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Cover Page Footnote

I would like to thank my family, friends, and mentors, especially Professor Kevin Noble Maillard, Joseph DePadilla, Jeremy Boardman, Jessica A. Hitchcock, Lindy R. Falvey, and Raphael Ortega, for their invaluable help, guidance, and support.

THE RIGHTS OF DIVORCED LESBIANS: INTERSTATE RECOGNITION OF CHILD CUSTODY JUDGMENTS IN THE CONTEXT OF SAME-SEX DIVORCE

*Kathryn J. Harvey**

This Note explores the issue of interstate recognition of child custody, which arises in the context of same-sex divorce. The Parental Kidnapping Prevention Act (PKPA) requires states to grant full faith and credit to all child custody orders; on the other hand, the Defense of Marriage Act (DOMA) allows states to deny full faith and credit to judgments “arising out of” same-sex marriage. This Note argues that DOMA partially repeals the PKPA, such that states need not grant full faith and credit to divorce and child custody decrees in the context of same-sex marriage. Further, this Note argues that because same-sex divorce does not raise the same concerns as same-sex marriage, sister states should recognize same-sex divorce and custody orders as doing so is in the best interest of the child and supports interstate comity.

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INTRODUCTION

Lisa and Janet met at an Alcoholics Anonymous meeting, and it was love at first sight.¹ They moved in together after only a few months. Lisa and Janet married in Vermont because it is one of only five states that provide the rights and privileges of marriage to same-sex couples.² Eventually, the happily married couple decided to have a child through artificial insemination. Lisa volunteered to carry the child so that Janet could pursue various business ventures. Both women actively participated in the pregnancy process, and, nine months later, Lisa gave birth to a baby girl named Isabella. Lisa stayed at home with Isabella while Janet worked and took care of the family’s finances. Isabella called Janet “mommy” and Lisa “mammy.” Both women involved themselves in their child’s life, until the union broke down after almost three years of marriage. Subsequently, like many other American couples, Janet and Lisa decided to legally separate, and the Vermont Family Court entered divorce and custody judgments that granted Lisa custody of the child and Janet visitation rights. However, Lisa did not want Janet to be any part of Isabella’s life, so Lisa fled to Virginia family court and sought to void the Vermont order. Lisa picked Virginia because the state has a strong public policy against same-sex marriage.³ What are the Virginia court’s options if it does not want to give any recognition to the judgment arising out of a same-sex marriage but is required to recognize valid out-of-state custody judgments? What rights does Janet have as a lesbian divorcée? Will she ever be able to see her child again?

For proponents of same-sex marriage, the extension of marital rights to same-sex couples has been lauded as a “joyful event.”⁴ Same-sex couples

1. This introductory hypothetical is based on the facts from *Miller-Jenkins v. Miller-Jenkins*, 276 Va. 19, 22–24 (2008). See April Witt, *About Isabella*, WASH. POST MAG., Feb. 4, 2007, at 14. This Note dramatizes and changes some of the facts in order to better highlight the issues discussed in this Note. Cf. Part II.A (explaining the facts of *Miller-Jenkins*).

2. See *infra* Part I.A.1.c.

3. See, e.g., VA. CODE ANN. § 20-45.2 to .3 (2008).

4. See, e.g., Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J.C.R. & C.L. 1, 1 (2005) (describing May 17, 2004, as a

worked hard for this right of marital freedom, and now they have the opportunity, in certain states, to share in all the associated benefits.⁵ Marriage is often characterized as a “positive good” for individuals and society because it encourages esteemed values such as stability, permanency, and support within a family unit.⁶ However, what happens when that same-sex family unit collapses?⁷

Each state has its own set of rules for resolving familial relations issues.⁸ In our transient society, multiple states often have an interest in the same family unit.⁹ As a result, interstate conflict arises because each state has an interest in enforcing its own domestic relations public policy.¹⁰ Further,

magical and joyful day because state officials in Massachusetts were allowed to grant marriage licenses to same-sex couples for the first time).

5. See Lynn D. Wardle, *The Attack on Marriage as the Union of a Man and a Woman*, 83 N.D. L. REV. 1365, 1367–68 (2007) [hereinafter Wardle, *Attack on Marriage*] (describing the progress made by the same-sex marriage movement since 1985 to legalize these unions); see also *infra* Part I.A.1.b.

6. See Symposium, *Should the Government Recognize Same-Sex Marriage?: Session One: Social, Cultural, and Philosophical Issues*, 7 U. CHI. L. SCH. ROUNDTABLE 1, 7–8 (2000) (“[S]ame-sex marriage is a positive good to the individuals who participate in it and to the society that makes it available.”); see also Vikram David Amar & Alan Brownstein, *Why the Case for Amending the U.S. Constitution To Prohibit or Regulate Gay Marriage Is “Not Proved,”* 32 HASTINGS CONST. L.Q. 637, 650 (2004) (noting that marriage is a positive good, not only because it promotes procreation, but because it accomplishes other profoundly valuable things); Wardle, *Attack on Marriage*, *supra* note 5, at 1371 (“Marriage establishes the moral core of the family and the moral baseline and standards for society in many ways.”).

7. See Cort I. Walker, Note, *The Defense of Marriage Act as an Efficacious Expression of Public Policy: Towards a Resolution of Miller v. Jenkins and the Emerging Conflict Between States over Same-Sex Parenting*, 20 REGENT U. L. REV. 363, 363–64 (2008) (“[A]s more same-sex unions come to an end[,] . . . the states wrestle with how to legally deal with the consequences.”).

8. See Stanley E. Cox, *DOMA and Conflicts Law: Congressional Rules and Domestic Relations Conflicts Law*, 32 CREIGHTON L. REV. 1063, 1069 (1999); Lynn D. Wardle, *Counting the Costs of Civil Unions: Some Potential Detrimental Effects on Family Law*, 11 WIDENER J. PUB. L. 401, 429 (2002) [hereinafter Wardle, *Counting the Costs*] (“[F]ederalism in family law is alive and well, and state law makers (both judicial and legislative) are quite independent and have remarkable autonomy.”); see also Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-uniform Marriage Laws*, 84 OR. L. REV. 433, 437 (2005) (noting that, historically, “American states maintained a variety of restrictions on marriage”); Lynn D. Wardle, *Non-recognition of Same-Sex Marriage Judgments Under DOMA and the Constitution*, 38 CREIGHTON L. REV. 365, 403 (2005) [hereinafter Wardle, *Non-recognition of Same-Sex Marriage*]; see also *infra* notes 84–86 and accompanying text (discussing principles of federalism).

9. See *Baures v. Lewis*, 770 A.2d 214, 217 (N.J. 2001) (“Ideally, after a divorce, parents cooperate and remain in close proximity to each other to provide access and succor to their children. But that ideal is not always the reality.”).

10. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003) (“A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders”); see also Linda S. Anderson, *Protecting Parent-Child Relationships: Determining Parental Rights of Same-Sex Parents Consistently Despite Varying Recognition of Their Relationship*, 5 PIERCE L. REV. 1, 17–18 (2006) (“[W]hen a same-sex couple and their family relocate, or when part of the family relocates, their entire legal relationship is put in jeopardy by simply crossing state borders.”); Alison M. Schmieder, Note, *Best Interests and Parental Presumptions: Bringing Same-Sex*

states do not want practices adverse to their own policies to be imposed upon them by a sister state.¹¹ As the U.S. District Court for the Middle District of Florida noted, if states were required to give full faith and credit to every same-sex marriage performed in sister states, it “would create a license for a single State to create national policy.”¹² The debate remains over what to do in cases regarding recognition of child custody judgments when they arise out of a same-sex divorce.¹³

Divorce is a common outcome for marriage in the United States, and it significantly affects the present reality of the American family. Approximately fifty percent of American marriages end in divorce.¹⁴ Further, it is estimated that over forty percent of children will experience their parents’ divorce prior to reaching age sixteen.¹⁵ Divorce proceedings accomplish more than providing rights and benefits to spouses. They attempt to protect children as well, by focusing on the best interest of the child.¹⁶ However, these protections may not be available to same-sex divorcés and their children in states that do not recognize their marriage in the first place.¹⁷

Part I of this Note presents the historical rules governing marriage and divorce recognition among sister states and the dramatic changes to those rules caused by same-sex unions. Furthermore, this Part explains

Custody Agreements Beyond Preclusion by the Federal Defense of Marriage Act, 17 WM. & MARY BILL RTS. J. 293, 294 (2008) (“Even if same-sex parents are granted custody rights in an agreement, the difficulty in seeking legal protection for these parenting rights is further compounded if one partner moves to a different state after dissolution of the relationship.”).

11. See, e.g., *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1303–04 (M.D. Fla. 2005) (defending Florida’s right to deny full faith and credit to sister states’ judgments that violate Florida’s public policy).

12. *Id.* at 1303; see also *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 323 (1981) (Stevens, J., concurring) (“[I]n view of the fact that the forum State is also a sovereign in its own right, in appropriate cases it may attach paramount importance to its own legitimate interests.”). As the U.S. District Court for the Middle District of Florida in *Wilson v. Ake* demonstrates, there are diametrically opposed postures on the issue of same-sex marriage. *Wilson*, 354 F. Supp. 2d at 1303–04; see also *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) (describing the conflicting “religious, moral, and ethical convictions” regarding same-sex marriage). Accordingly, this conflict of views raises a significant number of policy concerns regarding states’ rights to accept or reject marriages performed in sister states. See *infra* Part I.A.2, B.1, C.1.

13. In the United States, “thirty-four percent of lesbian couples and twenty-two percent of gay male couples [are] raising children under eighteen.” Schmieder, *supra* note 10, at 293 (citing T. Shawn Taylor, *Ties That Unwind; Legal Cases and Some State Laws Threaten To Undo Lesbian Couples’ Adoptions, Parental Arrangements*, CHI. TRIB., Nov. 17, 2004, § 8, at 1).

14. Linda C. McClain, *Family Constitutions and the (New) Constitution of the Family*, 75 FORDHAM L. REV. 833, 854 (2006); see also Ron Lieber, *Four Talks About Money To Have Before Marriage*, N.Y. TIMES, Oct. 24, 2009, at B1.

15. H. Patrick Stern et al., *Professionals’ Perceptions of Divorce Involving Children*, 22 U. ARK. LITTLE ROCK L. REV. 593, 593 (2000).

16. See *Finlay v. Finlay*, 148 N.E. 624, 625–26 (N.Y. 1925) (noting that the main goal when making a child custody determination is to ensure the welfare of the child and not to resolve disputes between the parents).

17. See *infra* Part II.C.

Congress's reaction to these marriages—its passage the Defense of Marriage Act (DOMA).¹⁸ Part I concludes by describing the Parental Kidnapping Prevention Act (PKPA),¹⁹ which traditionally provides interstate recognition for child custody agreements. Part II explores DOMA's incongruities with the PKPA. This conflict is exemplified by the *Miller-Jenkins v. Miller-Jenkins*²⁰ case, which Part II also discusses. Finally, Part III of this Note argues that DOMA is constitutional and that it partially repeals the PKPA such that states are free to disregard certain types of orders issued as part of a same-sex divorce. Despite this outcome, this Note advocates for uniform recognition of sister states' divorce and custody judgments, even though they are derived from same-sex marriage, because uniform recognition is in the best interest of the child and supports comity among sister states.

I. COMPLEXITIES OF (SAME-SEX) MARRIAGE, DIVORCE, AND CHILD CUSTODY RECOGNITION

The Introduction presented a major problem incident to same-sex marriage, namely, interstate recognition of divorce and custody orders. Part I presents the background material needed to investigate this conflict. Part I.A explores the development of the gay rights movement and its achievements, as well as the opposing "marriage movement"—a group of "academics, religious leaders, politicians, and family and relationship professionals" that is committed to strengthening the traditional institution of marriage.²¹ Next, Part I.B reviews historical methods for interstate recognition of marriage and divorce in the United States. Part I.C discusses the changes in marriage recognition in the context of same-sex marriage affected by the federal government's enactment of DOMA and the scholarly debate over DOMA's constitutionality. Finally, Part I.D lays out the federal scheme for issuance of child custody orders and interstate jurisdiction, as established by the PKPA.

A. *The Same-Sex Marriage Movement*

The same-sex marriage movement, although lauded by some supporters, causes deep-seated moral conflict in American society.²² This section

18. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006)).

19. 28 U.S.C. § 1738A (2006).

20. *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, 912 A.2d 951; *Miller-Jenkins v. Miller-Jenkins*, 661 S.E.2d 822 (Va. 2008).

21. Daniel Strieff, *Move To Put 'Happily' Back into 'Ever After': Bush Administration Seeks Funding Boost for Marriage Education*, MSNBC.COM, Apr. 1, 2004, <http://www.msnbc.msn.com/id/4637878/>.

22. The court in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), summed up the conflict over same-sex marriage very well when it said,

Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral. Many hold equally strong religious, moral, and

explores the development of the gay rights movement and the corresponding backlash. Part I.A.1 presents the background and history of same-sex marriage and its success in the courts. Part I.A.2 describes the “marriage movement,” which arose in response to the achievements of the gay rights movement, and the arguments expounded by its supporters and Professor Lynn Wardle.

1. Development of the Same-Sex Marriage Movement

Advocates of the same-sex marriage movement began working to secure equal rights in the courts for lesbian, gay, bisexual, and transgendered (LGBT) couples when they filed their first LGBT lawsuit in 1972.²³ First, Part I.A.1.a details the same-sex marriage movement’s development. Then, Part I.A.1.b and Part I.A.1.c explain the movement’s legal successes in its battle to protect same-sex relationships.

a. *Arising from the Fire of the Feminist Movement*

During the 1960s and 1970s, notions of equality and liberty began to supersede traditional notions of hierarchy and conformity in American society and the courts.²⁴ The feminist era initiated this trend by calling for a dramatic shift in the institution of marriage.²⁵ Feminists paved the way for new methods of defining family, and, to this end, they were successful.²⁶ To some extent, the advocates for LGBT rights rode on the feminist movement’s coattails because of the advancements the women’s movement made and the similarities in their causes.²⁷ Both movements struggled to redefine gender-based notions of marriage, sex, and family through the judicial system and the protections of the Fourteenth Amendment of the U.S. Constitution.²⁸

ethical convictions that same-sex couples are entitled to be married, and that homosexual persons should be treated no differently than their heterosexual neighbors.

Id. at 948.

23. American Civil Liberties Union, ACLU and the History of LGBT Rights & HIV/AIDS (Mar. 16, 2006), <http://www.aclu.org/lgbt/gen/24578res20060316.html>.

24. NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 11 (2008).

25. *See id.* at 11–12.

26. *See id.* The women’s rights movement in the 1960s and 1970s changed the way that the law and society, as a whole, viewed the status of women. *See* Amy Leigh Campbell, *Raising the Bar: Ruth Bader Ginsburg and the ACLU Women’s Rights Project*, 11 TEX. J. WOMEN & L. 157, 165 (2002).

27. POLIKOFF, *supra* note 24, at 11 (“The contemporary movement for the rights of lesbian, gay, bisexual, and transgender people owes a great debt to the feminist movement of the 1960s and early 1970s, including its critique of marriage and the family.”).

28. *See id.* at 25, 47. The Due Process Clause of the U.S. Constitution states that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V. The Fourteenth Amendment, which is a limit on state authority, provides the same rights. *Id.* amend. XIV, § 1. Advocates of the feminist movement successfully argued that the Fourteenth Amendment protects the right to privacy, procreation, and equal

Although couples challenged prohibitions of same-sex marriages in the 1970s, lawyers for the gay rights movement initially avoided the issue because it was not seen as a winning cause.²⁹ Eventually, organizations such as the American Civil Liberties Union's Lesbian and Gay Rights Project, the National Lesbian and Gay Law Association, and Lambda Legal developed in order to advocate for these rights.³⁰ By the late 1980s, the gay rights movement had its own infrastructure, which aided in the pursuit of its specific policy interests.³¹ The next section describes how this led to a series of U.S. Supreme Court cases that allowed for the creation and acceptance of same-sex marriage in individual states.

b. *Supreme Court Cases in the Development of Gay Rights*

Advocates of the gay rights movement did not make major advancements until relatively recently. Initially, the movement suffered a severe setback when the Supreme Court issued its 1986 ruling in *Bowers v. Hardwick*.³² In that case, the plurality held that there was no fundamental protection under the Due Process Clause of the U.S. Constitution for homosexuals "to engage in acts of consensual sodomy."³³

Subsequently, the Supreme Court was faced with a challenge to *Bowers* in *Romer v. Evans*.³⁴ In *Romer*, the respondents challenged a Colorado

treatment, regardless of gender. *See generally* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) (holding that it is a violation of the Equal Protection Clause to deny food assistance to unrelated persons solely because they chose to live together and had no legally established relationship); N.J. Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973) (per curiam) (holding that a state law providing benefits to only married households with at least one child is unconstitutional because it denied equal benefits to illegitimate children); Roe v. Wade, 410 U.S. 113, 169-70 (1973) (Stewart, J., concurring) (declaring that the right to choose whether or not to "bear or beget a child" is protected under the right to privacy embodied in the Fourteenth Amendment); Stanley v. Illinois, 405 U.S. 645 (1972) (finding that a father was denied equal protection when he was presumed unfit to be the custodian of his minor children because he had not married their mother); Eisenstadt v. Baird, 405 U.S. 438 (1972) (finding that a prohibition on access to contraceptives based on marital status violated the Equal Protection Clause of the U.S. Constitution because it treated similarly situated individuals differently); Reed v. Reed, 404 U.S. 71 (1971) (finding a statute unconstitutional under the Equal Protection Clause because, without any hearing on the merits, it gave preference to males when appointing testators); King v. Smith, 392 U.S. 309 (1968) (finding that a state cannot deny children benefits because their unmarried mother cohabitated with an unrelated adult male); Levy v. Louisiana, 391 U.S. 68 (1968) (holding that, under the Equal Protection Clause, illegitimate children are entitled to protection from invidious discrimination); Griswold v. Connecticut, 381 U.S. 479 (1965) (reasoning that the right to privacy, implicit in the Bill of Rights, includes the right to use birth control).

29. *See* POLIKOFF, *supra* note 24, at 48; *see, e.g.*, Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974) (refusing to order county clerk to issue a marriage license to two males in Washington).

30. POLIKOFF, *supra* note 24, at 55 (describing the creation of the American Civil Liberties Union's Lesbian and Gay Rights Project, the National Lesbian and Gay Law Association, and Lambda Legal).

31. *See id.*

32. 478 U.S. 186 (1986).

33. *Id.* at 192.

34. 517 U.S. 620 (1996).

state constitutional provision (Amendment 2)³⁵ prohibiting governmental protection of homosexuals as a class.³⁶ The State defended Amendment 2 by arguing that homosexuals were not harmed by it and were only denied special protection under the law.³⁷ In other words, it argued that gays, lesbians, or bisexuals could not be protected on the basis of their sexual orientation, but they still enjoyed all the other protections afforded to all Colorado citizens.³⁸ The Court rejected this argument.³⁹ It found Amendment 2 unconstitutional because the State offered no rational basis for the creation of a separate political process for homosexuals.⁴⁰ The Court reasoned that any group of Colorado citizens could pass a law to help themselves, while homosexuals had to pass a constitutional amendment in order to garner the same protections.⁴¹ Thus, the Supreme Court in *Romer* protected the rights of homosexuals.

The Supreme Court did not explicitly overturn its holding in *Bowers* until 2003 in the seminal case of *Lawrence v. Texas*.⁴² It found that “*Bowers* was not correct when it was decided.”⁴³ In *Lawrence*, the petitioners were charged with violating a Texas statute that prohibited sexual acts between two people of the same-sex.⁴⁴ Justice Kennedy, writing for the majority, held that homosexuals were entitled to private relationships without state

35. Amendment 2 states,

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

COLO. CONST. art. II, § 30b, *invalidated by Romer*, 517 U.S. 620.

36. Respondents in *Romer v. Evans* were homosexual plaintiffs and municipalities that had passed laws and ordinances to protect homosexuals from discrimination. *Romer*, 517 U.S. at 625.

37. *Id.* at 626.

38. Brief for the American Federation of State, County & Municipal Employees, AFL-CIO as Amici Curiae Supporting Respondents at 3, *Romer*, 517 U.S. 620 (No. 94-1039) (articulating the State’s position that “Amendment 2 produces only an inconsequential deprivation of rights because gays, lesbians and bisexuals are still free to participate in the political process on issues unrelated to discrimination at all levels of government and on issues related to discrimination through advocating a constitutional referendum to repeal Amendment 2”).

39. *Romer*, 517 U.S. at 632.

40. Under the rational basis test, the court requires a legitimate interest or, in other words, a rational basis in order to ensure that the legislature is not motivated by the sole desire to burden a specific group. *Id.* at 632–33. “In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous.” *Id.* at 632. In *Romer*, the Court maintained that “Amendment 2 confounds this normal process of judicial review” because it is not supported by any legitimate government interest. *Id.* at 633.

41. *See id.* at 633.

42. 539 U.S. 558, 577 (2003).

43. *Id.* at 578.

44. *Id.* at 562–63.

interference.⁴⁵ By criminalizing these sexual acts, the Court found that homosexuals' human existence is unconstitutionally demeaned.⁴⁶ However, the Court specifically noted that its holding was only applicable to same-sex relations, not same-sex marriage.⁴⁷

c. Individual States Are First To Legalize Same-Sex Marriage

In *Lawrence*, the Supreme Court recognized homosexuals' fundamental right to engage in intimate relationships, but state courts and legislatures have gone even further to legally protect these relationships. Following the reasoning in *Romer* and *Lawrence*, the Supreme Court of Hawai'i, in *Baehr v. Lewin*,⁴⁸ was the first court to find that restricting marriage benefits to heterosexual couples was a violation of its state constitution's equal protection clause.⁴⁹ However, the Hawaiian court's decision was superseded by a state constitutional amendment.⁵⁰

In 2003, Massachusetts became the first state to fully legalize same-sex marriage in *Goodridge v. Department of Public Health*.⁵¹ In *Goodridge*, the plaintiffs were unable to obtain a marriage license pursuant to Massachusetts law because they were both of the same sex.⁵² The court followed the reasoning in *Romer*⁵³ and held that this restriction of a fundamental right was not rationally related to a state purpose and was therefore unconstitutional under state law.⁵⁴ Pursuant to this principle, the court reasoned that the state regulations were not allowed to "directly and substantially" interfere with a citizen's right to marry.⁵⁵ While the court recognized that infringements on fundamental rights are subject to strict scrutiny,⁵⁶ it did not reach the question of whether a ban on same-sex

45. *Id.* at 567.

46. *Id.* at 578.

47. *See id.* at 585 (O'Connor, J., concurring) ("Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.").

48. 852 P.2d 44 (Haw. 1993), *superseded by constitutional amendment*, HAW. CONST. art. I, § 23.

49. *See id.*

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

51. 798 N.E.2d 941 (Mass. 2003).

52. *Id.* at 949–50.

53. *Id.* at 962 (rejecting the "marriage is procreation" justification for the government ban on same-sex marriage by comparing it to Amendment 2 in *Romer* because both acts "identif[y] persons by a single trait and then den[y] them protection across the board" (citing *Romer v. Evans*, 517 U.S. 620, 633 (1996))).

54. *Id.* at 957, 961, 963, 965.

55. *Zablocki v. Redhail*, 434 U.S. 374, 387 (1978); *see also Goodridge*, 798 N.E.2d at 957.

56. *See Goodridge*, 798 N.E.2d at 957, 961; *see also Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (noting that fundamental rights are constitutional guarantees of basic liberties). Notably, the Supreme Court has not specifically found that marriage is a fundamental right but, rather, has found that it is a part of the right to privacy, which is protected by the Due Process Clause. *See Zablocki*, 434 U.S. at 383–84 ("[T]he right to

marriage unconstitutionally infringed on a fundamental right under strict scrutiny analysis.⁵⁷ Instead, the court in *Goodridge* reasoned that there was no interest proffered by the government to justify the denial of marriage to same-sex couples.⁵⁸

Next, the Supreme Court of California, in *In re Marriage Cases*,⁵⁹ held that the denial of marital rights to same-sex couples violated the state constitution's equal protection clause.⁶⁰ This case followed the same reasoning described above in *Goodridge*. However, as in Hawai'i, the voters of California overturned this holding by an amendment to the state constitution.⁶¹

Additionally, the Connecticut Supreme Court extended the right of marriage to same-sex couples in *Kerrigan v. Commissioner of Public Health*.⁶² As in *Goodridge*, the plaintiffs in *Kerrigan* were same-sex couples who were denied a marriage license.⁶³ The *Kerrigan* court applied heightened scrutiny to the classification based on sexual orientation.⁶⁴ The court found that the state failed to provide any validation for the same-sex marriage ban that would satisfy the state constitution's equal protection clause.⁶⁵ Similarly, the Iowa Supreme Court, in *Varnum v. Brien*,⁶⁶ assured homosexuals the right to marry.⁶⁷ Also applying heightened scrutiny, the court found that the prohibition on same-sex marriage violated the equal protection clause of the Iowa Constitution because there was no "constitutionally adequate justification for excluding plaintiffs from the institution of civil marriage."⁶⁸

marry is of fundamental importance."); *Roe v. Wade*, 410 U.S. 113, 169 (1973) ("Several decisions of this Court make clear that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause . . .").

57. *Goodridge*, 798 N.E.2d at 959–61 (recognizing that, under rational basis analysis, due process claims must be substantially related to a government interest); see also *Griswold v. Connecticut*, 381 U.S. 479, 504 (1965) (White, J., concurring) (reasoning that, under strict scrutiny analysis, a government regulation that restricts a fundamental right is only constitutional "if [the regulation is] reasonably necessary for the effectuation of a legitimate and substantial state interest, and [is] not arbitrary or capricious in application").

58. See *Goodridge*, 798 N.E.2d at 957, 961, 962–63, 965.

59. 183 P.3d 384 (Cal. 2008).

60. *Id.* at 421–23, 444–46, 453.

61. CAL. CONST., art. I, § 7.5. The Supreme Court of California upheld this constitutional amendment. *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

62. 957 A.2d 407 (Conn. 2008).

63. *Id.* at 412; see also *supra* note 52 and accompanying text.

64. See *Kerrigan*, 957 A.2d at 422–23, 430–31 ("Intermediate scrutiny typically is used to review laws that employ quasi-suspect classifications. . . . Under intermediate scrutiny, the government must show that the challenged legislative enactment is substantially related to an important governmental interest."); cf. *supra* note 40 (describing rational basis review, which is very deferential to the legislature as compared to heightened scrutiny).

65. *Kerrigan*, 957 A.2d at 482.

66. 763 N.W.2d 862 (Iowa 2009).

67. *Id.* at 907.

68. *Id.* at 896–906.

Furthermore, advocates of the same-sex marriage movement have made inroads lobbying state legislatures.⁶⁹ The Vermont legislature was the first to extend marriage, not just civil unions, to same-sex couples.⁷⁰ Then, in the spring of 2009, both Maine and New Hampshire followed suit.⁷¹ These developments faced substantial opposition from the “marriage movement,” which the next section discusses.

2. Backlash to the Same-Sex Marriage Movement

The “marriage movement” describes activists who advocate for what they deem traditional family values.⁷² These values include limiting marriage to unions between members of the opposite sex.⁷³ In Part I.A.2.a, this Note describes the background of the “marriage movement” and its origin. Then, this section explains reasons for opposing same-sex marriage, as articulated by advocates of the “marriage movement” and Professor Wardle. In particular, Professor Wardle asserts that negative structural, doctrinal, social, and familial effects will result if same-sex unions are permitted in the United States.

a. *Development of the “Marriage Movement”*

Beginning in the 1980s, there was a backlash against the growing strength of the gay rights movement.⁷⁴ By the 1990s, many commentators and politicians publicly took the position that two-parent families provide the best environment in which to raise children and, further, that illegitimacy is one of the most serious problems in the United States.⁷⁵ The breakdown of the traditional family structure was blamed for many of the

69. 2009 Conn. Acts §§ 9–12; MASS. GEN. LAWS ch. 207, §§ 1–3 (2003) (placing no gender limitations on marriage); 2009 N.H. Laws ch. 59 §§ 1–10; 2009 Vt. Acts & Resolves 33; Nikita Stewart & Tim Craig, *D.C. Council Votes To Recognize Gay Nuptials Elsewhere: Decision Comes as Vermont Legalizes Same-Sex Marriage*, WASH. POST, Apr. 8, 2009, at A1; *Lawmakers Approve Same-Sex Marriage in N.H., Maine*, CNN, May 6, 2009, <http://www.cnn.com/2009/POLITICS/05/06/maine.same.sex.marriage>. Additionally, civil unions are available to same-sex couples in California, the District of Columbia, Hawai‘i, New Jersey, Oregon, and Washington, with varying degrees of benefits and protections under the law. CAL. FAM. CODE §§ 297, 299.2 (West 2004); D.C. CODE § 32-701 to -702 (2001); HAW. REV. STAT. § 572C-1 to -7 (2008); N.J. STAT. ANN. § 26:8A-2 to -13 (West 2007); WASH. REV. CODE § 26.60.010 (Supp. 2008); Oregon Family Fairness Act, 2007 Or. Laws 607; *see also* Wardle, *Attack on Marriage*, *supra* note 5, at 1390 (listing the states that gave rights to same-sex couples to enter civil unions, as of December 31, 2007).

70. 2009 Vt. Acts & Resolves 33.

71. 2009 Me. Laws ch. 82, § 650-A to -B; 2009 N.H. Laws ch. 59, §§ 1–10. However, in November 2009, Maine citizens passed a public referendum that reversed the state legislature and banned same-sex marriage in the state. Abby Goodnough, *Gay Rights Rebuke May Result in a Change in Tactics*, N.Y. TIMES, Nov. 5, 2009, at A25.

72. Strieff, *supra* note 21.

73. *See infra* Part I.A.2.b (describing the view of “marriage movement” advocates that same-sex marriage is harmful to American society).

74. POLIKOFF, *supra* note 24, at 63.

75. *Id.* at 67.

country's social ills.⁷⁶ For example, presidential candidate Dan Quayle blamed the 1992 Los Angeles riots on "a breakdown of family structure and traditional values [and] asserted that single motherhood was responsible for the rise of gangs and other social problems."⁷⁷ Although his opponent, then-Governor Bill Clinton, denounced Quayle's argument, he too called for an increase in traditional family values.⁷⁸

By 2000, the "marriage movement" developed into an effort to refocus the marriage conversation back to the protection of traditional relationships and away from expansion of marriage rights to same-sex couples.⁷⁹ This movement provided research to confirm its supposition that people in heterosexual unions, consisting of a mother and father, "live happier, longer, healthier lives filled with more sex and more money."⁸⁰ Intertwined with all of these social policy arguments is the notion that marriage is a fundamental institution in America that benefits individuals and society.⁸¹ For the "marriage movement," same-sex unions threaten all of the benefits of marriage itself and, consequently, are a detriment to society.⁸²

b. *Perverse Effects of Same-Sex Unions*

This section discusses specific views of proponents of the marriage movement. In particular, Professor Wardle identifies four categories of perverse effects that he believes arise out of same-sex unions—structural, doctrinal, social, and familial.⁸³

First, Professor Wardle fears that same-sex domestic partnerships will create structural consequences in the law. American federalism is based on the division of power between the federal and state governments.⁸⁴ The

76. *See id.* at 63.

77. *Id.* at 63–64.

78. *See id.* at 65; *see also* Michael K. Frisby, *Jay Rockefeller Reopens Door to Presidential Bid*, BOSTON GLOBE, May 8, 1991, at A4.

79. *See* POLIKOFF, *supra* note 24, at 72 ("The marriage movement consistently describes marriage as a transhistorical, transcultural core institution that must be protected against incursions from advocates of family diversity." (citing INST. FOR AM. VALUES & INST. FOR MARRIAGE & PUB. POLICY, MARRIAGE AND THE LAW: A STATEMENT OF PRINCIPLES 6–8 (2006), available at <http://center.americanvalues.org/?p=47>)).

80. *Id.* at 70.

81. *Id.* at 72 ("[Marriage] is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress." (citing *Maynard v. Hill*, 125 U.S. 190, 210–11 (1888))).

82. *Id.* at 80 (describing the belief of the proponents of the "marriage movement" that same-sex marriage creates a greater risk of "poverty, crime, juvenile delinquency, welfare dependency, child abuse, unwed teen motherhood, infant mortality, mental illness, high school dropouts and other education failures").

83. Wardle, *Counting the Costs*, *supra* note 8, at 429.

84. Jason Lynch, Note, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998, 2025 (2001); *see also* Thomas C. Fischer, "Federalism" in the European Community and the United States: *A Rose by Any Other Name*, 17 FORDHAM INT'L L.J. 389, 413 n.101 (1994) (defining federalism).

relationship between the sovereign states themselves is termed horizontal federalism, and the relationship between the federal government and the individual states is known as vertical federalism.⁸⁵ Professor Wardle has concerns regarding each of these intergovernmental relationships. Under horizontal federalism, Professor Wardle argues that states are likely to be peer-pressured into adopting same-sex marriage policies, even though they are “quite independent and have remarkable autonomy” over family law.⁸⁶ In this way, as more state courts and legislatures grant same-sex couples greater rights, Professor Wardle expects that other states will join the “bandwagon” and adopt similar policies.⁸⁷ Also, under vertical federalism, federal powers have the unique constitutional authority to police the relationships of horizontal federalism.⁸⁸ Professor Wardle particularly fears that the Supreme Court may override the individual powers of the states by stretching the language of the Constitution to provide for the right to same-sex unions.⁸⁹ According to Professor Wardle, the negative structural consequence is that the Court’s integrity will be diminished.⁹⁰ Thus, he advocates that “significant alteration of the definition and composition of [marriage] risks alteration of the political and legal foundations of our government.”⁹¹

Second, Professor Wardle argues that same-sex marriage, if adopted by states, will cause doctrinal questions to arise in many areas of the law.⁹² He presents thirty-two areas that may be affected, including interstate

85. Noah D. Hall, *Toward a New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 U. COLO. L. REV. 405, 409 (2006) (citing Dan L. Burk, *Federalism in Cyberspace*, 28 CONN. L. REV. 1095, 1100 (1996)).

86. Wardle, *Counting the Costs*, *supra* note 8, at 429 (“Novel developments in one state are often mimicked by judges (and sometimes by legislators) in other states. . . . [I]t reasonably can be expected that other states will get on that bandwagon . . .”).

87. *See id.*

88. *See, e.g.*, Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1475 (2007) (“[T]he Constitution grants Congress expansive authority to structure interstate relationships.”). An example of Congress’s broad power to regulate interstate relations is the Commerce Clause. *See id.* at 1480; *see also* U.S. CONST. art. I, § 8, cl. 3. Using the Commerce Clause, the U.S. Supreme Court has strongly prohibited state regulations that may discriminate against sister states. *See Metzger, supra*, at 1481–85. *See generally* *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality of Or.*, 511 U.S. 93 (1994) (holding a higher fee for disposing of out-of-state waste unconstitutional because it was not substantially similar to the fee imposed on in-state waste); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (finding a New Jersey law that prohibited importation of out-of-state waste unconstitutional because it was facially discriminatory and protectionist); *Welton v. Missouri*, 91 U.S. 275 (1875) (invalidating a law that banned peddlers from Missouri unless they were peddling Missouri goods because it unconstitutionally infringed on sister states). However, the Court has respected congressional decisions that permit similar interstate discrimination in certain circumstances. *Metzger, supra*, at 1481–85. *See generally* *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 31 (1937) (“It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power.”).

89. Wardle, *Counting the Costs*, *supra* note 8, at 430.

90. *Id.*

91. *Id.*

92. *Id.* at 431–39.

recognition of marriage, adequacy of justifications for marriage prohibitions, parentage, marital property regimes, and other marital and familial rights.⁹³ Particularly relevant to this Note, he raises issues regarding same-sex marriage dissolution.⁹⁴ For example, he questions how the termination of unions, property division, alimony, and tax consequences of same-sex divorce in one state will affect other states.⁹⁵ Although Professor Wardle presents these problems, he is unable to provide any adequate remedies for them, which is his main cause of concern.⁹⁶

Additionally, Professor Wardle maintains that social validation of same-sex unions will increase the number of these unions and promote greater rights for same-sex couples “concerning custody, visitation, guardianship, and adoption.”⁹⁷ He posits that greater rights for same-sex couples will decrease the overall value of family and marriage to society. He argues that same-sex partners are less committed to the union and that, therefore, increased rights for same-sex couples erode the value of interpersonal relationships.⁹⁸ For example, statistics he cites show the following trends: (1) same-sex partners are more likely to break up than heterosexual couples;⁹⁹ (2) gay men are more likely to engage in risky sexual behavior and have more sexual partners;¹⁰⁰ (3) gay men are more prone to cheating on their partners than straight men;¹⁰¹ and (4) marital status does not change these figures.¹⁰² He also concludes that same-sex unions encourage “free-riding,” since same-sex partners get increased benefits for their relationship under the law, while the union contributes less to society than other interpersonal heterosexual relationships.¹⁰³

Finally, Professor Wardle describes the negative impact of same-sex unions on individuals and families.¹⁰⁴ The “marriage movement” maintains that a family with a mother and a father, and not the cohabitation of two males or two females, provides the best environment for child-rearing.¹⁰⁵ Similarly, Professor Wardle argues, “[t]he union of a man and a woman in marriage creates a unique and uniquely valuable union much greater than the sum of the parts.”¹⁰⁶ He also posits that parenting, including the

93. *Id.*

94. *Id.* at 438.

95. *Id.*

96. *See id.* at 431–39.

97. *Id.* at 439.

98. *Id.* at 440–41.

99. Wardle, *Attack on Marriage*, *supra* note 5, at 1375.

100. *Id.* at 1374.

101. *Id.* at 1375.

102. *Id.*

103. Wardle, *Counting the Costs*, *supra* note 8, at 441

104. *Id.* at 429.

105. *See* Wardle, *Attack on Marriage*, *supra* note 5, at 1371, 1377 (describing a family environment between a man and a woman as uniquely valuable to parenting and child-rearing); *see also* POLIKOFF, *supra* note 24, at 75.

106. Wardle, *Attack on Marriage*, *supra* note 5, at 1371. Professor Lynn Wardle proposes that men and women complement each other and that their conjugal union contributes more to society than other relationships. *Id.*

teaching of moral standards, by same-sex couples is undermined because their intimate relations are for pleasure, rather than procreation.¹⁰⁷ In other words, the responsible teaching of moral standards “is weakened when marriage is redefined to include relations among same-sex couples that are designed for sexual pleasure and lack the ability to co-parent.”¹⁰⁸ For these reasons, one of the principal objectives of the “marriage movement” is to restrict marriage to a man and a woman in order to strengthen this fundamental institution.¹⁰⁹

B. *History of Interstate Marriage and Divorce Recognition*

Part I.A discussed same-sex marriage in the United States. In order to explain the way in which extension of this right affects interstate recognition of child custody judgments, this section discusses how states resolved varying marriage and divorce policies in the past, before the controversy over same-sex marriage recognition. Part I.B.1 discusses the implications of the Full Faith and Credit Clause in the context of marriage. Part I.B.2 introduces the “place of celebration” rule, which exemplifies the general tendency of states to recognize the validity of marriages performed in a sister state regardless of public policy considerations. Finally, Part I.B.3 examines the different rules for divorce orders, which traditionally are subject to full faith and credit in sister states.

1. The Full Faith and Credit Clause and the Effects Clause

Section 1 of Article IV of the Constitution 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.”¹¹⁰ The first and second sentences of this section are known, respectively, as the Full Faith and Credit Clause and the Effects Clause.

The Full Faith and Credit Clause imposes an obligation on states.¹¹¹ During the Constitution’s ratification, the Full Faith and Credit Clause was not a subject of intense discussion, so there is little historical analysis to give credence to a specific interpretation.¹¹² The Full Faith and Credit

107. *Id.* at 1377.

108. *Id.*

109. See POLIKOFF, *supra* note 24, at 80; Strieff, *supra* note 21. This goal to ban same-sex marriage has been achieved in forty-three states. See Part I.A.1.c; see also Wardle, *Attack on Marriage*, *supra* note 5, app. at 1391 (describing the states banning same-sex unions as of May 2, 2007).

110. U.S. CONST. art. IV, § 1. The Full Faith and Credit Clause was clarified by Congress in the Full Faith and Credit Act, 28 U.S.C. § 1738 (2006) (declaring that copies of judgments accompanied by the attestation and seal of the clerk shall be accorded full faith and credit by sister states).

111. See Cox, *supra* note 8, at 1067.

112. See Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 2004 (1997).

Clause was originally part of the Articles of Confederation, without inclusion of the Effects Clause.¹¹³ James Madison introduced the Effects Clause because he believed that the Legislature was the appropriate body to promote interstate comity, specifically interstate recognition of sister states' judgments.¹¹⁴ Additionally, Madison changed the language of the Full Faith and Credit Clause to "shall" and the Effects Clause to "may."¹¹⁵ Accordingly, the Full Faith and Credit Clause is mandatory on the states while the Effects Clause is merely a discretionary power of Congress.¹¹⁶ The Founders intended for the Full Faith and Credit Clause to promote uniformity and unite the states as one nation.¹¹⁷

The second sentence, the Effects Clause, grants Congress the power to modify the default requirement of full faith and credit by prescribing the effect of acts, records, and judgments upon sister states.¹¹⁸ Similarly, there was very little historical discussion of this clause during the debate over the Constitution.¹¹⁹ Further, in the Federalist Papers, Madison pointed out the ambiguity of the language in the Effects Clause. He wrote that "[t]he meaning of the [Effects Clause] is extremely indeterminate; and can be of little importance under any interpretation which it will bear."¹²⁰ Madison simply believed that Congress could use its Effects Clause power to establish justice between sister states and that its meaning would be realized over time.¹²¹ However, this meaning was never firmly established by the legislature or the courts because Congress has rarely used it.¹²²

Unlike the Effects Clause, the Full Faith and Credit Clause is the subject of several Supreme Court decisions.¹²³ Full faith and credit doctrine is relevant to two types of analysis used by U.S. courts: (1) enforcement of

113. Daniel A. Crane, *The Original Understanding of the "Effects Clause" of Article IV, Section 1 and Implications for the Defense of Marriage Act*, 6 GEO. MASON L. REV. 307, 315–16 (1998); see also ARTICLES OF CONFEDERATION art. IV.

114. See Crane, *supra* note 113, at 319; Timothy Joseph Keefer, Note, *DOMA as a Defensible Exercise of Congressional Power Under the Full-Faith-and-Credit Clause*, 54 WASH. & LEE L. REV. 1635, 1642–45 (1997).

115. Crane, *supra* note 113, at 323.

116. *Id.*

117. See *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 276–77 (1935); Singer, *supra* note 4, at 49–50; see also Kramer, *supra* note 112, at 2002.

118. See U.S. CONST. art. IV, § 1.

119. See 142 CONG. REC. 17,080 (1996) ("We have no explicit Supreme Court interpretation of these words to rely on."); Kramer, *supra* note 112, at 2004.

120. THE FEDERALIST NO. 42 (James Madison).

121. See *id.*

122. Katrina C. Rose, *The Transsexual and the Damage Done: The Fourth Court of Appeals Opens PanDOMA's Box by Closing the Door on Transsexuals' Rights To Marry*, 9 LAW & SEXUALITY 1, 107 (2000) (observing that the Defense of Marriage Act (DOMA) is only the fourth statute passed pursuant to congressional authority under the Effects Clause); see also Wardle, *Non-recognition of Same-Sex Marriage*, *supra* note 8, at 388.

123. Theodore F. Haas, *The Rationality and Enforceability of Contractual Restrictions on Divorce*, 66 N.C. L. REV. 879, 897 n.67 (1988); see also Jeffrey L. Rensberger, *Interstate Pluralism: The Role of Federalism in the Same-Sex Marriage Debate*, 2008 BYU L. REV. 1703, 1708 n.12.

judgments and (2) choice of law doctrine.¹²⁴ First, in interpreting this clause, the Supreme Court has held that judgments of sister states must be universally enforced regardless of the enforcing state's public policy.¹²⁵ For example, if a plaintiff wins a monetary judgment, then the plaintiff may take that judgment to any other state to have it enforced against the defendant.¹²⁶ However, marriage is not a judgment within the terms of the Full Faith and Credit Clause and thus is not absolutely enforceable in other states.¹²⁷

Second, under choice of law doctrine, the Full Faith and Credit Clause's requirements are not applicable to a court's decision regarding which state's laws to apply when entering a judgment.¹²⁸ Rather, the applicable law depends upon the forum state's choice of law statute, which may reflect the forum state's public policies.¹²⁹ Thus, even though there is no public policy exception to the Full Faith and Credit Clause, "A court may be guided by the forum state's 'public policy' in determining the law applicable to a controversy."¹³⁰ Accordingly, a state is not constitutionally required to apply a sister state's marriage laws when resolving a conflict over the

124. See Singer, *supra* note 4, at 34.

125. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998); see also Mark D. Rosen, *Why the Defense of Marriage Act Is Not (Yet?) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors That Determine What the Constitution Requires*, 90 MINN. L. REV. 915, 933 (2006) ("[S]tates have a virtually ironclad obligation to give effect to judgments from sister states but are virtually never required to apply another state's acts or records." (citing *Baker*, 522 U.S. at 231-36)); Singer, *supra* note 4, at 34 ("[T]he Supreme Court has required states to enforce the final court judgments of other states with almost no exceptions, even if those judgments violate the strong public policy of the forum."); Wardle, *Non-recognition of Same-Sex Marriage*, *supra* note 8, at 380.

126. See *Baker*, 522 U.S. at 233 ("[T]he judgment of the rendering State gains nationwide force."); *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 373 (1996) ("The Full Faith and Credit Act . . . directs all courts to treat a state-court judgment with the same respect that it would receive in the courts of the rendering State.").

127. Rosen, *supra* note 125, at 933.

128. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1) cmt. b (1971) ("[A] court will rarely be directed by statute to apply the local law of one state, rather than the local law of another state, in the decision of a particular issue."); Singer, *supra* note 4, at 34 ("States are generally free to apply any law they like as long as the state whose law is applied has some significant contact with the parties and the transaction or occurrence . . .").

129. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1). For example, if no conflict of laws statute exists, then the *Restatement (Second) of Conflict of Laws* suggests that the following factors be considered in determining, which state's laws should apply to a particular conflict:

(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. § 6(2).

130. *Baker*, 522 U.S. at 233 (citing *Nevada v. Hall*, 440 U.S. 410, 421-24 (1979)); see also Brian H. Bix, *State of the Union: The States' Interest in the Marital Status of Their Citizens*, 55 U. MIAMI L. REV. 1, 25 (2000). However, there is a public policy exception to the "place of celebration" rule. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2); Grossman, *supra* note 8, at 435, 467.

validity of a marriage, especially if the law is incompatible with the public policy of the forum state.¹³¹ In sum, under Section 1 of Article IV of the Constitution, a state is not required to recognize or enforce marriages from other states and is not required to apply the marriage laws of other states to a particular case in its court, unless so required by Congress under its Effects Clause power.

2. Marriage and the “Place of Celebration” Rule

Since full faith and credit does not apply to marriage recognition, state courts developed the “place of celebration” rule to resolve the problems created by conflicting marriage laws.¹³² Prior to the same-sex marriage debate, state courts resolved conflicts over interstate marriage recognition according to the principles of comity.¹³³ These principles are reflected in the “place of celebration” rule, articulated in the *Restatement (Second) of Conflict of Laws*.¹³⁴ Under this rule, if a marriage is valid in the state where it is performed, then it is valid in all other states.¹³⁵ For example, the “place of celebration” rule was routinely applied to honor interracial marriages before prohibitions on interracial marriages were found unconstitutional.¹³⁶ In these cases, if an interracial couple entered into a legal marriage in one state, then the marriage was recognized by a sister state, even if that state statutorily prohibited interracial unions.¹³⁷ Accordingly, this rule exemplifies state courts’ preference for upholding marriages.¹³⁸

131. Grossman, *supra* note 8, at 454.

132. *See id.* at 437–39, 442 (noting that nonuniformities existed between states’ marriage restriction laws prior to the Supreme Court’s decision in *Loving v. Virginia*, 388 U.S. 1 (1967)); *see also id.* at 434–35 (“In prior eras, states had routinely struggled with marriage recognition questions that arose because of sometimes stark disagreements about impediments to marriage.”).

133. *Id.* at 460–61 (citing BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 174 (2d ed. 1995)). *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283.

134. *See* Grossman, *supra* note 8, at 435; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2). Notably, Professor Stanley Cox has challenged the “place of celebration” rule as “arbitrary and illogical.” Cox, *supra* note 8, at 1069.

135. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2). State courts use this rule to determine whether to recognize a marriage. *See, e.g.,* Adams v. Howerton, 673 F.2d 1036, 1038–39 (9th Cir. 1982) (“[V]alidity of a marriage is governed by the law of the place of celebration.”).

136. Grossman, *supra* note 8, at 435, 467. *See generally* *Loving*, 388 U.S. 1 (finding that it is unconstitutional to limit marriage based on race classifications).

137. *See* Grossman, *supra* note 8, at 435, 467. For instance, the following is an application of the “place of celebration” rule. If a black woman married a white man in New York, where such marriages were allowed, and moved to Virginia, where such marriages were prohibited, then Virginia would still recognize the couple as married despite its public policy to the contrary.

138. *Id.* at 471 (“The Second Restatement notes the ‘strong inclination to uphold a marriage because of the hardship that might otherwise be visited upon the parties and their children.’” (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 cmt. h)); Anita Y. Woudenberg, Note, *Giving DOMA Some Credit: The Validity of Applying Defense of Marriage Acts to Civil Unions Under the Full Faith and Credit Clause*, 38 VAL. U. L. REV. 1509, 1528 (2004) (“States have a particular interest in sustaining, not upsetting, marriages.”).

However, there is a categorical exception to the “place of celebration” rule for marriages that violate a state’s public policy, such as evasive marriages—when a couple goes to another state with more favorable marriage laws for the sole purpose of celebrating a marriage.¹³⁹ When a state challenges the validity of a marriage under the evasive marriage exception, two elements must be shown: “state intent to disallow the marriage[] and . . . spousal intent to evade state law.”¹⁴⁰ But in the interest of comity, courts have not always applied this exception and have instead chosen to uphold even evasive marriages despite their deceptive nature.¹⁴¹ Accordingly, this demonstrates courts’ desire to uphold marriages, rather than void them, in order to prevent (1) illegitimate children, (2) treading on the expectations of the parties who entered into the marriage, and (3) generating ambiguity as to the marital status of a particular couple.¹⁴² As the next section discusses, these serious public policy concerns regarding uniform interstate marriage recognition are not relevant to divorce.

3. Different Rules for Divorce Recognition

Traditionally, the “place of celebration” rule is not applied in the context of divorce.¹⁴³ Rather, courts apply a full faith and credit analysis, which the Supreme Court upheld in *Williams v. North Carolina*.¹⁴⁴ The underlying reasoning is that divorce orders “are court judgments, and the full faith and credit doctrine long has distinguished between judgments and other ‘acts’ of states.”¹⁴⁵ In other words, state courts are not always required to apply statutes or acts from other states when rendering a judgment, but they are required to honor sister states’ final court judgments.¹⁴⁶

139. Grossman, *supra* note 8, at 435, 467. The exception in the *Restatement (Second) of Conflict of Laws* states that if the marriage “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” ceremony, then that marriage does not have to be recognized in other states. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2).

140. Cynthia M. Reed, *When Love, Comity, and Justice Conquer Borders: INS Recognition of Same-Sex Marriage*, 28 COLUM. HUM. RTS. L. REV. 97, 116 (1996). For example, the following is an application of the evasive marriage exception to the “place of celebration” rule in the interracial marriage context. A black man and white woman who live in Virginia go to New York to get married only because they could not get married in Virginia due to anti-miscegenation law. In this case, Virginia may not recognize the marriage when the couple returns immediately after their marriage ceremony.

141. Grossman, *supra* note 8, at 467–68 (“[T]he Supreme Judicial Court of Massachusetts upheld a marriage even though the parties had left their home state of Massachusetts specifically to avoid its antimiscegenation law and then returned immediately after marrying in neighboring Rhode Island.” (citing *Medway v. Needham*, 16 Mass. (15 Tyng) 157, 159 (1819)); *see also* *Pearson v. Pearson*, 51 Cal. 120 (1875) (recognizing an interracial union between two California residents that was celebrated in Utah, even though the evasive marriage could not have been legally performed in California).

142. *See* Grossman, *supra* note 8, at 471 (discussing courts’ priorities, which support a “Historical Pro-Recognition Approach”).

143. *See* Rosen, *supra* note 125, at 987.

144. 317 U.S. 287, 303 (1942); Rosen, *supra* note 125, at 987.

145. Rosen, *supra* note 125, at 987; *see also* *Williams*, 317 U.S. at 296.

146. *See* *Williams*, 317 U.S. at 296; *see also supra* Part I.B.1.

The Supreme Court in *Williams* was particularly worried about the complexities that might arise from inconsistent recognition of divorce decrees.¹⁴⁷ For example, problems are created when a spouse is legitimately divorced in state A and remarried, but may be prosecuted as a bigamist in state B.¹⁴⁸ This could happen if state B refused to recognize a sister state's divorce judgment that dissolved the first marriage.¹⁴⁹ The policy behind the Court's decision was that "it [is] absolutely essential in a federal system for there to be a single answer to the question of a person's marital status and that one should not be married or unmarried as one travels through the country."¹⁵⁰ This Note demonstrates how this question has become increasingly complex for many same-sex couples to answer.

C. *The Defense of Marriage Act and Its Constitutionality*

The previous sections described the traditional method of interstate recognition of marriage and divorce. Historically, Congress has left these family law issues to the authority of the states.¹⁵¹ This section analyzes the role Congress played in the same-sex marriage recognition debate with its passage of DOMA in 1996.¹⁵² Part I.C.1 explores DOMA's language and the circumstances surrounding its passage. Part I.C.2 discusses the constitutionality of DOMA, particularly, whether Congress has the power under Section 1 of Article IV of the Constitution to determine that state judgments with a specified subject matter have no effect in sister states.¹⁵³

147. See *Williams*, 317 U.S. at 299.

148. See *id.*

149. See *id.*

150. Singer, *supra* note 4, at 39; see also Rosen, *supra* note 125, at 984–85 (agreeing with Professor Joseph Singer that there are real problems created when there are different marital obligations in different states).

151. Cox, *supra* note 8, at 429; Wardle, *Counting the Costs of Civil Unions*, *supra* note 8, at 429.

152. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006)).

153. This Note focuses on Article IV, Section 1 because it is the foundation of both DOMA and the Parental Kidnapping Prevention Act (PKPA). See *infra* Part I.C.1, D.2. However, the constitutionality of DOMA and its federal ban on same-sex marriage has also been questioned under the Constitution's Equal Protection and Due Process Clauses. See generally *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004) (analyzing DOMA's constitutionality under the Fourth, Fifth, and Tenth Amendments of the U.S. Constitution and the theory of comity); Alana M. Bell & Tamar Miller, *When Harry Met Larry and Larry Got Sick: Why Same-Sex Families Should Be Entitled to Benefits Under the Family and Medical Leave Act*, 22 HOFSTRA LAB. & EMP. L.J. 276, 294–323 (2004) (maintaining that DOMA is unconstitutional under the Equal Protection Clause because it was only passed out of animus against homosexuals); Heather Hodges, *Dean v. The District of Columbia: Goin' to the Chapel and We're Gonna Get Married*, 5 AM. U. J. GENDER SOC. POL'Y & L. 93 (1996) (analyzing same-sex marriage claims under the Equal Protection and Due Process Clauses and arguing for an end to discrimination against same-sex couples); Ronald J. Krotoszynski, Jr. & E. Gary Spitko, *Navigating Dangerous Constitutional Straits: A Prolegomenon on the Federal Marriage Amendment and the Disenfranchisement of Sexual Minorities*, 76 U. COLO. L. REV. 599, 626–44 (2005) (arguing that if the U.S. Constitution is not amended, then DOMA is invalid under the Equal Protection Clause); Justin Reinheimer, *Same-Sex Marriage Through the Equal Protection Clause: A Gender-Conscious Analysis*,

1. Defense of Marriage Act (DOMA)

Congress passed DOMA pursuant to its powers under the Effects Clause.¹⁵⁴ This statute was a direct response to the decision of the Supreme Court of Hawai'i in *Baehr*.¹⁵⁵ Members of Congress were particularly concerned that the Full Faith and Credit Clause would require sister states to recognize same-sex unions celebrated in other states, even though such a concern was unfounded in full faith and credit analysis.¹⁵⁶ DOMA provides, in pertinent part,

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.¹⁵⁷

Thus, the purpose of DOMA was to ensure that states have the option to deny recognition to judgments from sister states respecting same-sex marriages.¹⁵⁸ Additionally, DOMA provides that, for federal purposes, “the word ‘marriage’ means only a legal union between one man and one

21 BERKELEY J. GENDER L. & JUST. 213 (2006) (reasoning that it is a denial of equal protection to deny same-sex couples the right to marry because it treats homosexuals differently from similarly situated people of the same gender); Veronica C. Abreu, Note, *The Malleable Use of History in Substantive Due Process Jurisprudence: How the “Deeply Rooted” Test Should Not Be a Barrier To Finding the Defense of Marriage Act Unconstitutional Under the Fifth Amendment’s Due Process Clause*, 44 B.C. L. REV. 177 (2002) (arguing that DOMA is unconstitutional under the due process protection of the Fifth Amendment because it protects the fundamental right for same-sex couples to marry); Sherri L. Toussaint, Comment, *Defense of Marriage Act: Isn’t It Ironic . . . Don’t You Think? A Little Too Ironic?*, 76 NEB. L. REV. 924 (1997) (advocating for the declaration that DOMA is unconstitutional under the Equal Protection Clause); Matthew Spalding, The Heritage Foundation, Will DOMA Protect Marriage? (July 12, 2004), <http://www.heritage.org/research/family/wm532.cfm>.

154. See *supra* notes 111–22 and accompanying text.

155. See *supra* note 49 and accompanying text. This case was subsequently overturned by an amendment to Hawaii’s state constitution. See HAW. CONST. art. I, § 23; see also *supra* note 50 and accompanying text.

156. See Grossman, *supra* note 8, at 436.

157. Defense of Marriage Act, 28 U.S.C. § 1738C (2006).

158. 142 CONG. REC. 16,796 (1996) (statement of Rep. McInnis) (“What this bill does is it allows every State to make their own individual decision.”). However, a state already has this power under the “place of celebration” rule. Metzger, *supra* note 88, at 1532 (“Under traditional choice of law principles, . . . a state can refuse recognition to marriages performed elsewhere that violate its fundamental public policies. Accordingly, it is unlikely that a state’s refusal to recognize a same-sex marriage would have violated Article IV’s full faith and credit demand even absent DOMA, at least as applied to a same-sex marriage involving state residents.”); see also 142 CONG. REC. 16,798 (statement of Rep. Abercrombie) (“[O]ther States are able to establish already what they recognize or do not recognize with respect to marriage.”); *supra* notes 132–38 and accompanying text. In effect, DOMA codified the rule, but did not grant any powers or rights that the states did not already possess. See Metzger, *supra* note 88, at 1532.

woman.”¹⁵⁹ By defining marriage in this way, Congress aligned itself with the “marriage movement” in the same-sex marriage debate.¹⁶⁰

Following DOMA’s passage, states rushed to pass their own same-sex marriage prohibition statutes.¹⁶¹ Currently, same-sex marriage is explicitly banned in forty-three states, twenty-eight of which memorialized the prohibition via a state constitutional amendment.¹⁶² In these states, same-sex unions are void.¹⁶³ A void marriage is treated as if the parties never had any marital rights or obligations to one another.¹⁶⁴ Accordingly, the same-sex marriage is not recognized as valid, nor is it eligible to be dissolved.¹⁶⁵ The following section discusses whether Congress had the authority to pass DOMA under the Full Faith and Credit Clause and the Effects Clause.

2. DOMA’s Questionable Constitutionality Under the Full Faith and Credit Clause and the Effects Clause

As discussed in Part I.B.1, the Full Faith and Credit Clause promotes uniformity by requiring interstate recognition of judgments, and the Effects Clause grants Congress the power to establish the effects of those judgments. By passing DOMA, Congress diminished the requirements of the Full Faith and Credit Clause through its Effects Clause power. For this reason, scholars have questioned the constitutionality of DOMA. This section discusses whether DOMA is a valid exercise of congressional power under both of these constitutional provisions.

159. Defense of Marriage Act, 1 U.S.C. § 7 (2006).

160. When DOMA was debated in the House of Representatives, the bill sponsor urged its passage in order to continue the tradition that marriage is between one man and one woman. See 142 CONG. REC. 16,796. Further, by passing this statute, scholars argue that “Congress is seeking to advance its own substantive agenda in an area traditionally reserved for the states” Metzger, *supra* note 88, at 1533; see also 142 CONG. REC. 16,799 (statement of Rep. McInnis) (arguing that DOMA’s substantive effect is to “defend[] the traditional recognition of marriage”).

161. Grossman, *supra* note 8, at 447 (“States embraced DOMA’s ‘offer’ in large numbers by adding express anti-same-sex marriage provisions”). This Note refers to states that have enacted same-sex marriage prohibition statutes and constitutional referenda as “mini-DOMA” states.

162. See *supra* notes 58, 62, 66–67, 71 (describing how same-sex marriages are legally performed in Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire); see also Wardle, *Attack on Marriage*, *supra* note 5, app. at 1391 (describing the states banning same-sex unions as of May 2, 2007).

163. See, e.g., *Broadus v. Broadus*, 361 So. 2d 582, 584–85 (Ala. Civ. App. 1978) (stating that a void marriage is as if “the union had never taken place”); *Hodges v. Hodges*, 578 P.2d 1001, 1003 (Ariz. Ct. App. 1978) (maintaining that void marriages have “no force, form or effect whatsoever”); *Johnson County Nat’l Bank & Trust Co. v. Bach*, 369 P.2d 231, 234 (Kan. 1962) (“A void marriage may be treated as void by the parties to it and by all the world. It is good for no legal purpose, and is not attended or followed by any of the incidents of a valid marriage.”).

164. See *Broadus*, 361 So. 2d at 584–85; *Hodges*, 578 P.2d at 1003; *Bach*, 369 P.2d at 234.

165. See, e.g., *Mireles v. Mireles*, No. 01-08-00499-CV, 2009 WL 884815, at *2 (Tex. App. Apr. 2, 2009) (“A Texas court has no more power to issue a divorce decree for a same-sex marriage than it does to administer the estate of a living person.”).

a. *DOMA Violates the Principles of the Full Faith and Credit Clause and the Effects Clause*

DOMA's constitutionality has been challenged as a violation of Section 1 of Article IV of the Constitution.¹⁶⁶ Some constitutional scholars suggest that DOMA is unconstitutional because it subverts the principal purpose of the Full Faith and Credit Clause by condoning complete nonrecognition of sister states' judgments and orders if they are related to a same-sex marriage.¹⁶⁷ While providing for uniformity, the clause protects individual states from infringement on their sovereignty by requiring respect for sister states' interests.¹⁶⁸

In a letter from Professor Laurence Tribe to Senator Edward Kennedy, Professor Tribe argued that Congress's use of the Effects Clause, like that used to enact DOMA, will dismantle the union.¹⁶⁹ He, like many other scholars, believes that Congress can only make the full faith and credit requirement more stringent and cannot prescribe that state judgments will have no effect at all.¹⁷⁰ This belief has been deemed the "ratchet"

166. Rosen, *supra* note 125, at 934 ("An oft-repeated critique is that DOMA is unconstitutional because it flatly subverts the Full Faith and Credit Clause's foundational principle."); Wardle, *Non-recognition of Same-Sex Marriage*, *supra* note 8, at 385 (suggesting that DOMA, on its face, seems to contradict full faith and credit principles).

167. Kramer, *supra* note 112, at 2000-07; Rosen, *supra* note 125, at 933-34 (citing Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1, 22 (1997)); see also Joanna Grossman, *The Proposed Marriage Protection Act: Why It May Be Unconstitutional*, FINDLAW, July 27, 2004, <http://writ.news.findlaw.com/grossman/20040727.html> ("Thus, to interpret the [Effects] Clause to allow Congress to entirely undermine that comity by targeting certain states' acts and rendering them ineffective out-of-state, seems somewhat perverse."). See generally 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 (1997); Cox, *supra* note 8; Evan Wolfson & Michael F. Melcher, *Constitutional and Legal Defects in the "Defense of Marriage" Act*, 16 QUINNIAC L. REV. 221 (1996); Rex Glensy, Note, *The Extent of Congress' Power Under the Full Faith and Credit Clause*, 71 S. CAL. L. REV. 137 (1997); Heather Hamilton, Comment, *The Defense of Marriage Act: A Critical Analysis of Its Constitutionality Under the Full Faith and Credit Clause*, 47 DEPAUL L. REV. 943 (1998); James M. Patten, Comment, *The Defense of Marriage Act: How Congress Said "No" to Full Faith and Credit and the Constitution*, 38 SANTA CLARA L. REV. 939 (1998); Melissa A. Provost, Comment, *Disregarding the Constitution in the Name of Defending Marriage: The Unconstitutionality of the Defense of Marriage Act*, 8 SETON HALL CONST. L.J. 157 (1997); Scott Ruskay-Kidd, Note, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435 (1997); Jennie R. Shuki-Kunze, Note, *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 (1998).

168. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 323 (1981) (Stevens, J., concurring); see also Kramer, *supra* note 112, at 2002.

169. Crane, *supra* note 113, at 314-15.

170. *Id.* at 310. But see Wardle, *Non-recognition of Same-Sex Marriage*, *supra* note 8, at 372-73. Furthermore, Professor Cox suggests that if Congress was able to decrease the requirements of full faith and credit, it would completely "gut" the Full Faith and Credit Clause. Cox, *supra* note 8, at 1067.

theory.¹⁷¹ “The ‘ratchet’ theory is understandable in such situations, by insisting that there is a full faith and credit ‘floor’ that provides a core set of full faith and credit values which should be promoted rather than frustrated by any congressional action attempted under the Full Faith and Credit Clause.”¹⁷² In other words, under this theory, Congress can only strengthen, not weaken, full faith and credit among sister states.¹⁷³ Furthermore, according to this reasoning, because Congress does not have the power under the Full Faith and Credit Clause to pass DOMA, an amendment to the Constitution would be required to pass such legislation.¹⁷⁴

Additionally, the Dean of Stanford Law School, Larry Kramer, in his analysis of the Full Faith and Credit Clause’s language, posits that the Constitution mandates full faith and credit “shall be given” without exception.¹⁷⁵ He suggests that the Framers’ passive language indicates a general command to both Congress and state governments.¹⁷⁶ Thus, the clause’s mandate also applies to congressional action under the Effects Clause, when regulating full faith and credit, despite the lack of an explicit articulation of such a limitation in the Constitution.¹⁷⁷ It follows, under this reasoning, that Congress cannot use legislation to completely eliminate the effects of state judgments.¹⁷⁸ If Congress were allowed to legislate around this constitutional requirement, then the Full Faith and Credit Clause would lose some, or all, of its original meaning and purpose.¹⁷⁹ Dean Kramer concludes that “Congress should not be permitted to redefine [the Full Faith and Credit Clause’s] terms at will or to legislate away the minimum requirements of mutual respect and recognition . . . any more than Congress can suppress speech or legislate inequality.”¹⁸⁰

171. See Cox, *supra* note 8, at 1067; see also Crane, *supra* note 113, at 315 (describing Professor Laurence Tribe’s support of the “ratchet” theory, although not using that specific terminology).

172. Cox, *supra* note 8, at 1067; see also Wardle, *Non-recognition of Same-Sex Marriage*, *supra* note 8, at 410.

173. See Cox, *supra* note 8, at 1067.

174. See Joanna Grossman, *As the Federal Marriage Amendment Fails in the Senate, Recent and Older Examples in Legal History Provide Insight*, FINDLAW, July 15, 2004, <http://writ.news.findlaw.com/grossman/20040715.html>.

175. See Kramer, *supra* note 112, at 2003.

176. *Id.* (“[U]se of passive voice . . . makes [the Full Faith and Credit Clause] a general command rather than one directed solely at state lawmakers.”).

177. *Id.*; see also Linda J. Silberman, *Can the Island of Hawaii Bind the World?: A Comment on Same-Sex Marriage and Federalism Values*, 16 QUINNIPIAC L. REV. 191, 207 (1996).

178. Kramer, *supra* note 112, at 2003. Professor Larry Kramer finds support for this interpretation in the records of the Federal Convention because the language was changed from “ought” to “shall.” *Id.* at 2004. Thus, he argues, the requirement is mandatory. *Id.*; see also *supra* note 115 and accompanying text.

179. Kramer, *supra* note 112, at 2003; see *supra* note 117 and accompanying text.

180. Kramer, *supra* note 112, at 2006; see also Rose, *supra* note 122, at 108 (“[F]or constitutional analysis, the PKPA reinforced ‘shall’ while DOMA effectively erases ‘shall’ and replaces it not even with ‘ought,’ but with ‘may,’ essentially permitting ‘each State on

b. *DOMA Is a Valid Exercise of Congressional Power*

Conversely, proponents of DOMA argue that Congress has the power to remove the Full Faith and Credit requirement for state laws.¹⁸¹ According to these scholars, although Congress does not have the power to discriminate against specific states, it does have the authority under the Effects Clause to declare that certain classes of judgments have no effect, if a state so chooses.¹⁸² To support this conclusion, Professor Wardle points to the text of the Constitution.¹⁸³ He contends that there is no qualification or limit to Congress's absolute power to regulate the effect of laws.¹⁸⁴ Thus, Congress is free to decide both the substantive and procedural effect of laws¹⁸⁵ and can expand or contract the requirement of the Full Faith and Credit Clause.¹⁸⁶ Accordingly, under this reasoning, Congress was within

an ad hoc basis to determine whether or not it wants to extend full faith and credit to a same-sex marriage.” (quoting Reed, *supra* note 140, at 130)).

181. Wardle, *Non-recognition of Same-Sex Marriage*, *supra* note 8, at 372–73 (“[M]ost conflicts scholars who have addressed the issue have agreed that under long-established and unambiguous choice of law rules a state may refuse to recognize same-sex marriages that are valid in other states if such unions contradict the strong public policy of the forum, and that DOMA’s choice of law rule is clearly constitutional.” (citing *Judicial Activism vs. Democracy: What are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws?: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary United States Senate*, 108th Cong. 76 (2004), available at <http://www.access.gpo.gov/congress/senate/pdf/108hrg/96924.pdf>; Emily J. Sack, *Domestic Violence Across State Lines: The Full Faith and Credit Clause, Congressional Power, and Interstate Enforcement of Protection Orders*, 98 NW. U. L. REV. 827, 888–89 (2004); Silberman, *supra* note 178; Linda Silberman & Karin Wolfe, *The Importance of Private International Law for Family Issues in an Era of Globalization: Two Case Studies—International Child Abduction and Same-Sex Unions*, 32 HOFSTRA L. REV. 233, 254–56, nn.102–04, 258–60 (2003); Symposium, *Interjurisdictional Marriage Recognition*, 32 CREIGHTON L. REV. 1 (1998); Lea Brilmayer, *Full Faith and Credit*, WALL ST. J., Mar. 9, 2004, at A16)); see Metzger, *supra* note 88, at 1475–79 (arguing that Congress not only has the authority to pass DOMA, but that it is the correct governmental body to do so); Rosen, *supra* note 125, at 935–38.

182. See Metzger, *supra* note 88, at 1495; see also Wardle, *Non-recognition of Same-Sex Marriage*, *supra* note 8, at 388.

183. Wardle, *Non-recognition of Same-Sex Marriage*, *supra* note 8, at 392–95; cf. *supra* notes 174–76 and accompanying text.

184. Wardle, *Non-recognition of Same-Sex Marriage*, *supra* note 8, at 392.

185. *Id.* at 393. Procedural effects are those that “permit Congress to determine the nature of the effect an act, record, or judgment might have on a state court’s decision 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.” Woudenberg, *supra* note 138, at 1544–45. For example, DOMA is considered substantive, while the PKPA is procedural in nature. See Cox, *supra* note 8, at 1081; see also Wardle, *Non-recognition of Same-Sex Marriage*, *supra* note 8, at 393; Woudenberg, *supra* note 138, at 1547 (arguing that Congress’s role under the Full Faith and Credit clause is both procedural and substantive).

186. Wardle, *Non-recognition of Same-Sex Marriage*, *supra* note 8, at 414, 418.

its authority when it passed DOMA, even though it reduced the requirements of full faith and credit in a substantive area of law.¹⁸⁷

Additionally, Professor Mark Rosen argues that the federal government has the power to prescribe choice-of-law rules, like DOMA, under the Effects Clause, regardless of the fact that it regulates family law—a largely state function.¹⁸⁸ Specifically, he posits that the “DOMA regulates the extraterritorial effects of state policies—an eminently federal function that accordingly does not improperly trench on state sovereignty.”¹⁸⁹ Under Professor Rosen’s reasoning, Congress’s authority to regulate interstate effects is absolute regardless of the subject matter that it is regulating.¹⁹⁰ Thus, even though DOMA pertains to marriage, which is a state function, it is only regulating interstate relations, which is within the scope of federal authority.

According to these scholars, DOMA is a congressional exercise that constitutionally resolves interstate tension by providing state autonomy, rather than unification.¹⁹¹ In this way, interstate discrimination serves the same purpose as the Full Faith and Credit Clause—preservation of the union.¹⁹² Professor Gillian E. Metzger presents four reasons why interstate discrimination, such as DOMA, may work as a positive good despite its endorsement of conflicting state policies.¹⁹³ First, it allows states to support their own public policy by permitting local governments to determine their own regulations that better help their own citizens and limit particularized harmful externalities.¹⁹⁴ For example, if a majority of citizens are opposed to promoting same-sex marriage, then DOMA allows these states to protect their own concerns, while still allowing sister states to promote their radically different policy. Thus, each state gets what it wants.

187. *See id.*; *see also* Woudenberg, *supra* note 138, at 1549 (reasoning that Congress has the authority to pass substantive laws under the Full Faith and Credit Clause). *But see* Cox, *supra* note 8, at 1072 (arguing that Congress does not have power to prescribe substantive choice of law rules, such as DOMA).

188. Rosen, *supra* note 125, at 943–44. *But see* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 5 cmt. a (1971) (declaring that individual states are free to create their own choice of law rules).

189. Rosen, *supra* note 125, at 940.

190. *See* Wardle, *Non-recognition of Same-Sex Marriage*, *supra* note 8, at 406; *cf. id.* at 403 (noting that marriage itself is left up to states’ control); Woudenberg, *supra* note 138, at 1524 (citing *Parish v. Minvielle*, 217 So. 2d 684, 688 (La. Ct. App. 1969); 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)).

191. Rosen, *supra* note 125, at 937–38; *see also* Grossman, *supra* note 174 (“DOMA was lauded [by members of Congress] for reinforcing states’ rights, as against both the federal government and each other.”); Wardle, *Non-recognition of Same-Sex Marriage*, *supra* note 8, at 401.

192. Metzger, *supra* note 88, at 1502; Wardle, *Non-recognition of Same-Sex Marriage*, *supra* note 8, at 401 (“[T]he DOMA enhances national unity by tolerating diversity of state same-sex marriage recognition rules.”); *see also supra* note 117 and accompanying text.

193. Metzger, *supra* note 88, at 1501–02.

194. *See id.* at 1501.

Second, in some circumstances, interstate discrimination protects interstate development or maintenance of state industries.¹⁹⁵ Accordingly, if a state wanted to become a same-sex marriage destination, while another wanted to avoid it, both states could achieve this goal.

Next, Professor Metzger posits that interstate discrimination limits conflict among the states “over an activity or to preserve traditions of local regulation”¹⁹⁶ Following from Professor Metzger’s first argument, if a state wishes to promote its own agenda and interstate discrimination is allowed, then it may do as it sees fit without forcing all states to adopt the same agenda.¹⁹⁷

Finally, interstate discrimination can facilitate effective state regulation.¹⁹⁸ Under this reasoning, if a state is permitted to promote its individual public policy, then that policy is more effectively created and enforced because the states are not reluctant to create such legislation.¹⁹⁹ For these reasons, scholars believe that DOMA limits interstate conflict, which is a positive good for society, even though it promotes nonconformity of interstate recognition of same-sex marriages.

In sum, according to these scholars, DOMA is constitutional, even though it abridges full faith and credit and promotes the development of conflicting state policies.²⁰⁰ Moreover, these scholars argue that such diversity only serves to help the union, rather than divide it, which was the exact purpose for the creation of the Full Faith and Credit Clause.²⁰¹ According to this reasoning, DOMA does not infringe upon the requirements of Article IV, Section 1 of the Constitution and is a valid exercise of congressional power.²⁰²

As exemplified by the previous section, DOMA’s validity is questionable under the Full Faith and Credit and Effects Clauses. Nevertheless, this Note assumes *arguendo* that DOMA is constitutional in order to examine

195. *Id.*

196. *Id.*

197. *See id.*

198. *Id.*

199. This point is best exemplified by the desegregation of schools. Southern states resisted this radical change because it conflicted with the states’ public policies. *See* Daniel R. Gordon, *Reconsidering Homosexual Rights in Light of the Reemergence of Southern States’ Rights*, 10 SETON HALL CONST. L.J. 111, 141–42 (1999) (noting that southern states were reluctant to desegregate public schools after the Supreme Court’s holding in *Brown v. Board of Education*, 347 U.S. 483 (1954), and that it took almost a quarter-century for the state of Georgia to make an “about face in the development of human rights” (citing James C. Cobb, *Segregating the New South: The Origins and Legacy of Plessy v. Ferguson*, 12 GA. ST. U.L. REV. 1017, 1033–34 (1996))).

200. *See supra* notes 191–92 and accompanying text.

201. *See supra* notes 191–99 and accompanying text.

202. *See* Wardle, *Non-recognition of Same-Sex Marriage*, *supra* note 8, at 417 (noting that the House Committee reported that “[i]t is even clearer that the Effects Clause authorizes the [DOMA], which, in the Committee’s understanding, neither augments nor relaxes the free-standing constitutional obligation, but merely clarifies a very murky and complicated legal situation.” (alterations in original) (quoting H.R. REP. NO. 104-664, at 28 n.71 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2932)).

whether or not it partially repeals the PKPA. The details of the PKPA are discussed in the following section.

D. *Issues Surrounding Child Custody*

This Note examines how DOMA's broad language impacts other statutes, specifically the PKPA. This section presents the PKPA, which governs interstate child custody disputes in the United States. Part I.D.1 introduces the best interest of the child standard, which is the prevailing judicial standard used to determine custody.²⁰³ Part I.D.2 summarizes the PKPA and the Uniform Child Custody Jurisdiction Act (Uniform Act), which were created to resolve interstate jurisdictional conflict over the issuance and modification of child custody orders.

1. Best Interest of the Child Standard

The best interest of the child standard is employed by courts in all fifty states to determine child custody.²⁰⁴ The general goal of this standard is to ensure a child's well-being by placing him with adults who are best able to care for him.²⁰⁵ The Uniform Marriage and Divorce Act (UMDA)²⁰⁶ provides examples of factors to consider under this standard, including, (1) desires of the parents and (2) child as to custody; (3) the "interaction and interrelationship of the child . . . and any other person who may significantly affect the child's best interest"; (4) the child's ability to adjust to living arrangements at home, school, and in the community; and (5) "the mental and physical health of all individuals involved."²⁰⁷ The UMDA specifies that this list is not exclusive and encourages courts to consider all pertinent factors in order to ensure the child's well-being.²⁰⁸ Although each state employs the best interest of the child standard, there is great disparity among the states in its application to custody orders.²⁰⁹ Accordingly, the jurisdiction in which a custody order is entered can substantially affect the

203. Gregory A. Kelson, *In the Best Interest of the Child: What Have We Learned from Baby Jessica and Baby Richard?*, 33 J. MARSHALL L. REV. 353, 371 (2000).

204. *Id.*

205. *Id.* The focus is on the child's welfare, not the divorcing spouses' interests. Margaret Martin Barry, *The District of Columbia's Joint Custody Presumption: Misplaced Blame and Simplistic Solutions*, 46 CATH. U. L. REV. 767, 824 (1997).

206. UNIF. MARRIAGE AND DIVORCE ACT (amended 1973), 9A U.L.A. 159 (1998).

207. *Id.* § 402, 9A U.L.A. 282.

208. *Id.* Specifically applying this standard to DOMA, one commentator argues, "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. . . . [I]f a couple joined by a [same-sex] union had a child, adopted or by some other means, denying that relationship might adversely affect that child." Woudenberg, *supra* note 138, at 1561-63 (citing Mark Strasser, *Some Observations About DOMA, Marriages, Civil Unions, and Domestic Partnerships*, 20 CAP. U. L. REV. 363, 371-72 (2002)).

209. See Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337, 370-76 (2008).

outcome of the case.²¹⁰ As the next section discusses, a court's custody order, which is based on the best interest of the child standard, must be enforced by sister states pursuant to the PKPA.

2. The Parental Kidnapping Prevention Act

Prior to the PKPA's passage in 1980, custody orders were not considered final judgments by courts, and rules regarding interstate recognition were "often inconsistent and conflicting."²¹¹ This statute mandates full faith and credit for child custody orders for the purpose of preventing parental kidnapping—"the taking, retention or concealment of a child by a parent . . . in derogation of the custody rights . . . of another parent or family member . . . [with intent to] keep the children indefinitely or to have custody changed."²¹² This section describes the underlying problems and policies that the PKPA was created to address, then presents the terms of the statute.

a. Purpose of the PKPA

Congress passed the Parental Kidnapping Prevention Act pursuant to its authority under the Effects Clause of Section 1 of Article IV of the Constitution.²¹³ Prior to the passage of this statute, the Supreme Court continued to find, albeit reluctantly, that child custody and support orders were modifiable at will by sister states.²¹⁴ Because they were not final judgments, they were not enforceable in sister states under the Full Faith

210. For example, in the *Miller-Jenkins* case, the family court of Vermont granted visitation to the nonbiological parent during the dissolution of a same-sex union, while the Virginia family court refused to recognize the union and any rights of the nonbiological parent. See *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, 912 A.2d 951; *Miller-Jenkins v. Miller-Jenkins* 637 S.E.2d 330 (Va. Ct. App. 2006), *aff'd*, 661 S.E.2d 822 (Va. 2008); see also *infra* Part II.A.

211. Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, 94 Stat. 3568 (codified at 28 U.S.C. § 1738A (2006)) (stating the congressional findings supporting the enactment of the PKPA); see also Cox, *supra* note 8, at 1065.

212. PATRICIA M. HOFF, A.B.A. CTR. ON CHILDREN AND THE LAW, PARENTAL KIDNAPPING: PREVENTION AND REMEDIES 1 (2000), available at <http://www.abanet.org/child/pkprevrem.pdf>; see also Parental Kidnapping Prevention Act of 1980, 94 Stat. 3566; ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES 125 (2006); Herma Hill Kay, *Adoption in the Conflict of Laws: The UAA, Not the UCCJA, Is the Answer*, 84 CAL. L. REV. 703, 713 (1996).

213. Bix, *supra* note 130, at 25 n.124; *supra* notes 114–22 and accompanying text. Interestingly, DOMA and the PKPA are two of only three statutes to be passed under Article IV, Section 1 of the Constitution in recent congressional history. Charles J. Butler, *The Defense of Marriage Act: Congress's Use of Narrative in the Debate over Same-Sex Marriage*, 73 N.Y.U. L. REV. 841, 846 (1998).

214. KOPPELMAN, *supra* note 212, at 125 ("[T]he 1790 statute provides that judgments should be given the same effect that they are given in the state that hands them down. . . . Any child custody judgment . . . can be reconsidered by the court in light of changed circumstances."); Kay, *supra* note 212, at 713 (citing *Kovacs v. Brewer*, 356 U.S. 604, 607 (1958); *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 615 (1947)).

and Credit Clause.²¹⁵ As a result, parents essentially kidnapped their own children in order to find a state where the court would enter a judgment favorable to them.²¹⁶ For example, a parent who receives an unfavorable custody outcome in state A would defy the initial judgment and take his child to state B, where he would try to modify state A's order.²¹⁷ In order to close this jurisdictional loophole, Congress passed the PKPA.²¹⁸ This statute corrected the harmful consequences caused by the lack of finality of child custody orders by subjecting them to the requirements of the Full Faith and Credit Clause.²¹⁹ The details of the PKPA are discussed in the section below.

b. *Terms of the Uniform Child Custody Jurisdiction Act and the PKPA*

The Uniform Child Custody Jurisdiction Act²²⁰ was the precursor to the PKPA.²²¹ All fifty states adopted their own version of the Uniform Act.²²² The Uniform Conference of Commissioners on Uniform State Laws created the Uniform Act in 1968 to address growing concerns regarding interstate custody disputes and parental kidnapping.²²³ The primary goal of the Uniform Act was to stabilize custody arrangements by correcting the problem of parental kidnapping.²²⁴

Under the Uniform Act, if one state has "jurisdiction to issue an initial custody decree," then that decree is granted full faith and credit and may only be modified by the original court.²²⁵ A state has jurisdiction to enter custody judgments in two circumstances. First, a state may have "home state" jurisdiction over the child custody order in two ways:

215. See Cox, *supra* note 8, at 1065; Schmieder, *supra* note 10, at 298–99.

216. Kay, *supra* note 212, at 713; see also KOPPELMAN, *supra* note 212, at 125.

217. Kay, *supra* note 212, at 713; see also UNIF. CHILD CUSTODY JURISDICTION ACT prefatory note, 9 U.L.A. 262–64 (1999); KOPPELMAN, *supra* note 212, at 125.

218. Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, 94 Stat. 3568 (codified at 28 U.S.C. § 1738A (2006)) (stating the congressional findings supporting the enactment of the PKPA).

219. Kay, *supra* note 212, at 703; see also Parental Kidnapping Prevention Act of 1980, 94 Stat. at 3568.

220. 9 U.L.A. 261 (1999).

221. See Kay, *supra* note 212, at 713. The National Conference of Commissioners on Uniform State Laws created the Uniform Child Custody Jurisdiction Act (Uniform Act) in 1968, which was twelve years prior to the enactment of the PKPA. Compare UNIF. CHILD CUSTODY JURISDICTION ACT prefatory note, 9 U.L.A. 261 (passing the Uniform Act in 1968), with Parental Kidnapping Prevention Act of 1980, 94 Stat. 3568 (enacting the PKPA in 1980).

222. Russell M. Coombs, *Child Custody and Visitation by Non-parents Under the New Uniform Child Custody Jurisdiction and Enforcement Act: A Rerun of Seize-and-Run*, 16 J. AM. ACAD. MATRIMONIAL L., 1, 39 (1999).

223. See UNIF. CHILD CUSTODY JURISDICTION ACT prefatory note, 9 U.L.A. 262–64; see also *supra* Part I.D.2.a.

224. Kay, *supra* note 212, at 713 ("The primary goal of the [Uniform Act] was to overcome this instability in child custody decisions . . .").

225. *Id.*

(i) [it] is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within 6 months before commencement of the proceeding and the child is absent from this State because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this State²²⁶

Second, a court has jurisdiction if the child has a "significant connection" with that state and if there is "substantial evidence" that the state will take appropriate care of the child.²²⁷ There is no judicial test under the Uniform Act to determine whether a "significant connection" or "substantial evidence" exists in a specific case; the court must simply consider all the facts and circumstances to make a determination.²²⁸ Although the Uniform Act clarifies the issue, it still does not provide a jurisdictional remedy when more than one state has concurrent jurisdiction over a case and neither state has entered a prior custody order.²²⁹

Congress tailored the PKPA after the Uniform Act.²³⁰ Like the Uniform Act, discussed above, the PKPA provides jurisdiction in two circumstances: (1) it is the child's home state, or (2) there is significant evidence that the child has a substantial connection with the state.²³¹ However, there is one

226. UNIF. CHILD CUSTODY JURISDICTION ACT § 3(a)(1), 9 U.L.A. 307.

227. *Id.* § 3(a)(2), 9 U.L.A. 307.

228. *See, e.g.,* Meade v. Meade, 812 F.2d 1473, 1478 (4th Cir. 1987) (finding that there was a significant connection to Virginia when "[t]he child was born in Virginia and lived there most of his life," a majority of his friends and family remained in the state, and there was evidence that the child would continue to be cared for, protected, educated, and have relationships in Virginia); *In re* Murphy, 171 F. Supp. 2d 499, 505 (D.V.I. 2001) (finding that the lower court erred when it determined there was substantial evidence because it failed to consider the child's lack of contact or support in New Jersey and based its decision on the fact that the father lived there).

229. *See* Linda M. DeMelis, Note, *Interstate Child Custody and the Parental Kidnapping Prevention Act: The Continuing Search for a National Standard*, 45 HASTINGS L.J. 1329, 1330 (1994) (noting that the PKPA differs from the Uniform Act because the PKPA provides a preference for home state jurisdictions). Subsequently, the Uniform Child Custody Jurisdiction and Enforcement Act (Uniform Enforcement Act) was created to revise the Uniform Act and clarify designation of jurisdiction to modify custody decrees. UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT prefatory note, 9 U.L.A. 650-52 (1999). Under the Uniform Enforcement Act, like the PKPA, "home state" jurisdiction is preferred to "significant connection" jurisdiction. *Id.* § 201(a)(2)(A), 9 U.L.A. 650-51. The Uniform Enforcement Act has been adopted by thirty-four states and the District of Columbia. Deborah M. Goelman, *Shelter from the Storm: Using Jurisdictional Statutes To Protect Victims of Domestic Violence After the Violence Against Women Act of 2000*, 13 COLUM. J. GENDER & L. 101, 143 (2004). Because the Uniform Enforcement Act was not adopted by every state, it does not provide a uniform way to deal with these jurisdictional issues.

230. *See* Kay, *supra* note 212, at 713. *See generally* UNIF. CHILD CUSTODY JURISDICTION ACT prefatory note, 9 U.L.A. 262-65 (describing the parental kidnapping problem that the Uniform Act was designed to address).

231. The provision reads as follows:

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

....

(2) one of the following conditions is met:

important difference between the Uniform Act and the PKPA. In the PKPA, Congress provides a remedy to interstate conflict arising from concurrent jurisdiction over a custody dispute.²³² Under the PKPA, the court with “home state” jurisdiction is given preferential jurisdiction over other states’ courts with only “substantial evidence” of a “significant connection.”²³³ Also, once a state issues an initial valid custody order, that state court has exclusive jurisdiction to modify the order.²³⁴ Accordingly, under this federal statute, a sister state must accord valid custody orders full faith and credit and cannot interject itself into an out-of-state custody dispute, even if the state would otherwise have jurisdiction.²³⁵

Part I of this Note examined the development of gay rights and, more specifically, the right of same-sex marriage. The achievements by advocates of the gay rights movement created a backlash, which led to the “marriage movement” and the passage of DOMA.²³⁶ By passing DOMA, the federal government involved itself in an area of law traditionally left to the states and aligned itself with the “marriage movement.”²³⁷ Assuming *arguendo* that DOMA is constitutional, it gives states broad discretion in the context of same-sex marriage to deny recognition to sister states’ judgments and rights derived therefrom.²³⁸ However, the PKPA requires recognition of all custody judgments, which most often arise out of marriage dissolutions.²³⁹ The following Part analyzes the interaction between these two federal statutes, DOMA and the PKPA.

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

Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A (2006).

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. POLIKOFF, *supra* note 24, at 66–72 (discussing the development of the marriage movement).

237. Domestic relation regulations, which govern the institution of marriage, have always been within the exclusive province of the states. *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *see also* Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1821 (1995).

238. *See* Defense of Marriage Act, 28 U.S.C. § 1738C (2006); *see also supra* notes 157–58 and accompanying text.

239. Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A; *see also* David E. Seidelson, *Jurisdictional Reach and Choice-of-Law Determinations in Divorce Actions and Proceedings Incident Thereto: The Illusion of Tradition and the Significance of Finality and*

II. THE CONFLICT THAT EMERGES UNDER DOMA IN THE CONTEXT OF SAME-SEX DIVORCE AND CUSTODY

DOMA's broad language applies to all judgments derived from same-sex marriage. Does DOMA's scope include judgments such as same-sex divorce and child custody orders? If two statutes overlap and contradict in this way, then the one passed later in time partially repeals the first.²⁴⁰ It is a matter of debate whether the PKPA is partially repealed by DOMA in this way.²⁴¹ First, Part II.A introduces the case of *Miller-Jenkins*, which is an illustration of how courts struggle with this question. Part II.B presents arguments that DOMA does not repeal the PKPA. Conversely, Part II.C examines how DOMA may be found to partially repeal the PKPA.

A. *Miller-Jenkins: Example of Conflict Between DOMA and the PKPA*

In *Miller-Jenkins*,²⁴² a court in a mini-DOMA²⁴³ state faced the issue of child custody in the context of same-sex union dissolution.²⁴⁴ According to the facts of the case, Lisa and Janet began living together in Virginia during the late 1990s.²⁴⁵ The two women chose to memorialize their relationship in December 2000 by entering into a civil union in Vermont.²⁴⁶ In 2001, Lisa and Janet decided to have a child and Lisa began artificial insemination treatments.²⁴⁷ Janet was a full participant in this decision to bring a child into the relationship, including the selection of an anonymous sperm donor.²⁴⁸ Additionally, both Lisa and Janet contributed financially to the

Efficacy, 6 WIDENER J. PUB. L. 423, 451–53 (1997) (noting that alimony, custody, and child support are intimately related to divorce).

240. *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936); *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 336 (Va. Ct. App. 2006), *aff'd*, 661 S.E.2d 822 (Va. 2008); Bernadette Bollas Genetin, *Expressly Repudiating Implied Repeals Analysis: A New Framework for Resolving Conflicts Between Congressional Statutes and Federal Rules*, 51 EMORY L.J. 677, 681 (2002).

241. There is very little case law on this topic, although an increase in litigation in this area is likely to occur, as evidenced by the *Miller-Jenkins* case. Schmieder, *supra* note 10, at 305–06.

242. The hypothetical in the Introduction is a loosely based dramatization of the facts of *Miller-Jenkins*. See *supra* note 1. The most significant change is that Lisa and Janet were in a civil union, not a same-sex marriage.

243. See *supra* note 161.

244. See generally Symeon C. Symeonides, *Choice of Law in the American Courts in 2007: Twenty-First Annual Survey*, 56 AM. J. COMP. L. 243, 302–03 (2008) (describing the conflict in laws between DOMA and the PKPA).

245. *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, ¶ 3, 912 A.2d 951, 956.

246. *Id.*

247. *Id.*

248. *Id.*; see also Oren Goldhaber, Note, "I Want My Mommies": *The Cry for Mini-DOMAs To Recognize the Best Interests of the Children of Same-Sex Couples*, 45 FAM. CT. REV. 287, 288 (2007) ("Together, they decided that Lisa would carry the child, and they worked together to select a donor who would share Janet's physical characteristics." (citing Brief of the Appellee at 4, *Miller-Jenkins*, 2006 VT 78, 912 A.2d 951 (No. 2007-271), available at <http://www.glad.org/uploads/docs/cases/2007-11-07-vermont-supreme-court-brief.pdf>)).

relationship.²⁴⁹ In July 2002, when their daughter Isabella was four months old, the family moved to Vermont because they believed that Virginia was an unreceptive environment for a same-sex couple to raise a family.²⁵⁰ The family unit remained together in Vermont until Lisa and Janet decided to separate in the fall of 2003, when Lisa moved with Isabella back to Virginia.²⁵¹

1. Vermont Family Court

Subsequently, on November 24, 2003, Lisa sought to dissolve her union with Janet in Vermont Family Court.²⁵² In response, the court filed a temporary order of parental rights and responsibilities, which granted temporary legal and physical custody to Lisa and visitation rights to Janet.²⁵³ Lisa failed to follow the Vermont Family Court's visitation order by not allowing Janet to have contact with Isabella other than one initial visit on the first weekend.²⁵⁴

2. Virginia Family Court

Then, on July 1, 2004, Lisa petitioned the Virginia Circuit Court to establish Isabella's parentage.²⁵⁵ The Virginia court conferred via one telephone call with the Vermont Family Court regarding this case; however, a dispute over Lisa's and Janet's parental rights still developed.²⁵⁶ In August, the Virginia trial court found that it had jurisdiction under the state's Uniform Child Custody Jurisdiction and Enforcement Act.²⁵⁷ The Virginia trial court also found that Lisa was the biological and natural mother of Isabella; that the biological mother "solely has the legal rights, privileges, duties and obligations as parent hereby established for the

249. Goldhaber, *supra* note 248, at 288.

250. *Id.* (citing Brief of the Appellee, *supra* note 248, at 4).

251. *Miller-Jenkins*, 2006 VT 78, ¶ 3, 912 A.2d at 956.

252. *Id.* ¶ 4, 912 A.2d at 956.

253. *Id.* ("[The court] awarded Janet parent-child contact for two weekends in June, one weekend in July, and the third full week of each month, beginning in August 2004. The family court also ordered Lisa to permit Janet to have telephone contact with [Isabella] once daily.").

254. *Id.*

255. *Id.* ¶ 5, 912 A.2d at 956. Parentage is defined as "[t]he state or condition of being a parent." BLACK'S LAW DICTIONARY 1223 (9th ed. 2009). Thus, Lisa wanted the Virginia family court to decide who were Isabella's parents, under the laws of Virginia. This is important because parents, as opposed any other third party, are granted special rights and privileges under the law, such as custody rights. *See Troxel v. Granville*, 530 U.S. 57, 68-69 (2000) (holding that the mother had a fundamental right as a parent to restrict the paternal grandparents' ability to visit with the child); *see also Schmieder*, *supra* note 10, at 312.

256. *Miller-Jenkins*, 2006 VT 78, ¶ 7, 912 A.2d at 957.

257. *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 333 (Va. Ct. App. 2006), *aff'd*, 661 S.E.2d 822 (Va. 2008). The Uniform Child Custody Jurisdiction and Enforcement Act is Virginia's adaptation of the American Law Institute's Uniform Enforcement Act. VA. CODE ANN. §§ 20-146.1 to .38 (2008); *see also supra* note 229.

health, safety, and welfare of [Isabella]”); and that no third party, including Janet, had any parental claim to the child.²⁵⁸

3. Vermont Appellate History

When the Vermont Family Court initially learned of the subsequent custody order of the Virginia family court, it reaffirmed that only the Vermont court had jurisdiction over the *Miller-Jenkins* case under the PKPA.²⁵⁹ The court also refused to recognize the Virginia family court’s parentage determination and custody order, especially because it denied the parties a remedy.²⁶⁰ Accordingly, the Vermont court held Lisa in contempt for refusing to honor Janet’s visitation rights.²⁶¹ Furthermore, the court refused to give full faith and credit to the Virginia Circuit Court’s order because it reasoned that the PKPA prohibited the Virginia court from exercising jurisdiction over Isabella’s custody arrangement in this case.²⁶² Subsequently, the Vermont Supreme Court upheld its lower court’s decision.²⁶³

4. Virginia Appellate History and “Later-in-Time” Analysis

The Virginia Court of Appeals overturned the Virginia family court and held that Virginia did not have jurisdiction to modify the Vermont Family Court custody order.²⁶⁴ In making this determination, the appellate court examined whether DOMA repeals the PKPA.²⁶⁵ There are two ways in which a federal statute may repeal another statute: expressly or impliedly.²⁶⁶ First, to expressly repeal a statute, Congress must explicitly pronounce in a second statute that it is revoking the prior one.²⁶⁷ The Virginia appellate court in *Miller-Jenkins* found that there was no express repeal because the language of the statute and its legislative history did not indicate unequivocal congressional intent to repeal the PKPA.²⁶⁸ Thus, according to the court, Congress did not intend for DOMA to apply to

258. *Miller-Jenkins*, 637 S.E.2d at 332 (quoting trial court order).

259. *Miller-Jenkins*, 2006 VT 78, ¶ 6, 912 A.2d at 956–57.

260. *Id.*

261. *Id.* ¶ 6, 912 A.2d at 957.

262. *Id.* ¶ 8, 912 A.2d at 957.

263. *Id.* ¶ 72, 912 A.2d at 974.

264. Symeonides, *supra* note 244, at 302. See generally *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 332 (Va. Ct. App. 2006), *aff’d*, 661 S.E.2d 822 (Va. 2008). One commentator called this narrow jurisdictional decision so limited that it leaves “the conflicts between full faith and credit, DOMA, and the PKPA open to further—potentially backpedaling—interpretation.” Schmieder, *supra* note 10, at 295.

265. *Miller-Jenkins*, 637 S.E.2d at 336–37.

266. *Posadas v. Nat’l City Bank*, 296 U.S. 497, 503 (1936); *Miller-Jenkins*, 637 S.E.2d at 336; Genetin, *supra* note 240, at 681.

267. See Genetin, *supra* note 240, at 681.

268. *Miller-Jenkins*, 637 S.E.2d at 336–37.

ordinary judgments, such as custody orders.²⁶⁹ Therefore, there was no express repeal.²⁷⁰

Second, the Virginia appellate court explored DOMA's implicit repeal of the PKPA.²⁷¹ Implied repeals are not preferred by the Supreme Court.²⁷² Rather, the two statutes should be reconciled, if possible, such that both are given effect.²⁷³ However, if a conflict exists, a statute is implicitly repealed in one of two ways: (1) when the statutes are irreconcilable in part, then the later act repeals the earlier one to the extent of the overlap; or (2) when the two statutes completely overlap, then the later act is treated as a complete substitute.²⁷⁴ Accordingly, this is called the "later-in-time" analysis because if there is a conflict, then only the statute passed later in time is enforced.²⁷⁵

The Virginia appellate court held that DOMA did not implicitly repeal the PKPA.²⁷⁶ The court tried to reconcile DOMA and the PKPA, rather than find a conflict between them.²⁷⁷ It noted that the purpose of DOMA was only to allow nonrecognition of same-sex marriages, while the PKPA extended full faith and credit to custody judgments.²⁷⁸ It concluded that the *Miller-Jenkins* case was only about recognition of a custody judgment, and not about recognition of a Vermont civil union.²⁷⁹ Thus, according to the court, the PKPA required Virginia to grant full faith and credit to the Vermont order and nothing in DOMA changed that requirement.²⁸⁰

The Supreme Court of Virginia upheld the Virginia appellate court decision, albeit on different grounds.²⁸¹ Ultimately, the Virginia and

269. Rosen, *supra* note 125, at 981. Although Professor Mark Rosen does not discuss the PKPA, he argues that DOMA should only apply to nonadversarial declaratory judgments and not to "garden-variety judgments," such as a judgment for insurance proceeds. *Id.* at 979–81.

270. *Miller-Jenkins*, 637 S.E.2d at 337.

271. *Id.*

272. *See id.* at 336–37; *see also* Morton v. Mancari, 417 U.S. 535, 549 (1974).

273. *See* Posadas v. Nat'l City Bank, 296 U.S. 497, 503 (1936). When determining whether a conflict exists, the language of the statute is given its "plain, obvious and rational meaning." Commonwealth v. Zamani, 507 S.E.2d 608, 609 (Va. 1998); *see also* *Miller-Jenkins*, 637 S.E.2d at 337. Thus, a court may not strain the language or congressional intent in order to find a conflict. *See* Posadas, 296 U.S. at 503; *see also* *Miller-Jenkins*, 637 S.E.2d at 336–37.

274. *Posadas*, 296 U.S. at 503. Both of these categories require clear and manifest congressional intent to repeal and if such intent is lacking then the later statute is treated as a continuation, rather than a substitute, of the first. *Id.*

275. *See id.*

276. *Miller-Jenkins*, 637 S.E.2d at 336–37. The Virginia appellate court noted the strong tendency of other courts to favor "a construction as will give force and effect" to both of the statutes. *Id.* at 336 (quoting Scott v. Lichford, 180 S.E. 393, 394 (Va. 1935)).

277. *Id.* at 336–37.

278. *Id.* at 337.

279. *Id.*

280. *Id.* at 337–38.

281. *Miller-Jenkins v. Miller-Jenkins*, 661 S.E.2d 822, 827 (Va. 2008). The Virginia Supreme Court refused to overturn the appellate court but did not reach the merits of the case. *Id.* Rather, the supreme court found that Lisa did not have the right to challenge the

Vermont courts both found that only Vermont had jurisdiction to enter custody orders in this case.²⁸² Although the conflict was resolved, the fact that the Virginia and Vermont family courts reached different conclusions regarding the operation of DOMA and the PKPA illustrates the potential for more state conflict on this divisive issue of interstate recognition of child custody judgments in the context of same-sex marriage in the future, especially as more states extend the institution of marriage to include homosexual couples.²⁸³ The following sections discuss further the inherent conflict between the language of DOMA and the PKPA.

B. Arguments That DOMA's Passage Had No Impact on the PKPA

Some scholars posit that DOMA does not explicitly or implicitly repeal the PKPA because it was not Congress's intent.²⁸⁴ Rather, they claim that DOMA was only passed because Congress was afraid that declaratory judgments recognizing a same-sex marriage would be binding on sister states.²⁸⁵ According to this reasoning, DOMA does not affect custody judgments and, thus, has no impact on the PKPA.²⁸⁶

Under a "later-in-time" analysis, as discussed in the previous section, if two statutes irreconcilably conflict, the one passed later implicitly repeals the one passed earlier.²⁸⁷ Professor Mark Strasser presents arguments why DOMA does not and should not be held to implicitly repeal the PKPA. First, he argues that it was not Congress's intention for DOMA to impact the PKPA and that, further, the language of the two statutes does not conflict.²⁸⁸ He notes that parenthood and marriage, although related, are

appellate court's decision under the "law of the case" doctrine because she did not raise the PKPA issue at an earlier stage of the litigation. *Id.* at 825–27.

282. See *supra* notes 262–64 and accompanying text.

283. See Symeonides, *supra* note 244, at 303 ("Although [the Virginia appellate court's decision] was a graceful way to avoid a sharp conflict, the fact remains that the asserted basis for Janet's visitation rights was her parentage of the child, which depended on the validity of the Vermont civil union.").

284. Mark Strasser, *Interstate Recognition of Adoptions: On Jurisdiction, Full Faith and Credit, and the Kinds of Challenges the Future May Bring*, 2008 BYU L. REV. 1809, 1840.

285. See Rosen, *supra* note 125, at 981; Wardle, *Non-recognition of Same-Sex Marriage*, *supra* note 8, at 388; see also Woudenberg, *supra* note 138, at 1552 (noting that Congress only created an exception for marriages, not divorce judgments, by passing DOMA).

286. See *supra* notes 267–74 and accompanying text. For example, courts in mini-DOMA states have been forced to recognize same-sex adoptions of other states because of the PKPA. Kate Girard, Comment, *The Irrational Legacy of Romer v. Evans: A Decade of Judicial Review Reveals the Need for Heightened Scrutiny of Legislation That Denies Equal Protection to Members of the Gay Community*, 36 N.M. L. REV. 565, 586–87 (2006); cf. Lynn D. Wardle, *A Critical Analysis of Interstate Recognition of Lesbian Adoptions*, 3 AVE MARIA L. REV. 561, 570–71 (2005) (arguing that the PKPA could be read to allow for nonrecognition of same-sex adoptions in states where adoption is only allowed by married couples).

287. See *supra* notes 267–74 and accompanying text.

288. Strasser, *supra* note 284, at 1839–40; see also Schmieder, *supra* note 10, at 302 ("With . . . a child-focused objective, nothing indicates that the PKPA was meant, or should be construed, to leave out the children of same-sex couples."); Posting of Eugene Volokh to The Volokh Conspiracy, <http://volokh.com/posts/1154716552.shtml> (Aug. 4, 2006, 14:35

not so intertwined that DOMA would create an exception to the PKPA.²⁸⁹ Other commentators agree that “the *right or claim* [in a custody dispute] doesn’t arise from a relationship, just like, say, two married people’s purchase of a house as tenants in common wouldn’t be ‘a right or claim arising’ from the marriage, and would remain legally valid even if the marriage were found to be invalid.”²⁹⁰ Thus, the two statutes can and should be reconciled, such that DOMA does not affect the PKPA.²⁹¹

Second, Professor Strasser suggests that the PKPA is actually the statute passed later in time and, therefore, the PKPA’s language should still prevail over DOMA.²⁹² Congress modified the PKPA in 1998 in order to make its language clearer.²⁹³ At that time, Congress could have made an exception for custody judgments related to same-sex marriages, but it did not.²⁹⁴ Rather, the amended version of the PKPA applies to all custody judgments, without limitation.²⁹⁵ Pursuant to this reasoning, the PKPA is the more recently enacted law. Thus, according to Professor Strasser, even if the PKPA was implicitly repealed by DOMA, that consequence was corrected in 1998.²⁹⁶

Finally, Professor Strasser posits that if DOMA partially repealed the PKPA, it would encourage parental kidnapping and undermine the entire purpose of the PKPA.²⁹⁷ This, he argues, “is exactly what the PKPA was designed to avoid, namely, to prevent parents who disagreed with a visitation or custody decision of one court to take the child to another state to re-litigate the case in hopes that the new forum’s public policy would yield a more desirable result.”²⁹⁸ Thus, if parental kidnapping is available to same-sex divorcés, it would put an incentive on same-sex parents to rush into a divorce, rather than stay together, in order to protect their relationships with their children.²⁹⁹ Professor Strasser implores the legislatures and courts not to put such a burden on “same-sex parents and their children” by finding that DOMA repeals the PKPA.³⁰⁰

PDT); Posting of PatHMV to The Volokh Conspiracy, <http://volokh.com/posts/1154716552.shtml#130150> (Aug. 4, 2006 17:06 PDT).

289. See, e.g., Strasser, *supra* note 284, at 1839–40, 1844; cf. Walker, *supra* note 7, at 373.

290. Posting of Eugene Volokh to The Volokh Conspiracy, <http://volokh.com/posts/1154716552.shtml> (Aug. 4, 2006, 14:35 PDT).

291. See *supra* notes 267–80 and accompanying text.

292. Strasser, *supra* note 284, at 1841–42.

293. *Id.* at 1841.

294. See *id.* at 1841–42.

295. *Id.* at 1842.

296. *Id.*

297. See *id.* at 1844.

298. *Id.*; see also *supra* notes 211–19 and accompanying text.

299. Strasser, *supra* note 284, at 1853.

300. *Id.* at 1854.

C. *Arguments That There Is No Full Faith and Credit for Child Support Orders That Arise out of Same-Sex Divorce*

DOMA allows for nonrecognition of a sister state's judgments if they arise out of a same-sex marriage.³⁰¹ This statute, as discussed above, declares that states are not required to grant full faith and credit to judgments of a sister state that acknowledge a same-sex marriage or "a right or claim arising from such relationship."³⁰² Using the *Miller-Jenkins* hypothetical from the Introduction, the plain language of DOMA raises two questions regarding its conflict with the PKPA:³⁰³ (1) How are the divorce and custody orders between Lisa and Janet not "judgments" that respect a same-sex marriage?³⁰⁴ (2) How do Janet's parental rights and obligations, which are memorialized in Vermont's custody judgment, not arise out of the same-sex union?³⁰⁵

Some scholars suggest that the PKPA is repealed by DOMA because this is the only way that DOMA can substantively change preexisting law.³⁰⁶ One rule of statutory construction declares, "Laws should not be construed in such a way that they have no effect whatsoever on preexisting law. On the contrary every word of a statute is to be construed so that it has some effect."³⁰⁷ Prior to DOMA's passage, states were not required to recognize all marriages performed in a sister state as a result of the public policy exception to the "place of celebration" rule.³⁰⁸ If the federally enacted DOMA only granted mini-DOMA states the ability to deny full faith and

301. See Symeonides, *supra* note 244, at 303.

302. Defense of Marriage Act, 28 U.S.C. § 1738C (2006); see also *supra* notes 157–58 and accompanying text.

303. See *supra* Introduction.

304. See Schmieder, *supra* note 10, at 307 (noting that custody and visitation "fall[] within the common understanding of 'parental rights'" (citing *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 336 (Va. Ct. App. 2006), *aff'd*, 661 S.E.2d 822 (Va. 2008))); see also Anderson, *supra* note 10, at 5 ("Once created, a civil union, domestic partnership, or same-sex marriage cannot be dissolved without the oversight of a court.").

305. See Anderson, *supra* note 10, at 11 ("[P]arentage determinations for same-sex parents usually arise in the course of dissolution of the relationship."); Woudenberg, *supra* note 138, at 1524 ("Marriage impacts a variety of other legal issues, such as divorce, custody, inheritance, and tort claims." (footnotes omitted)).

306. See KOPPELMAN, *supra* note 212, at 128; see also Walker, *supra* note 7, at 380 (arguing that it was Congress's intent that DOMA have an impact on "literally hundreds" of federal laws (quoting H.R. REP. NO. 104-664, at 10–11 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2914–15)). In support of this argument that DOMA affects the PKPA, one commentator points out the position of these statutes within the code, such that DOMA is immediately after the PKPA. Walker, *supra* note 7, at 380.

307. See KOPPELMAN, *supra* note 212, at 128.

308. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971); Jennifer Gerarda Brown, *Extraterritorial Recognition of Same-Sex Marriage: When Theory Confronts Praxis*, 16 QUINNIAC L. REV. 1, 6 (1996); Wardle, *Non-recognition of Same-Sex Marriage*, *supra* note 8, at 385–88 ("When the full faith and credit obligation does not apply, . . . [a]s a general rule, nonrecognition of judgments from other jurisdictions is allowed if it serves the administration of justice and 'is compatible with the maintenance of comity among courts.'" (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 82 (1982))); see also, e.g., *supra* notes 139–41 and accompanying text.

credit to declaratory judgments, then the federal statute does nothing more than codify the “place of celebration” rule in the context of same-sex marriage.³⁰⁹ In other words, states already had the right to not recognize same-sex marriages performed in sister states under the “place of celebration” rule.³¹⁰ According to the rule of statutory construction mentioned above, DOMA must do something more than limit recognition of declaratory judgments because that is a power states already had.³¹¹ So, then the question is as follows: what effects does DOMA have on preexisting law? The answer to what DOMA’s effect is, besides codification of the “place of celebration” rule, must be found in the words of the statute itself and not based solely on Congress’s intent.³¹²

In order to answer this question, Professor Andrew Koppelman suggests DOMA removes full faith and credit from divorce judgments arising out of a same-sex union.³¹³ He argues that divorce judgments fall within the scope of the plain language of DOMA.³¹⁴ There are two separate analyses that show DOMA applies to dissolution and custody orders, since they arise out of marriage. First, in order to dissolve any marriage, the union must be valid, or at least not void.³¹⁵ By entering a divorce judgment and dissolving a marriage, the court is recognizing the marital rights of persons within that relationship, which are the result of a legally valid and judicially recognized union.³¹⁶ According to this reasoning, if a divorce judgment dissolves a union between two males or two females, then it falls within the scope of DOMA because it respects and acknowledges a same-sex marriage. Thus, although it may not have been Congress’s primary intent, divorce and

309. KOPPELMAN, *supra* note 212, at 127 (“Some scholars have suggested one way to rehabilitate DOMA: simply hold it to be declaratory of existing law.”); Keefer, *supra* note 114, at 1638 (“According to DOMA’s legislative history, . . . Congress believed that states rightfully could raise a public-policy exception to avoid recognizing such marriages. Nonetheless, Congress and the states were unwilling to rely on this Court-created protection.” (citing H.R. REP. NO. 104-664, at 8–10, 25–27, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2912–14, 2929–31)).

310. *See supra* Part I.B.2. The “place of celebration” rule is a state judicial practice and not a mandatory rule, statute, or regulation. *See supra* Part I.B.2.

311. *See* KOPPELMAN, *supra* note 212, at 125–28.

312. *See id.*

313. *See id.* at 125 (“Since a claim like Janet’s [in *Miller-Jenkins*] is a claim arising from such a [same-sex] relationship, so the argument would go, it is covered by DOMA, and the PKPA’s requirement to the contrary is to that extent repealed.”); Posting of A. S. to The Volokh Conspiracy, <http://volokh.com/posts/1154716552.shtml#130141> (Aug. 4, 2006, 16:26 PDT) (arguing that a custody decision that is rendered for a same-sex couple dissolving their civil union, arises from the civil union).

314. *See* KOPPELMAN, *supra* note 212, at 125; *see also* Chabora, *supra* note 167, at 633 n.136 (“One DOMA cosponsor, Senator Nickles, argued DOMA was similar to PKPA.” (citing 142 CONG. REC. S4869–70 (daily ed. May 8, 1996))).

315. *See* *Everetts v. Apfel*, 214 F.3d 990, 992 (8th Cir. 2000) (“A voidable marriage is valid until set aside by a decree of annulment; in contrast, a void marriage is null from inception.”); *see also supra* notes 163–64 and accompanying text. Accordingly, a marriage must be valid or voidable in order to be eligible for a divorce decree.

316. *See supra* notes 163–65 and accompanying text.

custody orders are within the scope of DOMA if they arise from the rights of a same-sex couple that is legally married and divorced.³¹⁷

Second, some commentators maintain that DOMA applies to child custody and support orders, in particular, because these judgments respect the custody rights of parents, which are inherently derived from the marriage.³¹⁸ In the context of marriage, a court may presume that a child born into a marriage is the natural child of both partners, even if there is evidence to the contrary.³¹⁹ Significantly, the parental protection afforded by this presumption may only be extended to same-sex marriages in non-mini-DOMA states.³²⁰ This is because if the same-sex marriage is not recognized, then there would be no recognition of the marriage to which the presumption could apply.³²¹ Furthermore, natural parents are often given great deference by courts in the best interest of the child analysis, which is used to determine custody and visitation.³²² In contrast, if a court does not recognize a union, then the nonbiological parent is not granted any special rights of parenthood and may be denied visitation or custody.³²³ Accordingly, if a court applies the parental presumption at the dissolution of a same-sex marriage, then both partners are given deference in the determination of child custody, regardless of the impossibility that both

317. See KOPPELMAN, *supra* note 212, at 125–26 (noting that this “bizarre result[]” was not the intent of Congress, which only wanted to limit the effect of declaratory judgments, despite the contradictory language that covers all types of judgments). During the debate over DOMA, members of Congress speaking against the passage of DOMA drew attention to the breadth of the statute’s language, such that it would encompass “any claim derived from a same-sex marriage.” 142 CONG. REC. 17,080 (1996) (statement of Rep. Skaggs); see also 142 CONG. REC. 22,439 (1996) (statement of Sen. Kennedy) (arguing that if DOMA was enacted, “Congress could decree that any state was free to disregard any Hawaii marriage, any California divorce, any Kansas default judgment—or any of a potentially endless list of official acts that a Congressional majority might wish to denigrate”).

318. See Walker, *supra* note 7, at 369, 372–73; see also Cox, *supra* note 8, at 1073 (“[A] valid marriage . . . produces enforceable obligations between the parties . . . to care for children of the marriage.”); Posting of A. S. to The Volokh Conspiracy, <http://volokh.com/posts/1154716552.shtml#130233> (Aug. 4, 2006, 19:36 PDT). Additionally, “[t]he ALI’s *Principles of the Law of Family Dissolution, Chapter Two*, would extend standing and parental rights not only to legal and biological parents but also to persons it calls *de facto parents* and *parents by estoppel*, which would include same-sex domestic partners” Wardle, *Counting the Costs*, *supra* note 8, at 418.

319. See Michael H. v. Gerald D., 491 U.S. 110, 117–18, 129–30 (1989); see also Schmieder, *supra* note 10, at 311 (“Today, biology matters less, and courts have gone so far as to ignore positive DNA tests in favor of protecting an existing family unit” (citing Jennifer L. Rosato, *Children of Same-Sex Parents Deserve the Security Blanket of Parentage Presumption*, 44 FAM. CT. REV. 74, 75, 83 n.16 (2006))).

320. Schmieder, *supra* note 10, at 312.

321. See *id.* (noting that, to avoid DOMA’s influence, the custody determination must be the result of the nonbiological parent’s relationship with the child, rather than the same-sex marriage); cf. Anderson, *supra* note 10, at 4 (noting that the Uniform Parentage Acts should provide a presumption of parenthood for all children born into a same-sex union in Vermont, but that courts have not applied the Act in conjunction with custody determinations).

322. See Kelson, *supra* note 203, at 372–73.

323. See, e.g., White v. Thompson (*In re Thompson*), 11 S.W.3d 913, 923 (Tenn. Ct. App. 1999) (finding that only parents, not the same-sex partner, had a right to custody and control of children born into their relationship).

could be biological parents.³²⁴ For example, the Vermont court in *Miller-Jenkins* granted Janet, as a mother of Isabella, visitation rights because of her parental role in Isabella's life, even though she was not her biological mother.³²⁵ Thus, these parental rights to custody or visitation are solely derived by virtue of the dissolution of the same-sex relationship.³²⁶

Just as with divorce decrees, custody orders are subject to the plain language of DOMA when they acknowledge the nonbiological parent's rights to the child by virtue of the child being born into the married family unit.³²⁷ In other words, as a result of DOMA, states need not grant full faith and credit to child custody orders, which recognize parents' rights to the child, if his or her custody rights are derived directly from the same-sex marriage. According to this reasoning, DOMA applies to child custody orders, as well as to marriage and divorce decrees.

As Professor Koppelman points out, if DOMA only limited the full faith and credit given to declaratory judgments, then the statute was written incorrectly.³²⁸ He argues that DOMA's "language is too plain . . . to be construed away."³²⁹ As shown above, DOMA allows states to not recognize judgments incident to divorce and parental rights arising out of a same-sex marriage. Since DOMA permits states to give no effect to these determinations of sister states, while the PKPA requires full faith and credit, the two federal statutes are in direct conflict. Under the "later-in-time" analysis, DOMA implicitly repeals the PKPA because it was passed later in time.³³⁰ Accordingly, under this theory, DOMA only partially repeals the PKPA, because their subject matter only overlaps in the context of same-sex marriage, not heterosexual unions.³³¹

324. See Paula L. Ettelbrick, *Domestic Partnership, Civil Unions, or Marriage: One Size Does Not Fit All*, 64 ALB. L. REV. 905, 913 (2001).

325. See *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, ¶¶ 45–48, 912 A.2d 951, 967.

326. See *supra* notes 317–18 and accompanying text.

327. See sources cited *supra* notes 317–18 and accompanying text.

328. See KOPPELMAN, *supra* note 212, at 128; see also *supra* notes 317–18 and accompanying text.

329. KOPPELMAN, *supra* note 212, at 128; see also *supra* notes 317–18 and accompanying text.

330. Scholars who suggest that DOMA partially repeals the PKPA have not addressed the fact that the PKPA was subsequently modified after DOMA's passage. See *supra* notes 292–96 and accompanying text. This Note suggests that this is because the amendments were relatively minor and superficial, such that they do not in themselves repeal the broad language of DOMA. See Full Faith and Credit for Child Support Orders, Pub. L. No. 105-33, § 5554, 111 Stat. 636, 636 (1997) (changing the PKPA "by striking 'a court may' and all that follows and inserting 'a court having jurisdiction over the parties shall issue a child support order, which must be recognized' . . . [and] inserting 'under subsection (d)' after 'jurisdiction'"); see also *infra* notes 351–52 and accompanying text (arguing that as a result of DOMA's broad language, states are not required to grant full faith and credit to child custody orders arising out of same-sex marriage).

331. Compare *supra* note 157 (quoting the language of DOMA, which revokes full faith and credit from any right or claim derived from a same-sex union), with *supra* notes 225, 230 (discussing the language of the PKPA, which grants full faith and credit to child support orders).

Part I explained the same-sex marriage movement and its many successes in the past decade, despite the resistance of the “marriage movement.” As long as some states continue to authorize same-sex marriage and divorce, interstate recognition of same-sex marriage, divorce, and child custody judgments is likely to cause more tension between sister states because of their conflicting public policies with respect to these unions. As a result of DOMA’s passage, many states passed their own mini-DOMAs. These statutes remove full faith and credit from any judgments arising out of same-sex marriage. But does DOMA also remove full faith and credit from same-sex divorce and child custody orders by partially repealing the PKPA? This conflict is exemplified by the discussion in Part II of the *Miller-Jenkins* case, where the Virginia and Vermont courts both struggled with this issue. Even though *Miller-Jenkins* is the first case to address this issue, it is likely to become more prominent as more same-sex couples marry, have children, and subsequently divorce. Part III argues that DOMA partially repeals the PKPA.

III. UNIFORM RECOGNITION OF MARRIAGE AND DIVORCE JUDGMENTS IS NOT REQUIRED, BUT IT SHOULD BE ENCOURAGED

First, DOMA is constitutional because the courts should defer to Congress’s interpretation of the Effects Clause. Further, DOMA partially repeals the PKPA, which gives states the power to not recognize same-sex divorce and custody orders. In *Miller v. Jenkins*,³³² unspoken policy reasons likely drove the Virginia appellate and supreme courts. However, interstate recognition of same-sex divorce does not raise the same policy concerns as recognition of same-sex marriage. Consequently, the Virginia courts came to the legally correct conclusion using the wrong statutory analysis. In other words, the court upheld the Vermont judgments, even though it should have found that DOMA repealed the PKPA. The Virginia courts likely did this because they were not concerned with the consequences of same-sex divorce. Regardless of its incorrect statutory analysis, the Virginia courts came to the best conclusion because uniform interstate recognition of divorce and child custody judgments arising out of same-sex divorce is in the best interest of the child and promotes interstate comity.

A. *DOMA’s Constitutionality*

DOMA is constitutional under Section 1 of Article IV of the U.S. Constitution. Congressional power under this section remains largely untested in the courts.³³³ Therefore, analysis must refer to the language of the Constitution and the original debates over the clauses.³³⁴ The language

332. *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, 912 A.2d 951; *Miller-Jenkins v. Miller-Jenkins*, 661 S.E.2d 822 (Va. 2008).

333. *See supra* note 122 and accompanying text.

334. *See supra* notes 88, 181–82.

of the Full Faith and Credit Clause is mandatory and gives states no leeway in deciding whether to recognize the judgments of sister states.³³⁵ In contrast, the Effects Clause gives Congress discretionary power to change the scope of full faith and credit.³³⁶ There are no limits to congressional power specifically detailed in the Effects Clause, which would lend itself to interpretation of this federal power.³³⁷ In fact, the Framers of the Constitution did not fully know the extent of the power given to Congress by the Effects Clause.³³⁸ One Framers, James Madison, believed that such an understanding would be found in time.³³⁹ Unfortunately, this was not the case.³⁴⁰

In the absence of a clear definition of Section 1 of Article IV, courts should defer to Congress's interpretation because of its unique constitutional authority to police horizontal federalism.³⁴¹ The Commerce Clause³⁴² is another congressional power under Article IV that allows Congress to legislate the relationship among the states.³⁴³ Under the Commerce Clause, Congress is free to create legislation that permits interstate discrimination, even though states are forbidden from passing similar legislation.³⁴⁴ In applying this same analysis to the Full Faith and Credit and the Effects Clauses, Congress has the power to allow for nonrecognition of interstate judgments, while states may not unilaterally deny such recognition.³⁴⁵ Accordingly, on the issue of DOMA's constitutionality, the courts should defer to this congressional action because Congress is in the best position—pursuant to its powers under Article IV—to regulate the relationship among sister states.

B. *DOMA Repeals the PKPA*

Assuming DOMA is a constitutional exercise of congressional power, Congress partially repealed the PKPA by passing DOMA and, thus, sister

335. See *supra* notes 114–16, 175–76 and accompanying text.

336. See *supra* notes 114–16, 175–76 and accompanying text.

337. See *supra* notes 182–86; cf. *supra* notes 175–78 and accompanying text (presenting arguments of scholars that the Full Faith and Credit Clause is a general constitutional mandate limiting Congress's power under the Effects Clause).

338. See *supra* notes 120–21 and accompanying text.

339. See *supra* notes 120–21 and accompanying text.

340. See *supra* note 122 and accompanying text.

341. See *supra* notes 85–88 and accompanying text; see also Metzger, *supra* note 88, at 1475, 1478 (“[T]he Constitution grants Congress expansive authority to structure interstate relationships.”).

342. U.S. CONST. art. 1, § 8, cl. 3.

343. See *supra* note 88 and accompanying text.

344. See sources cited *supra* note 88; see also Metzger, *supra* note 88, at 1533 (applying Commerce Clause-type analysis to DOMA). In fact, Professor Gillian Metzger argues, “Although DOMA has a discriminatory aspect for [states that allow same-sex marriage], Section 2[s] . . . target is instead same-sex marriage [itself]. And absent the unjustified assumption that the category of all marriages represents a constitutionally mandated baseline, targeting all same-sex marriages appears sufficiently general for Effects Clause purposes.” Metzger, *supra* note 88, at 1533.

345. See *supra* notes 88, 181 and accompanying text.

states have the ability to decide to not recognize divorce and child custody orders derived from same-sex unions. The Virginia appellate and supreme courts in *Miller-Jenkins* did not agree with this conclusion. Rather, the appellate court found that DOMA did not repeal the PKPA due to public policy concerns, such as comity and the best interest of the child. The opinions of the Virginia courts were ends, rather than means, oriented. In other words, in order to avoid parental kidnapping and to promote interstate comity, the Virginia court upheld the Vermont Family Court's order. Interestingly, the Virginia courts' holdings do not raise any policy concerns regarding recognition of same-sex divorces. This is because same-sex divorce does not produce the same issues—structural, doctrinal, social, and familial—as same-sex marriage. In fact, interstate recognition of same-sex divorce and child custody orders relieve some of the concerns propounded by Professor Wardle and the “marriage movement.”

1. DOMA Allows for Nonrecognition of Custody Judgments by Repealing the PKPA

DOMA's broad language implicitly repeals the PKPA because same-sex divorce and child custody judgments arise out of same-sex marriage. “Canons of statutory construction—such as the presumption against implied repeals or the presumption against pre-emption—are often less reliable guides in the search for congressional intent than a page or two of history.”³⁴⁶ Statutory construction suggests that implicit repeals only happen in the narrowest of circumstances.³⁴⁷ But it is not impossible. The legislative debate over a bill can be used to rebut the presumption against DOMA's implicit repeal of the PKPA.³⁴⁸ By passing DOMA, it was Congress's clear intent to ensure that Hawai'i did not force the entire nation to adopt same-sex marriage.³⁴⁹ The federal legislature provided states with an option of accepting or rejecting a sister state's same-sex marriage policy, including judgments related thereto.³⁵⁰

However, Congress passed a very broad statute that encompasses more than just marriage acts with its plain language.³⁵¹ Congress gave states the freedom to deny recognition to all judgments arising out of a same-sex marriage.³⁵² As a general rule, custody decrees are intertwined with divorce actions and divorce actions are intertwined with marriage.³⁵³ Custody, divorce, and marriage are so interrelated that you cannot recognize

346. *Branch v. Smith*, 538 U.S. 254, 292 (2003).

347. See *supra* notes 272–73 and accompanying text.

348. See *supra* note 346 and accompanying text.

349. See *supra* notes 154–58 and accompanying text; see also 142 CONG. REC. 16,796 (1996).

350. See *supra* notes 155–57 and accompanying text; see also Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006)); 142 CONG. REC. 16,796.

351. See *supra* notes 313–17 and accompanying text.

352. See *supra* notes 157–58 and accompanying text.

353. See *supra* notes 313–26 and accompanying text.

one without recognizing the other.³⁵⁴ In this way, custody and divorce orders arise out of marital rights. In the context of same-sex marriage, parental rights often arise out of the marriage and are recognized when the court enters custody and divorce decrees.³⁵⁵ Thus, a clear and unstrained interpretation of DOMA's language allows for nonrecognition of a sister state's divorce and custody orders derived from a same-sex marriage.³⁵⁶

In only this way, DOMA would have an effect on existing law and "defend" heterosexual marriage. The public policy exception to the "place of celebration" rule already guaranteed states the power to refuse recognition of marriages performed in sister states.³⁵⁷ This raises the question, if states already had the power to deny recognition to same-sex marriages, what does DOMA do?³⁵⁸ The answer is in the broad language in DOMA, discussed above.³⁵⁹ The statute applies not only to same-sex marriage declaratory judgments, but also to custody orders and divorce decrees. So if DOMA granted the Virginia court in *Miller-Jenkins* the power to not recognize the Vermont court's custody decree, why did the court come to the opposite conclusion? Public policy considerations motivated the courts in *Miller-Jenkins* to recognize a judgment arising out of a same-sex marriage, despite being a mini-DOMA state. As the following section demonstrates, the structural, doctrinal, social, and familial consequences of same-sex marriage propounded by Professor Wardle and the "marriage movement" do not exist or are, at least, alleviated in the context of same-sex divorce.

2. Effect of Same-Sex Marriage Policies

a. *Interstate Recognition of Same-Sex Divorce Does Not Raise the Same Policy Concerns as Recognition of Same-Sex Marriage*

States have diametrically opposed public policies concerning same-sex unions.³⁶⁰ This can lead to conflicting legislation and court decisions among the fifty states.³⁶¹ Mini-DOMA states are more focused on prohibiting same-sex marriage, rather than same-sex divorce.³⁶² This unilateral focus is most likely the underlying motive for the Virginia

354. See *supra* notes 304, 313–16 and accompanying text.

355. See *supra* notes 313–26 and accompanying text.

356. See *supra* notes 313–26 and accompanying text.

357. See *supra* notes 137, 308–09 and accompanying text.

358. See *supra* notes 139, 310–11 and accompanying text.

359. See *supra* notes 351–56 and accompanying text.

360. See *supra* note 10 and accompanying text.

361. See *supra* notes 8–10 and accompanying text.

362. See, e.g., *supra* notes 158–60 and accompanying text (detailing Congress's focus on marriage when enacting DOMA); see also *A. K. v. N. B.*, No. JU-06-455, 2008 WL 2154098 (Ala. Civ. App. May 23, 2008) (upholding a California judgment, pursuant to the PKPA, that determined that both the biological mother and her former same-sex partner were parents of the child).

appellate court's determination in *Miller-Jenkins*, where it found DOMA does not repeal the PKPA. Professor Wardle described four categories of harm caused by same-sex unions—structural, doctrinal, social, and familial. These concerns are moot with respect to same-sex divorce. Marriage dissolution does not lead to the same harms purportedly caused by same-sex marriage. In fact, it alleviates some of them. Accordingly, when the Virginia appellate court in *Miller-Jenkins* found that DOMA did not repeal the PKPA, it was not concerned about the consequences of recognizing Vermont's dissolution of a same-sex union. As a result, the Virginia court recognized Janet's visitation rights arising from her same-sex union with Lisa, even though Janet would not have the same rights in Virginia. This decision was in the best interest of Isabella—Janet and Lisa's child—and promoted comity between Virginia and Vermont.

i. Structural Concerns: Possible Deterioration
of Americans' Opinion of the Courts

One public policy concern advocated by Professor Wardle is the effect of same-sex marriage on the structure of the courts. First, structural consequences encompass the deterioration of Americans' opinion of courts' honor and reliability, when they stretch the language of any constitution—state or federal—to extend marriage to same-sex couples.³⁶³ A judicially recognized constitutional right to same-sex marriage is a recent phenomenon, which stems, in part, from the due process analysis developed in *Romer*.³⁶⁴ The Supreme Court's protection of homosexual rights in *Romer* was groundbreaking because it rejected the state's rational basis justifications for Amendment 2.³⁶⁵ Beginning in 1993, state courts and legislatures advanced this reasoning by protecting homosexuals' right to

363. See *supra* notes 89–90 and accompanying text. Notably, all courts that have judicially recognized a right to same-sex marriage based their decisions on state constitutions. See *supra* Part I.A.1.c. In fact, the Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003), refused to recognize such a right. See *supra* note 47 and accompanying text. However, Professor Wardle is concerned about the possibility of a judicially recognized right to same-sex marriage, particularly at the federal level. See *supra* notes 89–90 and accompanying text.

364. See *supra* notes 35–41, 53 and accompanying text; see also Wardle, *Attack on Marriage*, *supra* note 5, at 1367 (“When the new millennium dawned in 2000, same-sex marriage was not legal in any nation on earth, and domestic partnerships were recognized in only one nation. . . . Today, however, the movement to legalize same-sex marriage has made great progress.”).

365. See *supra* notes 35–41 and accompanying text; see also *Romer v. Evans*, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting) (“No principle set forth in the Constitution, nor even any imagined by this Court in the past 200 years, prohibits [Colorado’s passage of Amendment 2].”). In *Romer*, 517 U.S. at 620, the Supreme Court found Colorado’s Amendment 2 unconstitutional under its rational basis analysis, because there was no rational reason to create a separate political process for homosexuals, who wanted greater protection under the law. See *supra* notes 34–41 and accompanying text.

marry.³⁶⁶ Professor Wardle correctly concluded that protection of same-sex marriage is a new development in constitutional analysis.³⁶⁷

According to Professor Wardle's reasoning, increased recognition of same-sex marriage undermines the authority of the court because such decisions require flawed constitutional analysis by taking away states' authority to control marriage policy.³⁶⁸ This potential problem is less likely to occur in the context of same-sex custody and divorce recognition. The Full Faith and Credit Clause already requires courts to recognize divorce judgments issued by sister states.³⁶⁹ The PKPA already mandates full faith and credit for child custody orders.³⁷⁰ Although the status of same-sex marriage divorce and custody decrees is unsettled or untested in most states, the principles of full faith and credit are very clear. A divorce, unlike a marriage, must be given effect in sister states.³⁷¹

Accordingly, application of full faith and credit to same-sex union dissolutions and corresponding custody orders will not disturb the current doctrine and practice. Also, such recognition would not guarantee same-sex couples any more rights.³⁷² Rather, interstate recognition would highlight full faith and credit's emphasis on comity.³⁷³ Thus, interstate recognition of same-sex divorce is unlikely to cause any damage to courts' integrity. Structural concerns regarding expansion of marital rights to same-sex couples are moot in the context of same-sex marriage dissolution.

ii. Doctrinal Concerns: Are Courts Equipped To Manage the Collateral Issues Raised by Same-Sex Marriage?

Next, Professor Wardle suggests that the expansion of marriage to same-sex couples will generate many doctrinal questions.³⁷⁴ The cause for concern is that courts are ill-equipped to manage these issues, which may arise as a result of same-sex marriage.³⁷⁵ One of the specific doctrinal concerns caused by same-sex marriage is the issue presented in this Note: how should courts handle same-sex divorce decrees issued by sister states?³⁷⁶ Even though Professor Wardle raises this question, it is not same-sex divorce that is the source of his fear, but, rather, he worries about

366. See *supra* notes 49–71 and accompanying text.

367. See source cited *supra* note 5.

368. See *supra* notes 89–91 and accompanying text.

369. See *supra* notes 144–46 and accompanying text.

370. See *supra* note 235 and accompanying text.

371. See *supra* notes 144–46, 235 and accompanying text.

372. Note, however, this Part addresses interstate recognition of same-sex divorce decrees and not the right to receive a same-sex divorce in a sister state.

373. See *supra* notes 114, 133 and accompanying text.

374. See *supra* notes 92–95 and accompanying text.

375. See *supra* note 96 and accompanying text (discussing Professor Wardle's concern that there are no remedies for states to adopt that would adequately address the doctrinal consequences of same-sex unions).

376. See *supra* notes 94–95 and accompanying text.

the effects of same-sex unions.³⁷⁷ Once courts establish an answer to this debate over interstate recognition of same-sex divorce and custody decrees, then all doctrinal concerns will be allayed regarding this discrete issue. The result would be to continue the traditional state practice to grant full faith and credit to divorce judgments and child custody orders.³⁷⁸ These practices are already well-settled in American family courts.³⁷⁹ Thus, the potential doctrinal problems raised by Professor Wardle are only applicable to same-sex marriage.

iii. Social Concerns: The “Free-Riding” Problem

As discussed above, social concerns involve the public endorsement of “free-riding” same-sex couples, who get benefits, while not contributing equally to society.³⁸⁰ Professor Wardle points out that homosexual couples will get greater legal rights in areas such as “custody, visitation, guardianship and adoption.”³⁸¹ For example, a nonbiological parent has limited rights under the law, unless that parent is married to a biological parent of the child.³⁸² In this way, same-sex marriage protects the parental rights of homosexuals.³⁸³

However, Professor Wardle suggests that rights stemming from same-sex relationships need not and should not be so protected.³⁸⁴ He reasons that same-sex unions are “less demanding forms of interpersonal relationships . . . [with] less value to the common weal than marriage.”³⁸⁵ Even taking these arguments as true, if people are no longer married, then they are no longer able to free-ride on society because the same-sex relationship no longer exists.³⁸⁶ Interstate recognition of divorce decrees only effectuates the breakup of same-sex unions and confers no other rights for homosexuals. This is because after dissolution of a marriage, the former spouses do not receive any additional benefits.³⁸⁷ Furthermore, uniform recognition of sister states’ same-sex divorce and custody judgments

377. See *supra* notes 92–96 and accompanying text.

378. See *supra* notes 144–46, 235 and accompanying text.

379. See *supra* notes 144–46, 235 and accompanying text.

380. See *supra* note 103 and accompanying text.

381. Wardle, *Counting the Costs*, *supra* note 8, at 439.

382. See *supra* notes 318–19 and accompanying text.

383. See *supra* notes 318–19 and accompanying text.

384. See *supra* notes 97–103 and accompanying text.

385. See Wardle, *Counting the Costs*, *supra* note 8, at 441; see also *supra* note 98 and accompanying text.

386. It may be argued that increased interstate recognition of these divorces is increasing public endorsement of same-sex marriage. Thus, this would still be a social harm caused by same-sex unions. However, this Note opines that if there is a valid divorce decree entered in a different state, then the marital rights have already been conferred and are not being increased via mere recognition.

387. This is not to say that spouses have no rights at the time of the dissolution. See, e.g., *supra* notes 97, 318–19 and accompanying text. In light of DOMA, this Note does not suggest that states are required to dissolve same-sex marriages and, thus, confer the respective rights to same-sex couples.

benefits society by respecting comity and supports consistency and stability by promoting the best interest of the child.³⁸⁸

iv. Familial Concerns: Traditionally Family Is the Best Environment for Child-Rearing

Finally, scholars argue that the optimal environment for child-rearing consists of a household with a mother and a father, not two mothers or two fathers.³⁸⁹ By acknowledging sister states' divorce judgments while not recognizing same-sex marriage, mini-DOMA states are only advancing their public policy against these relationships. Although a child will not be in the optimal child-rearing environment, for "marriage movement" advocates a single-family household is preferable.³⁹⁰ Accordingly, recognition of same-sex divorce decrees will cause no greater harm to families under this "marriage movement" concern. Thus, the familial harm with which the "marriage movement" is concerned will not be caused by same-sex divorce and child custody recognition.

Furthermore, interstate recognition of child custody orders arising out of same-sex divorce is in the best interest of the child. It avoids the risk and dangers caused by parental kidnapping.³⁹¹ Often in parental kidnapping situations, it is the child and not the parent who suffers the negative consequences when child custody judgments are not accorded full faith and credit. Regardless of DOMA's preemption of the PKPA, full faith and credit should be given to all custody orders because of those negative consequences, especially because same-sex divorce does not pose the same familial issues as same-sex marriage.

b. *The Virginia Court in Miller-Jenkins Reached the Correct Result*

Given that same-sex divorce does not raise the same concerns as same-sex marriage, the public policy of mini-DOMA states, even if not advanced by same-sex divorce, is not significantly harmed by it.³⁹² For these reasons, the Virginia appellate and supreme courts in *Miller-Jenkins* were not particularly concerned about Virginia's public policy when it summarily

388. For a further discussion of the benefits of uniform recognition of same-sex divorce judgments see *infra* Part III.B.2.b.

389. See *supra* note 105 and accompanying text.

390. See *supra* notes 107–08 and accompanying text.

391. See *supra* notes 211–35 and accompanying text (discussing the PKPA, which provided interstate recognition to child custody orders in order to solve the problem of parental kidnapping); see also UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT prefatory note, 9 U.L.A. 652 (1999) ("The jurisdictional scheme of the [Uniform Act] was designed to promote the best interests of the children whose custody was at issue by discouraging parental abduction . . .").

392. Conversely, it may be argued that same-sex divorce recognition is harmful because it acknowledges the existence of the same-sex marriage, thus diminishing the structural integrity of courts. See *supra* note 386 and accompanying text. However, this residual effect of same-sex divorce recognition would be negligible, and such concerns are speculative at best.

found that “[t]his case does not place before us the question whether Virginia recognizes the civil union entered into by the parties in Vermont.”³⁹³ Although the court may have incorrectly found that DOMA does not repeal the PKPA, it did come to the correct conclusion by properly advancing two other important public policies—comity and the best interest of the child.³⁹⁴

Uniform recognition of custody judgments arising out of same-sex marriages, although not required, should be encouraged by both state and federal governments for several reasons. First, ill will often arises as a result of interstate discrimination.³⁹⁵ Comity counsels tolerance of sister states’ policies. “[Comity] . . . fosters the Constitution’s commitment to national union, since even constitutionally permissible interstate discrimination can spark resentment and retaliation.”³⁹⁶

Additionally, uniform recognition of all custody orders is in the best interest of the child. Generally, when assessing a child’s living arrangements, the court looks at all factors of the child’s life in order to ensure that a child’s well-being is supported.³⁹⁷ However, this goal is subverted by nonrecognition of a custody order arising out of the dissolution of a same-sex union because parents can unilaterally try to change the order by kidnapping the child and moving to another state.³⁹⁸ Thus, it would recreate the problem of parental kidnapping.³⁹⁹ Nonrecognition of divorce decrees will enable parents to avoid their obligations by simply moving to another state, which is what happened prior to the enactment of the PKPA.⁴⁰⁰ In other words, if a biological or adoptive parent wanted to terminate the custodial or visitation rights of a former marital partner, all they would have to do is move to a mini-DOMA state where the PKPA is nonoperative. The true victims of nonrecognition of same-sex divorce are the children of the union.⁴⁰¹

393. *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 337 (Va. Ct. App. 2006), *aff’d*, 661 S.E.2d 822 (Va. 2008).

394. *See supra* notes 133–38, 204–08 and accompanying text.

395. *See supra* note 167 and accompanying text (discussing how interstate discrimination subverts the principal purpose of the Full Faith and Credit Clause); *see also Metzger, supra* note 88, at 1515.

396. *Metzger, supra* note 88, at 1514–15 (discussing the dangers of interstate discrimination); *see also supra* notes 179–80 and accompanying text.

397. *See supra* notes 207–08 and accompanying text.

398. *See supra* notes 214–19 and accompanying text.

399. *See supra* notes 214–19 and accompanying text.

400. *See supra* notes 214–19 and accompanying text; *see also Singer, supra* note 4, at 6.

401. *See supra* notes 214–19 and accompanying text; *see also Grossman, supra* note 8, at 486 (“A state’s refusal to recognize . . . [a] parent-child relationship validly created in another state, can wreak havoc on a child’s or her parents’ lives.”); *Strasser, supra* note 190, at 334 (“Were states able retroactively to nullify unions valid in the states of celebration and domicile at the time of the marriage, they might cause children to have only one legal parent rather than two and might subject couples to criminal punishment.” (footnote omitted)).

CONCLUSION

The PKPA granted full faith and credit to child custody orders and thereby alleviated the problem of parental kidnapping. Afterward, Congress passed DOMA, which revoked the automatic application of full faith and credit to any judgment arising out of same-sex marriage. Many scholars concluded that DOMA partially repealed the PKPA because their language overlaps and conflicts. As a result, DOMA has opened a Pandora's Box by encouraging parental kidnapping once again, albeit only in the context of same-sex divorce.

Congress's intrusion into this issue, which is traditionally reserved to the states, causes greater confusion, inconsistency, and conflict. Congress rushed to enact DOMA because of the fear that Hawai'i would impose same-sex marriage on sister states and may have overlooked its broad effects. The debate over DOMA's language failed to consider the devastating consequences that might flow to families as a result of the enactment of the statute. Absent DOMA, full faith and credit would apply to all custody judgments under the PKPA. Thus, by passing DOMA, Congress has not only deprived states of the ability to grant recognition to marriages validly performed elsewhere, but also has interfered with states' ability to recognize other types of judgments, thus causing conflict and instability. Effectively, mini-DOMA states are permitted to ignore policies of comity and the best interest of the child because of their worries about same-sex marriage. However, not all judgments arising from a same-sex union raise the same concerns or cause the claimed detrimental effects as same-sex marriage. As discussed above, the negative structural, doctrinal, social, and familial concerns raised in opposition to same-sex unions do not apply to divorce and custody recognition.

Although the rights of divorced lesbians, such as Lisa and Janet, remain uncertain, it is even more worrisome that their child's financial, emotional, and familial future likewise remains uncertain, just of because a state's policy against recognizing her mothers' relationship. Additionally, by marrying and divorcing, Lisa and Janet have the power to create conflict between sister states by merely moving and initiating a separate custody action. This result confounds logic. DOMA's broad language, which grants courts almost limitless power to deny recognition to any judgment relating to a same-sex union, is the source of this conflict. In this way, DOMA undermines the traditional and well-established principles of the Full Faith and Credit Clause. Courts must recognize sister states' divorce and custody judgments because doing so promotes the best interest of the child and supports comity.

Notes & Observations