DOMA, THE CONSTITUTION, AND THE PROMOTION OF GOOD PUBLIC POLICY

Mark Strasser∗

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∗Trustees Professor of Law, Capital University Law School, Columbus, Ohio.
INTRODUCTION

The Defense of Marriage Act (DOMA)\(^1\) has two different provisions. One addresses whether states must recognize marriages validly celebrated in other states and the other addresses which marriages will be recognized for federal purposes.\(^2\) Much of the recent public focus has been on the latter provision—not only have bills been introduced in the Congress to repeal the Act,\(^3\) but some courts have suggested that it offends constitutional guarantees.\(^4\) This article discusses each provision, both with respect to some of the ways that the provision might be constitutionally vulnerable and with respect to the provision’s public policy implications.

Any discussion of the constitutional and public policy implications of DOMA requires an explication of what the different provisions do. Such a task is more difficult than might first appear, both because the provisions have not been authoritatively construed and because the language of one of the provisions is somewhat ambiguous. Thus, the provision defining marriage for federal purposes is relatively clear about what it does, whereas the full faith and credit provision is open to differing interpretations. Some interpretations of the latter provision make it more constitutionally vulnerable than do

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others, and it is an open question whether or how the provision will ultimately be construed. Thus, because there are some respects in which each provision seems equally constitutionally vulnerable, it may be that there will be no need to distinguish among some of the possible meanings of the full faith and credit provision. In that event, we shall have to wait for another day for the Supreme Court to resolve some of the implicated constitutional issues.

Part II of this article discusses the provision defining marriage for federal purposes, outlining some of the respects in which this provision is constitutionally vulnerable and some of the reasons that it reflects bad public policy. Part III of this article discusses the full faith and credit provision, clarifying some of the ways in which the provision is ambiguous and outlining some of the respects in which this provision is constitutionally vulnerable and incentivizes conduct that runs counter to good public policy. The article concludes by discussing some of the issues that will remain to be sorted out even if both provisions of DOMA are struck down or repealed.

I. THE FEDERAL DEFINITION OF MARRIAGE

One DOMA provision is relatively straightforward—it defines marriage for federal purposes. While that might appear to be the kind of choice that is within Congress’s power, there are several reasons to believe that Congress has exceeded its power when attempting to define marriage for federal purposes. First, the provision bars the recognition of only one kind of marriage that is currently valid in some states, and precludes recognition of such marriages for all purposes.\(^5\) This unprecedented step itself suggests animus, especially when one considers some of the reasons that have been offered to justify Congress taking this step. Second, the provision employs a quasi-suspect classification to impose burdens on a group that might itself be a quasi-suspect class.\(^6\) Third, even were there no equal protection difficulties implicated by the provision, the Court has long recognized that the federal government cannot supplant state law absent


important reasons for doing so, and no sufficiently important reasons have yet been proffered.\footnote{See generally Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 616 (1991) (holding that the Federal Insecticide, Fungicide, and Rodenticide Act did not preempt a town ordinance); Kellerman v. MCI Telecomm. Corp., 493 N.E.2d 1045, 1052 (Ill. 1996) (finding that state law was not preempted by the federal law); People v. Applied Card Sys., 894 N.E.2d 1, 8 (N.Y. 2008) (holding that the federal law Truth in Lending Act did not preempt state law concerning petitioner’s claims).} Thus, for a variety of reasons this provision seems indefensible as a matter of constitutional law and good public policy.

\section{The Federal Definition of Marriage}

One provision of DOMA defines marriage for federal purposes. The section 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.\footnote{1 U.S.C. § 7.}

On its face, this provision has a very wide scope, defining marriage for all federal purposes as a union of one man and one woman. Its very breadth provides a basis for its being struck down as unconstitutional for two distinct reasons. First, such a statute seems to defy the lessons offered in \textit{Romer v. Evans},\footnote{517 U.S. 620, 624–26, 635–36 (1996). Amendment 2 was passed in Colorado which prohibited any legislative, judicial, or executive action that intended to protect homosexual persons from discrimination on the basis of their sexuality. \textit{Id.} at 624. The state supreme court applied the strict scrutiny test citing that it was a “fundamental right of gays and lesbians to participate in politics.” \textit{Id.} at 625. The Supreme Court of the United States affirmed the ruling on the basis that Amendment 2 violated the Equal Protection Clause. \textit{Id.} at 626, 635.} especially when one considers that the statute targets only one kind of marriage—same-sex marriages—and declares that such unions will not be recognized for federal purposes even if they are valid under state law.\footnote{1 U.S.C. § 7; Adrienne D. Davis, \textit{Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality}, 110 \textit{COLUM. L. REV.} 1955, 1985 (2010) (“DOMA targets same-sex couples . . . .”).} While it is fair to suggest that DOMA would also preclude federal recognition of plural marriages,\footnote{See Davis, \textit{supra} note 10, at 1985 (noting that DOMA “also limits marriage to ‘monogamous,’ or dyadic, unions”).} no
state currently recognizes such unions, so it is still true that the only marriages valid under state law but not valid under federal law are same-sex marriages. Add to this that the law says such marriages will not be considered valid for any federal purpose, and it should be clear that this DOMA provision “has the peculiar property of imposing a broad and undifferentiated disability on a single . . . group.”

Romer involved a Colorado constitutional amendment that precluded the state or any of its subdivisions from affording protection on the basis of sexual orientation. The Supreme Court in Romer noted that Colorado’s amendment “withdraws from homosexuals, but no others, specific legal protection,” and suggested that the “amendment seems inexplicable by anything but animus toward the class it affects.” For this reason among others, the Romer Court held that the law did not even survive rational basis review.

Like the Colorado amendment, this DOMA provision targets on the basis of orientation and precludes same-sex married couples from enjoying any of the vast array of benefits normally afforded by the federal government to married couples. Thus, even if there was no evidence beyond the very text of the amendment, one might have reason to infer orientation animus. Yet, there is

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12 See Lois A. Weithorn, Can a Subsequent Change in Law Void a Marriage That Was Valid at Its Inception? Considering the Legal Effect of Proposition 8 on California’s Existing Same-Sex Marriages, 60 HASTINGS L.J. 1063, 1094 (2009) (“No state permits plural or polygamous marriages . . . .”).
13 Romer, 517 U.S. at 632.
14 See id. at 624.
15 No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing. Id. (quoting COLO. CONST. art. II, § 30b).
16 Id. at 627.
17 Id. at 632.
18 Id. at 635.
additional evidence to infer such a motivation.

Consider some of the comments made by various members of Congress in support of the Defense of Marriage Act. Senator Byrd offered his reason for supporting DOMA: “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.” Senator Coats suggested that members of the Lesbian Gay Bisexual and Transgendered community are immoral, and Senator Helms suggested that DOMA would “safeguard the sacred institutions of marriage and the family from those who seek to destroy them and who are willing to tear apart America’s moral fabric in the process.” Members of the House of Representatives also made their views clear. Representative Funderburk suggested that “homosexuality is immoral and harmful,” and Representative Smith claimed, “[s]ame-sex ‘marriages’ demean the fundamental institution of marriage. They legitimize unnatural and immoral behavior. And they trivialize marriage as a mere ‘lifestyle choice.’”

Many DOMA opponents suggested that the Act was motivated by animus. Representative Collins described DOMA as “nothing more than blatant homophobic gay-bashing.” Representative Kennedy described DOMA in the following way:

This is not about defending marriage. It is about finding an enemy. It is not about marital union. It is about disunion, about dividing one group of Americans against another. This bill is unconstitutional, this bill is unfair, and the spirit behind this bill further fans the flames of prejudice and bigotry that this 104th Congress has done a pretty good job at fanning thus far.

While it is, of course, true that the comments above reflect the views of individual members and may not reflect the views of all of those voting for or against DOMA, they provide evidence in addition to the text itself about the motivation behind DOMA’s passage. Indeed, consider the claims that same-sex relations and relationships are immoral. Justice O’Connor suggested in her

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20 See id. at 10,692 (statement of Sen. Coats) (“When we prefer traditional marriage and family in our laws, it is not intolerance. Tolerance does not require us to say that all lifestyles are morally equal, only that no individual deserves to be persecuted.”).
21 Id. at 22,334 (statement of Sen. Helms).
22 Id. at 17,076 (statement of Rep. Funderburk).
23 Id. at 17,082 (statement of Rep. Smith).
24 Id. at 17,085 (statement of Rep. Collins).
Lawrence v. Texas\textsuperscript{26} concurring opinion that “moral disapproval, without any other asserted state interest, is [not] a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.”\textsuperscript{27} Thus, those trying to justify the passage of this law by claiming that it promotes morality will not have offered a legitimate reason for the provision’s enactment.

As a public policy matter, this DOMA provision is difficult to justify. Suppose that one takes at their word those who believe that the recognition of same-sex marriage would somehow undermine the nation, notwithstanding that the states recognizing such marriages have not suddenly fallen apart. This DOMA provision does not prevent same-sex marriages from being recognized, and so the alleged harms that will occur as a result of the recognition of such marriages will still take place even with this provision in effect. Indeed, the very reason that this provision can be challenged is that such unions are recognized in the states, lack of federal recognition notwithstanding.\textsuperscript{28} Thus, the alleged purpose behind the provision—preventing the harms that would allegedly occur as a result of the recognition of same-sex marriage—is not served by the provision.

The point here is not that this provision has no effect. On the contrary, it has effects because it denies various benefits to same-sex couples and their children to which those families would otherwise have been entitled. Yet, especially in difficult economic times, families of all kinds face enough difficulties without having additional burdens imposed upon them. If, indeed, society benefits when families stay together, both because the individuals themselves are thereby benefited and because any children they are raising are thereby benefited, then it is especially surprising that Congress would believe public policy promoted by enacting a provision that undermines family stability. By denying federal benefits to same-sex couples and their children, the federal government picks out those families in particular and imposes undeserved burdens on them to the detriment of those individuals, their families more generally, and society as a whole.

\textsuperscript{26} 539 U.S. 558 (2003).
\textsuperscript{27} Id. at 582 (O’Connor, J., concurring).
\textsuperscript{28} If no state recognized same-sex marriages, then no one would have standing to challenge DOMA. See Smelt v. Cnty. of Orange, 447 F.3d 673, 683 (9th Cir. 2006) (denying members of a same-sex couple standing to challenge DOMA because they did not have a valid marriage under any state law).
B. Triggering Heightened Scrutiny

When striking down the Colorado amendment, the Romer Court suggested that the enactment at issue would not pass muster under even the most forgiving constitutional test.\(^{29}\) Arguably, the federal definition of marriage provision also fails that test.\(^{30}\) Yet, there is reason to think that this provision should be examined under a less forgiving test, which makes the provision’s unconstitutionality even easier to establish.

1. Sex Discrimination

The federal definition of marriage provision classifies on the basis of gender. Basically, the federal government recognizes a marriage between a man and a woman but not a marriage between two women or a marriage between two men. The provision makes use of sex-based terms (man and woman), and determines whose marriages will be recognized based on those sex-linked terms.

A separate question is whether this sex-based classification passes constitutional muster. Thus, merely because sex-based terms are used does not establish that the provision will not pass muster. Some gender-based classifications have been upheld.\(^{31}\) That said, however, while classifications on the basis of gender are not examined as closely as are classifications based on race, the former classification will be upheld only upon an “exceedingly persuasive justification.”\(^{32}\)

It might be argued that the DOMA provision does not trigger heightened scrutiny because the sexes are treated similarly—men cannot marry men and women cannot marry women.\(^{33}\) But this is

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33 See Charles Patrick Schwartz, Note, Thy Will Not Be Done: Why States Should Amend Their Probate Codes to Allow an Intestate Share for Unmarried Homosexual Couples, 7 CONN. PUB. INT. L.J. 133, 141 (2008) (“In resisting a charge of gender discrimination, it is proposed that limitation of marriage...”)
a misunderstanding of the relevant jurisprudence.

Consider *McLaughlin v. Florida*,\(^\text{34}\) which involved the constitutionality of a Florida law punishing interracial, non-marital relations more severely than intra-racial, non-marital relations. The Supreme Court noted that “all whites and Negroes who engage in the forbidden conduct are covered by the section and each member of the interracial couple is subject to the same penalty,”\(^\text{35}\) and thus seemed to accept at least for purposes of the opinion that the two races were being treated equally. However, the Court also noted, “[j]udicial inquiry under the Equal Protection Clause . . . does not end with a showing of equal application among the members of the class defined by the legislation.”\(^\text{36}\) The Court explained that interracial couples were being treated differently than intra-racial couples,\(^\text{37}\) and struck down the law as a violation of equal protection guarantees.\(^\text{38}\)

The same lesson might be learned from *Loving v. Virginia*,\(^\text{39}\) which involved Virginia’s anti-miscegenation law. For purposes of the opinion, the Court accepted that the ban on interracial marriage applied equally to the different races,\(^\text{40}\) but nonetheless held that rational basis review was inappropriate.\(^\text{41}\) Thus, the Court explained that “the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.”\(^\text{42}\) While the Court struck down the law because it was “an endorsement of the doctrine of White Supremacy,”\(^\text{43}\) it also explained that the statute would not have passed muster even if the state had had “an even-handed

\(^{34}\) 379 U.S. 184 (1964).

\(^{35}\) Id. at 188.

\(^{36}\) Id. at 191.

\(^{37}\) See id. at 188 (“It is readily apparent that [the statute] treats the interracial couple made up of a white person and a Negro differently than it does any other couple.”).

\(^{38}\) Id. at 184, 192–93 (stating that the Florida law is “an invidious discrimination forbidden by the Equal Protection Clause”).

\(^{39}\) 388 U.S. 1 (1967).

\(^{40}\) Id. at 8 (noting the “fact of equal application” does not preclude statutes from further analysis).

\(^{41}\) Id.

\(^{42}\) Id. at 9.

\(^{43}\) Id. at 7.
state purpose to protect the ‘integrity’ of all races.” Because Virginia expressly employed a protected classification in its marriage statute, the law was struck down, equal application notwithstanding.

In both *McLaughlin* and *Loving*, Florida and Virginia, respectively, used classifications that trigger close scrutiny. Those statutes could not pass muster, even assuming the burdens they imposed were distributed evenly.

The point here is not that classifications on the basis of sex and race trigger the same level of scrutiny, but merely that express classifications on the basis of a protected classification trigger higher scrutiny, whether or not one of the affected groups is adversely impacted more than another. But if that is so, then this DOMA provision should receive heightened scrutiny by virtue of the basis of classification, regardless of whether it disproportionately impacts one sex more than another.

For purposes of equal protection analysis, neutral classifications are not those that affect members of a suspect or quasi-suspect class equally, e.g., which affect members of different races or sexes equally. Rather, neutral classifications are those that do not implicate the protected classification. An interracial marriage ban is not race-neutral even if it affects different races equally because it employs a race-based (and hence not race-neutral) term. A same-sex marriage ban is not sex-neutral even if it affects the sexes equally because it uses sex-based (and hence not sex-neutral) terms. While the levels of scrutiny are different depending upon whether the classification involves race or sex, the trigger for imposing higher scrutiny operates the same way regardless of whether race or sex is at issue—use of the protected classification triggers the higher scrutiny, and then the court employing the appropriate level of scrutiny determines whether the classification at issue passes muster.

2. Orientation Discrimination

The federal definition of the marriage provision classifies on

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44 Id. at 11 n.11.
45 See id. at 11–12.
46 For further discussion, see Mark Strasser, *Equal Protection, Same-Sex Marriage, and Classifying on the Basis of Sex*, 38 PEPP. L. REV. 1021, 1039–41 (2011) (discussing when classifications may be neutral and what tests are applicable for determining neutrality).
the basis of sex but is targeting on the basis of sexual orientation. A separate question is whether orientation itself should trigger closer scrutiny.

The Obama administration has suggested that statutes targeting on the basis of orientation should be subjected to heightened scrutiny.\(^{47}\) If the courts were to accept that orientation itself is a quasi-suspect classification and triggers heightened scrutiny, then this would be yet another basis upon which courts might require an exceedingly persuasive justification before upholding the constitutionality of that provision.

Suppose, however, that the courts did not accept that orientation should trigger intermediate scrutiny. Even so, a separate question would be whether statutes targeting on the basis of orientation should be examined under rational basis with bite review.\(^{48}\) Under that form of review, the Court would not employ intermediate scrutiny, but would nonetheless be less deferential than it would have been using the rational basis review commonly employed when economic matters are at issue.\(^{49}\) Arguably, this heightened form of rational basis review has been employed by the Court in a few cases,\(^{50}\) including United States Department of Agriculture v. Moreno,\(^{51}\) Romer v. Evans,\(^{52}\) and Cleburne v. Cleburne Living Center.\(^{53}\)

\(^{47}\) David G. Savage, Tiny Steps Toward Gay Marriage Win; Group Hopes for Broader Victory at Supreme Court, CHI. TRIB., Mar. 11, 2011, at C15 (“The Obama administration said in February that it believed this heightened-scrutiny standard also was the right way to judge discrimination based on sexual orientation.”).

\(^{48}\) See Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring) (“When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.”).

\(^{49}\) See id. at 579 (O’Connor, J., concurring) (“Laws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster . . . .”).

\(^{50}\) See Kenji Yoshino, The New Equal Protection, 124 HARV. L. REV. 747, 760 (2011) (stating that in Romer, Cleburne, and Moreno the Court invoked rational basis with bite review to strike down legislation).

\(^{51}\) 413 U.S. 528, 538 (1973) (holding a food stamp amendment unconstitutional because the classification system established was imprecise and “wholly without any rational basis”).

\(^{52}\) 517 U.S. 620, 635 (1996) (invalidating a Colorado constitutional amendment prohibiting any protections based solely on their sexual orientation because it did not “bear a rational relationship to a legitimate governmental purpose”).

\(^{53}\) 473 U.S. 432, 446 (1985) (holding that “[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to
The federal definition of marriage provision would likely not survive even if this form of rational basis review were employed. However, there is one more basis upon which to justify the imposition of a higher form of scrutiny to this DOMA provision.

3. Supplanting State Family Law

Traditionally, family law is a matter of state rather than federal concern. The Supreme Court has recognized that “there is no federal law of domestic relations.”\(^54\) This does not mean that the federal government is precluded from supplanting state law under any circumstances, but does mean that state law cannot be displaced by federal law unless the former law does “‘major damage’ to ‘clear and substantial’ federal interests.”\(^55\)

While the language employed in the “major damage to substantial state interests” test does not mirror the intermediate scrutiny test, it nonetheless should be clear that this test is by no means as deferential as the rational basis test. First, the interests at issue must not merely be legitimate but substantial, which is similar to the “important” state interests that must be served under intermediate scrutiny.\(^56\) Second, the degree of alleged harm that would justify the federal law as a constitutional matter also involves a heightened standard.\(^57\) The rational basis standard merely requires that the challenged classification “rationally further a legitimate state interest.”\(^58\) Here, however, to justify supplanting the state statute, the federal statute must not only promote the federal interest asserted; it must prevent the state law from doing major damage to the substantial federal interest at issue.

It is not even clear what legitimate interests are served by refusing to afford legally married same-sex couples all of the federal benefits to which other legally married couples are entitled, and it certainly is not clear what major damage to


\(^{56}\) See United States v. Virginia, 518 U.S. 515, 533 (1996) (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)) (holding that intermediate scrutiny is satisfied only when the government establishes that the classification serves “important governmental objectives”).

\(^{57}\) Id. at 535–36.

\(^{58}\) Nordlinger v. Hahn, 505 U.S. 1, 10 (1992).
substantial federal interests is caused by deferring to state law with respect to who is married to whom. It is quite difficult to understand how the federal definition of marriage provision could possibly meet the requirement imposed by the “major damage to substantial federal interests” test.

II. THE FULL FAITH AND CREDIT PROVISION

The full faith and credit DOMA provision is more difficult to analyze because it is open to different interpretations, and some interpretations implicate constitutional and public policy issues that others do not. While this provision also picks out one kind of marriage for disadvantageous treatment, it is important to understand the ways that this provision modifies (or does not modify) the law that prevails even absent this provision before one can offer an assessment of its constitutionality or its public policy implications.

A. The DOMA Full Faith and Credit Provision

This DOMA section reads:
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.\(^\text{59}\)

This section was passed pursuant to Congress’s enumerated power under Article IV, Section 1 of the U.S. Constitution, which 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.\(^\text{60}\)

It is simply unclear whether this DOMA section counts as a “general” law for purposes of the second sentence of article IV, section 1. It should be noted, for example, that the provision picks out one kind of relationship—same-sex relationships treated as marriages under state law—and describes how such


\(^\text{60}\) U.S. CONST. art. IV, § 1 (emphasis added).
relationships can be treated under other states’ laws rather than say, for example, that marriages as a general matter need not be given effect under other states’ laws.

Suppose that Congress passed a law specifying that relationships between individuals of different races that were treated as marriages under the laws of one state would not need to be given effect in other states. Let us bracket temporarily whether the Equal Protection Clause would permit Congress to pass such a law. The question here is merely whether such a law would meet the generality requirement of the second sentence of Article IV, Section 1. Such a provision would be more general than one that specified that interracial marriages involving certain groups would be subject to non-recognition, but would be less general than a provision that said any marriage valid according to one state’s law would not have to be treated as valid in another state. We simply do not have a particularly well-developed jurisprudence with respect to how general the laws must be in order for Congress to meet the requirements of that section.

A court would not need to determine whether Congress met the generality requirement when passing the hypothesized law because such a law could not pass muster under the Equal Protection Clause, whether or not such a law would adversely impact one race more than another. But just as the express use of race triggers strict scrutiny regardless of whether such a law has a greater adverse impact on one race than another, the express use of gender in the classification should also trigger heightened scrutiny regardless of whether such a law has a greater adverse impact on one sex than another. This DOMA provision should also trigger closer scrutiny for the reasons previously discussed.

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62 See, e.g., Miller v. Johnson, 515 U.S. 900, 913 (1995) (“[S]tatutes are subject to strict scrutiny under the Equal Protection Clause . . . when they contain express racial classifications . . . .”)
63 See supra notes 29–38 and accompanying text.
64 By the same token, if orientation discrimination triggers heightened scrutiny or rational basis with bite scrutiny, then this provision would seem to trigger at least that level of scrutiny on equal protection grounds. See supra notes 39–45 and accompanying text.
B. How Does this Provision Change Existing Law

All states prohibit certain incestuous marriages, for example, in no state can a parent marry his or her biological child. Further, all states permit individuals not of the same sex to marry, as long as they are of age, are not related to each other by blood or marriage, are competent, and neither is already married to someone else.

Yet, the fact that there is much overlap among state laws does not mean that they are uniform. For example, some states prohibit first cousins from marrying, whereas others permit such marriages only under certain conditions, and other states impose no limitations on such marriages at all. That there is

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65 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.”).

66 See, e.g., ARK. CODE ANN. § 9-11-208(a)(1)(A) (2009 & Supp. 2011) (“It is the public policy of the State of Arkansas to recognize the marital union only of man and woman.”).

67 See, e.g., ARIZ. REV. STAT. ANN. § 25-102(A) (2007) (“Persons under eighteen years of age shall not marry without the consent of the parent or guardian having custody of such person.”).

68 See, e.g., ALASKA STAT. § 25.05.021(2) (2010) (“Marriage is prohibited and void if performed when . . . the parties to the proposed marriage are more closely related to each other than the fourth degree of consanguinity, whether of the whole or half blood, computed according to rules of the civil law.”).

69 See, e.g., KY. REV. STAT. ANN. § 402.020(1)(a) (LexisNexis 2010) (“Marriage is prohibited and void . . . [w]ith a person who has been adjudged mentally disabled by a court of competent jurisdiction.”).

70 See, e.g., ALASKA STAT. § 25.05.021(1) (2010) (“Marriage is prohibited and void if performed when . . . either party to the proposed marriage has a husband or wife living.”).

71 See, e.g., IDAHO CODE ANN. § 32-206 (2006) (“All marriages between first cousins are prohibited.”).


The following marriages are prohibited:

(4) a marriage between cousins of the first degree; however, a marriage between first cousins is not prohibited if:
(i) both parties are 50 years of age or older; or
(ii) either party, at the time of application for a marriage license, presents for filing with the county clerk of the county in which the marriage is to be solemnized, a certificate signed by a licensed physician stating that the party to the proposed marriage is permanently and irreversibly sterile. Id.

73 See, e.g., MASS. ANN. LAWS ch. 207, § 1 (LexisNexis 2011) (“No man shall marry his mother, grandmother, daughter, granddaughter, sister, stepmother,
variation among the states suggests that an individual might be able to marry his romantic partner in one state and not another.

Suppose that an individual and his would-be marital partner are domiciled in a state where they are prohibited by law from marrying. Suppose further that the neighboring state permits couples like them to marry. Such a couple might be tempted to go to the neighboring state for a weekend, marry in accord with local law, and then return home and demand that their domicile state recognize the marriage.

Traditionally, were the hypothetical case described to occur, the domicile at the time of the marriage would determine the marriage's validity, notwithstanding that the marriage was valid where celebrated. That the domicile's law would govern the validity of the marriage would not necessitate that the marriage would not be recognized. For example, Ohio does not permit first cousins to marry within the state. However, if first cousins marry in a jurisdiction where such marriages are permitted, Ohio will recognize the marriage, notwithstanding that it could not have been celebrated within the state. However, that is not to say that Ohio will recognize any marriage validly celebrated elsewhere, even if it could not have been celebrated within the state. For example, if an uncle and niece living in Ohio went to another state where such unions were permitted, married there, and then returned to the state demanding that their marriage be

grandfather's wife, grandson's wife, wife's mother, wife's grandmother, wife's daughter, wife's granddaughter, brother's daughter, sister's daughter, father's sister or mother's sister.; id. § 2 ("No woman shall marry her father, grandfather, son, grandson, brother, stepfather, grandmother's husband, daughter's husband, granddaughter's husband, husband's grandfather, husband's son, husband's grandson, brother's son, sister's son, father's brother or mother's brother."). See also Ghassemi v. Ghassemi, 998 So. 2d 731, 749 (La. Ct. App. 2008) (holding that "such marriages [between first cousins] may be legally contracted in Alabama, Alaska, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Maryland, Massachusetts, New Jersey, New Mexico, New York, North Carolina . . . .").


75 OHIO REV. CODE ANN. § 3101.01(A) (LexisNexis 2008) ("Male persons of the age of eighteen years, and female persons of the age of sixteen years, not nearer of kin than second cousins, and not having a husband or wife living, may be joined in marriage.").

recognized, the state would not recognize the marriage, its having been validly celebrated elsewhere notwithstanding.\textsuperscript{77}

When DOMA was passed, it appeared that Hawaii might soon recognize same-sex marriage.\textsuperscript{78} Some in Congress feared that if Hawaii were to recognize such unions, then same-sex couples domiciled in other states would go to Hawaii, marry, and then return to their domiciles demanding that their marriages be recognized.\textsuperscript{79} But if that was the problem that this DOMA section was meant to address, then there are at least two difficulties with the provision. First, there was no need for Congress to act at all. As the Ohio treatment of first cousin and uncle-niece marriages illustrates, domiciles already had the power to refuse to recognize those marriages of their domiciliaries that contravened local law, even if those marriages were validly celebrated elsewhere.

The second point is that the language of the provision is not designed to protect the power of the domicile at the time of the marriage to determine that marriage's validity. It instead says that \textit{no} state shall be required to give effect to such a marriage. This provision has a much wider scope than merely protecting states from domiciliaries who wish to evade local law.

Suppose that Tom Thompson and Steve Smith are domiciled in Massachusetts and marry there. Their marriage is valid, assuming that they meet the other requirements of Massachusetts law. However, suppose that a job opportunity presents itself in another state. This DOMA provision would permit the new domicile to refuse to recognize the marriage. Thus, a price of Tom and Steve's taking advantage of these employment prospects in the new state is that their marriage would not be recognized in their newly acquired domicile. But that is not all. Suppose that the new position were in a state that also recognized same-sex marriage, so the couple would not be forced to surrender their marital status in order to take

\textsuperscript{77} See \textit{In re} Estate of Stiles, 391 N.E.2d 1026, 1027 (Ohio 1979).
\textsuperscript{79} See \textit{id}.

The possibility that homosexual men and women might attain a marriage license in Hawaii and that their home states would have to recognize the unions' legality under the Full Faith and Credit Clause was too much for Congress to bear. DOMA easily passed through both the House and Senate and was signed into law by President Bill Clinton. \textit{Id}. 
advantage of the economic opportunity that had presented itself. 80
Even so, if the couple was driving across country to get to their
new domicile and had an accident along the way in a state that
prohibited the celebration of same-sex unions, this DOMA
provision authorizes the state through which the couple had been
driving to refuse to recognize the marriage.

One reason that it is difficult to assess the constitutionality of
the full faith and credit provision is that the U.S. Supreme Court
has not yet addressed whether subsequent domiciles have the
power to refuse to recognize marriages that had been valid in a
sister domicile at the time of the marriage’s celebration. 81 Indeed,
the Court has not addressed whether a state through which a
couple was traveling could refuse to recognize their marriage, so
it is not clear whether this DOMA provision affords states a
power that they do not already have. However, there is a power
that states may have acquired by virtue of this provision,
depending upon how the provision is construed. Not only does
the provision permit states not to recognize a same-sex marriage
validly celebrated in another state, but it also permits states to
refuse to give effect to “a right or claim arising from such
relationship.” 82 This, too, requires interpretation.

Certain rights arise by virtue of being married. Historically,
states criminalized non-marital relations and at the time that
DOMA was enacted states were still permitted to criminalize
same-sex sexual relations. 83 However, Griswold v. Connecticut 84
extends constitutional protection to marital relations, 85 and so

80 A separate issue is whether a subsequent domicile’s refusal to recognize a
marriage that had been valid in the couple’s domicile at the time of the marriage
violates right to travel guarantees. See generally Mark Strasser, Interstate
Marriage Recognition and the Right to Travel, 25 Wis. J. L. Gender & Soc’y 1
(2010) (describing how states may challenge the validity of one’s marriage from
beyond the borders of that state and the Supreme Court’s suggestion that one’s
right-to-travel guarantees recognition of one’s marriage).
81 But cf. Loughran v. Loughran, 292 U.S. 216, 223 (1934) (suggesting
“[m]arriages not polygamous or incestuous, or otherwise declared void by
statute, will, if valid by the law of the State where entered into, be recognized as
valid in every other jurisdiction” (citation omitted)). However, in Loughran, the
Court did not make clear whether that result was required by the Constitution
or was instead simply the prevailing practice. See id.
sodomy law as applied to same-sex sexual relations), overruled by Lawrence v.
84 381 U.S. 479 (1965).
85 Id. at 485 (discussing the “sacred precincts of marital bedrooms”); Laura
M. Clark, Comment, Should Texas’s Former Ban on Obscene-Device Promotion
would seem to protect the relations between members of a same-
sex marital couple. But the mantle provided by Griswold did not
extend to non-marital relations. A state could have prosecuted
married individuals of the same sex for engaging in sexual
relations if that state was authorized to ignore that couple’s
marriage and any rights arising therefrom. Arguably, DOMA
permitted states to enforce their sodomy laws against couples
whose marriages had been validly celebrated elsewhere, at least
until Lawrence v. Texas invalidated such laws.86

Or, consider parenting rights that come with marriage—a
child born into a marriage is presumed to be the child of the
parties to the marriage.87 Perhaps this DOMA provision was
suggesting that states would not have to recognize a parenting
presumption arising from a same-sex marriage validly celebrated
in another domicile.

Yet, there are other meanings that might also be attributed to
this section. Consider same-sex divorces. While the Court has not
made clear the conditions under which marriages validly
celebrated in the domicile at the time of the marriage must be
recognized by other states, it has made clear the conditions under
which divorces must be recognized. Absent fraud or lack of
jurisdiction, a divorce granted in one state is entitled to full faith
and credit in the other states.88

At least one issue raised by this provision’s “right or claim”

Pass Constitutional Muster under a Murky Lawrence?, 41 St. Mary’s L.J. 177, 197 (2009) (“In Griswold v. Connecticut, in 1965, the Supreme Court struck
down a state law criminalizing contraceptive use and acknowledged that the Bill
of Rights gives rise to zones of privacy protecting spousal relations occurring in
marital bedrooms.” (footnotes omitted)).

86 Lawrence, 539 U.S. at 578.


The rights of parties to a civil union, with respect to a child of whom
either party becomes the parent during the term of the civil union,
shall be the same as the rights (including presumptions of parentage)
of married spouses with respect to a child of whom either spouse
becomes the parent during the marriage. Id.

88 See Johnson v. Muelberger, 340 U.S. 581, 589 (1951) (“When a divorce
cannot be attacked for lack of jurisdiction by parties actually before the court or
strangers in the rendering state, it cannot be attacked by them anywhere in the
Union. The Full Faith and Credit Clause forbids.”); 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.”).
language is whether Congress intended to exempt divorce decrees and rights or claims arising therefrom from full faith and credit guarantees. In *Williams v. North Carolina*, the Court expressly raised but refused to decide whether Congress had the power to exempt divorce from full faith and credit guarantees. 89 “Whether Congress has the power to create exceptions [with respect to the full faith and credit due divorces] is a question on which we express no view.” 90 However, immediately after saying that it would not express a view, the *Williams* Court noted “the considerable interests involved, and the substantial and far-reaching effects which the allowance of an exception would have on innocent persons.” 91 At the very least, the *Williams* Court suggested that an exception would be a public policy disaster, although one cannot tell in addition whether the Court was suggesting that such an exception could not be granted as a constitutional matter.

Arguably, because the provision discusses the rights arising from a same-sex relationship and does not mention rights arising from a judgment of divorce, this provision should not be interpreted to permit states to ignore judgments and property divisions from other states pursuant to validly issued divorce decrees. However, if this provision is interpreted to exempt divorce judgments from full faith and credit guarantees and if Congress has the power to create such an exception, then this provision would encourage the kind of behavior that simply cannot be reconciled with good public policy.

Consider an individual who is ordered pursuant to a same-sex divorce to divide property with his or her same-sex ex-spouse. Such an individual might flee to a jurisdiction that refuses to recognize same-sex relationships in an attempt to avoid his or her court-imposed obligations. It is difficult to understand how it would be thought good public policy to encourage this kind of behavior.

**CONCLUSION**

The two provisions of the Defense of Marriage Act are constitutionally vulnerable, sometimes for the same reason and

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89 *Williams*, 317 U.S. at 302–03.
90 *Id.* at 303 (citing Yarborough v. Yarborough, 290 U.S. 202, 215 n.2 (1933) (Stone, J., dissenting)).
91 *Id.* at 303–04.
sometimes for different reasons. Both sections classify on the basis of sex and target on the basis of orientation, which should trigger close judicial scrutiny. The provision defining marriage for federal purposes should be examined closely anyway, and it is difficult to understand how deferring to state marriage laws would do major damage to substantial federal interests.

The full faith and credit provision needs to be authoritatively construed before its effect can be determined. Further, the Court may be forced to explain the conditions under which states will be forced to recognize marriages validly celebrated in other domiciles, so that the degree to which DOMA changes current law will be clear. For example, the Court might hold that the provision is limited to exempting marriages (and not divorces) from recognition in other states. Indeed, the Court might hold that states have the power not to recognize marriages validly celebrated in other domiciles, even without DOMA.

Suppose that the Court were to hold that the Constitution does not require states to recognize marriages validly celebrated in other domiciles and that there were no federal laws speaking to these issues. Such a holding might invite a whole new federalism in domestic relations matters, inviting states to invalidate marriages that had been validly celebrated decades earlier because those unions could not be celebrated in the forum. Individuals who sought to avoid their marital obligations could flee to jurisdictions that would not recognize such unions—the individuals would thereby rid themselves not only of no-longer-desired marriages but also of not-desired obligations of support or property distribution.

Perhaps both provisions of DOMA will be struck down or repealed. Depending upon the basis for striking down the provisions or the language of the statute repealing DOMA, the Court may be able to defer a decision about the conditions under which one state may refuse to recognize a marriage validly celebrated in a sister domicile. But such a question will eventually have to be addressed, and the answer may have important implications for many types of families.