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Eluding the Grim Reaper: How Section 2 of the Defense of Marriage Act Could Survive Strict Scrutiny

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Eluding the Grim Reaper: How Section 2 of the Defense of Marriage Act Could Survive Strict Scrutiny

By Michael DiSiena*

“The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex [I]t is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.”¹
~Federalist No. 48

“[I]n order to form a proper judgment of the probable effects of this plan of general government on the sovereignties of the several states, it is necessary also to take a view of what Congress may, constitutionally, do and of what the states may not do.”²
~Antifederalist No. 44

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* J.D., 2013, Washington and Lee University School of Law; B.A., Siena College. The author owes a debt of gratitude to Professor Joan Shaughnessy, without whose help this project would have foundered amid the seas of his own inability.

1. THE FEDERALIST NO. 48, at 343–44 (James Madison) (Benjamin Wright ed., 1961).
2. THE ANTI-FEDERALIST PAPERS NO. 44, at 124 (Samuel Bryan) (Morton Borden ed., 1965).

I. Introduction

Victories for proponents of same-sex marriage, both in scope and in number, continue to expand.³ Six states, in addition to the District of Columbia, currently recognize same-sex marriage.⁴ Two more states seem poised to follow suit.⁵ These statewide victories should rekindle debate over the constitutionality of the federal Defense of Marriage Act (DOMA).⁶ Adding fuel to the fire, in early 2011, the Department of Justice (DOJ) announced that it would no longer defend the constitutionality of Section 3 of DOMA, which excludes same-sex couples from the definition of federally-recognized marriages.⁷ Only months later, DOJ went one step further, and filed a brief actively arguing that DOMA was unconstitutional.⁸ DOJ reasoned that DOMA could not survive a heightened form of judicial scrutiny, which would require the government to show that DOMA serves a compelling interest.⁹ The shifting political dynamics underlying the issue of

3. See Nicholas Confessore & Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. TIMES, June 25, 2011, at A1 (reporting on the legalization of same-sex marriage by New York State through the legislative process); see also Adam Nagourney, *Court Strikes Down Ban on Gay Marriage in California*, N.Y. TIMES, Feb. 8, 2012, at A1 (reporting the Ninth Circuit's holding in *Perry v. Brown*, 134 Cal. Rptr. 3d 499 (2011), that invalidated an amendment to the California State Constitution that banned same-sex marriage).

4. See Kim Murphy, *Washington State Makes 7: Governor Signs Gay Marriage Law*, L.A. TIMES, Feb. 13, 2012, <http://www.latimesblogs.latimes.com/nationnow/2012/02/washington-governor-signs-law-legalizing-same-sex-marriage.html> (last visited May 15, 2013) (reporting the legalization of same-sex marriage in Washington, listing other states where same-sex marriage is legal, and giving the eventual date the Washington law goes into effect) (on file with the WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

5. See Annie Linskey, *O'Malley to Sign Gay Marriage Bill Today*, BALT. SUN, Mar. 1, 2012, <http://www.baltimoresun.com/news/maryland/politics/blog/bal-omalley-to-sign-samesex-marriage-bill-today-20120229,0,1317765.story> (last visited May 15, 2013) (reporting on the legalization of same-sex marriage in Maryland and the eventual date that the law goes into effect) (on file with the WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

6. See generally Defense of Marriage Act, 110 Stat. 2419 (1996).

7. See Letter from Eric H. Holder, Jr., U.S. Att'y Gen., to John A. Boehner, Speaker of the House (Feb. 23, 2011) [hereinafter Letter] (notifying Congress that the Department of Justice will no longer defend DOMA because it believes the law to be unconstitutional) (on file with the WASH. & LEE J. CIVIL RTS. & SOC. JUST.). See 1 U.S.C. § 7 ("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.").

8. See generally Brief for Defendant in Opposition of Motion to Dismiss, *Golinski v. Office of Pers. Mgmt.*, No. 10-00257 (N.D. Cal. Jan. 20, 2010).

9. See Letter, *supra* note 7.

same-sex marriage likely account for this dramatic development. But the legal terrain has shifted as well. Eight Years after DOMA was passed, no state had yet legalized same-sex marriage.¹⁰ For this reason, Section 2 of the law, which permits states to refuse to grant recognition to same-sex marriages performed outside their borders, had no immediate legal consequences when it was first adopted. As the number of states recognizing same-sex marriage grows, Section 2 may become increasingly central to the debate over the constitutionality of DOMA. At issue will be whether Congress has the power to abrogate state obligations under the Full Faith and Credit Clause of the Constitution and, if so, whether such congressional action must still be reconciled with the equal protection component of the Fifth Amendment.

The passage of DOMA was motivated by federal actors' concern that Hawaii was on the cusp of legalizing same-sex marriage.¹¹ The Full Faith and Credit Clause provides that "[f]ull faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."¹² Opponents of same-sex marriage feared that other states would be forced to confer full legal validity on same-sex marriages that took place in Hawaii, thus potentially effecting sweeping change in U.S. marriage law.¹³ Hoping to avoid this result, DOMA ensures that no state need give legal effect to same-sex unions performed in other states.¹⁴ DOMA was passed with overwhelming support in 1996.¹⁵

The constitutional authority on which Congress relied when enacting Section 2 of DOMA, stems from the Effects Clause, which immediately

10. See *Goodridge v. Dep't. of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (holding that the Massachusetts Constitution required the state to recognize same-sex marriage, thus making Massachusetts the first state in the union to do so).

11. See Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 *YALE L.J.* 1965, 1966 (1996) (stating that opponents of same-sex marriage feared states might have to recognize same-sex marriages in Hawaii without federal legislation).

12. U.S. CONST. art. IV, § 1, cl. 1.

13. See Kramer, *supra* note 11, at 1965–68 (explaining the recognition of out-of-state marriages in choice of law doctrine).

14. See 28 U.S.C. § 1738C (“No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship.”).

15. See *generally* Final Vote Results for Role Call 316, (Jul. 12, 1996, 2:21 PM) <http://clerk.house.gov/evs/1996/roll316.xml>; Roll Call Vote, (Sept. 10, 1996, 2:42 PM) http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=104&session=2&vote=00280 (on file with the WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

follows the Full Faith and Credit Clause.¹⁶ Under the Effects Clause, Congress “may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.”¹⁷ Together, these two clauses compose Section 1 of Article IV. According to the reasoning of DOMA’s drafters, the Effects Clause enables Congress to contract the extent of the faith and credit requirements imposed on the states by the Full Faith and Credit Clause, even to the point of eliminating them altogether.¹⁸ There is considerable debate over whether Congress does have such power and, if so, whether there are limits on its exercise.¹⁹

To say that Congress retains the power to prescribe the extent of sister-state effect under the Full Faith and Credit Clause is not to resolve the constitutionality of DOMA. Additionally, congressional action pursuant to its Article IV power must comport with the due process protections guaranteed by the Fifth Amendment.²⁰ When such protections are invoked, judicial review takes on varying levels of scrutiny. In times past, one could fairly assume that judicial review of DOMA would not take on the form of strict scrutiny.²¹ In light of doctrinal developments in the Supreme Court’s jurisprudence, it is now prudent to assume the opposite.²² The judiciary has become increasingly sensitive to laws that engender “the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”²³ To survive a constitutional challenge, Section 2 of DOMA may have to withstand the most searching form of judicial inquiry, one that requires the government to demonstrate a compelling interest advanced by its legislation.

It is the contention of this note that Section 2 of DOMA is a proper exercise of congressional power under Article IV, and that Section 2 could

16. U.S. CONST. art. IV, § 1, cl. 2.

17. *Id.*

18. See Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 933 (1998) (arguing against the power of Congress to enact DOMA under the Effects Clause).

19. See Gillian Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1473 (2007) (listing the scholarship exploring the constitutionality of DOMA).

20. See *id.* at 1523–31 (arguing that due process protections curb congressional power under the Effects Clause).

21. See *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) (applying rational review to laws that discriminated against homosexuals).

22. See generally *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003) (concluding that legislation that served to discriminate against homosexuals could not be cured by resorting to the state’s police power to regulate communal morals).

23. *Romer v. Evans*, 517 U.S. 620, 647 (1996).

survive strict judicial review. To reach this conclusion, I rely on a classic conception of Congress's power under the Exceptions Clause, and propose a novel way of characterizing the federal interest advanced by Section 2 of DOMA. I argue that the compelling interest furthered by Section 2 of DOMA consists in preserving state control and limiting federal control over questions of public morality. This justification stands apart from any substantive moral outcome, tethering itself instead to the procedural norms underlying federalism. This approach contains attractive elements for both supporters and critics of DOMA. On one hand, it ensures that the question of same-sex marriage will be resolved at the state level rather than by the federal judiciary. On the other hand, it counsels an abandonment of any reliance on moral arguments, thus excising a central argument against same-sex marriage from the constitutional debate.

Part I examines the historical underpinnings of the Full Faith and Credit Clause and attempts to justify a broad reading of congressional power over interstate relations under that same clause. Having already presumed that strict scrutiny would apply to judicial review of Section 2, Part II concludes that such review would be triggered by concerns over invidious discrimination, rather than by concerns over any supposed infringement of fundamental rights. Part III engages in equal protection analysis and proposes a new argument for how Section 2 could survive strict scrutiny.

Before going further, it may be worthwhile to pause to highlight what this note is not. It is not a substantive argument for the wisdom of DOMA. Nor is it an effort to engage in a debate over the merits of same-sex marriage. Instead, it is an investigation into a particular exercise of congressional power and the constitutional justifications underlying that exercise. Indeed, to conclude that Section 2 of DOMA is constitutional is not to conclude that DOMA ought to be the law of the land. Rather, it is to conclude that the demise of Section 2, if it is to come at all, must come at the hands of our congressional representatives.

II. Congress's Article IV Power

An adequate understanding of Congress's authority over interstate relations contemplated in Section 1 of Article IV requires a brief investigation into the drafting history of the text. As Justice Frankfurter cautioned, “[i]t is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution.”²⁴ We risk erroneous interpretation when we overlook the insights embedded in a historical account of the text. That is particularly true when, as in the case of Congress's power to contract the scope of faith and credit requirements, there is little judicial guidance.²⁵

The immediate predecessor to the Full Faith and Credit Clause was a similar provision in the Articles of Confederation.²⁶ Indeed, the new clause so closely paralleled the one contained in the Articles that there was little debate over its adoption at the Constitutional Convention.²⁷ Early courts interpreting the faith and credit requirement of the Articles viewed them as “chiefly intended to oblige each state to receive the records of another as full evidence of such acts and judicial proceedings.”²⁸ The “full faith and credit” of the Articles referred not to any general obligation states had to replicate the effect of an out-of-state act, record, or judgment, but rather to the evidentiary weight accorded to these out-of-state matters in sister-state courts.²⁹

Shortly after the Articles of Confederation were adopted, a committee appointed by the Continental Congress to examine the adequacy of the faith and credit provisions reported that there remained a need for explaining “the operation of the acts and judicial proceedings of the courts of one State

24. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Frankfurter, J., concurring) (contending that the Court's opinion overemphasized textualism at the expense of lessons that can be learned from practice).

25. See *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 273 n.18 (1980) (plurality opinion) (“[W]hile Congress clearly has the power to increase the measure of faith and credit that a State must accord to the laws or judgments of another State, there is at least some question whether Congress may cut back on the measure of faith and credit required by a decision of this Court.”).

26. See ARTICLES OF CONFEDERATION of 1781, art. IV, para. 3.

27. See Paul Engdahl, *The Classic Rule of Faith and Credit*, 118 YALE L.J. 1586, 1607 (2009) (describing the relationship between the faith and credit clause in the Articles and the Full Faith and Credit Clause in the Constitution).

28. *James v. Allen*, 1 Dall. 188, 191–92 (Pa. C.P. 1786).

29. See Engdahl, *supra* note 27, at 1589 (explaining the original meaning of the term “faith and credit”).

contravening those of the States in which they were asserted.”³⁰ The implication of the committee’s suggestion is clear: even after the adoption of these provisions, the effect of out-of-state acts or proceedings in different states remained an open question.

While it is true that James Madison would describe the faith and credit requirement of the Articles as “extremely indeterminate,”³¹ there is simply no basis for concluding that the framers of the Constitution’s Full Faith and Credit Clause ascribed a new meaning that departed from the common construction given to the faith and credit requirement of the Articles.³² The limited debate over the adoption of the Full Faith and Credit and Effects provisions bolsters this contention. The indomitable Gouverneur Morris offered a key early proposal that would have couched discretion over the extent of faith and credit in the federal legislative branch.³³ Still more, Morris advocated for language that actually would have required Congress to determine the effect given to statutes of other states. Inveterate Anti-federalist Edmund Randolph discerned in Morris’s proposal a federal power “so loose as to give it opportunities of usurping all the State powers.”³⁴

It was, perhaps, in response to Randolph’s concerns that Madison made his decisive proposal.³⁵ Madison recommended that full faith and credit “shall” be given, and that Congress “may” determine the scope of sister-state effect. The consequence of Madison’s proposal was to ensure that congressional silence on the question of sister-state effect would not preclude state enforcement of the faith and credit command while, at the same time, empowering Congress to prescribe sister-state effect at its discretion. So, while states would be compelled to grant full faith and credit, Congress was free to abrogate that requirement by promulgating “general laws.”³⁶

30. 21 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–89, at 894 (1912).

31. THE FEDERALIST NO. 42, *supra* note 1, at 326.

32. See Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201, 1206 (2009) (“[T]he only self-executing portion of the Clause was evidentiary in nature: it obliged states to admit sister-state records into evidence but did not mandate the substantive effect those records should have. The real significance of the Clause was the power it granted to Congress to specify that effect later.”).

33. See Engdahl, *supra* note 27, at 1623 (describing the developments of the Full Faith and Credit Clause at the Constitutional Convention).

34. Max Farrand, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 448 (1913).

35. See Metzger, *supra* note 19, at 1497 n.106 (explaining Madison’s role in the creation of the final version of the Full Faith and Credit Clause).

36. The “general laws” term likely means that particular states may not be

The Full Faith and Credit enabling statute of 1790 further confirms this understanding. The language of that early statute announces that authenticated records and judicial proceedings “shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken.”³⁷ There is no mention that public acts must be accorded. Furthermore, the statute clearly departs from the language in Article IV that appears to mandate “full” faith and credit, rather than “such faith and credit . . . as” that accorded in sister states. This indicates that Congress, by enacting the 1790 statute, deliberately chose to require less of states than the Full Faith and Credit Clause appears to obligate.³⁸ Naturally, the existence of such a choice implies the power to choose.

Early Supreme Court precedent also aligns with a robust conception of Congressional power over interstate faith and credit decisions. The disparity between the description of faith and credit in the Constitution (“full”) and the description of faith and credit in the enabling act (“such . . . as”) inevitably engendered confusion.³⁹ The Supreme Court accounted for this difference by holding that the enabling act, not the Full Faith and Credit Clause, sets the effect that states must give to out-of-state records and proceedings.⁴⁰ The point to emphasize here is that the effect of records and proceedings fell within the ambit of congressional discretion, and was not an unbending constitutional requirement. Writing for the Court in one leading case, *Mills v. Duryee*, Justice Story stated: “It is manifest, however, that the Constitution contemplated a power in congress to give a conclusive effect to [judgments].”⁴¹ In other words, Congress, not the Constitution, defined the scope of the effect an out-of-state judgment would have in other state courts. Therefore, the 1790 statute was a valid exercise of congressional power over interstate effects. Records and judicial proceedings would be given precisely the same effect across state lines, while

discriminated against when Congress acts under its Effects Clause power. *See id.* (“[G]eneral laws’ could be read as preventing measures targeting a specific state’s laws and judgments (akin to the Constitution’s prohibitions on bills of attainder), or alternatively, as preventing measures targeting a narrow category of laws and judgments for special treatment. The former seems the better reading.”).

37. Act of May 26, 1790, ch. XI, 1 Stat. 122.

38. *See* Engdahl, *supra* note 27, at 1632 (rationalizing the difference between the Constitution’s Full Faith and Credit Clause and the 1790 enabling act).

39. *Id.* at 1587.

40. *See* *Christmas v. Russell*, 72 U.S. (5 Wall.) 290, 301–02 (1866) (confirming that the Full Faith and Credit Clause empowered Congress to determine sister-state effect).

41. *See generally* *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 485 (1813).

recognition of state statutes would not be subject to any federal requirement.

The picture that emerges from this brief sketch of the historical record is one of broad, if not plenary, congressional power over interstate relations involving faith and credit requirements. Antiquity is the notion that faith and credit references the evidentiary value out-of-state matters must be given in a state's courts, and wisdom may counsel against relying on such iconoclastic legal arguments. Even deserting the original meaning of faith and credit would not, however, necessitate a similar retreat from a vigorous conception of congressional power over interstate relations. What 'faith and credit' constitutes tells us little about the extent of congressional control.

The modern rule of faith and credit not only misconstrues the original meaning of the text, but it diminishes the congressional role. According to this approach, the Full Faith and Credit Clause imposes an irreducible constitutional minimum—that is to say, a guarantee—of faith and credit among the states.⁴² So construed, the clause reads as an obligation directed against the states that Congress may not legislate away.⁴³ Consequently, the grant of authority to Congress in the Effects Clause could only encompass the power to expand state requirements.⁴⁴ Congress could not contract state obligations.⁴⁵ There is one further implication. If the Full Faith and Credit Clause is a constitutional mandate, the Supreme Court, not Congress, has "responsibility for the final arbitration of full faith and credit questions."⁴⁶ In terms of its understanding of the allocation of power shared among Congress, the states, and the courts, the modern approach, when juxtaposed against the classic approach, could hardly be more distinct.

Advocates of the modern view contend that the purpose underlying the Full Faith and Credit Clause, mainly to secure national unity, is best served by a rigid constitutional imperative.⁴⁷ While it is assuredly correct that the

42. See Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 257 (1992) (articulating the modern understanding of faith and credit).

43. *Id.*

44. See Letter from Laurence H. Tribe to Edward M. Kennedy, Senator (May 24, 1996), 142 CONG. REC. 13,359, 13,361 (1996) (arguing that Congress may not eliminate full faith and credit demands under the Effects Clause) (on file with the WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

45. *Id.*

46. *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 271–72 (1980).

47. See Laycock, *supra* note 42, at 270–72 (explaining the functional goals of the Full Faith and Credit Clause).

clause aims at national cohesion, it is simply wrong to assume that congressional control over sister-state effect cannot be squared with that purpose. Congress, unlike any other institution, is a national representative body and draws together all interested parties. The will of Congress is the will of the nation. Furthermore, the Effects Clause requires congressional enactments to be generally applicable, likely meaning that particular states could not be discriminated against.⁴⁸ Given these protections, it is difficult to envision a scenario where congressional prerogative would impair national unity.

It would also be presumptuous to assume that congressional authorization of interstate discrimination could not actually enhance interstate harmony.⁴⁹ When interstate strife is especially divisive, it may be wiser to channel passions through the legislative process presupposed by the congressional power to promulgate general laws that mandate the effect that certain state acts and judicial proceedings must carry across state lines. Congress is institutionally well-equipped to decide such a question. And, picking not quite at random, DOMA may be such a statute. Congress can account for the competing values at play and might readily conclude that letting states choose the extent to which they will recognize novel forms of marriage, rather than retaining the status quo or even forcing interstate recognition, is the best way to serve national unity.

There is an additional flaw in the modern conception's understanding of congressional power. Neither the history nor the text underlying the Effects Clause can support the peculiar result that would sanction congressional power to expand faith and credit requirements, but not contract them. The power to prescribe sister-state effect contemplates the power to prescribe no effect whatsoever.⁵⁰ In fact, the concern that Congress could achieve through the Effects Clause what it could not itself substantively legislate is greater where Congress expands faith and credit requirements than where Congress abrogates such requirements. Moreover, where Congress contracts faith and credit requirements, it "exalt[s] state

48. See Metzger, *supra* note 19, at 1494 (noting the ambiguity of the "general laws" requirement, but concluding that it references equal application among all states).

49. See *id.* at 1501 (explaining the cohesive effect that federally-sanctioned state discrimination can have).

50. See *id.* at 1495 ("Indeed, on its face this language would allow Congress to prescribe that some laws and judgments should be given no effect; after all, it is perfectly compatible with standard usage to reply 'none' or 'no effect' when asked to specify the effect something should have.").

power at the expense of national power.”⁵¹ As a procedural matter, it makes less sense to fret about congressional power when such power enhances the discretion of state sovereigns.⁵²

The foregoing discussion leads to the conclusion that Congress has broad latitude to alter the level of faith and credit that states must grant to sister-state acts, records, and proceedings. The Effects Clause constitutes a substantive grant of congressional power; one might even say it represents a “textually demonstrable commitment to a coordinate branch of government.”⁵³ Under this framework, Section 2 of DOMA would fall well within the domain of congressional power to prescribe the effect that out-of-state marriages have in other states.

But even plenary grants of congressional power have limits, and Article IV is not a freestanding clause, but is part of a larger constitutional framework that limits the manner in which Congress may exercise its power. That congressional action must have a nexus to an enumerated power is a necessary but not sufficient condition of a statute’s constitutionality.⁵⁴ A statute must additionally comport with individual protections guaranteed by the Bill of Rights.⁵⁵ Congress may not act so as to deprive citizens of their rights without due process of law.⁵⁶ So while Congress may act according to an enumerated power, it may not do so in a manner antithetical to individual rights protections. Congressional action pursuant to Article I power, therefore, may not run afoul of due process protections. Likewise, congressional action pursuant to Article IV power may not run afoul of due process protections. Having concluded that Congress has the power to contract the faith and credit requirement of Article IV, the question remains as to whether, by enacting Section 2 of

51. William Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 STAN. L. REV. 387, 406 (1983).

52. *See id.* (explaining that federal acts can affect the power of the states).

53. *Baker v. Carr*, 369 U.S. 186, 217 (1962) (stating that if the Effects Clause was construed as such a textual commitment, it could render disputes over congressional action pursuant to the clause non-justiciable political questions). In some sense, congressional power under Article IV mirrors congressional power over the jurisdiction of federal courts in Article III’s Exceptions Clause. *See* U.S. CONST. art. I, § 2, cl. 2. (“[T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”).

54. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 425 (1819) (explaining that federal power must stem from a grant of authority enumerated in the Constitution).

55. *See Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833) (stating that the protections in the Bill of Rights are against federal, not state or local, government).

56. *See* U.S. CONST. amend. V (creating the due process rights of citizens).

DOMA, Congress violated due process protections. The constitutionality of Section 2 of DOMA depends on its compatibility with the Fifth Amendment.

III. STRICT SCRUTINY: PULLING THE RIGHT TRIGGER

Section 3 of DOMA has already been found unconstitutional by two district courts.⁵⁷ One court found that the provision defining marriage as the union of one man and one woman could not bear scrutiny under the deferential rational basis test.⁵⁸ The other court, while invoking a heightened category of scrutiny, also hinted that the provision would fail under the rational basis test.⁵⁹ The rational basis test, of course, was meant to protect legislative initiatives, which is why these are curious results.⁶⁰ Perhaps strict scrutiny should apply to challenges to DOMA, if for no other reason, to protect the integrity of rational basis review. Whether or not strict scrutiny should apply to Section 2 of DOMA, it may now be appropriate to assume that strict scrutiny would apply.

Testing legislation under strict scrutiny requires the government to posit a compelling interest accomplished by the legislation in a fashion that narrowly achieves that interest.⁶¹ Strict scrutiny applies when at least one of two conditions are obtained: (1) government action infringes on a right “so rooted in the traditions and conscience of our people as to be ranked as fundamental,”⁶² or, (2) government denies the equal protection of its laws on the basis of a suspect classification.⁶³ Before one can assert that Section

57. See *Gill v. U.S. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 397 (D. Mass. 2010); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 1002 (N.D. Cal. 2012) (concluding that Section 3 of DOMA violates the equal protection of the laws).

58. See generally *Gill*, 699 F. Supp. 2d 374, 387 (applying the rational basis test to DOMA).

59. See generally *Golinski*, 824 F. Supp. 2d 966, 968 (applying a heightened form of judicial review, although not strict scrutiny).

60. See Richard Epstein, *The Constitutionality of Proposition 8*, 34 HARV. J. L. & PUB. POL’Y 879, 886 (2011) (explaining that rational basis review was intended to protect legislative action from being dismissed as impermissible deviations from traditional notions of common law).

61. See LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-6, at 1451–66 (2d. ed. 1988) (discussing the requirements of strict scrutiny).

62. *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

63. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (“The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does

2 of DOMA would survive strict scrutiny, one must determine what constitutional protection would trigger this most unforgiving form of judicial review.

Although the practice has not eluded criticism,⁶⁴ discovering substantive rights within the meaning of due process, and prohibiting unwarranted infringement of such rights, forms the basis of much of modern constitutional law.⁶⁵ When fundamental rights are implicated by government regulation, judicial inquiry takes the form of strict scrutiny. And while the judiciary decides what may constitute a fundamental right, the Court has “always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended.”⁶⁶ To curtail judicial discretion in this field, a fundamental right may fairly include only those rights “which are, objectively, ‘deeply rooted in [our] Nation’s history and tradition,’ and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’”⁶⁷ The right to marry, few would dispute, boasts these defining features. The Court has said as much.⁶⁸ If marriage is indeed a fundamental right, the reasoning goes, then prohibiting same-sex couples from marrying constitutes an infringement of a fundamental right that, when challenged, must be reviewed under strict scrutiny. Marriage may well be a fundamental right,

the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive [A]s this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.”).

64. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW*, 18–21, 43–72 (1980) (rejecting a series of justifications for judicial enforcement of fundamental values, and arguing that “substantive due process is a contradiction in terms—sort of like green pastel redness”).

65. See Lino Graglia, *Rule of Law: Our Constitution Faces Death by “Due Process”*, WALL ST. J., May 24, 2005, at A12 (noting that most of constitutional law is based either on notions of “due process” or “equal protection”).

66. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (suggesting that judicial deference should not impede the Court from conducting a more searching judicial inquiry when fundamental rights are at stake).

66. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)).

67. *Id.* at 720–21 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937)).

68. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (concluding that a state’s prohibition of interracial marriage violates the Fourteenth Amendment’s Due Process Clause); *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (“[O]ur past decisions make clear that the right to marry is of fundamental importance.”).

but the right to marry someone of the same sex—to put it mildly—is something of more recent vintage.⁶⁹ The question, properly posed, is not whether marriage is a fundamental right, but whether the right to marry a person of the same sex is a fundamental right. Defining the individual interest at stake at the most particularized level has the effect of filtering out transient causes and the “faddish slogan[s] of the cognoscenti” from that category of rights essential to our self-understanding as a people.⁷⁰ So framed, the right to participate in a state-recognized same-sex marriage would almost certainly not possess the historical pedigree required for a right to be deemed fundamental. Likely for this reason, courts are reluctant to elevate matters touching upon same-sex relationships to fundamental right status.⁷¹

The Constitution also requires that the federal government afford each citizen equal protection of the laws.⁷² Not all government distinctions or classifications violate equal protection. Axiomatic is the proposition that equal protection does not necessitate absolute equality or enshrine egalitarianism.⁷³ Rather, the core meaning of equal protection is that “persons similarly situated should be treated alike.”⁷⁴ Equal Protection analysis only brings strict scrutiny into play when a government makes distinctions that bear on a suspect classification.⁷⁵ There are four acknowledged criteria for determining whether a suspect class exists: (1) whether the class has been subject to a history of invidious discrimination, (2) whether the defining characteristics of the class pertain to a class member’s ability to contribute to society, (3) whether such characteristics are immutable, and (4) whether the class lacks political power.⁷⁶ Credible

69. See *Hernandez v. Robles*, 7 N.Y.3d 338, 361 (2006) (“The idea that same-sex marriage is even possible is a relatively new one. Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex.”).

70. *Grutter v. Bollinger*, 539 U.S. 306, 350 (2003) (Thomas, J., dissenting).

71. See *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. 1984) (declining to hold that homosexual conduct is a fundamental right).

72. See *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (concluding that the Fifth Amendment, while making no reference to equal protection, ensures equal protection through the Due Process Clause).

73. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (expressing that equal protection is not absolute).

74. *Id.*

75. See *TRIBE*, *supra* note 61 (discussing strict scrutiny and suspect classifications).

76. See *id.* at 1616 (“Homosexuality should thus be added—and openly—to the list of classifications that trigger increased judicial solicitude.”).

arguments can be constructed that would either include or exclude homosexuals from characterization as a suspect class on these bases. Because homosexuality is associated with a history of discrimination, and because no one can seriously contend that homosexuality limits an individual's capacity to contribute to our society, most arguments would likely focus on the immutability of same-sex attraction, and the political power of homosexual Americans. Courts have found in the past that homosexuals do not constitute a suspect class.⁷⁷

This brief overview could give one pause before asserting that strict scrutiny must apply to classifications drawn by DOMA. Having accepted uncontested, however, that strict scrutiny does in fact apply, the choice remains between which route should be taken to reach that result. For reasons of both strategy and political theory, advocates of same-sex marriage are on stronger footing on equal protection grounds.

Creating new constitutional rights is tricky business. It is one thing to deploy new permutations of older understandings of our rights in the service of expanding familiar constitutional protections. It is quite another matter to invoke the indeterminacy of substantive due process to expand the sphere of constitutional rights at the expense of political choice. Courts that wade through the murky depths of substantive due process may find their perception so obscured that the values which courts discern can only bear striking resemblance to the values of the judiciary itself. Such a process contains the potential to be "so flagrantly elitist and undemocratic that it should be dismissed forthwith."⁷⁸ In that vein, Justice White, dissenting in *Moore v. City of East Cleveland*, warned that when the Court creates a new constitutional right without a clear textual command it "comes nearest to illegitimacy."⁷⁹ White's point echoes an earlier admonition by Justice Jackson:

The burden should rest heavily upon one who would persuade us to use the due process clause to strike down a substantive law or ordinance . . . Invalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable. Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing

77. See *Bowers v. Hardwick*, 478 U.S. 186, 195 (1986) (declining to classify distinctions drawn on the basis of sexual orientation as suspect); *Dronenburg v. Zech*, 741 F.2d 1388, 1396 (D.C. 1984) (concluding that the military may discharge service members for engaging in homosexual conduct).

78. ELY, *supra* note 64, at 59.

79. *Moore v. City of East Cleveland*, 431 U.S. 494, 544 (1977).

with the subject at hand. It merely means that the prohibition or regulation must have a broader impact . . . Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.⁸⁰

All of this is to say that the equal protection route offers a less unsettling means to reach strict scrutiny than does the substantive due process route. To say that same-sex marriage is a fundamental right, to say that it holds a privileged place over and above far more familiar rights, would come as news to a sizable portion of the country. To say, on the other hand, that marriage law should conform to the principle of equal protection, an elemental norm of our constitutional order, would not ring so discordant in the ear of the listener attuned to the Court's jurisprudence. For that reason, the equal protection clause, not the due process clause, could plausibly trigger strict scrutiny. That is the stronger argument.

Before a government regulation may be upheld using strict scrutiny under equal protection analysis, the government has the burden of showing that the discriminatory law in question is necessary to serve a compelling government interest.⁸¹ Scholars have frequently noted the formulation that strict judicial review is "strict in theory and fatal in fact."⁸² Understandably then, the question of what level of scrutiny must be applied is of such gravity that it pulls much legal debate into its orbit. But familiarity breeds laxity, and the facile maxim that strict scrutiny effectively ends the matter can cause us to overlook what is really the key question: whether a law can withstand the level of scrutiny that is applied to it. The remainder of this note proposes a potential argument for how the Section 2 of DOMA can indeed survive strict scrutiny.

80. *Railway Express Co. v. New York*, 336 U.S. 106, 112–13 (1949).

81. *See* TRIBE, *supra* note 61 (explaining the requirements that must be met by legislation under strict scrutiny).

82. *See* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (noting that laws reviewed under strict scrutiny are likely to be struck down). *But see* *Korematsu v. United States*, 323 U.S. 214 (1944) (finding that internment of a particular race of citizens during wartime survived strict scrutiny); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006) (noting that, as an empirical matter, laws have frequently survived strict scrutiny).

IV. DOMA'S COMPELLING INTEREST

Anterior to the question of whether or not a government interest is compelling, is the question of what interest is actually in play. Congress proffered four distinct interests achieved by DOMA: (1) fostering responsible procreative activity, (2) promoting the traditional conception of marriage, (3) defending traditional moral norms, and (4) preserving scarce government resources.⁸³ A House Judiciary Committee report lamenting the “orchestrated assault being waged against traditional heterosexual marriage” was somewhat less discreet.⁸⁴ Whether or not one would consider these interests to be compelling, they fail to capture the federalist implications simmering beneath the surface of the debate. They also rely on an expansive view of the role for the federal government in the regulation of marriage. The interests identified reach the question of whether or not federally-recognized marriages should be limited to one man and one woman, but they do not extend their reach to the pertinent question of this analysis: whether the federal government may favor the marital arrangements of one state over another.

And, favoritism is precisely what is at issue here. Heterosexual marriages, with a few exceptions on the margins, are on equal footing from state to state.⁸⁵ When states begin to confer marital status upon same-sex couples and the federal government not only declines to require, but actively alters the law to eliminate any potential requirement of faith and credit, the government engages in discrimination. The government, in effect, carves out an exception to a general constitutional principle in order to release states opposed to same-sex marriage from any potential obligation to recognize such marriages.

For reasons already outlined, Congress's dominion over faith and credit requirements permits just this sort of thing. When Congress draws distinctions in the process of acting upon that power, however, it must do so in a way that satisfies the demands of equal protection inherent in the Fifth Amendment.⁸⁶ By pointing out same-sex unions as relationships that need

83. See *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 997–98 (N.D. Cal. 2012) (listing, only to reject as insufficient, the proffered government interests behind DOMA).

84. H.R. Rep. No. 104-664 at 2–3 (1996).

85. See EUGENE SCOLES ET AL., *CONFLICTS OF LAW*, 557–95 (4th ed. 2004) (explaining faith and credit given to marriage across state lines, and how certain conflicts over state laws can arise in the context of domestic relations).

86. See Geoffrey Stone, *Deconstructing DOMA*, HUFFINGTON POST (July 20, 2010, 12:33 PM), www.huffingtonpost.com/geoffrey-r-stone/deconstructing-domab652749.html

not be recognized as valid by other states, Congress created a regime where same-sex couples who obtained legal marriage licenses in one state could be discriminated against in a different state. The constitutional obstacle arises not because Congress contracted the scope of the Full Faith and Credit requirement, but because it did so in a manner that legitimates discrimination against legally-wedded same-sex couples.

The very term “discrimination” conjures up ugly chapters in American history, and so is etched with an indelibly negative connotation. Perhaps for that reason, much modern democratic discourse is stunted when one side of the argument invokes the haunting specter of discrimination lurking beneath our policy judgments. But that is not to say that discriminatory government action is impermissible simply by virtue of its discriminatory character. The intelligibility of a great deal of government action hinges on the permissibility of certain forms of discrimination.⁸⁷ The question is not so much whether government has engaged in discrimination, but whether government discrimination is repugnant to the Constitution.⁸⁸ Legitimate discrimination should create the impression that government is acting according to sound judgment (which, of course, is the original and positive connotation that once attached to the term).

Having assumed at the outset that strict scrutiny would apply to the distinction between same-sex and opposite-sex marriages drawn by DOMA, only a compelling government interest could enable the law to withstand a constitutional challenge. To find a compelling government interest, one must look to DOMA not at the time of its adoption, but DOMA today, keeping in mind the developments that have occurred since 1996. That new rationales constructed to support the constitutionality of DOMA will inevitably be post-hoc justifications is not problematic so long as the new rationales are connected to the classification as originally drawn.⁸⁹

It may be time to stop pointing to traditional moral norms of conduct to justify government action. Not because such arguments have lost their potency, but because they have been met by an increasingly skeptical judicial eye. Arguments asserting the government’s interest in cultivating a

(noting that government makes numerous distinctions with great frequency, and that only a small percentage of them actually give rise to an equal protection claim).

87. *See id.*

88. *See id.*

89. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1002 (N.D. Cal. 2010) (explaining that government may put forward justifications for legislation that may not have been the original motivation underlying a statute).

particular moral order are no longer in vogue, and have not garnered the support of a majority of the Supreme Court in recent years.⁹⁰ What Robert Bork derisively terms the “autonomy agenda” rules the day. And, as that agenda becomes enshrined in the Constitution, the sphere of political choice wanes.⁹¹ Scant indeed is the evidence that presages reversal of this trend.

The hubristic dismissal of arguments resting on tradition or morality may be irksome to some, but it is not necessarily the death knell for DOMA. While there can be little doubt that the intent behind DOMA was to forestall the advent of same-sex marriage across the country and to preserve what Congress perceived as the natural rather than socially-constructed definition of marriage, there are sound interests DOMA achieves that implicate the moral component of the debate, but only indirectly. Legislation may vindicate compelling interests apart from public morality even if the legislation incidentally or even substantially has the effect (which may even be intentional) of advancing public morality.

There is a basic difference between enacting a law to preserve a moral understanding and enacting a law to enable a jurisdiction to preserve a moral understanding if it chooses to do so. If, for example, every state in the nation elected to legalize same-sex marriage, there would be nothing in DOMA that could ultimately prevent it.⁹² Additionally, DOMA does not pose any obstacle to states that, while perhaps not willing to allow same-sex marriage, wish to give full legal recognition to same-sex marriages performed in other states. Viewed in this context, a compelling government interest emerges quite apart from bolstering a government-sanctioned moral code: DOMA enables each state to safeguard its own moral vision and enables those states disinclined to confer social legitimacy on same-sex marriage (either by creating a right to same-sex marriage or by providing benefits incident to marital status) to refrain from doing so.

In a nation as expansive and as increasingly diverse as the United States, morality is defined at increasingly localized levels. The federalist structure created by the Constitution anticipates a broad range of

90. See *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003) (concluding that legislation that served to discriminate against homosexuals could not be cured by resorting to the state’s police power to regulate communal morals).

91. See Robert H. Bork, *The Necessary Amendment*, FIRST THINGS, Aug.–Sept. 2004, at 145, available at <http://www.firstthings.com/article/2007/01/the-necessary-amendment--27> (arguing that the judiciary will inevitably find a right to same-sex marriage given that it views exercises in human autonomy as fundamental rights).

92. See 28 U.S.C. § 1738C (2000) (employing language that derogates from obligation rather than adding to obligation).

permissible regulatory regimes across the states. It is the mark of our constitutional system that different states, our laboratories of democracy, as Justice Brandeis called them, may experiment with a host of legal and institutional arrangements. On that premise, a state should not be compelled to allow another state's experimentation to run its course within its own borders. Admittedly, giving full faith and credit to same-sex marriages performed out-of-state is not the same as forcing a state itself to recognize same-sex marriage. But it would involve the state in conferring the tangible benefits that marital status affords. That alone may be enough to dilute the moral message a state seeks to convey by withholding its imprimatur from same-sex marriage.

Critics of this justification may contend that the federal government has taken sides in the moral argument, clearly favoring states opposed to same-sex marriage.⁹³ But moral neutrality may not even be possible in the situation faced here. It is one thing to assert that the federal government should be neutral, although it is worth noting that that itself is a non-neutral moral claim.⁹⁴ Consider though, that if the vast majority of states were forced to recognize the same-sex marriages taking place in the states that permit them, such sweeping change in marriage law would render the federal government's failure to act as it did when it passed DOMA a tacit admission that it supported the jurisdictions effecting the change. Indeed, when the federal government is confronted with the options of either safeguarding or rendering vulnerable a particular moral understanding, it is no criticism at all to say that the government has advanced the moral views of one side of the argument. It can do no other.

In the debate over the nature of marriage, where passions run high and disagreements run deep, moral neutrality is simply untenable. In the American context, politics, as the platitude goes, is played within the 40-yard lines.⁹⁵ This means that Americans, for the most part, share a vision of what we as a people aspire to achieve. That compatibility is especially forceful in the economic realm, where disagreements arise over the proper means to obtaining certain ends, and the ends themselves are always

93. See Andrew Koppelman, *DOMA, Romer, and Rationality*, 58 *DRAKE L. REV.* 923, 934 (2010) (viewing DOMA as intended to advance the moral views of government).

94. See Robert George, *THE CLASH OF THE ORTHODOXIES: LAW, RELIGION, AND MORALITY IN CRISIS* (2001) (arguing that moral neutrality within the same-sex marriage debate is wholly implausible).

95. See Charles Krauthammer, *A Vote for the 40-yard Lines*, *WASH. POST*, Nov. 5, 2010, at A18 (arguing that ideological disparities in the American context are relatively limited).

agreed-upon by disputants in the political debate. Because social issues, such as same-sex marriage, frequently provoke disagreement not only over the means that should be employed to achieve a just society but the very vision of a just society itself, public debate is destined to be divisive.

The debate over same-sex marriage entails more than wrangling over the allocation of economic benefits or semantic squabbles over the definition of marriage. To suggest otherwise is to belittle both sides of the argument. What matters to same-sex marriage advocates is the social legitimacy that the marital relation confers on its participants. What matters is how the rest of society views the same-sex relationship. The question of same-sex marriage can be readily separated from the issue of the tangible benefits granted by government. If the debate remained at the superficial level of economic benefits, consensus could be reached if states offered civil unions. Both proponents and opponents of same-sex marriage recognize, however, that the marital relationship confers intangible benefits as well. When a state bestows the title of marriage to same-sex couples, it is doing more than granting benefits; it is making a moral claim that a same-sex relationship is of equal value to society as an opposite-sex relationship. To borrow from Charles Fried: “To the extent it’s something other than a collection of benefits, calling it ‘marriage’ represents a sign of society’s approval, society’s ‘coming to the party’ [in celebration of the union].”⁹⁶ Massachusetts may have joined the party some time ago, but that is no reason to require Pennsylvania to attend. Where there is ongoing debate over the very nature of marriage itself, an issue that cuts to the center of society’s moral fabric, the mundane matters of faith and credit are drawn into deeper questions reaching our very self-understanding as a people.

To see how a state’s prohibition of same-sex marriage can be undercut if it were required to provide full faith and credit to out-of-state same-sex marriages, consider the very plausible following illustration: After a long and hard-fought debate, state *X* legalizes same-sex marriage. State *Y*, which shares a border with state *X*, prohibits same-sex marriage. The popular governor of state *Y* (which does not have term limits for its elected officials) has repeatedly declared that same-sex marriage will never be legalized “as long as I’m around.” Excited by the news about state *X* and realizing that prospects for same-sex marriage in state *Y* are bleak, same-sex couples in state *Y* travel to state *X*, get married, and return home to state *Y*.

96. David Lat, *The Breyer-Fried Discussion: Some Highlights (Part 2)*, ABOVE THE LAW (Dec. 13, 2006, 11:50 AM), <http://abovethelaw.com/2006/12/the-breyer-fried-discussion-some-highlights-part-2/> (on file with the WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

In one sense, nothing has changed. State *Y*'s choice to prohibit same-sex marriage remains intact. The prohibition is still law, and marriage licenses are still not granted to same-sex couples. The same-sex couples that traveled to state *X* return, and the lives of the citizens of state *Y* continue as usual. In another subtler sense, very much has changed. Slowly, as questions over the rights of these newly-married same-sex couples emerge in different legal contexts, state *Y* begins to grant marital benefits, once the exclusive enjoyment of opposite-sex couples, to same-sex couples. What, then, has become of state *Y*'s law against same-sex marriage? Yes, it may still exist on paper, but many of the modes in which that prohibition once expressed itself have become unavailable.

The situation is not unique to same-sex marriage. The same principles would apply to a young, wily couple not yet old enough to legally marry in their home state.⁹⁷ If they have the gumption to travel across state lines, wed, and return to their home state, the home state's age requirements could easily be evaded unless the home state was somehow empowered to refuse to recognize the out-of-state marriage. Here, as in the case of same-sex marriage, we see that the law is a teacher, and the lessons that the law articulates become less clear when its instruction can largely be circumvented. The moral choices of one community thus begin to dictate the permissible moral choices of a different community.

The federal government's interest in these circumstances is clear. In a clash of moral visions where government neutrality is untenable, the government has an interest in ensuring that one state's moral choices remain undisturbed by another state's moral choices. To reiterate, the difference between enacting a law to preserve a moral understanding and enacting a law to enable a jurisdiction to preserve a moral understanding, if it chooses to do so, is constitutionally significant. That such an interest may be a post-hoc justification that emerges only after legislation is adopted, rather than contemporaneous with its adoption, poses no obstacle when defending against an equal protection claim.⁹⁸

The question that remains is whether such an interest can fairly fall under the category of interests that are compelling. That question must be addressed in light of the structural features of the Constitution. Federalist implications underlying the Full Faith and Credit Clause are frequently

97. See Kramer, *supra* note 11, at 1980–92 (explaining choice of law principles when a state may have to recognize a marriage that could not have been validly performed within its own borders).

98. See Perry, *supra* note 89 (explaining that new government interests may be proffered to justify legislation).

overlooked because federalism is most often conceived of vertically.⁹⁹ That is to say, federalism empowers the states to cultivate an identity separate from the federal government. The federal government may not coerce or commandeer the states to effectuate its own ends.¹⁰⁰ When a state enters the union, it surrenders certain features of sovereignty to the federal government, but it retains broad powers to shape its own identity.¹⁰¹ The principles of federalism require the maintenance of a dual sovereignty, by which the states and federal government occupy separate domains.¹⁰² Residual state sovereignty would be much less meaningful if state choices were subject to internecine attacks by fellow states. Inherent in federalism, then, is not only vertical symbiosis between the federal government and the states, but also horizontal comity among the states. Vertical federalism presupposes horizontal federalism.

Just as federalism can be divided according to its different effects, so too can it be divided according to the goals that it serves. Creation of a dual sovereign, which requires power-sharing, as opposed to power-concentration, adds a layer of protection for the individual liberty of citizens. Alexander Hamilton, writing in *Federalist No. 28*, notes that the dual sovereignty scheme would cause both sovereigns to “exercise authority to the citizens’ benefit: If their rights are invaded by either, they can make use of the other as the instrument of redress.”¹⁰³ Consonant with this theme was Justice Kennedy’s recent paean to federalism:

Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. “State sovereignty is not just an end in itself: ‘Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power’” . . . Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times

99. See Allen Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 2 (2008) (discussing federalism’s under-theorized components that relate to the relationships among states).

100. See *Printz v. U.S.*, 521 U.S. 898, 935 (1997) (holding that the federal government may not require state officials to administer federal programs); see also *South Dakota v. Dole*, 483 U.S. 203, 210 (1987) (discussing that the federal government may not coerce states into adopting federal policy objectives).

101. See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 48 (1996) (affirming the concept of residual state sovereignty).

102. See *The Federalist*, *supra* note 1, at 201 (“The proposed Constitution . . . is, in strictness, neither a national nor a federal Constitution, but a composition of both.”).

103. *Id.* at 195.

without having to rely solely upon the political processes that control a remote central power.¹⁰⁴

Federalism serves to enhance individual liberty protections. Creating a second, more localized sovereign apart from the centralized federal government offers citizens a better chance to be heard in the social discourse. This benefit correlates with vertical federalism. Horizontal federalism carries its advantages as well. States will be able to address public policy issues with creativity and in accordance with their citizens' preferences, free from any undue intrusion on the part of outside states.¹⁰⁵ Horizontal federalism throws states into a nation-wide competition with one another that can benefit all citizens throughout the country by offering a variety of legal regimes under which a citizen may decide to live.¹⁰⁶

To say that the states may shape their own identities tells us little about the degree to which they may do so. To say that the states need not conform to a homogenized national morality tells us little about the degree to which morality may become regionalized. Indeed, proffering state diversity as a compelling government interest refers back to the original question of the purpose of the Full Faith and Credit Clause. If, however, the framers designed the Full Faith and Credit Clause to encourage national unity, the question remains as to whether there is a compelling government interest in eliminating requirements for which the Constitution may call.

The answer, of course, lies in Congress's unique ability, as a national representative body, to determine what, in fact, serves the united national interest. Congress, not the courts, sets the quantum of the faith and credit that the Constitution requires.¹⁰⁷ We must assume simply by virtue of the fact that Congress qua Congress has acted, that the united national interest has been served. If, after legislative bouts, certain state factions emerge victorious over other state factions, it will have been because the Congress has judged that it ought to be so. That judgment is the judgment of the nation speaking with one voice.

By enacting DOMA, Congress has chosen to reduce faith and credit requirements, thereby expanding the power of the states to foster separate moral identities beyond any default rule of the Constitution. This result is

104. *Bond v. U.S.*, 131 S. Ct. 2355, 2364 (U.S. 2011) (citations omitted).

105. *See Erbsen, supra* note 99, at 19 (explaining the benefits of horizontal federalism).

106. *See id.* (explaining further the benefits of horizontal federalism).

107. *See Engdahl, supra* note 27, at 1659 ("Efforts to moderate and accommodate a free people's fiercely held differences is what statecraft and political dialogue—not judicial fiat—are for.").

not a contradiction of the principles of the Full Faith and Credit Clause but a possibility embedded in the Effects Clause.¹⁰⁸ In other words, the Effects Clause gives the federal government the power to expand the permissible range of state sovereignty vis-à-vis faith and credit questions. DOMA, then, is an exercise in what could be termed fortified federalism.

Having identified a cognizable legal interest in DOMA, and having demonstrated that that interest is a subspecies of federalism, it remains to explain what is compelling about that interest. An interest, however legitimate, will not overcome an equal protection challenge under strict scrutiny unless it is compelling.¹⁰⁹ Federalism, of course, is not a policy preference; it is constitutionally prescribed.¹¹⁰ Here, the government need not rely on arguments about the importance of morality and tradition in society but may rely on this basic feature of our constitutional system. Rather than draw from policy concerns extrinsic to the Constitution, the compelling interest of DOMA exists within the framework ordained by the Constitution itself.

To clarify the interest at stake, consider the primary justifications underlying federalism. The creation of a dual sovereign, rather than a single sovereign, permits states to compete with one another in a manner that ultimately benefits citizens of the country.¹¹¹ A state can determine for itself the goods and services it affords to citizens and the tax rate at which it does so in order to induce citizens to flock to the state and to enhance economic growth.¹¹² The same principle applies to the question of marriage. A same-sex couple residing in a state that does not recognize same-sex marriage may deem the guarantee of marriage important enough to leave their home state and move to the state that does recognize same-sex marriage. It would be difficult to imagine citizens leaving a state solely because it permits same-sex marriage. There are, then, potential economic costs that result when a state refuses to grant marriage licenses to same-sex couples. Same-sex couples may simply vote with their feet, leaving their

108. See Metzger, *supra* note 19, at 1506 (explaining the procedural protections of federalism).

109. See TRIBE, *supra* note 61 (explaining the requirements legislation must meet under strict scrutiny).

110. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 567 (1985) (Powell, J., dissenting) (arguing that the principles of federalism should not be subjected to the whim of federal and state actors, but rather, should be protected by the Court).

111. See Clayton Gillete, *Fiscal Federalism and the Use of Municipal Bond Proceeds*, 58 N.Y.U. L. Rev. 1030, 1031–33 (1983) (explaining the economic incentives created by federalism).

112. See *id.*

home state for seemingly more broad-minded communities. States that refuse to recognize same-sex marriage do so in spite of the potential economic boon that it could provide. To these states, the moral conviction of the community trumps any economic incentive. These distinctions among states are the stuff of federalism.

These interests touch upon the very core of our constitutional structure and, in that regard, should be accorded even greater weight than what is given to worthy policy objectives. For example, the Court has held that achieving the educational benefits that stem from racial diversity is a compelling interest, at least in the classroom setting, and can be invoked to defeat an equal protection claim.¹¹³ As noble as that sort of interest might be, it does not strike at the heart of our constitutional system in the same way that federalism concerns do. Whether or not affirmative action programs will be adopted is a matter fit for public debate. There can be no discussion, however, about whether or not government officials should or should not adhere to the principles of federalism, because the role of the states in our Republic is, to use Justice Powell's attractive quip, "a matter of constitutional law, not of legislative grace."¹¹⁴

Rather than viewing federalism and the principles of full faith and credit as competing values, they should be viewed instead as complementary values, both prerequisites to a properly functioning political system. There exists a permissible spectrum within our constitutional framework that neither gives undue weight to federalism nor to full faith and credit. DOMA amply fits within that spectrum. DOMA simply permits states to exercise their autonomy to resist novel forms of marriage. DOMA bolsters the status quo as it existed throughout the history of the Republic. There is nothing radical or extreme about that. The motif of federalism, even the fortified federalism that results from state contraction of faith and credit requirements, supports the ultimate and indeed compelling government interest in ensuring that morality remains regionally defined.

113. See *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding that a state-run university system may consider the racial identity of applicants because it serves the compelling government interest of achieving diversity in the classroom).

114. *Garcia*, 469 U.S. at 567.

A. NARROW TAILORING

The presence of a compelling interest does not suffice to defeat an equal protection claim analyzed under strict scrutiny. Courts require legislatures to legislate with efficiency. To this end, courts will not uphold an equal protection claim if the law under scrutiny, in relation to the interest advanced, is either overinclusive or underinclusive.¹¹⁵ A law is overinclusive if it curtails legitimate conduct that, if left unperturbed by the law, would not undermine the government interest at stake.¹¹⁶ Likewise, a law is underinclusive if it fails to address conduct that undermines the government interest at stake.¹¹⁷ DOMA furthers the government's compelling interest in retaining the structures of federalism that allow states to forge their own moral identities. It achieves this interest by immunizing one state's conception of marriage from contrary conceptions espoused by other states. We must ask whether DOMA actually achieves that intended aim with a precise fit between the means utilized and the objective sought.

On its very terms, Section 2 of DOMA reads, "No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . ." ¹¹⁸ DOMA forbids nothing, but instead affirmatively grants states the discretion to choose not to recognize a same-sex marriage performed out of state. In this respect, DOMA is far less intrusive than a national rule of faith and credit that would require non-recognition of out-of-state marriages. Moreover, there is debate about whether, even in the absence of a congressionally-sanctioned abrogation of faith and credit, states could refuse to recognize out-of-state marriages on the premise that to do so would violate that state's public policy.¹¹⁹ While DOMA is unprecedented in the sense that Congress had never before contracted faith and credit requirements, Section 2 does nothing more than give states a power that

115. See TRIBE, *supra* note 61, at 1446–50 (explaining the meaning of narrow tailoring).

116. See *id.* (explaining overinclusiveness).

117. See *id.* (explaining underinclusiveness).

118. The Defense of Marriage Act, 28 U.S.C. 293 (1996).

119. See generally Kramer, *supra* note 11 (claiming that the public policy exception permits states to nullify faith and credit requirements if doing so would violate "some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal").

they may have already possessed through different means.¹²⁰ Such is the modesty of the faith and credit provision.

Of course, DOMA does not speak to civil unions. The very concept of a civil union did not creep into the mainstream until after DOMA was passed. A civil union is a state-specific guarantee of the economic benefits that heterosexual marriages are given. Civil unions are only valid in the state in which they are formed and cannot be taken across state lines (although a state may choose to grant benefits to couples that formed civil unions elsewhere).¹²¹ This raises the specter of underinclusiveness. After all, many claim that civil unions are simply marriage by another name, or a halfway house on the way to marriage, so close to marriage that their recognition dilutes the moral message sent by reserving marriage to opposite-sex relationships. According to proponents of same-sex marriage, civil unions, while a mark of progress, should not temper efforts to secure marriage rights in the fullest sense of the term. To call a same-sex union a “marriage” is profoundly forceful symbolism. If same-sex couples can flourish in one of the bedrock institutions of the society, then any moral stigma attached to same-sex relations would, in time, vanish. It is that very possibility that offers justification for the federal government’s concern over same-sex marriage but not civil unions. To take the step from civil unions to marriage is to confer legitimacy, to align the force of social convention behind same-sex couples. That is precisely what states that still resist same-sex marriage seek to avoid. Both opponents and proponents of same-sex marriage continue to acknowledge a distinction between civil unions and same-sex marriage. That DOMA tacitly does as well does not render the law underinclusive.

DOMA represents a blanket exemption to the Full Faith and Credit Clause.¹²² Government distinctions cannot be overinclusive. That is to say, distinctions cannot be drawn so as to burden groups or individuals the burdening of which does not serve the government interest achieved by the distinction. A state’s definition of marriage falls within the ambit of the interests that DOMA seeks to advance. Here, terminology is of crucial importance. To alter the definition of marriage is to alter the moral meaning rooted in marriage itself. Yet, acknowledging the same-sex marriages of

120. *Id.*

121. See EUGENE SCOLES ET AL., CONFLICTS OF LAW 557–95 (4th ed. 2004) (explaining faith and credit given to novel domestic partnerships across state lines, and how certain conflicts over state laws can arise in the context of domestic relations).

122. See Koppelman, *supra* note 18, at 939 (calling Section 2 of DOMA a “blanket non-recognition” rule).

other states can actually serve to reinforce the state's moral understanding of marriage: it will acknowledge those same-sex marriages that it must in order to adhere to the Constitution, but it will steadfastly resist endorsing such marriages itself. Beyond the problem created by enabling same-sex couples to travel across borders in order to get married, only to return to their home state and enjoy the benefits of full marital rights, is the issue of whether requiring the state to acknowledge just one same-sex marriage would be sufficient to muddy the moral message a state seeks to convey by confining marriage to its traditional boundaries.

Then again, it may be prudent to ask how clear the moral message has to be anyway. Missouri would not be any less Missouri if it acknowledged same-sex marriages that take place in Iowa, composing as they do a tiny minority of all marriages throughout the state and the country. When, however, there exists a strong enough incentive for a large number of same-sex couples to deliberately travel to another state for the sole purpose of getting married only to return to their home state, there is great potential that the effect would be similar to what would occur if Missouri itself had enacted legislation recognizing same-sex marriage. There would then be a critical mass of same-sex marriages that would lead citizens to deduce that same-sex marriage, being of equal legal validity to traditional marriage, would be of equal moral validity as well.

DOMA does not so much as dictate a rule to be followed.¹²³ It offers an avenue for states to follow if such states wish to continue to recognize only those marriages congenial to the state's moral views. It does not impose. It proposes.

B. LEAST RESTRICTIVE MEANS

The final requirement that must be met prior to upholding a law under strict scrutiny is showing that the law employs the least restrictive means toward achieving the government interest in question.¹²⁴ One common misunderstanding is that DOMA covers all same-sex marriages, and, in a single stroke, snatches away any cross-state legitimacy that these marriages may have otherwise enjoyed. As we have repeatedly seen, DOMA does not compel states to do or change anything. The federal government does not

123. See generally William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 STAN. L. REV. 1371 (2012) (showing that DOMA does not dictate states to adopt particular choice of law rules).

124. See TRIBE, *supra* note 61 (explaining the requirements of strict scrutiny).

retain the power to regulate morality.¹²⁵ It would be mistaken to argue that the federal government has a moral interest in the very definition of marriage because such an interest is reserved to the states. The interest of the federal government, while related to the moral concerns implicated in the same-sex marriage debate, is in fostering the federalist structures designed by our Constitution which enable cross-state competition and allow states to forge unique identities. That the morality of a community may form an integral part of a state's identity is no objection.

The escape-hatch offered by DOMA's limitation of faith and credit requisites is not meant to cultivate public morality per se but to preserve a state's prerogative to choose for itself what arrangements deserve the label of marriage. That prerogative can only be fully preserved by the blanket exception established in DOMA. Note also that this argument holds even if more jurisdictions were to recognize same-sex marriage within the U.S. Even if forty-nine states came to legalize same-sex marriage, this argument would still hold. The states are not a conglomerate but separate jurisdictions with separate concerns, aspirations and moral understandings.¹²⁶ DOMA retains that view of the states in our constitutional system and nothing more. DOMA is no more restrictive than it need be.

C. JETTISONING MORAL PRETENSION

The foregoing analysis, then, proposes a novel argument that, if applied, would uphold the constitutionality of Section 2 of DOMA even under strict scrutiny, the grim reaper of constitutional jurisprudence. Rather than resting on moral assumptions that are no longer widely shared, the argument rests on a classic conception of congressional power over interstate relations, and how that conception squares with a chief rationale of federalism, that is, keeping moral choices at the state, rather than federal, level.

The debate over same-sex marriage circles around the intangible benefits that flow from society's legal recognition of same-sex marriage. It quite obviously does not concern the tangible benefits of marriage, which may easily be conferred through civil unions. Legal recognition creates an aura of legitimacy. Relationships once thought aberrant would suddenly

125. See *U.S. v. Comstock*, 130 S. Ct. 1949, 1974 (2010) (Thomas, J., dissenting) (observing that the federal government may not exercise general police powers).

126. See Erbsen, *supra* note 99, at 22 (commenting on the practical meaning of sovereignty).

become worthy of honor, respect, and celebration. In time, those who once harbored objections to these relationships would slowly accept that they have lost the debate and direct their concern toward other pressing issues that have not yet been settled in the public forum. Ultimately, society itself will have changed; a new moral character will have been forged. That is what advocates of same-sex marriage propose and seek.

That, also, is precisely what states opposed to same-sex marriage seek to avoid. It is precisely what DOMA enables states to avoid. There is, of course, precedent for forcing unwilling states to succumb to a new moral vision under the banner of equal rights. Indeed, much overt racial discrimination fell by the wayside precisely because the law moved in the direction of equality, which over time impelled social acceptance of racial integration.¹²⁷ Even then, however, progress was painfully slow.¹²⁸ One should not forget that the question of racial equality was settled by debate at the federal level, and the federal government took sides in the moral argument, even at the expense of state identity and federalism concerns.¹²⁹

If the federal government may issue policy choices that run counter to the spirit of federalism, surely it may issue policy choices that bolster federalism. The idea that same-sex marriage is even possible is itself relatively new.¹³⁰ Until only very recently, it was beyond debate for most cultures, certainly including our own, that marriages could only be composed of participants of different sex.¹³¹ The growing acceptance of same-sex marriage in recent years allows the inference that same-sex marriage will become more prevalent in the coming years. Section 2 of DOMA merely ensures that that process will play out state by state, without undue interference by competing states. While that process may also be painfully slow, that is no reason to suppose it is an unconstitutional one. Still less should one suppose that a law that keeps that process in place, rather than expediting it, is unconstitutional.

127. *See generally* ALEXANDER BICKEL, *THE SUPREME COURT AND THE IDEAL OF PROGRESS* (1978) (discussing the social influence the Supreme Court exercised in the segregation cases, which led society toward not only legal condemnation of segregation, but moral condemnation as well).

128. *See id.*

129. *See id.*

130. *See Hernandez v. Robles*, 7 N.Y.3d 338, 361 (2006) (explaining the historical pedigree of same-sex marriage).

131. *See id.*

V. CONCLUSION

We have seen that Congress has the power to alter the degree to which states must accord faith and credit to sister states. That power, while considerable, is limited by the Fifth Amendment. We have further seen that the federal interest achieved in DOMA, preserving regional conceptions of the moral order, is compatible with the aims of federalism. Acting to fortify the underlying goals of federalism constitutes a compelling interest. Unlike other ostensible government interests, the interest advanced by Section 2 of DOMA is rooted in the Constitution itself and is not just another policy choice. The manner in which DOMA achieves this interest is neither overinclusive nor underinclusive, doing so instead in the least restrictive fashion possible. Accepting this argument, Section 2 of DOMA can survive its inevitable encounter with strict scrutiny. It can elude the grim reaper.