

## LIFE AFTER DOMA

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### I. INTRODUCTION

During the 2008 presidential campaign, President Obama outlined his position on same-sex relationships. While making clear that he does not support same-sex marriage, he nonetheless suggested both that same-sex married couples should receive all of the benefits that different-sex married couples receive and that the Federal Defense of Marriage Act (DOMA)<sup>1</sup> should be repealed. Further, in separate orders, two Ninth Circuit Court of Appeals judges—one liberal and the other conservative—each recently suggested that one provision of the Defense of Marriage Act violated constitutional guarantees.<sup>2</sup> DOMA's days may well be numbered, whether as a result of its being struck down or repealed. Given that distinct possibility, the legal ramifications of a repeal or invalidation of either of DOMA's provisions should be discussed.

The Federal Defense of Marriage Act (DOMA) has two provisions. One makes clear that states are not required by the Full Faith and Credit Clause to recognize same-sex marriages validly celebrated in other states, and the other defines marriage for federal purposes as the union of one man and one woman. The two provisions are designed to do different things, and Congress could repeal one without repealing the other. By the same token, a court could strike down one of the provisions without addressing the constitutionality of the other.

To understand the effect of the repeal or invalidation of one or both DOMA provisions, it is necessary to understand what each does. While there is little or no dispute about some of the implications of the DOMA provisions, the Act was not drafted with as much care as might have been desired,<sup>3</sup> and there are certain ambiguities that have not been clarified by the courts.

Some possible interpretations and implications of the ambiguous provisions are included below. Ironically, on some interpretations of DOMA, the repeal or invalidation of the Act will have little or no effect on the power of states to refuse to recognize same-sex marriages validly celebrated elsewhere, although on other interpretations the repeal or invalidation of DOMA would

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1. 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006).

2. See *In re Golinski*, 587 F.3d 901 (9th Cir. 2009) (Chief Judge Alex Kozinski); See *In re Levenson*, 560 F.3d 1145 (9th Cir. 2009) (Judge Stephen Reinhardt).

3. Patrick J. Borchers, Baker v. General Motors: *Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147, 182 (1998) (discussing "DOMA's rather awkward phraseology").

have important effects. What is clear, however, is that the repeal or invalidation of one provision of DOMA will have important ramifications for some same-sex couples, and the repeal or invalidation of the other provision will have important implications for some of the state Defense of Marriage Acts that have been passed.

Part II of this essay discusses the two DOMA provisions, including what they may mean and some of the ways that they are constitutionally vulnerable. Part III discusses some of the effects and non-effects of the repeal or invalidation of either DOMA provision. The essay concludes that while many of the exaggerated claims of members of Congress about the need for DOMA will be laid to rest as groundless, the repeal or invalidation of DOMA will benefit LGBT families and society as a whole in a number of tangible and intangible ways.

## II. DOMA

The Defense of Marriage Act has one provision ostensibly affecting full faith and credit guarantees and another provision defining marriage for federal purposes. While the latter provision's meaning and reach seem relatively straightforward, the same cannot be said of the former, which is ambiguous in a very significant way. Each provision is constitutionally vulnerable, sometimes for the same reason and sometimes for different reasons, which provides support for the prediction that one or both will be repealed or struck down in the not-too-distant future.

### A. Why Was the Defense of Marriage Act Passed?

In 1993, the Hawaii Supreme Court decided *Baehr v. Lewin*,<sup>4</sup> which involved a challenge to the state's same-sex marriage ban. Rather than simply strike down the restriction, the court instead made clear that the ban should be examined in light of the strictest standard under the Hawaii Constitution, and then remanded the case for evaluation in light of that standard.<sup>5</sup>

Many who read the *Baehr* decision understood that the standard in light of which the ban would be examined by the lower court was so strict that it would be almost impossible for the state to defend the marriage ban successfully.<sup>6</sup> Absent an amendment to the state constitution or some other compromise,<sup>7</sup> the

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4. 852 P.2d 44 (Haw. 1993).

5. *Id.* at 68 ("On remand, in accordance with the 'strict scrutiny' standard, the burden will rest on Lewin to overcome the presumption that HRS § 572-1 is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgements of constitutional rights.").

6. See John DeWitt Gregory & Joanna L. Grossman, *The Legacy of Loving*, 51 HOW. L.J. 15, 28 (2007) ("[T]he Hawaii court concluded that the ban on same-sex marriage constituted a sex-based classification. This doomed it to almost certain invalidation since such classifications are reviewed with strict scrutiny under the Hawaii Constitution."); Jonathan Deitrich, Comment, *The Lessons of the Law: Same-Sex Marriage and Baehr v. Lewin*, 78 MARQ. L. REV. 121, 125 (1994) ("Since very few statutes can meet this standard, it is believed that Hawaii may become the first state to recognize same-sex marriages.").

7. Cf. Mark Strasser, *Unconstitutional? Don't Ask; If It Is, Don't Tell: On Deference, Rationality, and the Constitution*, 66 U. COLO. L. REV. 375, 458 n.462 (1995) ("[A] political compromise may be adopted so that partnership benefits will be extended but [Hawaii] will not recognize same-sex marriages.").

relevant question would be when rather than whether Hawaii would recognize same-sex marriages.<sup>8</sup>

The developments in Hawaii did not escape the attention of members of Congress.<sup>9</sup> The legal recognition of same-sex marriage would implicate two separate concerns: (1) same-sex couples living in other states might go to Hawaii, marry, and then return to their domiciles asking that their marriages be recognized,<sup>10</sup> and (2) federal benefits are accorded to those who are married according to state law and thus same-sex couples validly married under Hawaii law would be eligible to receive the same benefits that other couples receive.<sup>11</sup>

As matters turned out, the Hawaiian litigation did not result in the recognition of same-sex marriage.<sup>12</sup> By the time that the trial court had issued its opinion<sup>13</sup> and the Hawaii Supreme Court had considered the state's appeal of the trial court decision,<sup>14</sup> the Hawaii Constitution had been changed by referendum.<sup>15</sup> Even if same-sex marriage had been protected under the unamended state constitution, that document was changed to give the state legislature the power to reserve marriage for different-sex couples.<sup>16</sup>

Congress did not wait to see whether the Hawaii Constitution would be amended by referendum or whether the Hawaii Supreme Court would uphold the trial court's striking down the state's same-sex marriage ban. Instead, the Defense of Marriage Act was passed, one provision of which addressed full faith and credit matters and the other of which addressed which marriages would qualify for federal benefits.

8. Cf. 142 CONG. REC. H7277 (statement of Rep. Hoke) (July 11, 1996) ("The impending recognition of same-sex marriages in Hawaii is what is bringing it to the floor.").

9. *In re Kandu*, 315 B.R. 123, 132 (Bankr. W.D. Wash. 2004) ("Congress recognized that the Hawaii Supreme Court appeared to be on the verge of requiring the State of Hawaii to issue marriage licenses to same-sex couples.").

10. 142 CONG. REC. H7486 (statement of Rep. Buyer) (July 12, 1996) ("The full faith and credit of the Constitution would force States like Indiana to abide by [the recognition of same-sex marriage].").

11. *Id.* at H7484 (statement of Rep. Sensenbrenner) ("Because this United States Code does not contain a definition of marriage, a State's definition of marriage is regularly utilized in the implementation of Federal laws and regulations.").

12. Gregory & Grossman, *supra* note 6, at 28 ("Same-sex marriage never came to pass in Hawaii . . .").

13. See *Baehr v. Miike*, No. 91-1394-05, 1996 WL 694235, \*22 (Haw. Cir. Ct. 1996) ("The sex-based classification in *HRS* § 572-1, on its face and as applied, is unconstitutional and in violation of the equal protection clause of article I, section 5 of the Hawaii Constitution.").

14. See Dean Agnos, Comment, *Employee Benefits and the Paradox of Same-Sex Marriages and Equal Rights*, 8 U. PA. J. LAB. & EMP. L. 543, 548 (2006) ("[A] stay was granted pending appeal and before the appeal was heard, a referendum was passed by Hawaii voters which amended the state constitution to permit the legislature to prohibit same-sex marriage . . .").

15. James Askew, Note, *The Slippery Slope: The Vitality of Reynolds v. U.S. After Romer and Lawrence*, 12 CARDOZO J.L. & GENDER 627, 640 (2006) ("[T]he case was ultimately made moot by a referendum in 1998 which amended the Hawaii Constitution to permit the state legislature to restrict marriage to men and women only.").

16. Gregory & Grossman, *supra* note 6, at 28 ("[W]hile the case was pending on remand the constitution was amended to grant the legislature the power to ban same-sex marriage . . .").

## B. The Full Faith and Credit Provision

One section of the Defense of Marriage Act reads as follows:

No state, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.<sup>17</sup>

Initially, this statute appears relatively easy to understand. As far as full faith and credit guarantees are concerned,<sup>18</sup> a same-sex marriage validly celebrated in one jurisdiction may but need not be recognized in another. For example, at the time that this article is being written, five states plus the District of Columbia permit same-sex marriages to be celebrated locally— Connecticut, Massachusetts, New Hampshire, Iowa, and Vermont.<sup>19</sup> A state like New York, whose law does not permit such unions to be celebrated within the state, might nonetheless decide that its public policy does not preclude the recognition of such unions as long as they are validly celebrated in another state, e.g., Connecticut.<sup>20</sup> Thus, an individual domiciled in New York might go to Connecticut to marry a same-sex partner and then return home and have that relationship recognized, even though the relationship would not have been legally recognized if, instead, there had been a local ceremony with a clergyperson officiating. The difficulty would not have been that a clergyperson had officiated (the marriage would have been recognized had the members of the couple been of different sexes),<sup>21</sup> but that the couple had celebrated it locally rather than in a state that would accord the relationship legal recognition.<sup>22</sup>

At the very least, the DOMA full faith and credit provision permits, but does not require, a domicile to refuse to recognize its own domiciliaries' same-sex marriage even if validly celebrated in a sister state. Thus, when the Act says that a state is not required to give effect to a public record respecting a same-sex relationship that is treated as a marriage under the laws of that other state, the

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17. 28 U.S.C. § 1738C (2006).

18. A separate question is whether equal protection guarantees are implicated. *See infra* notes 102-06, 115-25 and accompanying text.

19. *See* Clement Tan, *Same-Sex Wedding Bells toll in D.C.*, L.A. TIMES, Mar. 10, 2010, at 11 (noting that five states plus the District of Columbia permit same-sex marriages to be celebrated)

20. *See* Lewis v. N.Y. State Dep't. of Civil Serv., 872 N.Y.S.2d 578, 583 (App. Div. 2009) (“[T]he Supreme Courts of our neighboring states of Connecticut and Massachusetts have defined marriage in their states to include the marriage of same-sex couples (*see* Kerrigan v. Commissioner of Pub. Health, 957 A.2d 407 (2008); Goodridge v. Department of Pub. Health, 798 N.E.2d 941 (2003)). Thus, regardless of how we define marriage in New York, we must apply the marriage recognition rule to determine whether we will recognize same-sex out-of-state marriages for the purpose of according their parties spousal benefits.”).

21. *See* N.Y. Dom. Rel. Law § 11(1) (McKinney 1999) (Marriage may be solemnized by a clergyperson or minister of any religion.).

22. Jeff Storey, *State Bar 'Refines' Position on Same-Sex Couples, Says Marriage Is the Only Possible Path to Equality*, 6/23/2009 N.Y. L.J. 1 (discussing state bar's report noting that “courts in New York have recognized these out-of- state marriages, resulting in the anomaly that same-sex couples ‘can be married in New York; they just can't get married in New York’”).

Act is saying that New York will not be forced to recognize a Connecticut public record establishing that a particular New York same-sex couple had married. So, too, when the Act says that a state is not required to give effect to a public act respecting a relationship between persons of the same sex that is treated as a marriage, the Act is saying that New York is not required to give effect to a same-sex marriage celebrated by New Yorkers in accord with Connecticut law. However, it does not seem plausible to give such a limited interpretation when the Act says that a state is not required to give effect to a judicial proceeding respecting a same-sex relationship that is treated as a marriage under a different state's law.

As an initial matter, it is not immediately clear how to interpret the provision regarding the effects of judicial proceedings at least in part because it might simply have been meant to include certain proceedings involving a judge—for example, a ceremony in which a justice of the peace marries two individuals might qualify as such a proceeding.<sup>23</sup> Or, the judicial proceedings clause might have been adopted to cover the following scenario: Alex and Brian are domiciled in Pennsylvania. They travel to Connecticut, marry, and then obtain a declaratory judgment in Connecticut that they are indeed married. They then seek to have that declaratory judgment given effect in Pennsylvania, notwithstanding that state's announced refusal to recognize such marriages.<sup>24</sup> By permitting Pennsylvania to refuse to give effect to the Connecticut declaratory judgment,<sup>25</sup> Pennsylvania would not be forced to recognize its domiciliaries' same-sex marriage, judgment affirming its validity notwithstanding.<sup>26</sup>

Even assuming that it would be possible to get a Connecticut declaratory judgment in these circumstances,<sup>27</sup> DOMA's judicial proceedings language is not well-suited to being limited to cases involving a marriage by a justice of the peace or to cases in which a declaratory judgment affirming the existence of a marriage had been issued. There is no language in the Act limiting the kinds of

23. Cf. *People ex rel. Mitts v. Ham*, 206 Ill. App. 543, 546 (1917) ("The relator introduced in evidence the statutes of the State of Missouri concerning marriage and also a certified copy of the marriage proceedings, including the license, the certificate of the marriage issued by the justice of the peace and a certificate of the officials of the State of Missouri showing the official character of the justice of the peace."); 142 CONG. REC. H7480-81 (statement of Rep. Mink) (July 12, 1996) (I would like to point out that marriage is not only a religious ceremony. A marriage is also a ceremony presided over by a judge or a justice of the peace.").

24. See 23 PA. CONS. STAT. ANN. § 1704 (West 2001) ("A marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth.").

25. Emily J. Sack, *Domestic Violence Across State Lines: The Full Faith and Credit Clause, Congressional Power, and Interstate Enforcement of Protection Orders*, 98 NW. U. L. REV. 827, 888 (2004) ("[T]here was concern that same-sex partners married in Hawaii would then obtain declaratory judgments of their marriages so that other states could not invoke the 'public policy exception.' DOMA went even further to extend the option to deny full faith and credit to these judgments in addition to the marriages themselves.").

26. 150 CONG. REC. H1327 (statement of Rep. Stearns) (Mar. 23, 2004) ("We clarified the full faith and credit clause to mean that States do not need to recognize same-sex marriages performed and validated in other States.").

27. For the conditions under which a declaratory judgment could be sought, see STATE OF CONN. JUDICIAL BRANCH, 2009 CONNECTICUT PRACTICE BOOK, § 17-55 (2009).

judgments involving same-sex marriages that need not be given effect in other states, and the provision might be taken to mean that one state would not have to give effect to a divorce of a same-sex couple that had been issued by a court in a different state.

The non-recognition of divorce judgments might offer individuals ways in which they could evade their court-imposed responsibilities.<sup>28</sup> Suppose, for example, that Carl and David divorce in Massachusetts, and the court awards Carl both property and spousal support. On one interpretation of the full faith and credit provision, David could avoid his court-imposed responsibilities simply by moving to a state that refuses to recognize the marriage (or divorce) of that couple.

Consider, for example, the following Georgia constitutional provision:

This state shall not give effect to any public act, record, or judicial proceeding of any other state or jurisdiction respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state or jurisdiction. The courts of this state shall have no jurisdiction to grant a divorce or separate maintenance with respect to any such relationship or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such relationship.<sup>29</sup>

Presumably, this means that if David moved to Atlanta and Carl sought to enforce the Massachusetts judgment, the Georgia courts would be precluded from considering or enforcing any of the rights arising from the Massachusetts decree. Needless to say, such a refusal might result in great unfairness. Carl might have made both financial and non-financial contributions to the marriage, and the just distribution of the marital assets (as determined by the Massachusetts court) would not occur because David had evaded his obligations by moving to Georgia.

Yet, the full faith and credit provision need not be interpreted as authorizing a state to refuse to enforce a claim for money damages arising as a result of the termination of a same-sex marriage. To see why this is so, it will be helpful to consider both what the Act says and what it does not say. The provision specifies that states are not required "to give effect to any public act, record, or judicial proceeding of any other State [involving a same-sex marriage] . . . or a right or claim arising from such *relationship*."<sup>30</sup> Apparently, the drafters were not confident that the provision exempting acts, records, and judicial proceedings from full faith and credit guarantees would be understood to include associated rights and claims, so they also expressly stated that rights or claims arising from such a relationship would also not have to be given full faith and credit. Thus, states would not be required to give effect to the relationship itself or to any rights or claims arising from it.

What rights might the drafters have had in mind? While they did not elaborate, at least two come to mind. Individuals who are married enjoy a

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28. For a suggestion as to how it might be construed so as not to give rise to this result, see notes 30-40 and accompanying text *infra*.

29. GA. CONST. art. 1, § 4, para. I, subsec. (b).

30. 28 U.S.C. § 1738C (2006) (emphasis added).

variety of rights including, for example, a presumption of parenthood of a child born into the relationship.<sup>31</sup> The drafters might have wanted to make clear that a child born into a same-sex union would not be presumed to be a child of each of the parties.<sup>32</sup> Or, the drafters might have believed that a married individual would be protected from prosecution for engaging in consensual sexual relations with his or her spouse.<sup>33</sup> Given that DOMA was passed and signed in 1996<sup>34</sup> and state laws criminalizing same-sex relations were not held unconstitutional until 2003 in *Lawrence v. Texas*,<sup>35</sup> it might have been thought that, absent congressional action, same-sex marriage would provide a way whereby individuals with a same-sex orientation would be immunized from prosecution for engaging in sexual relations with their partners.

The point here is not to list all of the rights that are associated with marriage,<sup>36</sup> but merely to point out the provision's lack of parallelism with respect to the ways that relationships and judicial proceedings are treated. With respect to the latter, the Act did not say that neither the judicial proceeding itself nor any rights arising from such a proceeding would be entitled to full faith and credit, but simply said that a judicial proceeding itself would not need to be credited.<sup>37</sup>

Why should a state be required to enforce rights or claims arising from a proceeding without recognizing the proceeding itself? Arguably, recognizing the divorce proceeding would recognize the marital union itself, whereas simply enforcing a claim for money damages need not involve a recognition much less an endorsement of a same-sex relationship. Money damages are awarded for a variety of reasons, and states might not be thought to be making any kind of broad policy statement simply by requiring an individual to pay an existing debt. The drafters might have been thinking that states would now be authorized to refuse to give effect to the proceeding (because giving effect to

31. See, e.g., ALA. CODE § 26-17-204 (a) (LexisNexis 2009); CAL. FAM. CODE § 7540 (West 2004); COLO. REV. STAT. § 19-4-105 (1) (2008); 750 ILL. COMP. STAT. ANN. 45/5 (West 2009); IND. CODE ANN. § 31-14-7-1 (LexisNexis 2007); IOWA CODE § 598.31 (2001); KAN. STAT. ANN. § 38-1114 (a) (2000); KY. REV. STAT. ANN. § 406.011 (West 2006); LA. CIV. CODE ANN. art. 185 (Supp. 2010); MASS. ANN. LAWS ch. 209C, § 6 (LexisNexis 2003); MINN. STAT. ANN. § 257.55 (West 2007); MO. ANN. STAT. § 210.822 (2004); MONT. CODE ANN. § 40-6-105 (2009); N.J. STAT. ANN. § 9:17-43 (West 2002); OR. REV. STAT. § 109.070 (1) (2009); TENN. CODE ANN. § 36-2-304(a) (2005); TEX. FAM. CODE ANN. § 160.204 (a) (Vernon 2008); WASH. REV. CODE ANN. § 26.26.116 (1) (West 2005); WIS. STAT. ANN. § 891.41 (1)(a) (West Supp. 2009); WYO. STAT. ANN. § 14-2-504 (a) (2009).

32. For a discussion of how presumptions of parenthood might be treated in other states where the parents are of the same sex, see generally Mark Strasser, *When Is a Parent Not a Parent? On DOMA, Civil Unions, and Presumptions of Parenthood*, 23 CARDOZO L. REV. 299, 299-324 (2001).

33. Cf. *Dean v. District of Columbia*, 653 A.2d 307, 344 (D.C. 1995) (noting that husband and wife have a protected right to engage in consensual sodomy).

34. Mark Strasser, *Loving the Romer out for Baehr: On Acts in Defense of Marriage and the Constitution*, 58 U. PITT. L. REV. 279, 279 (1997) ("The Defense of Marriage Act (DOMA) [was] signed into law on September 21, 1996 . . .").

35. 539 U.S. 558 (2003).

36. Cf. Caleb W. Langston, Comment, *Fundamental Right, Fundamentally Wronged: Oregon's Unconstitutional Stand on Same-Sex Marriage*, 84 OR. L. REV. 861, 867 n.22 (2005) ("In a report issued in January 2004, the United States General Accounting Office (GAO) identified 1138 federal statutory provisions that confer benefits, rights, and privileges conditioned upon marital status.").

37. See 28 U.S.C. § 1738C (2006) ("to give effect to any . . . judicial proceeding")

such a proceeding would involve recognizing a relationship that allegedly violated an important public policy of the state), but that states would not be authorized to refuse to enforce debts (which, after all, might have arisen in any number of circumstances).<sup>38</sup>

It might be argued that the language referring to rights was included to make crystal clear that no rights arising from a same-sex relationship would have to be recognized.<sup>39</sup> Yet, such an explanation raises still other issues. Even had that sentence not been included, it would have been assumed that rights arising by virtue of a marriage in one state would be subject to a public policy exception in a different state, precisely because those rights would be viewed as arising by virtue of that state's laws.<sup>40</sup> However, the same assumption would not have been made about rights arising from a judgment, since the existing law had been that rights reduced to judgment were enforceable throughout the country, public policy of a particular state to the contrary notwithstanding.<sup>41</sup> Thus, one would have expected the Act to make crystal clear that rights arising from judgments did not have to be accorded full faith and credit rather than that rights arising from a sister state's laws did not have to be given effect. By specifying that the rights arising by virtue of the relationship would not have to be credited but not saying the same about rights reduced to judgment, the Act implicitly reinforces existing law rather than supplants it.

One issue yet to be resolved by the courts involves what this provision was intended to do. Offering a definitive construction of legislative intent on this matter is quite difficult if only because members of Congress did not seem to appreciate the implications of modifying the credit due to judgments. First, some seemed to believe that the DOMA full faith and credit provision was simply reflecting current law,<sup>42</sup> even though then-existing law required states to recognize divorce judgments validly issued in other states.<sup>43</sup> Other members

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38. Cf. Borchers, *supra* note 3, at 182 (1998) ("I, for one, would not construe DOMA to affect the obligation of courts to recognize money judgments simply because the existence of a same-sex marriage played into the underlying theory that led to the judgment.").

39. See, e.g., 142 CONG. REC. H7277 (statement of Rep. Hoke) (July 11, 1996) ("[W]hat we are going to do is we are going to make it crystal clear that a State will not have to recognize a same-gender marriage if it chooses not to.").

40. See *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232-33 (1998) ("The Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'" (citing *Pac. Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501 (1939)).

41. *Id.* at 233 ("Regarding judgments, however, the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land.").

42. See 142 CONG. REC. S10, 100, S10, 103 (statement of Sen. Nickles) (Sept. 10, 1996) ("There is nothing earth-shattering here. No breaking of new ground. No setting of new precedents. Indeed, there [sic] provisions simply reaffirm what is already known, what is already in place."); *Id.* at H7482 (statement of Rep. Frank) (July 12, 1996) ("Every single sponsor of this bill believes as I do that the States already have the right that this bill gives them.").

43. *Williams v. North Carolina*, 317 U.S. 287, 303 (1942) ("So, when a court of one state acting in accord with the requirements of procedural due process alters the marital status of one domiciled in that state by granting him a divorce from his absent spouse, we cannot say its decree should be excepted from the full faith and credit clause merely because its enforcement or recognition in another state would conflict with the policy of the latter.").

seemed to understand that this provision might be changing the current system,<sup>44</sup> although they did not explore the kinds of changes that they were creating. The focus for most members of Congress seemed to be on whether same-sex marriages validly celebrated in Hawaii would have to be recognized in the other states rather than on whether divorce judgments would have to be recognized.<sup>45</sup>

One ironic implication of this provision is that same-sex divorces might be subject to non-recognition even in states not having any objections to same-sex marriage. Consider a state that recognizes same-sex marriage but strongly disapproves of divorce and limits the conditions under which individuals can terminate their marriages. That state's law specifying the conditions under which marriages could be ended would of course apply to all local married couples, whether composed of individuals of the same sex or of different sexes. The complication posed by DOMA is that the Act seems to authorize a state to refuse to recognize a same-sex divorce granted in another jurisdiction if that latter jurisdiction made it too simple to secure a divorce.

Suppose, for example, that Massachusetts changes its divorce law to reflect Maryland's, which permits couples to divorce when they have been living separate and apart for at least a year.<sup>46</sup> Vermont's law is less stringent, since it permits couples to divorce if they have been living separate and apart for six months.<sup>47</sup>

44. See 142 CONG. REC. H7492 (statement of Rep. Skaggs) (July 12, 1996) ("Perhaps, the States don't have quite all the powers this bill would give them, because it also apparently would grant States the power to ignore certain final judicial proceedings concluded in another State. The public-policy exception has not previously been construed to go that far."); *id.* at H7274 (statement of Rep. Campbell) (July 11, 1996) ("Congress may under the clause describe a certain type of divorce and say it shall be granted recognition throughout the Union and that no other kind shall.").

45. See, e.g., *id.* at H7277 (statement of Rep. Hoke) (July 11, 1996) ("For example, if two individuals of the same gender obtain a marriage license in Hawaii and then move to Ohio, the State of Ohio would have to honor that marriage license. The people of Ohio would have no say in the matter."); *id.* at S12, 015 (Sen. Abraham) (Sept. 30, 1996) ("DOMA deals only with the following issue: If State A decides to allow people of the same sex to marry, does Federal law require State B to treat these individuals as married as well if they decide to move to State B? DOMA answers that question in the negative: No, Federal law does not require State B to treat them as married just because State A chooses to do so.").

46. See MD. CODE ANN., FAM. LAW § 7-103 (2006):

(a) The court may decree an absolute divorce on the following grounds:

...

(3) voluntary separation, if:

(i) the parties voluntarily have lived separate and apart without cohabitation for 12 months without interruption before the filing of the application for divorce; and

(ii) there is no reasonable expectation of reconciliation;

...

(5) 2-year separation, when the parties have lived separate and apart without cohabitation for 2 years without interruption before the filing of the application for divorce . . . .

47. VT. STAT. ANN. tit. 15 § 551 (2002) ("A divorce from the bond of matrimony may be decreed . . . (7) When a married person has lived apart from his or her spouse for six consecutive months and the court finds that the resumption of marital relations is not reasonably probable.").

Consider the hypothetical couple, Ellen and Frieda, who have married in Vermont but have decided to divorce. They live separate and apart for the required six months, and then dissolve their union in accord with local law. Ellen decides to move to Massachusetts to start a new life. On its face, DOMA would permit Massachusetts to refuse to recognize the Vermont divorce. The state's rationale would not be that it disapproves of same-sex marriages but that it disapproves of permitting individuals to divorce when they have only been living apart for six months.

The state would not be trying to punish same-sex couples. On the contrary, were the state permitted to do so, it would refuse to recognize any divorce granted when the couple had only been living apart for six months. However, the state is precluded by the Full Faith and Credit Clause from refusing to credit divorce judgments validly issued in other states, unless the members of the couple happen to be of the same sex.

The DOMA full faith and credit provision is not a federalism provision that simply accords states the power to decide which judgments are contrary to the strong public policy of the state.<sup>48</sup> Rather, it picks out a subset of judgments—those involving same-sex couples—and makes only those subject to non-recognition in sister states. Rather than promote states' rights, the provision is simply a vehicle by which members of the LGBT community can be subjected to unique burdens.

### C. Is the Full Faith and Credit Provision Constitutional?

A separate issue is whether Congress has the power to pass this DOMA provision. While there is language in the Constitution authorizing Congress to pass laws affecting full faith and credit, that language has yet to be authoritatively construed. Article IV, section 1, of the United States Constitution reads:

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.<sup>49</sup>

There has been some debate whether the second sentence gives Congress the power to increase or decrease the credit to be given to sister state acts, records, and proceedings or whether, instead, it only gives Congress the power to increase the credit to be given. For example, Professor Tribe suggests that Congress does not have the power to decrease the credit due to judgments of sister states,<sup>50</sup> although the Court has not yet fully discussed much less adopted that position.

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48. See 142 CONG. REC. S10, 110 (Sept. 10, 1996) (statement of Sen. Byrd) (DOMA "would protect federalism interests and State sovereignty . . ."); Lynn D. Wardle, *Williams v. North Carolina, Divorce Recognition, and Same-Sex Marriage Recognition*, 32 CREIGHTON L. REV. 187, 220 (1998) ("DOMA protects the crucial balance of federalism in our constitutional system . . .").

49. U.S. Const. art. IV, § 1.

50. See 142 CONG. REC. S5931-33 (statement of Sen. Kennedy) (introducing a letter from Laurence Tribe, which read in relevant part:

The reason that the Court has not yet had to directly address the contours of Congress's power under the Full Faith and Credit Clause is that Congress passed legislation in 1790<sup>51</sup> establishing that the judgments issued in one state would have "such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken."<sup>52</sup> Often, when discussing the demands imposed by the Full Faith and Credit Clause, the Court considers the constitutional and statutory text in tandem, and does not distinguish between the demands imposed by the Constitution and the demands imposed by the congressional statute. Thus, in *Magnolia Petroleum Company v. Hunt*,<sup>53</sup> the Court discussed "the command of the Constitution and the statute."<sup>54</sup> The Court explained that it was not "aware of any considerations of local policy or law which could rightly be deemed to impair the force and effect which the full faith and credit clause and the Act of Congress require to be given to . . . a judgment outside the state of its rendition."<sup>55</sup> Even when discussing the "unifying force" of the Clause, which "altered the status of the several states as independent foreign sovereignties, each free to ignore rights and obligations created under the laws or established by the judicial proceedings of the others, by making each an integral part of a single nation, in which rights judicially established in any part are given nation-wide application,"<sup>56</sup> the Court did not make clear whether the Clause itself had this effect or, instead, whether the Clause and the Act of Congress together had this effect.

The Court has explained:

The faith and credit required to be given to judgments does not depend on the Constitution alone. Article 4, § 1, not only commands that "full Faith and Credit shall be given" . . . but it adds "Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." And Congress has exercised this power . . . and specifically directs that judgments "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."<sup>57</sup>

The Court had never made clear whether Congress would have been within its constitutional power if affording less faith and credit to judgments than it did in the 1790 Act, although the Court has hinted that Congress could not have lessened the obligation to enforce a judgment from a sister state. For

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The basic point is a simple one: The Full Faith and Credit Clause authorizes Congress to enforce the clause's self-executing requirements insofar as judicial enforcement alone, as overseen by the Supreme Court, might reasonably be deemed insufficient. But the Full Faith and Credit Clause confers upon Congress no power to gut its self-executing requirements, either piecemeal or all at once.

51. See *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908) (discussing "the act of May 26, 1790, chap. 11, 1 Stat. at L. 122 (REV. STAT. § 905, U. S. COMP. STAT. 1901, p. 677)").

52. *Id.* (quoting REV. STAT. § 905, U. S. COMP. STAT. 1901, p. 677).

53. 320 U.S. 430 (1943).

54. *Id.* at 438.

55. *Id.* (citing *Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 277-78 (1935)).

56. *Id.* at 439 (citing *M.E. White Co.*, 296 U.S. at 276-77).

57. *M.E. White Co.*, 296 U.S. at 273.

example, the Court noted in *Davis v. Davis*<sup>58</sup> that “Congress [had] rightly interpreted the clause to mean not some, but full credit.”<sup>59</sup> Perhaps that means that Congress would have been exceeding its power if lessening the credit due to judgments.

After noting in *Williams v. North Carolina*<sup>60</sup> that there was no public exception that would permit a state not to give full faith and credit to a divorce judgment from another state,<sup>61</sup> the Supreme Court expressly refused to address whether Congress had the power to create such an exception.<sup>62</sup> Nonetheless, the Court made clear that the creation of such an exception would undermine the purposes of the Full Faith and Credit Clause “to a substantial degree,”<sup>63</sup> especially considering “the considerable interests involved and the substantial and far-reaching effects which the allowance of an exception would have on innocent persons.”<sup>64</sup> Further, the Court has noted that “while Congress clearly has the power to increase the measure of faith and credit that a State must accord to the laws or judgments of another State, there is at least some question whether Congress may cut back on the measure of faith and credit required by a decision of this Court.”<sup>65</sup> On the other hand, Justices have sometimes suggested in dicta that Congress has broad powers under the Full Faith and Credit Clause.<sup>66</sup>

Whether Congress had the power to enact the DOMA full faith and credit provision has not been extensively analyzed in the courts. For example, in *Wilson v. Ake*,<sup>67</sup> a Florida district court rejected the claim that “Congress may only regulate what effect a law may have, it may not dictate that the law has no effect at all”<sup>68</sup> by suggesting that “Congress’ actions in adopting DOMA are exactly what the Framers envisioned when they created the Full Faith and Credit Clause.”<sup>69</sup> Regrettably, the *Wilson* court did not even consider the

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58. 305 U.S. 32 (1938).

59. *Id.* at 39-40 (citing *Haddock v. Haddock*, 201 U.S. 562, 567 (1906)) (emphasis added).

60. 317 U.S. 287 (1942).

61. *Id.* at 303.

62. *Id.* (“Whether Congress has the power to create exceptions (see *Yarborough v. Yarborough*, 290 U.S. 202, 215, 54 S.Ct. 181, 186, 78 L.Ed. 269, 90 A.L.R. 924, note 2, dissenting opinion) is a question on which we express no view. It is sufficient here to note that Congress in its sweeping requirement that judgments of the courts of one state be given full faith and credit in the courts of another has not done so.”)

63. *Id.* at 304.

64. *Id.* at 303-04.

65. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 n.18 (1980) (citing Paul A. Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1229-30 (1946)).

66. See *Sherrer v. Sherrer*, 334 U.S. 343, 366 (1948) (Frankfurter, J., dissenting) (“The answer to so tangled a problem as that of our conflicting divorce laws is not to be achieved by the simple judicial resources of either/or—this decree is good and must be respected, that one is bad and may be disregarded. We cannot draw on the available power for social invention afforded by the Constitution for dealing adequately with the problem, because the power belongs to the Congress and not to the Court.”); *Yarborough v. Yarborough*, 290 U.S. 202, 215 n.2 (1933) (Stone, J., dissenting) (“The mandatory force of the full faith and credit clause as defined by this Court may be, in some degree not yet fully defined, expanded or contracted by Congress.”) (emphasis added).

67. 354 F. Supp. 2d 1298 (M.D. Fla. 2005).

68. *Id.* at 1303.

69. *Id.*

prevailing jurisprudence in this area, apparently unaware of the differing views expressed by members of the Court regarding whether Congress had the power to reduce the credit to be given to other states' judgments.<sup>70</sup>

At least one reason that this issue has not been analyzed thoroughly is that there have been relatively few cases challenging DOMA. Because no state recognized same-sex marriage until 2003,<sup>71</sup> individuals did not even have standing to make a challenge until fairly recently.<sup>72</sup> Further, just because some states recognize same-sex marriage does not give individuals standing to challenge DOMA unless they themselves have married in accord with local law.<sup>73</sup> For example, *Smelt v. Orange County*<sup>74</sup> involved a constitutional challenge to DOMA by Arthur Smelt and Christopher Hammer.<sup>75</sup> While the two had a legal relationship with each other in that they were domestic partners under California law,<sup>76</sup> they were not married under California or any other state's law.<sup>77</sup> For that reason, the Ninth Circuit found that they lacked standing.<sup>78</sup>

Were the Court to hear a challenge to the DOMA full faith and credit provision, it might take the opportunity to limit the power of Congress to decrease the credit due judgments. Indeed, in a different respect, the Court has taken the opportunity in the recent past to bolster the robustness of full faith and credit guarantees.<sup>79</sup>

At one point, members of the Court hinted that there might be a public policy exception to full faith and credit guarantees regarding the enforcement of judgments. For example, after noting that as a general matter final judgments are entitled to full faith and credit,<sup>80</sup> the *Williams* Court suggested that there are exceptions to this rule,<sup>81</sup> although the "actual exceptions have been few and far between."<sup>82</sup> Thus, one would have inferred from *Williams* that there existed some, albeit very few, exceptions to the rule that final judgments must be respected by sister states.<sup>83</sup> However, in *Baker v. General Motors*,<sup>84</sup> the Court

70. *See id.* In a rather conclusory fashion, the court announced, "Congress' actions in adopting DOMA are exactly what the Framers envisioned when they created the Full Faith and Credit Clause."

71. *See Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (striking down Massachusetts same-sex marriage ban).

72. 150 CONG. REC. H1328 (Mar. 23, 2004) (statement of Rep. Stearns) ("But in order to challenge DOMA, plaintiffs need standing to sue. That was accomplished a month ago when the Massachusetts Supreme Judicial Court decision set the stage for a constitutional challenge.")

73. *See Smelt v. County of Orange*, 447 F.3d 673, 683 (9th Cir. 2006).

74. *Id.*

75. *See id.* at 677.

76. *Id.* at 684.

77. *Id.* at 683 ("Smelt and Hammer are not even married under any state law, or, for that matter, under the law of any foreign country.")

78. *Id.*

79. *See infra* notes 77-82 and accompanying text.

80. *See Williams*, 317 U.S. at 294.

81. *Id.* at 294 ("Some exceptions have been engrafted on the rule.")

82. *Id.* at 295.

83. *See Vanderbilt v. Vanderbilt*, 354 U.S. 416, 426 (1957) (Frankfurter, J., dissenting) ("It is true that the commands of the Full Faith and Credit Clause are not inexorable in the sense that

made clear that there was no public policy exception permitting a state to refuse to credit a final judgment from another state.<sup>85</sup> So, too, in a case involving DOMA, the Court might take the opportunity to clear up some of the lingering doubts regarding Congress' power to decrease the credit due judgments.

Perhaps the Court will continue its established practice of refusing to face that question head-on,<sup>86</sup> instead deciding the constitutionality of the provision on other grounds. For example, the Court might suggest that whether or not Congress had the power to make general laws prescribing the effect that judgments will have in sister states, it cannot pick out a particular sub-group and make their divorce judgments, but no one else's, subject to non-recognition.<sup>87</sup>

#### D. Defining Marriage for Federal Purposes

The DOMA provision defining marriage for federal purposes reads:

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.<sup>88</sup>

This provision does not seem as open to multiple interpretations as is the full faith and credit provision.<sup>89</sup> Further, the provision might seem less constitutionally vulnerable, because it is only attempting to provide clarification of what marriage means for federal purposes. Nonetheless, this section has a few constitutional difficulties.

As an initial matter, the breadth of this provision must be appreciated, since it applies whenever marital status for federal purposes is at issue. Thus, while this provision affects who will receive benefits and implicates federal spending,<sup>90</sup> the provision is by no means limited to spending.<sup>91</sup> For example,

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exceptional circumstances may relieve a State from giving full faith and credit to the judgment of a sister State because 'obnoxious' to an overriding policy of its own.").

84. 522 U.S. 222 (1998).

85. *Id.* at 233 ("Regarding judgments, however, the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land.").

86. See *supra* notes 58-64 (discussing the Court's contradictory signals on this matter).

87. See Strasser, *supra* note 34, at 299 (suggesting that at issue is whether Congress "has the power to make a full faith and credit exception for a particular *subtype* of judgment").

88. 1 U.S.C. § 7 (2006).

89. See Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1673 (2007) ("[N]ow that DOMA has been enacted, the federal stance on same-sex marriage is perfectly clear.").

90. See 142 CONG. REC. H7276 -77 (July 11, 1996) (statement of Rep. Nadler) ("What this bill says in the second clause is that if Colorado or New York or Hawaii or New Jersey or any State chooses whether by judicial fiat or by action of its legislature or by public referendum of its people to recognize same sex marriages, the Federal Government will not recognize those marriages for purposes of Social Security or Veterans' Administration benefits or pensions or tax benefits or anything else.").

suppose that an American national marries a Canadian national, whether in Toronto or in Boston. If the couple is composed of individuals of the same sex, the United States government will not recognize the marriage,<sup>92</sup> whereas the marriage would have been recognized had the couple been composed of individuals of different sexes.<sup>93</sup> This differential treatment might have very important implications should the couple wish to reside in the United States.<sup>94</sup>

Second, it must be understood just how unusual it is for Congress to attempt to define family,<sup>95</sup> given that family law is a “peculiarly state province.”<sup>96</sup> That said, Congress can and does pass legislation implicating domestic relations,<sup>97</sup> although Congress must bear a special burden when doing so. In *Rose v. Rose*,<sup>98</sup> the Court explained, “[b]efore a state law governing domestic relations will be overridden, it ‘must do “major damage” to “clear and substantial” federal interests.’”<sup>99</sup>

What are the clear and substantial federal interests at stake? While money might be saved by refusing to accord federal benefits to same-sex couples, it is not at all clear how much that would be.<sup>100</sup> Further, the Court has already suggested that saving money may well not suffice as a justification for supplanting state law with federal law in the domestic relations context. For example, after noting in *United States v. Yazell*<sup>101</sup> that “there is always a federal interest to collect moneys which the Government lends,”<sup>102</sup> the Court nonetheless rejected that a substantial interest was implicated that would justify supplanting state law with federal law. The *Yazell* Court explained that both

91. See CONG. REC. H7273 (July 11, 1996) (statement of Rep. Schroeder) (“What we are saying today is even if States vote unanimously to allow this type of marriage, the Federal Government will not recognize it.”). See also Stephen D. Sugarman, *What Is a “Family”? Conflicting Messages from Our Public Programs*, 42 FAM. L.Q. 231, 253 n. 85 (2008) (“DOMA’s definition of “marriage” as a legal union between *one man and one woman* applies to all acts of Congress, including federal immigration law.”).

92. Cori K. Garland, Note, *Say “I Do”: The Judicial Duty to Heighten Constitutional Scrutiny of Immigration Policies Affecting Same-Sex Binational Couples*, 84 IND. L.J. 689, 702 (2009) (“Because DOMA refuses to recognize same-sex marriage or any union of a same-sex couple, spousal immigration benefits cannot be conferred on same-sex binational couples.”).

93. *Id.* at 691 (“One legal entitlement of marriage is the relative ease with which a heterosexual binational couple may acquire a visa for the non-citizen spouse.”).

94. *Id.* (“Same-sex binational couples face tremendous obstacles to maintaining their loving, committed relationships in the United States.”).

95. See *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956) (“[T]here is no federal law of domestic relations . . .”).

96. *United States v. Yazell*, 382 U.S. 341, 353 (1966).

97. *Mansell v. Mansell*, 490 U.S. 581, 587 (1989) (“Congress has directly and specifically legislated in the area of domestic relations.”).

98. 481 U.S. 619 (1987).

99. *Id.* at 625 (citing *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979)).

100. Cf. Maria A. La Vita, Note, *When the Honeymoon Is Over: How a Federal Court’s Denial of the Spousal Privilege to a Legally Married Same-Sex Couple Can Result in the Incarceration of a Spouse Who Refuses to Adversely Testify*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 243, 279 (2007) (“In the Congressional hearings prior to the enactment of DOMA, Senator Byrd admitted that he did not have any reliable estimates of how much money it would cost the federal government if federal benefits were extended to same-sex marriages.”).

101. 382 U.S. 341 (1966).

102. *Id.* at 348.

“theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements.”<sup>103</sup>

Members of Congress were concerned that additional federal monies might have to be spent were same-sex marriages recognized for federal purposes; however, they did not focus on how much that would involve but, instead, on who would receive the monies. Representative Barr explained that “if you do not believe it is fiscally responsible to throw open the doors of the U.S. Treasury to be raided by the homosexual movement, then the choice is very clear.”<sup>104</sup> Needless to say, a spouse hoping to receive Social Security benefits so that he or she would have enough to live on would be unlikely to be funding the “homosexual movement.” Indeed, it is hard to read a comment like this without suspecting that animus played some role in the Act’s adoption.<sup>105</sup>

The Court has already struck down legislation that was designed to prevent a disfavored group from receiving federal benefits on rational basis grounds.<sup>106</sup> The *Moreno* Court explained, “[f]or if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”<sup>107</sup> There, Congress was trying to make sure that hippies did not benefit from a federal program.<sup>108</sup>

Arguably, this DOMA provision is unconstitutional on rational basis grounds—it should not be difficult to show that it was adopted out of animus,<sup>109</sup> since members of Congress were not shy about vilifying members of the LGBT community.<sup>110</sup> But the point here is that the traditional test to determine whether

103. *Id.* at 352.

104. 142 CONG. REC. H7488 (July 12, 1996) (statement of Rep. Barr) (emphasis added).

105. *Cf. In re Golinski*, 587 F.3d 901, 903 (9th Cir. 2009) (“Whether DOMA’s sweeping classification has a proper legislative end, or whether it reflects no more than an invidious design to stigmatize and disadvantage same-sex couples, is a hard question.”).

106. *See* U.S. Dep’t of Agric. v. *Moreno*, 413 U.S. 528, 534 (1973) (“[I]f it is to be sustained, the challenged classification must rationally further some legitimate governmental interest . . . . The challenged classification clearly cannot be sustained . . .”).

107. *Id.*

108. *Id.* (“The legislative history that does exist, however, indicates that that amendment was intended to prevent so-called ‘hippies’ and ‘hippie communes’ from participating in the food stamp program.”).

109. *See In re Levenson*, 560 F.3d 1145, 1150 (9th Cir. 2009) (“[T]he denial of federal benefits to same-sex spouses cannot be justified as an expression of the government’s disapproval of homosexuality, preference for heterosexuality, or desire to discourage gay marriage.”).

110. 142 CONG. REC. H7276 (July 11, 1996) (statement of Rep. Johnston) (“Demonizing Communist countries, welfare mothers, or immigrants is now old news. So the demon du jour is gays.”); *Id.* at H7491 (July 12, 1996) (statement of Rep. Canady) (“It is an attempt to evade the basic question of whether the law of this country should treat homosexual relationships as morally equivalent to heterosexual relationships. That is what is at stake here.”); *See also id.* (statement of Rep. Studds) (“Words have been thrown around. . . . promiscuity, perversion, hedonism, narcissism, . . . depravity and sin.”); *id.* at H7275 (July 11, 1996) (statement of Rep. Barr) (“We have a basic institution, an institution basic not only to this country’s foundation and to its survival but to every Western civilization, under direct assault by homosexual extremists all across this country, not just in Hawaii.”); *id.* (statement of Rep. Barr) (“It is an issue that is being forced on us directly by assault by the homosexual extremists to attack the institution of marriage.”); *id.* at H7497 (July 12, 1996) (statement of Rep. Collins) (“Mr. Chairman, the so-called Defense of Marriage Act should really be called the Republican Offense on People Who are Different Act because it is nothing more than

Congress may supplant state domestic relations law is not merely the rational basis test—on the contrary, the federal government has a heavier burden to shoulder.<sup>111</sup>

Some members of Congress seemed to believe that DOMA was necessary to protect the very institution of marriage.<sup>112</sup> First, it should not be necessary to point out that the institution of marriage is alive and well in Massachusetts, notwithstanding that state's recognition of same-sex marriage.<sup>113</sup> Second, it might be noted that the DOMA provision at issue does not prevent states from recognizing same-sex marriages. Nor does it prevent states from according benefits to such marriages, so that same-sex couples would have both symbolic and practical reasons to enter into such unions. Instead, DOMA merely withholds the federal benefits. Thus, the statute was not designed to secure the articulated goal of "protecting" marriage, even if it were plausible to believe that recognition of same-sex marriage would somehow hurt the institution.<sup>114</sup>

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blatant homophobic gay-bashing."); *id.* at S10, 101 (Sept. 10, 1996) (statement of Sen. Lott) ("The Defense of Marriage Act is . . . a response to an attack upon the institution of marriage itself."); *id.* at S10, 110 (Sept. 10, 1996) (statement of Sen. Byrd) ("The drive for same-sex marriage is, in effect, an effort to make a sneak attack on society by encoding this aberrant behavior in legal form before society itself has decided it should be legal — a proposition which is far in the distance, if ever to be realized."); *id.* at H7494 (July 12, 1996) (statement of Rep. Smith) ("Same-sex 'marriages' demean the fundamental institution of marriage. They legitimize unnatural and immoral behavior. And they trivialize marriage as a mere 'lifestyle choice.' The institution of marriage sets a necessary and high standard. Anything that lowers this standard, as same-sex 'marriages' do, inevitably belittles marriage. Traditional marriage has served across the majority of cultures as a foundation for a stable society. Undermining traditional marriage by forcing States to legalize same-sex 'marriages' will have far-reaching social consequences. The attempt to legitimize same-sex 'marriages' threatens our cultural values that have proved their worth down the centuries. Those who seek to overturn our system of values are attempting to achieve not just toleration of their behavior, but full social acceptance as well.").

111. See *Rose v. Rose* 481 U.S. 619, 625 (1987) (suggesting that federal law can supplant state domestic relations law only when the state law would do major damage to substantial federal interests).

112. *Id.* at H7276 (July 11, 1996) (statement of Rep. Largent) ("Destroying the exclusive territory of marriage to achieve a political end will not provide homosexuals with the real benefits of marriage, but it may eventually be the final blow to the American family."); *id.* at S10, 111 (Sept. 10, 1996) (statement of Sen. Byrd) ("If same-sex marriage is accepted, the announcement will be official, America will have said that children do not need a mother and a father, two mothers or two fathers will be just as good. This would be a catastrophe.").

113. Vanessa A. Lavelly, Comment, *The Path to Recognition of Same-Sex Marriage: Reconciling the Inconsistencies Between Marriage and Adoption Cases*, 55 UCLA L. REV. 247, 277 (2007) ("Even Massachusetts legislators who initially opposed same-sex marriage have since conceded that the *Goodridge* decision did not adversely affect the institution of marriage.").

114. Strasser, *supra* note 34, at 318.

DOMA does not prevent states from recognizing same-sex marriages. It merely denies federal benefits to same-sex couples. If the purpose of DOMA is to protect the institution of marriage, and if including same-sex couples really changes the institution, then DOMA is not rationally designed to meet its goal since it does not protect the institution. DOMA neither prevents the definition nor the institution from being changed; it merely allows Congress not to accord the federal benefits that go along with marriage.

### E. The Challenges to the Federal Definition of Marriage Provision

The federal judiciary has offered mixed responses to the constitutionality of this provision. For example, in *In re Kandu*,<sup>115</sup> a federal bankruptcy judge upheld the provision on rational basis grounds. After noting that the “review afforded under this rational basis standard is very deferential to the legislature,”<sup>116</sup> the court held that “DOMA does not violate either the Due Process or Equal Protection Clause of the Fifth Amendment.”<sup>117</sup>

Two circuit court judges have suggested in separate orders that this DOMA provision runs afoul of constitutional guarantees. In *In re Golinski*,<sup>118</sup> Chief Judge Kozinski of the Ninth Circuit addressed whether a staff attorney at the Ninth Circuit headquarters could have her same-sex spouse covered under the Federal Employees Health Benefit Act (FEHBA).<sup>119</sup> Judge Kozinski construed the Act as permitting the coverage,<sup>120</sup> notwithstanding DOMA,<sup>121</sup> at least in part because his construction “avoid[ed] difficult constitutional issues.”<sup>122</sup> He noted that were FEHBA to be construed as precluding coverage for same-sex spouses, there would be some question whether “such an exclusion furthers a legitimate governmental end.”<sup>123</sup> He reasoned that because “mere moral disapproval of homosexual conduct isn’t such an end, the answer to this question is at least doubtful.”<sup>124</sup>

In *In re Levenson*,<sup>125</sup> Judge Reinhardt, also of the Ninth Circuit, addressed the same issue, namely, whether an individual’s same-sex spouse could be included under the federal employee’s insurance policy.<sup>126</sup> While agreeing with Judge Kozinski that the spouse could not be excluded from coverage,<sup>127</sup> Judge Reinhardt rejected that FEHBA was ambiguous and instead addressed the constitutionality of DOMA.<sup>128</sup> Although believing that heightened scrutiny would have been the appropriate standard of review,<sup>129</sup> he noted that “the denial of benefits here cannot survive even rational basis review, the least searching form of constitutional scrutiny.”<sup>130</sup>

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115. *Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004).

116. *Id.* at 145.

117. *Id.* at 148.

118. 587 F.3d 901 (9th Cir. 2009).

119. *See id.* at 902.

120. *See id.* at 904 (“I therefore construe the Federal Employee Health Benefits Act to permit the coverage of same-sex spouses.”).

121. *See id.* at 902 (“[T]he Director of the Administrative Office of the United States Courts refused to certify Golinski’s identification of her spouse as family, because he believed that such an identification was barred by the Defense of Marriage Act (DOMA).”).

122. *Id.* at 903.

123. *Id.*

124. *Id.*

125. 560 F.3d 1145 (9th Cir. 2009).

126. *See id.* at 1145.

127. *See id.* at 1149 (“I adopt the same remedy as the Chief Judge . . .”).

128. *See id.*

129. *Id.* (“I believe it likely that some form of heightened constitutional scrutiny applies to Levenson’s claims.”)

130. *Id.*

A few points might be made about these differing views of the provision's constitutionality. The disagreement has focused on whether this provision can withstand constitutional scrutiny under rational basis review. The bankruptcy judge held that it could, Judge Kozinski implied but did not state that it could not, and Judge Reinhardt expressly rejected that it could withstand such scrutiny.

Before one simply dismisses this as a difference of opinion and concludes, for example, that it should have relatively little persuasive power in the context of a challenge arising in a different circuit,<sup>131</sup> an important element of the bankruptcy opinion should be emphasized. When analyzing the claim that "Congress may preempt state family law, in favor of a federal standard, only when specific conditions are met,"<sup>132</sup> the *Kandu* court reasoned that in the case at hand there was "no conflict between state and federal policy."<sup>133</sup> The federal government's supplanting state law was not at issue, because "Washington State has adopted its own definition of marriage identical to DOMA, defining marriage for state purposes as the legal union of one man and one woman."<sup>134</sup> Because no conflict was shown, the federal government did not need to establish which substantial interests would be served by supplanting state law.<sup>135</sup>

Suppose, however, that this had been a bankruptcy proceeding in Massachusetts, where the outcome depended upon whether the state rather than the federal definition of marriage was used.<sup>136</sup> In that event, there would have been a "direct conflict between the state and federal policy,"<sup>137</sup> and a different standard of review would have been triggered. While there might be some debate about whether this DOMA provision can survive constitutional scrutiny under the most deferential review, there likely would have been no debate whatsoever had a more stringent standard of review been employed.

### III. AFTER DOMA

Suppose that a court were to strike down or that Congress were simply to repeal one or both DOMA provisions. While many of the fears articulated by members of Congress would be proven to have been baseless, it is nonetheless true that there would be various salutary effects for members of the LGBT community. Some of those are described below.

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131. Here, all of these analyses were written by jurists in the Ninth Circuit. The bankruptcy judge is in the state of Washington. While the two orders were by well-respected judges on the Ninth Circuit Court of Appeals, they were orders rather than opinions—it is simply unclear what a Ninth Circuit panel would say about this provision's constitutionality.

132. *Kandu*, 315 B.R. at 132.

133. *Id.* at 133.

134. *Id.*

135. *Id.* In this case, unlike the cases cited above, there is no conflict between state and federal policy. Washington State has adopted its own definition of marriage identical to DOMA, defining marriage for state purposes as the legal union of one man and one woman. Preemption is not at issue since federal and Washington state standards remain identical.

136. The federal definition provision has been challenged on different grounds in the First Circuit. See *Same-Sex Unions Changing, State by State*, CHI. DAILY HERALD, Apr. 19, 2009, at 16 (discussing the challenge to the federal benefits provision of DOMA).

137. *Kandu*, 315 B.R. at 133.

### A. Repeal of the Federal Definition of Marriage Provision

Were the definition of marriage for federal purposes provision repealed, members of the LGBT community would be benefited in a number of ways. A host of federal benefits are associated with marriage,<sup>138</sup> including immigration rights and Social Security benefits.<sup>139</sup>

Some additional points should be made about the effects that this would have, however. For example, merely because the federal government was willing to recognize a same-sex marriage that was valid in the domicile would not mean that Georgia would have to recognize same-sex marriages. Absent a finding that same-sex marriage bans themselves violate federal constitutional guarantees, the states would be free to prevent their domiciliaries from marrying same-sex partners. Further, the federal government's recognizing same-sex marriages would not mean that the government would have to treat civil unions, for example, as the equivalent of marriages for federal purposes. Indeed, absent specific legislation to that effect by Congress, it seems likely that couples in a civil union or domestic partnership would not be viewed as "married."<sup>140</sup>

Even were this DOMA provision repealed or struck down, it would not be surprising if some members of Congress objected to treating civil unions as the equivalent of marriages, perhaps out of a desire to continue to differentiate marriage from other kinds of relationships. Those who wish to privilege marriage might want to make marriage special, whether those entering into the relationship are of the same sex or of different sexes. For example, some might believe that marriage is the bedrock of society, providing the setting in which children can flourish.<sup>141</sup> Yet, such a rationale would not justify excluding those in civil unions from federal benefits, since those who have contracted civil unions have taken on all of the obligations of marriage and, further, may well have children to raise. Further, even were it justifiable to accord more federal benefits to marriages than to other relationships involving fewer responsibilities, that would not suffice to establish that there should be no federal recognition of any relationships that did not involve all of the responsibilities of marriage.

Others do not seem to be interested in privileging marriage per se but, instead, are interested in privileging "traditional marriage," i.e., a marriage

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138. See Justin T. Wilson, Note, *Preservationism, or the Elephant in the Room: How Opponents of Same-Sex Marriage Deceive Us into Establishing Religion*, 14 DUKE J. GENDER L. & POL'Y 561, 569 n.36 (2007) ("A recent report released by the presently-named Government Accountability Office identified 1,138 discrete federal-level benefits that attach to legal marriage.").

139. Jonathan Rauch, *Not Whether but How: Gay Marriage and the Revival of Burkean Conservatism*, 50 S. TEX. L. REV. 1, 12 (2008).

140. Cf. *Golden v. Paterson*, 877 N.Y.S.2d 822, 831 (Sup. Ct. 2008) ("Both the courts and the other state legislatures, in providing for civil unions, took pains to distinguish a civil union or life partnership from marriage. Governor Paterson's Directive, by contrast, applies only to same sex marriages and not to civil unions or life partnerships.").

141. See *Zablocki v. Redhail* 434 U.S. 374, 386 (1978) ("It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. As the facts of this case illustrate, it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.").

between one man and one woman.<sup>142</sup> Ironically, those who do not want civil unions recognized out of a desire to promote traditional marriage might well find that their policy choice will result in the celebration of many more same-sex marriages. This would be for several reasons:

1. Same-sex individuals who are in a committed relationship might find the federal benefits accorded to marriage too good to resist. Thus, they might not find it sufficiently tempting to enter into a legal relationship, e.g., a civil union or domestic partnership, that is recognized by the state but not by the federal government. However, the benefits accrued by entering into a relationship recognized by both the state and the federal governments might be too valuable to refuse.

2. Same-sex individuals who are in a committed relationship might be choosing between celebrating a civil union and celebrating a marriage. It might be, for example, that the state in which they live recognizes both civil unions and same-sex marriages.<sup>143</sup> Or, it might be that the state permits civil unions to be celebrated locally but is also willing to recognize a same-sex marriage if validly celebrated in a sister state. In that event, with civil unions only receiving state recognition but same-sex marriages receiving both state and federal recognition, the couple might decide to forego the civil union and instead celebrate a marriage.

3. While states cannot control what federal benefits will be conferred on a relationship, they can control which relationships will be recognized and which state benefits will be conferred on particular relationships. Those states wishing to afford equal treatment to same-sex and different-sex couples might have recognized civil unions rather than same-sex marriages out of a belief that doing so: (1) would be more politically palatable to those opposing same-sex unions, but (2) would not have deprived same-sex couples of any of the material benefits that they would have had if they had been able to marry.<sup>144</sup> However, if the federal government recognizes same-sex marriages but not civil unions, then those states recognizing civil unions might feel added pressure to recognize same-sex marriages too. It could hardly be said that the state was affording equal treatment to same-sex couples domiciled in the state if those couples were in effect being denied the opportunity to enjoy the various federal benefits that are accorded to married couples. Thus, if the federal government were to recognize same-sex marriages but not civil unions, states that might otherwise have only recognized civil unions might now be induced to recognize same-sex

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142. See generally, George W. Dent, Jr., *Traditional Marriage: Still Worth Defending*, 18 BYU J. PUB. L. 419 (2004).

143. See *In re Levenson*, 560 F.3d 1145, 1146 (9th Cir. 2009) (“Brad Levenson . . . and Tony Sears have been partners for 15 years. They registered their domestic partnership on March 16, 2000, and were married in California on July 12, 2008.”).

144. See, e.g., VT. STAT. ANN. tit. 15, § 1204(a) (Supp. 2009) (“Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.”).

marriages either in addition to or instead of civil unions. The political gains afforded by offering a “separate but equal” status<sup>145</sup> would be outweighed by the costs of imposing a separate and clearly unequal status.

The point here is not, for example, that states recognizing same-sex marriage should refuse to recognize civil unions.<sup>146</sup> There might be reasons that two individuals, whether of the same-sex or of different sexes, would prefer a civil union to a marriage, notwithstanding that federal benefits are associated with one and not the other.<sup>147</sup> For example, individuals might lose particular benefits by (re)marrying, and they might want to have some legal recognition of their romantic relationship without marrying and losing the benefits that they otherwise would have.<sup>148</sup> Indeed, whether the federal government decides to recognize same-sex marriage but not civil unions or both same-sex marriages and civil unions, states might try to create or maintain alternative statuses that promote the interests of the state while at the same time serving the needs of their domiciliaries.<sup>149</sup> Thus, were civil unions treated as the equivalent of marriage for federal purposes (and benefits that might be lost by marrying would also be lost by entering into a civil union), states might decide to recognize domestic partnership or reciprocal beneficiary status.<sup>150</sup> That way, they could induce individuals to have their relationships recognized, which might produce benefits for the individuals themselves and society as a whole. At the same time, however, some but by no means all of the rights and obligations of marriage would be associated with that differing status, thereby making clear that the status was not the equivalent of marriage for legal purposes.

Were the federal-definition-of-marriage provision struck down or repealed, same-sex married couples would presumably be entitled to the same benefits that different-sex married couples receive. Yet, a number of other issues would have to be decided, e.g., whether other legally recognized relationships such as civil unions would also be entitled to benefits. Congress’s decision with respect to that would likely have many ramifications, including the possibility not only

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145. A different issue is whether affording a separate and allegedly equal status would itself be viewed as stigmatizing.

146. For such an argument, see James M. Donovan, *An Ethical Argument to Restrict Domestic Partnerships to Same-Sex Couples*, 8 L. & SEX. 649, 669 (1998) (“[I]f same-sex marriage is finally achieved, again we should eliminate all domestic partnerships.”).

147. See *supra* note 140 and accompanying text.

148. See Daniel I. Weiner, *The Uncertain Future of Marriage and the Alternatives*, 16 UCLA WOMEN’S L.J. 97, 105 n.36 (2007) (“The elderly, for instance, are more likely to be widowed and therefore precluded from remarrying if they want to keep various federal benefits.”).

149. Mark Strasser, *The Future of Marriage*, 21 J. AM. ACAD. MATRIM. LAW. 87, 104-05 (2008) (“[S]tates could structure benefits in such a way as to take account of the existing needs and preferences of individuals while at the same time giving individuals some incentive to marry. States could and likely will create alternative structures that will not be the equivalent of marriage and will not have all of the benefits of marriage, but nonetheless will improve the lives of individuals who for whatever reason refuse to marry. Such programs might also have salutary effects for children living in such homes.”).

150. Cf. HAW. REV. STAT. ANN. § 572C-1 (LexisNexis 2005) (“The purpose of this chapter is to extend certain rights and benefits which are presently available only to married couples to couples composed of two individuals who are legally prohibited from marrying under state law.”).

that many more same-sex couples would marry but also that many more states would recognize same-sex marriage.

### B. Repeal of the Full Faith and Credit Provision

The parade of horrors recounted by members of Congress when they feared that Hawaii would recognize same-sex marriage would not occur even were the DOMA full faith and credit provision repealed. Marriage itself would not suddenly disintegrate. Further, states would not suddenly be forced to recognize their domiciliaries' same-sex marriages celebrated in Massachusetts, Iowa, Connecticut, or Vermont during a weekend getaway.

Historically, states prevented a variety of individuals from marrying each other, for example, those who were too young, too closely related by blood, or of different races.<sup>151</sup> Sometimes, individuals who could not marry in their own domicile were not barred from marrying in a different state. Such individuals might travel across a state border, marry, and then hope to have their marriage recognized in their domicile.

The first point to consider is that such marriages were not automatically recognized. Instead, the domicile would consider a variety of factors before deciding whether or not the union would be recognized.<sup>152</sup> Basically, the question was not whether the marriage was against public policy—if the marriage was viewed as in accord with public policy then it would not have been prohibited in the first place. Rather, the question was whether the union violated an important public policy of the state. If so, then the domicile would refuse to recognize the marriage, notwithstanding its having been validly celebrated elsewhere.<sup>153</sup> If the marriage did not violate an important public policy of the state, then it would be recognized, notwithstanding that it would not be celebrated within the state.

Divorces, however, were a different matter. Assuming that they were granted by a court having jurisdiction over the parties and the subject matter, they would have to be given full faith and credit throughout the nation.<sup>154</sup> Were this DOMA provision repealed or struck down, states would not have the power

151. See, e.g., ARIZ. REV. STAT. ANN. § 25-101 (A) (2007) (“Marriage between parents and children, including grandparents and grandchildren of every degree, between brothers and sisters of the one-half as well as the whole blood, and between uncles and nieces, aunts and nephews and between first cousins, is prohibited and void.”); CAL. FAM. CODE § 301 (West 2004) (“An unmarried male of the age of 18 years or older, and an unmarried female of the age of 18 years or older, and not otherwise disqualified, are capable of consenting to and consummating marriage.”); *Loving v. Virginia*, 388 U.S. 1, 4 n.3 (1967) (“Section 20-57 of the Virginia Code provides: ‘Marriages void without decree. All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process.’”).

152. For a discussion of the marriage recognition practices existing prior to DOMA, see generally Mark Strasser, *Judicial Good Faith and the Baehr Essentials: On Giving Credit Where It's Due*, 28 RUTGERS L.J. 313 (1997).

153. A separate question is whether one state could refuse to recognize a marriage validly celebrated in another domiciliary state, where the couple had not immediately planned on moving to a new domicile after the marriage. See generally, for example, Mark Strasser, *For Whom Bell Tolls: On Subsequent Domiciles' Refusing to Recognize Same-Sex Marriages*, 66 U. CIN. L. REV. 339 (1998).

154. Williams, 317 U.S. at 303.

to refuse to recognize a divorce judgment validly issued in another state. Further, rights arising from such a judgment would also have to be enforced.

The repeal of this DOMA provision would not automatically render invalid the various mini-DOMAs that have been passed by the various states. Assuming no other federal guarantees are thereby violated, states can include within their own constitutions provisions that prohibit same-sex marriage, just as various states had constitutional provisions barring interracial marriage prior to *Loving v. Virginia*.<sup>155</sup> However, a state constitutional provision that barred recognition of a judgment involving a same-sex marriage would be void. Without DOMA, there would be no arguable exception to the rule that divorce judgments validly issued in one state must be given full faith and credit in all of the states.

Many state DOMAs not only preclude the recognition of same-sex marriage but also the recognition of same-sex divorces or any rights arising from the relationship.<sup>156</sup> In such a state, part of its DOMA would be void. As to whether the entire Act would be void or just that part of it that violates full faith and credit guarantees, this would be a statutory interpretation question for the state supreme court—essentially, the question would be whether the provision barring the recognition of judgments was severable.<sup>157</sup>

Even were the entire Act void, the state would not thereby be forced to recognize same-sex marriages. There might be other laws on the books precluding the celebration of such unions. Nonetheless, without a state DOMA on the books, it would be more difficult for a state court to refuse to credit a same-sex marriage celebrated elsewhere, at least for some purposes. Further, were the state Defense of Marriage Act invalidated, there would no longer be a constitutional bar to the state's recognizing same-sex marriages. The Legislature might pass such an act or, perhaps, a court might strike down the existing ban in light of state constitutional guarantees.

Certainly, if a state Defense of Marriage Act were struck down on federal grounds, the Act might be passed again without the offending provision. However, prevailing attitudes toward same-sex marriage are changing,<sup>158</sup> and it might be more difficult to pass a measure now than it was a mere decade ago.

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155. 388 U.S. 1 (1967). The *Loving* Court mentioned various state constitutions including such a ban including the constitutions in Alabama, Florida, Mississippi, North Carolina, South Carolina, and Tennessee. *See id.* at 6 n.5.

156. For a description of the various types of state marriage amendments, *see* Mark Strasser, *State Marriage Amendments and Overreaching: On Plain Meaning, Good Public Policy, and Constitutional Limitations*, 25 LAW & INEQ. 59 (2007).

157. *Cf.* Debra M. Strauss, *Reaching Out to the International Community: Civil Lawsuits as the Common Ground in the Battle Against Terrorism*, 19 DUKE J. COMP. & INT'L L. 307, 353 n.230 (2009) ("As a general fundamental principle of construction, if a statute or contract contains a part that is invalid, unconstitutional, or against public policy and the invalid part may be severable from the rest, that invalid part should be stricken while the portion which is constitutional or unobjectionable may stand and be upheld by the court."). *See also* *Regan v. Time, Inc.*, 468 U.S. 641, 642 (1984) ("Whether an unconstitutional provision is severable from the remainder of a statute is largely a question of legislative intent, but the presumption is in favor of severability.").

158. Adam Nagourney, *Same-Sex Marriage Holds Peril for G.O.P.*, N.Y. TIMES, Apr. 29, 2009, at A15 ("The fact that a run of states have legalized same-sex marriage in recent months—either by court decision or by legislative action—with little backlash is only one indication of how public attitudes about this subject appear to be changing.").

Even were it possible to pass the more limited measure again, that measure might not have some of the draconian effects that the existing measures are thought to have.<sup>159</sup>

#### IV. CONCLUSION

The Defense of Marriage Act is constitutionally vulnerable, and one or both provisions may be struck down or repealed in the not-too-distant future. Were the Act repealed in its entirety, there would be a number of salutary effects—same-sex married couples would be entitled to a large number of federal benefits to which they thus far have not been entitled. Further, individuals would not be able to avoid their court-imposed obligations by simply moving to a state that refused to enforce judgments arising from same-sex relationships. That said, however, even without DOMA, states could continue to refuse to recognize their domiciliaries' same-sex marriages, absent a finding that such bans themselves violate constitutional guarantees.

The above description of effects might also be accurate even were DOMA struck down rather than repealed. Thus, the full faith and credit provision might be struck down because Congress does not have the power to decrease the credit due to judgments and the federal definition provision might be struck down because no substantial interests could be articulated to justify the displacement of state law. Were these the bases for invalidation, DOMA's unconstitutionality would seem to have few if any implications for the constitutionality of same-sex marriage bans.

Suppose, however, that DOMA were struck down for other reasons. Were the Court to suggest, for example, that the refusal to recognize same-sex marriage for federal purposes was animus-based and could not pass muster under rational basis review, that *might* have implications for state same-sex marriage bans—were the latter held to be animus-based, they too would presumably be struck down.<sup>160</sup>

The *Lawrence* Court expressly refused to consider the constitutionality of same-sex marriage bans.<sup>161</sup> Nonetheless, the Court struck down the Texas same-sex sodomy ban, at least in part, because those sexual relations might be an element of an enduring relationship.<sup>162</sup> Given the importance of such

159. Cf. *State Constitutional Law—Same-Sex Relations—Supreme Court of Michigan Holds that Public Employers May Not Provide Healthcare Benefits to Same-Sex Domestic Partners of Employees—National Pride at Work, Inc. v. Governor of Michigan*, 748 N.W.2d 524 (Mich. 2008), 122 HARV. L. REV. 1263, 1263 (2009) (“Recently, in *National Pride at Work, Inc. v. Governor of Michigan*, the Supreme Court of Michigan undertook such an interpretive exercise and held that the state’s marriage amendment prohibits public employers from providing healthcare benefits to the same-sex domestic partners of their employees.”).

160. Cf. *Romer v. Evans*, 517 U.S. 620, 632 (1996) (“[T]he amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.”).

161. See *Lawrence*, 539 U.S. at 578 (“The present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”).

162. See *id.* at 567 (“When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.”).

relationships to the adults themselves and to any children that they might be raising, and the lack of substantial or, arguably, even legitimate state interests to support such bans, the existing jurisprudence would seem to require the invalidation of same-sex marriage bans.<sup>163</sup>

Yet, even if the current jurisprudence suggests that same-sex marriage bans violate federal constitutional guarantees, two points might be emphasized: (1) the unconstitutionality of such bans does not depend upon the presence or absence of DOMA, and (2) as Justice Scalia seems to have recognized, the lack of a constitutional basis to uphold such bans<sup>164</sup> does not necessitate their being struck down, given the Court's willingness to ignore principle and logic in this area of the law.<sup>165</sup>

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163. See generally Mark Strasser, *Lawrence and Same-Sex Marriage Bans: On Constitutional Interpretation and Sophisticated Rhetoric*, 69 BROOK. L. REV. 1003 (2004).

164. See *Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting) ("Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.").

165. *Id.* at 605 (Scalia, J., dissenting) ("This case [*Lawrence*] 'does not involve' the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. Many will hope that, as the Court comfortably assures us, this is so.").