

INTERSTATE RECOGNITION OF SAME-SEX MARRIAGE, THE PUBLIC POLICY EXCEPTION, AND CLEAR STATEMENTS OF EXTRATERRITORIAL EFFECT

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INTRODUCTION

The current legal regime regarding interstate recognition of same-sex marriage is an often told and, within broad parameters, seemingly well-settled story. It's generally presented as follows. All states follow the venerable choice of law rule of marriage recognition, which holds that a marriage is considered valid in any jurisdiction if it was valid in the state of celebration, even if it would not be valid in the state where recognition is sought. There is an equally venerable public policy exception to the general rule, which holds that a state can refuse recognition to a marriage validly celebrated elsewhere, if recognition would violate a strong public policy of the state. For same-sex marriages, that exception received a federal imprimatur when Congress passed the Defense of Marriage Act¹ ("DOMA") in 1996, which specifies that states are not required by the Full Faith and Credit Clause² to recognize same-sex marriages from other states. Motivated in part by the passage of DOMA, most states passed legislation or amendments to constitutions (or both), which specify that same-sex

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1. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified in relevant part at 28 U.S.C. § 1738C (2006)).

2. U.S. CONST. art. IV, § 1.

marriages are invalid, though not all of these provisions refer to marriages celebrated elsewhere. Even in the absence of such mini-DOMAs, the courts of several states have refused to establish a right to same-sex marriage as a matter of state constitutional law. All of the latter states would seem to fall within the public policy exception to the recognition of a same-sex marriage lawfully celebrated in another state.³

But the story is more complicated, and the purpose of this Article is to illuminate some of those complications and their potential jurisprudential significance. All mini-DOMAs declare, in various ways, that same-sex marriages are invalid, but not all explicitly address the issue of recognition of a marriage celebrated in another state or a foreign country. Also, a large number of states have *two* mini-DOMAs, usually the result of a statute passed by the legislature, followed by an amendment to the state constitution. Sometimes one, but not both, of these provisions explicitly address extraterritorial recognition of marriage. These complications have received relatively little discussion in the literature.⁴

Jurisprudential questions are also raised by this richer understanding of mini-DOMAs. If a mini-DOMA does not address a same-sex marriage validly celebrated elsewhere, should it bar recognition of that marriage? Should mini-DOMAs be required to clearly state that extraterritorial marriages are invalid as well? If a state has in effect two mini-DOMAs, and the wording is not the same, does one have superior legal effect, or should they be harmonized? If

3. For examples of sources that relate the story, with varying degrees of details, in the manner described, see PETER HAY ET AL., *CONFLICT OF LAWS* 652-54 (5th ed. 2010); Lynn D. Wardle, *From Slavery to Same-Sex Marriage: Comity Versus Public Policy in Inter-jurisdictional Recognition of Controversial Domestic Relations*, 2008 BYU L. REV. 1855, 1913-14; Colleen McNichols Ramais, Note, *'Til Death Do You Part...And This Time We Mean It: Denial of Access to Divorce For Same-Sex Couples*, 2010 U. ILL. L. REV. 1013, 1015-18.

4. See, e.g., Joanne L. Grossman & Edward Stein, *The State of the Same-Sex Union: Part Two in a Three-Part Series*, FINDLAW LEGAL NEWS (July 21, 2009), <http://writ.news.findlaw.com/grossman/20090721.html> (observing that some states have multiple provisions restricting same-sex marriage); Andrew Koppleman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143 (2005) (documenting different provisions within some states, but not extensively commenting on the intrastate jurisprudential significance of such provisions); Wardle, *supra* note 3, at 1913 (same).

a state does not have a mini-DOMA of any kind, but state courts have held that there is no state constitutional right to same-sex marriage, should that state refuse to recognize such a marriage celebrated in another state, on the basis of the public policy exception? These issues, too, have received some discussion in the literature, though not at great length.⁵

The purpose of this Article is to shed greater descriptive and prescriptive light on these issues. Part II addresses the proliferation of, and differences among, mini-DOMAs in the last two decades. It particularly focuses on the intrastate differences in those provisions, in states with more than one mini-DOMA, and discusses why one provision may refer to an extraterritorial marriage, and another may not. Part III revisits the public policy exception in light of a richer appreciation of the development of mini-DOMAs, and the fact that some states do not have such provisions. This part advances three interrelated reasons for concluding that mini-DOMAs must clearly state that extraterritorial same-sex marriages are invalid: the appropriateness of a rebuttable presumption against construing these provisions to affect marriages celebrated elsewhere, the import of a law and economics approach to choice of law issues, and the consequences of the direct democracy origins of many of the mini-DOMAs. Part III also concludes, in contrast, that in states without mini-DOMAs, a state court holding that, as a matter of its law, there is no right to a same-sex marriage, can be itself sufficient to satisfy the public policy exception. Part IV concludes the Article.⁶

5. See, e.g., John P. Feldmeier, *Federalism and Full Faith and Credit: Must States Recognize Out-of-State Same-Sex Marriages?*, 25 PUBLIUS: J. FEDERALISM 107, 117 (Fall 1995) (discussing clear statement requirement); Joseph W. Hovermill, *A Conflict of Laws and Morals: The Choice of Law Implications of Hawaii's Recognition of Same-Sex Marriage*, 53 MD. L. REV. 450, 488 (1994) (arguing that mini-DOMAs must clearly state that extraterritorial marriages are invalid); Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. PA. L. REV. 2215, 2240-44 (2005); see also Gary J. Simson, *Beyond Interstate Recognition in the Same-Sex Marriage Debate*, 40 U.C. DAVIS L. REV. 313, 316 n.7 (2006) (noting the position of Wolff, *supra*); Marriage-Whether Out-of-State Marriage That is Valid in the State of Celebration May be Recognized in Maryland, 95 Md. Op. Att'y Gen. 3, 33 (2010) (arguing for clear statement interpretation of Maryland's mini-DOMA, in part relying on Hovermill, *supra*).

6. My primary focus is how to interpret certain aspects of mini-DOMAs. So, among the matters I do not address are the constitutionality of DOMA, or of mini-

I. THE DIFFUSION OF AND DIFFERENCES AMONG MINI-DOMAS

Forty-one states now have statutory or constitutional provisions, or both, which in varying ways declare same-sex marriage invalid. Not all of these provisions were passed in the wake of DOMA's passage by Congress in 1996, but many were, and for convenience I will refer to all of them as mini-DOMAs. Nor is the presence or absence of a mini-DOMA necessarily coextensive with the proper invocation of the public policy exception to the place of celebration rule for foreign marriages. But the passage of a mini-DOMA, or more than one, is a significant step in the direction of invoking that exception, and that policy history will be the focus of this Part of the Article. The next Part will consider the jurisprudential significance of the different wording of different mini-DOMAs, as well as the appropriate use of the public policy exception by states that do not have such a provision.

A. *Litigation and Legislation, 1970-2010*

Scholars have extensively discussed the history of litigation seeking to require states to recognize same-sex marriage and the interrelated story of the passage of mini-DOMAs.⁷ Only the highlights need be recounted here. Despite the relatively recent attention devoted to litigation over same-sex marriage, and the passage of mini-DOMAs, both date back forty years. Same-sex couples challenged laws forbidding same-sex marriage in several states in the early 1970s, but that litigation failed. A second wave of suits were filed in the early

DOMAs, or of the public policy exception itself. Likewise, I do not address other interpretative issues regarding mini-DOMAs, such as their applicability to civil unions celebrated in other states, to divorces of marriages celebrated elsewhere, or to the enforcement of judgments from other states that embody recognition of a same-sex marriage. As this Article went to press, a federal court held California law forbidding same-sex marriage to be unconstitutional. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010). The case is on appeal.

7. For recent helpful overviews, see, for example, Scott Barclay, *In Search of Judicial Activism in the Same-Sex Marriage Cases: Sorting the Evidence from Courts, Legislatures, Initiatives and Amendments*, 8 PERSP. ON POL. 111, 113-15 (2010); Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1183-93 (2009); Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1383-86 (2010); Ramais, *supra* note 3, at 1015-24.

1990s, the most prominent of which was litigation in Hawaii that culminated in a supreme court decision in 1993,⁸ which found there to be a right to same-sex marriage. An amendment to the state constitution overturned that decision, but litigation in other states followed. Eventually, by 2009 the high courts of Massachusetts, Connecticut, and Iowa held there was a right to same-sex marriage under their law. The Supreme Court of California also so held, but a referendum overturned that decision a year later. In contrast, courts in Arizona, Indiana, Maryland, New Jersey, New York, and Washington held there was no such right.⁹

As early as 1975, presumably in reaction to the first wave of litigation, state legislatures began passing mini-DOMAs. By the time of the Hawaii court decision, sixteen states had already adopted some kind of mini-DOMA. In the year after the decision, eight other states adopted a mini-DOMA.¹⁰ In the midst of the state legislative activity, Congress passed DOMA in 1996. The principal impetus for its passage was the Hawaii decision, and the fear that other states would be required to recognize same-sex marriages celebrated in that state.¹¹

8. *Baehr v. Lewis*, 852 P.2d 44 (Haw. 1993). The court did not expressly hold there was such a right, only that the state's denial of such a right would be subject to strict judicial scrutiny, and remanded for further proceedings on that point. Those further proceedings were superseded by an amendment to the state constitution. Wardle, *supra* note 3, at 1859 n.13.

9. For overviews of this litigation, see Barclay, *supra* note 7, at 114-15; Tebbe & Widiss, *supra* note 7, at 1384-85.

10. Barclay, *supra* note 7, at 115.

11. This is clear from the legislative history of DOMA. See H.R. Rep. No. 104-664, at 4-10 (1996) [hereinafter DOMA Legislative History] (discussing the Hawaii litigation and its possible implications for marriage recognition in the other forty-nine states). The dissenting members of the House Judiciary Committee argued that DOMA was unnecessary, given that the Full Faith and Credit Clause had historically not been applied to marriages, and that in any event the public policy exception already empowered states not to recognize marriages from other states. *Id.* at 36-40. The majority responded by arguing that the inapplicability of the Clause to marriages was "far from certain," and that legislation was necessary to "protect" the then-passed mini-DOMAs. *Id.* at 9. For further discussion of Congress's intent in passing DOMA, see Lynn D. Wardle, *Non-Recognition of Same-Sex Marriage Judgments Under DOMA and the Constitution*, 38 CREIGHTON L. REV. 365 (2005). Congress was controlled by the Republicans at the time, and given its largely symbolic nature, its passage is sometimes described as a low-cost nod to opponents of gay marriage. J. Harvie Wilkinson III, *Gay Rights and American Constitutionalism: What's A Constitution For?*, 56 DUKE L.J. 545, 555 (2006). On

As already noted, DOMA stated that states were not so required as a matter of federal law. While mini-DOMAs already existed when Congress passed DOMA, others were passed in the wake of the federal law. By the mid-1990s, the issue of same-sex marriage had been seized upon by politicians and religious and interest groups of various ideological persuasions, and conservative interest groups mobilized state legislatures to pass mini-DOMAs.¹² But the passage of DOMA had a catalytic effect as it “helped to crystallize, in the eyes of many supporters, the pressing need for legislation on same-sex marriage.”¹³ By 1998, thirty-eight states had adopted a mini-DOMA.¹⁴

A second wave of mini-DOMA passage began in the late 1990s. Between 1998 and 2008, there were popular initiatives in thirty states—this time amending state constitutions by adding language declaring same-sex marriages invalid.¹⁵ With one exception, all of the initiatives passed, most by considerable margins.¹⁶ The exception was Arizona, where the initiative failed by a slim margin in 2006; in 2008, another initiative passed in that state.¹⁷ Most of these states already had mini-DOMAs on the books. Why was another one necessary? Undoubtedly, the reasons varied from state to state, but the primary

the other hand, the Democratic President, Bill Clinton, signed the law, purportedly reluctantly, but then touted the passage of DOMA during his 1996 presidential re-election campaign. JAMES T. PATTERSON, *RESTLESS GIANT: THE UNITED STATES FROM WATERGATE TO BUSH V. GORE* 373-74 (2005).

12. See generally Donald P. Haider-Markel, *Policy Diffusion as a Geographical Expansion of the Scope of Political Conflict: Same-Sex Marriage Bans in the 1990s*, 1 ST. POL. & POL’Y Q. 5 (2001); Donald P. Haider-Markel, *Lesbian and Gay Politics in the States: Interest Groups, Electoral Politics, and Policy*, in *THE POLITICS OF GAY RIGHTS* 290 (Craig A. Rimmerman, Kenneth D. Wald & Clyde Wilcox, eds., 2000) [hereinafter Haider-Markel, *Lesbian and Gay Politics in the States*].

13. Sarah A. Soule, *Going to the Chapel? Same-Sex Marriage Bans in the United States, 1973-2000*, 51 SOC. PROBS. 453, 467 (2004).

14. Barclay, *supra* note 7, at 112 tbl.1.

15. KENNETH P. MILLER, *DIRECT DEMOCRACY AND THE COURTS* 209 (2009); Rory McVeigh & Maria-Elena D. Diaz, *Voting to Ban Same-Sex Marriage: Interests, Values, and Communities*, 74 AM. SOC. REV. 891, 891 (2009).

16. See MILLER, *supra* note 15, at 209-11 & tbls.7.1 & 7.2; McVeigh & Diaz, *supra* note 15, at 891-92 & tbl.1.

17. MILLER, *supra* note 15, at 209; McVeigh & Diaz, *supra* note 15, at 891-92. Of the thirty-one initiatives, nineteen were placed on the ballot by legislatures, while voters placed twelve on the ballot. MILLER, *supra* note 15, at 209.

rationale was to constitutionalize the prior mini-DOMA; not only would the provision then be harder to repeal—as opposed to a mere statute—but proponents could not use the state constitution as a potential source of legal authorization of same-sex marriage.¹⁸ Not coincidentally, the Massachusetts Supreme Court, in a highly publicized decision in 2003, held that there was a state constitutional right to same-sex marriage.¹⁹ Twelve of the initiatives were on the ballot in 2004, and it seems they were meant to coincide with the 2004 Presidential election and mobilize conservatives who otherwise might not vote.²⁰

B. Intrastate Differences Among Mini-DOMAs

While the passage of the mini-DOMAs from the early 1990s to the mid-2000s was the result, in part, of coordinated activity by national conservative interest groups and their affiliates and allies in particular states,²¹ it did not result in uniform language among the

18. Schacter, *supra* note 7, at 1188-89; Wilkinson, *supra* note 11, at 565, 569-70. For further discussion of these provisions, see Scott Barclay & Shauna Fisher, *Said and Unsaid: State Legislative Signaling to State Courts over Same Sex Marriage 1990-2004*, 30 LAW & POL'Y 254 (2008); Arthur Lupia et al., *Why State Constitutions Differ in Their Treatment of Same-Sex Marriage*, 72 J. POL. 122 (2010).

19. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

20. MILLER, *supra* note 15, at 209-11. Scholars have described the 2004 initiatives as a backlash against *Goodridge*, suggesting that the decision ultimately redounded to the nationwide detriment of supporters of same-sex marriage. *E.g.*, Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431 (2005); Schacter, *supra* note 7, at 1156; *cf.* Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235 (2010) (arguing against backlash thesis regarding developments in California); Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 LAW & SOC'Y REV. 151 (2009) (arguing that the backlash thesis has been overstated). It is not clear that conservative voters were in fact mobilized by the 2004 and 2006 initiatives in the way apparently desired by many supporters of those measures. For discussion of that point, see David E. Campbell & J. Quin Monson, *The Religion Card: Gay Marriage and the 2004 Election*, 72 PUB. OP. Q. 399 (2008); Michael J. Ensley & Erik P. Bucy, *Do Candidate Positions Matter? The Effect of the Gay Marriage Question on Gubernatorial Elections*, 38 AM. POL. RES. 142 (2010).

21. See Haider-Markel, *Lesbian and Gay Politics in the States*, *supra* note 12, at 307-11 (discussing various conservative interest groups that worked in favor of same-sex marriage bans in the states in the 1990s); Soule, *supra* note 13, at 460-61

mini-DOMAs. A full exploration of these language differences is not necessary here; what is pertinent is the presence or absence of language in mini-DOMAs that addresses extraterritorial marriage. As noted, by the late 1990s, states enacted over thirty such provisions. Most were in the form of statutes passed by the legislature.²² Of those, five did not have language that specifically declared marriages performed in other states invalid.²³ In the second wave of passage between 1998 and 2008, states enacted thirty initiatives, all amending constitutions. As of 2010, forty-one states have one or more statutory or constitutional provision limiting same-sex marriage.²⁴ Of the second-wave provisions, twenty-four²⁵ did not have language that

(same).

22. Schacter, *supra* note 7, at 1185. Four states amended their constitutions: Alaska (1998), Hawaii (1998), Nebraska (2000), and Nevada (2002). *Id.* at 1186 & n.201.

23. The five states are Illinois, Maryland, South Carolina, South Dakota, and Wyoming. While South Carolina's mini-DOMA, passed by statute in 1996, had no clear statement of extraterritorial effect, the constitutional amendment by initiative in 2006 did. For the numbers reported in this paragraph, I rely on three sources: the appendix in Koppelman, *supra* note 4, at 2166-94 (providing operative language from all mini-DOMAs from all states up to 2005); Ramais, *supra* note 3, at 1023 (compiling additional information on mini-DOMAs up to 2010); and state-by-state laws compiled by the Human Rights Campaign, *Marriage and Relationship Recognition*, http://www.hrc.org/issues/marriage/marriage_laws.asp (last visited June 1, 2010). Since lists of mini-DOMAs vary in the literature, depending largely on when counts are being made and what is being counted, I supply my own list in the Appendix to this Article.

24. Wardle, *supra* note 3, at 1913.

25. Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Hawaii, Idaho, Kansas, Kentucky, Michigan, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oregon, South Dakota, Texas, Utah, Virginia, and Wisconsin. The convoluted history of California law is worth mentioning. That state passed an initiative banning same-sex marriage in 2000 with no clear statement language, and the state supreme court declared that initiative unlawful in *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). That decision was overturned by the passage of Proposition 8, a constitutional amendment in 2008, CAL. CONST. art. I, § 7.5, which itself survived a constitutional challenge in *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009). Proposition 8 did not have a clear statement, but legislation passed in California late in 2009, codified at CAL. FAM. CODE § 308 (West 2004 & Supp. 2010), was meant to codify Proposition 8 and recognize same-sex marriages, celebrated in California or elsewhere, prior to Nov. 4, 2008. Same-sex marriages celebrated after that date outside of California will only be considered domestic partnerships. See Ramais, *supra* note 3, at 1021; see also Cummings & NeJaime,

specifically targeted same-sex marriages celebrated in other states. In nineteen states, the second provision did not have any such language, while the earlier passed provision did. In those nineteen, there is an arguable conflict or ambiguity in state law regarding the legality of extraterritorial same-sex marriage.²⁶ At the end of both waves of passage, there are nine states that have passed mini-DOMAs that do not clearly state that they apply to extraterritorial marriages.²⁷

Given that the impetus for many of the mini-DOMAs was the professed fear that Hawaii and Massachusetts, after court decisions in those states in 1993 and 2003, respectively, would become meccas for same-sex couples to evade their home state's law, it might seem curious that *all* of the mini-DOMAs do not routinely refer to the invalidity of out-of-state marriages. There is less curiosity for the first wave of mini-DOMAs; only eight of the thirty-eight initiatives lack such language. More curious are the second wave of initiatives. Eighty percent of those lack such language, and odder still, 19 of those initiatives, in effect, constitutionalized prior statutes that did expressly invalidate marriages celebrated elsewhere.

Compelling explanations for these intrastate disparities do not easily come to mind. With regard to the first wave, perhaps the drafters did not think clear language on marriages from other states was necessary, since the public policy exception against recognition might apply even in the absence of such language. Whether that is a sound interpretation of the prevailing law is discussed in the next Part. The same reason might also explain the larger number of mini-DOMAs in the second wave that did not have such language. The political context of the latter provisions might have some explanatory force. As potential constitutional provisions, intended at least in part to mobilize voters for concurrent elections for national or statewide

supra note 20, at 1297 (noting that *Strauss* left open the issue of the effect of its holding on extraterritorial marriages). As this article went to press, a federal court held Proposition 8 to be unconstitutional. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010). The case is on appeal.

26. The nineteen states are those in the preceding footnote, less Hawaii, Nebraska, Nevada, and Oregon, where there were initiatives not preceded by a statute, and less South Dakota, where neither mini-DOMA had clear statement language.

27. The nine states are Hawaii, Illinois, Maryland, Montana, Nebraska, Nevada, Oregon, South Dakota, and Wyoming.

political office, perhaps the drafters intentionally kept the initiatives short and to the point. References to an extraterritorial marriage might have been thought to be confusing to voters, or even counterproductive to the initiative's mission. Perhaps it was thought that some voters, while willing to ban same-sex marriage in their own state, might be less interested in (or even disagree with) denying that right to couples who go elsewhere to get married, or who are from elsewhere and move to the forum after a same-sex marriage.²⁸ In most states, initiatives are legally required to only address a single subject,²⁹ and this may have also led to the brevity of some of the second-wave provisions.³⁰

Perhaps the differences in wording can be largely explained simply due to the peculiarities of drafting statutes and initiatives within each state. A full exploration of the drafting history of these

28. There have been many polls on same-sex marriage and related issues—for example, Paul R. Brewer & Clyde Wilcox, *The Polls-Trends: Same-Sex Marriage and Civil Unions*, 69 PUB. OP. Q. 599 (2005)—but I am unaware of any evidence that directly reveals what voters might have thought about interstate recognition of marriage. Professor Schacter has reported that polls have tested this question, Schacter, *supra* note 7, at 1195 (noting that a poll question asked “whether other states should recognize a same-sex marriage performed in Massachusetts”), but the source she cites for that proposition, *id.* at 1195 n.265 (citing Karlyn Bowman & Adam Foster, *Attitudes About Homosexuality and Gay Marriage*, AM. ENTER. INST., 26, 29, 33, 35 (June 3, 2008), <http://www.aei.org/paper/14882>), by my reading does not report or discuss a poll question that directly addresses the interstate recognition issue.

29. For discussions of the single-subject rule for initiatives, see WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 541-42 (4th ed. 2007); Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687, 704-08 (2010).

30. E-mail from Donald P. Haider-Markel, Professor of Political Science, University of Kansas, to Michael E. Solimine, Professor of Law, University of Cincinnati College of Law (October 21, 2009, 12:38 EST) (on file with author). The second wave of mini-DOMAs led to some legal challenges on single-subject rule grounds on the basis that some of them also rendered invalid same-sex civil unions, in addition to marriages. *E.g.*, *O’Kelly v. Cox*, 604 S.E.2d 773 (Ga. 2004); *McConkey v. Van Hollen*, 783 N.W.2d 855 (Wis. 2010). For further discussion of such challenges, see Glen Staszewski, *The Bait and Switch in Direct Democracy*, 2006 WIS. L. REV. 17; Kurt G. Kastorf, Comment, *Logrolling Gets Logrolled: Same-Sex Marriage, Direct Democracy, and the Single-Subject Rule*, 54 EMORY L.J. 1633 (2005).

provisions within each state is beyond the scope of this Article. Whatever the intent of the drafters of, or the voters in favor of, these provisions, the lack of clear language affecting out-of-state marriages in some of the provisions arguably has jurisprudential consequences, as the next Part will explore.

III. APPLYING THE PUBLIC POLICY EXCEPTION IN THE PRESENCE OR ABSENCE OF MINI-DOMAS

The public policy exception in choice of law has had a tortuous and contentious history. It has been an exception to the normal rules under both the older territorial approach and modern choice of law theories. If choice of law principles, whatever they are, require the application of the law of another jurisdiction, the exception permits the forum to apply its own law if the foreign law would in some manner violate the forum's public policy.³¹ The inevitable problem has been to define and cabin the exception, since if applied expansively, the exception would swallow the rules, and all choice of law decisions would devolve into *lex fori*. Most courts did this by emphasizing that they would apply the exception narrowly; a mere difference in the law would not be sufficient; and the forum law must be of a strong or important character. Even so, it is common ground that the exception was both difficult to describe in theory and apply in a coherent and principled way in practice.³²

These difficulties attended the application of the public policy exception in the marriage context. Courts have long struggled with defining how different the marriage rules of the forum must be from those of the place of celebration to invoke the exception.³³ A full

31. See RESTATEMENT OF CONFLICT OF LAWS § 612 (1934) (referring to the "strong public policy of the forum"); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 90 (1971) (same).

32. For general discussion of the public policy exception, see DAVID P. CURRIE ET AL., CONFLICT OF LAWS 76-79 (8th ed. 2010); HAY, *supra* note 3, at 168-71; RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 118-25 (6th ed. 2010); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1972-76 (1997).

33. For general discussion, see HAY, *supra* note 3, at 628-38; WEINTRAUB, *supra* note 32, at 333-39; Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 944-62 (1998); Richard S. Myers, *Same-Sex "Marriage" and the Public Policy Doctrine*, 32 CREIGHTON L. REV. 45, 48-55

exploration of those struggles is unnecessary here. The focus of the first portion of this Part of the Article is one factor relevant to the interpretation of mini-DOMAs, and the corollary of the absence of such a provision: how specific should forum law be regarding an out-of-state marriage in order to invoke the exception? This Part will then address two factors not the subject of extensive discussion in prior literature: the impact of a law and economics analysis on interstate marriage recognition, and the jurisprudential significance of the juridical origins of most of the second wave of mini-DOMAs in the initiative process, as opposed to the legislature.

A. Forum Law and Clear Statements of Extraterritorial Effect

With respect to interstate recognition of marriage, courts could draw on any number of sources for the proposition that the foreign marriage violated the public policy of the forum. This could include natural law, common law, and forum statutes defining what relationships did or did not constitute a lawful marriage. Courts in different states addressed these issues in different ways. One of the splits in authority concerned the interpretation of marriage statutes. If a marriage lawfully celebrated elsewhere would have violated statutes of the forum if celebrated there, was that enough to justify the forum invoking the public policy exception? Or, to apply the exception, must the forum statutes also clearly state that their requirements or prohibitions applied to marriages celebrated elsewhere?³⁴

(1998).

34. For discussion of the different approaches courts took on this issue, see WEINTRAUB, *supra* note 32, at 334-35 & nn.6-12; Joanne L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 ORE. L. REV. 433, 466 & nn.164-68 (2005); Wolff, *supra* note 5, at 2241; DOMA Legislative History, *supra* note 11, at 39. As Professor Grossman details, when addressing this issue many courts have also explicitly or implicitly taken into account other factors, such as whether one or both marriage partners were attempting to evade the marriage requirements of a state. Grossman, *supra*, at 460-66. To a degree, this debate could be largely, though not completely, mooted by the universal or widespread adoption of a separate marriage evasion statute. Such a statute could state that parties, ineligible to marry in the forum, who left the forum to lawfully marry elsewhere, would not have their marriages recognized as lawful when they returned to the forum. Such statutes would in effect supply a clear statement of extraterritorial effect for all provisions of the forum's marriage laws. But they would not necessarily render the entire issue moot; in a mobile society

Two well-known cases illustrate the debate. In *Lanham v. Lanham*,³⁵ the Wisconsin Supreme Court faced the validity of a marriage properly celebrated in Michigan. The parties, citizens of Wisconsin, travelled to Michigan to get married and then returned, but the marriage was arguably invalid, since one of the parties had not waited the requisite time under Wisconsin statutes after a divorce to remarry. The Wisconsin statute did not specifically reference a marriage that might occur out-of-state.³⁶ Addressing the scope of the public policy exception, the court stated that the intention of the legislature to give “extraterritorial effect to its laws . . . must . . . be quite clear.”³⁷ Properly understood, the court continued that clarity was achieved here. It would “ascribe practical imbecility to the lawmaking power” to assume that the Wisconsin legislators would have intended the law to be easily evaded by going into a neighboring state to be married.³⁸ The terms of the statute were “broad and sweeping [with] no limitation as to the place of the pretended marriage. . . . [It] seems unquestionably intended to control the conduct of residents of the state, whether they be [sic] within or outside of its boundaries.”³⁹

The court in *In re May's Estate*⁴⁰ used a different approach. There, the New York Court of Appeals was asked to validate a marriage between two New York citizens, an uncle and his niece, valid under the law of Rhode Island where they went to celebrate it, but in violation of a New York statute.⁴¹ The court held the marriage valid, in part because the New York statute “does not by express terms regulate a marriage solemnized in another State,” and the “statute’s

courts can be confronted, in a variety of circumstances, with the issue of recognition of a foreign marriage, other than when citizens of the forum leave to get married and return. The Uniform Marriage Evasion Act, approved by the National Conference of Commissioners on Uniform Laws in 1912, was one such provision, but it only five states fully adopted it, and has since been withdrawn. HAY, *supra* note 3, at 637-38; Simson, *supra* note 5, at 334 n.80.

35. 117 N.W. 787 (Wis. 1908).

36. *Id.* at 788.

37. *Id.*

38. *Id.* at 789.

39. *Id.*

40. 114 N.E.2d 4 (N.Y. 1953).

41. *Id.* at 4-5.

scope should not be extended by judicial construction.”⁴² The court continued that the legislature could have added language to the statute, making it clear that it applied to marriages celebrated elsewhere.⁴³

Both courts agreed that the issue was one of statutory interpretation, and that a statute could only apply to an extraterritorial marriage if the legislature so intended. Where the courts parted company was on what presumptive interpretive canon was appropriate: should courts presume that statutes that are silent or ambiguous on extraterritorial effect apply to marriages celebrated elsewhere? There is respectable authority supporting both sides.⁴⁴ The answer is relevant to the interpretation of mini-DOMAs, some of which do not refer to extraterritorial marriages. Similarly, scholars have weighed in on both sides of this point as well.⁴⁵

In my view, the better argument is to require mini-DOMAs to clearly state⁴⁶ that they apply to marriages celebrated in another

42. *Id.* at 6-7. The court rejected the other reason advanced for nonrecognition—that natural law principles forbade the marriage. *Id.* at 7.

43. *Id.* at 7. The court added that “examples of such legislation are not wanting,” citing for that proposition “2 BEALE, CONFLICT OF LAWS, § 129.6, p. 681, and statutes there collated.” *Id.* at 7 n.1.

44. For support of a presumption of extraterritorial effect in marriage cases, see HAY, *supra* note 3, at 633 & n.13 (endorsing presumption of *Lanham*); RESTATEMENT OF CONFLICT OF LAWS § 134 (1934) (providing for public policy exception without requiring clear statement of extraterritorial effect, though not directly addressing the issue); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2)(1971) (same). For support of a clear statement requirement in this context, see WEINTRAUB, *supra* note 32, at 334-35 (discussing though questioning cases that apply this requirement).

45. For support for presuming that all mini-DOMAs apply to extraterritorial marriages, see Peter Hay, *Recognition of Same-Sex Legal Relationships in the United States*, 54 AM. J. COMP. L. 257, 263 (2006) (American Law in the 21st Century: U.S. National Reports to the XVIIth International Congress of Comparative Law) (a mini-DOMA is a “strong statement of public policy”); Simson, *supra* note 5, at 332 (arguing that *May’s Estate* interpretation of the positive law exception “stripped it of any independent significance and rendered it superfluous”); Wardle, *supra* note 3, at 1914 (agreeing with Hay, *supra*). For support for presuming that mini-DOMAs do not have an extraterritorial effect, see the authorities cited *supra* note 5.

46. In what follows, I assume the general correctness of courts adopting and applying clear statement rules of statutory construction in appropriate situations. There is a lively debate, at least at the federal level, of the propriety of courts fashioning such clear statement rules. For an overview of the debate, see John F.

jurisdiction. One reason is that it is a way to cabin the reach of the public policy exception. That exception, as already noted,⁴⁷ has had a long and controversial history in choice of law theory. Other than simply doing away with it entirely,⁴⁸ the exception, to the extent its basis is statutes passed by the forum state, can be limited by the requirement that the state legislature intended that it apply to extraterritorial events. Indeed, such a requirement will largely do away with a freestanding public policy exception based on state statutes that are silent or ambiguous on their extraterritorial effect. Unlike others,⁴⁹ I would not lament this result. The history of the public policy exception has been marked by judicial efforts to limit its scope; placing responsibility on state legislatures to clearly articulate the intended geographic scope of statutes is an appropriate continuation of that response.⁵⁰ The clear statement requirement is

Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 402-03 (2010) (observing that critics argue that such rules intrude upon legislative prerogatives, since they require courts to depart from the most natural readings of statutes, while supporters view them as healthy means of enhancing legislative responsibilities in sensitive areas). I agree with Manning that “clear statement rules do impose something of a clarity tax upon legislative proceedings in particular areas, which would seem to demand a justification other than the raw expression of judicial value preferences.” *Id.* at 403. While not exclusively drawing such justifications from the U.S. Constitution (as apparently would Manning) or state constitutions, I present, in what follows, reasons for a clear statement requirement in the present context, without purporting to set out a general theory of clear statement canons of interpretation.

47. See *supra* notes 31-32 and accompanying text.

48. See, e.g., WEINTRAUB, *supra* note 32, at 118-24 (arguing that the exception is of limited if any relevance when a court uses modern choice of law theories, focusing on the interests of the respective states); Kramer, *supra* note 32 (arguing that the exception is unconstitutional). This is not to say that the exception lacks defenders—in the marriage recognition context or otherwise. See, e.g., Myers, *supra* note 33; Richard S. Myers, *The Public Policy Doctrine and Interjurisdictional Recognition of Civil Unions and Domestic Partnerships*, 3 AVE MARIA L. REV. 531 (2005) [hereinafter Myers, *Public Policy Doctrine*]; Wardle, *supra* note 3; see also authorities cited *infra* note 62.

49. E.g., Simson, *supra* note 5, at 332.

50. In these observations, I am not drawing on a distinction that the Supreme Court has often made between the appropriate extraterritorial effect of state statutes and state court decisions. Compare, for example, *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981) (plurality opinion) (under Due Process Clause, state court can apply forum law when state has contacts, creating state interests, with the parties and

rebuttable, since a state legislature can always revisit the legislation once a court (or anyone else) brings the issue of extraterritorial effect to its attention.

A second, related reason is that almost all state jurisprudence on choice of law is and historically has been judge-made. State legislatures rarely address choice of law issues by statute, and by default leave it to state courts to resolve such issues on a case-by-case basis.⁵¹ Given this practice, it makes sense to interpret state statutes on the basis that they are not meant to apply in an extraterritorial way, absent statutory language or other indicia of legislative intent to the contrary.⁵² This assumption is especially justified in the context of

the occurrence or transaction) with *Edgar v. MITE Corp.*, 457 U.S. 624, 640-46 (1982) (Dormant Commerce Clause limits extraterritorial effect of state statutes). For a useful overview and critique of the distinction, see Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057 (2009).

In choice of law circles, in the same-sex marriage context or otherwise, commentators often do not make any such distinction in evaluating the propriety of the public policy exception. *E.g.*, Simson, *supra* note 5, at 318 n.13. In any event, the distinction is of limited relevance to the present discussion, since Congress in DOMA has in effect authorized states to legislate on this topic in an extraterritorial way. Assuming DOMA is constitutional, an issue I do not address in this article, see *supra* note 6, Congress is an appropriate national institution with a repository of power to allow states to take different positions on the contested issue of interstate recognition of same-sex marriage. See Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1532-36 (2007); Mark D. Rosen, "Hard" or "Soft" Pluralism?: Positive, Normative, and Institutional Considerations of States' Extraterritorial Powers, 51 ST. LOUIS U. L.J. 713, 752-53 (2007).

51. See Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1170 (2000); Robert A. Leflar, *Choice-of-Law Statutes*, 44 TENN. L. REV. 951, 951 (1977); Simson, *supra* note 5, at 334.

52. Lindsay Traylor Braunig, Note, *Statutory Interpretation in a Choice of Law Context*, 80 N.Y.U. L. REV. 1050, 1053-54 (2005). A clear statement rule against extraterritorial effect of state statutes has a long jurisprudential history in conflicts of laws. Consider that it was applied in the canonical case of *Ala. Great S. R.R. v. Carroll*, 11 So.2d 803 (Ala. 1892) (holding that Alabama statute regulating torts did not apply to injury of an Alabama citizen suffered in another state). Statutory law also contains such clear statement rules. See, *e.g.*, *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) ("Congress ordinarily legislates with respect to domestic, not foreign affairs."). While clear statement rules typically can only be satisfied by statutory text, the presence of legislative history or other evidence of the intent of the enacting legislature could, in my view, satisfy the requirement, ensuring that the body has presumably considered and addressed the

mini-DOMAs. These provisions were passed in the context of a great deal of publicity given to the progress of litigation seeking same-sex marriage recognition in several states, and the passage of DOMA itself.⁵³ In these circumstances, the issues of the legality of same-sex marriage and their interstate recognition was in some manner surely on the public policy agenda of all state legislatures. It would not be unfair to place the burden on those legislatures to squarely address the issue, if they care to do so.⁵⁴

B. The Law and Economics of Interpreting Mini-DOMAs

Law and Economics scholarship has, comparatively speaking, only recently begun to address choice of law issues.⁵⁵ For present purposes, the branch of that scholarship that addresses federalism is most relevant to interstate recognition of marriage. Functional and economic theories of federalism posit that states are valuable law providers in a federation, since they can check the aggrandizement of power by the national government. Such decentralization of power makes it more likely that the diverse interests of different people can be better served by smaller governmental units. Different policies pursued by different governmental units can serve as “laboratories of experimentation,” which can redound to the benefit of other states and the national government itself.⁵⁶

issue of extraterritorial effect.

53. Neal Devins, *How State Supreme Courts Take Consequences Into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1674-91 (2010) (discussing publicity surrounding same-sex marriage legislation and litigation); Grossman, *supra* note 34, at 446-51 (same); Ralf Michaels, *After the Revolution—Decline and Return of U.S. Conflict of Laws*, 11 Y.B. PRIVATE INT’L L. 11, 16 (2009) (noting unusual interest group focus on conflict of laws in the same-sex marriage debate).

54. I would be willing to temper this conclusion if, in a particular state, the case law was clear that in the marriage recognition context, ambiguous or silent state statutes were presumed to have an extraterritorial effect. A consideration of each state’s law on that point is beyond the scope of this Article, but the law appears to have been and remains uncertain on that point in many states. Many if not most states, it appears, followed a presumption against an extraterritorial effect in this context. *See supra* notes 5 and 34.

55. For an overview, see Ralf Michaels, *Economics of Law as Choice of Law*, 71 LAW & CONTEMP. PROBS. 73 (Summer 2008).

56. For summaries of the vast literature on American federalism, discussing

These principles suggest that states should generally define marriage. Historically, states have drawn from local community values, rather than national norms, in defining marriage. States differ among (and within) themselves with regard to a host of economic, political, religious and other demographic characteristics, and it is unnecessary and inappropriate for a national solution to marriage definition to be imposed.⁵⁷ The concept of interjurisdictional competition, or competitive federalism, places these conclusions in sharper focus. This theory posits that states in a federation can compete to supply goods and services, and the law itself. Citizens unhappy with the goods supplied can vote with their feet by exiting that jurisdiction and going to another. This movement creates a resulting market in law, which in theory should allocate activity among different jurisdictions and satisfy the tastes of different people, in an efficient way, making national uniform rules unnecessary and unproductive. This model depends on a number of assumptions, including the assumption that citizens can literally exit a jurisdiction, or at least escape the effect of its laws if they stay. The model also depends on the assumption that a state, through its law, cannot impose negative externalities on other states, but must instead internalize the costs of its laws. If these assumptions are satisfied, then the competition is regarded as a beneficial race to the top. If they are not,

these and other virtues of federalism, see, for example, Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317 (1997); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180 (1998). For skeptical appraisals of the values of federalism, see MALCOLM M. FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE* (2008); Frank B. Cross, *The Folly of Federalism*, 24 CARDOZO L. REV. 1 (2002); Todd E. Pettys, *The Mobility Paradox*, 92 GEO. L.J. 481 (2004).

57. See Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1875-79 (1995); Jeffrey L. Rensberger, *Interstate Pluralism: The Role of Federalism in the Same-Sex Marriage Debate*, 2008 BYU L. REV. 1703, 1740-95; Wilkinson, *supra* note 11, at 559-60; see also Jeffrey R. Lax & Justin H. Phillips, *Gay Rights in the States: Public Opinion and Policy Responsiveness*, 103 AM. POL. SCI. REV. 367, 382-83 (2009) (finding that public policies of states on same-sex marriage, adoptions by gays, and other gay rights issues is generally congruent with the majoritarian preferences (as measured by polls) in those states). Of course, many critics and supporters of same-sex marriage argue that a national solution is ultimately necessary. See, e.g., Dwight G. Duncan, *The Federal Marriage Amendment and Rule by Judges*, 27 HARV. J. L. & PUB. POL'Y 543 (2004). They disagree on the national solution.

then interjurisdictional competition can degenerate into a race to the bottom.⁵⁸

Under this model, jurisdictions are inevitably asked to decide whether to apply or recognize the law of other jurisdictions. To optimize competitive federalism, choice of law rules should facilitate individual choice of the law of different jurisdictions, while preserving a role for beneficial governmental regulation.⁵⁹ These principles have been applied to interstate recognition of marriage. To attract revenue from tourism and for other reasons, states compete to celebrate marriages. Couples may travel to different states, at least in part, due to the laws permitting marriage. It is relatively easy for people to go to other states to get married, even if that is the only reason they would go there.⁶⁰ Granted, conferring the legal status of marriage can have spillover effects in other states. It will affect not only the married couple, but potentially the relatives and others in the state where the

58. The classic formulation of the model is found in Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). For helpful overviews of the model, see ERIN A. O'HARA & LARRY E. RIBSTEIN, *THE LAW MARKET* 19-36 (2009); William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 GEO. L.J. 201 (1997). As is often observed, especially when it is difficult to measure spillovers, whether there is a race to the top or the bottom often turns on a normative judgment of the state regulation at issue. Erin Ann O'Hara, *Opting Out of Regulation: A Public Choice Analysis of Contractual Choice of Law*, 53 VAND. L. REV. 1551, 1572 (2000) (commenting on proper characterization of the effect of the passage of DOMA).

59. O'Hara & Ribstein, *supra* note 51, at 1152-53.

60. To make the individual choice of law for marriage even easier, some have proposed that states treat marriages like contracts, and that couples be permitted to apply the law of another jurisdiction in a choice of law clause in the contract. Brian H. Bix, *State Interests in Marriage, Interstate Recognition, and Choice of Law*, 38 CREIGHTON L. REV. 337, 347 (2005); O'Hara & Ribstein, *supra* note 51, at 1209. In theory, couples could even formalize such a contract online. See Adam Candeub & Mae Kuykendall, *E-marriage: Breaking the Marriage Monopoly* (Mich. State Univ. Coll. of Law Legal Stud. Res. Paper Series, Res. Paper No. 07-25, 2010), available at <http://ssrn.com/abstract=1491704>. To be sure, the conventional understanding, as reflected in the RESTATEMENT (SECOND) CONFLICT OF LAWS § 187 (1971), is that the forum may refuse to enforce a choice of law clause if the chosen law would violate the forum's public policy. See Myers, *Public Policy Doctrine*, *supra* note 48, at 541-45. But the law and economic critique calls for limits to the exception in these circumstances, since it undermines the efficacy of parties choosing the law. *E.g.*, O'HARA & RIBSTEIN, *supra* note 58, at 209-10.

couple is from or resides after the marriage, if different from the state of celebration. But these effects are difficult to quantify, and the positive and negative externalities of recognizing marriage may cancel out in different states. In these circumstances, scholars have argued that, as a general matter, the competition among states to confer the status of marriage is a race to the top.⁶¹

Others and I argue that the optimal choice of law rule for marriage recognition, from a competitive federalism perspective, is the current place of celebration rule, with the public policy exception.⁶² The celebration rule permits prospective marriage couples to choose the law to govern that status, while the public policy exception permits a state to enforce its own regulatory interests, should it care to do so. The problem is the scope of the exception from an interjurisdictional perspective. I have further argued that the public policy exception in this context should be narrowly focused. Ways to achieve such a focus include requiring that the exception be grounded in a state statute, not merely state common law, and that the statute clearly indicate that it applies to extraterritorial marriages.⁶³ A broad reading of the exception would undermine the individual choice that is crucial to the success of the model. But having no exception at all improperly assumes that the state being asked to recognize a foreign marriage has no regulatory interests in the possible interstate spillover effects generated by that marriage.⁶⁴

61. Bix, *supra* note 60, at 337-40; Bratton & McCahery, *supra* note 58, at 266-67; Michael E. Solimine, *Competitive Federalism and Interstate Recognition of Marriage*, 32 CREIGHTON L. REV. 83, 88-90 (1998).

62. Rensberger, *supra* note 57, at 1800-03; Solimine, *supra* note 61, at 97-99; *see also* Bix, *supra* note 58, at 347.

63. Solimine, *supra* note 61, at 98-99. O'Hara and Ribstein similarly argue that, from a competitive federalism perspective, states should not be able to use statutes to give content to a public policy exception unless the legislature clearly states that it is meant to limit contractual choice-of-law clauses. O'HARA & RIBSTEIN, *supra* note 58, at 209-11. Elsewhere, though, they endorse the place of celebration as the appropriate choice of law rule to recognize same-sex marriages, apparently without the public policy exception. But they acknowledge state policy against same-sex marriage by suggesting a "compromise solution," whereby states would enforce foreign marriages, distinguishing "incidents of marriage that the parties can replicate by contract or other private arrangement from benefits that states provide to encourage people to marry." *Id.* at 165 (citation omitted). States could deny the latter benefits to same-sex couples married elsewhere. *Id.*

64. For functional social policy arguments against recognition of same-sex

For the issues that concern the present Article, these principles mean that the public policy exception for same-sex marriages should be confined to mini-DOMAs, and that for the exception to apply, those provisions must clearly state that they apply to extraterritorial marriages.⁶⁵ So, application of the competitive federalism model leads to the same result advanced in the previous section.

marriage and civil unions, see Lynn D. Wardle, *Counting the Costs of Civil Unions: Some Potential Detrimental Effects on Family Law*, 11 WIDENER J. PUB. L. 401, 429-41 (2002) (arguing that official recognition of same-sex relationships will devalue traditional marriage and family, which will have deleterious effects on society); Lynn D. Wardle, *The Attack on Marriage as the Union of a Man and a Woman*, 83 N.D. L. REV. 1365, 1371-78 (2007) (same). *But see* Laura Langbein & Mark A. Yost, Jr., *Same-Sex Marriage and Negative Externalities*, 90 SOC. SCI. Q. 292 (2009) (finding that adverse rates of marriage, divorce, abortion, and other issues were not associated with states permitting gay marriage, but not examining interstate externality issue). Granted, the positive or negative externalities associated with interstate recognition of same-sex marriage are difficult to quantify, as they are for other marriages. *See supra* note 61 and accompanying text. But the difficulties in measurement do not make it inappropriate for a state to have the option of not giving a subjective stamp of approval to a same-sex marriage from another state. O'HARA & RIBSTEIN, *supra* note 58, at 164-65 ("[M]arriage resists the choice-of-law solution because it is a subject in which society as a whole, and not merely the spouses, is deeply interested.") (citation omitted); Koppelman, *supra* note 33, at 941 (explaining that a state has a particular interest in regulating the marriage status of its domiciliaries); Solimine, *supra* note 61, at 89 n.23 (discussing a state refusing to give its stamp of approval in this context).

65. Solimine, *supra* note 61, at 98. A consequence of my analysis is that it leads to the embarrassing conclusion that *Loving v. Virginia*, 388 U.S. 1 (1967), holding interracial marriage bans unconstitutional, was wrongly decided, at least on the facts of that case. The Lovings were an interracial couple from Virginia, which had a statute that banned such marriages, and it specifically referenced extraterritorial marriages. They married in the District of Columbia, which had no such laws, and were prosecuted when they returned to Virginia. *Id.* at 2-4. I earlier suggested that this result does not undermine the appropriateness of the competitive federalism model for marriage recognition. Given the history of racial subordination in this country, one could argue that a national solution to the validity of interracial marriage bans was appropriate. Alternatively, one might argue that to refuse to enforce a foreign marriage, a state should need to show actual evidence of negative externalities. It is most difficult to argue that such evidence was present in *Loving*. *See Solimine, supra* note 61, at 98-99.

C. Mini-DOMAs and Judicial Interpretation of the Products of Direct Democracy

There is a third reason mini-DOMAs should be interpreted in a narrow manner, including the assumption that extraterritorial marriages are not covered unless clearly stated. Recall that the first wave of mini-DOMAs was mostly comprised of statutes passed by legislatures in the 1990s. The mini-DOMAs in the large second wave were enacted by popular initiatives, amending state constitutions. A number of the latter, unlike most of the former, did not refer to extraterritorial marriages.⁶⁶ The enactments raise interrelated interpretative problems. In states with two mini-DOMAs, the second of which does not refer to extraterritorial marriages, should the second provision in some manner preempt the first provision? Should initiatives in any state, silent on extraterritorial marriage, nonetheless be interpreted to apply to such marriages? How, if at all, should the fact that the second wave of mini-DOMAs came to be enacted via initiatives affect their interpretation by courts?

The argument that the juridical origin of the second wave of mini-DOMAs should affect their interpretation starts with the history of initiatives and referenda,⁶⁷ which together constitute the principal tools of popular or direct democracy. At the turn of the last century, Populist and Progressive forces became disenchanted by what they saw as the capture of government in general, and state legislatures in particular, by business associations and other interest groups, and supported the use of tools of direct democracy to combat that influence.⁶⁸ While adopted in many states, these devices were used relatively rarely in most jurisdictions during much of the twentieth

66. See *supra* notes 10-23 and accompanying text.

67. The initiative is a method whereby an amendment to a state constitution is placed for approval on a state-wide ballot. Initiatives may be direct (placed on the ballot after a requisite number of signatures are obtained) or indirect (first submitted to the state legislature for approval, and only placed on the ballot if the legislature refuses to pass it). The referendum is a method that permits the electorate to approve or disapprove a law proposed or passed by the legislature. Twenty-seven states provide for the initiative, referendum or both methods. ESKRIDGE, *supra* note 29, at 523-24; MILLER, *supra* note 15, at 35-36.

68. For a useful historical overview, see MILLER, *supra* note 15, at 23-35.

century. A revival in use came in the last three decades, covering a wide range of topics from political reform, morality, taxation, education, and other issues.⁶⁹ The adoption of mini-DOMAs by initiative in the past fifteen years is another example of that revival.

Many observers have criticized this revival. Among other things, they argue that the initiative and referenda often undermines representative government by limiting the discretion and authority of elected officials. Simplistic or poorly drafted initiatives can replace the necessary deliberation and compromise over issues that are characteristic of legislative decision-making. Public campaigns for or against these measures can themselves be dominated by special interests. Some remodeling by initiative of the political process itself, such as the widespread adoption of term limits, has in the minds of many hardly been an unqualified success. Some initiatives, some argue, threaten individual or minority rights.⁷⁰ Other observers offer a less bleak assessment of the initiative. They argue that initiatives can lead to greater turnout, voters are more informed than sometimes thought when considering initiatives, and the threat of initiatives can lead legislatures to govern more effectively.⁷¹

Informed by the normative debate over the desirability of the initiative process, there has been a lively scholarly debate over the appropriate stance courts should take in interpreting constitutional

69. *Id.* at 41-65. During this period, a disproportionate number of initiatives were adopted in five states (Arizona, California, Colorado, Oregon, and Washington), due in part to the ease of placing such measures on the ballots of those states. *Id.* at 51. Many observers trace the revival of the initiative in those states and elsewhere to the adoption of Proposition 13, the famed anti-tax initiative in California, in 1978. *Id.* at 53-55.

70. For overviews and examples of the critical assessment discussed in this paragraph, see MILLER, *supra* note 15, at 67-70; Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434 (1998); Cooter & Gilbert, *supra* note 29, at 697-704; Donald P. Haider-Markel et al., *Lose, Win, or Draw? A Reexamination of Direct Democracy and Minority Rights*, 60 POL. RES. Q. 304 (2007).

71. For examples of the more positive critique, see Todd Donovan et al., *Political Engagement, Mobilization, and Direct Democracy*, 73 PUB. OP. Q. 98 (2009); Arthur Lupia & John G. Matsusaka, *Direct Democracy: New Approaches to Old Questions*, 7 ANN. REV. POL. SCI. 463 (2004); James Monogan et al., *Public Opinion, Organized Interests, and Policy Congruence in Initiative and Noninitiative States*, 9 ST. POL. & POL'Y Q. 304 (2009).

provisions or statutes enacted by initiative or referenda.⁷² For such enactments, it appears that most state courts have routinely resorted to the ordinary tools of construction they use for other enactments, and do not give special weight to the non-legislative process that led to the enactment.⁷³ Precisely given the unique provenance of initiatives, a number of scholars have suggested different interpretive approaches. Some have argued that it is difficult to conceptualize voters for initiatives as having a collective intent; but to do so, courts should go beyond the text and examine a rich variety of extrinsic sources to discern such intent, such as media coverage and public opinion polls taken during the initiative campaign.⁷⁴ Others have suggested these provisions should be interpreted pursuant to their plain text but, given that the provisions are meant to diminish the powers of democratic institutions (i.e., legislatures), they should be narrowly construed and ambiguities should be, in effect, read against the drafters.⁷⁵ Still other scholars contend that, given the acknowledged weaknesses of the legislative process, the differences between the creation of ordinary statutes and initiatives has been overplayed, and that ordinary rules of

72. For overviews, see ESKRIDGE, *supra* note 29, at 1101-04; ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 315-34 (2009); Note, *Judicial Approaches to Direct Democracy*, 118 HARV. L. REV. 2748 (2005); see also Ethan Lieb, *Interpreting Statutes Passed Through Referendums*, 7 ELECTION L.J. 49 (2008) (arguing that courts should interpret initiatives differently from referendums). The interpretive issues are to be distinguished from similar issues regarding constitutional challenges to the products of direct democracy. For an overview, see MILLER, *supra* note 15, at 88-98. The latter issue is beyond the scope of this Article.

73. Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107 (1995). Regarding the ordinary tools of construction, courts in different states follow different canons of interpretation, but a recent study found that most state courts follow a "modified textualist rule: first step, text only; if ambiguity found, then second step, legislative history." Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1844 (2010) (citation omitted); see also WILLIAMS, *supra* note 72, at 330 ("A number of state courts have identified judge-made canons of state constitutional construction that are virtually identical to statutory interpretation canons . . .").

74. Schacter, *supra* note 73, at 155-64.

75. Philip Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 ANN. SURV. AM. L. 477; D. Zachary Hudson, Comment, *Interpreting the Products of Direct Democracy*, 28 YALE L. & POL'Y REV. 223 (2009).

construction should be used in interpreting both provisions.⁷⁶

Two state supreme court decisions illustrate how these differing approaches can be used to interpret mini-DOMAs. The Ohio Supreme Court in *State v. Carswell*⁷⁷ confronted the issue of whether Ohio's second mini-DOMA, enacted by initiative and codified in the state constitution, rendered unconstitutional a statute that criminalized domestic violence between unmarried couples. The mini-DOMA stated neither same-sex marriages nor legal relationships of unmarried people that approximated different-sex marriage would be recognized.⁷⁸ The court seemed to acknowledge that, at the least, there was tension between the language of the initiative and the statute, which arguably recognized a legal status similar to marriage. With bracing honesty, the court proceeded with the "presumption, notwithstanding the absence of any empirical data to support it, that the drafters of the proposed constitutional amendment and the voters who approved it knew of the domestic-violence statute and that its purpose is the protection of persons from acts of domestic violence."⁷⁹ The court continued that the initiative did not explicitly repeal the statute, and repeals by implication were not favored.⁸⁰ The court added a reference to the presumed intent of the voters who supported the initiative: it was purportedly based on the fear that courts could declare the statute unconstitutional under the state law, like the *Goodridge* decision in Massachusetts, and the "possible effect" of same-sex marriages celebrated in another state.⁸¹ A dissenting justice argued that the text of the initiative should control, and that the court

76. Michael M. O'Hear, *Statutory Interpretation and Direct Democracy: Lessons from the Drug Treatment Initiatives*, 40 HARV. J. ON LEGIS. 281, 322-37 (2003); John Copeland Nagle, *Direct Democracy and Hastily Enacted Statutes*, 1996 ANN. SURV. AM. L. 535, 544-45.

77. 871 N.E.2d 547 (Ohio 2007).

78. OHIO CONST. art. XV, § 11. This provision makes no reference to the invalidity of an extraterritorial marriage, unlike the earlier-enacted statutory mini-DOMA, which did. OHIO REV. CODE ANN. § 3101.01. The court made a brief mention of the latter provision, 871 N.E.2d at 551 n.1, but the decision did not turn in any way on the presence of the previous enactment.

79. 871 N.E.2d at 549-50.

80. *Id.* at 550.

81. *Id.* at 551 n.1. The reference was to an "Editor's Note" of a summary of the initiative prepared by a state legislative service. *Id.*

should not rest “on the supposed intent” of the voters.⁸²

The Michigan Supreme Court faced a different substantive issue but similar interpretative choices in *National Pride at Work, Inc. v. Governor*.⁸³ Michigan had passed a mini-DOMA by initiative⁸⁴ at the same time as Ohio, and the issue was whether it precluded public employees who were in same-sex relationships from receiving domestic partner benefits. Focusing closely on the “plain meaning” of the constitutional text at the time of the adoption of the initiative,⁸⁵ the court answered in the affirmative. The court discounted evidence during the campaign that the interest groups that supported the initiative had conceded that it only targeted same-sex marriage, not domestic partner benefits. Such evidence, the court held, could not be used to “contradict the unambiguous language of the constitution.”⁸⁶ A dissenting justice argued that if the common understanding of the initiative language was the touchstone, then an inquiry into the circumstances surrounding the adoption of the initiative was appropriate.⁸⁷ This was especially true because, in her view, the initiative was ambiguous with respect to its effect on domestic partner benefits.⁸⁸ Surveying a wide range of extrinsic sources, the dissent concluded that the intent of the initiative and its supporters was to focus solely on invalidating same-sex marriage, and not to address other matters.⁸⁹

What can these differing interpretative approaches tell us about

82. *Id.* at 556 (Lanzinger, J., dissenting). For a recent analysis of the similar mini-DOMA initiative in Wisconsin, passed at the same time as Ohio’s, drawing on the expressed intent of the supporters of the initiative and reaching the same conclusion as did the majority in *Carswell*, see *McConkey v. Van Hollen*, 783 N.W.2d 855, 869 & n.22 (Wis. 2010).

83. 748 N.W.2d 524 (Mich. 2008).

84. MICH. CONST. art. I, § 25.

85. 748 N.W.2d at 533.

86. *Id.* at 540.

87. *Id.* at 545 (Kelly, J., dissenting).

88. *Id.* at 548 n.34. (Kelly, J., dissenting).

89. *Id.* at 545-52 (Kelly, J., dissenting); see also Gluck, *supra* note 73, at 1807-08 & n.217 (discussing recent debates among Justices on the Michigan Supreme Court regarding the propriety of going beyond textual analysis, citing *National Pride at Work*, among other cases); Darrell A.H. Miller, *State DOMAs, Neutral Principles, and the Möbius of State Action*, 81 TEMP. L. REV. 967, 983-84 (2008) (discussing different approaches of the Ohio and Michigan cases).

the interpretation of mini-DOMAs concerning the recognition of extraterritorial marriages? Consider first the situation when a statutory mini-DOMA does refer to an extraterritorial same-sex marriage, and the subsequent initiative does not.⁹⁰ Under a strict textualist approach, like the Michigan court, the initiative should not be interpreted to apply to extraterritorial marriage. In contrast, an approach willing to go beyond the text and consider broader evidence of presumed intent—like that taken by the *Carswell* court—could reach the conclusion that, despite the silence, the initiative was meant to apply to such marriages.⁹¹ The latter approach might also lead to the conclusion that the initiative was meant to codify and constitutionalize the earlier (albeit somewhat differently worded) statute. Perhaps choosing an approach does not make much difference, because in either case it could be argued that the later initiative does not repeal the earlier statute, and they can have simultaneous legal effect. A venerable interpretative canon of construction, long-accepted by federal and state courts, is that implied repeals are not favored.⁹² The second wave of mini-DOMAs, by text and apparently by intent, did not purport to expressly repeal or limit the first wave of mini-DOMAs. The curious differences in the language between some of the mini-DOMAs in the same states are unlikely to be considered inconsistent.⁹³ To put the same point another way, the second wave of mini-DOMAs do not expressly (i.e., textually) preempt the first wave. The second wave do not appear to impliedly preempt the first wave either; though, to fully support that conclusion, one would presumably

90. See *supra* note 26 and accompanying text.

91. See, e.g., *Knight v. Superior Court*, 128 Cal. App. 4th 14, 20 (Cal. App. 2005) (interpreting, albeit with little discussion, California mini-DOMA, enacted by initiative and with no reference to extraterritorial marriage, to apply to such marriages); *Banks v. Jennings*, 920 N.E.2d 432, 437-38 (Ohio Ct. App. 2009) (Fain, J., concurring) (discussing public policy exception to choice of law rules, and suggesting in dicta that the mini-DOMA enacted by initiative in Ohio applies to an extraterritorial marriage).

92. *ESKRIDGE*, *supra* note 29, at 1081-1100 (discussing cases).

93. For another example of harmonization involving a mini-DOMA, see *Knight*, 128 Cal. App. 4th at 25 (statute establishing same-sex domestic partnerships did not conflict with mini-DOMA passed by initiative, since the unambiguous language of the latter, without needing resort to indicia of voter's intent, was only concerned with the "status of marriage, and not with the rights of obligations associated with marriage.").

need to consult extrinsic evidence in each state regarding the intent of the drafters and supporters (including voters) of those provisions.⁹⁴

Next, consider a state with only one mini-DOMA that makes no mention of extraterritorial same-sex marriages.⁹⁵ A strictly textual approach to interpretation would seem to exclude coverage of such marriages. A nontextualist approach could proceed on the basis that extrinsic sources of voters' intent might reveal that coverage of same-sex marriages from other states was intended. The presence or strength of such extrinsic evidence could vary among states. The lack of a prior, statutory mini-DOMA in this instance could make the task more difficult, since it could not be argued that the initiative was constitutionalizing a statute that did have explicit extraterritorial effect.

D. The Absence of Mini-DOMAS and Judicial Decisions as Clear Statements

In two states with no mini-DOMA, the highest courts have held that there is no state constitutional right to same-sex marriage.⁹⁶ In Rhode Island, one state with no mini-DOMA, the supreme court has not addressed the issue of the validity of same-sex marriage. How should these states apply the public policy exception to the celebration of marriage rule? Granted, it is axiomatic that a mere difference in the law is not enough to demonstrate that it would violate the "strong public policy" of the forum by recognizing a foreign marriage, invalid in the forum. But when the most authoritative judicial expositor of

94. A result different from that suggested in the text would follow if clear statement canons of construction with respect to extraterritorial effect of statutes, see *supra* notes 52-54 and accompanying text, were applied to state constitutional provisions (like the second wave of mini-DOMAs) as well. To be sure, we ordinarily do not apply canons of interpretation for statutes to constitutional provisions. But state statutes and constitutions (unlike most federal statutes and the U.S. Constitution) have many similarities with regard to length and detail, and state constitutions are far easier to amend than the federal constitution. Devins, *supra* note 53, at 1640-43. In these circumstances, it seems appropriate to construe state statutes and state constitutions in similar ways. *Cf.* WILLIAMS, *supra* note 72, at 330-34 (comparing interpretation of state constitutions and state statutes).

95. *See supra* note 27.

96. The states are New York (*Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006)) and New Jersey (*Lewis v. Harris*, 908 A.2d 196 (N.J. 2006)).

state law squarely holds (albeit in an intrastate context) that there is no right to same-sex marriage, it would seem to follow that there is a strong public policy in the forum. It is not as blunt as a mini-DOMA, explicitly referring to extraterritorial marriages, but traditionally a state supreme court decision can be given significant weight to determine if there is a strong public policy of the forum in place.⁹⁷

A different approach, giving apparent primacy to the presence or absence of a mini-DOMA, is *Godfrey v. Spano*.⁹⁸ Earlier, the New York Court of Appeals held there was no state constitutional right to same-sex marriage.⁹⁹ In *Godfrey*, the same court considered a challenge by taxpayers to executive orders by county officials, which for purposes of public benefits eligibility recognized same-sex marriages validly celebrated outside of New York. The plaintiffs argued that the earlier decision precluded recognition of extraterritorial same-sex marriages.¹⁰⁰ The majority found that the taxpayers lacked a basis under state law to challenge the orders and dismissed the case.¹⁰¹

A concurring opinion reached the merits of the taxpayers' challenge. It observed that the earlier decision did not address choice of law issues, and drew on the *May's Estate* case to determine if the foreign marriage could be recognized.¹⁰² It noted that many states had passed mini-DOMAs, addressing foreign same-sex marriages, but New York had not done so. Indeed, mini-DOMAs had "been introduced at every legislative session since 1998, but not one ha[d] been reported out of committee."¹⁰³ Since positive law was lacking as a basis for the exception, the concurring opinion acknowledged that the court could draw on "decisional law, as well as from 'prevailing social and moral attitudes of the community.'"¹⁰⁴ Thus, the concurring

97. In discussing the application of the public policy exception to the place of celebration rule, the Second Restatement seems to give the most jurisprudential weight to state statutes, but also refers to "judicial precedent" from the forum on point. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283, cmt. k (1971).

98. 920 N.E.2d 328 (N.Y. 2009).

99. *See supra* note 96.

100. *Godfrey*, 920 N.E.2d at 332-33.

101. *Id.* at 334-37.

102. *Id.* at 337-39 (Ciparick, J., concurring).

103. *Id.* at 338 n.1 (Caparick, J., concurring).

104. *Id.* at 339 (Caparick, J., concurring) (quoting *Intercontinental Hotels*

opinion argued that other developments in New York decisional and statutory law, such as recognition of same-sex partners as family members in various contexts, “express a public policy of acceptance that is simply not compatible with plaintiffs’ argument that the recognition” of a foreign same-sex marriage “is contrary to New York public policy.”¹⁰⁵

It’s tempting to agree with the result, if not necessarily the reasoning of the concurring opinion, in *Godfrey*. It can be argued that for public policy exception purposes, state statutes and judicial decisions should be treated the same.¹⁰⁶ A court decision concerned with intrastate issues will typically say nothing about its extraterritorial effect, and likewise will lack any clear statement to that effect. Ultimately, the concurring opinion in *Godfrey* reads the public policy exception too narrowly. For one thing, it gives too much weight to the failure of New York to pass a mini-DOMA. Another venerable maxim of statutory interpretation holds that the failure of introduced legislation, which would have addressed an issue, to be enacted should not be given weight, since bills may fail to pass for many reasons, not necessarily because of rejection of the merits of the proposal.¹⁰⁷

For another, it would drain the exception of vitality if (at least) state supreme court decisions do not count as a strong public policy. To critics of the exception, this would no doubt be an acceptable result. I do not agree. It is unreasonable to insist that court decisions “clearly state,” or state at all, their extraterritorial effect when that is not at issue in the case. In contrast, it is not unreasonable, as I argued above, to insist that legislators clearly state any extraterritorial effect of statutes normally assumed to be for domestic consumption. Legislators have broader drafting prerogatives than judges drafting decisions. Among other things, legislation is typically prospective in nature, while court decisions are typically retrospective.¹⁰⁸ This is not to say that a court cannot consider other factors when addressing the scope of the public policy exception in a particular case. The

Corp. v. Golden, 203 N.E.2d 210 (N.Y. 1964)).

105. *Id.* at 381 (Caparick, J., concurring).

106. Simson, *supra* note 5, at 318 n.13.

107. ESKRIDGE, *supra* note 29, at 1026.

108. *Id.* at 649-88 (discussing presumptive canons in favor of statutory prospectivity and judicial retroactivity).

concurring opinion in *Godfrey* discussed factors it considered relevant to the public stance of New York with respect to same-sex marriage, other than the decision against such marriages by the state high court. But in my view, the absence of a mini-DOMA alone is not determinative on the possibility of state courts applying the public policy exception, and state supreme court decisions against same-sex marriage alone can be a sufficient reason to invoke the exception.¹⁰⁹

CONCLUSION

My analysis is a relatively limited one, as I am only examining the legal regimes in those states that do not have a mini-DOMA that explicitly refers to extraterritorial same-sex marriages, or states without a mini-DOMA that have by court decision not recognized such marriages. Nor am I positing a general theory of choice of law for marriage recognition, or of the public policy exception. Nonetheless, after much ferment in the 1990s and 2000s, the various forms of mini-DOMAs appear to be here to stay, and appear unlikely to be modified in the near term. Courts, then, will inevitably face some of the jurisprudential issues I address. My principal contention is that mini-DOMAs should not be presumed to affect the recognition of extraterritorial same-sex marriages, unless they explicitly so state. In facing the question of recognizing foreign marriages, courts do not always slavishly follow the place of celebration rule. Instead, courts will likely consider (explicitly or implicitly) the citizenship of the couple at the time of the marriage,¹¹⁰ the identity of the party

109. In their analysis of conflict of laws and competitive federalism, O'Hara and Ribstein argue that state legislatures, not state courts, are better positioned to explicitly place limits on the party choice-of-law they advocate. O'Hara & Ribstein, *supra* note 51. Judges, they argue, are typically elected and, due to that and other reasons, may be subject to pressure to limit individual choice of law that may evade forum law. *Id.* at 1158, 1160. "Legislative determinations," they argue elsewhere, "are superior to judicial ones because they are more likely to provide notice to parties [and] are more likely to be subject to powerful interest group opposition if they are inefficient." *Id.* at 1196. This analysis would seem to exclude state court decisions from being considered as sources of the public policy exception to the place of celebration rule, as they suggest in their discussion of same-sex marriage. *Id.* at 1209-10. These arguments are not without force, but I think they overstate the supposed deficiencies of court decision-making regarding inefficient deference to forum law.

110. For example, my suggested analysis might turn on whether

contesting the validity of the marriage and for what reason, and the connections that the forum has with the marriage and the parties to it, among other things.¹¹¹ For recognition of same-sex marriages, the presence or absence of mini-DOMAs will be a factor as well, perhaps a determinative one, and the clear statement rule of construction here advocated is the best path for courts to take when applying those provisions.

APPENDIX: STATE MINI-DOMAS

The following is a compilation of the principle statutes and constitutional provisions in each state (if any), that, in some manner, forbid or invalidate same-sex marriage. Footnote 23 contains the sources for these provisions, and these sources also contain the language of the provisions. An asterisk follows the provision if it does *not* have language that can reasonably be construed as a clear statement against the validity of a same-sex marriage celebrated outside the enacting jurisdiction. I have also briefly quoted language from a provision that, in my view, does indicate that it was intended to have extraterritorial effect. Excluded are those states which had provisions at one point but have been superseded by state statutes (i.e., New Hampshire, Vermont) or supreme court decisions (i.e., Connecticut, Iowa, Massachusetts) establishing a right to same-sex marriage.

Alabama

ALA. CODE § 30-1-19 (LexisNexis 1998) (passed 1998) (refers to marriage “as a result of the law of any jurisdiction”).

ALA. CONST. art. I, § 36.03 (passed 2006).*

extraterritorial same-sex marriage recognition is sought in a state not recognizing such marriages, when the partners were not citizens of the state when they were married elsewhere, and hence were not trying to evade state law. MICHAEL H. HOFFHEIMER, *CONFLICT OF LAWS: EXAMPLES & EXPLANATIONS* 400 (2010) (discussing this situation).

111. For discussion of these factors in the context of recognizing same-sex marriage, see Kramer, *supra* note 32, at 1970-71; Linda Silberman, *Same-Sex Marriage: Refining the Conflict of Laws Analysis*, 153 U. PA. L. REV. 2195, 2214 (2005); Simson, *supra* note 5, at 337-51; Wolff, *supra* note 5, *passim*.

Alaska

ALASKA STAT. § 25.05.013 (2008) (passed 1996) (refers to marriage from “another state or foreign jurisdiction”).

ALASKA CONST. art. 1, § 25 (passed 1999).*

Arizona

ARIZ. REV. STAT. ANN. § 25-112 (2007) (passed 1996) (refers to marriages “in another state or country”).

ARIZ. CONST. art. XXX, § 1 (passed 2008).*

Arkansas

ARK. CODE ANN. §§ 9-11-107, 9-11-208 (2008) (passed 1997) (refers to marriages from “another state” or “a foreign jurisdiction”).

ARK. CONST. amend. LXXXIII, § 1 (passed 2004).*

California

CAL. FAM. CODE § 308.5 (West 2004 & Supp. 2010) (passed 2000).*

CAL. CONST. art. I, § 7.5 (passed 2008).*

CAL. FAM. CODE § 308 (West 2004 & Supp. 2010) (passed 2009) (refers to marriages outside of California).

Colorado

COLO. REV. STAT. § 14-2-104 (2010) (passed 2000) (refers to marriages contracted “outside this state”).

COLO. CONST. art. II, § 31 (passed 2006).*

Delaware

DEL. CODE ANN. tit. 13, § 101 (2009) (passed 1996) (refers to marriages obtained “outside the State”).

Florida

FLA. STAT. ANN. § 741.212 (West 2010) (passed 1997) (refers to marriages “entered into in any jurisdiction, whether within or outside the State of Florida”).

FLA. CONST. art. I, § 27 (passed 2008).*

Georgia

GA. CODE ANN. § 19-3-3.1 (West 2010) (passed 1996) (refers to

marriages issued “by another state or foreign jurisdiction”).

GA. CONST. art. 1, § 4, para. 1 (passed 2004) (refers to marriage from another “state or jurisdiction”).

Hawaii

HAW. REV. STAT. § 572-1 (2006) (passed 1994).*

HAW. CONST. art. I, § 23 (passed 1998).*

Idaho

IDAHO CODE ANN. § 32-209 (2006) (passed 1996) (refers to “marriages contracted without this state”).

IDAHO CONST. art. III, § 28 (passed 2006).*

Illinois

750 ILL. COMP. STAT. ANN. 5/213.1 (West 1999) (passed 1996).*

Indiana

IND. CODE ANN. § 31-11-1-1 (West 2008) (passed 1997) (refers to marriage solemnized in a “place” other than Indiana).

Kansas

KAN. STAT. ANN. § 23-115 (2007) (passed 1996) (refers to “marriages contracted without this state”).

KAN. CONST. art. 15, § 16 (passed 2005).*

Kentucky

KY. REV. STAT. ANN. § 402.040 (West 2006) (passed 1998) (refers to marriage “in another state”).

KY. CONST. § 233A (passed 2004).*

Louisiana

LA. CIV. CODE ANN. art. 89 (1999 & Supp. 2009) (passed 1988) (refers to marriage “contracted in another state”).

LA. CONST. art. XII, § 15 (passed 2004) (refers to marriage contracted “in any other jurisdiction”).

Maine

ME. REV. STAT. ANN. tit. 19-A, § 701 (1998 & Supp. 2009) (passed 1997) (refers to “marriages performed in another state”).

Maryland

MD. CODE ANN., FAM. LAW § 2-201 (LexisNexis 2006) (passed 1984).*

Michigan

MICH. COMP. LAWS ANN. § 551.271 (West 2005) (passed 1996) (refers to marriages “solemnized in another state”).

MICH. CONST. art. I, § 25 (passed 2004).*

Minnesota

MINN. STAT. ANN. § 517.03 (West 2006 & Supp. 2008) (passed 1997) (refers to marriages “recognized by another state”).

Mississippi

MISS. CODE ANN. § 93-1-1 (West 2007) (passed 1997) (refers to marriage “valid in another jurisdiction”).

MISS. CONST. art. 14, § 236A (passed 2004) (refers to “marriage in another state or foreign jurisdiction”).

Missouri

MO. ANN. STAT. § 451.022 (West 2003) (passed 2001) (same-sex marriage “will not be recognized for any purpose in this state even when valid where recognized”).

MO. CONST. art. I, § 33 (passed 2004).*

Montana

MONT. CODE ANN. § 40-1-401 (2009) (passed 1997).*

MONT. CONST. art. XIII, § 7 (passed 2004).*

Nebraska

NEB. CONST. art. I, §29 (passed 2000).*

Nevada

NEV. CONST. art. I, § 21 (passed 2002).*

North Carolina

N.C. GEN. STAT. § 51-1.2 (2009) (passed 1995) (refers to marriages “performed outside” of state).

North Dakota

N.D. CENT. CODE § 14-03-08 (2009) (passed 2000) (refers to marriages contracted “in another state”).

N.D. CONST. art. XI, § 28 (passed 2004).*

Ohio

OHIO REV. CODE ANN. § 3101.01 (West 2005) (passed 2004) (refers to marriages entered into “in any other jurisdiction”).

OHIO CONST. art. XV, § 11 (passed 2004).*

Oklahoma

OKLA. STAT. ANN. tit. 43, § 3.1 (West 2001) (passed 1996) (refers to marriage “performed in another state”).

OKLA. CONST. art. II, § 35 (passed 2004) (refers to marriages “performed in another state”).

Oregon

OR. CONST. art. XV, § 5a (passed 2004).*

Pennsylvania

23 PA. CONS. STAT. ANN. § 1704 (West 2010) (passed 1996) (refers to marriages “entered into in another state or foreign jurisdiction”).

South Carolina

S.C. CODE ANN. § 20-1-15 (1985 & Supp. 2009) (passed 1996).*

S.C. CONST. art. XVII, § 15 (passed 2006) (refers to marriages from another state).

South Dakota

S.D. CODIFIED LAWS § 25-1-1 (2004) (passed 1996).*

S.D. CONST. art. XXI, § 9 (passed 2006).*

Tennessee

TENN. CODE ANN. § 36-3-113 (2005) (passed 1996) (refers to marriages from “another state or foreign jurisdiction”).

TENN. CONST. art. XI, § 18 (passed 2006) (refers to marriage from another state).

Texas

TEX. FAM. CODE ANN. § 6.204 (West 2006) (passed 2003) (refers to marriage from “any other jurisdiction”).

TEX. CONST. art. I, § 32 (passed 2005).*

Utah

UTAH CODE ANN. § 30-1-4 (LexisNexis 2007) (passed 1996) (refers to marriage from “any other country, state, or territory”).

UTAH CONST. art. I, § 29 (passed 2004).*

Virginia

VA. CODE ANN. § 20-45.2 (2004) (passed 1997) (refers to marriage entered into “in another state or jurisdiction”).

VA. CONST. art. I, § 15-A (passed 2006).*

Washington

WASH. REV. CODE ANN. § 26.04.020 (West 2005) (passed 1998) (refers to marriage from “another jurisdiction”).

West Virginia

W. VA. CODE ANN. § 48-2-603 (LexisNexis 2004) (passed 2001) (refers to marriage “of any other state”).

Wisconsin

WIS. STAT. ANN. § 765.001(2) (West 2009) (passed 1959) (defines marriage as being between “a husband and wife”).

WIS. STAT. ANN. § 765.04 (West 2009) (passed 1959) (marriage evasion statute).

WIS. CONST. art. III, § 13 (passed 2006).*

Wyoming

WYO. STAT. ANN. § 20-1-101 (2009) (passed 1977).*

