DOMA AND THE CONSTITUTION

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I. INTRODUCTION

The Defense of Marriage Act (DOMA)¹ is subject to constitutional attack on a number of bases. The merits of some of those challenges may soon be addressed in cases currently winding their way through the courts,² although Congress may make such challenges moot by repealing or modifying existing law.³ Even were DOMA modified or repealed,

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3. Keith Perine, Gay Rights Activists Look Ahead, but Reaching Other Goals
however, some of the underlying constitutional issues would likely arise in another context and therefore should be addressed here.

DOMA has two different sections. The first addresses interstate recognition issues, while the second addresses the definition of marriage for federal purposes. Each section, while perhaps appearing noncontroversial, nonetheless involves Congress taking an unprecedented step. The analysis of whether and why the different DOMA provisions are unconstitutional may have important implications for the lesbian, gay, bisexual, and transgender (LGBT) community in particular and for various areas of substantive law more generally.

Part II of this Article addresses some of the constitutional issues implicated in the full faith and credit provision and discusses some of the different possible constructions of the provision and the ways that these different constructions would make the provision more or less vulnerable to constitutional attack. Part III analyzes some of the special constitutional difficulties associated with the provision defining marriage for federal purposes. The Article concludes that DOMA is vulnerable on a number of grounds, some peculiar to the jurisprudence associated with the substance of the respective provisions and others that might invalidate both provisions. While it is not clear whether the Supreme Court will ultimately hear a constitutional challenge to DOMA or, if so, how the Court will rule, it is clear that the analysis offered by the Court will likely have important implications for individuals’ rights and for state and congressional powers.

II. THE FULL FAITH AND CREDIT PROVISION

The constitutionality of the DOMA provision regarding the interstate recognition of marriage is difficult to assess, in part, because it was not particularly well-crafted. While some of the effects of this provision are quite clear, others are not, and it is these latter possible effects that seem especially vulnerable to constitutional attack.

an Uphill Climb, CQ TODAY, Oct. 23, 2009 available at 2009 WLNR 21446740 (“In September, Rep. Jerrold Nadler, D–N.Y., introduced a bill (HR 3567) that would repeal the 1996 law known as the Defense of Marriage Act and extend federal recognition to same-sex marriages. However, Democratic leaders have shown no appetite for moving his measure.”).

A. What Does the DOMA Full Faith and Credit Provision Do?

The DOMA full faith and credit provision reads:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.6

As an initial matter, one difficulty posed in analyzing the constitutionality of this provision is that it has never been authoritatively construed. While its language might seem relatively clear, there are different ways to interpret the provision, some of which are more open to constitutional attack than others. Consider, for example, what it means to be “treated as a marriage” under another state’s law. Under one interpretation, that includes a same-sex marriage but not a civil union, especially if the state recognizing both same-sex marriages and civil unions expressly distinguishes the two statuses.7

The Connecticut Supreme Court has found not only that marriages and civil unions are not equivalent,8 but also that the state was violating state constitutional guarantees by failing to afford individuals the right to marry a same-sex partner.9 Perhaps, then, DOMA does not afford states the power to refuse to recognize a civil union validly celebrated in another state.10 Even if that interpretation is correct,11 however, a separate issue involves whether states have the power to refuse to recognize a civil union validly celebrated elsewhere, lack of congressional authorization to do so

6. 28 U.S.C. § 1738C.
7. Cf. Shields v. Madigan, 783 N.Y.S.2d 270, 275 (Sup. Ct. 2004) (“In the State of Vermont, where a statutory scheme has been enacted to recognize and govern same-sex civil unions, the statute acknowledges that the term ‘marriage’ is reserved solely for opposite-sex unions.”).
8. See Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407, 412 (Conn. 2008) (“[T]he institution of marriage carries with it a status and significance that the newly created classification of civil unions does not embody . . . .”).
9. Id. (“[T]he state has failed to provide sufficient justification for excluding same-sex couples from the institution of marriage.”).
10. See Greg Johnson, In Praise of Civil Unions, 30 CAP. U. L. REV. 315, 328 (2002) (“It is possible to argue in the DOMA states that civil unions should still be recognized since the civil unions law does not use the word ‘marriage’. . . .”).
11. But see id. (“I do not think this argument has much of a chance or deserves much of a chance.”).
notwithstanding. If, as seems likely, states do have this power, then the
debate among commentators may not be especially important to resolve on
this particular point.\textsuperscript{12}

How other ambiguous provisions are interpreted may well have
constitutional import, however. For example, a different respect in which
this provision has yet to be construed involves the power conferred upon
the states to refuse to give effect to “a right or claim arising from such
relationship.”\textsuperscript{13} At the very least, this means that a presumption arising by
virtue of a marriage, for example, that a particular person is the parent of a
child born into the relationship, might not be given weight by another
jurisdiction.\textsuperscript{14} A separate question is whether DOMA also authorizes states
to ignore rights or claims that have been reduced to judgment.\textsuperscript{15}

An example helps to illustrate the difference pointed to here.
Suppose that Tina and Diane have entered into a same-sex marriage in
Connecticut. With the full consent and support of Diane, Tina is artificially
inseminated and eventually gives birth to a child, Nancy. According to
Connecticut law, a child born into a marriage is presumed to be the child of
the marital couple,\textsuperscript{16} which makes Diane the presumptive parent of
Nancy.\textsuperscript{17}

Suppose that Tina, Diane, and Nancy move to Virginia to take
advantage of an employment opportunity. DOMA permits Virginia not
only to refuse to recognize Tina and Diane’s marriage but also to refuse to
give effect to the presumption under Connecticut law that Diane is Nancy’s

\begin{itemize}
\item \textsuperscript{12} See Mark Strasser, \textit{Some Observations About DOMA, Marriages, Civil
are likely to be viewed by many states as a purely local creation having purely local
scope.”).
\item \textsuperscript{13} See 28 U.S.C. § 1738C (2006).
\item \textsuperscript{14} See generally Mark Strasser, \textit{When Is a Parent Not a Parent? On DOMA,
\item \textsuperscript{15} See discussion infra Part II.F (discussing the constitutional implications of
DOMA authorizing states to refuse to give effect to judgments issued in other states).
\item \textsuperscript{16} See Weidenbacher v. Duclos, 661 A.2d 988, 994 (Conn. 1995) (discussing
the “common law ‘presumption of legitimacy,’ which provides that a child born in
wedlock is presumed to be the issue of the mother and her husband”).
\item \textsuperscript{17} See Kathryn J. Harvey, Note, \textit{The Rights of Divorced Lesbians: Interstate
Recognition of Child Custody Judgments in the Context of Same-Sex Divorce}, 78
FORDHAM L. REV. 1379, 1420-21 (2009) (“[I]f a court applies the parental presumption
at the dissolution of a same-sex marriage, then both partners are given deference in the
determination of child custody, regardless of the impossibility that both could be
biological parents.”).
\end{itemize}
parent. Were Tina and Diane to end their relationship after they had changed their domicile, Virginia might well refuse to recognize that there was a legal relationship either between Tina and Diane or between Diane and Nancy.  

Suppose that the hypothetical involving Tina, Diane, and Nancy is modified. Tina and Diane are living with Nancy in Connecticut. However, the marriage does not last. Tina and Diane secure a divorce in Connecticut, which includes a custody and visitation order. Now, Diane’s right to custody of or visitation with Nancy does not merely arise by virtue of a presumption that Diane is one of Nancy’s parents but, instead, by virtue of a judgment of divorce issued by a court. It is simply unclear as a matter of statutory construction whether this DOMA provision was intended to authorize another state to refuse to give credit to a judgment involving custody or, perhaps, a property division, since the right or claim would then not merely have arisen from the relationship.

A different but related issue was addressed in Miller-Jenkins v. Miller-Jenkins. At issue was a conflict between a biological parent and her former civil union partner over whether the former partner would have contact with the child born during the adults’ relationship. A Vermont court had issued a custody and visitation order with respect to the child, IMJ. However, the biological mother, Lisa, who was domiciled in Virginia, argued that the Vermont order did not have to be given full faith and credit under DOMA because Virginia, in its own Defense of Marriage Act, made clear its unwillingness to recognize same-sex relationships and any rights arising therefrom.

There are at least two reasons that Lisa’s position is not persuasive. First, she is arguing that Congress implicitly modified the Parental Kidnapping Prevention Act (PKPA) by passing DOMA, even though the PKPA was never mentioned in the DOMA debates. As the Virginia

20. Id. at 956–57.
21. Id. at 956.
22. Id. at 961.
24. See Mark Strasser, Interstate Recognition of Adoptions: On Jurisdiction, Full Faith and Credit and the Kinds of Challenges the Future May Bring, 2008 BYU L.
Court of Appeals pointed out, repeals by implication are not favored.\textsuperscript{25} Second, DOMA only speaks to parental relations established by virtue of a same-sex relationship. A parental relationship established in another way, e.g., because one of the individuals is a legal parent by virtue of being a functional parent,\textsuperscript{26} does not trigger DOMA and is not subject to the same arguments for non-recognition.\textsuperscript{27} Because Janet met the criteria in Vermont for establishing her parental relationship with IMJ—even bracketing that she had been in a civil union with Lisa\textsuperscript{28}—her parental rights did not arise solely by virtue of a relationship that Virginia was allegedly entitled to ignore. Thus, even had Lisa’s claim that DOMA modified the PKPA been accepted, Virginia still would not have been authorized to ignore the Vermont order regarding custody and visitation.

One of the reasons it is somewhat difficult to determine how the DOMA full faith and credit provision affects other existing law is that members of Congress were not entirely clear about what they wanted the law to achieve.\textsuperscript{29} At the time that DOMA was enacted, it appeared that Hawaii was going to recognize same-sex marriage, and members of Congress apparently believed that same-sex couples from a variety of states would fly to Hawaii, get married, and return home demanding that their domiciles recognize the unions celebrated in Hawaii.\textsuperscript{30} By passing DOMA,

\textsuperscript{25} Miller-Jenkins, 637 S.E.2d at 336.
\textsuperscript{26} See Miller-Jenkins, 912 A.2d at 970 (indicating that factors such as the intent of both Lisa and Janet that Janet would be a parent of the child born to Lisa through artificial insemination, Janet’s participation in the decision to have Lisa undergo artificial insemination, Janet’s active participation in Lisa’s prenatal care and birth, treatment of Janet by both herself and Lisa as the child’s parent during the period in which they lived together, Lisa’s identification of Janet as the child’s parent in the dissolution petition, and the fact that the child would have only one parent if the court reached a negative decision aided the court in determining that Janet was a functional parent to the child born to Lisa through artificial insemination—just as Janet would have been the child’s parent if she were Lisa’s husband).
\textsuperscript{27} See Strasser, supra note 24, at 1846–47 (noting that whether a state recognizes the notion of “functional parenthood is a matter of state law” and because the laws of one state are “not required to substitute another state’s law,” the factors considered by the Vermont court would not be binding on another state).
\textsuperscript{28} See Miller-Jenkins, 912 A.2d at 970 (holding that “many factors . . . support a conclusion that Janet is a parent”).
\textsuperscript{29} See infra notes 30–34 and accompanying text.
\textsuperscript{30} See M.V. Lee Badgett & R. Bradley Sears, Putting a Price on Equality? The Impact of Same-Sex Marriage on California’s Budget, 16 STAN. L. & POL’Y REV. 197, 198 (2005) (“In response to the Hawaii Supreme Court’s ruling, forty states eventually passed laws or constitutional amendments stating that they would not
federal legislators evidently thought they were making it possible for states to refuse to recognize a same-sex marriage validly celebrated in a different state.31

Yet, even before same-sex marriage was a contentious issue in the United States, there was a long history of states refusing to recognize marriages validly celebrated elsewhere.32 The problem that DOMA was allegedly designed to solve—namely, protecting states from their domiciliaries who might enter into a same-sex marriage in Hawaii and then return home demanding that it be recognized—was not really a problem at all.33 Indeed, some characterize DOMA as not having given states any powers they did not already possess, i.e., as reflecting rather than changing then-current law.34


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

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


must take into account historical marriage recognition practices. There are numerous cases in which individuals who were barred from marrying in their domicile would go to another state, marry, and then return home. The question for the domicile in such cases was whether to recognize the marriage that had been validly celebrated in a different state.

That a state prohibits individuals from celebrating a marriage locally does not commit that state to refusing to recognize such a marriage if validly celebrated elsewhere. The refusal to recognize a marriage has a variety of important implications if only because an individual may be entitled to a variety of benefits by virtue of being a spouse—insurance, retirement, or other kinds of benefits. Non-recognition of a marriage might mean that the purported spouse would not be entitled to the resources needed to survive.

Realizing the stakes involved when marriages are declared void and of no legal effect, state courts were unwilling to make such declarations of invalidity lightly. Thus, a state might refuse to permit particular couples to marry within the state but nonetheless recognize marriages involving such couples if celebrated in a state permitting such marriages.

That said, however, merely because a state might recognize a marriage that could not be celebrated within the state would not commit the state to recognizing every marriage that is celebrated in accord with the law of another state. For example, Ohio does not permit first cousins to contract a marriage within the state but will recognize a marriage between...

35. See generally Mark Strasser, For Whom Bell Tolls: On Subsequent Domiciles' Refusing to Recognize Same-Sex Marriages, 66 U. Cin. L. Rev. 339 (1998) (discussing various scenarios which can arise in the situation).

36. See id.

37. See Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955 (Mass. 2003) (listing numerous benefits, and stating, “[t]he benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death”).

38. See Toler v. Oakwood Smokeless Coal Corp., 4 S.E.2d 364 (Va. 1939) (holding a putative spouse not entitled to workmen’s compensation benefits when her marriage to the deceased was declared void and of no legal effect).

39. See, e.g., Main v. Main, 74 So. 138, 141 (Miss. 1917) (“In the instant case it is sought to annul the marriage and make it void from the beginning, the effect of which will be, if permitted, to render the child born a bastard and to place upon the woman in the case the stigma of impurity . . . .”).

40. In re Guthery’s Estate, 226 S.W. 626, 627 (Mo. Ct. App. 1920) (“Present-day civilization looks with disfavor on the harsh doctrine of ab initio nullity of marriages . . . .”).
first cousins if validly celebrated elsewhere.\textsuperscript{41} However, the state not only prohibits uncles from marrying their nieces within the state but also refuses to recognize such marriages of its domiciliaries even if validly celebrated in another jurisdiction.\textsuperscript{42}

Two issues should not be conflated. One is whether federal due process or equal protection guarantees preclude any state from prohibiting certain kinds of marriages,\textsuperscript{43} and the other is whether the United States Constitution requires states to recognize those marriages that have been validly celebrated in a sister state.\textsuperscript{44} Certainly, the two issues are related. For example, if a state is barred by the Federal Constitution from prohibiting the celebration of a particular kind of marriage within the state, then the state would also be barred from refusing to recognize all such marriages that had been validly celebrated in sister states. Suppose, however, that a particular marriage is not protected by federal due process or equal protection guarantees. It might nonetheless be true that such a marriage, if validly celebrated in one state, would have to be recognized in another, although the Supreme Court has never expressly addressed this question.\textsuperscript{45}

Consider the facts of \textit{Loving v. Virginia}, in which the Supreme Court addressed the constitutionality of Virginia’s antimiscegenation law.\textsuperscript{46} Richard Loving and Mildred Jeter had been domiciled in Virginia,\textsuperscript{47} where they were precluded by law from marrying because they were of different races.\textsuperscript{48} They went to the District of Columbia, which had no antimiscegenation statute, and married in accord with local law.\textsuperscript{49} They then went back to Virginia, holding themselves out as husband and wife.\textsuperscript{50}

This case raised two distinct constitutional issues. One was whether

\textsuperscript{41} E.g., Mazzolini v. Mazzolini, 155 N.E.2d 206, 209 (Ohio 1958) (marriage between first cousins who wed in Massachusetts not void in Ohio).

\textsuperscript{42} E.g., \textit{In re Estate of Stiles}, 391 N.E.2d 1026, 1027 (Ohio 1979) (marriage between uncle and niece void \textit{ab initio}).

\textsuperscript{43} See infra Part II.B–C.

\textsuperscript{44} See infra Part II.D–E.

\textsuperscript{45} Further distinctions might be necessary when addressing the conditions under which such marriages would have to be recognized, e.g., whether the marriage was valid in the domicile at the time of its celebration.

\textsuperscript{46} \textit{Loving v. Virginia}, 388 U.S. 1 (1967).

\textsuperscript{47} \textit{Id. at} 2.

\textsuperscript{48} \textit{Id. at} 5 n.4.

\textsuperscript{49} \textit{Id. at} 2.

\textsuperscript{50} \textit{Id.}
Virginia was precluded by the United States Constitution from prohibiting its residents from contracting an interracial marriage. Even were that not foreclosed by federal constitutional guarantees, a different issue would be whether any federal constitutional provision requires states to recognize marriages that have been validly celebrated in sister states.

B. Due Process Protections

The *Loving* Court did not address whether states had to recognize a marriage validly celebrated elsewhere, but instead held that the United States Constitution precludes states from barring interracial marriage as a matter of both equal protection and substantive due process guarantees.\(^51\) In its discussion of the latter protections, the *Loving* Court noted that “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”\(^52\) The Court further explained that “[m]arriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”\(^53\)

In its brief discussion, the Court alluded to two very different kinds of interests served by marriage: the interests of the individual and the interests of society.\(^54\) Just as those societal and individual interests are served by recognizing interracial marriage, those interests are also served by recognizing same-sex marriage. For individuals with a same-sex orientation—like those individuals with a different-sex orientation—marriage can be a vital personal right essential to the pursuit of happiness. Marriage provides both tangible and intangible benefits including, on the one hand, insurance coverage as well as a variety of state and federal benefits and, on the other, the symbolic benefits associated with making a public statement of commitment.\(^55\)

Yet, it is not only the individual himself or herself who benefits from marriage. When suggesting marriage is fundamental to the existence and survival of the state, the Court presumably had in mind that marriage and family provide a setting in which the next generation can be raised.

\(^{51}\) *Id.* at 2, 10–12.

\(^{52}\) *Id.* at 12.

\(^{53}\) See *id.* (citing *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

\(^{54}\) *Id.* at 10–12.

\(^{55}\) *Turner v. Safley*, 482 U.S. 78, 95–96 (1987) (noting that marriage involves an “expression[] of emotional support and public commitment” and that “marital status often is a precondition to the receipt of government benefits (e.g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimation of children born out of wedlock)”).
However, with or without marriage, same-sex couples are having and raising children. If children are benefited by being raised in a stable environment and if marriage helps provide stability for children, then children raised by same-sex parents would also benefit were their parents able to marry. Society as a whole benefits when children prosper, and society would benefit by recognizing same-sex marriage in the same ways it benefits by recognizing different-sex marriage.

It might seem surprising that the *Loving* Court would say marriage is essential for our very survival, but provide no explanation of the respect in which that is true. The Supreme Court was more forthcoming in *Zablocki v. Redhail*, explaining:

> It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. . . . [I]t would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.

Yet, same-sex couples, like different-sex couples, are making a variety of decisions related to procreation, childbirth, child-rearing, and family relationships, so the *Zablocki* reasoning applies with equal force to same-sex couples who wish to raise their children in a traditional family setting.

One reason the *Loving* Court might have been unwilling to spell out the respect in which marriage was essential to society’s survival was that Virginia had attempted to justify its refusal to permit interracial marriage by suggesting that the children born to such couples were somehow inferior. The Court may well have wanted to de-emphasize procreation because the state was at least claiming that its statute promoted the

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58. *See Loving*, 388 U.S. at 7 (“In upholding the constitutionality of these provisions in the decision below, the Supreme Court of Appeals of Virginia referred to its 1955 decision in *Naim v. Naim* as stating the reasons supporting the validity of these laws. In *Naim*, the state court concluded that the State’s legitimate purposes were ‘to preserve the racial integrity of its citizens,’ and to prevent ‘the corruption of blood,’ ‘a mongrel breed of citizens’ and ‘the obliteration of racial pride,’ obviously an endorsement of the doctrine of White Supremacy.” (quoting *Naim v. Naim*, 87 S.E.2d 749, 756 (1955))).
interests of children. In any event, by focusing on the rights of adults and the implicated equal protection issues, the Court was able to explain the statute had to be examined using a higher level of scrutiny and why the Court did not have to accept the state’s claim that the antimiscegenation statutes should be upheld “if there is any possible basis for concluding that they serve a rational purpose.”

It might be noted that some try to justify same-sex marriage bans by suggesting that such bans promote the interests of children. Yet, children raised by same-sex couples are thriving, and the inability to marry is not preventing members of the LGBT community from having or raising children. Rather, such statutes merely prevent such children from living in a marital home, which harms children living with same-sex parents and provides no offsetting benefits to children living in homes with different-sex parents.

Zablocki is instructive to consider in this context. At issue was a Wisconsin statute that precluded non-custodial parents from marrying if they could not show that they would be able to meet their existing child support obligations. After discussing marriage as the foundation of family and noting that it made no sense to treat marriage as of lesser

59. *Id.* at 8.
62. Hernandez v. Robles, 855 N.E.2d 1, 32 (N.Y. 2006) (Kaye, C.J., dissenting) (“The State plainly has a legitimate interest in the welfare of children, but excluding same-sex couples from marriage in no way furthers this interest. In fact, it undermines it. Civil marriage provides tangible legal protections and economic benefits to married couples and their children, and tens of thousands of children are currently being raised by same-sex couples in New York. Depriving these children of the benefits and protections available to the children of opposite-sex couples is antithetical to their welfare, as defendants do not dispute.”).
63. See Zablocki v. Redhail, 434 U.S. 374, 387 (1977) (“Under the challenged statute, no Wisconsin resident in the affected class may marry in Wisconsin or elsewhere without a court order, and marriages contracted in violation of the statute are both void and punishable as criminal offenses. Some of those in the affected class, like appellee, will never be able to obtain the necessary court order, because they either lack the financial means to meet their support obligations or cannot prove that their children will not become public charges.”).
importance than other family matters, the Court noted one of the ironies of the position offered by the State of Wisconsin in support of its statute:

Although it is true that the applicant will incur support obligations to any children born during the contemplated marriage, preventing the marriage may only result in the children being born out of wedlock, as in fact occurred in appellee’s case. Since the support obligation is the same whether the child is born in or out of wedlock, the net result of preventing the marriage is simply more illegitimate children.

An analogous criticism might be made of those states precluding same-sex couples from marrying. The point here is not that children born to same-sex couples would be at a special disadvantage because they would be viewed as “illegitimate,” but that such children might nonetheless be at a relative disadvantage when compared to children born into a marriage; the added financial and emotional stability associated with marriage should not be denied as a matter of law to children being raised by same-sex parents.

It might be thought that when issuing the Zablocki opinion, the Court was not even considering the possible effects of the holding on same-sex relations. Yet, that would be incorrect. Justice Powell noted in his Zablocki concurrence that the Court’s holding would have implications for those in same-sex relationships.

Some suggest that Loving was basically an equal protection case in which strict scrutiny was triggered because the state discriminated on the

64. Id. at 384–86.
65. Id. at 390.
67. See id. at 956–57 (noting “the fact remains that marital children reap a measure of family stability and economic security based on their parents’ legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children”).
68. Zablocki, 434 U.S. at 399 (Powell, J., concurring) (“State regulation has included bans on incest, bigamy, and homosexuality, as well as various preconditions to marriage, such as blood tests. Likewise, a showing of fault on the part of one of the partners traditionally has been a prerequisite to the dissolution of an unsuccessful union. A ‘compelling state purpose’ inquiry would cast doubt on the network of restrictions that the States have fashioned to govern marriage and divorce.”).
basis of race,\textsuperscript{69} and that the case therefore provides no basis for believing that same-sex marriage bans are unconstitutional.\textsuperscript{70} Yet, this characterization of \textit{Loving} is incorrect. As the Court explained in \textit{Zablocki}, an independent basis for finding the Virginia statute unconstitutional was that it violated due process guarantees.\textsuperscript{71} Thus, even were same-sex marriage bans not to trigger heightened or strict scrutiny as a matter of equal protection, \textit{Loving} would nonetheless speak to the importance of marriage for everyone. Further, the \textit{Loving} Court went out of its way to avoid discussing procreation\textsuperscript{72} precisely because it did not want the focus of attention to be on the children born of the marriage.

\textbf{C. Equal Protection Guarantees}

While it is correct to point out that the \textit{Loving} equal protection analysis involved strict scrutiny because the Virginia statutes expressly classified on the basis of race, and that same-sex marriage bans are distinguishable because they do not classify on the basis of race, it is

\textsuperscript{69} See Bijal Shah, \textit{Gay American “Deviance:” Using International Comparative Analysis to Argue for a Free Speech and Establishment Clause Approach to Furthering Gay Marriage in the United States}, 26 WIS. INT’L L.J. 1, 20 (2008) (“Therefore, a ban on miscegenation and interracial marriage ‘discriminates on the basis of race’ in violation of the equal protection clause of the Fourteenth Amendment, and is also therefore suspect on its face and deserving of strict scrutiny under the Fourteenth Amendment.” (citing Cass R. Sunstein, \textit{Homosexuality and the Constitution}, 70 IND. L.J. 1, 16–19 (1994))); see also \textit{Loving}, 388 U.S. at 12 (“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.”); \textit{but see Zablocki}, 434 U.S. at 383 (“the \textit{[Loving]} Court’s opinion could have rested solely on the ground that the statutes discriminated on the basis of race in violation of the Equal Protection Clause. But the Court went on to hold that the laws arbitrarily deprived the couple of a fundamental liberty protected by the Due Process Clause, the freedom to marry.” (citing \textit{Loving}, 388 U.S. at 11–12)).

\textsuperscript{70} See, e.g., Lynn D. Wardle, \textit{Lessons from the Bill of Rights about Constitutional Protection for Marriage}, 38 LOY. U. CHI. L.J. 279, 309 (2007) (“Allowing the intrusion of the gay rights movement into family law at the state level by promoting the legalization of same-sex marriage seems to make a mockery of the \textit{Loving} decision.”).

\textsuperscript{71} See \textit{Zablocki}, 434 U.S. at 384 (“Although \textit{Loving} arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals.”).

\textsuperscript{72} Professors Wardle and Oliphant do not seem to appreciate this facet of the \textit{Loving} opinion. See Lynn D. Wardle & Lincoln C. Oliphant, \textit{In Praise of Loving: Reflections on the “Loving Analogy” for Same-Sex Marriage}, 51 HOW. L.J. 117, 134 (2007) (stating that “the \textit{Loving} Court linked the kind of ‘marriage’ it deemed a fundamental right to procreation”).
incorrect to claim that same-sex marriage bans do not classify on the basis of a protected classification. Even assuming that sexual orientation is not a protected classification,\footnote{Some courts have found that orientation is protected under the state constitution. Strauss v. Horton, 207 P.3d 48, 102 (Cal. 2009) (“Thus, except with respect to the designation of ‘marriage,’ any measure that treats individuals or couples differently on the basis of their sexual orientation continues to be constitutionally ‘suspect’ under the state equal protection clause and may be upheld only if the measure satisfies the very stringent strict-scrutiny standard of review that also applies to measures that discriminate on the basis of race, gender, or religion.”); see also Kerrigan v. Comm’n of Pub. Health, 957 A.2d 407, 475–76 (“gay persons are entitled to recognition as a quasi-suspect class”).} same-sex marriage bans distinguish on the basis of sex—a man can marry a woman but not a man, and a woman can marry a man but not a woman. While it is of course true that the scrutiny associated with classifications based on race is more stringent than the scrutiny associated with classifications based on sex,\footnote{But cf. Wardle & Oliphant, supra note 72, at 139 (quoting Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 1971) (noting that “there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex”).} classifications based on sex will be upheld only if there is “‘an exceedingly persuasive justification’ for their use.”\footnote{See United States v. Virginia, 518 U.S. 515, 531 (1996) (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).}

When examining the constitutionality of the state’s same-sex marriage ban, the Maryland Supreme Court seemed to distinguish whether a classification was based on sex from whether the purpose behind the statute was to disadvantage a particular sex. Basically, the court reasoned that it was permissible to distinguish on the basis of sex as long as the statute was targeting sexual orientation rather than sex.\footnote{Conaway v. Deane, 932 A.2d 571, 586 (Md. 2007) (“[B]ecause we believe that [Maryland’s Equal Rights Amendment] was not intended by the General Assembly and the Maryland voters who enacted and ratified, respectively, the Maryland ERA in 1972 to reach classifications based on sexual orientation, we conclude that Family Law § 2-201 does not draw an impermissible sex-based distinction.”).} Yet, this is at best an unusual way to determine whether a statute employs a sex-based classification. Consider the analogous argument in the context of race. Suppose that a legislature used a racial classification as a way of targeting a
particular socio-economic class. Presumably, no one would suggest that such a racial classification should be examined with rational basis scrutiny because the legislature was targeting on the basis of wealth. Instead, the targeting on the basis of race would be examined with strict scrutiny. So, too, same-sex marriage bans expressly distinguish on the basis of sex and should be examined with heightened scrutiny at the very least. Perhaps a state with such a ban can offer an exceedingly persuasive justification for such a classification, although there is reason to doubt that any such rationale can be offered.

If same-sex marriage bans are unconstitutional because of violations of either federal equal protection or due process guarantees, then DOMA will presumably be found unconstitutional as well. Suppose, however, that same-sex marriage bans do not violate equal protection and due process guarantees. A separate question is whether the Federal Constitution requires states to recognize marriages validly celebrated in other states.

D. Interstate Marriage Recognition Practices

It might be argued that states must give full faith and credit to marriages validly celebrated in other states regardless of whether those marriages could be celebrated locally and, indeed, Congress passed DOMA precisely to undercut such a claim. Yet, the argument that states must recognize marriages validly celebrated elsewhere is not supported by historical practice, which instead has been that the law of the domicile at the time of the marriage determines the validity of the marital union, even when that union has been celebrated in accord with the law of the place of...
The choice-of-law rule traditionally applied in the marriage recognition cases is even more forgiving than might initially be inferred from the description above. Suppose, for example, that a couple domiciled in State A, marries in State B, and then immediately moves to State C. Suppose further that while State B’s law permits the marriage, State C’s law does not. Traditionally, State C could refuse to recognize the marriage even though it was not the domicile at the time of the marriage (the newlyweds had not yet moved there), because it was about to become the state with the most important connection to the marriage.83

Yet, for purposes of determining a marital union’s validity, the inclusion of the domicile right after the marriage within the category of “domicile at the time of the marriage” supports the principle behind the traditional rule that the justification for permitting the domicile’s law to determine the union’s validity is that the domicile at the time of the marriage (or immediately thereafter) is the state with the greatest interest in the validity of the marriage.84 However, DOMA does not merely authorize the domicile at the time of the marriage to refuse to recognize a marriage that is valid in the place of celebration. Instead, it authorizes much more than that.

Consider, for example, two individuals of the same sex who marry in Massachusetts, their domicile. Ten years later, they move to Atlanta, Georgia, for a job opportunity. DOMA authorizes Georgia’s refusal to recognize the marriage, its validity in the former domicile for the previous ten years notwithstanding.

DOMA on its face authorizes even more. The full faith and credit provision not only authorizes current or future domiciles to refuse to recognize a same-sex marriage, it also authorizes any state to deny recognition to such a union. Thus, consider a same-sex couple domiciled in Massachusetts who marry there and immediately move to Atlanta, Georgia. Ten years later, they return to Massachusetts, where they had previously married. If DOMA were to apply, Georgia would be authorized to refuse to recognize the Massachusetts marriage, its validity in Massachusetts for the previous ten years notwithstanding.

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82. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971).
83. See C.W. Taintor, II, What Law Governs the Ceremony, Incidents and Status of Marriage, 19 B.U. L. REV. 353, 367 (1939) (“The intrinsic validity of this status may be referred to the law of the place of ceremony, to the law of the domicils [sic] of both parties if they live in the same state, to the law of the domicils [sic] of either or both of the parties if they live in different states, or to the law of the state in which the parties intend to live as husband and wife.”).
84. Cf. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(1) (“The validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage . . . .”).
Massachusetts who happened to travel through a state that did not recognize same-sex marriage. On its face, DOMA authorizes that state to refuse recognition of the marriage, thus impacting the right to visit someone in a hospital or the right to sue in a tort action for wrongful death or loss of consortium.

E. Right to Travel Guarantees

Certainly, it might be suggested that anyone who vacations must take into account a variety of factors—cost, climate, etc.—when determining a final destination and, perhaps, the states through which one might pass on the way. Arguably, DOMA merely adds another factor to the mix—that some states might refuse to recognize a same-sex marriage—and thus, all else being equal, those states should be avoided by same-sex couples for whom non-recognition might be problematic.

Yet, the right to travel is a right guaranteed by the Fourteenth Amendment to the United States Constitution. States are prohibited from interfering with the exercise of that right. In Ex parte Kinney, a federal court in Virginia suggested that the state would have to recognize an interracial marriage of a couple traveling through the state, even though such a marriage could not be contracted locally, as long as the marriage was valid in the couple’s domicile.85 But if such a marriage had to be recognized, its contravention of an allegedly important public policy of the state notwithstanding, then the marriage of a same-sex couple traveling through a state would also have to be recognized, its contravention of an allegedly important public policy notwithstanding.

In Saenz v. Roe, the Supreme Court explained:

The “right to travel” discussed in our cases embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.86

Here, the Saenz Court explains that it is incorrect to believe that the right to travel only applies to individuals traveling through a state—it also applies to those emigrating to a state. That means that the right to travel may have important implications not only for same-sex marital couples.

85. Ex parte Kinney, 14 F. Cas. 602, 606 (E.D. Va. 1879) (No. 7825).
traveling through states but also for those emigrating to certain states.

DOMA is a federal statute, and at least one issue involves the degree to which Congress can modify the protections afforded by the federally protected right to travel. Yet, the *Saenz* Court made clear not only that states are precluded from burdening the right to travel, but also that “Congress may not authorize the States to violate the Fourteenth Amendment”87 and that “the protection afforded to the citizen by the Citizenship Clause of that Amendment is a limitation on the powers of the National Government as well as the States.”88 If the refusal to recognize a marriage valid in the domicile at the time of the marriage is enough of a burden to trigger right-to-travel guarantees, then that right may have important implications for the constitutionality of DOMA, especially when construed broadly.

The interests implicated in having one’s marriage recognized are at least as significant as some of the other interests the Supreme Court has found to have triggered right-to-travel guarantees. For example, in *Crandall v. Nevada*, the Supreme Court struck down a tax of one dollar imposed on those leaving the state via a public conveyance, reasoning that this abridged the right to travel.89 The Court noted,

> If one State can do this, so can every other State. And thus one or more States covering the only practicable routes of travel from the east to the west, or from the north to the south, may totally prevent or seriously burden all transportation of passengers from one part of the country to the other.90

The Court’s rationale is also applicable to same-sex marriages. Permitting states to refuse recognition of same-sex marriages that are valid in the domicile might significantly deter travel by LGBT couples, especially if many states refuse to recognize such unions.

*Sosna v. Iowa* is instructive to consider in this context.91 One issue in the case was whether Iowa’s one-year residency requirement for divorce violated right-to-travel guarantees.92 In analyzing this question, the Supreme Court’s focus was not on whether marital status involves an

87. *Id.* at 507.
88. *Id.* at 507–08.
90. *Id*.
92. *Id.* at 404–10.
interest sufficient to trigger right-to-travel guarantees, but on whether the implicated state interests were sufficiently important to justify the state’s residency requirement for divorce. In holding that they were, the Court emphasized that a one-year residency requirement would as a general matter merely delay, rather than deny, a marriage dissolution. Needless to say, the statutes authorized by DOMA do not merely delay same-sex marriages—through some sort of waiting period—but instead prohibit them entirely.

F. Full Faith and Credit Guarantees

Suppose that DOMA is understood to authorize not only a state’s refusing to recognize a same-sex marriage validly celebrated elsewhere, but even to refuse to recognize rights or claims arising from divorce judgments. That would be a change in current practice and might be constitutionally precluded.

The Full Faith and Credit Clause reads:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

A few different points should be made about this constitutional provision. First, while the Clause might seem to treat acts, records, and judgments in the same way, that has not been the authoritative interpretation offered by the Supreme Court. Rather, the Court has distinguished between acts and records on the one hand and judgments on the other.

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93. But cf. id. at 420 (Marshall, J., dissenting) (“[I]t is clear beyond cavil that the right to seek dissolution of the marital relationship is of such fundamental importance that denial of this right to the class of recent interstate travelers penalizes interstate travel.”).

94. See id. at 407 (describing various “consequences of . . . moment riding on a divorce decree”).

95. See id. at 406 (“Iowa’s requirement delayed her access to the courts, but, by fulfilling it, she could ultimately have obtained the same opportunity for adjudication which she asserts ought to have been hers at an earlier point in time.”).


97. U.S. Const. art. IV, § 1.
the other. The former are thought to be subject to a public policy exception, while the latter are not.

Divorces but not marriages are judgments and subject to full faith and credit guarantees. Traditionally, states could refuse to recognize marriages validly celebrated elsewhere but could not refuse to recognize divorces validly issued elsewhere. As the Supreme Court explained in *Williams v. North Carolina*:

> So when a court of one state acting in accord with the requirements of procedural due process alters the marital status of one domiciled in that state by granting him a divorce from his absent spouse, we cannot say its decree should be excepted from the full faith and credit clause merely because its enforcement or recognition in another state would conflict with the policy of the latter.

A separate question is whether Congress is permitted to undermine full faith and credit guarantees. While the Constitution expressly authorizes Congress to pass general laws to “prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof[.]” the Court has not made clear whether the power accorded to Congress in this area includes the power to lessen the full faith and credit to be given to judgments. As noted by the *Williams* Court, the creation

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99. *See id.* (“[T]he Full Faith and Credit Clause does not compel ‘a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.’” (quoting *Pac. Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501 (1939))).  
100. *Id.* at 233 (“A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land.”).  
103. *See id.* at 303 (“Whether Congress has the power to create exceptions is a question on which we express no view.” (citing *Yarborough v. Yarborough*, 290 U.S. 202, 215 n.2 (1933) (Stone, J., dissenting))).  
104. U.S. CONST. art. IV, § 1.  
105. Mark Strasser, *Baker and Some Recipes for Disaster: On DOMA*,
of such an exception would harm innocent persons and thwart the purposes that the clause was designed to serve—\(106\) the Clause would no longer be the “nationally unifying force”\(107\) that it was designed to be.

Even were Congress thought to have this power, a separate matter is whether the laws singling out judgments arising from same-sex marriages are sufficiently general to meet the conditions imposed by the Clause.\(108\) DOMA does not create an exception for judgments—such as saying that they need not be given full faith and credit if contravening an important public policy—or even create an exception for a certain class of judgments—such as saying that only final judgments involving divorce need not be given full faith and credit. Rather, this statute creates an exception for a very specific type of judgment—a judgment involving a same-sex relationship that is treated under a particular state’s law as a marriage.\(109\) This is a specific exception rather than a general law and thus does not seem to fall within the power granted to Congress.\(110\)

There are several bases upon which the DOMA full faith and credit provision might be challenged, depending on how it is construed. Some of those would only apply to this particular provision, whereas others would apply to the statute more generally and also to the provision defining marriage for federal purposes.

III. DEFINING MARRIAGE FOR FEDERAL PURPOSES

A different section of the Defense of Marriage Act does not purport to authorize states to refuse to recognize particular marriages but, instead, simply says that the federal government will not recognize a same-sex

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\(Covenant Marriages, and Full Faith and Credit Jurisprudence, 64 BROOK. L. REV. 307, 316 (1998)\) (“To date the Supreme Court has not determined whether Congress has the power to lessen full faith and credit as Congress has never attempted such an act.”).

\(106\). \(Williams, 317 U.S. at 303–04\) (discussing the “considerable interests involved, and the substantial and far-reaching effects which the allowance of an exception would have on innocent persons, indicate that the purpose of the full faith and credit clause . . . would be thwarted to a substantial degree”).

\(107\). \(Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 439 (1943)\).

\(108\). \(See Mark Strasser, Loving the Romer Out for Baehr: On Acts in Defense of Marriage and the Constitution, 58 U. PITT. L. REV. 279, 297–301 (1997)\) (suggesting that DOMA does not meet the requirement that laws enacted pursuant to full faith and credit by “general laws”).


\(110\). \(See Strasser, supra note 108, at 297–301.\)
union even if that marriage is validly celebrated in the couple’s domicile.\footnote{111} This congressional exercise is unprecedented and is constitutionally vulnerable on a few different bases.

A. The Federal Benefits Provision

The DOMA provision defining marriage for federal purposes reads:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.\footnote{112}

This provision seems less subject to multiple interpretations only because its express language is so sweeping. Yet, its all-inclusiveness might itself make the provision constitutionally vulnerable.

B. Equal Protection

The equal protection difficulties posed for states in their same-sex marriage bans would also seem applicable to this provision.\footnote{113} Congress is making a distinction based on sex, and it is not at all clear that a persuasive justification can be offered for such a distinction.

There are additional reasons to think that this provision violates equal protection guarantees. The only marriages recognized in any of the states that are not entitled to federal recognition are those involving members of the same sex—this provision does not limit marriages recognized for federal purpose on the basis of age or degree of consanguinity, for example.\footnote{114} Yet, once a marriage falls into the category of those that will not be recognized, then the marriage will not be recognized for any purpose. Such a provision seems to violate the admonition in Romer v. Evans against passing statutes that are “at once too narrow and too broad,”\footnote{115} since it identifies only one kind of marriage valid in the states that is denied federal “protection across the board.”\footnote{116}

\footnotesize
\begin{itemize}
\item[112.] Id.
\item[113.] See supra Part II.C.
\item[114.] See supra Part II.C.
\item[116.] Id.
\end{itemize}
point made in Romer seems equally applicable here, namely, it “is not within our constitutional tradition to enact laws of this sort.”

C. Federal Supplanting of State Marriage Laws

Suppose that the equal protection difficulties posed by the federal definition of marriage provision can somehow be avoided. Even so, this provision is constitutionally vulnerable.

First, the Supreme Court has made clear that “there is no federal law of domestic relations, which is primarily a matter of state concern.” This does not mean that the Congress is precluded from legislating in the area, although it does mean that a state law will not be displaced by federal law unless “it ‘[does] “major damage” to “clear and substantial” federal interests.’” Still, it is difficult to imagine which clear and substantial federal interests are implicated by recognizing marriages valid in certain states, or how those interests will suffer major damage if those relationships are recognized for federal purposes.

Certainly, it could not plausibly be argued that the very existence of same-sex marriages will somehow do major damage to substantial federal interests. First, it is hard to imagine what those interests would be. Second, whether or not the federal government chooses to recognize the marriage, the marriage will still exist in the state recognizing the relationship and thus DOMA will not have prevented the existence of such a marriage.

Perhaps the federal government would be able to save money if such relationships were not recognized. However, even were that so, saving money would not be a sufficiently important interest. Otherwise, the federal government could displace state domestic relations law very easily as long as money might thereby be saved.

117. Id.
120. See Strasser, supra note 108, at 318 (“DOMA does not prevent states from recognizing same-sex marriages. It merely denies federal benefits to same-sex couples.”).
121. See United States v. Yazell, 382 U.S. 341, 348–53 (1966) (suggesting that the federal government’s interest in collecting money that it lends is not a sufficiently important interest to justify displacing state domestic relations law).
122. Strasser, supra note 108, at 318.
IV. CONCLUSION

The Federal Defense of Marriage Act is constitutionally vulnerable on a number of bases. It uses a sex-based classification without sufficient justification and picks out one kind of legally recognized marriage and subjects it to non-recognition for all purposes. DOMA undermines right-to-travel guarantees and supplants state domestic relations law with federal law without adequate justification.

Perhaps Congress will modify or repeal DOMA before the Court hears a case challenging its constitutionality. If the Court does accept a challenge to the statute, it is simply unclear what the Court will do. Some, but not all, reasons for striking down DOMA would have import for whether same-sex marriages must be recognized throughout the United States. Other bases, however, would merely suggest that Congress had overreached in passing DOMA and would leave for another day the power of each state to choose to recognize a same-sex marriage validly celebrated in another domicile.

Even were the Court to strike down DOMA on very narrow grounds, some state laws simply could not stand. For example, without DOMA, states could not refuse to enforce judgments validly issued in other states. Further, those couples who had married in accord with the law of their domiciles would be entitled to a variety of federal benefits to which they are now denied access. Nonetheless, there would be a variety of state laws whose constitutionality would still be an open question. In short, were DOMA repealed or struck down on narrow federal constitutional grounds, the battle to secure for LGBT families the protections that many families take for granted would only be beginning.