FOR RICHER OR POORER: THE DEFENSE OF MARRIAGE ACT'S WANING LEGITIMACY IN BANKRUPTCY COURT

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Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself—Cessante ratione legis, cessant et ipsa lex.[1]

INTRODUCTION

In August 2008, Gene Balas and his husband Carlos Morales married in California.[2] As the nation began to weather the worst economic downturn since the Great Depression,[3] Balas and Morales found themselves in an increasingly familiar position among American families. Balas was laid off from his job in financial services; shortly thereafter, Morales went on unpaid medical leave.[4] Credit card debts and medical bills mounted.[5] With jobs hard to come by, their "savings were depleted" after a short while, and bankruptcy became difficult to avoid.[6] With their property and debt intertwined in marriage, the couple voluntarily sought joint bankruptcy protection under Chapter 13 of the Bankruptcy Code.[7] The United States Trustee ("Trustee")—the Department of Justice ("DOJ") officer responsible for supervising the administration of bankruptcy proceedings[8]—quickly moved to dismiss the case. The Trustee argued that since the Defense of Marriage Act ("DOMA") precludes federal recognition of same-sex

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[1] Kerper v. Kerper, 780 P.2d 923, 937 (Wyo. 1989).

[2] Bob Egelko, *Bankruptcy Court Blasts Defense of Marriage Act*, S.F. CHRON., June 15, 2011, at A1.

[3] Bob Willis, *U.S. Recession Worst Since Great Depression, Revised Data Show*, BLOOMBERG (Aug. 1, 2009), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aNivTjr852TI.

[4] Matthew S. Bajko, *Bankruptcy Courts Reject DOMA*, BAY AREA REPORTER (June 16, 2011), http://www.ebar.com/news/article.php?sec=news&article=5775.

[5] *Id.*

[6] *Id.*

[7] *In re* Balas, 449 B.R. 567 (Bankr. C.D. Cal. 2011).

[8] *The United States Trustee Program*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/ust/eo/ust_org/index.htm (last visited Aug. 26, 2012).

marriage, the debtors were ineligible to file a joint petition under the Bankruptcy Code, despite being legally married under California law.[9]

Balas and Morales are certainly not alone. Personal bankruptcy filings have risen dramatically in recent years as consumers have found themselves mired in an economy defined by a stagnant job market and a dearth of consumer credit.[10] Last year, personal bankruptcy filings reached levels not seen since before 2005, when Congress modified bankruptcy laws to make it more difficult to file.[11] Not only are personal bankruptcy filings reaching new levels, but census data reveals an astonishing eighty-percent increase in the number of same-sex households in the United States over the last ten years.[12] With bankruptcy filings on the rise at a time when increasing numbers of Americans are living in same-sex households, DOMA's impact on families seeking the protection of bankruptcy courts has never been greater.

Gene Balas and Carlos Morales made headlines when the United States Bankruptcy Court for the Central District of California rejected the Trustee's challenge to the couple's joint Chapter 13 petition on constitutional grounds.[13] In a terse opinion authored by Judge Thomas Donovan, the Court held that "no legally married couple should be entitled to any fewer bankruptcy rights than any other legally married couple,"[14] and that DOMA, as applied to these debtors, violates the "equal protection rights afforded under the Fifth Amendment of the United States Constitution."[15] In a sign of resounding approval, nineteen additional judges from the district, including the chief judge, signed onto Judge Donovan's opinion.[16]

In the wake of the *Balas* opinion, the DOJ "informed bankruptcy courts that it [would] no longer seek dismissal of bankruptcy petitions filed jointly by same-sex debtors who are married under state law."[17] This policy change marks a dramatic shift for legally married same-sex couples, ensuring that couples like Balas and Morales can jointly file bankruptcy petitions without going "through the exhaustive task of trying to untangle their financial lives."[18]

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[9] *In re Balas*, 449 B.R. at 569.

[10] Duff Wilson, *Steep Increase in March in Personal Bankruptcies*, N.Y. TIMES, Apr. 2, 2010, at B3.

[11] *Id.*; Kevin O'Leary, *Personal Bankruptcies Hit a High and May Keep Rising*, TIME (Apr. 5, 2010), *available at* http://www.time.com/time/business/article/0,8599,1977728,00.html.

[12] The 2010 census data revealed 646,000 same-sex households, compared to 358,000 same-sex households in 2000. Curtis Tate, *Census Shows More Gay Couples, but Original Count Was Flawed*, MCCLATCHY (Sept. 27, 2011), http://www.mcclatchydc.com/2011/09/27/125450/census-shows-more-gay-couples.html.

[13] *See, e.g.*, John Schwartz, *A California Bankruptcy Court Rejects U.S. Law Barring Same-Sex Marriage*, N.Y. TIMES, June 14, 2011, at A18.

[14] *In re Balas*, 449 B.R. at 569.

[15] *Id.* at 579.

[16] Bajko, *supra* note 4.

[17] Lisa Leff, *Policy on 'Same-Sex Debtors,'* HOUS. CHRON. (July 9, 2011), http://www.chron.com/business/business/article/Policy-on-same-sex-debtors-1458859.php.

[18] *Id.*

However, the shift in DOJ policy is not a final resolution for financially distressed same-sex couples. On the contrary, the DOJ's policy removes the question of DOMA's constitutionality from the hands of bankruptcy courts that appear ready and willing to address the issue.[19] Although DOMA remains on the books, its propriety cannot be litigated as long as the DOJ refuses to raise it in court. As a result, the DOJ's policy nearly ensures that a definitive judicial determination regarding DOMA's applicability in bankruptcy suits will remain out of reach as long as it remains federal law.

This Note will argue that the current state of affairs for same-sex couples seeking bankruptcy protection is unsatisfactory, notwithstanding the DOJ's current policy of assenting to joint petitions filed by legally married same-sex couples. DOJ policy is guided by politics and subject to change. The needs of financially distressed couples do not change as political tides shift, and neither should the availability of joint bankruptcy protection depend on policies articulated by political actors. Rather, continued exploration into the judicial remedies that bankruptcy courts can provide is warranted. Part I will offer necessary background that briefly explains personal bankruptcy in the United States, outlines the pre-DOMA framework, and analyzes the handful of bankruptcy cases involving same-sex couples before *Balas*. Part II will explore the *Balas* decision in greater depth, the government's response, and the new legal consequences facing same-sex debtors in the aftermath. Although *Balas* ushered in a favorable climate for bankrupt same-sex couples, the government's policy of non-enforcement extinguishes any opportunities for bankruptcy courts to consider DOMA, effectively hindering their ability to reach a definitive judicial resolution on the remedies available to married same-sex debtors. Part III proposes a revival of the long-absent doctrine of desuetude as a tool for courts to consider in the future. Desuetude is the process by which laws become invalid because they are obsolete.[20] The doctrine, grounded in due process principles, allows courts to invalidate laws subject to arbitrary and capricious enforcement following a period of government non-enforcement.[21] With the constitutionality of DOMA uncertain,[22] the doctrine of desuetude would permit bankruptcy courts to cite the

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[19] *See, e.g.*, *In re Balas*, 449 B.R. at 567.

[20] NORMAN J. SINGER & J.D. SHAMBIE SINGER, 1A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 23:26 (7th ed.).

[21] *Id.*

[22] DOMA has recently come under constitutional attack in several federal court cases. *See, e.g.*, Gill et al. v. Office of Pers. Mgmt., 699 F.Supp.2d 374 (D. Mass. 2010) (holding that DOMA violates constitutional principles of equal protection); Massachusetts v. U.S. Dep't of Health and Human Servs., 698 F.Supp.2d 234 (D. Mass. 2010) (holding that DOMA exceeds Congress' spending power and violates the Tenth Amendment). *Gill* and *Massachusetts*, consolidated on appeal, were affirmed by the United States Court of Appeals for the First Circuit in May 2012. Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1 (1st Cir. 2012). Similarly, in October 2012, the United States Court of Appeals for the Second Circuit also declared DOMA unconstitutional. *See* Windsor v. U.S., 2012 WL 4937310 (2d Cir. 2012). *See also* Golinski v. Office of Pers. Mgmt., 824 F. Supp. 2d 968 (N.D. Cal. 2012) (holding Section 3 of DOMA unconstitutional); Pederson v. Office of Pers. Mgmt., No. 3:10-cv-

law's disuse in the bankruptcy realm as reason enough to invalidate it, without considering the constitutionality of DOMA in other contexts.[23]

I. PERSONAL BANKRUPTCY, JOINT PETITIONS, AND SAME-SEX DEBTOR COUPLES

A. Brief Overview of Personal Bankruptcy and Advantages of Joint Filing

The power to establish uniform bankruptcy laws throughout the United States is one of Congress' enumerated powers under the United States Constitution.[24] The Bankruptcy Code, codified in Title 11 of the United States Code, is divided into nine chapters;[25] Chapters 7 and 13 are the most common channels through which individuals seek relief.[26] Chapter 7 provides for "liquidation,"[27] whereby the debtor's assets are placed into a bankruptcy estate under the supervision of the court.[28] Debtors provide a list of all their creditors and the amounts due, details regarding their income, a schedule of their property, and a statement regarding their monthly living expenses.[29] As a matter of law, the filing of a Chapter 7 petition halts collection actions against the debtor, thereby preventing creditors from initiating lawsuits or wage garnishment proceedings.[30] The debtor's assets are placed into a bankruptcy estate, and the Trustee liquidates the estate's nonexempt assets,[31] using the proceeds to pay creditors.[32] Once the bankruptcy estate is exhausted, most debts are then discharged, and the debtor is no longer liable for those debts.[33]

1750 (VLB) (D. Conn. 2012) (holding Section 3 of DOMA unconstitutional).

[23] For example, *In re Balas* was decided on equal protection grounds. *In re Balas*, 449 B.R. at 579. The doctrine of desuetude is a way for a law to be invalidated, and would not require a holding that the law is unconstitutional. SINGER, *supra* note 20. Rather, the doctrine would allow a court to invalidate the law because it has fallen into a state of disuse without regard to the statute's constitutionality, or its application elsewhere. *Id.*

[24] U.S. CONST. art. I, § 8, cl. 4.

[25] Bankruptcy Reform Act of 1978, 42 U.S.C. § 101 (2010).

[26] ADMIN. OFFICE OF THE U.S. COURTS, 2010 REPORT OF STATISTICS REQUIRED BY THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005 5 (2011), *available at* http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BAPCPA/2010/2010BAPCPA.pdf.

[27] 11 U.S.C. §§ 701-727 (2010).

[28] *Liquidation Under the Bankruptcy Code*, U.S. COURTS, http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter7.aspx (last visited Aug. 26, 2012). Exempt assets are those that will not be liquidated with the remainder of the bankruptcy estate. *Id.* There are exemptions under federal law, as well as state law, and debtors are able to choose which set of exemptions they would like to utilize. *Id.*

[29] *Id.*

[30] *Id.* (citing 11 U.S.C. § 362 (2010)).

[31] Upon the commencement of a Chapter 7 case, the bankruptcy estate is established and becomes the temporary owner of all of the debtor's assets; however, exempt assets—as defined by federal exemptions or state law exemptions—will not be liquidated with the remainder of the bankruptcy estate. *Id.*

[32] *Id.* (citing 11 U.S.C. § 726 (2010)).

[33] *Liquidation Under the Bankruptcy Code*, *supra* note 28 (citing 11 U.S.C. § 727 (2010)).

On the other hand, Chapter 13 does not require debtors to liquidate their assets.[34] Available to debtors with a regular income, Chapter 13 affords debtors an opportunity to reorganize their debt and pay creditors over time in accordance with a reorganization plan approved by the court.[35] Chapter 13 filers must also supply extensive financial information to the court and the Trustee.[36] As with Chapter 7 filings, the filing of a Chapter 13 petition halts creditors' collection efforts against the debtor.[37] Although Chapter 13 does not require debtors to pay all of their debts in full, the plan submitted to the bankruptcy court must ensure that unsecured creditors will receive at least much as they would if the debtor were to liquidate his or her assets under Chapter 7.[38] All debts accounted for in the reorganization plan are discharged when the debtor completes all payments anticipated by the Chapter 13 reorganization plan.[39]

The Bankruptcy Code guarantees spouses the right to file joint bankruptcy petitions.[40] Married couples acquire assets together, make financial decisions together, and are often jointly liable for their debts.[41] Married debtors who file a single petition enjoy significant procedural advantages. Specifically, joint administration of a bankruptcy case allows financially distressed couples to "pay only one filing fee, pay only one attorney fee," have their estates "administered by a single trustee," and enables them to "combine their financial information into a single set of schedules and statements."[42] Joint administration offers a more cost efficient solution at a time when such savings are desperately needed; in short, it makes an unpleasant experience easier, lessening "the burden of administration on debtors, their creditors, and the trustee."[43]

Furthermore, the filing of a joint petition also opens the door to consolidation of the debtors' bankruptcy estates, which occurs at the direction of the court.[44] The process "creates a single estate and the debtors' combined liabilities are paid from

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[34] *See Individual Debt Adjustment*, U.S. COURTS, http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter13.aspx (last visited Aug. 26, 2012).

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.* "Secured" claims are typically claims backed by a form of collateral, such that the creditor has a right to reclaim certain assets belonging to the debtor upon default; "unsecured" claims, on the other hand, do not confer any special rights upon the creditor to reclaim certain property or assets. *Id.*

[39] 11 U.S.C. § 1328 (2010).

[40] "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." 11 U.S.C. § 302(a) (2010).

[41] *See* A.B.A., GUIDE TO MARRIAGE, DIVORCE, & FAMILIES 42 (2006).

[42] Susan Hauser, *More than Abstract Justice: The Defense of Marriage Act and the Equal Treatment of Same-Sex Married Couples Under Section 302(a) of the Bankruptcy Code*, 85 AM. BANKR. L.J. 195, 202 (2011).

[43] *Id.*

[44] 11 U.S.C. § 302(b) (2010) ("After the commencement of a joint case, the court shall determine the extent, if any, to which the debtors' estates shall be consolidated.").

the resulting pool of assets."[45] Although the effect of estate consolidation on the substantive rights of debtors, creditors, and the Trustee is beyond the scope of this Note,[46] consolidation eases the bankruptcy process when the assets and liabilities of the couple are intermingled to such a degree that separating them becomes burdensome.[47] However, a married couple must file a joint petition to be eligible for estate consolidation.[48]

B. Bankruptcy Code as a Blend of Federal and State Law and DOMA's Impact

Although federal law, the Bankruptcy Code relies heavily on state law interpretations and incorporates state law in several important respects. For starters, the validity of a creditor's claim relies, in part, on state law.[49] Whether or not a particular creditor is entitled to a share of assets in the bankruptcy estate depends upon the substantive law governing the debtor's obligation, which—absent a contravening federal interest—is typically defined by state law.[50] For example, assume a creditor is making a claim against the bankruptcy estate based on the debtor's obligations under a contract. Whether or not the creditor's claim is valid depends upon the contract's enforceability, which, in turn, depends on state contract law, not federal bankruptcy law.[51]

The Bankruptcy Reform Act of 1978, which established the modern Bankruptcy Code, necessitated a similar scheme with regard to marriage. The Bankruptcy Code does not define "spouse," and in 1978, the definition of marriage remained within the states' exclusive domain.[52] Federal bankruptcy courts have consistently held that "spouse" implies a valid, legal marriage, and not marriage-similar living arrangements,[53] suggesting that the threshold question for couples seeking joint protection pre-DOMA was whether or not they were validly married under state law. When Section 302 of the Bankruptcy Code was codified in 1978, there was no possibility that the term "spouse" could refer to a same-sex partner.[54] At that time, there was no federal definition of marriage, and no state performed

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[45] Hauser, *supra* note 42, at 200.

[46] Estate consolidation may affect the rights of both debtors and creditors, because estate consolidation renders community property of both spouses reachable by the separate creditors of both spouses. Tisha Morris Federico, *The Impact of the Defense of Marriage Act on Section 302 of the Bankruptcy Code and the Resulting Renewed Interest in the Equitable Doctrine of Substantive Consolidation*, 103 COM. L.J. 82, 85-86 (1998).

[47] *Id.* at 86.

[48] *See* 11 U.S.C. § 302(b) (2010). The statutory provision for estate consolidation indicates that the court shall determine whether to consolidate only "after the commencement of a joint case." *Id.*

[49] Butner v. U.S., 440 U.S. 48, 57 (1979) (holding that bankruptcy courts must look to state law definitions to determine property interests).

[50] *Id.* at 55.

[51] Raleigh v. Ill. Dep't. of Revenue, 530 U.S. 15, 20 (2000) (holding that a debtor's tax obligations are defined by the state tax law and the relevant state authority).

[52] *See, e.g., In re* Allen, 186 B.R. 769, 773 (Bankr. N.D. Ga. 1995); Hauser, *supra* note 42, at 196.

[53] Federico, *supra* note 46, at 87-88.

[54] *In re Allen*, 186 B.R. at 773.

same-sex marriages.[55] Before DOMA's enactment, bankruptcy courts referred to state definitions of marriage by default when determining eligibility for relief under Section 302.[56] Absent a federal standard, no other definition existed.

However, the long absent federal standard arrived when President Clinton signed DOMA into law on September 21, 1996.[57] The purpose of the law was twofold. First, the statute ensured that no state would be required to recognize same-sex marriages performed in another state, the Full Faith and Credit Clause notwithstanding.[58] Second, DOMA imposed a federal definition of marriage as a legal union between one man and one woman.[59] DOMA marked the first time that the federal government attempted to define marriage, a role that had previously been reserved exclusively to the states.[60] Before DOMA, the federal government typically deferred to state definitions of marriage when federal laws turned on a person's marital status. DOMA changed this by defining the type of marriage—heterosexual marriage—that federal laws would recognize, even if a state were to broaden its own definition of marriage to include same-sex couples.[61]

DOMA's impact on the Bankruptcy Code is relatively straightforward. Before its enactment, state law controlled, and as a result, bankruptcy courts needed only ask whether a couple was validly married under state law when considering joint petitions under Section 302.[62] This left open the legal possibility that same-sex couples could avail themselves of Section 302's procedural benefits should states begin performing same-sex marriages.[63] DOMA foreclosed this possibility by imposing a previously absent federal definition of marriage into the Section 302 scheme. With DOMA in effect, the term "spouse" in Section 302 refers "only to a person of the opposite sex who is a husband or a wife," regardless of the state's

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[55] *See* Goodridge v. Dep't of Pub. Health, 440 N.E.2d 941 (Mass. 2003). Massachusetts became the first U.S. state to perform same-sex marriages. *Id.*

[56] *In re Allen*, 186 B.R. at 773 n.3 ("[I]t is neither unusual nor inappropriate to look to state law for certain purposes, including the determination of whether or not two people are married.").

[57] Defense of Marriage Act, 28 U.S.C. § 1738C (2011).

[58] 28 U.S.C. § 1738C. The Full Faith and Credit Clause is a constitutional provision requiring each state within the United States to respect the public acts, records, and judicial proceedings of every other state. U.S. CONST. art. IV, § 1. DOMA was enacted after state courts in Hawaii appeared poised to require the state to issue marriage licenses to same-sex couples. H.R. Rep. No. 104-664, at 2906 (1996). Congress feared that if Hawaii were to judicially adopt same-sex marriage, "other States . . . would be confronted with the complicated issue of whether they are nonetheless obligated under the Full Faith and Credit Clause . . . to give binding legal effect to such unions." *Id.*

[59] 1 U.S.C. § 7 (1996) ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.").

[60] *In re Allen*, 186 B.R. at 773.

[61] For an excellent explanation DOMA's intrusion into the state's power to define marriage and a discussion of the pre-DOMA framework, see Brief for the State of New York as Amicus Curiae Supporting the Plaintiff, Windsor v. United States, No. 1:10-cv-8435-BSJ-JCF (S.D.N.Y. July 26, 2011), *available at* http://www.ag.ny.gov/sites/default/files/press-releases/2011/10-cv-8435%20Windsor%20v%20United%20States%20Amicus%20NY%20State.pdf.

[62] *In re Allen*, 186 B.R. at 773.

[63] *Id.*

definition of the term.[64] Indeed, the efforts of same-sex couples to file joint bankruptcy petitions before *Balas* failed, but for varying reasons.

C. Joint Petitions by Same-Sex Couples Before Balas

Before DOMA became law in 1996, the inability to obtain a legal marriage represented the sole hurdle for same-sex debtors wishing to file joint bankruptcy petitions.[65] The first case to consider the issue was decided in 1995, a year before DOMA's enactment.[66] The case, *In re Allen*, involved a gay couple who "considered themselves to be married despite the fact that they [had no] marriage license."[67] The couple, jointly liable on over 90% of their debts, filed a joint Chapter 13 petition under Section 302.[68] The Trustee objected, arguing that the legislative history of the Bankruptcy Code illustrated a congressional intent to limit joint filings to heterosexual married couples.[69] The debtors urged the court to ignore state laws defining marriage in favor of a federal standard of marriage that would deem the debtors married if they resembled a married couple and considered themselves to be in a spousal relationship.[70]

The *Allen* court explicitly rejected the Trustee's contention that Congress intended to prohibit same-sex couples from filing joint petitions, but insisted that the deciding question of whether or not the debtors were entitled to file a joint petition under Section 302 was whether or not they were legally married.[71] Finding that state marriage laws controlled, the court rejected the couple's invitation to create a federal standard of marriage and found the debtors ineligible to file jointly.[72] Nonetheless, the bankruptcy judge specifically addressed the possibility that states may one day legalize same-sex marriages and predicted that same-sex couples, if legally married, would qualify for joint relief under Section 302.[73]

Upon its passage, DOMA forestalled the *Allen* court's prediction that same-sex couples would be eligible to file joint petitions if legally married,[74] and it erected a new barrier even for legally married same-sex debtors. The first challenge to DOMA in bankruptcy court—*In re Kandu*—arrived in 2004, nine

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[64] *See* Federico, *supra* note 46, at 90.

[65] *See In re Allen*, 186 B.R. at 769.

[66] *Id.*

[67] *Id.* at 771.

[68] *Id.*

[69] *Id.*

[70] *Id.* at 772-73.

[71] *In re* Allen, 186 B.R. 769, 773 (Bankr. N.D. Ga. 1995) ("In other words, what is controlling is the fact that the parties are not legally married. [Section 302] is not limited to legally married husbands and wives.").

[72] *Id.*

[73] *Id.* at 774.

[74] *Id.*

years after the *Allen* decision.[75] Ann and Lee Kandu were partners for thirteen years before they legally married in Canada.[76] Within months of marrying, the Kandus were simultaneously diagnosed with cancer and became unable to work.[77] They filed a joint Chapter 7 petition in their home state of Washington, arguing that principles of comity required the court to recognize their Canadian marriage for purposes of interpreting Section 302.[78] Before the bankruptcy court could hear the case, Ann Kandu died.[79] Lacking many of the legal protections enjoyed by heterosexual couples in bankruptcy, Lee Kandu came face to face with the prospect of losing the home she shared with her wife.[80] Because only Ann Kandu held title to the home when the couple filed their joint petition, Lee Kandu would be unable to exempt the home from liquidation if required by the court to withdraw her joint petition and re-file individually.[81]

Lee Kandu mounted a constitutional challenge to DOMA in the bankruptcy court alleging, *inter alia*,[82] violations of the due process and equal protection components of the Fifth Amendment.[83] The court refused to characterize the right to marry a person of the same sex as a fundamental right, and cited the Ninth Circuit's holding that "homosexuals are not a suspect or quasi-suspect class, but are a definable group entitled to rational basis scrutiny for equal protection purposes."[84] Absent a finding that DOMA burdened a fundamental right or targeted a suspect class, the court held the law valid under a rational basis of

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[75] *In re* Kandu, 315 B.R. 123 (Bankr. W.D. Wa. 2004).

[76] Maureen O'Hagan, *Marriage Act is Upheld in Gay Couple's Bankruptcy*, SEATTLE TIMES (Aug. 20, 2004), *available at* http://seattletimes.nwsource.com/html/localnews/2002010602_gaymarriage20m.html.

[77] *Id.*

[78] *In re Kandu*, 315 B.R. at 133-34. "Comity" is the degree to which one nation will recognize, within its territory, the legislative, executive, or judicial acts of another nation. *Id.* at 133 (quoting Hilton v. Guyot, 159 U.S. 113, 163-64 (1895)). The *In re Kandu* plaintiff argued that because she was legally married in Canada, the bankruptcy court should recognize her as a "spouse" for purposes of interpreting the Bankruptcy Code. *Id.* at 134. Comity, however, typically does not apply when the policies between the two nations conflict, and American courts are required to find their own laws—in this case, DOMA—controlling. *Id.* at 133-34.

[79] *Id.* at 130.

[80] O'Hagan, *supra* note 76.

[81] *Id.*

[82] In addition to Kandu's Fifth Amendment claims, she also alleged violations of the Tenth and Fourth Amendments. Although the Tenth Amendment protects the right of the state to define marriage free from federal intrusion, the bankruptcy court found that DOMA posed no Tenth Amendment violation because the federal definition of marriage is not binding upon the states, which remain free to define marriage in any way they see fit. *In re Kandu*, 315 B.R. at 133. Kandu's Fourth Amendment claim was grounded in an intriguing theory that DOMA unlawfully "seized" her property interests in federal benefits. *Id.* at 134-35. The court held that for a property interest to be "seized," the person alleging the constitutional violation must first demonstrate ownership in the property; in other words, the debtor's property cannot be "seized" if the debtor had no entitlement to that property in the first place. *Id.* at 135.

[83] *Id.*

[84] *Id.* at 143 (quoting High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 574 (9th Cir. 1990)).

review.[85] In upholding DOMA's validity, the court concluded that the Kandus were not married for purposes of the Bankruptcy Code, and ordered the joint bankruptcy petition dismissed unless bifurcated.[86]

In May 2011, two bankruptcy cases—one in New York, and one in California—involved joint Chapter 7 petitions filed by legally married same-sex debtors.[87] The Trustee objected in both cases, again arguing that DOMA prohibits a reading of Section 302 that would permit joint filing by a same-sex couple.[88] The New York bankruptcy court acknowledged that DOMA rendered the debtors ineligible to file a joint petition,[89] but ultimately dismissed the Trustee's objections to the joint filing.[90] The court recognized that the case had already "substantially progressed," and that forcing the debtors to bifurcate their petition would burden the court, the creditors, and the Trustee.[91] Moreover, because the Trustee mounted no defense of DOMA, the court found no reason to consider DOMA's propriety under the Bankruptcy Code, and held that equitable principles of efficiency required the case to proceed as filed.[92] Similarly, the California court declined to consider DOMA's constitutionality, but remained unconvinced that dismissal would serve the best interests of the parties involved, and denied the Trustee's motion to dismiss.[93]

This line of reported decisions represents a degree of tension in the case law. The pre-*Balas* cases clearly establish that a couple must be legally married to be eligible for joint proceedings under Section 302[94] and that DOMA prohibits bankruptcy courts from recognizing same-sex marriages for the purposes of interpreting the Bankruptcy Code.[95] Nonetheless, *Somers* and *Ziviello-Howell* ultimately relied upon fact-specific inquiries, equitable principles of efficiency, and the Trustee's failure to adequately defend DOMA in allowing joint petitions filed by same-sex couples to proceed despite the law.[96] However, the cases left open the

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[85] *Id.* at 144-46.

[86] *In re Kandu*, 315 B.R. at 148.

[87] *In re* Ziviello-Howell, Ch. 7 Case No. 11-22706-A-7 *Civil Minutes*, Docket No. 44 (Bankr. E.D Cal. May 31,
2011)(McManus, J); *In re* Somers, 448 B.R. 677 (Bankr. S.D.N.Y. 2011).

[88] *In re* Ziviello-Howell, Ch. 7 Case No. 11-22706-A-7 *Civil Minutes*, Docket No. 44 (Bankr. E.D Cal. May 31,
2011)(McManus, J); *In re Somers*, 448 B.R. at 678-79.

[89] *In re Somers*, 448 B.R. at 681 ("It is clear from case law and the plain language of section 302 of the Bankruptcy Code that the Debtors, as a legally married couple, would qualify to file a joint petition if not for the existence of DOMA.").

[90] *Id.* at 679.

[91] *Id.* at 683.

[92] *Id.* at 682.

[93] *In re* Ziviello-Howell, Ch. 7 Case No. 11-22706-A-7 *Civil Minutes*, Docket No. 44 (Bankr. E.D Cal. May 31,
2011)(McManus, J).

[94] *See In re* Allen, 186 B.R. 769 (Bankr. N.D. Ga. 1995).

[95] *See In re* Kandu, 315 B.R. 123 (Bankr. W.D. Wa. 2004).

[96] *In re* Ziviello-Howell, Ch. 7 Case No. 11-22706-A-7 *Civil Minutes*, Docket No. 44 (Bankr. E.D

question of whether or not similarly situated couples would be able to file jointly if, for example, the Trustee were to mount a more aggressive defense of DOMA from the outset, or if efficient administration did not clearly require joint proceedings.

II. IN RE *BALAS* AND THE IMMEDIATE AFTERMATH

A. DOMA Unconstitutional As Applied to Married Same-Sex Debtors

In re Balas, decided just weeks after *Somers* and *Ziviello-Howell*, addressed the same fundamental question—whether a couple legally married under state law can file a joint bankruptcy petition despite DOMA's federal standard of marriage.[97] The court cited the two earlier decisions, and presumably could have denied the Trustee's motion to dismiss based on identical procedural grounds. Like the proceedings at issue in *Somers* and *Ziviello-Howell*, the *Balas* debtors had nearly reached resolution of their case. The debtors submitted a proposed reorganization plan pursuant to Chapter 13, which—if not for the Trustee's motion—was eligible for confirmation.[98] Similarly, creditors did not object to joint proceedings and offered no support to the Trustee's motion.[99] As in *Somers* and *Ziviello-Howell*, efficient administration weighed heavily in favor of denying the Trustee's motion to dismiss.

However, rather than invoking equitable principles of efficiency, the court attacked the Trustee's motion to dismiss solely on constitutional grounds.[100] Judge Donovan adopted the debtors' characterization of the question before the court: "'[T]he only issue in this Bankruptcy Case is whether some legally married couples are entitled to fewer rights than other legally married couples, based solely on a factor—i.e., the gender and/or sexual orientation of the parties in the union—that finds no support in the Bankruptcy Code or Rules and should be a constitutional irrelevancy.'"[101] The debtors alleged a violation of the equal protection component of the Fifth Amendment, arguing, in part, that they are indistinguishable from married heterosexual couples who file for bankruptcy protection jointly[102] and that DOMA—in the context of bankruptcy—violates the principle that the government must "remain open on impartial terms to all who seek its assistance."[103]

Citing a letter from United States Attorney General Eric Holder to House Speaker John Boehner (the "Holder Letter") outlining the documented history of

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Cal. May 31, 2011)(McManus, J); *In re Somers*, 448 B.R. at 677.

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

98 *Id.* at 570.

99 *Id.* at 578.

100 *Id.* at 567.

101 *Id.* at 569 (citing Debtors' Opp. 5:24-28).

102 *Id.* at 572 (quoting Debtors' Opp. 6:5-12).

103 *In re* Balas, 449 B.R. 567, 572 (Bankr. C.D. Cal. 2011) (quoting Romer v. Evans, 517 U.S. 620, 633 (1996)).

discrimination against gays and lesbians and President Obama's announcement that his administration would no longer defend DOMA, the *Balas* debtors urged the court to apply a heightened standard of scrutiny to DOMA.[104] Judge Donovan, relying in part on the Holder Letter, agreed that heightened scrutiny should apply, citing a long history of public and private discrimination against gays and lesbians,[105] the Ninth Circuit's recognition of sexual orientation as a defining and immutable characteristic,[106] the political obstacles faced by gays and lesbians,[107] and judicial conclusions that sexual orientation bears no relation to "an individual's ability to contribute to society."[108] Under heightened scrutiny, the *Balas* court looked to the Trustee to demonstrate that DOMA, *as applied to the* Balas *debtors*, would advance important government interests.[109] In other words, the Trustee needed to establish that dismissing the debtors' joint petition or forcing them to sever the case would serve the government's actual justifications for DOMA.[110] The Trustee failed to meet this burden.

The court identified four reasons offered by Congress for enacting DOMA,[111] and it held that dismissing the debtors' joint petition would advance none of them.[112] Specifically, the court considered whether or not applying DOMA to the *Balas* debtors would encourage responsible procreation, nurture the institution of heterosexual marriage, defend traditional notions of morality, or preserve scarce government resources.[113] The question before the court centered upon whether allowing the couple to seek bankruptcy protection jointly would hinder the government's stated interests, not whether their marriage was offensive to traditional, heterosexual marriage.[114] The fact that the debtors were already legally married was, therefore, crucial to the court's analysis. For example, the court held that *once legally married*, prohibiting the debtors to file jointly under Section 302 could not advance the government's goal of protecting traditional mores or "have the slightest cognizable effect on anyone else's marriage."[115]

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[104] *Id.* at 573-74.

[105] *Id.* at 576.

[106] *See, e.g.*, Hernandez-Montiel v. Immigration and Naturalization Serv., 225 F.3d 1084, 1093 (9th Cir. 2000). Judge Donovan cited a series of Ninth Circuit cases, including *Hernandez-Montiel*, to support the proposition that sexual orientation is a defining and immutable characteristic. *In re Balas*, 449 B.R. at 576.

[107] *Id.* at 577.

[108] *Id.*

[109] *Id.* at 575 (citing Witt v. Dep't of Air Force, 527 F.3d 806, 821 (9th Cir. 2008)).

[110] *Id.*

[111] To parse out specific congressional justifications for DOMA, the *In re Balas* court looked to a recent District Court decision considering DOMA in Massachusetts, *Gill v. Office of Pers. Mgmt.*, 699 F.Supp.2d 374, 388 (D.Mass. 2010). *In re Balas*, 449 B.R. at 576 (Bankr. C.D. Cal. 2011).

[112] *In re Balas*, 449 B.R. at 575.

[113] *Id.* at 575-76.

[114] *Id.*

[115] *Id.*

The Trustee also failed to identify any way in which dismissing the joint petition would advance the government's goal of encouraging responsible childbearing. The *Balas* debtors had no children, but more importantly, "even if they did, there is no basis in the evidence or authorities to conclude that [their] joint bankruptcy filing would" in any way encourage responsible procreation.[116] Likewise, any argument that dismissing the debtors' joint petition on the ground that it preserves government resources is untenable; the administration of joint bankruptcy proceedings requires the same amount of government resources regardless of the debtors' sexual orientation.

Although the crux of the court's argument is that DOMA cannot survive properly applied heightened scrutiny, the court alternatively held that DOMA fails even a rational basis review, for primarily the same reasons.[117] Under a rational basis review, DOMA is presumed valid, allowing the court and the Trustee to posit any *post hoc* justifications for DOMA that would be validly served by dismissing the debtors' joint bankruptcy case.[118] The court found that even the government's *post hoc* justifications of DOMA—preserving the status quo, eliminating inconsistencies, and easing administrative burdens—were not rationally related to dismissal of the debtors' joint petition.[119] Concluding that the sole basis for upholding DOMA "comes down to an apparent belief that the moral views of the majority may properly be enacted as the law of the land," the court held that the debtors met the high burden of rebutting DOMA's presumed validity under a low level of judicial scrutiny.[120]

B. The Government's Response

Balas was decided in the midst of major policy changes regarding DOMA. In February 2011, U.S. Attorney General Eric Holder announced that the Department of Justice would no longer defend DOMA.[121] The "Holder Letter" identified a number of factors leading to President Obama's conclusion that DOMA should be subject to a heightened level of judicial scrutiny, including the history of discrimination against gays and lesbians, the immutable nature of one's sexual orientation, and the difficulty gays and lesbians have encountered in the political process.[122] Furthermore, although "substantial circuit court authority" suggests that rational basis review is appropriate for laws drawing distinctions on the basis

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[116] *Id.* at 575.

[117] *Id.* at 578.

[118] *In re* Balas, 449 B.R. 567, 578-579 (Bankr. C.D. Cal. 2011).

[119] *Id.* at 578.

[120] *Id.* at 579.

[121] Letter from Eric H. Holder, Jr., Att'y Gen., to the Hon. John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011) [hereinafter Holder Letter], *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.

[122] *Id.* (pointing out the adoption of laws prohibiting anti-discrimination measures for gays and lesbians, the longstanding ban on gays and lesbians in the military, and the lack of federal protection against employment discrimination on the basis of sexual orientation).

of sexual orientation, the Supreme Court's ruling in *Lawrence v. Texas*—striking down the last remaining laws prohibiting consensual same-sex sodomy—and recent changes in social science indicate that the circuit court authority is outmoded and should be revisited.[123]

While the Holder Letter is not binding on the courts, if heightened scrutiny should apply in future cases challenging DOMA, the question becomes whether or not the classification based on sexual orientation is "substantially related to an important government objective."[124] Under this analysis, the government is limited to asserting the *actual* justifications for DOMA's passage and cannot assert *post hoc* rationalizations for the law.[125] Because the legislative history indicates that DOMA is grounded primarily in a "moral disapproval of gays and lesbians and their intimate and family relationships," the law cannot withstand constitutional challenge.[126] While it is rare for the DOJ to halt defense of a duly enacted federal law, the Attorney General emphasized its appropriateness in limited cases, including those in which the government lacks responsible arguments in defense of the law or when the President has concluded that the law is unconstitutional.[127]

President Obama's decision to halt defense of DOMA drew sharp criticism from Republican leadership in the House of Representatives. House Speaker John Boehner announced plans to convene the Bipartisan Legal Advisory Group ("BLAG"), a group with the power to instruct House lawyers to take legal action primarily in situations involving institutional or separation-of-powers issues.[128] Vowing to step in to defend DOMA on behalf of the federal government, Speaker Boehner argued that BLAG's defense will "ensure that this law's constitutionality is decided by the courts, rather than by the President unilaterally."[129]

Before the *Balas* court announced that DOMA is unconstitutional as applied to legally married same-sex debtors, BLAG requested a last-minute continuance in the case to secure an opportunity to step in and defend the law.[130] Although BLAG was granted such an opportunity, it ultimately failed to appear.[131] After the court announced its holding, the DOJ continued to offer BLAG an opportunity to

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123 *Id.*

124 *Id.* (citing Clark v. Jeter, 486 U.S. 456, 461 (1988)).

125 *Id.*

126 *Id.*

127 Holder Letter, *supra* note 121; *see also* Memorandum from Walter Dellinger, Assistant Att'y Gen., to Abner J. Mikva, Counsel to President Clinton on Presidential Authority to Decline to Execute Unconstitutional Statutes (Nov. 2, 1994), *available at* http://www.justice.gov/olc/nonexcut.htm.

128 Felicia Sonmez, *House to Defend the Defense of Marriage Act in Court*, WASH. POST (Mar. 9, 2011), *available at* http://voices.washingtonpost.com/2chambers/2011/03/house_to_defend_the_defense_of.html.

129 *Id.*

130 Debtors' Response to the United States Trustee's Motion to Dismiss Bankruptcy Appeal at 1, *In re* Balas, 449 B.R. 567 (Bankr. C.D. Cal. 2011) [hereinafter *In re* Balas Response] (No.:2:11-bk-17831-TD).

131 *Id.*

defend DOMA by filing a timely appeal in the case.[132] The debtors filed no objection to the appeal, instead asking the bankruptcy court to certify the Trustee's appeal directly to the Ninth Circuit since a "definitive ruling on the constitutionality of applying DOMA in the bankruptcy context" was appropriate.[133] Although the appeal was filed, the Trustee sought dismissal of its own appeal a few weeks after BLAG notified the DOJ that it would not appear in any bankruptcy cases.[134] A representative of Speaker Boehner announced that the *Balas* ruling would not be appealed, stating:

> Bankruptcy cases are unlikely to provide the path to the Supreme Court, where we imagine the question of constitutionality will ultimately be decided . . . Obviously, we believe the statute is constitutional in all its applications, including bankruptcy, but effectively defending it does not require the House to intervene in every case, especially when doing so would be prohibitively expensive.[135]

The debtors refused to stipulate to dismissal of the appeal "absent indication that dismissal . . . was part of a larger shift in policy by which no further challenges would be brought under DOMA to joint bankruptcy" petitions filed by same-sex couples.[136]

On July 6, 2011, the DOJ announced that it had in fact changed its policy in a manner consistent with the *Balas* ruling.[137] Following the Trustee's motion to withdraw the *Balas* appeal, a DOJ spokesperson wrote that the withdrawal represented the Department's new policy regarding bankruptcy petitions filed jointly by same-sex debtors legally married under state law.[138] According to the DOJ, the policy to abandon efforts to dismiss such petitions in the future is consistent with the Obama Administration's determination that DOMA is unconstitutional.[139] Citing BLAG's unwillingness to participate in bankruptcy cases despite ample opportunity and the "availability of other judicial fora" to consider DOMA's constitutionality, the DOJ determined that its new policy would avoid "costly and time-consuming constitutional litigation that neither the BLAG nor the Department plans to defend."[140] Furthermore, by withdrawing similar appeals in California and New York, the DOJ essentially ensured that the *Balas*

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[132] *Id.*

[133] *Id.* at 2.

[134] *Id.*

[135] *Id.* at 1 (quoting Schwartz, *supra* note 13).

[136] *In re* Balas Response, *supra* note 130, at 3.

[137] Terry Baynes, *U.S. Shifts Policy on Same-Sex Bankruptcies*, REUTERS, July 8, 2011, http://www.reuters.com/article/2011/07/08/us-gaymarriage-bankruptcy-idUSTRE76770020110708.

[138] Chris Geidner, *U.S. Trustee Withdraws Appeal of Gay Couple's Bankruptcy Court DOMA Victory*, METRO WEEKLY (July 7, 2011), *available at* http://metroweekly.com/poliglot/2011/07/us-trustee-withdraws-appeal-of.html.

[139] *Id.*

[140] *Id.*

decision would have nationwide effect, opening the door for same-sex couples seeking to file joint bankruptcy petitions without fear of government objection.[141]

Although media hailed the *Balas* decision and the DOJ's subsequent policy change as a "victory" for DOMA's opponents and similarly situated same-sex debtors,[142] such policy shifts fail to offer definitive resolution of the issue. Absent congressional repeal or a final judicial invalidation of DOMA, the law remains on the books and the equal treatment same-sex debtors currently receive in bankruptcy court is by no means guaranteed. Rather, same-sex debtors legally married under state law currently are able to file joint bankruptcy petitions—thereby securing the procedural benefits guaranteed to heterosexual married couples by the Bankruptcy Code[143]—not because they have the same legal right afforded to heterosexual married couples, but because policy currently dictates that it is neither an "appropriate expenditure" to litigate[144] and because bankruptcy court is not the appropriate "path" to the Supreme Court.[145] The current policy essentially suspends DOMA's enforcement in the bankruptcy context while the statute's constitutionality is litigated in other arenas. As long as the DOJ and BLAG refuse to appear in bankruptcy courts, same-sex debtors are given a "pass" without any indication of what may happen should the policy change.

If the DOJ's policy changes a second time, if BLAG decides to intervene after all, if the Obama Administration's position changes during a second term, or if a new president orders the DOJ to resume aggressive enforcement of DOMA, same-sex debtors legally married under state law are back to square one. In that scenario, how will bankruptcy courts respond after a period of explicit non-enforcement of DOMA in the bankruptcy context? More importantly, as DOMA's constitutionality continues to be tested in a variety of cases around the country, will the opportunities currently available to married same-sex debtors be extinguished upon a judicial determination that DOMA is, after all, constitutional? One thing is certain: the current regime will not last indefinitely. Therefore, it is therefore important to explore which tools will remain available to courts wishing to allow same-sex debtors to continue to file joint bankruptcy petitions moving forward. The doctrine of desuetude, which promises to protect against "unpredictable and discriminatory enforcement practices,"[146] is one workable option.

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[141] *In re* Balas Response, *supra* note 130, at 4.

[142] *See* Geidner, *supra* note 138; Phil Reese, *DOJ to File Appeal of Bankruptcy Court's DOMA Ruling*, WASH. BLADE (June 29, 2011), http://www.washingtonblade.com/2011/06/29/doj-to-file-appeal-of-bankruptcy-courts-doma-ruling.

[143] 11 U.S.C.A. § 302(a) (West 2012).

[144] Baynes, *supra* note 137.

[145] Schwartz, *supra* note 13.

[146] Cass Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 55 SUP. CT. REV. 27, 73 (2003).

III. DESUETUDE AS AN AVAILABLE JUDICIAL TOOL

Desuetude is a legal doctrine that recognizes the inherent unfairness of enforcing statutes that have become outmoded after a change in factual conditions or a long period of non-enforcement.[147] At its most general level, the doctrine allows courts to render statutes obsolete "when their objects vanish or their reason ceases," resulting in judicial repeal of the law.[148] The doctrine in its barest form is generally disfavored in American jurisprudence because the Constitution vests legislative power wholly within the hands of the Legislature,[149] and courts therefore hesitate to abrogate constitutionally enacted laws simply because the law has fallen out of favor.[150] Nonetheless, when law enforcement officers refuse to enforce legislation, individuals burdened by the statute may be entitled to relief, even though the law remains on the books.[151] This theory derives support from fundamental notions of fairness implicit in federal and state constitutional guarantees of due process and equal protection.[152]

This section first describes desuetude in its most straightforward application, before exploring broader interpretations of the doctrine and its applicability to DOMA in the bankruptcy context. Courts have explicitly invoked the doctrine in exceptionally rare circumstances involving long-forgotten penal statutes pervasively violated alongside an overt policy of non-enforcement.[153] However, some scholars have suggested that a broader, "American-style" of the doctrine can be found in American jurisprudence, particularly when the law in question finds itself in a constitutional gray area, the moral underpinnings of the law have become anachronistic or lost public support, and there exists a conspicuous policy of non-enforcement.[154]

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147 *See, e.g.*, Poe v. Ullman, 367 U.S. 497, 502 (1961) ("The undeviating policy of nullification by Connecticut on its anti-contraceptive laws throughout all the long years that they have been on the statute books bespeaks more than prosecutorial paralysis."); Nashville, C. & St. L.R. Co. v. Browning, 310 U.S. 362, 369 (1940) ("It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it" since "[d]eeply embedded traditional ways of carrying out state policy . . . are often tougher and truer law than the dead words of the written text.").

148 James v. Commonwealth, 1825 WL 1899, at *8 (Pa. 1825).

149 U.S. CONST. art I, § 1.

150 State v. Legrand, 20 A.3d 52, 74 (Conn. App. Ct. 2011) (rejecting the doctrine of desuetude where a state statute was rarely, but sometimes, enforced).

151 *See, e.g.*, Rubert Hermanos, Inc. v. Puerto Rico, 106 F.2d 754 (1st Cir. 1939). Although the First Circuit explicitly held that a statute could not be repealed merely because of a failure to enforce it, the Court did suggest that the government could be prohibited from penalizing "past violations which it ha[d] winked at and condoned . . . ." *Id.* at 762.

152 State v. Linares, 630 A.2d 1340, 1346 n.11 (Conn. App. Ct. 1993) (citing Poe v. Ullman, 367 U.S. 497 (1961)).

153 *But see, e.g.*, James v. Commonwealth, 1825 WL 1899 (Pa. 1825); Comm. on Legal Ethics v. Printz, 416 S.E.2d 720 (W. Va. 1992).

154 Sunstein, *supra* note 146; Erik Encarnación, *Desuetude-Based Severability: A New Approach to Old Morals Legislation*, 39 COLUM. J.L. & SOC. PROBS. 149 (2005).

A. Explicit Application of Desuetude

The vast majority of jurisdictions in the United States have not explicitly adopted a doctrine of desuetude,[155] but a handful of jurisdictions have recognized the doctrine to varying degrees. Representing perhaps its earliest application in the United States, the Supreme Court of Pennsylvania in 1825 reversed the judgment of a lower court which ordered that a woman convicted as a "common scold" be punished by "ducking."[156] The court held that being a common scold remained an indictable offense,[157] but insisted that the defendant's sentence—to be strapped into a ducking stool and submerged in water three times—must be overturned.[158] In so holding, the court reasoned that a period of a law's disuse introduces a form of "silent legislation," which may actually repeal previously enforced statutory law.[159] Furthermore, when the purpose or justification for a law vanishes, the law may become obsolete and therefore unenforceable.[160] Characterizing the lower court's ducking sentence as antiquated and long disused,[161] the court held the form of punishment obsolete and reversed the lower court's judgment.

The seminal modern case to explicitly embrace a doctrine of desuetude is *Committee on Legal Ethics v. Printz*, a case decided in 1992 by the Supreme Court of West Virginia in the context of attorney disciplinary proceedings.[162] The court considered the propriety of a rarely enforced disciplinary rule established by the state's legal ethics committee, and ultimately concluded that the rule was void under the doctrine of desuetude.[163] Desuetude, the court explained, finds its roots in ancient Roman law:

> Age-encrusted custom is not undeservedly cherished as having almost statutory force, and this is the kind of law which is said to be established by use and wont. . . . What does it matter whether the people declares its will by voting or by the very substance of its actions? Accordingly, it is absolutely right to accept the point that statutes may be repealed not only

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155 Encarnación, *supra* note 154, at 151.

156 4 WILLIAM BLACKSTONE, COMMENTARIES *169 (1765). In the English common law tradition, a particularly quarrelsome, noisy, or abusive woman could be convicted of being a "common scold," which was considered a form of public nuisance. The traditional punishment for women convicted as "common scolds" was to be placed in a "ducking stool," a female-specific form of punishment whereby the convicted woman was strapped into an apparatus designed like a chair, suspended over water, and submerged into the water a number of times. *Id.*

157 James v. Commonwealth, 1825 WL 1899, at *14 (Pa. 1825).

158 *Id.*

159 *Id.* at *8.

160 *Id.*

161 *Id.* at *10 ("There is no ground, whatever may be the antiquated theory of the law, that it now exists, in fact and in practice, as a legal punishment.").

162 Comm. on Legal Ethics v. Printz, 416 S.E.2d 720 (W. Va. 1992). Charles Printz, an attorney and businessman, entered into private negotiations with an employee after the employee admitted embezzling company funds. As negotiations deteriorated, Printz announced that he would consider criminal prosecution if the funds were not repaid. Printz was charged with violating an ethics committee rule prohibiting lawyers from threatening criminal charges to gain an advantage in a civil matter. *Id.*

163 *Id.* at 727.

> by vote of the legislature but also by the silent agreement of everyone expressed through desuetude.[164]

Admitting that the doctrine is seldom used, the court nonetheless invalidated the statute after finding its application unworkable and antiquated.[165]

The *Printz* court articulated a three-part test that must be satisfied before a penal statute may be judicially abrogated.[166] First, the law in question must be a criminal law proscribing activity that is *malum prohibitum* rather than *malum in se*.[167] This distinction ensures that laws prohibiting inherently criminal behavior will continue to be enforceable even if defendants are rarely, if ever, convicted of those crimes.[168] "Second, there must be an open, notorious, and pervasive violation of the statute for a long period of time" for the court to declare a statute void under the doctrine.[169] And finally, a statute can only become desuetudinal following a conspicuous policy of non-enforcement.[170]

Similarly, in 1993, a Connecticut appellate court briefly considered the doctrine in a case involving a state law prohibiting acts that disrupt or interfere with any legislative session or meeting.[171] At trial, the defendant asserted that the statute was invalid as overbroad and vague and claimed that it unconstitutionally abridged her right to free speech.[172] On appeal, the defendant also asserted that the statute is void under the doctrine of desuetude.[173] The appellate court recognized the doctrine, explaining that the concept of desuetude is grounded in constitutional notions of fairness and that the courts must judge a statute "in terms of whether the defendant had fair notice that she might be prosecuted pursuant" to the law.[174] Despite acknowledging the statute and the determinative factors identified by the *Printz* court, the court refused to consider the applicability of the doctrine since it was not raised at the trial level.[175]

B. Revisiting Lawrence *and* Griswold*: An Expanded View of Desuetude*

Although explicit adoption of the doctrine of desuetude is rare, a less obvious variation of the doctrine exists and is grounded in procedural due process: when "constitutionally important interests are at stake, due process principles requiring

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164 *Id.* at 725 n.3.

165 *Id.* at 727.

166 *Id.* at 726.

167 *Id. Malum in se* offenses are those considered to be "naturally evil as adjudged by the sense of a civilized community," whereas *malum prohibitum* offenses are wrong simply because a statute prohibits the conduct. State v. Horton, 51 S.E. 945, 946 (N.C. 1905).

168 Comm. on Legal Ethics v. Printz, 416 S.E.2d 726 (W. Va. 1992).

169 *Id.*

170 *Id.*

171 State v. Linares, 630 A.2d 1340 (Conn. App. Ct. 1993).

172 *Id.* at 1344-45.

173 *Id.* at 1346 n.11.

174 *Id.* (citing Comm. on Legal Ethics v. Printz, 416 S.E.2d 720 (W. Va. 1992)).

175 *Id.*

fair notice and banning arbitrary action are violated if criminal prosecution is brought on the basis of moral judgments lacking public support, as exemplified by exceedingly rare enforcement activity."[176] The Supreme Court's landmark decision in *Lawrence v. Texas*—striking down the last remaining criminal prohibitions on same-sex sodomy—[177] provides a salient illustration, particularly when viewed as a successor to the Court's decision in *Griswold v. Connecticut*, which invalidated a state law prohibiting the use of contraceptives by married couples.[178] Although the Supreme Court has never claimed that its decisions in either *Lawrence* or *Griswold* are based upon the doctrine of desuetude, revisiting these cases reveals that they may be explained by a "distinctly American" variation on the doctrine,[179] which may be applicable to other types of morals-based legislation,[180] like DOMA.

In 1965, the Supreme Court struck down Connecticut's law banning the use of contraceptives by married couples.[181] The Court identified a fundamental right to privacy such that married individuals are entitled to protection from intrusion into the bedroom and are consequently guaranteed a right to control the family.[182] The Court was confronted with the challenge of determining where the right exists within our constitutional framework. The majority opinion identified the right as stemming from the "penumbra" of the Bill of Rights—although the right is not specifically enumerated, it is so foundational that it precedes the Bill of Rights and is included in its protections.[183]

However, the doctrine of desuetude helps explain the Court's decision in *Griswold*.[184] *Griswold* was decided "in the midst of a substantial national rethinking of issues of sex and morality," and public support for laws banning the use of contraceptives within marriage was eroding by 1965.[185] Because the statute became "out of touch" with public convictions,[186] it became a "recipe for arbitrary and even discriminatory" action.[187] This suggests that the law must have been

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176 Sunstein, *supra* note 146, at 27-8.

177 Lawrence v. Texas, 539 U.S. 558 (2003).

178 Griswold v. Connecticut, 381 U.S. 479 (1965).

179 Sunstein, *supra* note 146, at 27.

180 As used in this Note, "morals-based" legislation refers to laws that purport to regulate sexual conduct with a view toward upholding traditional notions of sexual morality. *See Lawrence*, 539 U.S. at 599.

181 *Griswold*, 381 U.S. at 479.

182 *Id.* at 495 ("The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.").

183 *Id.* at 485.

184 Sunstein, *supra* note 146, at 27.

185 *Id.* at 28.

186 *Id.* at 27.

187 *Id.* at 50.

invalidated—at least in part—because the rule of law depends on predictability that became hopelessly absent.[188]

The Supreme Court's decision in *Lawrence* can be viewed as a successor to *Griswold*, reflecting the same version of the desuetude doctrine. Like *Griswold*, *Lawrence* was decided during a civil rights revolution which promised to "delegitim[ate] prejudice against and hatred for homosexuals."[189] There are many possible readings of *Lawrence*;[190] however, interpreting the decision under a rubric of desuetude is persuasive. The state statute prohibiting same-sex sodomy was unenforced, suggesting that it "lack[ed] support in public convictions," and it raised concerns about unpredictable and arbitrary enforcement against private citizens.[191] Furthermore, while the Court's decision was not based upon equal protection analysis, constitutional issues of equality were clearly a crucial component of the Court's analysis.[192] For example, when the Court claimed that "[p]ersons in a homosexual relationship may seek autonomy . . . just as heterosexual persons do," or that "[t]he liberty protected by the Constitution allows homosexual persons the right to make this choice," it is difficult to imagine the Court uttering the same claims for adulterers, bigamists, or those involved in incestuous relationships.[193] This language—stressing the importance of liberty and autonomy for homosexual and heterosexual persons alike—suggests that the court's decision was "powerfully influenced by a claim of equality" for gays and lesbians.[194]

A desuetude-based reading of *Lawrence* therefore suggests that the moral arguments underlying the statute in question became insufficient to justify the law.[195] Harkening back to the Pennsylvania Supreme Court's invalidation of "ducking" as an acceptable punishment,[196] the object or purpose of the anti-sodomy statute—to preserve social ideas of morality—eroded, evidenced primarily by a lack of enforcement.[197] The law, therefore, could not stand.

Revisiting *Lawrence* and *Griswold* through a desuetude-informed lens suggests that the doctrine may properly apply to statutes even in jurisdictions where the doctrine is not explicitly adopted and even if the rigid requirements articulated by the *Printz* court are not satisfied.

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188 *Id.*

189 *Id.* at 29.

190 *See* Sunstein, *supra* note 146, at 29-31 (suggesting autonomy, rational basis, desuetude, and equality as possible readings of *Lawrence*).

191 *Id.* at 50.

192 *Id.* at 52-3.

193 *Id.* (citing Lawrence v. Texas, 539 U.S. 558, 567, 574 (2003)).

194 *Id.* at 53.

195 *Id.* at 51.

196 *See, supra* Part III.A.

197 *See* Sunstein, *supra* note 146, at 49.

C. Applying a Doctrine of Desuetude to DOMA in Bankruptcy

The American variation of desuetude at play in *Lawrence* and *Griswold* builds upon the doctrine's explicit adoption in the handful of jurisdictions where it exists. By considering the doctrine both as explicitly adopted—in Pennsylvania's "ducking" case and West Virginia's *Printz* case—and as a theory operating underneath the surface in *Lawrence* and *Griswold*, it is possible to tease out triggering elements that demonstrate DOMA's susceptibility to the doctrine. Specifically, this analysis suggests five key components which all apply to DOMA in the context of bankruptcy. These components involve the law's inability to serve governmental interests in bankruptcy, the government's erratic enforcement policy, shifting social support for the law, and the constitutional tension it creates.

First, laws fall into desuetude "when their objects vanish or their reason ceases."[198] The idea is that a law becomes obsolete—and therefore unenforceable—when conditions that justified the law's enactment change or disappear.[199] For example, if the law banning the use of contraceptives was supported by public policy supporting such a ban, when public support for that policy vanishes, so too must the statute.[200] Likewise, if the purpose of an anti-sodomy statute is to reflect society's condemnation of such practices, the statute falls into desuetude when society reaches the conclusion that those practices should no longer be punished.[201]

Although desuetude is typically conceptualized in the context of arbitrarily enforced criminal laws, the same principles should apply to DOMA in the bankruptcy context. An expanded view of desuetude places the focus of the inquiry on the arbitrary and unpredictable nature of DOMA's application. Notwithstanding the fact that DOMA is not criminal law, its application in bankruptcy creates additional expense for—and, indeed, "penalizes"—same-sex couples vis-à-vis their heterosexual peers, and it does so arbitrarily and unpredictably.

The "objects" and "reason" for DOMA were clearly articulated by Congress in 1996 when the statute was passed.[202] Namely, by enacting DOMA, the government sought to defend traditional heterosexual marriage, defend traditional notions of morality, and preserve scarce government resources.[203] Certainly, in other contexts, DOMA may advance at least some of these objectives.

However, as recognized by the *Balas* court, it is difficult to imagine how a prohibition on same-sex couples filing joint bankruptcy petitions will advance any

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198 James v. Commonwealth, 1825 WL 1899, at *8 (Pa. 1825).

199 SINGER, *supra* note 20.

200 *See* Sunstein, *supra* note 146, at 27-28.

201 *Id.* at 30.

202 H.R. REP. NO. 104-664 (1996).

203 *Id.* at 2916-2922.

of these goals.[204] The issue in the bankruptcy context is not whether same-sex couples *should* or *should not* to be allowed to marry, but whether or not they should be denied the opportunity to file joint bankruptcy petitions once already legally married.[205] Limiting joint bankruptcy relief to heterosexual married couples cannot defend traditional heterosexual marriage nor traditional morality if the debtors are *already legally married under state law*.[206] In other words, if DOMA aims to protect traditional, heterosexual marriage by placing restrictions on same-sex marriages,[207] then the alleged affront to traditional morality Congress aimed to protect again already occurred when the same-sex couple entered into a marriage; as a result, limiting that couple's bankruptcy remedies after the fact cannot advance the government's goal.[208] Furthermore, limiting joint bankruptcy relief to heterosexual married couples will not preserve scarce resources;[209] rather, the opposite is true. Requiring same-sex couples to file individually means the government incurs greater costs in administering two, rather than one, bankruptcy estates. Without any discernible "object" or "reason" supporting the DOMA's interference in the bankruptcy process, the statute simply should not apply in the bankruptcy context.

The second crucial component of the doctrine of desuetude involves a failure to enforce.[210] In fact, in articulating the doctrine of desuetude, the *Printz* court recognized that a statute may not fall into desuetude absent a conspicuous policy of non-enforcement.[211] Similarly, Connecticut's contraceptives prohibition, and the anti-sodomy statute struck down in *Lawrence*, were both rarely enforced.[212]

As of this writing, DOMA—while still the law of the land—is simply not enforced in the context of bankruptcy, and married same-sex debtors are free to file joint petitions despite DOMA.[213] While DOMA still has an impact in other areas of the law,[214] the DOJ has announced that its policy is simply to turn a blind eye to DOMA in the context of bankruptcy.[215] Because the law is disused in bankruptcy courts, the doctrine of desuetude suggests that the law is simply no longer applicable in that context.

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[204] *In re* Balas, 449 B.R. 567, 578 (Bankr. C.D. Cal 2011).

[205] *Id.* at 575-76.

[206] *Id.*

[207] H.R. REP. NO. 104-664 (1996).

[208] *See In re Balas*, 449 B.R. at 578.

[209] *Id.* at 576.

[210] *See, e.g.*, Comm. on Legal Ethics v. Printz, 416 S.E.2d 720 (W. Va. 1992).

[211] *Id.* at 726.

[212] *See* Sunstein, *supra* note 146, at 50.

[213] Baynes, *supra* note 137.

[214] *See, e.g.*, Andrew Harmon, *Judge Throws Out Binational Couple's DOMA Lawsuit*, ADVOCATE (Sept. 29, 2011), *available at* http://www.advocate.com/News/Daily_News/2011/09/29/Judge_Throws_Out_Binational_Couple_s_DOMA_Suit/. DOMA still prevents same-sex spouses from obtaining lawful immigrant status through marriage-based petitions. *Id.*

[215] *See supra* text accompanying notes 137-41.

The third element, closely related to the requirement of a non-enforcement policy, reflects the view that desuetude is designed to safeguard against unpredictable and arbitrary enforcement practices.[216] In *Griswold*, the statutory ban on contraceptives by its very nature offended the rule of law because enforcement was unpredictable.[217] Likewise, in *Lawrence*, the anti-sodomy statute invalidated was not used "for frequent arrests or convictions, but for rare and unpredictable harassment by the police."[218] Such laws are particularly vulnerable to the doctrine of desuetude.

Desuetude, if invoked in bankruptcy courts, would similarly protect married same-sex debtors who are currently unable to predict their available bankruptcy remedies moving forward. While such debtors are currently able to take advantage of the procedural benefits of filing a joint petition—namely, the ability to streamline the proceedings, saving substantial time and money in process—it is not clear whether or not such benefits will be available in the future.[219] As previously discussed in Part II, DOMA continues to plague same-sex debtors with uncertainty and unpredictability because even the slightest change in the political winds may evaporate the benefits currently available to them.[220] Protection against this type of arbitrary enforcement lies at the very heart of the doctrine of desuetude.

The fourth element considers eroding public support and changing social mores. In striking down "ducking" as an acceptable mode of punishment for women, the Pennsylvania Supreme Court recognized the practice as "one of the vestiges of a barbarous antiquity."[221] In holding that the law had fallen into desuetude, the court's opinion reflected the view that society could no longer tolerate such punishment as acceptable, despite the fact that its availability had never been legislatively repealed.[222] Likewise, society's views regarding sex and morality were rapidly changing when both *Griswold* and *Lawrence* invalidated desuetudinal statutes.[223] The ultimate outcome of these changing social views is irrelevant;[224] if a law is based on moral justifications, once the moral tides begin shifting, those moral justifications become insufficient to support the law.[225]

DOMA is undeniably grounded in moral judgments regarding same-sex relationships in the United States.[226] In enacting the law, Congress aimed to

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216 *See* Sunstein, *supra* note 146, at 50.

217 *Id.*

218 *Id.*

219 *See supra* text accompanying notes 142-146.

220 *Id.*

221 James v. Commonwealth, 1825 WL 1899, at *2 (Pa. 1825).

222 *Id.*

223 Sunstein, *supra* note 146, at 28-9.

224 *See generally id.* at 28.

225 *Id.* at 51-2.

226 "In the court's final analysis, the government's only basis for supporting DOMA comes down to an apparent belief that the moral views of the majority may properly be enacted as the law of the land in regard to state-sanctioned same-sex marriage in disregard of the personal status and living conditions of

preserve and nurture "traditional notions of morality,"[227] but never before have those notions been more in flux—more than thirty-five percent of Americans now live in states granting the rights and responsibilities of marriage to same-sex couples,[228] and with a majority of Americans now favoring full marriage equality, public support for legal recognition of same-sex relationships has never been higher.[229] This indicates that the moral underpinnings supporting DOMA are shifting and therefore no longer represent sufficient justification for the law. Furthermore, since the only conceivable "non-moral" justification for DOMA—to preserve government resources—is actually hindered by enforcement in context of bankruptcy,[230] the statute is susceptible to invalidation under a theory of desuetude.

The last element serves to limit the doctrine's applicability to laws involving a degree of constitutional uncertainty or tension. The doctrine, as a practical matter, is a mechanism to safeguard the guarantees of fairness implicit in the due process and equal protection components of the Constitution.[231] Laws triggering the doctrine all involve potential or looming threats to these guarantees.[232] For example, even when the *Printz* court explicitly invoked the doctrine to invalidate a statute, the court suggested that desuetude properly applied because the statute violated due process principles requiring fair notice.[233] Likewise, the Supreme Court's *Lawrence* holding was not based upon an equal protection analysis, yet equal protection concerns were "pivotal to the outcome."[234] This fact is perhaps best illustrated by the Court's pronouncement that criminalizing homosexual conduct "in and of itself is an invitation to subject homosexual persons to discrimination in both the public and private spheres."[235]

Applying DOMA to same-sex debtors in bankruptcy proceedings implicates equal protection concerns sufficient to satisfy this element. Indeed, it is difficult to imagine a constitutional analysis of DOMA without considering the law's possible frustrations of equal protection guarantees. This is most clearly evidenced by the *Balas* court's strong ruling that DOMA, as applied to married same-sex debtors,

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a significant segment of our pluralistic society." *In re* Balas, 449 B.R. 567, 579 (Bankr. C.D. Cal 2011).

227 H.R. REP. NO. 104-664, at 2919 (1996).

228 *N.Y. Legalizes Gay Marriage,* USA TODAY (June 26, 2011), *available at* http://www.usatoday.com/news/nation/2011-06-24-gay-marriage-new-york_n.htm#.

229 *Gallup Poll: Majority for Marriage Equality*, ADVOCATE (May 20, 2011), *available at* http://www.advocate.com/News/Daily_News/2011/05/20/Gallup_Poll_Majority_for_Marriage_Equality/.

230 *See In re* Somers, 448 B.R. 677 (Bankr. S.D.N.Y. 2011); *In re* Ziviello-Howell, Ch. 7 Case No. 11-22706-A-7 *Civil Minutes*, Docket No. 44 (Bankr. E.D Cal. May 31, 2011)(McManus, J) (both cases rejecting Trustee's challenge to joint petitions on the grounds that bifurcating the petitions would be too burdensome on the parties involved).

231 SINGER, *supra* note 20 (citing States v. Linares, 630 A.2d 1340 (Conn. App. Ct. 1993)).

232 Sunstein, *supra* note 146, at 27.

233 Comm. on Legal Ethics v. Printz, 416 S.E.2d 720, 726-7 (W. Va. 1992).

234 Sunstein, *supra* note 145, at 52.

235 *Id.* at 53 (quoting Lawrence v. Texas, 539 U.S. 558, 575 (2003)).

draws an impermissible distinction between two classes of married people—heterosexual couples and homosexual couples—in violation of equal protection principles.[236] Even absent a finding that such distinction violates the equal protection clause, the law undeniably raises constitutional concerns.[237]

Satisfaction of all five elements will generally require a unique set of circumstances, suggesting that desuetude's applicability is limited. However, DOMA—at least in the context of bankruptcy—is particularly vulnerable to the doctrine, because the law serves no government interest in bankruptcy court,[238] is unpredictably enforced, if enforced at all,[239] is grounded in moral judgments that are currently in a state of flux,[240] and represents a threat to constitutional guarantees of equal protection.[241] Invalidating DOMA under a theory of desuetude would establish a degree of certainty that the law currently lacks in bankruptcy—namely, the doctrine would ensure that debtors cannot be disadvantaged by a statute satisfying these elements, regardless of its applicability or constitutionality outside of bankruptcy.

D. Potential Challenge to Applying Desuetude Doctrine

Perhaps the greatest potential counterargument to invoking a doctrine of desuetude relies upon a separation of powers theory, whereby any doctrine allowing judges to interfere in the legislative process by choosing when or whether to apply duly enacted law is simply untenable.[242] The idea is that "activist" judges who subscribe to a doctrine of desuetude are permitted to judicially abrogate laws in a way that improperly encroaches upon powers reserved to the legislature, and in so doing contravenes constitutional separation of powers.[243] One can imagine an argument that judges simply do not have the power to choose which laws to enforce, and which ones to ignore.

While not wholly without merit, this argument fails to consider one crucial point. The doctrine of desuetude cannot apply to any law with which judges, or even society at large, disagree; it is designed to protect against laws that are already arbitrarily enforced.[244] This resonates with DOMA, particularly in the bankruptcy context. The United States Trustee, a branch of the Department of Justice, is responsible for overseeing bankruptcy cases.[245] This is an executive function, and the executive branch has declined to enforce DOMA in the context of bankruptcy

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

237 *Id.*

238 *See supra* text accompanying notes 198-209.

239 *See supra* text accompanying notes 210-20.

240 *See supra* text accompanying notes 221-30.

241 *See supra* text accompanying notes 231-35.

242 Encarnación, *supra* note 154, at 160.

243 *Id.*

244 *See generally* Sunstein, *supra* note 146.

245 *The United States Trustee Program*, *supra* note 8.

proceedings.[246] Following the Obama Administration's announcement that it would no longer defend DOMA,[247] the House of Representatives hired attorneys to step in and defend the law before ultimately concluding that they were simply not interested in defending the law in bankruptcy court.[248] If neither the executive branch nor the Legislature see any merit in enforcing DOMA in bankruptcy court, then the judiciary cannot be taken to task for similarly refusing to apply it.

Furthermore, the doctrine's applicability will be limited. Desuetude does not give judges carte blanche to determine that a law has fallen out of favor and should therefore be struck down. Rather, it is a mechanism allowing judges to recognize the inherent unfairness of holding individuals to constitutionally questionable laws that are unenforced by the very entities charged with the responsibility of enforcing them.[249] To illustrate this point, consider any number of changed circumstances that would render desuetude inapplicable to DOMA in the context of bankruptcy. If the law were consistently enforced either by the Trustee or the House lawyers hired to defend DOMA,[250] if it presented no risk of constitutional violation, or if the law was undergirded in legitimate, non-moral justifications, desuetude would not be an available judicial tool.[251] Therefore, the doctrine is properly viewed as a safeguard against laws—like DOMA—that violate the rule of law requiring predictability and present potential constitutional injustices.[252]

CONCLUSION

In the summer of 2011, the Bankruptcy Court for the Central District of California made history by declaring, in a first for bankruptcy courts, that DOMA is unconstitutional as applied to same-sex debtors legally married under state law.[253] The decision, following closely on the heels of an announcement by the Obama Administration that it would no longer defend DOMA,[254] ushered in policy shifts that presently allow married same-sex debtors to file joint bankruptcy petitions—at least temporarily—without government objection.[255] However, policies change, and it is impossible to predict whether same-sex debtors will continue to enjoy the same procedural benefits that accrue to married heterosexual couples who file bankruptcy petitions jointly, rather than as individuals.[256]

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246 Baynes, *supra* note 137.

247 Holder letter, *supra* note 121.

248 *In re* Balas response, *supra* note 130.

249 *See supra* text accompanying notes 128-41.

250 *Id.*

251 *See generally* Sunstein, *supra* note 146.

252 *Id.* at 50.

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

254 Holder letter, *supra* note 121.

255 Baynes, *supra* note 137.

256 *See supra* text accompanying notes 136-45.

The unpredictable nature of DOMA's enforcement in the bankruptcy context renders it particularly susceptible to a doctrine of desuetude, which, if invoked, would allow courts to refuse to apply the statute in the context of bankruptcy. The doctrine, although rare in the United States, is designed to protect individuals from laws that are arbitrarily or unpredictably enforced.[257] DOMA is amenable to this doctrine; although the law remains on the books, neither the House lawyers hired to defend DOMA, nor the DOJ, are concerned about its enforcement in bankruptcy courts.[258] Thus, in an effort to address due process concerns regarding morals-based legislation that is unpredictably enforced, courts should be able to declare DOMA "disused" as it applies to bankruptcy.

Marriage is our society's most celebrated representation of lifelong commitment to another person, and it is a legal possibility for more gay and lesbian Americans than ever before.[259] Although increasing numbers of states are amending their laws to grant marriage equality, DOMA continues to deny even legally married same-sex couples substantial legal and economic benefits.[260] As such, securing full marriage equality is an easy goal for proponents of gay rights to rally around, particularly while DOMA continues to present a stubborn obstacle standing in the way of full equality.

Equal access to bankruptcy remedies is unlikely to become the rallying cry for those in this country who believe that gays and lesbians should be permitted to make the same vows of commitment as their heterosexual peers. However, same-sex couples who vow to stick together "for richer or poorer" should be entitled to an even playing field vis-à-vis their heterosexual counterparts, particularly in times of financial distress. The doctrine of desuetude, although long absent from American jurisprudence, is uniquely equipped to provide this degree of equality.

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[257] Sunstein, *supra* note 146, at 50.

[258] *See supra* text accompanying notes 137-46.

[259] *N.Y. Legalizes Gay Marriage, supra* note 228.

[260] Hauser, *supra* note 42, at 196 (citing Jackie Gardina, *The Perfect Storm: Bankruptcy, Choice of Law, and Same-Sex Marriage*, 86 B.U. L. REV. 881, 889 (2006)).