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Giving DOMA Some Credit: The Validity of Applying Defense of Marriage Acts to Civil Unions Under the Full Faith and Credit Clause

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GIVING DOMA SOME CREDIT: THE VALIDITY OF APPLYING DEFENSE OF MARRIAGE ACTS TO CIVIL UNIONS UNDER THE FULL FAITH AND CREDIT CLAUSE

I. INTRODUCTION

*A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own.*¹

Julie and Cassandra want to get married.² Upon arriving at the local clerk's office, they discover that their home state of Georgia will not legally recognize a same-sex marriage. However, after much investigation, they learn that in Vermont they can enter into a civil union,³ which offers similar but not precisely the same rights as a heterosexual marriage. In light of this, they travel to Vermont and get a civil union certified for the two of them. Upon return to their state of residence, however, they learn that Georgia will not recognize the civil union. Georgia bases this refusal upon a statute it has enacted, stating that it prohibits the recognition of same-sex marriages.⁴ Consequently,

¹ Alaska Packers Ass'n v. Indus. Accident Comm'n, 294 U.S. 532, 547 (1935) (Stone, J.). This issue has become one of current significant controversy. The author has last updated all sources contained in this Note as of October 26, 2003, to reflect current trends and political movement.

² This is a hypothetical created entirely by the author and contains fictitious names and events. It does, however, reflect the typical occurrence of same-sex couples going to Vermont to get a civil union and the problems they face when they move elsewhere. See *Indiana Lesbian Couple Seek Divorce* (Dec. 17, 2003), at <http://www.365gay.com/newscontent/121703indianadivorce.htm>; *Judge Amends Controversial Lesbian Divorce* (Dec. 31, 2003), at <http://www.365gay.com/newscontent/123103iowadivorce.htm>.

³ A "civil union," currently established only in Vermont, is a legally recognized relationship between individuals of the same gender. VT. STAT. ANN. tit. 15, § 1202(2) (2000). Since its recognition, civil unions have been entered into at a significant rate. Greg Johnson, *In Praise of Civil Unions*, 30 CAP. U. L. REV. 315, 334 (2002). Beginning in 2000, almost 2,500 civil unions have been recorded. Report of the Vermont Civil Union Review Commission (Jan. 2001), available at <http://www.leg.state.vt.us/baker/cureport.htm>. Nearly two-thirds of those are between female couples, and the average age of all civil union couples is forty-one. *Id.* Three-quarters of these unions involve persons from states other than Vermont. *Id.* Same-sex couples have not come from the following states: Mississippi, Montana, North Dakota, and Wyoming. Johnson, *supra*, at 334.

⁴ See GA. CODE ANN. § 19-3-3.1 (2000). The statute states:

Georgia will not grant full faith and credit to any other state's same-sex marriage decrees.⁵ Julie and Cassandra also find out that Georgia passed this statute with Congress' express permission.⁶ This permission is found in a statute that allows states to determine that the application of the Full Faith and Credit Clause is optional with regard to same-sex marriage. Angered by Georgia's hostility to their union, Julie and Cassandra challenge both the state and federal statutes. First, they criticize Congress' statute, contending that Congress cannot constitutionally limit the Full Faith and Credit Clause.⁷ Further, they argue that Georgia, who acted in response to Congress' statute, should be required to honor the language of the Full Faith and Credit Clause

(a) It is declared to be the public policy of this state to recognize the union only of man and woman. Marriages between persons of the same sex are prohibited in this state.

(b) No marriage between persons of the same sex shall be recognized as entitled to the benefits of marriage. Any marriage entered into by persons of the same sex pursuant to a marriage license issued by another state or foreign jurisdiction or otherwise shall be void in this state. Any contractual rights granted by virtue of such license shall be unenforceable in the courts of this state and the courts of this state shall have no jurisdiction whatsoever under any circumstances to grant a divorce or separate maintenance with respect to such marriage or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such marriage.

Id.

⁵ *Id.*

⁶ See 28 U.S.C. § 1738C (2000).

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

⁷ Arguments for recognition of civil unions under the Full Faith and Credit Clause ("FFCC") may seem to fly in the face of the democratic process. Patrick J. Borchers, *Baker v. General Motors: Implications for Inter-Jurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147, 150 (1998) (stating that requiring states to recognize civil unions and same-sex marriages under the FFCC "would be the most astonishingly undemocratic, counter-majoritarian political development in American history" as American adults are opposed to it by a margin of two to one and an overwhelming majority in both of the houses of Congress, in conjunction with President Clinton (perhaps the President most sympathetic to gay and lesbian concerns), passed DOMA). However, proponents of the recognition of civil unions and same-sex marriage threaten to use the FFCC to impose on other states the obligation to recognize these legal relationships. Lawrence Morahan, *Civil Rights, Legal Groups Voice Support of Same-Sex Marriage* (Nov. 25, 2002), at <http://www.cnsnews.com/Culture/Archive/200211/CUL20021125c.html>.

even when it does not serve Georgia's interest.⁸ Can Julie and Cassandra win on these grounds?⁹

Julie and Cassandra will not prevail with this legal argument.¹⁰ As a preliminary issue, Congress' statute, officially recognized as the Defense of Marriage Act ("DOMA"),¹¹ explicitly permits states not to recognize same-sex marriages entered into in another state.¹² This federal DOMA is mirrored in many states with what scholars label "mini-DOMAs,"¹³ which implement this permission by explicitly refusing to recognize same-sex marriages.¹⁴ Congress enacted the federal DOMA under the

⁸ Such a refusal to recognize a civil union, regardless of its constitutionality, may seem intolerant and narrow-minded. *But see* Richard F. Duncan, *Homosexual Marriage and the Myth of Tolerance: Is Cardinal O'Connor a "Homophobe"?*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 587 (1996).

⁹ Julie and Cassandra might win on other grounds, such as equal protection, due process, or even free speech. *See* articles cited *infra* note 219. However, the analysis of such issues is beyond the scope of this paper.

¹⁰ *See infra* Part III.A.2 for a detailed discussion of the constitutionality of Congress' federal statute, and Part III.A.3 for a detailed discussion of the constitutionality of the states' statutes.

¹¹ 28 U.S.C. § 1738C (2000). *See infra* Part II.C for further discussion of DOMA's passage and current application.

¹² 28 U.S.C. § 1738C. The Federal DOMA states:

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.

Id.

¹³ *See infra* note 169 and accompanying text for examples of the three types of state DOMAs enacted pursuant to the federal DOMA.

¹⁴ *See, e.g.,* ALA. CODE § 30-1-19(e) (1975) (stating that "[t]he state of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license was issued"); ALASKA STAT. § 25.05.013(a) (Michie Supp. 2000) (stating that "[a] marriage entered into by persons of the same sex, either under common law or under statute, that is recognized by another state or foreign jurisdiction is void in this state, and contractual rights granted by virtue of the marriage, including its termination, are unenforceable in this state."). Similarly, Arkansas' DOMA states:

Any marriage entered into by persons of the same sex, where a marriage license is issued by another state or by a foreign jurisdiction, shall be void in Arkansas and any contractual or other rights granted by virtue of that license, including its termination, shall be unenforceable in the Arkansas courts.

ARK. CODE ANN. § 9-11-208(c) (Michie 1998). Thirty-seven states currently have such statutes in place. Liberty Counsel, *United States Laws Prohibiting Same-Sex Marriages*, available at <http://www.lc.org/ProFamily/DOMAs.html> (last updated Mar. 11, 2004).

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assumption that the Full Faith and Credit Clause ("FFCC") is applicable only as Congress determines.¹⁵ However, such an interpretation of the FFCC is hotly debated.¹⁶ Some scholars argue against Congress' interpretation of the FFCC, stating that the role of Congress is a procedural one. Congress' role is to prescribe the extent of the effect of judgments, not determine whether they have an effect.¹⁷ Other scholars agree with Congress' use of its power under the FFCC, citing historical evidence that the drafters of the United States Constitution intended Congress to use the FFCC in precisely such a substantive manner.¹⁸ Thus, the issue as to which understanding of the FFCC is correct is a preliminary question in determining whether DOMA violates the FFCC.

Against this controverted background another issue regarding DOMA arises: scholars have consistently recognized same-sex marriage and civil unions as two different relationships.¹⁹ The federal DOMA and some of the state DOMAs' language seem only to permit states not to recognize same-sex marriage.²⁰ They mention nothing of civil unions.²¹

¹⁵ H.R. REP. NO. 104-664, at 26 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2930. Specifically, Congress cites the second sentence of Article IV Section 1, which states: "Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." *Id.*

¹⁶ See, e.g., Mark Strasser, *Baker and Some Recipes for Disaster: On DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence*, 64 BROOK. L. REV. 307, 309 (1998) (arguing that DOMA is an unconstitutional use of Congress' power under the FFCC); Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255 (1998) (arguing that Congress properly employed its power to proscribe the effect of judgments under the FFCC).

¹⁷ See *infra* Part III.A.1 for further discussion of Congress' role as procedural and the weaknesses of that argument.

¹⁸ See *infra* Part III.A.1 for deeper analysis regarding the view that Congress' role is substantive and the support for this argument.

¹⁹ Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont's Civil Unions, Law, Same-Sex Marriage, and Separate but (Un)Equal*, 25 VT. L. REV. 113, 113-15 (2000); Mark Strasser, *Some Observations about DOMA, Marriages, Civil Unions, and Domestic Partnerships*, 20 CAP. U. L. REV. 363, 374 (2002). *But see* Johnson, *supra* note 3, at 331 (stating that it would not be too difficult to argue that civil unions are marriages in all but name).

²⁰ E.g., 28 U.S.C. § 1738C (2000) (stating that a relationship treated like a marriage in another state need not be recognized by other state if they so choose). Compare ARIZ. REV. STAT. § 25-101(c) (2000) (stating that "[m]arriage between persons of the same sex is void and prohibited" and that, pursuant to section 25-112(a), "[m]arriages valid by the laws of the place where contracted are valid in this state, except marriages that are void and prohibited by § 25-101"), with FLA. STAT. ANN. § 741.212(1), (2) (West 2001) (stating that marriage or any relationship treated as a marriage in any jurisdiction is not recognized for any purpose in that state).

²¹ Johnson, *supra* note 3, at 328. So far, states have honored Vermont's distinction between civil unions and marriage. See, e.g., *Burns v. Burns*, 560 S.E.2d 47, 48 (Ga. Ct. App.

So far, states have not applied their DOMAs, the existence of which is conditioned upon the federal DOMA, to civil unions.²² However, the potential exists. This raises an important question as to whether states could use such an interpretation and application of not only the state, but federal DOMA and still maintain the DOMAs' constitutionality.²³

This Note argues that both federal and state DOMAs are constitutional implementations of both Congressional and state power under the FFCC. However, civil unions cannot validly be interpreted to fall under either the federal or state DOMAs. Specifically, this Note will show that although both Congress and state legislatures can constitutionally deny recognition of same-sex marriages, neither Congress nor the states can deny recognition of civil unions under the same-sex marriage language of the federal and state DOMAs. To that end, Part II of this Note provides both the legal background and purpose of the FFCC, as well as the FFCC's application to both heterosexual and same-sex marriage.²⁴ Part III discusses the constitutionality of denying full faith and credit, with its implicitly incorporated conflict of laws doctrine, to civil unions, and the implication of denying full faith and credit in light of state sovereignty.²⁵ Finally, Part IV proposes model amendments to the federal DOMA as well as state DOMAs to resolve their limitation regarding civil unions.²⁶

II. BACKGROUND

Before considering the constitutionality of DOMAs under the FFCC and their application to civil unions, it is necessary to understand the purpose and meaning of the FFCC and its application to marriage, as well as recent changes in the status of marriage. Thus, Part A discusses

2002) (stating that for the purposes of the court's analysis, civil unions are not the same as marriage).

²² See, e.g., *Rosengarten v. Downes*, 802 A.2d 170, 180 (Conn. App. Ct. 2002); *Burns*, 560 S.E.2d at 48. See *infra* notes 185-208 and accompanying text for a detailed examination of these cases.

²³ See *infra* Parts III.A.2, III.A.3 (analyzing DOMA's validity under the FFCC).

²⁴ See *infra* Part II (discussing how Congress and the Supreme Court have traditionally understood the FFCC's role and its implementation regarding marriage, and how recent state legislation raises issues regarding that tradition).

²⁵ See *infra* Part III (addressing the constitutionality of both the federal and state DOMAs in light of the FFCC's traditional understanding, and evaluating the problem of applying DOMAs to civil unions).

²⁶ See *infra* Part IV (addressing the problem of applying DOMAs to civil unions by proposing changes to DOMAs that avoid this problem).

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the purpose of the Full Faith and Credit Clause.²⁷ Part B explains its traditional application to marriage.²⁸ Last, Part C introduces the current state of the law regarding same-sex marriages and its possible ramifications for civil unions.²⁹

A. *The Purpose and Function of the Full Faith and Credit Clause*

Article IV, Section 1, of the United States Constitution states that “Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State.”³⁰ The founders included this clause to ensure that the states, though independent and sovereign, would function as a unified nation by offering other states the same level of faith and credit it rendered to its own laws.³¹ Specifically,

²⁷ See *infra* text accompanying notes 30-91 (explaining the intent behind the inclusion of the FFCC in the United States Constitution and the roles of Congress and the Supreme Court in implementing it).

²⁸ See *infra* text accompanying notes 92-134 (discussing the role FFCC has had in ensuring validity for marriage among the states).

²⁹ See *infra* text accompanying notes 135-214 (addressing new developments in marriage and marriage-like relationships that may create problems under the FFCC).

³⁰ U.S. CONST. art. IV, § 1. Further, the clause states that “Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” *Id.* The Supreme Court interpreted “full faith” literally to mean not just some credit, but *full* credit must be given to other states. *Davis v. Davis*, 305 U.S. 32, 40 (1938) (holding that a divorce granted in Virginia on grounds not recognized in the District of Columbia is nonetheless binding in the District of Columbia provided that Virginia is the state of domicile for the moving party). However, states have limited how fully credit is given to ensure that other states’ laws do not apply to the exclusion of the forum state’s law. See, e.g., *LeBlanc v. United Eng’rs and Constructors, Inc.*, 584 A.2d 675 (Me. 1991) (holding that employee injuries sustained in New Hampshire should be borne by Maine employer despite recovery under New Hampshire law because, even though full faith and credit requires recognizing New Hampshire law of recovery, Maine has an interest in providing its residents with compensation for their injuries from their employers).

³¹ *Johnson v. Muelberger*, 340 U.S. 581, 585 (1951) (stating that the FFCC offers unification, not centralization, by allowing each state to render judgments that will be honored anywhere in the United States); see also *Hughes v. Fetter*, 341 U.S. 609, 611 (1951) (stating that the FFCC alters the state’s status from absolute independence to an integral part of the United States); *Sherrer v. Sherrer*, 334 U.S. 343, 355 (1948) (stating that the FFCC aggregates independent sovereign states into a nation); *Order of United Commercial Travelers of Am. v. Wolfe*, 331 U.S. 586, 618 (1947) (stating that the FFCC ensures that remedies for obligations are provided by granting recognition of that obligation among the unified states); *Williams v. North Carolina*, 317 U.S. 287, 294-95 (1942) (stating that the FFCC integrates sovereign states into a single nation). This notion was found originally in English common law as comity, in which a sovereign nation recognizes the policies, legislation, and judicial acts of another country. *Estin v. Estin*, 334 U.S. 541, 545-46 (1948). The founders borrowed this concept of comity from the English common law and incorporated it into the Constitution through the FFCC. *Id.* at 546. Rather than applying it to recognizing another country’s laws, the founders redefined it and applied it to the

the FFCC serves as a means of preserving rights granted or affirmed through public records and judicial proceedings by guaranteeing such records and proceedings recognition and validity in other states.³² By offering such validity to other states' records and proceedings, the FFCC prevents re-litigation of already adjudicated issues.³³ The FFCC is not concerned with social or political considerations surrounding the merits of an already adjudicated case, but rather with "the techniques of the law" as the needs for such techniques arise in a given case.³⁴

As a result of its prevention of re-litigation, the FFCC ensures maximum enforcement of state laws and statutes among states.³⁵ Additionally, it coordinates the application of laws, thereby ensuring consistent and just results.³⁶ The FFCC achieves such consistency by aiding states in resolving interstate controversies in which state policies differ.³⁷

recognition of other state's laws to limit the states' status as independent sovereigns. *Id.* Despite this refinement of the definition of comity to that of the recognition among states of other state's laws, some courts still use the term comity as short hand for the FFCC. *See, e.g.,* Mason v. Mason, 775 N.E.2d 706, 709 (Ind. Ct. App. 2002) (holding that based upon comity grounds Indiana would recognize as legitimate a marriage validly contracted and celebrated elsewhere); Goode v. Goode, 997 P.2d 244, 245 (Or. Ct. App. 2000) (stating that under comity principles, marriages celebrated in other states are valid in Oregon unless they violate Oregon's public policy).

³² Pac. Employers Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 501 (1939) (holding that California is not required to apply Massachusetts' worker's compensation law under the FFCC because California has its own statute adequately covering that issue). *See generally* Pink v. AAA Highway Express, 314 U.S. 201 (1941).

³³ Jon-Peter Kelly, *Act of Infidelity: Why the Defense of Marriage Act is Unfaithful to the Constitution*, 7 CORNELL J.L. & PUB. POL'Y 203, 219 (1997).

³⁴ ROBERT H. JACKSON, FULL FAITH AND CREDIT: THE LAWYER'S CLAUSE OF THE CONSTITUTION 3-4 (1945). States do, however, weigh political and social considerations when determining whether to offer full faith and credit to another state's law as they often have an incentive for recognition of another state's laws, namely, that their own laws will be recognized in another state. Strasser, *supra* note 19, at 376.

³⁵ Szantay v. Beech Aircraft Corp., 349 F.2d 60, 65 (4th Cir. 1965). The Supreme Court specifically recognized statutes to constitute public acts for purposes of the FFCC. Carroll v. Lanza, 349 U.S. 408, 411 (1955).

³⁶ Americana of Puerto Rico, Inc. v. Kaplus, 368 F.2d 431, 438 (3d Cir. 1966). Congress enacted § 1738 of Title 28 of the United States Code to maintain uniformity, requiring, for example, that each court verify the validity of its records and judicial proceedings by affixing a seal. *E.g.,* 28 U.S.C. § 1738 (2000). If such a seal is affixed, Congress requires that other states recognize that record or judicial proceeding. *Id.*

³⁷ Morris v. Jones, 329 U.S. 545, 553 (1947). Thus, the convenience of law does not serve as a balance with which to determine the applicability of the clause. *Id.* at 554. Further, some states strictly apply full faith and credit without evaluating the rightness of the other state's policy. *See, e.g.,* M & R Invs. Co. v. Hacker, 511 So. 2d 1099, 1101 (Fla. Dist. Ct. App.

Juxtaposed against the FFCC are states' rights.³⁸ States' rights are a residual power of the Constitution, which leaves all undelegated powers to the states.³⁹ The founders, in including this concept, hoped to prevent the federal government from requiring states to enforce federal laws, thereby creating double security under both the FFCC and state sovereignty for the people in their government.⁴⁰ This security serves the founders' intent to create concurrent authority of the state and federal governments over the people, each protected from incursion by the other.⁴¹ Inherent in this is a conflict: to which entity will deference

1987) (refusing to enforce a Nevada gambling debt judgment because it violated Florida's public policy); *Brown v. Brown*, 377 So. 2d 438, 441 (La. Ct. App. 1979) (holding the Louisiana court must give an Arkansas divorce decree the same force it would have in Arkansas); *Hirson v. United Stores Corp.*, 34 N.Y.S.2d 122, 127 (App. Div. 1942) (stating that local policy may not override the full faith and credit clause). However, most states limit their application to those laws that do not contravene their own state policy. *See, e.g., Univ. of Iowa Press v. Urrea*, 440 S.E.2d 203 (Ga. Ct. App. 1993) (holding that Iowa publisher who used residents' information without their consent could be sued under Iowa invasion of privacy law because the Iowa Tort Claims Act was virtually identical to Georgia's and thus did not contravene Georgia's public policy); *Meenach v. Gen. Motors Corp.*, 891 S.W.2d 398, 401-02 (Ky. 1995) (modifying a Michigan injunction to permit only testimony regarding non-confidential relevant facts on public policy grounds). Some state and federal courts balance the governmental interests involved to determine whether full faith and credit should be granted in instances where another state's law contradicts the forum state's public policy. *See, e.g., Sheerin v. Steele*, 240 F.2d 797 (6th Cir. 1957); *Bohannon v. Allstate Ins. Co.*, 820 P.2d 787 (Okla. 1991).

³⁸ *Printz v. United States*, 521 U.S. 898 (1997) (holding that background checks required of law enforcement officers under Congress' Brady Handgun Violence Prevention Act was unconstitutional as it required states to execute federal laws).

³⁹ U.S. CONST. amend. X (stating that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"); *Printz*, 521 U.S. at 919.

⁴⁰ *Printz*, 521 U.S. at 920, 922. In *Printz*, Congress was in the process of implementing the Brady Handgun Violence Prevention Act ("Brady Act"). *Id.* at 902. This Act required a national system for checking handgun purchasers' backgrounds. *Id.* Because Congress wanted the background checks to be carried out immediately, it passed some interim provisions to the states until the Brady Act was operative. *Id.* Plaintiffs, as chief law enforcement officers for counties in Montana and Arizona, filed suits challenging the constitutionality of the Act. *Id.* at 903. The District Court held that the background check provision was unconstitutional, but that the remainder of the Act was constitutional. *Id.* The Ninth Circuit reversed, finding the entire Act to be unconstitutional. *Id.* The Supreme Court affirmed, stating that because the background check provision was part of a federal law that required states to enforce it, the provision violated principles of state sovereignty. *Id.* at 929.

⁴¹ *Id.* at 920. The legal system was designed to provide two orders of government, each with their own set of rights and obligations to the people. *Id.* States, as well as the federal government, are expected to represent and remain accountable to their citizens. *Id.*

be rendered?⁴² Such situations are further confounded when both federal and state governments have an interest in the issue at hand.⁴³ The Supreme Court has evaluated this conflict and determined that the issue turns on whether the law in question serves the interests of the individual or the state.⁴⁴ The Constitution “confers upon Congress the power to regulate individuals, not States.”⁴⁵ Consequently, deference is given to state laws where state governance is at issue.⁴⁶ Conversely, state law must yield to federal law where federal law regulates individuals.⁴⁷

In a limited fashion, the FFCC also protects states’ rights where state laws conflict with other states.⁴⁸ The FFCC prevents “entrenchment on the interests of other [s]tates” through the over-application of a state’s own law in another state.⁴⁹ States’ rights are further advanced as the FFCC leaves the forum state the opportunity to apply its own laws to an issue while, at the same time, preventing re-litigation of issues already adjudicated in other states.⁵⁰ Thus, once a court enters a judgment, that judgment is upheld in every other state, unless that state has more adequately addressed the present issue through its own statutes.⁵¹

⁴² *Id.* at 919. This determination fundamentally rests on whether the powers being used are those reserved to Congress as an enumerated power, or to the states as a residual power. *Id.*; see U.S. CONST. amend. X.

⁴³ See generally *Printz*, 521 U.S. 898 (recognizing that both federal and state government have an interest in handgun control).

⁴⁴ *Id.* at 920 (citing *New York v. United States*, 505 U.S. 144, 166 (1992)).

⁴⁵ *Id.*

⁴⁶ *New York v. United States*, 505 U.S. 144, 166 (1992) (holding that Congress cannot compel states to provide for disposal of radioactive waste within their own borders because Congress is governing not just national radioactive waste disposal, but state disposal as well, a clear violation of state sovereignty).

⁴⁷ *Id.* The Court further stated that Congress, though it may have the power, cannot directly compel or prohibit states to act. *Id.* Congress may, of course, encourage states to act in a particular fashion. *Id.* But the ultimate decision must be the states. *Id.*

⁴⁸ *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 270 (1980) (holding that the FFCC does not preclude receiving disability benefits from two different states where one state’s law is provided as an exclusive remedy because that state had no legitimate interest in limiting recovery to just one state).

⁴⁹ *Id.* at 272; Lynn D. Wardle, *Williams v. North Carolina, Divorce Recognition, and Same-Sex Marriage Recognition*, 32 CREIGHTON L. REV. 187, 222 (1998).

⁵⁰ *Sutton v. Leib*, 342 U.S. 402, 409-10 (1952) (holding that a previous judgment that a marriage was annulled under New York law was entitled to full faith and credit in proceedings in Illinois determining whether a divorced Illinois resident could marry a Nevada resident whose previous marriage was deemed invalid under New York law).

⁵¹ *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 436-37 (1943), *overruled in part on other grounds by Thomas v. Wash. Gas Light Co.*, 448 U.S. 261 (1980) (holding that an employee

Congress governs the application of the FFCC.⁵² Congress first construed the FFCC through an implementing statute.⁵³ This general implementing statute ensures interstate enforcement of state judgments.⁵⁴ Congress has narrowed the implementing statute for specific instances.⁵⁵ For example, pursuant to the Parental Kidnapping Prevention Act ("PKPA"),⁵⁶ Congress limited the application of full faith

may not receive Workmen's Compensation in Texas if the employee has already been compensated under the law of another state).

⁵² U.S. CONST. art. IV, § 1. The second sentence of the FFCC states that "Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." *Id.*

⁵³ 28 U.S.C. § 1738 (2000). This statute, the first enacted by Congress and commonly referred to as the implementing statute of the FFCC, states that:

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto. The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form. Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Id.

⁵⁴ Ralph U. Whitten, *Exporting and Importing Domestic Partnerships: Some Conflict-of-Laws Questions and Concerns*, 2001 BYU L. REV. 1235, 1238 (citing 28 U.S.C. § 1738 (1994)).

⁵⁵ See, e.g., 28 U.S.C. § 1738A (2000) (limiting which jurisdictions can honor custody judgments in other states). Congress has also required enforcement of other state laws. See 28 U.S.C. § 1738B(d) (providing that a state which has made a child support order consistent with this statute would have exclusive jurisdiction over the order).

⁵⁶ 28 U.S.C. § 1738A. Specifically, the relevant part of the statute reads:

(c) A child custody or visitation determination made by a court of a State is consistent with the provisions of this section only if—

(1) such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met:

(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B) (i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such

and credit in custody determinations through stipulating which jurisdictions can validly recognize and address previous custody determinations.⁵⁷ Thus, Congress abrogates full faith and credit requirements regarding this issue.⁵⁸ Statutes such as the PKPA do not, however, demonstrate the extent of Congress' power under the FFCC. Nor does the language of Article IV, Section 1, make Congress's role as implementer of the FFCC clear.⁵⁹ Consequently, the Supreme Court is turned to for further guidance in understanding the breadth of the FFCC.

The Supreme Court is the final arbiter of the limitations of this clause for both state and federal courts.⁶⁰ Like the founders, the Court

State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because the child, a sibling, or parent of the child has been subjected to or threatened with mistreatment or abuse;

(D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody or visitation of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

Id. § 1738A(c)-(d).

⁵⁷ *Id.* § 1738A; see *Thompson v. Thompson*, 484 U.S. 174 (1988) (upholding the PKPA as a proper and constitutional use of Congress' power under the FFCC). Using its power under the FFCC, Congress specified the jurisdictional and substantive provisions required for recognition of out-of-state custody orders when the issue arose as to which state's judgment should be upheld. Jennie R. Shuki-Kunze, *The "Defenseless" Marriage Act: The Constitutionality of the Defense of Marriage Act as an Extension of Congressional Power Under the Full Faith and Credit Clause*, 48 CASE W. RES. L. REV. 351, 366 (1998).

⁵⁸ *Id.* at 374.

⁵⁹ Strasser, *supra* note 16, at 309. The first sentence of Article IV, Section 1, appears to give Congress only a procedural duty in applying the FFCC. *Id.* However, the second sentence seems to imply that Congress may, in fact, govern what should and should not be granted full faith and credit. *Id.*

⁶⁰ *Johnson v. Muelberger*, 340 U.S. 581, 585 (1951). See generally *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). The Supreme Court has taken on this role of arbiter because the FFCC serves a federal purpose, namely that of preventing the centralization of federal

recognizes that the chief purpose of the FFCC is to ensure that judgments from other forums are recognized.⁶¹ However, the Court has held that the FFCC does not automatically compel states to follow other state laws; rather, the nature of the law in question determines the level of credit it receives.⁶² Specifically, the Court makes a distinction between judgments and state law.⁶³

The Supreme Court has held that the implementing statute of the FFCC requires that state judgments be given the same effect in other states as the judgment would have received in the state where it was rendered.⁶⁴ Thus, judgments are legally unassailable in another state unless that state lacks jurisdiction.⁶⁵ No roving public policy exception exists regarding credit given judgments.⁶⁶ Consequently, the test the Court will apply in analyzing whether a state gave appropriate recognition to a judgment is "exacting," which holds the states to the highest standard in justifying why they refused to honor another state's judgment.⁶⁷

government while maintaining unity among the states. *Muelberger*, 340 U.S. at 585. This role is an interpretive one, addressing what are the permissible limitations of the FFCC. *Id.*

⁶¹ *Barber v. Barber*, 323 U.S. 77, 88 (1944) (Jackson, J., concurring); Shuki-Kunze, *supra* note 57, at 358. However, the Supreme Court's accurate understanding of the purpose of the FFCC, namely, its unifying function, is too limited as it ignores other relevant historical purposes and understandings of the clause. See *infra* Part III.A.1.

⁶² See, e.g., *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998) ("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."); *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 279 n.23 (1980) ("[T]he purpose of that provision was to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in other states . . .").

⁶³ *Baker*, 522 U.S. at 233. "A court may be guided by the forum State's 'public policy' in determining the law applicable to a controversy. But our decisions support no 'roving public policy exception' to the full faith and credit due judgments." *Id.* (citations omitted).

⁶⁴ *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 484 (1813). This same effect is only required as to record evidence. *Id.* The FFCC operates as to evidence only. *Id.* at 486 (Johnson, J., dissenting). See *infra* Part III.A.1 for further discussion of the FFCC's historical interpretation.

⁶⁵ *Borchers*, *supra* note 7, at 164.

⁶⁶ *Baker*, 522 U.S. at 233. Conversely, as to state laws, the Court held that state courts may be guided by their own public policy in determining which state law to apply. *Id.* This option is not, however, available for judgments. *Id.*

⁶⁷ *Id.* Under such a standard, the Court will require a compelling reason for denying recognition to another state's judgment. *Id.* This requirement to uphold other state's judgments is particularly necessary where issues of claim preclusion and issue preclusion—*res judicata*—are at issue. *Id.*

However, when the recognition of a state law rather than another state's judgment is in question, the Court applies a different, more flexible test.⁶⁸ In such a case, the Court has held that the state court may choose which of the two competing public policies involved it will follow.⁶⁹ This permits states to enforce their own laws as well as other states' laws at their own discretion.⁷⁰ To determine this, the FFCC has been interpreted to imply conflict-of-laws principles.⁷¹ As a result, sister state laws can be applied or refused application at the discretion of the states, provided the decision complies with conflict-of-laws principles.⁷²

Conflict-of-laws principles facilitate such compliance through their public policy exception.⁷³ This exception states that if a law violates an important public policy of a state, that state may use the public policy

⁶⁸ *Id.* at 232-33. Laws such as legislative measures and common law rules are governed under this more lenient standard. *Id.* at 232.

⁶⁹ *E.g.* *Hughes v. Fetter*, 341 U.S. 609, 611 (1951) (holding that a wrongful death action brought under an Illinois statute could be brought in Wisconsin because Wisconsin must recognize Illinois law under the FFCC); *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532, 547 (1935) (holding that law of California applied in a Workmen's Compensation claim rather than Alaska's despite the fact that the injury occurred in Alaska because the contract was made in California). This public policy exception is derived from the conflict-of-laws doctrine. Shuki-Kunze, *supra* note 57, at 361; *see* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971). This exception can be played as a "trump card" to the FFCC should the judgment in question be "repugnant to the state's laws and legitimate public policies." *Id.* Thus, "[a]lthough states are bound by the Full Faith and Credit Clause to enforce judgments, they are free through their forum choice-of-law rules to decide whether or not to apply foreign law to a dispute properly before the court." L. Lynn Hogue, *State Common-Law Choice-of-Law Doctrine and Same-Sex "Marriage": How Will States Enforce the Public Policy Exception?*, 32 CREIGHTON L. REV. 29, 30 (1998). Critics of the public policy exception argue that it provides a "substitute for analysis. The concepts stand in the way of careful thought, of discriminating distinctions, and of true policy development in the conflict of laws." Monrad G. Paulsen and Michael I. Sovern, "Public Policy" in *Conflict of Laws*, 56 COLUM. L. REV. 969, 1016 (1956). Such criticism of the public policy exception holds true today. Hogue, *supra*, at 32.

⁷⁰ *See generally* *Alaska Packers*, 294 U.S. 532.

⁷¹ *Sun Oil Co. v. Wortman*, 486 U.S. 717, 724 n.1 (1988) ("The conflicts law embodied in the Full Faith and Credit Clause allows room for common-law development, just as did the international conflicts law that it originally embodied.").

⁷² Borchers, *supra* note 7, at 164.

⁷³ Michael E. Solimine, *Competitive Federalism and Interstate Recognition of Marriage*, 32 CREIGHTON L. REV. 83, 94 (1998). *Cf.* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971). In this manner, the Supreme Court has incorporated conflict-of-laws principles into FFCC analysis. *See* *Nevada v. Hall*, 440 U.S. 410, 422 (1979) (stating that "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy").

exception to prevent application of another state's law.⁷⁴ The specific criteria that govern the application of the public policy exception are unclear.⁷⁵ Generally, if a state is competent to legislate in a particular area, it need not substitute other state statutes for its own.⁷⁶ Additionally, the Supreme Court is particularly concerned about the denial of constitutional guarantees; consequently, if another state's law violates the Federal Constitution, that law is not entitled to full faith and credit in the forum state.⁷⁷ Last, the public policy exception is typically only invoked when a state's law is repugnant to another state as it either violates some fundamental principle of justice, morality, or deep-rooted tradition.⁷⁸ Beyond this, states appear to have unlimited discretion in applying the public policy exception.⁷⁹

The Supreme Court historically permitted this view of the public policy exception under the FFCC to be governed by state interest.⁸⁰ However, the Court no longer weighs state interests to determine which state law will apply.⁸¹ The Supreme Court now upholds an additional limitation to the public policy exception: the state which wishes to impose its own law must be the state in which the parties are domiciled.⁸² In doing this, the Court requires the contacts of the State

⁷⁴ Strasser, *supra* note 19, at 367. This public policy exception is a product of the common law. Hogue, *supra* note 69, at 32.

⁷⁵ Hogue, *supra* note 69, at 34.

⁷⁶ State Farm Mut. Auto. Ins. Co. v. Duel, 324 U.S. 154, 160 (1945) (dismissing plaintiff's demand that defendant be enjoined from interfering with plaintiff's business and granting plaintiff a license to do business in Wisconsin because Wisconsin law served to protect its citizens by limiting the number of mutual insurance companies that could do business in Wisconsin through fees).

⁷⁷ See *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 291 (1980) (stating that a judgment rendered in another state that violates due process should not be accorded full faith and credit elsewhere).

⁷⁸ See, e.g., *Greschler v. Greschler*, 414 N.E.2d 694 (N.Y. 1980) (holding that a divorce decree granted in the Dominican Republic was valid despite wife's claims of fraud).

⁷⁹ *Id.*

⁸⁰ *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (holding that a class action claim must be modified because Kansas did not have jurisdiction over all defendant investors, and that Kansas could not apply Kansas law to all of the investors); *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) (holding Minnesota law could be applied to plaintiff's insurance claim for the death of husband even though plaintiff's husband was killed in Wisconsin because husband had been a resident of Minnesota for sixteen years).

⁸¹ See, e.g., *Carroll v. Lanza*, 349 U.S. 408, 419 (1955) (Frankfurter, J., dissenting) (holding that a state's exclusive remedies for personal injury do not limit remedies that can be sought when applying another state's law).

⁸² "Domicile" refers to more than just residency. It is defined as "[t]he place at which a person is physically present and that the person regards as home; a person's true, fixed,

with the parties who are involved in current litigation to be evaluated.⁸³ For example, if the only contact a party has with a state is that the injury took place in that state, another state's law is likely to be applied, perhaps the law of the state which the injured considers home.⁸⁴ By establishing this domicile requirement, the Court has further limited the use of the public policy exception.

The Court has clearly established that the FFCC will apply to the states pursuant to conflict-of-laws principles.⁸⁵ Specifically, the Court has denied a roving public policy exception to the FFCC as to judgments while permitting such an exception for state laws.⁸⁶ However, the Court has not resolved the fundamental ambiguity in Article IV, Section 1, regarding whether the FFCC grants Congress a procedural or substantive role in determining the application of the Full Faith and Credit Clause.⁸⁷ This distinction is of utmost importance.⁸⁸ If Congress's role is procedural, Congress could articulate a system by which full faith and credit could be efficiently granted.⁸⁹ However, if Congress' role is substantive, Congress could determine what, and to what extent, the states must grant full faith and credit.⁹⁰ Because Congress's role is ambiguous in this regard, how much power Congress has to limit the FFCC in substantive areas such as marriage or, more controversially, civil unions, appears uncertain.⁹¹

principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere." BLACK'S LAW DICTIONARY 501 (7th ed. 1999).

⁸³ See *Allstate*, 449 U.S. at 308, cited in Borchers, *supra* note 7, at 161 (stating that this requirement ensures that the law chosen is not arbitrary or fundamentally unfair). This modern test, labeled the "significant relationship test" under the conflict-of-laws doctrine, requires that the state making public policy arguments to invalidate a judgment must be the state that has the strongest connection with the parties. Shuki-Kunze, *supra* note 57, at 364; see RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(1) (1971). The only way for the state *not* to apply its own law, according to the Supreme Court, is if the state has significant contacts with the parties or the transaction involved and application of the forum law cannot be justified under traditional choice-of-law principles. Borchers, *supra* note 7, at 164.

⁸⁴ *Id.*

⁸⁵ See *Sun Oil Co. v. Wortman*, 486 U.S. 717, 723 n.1 (1988).

⁸⁶ See *supra* text accompanying notes 64-72 (explaining this distinction and its importance).

⁸⁷ See Strasser, *supra* note 16, at 309.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ For further analysis of Congress' role under the FFCC, see *supra* Part III.A.1.

B. *The Application of the FFCC to Marriage*

Congress has not had to speak regarding traditional marriage and the FFCC. Marriage⁹² impacts a variety of other legal issues, such as divorce,⁹³ custody,⁹⁴ inheritance,⁹⁵ and tort claims.⁹⁶ Because of this, marriage issues have been traditionally reserved to the states.⁹⁷ Historically, the states have consistently recognized marriages entered into in other states.⁹⁸ State courts have typically held that if a marriage is validly recognized and celebrated in another state, they would recognize

⁹² For the purposes of this Note, "marriage," unless otherwise defined, refers to its traditional definition of a valid and celebrated union between a man and a woman. See 1 U.S.C. § 7 (2002). In contrast, common law marriages are defined as a marriage "that takes legal effect, without license or ceremony, when a couple live together as husband and wife, intend to be married, and hold themselves out to others as a married couple." BLACK'S LAW DICTIONARY 986 (7th ed. 1999). Such marriages were treated with widely varying results due to the gradual demise of their recognition. See, e.g., *Thomas v. Sullivan*, 922 F.2d 132 (2d Cir. 1990) (holding that plaintiff, a "widow," was not entitled to social security benefits because she and decedent had not ceremonially married and New York refuses to recognize common-law marriage). See *infra* text accompanying notes 115-22 for further discussion of common-law marriages.

⁹³ See, e.g., *Chambrello v. Chambrello*, No. FA990080464S, 2002 WL 1492175, at *1 (Conn. Super. June 10, 2002) (applying North Carolina's divorce requirement of separation for a year in its analysis because the plaintiffs had filed a motion for divorce there, and finding it satisfied). See *infra* notes 129-32 and accompanying text for a brief discussion of divorce recognition.

⁹⁴ *Strasser*, *supra* note 19, at 364; see, e.g., *Muckle v. Superior Court*, 125 Cal. Rptr. 2d 303, 308 (Ct. App. 2002) (stating that once the court has determined jurisdiction, it may determine not only marital issues, but custody and support issues as well).

⁹⁵ *Strasser*, *supra* note 19, at 364; see, e.g., *Shadwick v. Young*, No. E1999-02607-CDA-R3-CV, 2000 WL 144111, at *1 (Tenn. Ct. App. Feb. 9, 2000). In *Shadwick*, the plaintiff claimed inheritance rights of her deceased spouse on the grounds that they had been united in a common-law marriage. *Id.* The court upheld her claim, stating that public policy is to sustain marriage. *Id.* at *3. Because the defendant and the party attempting to intervene could not show that the plaintiff and the deceased were married at the common law, the plaintiff was granted her inheritance rights. *Id.* at *5.

⁹⁶ *Strasser*, *supra* note 19, at 364; see, e.g., *In re Bester*, 828 So. 2d 644, 647-48 (La. Ct. App. 2002). The court held that a child's father could not intervene in a wrongful death claim because no filiation had been established between him and his child either through marriage to the child's mother or through other means established by law. *Id.*

⁹⁷ *Solimine*, *supra* note 73, at 84. In fact, "[t]he entire issue of interstate recognition of marriage would be moot, of course, if marital validity were governed by federal law." *Id.* at 84. See *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1877) (holding that a state "has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved").

⁹⁸ *Strasser*, *supra* note 16, at 329; see, e.g., *Parish v. Minville*, 217 So. 2d 684, 688 (La. Ct. App. 1969) (stating that "we are obliged to give effect to . . . marriages when they are validly contracted in another state. This is commanded by the full faith and credit clause of the United States Constitution, Art. 4, Section 1").

that marriage as valid, provided that it does not violate the public policy of that state.⁹⁹ However, this standard is applied to traditional marriages, which are celebrated civilly or ceremonially.¹⁰⁰ The states loosened this requirement of a marriage celebration for common law marriages, which have been historically recognized.¹⁰¹

Because of this loosened requirement, most states will recognize a marriage from another state provided that the marriage was legitimately and validly entered into in another state.¹⁰² Some states do so to demonstrate "a willingness to grant a privilege, not as a matter of right,

⁹⁹ Hogue, *supra* note 69, at 31-32 (citing RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 134 (1934) and RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1969)). Both the First and Second Restatements of Conflict of Laws have been widely adopted. Solimine, *supra* note 73, at 99. The First Restatement states that "a marriage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with." RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 121 (1934). Similarly, the Second Restatement articulates that "[a] marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971); *see, e.g.*, *Mason v. Mason*, 775 N.E.2d 706, 709 (Ind. Ct. App. 2002). This can include recognition of marriages not typically recognized in the forum state. *Mason*, 775 N.E.2d at 709. For example, in *Mason*, the couple seeking divorce were first cousins. *Id.* at 708. They had been married in Tennessee, but were seeking dissolution or annulment of their marriage. *Id.* The husband claimed that, because Indiana does not permit marriage between first cousins, the marriage was invalid. *Id.* However, the court held that although Indiana does not recognize such marriages, it was validly contracted and celebrated in Tennessee. *Id.* at 709. Applying comity principles, the court determined that the marriage was valid. *Id.* For a further discussion of comity, *see supra* note 31. Therefore, it found that the trial court did not err in determining that it could only dissolve, not annul, the marriage. *Mason*, 775 N.E.2d at 709. Historically, merely participating in a validly celebrated marriage in another state was not a guarantee for the recognition of marriage among states. Strasser, *supra* note 19, at 366. Other factors, particularly the nature of the marriage, affected whether such a marriage was valid. *Id.* at 366-67. For further discussion of such policy concerns, *see infra* notes 111-22 and accompanying text.

¹⁰⁰ *Estate of Whyte v. Whyte*, 614 N.E.2d 372, 376 (Ill. App. Ct. 1993) (stating that although current statutes require marriage to be celebrated, such a requirement does not apply to common law marriages). Historically, because of America's Christian heritage, marriages that did not offend the tenets of that faith were to be encouraged by their recognition among states. Lewis A. Silverman, *Vermont Civil Unions, Full Faith and Credit, and Marital Status*, 89 Ky. L.J. 1075, 1087 (2000). The celebration standard of marriage recognition seems to be under attack in light of DOMAs, both federal and state. *See Solimine, supra* note 73, at 95.

¹⁰¹ For a further discussion of common law marriages, *see infra* notes 115-22, and accompanying text.

¹⁰² *See, e.g., Mason*, 775 N.E.2d at 709.

but out of deference and good will.”¹⁰³ Thus, even if the nature of the marriage at bar might be contrary to the state’s law regarding marriage, it can in some instances be offered full faith and credit.¹⁰⁴

Some states, however, have established a few limitations when recognizing a marriage granted in another state.¹⁰⁵ One such limitation is if the marriage in question is void under the enforcing state’s statute.¹⁰⁶ For example, the Wisconsin Court of Appeals voided the second marriage of a woman from another state because the second marriage had occurred during Wisconsin’s statutory waiting period between marriages.¹⁰⁷ Because the woman was domiciled in Wisconsin and Wisconsin had a statute on point regarding remarriage, Wisconsin applied its own law, which required a six month waiting period before remarrying.¹⁰⁸ The remarriage violated Wisconsin’s statute, so the court deemed the marriage void.¹⁰⁹ Such a refusal to offer full faith and credit is constitutional; the Supreme Court permits such restrictions because the forum state had its own statutory law on the issue at bar.¹¹⁰

Additionally, states have validly used the public policy exception under the conflict-of-laws doctrine, refusing to recognize marriages if such marriages violate the public policy of the forum state.¹¹¹ For

¹⁰³ *Id.* However, some states are adamantly unwilling to recognize other states’ laws, just as others are willing. See, e.g., *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 49 (Minn. 1979) (stating that it would not apply Wisconsin law because “the Minnesota rule is better”). The Supreme Court has found this “prideful unwillingness” constitutional under the FFCC. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 320 (1981), cited in *Borchers*, *supra* note 7, at 169.

¹⁰⁴ See *Parish v. Minveille*, 217 So. 2d 684, 688 (La. Ct. App. 1969).

¹⁰⁵ See *In re Estate of Toutant*, 633 N.W.2d 692, 700 (Wis. Ct. App. 2001) (holding that even though a remarriage had taken place in another state, it was void because it violated Wisconsin’s requirement of waiting six months before remarrying, and Wisconsin is permitted to apply its own policy standards to its own citizens).

¹⁰⁶ See *id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* The court further stated that because Wisconsin was able to govern this area of law competently, the full faith and credit clause did not require it to yield to another state’s conflicting statute. *Id.*

¹¹⁰ See *Sutton v. Leib*, 342 U.S. 402, 409-10 (1952).

¹¹¹ *Strasser*, *supra* note 19, at 367; e.g., *Bronislaw K. v. Tadeusz K.*, 393 N.Y.S.2d 534, 535 (Fam. Ct. 1977) (holding that the court was willing to apply Polish marriage law because that law did not violate New York’s public policy regarding marriage). This public policy exception is derived from conflict-of-laws principles. See *RESTATEMENT (FIRST) OF CONFLICT OF LAWS* §§ 121, 132 (1934); *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 283 (1971). States adopting the Uniform Marriage and Divorce Act (“UMDA”) cannot utilize the public policy exception as it is explicitly rejected as a defense under the Act. See *UNIF. MARRIAGE & DIVORCE ACT* § 210, 9A U.L.A. 194 (1998).

example, if a marriage in a former state is considered bigamous or polygamous in a latter state, the latter state often will not recognize it.¹¹² Similarly, if a state has a strong local state interest in the marital status and welfare of a state's residents for purposes of alimony determinations, deciding according to those interests would not violate the FFCC because the state interests outweigh the interest of uniformity for which the clause stands.¹¹³ However, the application of the public policy exception is limited to only those circumstances where a "strong" public policy interest of the domicile state exists, or where the marriage in question is "repugnant to [that state's] laws and policies."¹¹⁴

A specific example of such a strong policy interest is found in common-law marriages. A common-law marriage is defined as a marriage "that takes legal effect, without license or ceremony, when a couple live together as husband and wife, intend to be married, and hold themselves out to others as a married couple."¹¹⁵ As a general rule,

¹¹² Cf. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 132 (1934). This doctrine states:

A marriage which is against the law of the state of domicile of either party, though the requirements of the law of the state of celebration have been complied with, will be invalid everywhere in the following cases: (a) polygamous marriage, (b) incestuous marriage between persons so closely related that their marriage is contrary to a strong public policy of the domicile.

Id.; see *Bronislawa K.*, 393 N.Y.S.2d at 535 (holding that because the marriage at hand was not bigamous, it was not void as a result of public policy). In addition to bigamy and polygamy, incestuous marriages, interracial marriages, marriages between minors, and certain alleged common-law marriages have been historically found to violate states' public policies. *Shuki-Kunze*, *supra* note 57, at 362. Such decisions vary from state to state. *Strasser*, *supra* note 19, at 367-68. For example, some states will not recognize marriages between first cousins. *E.g.*, *Mazzolini v. Mazzolini*, 155 N.E.2d 206, 209 (Ohio 1987). Others will allow such marriages to be celebrated so long as the couple in question cannot reproduce. *E.g.*, ARIZ. REV. STAT. § 25-101 (2000). DOMA is the first time, however, that such exceptions have been made permissible under a federal statute. Cynthia M. Reed, *When Love, Comity, and Justice Conquer Borders: INS Recognition of Same-Sex Marriage*, 28 COLUM. HUM. RTS. L. REV. 97 (1996) (citing *Same Sex Marriage: Hearings on S. 1740: The Defense of Marriage Act Before the Senate Comm. on the Judiciary*, 104th Cong., 2d Sess. (1996)).

¹¹³ *E.g.*, *Borys v. Borys*, 386 A.2d 366, 376 (N.J. 1978).

¹¹⁴ *Silverman*, *supra* note 100, at 1090-91; see, e.g., *Barrons v. United States*, 191 F.2d 92, 95 (9th Cir. 1951) (holding that a proxy marriage in Nevada was not inconsistent with Nevada law nor was there a strongly conflicting public policy in the domicile state); *State v. Austin*, 234 S.E.2d 657, 663 (W. Va. 1977) (stating that "a State is not required to recognize a marriage performed in another State which is repugnant to the former State's statutes or public policy"). Historically, what was deemed repugnant was determined under the general principles of the Christian tradition. *Silverman*, *supra* note 100, at 1091 (citing *Modianos v. Tuttle*, 12 F.2d 927, 928 (E.D. La. 1925), which states, "marriage which are contrary to the general view of Christendom" fit the public policy exception).

¹¹⁵ BLACK'S LAW DICTIONARY 986 (7th Ed. 1999).

courts have consistently held that common law marriages are recognized among states under the FFCC.¹¹⁶ States have a particular interest in sustaining, not upsetting, marriages.¹¹⁷ Thus, even though some states no longer recognize common-law marriages, they will uphold those validly recognized in other states.¹¹⁸

However, states which would otherwise recognize common-law marriages will not recognize them if they violate their public policy.¹¹⁹ In particular, states are concerned that their citizens are trying to circumvent their state's law by entering into a common-law marriage in another state that recognizes common-law marriages.¹²⁰ Frequently, citizens have actively left the state in pursuit of a type of marriage that they wanted but that their state did not recognize.¹²¹ States have consistently not recognized common-law marriages in these instances, using their public policy exception to deny them recognition.¹²²

¹¹⁶ See, e.g., *Allen v. Storer*, 600 N.E.2d 1263, 1266 (Ill. App. Ct. 1992) (stating that if domiciles of another state validly enter into a common-law marriage, that marriage will move with them to Illinois, despite Illinois' refusal to recognize such a marriage under its own laws); *Netecke v. State*, 715 So. 2d 449, 450 (La. Ct. App. 1998) (stating that if a common law marriage is validly entered into under the laws of another state, Louisiana will recognize it, even though its laws do not recognize it); *Raum v. Rest. Assoc.*, 675 N.Y.S.2d 343, 347-48 (App. Div. 1998) (holding that even though New York does not recognize common-law marriages, it will grant full faith and credit to such marriages if they are valid in the state where they were contracted).

¹¹⁷ *Shadwick v. Young*, No. E1999-02607-CDA-R3-CV, 2000 WL 144111, at *3 (Tenn. Ct. App. Feb. 9, 2000).

¹¹⁸ E.g., *Compagnoni v. Compagnoni*, 591 So. 2d 1080, 1081 (Fla. Dist. Ct. App. 1991) (stating that although Florida does not recognize common law marriages entered into after 1968, "Florida w[ould] respect a common law marriage when entered into in a state which recognizes common law marriages"); *Ram v. Ramharack*, 571 N.Y.S.2d 190, 191 (1991) (stating that although common law marriages were outlawed in 1933, New York would still honor a common law marriage legally recognized in another state).

¹¹⁹ E.g., *Hesington v. Hesington's Estate*, 640 S.W.2d 824 (Mo. Ct. App. 1982) (holding that a weekend in Oklahoma is insufficient to establish a common-law marriage and violates Missouri public policy).

¹²⁰ See *Grant v. Superior Court*, 555 P.2d 895 (Ariz. Ct. App. 1976); *Goldin v. Goldin*, 426 A.2d 410 (Md. Ct. Spec. App. 1981); *In re Brack's Estate*, 329 N.W.3d 432 (Mich. Ct. App. 1982).

¹²¹ E.g., *Grant*, 555 P.2d at 897 (holding that staying overnight in a Texas hotel was insufficient to establish a common-law marriage); *Goldin*, 426 A.2d at 415 (holding that a ski weekend in Pennsylvania was insufficient grounds for the recognition of a common-law marriage, especially when the couple shared the room with young children); *Brack's Estate*, 329 N.W.2d at 434 (stating that one night in a Georgia motel while enroute to Florida was insufficient to establish a common law marriage).

¹²² As a result of this abuse of the FFCC, courts have required an investigation of the couple's relationship to determine whether a common law marriage existed under the law

All of these uses of the public policy exception are an inappropriate use of the doctrine, however, if the state lacks jurisdiction over the parties.¹²³ Jurisdiction is determined under the concept of domicile.¹²⁴ Marriages that are entered into by two domiciles of a state are guaranteed full faith and credit recognition of that marriage in another state.¹²⁵ States typically do not apply the public policy exception unless the marriage in question is itself void in the domicile state.¹²⁶ However, if the married party moves to and becomes domiciled in another state, the validity of their marriage will be subject to the laws of their new domicile state, not the state which granted their marriage.¹²⁷ Domicile clearly plays a critical part in the public policy analysis.¹²⁸

Another component to marriage recognition can be inferred from the recognition of divorce. By recognizing out-of-state divorces, states implicitly affirm the recognition of out-of-state marriages.¹²⁹ Most states have statutes offering full faith and credit to a divorce or an annulment granted by another state provided that the state could competently grant the divorce or annulment.¹³⁰ Implicit in such recognition is that the

of the couple's domicile, rather than the law where the marriage was entered into. See, e.g., *Raum v. Rest. Assocs.*, 675 N.Y.S.2d 343, 347-48 (App. Div. 1998). Factors include financial and living arrangements, and whether the couple held themselves out to the public as married. *Id.* at 348. However, the state courts have held that such investigations may not be unduly burdensome to the couple. *Id.*

¹²³ See generally *Williams v. North Carolina*, 325 U.S. 226 (1945).

¹²⁴ For a definition of domicile, see *supra* note 82.

¹²⁵ See *Williams*, 325 U.S. at 229-30. Since the framing of the Constitution, domicile has been recognized as the means by which a state is given power to recognize or dissolve a marriage. *Id.* at 229; see RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971).

¹²⁶ *Silverman*, *supra* note 100, at 1091. Thus, voidable marriages, such as underage marriages, may be recognized by a state if the marriage is valid in the state where it was celebrated. *Id.* at 1092.

¹²⁷ See *Williams*, 325 U.S. at 230. However, if both parties to the divorce appear in the out-of-state court and the issue of domicile is raised and decided, those parties cannot later claim that court lacked jurisdiction because of the doctrine of *res judicata*, which prevents re-litigation of the same issue in a separate proceeding. *Johnson v. Muelberger*, 340 U.S. 581, 587 (1951).

¹²⁸ *Williams*, 325 U.S. at 229.

¹²⁹ See, e.g., *Plaisance v. Plaisance*, 836 So. 2d 166 (La. Ct. App. 2002) (holding that so long as spouse had the opportunity to contest the divorce, Louisiana would honor a divorce decree from Arkansas). In *Williams*, the Supreme Court stated that marriage and divorce both implicate similar interests as both are of concern not only to the individual parties, but to society, and they affect personal rights. *Williams*, 325 U.S. at 230.

¹³⁰ See, e.g., DEL. CODE ANN. tit. 13, § 1521 (1996) (stating that "[f]ull faith and credit shall be given in all the courts of this State to a decree of divorce or annulment of marriage by a court of competent jurisdiction in another state, territory or possession of the United States"); KAN. STAT. ANN. § 60-1611 (2000) (stating that "[a] judgment or decree of divorce

marriage itself was found to be valid by that state.¹³¹ Thus, by recognizing a divorce decree of another state, the forum state not only gives credit due to a judgment, but also grants recognition to the validity of the original marriage itself.¹³²

As to marriages, states are free to apply the public policy exception as they see fit. States have consistently used the public policy exception in areas of common-law marriages, polygamy, bigamy, and incestuous marriages.¹³³ However, uniformity as to which of these marriages states will or will not recognize does not, on the whole, exist.¹³⁴

C. *The Full Faith and Credit Exception: DOMAs and Their Application*

While the states have been willing to recognize out-of-state marriages, and even common-law marriages, they have not been so willing to recognize same-sex marriages nor in recent months, civil unions.¹³⁵ However, declining to extend full faith and credit to same-sex marriage has not been independent of federal suggestion.¹³⁶ Congress has specifically addressed this issue.¹³⁷ However, the Supreme Court, as

rendered in any other state or territory of the United States, in conformity with the laws thereof, shall be given full faith and credit in this state . . ."). *But see* ME. REV. STAT. ANN. tit. 19-A, § 907 (West 1998) (limiting divorce recognition to only those from other states but denying recognition of divorces granted to its own citizens by other states).

¹³¹ *E.g.*, *Burns v. Burns*, 560 S.E.2d 47 (Ga. Ct. App. 2002) (holding that because Georgia did not recognize the marriage the parties had entered into, it could not grant a divorce).

¹³² *Id.* Of course, a state must recognize a divorce granted in another state unless it lacks jurisdiction because divorces are judgments, to which the Supreme Court requires full faith and credit to be applied. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 234 (1998).

¹³³ Charles J. Butler, *The Defense of Marriage Act: Congress' Use of Narrative in the Debate over Same-Sex Marriage*, 73 N.Y.U. L. REV. 841, 847-48 (1998).

¹³⁴ Silverman, *supra* note 100, at 1090.

¹³⁵ *See, e.g.*, *Rosengarten v. Downes*, 802 A.2d 170 (Conn. App. Ct. 2002) (denying the family court jurisdiction of a civil union dissolution because civil unions are not marriages, and thus, do not fall under the scope of domestic relations); *Burns v. Burns*, 560 S.E.2d 47 (Ga. Ct. App. 2002) (refusing to grant visitation rights to an ex-wife because she violated the visitation agreement prohibiting non-marital cohabitation by entering into a civil union). Scholars oppose the civil union for disparate reasons—some because they do not believe same-sex couples should receive any recognition, others because civil unions are not offered sufficient recognition, falling short of full recognition as marriage. William N. Eskridge, Jr., *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Union*, 64 ALB. L. REV. 853, 854 (2001).

¹³⁶ *See* 28 U.S.C. § 1738C (2000) (stating that same-sex marriages need not be recognized among the states). For further discussion of this issue, see *infra* notes 161-64 and accompanying text.

¹³⁷ *See infra* notes 161-64 and accompanying text.

final arbiter, has not spoken on this limitation on the FFCC.¹³⁸ To explain this issue, this Note first looks at the catalyst for the civil union debate: the legalization of same-sex marriages in Hawaii.¹³⁹ Then, this Note discusses both federal and state responses to Hawaii's decision.¹⁴⁰ Last, this Note addresses the subsequent adoption of civil unions in Vermont and the problem that they pose.¹⁴¹

1. The Potential Legalization of Same-Sex Marriages

In 1993, the supreme court of Hawaii recognized same-sex marriages under its state constitution.¹⁴² The court, articulating its decision in *Baehr v. Lewin*,¹⁴³ found that denying same-sex couples a marriage license violated the couples' equal protection guarantee.¹⁴⁴ Six plaintiffs initiated the *Baehr* case.¹⁴⁵ In *Baehr*, the plaintiffs had all filed applications for marriage licenses with the Department of Health ("DOH"), a state entity.¹⁴⁶ DOH denied the plaintiffs' applications because the plaintiffs were of the same sex.¹⁴⁷ The plaintiffs subsequently filed a complaint against John Lewin, Director of DOH.¹⁴⁸ They sought injunctive and declaratory relief, arguing that the Hawaii

¹³⁸ Martin L. Haines, *Same Sex Marriage Laws are Entitled to Full Faith and Credit*, 165 N.J. L.J. 1167 (2001).

¹³⁹ See *infra* text accompanying notes 142-60 (discussing Hawaii's recognition of same-sex marriage under the state's equal protection clause and the subsequent amendment to Hawaii's constitution denying recognition of same-sex marriages).

¹⁴⁰ See *infra* text accompanying notes 161-72 (addressing the federal and state responses of establishing DOMAs, claiming constitutionality under the FFCC).

¹⁴¹ See *infra* text accompanying notes 173-214 (looking at Vermont's civil union laws and the concerns they raise for other states).

¹⁴² See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). In 1998, Alaska entertained a similar discussion in *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Feb. 27, 1998). In *Brause*, the court held that plaintiffs, a homosexual couple to whom Alaska denied a license to marry, were protected under both the right to privacy and equal protection provisions of the Alaska Constitution. *Id.* at *1. Consequently, the court required the state to show a compelling state interest for banning same-sex marriage under Alaska's DOMA. *Id.* at *6. Otherwise, the statute would be held unconstitutional. *Id.* To prevent the state's DOMA from being repealed, the Alaskan legislature amended their constitution to specifically recognize marriage as between one man and one woman. See ALASKA CONST. art. I, § 25 (1999) ("To be valid or recognized in this State, a marriage may exist only between one man and one woman").

¹⁴³ 852 P.2d 44.

¹⁴⁴ *Id.* at 48-49.

¹⁴⁵ *Id.* at 48. Four of the plaintiffs were two female same-sex couples; the remaining two plaintiffs were a male same-sex couple. *Id.*

¹⁴⁶ *Id.* at 49.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 48.

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Marriage Law, in as much as it listed the requirements for marriage, should be found unconstitutional as it permitted DOH to refuse to issue plaintiffs marriage licenses solely based on gender.¹⁴⁹ Such recovery, plaintiffs alleged, violated their right to privacy, due process, and equal protection under the Hawaii Constitution.¹⁵⁰ Subsequently, the defendant filed an amended answer, moving for a judgment on the pleadings because plaintiffs failed to state a claim.¹⁵¹ The lower court granted the defendant's motion.¹⁵² The plaintiffs appealed.¹⁵³

The Hawaii Supreme Court held that while Hawaii's Constitution did not offer same-sex couples a fundamental right to marry under the right to privacy, the Constitution might offer plaintiffs an equal protection claim because DOH made a sex-based classification.¹⁵⁴ Because of this classification, DOH would need to show that the Hawaii law DOH had acted under served a compelling state interest and was narrowly drawn so as to avoid unnecessary abridgement of constitutional rights.¹⁵⁵ Having found that the plaintiffs had adequately stated a claim, the court vacated the lower court's dismissal of the case and remanded it for further proceedings.¹⁵⁶

¹⁴⁹ *Id.* at 48-49. Plaintiffs specifically sought to have Section 572-1 of the Hawaii Revised Statutes as applied in their case declared unconstitutional. *Id.* at 48.

¹⁵⁰ *Id.* at 50. Plaintiffs specifically cited Article I, Section 6 of the Hawaii Constitution as to a right to privacy, and Article I, Section 5 of the Hawaii Constitution regarding equal protection and due process. *Id.*

¹⁵¹ *Id.* at 48. Defendant argued that because Hawaii's state laws recognized marriage as a union between a man and a woman and did not penalize, infringe, or interfere with plaintiffs' private relationships, plaintiffs had no legally recognized right to enter into a state-licensed homosexual marriage. *Id.* at 51-52.

¹⁵² *Id.* at 52. The lower court reasoned that plaintiffs had not shown infringement on their lifestyle decisions or oppression and political powerlessness because of that lifestyle; that plaintiffs were not prevented from engaging in a homosexual lifestyle; and that plaintiffs failed to show that homosexuals constitute a suspect class entitled to equal protection. *Id.* at 53.

¹⁵³ *Id.* at 52, 57. Plaintiffs alleged that the lower court had erred in refusing to recognize homosexuals as a suspect class. *Id.* at 58. Plaintiffs further alleged that because of this initial error, the lower court had also erred in declining to apply strict scrutiny to the Hawaii statute. *Id.* at 58.

¹⁵⁴ *Id.* at 64. The court reasoned that no right to same-sex marriage is implicit under fundamental principles of liberty. *Id.* at 57. Consequently, DOH had not infringed upon plaintiffs' right to privacy. *Id.*

¹⁵⁵ *Id.* at 68. Under the Hawaii Constitution, laws classifying based upon suspect categories are presumed unconstitutional unless the state can meet strict scrutiny. *Id.* at 64.

¹⁵⁶ *Id.* at 68.

As a result of *Baehr*, couples of the same sex who wished to be legally recognized as married under Hawaii law—participants in same-sex marriage—were constitutionally found to be able to do so.¹⁵⁷ Although *Baehr* did not explicitly grant recognition to same-sex marriage, the possibility was enough to get national attention.¹⁵⁸ The Hawaii legislature, concerned by the implications of *Baehr* on the state's definition of marriage, amended its state constitution to reserve the same-sex marriage issue to the legislature.¹⁵⁹ Congress had plans of its own.¹⁶⁰

2. The Creation of Federal and State DOMAs

In response to Hawaii's protection of same-sex marriage under its constitution, Congress, in 1996, passed a federal DOMA,¹⁶¹ which states:

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.¹⁶²

¹⁵⁷ See generally *id.*

¹⁵⁸ See 1 U.S.C. § 7 (2000) (explicitly limiting marriage to a union between one man and one woman for purposes of federal law).

¹⁵⁹ See HAW. CONST. art. I, § 23 (1998) ("The legislature shall have the power to reserve marriage to opposite-sex couples").

¹⁶⁰ See *infra* text accompanying notes 161-64 for a discussion of this plan.

¹⁶¹ 28 U.S.C. § 1738C (2000). The federal DOMA was passed by a vote of 342 to sixty-seven in the House, eighty-five to fourteen in the Senate, and signed by President Clinton on September 21, 1996. Lynn D. Wardle, *DOMA: Protecting Federalism in Family Law*, 45 FED. LAW. 30, 31 (1998).

¹⁶² 28 U.S.C. § 1738C. In other words, "DOMA permits states to refuse to enforce rights arising out of the creation or dissolution of same-sex marriages." Strasser, *supra* note 19, at 371. The purpose of this statute is twofold. H.R. REP. NO. 104-664, at 2906 (1996). First, it serves to protect the traditional institution of heterosexual marriage. *Id.* Second, it protects the rights of the states to create their own public policy on the issue of same-sex marriage, free of any federal implications. *Id.*; see also Strasser, *supra* note 19, at 374. Thus, it defines marriage as between one man and one woman for the purposes of federal law only. H.R. REP. NO. 104-664, at 2906; see 1 U.S.C. § 7 ("In determining the meaning of any Act of Congress . . . 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."). Congress mentions four government interests that this

Under this statute, Congress granted states the option of recognizing same-sex marriages by relieving them of the obligation to do so.¹⁶³ To date, the federal DOMA has not been constitutionally challenged.¹⁶⁴

States, in light of the federal DOMA's permissive language regarding same-sex marriage, established their own state DOMAs declining to recognize same-sex marriage.¹⁶⁵ To date, thirty-six states

statute serves: "(1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce government resources." H.R. REP. NO. 104-664, at 2916. While some have contended that the statute was created out of animus against homosexuals, "moral objection to homosexual practices is not the same thing as animus, unless all disapprovals based on morality are to be disallowed as mere animus. Modern liberalism tends to classify all moral distinctions it does not accept as hateful and invalid." ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 113 (1996). Whether Congress was attempting "to reaffirm the existence of a power that states already had or, instead was trying to grant states a new power" is unclear. Mark Strasser, *When Is a Parent Not a Parent? On DOMA, Civil Unions, and Presumptions of Parenthood*, 23 *CARDOZO L. REV.* 299, 302 (2001) [hereinafter Strasser, *Parent*]. However, Congress claims to have received its power under the Effects Clause of the FFCC, which states that "Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST art. IV, § 1. Such constitutional support for the Act was necessary as marriage is traditionally an institution controlled exclusively by the states. Shuki-Kunze, *supra* note 57, at 355. See *infra* text accompanying 235-87 for analysis of this constitutional support.

¹⁶³ 28 U.S.C. § 1738C. Interestingly, no state had ever licensed a same-sex marriage when the DOMA was drafted. Josephine Ross, *The Sexualization of Difference: A Comparison of Mixed-Race and Same-Gender Marriage*, 37 *HARV. C.R.-C.L. L. REV.* 255, 270 n.67 (2002). The only "threat" in sight was the civil union, which only Vermont recognizes but which did not exist when the federal DOMA was passed. *Id.*

¹⁶⁴ Strasser, *supra* note 19, at 364. Further, "[f]ew of the Supreme Court's past opinions shed much light on DOMA's compliance (or lack thereof) with the [FFCC]." Kelly, *supra* note 33, at 211. Some scholars argue that DOMA cannot be tested because to have standing in federal court, a plaintiff must violate the statute. See, e.g., Brett P. Ryan, *Love and Let Love: Same-Sex Marriage, Past, Present, and Future, and the Constitutionality of DOMA*, 22 *U. HAW. L. REV.* 185, 224 n.280 (2000). This can only be done through entering into a same-sex marriage, which is not an available option in this country. *Id.* Only civil unions are currently available. Ross, *supra* note 163, at 270 n.67.

¹⁶⁵ Strasser, *Parent*, *supra* note 162, at 307. Specifically, state legislatures were concerned about same-sex couples traveling to Hawaii to get married or enter into a civil union, returning home, and expecting their home state to honor such marriages or unions. Shuki-Kunze, *supra* note 57, at 355. Over thirty states introduced legislation in response to the "threat" of Hawaii's same-sex marriage law. *Id.* For a citation of each state's DOMA, see Wardle, *supra* note 49, at 239 app. II. Alaska, Hawaii, Nebraska, and Nevada have incorporated DOMA into their state constitutions. Liberty Counsel, *United States Laws Prohibiting Same-Sex Marriages*, available at <http://www.lc.org/ProFamily/DOMAs.html> (last updated Mar. 11, 2004).

have enacted state DOMAs.¹⁶⁶ Such state DOMAs directly implement the federal DOMA.¹⁶⁷ Georgia, for example, uses language similar to that of the federal DOMA and provides in its DOMA that “[a]ny marriage entered into by persons of the same sex pursuant to a marriage license issued by another state or foreign jurisdiction or otherwise shall be void in this state.”¹⁶⁸ State DOMAs all prohibit recognition of same-sex marriages granted in other jurisdictions in varying degrees.¹⁶⁹ Some

¹⁶⁶ Liberty Counsel, *United States Laws Prohibiting Same-Sex Marriages*, available at <http://www.lc.org/ProFamily/DOMAs.html> (last updated Mar. 11, 2004). The fourteen states which have not adopted DOMAs are: Connecticut, Maryland, Massachusetts, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Rhode Island, Texas, Vermont, Wisconsin, and Wyoming. *Id.* Nevada, on its November 2002 ballot, ratified a constitutional amendment limiting marriage to the union of one man and one woman. Scott Sonner, *Republicans Nearly Sweep Nevada; Pot Loses; Anti-Gays Win; Berkely Only Democratic Win* (Nov. 5, 2002), available at <http://www.lasvegassun.com/sunbin/stories/nevada/2002/nov/05/110510489.html>. Connecticut is currently engaged in a drive petitioning its legislators to enact a DOMA. Brian Brown, *Family Institute of Connecticut Sponsor Rally for Marriage on Capitol Steps January 29th: Over 500 Supporters of Traditional Marriage Expected* (Jan. 28, 2003), at <http://www.ctfamily.org> (on file with Valparaiso University Law Review). Similarly, Texas has a bill before its legislature banning the recognition of and denying any legal rights to both same-sex marriages and civil unions. Janet Elliot and Clay Robison, *Bill Attempts to Ban Same-Sex Marriages* (Nov. 13, 2002), available at <http://www.chron.com/cs/CDA/ssistory.mpl/front/1659379> (on file with Valparaiso University Law Review). A recent attempt at amending the Massachusetts state constitution to ban same-sex marriage was made through the Protection of Marriage Amendment, but failed. Michael J. Meade, *Bid to Ban Gay Marriage Fails* (Dec. 31, 2002), at <http://www.365gay.com/NewsContent/123102massmarriage.htm> (on file with Valparaiso University Law Review). Proponents of the amendment are seeking to reintroduce the issue as a DOMA bill in 2006. *Id.*

¹⁶⁷ See, e.g., ARIZ. REV. STAT. § 25-101(c) (West 2000) (“Marriage between persons of the same sex is void and prohibited.”); DEL. CODE ANN. tit. 13, § 101(d) (1999) (“A marriage obtained or recognized outside the State between persons [of the same gender] shall not constitute a legal or valid marriage within the State.”); GA. CODE ANN. § 19-3-3.1(b) (1996) (“It is declared to be the public policy of this state to recognize the union only of man and woman. Marriages between persons of the same sex are prohibited in this state.”); KAN. STAT. ANN. § 23-101 (1995) (“The marriage contract is to be considered in law as a civil contract between two parties who are of opposite sex. All other marriages are declared to be contrary to the public policy of this state and are void.”); MINN. STAT. § 517.01 (1997) (“Lawful marriage may be contracted only between persons of the opposite sex.”); WASH. REV. CODE § 26.04.020 (1998) (“Marriages in the following cases are prohibited: When the parties are persons other than a male and a female.”).

¹⁶⁸ GA. CODE ANN. § 19-3-3.1(b) (2000).

¹⁶⁹ Compare ALA. CODE § 30-1-19(e) (1975) (“The State of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license was issued.”), with ALASKA STAT. § 25.05.013(a) (Michie Supp. 2000) (“A marriage entered into by persons of the same sex, either under common law or under statute, that is recognized by another state or foreign jurisdiction is void in this state, and contractual rights granted by virtue of the marriage, including its termination, are unenforceable in this state.”); ARK.

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DOMAs serve as a refusal to recognize a same-sex marriage validly granted elsewhere.¹⁷⁰ Others deny not only recognition, but also rights arising out of such a marriage.¹⁷¹ Still, other DOMAs more broadly refuse to recognize relationships that are legally treated like same-sex marriages and further deny any rights such relationships might have.¹⁷²

CODE ANN. § 9-11-208(c) (Michie 1998) (“Any marriage entered into by persons of the same sex, where a marriage license is issued by another state or by a foreign jurisdiction, shall be void in Arkansas and any contractual or other rights granted by virtue of that license, including its termination, shall be unenforceable in the Arkansas courts.”).

¹⁷⁰ See, e.g., ALA. CODE § 30-1-19(e) (stating that “[t]he state of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license was issued”); ARIZ. REV. STAT. § 25-101(c) (stating that “[m]arriage between persons of the same sex is void and prohibited” and that, pursuant to section 25-112(a), “[m]arriages valid by the laws of the place where contracted are valid in this state, except marriages that are void and prohibited by § 25-101”); IND. CODE § 31-11-1-1(b) (1998) (stating that “[a] marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized”). Other states, including Idaho, North Carolina, Oklahoma, Pennsylvania, South Dakota, and Washington have similar DOMAs. See Strasser, *Parent*, *supra* note 162, at 324 n.28.

¹⁷¹ See, e.g., ARK. CODE ANN. § 9-11-208(c). Arkansas’ DOMA provides:

Any marriage entered into by persons of the same sex, where a marriage license is issued by another state or by a foreign jurisdiction, shall be void in Arkansas and any contractual or other rights granted by virtue of that license, including its termination, shall be unenforceable in the Arkansas courts.

Id. Similarly, Georgia’s DOMA states:

No marriage between persons of the same sex shall be recognized as entitled to the benefits of marriage. Any marriage entered into by person of the same sex pursuant to a marriage license issued by another state or foreign jurisdiction or otherwise shall be void in this state. Any contractual rights granted by virtue of such license shall be unenforceable in the courts of this state and the courts of this state shall have no jurisdiction whatsoever under any circumstances to grant a divorce or separate maintenance with respect to such marriage or otherwise to consider or rule on any of the parties’ respective rights arising as a result of or in connection to such marriage.

GA. CODE ANN. § 19-3-3.1(b). Other states, such as Kentucky, Louisiana, Minnesota, and Virginia, have similar provisions in their DOMAs. See Strasser, *Parent*, *supra* note 162, at 324 n.29.

¹⁷² See, e.g., ALASKA STAT. § 25.05.013(a) (stating that “[a] marriage entered into by persons of the same sex, either under common law or under statute, that is recognized by another state or foreign jurisdiction is void in this state, and contractual rights granted by virtue of the marriage, including its termination, are unenforceable in this state”). Florida’s DOMA reads similarly:

(1) Marriages between persons of the same sex entered into in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, or relationships between persons of the same

However, only the latter type of DOMA anticipated any attempts to outmaneuver the DOMA, which Vermont later tried.

3. Vermont's Civil Unions and the Issue They Raise Under DOMA

Subsequent to the passage of the federal and many state DOMAs, the Vermont Supreme Court affirmed protection of same-sex couples under the state constitution and required the state to draft a statute accordingly.¹⁷³ Specifically, the court held that the exclusion of same-sex couples from benefits and protections that are incident of Vermont's marriage laws violated the common benefits clause of Vermont's

sex which are treated as marriages in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, are not recognized for any purpose in this state

(2) The state, its agencies, and its political subdivisions may not give effect to any public act, record, or judicial proceeding of any state, territory, possession, or tribe of the United States or of any other jurisdiction, either domestic or foreign, or any other place or location respecting either a marriage or relationship not recognized under subsection (1) or a claim arising from such a marriage or relationship.

FLA. STAT. ANN. § 741.212(1), (2) (West Supp. 2003). West Virginia has a similar language in its DOMA. See Strasser, *Parent*, *supra* note 162, at 324 n.30.

¹⁷³ See *Baker v. State*, 744 A.2d 864 (Vt. 1999). Similarly, in the more recent decision of *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), the Massachusetts Supreme Court mandated a similar statute. Specifically, the Court reasoned that because the state's marriage licensing statute did not define "marriage," the definition must be derived from the legislature's intent to use the common law meaning of the term when drafting the statute, that of the union between one man and one woman. *Id.* at 952-53. While the legislature was exercising its constitutionally granted police power to create this statute, it must demonstrate that the statute was not an arbitrary and capricious use of that police power for it to be deemed constitutional. *Id.* at 954, 960. To satisfy this standard, the Court stated that the law must have a rational basis for its creation, namely, the statute must "bear a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare." *Id.* at 960. Because the statute did not further the state's interest in either providing a favorable setting for procreation or ensuring an optimal setting for child-rearing, the Court held that the statute lacked rational basis and violated the state constitution's equal protection privileges. *Id.* at 961-64. Thus, the Court deemed the statute unconstitutional and reformulated the language of the statute to define marriage to mean "the voluntary union of two persons as spouses, to the exclusion of all others," borrowing the language from a case handed down by the Canadian province of Ontario's Supreme Court and thereby recognizing same-sex marriage in the state of Massachusetts. *Id.* at 969. New Jersey is headed in the same direction with its Senate passing a bill providing benefits to same-sex couples, which the governor is expected to sign. Concerned Women for America, *New Jersey Senator "Pulled a Fast One" on Citizens*, *CWA's Rios Says* (Jan. 9, 2004), at <http://www.cwfa.org/articles/5076/MEDIA/family/index.htm>.

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Constitution.¹⁷⁴ Because same-sex couples were entitled to legal benefits and protection, the court required the Vermont legislature to create a statutory scheme that would provide same-sex partners with “all or most of the same rights and obligations provided by the law to married partners,” the nature of which was left to the legislature.¹⁷⁵ In response to the Vermont Supreme Court’s mandate, the Vermont legislature chose to create the civil union.¹⁷⁶

¹⁷⁴ *Baker*, 744 A.2d at 889 (“The extension of the Common Benefits Clause to acknowledge plaintiffs as Vermonters who seek nothing more, nor less, than legal protection and security for their avowed commitment to an intimate and lasting human relationship . . .”).

¹⁷⁵ *Id.* at 886.

¹⁷⁶ VT. STAT. ANN. tit. 15, § 1201 (2000). Vermont passed legislation granting recognition of civil unions, which offer similar benefits as those bestowed upon heterosexual married couples. *Id.* Four other states are working to legalize same-sex couples. First, Colorado is currently considering recognizing same-sex couples legally. Michael A. de Yoanna, *Bill Calls for Gay Civil Unions* (Jan. 12, 2003), at <http://www.coloradodaily.com/articles/2003/01/12/export7219.txt> (on file with Valparaiso University Law Review). Though this recognition falls short of marriage, it permits same-sex couples recognition for the purposes of benefits, inheritance, and adoption, as well as many other benefits married couples enjoy. *Id.* Second, Connecticut is moving towards the legalization of same-sex marriages. Susan Haigh, *Efforts Resume to Enact Same-Sex Marriage Law* (Nov. 21, 2002), at <http://www.ctnow.com/news/local/nc-apsamesex1121.artnov.21.story> (on file with Valparaiso University Law Review). Proponents of this legalization prefer same-sex marriage over civil unions as they are more likely to be recognized by other states. *Id.* These proponents have also requested the General Assembly’s Judiciary Committee to conduct a study regarding the impact of permitting same-sex marriages. Brian S. Brown, *A Victory for Marriage* (Jan. 9, 2003), at <http://www.ctfamily.org/updates.html> (on file with Valparaiso University Law Review). The Committee did so without issuing any recommendations in light of the findings in the report. *Id.* The Catholic Church of Connecticut has expressed direct opposition to any such legislation recognizing same-sex unions. John Zorabedian, *City Church Considers Resolution Supporting Same-Sex Unions* (Jan. 19, 2003), at <http://www.middletonpress.com/site/news.cfm?newsid=6744071&BRD=1645&PAG>. Third, in Massachusetts, a case is pending before the state supreme court involving seven same-sex couples seeking to marry. Lawrence Morahan, *Civil Rights, Legal Groups Voice Support of Same-Sex Marriage* (Nov. 25, 2002), at <http://www.cnsnews.com/Culture/Archive/200211/CUL20021125c.html>. Those following the case predict that the court is likely to legalize same-sex marriage. Stanley Kurtz, *The Coming Battle*, NAT’L REV. ONLINE, Nov. 26, 2002, at <http://www.nationalreview.com/kurtz/kurtz112602.asp>. Other states, such as Utah, have filed amicus briefs urging Massachusetts not to recognize the marriage as it will require other states to do so as well. Lisa Riley Roche, *400 Decry Proposal to Ban Same-Sex Marriage* (Jan. 25, 2003), at <http://deseretnews.com/dn/view/0,1249,455027520,00.html>. Last, in New Jersey, a case is pending in which seven couples are seeking to have their unions recognized as marriages. Reginald Roberts, *Their Goal: Same-Sex Unions* (Jan. 23, 2003), at <http://www.nj.com/news/ledger/jersey/index.ssf?/base/news-3/104330598424810.xml> (on file with Valparaiso University Law Review).

When Vermont passed its bill granting legal recognition to civil unions, it was precise in stating that civil unions were not to be treated as marriages under the law.¹⁷⁷ The Vermont legislature made it clear that civil unions were not marriages because marriages required the union of a man and a woman.¹⁷⁸ Civil unions, conversely, were created for the exclusive use of same-sex couples.¹⁷⁹ Although the Vermont legislature had the option of legalizing same-sex marriages, it chose to create the civil union, a separate entity with separate treatment, rights, and responsibilities under the law, because the Vermont legislature knew of both federal and state DOMAs addressing the recognition of same-sex marriages and hoped to circumvent their impact.¹⁸⁰ Recent legislative activity to amend the Vermont Constitution to deny recognition to same-sex marriages further cements this distinction.¹⁸¹ It is in states that have passed DOMAs that specifically refuse recognition of same-sex marriages that civil unions become problematic. Whether these DOMAs should apply to Vermont's civil union is currently uncertain.¹⁸²

¹⁷⁷ VT. STAT. ANN. tit. 15, § 1202(2). In fact, several different types of partnerships exist: the domestic partnership, the civil union, and marriages. Strasser, *supra* note 19, at 363. "Each has its own benefits and drawbacks," but comparison between the two is difficult because the benefits and drawbacks of each are different, including symbolic and material benefits. *Id.* For a detailed discussion on the differences between the three, see generally *id.*

¹⁷⁸ VT. STAT. ANN., tit. 15, § 1201(4) ("'Marriage' means the legally recognized union of one man and one woman.").

¹⁷⁹ *Id.* § 1202 ("For a civil union to be established in Vermont, it shall be necessary that the parties . . . Be of the same sex and therefore excluded from the marriage laws of this state."). Most scholars argue that "civil unions law . . . does not 'bestow the status of civil marriage' on same-sex couples." Eskridge, *supra* note 135, at 859. See, e.g., Johnson, *supra* note 3, at 339. Some scholars do, however, make a "separate but equal" argument, stating that marriages and civil unions are treated similarly, with all the same benefits and the same dissolution proceedings. *Id.* at 321. Thus, while civil unions are not marriage, they are quasi-marital in nature, mimicking a "super" domestic partnership, but enjoying all the privileges and rights of marriage. Silverman, *supra* note 100, at 1100. Of note is that dissolution proceedings are not always granted by many other states because such states do not recognize civil unions. See, e.g., *Burns v. Burns*, 560 S.E.2d 47 (Ga. Ct. App. 2002).

¹⁸⁰ Eskridge, *supra* note 135, at 859. This decision may also have been intended to "provide due respect for tradition and long-standing social institutions." *Id.* Some scholars believe that this compromise undermines liberal principles as it bends to the will of more traditionally-oriented constituents. *Id.* However, other scholars think that the creation of the civil union was intended to demonstrate that marriage is not the only relationship that can have legal and social rights and benefits. See Cox, *supra* note 19, at 121.

¹⁸¹ Ross Sneyd, *Senator Wants Amendment Against Same-Sex Marriage*, TIMES ARGUS (Vt.), Feb. 7, 2003, available at <http://timesargus.nybor.com/local/Story/60305.html>.

¹⁸² So far, only Georgia has spoken on the issue and has refrained from applying its DOMA to civil unions. See generally *Burns*, 560 S.E.2d at 47.

As of yet, no state has denied civil unions recognition using its state DOMA.¹⁸³ Instead, states have reinforced Vermont's distinction between civil unions and marriages.¹⁸⁴ For example, in *Burns v. Burns*,¹⁸⁵ a suit was brought in Georgia concerning visitation rights of an ex-wife who had subsequently entered into a civil union in Vermont, receiving a "LICENSE AND CERTIFICATE OF CIVIL UNION."¹⁸⁶ The visitation agreement stipulated that the ex-wife would be granted visitation rights to her child so long as she was not cohabitating with another adult to whom she was not legally married.¹⁸⁷ In light of her cohabitation, the child's father filed a motion for contempt and requested that the plaintiff's visitation rights be revoked because she had breached the agreement.¹⁸⁸ In response, the plaintiff argued that civil unions constitute marriage and thus, she did not violate the visitation agreement.¹⁸⁹ Further, she claimed that she should be granted full faith and credit for her civil union because it was a marriage.¹⁹⁰

The Court of Appeals, affirming the trial court, disagreed, stating that because civil unions are not marriages, the plaintiff's civil union violated the visitation agreement.¹⁹¹ The court cited Vermont's civil union statute to support this determination, noting that the statute explicitly distinguishes between marriages and civil unions.¹⁹² The court further stated that even if the plaintiff's civil union was recognized as a marriage under Vermont law, the court still would not recognize it as such because, pursuant to Georgia's DOMA,¹⁹³ Georgia would not

¹⁸³ See, e.g., *Rosengarten v. Downes*, 802 A.2d 170 (Conn. App. Ct. 2002); *Burns*, 560 S.E.2d 47.

¹⁸⁴ See *Rosengarten*, 802 A.2d 170 (holding that the court lacked jurisdiction to dissolve a civil union because the court only had jurisdiction to hear domestic relation matters; the court lacked jurisdiction to dissolve a civil union because civil unions are excluded from Vermont's marriage law); *Burns*, 560 S.E.2d at 48 (stating that plaintiff had not been married in Vermont, but had instead entered into a civil union).

¹⁸⁵ 560 S.E.2d 47.

¹⁸⁶ *Id.* at 48. Plaintiff traveled with her partner to Vermont two days after the civil union laws were enacted. *Id.*

¹⁸⁷ *Id.* This visitation provision was the result of plaintiff's motion for contempt against defendant, alleging that defendant was not allowing her to visit her children. *Id.* The court issued a consent form modifying visitation rights to those described above. *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* Neither party contested the enforceability of the consent decree. *Id.*

¹⁹⁰ *Id.* Plaintiff also argued that her fundamental right to privacy had been violated as she had a right to define her own family. *Id.* She further argued that Georgia could not limit that right. *Id.*

¹⁹¹ *Id.* at 49.

¹⁹² *Id.* at 48.

¹⁹³ See GA. CODE ANN. § 19-3-3.1 (1996).

recognize same-sex marriages.¹⁹⁴ Thus, regardless of how the plaintiff's civil union was construed, the court held that the plaintiff violated the visitation agreement when she cohabitated with another woman.¹⁹⁵ Through this decision, the court articulated an important point: civil unions would not be subject to state DOMAs.

Because of the newness of civil unions, only one non-DOMA state has had to rely on its own common law to refuse to recognize civil unions.¹⁹⁶ In July 2002, the Connecticut Appellate Court affirmed a lower court decision to decline to dissolve a civil union because it lacked jurisdiction.¹⁹⁷ In *Rosengarten v. Downes*,¹⁹⁸ the plaintiff and defendant were joined in a civil union on December 21, 2000, in Vermont.¹⁹⁹ Subsequently, the union broke down, and the plaintiff moved to Connecticut.²⁰⁰ The plaintiff had lived in Connecticut for one year before commencing these proceedings to dissolve his civil union.²⁰¹ The trial court dismissed the case for lack of subject matter jurisdiction, stating that it could only handle family relations matters, which civil unions are not.²⁰² The Connecticut court agreed with the lower court's finding, citing language from Vermont's civil union statute that clearly excludes civil unions from its marriage laws.²⁰³ Further, the court found that the FFCC did not mandate that it recognize the plaintiff's civil union. Because the plaintiff had sufficient contacts with Connecticut, Connecticut had greater interest in this case than Vermont.²⁰⁴ As a result, Connecticut's law and public policies applied.²⁰⁵ Connecticut's public policy consistently demonstrated that it had no interest in legally recognizing same-sex marriages, nor civil unions.²⁰⁶ Because civil unions were contrary to Connecticut's public policy, the court held that it did

¹⁹⁴ *Burns*, 560 S.E.2d at 49.

¹⁹⁵ *Id.* at 49.

¹⁹⁶ See *Rosengarten v. Downes*, 802 A.2d 170, 184 (Conn. App. Ct. 2002).

¹⁹⁷ *Id.* The lower court reasoned that "the Vermont legislature cannot legislate for the people of Connecticut [whether civil unions should be recognized]." *Id.* at 178.

¹⁹⁸ 802 A.2d 170.

¹⁹⁹ *Id.* at 172.

²⁰⁰ *Id.*

²⁰¹ *Id.* Plaintiff claimed the court could hear his case because it involved family relations, over which the court had jurisdiction. *Id.* at 174.

²⁰² *Id.* at 175.

²⁰³ *Id.* at 173.

²⁰⁴ *Id.* at 178-79.

²⁰⁵ *Id.* at 178. For more discussion on the contacts test under the FFCC, see *supra* text accompanying notes 116-19.

²⁰⁶ *Rosengarten*, 802 A.2d at 179 n.6.

not have to offer the plaintiff's civil union full faith and credit.²⁰⁷ Consequently, it dismissed the case.²⁰⁸

As *Rosengarten* demonstrates, public policy can be used in determining recognition of civil unions.²⁰⁹ But, this should not be a state's only option. After all, as to judgments, a state court may only use public policy if the parties have sufficient contacts with, or are domiciled in, that state.²¹⁰ But, as the *Burns* court states, DOMA should not be applied to civil unions.²¹¹ If this is the case, states have little recourse against "marriage" laws of other states. Perhaps DOMAs should be construed to include civil unions.²¹² However, their language does not appear to include civil unions.²¹³ Further, DOMAs also raise constitutional concerns under the FFCC because they appear to limit the FFCC.²¹⁴ It is these dilemmas of constitutionality and applicability that this Note now addresses.

III. ANALYSIS

The problems that surround applying DOMAs to civil unions in light of the FFCC are significant. Not only is it uncertain whether such statutes are constitutional, it is also uncertain whether the states can properly apply them to civil unions.²¹⁵ In light of this, Part A of this

²⁰⁷ *Id.* at 179.

²⁰⁸ *Id.* at 184. Mr. Rosengarten appealed this decision, but before the Connecticut Supreme Court could hear the case, Mr. Rosengarten died. Mathew Staver, *Case Seeking to Establish Civil Unions in Connecticut Diminished Due to Death of the Plaintiff* (Jan. 28, 2003), at <http://www.lc.org/pressrelease/2003/nr012803.htm>. After placing the case on hold for a time, the Connecticut Supreme Court dismissed the case. *Id.*

²⁰⁹ See *supra* text accompanying notes 198-208 for a discussion of the *Rosengarten* court's use of Connecticut's public policy.

²¹⁰ See *supra* text accompanying notes 80-84 (explaining that a state court may use a public policy exception when deciding whether to recognize another state's law only if the parties involved are domiciled in that state).

²¹¹ See *supra* notes 191-94 and accompanying text.

²¹² See *infra* Part.III.B (analyzing why construing DOMA to include civil unions is inappropriate).

²¹³ See *supra* notes 169-72 for the express language of state DOMAs.

²¹⁴ See *infra* Part.III.A (determining that DOMAs are a constitutional use of both state and federal power).

²¹⁵ A more fundamental and basic question is that of worldview and understanding of truth. Leonard G. Brown III, *Constitutionally Defending Marriage: The Defense of Marriage Act, Romer v. Evans and the Cultural Battle They Represent*, 19 CAMPBELL L. REV. 159, 160 (1996) (citing Francis A. Schaeffer, *How Should We Then Live?*, in THE COMPLETE WORKS OF FRANCIS A. SCHAEFFER 5 (1982)). The view of truth that judges and legislators have will determine the outcome of deciding cases and implementing statutes, respectively. *Id.* For further discussion of this preliminary question, see *id.*

analysis looks at the constitutionality of the DOMA in the context of Congress's role under the FFCC, the federal DOMA, and state DOMAs.²¹⁶ Part B addresses the appropriateness of the application of such DOMAs to civil unions.²¹⁷ Finally, Part C addresses policy concerns that arise in denying civil unions recognition.²¹⁸

A. *The Constitutionality of DOMAs Under the FFCC*

The implementing of both state and federal DOMAs raises considerable constitutional concerns under the FFCC.²¹⁹ First, the constitutionality of whether Congress has the power and the extent of that power to pass the federal DOMA is in question. Whether the states can utilize the power Congress defers to them without violating the FFCC is another concern. This Note addresses each in turn. Part 1

²¹⁶ See *infra* text accompanying notes 219-314 (finding that both federal and state DOMAs are constitutional under the language and historical interpretation of the FFCC).

²¹⁷ See *infra* text accompanying notes 315-32 (determining that DOMAs, as they currently stand, cannot properly be interpreted to include civil unions).

²¹⁸ See *infra* Part III.C (discussing the possible benefits lost to those in civil unions if DOMAs are amended to include civil unions).

²¹⁹ See generally Whitten, *supra* note 16. DOMA raises other constitutional issues as well, including privileges and immunities guarantees, due process guarantees, equal protection guarantees, and First Amendment freedom of expression issues. For a further discussion of DOMA in light of privileges and immunities, see generally Mark Strasser, *The Privileges of National Citizenship: On Saenz, Same-Sex Couples, and the Right to Travel*, 52 RUTGERS L. REV. 553 (2000). For analysis of DOMA's relationship to the due process and equal protection guarantees, see generally Mark Strasser, *Domestic Relations Jurisprudence and the Great, Slumbering Baehr: On Definitional Preclusion, Equal Protection, and Fundamental Interests*, 64 FORDHAM L. REV. 921, 986 (1995). For an exploration of the First Amendment's impact on DOMA, see generally David Cruz, *Just Don't Call It Marriage: The First Amendment and Marriage as an Expressive Resource*, 74 CAL. L. REV. 925 (2000). All of these constitutional concerns, including that of the FFCC, are sought to be eliminated under the proposed Federal Marriage Amendment, which would state that marriage is only available to couples comprised of one man and one woman. Brooke Adams, *Gay Community Prepares to Fight Marriage Amendment*, SALT LAKE TRIB., Jan. 16, 2003, available at <http://www.sltrib.com/2003/Jan/01162003/utah/20627.asp>. Arguably, the Amendment is aimed at a nonexistent target, as same-sex marriage is not recognized among the fifty states, with Vermont the only state to recognize anything close to same-sex marriage in its civil union laws. *Id.* Others argue that this issue has been and should continue to be one for the states to determine. Lisa Riley Roche, *400 Decry Proposal to Ban Same-Sex Marriage* (Jan. 25, 2003), at <http://deseretnews.com/dn/view/0,1249,455027520,00.html>. A total of thirty-eight states are needed to ratify the bill. Joyce Howard Price, *Nevada OKs Constitutional Amendment on Marriage* (Nov. 7, 2002), available at <http://www.washtimes.com/national/20021107-3506359.htm> (on file with Valparaiso University Law Review). Currently, thirty-six states have DOMAs in place. See Liberty Counsel, *United States Laws Prohibiting Same-Sex Marriages*, available at <http://www.lc.org/ProFamily/DOMAs.html> (last updated Mar. 11, 2004).

determines the nature of Congress' role in applying the FFCC.²²⁰ Part 2 analyzes full faith and credit issues that the federal DOMA raises.²²¹ Finally, Part 3 evaluates state DOMAs in light of the FFCC.²²²

1. Congress' Role and the FFCC: Procedural or Substantive?

Essential to determining whether the DOMAs enacted on both the state and federal level are constitutional is addressing what role Congress plays in implementing the FFCC.²²³ Clearly, Congress does play a part in enforcing the FFCC as the FFCC itself states that "Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."²²⁴ However, a tension in determining the nature of Congress' role in the application of the FFCC arises out of this very language.²²⁵ Specifically, while the first part of the FFCC grants full faith and credit of authenticated acts, records, and judgments, the second part permits Congress to determine just what effect those acts, records, and judgments should take.²²⁶

Congress may have one of two types of "effects" power under the FFCC: a procedural one or a substantive one.²²⁷ A procedural effect would permit Congress to determine the nature of the effect an act, record, or judgment might have on a state court's decision.²²⁸ Under this approach, Congress must grant conclusive effect to all acts, records, and judgments.²²⁹ However, Congress is permitted to determine how the

²²⁰ See *infra* text accompanying notes 223-59 (arguing that Congress' role under the FFCC is substantive from a historical perspective).

²²¹ See *infra* text accompanying notes 260-87 (demonstrating that the federal DOMA is constitutional under the language and historical context of the FFCC).

²²² See *infra* text accompanying notes 288-314 (showing the constitutionality of the state DOMAs under the FFCC's implicit incorporation of the conflict-of-laws doctrine).

²²³ If Congress has the power to establish the parameters of the FFCC, then a statute such as the DOMA would not be problematic. However, if Congress' power is limited to merely a procedural implementing of the FFCC, DOMA overreaches. See *infra* notes 227-59 and accompanying text.

²²⁴ U.S. CONST. art. IV, § 1.

²²⁵ See Strasser, *supra* note 16, at 308-09.

²²⁶ See *id.* The language of Article I, Section 4, states: "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." U.S. CONST. art. IV, § 1.

²²⁷ Timothy Joseph Keefer, *DOMA as a Defensible Exercise of Congressional Power Under the Full Faith and Credit Clause*, 54 WASH. & LEE L. REV. 1635, 1655-56 (1997).

²²⁸ See Strasser, *supra* note 16, at 310.

²²⁹ *Id.* at 311. Such a view historically has been dismissed because it requires a state to examine the effect of a judgment in the state where it was rendered and could possibly

recognition of those acts, records, and judgments should be done.²³⁰ For example, Congress could set up a system in which a new trial in a sister state would be deemed inappropriate because of a previous judgment on the issue in the forum state.²³¹ Such a decision would promote efficiency in the administration of the FFCC among states.²³² But, Congress could not set up such a system if no previous judgment was involved. Thus, Congress could determine what kind of an effect a judgment would have among the states.²³³ But, it could not determine whether or not the judgment should have any effect.²³⁴

However, if Congress could decide the substantive effect of acts, records, or judgments among the states, it would be permitted to decide which acts, records, or judgments have any effect among the states and which do not.²³⁵ For example, if Congress passed legislation that stated that no state should recognize divorces granted in another state, Congress would be affecting the substance of the judgments involved. Thus, if Congress' role was substantive, it would be constitutionally permissible for it to deny effect to any judgment it so chose.²³⁶

Determining which of these is an appropriate understanding of Congress' role under the FFCC is crucial to determining the constitutionality of DOMAs. DOMAs substantively affect the validity of same-sex marriages.²³⁷ If Congress' role is procedural, then DOMAs are inherently unconstitutional because Congress may only determine the type of effect same-sex marriages might have.²³⁸ Conversely, if Congress' role is substantive, DOMA overcomes this preliminary

result in a judgment having greater effect than it would have in the state in which the judgment is in question. *Hitchcock v. Aicken*, 1 Cai. R. 460, 484 (N.Y. Sup. Ct. 1803). It is likely that this view was adopted through the misinterpretation of precedent which appeared to be interpreting the first sentence of the FFCC but was actually interpreting a different implementing statute that mimicked the FFCC in language. See *Mills v. Duryee*, 11 U.S. (7 Cranch) 481 (1813), cited in *Borchers*, *supra* note 7, at 158.

²³⁰ See Whitten, *supra* note 16, at 311.

²³¹ See Strasser, *supra* note 16, at 310-11.

²³² See *id.* at 311.

²³³ Scott Ruskay-Kidd, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435, 1452 (1997).

²³⁴ *Id.* at 1452-53.

²³⁵ See Strasser, *supra* note 16, at 311.

²³⁶ Paige E. Chabora, *Congress' Power Under the Full Faith and Credit Clause and the Defense of Marriage Act of 1996*, 76 NEB. L. REV. 604, 623 (1997).

²³⁷ *Id.* at 630.

²³⁸ *Id.* at 624-25.

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problem as Congress is permitted to establish which acts, records, or judgments are valid.

The Supreme Court has not addressed which type of effect Congress may give to acts, records, and judicial proceedings in any clear, decisive manner.²³⁹ The most the Court has said on the issue is that *full credit* must be given.²⁴⁰ Beyond that, however, the Supreme Court offers little guidance. Thus, whether Congress may govern the effect of judgments, records, and judicial proceedings in a procedural manner or in a substantive manner is ambiguous at best. Yet, this fundamental question must be resolved.

The argument for Congress' role as procedural relies on several assumptions. First, because *some* exceptions to the FFCC should be permitted,²⁴¹ this argument assumes that the FFCC must have been drafted to comply with "enforcement of other states' statutes . . . in accord with a set of conflict-of-laws and jurisdictional rules not explicitly specified in the text of the [FFCC]."²⁴² This assumption, however, yields another problem regarding the second sentence of the FFCC. Conflict-of-laws doctrine limits Congress' ability to determine the effect of judgments among states.²⁴³ To explain this limitation, scholars limit Congress' role to that of a procedural one, that is, one of determining the "technical rules for authenticating the statutes of other states."²⁴⁴ Thus, this argument arrives at the conclusion that Congress' role under the

²³⁹ Strasser, *supra* note 16, at 309. Strasser argues that the power to proscribe would nullify the FFCC and consequently, render it moot. MARK STRASSER, LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION 137 (1997). Consequently, Congress' role in implementing the FFCC must be a procedural one. *Id.*

²⁴⁰ See *Davis v. Davis*, 305 U.S. 32, 40 (1938).

²⁴¹ See *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532, 547 (1935).

A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own.

Id.; see also Whitten, *supra* note 16, at 261. If no exception could be made, states would be forced to use out-of-state laws in its own decision making and, in cases involving more than one state, would have to make impossible decisions regarding which states' law to apply. Borchers, *supra* note 7, at 159.

²⁴² Whitten, *supra* note 16, at 261.

²⁴³ *Id.*

²⁴⁴ *Id.* at 262. An alternative interpretation would be to assume Congress can override any effect the conflict-of-law doctrine might have via the first sentence of the FFCC. *Id.* However, because such an interpretation of the Effects Clause is contrary to the usual understanding of the relationship between Congress and the courts, this alternative is typically dismissed. *Id.*

FFCC is procedural merely because it wants to ensure that its assumptions made under the FFCC are true.

The better argument is that Congress' role is substantive. Rather than relying on assumptions, this argument instead looks to the context of the FFCC's drafting.²⁴⁵ Under this historical analysis of each sentence of the FFCC, it becomes clear that Congress was intended to have a substantive role. The first sentence of the FFCC requires that "Full Faith and Credit" be given among the states.²⁴⁶ Historically, this meant that other states' statutes were to be considered "good" or "admissible" evidence in another state.²⁴⁷ Thus, "faith" and "credit" in relation to state laws are understood as evidentiary terms, rather than words giving other states' laws conclusive effect.²⁴⁸

"Full faith and credit" can mean one of two things. It can mean conclusive as to authentication (supporting the existence and contents of itself), or it can mean conclusive on the merits (*res judicata*).²⁴⁹ Historical

²⁴⁵ See Kelly, *supra* note 33, at 209-10 (stating that "debating semantics alone ignores the constitutional history of the [FFCC]. A proper analysis entails reviewing how the Constitution's Framers, the U.S. Supreme Court and the states themselves have interpreted the [FFCC]"); Whitten, *supra* note 16, at 258-59. Though many scholars turn to history for FFCC analysis, modern commentary on the meaning of the FFCC "can only be described as 'political,' rather than scholarly, and it certainly does not amount in any way to a competent or objective attempt to examine the historical evidence about the meaning of the Clause." *Id.* at 347. Even Justice Scalia, who purportedly looks to history for guidance in evaluating the Constitution, stated that "[t]he conflicts law embodied in the Full Faith and Credit Clause allows room for common-law development." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 723 n.1 (1988). For an in depth discussion on the weaknesses of current historical and theoretical analysis of the FFCC, see Whitten, *supra* note 16, at 346-90.

²⁴⁶ U.S. CONST. art. IV, § 1.

²⁴⁷ See Whitten, *supra* note 16, at 263. In other words, a statute can be authenticated by rules not explicitly in the Constitution so as to prove "conclusive proof that the statutes exist and deal with the matters described in their text." *Id.* at 264. The evidentiary origins of the terms "faith" and "credit" can be traced back to English law and ultimately to the middle ages. *Id.* at 266 n.24. Under English law, these terms were very flexible, applying to the mere admission of evidence or to the weight or effect such evidence should have. *Id.* at 267. It came out of a need for authentication and proof of foreign law where such law was applied in English courts. *Id.* at 272.

²⁴⁸ See *James v. Allen*, 1 U.S. (1 Dall) 188, 192 (1786). This distinction between authentication rather than conclusive effect is significant, as proof of a law (authentication) did not dictate that such a law necessarily govern the outcome of the case at hand. Whitten, *supra* note 16, at 273. The understanding of the FFCC as an evidentiary clause may seem to be trivial, but the importance of the issue to us is irrelevant when seeking a historical understanding of the clause. *Id.* at 264.

²⁴⁹ See Whitten, *supra* note 16, at 267-68. Thus, if a document was given full faith and credit, the decree could not be impeached by putting on new evidence. Borchers, *supra* note 7, at 158.

documents indicate that the drafters of the FFCC intended the former to be the appropriate understanding and application of the FFCC.²⁵⁰ Such a constitutional provision regarding acts, public records, and judgments was necessary to ensure that the provision did not “amount to nothing more than what now takes place among all Independent Nations.”²⁵¹ Thus, the first sentence of the FFCC was intended to demand that acts, public records, and judgments were conclusive as to authentication.

The second sentence of the FFCC was intended to allow Congress to determine the manner and effect of such authentication.²⁵² Determinations regarding acts, public records, and judgments are reserved exclusively for Congress.²⁵³ Under this exclusive power, Congress may “‘limit the effect of judicial proceedings’ under the Clause.”²⁵⁴ Congress must do so in the form of a “general law.”²⁵⁵ The word “general” was historically used to indicate that a legislating body could not legislate with reference to or with a particular case in mind.²⁵⁶ For example, Congress could not pass a bill addressing the outcome of a pending case. Providing it did not do so, Congress could constitutionally pass limitations as to the effects of acts, public records, and judgments. However, if Congress did not pass a general law on a

²⁵⁰ See generally MAX FARRAND, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (rev. 3d ed. 1966). For example, Wilson and Johnson saw state judgments only as grounds of action, rather than having a conclusive effect on the merits. *Id.* at 447 (Madison’s notes). A shift from conclusive as to authentication to conclusive on the merits occurred in *Mills v. Duryee*, 11 U.S. (7 Cranch) 481 (1813), when the Supreme Court adopted a more expansive view. Borchers, *supra* note 7, at 158.

²⁵¹ FARRAND, *supra* note 250, at 488.

²⁵² See U.S. CONST. art. IV, § 1 (“Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”).

²⁵³ See *id.*

²⁵⁴ Whitten, *supra* note 16, at 302 (citing *Green v. Sarmiento*, 10 F. Cas. 1117, 1118 (C.C.D. Pa. 1810) (No. 5,760)).

²⁵⁵ U.S. CONST. art. IV, § 1.

²⁵⁶ Whitten, *supra* note 16, at 388. This understanding of “general laws” was the source of the due process prohibition on retroactive laws. *Id.* However, some historical scholars hold that the term “general” is used in contrast to “local.” See *Defense of Marriage Act: Hearings on S. 1740 Before the Senate Comm. on the Judiciary*, 104th Cong., 2d Sess. 42, 57 (1996) (statement of Michael W. McConnell); see, e.g., *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842) (determining that the meaning of the ‘general commercial law’ was to be done in contrast with ‘local’ laws). Such an interpretation may, however, be erroneous as the “‘general’ versus ‘local’ distinction was only used to communicate a difference in sources of applicable substantive law.” Whitten, *supra* note 16, at 388 (citing *Bolling v. Sharpe*, 347 U.S. 497 (1954)).

particular issue, the states could determine what constitutes appropriate authentication.²⁵⁷

This historical view clearly supports Congress' role as substantive in implementing the FFCC. Congress is permitted to determine the effect of acts, public records, and judgments among states, provided it does so in a general fashion.²⁵⁸ Having thus analyzed this preliminary question, this Note now addresses the federal and state DOMAs' constitutionality.²⁵⁹

2. The Constitutionality of the Federal DOMA

Because Congress has a substantive role in implementing the FFCC, DOMA could not possibly be undermining the FFCC. First, to qualify for consideration under the FFCC, DOMA must address an act, public record, or judgment.²⁶⁰ Marriage, whether between couples of the same sex or opposite sex, does not constitute a judgment for the purposes of the FFCC.²⁶¹ A judgment involves a controversy that the courts must resolve and enforce.²⁶² For example, a divorce is considered a judgment—it involves a controversy and a court must enforce it. Marriage, on the other hand, does not constitute a controversy, as both parties must assent and be in agreement for such a union to take place. The state's only involvement with a marriage is issuing a marriage certificate.²⁶³ Consequently, DOMA does not affect a judgment.

DOMA does, however, affect a public record. Marriage certificates are evidence of a public record. Marriage documentation is kept on record and is available to the public.²⁶⁴ Consequently, marriage falls under the language of the FFCC as a public record. The first sentence of the FFCC historically was intended to deal with the evidentiary effect,

²⁵⁷ See *id.* at 264. Typically, this takes the form of choice-of-law and conflict-of-law doctrine. *Id.* at 265. For a further discussion on the choice-of-law element of the FFCC, see *supra* notes 71-91 and accompanying text.

²⁵⁸ See U.S. CONST. art. IV, § 1 ("Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.").

²⁵⁹ See *infra* Part III.A.2 for a discussion of the federal DOMA's constitutionality in a historical context.

²⁶⁰ See U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State.").

²⁶¹ See Borchers, *supra* note 7, at 165-66. If they were, fishing and driving licenses would need to be recognized as judgments as well. *Id.* at 167.

²⁶² Kelly, *supra* note 33, at 217.

²⁶³ *Id.* at 216.

²⁶⁴ See *Thomas v. Sullivan*, 922 F.2d 132, 138 (2d Cir. 1990).

not the validity of a document.²⁶⁵ The federal DOMA seems to comply with this requirement. The federal DOMA asserts that states are not required to recognize same-sex marriages performed in another state.²⁶⁶ This does not mean that those marriages will have no legal weight; rather, it means that courts do not need to enforce them.²⁶⁷ Thus, marriage certificates demonstrating that a same-sex couple was married can serve as conclusive proof that the individuals in question were indeed married. But, such proof does not require a state to recognize that marriage as valid.²⁶⁸ The FFCC stipulates nothing regarding validity.²⁶⁹ Thus, because the first sentence of the FFCC deals with evidentiary effect, Congress' enactment of DOMA, which speaks to validity, not authenticity, satisfies the initial requirements of the FFCC.

Having survived the first sentence of the FFCC, the federal DOMA still must face the latter part of the FFCC. The second sentence permits Congress to pass "general laws" regarding the manner in which judgments and proceedings are proved.²⁷⁰ True, DOMA does address a narrow issue in its language—that of same-sex marriage and its recognition—but such a narrow exception is broad enough to be characterized as a "general law" because it does not address a particular case nor is framed with a specific judgment in mind.²⁷¹ Because of this,

²⁶⁵ See *supra* note 248 and accompanying text.

²⁶⁶ See 28 U.S.C. § 1738C (2000).

²⁶⁷ The court must first satisfy the domicile and public policy requirements of the conflict-of-laws doctrine before determining it will not recognize another state's marriage. See *supra* notes 180-84 and accompanying text for a discussion of these requirements. See *infra* notes 275-77 and accompanying text for an analysis of these state requirements under the FFCC.

²⁶⁸ See Whitten, *supra* note 16, at 389. But see Borchers, *supra* note 7, at 152 (arguing that a marriage license does not meet any of the criteria of a judgment and thus is not entitled to mandatory recognition under the FFCC). Analogously, if a state issued a gun permit, and the permit holder went to another state with that permit and gun in hand, that state, while recognizing the permit as proof of receiving a gun permit, is not required to deem the permit valid and allow the permit holder to proceed with his or her gun into the state despite contrary laws. Whitten, *supra* note 16, at 389.

²⁶⁹ See U.S. CONST. art. IV, § 1 ("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.").

²⁷⁰ See U.S. CONST. art. IV, § 1 ("Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof").

²⁷¹ See generally Julie L.B. Johnson, *The Meaning of "General Laws": The Extent of Congress's Power Under the Full Faith and Credit Clause and the Constitutionality of the Defense of Marriage Act*, 145 U. PA. L. REV. 1611 (1997). Some scholars have argued that because Congress only addressed some types of marriage in the DOMA, rather than marriage in general, DOMA

federal DOMA survives scrutiny as a “general law” under the second sentence of the FFCC. Further, DOMA satisfies the language of the FFCC and is therefore constitutional.

Despite satisfying the language of the FFCC, DOMA still must mollify one last concern: states’ rights. Inherent in the Constitution is a conflict between federal and state laws.²⁷² Constitutional concerns regarding the federal DOMA arises from tension between states’ rights and federal power.²⁷³ DOMA might be construed to tread upon those rights, laying out what the states can and cannot do regarding same-sex marriage, thus creating an apparent “exception” to the FFCC that limits states’ rights that are fundamentally theirs.²⁷⁴ However, the language of DOMA states that “No State . . . shall be required.”²⁷⁵ Such language can hardly be construed to limit state power. Rather, it affirmatively asserts the states’ right not to recognize same-sex marriage. That right is created under the public policy exception of the conflict-of-laws doctrine.²⁷⁶ The federal DOMA does not abrogate that right; rather, it affirms that the states that wish to deny recognition to same-sex marriages, whether under their own DOMAs or under the public policy exception, may do so.²⁷⁷

Further, the federal DOMA does not directly take away from the command of enforcement in the first sentence of the FFCC. Rather, it

does not meet the requirements of the FFCC and, consequently, is unconstitutional. *Id.*; see also Strasser, *supra* note 19, at 372.

²⁷² For a discussion of how the FFCC protects states’ rights, see *supra* notes 38-52, and accompanying text.

²⁷³ See *Same-Sex Marriage: Hearings on S. 1740 Before the Senate Comm. on the Judiciary, 104th Cong., 2d Sess. (1996)* (written statement of Lynn D. Wardle) (stating that federalism “protects the integrity of the states from possible overreaching by the national government, while the Full Faith and Credit Clause protects the states from possible overreaching by each other”).

²⁷⁴ See 142 CONG. REC. S5931-01 (1996), cited in Brown, *supra* note 215, at 165 (statement of Lawrence H. Tribe, as read into the Record by Senator Ted Kennedy). Specifically, this exception is a “negative” use of the FFCC, allowing states *not* to recognize other states’ law despite the FFCC. Allegedly, such a use is unprecedented, and thus, unconstitutional. *But see* Brown, *supra* note 215, at 166-67 (showing as precedent that the Parental Kidnapping Prevention Act (“PKPA”) was held constitutional in *Thompson v. Thompson*, 484 U.S. 174 (1988), despite its “negative” use under the FFCC to limit custody decrees to three jurisdictional bases).

²⁷⁵ 28 U.S.C. § 1738(C)(2) (2000). This permissive, rather than mandatory, language appears to be non-binding and to “offer nothing beyond a ‘sense of Congress.’” Silverman, *supra* note 100, at 1099.

²⁷⁶ See *supra* notes 73-79 and accompanying text.

²⁷⁷ See *supra* notes 73-79 and accompanying text.

subtracts from the general implementing statute.²⁷⁸ The federal DOMA makes an exception to the implementing statute Congress passed regarding the effect that should be given to judgments.²⁷⁹ Such an exception is permissible provided it does not undermine the authenticity of a judgment.²⁸⁰ Congress could have decided to permit states not to recognize divorce judgments from another state under the FFCC's implementing statute.²⁸¹ Rather than addressing divorces however, Congress, through DOMA, created an exception regarding same-sex marriages. The federal DOMA not only expressly allocates to the states the power to recognize or not recognize same-sex marriage; it intentionally detracted from Congress' power to do so.

By creating the federal DOMA, Congress expressed a willingness to preserve the same-sex marriage issue for the states. The federal DOMA was created out of concern that states would feel pressured to recognize another state's same-sex marriage.²⁸² Because of Congress' DOMA, such fear was mollified. The federal DOMA permits states to determine for themselves whether they will recognize same-sex marriages entered into in another state, while also informing the states that Congress will stay

²⁷⁸ See *supra* notes 52-59 and accompanying text. The implementing statute is Title 28 § 1738 of the United States Code, which states:

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738.

²⁷⁹ See 28 U.S.C. § 1738C, which states:

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.

²⁸⁰ See *supra* notes 249-52 and accompanying text.

²⁸¹ Wardle, *supra* note 49, at 225; see *supra* notes 52-59 and accompanying text.

²⁸² See *supra* note 162.

out of this issue.²⁸³ Further, by permitting states to create their own statutes governing same-sex marriage, the federal DOMA ensures that states address the issue of same-sex marriage as a legislative, rather than a judicial question. For these reasons, the articulation of DOMA is an important one.

The federal DOMA, then, survives scrutiny under the FFCC. DOMA falls under the FFCC because DOMA governs public records, namely, same-sex marriages.²⁸⁴ DOMA does not, however, deny authentication, which is impermissible under the FFCC, but rather addresses the substantive effect of same-sex marriages among the states.²⁸⁵ Nor does DOMA tread upon states' rights; rather, it allows each state to decide for itself whether or not it will recognize same-sex marriage.²⁸⁶ The federal DOMA provides a balance between federalism and the FFCC, providing an equilibrium between state and federal government as well as among states regarding the recognition of same-sex marriage.²⁸⁷ In light of this, the federal DOMA satisfies the FFCC requirements. However, while the federal DOMA may stand constitutionally, whether state DOMAs will pass constitutional muster is of equal importance and concern. This is addressed next.

3. State DOMAs and Their Constitutionality

Just as the federal DOMA must survive analysis under the language of the FFCC and state sovereignty issues implicit in the FFCC, state DOMAs run into potential federal constitutional problems.²⁸⁸ For the states to have constitutionally valid DOMAs, the states must ensure that

²⁸³ See Sylvia Law, *Access to Justice: The Social Responsibility of Lawyers: Families and Federalism*, 4 WASH. U. J.L. & POL'Y 175, 216 (2000). Further, DOMA sends a message: that same-sex marriages are uniquely illegitimate. *Id.* at 218. However, DOMA also ensures federalism. Wardle, *supra* note 161, at 30.

²⁸⁴ See *supra* text accompanying note 264.

²⁸⁵ See *supra* note 6.

²⁸⁶ See *supra* note 6.

²⁸⁷ Wardle, *supra* note 49, at 221.

²⁸⁸ Arguably, despite federal DOMA, "states already could refuse to recognize [same-sex] marriages" under the public policy exception, rendering state DOMAs inherently constitutional. Strasser, *supra* note 19, at 370-71. Some scholars, however, argue that the public policy exception itself is unconstitutional. See, e.g., Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997) (arguing that because the public policy exception permits discrimination against out-of-state marriages, it is unconstitutional). *But see* Richard S. Myers, *Same-Sex "Marriage" and the Public Policy Doctrine*, 32 CREIGHTON L. REV. 45 (1998) (arguing that the public policy exception applies to each state equally and, as such, is constitutional).

they do not run afoul of the FFCC.²⁸⁹ This is especially problematic if the federal DOMA is determined to be unconstitutional.²⁹⁰ However, if the federal DOMA is deemed constitutional under the express language of the FFCC, as is argued above, state DOMAs, which respond to the federal DOMA, are likely constitutional on those grounds. After all, if Congress is permitted to limit the extent of FFCC application among the states, the states should be able to, in turn, respond by implementing that limitation if they so desire. One constitutional constraint on this response does, however, exist: the implicit FFCC requirement of honoring the sovereignty and rights of another state.²⁹¹

The fundamental FFCC concern that state DOMAs raise is that of recognizing other states' laws.²⁹² State DOMAs explicitly deny recognition of another state's legally recognized same-sex marriage.²⁹³ This denial seems to limit the sovereignty of the state which recognized the same-sex marriage in the first place. For example, state A's DOMA impedes on state B's sovereignty because state A will not apply state B's law, following its DOMA instead. On the other hand, state A should be able to apply its own law in its own courts.²⁹⁴ To always require state B's law to be applied in A's court is to overextend B's sovereignty while at the same time minimizing A's sovereignty.²⁹⁵ It was precisely to prevent this that the FFCC was implemented.²⁹⁶ The FFCC was created to prevent situations like the one above, ensuring that state A can apply its own law.²⁹⁷ For purposes of state application, the FFCC has been

²⁸⁹ Other constitutional provisions might be problematic as well, such as equal protection, freedom of speech, and due process. See generally Mark Strasser, *Same-Sex Marriages and Civil Unions: On Meaning, Free Exercise, and Constitutional Guarantees*, 33 LOY. U. CHI. L.J. 597, 626 (2002).

²⁹⁰ See *Burns v. Burns*, 560 S.E.2d 47, 49 (Ga. Ct. App. 2002) (stating that it would rely on the federal DOMA as well as Georgia's DOMA to deny recognition to same-sex marriages).

²⁹¹ See *supra* text accompanying notes 38-51.

²⁹² See *supra* text accompanying notes 38-51.

²⁹³ See *supra* notes 165-72 and accompanying text.

²⁹⁴ It is in this way that DOMA protects horizontal federalism (among states) as well as vertical federalism (between the states and the federal government). Wardle, *supra* note 161, at 33.

²⁹⁵ See *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532, 547 (1935). Concerned with this very issue, Justice Stone stated:

A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own.

Id.

²⁹⁶ See *supra* notes 48-51 and accompanying text.

²⁹⁷ See *supra* text accompanying notes 48-51.

interpreted to imply conflict-of-laws principles.²⁹⁸ Thus, should DOMA satisfy the conflict-of-laws doctrine regarding marriage, it will be constitutional for purposes of state sovereignty under the FFCC.

Under the conflict-of-laws doctrine, states are permitted to apply a public policy exception to marriage.²⁹⁹ This exception permits state *A* to apply state *A*'s marriage law if state *B*'s marriage law violates state *A*'s public policy.³⁰⁰ The only limitation to the use of this exception is that it may only be used in states in which the parties involved are domiciled.³⁰¹ This is because the state of domicile would have a stronger interest in the outcome of the case and the parties involved.³⁰² In theory, then, a state is permitted under the public policy exception to deny recognition of *any* marriage that violates that state's public policy, providing that the parties involved are domiciled within that state.³⁰³

DOMA seems to ignore the domicile requirement, permitting states to not recognize same-sex marriages regardless of domicile connections. However, while domicile matters for the purposes of the exception, very few civil unions are between Vermonters.³⁰⁴ Most come from other states.³⁰⁵ Thus, this issue, while a valid one, will arise infrequently as very few couples that receive civil unions are domiciled in Vermont.

Because domicile is unlikely to be an issue for state DOMAs, DOMAs should be able to function as an expression of the implementing state's public policy exception. States have applied the public policy exception to common-law marriages.³⁰⁶ They also have done so for under-age marriage, polygamy, and incest.³⁰⁷ Presumably, the public policy exception can be applied to same-sex marriages as well. States may have a significant interest in preserving the traditional view that

²⁹⁸ See *Sun Oil Co. v. Wortman*, 486 U.S. 717, 723 n.1 (1988) (stating that conflicts law is embodied in the FFCC).

²⁹⁹ See *supra* text accompanying notes 111-14.

³⁰⁰ See *supra* notes 111-14.

³⁰¹ See *supra* text accompanying note 114.

³⁰² See *supra* text accompanying note 114.

³⁰³ See *Law, supra* note 283, at 217 (showing that "[s]tates have always been free to decide whether a marriage valid in the state in which it was contracted violates a 'strong public policy' of another state").

³⁰⁴ See *supra* note 3.

³⁰⁵ See *supra* note 3.

³⁰⁶ See *supra* notes 119-22 and accompanying text.

³⁰⁷ See *supra* note 112 and accompanying text.

marriage should be between one man and one woman.³⁰⁸ State DOMAs function as an expression of that interest. Thus, they should be recognized as a valid use of each state's public policy exception.

State DOMAs, because they are merely declarations of intent to disregard same-sex marriages under the public policy exception, may appear on their face to be unnecessary statutes.³⁰⁹ The state DOMAs merely specifically lay out what the courts could conclude, despite the statute, under the public policy exception.³¹⁰ However, state DOMAs do more than just lay out a public policy exception. They preserve each state's right to decide the same-sex marriage issue, a topic which more broadly has historically been left to the states,³¹¹ according to the policy of each state.³¹² Just as the federal DOMA permits each state to decide this issue legislatively,³¹³ states can, through their DOMAs, relegate the same-sex marriage issue to their legislatures.³¹⁴ Rather than leaving this issue to case-by-case claims, state DOMAs explicitly lay out what their courts should decide on the issue of same-sex marriage. Further, state DOMAs ensure notice to all parties who might be interested as to the outcome of their claim. For these reasons, state DOMAs serve not only an important and constitutionally permissible function, but protect each state's autonomy as the FFCC intended.

However, even if the Supreme Court found federal and state DOMAs to be constitutional, the problem remains whether they can properly be applied to civil unions, which they do not explicitly address. It is to this issue that this Note now turns.

B. *The Accuracy of the Application of DOMAs to Civil Unions*

To date, courts have resisted broadening the language of both the federal and state DOMAs to include not just same-sex marriages, but

³⁰⁸ See Stanley Kurtz, *The Coming Battle*, NAT'L REV. ONLINE, Nov. 26, 2002, at <http://www.nationalreview.com/kurtz/kurtz112602.asp> (stating that "[o]nce marriage can mean anything, it will mean nothing").

³⁰⁹ See Stanley E. Cox, *DOMA and Conflicts Law: Congressional Rules and Domestic Relations Conflicts Law*, 32 CREIGHTON L. REV. 1063, 1064 (1999).

³¹⁰ Whitten, *supra* note 54, at 1247-48.

³¹¹ See *supra* text accompanying note 97.

³¹² See *supra* text accompanying notes 111-14.

³¹³ See *supra* text accompanying note 282.

³¹⁴ Wardle, *supra* note 161, at 33.

civil unions.³¹⁵ The federal DOMA permits recognition of same-sex relationships that are treated as marriages in the law of the state that granted recognition of the relationship.³¹⁶ While some state DOMAs broadly deny recognition to any same-sex relationship, most state DOMAs mirror the federal DOMA's language, denying recognition to same-sex couples whose relationship is treated as a marriage under state law.³¹⁷ In light of this language, the grounds for application of DOMAs to civil unions are unclear, particularly in light of the Vermont civil union statute itself.³¹⁸ Yet, it seems unreasonable to force states to resort to their courts for evaluation of civil unions when same-sex marriages are dealt with legislatively. Such a dichotic approach to address two similar relationships is simultaneously confusing and inconsistent to citizens as it provides notice regarding state policies as to same-sex marriage but none regarding civil unions. To address this concern, the distinction between civil unions and same-sex marriages must be examined.

Vermont's civil union statute was created as a separate relationship from that of marriage.³¹⁹ Civil unions were created to offer same-sex couples access to legal benefits.³²⁰ Thus, while civil unions and marriages enjoy the same benefits under Vermont law,³²¹ civil unions are explicitly precluded from Vermont's marriage laws, just as marriages are precluded from civil union laws.³²² Civil unions function under a

³¹⁵ See, e.g., *Rosengarten v. Downes*, 802 A.2d 170 (Conn. App. Ct. 2002); *Burns v. Burns*, 560 S.E.2d 47 (Ga. Ct. App. 2002). For a detailed examination of these cases, see *supra* notes 185-208 and accompanying text. If state DOMAs, with their intent to refuse recognition to same-sex marriages, were found unconstitutional, even Vermont would have to recognize same-sex marriages in addition to civil unions. Strasser, *supra* note 19, at 373. Some scholars also argue that if same-sex marriages are recognized between states, so civil unions should also be recognized. Johnson, *supra* note 3, at 318.

³¹⁶ See 28 U.S.C. § 1738C (2000).

³¹⁷ See *supra* notes 170-71.

³¹⁸ See *supra* text accompanying notes 177-81.

³¹⁹ See *supra* notes 177-81 and accompanying text.

³²⁰ See *supra* text accompanying notes 174-76.

³²¹ For example, the Vermont civil union law includes civil union partners under any applicable laws containing the word "spouse." VT. STAT. ANN. tit. 15, § 1204(b) (Supp. 2000). Such a broad integration of civil unions is qualified only where federal law is in play. Strasser, *supra* note 19, at 373. Such a limitation was included because Vermont cannot force the federal government to grant couples in civil unions federal benefits. *Id.* Some argue from these factors that "[c]ivil unions are the legal equivalent to marriage." Johnson, *supra* note 3, at 327.

³²² See VT. STAT. ANN. tit. 15, § 1202(2) (2000).

separate licensing system.³²³ Civil unions are a local creation, which lacks the traditional recognition and stability marriage enjoys. This distinction between civil unions and marriage is further supported by recent legislative activity to amend Vermont's constitution to deny recognition to same-sex marriages.³²⁴ Such an amendment would not be proposed if it was thought to upset the already established civil union.³²⁵ Civil unions and marriages are treated as separate entities in Vermont.

Such disparate treatment has not been lost on state courts in recent cases.³²⁶ In *Burns*,³²⁷ the Georgia Court of Appeals stated that it would deny the plaintiff her right to visit her son because, as part of the agreement, she was not allowed to cohabit, except in the case of remarriage, and civil unions were not marriages.³²⁸ Similarly, in *Rosengarten*,³²⁹ the Connecticut Appellate Court refused to hear a civil union dissolution case because the court had jurisdiction over family relations, under which civil unions, distinct from marriages, did not fall.³³⁰ Both Georgia and Connecticut recognized the distinction Vermont made between civil unions and marriages and honored it.³³¹

Because Vermont does not treat civil unions as marriages, both federal and state DOMAs should not be interpreted to include civil unions. This seems logical; after all, these DOMAs "did not anticipate the scenario of an alternate form of legally-cognizable relationship" because civil unions were created after DOMAs.³³² Because DOMAs include only those relationships treated as marriages, civil unions should not be implicitly included in their language.

³²³ Compare VT. STAT. ANN. tit. 18, § 5131 (requiring a marriage license for those wishing to have their solemnized marriage legally recognized), with VT. STAT. ANN. tit. 15, § 5160 (requiring additionally that a civil union be certified).

³²⁴ Ross Sneyd, *Senator Wants Amendment Against Same-Sex Marriage*, TIMES ARGUS (Vt.), Feb. 7, 2003, available at <http://timesargus.nybor.com/local/Story/60305.html>.

³²⁵ *Id.* The proposal was never intended to effect civil unions, but to address the separate issue of same-sex marriage. *Id.*

³²⁶ See, e.g., *Rosengarten v. Downes*, 802 A.2d 170 (Conn. App. Ct. 2002); *Burns v. Burns*, 560 S.E.2d 47 (Ga. Ct. App. 2002). For a detailed examination of these cases, see *supra* notes 185-208 and accompanying text.

³²⁷ 560 S.E.2d 47.

³²⁸ *Id.* at 49.

³²⁹ 802 A.2d 170.

³³⁰ *Id.* at 184.

³³¹ See *supra* text accompanying note 184.

³³² Silverman, *supra* note 100, at 1102.

States may decide to use their public policy exception regarding civil unions the same way they have for marriage.³³³ Because state DOMAs are subject to their state's public policy under the FFCC,³³⁴ states may avoid recognizing civil unions despite a lack of DOMA if such recognition violates their public policy.³³⁵ The Connecticut Appellate Court in *Rosengarten* refused to grant a civil union dissolution precisely for this reason – pursuant to Connecticut public policy, civil unions were no more acceptable than were same-sex marriages.³³⁶ This is an appropriate use of the public policy exception.³³⁷

States can deny recognition of civil unions under their public policy exception because the nature of civil unions is sufficiently similar enough to other types of relationships that they have denied recognition to warrant its use.³³⁸ Thus, the best public policy argument states could make would be from analogy. Civil unions can be included under the public policy exception, just as are polygamy, incest, and common-law marriage.³³⁹ The latter provides an apt comparison as to how the argument might look. Common-law marriages were typically not recognized if sought out explicitly.³⁴⁰ Civil unions should be similar in this regard. Because Vermont is the only state that recognizes civil unions, people travel from all over the nation to enter into them, return home, and hope for recognition in their domicile state.³⁴¹ Because these unions, like common-law marriages, are sought out explicitly, and

³³³ See *supra* notes 111-22 and accompanying text. Currently, scholars believe that “if a state has a strong public policy against same-sex marriage, they won’t be forced to recognize a same-sex marriage from another state.” Lawrence Morahan, *Civil Rights, Legal Groups Voice Support of Same-Sex Marriage* (Nov. 25, 2002), at <http://www.cnsnews.com/Culture/Archive/200211/CUL20021125c.html>. Such a standard should be equally applicable to civil unions.

³³⁴ See *supra* text accompanying notes 298-99.

³³⁵ See Johnson, *supra* note 3, at 328.

³³⁶ *Rosengarten v. Downes*, 802 A.2d 170 (Conn. App. Ct. 2002).

³³⁷ See *supra* notes 198-208 and accompanying text.

³³⁸ See *supra* notes 112, 119-22.

³³⁹ See *supra* notes 111-22 and accompanying text. In fact, if civil unions are not, they may undermine the ability of the states to prohibit these other forms of relationships. Staff Report, *Attorney General Seeks Dismissal of Same-Sex Marriage Suit*, INDIANAPOLIS STAR, Jan. 4, 2003, available at <http://www.indystar.com/print/articles/3/013357-1053-092.html> (on file with Valparaiso University Law Review). This is precisely the argument Indiana’s Attorney General is making in a current case seeking recognition of a civil union. *Id.*

³⁴⁰ See *Metro. Life Ins. Co. v. Chase*, 294 F.2d 500 (3d Cir. 1961) (finding that a New Jersey couple that traveled to the District of Columbia for the apparent purpose of entering into a common law marriage did not have a recognizable marriage in New Jersey because they were not domiciles of the District of Columbia); *supra* notes 115-22 and accompanying text.

³⁴¹ See *supra* note 3.

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because they are often not recognized by the domicile state, the domicile state has an interest in protecting its own state policy and can thus implement the public policy exception.

Resorting to the public policy exception, while available to states, is not ideal. It requires the courts to decide these issues on a case-by-case basis, an approach that is tedious and inefficient. Further, it does not provide citizens with adequate notice as to the state's position on civil unions. Additionally, it is uncertain whether the federal DOMA will yield to the states such power, as it only gives states the power to address same-sex marriage recognition, not civil unions.³⁴² Fortunately, a solution exists.

Both the federal and state DOMAs may be revised to include civil unions, resolving the notice, efficiency, and inconsistency concerns mentioned above. Because civil unions satisfy the public policy exception of conflict-of-laws, state DOMAs can be constitutionally expanded to include civil unions.³⁴³ State DOMAs are constitutional under the FFCC because they satisfy the implicit conflict-of-laws doctrine of the FFCC.³⁴⁴ Just as same-sex marriage can be validly denied recognition under state DOMAs because it violates a state's public policy, so too can civil unions.³⁴⁵ The denial of same-sex marriages is constitutional because such denial satisfies the public policy exception; so to do civil unions, which can also be denied recognition under the public policy exception.³⁴⁶ As a result, states may also, to avoid constant revision of their DOMAs, include all public policy concerns under the language of their DOMAs. For example, if states are strongly concerned not only with recognizing same-sex marriages and civil unions but with *all* relationships between same-sex couples, their DOMAs can reflect that concern. In this manner, states preserve their sovereignty regarding their laws and policies.

In order for states to amend their statutes, however, the federal DOMA must be revised as the states derive their power to implement their DOMAs from the federal DOMA.³⁴⁷ The federal DOMA can constitutionally be amended. If Congress has an interest in reserving not

³⁴² See *supra* text accompanying notes 315-32.

³⁴³ See *supra* text accompanying notes 333-41.

³⁴⁴ See *supra* text accompanying notes 299-308.

³⁴⁵ See *supra* text accompanying notes 333-41.

³⁴⁶ See *supra* text accompanying notes 338-41.

³⁴⁷ See *supra* text accompanying note 161.

just same-sex marriage, but also civil union decisions to the states, it should express that interest through the federal DOMA. Congress can constitutionally preserve this interest under the FFCC.³⁴⁸ Because civil unions are issued licenses, they constitute a public record under the FFCC.³⁴⁹ However, as a public record, a civil union's authenticity is not undermined by a revised federal DOMA; its validity is.³⁵⁰ Thus, a certificate of a civil union can serve as evidentiary proof that a civil union was entered into, while constitutionally being denied recognition as a civil union.³⁵¹ State sovereignty is still preserved through this change, while still honoring the explicit text of the FFCC.³⁵² If Congress wishes to defer all same-sex couple issues to the states, it may state that in its DOMA as well. Because both the federal and state DOMAs are constitutional limitations on the effect of same-sex marriage among the states under the FFCC, these statutes can be amended to include civil unions as well.

C. *The Consequences of Expanding DOMA to Include Civil Unions*

Even if federal and state DOMAs can be constitutionally expanded to include civil unions, significant ramifications exist as a consequence. Thus, before both states and Congress consider revising DOMA, they should be sure that the results are in accord with their intentions.

The ramifications of permitting each state under a DOMA to not recognize a relationship created and established in another state seems to lead down a destructive path, not only for those in the relationship, but for those around them as well.³⁵³ After all, civil unions are similar to marriage in that they impact many legal areas, such as dividing property upon a spouse's death, pension rights, and health and insurance benefits.³⁵⁴ Each state should weigh these issues carefully before enacting legislation denying recognition of civil unions.

Of course, states cannot control what the federal government does with civil unions. For example, the fact that the federal DOMA explicitly denies those in same-sex marriages benefits provided under federal law

³⁴⁸ See *supra* Part III.A.1-2.

³⁴⁹ See *supra* note 264 and accompanying text.

³⁵⁰ See *supra* note 248 and accompanying text.

³⁵¹ See *supra* note 248 and accompanying text.

³⁵² See *supra* text accompanying note 30.

³⁵³ See generally Strasser, *supra* note 19.

³⁵⁴ Hogue, *supra* note 69, at 41; Whitten, *supra* note 54, at 1249.

is not something states can change.³⁵⁵ If Congress changes the federal DOMA to include civil unions, these benefits will change with it. However, states can determine what benefits they would like to offer same-sex partners and, in light of these desires, determine whether to pass a DOMA that will refuse recognition of civil unions.

First, by not recognizing a civil union, a couple loses legal benefits—spousal medical and life insurance, for example—that they might have been entitled to if their civil union had been honored.³⁵⁶ Second, couples in civil unions cannot file joint tax returns.³⁵⁷ Further, a couple who receives dissolution of their civil union may not be able to enforce their

³⁵⁵ Law, *supra* note 283, at 218; see 1 U.S.C. § 7 (2000). Additionally, Congress, when creating DOMA, included declaratory judgments under the Act in an attempt to ensure that same-sex partners who decided to seek declaratory judgments regarding their union, could not evade the reach of DOMA. Whitten, *supra* note 16, at 391. However, by doing so, Congress may have inadvertently prohibited more traditional judgments, such as money judgments in wrongful death actions, from being brought by their same-sex spouses. *Id.* But, Congress was intentional in preventing benefits under its federal DOMA by explicitly stating that same-sex couples in a marriage-like relationship would not be eligible for federal benefits. See 1 U.S.C. § 7 (2002). It seems unlikely that that DOMA bars any claim that could be brought “but for” the marriage. Borchers, *supra* note 7, at 181. It could be reasonably argued that loss of consortium does not arise out of marriage but arises out of the negligence of another. *Id.* Further, the “arising out of” language in DOMA might be understood as applying to choice-of-law, not judgment recognition. *Id.* Thus, it might be construed to relate to which state’s law applies, not whether a claim can be made. *Id.* at 182.

³⁵⁶ See *Domestic Relations – Same-Sex Couples – Vermont Creates System of Civil Unions – Act Relating to Civil Unions*, 114 HARV. L. REV. 1421, 1422-23 (2001). Vermont’s civil unions are granted “all the same benefits, protections and responsibilities under law . . . as are granted to spouses in a marriage.” VT. STAT. ANN. tit. 15, § 1204(a) (2000). However, these similarities end where federal law is in any way applicable. *Domestic Relations, supra*, at 1423. Specifically, the federal DOMA defines “marriage” as between one man and one woman. 1 U.S.C. § 7 (2000). Thus, federal benefits are not available to same-sex couples unless the federal DOMA is found unconstitutional or repealed. Strasser, *supra* note 19, at 364. Some states, however, are willing to grant same-sex couples benefits even if they are unwilling to recognize same-sex marriage. See, e.g., Mark Worrall, *Cal to Consider Sweeping Domestic Partner Bill* (Jan. 27, 2003), at <http://www.365gay.com/NewsContent/012703calPartners.htm> (on file with Valparaiso University Law Review) (explaining California’s recent plans to offer same-sex couples benefits); Ed Sealover, *Same-Sex Partners Get City Benefits*, THE GAZETTE (Colo.), Feb. 6, 2003, available at <http://www.gazette.com/display.php?sid=83376> (on file with Valparaiso University Law Review) (discussing Colorado Springs’ plan to give same-sex partners healthcare benefits). New Jersey has had a recent bill introduced that would give same-sex couples the same benefits as married couples under New Jersey law. Reginald Roberts, *Their Goal: Same-Sex Unions* (Jan. 23, 2003), available at <http://www.nj.com/news/ledger/jersey/index.ssf?/base/news-3/104330598424810.xml> (on file with Valparaiso University Law Review).

³⁵⁷ Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1, 3 (1997).

property division judgment if they are in another state because DOMA seems to permit states to refuse to enforce this type of judgment as well.³⁵⁸ Additionally, if a couple joined by a civil union had a child, adopted or by some other means, denying that relationship might adversely affect that child.³⁵⁹ Finally, by not recognizing the lawful union of the parents, a child may be rendered illegitimate.³⁶⁰

Civil unions are already fundamentally disadvantaged because they are less portable than marriages.³⁶¹ However, states should remember that, under Vermont law, those in civil unions are entitled to the rights and benefits listed above.³⁶² Civil union couples receive other benefits as well, such as the right to receive maintenance and support from their partners; judicial intervention and remedy regarding division of property, child custody, and spousal abuse; inherit; bring wrongful death suits; joint parenting; joint adoption; receive worker's compensation as a family; spousal immunity from testifying; and equality under local and state tax laws.³⁶³ Whether or not another state will decide to honor those benefits hinges on whether that state will recognize the civil union entered into. States should consider carefully whether they intended to deny recognition of civil unions under their DOMAs or as a public policy exception because the implications of denying a same-sex couple recognition of their union are many. However, each state should be aware that it is their decision. Under the FFCC, each state is entitled to determine, based upon its public policies, whether it wants to recognize civil unions and, if not, whether to leave the issue to its courts under the public policy exception, or to its legislature through DOMA.

IV. MODEL FEDERAL AND STATE DOMAS

It seems that while Julie and Cassandra would succeed in having their civil union found inapplicable under both the federal and Georgia DOMAs, such a success might be limited. If Congress and the state of Georgia amend their DOMAs to include civil unions, Julie and Cassandra have no recourse under the FFCC.

³⁵⁸ Strasser, *supra* note 19, at 371-72.

³⁵⁹ *Id.*

³⁶⁰ Kelly, *supra* note 33, at 211-12.

³⁶¹ Eskridge, *supra* note 135, at 862.

³⁶² See VT. STAT. ANN. tit. 15, § 1240(a) (2000).

³⁶³ Eskridge, *supra* note 135, at 866.

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This Part proposes what such an amendment would look like. First, this Part suggests revisions to the current federal DOMA. Then, this Part offers changes to those state DOMAs that currently only apply to same-sex marriages.

A. *A Model Revision of the Federal DOMA*

Although it is constitutional for Congress to limit the effects of civil unions among states, Congress cannot do so under its federal DOMA as it currently stands. Specifically, the plain language of this statute does not apply to civil unions, which are fundamentally different from same-sex marriages.³⁶⁴ Consequently, Congress may redraft its DOMA if it wishes to allow states to address this issue. Specifically, the federal DOMA should be rewritten as follows:

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 marriage *or civil union* between persons of the same sex under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.³⁶⁵

If Congress wishes to have the states handle all same-sex relationships, it should include that in its revision. Such a revision is preferable as it ensures that states do not circumvent the law by creating a different type of same-sex relationship treated differently than marriage under their laws.³⁶⁶ Such a revision might look like the following:

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 *any conjugal relationship* between persons of the same sex *contracted* under the laws of such other State, territory, possession,

³⁶⁴ See *supra* notes 177-81 and accompanying text.

³⁶⁵ Cf. 28 U.S.C. § 1738C (2000) (italicized words added).

³⁶⁶ This is precisely what happened with Vermont's civil union. See *supra* Part II.C.3.

or tribe, or a right or claim arising from such relationship.³⁶⁷

Commentary: By making either of these changes under the language of the federal DOMA, Congress preserves the recognition of civil unions, as it did with same-sex marriages, for the states, honoring the implied state sovereignty found in the FFCC.³⁶⁸ Because states have traditionally reserved marriage and its aberrations to the states, permitting them to determine the nature and extent of credit they will give to other states, Congress should extend the civil unions issue to the states as well.³⁶⁹ Congress has already demonstrated that it is willing to allow states to address the issue of same-sex marriage.³⁷⁰ Reserving the same power regarding civil unions for the states would be consistent with such willingness. Congress would be appropriately deferring to the states and their sovereignty on this issue.

Further, by implementing this change, Congress ensures that its meaning and purpose for the statute is clear. Congress facilitates efficiency in the federal DOMA's application as courts are enabled to apply it based upon the plain language of the statute itself. States will have a clear statement as to the extent of their power under the federal DOMA, and will be able to act according to their public policy on this issue.

B. Model State DOMA Amendments

In states where recognition of civil unions contravenes their public policy, DOMA may explicitly reflect that policy for it to be included under their DOMA provided that the federal DOMA permits them to do so.³⁷¹ Though the public policy exception permits the states to deny recognition to civil unions if they so chose, the states may revise their statutes to provide a clear statement as to the will of the people and to promote efficiency in and clarity for the courts. As such, each state may constitutionally include civil unions specifically in their DOMAs, provided such an inclusion reflects public policy concerns in their respective state. Thus, states that wish to refuse to recognize a civil

³⁶⁷ Cf. 28 U.S.C. § 1738C (italicized words added).

³⁶⁸ See *supra* text accompanying notes 38-51.

³⁶⁹ See *supra* text accompanying note 97.

³⁷⁰ See *supra* text accompanying note 161-63.

³⁷¹ See *supra* notes 310-14 and accompanying text.

union validly granted elsewhere might reword their state DOMAs to state:

The State of [state name] shall not recognize as valid any marriage of *or civil unions between* parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license *or civil union* license was issued.³⁷²

Other states which intended to include civil unions under their DOMAs when they denied not only recognition but also rights arising out of such relationships may redraft their DOMAs to read as follows:

Any marriage *or civil union* entered into by persons of the same sex, where a marriage *or civil union* license is issued by another state or a foreign jurisdiction, shall be void in [state name] and any contractual or other rights granted by virtue of that license, including its termination, shall be unenforceable in the [state name] courts.³⁷³

In states with strong public policy concerns that extend broader than just same-sex marriage or civil unions to include other legally recognized same-sex relationships, DOMA may be revised to include this concern, stating that interest as follows:

The State of [state name] shall not recognize as valid any *legally contracted conjugal relationship between* parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a license was issued.³⁷⁴

Finally, those states that have DOMAs which more broadly refuse to recognize same-sex relationships and further deny any rights of such relationships need not redraft their statute as they implicitly include civil

³⁷² Cf. ALA. CODE § 30-1-19(e) (1975) (italicized words added). States who might adopt this revised statute include Alabama, Arizona, Indiana, Idaho, North Carolina, Oklahoma, Pennsylvania, South Dakota, and Washington. See *supra* note 170.

³⁷³ Cf. ARK. CODE ANN. § 9-11-208(c) (Michie 1998) (italicized words added). States who might like to adopt this version of DOMA include Georgia, Kentucky, Louisiana, Minnesota, and Virginia. See *supra* note 171.

³⁷⁴ Cf. ALA. CODE § 30-1-19(e) (italicized words added).

unions and other same-sex relationships under their DOMA's language.³⁷⁵

Commentary: Either revision to include civil unions or, more broadly, legally contracted relationships between same-sex couples ensures that state DOMAs accurately reflect all of the public policy concerns of their state while also guaranteeing that its citizens are notified of that concern. If such concerns are not reflective of its citizenry, states' residents may indicate this to their legislature. As a consequence, case-by-case decisions are avoided and the people's will on this issue is effectively followed.

A state might revise its DOMA to ensure that its own sovereignty is honored within its own state, guaranteeing that its own laws will apply to its citizens, who created such laws.³⁷⁶ Particularly on this controversial issue, states may establish their own laws governing this issue based upon their public policies without worrying about the constitutionality of such laws under the FFCC, provided the federal DOMA extends power to the states to do so.

V. CONCLUSION

Julie and Cassandra may have won a victory, but that victory will likely be temporary. It is likely that their attempt to circumvent the law of their home state in an effort to be legally recognized as a couple will ultimately be in vain.³⁷⁷ The federal and state DOMAs that Georgia adheres to are constitutional under Article IV, Section 1.³⁷⁸

This Note asserts that while both federal and state DOMAs are constitutional under the FFCC, the application of DOMA to civil unions is not permissible. Under a historical interpretation of the FFCC, Congress has the power to declare the substantive effect that any

³⁷⁵ These states include Alaska, Florida, and Virginia. *See supra* note 172.

³⁷⁶ *See supra* text accompanying notes 38-51.

³⁷⁷ A more valuable and effective approach would be to go through the state legislature itself, as it has the power to control the recognition of civil unions that a same-sex couple would desire. Wardle, *supra* note 161, at 31. However, even this resort may not be available as consideration is currently beginning for a Federal Marriage Amendment, though its success seems nominal. *See* Dennis Teti, *The Federal Marriage Amendment Is Hopeless* (Nov. 19, 2003), at <http://www.weeklystandard.com/Content/Public/Articles/000/000/003/395zmzjc.asp>.

³⁷⁸ Other avenues might be pursued, such as equal protection, due process, and freedom of expression violations. *See supra* note 219.

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judgment, including marriage and civil unions, may have among states. Similarly, states are free to disregard same-sex marriages and civil unions granted in other states provided that Congress has permitted them to do so and that such disregard satisfies the state's public policy exception.

The language of the federal DOMA, as well as many state DOMAs, clearly is limited to same-sex marriages. Because civil unions are not same-sex marriages, these statutes should not be applied to civil unions. However, states may use their public policy exception to determine whether civil unions are recognized in their state.

If Congress and the states wish to apply DOMA to civil unions after considering the ramifications of denying civil unions recognition, they must revise their DOMAs to include civil unions. To do so would promote efficiency and clarity for the courts and relegate this issue to the state legislatures.

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* The author dedicates this Note to her husband, Nathan, out of gratitude for his support and patience throughout the writing process. May the discussions sparked by this Note be as meaningful and thought-provoking as his have been. SDG