

BAKER v. GENERAL MOTORS: IMPLICATIONS FOR INTERJURISDICTIONAL RECOGNITION OF NON-TRADITIONAL MARRIAGES

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INTRODUCTION

It always worries me a little when the Conflict of Laws suddenly seems interesting. When outsiders begin to visit this little corner of the legal universe, the results usually are not good.

Take William Prosser, for example. Prosser was and still is the most famous writer on American tort law. When Prosser decided to write an article about multistate publication in defamation cases he was forced to confront choice-of-law. He declared: "The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon."¹ This quickly became the most famous sentence ever written about conflicts; hardly anyone writes about the subject anymore without making reference to "dismal swamps."² And all of this was twelve years *before* the so-called conflicts revolution commenced,³ which everyone agrees made the subject more difficult and spawned a whole new generation of theories that are often mixed together to brew strange potions with deadly side effects.⁴ The problem, of course, is that Prosser was right and he still is. If he were wrong, everyone would have forgotten about his pithy line and gotten on to other matters.

Or how about John Hart Ely? Ely, of course, is the famous constitutional writer who swooped in to declare unconstitutional Brainerd

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1. William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

2. See Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1 (1991); Symeon C. Symeonides, *Exploring the "Dismal Swamp": The Revision of Louisiana's Conflicts Law on Successions*, 47 LA. L. REV. 1029 (1987).

3. *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963).

4. See generally William A. Reppy, Jr., *Eclecticism in the Choice of Law: Hybrid Method or Mismatch?*, 34 MERCER L. REV. 645 (1983) (stating that modern courts often utilize two or more different choice-of-law analyses to decide one choice-of-law problem).

Currie's "revolutionary" interest analysis because of its local bias.⁵ Ely had a point too, but not one as good as Prosser's. Currie's theory can be rescued from unconstitutionality in part because hardly anyone takes it as seriously as did Currie,⁶ but conflicts writers spent years untangling this mess.⁷

The problem has reached epidemic proportions now, however. Students (who hardly ever write on conflicts subjects) and others are flooding law reviews with notes on the obscure *lex loci celebrationis* rule and its exceptions.⁸ Senators,⁹ state legislators,¹⁰ governors,¹¹ religious groups¹² and even Lawrence Tribe¹³ have suddenly taken an active interest in the Full Faith and Credit Clause, an obscure constitutional provision usually tended to by academic specialists.¹⁴ Congress, with President Bill Clinton's signature, recently legislated under its rarely-exercised full-faith-and-credit power.¹⁵

5. John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981).

6. Patrick J. Borchers, *Professor Brilmayer and the Holy Grail*, 1991 WIS. L. REV. 465, 466 (1991) (calling Currie's theory "intellectually bankrupt").

7. Symposium, *Choice of Law: How it Ought to Be*, 48 MERCER L. REV. 639, 653 (1997).

8. See, e.g., Joseph W. Hovermill, *A Conflict of Laws and Morals: The Choice of Law Implications of Hawaii's Recognition of Same-Sex Marriages*, 53 MD. L. REV. 450 (1994) (discussing the generally accepted choice-of-law rules and the public policy exception applied by state courts); Scott Ruskay-Kidd, Note, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435 (1997) (analyzing the difficulties the Defense of Marriage Act ("DOMA") presents to the principles of federalism); Anthony D'Amato, Note, *Conflict of Laws Rules and the Interstate Recognition of Same-Sex Marriages*, 1995 U. ILL. L. REV. 911 (1995) (discussing same-sex marriages and relevant conflict-of-laws rules); Note, *In Sickness and in Health, in Hawaii and Where Else?: Conflict of Laws and Recognition of Same-Sex Marriages*, 109 HARV. L. REV. 2038 (1996) (arguing that *lex celebrationis* should govern the recognition of same-sex marriages in states other than the marrying state); Beth A. Allen, Note, *Same-Sex Marriage: A Conflict-of-Laws Analysis for Oregon*, 32 WILLAMETTE L. REV. 619 (1996) (discussing the perceived public policy exception to the Full Faith and Credit Clause).

9. See, e.g., Editorial, *Posturing About Marriage*, AUSTIN-AM. STATESMAN, Sept. 14, 1996, at A12 (discussing the impact of DOMA).

10. See, e.g., Robert Whereatt, *Bill Would Ban Same-Sex Marriages*, STAR TRIBUNE, Jan. 14, 1997, at 1B (quoting various Minnesota Senators regarding a state bill that would ban same-sex marriages).

11. See, e.g., *James' Order Outlaws Same-Sex Marriages*, MONTGOMERY ADVERTISER, Aug. 30, 1996, at 3B (quoting Alabama Governor Fob James regarding the state bill he signed prohibiting same-sex marriages).

12. See, e.g., Kim A. Lawton, *State Lawmakers Scramble to Ban Same-Sex Marriages*, CHRISTIANITY TODAY, Feb. 3, 1997, at 84 (quoting individuals from religious organizations while noting that religious leaders "have been working intensively . . . to prohibit same-sex marriages").

13. Press Release of Senator Edward M. Kennedy (Sept. 10, 1996).

14. See, e.g., Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part One)*, 14 CREIGHTON L. REV. 499 (1981) (providing a comprehensive review of the history of the Full Faith and Credit Clause).

15. See 28 U.S.C. § 1738C (1998).

What is the problem? The problem is that the fiftieth state admitted to the Union, Hawaii, is apparently on the road to recognizing same-sex marriages.¹⁶ In *Baehr v. Lewin*,¹⁷ a two-justice plurality of the Hawaii Supreme Court (along with a narrow concurrence to provide the necessary third vote),¹⁸ held that the state's marriage law discriminated on the basis of sex by not allowing same-sex couples to marry. Applying the Hawaii Constitution, the court held that the state must assume the burden of showing a compelling interest for refusing to allow same-sex couples to marry and remanded the case for trial.¹⁹ The state lost at trial,²⁰ and the case is on appeal again. The trial court judgment might get reversed, but hardly anyone thinks this will happen.²¹

At first glance, one might think this a mostly intra-Hawaiian matter. After all, it's the Hawaii Supreme Court, interpreting the Hawaii Constitution, about whether the Hawaii state government is required to issue marriage licenses to same-sex couples who get married in Hawaii. Of course what Hawaii does might influence the rest of the Nation, but Hawaii isn't Maine.²²

The assertedly national character to all of this derives from the constitutional provision that everyone suddenly finds so interesting, the Full Faith and Credit Clause. This humble little scrap of the Constitution says:

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.²³

The Clause was seized upon almost immediately by advocates of same-sex marriages to argue that if a same-sex couple were to get married in Hawaii, every other state would have to treat the couple as

16. So, too, may be the 49th state, Alaska. See *Brause v. Bureau of Vital Statistics*, No. 97-8156, 1998 WL 99743, at *1 (Alaska Super. Mar. 11, 1998) (stating that the state law limiting marriages to opposite-sex couples is subject to strict scrutiny and the state must prove at trial a compelling interest for such a limitation).

17. 852 P.2d 44 (Haw.), *reconsideration granted in part and mandate clarified*, 74 Haw. 645 (1993).

18. *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993) (Burns, J., concurring).

19. *Baehr*, 852 P.2d at 68 (plurality opinion).

20. *Baehr v. Miike*, Civ. No. 91-1394, 1996 WL 694235, at *1 (Haw. Cir. Ct. Dec. 3, 1996).

21. See Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 15-16 (1996) (noting that recent appointees to the Hawaiian Supreme Court were selected by the same Governor who appointed the two members of the *Baehr* plurality).

22. See Editorial, *Setback for Gay Rights*, SAN FRANCISCO CHRONICLE, Feb. 13, 1998, at A26 ("As Maine goes, so goes the Nation. . .").

23. U.S. CONST. art. IV, § 1.

married because a marriage is a "public Act" or "Record" or "judicial proceeding."²⁴ This argument, aside from its apparent reliance on the Full Faith and Credit Clause, gains a little from experience. After all, marrying isn't like registering to vote or getting a driver's license; couples don't have to remarry with every move. Heterosexual couples who decide to combine the ceremony and honeymoon in one excursion to the Island Paradise are married when they get home, so why should it be different for same-sex couples?

On the other hand, there's something a bit shocking about this assertion regarding the Full Faith and Credit Clause. If this interpretation of the Clause were correct — and, as I explain, it's wrong — it would be the most astonishingly undemocratic, counter-majoritarian political development in American history. By slightly more than two to one, American adults are opposed to same-sex marriage (the poll results in Hawaii are no different),²⁵ and overwhelming majorities of both houses of Congress²⁶ approved the so-called Defense of Marriage Act ("DOMA"),²⁷ which purports to free states from being required to recognize same-sex marriages. Clinton, probably the president most sympathetic in history to gay and lesbian concerns, promptly signed the legislation.²⁸ If this pro-recognition interpretation of the Full Faith and Credit Clause is correct, it means that all of the other states are required to accept the judgment of three members of the Hawaii Supreme Court on a social issue of intense popular interest.

One might point out, of course, that the populace is routinely bound by the judgments of five or more members of the United States Supreme Court, so that perhaps all of this is not as shockingly undemocratic and counter-majoritarian as it seems. But the Justices of the United States Supreme Court take their offices under a process dictated by the Constitution,²⁹ ratified by the entire Nation, and adults can — and some surely do — vote for Presidents and Senators

24. See, e.g., Shannon P. Duffy, *Same-Sex Marriages on the Horizon?; Lawyers Say Hawaii Case is Test for Rest of U.S.*, LEGAL INTELLIGENCER, May 9, 1995, at 1 (discussing the implications of Hawaiian marriages in the 49 other states based on the Full Faith and Credit Clause).

25. Bob Sipchen, *A Storm Over Same-Sex Marriage*, COURIER-JOURNAL, Apr. 14, 1996, at 10 (reporting on a Gallup poll finding that 68% of adults nationally oppose same-sex marriage and 71% of Hawaii adults oppose same-sex marriage).

26. See Kendrick Blackwood, *Recent Legislative Actions a Blow to Same-Sex Couples*, OMAHA WORLD-HERALD, Oct. 1, 1996, at 31SF (reporting that the Defense of Marriage Act passed the Senate 85-14); Editorial, *Anti-Gay Bias Persists as Court Deliberates*, SAN FRANCISCO CHRONICLE, Dec. 5, 1996, at A26 (reporting that the Defense of Marriage Act passed the House 342-67).

27. The Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C).

28. *Id.*

29. U.S. CONST. art. III.

based upon what sorts of federal judges those elected officials will appoint and confirm respectively. The United States Constitution can even be amended with super-majoritarian, national political support.³⁰ But when the Hawaii Supreme Court interprets the Hawaii Constitution, the folks in New York, Nebraska and Texas have not had much of a say.

As luck would have it, the Supreme Court had before it this term a Full Faith and Credit case. The case, *Baker v. General Motors Corp.*,³¹ did not deal with marriages. Instead, it dealt with the effect in other states of a stipulated injunction entered in a Michigan case between General Motors and one of its retired engineers forbidding the engineer from testifying against GM in product safety cases. Despite these evident differences, the case was watched closely for what hints it might give about the faith and credit that would be given to Hawaiian same-sex marriages.³² Even though the Supreme Court in *Baker* unanimously ruled that other state courts did not have to enforce the Michigan injunction by preventing the GM engineer from testifying,³³ the decision was immediately hailed by proponents of same-sex marriage as a major victory.³⁴

My purpose in this Article is to examine what, if anything, the Full Faith and Credit Clause has to say about interjurisdictional recognition of non-traditional marriages (including, obviously, same-sex marriages), and in particular what implications the *Baker* case has for this question. I lay to one side the "substantive" constitutional arguments based on due process and equal protection. It might be that same-sex marriage will have its *Loving v. Virginia*,³⁵ but there are evident differences with *Loving*³⁶ and, as long as *Bowers v. Hardwick*³⁷ allows states to criminalize same-sex sex, the substantive arguments face an impossibly uphill climb under the Federal Constitution.

30. U.S. CONST. art. V.

31. 118 S. Ct. 657 (1998).

32. See, e.g., Tony Mauro, *Following a Rush of Groundbreaking Cases the Court Sees a Quieter Time*, LEGAL TIMES, Oct. 6, 1997, at S32 (stating that "some think a decision in *Baker* will have a bearing on whether gay marriages recognized in Hawaii have to be honored in other states"); Linda Greenhouse, *Court to Weigh States' Legal Reciprocity*, NEW YORK TIMES, March 25, 1997, at § A, 18 ("While the case before the Justices involves an auto accident, the decision could affect . . . eventual interstate recognition of marriages between gay partners.")

33. *Baker v. General Motors Corp.*, 118 S. Ct. 657, 666-68 (1998).

34. See, e.g., David G. Savage, *Combustible Cases: Will a Car Crash Ruling Lead to Recognition of Gay Marriages?*, 84 A.B.A. J. 42, 44 (1998) ("*Baker* cheers Evan Wolfson, director of the marriage project for LAMBDA. . .").

35. 388 U.S. 1 (1967) (holding that Virginia law prohibiting interracial marriages violated the Equal Protection Clause).

36. See, e.g., Wardle, 1996 BYU L. Rev. at 75-82 (arguing that the *Loving* analogy ultimately fails).

37. 478 U.S. 186 (1986).

Rather, my focus is on whether other states will be compelled by the Full Faith and Credit Clause to give effect to Hawaiian same-sex, and other non-traditional, marriages.

In Part I, I examine the two principal pro-recognition, full-faith-and-credit arguments. One, which I call the “expansive” argument, contends that a marriage lawfully entered into in the celebration state is unassailable in any other state. The other, which I call the “narrow” argument, contends simply that states may not single out same-sex (or presumably other non-traditional) marriages for non-recognition, although a state could choose to follow an across-the-board rule requiring the state’s domiciliaries to comply with its marriage laws.

In Part II, I discuss the Court’s full-faith-and-credit jurisprudence and its relationship to the traditional conflict-of-laws rules regarding marriages. I then turn to the *Baker* case and show that it is fully consistent with the Court’s current full-faith-and-credit jurisprudence. Under this line of cases, the expansive argument fails immediately because a marriage license meets none of the criteria for a “judgment” entitled to mandatory recognition. The narrow argument fails as well, although for different and more complicated reasons. The narrow argument avoids the difficulty that a marriage license is not a judgment, but rests on untenable assumptions regarding the effect of the Clause on state choice-of-law doctrine. Not only does *Baker* offer no support to either the expansive or narrow arguments, it undercuts each.

In Part III, I consider what the failure of the expansive and narrow arguments portends for the future of same-sex marriage. I briefly consider here the effect of DOMA and legislation passed in about half of the states regarding interjurisdictional recognition of same-sex marriages. Ultimately, I conclude that the matter is one of state choice, and that the future of same-sex marriage rests in the hands of the political process. States are free to follow Hawaii in legalizing same-sex marriage or to recognize same-sex or other non-traditional marriages from Hawaii or elsewhere. States are also free to refuse to recognize same-sex marriages or to give them only limited effect. In short, the Full Faith and Credit Clause cannot be legitimately invoked to remove the question from the political arena.

I. PRO-RECOGNITION ARGUMENTS

Let me begin with the expansive pro-recognition argument. The expansive argument turns out to be easy to state but hard to defend. The expansive argument, advanced mostly in student writing³⁸ and

38. See Habib A. Balian, Note, *Til Death Do Us Part: Granting Full Faith and Credit to Marital Status*, 68 S. CAL. L. REV. 397 (1995); see also *infra* notes 115, 121 (discussing the authorities cited in support of the expansive position).

the popular press,³⁹ varies somewhat from author to author but has an easily-identifiable common core. The common core is that a marriage solemnized under the law of the state in which it is celebrated is a “record” or “proceeding” under the Full Faith and Credit Clause. In fact, continues the argument, a marriage is the functional equivalent of a judgment;⁴⁰ the type of proceeding most invulnerable to collateral attack under the Full Faith and Credit Clause.⁴¹

Proponents of the expansive argument make the superficially appealing analogy to divorce judgments.⁴² If a state court obtains divorce jurisdiction over one of the parties to a marriage, its decree dissolving the marital union is undeniably a judgment entitled to faith and credit and immune from collateral impeachment.⁴³ If the dissolution of a marriage is immune from attack by other states, runs the expansive argument, then surely the creation of a marriage must enjoy similar protection.

The narrow argument, advanced in an article by Professor Kramer,⁴⁴ is more complicated and harder to attack, although it, too, ultimately fails. The narrow argument — for good reasons that will become apparent shortly — does not contend that a marriage is the equivalent of a judgment. Rather, the narrow argument correctly identifies the question as one of giving faith and credit to the “public Acts” (here the marriage *law*) of Hawaii. Thus, the problem is one of the Full Faith and Credit Clause’s effect on state choice-of-law doctrine. Building principally on a couple of older Supreme Court cases, namely *Hughes v. Fetter*⁴⁵ and *Broderick v. Rosner*,⁴⁶ Kramer posits an “equality” component to the Full Faith and Credit Clause in the application of sister state laws.⁴⁷ By this, of course, he doesn’t mean

39. See, e.g., Joan Biskupic, *Once Unthinkable, Now Under Debate; Same-Sex Marriage Issue to Take Center Stage in Senate*, WASH. POST, Sept. 3, 1996, at A1 (noting that some argue “that courts might deem state-sex marriages ‘judgments,’ forcing other states to accept them unless Congress intervened”); Henry J. Reske, *A Matter of Full Faith: Legislators Scramble to Bar Recognition of Gay Marriages*, 82 A.B.A. J. 32 (1996) (advocating the use of the same-sex marriage point to divorce recognition cases as precedent for requiring recognition of lawfully celebrated marriages).

40. Balian, 68 S. CAL. L. REV. at 403-04.

41. See generally EUGENE SCOLES & PETER HAY, CONFLICT OF LAWS § 8.3 (2d ed. 1992) (declaring that judgments may be attacked collaterally only in narrow circumstances).

42. See Reske, 82 A.B.A. J. at 32 (noting the divorce analogy cited by proponents of same-sex marriage).

43. See, e.g., *Williams v. North Carolina*, 325 U.S. 226 (1945) (*Williams II*) (holding that a state divorce decree must be recognized in all other state providing jurisdiction is established).

44. Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997).

45. 341 U.S. 609 (1951).

46. 294 U.S. 629 (1935).

47. Kramer, 106 YALE L.J. at 1980.

that a state can never refuse to apply another state's law if one of the parties so demands. Rather, he means that states can't refuse to apply the laws of other states just because they don't like the other state's laws.⁴⁸

Kramer's argument is considerably narrower, because a state could make an across-the-board change to its marriage conflicts rules to completely, or almost completely, avoid recognizing same-sex marriages. As we shall see in a moment, the law of the state in which a marriage is celebrated is the one usually applied to determine the marriage's validity.⁴⁹ Even under the narrow argument, a state could decide to always apply the law of the domicile of the parties, or could create a "double validity" rule in which a marriage is upheld only if it conforms to the laws of both the celebration and domiciliary states. In fact, this "double validity" rule is partially accomplished in some states by "marriage evasion" statutes.⁵⁰

Adoption of the narrow argument would, however, be more than a technical victory for proponents of same-sex marriage. A state would have to rearrange its choice-of-law rules so that all out-of-state marriages receive equal treatment. This would mean that a state would have to deny recognition to marriages made under laws slightly different than its own, such as marriages between 17-year-olds if the forum state's law requires majority age. This would be a major burden that might upset a large number of heterosexual marriages. Therefore, this approach might not be worth the effort (for a state so inclined) just to avoid having to recognize a few same-sex marriages.

Professor Kramer's argument is a smaller and much more interesting target. But, like the expansive argument, it ultimately cannot be reconciled with the Supreme Court's interpretation of the Full Faith and Credit Clause, including its most recent exposition in *Baker*, and collapses under the weight of the implausible consequences that adherence to it would bring.

II. THE CELEBRATION RULE AND FULL FAITH AND CREDIT

A. THE CELEBRATION RULE

The validity of marriages has long been one of the staples of the conflict of laws. As far back as one cares to read reported decisions,

48. *Id.* at 1986 ("The central object of the Clause was, in fact, to eliminate a state's prideful unwillingness to recognize other states' laws or judgments on the ground that these are inferior or unacceptable.").

49. See *infra* notes 52-72 and accompanying text.

50. See, e.g., E.H. Schopler, Annotation, *Conflict of Laws as to Validity of Marriage Attacked Because of Nonage*, 71 A.L.R.2D 687 (1960) (discussing various statutory limitations on marriage).

couples have gotten married in one place, taken up residence in another, and managed to create deliciously close questions as to their marital status.

The general rule has been, and still is, that marriages valid in the state of celebration are valid for all purposes. Joseph Story, whose conflicts treatise marks the dawn of time for the subject in the United States,⁵¹ stated that “[t]he general principle certainly is . . . that . . . marriage is to be decided by the law of the place . . . where it is celebrated.”⁵² Story, however, recognized that there were exceptions to the rule, among which he counted “those respecting polygamy and incest; those positively prohibited by the public law of a country, from motives of policy; and those celebrated in foreign countries by subjects entitling themselves under special circumstances to the benefit of the laws of their country.”⁵³ Although Story did not list same-sex marriages among those to be denied recognition, he stated that marriages “may exist between individuals of different sexes,”⁵⁴ making it unlikely that he would have thought that a same-sex union could be validated under the celebration rule.

A treatise written in 1937 by George W. Stumberg gives a flavor for just how little the rule has changed over time. In his blackletter statement of the rule, Stumberg concluded that it “is customarily stated by the courts that the validity of a marriage is controlled by the law of the place of celebration,” but that “[t]here are exceptions which vary in the different states, depending upon the local views of the policy behind particular statutory prohibitions.”⁵⁵ Stumberg, assembling a list close to Story’s, listed “marriages which are deemed contrary to the law of nature as generally recognized in Christian countries,” marriages “contrary to the policy of” the domiciliary state, and marriages entered into to evade requirements of the domiciliary state, as among those that could be denied recognition.⁵⁶ Later, Stumberg again summarized the blackletter principles by stating that “policy at the domicile is a factor which must always be taken into consideration.” Stumberg continued by stating that “most courts have felt free to hold a marriage invalid when it runs counter to what is regarded as a particularly strong policy at the domiciliary forum.”⁵⁷

Both the First and Second Restatements of Conflict of Laws, completed in 1934 and 1969 respectively, endorsed the celebration rule as

51. FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 29-31 (1993).

52. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 113 (7th ed. 1972).

53. STORY, *supra* note 52, § 113.

54. *Id.* § 108.

55. GEORGE W. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 255 (1937).

56. STUMBERG, *supra* note 55, at 262.

57. *Id.*

well. The First Restatement did so reasonably categorically, although it recognized the usual exceptions for incestuous, polygamous and other marriages violative of public policy.⁵⁸ The Second Restatement endorsed the celebration rule less categorically but indicated its presumptive claim to application.⁵⁹

As these summaries suggest, American courts have consistently shown substantial, but not unlimited, tolerance for marriages invalid under their law. A constellation of different considerations influence courts on this question. One is the party attacking the marriage. Third parties challenging the validity of a marriage — usually after one of the spouses has died in the hopes of cutting off the living spouse's inheritance rights — have normally faced an uphill battle. For instance, in the famous case of *In re May's Estate*,⁶⁰ the New York Court of Appeals upheld a marriage between an uncle and his niece of half blood who had lived in New York their entire married life. The marriage was valid under Rhode Island law where it was celebrated, but was incestuous under New York law. The New York court concluded that notwithstanding its invalidity under New York law, the marriage "was not offensive to the public sense of morality to a degree regarded generally with abhorrence and thus was not within the inhibitions of natural law. . . ."⁶¹ The court was also careful to note that the spouses were of the same age and lived in an apparently happy 32-year marriage that produced six children.⁶²

A useful comparison⁶³ with *May's Estate* is *Wilkins v. Zelichowski*.⁶⁴ In *Wilkins*, a 16-year-old girl living in New Jersey had run off to be married in Indiana — which allowed such underage marriages — and then returned home. New Jersey prohibited such marriages, and when she sued there to annul the marriage she succeeded because "the strong public policy of New Jersey . . . requires that the annulment be granted."⁶⁵

Of course, it is hard to reconcile the cases on the grounds that age restrictions are more fundamental and important than limitations on consanguinity. It is easy to find cases in which uncle-niece marriages

58. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 121 (1934).

59. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1969).

60. 114 N.E.2d 4 (N.Y. 1953).

61. *In re May's Estate*, 114 N.E.2d 4, 7 (N.Y. 1953).

62. *May's Estate*, 114 N.E.2d at 5.

63. Note that a popular Conflicts casebook places these cases back to back to make essentially the point I am making in the text. See MAURICE ROSENBERG, PETER HAY & RUSSELL WEINTRAUB, CONFLICT OF LAWS: CASES AND MATERIALS 821-27 (10th ed. 1996).

64. 140 A.2d 65 (N.J. 1958).

65. *Wilkins v. Zelichowski*, 140 A.2d 65, 69 (N.J. 1958).

have been invalidated⁶⁶ and underage marriages have been upheld.⁶⁷ The careful reader of these opinions, however, can't escape the conclusion that it makes a great deal of difference who wants to void the marriage and why. In *May's Estate* it would have been odd to deny the husband in a happy 32-year marriage his inheritance rights and probably unjust not to allow the very young wife in *Wilkins* to escape a foolish mistake.

Other factors besides the nature of the parties attacking the marriage seem to matter. Even without a "marriage evasion" statute, courts have looked with less favor on marriages in states with very little connection to the parties, and entered into for the purpose of circumventing the domiciliary state's restrictions.⁶⁸ On the other hand, parties who are married in accord with the celebration state's and the domiciliary state's laws generally do not become "unmarried" simply because they move to a state that has a policy against such marriages.⁶⁹

While this summary is incomplete, it gives some flavor for the breadth of discretion that courts accord themselves in deciding whether to validate marriages. Marriages valid in the celebration state usually are upheld, and the public policy restriction is fairly rarely invoked to strike them down. Proponents of same-sex marriage have been careful to survey these precedents, and have argued that marriages celebrated in Hawaii are likely to be recognized by other states.⁷⁰ This is a point to which I want to return later,⁷¹ and a different (and much more defensible) position than asserting the Full Faith and Credit Clause requires recognition of marriages. But, for present purposes, it is critical to understanding the full-faith-and-credit issue to know that the celebration rule is a flexible one subject to a public policy exception. While the application of the public policy exception has varied with courts and circumstances, state conflicts rules have

66. See, e.g., *Catalano v. Catalano*, 170 A.2d 726 (Conn. 1961) (holding that an uncle-niece marriage is contrary to public policy).

67. See *Arkansas v. Graves*, 307 S.W.2d 545 (Ark. 1957).

68. See, e.g., *Michigan v. Steere*, 151 N.W. 617 (Mich. 1915) (declaring that a marriage during a four-hour stay in the celebration state cannot overcome the waiting period imposed by the domiciliary state).

69. See, e.g., *Miller v. Lucks*, 36 So. 2d 140 (Miss. 1948) (discussing an interracial marriage recognized in Mississippi notwithstanding local law forbidding interracial marriages because parties domiciled in Illinois where such marriages are legal).

70. See Barbara J. Cox, *Same-Sex Marriage and the Public Policy Exception in Choice-of-Law: Does it Really Exist?*, 16 QUINNIPIAC L. REV. 61, 67, 102-03 (1996); Barbara J. Cox, *Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033 (1994); Andrew Koppelman, *Same-Sex Marriage and Public Policy: The Miscegenation Precedents*, 16 QUINNIPIAC L. REV. 105 (1996).

71. See *infra* note 226 and accompanying text.

always been open to refusing to recognize certain marriages and classes thereof.

B. FULL FAITH AND CREDIT'S DEVELOPMENT

Early in the history of the United States, the Full Faith and Credit Clause was one of the most frequently litigated clauses in the Constitution. An initial problem centered on the meaning of the terms "faith" and "credit." Some courts took the view that the terms meant that a judgment must be given evidentiary effect.⁷² In other words, a certified judgment was conclusive evidence of what the rendering court had decreed, but the effect of that judgment elsewhere was a question for the recognizing state's courts.

There is very strong originalist evidence that this reading of the Clause was correct.⁷³ The words "faith" and "credit," as used by the English courts, meant essentially what these early American decisions said they meant. A judgment was given "faith" and "credit" in that the judgment debtor could not impeach the decree by putting on new evidence as to what had been decided in the court that rendered the judgment.⁷⁴ This evidentiary interpretation had the advantage that it made sense out of the second sentence of the Clause, which leaves to Congress to determine the "Effect" of "Acts, Records and Proceedings" of one state in another.⁷⁵

In 1790, Congress promptly passed a statute implementing the Clause⁷⁶ that in all probability was meant to confirm this "evidentiary interpretation."⁷⁷ But in *Mills v. Duryee*,⁷⁸ decided almost a quarter century later, the Supreme Court settled on a more expansive interpretation of the implementing legislation. The statute, said the Court, is not limited to requiring a mere evidentiary effect for judgments. Rather, final judgments of one state bind the parties as *res judicata* in all other states unless the judgment debtor can establish a ground for collateral attack generally recognized by the common law. As a practical matter, *Mills* meant that a judgment debtor could escape the effect of a judgment only if he could show that the court rendering the judgment lacked subject matter jurisdiction, personal jurisdiction or that there existed some other well-established defense to the judgment.⁷⁹

72. See, e.g., *Hitchcock v. Aicken*, 1 Cai. R. 460 (N.Y. Sup. Ct. 1803) (stating that a sister state judgment has only evidentiary, not *res judicata*, effect in New York); Whitten, 14 CREIGHTON L. REV. at 559-64.

73. Whitten, 14 CREIGHTON L. REV. at 541-70.

74. *Id.* at 522-23.

75. U.S. CONST. art. IV, § 1; Whitten, 14 CREIGHTON L. REV. at 555.

76. Act of May 26, 1790, ch. 11, 1 Stat. 122 (codified at 28 U.S.C. § 1738).

77. See Whitten, 14 CREIGHTON L. REV. at 559-64.

78. 11 U.S. (7 Cranch) 481 (1813).

79. See *Pennoyer v. Neff*, 95 U.S. (5 Otto) 714 (1877).

While the Supreme Court's interpretation worked reasonably well for judgments of courts of record, which are clearly "judicial proceedings" within the meaning of the Clause and the statute,⁸⁰ its application to "Acts" of sister states was much more problematic. The rejected "evidentiary" interpretation of the Clause would have made the matter quite straightforward. Under the evidentiary interpretation, a party wishing to prove the law of a sister state could do so by presenting the "Acts" comprising that law. The "Effect" of that law would be a matter for the court to which the matter was presented. Moreover, the subject was within the legislative competence of Congress should it decide to pass laws regulating choice-of-law doctrine.

Under the Court's "mandatory effect" interpretation, however, the matter was not nearly so straightforward. To give "Acts" of sister states the same mandatory effect as judgments would have been to force state courts to rely on sister state law every time it was offered and proved. This would have led to an absurd amount of reliance on the laws of other states, and it would have given no clear mechanism for deciding which sister state's law to choose in cases in which more than two states were connected to the transaction. While the Court never suggested that it would adopt this "mandatory effect" approach to sister state Acts, the text of the Clause treats "Acts, Records and Proceedings"⁸¹ in a parallel fashion, thus making it difficult to justify differential treatment of any of the three.

The problem did not often surface before the twentieth century, however, because of the great uniformity with which state courts applied the traditional choice-of-law rules derived from Story's treatise.⁸² Because courts largely agreed as to the applicable law — the injury state for torts,⁸³ the place of the making to determine the validity of a contract,⁸⁴ and so on — interjurisdictional conflict was fairly rare.

By the 1930's, however, states were beginning to experiment with non-traditional choice-of-law principles. One common way in which the problem came up was workers' compensation tribunals. Workers' compensation tribunals generally apply only their own law, even to industrial accidents occurring in other states.⁸⁵ This forum preference runs counter to the traditional tort rule favoring application of

80. See *Mills v. Duryee*, 11 U.S. (7 Cranch) 481 (1813).

81. U.S. CONST. art. IV, § 1.

82. See *supra* notes 51-53 and accompanying text.

83. *Alabama Great S. R.R. Co. v. Carroll*, 11 So. 803, 804 (Ala. 1892) (declaring that the law of the injury state applies in tort cases).

84. *Milliken v. Pratt*, 125 Mass. 374 (1878) (stating that the law of the place of making of the contract governs its validity).

85. See, e.g., *Hauch v. Connor*, 453 A.2d 1207 (Md. 1983) (holding that *lex fori* applies to the workers' compensation claim even if the injury took place in another state).

the injury state's law, and employers began to challenge the application of forum law to out-of-state industrial accidents.

The most significant case along the route to giving states broad authority to apply their own law was *Alaska Packers Ass'n v. Industrial Accident Commission of California*.⁸⁶ In *Alaska Packers*, a California company hired a non-resident alien to journey to Alaska to work during the salmon canning season. The employment contract provided that the employee elected to be bound by Alaska's workmen's compensation law.⁸⁷ He was injured in Alaska, but returned to California where he applied for and received benefits. The employer attacked the award as violative of the Full Faith and Credit Clause, but the Supreme Court rejected the constitutional argument and upheld the award.

Justice Stone's opinion in *Alaska Packers* was sweeping. He recognized the tension with the "mandatory effect" approach to the Clause that had been taken with regard to judgments. Not blind to the pragmatic problems that would follow from taking this tack with regard to choice-of-law, he reasoned: "A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own."⁸⁸ Rather, the Court favored a balancing approach that allowed each state to apply its own law "by appraising the governmental interest of each jurisdiction. . . ."⁸⁹ The Full Faith and Credit Clause, said the majority, will only prevent a state from applying its own law if the interests of the sister state are shown to be "superior" to that of the forum state.⁹⁰ Because no such showing was or could be made in *Alaska Packers*, the Court held that there was no constitutional infirmity in California's application of its own law.

At the same time the Court was relaxing the application of the Full Faith and Credit Clause to allow for a large reliance on forum law, it began to develop the Due Process Clause as an affirmative limitation on the application of unconnected laws. The Supreme Court's 1930 opinion in *Home Insurance Co. v. Dick*,⁹¹ held that it violated due process to apply a Texas statute to void a private statute of limitations contained in an insurance policy. Although the action was brought in the Texas courts, the policy had originally been written to a

86. 294 U.S. 532 (1935).

87. *Alaska Packers Ass'n v. Industrial Accident Comm'n of Cal.*, 294 U.S. 532, 538 (1935).

88. *Alaska Packers*, 294 U.S. at 547.

89. *Id.*

90. *Id.* at 548.

91. 281 U.S. 397 (1930).

Mexican citizen, by a Mexican insurance company, to insure a tug boat used in Mexican waters, and was expressly made subject to Mexican law.⁹² Given the almost complete absence of connections between the dispute and Texas,⁹³ the Court held that application of Texas law would deprive the company of its due process rights.⁹⁴

Thus, as we approach the modern era, the Due Process and Full Faith and Credit Clauses operated in tandem as a modest restraint on state-court choice-of-law. *Dick* and its progeny stood for the proposition that the Due Process Clause could act negatively to void a choice of applicable law that had little or no connection to the transaction. *Alaska Packers* and its progeny held that the Full Faith and Credit Clause could act affirmatively to require a state to apply sister state law, but only if the sister state were shown to have a "superior" interest in the matter. This comparatively relaxed attitude toward choice-of-law required the Court to draw a very sharp distinction between the faith and credit due "judgments" and "laws," because judgments were still subject to the "mandatory effect" interpretation of the Clause.

The Supreme Court's most recent expositions on the constitutional limitations on choice-of-law make clear that this permissive attitude continues. In fact, the Court has shown an almost unlimited tolerance for application of forum law. The most significant recent case is *Allstate Insurance Co. v. Hague*.⁹⁵ *Hague* involved a widow's claim for benefits under the uninsured motorist clause on the automobiles that she and her late husband owned. She and her late husband, Ralph Hague, had owned three vehicles, each covered by a \$15,000 policy for the liability of uninsured motorists. Under Minnesota law she was entitled to "stack" the coverage and recover up to \$45,000; Wisconsin law was asserted to limit recovery to \$15,000.⁹⁶

92. *Home Ins. Co. v. Dick*, 281 U.S. 397, 403-04 (1930).

93. *Dick*, 281 U.S. at 402 (noting that the assignee of the original policy holder had at least a technical Texas domicile).

94. *Id.* at 407. This, at least, is how the *Dick* case has come to be understood after its treatment in *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981). See *infra* notes 95-107 and accompanying text. The historical record shows, however, that Mr. Dick – the policy holder – was a bona fide Texan. For a fine discussion of this, see Jeffrey L. Rensberger, *Who Was Dick? Constitutional Limitations on State Choice of Law*, 1998 UTAH L. REV. 37 (1998). The Court in *Dick* apparently did not much care where Mr. Dick lived, because the crucial fact was that the contract was formed in Mexico, making Mexican law the only viable choice for substantive contractual issues.

95. 449 U.S. 302 (1981).

96. *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981). Actually, Wisconsin law probably did not so limit coverage. The difference between Minnesota law and Wisconsin law was that Minnesota absolutely prohibited enforcement of anti-stacking clauses, while Wisconsin would enforce an anti-stacking clause, but only if it were unambiguous, which apparently did not describe the *Hague* clause. See Russell J. Weintraub, *Who's Afraid of Constitutional Limitations on Choice of Law?*, 10 HOFSTRA L. REV. 17 (1981) (discussing the clauses analyzed in *Hague*).

The Hagues were Wisconsin domiciliaries and the motorcycle accident that killed Mr. Hague occurred in Wisconsin. Mrs. Hague, however, brought suit in Minnesota, evidently hoping to take advantage of the more favorable Minnesota rule. The Minnesota courts, applying their flexible choice-of-law rule derived from Professor Leflar's writings,⁹⁷ ruled for Mrs. Hague. In particular, the Minnesota Supreme Court emphasized the fifth of Leflar's considerations — application of "the better rule of law" — to conclude that Mrs. Hague should be allowed to stack the coverage.⁹⁸

The Supreme Court granted *certiorari* and held that the Minnesota decision neither denied faith and credit to Wisconsin law nor violated Allstate Insurance Co.'s due process rights. The plurality opinion united the due process and full-faith-and-credit tests, and concluded that neither Clause is violated unless a state chooses a law "which has had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction."⁹⁹ The plurality identified three contacts which, in the aggregate, were sufficient to allow for application of Minnesota law. The first, which the plurality described as "very important," was that Mr. Hague, though from Wisconsin, had worked across the border in Minnesota, and that his death had thus diminished the Minnesota workforce.¹⁰⁰ Second was the rather ubiquitous business presence of Allstate, including offices in Minnesota.¹⁰¹ Third was the fact that Mrs. Hague had subsequently remarried and moved to Minnesota.¹⁰² All of these taken together, held the plurality, were enough to satisfy both the Full Faith and Credit and Due Process Clauses.

In his concurrence, Justice Stevens argued for a potentially more permissive rule. While Stevens was anxious to separate the Due Process and Full Faith and Credit Clauses, in neither instance did he see much limitation on the ability of a state court to apply its own law. As to the due process inquiry, Justice Stevens "question[ed] whether a judge's decision to apply the law of his own State could ever be described as wholly irrational."¹⁰³ As to the full-faith-and-credit inquiry, although Stevens conceded that "there is little in this record other than the presumption in favor of the forum's own law to support that decision,"¹⁰⁴ he was nonetheless willing to join the plurality in

97. Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966).

98. *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 49 (Minn. 1979).

99. *Hague*, 449 U.S. at 308.

100. *Id.* at 313-14.

101. *Id.* at 317.

102. *Id.* at 318-19.

103. *Id.* at 326 (Stevens, J., concurring).

104. *Id.* at 331-32 (Stevens, J., concurring).

holding that the application of Minnesota law did not offend the Full Faith and Credit Clause.

The dissent characterized its disagreement with the majority opinion as “narrow.”¹⁰⁵ However, the dissent viewed all of the Minnesota contacts as too “trivial” to support application of forum law.¹⁰⁶ Stressing the lack of any strong relationship between the forum-state contacts and the dispute, the dissent would have voided the state court’s application of its own law.¹⁰⁷

In the later case of *Phillips Petroleum Co. v. Shutts*,¹⁰⁸ the Court invalidated the Kansas courts’ choice-of-law. In *Shutts*, the Kansas Supreme Court applied Kansas law to determine interest rates on arrearages on lease payments on gas wells. The Court, expressly reaffirming *Hague*, held that with respect to wells located in states other than Kansas — and many wells were located in Texas, Oklahoma and Louisiana — application of Kansas law could not be justified because of the complete “lack of ‘interest’ in claims unrelated to” Kansas.¹⁰⁹ That ruling, however, turned out to be little more than a purely technical victory for the petitioners, as on remand the Kansas courts concluded that the laws of the other states were essentially identical to Kansas law, and the Supreme Court refused to disturb that assessment.¹¹⁰

Rounding out the Supreme Court’s modern choice-of-law cases is *Sun Oil Co. v. Wortman*.¹¹¹ *Wortman* — a reprise of *Shutts* — challenged the application of the Kansas statute of limitations to all claims, including those arising from wells outside of Kansas. This time the majority, in an opinion authored by Justice Scalia, held that the choice of Kansas law was unassailable, because it was consistent with the traditional conflicts rule dictating that the forum apply its own statute of limitations.¹¹² Because this *lex fori* rule was well established at the time of the ratification of both the Full Faith and Credit and Due Process Clauses, its constitutionality was held to be beyond question.¹¹³ Summarizing the Court’s constitutionally-minimalist approach, the majority stated: “In sum, long established and still subsisting choice-of-law practices that come to be thought, by modern scholars, unwise, do not thereby become unconstitutional.”¹¹⁴

105. *Id.* at 332 (Powell, J., dissenting).

106. *Id.* (Powell, J., dissenting).

107. *Id.* at 337-40 (Powell, J., dissenting).

108. 472 U.S. 797 (1985).

109. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985).

110. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730-34 (1988).

111. 486 U.S. 717 (1988).

112. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730-34 (1988).

113. *Wortman*, 486 U.S. at 726.

114. *Id.* at 728-29.

As things stand now, therefore, there is a wide divergence in the way in which the Court applies the Full Faith and Credit Clause to judgments and to laws. Judgments — assuming that they meet the Court's exacting definition — are essentially unassailable if presented to another court, unless entered without personal or subject matter jurisdiction. Sister state laws, however, are by no means entitled to automatic application. Rather, courts are permitted to apply their own law and refuse the application of a sister state's law in almost all cases. Under the *Hague-Wortman* line of cases, a state court is prohibited from applying its own law only if that state has no significant contacts with the parties or the transaction *and* the application of forum law cannot be justified under traditional choice-of-law principles. With those parameters in mind, let us return now to the expansive and narrow arguments for recognition of same-sex marriages.

C. THE PRO-RECOGNITION ARGUMENTS REVISITED

1. *The Expansive Argument*

Recall that the expansive argument requires treating a marriage license either as a judgment or the equivalent thereof for full faith and credit purposes.¹¹⁵ This argument is simply not tenable.

The Second Restatement of Conflict of Laws lists four criteria for the existence of a valid judgment for full faith and credit purposes.

115. See, e.g., Balian, 68 S. CAL. L. REV. at 403-04 (arguing that the Full Faith and Credit Clause is not applied to validate nontraditional marriages because marriages are not viewed as legal judgments); Deborah M. Henson, *Will Same-Sex Marriages Be Recognized in Sister States: Full Faith and Credit and Due Process Limitations on States' Choice of Law Regarding the Incidents of Homosexual Marriages Following Hawaii's Baehr v. Lewis*, 32 U. LOUISVILLE J. FAM. L. 551, 584-87, 590 (1994) (coming close to making this argument but appearing to recognize its weakness). Henson suggests that couples simply bring declaratory relief actions in Hawaii to confirm their marriages. However, such actions generally require an "actual controversy," and even if Hawaii were to entertain such actions, absent any actual litigation or controversy, it is very unlikely that such decrees would qualify as judgments under the standards discussed in the text.

A student commentator also attempts to take the declaratory judgment route. See Jon-Peter Kelly, Note, *Act of Infidelity: Why the Defense of Marriage Act is Unfaithful to the Constitution*, 7 CORNELL J.L. & PUB. POL'Y 203 (1997). Recognizing the problem that there would be no actual controversy, the author argues, rather bravely, that DOMA itself creates a controversy as to the marriage's status. Kelly, 7 CORNELL J.L. & PUB. POL'Y at 218. While this is a clever contention, it is hopelessly flawed. First, while DOMA might create a controversy as to DOMA's constitutionality, this is quite a bit different than a question as to whether the parties have a valid marriage under Hawaiian law. Moreover, in order to have an actual controversy, presumably some governmental official would have to be the defendant in such a case. Any effort to resolve the matter simply by naming the two willing parties, *i.e.*, the partners, would be a collusive action. A brief article arguing that DOMA is unconstitutional also apparently takes the expansive position. See Evan Wolfson & Michael F. Melcher, *Constitutional and Legal Defects in the "Defense of Marriage" Act*, 16 QUINNIPIAC L. REV. 221 (1996).

Those criteria are that the state rendering the judgment "has jurisdiction to *act judicially* in the case," the state has a reasonable method of notifying affected persons, the court rendering the judgment has subject matter jurisdiction, and the parties have complied with the formalities of the rendering state.¹¹⁶ In the comments, the Restatement defines the term "judicial action" as "action taken in the name of the state by a duly authorized representative or representatives in *the adjudication of a controversy*."¹¹⁷

It is true, of course, that a "judgment" for full faith and credit purposes can be rendered by an administrative agency, such as a workers' compensation board.¹¹⁸ But the essential requirement is that there be some controversy, or at least the potential therefor, to be determined. A marriage ceremony lacks this character.¹¹⁹ Unless both parties assent to a marriage, there is no marriage. Thus, the state action has none of the trappings of judicial action. There are no jurisdictional requirements (except, perhaps, a brief waiting period),¹²⁰ no requirement of notice to any potentially affected third parties, and no fact-finding by the state that is any more extensive than, say, that necessary to obtain a fishing license.

It is unsurprising, therefore, that the proponents of the expansive argument have not succeeded in producing any authority holding that a marriage license or certificate is the equivalent of a judgment for full-faith-and-credit purposes.¹²¹ The exacting definition of a judg-

116. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 92 (1969) (emphasis added).

117. *Id.* § 92, cmt. d (emphasis added).

118. *See, e.g.*, *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943) (declaring that a workers' compensation award is subject to the Full Faith and Credit Clause).

119. I mean, of course, "controversy" in the legal sense, not in the social sense of the color of tuxedos or the size of the reception.

120. *See, e.g.*, KANS. STAT. ANN. § 23-106 (1995) (three-day waiting period); MO. REV. STAT. § 451.040 (1997) (waivable three-day waiting period); OR. REV. STAT. § 106.077 (1997) (three-day waiting period).

121. The proponents of the expansive argument have collectively identified four cases as supporting their position. *See* Beth A. Allen, *Same-Sex Marriage: A Conflict-of-Laws Analysis for Oregon*, 32 WILLAMETTE L. REV. 619, 670 n.370 (1996) (citing all four cases discussed in this footnote); Balian, 68 S. CAL. L. REV. at 403 (citing *Ram v. Ramharack*, 571 N.Y.S.2d 190 (Sup. Ct. 1991)). While the arguments are creative, the cases cited simply cannot bear the load placed on them, and, even if they could, would be greatly against the weight of authority.

Taking the cases in reverse chronological order we begin with *Ram v. Ramharack*, 571 N.Y.S.2d 190 (Sup. Ct. 1991). The court in *Ram* (a New York state trial court) does mention full faith and credit, but its brief mention is relevant to choice-of-law, if indeed it is relevant to anything. The *Ram* court's entire discussion of full faith and credit is this: "However, a common-law marriage validly consummated in another state or jurisdiction (for example, Washington, D.C.) can be recognized in New York under the doctrine of full faith and credit (U.S. CONST. art IV, § 1) if the other state recognizes the validation of a common-law marriage." *Ram*, 571 N.Y.S.2d at 191. The discussion in the case concerned whether the parties had contracted a valid common law marriage under the law of Washington, D.C., where the couple had spent some time. The case is

ment for full-faith-and-credit purposes also illustrates why the divorce analogy is wanting. The question of whether the parties can be divorced can be, and often is, an adversarial proceeding, with fact-finding as to whether one party has engaged in serious wrongdoing such as adultery or extreme cruelty. One party can be seeking and the other resisting a divorce, which requires a *court* to make a determination as to whether the elements of the complaint for divorce have been proved. Thus, courts need jurisdiction — based upon the genuine domicile of at least one party — to enter a divorce.¹²² Indeed, one of the cases often cited by the proponents of the expansive argument¹²³ — *Williams v. North Carolina*¹²⁴ — actually holds that the purported divorce in the case was *not* entitled to full faith and credit because the jurisdictional predicate (domicile of one party) was absent.

The differences, then, with marriage are clear. There are no “contested” marriages in the sense that one party wants to get married

a quite doubtful application of the celebration rule, and one gets the feeling that the court was trying rather hard to do justice to a wife who had been with her husband for a 10-year relationship that had produced two children. But, in any event, the case is entirely about choice-of-law.

In another case, the court considered whether there had been a valid divorce that would have allowed the parties to be married in the celebration state. *Alexander v. Alexander*, 289 A.2d 83, 85 (Pa. 1971). There is a brief mention by the concurrence of giving “full faith and credit” to an earlier Georgia marriage certificate, but only in the sense that the certificate “evidences appellant’s prior marriage.” *Alexander*, 289 A.2d at 86-87 (Jones, J., concurring). Even taking the concurrence as if it were the opinion of the court (which it clearly is not), the reference to full faith and credit is no more than a suggestion that the certificate is “evidence” of the parties’ marital status in the other state.

Next is a case from a Louisiana intermediate appellate court, with some similarities to *Ram*. See *Wyble v. Minviellee*, 217 So. 2d 684 (La. Ct. App. 1969). The following is the court’s entire full-faith-and-credit discussion in *Wyble*: “Louisiana courts had to give full faith and credit to the Texas marriage, thereby making Helen Wyble, the legal widow of Merton R. Parish, entitled to recover [under Louisiana law].” *Wyble*, 217 So. 2d at 686. Again, this is a choice-of-law case that considers whether there was valid common law marriage under Texas law. Further — and this is a problem that infects all of the common law marriage cases — there simply is no document that could be remotely described as a “judgment” in the case of a common law marriage.

The final case is an older Arkansas case. See *Orsburn v. Gravels*, 210 S.W.2d 496 (Ark. 1948). *Orsburn*, like three of the four cases, is a choice-of-law case regarding the question of whether a common law marriage had been validly contracted. The following is this court’s entire discussion: “While Arkansas recognizes a valid common law marriage — that is, one consummated in a state authorizing that procedure — the recognition is accorded because, to do otherwise, there would [sic] inevitably be involved a denial of full faith and credit.” *Orsburn*, 210 S.W.2d at 498. Except for mention of full faith and credit, the case is little more than an ordinary application of the celebration rule. The case is clearly a choice-of-law case, and given the willingness of Arkansas courts to apply the “public policy” doctrine, there can be little doubt that the court did not mean that it would treat a marriage as unassailable as a judgment.

122. *Williams v. North Carolina*, 317 U.S. 287, 296 (1942) (*Williams I*).

123. See *supra* note 38.

124. *Williams v. North Carolina*, 325 U.S. 226, 239 (1945) (*Williams II*).

and the other does not, whereby a court or agency must decide between the two. Thus, unlike a divorce, there is no potential for extensive fact finding, no jurisdictional requirements; in short, no "adjudication" in any sense.

The requirement that there be the potential for controversy in order to render a "judgment" for full-faith-and-credit purposes is more than a mere technicality to be dispensed with in the name of progress. Judgments qualify as such in part because of the potential for an extraordinary amount of the parties' and public's resources being invested in obtaining them. A judgment should bring repose in the sense that the parties ought not be required to make that investment over and over as each new state becomes connected with the transaction. But marriage licenses, fishing licenses, drivers' licenses and the whole gambit of government permissions that are issued without litigation of any actual controversy do not represent any such investment of resources.

To treat a marriage, therefore, as a "judgment" would make nonsense out of a great deal of existing full-faith-and-credit doctrine.¹²⁵ If a marriage license is a "judgment," then every one of the hundreds of decisions that have refused to recognize out-of-state marriages has been an undetected violation of the Clause. To carry the matter further, if a marriage license is a "judgment," then so must be fishing and hunting licenses. If one takes the expansive argument seriously, then a Wyoming game warden who refuses to allow the holder of a Colorado hunting license to hunt in Wyoming is denying the hunter his rights under the Full Faith and Credit Clause — a contention that cannot be seriously maintained.

2. *The Narrow Argument*

The narrow argument, set forth by Professor Kramer,¹²⁶ rests mostly on the funny old case of *Hughes v. Fetter*.¹²⁷ The case, lucidly described by Kramer,¹²⁸ involved a wrongful death action brought on behalf of Harold Hughes, a Wisconsinite, who died in an auto accident in Illinois.¹²⁹ The Wisconsin wrongful death statute covered only

125. See Lea Brilmayer, *Credit Due Judgments and Credit Due Laws: The Respective Roles of Due Process and Full Faith and Credit in the Interstate Context*, 70 IOWA L. REV. 95, 98 (1984) (explaining differential treatment of judgments and laws under the Clause); Linda J. Silberman, *Can the Island of Hawaii Bind the World? A Comment on Same-Sex Marriage and Federalism Values*, 16 QUINNIPIAC L. REV. 191, 194 (1996) (stating that marriage does not meet the definition of a judgment under current full-faith-and-credit jurisprudence).

126. Kramer, 106 YALE L.J. at 1980-84.

127. 341 U.S. 609 (1951).

128. Kramer, 106 YALE L.J. at 1980-84.

129. *Hughes v. Fetter*, 341 U.S. 609, 610 (1951).

deaths "caused in the state."¹³⁰ Hughes, therefore, relied upon the Illinois wrongful death statute, but the Wisconsin Supreme Court dismissed — over a full-faith-and-credit objection — on the grounds that the Wisconsin statute "establishes a local public policy against Wisconsin's entertaining suits brought under the wrongful death acts of other states."¹³¹

In a cryptic opinion, Justice Black held that Wisconsin's dismissal of the case violated the Full Faith and Credit Clause, apparently by failing to "credit" the Illinois wrongful death statute. Kramer is right to describe *Hughes* as a case that "has long puzzled the commentators."¹³² I have always been inclined to agree with Currie that *Hughes* is really an equal protection case.¹³³ The *Hughes* Court said that the result would have been different had Wisconsin decided to apply its own law, even if that meant that Hughes lost.¹³⁴ Thus, it seems reasonably clear that the Court was *not* saying that Wisconsin lacked a sufficient connection with the dispute to apply its own law. Rather, the problem seems to have been the bizarre consequence of the Wisconsin statute and the "negative" policy not to entertain suits based on other states' statutes that the Wisconsin courts extrapolated from their statute. Under the Wisconsin statute and its extrapolated policy, only persons with the good fortune to be killed in Wisconsin could recover. Persons killed outside Wisconsin — even if killed in a state like Illinois that recognized a cause of action for wrongful death — lost, and lost on the merits. As the *Hughes* Court pointed out, the Wisconsin dismissal was not one of *forum non conveniens* with the likelihood that the case would be re-filed in Illinois.¹³⁵ Even being charitable, this seems like a completely irrational basis for classification, and irrational classifications are invalid for equal protection purposes.

Professor Kramer is quite right to raise a substantial objection to this reading of *Hughes*, which is that it is not at all what the Court actually said; the case never once mentioned equal protection.¹³⁶ This is a substantial objection, but not necessarily fatal, as the Supreme Court occasionally reinvents old cases to fit with its current thinking.¹³⁷ But, for the sake of argument, I want to give Professor

130. *Hughes*, 341 U.S. at 610 n.2.

131. *Id.* at 610.

132. Kramer, 106 YALE L.J. at 1981.

133. See Brainerd Currie, *The Constitution and the "Transitory" Cause of Action*, 73 HARV. L. REV. 36, 293 (1959).

134. *Hughes*, 341 U.S. at 612 n.10.

135. *Id.* at 613.

136. Kramer, 106 YALE L.J. at 1981.

137. For example, in *Employment Division Department of Human Resources of Oregon v. Smith*, the Supreme Court reinvented *Wisconsin v. Yoder* — an apparently

Kramer's contentions about *Hughes*, and its apparent forerunner *Broderick v. Rosner*,¹³⁸ their due and assume that he is right in his reading of *Hughes* and *Broderick* and that the alternative readings are incorrect.

Accepting his argument, *Hughes* and *Broderick* are at least the beginnings of a principle that states cannot refuse to enforce each others' laws simply on the basis of policy. An assessment, so we are told, that another state's law is of inferior quality cannot be a constitutionally-acceptable basis for refusing to apply that law. Here is how Professor Kramer puts it:

[I]n *Hughes* and *Broderick* we see the Court clearly groping towards a principle that makes considerable sense in its own right. The Full Faith and Credit Clause is one of a bundle of provisions incorporated into the Constitution to bind states more closely together. . . . With respect to full faith and credit in particular, the whole point was that states should not be free to dismiss or ignore the laws of sister states. . . . The central object of the Clause was, in fact, to eliminate a state's prideful unwillingness to recognize other states' laws or judgments on the ground that these are inferior or unacceptable. If anything should be off-limits in such a system, it is the public policy doctrine.¹³⁹

The problem with this argument is that if the Court were "groping" in this direction in *Hughes*, it furiously started "groping" in the opposite direction immediately thereafter.¹⁴⁰ Think back to the post-*Hughes* case of *Hague*. In *Hague*, the Minnesota Supreme Court decided not to apply Wisconsin law because "[t]he Minnesota rule is better. . . ." ¹⁴¹ One could hardly imagine a clearer, more candid expression of a "prideful unwillingness" to apply another state's law, yet the Supreme Court held that this was *not* a violation of the Full Faith and Credit Clause.¹⁴²

The other strand of the Court's modern full-faith-and-credit jurisprudence is equally lethal to Professor Kramer's argument. Recall *Wortman*, in which the Court refused to question the application of the forum's statute of limitations because the *lex fori* rule was so well

straightforward Free Exercise Clause case — as a "hybrid" case resting both on the Free Exercise Clause and other constitutional provisions. See *Employment Div. Dep't of Human Resources of Or. v. Smith*, 494 U.S. 872, 893-97 (1990) (O'Connor, J., concurring).

138. 294 U.S. 629 (1935).

139. Kramer, 106 YALE L.J. at 1986.

140. See Silberman, 16 QUINNIPIAC L. REV. at 199-203 (making a similar argument).

141. *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 49 (Minn. 1979).

142. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 320 (1981).

accepted at the time of the ratification of the Constitution.¹⁴³ As we have seen, the refusal of courts to apply each others' laws on "public policy" grounds is as old as the United States.¹⁴⁴ One can't help but think that when Justice Scalia wrote that "long established and still subsisting choice-of-law practices that come to be thought, by modern scholars, unwise, do not thereby become unconstitutional,"¹⁴⁵ he had in mind clever law review articles like Professor Kramer's.

The problem, then, with Kramer's argument is that in the paradigmatic case — a couple from a state that doesn't recognize same-sex marriages flies to Hawaii, gets married, and comes home — there is no substantial basis for arguing that applying the domiciliary law is a violation of the Full Faith and Credit Clause. The fact that both parties are domiciled in the forum state is clearly a more significant connection than that in *Hague*,¹⁴⁶ and the domicile of one or more of the parties is a commonly-accepted basis for the application of forum law under most modern conflicts theories.¹⁴⁷ Moreover, courts applying modern conflicts theories either overtly¹⁴⁸ or covertly¹⁴⁹ apply the substantive law that the forum court finds preferable; in fact, at least one proponent invokes the "better rule" methodology to argue that same-sex marriages should be recognized.¹⁵⁰ To the extent that Kramer's argument purports to deny courts the ability to consider their substantive preferences in making choice-of-law decisions, it runs counter to what courts have done since the conflicts revolution began.¹⁵¹

Perhaps the best case that one can imagine for imposing a full-faith-and-credit duty on courts to recognize same-sex marriages would be a case in which a couple, long-domiciled in Hawaii and there mar-

143. See also *supra* notes 52-54 and accompanying text. The majority in *Wortman* did mention "public policy" and characterized it (correctly) as an "escape device" from traditional conflicts rules. *Wortman*, 486 U.S. at 728 n.2 (1988). The entirety of this was in the context of a debate with the concurrence over whether the place-of-making rule for contract conflicts still "subsisted" as that term was used by the majority. *Wortman*, 486 U.S. at 742 n.4 (Brennan, J., concurring). While the escape device label is mildly pejorative, there can be little doubt that Justice Scalia's approach would validate traditional uses of it, as in the context of the marriages.

144. See *supra* notes 51-59 and accompanying text.

145. *Wortman*, 486 U.S. at 728-29.

146. See *supra* notes 96-108 and accompanying text.

147. *Reich v. Purcell*, 432 P.2d 727, 730 (Cal. 1967) (declaring that the domicile of a party is a basis for applying the domiciliary state's law).

148. See generally *Offshore Rental Co. v. Continental Oil Co.*, 583 P.2d 721, 726 (Cal. 1978) (applying "the [most] prevalent and progressive law").

149. Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357 (1992); Michael Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49 (1989).

150. See *Cox*, 16 QUINNIPIAC L. REV. at 65.

151. Silberman, 16 QUINNIPIAC L. REV. at 199-203.

ried, moves several years later to another state that does not allow same-sex marriages. One author, at least, raises this scenario as presenting the most compelling pro-recognition case, although he does not seem to insist that recognition would be constitutionally-compelled.¹⁵² Most courts will probably recognize same-sex marriages under these circumstances, even if they generally would not validate such marriages.¹⁵³ But that question is far removed from whether there exists such a constitutional duty. Even in this hypothetical case the full-faith-and-credit argument for recognition cannot succeed. The later-acquired domicile is clearly a sufficient connection for the forum state to make determinations as to their marital status, just as Mrs. Hague's later move to Minnesota helped establish that state's right to determine her rights under the insurance policies.¹⁵⁴ From a full-faith-and-credit perspective, it is hard to distinguish this hypothetical case from the holder of a Virginia gun license who moves to Washington, D.C. and wants to keep his guns in violation of a local ordinance. Presumably no one would deny that Washington, D.C. had acquired the authority to determine whether he could keep guns, no matter what his rights might formerly have been in Virginia.

In the final analysis, the narrow argument simply cannot be squared with the Court's current interpretation of the Full Faith and Credit Clause. If accepted, the narrow argument would pitch the baby (most modern conflicts analysis) out with the bath water (a feared too-grudging approach to marriage recognition). While the narrow argument avoids the trap into which the expansive argument falls (treating marriage licenses as "judgments"), it is ultimately no more tenable.

3. *Common Objections*

In at least one other sense, both the narrow and expansive arguments fall prey to the objection that they produce some very implausible consequences. Suppose, for instance, a state with a radically libertarian bent decided to abolish all restrictions on marriage between adults, and thereby allow marriages without regard to consanguinity (even between, say, siblings or a parent and child) or the existence of other spouses (thus permitting both polygamy and polyan-

152. See Mark Strasser, *Loving the Romer out for Baehr: On Acts in Defense of Marriage and the Constitution*, 58 U. PITT. L. REV. 279, 280 (1997).

153. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1969) (noting that a marriage can be voided under the public policy rationale only where strong public policy is violated and the voiding state had the strongest connection to the parties at the time of the marriage).

154. See *supra* notes 95-107 and accompanying text.

dry). If one takes the full-faith-and-credit arguments seriously, such marriages ought stand on an equal footing to any other.

Take, for instance, the hypothetical allowance of sibling marriage. Sexual attraction between adult siblings is rare, but not unheard-of.¹⁵⁵ One could imagine a state deciding adult sibling marriage is a matter of personal choice that ought to be left to individuals. Under either pro-recognition argument, a refusal of another state to give effect to such a marriage should be an unconstitutional display of "prideful unwillingness" of that other state to give effect to the libertarian state's marriage law.

I do not wish to be misunderstood on this sensitive topic. I am not, obviously, advocating incest. Nor am I saying that those supporting same-sex marriage are advocating incest, nor am I saying that there are not good ways to distinguish same-sex marriages from other non-traditional unions. But all of the arguments for distinguishing, say, sibling marriage from same-sex marriage are *policy* arguments, whether that policy be based on psychology, genetics or some other discipline.¹⁵⁶ If, as the proponents of these arguments say, the Clause must be blind to policy in deciding what marriage law to apply, then states lose their ability to classify some unions as marriages and others as not, as long as one other state has decided to characterize the union as a marriage.

In the end, there is a backwards character to all of the pro-recognition full-faith-and-credit arguments. Each argument starts essentially from its conclusion — that the celebration rule should validate same-sex marriages lawfully contracted in Hawaii — and then backs into the Full Faith and Credit Clause as the device for constitutionalizing that rule.¹⁵⁷ But, I submit, if one looks first at existing doctrine, and then applies it to the question of marriage recognition, the unavoidable conclusion is that the Clause has almost nothing to say.

155. Nigel Hawkes, *Taboo of Incest Explained by Relative Boredom*, THE TIMES, Apr. 3, 1995 (explaining that children adopted by other families who then find their natural siblings and parents often have strong feelings of sexual attraction towards their natural family members).

156. See, e.g., Bruce Bower, *Oedipus Wrecked: Freud's Theory of Frustrated Incest Goes on the Defensive*, 140 SCIENCE NEWS, Oct. 19, 1991, at 248 (discussing competing explanations of incest taboo); Sally Abrahms, Book Review, *Disturbing New Study Looks at Incest's Damaging Effects*, LOS ANGELES TIMES, Apr. 24, 1986, at 24 (discussing incest rates and accompanying psychological injuries).

157. An exception is a student author who reluctantly concludes that "the current Court seems unlikely to use a same-sex marriage case as the occasion to greatly expand the Clause's application." Thomas M. Keane, Note, *Aloha, Marriage? Constitutional and Choice of Law Arguments for Recognition of Same-Sex Marriages*, 47 STAN. L. REV. 499, 508 (1995).

D. *BAKER V. GENERAL MOTORS CORP.*

Let us turn now to the Supreme Court's quite recent full-faith-and-credit case, *Baker v. General Motors Corp.*¹⁵⁸ *Baker* is an interesting case in its own right, and made more interesting by its invocation in favor of the pro-recognition position.¹⁵⁹

Baker is the tale of two lawsuits. The first involved litigation between a now-retired GM engineer, Ronald Elwell, and GM. Elwell studied vehicular fires while at GM, and was a frequent defense witness for GM in products liability actions.¹⁶⁰ At some point Elwell and GM apparently had a bitter dispute that resulted in Elwell suing GM in Michigan state court for wrongful termination of Elwell's employment. Elwell settled his suit with GM and as consideration for the settlement agreed to the entry of an injunction by the Michigan court. In its relevant part, the Michigan judgment enjoined Elwell from "testifying, without the prior written consent of General Motors Corporation . . . in any litigation already filed, or to be filed in the future, involving General Motors Corporation as an owner, seller, manufacturer and/or designer of the product(s) in issue."¹⁶¹ The injunction made an express exception only for a then-pending Georgia lawsuit, although the parties entered into a side agreement that if Elwell testified by compulsion of a subpoena or otherwise, such testimony would "in no way' support a GM action for violation of the injunction or the settlement agreement."¹⁶²

Elwell became interwoven in the second suit, a tort action by Baker as the representative of Beverly Garner, a woman who died on a Missouri highway after a collision involving a pickup truck manufactured by GM.¹⁶³ The plaintiff alleged that Garner died as the result of a fire caused by a faulty fuel pump that continued to run after the collision.¹⁶⁴ The *Baker* case began in Missouri state court and was removed to federal court on diversity grounds.¹⁶⁵ Elwell — who specialized in vehicle fires — was served in Missouri with subpoenas both for a deposition and for trial.¹⁶⁶

Citing the Michigan injunction, GM objected to Elwell's participation at every step. The district court's order, as summarized by the Eighth Circuit, allowed Elwell to testify on the twin grounds that the

158. 118 S. Ct. 657 (1998).

159. See *supra* note 34.

160. *Baker v. General Motors Corp.*, 118 S. Ct. 657, 660-61 (1998).

161. *Baker*, 118 S. Ct. at 661 (quoting the injunction issued by the Michigan court).

162. *Id.* at 661-62.

163. *Id.* at 662.

164. *Id.*

165. *Id.*

166. *Id.* at 660, 662.

“public policy” exception overcame whatever force the injunction would have and that the injunction was modifiable in Michigan, making it modifiable in the collateral Missouri proceedings.¹⁶⁷ The case went to trial, Elwell testified, and the jury awarded the plaintiff in excess of \$ 11,000,000.¹⁶⁸

The Eighth Circuit reversed on two grounds. One was that the discovery sanction imposed on GM — which essentially forced GM to stipulate to liability — was too severe.¹⁶⁹ The other — the issue of interest for us and the only one to reach the Supreme Court — was that the district court had denied faith and credit to the Michigan injunction by allowing Elwell to testify. The Eighth Circuit was skeptical of the district court’s “public policy” rationale, but held in any event that the policy of full faith and credit overcame whatever competing policies there might be.¹⁷⁰ As to the district court’s modification rationale, the Eighth Circuit held that there was no showing of changed circumstances which would allow for modification.¹⁷¹ Thus, concluded the circuit court, to allow Elwell to testify would be to deny credit to the Michigan judgment.

One curious feature of the way in which the case made its way through the lower courts, and which appeared to infect the Supreme Court’s opinion, was the assumption that Elwell was, in fact, violating the injunction by testifying. Although the injunction made an exception for only the single Georgia case, recall that GM had a side agreement that the injunction could not be enforced against Elwell if he were subpoenaed, which he was in *Baker*. Of course, it was probably not blind luck that the plaintiff found Elwell lurking in the Show-Me State waiting to have a subpoena dropped in his lap. Service of the subpoena on Elwell in Missouri must have been prearranged between the plaintiff and Elwell, and perhaps this caused all three courts to write as if Elwell were violating the injunction.¹⁷²

The Supreme Court unanimously reversed the Eighth Circuit and held that the district court’s order allowing Elwell to testify did not deny faith and credit to the Michigan injunction. Justice Ginsburg’s

167. *Baker v. General Motors Corp.*, 86 F.3d 811, 819 (8th Cir. 1996).

168. *Baker*, 86 F.3d at 815-16.

169. *Id.* at 816-17.

170. *Id.* at 819.

171. *Id.* at 820.

172. See FED. R. CIV. P. 45. One has to wonder what GM thought it was buying with this injunction and the side agreement; GM might as well have obtained an injunction that Elwell could not testify and then have entered into a side agreement that the injunction would not be enforced on Mondays, Tuesdays, Wednesdays, Thursdays or Fridays. Elwell also, conceivably, could have been served in his home state with a deposition subpoena. His testimony would then be admissible under the former testimony exception to the hearsay rule if Elwell were unavailable for trial.

opinion collected five votes, including her own. She was careful to note at the outset that Supreme Court “precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments.”¹⁷³ As to the credit due laws, the majority opinion repeated *Pacific Employer’s* admonition that the test must be relatively flexible.¹⁷⁴ As to judgments, however, the Court accurately described the test as “exacting.”¹⁷⁵

Because the public policy doctrine had received some attention from the lower courts, the Court was careful to clarify its different roles in the question of credit due judgments and credit due laws. As to choice-of-law, the Court said: “A court may be guided by the forum State’s ‘public policy’ in determining the *law* applicable to a controversy.”¹⁷⁶ As to the full-faith-and-credit obligations of courts as to judgments, however, the Court said that Supreme Court “decisions support no roving ‘public policy exception’ . . .”¹⁷⁷ The Court then went on to squarely hold that equity decrees — including, obviously, injunctions — fall within the scope of the Clause.¹⁷⁸

To this point, Justice Ginsburg’s opinion gave the appearance of a decision on its way to affirming the Eighth Circuit’s conclusion that allowing Elwell to testify would deny the injunction credit. But, after sailing with the steady doctrinal wind of the near absoluteness of the credit due judgments, the majority opinion tacked back to describe

173. *Baker*, 118 S. Ct. at 663

174. *Id.*

175. *Id.*

176. *Id.* at 664. In a footnote following this discussion, the Court cited a pre-conflicts-revolution article “noting [the] traditional but dubious use of the term ‘public policy’ to obscure ‘an assertion of the forum’s right to have its [own] law applied to the [controversy] because of the forum’s relationship to it.’” *Baker*, 118 S. Ct. at 664 n.6 (quoting Monrad G. Paulsen & Michael J. Sovern, “Public Policy” in the Conflict of Laws, 56 COLUM. L. REV. 969, 980-81 (1956)). It is, of course, an oft-made observation that in many cases courts have used the “public policy” doctrine in choice-of-law as a vehicle for applying forum law to disputes that are connected with the forum. The best-known example is probably *Kilberg v. Northeast Airlines, Inc.*, in which the New York Court of Appeals used the public policy doctrine to apply New York’s rule of unlimited wrongful death recovery to a New York plaintiff killed in a Massachusetts airplane crash. *Kilberg v. Northeast Airlines, Inc.*, 172 N.E.2d 526, 526-28 (N.Y. 1961).

As post-revolution conflicts analysis has become more overtly flexible, *see, e.g.*, *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963) (applying “grouping of contacts” approach to apply New York law to New York parties despite out-of-state locus of tortious events), the need to resort to public policy has become less frequent, though it still crops up. *See Wong v. Tenneco, Inc.*, 702 P.2d 570, 576 (Cal. 1985); *Schultz v. Boy Scouts of Am.*, 480 N.E.2d 679, 687-88 (N.Y. 1985). To the extent, then, that the Court saw the public policy rationale as dubious in choice-of-law, it quite evidently meant that other more modern methodologies have often substituted for it. The Court’s express statement in the text of the opinion makes clear that use of it in the choice-of-law context poses no automatic full-faith-and-credit difficulty.

177. *Baker*, 118 S. Ct. at 664.

178. *Id.*

two important counter-principles. The first was that “[f]ull faith and credit, however, does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments.”¹⁷⁹ The second was that “[o]rders commanding action or inaction have been denied enforcement in a sister State when they purported to accomplish an official act within the exclusive province of that other State or interfered with litigation over which the ordering State had no authority.”¹⁸⁰

These counter-principles, held the majority, meant that Elwell could testify without doing violence to the Clause. To allow Michigan to control the admissibility of Elwell’s testimony in Missouri would be to allow it to dictate the mechanism for enforcement of the judgment.¹⁸¹ Moreover, to allow the Michigan injunction to become Missouri’s surrogate on evidentiary matters would be to interject Michigan into the role of performing “official acts” over which Missouri has exclusive control and would interfere with its litigation machinery.¹⁸²

Justice Scalia, concurring by himself in the judgment, would have written a considerably narrower opinion. For him, the matter was simply that the enforcement of the Michigan injunction was a matter for Michigan. Quoting the old case of *McElmoyle ex rel. Bailey v. Cohen*¹⁸³ for the proposition that “the judgment of a state Court cannot be enforced out of the state by an execution issued within it,”¹⁸⁴ Justice Scalia would have held simply that the exclusive route to enforcement by GM was to apply to the Michigan court to hold Elwell in contempt.

Justice Kennedy’s concurrence in the judgment, which attracted three votes including his own, was also considerably narrower than the majority opinion. Justice Kennedy termed “the majority’s extended analysis unnecessary and, with all due respect, problematic in some degree.”¹⁸⁵ Justice Kennedy’s concern clearly focused on the “enforcement mechanism” and the “official act/interference” counter-principles articulated by the majority.¹⁸⁶ His concern was that the majority, although apparently denying any policy-based defenses to the enforcement of judgments, might be opening the door to such chal-

179. *Id.* at 665.

180. *Id.*

181. *Id.* at 666-68.

182. *Id.* at 667.

183. 38 U.S. (13 Pet.) 312 (1839).

184. *Baker*, 118 S. Ct. at 668 (Scalia, J., concurring) (quoting *McElmoyle ex rel. Bailey v. Cohen*, 38 U.S. (13 Pet.) 312, 325 (1839)).

185. *Id.* at 668-69 (Kennedy, J., concurring).

186. *Id.* (Kennedy, J., concurring).

lenges with its loosely-worded exceptions.¹⁸⁷ For Justice Kennedy, the case could be disposed of simply with the observation that the Bakers were neither parties nor privies to the *Elwell* litigation and could not be bound by the judgment.¹⁸⁸

In the final analysis, *Baker* probably does not break any significantly new ground. Even if one makes the rather large assumption that allowing *Elwell* to testify violates the injunction, there were ample grounds for the *Baker* plaintiff to prevail, and the intra-Supreme Court debate was simply about which ground or grounds to select.

As it turns out, any of the grounds is probably an adequate rationale for the holding. First, the Court was clearly correct to say that "public policy" is not a ground for refusing to give faith and credit to the *judgments* of another state. It has long been the established rule that even judgments which are manifestly incorrect on the facts or law (even the recognizing state's law) must be respected nonetheless.¹⁸⁹

Second, the "enforcement mechanisms" rationale is probably unexceptional as well. The Second Restatement of Conflict of Laws, for instance, states the unremarkable principle that "[t]he local law of the forum determines the methods by which a judgment of another state is enforced."¹⁹⁰ The Court's opinion also expresses some ambivalence about the enforcement of injunctions in states other than that of the rendering. Although the Court, supported again by the Second Restatement of the Conflict of Laws,¹⁹¹ held that equity decrees are subject to full faith and credit, for practical reasons the law here is less well developed than with money judgments. Because the issuing court, having acquired jurisdiction over the parties and having continuing jurisdiction over them,¹⁹² has the power to enforce the injunction by a contempt citation, the aggrieved party can usually return to the issuing court for enforcement. Essentially, this was Justice Scalia's point in concurrence; GM should have gone to Michigan to attempt to have *Elwell* jailed for violating the injunction, or perhaps brought an independent action in Missouri naming *Elwell* as the defendant and seeking to enjoin him from cooperating with the plaintiffs. The Court,

187. *Id.* at 669 (Kennedy, J., concurring).

188. *Id.* at 671 (Kennedy, J., concurring).

189. *See, e.g.,* *Milliken v. Meyer*, 311 U.S. 457, 462 (1940) (noting that the conflict between findings and decree does not open the judgment to re-examination); *Fauntleroy v. Lum*, 210 U.S. 230, 235-36 (1908) (holding that the obvious misinterpretation of recognizing state's law as to the legality of a gambling contract does not open the judgment to re-examination). *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 117 (1971) ("A valid judgment rendered in one State of the United States will be recognized and enforced in a sister State even though the strong public policy of the latter State would have precluded recovery in its courts on the original claim.").

190. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 99 (1971).

191. *Id.* § 102.

192. *Michigan Trust Co. v. Ferry*, 228 U.S. 346, 355-56 (1913).

with its “enforcement mechanisms” language, pays homage to the idea that the Clause covers equity, but the nearly unlimited discretion conferred on recognizing courts as to how, if at all, they are enforced suggests that it may well be a rule honored in the breach.

Third, the majority’s “official act/interference” principle appears to be an effort to make sense out of the old cases holding that decrees to convey land in another state are not subject to credit.¹⁹³ The majority’s language actually resembles the long-controversial¹⁹⁴ section 103 of the Second Restatement of the Conflict of Laws, which provides that “[a] judgment rendered in one State of the United States need not be recognized or enforced in a sister State if such recognition or enforcement is not required by the national policy of full faith and credit because it would involve an improper interference with important interests of the sister State.”¹⁹⁵ The land conveyance exception itself is a puzzling one that commentators have suggested has been, or should be, abandoned.¹⁹⁶ It is, moreover, a restriction easily enough evaded with the rendering court’s contempt power by enjoining the unwilling conveyor to make the conveyance.¹⁹⁷

It is, in all likelihood, the majority’s effort to unite this line of cases with those on equity decrees that worries the members of the Court who concurred only in the judgment. After all, in nearly any case in which a court is asked to recognize the judgment of another state, the recognizing state is being forced to perform “official acts” and is having the mechanisms of enforcement “interfered” with by the rendering state, even if only to a minimal degree. A lower court, anxious to avoid the effect of another court’s judgment, might well be able to construct a plausible argument for denying recognition based on this language.

Thus, to the extent that *Baker* makes any change in the scope of existing full-faith-and-credit law, it narrows — not expands — the duties of courts with regard to each others’ decrees. One might fairly wonder, therefore, what it is that the proponents of same-sex marriage like in the decision. Undoubtedly, the language that is seen as helpful is the Court’s statement that there is no “roving” public policy exception to the enforcement of judgments. This language’s superficial appeal is produced only, however, by confusion of the credit due

193. *Fall v. Eastin*, 215 U.S. 1, 7 (1903).

194. William L. Reynolds, *The Iron Law of Full Faith and Credit*, 53 MD. L. REV. 412, 436 (1994) (discussing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 103 (1969)).

195. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 103 (1971).

196. John M. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1036-37 (1983) (stating that *Fall* is of limited practical impact and probably limited by Justice Holmes’ concurrence).

197. *Baker*, 118 S. Ct. at 665.

judgments and the credit due laws. Recall that the question of the recognition of a sister state's marriage license is a choice-of-law question; no judgment is involved.¹⁹⁸ The Court's "public policy" language in *Baker* is actually quite unhelpful from the standpoint of the pro-recognition arguments, because it specifically reaffirms the authority of states to use "public policy" to apply their own law¹⁹⁹ — a position directly contrary to the narrow argument.²⁰⁰ The Court's language in *Baker* is also unhelpful to the expansive argument because of its clear reaffirmation of the fundamentally different nature of the full-faith-and-credit obligations of courts towards each others' laws and judgments.

In sum, neither the expansive nor the narrow argument survives close analysis. The expansive argument founders on its confusion of judgments and laws. The narrow argument's "equality" principle does not survive the modern full-faith-and-credit cases, including *Baker*.

III. DOMA AND THE FUTURE OF SAME-SEX MARRIAGES

In its portion relative to interjurisdictional recognition of marriages,²⁰¹ the Defense of Marriage Act ("DOMA") provides:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or right or claim arising from such relationship.²⁰²

There was a considerable amount of cynicism demonstrated in the debate surrounding DOMA. Its proponents alternately claimed that it would do nothing and that it would do something.²⁰³ Its opponents alternately claimed that it would do nothing and that it would do

198. See *supra* notes 115-25 and accompanying text.

199. *Baker*, 118 S. Ct. at 664 ("A court may be guided by the forum state's 'public policy' in determining the law applicable to a controversy.").

200. See *supra* notes 126-56 and accompanying text.

201. There is another portion of the Defense of Marriage Act which adds 1 U.S.C. § 7 to define a "marriage" for federal law purposes as including only heterosexual unions. See The Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738). This portion of the statute was apparently inspired by a concern that federal court deference to state-law terminology in the family law area might result in same-sex couples being treated as married for federal tax, social security and other purposes. See, e.g., *De Sylva v. Ballentine*, 351 U.S. 570 (1956) (using the state's definition of "children" as found in the copyright act). Unless one of the "substantive" constitutional arguments succeeds, it would appear that there is no serious constitutional objection to this provision. See *supra* notes 35-37 and accompanying text.

202. 28 U.S.C. § 1738C (1998).

203. See, e.g., *Biskupic*, *supra* note 39, at A1 (summarizing the debate).

something.²⁰⁴ Its proponents seemed to fear that the expansive argument would succeed under the Full Faith and Credit Clause, and that DOMA was necessary to prevent it from succeeding.²⁰⁵ Its opponents seemed to suggest that DOMA was unconstitutional because the expansive argument would succeed, and that it was an invalid attempt to use the second sentence of the Clause to override the first.²⁰⁶ DOMA's timing in 1996 was undoubtedly motivated more by the looming November elections than by any real thought that the Hawaii litigation would soon be over.²⁰⁷

Clearly, a good deal of the debate over the passage of DOMA, and since, has been fueled by fundamental misunderstandings about the Clause, which I have endeavored to address thus far. To the extent that DOMA provides that states are under no constitutional obligation to recognize a marriage license issued by another state to a same-sex couple, it is an utterly unremarkable statute.²⁰⁸ In fact, it was utterly unnecessary. As we have seen, states — whether through use of the “public policy” reservation in their choice-of-law doctrines, a statute, or application of their standard choice-of-law approach — are under no constitutional obligation to recognize marriages solemnized in other states. Thus, all of the ink being spilled over the extent of congressional authority under the “Effects” clause of the Full Faith and Credit Clause is almost entirely beside the point.²⁰⁹

There is, however, one respect in which the above-quoted portion of DOMA might actually do something. Note that the last clause of DOMA provides that, with regard to same-sex marriages, states need not give any effect to “a right or claim arising from such relationship.”²¹⁰ Consider the following hypothetical scenario. One member of a same-sex couple, long married and a resident in Hawaii, is negligently injured by a tourist from California. The uninjured spouse sues

204. See Press Release, *supra* note 13.

205. See Biskupic, *supra* note 39, at A1 (reporting on a letter to Senator Hatch from a law professor expressing concern that courts might treat marriages as judgments for full-faith-and-credit purposes).

206. *Id.* (reporting on the statements of Professor Tribe arguing that DOMA would be unconstitutional if passed).

207. See Press Release, *supra* note 13.

208. Silberman, 16 QUINNIPIAC L. REV. at 193.

209. See, e.g., Kramer, 106 YALE L.J. at 1978 (discussing the Full Faith and Credit Clause and its application to DOMA); Julie L. B. Johnson, Comment, *The Meaning of “General Laws”: The Extent of Congress’s Power Under the Full Faith and Credit Clause and the Constitutionality of the Defense of Marriage Act*, 145 U. PA. L. REV. 1611, 1639 (1997) (discussing Congress’s power to enact DOMA and the Full Faith and Credit Clause); Timothy Joseph Keefer, Note, *DOMA as a Defensible Exercise of Congressional Power Under the Full-Faith-and-Credit Clause*, 54 WASH. & LEE L. REV. 1635, 1638 (1997) (discussing congressional power to create exceptions to the Full Faith and Credit Clause).

210. 28 U.S.C. § 1738C (1998).

the California tourist in the Hawaii state courts for loss of consortium and wins a judgment. The California tourist does not pay, and the judgment creditor takes the Hawaii judgment to California to enforce it. Does DOMA excuse California from enforcing the judgment? If so, is DOMA constitutional in this respect?

First, note that this problem will probably not arise in most cases. The pervasiveness of insurance means that to the extent judgments can be satisfied at all, they usually can be satisfied without being transported throughout the United States. Moreover, even if DOMA covers circumstances like this, it doesn't say that California *cannot* recognize the judgment, all it might say is that California is not *required* to recognize the judgment. I suspect that if the problem is really one of *judgment* recognition, most courts will be reluctant to leave the judgment creditor without a remedy, no matter what they might think about the underlying theory of recovery.

Second, there are good arguments that DOMA doesn't cover cases like our hypothetical one. Initially, the phrase "right or claim arising from such relationship" is far from self-defining. It seems unlikely that DOMA means to refer to any right or claim that could not be maintained "but for" the marriage. Most courts, for instance, in interpreting the "arising out of" portion of the Supreme Court's minimum contacts jurisdictional test,²¹¹ have rejected the "but for" test and required a more substantial nexus.²¹² One might reasonably maintain, for example, that the loss of consortium claim does not arise from the marriage; rather, it arises from the negligent actions and the injuries. Hawaii could, for instance, decide to extend its loss of consortium tort to unmarried partners (including same-sex partners) without attaching the label "marriage" to the relationship. On identical facts (except the absence of a formal "marriage") the Hawaii judgment would be unimpeachable in any other state.²¹³ It might have been the intent of DOMA to cause the integrity of judgments to so depend, but that result does not seem self-evident to me.

The "arising from" clause might also be directed to choice-of-law, not judgment recognition. The placement of the "arising from" language at the very end makes its relationship to the earlier "act, record, or judicial proceeding" language unclear. Conceivably, it could mean

211. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

212. See Flavio Rose, Comment, *Related Contacts and Personal Jurisdiction: The "But For" Test*, 82 CAL. L. REV. 1545, 1568-78 (1994) (collecting authorities); Mark. M. Maloney, Note, *Specific Personal Jurisdiction and the "Arise from or Relate to" Requirement . . . What Does it Mean?*, 50 WASH. & LEE L. REV. 1265, 1277-82 (1993) (collecting authorities).

213. See *Fauntleroy*, 210 U.S. at 237 (1908) (declaring that a judgment cannot be impeached in another state even if it is based on a clear misconstruction of the recognizing state's law).

that courts are freed from having to recognize judgments such as the hypothetical loss-of-consortium judgment, but note that the statute refers to a “right or claim” arising from the relationship. One could take this to mean only that if, say, our hypothetical suit were brought in California (instead of Hawaii), the California court would not have to apply Hawaii law, but could apply California law instead. If this is all the “arising from” clause means it accomplishes little, because the forum domicile of one party is a sufficient basis to apply the forum state’s law.²¹⁴

Admittedly, the earlier portion of the statute frees states from being required to “give effect to any public act, record, or judicial proceeding . . . respecting a relationship between persons of the same sex that is treated as a marriage. . . .”²¹⁵ Again, however, the phrase “respecting a relationship” is not self-defining. It seems to cover adjustments of status, including marriage and divorce, and thereby excuses states from having to treat same-sex marriages as conclusive. Again, however, this is not news. As discussed extensively above, states have no constitutional obligation to give effect to out-of-state marriages. It seems unlikely, however, that the phrase “respecting a relationship” would reach our hypothetical Hawaii loss-of-consortium judgment. It is not, in any conventional sense, a judgment “respecting a relationship.” To be sure, it is a judgment that would not have been possible without the relationship, but this is hardly the same thing. Suppose, for instance, that our California tourist causes the injury while riding a rented bicycle. The judgment would not have been possible without the bicycle, but I doubt anyone would think it a judgment “respecting a bicycle.”

From what one can discern from the confusing debate surrounding DOMA, it appears that it was principally directed at rejecting the expansive argument.²¹⁶ Given that goal, and DOMA’s rather awkward phraseology, it probably ought be confined to that context. I, for one, would not construe DOMA to affect the obligation of courts to recognize money judgments simply because the existence of a same-sex marriage played into the underlying theory that led to the judgment.

Of course, I might be wrong about this. Courts might read DOMA more expansively than I suggest, and hold that it frees them from having to recognize judgments such as our hypothetical loss-of-consortium judgment. What then? This interpretation of DOMA would give

214. See, e.g., *Hague*, 449 U.S. at 318-19 (stating that the after-acquired domicile of a party plus the employment of the deceased in the forum state was enough contact to allow the application of the forum’s state law).

215. 28 U.S.C. § 1738C (1998).

216. See, e.g., *supra* notes 9-14 (giving citations to various commentators who have contributed to the debate surrounding the Full Faith and Credit Clause).

it some effect beyond merely codifying the conventional and correct understanding of the role of the Clause relative to marriages. Without DOMA, there could be no serious argument that a state would be free to ignore our hypothetical judgment simply out of dislike for the underlying theory.²¹⁷

This is the one and only way in which it can be seriously maintained that DOMA presents a substantial constitutional question, as it would clearly conflict with the conventional, “mandatory effect” interpretation of the Clause relative to judgments.²¹⁸ The question of whether DOMA (so read) is constitutional reduces to what one thinks is the scope of Congress’s power under the second sentence of the Clause, the so-called “Effects Clause.”

Some who suggest that DOMA is unconstitutional contend it rests on an untenable interpretation of the Effects Clause by interpreting “Effect” to encompass “No Effect.” Professor Kramer, for instance, at least tentatively suggests that the Effects Clause can’t be read to allow Congress to “undermine or abolish” the rest of the Full Faith and Credit Clause.²¹⁹ To the extent that DOMA purports to free states of their historical obligations under the Full Faith and Credit Clause, the burden — he suggests — rests on those who wish to demonstrate that such a legislative effort is constitutional.²²⁰ Others suggest that DOMA is unconstitutional because of the Effects Clause’s requirement that Congress legislate by “General Laws,” and that DOMA is not such a law.²²¹

I doubt that either one of these arguments will carry the day. But, I want to emphasize just how small a problem this is. It is a problem that can only arise with a truly controverted claim *reduced to judgment*; it would require a court to expansively interpret DOMA; and a justiciable controversy would arise only if the recognizing court decided *not* to recognize this judgment. It might well be, therefore, that cases presenting a realistic challenge to DOMA’s constitutionality never, or rarely, arise.

But assuming such a case arises, I suspect DOMA will be upheld. The first argument seems wrong on its own terms. If, hypothetically, Congress passed a statute preventing any court from ever giving any effect to any judgment rendered by another court, that would truly

217. See, e.g., *Fauntleroy*, 210 U.S. at 237 (noting that even violent disagreement with the result reached by the judgment-rendering court is not a ground for judgment-recognizing court to deny faith and credit to the judgment).

218. See *supra* notes 72-79 and accompanying text.

219. Kramer, 106 YALE L.J. at 2003.

220. *Id.* at 2005.

221. See, e.g., Johnson, 145 U. PA. L. REV. at 1613 (arguing that the “General Laws” requirement in the Clause renders DOMA vulnerable).

undermine the Clause. But selecting a narrow class of judgments, such as child custody judgments in the Parental Kidnapping Prevention Act ("PKPA"),²²² for different treatment does not raise the same specter of "abolition." And recall DOMA, at most, simply gives states the choice, it doesn't prohibit judgment recognition as does the PKPA.

As to the second argument, I suspect strongly that the reference to "General Laws" simply means that Congress cannot pass legislation that is directed to a particular judgment, just as the Bill of Attainder and Ex Post Facto²²³ Clauses prevent Congress from acting in an essentially judicial manner to convict particular persons of a crime. The anti-DOMA "General Laws" argument, if accepted, would place the PKPA in danger. The PKPA selects a relatively narrow class of judgments (custody judgments that violate the statute's strictures) and *mandates* non-recognition.²²⁴ But, whether or not DOMA survives these challenges is of little importance to the same-sex marriage debate, because with or without DOMA states remain free to shape their choice-of-law approach as they see fit.

Given, then, that states are free to approach interjurisdictional recognition of same-sex marriages as they wish, the question remains how states will approach them. A good deal of writing has been devoted to arguing that states should adhere to the celebration rule and honor same-sex marriages performed in Hawaii.²²⁵ About half the states have already passed statutes that, in a variety of ways, are designed to prevent recognition of same-sex marriages, although — as with DOMA — there may be some marginal questions of interpretation.²²⁶ In any event, I suspect that the responses will vary considerably between the states.

First, money judgments that could not have occurred but for the existence of the marriage — such as in our hypothetical loss-of-consortium case — present the best case for recognition. Even if one reads DOMA to free states from having to recognize such a judgment, it certainly does not prevent recognition. Recall also that Hawaii tort law could be redefined to avoid the "marriage" question and thereby make the judgment unimpeachable. Given this, I think courts will probably be reluctant to deny enforcement of such judgments, no matter how negative the sentiments about same-sex marriages might be in their state.

222. 28 U.S.C. § 1738A (1994).

223. U.S. CONST. art. I, § 9, cl. 3.

224. See 28 U.S.C. § 1738A(c), (g) (1994).

225. See *supra* note 71.

226. See *generally* Koppelman, 16 QUINNIPIAC L. REV. at 106 n.2 (collecting statutes).

Second, I suspect that many states will give some effect to same-sex marriages even if they don't give them full effect, and the effect they give may depend on the circumstances of the marriage. For instance, states may be inclined to give more (or full) effect to a marriage that involves Hawaiian domiciliaries who were validly married there and years later move to another state where same-sex marriages are not permitted. On the other hand, states may be less inclined to give much or any effect to marriages in which the couple's only connection to Hawaii is that they flew there for the ceremony.

Some effects may well prove more readily attainable. For instance, some courts may give same-sex couples the benefit of the marital communication privilege or treat them as "family" for purposes of hospital visitation, but may be unwilling to treat them as spouses for income tax or intestacy purposes. Obviously, this is little more than speculation on my part, but I am fairly confident that the state court treatment of same-sex marriages will not be uniform.

CONCLUSION

This is a sensitive and difficult subject that I have attempted to approach dispassionately. The cultural, political and religious debate surrounding the question of whether same-sex marriage should be permitted is not likely to disappear any time soon.

It may be that the debate will be resolved on the side of allowing same-sex marriages, and that 30 years from now prohibitions on same-sex marriage will have been discarded into the same bin as prohibitions on interracial marriages. I am not certain what course the debate will take; but of this much I am certain: the Full Faith and Credit Clause cannot be legitimately involved to remove the debate from the political arena. Although both the proponents and opponents of same-sex marriage have apparently assumed that the Clause has a large role in this question, it legitimately has almost none. Like a large number of other issues of contemporary concern, same-sex marriage will have to be decided state by state.

