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## WHAT'S NEXT AFTER *WINDSOR*?

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MARK STRASSER\*

### INTRODUCTION

In *United States v. Windsor*,<sup>1</sup> the Court struck down Section Three of the Defense of Marriage Act (“DOMA”),<sup>2</sup> which defined marriage for federal purposes.<sup>3</sup> In explaining why the section did not pass constitutional muster, the Court discussed federalism, due process, and equal protection guarantees, which makes it difficult to pin down the precise bases upon which this section failed to pass constitutional muster.<sup>4</sup> While it may not matter for some purposes which guarantee or combination of guarantees ultimately led to the Court’s striking down this DOMA section, it would be quite useful for other purposes to know whether, for example, *Windsor* is basically a federalism case<sup>5</sup> or, instead, should be understood in a much different way.<sup>6</sup> Certainly, the decision’s implications, if any, for the constitutionality of DOMA’s Section Two<sup>7</sup> or for state same-sex marriage bans will greatly depend upon the proper interpretation(s) of *Windsor*. It is not argued here that

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\* Trustees Professor of Law, Capital University Law School, Columbus, Ohio.

<sup>1</sup> 570 U.S. \_\_\_, 133 S. Ct. 2675 (2013).

<sup>2</sup> *See id.* at 2696 (“the federal statute is in violation of the Fifth Amendment”).

<sup>3</sup> *See* 1 U.S.C. § 7 (2012), *held unconstitutional by* *United States v. Windsor*, 570 U.S. \_\_\_, 133 S. Ct. 2675 (2013).

<sup>4</sup> Compare Natasha J. Silber, Note, *Unscrambling the Egg: Social Constructionism and the Antireification Principle in Constitutional Law*, 88 N.Y.U. L. REV. 1873, 1901 (2013) (“[I]n *United States v. Windsor*, the Court struck down section 3 of DOMA, but largely on federalism grounds.”), with Douglas Nejaime, *Windsor’s Right to Marry*, 123 YALE L.J. ONLINE 219, 219 (2013) (“And though the U.S. Supreme Court’s decision in *Windsor*’s favor is sprinkled with elements of federalism and due process, it ultimately rests on equal protection grounds.”).

<sup>5</sup> *See, e.g., Windsor*, 133 S. Ct. at 2697 (Roberts, C.J., dissenting) (“[I]t is undeniable that [the majority’s] . . . judgment is based on federalism”).

<sup>6</sup> *See id.* at 2692 (“[I]t is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance”).

<sup>7</sup> 28 U.S.C. § 1738C (2000).

there is only one possible interpretation of *Windsor*,<sup>8</sup> nonetheless, the Court's approach provides several bases upon which to believe that neither Section Two nor state same-sex marriage bans pass constitutional muster.<sup>9</sup>

Part II of this article discusses *Windsor* and the various approaches the Court used to explain why this DOMA section did not pass constitutional muster. Part III analyzes the constitutionality of Section Two of DOMA in light of the *Windsor* analysis, suggesting some of the ways that *Windsor* makes Section Two constitutionally vulnerable. Part IV addresses state same-sex marriage bans, explaining how the rationales employed in *Windsor* suggest that state same-sex marriage bans also cannot pass constitutional muster. The article concludes that, although *Windsor* can be read in several ways, it likely sounds the death knell for both Section Two of DOMA and for state same-sex marriage prohibitions.

## II. WINDSOR

Section Three of the Defense of Marriage Act defined marriage for federal purposes.<sup>10</sup> The Court offered several bases upon which to strike it down,<sup>11</sup> some of which were narrowly tailored to the section at issue and others of which had broader implications. While *Windsor*'s ultimate meaning will not be clear until it is examined and explained in the subsequent case law, much of the opinion reads as if it is designed to apply more broadly than to the particular federal provision that could not pass constitutional muster.

Section Three of the Defense of Marriage Act read:

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<sup>8</sup> *Cf. Windsor*, 133 S. Ct. at 2709 (Scalia, J., dissenting) (“Lord, an opinion with such scatter-shot rationales as this one (federalism noises among them) can be distinguished in many ways. And deserves to be. State and lower federal courts should take the Court at its word and distinguish away.”).

<sup>9</sup> *See infra* Parts III and IV.

<sup>10</sup> *See* 1 U.S.C. § 7 (2012) (“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 . . . .”), *held unconstitutional by* *United States v. Windsor*, 570 U.S. \_\_\_, 133 S. Ct. 2675 (2013).

<sup>11</sup> *See Windsor*, 133 S. Ct. at 2692 (“DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next.”); *id.* at 2693 (“DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government.”).

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.<sup>12</sup>

The provision was challenged in *Windsor*,<sup>13</sup> and the Court discussed several grounds—including federalism,<sup>14</sup> equal protection, and due process<sup>15</sup>—when holding that the section did not pass constitutional muster.<sup>16</sup> By discussing these different grounds, the Court at least suggests that the section ran afoul of constitutional guarantees in multiple ways,<sup>17</sup> and it is important to identify and understand these differing constitutional defects insofar as one wishes to make headway in determining implications of *Windsor* for other laws.

The Defense of Marriage Act was passed shortly after the Hawaii Supreme Court had remanded a challenge to Hawaii's same-sex marriage ban.<sup>18</sup> On remand, the district court was to examine the state same-sex marriage ban with strict scrutiny, which meant that the prohibition would be struck down as a violation of state constitutional guarantees unless the state could show that the law was narrowly drawn to promote compelling state interests.<sup>19</sup> Because statutes rarely survive

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<sup>12</sup> 1 U.S.C. § 7.

<sup>13</sup> *Windsor*, 133 S. Ct. at 2683 ("Section 3 is at issue here.").

<sup>14</sup> *Id.* at 2692 ("DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next."). *See also id.* at 2697 (Roberts, C.J., dissenting) ("it is undeniable that its judgment is based on federalism").

<sup>15</sup> *Id.* at 2693 (majority opinion) ("DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government.").

<sup>16</sup> *Id.* at 2682 ("The United States District Court and the Court of Appeals ruled that this portion of the statute is unconstitutional and ordered the United States to pay Windsor a refund. This Court granted certiorari and now affirms the judgment in Windsor's favor.").

<sup>17</sup> *See supra* notes 13-14 and accompanying text.

<sup>18</sup> Olga Tomchin, Comment, *Bodies and Bureaucracy: Legal Sex Classification and Marriage-Based Immigration for Trans\* People*, 101 CALIF. L. REV. 813, 831 n.126 (2013) ("DOMA was a response to the possibility that Hawai'i would recognize same-sex marriages.").

<sup>19</sup> *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993) ("On remand, in accordance with the "strict scrutiny" standard, the burden will rest on Lewin to overcome the presumption that HRS § 572-1 is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgements of constitutional rights.").

constitutional review under strict scrutiny,<sup>20</sup> members of Congress apparently feared that Hawaii would soon recognize same-sex marriages.<sup>21</sup>

The possibility that Hawaii might soon recognize same-sex marriage had federal implications. If same-sex couples domiciled in Hawaii were to marry, then they would be entitled to all of the federal benefits to which traditional married couples are entitled.<sup>22</sup> The *Windsor* Court explained that Congress enacted DOMA to “defend the institution of traditional heterosexual marriage.”<sup>23</sup> Precisely because those same-sex couples who had married legally in accord with state law would nonetheless not be entitled to federal benefits by virtue of DOMA, the Court explained that “[t]he Act’s demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law.”<sup>24</sup> By making such a distinction among marriages, “DOMA’s principal effect is to identify a subset of state-sanctioned marriages and make them unequal.”<sup>25</sup> The Court summed up its understanding of DOMA—“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.”<sup>26</sup>

The imposition of stigma simply is not a valid purpose.<sup>27</sup> The *Romer* Court struck down Colorado’s Amendment Two because it “classifie[d] homosexuals not to further a proper legislative end but to

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<sup>20</sup> Joshua J. Orewiler, Note, *Stolen Valor and Freedom of Speech: An Analysis of How Federal Law Should Criminalize The Wearing of Unearned Military Awards*, 97 IOWA L. REV. 1811, 1819 (2012) (“[C]ourts rarely uphold statutes subject to strict scrutiny. . .”).

<sup>21</sup> See Maura T. Healey, *A State’s Challenge to DOMA: Federalism and Constitutional Rights*, 5 ALB. GOV’T L. REV. 422, 427-28 (2012) (discussing members of Congress who were “motivated by fears that Hawaii might begin to recognize marriages between same-sex couples following the Hawaii Supreme Court’s decision in *Baehr v. Lewin*”).

<sup>22</sup> Cf. *United States v. Windsor*, 570 U.S. \_\_\_, \_\_\_, 133 S. Ct. 2675, 2692 (2013) (“DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State. . .”).

<sup>23</sup> *Id.* at 2693 (citing H.R. Rep. No. 104-664, at 12-13 (1996)).

<sup>24</sup> *Id.* at 2693-94.

<sup>25</sup> *Id.* at 2694.

<sup>26</sup> *Id.* at 2693.

<sup>27</sup> See *id.* at 2695 (“[T]he principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.”).

make them unequal to everyone else,”<sup>28</sup> and the *Windsor* Court implied that Congress was trying to do the same thing by enacting DOMA.<sup>29</sup> Colorado’s Amendment Two was unconstitutional, at least in part, because “its sheer breadth [wa]s so discontinuous with the reasons offered for it that the amendment seem[ed] inexplicable by anything but animus toward the class it affect[ed]; it lack[ed] a rational relationship to legitimate state interests.”<sup>30</sup> So, too, the *Windsor* Court suggested, one of the factors militating in favor of DOMA’s unconstitutionality was its breadth—the Court expressly commented about DOMA’s “great[ ] reach; for it enacts a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations.”<sup>31</sup>

Congress’s communication of its own view that same-sex relationships are inferior would not go unnoticed. “DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition.”<sup>32</sup>

At least two different classes of individuals are hurt by this stigmatization.<sup>33</sup> First, this “differentiation demeans the couple, whose moral and sexual choices the Constitution protects, and whose relationship the State has sought to dignify.”<sup>34</sup> Second, “it humiliates tens of thousands of children now being raised by same-sex couples, [because] [t]he 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.”<sup>35</sup> Thus, the Court suggested, Section 3 stigmatized both the same-sex couples who had married and any children whom those couples might be raising.<sup>36</sup> The Court explained that the “federal statute is invalid,

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<sup>28</sup> *Romer v. Evans*, 517 U.S. 620, 635-36 (1996).

<sup>29</sup> *Windsor*, 133 S. Ct. at 2693.

<sup>30</sup> *Romer*, 517 U.S. at 632.

<sup>31</sup> *Windsor*, 133 S. Ct. at 2690.

<sup>32</sup> *Id.* at 2694.

<sup>33</sup> Others are also hurt by the message that a same-sex marriage ban sends. See Cori K. Garland, Note, *Say “I Do”*: The Judicial Duty to Heighten Constitutional Scrutiny of Immigration Policies Affecting Same-Sex Binational Couples, 84 *IND. L.J.* 689, 699 (2009) (“The sentiment behind these bans—‘You do not belong’—stigmatizes gays and lesbians individually and as a group.”).

<sup>34</sup> *Windsor*, 133 S. Ct. at 2694 (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)).

<sup>35</sup> *Id.*

<sup>36</sup> See *id.* (“The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, and whose relationship the State has sought to dignify. And it

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.”<sup>37</sup>

The *Windsor* Court not only focused on the symbolic harms to same-sex couples and their families, but also described some of the tangible benefits that such couples lost by virtue of the lack of federal recognition.<sup>38</sup> Section 3 forced same-sex couples “to follow a complicated procedure to file their state and federal taxes jointly,”<sup>39</sup> “prevent[ed] same-sex married couples from obtaining government healthcare benefits they would otherwise receive,”<sup>40</sup> “br[ought] financial harm to children of same-sex couples,”<sup>41</sup> and “denie[d] or reduce[d] benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security.”<sup>42</sup> These are the kinds of harms that families can ill afford, especially in a challenging economy where many families live paycheck to paycheck.<sup>43</sup>

Certainly, the opinion also included federalism concerns. By enacting DOMA, Congress was encroaching upon an area traditionally reserved for the States.<sup>44</sup> The Court expressly noted that “DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary. . . from one State to the next.”<sup>45</sup> The Court emphasized “[t]he State’s power in defining the marital relation, [which] is of central relevance in this case.”<sup>46</sup> Here, states having decided “to give this class of persons the right to marry conferred upon

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humiliates tens of thousands of children now being raised by same-sex couples.”) (citing *Lawrence*, 539 U.S. 558).

<sup>37</sup> *Id.* at 2696.

<sup>38</sup> *See id.* at 2694-95.

<sup>39</sup> *Id.* at 2694.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 2695.

<sup>42</sup> *Id.*

<sup>43</sup> *See* Roby Brock, *Retailers Are Catering to the 21st Century Shopper*, TALK BUS. (May 14, 2012), <http://talkbusiness.net/2012/05/retailers-are-catering-to-the-21st-century-shopper/> (“We know the economy is still extremely challenging for our core customers. Many are living paycheck to paycheck from the 1st to the 15th of the month.”) (quoting Carol Johnston, senior vice president at Wal-Mart.).

<sup>44</sup> *See Windsor*, 133 S. Ct. at 2691 (“the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations”).

<sup>45</sup> *Id.* at 2692.

<sup>46</sup> *Id.*

them a dignity and status of immense import,”<sup>47</sup> and DOMA was an attempt to undercut what the states were trying to do.<sup>48</sup>

The *Windsor* Court offered several different rationales for striking down this DOMA section.<sup>49</sup> They ranged from Congress exceeding its power and undermining the sovereignty of the states<sup>50</sup> to Congress having been motivated by an illicit purpose<sup>51</sup> to Congress having offended constitutional guarantees protecting individuals.<sup>52</sup> While these factors all militated in favor of Section Three’s unconstitutionality, they would not all militate in the same direction in a different kind of case.

### III. SECTION TWO OF DOMA

Some members of Congress apparently had an additional fear about what would or might happen if Hawaii began to permit same-sex marriages to be celebrated.<sup>53</sup> They worried that individuals domiciled in one state would go to Hawaii, marry, and then return to their domiciles demanding that their same-sex marriages be recognized.<sup>54</sup> They further feared that those domiciles would have to recognize those marriages as a matter of full faith and credit,<sup>55</sup> and they passed a different

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 2693 (“DOMA seeks to injure the very class New York seeks to protect.”).

<sup>49</sup> *See id.* at 2692 (“DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next.”).

<sup>50</sup> *See id.*

<sup>51</sup> *Id.* at 2693 (“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.”).

<sup>52</sup> *Id.* at 2695 (“DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.”).

<sup>53</sup> *See* Mark Strasser, *DOMA, the Constitution, and the Promotion of Good Public Policy*, 5 ALB. GOV’T L. REV. 613, 629 (2012) (“Some in Congress feared that if Hawaii were to recognize such unions, then same-sex couples domiciled in other states would go to Hawaii, marry, and then return to their domiciles demanding that their marriages be recognized.”).

<sup>54</sup> Mark Strasser, *DOMA and the Two Faces of Federalism*, 32 CREIGHTON L. REV. 457, 464 (1998) (“When Congress was debating whether to pass the Defense of Marriage Act, many members seemed concerned that individuals domiciled in one state might go to Hawaii to marry (should Hawaii come to recognize same-sex marriages) and then return to their domiciles claiming that the marriage would have to be recognized under the Full Faith and Credit Clause.”).

<sup>55</sup> *See* 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

DOMA section, allegedly to prevent Hawaii from imposing its marriage laws on all of the states.<sup>56</sup>

Section Two 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.<sup>57</sup>

This section makes clear that full faith and credit need not be given to “any public act, record, or judicial proceeding. . .respecting a relationship between persons of the same sex that is treated as a marriage under the laws of. . .[an]other State.”<sup>58</sup> At least one issue raised by Section Two is whether Congress has the power to regulate full faith and credit in this way.

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 rules prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.”<sup>59</sup> The second sentence has been interpreted in different ways—for example, some argue that the power accorded to Congress is only to in-

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Clause of the United States Constitution, potentially disrupting state sovereignty in domestic relations laws.”).

<sup>56</sup> *But cf.* Lynn D. Wardle, *Involuntary Imports: Williams, Lutwak, the Defense of Marriage Act, Federalism, and “Thick” and “Thin” Conceptions of Marriage*, 81 *FORDHAM L. REV.* 771, 789 (2012) (“The drafters of section 2 of DOMA wanted to prevent advocates of same-sex marriage from using federal law—particularly the Full Faith and Credit Clause of the Constitution, as well as federal statutes and choice of law doctrines—to compel recognition of same-sex marriage in resistant states.”).

<sup>57</sup> 28 U.S.C. § 1738C (1996).

<sup>58</sup> *Id.*

<sup>59</sup> U.S. CONST. art. IV, § 1.



crease but not to decrease full faith and credit,<sup>60</sup> although others disagree.<sup>61</sup>

This dispute about whether Congress is only permitted to increase full faith and credit need not be settled in order to find that Section Two is unconstitutional. The Constitution gives Congress the power to pass “general” laws,<sup>62</sup> and this provision may not be viewed as sufficiently general, given that it targets same-sex relationships.<sup>63</sup> Even were DOMA somehow to meet the generality requirement, it seems doubtful that this congressional provision would pass muster, given the Court’s already having found that DOMA’s “purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”<sup>64</sup> Thus, the Court having found that Congress passed DOMA out of animus<sup>65</sup> will likely go a long way to establish Section Two’s constitutional invalidity, even if the Court might have been tempted to uphold such a law under other circumstances.

It is not claimed here that the Court’s finding that Section Two was unconstitutional would therefore mean that a marriage celebrated in one jurisdiction would have to be recognized throughout the country. Traditionally, the domicile at the time of the marriage determines which marriages are valid and which are not.<sup>66</sup> But this means that

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<sup>60</sup> 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, 606 (1997) (“When queried regarding the constitutionality of the proposed bill, several scholars argued DOMA was an improper exercise of the full faith and credit power because the Clause does not authorize Congress to decrease full faith and credit. According to this line of reasoning, Congress’ power is subject to a ‘one-way ratchet,’ which gives Congress power to expand—but not to contract—full faith and credit.”).

<sup>61</sup> *Id.* at 620 (“Supporters of DOMA rejected the one-way ratchet theory as a limit on Congress’ full faith and credit authority.”).

<sup>62</sup> U.S. CONST. art. IV, § 1.

<sup>63</sup> See Strasser, *supra* note 52, at 625-26 (“It is simply unclear whether this DOMA section counts as a “general” law for purposes of the second sentence of article IV, section 1. It should be noted, for example, that the provision picks out one kind of relationship—same-sex relationships treated as marriages under state law—and describes how such relationships can be treated under other states’ laws rather than say, for example, that marriages as a general matter need not be given effect under other states’ laws.”).

<sup>64</sup> *United States v. Windsor*, 570 U.S. \_\_\_, \_\_\_, 133 S. Ct. 2675, 2696 (2013).

<sup>65</sup> See *id.* at 2708 (“the majority says that the supporters of this Act acted with malice. . .”).

<sup>66</sup> See Mark Strasser, *Let Me Count the Ways: The Unconstitutionality of Same-Sex-Marriage Bans*, 27 BYU J. PUB. L. 301, 315 (2013) (“Traditionally, the law of the domicile governs the validity of marriages.”).

Section Two was a solution in search of a problem.<sup>67</sup> The difficulty that it was allegedly designed to solve—preventing domiciles from being forced to recognize the marriages of their domiciliaries who took a quick trip to Hawaii to get married—was not a difficulty in the first place, because the domicile has long had the power to refuse to recognize marriages that violate an important policy of the state.<sup>68</sup> A separate issue is whether states can maintain same-sex marriage bans without violating constitutional guarantees.<sup>69</sup>

*Loving v. Virginia*<sup>70</sup> involved a challenge to Virginia's anti-miscegenation law. Mildred Jeter and Richard Loving, an interracial couple domiciled in Virginia,<sup>71</sup> married in the District of Columbia in accord with local law.<sup>72</sup> Virginia treated such marriages as void<sup>73</sup> and imposed criminal penalties on those who attempted to contract an interracial law, whether locally or in another state.<sup>74</sup> The Lovings were charged with and convicted of breaking the Virginia law.<sup>75</sup>

When the Lovings challenged the law, they did not challenge Virginia's power to refuse to recognize a marriage of its domiciliaries deemed contrary to public policy that had been celebrated elsewhere<sup>76</sup> but, instead, the state's power to refuse to recognize interracial marriages.<sup>77</sup> When the *Loving* Court struck down Virginia's interracial

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<sup>67</sup> See generally Jennie R. Shuki-Kunze, Note, *The "Defenseless" Marriage Act: The Constitutionality of the Defense of Marriage Act as an Extension of Congressional Power Under the Full Faith and Credit Clause*, 48 CASE W. RES. L. REV. 351, 375 n.165 (1998) ("DOMA is a 'solution in search of a problem.'" (quoting 142 Cong. Rec. S10107 (daily ed. Sept. 10, 1996) (statement of Sen. Kerry))).

<sup>68</sup> See Strasser, *supra* note 52, at 629 ("[D]omiciles already had the power to refuse to recognize those marriages of their domiciliaries that contravened local law, even if those marriages were validly celebrated elsewhere").

<sup>69</sup> See *infra* notes 75-129 and accompanying text (discussing the constitutionality of same-sex marriage bans).

<sup>70</sup> 388 U.S. 1 (1967).

<sup>71</sup> *Id.* at 2.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 4.

<sup>74</sup> *Id.*

<sup>75</sup> See *id.* at 3.

<sup>76</sup> Mark P. Strasser, *DOMA and the Constitution*, 58 DRAKE L. REV. 1011, 1020 (2010) ("The *Loving* Court did not address whether states had to recognize a marriage validly celebrated elsewhere. . .").

<sup>77</sup> *Loving*, 388 U.S. at 3. ("[T]he Lovings instituted a class action in the United States District Court for the Eastern District of Virginia requesting that a three-judge court be convened to declare the Virginia antimiscegenation statutes unconstitutional and to enjoin state officials from enforcing their convictions.").

ban,<sup>78</sup> it cited equal protection concerns<sup>79</sup> and due process concerns,<sup>80</sup> but nowhere cast any doubt as a general matter on a domicile's power to refuse to recognize its domiciliary's marriage that violated an important public policy.<sup>81</sup>

DOMA does not include the word "domicile," instead permitting any state not to recognize a same-sex marriage validly celebrated in another state.<sup>82</sup> Thus, an individual who has a valid same-sex marriage in her domicile might be passing through another state on a vacation with her spouse. If her marriage were somehow at issue in the latter state, e.g., because there was an auto accident and she wished to sue for wrongful death or loss of consortium, that state would seem authorized by DOMA to refuse to recognize that marriage.<sup>83</sup> It is an open question whether states would have this power. Arguably, the right to travel precludes a state from refusing to recognize a marriage that is valid in a sister domicile.<sup>84</sup>

Yet, the Court has never made clear the conditions, if any, under which one state must recognize a marriage that has been validly celebrated in a different state.<sup>85</sup> If a state, regardless of whether it is a couple's domicile, has the power to refuse to recognize a marriage that violates local policy,<sup>86</sup> then Section Two would not have given a power

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<sup>78</sup> *Id.* at 12 ("Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.").

<sup>79</sup> *Id.* ("There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.").

<sup>80</sup> *Id.* ("These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment.").

<sup>81</sup> *Cf.* Mark Strasser, *The Legal Landscape Post-DOMA*, 13 J. GENDER RACE & JUST. 153, 158 n.35 (2009) ("*Loving v. Virginia* did not take away the domicile's power to refuse to recognize marriages validly celebrated elsewhere as a general matter. . .").

<sup>82</sup> *See* 28 U.S.C. § 1738C (2000).

<sup>83</sup> *See* Roderick T. Chen & Alexandra K. Glazier, *Can Same-Sex Partners Consent to Organ Donation?*, 29 AM. J.L. & MED. 31, 37 (2003) ("An even more expansive interpretation would permit a state to refuse to recognize same-sex marriages of non-domiciles who were merely passing through the state.").

<sup>84</sup> *See generally* Mark Strasser, *Interstate Marriage Recognition and the Right to Travel*, 25 WIS. J. L. GENDER & SOC. I (2010).

<sup>85</sup> Strasser, *supra* note 53, at 630 ("[T]he Court has not addressed whether a state through which a couple was traveling could refuse to recognize their marriage. . .").

<sup>86</sup> *Cf.* Sarah Bollasina Fandrey, Comment, *The Goals of Marriage and Divorce in Missouri: The State's Interest in Regulating Marriage, Privatizing Dependency, and Allowing Same-Sex Divorce*, 32 ST. LOUIS U. PUB. L. REV. 447, 455-56 (2013) ("States reserve the right to refuse to recognize 'foreign' marriages if they are contrary to the state's strong public policy.").

to states that they did not already have,<sup>87</sup> at least with respect to marriage recognition.

Suppose for purposes here that a state, regardless of whether it is the domicile, has the power to refuse to recognize a marriage that is strongly offensive to local public policy. Even if that were so, Section Two would still likely be unconstitutional. On its face, Section Two seems to authorize states to refuse to recognize divorce judgments validly issued in other states.<sup>88</sup> Without DOMA, states would not have the power to refuse to give such judgments full faith and credit.<sup>89</sup>

Suppose, for example, that Jesse is awarded property pursuant to a divorce judgment ending his same-sex marriage to Corey. Corey quickly moves to Georgia in the hopes that the judgment will not be enforceable there.<sup>90</sup> Section Two of DOMA might be interpreted to permit Georgia not to give effect to a “right or claim”<sup>91</sup> of a party arising as a result of a same-sex marriage (or its dissolution).<sup>92</sup>

It is not at all clear why Congress believed it was good public policy to enable individuals to avoid their court-imposed obligations by

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<sup>87</sup> Strasser, *supra* note 53, at 630 (“[I]t is not clear whether this DOMA provision affords states a power that they do not already have”).

<sup>88</sup> Elisabeth Oppenheimer, *No Exit: The Problem of Same-Sex Divorce*, 90 N.C. L. REV. 73, 122 (2011) (“One might expect that a divorce judgment would always be recognized on full faith and credit grounds, but DOMA says that no state ‘shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage.’ Thus, states can apparently disregard divorce proceedings from other states, and some mini-DOMAs direct state actors to do just that.”).

<sup>89</sup> Mark Strasser, *What If DOMA Were Repealed? The Confused and Confusing Interstate Marriage Recognition Jurisprudence*, 41 CAL. W. INT’L L.J. 249, 265 (2010) (“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.”).

<sup>90</sup> See GA. CONST. art. 1, § 4, ¶ 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.”).

<sup>91</sup> 28 U.S.C. § 1738C (2000).

<sup>92</sup> See Nick Tarasen, Comment, *Untangling the Knot: Finding a Forum for Same-Sex Divorces in the State of Celebration*, 78 U. CHI. L. REV. 1585, 1620 (2011) (“DOMA, by its plain text, entitles hostile states to completely ignore a state-of-celebration divorce (and, potentially, any downstream judgments) as ‘arising from’ a same-sex marriage.”).

simply moving to a state that would refuse to enforce a judgment establishing those legal responsibilities. If there is some non-obvious reason that this really is a good idea, then one might assume that Congress would make *all* divorce judgments subject to non-recognition in sister states rather than only those involving same-sex couples.

The *Windsor* Court's worry that same-sex marriages were being singled out for adverse treatment by Section Three of DOMA<sup>93</sup> should also be triggered by Section Two. The Court's worry that Section Three was motivated by animus<sup>94</sup> should also be present in a challenge to Section Two. In short, it would be unsurprising for the Court to hold that Section Two's "purpose and effect [is] to disparage and to injure"<sup>95</sup> a particular group and for that reason, among others, does not pass muster.

#### IV. SAME-SEX MARRIAGE BANS

A much-debated question is whether or when, in Justice Scalia's words, the next shoe will drop, i.e., whether or when the Court will hold that state same-sex marriage bans violate constitutional guarantees.<sup>96</sup> This depends, at least in part, upon the extent to which *Windsor* is a federalism case.<sup>97</sup>

In his dissent, Chief Justice Roberts sought to reassure the states that *Windsor* did not speak to the constitutionality of same-sex marriage bans.<sup>98</sup> "The Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States, in the exer-

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<sup>93</sup> *United States v. Windsor*, 570 U.S. \_\_\_, \_\_\_, 133 S. Ct. 2675, 2695-96 (2013) ("The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper.")

<sup>94</sup> *See id.* at 2693 ("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.")

<sup>95</sup> *Id.* at 2696.

<sup>96</sup> *See id.* at 2705 (Scalia, J., dissenting) (discussing "the second, state-law shoe to be dropped later, maybe next Term").

<sup>97</sup> *Cf. 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.") (quoting *Windsor*, 133 S. Ct. at 2692 (majority opinion)).

<sup>98</sup> *Id.* (Roberts, C.J., dissenting).

cise of their ‘historic and essential authority to define the marital relation,’ may continue to utilize the traditional definition of marriage.”<sup>99</sup> Indeed, he implied that the *Windsor* decision, which he read as a federalism decision,<sup>100</sup> provides reason to believe that state same-sex marriage bans will be left intact.<sup>101</sup> “The dominant theme of the majority opinion is that the Federal Government’s intrusion into an area ‘central to state domestic relations law applicable to its residents and citizens’ is sufficiently ‘unusual’ to set off alarm bells.”<sup>102</sup> He explained that

while “[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.<sup>103</sup>

Justice Scalia read the majority opinion differently, suggesting that the Court was laying the foundation for striking same-sex marriage bans.<sup>104</sup>

My guess is that the majority, while reluctant to suggest that defining the meaning of “marriage” in federal statutes is unsupported by any of the Federal Government’s enumerated powers, nonetheless 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).<sup>105</sup>

Justice Scalia’s take on the decision seems more accurate, although it is fair to suggest that the *Windsor* opinion is not a model of clarity.<sup>106</sup>

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<sup>99</sup> *Id.* at 2696 (Roberts, C.J., dissenting) (quoting *Windsor*, 133 S. Ct. at 2692 (majority opinion)).

<sup>100</sup> *Id.* at 2697 (Roberts, C.J., dissenting).

<sup>101</sup> *Cf. id.* (“[T]he federal decision undermined (in the majority’s view) the ‘dignity [already] conferred by the States in the exercise of their sovereign power,’ whereas a State’s decision whether to expand the definition of marriage from its traditional contours involves no similar concern.”) (quoting *Windsor*, 133 S. Ct. at 2693 (majority opinion)).

<sup>102</sup> *Id.* at 2697 (Roberts, C.J., dissenting) (quoting *Windsor*, 133 S. Ct. at 2690, 2692 (majority opinion)).

<sup>103</sup> *Id.* (Roberts, C.J., dissenting).

<sup>104</sup> *See id.* at 2709-10 (Scalia, J., dissenting).

<sup>105</sup> *Id.* at 2705.

<sup>106</sup> *Cf. id.* at 2709 (“[A]n opinion with such scatter-shot rationales as this one (federalism noises among them) can be distinguished in many ways”).

Perhaps the first point to note is that the Court expressly stated that, “it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance.”<sup>107</sup> Such a comment at least suggests that *Windsor* is not a federalism opinion.<sup>108</sup> However, the Court spends a fair amount of time discussing federalism issues,<sup>109</sup> so it does not seem plausible to suggest that federalism played no role in the analysis. Perhaps a more appropriate focus, then, is on the degree to which some of the factors militating in favor of section 3’s unconstitutionality<sup>110</sup> would also militate in favor of the unconstitutionality of state same-sex marriage bans.

Chief Justice Roberts noted that the Court was not focusing on the constitutionality of state same-sex marriage bans.<sup>111</sup> As an initial matter, it might make sense to consider whether state same-sex marriage bans were off the Court’s radar screen, Justice Scalia’s intimations to the contrary notwithstanding.<sup>112</sup>

The Court was clearly stating that determining who may marry whom is, as a general matter, something left to the states rather than to the federal government.<sup>113</sup> Yet, when talking about “[t]he States’ interest in defining and regulating the marital relation,”<sup>114</sup> the Court was careful to note that the States’ power was “subject to constitutional guarantees.”<sup>115</sup> Further, the Court discussed why Section 3’s “differentiation demeans the couple, whose moral and sexual choices the Constitution protects.”<sup>116</sup> But the constitutional protection afforded to these moral and sexual choices is not only applicable against the federal government; it is also applicable against the states, as is illustrated by *Lawrence v. Texas*,<sup>117</sup> the case the Court cited in support.<sup>118</sup>

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<sup>107</sup> *Id.* at 2692 (Roberts, C.J., dissenting).

<sup>108</sup> *Cf.* Courtney G. Joslin, *Windsor, Federalism, And Family Equality*, 113 COLUM. L. REV. SIDEBAR 156, 167 (2013) (“*Windsor* is not accurately described as a federalism-based opinion.”).

<sup>109</sup> *See Windsor*, 133 S. Ct. at 2690-94 (Roberts, C.J., dissenting).

<sup>110</sup> *See id.* at 2692, 2693.

<sup>111</sup> *Id.* at 2696.

<sup>112</sup> *Id.* at 2705 (Scalia, J., dissenting).

<sup>113</sup> *See id.* at 2692 (majority opinion) (discussing “[t]he State’s power in defining the marital relation”).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 2694 (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)).

<sup>117</sup> 539 U.S. at 578-79.

<sup>118</sup> *See Windsor*, 133 S. Ct. at 2694.

*Lawrence* involved Texas's same-sex sodomy ban.<sup>119</sup> When striking down that law,<sup>120</sup> the Court explained that “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.”<sup>121</sup> The case before the *Lawrence* Court “[did] not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”<sup>122</sup> Nonetheless, after referring to the “personal bond that is more enduring,”<sup>123</sup> the Court explained that, “[t]he liberty protected by the Constitution allows homosexual persons the right to make this choice.”<sup>124</sup> In addition, the Court also explained that “[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”<sup>125</sup> The purposes to which the Court was referring were “to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>126</sup> By discussing how both same- and different-sex relationships implicate these important individual interests, the *Lawrence* Court seemed to recognize that the liberty interest in a same-sex relationship has constitutional weight,<sup>127</sup> which may be one of the reasons that Justice Scalia in dissent suggested that the majority opinion “dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.”<sup>128</sup>

It might be argued that the *Windsor* Court, having once made the unremarkable observation that the States’ power to define marriage is

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<sup>119</sup> *Lawrence*, 539 U.S. at 563.

<sup>120</sup> *Id.* at 578 (“The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. . . . Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. ‘It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.’ The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992) (plurality opinion)).

<sup>121</sup> *Id.* at 567.

<sup>122</sup> *Id.* at 578.

<sup>123</sup> *Id.* at 567.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 574.

<sup>126</sup> *Id.* (citing *Casey*, 505 U.S. at 851).

<sup>127</sup> See *id.* at 578 (discussing substantive due process protections for those adults wishing to engage in consensual same-sex relations).

<sup>128</sup> *Id.* at 604 (Scalia, J., dissenting).



subject to constitutional guarantees,<sup>129</sup> is “a slim reed upon which to rest the broad conclusion”<sup>130</sup> that the Court was anticipating a challenge to a state same-sex marriage ban. Yet, the Court again noted that states are not free to define marriage as they see fit.<sup>131</sup> When explaining that the “‘regulation of domestic relations’ is ‘an area that has long been regarded as a virtually exclusive province of the States,’”<sup>132</sup> the Court was careful to qualify its statement by noting that “State laws defining and regulating marriage, of course, must respect the constitutional rights of persons.”<sup>133</sup> Here, the Court was implying that, although as a general matter marriage is subject to state rather than federal regulation,<sup>134</sup> the states must abide by constitutional guarantees.

When striking down Section Three, the Court explained that “[t]he 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.”<sup>135</sup> The Court then made an observation that would be surprising unless the Court was thinking that it might soon see a challenge to a state law—the Court noted, “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.”<sup>136</sup> But the Fourteenth Amendment protections are applicable to the states,<sup>137</sup> and there would have been little reason to refer to Fourteenth Amendment

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<sup>129</sup> *See, e.g.*, *United States v. Windsor*, 570 U.S. \_\_\_, \_\_\_, 133 S. Ct. 2675, 2692 (2013) (“Against this background DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, *subject to constitutional guarantees*, from one State to the next.” (emphasis added)).

<sup>130</sup> *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep’t of Health and Human Res.*, 532 U.S. 598, 614 n.2 (2001).

<sup>131</sup> *See Windsor*, 133 S. Ct. at 2691.

<sup>132</sup> *Id.* (citing *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)).

<sup>133</sup> *See id.* (citing *Loving v. Virginia*, 388 U.S. 1 (1967)).

<sup>134</sup> Congress can pass legislation that affects marriage in some circumstances. *See id.* at 2690 (“Congress, in enacting discrete statutes, can make determinations that bear on marital rights and privileges”).

<sup>135</sup> *Id.* at 2695 (citing *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954)).

<sup>136</sup> *Id.*

<sup>137</sup> *See U.S. CONST.* amend. XIV (“No State shall . . . deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

guarantees unless the Court was anticipating a challenge to state same-sex marriage bans.

The Court found that Congress had been improperly motivated when passing DOMA,<sup>138</sup> and comments in a House Report, for example, could not simply be imputed to the states.<sup>139</sup> Chief Justice Roberts in his dissent discusses that “the majority focuses on the legislative history and title of this particular Act,”<sup>140</sup> and then reassures others that “those statute-specific considerations will, of course, be irrelevant in future cases about different statutes.”<sup>141</sup> Certainly, he is correct that something said by a senator or representative will not be attributed to her state when explaining why that state passed its same-sex marriage ban. Yet, it might also be noted that one would infer that just as Congress’s attempt to “defend marriage” was itself viewed by the Court as indicative of inappropriate motivation, the same kind of language at the state level might be taken to embody similar attitudes and motivations.

Consider the following provision:

Marriage in the state of Louisiana shall consist only of the union of one man and one woman. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman.<sup>142</sup>

Basically, the state constitutional provision does the same work for Louisiana as Section Three of DOMA did for the federal government. Further, the title of this constitutional provision is “Defense of Marriage.”<sup>143</sup>

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<sup>138</sup> See *Windsor*, 133 S. Ct. at 2693 (citing H.R. Rep. No. 104-664, at 12-13, 16 (1996)). See also *id.* at 2696 (Roberts, C.J., dissenting) (“The majority sees a more sinister motive”); *id.* at 2708 (Scalia, J., dissenting) (“But the majority says that the supporters of this Act acted with malice”).

<sup>139</sup> *Id.* at 2693 (majority opinion) (“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.”).

<sup>140</sup> *Cf. id.* at 2697 (Roberts, C.J., dissenting).

<sup>141</sup> *Cf. id.*

<sup>142</sup> LA. CONST. art. XII, § 15.

<sup>143</sup> *Id.*

Or, consider the Ohio constitutional amendment, which reads:

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.<sup>144</sup>

This constitutional provision, which seems to do for state purposes what Section Three was designed to do for federal purposes, is also titled, “Defense of marriage.”<sup>145</sup> Thus, some of the language of the state provisions, as well as their purpose and effect, might induce the Court to find that the state provisions were designed to demean.<sup>146</sup>

By the same token, consider a state constitutional amendment titled, “Sanctity of Marriage Amendment,”<sup>147</sup> which precludes the recognition of same-sex marriages regardless of where or when they were celebrated.<sup>148</sup> It is difficult to read a provision designed to protect the sanctity of marriage by precluding same-sex couples from marrying without believing that the provision was designed to demean same-sex marriages and relationships.

A separate question is how the Court would view a state statute or constitutional provision that did not include “sanctity” or “defense,” but nonetheless operated on the state level as Section 3 operated on the federal level.<sup>149</sup> Thus, consider a statute that precludes recognizing a same-sex marriage for any purpose.<sup>150</sup> The *Windsor* Court worried about DOMA’s breadth, noting how many laws were affected by the exclusion.<sup>151</sup> But state laws that preclude same-sex couples from marrying thereby deny such couples and their children a whole host of

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<sup>144</sup> OHIO CONST. art. XV, § 11.

<sup>145</sup> *Id.*

<sup>146</sup> See *infra* notes 147-73 and accompanying text.

<sup>147</sup> ALA. CONST. art. I, § 36.03(a).

<sup>148</sup> *Id.* § 36.03(g) (“A union replicating marriage of or between persons of the same sex in the State of Alabama or in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state as a marriage or other union replicating marriage.”).

<sup>149</sup> See *infra* notes 150-55 and accompanying text.

<sup>150</sup> See FLA. STAT. ANN. § 741.212(3) (2013) (“For purposes of interpreting any state statute or rule, the term ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the term ‘spouse’ applies only to a member of such a union.”).

<sup>151</sup> *United States v. Windsor*, 570 U.S. \_\_\_, \_\_\_, 133 S. Ct. 2675, 2690 (2013) (“DOMA has a far greater reach; for it enacts a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations.”).

benefits.<sup>152</sup> In addition, such laws make it harder for such couples to have federal benefits accorded to them, because those couples will have to marry out of state to be eligible for those benefits.<sup>153</sup> The Court warned that one of the defects of DOMA was that “[i]t forces [same-sex married couples] to follow a complicated procedure to file their state and federal taxes jointly.”<sup>154</sup> But the federal government now requires individuals who have married their same-sex partners to file their federal taxes as married (either jointly or separately) as long as the marriages were celebrated in a state recognizing such unions, even if the couple’s domicile does not recognize such unions.<sup>155</sup> This means that states with same-sex marriage bans will be forcing their citizens to follow a complicated procedure to file taxes.<sup>156</sup> The point here is not that this fact alone will be the basis for invalidating same-sex marriage bans, but that it may well combine with other factors to establish their unconstitutionality.

The *Windsor* Court described marriage as “more than a routine classification for purposes of certain statutory benefits,”<sup>157</sup> and emphasized that “[t]his opinion and its holding are confined to . . . lawful marriages.”<sup>158</sup> At the very least, the Court is likely pointing out that its striking down DOMA will require that same-sex couples in valid mar-

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<sup>152</sup> See, e.g., *Baker v. State*, 744 A.2d 864, 883 (Vt. 1999) (outlining some of the benefits accorded to married couples).

<sup>153</sup> See, e.g., Donald Scarinci, *Federal Benefits for Same-Sex Married Couples Not Always Clear Cut*, JD SUPRA (Sept. 17, 2013), <http://www.jdsupra.com/legalnews/federal-benefits-for-same-sex-married-co-81271/> (“[T]he Department of Labor announced that same-sex married spouses are now entitled to leave benefits under the Family and Medical Leave Act (FMLA). Also, the Internal Revenue Service announced that legally married same-sex couples will file taxes like any other spouses by selecting married filing jointly or married filing separately.”).

<sup>154</sup> *Windsor*, 133 S. Ct. at 2694.

<sup>155</sup> See I.R.S. Rev. Rul. 2013-17, 2013-38 I.R.B. 201.

<sup>156</sup> See CCH, *North Dakota ~ Personal Income Tax: Guidance Issued on Same-Sex Marriages*, CCHGROUP.COM (Oct. 1, 2013), <http://www.cchgroup.com/wordpress/index.php/tax-headlines/state-tax-headlines/north-dakota-personal-income-tax-guidance-issued-on-same-sex-marriages/> (“The North Dakota Tax Commissioner has issued a guideline explaining how individuals in same-sex marriages recognized by other states are to file their North Dakota personal income tax returns. North Dakota does not recognize same-sex marriages. Individuals who entered into a same-sex marriage in another state cannot file a North Dakota income tax return using the filing status of married filing jointly or married filing separately.”).

<sup>157</sup> *Windsor*, 133 S. Ct. at 2692.

<sup>158</sup> *Id.* at 2696 (Roberts, C.J., dissenting).

riages, *but not in civil unions or domestic partnerships*, will have to receive federal benefits.<sup>159</sup>

Consider a state legislature deciding whether to recognize same-sex marriage or instead to recognize a separate civil union status.<sup>160</sup> Before DOMA was struck down, the state might have said that its citizens would suffer no tangible harms if afforded a separate civil union status as long as that status entitled citizens to all of the benefits that they would have received had they instead entered a marriage.<sup>161</sup> Basically, because Section Three denied federal benefits to same-sex couples regardless of whether they were in a marriage or a civil union,<sup>162</sup> it would not matter which status was afforded by the state for purposes of federal benefits. Because the state could itself require that all benefits accorded to married couples would also be accorded to couples in civil unions, it could claim to be treating same-sex couples equally, at least as far as benefits were concerned.<sup>163</sup> Regardless of whether that argument was accurate prior to DOMA being struck down,<sup>164</sup> it can no longer be maintained now that the Federal Govern-

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<sup>159</sup> Cf. Shari A. Levitan, Edward Koren & Christine Quigley, *United States: Revenue Ruling Confirms That IRS Will Recognize Same-Sex Marriages, But Not Civil Unions or Registered Domestic Partnerships*, MONDAQ (Sept. 10, 2013), <http://www.mondaq.com/unitedstates/x/261728/wills+intestacy+estate+planning/Revenue+Ruling+Confirms+That+IRS+Will+Recognize+SameSex+Marriages+But+Not+Civil+Unions+Or+Registered+Domestic+Partnerships> (“The Revenue Ruling confirmed that couples joined in a legal relationship that is not ‘denominated as a marriage under the laws of that state’ will not be treated as married for federal tax purposes.”).

<sup>160</sup> See generally Jennifer Lazor, *Understanding The Legal Issues Surrounding Same-Sex Marriage Leading Lawyers on Adapting to Recent Supreme Court Decisions Impacting Family Law: The Evolution of Law Surrounding Same-Sex Marriage in the United States*, RIKER DANZIG SCHERER HYLAND & PERRETTI LLP (Sept. 16, 2013), [http://riker.com/images/uploads/pdfs/Lazor\\_-\\_Inside\\_The\\_Minds\\_Chapter.pdf](http://riker.com/images/uploads/pdfs/Lazor_-_Inside_The_Minds_Chapter.pdf) (“[A]t present, six states recognize some form of domestic partnership and/or civil union status for same-sex couples: Colorado, Hawaii, Illinois, New Jersey, Nevada, and Oregon.”).

<sup>161</sup> Cf. *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999) (“We hold only that plaintiffs are entitled under Chapter I, Article 7, of the Vermont Constitution to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples.”).

<sup>162</sup> See 1 U.S.C. § 7 (1996), held unconstitutional by *United States v. Windsor*, 570 U.S. \_\_\_, 133 S. Ct. 2675 (2013) (“[T]he word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife”).

<sup>163</sup> Cf. *Baker*, 744 A.2d at 886.

<sup>164</sup> Civil unions might be less likely to be recognized than marriages in other states. Cf. Courtney G. Joslin, *Interstate Recognition of Parentage in a Time of Disharmony: Same-Sex Parent Families and Beyond*, 70 OHIO ST. L.J. 563, 597 (2009) (“Courts uniformly have held that civil unions and California domestic partnerships are not ‘treated as a marriage’ because the states permitting these statuses do not treat them as marriages.”).

ment is precluded from distinguishing among marriages.<sup>165</sup> There is a salient difference between civil unions and marriages even in terms of benefits.<sup>166</sup>

The *Windsor* Court noted, “As the title and dynamics of the bill indicate, [section three’s] purpose is to discourage enactment of state same-sex marriage laws and to restrict the freedom and choice of couples married under those laws if they are enacted.”<sup>167</sup> Now, a state that offers civil unions rather than marriages will thereby be making it more difficult for same-sex couples to receive a whole host of federal benefits.

Yet, one of the points made in *Windsor* is that marriage is also important for its nontangible benefits—“marriage is more than a routine classification for purposes of certain statutory benefits.”<sup>168</sup> Marriage has important symbolic considerations as well.<sup>169</sup> “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.”<sup>170</sup>

States that afford a civil union option for same-sex couples without also affording them the option of marriage are withholding from such couples the symbolic benefits associated with marriage.<sup>171</sup> Even were

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<sup>165</sup> *Cf.* United States v. Windsor, 570 U.S. \_\_\_, \_\_\_, 133 S. Ct. 2675, 2696 (2013) (“This opinion and its holding are confined to. . . lawful marriages.”).

<sup>166</sup> *See supra* notes 156-58 and accompanying text.

<sup>167</sup> *Windsor*, 133 S. Ct. at 2693.

<sup>168</sup> *Id.* at 2692.

<sup>169</sup> *See infra* note 170 and accompanying text.

<sup>170</sup> *Windsor*, 133 S. Ct. at 2692.

<sup>171</sup> *See, e.g.*, COLO. REV. STAT. ANN. § 14-15-102 (West 2013) (“The general assembly declares that the public policy of this state, as set forth in section 31 of article II of the state constitution, recognizes only the union of one man and one woman as a marriage. The general assembly declares that the purpose of this article is to provide eligible couples the opportunity to obtain the benefits, protections, and responsibilities afforded by Colorado law to spouses consistent with the principles of equality under law and religious freedom embodied in both the United States constitution and the constitution of this state. The general assembly declares that a second purpose of the act is to protect individuals who are or may become partners in a civil union against discrimination in employment, housing, and in places of public accommodation. The general assembly further finds that the general assembly, in the exercise of its plenary power, has the authority to define other arrangements, such as a civil union between two unmarried persons regardless of their gender, and to set forth in statute any state-level benefits, rights, and protections to which a couple is entitled by virtue of entering into a civil union. The general assembly finds that the ‘Colorado Civil Union Act’ does not alter the public policy of this state, which recognizes only the union of one man and

there no practical differences between the two kinds of recognized relationships, the difference in symbolic benefits is constitutionally cognizable and might also suffice to establish the state's refusal to recognize same-sex marriage as unconstitutional.

Many states recognize neither civil unions nor same-sex marriages.<sup>172</sup> The refusal of these states to recognize such relationships is not merely due to their not having considered the matter, e.g., because there were other more pressing concerns.<sup>173</sup> Rather, many of these states have laws expressly precluding recognition of such relationships.<sup>174</sup> These states deny to same-sex couples both the symbolic and tangible benefits of marriage and would seem especially vulnerable in light of some of the rationales articulated in *Windsor*.

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one woman as a marriage. The general assembly also declares that a third purpose in enacting the 'Colorado Civil Union Act' is to state that Colorado courts may offer same-sex couples the equal protection of the law and to give full faith and credit to recognize relationships legally created in other jurisdictions that are similar to civil unions created by this article and that are not otherwise recognized pursuant to Colorado law.”).

<sup>172</sup> See, e.g., OHIO REV. CODE ANN. § 3101.01 (C) (West 2004) (stating that “(1) Any marriage between persons of the same sex is against the strong public policy of this state. Any marriage between persons of the same sex shall have no legal force or effect in this state and, if attempted to be entered into in this state, is void ab initio and shall not be recognized by this state. (2) Any marriage entered into by persons of the same sex in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state. (3) The recognition or extension by the state of the specific statutory benefits of a legal marriage to nonmarital relationships between persons of the same sex or different sexes is against the strong public policy of this state. Any public act, record, or judicial proceeding of this state, as defined in section 9.82 of the Revised Code, that extends the specific statutory benefits of legal marriage to nonmarital relationships between persons of the same sex or different sexes is void ab initio.”).

<sup>173</sup> Cf. John B. Attanasio, *The Constitutionality of Regulating Human Genetic Engineering: Where Procreative Liberty and Equal Opportunity Collide*, 53 U. CHI. L. REV. 1274, 1340 (1986) (“The legislature, constrained by time, usually tends to the obvious, pressing, and immediate, leaving less concrete concerns for another day.”).

<sup>174</sup> See, e.g., ALASKA STAT. § 25.05.013 (a)-(b) (1996) (“A marriage entered into by persons of the same sex, either under common law or under statute, that is recognized by another state or foreign jurisdiction is void in this state, and contractual rights granted by virtue of the marriage, including its termination, are unenforceable in this state. A same-sex relationship may not be recognized by the state as being entitled to the benefits of marriage.”); ARIZ. REV. STAT. § 25-101 (C) (“Marriage between persons of the same sex is void and prohibited.”); UTAH CODE ANN. 1953 § 30-1-2 (West 1953) (“The following marriages are prohibited and declared void: . . . (5) between persons of the same sex.”).

## V. CONCLUSION

Members of the United States Supreme Court themselves disagree what *Windsor* means,<sup>175</sup> so one cannot be confident about its implications for other kinds of cases until more decisions are issued. Nonetheless, several of the Court's rationales for striking down Section Three of DOMA would also apply to section two of DOMA and to state same-sex marriage bans. While Justice Scalia is correct that there are ways to distinguish *Windsor* from the other kinds of cases that are likely to be presented,<sup>176</sup> he is also likely correct that this opinion provides the basis for striking down state same-sex marriage bans.<sup>177</sup> Indeed, the Court cannot affirm the constitutionality of state same-sex marriage bans without overruling the letter and spirit of *Windsor*. Will the Court deliver on *Windsor*'s promise? As to that, we can only wait and see.

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<sup>175</sup> Compare *Windsor*, 133 S. Ct. at 2697 (Roberts, C.J., dissenting) (suggesting that the majority's "judgment is based on federalism"), with *id.* at 2705 (Scalia, J. dissenting) ("My guess is that the majority, while reluctant to suggest that defining the meaning of 'marriage' in federal statutes is unsupported by any of the Federal Government's enumerated powers, nonetheless 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).").

<sup>176</sup> *Id.* at 2709 (Scalia, J., dissenting) ("[A]n opinion with such scatter-shot rationales as this one (federalism noises among them) can be distinguished in many ways").

<sup>177</sup> *Id.* (Scalia, J., dissenting) ("[T]he view that this Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today's opinion").