

1-1-1998

## *Baker* and Some Recipes for Disaster: On DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence

Mark Strasser

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/blr>

---

### Recommended Citation

Mark Strasser, *Baker and Some Recipes for Disaster: On DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence*, 64 Brook. L. Rev. 307 (1998).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol64/iss1/5>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized editor of BrooklynWorks.

# BAKER AND SOME RECIPES FOR DISASTER: ON DOMA, COVENANT MARRIAGES, AND FULL FAITH AND CREDIT JURISPRUDENCE\*

Mark Strasser

## INTRODUCTION

In *Baker v. General Motors Corp.*, the Supreme Court held that Missouri was not constitutionally required to give full faith and credit to a Michigan injunction barring an individual from testifying against General Motors without the latter's consent.<sup>1</sup> The opinion is important for a variety of reasons, not the least of which is that it helps to clarify full faith and credit jurisprudence. For example, the Court made clear that states are not free to refuse to give full faith and credit to the judgments of sister states, even if the enforcement of those judgments would violate an important public policy of the enforcing state.<sup>2</sup>

There are some issues, however, which must be clarified, such as whether the full faith and credit obligations imposed on the states are required by the Constitution or, instead, by Congress. The Supreme Court may soon address this issue in the domestic relations context when the constitutionality of the Defense of Marriage Act<sup>3</sup> ("DOMA") is challenged or, perhaps, after Congress has acceded to demands to create an exception which allows states to refuse to recognize the no-fault divorce decrees of sister states. Such acts might be held unconstitutional, however, even without addressing Congress' power under the Full Faith and Credit Clause to return

---

\* ©1998 Mark Strasser. All Rights Reserved.

<sup>1</sup> 118 S. Ct. 657 (1998).

<sup>2</sup> The Court distinguished the issue in *Baker* from a case in which full faith and credit would be required, pointing out that in the instant case, Michigan did not have the "authority to shield a witness from another jurisdiction's subpoena power in a case involving persons and causes outside Michigan's governance." *Id.* at 667.

<sup>3</sup> 28 U.S.C. § 1738C (1996) (stating that states are not required to recognize same-sex marriages validly celebrated in other states and defining marriage for federal purposes as the union of one man and one woman).

extra sovereignty to the states. Bracketing whether Congress has this power, the Court will also have to decide whether states are constitutionally permitted to refuse to recognize marriages valid in the states of celebration and domicile at the time of the marriage. States must not be permitted to refuse to recognize such marriages, since any other holding by the Court would significantly eviscerate due process and privileges and immunities protections.

Part I of this Article argues that the Full Faith and Credit Clause empowers Congress to increase but not to decrease the full faith and credit due to sister states' judicial proceedings. Part II suggests that the Full Faith and Credit and the Due Process Clauses prohibit Congress from passing DOMA and might also prohibit Congress from passing legislation requiring states to employ the laws of the marital domicile to determine the conditions under which the parties might divorce. This Article concludes that the Full Faith and Credit and Due Process Clauses must be understood to: (1) preclude the passage of DOMA, (2) prevent states from refusing to recognize marriages valid in the states of celebration and domicile at the time of the marriage, and (3) prohibit Congress from passing legislation requiring states to supplant their own divorce laws with the fault-only divorce laws of other states. Unless the above limitations are recognized and accepted, we will have a very different type of federal union than most individuals would either imagine or desire.

## I. FULL FAITH AND CREDIT

Article IV of the United States Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State."<sup>4</sup> The Article further provides that "Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."<sup>5</sup>

Yet, it is not clear how Article IV should be interpreted since the text specifies *both* that full faith and credit shall be given *and*

---

<sup>4</sup> U.S. CONST. art. IV, § 1.

<sup>5</sup> *Id.*

that Congress may specify the effect of authenticated acts, records, and judgments.<sup>6</sup> An interpretation of the text should be offered which nullifies the language of neither provision.<sup>7</sup>

### A. On Giving Full Faith and Credit to Judgments

Regrettably, the U.S. Supreme Court has not made sufficiently clear what is encompassed by the congressional power to prescribe effects—whether, for example, it merely involves setting up the mechanism whereby the full faith and credit obligations will be enforced or whether, instead, it allows Congress to determine how much credit is due. The former would mean that Congress has been authorized to streamline the system, making it easier for judgments to be given their due, but not to affect the amount of credit that the judgments would be given. The latter would mean that Congress could affect how much credit is given to particular judgments.

The Court has noted that the Constitution requires that “not some but full’ faith and credit be given judgments of a state court.”<sup>8</sup> As made clear in *Johnson v. Muelberger*,<sup>9</sup> the “faith and credit given is not to be niggardly but generous, full.”<sup>10</sup> These comments suggest that Congress is not empowered to lessen the amount of credit that one state is to give to another state’s judgment. However, that would not help determine whether Congress has only the power to set up a more efficient mechanism or, in addition, the power to affect how much credit will be given as long as Congress does not decrease what is due.

In *M’Elmoyle ex rel. Bailey v. Cohen*,<sup>11</sup> the Court explained, “The authenticity of a judgment and its effect, depend upon the law made in pursuance of the Constitution; the faith and credit due to it as the judicial proceeding of a state, is given by the Constitution,

---

<sup>6</sup> See *infra* notes 11-63 and accompanying text (offering differing interpretations of one part of the Full Faith and Credit Clause, namely, the Effects Clause).

<sup>7</sup> See Daniel A. Crane, *The Original Understanding of the “Effects Clause” of Article IV, Section 1 and Implications for the Defense of Marriage Act*, 6 GEO. MASON L. REV. 307, 323 (1998) (recognizing tension between claim that records, judgments, and acts must be given full faith and credit and claim that Congress has the power to prescribe the effects of one state’s law in another state).

<sup>8</sup> *Williams v. North Carolina (Williams I)*, 317 U.S. 287, 294 (1942) (quoting *Davis v. Davis*, 305 U.S. 32, 40 (1938)).

<sup>9</sup> 340 U.S. 581 (1951).

<sup>10</sup> *Id.* at 584.

<sup>11</sup> 38 U.S. 312 (1839).

independently of all legislation."<sup>12</sup> The Court distinguished between the faith and credit due to a judgment, which is prescribed by the Constitution *independent* of congressional legislation, and the judgment's authenticity and effect, which are *dependent* upon the relevant congressional legislation. Yet, it is not immediately clear what distinction the Court was trying to capture, since the Court distinguished between the full faith and credit due to a judgment on the one hand and the effect of the judgment on the other.

First, it is important to establish what the Court was *not* doing. The Court was *not* distinguishing between the judgment's effect in the state in which it was issued and the judgment's effect in sister states. On the contrary, whether the Court was analyzing the faith and credit due to an authenticated judgment or, instead, was examining the effect of such a judgment, the Court was discussing the obligations of one state when a sister state had already issued a judgment on the merits with respect to a particular controversy.

The *M'Elmoyle* Court suggested that the Full Faith and Credit Clause, itself, made "judgments out of the state in which they are rendered . . . only evidence in a sister state."<sup>13</sup> Yet, it may be misleading to describe an authenticated judgment as *only* evidence in a sister state since the issue at hand is, "Evidence as opposed to what?" Insofar as an authenticated judgment from a sister state would be *conclusive* evidence on the merits,<sup>14</sup> it might be quite misleading to describe a sister state's judgment as *mere* evidence.

### 1. The Mechanics of Full Faith and Credit

One interpretation of the Effects Clause is that the Constitution has given Congress the power to decide what *kind* rather than *how much* of an effect a sister state's judgment is to have. According to this interpretation, Congress is not to address *whether* the judgment will be given credit or *how much* credit it will be given but rather *who* will be required to ensure that the foreign judgment will be given its due. For example, Congress could set up a registration system to preclude the need to have a new trial in a sister state in

---

<sup>12</sup> *Id.* at 324-325.

<sup>13</sup> *Id.* at 325; see also *Baker v. General Motors Corp.*, 118 S. Ct. 657, 668 (1998) (Scalia, J., concurring).

<sup>14</sup> See 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1312 (5th ed., William S. Hein & Co., Inc. 1994) (1891) (discussing controversy whether the evidence should be viewed as conclusive or *prima facie*).

order for a foreign judgment to be given credit.<sup>15</sup> Such a system would be more efficient<sup>16</sup> since "execution or other process under the law of the second state could issue directly upon the registered judgment, without necessity for new action with new service and all its attendant delays and disadvantages."<sup>17</sup>

The *M'Elmoyle* Court suggested that the section of Article IV referring to Congress "was intended to provide [Congress] the means of giving to . . . [sister state judgments] the conclusiveness of judgments upon the merits, when it is sought to carry them into judgments by suits in the tribunals of another state,"<sup>18</sup> thereby suggesting that Congress has been given the power to set up the *mechanism* whereby the Clause can be effectuated. On this interpretation of the Effects Clause, Congress would not have the power to *lessen* the faith and credit to be given to sister state judgments.

Another interpretation of the Effects Clause has been offered which also implies that Congress would lack the power to lessen full faith and credit. Some have interpreted the phrase "Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof"<sup>19</sup> to mean that Congress can prescribe the manner and effect of the *proof* of sister state judgments.<sup>20</sup> Thus, Congress has been given the power to mandate the system by which judgments would be authenticated and establish the effect of that proof (presumably,

---

<sup>15</sup> See ROBERT A. LEFLAR, *AMERICAN CONFLICTS LAW* § 79, at 182 (The Bobbs-Merrill Company, Inc. 1968) ("The last sentence of the full faith and credit clause, authorizing the Congress to prescribe by general law "the effect" of sister state judgments, permits that body to provide by statute for a general registration of judgments procedure to be administered in state courts, whereby a judgment of one state, upon registration in another state (without new action or new service of process) would be at once enforceable by execution or otherwise on the same basis as judgments of the second state."); see also ROBERT A. LEFLAR, *AMERICAN CONFLICTS LAW* (3d ed. 1977); Rex Glensy, *The Extent of Congress' Power Under the Full Faith and Credit Clause*, 71 S. CAL. L. REV. 137, 164 (1977) ("To avoid the confusing, intricate, and somewhat contorted way of enforcing sister state judgments, the enabling provision was meant for Congress to enact a statute providing for registration of state judgments.").

<sup>16</sup> See LEFLAR, *supra* note 15, § 73, at 144-45 (1977) ("The procedure of bringing a new action in a second state on a judgment previously rendered, after full litigation of issues or opportunity therefor, is slow, clumsy, and sometimes ineffectual.").

<sup>17</sup> LEFLAR, *supra* note 15, § 73, at 144-45 (1977).

<sup>18</sup> *M'Elmoyle*, 38 U.S. at 324 (emphasis added).

<sup>19</sup> U.S. CONST. art. IV, § 1.

<sup>20</sup> See STORY, *supra* note 14, § 1303.

the effect of the proof would be that the judgments would now be viewed as authenticated and therefore entitled to full faith and credit).

Each of these competing interpretations of the Effects Clause has its weaknesses. The interpretation in which Congress is to prescribe the manner and effect of the *proof* of sister state judgments seems to involve a tortured reading of the constitutional text. When the phrase "the effect thereof" is used, the effect must be an effect of something. In the phrase "the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof," the effect presumably is either of the "Manner" or of the "Acts, Records, and Proceedings."<sup>21</sup> However, neither of those corresponds to the "proof." Similarly, the interpretation in which Congress is empowered to set up the mechanism (manner) whereby sister state judgments will be given effect nonetheless relies on a particular interpretation of the kind of procedural effect Congress is to prescribe. Congress is to regulate whether an individual will have to go to court in a state in order to have a judgment from a sister state enforced. However, Congress *is not* to regulate whether a sister state judgment is to be conclusive on the merits. The interpretation in which Congress can prescribe the amount of full faith and credit to be given sister state judgments seems to involve the most natural reading of the constitutional text since it would seem unnecessary to add that Congress has the power to prescribe the effect of the manner. For example, had "and the effect thereof" not been added, Congress presumably would still have had the power to say that only acts, records and judgments proven in a particular manner would be subject to full faith and credit. Further, as a historical matter, the "thereof" was substituted for "which judgments obtained in one state, shall have in another."<sup>22</sup> However, insofar as the textual interpretation allowing Congress to prescribe the effects of acts, records, and judicial proceedings would allow Congress to *lessen*

---

<sup>21</sup> See Timothy Joseph Keefer, *DOMA as a Defensible Exercise of Congressional Power under the Full-Faith-and-Credit Clause*, 54 WASH. & LEE L. REV. 1635, 1655 (1997) (discussing these two options).

<sup>22</sup> See James M. Patten, Comment, *The Defense of Marriage Act: How Congress Said "No" to Full Faith and Credit and the Constitution*, 38 SANTA CLARA L. REV. 939, 946-47 (1998) (citing WILLIAM M. MEIGS, *THE GROWTH OF THE CONSTITUTION IN THE FEDERAL CONVENTION OF 1787*, 255 (1987)); Scott Ruskay-Kidd, Note, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435, 1454-55 (1997).

the full faith and credit which is due, it contradicts the textual requirement in the previous sentence that *full* faith and credit shall be given in each state to the judgments of the courts of sister states.

## 2. The Better Interpretation

To decide which interpretation is the most accurate, it may be helpful to consider how Congress has in fact exercised its power under the Full Faith and Credit Clause, especially insofar as those attempts have been endorsed by the Supreme Court. Congress first exercised this power by specifying that authenticated acts, records, and judicial proceedings "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."<sup>23</sup> The Supreme Court has interpreted this to mean that each state must treat the *judgment* of a sister state as it would be treated in the state in which the judgment was rendered.<sup>24</sup> If the judgment is not subject to modification in the state rendering it, then the judgment is not subject to modification in any other states.<sup>25</sup> If the judgment is subject to modification in the state rendering it, then it is subject to such modification elsewhere,<sup>26</sup> absent additional legislation to the contrary.<sup>27</sup>

Great difficulties can arise, however, if sister states are permitted to modify judgments which were modifiable in the rendering state. For example, consider custody decrees, which generally are modifiable in the decree-granting state. Absent legislation to the contrary, such decrees are modifiable in sister states as well. As the Court explained in *Thompson v. Thompson*,<sup>28</sup> "[b]ecause courts entering custody orders generally retain the power to modify them,

---

<sup>23</sup> See *Baker v. General Motors Corp.*, 118 S. Ct. 657, 663 (1998) (quoting 28 U.S.C. § 1738 (1996)).

<sup>24</sup> See *Morris v. Jones*, 329 U.S. 545, 547 (1947).

<sup>25</sup> See *Baker*, 118 S. Ct. at 663-64 ("A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land.")

<sup>26</sup> See *LEFLAR*, *supra* note 15, § 73, at 169 (1968) ("if a judgment lacks conclusive effect in the state where it was rendered, it will not be conclusive elsewhere either; . . .").

<sup>27</sup> See discussion of Parental Kidnapping Prevention Act *infra* note 37 (discussing Congressional legislation which increased the faith and credit due custody decrees).

<sup>28</sup> 484 U.S. 174 (1988).



courts in other States were no less entitled to change the terms of custody according to their own views of the child's best interest."<sup>29</sup>

If sister states are permitted to modify custody decrees, parents who have lost a custody battle in one state will have an incentive to kidnap their children and relitigate the issue in a different forum.<sup>30</sup> Confronted with this possible scenario, states adopted their own versions of the Uniform Child Custody and Jurisdiction Act (UCCJA)<sup>31</sup> which had been developed in an effort to avoid these jurisdictional conflicts.<sup>32</sup> However, even after states had adopted this Act, there remained great confusion, both because some states had refused to enact their own version of the UCCJA<sup>33</sup> and because those enacting it had modified the Act.<sup>34</sup> Thus, the incentive for noncustodial parents to kidnap their children and travel to certain states<sup>35</sup> to petition for a change in custody was preserved.<sup>36</sup>

Congress passed the Parental Kidnapping Prevention Act ("PKPA")<sup>37</sup> to limit the right of states to modify sister states' custody decrees, thereby removing the incentive for parents to take their children to a different jurisdiction to relitigate custody.<sup>38</sup> Had Congress not acted, the Full Faith and Credit Clause would *not* have been a bar to sister states modifying the (modifiable) judgments of the original decree-granting states since the Full Faith and Credit Clause "obliges States only to accord the *same* force to judgments

---

<sup>29</sup> *Id.* at 180.

<sup>30</sup> See *id.* While some courts might view those who kidnap their children with a jaundiced eye, other courts might favor those individuals (who had become residents of the state) over individuals residing elsewhere.

<sup>31</sup> UNIF. CHILD CUSTODY JURISDICTION ACT §§ 1-28, 9 U.L.A. 123 (1988) (specifying the conditions under which a state will have jurisdiction to make or modify a custody determination).

<sup>32</sup> See *Thompson*, 484 U.S. at 181.

<sup>33</sup> See Melanie Togman Sloan, *No More Baby Jessicas: Proposed Revisions to the Parental Kidnapping Prevention Act*, 12 YALE L. & POL'Y REV. 355, 357 (1994) (discussing states that had not adopted the Act).

<sup>34</sup> See *Thompson*, 484 U.S. at 181.

<sup>35</sup> See Sloan, *supra* note 33, at 357 (By 1979, the eleven states that had not adopted the UCCJA "had become sanctuaries in which kidnappers could live with their kidnapped children.") (citation omitted)).

<sup>36</sup> See *Thompson*, 484 U.S. at 181.

<sup>37</sup> 28 U.S.C.A. § 1738A (1988).

<sup>38</sup> See *Murphy v. Woerner*, 748 P.2d 749, 750 (Alaska 1988) ("When the UCCJA proved an imperfect remedy for the staggering national problem of parental child-snatching and forum shopping in interstate child custody disputes, Congress enacted the PKPA to provide a uniform federal standard to ascertain the one state with jurisdiction to modify an existing child custody order.").

as would be accorded by the courts of the State in which the judgment was entered."<sup>39</sup> Thus, when the *Baker* Court said that a "final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land,"<sup>40</sup> the Court was not claiming that the Full Faith and Credit Clause requires that modifiable judgments like custody decrees be given more credit in sister states than in the decree-issuing state.

Congress' passage of the PKPA has import for determining the appropriate interpretation of the congressional power under the Effects Clause. If Congress has the power to prescribe only whether a registration system will be set up, then it would seem that Congress would not have had the power to *increase* the full faith and credit due to a custody judgment by saying that a sister state will be precluded from modifying a judgment which is nonetheless modifiable by the decree-granting state.

Two different responses might be made to the claim that Congress' passage of the PKPA strongly suggests which interpretation of the Effects Clause is correct: (1) Congress does *not* have the power to pass the PKPA under the Full Faith and Credit Clause, although it might well have such a power under the Commerce Clause,<sup>41</sup> or (2) Congress does have the power to pass the PKPA under the Effects Clause, because it is seeking to increase rather than to decrease full faith and credit and thus does not run afoul of the constitutional provision that *full* faith and credit be given.

The first response is possibly true, although the Court in *Thompson v. Thompson*<sup>42</sup> gave no hint that there was any difficulty<sup>43</sup> in Congress' passage of the PKPA under the Effects Clause.<sup>44</sup> For example, the Court described the PKPA as an "addendum to the full faith and credit statute"<sup>45</sup> without a hint that this was a constitutionally suspect exercise of congressional power. Further, the

---

<sup>39</sup> *Thompson*, 484 U.S. at 180 (emphasis added).

<sup>40</sup> *Baker v. General Motors Corp.*, 118 S. Ct. 657, 663-64 (1998) (emphasis added).

<sup>41</sup> See U.S. CONST. art. I, § 8.

<sup>42</sup> 484 U.S. 174 (1988).

<sup>43</sup> See *id.* at 177, 180-81.

<sup>44</sup> See Mark Strasser, *Loving the Romer Out for Baehr: On Act in Defense of Marriage and the Constitution*, 58 U. PITT. L. REV. 279, 297 n.115 (1997) [hereinafter *Loving the Romer Out for Baehr*] (Author's LEXIS search of the briefs filed in *Thompson v. Thompson*, 488 U.S. 174 (1988), did not reveal that either petitioner or respondent discussed the constitutionality of the PKPA.).

<sup>45</sup> See *Thompson v. Thompson*, 488 U.S. 174, 183 (1988).

Court discussed the significance of "Congress' full faith and credit approach to the problem of child snatching,"<sup>46</sup> at least implicitly suggesting that this was a valid approach to solving the problem at hand.

In contrast, there are several reasons to believe that the second response rather than the first is correct. Consider Congress' first exercise of power under the Effects Clause.<sup>47</sup> There, Congress did not set up a registration system but, instead, prescribed that judgments will have the same effect in sister states that they have in the rendering state.<sup>48</sup> Courts have spoken approvingly of that exercise of power. For example, in *Thompson v. Whitman*,<sup>49</sup> the Court described that Act of Congress as carrying the Full Faith and Credit Clause into effect.<sup>50</sup> Even the *Baker* Court endorsed the constitutionality of that Act of Congress, describing it as *pursuant* to the Full Faith and Credit Clause.<sup>51</sup> Thus, it seems at best implausible to claim that Congress does not have the power under the Full Faith and Credit Clause to *increase* the credit which is due to sister state judgments.

### 3. The Power to Decrease Faith and Credit

When interpreting Congress' power under the Effects Clause, several issues should be separately analyzed. One issue is whether Congress has merely been empowered to set up a registration system or, instead, to regulate how much credit will be due to a sister state's judgment. If the latter, then an additional question is whether Congress has the power to *decrease* the amount of credit due, notwithstanding the explicit constitutional requirement that *full* faith and credit be given. To date the Supreme Court has not determined whether Congress has the power to lessen full faith and credit<sup>52</sup> as Congress has never attempted such an act.

---

<sup>46</sup> *Id.* at 182.

<sup>47</sup> See Act of May 26, 1790, 1 Stat. 122.

<sup>48</sup> See *supra* text accompanying notes 23-26.

<sup>49</sup> 85 U.S. 457 (1873).

<sup>50</sup> See *id.* at 461. (The Court is discussing the Act of Congress of May 26, 1790 in which Congress prescribed the effect that authenticated records and judicial proceedings of one state would have in the courts in the rest of the country.).

<sup>51</sup> See *Baker v. General Motors Corp.*, 118 S. Ct. 657, 663 (1998).

<sup>52</sup> See Paige E. Chabora, *Congress' Power Under the Full Faith and Credit Clause and the Defense of Marriage Act of 1996*, 76 NEB. L. REV. 604, 635 (1997).

The Supreme Court has, however, hinted at its position. For example, the Court in *Davis v. Davis* suggested that Congress had "rightly interpreted the clause to mean not some but full credit,"<sup>53</sup> implying that a different interpretation would have been an incorrect interpretation of the constitutional requirement.

In addition, in *Thomas v. Washington Gas Light Co.*,<sup>54</sup> the Court noted that "it is quite clear that Congress' power in this area is not exclusive, for this Court has given effect to the Clause beyond that required by implementing legislation."<sup>55</sup> Thus, when interpreting the Constitution to determine the obligations the Full Faith and Credit Clause imposes on the states, the Court does not appear to feel constrained to limit those obligations to those imposed by Congress. If both the Court and Congress have the power to give effect to the Full Faith and Credit Clause, however, it is unclear what would happen if those two powers were to come into conflict. One possibility is that the Court would always defer to Congress.<sup>56</sup> Yet, Court dicta indicates that this would not always occur.

The Court has suggested that Congress can exceed the requirements imposed by the Full Faith and Credit Clause and impose *additional* full faith and credit obligations.<sup>57</sup> As discussed above, Congress can require that even judgments modifiable in the decree-granting state be given full faith and credit in sister states under certain conditions.<sup>58</sup> On the other hand, it is not at all clear that the Court would hold that Congress can *reduce* the requirements imposed by the Clause.<sup>59</sup>

In *Williams v. North Carolina*,<sup>60</sup> the Court refused to express a view regarding whether Congress had the power to create excep-

---

<sup>53</sup> *Davis v. Davis*, 305 U.S. 32, 40 (1938) (emphasis added) (citation omitted).

<sup>54</sup> 448 U.S. 261 (1980).

<sup>55</sup> *Id.* at 272-273 n.18.

<sup>56</sup> Cf. Larry Kramer, *The Public Policy Exception and the Problem of Extra-Territorial Recognition of Same-Sex Marriage*, 16 QUINNIPIAC L. REV. 153, 158 (1996) [hereinafter *The Public Policy Exception*] ("Whatever limits the Supreme Court imposes in interpreting 'full faith and credit' are only federal common law, similar to Supreme Court decisions under the dormant Commerce Clause. As such, they can be over-ridden by Congress.").

<sup>57</sup> See *Thomas*, 448 U.S. at 273 n.18 ("Congress clearly has the power to increase the measure of faith and credit that a State must accord to the laws or judgments of another State . . .").

<sup>58</sup> See *supra* notes 37-40 and accompanying text (discussing PKPA).

<sup>59</sup> See *Thomas*, 448 U.S. at 273 n.18 (there is "some question whether Congress may cut back on the measure of faith and credit required by a decision of this Court."); see also Chabora, *supra* note 52, at 635 (supporting ratchet view).

<sup>60</sup> 317 U.S. 287 (1942).

tions to the obligations imposed by the Full Faith and Credit Clause when divorces granted in sister states were at issue.<sup>61</sup> However, the Court did note that "the considerable interests involved and the substantial and far-reaching effects which the allowance of an exception would have on innocent persons indicate that the purpose of the full faith and credit clause . . . would be thwarted to a substantial degree"<sup>62</sup> were such exceptions permitted. Similarly, the Court in *Sherrer v. Sherrer* noted that the fact "[t]hat vital interests are involved in divorce litigation indicates to us that it is a matter of greater rather than lesser importance that there should be a place to end such litigation."<sup>63</sup> These comments at least suggest that the Court would hold unconstitutional an attempt by Congress to modify the Full Faith and Credit Clause by making sister state divorce decrees not subject to full faith and credit guarantees. For example, suppose that Congress were to pass an amendment to the Full Faith and Credit Clause authorizing states to refuse to recognize divorces which would not have been permitted under local law. States which had fault-only divorce laws would be entitled to refuse to recognize no-fault divorces issued in other states, even if such a refusal would make subsequent contracted marriages bigamous. The Supreme Court would likely hold such a congressional enactment unconstitutional. The Court would not simply be saying that such a modification would be bad public policy but that such a modification would contradict the purposes of the Full Faith and Credit Clause and would violate the Constitution itself.

#### B. *On Giving Full Faith and Credit to Laws*

The text of the Constitution and accompanying congressional legislation state that judgments and legislative acts shall receive *parallel* treatment.<sup>64</sup> Text notwithstanding, however, the *Baker* Court explained that Supreme Court "precedent differentiates the credit owed to laws (legislative measures and common law) and to

---

<sup>61</sup> See *id.* at 303.

<sup>62</sup> *Id.* at 303-04.

<sup>63</sup> *Sherrer v. Sherrer*, 334 U.S. 343, 356 (1948).

<sup>64</sup> 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, 95 (1984) ("The parallel treatment of judgments and legislative acts is evident.").

judgments."<sup>65</sup> One explanation for this apparent infidelity to the constitutional and legislative text proposes that statutes and judgments are not really being treated differently and that laws are appropriately analogized to *modifiable* judgments.

Legislative acts seem to be modifiable in that legislatures can repeal or amend those statutes which have already been enacted.<sup>66</sup> Arguably, if legislative acts can be made and remade at will by the legislature of the state whose law is at issue, then it is not clear why any other state should be bound by such laws.<sup>67</sup> On this analysis, just as before the passage of the PKPA sister states did not have to accept or enforce the original decree-granting state's judgment concerning custodial rights, so, too, sister states do not have to accept or enforce another state's laws, absent some sort of additional legislation requiring that full faith and credit be given.

Although initially appealing, this analysis is misleading. Suppose, for example, that State A's law is incorporated within the state constitution and thus cannot be changed at the whim of the legislature. Suppose further that a court in State B must decide whether to subordinate State B's law to State A's in a particular case. When making this decision, the State B court will *not* consider whether State A's legislature can change the law or even whether or how easily State A's constitution can be changed but, instead, will determine whether State A's law violates an important public policy of State B's.<sup>68</sup> Thus, the decision whether to give a sister state's law full faith and credit will not be based upon how readily the sister state's law can be changed but upon whether that law is obnoxious to the forum's public policy.<sup>69</sup>

The difference between the obligations imposed by the Full Faith and Credit Clause with respect to other state's judgments and with respect to other state's statutes can be illustrated by considering how some states treat gambling debts. Suppose that an individual borrows money to pay for chips at a gambling casino.<sup>70</sup>

---

<sup>65</sup> Baker v. General Motors Corp., 118 S. Ct. 657, 663 (1998).

<sup>66</sup> See Brilmayer, *supra* note 64, at 98.

<sup>67</sup> *Id.*

<sup>68</sup> See Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1970 (1997) [hereinafter *Same-Sex Marriage*] (discussing the public policy exception which involves a violation of the forum state's strong public policy).

<sup>69</sup> See *id.*

<sup>70</sup> See *M & R Invs., Co. v. Hacker*, 511 So. 2d 1099 (Fla. Dist. Ct. App. 1987).

Suppose further that the casino sues the individual in *its* home state, the court has jurisdiction over the parties and the subject matter,<sup>71</sup> and that judgment is entered in favor of the casino. The casino then files suit in the individual's home state to have the judgment enforced. The Full Faith and Credit Clause would require that the latter state enforce the judgment, *even if enforcement of gambling debts violated that state's public policy*.<sup>72</sup> Because the debt would have been reduced to judgment, the latter state would not have the option of pleading the public policy exception. As the *Baker* Court explained, there is "no roving 'public policy exception' to the full faith and credit due judgments."<sup>73</sup>

Suppose that the example is a little different. The casino tries to enforce the gambling debt by suing the individual in *his* home state. However, the individual's home state has already made clear that the enforcement of gambling debts is obnoxious to an important public policy.<sup>74</sup> Notwithstanding that the debt would be valid in the state in which it was incurred, the court might nonetheless refuse to enforce the debt as a matter of public policy.<sup>75</sup>

Consider Florida, a state in which certain types of gambling are considered against public policy.<sup>76</sup> A gambling debt of a prohibited type would be enforceable in Florida, for example, if a judgment had been entered in a different jurisdiction and the individual who was owed the money then litigated in Florida arguing that the Full Faith and Credit Clause required that the judgment be enforced. Public policy could not be used to preclude enforcement of that valid judgment. However, if the case was originally heard in Florida, public policy might preclude enforcement of that gambling debt.<sup>77</sup> As the Court explained in *Magnolia Petroleum Co. v.*

---

<sup>71</sup> See *id.* at 1099.

<sup>72</sup> See *id.* at 1100-1101; see also *Coghill v. Boardwalk Regency Corp.*, 396 S.E.2d 838 (Va. 1990) (Full Faith and Credit Clause requires that New Jersey judgment involving payment of gambling debt be enforced, notwithstanding Virginia's strong public policy prohibiting the enforcement of such debts).

<sup>73</sup> See *Baker v. General Motors Corp.*, 118 S. Ct. 657, 664 (1998) (citing *Estin v. Estin*, 334 U.S. 541, 546 (1948)).

<sup>74</sup> See *Barquin v. Flores*, 459 So. 2d 436 (Fla. Dist. Ct. App. 1984).

<sup>75</sup> See *id.* at 436-37; see also *Casanova Club v. Bisharat*, 458 A.2d 1 (Conn. 1983) (refusal to enforce gambling debt valid where incurred).

<sup>76</sup> See *Dorado Beach Hotel Corp. v. Jemigan*, 202 So. 2d 830, 831 (Fla. Dist. Ct. App. 1967) ("the public policy of the State of Florida is established to permit a restricted type of gambling which is incidental to spectator sports. This State has consistently refused to permit gambling on non-spectator sports such as bookie parlors, football parlors, et cetera.").

<sup>77</sup> In MARK STRASSER, LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION 104

*Hunt*,<sup>78</sup> the Full Faith and Credit Clause demands recognition of a judgment, "even though the statute on which the judgment was founded need not be applied in the state of the forum because in conflict with the laws and policy of that state."<sup>79</sup>

Merely because the law of a foreign state differs from the law of a forum state is not sufficient to justify the forum's invocation of the public policy exception. The Supreme Court has noted that the Full Faith and Credit Clause requires states to submit to "hostile policies" of other states "because the practical operation of the federal system, which the Constitution designed, demand[s] it."<sup>80</sup> Indeed, it is "when a clash of policies between two states emerges that the need of the Clause is the greatest."<sup>81</sup> Thus, the mere fact that two state statutes differ does not establish that the statute of the former would be obnoxious to the latter's public policy. For example, although Florida might refuse to enforce gambling debts validly incurred in other jurisdictions, a different state might enforce such debts, even if such debts could not have been validly incurred in that state.<sup>82</sup> Thus, the public policy exception does not allow the forum state to refuse to enforce other states' laws merely because their laws conflict, although it does allow the forum state to refuse to enforce a law which is contrary to one of its important public policies.<sup>83</sup>

---

(1997) [hereinafter LEGALLY WED] and Mark Strasser, *Judicial Good Faith and the Baehr Essentials: On Giving Credit Where It's Due*, 28 RUTGERS L.J. 313, 319-20 n.49 (1997) [hereinafter *Judicial Good Faith*], there is an attempt to offer an example of a judgment which did not have to be enforced because it was contrary to the public policy of the enforcing state. The example should have involved a gambling debt reduced to judgment rather than a gambling debt not reduced to judgment. Of course, the *Baker* Court has made clear that such a judgment would have to be enforced in a sister state, public policy of the enforcing state notwithstanding.

<sup>78</sup> 320 U.S. 430 (1943), *rev'd on other grounds*, *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 286 (1980); see also *Baker*, 118 S. Ct. at 663 (As the *Baker* Court explained, Supreme Court "precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments.").

<sup>79</sup> *Magnolia Petroleum Co.*, 320 U.S. at 439.

<sup>80</sup> See *Estin v. Estin*, 334 U.S. 541, 546 (1948).

<sup>81</sup> *Union Nat'l Bank v. Lamb*, 337 U.S. 38, 42 (1949).

<sup>82</sup> See *Intercontinental Hotels Corp. v. Golden*, 15 N.Y.2d 9, 203 N.E.2d 210, 254 N.Y.S.2d 527 (1964) (gambling debts enforceable under Puerto Rican law are enforceable in New York); see also *Caribe Hilton Hotel v. Toland*, 307 A.2d 85 (N.J. 1973).

<sup>83</sup> See *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 111, 120 N.E. 198, 202 (1918) ("The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors, unless help would violate some deep-rooted fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition in the common



Justice Frankfurter in *Vanderbilt v. Vanderbilt* suggested that the Full Faith and Credit Clause incorporated a public policy exception for sister states' judgments too, arguing that "exceptional circumstances may relieve a State from giving full faith and credit to the judgment of a sister State because 'obnoxious' to an overriding policy of its own."<sup>84</sup> However, this obnoxiousness exception was to be read narrowly and, even in his view, states were not permitted to ignore foreign judgments merely because the states disagreed with the policies underlying those judgments. States might have to submit "even to hostile policies reflected in the judgment of another State"<sup>85</sup> and, thus, a mere policy conflict would not establish that a judgment of one state would be obnoxious to the public policy of another.<sup>86</sup> Nonetheless, Justice Frankfurter implied that in limited circumstances a state would be permitted to refuse to honor a judgment issued in a sister state on public policy grounds. This implications was in direct conflict with the *Baker* Court which denied the existence of a "roving 'public policy exception' to the full faith and credit due judgments."<sup>87</sup>

The *Baker* Court distinguished between final judgments and the "practices of other States regarding the time, manner, and mechanisms for enforcing judgments."<sup>88</sup> The Court stated, "[e]nforcement measures do not travel with the sister state judgment as preclusive effects do; . . .," suggesting that the enforcement measures "remain subject to the even-handed control of forum law."<sup>89</sup> For example, the statute of limitations of a forum state might bar recovery of a debt arising from a judgment in a different state. As explained in

---

weal.").

<sup>84</sup> *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 426 (1957) (Frankfurter, J., dissenting) (emphasis added). See also *Pacific Employers Ins. v. Industrial Accident Comm'n*, 306 U.S. 493, 502 (1939) ("It has often been recognized by this Court that there are some limitations upon the extent to which a state may be required by the full faith and credit clause to enforce even the judgment of another state in contravention of its own statutes or policy."); RESTATEMENT (SECOND) OF THE CONFLICTS OF LAW §103 (1971) ("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."). But see William L. Reynolds, *The Iron Law of Full Faith and Credit*, 53 MD. L. REV. 412, 438 (1994) ("it is quite doubtful that Section 103 provides an accurate statement of the law.").

<sup>85</sup> *Estin*, 334 U.S. at 546.

<sup>86</sup> See *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 162-163 (1932).

<sup>87</sup> *Baker v. General Motors Corp.*, 118 S. Ct. 657, 664 (1998).

<sup>88</sup> *Id.* at 665.

<sup>89</sup> *Id.*

*M'Elmoyle ex rel. Bailey v. Cohen*,<sup>90</sup> "the statute of limitations may bar recoveries upon foreign judgments"<sup>91</sup> because "the effect intended to be given under our Constitution to judgments is that they are conclusive only as regards the merits; . . ."<sup>92</sup> Thus, unless a suit upon a judgment is "brought within the period prescribed by the local law, . . . the suit will be barred."<sup>93</sup>

Several other exceptions exist to the requirement that full faith and credit be given. For example, "a want of jurisdiction over either the person or the subject-matter"<sup>94</sup> would entail that a court issuing a decree would not have had the power to issue that decree and thus that decree would not be subject to a full faith and credit obligation.<sup>95</sup> As the *Williams* Court explained, "A judgment in one State is conclusive upon the merits in every other State, but only if the court of the first State had power to pass on the merits—had jurisdiction, that is, to render the judgment."<sup>96</sup> Where a court has jurisdiction over the parties and the subject matter, its judgment must be accorded full faith and credit in all of the states.

### C. The Purposes Behind the Full Faith and Credit Clause

To understand which requirements are imposed by the Clause, itself, it is important to understand the purposes of the Clause. The Full Faith and Credit Clause is a "nationally unifying force"<sup>97</sup> which makes the individual states "integral parts of a single nation."<sup>98</sup> Indeed, the Constitution "in no small measure brings separate sovereign states into an integrated whole through the medium of the full faith and credit clause."<sup>99</sup> However, this integration can-

---

<sup>90</sup> 38 U.S. 312 (1839).

<sup>91</sup> *Id.* at 328.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* But see *Order of United Commercial Travelers of Am. v. Wolfe*, 331 U.S. 586, 627 (1947) (Black, J., dissenting) (arguing that *M'Elmoyle* had been overruled by *Wolfe*); *id.* at 629-30 (Black, J., dissenting) (arguing that if *M'Elmoyle* had not been overruled, then "an Ohio private corporation's laws [must] have a higher constitutional standing than an Ohio law or judgment would have . . .").

<sup>94</sup> *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908).

<sup>95</sup> See *Estin v. Estin*, 334 U.S. 541, 549 (1948) ("A judgment of a court having no jurisdiction to render it is not entitled to the full faith and credit which the Constitution and statute of the United States demand.").

<sup>96</sup> *Williams v. North Carolina (Williams II)*, 325 U.S. 226, 229 (1945).

<sup>97</sup> *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943).

<sup>98</sup> *Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 277 (1935).

<sup>99</sup> *Williams v. North Carolina (Williams I)*, 317 U.S. 287, 303 (1942).

not occur unless states surrender some of their independence. As the *Sherrer* Court explained, if in the application of the Full Faith and Credit Clause "local policy must at times be required to give way, such 'is part of the price of our federal system.'"<sup>100</sup>

The purpose of the Full Faith and Credit Clause is to "resolve controversies where state policies differ."<sup>101</sup> The Clause does not merely direct states to *take into consideration* that a judgment had been issued in another state's judicial proceeding, as if once that were done the state would have the right to ignore that judgment. On the contrary, the "very purpose of the full faith and credit clause [is] to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created . . . by the judicial proceedings of the others . . . ."<sup>102</sup>

Even without the Full Faith and Credit Clause, states would still be able to recognize their sister states' judgments out of comity, just as can be done for judgments which have been issued in *foreign countries*.<sup>103</sup> However, as the *Williams* Court explained, "the Full Faith and Credit Clause puts the Constitution behind a judgment instead of the too fluid, ill-defined concept of 'comity.'"<sup>104</sup> Comity is not a matter of absolute obligation, and the Full Faith and Credit Clause substitutes a "command for the earlier principles of comity."<sup>105</sup>

The Full Faith and Credit Clause forces states to surrender their local policies for the sake of the federal union. Indeed, the space which has been "left for the play of conflicting policies is a narrow one,"<sup>106</sup> since otherwise the Clause could not fulfill its proper role. Perhaps it would seem that the Full Faith and Credit Clause as thus conceived is rather constricting. However, as Justice Rutledge suggested, "If the impairment of the power of the states is large, it is one the Constitution itself has made."<sup>107</sup> While it is not clear what Justice Rutledge would have said in a case in which Congress had

<sup>100</sup> *Sherrer v. Sherrer*, 334 U.S. 342, 355 (1948) (citing *Williams I*, 317 U.S. at 302).

<sup>101</sup> *Morris v. Jones*, 329 U.S. 545, 553 (1947).

<sup>102</sup> *Milwaukee County*, 296 U.S. at 276-77.

<sup>103</sup> The Full Faith and Credit Clause does not apply to judgments of foreign countries. See *Golden v. Golden*, 68 P.2d 928, 932 (N.M. 1937).

<sup>104</sup> *Williams v. North Carolina (Williams II)*, 325 U.S. 226, 228 (1945).

<sup>105</sup> See *Estin v. Estin*, 334 U.S. 541, 546 (1948).

<sup>106</sup> *Williams v. North Carolina (Williams I)*, 317 U.S. 287, 294 (1942) (quoting *Broderick v. Rosner*, 294 U.S. 629, 642 (1935)).

<sup>107</sup> *Williams II*, 325 U.S. at 254 (Rutledge, J., dissenting).

lessened the full faith and credit requirements,<sup>108</sup> he did suggest that the "very function of the clause is to compel the states to give effect to the contrary policies of other states when these have been validly embodied in judgment," and that "[t]o this extent the Constitution has foreclosed the freedom of the states to apply their own local policies."<sup>109</sup>

Justice Robert H. Jackson, in fact, suggested that the Constitution "created a political union among otherwise independent and sovereign states."<sup>110</sup> The Full Faith and Credit Clause was incorporated within the Constitution to "guard the new political and economic union against the disintegrating influence of provincialism in jurisprudence."<sup>111</sup> Such a goal can only be accomplished if the judgments of sister states are not subject to trumping by local public policy.

Yet, as discussed *infra*, it might be argued that provincialism in jurisprudence is not a worry since Congress is authorizing the states to refuse to recognize same-sex marriages if they so desire. Further, the Constitution specifically authorizes Congress to prescribe the manner in which acts, records and judicial proceedings will be authenticated and the effect thereof. Yet, the question at hand is whether Congress is authorized to decrease the full faith and credit which is due. Congress claims that it has the authority, but Congress is not the final arbiter of what the Constitution prohibits or permits.

The Supreme Court has indicated in a different context that it is unwilling to allow Congress to define its own powers. In *City of Boerne v. Flores*,<sup>112</sup> the Court suggested, "If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.' It would be 'on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it.'"<sup>113</sup> The Court was unwilling to declare that Congress had the power to pass the Religious Freedom

---

<sup>108</sup> See *id.* (Rutledge, J., dissenting) (basing his interpretation on "the terms of the Constitution and the Act of Congress implementing them . . .").

<sup>109</sup> *Id.*

<sup>110</sup> Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 17 (1945).

<sup>111</sup> *Id.*

<sup>112</sup> 521 U.S. \_\_\_, 117 S. Ct. 2157 (1997).

<sup>113</sup> See *id.* at 2168 (citing *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

Restoration Act of 1993,<sup>114</sup> notwithstanding the Fourteenth Amendment's explicit allocation to Congress of the "power to enforce, by appropriate legislation, the provisions of this article."<sup>115</sup> The Court explained, "Congress does not enforce a constitutional right by changing what the right is."<sup>116</sup>

Any analysis of Congress' power under the Full Faith and Credit Clause must take into account the spirit of the *City of Boerne* Court's comments.<sup>117</sup> Just as Congress does not enforce a constitutional right by changing what it is, Congress would hardly be giving effect to the Full Faith and Credit Clause by changing what the Clause requires.

#### D. Choice of Law

The Full Faith and Credit Clause requires states to enforce the judgments of sister states' courts, as long as those courts had the requisite jurisdiction to render judgment initially. The Clause imposes a less stringent requirement if those conditions have not been met. As discussed earlier, states are permitted to refuse to enforce obligations validly incurred in other states if those obligations have not been reduced to judgment and if enforcement of those obligations would be obnoxious to an important public policy.<sup>118</sup>

When discussing what the Full Faith and Credit Clause requires, commentators are sometimes explaining the limitations it imposes on which state's law may be applied to a particular occurrence or transaction. This issue must be differentiated from whether the Full Faith and Credit Clause requires, for example, that a forum enforce a debt validly incurred elsewhere. The former is determined by inquiring whether a particular state had enough of a connection to the parties and the transaction or occurrence at issue to justify application of that state's law, whereas the latter is determined by inquiring whether the enforcement would violate an important public policy of the forum.

---

<sup>114</sup> 42 U.S.C. 2000bb (1994).

<sup>115</sup> See U.S. CONST. amend. XIV § 5.

<sup>116</sup> *City of Boerne*, 521 U.S. at \_\_\_, 117 S. Ct. at 2164.

<sup>117</sup> But see Kramer, *Same-Sex Marriage*, *supra* note 68, at 2002 (suggesting that Congress' power under the Effects Clause is more like its power under the dormant Commerce Clause than the Fourteenth Amendment).

<sup>118</sup> See *supra* notes 70-79 and accompanying text.

Suppose that a resident of Minnesota buys an insurance policy from an insurance company in Wisconsin. One evening, the Minnesota resident is driving in Wisconsin when a Wisconsin resident who has had several drinks crosses the double yellow line in the center of the road, has a head-on collision with the Minnesota driver, and kills him. The Minnesota driver's widow tries to collect the insurance proceeds due her. However, it turns out that the amount she will collect will depend upon whether Minnesota or Wisconsin law is applied, and she will be entitled to more insurance proceeds if the former law is applied.<sup>119</sup> The widow goes to court in Minnesota where she lives and sues the insurance company, claiming that she is entitled to the more generous benefits provided by Minnesota law. The Minnesota court applies Minnesota law, and the widow is awarded greater benefits.

Both Minnesota and Wisconsin had significant contacts to the occurrence. The accident occurred in Wisconsin, involved a Wisconsin driver, and the insurance company was based in Wisconsin. The innocent party was a Minnesota resident, the insurance policy was bought while the individual was a resident of Minnesota, and the individual's widow still lived in Minnesota. The issue here was *not* whether one state's law was obnoxious to an important public policy of another, but merely whether the different states (Minnesota and Wisconsin) each had sufficient contacts with the event at issue to have its own law applied. Under this scenario, each state would have more than sufficient contacts with the parties and the event to justify application of local law.

### E. Choice of Law Rules

As a general matter, choice of law is a difficult and confusing area.<sup>120</sup> An additional complicating factor is that a number of different questions might be asked when examining choice of law, and the failure to carefully identify the relevant question might yield inaccurate answers. For example, it is important to distinguish between two different questions: (1) what is the best rule for deciding which law should be applied,<sup>121</sup> and (2) which choice of law rules

---

<sup>119</sup> This case is based on *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) although the facts have been changed to make even clearer that either state's law might be applied.

<sup>120</sup> See Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 1030 (1994) (discussing choice of law "chaos").

<sup>121</sup> Jackson, *supra* note 110, at 24 ("Where there is a choice under the full faith and

are required by the Constitution.<sup>122</sup> Merely because some choice of law rules are thought non-optimal or unwise does not render them unconstitutional.<sup>123</sup> Further, it would be a mistake to think that there is only one "wise" choice of law rule. There is no universal agreement about which choice of law system would be best, and different scholars offer different approaches.<sup>124</sup> Several commentators suggest that certain approaches are not only inferior but unconstitutional.<sup>125</sup> However, the Supreme Court has been unwilling to declare that any allegedly unconstitutional approach actually violates constitutional guarantees.<sup>126</sup>

The Court has explained that there are minimal constitutional limits on which state's laws are applicable to a particular occurrence or transaction. For example, "if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional."<sup>127</sup> However, the Court has failed to make sufficiently clear how minimal those contacts must be,<sup>128</sup> having recognized that "it is frequently the case under the Full Faith and Credit Clause that a court can lawfully apply either the law of one State or the contrary law of another."<sup>129</sup>

---

credit clause, the one should be made, I should say, which best will meet the needs of an expanding national society for a modern system of administering, inexpensively and expeditiously, a more certain justice.").

<sup>122</sup> *Id.* at 16 ("I think it difficult to point to any field in which the Court has more completely demonstrated or more candidly confessed the lack of guiding standards of a legal character than in trying to determine what choice of law is required by the Constitution.").

<sup>123</sup> *Sun Oil Co. v. Wortman*, 486 U.S. 717, 728-29 (1988).

<sup>124</sup> See, e.g., Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992) (offering a sophisticated territorialist approach); Robert A. Lefflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584, 1587-88 (1966) (discussing the better rule of law criterion); David E. Seidelson, *Resolving Choice of Law Problems Through Interest Analysis in Personal Injury Actions: A Suggested Order of Priority Among Competing State Interests and Among Available Techniques for Weighing Those Interests*, 30 DUQ. L. REV. 869 (1992) (offering interest analysis approach).

<sup>125</sup> See John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 187 (1981) (suggesting that interest analysis is constitutionally suspect); Laycock, *supra* note 124, at 312 (suggesting that better rule of law theory is constitutionally suspect).

<sup>126</sup> See *Sun Oil Co.*, 486 U.S. at 728-29 ("long established and still subsisting choice-of-law practices that come to be thought, by modern scholars, unwise, do not thereby become unconstitutional.").

<sup>127</sup> *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 310-11 (1981) (footnote omitted).

<sup>128</sup> See *id.* at 334-38 (Powell, J., dissenting) (describing the insignificant contacts which the Court nonetheless held were sufficient).

<sup>129</sup> *Sun Oil Co.*, 486 U.S. at 727.

Some commentators have concluded that, as a general matter, the forum state can apply its own law without much fear of being overturned on constitutional grounds.<sup>130</sup>

Nonetheless, it would be implausible to claim that a state can *always* apply its own law, since that would undermine the Constitution having constrained state powers to create a federal system.<sup>131</sup> The Court has recognized that "the statute of a state may sometimes override the conflicting statute of another, *both at home and abroad*,"<sup>132</sup> that is, in some cases states must apply a sister state's law. Regrettably, the Court has refused to offer explicit guidelines to help establish when a state is permitted to apply its own law, believing it "unavoidable" that in particular cases the Court will be forced to "determine for itself the extent to which the statute of one state may qualify or deny rights asserted under the statute of another."<sup>133</sup>

#### F. Choice of Law in the Marital Context

In the context of marriage and divorce, decisions about which state's law is applicable are relatively clear, in part because of the *importance* of the implicated interests. For example, a divorced individual who remarries might be charged with bigamy if the divorce is not recognized.<sup>134</sup> An individual whose marriage was not recognized might lose a variety of rights including the right to inherit,<sup>135</sup> the right to have custody of a child,<sup>136</sup> the right to bring

---

<sup>130</sup> See, e.g., Louise Weinberg, *Choosing Law: The Limitations Debates*, 1991 U. ILL. L. REV. 683, 719.

<sup>131</sup> Jackson, *supra* note 110, at 26 (Such a policy would "be at odds with the implication of our federal system that the mutual limits of the states' powers are defined by the Constitution.").

<sup>132</sup> Alaska Packers Ass'n v. Industrial Accident Comm'n of Cal., 294 U.S. 532, 548 (1935) (emphasis added).

<sup>133</sup> *Id.* at 547.

<sup>134</sup> Williams v. North Carolina (*Williams I*), 317 U.S. 287, 289 (1942) ("Petitioners were tried and convicted of bigamous cohabitation under § 4342 of the North Carolina Code, 1939, and each was sentenced for a term of years to a state prison.") (footnote omitted).

<sup>135</sup> See *In re Estate of Cooper*, 187 A.D.2d 128, 592 N.Y.S.2d 797 (2d Dep't 1993) (surviving partner in same-sex relationship not allowed to elect against will as surviving spouse); *Dismuke v. C & S Trust Co.*, 407 S.E.2d 739, 740 (Ga. 1991) ("Having determined that appellant had not established the existence of a common-law marriage between her and the decedent, . . . appellant was not an heir at law of the decedent.").

<sup>136</sup> See *In re Guardianship of Sedelmeier*, 491 N.W.2d 86, 87 (S.D. 1992) ("In legal contests between a parent and a non-parent for the custody of a child the threshold



certain actions in tort,<sup>137</sup> etc.

Most courts and commentators agree that the recognition of marriages validly celebrated in other states involves a choice of law question because the law of more than one state is potentially applicable when the ceremony takes place.<sup>138</sup> Certain states have a significant interest in whether a particular marriage will be recognized: the state or states where the parties are domiciled, the state where the marriage ceremony is performed, and the state where the couple plans to live immediately after they are married. The laws of any of these states *might* be applied to determine the validity of a marriage. However, because such important interests are at stake when the validity of a marriage is at issue, clear rules have been established for determining which states law will apply to determine the validity of a particular marriage.

The *First Restatement of the Conflict of Laws* suggests that "a marriage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with."<sup>139</sup> However, the *Restatement* lists some exceptions. Section 132 reads:

Marriage Declared Void by Law of Domicil

A marriage which is against the law of the state of domicil of either party, though the requirements of the law of the state of celebration have been complied with, will be invalid everywhere in the following cases:

- (a) polygamous marriage,
- (b) incestuous marriage between persons so closely related that their marriage is contrary to a strong public policy of the domicil,
- (c) marriage between persons of different races where such marriages are at the domicil regarded as odious,

---

question is: Is the parent unfit to have custody of the child? . . . Without unfitness being established, there is no necessity to look to the best interests of the child.").

<sup>137</sup> See *Denil v. Integrity Mutual Ins. Co.*, 401 N.W.2d 13, 15 (Wis. Ct. App. 1986) (unmarried partner may not bring an action for loss of consortium).

<sup>138</sup> Robert Cordell II, *Same-Sex Marriage: The Fundamental Right of Marriage and an Examination of Conflict of Laws and the Full Faith and Credit Clause*, 26 COLUM. HUM. RTS. L. REV. 247, 265 (1994) ("[T]he decision to honor a marriage from another state, especially a marriage which conflicts with the laws in the state deciding, involves a choice of laws question."); C.W. Taintor II, *What Law Governs the Ceremony Incidents and Status of Marriage*, 19 B.U. L. REV. 353, 367 (1939) ("Since the question of the creation of the marriage status must be referred to the law of some state or to the laws of two states acting together, the problem is one of choice of law.").

<sup>139</sup> RESTATEMENT (FIRST) OF THE CONFLICT OF LAWS § 121 (1934) [hereinafter FIRST RESTATEMENT].

(d) marriage of a domiciliary which a statute at the domicil makes void even though celebrated in another state.<sup>140</sup>

*Comment c* is no longer applicable because the Supreme Court has held that *no* state may prohibit interracial marriage.<sup>141</sup> However, the remaining exceptions ensure that a marriage will be valid unless it is polygamous, incestuous, or declared *void* by the domicil.

The *Second Restatement of the Conflict of Laws* suggests a similar policy, since a "marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage."<sup>142</sup> Both *Restatements* suggest that a marriage valid where celebrated will be valid everywhere unless the marriage would be treated as *void* in the domicil,<sup>143</sup> although the *Second Restatement* formulation may include one exception.

Suppose that Wanda Williams and Trent Thomas are domiciled in one state, celebrate their marriage in another state, and then immediately move to a third state where they expect to spend the rest of their lives. Arguably, the third state has the most significant relationship to the spouses and marriage at the time of the marriage because that is where the marital couple will permanently reside. The *Second Restatement* suggests that if the union is void according to the law of the state which will be the couple's domicil *immediately after* the marriage, then the marriage may not be valid.

According to the *First* and *Second Restatements*, the only states whose law might be applicable to determine the validity of a marriage are the states where the parties are domiciled before the marriage, the state where the marriage is celebrated, and the state where the couple will live after they have married. Because the states whose laws might be applicable are limited in this way, the parties will know whether their marriage will be valid. They can make plans and have justified expectations based on their knowl-

---

<sup>140</sup> *Id.* at § 132.

<sup>141</sup> See *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>142</sup> RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 283, at 233 (1969).

<sup>143</sup> For a discussion of why "violates the strong public policy" is equivalent to "void," see STRASSER, LEGALLY WED, *supra* note 77, at 111-12 & n.48-51. See also FIRST RESTATEMENT, *supra* note 139, § 132 cmt. b (describing void marriage as one which offends strong policy of the state).

edge that because their marriage was valid according to the laws of the relevant states, their marriage will be recognized throughout the United States.

States might declare a marriage void<sup>144</sup> or voidable<sup>145</sup> or, perhaps, merely prohibited.<sup>146</sup> The general rule for the validity of marriages is that only marriages *void* in the domicile will be invalid when validly celebrated in another state.<sup>147</sup> As the Court explained in *Loughran v. Loughran*,<sup>148</sup> "Marriages not polygamous or incestuous or otherwise declared *void* by statute will, if valid by the law of the State where entered into, be recognized as valid in every other jurisdiction."<sup>149</sup> When the *Loughran* Court was discussing the statute declaring the marriage void, the Court was referring to the statute of the *domicile*. In the very next sentence, the Court pointed out that the "mere statutory prohibition by the State of the *domicile*"<sup>150</sup> would not "invalidate a marriage solemnized in another state in conformity with the laws thereof."<sup>151</sup> As the Court explained in *Modern Woodmen of Am. v. Mixer*,<sup>152</sup> "[M]arriage looks to domicil."<sup>153</sup>

A different question may arise when assessing *which* domicile's law should determine the validity of a marriage. For example, sup-

<sup>144</sup> See ARIZ. REV. STAT. § 25-101 (1991) (incestuous marriages void).

<sup>145</sup> See CAL. FAM. CODE § 2210 (West 1994) (voidable marriages include underage marriages and those obtained by fraud).

<sup>146</sup> A marriage might be prohibited if it did not meet certain formal requirements of the state. Cf. *Barrons v. United States*, 191 F.2d 92, 94 (9th Cir. 1951) (discussing the "formal requirements of the laws of the state of residence relating to such matters as the essential recitals of the marriage certificate, authorization to issue the license and perform the ceremony, and similar details.").

<sup>147</sup> There is an exception to this rule if the domicile has an evasion statute which specifies that domiciliaries' marriages which are *prohibited* (rather than void) in the domicile will not be recognized even if validly celebrated elsewhere. See Strasser, *Judicial Good Faith*, *supra* note 77, at 354-358; see also WIS. STAT. ANN. § 765.04 (West 1993) which provides:

If any person residing and intending to continue to reside in this state who is disabled or prohibited from contracting marriage under the laws of this state goes into another state or country and there contracts a marriage prohibited or declared void under the laws of this state, such marriage shall be void for all purposes in this state with the same effect as though it had been entered into in this state.

<sup>148</sup> 292 U.S. 216 (1934).

<sup>149</sup> *Id.* at 223 (emphasis added) (footnote omitted).

<sup>150</sup> *Id.* (emphasis added).

<sup>151</sup> *Id.* (footnote omitted).

<sup>152</sup> 267 U.S. 544 (1925).

<sup>153</sup> *Id.* at 551.

pose that one of the parties to a marriage were to become domiciled in a state twenty years after having celebrated that marriage in a different state. Suppose further that the new state declared the party's marriage void. Would the marriage of the past twenty years be treated as void and of no legal effect because the new domicile of one of the parties treated it as void? Both the *First* and the *Second Restatements*, as discussed *supra* in Part I.F, determine the validity of a marriage by looking at the domicile at the time of the marriage or, perhaps, immediately following the marriage. This way, marital status can be established early and with certainty. Important rights involving family or property will not suddenly be destroyed years after the wedding has taken place without the parties having had notice at the time of the marriage that the validity of their marriage might be in doubt. Individuals can make plans and have reasonable and justified expectations about their marriage and about how they might go about living their lives.

Perhaps it would seem that the analysis here cannot be correct because an individual married in State A may move twenty years later to State B and be divorced under State B's law.<sup>154</sup> Yet, a divorce is different from an annulment, since the latter may involve a marriage being declared void and of no legal effect, notwithstanding the marriage having been valid under State A's law.<sup>155</sup> In the latter case, the "nonspouse" might be held to have had no property rights resulting from the twenty-year marriage.<sup>156</sup> It is somewhat unclear, however, whether the Supreme Court would affirm such a holding. In this regard, *Vanderbilt v. Vanderbilt*<sup>157</sup> may be instructive.

In *Vanderbilt*, the Court held that while a state could grant a divorce even if it did not have jurisdiction over one of the spouses, the state could not determine the property rights of the spouse over

---

<sup>154</sup> See *Williams v. North Carolina (Williams II)*, 325 U.S. 226, 229-30 (1945) ("The domicil of one spouse within a State gives power to that State . . . to dissolve a marriage wheresoever contracted.").

<sup>155</sup> See *Commonwealth ex rel. Knobe v. Knobe*, 27 A.2d 536, 538 (Pa. Super. Ct. 1942) ("A decree of annulment . . . declares that the marriage was void from the very beginning."); *Southern Ry. Co. v. Baskette*, 133 S.W.2d 498, 502 (Tenn. 1939) ("The legal effect of the judgment in the annulment suit was to render this voidable marriage a nullity—that is, judicially declare that it never had been a legal and lawful marriage.").

<sup>156</sup> Such a "nonspouse" might be treated as a putative spouse. See, e.g., CAL. FAM. CODE § 2251 (West 1994) (discussing division of property when putative spouse involved).

<sup>157</sup> 354 U.S. 416 (1957).

whom it did not have jurisdiction.<sup>158</sup> Were a state able to treat a marriage as void notwithstanding that union having been valid in the states of celebration and domicile at the time of the marriage, the state might not only be dissolving the marriage but affecting property rights, custody rights, etc.<sup>159</sup> The Court might well look askance at such a result.

Similarly, in *Maynard v. Hill*,<sup>160</sup> the Court quoted with approval a decision by the Supreme Court of Connecticut upholding the constitutionality of that state's divorce law.<sup>161</sup> The Connecticut court had worried that if it struck down the law as unconstitutional, it could have caused "consequences easily conceived but not easily expressed, such as bastardizing the issue and subjecting the parties to punishment for adultery."<sup>162</sup> Were states able retroactively to nullify unions valid in the states of celebration and domicile at the time of the marriage,<sup>163</sup> they might cause children to have only one legal parent rather than two and might subject couples to criminal punishment.<sup>164</sup>

## II. DEFENSE OF MARRIAGE ACT ("DOMA") AND COVENANT MARRIAGES

Congress claimed to be exercising its power under the Full Faith and Credit Clause when it passed the Defense of Marriage Act, which denounces same-sex marriages. Should Hawaii or some

---

<sup>158</sup> *Id.* at 419 ("[t]he Nevada decree, to the extent it purported to affect the wife's right to support, was void and the Full Faith and Credit Clause did not obligate New York to give it recognition." (footnote omitted)).

<sup>159</sup> See Kramer, *Same-Sex Marriage*, *supra* note 68, at 2000 (DOMA "expressly authorizes states to ignore even judgments involving the marital rights or status of a same-sex couple. All bets are off for these people, and no divorce decree, property settlement, or adoption is safe.").

<sup>160</sup> 125 U.S. 190 (1888).

<sup>161</sup> See *id.* at 207-08 (quoting *Starr v. Pease*, 8 Conn. 541 (1831)). The state's divorce law was challenged on the ground that it violated Article I, § 10 of the Constitution which prohibits states from passing laws which impair contractual obligations.

<sup>162</sup> *Id.* at 208.

<sup>163</sup> A different question would be presented were the marriage void or voidable at the time of celebration because then the parties would be on notice that their marriage's validity was in doubt. See Strasser, *Judicial Good Faith*, *supra* note 77, at 354; cf. Willis L.M. Reese, *Marriage in American Conflict of Laws*, 26 INT'L & COMP. L. Q. 952, 954-55 (1977) ("to the extent possible, the choice of law rules applicable to marriage should be clear and precise so that the parties may be able to foretell with fair confidence what law will be applied to their relationship.").

<sup>164</sup> Insofar as a state had a sodomy statute which had an exception for married couples, couples might be subject to prosecution if their marriages were not recognized.

other state recognize same-sex marriages, the constitutionality of the Act will be challenged. Even if held unconstitutional, however, it may be for reasons which have nothing to do with whether Congress has the power to lessen the credit due to sister state judgments.<sup>165</sup> That power may not be tested until a law is passed which, for example, exempts certain divorce decrees from full faith and credit.<sup>166</sup> At that time, the Court may be forced to address this issue squarely, if it has not done so already.<sup>167</sup>

### A. DOMA

The Defense of Marriage Act reads in relevant part:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.<sup>168</sup>

There are certain ambiguities to this Act. Because it does not mention choice of law anywhere, it is unclear whether a state which has adopted the *Second Restatement* will be entitled to not recognize a marriage which had been valid in the states of celebration and domicile at the time of the marriage.<sup>169</sup> Arguably, such a state would be required under its own choice of law rules to apply the other states' laws to determine the validity of the marriage.<sup>170</sup>

---

<sup>165</sup> See, e.g., Mark Strasser, *Ex Post Facto Laws, Bills of Attainder, and the Definition of Punishment: On DOMA, the Hawaii Amendment, and Federal Constitutional Constraints*, 48 SYRACUSE L. REV. 227 (1998) (suggesting that DOMA violates Bill of Attainder guarantees). For an argument suggesting that Colorado's Amendment 2 violated bill of attainder guarantees, see generally Akhill Reed Amar, *Essay, Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203 (1996).

<sup>166</sup> In the alternative, the Act might be challenged on equal protection grounds. In *Romer v. Evans*, 517 U.S. 620 (1996), the Supreme Court struck down Colorado's Amendment 2 at least in part because the amendment raised "the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." See *id.* at 634. A similar analysis might be offered here.

<sup>167</sup> But see *infra* notes 232-244 and accompanying text (suggesting that due process guarantees might prevent Congress from enacting such legislation).

<sup>168</sup> See Pub. L. No. 104-199, 110 Stat. 2419 (1996) (emphasis added).

<sup>169</sup> As discussed earlier, the *Second Restatement* looks to the laws of the domicile at the time of the marriage or immediately following the marriage in order to determine the validity of that marriage.

<sup>170</sup> See Strasser, *Loving the Romer Out for Baehr*, *supra* note 44, at 294-96; see, e.g.,

Some commentators suggest that, rather than merely expanding the possible choice of law options for each state, DOMA involves Congress imposing its own choice of law rules which supersede those of the individual states.<sup>171</sup> However, there are reasons to reject that analysis. First, members of Congress claimed that DOMA did not change state law<sup>172</sup> and merely "reaffirm[ed] current practice and policy."<sup>173</sup> Had Congress supplanted state law with federal law, one could hardly claim that current practice and policy had not been changed. Second, if Congress had wanted to include choice of law rules, it would have done so. For example, when it passed the Full Faith and Credit for Child Support Orders Act,<sup>174</sup> it included a provision regarding choice of law.<sup>175</sup> Third, it is unclear what these federally imposed choice of law rules would be, and courts would simply have to guess.<sup>176</sup> For example, would subsequent domiciles be allowed to refuse to recognize same-sex marriages if those unions were void there? Prohibited there? Would nondomiciles be allowed not to recognize such marriages? Under what conditions?

While DOMA may affect how and whether marital property is distributed or support payments are made, a much different worry is suggested by the Act which may render domestic relations law somewhat complicated. Suppose that Hawaii comes to recognize same-sex marriages. Suppose further that Lynn and Kim, a same-sex couple domiciled in Hawaii, marry there. A few years into the marriage, Lynn decides that she no longer wants to be married to Kim and goes to Georgia to start a new life.

---

*In re Estate of Lenherr*, 314 A.2d 255, 258 (Pa. 1974) (applying Second Restatement rules to determine which state's law should be applied in assessing the validity of a particular marriage).

<sup>171</sup> See, e.g., Kramer, *The Public Policy Exception*, *supra* note 56, at 158 (suggesting that DOMA involves a "federal choice-of-law rule.")

<sup>172</sup> See, e.g., 142 CONG. REC. S4870 (daily ed. May 8, 1996) (statement of Sen. Nickles) ("This bill does not change State law").

<sup>173</sup> *Id.*

<sup>174</sup> 28 U.S.C. § 1738B (1994).

<sup>175</sup> 28 U.S.C. § 1738B(g). 28 USCA § 1738B(h) suggests that to establish, modify, or enforce a child support order, the forum state's law will apply except that (1) the issuing state's law will apply with respect to the duration of the payments and (2) in an action for arrears under a child support order, the statute of limitations will be either that of the forum or that of the issuing state, whichever is longer.

<sup>176</sup> See Strasser, *Loving the Romer Out for Baehr*, *supra* note 44, at 305-06 (discussing different possible choices); cf. Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1 (1991) (advocating that federal choice of law rules be drafted for certain kinds of disputes).

After Lynn has abandoned her, Kim files for divorce in Hawaii. Suppose that Kim is granted the divorce. Under DOMA, Georgia would be entitled to refuse to recognize that divorce. Suppose further that Lynn goes to court in Georgia to have her marriage to Kim declared null and void and gets a judgment to that effect.<sup>177</sup> One issue would involve the division of marital property. According to Hawaiian law, there might be marital property to be divided, although Georgia might refuse to recognize any property division imposed by the Hawaiian courts. Thus, suppose that Lynn had withdrawn from the bank a substantial amount of money which had been earned during the marriage. According to Hawaiian law, this would be marital property subject to division,<sup>178</sup> although DOMA would permit Georgia to refuse to enforce a judgment from a Hawaiian court to that effect.

This hypothetical would have been even more complicated if child support was at issue, since courts would then have to decide how to reconcile DOMA with the Full Faith and Credit for Child Support Act.<sup>179</sup> DOMA would suggest that rights to child support incident to a divorce would not have to be enforced whereas the Full Faith and Credit for Child Support Act would suggest otherwise.<sup>180</sup>

Suppose that Lynn seeks to have the Georgia child support judgment given full faith and credit in Hawaii. It is unclear whether Hawaii would have to give credit to that judgment. Georgia would not have to give effect to a judgment in Hawaii because Hawaii would be treating such relationships as marriages. DOMA exempts

---

<sup>177</sup> See GA. CODE ANN. § 19-3-3.1(b) (1996 & Supp. 1998) ("Any marriage entered into by persons of the same sex pursuant to a marriage license issued by another state or foreign jurisdiction or otherwise shall be void in this state.")

<sup>178</sup> See *Cassiday v. Cassiday*, 716 P.2d 1133, 1137 (Haw. 1986) (marital property to be divided according to what is just and equitable) (citing *Au-Hoy v. Au-Hoy*, 590 P.2d 80 (Haw. 1979)).

<sup>179</sup> See *Strasser, Loving the Romer Out of Baehr*, *supra* note 44, at 321-322 (discussing how this might be resolved). In *Wetmore v. Markoe*, 196 U.S. 68 (1904), the Court suggested that courts should not assume that Congress intends to make the law a means of avoiding support obligations. *Id.* at 77. Presumably, the Court would not interpret DOMA to permit avoiding those obligations unless such an interpretation was "positively required." *Id.*

<sup>180</sup> If, for example, the child and parent continued to live in Hawaii and Kim does not consent to Georgia having jurisdiction to make the modification, then the Georgia court would not have jurisdiction to modify the support decree. See 28 U.S.C. § 1738B(e)(2) (1996). Instead, the appropriate authorities would have the obligation to enforce the decree. *Id.* § 1738B(a)(1).



states from the usual obligations imposed by the Clause when the other state treats "a relationship between persons of the same sex . . . as a marriage." However, DOMA would not give Hawaii the same opportunity to reject Georgia's judgment, because Georgia does *not* treat such relationships as marriages. Presumably, a court would rule that the Georgia judgment would not be binding in Hawaii,<sup>181</sup> although that might depend upon whether DOMA was interpreted to have any bearing on how that issue should be resolved.

When DOMA permits states to refuse to recognize same-sex marriages validly celebrated elsewhere, it does not say that only future *domiciles* have that option—the Act read literally would entitle *any* state not to recognize such marriages. Yet, it is not at all clear that such a broad grant of authority to refuse to recognize same-sex marriages will pass constitutional muster.<sup>182</sup>

In other contexts, the Court has suggested that full faith and credit guarantees would be violated by Congress granting such broad authority to the states. In *Order of United Commercial Travelers of America v. Wolfe*,<sup>183</sup> the Supreme Court decided whether the Full Faith and Credit Clause required a South Dakota court to give effect to a provision of the constitution of a fraternal benefit society, when that provision was valid under the law of the state of incorporation, Ohio, but not the law of South Dakota.<sup>184</sup> The Court pointed out that "interwoven with [the] . . . financial rights and obligations" which members of such fraternal organizations have, "they have other common interests incidental to their memberships, which give them a status toward one another that involves more mutuality of interest and more interdependence than arises from purely business and financial relationships."<sup>185</sup> The Court

---

<sup>181</sup> See *Williams v. North Carolina (Williams I)*, 317 U.S. 287, 307 (1942) (Frankfurter, J., concurring) ("It is indisputable that the Nevada [divorce] decrees . . . were valid and binding in the state where they were rendered [i.e., Nevada.]"); see also *Tougas v. Tougas*, 868 P.2d 437, 447 (Haw. 1994) (The Full Faith and Credit Clause does not require a state to give credit to a foreign judgment which is in opposition to an earlier judgment issued in that state's own courts.).

<sup>182</sup> But see Kramer, *Same-Sex Marriage*, *supra* note 68, at 2000 (suggesting that existing law permits this).

<sup>183</sup> 331 U.S. 586 (1947).

<sup>184</sup> See *id.* at 588-589.

<sup>185</sup> See *id.* at 605-606.

analogized the relationship to one involving a marriage and suggested that just as the law of the domicile governs the marriage, the law of the state granting the incorporation must prevail.<sup>186</sup>

The question is why such laws "must prevail." The Court implied that it would be unfair to apply South Dakota's rather than Ohio's law because all of the society members' rights had to be determined by a single law.<sup>187</sup> Insofar as such a fairness claim implicates due process concerns,<sup>188</sup> then *Wolfe* would at least suggest that due process guarantees might be violated by not having the law of the state of incorporation prevail. However, the Court likened the state of incorporation to the marital domicile. This suggests by analogy that not having the domicile's law govern the marriage might have due process implications. The limits imposed by the Full Faith and Credit Clause are identical to those imposed by the Due Process Clause.<sup>189</sup> Congressional amendment of the Full Faith and Credit Clause would not affect the constitutional limitations on which state's law may be used when the validity of a marriage valid in the states of celebration and domicile is at issue if those limits are imposed by the Due Process Clause since the limitations imposed by the Due Process Clause would not be affected by Congress having modified the Full Faith and Credit Clause. If indeed the law of the domicile governs the marriage as a constitution-

---

<sup>186</sup> *Id.* at 606; see also *Modern Woodmen of Am. v. Mixer*, 267 U.S. 544, 551 (1925) ("The act of becoming a member [of a fraternal beneficiary society] is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicil, membership looks to and must be governed by the law of the State granting the incorporation."); *Supreme Council of the Royal Arcanum v. Green*, 237 U.S. 531 (1915) (law of state of incorporation must prevail).

<sup>187</sup> See *Wolfe*, 331 U.S. at 606 (quoting *Modern Woodmen of Am. v. Mixer*, 267 U.S. 544, 551 (1925)).

<sup>188</sup> See *International Shoe v. Washington Office of Unemployment Compensation and Placement*, 326 U.S. 310, 320 (1945) (due process implicates "traditional conceptions of fair play and substantial justice . . .").

<sup>189</sup> See Bruce Posnak, *Choice of Law: A Very Well-Curried Leflar Approach*, 34 *MERCER L. REV.* 731, 751 (1983) (suggesting that the Court's view seems to be that "the full faith and credit clause places no other limitations on a state forum's choice of law than those imposed by the due process clause."); Ralph U. Whitten, *The Constitutional Limitations on State Choice of Law: Full Faith and Credit*, 12 *MEM. ST. U. L. REV.* 1, 2 (1981) (suggesting that the limitations imposed on the states by the Full Faith and Credit Clause with respect to their choice of law rules are identical to the limitations imposed by the Due Process Clause).

al matter,<sup>190</sup> that would suggest that a state which is not the domicile of either party cannot invalidate the marriage.<sup>191</sup>

Certainly, there are differences between the society discussed in *Wolfe* and natural persons who might marry. For example, the latter are protected by the Privileges and Immunities Clause while the former may not be.<sup>192</sup> However, such a difference would militate in favor of states being unable to treat as void those marriages which were valid in the states of celebration and domicile at the time of the marriage because of such additional protection. Certainly, individuals would be deterred from travelling to a state which would refuse to recognize those individuals' marriages as a price of admission to that state. It is not at all clear that the Constitution permits states to charge such an admission price.<sup>193</sup>

In *Crandall v. Nevada*,<sup>194</sup> the Court struck down a Nevada law in which persons were charged a dollar for the right to exit the state.<sup>195</sup> In *Shapiro v. Thompson*,<sup>196</sup> the Court struck down a Connecticut law because the purpose of inhibiting migration into the state was constitutionally impermissible.<sup>197</sup> If *Crandall* and *Shapiro* involved impermissible interferences with the right to travel,

---

<sup>190</sup> A separate and different question would be involved if the individuals married in a foreign country rather than a sister state. Here, the discussion is limited to only those individuals who have married in the United States.

<sup>191</sup> Professor Silberman suggests that choice-of-law rules may require that (assuming Hawaiian comes to recognize same-sex marriages) a same-sex marriage celebrated by Hawaiian domiciliaries be recognized as valid by other states. See 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, 202 (1996). The same rule should apply wherever the individuals are domiciled at the time of marriage as long as that domicile treats the marriage as valid.

<sup>192</sup> See *Asbury Hosp. v. Cass County*, 326 U.S. 207, 210-11 (1945) (suggesting that nonnatural persons are not protected by the Privileges and Immunities Clause); *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 514 (1939) (Roberts, J., concurring) ("Natural persons, and they alone, are entitled to the privileges and immunities which Section 1 of the Fourteenth Amendment secures."); Michael G. Collins, 'Economic Rights,' *Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO. L.J. 1493, 1547 (1989) (Privileges and Immunities Clause limited to natural persons).

<sup>193</sup> But see Seth F. Kreimer, *Territoriality and Moral Dissensus: Thoughts on Abortion, Slavery, Gay Marriage and Family Values*, 16 QUINNIPIAC L. REV. 161, 182 (1996) ("I am afraid a federal system which vests domestic relations power in the states means precisely that migrants sacrifice legal advantages in their state of origin when they seek to exercise their rights to travel or migrate.").

<sup>194</sup> 73 U.S. 35 (1867).

<sup>195</sup> *Id.* at 39, 46.

<sup>196</sup> 394 U.S. 618 (1969).

<sup>197</sup> *Id.* at 631-33.

so too would a state requirement mandating one to give up the legal recognition of one's marriage as a price of admission to a neighboring state.<sup>198</sup>

### B. *Judgments and Laws*

Various states have enacted statutes which not only declare same-sex marriages void but also that such marriages will not be recognized even if recognized in another state.<sup>199</sup> For example, consider the Georgia statute declaring, "No marriage between persons of the same sex shall be recognized as entitled to the benefits of marriage. Any marriage entered into by persons of the same sex pursuant to a marriage license issued by another state or foreign jurisdiction or otherwise shall be void in this state."<sup>200</sup> One interpretation of this statute is that Georgia will refuse to recognize such a marriage of its *domiciliaries* even if that marriage is validly celebrated elsewhere. Suppose that Hawaii comes to recognize same-sex marriages. Suppose further that two individuals of the same sex who are domiciled in Georgia go to Hawaii to marry. Georgia might refuse to recognize that marriage validly celebrated in Hawaii. However, interpreted this way, Georgia would *not* be entitled to refuse to recognize a same-sex marriage of individuals *subsequently* moving to the state if that union was recognized by the individuals' domicile at the time of the marriage because only the same-sex marriages of Georgia *domiciliaries* would be considered void.

A different interpretation of that statute would be that Georgia would refuse to recognize a same-sex marriage which was recognized by the states of celebration *and* domicile at the time of the marriage. Thus, Georgia would have declared that regardless of

---

<sup>198</sup> See Strasser, *Loving the Romer Out for Baehr*, *supra* note 44, at 306-313; Thomas M. Keane, Note, *Aloha, Marriage? Constitutional and Choice of Law Arguments for Recognition of Same-Sex Marriages*, 47 STAN. L. REV. 499, 508-510 (1995) (discussing right-to-travel implications of same-sex marriage bans).

<sup>199</sup> See, e.g., ARK. CODE ANN. § 9-11-107 (Michie 1998); DEL. CODE ANN. tit. 13, § 101(a),(d) (Supp. 1996); GA. CODE ANN. § 19-3-3.1(b) (1996 & Supp. 1998); MISS. CODE ANN. § 93-1-1(2) (1997 & Supp. 1998); N.C. GEN. STAT. § 51-1.2 (Supp. 1997).

<sup>200</sup> See GA. CODE ANN. § 19-3-3.1 (1996 & Supp. 1998); see also MISS. CODE ANN. § 93-1-1(2) (Supp. 1998) ("Any marriage between persons of the same gender is prohibited and null and void from the beginning. Any marriage between persons of the same gender that is valid in another jurisdiction does not constitute a legal or valid marriage in Mississippi.").

where the individuals were domiciled at the time of their same-sex marriage, that union would not be recognized by Georgia. Notwithstanding that the state would have had *no* contacts with the parties or the marriage at the time of celebration, the state would nonetheless refuse to recognize the marriage. It is not at all clear, however, that it would be constitutional for a state to reserve such a power for itself.<sup>201</sup>

A separate question would be whether the state could refuse to permit the enjoyment of the incidents of such a marriage. Thus, merely because a state recognizes the validity of a marriage does not entail that the state must permit the couple in question to enjoy all of the benefits of marriage.<sup>202</sup> Yet, it should not be thought that states are utterly free to refuse to permit the enjoyment of the incidents of marriage whenever they so choose. If a state were to prevent same-sex couples from cohabiting<sup>203</sup> but subjected no other married couple to that limitation, equal protection guarantees would be implicated.<sup>204</sup>

### C. Declaratory Judgments

Suppose that Hawaii comes to recognize same-sex marriages *and that DOMA is found unconstitutional* on grounds which do not establish that there is a fundamental right to marry a same-sex partner.<sup>205</sup> Even without DOMA, states might adopt choice of law rules allowing them to refuse to recognize same-sex marriages validly celebrated elsewhere.<sup>206</sup> Assuming that such laws would pass

---

<sup>201</sup> See *supra* notes 184-199 and accompanying text.

<sup>202</sup> See Silberman, *supra* note 191, at 202 (recognizing the validity of marriage does not entail that the state must permit couples to enjoy the incidents of marriage).

<sup>203</sup> See *id.* at 204 (suggesting that the new domicile would be free to prevent the same-sex couple from cohabiting).

<sup>204</sup> Cf. *Romer v. Evans*, 517 U.S. 620, 633 (1996) (striking Amendment 2 of the Constitution of Colorado, in part, because it "singl[ed] out a certain class of citizens for disfavored legal status or general hardships . . ."). *Id.*

<sup>205</sup> For a discussion suggesting that the fundamental right to marry does include the right to marry a same-sex partner, see Mark Strasser, *Domestic Relations Jurisprudence and the Great, Slumbering Baehr: On Definitional Preclusion, Equal Protection, and Fundamental Interests*, 64 *FORDHAM L. REV.* 921, 951-80 (1995); see also Mark Tamney, *The Defense of Marriage Act: A "Bare Desire to Harm" an Unpopular Minority Cannot Constitute a Legitimate Governmental Interest*, 19 *THOMAS JEFFERSON L. REV.* 99, 99 (1997) (suggesting that DOMA interferes with the fundamental right of gays and lesbians to marry).

<sup>206</sup> Some states passed laws indicating that they would not recognize same-sex marriages validly celebrated elsewhere even before DOMA was passed. See, e.g., N.C. GEN.

constitutional muster,<sup>207</sup> there might nonetheless be a way to prevent states from refusing to recognize such marriages. One suggestion which has been made is that same-sex couples could get declaratory judgments affirming the validity of their marriages.<sup>208</sup>

Declaratory judgments may be issued when "an actual controversy has existed which requires a judgment to determine legal rights and relations."<sup>209</sup> Where marital status is in doubt and there is some dispute as to whether two individuals are (or were) married to one another,<sup>210</sup> an individual might want a legal declaration of "his marital status in order to determine his future conduct,"<sup>211</sup> e.g., whether he is still free to marry.<sup>212</sup>

A declaratory judgment can have the force and effect of a final judgment,<sup>213</sup> although there is some controversy whether a declaratory judgment would be subject to full faith and credit.<sup>214</sup> The

STAT. § 51-1.2 (1995 & Supp. 1997).

<sup>207</sup> But see *supra* notes 184-199 and accompanying text.

<sup>208</sup> See 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 Status and Incidents of Homosexual Marriages Following Hawaii's Baehr v. Lewin*, 32 J. FAM. L. 551, 588-89 (1994); Julie L. B. Johnson, *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, 1628 (1997); Jon-Peter Kelly, *Act of Infidelity: Why the Defense of Marriage Act Is Unfaithful to the Constitution*, 7 CORNELL J.L. & PUB. POL'Y 203, 217 (1997); Rebecca S. Paige, *Wagging the Dog—If the State of Hawaii Accepts Same-Sex Marriage Will Other States Have to?: An Examination of Conflict of Laws and Escape Devices*, 47 AM. U. L. REV. 165, 173 (1997).

<sup>209</sup> *Demorest v. DiPentima*, 324 N.W.2d 634, 636 (Mich. App. 1982).

<sup>210</sup> See *id.* at 635.

<sup>211</sup> *Id.* at 636.

<sup>212</sup> Sometimes, a dispute about marital status, e.g., whether a valid common law marriage had in fact been contracted, will determine who will be entitled to inherit. See *Smith v. Winder (In re Winder's Estate)*, 219 P.2d 18 (Cal. Ct. App. 1950) (woman held not to have had common law marriage and thus not to have been precluded from marrying deceased); *In re Danza*, 188 A.D.2d 530, 591 N.Y.S.2d 197 (2d Dep't 1992) (woman not entitled to elect against will because she was held not to have entered into common law marriage with deceased).

<sup>213</sup> See *Wall v. Wall*, 534 A.2d 465, 467 (Pa. 1987) ("a declaration as to the validity of a marriage, pursuant to section 206 of the Code, would be final . . .").

<sup>214</sup> See Habib A. Balian, *Til Death Do Us Part: Granting Full Faith and Credit to Marital Status*, 68 S. CAL. L. REV. 397, 406 (1995) (suggesting that it is not clear whether declaratory judgments would be entitled to the same full faith and credit as are other decrees). But see Henson, *supra* note 208, at 588-89 (suggesting that declaratory judgment would be entitled to same full faith and credit as is afforded to other judgments); Johnson, *supra* note 208, at 1628 (suggesting that but for DOMA, declaratory judgments would have to be given the full faith and credit due other judgments); Kelly, *supra* note 208, at 217 (suggesting that declaratory judgments would be subject to full faith and

Baker Court suggested, "[t]he Court has never placed equity decrees outside the full faith and credit domain."<sup>215</sup>

Two different kinds of scenarios should be distinguished. In the first scenario, a couple from a state declaring same-sex marriages void travels to a state recognizing such marriages, marries, and then seeks a declaratory judgment from a court in the celebratory state that their marriage is valid.<sup>216</sup> Assuming that the celebratory state follows the *First* or the *Second Restatement of the Conflict of Laws*, the court should consult the *domicile's* law to determine whether the marriage is treated by the domicile as void or whether the domicile has an evasion statute. If, for example, the domicile would treat the marriage as void and of no legal effect, the forum court should rule that the marriage is *invalid*, notwithstanding its validity in the celebratory state.<sup>217</sup> Otherwise, individuals could always evade the domicile's marital laws by simply going to a celebratory state which recognized the marriage and then getting a declaratory judgment that the marriage was valid.<sup>218</sup>

The above scenario should be distinguished from one in which a same-sex marriage is valid according to the laws of the states of celebration and domicile at the time of the marriage. A same-sex couple might still seek a declaratory judgment, either because they were planning on moving to a state which refused to recognize such marriages or because the couple would be travelling through such a state.<sup>219</sup> Arguably, notwithstanding both members of the couple claiming to have a valid marriage, an actual controversy would still be posed because the new state would have a statute on the books precluding recognition of such marriages.<sup>220</sup> Assuming

---

credit); Paige, *supra* note 208, at 173 (suggesting that but for DOMA, declaratory judgments would be considered subject to full faith and credit guarantees).

<sup>215</sup> Baker v. General Motors Corp., 118 S. Ct. 657, 664 (1998).

<sup>216</sup> See Henson, *supra* note 208, at 588 (suggesting this scenario).

<sup>217</sup> A separate question would be raised if the court in the celebratory state misconstrued, in good faith, the domicile's law and declared the marriage valid. In that event, the judgment would seem subject to full faith and credit guarantees. Cf. *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908) ("[A]s the jurisdiction of the Missouri court is not open to dispute the judgment cannot be impeached in Mississippi even if it went upon a misapprehension of the Mississippi law.").

<sup>218</sup> Some commentators suggest that individuals could nullify the domicile's laws in this way. See Henson, *supra* note 208, at 588-89; Kelly, *supra* note 208, at 217; Paige, *supra* note 208, at 174.

<sup>219</sup> See Kelly, *supra* note 208, at 203, 218.

<sup>220</sup> See Kelly, *supra* note 208, at 203, 218. But see David P. Currie, *Full Faith and Credit to Marriages*, 1 GREEN BAG 2D 7, 11 (1997) (suggesting that insulating a ruling

that the forum state followed either the *First* or the *Second Restatement of the Conflict of Laws*, the court would declare the marriage *valid*, because the states of celebration and domicile at the time of the marriage had recognized the union. It would not matter that there were other states (having no relation to the parties or the marriage at the time of the marriage) that would not recognize the union.

If Hawaii or some other state recognizes same-sex marriages and if DOMA is challenged and held constitutional, the above analysis would be inapplicable because Congress would have created an express exception to the normal operations of the Full Faith and Credit Clause. Absent DOMA, however, subsequent domiciles would seem obligated to give full faith and credit to a declaratory judgment specifying that a same-sex marriage was valid.

#### D. Covenant Marriages

Recently, Louisiana passed legislation creating a new form of marital union "a covenant marriage," which is more difficult to dissolve than a conventional marriage.<sup>221</sup> For purposes here, the question is whether other states should restrict the grounds of divorce for those who have entered into covenant marriages to those grounds specified in the relevant statute.<sup>222</sup>

Currently, states are not required to refuse to grant no-fault divorces to domiciliaries who had celebrated a covenant marriage in Louisiana. That divorce decree would be entitled to full faith and credit. As explained in *Williams v. North Carolina*,<sup>223</sup> "when a court of one state acting in accord with the requirements of procedural due process alters the marital status of one domiciled in that state by granting him a divorce from his absent spouse," that decree will not "be excepted from the full faith and credit clause merely because its enforcement or recognition in another state would con-

---

"from judicial reexamination in the absence of a meaningful opportunity—even in theory—to contest the order in the original proceeding would be difficult to reconcile with the rule of law.").

<sup>221</sup> See LA. REV. STAT. ANN. § 9:307 (West Supp. 1998) (listing exclusive grounds for divorce). A covenant marriage is a special form of legally recognized marriage where couples may only obtain a divorce if certain specified grounds can be established.

<sup>222</sup> Thus far, relatively few couples have signed up for covenant marriages. See Joan Kirchner, *Preacher Legislator Wants Georgia to Allow Covenant Marriages*, BATON ROUGE ADVOC., Jan 3, 1998, at 11A.

<sup>223</sup> *Williams I*, 317 U.S. 287 (1942).



flict with the policy of the latter."<sup>224</sup> Assuming no fraud or lack of jurisdiction, the "decree of divorce [would be] a conclusive adjudication of everything."<sup>225</sup>

A different issue would be whether a state court could estop an individual who had entered into a covenant marriage from seeking a divorce on grounds *other* than those specified in the relevant statute.<sup>226</sup> For example, suppose that an individual had entered into a covenant marriage but had then abandoned his wife. The individual *might* be estopped from seeking a divorce until he and his wife had been separated for two years,<sup>227</sup> even if the individual had met the residency requirement, had established domicile, and would otherwise have been entitled to secure a divorce. Of course, the court would not be *obligated* to prevent such an individual from divorcing his wife,<sup>228</sup> and the court might be precluded by the Due Process Clause from forever preventing the individual from getting a divorce if, for example, he had come from a state which had only allowed the party not at fault to seek a divorce.<sup>229</sup>

Some commentators have suggested that Congress pass a law requiring that "the grounds for divorce that are effective in the couple's domicile at the time of execution . . . be honored by other states."<sup>230</sup> Yet, it must be remembered that states might not only provide their domiciliaries with an option to enter into a covenant marriage but might, instead, enact fault-only divorce legislation.

---

<sup>224</sup> *Id.* at 303.

<sup>225</sup> *Williams v. North Carolina (Williams II)*, 325 U.S. 226, 232 (1945).

<sup>226</sup> Courts sometimes use estoppel in the domestic relations context. See, e.g., *Spellens v. Spellens*, 317 P.2d 613 (Cal. 1957) (en banc) (husband estopped from questioning validity of his marriage to wife); *Dietrich v. Dietrich*, 261 P.2d 269 (Cal. 1953) (en banc) (husband estopped from attacking validity of divorce decree); *Henley v. Houck*, 200 N.E.2d 99 (Ill. App. Ct. 1964) (ex-wife collaterally estopped from challenging divorce decree); *Attebery v. Attebery*, 111 N.W.2d 553 (Neb. 1961) (husband estopped from challenging divorce from wife); *Raspa v. Raspa*, 504 A.2d 683 (N.J. Super. Ct. Ch. Div. 1985) (husband estopped from challenging validity of marriage); *Watson v. Watson*, 270 S.E.2d 542 (N.C. App. 1980) (former wife estopped from challenging validity of foreign divorce decree).

<sup>227</sup> See LA. REV. STAT. ANN. § 9:307(5) (West Supp. 1998) (requiring separation for two years).

<sup>228</sup> See Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453, 496-97 (1998) (suggesting that a subsequent domicile would be free to ignore the divorce law of the state in which the marriage had taken place).

<sup>229</sup> See *infra* notes 237-248 and accompanying text (suggesting that a permanent prohibition on remarrying might violate due process guarantees).

<sup>230</sup> See *supra* note 228 and accompanying text.

While the proposal to use the marital domicile's divorce law was made in the context in which the married couple had agreed to be bound by those laws, it would be quite foreseeable for Congress to pass a law specifying that the divorce law in the marital domicile be applied regardless of whether the couple had opted for more stringent divorce requirements.<sup>231</sup> Further, such a proposal would entail that an individual who had married in a state which allowed no-fault divorce would nonetheless be bound by his or her domicile's fault-only divorce law. Various undesirable consequences might result from such a law, e.g., more unhappy couples staying together with negative consequences for their children<sup>232</sup> or charades in court where one spouse falsely admits to being at fault or the other spouse falsely testifies about his or her spouse's fault in order to secure a divorce.<sup>233</sup>

Commentators have further suggested that if marriages were treated as involving contracts rather than a kind of status, then the law of the state where the marital "contract" was made should be applied.<sup>234</sup> The issue of concern here is whether the Full Faith and Credit Clause might be used to affect which state's divorce law would be applicable to a particular divorce, bracketing the wisdom of changing the current system.

Suppose that Congress were to mandate that states must give full faith and credit to the domestic relations law of the state where

---

<sup>231</sup> It might be argued that the couple had opted for those more stringent requirements by choosing to marry while domiciled in a state which, for example, only allowed fault-based divorces.

<sup>232</sup> See *supra* note 228 and accompanying text (discussing experts who take the position that children are better off if the unhappy couple divorces since it would be harmful for the children to be around when the parents were in a constant state of warfare).

<sup>233</sup> See J. Herbie DiFonzo, *Alternatives to Marital Fault: Legislative and Judicial Experiments in Cultural Change*, 34 IDAHO L. REV. 1, 2 (1997) (discussing "the scripted courtroom behavior of most divorcing wives and husbands [who] played scenes from an adversary theater of the absurd. Wives usually breathlessly testified to their husbands' domestic beastliness, while their spouses almost always passed up their right to respond, many waiting outside the courtroom door for their freshly divorced ex-wives to bring them the good news of the liberating decree they had conspired to obtain.").

<sup>234</sup> See Rasmusen & Stake, *supra* note 228. The authors suggest that were marriage treated like other contracts, states would honor the contract's specifications unless contrary to local public policy. See *id.* at 496-97. This need not allow individuals to set up their own rules or even to opt for the divorce law of a different state. See *id.* at 499. Rather, it might be understood to specify that the law of the state where the marriage was contracted would be applied. For an additional argument suggesting that the law of the state where the marriage was contracted should be applied, at least with respect to the validity of the marriage, see *supra* notes 183-191 and accompanying text.

the marriage was contracted at the time it was celebrated.<sup>235</sup> The question here is whether the Full Faith and Credit Clause would permit such an enactment. While such an act would involve *increasing* rather than decreasing the credit which was due and would not involve Congress impermissibly reducing full faith and credit,<sup>236</sup> there are some fatal weaknesses inherent in this approach.

First, the Court has interpreted the Full Faith and Credit Clause as imposing greater obligations with respect to sister states' judgments than sister states' laws, notwithstanding Congress having made no such distinction.<sup>237</sup> If the Constitution requires that such a differentiation be made, then Congress would be precluded from *increasing* the credit due to sister states' marital laws in this way. Second, substantive due process guarantees might be implicated if such a rule would preclude an individual's opportunity to remarry in the future.<sup>238</sup>

In *Zablocki v. Redhail*,<sup>239</sup> the Court examined a Wisconsin statute limiting the remarriage rights of noncustodial parents who were behind in their child support payments.<sup>240</sup> The Court held the statute unconstitutional, in part, because certain individuals would be "absolutely prevented from getting married" by that statute.<sup>241</sup> The Court thereby suggested that statutes which in effect bar individuals from marrying or remarrying must shoulder a heavy burden of persuasion.<sup>242</sup> Fault-only divorce laws may in effect bar individuals from ever (re)marrying, either because neither spouse might be willing to act "wrongly" or because the innocent spouse might be unwilling to seek a divorce.

---

<sup>235</sup> This might create administrative difficulties and be an unwise policy. For example, courts might be in the position of having to learn the intricacies of the divorce laws of the various states.

<sup>236</sup> See *supra* notes 57-63 and accompanying text.

<sup>237</sup> See *supra* notes 64-65 and accompanying text.

<sup>238</sup> Of course, the individual would only be so precluded if the law of the marital domicile so precluded that individual, in which case the divorce law of the marital domicile would also seem constitutionally infirm. This might mean, for example, that a state would be precluded by the Constitution from reserving divorce for only innocent spouses.

<sup>239</sup> 434 U.S. 374 (1978).

<sup>240</sup> *Id.* at 375.

<sup>241</sup> *Id.* at 387.

<sup>242</sup> See *id.* at 383 (since right to marry is fundamental, critical examination of the state interests advanced in support of the classification would be required).

The Supreme Court has recognized that the freedom to marry is "one of the vital personal rights"<sup>243</sup> essential to the orderly pursuit of happiness."<sup>244</sup> Of course, this does not mean that states are precluded from regulating marriage. "To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed."<sup>245</sup> However, when a classification "significantly interferes" with the right to marry, the Court will critically examine "the state interests advanced in support of the classification."<sup>246</sup> The *Zablocki* Court made clear that when a "statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."<sup>247</sup>

It is simply unclear whether states have sufficiently important state interests to justify precluding individuals from divorcing (and thus being able to remarry) unless fault can be shown. If indeed such statutes would not be constitutional, this would have implications both for those states considering making their divorce statutes much stricter and for any attempt to apply those statutes wherever an individual may travel.

Certainly, it might be argued that no-fault divorce is of comparatively recent vintage;<sup>248</sup> thus, states can, of course, reenact fault-only divorce laws should they so desire. However, fault-only divorce laws were not examined in light of contemporary substantive due process jurisprudence and, as Justice Powell noted in his *Zablocki* concurrence, the previous laws might no longer pass constitutional muster.<sup>249</sup>

---

<sup>243</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

<sup>244</sup> See also *Turner v. Safley*, 482 U.S. 78, 96 (1987) (recognizing a constitutionally protected interest in marriage in the prison context).

<sup>245</sup> *Zablocki*, 434 U.S. at 386.

<sup>246</sup> *Id.* at 383.

<sup>247</sup> *Id.* at 388.

<sup>248</sup> See Martin Zelder, *The Economic Analysis of the Effect of No-Fault Divorce Law on the Divorce Rate*, 16 HARV. J.L. & PUB. POL'Y 241, 241 (1993) ("Almost all American states adopted a no-fault divorce statute during the 1970's.").

<sup>249</sup> See *Zablocki*, 434 U.S. at 399 (Powell, J., concurring in the judgment)

(State regulation has included bans on incest, bigamy, and homosexuality, as well as various preconditions to marriage, such as blood tests. Likewise, a showing of fault on the part of one of the partners traditionally has been a prerequisite to the dissolution of an unsuccessful union. A "compelling state purpose" inquiry would cast doubt on the network of restrictions that the States have fashioned to govern marriage and divorce.).

## CONCLUSION

The Full Faith and Credit Clause requires that full faith and credit be given to sister states' judgments and has authorized Congress to pass statutes to give effect to that requirement. Congress is thereby empowered not only to set up a registration system but also to prescribe the amount of credit due, as long as Congress does not attempt to circumvent the explicit constitutional requirement that *full* faith and credit be given. Because of that explicit requirement, DOMA is unconstitutional.

It is unclear whether Congress has also been authorized to increase (but not decrease) the credit due to sister states' Acts. The Supreme Court has interpreted the Full Faith and Credit Clause to require that *less* credit be given to acts than to judgments, although the Court has never made clear whether Congress can legislatively overrule that interpretation. Perhaps federalist principles incorporated within the Constitution would preclude Congress from forcing states to be subservient to sister states' divorce laws in certain circumstances, although that is controversial. What is less controversial is that states must respect the minimal due process guarantees surrounding marriage. When states refuse to recognize a marriage which is valid according to the laws of the states of celebration and domicile at the time of the marriage, they attempt to exempt themselves from the constitutional constraints which protect the rights of all citizens.

Our current constitutional system involves a careful balancing of the powers of the states with respect to each other and with respect to the federal government. Fundamental individual interests must be given their due weight whenever the powers of the states or the federal government are discussed. Were DOMA upheld as constitutional or were states allowed to ignore marriages which were valid in the states of celebration and domicile at the time of the marriage, the design of our current federal system would be undermined, making the United States more like a federation of sovereign states than a constitutional democracy. Further, were states allowed to preclude individuals from exercising the fundamental right to marry without establishing the sufficiently important state interests that would thereby be promoted, the equal protection and due process guarantees would be eviscerated. Such attempts to

---

undermine our constitutional framework must be rebuked. Otherwise, there will be "consequences easily conceived but not easily expressed"<sup>250</sup>—the destruction of families, the harming of children, and the undermining of basic human freedoms.

---

<sup>250</sup> See *Maynard v. Hill*, 125 U.S. 190, 208 (1888) (quoting *Starr v. Pease*, 8 Conn. 541 (1831)).

