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# Comity: Another Nail in the Coffin of Institutional Homophobia

Nanci Schanerman

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## Comity: Another Nail in the Coffin of Institutional Homophobia

Nanci Schanerman\*

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### I. INTRODUCTION

“Sexual minorities — lesbians, gay males, bisexuals, and transgender people — are among the most despised groups in the United States today. Perhaps paradoxically, for many in our society, love of sameness (i.e. homo-sexuality) makes people different, whereas love of difference (i.e. hetero-sexuality) makes people the same.”<sup>1</sup>

Rights concerning sexual orientation have come to the forefront in the last twenty years. The legalization of same-sex marriage was a big part of this battle, and in the year 2000, the Netherlands became the first country to recognize it.<sup>2</sup> As of 2010,

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1. HOMOPHOBIA: HOW WE ALL PAY THE PRICE 3 (Warren J. Blumenfeld ed., Beacon Press 1992).

2. *World's First Legal Gay Weddings*, ONE NEWS, Apr. 1, 2001, [http://tvnz.co.nz/view/news\\_world\\_story\\_skin/34978](http://tvnz.co.nz/view/news_world_story_skin/34978).

Canada,<sup>3</sup> Uruguay,<sup>4</sup> Argentina,<sup>5</sup> Spain, Belgium, South Africa, the Netherlands, Sweden, and Norway have all legalized same-sex marriage.<sup>6</sup> Also, Mexico City has become the only city to recognize gay marriage in Mexico.<sup>7</sup> Portugal is the latest European country to approve of gay marriage.<sup>8</sup> The prime minister, Jose Socrates, stated that the approval of gay marriage was a step in favor of the country's fight against anti-discrimination.<sup>9</sup>

Even though countries around the world have taken this important step, the United States still resists recognition based on the Defense of Marriage Act<sup>10</sup> ("DOMA") enacted in 1996, which allows the states to deny recognition to marriages performed in a foreign jurisdiction that are against state public policy. DOMA states:

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.<sup>11</sup>

Even though the Act only encompasses states within the U.S., many states, in adopting their own version of DOMA, or their "mini-DOMA," have included jurisdictions outside the United States. DOMA seems, on its face, to be contrary to the Full Faith and Credit Clause in the U.S. Constitution,<sup>12</sup> but thus far, no court has come to this conclusion. The Middle District of Florida held

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3. Civil Marriage Act, S.C. 2005, c. 33 (Can.).

4. E. Eduardo Castillo, *Mexico City Assembly Legalizes Same-Sex Marriage*, YAHOO! NEWS, available at [http://news.yahoo.com/s/ap/20091221/ap\\_on\\_re\\_la\\_am\\_ca/lt\\_mexico\\_gay\\_marriage](http://news.yahoo.com/s/ap/20091221/ap_on_re_la_am_ca/lt_mexico_gay_marriage).

5. Michael Warren, *Argentina Legalizes Gay Marriage in Historic Vote*, YAHOO! NEWS, available at [http://news.yahoo.com/s/ap/20100715/ap\\_on\\_re\\_la\\_am\\_ca/lt\\_argentina\\_gay\\_marriage](http://news.yahoo.com/s/ap/20100715/ap_on_re_la_am_ca/lt_argentina_gay_marriage).

6. *Sweden Allows Same-Sex Marriage*, BBC NEWS, Apr. 2, 2009, <http://news.bbc.co.uk/2/hi/7978495.stm>.

7. Castillo, *supra* note 4.

8. Shrikesh Laxmidas, *Portugal Approves Gay Marriage*, N.Y. TIMES, Jan. 8, 2010, <http://www.nytimes.com/reuters/2010/01/08/world/international-uk-portugal-marriage.html>.

9. *Id.*

10. 28 U.S.C.A. § 1738C (West 1996).

11. *Id.*

12. U.S. CONST. art. IV, § 1 ("Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.").

that the Act embodied Congress' role in administering full faith and credit because the Act regulates conflicts between the states.<sup>13</sup> The Middle District also found that the statute was constitutional because there is no fundamental right to have a same-sex marriage.<sup>14</sup>

This opinion, however, only addresses the issue of the conflict as it has come up between the states. A similar result is expected if the marriage was performed in another country, but reliance on the Full Faith and Credit Clause would not be a defense. This is where other principals of recognition are important, such as the principal of comity.

Comity has had little effect when used as a defense for the recognition of a foreign performed same-sex marriage. Comity has been regarded with even less merit than the Full Faith and Credit Clause. Comity first appeared in the U.S. in the case of *Hilton v. Guyot*,<sup>15</sup> but the theories behind this policy have been in force since the beginning of the seventeenth century.<sup>16</sup> The definition of comity in U.S. law comes from *Hilton*:

‘Comity,’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.<sup>17</sup>

Even though this definition leaves us with the sense that there is room for judicial discretion, this discretion is limited to when the laws of another country are repugnant to U.S. public policy.<sup>18</sup>

Comity today, over 100 years after the *Hilton* decision, still

13. *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1303 (M.D. Fla. 2005) (holding that DOMA does not violate the constitution or full faith and credit). This case does not address the issue of marriages performed abroad and their recognition in the U.S. Rather, it is pertinent to show the stand that the U.S. has taken by allowing states to base the recognition of same-sex marriages by their own public policy and not having the policy of another state forced upon them. If anything, this is a more dramatic example because states are more likely to recognize the laws of another state before recognizing the laws of another country.

14. *Id.* at 1306.

15. *Hilton v. Guyot*, 159 U.S. 113, 143-45 (1895).

16. See generally ALAN WATSON, JOSEPH STORY AND THE COMITY OF ERRORS: A CASE STUDY IN CONFLICT OF LAWS 2 (University of Georgia Press 1992).

17. *Hilton*, 159 U.S. at 143-45.

18. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 (1987).

retains the same definition as given in *Hilton*, yet its effect produces strange results. A foreign performed same-sex marriage could be accepted in New York due to comity and that same marriage would be rejected in Florida based on comity, demonstrating how arbitrary the principle has become. If the original tenets of comity were followed, this would not be the case. Judgments would be predictable and consistent over time if the original policy of comity were followed. If comity were formulaic instead of discretionary (as the doctrine is now used), foreign marriages would automatically be recognized as long as they were legally performed in the country where the couple had previously been domiciled before entering the United States.

This strange result from the application of comity may be attributed to institutional homophobia. Institutional homophobia refers to the ways in which “governments, businesses, and educational, religious and professional organizations systematically discriminate on the basis of sexual orientation or identity.”<sup>19</sup> This form of homophobia is enforced through laws and codes that treat homosexuals as second-class citizens.<sup>20</sup> Scholars believe that the recognition of same-sex marriage in the U.S. will be the end of discrimination against homosexuals and will put an end to institutional homophobia.<sup>21</sup> The way in which comity has been used, as a sword against the recognition of legally performed foreign same-sex marriages, is another example of how institutional homophobia has taken root in the government institutions and allowed for outright discrimination against homosexuals.

This note will explore the history of same-sex marriage and comity, and how they have interacted to perpetuate institutional homophobia, as well as the expansion of that relationship in the future. Part II of this note will present the history of marriage law and why U.S. public policy dictates that same-sex marriage will not be recognized through comity. Part III will explore the history of comity and its evolution. It will further address the works on comity by Justice Joseph Story, the original U.S. writer on the subject. Part IV will address the way in which institutional homophobia has taken root in our society and its use of comity to continue to foster discrimination against those of a different sex-

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19. See Blumenfeld, *supra* note 1, at 5.

20. *Id.*

21. AMY D. RONNER, HOMOPHOBIA AND THE LAW 29 (American Psychological Association 2005).

ual orientation. Finally, Part V will further explore the effect that comity should have had under its actual definition.

## II. MARRIAGE IN THE UNITED STATES: THE SHIFT OF FOCUS FROM INCEST TO HOMOSEXUALITY

Historically, issues over recognition of foreign marriages arose when another country's incest laws differed from state laws in the U.S.<sup>22</sup> For example, if an uncle legally married his niece in Italy and then the couple immigrated to New Jersey, they would be arrested pursuant to New Jersey's incest laws for cohabitation. In this situation, the principles of international recognition would be of use.<sup>23</sup> While, under New Jersey state law, this marriage would be invalid if the uncle was a legal New Jersey resident, because the uncle is an Italian citizen, comity obligates the New Jersey courts to legally recognize this marriage.<sup>24</sup> Due to the fact that incest laws varied from state to state and country to country, this problem commonly arose when couples of close familial relationship chose to immigrate and establish a new domicile in the U.S.

The above scenario demonstrates many of the common law principles that apply to migrating marriages of questionable validity in the U.S. First, the "general rule is that the validity of a marriage is determined by the law of the place where it was contracted."<sup>25</sup> This is a well known rule and has hardly any exceptions:

The rule that a marriage valid where celebrated is valid everywhere is, with few exceptions, so well recognized by the courts, for reasons of general policy, that it has almost become a maxim in the field of conflict of laws. Exceptions to the general rule are 1.) polygamous marriages and marriages incestuous according to the principles prevailing in Christendom, and sometimes 2.) marriages prohibited by the public acts of the forum for reasons of local distinctive policy.<sup>26</sup>

Today, Christendom is not cited to, instead it's substituted with

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22. See generally P.H. Vartanian, Annotation, *Recognition of Foreign Marriage as Affected by Policy in Respect of Incestuous Marriages*, 117 A.L.R. 186 (1938).

23. *Bucca v. State*, 128 A.2d 506 (N.J. 1957).

24. *Id.* at 509-10.

25. *Id.* at 508.

26. P.H. Vartanian, Annotation, *Recognition of Foreign Marriage as Affected by Policy in Respect of Incestuous Marriages*, 117 A.L.R. 186 (1938).

“natural law,”<sup>27</sup> but the principle is still the same. These general common law policies demonstrate the rules of law in marriage that were consistently followed until the types of marriage that were subject to litigation shifted from incestuous marriages to same-sex marriages.

A. *The U.S. Takes Its Stand Against Same-Sex Marriage*

In 1996, the U.S. adopted into law two acts that would effectively halt the same-sex marriage movement in its tracks. After the Supreme Court of Hawaii in 1993 held that the Hawaiian marriage statute on its face violated its constitution’s equal protection clause,<sup>28</sup> the federal government was worried that this state was dangerously close to granting same-sex marriages, and the implications of the Full Faith and Credit Clause would mandate recognition of marriages performed in Hawaii in every state around the country.<sup>29</sup>

Thus, Congress enacted DOMA,<sup>30</sup> which defines marriage for the purposes of federal law.<sup>31</sup> Under federal law, marriage means “only a legal union between one man and one woman as husband and wife.”<sup>32</sup> There were two purposes behind the passage of the Act: 1.) “to defend the institution of traditional heterosexual marriage;”<sup>33</sup> and 2.) to allow the states to formulate their own public policy regarding same-sex marriages.<sup>34</sup> With the Hawaii Supreme Court decision, the federal government wanted to ensure that states were able to decide whether to recognize same-sex marriages based on their own policy and not force the recognition based on federal principles such as the Full Faith and Credit

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27. *See id.*

28. *Beahr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993). This case was remanded to the circuit court in order for Lewin to bring evidence to overcome the strict scrutiny standard and show the state’s compelling interest for limiting marriage to heterosexual couples.

29. H.R. REP. NO. 104-664, at 2, 4 (1996) *reprinted in* 1996 U.S.C.C.A.N. 2905. This House Report details the legislative history of DOMA and points to *Beahr v. Lewin* as the main reason for its enactment. It also provides the governmental interests supporting DOMA and the findings of the various committees concerning the Act. Ironically, after *Beahr*, a constitutional amendment was passed that banned same-sex marriage in Hawaii. HAW. CONST. art. I, § 23.

30. 28 U.S.C.A. § 1738C (West 1996).

31. 1 U.S.C.A. § 7 (West 1996).

32. *Id.*

33. H.R. REP. NO. 104-664, at 2.

34. *See generally id.*

Clause.<sup>35</sup> These acts became effective September 21, 1996.<sup>36</sup>

When President Bill Clinton signed this Act into law he emphasized what DOMA was meant to accomplish and reiterated that this Act gives the states an opportunity to choose for themselves how to treat same-sex marriages.<sup>37</sup> He further emphasized that this Act did not go beyond its stated purpose, even though it is surrounded by divisive rhetoric.<sup>38</sup> President Clinton's comment effectively recognizes the presence of institutional homophobia in the American legal system. Four years later, President George W. Bush also supported DOMA, shown by his unsolicited statement, "I believe marriage is a union between a man and a woman. I believe it's a sacred institution that is critical to the health of our society and the well-being of families, and it must be defended."<sup>39</sup>

The viewpoints against same-sex marriage and the support of this statute further demonstrate how organizations and the government use the law to assert their own personal homophobia. DOMA and the reasons behind its inception depict the unrealistic fears of society against homosexuals. These fears have permeated the framework of American history so that the definitions of marriage have been restructured for the purpose of excluding homosexuals from this institution. Hence, the emphasis in President Bush's statement that marriage is between one man and one woman, instead of the more generic definition, which emphasizes the union of two people in order to become a family.

The states have each reacted differently to the introduction of DOMA. Thirty-nine states prohibit homosexual couples from marrying with laws modeled after DOMA.<sup>40</sup> However, two of the states with legislative bans, Oregon and Nevada, recognize domestic partnerships or civil unions.<sup>41</sup> New Mexico has no marriage laws in their state but has yet to recognize or deny recognition of same-

35. *Id.*

36. Kavan Peterson, *50-State Rundown on Gay Marriage Laws*, STATELINE.ORG (Nov. 23, 2004), <http://www.stateline.org/live/printable/story?contentId=15576>.

37. See Press Release, President Bill Clinton, President on Signing Same Gender Marriage Ban (Sept. 22, 1996), 1996 WL 533626.

38. *Id.*

39. *Bush Defines Marriage as Man and Woman*, WASH. POST, Oct. 26, 2006, [http://www.washingtonpost.com/wp-dyn/content/article/2006/10/26/AR2006102600876\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2006/10/26/AR2006102600876_pf.html).

40. Kavan Peterson, *State by State: The Legal Battle Over Gay Marriage*, NPR.ORG (Dec. 15, 2009), <http://www.npr.org/templates/story/story.php?storyId=112448663> This article does not reflect the changes made in California in August of 2010. See generally *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

41. Peterson, *supra* note 40.



sex marriage.<sup>42</sup> Also, New Jersey does not recognize same-sex marriage, but has no laws enacted that are modeled after DOMA.<sup>43</sup> New Jersey does recognize civil unions.<sup>44</sup> New York allows for recognition of marriages performed elsewhere, but does not yet perform same-sex marriages within the state.<sup>45</sup> Most of New England, Iowa, and California recognize same-sex marriages.<sup>46</sup> The most recent state to recognize same-sex marriage is California, where, in August of 2010, a federal court struck down California's constitutional amendment banning gay marriage as unconstitutional.<sup>47</sup> The parties to that case are not planning on appealing the ruling; therefore, gay marriages will once again be performed in California.<sup>48</sup>

States that have adopted the prohibition do so by either codifying DOMA into state law or by writing a ban into their constitution.<sup>49</sup> For example, Florida's mini-DOMA reads as follows:

- 1.) Marriages between persons of the same sex entered into in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, or relationships between persons of the same sex which are treated as marriages in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, are not recognized for any purpose in this state.
- 2.) The state, its agencies, and its political subdivisions may not give effect to any public act, record, or judicial proceeding of any state, territory, possession, or tribe of the United States or of any other jurisdiction, either domestic or foreign, or any other place or location respecting either a marriage or relationship not recognized under subsection (1) or a claim arising from such a marriage or relationship.

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42. *Id.*

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

44. Peterson, *supra* note 40.

45. Martinez v. Monroe, 50 A.D.3d 189, 193 (N.Y. 2008).

46. Peterson, *supra* note 40.

47. Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010)

48. Daniel C. Vock, *State Officials Step Aside for Prop. 8's Demise*, STATELINE.ORG (Aug. 13, 2010), <http://www.stateline.org/live/details/story?contentId=505823>. The ruling will not be appealed because the parties do not have standing based on Judge Walker's belief that "a party must show that it has suffered an actual injury." Judge Walker said no evidence suggests that the campaign (supporting Proposition 8) would meet that test.

49. Peterson, *supra* note 40.

3.) For purposes of interpreting any state statute or rule, the term “marriage” means only a legal union between one man and one woman as husband and wife, and the term “spouse” applies only to a member of such a union.<sup>50</sup>

These mini-DOMAs, or the state law versions of DOMA, have been enacted in order to provide a mechanism for stating that same-sex marriage is against that state’s policy.

### *B. The Defense of Marriage Act and Its Impact*

While DOMA law has been accepted and codified in a majority of states in the U.S., there are a few states that have ignored it completely. These states have allowed the legal recognition of same-sex marriage, but will not actually perform these kinds of marriages within the state. New York is one of these states as shown in the case of *Martinez v. Monroe*, where the court pointed out that as long as the New York legislature does not codify DOMA, the courts will extend full faith and credit and comity to marriages legally performed in other jurisdictions.<sup>51</sup> The court decided that it would recognize same-sex marriages based on the same common law scheme that permitted recognition of legally performed incestuous marriages.

In states that have enacted their own mini-DOMA, courts almost always uphold its validity. However, many same-sex couples who have challenged DOMA were never able to question its constitutionality because they “lacked standing” to bring the claim.<sup>52</sup> These standing issues seemed to be a way for courts to avoid hearing the issues of the case.

One such lesbian couple, who had been married legally in Canada, sought to have their marriage recognized in Oklahoma. They challenged the amendment to the Oklahoma constitution that stated that Oklahoma will not recognize same-sex marriages performed in other states and that any person who issues a marriage license for a same-sex couple will be guilty of a misde-

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50. FLA. STAT. ANN. § 741.212 (West 2010).

51. *Martinez v. Monroe*, 50 A.D.3d 189, 193 (N.Y. 2008). In this case, a Canadian couple petitioned the court for the recognition of spousal benefits. The court said that they should not be denied recognition because their marriage was legally performed in Canada.

52. *Mueller v. Comm’r*, 39 F. App’x 437 (7th Cir. 2002) (holding that because the couple was not legally married in another state they lacked standing to challenge DOMA); *Bishop v. Oklahoma*, 333 F. App’x 361, 365 (10th Cir. 2009) (concluding that the couple lacked standing to challenge because they did not bring the proper defendant as a party).

meanor.<sup>53</sup> The court held that the couple did not have standing to bring a suit challenging the constitution because they did not have the proper party named as a defendant in the case.<sup>54</sup> The Attorney General, the named defendant, was not the party who would enforce the law and injure the couple; therefore, the suit was dismissed.<sup>55</sup> In this case, the court asserted that there was no proper party to sue because no party was responsible for the enforcement of the law and any injury would be against the person who issued the license, not the couple seeking to marry.<sup>56</sup> This case demonstrates the weird, but consistent results, which are apparent in cases regarding same-sex marriage.

In the states that have adopted DOMA, its constitutionality has been consistently affirmed.<sup>57</sup> DOMA's definition of marriage as defined in section three<sup>58</sup> of the Act was challenged in *In re Kandu* when a same-sex couple (who had been married in Canada) filed a joint-petition for bankruptcy in Washington.<sup>59</sup> The court found that there was no fundamental right to marry someone of the same gender,<sup>60</sup> homosexuals do not constitute a suspect or a quasi-suspect class, and there was no discrimination against either men or women under this law.<sup>61</sup> It also held that DOMA did not violate due process or equal protection based on a rational basis review because the Act furthers a legitimate governmental interest of protecting the institution of "traditional, heterosexual marriage."<sup>62</sup> This case demonstrates the traditional analysis that courts have undertaken to defend DOMA, and that the public policy exceptions that stem from the protection of traditional marriages are based on the circular logic that history should be followed.<sup>63</sup>

DOMA has defeated Fourth, Fifth, and Tenth Amendment arguments as well.<sup>64</sup> For example, the debtor in *In re Kandu* peti-

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53. *Bishop*, 333 F. App'x at 363.

54. *Id.* at 365.

55. *Id.*

56. *Id.*

57. See Castillo, *supra* note 4.

58. 1 U.S.C.A. § 7 (West 1996).

59. *In re Kandu*, 315 B.R. 123 (W.D. Wash. 2004). *Kandu* discusses at length the public policy reasons invoked when defending DOMA, *infra* Part II(C). Also, this case specifically discusses how comity has been ineffective in the fight to have foreign marriages recognized in the U.S., discussed *infra* Part IV.

60. *Id.* at 140.

61. *Id.* at 143.

62. *Id.* at 145-46.

63. See H.R. REP. NO. 104-664 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905.

64. *Kandu*, 315 B.R. at 123.

tioned the court to have his same-sex marriage recognized in a bankruptcy proceeding.<sup>65</sup> The debtor argued that DOMA is unconstitutional because it violated the Fourth Amendment because his federal rights and responsibilities were taken from him under the search and seizure provisions.<sup>66</sup> The court held that the couple's Fourth Amendment rights could not be violated because they failed to demonstrate possessory interest in government benefits that were entitled to protection.<sup>67</sup> In other words, because the debtor's marriage did not fit the definition of marriage under federal law, the couple was not entitled to the benefits in bankruptcy that married couples would typically have.<sup>68</sup> The court denied the argument because there was no legal basis to support the claim.<sup>69</sup>

Additionally, the debtor argued that DOMA violated the due process and equal protection guarantees of the Fifth Amendment. The Court dismissed this argument because there was authority in *Baker v. Nelson* that stated that same-sex marriage is not a fundamental right and there was no due process violation.<sup>70</sup> Since DOMA only had to pass rational basis review, the court found that the legislation is rationally related to a legitimate government interest in that the government had an interest in preserving the traditional bonds of marriage.<sup>71</sup>

The debtor also argued that there was a Tenth Amendment violation because the federal government was trying to regulate domestic relations, a power not granted to Congress in Article I of the U.S. Constitution.<sup>72</sup> The court stated that the definition of marriage is not binding on the states, but rather the states retain the power to decide their own definition of marriage.<sup>73</sup> Therefore DOMA does not infringe on state sovereignty at all because it only applies to federal law.<sup>74</sup>

Furthermore, DOMA circumvented the Full Faith and Credit Clause. Where the Full Faith and Credit Clause would normally demand the recognition of other states' marriages, DOMA has allowed for each state to choose its own recognition policy. The

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65. *Id.* at 134.

66. *Id.*

67. *Id.* at 135.

68. *Id.*

69. *Id.*

70. *Id.* at 140, 143.

71. *Id.* at 146.

72. *Id.* at 131.

73. *Id.* at 132.

74. *Id.*

argument against the application of full faith and credit is that the Act embodies Congress' role of regulating conflict between the states.<sup>75</sup>

C. *The Public Policy Exception: What DOMA is Protecting*

There are three types of cases that bring the validity of same-sex marriages performed in another state to the forefront in litigation: dissolution of the relationship, legal incidents, and precedential recognition.<sup>76</sup> The legal incidents are usually about spousal recognition for benefits for government programs<sup>77</sup> and bankruptcy petitions.<sup>78</sup> These petitions for recognition have been summarily denied in all states where it is against that state's "public policy."

A state's public policy is also alluded to as a reason to deny recognition to same-sex marriages under DOMA.<sup>79</sup> Courts invoke DOMA to deny same-sex marriage as against public policy and the court knows this because of the enactment of DOMA.<sup>80</sup> The purpose of DOMA is to protect traditional, heterosexual marriages.<sup>81</sup> This is one of the four U.S. governmental interests that were put forward in the legislative history. Furthermore, the government is 1.) "defending the traditional notions of morality;" 2.) "protecting state sovereignty and democratic self-governance;" and 3.) "preserving scarce government resources."<sup>82</sup> These governmental interests seem to be rational according to the courts, and since they do not have to be persuasive pursuant to a rational basis review, they satisfy the minimum burden imposed for DOMA to remain constitutional.<sup>83</sup>

According to the legislative history of DOMA, the notion of protecting traditional, heterosexual marriage is really Congress' subterfuge for furthering procreation, and it is the inescapable

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75. *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1303 (M.D. Fla. 2005).

76. Brenda Cossman, *Betwixt and Between Recognition: Migrating Same-Sex Marriages and the Turn Toward the Private*, 71 LAW & CONTEMP. PROBS. 153, 158 (2008).

77. *Martinez v. Monroe*, 50 A.D.3d 189 (N.Y. 2008).

78. *In re Goodale*, 298 B.R. 886 (W.D. Wash. 2003).

79. 28 U.S.C.A. § 1738C (West 1996).

80. *Wilson*, 354 F. Supp. 2d at 1303-04.

81. H.R. REP. NO. 104-664, at 12 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2916.

82. *Id.*

83. *See In re Kandu*, 315 B.R. 123 (W.D. Wash. 2004).

fact that only two people, a man and a woman, can create a child.<sup>84</sup> Additionally, Congress wanted to protect traditional marriages because the addition of same-sex couples would lead to more divorces.<sup>85</sup> As stated in the legislative history, they wanted to avoid “opening a new front in the war.”<sup>86</sup> Courts also have stated reasons to avoid same-sex marriage because there is a fear that it would be a gateway for the recognition of polygamous and incestuous marriages. The reasoning behind DOMA is filled with heterocentric<sup>87</sup> language, so even though there is no explicit discrimination evidenced in the language used, the law still allocates same-sex couples to an inferior status.

#### D. *Canada’s Legalization of Same-Sex Marriage and the Bigger Chances for Migrating Marriages*

Canada has recognized same-sex marriages since 2005 when it passed the Civil Marriage Act, which defined marriage as “the lawful union of two persons to the exclusion of all others.”<sup>88</sup> This bill specifically states that this is an expansion of the traditional common-law definition of marriage for the purpose of including couples of the same-sex.<sup>89</sup> Canada decided to legalize same-sex marriage after several cases found that the definition of marriage is not fixed, but something that is changing over time, and that procreation is no longer an overriding reason to limit marriage to those who can procreate unassisted.<sup>90</sup> Furthermore, several courts also found that limiting marriage to heterosexual couples was against the equality guarantee of their Charter.<sup>91</sup>

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84. See H.R. REP. NO. 104-664, at 13 (1996).

85. *Id.* at 14.

86. *Id.* at 15.

87. Refers to language that centers on a heterosexual point of view. Robert B. Mison, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133, 149 (1992).

88. Civil Marriage Act, S.C. 2005, c. 33 (Can.).

89. *Id.*

90. *EGALE Canada Inc. v. Canada*, [2003] 13 B.C.L.R. 4th 1 (Can.).

91. *Same-Sex Marriage (Re)*, [2004] 3 S.C.R. 698 (Can.). The Canadian Charter of Rights and Freedoms section 15(1) states that “every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental and physical disability.” Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.). This clause varies dramatically from the U.S. Constitution because the Canadian Charter delineates certain classes upon which discrimination will not be based. While these classes are all recognized in U.S. common law, courts have yet to find that laws against same-sex marriage are against equal protection like the Canadian courts have.

Canadian courts based their decisions on same-sex marriage on the incremental changes that have taken place in their common law thus far. These decisions sought to bridge the gap between the rights and privileges given to heterosexual couples and those denied to same-sex couples.<sup>92</sup> Those changes include spousal support, guardianship, adoption, pension entitlement and medical decision-making. Generally, defining spouse differently in the statutes in order to include same-sex partners accomplished these changes.<sup>93</sup>

The recognition of same-sex marriage in Canada could have a huge impact on the U.S. concerning migrating marriages. Suits have already been brought where a couple, originally from Canada, sought recognition of their marriage in the U.S. to maintain benefits that were accorded to them as a married couple.<sup>94</sup> One could even imagine a scenario where a Canadian couple visiting the U.S. could suffer a medical injury and their marriage would be denied recognition at the local hospital so no medical decisions could be made on behalf of their spouse.<sup>95</sup> There are an enormous number of possibilities concerning migrating marriages and this further supports the need for recognition of marriages that are legally performed in another locale.

### III. HISTORY OF COMITY – HILTON AND JUSTICE STORY

The divergence between the United States and Canada on the issue of same-sex marriages poses a problem that only the conflict of laws theory can sort out. Historically, the principal of comity was used to remedy problems where recognition of another country's laws was needed in order to determine the status of a person

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92. *EGALE*, [2003] 13 B.C.L.R. 4th 1, para. 37 (Can.).

93. *Id.*

94. *Martinez v. Monroe*, 50 A.D.3d 189 (N.Y. 2008); *Bishop v. Oklahoma*, 333 F. App'x 361 (10th Cir. 2009); *In re Kandu*, 315 B.R. 123 (W.D. Wash. 2004).

95. A similar situation took place in Florida where a lesbian couple from Washington State was going to take a cruise leaving out of the port of Miami when one of the women suffered a brain aneurysm. The hospital, pursuant to policy, would not allow the patient to see her partner and they were kept apart while she died. The district court dismissed the discrimination suit and held that the hospital was following policy and not "anti-gay." The couple was not married, and in the state of Florida, where DOMA has been repeatedly upheld, it is difficult to see if there would have been a different outcome had the couple been legally married in another state. Steve Rothaus, *Jackson Memorial Hospital Nurses Personally Apologize to Lesbian Whose Partner Died There*, *MIAMI HERALD*, Nov. 20, 2009, <http://miamiherald.typepad.com/gaysouthflorida/2009/11/gay-nurses-at-jackson-memorial-hospital-personally-apologize-to-lesbian-whose-partner-died-there.html>.

currently within the U.S.<sup>96</sup> Marriage was often recognized as a status that comity regulated when a marriage migrated between nations.<sup>97</sup> Comity, in U.S. law, originated from the case of *Hilton v. Guyot*,<sup>98</sup> and this opinion is still cited to today in any decision where comity needs to be defined.<sup>99</sup>

The *Hilton* decision was based on Justice Story's theory of comity.<sup>100</sup> The general tenets state that 1.) no law has any effect on its own outside of the territory in which it is promulgated;<sup>101</sup> 2.) comity is neither an absolute obligation nor a mere courtesy;<sup>102</sup> 3.) "no nation will suffer the laws of another to interfere with her own to the injury of her citizens;"<sup>103</sup> 4.) foreign judgments are entitled to effect when a court having jurisdiction over the matter renders them as a regular proceeding with proper notice;<sup>104</sup> and 5.) the judgment affecting the status of persons is recognized as valid in every country, unless repugnant to the policy of its own laws.<sup>105</sup> These principles along with the definition of comity<sup>106</sup> are the primary parts of *Hilton* that are relied on time and again when determining the effect of a foreign law or judgment. Justice Story in his work also called comity a "paramount moral duty" and described it as an "imperfect obligation."<sup>107</sup>

Justice Story's theory of comity lacks uniformity and leaves much to judicial discretion.<sup>108</sup> This is contrary to the theory of comity promulgated by Ulrich Huber upon which Justice Story's theory is based.<sup>109</sup> Huber's theory proposed the assumption of three axioms, which produce a predictable result when applied to a conflict of laws situation:

96. See generally *Hilton v. Guyot*, 159 U.S. 113 (1895).

97. WATSON, *supra* note 16, at 9.

98. *Hilton*, 159 U.S. at 113.

99. *In re Kandu*, 315 B.R. at 133-34.

100. *Hilton*, 159 U.S. at 143.

101. *Id.* at 143.

102. *Id.*

103. *Id.* at 144.

104. *Id.*

105. *Id.* at 145. After the tenant of comity is given in *Hilton*, the example of status is "such as a decree confirming or dissolving a marriage."

106. See *supra* Part I.

107. WATSON, *supra* note 16, at 20.

108. *Id.* at 22.

109. See WATSON, *supra* note 16 for a detailed analysis of the difference between Huber and Justice Story's theory. The author's thesis rests on the theory that Story made a mistake in his analysis of Huber, and misinterpreted one of the axioms, because under Huber's theory, comity should predict the outcome of any case, whereas Justice Story's theory leaves matters undeterminable.



1.) The laws of each sovereign authority have force within the boundaries of its state, and bind all subject to it, but not beyond; 2.) "those people are held to be subject to a sovereign authority who are found within its boundaries, whether they are there permanently or temporarily; and 3.) the rulers of states so act from comity that the rights of each people exercised within its own boundaries should retain their force everywhere, insofar as they do not prejudice the power or rights of another state or its citizens."<sup>110</sup>

These axioms are similar to those tenets laid out by Justice Story as understood in the analysis of *Hilton*. Under Huber's theory, the validity of a contract would depend upon the place where it was made and if accepted there, then it would be accepted everywhere.<sup>111</sup> This contract interpretation was followed by an example of a marriage contract, that if valid where the marriage was performed, then valid everywhere.<sup>112</sup> Huber further comments on the acceptance of foreign marriages through comity by stating that the marriage would only be rejected if it were too "revolting" an example and that this should rarely be the case.<sup>113</sup>

Justice Story's theory allows for a bit more discretion than Huber's and the effect of this discretion can be seen in the seminal decision of *Hilton*.<sup>114</sup> The court was presented with a petition to enforce a French judgment where the plaintiffs, French citizens, were awarded damages for money owed to them through their business with the defendants, U.S. citizens, who operated a store in Paris.<sup>115</sup> The French citizens could not collect on their judgment in France because subsequent to the litigation, the defendants removed all of their property from France and therefore the judgment could not be satisfied.<sup>116</sup> The defendants alleged that the trial had been unfair and that in reality the plaintiffs had owed them large sums of money.<sup>117</sup> The defendants claimed that they

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110. *Id.* at 4. While the first two axioms were rooted in Roman law, the third was Huber's own creation. Despite this fact, Huber stated that this is the general rule of law as accepted by everyone pursuant to the principle of *ius gentium*, which is the law established by reason among all men and observed equally among all nations. *Id.* at 3, 7.

111. *Id.* at 9.

112. *Id.*

113. *Id.* at 12.

114. Justice Story established that no nation is bound to recognize a contract that is injurious to their own interests or those of their citizens. *Id.* at 23.

115. *Hilton v. Guyot*, 159 U.S. 113, 114 (1895).

116. *Id.* at 116.

117. *Id.*

had not been allowed to make a statement, to cross-examine any witnesses, and further that they had not been allowed to examine any documents presented by the plaintiffs in the French trial.<sup>118</sup>

After an extensive analysis in which the court set forth the doctrine of comity and listed case after case where this doctrine had been accepted in foreign courts, the court declined to extend comity to the situation. Instead, the court held that it should be subjected to re-examination because the French courts would do the same had the situation been reversed, since a member of their country had not been treated fairly in the foreign jurisdiction.<sup>119</sup> The court emphasized that the defendants did not have the opportunity to be heard in the French court and also were not afforded the right to cross-examine witnesses proffered by the plaintiffs.<sup>120</sup> Since the court was unsure that the result was fair to the U.S. citizens due to the lack of due process, it felt the case had to be re-litigated in order to make sure the result was just.

The tenets provided by Justice Story are continually recited in cases today and still demonstrate the essential spirit of comity. In *MacKenzie v. Barthol*, a wife brought an ejectment action against her former husband in Washington and asked the court to enforce the judgment procured in British Columbia. The court, in applying the principles of comity recited by Justice Story, found that the decision reached in Canada was fair and that the order should be applied on the basis of comity. This case, which was decided in 2007, is a good example of how comity is used to arrive at judgments and to affirm statuses across borders, especially the borders of the U.S. and Canada.

#### IV. COMITY'S ROLE IN PERPETUATING INSTITUTIONAL HOMOPHOBIA

Canada and the U.S. have a history of reciprocity concerning the recognition of legally performed marriages.<sup>121</sup> This has led activists in Canada to argue that same-sex marriages should not be treated any differently.<sup>122</sup> However, this has not been the case, as shown by a review of the overwhelming case law which has

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118. *Id.* at 159.

119. *Id.* at 168.

120. *Id.* at 159.

121. Deborah Gutierrez, *Gay Marriage in Canada: Strategies of the Gay Liberation Movement and the Implications It Will Have on the United States*, 10 *NEW ENG. J. INT'L & COMP. L.* 175, 208 (2004).

122. *Id.*

held these marriages to be against the public policy of states where DOMA has been enacted.

Whenever comity has been used in order to compel a court to recognize a foreign same-sex marriage, the doctrine has been applied in an unexpected way where a state follows DOMA.<sup>123</sup> This expectation only arises because of the basic tenets of comity and the fairly consistent way it is applied to cases unrelated to same-sex marriage. Where a state follows DOMA the state uses the statute and the discretion allowed for in the principle of comity to perpetuate this widespread institutional homophobia. A bankruptcy court, in deciding whether a joint petition was correctly filed by a same-sex couple married in Canada, chose to give comity no effect because the Canadian policy directly conflicted with that of the state, and therefore the Court had to prefer its own laws to that of a foreign nation.<sup>124</sup> Similarly, a New Jersey tax court also denied recognition of a Canadian marriage because the laws of Canada were inconsistent with those of New Jersey, which did not recognize same-sex marriages.<sup>125</sup>

In both of these cases, the doctrine of comity was used as a last ditch effort to have a foreign performed same-sex marriage recognized in the U.S. After due process, equal protection, Fifth Amendment, Ninth Amendment, and Tenth Amendment arguments are made, comity is the catchall that petitioners use in order to salvage their case.<sup>126</sup> As in these two cases, this doctrine has been of no use in allowing for the recognition of foreign performed same-sex marriages because of the pervasive nature of institutional homophobia.

Homophobic beliefs are “rooted in and perpetuate cruel stereotypes, which surface in all facets of the law” through institutional homophobia.<sup>127</sup> Institutional homophobia occurs when major social institutions, laws, customs, religious orders, schools and other organizational codes work together to reinforce existing prejudice and discrimination.<sup>128</sup> There are numerous examples of institutional homophobia that are present in daily life such as housing discrimination, statutes that make same-sex activity illegal and punishable by law, denial of child custody, invalidation of

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123. *See In re Kandu*, 315 B.R. 123 (W.D. Wash. 2004)

124. *Id.* at 133-34.

125. *Hennefeld v. Montclair*, 22 N.J.Tax 166, 184 (2005).

126. *See Kandu*, 315 B.R. at 123.

127. RONNER, *supra* note 21, at 3.

128. CHUCK STEWART, CONTEMPORARY LEGAL ISSUES: HOMOSEXUALITY AND THE LAW 145 (ABC-CLIO, Inc. 2001).

personal unions, exclusion from job protections, denial of immigration, discrimination in public accommodations, and even disinheritance.<sup>129</sup> According to a survey by the National Gay and Lesbian Task Force, more than ninety percent of respondents had experienced some form of victimization based on sexual identity.<sup>130</sup> The fostering of institutional homophobia through laws and codes reinforces and validates peoples' feelings about their own personal homophobia.

The federal government is fairly obvious when trying to enact laws based on homophobia.<sup>131</sup> When Congress passed the Hate Crimes Statistics Act of 1990 in an effort to collect data on crimes based on race, religion, sexual orientation, and ethnicity, a Senator proposed an amendment that expressed the following:

- 1.) the homosexual movement threatens the strength and the survival of the American family as the basic unit of society;
- 2.) state sodomy laws should be enforced because they are in the best interest of public health;
- 3.) the federal government should not provide discrimination protections on the basis of sexual orientation; and
- 4.) school curriculums should not condone homosexuality as an acceptable lifestyle in American society.<sup>132</sup>

This Amendment was not adopted, but instead more heterocentric language was used to express this homophobia:

- 1.) the American family life is the foundation of American Society;
- 2.) federal policy should encourage the well being, financial security, and health of the American family; and
- 3.) schools should not de-emphasize the critical value of American family life.<sup>133</sup>

While this language is more subtle, the amendment did go on to state that nothing in the Act should be construed to promote or encourage homosexuality. Institutional homophobia is seen at its worst in statutes such as the Hate Crimes Statistics Act. Due to the statutes and codes that basically permit discrimination

129. *Id.*

130. *Id.*

131. See Robert B. Mison, Comment, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133, 150 (1992).

132. 136 CONG. REC. S1169 (daily ed. Feb. 8, 1990).

133. Hate Crimes Statistics Act of 1990, Pub. L. No. 101-275, § 2(a), 104 Stat. 140 (to be codified at 28 U.S.C. § 534).

against homosexuals, it is no wonder that this discrimination has pervaded common law applications as well. Comity is applied by judges who, by definition of the doctrine, have discretion in their application of the standard. By combining the doctrine of comity with DOMA, we have an explanation of how institutional homophobia is producing this weird, but consistent result, which favors rejecting same-sex marriages. These standards taken together make sexual orientation the last legal form of discrimination in the U.S.<sup>134</sup>

DOMA is the perfect example of a law giving special rights to heterosexuals and depriving homosexuals of those same rights. At least 1,049 federal regulations involve marital status, and thus DOMA influences these regulations and places same-sex couples in the place of second-class citizens.<sup>135</sup> Institutional homophobia is very present in the framework of American society and this is further evidenced by the effect of comity when used to recognize same-sex marriage.

#### V. COMITY: A WEIRD, BUT CONSISTENT RESULT

Comity, as described in *Hilton* and as adopted by the Restatement (Third) of Foreign Relations Law, should be more effective as a doctrine than the same-sex marriage cases have suggested in that the public policy exception should not be used as a shield to prevent migrating marriages from recognition. The Restatement posits that a judgment confirming the status of a person that is conclusive between the parties is entitled to recognition in the U.S.<sup>136</sup> unless it is repugnant to the public policy of the U.S.<sup>137</sup> The Restatement goes on to provide for divorce decrees,<sup>138</sup> child custody,<sup>139</sup> and support orders,<sup>140</sup> yet has no provision for recognition of foreign marriages. The Restatement (Second) of Conflict of Laws takes a similar approach to recognition of status, but its pro-

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134. Henry F. Fradella, *Integrating the Study of Sexuality into the Core Law School Curriculum: Suggestions for Substantive Criminal Law Courses*, 57 J. LEGAL EDUC. 60, 61 (2007).

135. STEWART, *supra* note 128, at 146. Stewart also explores the legal challenges that are continually being mounted to remove discriminatory laws that keep homosexuals as second-class citizens in the preface of this work.

136. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 (1987).

137. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 (1987).

138. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 484 (1987).

139. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 485 (1987).

140. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 486 (1987).

visions concerning the validity of a marriage in a state are as follows:

A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.<sup>141</sup>

This provision is similar to the Restatement of Foreign Relations but is more specific to marriage. The major difference between the two is that the Foreign Relations Restatement requires that the status be repugnant to the public policy, whereas the Conflict of Laws Restatement requires both that the state possess a strong public policy against the marriage and have a significant relation at the time of marriage.

The very fact that thirty-nine states have felt strongly enough to enact some version of DOMA amounts to a strong public policy allowing states to refuse the recognition of legally performed foreign marriages. When marriages migrate, the parties involved may not realize the ramifications of these actions, such as the loss of all their spousal rights. As in the example where a Canadian couple traveled for vacation to the United States and ended up in the hospital in a state that does not recognize their marriage, hospital policy could interfere and keep the couple apart, which would result in a loss of recognition of the couple's status that was not accounted for in their vacation plans.<sup>142</sup> This should not be the case. The doctrine of comity should be followed to allow recognition of these marriages instead of further fostering institutional homophobia.

Critics have called modern discussions of comity "irrelevant at best, or cruelly ironic at worst."<sup>143</sup> U.S. courts have gone so far to disregard comity and reject foreign decrees that it "stands accused of acting with unprecedented unilateralism in the international sphere; or dramatically exceeding its legitimate judicial and legislative jurisdiction; even of casually disregarding its treaty obligations."<sup>144</sup> Comity, if it is to play any role in international law, must be elevated in status in order to provide synchro-

141. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971).

142. See Rothaus, *supra* note 95.

143. C. Ryan Reetz, *Prologue* to PEDRO J. MARTINEZ-FRAGA, *THE NEW ROLE OF COMITY IN PRIVATE PROCEDURAL INTERNATIONAL LAW* 19 (Thomson Aranzadi 2007).

144. *Id.*

nization in the international community of nations.<sup>145</sup>

In Justice Brennan's dissent in the case of *First National City Bank v. Banco Nacional de Cuba*,<sup>146</sup> the dissenters established a new framework for analyzing foreign decrees and giving them effect in the U.S. First, the extent to which U.S. interests were to be affected was evaluated. Then the court was to look at the interest germane to the foreign sovereign at issue. Last, the court would find the "extent to which a specific holding would harmonize with the interests of the community of nations in developing, promoting, and preserving a reliable efficacious system of international law."<sup>147</sup> This system would still allow for judicial discretion and would recognize the issues surrounding the current framework and discriminatory holdings of courts across the nation.

Courts consistently speak of comity as if it is an obligation, yet hold otherwise when their decisions are rendered by denying recognition to a foreign marriage. Comity is meant to foster mutuality and form a moral necessity to do justice, in order that it may be done in return for the U.S.<sup>148</sup> One court has even gone so far as to say that comity should not just be used when it is within the interests of the domestic party to use it, but should be a "principle under which judicial decisions reflect the systemic value of reciprocal tolerance and goodwill."<sup>149</sup> Also, that choice of law should be governed by the needs of other countries within the larger international community.<sup>150</sup> This talk of reciprocity and systematic approaches is far from what courts do when confronted with issues where comity is most commonly used. Furthermore, as seen by comity's application to same-sex marriages, comity should never be used in a way that is inconsistent with its definition in order to distinguish minorities.

Marriage, before the rest of the world had considered the legalization of same-sex marriages, was a common example of how comity was used.<sup>151</sup> Choice of law articles and books were replete with examples of what happened when marriages migrated and

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145. PEDRO J. MARTINEZ-FRAGA, *THE NEW ROLE OF COMITY IN PRIVATE PROCEDURAL INTERNATIONAL LAW* 91 (Thomson Aranzadi 2007).

146. *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 787 (1972).

147. MARTINEZ-FRAGA, *supra* note 145, at 117-18.

148. *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for the S.D. of Iowa*, 482 U.S. 522 (1987).

149. *Id.* at 555.

150. *Id.* at 555-56.

151. *See generally* WATSON, *supra* note 16.

were against the public policy of their new domicile.<sup>152</sup> However, in most cases, marriages were accepted as long as they were recognized in the place performed. Public policy issues arose when something was truly repugnant to public policy, such as incestuous marriages where the degree of relation between the parties was close,<sup>153</sup> as in the marriage between a brother and sister, or polygamous marriages.<sup>154</sup> This is not the case anymore.

Most courts, when rejecting the recognition of same-sex marriage, cite history, if they are going to give a reason at all. For example, in New Jersey, the court stated that the state marriage statute was understood to reject same-sex marriages because historically marriages were always between members of the opposite sex.<sup>155</sup> No specific state law stated this, but by reference to its incest statutes, which indicate that a man is not to marry any of his ancestors' daughters and sisters, the court found there is a strong indication that marriage was only seen to occur between members of different genders.<sup>156</sup> While this reference does show the traditional outlook, it ignores any reference to "strong" public policy.

The traditional notions of marriage that proponents seek to protect come from historical notions of gender that have been abolished in our current society.<sup>157</sup> Gender restrictions in marriage arose when genders were legally required to adhere to specific roles.<sup>158</sup> These legally mandated gender roles have been abolished by law and currently there are no gender specific roles that a man and woman play in a marriage. By citing tradition in an analysis for denying same-sex marriage, the government seeks to give credit to antiquated gender notions that are no longer feasible and downright discriminatory in today's society. The only explanation to adhering to tradition would simply be to state that opposite-sex

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152. *Id.* at 9. "Everyone is considered to have contracted in that place which he is bound to perform.' Hence, for marriage, for instance, the place of marriage contract is not where the marriage contract was entered into, but where the parties intend to conduct the marriage, which will be the normal residence of the parties."

153. See P.H. Vartanian, Annotation, *Recognition of Foreign Marriage as Affected by Policy in Respect of Incestuous Marriages*, 117 A.L.R. 186 (1938). Usually, marriages between an uncle and a niece were accepted where marriages between a brother and sister would be more questionable.

154. *Bronson v. Swensen*, No. 2:04CV21TS, 2005 WL 1310482, at \*1, \*2 (D. Utah 2005).

155. *Lewis v. Harris*, No. MER-L-15-03, 2003 WL 23191114, at \*1, \*23 (N.J. Super. Ct. Law Div. 2003).

156. *Id.* at \*3.

157. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 992 (N.D. Cal. 2010).

158. *Id.* at 998.



couples are better than same-sex couples.<sup>159</sup> “The state cannot have an interest in disadvantaging an unpopular minority group simply because the group is unpopular.”<sup>160</sup>

Arguments about the history of marriage are in themselves circular. As noted by the California Supreme Court, when the court was considering six cases questioning the decision to deny same-sex couples the right to marriage, “history alone is not invariably an appropriate guide for determining the meaning and scope of this fundamental constitutional guarantee.”<sup>161</sup> The court based this opinion on the fact that prohibiting interracial marriages was found to be inconsistent with the right to marry, even though those statutes had existed “since the founding of the state.”<sup>162</sup> The California Supreme Court recognized, in similar reasoning to the Canadian Charter, that marriage as an institution has evolved from traditional notions which are hundreds of years old. Therefore, the court revisited the substantive rights embodied in the fundamental right to marry and established that this right should be extended to couples of the same-sex.<sup>163</sup>

The California Supreme Court found that the substantive right to marry was embodied by the rights of an individual and not those of a couple. It is “the opportunity of an individual to establish – with the person whom the individual has chosen to share his or her life – an officially recognized and protected family possessing mutual rights and responsibilities and entitled to the same respect and dignity accorded a union traditionally designated as marriage.”<sup>164</sup> The court further found that it is against the right of equal protection to deny same-sex couples the right to marry and instead provide civil unions.<sup>165</sup> This would serve to denigrate them as “second-class citizens.”<sup>166</sup>

Same-sex marriages have also been criticized because they

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159. *Id.*

160. *Id.* (citing U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

161. *In re Marriage Cases*, 183 P.3d 384, 399 (Cal. 2008). Even though this case has been superseded by a state Constitutional Amendment in 2008 which provides “only marriage between a man and a woman is valid or recognized in California,” this case still establishes the relevant arguments for why same-sex marriages should be recognized in the United States. However, this amendment was declared unconstitutional in *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 992 (N.D. Cal. 2010).

162. *Marriage Cases*, 183 P.3d at 399.

163. *Id.* at 433-34.

164. *Id.* at 399.

165. *Id.* at 434-35.

166. *Id.* at 402.

would not lead to procreation, which is simply not the case anymore. With the wide spread use of in-vitro fertilization and sperm donors, same-sex couples are now able to care for children in the same way that heterosexual families are. Furthermore, heterosexual couples who have no intention of ever procreating are allowed to marry; therefore to disallow homosexual marriages on that basis alone is discrimination.

Furthermore, there is no evidence to suggest that same-sex parents and opposite-sex parents are of a different quality when it comes to parenting. One court found that there was explicit evidence to the contrary. The Northern District of California declared a state constitutional amendment that banned same-sex marriage as unconstitutional based on rational basis review.<sup>167</sup> The court found that same-sex parents and opposite-sex parents are of equal quality and that the amendment banning gay marriage “does not make it more likely that opposite-sex couples will marry and raise offspring biologically related to both parents.”<sup>168</sup> By not allowing gay marriage, states also promote sexual activity, child-bearing, and child-rearing to occur outside of marriage and create unstable families.<sup>169</sup> Therefore, the reasoning advanced in support of the amendment, which is similar to the reasoning advanced in support of DOMA, had no rational basis to support upholding the amendment.

Congress wanted to protect traditional marriages because the addition of same-sex couples would lead to more divorces.<sup>170</sup> As stated in the legislative history, they wanted to avoid “opening a new front in the war.”<sup>171</sup> It is true that if same-sex couples marry, they may want to divorce. Currently, cases exist where homosexual couples seek to have a court divide their property in a divorce-like action when their relationship has ended.<sup>172</sup> In this case, it would be more prudent to provide these couples with the mechanism of dividing property that heterosexual couples are afforded in order to avoid frivolous litigation in contract actions, which would be burdened with implied contract claims.<sup>173</sup> Also, it would be unfair to same-sex couples to keep them from those forums to

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167. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010).

168. *Id.* at 999-1000.

169. *Id.* at 1000.

170. See H.R. REP. NO. 104-664, at 11, 14 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2918.

171. *Id.* at 15.

172. *In re Goodale*, 298 B.R. 886 (W.D. Wash. 2003).

173. *Id.*

which heterosexual couples have access, because it could lead to injustice against one partner or their children. The governmental interests provided may be "rational" according to most courts, but they are by no means persuasive when looking at the true effect that they could have on the U.S. court system.

Courts also have reasoned that same-sex marriages should be avoided because they would act as a gateway to the recognition of polygamous and incestuous marriages. This scare tactic is similar to the one used when arguing against interracial marriages during the Civil Rights Movement.<sup>174</sup> Several of the arguments as enumerated here against same-sex marriage parallel those made when challenging interracial marriage. Furthermore, after interracial couples successfully challenged the ban on their marriage, there has been neither a "downfall of society nor an abandonment of marriage" as predicted.<sup>175</sup> Just as racism was the source of the laws against interracial marriage, institutional homophobia is similarly fueling the arguments presented against same-sex marriage.

Comity, when applied to same-sex marriage, faces many of the same barriers that domestic recognition faces. For this reason, comity will be interpreted as providing a shield against these foreign performed marriages just like DOMA in order to further cement institutional homophobia into our legal system. Even though the principles of foreign recognition enunciated in *Hilton* would seem to lead to a different result, courts are consistently using comity to deny recognition of same-sex marriages. The use of comity in this fashion demonstrates how DOMA has made it acceptable for individual judges to discriminate against homosexual couples. This institutional homophobia stems from the laws and codes that are in force, but reach out to all common law doctrines as well by providing implicit acceptance of this discrimination.

It would seem that on the federal level, where the government would be more concerned with foreign relations, it would be important to foster these relationships by recognizing the status afforded by other countries. On that level it should be important to fight for the recognition of foreign performed marriages over those of the states. As long as the states individually allow for this institutional homophobia to permeate their political system, comity

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174. STEWART, *supra* note 128, at 181.

175. *Id.*

will deny recognition of same-sex marriages even though it is contrary to the policy established by Justice Story in *Hilton*.

## VI. CONCLUSION

Canada has made major progress in its recognition of the rights of the gay and lesbian movement, especially through its legalization of same-sex marriage. The U.S. has made slow progress towards this recognition as well, but enough states have enacted DOMA to create divergent interests between these bordering countries.

While there has typically been recognition between the U.S. and Canada of marriages performed legally in each place, this policy has not been continued and instead couples are relegated to second-class citizenship because of institutional homophobia. As one California federal court noted:

Many people erroneously believe that the sexual experience of lesbians and gay men represents the gratification of purely prurient interests, not the expression of mutual affection and love. They fail to recognize that gay people seek and engage in stable monogamous relationships. Instead, to many, the very existence of gay men is inimical to the family.<sup>176</sup>

Even though this stereotype should be counteracted and diminished when people see that homosexuals are seeking to make their union official in the eyes of the law, this is not the case. Homosexuals are seeking monogamous, stable relationships through the institution of marriage as any couple looking to solidify their relationship would. This stereotype has not diminished and instead has only been reaffirmed by numerous court opinions that seek to keep same-sex couples away from the institution of marriage. It seems almost as if this stereotype and the fight for same-sex marriage have been reconciled, and the stereotype has evolved to new levels, which result in people believing that if same-sex couples were allowed to marry, the marriage would be unstable since they only seek the gratification of purely prurient interests.

While many critics believe that same-sex marriage is the final barrier in the demise of institutional homophobia,<sup>177</sup> this barrier is only part of the solution. Since so many states have enacted their

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176. RONNER, *supra* note 21, at 5 (citing H.R. REP. NO. 104-664, at 14 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2919).

177. *Id.* at 29.

own mini-DOMA and continue to find it perfectly constitutional, there is no possibility of recognition principles such as comity breaking the barriers to achieve the result desired by the homosexual community. Comity will not prevail until institutional homophobia recedes through the repeal of statutes that implicitly allow for this overt discrimination. Therefore, comity will continue to be twisted and abused, but consistently applied as long as Americans continue to view same-sex marriage as inferior to heterosexual marriages.

The principle of comity as described in *Hilton* demanded more in order to prevent the chaos of each country's arbitrary dismissal of another country's law. The court in *Hilton* cited to a case surrounding the status of a marriage to demonstrate this point.<sup>178</sup> The court directly quoted a case that came to fruition prior to the existence of the United States as a country to show the effect that comity should have in regulating status and foreign judgments:

It is against the law of nations not to give credit to the judgments and sentences of foreign countries till they be reversed by the law, and according to the form, of those countries wherein they were given; for what right hath one kingdom to reverse the judgment of another? And how can we refuse to let a sentence take place till it be reversed? And what confusion would follow in Christendom, if they should serve us so abroad, and give no credit to our sentences!<sup>179</sup>

This "confusion" is precisely what the justices in the Supreme Court were trying to avoid when introducing comity to American jurisprudence.

In order to achieve a cohesive community of nations, the original common law standards that governed marriage should be followed. This means applying comity to foreign performed same-sex marriages that will allow for recognition when couples immigrate. This change will be more likely to come about when institutional homophobia has ebbed, and the Full Faith and Credit Clause is used in recognizing same-sex marriages. This change could be forced on the U.S. sooner if the Respect for Marriage Act is passed. The Respect for Marriage Act would serve to repeal DOMA and adds:

(a) For the purposes of any Federal law in which marital status is a factor, an individual shall be considered married

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178. *Hilton v. Guyot*, 159 U.S. 113, 145 (1895).

179. *Id.*

if that individual's marriage is valid in the State where the marriage was entered into or, in the case of a marriage entered into outside any State, if the marriage is valid in the place where entered into and the marriage could have been entered into in a State.<sup>180</sup>

Marriages that are valid where celebrated should be valid everywhere, as they were before same-sex marriage became an issue.

Even though any discussion about comity has been described as "irrelevant at best,"<sup>181</sup> other scholars urge that there is more to the comity discussion than courts give it credit.<sup>182</sup> Comity should be elevated to a status that recognizes foreign law and promotes the community of nations that is forming with the world's international economy.<sup>183</sup>

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180. Respect for Marriage Act of 2009, H.R. 3567, 111th Cong. § 7(a) (2009).

181. MARTINEZ-FRAGA, *supra* note 145, at 19.

182. *Id.*

183. *Id.*

