amendment banning same-sex civil marriage. In response, the Attorney General's Office said that plaintiffs, Lindsey Bain and Daniel Rogers, a married same-sex couple, don't have "standing to challenge our state definition of marriage and that their claim does not qualify as an 'injury in fact' and so is not ripe for adjudication."

In a joint filing dated September 30, Conway and Governor Beshear "deny that Plaintiffs are entitled to the requested relief or any other relief whatsoever."

3. Romero v. Romero: On October 25, 2013, Alysha Romero filed a dissolution petition from Rebecca Sue Romero in Jefferson Family Court. The Romeros were legally married in Massachusetts in 2009. This filing is the state's first dissolution involving a same-sex couple who were married in another state where same-sex marriages are legal, and who want to end their marriage in Kentucky.

B. KRS 411.130: Kentucky's Wrongful Death Statute

§411.130. Action for wrongful death – Personal representative to prosecute – Distribution of amount recovered.

(1) Whenever the death of a person results from an injury inflicted by the negligence or wrongful act of another, damages may be recovered for the death from the person who caused it, or whose agent or servant caused it. If the act was willful or the negligence gross, punitive damages may be recovered. The action shall be prosecuted by the personal representative of the deceased.

(2) The amount recovered, less funeral expenses and the cost of administration and costs of recovery including attorney fees, not included in the recovery from the defendant, shall be for the benefit of and go to the kindred of the deceased in the following order:

(a) If the deceased leaves a widow or husband, and no children or their descendants, then the whole to the widow or husband.

(b) If the deceased leaves a widow and children or a husband and children, then one-half (1/2) to the widow or husband and the other one-half (1/2) to the children of the deceased.

(c) If the deceased leaves a child or children, but no widow or husband, then the whole to the child or children.

(d) If the deceased leaves no widow, husband or child, then the recovery shall pass to the mother and father of the deceased, one (1) moiety each, if both are living; if the mother is dead and the father is living, the whole thereof shall pass to the father; and if the father is dead and the mother living, the whole thereof shall go to the mother. In the event the deceased was an adopted person, "mother" and "father" shall mean the adoptive parents of the deceased.

(e) If the deceased leaves no widow, husband or child, and if both father and mother are dead, then the whole of the recovery shall become a part of the personal estate of the deceased, and after the payment of his debts the remainder, if any, shall pass to his kindred more remote than those above named, according to the law of descent and distribution.

C. KRS 411.145: Kentucky's Loss of Consortium Statute

(1) As used in this section "consortium" means the right to the services, assistance, aid, society, companionship and conjugal relationship between husband and wife, or wife and husband.

(2) Either a wife or husband may recover damages against a third person for loss of consortium, resulting from a negligent or wrong.

Martin v. Ohio County Hosp. Corp., 295 S.W.3d 104 (Ky. 2009), holding that surviving spouse's loss of consortium damages extend beyond the death of the injured.

D. Other Statutory Challenges

Aside from §233A of the Kentucky Constitution, attack KRS 402.045(1) and (2).

1. "A marriage between members of the same sex which occurs in another jurisdiction shall be void in Kentucky." KRS 402.045(1).
2. "Any rights granted by virtue of the marriage, or its termination, shall be unenforceable in Kentucky courts." KRS 402.045(2).
3. "Any clerk who knowingly issues a marriage license to any persons [same sex couples] prohibited by this chapter from marrying shall be guilty of a Class A misdemeanor and removed from office by the judgment of the court in which he is convicted. KRS 402.990(6).

**TYING THE KNOT FEDERALLY: WHAT WILL IT MEAN
FOR KENTUCKY SAME-SEX COUPLES?**

Ross T. Ewing¹

I. KEY LEGAL DEVELOPMENTS POST-WINDSOR AFFECTING SAME-SEX MARRIED COUPLES LIVING IN KENTUCKY, OR OTHER "NON-RECOGNITION" (FOR NOW) STATES

A. Taxes

1. Federal taxes.

The IRS will consider all same-sex married couples as married for federal tax purposes, regardless of place of domicile. This includes income taxes, gift and estate taxes, personal and dependency exemptions where marriage is a factor, earned income tax credit, child tax credit, and IRAs. (Rev. Rul. 2013-17 dated 8/29/2013, effective 9/16/2013.)

All married couples must file their income tax returns as married (married filing jointly, or married filing separately). Total income taxes might be higher or lower than when each of the married spouses had to file tax returns as "single."

See Instructions for Form 1040X (Rev. December 2013), available at www.irs.gov, regarding same-sex married couples: "You may amend a return filed before September 16, 2013 to change your filing status to married filing separately or married filing jointly. But you are not required to change your filing status on a prior return, even if you amend that return for another reason. In either case, your amended return must be consistent with the filing status you choose. You must file the amended return before the expiration of the period of limitations."

Refund claims could include: (1) taxes paid by an employee for the value of health insurance coverage provided by the employer for the employee's spouse, and which was included as part of the employee's gross income in one or more prior tax years; (2) taxes paid by an employee on premiums that an employee paid with after-tax dollars for health insurance coverage for his/her spouse (e.g. in a cafeteria plan); and (3) Social Security and Medicare taxes paid by the employee on the health insurance benefits for his/her spouse. (See Q & A 10-12 in Answers to FAQs for Individuals of the Same Sex Who are Married, issued by the IRS

¹ Adapted, with permission, from "To Marry or Not to Marry" by Arlene Zarembka, Esq. The author wishes to thank Ms. Zarembka, Joan Burda, Esq., and the National LGBT Bar Association for assistance in compiling the federal materials obtained herein.

in conjunction with Rev. Rul. 2013-17.) The IRS has issued administrative procedures for adjustments and claims for refunds or credits for overpayments of employment taxes attributable to same-sex spouse benefits. See IRS Notice 2013-61 dated 10/28/2013.

2. Kentucky taxes.

The stay in Bourke v. Beshear obviously complicates the filing of state returns. Meanwhile, a suit has been filed in Franklin Circuit Court seeking to require the Revenue Cabinet specifically to recognize same-sex marriages performed in other states. A decision in that case is unlikely pending the dissolution of the stay in Bourke.

B. Retirement Plans

1. Retirement plans subject to ERISA.

ERISA applies to most employer and union sponsored retirement plans in private industry. ERISA does not apply to state and local government plans (including plans covering public school teachers and school administrators), most church plans, and plans for federal government employees.

All retirement plans subject to ERISA must provide the same benefits to an employee married to a person of the same sex as provided to employees married to opposite-sex spouses, even if the employee lives in a non-recognition state. (U.S. Department of Labor, Technical Release #2013-04, dated 9/18/2013). However, employers are not required to provide benefits to spouses. Moreover, experts in health insurance law have concluded that there currently is no requirement that employers subject to ERISA who provide health plan coverage to opposite-sex spouses of employees must also provide it to same-sex spouses in non-recognition states (although they may do so if they so choose).

If a married employee under a plan governed by ERISA wants to name a beneficiary other than the spouse of his/her retirement benefits under a defined benefit plan (and most defined contribution plans), the spouse must sign a consent to such an election.

A married employee can take a hardship distribution from a defined contribution plan to pay medical expenses, tuition, or funeral expenses of his/her spouse, even if the spouse has consented to the employee naming someone else as the primary beneficiary of the plan upon the employee's death.

See www.dol.gov/ebsa for more details about retirement plans under ERISA.

N.B.: The IRS has announced that it will be issuing a guidance on the retroactive application of the Windsor decision for retirement plans in the near future, and the Department of Labor plans to issue a guidance on the definition of "spouse" in Title 1 of ERISA. (Bloomberg BNA Weekly Report, 2/3/2014) Whether or not that guidance will address refusal by employers to treat same-sex spouses the same as opposite-sex spouses for health plan coverage remains to be seen.

2. Distributions from retirement plans (including IRAs).

A spouse (including a same-sex spouse) who is the beneficiary of a retirement account or plan of his/her spouse has more options regarding Required Minimum Distributions (RMDs) than a beneficiary who is not a spouse. A spouse can:

- Treat the retirement account or plan as her own, or roll-over to her own IRA; or
- Calculate the RMD based on her own current age; or
- Calculate the RMD based on the deceased spouse's age at death; or
- Wait to start taking RMDs until the deceased spouse would have reached age 70 ½ . No distributions are required from a Roth IRA until the owner's death.

See www.irs.gov/retirement plans for more information regarding retirement account distribution rules.

C. Federal Employees

A federal employee married to a person of the same sex (including married same-sex employees living in non-recognition states) is entitled to many of the same benefits to which employees married to a member of the opposite sex are entitled. This includes naming her spouse as beneficiary for spousal survivor benefits. The children being raised by same-sex married couples are entitled to family coverage under the federal employee's benefits, even if the federal employee has not legally adopted the children.

In addition, same-sex domestic partners, the children of an employee's same-sex domestic partner, and some other relatives of the employee's same-sex domestic partner have been identified by the Office of Personnel Management (OPM) as "family members" for the purposes of sick leave, funeral leave, the Voluntary Leave Transfer (VLTP) Program,

the Voluntary Leave Bank (VLBP) Program, and the Emergency Leave Transfer (ELT) Program.

See "Frequently Asked Questions-Same Sex Domestic Partner Benefits" (which also includes information about same-sex married couples) on OPM's website (www.OPM.gov), and the OPM fact sheets listed in that FAQ, for more details.

D. Family and Medical Leave Act

Under current regulations, whether a person is a "spouse" under the FMLA is based on the place of domicile of the employee. Therefore, the FMLA regulations currently do not require that an employee married to a same-sex spouse and living in a non-recognition state be given unpaid leave to care for her spouse. However, an employee living in a non-recognition state who acts "in loco parentis" with regard to the child of her spouse or unmarried partner can be entitled to FMLA leave. (DOL Fact Sheet #28, August 2013). Recent news reports indicate that the DOL may be planning to change the regulations to include same-sex spouses living in non-recognition states.

E. Social Security

In determining whether spousal benefits will be paid to the spouse of a person who is receiving Social Security benefits (or to the spouse of a deceased Social Security recipient), Social Security looks to whether the marriage is recognized in the place of domicile of the wage earner (*i.e.* the spouse upon whose earnings a claim for benefits is made) at the time of application for benefits. This is pursuant to the Social Security statute. If the marriage is not recognized in the state of domicile of the wage earner, then spousal benefits are not paid. Instead, Social Security is holding such applications until a decision is made as to whether or not such couples are entitled to spousal benefits.

For marriages that are recognized in the place of domicile, if a wage-earner is receiving Social Security benefits (whether due to disability or retirement), the spouse could be entitled to spousal benefits of up to 50 percent of the benefit that the retired or disabled wage-earner is receiving (and the retired or disabled recipient continues to receive 100 percent of his own benefit). If a deceased wage-earner was receiving Social Security benefits prior to death, the surviving spouse could receive 100 percent of the benefits that the deceased spouse was receiving at time of death. If the surviving spouse is already receiving his own benefits, he can decide whether it is more advantageous to continue to receive his own benefits or to receive the deceased spouse's benefits. If there are children, they also might be eligible for child benefits.

The federal Social Security statute also allows Social Security to pay spousal benefits to a person who would inherit from the worker as a spouse would under the laws of intestate succession for personal property in the state of domicile. 42 U.S.C §416(h). Thus, if the couple has registered as domestic partners or civil union partners in a state that

has a registered domestic partner or civil union statute, the partner of the wage earner may be eligible for spousal benefits. Further guidance may be needed from Social Security.

Even if living in a non-recognition state, filing for spousal benefits immediately (if otherwise eligible) is very important, in order to preserve the filing date for calculation of back benefits due if Social Security later recognizes the same-sex marriage, domestic partnership, or civil union.

See the FAQs at <http://www.socialsecurity.gov/same-sex-couples/> for more information. See *also* the following sections of Social Security's Program Operations Manual System (POMS):

- GN 00210.001 Windsor Same-Sex Marriage Claims-Introduction
- GN 00210.005 Holding Claims, Appeals, and Post-Entitlement Actions Involving Same-Sex Marriages or Legal Same-Sex Relationships other than Marriage
- GN 00210.010 Interviewing Individuals with Claims Involving Same-Sex Relationships
- GN 00210.800 Same-Sex Marriages – Supplemental Security Income
- GN 00305.005 Determining Marital Status

F. Department of Defense

The DOD considers all married same-sex couples, both uniformed service members and DOD civilian employees, to be married for all DOD benefits purposes, including those living in non-recognition states. Same-sex military spouses have access to all military facilities that are available to military spouses. The DOD also will give "non-chargeable leave" to a gay service member serving at a duty station that is more than 100 miles from a state that grants same-sex marriages, so that the couple can travel to a jurisdiction where they can marry. (DOD Memorandum dated 8/13/2013 and DOD News Release #581-13 dated 8/14/2013.)

G. Immigration

An American married to a same-sex spouse should be able, in many cases, to sponsor the spouse for a green card or a visa. Immigration law is extremely complex. Anyone married to a non-citizen, or who is considering marriage to a non-citizen, must consult with an attorney specializing in immigration law to determine whether or not to file an application to sponsor a spouse for a green card or visa.

H. Department of Justice

Attorney General Eric Holder has announced that the DOJ will "interpret the terms 'spouse,' 'marriage,' 'widow,' 'widower,' 'husband,' 'wife,' and any other term related to family or marital status in statutes, regulations, and policies administered, enforced, or interpreted by the Department, to include married same-sex spouses whenever allowable. The Department will take the same position in litigation, to the extent consistent with the lawful statutes, regulations, and policies over which other agencies bear primary administrative, enforcement, or interpretive responsibility. The Department will recognize all marriages, including same-sex marriages, valid in the jurisdiction where the marriage was celebrated to the extent consistent with law." Moreover, the DOJ will not challenge an assertion of marital privilege in a civil or criminal case by a party who is married to a same-sex spouse, even if the couple is living in a non-recognition state. (Memorandum by the Attorney General dated 2/10/14 to all DOJ Personnel.)

Likewise, all programs administered under the DOJ (e.g. Public Safety Officers' Benefits Program, the September 11th Victim Compensation Fund, and the Radiation Exposure Compensation Program) will recognize same-sex marriages that are valid in the place where they were celebrated. The United States Trustee Program will apply the Bankruptcy Code and Bankruptcy Rules to same-sex married couples in the same manner they are applied to opposite-sex married couples to cover individuals lawfully married in any jurisdiction. The Bureau of Prisons will interpret all of its policies that are affected by marital status, such as visitation at federal prisons and next-of-kin notification regarding inmates, to include all lawful same-sex marriages, regardless of the place of domicile.

I. Divorce

In Kentucky, the availability of divorce is currently being litigated in Jefferson Circuit Court in Romero v. Romero, 13-CI-503351. A decision in that case, as with action on almost any issue at the state level, may not be forthcoming until the expiration of the stay in Bourke v. Beshear, *supra*. Other states may be available. To wit:

Canada, California, Delaware, D.C., Hawaii, Illinois (after 6/1/2014),* Minnesota, and, in limited circumstances, Vermont. See "Divorce for Same-Sex Couples Who Live in Non-Recognition States: A Guide for Attorneys" at www.nclrights.org (Dec. 2013).

N.B.: Illinois law prohibits marriage by non-residents if the marriage would be void if contracted in the jurisdiction where the couple lives. 750 ILCS 5/217 (in Ch. 40., par 217). New Hampshire law does as well.

With the possibility of divorce, consider also the possibility of a prenuptial agreement. In Kentucky, the consideration for a valid prenuptial agree-

ment is the marriage itself. Settles v. Settles, 114 S.W. 303 (Ky. 1908). If the ruling in Bourke v. Beshear is properly enforced, then a legal same-sex marriage entered into in a foreign jurisdiction is a "marriage" under Kentucky law and thus valid consideration for a prenuptial agreement. Query: does it have to be so at the time of solemnization? Do rules of contract interpretation permit the validation of consideration after the execution of the contract?

J. Additional Resources

1. Whether to Wed: A Legal and Tax Guide for Gay and Lesbian Couples, by Scott E. Squillace, available for purchase at <http://whether-to-wed.com//>.
2. Sexual Orientation & the Law (2013-2014 edition), Karen Moulding, Ed. (Thomson Reuters, aka West.)

SOCIAL SECURITY AND OTHER EMPLOYEE BENEFITS FOR SAME-SEX COUPLES AFTER WINDSOR

Kathryn L. Moore

I. SOCIAL SECURITY BENEFITS

The American Social Security system covers about 96 percent of the American workforce. It pays two basic types of benefits to workers: (1) old-age (that is, retirement) benefits¹ and (2) disability benefits.² In addition, it provides "auxiliary" or "derivative" benefits to certain family members of retired, disabled, and deceased workers. Family member beneficiaries fall into four basic categories: (1) the spouses of retired or disabled workers;³ (2) the surviving spouses of deceased workers;⁴ (3) the dependent children of retired, disabled, or deceased workers;⁵ and (4) the dependent parents of deceased workers.⁶

On August 9, 2013, the Social Security Administration announced that it had begun to process some retirement spouse claims for same-sex couples and paying benefits when due.⁷ On December 16, 2013, the Social Security Administration announced that it had begun to process some surviving spouse benefits for surviving members of same-sex marriages and paying benefits when due.⁸ In addition, it has said that it is working with the Justice Department to develop policies on the payment of spouse and surviving spouse benefits for same-sex couples who live in a state that does not recognize same-sex

¹ 42 U.S.C. §402(a).

² 42 U.S.C. §423(a).

³ 42 U.S.C. §402(b) & (c).

⁴ 42 U.S.C. §402(e) & (f).

⁵ 42 U.S.C. §402(d).

⁶ 42 U.S.C. §402(g).

⁷ Social Security, News Release, Statement of Carolyn W. Colvin, Acting Commissioner of Social Security on Payments to Same-Sex Couples (Aug. 9, 2013), available at <http://socialsecurity.gov/pressoffice/pr/doma-statement-pr.html>.

⁸ Social Security, News Release, Statement of Carolyn W. Colvin, Acting Commissioner of Social Security on New Payments to Same-Sex Married Couples (Dec. 16, 2013), available at <http://www.socialsecurity.gov/pressoffice/pr/doma-new-payments-pr.html>.

marriage.⁹ It encourages individuals who may be eligible for such benefits to apply now to protect against the potential loss of any benefits.¹⁰

A Calculating Social Security Benefits

Both worker benefits and family member benefits are based on the worker's earnings record. Accordingly, this section will first provide a basic overview of how workers' benefits are calculated. It will then describe how spouse and surviving spouse benefits are calculated.

1. Workers' benefits.

Workers' old-age benefits are based on thirty-five years of earnings, which are indexed for inflation.¹¹ Average adjusted earnings, or "average indexed monthly earnings" ("AIME"), are calculated by taking the best thirty-five years of earnings adjusted for past wage inflation, adding them together and dividing by 420 (the number of months in thirty-five years). Average adjusted earnings are then multiplied by a progressive benefit formula to determine the "primary insurance amount" (PIA), or how much of the average adjusted earnings should be replaced.¹² The formula replaces a higher percentage of adjusted average earnings the lower one's average earnings so that the ratio of benefits to average earnings is higher for those with low average earnings than for those with high average earnings. For those reaching age sixty-two in 2014, the formula replaces 90 percent of the first \$816 of AIME, plus 32 percent of AIME between \$816 and \$4,917, plus 15 percent of AIME above \$4,917, up to the Social Security maximum benefit.¹³ Disability benefits are calculated in a similar manner, but fewer than thirty-five years may be taken into account in determining the PIA for a disabled worker.¹⁴

⁹ Social Security Administration, Frequently Asked Questions, "Do I qualify for benefits if I live in a place that prohibits or does not recognize same sex marriage or other legal same sex relationships?", available at <https://faq.ssa.gov/link/portal/34011/34019/Article/3547/Do-I-qualify-for-benefits-if-I-live-in-a-place-that-prohibits-or-does-not-recognize-same-sex-marriages-or-other-legal-same-sex-relationships>.

¹⁰ *Id.*

¹¹ 42 U.S.C. §415(b). To index earnings, "each year's wage is multiplied by an 'indexing factor,' which equals the ratio of the average national wage in the year the worker turns sixty to the average national wage in the year to be indexed. For administrative convenience, wages earned at age sixty or later are left at their nominal value in the indexing process." C. Eugene Steuerle & Jon M. Bakija, Retooling Social Security for the 21st Century: Right and Wrong Approaches to Reform 76 (1994).

¹² 42 U.S.C. §415(a).

¹³ In 2013, the maximum Social Security benefit for a worker retiring at the full retirement age is \$2,533 per month or \$30,396.

Under current law, a worker¹⁵ is entitled to receive "full benefits," that is, benefits equal to her PIA, at "Full Retirement Age."¹⁶ The full retirement age is currently age sixty-six for individuals who reach sixty-two in 2005 or later.¹⁷ Beginning in 2017, it is scheduled to increase gradually to age sixty-seven by the year 2022.¹⁸ A worker may elect to receive actuarially reduced benefits as early as age sixty-two.¹⁹ Similarly, a worker may elect to delay the receipt of benefits beyond age sixty-five and receive an actuarially increased benefit.²⁰ A "totally disabled"²¹ worker²² is also entitled to receive benefits equal to her PIA.²³

2. Spouse benefits.

Upon reaching full retirement age, the spouse of a retired or disabled worker is entitled to receive a spouse benefit equal to 50 percent of the worker's PIA.²⁴ The spouse may elect to receive a reduced benefit as early as age sixty-two.²⁵ Spouses who are entitled to receive benefits based upon their own earnings record as well as their spouse's earnings record may only receive a total

¹⁴ For disabled workers, the PIA is calculated as though the worker had attained age sixty-two at the time of disablement. 42 U.S.C. §423(a)(2).

¹⁵ In order to be eligible for old-age benefits, a worker must be "fully insured"; that is, the worker must have worked in covered employment for a long enough period of time. 42 U.S.C. §§402(a)(1) & 414.

¹⁶ 42 U.S.C. §402(a).

¹⁷ 42 U.S.C. §416(l).

¹⁸ 42 U.S.C. §416(l). The full retirement age was sixty-five for individuals who reached sixty-two before 2000. It gradually increased from sixty-five to sixty-six for individuals who reached sixty-two between 2000 and 2005. *Id.*

¹⁹ 42 U.S.C. §402(q)(1) & (9). If a worker with a full retirement age of sixty-six elects to begin receiving benefits at age sixty-two, the worker's benefit will be equal to 75 percent of the benefit the worker would have been entitled to had the worker waited until the full retirement age to retire.

²⁰ 42 U.S.C. §402(w). For all workers born after 1942, the delayed retirement credit is 8 percent per year until age seventy.

²¹ 42 U.S.C. §423(a)(1)(D) & (d).

²² In order to be eligible for old-age benefits, a totally disabled worker must be "fully insured" and "disability insured"; that is, the worker must have worked in covered employment long enough and recently enough. 42 U.S.C. §423(a)(1)(A) & (c).

²³ 42 U.S.C. §423(a).

²⁴ 42 U.S.C. §402(b)(2).

²⁵ The spousal benefit is reduced by a greater percentage than the reduction applied to retired worker's benefits.

benefit equal to the larger of the two benefits.²⁶ Thus, those spouses whose worker's benefit exceeds their spouse benefit are only entitled to receive their own worker's benefit. In contrast, "dually entitled" beneficiaries, that is, spouses whose spouse benefit exceeds their worker's benefit, are only entitled to a total benefit equal to their spouse benefit.

3. Surviving spouse benefits.

The surviving spouse of an insured worker is entitled to receive a surviving spouse benefit equal to 100 percent of the deceased worker's PIA if the surviving spouse has reached full retirement age.²⁷ Surviving spouses as young as age sixty may elect to receive a reduced benefit.²⁸ Again, working spouses are only entitled to receive a total benefit equal to the larger of their own worker's benefit or their surviving spouse benefit.²⁹

B Maximizing Social Security Benefits

Prior to reaching the full retirement age, a married individual who files for benefits is subject to a "deemed filing" provision. Under the "deemed filing provision," the individual is assumed to be filing for both the individual's worker's benefit (based on the individual's own earnings record) and the individual's spouse benefit (based on a percentage of his or her spouse's earnings record). The Social Security Administration compares the two benefits and awards the higher of the two benefits.³⁰

Once an individual reaches full retirement age, deemed filing no longer applies and an individual may elect whether to receive the individual's own worker's benefit or a spouse benefit. Thus, married individuals can elect to receive a spouse benefit at age sixty-six and later switch to their own retired worker's benefit. This provides married couples with some planning opportunities to coordinate spouse and surviving spouse benefits and maximize their total benefits as a couple.³¹

²⁶ 42 U.S.C. §402(k)(3)(A).

²⁷ 42 U.S.C. §§402(e)(2)(A) & (f)(2)(A).

²⁸ 42 U.S.C. §§402(q)(1).

²⁹ 42 U.S.C. §402(k)(3)(B).

³⁰ Alicia H. Munnell, *et al.*, Strange But True: Claim Social Security Now, Claim More Later, Center for Retirement Research at Boston College Brief No. 9-9 (April 2009).

³¹ For a discussion of the various claiming strategies and opportunities to maximize benefits, see Francine J. Lipman, and James E. Williamson, "Social Security Benefits Formula 101: A Practical Primer," ABA Section of Taxation Newsquarterly 14 (Summer 2010); Francine J. Lipman, and James E. Williamson, "Social Security Spouse and Survivor Benefits 101: Practical Primer Part II (Or Another Reason to Put a Ring on It)," ABA Section of Taxation Newsquarterly 10 (Fall 2010); Alicia H. Munnell, *et al.*, Strange But True: Claim Social Security Now, Claim More Later, Center

There are two principal maximizing strategies: (1) file and suspend, and (2) claim now, claim more later.

1. File and suspend.

Under this scenario, the higher income earning spouse files for his or her Social Security benefit at full retirement age so that the lower income earning spouse can start receiving a spouse benefit. The higher earning spouse suspends his or her benefit to start earning the delayed retirement credits until age seventy. At that time, the higher earning spouse would begin to collect his or her own higher benefit.

2. Claim now, claim more later.

Under this scenario, the lower earning spouse applies for his or her benefits at full retirement age. The higher earning spouse then applies for a spouse benefit at his or her full retirement age and delays applying for his or her own benefit until the higher earning spouse reaches age seventy. At age seventy, the higher earning spouse would then switch over to his or her own higher benefit.

As rule of thumb, it is generally a good idea for the highest income earner in the marriage to delay receipt of Social Security benefits until age seventy because this will give couple the highest income while they're both alive and the highest death benefit when one passes away.

II. OTHER EMPLOYEE BENEFITS

While Social Security benefits are mandatory for most employers, many employers also offer additional employee benefits, such as 401(k) plans. The provision of such benefits is purely voluntary; no federal law requires that employers offer such benefits. If, however, an employer elects to offer voluntary employee benefit plans, the plans are generally³² regulated by the Employee Retirement Income Security Act of 1974 (ERISA).³³ In addition, in order to receive favorable income tax treatment, such plans must satisfy requirements set forth in the Internal Revenue Code.³⁴

for Retirement Research at Boston College Brief No. 9-9 (April 2009); Alicia H. Munnell *et al.*, Strange But True: Claim and Suspend Social Security, Center for Retirement Research at Boston College Brief No. 9-11 (May 2009); Steven A. Sass, When Should Married Men Claim Social Security Benefits?, Center for Retirement Research at Boston College Brief No. 8-4 (March 2008).

³² ERISA only applies to private-sector employee benefit plans; it does not apply to governmental plans. ERISA §4(b), 29 U.S.C. §1003(b).

³³ Pub. L. No. 93-406, 88 Stat. 829 (1974).

³⁴ See, e.g. IRC §401(a) (setting forth qualification requirements for most employer-sponsored retirement plans).

In Rev. Rul. 2013-17, the Internal Revenue Service announced that effective September 16, 2013, same-sex couples married in a state or foreign jurisdiction that recognizes same-sex marriage will be treated as married for federal tax and qualified retirement plan purposes. In Technical Release 2013-04, the Department of Labor, which regulates many of ERISA's requirements, similarly adopted the "state of celebration" rule for employee benefit plan purposes. Thus, for employee benefit plan purposes, the state where the marriage takes place (that is, the state of celebration), and not the state of residence, determines if a same-sex couple is entitled to spousal rights and obligations.

Neither ERISA nor the Internal Revenue Code require that plans define the term "spouse." Moreover, many plans do not define the term. If, however, a plan does define the term spouse, the plan may not define the term to exclude same-sex spouses who were legally married in a jurisdiction that recognizes same-sex marriages. In addition, in operating plans, all plan sponsors and plan administrators must ensure that spousal rights,³⁵ such as qualified joint and survivor annuities (QJSAs),³⁶ qualified preretirement survivor annuities (QPSAs),³⁷ qualified domestic relations orders (QDROs),³⁸ hardship distributions,³⁹ and required minimum distribution relief⁴⁰ extend to same-sex spouses.⁴¹

³⁵ For a more detailed discussion of the effect of Windsor on employee benefit plans, see Laura Pergine and Janet Luxton, "The DOMA Decision and Retirement Plans," Vanguard Strategic Retirement Consulting Brief (Nov. 2013); Elizabeth Thomas Dold and David N. Levine, "A Look at How the Supreme Court's DOMA Decision Impacts Employee Benefit Plans," Taxes – The Magazine 13 (Sept. 2013).

³⁶ See ERISA 205(a)(1), 29 U.S.C. §1055(a)(1); IRC §401(a)(11)(A)(i).

³⁷ See ERISA 205(a)(2), 29 U.S.C. §1055(a)(2); IRC §401(a)(11)(A)(ii)

³⁸ See ERISA 206(d)(3), 29 U.S.C. §1056(d)(3); IRC §401(a)(13)(B).

³⁹ See Treas. Reg. §1.401(k)-1(d)(3)(iii)(B)(3)&(5) (permitting plan to authorize hardship withdrawal for medical, tuition, and funeral expenses of spouse).

⁴⁰ See IRC §401(a)(9)(B)(iv).

⁴¹ For additional guidance on the rules applicable to cafeteria plans, flexible spending arrangements (FSAs), and health savings accounts (HSAs), see IRS Notice 2014-01.