THE RETREAT FROM DOMA: 
THE PUBLIC POLICY OF SAME-SEX MARRIAGE AND A THEORY OF CONGRESSIONAL POWER UNDER THE FULL FAITH AND CREDIT CLAUSE

EMILY J. SACK†

I. INTRODUCTION

In a 1980 case rejecting the right to same-sex marriage, the court concluded:

[T]he time may come, far in the future, when contracts and arrangements between persons of the same sex who abide together will be recognized and enforced under state law... 

[but in my opinion, even such a substantial change in the prevailing mores would not reach the point where such relationships would be characterized as 'marriages'.]

That point was reached a mere twenty-three years later when Massachusetts' highest court held that the prohibition on same-sex marriage violated due process and equal protection rights under the state Constitution. In the aftermath of the Goodridge decision, other state courts have begun to consider similar cases. While the potential impact of such a ruling has been anticipated and discussed for several years, these discussions have now moved beyond the hypothetical. With vast differences in state policies and laws, as well as federal

† Associate Professor of Law, Roger Williams University School of Law. B.A., Swarthmore College; J.D., New York University School of Law. A draft of this article was presented at the Conference on The Implications of Lawrence and Goodridge for the Recognition of Same-Sex Marriage and the Validity of DOMA, held at Catholic University Law School on May 20, 2004. I would like to thank the co-sponsors of the conference, Catholic University Law School, Creighton University School of Law, and Brigham Young University Law School, particularly Professor Robert Destro, Dean Patrick Borchers and Professor Lynn Wardle, for their efforts in making this conference possible and encouraging academic dialogue in this important area. My thanks as well to all of the conference participants for their helpful comments and remarks. I am also grateful to the participants in a Roger Williams University School of Law faculty development workshop for their suggestions on this article.

legislation on the subject, it is only a matter of time before the same-sex marriage issue comes before the United States Supreme Court.

There are several different contexts in which the question of the right to same-sex marriage could arrive at the Court. There could be a direct challenge from individuals in a state that does not permit same-sex marriage, arguing that the prohibition violates the right to substantive due process or equal protection under the federal Constitution. Equally likely, however, would be a challenge concerning interstate recognition of a same-sex marriage. With a sister state now granting couples access to same-sex marriages, the Full Faith and Credit Clause would generally require recognition of these marriages in all other states. In this situation, a same-sex couple legally married in Massachusetts may bring a constitutional challenge if another state refuses to recognize the marriage or an incident of the marriage under the "public policy exception" to the Full Faith and Credit Clause.

This latter type of case would invoke the constitutionality of federal legislation regarding the interstate recognition of same-sex marriage, the Defense of Marriage Act ("DOMA"). DOMA states that no state "shall be required to give effect to any public act, record, or judicial proceeding of any other State.

4. U.S. CONST. art. IV, § 1 (providing "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof").

5. Several Canadian provinces have recognized the right to same-sex marriage under the Canadian Charter of Rights and Freedoms. See Halpern v. City of Toronto, [2000] 172 O.A.C. 276 (Ontario); EGALE Canada Inc. v. Canada (Attorney General), [2003] 13 B.C.L.R. (4th) 1 (British Columbia); Hendrick v. Quebec (Procureure generale), [2004] Q.J. No. 2593 (Que. C.A.) (Quebec); N.W. v. Canada (Attorney General) [2004] S.J. No. 669, 2004 SK. C. LEXIS 705 (Nov. 5, 2004) (Saskatchewan); Dunbar v. Yukon, [2004] Y.J. No. 61, 2004 BC.C. LEXIS 1707 (July 14, 2004) (Yukon Territory). The Netherlands and Belgium also permit same-sex marriage, but due to stricter requirements on eligibility than in Canada, the number of United States citizens who are able to enter a same-sex marriage in these countries will likely be far lower. See Deborah Gutierrez, Note, Gay Marriage in Canada: Strategies of the Gay Liberation Movement and the Implications it will have on the United States, 10 NEW ENG. J. INT’L & COMP. L. 175, 207-08 (2004). However, recognition in the United States of same-sex marriages validly performed in Canada does not raise Full Faith and Credit Clause concerns, because recognition of international laws or judgments is guided only by the common law of comity, which is discretionary. Hilton v. Guyot, 159 U.S. 113, 163-66 (1895). Though the United States often defers to foreign law or judgments, it has no responsibility to recognize such laws or judgments if they are contrary to its law or policy. Id. at 164-65. Therefore, while Canadian marriages have regularly been recognized in the United States under the comity doctrine, without any constitutional requirement, same-sex marriages could easily be refused recognition under the discretionary comity standard.

between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship.” The statute was designed to permit states to refuse to give full faith and credit to same-sex marriages performed in any state that might recognize these marriages as valid.

A consideration of the constitutionality of DOMA by the Court raises at least two issues. First, the Court may examine the constitutionality of prohibitions on same-sex marriage, in the context of federal legislation that permits states to invoke their own public policy and refuse to grant full faith and credit to such marriages from other states. This failure to grant full faith and credit would not be legitimate if it rests on a public policy that is unconstitutional.

However, even if prohibitions on same-sex marriage, and therefore public policy supporting these prohibitions are not unconstitutional, the Court may examine a second constitutional issue concerning DOMA. The Court may analyze the authority of Congress to enact DOMA under the Full Faith and Credit Clause. The Court first would examine the scope of the “public policy exception” regarding recognition of marriages validly performed in sister states. This question has been quite unsettled in Full Faith and Credit jurisprudence. In particular, the Court would focus on the states' use of the public policy exception to refuse to recognize same-sex marriages from other states. This examination of the scope of the public policy exception would lead to an analysis of Congress' power to legislate under the Full Faith and Credit Clause. The question is whether Congress can interpret the Clause differently than the Supreme Court and enact legislation that either diminishes or enlarges the constitutional mandates of full faith and credit. Let's assume, arguendo, a Court ruling that under the Full Faith and Credit Clause of the Constitution, one state can not invoke a public policy exception to deny recognition to same-sex marriages validly celebrated elsewhere. Would Congress have the power to make different decisions about Full Faith and Credit—i.e., the Defense of Marriage Act—in the face of a contradic-

7. 28 U.S.C. § 1738C (2000). DOMA also added a definition of marriage to the U.S. Code stating that “marriage” means only the legal union between one man and one woman as husband and wife and that the word “spouse” refers only to a person of the opposite sex who is a husband or a wife. 1 U.S.C. § 7 (2000). DOMA was passed in the wake of a Hawaii Supreme Court decision that held, absent a compelling state interest, Hawaii's failure to recognize same-sex marriage violated the Hawaii Constitution. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993). A Hawaii trial court failed to find a compelling state interest in the existing law, which permitted only opposite-sex couples to marry, and found the law invalid under the Hawaii Constitution. Baehr v. Miike, No. 91-1394, 1996 WL 694235, at *21 (Haw. Cir. Ct. Dec. 3, 1996). However, the Hawaii electorate voted to amend the state Constitution to bar same-sex marriage, so that the court ruling never took effect.
tory ruling by the Court? Does Congress have plenary power to reduce (or expand) Full Faith and Credit mandates of the Constitution, as interpreted by the Supreme Court?

The constitutionality of DOMA was hotly debated when it was first under consideration. However, when an amendment to the state Constitution mooted the issue of same-sex marriage in Hawaii, the issues of DOMA and interstate recognition of same-sex marriage subsided. The Goodridge decision, as well as Lawrence v. Texas,\(^8\) have rekindled interest in these issues, and make their consideration by the Supreme Court a strong possibility. This Article examines the issue of same-sex marriage from the perspective of interstate recognition, and analyzes whether a state could constitutionally refuse to grant full faith and credit to a same-sex marriage validly performed in another state.

In Part II of this Article, I examine the constitutionality of laws barring same-sex couples from marriage, to determine if a state’s use of a public policy exception to refuse to recognize a same-sex marriage from another state would be constitutional. I examine both the substantive due process and equal protection arguments challenging the constitutionality of prohibitions on same-sex marriage. In this Part, I conclude that while the constitutional argument is quite strong, there is room for the Court to uphold the constitutionality of such prohibitions. A state’s use of a public policy exception opposing same-sex marriage in order to deny full faith and credit to an out-of-state same-sex marriage, then would not be clearly unconstitutional. Therefore, in turn, DOMA would not be clearly unconstitutional by permitting states to invoke this public policy exception. In Part III, I begin the analysis of a second constitutional challenge to DOMA relating to the scope of congressional power to legislate under the Full Faith and Credit Clause. I review the law of the public policy exception to the Full Faith and Credit Clause, and focus on the interstate recognition of marriages. I then hypothesize a Supreme Court ruling that limited the scope of the public policy exception regarding same-sex marriage. In Part IV, I analyze the boundaries of Congress’s authority to legislate in the area of Full Faith and Credit, and focus on the constitutionality of DOMA in the face of such a hypothetical ruling by the Court. I conclude in this Part that Congress cannot enact legislation in direct conflict with a ruling by the Court interpreting the mandates of the Full Faith and Credit Clause. Therefore, if a Court decision were to create such a conflict, DOMA would be unconstitutional as beyond the scope of congressional power.

\(^8\) 539 U.S. 558 (2003) (holding that a Texas statute criminalizing homosexual sodomy violated the Due Process Clause of the federal Constitution).
In Part V, I conclude that a decision by the Supreme Court on the constitutionality of same-sex marriage may be inevitable in the wake of Goodridge. However, that decision may come in the form of a Full Faith and Credit issue. The constitutionality of the "public policy exception" to interstate recognition of marriage, as well as the limits of congressional power to legislate under the Full Faith and Credit Clause, may be the issues on which the Court focuses when considering same-sex marriage.

II. THE CONSTITUTIONALITY OF PROHIBITIONS ON SAME-SEX MARRIAGE

While the Full Faith and Credit Clause generally requires one state to recognize the valid marriages of all other states, a state with sufficient connection to the parties may refuse to grant such recognition if it would violate its own strong public policy.\(^9\) The federal DOMA explicitly permits states to refuse such recognition to same-sex marriages performed in other states, as well as any collateral incidents of the marriage.\(^10\) However, if any prohibition on same-sex marriage were unconstitutional, then by necessity a public policy supporting such a prohibition would be unconstitutional as well. In turn, DOMA, federal legislation permitting such a public policy exception to full faith and credit, would be unconstitutional. Therefore, we must start by examining the arguments supporting a constitutional challenge to a prohibition on same-sex marriage.

A. SUBSTANTIVE DUE PROCESS

An obvious argument in support of the claim that refusal to recognize same-sex marriage violates substantive due process, is that the right to marry is a fundamental right.\(^11\) Such a right receives heightened protection from state interference under the Due Process Clause, and a denial of this right to same-sex couples should be analyzed under the strict scrutiny standard, to determine if the prohibition is "narrowly tailored to serve a compelling state interest." However, the courts considering this issue have not been in agreement on this analysis and have debated how to define both "marriage" and the "fundamental right to marry."

\(^9\) Restatement (Second) of Conflict of Laws § 283(2) (1971). See infra note 88 and accompanying text.

\(^10\) See supra note 7 and accompanying text.

\(^11\) See Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (the right to marry is "part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause"); Loving v. Virginia, 388 U.S. 1, 12 (1967) (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)) ("[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival").
Some courts have concluded that the essence of the definition of marriage is the requirement of a union between one man and one woman. If this is the definition, then same-sex couples have neither a due process nor an equal protection argument, because they cannot bring themselves within this definition and are not similarly situated to heterosexual couples.\textsuperscript{12} However, other courts have argued that such a definition "assumes the point that is in contention" by concluding that "there is no discrimination in forbidding same-sex marriage because there is no such thing as same-sex marriage."\textsuperscript{13} As Justice Greaney stated in his concurring opinion in Goodridge, "[t]o define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of those to whom it never has been accessible, is conclusory and bypasses the core question we are asked to decide."\textsuperscript{14} These opinions have pointed out that, using this kind of reasoning, the Supreme Court would never have struck down Virginia's anti-miscegenation laws in Loving v. Virginia since "by 'definition' there was no marriage allowed between different races," so that there was no discrimination in denying interracial couples access to marriage.\textsuperscript{15}

A similar tautological argument surrounds the "fundamental right to marry," where the fundamental right analysis turns on how the right at issue is defined.\textsuperscript{16} In Andersen v. King County, the Washington Superior Court considered whether the state's marriage statute, which limited marriage to heterosexual couples, violated the state constitution.\textsuperscript{17} The Court posed the question: "[s]hould the Court focus on the broad right to marry or should it, instead, focus on the more narrowly drawn right to marry someone of the same sex?"\textsuperscript{18} The definition of the right is central to determining whether it is "fundamen-

\textsuperscript{12} See, e.g., Adams v. Howerton, 486 F. Supp. 1119, 1124 (D. Cal. 1980), aff'd, 673 F.2d 1036 (9th Cir. 1982); Lewis v. Harris, No. MER-L-15-03, 2003 WL 23191114, at *13 (N.J. Super. L. Nov. 5, 2003) ("a prohibition on same-sex marriage is not so much a limitation on the right to marry, but a defining element of that right accepted for generations as an essential characteristic of marriage"); Standhardt v. Superior Court, 77 P.3d 451, 458 (Ariz. Ct. App. 2003) ("recognizing a right to marry someone of the same sex would not expand the established right to marry, but would redefine the legal meaning of 'marriage'").


\textsuperscript{16} Andersen v. King County, No. 04-2-04964-4 SEA, slip op. at 7 (Wash. Super. Ct. Aug. 4, 2004).

\textsuperscript{17} Id.

\textsuperscript{18} Id. at 10.
tal”, an issue frequently in contention in substantive due process cases.\textsuperscript{19} In \textit{Andersen}, the court argued that in previous right to marry cases, the right had been defined broadly.\textsuperscript{20} For example, in \textit{Loving v. Virginia}, the Supreme Court did not analyze the right as “the right to interracial marriage,” for which there was clearly no deeply rooted tradition, but as the “right to marry.”\textsuperscript{21} Accordingly, the \textit{Andersen} Court found that the fundamental right to marry was at stake and analyzed the statute limiting that right to heterosexual couples under the strict scrutiny standard.\textsuperscript{22}

Even if the right at stake is framed narrowly as “the right to same-sex marriage,” \textit{Lawrence v. Texas} provides some support for evaluating this right under a heightened scrutiny standard. \textit{Lawrence} holds that homosexuals have a constitutionally protected right to private intimate conduct.\textsuperscript{23} After reaffirming that the Constitution protects “personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,” the Court states “[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”\textsuperscript{24} The court did not state that these were fundamental rights for homosexuals, and did not use strict scrutiny in their analysis. However, the Court’s citation of several rights it has previously found to be fundamental, and its link of these rights to “persons in a homosexual relationship” provides at least the foundation, if not the explicit ruling, for a heightened scrutiny review when homosexuals’ access to these rights are denied.\textsuperscript{25}

However, those courts disposed to take the narrow definition of the Supreme Court’s precedent on the right to marry have found that, \textit{Lawrence v. Texas} offers no reason to expand that definition. In \textit{In re Kandu}, the Bankruptcy Court for the Western District of Washington considered the constitutionality of DOMA to determine whether a lesbian couple married in British Columbia was barred from filing a joint

\textsuperscript{19} See \textit{Lawrence v. Texas}, 539 U.S. 558, 566-67 (2003) (noting that the \textit{Bowers v. Hardwick} Court defined the issue presented as whether the Constitution “confers a fundamental right upon homosexuals to engage in sodomy,” which “demeans the claim the individual put forward,” rather than defining the issue as the right of the individual to make choices about personal relationships and intimate conduct).

\textsuperscript{20} \textit{Andersen v. King County}, No. 04-2-04964-4 SEA, slip op. at 11 (Wash. Super. Ct. Aug. 4, 2004).

\textsuperscript{21} \textit{Id.}

\textsuperscript{22} \textit{Id.} at 14-15.


\textsuperscript{24} \textit{Lawrence}, 539 U.S. at 574.

\textsuperscript{25} \textit{Id.} at 604-05 (Scalia, J., dissenting) (Justice Scalia points out that there is no principled distinction between the rights for homosexuals recognized by the majority and the right to same-sex marriage).
bankruptcy petition as spouses in the United States federal court.\textsuperscript{26} The Court considered the couple's due process argument that DOMA's exclusion of federal benefits for same-sex marriages infringed on their right to marry someone of the same sex, a right they argued was fundamental under the Due Process Clause of the Fifth Amendment.\textsuperscript{27} Though it was not disputed that the Supreme Court had found the right to marry to be fundamental, the question was whether this included the right to enter into a same-sex marriage.\textsuperscript{28} The Court answered this in the negative, explaining that the \textit{Lawrence} Court had explicitly limited its holding so as not to include situations in which "the government must give formal recognition to any relationship that homosexual persons seek to enter."\textsuperscript{29} Therefore, \textit{Lawrence} does not require "a change in the federal statutory approach to marriage."\textsuperscript{30} The \textit{Kandu} Court, finding no binding federal precedent on the issue, itself declined to find same-sex marriage to be a fundamental right, as it is not "deeply rooted in this Nation's history and tradition."\textsuperscript{31}

The resolution of this issue will determine the standard of review that is used to analyze statutes prohibiting the right to same-sex marriage. The arguments limiting the definition or right to marriage to opposite-sex couples are tautological and inconsistent with prior right to marry cases. Moreover, the language of \textit{Lawrence} clearly links homosexuals to the fundamental right to marry. However, it is also true that both the \textit{Lawrence} majority and concurrence were careful to note that their reasoning did not extend to "formal recognition" of homosexual relationships.\textsuperscript{32} I believe that analyzing same-sex marriage under the "fundamental right to marry" and heightened scrutiny framework is the better argument. However, the inconsistencies in \textit{Lawrence} create uncertainty as to the framework the Supreme Court would use and there is clearly room for the position that only the lower rational basis standard would be applied to this issue. Several courts, however, have found that legislation barring same-sex marriage fails

\textsuperscript{26} \textit{In re Kandu}, 315 B.R. 123, 131-32 (Bankr. W. D. Wash. 2004).
\textsuperscript{27} \textit{Kandu}, 315 B.R. at 138-39.
\textsuperscript{28} Id. at 139.
\textsuperscript{29} Id. at 139.
\textsuperscript{30} Id. (citing \textit{Lawrence} v. Texas, 539 U.S. 558, 578 (2003)).
\textsuperscript{31} Id. at 140.
\textsuperscript{32} Id.; see also \textit{Lewis}, 2003 WL 23191114, at *7 (finding no fundamental right to same-sex marriage because it is not deeply rooted in this country's history and tradition). The \textit{Kandu} Court also found that DOMA does not "significantly interfere" with the decision or ability of same-sex couples to marry, using the Supreme Court's language in \textit{Zablocki v. Redhail} that not all state laws that relate to marriage must be subjected to heightened scrutiny and "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed." \textit{Kandu}, 315 B.R. at 141 (quoting \textit{Zablocki} v. \textit{Redhail}, 434 U.S. 374, 386 (1978)).
\textsuperscript{32} See infra note 69 and accompanying text.
even the rational basis standard because none of the state’s concerns bear a rational relation to the legislation.\(^{33}\)

B. EQUAL PROTECTION

A central issue in equal protection analysis of homosexual rights claims has been the level of scrutiny appropriate for classifications based on sexual orientation. This issue has not yet been decided by the Supreme Court. Prior to *Lawrence v. Texas*, the lower courts generally used the most deferential "rational basis" standard, often relying explicitly on *Bowers v. Hardwick*.\(^{34}\) For example, in *Ben-Shalom v. Marsh*,\(^{35}\) the Seventh Circuit noted that though *Bowers* was a substantive due process case, its holding was also relevant to equal protection claims.\(^{36}\) The *Ben-Shalom* Court argued that since *Bowers* had held that there was no fundamental right to engage in homosexual sodomy and such conduct may be criminalized, "then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes."\(^{37}\) In addition, if there is no fundamental right of homosexuals to engage in private intimate conduct, then there is also no suspect or quasi-suspect classification based on infringement of a fundamental right. Without such a classification, under this analysis, differential treatment of homosexuals is subject only to a rational basis review.\(^{38}\)

33. This rational basis analysis is discussed in Part II.C. See infra notes 45-65 and accompanying text.
35. 881 F.2d 454 (7th Cir. 1989).
37. Ben-Shalom, 881 F.2d at 464. See also High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990) (*Bowers* holding that homosexual activity is not a fundamental right protected by substantive due process and that criminalizing such activity is not unconstitutional dictates that homosexuals cannot be a suspect or quasi-suspect class for equal protection analysis); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (similarly); Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987).

The determination of suspect or quasi-suspect classification rests on three basic concerns: whether the class has suffered a history of discrimination; whether the class exhibits obvious, immutable, or distinguishing characteristics that define them as a discrete group; and whether they are a minority or politically powerless, or alternatively, that the statutory classification at issue burdens a fundamental right. Bowen v. Gilliard, 483 U.S. 587, 602-03 (1987); Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 441 (1985). Courts have not contested that homosexuals meet the first ground, a history of discrimination, but the issue of whether homosexuality is an immutable trait or rather is a learned behavior has been controversial. See, e.g., High Tech Gays, 895 F.2d at 573-74 (homosexuality is behavioral and thus fundamentally different from traits such as race, gender or alienage). Moreover, there is also debate whether homosexuals are in fact politically powerless, and so meet the third element. Id.
38. Ben-Shalom, 881 F.2d at 464.
Yet even while Bowers remained good law, there was discussion in the courts that sexual orientation may be a classification entitled to heightened scrutiny. The Supreme Court's holding in Lawrence may strengthen the argument that sexual orientation should be considered a suspect or quasi-suspect classification. However, though the Court clearly expressed that the Constitution protected the right of homosexuals to personal autonomy and to make decisions regarding intimate conduct, it did not undertake an equal protection analysis. The protection of a right under due process is conceptually distinct from the analysis of a classification under equal protection, and so the Lawrence majority does not offer legal support for a heightened equal protection review. However, Justice O'Connor's concurrence in Lawrence may provide stronger support for heightened scrutiny review of same-sex marriage under equal protection. Justice O'Connor rested her concurring opinion on an equal protection analysis. Though she did not analyze the classification as suspect or quasi-suspect, she did state "[w]hen a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause." Justice O'Connor relied on prior cases, including Dept. of Agriculture v. Moreno, Cleburne v. Cleburne Living Center, and Romer v. Evans as support for the proposition that "[w]e have been most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where, as here, the challenged legislation inhibits personal relationships."

39. See, e.g., Tanner v. Oregon Health Sciences Univ., 971 P.2d 435, 447 (Or. Ct. App. 1998) (unmarried homosexual couples constitute a suspect class in challenge to denial of insurance benefits to same-sex partners); Watkins v. United States Army, 875 F.2d 699, 716-17, 728 (9th Cir. 1989) (en banc) (Norris, J., concurring) (homosexuals constitute a suspect class and Bowers' holding on substantive due process ground is not relevant to equal protection analysis). Judge Norris also distinguished Bowers as a case involving homosexual conduct, rather than homosexual orientation. Watkins, 875 F.2d at 716-17.

40. Watkins, 875 F.2d at 718-19. Though the Lawrence majority rested its opinion on substantive due process grounds, it implied that the statute would also fail under equal protection grounds. Lawrence, 539 U.S. at 574-75 (terming the argument finding the statute to violate the Equal Protection Clause "tenable"). The Court expressed concern, however, that a decision resting on equal protection grounds could leave open the question of whether the statute would be valid if it were redrawn to prohibit the conduct among both same-sex and opposite-sex participants. Id. at 575. To eliminate that question, the Court determined that it must rely on a due process argument that directly confronted the Bowers decision. Id. The Court added that "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests." Id.

41. Lawrence, 539 U.S. at 580 (O'Connor, J., concurring).

42. Id. See Dep't of Agric. v. Moreno, 413 U.S. 528, 534-35 (1973) (law preventing households composed of unrelated individuals from receiving food stamps violated equal protection because the legislative purpose was to "discriminate against hippies");
While Justice O'Connor's concurrence supports an argument for heightened review of same-sex marriage under equal protection, most of the few post-Lawrence cases considering the issue have not followed Justice O'Connor's lead. In *In re Kandu*, the court held that prevailing case law finding that homosexuals are not a suspect or quasi-suspect class had not been altered by *Lawrence*. The court therefore found rational basis review was the proper standard for its analysis under equal protection, as well as due process.

Though Justice O'Connor's argument for a strengthened rational basis review is convincing, because the *Lawrence* majority opinion rested on due process grounds and lacked any explicit statement that homosexuals' right to private conduct is fundamental, it does not create binding precedent for this more searching rational basis standard. If it were to consider same-sex marriage on an equal protection claim, it is possible that the Court would adopt Justice O'Connor's standard, but it is equally likely that the Court would employ a regular rational basis analysis.

C. RATIONAL BASIS REVIEW OF SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION CLAIMS

1. The Nature of Civil Marriage

In order to analyze the state interests in prohibiting same-sex couples from marrying, we need to understand what is at stake in the recognition of civil marriage. Marriage brings with it an enormous number of rights and responsibilities under state law. Inheritance rights, the right to a court-ordered distribution of assets in any dissolution of the relationship, retirement, insurance, tax, and health bene-

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*Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985) (requirement that home for mentally disabled obtain a special use permit when other residences such as fraternity houses and apartment buildings had no such requirement violated equal protection); *Romer v. Evans*, 517 U.S. 620, 632 (1996) (state statute imposing broad disability on a specific group, homosexuals, violated equal protection).

43. *Kandu*, 315 B.R. at 143-44; see also *Andersen v. King County*, No. 04-2-04964-4 SEA, slip op. at 10 (Wash. Super. Ct. Aug. 4, 2004) (declining to designate homosexuals a suspect class and noting that "the substantial weight of appellate authority runs contrary" to such designation). *But see Castle v. State*, No. 04-2-00614, slip op. at 26 (Wash. Super. Ct. Sept. 7, 2004) (finding homosexuals to be a suspect class under the State constitution). The *Castle* court also held that the statutes banning same-sex marriage infringed on the fundamental right to marry; because of both the suspect classification and the burden on a fundamental right, the court found that the statute was subject to strict scrutiny analysis. *Id.* at 30.

44. *Kandu*, 315 B.R. at 144. Courts holding that the rational basis standard applies also note that the classification does not affect a fundamental right, and find that the right to same-sex marriage is not fundamental. See, e.g., *Standhardt v. Superior Court*, 77 P.3d 451, 464 (Ariz. Ct. App. 2003); see *supra* notes 11-33 and accompanying text.
fits are just some of the rights affected by marital status. In a report conducted soon after enactment of DOMA, the General Accounting Office found that 1,049 federal laws contained benefits, rights and privileges that were contingent on marital status. Civil marriage involves not only two individuals, but also the approval of the state, and it is this state recognition that qualifies the parties to access this panoply of rights and benefits. In addition, marriage brings intangible benefits, as an "exclusive commitment of two individuals to each other nurtures love and mutual support."  

2. Moral Disapproval and State Interests

Justice O'Connor emphasized in the Lawrence concurrence that, "we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons." Though the issue of moral disapproval formed a centerpiece of Justice O'Connor's argument, the majority also expressed that moral beliefs were not adequate state interests in enacting legislation. Quoting from Justice Stevens' dissent in Bowers, that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice," the Lawrence majority concluded,

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48. Goodridge, 798 N.E.2d at 948.

49. Lawrence, 539 U.S. at 582 (O'Connor, J., concurring). See Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (a "bare . . . desire to harm a politically unpopular group" is not a legitimate state interest). See also State v. Limon, 83 P.3d 229, 246 (Kan. App. 2004) (Pierron, J., dissenting), review granted, State v. Limon, 2004 Kan. LEXIS 284 (Kan. 2004) (arguing that criminal law punishing homosexual sex with a minor more severely than heterosexual sex with a minor violated the Constitution because distinction was based solely on moral disapproval and therefore had no rational basis).

50. Lawrence, 539 U.S. at 577, 582-83.

“Justice Stevens’ analysis, in our view, should have been controlling in Bowers and should control here.”

In Romer v. Evans, the Supreme Court struck down an amendment to the Colorado Constitution on equal protection grounds, under a rational basis standard. The amendment prohibited all governmental action designed to protect homosexual persons from discrimination, which the Court found was not rationally related to any legitimate governmental interest. The Supreme Court found that the amendment had “the peculiar property of imposing a broad and undifferentiated disability on a single named group,” and “its sheer breath is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects.” Such animus could not provide a legitimate basis for state legislation. In addition to this holding in Romer, the Court’s overruling of Bowers in Lawrence made explicit that such moral disapproval could not form the rational basis for legislation that denied homosexuals access to state rights or benefits. As the Lawrence Court stated, “[o]ur obligation is to define the liberty of all, not to mandate our own moral code.”

3. Legitimate State Interests in Prohibiting Same-Sex Marriage and Rational Basis Review

Because the Court has held that moral disapproval of a particular group cannot be enough, even under a rational basis standard, to validate legislation directed against this group, we must look beyond this interest to see whether legitimate state interests in preserving marriage for opposite-sex couples do exist. The interest most frequently articulated is to encourage procreation and child rearing in a healthy and stable environment, meaning families with two biological parents.

However, while several courts have found these state interests to be rational or even compelling, they have held that statutes prohibit-
ing same-sex marriage do not bear even a rational relationship to these interests.\textsuperscript{59} While these interests are legitimate, they are not injured by permitting homosexual couples access to marriage.\textsuperscript{60} As the Vermont Supreme Court expressed, "[i]f anything, the exclusion of same-sex couples from the legal protections incident to marriage exposes their children to the precise risks that the State argues the marriage laws are designed to secure against."\textsuperscript{61} The Washington Superior Court stated, "[i]t is more likely that [the statutes banning same-sex marriage] weaken family stability when we consider what a family really is."\textsuperscript{62}

However, using a highly deferential rational basis standard, the court in \textit{In re Kandu} found that the government's interest in the maintenance of stable relationships to promote the rearing of children by both biological parents is legitimate and that DOMA's restriction on marriage to heterosexual couples is "not wholly irrelevant" to this interest.\textsuperscript{63} Moreover, unlike the Colorado amendment at issue in \textit{Romer v. Evans}, DOMA was not driven by animus toward same-sex couples, but rather "simply codified that definition of marriage historically understood by society."\textsuperscript{64} The court recognized that the legislative history of DOMA revealed an interest in protecting morality in enacting the legislation, which "may be questionable in light of \textit{Lawrence}," but the government has a "conceivable" legitimate interest in promoting an optimal social structure, which the court may consider apart from other possible interests.\textsuperscript{65}

The analysis in \textit{Kandu} does not exactly provide a ringing endorsement of the relation between the state's interests and its law limiting marriage to heterosexual couples. The \textit{Kandu} court used a highly def-


\textsuperscript{60} \textit{Andersen v. King County}, No. 04-2-04964-4 SEA, slip op. at 18-20, 22 (Wash. Super. Ct. Aug. 4, 2004) (while court believes heightened scrutiny is appropriate, exclusion of same-sex partners from marriage fails even rational basis review because it is not rationally related to the state's interest in promoting stable family environment). The court also found that there was no credible scientific evidence to demonstrate a negative impact on children raised by an intact same-sex couple, so that protecting children from this harm could not be a legitimate interest. \textit{Id.} at 21.

\textsuperscript{61} \textit{Baker v. State}, 744 A.2d 864, 882 (Vt. 1999); see also \textit{Goodridge}, 798 N.E.2d at 962-64, 968.


\textsuperscript{63} \textit{Kandu}, 315 B.R. at 145-46.

\textsuperscript{64} \textit{Id.} at 147-48.

\textsuperscript{65} \textit{Id.} at 148. See also \textit{Standhardt v. Superior Court}, 77 P.3d 451, 465 (Ariz. Ct. App. 2003) (state statute's prohibition of same-sex marriage furthers a legitimate end of encouraging procreation and child-rearing within the marital relationship, and was not enacted "simply to make same-sex couples unequal to everyone else").
erential of rational basis review to reach its conclusion that the law barring same-sex couples from marrying did not violate the Constitution. The *Kandu* decision is technically within the boundaries set by the Supreme Court in *Lawrence*. However, given the Court’s clear dislike of the use of moral disapproval as a basis for legislation, even if not the sole basis, and Justice O’Connor’s argument for a more searching rational basis review in this context, the *Kandu* analysis appears to be on shaky ground. There is little dispute that state interests in marriage, such as promotion of a healthy and stable environment to have and raise children, are legitimate. However, it has been difficult for states to argue that these interests are rationally related to laws prohibiting same-sex couples from marrying. This is particularly true since the Court made clear in *Lawrence* that moral disapproval of a particular group is not an appropriate state interest. While some courts have found otherwise, I believe the argument most consistent with prior case law is that the state laws at issue could not withstand scrutiny under rational basis review.

D. The Impact of *Lawrence v. Texas* on the Constitutionality of Same-Sex Marriage

In holding the Texas statute unconstitutional, the *Lawrence* Court found that the right of homosexuals to engage in private intimate conduct was a constitutionally protected liberty. Justice Kennedy noted several rights that the Court has found to be protected under the Constitution, including marriage, procreation, family relationships and child rearing. He then stated that “persons in homosexual relationships may seek autonomy for these purposes, just as heterosexuals do.” Given this language, it does not seem a far leap to find a constitutionally protected right to same-sex marriage. Moreover, given the concurrence’s finding that the differential treatment of homosexual relationships from heterosexual relationships violates the Equal Protection Clause, it is the principled next step to find a distinction in the right to marry between opposite-sex couples and same-sex couples to be an equal protection violation. This is particularly true given the weakness of the state’s interests in preserving marriage as a heterosexual institution.

Both the majority and the concurring opinions took care to distinguish their analyses from homosexual relationships in the context of

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67. *Id.* at 574 (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992)).
68. *Id.*
However, Justice Scalia's dissent, which found no principled barrier to same-sex marriage under the Court's reasoning, is most convincing. As Justice Scalia noted, despite their attempts to distinguish the right to intimate sexual relationships by homosexuals from the right to same-sex marriage, the majority and concurrence simply made "bald, unreasoned, disclaimer[s]" which could not withstand principled legal analysis.\textsuperscript{70} \textit{Lawrence} has laid the foundation for a decision finding that prohibitions on same-sex marriage violate both the Due Process Clause and the Equal Protection Clause of the Constitution.

If prohibitions on same-sex marriage were held unconstitutional, then a state's public policy supporting such prohibitions as justification for refusing to recognize same-sex marriages from other states could not be maintained. A public policy that protects an interest that the Supreme Court has found unconstitutional cannot be valid. Thus, after \textit{Loving v. Virginia}, no state could refuse to recognize the marriage of an interracial couple performed in another state on the grounds that this was against its public policy. Therefore, if the Court were to rule that it is unconstitutional to prohibit homosexuals from marrying, clearly there could be no valid public policy argument invoked by a state to avoid granting such a marriage from another state full recognition. Accordingly, in this scenario, DOMA's grant of permission to the states to use such a public policy argument would clearly be unconstitutional as well.

However, at the moment, there has been no such holding by the Supreme Court, and there is no clear bar to a state's use of a public policy against same-sex marriage to deny full faith and credit to such a marriage from another state. Because we cannot be certain that bars on same-sex marriage will be held unconstitutional, it is important to analyze other constitutional challenges that may be brought against DOMA. The constitutionality of DOMA might turn, not on whether denial of the right to same-sex marriage violates due process or equal protection, but on constitutional limits to the scope of the public policy exception under the Full Faith and Credit Clause.

\textsuperscript{69} \textit{Id.} at 578 ("[The present case] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter"); \textit{Id.} at 585 (O'Connor, J., concurring) ("[u]nlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group"). \textit{Id.} (O'Connor, J., concurring).

\textsuperscript{70} \textit{Id.} at 604 (Scalia, J., dissenting). Justice Scalia also commented that "[t]his case 'does not involve' the issue of homosexual marriage only if one entertains the belief that principal and logic have nothing to do with the decisions of this Court." \textit{Id.} at 605 (Scalia, J., dissenting).
III. THE SCOPE OF THE PUBLIC POLICY EXCEPTION TO RECOGNITION OF MARRIAGE UNDER THE FULL FAITH AND CREDIT CLAUSE

A. THE PUBLIC POLICY EXCEPTION TO THE FULL FAITH AND CREDIT CLAUSE

There is nothing in the Constitution's Full Faith and Credit Clause, nor in any federal full faith and credit legislation that creates a public policy exception to the full faith and credit mandate. The development of this exception has come solely from the common law, and its scope, or even its existence, is unsettled.

With respect to judgments, it seems unlikely that the public policy exception even exists. The quintessential case demonstrating that proposition is Fauntleroy v. Lum.\textsuperscript{71} There the Supreme Court required Mississippi to grant full faith and credit to a Missouri judgment based on a gambling contract, which had been made in Mississippi, where it was void.\textsuperscript{72} The Court ruled that full faith and credit was owed to the Missouri judgment even though the Missouri Court had incorrectly recognized the illegitimate contract in issuing the judgment on the debt.\textsuperscript{73}

The case of Yarborough v. Yarborough\textsuperscript{74} also exemplifies the strength of full faith and credit owed to judgments, despite the forum state's significant policy interests against recognition.\textsuperscript{75} In Yarborough, a girl had received support from her father in a lump sum meant as a final payment under a judgment issued in Georgia.\textsuperscript{76} She now lived in South Carolina, and sued to require her father to pay additional support.\textsuperscript{77} The Supreme Court held that under full faith and credit, the South Carolina court had to honor Georgia's judgment, so that the father, having satisfied that judgment, could not be required to provide additional funds.\textsuperscript{78} This was true even though the daughter was now in South Carolina, and it was this state, rather than Georgia, that had an interest in her welfare.\textsuperscript{79} In addition, the Restatement (Second) of Conflict of Laws, while acknowledging the public policy exception, has given it an extremely narrow reading.\textsuperscript{80}

\textsuperscript{71} 210 U.S. 230 (1908).
\textsuperscript{72} Fauntleroy v. Lum, 210 U.S. 230, 233-34, 237 (1908).
\textsuperscript{73} Fauntleroy, 210 U.S. at 237.
\textsuperscript{74} 290 U.S. 202 (1933).
\textsuperscript{75} Yarborough v. Yarborough, 290 U.S. 202, 204-13 (1933).
\textsuperscript{76} Yarborough, 290 U.S. at 204.
\textsuperscript{77} Id.
\textsuperscript{78} Id. at 212-13.
\textsuperscript{79} Id. at 212. The South Carolina courts had refused to give the Georgia judgment final effect. Id. at 204-05.
\textsuperscript{80} RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 103 (1971) (A judgment issued in one state "need not be recognized or enforced in a sister State if such recognition or
some scholars have argued that there should be no "public policy exception" even for laws, the scope of the exception with regard to laws, rather than judgments, is less clear. The Full Faith and Credit Clause itself does not differentiate between laws and judgments. However, the Supreme Court has repeatedly called the full faith and credit requirement for judgments "exacting," while laws are subject to a choice of law "interests" analysis. In this choice of law analysis, the forum state can apply its own law when it has a sufficient connection with the parties or the case to give it an interest in the litigation and to meet the requirements of due process. The public policy of the forum state is therefore a factor in determining whether to apply the sister state's law.

B. THE SCOPE OF THE PUBLIC POLICY EXCEPTION FOR INTERSTATE RECOGNITION OF MARRIAGE

The scope of the public policy exception with regard to marriage remains unclear. The first problem lies in identifying the proper category in which to analyze marriage. Though often analyzed under a choice of law framework, an existing marriage is not a law, and involves stronger interests than a determination of which law to apply to an as-yet-undecided matter. Yet it is not precisely a judgment, issued by a court after an adversarial proceeding. It may be considered a type of record or act. The question is whether such a record enforcement is not required by the national policy of full faith and credit because it would involve an improper interference with important interests of the sister State"). The Commentary to this section notes that the public policy exception has been given "an extremely narrow scope of application." Id. at § 103, cmt. a. Moreover, several scholars have discredited this section as an inaccurate reflection of the Court's case law. See Emily J. Sack, Domestic Violence Across State Lines: The Full Faith and Credit Clause, Congressional Power, and Interstate Enforcement of Protection Orders, 98 Nw. U. L. Rev. 827, 862 & n.195 (2004) [hereinafter Sack, Domestic Violence Across State Lines].

82. Full faith and credit must be given to "public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. IV, § 1.
85. Id. at 308.
87. See Jeffrey L. Rensberger, Same-Sex Marriages and the Defense of Marriage Act: A Deviant View of an Experiment in Full Faith and Credit, 32 Creighton L. Rev. 409, 421 (1998) (arguing that marriage is best considered an administrative or ministerial act). The uncertainty in how to characterize marriage for full faith and credit purposes has been noted by many commentators. See, e.g., Brian H. Bix, State of the Union: The States' Interest in the Marital Status of Their Citizens, 55 U. Miami L. Rev. 1, 25 (2000) (noting that marriages, unlike divorces, are not clearly judgments, acts or records, though the laws under which people marry are acts); Wolfson & Melcher, supra
or act, involving such important rights and responsibilities and intimate relationships, should be granted full faith and credit by another state.

Under the Restatement (Second) of Conflict of Laws § 283, marriages that are valid under the law of the place of celebration are usually recognized by other states, but a fundamental policy difference in the state which has "the most significant relationship to the spouses and the marriage at the time of the marriage" will permit that state to find the marriage invalid. Therefore, it appears that the public policy exception could apply to same-sex marriages, which would eliminate any need for the DOMA provision permitting states not to recognize such marriages performed in other states. However, given the uncertainty of the exception, supporters of DOMA argued that the legislation was necessary to make the state's ability to avoid recognition of same-sex marriages explicit.

Since the passage of DOMA, many states have made their own public policy on same-sex marriage clear. As of April 2004, 38 states had passed their own versions of the federal DOMA, four of which were amendments to the state constitutions. In August 2004, voters in Missouri added a DOMA amendment to their constitution, as did the Louisiana electorate on September 18, 2004. In the elections of November 2004, eleven additional states passed DOMAs as constitutional amendments. Therefore, there can be no doubt that a majority of states has expressed an explicit public policy against recognition of same-sex marriages from other states.

It would seem that these policy statements should be entitled to respect by the Supreme Court in determining whether one state must recognize a same-sex marriage validly performed in another state. However, the appropriate analysis under the Full Faith and Credit Clause may not be so straightforward.

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note 86, at 225-26 & n.22 (arguing that civil marriages qualify for recognition under all three categories enumerated in the Full Faith and Credit Clause, as they contain elements of public acts, records, and judicial proceedings).

88. Restatement (Second) of Conflict of Laws § 283(2) (1971).

89. Scholars on both sides of the DOMA debate recognized the potential applicability of the public policy exception to same-sex marriages. See Hearing Before the Sen. Judiciary Comm. on S. 1740, The Defense of Marriage Act, 104th Cong. 44-47 (1996) (prepared statement of Professor Cass R. Sunstein); id. at 35-36 (prepared statement of Professor Lynn D. Wardle).

90. DOMA also does not have a "significant relationship to the parties" requirement in order for the forum state to invoke the public policy exception. See 28 U.S.C. § 1738C.

1. The Limits of the Public Policy Exception and the Impact of Lawrence on Public Policy Analysis

It is critical to recognize that an evaluation of state public policy for purposes of full faith and credit analysis is a different exercise than a determination of whether a particular public policy justifies a state's own laws. For example, as Fauntleroy v. Lum made clear, a state cannot refuse to grant full faith and credit to another state's judgment, even if the enforcing state would not have permitted the same judgment under its own law due to a strong public policy.\(^9\)

Therefore, the Supreme Court does not have to find a public policy prohibiting same-sex marriage unconstitutional, in order to hold that this policy cannot be used to deny full faith and credit to an out-of-state same-sex marriage. The Court could focus on the scope of the public policy exception in order to determine the ability of one state to deny recognition to a valid same-sex marriage from another state. Without ruling on the constitutionality of same-sex marriage, the Court could consider a public policy against same-sex marriage to be inappropriate or at least not compelling enough to override the important interests involved in the recognition of marriage.

There is a substantial body of case law in which courts have recognized an out-of-state marriage, at least in certain contexts, despite the fact that such a marriage is against the public policy in their own state, and may even be explicitly prohibited by statute.\(^9\)\(^3\) There are clear reasons for doing so, given a state's strong interest in promoting stability, protecting children, and protecting the parties' expectations.\(^9\)\(^4\)

The purpose of the public policy exception and the competing interests in full faith and credit are crucial in determining the legiti-
macy of invoking the exception in a particular case. This is exemplified by the dissenting opinion of Justice Stone in *Yarborough*, which has been highly influential in analyzing the public policy exception. Though the majority held that no public policy exception could be invoked to refuse full faith and credit to a judgment from another state, Justice Stone argued that in this case full faith and credit should not be applied, because South Carolina had a strong interest in providing protection to the daughter now living there. The forum state's strong public policy of ensuring the welfare of the child now within its borders must, he argued, permit an exception to full faith and credit.

It is informative to compare the situation in *Yarborough* to the case of interstate recognition of same-sex marriage. Contrary to Justice Stone's argument for invocation of the public policy exception in order to protect a party resident in the forum state, the same-sex marriage case provides no reason to deny full faith and credit. For in this situation, it is the recognition of the out-of-state marriage under the Full Faith and Credit Clause that will provide more protection to the parties now within the forum state's borders.

In this context, the question is whether the forum state has a strong public policy interest in denying protection to spouses or children that have already been recognized as entitled to protection in the state that performed the marriage. Whatever interests the forum state has in deciding whether to recognize a particular intimate relationship under its own marriage laws, it does not have the equivalent interest in denying recognition to a valid out-of-state marriage. State interests in consistent inheritance and property laws, preservation of legitimacy of children born of the relationship, and provision of health and social services benefits also protect the stability of the family and its members. Unlike Justice Stone's concerns in *Yarborough*, the forum state in a same-sex marriage case would deprive parties within its borders of protection by failing to grant full faith and credit to the marriage.

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96. *Id.* at 214-15 (Stone, J., dissenting).
97. The context for recognition of out-of-state marriages can differ, and no doubt there is a distinction between a case involving a couple in a same-sex marriage from Massachusetts, who came to another state after a number of years, and a case involving a same-sex couple from the forum state who went to Massachusetts simply to be married there, and then quickly returned to their home state. While clearly the interests of the forum state are stronger in the latter case, I would argue that these interests are still not equivalent to the interest the state has in decisions regarding same-sex marriage under its own law. The fact of the marriage already in existence, its legal recognition in another state, and the general purposes and interests of full faith and credit among sister states all require that the invocation of the public policy exception meet a higher standard than the expression of the state's policy in its own law.
Finally, the Supreme Court has put into question whether moral disapproval of a particular group is ever a legitimate state interest in the context of due process or equal protection analysis. Apart from reviewing a state's public policy to determine its constitutionality under the Due Process Clause or Equal Protection Clause, the Court may still find that, according to the mandates of the Full Faith and Credit Clause, a state's public policy of moral disapproval cannot be the basis for refusing to recognize a same-sex marriage from another state.

C. A HYPOTHETICAL SUPREME COURT RULING ON THE SCOPE OF THE PUBLIC POLICY EXCEPTION TO INTERSTATE RECOGNITION OF SAME-SEX MARRIAGES

There are strong arguments to support a Court decision that a state's public policy against same-sex marriage cannot trump the full faith and credit mandate to recognize these marriages from other states. The Court could find that the public policy exception cannot be invoked on the basis of moral disapproval alone, or that a public policy against same-sex marriage cannot override the strong state interests in recognizing these unions. For current purposes, let's assume arguendo that such a Supreme Court decision exists. How would such a ruling impact the constitutionality of DOMA on the grounds of congressional power to legislate under the Full Faith and Credit Clause?

IV. THE BOUNDARIES OF CONGRESSIONAL POWER AND THE CONSTITUTIONALITY OF THE DEFENSE OF MARRIAGE ACT

A. A THEORY OF CONGRESSIONAL POWER TO LEGISLATE UNDER THE FULL FAITH AND CREDIT CLAUSE

A Supreme Court decision on the mandates of the Full Faith and Credit Clause regarding interstate recognition of same-sex marriage would impact DOMA dramatically, as well as provide much-needed guidance on the relation between the Court's and Congress's power to determine the amount of full faith and credit that is owed by the states. The Supreme Court has not yet ruled directly on the scope of Congress's power to enact legislation under the "Effects" Clause of the Full Faith and Credit Clause.

Under a theory on the scope of congressional power to legislate under the Full Faith and Credit Clause that I have developed at length elsewhere, I argue that Congress does not have plenary power either to dilute or expand full faith and credit beyond what the Court

98. See supra notes 49-57 and accompanying text.
has mandated. However, Congress is authorized to enact legislation according to its own views of the full faith and credit mandate in the substantial areas where the Court has not provided clear guidance or has explicitly refused to rule on the requirements of the Constitution's Full Faith and Credit Clause. Congress is able to both diminish and expand the amount of full faith and credit owed by the state in particular areas, until and unless the Court provides a definitive interpretation of what the Constitution requires. I believe that this theory of congressional authority under the Full Faith and Credit Clause is most consistent with the history and purpose of the Clause and of Congress's own understanding, as demonstrated in the legislative histories of all specialized full faith and credit legislation.

B. THE CONSTITUTIONALITY OF DOMA UNDER CURRENT LAW

Some opponents of DOMA argue that it was either pointless legislation—if the public policy exception already permitted states to refuse recognition to out-of-state same-sex marriages—or unconstitutional—if, according to the Court, the Constitution did not permit such refusal. Under my theory, however, there is a third alternative. Congress has the authority under the Effects Clause to clarify the scope of full faith and credit in a particular area, if there has been no clear ruling by the Court.

Because the recognition of marriage in general and same-sex marriage in particular is such an area without clear guidance from the Court, I believe that the portion of DOMA that permits states to refuse direct recognition of same-sex marriages from other states is constitutional under current law. The Court has not currently mandated

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100. Id. at 851-54. The history of the Clause's development and purpose demonstrates the Framers intent to impose a strong Full Faith and Credit mandate on the states. The Framers viewed the Full Faith and Credit Clause as an important provision in promoting their goal of national unity. See Milwaukee County v. M.E. White Co., 296 U.S. 268, 277 (1935).
101. Sack, Domestic Violence Across State Lines, supra note 80, at 880-95. Without direct guidance from the Supreme Court, and apart from the history of the Clause's development, legislative histories of congressional legislation involving full faith and credit may be the only other source to provide some insight, at least into Congress's own understanding of its power to legislate in this area. Apart from the first implementing statute in 1790, a statute making some procedural changes in 1804, and a statute in 1948 which amended the original statute to include "acts" and made some stylistic changes, Congress has enacted only four pieces of full faith and credit legislation, all since 1980. These are the Parental Kidnapping Prevention Act, the Full Faith and Credit for Child Support Orders Act, the Violence Against Women Act, and the Defense of Marriage Act. A close examination of the statutes enacted prior to DOMA, and their legislative histories shows that Congress legislated in areas in which the extent of the Full Faith and Credit Clause's mandate had not been settled by the Supreme Court, and remained unclear. See id.
full faith and credit for same-sex marriages and its public policy exception arguably could permit states with connections to the parties to deny recognition to these marriages. Given this situation, Congress had the authority to pass the provision of DOMA that permitted states to deny full faith and credit to these marriages.

However, the DOMA provision that permits states to refuse to recognize judgments based on same-sex marriages or their incidents presents a different situation and would not be constitutional according to my theory of congressional power under the Full Faith and Credit Clause. This is because, unlike the issue of direct recognition of marriages, the recognition of judgments from other states has been well settled by the Court.\textsuperscript{102} Therefore, Congress cannot contradict this mandate.

C. THE IMPACT OF A SUPREME COURT DECISION ON CONGRESS'S AUTHORITY

Under my theory of congressional power in the full faith and credit area, the hypothetical Supreme Court decision that I have posited would have critical impact because it would occupy the field. Assuming that the Court clearly ruled one way or the other about the scope of full faith and credit owed to same-sex marriages, Congress could no longer legislate in this area in a way that contradicted this holding. Therefore, under my hypothetical Supreme Court ruling that rejects use of a public policy exception to deny full faith and credit to same-sex marriages, DOMA could be held unconstitutional, not on substantive due process or equal protection grounds, but on full faith and credit grounds. In the face of such a ruling from the Court, DOMA would be in direct contradiction and under my theory, beyond Congress's authority to enact.\textsuperscript{103}

\textsuperscript{102} Baker v. General Motors Corp., 522 U.S. 222, 233-34 (1998) (as to judgments, “the full faith and credit obligation is exacting” and there is “no roving 'public policy exception' to the full faith and credit due judgments”). This recently has been reiterated by the Court in Franchise Tax Bd. v. Hyatt, 538 U.S. 488, 488 (2004) (citing Baker v. General Motors Corp., 522 U.S. at 233) (“the full faith and credit command 'is exacting' with respect to a final judgment”). See also \textit{Restatement (Second) of Conflict of Laws} § 117 (1971) (“[a] valid judgment rendered in one State of the United States will be recognized and enforced in a sister State even though the strong public policy of the latter State would have precluded recovery in its courts on the original claim”). \textit{But cf.} Lynn D. Wardle, \textit{Non-Recognition of Same-Sex Marriage Judgments Under DOMA and the Constitution}, 38 \textit{Creighton L. Rev.} 365, 384 (2005) (recognizing that the DOMA judgment provision appears to contradict existing full faith and credit doctrine concerning judgments, but arguing that under the Effects Clause, Congress has the power to alter the “baseline” of judgment recognition that it created under the Full Faith and Credit Act of 1790).

\textsuperscript{103} This theory of congressional power under the Full Faith and Credit Clause is also consistent with the Supreme Court's recent case law regarding the scope of congressional authority under other parts of the Constitution, such as Section 5 of the
V. CONCLUSION

The Massachusetts Supreme Judicial Court’s ruling in Goodridge has moved the issues raised by same-sex marriage to the forefront of public debate, as well as into courtrooms. When a constitutional challenge involving same-sex marriage eventually comes to the Supreme Court, it might very well be framed as a full faith and credit case that contests the validity of DOMA.

In order to consider the constitutionality of DOMA, the Court may examine the legitimacy of a state public policy that refuses to recognize same-sex marriages from other states. This would involve at least two different prongs of constitutional analysis. First, the Court would consider whether a prohibition on same-sex marriage is a violation of either due process or equal protection under the Constitution. If it finds a constitutional violation, then clearly a public policy based on such a prohibition cannot stand. This in turn would mean that DOMA’s grant of permission to the states to deny recognition to valid same-sex marriages from other states would be unconstitutional.

While I believe that there is a substantial argument for finding such a public policy unconstitutional on these grounds, there is a second type of constitutional challenge that may be brought against DOMA. The Court could rule under the Full Faith and Credit Clause that a public policy exception could not be invoked against same-sex marriage. This would be because the interests of a state in refusing full faith and credit to a same-sex marriage from out of state are not powerful enough to overcome the strong preference for recognizing valid marriages. In addition, based on its prior case law, the Court could hold that a public policy founded on moral disapproval of a particular group does not provide a valid exception to the mandate of full faith and credit.

Once the Court had exercised its power to interpret the requirements of the Full Faith and Credit Clause, congressional legislation that contradicts the Court’s interpretation would be beyond Congress’s authority. If the Court were to rule in this way, DOMA would

Fourteenth Amendment. While precedent involving areas other than the Full Faith and Credit Clause is not binding in that area, and may require a different analysis, this precedent does provide some insight into the Court’s possible analysis of a Full Faith and Credit Clause challenge to a congressional enactment. Recent case law concerning Section 5 of the Fourteenth Amendment is particularly interesting, given some parallels in the analysis and the fact that this Section was explicitly invoked during the DOMA debates as analogous to the Effects Clause of Article IV. The Section 5 case law suggests that the Court would not be sympathetic to a broad reading of congressional power in this area, and so makes it more likely that the Court would hold DOMA unconstitutional if it were to find it in conflict with its own reading of the requirements of the Full Faith and Credit Clause or the scope of the public policy exception. See Sack, Domestic Violence Across State Lines, supra note 80, at 899-905.
be unconstitutional as exceeding Congress's lawmaking authority under the Full Faith and Credit Clause.

The legality of same-sex marriage in Massachusetts, as well as the growth of other institutions such as same-sex civil unions and domestic partnerships, creates instability, because the legality of a couple’s union and the rights to which they are entitled may vary as they move from place to place. This lack of clarity was perhaps last seen in the days of miscegenation statutes, where the status of an interracial couple’s marriage would depend upon the state in which they were located. Our country cannot tolerate this insecurity for its citizens, and the primary purpose of the Full Faith and Credit Clause was to avoid this divisiveness and confusion among the states. When this issue eventually reaches some resolution in the Supreme Court, it may be the Full Faith and Credit Clause that provides the basis for recognition of same-sex marriages throughout the states.