The Defense of Marriage Act: How Congress Said No to Full Faith and Credit and the Constitution

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THE DEFENSE OF MARRIAGE ACT: HOW CONGRESS SAID "NO" TO FULL FAITH AND CREDIT AND THE CONSTITUTION

I. INTRODUCTION

It is estimated that ten percent of the human population is homosexual. Based upon 1990 census figures, potentially 2.5 million people will be affected by the Defense of Marriage Act ("DOMA"). DOMA was enacted in September of 1996 to permit states to disregard the Full Faith and Credit Clause of the United States Constitution in the event that same sex marriage became legal in any state.

The debate over same sex marriage actually began over twenty-five years ago in Minnesota, but the fury erupted in Hawaii with the 1993 Baehr v. Lewin decision. In Baehr, three same sex couples were denied the right to marry by the State of Hawaii. However, the Hawaii Supreme Court ruled that the state’s failure to issue a marriage license amounted to sex discrimination. The case was remanded to determine if Hawaii had a compelling reason for refusing to issue the couples’ marriage licenses.

Although the Hawaiian courts had not made a final judicial determination regarding same sex marriage, the United States Congress decided not to wait for the outcome and en-

1. According to the Kinsey report, 37% of the male population has had some homosexual experience, 13% has had more homosexual than heterosexual experience, and 4% were exclusively homosexual. HOMOSEXUALITY/HETEROSEXUALITY 1 (David P. McWhirter, et al. eds., 1990). The numbers were similar, but lower, for women. Id. For purposes of this comment, and for ease of calculation, the author uses the common belief that 10% of the population is homosexual.

2. The total population of the United States in 1990 was 248,709,873.


4. See discussion infra Part II.B.1-2.

5. See Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971); see also discussion infra Part II.A.1.


7. Baehr, 852 P.2d at 49.

8. Id. at 60; see discussion infra Part II.A.2.

acted DOMA.\textsuperscript{10} Congress believed that under the second sentence of the Full Faith and Credit Clause\textsuperscript{11} it had the power to enact legislation that would allow states to choose whether to recognize a same sex marriage.\textsuperscript{12}

This comment explores the ruling in \textit{Baehr v. Lewin}\textsuperscript{13} and Congress' reaction to it—the enactment of DOMA.\textsuperscript{14} After discussing Congress' reasoning for enacting DOMA,\textsuperscript{15} the background section continues with a discussion of the history of the Full Faith and Credit Clause, including the Framers' intent to ensure that all acts and judgments be recognized by sister states.\textsuperscript{16} How the Supreme Court has interpreted the Full Faith and Credit Clause is also addressed.\textsuperscript{17} The background concludes by discussing the "effects clause" of the Full Faith and Credit Clause and its judicial interpretation.\textsuperscript{18} Previous legislation Congress has enacted under the effects clause will also be explored.\textsuperscript{19}

After identifying the problem of whether Congress has the power to allow states to give no effect to a sister state's acts or judgments,\textsuperscript{20} the analysis explores the constitutionality of DOMA, and argues that it is unconstitutional.\textsuperscript{21} The author asserts that DOMA is unconstitutional as it violates the Framers' intent\textsuperscript{22} and because Congress has no power to enact legislation that limits the effect of the Full Faith and Credit Clause.\textsuperscript{23} Finally, this comment proposes that if Congress wants to enact legislation which allows states to disregard the Constitution, the only way it can be done is through

\begin{footnotes}
\item[11] The second sentence reads, "And Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." U.S. CONST. art IV, § 1.
\item[12] See discussion \textit{infra} Part II.B.2.
\item[13] 852 P.2d 44 (Haw. 1993); see also discussion \textit{infra} Part II.A.2.
\item[14] See discussion \textit{infra} Part II.B.1-2.
\item[15] See discussion \textit{infra} Part II.B.2.
\item[16] See discussion \textit{infra} Part II.C.1.
\item[17] See discussion \textit{infra} Part II.C.2.
\item[18] See discussion \textit{infra} Part II.C.3-4.
\item[19] See discussion \textit{infra} Part II.C.5.
\item[20] See discussion \textit{infra} Part III.
\item[21] See discussion \textit{infra} Part IV.
\item[22] See discussion \textit{infra} Part IV.A.1.
\item[23] See discussion \textit{infra} Part IV.B.
\end{footnotes}
the constitutional amendment process.\textsuperscript{24}

II. BACKGROUND

A. Same Sex Marriage

1. The Early Years

The first shots were fired in the debate surrounding same sex marriage over twenty-five years ago in \textit{Baker v. Nelson}.\textsuperscript{25} In 1971, two Minnesota men applied for a marriage license with the county clerk of Hennepin.\textsuperscript{26} The application was denied because the applicants were of the same sex.\textsuperscript{27} The men filed suit, claiming denial of their First, Eighth, and Ninth Amendment rights.\textsuperscript{28} Additionally, they claimed that the refusal to issue a marriage license to two members of the same sex violated the Fourteenth Amendment's due process and equal protection guarantees.\textsuperscript{29}

On appeal, the Minnesota Supreme Court upheld a lower court ruling which refused to issue the license.\textsuperscript{30} The court believed that the constitutional arguments raised lacked merit and refused to change the commonly understood meaning of "marriage."\textsuperscript{31}

In the years since 1971, several other claimants brought the issue of the right to marry a member of the same sex before courts across the country.\textsuperscript{32} None were successful in gaining the fundamental right to marry;\textsuperscript{33} however, claimants in Hawaii might be the first to succeed.\textsuperscript{34}

\textsuperscript{24} See discussion \textit{infra} Part V. This comment is not concerned with any religious, moral, social, or equal protection arguments that may be raised by same sex marriages. The exclusive focus of this comment is on Congress' power under the Constitution to enact legislation prohibiting same sex marriage.

\textsuperscript{25} 191 N.W.2d 185 (Minn. 1971).

\textsuperscript{26} \textit{Baker}, 191 N.W.2d at 185.

\textsuperscript{27} \textit{Id}.

\textsuperscript{28} \textit{Id.} at 186 n.2.

\textsuperscript{29} \textit{Id}.

\textsuperscript{30} \textit{Id.} at 185.

\textsuperscript{31} \textit{Baker}, 191 N.W.2d at 185-86 (finding that the common understanding of marriage meant a union between persons of the opposite sex).


\textsuperscript{33} \textit{See supra} note 32.

\textsuperscript{34} Baehr v. Lewin, 852 P.2d 44 (Haw. 1993); \textit{see infra} Part II.A.2.
2. The Baehr v. Lewin Decision

In its landmark decision of *Baehr v. Lewin*, the Hawaii Supreme Court stepped up the debate over same sex marriage. For the first time in history, it appears that same sex couples may be allowed to legally marry.

In *Baehr*, three same sex couples filed suit in a Hawaii circuit court against the Director of the Department of Health ("DOH") for refusing to issue them marriage licenses. While Hawaii's marriage statute does not specifically deny same sex marriages, the DOH interpreted the statute to apply only to opposite sex couples.

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35. *Baehr*, 852 P.2d at 44.


37. *Baehr*, 852 P.2d at 68. Hawaii has since enacted a domestic partners law which would give same sex couples some rights, including medical insurance and survivorship rights. HAW. REV. STAT. § 572C-1, et. seq. (1998). Hawaii has also placed on the 1998 ballot a constitutional amendment that would ban marriage between members of the same sex. See Guy Kelly, *Gay Marriage Suit in Hawaii Prompts Colorado Legislature*, ROCKY MOUNTAIN NEWS, Feb. 11, 1998, at 22A.


39. *Id.* at 50. Hawaii's marriage statute contains gender based language that led the DOH to interpret the statute to apply only to opposite sex couples. HAW. REV. STAT. § 572-1 (1993).
statute to apply only to opposite sex couples.\textsuperscript{40} The Circuit Court dismissed the plaintiffs' action for failure to state a claim upon which relief could be granted.\textsuperscript{41}

On appeal to the Hawaii Supreme Court, the appellants argued that the DOH's interpretation and application of Hawaii's marriage statute violated the Equal Protection Clause of the Hawaii Constitution.\textsuperscript{42} Hawaii's Equal Protection Clause provides, in pertinent part, that "[n]o person shall be . . . denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of . . . sex . . . ."\textsuperscript{43}

The Hawaii Supreme Court held that while same sex couples had no fundamental right to marry, the Hawaii Equal Protection Clause had been violated.\textsuperscript{44} The court believed that the refusal to issue a marriage license to a same sex couple amounted to sex discrimination and, therefore, the Hawaii marriage statute was presumptively unconstitutional on its face and as applied by the DOH.\textsuperscript{45} However, the statute would be deemed constitutional if, under a strict scrutiny analysis, the DOH could show a compelling reason for the difference in treatment between same sex and opposite sex couples.\textsuperscript{46} The case was remanded to determine that issue.\textsuperscript{47}

On remand, the circuit court found the reasons offered by the DOH for the difference in treatment between same sex and opposite sex couples, including protecting traditional marriage, were not compelling.\textsuperscript{48} The court found that the failure to issue a marriage license amounted to sex discrimination.\textsuperscript{49} The possibility that same sex couples could soon legally marry in Hawaii prompted other states to enact legisla-

\textsuperscript{40} Baehr v. Lewin, 825 P.2d 44, 51-52 (Haw. 1993).
\textsuperscript{41} Id. at 52.
\textsuperscript{42} Id. at 50.
\textsuperscript{43} HAW. CONST. art. I, § 5 (1978).
\textsuperscript{44} Baehr, 852 P.2d at 67.
\textsuperscript{45} Id.
\textsuperscript{46} Id. The strict scrutiny test would be satisfied if Hawaii could show that "the statute's sex-based classification is justified by compelling state interests and . . . the statute is narrowly drawn to avoid unnecessary abridgments of the applicant couples' constitutional rights." Id.
\textsuperscript{47} Id. at 68.
\textsuperscript{49} Baehr, 1996 WL 694235, at *22.
tion banning same sex marriage.  

B. Reaction to Baehr

1. The Congressional Response to Same Sex Marriage

In response to Baehr, Congress enacted DOMA.  DOMA has two purposes: (1) “to defend the institution of traditional heterosexual marriage,” and (2) “to protect the right of the States to formulate their own public policy regarding same sex unions, free from any federal constitutional implications.”

DOMA allows states, if they so choose, to refuse to recognize a valid same sex marriage performed in another state. It reads in pertinent part:

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

In the House of Representatives report on DOMA, Congress emphasized the narrowness of the Act. According to the report, DOMA “merely provides that... other states will not be obligated or required” to recognize a same sex marriage, or a right or claim arising from a same sex marriage, performed elsewhere. Under DOMA, states are still free to recognize same sex marriages, but are not required to if they decide that doing so violates their public policy.

2. DOMA’s Reasoning

In the House Report on DOMA, Congress indicated that the reason for enacting DOMA was because the campaign for

50. See supra note 36.
54. Id. DOMA also defines marriage for federal purposes as “a legal union between one man and one woman as husband and wife.” Defense of Marriage Act, 1 U.S.C. § 7 (1996).
55. H.R. REP. No. 104-664, at 25
56. Id.
57. Id. at 27.
same sex marriage was an “assault being waged against traditional heterosexual marriage by gay rights groups and their lawyers.” Additionally, Congress found that gay rights activists considered a victory in Hawaii to be only the “first step in a national effort to win... the right to same sex marriage.” The primary means gay rights activists were going to use to win the right to marriage was the Full Faith and Credit Clause of the United States Constitution.

Since it appeared other states might have to recognize same sex marriages performed in Hawaii under the Full Faith and Credit Clause, Congress deemed it necessary to enact legislation that would allow States to formulate their own public policy towards same sex marriage and to choose whether to recognize them. In its report, Congress found that while there is a judicially recognized public policy exception to the Full Faith and Credit Clause, which would allow States to disregard same sex marriages performed elsewhere, federal action was necessary because the public policy exception “is far from certain.” DOMA was meant to clear up the “complicated issue” of whether States must recognize a valid same sex marriage from another state.

Congress, relying on language in the Full Faith and Credit Clause, decided that by not requiring states to recognize same sex marriages, but allowing them to do so if they choose, would not run afoul of the Constitution. DOMA takes the Full Faith and Credit Clause out of the debate and lets

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58. Id. at 2-3.
59. Id. at 7.
60. Id. (citing a memorandum written by Evan Wolfson, Director of the Marriage Project for Lambda Legal Defense Fund, a gay rights legal organization, entitled Winning an Keeping Equal Marriage Rights: What Will Follow Victory in Baehr v. Lewin?, outlining the strategy gay rights organizations intend to pursue in the fight for same sex marriage). The memorandum was included in the report of the May 15, 1996 hearing before the House Judiciary Subcommittee on the Constitution. H.R. REP. No. 104-664, at 7 n.19.
61. U.S. CONST. art. IV; see infra Part II.C.
63. Id.; see Nevada v. Hall, 440 U.S. 410 (1979) (finding the Full Faith and Credit Clause does not require one State to recognize another State’s law in violation of its own public policy).
65. Id. at 2. Congress noted that since no State has ever recognized same sex marriages, there is a “significant legal uncertainty” as to how the courts would rule on the issue. Id. at 25.
66. See infra Parts II.C.1, II.C.3.
each State decide the issue of same sex marriage "free from the threat of constitutional compulsion."\textsuperscript{67} The House Report indicates that, under the Effects Clause of the Article IV of the Constitution,\textsuperscript{68} "Congress is empowered to specify by statute how States are to treat laws from other States."\textsuperscript{69} DOMA would be constitutional because Congress has "discretionary power to carve out such exceptions as it deems appropriate"\textsuperscript{70} under the Effects Clause.\textsuperscript{71} Congress deemed the threat to traditional heterosexual marriage—that one State would soon force its non-traditional definition of marriage on another—significant enough to trigger this exception under the clause.\textsuperscript{72}

Before reaching the issue of whether Congress has the authority to act under the Full Faith and Credit Clause in this way, it is necessary to first look to the history and purpose of the clause itself.\textsuperscript{73}

C. \textit{The Full Faith and Credit Clause}

1. \textit{History of the Clause}

The Full Faith and Credit Clause,\textsuperscript{74} as it appears in the Constitution, is not the same clause that was proposed for adoption. The clause as proposed for adoption read:

[(full faith and credit ought to be given in each state to the public acts, records and judicial proceedings of every other state, and the Legislature shall by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect which judgments obtained in one state, shall have in another.]

After some debate, the clause was amended with "thereof" being substituted for "which judgments obtained in

\begin{itemize}
\item \textsuperscript{67} H.R. REP. NO. 104-664, at 17.
\item \textsuperscript{68} U.S. CONST. art. IV, §1; \textit{see infra} note 78.
\item \textsuperscript{69} \textit{Id.} at 26.
\item \textsuperscript{70} \textit{Id.} at 25.
\item \textsuperscript{71} \textit{See infra} Part II.C.3.
\item \textsuperscript{72} H.R. REP. NO. 104-664, at 26, 27.
\item \textsuperscript{73} In addition to whether Congress has the power to act under the Full Faith and Credit Clause, the notion of separation of powers may also be implicated.
\item \textsuperscript{74} U.S. CONST. art. IV, § 1.
\item \textsuperscript{75} \textsc{William M. Meigs}, \textsc{The Growth of the Constitution in the Federal Convention of 1787}, 255 (1987) (emphasis added).
\end{itemize}
one state, shall have in another.\textsuperscript{76} A further amendment substituted “shall” for “ought to” on the effect states must give to sister state judgments, and “may” for “shall” on the legislature’s ability to implement the clause.\textsuperscript{77}

These amendments bring us to the form that became Article IV of the Constitution. The clause reads, “[f]ull faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.\textsuperscript{78}

The change is important because “[t]he language is positive, and declaratory, leaving nothing to future legislation.\textsuperscript{79} The requirement of full faith and credit is “declared, and established by the constitution itself, and is to receive no aid, nor is it susceptible of any qualification by congress.”\textsuperscript{80} The Framers did not intend the States to give another State’s judgments or acts some faith and credit, “but full faith and credit, that is, to attribute to them positive and absolute verity, so that they cannot be contradicted, or the truth of them be denied, any more than in the state, where they originated.”\textsuperscript{81} One commentator has noted that the change made the clause “self executing, commanding full faith and credit in the constitutional text and making congressional action discretionary, instead of commanding congressional action and leaving the clause dependent on implementation of the command to Congress.”\textsuperscript{82}

The United States Supreme Court has also interpreted the intent of the Framers and the meaning of the Full Faith

\textsuperscript{76} Id. at 256.
\textsuperscript{77} Id.
\textsuperscript{78} U.S. CONST. art. IV, § 1. The Committee on Style made two changes to the clause before it became part of the Constitution. MEIGS, supra note 75, at 256. The first was to substitute “Congress” for “Legislature.” Id. The second was to break the clause into two sentences. Id.
\textsuperscript{80} Story, supra note 80, at 485.
\textsuperscript{81} Id.
and Credit Clause.\textsuperscript{83}

2. Judicial Interpretation of the Full Faith and Credit Clause

In \textit{Williams v. North Carolina},\textsuperscript{84} the Supreme Court found the very purpose of the Full Faith and Credit Clause was "to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or judicial proceedings of the others, and to make them integral parts of a single nation."\textsuperscript{85} The Court proceeded, mandating "not some but full faith and credit" be given to judgments.\textsuperscript{86}

In \textit{Johnson v. Muelberger},\textsuperscript{87} the Court found the clause was intended by the Framers "to help weld the independent states into a nation by giving judgments within the jurisdiction of the rendering state the same faith and credit in sister states as they have in the state of the original forum."\textsuperscript{88} "This constitutional purpose promotes unification, not centralization."\textsuperscript{89} Additionally, the faith and credit that is to be given is nothing short of "full."\textsuperscript{90}

In addition to requiring full faith, the Full Faith and Credit Clause enables Congress to enact legislation under the clause.\textsuperscript{91}

3. The "Effects Clause"

While the first sentence of the Full Faith and Credit Clause requires states to give full credit to each others judgments, the second sentence allows Congress to prescribe the effect states must give a sister states' judgments or acts.\textsuperscript{92} It reads: "[a]nd the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be

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\item[83.] \textit{See} discussion \textit{infra} Part II.C.2.
\item[84.] 317 U.S. 287 (1942) (dealing with the recognition one state must give to another state's divorce).
\item[85.] \textit{Williams}, 317 U.S. at 295 (quoting Milwaukee County v. M.E. White Co., 296 U.S. 268, (1935)).
\item[86.] \textit{Id.} at 294. (quoting Davis v. Davis, 305 U.S. 32 (1938)).
\item[87.] 340 U.S. 581 (1951) (requiring a state to give full faith and credit to an out-of-state divorce).
\item[88.] \textit{Johnson}, 340 U.S. at 584.
\item[89.] \textit{Id.} at 585.
\item[90.] \textit{Id.} at 584.
\item[91.] U.S. CONST. art. IV, § 1; \textit{see infra} Part II.C.3.
\item[92.] U.S. CONST. art. IV, § 1.
\end{itemize}
\end{footnotesize}
proved, and the effect thereof.”93 This section of the Full Faith and Credit Clause, the Effects Clause, allows Congress to enact “supplementary and enforcing legislation.”94 The effects clause allows for legislation as to how judgments are to be authenticated, and the effect of judgments, once authenticated, so “full faith and credit are given to them.”95

4. Judicial Interpretation of the Effects Clause

The Supreme Court has not decided the issue of whether Congress has the power to create exceptions to the Full Faith and Credit Clause by using the effects clause. However, Justice Stone, in his dissent in Yarborough v. Yarborough,96 noted “[t]he mandatory force of the full faith and credit clause as defined by [the] Court may be, in some degrees not yet fully defined, expanded or contracted by Congress.”97 Stone believed that Congress would have the power to limit the amount of full faith given; otherwise, the effects clause “would have been quite unnecessary.”98

However, in Williams v. North Carolina,99 the Court expressed “no view” on whether Congress has the power to limit the effect of full faith and credit.100 The Court noted that Congress, “in its sweeping requirement that judgments of the courts of one state be given full faith and credit in the courts of another . . . ,” has never sought to limit the effect of the clause.101 “[T]he considerable interests involved and the substantial and far reaching effects which the allowance of an exception would have on innocent persons indicate that the purpose of the full faith and credit clause and of the supporting legislation would be thwarted . . . .”102
5. **Congress Acts Under the Full Faith and Credit Clause**

Congress has used its power to legislate under the Full Faith and Credit Clause several times, the first of which was in 1790 when it enacted the Full Faith and Credit Act. The current version of the Full Faith and Credit Act reads in part: "[s]uch acts, records and judicial proceedings . . . so authenticated, shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such state . . . from which they are taken."

In 1980, Congress again used its power under the Full Faith and Credit Clause to amend the Full Faith and Credit Act by adding The Parental Kidnapping Prevention Act ("Parental Act"). The Parental Act reads, "every State shall enforce according to its terms . . . any child custody determination made consistently with the provisions of this section by a court of another State." The reason for the addition was because Congress found child custody determinations were not being accorded the full faith and credit treatment they deserved. One of the purposes of the Parental Act was "to avoid jurisdictional competition and conflict between state courts."

In 1994, Congress again amended the Full Faith and Credit Act by adding the Full Faith and Credit for Child Support Orders Act ("Child Support Act"). The Child Support Act requires that states "enforce according to its terms a child support order made consistently with this section by a court of another State . . . ." The reason for this addition

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103. See infra notes 104-105 and accompanying text.
104. Act of May 26, 1790, 1 Stat. 122 (1790). The statute provided for the authentication of acts, records, and judicial proceedings, and required any act, record, or proceeding that was so authenticated to be given full faith and credit in every state. Id.
107. Id.
109. Id.
111. Id.
was that Congress found states were not according full faith and credit to child support orders when the issuing state retained the power to modify the order. The purpose of the Child Support Act was to "facilitate the enforcement of child support orders among the States . . . and to avoid jurisdictional competition and conflict among State courts in the establishment of child support orders." With this addition, states are now required to give child support orders full faith and credit.

In 1996, Congress enacted the third addition to the Full Faith and Credit Act—the Defense of Marriage Act. DOMA does not require states to give full faith and credit to same sex marriages performed in a sister state.

III. IDENTIFICATION OF THE PROBLEM

The Defense of Marriage Act was enacted as a reaction to the possibility that same sex marriage might soon be legalized in Hawaii. Part of DOMA's purpose is to clear up the confusing issue of whether states must recognize such marriages under the Full Faith and Credit Clause.

This comment is concerned with Congress' power to use the Full Faith and Credit Clause to allow states to disregard valid acts or judicial proceedings of sister states. In effect, DOMA allows States to ignore the Constitutional mandate which requires a State to recognize the "acts, records, and judicial proceedings" of another state.

Although the Effects Clause of the Full Faith and Credit Clause authorizes Congress to enact legislation, the question remains, may Congress enact legislation permitting a state to give no effect, instead of full effect, to another state's acts or judicial proceedings?

113. Id. at 4.
114. Id. at 5.
115. 28 U.S.C. § 1738C (1996); see discussion supra Part II.B.
116. See discussion supra Part II.B.1-2.
119. U.S. Const. art. IV, § 1; See discussion supra Part II.C.
120. See discussion supra Part II.B.1.
121. See discussion supra Part II.C.3.
IV. ANALYSIS

A. The Defense of Marriage Act Violates the Mandate of Full Faith and Credit

1. DOMA Is in Violation of the Framers' Intent

The language of the Full Faith and Credit Clause is clear: “Full faith and credit shall be given... to the public acts... and judicial proceedings of every other state.”\(^{122}\) The notion of giving the acts and judgments of sister states only some faith and credit was entertained at the Constitutional Convention.\(^{123}\) However, the clause, as finally adopted, shows that notion was rejected.\(^{124}\) The Framers, “in order to form a more perfect union,”\(^{125}\) saw fit to command the states to recognize each other’s laws and judgments.\(^{126}\)

DOMA’s pronouncement that “[n]o State... shall be required to give effect to... a relationship between persons of the same sex...”\(^{127}\) makes the Full Faith and Credit Clause discretionary. This is not what the Framers contemplated.\(^{128}\) The Framers, by changing the words “ought to” to “shall,”\(^{129}\) sent a message that recognition of judgments is mandatory, not discretionary.\(^{130}\) DOMA runs contrary to that mandate by allowing a state to give no faith and credit instead of full faith and credit.\(^{131}\)

In his commentary on the Constitution, Justice Story\(^{132}\) observed that the Framers intended the Full Faith and Credit Clause to “give each state a higher security and confidence in the others, by attributing a superior sanctity and conclusiveness to the public acts and judicial proceedings of all.”\(^{133}\) Allowing anything less than full faith “could scarcely consist with the peace of society, or with the interest and se-

\(^{122}\) STORY, supra note 79, at 485.
\(^{123}\) See discussion supra Part II.C.1.
\(^{124}\) See discussion supra Part II.C.1.
\(^{125}\) U.S. CONST. preamble.
\(^{126}\) See discussion supra Part II.C.1.
\(^{128}\) See discussion supra Part II.C.1.
\(^{129}\) See discussion supra Part II.C.1.
\(^{130}\) See discussion supra Part II.C.1.
\(^{131}\) See discussion supra Part II.B.1.
\(^{132}\) See supra note 79.
\(^{133}\) See STORY, supra note 79, at 485.
DOMA does none of the things Justice Story believes the Framers intended. 136 DOMA does not require one state to recognize the acts or judgments of another state; it gives them a choice. 136 This choice, whether to abide by the Full Faith and Credit Clause and recognize a judicial proceeding of another state, violates the Framers' mandate of full recognition of other state's judgments. 137 The Full Faith and Credit Clause was not intended to allow states to choose which acts or judgments to recognize; all acts and judgments are to be recognized. 138

As enacted, DOMA does not promote the interest or security of individuals, since a same sex couple may be legally married in one state and cross into another state and suddenly not be married. 139 This hinders an individual's constitutional right to travel. 140 If same sex marriages are not acknowledged in every state, Congress has, in effect, placed a restriction on part of the population by not allowing them to move freely.

However, assume that a same sex couple does travel to a state that refuses to recognize their marriage. If there is an accident, will one be able to visit the other in the hospital since they are no longer "spouses?" Further, suppose a same sex couple legally adopts a child in a state that recognizes their marriage, what will happen if they then move to a state which does not recognize their union? Is the child suddenly "unadopted?" Will the state take the child away? Are they no longer parents? These are examples of why DOMA does not promote the interest or security of individuals, and actually creates conflict—something Congress sought to avoid when enacting the Parental Kidnapping Prevention Act 141 and

134. Id.
135. See supra notes 132-34 and accompanying text.
137. See discussion supra Part II.C.1.
138. See discussion supra Part II.C.1-2.
139. Individuals will not be secure by knowing that in order for them to be legally married, they must only move to, or travel to another state which will recognize their marriage.
140. See Shapiro v. Thompson, 394 U.S. 618 (1969) (holding that the right to travel is inferred from various constitutional provisions).
141. See discussion supra Part II.C.5.
the Full Faith and Credit for Child Support Orders Act under the guise of the Full Faith and Credit Clause.

Full faith and credit is required by the Constitution. However, by permitting something less than "full" faith, DOMA effectively reduces the Full Faith and Credit Clause to surplusage. Since the Framers intended the clause to be an integral part of the formation and continuation of this nation, any act, by any branch of government, that would reduce part of the Constitution to surplusage cannot be allowed to stand. Congress' action of allowing states to disregard the Constitution is necessarily an invalid use of the Full Faith and Credit Clause. In addition to violating the intentions of the Framers, DOMA also runs contrary to the Supreme Court's interpretation of the Full Faith and Credit Clause.

2. **DOMA Violates Judicial Interpretation of the Full Faith and Credit Clause**

In *Williams v. North Carolina,* the Court clarified the purpose of the Full Faith and Credit Clause—to form one nation where the laws and judicial proceedings of each state would be given full recognition in every other state. In *Johnson v. Muelberger,* the Court found the purpose of the clause was to promote unification.

However, DOMA does not weld this country into a "single nation." DOMA divides the states into separate sovereignties by allowing them to disregard the acts or proceedings of other states. The Constitution is about unification of the country, not fragmentation. DOMA's allowance of less than full faith cannot be reconciled with the Supreme Court's interpretation of the Full Faith and Credit Clause.

The Constitutional mandate, and the Supreme Court's interpretation of that mandate, is clear—full faith and credit is to be given to the acts and judicial proceedings of each

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142. See discussion supra Part II.C.5.
143. See discussion supra Part II.C.5.
145. See discussion supra Part II.C.2.
146. Williams, 317 U.S. at 287.
147. See discussion supra Part II.C.2.
149. Johnson, 340 U.S. at 585.
150. Williams, 317 U.S. at 295.
151. See discussion supra Part II.B.1-2.
By allowing states to disregard the judicial proceedings of other states, DOMA violates that mandate and, therefore, is unconstitutional.

B. Congress Lacked Power Under the Effects Clause to Enact DOMA

1. Congress Cannot Decide “If” the Full Faith and Credit Clause Applies

From the wording of the Full Faith and Credit Clause, it can be argued that DOMA is constitutional because the clause allows Congress to determine the effect of full faith. This is what Congress was doing when it enacted DOMA—prescribing the effect states would have to give same sex marriages. DOMA simply states that any State “shall not be required to give effect” to a same sex marriage performed elsewhere. Therefore, Congress, by prescribing the effect states must give same sex marriages, has used its power to enact legislation under the Full Faith and Credit Clause appropriately, and DOMA is constitutional.

However, while the language does allow Congress to enact legislation to enforce the Full Faith and Credit Clause, it does not allow Congress the power to enact legislation as to whether the Full Faith and Credit Clause applies. This is really what Congress did when it enacted DOMA—it let each state decide whether full faith and credit will apply.

The Framers made their intention known that full faith is to be given to all acts and judgments. They could not have intended Congress to do anything under the clause other than prescribe how acts, records, and judicial proceedings are to be authenticated and how the clause is to apply to the states. The determination of if the clause applies is not

152. See discussion supra Parts II.C, IV.A.
153. See U.S. CONST. art IV, § 1 (“[T]he Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.”).
154. See discussion supra Part II.B.1-2.
156. Id.
157. Id.
158. See discussion supra Parts II.C.1, IV.A.1.
159. See discussion supra Part II.C.1.
"susceptible to any qualification by Congress." The language of the Full Faith and Credit Clause is "positive, and declaratory, leaving nothing to future legislation." Congress has no power to enact legislation that creates an exception to the constitutional mandate of full faith.

2. Previous Legislation Shows Congress Understands Full Faith Is Required

The effects clause only "endows Congress to enact supplementary and enforcing legislation." The statutes Congress has enacted under the clause, barring DOMA, show that it understands these two concepts. Both the Parental Kidnapping Prevention Act and the Full Faith and Credit for Child Support Orders Act specifically require full recognition be given. The Parental Kidnapping Prevention Act requires that each state shall enforce the child custody determinations of other states. The purpose of requiring the states to recognize these determinations was to prevent "conflict between State courts...." The Full Faith and Credit for Child Support Orders Act also sought to end conflict between states in applying child support orders. Both of these acts supplement and enforce the Full Faith and Credit Clause, consistent with the Framers' intent.

Unlike previous legislation, DOMA is neither supplementary nor enforcing because it seeks to avoid and disregard the Full Faith and Credit Clause entirely. The legislative history shows that DOMA was enacted as a way around the Full Faith and Credit Clause. The Framers could not have intended Congress to decide when a provision of the

159. STORY, supra note 79, at 485.
161. Id.
162. CORWIN, supra note 94, at 373.
163. See discussion supra Part II.C.5.
166. See discussion supra Part II.C.5.
168. Id.
170. See discussion supra Parts II.C.3, II.C.5.
171. See discussion supra Part II.B.1-2.
172. See supra note 67 and accompanying text.
Constitution applies.

By seeking a way around the Full Faith and Credit Clause, Congress has added an exception to the clause by allowing States to give no faith and credit to the acts, records or judicial proceedings of another state.\(^{173}\) Congress does not have the power to place limits on whether the Full Faith and Credit Clause applies; therefore, DOMA is unconstitutional.

V. PROPOSAL

A. *Amending the Constitution*

The legislative history of DOMA is clear. Congress enacted DOMA to address the issue of same sex marriage by giving states a choice whether they must recognize such unions.\(^{174}\) However, Congress lacks the power to allow states to make this choice under the Full Faith and Credit Clause.\(^{175}\)

Under our present form of government, the only way that Congress can enact legislation that limits the Full Faith and Credit Clause is by amending the Constitution.\(^{176}\) This can be accomplished in two ways. First, Congress can propose an amendment that would bar same sex marriages, then the states would need to ratified that proposal.\(^{177}\) The second way to amend the Constitution would be for the legislatures of two-thirds of the states to call a constitutional convention.\(^{178}\) These options would, of course, take time to organize and accomplish. However, regardless of the time it takes, Congress cannot be allowed to amend the Constitution, as it did by enacting DOMA, without following the process laid down by the Framers.\(^{179}\) Ultimately it will be up to the people of this country to decide whether to recognize same sex marriages, not Congress.


\(^{174}\) See discussion *supra* Part II.B.2.

\(^{175}\) See discussion *supra* Parts IV.A-B.

\(^{176}\) See U.S. CONST. art. V.

\(^{177}\) *Id.* Congress' proposal must pass by a two-thirds vote of both Houses, then three-fourths of the States must agree to adopt the proposal. *Id.*

\(^{178}\) *Id.* Once the convention is called, three-fourths of the States must agree to adopt the proposal. *Id.*

\(^{179}\) See *id.*
B. Congress Should Not Be Legislating in This Area

Amending the Constitution would be a drastic step to take because two people wish to marry. The Constitution has only been amended twenty-seven times. This raises the question: is denying same sex marriage so important that there is a need for a twenty-eighth amendment?

While amending the Constitution is certainly one way to ensure same sex marriage will never be legal, a better solution would be to leave the decision up to the people and for Congress to stay out of the area altogether.

It is interesting to note, and ironic as well, that Congress wanted states to decide for themselves whether to recognize a same sex marriage. If this is true, then why did Congress speak on the subject at all? This is a decision the states should be making alone.

The final determination of whether States will be required to recognize a same sex marriage, or whether same sex marriages qualify for the public policy exception under the Full Faith and Credit Clause, will no doubt end up in the courts. The courts are in a better position to protect the rights of minorities. Further, it is the responsibility of the judiciary to interpret the Constitution, not Congress.

VI. CONCLUSION

The Defense of Marriage Act represents a legislative response to what Congress thought to be a growing national problem—same sex marriage. While at one time parties bringing claims for same sex marriage were not seen as a threat, the Baehr case spurred Congress into enacting DOMA. Whatever its motives for enacting it, this comment has shown that what Congress has done is an unconstitutional use of its legislative power. Not only does the very idea of allowing states to give something less than full faith to the acts or proceedings of sister states run contrary to the Framers' intent, Congress does not have the power under the effects clause to limit the amount of faith and credit that is to be given to acts and judgments of sister states.

180. See U.S. CONST. amends. I-XXVII.
181. See discussion supra Parts II.B.1-2.
182. See supra notes 63-65 and accompanying text.
183. See supra note 63.
To allow Congress this power would be akin to allowing it to amend the Constitution by statute. The Framers set up a system of government that does not allow Congress the power to change the Constitution without the states' help—a system of checks and balances. Allowing DOMA to stand would disrupt the federal system, and encourage Congress to, by statute, amend the Constitution again for anything else it found undesirable. This contradicts the Framers' intent, that full faith and credit be given to the acts and judgments of sister states. Therefore, the Defense of Marriage Act is unconstitutional.

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