

WHO DECIDES? THE FEDERAL ARCHITECTURE OF DOMA AND COMPARATIVE MARRIAGE RECOGNITION

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I. INTRODUCTION: WHO DECIDES?

The critical issue the Defense of Marriage Act (“DOMA”)¹ re-

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solves is: *who decides*. Who decides whether, when, and to what extent same-sex marriages created in one American state will be recognized by other state governments, and by the federal government? That structural issue is the most important issue at stake in the controversy about interstate recognition of same-sex marriage in the United States. It is a question legal proceduralists and legal structuralists, such as conflict of laws scholars, can, should, and largely do understand and appreciate. The structural matters of respect for the constitutional allocation of government, and adherence to legitimate processes to decide important issues are at least as important—and are probably even more important to our nation’s legal system as—the very significant substantive policies concerning same-sex marriage and inter-jurisdictional recognition of same-sex marriage.

DOMA is an example of a well-designed legal “architectural” act. Both sections of DOMA were intended to answer the “who decides” questions—about horizontal (section two) and vertical (section three) inter-jurisdictional recognition of same-sex marriage. That structural purpose is key to the legal effect of both sections of DOMA—even more than the substantive choice of law policy (about inter-jurisdictional recognition of same-sex marriages from other states), and significantly more than the substantive marriage policy issue (of whether same-sex marriage should be legally recognized at all). The politics of DOMA, the controversies in the academy, and the public controversies focus on, and are driven by, the two substantive policy issues. The operative significance of DOMA, however, lies primarily in the structural confirmation of “who decides” what those substantive policy positions will be for the federal and state governments.

This Article focuses primarily on the importance of the structural dimensions of section two of DOMA, known as the horizontal or interstate recognition section. While this Article describes generally the overall architectural structure of both sections of DOMA, a more detailed analysis of section three, the vertical provision of DOMA, is

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1. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (2006) and 1 U.S.C. § 7 (2006)) [hereinafter DOMA].

provided in a companion article that is being published elsewhere.²

*A. Background of DOMA and the Current
Constitutional Controversies*

Congress enacted DOMA and President Clinton signed it into law in 1996.³ It contains two operative sections. Section two, the horizontal section, provides, in relevant part, that no state “shall be required to give effect” to same-sex marriages from any other state.⁴ Section three, the vertical section, provides in relevant part that for purposes of federal law “the word ‘marriage’ means only a legal union between one man and one woman as husband and wife.”⁵

The vote in both houses of Congress in support of DOMA in 1996 was overwhelming and bi-partisan; the House of Representatives passed DOMA by a vote of 342 to 67,⁶ and the Senate approved DOMA by a vote of 85 to 14.⁷ President Clinton signed DOMA without any veto-rattling objections to the bill.⁸

However, today, not even fourteen years after it was adopted so handily, DOMA is the subject of much political controversy, litigation, and academic debate (as the diverse papers in this Symposium illustrate). Indeed, a bill to repeal both sections of DOMA is pending in Congress.⁹ Mr. Nadler, Representative from New York, introduced House Bill 3567, titled “Respect for Marriage Act of 2009,” in the House of Representatives on September 15, 2009 with scores of co-sponsors.¹⁰ If Congress passes this bill, it will explicitly repeal section

2. See Lynn D. Wardle, *Section Three of the Defense of Marriage Act: Deciding, Democracy and the Constitution*, 59 DRAKE L. REV. (forthcoming Fall 2010) [hereinafter Wardle, *Section Three*].

3. DOMA, *supra* note 1.

4. 28 U.S.C. § 1738C (2006).

5. 1 U.S.C. § 7 (2006).

6. 142 CONG. REC. H7480-05 (daily ed. July 12, 1996).

7. 142 CONG. REC. S10129-01 (daily ed. Sept. 10, 1996).

8. Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1186 (2009) (contrasting lack of public backlash to judicial decisions invalidating anti-miscegenation laws with strong public backlash to judicial decisions mandating same-sex marriage).

9. Respect for Marriage Act of 2009, H.R. 3567, 111th Cong. (2009), available at <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.3567.IH>.

10. *Id.*

two and effectively repeal section three of DOMA.¹¹ Additionally, though all prior lawsuits challenging DOMA have failed (on both substantive and procedural grounds),¹² the environment has been changed by the recent decisions of a Massachusetts federal district court in two sibling lawsuits challenging section three of DOMA.¹³ Massachusetts' judicial environment¹⁴ and political climate have long been favorable to various gay rights challenges.¹⁵

B. Overview

Section two of DOMA was designed to create federal protection against the growing threat that legalization of same-sex marriage in one state would open the door for, and encourage, judges to interpret federal law (particularly full faith and credit doctrines) in a manner that would force other states to recognize same-sex marriage over ob-

11. *Id.*

12. *See Smelt v. Cnty. of Orange*, 447 F.3d 673, 686 (9th Cir. 2006), *aff'g* 374 F. Supp. 2d 861 (C.D. Cal. 2005) (affirming dismissal of a section two claim, and remanding to dismiss a section three claim on standing); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005); *In re Kandou*, 315 B.R. 123, 148 (Bankr. W.D. Wash. 2004); *see also* Order Granting Defendant's Motion to Dismiss at 7, *Smelt v. United States*, No. 8:09-cv-00286-DOC-MLG (C.D. Cal. filed Aug. 24, 2009), *available at* <http://www.scribd.com/doc/19079566/Order-Dismissing-Smelt-v-United-States-of-America>.

13. *Massachusetts v. U.S. Dep't of Health and Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010). *See generally* Mary L. Bonauto, *DOMA Damages Same-Sex Families and Their Children*, 32 FAM. ADVOC. 10, 16 (2010).

14. *See, e.g., Parker v. Hurley*, 474 F. Supp. 2d 261 (D. Mass. 2007), *aff'd*, 514 F.3d 87 (1st Cir. 2008).

15. Massachusetts may be the most "gay-receptive" jurisdiction in America; in 2003, Massachusetts was the first state to legalize same-sex marriage when the Supreme Judicial Court of Massachusetts mandated the legalization of same-sex marriage. *Goodridge v. Dep't Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003). Massachusetts not only allows gay partner adoption, but has forced Catholic Social Services in Boston to quit offering adoptions because it would not provide children to same-sex couples for adoption. Daniel Avila, *Same-Sex Adoption in Massachusetts, the Catholic Church, and the Good of the Children: The Story Behind the Controversy and the Case for Conscientious Refusals*, 27 CHILD. LEGAL RTS. J. 1, 1 (2007). Public schools in Massachusetts indoctrinate children in the acceptance of gay and lesbian lifestyles over parental objection. *See Parker supra* note 14, at 269-74.

jections from the people and lawmakers in those states.¹⁶ Similarly, section three was intended to prevent federal judges and agency officials from using federal choice of law and interpretative principles to recognize same-sex marriages in federal laws, regulations, and programs before Congress decided such recognition was appropriate.¹⁷

Part II of this article analyzes how DOMA reflects and respects principles of federalism in both its horizontal (section two) and vertical (section three) marriage recognition sections, and in the overall architectural structure of the act. Part II.A. shows that the drafters of DOMA designed section two to preserve the states' choice of authority over horizontal marriage recognition in the face of twin pressures (vertical and horizontal) to force states to recognize same-sex marriage. Part II.B. proves that claims that section two of DOMA violates the Full Faith and Credit Clause, and other constitutional provisions, are meritless. Part III provides some comparative choice of law perspectives on section two of DOMA to show how it protects the overwhelming policy interests of the states; specifically, how most states still refuse to recognize same-sex marriage and continually want to have that policy protected. Part III also compares principles governing marriage recognition in section two with marriage recognition rules and principles governing international marriage recognition. It describes that in substantially all respects, DOMA embodies and reflects globally well-respected and widely-followed dominant principles of marriage recognition in private international law.

Part IV briefly reviews section three of DOMA and the structural constitutional objections to it. It discusses how section three of DOMA was intended to preserve Congress's control over deciding the issue regarding when and to what extent same-sex marriages, created in states, will be recognized in federal law against two challenges to take that decision-making authority from Congress. It also summarizes why the claims that section three of DOMA violates the constitu-

16. H.R. REP. No. 104-664, at 2, 6-10 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906, 2910-14; *The Defense of Marriage Act: Hearing on H.R. 3396 Before the H. Comm. on the Judiciary*, 104th Cong. 28-32 (1996) [hereinafter *Hearings*] (statement of Lynn D. Wardle); *Hearings, supra* at 62 (statement of Jay Alan Sekulow).

17. H.R. REP. No. 104-664, at 10-12; *Hearings, supra* note 16, at 32-35 (statement of Lynn D. Wardle); *Hearings, supra* note 16, at 62 (statement of Jay Alan Sekulow).

tional principle of federalism are groundless.

Part V concludes by noting the value of DOMA as an architectural provision that protects the constitutional allocation of power to decide such hotly contested policy questions as to whether same-sex marriages, created validly in other jurisdictions, should be recognized. This is because section two preserves the architecture of federalism, in both its horizontal federalism (state-federal relations) and in its lateral federalism (equal respect for all states within the federal union of the states). The threatening conditions that caused Congress to enact DOMA to protect the authority of the states to decide the marriage recognition question for their own sovereign jurisdictions have not disappeared, but are more ominous than ever before. Thus, for reasons of constitutional structure, especially federalism, DOMA is still necessary and is constitutional.

II. INTERSTATE RECOGNITION OF SAME-SEX MARRIAGE UNDER SECTION TWO OF DOMA

Section two of DOMA, the interstate recognition or full faith and credit provision, provides:

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.¹⁸

This section can be called the *horizontal* provision as it concerns the interstate effect in other states of same-sex marriages created in one state. It is horizontal because it primarily concerns the relations among the co-equal sovereign states of the Union concerning interstate recognition of certain marriages, validly created in one of the states. However, section two also has an important *vertical* dimension because it addresses relations between the national government and the states in one respect. While Congress lacks the authority to regulate the subject of marriages (or any other domestic relationships) di-

18. 28 U.S.C. § 1738C (2006).

rectly,¹⁹ the Constitution gives Congress the authority to “prescribe . . . the Effect[s] thereof” that must be given in each state to the “public Acts, Records, and judicial Proceedings” of the other states.²⁰ That includes the power to determine rules for interstate recognition of domestic relationships. Therefore, Congress has the power to tell the states when they must, and when they may not, recognize the domestic relations laws, records, and judgments of other states. Indeed, Congress has enacted rules governing when and to what extent mandatory interstate recognition must be given to other domestic relationships well before Congress even considered DOMA.²¹

Thus, vis-à-vis the federal government, DOMA section two protects what Alexander Hamilton described as “the constitutional equilibrium between the general and the State governments.”²² It protects constitutional state sovereignty regarding an issue (the regulation of domestic relations), which the Supreme Court has described as reserved for and falling within “a virtually exclusive province of the states.”²³ It protects horizontal federalism by preserving the right of each state to decide for itself whether it will recognize same-sex marriage. It also protects strong policy values such as: respect for the commitment to preserve and foster pluralism; the belief that laws regulating families should reflect local values; respect for the expertise of state courts (then existing and experienced, unlike the federal courts that were being created anew and were expected to focus on issues of national concern); and the belief that the federal government has more

19. See generally Wardle, *supra* note 2, at Part IV.

20. U.S. CONST. art. IV, §1.

21. The Parental Kidnapping Prevention Act was enacted by Congress in 1980 and compelled interstate recognition and non-modification of child custody orders. The Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, § 8(a), 94 Stat. 3469 (codified at 28 U.S.C. § 1738A). Likewise, two years before Congress enacted DOMA, it set rules for the interstate recognition, enforcement, and non-modification of child support orders. Full Faith and Credit for Child Support Orders Act, Pub. L. No. 103-383, § 3(a), 108 Stat. 4064 (1994) (codified at 28 U.S.C. § 1738B). Less than a month before it passed DOMA, Congress amended this law concerning interstate recognition and enforcement of child support. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 322, 110 Stat. 2221 (codified as amended at 28 U.S.C. § 1738B).

22. THE FEDERALIST NO. 31, at 197 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

23. *Sosna v. Iowa*, 419 U.S. 393, 404 (1975).

than enough other important issues to address under the Constitution.²⁴

A. *The Neutrality of Section Two of DOMA*

Section two of DOMA establishes both the complete horizontal and vertical neutrality of federal law, especially federal full faith and credit and choice of law rules, applicable to interstate recognition of same-sex marriage. Section two's neutrality is especially apparent when one considers the pro-recognition or anti-recognition horizontal rules that Congress could have enacted. For example, Congress could have considered passing a law that mandated *no* interstate recognition for same-sex marriage. Under Article IV, Congress arguably could have established as a matter of federal law that no state *may* give any faith and credit to same-sex marriages performed in other states.²⁵ On the other hand, Congress could have passed a law under Article IV that mandated *compulsory* recognition by all states of same-sex marriages validly contracted in any other state; that all states *must* recognize such same-sex marriages.²⁶ Thus, Congress chose not to adopt a substantive position when it could have created a substantive marriage policy for interstate recognition or non-recognition of same-sex marriage.

Congress did not take any federal position on the policy or merits of interstate recognition of same-sex marriage, and instead adopted a rule that left the marriage recognition issue to each state to decide for itself, as had been the rule under the Constitution for over two centu-

24. See generally Lynn D. Wardle, *Tyranny, Federalism, and the Federal Marriage Amendment*, 17 YALE J.L. & FEMINISM 221, 224-55 (2005) (discussing the power the state governments were meant to have versus the national government); Lynn D. Wardle, *The Proposed Federal Marriage Amendment and the Risks to Federalism in Family Law*, 2 ST. THOMAS L. REV. 137, 158-86 (2004).

25. Congress has enacted similar non-recognition provisions in the past. See, e.g., 28 U.S.C. § 1738 (2006); 29 U.S.C. § 633(b) (2006); see also *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532, 547-50 (1935); *Miller v. Kingsley*, 230 N.W.2d 472, 475 (Neb. 1975); *McGrath v. Tobin*, 103 A.2d 795, 798 (R.I. 1954).

26. Congress has enacted similar mandatory recognition provisions in the past. See, e.g., 28 U.S.C. § 1738 (2006); 42 U.S.C. § 1983 (2006); see also *Hazen Research, Inc. v. Omega Minerals, Inc.* 497 F.2d 151, 153 (5th Cir. 1974); *State v. Leming*, 46 So. 2d 262, 283-84 (La. 1950).

ries.²⁷ Thus, DOMA protects by federal law the principle of voluntarily²⁸ recognition or non-recognition by each state of same-sex marriages from other states. In so doing, DOMA reinforced the well-established existing federalism principle of respect for the authority of each United States sovereign entity to regulate matters allocated by the Constitution to that sovereign. This includes respect for the sovereignty of the state to directly regulate and control the creation and recognition of domestic relations, including same-sex marriages, within their own territories.²⁹

DOMA preserved and protected state self-determination for marriage recognition against forced rejection of the long-established rule governing interstate recognition of marriage. That rule, and section two of DOMA, allows each affected state to choose for itself whether or not to recognize same-sex marriages validly contracted in other states.³⁰ Section two of DOMA did not change the existing law, but merely codified the long-established federal choice of law rule and full faith and credit principle that states may choose for themselves whether to recognize controversial marriages, validly contracted in other states, or to refuse to apply or enforce laws, rules, and doctrines of sister states that are contrary to the strong public policy of the forum. Thus, section two of DOMA was enacted to determine *who de-*

27. See 28 U.S.C. § 1738C (2006); U.S. CONST. art. IV, §1.

28. It is voluntary because each state is explicitly authorized to decide for itself whether or not to recognize such relationships. See 28 U.S.C. § 1738C (2006).

29. See, e.g., Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 962-64 (1983) (discussing the importance of deciding such issues at the state level); Linda J. Silberman, *Can the Island of Hawaii Bind the World? A Comment on Same-Sex Marriage and Federalism Values*, 16 QUINNIPIAC L. REV. 191, 197-200 (1996) (discussing the importance of domiciliary nexus for marriage regulation); Linda Silberman & Karin Wolfe, *The Importance of Private International Law for Family Issues in an Era of Globalization: Two Case Studies—International Child Abduction and Same-Sex Unions*, 32 HOFSTRA L. REV. 233, 271-72 (2003) (discussing the importance of protecting marriage norms of particular state communities in choice of law). See generally Lynn D. Wardle, *Non-Recognition of Same-Sex Marriage Judgments Under DOMA and the Constitution*, 38 CREIGHTON L. REV. 365, 395-404 (2005) (discussing the importance of protecting state interests against sister-state regulatory bleeding, and the importance of state interests in domestic relations).

30. Linda J. Silberman, *Rethinking Rules of Conflict of Laws in Marriage and Divorce in the United States: What Can We Learn From Europe?*, 82 TUL. L. REV. 1999, 2001 (2008).

cides the controversial question of whether courts of any particular state will or will not recognize same-sex marriages validly created in another state.³¹ Some same-sex marriage advocates in the legal community criticize the horizontal and vertical aspects of section two of DOMA, and wish to have Congress mandate a change to existing choice of law rules to require recognition of same-sex marriage; yet the precedents and policies behind section two's marriage recognition rule are settled, clear, and well-grounded in long-established principles of full faith and credit, choice of law, and domestic relations law and policy.³²

Finally, the language of section two underscores the structural focus of the provision as well as its neutrality. The language is negative—no state shall be required to recognize same-sex marriage from other states.³³ This emphasizes the structural, shielding purpose of section two. If the purpose were substantive, to entitle or assert entitlement, positive language would have been used. Thus, the negative language reinforces the structural purpose of section two.

B. The Constitutionality of Section Two Under Article IV

After more than a dozen years, at least before the July 2010 federal district court decisions of Judge Tauro in Massachusetts,³⁴ it seemed that the constitutionality of section two of DOMA was no longer seriously in doubt. Even after these Massachusetts decisions, the constitutional challenges seem quite strained. The overwhelming consensus of conflicts scholars (and historically the correct position) is that under long-established and unambiguous principles of both choice of law and full faith and credit, a state may constitutionally

31. See *supra* notes 16-17 and accompanying text.

32. See Patrick J. Borchers, *Baker v. General Motors: Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147, 158-64 (1998); Richard S. Myers, *Same-Sex "Marriage" and the Public Policy Doctrine*, 32 CREIGHTON L. REV. 45, 55-59 (1998); Michael E. Solimine, *Competitive Federalism and Interstate Recognition of Marriage*, 32 CREIGHTON L. REV. 83, 99-102 (1998); Lynn D. Wardle, *Williams v. North Carolina, Divorce Recognition, and Same-Sex Marriage Recognition*, 32 CREIGHTON L. REV. 187, 226-33 (1998). See generally Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255 (1998).

33. 28 U.S.C. § 1738C (2006).

34. See *infra* notes 52-57 and accompanying text.

refuse to recognize same-sex marriages that are valid in other states if such unions violate the strong public policy of the forum.³⁵ Section two's preservation of state authority to determine whether or not to recognize same-sex marriage is permissible and appropriate under the Full Faith and Credit Clause of the Constitution. In a nutshell: (a) the Constitution gives Congress the authority to "prescribe . . . the Effect[s] thereof" that must be given in each state to the "public Acts, Records, and judicial Proceedings" of the other states;³⁶ (b) section two of DOMA was passed specifically with reference to this power;³⁷ and (c) section two merely codified two hundred years of common law practice of both the federal government and the states—the notion that each state decides for itself whether recognition of a marriage from another jurisdiction would violate such a strong local public policy that it will not recognize the foreign marriage.³⁸ There is little credible support for the claim that state-self-determination-in-marriage-recognition, provided by section two, is unconstitutional under the Full Faith and Credit Clause or any other structural provision. Professor Lea Brilmayer³⁹ succinctly summarized the status of credible scholarly opinion when she testified before Congress:

Although some people have expressed skepticism about whether DOMA is constitutional, these are mostly people whose expertise lies outside the area of conflict of laws. Even most lawyers are not

35. See, e.g., Patrick J. Borchers, *The Essential Irrelevance of the Full Faith and Credit Clause to the Same-Sex Marriage Debate*, 38 CREIGHTON L. REV. 353, 354-55 (2005); Maurice J. Holland, *The Modest Usefulness of DOMA Section 2*, 32 CREIGHTON L. REV. 395, 396-98 (1998); Wardle, *supra* note 32, at 214-19; Ralph U. Whitten, *Full Faith and Credit for Dummies*, 38 CREIGHTON L. REV. 465, 480-82 (2005); Whitten, *supra* note 32, at 372-73.

36. U.S. CONST. art. IV, §1.

37. 28 U.S.C. § 1738C (2006). See also H.R. REP. NO. 104-664, at 24-25 (1996), reprinted in 1996 U.S.C.C.A.N. 2929-30; *Hearings*, *supra* note 16, at 28-32 (statement of Lynn D. Wardle).

38. See *infra* notes 43-47 and accompanying text. See generally 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 (2008) [hereinafter Wardle, *Slavery*] (providing the history of state recognition of controversial domestic relations from other jurisdictions, and of non-recognition when deemed volatile of strong public policy).

39. Howard M. Holtzmann Professor of International Law, Yale University School of Law, New Haven, Connecticut.

fully familiar with the history of congressional implementation of the Full Faith and Credit Clause, and they underestimate the latitude it gives to adopt legislation. Constitutional power to enact such legislation is found in Article IV itself⁴⁰

There is little serious doubt that section two of DOMA falls within Article IV's grant of congressional power. Moreover, it is not insignificant that key state court opinions that legalized same-sex marriage also indicated no expectation that such marriages would necessarily be recognized elsewhere; similarly those jurisdictions denied any desire or attempt to export same-sex marriages into other jurisdictions.⁴¹

Additionally, section two of DOMA has a significant separation of powers dimension that reinforces that core constitutional principle. It preserves the issue for the state systems in which legislatures have the chance to assert their own authority over the marriage recognition issue, if they wish.⁴² Moreover, section two recognizes legislative su-

40. *Judicial Activism vs. Democracy: What are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws?: Hearing Before the Subcomm. on the Constitution, Civil Rights, & Property Rights of the S. Comm. On the Judiciary*, 108 Cong. 70 (2004) (statement of Professor Lea Brilmayer), available at <http://www.access.gpo.gov/congress/senate/pdf/108hr/96924.pdf>. See also Lea Brilmayer, *Full Faith and Credit*, WALL ST. J., March 9, 2004, at A16; Emily J. Sack, *Domestic Violence Across State Lines: The Full Faith and Credit Clause, Congressional Power, and Interstate Enforcement of Protection Orders*, 98 NW. U. L. REV. 827, 888-89 (2004) ("some advocates and scholars on both sides of the DOMA debate acknowledged that due to the 'public policy exception,' other states with connection to the parties likely would not have to recognize same-sex marriages from another state. Opponents of the legislation therefore argued it was unnecessary because the Constitution itself would not require states to give the same-sex marriages recognition." (footnote omitted)).

41. Silberman & Wolfe, *supra* note 29, at 254-56 nn.102-04, 258-60 (noting that even nations that have created same-sex unions indicate they are unlikely to be recognized in most other jurisdictions). See also *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565, 571 (Mass. 2004) (noting Massachusetts same-sex marriages may not be recognized elsewhere, and the court does not wish to determine the validity of Massachusetts same-sex marriages in other jurisdictions); *Goodridge v. Dep't of Health*, 798 N.E.2d 941, 967 (Mass. 2003) (explaining that Massachusetts would not presume to impose its legalization of same-sex marriage on other states); *Goodridge*, 798 N.E.2d. at 972 n.4 (Greaney, J., concurring) (stating *Goodridge* will not be a tool to foist same-sex marriage upon other states).

42. See 28 U.S.C. § 1738(c) (2006).

premacymuch as it is a rule of inter-state marriage recognition—which allows each state to decide for itself—declared and enacted into law by a legislature. Congress enacted section two, and Congress’s legislative power to decide what “effects” a marriage in one state would have in another state is explicitly established by Article IV of the United States Constitution.⁴³

Finally, with the failure of the arguments that DOMA is structurally unconstitutional, some advocates for the recognition of same-sex marriage have returned to more sweeping claims that DOMA is unconstitutional under malleable substantive constitutional doctrines such as religious establishment, association, equal protection, and substantive due process principles.⁴⁴ These arguments will be popular with those who favor the outcome that would result, but the arguments are internally inconsistent and cannot stand on their own merits. While there is not room for a full discussion of these claims in this Article, which is devoted to structural constitutional issues, it suffices to note that there is simply no credible basis in constitutional text, history, or precedent for the claim that same-sex marriage is a fundamental right.

Neither the “deeply rooted in history” nor the “essential to the concept of ordered liberty” test for identifying unwritten fundamental rights entitled to special constitutional protection are satisfied.⁴⁵

43. U.S. CONST. art. IV, §1.

44. See Symposium, *DOMA and Issues Concerning Federalism and Interstate Recognition of Same-Sex Relationships*, 41 CAL. W. INT’L L.J. 1 (2010).

45. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). Here, the Supreme Court explained:

Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, “deeply rooted in this Nation’s history and tradition,” and “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed.” Second, we have required in substantive-due-process cases a “careful description” of the asserted fundamental liberty interest. Our Nation’s history, legal traditions, and practices thus provide the crucial “guideposts for responsible decisionmaking,” that direct and restrain our exposition of the Due Process Clause.

Id. (internal citations omitted). See also *Michael H. v. Gerald D.*, 491 U.S. 110, 122-23 (1989); *Moore v. E. Cleveland*, 431 U.S. 494, 502-03 (1977) (providing the test for substantive due process); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (“The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents

Adults who engage in alternative consensual sexual practices deserve to be treated with respect for their human dignity, but not all personal relationships “have ‘played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs.’”⁴⁶ Likewise, it is arguable that not all relationships make equal contributions to the needs of society (as distinct from the desires of particular individuals), which eliminates equality claims. For example, the distinctive value of marriage in providing dual-gender parenting is one example of many legally-cognizable differences between marriage and same-sex unions that matters for society. Marriage is the only legal institution that directly links sexual relations with responsible procreation, and with optimal parenting of children. While marriage also serves important adult intimacy and relationship functions, the parental dimension of marriage is deeply rooted in our legal and social understanding of marriage. The fundamental rights and interests protected by marriage include children’s rights to establish and maintain a parental relationship with their own biological mothers and fathers.⁴⁷ Every child deserves to be raised by a mother and father whenever possible, and the biological parents have priority in parenting, unless required otherwise to protect the child, both for their own sakes and for the sake of the child.⁴⁸ In numerous constitutions, charters, and conventions around the world, recognition of a state obligation to protect marriage and/or the family is clearly expressed.⁴⁹ In American constitutional law this notion is most often expressed in the context of

in the upbringing of their children is now established beyond debate as an enduring American tradition.”).

46. *FW/PBS, Inc. v. City of Dall.*, 493 U.S. 215, 237 (1990) (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618-19 (1984)) (holding that a voluntary business club is not a protected intimate association). *See also* *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987) (declining to hold that the relationships protected are limited to the family, but rejecting claim that a service club is protected).

47. *See, e.g., Du Toit v. Minister of Welfare and Population Dev.* 2003 (2) SA 198 (CC) at 22 (S. Afr.); C. Quince Hopkins, *Variety in U.S. Kinship Practices, Substantive Due Process Analysis and the Right to Marry*, 18 *BYU J. PUB. L.* 665, 676 (2004); Martha Minow, *What Ever Happened to Children’s Rights?*, 80 *MINN. L. REV.* 267, 281-82 (1995).

48. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 65-66 (2000). *See infra* note 50 for further cases.

49. *See infra* Appendix § IV.B.

“parents’ rights,” in which children’s fundamental human rights to establish and maintain a parental relationship with their mother and father, are imbedded unless an alternative arrangement is required to protect the best interests of the child.⁵⁰

Thus, it is not surprising that four district court decisions and one federal court of appeals decision have rejected claims that DOMA is unconstitutional.⁵¹ However, that unanimity of federal court decisions was broken in July 2010 when Massachusetts Federal District Judge Tauro ruled in two separate suits that section three of DOMA violates the Fifth Amendment’s Equal Protection Clause, the Tenth Amendment, and federalism.⁵² However, both opinions’ heavily tilted findings of facts, feeble constitutional analysis, and conclusions of law are completely inadequate and self-contradictory. As Yale Law Professor Jack Balkin explained: “‘What an amazing set of opinions[.]’ . . . ‘No chance they’ll be held up on appeal.’ . . . ‘These two opinions are at war with themselves[.]’”⁵³ For example, *Gill v. Office of Personal*

50. See e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925); *Prince v. Massachusetts*, 321 U.S. 158, 165-66 (1943); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

51. See *Smelt v. Cnty. of Orange*, 447 F.3d 673, 686 (9th Cir. 2006), *aff’g* 374 F. Supp. 2d 861 (C.D. Cal. 2005) (affirming the district court’s dismissal of a section two claim, rejecting equal protection and due process claims, and remanding to dismiss a section three claim on the merits); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1303-09 (M.D. Fla. 2005) (finding DOMA does not violate the Full Faith and Credit, Equal Protection, or Due Process Clauses); *In re Kandu*, 315 B.R. 123, 131-48 (Bankr. W.D. Wash. 2004) (finding DOMA does not violate, *inter alia*, the Fifth Amendment’s guarantees of due process and equal protection, or the Tenth Amendment’s reservation to the states of the power to regulate marriage); see also Order Granting Defendant’s Motion to Dismiss at 7, *Smelt v. United States*, No. 8:09-cv-00286-Doc-MLG (C.D. Cal. filed Aug. 24, 2009), available at <http://www.scribd.com/doc/19079566/Order-Dismissing-Smelt-v-United-States-of-America> (dismissing DOMA challenge on jurisdictional grounds). *But see In re Levenson*, 560 F.3d 1145, 1149 (9th Cir. Jud. Council 2009) (Reinhardt, Cir. J.) (“There is no rational basis for denying benefits to the same-sex spouses of [federal court-supervised] employees while granting them to the opposite-sex spouses . . .”).

52. *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 387 (D. Mass. 2010); *Massachusetts v. United States Dep’t of Health and Human Servs.*, 698 F. Supp. 2d 234, 249 (D. Mass. 2010) [hereinafter *D.H.H.S.*].

53. Abby Goodnough & John Schwartz, *Judge Topples US Rejection of Gay Unions*, N.Y. TIMES, July 8, 2010, available at <http://www.nytimes.com/2010/07/09/us/09marriage.html>.

*Management*⁵⁴ held that the Equal Protection Clause requires same-sex unions to be treated the same as marriages, implying that state refusal to recognize same-sex marriages violates federal equal protection doctrine.⁵⁵ This mocks the holding in *Commonwealth of Massachusetts v. United States Department of Health and Human Services* (“*D.H.H.S.*”)⁵⁶ that only the states—and not the federal government—have valid constitutional interests in regulating marriage.⁵⁷ The holding in *D.H.H.S.* that only states may regulate marriage flies in the face of not only centuries of federal law, but also of the court’s insistence in *Gill* that the Equal Protection Clause commands recognition of same-sex marriage.⁵⁸ Arguably, the credibility of the judgments was undermined for several reasons: the district court, in an “Alice-in-Wonderland” judicial moment, brushed aside all differences between conjugal marriages and same-sex relationships; Judge Tauro was painfully unpersuasive in his attempt to ignore the long history of federal preemption of state marriage law for purposes of federal programs; and he desperately focused on “straw man” equality arguments.

However, the prospects on appeal are uncertain because the United States Department of Justice played politics when they defended DOMA at the trial court level. The Department of Justice deliberately conceded critical factual points and declined to assert legal arguments that had been successful in previous DOMA litigation.⁵⁹ If the Obama Justice Department continues to refuse to present a credible, let alone zealous, defense of DOMA, it is possible that Judge Tauro’s feeble and flawed judgments may not be corrected. However, this would be due to politics, not the law.

54. 699 F. Supp. 2d 374 (D. Mass. 2010).

55. *Id.* at 396-97.

56. 698 F. Supp. 2d 234 (D. Mass. 2010).

57. *Id.* at 249.

58. *See Gill*, 699 F. Supp. 2d. at 396-97; *D.H.H.S.*, 698 F. Supp. 2d. at 249.

59. *See, e.g., A Defense of Fairness Act*, WASHINGTON POST, July 11, 2010, at A16, available at http://www.washingtonpost.com/wp-dyn/content/article/2010/07/10/AR2010071002534_pf.html (even the Washington Post called the Obama Justice Department defense of DOMA “tepid” and noted concessions by the government lawyers).

III. SAME-SEX MARRIAGE RECOGNITION UNDER SECTION TWO OF DOMA IN INTERSTATE AND INTERNATIONAL COMPARATIVE CONFLICTS ANALYSIS

A brief primer on marriage recognition provides some context for the interstate comparative conflicts analysis. “[I]n the United States, the approach to ‘applicable law’ issues in the entire family law area has been left almost completely to the individual states and . . . there is no ‘federal’ conflicts rule on these issues for marriage or divorce.”⁶⁰ As to the “validity of a marriage in the United States, it is state law that determines the applicable law,” just as the direct regulation of substantive domestic relations have been left entirely to the states.⁶¹ Traditionally, the ubiquitous rule regarding marriage recognition followed in all of the American states has been some variation of *lex loci delicti*, meaning that marriages that are valid in the state where performed are recognized as valid in other states too, unless they violate some strong public policy of the other state.⁶² That approach is still the general American marriage recognition standard; however, some states follow variations of the governmental interest analysis, where the application of the test generally focuses on the “contacts” with the states, and the states “interests” in having their marriage law govern the question.⁶³ Ordinarily, “the regulatory interests and values of the community of which the couple is a part”⁶⁴ should be respected at both the celebration and recognition stages of marriage.⁶⁵ But those community interests can be, and historically have been, preempted when the marriage violates the state’s strongly-held fundamental policy values regarding proposed recognition of controversial domestic relation-

60. Silberman, *supra* note 30, at 2001.

61. *Id.*

62. See L. Lynn Hogue, *State Common-Law Choice-of-Law Doctrine and Same-Sex “Marriage”: How Will States Enforce the Public Policy Exception?*, 32 CREIGHTON L. REV. 29, 31-32 (1998); articles cited *supra* note 32.

63. Silberman, *supra* note 30, at 2001.

64. Linda J. Silberman, *Can the Island of Hawaii Bind the World? A Comment on Same-Sex Marriage and Federalism Values*, 16 QUINNIPIAC L. REV. 191, 203 (1996).

65. See Linda Silberman, *Same-Sex Marriage: Refining the Conflict of Laws Analysis*, 153 U. PA. L. REV. 2195, 2214 (2005); articles cited *supra* note 29.

ships.⁶⁶

*A. Same-Sex Marriage Recognition Under Section Two of DOMA
in Interstate Comparative Conflicts Analysis*

How many states have recognized, and now do recognize, same-sex marriages validly contracted in other states? How many other states are likely to recognize same-sex marriages validly performed in other states? How many states have constitutional, statutory, or case law that withholds recognition to same-sex marriages validly performed in other states?

The answer to the first question is factual and clear: as Appendix, Section I.A shows, same-sex marriage is allowed in only five of the fifty states, the District of Columbia (but none of the other dozen federal territories),⁶⁷ and one of the 564 federally-recognized American Indian tribes.⁶⁸ It would be difficult in most cases to argue that recog-

66. Wardle, *Slavery*, *supra* note 38, at 1908-09.

67. The District of Columbia is the 27th largest city in America. Infoplease, *Top 50 Cities in the U.S. by Population and Rank*, <http://www.infoplease.com/ipa/A0763098.html> (last visited Jul. 21, 2010). The five major territories administered as insular territories of the United States include American Samoa, Northern Mariana Islands, Puerto Rico, the U.S. Virgin Islands, and Guam. Office of Insular Affairs, U.S. Dep't of the Interior, All OIA Jurisdictions (2007), <http://www.doi.gov/oia/Firstpginfo/islandfactsheet.htm> (last visited Jul. 21, 2010). The Guam Senate considered a bill to legalize same-sex civil unions in 2010. *See Guam Senator defends same sex civil union bill*, SOLOMON STAR, Jan. 21, 2010, available at <http://www.solomonstarnews.com/news/regional/2119-guam-senator-defends-same-sex-civil-union-bill>. Seven other minor islands are also administered as territories (Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Navassa Island and Palmyra Atoll). Office of Insular Affairs, U.S. Dep't of the Interior, U.S. Territories Under U.S. Fish and Wildlife Jurisdiction or Shared with Johnston Atoll Chemical Agent Disposal System (JACADS) (2007), <http://www.doi.gov/oia/Firstpginfo/islandfactsheet2.htm> (last visited Jul. 21, 2010).

68. Julie Bushyhead, *The Coquille Indian Tribe, Same-Sex Marriage, and Spousal Benefits: A Practical Guide*, 26 ARIZ. J. INT'L & COMP. L. 509, 509 (2009) (stating the Coquille Tribe is the first and only Indian tribe to allow same-sex marriage). *See also* Matthew L.M. Fletcher, *Same-Sex Marriage, Indian Tribes, and the Constitution*, 61 U. MIAMI L. REV. 53 (2006) (discussing the impact of a same-sex marriage amendment on the Indian tribes). For the number of federally-recognized Indian tribes, see Bureau of Indian Affairs, Dep't of the Interior, Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 74 Fed. Reg. 40218 (Aug. 11, 2009), available at

nizing same-sex marriage violates the strong public policy of a forum state if the forum state has internally legalized the creation of same-sex marriages. Therefore, it is likely that the five states, which have legalized same-sex marriage, will recognize same-sex marriages performed in other jurisdictions.⁶⁹

Five other states have created same-sex civil unions with all or most of the incidents and benefits of marriage.⁷⁰ It is very unlikely that these states will recognize same-sex marriages validly performed in other states as “marriages” because the differences between marriage and civil unions are very important in these states, important enough for them to draw a very clear distinction. However, it is very likely these states will treat foreign same-sex marriages the same as civil unions by giving them the same status as civil unions in those states, or by giving the parties all of the same rights and benefits accorded to same-sex civil unions in these states.

On the other hand, and to answer the third question above, thirty states have adopted constitutional amendments specifically intended to protect marriage as the union of a man and a woman by explicitly defining marriage as the union of a man and a woman.⁷¹ Nineteen of these thirty states’ substantive amendments also expressly prohibit marriage-equivalent same-sex civil unions.⁷² However, three of these thirty states that have constitutionally prohibited same-sex marriage (California, Oregon and Nevada) have legalized same-sex civil unions,⁷³ leaving thirteen states still in play. Given these states’ clear constitutional stance against same-sex marriage, it would be very difficult for their courts to credibly conclude that it would not violate strong public policy to recognize a same-sex marriage validly performed in another state. Thus, it is not surprising that interstate same-

<http://www.loc.gov/catdir/cpsob/biaind.pdf> (including entities of Alaskan Native Americans).

69. There may be non-recognition by these states in at least some circumstances, such as evasive marriages by residents of the forum state, and other rules such as regulations of age of marriage, close relationship, etc. *See generally* Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921 (1998).

70. *See infra* Appendix § I.B.

71. *See infra* Appendix § II.A.

72. *See infra* Appendix § II.B.

73. *See infra* Appendix § I.B.

sex marriage recognition claims in those thirty states have failed.⁷⁴

What remains are thirteen “bleeding Kansas”-type “border states” that have neither adopted amendments rejecting same-sex marriage, nor legalized same-sex marriage or same-sex civil unions.⁷⁵ It is in these states (including prominently New York, Maryland, and Rhode Island) where the battle over recognition of sister-state same-sex marriages has raged, is raging, and will continue to rage, and which conflict of laws scholars find the most interesting. It is likely that in some of these “border states,” same-sex marriage will not be recognized as marriages generally, but will be recognized as marriages for specific purposes, such as eligibility for particular benefits or programs, as they have been in New York.⁷⁶ It is likely that these remaining thir-

74. See *Burns v. Burns*, 560 S.E.2d 47, 49 (Ga. Ct. App. 2002) (citing state marriage amendment in declining to recognize Vermont same-sex civil union for custody purposes); *Rosengarten v. Downes*, 802 A.2d 170, 181-84 (Conn. App. Ct. 2002) (affirming refusal to recognize Vermont Civil Unions prior to Connecticut legalizing same-sex marriage or civil unions). Compare *Knight v. Super. Ct.*, 26 Cal. Rptr. 3d 687, 690-91 (Cal. Ct. App. 2005) (holding state-initiated law (Prop. 22), which prohibited recognition of same-sex marriage, also applies to in-state marriages and out-of-state marriages), with *Armijo v. Miles*, 26 Cal. Rptr. 3d 623, 636-38 (Cal. Ct. App. 2005) (holding Prop. 22 applies to out-of-state marriages, but not to in-state marriages), and *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008) (holding Prop 22 applies to in-state marriages and out-of-state marriages, but it is unconstitutional under the state constitution), *overturned by* Proposition 8 (November 4, 2008), *amendment upheld by* *Strauss v. Horton*, 207 P.3d 48, 119 (Cal. 2009) (finding Proposition 8 to be valid). See also *Bishop v. Oklahoma*, No. 06-5188, 2009 WL 1566802, at *4 (10th Cir. 2009) (dismissing claims against state officials alleging unconstitutionality of state marriage amendment). But see *Perry v. Schwarzenegger*, No. C 09-2292, 2010 WL 3025614, at *66-69 (N.D. Cal. Aug. 4, 2010) (finding California’s constitutional amendment banning same-sex marriage to be “irrational” and violate the Due Process and Equal Protection Clauses).

75. The thirteen states are Delaware, Illinois, Indiana, Maine, Maryland, Minnesota, New Mexico, New York, North Carolina, Pennsylvania, Rhode Island, West Virginia, and Wyoming. See *infra* Appendix §§ I.A., I.B., II.A.

76. Compare *Langan v. St. Vincent’s Hosp. of N.Y.*, 765 N.Y.S.2d 411 (N.Y. Sup. Ct. 2003), *rev’d*, 802 N.Y.S.2d 476, 477-80 (N.Y. App. Div. 2005) (holding surviving partner of same-sex civil union could not bring wrongful death action), *appeal dismissed*, 850 N.E.2d 672 (N.Y. 2006), with *B.S. v. F.B.*, 883 N.Y.S.2d 458, 465-67 (N.Y. Sup. Ct. 2009) (recognizing Vermont civil union, but denying divorce), and *Godfrey v. Spano*, 871 N.Y.S.2d 296, 299 (N.Y. App. Div. 2008) (affirming county executive’s order directing recognition of same-sex marriages), *aff’d on other grounds*, 920 N.E.2d 328, 334-35 (N.Y. 2009) (dismissing claims for lack of standing and no improper expenditure of funds), and *Lewis v. N.Y. State Dep’t of*

teen “border states” will adopt or evolve substantive marriage policies that will effectively settle the issue of whether same-sex marriages created validly in sister states will be recognized. In the meantime, it is also likely that choice of law principles will be creatively applied, even twisted like a pretzel, to one or the other political end (recognition or non-recognition of same sex marriage).⁷⁷

Many of these “border states” have currently adopted what might be called mini-DOMA statutes, which define marriage as the union of a man and woman.⁷⁸ However, the impact of such statutes on interstate recognition of same-sex marriage is uncertain. For instance, these statutes can be repealed at any time by state legislatures. For example, in 2009 the New Hampshire legislature, which previously adopted a statute protecting marriage as a male-female union,⁷⁹ repealed that statute by adopting legislation legalizing same-sex mar-

Civil Serv., 872 N.Y.S.2d 578, 584 (N.Y. App. Div. 2009) (affirming department’s recognition of same-sex marriages as valid where performed because not abhorrent to New York public policy), *aff’d on other grounds*, *Godfrey v. Spano*, 920 N.E.2d 328, 337 (N.Y. 2009). *See also* *Chambers v. Ormiston*, 935 A.2d 956, 961-63 (R.I. 2007) (finding Rhode Island court lacked jurisdiction to grant divorce to a resident same-sex couple married in Massachusetts); *Kern v. Tanney*, 11 Pa. D. & C. 5th 558, 563-76 (2010) (declining to allow a same-sex couple to divorce and rejecting challenges to Pennsylvania statute forbidding same-sex marriage); *Marriage – Whether Out-of-State Same-Sex Marriage That is Valid in the State of Celebration May be Recognized in Maryland*, 95 Op. Att’y. Gen. Md. 3 (Feb. 23, 2010), *available at* <http://www.oag.state.md.us/Opinions/2010/95oag3.pdf> [hereinafter Md. Att’y. Gen.].

77. For a recent example of such outcome-driven legal gymnastics, see the recent Maryland Attorney General Opinion that opines—for it is not binding on courts or lawmakers or agencies—that same-sex marriages will be recognized in the state notwithstanding a state statute that expressly defines marriage as the union of a man and a woman. Md. Att’y. Gen. *supra* note 76.

78. DEL. CODE ANN. tit. 13, § 101 (2009); 750 ILL. COMP. STAT. ANN. § 5/212 (West 1999); IND. CODE ANN. § 31-11-1-1 (West 2008); MD. CODE ANN., FAM. LAW § 2-201 (LexisNexis 2006); N.C. GEN. STAT. § 51-1.2 (2009); 23 PA. CONS. STAT. ANN. § 1704 (2001); W. VA. CODE § 48-2-603 (LexisNexis 2004); WYO. STAT. ANN. § 20-1-101 (2009). *See also* HAW. REV. STAT. § 572-3 (2006) (supplementing structural constitutional amendment). Some other states have adopted both constitutional and statutory protection for marriage by defining marriage as the union of a man and a woman. *See generally* ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES 137-48 (2006); Wardle, *Slavery*, *supra* note 38, at 1911-14.

79. N.H. REV. STAT. ANN. §§ 457:1-3 (LexisNexis 2007) (repealed 2010).

riage in the state.⁸⁰

Likewise, the statutory protection can be overturned by a judicial interpretation of the state constitution as mandating legalization of same-sex marriage. For example, Iowa had a statute defining marriage as the union of man and woman,⁸¹ which was held unconstitutional by the Iowa Supreme Court in 2008 when that court mandated the legalization of same-sex marriage.⁸² Similarly, it may be determined that the statutes fail to embody a strong state policy against recognition in the state of same-sex marriages validly created in other jurisdictions. The Maryland Attorney General recently suggested this interpretation for the Maryland statute protecting the institution of marriage as a male-female union.⁸³

A state may recognize same-sex marriages validly created in other states for general purposes of the forum state's domestic relations law, or for only purposes of particular governmental benefits, incidents, or privileges. These two types of recognition must be distinguished. This distinction conforms to the pattern of foreign, validly-created, polygamous marriages, which are not recognized for domestic relations purposes, but have been recognized for success or inheritance purposes.⁸⁴

So at present, the "box score" is that five states are sure to fully recognize same-sex marriage.⁸⁵ Another five states will almost certainly give partial recognition to same-sex marriages (i.e. treat them the same as civil unions).⁸⁶ Another thirty states will not generally recognize same-sex marriages, but may recognize them for purposes of eligibility for particular benefits.⁸⁷ Finally, to the great academic interest of conflict of laws scholars, same-sex marriages are sure to be hotly contested case-by-case in the near future in about a baker's doz-

80. N.H. REV. STAT. ANN. §§ 457:1-3 (LexisNexis 2007 & Supp. 2009).

81. IOWA CODE § 595.2 (2001).

82. *Varnum v. Brien*, 763 N.W.2d 862, 907 (Iowa 2009).

83. Md. Att'y. Gen, *supra* note 76 (discussing, *inter alia*, MD. CODE ANN. FAM. LAW § 2-201 (LexisNexis 2006)).

84. *In re Dalip Singh Bir's Estate*, 188 P.2d 499, 502 (Cal. Ct. App. 1948); *Gibson v. Hughes*, 192 F. Supp. 564, 571 (S.D.N.Y. 1961).

85. *See* discussion *supra* Part III.A, at p. 160.

86. *Id.*

87. *See* discussion *supra* Part III.A, at p. 161.

en of the states, with unsure outcomes.⁸⁸ These outcomes will be more predictable on the basis of political analysis than choice of law principles or analysis.

What this suggests is that the drafters of section two of DOMA got it right. Section two protects state decision-making authority to resolve an issue that citizens and public officials in eighty percent of the states have determined is of very great importance, and on which they have taken a clear and strong policy (mostly state constitutional policy) position. It protects the authority of the remaining states to continue to wrestle with the issue and to determine the matter for themselves. It also protects the right of all of the states to modify, and even overturn, their existing policies about same-sex marriage recognition as public policy in the states evolves.

B. DOMA Section Two in Light of International Comparative Recognition of Same-Sex Marriages

There are two predominant choice of law systems widely used for international marriage recognition, concerning marriage essentials, in the world today.⁸⁹ One is the rule of *lex loci celebrationis* (the law of the place of celebration).⁹⁰ The other is the rule of *personal law* (the law that defines the personal status of the parties).⁹¹ The personal law system is divided, in turn, into two competing rules for determining personal law: *lex patriae* (the law of one's nationality) and *lex domicilii* (the law of one's domicile).⁹²

"In most countries the substantive validity of marriages is tested by the personal law rather than by the *lex loci celebrationis*."⁹³ In

88. See discussion *supra* Part III.A, at pp. 161-162.

89. See generally Lynn D. Wardle, *International Marriage and Divorce Regulation and Recognition: A Survey*, 29 FAM. L. Q. 497, 502-11 (1995) [hereinafter, Wardle, *Survey*]. For questions of marriage formalities, *lex loci celebrationis* is the predominant choice of law rule. *Id.* at 502-03.

90. LENNART PÅLSSON, MARRIAGE IN COMPARATIVE CONFLICT OF LAWS: SUBSTANTIVE CONDITIONS 2 (1981) [hereinafter PÅLSSON].

91. *Id.*

92. Lennart Pålsson, *Marriage and Divorce*, in 3 PRIVATE INTERNATIONAL LAW, INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 12, 58 (1978) [hereinafter IECL]; Pålsson, *supra* note 90, at 2.

93. IECL, *supra* note 92, at 60.

most civil law countries, nationality has been the primary source of personal law (*lex patriae*).⁹⁴ This is the traditional choice of law rule for marriage recognition “nearly everywhere in Continental Europe,” as well as in most of the Arab world countries with western legal systems.⁹⁵ The other personal law regime, *lex domicilii*, looks to the law of the domicile and has been the rule for marriage recognition in the United Kingdom, many British Commonwealth countries, and some Latin American countries.⁹⁶ Globally, one trend is to use domicile,⁹⁷ rather than nationality, to determine the law governing marriage capacity or essentials because of the desire to apply local law to labor immigrants and their families, who often remain nationals of their country of origin.⁹⁸

Nations that follow the *lex loci celebrationis* principle as to substantive marriage requirements include the United States, several Latin American countries,⁹⁹ and Scandinavian countries *inter se*.¹⁰⁰ In these nations, a marriage that is valid under the law of the place of celebration is valid in the forum, unless it violates the strong public policy of the forum.¹⁰¹

Under both the personal law and *lex loci celebrationis* regimes of

94. *Id.* at 68 (“[T]he rule of *lex patriae* prevails in the majority of countries adhering to the system of the personal law . . .”).

95. PÅLSSON, *supra* note 90, at 90.

96. IECL, *supra* note 92, at 69 & nn.395-96 (noting the use of *lex domicilii* in England, Scotland, Australia, Canada, Quebec, New Zealand, and Brazil). *See also* PÅLSSON, *supra* note 90, 91 & n.290, 92 (stating that *lex domicilii* applied in England, Scotland, Australia, Canada, Quebec, New Zealand, and Brazil; Venezuela used the test of nationality, and Peru and Sweden used mixed systems); Barbara E. Graham-Siegenthaler, *Principles of Marriage Recognition Applied to Same-Sex Marriage Recognition in Switzerland and Europe*, 32 CREIGHTON L. REV. 121, 137 (1998) (stating that *lex domicilii* is the choice-of-law in the UK, Greece, Portugal, and to an extent Ireland).

97. “Habitual residence” is another term sometimes used today to refer to domicile.

98. *See* Michael Bodgan & Eva Ryrstedt, *Marriage in Swedish Family Law and Swedish Conflicts of Law*, 29 FAM. L.Q. 675, 679-80 (1995).

99. Jae M. Lee, *Recognition of International Marriages in Argentina*, 29 FAM. L.Q. 519, 523 (1995); IECL, *supra* note 92, at 59 (noting that in Latin America, the *lex loci celebrationis* rule is usually subject to numerous exceptions in the case of foreign marriages).

100. PÅLSSON, *supra* note 90, at 83.

101. IECL, *supra* note 92, at 59.

private international law, foreign marriages that would otherwise be recognized under the choice of law rule will not be recognized if they violate the *ordre public* exception in choice of law: If a strong public policy of the forum is violated then a marriage that was valid in another country where performed will not be recognized.¹⁰²

The *ordre public* exception is especially important in nations that follow the *lex loci celebrationis* rule because it is easier for residents to evade local marriage laws. Restrictive policies of the residence state may be evaded by simply crossing a border to celebrate the marriage, and then returning to the restrictive state to live. Thus, *lex loci celebrationis* countries generally refuse to recognize evasive marriages of their own citizens.¹⁰³

Today, same-sex marriage is generally allowed in only nine world nations,¹⁰⁴ which is less than five percent of the world's 192 sovereign nations. Same-sex civil unions,¹⁰⁵ which are similar to traditional marriages, are permitted in an additional twelve nations.¹⁰⁶ Same-sex marriage is banned in nearly ninety percent of the world's nations, and at least thirty-five nations have constitutional provisions defining marriage as a male-female union.¹⁰⁷

Marriage between a man and a woman is a pre-state institution, meaning that it existed before there were states.¹⁰⁸ It is the most bene-

102. Wardle, *Survey*, *supra* note 89, at 506. See also PALSSON, *supra* note 90, at 10-50.

103. See Wardle, *Survey*, *supra* note 89, at 506.

104. See *infra* Appendix § III.A. Same-sex marriage is permitted in some cities or states in a few other nations including the United States and Mexico, but not throughout the nation. *Id.*

105. Same-sex unions are called by many different labels, including domestic partnerships, civil unions, *pactes civiles*, etc.

106. See *infra* Appendix § III.B.

107. See *infra* Appendix § IV.A.

108. See generally JOHN LOCKE, TWO TREATISES OF GOVERNMENT 362 (Peter Laslett, ed., 1963) ("The first society was between man and wife . . ."); Katherine Shaw Spaht, *Covenant Marriage Seven Years Later: Its As Yet Unfulfilled Promise*, 65 LA. L. REV. 605, 612 (2005) (describing marriage as the oldest social institution); Bill Muehlenberg, *Marriage as a Universal Norm*, NATIONAL MARRIAGE COALITION, http://www.marriage.org.au/index.php?option=com_content&view=article&id=22&Itemid=24 (last visited Oct. 12, 2010) ("Marriage is also the norm, both universal and historical."); see also *id.* ("Writing in 1938, Stanford University psychologist Lewis Terman opened his book on marital happiness with these words:

ficial form of an intimate relationship. Marriage is the original and ultimate basis for all other social relations, and the basic social unit upon which all other social organizations, including complex social organizations like the state, exist.¹⁰⁹ That is why the Universal Declaration of Human Rights declares and explicitly protects the right of men and women to marry, to enjoy equal rights within marriage as basic human rights,¹¹⁰ and links the importance of marriage directly to the family. “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”¹¹¹

Constitutions in eighteen percent of the sovereign nations of the world contain explicit provisions defining or describing marriage as a dual-gender union of a man and a woman.¹¹² This may be interpreted to reflect the recognition of the dual-gender union’s primary and essential importance to society, and to the state of marriage. By contrast, there are no world nations that have explicitly protected same-sex marriage in their constitutions, and only two national constitutions

‘Marriage is one of the most nearly universal of human institutions. No other touches so intimately the life of practically every member of the earth’s population.’ And more recent studies arrive at similar findings. Dr Helen Fisher, anthropologist at the American Museum of Natural History, puts it this way: ‘Marriage is a cultural universal; it predominates in every society in the world.’ American sociologist Kingsley Davis concurs: ‘Although the details of getting married—who chooses mates, what are the ceremonies and exchanges, how old are the parties—vary from group to group, the principle of marriage is everywhere embodied in practice No matter how bizarre or peculiar the marriage customs of a given society, they are still recognizable as marriage customs.’”).

109. See sources cited *supra* note 108; *infra* notes 110-112 and accompanying text; see also Steven K. Homer, Note, *Against Marriage*, 29 HARV. C.R.-C.L. L. REV. 505, 506, 515-19 (1994) (acknowledging it is commonly claimed that marriage is a pre-state institution, but critiquing that as a justification for dual-gender marriage).

110. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. GAOR, 3d Sess., U.N. Doc. A/810, at art. 16(1) (Dec. 12, 1948).

111. *Id.* at art. 16(3). Similarly, the Cairo Declaration on Human Rights in Islam, adopted in 1990 by the 45 nations then belonging to the Organization of the Islamic Conference, also provides that: “The family is the foundation of society, and marriage is the basis of its formation. Men and women have the right to marriage. . . .” Cairo Declaration of Human Rights in Islam, Aug. 5, 1990, G.A. Res. No. 49/19-P, art. 5, U.N. Doc. A/Conf.157/PC/62/Add.18 (June 9, 1993). See also *id.* at art. 6 (discussing equality of men and women).

112. See *infra* Appendix § IV.A.

have been interpreted to require legalization of same-sex marriage.¹¹³

As a matter of ordinary application of private international law, most same-sex marriages would fail the ordinary rules for foreign marriage recognition. For example, most nations apply the personal law regime for marriage recognition, and do not allow same-sex marriage. If a citizen or domiciliary of such a nation were to go to a country that allowed same-sex marriage and enter into such a union there, then under simple principles of private international law, no jurisdiction following *lex patria* or *lex domicilii* would recognize that marriage as valid. Such marriages would be treated as an evasive marriage not allowed in his or her country.

Additionally, all nations appear to have an *ordre public* or *public policy* exception to their general choice of law or private international law rules for marriage recognition.¹¹⁴ Thus, even if recognition of a same-sex marriage were appropriate under the general or specific rules of private international law, it would not be recognized if same-sex marriage was deemed to be deeply offensive to the public order or policy of the forum. Whether same-sex marriage would be deemed to violate the *ordre public* would depend upon the domestic law of the country in which recognition is sought. However, under general principles of private international law applicable to marriage recognition, it is clear that only those nine nations that allow same-sex marriage¹¹⁵ would definitely hold that recognition of a foreign same-sex marriage does *not* violate the domestic public policy.

This issue is uncertain in nations that recognize same-sex unions, which are like marriages. The differences between marriage *qua* marriage and civil unions or domestic partnerships are strong enough that internally such nations allow the latter but do not allow same-sex marriages. Therefore, it is unlikely that they would recognize same-sex marriages from other nations as “marriages” either. These unions may not be recognized as marriages, but foreign same-sex marriage couples may receive the benefits extended by local law to same-sex domestic partnerships or even receive the status of such domestic partnerships.

113. *Minister of Home Affairs v. Fourie* 2006 (3) BCLR 355 (CC) (S. Afr.); *Halpern v. Toronto*, [2003] 225 D.L.R. 529 (Can.).

114. Wardle, *Survey, supra* note 89, at 510.

115. *See infra* Appendix § III.A.

Thus, it seems probable that under general principles of private international law, same-sex marriages will only be recognized generally, and fully as marriages, in nine of the world's 192 nations at this time (and perhaps also in a few other cities, provinces, or states). Nations that allow some kind of civil unions may give marriage status to same-sex marriages contracted in another nation, or the benefits associated with that status. However, it is unlikely that they would be fully recognized as marriages since these nations' internal laws do not allow same-sex marriage and have drawn a clear distinction. Under the most favorable but implausible prospects, in only eleven percent of the nations is there a possibility that same-sex marriage will be fully or partially recognized under prevailing private international law principles of marriage recognition. Of course, nations, which do not or will not allow same-sex marriage, or give general marriage recognition to same-sex marriages, may recognize valid foreign same-sex marriages for specific purposes, such as for eligibility of specific government benefits.¹¹⁶

Specific treaties or conventions could change the basis for international recognition of same-sex marriages, but to date none have done so. Within the European community specifically, and potentially within the European Union generally, some conventions governing marriage recognition, family rights, civil status, and travel in other member countries have the potential of increasing the chances for recognition of same-sex marriages from one member European country in another. However, as of now, those are largely theoretical possibilities and not legal realities.¹¹⁷ Thus, as one European legal scholar

116. HCJ 3045/05 Ben-Ari & others v. Dir. of Population Admin., Ministry of the Interior (2) IsrLR 283 [2006] (Isr.), *available at* http://elyon1.court.gov.il/files_eng/05/450/030/a09/05030450.a09.htm (allowing registration of same-sex marriage couples from Canada as "married" on ground that such registration was relevant only for statistical purposes and not dispositive of the validity of the Israeli marriages); Fragomen Global, *Family Members Generally*, in GLOBAL BUSINESS IMMIGRATION HANDBOOK § 8:29, 12:30 (2010) (explaining that temporary entry to same-sex partners is granted in Germany; and designated activities status is granted to same-sex partners in Japan).

117. See Katharina Boele-Woelki, *The Legal Recognition of Same-Sex Relationships Within the European Union*, 82 TUL. L. REV. 1949, 1968-74 (2008); Allison R. O'Neill, *Recognition of Same-Sex Marriage in the European Community: The European Court of Justice's Ability to Dictate Social Policy*, 37 CORNELL INT'L L.J. 199, 200-01 (2004); Judith Faucette, *Same Sex Marriage and Free Movement in*

wrote:

[Currently the recognition of same-sex marriage within member states] all left to national legislatures and courts [T]raditional concepts are applied: in those countries which allow couples to legally formalize their same-sex relationship, the rules require that the couple must either (1) have their residence in the state of celebration or (2) not face an impediment to such a relationship according to their national law or the law of their habitual residence. Thus, Spanish nationals can conclude their same-sex marriage in the Netherlands if one of them has his or her habitual residence in that country. In particular, the transformation of a foreign institution into the 'local' institution (adapted recognition) expresses how traditionally but carefully the recognition issue is solved, not to mention those states that do not recognize a relationship formalized abroad because their national family laws prevent same-sex couples from obtaining any legal status.¹¹⁸

At present, there is one international convention that specifies marriage recognition rules called the Hague Convention on Celebration and Recognition of the Validity of Marriages.¹¹⁹ It avoids most inter-jurisdictional recognition issues by providing for strict front-end requirements, which the parties must meet before their marriage can be created in a particular jurisdiction.¹²⁰ As a general rule, the Hague Marriage Convention provides that a marriage properly celebrated in a member jurisdiction, meeting certain minimum essential requirements, must be recognized by all other contracting states.¹²¹ However, even this convention contains an *ordre public* exception, which allows nations to refuse to recognize the marriage if it is strongly against state public policy.¹²² More importantly, only three nations have ratified

the EU: Immigration and Benefits for Gay Families Based on European Law, SUITE101.COM, June 1, 2009, http://marital-gender-equality.suite101.com/article.cfm/same_sex_marriage_and_free_movement_in_the_eu.

118. Boele-Woelki, *supra* note 117, at 1977-78 (footnote omitted).

119. Hague Convention on Celebration and Recognition of the Validity of Marriages, arts. 7-15, Mar. 14, 1978, 16 I.L.M 18 [hereinafter Hague Marriage Convention].

120. *Id.* at arts. 3-6, 11, 14.

121. *Id.* at art. 14.

122. *Id.*

this convention since the Hague Conference of Private International Law officially proposed it; thus, it is effectively “dead-letter” as international law.¹²³

There are also bilateral treaties between the United States and other countries that may have specific provisions regarding marriage; at least one could have implications for marriage recognition.¹²⁴ However, those are very rare, so they are of limited comparative law significance.

Thus, section two of DOMA is consistent with international marriage recognition rules and principles. It harmonizes well with global marriage recognition theories and practices. International comparative conflict of laws analysis vindicates the policies embodied in DOMA.

IV. VERTICAL FEDERALISM AND THE STRUCTURAL IMPORTANCE OF SECTION THREE OF DOMA

Section three of DOMA added 1 U.S.C. § 7, which defined marriage as “only a legal union between one man and one woman as husband and wife” for purposes of federal law.¹²⁵ As a result, for purposes of interpreting federal laws, federal regulations, and rulings made by federal agencies, the terms “marriage” and “spouse” do not include same-sex unions.¹²⁶ Section three of DOMA defines what those terms mean for purposes of *federal* law only, and *does not* impose those definitions upon any state.¹²⁷ It does not attempt to create, define, or regulate domestic relations law; it only regulates the scope of application of federal laws and programs.¹²⁸ It *does* protect federal laws and programs from having state domestic relations laws recognizing same-sex marriage forced upon federal law.¹²⁹ If a state chooses to legalize

123. *Id.* See also The Hague Marriage Convention, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (Sept. 2007), <http://www.hcch.net/upload/outline26e.pdf> (only Australia, Luxembourg, and the Netherlands are parties to the Marriage Convention).

124. See, e.g., Agreement on Marriage: Documentary Requirements for United States Citizens in Italy, U.S.-Italy, Mar. 26, 1966, 18 U.S.T. 342.

125. DOMA, *supra* note 1.

126. See 1 U.S.C. § 7 (2006).

127. See DOMA, *supra* note 1.

128. *Id.*

129. *Id.*

same-sex marriage within its own jurisdiction (as it still may), section three provides that this state policy choice *does not* force federal officials or agencies to use that definition of marriage in interpreting or administering federal programs and laws.

Likewise, section three of DOMA does not prevent Congress from choosing to recognize same-sex marriage when it chooses to do so. Indeed, bills are currently pending in Congress that, *inter alia*, would recognize same-sex marriage for some or all purposes of federal law.¹³⁰ DOMA simply preserves that policy decision for Congress—the elected representative body that was created by the Constitution to make such decisions.¹³¹ Thus, section three of DOMA also has a significant “separation of powers” component. It is designed to protect Congressional authority to control and govern policy decisions, such as when federal law will consider same-sex marriages to be marriages for purposes of federal laws, against usurpation by the executive or judicial branches.

As explained in greater detail elsewhere, the argument that Congress lacks the power to define “marriage,” as that term is used in federal law, is meritless.¹³² The definition of legislative terms for the internal law of a jurisdiction is undeniably a proper function of any legislature. Congress has the power, which it has exercised for two centuries, to define terms used in federal law—including terms of marriage and family relationships.¹³³ Not infrequently, Congress has defined domestic relationship terms (including marriage) in ways inconsistent with some states’ definitions of those domestic relation-

130. See *supra* notes 9-11 and accompanying text. Other bills are also pending in Congress that impact state regulation of domestic relationships. See Military Readiness Enhancement Act of 2009, H.R. 1283, 111th Cong. § 3 (1st Sess. 2009) (proposing to amend title ten by replacing the military’s “Don’t Ask, Don’t Tell” Policy); Freedom From Credit and Discrimination Act of 2009, H.R. 4376, 111th Cong. § 2 (1st Sess. 2009) (prohibiting discrimination on the basis of sexual orientation and gender in credit matters); The Employment Non-Discrimination Act, H.R. 2981, 111th Cong. § 2, 4 (1st Sess. 2009) (prohibiting employment discrimination on the basis of sexual orientation and gender identity).

131. U.S. CONST. art. I, §§ 1, 8. See also U.S. CONST. art. IV. It would be ironic indeed if Congress could set the terms regulating recognition of same-sex marriages from one state to another, but not for purposes of federal law.

132. See Wardle, *Section Three*, *supra* note 2 (providing a detailed discussion of section three of DOMA and these issues).

133. *Id.*

ships. For example, some states recognize immigration marriages (marriages for the purpose of facilitating immigration) as valid (or merely voidable) marriages.¹³⁴ But Congress amended the Immigration and Naturalization Act to clarify that such marriages are not valid for purposes of immediate relative priority in federal immigration law.¹³⁵ Thus, a couple married for immigration purposes may have a valid state marriage, yet they are not considered married for the purpose of federal visa preference.¹³⁶

Likewise, Congress established a taxation system giving personal benefits to married couples based on the federal law's definition of marriage for federal taxes. Often, the state meaning of marriage is incorporated into the federal tax laws as a matter of federal choice, but that is not always the case. For example, persons married under state law, but legally separated, are not treated as married for federal income tax law.¹³⁷ A couple who consistently obtains a divorce at the end of the year for single status on their tax filings, but remarries early the following year, will be considered married even if they are deemed unmarried under state domestic relations laws.¹³⁸

Similarly, in bankruptcy law, it is well established that "what constitutes alimony, maintenance, or support will be determined under the [federal] bankruptcy laws, not state law."¹³⁹ Thus, a long line of statutes and cases involving federal programs have rejected application

134. *Id.* See generally Appeal of O'Rourke, 246 N.W.2d 461, 463 (Minn. 1976); Kleinfield v. Veruki, 372 S.E.2d 407, 410 (Va. Ct. App. 1988).

135. 8 U.S.C. § 1154(a)(2)(A) (2006); 8 U.S.C. § 1255(e) (2006).

136. See Lutwak v. United States, 344 U.S. 604, 617 (1953); *id.* at 620-21 (Jackson, J., dissenting); Garcia-Jaramillo v. Immig. & Natural. Servs., 604 F.2d 1236, 1238 (9th Cir. 1979).

137. I.R.C. § 7703(a)(2), (b) (2006) (providing definitions of marital status); I.R.C. § 71(b) (2006) (providing definition of alimony).

138. Rev. Rul. 76-255, 1976-2 C.B. 40. See generally Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law 2007-2008: Federalization and Nationalization Continue*, 42 FAM. L.Q. 713, 714-15 (2009).

139. H.R. REP. NO. 95-595, at 364 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6319, *cited with approval in In re Harrell*, 754 F.2d 902, 905 (11th Cir. 1985). See also *In re Williams*, 703 F.2d 1055, 1056 (8th Cir. 1983) ("Whether a particular debt is a support obligation or part of a property settlement is a question of federal bankruptcy law, not state law."); *Shaver v. Shaver*, 736 F.2d 1314, 1316 (9th Cir. 1984) (stating bankruptcy courts look to federal law, not state law, to determine whether an obligation is actually in the nature of alimony, maintenance, or support).

of state community property law (part of domestic relations law).¹⁴⁰

It has long been legally established that the meaning of family relationship terms used in federal statutes are governed by Congress, not by state lawmakers; Congress may, and usually chooses to, incorporate state domestic relations law into federal law; but if there is a conflict, federal law will preempt state domestic relations law for purposes of federal law. For example, disputes under the Federal Homestead Act over family succession to, or ownership of, an interest in the homestead property have been governed by federal law for nearly two centuries. In the 1905 case of *McCune v. Essig*,¹⁴¹ a mother and daughter disputed land settled by the father/husband under the homestead law.¹⁴² The Supreme Court rejected application of state law because “[t]he words of the [federal Homestead Act] statute are clear,” and even though contrary to state law, were controlling on the issue.¹⁴³ Citing cases going back to 1839, the Court rejected the daughter’s claim that under state law she was entitled to a share of the homesteaded property. The Court reasoned:

[The daughter’s claim is] but another way of asserting the law of the state against the law of the United States, and imposing a limitation upon the title of the widow which § 2291 of the Revised Statutes does not impose. It may be that appellant’s contention has support in some expressions in the state decisions. If, however, they may be construed as going to the extent contended for, we are una-

140. See *Boggs v. Boggs*, 520 U.S. 833, 854 (1997) (holding that pensions are governed under ERISA, not community property law); *Mansell v. Mansell*, 490 U.S. 581, 594-95 (1989) (finding veteran’s disability partial waiver of military retirement under USFSPA controls, not community property law); *McCarty v. McCarty*, 453 U.S. 210, 235-36 (1981) (ruling that military retirement pay is governed by federal law, not community property law), *superseded by statute*, Uniformed Services Former Spouses’ Protection Act (USFSPA), 10 U.S.C. § 1408 (2008); *Hisquidero v. Hisquidero*, 439 U.S. 572, 583-86 (1979) (ruling railroad retirement assets are governed by federal law, not community property law); *Yiatchos v. Yiatchos*, 376 U.S. 306, 311 (1964) (finding that U.S. Savings Bonds are governed by federal law, not community property law, unless dealing with fraud); *Wissner v. Wissner*, 338 U.S. 655, 658-59 (1950) (ruling that National Service Life Insurance Act governs beneficiaries of policies, and community property laws do not). See generally Wardle, *Section Three*, *supra* note 2.

141. 199 U.S. 382 (1905).

142. *Id.* at 386.

143. *Id.* at 389.

ble to accept them as controlling.¹⁴⁴

Federal courts generally follow a presumption that federal law is not intended to preempt state domestic relations law out of respect for the states' residual constitutional power to regulate domestic relations.¹⁴⁵ As the Supreme Court noted in *Hisquierdo v. Hisquierdo*¹⁴⁶: "On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be pre-empted."¹⁴⁷ Likewise, in *McCarty v. McCarty*,¹⁴⁸ the Court reiterated that "[s]tate family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden."¹⁴⁹ Congressional authority to supersede and displace state domestic relations law when domestic relations terms are used in federal law is clear; if there is any dispute the question is usually whether Congress's intent to preempt is clear. In fact, congressional intent to preempt state law was found in both *Hisquierdo* and *McCune*; the Court concluded that the federal law governing family members' interests in federal benefits superseded the otherwise applicable state domestic relations law.¹⁵⁰

144. *Id.* at 390. *See also* *Bernier v. Bernier*, 147 U.S. 242, 246-47 (1893). *But see* *Wilcox v. Jackson*, 38 U.S. 498 517-18 (1839) (providing that after title under federal law passes and is established under federal law, then its conveyance and related ownership questions are governed by state law).

145. *See generally* Wardle, *Section Three*, *supra* note 2.

146. 439 U.S. 572 (1979).

147. *Id.* at 581 (quoting *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904)).

148. 453 U.S. 210 (1981).

149. *McCarty v. McCarty*, 453 U.S. 210, 220 (1981) (quoting *Hisquierdo*, 439 U.S. at 581). Moreover, "[a] mere conflict in words is not sufficient"; the question remains whether the 'consequences [of that community property right] sufficiently injure the objectives of the federal program to require nonrecognition.'" *Id.* at 232 (quoting *Hisquierdo*, 439 U.S. at 581-83). Additionally, Justice Rehnquist noted in his dissent that he could find only five instances in which that kind of preemption (forcing federal standards upon state law) occurred in the history of community property disposition. *Id.* at 238 (Rehnquist, J., dissenting).

150. *See* *McCune v. Essig*, 199 U.S. 382, 389-90 (1905); *Hisquierdo*, 439 U.S. at 590.

V. CONCLUSION: THE ARCHITECTURE OF FEDERALISM AND THE FEDERAL ARCHITECTURE OF DOMA

DOMA is an architectural provision protecting the architecture of federalism, and the structure of purposely-separated governmental authority. It protects federalism by protecting the constitutional allocation of authority to set public policy regarding recognition of same-sex marriage in two respects, for two specific units of government.

Section two of DOMA protects the authority of the states to define and recognize domestic relationships within their own borders by allowing states to determine whether to recognize same-sex marriages performed in other states. First, it protects each state from aggressive sister-states that seek to export their same-sex marriages into the law, policy, and territorial jurisdiction of other states. In doing so, an aggressive state bypasses the approval of the elected policy-makers who represent the people of the effected state. Second, it protects each state from aggressive federal judges, and other governmental officials, who would use the supremacy of federal law to force states to recognize same-sex marriage in their internal domestic relations laws. Thus, section two of DOMA protects the right of each state to decide for itself whether, when, and to what extent it will or will not recognize same-sex marriages created in other states.

Additionally, section three of DOMA protects congressional authority to determine whether same-sex marriages created in the states will be treated like marriages for purposes of federal laws, rules, and regulations in two ways. First, it protects Congress against aggressive states and state officials who seek to export same-sex marriage recognition into federal law, policy, and programs, without congressional approval. Second, it protects Congress from aggressive federal judges and executive branch officials who may use their power to force the recognition of state-created same-sex marriages into federal programs, policies, and laws, without congressional approval. Section three preserves the authority of Congress to decide the question of whether to recognize state created same-sex marriages in federal laws.

The threatening conditions that caused Congress to enact DOMA fourteen years ago—to protect state and congressional authority to decide the marriage recognition question for their own sovereign jurisdictions—have not disappeared, but are instead more threatening than ever. No state had yet legalized same-sex marriage in 1996; today,

five states and the District of Columbia have legalized same-sex marriage. Therefore, those six jurisdictions create same-sex marriages that are exported to other states (when same-sex couples move from one state to another). Further, in 1996, no American court had yet ruled that same-sex marriages performed in one state had to be recognized in another. Today, over a dozen United States courts have ruled that same-sex marriages created elsewhere must be recognized by their respective state laws.¹⁵¹ Thus, as a matter of constitutional structure and procedure, DOMA is needed today more than ever before.

The critical issue that DOMA resolves is: *who decides* whether, when, and to what extent same-sex marriages created in one American state will be recognized by other states and Congress. Federalism principles and related concepts regarding separation of powers are the ultimate sources for the answer to that question. For conflict of laws scholars, that issue is the most important issue at stake in the ongoing controversy about interstate recognition of same-sex marriage in the United States. One hopes that needed conversation on this matter will take place. Conflicts scholars must maintain integrity and focus, and not be seduced by political sirens in the guise of various substantive constitutional doctrines.

151. See generally Lynn D. Wardle, *A Response to the "Conservative Case" for Same-Sex Marriage: Same-Sex Marriage and "The Tragedy of the Commons,"* 22 B.Y.U. J. Pub. L. 441 (2008).

APPENDIX

THE LEGAL STATUS OF SAME-SEX UNIONS IN THE U.S. AND GLOBALLY

Legal Status – 1 August 2010

I. LEGAL ALLOWANCE OF SAME-SEX UNIONS IN THE U.S. (50 STATES, D.C., COQUILLE):

A. Same-Sex Marriage Recognized in Five (5) U.S. States:

Connecticut,¹⁵² Iowa,¹⁵³ Massachusetts,¹⁵⁴ New Hampshire,¹⁵⁵ Vermont¹⁵⁶ (and in the District of Columbia and the Coquille Indian Tribe).¹⁵⁷

B. Same-Sex Unions Equivalent to Marriage Recognized in Five (5) U.S. States:

California,¹⁵⁸ Nevada,¹⁵⁹ New Jersey,¹⁶⁰ Oregon,¹⁶¹ and Washington.¹⁶²

152. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008).

153. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

154. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 943 (Mass. 2003).

155. N.H. REV. STAT. ANN. § 457:1-a (LexisNexis Supp. 2009).

156. VT. STAT. ANN. tit. 15, § 8 (Supp. 2009).

157. D.C. CODE § 46-401(a) (LexisNexis Supp. 2010); Julie Bushyhead, *The Coquille Indian Tribe, Same-Sex Marriage and Spousal Benefits: A Practical Guide*, 26 ARIZ. J. INT’L. & COMP. L. 509, 509 (2009) (“The Coquille Tribe, located in Oregon, is the first and only Indian tribe to codify the definition of marriage as a fundamental right regardless of the biological sex of the parties.”). *See also* Mark P. Strasser, *Tribal Marriages, Same-Sex Unions, and an Interstate Recognition Conundrum*, 30 B.C. THIRD WORLD L.J. 207, 233 (2010) (noting Coquille legislation and an incidental Cherokee marriage).

158. CAL. FAM. CODE § 297 (LexisNexis 2006).

159. NEV. REV. STAT. §§ 122A.010-122A.510 (2009).

160. N.J. STAT. ANN. § 37:1-28 (West Supp. 2010).

161. OR. REV. STAT. §§ 106.300-106.340 (2009).

162. WASH. REV. CODE § 26.60.010 (West Supp. 2010).

*C. Same-Sex Unions Registry & Specific, Limited Benefits in Six (6) U.S. Jurisdictions*¹⁶³:

Alaska,¹⁶⁴ Colorado,¹⁶⁵ Hawaii,¹⁶⁶ Maryland,¹⁶⁷ Maine,¹⁶⁸ Wisconsin.¹⁶⁹

II. LEGAL REJECTION OF SAME-SEX UNIONS IN THE U.S.:

A. Same-Sex Marriage Prohibited by State Constitutional Amendment in Thirty (30) U.S. States:

Alabama,¹⁷⁰ Alaska,¹⁷¹ Arizona,¹⁷² Arkansas,¹⁷³ California,¹⁷⁴ Colorado,¹⁷⁵ Florida,¹⁷⁶ Georgia,¹⁷⁷ Hawaii,¹⁷⁸ Idaho,¹⁷⁹ Kansas,¹⁸⁰

163. See generally Human Rights Campaign, *Marriage & Relationship Recognition*, http://www.hrc.org/issues/marriage/marriage_laws.asp (last visited Jul. 27, 2010). Several other states offer state employee partner benefits. See, e.g., ARIZ. ADMIN. CODE § 2-5-101(2008); R.I. GEN. LAWS §§ 28-48-1, 36-12-1, et seq. (Supp. 2008); *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445 (Mont. 2004); N.M. Exec. Order No. 2003-010 (Apr. 9, 2003), available at http://www.governor.state.nm.us/orders/2003/EO_2003_010.pdf. See also Lambda Legal, *Examples of States that Provide Benefits to Same-Sex Partners of State Employees* (Oct. 2008), <http://data.lambdalegal.org/pdf/legal/statedp102007rt.pdf>.

164. ALASKA ADMIN. CODE tit. 2, §§ 38.010, et seq. (2008); Alaska Civil Liberties Union v. State, 122 P.3d 781, 788-89 (Alaska 2005) (finding that state programs giving employment benefits to “spouses,” but not to same-sex partners of employees who cannot marry, violates the equal protection clause of the state constitution).

165. COLO. REV. STAT. §§ 15-22-105, 24-50-603 (2009).

166. HAW. REV. STAT. §§ 572C-1, et seq. (2006).

167. MD. CODE ANN. HEALTH-GEN §§ 1-101, 5-501, 5-509, 5-605, 5-612, 10-807, 19-310, 19-344 (LexisNexis 2008) (regarding health care facility visitation, medical visitation decisions, recordation and transfer taxes, and domestic partnerships); MD. CODE ANN. TAX-PROP. 12-101 (LexisNexis 2008) (regarding transfer taxes and domestic relationships).

168. ME. REV. STAT. ANN. tit. 22, §§ 2710, et seq. (Supp. 2009).

169. WIS. STAT. §§ 765, 770.01, et seq. (West 2010).

170. ALA. CONST. art. I, § 36.03.

171. ALASKA CONST. art. 1, § 25.

172. ARIZ. CONST. art. 30, § 1, added by Prop. 102.

173. ARK. CONST. amend. 83, § 1.

174. CAL. CONST. art. 1, § 7.5., added by Prop. 8 § 2.

175. COLO. CONST. art. 2, §31.

Kentucky,¹⁸¹ Louisiana,¹⁸² Michigan,¹⁸³ Mississippi,¹⁸⁴ Missouri,¹⁸⁵ Montana,¹⁸⁶ Nebraska,¹⁸⁷ Nevada,¹⁸⁸ North Dakota,¹⁸⁹ Ohio,¹⁹⁰ Oklahoma,¹⁹¹ Oregon,¹⁹² South Carolina,¹⁹³ South Dakota,¹⁹⁴ Tennessee,¹⁹⁵ Texas,¹⁹⁶ Utah,¹⁹⁷ Virginia,¹⁹⁸ and Wisconsin.¹⁹⁹

B. Same-Sex Civil Unions Equivalent to Marriage Recognition Prohibited by State Constitutional Amendment in Nineteen (19) U.S. States (38%):

Alabama,²⁰⁰ Arkansas,²⁰¹ Florida,²⁰² Georgia,²⁰³ Idaho,²⁰⁴ Kansas,²⁰⁵ Kentucky,²⁰⁶ Louisiana,²⁰⁷ Michigan,²⁰⁸ Nebraska,²⁰⁹ North

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176. FLA. CONST. art. 1, § 27.
 177. GA. CONST. art. 1, § 4(a), par. 1.
 178. HAW. CONST. art. 1, § 23.
 179. IDAHO CONST. art. III, § 28.
 180. KAN. CONST. art. 15, § 16(a).
 181. KY. CONST. § 233A.
 182. LA. CONST. art. 12, § 15.
 183. MICH. CONST. art. 1, § 25.
 184. MISS. CONST. art. 14, § 263A.
 185. MO. CONST. art. I, § 33.
 186. MONT. CONST. art. 13, § 7.
 187. NEB. CONST. art. I, § 29.
 188. NEV. CONST. art. I, § 21.
 189. N.D. CONST. art. XI, § 28.
 190. OHIO CONST. art. XV, § 11.
 191. OKLA. CONST. art. 2, § 35.
 192. OR. CONST. art. XV, § 5a.
 193. S.C. CONST. art. XVII, § 15.
 194. S.D. CONST. art. 21, § 9.
 195. TENN. CONST. art. 11, § 18.
 196. TEX. CONST. art. 1, § 32(a).
 197. UTAH CONST. art. I, § 29(1).
 198. VA. CONST. art. 1, § 15-A.
 199. WIS. CONST. art. XIII, § 13.
 200. ALA. CONST. art. 1, § 36.03(g).
 201. ARK. CONST. amend. 83, § 2.
 202. FLA. CONST. art. 1, § 27.
 203. GA. CONST. art. 1, § 4(b).
 204. IDAHO CONST. art. III., § 28.
 205. KAN. CONST. art. 15, § 16(b).

Dakota,²¹⁰ Ohio,²¹¹ Oklahoma,²¹² South Carolina,²¹³ South Dakota,²¹⁴ Texas,²¹⁵ Utah,²¹⁶ Virginia,²¹⁷ and Wisconsin.²¹⁸

*C. Same-Sex Marriage Barred by Positive Law or Appellate Decision in Forty-Three (43) U.S. States, and D.C.*²¹⁹

D. In all 31 U.S. states in which same-sex marriage has been on the ballot generally, the people (including Maine where in 2009, a “people’s veto” rejected the legislature’s approval of same-sex marriage.) have decisively rejected same-sex marriage.²²⁰ The total combined vote rejecting same-sex marriage, through the 31 state marriage amendments, is over 63%.²²¹

206. KY. CONST. § 233A.

207. LA. CONST. art. 12, § 15.

208. MICH. CONST. art. 1, § 25.

209. NEB. CONST. art. I, § 29.

210. N.D. CONST. art. XI, § 28.

211. OHIO CONST. art. XV, § 11.

212. OKLA. CONST. art. 2, § 35(A).

213. S.C. CONST. art. XVII, § 15.

214. S.D. CONST. 21, § 9.

215. TEX. CONST. art. 1, § 32(b).

216. UTAH CONST. art. I, § 29(2).

217. VA. CONST. art. 1, § 15-A.

218. WIS. CONST. art. XIII, § 13.

219. Same-sex marriage is expressly prohibited in all but the five states allowing same-sex marriage. In New Mexico and Rhode Island, same-sex marriage is prohibited by common law, but not high court rulings on point. *See generally* National Conference of State Legislatures, *Same Sex Marriage, Civil Unions and Domestic Partnerships* (2010), <http://www.ncsl.org/default.aspx?tabid=16430>. New York also lacks explicit statutory prohibition of same-sex marriage, but the Court of Appeals has rejected same-sex marriage. *See Hernandez v. Robles*, 855 N.E.2d 1, 5 (N.Y. 2006).

220. *See* DOMA Watch, *Marriage Amendment Summary* (2009), <http://www.domawatch.org/amendments/amendmentssummary.html>; Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1385 (2010) (“The legislature in Maine tried to [legalize same-sex marriage], but its law was subsequently repealed by voter referendum” in a People’s Veto vote in 2009); Wardle, *Section Three*, *supra* note 2, at app.

221. DOMA Watch, *Marriage Amendment Summary* (2009), <http://www.domawatch.org/amendments/amendmentssummary.html>.

III. LEGAL ALLOWANCE OF SAME-SEX UNIONS GLOBALLY (OF 192 NATIONS / UN):

A. Same-Sex Marriage Permitted in Nine (9) Nations:

Argentina,²²² Belgium,²²³ Canada,²²⁴ Iceland,²²⁵ The Netherlands,²²⁶ Norway,²²⁷ Portugal,²²⁸ Spain,²²⁹ and Sweden.²³⁰

222. Law No. 26.618, July 21, 2010, [CXVIII] B.O. 31.949, *available at* <http://www.infobae.com/download/55/0345567.pdf>.

223. Loi ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil [Law opening marriage to people of the same sex and amending certain provisions of the civil code] Feb. 13, 2003 MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Feb. 28, 2003, 3d ed., *available at* http://www.ejustice.just.fgov.be/doc/rech_f.htm; Ian Curry-Sumner, *Interstate Recognition of Same-Sex Relationships in Europe*, 13 J. GENDER RACE & JUST. 59, 61 n.10 (2009).

224. Civil Marriage Act, 2005 S.C., ch. 33 (Can.), *available at* <http://laws.justice.gc.ca/PDF/Statute/C/C-31.5.pdf>. *See also* Halpern v. Toronto (City), [2003] 225 D.L.R. (4th) 529 (Can.).

225. Lög um breytingar á hjúskaparlögum og fleiri lögum og um brottfall laga um staðfesta samvist (ein hjúskaparlög) [Law on amendments to the Marriage Act and the removal of registered partnership (one marriage)] (Law No. 65/2010), *available at* <http://www.althingi.is/altext/stjt/2010.065.html>; Curry-Sumner, *supra* note 223, at 61 n.18.

226. Wet van 21 december 2000 tot wijziging van Boek 1 van het Burgerlijk Wetboek in verband met de openstelling van het huwelijk voor personen van hetzelfde geslacht (Wet openstelling huwelijk) [Law amending the Civil Code to open marriage to same sex couples], Stb. 2001, p. 9, *available at* <https://zoek.officielebekendmakingen.nl/stb-2001-9.html?zoekcriteria=%3fzkt%3dUitgebreid%26pst%3dStaatsblad%26dpr%3dAlle%26jgp%3d2001%26nrp%3d9%26sdt%3dDatumUitgifte%26pnr%3d1%26rpp%3d10&resultIndex=0&sorttype=1&sortorder=4>. *See* Nancy G. Maxwell, *Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison*, 18 ARIZ. J. INT'L & COMP. L. 141 (2001).

227. Lov om ekteskap [The Marriage Act] (Act 1991-07-04 No. 47 §1), *amended by* Act 2008-27-06 No. 53, *available at* http://www.lovdato.no/cgi-wif/wiftdles?doc=/app/gratis/www/docroot/all/nl-19910704-047.html&emne=ekteskapslov*&&; Curry-Sumner, *supra* note 223, at 62 n.21.

228. Lei n.º 9/2010 de 31 de Maio Permite o casamento civil entre pessoas do mesmo sexo [Law allowing civil marriage between persons of the same sex] (Law No. 9/2010), *available at* <http://dre.pt/pdf/isdip/2010/05/10500/0185301853.pdf>.

229. Law 13/2005 of 1 July, amending the Civil Code concerning the right to marry (B.O.E. 2005, 11364), *available at* <http://www.boe.es/boe/dias/2005/07/02/pdfs/A23632-23634.pdf>; Curry-Sumner, *supra* note 223, at 62 n.23.

*B. Same-Sex Unions Equivalent to Marriage Allowed in Twelve (12) Other Nations*²³¹:

Andorra,²³² Austria,²³³ Denmark,²³⁴ Finland,²³⁵ France,²³⁶ Germany,²³⁷ Luxembourg,²³⁸ New Zealand,²³⁹ Slovenia,²⁴⁰ South Africa,²⁴¹

230. LAG OM UPPHÄVANDE AV LAGEN OM REGISTRERAT PARTNERSKAP [ACT REPEALING THE REGISTERED PARTNERSHIP ACT] (Svensk författningssamling [Swedish Code of Statutes] [SFS] 2009:260); ÄKTENSKAPSBALK [ÄKTB] [MARRIAGE CODE] 1987:230, available at <http://www.riksdagen.se/Webbnav/index.aspx?nid=3911&bet=2009:260>; Curry-Sumner, *supra* note 223, at 62 n.24.

231. See generally Katharina Boele-Woelki, *The Legal Recognition of Same-Sex Relationships Within the European Union*, 82 TUL. L. REV. 1949, 1955-59 (2008); Aaron Xavier Fellmeth, *State Regulation of Sexuality in International Human Rights Law and Theory*, 50 WM. & MARY L. REV. 797, 853 (2008); Lynn D. Wardle, *A Response to the "Conservative Case" for Same-Sex Marriage: Same-Sex Marriage and "The Tragedy of the Commons,"* 22 BYU J. PUB. L. 441, 443-45, nn.4-6 (2008); ILGA-EUROPE, *Country-by-Country*, http://www.ilga-europe.org/home/guide/country_by_country (last visited Aug. 11, 2010).

232. Qualificada de les unions estables de parella, [Qualified stable unions between couples] (Law 4/2005) 17 BOPA 25, available at <http://www.ciecl.org/Legislationpdf/Andorre-L.UnionsEstables21f-02-2005-EnVigueur24mars2005.pdf>.

233. EINGETRAGENE PARTNERSCHAFT-GESETZ (EPG) [REGISTERED PARTNERSHIP LAW] BUNDESGESETZBLATT I (BGBl I) No. 135/2009, available at http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2009_I_135/BGBLA_2009_I_135.html.

234. Bekendtgørelse af lov om registreret partnerskab [Registered Partnership Act] (Act. No. 372/1989), available at <https://www.retsinformation.dk/Forms/R0710.aspx?id=31533>; Curry-Sumner, *supra* note 223, at 61 n.12.

235. Laki rekisteröidystä parisuhteesta [Act on Registered Partnerships] (Act No. 950/2001), amended by Act No. 59/2005, available at <http://www.finlex.fi/fi/laki/alkup/2001/20010950>. See also Boele-Woelki, *supra* note 231, at 1955.

236. Loi 99-944 du 15 novembre 1999 [Law No. 99-944 of Nov. 15 1999], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Nov. 16, 1999, p. 16959, available at <http://www.droit.org/jo/19991116/JUSX9803236L.html>.

237. Gesetz über die Eingetragene Lebenspartnerschaft [LPartG] [Civil Partnership Act], Feb. 16, 2001, BUNDESGESETZBLATT [BGBl I] at 266, available at <http://www.juraforum.de/gesetze/lpartg/>; Curry-Sumner, *supra* note 223, at 61 n.15.

238. Loi du 9 juillet 2004 relative aux effets légaux de certains partenariats [Act of July 9, 2004 on the legal effects of certain partnerships] (Act No. 143/2004), available at http://www.gouvernement.lu/dossiers/justice/partenariat/loi_parten

Switzerland,²⁴² and UK.²⁴³

C. Same-Sex Unions Registry & Limited Benefits Provided in Seven (7) Other Nations:

Columbia,²⁴⁴ Croatia,²⁴⁵ Czech Republic,²⁴⁶ Ecuador,²⁴⁷ Hungary,²⁴⁸ Israel,²⁴⁹ and Uruguay.²⁵⁰

ariat.pdf; Curry-Sumner, *supra* note 223, at 62 n.19.

239. Civil Union Act 2004, 2004 S.N.Z. No. 102, available at <http://www.legislation.govt.nz/act/public/2004/0102/latest/DLM323410.html>.

240. Zakon o registraciji istospolne partnerske skupnosti [Law on the Registration of Same Sex Partnerships] (Act No. 65/2005), available at <http://www.uradni-list.si/1/objava.jsp?urlid=200565&stevilka=2840>; Curry-Sumner, *supra* note 223, at 62 n.22.

241. *Minister of Home Affairs & Another v. Fourie & Another* 2006 (1) SA 524 (CC) (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/2005/19.html>; Civil Union Act 17 of 2006, available at <http://www.info.gov.za/view/DownloadFileAction?id=67843>. See generally Bradley S. Smith & J.A. Robinson, *The South African Civil Union Act 17 of 2006: A Good Example of the Dangers of Rushing the Legislative Process*, 22 BYU J. PUB. L. 419 (2008).

242. LOI FÉDÉRALE SUR LE PARTENARIAT ENREGISTRÉ ENTRE PERSONNES DU MÊME SEXE [FEDERAL LAW ON REGISTERED PARTNERSHIPS BETWEEN PERSONS OF THE SAME SEX] June 18, 2004, RECUEIL SYSTEMATIQUE DU DROIT FÉDÉRAL [RS] 211.231, available at <http://www.admin.ch/ch/f/rs/2/211.231.fr.pdf>; Curry-Sumner, *supra* note 223, at 62 n.25.

243. Civil Partnership Act, 2004, c. 33, available at <http://www.legislation.gov.uk/ukpga/2004/33/introduction>.

244. Corte Constitucional [C.C.] [Constitutional Court], enero 28, 2009, Sentencia C-029/09, available at <http://www.corteconstitucional.gov.co/relatoria/2009/C-029-09.htm>; C.C., febrero 7, 2007, Sentencia C-075/07, available at <http://www.corteconstitucional.gov.co/relatoria/2007/C-075-07.htm>.

245. Zakon o istospolnim zajednicama [Law about Same-Sex Unions] Narodne Novine 116/2003 (July 22, 2003), available at <http://narodne-novine.nn.hr/clanci/sluzbeni/306172.html>. See also ILGA-EUROPE, *supra* note 231.

246. Zákon [Statute] č. 115/2006 Sb. [Collection of Laws], available at <http://www.mvcr.cz/mvcren/article/registrovane-partnerstvi.aspx>. See also ILGA-EUROPE, *supra* note 231.

247. CONSTITUCION DE LA REPUBLICA DEL ECUADOR art. 68 (constitutionally allowing same-sex civil unions). See also Pedro Dutour, *Ecuador's labyrinth of nebulous ambiguity*, MERCATORNET, Oct. 9, 2008, http://www.mercatornet.com/articles/view/ecuadors_labyrinth_of_nebulous_ambiguity/; see generally Wardle, *supra* note 231, at 445 n.9; ILGA-EUROPE, *supra* note 231.

248. 2009. évi XXIX. A bejegyzett élettársi kapcsolat létrejötte (Act estab-

IV. LEGAL REJECTION OF SAME-SEX MARRIAGE GLOBALLY:

*A. At Least Thirty-five (35) of 192 Sovereign Nations (18%) Have Constitutional Provisions Explicitly or Implicitly Defining Marriage as Union of Man and Woman.*²⁵¹

lishing registered partnerships), available at <http://www.kozlonyok.hu/nkonline/MKPDF/hiteles/mk09063.pdf>; see also ILGA-EUROPE, *supra* note 231.

249. HCJ 3045/05 Ben-Ari & others v. Dir. of Population Admin., Ministry of the Interior (2) IsrLR 283 [2006] (Isr.), available at http://elyon1.court.gov.il/files_eng/05/450/030/a09/05030450.a09.htm. See also Family Courts Law, 5755-1995, SH No. 1537 p. 393 (“reputed spouses”); HCJ 721/94 El-Al Israel Airways Ltd. v. Danielowitz 48(5) PD 749 [1994] (Isr.) (discussing employment benefits in Israel).

250. La Unión Concubinaria [Civil Unions Law] Dec. 27, 2007, Publicada D.O. 18.246, available at <http://www.parlamento.gub.uy/leyes/ AccesoTextoLey.asp?Ley=18246&Anchor=>.

251. THE CONSTITUTION OF THE REPUBLIC OF ARMENIA art. 35; AZƏRBAYCAN RESPUBLIKASININ KONSTITUSIYASI art. 34 (Azerbaijan); KANST'ITUTS'IIĀ RESPUBLIKI BELARUS' art. 32 (Belarus); CONSTITUIÇÃO FEDERAL [C.F.] art. 226 (Braz.); KONSTITUTSIIĀNA RESPUBLIKA BŪLGARIĀ art. 46 (Bulgaria) (“Matrimony shall be a free union between a man and a woman.”); LA CONSTITUTION DU BURKINA FASO art. 23; THE CONSTITUTION OF THE KINGDOM OF CAMBODIA art. 45; XIANFA art. 49 (1982) (China); CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 42 (Colombia); CONSTITUCION DE LA REPUBLICA DE CUBA art. 36 (Cuba); CONSTITUCION DE LA REPUBLICA DEL ECUADOR art. 37, 38, 67 (Ecuador); THE CONSTITUTION OF ERITREA art. 22; FEDERAL NEGARIT GAZETA OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA art. 34; CONSTITUTION OF THE REPUBLIC OF THE GAMBIA art. 27(1); CONSTITUCION DE LA REPUBLICA DE HONDURAS art. 112; NIHONKOKU KENPŌ [KENPŌ], art. 24 (Japan) (“Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis.”); LATVIJAS TUATA SAVĀ BRĪVI VĒLĒTĀ SATVERSMES SALPULCĒ IR NOLĒMUS SEV ŠĀDU VALSTS SATVERSMI art. 110 (Latvia) (“The State shall protect and support marriage - a union between a man and a woman, ...”); LIETUVOS RESPUBLIKOS KONSTITUCIJA art. 38 (Lithuania); CONSTITUTION OF THE REPUBLIC OF MALAWI art. 22(3); CONSTITUTIA MONITORUL OFICIAL AL R.MOLDOVA art. 48(2) (Moldova); USTAV CRNE GORE art. 71(Montenegro); THE CONSTITUTION OF NAMIBIA art. 14(1); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA art. 72 (Nicaragua); CONSTITUCION DE LA REPUBLICA DEL PARAGUAY art. 49, 51,52 (Paraguay); CONSTITUCION POLITICA DEL PERU DE 1993 art. 5 (Peru); KONSTYTUCJA RZECZYSPOLITEJ POLSKIEJ art. 18 (Poland); USTAV REPUBLIKE SRBIJE art. 62 (Serbia); GRONDWET VAN DE REPUBLIEK SURINAME art. 35(2) (Suriname); THE CONSTITUTION OF THE KINGDOM OF SWAZILAND ACT art. 27(1); KONSTITUTSIIA RESPUBLIKI TADZHIKISTAN art. 33 (Ta-

Armenia, Azerbaijan, Belarus, Brazil, Bulgaria, Burkina Faso, Cambodia, China, Columbia, Cuba, Ecuador, Eritrea, Ethiopia, Gambia, Honduras, Japan, Latvia, Lithuania, Malawi, Moldova, Montenegro, Namibia, Nicaragua, Paraguay, Peru, Poland, Serbia, Suriname, Swaziland, Tajikistan, Turkmenistan, Uganda, Ukraine, Venezuela, and Vietnam.

*B. Eighty-three (83) Nations Have Substantive Constitutional Provisions Protecting "Marriage," and One Hundred Forty-five (145) Nations have Constitutional Provisions Protecting "Family."*²⁵²

*C. One hundred eighty-three (183) Nations Do Not Allow Same-sex Marriage.*²⁵³

*D. One hundred seventy-one (171) Nations Do Not Allow Any Same-sex Marriage-Like Unions.*²⁵⁴

jikistan); KONSTITUTSIJA TURKMENSTANA art. 25 (Turkmenistan); CONSTITUTION OF THE REPUBLIC OF UGANDA art. 31(1); KONSTITUTSIJA UKRAINI art. 51(Ukraine); CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA art. 77 (Venezuela); THE CONSTITUTION OF THE SOCIALIST REPUBLIC OF VIETNAM art. 64. *See also* MONGOL ULSYN ÜNDSĒN KHUULI art. 16 (11) (Mongolia); BILL OF RIGHTS ORDINANCE art. 19(2) (Hong Kong), available at <http://www.constitution.org/cons/hkri91.txt>.

252. *See* Lynn D. Wardle, *Lessons from the Bill of Rights About Constitution Protections for Marriage*, 38 LOY. U. CHI. L. J. 277, 320-22 (2007) (providing a list of 136 national constitutional provisions). To that list now should be added nine additional national constitutions (for a total of 145): THE CONSTITUTION OF THE KINGDOM OF BHUTAN art. 7(19); CONSTITUTION OF THE REPUBLIC OF THE GAMBIA art. 27; KUSHTETUTA E REPUBLIKËS SË KOSOVËS art. 37 (Kosovo); LATVIJAS TUATA SAVĀ BRĪVI VĒLĒTĀ SATVERSMES SALPULCĒ IR NOLĒMUS SEV ŠĀDU VALSTS SATVERSMI art. 110 (Latvia); USTAV CRNE GORE art. 40, 71-3 (Montenegro); THE CONSTITUTION OF THE KINGDOM OF SWAZILAND ACT art. 14(f)(1), 27; BUNDESVERFASSUNG [BV] art. 13, 14, 41, 116 (Switz.); CONSTITUTION OF THE UNITED ARAB EMIRATES art. 15.

253. *See* Wardle, *supra* note 252, at app. § III.A. (listing the only nine of 192 sovereign nations that allow same-sex marriage).

254. *See* Wardle, *supra* note 252, at app. § III.B. (listing the additional twelve of 192 sovereign nations that allow same-sex marriage-equivalent unions).

