

WINDSOR, FEDERALISM, AND THE FUTURE OF MARRIAGE LITIGATION

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INTRODUCTION

In *United States v. Windsor*,¹ the United States Supreme Court struck down section 3 of the Defense of Marriage Act (DOMA).² Now that section 3 has been invalidated, section 2 of DOMA may also be challenged.³ The constitutionality of DOMA section 2 was not before the *Windsor* Court, so the Court could not have been expected to address its validity directly. Nonetheless, the *Windsor* opinion provides surprisingly little express guidance with respect to whether section 2 also violates constitutional guarantees.⁴ Further complicating any analysis of that section's validity is that the section has not been authoritatively construed. The constitutionality of section 2 (and even its being subject to challenge) will depend greatly on its authoritative interpretation and, in addition, on a clear articulation of the constraints, if any, on the power of a state to refuse to recognize a marriage validly celebrated in a sister domicile. If section 2 is construed narrowly and is found not to afford states a power that they do not already possess, then it would seem immune from challenge; however, in that event, a key provision of several state mini-DOMAs will lose even the veneer of legality.

Part II of this Article discusses *Windsor*. Part III examines that decision's possible implications for section 2 of DOMA, including some possible constructions of the provision and some of the differing constitutional implications of these alternate constructions. Part IV analyzes *Windsor*'s possible implications for state same-sex marriage bans. The Article concludes that while *Windsor* could have been clearer with respect to its implications for section 2 and for some of the state same-sex marriage bans, the most plausible interpretation of *Windsor* establishes the constitutional invalidity of DOMA's section 2 and of many state mini-DOMAs, in part if not in whole.

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¹ 133 S. Ct. 2675 (2013).

² 1 U.S.C. § 7 (1996).

³ 28 U.S.C. § 1738C (1996).

⁴ Justice Kennedy merely mentioned it in his opinion. See *Windsor*, 133 S. Ct. 2675, 2682–83 (2013) (“Section 2, which has not been challenged here, allows States to refuse to recognize same-sex marriages performed under the laws of other States.”).

WINDSOR

In *Windsor*,⁵ the United States Supreme Court struck down section 3 of DOMA, the provision defining marriage for federal purposes. The opinion appeals to principles of federalism and equal protection, both of which support the unconstitutionality of the provision at issue. The *Windsor* Court did not discuss how it would rule in a different kind of case involving same-sex unions if those principles were pitted against each other,⁶ a matter that will likely be the subject of much speculation over the coming months if not years.

A. Federalism

The *Windsor* Court recognized that several states have “decided that same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons.”⁷ While acknowledging the power of Congress to enact “discrete statutes . . . that bear on marital rights and privileges,”⁸ the Court noted that DOMA “enacts a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations,”⁹ suggesting that the very breadth of the enactment undercut its constitutionality.¹⁰

Two conflicting principles are implicated in any assessment of the constitutionality of congressional regulation of domestic relations. On the one hand, “Congress, in enacting discrete statutes, can make determinations that bear on marital rights and privileges,”¹¹ and the *Windsor* Court noted that it had recently upheld a federal statute impacting marital rights and responsibilities.¹² On the other hand, “the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations.”¹³ The Court chose not to offer an analysis specifying the conditions under which the Federal Government can supplant state marriage laws,¹⁴ believing it “unnecessary to decide whether this federal intrusion on state power is a violation of the

⁵ 133 S. Ct. 2675 (2013).

⁶ *See id.* at 2697 (Roberts, C.J., dissenting) (“[W]hile ‘[t]he State’s power in defining the marital relation is of central relevance’ to the majority’s decision to strike down DOMA here, that power will come into play on the other side of the board in future cases about the constitutionality of state marriage definitions. So too will the concerns for state diversity and sovereignty that weigh against DOMA’s constitutionality in this case.”) (citation omitted).

⁷ *Id.* at 2689.

⁸ *Id.*

⁹ *Id.* at 2690.

¹⁰ *Id.* at 2692 (explaining that DOMA’s “reach and extent” undercut its constitutionality).

¹¹ *Id.* at 2690.

¹² *Id.* (“Just this Term the Court upheld the authority of the Congress to pre-empt state laws, allowing a former spouse to retain life insurance proceeds under a federal program that gave her priority, because of formal beneficiary designation rules, over the wife by a second marriage who survived the husband.”) (citing *Hillman v. Maretta*, 133 S. Ct. 1943 (2013)).

¹³ *Id.* at 2691.

¹⁴ For a discussion of the conditions under which Congress can supplant state domestic relations law, see Mark Strasser, *Congress, Federal Courts, and Domestic Relations Exceptionalism*, 12 CONN. PUB. INT. L.J. 193, 193–230 (2012).

Constitution because it disrupts the federal balance.”¹⁵ Instead, the Court implied that because the statute at issue was so wide-ranging, it was distinguishable from the other “discrete statutes”¹⁶ impacting domestic relations enacted by Congress “to ensure efficiency in the administration of its programs.”¹⁷ The statute’s very breadth,¹⁸ coupled with its targeting one particular group,¹⁹ counseled against its constitutionality.²⁰

The Court’s reasoning is more easily understood in light of *Romer v. Evans*.²¹ The *Romer* Court struck down Colorado’s Amendment 2, which precluded any state entity from adopting or enforcing any law “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.”²² The Court noted that the amendment would have a wide-ranging effect. “Sweeping and comprehensive is the change in legal status effected by this law.”²³ But this wide-ranging effect would only impact one group. “The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.”²⁴ Because targeting one group and subjecting only that group to a broad-based burden,²⁵ the amendment was “at once too narrow and too broad.”²⁶

The *Windsor* Court cited *Romer* when explaining why section 3 of DOMA was unconstitutional.²⁷ Because the provision targeted one group and deprived the members of that group of so much,²⁸ the provision was clearly unconstitutional. The *Windsor* Court saw no need to provide a careful delimitation of the conditions under which Congress can supplant state domestic relations law and the conditions under which it cannot do so.²⁹

The Federal Government has traditionally deferred to state determinations of who is married to whom.³⁰ The Court explained that the “Constitution’s guarantee of equality ‘must at the very least mean that a bare congressional desire to harm a politically

¹⁵ *Windsor*, 133 S. Ct. at 2692.

¹⁶ *Id.* at 2690.

¹⁷ *Id.*

¹⁸ *See id.* (contrasting DOMA with “limited federal laws that regulate the meaning of marriage in order to further federal policy”).

¹⁹ *See id.* (noting that DOMA’s “operation is directed to a class of persons”).

²⁰ *See id.* at 2692 (“DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage. [D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.”) (citing *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

²¹ 517 U.S. 620 (1996).

²² *Id.* at 624 (citing Colo. Const., Art. II, § 30b).

²³ *Id.* at 627.

²⁴ *Id.*

²⁵ *Id.* at 632 (“[T]he amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group.”).

²⁶ *Id.* at 633.

²⁷ *Windsor*, 133 S. Ct. at 2693.

²⁸ *See id.* at 2693–95.

²⁹ *Id.* at 2692 (explaining that it was not necessary to provide a careful explication of the federal-state balance in order to decide this case).

³⁰ *Id.* at 2691 (“[T]he Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations.”).

unpopular group cannot' justify disparate treatment of that group,"³¹ and the Court inferred that DOMA's purpose was to injure a particular class.³² "The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages . . . was its essence."³³ The Court concluded that the "avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."³⁴ At least in part because Congress's motivation in passing DOMA was invidious, the Court held that section 3 did not pass constitutional muster.³⁵

B. Due Process and Equal Protection Guarantees

Section 3 of DOMA was struck down, at least in part, based on federalism principles.³⁶ Yet, the Court also discussed Congress's invidious intent when passing DOMA. Such a discussion would be unnecessary if the issue were merely whether Congress had exceeded federalism constraints by refraining from passing a discrete statute affecting particular "marital rights and privileges"³⁷ and instead enacting "a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations."³⁸ Indeed, the Court offered a different basis for its decision: it expressly held that DOMA violated due process and equal protection guarantees provided by the Fifth Amendment,³⁹ Although the Court did not explain exactly how and why DOMA violates these guarantees.

The Court's finding that Congress had illicit motivation when passing DOMA⁴⁰ helps explain why section 3 was struck down and, in addition, has import for the constitutionality of section 2 of DOMA.⁴¹ However, this finding of animus will be less helpful with respect to determining the constitutionality of state same-sex marriage bans. There are other elements of the opinion, however, suggesting that state same-sex marriage bans are constitutionally vulnerable.⁴²

First, lest it be thought that the *Windsor* Court was always emphasizing the power of the state to regulate marriage according to its own assessment of what best promotes

³¹ *Id.* at 2681 (citing *Dep't of Agric v. Moreno*, 413 U.S. 528, 534–35 (1973)).

³² *Id.* at 2693 ("DOMA seeks to injure the very class New York seeks to protect.").

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 2696 ("The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.").

³⁶ *See id.* at 2697 (Roberts, C.J. dissenting) (The majority's "judgment is based on federalism.").

³⁷ *Id.* at 2690.

³⁸ *Id.*

³⁹ *Id.* at 2693 ("DOMA . . . violates basic due process and equal protection principles applicable to the Federal Government.")

⁴⁰ *Id.* ("In determining whether a law is motivated by an improper animus or purpose, "[d]iscriminations of an unusual character" especially require careful consideration . . . DOMA cannot survive under these principles.") (citing *Romer*, 517 U.S. at 633).

⁴¹ *See infra* notes 70–72 and accompanying text.

⁴² *See infra* notes 178–79, 199–206 and accompanying text.

public policy,⁴³ the Court repeatedly pointed out that state regulations of marriage are constrained by constitutional guarantees. Thus, while noting that the “‘regulation of domestic relations’ is ‘an area that has long been regarded as a virtually exclusive province of the States,’”⁴⁴ the Court expressly cautioned that “[s]tate laws defining and regulating marriage, of course, must respect the constitutional rights of persons.”⁴⁵ So, too, when criticizing DOMA for “reject[ing] the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State”⁴⁶ and noting that such incidents benefits and obligations “may vary . . . from one State to the next,”⁴⁷ the Court reiterated that such variations in state laws are “subject to constitutional guarantees.”⁴⁸

Which aspects of the opinion suggest that state same-sex marriage bans are vulnerable in light of existing equal protection and due process guarantees? The *Windsor* Court noted that a state “decision to give this class of persons the right to marry confer[s] upon them a dignity and status of immense import.”⁴⁹ Marriage itself has a special status, and “is more than a routine classification for purposes of certain statutory benefits.”⁵⁰ The Court explained that this “status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages.”⁵¹ But, as Justice Scalia suggests in his dissent, the Court might find that a state’s refusal to accord same-sex couples the dignity associated with marriage is itself stigmatizing.⁵²

Section 3 of DOMA was unconstitutional, at least in part, because it “single[d] out a class of persons . . . [and] impose[d] a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper.”⁵³ The Court explained that DOMA “instruct[ed] all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others.”⁵⁴ The Court concluded that the section was unconstitutional because “no legitimate interest was asserted that could overcome[] the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”⁵⁵ Yet, it is unclear what legitimate interests can be asserted by a state to justify its limiting marriage to different-sex couples, especially given the tangible and intangible burdens imposed by that refusal.⁵⁶

⁴³*Windsor*, 133 S. Ct. at 2697 (Roberts, C.J., dissenting) (noting the “dominant theme of the majority opinion is that the Federal Government [had intruded] into an area ‘central to state domestic relations law applicable to its residents and citizens’”).

⁴⁴*Id.* at 2680 (citing *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)).

⁴⁵*Id.* (quoting *Loving v. Virginia*, 388 U.S. 1 (1967)).

⁴⁶*Id.* at 2691.

⁴⁷*Id.* at 2692.

⁴⁸*Id.*

⁴⁹*Windsor*, 133 S. Ct. at 2692.

⁵⁰*Id.*

⁵¹*Id.*

⁵²*See id.* at 2709–2710 (Scalia, J., dissenting).

⁵³*Windsor*, 133 S. Ct. at 2695–96 (alteration added).

⁵⁴*Id.* at 2696.

⁵⁵*Id.*

⁵⁶*See infra* notes 178–87 and accompanying text.

It is fair to suggest that the Court might have spelled out its analysis more fully. For example, the Court noted that the Executive Branch had concluded that “heightened equal protection scrutiny should apply to laws that classify on the basis of sexual orientation.”⁵⁷ But the Court neither affirmed nor denied that this was the proper standard. Indeed, as Justice Scalia noted in his dissent, the “opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality.”⁵⁸

Failure to specify notwithstanding, the Court did offer a hint that states would not be immune from the constitutional guarantees invalidating this DOMA section. The Court explained that the Due Process Clause of the Fifth Amendment has an equal protection component,⁵⁹ and then noted that while “the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.”⁶⁰

The Fourteenth Amendment equal protection guarantees apply to the states but not to the Federal Government.⁶¹ There would be no point in the Court mentioning the Fourteenth Amendment guarantees and, especially, noting that those guarantees are “all the more specific and all the better understood and preserved” unless it did so in order to suggest that the ruling had import for the equal protection guarantees applicable to the states. In any event, the Court’s analysis of the reach of the 5th Amendment has import for the constitutionality of section 2 of DOMA.

SECTION 2 OF DOMA

DOMA’s full faith and credit provision might seem relatively straightforward, because on its face it specifies that states are not required to give effect to acts, records, or judicial proceedings regarding same-sex marriages. Yet the force of the provision can only be understood in light of the practices that had existed prior to its passage. Once the background law is made clear, the best interpretation of section 2 becomes more difficult to discern, as the states have long had the power allegedly afforded to them by section 2.

⁵⁷ *Windsor*, 133 S. Ct. at 2683–84.

⁵⁸ *Id.* at 2706 (Scalia, J., dissenting).

⁵⁹ *Id.* at 2695 (“The liberty protected by the Fifth Amendment’s Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws.”) (citing *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217–18 (1995)).

⁶⁰ *Id.*

⁶¹ See Stephen Kanter, *Brevity Is the Soul of Wit: Nguyen Is Dead*, 16 LEWIS & CLARK L. REV. 1305, 1307 n.15 (2012) (“Although there is no express Equal Protection Clause limiting discrimination by the federal government, the Supreme Court properly has long held that fundamental fairness required by the Fifth Amendment Due Process Clause implicitly holds the federal government to the same standards of equality that the Fourteenth Amendment demands of the States through the Fourteenth Amendment Equal Protection Clause.”) (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995)).

A. *The Motivation behind Section 2's Passage*

Section 2 of DOMA 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.⁶²

When Congress passed DOMA, the Hawaii Supreme Court had just held that the state's same-sex marriage ban had to be examined with strict scrutiny to determine whether that ban passed constitutional muster under the state constitution's equal protection guarantees.⁶³ Members of Congress apparently feared that Hawaii would recognize same-sex marriage, and that domiciliaries of other states would go to Hawaii, marry their same-sex partners, and then return to their domiciles demanding that their marriages be recognized.⁶⁴

The fear that domiciles would be forced to recognize such marriages was unwarranted. It has long been understood that a domicile can refuse to recognize a marriage of its domiciliaries if they seek to circumvent the domicile's law by temporarily going to a different state and celebrating their marriage in accord with the latter state's law. For example, section 132 of the *Restatement (First) of Conflict of Laws* specifies that a "marriage which is against the law of the state of domicil of either party, though the requirements of the law of the state of celebration has been complied with, will be invalid

⁶² 28 U.S.C. § 1738C.

⁶³ See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (remanding case for an examination of whether state's same-sex marriage ban passed muster when examined with strict scrutiny).

⁶⁴ See 142 CONG. REC. H7480-05, H7490 (Rep. Canady) ("The idea of the gay rights legal advocacy community is that they will have same-sex marriages recognized in the State of Hawaii, and then folks will go there from around the country, be married under the laws of the State of Hawaii, and then go back to where they came from and attempt to use the full faith and credit clause to force those States to which they have returned to recognize the legality of that same-sex union contracted in the State of Hawaii."); 142 CONG. REC. H7480-05, H7486 (Rep. Buyer) ("When one State wants to move towards the recognition of same-sex marriages, it is wrong. The full faith and credit of the Constitution would force States like Indiana to abide by it. We as a Federal Government have a responsibility to act, and we will act."); 142 CONG. REC. H7480-05, H7487 (Rep. Funderburk) ("Mr. Chairman, people in my district in North Carolina are outraged by the possibility that our State might be forced to recognize same sex marriages performed in other States."); 142 CONG. REC. S12015-01, S12016 (Sen. Abraham) ("The only effect DOMA will have on the States is to prevent what the courts might otherwise find to be the possibly constitutionally-compelled result that every State recognize same-sex marriages contracted in another State, where such unions are permitted. By simply stating that the Federal Full Faith and Credit Clause does not require the States to recognize same-sex marriages, DOMA leaves the States free to recognize them or not recognize them as they see fit."); 142 CONG. REC. S10100-02, S10106 (Sen. Gramm) ("if the court rules in favor of single-sex marriages on the basis of sex discrimination, a failure to pass the Defense of Marriage Act here today will require the State of Texas, the State of Kansas, and every other State in the Union to recognize and give full faith and credit to single-sex marriages which occur in Hawaii"). See also Brian M. Balduzzi, Note, *A Taxing Divorce: A Solution to DOMA's Tax Inequities in Same-Sex Divorce*, 22 B.U. PUB. INT. L.J. 201, 205-06 (2013) ("Opponents of same-sex marriage worried that the *Baehr* decision to legalize same-sex marriages in Hawai'i would compel other states to recognize these unions under the Full Faith and Credit Clause of the United States Constitution.").

everywhere [if it involves a] marriage of a domiciliary which a statute at the domicile makes void even though celebrated in another state.”⁶⁵ The *Restatement (Second) of Conflict of Laws* states that a “marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.”⁶⁶ The paradigmatic example of a marriage subject to invalidation is offered in comment j: “a marriage has been held invalid in such circumstances only when it violated a strong policy of a state where at least one of the spouses was domiciled at the time of the marriage and where both made their home immediately thereafter.”⁶⁷

Both Restatements suggest that the domicile at the time of the marriage can refuse to recognize domiciliaries’ marriages for violating an important public policy of the state, even if those marriages were permitted under the law of the state of celebration. At the time that DOMA was being debated, some members of Congress explained to their colleagues that the public policy exception would prevent domiciles from being forced to recognize their domiciliaries’ marriages celebrated in accord with Hawaii law.⁶⁸ Notwithstanding the explanation that DOMA was not necessary to protect the domicile’s power to refuse to recognize a marriage celebrated elsewhere, DOMA was signed into law in 1996.⁶⁹

Perhaps those members of Congress supporting DOMA were afraid that the longstanding practices described in the Restatements would not survive examination in the federal courts.⁷⁰ Or, perhaps they supported DOMA in the belief that doing so was good politics⁷¹ or out of other motivations.⁷² Whatever the members’ actual reasons for

⁶⁵ See RESTATEMENT (FIRST) OF CONFLICT OF LAWS §132 (1934)(d).

⁶⁶ RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS §283 (1971).

⁶⁷ *Id.* Cmt. j.

⁶⁸ See 142 CONG. REC. H7480-05, H7489 (Rep. Moran) (“States already have the power to refuse to honor same-sex marriages conducted in other States under the public policy exemption to the full faith and credit clause. This is the law right now. So why are we debating an unnecessary bill? I am afraid that the real answer is that it is political exploitation of prejudicial attitudes.”); 142 CONG. REC. S10100-02, S10101 - S10102 (Sen. Kennedy) (“Even if the Hawaii courts eventually approve same-sex marriage, other States have ample authority under current law to reject that decision in their own courts.”).

⁶⁹ Daniel Dunson, *A Right to a Word? The Interplay of Equal Protection and Freedom of Thought in the Move to Gender-Blind Marriage*, 5 ALB. GOV’T L. REV. 552, 567 (2012) (“In 1996, in response to the possibility that one or more states might legally recognize committed same-sex couples either by legislative action or as a result of judicial rulings that a state constitution requires such recognition, the Defense of Marriage Act (DOMA) was passed by Congress and signed by President Clinton.”).

⁷⁰ See 142 CONG. REC. S12015-01, S12016 (Sen. Abraham) (“It is Congress’s failure to act to make this clear that could well result in significant Federal intrusion into this State matter by allowing the Federal courts to impose Hawaii’s answer on the other 49 States. By enacting DOMA, this Congress left each of these States free to decide for themselves whether to recognize such marriages or not.”).

⁷¹ See 142 CONG. REC. S10100-02, S10107 (Sen. Kerry) (“Obviously, the results of this bill will not be to preserve anything, but will serve to attack a group of people out of various motives and rationales, and certainly out of a lack of understanding and a lack of tolerance, and will only serve the purposes of the political season.”).

⁷² See *Windsor*, 133 S. Ct. at 2694 (“The history of DOMA’s enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence. The House Report announced its conclusion that ‘it is both appropriate and necessary for Congress to do what it

supporting the measure, their articulated reason was not plausible, as the states already had the power that the section alleged to give them.⁷³ However, it seems unlikely that the Court will interpret the section as conferring no new powers,⁷⁴ and the congressional debate offers little guidance with respect to how broadly the section should be construed.

B. DOMA's Reach

The congressional focus on whether a domicile would be forced to recognize a marriage of its domiciliaries celebrated in accord with another state's law was unfortunate for two distinct reasons. First, members of Congress were wasting time and energy, because they were debating a long-settled area of law, though they may well have been scoring political points at home.⁷⁵ Second, by focusing their debate on already-settled matters, the members of Congress failed to address unsettled matters that implicate competing policy and constitutional interests.

Consider the *Second Restatement's* analysis regarding the conditions under which a marriage should be considered valid. While section 283 makes clear that a marriage celebrated in accord with the law of the place of celebration need not be recognized if contravening an important public policy of the domicile at the time of the marriage, it also suggests that a marriage valid in the state of celebration should be recognized everywhere unless violating an important public policy of the state with the most significant relationship to the couple at the time of celebration.⁷⁶ Thus section 283 is

can to defend the institution of traditional heterosexual marriage.... H.R. 3396 is appropriately entitled the 'Defense of Marriage Act.' The effort to redefine 'marriage' to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage.' The House concluded that DOMA expresses 'both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.' The stated purpose of the law was to promote an 'interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws.' Were there any doubt of this far-reaching purpose, the title of the Act confirms it: The Defense of Marriage.") (citations omitted).

⁷³ Cf. *The Defense of Marriage Act: Hearings on S. 1740 before the Senate Comm. on the Judiciary*, 1996 WL 10829449 (July 11, 1996) (statement of Prof. Cass R. Sunstein) (suggesting that DOMA "gives states no authority that they lack").

⁷⁴ Cf. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 57–58 (2006) ("We refuse to interpret the Solomon Amendment in a way that ... indeed would render it a largely meaningless exercise.").

⁷⁵ See, e.g., 142 CONG. REC. H7480-05, H7489 (Rep. Moran) ("So why are we debating an unnecessary bill? I am afraid that the real answer is that it is political exploitation of prejudicial attitudes."); Representative Moran might have had some of the following in mind. See 142 CONG. REC. S10067-01, S10068 (Sen. Helms) ("But inch by inch, little by little, the homosexual lobby has chipped away at the moral stamina of some of America's courts and some legislators."); 142 CONG. REC. H7480-05, H7487 (Rep. Funderburk) ("If homosexuals achieve the power to pretend that their unions are marriages, then people of conscience will be told to ignore their God-given beliefs and support what they regard as immoral and destructive."); 142 CONG. REC. H7480-05, H7488 (Rep. Stearns) ("You do not threaten my marriage but you do threaten the moral fiber that keeps this Nation together. You threaten the future of families which have traditional marriage at their very heart. If traditional marriage is thrown by the wayside, brought down by your manipulation of the definition that has been accepted since the beginning of civilized society, children will suffer because family will lose its very essence. Instead of trying to ruin families we should be preserving them for future generations.").

⁷⁶ RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS §283.

double-edged. While it recognizes a public policy exception permitting the domicile at the time of the marriage to refuse to recognize a marriage celebrated elsewhere, it also suggests that a marriage valid in a United States domicile at the time of celebration must be recognized throughout the United States.

Several jurisdictions now permit same-sex marriages to be celebrated within the jurisdiction.⁷⁷ Suppose that a same-sex couple living in one of those jurisdictions marries with the intention of remaining within that jurisdiction. Assuming that the marriage does not violate a different prohibition of the domicile, e.g., that an individual is prohibited from marrying someone too closely related by blood,⁷⁸ the *Second Restatement* suggests that such a marriage should be recognized *everywhere*, because it is valid in both the states of celebration and domicile at the time of the marriage.⁷⁹

A number of points should be made about the *Second Restatement's* formulation. First, that formulation is not binding until adopted by a jurisdiction,⁸⁰ so it is not as if a state is forced to recognize a marriage valid in the domicile at the time of the marriage by virtue of the *Second Restatement* recommendation that such a policy be adopted. Instead, whether a subsequent domicile will recognize a marriage valid in the domicile at the time of celebration is a matter of state and federal (including constitutional) law.

As an initial point it may be helpful to consider the context in which this issue might arise. Suppose that Lynn and Robin, a same-sex couple, have validly married in Minnesota, their domicile. After a few years, they decide that they want to move to a warmer climate. Lynn and Robin are both able to secure new jobs in a few different jurisdictions, and they want to know which jurisdictions will recognize their marriage.

The first question is whether the new state recognizes same-sex marriage. If, for example, Lynn and Robin are considering Maryland, their marriage would not be at risk by the move, as Maryland also permits same-sex couples to marry.⁸¹ Suppose, however, that the couple was considering moving to a state that does not permit same-sex partners

⁷⁷ *Mich. gay marriage support up*, DETROIT NEWS, May 15, 2013, at A1, available at 2013 WLNR 11916566 (“Minnesota Gov. Mark Dayton on Tuesday signed legislation making his state the 12th to recognize same-sex marriages and the third alone this month.”).

⁷⁸ See, e.g., MD. CODE, FAMILY LAW, § 2-202 (b)(1) An individual may not marry the individual's:

- (i) grandparent;
- (ii) parent;
- (iii) child;
- (iv) sibling; or
- (v) grandchild

⁷⁹ A separate issue involves which law governs if the marriage is not valid in the state of celebration but is valid in the domicile at the time of the marriage. See *In re Farraj*, 900 N.Y.S.2d 340 (N.Y. App. Div. 2010) (upholding validity of marriage valid in New York, the domicile, but invalid in the state of celebration, New Jersey).

⁸⁰ Melissa Schwaller, Comment, *Uniform Biological Material Transfer Agreements: An Argument for Uniform Use*, 4 HOUS. BUS. & TAX. L.J. 190, n. 158 (2004) (“The Restatements are only model laws; it is necessary for the jurisdiction to have adopted them as law before they have binding effect.”).

⁸¹ Mr Keith McMurdy, *Defining Eligibility: Start With Plan Terms*, MONDAY, May 16, 2013, available at 2013 WLNR 12005879 (“in Maryland, the state is getting ready to eliminate coverage for ‘domestic partners’ because as of January 1, 2013, same-sex marriage became legal in that state”).

to marry within the state.⁸² Such a state might nonetheless be willing to recognize a same-sex marriage if contracted within a jurisdiction recognizing such unions.⁸³

Other states have laws specifying that they will not recognize a same-sex marriage even if validly celebrated elsewhere.⁸⁴ For example, Lynn and Robin's marriage would likely not be recognized if they moved to Indiana.⁸⁵ Such statutes at the very least suggest that the domicile will refuse to recognize a same-sex marriage of one of its domiciliaries even if celebrated in a state recognizing such marriages.⁸⁶ But in at least some jurisdictions these laws are likely to be read more broadly, so a same-sex marriage

⁸² Cf. WYO. STAT. 1977 § 20-1-101 ("Marriage is a civil contract between a male and a female person to which the consent of the parties capable of contracting is essential.").

⁸³ Even before permitting same-sex marriages to be celebrated within the state, New York recognized them if validly celebrated elsewhere. See *In re Estate of Ranftle*, 917 N.Y.S.2d 195, 196 (N.Y. App. Div. 2011) ("New York's long-settled marriage recognition rule affords comity to out-of-state marriages and 'recognizes as valid a marriage considered valid in the place where celebrated'" (citing *Van Voorhis v. Brintnall*, 86 N.Y. 18, 25 [1881])). While there are exceptions to this rule, see *id.* ("This rule does not extend such recognition where the foreign marriage is 'contrary to the prohibitions of natural law or the express prohibitions of a statute'" (citing *Moore v. Hegeman*, 92 N.Y. 521, 524 [1883])), same-sex marriages did not fall within those narrow exceptions. See *id.* See also WYO. STAT. 1977 § 20-1-111 ("All marriage contracts which are valid by the laws of the country in which contracted are valid in this state.") See also *Christiansen v. Christiansen*, 253 P.3d 153 (Wyo. 2011) (holding that a district court had jurisdiction to dissolve a same-sex marriage celebrated in Canada). It is unclear, however, whether Wyoming would recognize the hypothesized marriage between Lynn and Robin. See *id.* at 156 ("Paula and Victoria are not seeking to live in Wyoming as a married couple. They are not seeking to enforce any right incident to the status of being married.").

⁸⁴ KAN. CONST. Art. 15, § 16 (a) ("The marriage contract is to be considered in law as a civil contract. Marriage shall be constituted by one man and one woman only. All other marriages are declared to be contrary to the public policy of this state and are void."); KAN. CONST. Art. 15, § 16 (b) ("No relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage."); KY. REV. STAT. § 402.045 (1)-(2) ("A marriage between members of the same sex which occurs in another jurisdiction shall be void in Kentucky. Any rights granted by virtue of the marriage, or its termination, shall be unenforceable in Kentucky courts."); LA. CIV. CODE ANN. Art. 3520 (B) ("A purported marriage between persons of the same sex violates a strong public policy of the state of Louisiana and such a marriage contracted in another state shall not be recognized in this state for any purpose, including the assertion of any right or claim as a result of the purported marriage."); MICH. COMP. LAWS ANN. § 551.272 (West 1996) ("a marriage that is not between a man and a woman is invalid in this state regardless of whether the marriage is contracted according to the laws of another jurisdiction."); MS. CONST. Art. 14, § 263A ("A marriage in another state or foreign jurisdiction between persons of the same gender, regardless of when the marriage took place, may not be recognized in this state and is void and unenforceable under the laws of this state."); MO. ANN. STAT. § 451.022 (4) (West 2013) ("A marriage between persons of the same sex will not be recognized for any purpose in this state even when valid where contracted."); OKLA. STAT. 43 § 3.1 (West 1997) ("A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage."); VA. CODE ANN. § 20-45.2 (West 1975) ("A marriage between persons of the same sex is prohibited. Any marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable.").

⁸⁵ See IND. CODE § 31-11-1-1 (b) (1997) ("A marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized.").

⁸⁶ KY. REV. STAT. § ANN. § 402.040 (1998) ("If any resident of this state marries in another state, the marriage shall be valid here if valid in the state where solemnized, unless the marriage is against Kentucky public policy. A marriage between members of the same sex is against Kentucky public policy.").

validly celebrated in the parties' domicile at the time of the marriage will nonetheless not be recognized by the new jurisdiction if such a couple were to later emigrate to that state.⁸⁷ Thus, the narrow interpretation of such statutes is that these states refuse to recognize a same-sex marriage of their own domiciliaries that has been celebrated in a state permitting such marriages to be celebrated.⁸⁸ The broader interpretation is that these states would refuse to recognize a same-sex marriage even if validly celebrated in the couple's *domicile* at the time of the marriage.

Traditionally, the domicile is understood to have a great interest in the marital status of its domiciliaries. In *Williams v. North Carolina (Williams I)*,⁸⁹ the United States Supreme Court discussed the domicile's power over "the marital status of its domiciliaries,"⁹⁰ and Justice Murphy in his *Williams* dissent noted "the paramount interest of the state of domicile over the marital status of its citizens."⁹¹ In *Loughran v. Loughran*,⁹² the Court explained that "Marriages 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."⁹³ Here, when noting that a marriage void by statute would not be recognized, the Court was referring to the law of the domicile at the time of the marriage.⁹⁴ That said, it was unclear whether the *Loughran* Court was simply describing existing law or, instead, holding as a constitutional matter that a marriage valid in the domicile at the time of its celebration is valid everywhere.⁹⁵

In *Williams v. North Carolina (Williams II)*,⁹⁶ the Court explained that "Domicil [sic] implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance."⁹⁷ Because one's marital status "affects personal rights of the deepest significance ... [and] also touches basic interests of society,"⁹⁸ the Court suggested that "every consideration of policy makes it desirable that the effect should be the same wherever the question arises,"⁹⁹ i.e., that one's marital status is the same across jurisdictions. Here, the Court was discussing both

⁸⁷ See *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 659 (Tex. App. 2010) (refusing to recognize same-sex marriage validly celebrated in Massachusetts two years before individuals became Texas residents).

⁸⁸ A separate issue is whether a domicile's refusal to recognize a marriage of its domiciliaries celebrated elsewhere is based on legitimate reasons rather than animus. See *Obergefell v. Kasich*, No. 1:13-cv-501, 2013 WL 3814262 (S.D. Ohio July 22, 2013) (enjoining the Ohio Registrar of death certificates from accepting a death certificate of John Arthur if it did not list Arthur as married and, in addition, list James Obergefell as his surviving spouse. Arthur and Obergefell, Ohio domiciliaries, had married in Maryland.). The *Obergefell* court suggested that Ohio's refusal to recognize such marriages was animus-based. See *id.* at *6 ("this Court on this record cannot find a rational basis for the Ohio provisions discriminating against lawful, out-of-state same sex marriages that is not related to the impermissible expression of disapproval of same-sex married couples").

⁸⁹ 317 U.S. 287 (1942).

⁹⁰ *Id.* at 300.

⁹¹ *Id.* at 308 (Murphy, J., dissenting).

⁹² 292 U.S. 216 (1934).

⁹³ *Id.* at 223 (citing *Meister v. Moore*, 96 U.S. 76 (1877); *Travers v. Reinhardt*, 205 U.S. 423, 440 (1907)).

⁹⁴ *Id.*

⁹⁵ The Court in a footnote cited to existing laws in support of its statement. See *id.* at 223 n.1.

⁹⁶ 325 U.S. 226 (1945).

⁹⁷ *Id.* at 229.

⁹⁸ *Id.* at 230.

⁹⁹ *Id.*

marriage and divorce, because whether entering a marriage or securing a divorce one “creates a new status.”¹⁰⁰

Yet, it is important to understand the way that marriage and divorce might be treated as on par for constitutional purposes. A divorce decree is a judgment subject to full faith and credit guarantees,¹⁰¹ whereas a marriage is not a judgment and is not subject to the same treatment under the Full Faith and Credit Clause.¹⁰² The Court is not suggesting that marriage and divorce are equivalent for full faith and credit purposes but, instead, that they are on par in a different respect, as becomes clearer when one considers the focus of *Williams II*.

At issue in *Williams II* was whether North Carolina was bound by a Nevada determination that the latter state was the domicile of one of the parties to a divorce.¹⁰³ If so, then North Carolina was bound by the divorce decree issued by the Nevada court.¹⁰⁴ If not, then North Carolina would be bound by the divorce decree only if the North Carolina court independently found that the Nevada court had jurisdiction to grant the divorce, i.e., that at least one of the parties to the marriage had been domiciled in Nevada when the divorce was granted.¹⁰⁵ If the North Carolina court were to find that neither party to the divorce was domiciled in Nevada when the decree was granted, then North Carolina would be free to refuse to give full faith and credit to that divorce judgment.¹⁰⁶

The *Williams* Court discussed “the constitutional power of each [state] to deal with domestic relations of those domiciled within its borders.”¹⁰⁷ But that constitutional power had to be understood in light of the underlying question, namely, whether Nevada had jurisdiction to grant a divorce. If Nevada was the domicile of at least one of the parties at the time the divorce was granted, then its determination of the marital status of the parties

¹⁰⁰ *Id.*

¹⁰¹ Alexander V. Maugeri, *The Missing Ingredient: How Oft-Overlooked Modern Conflict of Laws Principles Will Dictate the Reach of Same-Sex Marriage in America*, 30 ST. LOUIS U. PUB. L. REV. 325, 371 (2011) (“once a party has secured a divorce judgment or decree in one state ... the Full Faith and Credit Clause demands full recognition”).

¹⁰² See Joanna L. Grossman, *Defense of Marriage Act, Will You Please Go Now!* 2012 CARDOZO L. REV. DE NOVO 155, 161 (2012) (“[M]arriage is not the product of a court judgment; it is merely the application of a state law, which requires only that other states meet ‘certain minimum requirements’ of full faith and credit. States can still prefer their own law—including their law denying same-sex marriage—over the competing choice of another state—one allowing same-sex marriage—as long as the choice is ‘neither arbitrary nor fundamentally unfair.’”) (citing *Phillips Petroleum v. Shutts*, 472 U.S. 797, 818 (1985)).

¹⁰³ *Williams II*, 325 U.S. at 227 (explaining that the precise issue before the Court was “whether North Carolina had the power ‘to refuse full faith and credit to Nevada divorce decrees because, contrary to the findings of the Nevada court, North Carolina finds that no *bona fide* domicile was acquired in Nevada.”) (quoting *Williams I*, 317 U.S. at 302).

¹⁰⁴ See *id.* at 232 (“What is true is that all the world need not be present before a court granting the decree and yet it must be respected by the other forty-seven States provided—and it is a big proviso—the conditions for the exercise of power by the divorce-decreeing court are validly established whenever that judgment is elsewhere called into question.”).

¹⁰⁵ See *id.* (“the decree of divorce is a conclusive adjudication of everything except the jurisdictional facts upon which it is founded, and domicile is a jurisdictional fact”).

¹⁰⁶ *Id.* at 239 (“North Carolina was entitled to find, as she did, that they did not acquire domiciles in Nevada and that the Nevada court was therefore without power to liberate the petitioners from amenability to the laws of North Carolina governing domestic relations.”).

¹⁰⁷ *Id.* at 237.

had to be respected by *all* of the states, even if, for example, another state like North Carolina would have been unwilling to grant the divorce on the grounds that had been successfully asserted in Nevada.¹⁰⁸

When suggesting that marriage and divorce are analogous for constitutional purposes, the *Williams II* Court may be emphasizing the importance of the domicile at the time an action is taken to alter marital status. The Court might have been offering the following analysis: Just as the domicile at the time of divorce can alter an individual's marital status and that new status is subject to recognition generally even if the divorce would not have been granted in light of a subsequent domicile's law, the marital status conferred by the domicile at the time of marriage is subject to recognition throughout the United States even though that status would not have been conferred by a subsequent domicile's law.

Such an emphasis on domicile would not create a national marriage law and would not permit a state of celebration to impose its marriage laws on the domicile at the time of the marriage—the domicile would still be able to refuse to recognize a marriage of its domiciliaries that had been celebrated elsewhere. Later-acquired domiciles would *not* be entitled to refuse to recognize a marriage validly celebrated in the domicile, however.

The ability of one domicile to bind future domiciles would not exist by virtue of the Full Faith and Credit Clause. Instead, it would exist because of a combination of (a) the power of a United States domicile at the time of the marriage, and (b) the individual interests implicated in having the marriage recognized throughout the United States if valid in the domicile at the time of celebration.

In *Estin v. Estin*,¹⁰⁹ the Court explained that states have the power to protect their domiciliaries “by changing or altering their marital status and by protecting them in that changed status throughout the farthest reaches of the nation.”¹¹⁰ For example, “a person domiciled in one State should not be allowed to suffer the penalties of bigamy for living outside the State with the only one which the State of his domicile recognizes as his lawful wife.”¹¹¹ In addition, “children born of the only marriage which is lawful in the State of his domicile should not carry the stigma of bastardy when they move elsewhere.”¹¹² Thus, suppose that an individual who, while remaining in her domicile, divorces one individual and then marries someone else. If the newlyweds went to another state to honeymoon, the vacation state could not refuse to recognize the validity of the divorce and then accuse the newlyweds of bigamy or adultery.

At the very least, the *Estin* Court is suggesting that the domiciliaries of one state must be immunized from the possible negative effects associated with a *non*-domicile's refusal to recognize the marital status conferred by the couple's domicile. But *Estin*'s reasoning applies with equal force to a couple who moves to another state and remains there. Otherwise, the couple who moved to a state would be immune from the deleterious effects associated with the non-recognition of a previously conferred status only until

¹⁰⁸ See *Estin v. Estin*, 334 U.S. 541, 545–46 (1948) (“The Full Faith and Credit Clause ... ordered submission by one State even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it.”) (citing *Williams I*, 317 U.S. at 301).

¹⁰⁹ 334 U.S. 541 (1948).

¹¹⁰ *Id.* at 546.

¹¹¹ *Id.* at 546–47.

¹¹² *Id.* at 547.

deciding to settle in the new state. Once the couple had emigrated to the new state, that state would be free to reject the validity of the divorce between one of the individuals and her previous spouse, e.g., because the ground upon which the divorce was granted was not available in the new domicile. In that event, the individual and her new “purported” spouse would find that by becoming domiciliaries of the new state, their marriage could be treated as void from its inception¹¹³ and, further, the individuals could be subject to criminal prosecution.

Were the correct interpretation of the applicable constitutional guarantees that the subsequent domicile determines marital status and, for example, could refuse to give effect to a divorce granted by a former domicile, then the *Williams II* Court would not have addressed whether the Nevada court had jurisdiction to grant the divorce. Instead, the Court would have reasoned that because North Carolina was the subsequent domicile (even if not the domicile all along), North Carolina was free to refuse to recognize the divorce granted by the Nevada court whether or not Nevada had been the bona fide domicile of one of the parties. The Court might have reasoned that any other holding would permit the alleged former domicile (Nevada) to impose its determination of marital status on the subsequent domicile. The Court would then conclude that because the defendants could not have secured a divorce in North Carolina on the ground accepted in Nevada, North Carolina as the new domicile would be free to determine the conditions under which its domiciliaries could marry or divorce (even retrospectively).

But the above reasoning is exactly what *Williams II* did *not* say. Instead, the *Williams II* Court made clear that the Nevada divorce decree would be binding on North Carolina¹¹⁴ if indeed Nevada had been the domicile at the time the divorce was granted.¹¹⁵ This means that a domicile can bind a subsequent domicile with respect to the marital status of its domiciliaries, at least when divorce is at issue.

Suppose that a subsequent domicile could undo a divorce of its domiciliaries if that divorce was based on a ground not recognized in the subsequent domicile. That would be a heavy price to pay for the privilege of becoming a domiciliary of the new state and the new state might fear that its having such a policy might deter potentially productive individuals from becoming citizens. Yet, the point is not merely that states would be wise to consider the potential costs of such a policy but, in addition, that right to travel guarantees would preclude a state from enacting legislation that imposes such a severe cost on individuals becoming citizens of a new state. The right to travel not only protects individuals when they travel through a state but also protects them when they emigrate to a state. In *Saenz v. Roe*,¹¹⁶ the Court described “three different components”¹¹⁷ that are protected by the right to travel:

¹¹³ See *Wright v. Hall*, 738 S.E.2d 594, 596 (Ga. 2013) (discussing “a marriage contract that was void from its inception due to a living spouse from a previous marriage”).

¹¹⁴ *Williams II*, 325 U.S. at 238 (“one State can grant a divorce of validity in other States only if the applicant has a bona fide domicil in the State of the court purporting to dissolve a prior legal marriage”) (emphasis omitted).

¹¹⁵ A separate issue is whether the decree-granting state is in fact the bona fide domicile of at least one of the parties. See *id.* (“The petitioners therefore assumed the risk that this Court would find that North Carolina justifiably concluded that they had not been domiciled in Nevada.”).

¹¹⁶ 526 U.S. 489 (1999).

¹¹⁷ *Id.* at 500.

“the right of a citizen of one State to enter and to leave another State,”¹¹⁸

“the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State,”¹¹⁹ and

“for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.”¹²⁰

Justice Black recognized that right to travel guarantees might be triggered depending upon how divorces were treated in other states. He noted, for example, that “to subject people to criminal prosecutions for adultery and bigamy merely because they exercise their constitutional *right to pass* from a state in which they were validly married into another state which refuses to recognize their marriage ... runs counter to the basic guarantees of our federal union.”¹²¹ Thus, he implied that the right to travel would preclude a non-domicile from exposing the individual to potential criminal penalty by imposing its own marriage rules on someone who had passed into the state.

Suppose that criminal penalties were taken off the table. Even so, as Justice Jackson has noted, the uncertainties regarding marital status may “affect fundamental rights and relations”¹²² such as “children’s legitimacy ... [and] title to property.”¹²³ The difficulties posed by a system making marital status indeterminate after border-crossings are magnified because in “a society as mobile and nomadic as ours, such uncertainties affect large numbers of people and create a social problem of some magnitude.”¹²⁴

Suppose that at least one of the reasons that an individual’s marriage is protected when she travels through another state is because of her right to travel.¹²⁵ If the right to travel includes not only the right to travel through a state but to emigrate to a state,¹²⁶ then individuals whose marriages are valid in the state of domicile at the time of the marriage must be able to bring those marriages with them when they emigrate to a new state.¹²⁷ If the status of one’s spouse and children are not sufficiently important to trigger right to travel guarantees, then it is difficult indeed to understand what suffices to trigger those guarantees.¹²⁸

Just as there was a question whether Nevada was indeed the domicile of one of the parties at the time of the divorce in *Williams*,¹²⁹ there might be some question whether a

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Williams II*, 325 U.S. at 265 (Black, J., dissenting) (citing *Edwards v. California*, 314 U.S. 160 (1941)) (emphasis added).

¹²² *Estin*, 334 U.S. at 553 (Jackson, J., dissenting).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ See *Ex parte Kinney*, 14 F. Cas. 602 (C.C.E.D. Va 1879) (explaining that interracial marriage would have to be respected in Virginia if interracial couple was traveling through the state).

¹²⁶ *Id.*

¹²⁷ For an exposition of this argument, see generally Mark Strasser, *Interstate Marriage Recognition and the Right to Travel*, 25 WIS J L. GENDER & SOC’Y. 1–34 (2010).

¹²⁸ For an example of an interest that is not sufficiently important for right to travel purposes, see *Baldwin v. Fish and Game Commission*, 436 U.S. 371, 388 (1978) (“Whatever rights or activities may be ‘fundamental’ under the Privileges and Immunities Clause, we are persuaded, and hold, that elk hunting by nonresidents in Montana is not one of them.”).

¹²⁹ See also *Rice v. Rice*, 336 U.S. 674, 675 (1949) (“After a full trial, judgment was entered in favor of respondent, and the court’s finding that Herbert N. Rice had never established a bona fide domicile in

particular state was the domicile of the parties at the time of a marriage. For example, if parties plan to move immediately after their wedding to a different state, the marriage would have to be in accord with the law of the state where the couple intended to live, because that state would also count as a state with the “most significant relationship to the spouses and the marriage at the time of the marriage,”¹³⁰ at least for purposes of the marriage’s validity.

The Court has never stated that marital status as determined by the domicile at the time of the marriage is binding on subsequent domiciles as a constitutional matter. Some of the rationales articulated by members of the Court would support such an interpretation, although others would not. When the importance of the domicile’s law in determining who is married to whom is emphasized,¹³¹ that supports the primacy of the domicile over a non-domicile but need not support the primacy of one domicile over another.¹³² One the other hand, when the Court talks about the burdens on individuals that would have to be borne if marital status could shift merely because of a change of domicile, the Court implies that the status acquired in the earlier domicile cannot be lost simply by virtue of the individual’s acquiring a new domicile.¹³³ As Justice Jackson has suggested, “If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom.”¹³⁴ A system that makes marital status indeterminate depending upon where one’s company requires one to relocate is a system in need of serious revision.

If individuals’ marriages are indeed protected by the right to travel, then Congress will be precluded from authorizing their nonrecognition by other states. As the *Saenz* Court made quite clear, Congress does not have the power to override right to travel

Nevada was affirmed on appeal by the Supreme Court of Errors of Connecticut.”); *id.* (“[W]e have concluded that the Connecticut courts gave proper weight to the claims of power by the Nevada court, that the burden of proving that the decedent had not acquired a domicile in Nevada was placed upon respondent, that this issue of fact was fairly tried according to appropriate procedure, and that the findings of the Connecticut courts are amply supported in evidence”).

¹³⁰ RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS §283 (1971). *See also* Mark Strasser, *What If DOMA Were Repealed? The Confused and Confusing Interstate Marriage Recognition Jurisprudence*, 41 CAL. W. INT’L L.J. 249, 257–58 (2010) (“Traditionally, the domicile immediately after the marriage is not required to recognize a marriage that could not be celebrated locally, because that state would be viewed as having the most significant connection to the marriage at the time of its celebration.”).

¹³¹ *See* *Order of United Commercial Travelers of America v. Wolfe*, 331 U.S. 586, 606 (1947) (“[M]arriage looks to domicil.”); *Sherrer v. Sherrer*, 334 U.S. 343, 357 (1948) (Frankfurter, J., dissenting) (“[W]hen it comes to dissolving a marriage status, throughout the English-speaking world the basis of power to act is domicile.”); *id.* at 361–62 (Frankfurter, J., dissenting) (“the State of domicile has an independent interest in the martial status of its citizens that neither they nor any other State with which they may have a transitory connection may abrogate against its will”).

¹³² *See Williams I*, 317 U.S. at 300 (“The existence of the power of a state to alter the marital status of its domiciliaries ... is dependent on the relationship which domicil creates and the pervasive control which a state has over marriage and divorce within its own borders.”).

¹³³ *See Estin*, 334 U.S. at 546–47 (“For a person domiciled in one State should not be allowed to suffer the penalties of bigamy for living outside the State with the only one which the State of his domicile recognizes as his lawful wife. And children born of the only marriage which is lawful in the State of his domicile should not carry the stigma of bastardy when they move elsewhere.”).

¹³⁴ *Id.* at 553 (Jackson, J., dissenting).

guarantees.¹³⁵ If a marriage valid in the domicile at the time of celebration must be recognized throughout the United States by virtue of Fourteenth Amendment guarantees, then Congress's attempt to undermine or abrogate that right will be unavailing.¹³⁶

A good argument can be made that the right to travel precludes a subsequent domicile from refusing to recognize a marriage valid in the domicile at the time of its celebration. Even if the right to travel is not so interpreted, however, section 2 is still unconstitutional. This DOMA section authorizes any "State, territory, or possession of the United States, or Indian tribe" to refuse to give effect to "a relationship between persons of the same sex that is treated as a marriage under the laws of ... [another] State, territory, possession, or tribe."¹³⁷ But this seems to authorize a state with a merely transitory connection to a same-sex married couple to refuse to recognize that marriage, even if that union is valid in the couple's current domicile.

Suppose that Lynn and Robin had moved to Maryland. Their marriage was valid in the domicile at the time of the marriage (Minnesota) and valid in their subsequent domicile (Maryland). But if they were traveling through a neighboring state (Virginia) on the way to some vacation spot and something important was dependent on their marriage being recognized, e.g., a wrongful death action by the surviving spouse, section 2 would seem to authorize Virginia to refuse to recognize the marriage¹³⁸ and reject the wrongful death action.¹³⁹

There are two distinct respects in which the non-domicile's having such a power undermines constitutional guarantees. First, it contravenes the domicile's power to determine and preserve its domiciliaries' marital status and hence infringes upon a power accorded to domiciliary states in particular. Second, it violates the individual's right to travel.

The Court has not yet explained whether section 2 permits a subsequent domicile to refuse to recognize a marriage valid in the domicile at the time of its celebration. Nor has the Court explained whether a non-domicile can refuse to recognize a marriage valid in the domicile. While the language of the statute suggests that any state can refuse to recognize a same-sex marriage, the Court might interpret it differently to avoid constitutional difficulties, e.g., by focusing on the comments in the Congressional Record or by referring to the powers accorded to the domicile.¹⁴⁰ Regrettably, there are other elements of the statute that are also in need of interpretation, for example, whether it

¹³⁵ See *Saenz*, 526 U.S. at 507–08 ("Congress may not authorize the States to violate the Fourteenth Amendment. Moreover, the protection afforded to the citizen by the Citizenship Clause of that Amendment is a limitation on the powers of the National Government as well as the States.").

¹³⁶ See *id.* at 507.

¹³⁷ 28 U.S.C. 1738C (1996).

¹³⁸ See VA. CODE ANN. § 20-45.2 ("A marriage between persons of the same sex is prohibited. Any marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia.").

¹³⁹ Cf. *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999) ("Her marriage to Jonathon was invalid, and she cannot bring a cause of action as his surviving spouse.").

¹⁴⁰ Cf. *I.N.S. v. St. Cyr*, 533 U.S. 289, 299–300 (2001) ("if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' [citing *Crowell v. Benson*, 285 U.S. 22, 62 (1932)] we are obligated to construe the statute to avoid such problems.") (citing *Ashwander v. TVA*, 297 U.S. 288, 341, 345–348, (1936) (Brandeis, J., concurring); *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)).

modifies the conditions under which divorce judgments must be given full faith and credit.

C. Section 2 and Divorce Judgments

Section 2 permits states to refuse “to give effect to any public act, record, or judicial proceeding”¹⁴¹ respecting a same-sex marriage. The part specifying that a state need not recognize a public act or record involving a same-sex marriage is not difficult to understand—this section gives states the power not to recognize the record of the marriage or, perhaps, the act (statute) authorizing same-sex couples to marry within a jurisdiction. Bracketing for a moment whether this section authorizes a non-domicile to refuse to recognize a marriage valid in the couple’s domicile,¹⁴² the section may simply be reaffirming that marriages are not subject to full faith and credit guarantees.¹⁴³

The Supreme Court explained in *Baker v. General Motors*¹⁴⁴ that “precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments.”¹⁴⁵ Thus, 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.’”¹⁴⁶ In the paradigm case, the domicile at the time of the marriage does not have to recognize a marriage validly celebrated according to another state’s law, i.e., substitute the other state’s law for its own.

Yet, section 2 does not restrict itself to other state’s acts and records; it also exempts judicial proceedings regarding a same-sex marriage. This may modify the regime that had existed prior to DOMA. As the *Baker* Court explained, “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.”¹⁴⁷

Section 2 does not specify the kinds of judicial proceedings that the section is meant to exempt. Consider Lynn and Robin who married in their domicile and who were anticipating moving to a new state. Perhaps they would be able to get a declaratory judgment respecting their marriage,¹⁴⁸ hoping that such a judgment would be given full

¹⁴¹ 28 U.S.C. § 1738C (1996).

¹⁴² See *supra* note 138 and accompanying text.

¹⁴³ Alvin Deutsch & Jeremy A. Schachter, *Gay Right to Terminate under the 1976 Copyright Act*, 31 CARDOZO ARTS & ENT. L.J. 275, 290 (2013) (“Marriage is not the sort of decree that states are constitutionally required to give full faith and credit.”); Mae Kuykendall, *Equality Federalism: A Solution to the Marriage Wars*, 15 U. PA. J. CONST. L. 377, 445 (2012) (“[T]he current DOMA, which provides that states need not recognize gay marriages, is seen as redundant of the existing Full Faith and Credit Clause and conflict-of-laws interpretations of it.”).

¹⁴⁴ 522 U.S. 222 (1998).

¹⁴⁵ *Id.* at 232.

¹⁴⁶ *Id.* at 232–33 (citing *Pacific Employers Ins. Co. v. Industrial Accident Comm’n*, 306 U.S. 493, 501 (1939)).

¹⁴⁷ *Id.* at 233.

¹⁴⁸ MINN. STAT. ANN. § 555.01 (“Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations

faith and credit in the jurisdiction to which they were planning on moving. It may be that this part of section 2 was designed to prevent a subsequent domicile from being forced to recognize a same-sex marriage that had been declared valid by a court in the domicile in which it had been celebrated.¹⁴⁹

Yet section 2 does not specify any limitation on the judicial proceedings involving a same-sex marriage that need not be given effect. Thus, this section might be interpreted to authorize a state to refuse to recognize a same-sex divorce and, *perhaps*, rights or obligations arising from such a divorce.

D. Which Rights or Obligations Need Not Be Given Effect?

While section 2 authorizes states to refuse to give effect to any “right or claim arising from [a same-sex] relationship,”¹⁵⁰ it does not specify which rights or claims may be ignored. Some rights or claims are associated with the relationship itself, whereas others might be associated with a divorce decree.

DOMA was passed into law before *Lawrence v. Texas* was issued,¹⁵¹ and states at that time were still permitted to criminalize sexual relations between individuals of the same sex. Without this DOMA section, it might have been thought that same-sex couples who had married would have a defense against prosecution for having engaged in sexual relations with their marital spouses.¹⁵² Or, it might have been thought that children born into a same-sex union would be presumed to be the child of each of the parties.¹⁵³ There are other kinds of claims that one would be entitled to make by virtue of being married to someone, e.g., the right to sue for loss of consortium,¹⁵⁴ or by virtue of having been

shall have the force and effect of a final judgment or decree.”). *But see* MINN. STAT. ANN. § 555.06 (“The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.”).

¹⁴⁹ Mark Strasser, *Baker and Some Recipes for Disaster: On DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence*, 64 BROOK. L. REV. 307, 345 (1998) (“Absent DOMA, however, subsequent domiciles would seem obligated to give full faith and credit to a declaratory judgment specifying that a same-sex marriage was valid.”); Lynn D. Wardle, *Non-Recognition of Same-Sex Marriage Judgments under DOMA and the Constitution*, 38 CREIGHTON L. REV. 365, 388 (2005) (“If a same-sex couple were to get married in Massachusetts then got a declaratory judgment recognizing their “marriage” as valid . . . Section Two of DOMA removes the potential federal full faith and credit compulsion (one way or the other) and leave it up to the second state to decide for itself what effect to give such judgments.”).

¹⁵⁰ 28 U.S.C. § 1738C (1996).

¹⁵¹ *See* *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁵² Mark Strasser, *Life after DOMA*, 17 DUKE J. GENDER L. & POL’Y 399, 405 (2010) (“[I]t 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.”).

¹⁵³ *See id.* at 404–05 (“Individuals who are married enjoy a variety of rights including, for example, a presumption of parenthood of a child born into the relationship. 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.”).

¹⁵⁴ *See*, for example, *Thurmon v. Sellers*, 62 S.W.3d 145, 159–60 (Tenn. Ct. App. 2001) (“Tennessee’s wrongful death statutes allowed surviving spouses and children of the deceased to sue for loss of consortium.”).

married to the deceased, e.g., the right to sue for wrongful death.¹⁵⁵ Perhaps section 2 is permitting states not to give effect to those.

Another interpretation of section 2, however, is that it authorizes states to refuse to give effect to divorce judgments or any rights arising therefrom.¹⁵⁶ As an initial matter, it is simply unclear whether Congress has the power to reduce the credit to be given to judgments. For example, the *Williams* Court mentioned the possibility that Congress could decrease the credit due to divorce judgments, but then refused to take a position on whether such an action would be constitutional. “Whether Congress has the power to create exceptions [to the credit due divorce judgments] is a question on which we express no view.”¹⁵⁷ Lest one think that the Court had no opinion on this matter, the Court expressly noted that were Congress to reduce the credit to be given to divorce judgments, “the considerable interests involved, and the substantial and far-reaching effects which the allowance of an exception would have on innocent persons, indicate that the purpose of the full faith and credit clause and of the supporting legislation would be thwarted to a substantial degree...”.¹⁵⁸ That said, however, some individual members of the Court have suggested that it is within Congress’s power to reduce the credit due to divorce judgments.¹⁵⁹

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.”¹⁶⁰ There is some debate about whether the second sentence includes the power to reduce full faith and credit.¹⁶¹ Even if that sentence does afford Congress the power to reduce the credit due, another part of the sentence must also be construed, namely, the “general laws” requirement. DOMA is not a federalism measure that permits all subsequent domiciles to

¹⁵⁵ *Hatwood v. Hospital of the University of Pennsylvania*, 55 A.3d 1229, 1235 (Pa. Super. 2012) (“Pennsylvania’s Wrongful Death Act, 42 PA. CONS. STAT. ANN. § 8301, allows a spouse, children or parents of a deceased to sue another for a wrongful or neglectful act that led to the death of the deceased.”).

¹⁵⁶ Bradley J. Betlach, *The Unconstitutionality of the Minnesota Defense of Marriage Act: Ignoring Judgments, Restricting Travel and Purposeful Discrimination*, 24 WM. MITCHELL L. REV. 407, 424 n.93 (1998) (“[A]lthough a divorce decree, an all too common consequence of marriage, is a judgment, DOMA purportedly would allow a state to refuse to give effect to it.”); Wardle, *supra* note 149, at 388 (“If a same-sex couple . . . got a divorce and award of alimony arising out of the same-sex marriage relationship, Section Two of DOMA removes the potential federal full faith and credit compulsion (one way or the other) and leave it up to the second state to decide for itself what effect to give such judgments.”).

¹⁵⁷ *Williams I*, 317 U.S. at 303.

¹⁵⁸ *Id.* at 303–04.

¹⁵⁹ *Williams II*, 325 U.S. at 268 (Black, J., dissenting) (“If, as the Court today implies, divorce decrees should be given less effect than other court judgments, Congress alone has the constitutional power to say so.”); *Sherrer v. Sherrer*, 334 U.S. 343, 364 (1948) (Frankfurter, J., dissenting) (discussing Congress’s “powers under the Full Faith and Credit Clause to meet the special problems raised by divorce decrees”).

¹⁶⁰ U.S. CONST. art IV, §1.

¹⁶¹ See Paige E. Chabora, *Congress’ Power under the Full Faith and Credit Clause and the Defense of Marriage Act of 1996*, 76 NEB. L. REV. 604, 620 (1997) (“DOMA’s critics argued that Congress could legislate only to increase or augment the full faith and credit available to state acts, records, and proceedings. In other words, Congress’ power under the Effects Clause is subject to a ‘one-way ratchet.’”).

refuse to recognize divorces that could not be secured locally.¹⁶² Instead, it subjects one kind of divorce—those involving same-sex partners—to non-recognition in other states.

Nor can it be argued that section 2 reserves for non-recognition those marriages or divorces that are most offensive to public policy. For example, even a state that recognizes same-sex unions is authorized to refuse to recognize a same-sex divorce if, for example, the couple did not live separate and apart for the period required locally. Suppose, for example, that a same-sex couple married and divorced in Minnesota. One of the parties moved to Maryland and sought to establish that the couple was still married. Because Maryland requires a couple to live separate and apart for a year before a divorce may be granted,¹⁶³ it would seem authorized to refuse to recognize a Minnesota divorce based on the couple's having lived apart for only six months.¹⁶⁴

Section 2 does not limit its authorization to refuse to give effect to divorces involving same-sex couples to those states refusing to recognize such marriages. Rather, it permits any state to refuse to recognize such a divorce for any reason. Thus, in the example above, Maryland would not be refusing to recognize the divorce because it disapproved of same-sex marriages but because it disapproved of permitting individuals to divorce prematurely.

Maryland has a public policy requiring individuals to live separate and apart for a particular period, perhaps believing that requiring couples to be apart for a longer period before divorce might save some marriages,¹⁶⁵ and imposes that requirement on its own domiciliaries. The difficulty here is that a same-sex couple who had secured a valid divorce in a different state could have that judgment examined in light of the forum's divorce laws, whereas a similarly situated different-sex couple would not be similarly at risk of having their divorce decree refused recognition.

The *Windsor* Court explained that “DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal.”¹⁶⁶ Interestingly, the Court noted that “DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and responsibilities.”¹⁶⁷ But if indeed section 2 permits an individual to avoid his or her court-imposed obligations as spelled out in a divorce decree, then section 2 of DOMA is subject to the criticism leveled against section 3—it

¹⁶² Cf. Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1534 (2007) (“DOMA's Section 2 thus represents a rational regulation of interstate relations that accords with the terms of the Effects Clause and with principles of federalism.”).

¹⁶³ MD. CODE, FAMILY LAW, § 7-103 (a)(4) (2011) (“The court may decree an absolute divorce on the following grounds: . . . 12-month separation, when the parties have lived separate and apart without cohabitation for 12 months without interruption before the filing of the application for divorce. . . .”).

¹⁶⁴ MINN. STAT. ANN. § 518.13 (2013) (“A finding of irretrievable breakdown under this subdivision is a determination that there is no reasonable prospect of reconciliation. The finding must be supported by evidence that (i) the parties have lived separate and apart for a period of not less than 180 days immediately preceding the commencement of the proceeding, or (ii) there is serious marital discord adversely affecting the attitude of one or both of the parties toward the marriage.”).

¹⁶⁵ Cf. James L. Musselman, *What's Love Got to Do with It? A Proposal for Elevating the Status of Marriage by Narrowing Its Definition, While Universally Extending the Rights and Benefits Enjoyed by Married Couples*, 16 DUKE J. GENDER L. & POL'Y 37, 51 (2009) (“The hope is that by slowing down the process considerably the spouses will decide to reconcile before the final divorce judgment.”).

¹⁶⁶ *Windsor*, 133 S. Ct. at 2681.

¹⁶⁷ *Id.*

targets one group and deprives only those couples of the rights and responsibilities accorded to other couples. Assuming that an individual or couple has standing to challenge section 2,¹⁶⁸ it should be struck down for many of the reasons that won the day in *Windsor*.

STATE SAME-SEX MARRIAGE BANS

The Court has long recognized that state regulations of marriage are subject to constitutional constraints. Some of these constraints are imposed by the Fourteenth Amendment's Due Process Clause while others are imposed by the Fourteenth Amendment's Equal Protection Clause. While *Windsor* did not expressly indicate that state same-sex marriage bans are constitutionally vulnerable under Fourteenth Amendment guarantees, the opinion offered a number of grounds upon which such state statutes or constitutional amendments might be struck down as a violation of Fourteenth Amendment guarantees.

A. Fourteenth Amendment Protections for Marriage

In *Loving v. Virginia*,¹⁶⁹ the United States Supreme Court struck down Virginia's antimiscegenation law. Much of the opinion was devoted to why Virginia's ban on interracial marriages violated equal protection guarantees,¹⁷⁰ while only a small portion of the opinion was devoted to due process concerns.¹⁷¹ It was not until *Zablocki v. Redhail*¹⁷² was issued several years later that the Court clarified some of the questions raised by *Loving*.

Zablocki involved a Wisconsin statute making it very difficult for certain indigent non-custodial parents to marry.¹⁷³ The Court had already held that classifications on the basis of indigency did not trigger heightened review under the Equal Protection Clause,¹⁷⁴ so the *Zablocki* Court's striking down the Wisconsin statute made clear that marriage itself is a fundamental interest¹⁷⁵ triggering close review.¹⁷⁶ The Court's

¹⁶⁸ See, for example, *Smelt v. County of Orange*, 447 F.3d 673, 683 (9th Cir. 2006) ("Smelt and Hammer lacked standing to attack Section 2 of DOMA.").

¹⁶⁹ 388 U.S. 1 (1967).

¹⁷⁰ See *id.* at 2–12.

¹⁷¹ See *id.* at 12.

¹⁷² See 434 U.S. 374 (1978).

¹⁷³ *Id.* at 387 ("Some of those in the affected class . . . are absolutely prevented from getting married. Many others . . . will be sufficiently burdened by having to do so that they will in effect be coerced into forgoing their right to marry.").

¹⁷⁴ See *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28–29 (1973).

¹⁷⁵ *Zablocki*, 434 U.S. at 383 ("the right to marry is of fundamental importance"). See also *id.* at 384 ("the right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause").

¹⁷⁶ *Id.* at 383 ("since the classification at issue here significantly interferes with the exercise of that right, we believe that "critical examination" of the state interests advanced in support of the classification is required") (citing *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312, 314 (1976)).

explanation of why marriage triggers a more exacting review of the challenged classification is illuminating.

The *Zablocki* Court wrote:

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. . . . Surely, a decision to marry and raise the child in a traditional family setting must receive equivalent protection.¹⁷⁷

Yet, same-sex couples have children to raise, so *Zablocki* suggests that some of the reasons militating in favor of recognizing a fundamental right to marry apply to same-sex couples as well as different-sex couples. Part of the *Windsor* rationale was based on the harms imposed by DOMA on children raised by same-sex couples.¹⁷⁸ But states that refuse to recognize same-sex marriage do not permit children of those couples to receive a variety of state and federal benefits, so it would not be surprising for those opportunity costs to play a role in an analysis of why state refusals to recognize same-sex marriage offend constitutional guarantees. Indeed, in his *Windsor* dissent, Justice Scalia noted that the detrimental effect on the children of same-sex couples might well play a role in a future decision by the Court striking down same-sex marriage bans.¹⁷⁹

In *Turner v. Safley*,¹⁸⁰ the Court examined a prison regulation burdening the right of inmates to marry. The Court discussed some of the constitutionally significant interests implicated by marriage: (1) they “are expressions of emotional support and public commitment;”¹⁸¹ (2) “the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication;”¹⁸² (3) “most inmate marriages are formed in the expectation that they ultimately will be fully consummated;”¹⁸³ and (4) “marital status often is a precondition to the receipt of government benefits (*e.g.*, Social Security benefits), property rights (*e.g.*, tenancy by the entirety, inheritance rights), and other, less tangible benefits (*e.g.*, legitimation of children born out of wedlock).¹⁸⁴

All of these constitutionally significant interests also apply to same-sex couples. Marriages of individuals of the same sex are also “expressions of emotional support and public commitment.” Furthermore, the celebration of such unions “may be an exercise of religious faith as well as an expression of personal dedication.”¹⁸⁵ While states can no longer criminalize adult, voluntary, same-sex relations,¹⁸⁶ the *Windsor* Court noted that

¹⁷⁷ *Id.* at 386.

¹⁷⁸ *Windsor*, 133 S. Ct. at 2695 (“DOMA also brings financial harm to children of same-sex couples.”).

¹⁷⁹ *See id.* at 2710 (Scalia, J., dissenting).

¹⁸⁰ 482 U.S. 78 (1987).

¹⁸¹ *Id.* at 95.

¹⁸² *Id.* at 96.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *See, e.g.*, *Shahar v. Bowers*, 114 F.3d 1097, 1100 (11th Cir. 1997) (“Plaintiff Robin Joy Shahar is a woman who has ‘married’ another woman in a ceremony performed by a rabbi within the Reconstructionist Movement of Judaism.”).

¹⁸⁶ *See Lawrence v. Texas*, 539 U.S. 558 (2003).

same-sex marriage accords to such lawful relations “a lawful status.”¹⁸⁷ Finally, the interest in marriage-based benefits, e.g., Social Security benefits, becomes all the greater now that *Windsor* has struck down the section 3 denial of federal benefits for same-sex couples.

A different issue involves the level of scrutiny that should be triggered by same-sex marriage bans. First, because such bans classify on the basis of sex, i.e., state that a man can marry a woman but not a man and that a woman can marry a man but not a woman, they should trigger heightened scrutiny because classifying on the basis of gender.¹⁸⁸ Second, statutes targeting on the basis of orientation seem to be getting rational basis with bite scrutiny, at the very least.¹⁸⁹

One other possible basis for striking down same-sex marriage bans might be included. Even if the Court is unwilling to recognize that same-sex marriage bans burden the fundamental interest in marriage and even were the Court unwilling to recognize that statutes targeting orientation should trigger closer scrutiny, the Court might nonetheless suggest that same-sex marriage bans should be struck down following a *Plyler v. Doe*¹⁹⁰ analysis.

At issue in *Plyler* was a refusal by the state of Texas to provide undocumented school-age children with a free public education.¹⁹¹ The Court did not find that the class (undocumented aliens) or the interest (education) triggered higher scrutiny, but nonetheless struck down the Texas law.¹⁹² This kind of hybrid approach¹⁹³ might justify striking down such bans even were the Court unwilling to increase the level of scrutiny either because of the interest or the class involved.

¹⁸⁷ *Windsor*, 133 S. Ct. at 2692.

¹⁸⁸ For a discussion of why same-sex marriage bans should trigger heightened scrutiny based on sex as well as orientation, see Mark Strasser, *Equal Protection, Same-Sex Marriage, and Classifying on the Basis of Sex*, 38 PEPPERDINE L. REV. 1021–52 (2011).

¹⁸⁹ Kenji Yoshino, *Why the Court Can Strike Down Marriage Restrictions under Rational-Basis Review*, 37 N.Y.U. REV. L. & SOC. CHANGE 331, 335–36 (2013) (“With respect to sexual orientation, however, the Court has deemed anti-gay views to constitute animus and applied rational basis ‘with bite.’”).

¹⁹⁰ 457 U.S. 202 (1982).

¹⁹¹ *Id.* at 205 (“The question presented by these cases is whether, consistent with the Equal Protection Clause of the Fourteenth Amendment, Texas may deny to undocumented school-age children the free public education that it provides to children who are citizens of the United States or legally admitted aliens.”).

¹⁹² *See id.* at 220 (“[U]ndocumented status is not irrelevant to any proper legislative goal. Nor is undocumented status an absolutely immutable characteristic since it is the product of conscious, indeed unlawful, action.”); *id.* at 221 (“Public education is not a ‘right’ granted to individuals by the Constitution.”) (citing *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973)). *See also id.* at 244 (Burger, C.J., dissenting) (“[T]he Court expressly—and correctly—rejects any suggestion that illegal aliens are a suspect class . . . or that education is a fundamental right”).

¹⁹³ Stephen Kanter, *The Griswold Diagrams: Toward a Unified Theory of Constitutional Rights*, 28 CARDOZO L. REV. 623, 638 n.68 (2006) (“The Court combined the factors of the children’s involuntary illegal status with the importance of education to form a quasi-suspect/quasi-fundamental hybrid right, but notably did not find either that this class of children was suspect or that education was a fundamental right.”).

B. State Relationship Regulation

States with same-sex marriage bans vary with respect to whether they recognize a distinct legal status for same-sex relationships. Some recognize civil unions,¹⁹⁴ whereas others refuse to afford any legal recognition to same-sex relationships.¹⁹⁵ *Windsor* has differing implications for these different kinds of states, although it provides support for the claim that both kinds of states violate federal constitutional by failing to permit same-sex couples to marry.

a. States that refuse to afford same-sex couples any legal recognition

If the Fourteenth Amendment's Due Process Clause protections for the right to marry include the right to marry a same-sex partner,¹⁹⁶ then it is difficult to see how a state same-sex marriage ban could pass constitutional muster.¹⁹⁷ Yet, even if strict scrutiny is not triggered by same-sex marriage bans, they may well nonetheless fail to pass constitutional muster.¹⁹⁸

States that refuse to afford same-sex couples any legal recognition may well be violating constitutional guarantees by refusing to afford such families both tangible and intangible benefits. The Court had noted how DOMA had adversely affected the children of same-sex couples,¹⁹⁹ and that point is even more accurate with respect to states that do not permit same-sex couples to marry. Children raised by such couples would not receive either the federal or the state benefits that they might be entitled to receive were their

¹⁹⁴ Jeff Mapes, *Summary: Rulings May Benefit Oregon Coup*, THE OREGONIAN, June 27, 2013, available at 2013 WLNR 15757286 (discussing "Oregon and six other states that provide broad benefits to couples in domestic partnerships or civil unions").

¹⁹⁵ See, for example, OH CONST. Art. XV, § 11 ("Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.").

¹⁹⁶ See *Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 993 (N.D. Cal. 2010) ("To characterize plaintiffs' objective as 'the right to same-sex marriage' would suggest that plaintiffs seek something different from what opposite-sex couples across the state enjoy—namely, marriage. Rather, plaintiffs ask California to recognize their relationships for what they are: marriages.").

¹⁹⁷ See *id.* at 995.

¹⁹⁸ *Id.* at 1003 ("Proposition 8 fails to advance any rational basis in singling out gay men and lesbians for denial of a marriage license.").

¹⁹⁹ *Windsor*, 133 S. Ct. at 2695 ("DOMA also brings financial harm to children of same-sex couples. It raises the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses. ... And it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security.") (citation omitted).

parents married.²⁰⁰ As Justice Scalia points out, an additional point is that such children may suffer dignitary harms when their parents are precluded from marrying.²⁰¹

The Court found that DOMA violated the due process guarantees provided by the Fifth Amendment.²⁰² But “the liberty protected by the Due Process Clause of the Fifth Amendment”²⁰³ against federal intrusion is presumably protected by the Fourteenth Amendment against state intrusion. For example, in *Lawrence v. Texas*, the Court implied that the content of the liberty protected by these different amendments was the same.²⁰⁴ If, indeed, the *Windsor* Court is suggesting *sub silentio* that Congress has abridged a liberty interest protected under substantive due process,²⁰⁵ then it would seem that the states do so as well by denying same-sex couples the right to marry.²⁰⁶

State laws precluding same-sex couples from marrying are classifying on the basis of sex and are targeting on the basis of orientation.²⁰⁷ Because they do so, they should trigger at least rational basis with bite scrutiny if not heightened scrutiny.²⁰⁸ It is not at all clear that state same-sex marriage bans can survive that level of scrutiny. For example, the Supreme Judicial Court of Massachusetts struck down that state’s same-sex marriage ban using a form of heightened rational basis under that state’s constitution, and the Vermont Supreme Court struck down that state’s refusal to grant same-sex couples the

²⁰⁰ Cf. *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 956–57 (Mass. 2003) (“marital children reap a measure of family stability and economic security based on their parents’ legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children”); *Lewis v. Harris*, 908 A.2d 196, 18 (N.J. 2006) (“Disparate treatment of committed same-sex couples, moreover, directly disadvantages their children.”).

²⁰¹ See *Windsor*, 133 S. Ct. at 2708 (Scalia, J., dissenting) (suggesting that the Court might strike down same-sex marriage bans, at least in part, because the humiliation that children of same-sex parents might feel if their parents are precluded from marrying). See also *id.* (majority) at 2694 (noting that DOMA “humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”).

²⁰² *Id.* at 2681 (DOMA “violates basic due process and equal protection principles applicable to the Federal Government”).

²⁰³ *Id.* at 2695.

²⁰⁴ See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (suggesting that “the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment . . . [protect the same] components of liberty”). See also *Chavez v. Martinez*, 538 U.S. 760, 788–789 n.3 (2003) (Stevens, J., concurring in part and dissenting in part) (“A person’s constitutional right to remain silent is an interest in liberty that is protected against federal impairment by the Fifth Amendment and from state impairment by the Due Process Clause of the Fourteenth Amendment.”); *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (discussing the Fourteenth Amendment’s Due Process Clause, . . . [and] its Fifth Amendment counterpart”); *Reno v. Flores* 507 U.S. 292, 301–02 (1993) (discussing the “line of cases which interprets the Fifth and Fourteenth Amendments’ guarantee of ‘due process of law’ to include a substantive component”).

²⁰⁵ See *Windsor*, 133 S. Ct. at 2706 (Scalia, J., dissenting) (“The majority never utters the dread words ‘substantive due process,’ perhaps sensing the disrepute into which that doctrine has fallen, but that is what those statements mean.”).

²⁰⁶ Cf. *id.* at 2705 (Scalia, J., dissenting) (“the majority . . . needs some rhetorical basis to support its pretense that today’s prohibition of laws excluding same-sex marriage is confined to the Federal Government (leaving the second, state-law shoe to be dropped later, maybe next Term”).

²⁰⁷ See *supra* notes 188–89 and accompanying text.

²⁰⁸ See *supra* notes 188–89 and accompanying text.

rights and benefits of marriage under a kind of heightened rational basis under that state's constitution.²⁰⁹

Some states with mini-DOMAs preclude those states from granting or enforcing rights acquired by virtue of a same-sex marriage.²¹⁰ Yet, if section 2 of DOMA is unconstitutional,²¹¹ states will no longer have any plausible claim that the requirements of the Full Faith and Credit Clause with respect to judgments can be avoided by the state merely because doing so would offend local public policy.²¹² But this means at the very least that those provisions within state mini-DOMAs preventing courts from giving full faith and credit to judgments validly issued in other states will be unconstitutional.²¹³ A separate issue is whether these unconstitutional provisions would be viewed as severable or, instead, would require that the whole statute or constitutional amendment be held unconstitutional.²¹⁴

b. States that recognize civil unions

Windsor also has implications for states that recognize domestic partnerships or civil unions. First, suppose that a state recognizes civil unions, at least in part, because of the equal protection guarantees of the state constitution.²¹⁵ Yet, same-sex couples who enter into marriages are now entitled to federal benefits, whereas couples who are in civil

²⁰⁹ Jeremy B. Smith, Note, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 *FORDHAM L. REV.* 2769, 2812 (2005) (discussing the “rational basis with bite approach as applied in cases like *Baker* and *Goodridge*”).

²¹⁰ See, for example, GA. CONST. Art. 1, § 4, P I (a) (“This state shall recognize as marriage only the union of man and woman. Marriages between persons of the same sex are prohibited in this state.”) and GA. CONST. Art. 1, § 4, P I (b) (“No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage. 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.”).

²¹¹ See *supra* Part III.

²¹² See *Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 233 (1998) (“As to judgments, 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.”).

²¹³ The same point has been made when discussing the implications of DOMA's repeal. See Strasser, *supra* note 130, at 266 (“DOMA's repeal would render certain parts of existing state statutes and constitutional provisions unenforceable, specifically those provisions that preclude the enforcement of a judgment validly issued in another state merely because that judgment was predicated on the existence of a same-sex marriage.”).

²¹⁴ See *id.* (“[A] separate question is whether the unconstitutionality of such a provision would require invalidation of the statute or amendment containing it—that is, whether the provision would be severable.”).

²¹⁵ *Lewis v. Harris*, 908 A.2d 196, 220–21 (N.J. 2006) (“We now hold that under the equal protection guarantee of Article I, Paragraph 1 of the New Jersey Constitution, committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples.”).

unions are not.²¹⁶ A state that wants to afford equal benefits to those in same-sex relationships as a matter of policy or constitutional mandate would fail to meet its objectives by only affording such couples the option of entering into civil unions or domestic partnerships, because (absent action by Congress) there would be a whole panoply of federal rights to which such couples would not be entitled.

The *Windsor* Court noted, “This opinion and its holding are confined to those lawful marriages.”²¹⁷ While not elaborating on why it was making this point, the Court might have been making clear that the opinion does not require Congress to afford federal benefits to those in civil unions. But this only underscores that state equal protection goals or guarantees will remain unfulfilled if same-sex couples are offered a “second-class”²¹⁸ substitute to marriage.

One of the reasons that the Court may have been unwilling to say that its holding also applied to civil unions or domestic partnerships is that its focus was on the dignity afforded to same-sex couples who *marry*—they can “live with pride in themselves and their union and in a status of equality with all other married persons.”²¹⁹ The Court noted that the state’s giving “this class of persons the right to marry conferred upon them a dignity and status of immense import.”²²⁰ The Court expressly noted that “marriage is more than a routine classification for purposes of certain statutory benefits,”²²¹ thereby undercutting the view that marriages and civil unions are equivalent for constitutional purposes even if the statutory benefits associated with these different statutes are the same. Because of both the practical and the symbolic advantages of marriage over civil unions and domestic partnerships, the states that offer same-sex couples some legal recognition will also find that their refusal to recognize same-sex marriage is constitutionally vulnerable.

CONCLUSION

Windsor can be read in a number of ways. Some will suggest that it is basically about federalism. Even if that were the correct reading, section 2 of DOMA would likely be held unconstitutional if only because that provision would presumably also be found to have been motivated by animus. Further, that provision implicates federalism concerns. By allowing a state to refuse to recognize the marriages of same-sex couples traveling though that state, section 2 undercuts the power of the domicile to determine the marriage status of its domiciliaries.

Yet, *Windsor* is more than a federalism case. The due process and equal protection considerations that made section 3 of DOMA unconstitutional militate in favor of a similar holding with respect to state same-sex marriage bans, whether or not those states

²¹⁶ Cf. *Smelt v. County of Orange*, 447 F.3d 673, 685 (9th Cir. 2006) (noting that because the parties were in a same-sex domestic partnership but not a marriage, they did not even have standing to challenge DOMA’s denial of benefits to couples in same-sex marriages).

²¹⁷ *Windsor*, 133 S. Ct. at 2696.

²¹⁸ *Id.* at 2693.

²¹⁹ *Id.* at 2689.

²²⁰ *Id.* at 2681.

²²¹ *Id.* at 2692.

permit same-sex couples to celebrate civil unions. While Justice Scalia is correct that *Windsor* “can be distinguished in many ways,”²²² he also seems correct that the most plausible reading of *Windsor* entails that same-sex marriage bans are also unconstitutional.²²³ One can only hope that he is also correct that such a ruling might be issued soon, possibly in the next term.²²⁴

²²² *Id.* at 2709 (Scalia, J., dissenting).

²²³ *See id.* at 2705 (Scalia, J. dissenting).

²²⁴ *See id.* (Scalia, J., dissenting) (discussing “the second, state-law shoe to be dropped later, maybe next Term”).