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

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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

The arc of history is long, but it bends toward justice.

Dr. Martin Luther King, Jr.

INTRODUCTION

Because 1996 was an election year, American attention was unquestionably drawn to the political agenda of Congress, its members actively seeking reelection, and the Presidential campaign. A Congressional issue receiving much attention prior to the election was the passage of the Defense of Marriage Act (DOMA). Two distinct provisions of the United States Code are amended by DOMA. First, DOMA amends Title 1 of the U.S. Code by inserting a "Definition of Marriage." This "definition" states that "marriage" is the legal union between one man and one woman as husband and wife, and a "spouse" must be a person of the opposite sex. Second, DOMA amends Title 28 with the addition of

2. See 1 U.S.C § 7 (Supp. II 1996). The amendment reads:

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

Id. When the Defense of Marriage Act was introduced into the Senate by Senator Don Nickles (R-OK) he argued that these congressional definitions of "marriage" and "spouse" were "based on common understanding rooted in our Nation's history, our statutes and
§1738C. It reads:

No State ... shall be required to give effect to any public act, record, or judicial proceeding of any other State ... respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State ... or a right or claim arising from such relationship.5

The stated purpose of DOMA is to “define and protect the institution of marriage.”4 Politicians argue that DOMA was proposed in response to the landmark 1993 Hawaii Supreme Court decision which held that Hawaii’s failure to recognize same-sex marriages violated Hawaii’s Constitution, absent a compelling state interest.5 Others assert the proposal of DOMA was nothing more than election year politics and would more appropriately be entitled “The Defense of Endangered Republican Candidates Act.”6 Proponents of DOMA argue this federal legislation is essential to strengthen the American family and is “morally necessary.”7 However, opponents argue Congress has overstepped its grant of legislative power under the Full Faith and Credit Clause of the U.S.
Constitution and is intruding upon a constitutional power reserved to the states.⁸

This Note will not address the section of Title 1 amended by Congress through DOMA, which defines the terms "marriage" and "spouse" for federal benefit purposes. While strong Equal Protection arguments exist in opposition to the contention that this "definition" of marriage is a constitutional exercise of Congress' legislative power, these issues lie beyond the scope of this Note.⁹

However, the amendment to Title 28, concerning the power of states to refuse to give effect to same-sex marriages, is analyzed herein through an examination of Congress' legislative power under the Full Faith and Credit Clause of the U.S. Constitution. The first section of this Note discusses the motivating factors behind the congressional enactment of DOMA. The second and third sections develop the history and purposes underlying both the constitutional grant of legislative power to Congress through the Clause and current conflicts of law analysis regarding conflicting state marriage laws and policies. The fourth section analyzes Congress' past implementation of its legislative power under the Full Faith and Credit Clause in the family law context. Sections five and six assert that Congress has overstepped its legislative boundaries by enacting an amendment that stands in direct opposition to the inherent meaning and purpose of the Constitution's Full Faith and Credit Clause. Finally, this author concludes that DOMA is an unconstitutional and unprecedented extension of Congress' power and will


The Supreme Court's decision in the Colorado Equal Protection case of Romer v. Evans increases the "tools" with which to challenge DOMA's constitutionality. See 116 S. Ct. 1620 (1996). The Romer Court struck down a Colorado anti-gay referendum, stating that it could not survive even under a rational basis Equal Protection standard. See id.

Constitutional scholar Cass R. Sunstein of the University of Chicago stated in his testimony before the Judiciary Committee that DOMA is very similar to the Colorado referendum. See A Bill to Define and Protect the Institution of Marriage: Hearing on S. 1740 Before the Committee on the Judiciary of the United States Senate, 104th Cong. 42 (1996) (statement of Professor Cass R. Sunstein). Professor Sunstein stated that DOMA is "unprecedented" and an "oddity in our constitutional tradition... drawn explicitly in terms of sexual orientation." Drawn along "the particular line that it does, [DOMA] risks running afoot of Romer's prohibition on 'laws based on animus against homosexuals.'" Id. at 48.
undoubtedly have a detrimental effect upon the institution of marriage, conflicts of law doctrine, and family law in general.

I. THE CONGRESSIONAL IMPETUS BEHIND DOMA

On July 12, 1996, after lengthy debate, the United States House of Representatives passed House Resolution 3396, entitled the “Defense of Marriage Act” (DOMA). Section 2(a) of the Act amends the United States Code to provide that no state is required to give effect to any public act, record, or judicial proceeding of any other state respecting any relationship between two people of the same sex that is recognized as a marriage by the laws of that other state. The House passed DOMA by a vote of 342 to 67.12 In September of 1996, the Senate followed suit and passed DOMA by an overwhelming vote of 85 to 14.13

According to DOMA’s Senate sponsor, Don Nickles (R-OK), this Act originated as a response to the May, 1993 ruling of the Hawaii Supreme Court in the case of Baehr v. Lewin.4 In Baehr, the case of same-sex couples seeking legal marriage recognition was remanded to the trial court to determine whether Hawaii’s marriage statutes, which declare that a marriage can only be recognized as between a man and a woman, violated the state’s constitutional prohibition against discrimination based on sex.5 The Court applied the strict scrutiny standard and held the marriage statutes presumptively unconstitutional. Hawaii would have to justify the statutes by proving the existence of a compelling state interest, to which the statutes were narrowly drawn.6 The case was remanded to the trial court for determination consistent with the Court’s

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14 852 P.2d 44 (Haw. 1993).
15 See id. This case arose when several same-sex couples decided they wanted to marry and desired the state of Hawaii to legally recognize their marriages. After summary judgment was ordered for the State, the couples appealed to the Supreme Court of Hawaii, arguing the State’s refusal to grant them marriage licenses violated their right to privacy, equal protection, and due process. The Hawaii Supreme Court determined summary judgment was incorrect as a matter of law and remanded the case to the trial court. The supreme court stated that the defendants would have to overcome a presumption of the marriage statutes’ unconstitutionality as required under a strict scrutiny standard. Strict scrutiny would be applied under an Equal Protection analysis because the statutes based the issuance of a marriage license upon a person’s sex, a suspect class as determined by a reading of the Hawaii Constitution. See id.
16 See id.
ruling.\^{17}

Subsequent to this ruling, state legislatures expressed concern that Hawaii's final decision would ultimately dictate whether they would have to recognize such same-sex marriages.\^{18} The state legislatures based their concern on the possibility that gay couples would travel to Hawaii to be married and then return to their home states to seek the benefits of that marriage.\^{19} Indeed, the legislatures of over thirty states introduced legislation in response to \textit{Baehr} to ensure they would not be obligated to recognize same-sex marriage licenses issued in states such as Hawaii.\^{20} Further, many authors agreed that \textit{Baehr} had the potential to force broad-sweeping acceptance of same-sex marriages upon other U.S. states.\^{21} Evidently, Congress felt the perceived threat of forced recognition of same-sex marriages was important enough to justify federal steps. DOMA was calculated to allow states the power to refuse to honor same-sex marriages.\^{22}

Because marriage is an institution traditionally controlled exclusively by state governments, through the powers reserved to them by the Constitution, a Constitutional source of authority was necessary to empower Congress to legislate in this family law area.\^{23} Thus, the DOMA congressional debates centered around the constitutionality of this Act as a product of Congress' legislative power bestowed under the Full Faith and Credit Clause, Article IV, Section 1 of the U.S. Constitution.\^{24} Proponents of DOMA argue that

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  \item \textit{See id.} Upon remand to the trial court, the State presented its policy arguments against same-sex marriage licensing. \textit{See Baehr v. Mikel, No. 91-1394, 1996 WL 694235 (Hawaii Cir. Ct. Dec. 3, 1996)}. On December 3, 1996, Judge Kevin S. L. Chang held that the State had failed to demonstrate a compelling interest sufficient to justify withholding the legal status of marriage from the parties. \textit{See id.} The State had failed to establish that the Hawaii statutes prohibiting same-sex marriage were narrowly drawn to avoid any unnecessary abridgment of the parties' constitutional rights. \textit{See id.} The court held, under the strict scrutiny standard, that the same-sex classifications in Hawaii's marriage statutes were facially unconstitutional and violated the Equal Protection Clause of Hawaii's state constitution. \textit{See id.}
  \item \textit{See Reske, supra note 9.}
  \item \textit{See id.}
  \item \textit{See id.}
  \item \textit{See 142 CONG. REC. S10101 (daily ed. Sept. 10, 1996) (statement of Sen. Lott).}
  \item \textit{See Todd D. Robichaud, \textit{Defense of Marriage or Attack on Family?}, NAT'L L.J..}
\end{enumerate}
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it is a constitutional extension of Congress' power under the Full Faith and Credit Clause, while opponents contend DOMA is a "constitutionally ill-advised intrusion" into an area of law handled at the state level for the past 200 years. In order to evaluate the strength of these opposing arguments, the history and purpose of Congress' grant of legislative power under the Full Faith and Credit Clause must be examined.

II. THE HISTORY AND PURPOSE OF CONGRESSIONAL LEGISLATIVE POWER UNDER THE FULL FAITH AND CREDIT CLAUSE

The Full Faith and Credit Clause (the "Clause") orders the states to give "Full Faith and Credit" to the "public acts, records and judicial proceedings of every other state." At the Constitutional Convention of 1787 (the "Convention"), the drafters of the United States Constitution adopted the Clause almost word for word from the Articles of Confederation. However, the Convention's Framers did extend the Articles' provision of Full Faith and Credit to include the non-judicial "public" acts and records of a state. Further, the Framers empowered Congress to prescribe by the general laws the manners in which such acts, records, and proceedings should be proved and their actual effects upon the states.

During the Convention, debates arose with regard to Congress' power to determine the "effect" of such state laws. Representative Randolph, a member of the Convention, feared the definition of Congress' power in this context would give the federal government the opportunity to usurp powers delegated to the states by the Constitution. Randolph's apprehension was likely due to the Framers' concern about good state relations when the Constitution was drafted. The Framers were "well aware that failure [of states] to recognize the acts of sister states would not further the life of the Confederation." Although Randolph's fellow Framers consid-

26 U.S. CONST. art. IV, § 1.
28 See Jackson, supra note 27, at 4.
29 See id.
30 See id. at 5 (citing MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION (1911)).
ered his argument, the Clause was eventually incorporated into the Constitution as written.33

The historical interpretation of the actual "reach" of the Full Faith and Credit Clause reveals considerable confusion over the extent to which the Framers intended that a judgment or act of a sister state be truly enforceable in another state.34 However, the clear purpose proposed by the Framers of the Clause was establishing a principle of uniformity throughout the Union.35 The Framers intended that the Clause would alter the status of the several states as separate sovereign entities.36 The Clause effectively disavowed the idea that the states were free to ignore the rights and obligations of their neighboring states.37

At the time of the Constitutional Convention, the states wanted to retain as much of their independence as possible.38 Consequently, the Framers were fearful that the separate states would choose to ignore the laws of other states as had occurred under the Articles of Confederation.39 As Justice Story put it, the purpose of the Clause was "to give each State a higher security and confidence in the others," and to provide for uniformity across state lines.40 The Clause was one of the provisions incorporated into the Constitution by the Framers for the "purpose of transforming an aggregation of independent, sovereign States into a nation."41 Arguing in the same vein, Deborah M. Henson asserts that the major purpose of the Full Faith and Credit Clause was to create uniformity in the application of the law and to prevent confusion within the newly formed United States.42 The Clause was designed by its Framers

33 See Jackson, supra note 27, at 5.
34 See Mortland, supra note 32, at 48; see also Williams v. North Carolina, 325 U.S. 226 (1945). In Williams, the Supreme Court stated that "the Full Faith and Credit Clause puts the Constitution behind a judgment instead of the too fluid, ill-defined concept of 'comity.'" Id. at 228. The Court went on to state, "'[t]here is scarcely any doctrine of the law which . . . is in a more unreduced and uncertain condition than that which relates to the question what force and effect should be given by the courts of one nation to the judgments rendered by the courts of another nation.'" Id. at 228 n.4 (quoting Hilton v. Guyot, 159 U.S. 113, 116 (1895)).
36 See id.
37 See id.
39 See id. at 423-24 (discussing the transformation of the Clause from its "literal descendant" in the Articles of Confederation to its present form).
40 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 190 (5th ed. 1891); see also Milwaukee County v. M. E. White Co., 296 U.S. 268, 276-77 (1935).
42 See Deborah M. Henson, Will Same-Sex Marriages Be Recognized in Sister States?
to help create a "united" states in which individual states would not compete against one another. Its anticipated function was to ensure that states would treat one another as equals rather than as competitors.43

The Supreme Court's treatment of the Full Faith and Credit Clause is consistent with the interpretation of the Clause as possessing a strong unifying purpose. In 1943, the Court described the Clause as a nationally unifying force:

It altered the status of the several states as independent foreign sovereignties, each free to ignore the rights and obligations created under the laws or established by the judicial proceedings of the others, by making each [state] an integral part of a single nation, in which rights . . . established in any [state] are given nation-wide application.44

More recently, Justice White asserted that while one purpose of the Clause was "to bring an end to increased litigation," the major purpose was "to act as a nationally unifying force."45

The grant of legislative power to Congress under the Clause suggests it was designed to ensure that Congress could expand the reach of states' decisions and judgments.46 This endowment of Congressional legislative power through the Full Faith and Credit Clause clearly illustrates the Framers' purpose of creating an integrative power that would secure uniformity between the many parts of their newly united states.

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43 See 142 CONG. REC. S10113 (daily ed. Sept. 10, 1996) (statement of Sen. Boxer) ("[T]he Clause was designed to help create a 'united' states. . . ."); ROBERT A. LEFLAR, AMERICAN CONFLICTS LAW § 73 (3d ed. 1977); Jackson, supra note 27, at 32 ("[T]he Full Faith and Credit Clause is the foundation of any hope we may have for a truly national system of justice, based on the preservation but better integration of the local jurisdictions we have.").


46 See Cook, supra note 38, at 425-26 ("[T]he language of the Clause was intended by its framers to give Congress the power 'by general laws' to 'prescribe the effect,' i.e., the legal effects or consequences, in other states of the 'public acts, records and judicial proceedings' of a state.").
III. THE HISTORY AND PURPOSE OF CURRENT CONFLICTS OF LAW ANALYSIS IN FAMILY LAW

Conflicts of law doctrine focuses on transactions between states having legal implications involving more than one state.\(^4\) When a legal issue involves incidents or problems pertaining to more than one state, "a court must determine which state’s legal rules should control the resolution of the problem."\(^5\)

Family law creates some particular problems in the conflicts of law arena.\(^4\) Family law involves personal relationships between family members.\(^5\) The law treats family members as having created a special "status" between them—a unique condition in which the state now has an interest.\(^5\) This state interest arises at the creation of the relationship, continues throughout its existence, and endures even after its dissolution.\(^5\) In the marriage relationship, for example, the relationship dictates that the couple may not end their association without "at least some form of approval by the state, nor may [the couple] ignore their children without a great deal of state intervention."\(^5\) After the dissolution of the marriage, support payments, child custody, and visitation arrangements create an ongoing need for state judicial supervision and management.\(^5\) An increasingly mobile family unit creates problems concerning which state has jurisdiction to govern the many facets of this continuing relationship.\(^5\) When more than one state has developed an interest in some aspect of the marital relationship over time, application of conflicts of law doctrine, used to determine which state’s law should prevail, may get very complicated.\(^5\)

In resolving a conflicts of law issue, the Second Restatement of Conflict of Laws (the "Second Restatement" or the "Restatement") states that if no choice of law rule exists in the forum state to address the issue, the law of the state with the most significant relationship to the issue should apply.\(^5\) When an issue of mar-

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\(^5\) Richman & Reynolds, supra note 47, at 2-3.

\(^6\) See id. at 313.

\(^7\) See id.

\(^8\) See id.

\(^9\) See id.

\(^10\) See id.; see also Carabetta v. Carabetta, 438 A.2d 109 (Conn. 1980) (recognizing state interest in marriage contract and validating a marriage solemnized although the parties did not apply for the required marriage license).

\(^11\) Richman & Reynolds, supra note 47, at 313.

\(^12\) See id.

\(^13\) See id.

\(^14\) See id.

\(^15\) See id.

\(^16\) See Restatement (Second) of Conflict of Laws § 6 (1971). The factors that
riage validity arises, the state with the most significant connection to the married couple is the appropriate one to adjudicate the validity issue. The current, universal conflicts of law rule employed to ascertain the validity of a marriage legally obtained and acknowledged in another state is to apply the governing law of the state in which the marriage was celebrated. Every state has the power, within constitutional limits, to prescribe the manner in which the marriage relationship will be legally created within its jurisdiction. This power arises from the state’s significant connection to its residents.

In conflicts of law situations, basic public policy considerations support the universal rule of applying the law of the state in which the marriage was celebrated. A choice of law rule which validates out-of-state marriages rests on two main policy considerations. The first encompasses the consequential results of the marital status: Sustaining an apparent out-of-state marriage provides stability, certainty, and predictability to the parties’ marriage relationship, as well as to society’s expectations in general. Second, the union should be recognized because it was entered into by the parties in good faith reliance upon its validity.

will be relevant to choosing which law to apply include:

(a) the needs of the interstate and international systems; (b) the relevant policies of the forum; (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (d) the protection of justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability and uniformity of result; and (g) ease in the determination and application of the law to be applied.

Id. See id. § 283(2). The Second Restatement directs that states apply the laws of the state where the marriage was celebrated or contracted unless an exception exists. See id.; see also ALBERT A. EHRENZEIG, A TREATISE ON THE CONFLICTS OF LAW 376-78 (1962) (noting that the current doctrine and court language assume a governing law of the place of celebration); LEFLAR, supra note 43, § 220; WEINTRAUB, supra note 47, at 230-33.


See id.; Hovermill, supra note 21, at 444-47 (arguing the right of a state to determine who shall assume and occupy a marital relationship is a universally accepted rule).

See RESTATEMENT (SECOND) CONFLICT OF LAWS § 283 (1971); see also LEFLAR, supra note 43, § 221 (stating several public policy reasons arising from the state’s interest in the marriage relationship); RICHMAN & REYNOLDS, supra note 47, at 315 (“[p]owerful reasons support a general rule of marriage validity); WEINTRAUB, supra note 47, at 233-36 (stating public policy reasons for why the rule is needed).

See LEFLAR, supra note 43, § 221 (“As a common law question, between one state’s law that would sustain a purported marriage and another that would defeat it, two basic nonterritorial policies are present.”).

See id. Leflar maintains that the parties and society wish to know whether the couple is married or not. See id. Predictability is a concern to the parties because of the rights and responsibilities arising from the marriage relationship. Predictability is also necessary to determine society’s interest in the marriage. See id. “It would be messy to have a couple married in one state and not in another, or to be uncertain of their status pending litigation to determine if they are married or unmarried.” Id. § 220.
An additional public policy justification for the need of a conflicts of law rule which validates out-of-state marriages is that this rule protects the interests of third parties affected by the marriage relationship. For instance, out-of-state marriage recognition ensures the legitimation of children arising from the marriage relationship. In addition, honoring out-of-state marriages promotes uniformity and comity between the states.

While these public policy considerations give rise to the general rule that out-of-state marriages are recognized if valid in the state where celebrated, public policies may likewise create exceptions to the general conflicts of law rule of marriage validity. That is, in spite of the "constitutional reins" the Full Faith and Credit Clause has on a state's power to apply a conflicting state law, a "trump card" remains with the state attempting to implement its own law in place of the out-of-state law. This is the Public Policy Exception (the "Exception") which is available under the conflicts of law doctrine as well as in the constitutional arena.

The Exception provides that a state is not bound by the doctrine of comity to give effect to a marriage celebrated under the laws of another state if the marriage is, in effect, repugnant to that state's own laws and legitimate public policies. "Otherwise," as

\[\text{dates out-of-state marriages . . . protects party expectations.} \]

\[\text{65 See Hovermill, supra note 21, at 455.}\]
\[\text{66 See id.}\]
\[\text{67 See id. Blacks Law Dictionary defines comity as "[a] willingness [of states] to grant a privilege, not as a matter of right, but out of deference and good will." BLACK'S LAW DICTIONARY 267 (6th ed. 1990). For a good explanation of the doctrine of comity, see Schombert, supra note 21, at 334-35. Schombert states that comity "occupies a rather large area between mere courtesy and absolute obligation." Id. at 334. Interestingly enough, comity is exactly what the Framers sought as they fashioned the Full Faith and Credit clause to promote uniformity and unity between the states.}\]
\[\text{68 See Henson, supra note 42, at 555.}\]
\[\text{69 See id. The Public Policy Exception says that a state may not be required to apply the law of a sister state if such law offends a substantial public policy of the forum state. See id.}\]
\[\text{70 See Nevada v. Hall, 440 U.S. 410 (1979) (stating that the Full Faith and Credit Clause does not require a state to apply another state's law if it is in violation of that state's legitimate public policy); Lynch v. Bowen, 681 F. Supp. 506 (N.D. Ill. 1988) (failing to recognize a common law marriage because of the state's strong public policy against the recognition of such marriages, even though the "widow" relied in good faith on the validity of the marriage); In re Mortenson's Estate, 316 P.2d 1106 (Ariz. 1957) (holding an out-of-state marriage of first cousins void, even though solemnized in a state recognizing such marriages; it offended Arizona's strong public policy against incestuous marriages); Wilkins v. Zelichowski, 140 A.2d 65 (N.J. 1958) (refusing to uphold the lower court's determination that an Indiana marriage statute permitting marriages of persons under age eighteen was not so odious to New Jersey's public policy as to call for the annulment of a 16 year old's marriage); In re Vetas' Estate, 170 P.2d 183 (Utah 1946) (holding that an out-of-state common law marriage was against Utah's strong public policy against common law marriages and therefore not recognizable) (superseded by UTAH CODE ANN. § 30-1-4.5 (1987)); Toler v. Oakwood Smokeless Coal Corp., 4 S.E.2d...}\]
one court stated, “a state would be deprived of the very essence of its sovereignty, the right of supremacy within its own borders.”

A state’s “substantial” public policies are found in its court decisions, constitution, laws, and legislation.

Authority such as the Second Restatement provides that the validity of a marriage “will be determined by the local law of the state which . . . has the most significant relationship to the spouses and the marriage.” The Restatement’s general rule states that a marriage is recognized as valid where celebrated unless it violates a strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the ceremony. This Exception has enabled courts to invalidate out-of-state marriages that violate strongly held beliefs or public policies of another state or country. A state court may consider a marriage so offensive to a local law or policy or to common “decency” and morality that it refuses to validate the marriage under the law of the state where it was celebrated.

Categories of marriages consistently found in the past to violate states’ public policies are: (1) polygamous marriages; (2) incestuous marriages; (3) interracial marriages; (4) marriages between persons under the legal age permitted by the forum state, and (5) certain alleged common law marriages.

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364 (Va. 1939) (failing to recognize the out-of-state wedding of woman not legally divorced from her first husband because of Virginia’s public policy against bigamy).

71 Toler, 4 S.E.2d at 366.

72 See Henson, supra note 42, at 553; see also Bahr v. Lewin, 852 P.2d 44, 55 (Haw. 1993) (noting Hawaii’s privacy concept is embodied in its Constitution).

73 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(1) (1971).

74 See id.

75 See Hovermill, supra note 21, at 455.

76 See id.

77 See Schombert, supra note 21, for an informative and detailed discussion of these past public policy exceptions.

78 See generally Earle v. Earle, 126 N.Y.S. 317 (App. Div. 1910) (stating that the court would have invalidated marriage as contrary to public policy if found to be polygamous); State v. Kennedy, 76 N.C. 251 (1877); State v. Ross, 76 N.C. 242 (1877) ("Polygamy is unlawful, consequently such marriages will be held null everywhere").

79 See generally Mortensen v. Mortensen, 316 P.2d 1106 (Ariz. 1957) (holding a marriage between first cousins was invalid even though solemnized in a state where legal). But see In re Estate of Loughmiller, 629 P.2d 156 (Kan. 1981) (holding a marriage between first cousins was legal because it was solemnized in a state recognizing such marriages).

80 See generally State v. Bell, 66 Tenn. 9 (1872) (holding interracial marriage occurring legally in Mississippi was an indictable offense when the couple moved to Tennessee, where interracial marriages were illegal).

81 See generally Wilkins v. Zelichowski, 140 A.2d 65 (N.J. 1958) (holding that a woman married at age sixteen was entitled to annulment in her best interests).

82 See generally Lynch v. Bowen, 681 F. Supp. 506 (N.D. Ill. 1988) (holding that Illinois does not recognize common law marriages occurring in other states or in Illinois); In re Vetas Estate, 170 P.2d 183 (Utah 1946) (holding plaintiffs' marriage was invalid
Modern conflicts of law doctrine looks to the Restatement's balancing formula to assess whether a strong public policy exists in a state attempting to use the Exception to invalidate an out-of-state marriage.\textsuperscript{53} For example, in a conflicts of law situation in which a marriage was performed in Kuwait, the Texas Court of Appeals used the Restatement's "most significant relationship test" to invalidate the second marriage of a husband.\textsuperscript{84} In \textit{Seth v. Seth},\textsuperscript{85} Mr. Seth and his second wife were married in India after he divorced his first wife in Kuwait by an \textit{ex parte} procedure called talak.\textsuperscript{86} The first wife was never notified of the divorce or remarriage.\textsuperscript{87} In this situation, the court decided it would not employ the traditional, "valid where celebrated" conflicts test to the purported second marriage of the parties, but would instead look to the Restatement's "most significant relationship approach."\textsuperscript{88} By using the factors set out in section six of the Restatement,\textsuperscript{89} the court weighed the policies for and against applying Texas law over the law of India or Kuwait to the purported marriage of Mr. Seth to his second wife. The court weighed the public policy considerations, the connection of the parties to each "state," and the expectations of the parties, and concluded that Texas law should prevail over the laws of India or Kuwait. The court reasoned that Texas's interest in the parties outweighed that of India or Kuwait because the parties had lived in Texas for eight years, owned property in Texas, and worked within the state.\textsuperscript{90} Therefore, under the "most significant relationship" test, the court found Texas law applied and declared the second marriage void as against Texas public policy.\textsuperscript{91}

This modern conflicts of law analysis uses the Restatement's weighing formula to balance a cited state policy against the benefits of validating the marriage.\textsuperscript{92} As stated above, these benefits include fulfilling the expectations of the parties and promoting

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\textsuperscript{53} See Note, In Sickness and in Health and Where Else?: Conflict of Laws and Recognition of Same-Sex Marriages, 109 HARV. L. REV. 2038, 2048 (1996).
\textsuperscript{55} Id.
\textsuperscript{56} See id. at 461.
\textsuperscript{57} See id.
\textsuperscript{58} Id. at 462.
\textsuperscript{59} See supra note 57.
\textsuperscript{60} See Seth, 694 S.W.2d at 463. The connections the parties had with India and Kuwait were that Mr. Seth married his first wife in India, performed his talak divorce in India, and married his alleged second wife in Kuwait.
\textsuperscript{61} See id.; see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).
\textsuperscript{62} See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).
stability and harmony within the family. Further, marriage law contemplates two common policies which are furthered by the recognition of out-of-state marriages: "(1) assuring complete individual freedom in the exchange of consents, and (2) sustaining the validity of relationships once parties freely enter into them." Using the Restatement's balancing test, a court carefully weighs the benefits of sustaining the marriage against the state's public policies for invalidating it, and determines which will prevail.

Together with the balancing of public policy considerations, a state attempting to invalidate an out-of-state marriage by invoking the Exception must also prove it has a strong interest in the parties and their marriage. The Restatement's "significant relationship" test is applied here to determine which state has the strongest connection to the parties. In practice, one state's interest in the parties and their marriage is balanced against the parties' connections to the state in which the marriage was celebrated to determine which state's law will control the validity of the marriage. For instance, if the parties had lived and worked in Indiana for eight years, flew to Hawaii to marry, and returned to Indiana to live, Indiana's law would likely prevail in a conflicts situation since Indiana had the strongest connection to the married parties. Similarly, if the parties lived and worked in Texas for eight years, married there, and later moved to Indiana, Texas law would likely apply in a conflicts situation, because Texas' connection to the parties would outweigh the relatively new interest of Indiana.

Thus, while states may utilize the Public Policy Exception to invalidate "repugnant" out-of-state marriages, the Second Restatement's "most significant relationship" test dictates that the state citing the policy arguments against validation must be the state with the strongest connection to the parties. Accordingly, a court could reject a state's public policy arguments if the state lacked a significant connection to the parties. The court could then uphold the marriage as valid, both within the state where the marriage was celebrated as well as within other states.

IV. CONGRESS' PAST USAGE OF ITS LEGISLATIVE POWER UNDER THE FULL FAITH AND CREDIT CLAUSE IN THE FAMILY LAW CONTEXT—SPECIFICALLY, THE PARENTAL KIDNAPPING PREVENTION ACT

The Full Faith and Credit Clause grants Congress the discretionary power to enact amendments in order to implement the

93. See id.
94. Note, supra note 83, at 2048; see also Scoles and Hay, supra note 47, § 13.2.
Clause, requiring states to recognize certain sister state judgments, acts, or records. Historically, Congress has rarely exercised this legislative implementing power under the Clause in problem situations. However, three examples exist in which Congress properly exercised its legislative power and directed the states to give full faith and credit to certain acts and judgments of other states: the Full Faith and Credit for Child Support Orders Act of 1994 (FFCCSOA), the Violence Against Women Act of 1994 (VAWA), and the Parental Kidnapping Prevention Act of 1980 (PKPA). The FFCCSOA provides that states must enforce child support determinations made by courts in other states. Title II of the VAWA requires states to recognize protective orders issued in other states with regard to domestic violence. But the PKPA is the primary example of a constitutional implementation of Congress' legislative power under the Clause.

95. See U.S. CONST. art. IV, § 1. The second portion of the Clause states, "And the Congress may by the general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the effect thereof." Id.

96. See Henson, supra note 42, at 590; see also A Bill to Define and Protect the Institution of Marriage: Hearing on S. 1740 Before the Committee on the Judiciary of the United States Senate, 104th Cong 42 (1996) (statement of Professor Cass R. Sunstein).


100. See 28 U.S.C. § 1738B (1994). "The appropriate authorities of each State (1) shall enforce according to its terms a child support order made consistently with this section by a court of another State; and (2) shall not seek or make a modification of such order except in accordance with subsections (c), (f), and (j)." Id. Congress found that the FFCCSOA was necessary due to a lack of a federal law requiring states to recognize ongoing child support orders of other states. See Margaret Campbell Haynes, Federal Full Faith and Credit for Child Support Orders Act, 14 DEL. LAW. 26 (1996). The Constitution did not require states to give effect to these support orders because they are not final, but always subject to modification. See id. The consequence of this modifiability was that a custodial parent seeking enforcement of prior support orders in a new state often found the second state fashioning a new order in a different, usually lower amount. See id. The FFCCSOA was enacted to improve interstate enforcement of prior child support orders, to promote uniformity and reliability in support orders, and to specify state jurisdictional rules regarding modifiability. See id.

101. The VAWA, passed via the controversial Crime Bill of 1994, sought to address the problems of gender-based violence through the application of five sections: Title I, Safe Streets for Women, increases sentences for repeat offenders of crimes against women; Title II, Safe Homes for Women, centers on domestic violence; Title III, Civil Rights for Women, provides a civil rights remedy for violent gender-based discrimination; Title IV, Safe Campuses, furnishes funds to use in combating problems of women on college campuses; and Title V, Equal Justice for Women in the Courts, provides for training of state and federal judges to address the rising prevalence of gender bias in the courts. See Catherine F. Klein, Full Faith and Credit: Interstate Enforcement of Protection Orders Under the Violence Against Women Act, 29 FAM. L.Q. 253 (1995). Title II, Safe Homes for Women, provides that any protection order issued by the court of one state "shall be accorded full faith and credit by the court of another State." 18 U.S.C. § 2265(b) (1994).
The PKPA requires states to enforce or give full faith and credit to child custody determinations made by other states.\textsuperscript{102} Congress, exerting its power under the Full Faith and Credit Clause, made the jurisdictional and substantive provisions of the PKPA the criteria for recognition of out-of-state custody orders when there arose a question of which state's judgment should be upheld.\textsuperscript{103} The constitutionality of Congress's implementation of the Clause through the enactment of the PKPA has been upheld as an appropriate extension of Congressional power under the Clause in Thompson v. Thompson.\textsuperscript{104}

The Court in Thompson stated Congress's principle aim in enacting the PKPA was to extend the requirements of the Full Faith and Credit Clause to custody determinations.\textsuperscript{105} The primary difficulty Congress sought to remedy via the PKPA was the inapplicability of full faith and credit to out-of-state custody determinations.\textsuperscript{106} The Court stated the PKPA was an "addendum to, and . . . therefore clearly intended to have the same operative effect as, the federal full faith and credit statute," requiring states to give preclusive effect to the judicial proceedings of sister states.\textsuperscript{107} The Court, therefore, upheld the PKPA as a proper and constitutional extension of congressional implementing power under the Full Faith and Credit Clause.\textsuperscript{108}

\textsuperscript{102} See 28 U.S.C. § 1738A (1994) ("[E]very state shall enforce according to its terms, and shall not modify except as provided . . . any child custody determination made consistently with the provisions of this section by a court of another State.").

\textsuperscript{103} See 28 U.S.C. § 1738A; Mortland, supra note 32, at 69.

\textsuperscript{104} 484 U.S. 174 (1987).

\textsuperscript{105} See id. at 182.

\textsuperscript{106} See id. at 181. Before Congress enacted PKPA, much confusion existed over interstate custody disputes resulting from conflicting custody orders between the states. See id. at 182. This provided incentive for parents to "shop" for a forum that would decide the case in their favor. See id. The PKPA was an attempt to create a uniform federal statute supplying clear guidelines for determining child custody jurisdiction. See id. Essentially, the PKPA imposes a federal "duty" upon states to give full faith and credit to custody decrees of sister states. See id.

\textsuperscript{107} Id. at 174.

\textsuperscript{108} See id. "The PKPA does not provide an implied cause of action in federal court to determine which of two conflicting state custody decrees is valid." Id. Indeed, the PKPA was intended to have the same operative effect as Full Faith and Credit statutes for child custody determinations. See id. at 184-85. For further history of the PKPA and of Congress's intent in its enactment, see Manuel E. Moraza Choise, Judicial Solutions in the United States of America for Parental Kidnapping in Child Custody Cases, 24 REV. JUR. 309 (1990); Lynda R. Herring, Taking Away the Pawns: International Parental Abduction and the Hague Convention, 20 N.C. J. INT'L L. & COM. REG. 137 (1994).
THE CONSTITUTIONALITY OF DOMA

V. DOMA WILL PRODUCE CHAOTIC AND INCONSISTENT RESULTS IN THE FAMILY LAW CONTEXT

A. DOMA Is Counterproductive and Will Create Confusion and Uncertainty

A historical glance at the clear purpose of the enactment of the Full Faith and Credit Clause illustrates the Framers' intent to create certainty, reliability, uniformity, and unity between the states in their dealings with each other. However, Congress' extension of its legislative power into the essentially state-dominated area of marriage and family law through DOMA will create exactly the opposite of uniformity and confidence. In fact, DOMA produces uncertainty and confusion in an area of law with a definite, substantial need of sureness and confidence—marriage.

Married couples have a vital interest in the rights, responsibilities, and incidents arising out of their marriage relationship. Marriage creates many expectations: (1) the expectation that the couple will be perceived as legally and legitimately married to each other; (2) the expectation that their relationship will be understood as lawful and moral; (3) the expectation that the couple's property will be owned and divided according to the laws of marital property division; (4) the expectation that children will be received into the community as legitimate off-spring of the couple; (5) the expectation that one's health insurance through employment will likely include one's spouse and children; and (6) the expectation that the couple will be able to rely upon equal treatment with other married couples based on their newly formed status as domestic partners.

What transpires when these logical expectations of marriage become indefinite and unreliable? Legally married partners, homosexual or heterosexual, have justified expectations for legitimate...
family structuring flowing from their legal union. Problems will undoubtedly arise when these legitimate expectations are left to the will of each of the fifty states to decide individually whether or not they will be fulfilled.

In view of the lack of full faith and credit to out-of-state marriages now permitted by DOMA, chaotic results are certain to occur. For instance, picture a homosexual married couple forced to relocate due to a job change. Legally married in Hawaii, their domicile for many years, this couple must now make their home in a new state which does not recognize their marriage. Under traditional conflicts of law doctrine, the couples' marital status would remain unchanged upon relocation. This result supports the policies of predictability and reliability in marital status, two policies which require that the rights and responsibilities arising from the marriage relationship—ongoing marital property rights, the right to travel with married status, rights of inheritance, and rights to legitimacy, custody, and visitation of children—continue without difficulty.

The policies behind the general rule of validation of out-of-state marriages support validating marriages between same-sex couples. The Second Restatement states that one of the primary purposes for upholding existing marriages stems from the hardships and inequities that would befall the couple and their children upon non-recognition. Marriage protects the financial and lawful ex-

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115 See Henson, supra note 42, at 588.
116 See Schombert, supra note 21, at 342.
117 See LEFLAR, supra note 43, § 220.
118 See id. The consequences that would occur from the failure to uphold an ongoing, legitimate marriage are disturbing and haphazard. Disturbing questions result: What will become of the children of same-sex couples who would now lack a "parent" or "step-parent," for instance? What about consistency and stability within the family? Congress seeks to protect and promote the "traditional" family, yet how do we define the traditional family today? Is it not wiser to protect and encourage any "family" unit and close-knit association of "family" members in today's world of single-parent families and "dead-beat dads"? Why disrupt a stable, working family unit by way of a marriage law now lacking in consistency and confidence, especially in an area of jurisprudence so much attuned to the protection of children and relationships? And what of a divorced same-sex couple? Are children who have been raised in that legal marriage now without the legal visitation of someone consistently known as a parent? If this new domicile refuses to recognize this earlier marriage relationship, past custody and visitation decrees would conceivably become null and void, since the new state believes no marriage ever existed. Past child support decrees resulting from the termination of the earlier same-sex marriage would be considered null and void in states that do not recognize this former marriage. This would leave the children of that marriage at a definite and harsh financial (as well as emotional) disadvantage. These children would now lack one "parent's" financial contribution to their well-being. And what of children adopted by same-sex couples? Are they now without parents? Are they now wards of their new state? Query: What happened to Congress' "protection" of the family unit?
119 See Henson, supra note 42, at 588.
120 See Schombert, supra note 21, at 338 (citing RESTATEMENT (SECOND) OF CONFLICT
pectations of the parties. Support payments, the orderly disposition of marital property upon divorce or the death of one spouse, the right to bring a wrongful death action, the right to public assistance, the right to insurance benefits, and the right to hospital visitation privileges are all valid expectations of partners granted the status of "marriage."

Far from creating uniformity between states as the Framers had anticipated, Congress' extension of its legislative power under the Full Faith and Credit Clause in this instance will result in disorder and discord among the states. DOMA restricts and undermines the fundamental approach of the Clause and the conflicts of law doctrine, both of which were created to promote unity and comity between states with different policies and agendas. Because it fosters uncertainty and confusion in marriage law, DOMA frustrates the expectations of couples relying on the legality of their same-sex marriage. Chaotic results will unquestionably occur when these partners find their marriages and the welfare of their families in jeopardy.

B. Where Will It End?

Through DOMA, Congress has written a national marriage law. DOMA applies to all fifty states, allowing them to make their own individual decisions about whether to recognize same-sex marriages performed in other states. Proponents argue that DOMA protects the states from accepting an out-of-state same-sex marriage "mandated" by a foreign state court. While DOMA does not prevent states from giving effect to same-sex marriage, it suggests these marriages, in contrast to heterosexual marriages, are not worthy of recognition by all states. Ultimately, a federal marriage law has been forged to govern state action in response to same-sex mar-

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OF LAWS § 283 (1971)). Currently, limited recognition of same-sex relationships has been granted even in states that have professed a policy against sanctioning of same-sex marriages. See id. at 339. This has occurred in limited circumstances "where nonrecognition would be fundamentally burdensome on the parties." Id. at 340 (citing In re Guardianship of Kowalski, 478 N.W.2d 790 (Minn. Ct. App. 1991)).

111. See id.; see also In re Cooper, 564 N.Y.S.2d 684 (App. Div. 1990) (denying the surviving homosexual partner the right to elect against the decedent's will as a surviving spouse). Further, could homosexual spouses, legally married under Hawaiian law, be charged with criminal sodomy in states that refuse to recognize same-sex marriages and still retain state sodomy statutes? At this point, state sodomy statutes still remain in seven states (Arkansas, Kansas, Kentucky, Missouri, Montana, Tennessee and Texas). See Schombert, supra note 21, at 338.


riage recognition. DOMA is evidence that the federal government is further extending its reach into the area of family law which has traditionally been controlled by the states. The federal government, through DOMA, seems to be prescribing how the private relationships of its citizens should be regulated. Consequently, DOMA invites the query, how far into the lives of American citizens will this new federal “power” under the Clause extend in the future?

If Congress may simply usurp state authority as it has through DOMA, it is questionable as to where this appropriation of state power will end. Conceivably, DOMA’s interpretation of the Full Faith and Credit Clause permits Congress to confidently create a national divorce law by utilizing Congressional legislative power under the Full Faith and Credit Clause. Perhaps Congress will be empowered by DOMA’s interpretation of its grant of legislative power under the Clause to inform states that they do not have to recognize disagreeable out-of-state divorce judgments. Congress’ present interpretation of the Clause would also allow Congress to prescribe that it is a state’s prerogative whether or not to recognize second or third marriages, as it may be against that state’s public policy of promoting the stability of marital relationships to recognize such remarriages.

In addition, under DOMA’s version of Congress’ grant of legislative power under the Clause, the federal government may now have the power to legislate the “appropriate” age at which persons may marry. Hence, a national marital minimum age requirement could be established under Congress’ present interpretation of the Clause.

Under DOMA’s interpretation of the grant of federal legislative power provided in the Full Faith and Credit Clause, Congress could simply declare that any state law which its members dislike has no effect in other states. This rendition of the Clause’s implementation power could give rise to dangerous precedent as the above hypotheticals illustrate. If the Full Faith and Credit Clause enables Congress to exempt same-sex marriages from its application, Congress may also exempt from the Clause other judg-

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126. See generally 142 CONG. REC. H7274 (daily ed. July 11, 1996) (statement of Rep. Abercrombie) (stating that “when we move into the area of the private relationships of other people, . . . we at least ought to show some respect for the human context”).
128. See id.
129. See id.
130. See id. Congress could conceivably authorize a state to nullify a judgment which it is reluctant to follow. See id.
ments states could nullify at their discretion, "including not only decrees affecting family structure but also specified types of commercial judgments." Inasmuch as DOMA bestows upon Congress the constitutional authority to expand its legislative power under the Clause in such disquieting ways as Professor Tribe anticipates, it produces a serious danger to traditionally state controlled areas of legislation of which family law is representative.

VI. DOMA IS AN UNCONSTITUTIONAL EXTENSION OF CONGRESSIONAL POWER UNDER THE FULL FAITH AND CREDIT CLAUSE AS EVIDENCED BY THE LANGUAGE AND PURPOSE OF THE CLAUSE, ITS PREVIOUS APPLICATION IN FAMILY LAW, AND THE PUBLIC POLICY EXCEPTION

A. The Language Argument

During the Constitutional Convention of 1787, the drafters of the United States Constitution appointed a special committee to reconsider the language of the Clause as it was written under the Articles of Confederation. As it stood, the Clause read:

Full Faith and Credit ought to be given in each State to the public acts, records, and judicial proceedings of every other State; and the Legislature shall, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect which judgments obtained in one State shall have in another.

The committee subsequently moved to substitute the word "shall" with the word "may" between the words "legislature" and "by the general laws." Further, the portion "judgments by one

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131 Letter from Lawrence Tribe, Professor of Constitutional Law, to Senator Edward Kennedy (1996), reprinted in 142 Cong. Rec. S5932 (daily ed. June 6, 1996) (statement of Sen. Kennedy) [hereinafter Letter from Lawrence Tribe]. Professor Tribe describes an analogy between DOMA and Katzenbach v. Morgan, 384 U.S. 641 (1966). In Katzenbach, the Court interpreted another of the Constitution's few clauses that expressly authorize Congress to enforce a constitutional mandate directed to the states. According to Professor Tribe, the Court stated that "Congress may effectuate such a mandate, but may not 'exercise discretion in the other direction [by enacting] statutes that 'dilute' the mandate's self-executing force..." Letter from Lawrence Tribe, supra, reprinted in 142 Cong. Rec. S5932 (daily ed. June 6, 1996) (statement of Sen. Kennedy) (quoting 384 U.S. at 651 n.10). Professor Tribe argues a similar principle must guide the interpretation of the legislative power granted under the Full Faith and Credit Clause. See id. He contends the text of the Clause leaves "no real doubt that its self-executing reach may not be negated or nullified, in whole or in part, under the 'guise' of legislatively enforcing or effectuating the Clause." Id. (emphasis added).

132 See Cook, supra note 38, at 424.

133 Id. at 425 (emphasis added).

134 See id.
state shall have in another" was stricken and replaced with the word "thereof" after the word "effect." The outcome was the Clause as it appears today: "Full Faith and Credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, and the Legislature may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof."3

Through this new language, the Framers intended to furnish Congress with the optional power to prescribe the effect, or legal consequences, in the province of one state, of another state's legislative acts, records, or judgments. One author states Congress' legislative authority under the Clause creates the problem of determining the intended extent of its utilization, which is the question in the case of DOMA. Hence the inquiry in this Note: Has Congress extended its full faith and credit implementing power too far with DOMA?

The Clause states that Congress may legislate as to the "effect" of acts, records, and judicial proceedings of one state in another. However, the Clause confers no power authorizing Congress to decree that one state's acts, records, or proceedings have no effect in the state of another. While an affirmative legislative power may be supported by the language of the Clause, it is unlikely that the Framers intended to provide Congress with a "negative" power under the Clause as well. While the Clause states Congress may legislate as to the "effect" of one state's acts or judgments in another, it does not declare that Congress may give these acts or judgments no effect whatsoever.

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132. See id.
133. U.S. CONST. art. IV, § 1.
134. See Cook, supra note 38, at 426.
135. See id. ("Congress has hardly begun to exercise the powers of legislation thus conferred upon it... Our problem is to determine the extent of the powers of legislation given to Congress but which have been only partially exercised.") (emphasis added). Cook discusses the exercise of Congress' power under the Full Faith and Credit Clause and the Necessary and Proper Clause to create federal law providing for the "direct enforcement" of one state's laws in other states. See id. However, the federal law providing for the non-enforcement of one state's laws in another state is never considered. This suggests that Cook never envisioned the Clause implemented in such a way as Congress is attempting to do through DOMA. That is, Cook never examined the possibility that Congress could exploit its power under the Clause by empowering states to give no effect or no full faith and credit to the laws of another state.
136. See U.S. CONST. art. IV, § 1.
138. See id.
139. See id.
Accordingly, the language of the Full Faith and Credit Clause does not grant Congress the power to authorize a nullification of the orders or proceedings of one state over another. One could easily imagine the states of 1787, extremely protective of their sovereignty, quickly pulling out of the infant union had the Framers allowed the Clause to produce such a result. On the contrary, as set out above, a historical study reveals that the Clause was designed to assist Congress in implementing the Full Faith and Credit Clause in order to facilitate state unity and uniformity. The Framers wished to decrease animosity and tension between the states and to increase state comity and confidence. A grant of congressional power allowing a state to restrict and negate the acts and judgments of its neighboring states would clearly not have produced unity and comity; only anger and hostility would have resulted between already antagonistic state governments had the Framers intended such an interpretation. Indeed, allowing the states to refuse recognition of a public act, judgment, or proceeding of another state is the exact opposite of what the “Founding Fathers laid forth in the Clause itself.”

DOMA’s proponents claim that a congressional act authorizing states to give no effect at all to a specific category of out-of-state acts and judgments is a general law prescribing “the effect there-of.” However, this argument is circular and, as Professor Tribe stated in his letter to Congress, “[it] is a play on words, not a legal argument.” If the proponents’ argument above were accepted, this interpretation would in fact add a new section to the Constitution’s Full Faith and Credit Clause, permitting states to refuse to recognize any legal marriage in another state. This result directly conflicts with the very specific understanding of the purpose and effect of the Full Faith and Credit Clause and of conflicts of law analysis, namely, the creation of uniformity, unity, and comity between the states, and certainty and predictability for state citizens.

It would do violence not only to the letter but also to the spirit of the Full Faith and Credit Clause to construe it as a fount of affirmative authority for Congress “to set asunder the States that

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148. See id.
this Clause brought together. Professor Tribe states that the Clause is a vital unifying section of the Constitution and is being subverted by DOMA. Furthermore, nothing in the language or history of the Clause indicates that equitable marital decrees should be excluded from full faith and credit. Certainly the Framers could have easily limited the wording of the Clause to express this idea had they so intended. In fact, a failed attempt was made to limit the wording of the Articles of Confederation version of the Clause. Conceivably, the Framers could have changed the wording of the Clause to omit marital decrees had they intended that full faith and credit be given to all acts and judgments of states except marriage declarations.

B. Congress' Past Implementation of Their Power under the Clause

Congress' utilization of its legislative power under the Full Faith and Credit Clause in the past demonstrates that DOMA's enactment is the first time in the history of the Constitution that Congress empowered states to disregard the Clause. Historically, Congress has only legislated the effect the Clause should have in the conflicts of law context. For instance, Congress has previously legislated that the Clause will apply specifically to particular judicial decrees, such as in the recognition of out-of-state child support or protection orders. Congress has created these Acts to give effect to judicial proceedings of other states—not to authorize that no effect be given to these decrees.

The PKPA is a primary example of Congress's exercising its implementation power under the Clause in the family law context. The PKPA is a product of a constitutional exercise of appropriate Congressional law-making power used to implement the Full Faith and Credit Clause. The PKPA implements, or gives effect to, out-of-state custody decrees; it is not restrictive, as is DOMA.

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150. See id.; see also Balian, supra note 21, at 413 (stating purpose of the Clause is as a unifying force).
151. See Balian, supra note 21, at 406 (examining the plain language and history of the Full Faith and Credit Clause).
152. See id.
153. See id.
154. See id.
The PKPA invokes the strength and authority of the Clause to produce uniform, certain results in out-of-state child custody matters.\textsuperscript{161} DOMA creates the opposite outcomes in cases of same-sex marriage.

DOMA attempts to exploit Congress' implementation power under the Clause by employing it in a way contrary to which it was intended. The Framers' goal for the Clause was to create harmony, uniformity, and predictability in a new nation of individual states striving earnestly to protect their sovereignty.\textsuperscript{162} While the PKPA uses the legislative authority of the Clause to reach precisely this goal, DOMA will only produce friction, mistrust, and animosity between states as one declares void the decrees of another.\textsuperscript{163} This result was not within the language or purpose of the Clause as created by the Framers of the Constitution and is therefore constitutionally suspect.

C. The Public Policy Exception to the Full Faith and Credit Clause and to the Conflicts of Law Doctrine

The Public Policy Exception has been cited by numerous opponents of DOMA as authority empowering states to invalidate out-of-state marriages repugnant to public policy.\textsuperscript{164} Opponents argue DOMA is unnecessary because it attempts to give the states a power they already possess by way of the Exception.\textsuperscript{165} While a strong argument, the application of the Exception to same-sex marriages may not, in reality, yield so unequivocal a result.

As stated above, the Second Restatement of Conflict of Laws

\textsuperscript{161} See Mortland, supra note 32, at 69; see also 28 U.S.C. § 1738A (1994). Congress exercised its power under the Full Faith and Credit Clause by making the jurisdictional and substantive provisions of the PKPA the standard for out-of-state custody orders. Furthermore, other previous congressional acts issued pursuant to the implementing power of the Clause (such as the VAWA and the FFCCSOA) each provide that states give effect to and recognize orders of other states. No act created with the authority conferred by the Clause has ever attempted to limit the application of full faith and credit until DOMA. See Mortland, supra note 32, at 69.

\textsuperscript{162} See Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 439 (1943) (explaining that the Full Faith and Credit Clause acts as a nationally unifying force), overruled by Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980); LEFLAR, supra note 43, § 73 (explaining that one of the principle assurances of the Full Faith and Credit Clause is unity among the states); Cook, supra note 38, at 422 (noting the goal of achieving interstate uniformity through the Full Faith and Credit Clause); Henson, supra note 42, at 584 (noting the purpose behind the Full Faith and Credit Clause was to provide uniformity); Jackson, supra note 27 (examining the historical context of the Full Faith and Credit Clause).

\textsuperscript{163} The PKPA is a constitutional extension of Congress' power under the Clause since it helps advance predictability to the structuring of family life; it creates increased certainty and harmony for family members. See Henson, supra note 42, at 591.


rejects the general rule of validation of out-of-state marriages if the marriage is repugnant to a strong public policy of the state in which the couple is currently residing.\(^6\) According to Dean Herma Hill Kay, the usual conflicts of law doctrine governing the recognition of marriages performed out of state provides that the state where recognition of marriage is sought need not validate a marriage if it would violate an acceptable public policy.\(^6\) A state with a well-founded prohibition against same-sex marriages could, under the Exception, refuse to sustain an out-of-state marriage it found repugnant to these policies.\(^6\) Consequently, opponents argue that DOMA is pointless and unwarranted: It does not give states any authority they lack, and it intrudes upon a traditionally state-controlled area of law.\(^6\) At present, states have the power to do what this legislation purports to do without federal intervention or protectionism.\(^6\) Thus, opponents assert, the issue of same-sex marriage recognition should be left to the individual states to decide under their own laws and policies.

Because the states rely on the Public Policy Exception in conflicts of law situations, it is not surprising that fourteen states have already attempted to exercise the power under the Exception to assert such a policy position in anticipation of the *Baehr* decision.\(^17\) Indeed, states have dealt with similar situations in out-of-state marriage conflicts in the past by asserting the Exception.\(^7\) Historically, the Exception has been applied in situations in which states refused to sustain polygamous, incestuous, or underaged marriages because they were "offensive" to state public policies.\(^17\)

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\(^6\) See Restatement (Second) of Conflict of Laws § 283 (1971) (rejecting the general rule if it "contravenes the strong public policy of another state"); Hovermill, supra note 21, at 455.


\(^7\) See Hovermill, supra note 21, at 455.


\(^7\) See 142 Cong. Rec. S10118 (daily ed. Sept. 10, 1996) (statement of Sen. Feinstein) (noting that states may refuse to recognize those marriages which violate public policy). During the DOMA congressional debates, Representative Moran of Virginia asked, "Why are we debating an unnecessary bill [when the states already hold the power to refuse to honor same-sex marriages]" 142 Cong. Rec. H7489 (daily ed. July 12, 1996) (statement of Rep. Moran). "I'm afraid the real answer is that it is political exploitation of prejudicial attitudes." *Id.*


\(^7\) See *id.*

\(^7\) See *id.;* see also supra notes 77-82 and accompanying text. For examples of the application of the Public Policy Exception in the past, see Lynch v. Bowen, 681 F. Supp. 506 (N.D. Ill. 1988); Tyus v. Tyus, 206 Cal. Rptr. 817 (1984); *In re Estate of Loughmiller,* 629 P.2d 156 (Kan. 1981); Meeker v. Meeker, 243 A.2d 80 (N.J. 1968);
The current Exception argument by opponents of DOMA merely extends the application of the Exception from the above types of marriages to same-sex marriages.

While the reasoning above is agreeable to those who argue against DOMA's enactment, in reality the Public Policy Exception may not produce such certain outcomes in cases of same-sex marriage conflicts of law. Ultimately, under the current position of the Second Restatement, the legitimate public policies of a state may not be enough to invalidate all out-of-state same-sex marriages in all conflicts situations.

While each state ordinarily has its own conflicts of law doctrine to employ in conflicts cases, many states look to the Second Restatement for authoritative guidance in marriage conflict situations. The most applicable section regarding interstate same-sex marriage recognition is section 283. Section 283 provides that:

(1) The validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage under the principles stated in section 6.

(2) 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.

While this section provides states with a vehicle by which to invalidate out-of-state same-sex marriages repugnant to their state policies, by its own words the Public Policy Exception restricts its application to the state that had the most significant relationship to the parties and the marriage at the time it was contracted. To apply the Exception properly, its application would be restricted "to states that had a [significant] relationship with the couple at the time of the marriage." By this construction, even if a state had strong public policies against same-sex marriage, if the couple had worked and resided in State-1 for several years, married there, and


174. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971) (stating which laws will govern the validity of a marriage).

175. Id. (emphasis added); see also Note, supra note 83, at 2039 (noting the importance of stability and predictability in a marital relationship).


177. Note, supra note 83, at 2044.
then moved to State-2, State-2 would be unable to appeal to the Exception.

Picture again our same-sex married couple forced to relocate due to a job change. The parties lived in Hawaii for several years before their marriage. They each worked in Hawaii, paid taxes, and perhaps sent their children to Hawaiian public schools. When this couple moves to a new state, that new home state does not have as significant a connection to the couple as Hawaii does. In order for the new home state to apply the Public Policy Exception, it must have had the "most significant relationship to the spouses and the marriage at the time of the marriage." Therefore, since Hawaii's connection to the parties is strongest, the new state will be unable to benefit from an appeal to the Exception under the Second Restatement's "significant relationship" approach.

The application of the Restatement's "significant relationship" conflicts of law provision is a sensible manner in which to determine which state law should prevail. It properly considers the expectations of the parties, the states' interest in the marriage, and the states' public policies.°° Weighing the parties' connection to each state allows a fair and equitable determination of which states' law should control.

This careful balancing approach lies in stark contrast to DOMA's arbitrary, haphazard application. DOMA does not balance the interests of the conflicting states, nor does it consider even slightly the expectations of the parties. While the Restatement's approach provides an exception to the general rule of marriage recognition, it does so by a careful balancing of interests.°°° Therefore, it affords an appropriate, impartial decision based on reason and equity. In contrast, DOMA gives individual states the power to arbitrarily expand the Public Policy Exception to invalidate marriages without regard to a state's connection to the parties. The cautious weighing formula provided in the Exception, used to promote both the welfare of the parties and of the states, is carelessly discarded in favor of an unprecedented and erratic rule of law. Because DOMA so heedlessly disregards the history of the Full Faith and Credit Clause and the balancing formula of the common law illustrated by the Restatement, one begins to wonder whether DOMA's opponents were not correct when they declared that DOMA was "designed to divide Americans, to drive a wedge between one group of citizens and the rest of the country, solely

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178. See LEFLAR, supra note 43.
179. See Note, supra note 83, at 2048.
for partisan advantage," eight weeks before the November, 1996 election.\(^3\)

VII. CONCLUSION

DOMA stands as an unconstitutional extension of congressional power under the Full Faith and Credit Clause of the United States Constitution. DOMA usurps power from the states and employs an unprecedented manipulation of the Clause in order to prescribe a majoritarian concept of marriage and family. As Senator Carol Moseley-Braun (D-IL) expressed before Congress, a historical examination of our nation and of the Constitution which guides it clearly illustrates that DOMA is an unconstitutional congressional attempt to legislate in an area of law reserved to the states.\(^1\) The Full Faith and Credit Clause was created by the Framers of the Constitution to bind us together as a nation. It should not be employed by those we entrust to protect our interests in a manner that can only tear us apart.

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