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Unity, Sovereignty, and the Interstate Recognition of Marriage

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UNITY, SOVEREIGNTY, AND THE INTERSTATE RECOGNITION OF MARRIAGE

Mark Strasser*

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I. INTRODUCTION

In 1996, Congress passed the Defense of Marriage Act as an amendment to the Full Faith and Credit Clause. Members of Congress claimed that they were thereby preserving for the states the power to refuse to recognize their domiciliaries’ same-sex marriages that had been validly celebrated in other states. However, the proper interpretation of the Act is controversial, at least in part, because states already had the power to refuse to recognize such unions even before the Act was enacted.

Traditionally, a marriage void in the domicile is void in all of the states, even if validly celebrated elsewhere, and a marriage valid in the states of celebration and domicile at the time of the marriage is valid in all of the states. Yet, the relevant conflicts literature has not adequately explored whether these traditional rules regarding marriage recognition are constitutionally required or, instead, are a mere practice subject to revision by state legislatures or courts.

In the next few decades, it will become increasingly important to establish the conditions under which states may refuse to recognize marriages validly celebrated in other states because, during that period, some states will likely become more inclusive and other states less inclusive regarding who may marry whom. The less inclusive states may wish to refuse to recognize some of the marriages of individuals celebrated in the more inclusive states if, for example, those married couples either move to or pass through the less inclusive states.

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Ultimately, the United States Supreme Court will have to decide under which conditions, if any, a marriage valid in the domicile at the time of the marriage may nonetheless not be recognized in sister states. That determination may have profound implications both for individual families and for the kind of relationship that will exist between the states.

Part II of this Article discusses the traditional rules for the interstate recognition of marriage and the ways that the Defense of Marriage Act may have changed those rules. Part III discusses some of the interstate recognition of marriage issues not addressed, but implicitly raised, by the Defense of Marriage Act. This Article concludes that if the United States is to remain a country in which the states are integral parts of a single nation rather than become something more akin to a loose confederation of states, it will be important for the United States Supreme Court to recognize that marriages valid in the states of celebration and domicile at the time of the marriage must be recognized throughout the country.

II. THE DEFENSE OF MARRIAGE ACT AND ITS EFFECTS

In 1993, a plurality of the Hawaii Supreme Court held that the state’s same-sex marriage ban implicated equal protection guarantees under the Hawaii Constitution.1 The case was remanded to give the state an opportunity to establish that its same-sex marriage ban was narrowly tailored to promote compelling state interests. In 1996, the trial court held that the state had not met its burden,2 although that court stayed its own opinion pending state supreme court review.3

In the meantime, Congress passed the Defense of Marriage Act (“DOMA”),4 at least in part, because members of Congress feared that the domiciliaries of a state prohibiting same-sex marriage would nonetheless go to Hawaii, marry, and then return to their home state demanding that the marriage be recognized.5 The Act reads in relevant part:

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4 The Defense of Marriage Act was signed into law on September 21, 1996, see Mark Strasser, Loving the Romer Out for Baehr: On Acts in Defense of Marriage and the Constitution, 58 U. PITT. L. REV. 279, 279 (1997) [hereinafter Strasser, Loving the Romer], while Baehr v. Miike was not issued until Dec. 3, 1996, see Baehr, Civ. No. 91-1394, 1996 WL 694235, at *1.
5 See The Defense of Marriage Act: Hearings on S. 1740 Before the Senate Comm. on the Judiciary, 104th Cong. (1996) (statement of Sen. Hatch) (“Thus, it would not be surprising that persons who want to invoke the legitimacy of ‘marriage’ for their same-sex unions will travel to Hawaii to become ‘married.’ Then, they will return to their home states where it would be expected that the state recognize, as valid, a Hawaii marriage certificate.”); The Defense of Marriage Act: Hearings on S. 1740 Before the Senate Comm. on the Judiciary, 104th Cong. (1996) (statement of Rep. Largent) (“If the state court in Hawaii legalizes same-sex marriage, homosexual couples from other states around the country will fly to Hawaii to ‘marry.’[sic] These same couples will then go back to their respective states and argue that the Full Faith and
No state, territory or possession of the United States, or Indian
tribe, shall be required to give effect to any public act, record, or
judicial proceeding of any other State, territory, possession, or
tribe respecting a relationship between persons of the same sex
that is treated as a marriage under the laws of such other State,
territory, possession or tribe, or a right or claim arising from such
relationship. 6

The Act was passed pursuant to Article IV, section one of the United
States Constitution. 7 However, it is not at all clear that the Act passes constitutional
muster, since there are a variety of constitutional guarantees that it seems to
implicate. Even if one brackets Fourteenth Amendment protections, 8 DOMA seems
precluded by other provisions of the Constitution.

For example, DOMA seems to violate bill of attainder guarantees. 9 A brief
examination of the Congressional Record indicates that members of Congress
supported DOMA as a way of serving God and promoting morality. 10 Legislative
announcements of moral blameworthiness suggest punitive intentions. 11 A
"recognized test of punishment is strictly a motivational one: inquiring whether the
legislative record evinces a congressional intent to punish." 12 If, indeed, Congress
was attempting to impose legislative punishment on a disfavored group as a way of
manifesting its moral disapproval of that group, Congress will have passed a classic
bill of attainder in violation of section nine of Article I of the United States
Constitution. 13

Were DOMA unconstitutional solely because of bill of attainder
guarantees, then Congress might have been acting within its constitutional power
had it, for example, enacted a general law permitting states to refuse to recognize
marriages validly celebrated in other states. The argument that Congress was

Credit Clause of the U.S. Constitution requires their home state to recognize their union as a 'marriage.'  ).

7 See U.S. CONST. art. IV, § 1 (“And the Congress may by general Laws prescribe the Manner in
which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”).
8 For reasons to believe that the Fourteenth Amendment’s equal protection and substantive due
process guarantees protect same-sex marriage, see generally Mark Strasser, Domestic Relations
Jurisprudence and the Great, Slumbering Baehr: On Definitional Preclusion, Equal Protection, and
Fundamental Interests, 64 FORDHAM L. REV. 921 (1995) [hereinafter Strasser, Domestic Relations
Jurisprudence].
9 See, e.g., Mark Strasser, Ex Post Facto Laws, Bills of Attainder, and the Definition of Punishment:
On DOMA, the Hawaii Amendment, and Federal Constitutional Constraints, 48 SYRACUSE L. REV. 227
10 See id. at 253.
12 Id. at 478.
13 See U.S. CONST. art. I, § 9, cl. 3 (“No bill of Attainder or ex post facto Law shall be passed.”).
thereby attempting to impose a legislative punishment on a particular group would then be much more difficult to make. Yet, such a law would be so unwise that it would never be passed. The only reason that the passage of DOMA did not promote general outrage was that it burdened one particular unpopular group.\textsuperscript{14} If couples in general had to worry that their marriages might not be recognized in other states, there would be such an outcry that the Act would immediately be repealed.\textsuperscript{15}

Suppose, however, that Congress does not believe amending the Full Faith and Credit Clause to permit each state to decide for itself whether to recognize marriages validly celebrated in other domiciles would be unwise. Or, suppose that Congress believes the drawbacks of such an amendment would be outweighed by the benefits of promoting individual state sovereignty. A separate question is whether Congress would have the power to pass such a bill under the Full Faith and Credit Clause provision allowing “the Congress . . . by general Laws [to] prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.”\textsuperscript{16} Arguably, Congress only has the power to augment full faith and credit guarantees; if that is so, then DOMA is unconstitutional because it is instead designed to undermine those guarantees.\textsuperscript{17} Thus, when DOMA is challenged, the United States Supreme Court may well strike it down as an invalid exercise of congressional power.

Suppose that DOMA is declared unconstitutional for a reason other than that same-sex marriages are protected by the Fourteenth Amendment.\textsuperscript{18} It is not clear what effect that declaration would have, because it is not clear that the Act gave any powers to the states that they did not have already.\textsuperscript{19} It thus becomes important to understand how the system operates without DOMA, both because of

\begin{flushleft}
\textsuperscript{14} See Melissa Healy, No Wedding Bell Blues for Gay Couples, L.A. TIMES, Sept. 22, 1996, at A1 (“But the overwhelming popularity of the Defense of Marriage Act bears witness to the difficulties still facing gays and lesbians in their battle for acceptance.”); cf. Bell’s Gap R. Co. v. Pennsylvania, 134 U.S. 232, 237 (1890) (“clear and hostile discriminations against particular persons and classes, especially as are of an unusual character . . . might be obnoxious to the constitutional prohibition.”).
\end{flushleft}

\begin{flushleft}
\textsuperscript{15} Cf. Maurice J. Holland, The Modest Usefulness of DOMA Section 2, 32 CREIGHTON L. REV. 395, 404 (1998) (“it would be an intolerable situation in the United States if couples who were lawfully married in the state where they lived at the time of the marriage regularly faced the prospect of their marriages not being recognized should they subsequently move to a new domiciliary state under whose laws they would not have been issued a marriage license.”).
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\textsuperscript{16} U. S. CONST. art. IV, § 1.
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\textsuperscript{17} See, e.g., Paige E. Chabora, Congress’ Power under the Full Faith and Credit Clause and the Defense of Marriage Act of 1996, 76 NEB. L. REV. 604 (1997) (suggesting that Congress only has the power to augment full faith and credit).
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\textsuperscript{18} But see Strasser, Domestic Relations Jurisprudence, supra note 8 (suggesting that Fourteenth Amendment protections might in fact pose a constitutional obstacle to such legislation).
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\textsuperscript{19} See Strasser, Loving the Romer, supra note 4, at 293 (suggesting that “it is unclear how this Act changes anything with respect to which marriages are recognized—those states given the option by DOMA to refuse to recognize same-sex marriages already have that option and those states not having that option will not have suddenly acquired it though DOMA.”).
\end{flushleft}

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the Act's constitutional vulnerability and because of its narrow focus.\textsuperscript{20}

\section*{A. Interstate Recognition of Marriage Jurisprudence}

Suppose that one state, e.g., Vermont, decides to recognize same-sex marriages. Suppose further that a same-sex couple domiciled in Vermont marries, challenges DOMA, and that DOMA is struck down as an invalid exercise of congressional power. It might seem that the domiciliaries of a different state prohibiting such unions, e.g., Arizona,\textsuperscript{21} might then go to Vermont, marry, and then demand that the state of Arizona recognize the marriage as a matter of full faith and credit.

Yet, there is good reason to believe that Arizona would not be forced by the Full Faith and Credit Clause to recognize such a union even were DOMA declared unconstitutional—a brief consideration of the Restatement (First) and the Restatement (Second) of the Conflicts of Law suggests that Arizona would be quite free to refuse to recognize that marriage even without congressional authorization. Indeed, some DOMA proponents suggested that DOMA did not change current law but merely affirmed current practice,\textsuperscript{22} thereby implying that even if the Act were held unconstitutional, the states would still have the power not to recognize the marriages it found so offensive.

The \textit{First Restatement} reads in relevant part:

\begin{quote}
A marriage which is against the law of the state of domicil of either party, though the requirements of the law of the state of celebration have been complied with will be invalid everywhere [if it involves a] marriage of a domiciliary which a statute at the domicil makes void even though celebrated in another state.\textsuperscript{23}
\end{quote}

Thus, in the case discussed above, the Arizona domiciliaries might have gone to Vermont where it was legally permissible to marry a same-sex partner. Further, they might in fact have married according to the requirements of local law. However, because the marriage was void in the domicile (Arizona), the marriage would be null and void, notwithstanding Vermont's recognition of such unions.

The \textit{Second Restatement} suggests that a "marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which

\begin{footnotes}
\footnotetext{20}{For example, the Act simply does not address whether states are permitted to refuse to recognize different-sex marriages validly celebrated marriages in other states which are nonetheless strongly offensive to local policy.}
\footnotetext{21}{See ARIZ. REV. STAT. ANN. § 25-101(c) (West 1999) ("Marriage between persons of the same sex is void and prohibited.").}
\footnotetext{22}{See 142 CONG. REC. S4870 (daily ed. May 8, 1996) (statement of Sen. Nickles) ("This effort hardly seems to be news as it reaffirms current practice and policy.").}
\footnotetext{23}{See \textit{RESTATMENT (FIRST) OF CONFLICT OF LAWS} § 132 (d) (1934).}
\end{footnotes}
had the most significant relationship to the spouses and the marriage at the time of
the marriage."\(^{24}\) The state with the most significant contacts in this example would
be Arizona, since it would be the domicile during the entire period.\(^{25}\) According to
the Second Restatement as well, the marriage would be void, notwithstanding its
having been validly celebrated in Vermont.

The claim here is not that whenever a domicile prohibits a marriage, the
union will not be recognized even if validly celebrated elsewhere. On the contrary,
many marriages prohibited in the domicile will nonetheless be recognized both in
the domicile and elsewhere if validly celebrated in another state.\(^{26}\) The state has a
variety of interests in promoting marriages validly celebrated elsewhere,\(^{27}\) such as
protecting the predictability of marriages\(^{28}\) and the security and stability in
marriages.\(^{29}\) Further, it has an interest in ensuring the legitimization of children,
protecting party expectations, and promoting interstate comity.\(^{30}\) For these reasons
and others, the law has a marked tendency "to sustain marriages, not to upset
them,"\(^{31}\) and thus states will recognize a variety of marriages celebrated elsewhere,
even if those celebrations were prohibited locally.

Suppose that a particular state suggests that same-sex marriages are
prohibited \textit{rather} than void.\(^{32}\) Suppose further that a same-sex couple goes to
Vermont, marries, and then returns to the state, demanding that their marriage be
recognized. If the domicile had adopted the First Restatement and had nonetheless
made the marriage prohibited rather than void (thereby indicating that the marriage
was not particularly offensive to public policy), then the marriage should be

\(^{24}\) \textit{Restatement (Second) of Conflicts of Laws} § 283 (1971).

\(^{25}\) \textit{See In re} Estate of Lenherr, 314 A.2d 255, 258 (Pa. 1974) ("Since both Leo and Sarah were
residents of Pennsylvania before and after their West Virginia marriage, we have no trouble concluding that
Pennsylvania has the most significant relationship to the spouses and the marriage.").

\(^{26}\) \textit{See}, e.g., \textit{In re} Kinkade's Estate, 57 N.W.2d 628 (Minn. 1953) (upholding validity of prohibited
marriage). Sometimes, states will uphold marriages void in the domicile if validly celebrated elsewhere. \textit{See},
e.g., \textit{State v. Graves}, 307 S.W.2d 545 (Ark. 1957) (upholding minor marriage valid in Mississippi,
notwithstanding its being void in Arkansas); \textit{In re} Estate of Loughmiller, 629 P.2d 156 (Kan. 1981)
(upholding marriage of first cousins validly celebrated in Colorado, notwithstanding that such marriages were
void in Kansas).

\(^{27}\) \textit{See Eugene F. Scopes \& Peter Hay, Conflict Of Laws} § 13.8 (2d ed. 1992) (discussing the
"strong public policy . . . for upholding the validity of marriage wherever possible").


\(^{29}\) \textit{See In re} Estate of Murnion, 686 P.2d 893, 899 (Mont. 1984).

\(^{30}\) \textit{See Joseph W. Hovermill, A Conflict of Laws and Morals: The Choice of Law Implications of


\(^{32}\) \textit{See In re} Kinkade's Estate, 57 N.W.2d 628, 634 (Minn. 1953) (suggesting that the legislature "has
carefully distinguished between prohibited marriages which are absolutely void, prohibited marriages which
are void only from the time they are adjudged nullities, and prohibited marriages which shall not be adjudged
nullities.").
recognized. By the same token, if the state had adopted the Second Restatement and declared the marriage to be prohibited rather than void to indicate that the union was not particularly offensive to local policy, then the marriage should be recognized.

Marriages validly celebrated in other states and not declared void by (or offensive to an important public policy of) the domicile should be recognized in all of the states. In Loughran v. Loughran the Court suggested that "[m]arriages not polygamous or incestuous, or otherwise declared void by statute, will, if valid by the law of the state where entered into, be recognized as valid in every other jurisdiction." The Court thereby indicated the importance of the difference between a marriage declared void rather than declared merely prohibited by the domicile. Indeed, the Court specifically addressed a mere statutory prohibition, suggesting that it would only be given "territorial effect" and that the court would not "invalidate a marriage solemnized in another state in conformity with the laws thereof."

DOMA does not distinguish between void and merely prohibited marriages and does not distinguish between domiciles and nondomiciles. Insofar as the Act was designed to allow Arizona, for example, to refuse to recognize a marriage that was void under local law, notwithstanding the marriage's having been celebrated elsewhere, the Act does nothing, because it allegedly confers a power that the state already had. However, insofar as the Act confers upon a domicile the power to refuse to recognize a marriage which is prohibited rather than void and which is validly celebrated elsewhere, the Act contradicts the lesson of Loughran.

Not only does the Act not distinguish between void and prohibited marriages, it also does not distinguish between states where the parties are domiciled and other states. For instance, a Georgia law states that same-sex marriages validly celebrated in another jurisdiction will not be recognized. The

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33 A separate question would be whether the state had passed an Evasion Statute which suggested that all marriages contrary to local law would not be recognized, even if the marriage was merely prohibited. See, e.g., Wis. STAT. ANN. § 765.04(1) (West 1993) ("If any person residing and intending to continue to reside in this state who is disabled or prohibited from contracting marriage under the laws of this state goes into another state or country and there contracts a marriage prohibited or declared void under the laws of this state, such marriage shall be void for all purposes in this state with the same effect as though it had been entered into in this state."). The Commissioners have withdrawn approval of the Uniform Marriage Evasion Act. See UNIF. MARRIAGE & DIVORCE ACT § 210 cmt., 9A U.L.A. 194.

34 But see Wis. STAT. ANN. § 765.04(1) (West 1993) and supra note 33 discussing evasion acts.

35 292 U.S. 216 (1934).

36 Id. at 223.

37 Id.

38 Id.

39 See Ga. CODE ANN. § 19-3-3.1(b) (1999) ("Any marriage entered into by persons of the same sex pursuant to a marriage license issued by another state or foreign jurisdiction or otherwise shall be void in this state"). See also Ala. CODE § 30-1-19(e) (Supp. 1998) ("The State of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of
statute does not qualify this refusal by saying, for example, that the marriages of Georgia domiciliaries at the time of the marriage will not be recognized or even that the same-sex marriages of individuals who subsequently became Georgia domiciliaries will not be recognized. Rather, the law bars recognition of all same-sex marriages no matter where the individuals were or are domiciled and no matter how long the individuals have been married.

It is perhaps underappreciated just how significant a state’s refusal to recognize a marriage might be. Not only might this induce individuals to turn down attractive job offers, but it might have health- or life-affecting consequences. Suppose, for example, that residents of Vermont entered into a same-sex marriage (where such marriages were permitted) and then went to Georgia to honeymoon. Suppose further that it was important to establish that the two individuals were in fact married during the honeymoon, e.g. because there was an auto accident and it was necessary to get consent from a family member so that a medical procedure might be performed. The spouse according to Vermont law would be treated as a legal stranger to the victim by Georgia law and thus might be unable to give consent to the required medical procedure.

A number of issues should not be conflated. One issue is whether the domicile at the time of the marriage can refuse to recognize a marriage that, while void in the domicile, is nonetheless recognized in a sister state. It has long been established that domiciles are permitted to refuse to recognize such a marriage, notwithstanding its having been validly celebrated elsewhere. A second issue is whether a subsequent domicile can refuse to recognize a marriage valid in the states of celebration and domicile at the time of the marriage. This is unclear, although a number of arguments might be offered to establish that subsequent domiciles do not have such a right. A third issue is whether a state that has never been the couple’s domicile may, nonetheless, refuse to recognize a marriage validly celebrated in another state that has been the couple’s domicile all of their lives. The Court has suggested that this is impermissible, although DOMA seems to permit even this type of marriage recognition refusal.

Before the passage of DOMA, the only states that were thought to have any interest in the invalidation of a marriage were the states of domicile and celebration at the time of the marriage. Indeed, the validity of a marriage has

any jurisdiction regardless of whether a marriage license was issued.”); MISS. CODE ANN. § 93-1-1(2) (Supp. 1998) (“Any marriage between persons of the same gender that is valid in another jurisdiction does not constitute a legal or valid marriage in Mississippi.”).

See infra notes 54-62 and accompanying text.

See Strasser, Loving The Romer, supra note 4, at 308 (discussing right to give input regarding medical treatment).


Here, the discussion is whether a marriage validly celebrated in another state must be recognized. A different analysis would be appropriate if the domicile at the time of the marriage were another country, but that is beyond the scope of this article.

See RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 132 (1934); RESTATEMENT (SECOND) OF

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traditionally been viewed as a choice-of-law question to be determined by the law of either of those states.\textsuperscript{45} Thus, a marriage valid in the states of celebration and domicile would be recognized in the rest of the states. Insofar as DOMA was not designed to change current law or practice,\textsuperscript{46} it should be interpreted to permit a domicile at the time of the marriage to refuse to recognize a marriage validly celebrated elsewhere, but should \textit{not} be interpreted to allow a state that was neither the state of celebration nor of domicile at the time of the marriage to refuse to recognize a marriage valid in the domicile at the time the marriage was contracted.

III. CONSTITUTIONAL LIMITS ON STATES' RECOGNITION POLICIES

The issues at stake may be obscured because they have arisen in the context of same-sex marriage. First, there is the difficulty in offering the correct interpretation of DOMA.\textsuperscript{47} Second, because no state (at least at the time of this writing) has recognized same-sex marriages, those thinking about these issues may be confident that the problem discussed here will not arise, mistakenly believing that lesbians and gays are so "different" from everyone else\textsuperscript{48} that the only time the issue would be presented would be if same-sex couples validly married in one state wished to have their marriages recognized in a state barring such unions.\textsuperscript{49}

Suppose then that the issue of same-sex marriage is taken off the table, e.g., because the Court declares that their prohibition violates the Equal Protection Clause of the Fourteenth Amendment and so must be recognized in all of the states or, perhaps, because no state will recognize such unions and, thus, the question whether one state would have to recognize a same-sex marriage validly celebrated in another domiciliary state would simply not arise. The issue at hand would still remain. Even if one brackets the issue of same-sex marriage, the Court will

\footnotesize{\textsuperscript{45} A third state’s law might be at issue if, for example, the couple was planning to be domiciled in that third state after the marriage. However, that is because this third state would then be viewed as having the most significant relationship to the couple \textit{at the time of the marriage}. See Strasser \textit{For Whom Bell Tolls}, supra note 42, at 352 (relevant states for determining validity of marriage would only include the states of celebration and domicile at the time of the marriage and, possibly, the state where the couple plans to live immediately after the marriage).

\textsuperscript{46} See 142 CONG. REC. S4870.

\textsuperscript{47} See Strasser, \textit{Loving The Romer}, supra note 4, at 304-06 (discussing some of the difficulties in interpreting DOMA).

\textsuperscript{48} A different claim is that lesbians and gays are subjected to a double standard. See Mary C. Dunlap, \textit{Gay Men and Lesbians Down by Law in the 1990's USA: The Continuing Toll of Bowers v. Hardwick}, 24 \textit{GOLDEN GATE U.L. REV.} \textbf{1}, 31 (1994) ("There can be little doubt that there is a higher standard in this system, approaching a double one, for gay men, lesbians, bisexual and transgendered persons who publicly identify our sexualities."); see also Stephen Macedo, \textit{Homosexuality and the Conservative Mind}, 84 GEO. L.J. 261, 277 (1995) (discussing a "double standard of permissiveness toward straights and censoriousness toward gays who engage in acts that are essentially the same"). Here, it is merely asserted that interstate recognition issues will also arise for different-sex couples.

\textsuperscript{49} Cf. Holland, supra note 15, at 404 (suggesting that this is not a problem if one brackets the issue of same-sex marriages).}
eventually be forced to decide the conditions under which subsequent domiciles (and nondomiciles) are permitted not to recognize marriages valid in the domicile at the time of the marriage.

A. First Cousin Marriages

States differ greatly in whether they will allow first cousin marriages. Some states treat them as null and void, some prohibit them, and some permit them. Of those prohibiting such unions, some, but not all, states will recognize a marriage of first cousins if validly celebrated elsewhere. The question of interest here is whether a subsequent domicile could refuse to recognize a marriage of first cousins that had been considered valid in the domicile at the time of the marriage.

One difficulty in interpreting the relevant case law to resolve this issue is that many of the reported cases in which such marriages have been challenged involved: (1) individuals domiciled in a state in which such marriages were not permitted, (2) who went to a state permitting such marriages, and (3) who then went back to their domicile to live. The individuals knew that their marriage was prohibited in the domicile and went to a different state in the hopes that they might thereby be able to contract a marriage that their domicile would nonetheless recognize. The individuals were on notice at the time that they contracted the marriage that their union might not be recognized in the state in which they planned to live, but decided to take a chance by marrying elsewhere.

A much different case is presented if the individuals have every reason to believe that their marriage is valid in the domicile at the time of the marriage. Suppose that two first cousins (Couple A) marry in their own domicile where such marriages are recognized. At the time that the marriage is celebrated, these individuals have the justified expectation that their union will be legally recognized, since local law permits such marriages to be contracted and the couple plans on remaining in their domicile.

Or, suppose that two first cousins (Couple B) are domiciled in a state that, while prohibiting the celebration of such a marriage locally, will nonetheless

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53 Compare Mortenson v. Mortenson, 316 P.2d 1106, 1107 (Ariz. 1957) (first cousins domiciled in Arizona did not contract valid marriage notwithstanding that marriage having been valid where celebrated) with Mazzolini v. Mazzolini, 155 N.E.2d 206, 207 (Ohio 1958) (first cousin marriage of Ohio domiciliaries valid because valid where celebrated).
recognize the union as long as it is celebrated in a state where such marriages are permitted. The couple goes to a state where such marriages may be celebrated, marries, and then returns to their domicile to live. At the time that the marriage is celebrated, these individuals also have the justified expectation that their union will be legally recognized because local law recognizes such marriages if celebrated in a state permitting such unions, the couple in fact celebrated their marriage in such a state, and the couple plans on remaining in their current domicile.

Suppose that either of these couples were to move to a new state a few years later for an unanticipated job opportunity. Suppose further that the new state not only treats first cousin marriages as void, but also refuses to recognize first cousin marriages even if valid in the domicile at the time of the marriage. The question is whether the new state could treat the marriage of Couple A or Couple B as void, notwithstanding the couple’s legitimate expectations, the contracts that they might have entered into as a couple, the property that they might have acquired as a couple, the children that they might have produced as a couple, etc.

Were the subsequent domicile to have adopted the First Restatement or the Second Restatement position on the recognition of marriages, its own law would suggest that the marriage of either couple was valid, since its own law would require the recognition of all marriages valid in the states of celebration and domicile at the time of the marriage. However, let us assume that the state had created an exception within its own law suggesting that first cousin marriages would not be recognized even if validly celebrated in the domicile at the time of the marriage. The question would be whether such a statutory exclusion of first cousin marriages would pass constitutional muster.

B. On Due Process and the Right to Travel

At least two different arguments might be offered to suggest that the first cousin exception described above would offend constitutional guarantees. First, the state’s applying its own law to determine the validity of a marriage validly celebrated in the domicile at the time of the marriage might seem “fundamentally

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54 Arguably, both Delaware and Arizona currently have such statutes in effect. See 13 Del. Code Ann. tit. 13 § 101(a) (1989) (“A marriage is prohibited and void between a person and his or her ancestor, descendant, brother sister, uncle, aunt, niece, nephew, first cousin or between persons of the same gender.”); Del. Code Ann. tit. 13 § 101(d) (1989) (marriage obtained or recognized outside the State between persons prohibited by subsection (a) of this section shall not constitute a legal or valid marriage within the state). See also Ariz. Rev. Stat. Ann. § 25-101(A), (B) (West 1991) (marriages between first cousins void unless both are over 65 or at least one has received approval from a superior court judge where proof has been presented to the judge that one of the cousins is unable to reproduce); Ariz. Rev. Stat. Ann. § 25-112(A) (West 1991) (marriages valid by the laws of the place where contracted are valid in this state, except marriages that are void and prohibited by § 25-101).

55 See Strasser, For Whom Bell Tolls, supra note 42, at 342-52 (analyzing the Restatement positions on marriage recognition in subsequent domiciles).

56 See sources cited supra note 54 (suggesting that certain state laws might be read to include such an exception).
unfair,”\textsuperscript{57} and since the prevention of unfairness is a “central concern”\textsuperscript{58} when the Court reviews choice-of-law decisions under the Due Process Clause,\textsuperscript{59} the application of the subsequent domicile’s laws would seem to violate due process guarantees. Since the move to the new state was not even foreseeable at the time the marriages were contracted—the jobs had not even been in existence at that time—application of the law of the new domicile would undermine the justified expectations of the parties and, arguably, would be so unfair that it would be unconstitutional.\textsuperscript{60}

Perhaps it would be thought that the couples described above would simply have been given a choice: (1) remain in their domicile at the time of the marriage or, perhaps, only go to other states that would recognize their unions, or (2) go to a new state where a great job opportunity existed with the understanding that their marriages would not be recognized in the new state. Yet, this would seem to be the kind of forced choice which right to travel guarantees prohibit states from imposing.\textsuperscript{61} Thus, arguably, federal constitutional guarantees might prevent one state from refusing to recognize a first cousin marriage valid in a sister domiciliary state at the time the union was celebrated.\textsuperscript{62}

\textbf{C. The Effect of Future Marital Restrictions}

Above arguments notwithstanding, it might be argued that first cousin marriages valid in the domicile at the time of celebration nonetheless need not be recognized in subsequent domiciles. The \textit{Loughran} Court suggested that marriages which were not polygamous or incestuous would be recognized everywhere if valid in the state of domicile at the time of the marriage.\textsuperscript{63} Yet, because the first cousin marriages discussed above might seem to fall into the incestuous marriage category mentioned by the Court, it might be argued that there is a narrow exception recognized by the Supreme Court that permits states to refuse to recognize these marriages, notwithstanding that they were valid in the domicile at the time that they were contracted.

It is simply unclear whether the Court would appeal to an implicit incest

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\textsuperscript{58} Id. (Stevens, J., concurring).

\textsuperscript{59} See id. (Stevens, J., concurring); See also id. at 333 (Powell, J., dissenting) (parties’ reasonable expectations is the touchstone of choice of law).

\textsuperscript{60} See Strasser, \textit{For Whom Bell Tolls}, supra note 42, at 375-76 (1998).


\textsuperscript{62} Here, it is assumed that the domicile is a sister state rather than, for example, a foreign country, since the constitutional guarantees discussed here might not be applicable in the latter context. See Strasser, \textit{For Whom Bell Tolls}, supra note 42, at 371-74 (suggesting that the standard for whether to recognize a marriage celebrated in a foreign country is too weak and thus is inapplicable if a marriage valid in a sister domiciliary state is at issue).

\textsuperscript{63} See Loughran v. Loughran, 292 U.S. 216, 223 (1934).
exception in the Constitution, perhaps by claiming that such an exception has been long recognized historically.\textsuperscript{64} However, the historical exception for incest did not include \textit{every} classification under the incest restriction; rather, it only included "marriages in the direct lineal line of consanguinity . . . [or] those contracted between brothers and sisters."\textsuperscript{65} For example, the Supreme Judicial Court of Massachusetts recognized a marriage between an aunt and her nephew that had been validly celebrated in a different domicile, notwithstanding that such a marriage could never have been celebrated in Massachusetts.\textsuperscript{66}

Suppose that the U.S. Supreme Court were to read into the Constitution a \textit{broad} incest exception suggesting that subsequent domiciles had no obligation to recognize incestuous unions (defined according to the subsequent domicile’s law), even if those unions were valid in the domicile at the time of the marriage, notwithstanding that the historical incest exception for marriages validly celebrated in other domiciles only involved a \textit{narrow} exception for certain incestuous relations.\textsuperscript{67} Nonetheless, the question would still be whether states are permitted to refuse to recognize marriages that (1) are neither polygamous nor incestuous and (2) are recognized in the states of celebration and domicile at the time of the marriage.

Recently, there has been a movement in some of the states to make it more difficult for individuals to secure a divorce.\textsuperscript{68} Some states have passed covenant marriage laws, which allow individuals to enter into "covenant marriages," a type of marital union that is more difficult to dissolve than are the more standard marriages.\textsuperscript{69} However, the response to this newly created option has not been as great as covenant marriage proponents might have hoped, since relatively few couples have decided to avail themselves of the opportunity to more severely limit the conditions under which they might divorce.\textsuperscript{70}

Suppose that some states that were disappointed by the results when individuals are given the option to enter into covenant marriages instead decided to


\textsuperscript{66} See id. at 453-54.

\textsuperscript{67} See State v. Ross, 76 N.C. 242, 246 (1877) (discussing the "few cases" which all states agree are incestuous, and the importance for recognition purposes if the marriage at issue is not one of those cases).


\textsuperscript{69} For the grounds of divorce for covenant marriages see \textit{ARIZ. REV. STAT. ANN.} § 25-903 (West 1999); \textit{LA. REV. STAT. ANN.} § 9:307 (West 1999).

\textsuperscript{70} See Brian Ford, "\textit{I Really Do}," \textit{TULSA WORLD} (Okla.), Feb. 22, 1999, at 1 ("The New Orleans Times-Picayune reported that a year after its enactment, only 450 to 500 couples had entered into covenant marriages, compared with 40,000 who entered into standard marriages."); David Madrid, \textit{Few Enter into Covenants: There Were Only 12 Such Marriages in Pima County in the Past Year}, \textit{TUCSON CITIZEN}, Sept. 13, 1999, at 1A ("More than 30,000 couples have been married in Arizona in the year since the law took effect but only about 150 have chosen to enter a covenant marriage.").
change the grounds upon which any divorce may be granted, limiting divorces to those which would be granted were a covenant marriage at issue. Such a law would raise a number of issues and it is important that these different issues not be conflated.

For example, one issue is whether individuals married in such states could then become domiciled in other states and thereafter take advantage of the latter state's more liberal grounds for divorce, although this issue does not seem particularly difficult to resolve. The United States Supreme Court explained in Williams v. North Carolina that "when a court of one state acting in accord with the requirements of procedural due process alters the marital status of one domiciled in the state by granting him a divorce," that decree will not "be excepted from the full faith and credit clause merely because its enforcement or recognition in another state would conflict with the policy of the latter." Thus, a couple who enters into a covenant marriage in one state, changes domicile, and then secures a divorce on no-fault grounds in their new domicile would have a valid judgment of divorce subject to full faith and credit guarantees, even in the state in which the parties had originally married.

Yet, the Williams Court was merely discussing whether individuals would be able to divorce in other states and whether that divorce would have to be recognized in every state. A separate issue would be whether a state would have to recognize a second marriage validly celebrated in another domicile if, for example, the parties' first marriages had been dissolved on no-fault grounds.

The issue posed here is one that was suggested, but not specifically addressed, when Congress was deciding whether to pass DOMA. When testifying before a House subcommittee about the lack of merit of the proposed bill, Congresswoman Schroeder suggested that if Congress were really worried about protecting the family, then it would consider an amendment which said that "a person's second or third or fourth marriage will not be recognized for purposes of Federal law unless the prior marriages were terminated by a court proceeding that takes into account the fault factors that led to the dissolution of the marriage." Congresswoman Schroeder's remarks were aimed at a different part of the Act that read:

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See Mark Strasser, Baker and Some Recipes for Disaster: On DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence, 64 Brook. L. Rev. 307, 345 (1998) [hereinafter Strasser, Recipes For Disaster] ("Currently, states are not required to refuse to grant no-fault divorces to domiciliaries who had celebrated a covenant marriage in Louisiana.").


Id. at 303.

Id.

A separate issue would be whether the new domicile as a matter of its own public policy would only allow the couple to secure a divorce on the grounds permitted by the other state's covenant marriage law. See Strasser, Recipes For Disaster, supra note 71, at 346.

In determining the meaning of any Act of Congress, or any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.\footnote{Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified as amended at 1 U.S.C. § 7 (1996)).}

The issue of concern here is not which marriages will be recognized for federal purposes but, instead, which marriages need not be recognized by a state if contrary to local policy. Suppose, for example, that a state were to modify Congresswoman’s Schroeder’s suggestion by changing its own marriage recognition laws. The state would require that fault have been taken into account in prior dissolutions in order for any subsequent marriages to be recognized by that state. Or, perhaps, the state would refuse to recognize the subsequent marriage of anyone who had been divorced and had not been found by the relevant court to have been the innocent, injured spouse in that divorce proceeding. If asked to justify its modification to its marriage recognition statute, the state might claim that it had an important or perhaps compelling interest in promoting long-term marriages and that it was adopting this measure (in addition to its getting rid of no-fault divorce)\footnote{See Martha Heller, Note, \textit{Should Breaking-Up Be Harder to Do?: The Ramifications a Return to Fault-Based Divorce Would Have Upon Domestic Violence}, 4 VA. J. SOC. POL’Y \& L. 263, 263-64 (1996) (discussing proposed modifications to state no-fault divorce laws).} as a way of promoting that interest.

It is of course \textit{not} argued here that getting rid of no-fault divorce and adopting the non-recognition rule described above would be a wise legislative step.\footnote{See Lynn D. Wardle, \textit{No-Fault Divorce and the Divorce Conundrum}, 1991 B.Y.U. L. REV. 79, 108 (“Few would argue against the modern notion that fault need not be a part of every divorce proceeding, especially when the divorcing couple has no desire to allege and prove fault.”).} Nonetheless, assuming that it would be constitutionally permissible for a state to refuse to permit no-fault divorces within its jurisdiction,\footnote{No-fault divorce was not adopted in any state until the 1960’s. See Heller, supra note 78, at 263 (“A quarter-century ago, California launched America’s no-fault divorce revolution when, in 1969, then-Governor Ronald Reagan signed the first trend-setting no-fault divorce law.”). The Court might suggest that because the right to a no-fault divorce was neither implicit in the concept of ordered liberty nor deeply rooted in this Nation’s history and tradition, \textit{see Bowers}, 478 U.S. at 191-92, it would be permissible for a state to repeal its no-fault provisions. Notwithstanding that the \textit{Bowers} test does not account for those rights that have been recognized, \textit{see Strasser}, \textit{Domestic Relations Jurisprudence}, supra note 8, at 970-73, the Court nonetheless sometimes employs it when wishing to uphold a particular statute.} a separate question would be whether a state could claim that the second marriages of those who had secured no-fault divorces elsewhere violated the state’s important public policy and thus would not have to be recognized.

The state’s non-recognition rule is \textit{not} what was at issue in \textit{Williams}—this state would \textit{not} be refusing to give full faith and credit to a divorce decree issued in another state, but would merely be refusing to recognize any subsequent marriages...
of a divorced individual unless certain requirements had been met. The state might claim that its non-recognition policy would induce individuals to have their innocence recognized in court (for fear that otherwise they would be unable to remarry), thereby promoting "justice" by inducing couples to make clear who in fact had been at fault and thus subjecting the "guilty" party to possible public humiliation. Further, such a policy might induce those with "faultless" partners to try harder to make their marriages work.  

Certainly, many would claim that this would be unwise legislation since it might result in more domestic abuse, either because it would be harder for the abused spouse to get a divorce, and thus the abusive relationship would last longer, or because the necessity of establishing the abuser's guilt in court might in fact exacerbate the violence that might occur in the home. However, the state might reject that claim or, perhaps, might recognize the possibility of increased violence resulting from such laws but might nonetheless deem that an acceptable risk.

Perhaps the particular second marriage law discussed above would not be adopted. Perhaps, instead, only the second marriages of individuals found to be at fault in their first marriages would be subject to non-recognition. In any event, it seems plausible to believe that states will adopt a variety of new rules specifying which additional marriages will not be recognized, regardless of where those marriages had been celebrated or how many years they had already been in existence. Unless states are constitutionally precluded from refusing to recognize either any marriage valid in the states of celebration or domicile at the time of the marriage or, perhaps, any nonpolygamous, nonincestuous marriages valid in the states of celebration and domicile at the time of the marriage, a whole host of statutory exceptions will likely be offered, accompanied by the claim that the recognition of the marriages at issue would offend local policy.

The seriousness of the difficulty pointed to here should not be underestimated. While there may be some constitutional checks on the policies that states can adopt in that some divorce or remarriage laws might themselves be thought unconstitutional because unduly restrictive, it is unlikely that those checks, even if recognized, would be at all robust. It is thus important to establish

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81 A separate question is whether it is so easy to establish which party is "really" at fault when, for example, one of the parties commits adultery. See Ira Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L.J. 773, 788 (1996).


83 See * id*. at 273.

84 But see Planned Parenthood v. Casey, 505 U.S. 833, 887-98 (1992) (striking down provision of Pennsylvania abortion statute because its enforcement might lead to increased domestic violence).


86 See * id*. at 331 (suggesting that some remarriage restrictions might offend constitutional guarantees).
whether there are any additional constitutional constraints on state policies with respect to the state's refusal to recognize marriages validly celebrated in sister state domiciles. If, indeed, there are no additional constitutional restrictions, it seems reasonable to expect that states will become more aggressive in modifying their own marriage recognition laws. This will only lead to the disappointment of legitimate, individual expectations, a chilling effect on interstate migration, and a bolstering of the view that the several states are individual, separate sovereignties rather than parts of one great nation.

IV. CONCLUSION

The passage of DOMA was regrettable for a variety of reasons. First, it is unclear what the Act does except, perhaps, make very clear that Congress disapproves of a particular group—a federal law may be on the books where the predominant effect is to publicize the congressional belief that a particular group is composed of individuals who, at best, are second-class citizens. Second, if in fact the Act's constitutionality is upheld, states will likely clamor for even more latitude with respect to which marriages they may refuse to recognize. Third, even if the Act is declared unconstitutional, the issue of which marriages valid in the domicile at the time of the marriage may nonetheless not be recognized by other states has been explicitly raised and will likely be the subject of conflicting court judgments until the Supreme Court explains what the United States Constitution permits and prohibits in this area.

Ultimately, the United States Supreme Court will have to decide whether marriages valid in sister domiciliary states may nonetheless not be recognized if the forum state finds such marriage offensive to important local policies. The Court should hold that a marriage valid in the domicile at the time of marriage must be recognized throughout the country. However, even if the Court were to reject that view because of some allegedly implicit exception within the Constitution, the Court should hold that all nonpolygamous, nonincestuous marriages valid in the domicile are valid everywhere. To do otherwise and to permit states to refuse to recognize any marriages offensive to local policy, notwithstanding those marriages having been valid in a different domicile within the same country, would not only result in the disappointment of many individuals' reasonable and justified expectations, but would also contribute to the increasing factionalization of the country. Even a Court interested in championing states' rights should find that the United States Constitution would never permit a price that dear to be paid.

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87 This may be another basis upon which DOMA is constitutionally vulnerable. Cf. Romer v. Evans, 517 U.S. 620, 635 (1996) (striking down Colorado's Amendment 2 because it "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else").