

WHAT IF DOMA WERE REPEALED? THE CONFUSED AND CONFUSING INTERSTATE MARRIAGE RECOGNITION JURISPRUDENCE

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I. INTRODUCTION

The Defense of Marriage Act (“DOMA”)¹ is constitutionally vulnerable, and President Obama supports its repeal.² Suppose, then, that the Act was repealed or invalidated. Some of the effects DOMA’s repeal would have on marriage recognition practices are clear; for example, same-sex couples who were validly married in their domicile would presumably be entitled to federal benefits. However, other possible effects are debatable. For example, whether DOMA’s absence would modify the conditions under which one state would have the power to refuse to recognize a marriage validly celebrated in another state is a question with no clear answer.

There are at least two distinct reasons why the effects of DOMA’s repeal are much less clear than one might initially suppose. First, the background law is itself controversial. For example, while the law of the domicile at the time of a marriage’s celebration has long been understood to determine the validity of that marriage, there is much less consensus about whether a subsequently acquired domicile can refuse to recognize a marriage validly celebrated years before in a sister domicile. Because the background law is not clear, it may be difficult to determine in a particular set of circumstances whether DOMA has changed or, instead, merely reaffirmed or reinforced

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1. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

2. Joe Davidson, *Rationale Builds for Same-Sex Benefits Law*, WASH. POST, Nov. 24, 2009, at 1 (“The Obama administration has found itself in the tricky position of defending DOMA because it is the law, while calling for its repeal and strongly supporting the congressional legislation.”).

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existing law. Second, DOMA has never been authoritatively construed, so it is difficult to identify all of the state practices authorized by DOMA that, but for its passage, would not have been permissible.

This Article addresses the likely effects of DOMA's repeal, noting that many questions remain unanswered regarding the conditions under which states have the power to refuse to give effect to marriages validly celebrated in other states, especially when states can no longer claim that the refusal to recognize a particular marriage is somehow authorized by Congress. By the same token, a repeal of DOMA's definition of marriage for federal purposes would leave open the questions of when same-sex marriages would be recognized, and for which federal purposes. While the repeal of DOMA would be most welcome, it should not be assumed that this would end all difficulties for same-sex couples and their families who seek the rights and protections that families take for granted. On the contrary, even with DOMA's repeal, these matters will continue to be litigated across the United States for the foreseeable future.

II. THE FEDERAL DEFENSE OF MARRIAGE ACT

The Defense of Marriage Act has two provisions, one authorizing states to refuse recognition to same-sex marriages celebrated elsewhere ("the full faith and credit provision"),³ and the other defining marriage for federal purposes.⁴ The former provision is subject to differing interpretations,⁵ while the latter is less ambiguous if only because it is so all-encompassing on its face.⁶ Each provision is constitutionally vulnerable, in some respects for the same reason and in other respects for differing reasons.

To understand the different respects in which these provisions are constitutionally suspect, one must understand the state of the law as it existed prior to DOMA and the ways that the Act may have changed then-existing law. Once that is clear, it becomes easier to identify

3. 28 U.S.C. § 1738C (2006).

4. 1 U.S.C. § 7 (2006).

5. See discussion *infra* Part II.A.

6. See discussion *infra* Part II.B.

some of the areas that will need further clarification once DOMA is no longer the law of the land.

A. The Full Faith and Credit Provision

DOMA's full faith and credit provision 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.⁷

This provision was enacted when it was believed that Hawaii was about to recognize same-sex marriage, and that domiciliaries⁸ of other states would go to Hawaii, marry their same-sex partners, and then return home demanding recognition of their marriages.⁹ It might seem, then, that DOMA's repeal would require states to recognize any marriage validly celebrated in another state as a matter of full faith and credit. But that claim is not plausible in light of past historical practices—it has long been recognized that individuals living in one state, who evade local marriage laws by going to another state to marry, will not then be able to force their domiciles to recognize their

7. 28 U.S.C. § 1738C (2006).

8. "A person who resides in a particular place with the intention of making it a principal place of abode; one who is domiciled in a particular jurisdiction." BLACK'S LAW DICTIONARY 559 (9th ed. 2009).

9. See *The Defense of Marriage Act: Hearing on S. 1740 Before the Senate Comm. on the Judiciary*, 104th Cong. 2 (1996), 1996 WL 387293 (statement of Sen. Hatch) ("Thus, it would not be surprising that persons who want to invoke the legitimacy of 'marriage' for same-sex unions will travel to Hawaii to become 'married.' Then they will return to their home states where it would be expected that the State recognize as valid a Hawaii marriage certificate."); *The Defense of Marriage Act: Hearing on S. 1740 Before the Senate Comm. on the Judiciary*, 104th Cong. 2 (1996), 1996 WL 387295 (testimony of Rep. Largent) ("If the state court in Hawaii legalizes same-sex marriage, homosexual couples from other states around the country will fly to Hawaii to 'many' [sic]. These same couples will then go back to their respective states and argue that the Full Faith and Credit Clause of the U.S. Constitution requires their home state to recognize their union as a 'marriage.'").

marriages.¹⁰ Rather, the validity of the marriage will be determined in light of the domicile's law.¹¹

Suppose, for example, that an eighteen-year-old wishes to marry his sixteen-year-old girlfriend and local law prevents their marrying until they each have reached age eighteen. They decide to go to another state and marry in accord with local law, and then return to their domicile. Such a marriage might be annulled in the domicile, even if it was valid where celebrated.¹² Yet, the fact that the domicile *could* refuse to recognize a marriage that was prohibited locally but validly celebrated elsewhere does not mean the domicile *would* refuse to recognize such a marriage. A variety of important interests are based on marital status, and the refusal to recognize a marriage might jeopardize those benefits.¹³ For example, an individual might be covered under an insurance policy by virtue of his marriage. Were that marriage held void and of no legal effect, the individual might suddenly find that he did not have the insurance coverage upon which he had relied.¹⁴

10. See *In re Stull's Estate*, 39 A. 16, 17 (Pa. 1898) ("But where a man and woman, citizens of the same state, and subject to an absolute statutory prohibition against entering into a marriage contract which is against good morals and contrary to public policy, leave their domicile, and enter another, for the express purpose of violating the law of their domicile in this respect, the case is highly exceptional, and the great weight of authority is against the validity of such a marriage in the place of their domicile.").

11. Denise C. Morgan, *Introduction: A Tale of (at Least) Two Federalisms*, 50 N.Y.L. SCH. L. REV. 615, 633 (2005-2006) ("Historically, states have been free to decline to recognize out-of-state marriages that are inconsistent with their own policies.").

12. See *Wilkins v. Zelichowski*, 140 A.2d 65, 67-68 (N.J. 1958) ("It is undisputed that if the marriage between the plaintiff and the defendant had taken place here, the public policy of New Jersey would be applicable and the plaintiff would be entitled to the annulment; and it seems clear to us that if New Jersey's public policy is to remain at all meaningful it must be considered equally applicable though their marriage took place in Indiana.").

13. See *State v. Graves*, 307 S.W.2d 545, 550 (Ark.1957) ("The celebration of a marriage gives rise to many ramifications, including questions of legitimacy, inheritance, property rights, dower and homestead, and causes of action growing out of the marital status. We have no statute which provides that marriages such as the one involved here, celebrated in another state, are void in the State of Arkansas.").

14. *Cf. Toler v. Oakwood Smokeless Coal Corp.*, 4 S.E.2d 364 (Va. 1939) (declaring marriage void, thus making putative spouse not entitled to workmen's

Suppose two individuals evade their domicile's law by going elsewhere to marry in accord with the law of the place of celebration. Suppose further the validity of the marriage is later challenged. The question for the court hearing the case will involve the degree to which the marriage offends the domicile's public policy.¹⁵ A marriage that, although prohibited, did not violate an important public policy of the domicile might well be recognized if validly celebrated elsewhere.¹⁶ As a general matter, states have an interest in preserving and promoting marriage, and the specific state interest in prohibiting the celebration of a particular kind of marriage might be outweighed by the more general interest in sustaining marriages.¹⁷ This might be especially true if, for example, children were born of the marriage.¹⁸

Some states, however, do not consider whether a marriage was validly celebrated elsewhere when deciding whether a marriage will be recognized locally.¹⁹ Instead, they determine the validity of their

compensation benefits).

15. See *In re Mortenson's Estate*, 316 P.2d 1106, 1108 (Ariz. 1957) ("Marriages performed outside the state which offend a strong public policy of the state of domicile will not be recognized as valid in the domiciliary state." (citing *Meisenhelder v. Chi. & N. W. Ry. Co.*, 213 N.W. 32 (Minn. 1927))).

16. See *Loughran v. Loughran*, 292 U.S. 216, 223 (1934) ("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." (citing *Meister v. Moore*, 96 U.S. 76 (1877))).

17. Cf. *Inhabitants of Medway v. Inhabitants of Needham*, 16 Mass. 157, 159 (1819) ("If the marriage takes place in a state whose laws allow it, the marriage is certainly good there; and it would produce greater inconveniences than those attempted to be guarded against, if a contract of this solemn nature valid in a neighboring state, could be dissolved at the will of either of the parties, by stepping over the line of a state, which might prohibit such marriages.").

18. See *Garcia v. Garcia*, 127 N.W. 586, 589 (S.D. 1910) ("The consequences of declaring a marriage void ab initio and annulling the same are very serious. Its effect is to bastardize innocent children, deprive them of their inheritance, and to make the parties whose marriage was legal and valid in the state where contracted criminally liable in this state, and subject to exceedingly severe penalties.").

19. See, e.g., WIS. STAT. ANN. §765.04(1) (West 2009) ("If any person residing and intending to continue to reside in this state who is disabled or prohibited from contracting marriage under the laws of this state goes into another state or country and there contracts a marriage prohibited or declared void under the laws of this state, such marriage shall be void for all purposes in this state with the same effect as though it had been entered into in this state.").

domiciliaries' marriage in light of local marriage prohibitions, and a marriage that could not be celebrated locally will not be recognized even if it was valid where celebrated.²⁰

The point here is not to spell out in detail the differing practices of the states, but merely to suggest that all of these approaches are considered within the power of the domicile at the time of the marriage. A domicile could choose to recognize a marriage that was valid where celebrated but prohibited locally, but does not have to do so. Insofar as DOMA is understood as merely preserving the power of the domicile to refuse to recognize a marriage of its domiciliaries celebrated elsewhere, the Act seems better understood as affirming or reinforcing existing law rather than changing it.²¹ After all, DOMA does not require states to refuse to recognize same-sex marriages celebrated elsewhere; it merely permits states to do so.

Suppose someone claimed that a marriage validly celebrated in one state had to be recognized in other states as a matter of full faith and credit.²² While the Supreme Court has never so held,²³ it is a conceivable interpretation of the Full Faith and Credit Clause. In any event, members of Congress apparently feared the Court might someday read the Full Faith and Credit Clause to require that marriages validly celebrated in one state be recognized throughout the

20. See, e.g., *In re Estate of Toutant*, 633 N.W.2d 692, 700 (Wis. App. 2001) (“The trial court’s decision is consistent with Wisconsin law. WISCONSIN STAT. § 765.03 prohibited Ellis and Toutant’s marriage, and thus, the Texas marriage is null and void pursuant to WIS. STAT. § 765.04.”).

21. See 142 CONG. REC. S4870 (daily ed. May 8, 1996), 1996 WL 468475 (statement of Sen. Nickles) (suggesting that DOMA reaffirms current practice and policy).

22. See Evan Wolfson & Michael F. Melcher, *A House Divided: An Argument against the Defense of Marriage Act*, OR. ST. B. BULL, Jan. 1998, at 17, 19 (“[M]arriages *should* be granted at least the level of faith and credit accorded to judgments.”).

23. See *Thomas ex rel. Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998) (“Our precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments.”); see also Rhonda Wasserman, *Are You Still My Mother?: Interstate Recognition of Adoptions by Gays and Lesbians*, 58 AM. U. L. REV. 1, 4 (2008) (“[T]he Full Faith and Credit Clause imposes a far more rigorous obligation on states to recognize judgments, such as adoption decrees and divorces, than marriages and laws.”).

country.²⁴ Indeed, some members of Congress implied that DOMA was enacted as a defensive measure to forestall this interpretation of the Full Faith and Credit Clause, notwithstanding that such an interpretation had never been adopted, or even suggested, by the Court.²⁵

Yet, the language of the DOMA full faith and credit provision should not be understood as a narrow, purely defensive measure designed to forestall an end-run around the domicile's power to regulate the pre-requisites to marriage. Instead, that provision is written in such a way as to invite constitutional review, even assuming that there are no constitutional difficulties posed by having the domicile at the time of a marriage's celebration determine that marriage's validity. This provision authorizes so much that it *undermines*, rather than protects, the power of a domicile to establish the conditions under which its domiciliaries are permitted to get (and remain) married. By providing that *no* state shall be required to recognize a same-sex marriage validly performed under another state's law, the provision not only authorizes a domicile to refuse to recognize a marriage validly contracted in another state, but also authorizes other states to refuse to recognize a marriage validly celebrated in the domicile.

To understand the effects of this provision, it is helpful to consider a variety of possible scenarios. Consider for example, two individuals of the same sex, Alice and Barbara, who marry in accord with their domicile's law. They have every intention of remaining in that state to raise their children. However, a few years after their marriage, Alice

24. See H.R. Rep. No. 104-664, at 2913 (1996) ("But even as the Committee believes that States currently possess the ability to avoid recognizing a same-sex "marriage" license from another State, it recognizes that that conclusion is far from certain. For example, there is a burgeoning body of legal scholarship—some of it inspired directly by the Hawaiian lawsuit—to the effect that the Full Faith and Credit Clause does mandate extraterritorial recognition of 'marriage' licenses given to homosexual couples."). Some members of Congress still seem to believe this. See, e.g., Marriage Protection Amendment, 152 CONG. REC. S5945-03 (daily ed. June 15, 2006), 2006 WL 1650895 (statement of Sen. Grassley) [hereinafter Sen. Grassley] ("But, it has become a common prediction that the Federal Defense of Marriage Act will be overturned by the judiciary. In that case, the full faith and credit clause of our Constitution would require every State to recognize so-called marriages performed in States that allow the union of same-sex couples . . .").

25. See Sen. Grassley, *supra* note 24.

receives a very tempting job offer in a state that does not permit same-sex couples to marry.

On its face, DOMA permits the later-acquired domicile to refuse to recognize Alice and Barbara's marriage. A few different points might be made about this aspect of DOMA. First, some of the justifications for permitting a domicile at the time of the marriage to refuse to recognize a marriage validly celebrated elsewhere do not apply as readily where that domicile is acquired years after the marriage has taken place. For example, because the law of the domicile at the time of the marriage is traditionally the law that determines the marriage's validity, some jurisdictions view those attempting to evade local law by marrying elsewhere as imposing a fraud on the jurisdiction.²⁶ But those who marry in accord with the law of the domicile at the time of the marriage are not attempting to perpetrate a fraud on the jurisdiction; on the contrary, they are marrying in accord with local law. Further, it may well be that two individuals of the same sex who marry in their domicile have no intention of moving to a state that prohibits their marriage, so it is not as if they are trying to impose a fraud on their future domicile when they celebrate their marriage.

Individuals who marry in accord with their domicile's law have the reasonable and justified expectation that they will remain married until one of them dies or sues for divorce. Yet, DOMA authorizes the non-recognition of a marriage by a new domicile, even when both parties want the relationship to continue. With concerns expressed about the possible detrimental effects on children posed by the separation of their parents,²⁷ one might expect that states would want to encourage married couples to remain married rather than refuse them that option, the individuals' desires to honor their marital obligations notwithstanding. Needless to say, treating a marriage as if

26. *See In re Stull's Estate*, 39 A. 16, 18 (Pa. 1898) (noting that the evasive marriage at issue "was contracted for the express purpose of evading the positive law of the domicile, and is therefore ot [sic] be regarded as a fraud upon the government and people of the domiciliary residence").

27. *Cf., e.g., Mary E. O'Connell, Mandated Custody Evaluations and the Limits of Judicial Power*, 47 FAM. CT. REV. 304, 307 (2009) ("Judith Wallerstein's studies, for example, suggested that, for at least some children, parental divorce has serious, long-term negative effects, especially if the child loses contact with one parent.").

it had never existed might have severe repercussions both for the adults in the relationship and for any children that the couple might be raising.²⁸

The scenario described above should be distinguished from one in which a couple marries in the domicile, but then immediately moves to a jurisdiction that prohibits the marriage. Indeed, to sharpen the point, suppose the reason a couple marries in the current domicile, rather than in the state where the individuals plan to live, is that they know their future domicile does not permit them to marry. This is analogous in several important respects to a case involving individuals living in a domicile who seek to evade local law by marrying in a different jurisdiction. In both cases, the individuals know they are barred from marrying where they intend to live immediately after their wedding, and they take steps to marry in a state where their union is not prohibited by local law. Basically, they intend to circumvent the law of the state where they intend to live.

Of course, a case in which two individuals seek to evade the marriage laws of their soon-to-be domicile is not all on fours with a case in which two individuals seek to evade the law of their *current* domicile's law. In the former case, unlike the latter, the state in which they plan to be live is not their legal domicile at the time of the marriage—it will not become their legal domicile until after they move there.²⁹ Nonetheless, this kind of case seems closer to the kind of case where a couple seeks to evade local marriage laws than it does to a case in which a couple marries in reliance on the law of the state where they plan to make their home.

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.³⁰ The new

28. For example, insurance benefits might be predicated on the state's recognition of the adults' relationship.

29. See *In re D.N.*, 522 N.W.2d 824, 827 (Iowa 1994) ("A new domicile is obtained by the occurrence of three things: (1) A definite abandonment of the former domicile; (2) Actual removal to, and physical presence in the new domicile; [and] (3) A bona fide intention to change and to remain in the new domicile permanently or indefinitely." (citing *State ex rel. Palmer v. Hancock County* 443 N.W.2d 690, 693 (Iowa 1989)) (alteration in original)).

30. See C.W. Taintor II, *What Law Governs the Ceremony, Incidents and*

domicile could recognize the marriage, either out of a recognition of the importance of promoting and maintaining marriage or for another reason, just as the domicile at the time of the marriage can recognize the validity of a marriage that is prohibited locally but permitted according to the law of the place of celebration.³¹ However, in neither case would the domicile be viewed as acting beyond its power in refusing to recognize such a marriage if one of its own important public policies would be violated by recognizing the marriage.

The DOMA full faith and credit provision is not limited to cases involving recognition of the marriage by the domicile at the time of the marriage or even by a subsequently acquired domicile. Rather, this provision authorizes *any* state to refuse to recognize a same-sex marriage validly celebrated under another state's law. This means that a state through which a same-sex, married couple is traveling would be permitted to refuse to recognize the validity of the marriage should the validity of that marriage be important to establish.

Suppose that Alice and Barbara marry in their domicile according to local law and then, a few years later, decide to accept a wonderful employment opportunity in another state that also recognizes their marriage. However, to drive to their new domicile, they must travel through states that do not recognize their marriage. Suppose further that they are involved in an auto accident in transit and that Alice is injured. Barbara's ability to visit Alice in the hospital or, perhaps, to make decisions about Alice's medical care might depend upon whether their marital relationship is recognized.³² Further, the right to

Status of Marriage, 19 B.U. L. REV. 353, 367 (1939) ("The intrinsic validity of this status may be referred to the law of the place of ceremony, to the law of the domicil of both parties if they live in the same state, to the law of the domicils of either or both of the parties if they live in different states, or to the law of the state in which the parties intend to live as husband and wife." (footnotes omitted)).

31. *Cf. supra* notes 8-13 and accompanying text.

32. *See* Patience Crozier, *Nuts and Bolts: Estate Planning and Family Law Considerations for Same-Sex Families*, 30 W. NEW ENG. L. REV. 751, 754 (2008) ("Marriage provides significant protections in terms of hospital visitation, organ donation, and control over bodily remains. A spouse is considered next-of-kin and has the right of visitation in a Massachusetts hospital as well as the authority to consent to medical treatment if the other is incapacitated.").

sue for loss of consortium or, perhaps, wrongful death might also depend upon whether their relationship was recognized.³³

Some commentators suggest that DOMA's full faith and credit provision, as applied to facts similar to those involving Alice and Barbara above, is unconstitutional as a violation of the right to travel.³⁴ Yet, it should be noted that the right to travel does not merely include the right to visit or travel through a state, but also the right to emigrate to a state.³⁵ Further, the Supreme Court has held that Congress does not have the power to authorize states to abridge the right to travel.³⁶ If, indeed, the right to travel precludes a state from refusing to recognize a marriage of individuals traveling through the state when that marriage is valid in the domicile, the right to travel may also require newly acquired domiciles to recognize a marriage that was validly celebrated in the domicile at the time of the marriage.³⁷ That would depend upon whether the interests of the new domicile in refusing to recognize such a marriage were sufficiently weighty to justify imposing such a burden on the right to travel.

It might be argued that states will have no difficulty in meeting such a burden if, indeed, it is constitutionally permissible for those states to prohibit same-sex marriage.³⁸ But that is incorrect, and especially so when one considers that many of the cases upholding

33. Anne Bloom, *To Be Real: Sexual Identity Politics in Tort Litigation*, 88 N.C. L. REV. 357, 390 (2010) (“[M]any tort claims, including wrongful death, alienation of affection, loss of consortium, and negligent infliction of emotional distress, rely upon the existence of a marital relationship for the plaintiff to establish a claim.”).

34. See, e.g., ANDREW KOPPELMAN, *SAME SEX DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES* 50 (2006) (“In every state in the United States, visiting same-sex couples are entitled to the protection of the law.”).

35. See *Saenz v. Roe*, 526 U.S. 489, 500 (1999).

36. *Id.* 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.” (footnote omitted)).

37. See generally Mark Strasser, *The Privileges of National Citizenship: On Saenz, Same-Sex Couples, and the Right to Travel*, 52 RUTGERS L. REV. 553 (2000).

38. See John Choon Yoo & Anntim Vulchev, *A Conservative Critique of the Federal Marriage Amendment*, 32 HASTINGS CONST. L.Q. 725, 728 (2004-2005) (suggesting that if a state can prohibit same-sex marriage than it cannot be required to recognize such marriages by virtue of right to travel guarantees).

same-sex marriage bans have examined the relevant statutes in light of the rational basis test.³⁹ If indeed the refusal to recognize a marriage validly celebrated in a sister domicile implicates the right to travel, then a higher level of scrutiny will be required.⁴⁰ Given that same-sex marriage bans may not even survive rational basis scrutiny,⁴¹ it might be quite difficult for such a statute to survive an even higher level of scrutiny.

Suppose the right to travel requires that a marriage valid in the domiciliary state must also be recognized in all of the other states. Suppose further that the right to travel includes not only the right to visit other states but also the right to emigrate to other states. In that event, the full faith and credit provision of DOMA would be unconstitutional to the extent that it authorized states to abridge those rights. By the same token, states would be precluded from refusing to recognize same-sex marriages that were valid in the domiciliary state at the time of the marriage. Needless to say, however, this is one area that will need to be addressed even after DOMA is no longer the law of the land—namely, the conditions under which states have the power to refuse to recognize marriages valid in the domicile at the time of the marriage.

The DOMA full faith and credit provision not only permits states to recognize same-sex marriages validly celebrated in other states, but also permits states to refuse to give effect to any “right or claim

39. See, e.g., *Hernandez v. Robles*, 855 N.E.2d 1, 9 (N.Y. 2006) (“Our conclusion that there is a rational basis for limiting marriage to opposite-sex couples leads us to hold that that limitation is valid under the New York Due Process and Equal Protection clauses, and that any expansion of the traditional definition of marriage should come from the Legislature.”)

40. See Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J. L. & PUB. POL’Y 143, 148 (2008) (“[A] court must analyze a law that infringes on the fundamental right to travel among the states under strict scrutiny....”).

41. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003) (“[T]he marriage ban does not meet the rational basis test for either due process or equal protection.”); *Hernandez*, 855 N.E.2d at 30 (Kaye, C.J., dissenting) (“Although the classification challenged here should be analyzed using heightened scrutiny, it does not satisfy even rational-basis review, which requires that the classification ‘rationally further a legitimate state interest.’” (citing *Affronti v. Crosson*, 746 N.E.2d 1049, 1052 (2001))).

arising from such relationship.”⁴² Presumably, this includes a whole host of rights associated with marriage.

In *Baker v. State*,⁴³ the Vermont Supreme Court noted many of the benefits tied to marriage.⁴⁴ Some of the rights or benefits discussed by the Vermont Supreme Court arise by virtue of the relationship itself; for example, the right to bring an action for wrongful death or loss of consortium. However, other rights require further proceedings. For example, one is not entitled to receive spousal support simply by virtue of having been married—one will also need to have a court award that support.

One matter left open to interpretation is whether DOMA distinguishes among the rights or claims arising from same-sex marriage that other states have been authorized to ignore. According to one possible interpretation of the language, those rights or claims arising from the relationship would be limited to those that had *not* been reduced to judgment.⁴⁵

42. 28 U.S.C. § 1738C (2006).

43. *Baker v. State*, 744 A.2d 864 (Vt. 1999).

44. *See id.* at 883-84 (“They include, for example, the right to receive a portion of the estate of a spouse who dies intestate and protection against disinheritance through elective share provisions . . . ; preference in being appointed as the personal representative of a spouse who dies intestate . . . ; the right to bring a lawsuit for the wrongful death of a spouse . . . ; the right to bring an action for loss of consortium . . . ; the right to workers’ compensation survivor benefits . . . ; the right to spousal benefits statutorily guaranteed to public employees, including health, life, disability, and accident insurance . . . ; the opportunity to be covered as a spouse under group life insurance policies issued to an employee . . . ; the opportunity to be covered as the insured’s spouse under an individual health insurance policy . . . ; the right to claim an evidentiary privilege for marital communications . . . ; homestead rights and protections . . . ; the presumption of joint ownership of property and the concomitant right of survivorship . . . ; hospital visitation and other rights incident to the medical treatment of a family member . . . ; and the right to receive, and the obligation to provide, spousal support, maintenance, and property division in the event of separation or divorce....”).

45. Ralph Whitten suggests that DOMA may be read to exclude only declaratory judgments from full faith and credit guarantees. *See* Ralph U. Whitten, *Exporting and Importing Domestic Partnerships: Some Conflict-of-Laws Questions and Concerns*, 2001 B.Y.U. L. REV. 1235, 1249 (2001) (“[T]he better construction of DOMA would limit its inclusion of judgments to the kind of evil at which Congress was aiming: a bogus declaratory judgment action in the state where the same-sex partners are wedded that is designed to force other states to accept the same-sex marriage contrary to their laws.”).

To see the point, it may be helpful to consider how full faith and credit traditionally works in a context having nothing to do with same-sex marriage. Suppose that a particular state's law holds certain gambling debts unenforceable as a matter of public policy.⁴⁶ Suppose further that an individual who is domiciled in that state has out-of-state gambling debts outstanding, and the creditor sues him to collect those debts. Finally, assume the debts are enforceable where they were incurred. The creditor might seek to have the debt reduced to judgment in the state where they were incurred and then seek to have that judgment enforced in the debtor's domicile. Or, the individual owed the monies might bring evidence of the debt (e.g., a note signed by the debtor promising to pay a certain amount) to the debtor's domicile and seek to have the courts there render a judgment requiring the debtor to pay.

It would not be a matter of indifference as to which strategy was adopted by the individual owed the debt. Suppose, for example, that he sought to enforce the debt in the debtor's domicile by having a court there issue a judgment requiring the debt to be paid. A court in that jurisdiction might hold that because gambling debts are void and unenforceable, the debtor could not be ordered to pay.⁴⁷ If, instead, the debt had been reduced to judgment in the state where it was incurred and then the debtor sought to have that judgment enforced in the debtor's domicile, the court in the debtor's domicile would enforce the judgment as a matter of full faith and credit,⁴⁸ even though it would

46. See *In re Hionas*, 361 B.R. 269, 273 (Bankr. S. D. Fla. 2006) ("Gambling, with certain exceptions, is against Florida's public policy. Fla. Stat. § 849.26 (2005) unequivocally provides that any type of gambling debt that is not expressly authorized by law is 'void and of no effect.' Florida courts have repeatedly interpreted this provision to mean that only gambling debts authorized by Florida law are enforceable, and that gambling debts, even when incurred in a jurisdiction where the debt is legal and enforceable, cannot be enforced by a Florida court." (citing *Carnival Leisure Indus., Ltd. v. Herman*, 629 So.2d 882 (Fla. Dist. Ct. App. 1993))).

47. *Carnival Leisure Indus., Ltd. v. Herman*, 629 So.2d 882, 882 (Fla. Dist. Ct. App. 1993) ("Foreign casino gambling obligations, although valid where created, are unenforceable in Florida.").

48. See *In re Hionas*, 361 B.R. at 273 n.3 ("[I]f a gambling debt has been reduced to judgment, Florida courts will enforce the foreign judgment under the full faith and credit clause of the United States Constitution." (citing *M & R Inv. Co., Inc. v. Hacker*, 511 So.2d 1099 (Fla. Dist. Ct. App. 1987))).

not have enforced the debt had there been no judgment from another state.

The point here should not be misunderstood. The issue is not whether Congress has the power to modify full faith and credit guarantees. Rather, it is that the phrase “right or claim arising from such relationship” is itself ambiguous—it might only refer to a right or claim predicated on the existence of a same-sex marriage that has not been reduced to judgment, or it might also include a judgment predicated on the existence of a same-sex marriage. Similarly, a state statute that holds gambling debts unenforceable as contrary to public policy might mean merely that gambling debts *not reduced to judgment* are unenforceable, or might be construed to include all gambling debts, including those reduced to judgment. Whether the state could refuse to enforce a gambling debt that had been reduced to judgment without offending constitutional guarantees is a different question;⁴⁹ at issue here is how to interpret the language of the provision.

Certainly, one possible interpretation is that the DOMA full faith and credit provision was intended to authorize states to refuse to enforce judgments involving same-sex relationships recognized in other states.⁵⁰ Indeed, it is inaccurate to suggest that DOMA’s “language is too plain (and with respect to judgments, too clearly supported by the legislative history) to be construed away.”⁵¹ The language is compatible with a construction that includes judgments, but is also amenable to interpretation as only applying to those rights and claims arising by virtue of the relationship itself—the language itself says “arising from the relationship.” The legislative history is not dispositive, because the fear was that Hawaiian marriages would

49. A separate issue of course is whether a state could refuse to enforce such a judgment without violating federal constitutional guarantees. *See Fauntleroy v. Lum*, 210 U.S. 230 (1908) (gambling debt reduced to judgment in Missouri enforceable in Mississippi, even though the judgment could not have been obtained in Mississippi courts).

50. Kathryn J. Harvey, *The Rights of Divorced Lesbians: Interstate Recognition of Child Custody Judgments in the Context of Same-Sex Divorce*, 78 *FORDHAM L. REV.* 1379, 1419-20 (2009) (“[D]ivorce and custody orders are within the scope of DOMA if they arise from the rights of a same-sex couple that is legally married and divorced.”).

51. *See Koppelman, supra* note 34, at 128.

have to be given full faith and credit, not that Hawaiian divorces would have to be given full faith and credit. It may well be that the only judgments that DOMA was designed to reach were themselves “bogus;”⁵² therefore, DOMA should not be construed as reaching divorce decrees.

There are at least two reasons why the correct interpretation of this provision is important to resolve. First, it *may* affect DOMA’s constitutionality. The Supreme Court has explained that its “precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments.”⁵³ A state is not required to adopt another state’s laws instead of its own.⁵⁴ However, the *judgments* of other states are given more respect. As the Court explained in *Baker v. General Motors Corp.*,⁵⁵ “Regarding 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.”⁵⁶

The fact that full faith and credit guarantees are more robust when judgments are at issue does not establish DOMA’s unconstitutionality. Article IV, Section 1 of the United States Constitution gives Congress special powers with respect to full faith and credit—“Congress may by General laws prescribe the manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof.”⁵⁷ That said, however, there is some question whether Congress has the power to reduce the full faith and credit to be given to judgments,⁵⁸ and even if

52. See Whitten, *supra* note 45, at 1249 (suggesting that Congress was only trying to reach judgments that were “bogus” anyway).

53. Thomas *ex. rel. Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998).

54. *Id.* at 232-33 (“The Full Faith and Credit Clause does not compel ‘a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.’” (citing *Pac. Emp’rs Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493, 501 (1939))).

55. 522 U.S. 222 (1998).

56. *Id.* at 233.

57. See U.S. CONST. art. IV, § 1.

58. See Mark D. Rosen, *Why the Defense of Marriage Act Is Not (Yet?) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors that Determine What the Constitution Requires*, 90 MINN. L. REV. 915, 934 (2006) (discussing the “oft-repeated critique is that DOMA is unconstitutional because it

so, whether DOMA is sufficiently general to meet the express constitutional requirements set out in Article IV.⁵⁹

Yet, the point here is not to discuss DOMA's unconstitutionality but, instead, to consider the effects of its repeal. Suppose, then, that Congress constitutionally has the power to pass the DOMA full faith and credit provision, but repeals it. Whether or not DOMA allows the states to ignore judgments validly issued in other states, these states clearly cannot refuse to recognize such judgments in the absence of congressional authorization. For example, a divorce decree including a property distribution award or, perhaps, spousal support would be subject to the same treatment that such judgments and awards now receive when different-sex couples dissolve their unions.

Were such decrees subject to full faith and credit guarantees, some of the perverse incentives inherent in the current system would cease to exist. Consider two partners, Carl and David, who marry and divorce in Massachusetts. Suppose the divorce decree divides certain marital property between them and orders Carl to pay David periodic spousal support. Rather than do what he has been ordered to do, Carl moves to Georgia, a state with its own version of DOMA that precludes the state from enforcing any rights or claims predicated on the existence of a same-sex marriage.⁶⁰ If indeed the federal Defense of Marriage Act is interpreted to permit states to refuse to enforce judgments predicated on the existence of a same-sex marriage, then David would be unable to go to Georgia to enforce those rights that have been reduced to judgment in Massachusetts. It is hardly good public policy to give individuals an incentive to cross state lines so that they can ignore their court-imposed obligations. If DOMA is

flatly subverts the Full Faith and Credit Clause's foundational principle").

59. See Mark Strasser, *Loving the Romer Out for Baehr: On Acts in Defense of Marriage and the Constitution*, 58 U. PITT. L. REV. 279, 297-301 (1997) (suggesting that DOMA does not meet the generality requirement).

60. See GA. CONST. art. 1, § 4, pt. 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.").

repealed, David would no longer be able to escape validly-imposed obligations simply by crossing state lines.

A separate question involves the constitutionality of the various state laws prohibiting the recognition of out-of-state same-sex marriages. Certainly, 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. Yet, 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.⁶¹

Consider a statute or state constitutional amendment that precludes recognition of same-sex marriages validly celebrated elsewhere and, in addition, precludes enforcement of judicial decrees predicated on the existence of a same-sex marriage. If the latter provision were severable, it would become unenforceable while the former provision continued in full force. The state would have to enforce a Massachusetts divorce judgment involving a same-sex couple, but would not have to recognize the marriage if instead the parties sought a divorce in that jurisdiction.

Consider a variation on the example involving Carl and David. They marry in Massachusetts but do not divorce there. Rather, while still married to David, Carl moves to Georgia to accept an employment opportunity. David remains in Massachusetts to sell their home before joining Carl in Georgia. Suppose the housing market is rather slow and that David remains in Massachusetts for a year before selling their home. David then moves to Georgia. Regrettably, perhaps in part because of the year of separation, the marriage breaks down and David seeks a divorce in a Georgia court. Even if DOMA were repealed, and Georgia courts were precluded from refusing to recognize a divorce decree involving a same-sex couple, that alone would not preclude Georgia courts from refusing to recognize a marriage validly celebrated in another jurisdiction. Unless states are required to recognize same-sex marriages validly celebrated in another

61. Cf. Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 387 (2010) (“Many states, such as Massachusetts, essentially require that severability clauses be read into every statute . . .”).

domicile (e.g., because of the right to travel),⁶² Georgia courts *might* be constitutionally permitted to refuse to recognize the marriage (and thus refuse to dissolve the union),⁶³ even if they were not permitted to refuse to recognize and enforce a divorce decree validly issued elsewhere.

If the Federal Defense of Marriage Act were repealed, there would be a host of questions that would require answers. It is simply unclear under what conditions, if any, the United States Constitution permits a state to refuse to recognize a marriage validly celebrated in a sister domicile. Because it is assumed by many that Congress has the power to pass DOMA,⁶⁴ it has not been thought necessary to address the limitations on state power that would exist but for the existence of DOMA. If and when DOMA is repealed, it will be necessary to determine whether there are any limitations on the states with respect to their power to refuse to recognize marriages validly celebrated in other states.

B. Defining Marriage for Federal Purposes

The other DOMA provision defines marriage for federal purposes. It reads:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.⁶⁵

62. See *supra* notes 28-34 and accompanying text.

63. Cf. *Rosengarten v. Downes*, 802 A.2d 170 (Conn. App. 2002) (refusing to recognize a Vermont civil union under Connecticut law).

64. See, e.g., Lynn D. Wardle, *Non-Recognition of Same-Sex Marriage Judgments under DOMA and the Constitution*, 38 CREIGHTON L. REV. 365, 395 (2005) (“[T]here can be no question that in enacting DOMA Congress was acting within the scope of its authority under the Constitution to prescribe the effects that must be given to sister-states judgments.”); Daniel A. Crane, *The Original Understanding of the “Effects Clause” of Article IV, Section 1 and Implications for the Defense of Marriage Act*, 6 GEO. MASON L. REV. 307, 336 (1998) (suggesting that Congress has plenary power to pass DOMA).

65. 1 U.S.C.A. § 7 (1996).

This provision seems less ambiguous if only because it is so all-inclusive—basically, it suggests that a same-sex marriage will not be recognized for *any* federal purpose. While this might *seem* to be well within Congress’s power because, after all, this provision permits states to define marriage as they wish for their own purposes, this is an unprecedented step that likely violates constitutional guarantees.

It is important to understand that there is no federal domestic relations law. The United States Supreme Court recognized long ago that the “whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States.”⁶⁶ While the federal government can supplant state family law in certain circumstances, the government must establish that important federal interests will be significantly harmed unless state law is displaced.⁶⁷

When Congress defines who is married to whom, notwithstanding contrary state law, it supplants that contrary state law. It is entirely unclear which federal interests, if any, would suffer harm if same-sex marriages were afforded federal recognition. For example, it cannot plausibly be argued that the relevant test is met whenever the federal government might thereby save money, both because the Court has already held the contrary⁶⁸ and because that would impose, at most, a minimal burden on the federal government whenever it needed to justify its displacing state law. Further, it is equally implausible that the federal government has an important interest in preventing the recognition of same-sex marriages for two distinct reasons. First, it is difficult to imagine what that interest would be. Recognizing same-sex marriage would not somehow harm different-sex marriage⁶⁹—it simply is not plausible to claim that recognizing same-sex marriage

66. *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890).

67. *See* *Rose v. Rose*, 481 U.S. 619, 625 (1987) (“Before a state law governing domestic relations will be overridden, it ‘must do major damage to clear and substantial federal interests.’” (quoting *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979)) (internal quotation marks omitted)).

68. *See* *United States v. Yazell*, 382 U.S. 341, 348 (1966) (suggesting that the federal interest in collecting money that it lends is not a sufficiently important interest to justify displacing state domestic relations law).

69. *Goodridge*, 798 N.E.2d at 965 (“Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage . . .”).

would either cause different-sex couples not to marry or would cause different-sex couples to divorce sooner than they otherwise would have.⁷⁰ Second, this provision does not prevent the recognition of same-sex marriages in the states, but merely withholds such recognition for federal purposes. If, indeed, the recognition of same-sex marriage will bring about calamitous effects, then this DOMA provision does nothing to avert that calamity. As a separate matter, it might be noted that the various states in which such unions are recognized have not undergone the terrible consequences that same-sex marriage opponents envision.⁷¹

Suppose, then, that DOMA is repealed. Without this provision, the presumption that domestic relations are established by state rather than federal law would control. For example, same-sex couples who are married in Massachusetts would be entitled to federal benefits, just as different-sex couples who marry in Massachusetts are entitled to federal benefits. Be that as it may, there are a number of unanswered questions with respect to the possible effects of a repeal of the provision defining marriage for federal purposes.

Consider, for example, the effect of this repeal on immigration. It would no longer be possible for a court to say that a same-sex partner of a United States citizen cannot be considered a marital partner by virtue of DOMA. Nonetheless, a separate question would involve the meaning to be given to the fact of the repeal.

Suppose that the repeal were interpreted to be the equivalent of Congress never having enacted DOMA in the first place. It might be assumed, then, that the relevant answer could be found by considering whether same-sex marriages were recognized for federal immigration

70. Mark Strasser, *State Constitutional Amendments Defining Marriage: On Protections, Restrictions, and Credibility*, 7 FLA. COASTAL L. REV. 365, 368 (2005) (“Just as it is unlikely that fewer different-sex couples would marry merely because same-sex couples were also offered that option, it is also improbable that the divorce rate of different-sex couples would increase if same-sex marriages were recognized. It is unreasonable to assume that different-sex couples would refuse to remain married if same-sex couples were also afforded the opportunity to marry.” (footnotes omitted)).

71. Cf. Harold P. Southerland, “*Love for Sale*”—*Sex and the Second American Revolution*, 15 DUKE J. GENDER L. & POL’Y 49, 111 (2008) (noting that “no ill effects have yet been experienced in Massachusetts”).

purposes before DOMA's passage. In fact, the Ninth Circuit Court of Appeals addressed precisely this issue in *Adams v. Howerton*.⁷²

Adams involved the marriage between Richard Adams, a United States citizen, and Anthony Sullivan, who was not a United States citizen.⁷³ They obtained a marriage license from the county clerk in Boulder, Colorado, and were married by a minister there.⁷⁴ Adams then petitioned the INS "[to classify] Sullivan as an immediate relative of an American citizen, based upon Sullivan's alleged status as Adam's spouse."⁷⁵

The Ninth Circuit explained that "a two-step analysis is necessary to determine whether a marriage will be recognized for immigration purposes. The first is whether the marriage is valid under state law. The second is whether that state-approved marriage qualifies under the Act."⁷⁶ The court did not believe that Colorado would recognize the marriage, citing an unpublished opinion by the Colorado Attorney General that same-sex marriages would have no legal effect in the state.⁷⁷ The court also noted that while "Colorado statutory law . . . neither expressly permits nor prohibits homosexual marriages, some statutes appear to contemplate marriage only as a relationship between a male and a female."⁷⁸ Thus, the court did not believe that the marriage satisfied the first prong of the analysis.

Nonetheless, the court of appeals did not rest its decision solely on its belief that the state would not recognize the marriage—it focused instead on the second prong of the test.⁷⁹ The court noted that Congress has plenary power over immigration,⁸⁰ and then interpreted

72. 673 F.2d 1036 (9th Cir. 1982).

73. *See id.* at 1038.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 1039 ("The Colorado Attorney General in an informal, unpublished opinion addressed to a member of the Colorado legislature three days after the alleged marriage in question occurred, stated that purported marriages between persons of the same sex are of no legal effect in Colorado.").

78. *Id.* (citing COLO. REV. STAT. § 14-2-104 (1973)).

79. *Id.* ("Even if the Adams-Sullivan marriage were valid under Colorado law, the marriage might still be insufficient to confer spouse status for purposes of federal immigration law.").

80. *See id.* at 1041 ("The Court without exception has sustained Congress'

congressional intent to preclude the recognition of same-sex marriage for immigration purposes.

Some of the force of the *Adams* analysis regarding congressional intent has been vitiated in the meantime. For example, the court seemed to believe that same-sex couples would not be raising children⁸¹ and that this might affect Congress's willingness to recognize a same-sex marriage for immigration purposes. Yet, it is true that same-sex couples are having and raising children.⁸² If Congress believes that bi-national families must be recognized for the sake of the children that might be raised in such families, then this would be a reason to recognize, rather than to refuse to recognize, same-sex marriages.

The *Adams* court referred to the commonly accepted definitions of "marriage" and "spouse" at the time, suggesting that Congress would not even be considering marriages between same-sex partners.⁸³ The court further noted that Congress had manifested elsewhere its intent to *exclude* on the basis of sexual orientation.⁸⁴ Yet, the common understanding of marriage changed since the *Adams* decision. At the time that *Adams* was decided, *no* countries recognized same-sex

'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.'" (citing *Boutilier v. Immig. & Natural. Servs.*, 387 U.S. 118, 123 (1967)).

81. *See id.* at 1043 ("Perhaps this is because homosexual marriages never produce offspring . . .").

82. *See* Caleb W. Langston, *Fundamental Right, Fundamentally Wronged: Oregon's Unconstitutional Stand on Same-Sex Marriage*, 84 OR. L. REV. 861, 899-900 (2005) ("Yet even if having and raising children were an indispensable component of marriage, same-sex couples could not be prohibited from marrying on that basis. While it is true that only opposite-sex couples can procreate through sexual intercourse, same-sex couples can and do choose to have children through adoption or assisted reproduction.").

83. *Adams*, 673 F.2d at 1040 ("The term 'marriage' ordinarily contemplates a relationship between a man and a woman. The term 'spouse' commonly refers to one of the parties in a marital relationship so defined. Congress has not indicated an intent to enlarge the ordinary meaning of those words." (citations omitted)).

84. *See id.* ("Yet, both section 15(b) of the amendments, Pub.L. No. 89-236, s 15(b), 79 Stat. 911, 919 (codified at 8 U.S.C. s 1182(a)(4)), and the accompanying Senate Report, S.Rep. No. 748, 89th Cong., 1st Sess., reprinted in, (1965) U.S.Code Cong. & Ad.News 3328, 3343, clearly express an intent to exclude homosexuals." (citing *Boutilier v. Immig. & Natural. Servs.*, 387 U.S. 118, 121 (1967))).

marriages.⁸⁵ Because same-sex marriage is currently recognized in some states and in some nations,⁸⁶ it is no longer an oxymoron to refer to a same-sex union as a marriage. Further, far from excluding on the basis of sexual orientation, the United States offers asylum to those who might face persecution in their home countries based on that trait.⁸⁷ Finally, the current discussion assumes that the DOMA provision defining marriage for federal purposes will be repealed. But before such a repeal occurs, Congress would likely consider and reject the wisdom of refusing to recognize same-sex marriages for federal purposes.

If DOMA were simply repealed and no guidance was offered as to the conditions under which the federal government would recognize same-sex marriages for federal purposes, different courts might be expected to reach different conclusions about the consequences of that repeal. For example, a split of authority on the issue of whether a bi-national same-sex couple would be recognized as married for federal immigration purposes would not be surprising, even if the state where the individuals were domiciled permitted same-sex couples to marry. Ultimately, this will be a question for the courts to decide.

Congress has good reason not merely to repeal the federal definition section of DOMA, but also to affirmatively express a desire

85. See Anthony R. Reeves, *Sexual Identity as a Fundamental Human Right*, 15 BUFF. HUM. RTS. L. REV. 215, 263 (2009) (“In 2001, the Netherlands became the first country in the world to recognize same-sex marriage.”).

86. See Kim Willoughby, *Lewis v. Lewis and Non-Married Partner Litigation*, 39 COLO. LAW. 33, 36 n.54 (Jan. 2010) (“Countries that recognize same-sex marriage are: Belgium, Canada, The Netherlands, Norway, South Africa, Spain, and Sweden.” (citing *International Progress Toward the Freedom to Marry*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/international-progress-toward-the-freedom-to-marry> (last updated Jan. 2011))).

87. See Ellen A. Jenkins, *Taking the Square Peg Out of the Round Hole: Addressing the Misclassification of Transgender Asylum Seekers*, 40 GOLDEN GATE U. L. REV. 67, 67-68 (2009) (“It was a watershed victory for the gay and lesbian community when United States courts first recognized that sexual orientation was a legal ground for membership in a particular social group for asylum-seeking purposes. This gave an unprecedented number of gay and lesbian asylum seekers the ability to escape persecution in their countries of origin and begin new lives in the United States.”).

to recognize validly celebrated same-sex marriages.⁸⁸ Suppose the focus is shifted from bi-national couples involving at least one United State citizen to a marriage involving two same-sex foreign nationals who married in accord with the law of their country. Suppose further that during a visit to the United States the validity of their marriage needs to be established. It would be in the United States' foreign policy interest to avoid the international embarrassment that would flow from a refusal to recognize such a marriage. As a separate matter, the United States' refusal to recognize these marriages harms its economic interests by deterring tourism from those who fear their unions will not be recognized.

An example is useful to illustrate another point. In 2009, Iceland became the first country to have an openly lesbian Prime Minister.⁸⁹ Were Congress to refrain from doing more than merely repealing DOMA's definition of marriage for federal purposes, a different kind of international embarrassment could occur. Suppose that a lesbian or gay head of state were to come with his or her same-sex spouse to the United States, perhaps to address the United Nations. A refusal by the federal government, or a state government, to recognize that dignitary's marriage would not only be utterly embarrassing,⁹⁰ but

88. Cf. Cynthia Juarez Lange, *Selected Documents*, at 41, 53, PLI Order No. 18655, 1768 PLI/Corp 41 (PLI Corp. & Prac. Course Handbk. Ser. No. 1768, 2009) ("Earlier this week, the Senate Judiciary Committee held a hearing on the Uniting American Families Act (S. 424), sponsored by Committee Chairman Patrick Leahy (D-VT). The bill would extend spousal immigration benefits to qualifying permanent partners—including same-sex partners—of U.S. citizens and lawful permanent residents.").

89. See *2009 - Year of Heroes*, SUNDAY MAIL (Austl.), Dec. 20, 2009, at 80 ("Jhanna Sigurdardttir is appointed as the new Prime Minister of Iceland, becoming the world's first openly lesbian head of government.").

90. Cf. *Godfrey v. DiNapoli*, 866 N.Y.S.2d 844, 846 (2008) ("The comptroller's decision to recognize same-sex Canadian marriages is based on the determination that such marriages are legal in that jurisdiction and would not otherwise be inconsistent with New York law. New York, unlike the majority of States, has not enacted a 'defense-of-marriage' act so as to expressly prohibit recognition of same-sex marriages. Moreover, the question posed to the Comptroller, and the policy determination that resulted, do not concern marriages involving polygamy or incest. Consequently, the determination by the Comptroller to recognize same-sex marriages performed in Canada, in accordance with the laws of that jurisdiction, is consistent with New York law regarding the recognition of marriages performed elsewhere.").

could also damage international relations. That a head of state would be less cooperative with countries that refused to recognize his or her family would not be surprising. By the same token, similar difficulties might arise if the spouses of important advisors were not recognized. Thus, according federal recognition to marriages validly celebrated in the parties' domicile might be not only the right thing to do, but the *prudent* thing to do.

III. CONCLUSION

The Federal Defense of Marriage Act authorizes any state to refuse to recognize a marriage validly celebrated in another state. Further, it defines marriage for federal purposes in such a way that same-sex married couples cannot qualify for federal benefits. Its repeal would be most welcome. Nonetheless, DOMA's repeal would not guarantee same-sex couples and their families the kinds of protections that other families take for granted. On the contrary, repealing DOMA would merely be a first step. Courts would still have to work out the conditions under which an out-of-state marriage, valid at the time of celebration, could nonetheless be denied full faith and credit. Further, courts would need to identify the conditions under which federal recognition would be accorded to marriages that were valid in the domicile at the time of celebration.

Marriage provides a variety of benefits to the adults in the relationship, and to any children of the marriage. It is both surprising and disappointing that some states, and the federal government, refuse to recognize same-sex marriages, especially considering the foreseeable and detrimental effects on same-sex partners and their families. With no offsetting benefits to justify DOMA, Congress would be wise to repeal it as soon as possible. However, DOMA's repeal will be but one step along the road toward securing for LGBT⁹¹ families the rights and protections that all families need and deserve.

91. Lesbian, gay, bisexual, and transgendered. LGBT, MERRIAM-WEBSTER ONLINE DICTIONARY (June 22, 2010), <http://www.merriam-webster.com/dictionary/lgbt>.