

THE FRAMEWORK OF FULL FAITH AND CREDIT AND INTERSTATE RECOGNITION OF SAME-SEX MARRIAGES

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INTRODUCTION

This article considers whether a Massachusetts same-sex marriage or a Vermont same-sex civil union is entitled to full faith and credit in other states by virtue of the Full Faith and Credit Clause of Article IV of the United States Constitution (“the Clause”) and, under a statute enacted by Congress to implement that clause, § 1739 of the Federal Judicial Code.¹ This is a moot point if the United States Supreme Court in the future holds that the Fourteenth Amendment’s Equal Protection Clause renders unconstitutional provisions in the laws of many states that preclude a same-sex couple from marrying. This article begins therefore with the assumption that the Supreme Court will not hold that a state’s denial of the benefits of marriage—under whatever name, marriage itself or civil union—to a same-sex couple is a violation of the Equal Protection Clause of the Fourteenth Amendment. Because the Supreme Court has classified marriage as a fundamental right,² or because a ban on same-sex marriage involves gender discrimination,³ the equal protection analysis in the Supreme

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1. 28 U.S.C. § 1739 (2000).

2. *See* *Turner v. Safley*, 482 U.S. 78, 95 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978). In the hypothetical case of the same-sex couple, a claim of denial of a fundamental right would fail if marriage were to be defined as a union of persons of the opposite sex. *Loving v. Virginia*, 388 U.S. 1 (1967), suggests that might be an improper way to define the institution.

3. *See* *United States v. Virginia*, 518 U.S. 515, 533 (1996) (holding that the Equal Protection Clause demands “exceedingly persuasive” justification for gender-based discrimination). Is there no gender discrimination because men and women are treated equally—each must find someone of the opposite sex to marry? Or is there gender discrimination because the state will

Court's potential future decision giving states the option to ban same-sex marriage could well employ a stricter level of review for reasonableness of the classification than any rational basis standard.⁴ This hypothetical approval of anti-gay discrimination by the Supreme Court must be kept in mind in considering how that Court will rule on full faith and credit and related issues that will arise when some states accept the invitation to ban same-sex marriage, while others follow as a matter of state statute, or interpretation of a state constitution's provision that is equivalent to the federal Equal Protection Clause, the steps already taken by Massachusetts and Vermont.

Part I of this article lays out the pertinent constitutional and statutory provisions, most notably § 1739 of the Federal Judicial Code, which compels state courts to give to another state's nonjudicial records—which include marriage records—the same credit they have in the state that created the record when the same-sex couple married there. Part II of this article demonstrates that the Supreme Court has held that the portion of the Full Faith and Credit Clause directing one state to give effect to the laws of another state does not apply in a choice of law situation where more than one state has contacts to a legal issue that make its law eligible for application when tested by Due Process considerations. Nor does that portion of the implementing statute, § 1738 of the Federal Judicial Code,⁵ which has since 1948 dealt with the duty of one state to give effect to the law of another state, apply. Section 1738 is inapplicable because the Supreme Court has declared that it has the power to create its own rules concerning the credit one state owes to the laws of another, rules that supersede the apparent mandate of statutes Congress passed

not let Mike marry Mark because Mike is a male? The latter way of viewing the state action is more consistent with *Loving*, in my view.

4. If the Court accepts the characterization by the same-sex couple of marriage as a fundamental right, the appropriate degree of heightened scrutiny of the state's justification for denying the right to same-sex couples could be drawn from decisions such as *Carey v. Brown*, 447 U.S. 455, 461-62 (1980) (holding that the justification for discrimination affecting freedom of speech must be "carefully scrutinized"). See also *Police Dep't v. Mosley*, 408 U.S. 92, 98 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (holding that discrimination affecting the "fundamental right" of interstate travel must be judged not under any rational basis test but by the stricter compelling state interest test); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) (holding that discrimination affecting the fundamental right to vote must be "closely scrutinized").

5. 28 U.S.C. § 1738 (2000).

pursuant to the grant of power in the Full Faith and Credit Clause to implement that constitutional provision. Since no language of the Full Faith and Credit Clause confers such a power on the United States Supreme Court, this article concludes in Part II that this Clause of the Constitution must have a penumbra that expands upon the scope of the Clause found in its literal language.

Part II also shows how the Supreme Court has applied its penumbra powers to make inapplicable to a narrow class of judgments the provisions of the Full Faith and Credit Clause and that part of § 1738 dealing with credit owed to sister-state judgments. Primarily because a workers' compensation tribunal cannot make a choice of law when two states have the contacts to an employee's injury that make the law of each constitutionally eligible for application, the Court has created its own rule that, when one of the states makes a workers' compensation award, the other can deny it preclusive effect.

Part III of this article demonstrates how Congress intended in enacting § 1739 to compel state courts to follow the model of full faith and credit owed to sister-state judgments in dealing with nonjudicial records from a sister state. Marriage licenses are covered by this mandate because the issuance of state marriage licenses and compiling of marriage records was common in 1804 when § 1739 was enacted. On the other hand, *renvoi*—the process by which a court looks to the whole law of the state indicated by the forum's choice of law rules, and can as a result be sent by the conflicts rules of that state to the forum's own substantive law or that of a third state—was unknown in 1804. Thus the law concerning the preclusive effect of a marriage record that § 1739 compels the forum to apply is the marriage validity law of the state that created the record, not the law of some other state that the forum state's courts might apply because of choice of law considerations.

Part IV of this article considers the application of § 1739 in the case of an evasion marriage—wherein a same-sex couple from a state that bans same-sex marriage goes to Vermont or Massachusetts, marries there, and returns home. The part discusses whether § 1739 compels the courts of the domicile state to apply the marriage validity law of the state of celebration rather than voiding the marriage under forum law, as the court could do if a proponent of the marriage had not invoked § 1739. If the Defense of Marriage Act ("DOMA") is constitutional, it supersedes § 1739 with respect to marriage records

which Congress in 1804 intended to be treated like judgments. But what if DOMA is unconstitutional in purporting to authorize a state to give no credit to the same-sex marriages contracted in states that have made them lawful? Where the state of celebration of a civil union is Vermont, the Supreme Court precedent concerning workers' compensation awards could possibly apply as a basis for holding § 1739 inapplicable despite Congress's intent that the record of the civil union be given full faith and credit because a Vermont marriage license clerk cannot make a choice of law but must issue the license to a same-sex couple from out of state. Part IV concludes that Supreme Court precedent concerning full faith and credit to divorce decrees is more analogous in the context of litigating the validity of a marriage than a rule developed for awards of workers' compensation tribunals. The Court has in some circumstances required that full faith and credit be given in the marital domicile state to a divorce granted by a state where one spouse set up temporary residence, even though the latter court can apply only its own law on grounds for divorce. Under that analogy, the domicile state of the same-sex couple cannot apply its own law to void the marriage even though the Vermont marriage license clerk never considered that the domicile state forbade the civil union Vermont formalized.

Part IV also notes that, even if the divorce decree cases would not apply by analogy in the context of litigation in the domicile state of the validity of a Vermont same-sex civil union, application of the rule created for workers' compensation awards would not be a basis for refusing application of Massachusetts law if Massachusetts were the state in which the same-sex couple married before returning home. That is so because a Massachusetts marriage license clerk is directed by Massachusetts statute to make a choice of law and deny the license to a same-sex couple domiciled in a state with a marriage law that bans same-sex marriage.

Part V of this article considers the situation where a same-sex couple domiciled in Vermont civilly unites there or a same-sex couple domiciled in Massachusetts marries there, and the couple then takes up domicile in a state that does not authorize same-sex marriage. Even if DOMA is a constitutional exercise of a power of Congress to implement the Full Faith and Credit Clause, DOMA cannot displace due process limits on the power of the new domicile to apply its own law. Because that state had no contacts to the spouses when they

contracted their marriage, *Allstate Insurance Co. v. Hague*⁶ precludes the courts of the new domicile from employing that state's marriage law to directly or indirectly void the marriage. At most, DOMA authorizes a judicial "hands-off" approach, such as declining to divorce the couple.

This article concludes that in situations where a same-sex couple formalizes a civil union while visiting in Vermont or marries while visiting Massachusetts, the state of domicile, by virtue of the federal statute requiring full faith and credit to state records, § 1739, will have to recognize that marriage even though it is not authorized by the law of that state, unless DOMA has constitutionally removed applicability of § 1739 to marriage records. This article also demonstrates that when same-sex partners who are bona fide domiciliaries of Vermont form a civil union there or, being domiciliaries of Massachusetts, marry in that commonwealth and later change their domicile to a different state, the new state of domicile cannot deny the existence of the status created by Vermont or Massachusetts. The reason is that the time of interest for determining a state's eligibility to have its law apply to a marriage or civil union is the moment the state of celebration purports to establish the status. The new domicile has no connections at all to Vermont or Massachusetts at the crucial time and thus under *Allstate Insurance Co. v. Hague* cannot apply its conflicting status law to the newly-arrived couple, even though DOMA purports to authorize it do just that.

For convenience, this article will henceforth speak of same-sex couples who formalize a civil union in Vermont as actually marrying there.⁷ Since Vermont law specifically provides that parties to a civil union have all the benefits and burdens of marriage of a male-female couple,⁸ the status created is identical to that created by marriage of a

6. 449 U.S. 302 (1981).

7. "Marry in Massachusetts or Vermont" is substantially less wordy than "marry in Massachusetts or unite civilly in Vermont."

8. The statute provides, in relevant part:

(a) Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, . . . as are granted to spouses in a marriage.

(b) A party to a civil union shall be included in any definition or use of the terms "spouse," "family," "immediate family," "dependent," "next of kin," and other terms that denote the spousal relationship, as those terms are used throughout the law. . . .

same-sex couple in Massachusetts pursuant to decisions of its Supreme Judicial Court.⁹ Creation of a trendy name for an established incident of marriage is not new to family law. For example, in California since the 1970s—apparently for reasons of political correctness—the term “divorce” has been banished and replaced by “dissolution,”¹⁰ and “alimony” discarded in favor of “spousal support.”¹¹ In Wisconsin, “alimony” is also out but replaced by “maintenance.”¹² But no one doubts that the Supreme Court precedents on divisible divorce that allow a state of domicile to dissolve a marriage based on in rem jurisdiction¹³ apply to California dissolutions and that the Supreme Court’s requirement of personal jurisdiction to impose or reduce an alimony obligation¹⁴ applies to spousal support and maintenance. So it is that any constitutional principle applicable to same-sex couples marrying in Massachusetts

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(d) The law of domestic relations, including annulment, separation and divorce, child custody and support, and property division and maintenance shall apply to parties to a civil union.

VT. STAT. ANN. tit. 15, § 1204 (2002); *see also Birth Mother and Civil Union Partner Are Both Parents of Child Born to Union*, 73 U.S.L.W. 1331 (2004) (discussing *Miller-Jenkins v. Miller-Jenkins*, No. 454-11-03 (Vt. Fam. Ct. Nov. 17, 2004), which held that when a female civil union partner gives birth to a child with her partner’s consent, both partners are legal parents of the child).

9. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004). That is not to say that a same-sex marriage is treated identically under all laws to the marriage of a male-female couple. Due to DOMA, in many instances the former cannot, but the latter couple can, for example, obtain federal income tax benefits by combining income on a joint return.

10. *Compare* CAL. FAM. CODE § 2000 (West 2004) (“dissolution”), *with* Law of May 27, 1963, ch. 605, § 1, 1963 Cal. Laws 1481 (repealed 1970) (“divorce”), *quoted in* *Bryan v. Bryan*, 63 Cal. Rptr. 612, 616 n.2 (Ct. App. 1967).

11. *Compare* CAL. FAM. CODE § 142 (West 2004) (“spousal support”), *with* *Warner v. Warner*, 215 P.2d 20, 21 (Cal. 1950) (quoting repealed CAL. CIV. CODE § 137 (“alimony”).

12. *Compare* WIS. STAT. § 767.08(2)(a) (2001) (“maintenance”), *with* *Carty v. Carty*, 275 N.W.2d 888, 889 (Wis. 1979) (concerning an award of “alimony” under WIS. STAT. § 247.26 (amended 1977) (current version at WIS. STAT. ANN. § 767.26 (West 2001)), *and* *Czaicki v. Czaicki*, 242 N.W.2d 214, 215-16 (Wis. 1976) (quoting former Wisconsin statute § 247.26).

13. *See* *Williams v. North Carolina*, 317 U.S. 287 (1942); *Williams v. North Carolina*, 325 U.S. 226 (1945).

14. *See* *Estin v. Estin*, 334 U.S. 541, 549 (1948) (holding that Nevada, when asserting jurisdiction over a divorcing couple based on in rem jurisdiction without personal jurisdiction over wife, could not reduce alimony obligation imposed on husband by New York court with in personam jurisdiction).

applies with equal force to the same-sex couple civilly uniting in Vermont.

I. FULL FAITH AND CREDIT: ARTICLE FOUR AND THE IMPLEMENTING STATUTES

Article IV, Section 1, of the United States Constitution provides: “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”¹⁵ Note that the clause does not apply when one of the involved jurisdictions is the federal government or a territory of the United States or, unless it is treated as a state under the Clause, the District of Columbia. This article uses the term “effect proviso” to refer to that part of the Full Faith and Credit Clause which authorizes Congress to enact statutes concerning the degree to which one state must apply the laws of another, honor the records of another, and enforce the judgments of another state.

Since 1948, the most-cited implementing statute, § 1738, has provided, after stating that acts, records, and judicial proceedings may be authenticated:

Such Acts, records and judicial proceedings or copies thereof, so authenticated, 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.¹⁶

Note that by adding the word “same,” § 1738 is clearer than the constitutional Clause in defining the faith and credit to be given. Section 1738 is construed to apply when the District of Columbia is one of the jurisdictions involved and also to judicial proceedings of federal courts in every state (as they are included in the term “every court within the United States”). Unless the District of Columbia is a

15. U.S. CONST. art. IV, § 1.

16. 28 U.S.C. § 1738 (2000). The third word of this statute, “records,” refers to judicial records only, since nonjudicial records are addressed in the second implementing statute, 28 U.S.C. § 1739 (2000). For full text of this statute, see *infra* text accompanying note 19.

state under the Article IV Clause,¹⁷ authority to include it in § 1738, as well as authority to apply that section to territories of the United States, is not derived from the constitutional grant in Article IV to prescribe the effect of proving an act, record, or judicial proceeding, but from Congress's plenary power over the District.

Between 1790 and 1948, the pertinent language of § 1738 was: "And the said records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the court of the state from whence the said records are or shall be taken."¹⁸ Note the exclusion of "Acts" and the inapplicability of the statute when the originating jurisdiction was not a state.

The second implementing statute, § 1739, provides for authentication of "[a]ll nonjudicial records or books kept in any public office of any State, Territory or Possession of the United States," and then declares:

Such records or books, or copies thereof, so authenticated, shall have the same full faith and credit in every court and office within the United States and its Territories and Possessions as they have by law or usage in the courts or offices of the State, Territory, or Possession from which they are taken.¹⁹

The final pertinent statute is the second section of DOMA, § 1738C, dealing with the obligation to recognize same-sex marriages:

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.²⁰

17. See *infra* notes 102-27 and accompanying text (concluding that the District probably is a "State" as the term is used in the Full Faith and Credit Clause).

18. Act of May 26, 1790, ch. 11, 1 Stat. 122 (1790) (current version at 28 U.S.C. § 1738 (2000)).

19. 28 U.S.C. § 1739 (2000).

20. 28 U.S.C. § 1738C (2000).

II. THE SUPREME COURT HAS HELD THAT THE FULL FAITH AND CREDIT CLAUSE AND SECTION 1738 DO NOT APPLY TO MOST CHOICE OF LAW ISSUES, NOR TO CERTAIN KINDS OF ENFORCEMENT JUDGMENT ISSUES

A. *Terminology of Full Faith and Credit Analysis*

Since “Acts” in the Full Faith and Credit Clause includes common law rules,²¹ I use the term “law prong” to refer to applicability of the pertinent part of the Full Faith and Credit Clause to choice of law questions in judicial or quasi-judicial tribunals. Under the law prong, the tribunal must decide whether a jurisdiction is constitutionally eligible to have its statute or common law rule applied; that is, whether the jurisdiction had contacts to the legal issue at the pertinent time of interest. If only one jurisdiction is so eligible, the law prong requires that this jurisdiction’s law be applied. Law prong issues arise before any government action has formally attached a law to the matter at hand. Since 1948, § 1738 has had a “law prong” that parallels that of the Article IV Clause.

Reference in both the constitutional provision and § 1738 to “judicial proceedings” concerns the obligation to honor a judgment entered, in some instances after a law prong decision has been made by the tribunal. For shorter reference I refer to the “judgment prong” of the constitutional Clause and § 1738.

“Records” in the constitutional Clause refers to nonjudicial applications of a law, such as creating a birth certificate, indexing and recording a deed, filing a security arrangement under the Uniform Commercial Code, and the like. Issuance of a marriage license involves creating a “record” under the Clause and § 1739, which

21. *See* *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66, 70-71 (1954) (noting in dictum that the common law of contracts of Illinois would be entitled to full faith and credit in other states in the case of a contract affecting only Illinois interests). If “Acts” in the Article IV Clause were construed to exclude common law rules, one state would nevertheless have to give credit to common law rules of another just as if the Clause did refer to common law as well as “Acts.” This is due to the Supreme Court’s holding that the Fourteenth Amendment’s Due Process Clause—which could not be restricted to “Acts” but must extend to laws of all kinds—imposes the same obligations to enforce out-of-state law as the Full Faith and Credit Clause does to “Acts.” *See* *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 n.10 (1981).

implements the records prong of the constitutional Clause.²² What is often called the “return” to the license—the certificate by a judge or cleric that he or she did marry the licensees—is also a record. The “records prong” of Article IV, Section 1, deals with the duty of tribunals in other states to give effect to such records. Section 1738 has no records prong because reference there to records is to legislative (law prong) and judicial (judgment prong) documents. This absence of a records prong has been clear since 1804 when § 1739, specifically dealing with nonjudicial records, was enacted.

The question of whether a jurisdiction that did not create the judgment or the record must give effect to it arises after the judge or record issuer has applied a law to the matter at hand. Usually the tribunal rendering a judgment has the power to apply out-of-state law in lieu of local law when a choice of law issue arises. A few judicial-type bodies are authorized to apply only the law of the jurisdiction in which they operate. Some decisions by these quasi-judicial bodies are nevertheless judgments for purposes of full faith and credit analysis. Usually the creator of a record can apply only local law and has no authority to deal with choice of law issues. This article uses the term “one law *matter*” to refer to the situation where the judge or issuer of a record could not constitutionally apply any law but that of a particular jurisdiction (which is not necessarily that of the jurisdiction where the official is operating). The term “one law *case*” is used when referring to judicial action only and not the creation of a record.

“Multi-law *matter*” refers to a process—judicial or record-making—to which the laws of more than one jurisdiction could constitutionally be applied, that is, a choice of law can be made. The determination by a state *X* record clerk as to whether the clerk should accept and file a deed to land located in state *X* and in the county where the clerk’s office is located is a multi-law matter if the grantor and grantee are domiciliaries of state *Y*. State *X* law might make the recordation conclusive of matters that would be subject to attack

22. Many cases hold that a marriage license or certificate was governed by § 1739 or its predecessor, former § 688 of Title 28 of the United States Code. See, e.g., *United States v. Neeley*, 475 F.2d 1136 (4th Cir. 1973); *Pittman v. Pittman*, 19 So. 2d 723 (Ala. 1944); *Reid v. State*, 53 So. 254 (Ala. 1910); *Witt v. State*, 59 So. 715 (Ala. Ct. App. 1912); *Schroder v. State*, 111 A.2d 587 (Md. 1955); *Armitage v. Seaboard Air Line Ry. Co.*, 164 S.E. 169 (S.C. 1932); *Skinner v. Vaughan*, 150 S.W.2d 260 (Tex. Civ. App. 1941); *State v. Kniffen*, 87 P. 837 (Wash. 1906).

under state *Y* law.²³ “Multi-law case” will be used when only judicial action is involved.

B. *The Full Faith and Credit Clause and Section 1738 Do Not Apply to Multi-Law Cases*

1. *The Clause Does Not Compel an Absurd Result*

This article will conclude that the general theory applied in determining the full faith and credit owed to a sister-state judgment, and not the rules applicable when the issue is what law should initially apply when a matter is litigated, should apply to marriage records proved under § 1739. To appreciate the significance of this distinction and also the limited applicability of DOMA to choice of law issues concerning the validity of a marriage, it is necessary to review how the Supreme Court has treated the Article IV Clause and § 1738, one of the implementing statutes, as a limitation—or more accurately as not being a limitation—on its own power to decide law prong and judgment prong issues in the manner the Court considers most appropriate.

As early as 1908, the Court established that a forum in state *Y*, asked to enforce a judgment of state *X*, could not decline to do so on the ground that enforcement would violate *Y*'s public policy.²⁴ Recently the court drew on cases following this precedent to state that with respect to sister-state judgments, “the full faith and credit obligation is exacting.”²⁵ But the Court said in the same case that its “precedent differentiates the credit owed to laws (legislative measures and common law).”²⁶ In the choice of law context, when two or more states have the contacts to an issue that make the law of each constitutionally eligible to be applied, the forum is usually under no

23. *Fall v. Eastin*, 215 U.S. 1, 11-12 (1909), would seem to permit a court in state *Y* to make a determination of the preclusive effect of the state *X* recordation, with the judgment of *Y* then enforced in an in personam action in state *X*. In any event, the issue of the effect of recordation certainly could arise outside state *X*.

24. *Fauntleroy v. Lum*, 210 U.S. 230 (1908).

25. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998) (quoted in *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 494 (2003)). We shall see that there is at least one significant exception to this rule: awards from tribunals implementing state workers' compensation laws. See *infra* notes 102-13 and accompanying text.

26. *Baker*, 522 U.S. at 232.

constitutional or statutory constraint in selecting the law to apply. As far as the Article IV Clause is concerned, the forum essentially can do whatever it wants to do because the Supreme Court has in effect construed the reference in Article IV to full faith and credit for “Acts” (laws) as not regulating a court making a choice of law, so long as the law chosen comes from a jurisdiction having some minimum contacts to the issue being litigated. The Court has treated the post-1948 text of § 1738 in precisely the same manner: it does not apply to choice of law issues.²⁷

a. *The Alaska Packers Case*

The Supreme Court first observed that the Full Faith and Credit Clause and § 1738 could not reasonably be applied to multi-law cases in the 1935 decision in *Alaska Packers Ass’n v. Industrial Accident Commission*.²⁸ An employer contended that California, as the place of contracting, had to forego applying its workers’ compensation law by giving full faith and credit to that of the Territory of Alaska, the place of injury.²⁹ These contacts made the statutes of both jurisdictions constitutionally eligible to be applied to make an award to the employee.³⁰

Noting that Congress had not in § 1738 dealt with the obligation of California to give effect to Alaskan law (as the case arose before the 1948 amendment to that statute that sought to extend its mandate to “Acts” as well as records and judgments), the Court examined the language of the Article IV Clause, apparently as a possible source of guidance to the Court in its own creation of a rule of decision in the case before it.³¹ The Court observed that a literal reading of the clause would require, in a multi-law case, state *A* to apply the law of *B* and state *B* to apply the law of *A*.³² Denying each the right to apply its own constitutionally eligible law would be an “absurd result,” the

27. “In deciding constitutional choice-of-law questions, whether under the Due Process Clause or the Full Faith and Credit Clause, this Court has traditionally examined the contacts of the State, whose law was applied,” and not applied the “full faith and credit” provision of § 1738 to require that the forum mechanically apply the law of the other relevant state. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981) (footnote omitted).

28. 294 U.S. 532 (1935).

29. *Id.* at 538-39.

30. *Id.* at 544.

31. *Id.* at 546-47.

32. *Id.* at 547.

Court declared.³³ Consequently, it was “unavoidable that this Court determine for itself the extent to which the statute of one state may qualify or deny rights asserted under the statute of another.”³⁴ Having concluded that the Full Faith and Credit Clause did not address the issue, the Court declared that when two states had substantial contacts to an issue, whether one state was required to apply the law of the other would be determined “by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight.”³⁵ On the facts of *Alaska Packers*, the interest of neither of the two involved jurisdictions outweighed the intent of the other.³⁶ Thus California had the choice of applying its law or yielding to Alaska’s law.

b. The *Pacific Employers Case*

Because *Alaska Packers* did not involve a conflict between laws of sister states, what the Court had to say about the Article IV Clause was dictum, but it became a holding four years later in *Pacific Employers Insurance Co. v. Industrial Accident Commission*,³⁷ where the two jurisdictions whose laws were constitutionally eligible to be applied to a workers’ compensation dispute were California (place of injury) and Massachusetts (place of contracting). Section 1738 still did not—and would not until amended in 1948—extend to disputes over an obligation of a jurisdiction to apply the “Acts” of another state.³⁸

33. *Id.* The alternative was to construe the Full Faith and Credit Clause as making mandatory on the states the precise application of the prevailing choice of law methodology of the year 1787 and making every conflicts case a constitutional case. The Supreme Court was not about to turn the clock back on choice of law development by over a century and a half and to hugely expand federal question jurisdiction so that it embraced every case where the facts the plaintiff had to plead revealed that a choice of law issue was at hand. Concerning the Court’s distaste for “freezing” a choice of law method, note its decision at the dawn of the conflicts revolution (a concept mentioned there by the Court) in *Richards v. United States*, 369 U.S. 1, 2-3, 12-14 (1962) (citing 28 U.S.C. § 1346(b) (1958)), construing “the law of the place where the act or omission occurred” as referring to the whole law of that state (i.e., *renvoi*) to provide flexibility for the choice of law process in actions where the United States was a defendant.

34. *Alaska Packers*, 294 U.S. at 547. Note that by referring to its power with respect to conflicts of laws between sister states the Court was not limiting its power to create the governing rule for a conflict involving a federal territory.

35. *Id.*

36. *Id.* at 550.

37. 306 U.S. 493 (1939).

38. *See* 28 U.S.C. § 1738 (2000).

Thus, if, as contended by the Massachusetts employer, California was required to recognize that the Massachusetts law of workers' compensation applied to the case, that obligation could arise only out of the Article IV Clause. Quoting the "absurd result" passage of *Alaska Packers*, the Court held:

[T]he very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate. . . .

. . . .

This Court must determine for itself how far the full faith and credit clause compels the qualification or denial of rights asserted under the laws of one state, that of the forum, by the statute of another state.³⁹

As in *Alaska Packers*, the opinion in *Pacific Employers* indicates that the rule for resolving a choice of law dispute between two states with sufficient contacts to an issue to have constitutionally applicable laws involved a weighing of state interests. This rule was fashioned by the Court, rather than drawn from Article IV. Massachusetts was said to have an interest in providing a remedy for its employees injured out of state, but it was not an interest that "would override" the interest of California.⁴⁰ Indeed, in *Alaska Packers* "[c]onsiderations of less weight"—namely, California was not the state of injury in *Alaska Packers* as it was in *Pacific Employers*—led the Court to hold that California was free to apply its own law.⁴¹

After the decision in *Pacific Employers*, it was settled that the law prong of the Full Faith and Credit Clause itself could impose a duty on a state only in one-law cases. That is, the Clause's reference to "Acts," or law, of a state was limited to the situation where the forum, directed by the Clause to give credit to a law, had no significant contacts to the issue at hand while some other state had all the

39. *Pac. Employers*, 306 U.S. at 501-02.

40. *Id.* at 503.

41. *Id.*

significant contacts.⁴² The forum would violate the Article IV Clause if it did not apply the law of the state having all the significant contacts.

In multi-law cases, where two or even more states had contacts that entitled them to apply their own law, the power of a forum state to make a choice of law was not constrained by the Full Faith and Credit Clause but would be policed by the Supreme Court under a rule it created calling for weighing of state interests. In the situation where neither state's interest was viewed as strong enough to override that of the other state, the forum facing the choice of law issue was free to apply the law of either one of the states whose law was constitutionally eligible. Meanwhile, the Court was employing the Fourteenth Amendment Due Process Clause as the basis for distinguishing one-law and multi-law cases in choice of law disputes not between sister states but between a state and a foreign country, to which the Article IV Clause had no application.⁴³ In doing so, the Court was creating precedents that could later be applied to conflict of laws disputes between sister states.

2. *The Court Has Found a Penumbra of the Full Faith and Credit Clause*

What provision of the United States Constitution gave the Supreme Court the power to “determine for itself”—language found in both *Alaska Packers* and *Pacific Employers*—how the federal government could, through the judicial branch, compel states to deal with choice of law issues in multi-law cases in a particular manner (that is, by employing a weighing of interests tests that would displace the state's local choice of law rules, such as *lex loci delicti* in tort matters and *lex loci contractus* in contract cases)? In cases of sister-state conflicts,⁴⁴ this power apparently comes from a penumbra

42. *See id.* at 502.

43. *See* Home Ins. Co. v. Dick, 281 U.S. 397 (1930) (holding that Texas had to apply Mexican law since Texas lacked sufficient contacts, assessed at time of making of contract in Mexico, to apply its law to void a provision thereof).

44. Recall that in *Pacific Employers*, the court said it would “determine for itself how far the *full faith and credit clause* compels” a state to make a choice of law in a particular manner. *Pac. Employers*, 306 U.S. at 502 (emphasis added). *Alaska Packers* also invokes the Full Faith and Credit Clause as if it could exert such compulsion on the states. See discussion of *Alaska Packers*, *supra* note 33 and accompanying text. Yet each decision persuasively demonstrated that the Clause simply could not apply to a multi-law case. Perhaps by these references to the

of Article IV's Full Faith and Credit Clause. Such a penumbra is the only way to explain why the quoted passages above from *Pacific Employers* are found in the part of the Court's opinion dealing with the employer's invocation of the Clause as compelling the California forum to apply the law of the employer's home state, Massachusetts.⁴⁵

If the First Amendment and other provisions of the Bill of Rights have penumbras,⁴⁶ certainly the Full Faith and Credit Clause can too. Viewed as of 1787 when the Clause became effective, there is good reason for assigning it a penumbra. The drafters of the Constitution included the Full Faith and Credit Clause in recognition of the fact that a workable federal union of states required each to give at least some respect to the laws of other states.⁴⁷ Since there was no developed common law methodology for choice of law in existence in 1787, the Framers could not have intended the Clause to make mandatory on the states an existing body of conflicts law.⁴⁸ Nor is it likely that the Framers intended by references to applying full faith and credit to "Acts" that the Supreme Court was to create choice of

Article IV Clause the Court was signaling that the weighing-of-interests rule it created in *Pacific Employers* and *Alaska Packers* was constitutionally based. That is, it was inartfully saying that the penumbra of the Article IV Clause empowered it to make a rule governing choice of law disputes that is not found in the Full Faith and Credit Clause. If a penumbra power explains *Alaska Packers*, the penumbra extends beyond the governance of sister-state conflicts disputes, the only type of such dispute the Clause itself could reach. The Court's exercise of a penumbra power to make a rule for recognition of workers' compensation awards in a case was subsequently involved in a dispute between the District of Columbia and Virginia. See *infra* notes 102-15 and accompanying text. This would support this notion of a penumbra to the Article IV Clause extending into conflicts disputes beyond the scope of the Clause itself, unless, as may be the case, the Court in the workers' compensation award case was viewing the District of Columbia as a State as that term is used in the Article IV Clause. See *infra* text accompanying notes 69-70, 108-09.

45. See *Pac. Employers*, 306 U.S. at 495, 500.

46. See *Griswold v. Connecticut*, 381 U.S. 479, 483, 484 (1965) ("[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion," and other provisions of "the Bill of Rights have penumbras."). Dissenting justices in *Wilson v. Schnettler*, 365 U.S. 381, 392 n.5 (1961) (Douglas, J., dissenting) found a penumbra in Article III, stating that "judicial discretion to deny declaratory relief is in the penumbra of the constitutional requirement of 'case or controversy.'"

47. See Kafahni Nkrumah, Note, *The Defense of Marriage Act: Congress Re-Writes the Constitution to Pacify Its Fears*, 23 T. MARSHALL L. REV. 513, 548 (1998).

48. According to an excellent choice of law treatise, around the time of the ratification of the United States Constitution, the most respected source of choice of law methodology was a ten-page essay presenting choice of law maxims written by Ulrich Huber of Holland, an English translation of which (referring to the writer by his Latinized name, Huberus) is quoted in a footnote to the opinion of the Supreme Court in *Emory v. Grenough*, 3 U.S. (3 Dall.) 369, 370 n.* (1797). EUGENE F. SCOLES ET AL., CONFLICT OF LAWS §§ 2.5, 2.7 (4th ed. 2004).

law rules from scratch which would have the force of constitutional law. Yet, in addition to the one-law problem, the Framers must have understood that choice of law questions in addition to the one-law problem—which their Article IV Clause did address—would arise, resolution of which would have an important impact on the success of federalism.⁴⁹ The Due Process Clause of the Fourteenth Amendment, as a basis for the Court to police the states in choice of law matters, would not be available for some eighty years after the drafting of the Full Faith and Credit Clause. The Framers could not have been anticipating a Due Process Clause directed to the states as a source of regulation by the Supreme Court of the choice of law process in the states.

A rule announced by the Supreme Court emanating from a constitutional penumbra is not mere federal common law that can be changed by an act of Congress,⁵⁰ a point that becomes significant when considering whether DOMA has an application to choice of law disputes over the validity of a same-sex marriage.

3. *Supreme Court Cases Finding Error in the Weighing of Interests and in Application of the Contra-Public-Policy Doctrine Cases Must Be Viewed as Decided Under the Penumbra of the Full Faith and Credit Clause*

The *Pacific Employers/Alaska Packers* weighing of interests rule for multi-law cases was refined and what appears to be a new rule concerning abuse of the contra-public-policy doctrine was created in a trio of peculiar post-*Alaska Packers* cases. I label these cases “peculiar,” because, as written, each decision seems to say that it was the Full Faith and Credit Clause, not a rule fashioned by the Court because of the inapplicability of the Clause to multi-law cases, that required one state’s law to be applied although another state had contacts to the issue that would, under a due process analysis, make it constitutionally eligible for application. That is, in these cases the

49. For example, the wording of the Clause does not seem to address a situation where states *A* and *B* have significant contacts to an issue but the forum state is *C*, which has no contacts to the issue. The Clause could, illogically, be read to direct *C* to apply the laws of both *A* and *B*.

50. See *Dickerson v. United States*, 530 U.S. 428, 437 (2000) (“Congress may not legislatively supersede our [the Supreme Court’s] decisions interpreting and applying the Constitution.”).

Court seems to overlook its discovery in *Alaska Packers* and *Pacific Employers* that the Full Faith and Credit Clause could not apply in multi-law cases. These three cases make sense if we view them as an exercise of the Court's power, claimed under the penumbra of the Article IV Clause, to make constitutionally-based rules of choice of law in cases where the Clause does not apply.

a. *Broderick v. Rosner*

The first of the group, *Broderick v. Rosner*,⁵¹ decided soon after *Alaska Packers* and before *Pacific Employers*, involved a suit in New Jersey by New York's commissioner of banking against New Jersey-domiciled shareholders of a New York bank to collect a shareholder assessment valid under New York law.⁵² A confusing New Jersey statute was construed by the Court as providing that New Jersey shareholders of any corporation could not be held liable for corporate debts except in an action in which all shareholders were joined, an impossibility in the bank commissioner's suit in New Jersey.⁵³ Relying on the Full Faith and Credit Clause and citing *Alaska Packers* in passing, the Supreme Court held that New Jersey could not apply its own law, but not because it lacked contacts required by due process to control the liability of New Jersey domiciliaries.⁵⁴ Rather, New Jersey could not defeat New York's policy by applying "a local policy . . . of enabling all residents of the State to escape from the performance of a voluntarily assumed statutory obligation, consistent with morality, to contribute to the payment of the depositors of a bank of another State of which they were stockholders."⁵⁵ That is, New York's law created a more worthy interest and hence, perhaps, a stronger interest than New Jersey's.

b. *Order of United Commercial Travelers v. Wolfe*

Broderick was relied on in a 1947 case, *Order of United Commercial Travelers v. Wolfe*,⁵⁶ to hold that South Dakota could not

51. 294 U.S. 629 (1935).

52. *Id.* at 630.

53. *Id.* at 638-40.

54. *Id.* at 642-44, 647.

55. *Id.* at 644.

56. 331 U.S. 586 (1947).

apply its statute voiding a six-months-to-sue proviso in a life insurance policy issued to a South Dakota resident by an Ohio fraternal benefit society.⁵⁷ The proviso was valid under Ohio law, and the opinion seems to say that the Full Faith and Credit Clause required South Dakota to apply that law.⁵⁸ The Court assumed that South Dakota had the contacts due process required to regulate the policy bought by its domiciliary, but concluded that “[t]he weight of public policy behind the general statute of South Dakota, which seeks to avoid certain provisions in ordinary contracts, does not equal that which makes necessary the recognition of the same terms of membership for members of fraternal benefit societies wherever their beneficiaries may be.”⁵⁹ This seems to be a very clear use of the weighing-of-interests test declared in *Pacific Employers* as the constitutional rule for resolving choice of law issues when the Full Faith and Credit Clause itself could not apply.

c. *Hughes v. Fetter*

In *Hughes v. Fetter*,⁶⁰ decided in 1951,⁶¹ a Wisconsin court had entered a judgment “on the merits” in favor of defendants in a wrongful death action. All of the parties were from Wisconsin. The death occurred in Illinois.⁶² Since Wisconsin was then using the *lex loci* method of choice of law,⁶³ plaintiffs relied on the Illinois wrongful death statute.⁶⁴ The wrongful death statute of Wisconsin applied by its terms only to deaths in that state.⁶⁵ The Supreme Court held that Wisconsin had to apply Illinois law, absent a bona fide application of the forum non conveniens doctrine (which would not have led to a

57. *Id.* at 624-25.

58. *Id.* at 609.

59. *Id.* at 624.

60. 341 U.S. 609 (1951).

61. The Court acknowledged that *Hughes* was its first “law prong” case after Congress rewrote § 1738 to extend the “same credit” rule—previously applicable only to judgments—to state laws as well. But the Court “found it unnecessary to rely on any changes accomplished by the Judicial Code revision” in deciding *Hughes*. *Id.* at 613-14 n.16.

62. *Id.* at 610.

63. See *Oehler v. Allstate Ins. Co.*, 87 N.W.2d 289, 290 (Wis. 1958) (indicating *lex loci* was still the choice of law method for tort cases in Wisconsin seven years after *Hughes*).

64. *Hughes*, 341 U.S. at 610.

65. *Id.*

judgment on the merits for the defendants).⁶⁶ The opinion is written as if it were the Full Faith and Credit Clause that imposed such a duty.

The Court said *Pacific Employers* would have permitted Wisconsin to apply its own statute to grant recovery.⁶⁷ Due process must, then, have allowed Wisconsin to apply its common law of torts, which did not recognize a cause of action for wrongful death.⁶⁸ The judgment on the merits for the defendants could only have been based on the state's common law of torts. The key to the Supreme Court's holding in *Hughes* is its conclusion that Wisconsin "ha[d] no real feeling of antagonism against wrongful death suits."⁶⁹ Thus, the Court, in its role—created under the powers it finds for itself in the constitutional penumbra to the Article IV Clause—of policing state courts in their handling of choice of law issues in cases where the Full Faith and Credit Clause does not apply, will examine whether denial of relief to a litigant is based on a non bona fide application of the contra-public-policy doctrine.⁷⁰

d. The Article IV Clause Cannot Explain These Decisions

Broderick's result cannot be viewed as an application of the law prong of the Full Faith and Credit Clause, which literally compels state *A* to apply the law of state *B* and vice-versa. If it were, and if New Jersey rewrote its statute to declare that shareholders were never liable for a corporation's debts absent an express contract to that effect, New York would have to apply that New Jersey law in a suit by the New York bank commissioner in New York courts against New Jersey shareholders over whom New York could get in

66. *Id.* at 612-13.

67. *Id.* at 612 n.10.

68. See *Hughes v. Fetter*, 42 N.W.2d 452, 453 (Wis. 1950) (stating that "[t]he right to recover for death by wrongful act is purely statutory").

69. *Hughes*, 341 U.S. at 612.

70. Other Supreme Court cases suggest a somewhat similar inquiry is to be made: if states *X* and *Y* have contacts to an issue sufficient to make the law of each constitutionally eligible as a matter of due process to govern the outcome, the Full Faith and Credit Clause nonetheless may compel a state to pick the state whose interests are "legitimate" if the other state's interest is not "legitimate." See *Nevada v. Hall*, 440 U.S. 410, 422 (1979) (stating that "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy"). *Accord* *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 497-98 (2003). No case bears on what "legitimate" means in this context. It seems unlikely that the term indicates no more than that the state's law is not unconstitutional.

personam jurisdiction. We know from *Pacific Employers* that the Court will not employ the Full Faith and Credit Clause in such a manner to bar New York, a state highly interested in the legal issue at hand, from applying its own law.

Wolfe cannot be viewed as an application of the Full Faith and Credit Clause, because if the Clause applied to conflict of laws cases concerning fraternal benefit insurance policies and the litigation were conducted in Ohio, it would require Ohio to apply the constitutionally eligible South Dakota rule, another "absurd result."⁷¹ Likewise, *Hughes* cannot rest on an application of the Full Faith and Credit Clause to multi-law wrongful death cases; that would require Illinois, if the plaintiff had sued there, to apply the common law of Wisconsin, which Wisconsin did apply, and to deny recovery. *Broderick* and *Wolfe* are best explained as applications of the interest-weighting test of *Alaska Packers*, a constitutional rule not found in the Article IV Clause but fashioned by the Court under its powers found in the penumbra of the Full Faith and Credit Clause. *Wolfe* has never been cited by the Supreme Court after *Allstate Insurance Co. v. Hague* announced in 1980 that the Court had "abandoned the weighing-of-interests requirement" of *Alaska Packers* and *Pacific Employers*.⁷² It has been implicitly overruled.

Broderick has been cited by the Court once since 1980,⁷³ but it seems inconceivable that it is still good law stemming from the penumbra of the Full Faith and Credit Clause after the specific abandonment of a constitutionally-based obligation to weigh state interests. If New Jersey cannot constitutionally apply its own law to relieve New Jersey shareholders in a New York corporation of shareholder liability imposed on other shareholders, the basis for the continued viability of such a holding would be the Dormant Commerce Clause⁷⁴ or the Equal Protection Clause of the Fourteenth Amendment.⁷⁵

71. See *supra* notes 38-40 and accompanying text.

72. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 n.10 (1981) (citing *Carroll v. Lanza*, 349 U.S. 408 (1955)).

73. See *Howlett v. Rose*, 496 U.S. 356, 381 (1990).

74. See *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986).

75. See *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888 (1988).

Hughes has been cited twice since 1980.⁷⁶ Its examination of whether a forum state has no real antagonism against the out-of-state law that the forum refused to apply by departing from its ordinary choice of law methodology appears to be something different from interest weighing. *Hughes* appears to have survived the demise of the interest-weighting rule derived by the Court from the penumbra of the Full Faith and Credit Clause.

4. *Extension of Section 1738 to Law-Prong Cases Leaves Supreme Court Rules Supplementing the Full Faith and Credit Clause Unchanged*

The implication of both *Alaska Packers* and *Pacific Employers* was that since the Article IV Clause dealt only with one-law cases, Congress, enacting implementing legislation pursuant to the effect proviso of the clause, could also deal only with one-law matters. But the issue was open: could Congress displace the Court's own rule for multi-law cases, apparently found in a penumbra of the Full Faith and Credit Clause, with something else? Stated differently, is there an implicit effect proviso in the penumbra of the Full Faith and Credit Clause which authorizes Congress to make choice of law rules different from those the Supreme Court has fashioned under its penumbra power?

In 1948, Congress acted by amending § 1738 to extend its same-credit rule from matters involving judgments and other judicial records to choice of law issues by adding a reference to state "Acts."⁷⁷ If the rewritten § 1738 actually did apply to multi-law cases, it would demand what the Supreme Court in *Alaska Packers* and *Pacific Employers* had called an "absurd result." Where states *A* and *B* both have the contacts to an issue that, applying the Due Process Clause, enable each of them to provide the governing law for a case, § 1738 would require *A* to apply *B*'s law and *B* to apply *A*'s.

76. *Printz v. United States*, 521 U.S. 898, 907 (1997); *Howlett*, 496 U.S. at 381.

77. 28 U.S.C. § 1738 (2000). For the text of the post-1948 § 1738, see *supra* text accompanying note 16. The Article IV Clause speaks merely of giving full faith and credit to the Acts of a state in the manner the state creating the laws would apply them, but § 1738, as amended, adds the requirement that this be the "same" full faith and credit. Hence § 1738 even more clearly than the constitutional clause calls for—if broadly construed—what the *Pacific Employers* court considered an absurd result.

The dissenting opinion of Justice Frankfurter in the 1955 case *Carroll v. Lanza*⁷⁸ raised the question whether the 1948 amendment to § 1738 had abrogated *Alaska Packers* and *Pacific Employers* by making applicable by statute the approach to multi-law cases that could be found in the Article IV Clause if it were literally construed (as the Court had refused to do). The plaintiff in *Carroll* was injured in Arkansas while working there under a Missouri employment contract with a subcontractor.⁷⁹ He obtained a Missouri workers' compensation award and then sued the prime contractor at common law in Arkansas.⁸⁰ Missouri law barred such a suit; Arkansas law did not.⁸¹ Clearly, the laws of both states were constitutionally eligible for application.⁸² The defendant insisted that Arkansas had to apply the Missouri law.⁸³ Justice Frankfurter wrote in response to the majority's affirmance of a judgment for the injured plaintiff by Arkansas courts applying Arkansas law:

[T]he new provision of 28 U.S.C. § 1738 cannot be disregarded. In 1948 Congress for the first time dealt with the full faith and credit effect to be given statutes. The absence of such a provision was used by Mr. Justice Stone to buttress the Court's opinions both in *Alaska Packers* . . . and *Pacific Employers* Hence, if § 1738 has any effect, it would seem to tend toward respecting Missouri's legislation.⁸⁴

The majority opinion ignores § 1738, applying *Pacific Employers* as if unchanged by the 1948 revision of the statute. This strongly suggests that the majority felt that § 1738 does not apply to multi-law cases and cannot do so to the extent that the source of power to enact it is the effect proviso of the Full Faith and Credit Clause, the constitutional provision that *Alaska Packers* and *Pacific Employers* had treated as inapplicable to multi-law cases. If the majority thought that Congress did have the power to supply a rule of full faith and credit law for multi-law cases but that the absurd same-credit test of

78. 349 U.S. 408 (1955).

79. *Id.* at 409.

80. *Id.* at 409-10.

81. *Id.*

82. *Id.* at 412-13.

83. *Id.* at 423.

84. *Id.* at 422 (Frankfurter, J., dissenting) (citations omitted).

the 1948 revision was an unconstitutional application of that power, one would have expected some statement to that effect in the majority opinion by Justice Douglas.⁸⁵

Subsequently, as we have seen, the weighing-of-interests rule drawn from the penumbra of the Article IV Clause was replaced by a freedom-to-choose rule in *Allstate Insurance Co. v. Hague*⁸⁶ without any consideration of whether the new freedom granted to state courts was inconsistent with § 1738. In 1985, the freedom-to-choose rule was again applied in *Phillips Petroleum v. Shutts*,⁸⁷ which acknowledged the existence of § 1738, but clearly considered it inapplicable to cases where more than one state had the contacts required by due process considerations to make its law applicable to decide the issue at hand.⁸⁸

It now seems clear that *Carroll v. Lanza* did implicitly hold that Congress's 1948 amendment to § 1738, apparently seeking to compel state *A* to apply *B*'s law and state *B* to apply *A*'s law when both have contacts to an issue, was an unconstitutional attempt by Congress to invoke the effect proviso of the Article IV Clause to specifically overturn a constitutionally-based decision of the Supreme Court, *Pacific Employers*. That aspect of *Carroll* makes it directly analogous to *City of Boerne v. Flores*,⁸⁹ which held unconstitutional Congress's invocation of section five of the Fourteenth Amendment to enact legislation (the Religious Freedom Restoration Act) that would have specifically abrogated the holding of the Court in *Employment Division, Department of Human Resources v. Smith*.⁹⁰ The latter case held that the First Amendment permitted a state to apply a general

85. Insofar as the revised § 1738 applies when one of the jurisdictions whose law is eligible is the District of Columbia or Puerto Rico or a territory of the United States, the source of congressional power to legislate is not the Full Faith and Credit Clause but, with respect to the District, the penultimate paragraph of Article I, Section 8 of the Constitution, empowering Congress "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may, by Cession of Particular States . . . become the Seat of Government of the United States," U.S. CONST. art I, § 8, cl. 17, and with respect to other territories and possessions, Article IV, Section 3's empowerment of Congress to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2.

86. 449 U.S. 302 (1981). None of the opinions in *Hague* even cites § 1738.

87. 472 U.S. 797 (1985). One opinion in *Shutts* cites § 1738 after quoting the Full Faith and Credit Clause. *Id.* at 824 n.1 (Stevens, J., concurring in part and dissenting in part). Section 1738 is never mentioned again in *Shutts*.

88. *Shutts* strongly indicates that a majority of the Court now accepts the reasoning of the four-justice plurality in *Hague*. See *id.* at 818-20.

89. 521 U.S. 507 (1997).

90. 494 U.S. 872 (1990).

regulatory law not directed against religion without qualifying the law with accommodation for religious practices.⁹¹ In short, both *Carroll* and *City of Boerne* said to Congress, “you can’t override our constitutionally-grounded decisions.”

But none of the cases dealing with constitutional limits on a forum’s power to make a choice of law squarely considered whether, operating under the effect proviso of the Article IV Clause, Congress could displace the weighing of interests rule of *Pacific Employers*, or its successor, the freedom-to-choose rule of *Hague*, with a statutory rule that did not call for weighing, but restricted freedom of choice. An example might be a directive to the states to use *lex loci delicti* in tort cases. Unlike the 1948 amendment to § 1738, such a statute would not require states to employ a choice of law rule that the Supreme Court had twice declared to be absurd. The answer to the question whether Congress can enact such a statute by invoking the effect proviso of the Article IV Clause⁹² apparently can be found in a Supreme Court decision not dealing with choice of law issues but with enforcement of judgments as required by the literal language of the Full Faith and Credit Clause and § 1738, a development to which we now turn.

C. *The Full Faith and Credit Clause and Section 1738 Are Held Inapplicable to Workers’ Compensation Awards*

1. *The Magnolia and McCartin Cases*

When considering whether and to what extent the Full Faith and Credit Clause and the primary implementing statute, what is now § 1738, apply to an award of a tribunal applying a state’s workers’ compensation law, the Supreme Court initially held, in *Magnolia Petroleum Co. v. Hunt*,⁹³ that both the Clause and statute applied in the same manner as if the award were a judgment by a court of the state.⁹⁴ Not only did the Court apply the Article IV Clause, but it quoted its effect proviso and noted that, pursuant to it, Congress had

91. *Id.* at 890.

92. It is questionable whether Congress could constitutionally enact such a statute by invoking its Commerce Clause power.

93. 320 U.S. 430 (1943).

94. *Id.* at 445-46.

enacted then § 687 of the Judicial Code (now § 1738): “Congress has provided that judgments ‘shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.’”⁹⁵ But just four years later, the Supreme Court in *Industrial Commission v. McCartin*,⁹⁶ another case involving a workers’ compensation award that could have been decided under § 1738 and the judgment prong of the Full Faith and Credit Clause, totally ignored that implementing statute.⁹⁷ *McCartin* created a rule inconsistent with the statute that the Court had quoted in 1943 in *Magnolia*. Where the worker’s injury was in one state and his employment contract was made in a different state, an award of benefits by one of the states did not bar an additional award in the other unless there was “some unmistakable language” of preclusion in the statutes or judicial decisions of the state that initially made the award which prohibited a supplemental award.⁹⁸ If state *A* had made an award, the implementing statute, § 1738, would compel state *B* to dismiss an application for an additional award if state *A*’s law sought to bar it in understandable words that did not meet *McCartin*’s “unmistakable language” test.⁹⁹

2. *The Court Uses Its Penumbra Power to Make Rules Concerning Recognition Owed to Judgments*

From what source did the Court get the power to fashion in *McCartin* the “unmistakable language” test? Although it seemed to

95. *Id.* at 437-38. The theory that the hearing held by a workers’ compensation tribunal is a “judicial proceeding” under § 1738—apparently accepted in *Magnolia*—is inconsistent with the holding many years later in *University of Tennessee v. Elliott*, 478 U.S. 788 (1986). See *infra* notes 185-89 and accompanying text, discussing *Elliott*’s holding that a hearing conducted by an administrative law judge for a state administrative agency is not such a judicial proceeding because those kinds of tribunals did not exist in 1790 when what is now § 1738 was first enacted. The nation’s first workers’ compensation law was enacted in March of 1909 by the Montana legislature (affecting only coal miners) and took effect on October 1, 1910. See 1 JAMES HARRINGTON BOYD, WORKMEN’S COMPENSATION AND INDUSTRIAL INSURANCE UNDER MODERN CONDITIONS 16-17, 22 (1913); see also ANNE RAMSAY SOMERS & HERMAN MILES SOMERS, WORKMEN’S COMPENSATION: PREVENTION, INSURANCE, AND REHABILITATION OF OCCUPATIONAL DISABILITY 31 (1954) (giving the history of workers’ compensation laws).

96. 330 U.S. 622 (1947).

97. See *id.* at 630.

98. *Id.* at 628.

99. See *Durfee v. Duke*, 375 U.S. 106, 107 n.2, 109 (1963).

say that the Article IV Clause was that source,¹⁰⁰ it could not be. If the Clause applied, so would the implementing statute, and § 1738 would have required the second state to honor the res judicata effect of the original award.¹⁰¹ The only possible explanation I can find is that the Full Faith and Credit Clause itself actually was not applied; rather, the Court created the “unmistakable language” test through the exercise of its powers derived from the penumbra of the Clause.

Since § 1738 is never mentioned in *McCartin*, that decision cannot be read as establishing with certainty that the full faith and credit rules created by the Court under its penumbra powers are unaffected by a statute passed by Congress. The bar to a supplemental award that § 1738 would have imposed based on language in the statutes of the state rendering the initial award that raised such a bar, although not in “unmistakable language,” would not have constituted an “absurd result.” Thus, had the *McCartin* court addressed the significance of § 1738, it could have applied that statute while distinguishing *Carroll v. Lanza*, which implicitly considered the statute inapplicable in the choice of law context in which it would have worked an absurd result.

3. *Thomas v. Washington Gas Light Co.*

Any uncertainty generated by *McCartin* concerning the applicability of the Article IV Clause and § 1738 clause to workers’ compensation awards ended in 1980 when the Court applied to such awards, treated as judgments under full faith and credit analysis, the logic of the law prong case *Pacific Employers*. The case was *Thomas v. Washington Gas Light Co.*,¹⁰² and it established that neither the Clause nor § 1738 applies to judgments of tribunals, such as workers’ compensation courts, whose jurisdiction is limited so that they cannot

100. “Only some unmistakable language by a state legislature or judiciary would warrant our accepting such a construction [i.e., that state *A* wishes to bar state *B*’s additional award]. Especially is this true where the rights affected are those arising under legislation of another state and where the full faith and credit provision of the United States Constitution is brought into play.” *McCartin*, 330 U.S. at 628.

101. Nothing in *McCartin* suggests that the Court considered a proceeding held by a workers’ compensation tribunal to be a “judicial proceeding” under the Full Faith and Credit Clause but not a “judicial proceeding” under the implementing statute. Compare this with the text accompanying notes 187-89, *infra*.

102. 448 U.S. 261 (1980).

make a choice of law but must apply only local law.¹⁰³ Instead, a Court-made rule that could only be authorized by the penumbra of the Clause applies to the awards of such a tribunal.

In *Thomas*, a majority of the Court—albeit in two separate non-majority opinions—concluded that the Court, by rules it would make, and not the Article IV Clause or § 1738, would govern the preclusive effect one state had to accord to another state's workers' compensation tribunal award.

Thomas involved an employee domiciled in the District of Columbia who was hired in the District by an employer with its principal place of business there.¹⁰⁴ The employee was injured on the job in Virginia.¹⁰⁵ *Alaska Packers* and *Pacific Employers* had, of course, established that on these facts the laws of both the District and Virginia were constitutionally eligible to be applied to determine what compensation the victim should receive. That is, prior to any adjudication, this was a multi-law case, the type to which § 1738 did not apply, and, in the state versus state context, to which the Article IV Clause also would not apply.

A Virginia tribunal made a workers' compensation award in the victim's favor.¹⁰⁶ A Virginia statute precluded the Virginia tribunal from choosing to apply the District of Columbia law in order to award the employee the greater damages he was entitled to under it.¹⁰⁷ Disregarding a provision of Virginia law that appeared to merge the victim's claim into the award so as to bar any further recovery, a tribunal in the District rendered a supplemental award.¹⁰⁸ If the judgment prong of § 1738 was constitutionally applicable, what the District did was prohibited, for it had not given the Virginia award the "same full faith and credit" it had under the Virginia law of *res judicata*. If the District were to be considered a state for purpose of applicability of Article IV's Full Faith and Credit Clause, the judgment prong of that Clause also would appear to have been violated by the granting of the supplemental award. The Fourth

103. *Id.* at 273 n.18, 286.

104. *Id.* at 264.

105. *Id.*

106. *Id.*

107. *See id.* at 265.

108. *Id.* at 265-66.

Circuit in an unpublished opinion reversed an order confirming the supplemental award.¹⁰⁹

A four-justice plurality of the Supreme Court held that a tribunal without power to consider possible application of another jurisdiction's constitutionally applicable law¹¹⁰ could not find authority in Article IV or § 1738 to "entrench[] on the interests of other States"¹¹¹ by entering a judicial-type award that would bar the other jurisdiction from vindicating its interest through application of its law to the matter at hand. Instead, the Court decided to extend the holding of *Pacific Employers* from law prong cases to some judgment prong cases. The plurality quoted this passage from *Pacific Employers*: "This Court must determine for itself how far the full faith and credit clause compels the qualification or denial of rights asserted under the laws of one state, that of the forum, by the statute of the other state."¹¹² Then Justice Rehnquist, joined by Justice Marshall in a dissenting opinion, stated: "I also agree completely with the plurality's ultimate conclusion that the rule announced in *McCartin* represents an unwarranted delegation to the States of this Court's responsibility for the final arbitration of full faith and credit questions."¹¹³ Both the Full Faith and Credit Clause and § 1738 do delegate to a state—that which renders the initial judgment—the power to determine how much preclusive effect the judgment will have in other jurisdictions, according to the terms of the rendering state's res judicata law.

Thus, six justices were in agreement on this rule to be found in the *Thomas* opinions: the Supreme Court, not Congress and not the

109. *Id.* at 266.

110. The plurality observed: "Although a Virginia court is free to recognize the perhaps paramount interests of another State by choosing to apply that State's law in a particular case, the Industrial Commission of Virginia does not have that power. Its jurisdiction is limited to questions arising under the Virginia Workmen's Compensation Act." *Id.* at 282.

111. *Id.* at 272.

112. *Id.* at 271 (quoting *Pac. Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 502 (1939)). Considered in the judgment prong context, the "statute" referred to at the end of the quotation is the Virginia res judicata statute, not Virginia's substantive statute granting lesser benefits than did the law of the District of Columbia.

113. *Id.* at 291 (Rehnquist, J., dissenting) (quoting the plurality opinion, *id.* at 271). *Industrial Commission v. McCartin*, 330 U.S. 622 (1947), was a decision contrary to the dissent's view that the Supreme Court alone could supply the rule governing full faith and credit owed to a workers' compensation award. *McCartin* would have allowed Virginia to preclude the supplemental award if its res judicata statute barred such a remedy by "unmistakable language." *Id.* at 628.

states, will decide how much credit is to be given to a workers' compensation award, and the Court is not guided by the language of the Article IV Clause, and certainly not by an implementing act passed by Congress, but creates a rule it considers most appropriate. The power to make that rule must be derived from the penumbra to the Article IV Clause discussed above.

These six justices were of the view that the obligation of state *B* to give effect to the res judicata law of state *A* concerning a judgment from a tribunal that could not consider applying *B*'s constitutionally eligible law was to be found, not in § 1738 or the Full Faith and Credit Clause (they would have barred the supplemental award), but in a rule created by the Supreme Court. That is where the six justices parted company. Justices Rehnquist and Marshall opted for a judge-made rule identical to that of the Article IV Clause and § 1738.¹¹⁴ The plurality fashioned an interest-weighting rule somewhat reminiscent of the rule created in *Pacific Employers*. It said that Virginia's interest in protecting the employer by placing a ceiling on liability was "not strong enough" to bar the District of Columbia from granting the supplemental award and that Virginia did not have an "overriding interest" in compelling the employee to investigate, before he filed in Virginia, whether he could get a larger award in the first instance elsewhere.¹¹⁵

114. *Thomas*, 448 U.S. at 296.

115. *Id.* at 284. The plurality then proceeded to reverse the judgment of the Fourth Circuit. *Id.* at 286. However, nothing in its opinion suggested in any way that the District of Columbia was *required* to grant a supplemental award. The plurality's reliance on *Pacific Employers* indicates that the plurality's theory should have given the District freedom to choose whether to grant a supplemental award or accept Virginia's invitation to treat the Virginia award as final.

Nevertheless, the theory of the plurality opinion required an affirmance of the judgment of the Fourth Circuit that had reversed the District's supplemental award. The reversal should have been affirmed on the ground that the District of Columbia tribunal wrongly exercised the choice it had as a matter of constitutional law emanating from the penumbra of the Full Faith and Credit Clause. What the plurality failed to see was that § 1738 is more than a general statute about full faith and credit matters. Section 1738 has an additional function: it tells the District of Columbia (but not a state after exercise of the penumbra power to give states a choice) how to exercise the choice that the plurality extended to the District. "Congress has plenary power over the District of Columbia . . ." *United States v. Lopez*, 514 U.S. 549, 589 n.3 (1995) (Thomas, J., concurring). Congress can act vis-à-vis the District in the same way a state's legislature governs affairs of a state. *Palmore v. United States*, 411 U.S. 389, 397 (1973). Congress in § 1738 directed the District of Columbia workers' compensation tribunal that in the *Thomas* matter it was supposed to give the Virginia award the "same full faith and credit" as it had under Virginia law, i.e., a bar to any award of more damages.

a. *Thomas's* Treatment of the Full Faith and Credit Clause
Is Not Dicta

Is the new rule of *Thomas* for judgment prong cases mere dicta that is not controlling where the facts are different, in that the workers' compensation tribunals involved in the dispute about a supplemental award are tribunals created by sister states of the union? Because in *Thomas* one of the contending jurisdictions was the District of Columbia, § 1738 could have applied, although six justices concluded it did not.¹¹⁶ The Full Faith and Credit Clause was not at issue, however, unless the District of Columbia is a state for purposes of applying the Clause. That is, unless the District is a state under the Clause, everything said about the Clause in *Thomas*, including its inapplicability to a workers' compensation award, is dicta.

Two passages from the *Thomas* plurality opinion reveal author Justice Stevens's awareness that it was more obvious that § 1738 applied on the facts there than that the Article IV Clause applied as well.¹¹⁷ Yet the clause is quoted in full¹¹⁸ and referred to repeatedly in the plurality opinion. As the Sixth Circuit has noted, "[a]lthough the *Thomas* Court cited § 1738, the Court's substantive discussion focused on the full faith and credit clause."¹¹⁹ Evidence of this is that the second to last sentence of the plurality opinion states: "The Full Faith and Credit Clause should not be construed to preclude successive workmen's compensation awards."¹²⁰

116. The reference to "full faith and credit questions" in Justice Rehnquist's opinion would extend to questions arising under § 1738 as well as under Article IV. *Thomas*, 448 U.S. at 291.

117. "Respondent contends that the District of Columbia was without power to award petitioner additional compensation because of the Full Faith and Credit Clause of the Constitution, or more precisely, because of the federal statute implementing that Clause." *Id.* at 266. "It has long been the law that 'the judgment of a state court should have the same credit, validity, and effect, in every other court in the United States, which it had in the state where it was pronounced.'" *Id.* at 270 (quoting *Hampton v. McConnel*, 16 U.S. (3 Wheat.) 234, 235 (1818)). "This rule, if not compelled by the Full Faith and Credit Clause itself, is surely required by 28 U.S.C. § 1738." *Id.* (citation omitted).

118. *Id.* at 264 n.1.

119. *Elliott v. Univ. of Tenn.*, 766 F.2d 982, 990 n.7 (6th Cir. 1985), *rev'd in part*. *Univ. of Tenn. v. Elliott*, 478 U.S. 788 (1986).

120. *Thomas*, 448 U.S. at 286.

I believe the *Thomas* Court viewed the District of Columbia as a state for purposes of applying the Full Faith and Credit Clause.¹²¹ The Supreme Court has declared that “[w]hether the District of Columbia constitutes a ‘State or Territory’ within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the specific provision involved.”¹²² The Court cited as support for this *Callan v. Wilson*,¹²³ which held that not only did the Sixth Amendment jury trial guarantee apply to the District of Columbia, but so did Section 2 of Article III, providing that trial of all crimes in Article III courts “shall be by jury; and such trial shall be held in the *State* where the said crimes shall have been committed.”¹²⁴ I think the “character and aim” of the Full Faith and Credit Clause requires that District of Columbia courts respect the sovereignty claims of a state to have its laws applied in courts of the District in cases where the state has all the significant contacts to an issue, to have the state’s nonjudicial records respected in the District, and to have its judgments enforced there.¹²⁵

Thus, *Thomas* presents a rule of law concerning non-applicability of the Full Faith and Credit Clause to a certain class of “judicial proceedings” that is not dictum, and the underlying theory that the Court has the power to find the Clause inapplicable in the face of literal language that would cause it to apply is supported by the views of six justices found in two opinions.¹²⁶ Most important for our purposes in this article, these six justices also viewed § 1738 as

121. In *Elliott*, the Sixth Circuit said that either this was what *Thomas* did, or else the Supreme Court there did not consider the difference in the language of the Article IV Clause and § 1738. 766 F.2d at 990 n.7. The Sixth Circuit was referring to the fact that the Article IV Clause imposes the obligation to recognize a judgment only on states, but § 1738 extends that obligation to “every court within the United States.” *Id.*

122. *District of Columbia v. Carter*, 409 U.S. 418, 420 (1973).

123. 127 U.S. 540 (1888).

124. *Id.* at 550 (emphasis added).

125. It might be thought that *Thomas* discussed the Full Faith and Credit Clause, and decided it did not apply to awards made by tribunals that cannot make a choice of law, to explain why § 1738 did not apply in that case. That is, the holding of inapplicability of the Clause included inapplicability of the effect proviso, so Congress could not enact a statute making a full faith and credit rule for workers’ compensation awards. That makes some sense insofar as § 1738 applies to sister-state conflicts, but in *Thomas* the conflict was between the District of Columbia and a state, a conflict which is outside the scope of the Clause’s effect proviso simply because a sister-state conflict is not at issue (so long as the District is not a state under the Article IV Clause).

126. See *supra* notes 113-14 and accompanying text.

inapplicable. That means they are of the view that when the Court exercises its penumbra power to fashion a rule of enforcement of judgments that supplants a substantive rule found in the literal language of the Article IV Clause, the effect proviso of that Clause is also supplanted. A statute enacted by Congress solely to implement the Article IV Clause cannot affect application of the rule the Court created under its penumbra power. The statute enacted by Congress is inapplicable even if its application would not lead to an absurd result.¹²⁷

D. *Thomas Is Erroneous and Should Be Overruled*

The theoretical basis for *Thomas v. Washington Gas Light Co.* allows the Supreme Court to declare, whenever it wishes, that it does not think the Full Faith and Credit Clause ought to apply to a particular type of judicial proceeding and, in so holding, eliminate Congress's power under the effect proviso of the Clause to legislate concerning recognition of that kind of judgment, whether or not the statute Congress would like to enact is reasonable or absurd. The Court must logically have the same power with respect to any kind of nonjudicial record that it thinks should not be subject to the Full Faith and Credit Clause. But the Clause envisions an active role for Congress in the full faith and credit arena in providing that "Congress may by general Laws prescribe the Manner in which such Acts, Records, and [judicial] Proceedings shall be proved, and the Effect thereof."¹²⁸ The Court should not be able to strip Congress of its intended participatory role at its whim.

It may be argued, of course, that a Supreme Court ruling eliminating Congress's ability to invoke the effect proviso of the Article IV Clause does little to cut back on congressional power to legislate with respect to full faith and credit issues, because Congress can invoke the Commerce Clause power to enact legislation concerning interstate relations, including those based on sister-state

127. Section 1738 would have required a worker such as Mr. Thomas to check out the level of benefits available in the District of Columbia compared to those in Virginia and to file in the District instead of Virginia if he wanted to receive benefits at that level—perhaps a bit of a burden for him, but hardly an absurdity.

128. U.S. CONST. art. IV, § 1.

judgments.¹²⁹ There will be many cases involving commercial litigation in which § 1738 can be upheld, as applied, because its enactment is authorized by the Commerce Clause, even though Congress had in mind the effect proviso in enacting § 1738 in 1790. *Thomas* concerned the rights of an employee working in interstate commerce, and could be overruled on the theory that the Court's power under the penumbra of the Full Faith and Credit Clause to displace an act of Congress enacted under the effect proviso cannot bar application of § 1738 in a situation where Congress's Commerce Power could authorize Congress to apply that statute.

However, especially after *United States v. Lopez*,¹³⁰ there are going to be some choice of law disputes and some judgments entered that do not fall within Congress's Commerce Clause power. Marriage law may present such disputes and judgments. Congress should not lose its power to legislate under the effect proviso of the Full Faith and Credit Clause even with respect to a narrow class of cases based on the Supreme Court's naked "power grab" in the *Thomas* case that reads the effect proviso out of Article IV.

In lieu of overruling *Thomas*, the Court could adhere to the result reached there but base it on a theory that would not strip Congress of its power to participate in the administration of the law of full faith and credit. The most obvious alternative basis for permitting the District of Columbia to ignore the Virginia law of res judicata would be that § 1738 did not apply because a hearing before a workers' compensation tribunal is not a "judicial proceeding" under § 1738 due to the fact such tribunals did not exist in 1790 when the statute was enacted.¹³¹ Coupled with a holding that the District of Columbia is not a state under the Full Faith and Credit Clause, such a construction of § 1738 would uphold the result in *Thomas* while not tying the

129. *Kilroy v. Superior Court*, 63 Cal. Rptr. 2d 390, 399-402 (Ct. App. 1997), upheld the constitutionality of the Full Faith and Credit for Child Support Orders Act, 28 U.S.C. § 1738B (2000), as a proper exercise of Congress's commerce power. *Accord* Peterson v. Israel, 22 Conn. L. Rptr. 536 (Super. Ct. 1998). That act addresses a state's obligation to enforce child support judgments and, in barring in certain situations a state whose law is constitutionally applicable from applying its law to enter a new judgment reducing or increasing the support owed, regulates a state's power to make a choice of law. The analysis in *Kilroy* ought to support a holding that a related statute, the Parental Kidnaping Prevention Act, 28 U.S.C. § 1738A (2000), that addresses child custody decrees, can also be upheld as a valid exercise by Congress of the Commerce Power.

130. 514 U.S. 549 (1995).

131. See *infra* text accompanying notes 186-89.

hands of Congress. Congress thereafter could amend § 1738 to make it specifically apply to awards made under workers' compensation laws, an amendment which, unlike the 1948 addition to § 1738, would not be an attempt to overturn a constitutional holding by the Supreme Court. Nor would the extension of § 1738 to workers' compensation awards require an absurd result, which would cast doubt on *Pacific Employers*. The reinterpretation by the Court of the theoretical basis for *Thomas* followed by the rewriting of § 1738 by Congress would leave *Thomas* a dead letter of the law.

III. IN ENACTING SECTION 1739, CONGRESS INTENDED MARRIAGE RECORDS TO BE GIVEN INTERSTATE RECOGNITION IN THE MANNER OF JUDGMENTS, A CHOICE THE SUPREME COURT HAS NO REASON TO REJECT

Both conflicts restatements¹³² and every treatise¹³³ and casebook¹³⁴ on choice of law state that the determination of the validity of marriage in a multi-state context raises simply a choice of law question. That is, a court may constitutionally apply the law of any jurisdiction that has the minimal connections to the validity issue required by *Allstate Insurance Co. v. Hague*.¹³⁵

The assumption that only a choice of law is involved is correct when the forum is the state where the marriage was entered into or, if the forum sits in a different state, the marriage is proved by means other than a copy of marriage records certified in the state where the marriage occurred according to the requirements of § 1739 of the Federal Judicial Code and introduced into evidence.

However, if § 1739 is utilized to prove the marriage, that statute pre-empts, by force of the Supremacy Clause of the federal Constitution,¹³⁶ state law that views the issue presented as one of choice of law. Section 1739 imposes a duty on the forum to give the same full faith and credit to the marriage record—which reflects the law of the validity of marriage of the state of celebration—as courts of

132. RESTATEMENT OF CONFLICT OF LAWS §§ 121, 132 (1934); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971).

133. *E.g.*, SCOLES ET AL., *supra* note 48, §§ 13.5-13.20.

134. *E.g.*, LEA BRILMAYER & JACK GOLDSMITH, CONFLICT OF LAWS: CASES AND MATERIALS 57-72, 688 (5th ed. 2002).

135. 449 U.S. 302 (1981).

136. U.S. CONST. art. VI, cl. 2.

that state would give to the marriage record were the question of validity litigated there. Under § 1739, the marriage record created by the state of celebration is conclusive of the validity of the marriage unless a ground for annulment can be found in the marriage law of that state. By definition, the fact that the parties to the marriage are of the same sex is not a basis for annulment where the state of celebration is Vermont or Massachusetts. In other words, § 1739 directs the forum to approach the marriage validity issue in the same manner it would if the record before the court were a judgment of the state of celebration declaring the marriage valid rather than a marriage license and return. The freedom the forum has when the matter is one of choice of law is stripped away by § 1739.

A close look at the history of what is now § 1739 makes this fact clear. Its date of enactment was March 27, 1804, thirteen years and ten months after enactment of what is now § 1738, the language of which it closely tracked. The text in 1804 of what is now § 1738 began by providing a procedure for authentication of state judicial records. Then followed the part of the statute of primary interest here, addressing the conclusive effect of such authenticated judicial documents when introduced into evidence in a court outside the state that created the documents. As enacted in 1790—unchanged in 1804—this language stated:

[T]he records and judicial proceedings of the courts of any state, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal if the court annexed, if there be a seal, together with a certificate of the judge . . . that the said attestation is in due form. And the said records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken.¹³⁷

The scope of what is now § 1739, enacted just a few years later, reveals that “records” in the quoted text of the 1790 law was restricted to judicial records.¹³⁸ Most importantly, the 1804 text so closely

137. 1 Stat. 122 (1790).

138. That is, the 1804 act addresses “records . . . not appertaining to a court” (see text following this footnote), indicating that “records” in the 1790 act are those that do pertain to a court. 2 Stat. 298 (1804).

follows that of 1790 with respect to the conclusive effect of “judicial proceedings” that there is no doubt Congress intended nonjudicial records in the 1804 act to be treated in the same manner as judgments were to be treated under the earlier law.

The 1804 Congress provided:

[A]ll records and exemplifications of office books, which are or may be kept in any public office of any state, not appertaining to a court, shall be proved or admitted in any other court or office in any other state, by the attestation of the keeper of the said records or books, and the seal of his office thereto annexed, if there be a seal, together with a certificate of the presiding justice . . . that the said attestation is in due form And the said records and exemplifications, authenticated as aforesaid, shall have such faith and credit given to them in every court and office within the United States, as they have by law or usage in the courts or offices of the state from whence the same are, or shall be taken.¹³⁹

A. *Courts Routinely Apply Section 1739 to Marriage Records in the Manner Intended by Congress*

Many cases hold that marriage licenses and returns are “records” under the 1804 statute that is now § 1739.¹⁴⁰ That Congress intended in enacting what is now § 1739 to treat a state’s nonjudicial records in the same manner that a state is required to treat a judgment from the other jurisdiction—that is, it must consult the law of the state that created the record as to what it does and does not establish conclusively—finds support in at least one decision dealing with § 1739. In *Tindle v. Celebrezze*,¹⁴¹ a woman sought social security benefits claiming to be age 65 in reliance on a Texas birth certificate which she placed in evidence in federal court under § 1739.¹⁴² The federal court referred to that section as “the special statutory provision . . . which is akin to the full faith and credit guaranty for state judgments under the federal Constitution.”¹⁴³ Noting that the

139. *Id.* at 298-99.

140. *See supra* note 22.

141. 210 F. Supp. 912 (S.D. Cal. 1962).

142. *Id.* at 914-15.

143. *Id.*

Article IV Clause did not apply to federal courts but that § 1739 did, the court said:

[E]ven under the constitutional provision the rights to be accorded are *coincidental* with the right accorded by the State whose judgment it is sought to enforce. "A judgment duly rendered by a state court of competent jurisdiction is entitled to receive in all courts of the United States the 'full faith and credit' which the courts of another state would be bound to accord to it; that is, it will be given the same credit, force, and effect which it would receive in the courts of the state where it was rendered, *no more and no less.*"¹⁴⁴

No reported decision dealing with the effect of § 1739 squarely rejects this view of the statute.¹⁴⁵ There is, however, contrary dicta in

144. *Id.* at 915 (quoting 50 C.J.S. *Judgments* § 900 (2004)).

145. In *Yacovone v. Bolger*, 645 F.2d 1028, 1030, 1034 (D.C. Cir. 1981), a postmaster contended that his dismissal from the job based on a Vermont shoplifting conviction was erroneous because § 1739 required the federal courts to give to a Vermont pardon he had received the same credit Vermont would give it, wiping out the conviction and barring its use against his employment. The court first held the pardon came too late—two weeks after his removal from the job—to benefit the employee. *Id.* at 1034. In what might be labeled an alternative holding, the court assumed Vermont would demand retroactive application of the pardon, and it quoted § 1739. *Id.* at 1034-35. The court then said "that in constitutional full faith and credit disputes between states, an analysis measuring the interests of the various states is appropriate." *Id.* at 1035. Did the court, by this reference to the cases dealing with choice of law and claims based apparently on Article IV's Full Faith and Credit Clause, deliver an alternative holding that § 1739 was inapplicable to the pardon for the same reason that *Pacific Employers*, exercising the penumbra power, held the Article IV Clause inapplicable to a choice of law dispute? If so, that is simply wrong, because recognizing the pardon would not be an "absurd result," which was the basis for the *Pacific Employers* holding that the Full Faith and Credit Clause did not apply to a choice of law issue in that case. The result—upholding the dismissal, despite receiving in evidence the pardon pursuant to § 1738—may, however, be correct under a penumbra powers analysis.

The Supreme Court has declared that "the Full Faith and Credit Clause does not require that sister States enforce a foreign penal judgment." *Nelson v. George*, 399 U.S. 224, 229 (1970) (applying the Full Faith and Credit Clause to alleged detainer effect in California of a North Carolina criminal conviction) (citing *Huntington v. Attrill*, 146 U.S. 657 (1892) (holding that the Article IV Clause does not apply to civil statute that is penal in nature)). The Vermont pardon in *Yacovone* could handily be equated to a part of the criminal process subject to the *Nelson-Huntington* exception. See *People v. Laino*, 87 P.3d 27 (Cal. 2004) (applying *Nelson* to give greater effect to a criminal conviction than the rendering state would give in context similar to a pardon). Surely a criminal trial in a state court is a "judicial proceeding" under the literal language of the Full Faith and Credit Clause. *Nelson* and *Huntington* are best explained not as interpretations of that term but as examples of the Court exercising its power found in the penumbra of Article IV to restrict the Full Faith and Credit Clause so it does not operate in a manner of which the Court does not approve. We have seen that if the Article IV Clause itself is held inapplicable to a situation, Congress has no power under the effect proviso of the Clause to

an unpublished Ohio appellate opinion.¹⁴⁶ One Nash was denied an Ohio marriage license to marry a person born female on the ground that Nash also was born a female, which appeared on his original birth certificate, a Massachusetts record.¹⁴⁷ Nash introduced in evidence under § 1739 an amended Massachusetts birth certificate he had obtained—stating that he was male—upon proving to the Massachusetts clerk that Nash had undergone gender reassignment surgery.¹⁴⁸ The Ohio court cited Massachusetts authority that a birth certificate is only prima facie evidence of facts appearing on it and that the evidence fully established Nash was born female.¹⁴⁹ That was ample basis for affirming the trial court’s refusal to order issuance of a marriage license.¹⁵⁰ But the court went on to say:

Moreover, since each state retains some attributes of sovereignty and, thus, may enact its own laws and, in effect, define its own public policy, see *Pacific Emp. Ins. Co. v. Indus. Accident Comm.* (1939), 306 U.S. 493, 501 . . . the full faith and credit clause is not violated when granting full faith and credit to another state’s records would violate the public policy of the state applying the other state’s records. See *Nevada v. Hall* (1979), 440 U.S. 410, 422 . . .¹⁵¹

This is plainly dicta, since Massachusetts law concerning the effect of the amended birth certificate did not purport to bar evidence that Nash obtained it upon showing he had undergone sex-change surgery. If Nash had been suing his surgeon for negligently leaving a surgical instrument in the scrotum the surgeon had constructed for Nash and the defendant was able to show that the effect of the amended Massachusetts birth certificate under the law of that

enact a statute addressing the situation in a penumbra-power case, meaning criminal pardons are removed from the scope of § 1739 even though they are nonjudicial records of a state.

146. *In re Application for a Marriage License for Nash*, Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095 (Ohio Ct. App. Dec. 31, 2003).

147. *Id.* at *1.

148. *Id.*

149. *Id.* at *4.

150. *Id.*

151. *Id.* at *5 (citations omitted). *Nevada v. Hall* is, like *Pacific Employers*, a choice of law decision upholding an interested forum’s application of its own law over a claim that it had to apply the law of another interested state. Although the quoted passage from *Nash* speaks of denying credit to the birth certificate as not violating the Full Faith and Credit Clause, since Nash was relying not on the Clause but on § 1739, the court intended to say that § 1739 also would not be violated by denying credit to the birth certificate of Massachusetts.

commonwealth was to conclusively presume Nash was born with male genitalia, thereby barring proof that Nash had undergone a surgical sex-change, an absurd result would be achieved by literally following the mandate of § 1739, and some basis for invoking *Pacific Employers* would appear. Absent some sort of abuse by Massachusetts of its power under § 1739 to provide some conclusive effect to an official record, the Ohio court had no reason to treat a case involving credit to a record as subject to the same analysis for full faith and credit purposes as a case involving a choice of law between two states each having contacts to the issue at hand.

I could find no decision involving the law of the state creating a record, one that can be proved under § 1739, respecting the conclusive or preclusive effect of that record that could lead to absurd results or even be labeled abusive of the state's power to make such laws concerning the official records of the state. The proposition that a record is only prima facie evidence of facts, referred to in *Nash*, is widely accepted by states that create official records.¹⁵² An officially recorded marriage license and return are said to be prima facie evidence of the marriage.¹⁵³ Presumably a misstatement of fact on these records—such as when the wife is listed as age thirty-five at the time of ceremony when in fact she was thirty-six—can be proved in court. The marriage itself can be attacked through an annulment proceeding. Of course the grounds for annulment of the marriage as void will be limited to those recognized by the state where the marriage was performed, a measure of the credit other states owe the marriage under § 1739. This is no “absurd result” warranting a holding that § 1739 cannot apply to marriage records because of the reasoning of the *Pacific Employers* decision. (Whether a *Thomas-*

152. See *Bennett v. Schweiker*, 532 F. Supp. 837, 839-40 (D.C. 1982) (holding that a birth certificate listing the date as 1919 was properly corrected by state officials to list 1918 as the date of birth; § 1739 required credit to be given to the corrected certificate); *Tindle v. Celebrezze*, 210 F. Supp. 912, 915 (S.D. Cal. 1962) (holding that a birth certificate was only prima facie evidence of facts appearing thereon); *Brite v. State*, 608 S.E.2d 204, 207 (Ga. 2005) (death certificate); *State v. Trotman*, 840 A.2d 952, 955 (N.J. Super. 2004) (official map of redevelopment project); *Kiecker v. N.D. Dept. of Transp.*, 691 N.W.2d 266, 267 (N.D. 2005) (records showing use of breathalyzer devices); *Barkman v. Erie Indemnity Co.*, 181 A.2d 874, 878 (Pa. Super. Ct. 1962) (death certificate).

153. *E.g.*, MASS. GEN. LAWS ANN. ch. 207, § 45 (West 1998); VT. STAT. ANN. tit. 18, § 5167 (2000) (“A copy of the record of the civil union received from the town or county clerk, the commissioner of health or the director of public records shall be presumptive evidence of the civil union in all courts.”).

based analysis should lead to the conclusion that § 1739 cannot apply in situations where the marriage license clerk is not authorized to deny a marriage license to an out-of-state couple based on the marriage law of their state of domicile is quite a different matter from rejecting § 1739 on an “absurd result” ground, a matter considered in Part IV of this article.)

Because all states recognize the concept of a bigamous marriage,¹⁵⁴ there can be no analogue in the area of recognition of marriage records to the absurdity that *Pacific Employers* sought to avoid: compelling state *X*, which has substantial contacts to a case, to apply state *Y*'s law to it rather than *X*'s own law that produces a different result, while also compelling state *Y*, which has contacts equally substantial, to forego applying its law and instead reach a contrary result under *X*'s. Suppose the official records of state *X* show Sarah Smith marrying Alan Jones in state *X* in 2002, and the records of state *Y* show the same Sarah Smith marrying a different man in state *Y* in 2003. Section 1739 does not require the courts of state *X* to recognize Sarah's 2003 marriage because state *X* need give only the same credit that *Y* gives the record, and *Y* will permit it to be voided on the ground that it is bigamous under *Y* law.¹⁵⁵

The congressional action of 1804, equating an official record of a state to a judgment for purposes of requiring other states to recognize and give effect to the record, was not only not absurd, it was eminently sensible, at least when the statute is applied to marriage records. To create many types of official state records, a state agent has to apply a law of the state. Thus if an elections department clerk is asked to register Mary Jones to vote, the clerk must determine that she is an eligible voter under applicable state statutes.

In applying the state's marriage law to a couple seeking a marriage license, a marriage license clerk routinely functions as a finder of fact, that is, in a quasi-judicial manner. The state law will charge the official who can issue marriage licenses with the duty to make factual determinations when there is a doubt as to whether an applicant is of age, has actually been divorced as he or she claims, or

154. 55 C.J.S. *Marriage* § 18 (1998).

155. If the state *Y* records show Sarah marrying the same man in *Y* she had married the year before in state *X*, state *Y* will not demand that state *X* treat the couple as having married in 2003 rather than 2002, but will treat the *Y* marriage as a nullity. “Generally, a person who has contracted a valid marriage is incapacitated to contract a subsequent marriage where such valid marriage has not been dissolved by death or otherwise” *Id.*

is barred by consanguinity from marrying the other applicant.¹⁵⁶ In Massachusetts, New Hampshire, and Wisconsin, issuance of the marriage license is a quasi-judicial process for the additional reason that a statute imposes on the official the duty to make a choice of law decision in order to deny the license if the marriage would be illegal under the law of the state of domicile of the applicants.¹⁵⁷

Actually, the conduct of the marriage clerk leading up to his or her issuance of a license to a couple is often going to be more akin to a judge conducting a trial than is the conduct of a judge leading up to his or her making a choice of law, the part of the trial process that *Pacific Employers* addresses. The judge frequently selects the governing law in advance of trial so that the litigants will know what legal standards will be employed and can obtain evidence relevant to those standards and withhold evidence pertinent only if the rejected law were to be applied.¹⁵⁸ The issuance of the license occurs at the end of the official proceeding like a judgment at the end of a trial. That is seldom the case with the choosing of the law to be applied in an actual trial.

In sum, there are several reasons to support Congress's determination—at least with respect to the type of state records at issue here—that the creation of the record is similar to the entry of a judgment, far more so than to the making of a choice of law.

B. *Full Faith and Credit Is Owed to Ministerial Judgments, Which are Very Common; Marriage Records Often Arise out of a Non-Ministerial Process*

Professor David Currie, an excellent conflict of laws scholar, objects to giving full faith and credit to marriage records in the manner that is accorded to judgments and would embrace the dicta of the Ohio court in *Nash* that would treat the matter as one of choice of law instead.¹⁵⁹ In effect, he bases this on his categorizing the issuance

156. See *infra* notes 170-76 and accompanying text.

157. See *id.*

158. See Kenneth G. Kubes, Note, "United We Stand": Managing Choice-of-Law Problems in September 11-Based Toxic Torts Through Federal Substantive Mass Tort Law, 77 IND. L.J. 825, 855-58 (2002).

159. David P. Currie, *Full Faith and Credit to Marriages*, 1 GREEN BAG 2d 7, 10-11 (1997).

of a marriage license as merely a ministerial act, even when § 1739 is invoked.¹⁶⁰ Currie concedes that in the issuance of a marriage license,

once in a great while [a “bureaucrat”] must ferret out an impediment. But there are no pleadings, no trials, briefs, or oral arguments; there is no judgment and no opinion. Marriage is not even quasi-judicial; it is a purely *administrative* proceeding analogous to the grant of a building permit or a corporate charter. And no court in the country, so far as I have been able to discover, has ever required a state to give conclusive effect to an administrative order of this nature. . . .

. . . .

. . . [T]he considerations that require that foreign judgments be given conclusive effect do not apply to garden-variety administrative actions.¹⁶¹

Inherent in Currie’s comparison of the process by which marriage licenses are issued and the process by which filing of a lawsuit leads up to entry of a judgment must be an assumption that court proceedings usually are not ministerial. Not so. A study determined that of all civil actions filed, only 3.3 percent go to trial, while 13.5 percent terminate in entry of default judgments, a ratio of less than 1 to 4.¹⁶² Proving damages in the default judgment cases is almost always non-adversarial and in cases of liquidated debt is essentially ministerial.

Default judgments are entitled to full faith and credit.¹⁶³ Entry of judgment based on the confession of the defendant’s “agent” appointed via a cognovit note is a ministerial act, but, absent a due

160. *Id.* at 10. See also *Lockyer v. City & County of San Francisco*, 95 P.3d 459 (Cal. 2004), where the majority opinion uses the term “ministerial” a mind-numbing sixty-six times in discussing the duties and actions of a marriage license clerk. Does this court protest too much?

161. Currie, *supra* note 159, at 10-11. In this passage Currie seems to have forgotten that no state asks another to give “conclusive effect” to its marriage records. The state where the marriage was performed and which has created a record thereof has no problem with a sister state annulling that marriage for a ground recognized in the marriage law of the original state.

162. Richard Lempert, *The Economic Analysis of Evidence Law: Common Sense on Stilts*, 87 VA. L. REV. 1619, 1656 n.103 (2001) (citing EXAMINING THE WORK OF STATE COURTS, 1996: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 24 (Brian J. Ostrom & Neal B. Kauder eds., 1997)).

163. See *Adam v. Saenger*, 303 U.S. 59 (1938).

process violation, the judgment is entitled to full faith and credit.¹⁶⁴ The judgment that was entitled to full faith and credit in *Union National Bank v. Lamb*,¹⁶⁵ by which a Colorado court clerk extended the period of enforceability of a prior Colorado judgment, was entered based on a ministerial process, but Missouri was required to give it full faith and credit.¹⁶⁶

Moreover, the process of issuing a marriage license often is not ministerial. This was noted briefly above, but a more detailed examination is appropriate to show why Currie is wrong to brush aside the fact that the official issuing a marriage license is empowered to “ferret out an impediment.”¹⁶⁷ The ferreting process Currie acknowledges can resemble a trial.

Thus, a New York marriage statute provides in pertinent part:

The town or city clerk is hereby given full power and authority to administer oaths and may require the applicants to produce

164. See *Fiore v. Oakwood Plaza Shopping Ctr., Inc.*, 585 N.E.2d 364, 365, 367 (N.Y. 1991) (citing both the Article IV Clause and § 1738, and relying upon *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972)). Since the obligor is seldom going to be present when the judgment is entered, consideration of whether the appointment of the agent to confess judgment was the product of free bargaining or was part of an adhesion contract, as required by *Overmyer*, will usually take place in the forum asked to enforce the judgment, not in the forum that enters the judgment.

165. 337 U.S. 38 (1949).

166. *Id.* at 44-45. A Colorado rule of procedure in effect in 1945 when the Colorado judgment was revived provided that this was to be done by order of the clerk of court. 3 COLO. REV. STAT. ANN. ch. 6 § 54(h) (West 1935) (Rules of Civil Procedure) (as renumbered in tables found at vol. 107 of the Colorado Reports). Jurisdiction over the defendant in the Colorado revival proceeding was obtained by long-arm process in Missouri. *Union Nat'l Bank v. Lamb*, 213 S.W.2d 416, 417 (Mo. 1948). If he had gone to Colorado to enter one of the permissible attacks or to pursue a defense of payment, the Supreme Court of Missouri surely would have mentioned that. The opening Brief for Appellant in *Lamb* states: “Respondent [judgment debtor] had full notice and opportunity to oppose the Colorado judgment of revivor,” as by proving payment or making a collateral attack on jurisdiction. Brief for Appellant at 18, *Union Nat'l Bank v. Lamb*, 337 U.S. 38 (1949) (No. 500). In his petition for rehearing after losing in the United States Supreme Court, the judgment debtor stated that “the record of the Colorado revival proceeding demonstrates that there was no judgment of any kind or for any amount entered at that time (1945), but that the only action taken was to extend the life of the 1927 judgment.” Petition for Rehearing at 4, *Lamb*, 337 U.S. 38 (1949) (No. 500). In sum, the judgment held to be entitled to full faith and credit in *Lamb* was the product of the quintessential ministerial judicial proceeding. The transcript of the record on appeal of the proceedings in the Supreme Court of Missouri reveals that the judgment debtor claimed to have paid the judgment in full in 1937, although he obviously did not pursue that claim in the revival proceeding. Transcript of the Record on Appeal at 5, *Lamb*, 337 U.S. 38 (No. 500).

167. Currie, *supra* note 159, at 10-11.

witnesses to identify them or either of them and may examine under oath or otherwise other witnesses as to any material inquiry pertaining to the issuing of the license, and if the applicant is a divorced person the clerk may also require the production of a certified copy of the decree of the divorce¹⁶⁸

The statute continues: "If the town or city clerk shall be in doubt as to whether an applicant claiming to be over eighteen years of age is actually over eighteen years of age, he shall, before issuing such license, require documentary proof" ¹⁶⁹ A practice commentary in McKinney's New York state code says of this statute:

The clerk is not required to accept at face value the statements made and documents proffered by the license applicants. The clerk is invested with a measure of judicial or quasi-judicial authority in the marriage license process. The clerk may make any inquiries which are material in the issuance of the license and may refuse to issue a license, even though the application appeared regular on its face, when questions raised by the clerk resulted in disclosure of facts indicating the existence of a legal impediment to the marriage.¹⁷⁰

Consider, too, the following statute from North Carolina, where the official who issues marriage licenses is the register of deeds:

In making a determination as to whether or not the parties are authorized to be married under the laws of this State, the register of deeds may require the applicants for the license to marry to present certified copies of birth certificates or such other evidence as the register of deeds deems necessary to the determination. The register of deeds may administer an oath to any person presenting evidence relating to whether or not parties applying for a marriage license are eligible to be married pursuant to the laws of this State.¹⁷¹

168. N.Y. DOM. REL. LAW § 15.1(a) (McKinney 1999).

169. *Id.* § 15.2.

170. Alan D. Scheinkman, *Practice Commentaries*, N.Y. DOM. REL. LAW § 15, C15:1, at 172 (McKinney 1999).

171. N.C. GEN. STAT. § 51-8 (2003); *see also* ARK. CODE ANN. § 9-11-102(b)(1) (Michie 2002) (clerk shall obtain "satisfactory evidence" of parental consent where applicant is underage); *id.* at § 9-11-209(a) (applicants shall "prove to the satisfaction of the clerk" they are of age); DEL. CODE ANN. tit. 13, § 120 (1999) (officer shall examine applicants under oath to determine no impediment to marriage); D.C. CODE ANN. § 46-410 (2001) (clerk has the "duty . . . to examine any applicant . . . under oath" on issue of age, marital status and consanguinity); HAW. REV.

North Carolina officials who issue marriage licenses have on three occasions¹⁷² asked the state's Attorney General to render a formal opinion providing guidance as to how the marriage statutes are to be applied, requests that are hardly consistent with their duties being purely ministerial.

In some states, including North Carolina, the official who issues marriage licenses has incurred a civil fine upon shirking his or her duty to investigate the eligibility of an applicant seeking a license.¹⁷³ There are a number of reported cases where a court, usually in a writ of mandamus action, has been asked to review the quasi-judicial decision of a clerk or other official that led to the denial of a license to marry.¹⁷⁴ For example, a New York trial court in a mandamus

STAT. ANN. § 572-10 (Michie 1999) (agent shall obtain "satisfactory proof" of age); IDAHO CODE § 32-403 (Michie 1996) (recorder shall receive affidavit and testimony on issue of applicant's eligibility to marry); 750 ILL. COMP. STAT. ANN. 5/203(1) (West 1999) (clerk must obtain "satisfactory proof" on issues of age, consanguinity, and marital status); KAN. STAT. ANN. § 23-114 (1995) (clerk may "examine witnesses under oath" on consanguinity issue; can be fined \$1000 for failure to do so); MONT. CODE ANN. § 40-1-202 (2003) (clerk must obtain "satisfactory proof" on issues of age, consanguinity and marital status); NEV. REV. STAT. ANN. § 122.040 (Michie 2004) (clerk "may require" evidence of age of applicant; evidence that parent executed consent to marriage of under-age applicant must be under oath if not personally given).

172. Issuance of Marriage License to Individuals of Same Gender; Penalties, Op. Att'y Gen., 2004 WL 871437 (N.C. Mar. 29, 2004); Validity of Marriage of Underage Persons, Op. Att'y Gen., 2001 WL 1712684 (N.C. Oct. 9, 2001); Marriage License; Eligibility of an Alien to Obtain a Marriage License Where the Alien is Prohibited by Federal Law from Obtaining a Social Security Number, Op. Att'y Gen., 1998 WL 643356 (N.C. Aug. 14, 1998).

173. See *Cole v. Laws*, 10 S.E. 172 (N.C. 1889) (affirming award of \$200 penalty; official did not reasonably investigate age of female applicant who was under age 15); *Md. Cas. Co. v. Teele*, 28 S.E.2d 193 (Ga. Ct. App. 1943) (affirming award of \$500 penalty; official failed to investigate whether female applicant was of age); see also *Brewer v. Kingsberry*, 69 Ga. 754 (1882) (holding that an official having non-ministerial duty to investigate age of applicants was barred from collecting fees from agent to whom he delegated authority to issue licenses).

174. See *In re Appeal of Coats*, 849 A.2d 254 (Pa. Super. Ct. 2004) (clerk had to determine whether prison inmate could satisfy statutory obligation to appear in person to obtain license by appearing through video conferencing and whether clerk could waive in-person appearance in case of an indigent prisoner applicant or was required to travel to the prison); *Adelman v. Hubbard*, 60 N.Y.S.2d 387 (Sup. Ct. 1945) (holding that the clerk erred in deciding that record of applicant's divorce did not prove court had jurisdiction to enter divorce judgment); *In re Application for Marriage License for Nash*, 2003 OH App. 721, ¶ 5 (official searching records apparently looking for prior divorce discovered male applicant was transsexual born female and denied license); *State ex rel/ Ten Residents of Franklin County*, 755 N.E.2d 443 (Ohio Ct. App. 2001) (official who consulted with county attorney and denied marriage licenses to applicants who refused to provide social security number erred; statutory requirement was directory only); *Li v. State*, No. 0403-03057, 2004 WL 1258167 (Or. Cir. Ct. Apr. 20, 2004) (unpublished opinion) (clerks in Oregon counties make different judgments on question whether same-sex couple eligible for license); see also *E.P. Marriage License*, 8 Pa. D. & C.2d 598 (Orphans' Ct. 1957) (clerk

proceeding held that a marriage license clerk had exceeded his authority in denying a license on the ground that one applicant's Mexican divorce was invalid.¹⁷⁵ But the appellate division reversed on the ground that the clerk had properly exercised his quasi-judicial authority.¹⁷⁶

The marriage license process in Massachusetts is especially non-ministerial because of the requirement that the clerk investigate the law of the domicile of out-of-state applicants of the same sex and deny the license if the state of domicile prohibits a same-sex marriage.¹⁷⁷ Although some Boston bureaucrats (with the state's Department of Public Health and the Registry of Vital Records) have sent to the marriage license clerks a directive ordering them to deny a license to all "same-sex couples who reside in any other state,"¹⁷⁸ that directive is clearly illegal. The statute says "the officer having authority to issue the license shall *satisfy himself*" that the domicile state would void a same-sex marriage celebrated there.¹⁷⁹ The statute also contemplates some sort of hearing on the choice of law issue at which the applicants can argue that their state of domicile would not void a same-sex marriage, for it requires the clerk to "satisfy himself, by requiring affidavits or otherwise."¹⁸⁰ A clerk who yields to the directive to pre-judge the issue, no matter how strong the applicant's argument, certainly denies the applicant due process of law.

Making a choice of law under the Massachusetts statutes is hardly a ministerial act. Very difficult questions will arise. If the applicants are a same-sex couple from Vermont, the question is whether Vermont would not void a same-sex marriage performed there, but instead convert it into a civil union. If this is what Vermont would do—and that would be my guess—the clerk must decide if the purpose of the Massachusetts choice of law statute is not defeated by issuance of the license, even though Vermont technically "prohibits" a

denied license to epileptic and certified matter to court pursuant to statute calling for determination if best interest of epileptic and the public would be advanced by permitting him to marry).

175. *Alzman v. Maher*, 242 N.Y.S. 8, 9 (Sup. Ct. 1930).

176. *Alzman v. Maher*, 246 N.Y.S. 60, 64 (App. Div. 1930).

177. See *infra* text accompanying notes 233-54.

178. See *Cote-Whitacre v. Dep't of Pub. Health*, 18 Mass. L. Rptr. 190, No. 042656G, 2004 WL 2075557 at *4, 5 (Super. Ct. Aug. 18, 2004).

179. MASS. GEN. LAWS. ANN. ch. 207, § 12 (West 1998) (emphasis added). See *infra* note 236 for the full text of the statute.

180. *Id.*

same-sex union celebrated in Vermont if the word “marriage” appears on the license.¹⁸¹

Some trial court decisions in New York have held that the state constitution entitles a same-sex couple to marry in New York.¹⁸² If the same-sex applicants for a Massachusetts marriage license are New Yorkers, it appears the marriage license clerk has to guess whether New York appellate courts would agree with these decisions. How else can the clerk “satisfy himself” or herself that New York prohibits same-sex marriages? Similar trial court decisions in other states may also require the Massachusetts clerk to guess how those states’ appellate courts will respond.¹⁸³

In sum, even if § 1739 were construed so as not to apply to state records that are invariably created through a purely ministerial process—perhaps recordation of a lien release—such a rule would not extend to marriage licenses.¹⁸⁴ Just as the fact that many judgments are entered following a ministerial process does not disqualify the entire class of judgments from the enforcement mechanism of § 1738, the fact that some marriage licenses may issue after a ministerial process does not mean that the entire class of marriage records is beyond the scope of § 1739. That some judgments do not result from a ministerial process has meant that all judgments are subject to § 1738. Section 1739 should apply to all marriage records by a parity of reasoning.

C. *The Historical Test of University of Tennessee v. Elliott Does Not Exclude Marriage Records from Section 1739, but Does Bar Interpreting that Statute to Provide for Use of Renvoi*

The Supreme Court in *University of Tennessee v. Elliott*¹⁸⁵ held that although an administrative law judge conducting a fact-finding

181. *Baker v. State*, 744 A.2d 864, 868-69 (Vt. 1999) (interpreting VT. STAT. ANN. tit. 15, §§ 1-8 (2002); tit. 18, §§ 5131-5151). There has been no post-*Baker* change in Vermont statutes concerning marriage except the recognition of civil unions.

182. *See infra* note 246.

183. *See*, for example, the now reversed *Li v. State*, No. 0403-03057, 2004 WL 1258167 (Or. Cir. Ct. Apr. 20, 2004), *rev'd*, 110 P.3d 91 (Or. 2005).

184. The adding of the return sent in by the judge or minister who performs the ceremony may be a ministerial act, but this document accompanies the license to marry, which is not the result of a ministerial process. The two documents together should be viewed as the “record” to which § 1739 applies.

185. 478 U.S. 788 (1986).

hearing for the University of Tennessee was “acting in a judicial capacity,” the hearing he conducted was not a “judicial proceeding” as that term is used in § 1738.¹⁸⁶ The only possible explanation of this holding is that, because it was enacted in 1790, “§ 1738 antedates the development of administrative agencies” and thus cannot be referring to such agencies when using the term “judicial proceeding.”¹⁸⁷ That is, administrative law did not exist in 1790, and although § 1738 has been amended several times since its enactment,¹⁸⁸ Congress never altered the term “judicial proceedings” as used in that statute. Thus the term “judicial proceedings” in § 1738 still has today the scope it had in 1790.¹⁸⁹

We can expect the Court to take a similar historical approach as to the scope of the term “records” as used in § 1739, when enacted in 1804. Under such an inquiry, “records” would include marriage licenses and returns, because in 1804 the issuance of marriage licenses

186. *Id.* at 794, 797.

187. *Id.* at 795. The Court in *Elliott* held that a hearing before a state administrative law judge was not a judicial proceeding under § 1738, although not directly presented as the explanation for that holding:

Title 28 U.S.C. § 1738 governs the preclusive effect to be given the judgments and records of state courts, and is not applicable to the unreviewed state administrative factfinding at issue in this case. However, we have frequently fashioned federal common-law rules of preclusion in the absence of a governing statute. Although § 1738 is a governing statute with regard to the judgments and records of state courts, because § 1738 antedates the development of administrative agencies it clearly does not present a congressional determination that the decisions of state administrative agencies should not be given preclusive effect.

478 U.S. at 794-95 (citations omitted).

188. Section 1738 was most recently re-enacted by Pub. L. No. 80-773, 62 Stat. 947, (1948) (codified at 28 U.S.C. § 1738 (2000)), long after administrative agencies came into being.

189. On the other hand the Court in *Elliott* clearly says that a workers' compensation law hearing is a “judicial proceeding” under Article IV's Full Faith and Credit Clause in its statement that “all of the opinions in *Thomas v. Washington Gas Light Co.* express the view that the Full Faith and Credit Clause compels the States to give preclusive effect to the factfindings of an administrative tribunal in a sister State.” 478 U.S. at 798 (citation omitted). How can it be that the term “judicial proceedings” in the Article IV Clause that became effective in 1787 includes hearings before state administrative law judges but the same term in the implementing act, passed by Congress in 1790, does not? The answer is that the Court views the Constitution as a document whose meanings evolve with changed conditions but does not have this view about terms of a statute. See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that the Eighth Amendment construed based on “evolving standards of decency”); *Katz v. United States*, 389 U.S. 347, 352 (1967) (extending the Fourth Amendment to electronic surveillance of telephone conversation because telephone technology had “come to play” a “vital role” in communications).

was a common practice in the states then constituting the nation. North Carolina provided for issuance of marriage licenses in 1741 as an alternative to the publication of banns.¹⁹⁰ A North Carolina law of 1778 provided that “the clerk of each county court is hereby authorized and empowered to grant marriage licenses to any person applying for the same.”¹⁹¹ A 1748 Virginia law provided:

[E]very license for marriage shall be issued by the clerk of the court of that county wherein the [same] usually resides, in manner following; that is to say, He shall take bond with good surety for the sum of fifty pounds current money, to our sovereign lord the king, his heirs and successors, with condition, that there is no lawful cause to obstruct the marriage for which the license shall be desired¹⁹²

A Massachusetts act of 1796 authorizing the town clerk to charge a fee of 50 cents for “giving the certificate of the publishment, and recording the marriage upon receiving the Justices’ or Ministers’ certificate thereof” indicates the practice of issuing marriage licenses in that commonwealth pre-dated the 1796 Fee Bill.¹⁹³ In colonial times, South Carolina and Georgia provided for the issuance of marriage licenses in lieu of reading of banns in public places, as did a New York law enacted in 1683.¹⁹⁴

In sum, marriage records pass *Elliott’s* test as to whether an institution existed at the time of enactment of a full faith and credit statute such as § 1739. On the other hand, an attempt to read *renvoi* into § 1739 will fail because of that historical test.

Despite some rewriting by Congress,¹⁹⁵ § 1739 retains today the same language employed in 1804 to direct state *B* as to what credit is owed to a nonjudicial record of state *A*: state *B* is to give the records

190. Law of Apr. 4, 1741, ch. 1, § 3, 1741 N.C. Laws ch. 23, 11 (repealed).

191. N.C. Laws 1778, ch. 134, § 2.

192. Laws of Virginia 1748, ch. 32, § 2, *in* STATUTES AT LARGE: A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 86 (William Waller Henning ed., 1819).

193. Fee Bill, ch. 1, 1796 Mass. Acts ch. 1, 533, *available in* 2 COMMONWEALTH OF MASSACHUSETTS, LAWS OF THE COMMONWEALTH OF MASSACHUSETTS (1801).

194. WILLYSTINE GOODSSELL, A HISTORY OF MARRIAGE AND THE FAMILY 382-83 (MacMillan Co. rev. ed. 1934) (1915). Beginning in 1696, Georgia and South Carolina required that persons marrying there record their marriage in municipal records. *Id.* at 390.

195. Section 1739 was last re-enacted by 1948, Pub. L. No. 80-773, 62 Stat. 947 (codified in 28 U.S.C. § 1739 (2000)).

the same preclusive effect “as they have by law or usage in the courts or offices” of state *A*. Applying the historical meaning test of *Elliott*, “law or usage” refers to the internal law of state *A* and not to the law of some other jurisdiction that courts of state *A* might today apply, because the theory of *renvoi* did not exist in 1804.

The notion that under a choice of law analysis the forum might select the whole law of another state, with a remission to its own substantive law or a transmission to the substantive law of a third state—*renvoi*—was first discussed in an 1841 English decision.¹⁹⁶ Thus, “law and usage” of the state creating a marriage record, as the term is used in today’s § 1739, would not include use of *renvoi*, a concept unknown when Congress chose the wording “law and usage” in 1804. Specifically applied, this means § 1739 does not direct the courts of the state of domicile of same-sex partners who go to Massachusetts, obtain a marriage license there, and marry there before returning to their home state to treat section 11 of chapter 207 of the Massachusetts General Laws as part of the “law and usage” of Massachusetts concerning what attacks are allowed on marriage records.¹⁹⁷ Section 11 directs Massachusetts courts to annul such a marriage by applying the law of the couple’s domicile if it considers a same-sex marriage contracted in the domicile state to be void.¹⁹⁸

The Supreme Court has held that a *federal* court will be reversed if it ignores the mandate of § 1738 to give a state court judgment the “same” preclusive effect the rendering state gives to it.¹⁹⁹ It would

196. See JOHN DELATRE FALCONBRIDGE, *The Problem of the Renvoi*, in *ESSAYS ON THE CONFLICT OF LAWS* 137, 143 (2d ed. 1954) (1947); Edwin W. Briggs, “*Renvoi*” in *the Succession to Tangibles: A False Issue Based on Faulty Analysis*, 64 *YALE L.J.* 195, 195 n.4 (1954). According to Ernest G. Lorenzen, *The Renvoi Theory and the Application of Foreign Law*, 10 *COLUM. L. REV.* 190, 191 (1910) (footnote omitted), although the English case of 1841 was the first to mention *renvoi*, “[i]t was not until the adoption of the *renvoi* doctrine by the French Court of Cassation in the *Forgo* case, decided in 1882, that the problem attracted the serious attention of the jurists.” JOHN DELATRE FALCONBRIDGE, *Renvoi in New York and Elsewhere*, in *ESSAYS ON THE CONFLICT OF LAWS* 233, 249 (2d ed. 1954) (1947) cites *Dupuy v. Wurtz*, 53 N.Y. 556 (1873), as the American case to discuss the possible use of *renvoi* in choice of law. Erwin N. Griswold, *Renvoi Revisited*, 51 *HARV. L. REV.* 1165, 1165 n.1 (1938) (citing Notes, 14 *L.Q. REV.* 219, 231 (1898)), says the word “*renvoi*” was first used in legal writing in English in 1898.

197. MASS. GEN. LAWS. ANN. ch. 207, § 11 (West 1998).

198. *Id.*

199. *Marrese v. Am. Acad. of Orthopedic Surgeons*, 470 U.S. 373, 381 (1985); *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). *Mulligan v. Rioux*, 643 A.2d 1226, 1244 (Conn. 1994), holds that these decisions are binding on a state court when it is hearing a federal cause of action.

seem that such a holding would have to apply to a state court giving more rather than the same preclusive effect, contrary to the terms of § 1738, to a judgment of another state. Extending this reasoning, the Court's application of § 1738 to its companion statute, § 1739, also seems logical. Suppose a situation where the state of domicile of the same-sex couple—over the objection of one of them, who has proved the Massachusetts marriage under § 1739—annuls the marriage under forum law on the theory that, because Massachusetts would do just that by applying domicile law, the mandate of § 1739 has not been violated. There is a real possibility the Supreme Court would reverse such a holding as violative of the Supremacy Clause on the theory that ignoring the no-*renvoi* meaning of “law and usage” in § 1739 is the precise equivalent of ignoring the meaning of “same” credit in § 1738.

If section 2 of DOMA, authorizing any state to deny full faith and credit to a same-sex marriage of a sister state, is constitutional, it obviously has impliedly amended § 1739 so that that statute does not apply to same-sex marriages. Dozens of commentators have addressed the constitutionality issue with respect to section 2 of DOMA as a whole.²⁰⁰ I will not rehash their arguments here except to comment that I agree with those who argue that the effect proviso of the Article IV Clause was not intended to authorize Congress to provide that states could give no credit to the records of a sister state. Moreover, as we shall see below,²⁰¹ the constitutionality of DOMA is a moot point with respect to one class of cases involving interstate recognition of same-sex marriages—those where the couple marries in the Massachusetts or Vermont domicile and then takes up domicile in a state that prohibits same-sex marriage. DOMA cannot authorize the new state of domicile to void the marriage or treat it as void because of absence of contacts to the marriage at the time it was contracted.

IV. INTERSTATE RECOGNITION OF “EVASION” MARRIAGES OF SAME-SEX COUPLES

Having laid out the framework of the full faith and credit obligation based on the Article IV Clause and the chief implementing

200. Most of the pertinent writings are collected at the conclusion of this article.

201. See *infra* text accompanying notes 266-77.

statutes (§§ 1738 and 1739), as well as rules found in cases decided by the Supreme Court applying a power emanating from the penumbra of the constitutional Clause, this article proceeds to apply that framework to specific types of cases where a court sitting in a state that bans same-sex marriage is asked to recognize such a marriage. It is important to distinguish two fact patterns. First, in the evasion marriage case, the same-sex couple domiciled in a state that forbids the marriage comes to Massachusetts or Vermont and is married there. Upon the couple's return to the state of domicile, litigation arises in which validity of the marriage is at issue. The evasion marriage is considered in this section of this article.

In the other fact pattern, which can be called the change-of-domicile case, the same-sex couple is domiciled in Vermont or Massachusetts and marries there but then changes domicile to a state that forbids such a marriage. Change of domicile cases are examined in Part V of this article. Because a marriage license clerk in Massachusetts, but not Vermont, has the authority to deny in the evasion marriage situation a marriage license to the out-of-state same-sex couple based on the law of the home state, separate analysis is required in Part IV of Vermont's and Massachusetts's same-sex marriages.

A. *Marriage in Vermont Where the License Clerk Cannot Deny a License to a Same-Sex Couple by Applying the Law of Their Domicile That Bans Gay Marriage*

"Evasion marriage" is the term often applied to the union arising out of a couple's seeking to avoid the law of their domicile which bars the couple's marriage.²⁰² They go to a state whose laws permit them to marry. Thus, same-sex partners domiciled in state *X*, whose law does not permit them to marry, may travel to Vermont, whose law authorizes the marriage (civil union). The laws of both states can constitutionally be applied—that of *X* as the common domicile and of Vermont as the place of the marriage contract, the place of forming the civil union. I can find no authority under Vermont law authorizing the official who issues licenses for civil unions to deny the

202. See, e.g., SCOLES ET AL., *supra* note 48, § 13.13. See also the Uniform Marriage Evasion Act, in effect in five states, including Massachusetts and Vermont. *Id.* at n.2; see MASS. GEN. LAWS ANN. ch. 207, § 10 (West 1998); VT. STAT. ANN. tit. 15, § 5 (2002).

requested license on the basis of state X 's ban of same-sex unions. Rather, two Vermont statutes appear to make issuance of the license mandatory even though the couple's home state would forbid the contemplated union.²⁰³ A recent report states that 86% of civil unions contracted in Vermont involved parties from out of state, confirming that licenses are not being denied based on the marriage law of the home state of the couple.²⁰⁴

After the couple marries in Vermont and returns to state X , one spouse may seek an annulment in the courts of X under state X marriage law. Or many other types of suits could be brought in X or even a third state, Y , that would place the validity of the Vermont marriage at issue. For example, a suit could be brought by one of the spouses for the wrongful death of the other caused by a defendant who asserts that the plaintiff is a legal stranger to the decedent. The party who benefits from a holding that the Vermont marriage is valid places in evidence a copy of the Vermont civil union records, authenticated according to § 1739, and asserts that § 1739 requires the forum to give that record the same credit that a Vermont court would give it.²⁰⁵ That is, only grounds for annulment recognized in Vermont can be applied, and they do not include the fact that the parties are of the same sex.

203. "A town clerk *shall* issue a civil union license to all applicants who have complied with the provisions of section 5160 of this title, and who are otherwise qualified under the laws of the state to apply for a civil union license." VT. STAT. ANN. tit. 18, § 5161(a) (2000) (emphasis added). "Upon application in a form prescribed by the department, a town clerk shall issue a civil union license The license *shall* be issued by the clerk of the town where either party resides or, if neither is a resident of the state, by any town clerk in the state." *Id.* § 5160(a) (emphasis added). This statute further requires the clerk to warn a couple that residence in Vermont is necessary to qualify a same-sex couple who civilly unites to obtain a divorce in Vermont. *Id.* § 5160(f).

204. See Fred Bayles, *Vermont's Gay Civil Unions Mostly Affairs of the Heart*, USA TODAY, Jan. 7, 2004, at 1A; see also Bill Graves, *Questions of Rights, Social Status Stir Debate on Same-Sex Marriage*, THE OREGONIAN (Portland), Oct. 8, 2004, at A.01 (85 percent of Vermont civil unions involve out-of-state couples); S. Mitra Kalita, *Vt. Same-Sex Union Null in Va., Judge Says; Case Seen as Test of Parental Rights*, WASH. POST, Aug. 25, 2004, at B1 ("vast majority" of couples civilly uniting in Vermont are from "out of state").

205. I am continuing to assume at this stage of the discussion of evasion marriages that section 2 of the DOMA is unconstitutional and hence cannot displace § 1739 as the pertinent statute enacted by Congress to implement the Full Faith and Credit Clause with respect to marriage records.

1. *The Effect of a Vermont Marriage License Clerk's Inability to Consider the Marriage Law of the Couple's State of Domicile*

What effect, if any, on the obligation under § 1739 of the forum to give effect to the Vermont marriage of a same-sex couple, domiciled in a state that prohibits such a marriage, arises from the fact that the Vermont license clerk cannot consider the possibility of applying the law of the common domicile²⁰⁶ of the out-of-state couple as a basis for denying a civil union license? One possibility is that the theory of the *Thomas* case, concerning recognition of workers' compensation awards, should apply. *Thomas*, of course, holds the Article IV Clause and § 1738 inapplicable to a judgment entered by a workers' compensation tribunal that cannot make a choice of law.²⁰⁷

If *Thomas* applies to evasion marriages in Vermont by analogy, the Full Faith and Credit Clause would have no application, nor would § 1739, for the same reason that can explain how it was that the *Thomas* Court could decline to apply § 1738 to the Virginia tribunal's award. That theory is that the effect proviso of the Article IV Clause is part and parcel of what becomes inapplicable due to the Court's assertion of its power under the penumbra of the Clause to fashion its own full faith and credit rule. Applying by analogy to the action involving the issue of validity of the Vermont marriage the Court-made rule of *Thomas* for determining when a state could decline to recognize another state's workers' compensation award as a bar in the second forum to a further award, the forum would decide whether the interest of the couple's domicile state at the time of the Vermont

206. Where the spouses have different domiciles at the time they marry, they will usually set up a marital domicile promptly after the marriage in the home state of one of them. The law considers the domicile of the party that becomes the marital domicile to be the state whose marriage law should be viewed as in conflict with the law of the place of celebration. The law of the other party's pre-marriage domicile drops out of consideration. See SCOLAS ET AL., *supra* note 48, § 13.15. A three-way conflict could theoretically exist if one spouse was from state *A*, the other from state *B*, they marry in state *C*, and each keeps his or her pre-marriage domicile. State *A* says the marriage is void, state *B* holds it voidable, and state *C* holds it valid. The chances of this happening are so remote that the three-way conflict is not addressed in this article. Theoretically, four states could have contacts that might make their laws constitutionally eligible if the couple, immediately after the marriage, established a marital domicile in state *D*. However, there is no fourth legal option: the marriage is void, voidable, or valid. Thus, a four-way conflict of law cannot occur in the area of validity of marriage.

207. See *supra* note 125.

marriage was “strong enough” to be declared “overriding” when compared to Vermont’s interest.²⁰⁸

If the facts are changed so that Vermont is state *X*, the common domicile of the same-sex couple and the forum, and Massachusetts the state that married the same-sex couple, it could not possibly be held that any asserted interest Vermont had in denying recognition to the marriage was a strong interest simply because the word “marriage” was used in Massachusetts to describe the contract between the persons of the same-sex rather than “civil union.”

Suppose California were the state of domicile of a same-sex couple that marries in Vermont and then returns to California. The domestic partnership law of California is very similar to the civil union law of Vermont, according same-sex couples who register as domestic partners all of the benefits of lawful marriage except benefits accorded to married persons under the tax laws of California (e.g., lower income tax rates, especially where one of the partners is employed and the other is not).²⁰⁹ A California statute can be construed as

208. See *supra* text accompanying note 115. Or, applying *Thomas* by analogy might direct the forum to ask if Vermont’s interest was “strong enough” to be considered “overriding” when compared to that of the domicile state because Vermont, like Virginia in *Thomas*, was the first state to take action.

A distinct argument can also be made that the party asserting validity of the same-sex marriage under § 1739 should prevail if he or she satisfies—in lieu of *Thomas*’s strong interest test—the “no real antagonism” test of *Hughes v. Fetter*. See *supra* text accompanying note 69. While the *Hughes* test was formulated as a restriction on freedom of the forum to make a choice of law, a freedom created by *Pacific Employers* in the context of the law prong of full faith and credit analysis, a restriction like that of *Hughes* seems appropriate when the issue is whether a state can escape from the mandate of § 1739 to give recognition to the marriage record of another state. That is, no matter how strong the state may claim its interest is in prohibiting same-sex marriage, if that stated antagonism is not “real” under *Hughes*’s constitutionally-based analysis, it should not suffice.

209. CAL. FAM. CODE § 297.5 (West 2004) (subdivision (g) of which withholds the income tax law benefits); see also CAL. FAM. CODE § 299.5 (West 2004). It appears the California legislature disallowed the income-splitting benefits enjoyed by opposite-sex married couples under the state income tax law so that the data and calculations used by same-sex couples in filling out their federal form 1040 (which DOMA requires they file separately as if unmarried) could be carried over to the state income tax forms to be filed. This also enables same-sex couples who become California domestic partners to point to some benefit of marriage of opposite-sex couples that they do not obtain in order to preclude a court’s holding the domestic partnership law, which was enacted by the legislature, invalid under law enacted by initiative of the California voters banning marriage of a same-sex couple. A law enacted by initiative cannot be amended except by another vote of the people. CAL. CONST. art. II, § 10(c). *Knight v. Super. Ct.*, 26 Cal. Rptr. 3d 687, 694 (Ct. App. 2005), held that the domestic partnership legislation did not amend the statute that had been enacted previously by initiative because the new relationship for same-sex couples was not called marriage. But the court also noted that California same-sex

directing a California court to convert a Vermont civil union into a California domestic partnership,²¹⁰ but a party can invoke § 1739 to argue that doing so violates that statute and, hence, the Supremacy Clause of the Federal Constitution. Vermont imposes no tax disability on the couple, so California cannot do so either. Since Vermont gives to the civilly united couple all the state law benefits of marriage, California must do the same unless it has a strong interest in declining to do so (the *Thomas* test). The loss to California in revenue incurred by granting true marital status to same-sex couples who marry in Vermont but are California taxpayers seems so minimal that courts should hold that California's interest in denying recognition to the Vermont marriage is not of the strength that would warrant application of the *Thomas* case's exception—applied by analogy—to the obligation to give full faith and credit to the marriage records from Vermont.

Hawaii's reciprocal beneficiary law provides many benefits of lawful marriage to same-sex couples who register under it, but not as many as California does.²¹¹ Whether Hawaii has a strong interest in

domestic partners must file state income tax returns as single persons, certainly a more sound basis for the holding. *Id.* at 699.

210. According to California law:

A legal Union of two persons of the same sex, other than a marriage, that was validly formed in another jurisdiction, and that is substantially equivalent to a domestic partnership as defined in this part, shall be recognized as a valid domestic partnership in this state regardless of whether it bears the name domestic partnership.

CAL. FAM. CODE § 299.2 (West 2004). Would California hold the statute inapplicable either (1) because a Vermont civil union is a "marriage" as that term is used in the statute, since Vermont accords all the benefits of opposite-sex married couples to same-sex couples, as does Massachusetts or (2) because on a choice of law analysis the California couple were not "validly" united in a civil union, as Vermont law was improperly applied?

211. To determine what benefits of marriage Hawaii reciprocal beneficiaries do and do not obtain, it is necessary to examine every statute referring to husband and wife to see if the statute was amended to be made applicable to reciprocal beneficiaries also after the Hawaii legislature created the status of reciprocal beneficiaries. Among the benefits flowing to reciprocal beneficiaries as a result of such amendments are the survivor's right to inherit by intestate succession upon death of one reciprocal beneficiary, HAW. REV. STAT. ANN. § 560:2-102 (Michie 1999), the right to recover for wrongful death of a reciprocal beneficiary, HAW. REV. STAT. ANN. § 663-3(b)(3) (Michie 2002), the right to co-own property in tenancy by the entirety, HAW. REV. STAT. ANN. § 509-2 (Michie 2000), and the right to make health care decisions for one's reciprocal beneficiary and enjoy hospital visitation privileges, HAW. REV. STAT. ANN. § 323-2 (Michie 2004). Benefits not obtained due to failure to amend statutes include the right to claim support during the union, HAW. REV. STAT. ANN. § 572-24 (Michie 1999), the right to alimony after termination of the union, HAW. REV. STAT. ANN. § 580-47 (Michie 1999), and income tax benefits available to

denying recognition to the Vermont marriage is problematic, but the same-sex couple certainly has a non-frivolous argument that Hawaii must recognize their Vermont marriage as a marriage and not convert it into a Hawaii reciprocal beneficiary relationship.²¹² With other states, the case for absence of a “strong interest” in refusing to recognize a Vermont same-sex civil union will be substantially more difficult to make.²¹³ Most of the states that have enacted a little DOMA²¹⁴ are likely to be held by the Supreme Court to have expressed the strong interest *Thomas* requires.

Thus, there are going to be several domiciliary states whose courts would declare, after applying the *Thomas* case by analogy, rather

opposite-sex married couples, *e.g.*, HAW. REV. STAT. ANN. § 235-1 (Michie 2003) (defining husband and wife).

212. As we have seen, a Court-made rule that causes § 1739 not to apply to a fact situation which on its face it addresses must be constitutionally based and authorized by powers bestowed upon the United States Supreme Court by a penumbra of the Full Faith and Credit Clause. Therefore, whether Hawaii or California has a “strong” interest in refusing to recognize a Vermont civil union because Vermont grants to same-sex married couples a few more rights than are obtained by parties to a domestic partnership in California and by reciprocal beneficiaries in Hawaii would be a federal question for purposes of Article III. However, potential applicability of § 1739 in a case in which validity of the Vermont marriage arises is not likely to appear on the face of a well-pleaded complaint as the basis for initial jurisdiction in federal court or removal to the federal court. But the state court’s decision on the “strong interest” issue could authorize a petition for writ of certiorari to the United States Supreme Court (grant of which seems most unlikely).

213. Consider Washington as the state of common domicile. It now applies to same-sex couples its judge-made meretricious relationship doctrine. *See Vasquez v. Hawthorne*, 33 P.3d 735, 737 (Wash. 2001); *Gormley v. Robertson*, 83 P.3d 1042, 1043 (Wash. Ct. App. 2004). The act of living together in the same manner as committed spouses creates a status that carries with it many of the benefits and obligations of lawful marriage, excluding, however, some significant benefits, such as the right of a lawful surviving spouse to inherit by intestate succession property of the deceased spouse and the right to sue for wrongful death of a spouse. *See William A. Reppy, Jr., Choice of Law Problems Arising When Unmarried Cohabitants Change Domicile*, 55 SMU L. REV. 273, 277-80 (2002) (collecting the benefits and obligations of marriage granted to and withheld from Washington couples in a meretricious relationship). Because many of the benefits of lawful marriage are not enjoyed by partners in a meretricious relationship, a Washington court could fairly hold that the state’s interest in refusing recognition to a same-sex marriage in Vermont contracted by Washington domiciliaries was strong, and not sufficiently weakened by the fact that same-sex couples in Washington can join in a meretricious relationship.

214. For citations to laws in thirty-five states that prohibit same-sex marriage and/or order the state’s courts not to recognize same-sex marriages contracted in other states, see William C. Duncan, *Against Redefining Marriage: A Review and Critique of Recent Local Developments*, 23 QUINNIPAC L. REV. 427, 431 n.33 (2004). A Washington trial court has held that state’s DOMA unconstitutional under a strict scrutiny analysis as violative of the privileges and immunities clause of the Washington constitution. *Castle v. State*, No. 04-2-00614-4, 2004 WL 1985215 (Wash. Super. Ct. Sept. 7, 2004).

than § 1739, as the source of the governing full faith and credit rule, that the state's interest in denying recognition to a same-sex marriage contracted in Vermont by domiciliaries of the forum state is as strong as *Thomas* requires in order to deny full faith and credit. There may also be third states that will hold that the domicile state has the level of interest that warrants nonrecognition of the marriage under the *Thomas* test—for instance, if after returning from Vermont to the state of common domicile, one of the parties to the civil union is tortiously killed in state *Y*, where the survivor sues the tortfeasor for wrongful death.²¹⁵

2. *What Is the Effect of a Couple's Obtaining a Vermont Declaratory Judgment That Their Vermont Evasion Marriage Is Valid?*

Anticipating that courts in their state of domicile, state *X*, or in a third state might not recognize their Vermont civil union based solely on proof under § 1739 of the Vermont records, the spouses might bring, before returning to *X*, a declaratory judgment action before a Vermont judge who has the jurisdiction to make a choice of law seeking a judgment that their marriage is valid in hopes that the strict rule of full faith and credit for judgments would apply to it. A Vermont statute provides:

When the validity of a marriage is denied or doubted by either of the parties, the other party may file a libel for affirming the marriage. Upon proof of the validity thereof, it shall be declared valid by a decree of the court. Such decree shall be conclusive upon persons concerned.²¹⁶

215. If the couple who contracted an evasion marriage later move from their domicile state and establish a new domicile in a third state, where litigation ensues concerning the validity of the marriage contracted in a state that considers it lawful, the strong interest of the original state of domicile has ceased to exist and the court in the new domicile state should not apply the law of the former domicile. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 cmt. k, illus. 2 (1971).

216. VT. STAT. ANN. tit. 15, § 7 (2002); accord MASS. GEN. LAWS ANN. ch. 207, § 14 (West 1998).

Since parties to a civil union have all the benefits of a married couple,²¹⁷ this procedure is available to our state *X*-domiciled couple.

For choice of law issues, Vermont employs the method of the *Restatement (Second) of Conflict of Laws*, section 6,²¹⁸ which directs the Vermont courts to follow a statutory directive from the Vermont legislature that resolves a choice of law issue.²¹⁹ We have seen that the Vermont civil union legislation orders the marriage license clerk to issue a license for a civil union to an out-of-state couple, while cautioning them they cannot get divorced in Vermont unless they take up residence in Vermont.²²⁰ I consider it very likely that Vermont judges will view this statute as a directive to apply Vermont law and reject the law of the out-of-state domicile when asked to determine the validity of the union. That is, they will recognize that the statute forbids the court from holding the civil union void through application of the marriage law of the common domicile of the couple.

Should the Vermont judge in the declaratory action hold that the civil union legislation is not a statutory directive that moots the potential choice of law issue, the court would apply section 283 of the *Restatement (Second) of Conflict of Laws*. Under this section, Vermont's civil union statute would validate the "marriage" unless state *X*, the state of domicile, was shown to have a "strong public policy" against the marriage.²²¹ Since that looks just like the *Thomas* test, nothing will be gained by bringing the declaratory judgment suit unless it is thought a Vermont judge would apply the "strong interest" test in a manner more sympathetic to the couple than a judge in the state of their domicile.

Assuming that the *Thomas* case, not § 1739, would be the source of applicable full faith and credit law in litigation in the domicile state

217. VT. STAT. ANN. tit. 15, § 1204 (2002).

218. See *Myers v. Langlois*, 721 A.2d 129, 131 (Vt. 1998).

219. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

220. VT. STAT. ANN. tit. 18, § 5160 (2000).

221. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971). I am assuming the court will hold that in comparison to Vermont, state *X* as the domicile state "had the most significant relationship to the spouses and the marriage at the time of the marriage." *Id.* That is the state which under section 283 can displace the *Restatement's* preference for application of the law of the place of celebration of the marriage. Note that the *Restatement* clearly places something akin to a burden of persuasion on the party seeking application of domicile law, while it was not entirely clear where a *Thomas* analogy would place it. See *supra* text accompanying notes 153-54. Cases where such placement would control the result of the choice of law process ought to be rare.

concerning the validity of the Vermont marriage in the absence of a Vermont declaratory judgment holding the same-sex marriage in Vermont of an out-of-state couple valid, would the Supreme Court require the state of domicile of the same-sex couple married in Vermont to treat such a declaratory judgment as a “judicial proceeding” under § 1738, entitled to the “same” credit Vermont would give it? If so, the domicile state would be bound to recognize the same-sex marriage. I think the Supreme Court would not require this of the domicile state. If the Vermont court holds that the civil union laws constitute a statutory directive to apply Vermont law, the Vermont court would be viewed as in the same legal straitjacket as the Virginia workers’ compensation tribunal was in *Thomas*—compelled to apply local law and barred from considering the interest of another involved state. The same logic that led the *Thomas* Court to hold that § 1738 did not apply there—although on its face it did—would permit state *X* to hold § 1738 inapplicable despite the Vermont declaratory judgment. That would leave applicable, by analogy, the strong interest test of *Thomas*.

Suppose, on the other hand, the Vermont court holds in the declaratory judgment suit that there is no statutory directive and—convinced by the same-sex couple seeking the declaratory judgment that their state of domicile has no strong interest under section 283 of the *Second Restatement* in denying recognition to the Vermont marriage—applies Vermont law under the choice of law method of section 283 of the *Second Restatement*. It issues a declaratory judgment that the couple’s Vermont marriage is valid. When the issue of validity of the Vermont marriage later comes up in a proceeding in a court of the state of the couple’s domicile, the judge there decides that the Vermont holding was wrong and that the domicile state does, indeed, have a strong interest in denying recognition to an out-of-state same-sex marriage of its domiciliaries. It can reasonably be argued that the domicile state should be able to escape the obligation imposed by § 1738 by extending the reasoning of *Thomas* from the situation there, in which the tribunal has no power to make a choice of law, to that in which a choice can be made but the proceeding is not adversarial. That is, in the case of the hypothetical declaratory judgment action, there was no one involved to present the argument that the domicile state actually did have a strong interest in applying its marriage law to its domiciliaries.

The Supreme Court could well permit courts of the domicile state to deny full faith and credit to the declaratory judgment on the theory that this non-adversarial opportunity for the Vermont judge to make a choice of law is an insufficient basis for barring the domicile state from applying the *Thomas* test itself. Such a displacement of the full faith and credit command of § 1738 with respect to the declaratory judgment would be based on the Court's powers under the penumbra of the Full Faith and Credit Clause. It appears most likely that the Court will exercise this power and hold that, in order to avoid a later *Thomas*-based decision as to whether the original forum had an insufficiently overriding interest to preclude subsequent contrary decisions in the state of domicile, the original forum (here, Vermont) would have to conduct a full adversarial hearing on the choice of law issue.

3. *Applying Full Faith and Credit Cases Concerning Divorce Decrees as a Basis for Avoiding Displacement of Section 1739 in Favor of a Penumbra Power Rule*

The foregoing discussion has assumed that *Thomas*, a workers' compensation tort case, would apply by analogy to cases concerning the validity of a marriage because Vermont marriage license clerks cannot make a choice of law—cannot consider the interest of the domicile state in the context of an evasion marriage. I believe, however, that that assumption is wrong. There is a sounder analogy to be applied to answer the question as to whether Vermont's inability to make a choice of law means other states can refuse to apply § 1739 and its mandate to treat the marriage (when proved by authenticated copies of the Vermont marriage documents) in the same manner as Vermont would. The proper analogy is to full faith and credit law developed for cases arising out of the same field of law that includes marriage—the field of family law. Specifically, the law applicable to full faith and credit owed to divorce decrees should apply by analogy.

Initially, it should be noted that the inability of the Virginia tribunal in *Thomas* to do other than apply Virginia law, although the law of the District of Columbia was also constitutionally eligible for application, was just one of several reasons given by the Court as to why the Full Faith and Credit Clause and § 1738 did not apply to the Virginia award. Although inability of the tribunal to make a choice of

law was mentioned, much emphasis was given in *Thomas* to creating a rule for recognition of workers' compensation awards that would be fair to injured employees.²²² Because of that focus in *Thomas*, the holding there is not in conflict with the Supreme Court's treatment of divorce decrees as judicial proceedings subject to § 1738²²³ and to the Full Faith and Credit Clause itself, even though divorce courts always apply only their own law on the central issue of whether there is a legal ground for dissolving a couple's marriage.²²⁴ The Supreme Court finds no constitutional problem with this practice.²²⁵ Apparently there is no reported American decision in which a divorce court chose to decide the existence of grounds for divorce by the law of the marital domicile where, for example, the defendant spouse may have committed adultery prior to a plaintiff spouse's moving to the forum state and establishing domicile there to give the new forum jurisdiction to dissolve the marriage.²²⁶

The most common situation in which a divorce court faces the fact that the law of a state other than the forum is constitutionally eligible

222. Thus the court said that "providing adequate compensation" to the victim should have been an interest of Virginia's as well as of the District of Columbia. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 280 (1980). The injured worker may have "been constrained by circumstances to seek relief in the less generous forum or has simply made an ill-advised choice of his first forum." *Id.* at 284. Virginia had no "overriding interest in requiring an injured employee to proceed with special caution when first assessing his claim." *Id.* As the court observed, "[c]ompensation proceedings are often initiated informally, without the advice of counsel, and without special attention to the choice of the most appropriate forum. Often the worker is still hospitalized when benefits are sought as was true in this case." *Id.* On the other hand, Virginia's interest in protecting the employer and its insurer from a supplemental award was considered weak by the *Thomas* court because, after the accident occurred, they would have anticipated that the victim would seek his remedy in the District of Columbia, where he could get the larger award. *Id.* at 280, 284-85.

223. Cases in which the United States Supreme Court cited § 1738 as being applicable to sister-state disputes concerning divorce decrees as well as the Full Faith and Credit Clause include *Kovacs v. Brewer*, 356 U.S. 604, 607 n.3 (1958) (child custody issues); *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 417 n.3 (1957) (alimony issues); *Sutton v. Leib*, 342 U.S. 402, 404 n.1 (1952) (alimony); *Johnson v. Muelberger*, 340 U.S. 581, 584 n.2 (1951) (authority of court to dissolve the marriage).

224. See, e.g., SCOLAS ET AL., *supra* note 48, § 15.4 ("identity of forum and applicable law"); RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 237 (3d ed. 1986); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 285 (1971).

225. *Williams v. North Carolina*, 317 U.S. 287, 299 (1942) (holding that the domicile status of one spouse was sufficient connection to apply forum divorce law).

226. See SCOLAS ET AL., *supra* note 48, § 13.16 ("[T]here are no choice of law rules for divorce. . . . [L]ocal law applies. . . ."); Katherine Shaw Spaht & Symeon Symeonides, *Covenant Marriage and the Law of Conflicts of Laws*, 32 CREIGHTON L. REV. 1085, 1102-07 (1999).

to have its law applied is where one spouse has left the marital domicile and moved to a new state, leaving the other spouse—and much or even all the divisible property—in the marital domicile. The court in the new domicile may grant a divorce on grounds not recognized in the domicile of the other spouse and, if personal jurisdiction is obtained over the spouse who did not change domicile, divide the property in a manner contrary to the division law of the other involved state. The new domicile's judgment is, of course, entitled to full faith and credit under the Article IV Clause and § 1738 despite the rendering court's inability, as a matter of local practice, to apply any law other than that of the forum.²²⁷

This state of the law has permitted what observers see as evasion of the divorce law of the marital domicile, much as the same-sex couple going to Vermont to marry seeks to evade the marriage law of their domicile. Thus, if the spouse who did not change domicile is willing, in order to facilitate the divorce, to make an appearance in the forum state yet declines to contest the plaintiff spouse's allegation that he or she has acquired a new domicile in the forum state, under *Sherrer v. Sherrer*²²⁸ the judgment is conclusive of whether the forum had jurisdiction to grant a divorce on grounds not recognized in the state that was the marital domicile before the plaintiff spouse departed it.

The refusal of a divorce court to even consider applying the law of some state other than the forum is presently a matter of grave concern to advocates of covenant marriage, an alternative to the "standard" marriage in three states.²²⁹ In a covenant marriage, the spouses contractually agree that the grounds for dissolution of their marriage will be limited to serious misconduct such as adultery and spousal abuse or, following mandatory counseling, on the ground of separation for a long period of time, such as two years.²³⁰ But under

227. See *Williams*, 317 U.S. at 296-97.

228. 334 U.S. 343 (1948). In *Sherrer*, the defendant spouse participated in the trial but did not introduce evidence to contradict the plaintiff's assertion that the plaintiff had acquired a domicile in the forum state. *Id.* at 343. *Cook v. Cook*, 342 U.S. 126, 127-28 (1951), indicated that the rule of the *Sherrer* case concerning conclusiveness of divorce jurisdiction in the forum court (which carries with it the authority to apply forum law in divorce cases) would also apply if the defendant were served with process but defaulted.

229. See ARIZ. REV. STAT. ANN. §§ 25-901 to -906 (West 1998); ARK. CODE ANN. §§ 9-11-801 to -811 (Michie 2002); LA. REV. STAT. ANN. §§ 272-273.1 (West 1999).

230. Spaht & Symeonides, *supra* note 226, at 1089-90 (summarizing the covenant marriage law of Louisiana).

the Supreme Court's precedents allowing a state that is the domicile of one spouse to grant a divorce by applying its own law of grounds therefore, a calculated move away from the marital domicile makes the covenant marriage contract unenforceable. Even worse, according to Professor Spaht and Dean Symeonides, if both spouses, having agreed to a covenant marriage, now want a quick divorce, under *Sherrer*, if the spouse who does not claim to have established domicile in the forum state makes an appearance, the matrimonial domicile is compelled to recognize the divorce granted, for example, based on three months' separation, even though both parties are now back in the matrimonial domicile and the plaintiff spouse's allegation of domicile in the state of the forum appears to be a sham.²³¹

Spaht and Symeonides are of the view that the *Sherrer* Court ruled as it did to facilitate the spouses' evasion of law of their home state that did not make available to them a divorce they wanted.²³² If the Supreme Court requires even the state that was the matrimonial domicile to accord full faith and credit to "evasion" divorces granted by a forum that will not consider the law of grounds for divorce of the actual domicile of both spouses, on what basis would it distinguish evasion marriages performed in Vermont pursuant to a license issued by a clerk who is statutorily barred from denying the license based on the law of the domicile of the soon-to-be spouses? Little basis for distinguishing the two situations appears, and there are sound reasons for the Court to apply to issues of full faith and credit for marriage records the same approach it has taken with respect to full faith and credit for divorce decrees.

There may be some basis for distinguishing divorce from annulment—though the fact that annulment of a void marriage relates back to the date of celebration of the "marriage" is not a relevant distinction. Surely, however, the fact that both these areas of law deal with domestic relations and whether there will be, after a

231. *Id.* at 1109; accord *SCALES ET AL.*, *supra* note 48, § 3.16.

232. As Professor Spaht and Dean Symeonides have argued:

This is not to say that the Court's failure to separate the choice of law question from the jurisdictional question can be attributed to either naivete or inattentiveness. The opposite is closer to the truth. The Court was undoubtedly aware that if the two questions were to be separated the whole campaign for migratory divorces would have been stopped in its tracks.

Spaht & Symeonides, *supra* note 226, at 1104.

judgment is entered, a marriage which the law recognizes, makes it far more reasonable to solve the problem raised by the inability of the Vermont marriage license clerk to make a choice of law by adopting by analogy the cases involving full faith and credit for divorce decrees rather than drawing an analogy from the area of tort law and industrial injuries by applying the logic of the *Thomas* case.

B. *Marriage in Massachusetts Where the Clerk Is Directed to Deny the License to an Out-of-State Couple in Certain Circumstances*

What credit is owed interstate to same-sex Massachusetts marriages warrants separate consideration from that due to same-sex Vermont marriages for two reasons. First, Massachusetts is one of at least three states²³³ that authorize the clerk who issues marriage licenses to make a choice of law and to deny the license on the basis of a law of the state of the couple's domicile, state *X*, that would render void the same-sex marriage of the state *X* couple.²³⁴ Second, while a Vermont statute appears to direct Vermont courts to apply Vermont law when determining the validity of an evasion marriage of a same-sex couple performed in Vermont, Massachusetts courts are directed to apply the law of the couple's domicile.²³⁵

233. The other states are New Hampshire and Wisconsin. N.H. REV. STAT. ANN. § 457:44 (1992) ("No marriage shall be contracted in this state by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this state in violation hereof shall be null and void."); WIS. STAT. ANN. § 765.04(3) (West 2001) (identical except that it refers to "state or jurisdiction" instead of "state" and "in violation of this provision").

234. See MASS. GEN. LAWS ANN. ch. 207, § 12 (West 1998), quoted *infra* note 236. Apparently the Massachusetts marriage license clerk is supposed to imagine a scenario in which his or her counterpart in state *X*—the common domicile of the same-sex couple applying to the Massachusetts clerk for a license—comes to the conclusion that the equivalent of the equal protection clause in state *X*'s constitution voids the state *X* statute barring same-sex marriages. The clerk then issues a license to a same-sex couple. See *Lockyer v. City & County of San Francisco*, 95 P.3d 459 (Cal. 2004) (San Francisco clerk does just that on urging of the mayor). A minister then marries the couple. The Massachusetts marriage license clerk must himself guess if the domicile state marriage license clerk's hypothetical guess was correct. If a trial court in the domicile state has ruled that the law of the domicile state barring same-sex marriages is invalid under the state constitution, the Massachusetts marriage license clerk must guess whether appellate courts will affirm or reverse.

235. See MASS. GEN. LAWS ANN. ch. 207, § 12 (West 1998).

Two Massachusetts statutes²³⁶ achieve these results—one addressed to the marriage license clerk and one to judges of the commonwealth. The two have been construed by a trial court in Massachusetts as a sort of package deal, with the former being a gloss on the latter.²³⁷ Section 12 of chapter 207 of the Massachusetts General Laws directs the marriage license clerk to withhold a marriage license for a couple domiciled in another state if that state has “prohibited” a marriage of persons having the characteristics of the applicant couple (e.g., they are of the same sex).²³⁸ Section 11, on the other hand, is narrower and says a court in Massachusetts shall declare void a marriage performed there that would be “void” if performed in the couple’s state of domicile. Many of the little DOMAs that ban same-sex marriage do not declare whether these marriages are void or voidable when celebrated in violation of a statute prohibiting same-sex marriage.²³⁹

In effect, the trial court opinion directs the clerk to deny a marriage license to the same-sex couple from out of state if the clerk determines that the law of *X*, the domicile state, simply prohibits a same-sex marriage without indicating whether it would label the marriage void. The same trial court opinion discloses, as discussed above,²⁴⁰ that marriage license clerks have been ordered by officials in

236. Section 11 of chapter 207 of the Massachusetts General Laws provides: “No marriage shall be contracted in this commonwealth by a party residing and intending to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this commonwealth in violation hereof shall be null and void.” Section 12 of the same chapter states: “Before issuing a license to marry a person who resides and intends to reside in another state, the officer having authority to issue the license shall satisfy himself, by requiring affidavits or otherwise, that such a person is not prohibited from intermarrying by the laws of the jurisdiction where he or she resides.” MASS. GEN. LAWS ANN. ch. 207, §§ 11-12 (West 1998).

237. *Cote-Whitacre v. Dep’t of Pub. Health*, 18 Mass. L. Rptr. 190, No. 042656G, 2004 WL 2075557, at *7 (Super. Ct. Aug. 18, 2004).

238. MASS. GEN. LAWS ANN. ch. 207, § 12 (West 1998).

239. *See, e.g.*, ALA. CODE § 30-1-19 (1998) (“invalid”); ARK. CODE ANN. § 9-11-107(b) (Michie 2002) (“This section shall not apply to a marriage between persons of the same sex.”); CAL. FAM. CODE § 308.5 (West 2000) (not “valid,” not “recognized”); IDAHO CODE § 32-209 (Michie 1996) (“violate public policy”); MICH. COMP. LAWS ANN. § 551.1 (West 2005) (“invalid”); N.D. CENT. CODE § 14-03-01 (2004) (marriage is between “one man and one woman”). Since some of the state DOMAs do declare a same-sex marriage “void,” *e.g.*, ALASKA STAT. § 25.05.013 (Michie 2004); DEL. CODE ANN. tit. 13, § 101(a) (1999), and apparently none classifies such a marriage as “voidable,” the prediction is that courts in states where DOMA does not specify whether a same-sex marriage is void or voidable will classify such a marriage as void ab initio.

240. *See supra* text accompanying note 178.

the state capital to deny licenses to all out of state same-sex couples,²⁴¹ although that order is illegal. In addition, the municipal attorney for each of four cities and towns in Massachusetts where marriage license clerks, according to published reports, had been ignoring the choice of law statutes and granting licenses to same-sex couples domiciled in a state that bans same-sex marriage received a warning letter from the office of the state's Attorney General. It stated that the actions of the clerks "'raise significant questions under G.L.c. 207, §§ 11 and/or 12, and, before we institute enforcement action, we write to request your immediate explanation of how these actions may be reconciled with those statutes.'"²⁴²

The "enforcement action" referred to is a criminal prosecution under section 50 of chapter 207 of the Massachusetts General Laws, which provides:

Any official issuing a certificate of notice of intention of marriage [i.e., a license] knowing that the parties are prohibited by section eleven^[243] from intermarrying, and any person authorized to solemnize marriage who shall solemnize a marriage knowing that the parties are so prohibited, shall be punished by a fine of not less than one hundred nor more than five hundred dollars or by imprisonment for not more than one year, or both.²⁴⁴

Thus, marriage license clerks in Massachusetts are under pressure to handle the choice of law issue entrusted to them by section 12 correctly and not to "cheat" out of sympathy for gay men and lesbians suffering discrimination under the laws of their home state. In litigation involving a potential choice of law issue, it is expected that the party who would benefit by the displacement of forum law by an out-of-state law will detect this legal issue, prove the content of the foreign law, and demonstrate to the court why, under the forum's choice of law methodology, that foreign law should be applied.²⁴⁵ If the party who would benefit from making such a choice of law

241. *Cote-Whitacre*, 2004 WL 2075557, at *4-5.

242. *Id.* at *5.

243. *See supra* note 236, quoting the statute directing courts to void such a marriage.

244. MASS. GEN. LAWS ANN. ch. 207, § 50 (West 1998).

245. *See Currie, supra* note 159, at 10 ("In the ordinary tort or contract case the adversary nature of the proceeding ensures that the party who stands to benefit under the appropriate law has the necessary incentive to insist on its application.").

neglects to raise the issue and as a result suffers a judgment against him or her, it is inconceivable that the Supreme Court would hold that a sister state could apply the *Thomas* case to deny full faith and credit to the judgment on the ground that a choice of law was not made by a judge who had the power to make it.

Although in the scenario of an out-of-state same-sex couple seeking a Massachusetts marriage license there is no adverse party to counter the argument that the couple might make to the clerk to the effect that their home state does not prohibit same-sex marriage, the Massachusetts clerk himself or herself assumes a quasi-adversarial role in the choice of law process. The interest of the state of domicile in having Massachusetts fairly consider denying the marriage license based on the domicile state's marriage law seems almost as effectively protected as it would be in actual litigation between adverse parties where the "tribunal" itself is compelled to consider applicability of the domicile state's law *sua sponte*, particularly if the official charged with doing so faces a hefty fine and time in prison for failing to do so.

Suppose then, Amy and Alice, a same-sex couple domiciled in New York, seek a marriage license in Massachusetts. They concede to the marriage license clerk that they will be returning to New York after they marry in Massachusetts, but file a memorandum that convinces the Massachusetts clerk that appellate courts of New York will affirm various trial court decisions²⁴⁶ that have held that New York's ban of same-sex marriages violates provisions of the Constitution of the State of New York. The clerk issues them a license in the good faith belief that their argument is sound, and Amy and Alice are married in Massachusetts.

Not long after the couple returns to New York, its court of appeals disagrees with the couple's arguments and holds that the state constitution does not require New York to marry same-sex couples. Later, and after a child is born to Amy by artificial insemination approved by Alice, the couple splits up. In a New York court, Amy

246. The highest court of New York that has so held as of the date of publication of this article was the Supreme Court of New York County in a case decided February 4, 2005, by Judge Doris Ling-Cohan in an action brought by five gay couples. See *Hernandez v. Robles*, 794 N.Y.S.2d 579 (Sup. Ct. 2005), *appeal denied, remanded*, 829 N.E.2d 670 (N.Y. 2005); Sabrina Tavernise, *New York Judge Opens a Window to Gay Marriage*, N.Y. TIMES, Feb. 5, 2005, at A1. Other lower court decisions so holding include *People v. Greenleaf*, 780 N.Y.S.2d 899 (Just. Ct. 2004) and *People v. West*, 780 N.Y.S.2d 723 (Just. Ct. 2004). There are also lower court decisions upholding the New York ban on same-sex marriages. See, e.g., *Shields v. Madigan*, 783 N.Y.S.2d 270 (Sup. Ct. 2004).

seeks an annulment and custody of the child with visitation denied to Alice on the ground that Alice has no legal ties to the child. Alice opposes the annulment and introduces into evidence a copy of the Massachusetts records of her marriage, authenticated in the manner directed by § 1739. Alice successfully argues that § 1739 directs the New York court to test the validity of her marriage by the internal law of Massachusetts, excluding its choice of law provisions (i.e., sections 11 and 12 of chapter 207).²⁴⁷ Through the *Goodridge* case Alice proves that same-sex marriages are lawful in Massachusetts. Alice also convinces the court that DOMA's provisions on recognition of same-sex marriages are unconstitutional in authorizing a sister state to give no credit at all to a same-sex marriage contracted in another state of the union. Alice asserts Amy's remedy is not annulment but divorce, a proceeding in which Alice may seek custody of the child or at least visitation rights.

Alice's argument that New York must give full faith and credit to the Massachusetts marriage records should prevail. Since Massachusetts provided an opportunity in an essentially adversary-type setting for the marriage license clerk to apply New York law prohibiting same-sex marriages and deny the couple a license, the policy considerations that lead the *Thomas* court to make an exception to the obligation to give full faith and credit to the award of a workers' compensation tribunal are absent. A record created through a mistake of law should stand on the same footing for full faith and credit purposes as a final judgment that rests on an error of law. Both are entitled to recognition. No reason appears, then, to hold § 1739 inapplicable, and that section requires New York to treat the Massachusetts marriage record like a Massachusetts judgment, in that its validity is tested by Massachusetts law, not New York law.

Not so clear is what will happen if Amy's annulment suit is brought in Massachusetts. She and Alice could be New Yorkers temporarily residing in Massachusetts who cannot claim to be domiciliaries—one could be a visiting professor at a Massachusetts university. Before returning to New York, the pair marries, Amy has the baby, she and Alice split up, and Amy sues for an annulment. Section 1739 is now inapplicable, as it deals with the credit a court of one state must give to the authenticated record from some "other state."

247. See *supra* text accompanying notes 197-99.

What role does section 11 have here? Should the Massachusetts judge consider the state of New York law at the time of the marriage when the Massachusetts clerk made a bona fide guess that the appellate court system of New York would agree with a number of lower courts that have held the ban on same-sex marriage violative of the state constitution, rather than contrary lower court cases upholding the ban? Or does section 11 envision the Massachusetts judge asked to annul the marriage applying post-marriage appellate decisions from New York that show the Massachusetts marriage license clerk guessed wrongly? Surely Massachusetts will not fine or imprison the clerk for his or her bona fide guess, but mens rea would not be an element in the annulment action. Annulment could well be denied by an interpretation that looks at the law of the domicile state solely as it existed at the time of the marriage.

There is another basis for denying the annulment despite section 11's literal language. My guess is that the Massachusetts Supreme Judicial Court would hold that, since § 1739 would require New York to deny an annulment if New York were the forum, the purpose of section 11 would not be furthered by Massachusetts's granting it.²⁴⁸ Since § 1739 is not in play in the Massachusetts court, nothing prevents it from taking a look at the whole law of New York, including its law concerning conflicts between federal and state statutes, with the Massachusetts court yielding to the result New York would reach by force of federal preemption.

Yet a third theory for denying the annulment presents itself. Massachusetts could hold section 11 incurably ambiguous because it fails to specify what law of the domicile state existing at what time is to be consulted. Since section 11 would thus fail as a "statutory directive . . . on choice of law,"²⁴⁹ the court would turn to the commonwealth's common law of choice of law for a rule of decision.

248. If, during the pendency of the annulment action, Amy and Alice (or even just one of them) changed their domicile from New York to Massachusetts, the policy reasons for annulling the marriage by literal application of section 11 would also be absent. They would not be returning to New York to disturb its citizens by virtue of their living arrangement. If Amy and Alice moved to state *Y* and Amy sought an annulment there rather than in Massachusetts, state *Y*'s courts could also readily hold that New York had lost its state interest in annulling the marriage by applying its own law when the couple gave up their New York domicile, leaving Massachusetts as the only interested state whose law can constitutionally apply to the issue of validity of the marriage. See *SCOLES ET AL.*, *supra* note 48, § 13.14.

249. See *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 6(1) (1971).

The choice of law method employed in Massachusetts is the most significant relationship test of the *Restatement (Second) of Conflicts*.²⁵⁰ Section 283(2) of the *Second Restatement* provides that, on the issue of validity of a marriage, the law of the place of the celebration will yield only to the law that is supported by “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.”²⁵¹ In other words, Massachusetts is to apply its own law (denying the annulment sought by Amy) unless the New York policy against same-sex marriage is “strong.” New York recognizes so many legal rights for same-sex couples who are cohabiting in a marriage-like relationship that the New York policy against same-sex marriage appears not strong at all, but marginal. Guidance is to be found in a reported New York decision holding New York policy was not violated by giving full faith and credit to a Vermont civil union in order to confer on the surviving “spouse” standing to sue for his mate’s wrongful death.²⁵² The decision was based on New York laws recognizing same-sex domestic partnerships for purposes of conferring employment benefits and rights of succession under rent control laws, recognizing the right of persons in a same-sex relationship to become co-parents by adopting the partner’s child, and protecting gays and lesbians from discrimination, in addition to several other laws.²⁵³

The *Second Restatement* also provides yet a fourth distinct theory for denying the annulment. If Massachusetts concludes that New York “clearly has the dominant interest in the issue” of validity of the marriage, Massachusetts is directed by the *Restatement* to “reach the same result on the very facts involved as would the courts of” New York.²⁵⁴ We have seen that because of § 1739, if Amy’s action were

250. See *New England Tel. & Tel. Co. v. Gourdeau Constr. Co.*, 647 N.E.2d 42 (Mass. 1995) (statute of limitations in contract case); *City of Haberhill v. George Brox, Inc.*, 716 N.E.2d 138 (Mass. App. Ct. 1999) (validity of contract); *Dasha v. Adelman*, 699 N.E.2d 20 (Mass. App. Ct. 1998) (medical malpractice); *Cheever v. Graves*, 592 N.E.2d 758 (Mass. App. Ct. 1992) (real property dispute).

251. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971). As the domicile of both Amy and Alice at the time of their Massachusetts marriage, New York would seem to have had a relationship to the marriage more significant than did Massachusetts.

252. *Langan v. St. Vincent’s Hosp.*, 765 N.Y.S.2d 411, 422 (Sup. Ct. 2003); see also *New York State Pension Plan Says It Will Recognize Canadian Same-Sex Marriages*, 30 FAM. L. REP. 1575 (2004).

253. *Langan*, 765 N.Y.S.2d at 413, 416.

254. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8 cmt. h (1971).

brought in New York, the annulment would be denied by application of the internal law of Massachusetts that upholds same-sex marriage. Massachusetts should under the *Restatement's* rules for application of *renvoi* reach that same result.

C. *If Constitutional When Applied to Evasion Marriages, DOMA Entitles a Sister State to Deny Full Faith and Credit to Vermont and Massachusetts Same-Sex Marriages*

Analogizing to cases involving the full faith and credit sister states owe to the divorce decrees each may enter sheds light on the Supreme Court's likely treatment of Vermont same-sex unions. The Supreme Court is unlikely to hold the Full Faith and Credit Clause and § 1739 inapplicable to Vermont same-sex marriages simply because when out-of-state same-sex couples come to Vermont to marry, Vermont officials will not consider the interest of the couple's domicile state (with its ban on same-sex marriages) by making a choice of law.

Because Massachusetts marriage license clerks are directed to make a choice of law and to deny a marriage license to a same-sex couple domiciled in a state that prohibits same-sex marriages, it is all the more clear that the Supreme Court has no reason to be troubled by application of the Article IV Clause and § 1739 to Massachusetts same-sex evasion marriages when their validity is litigated in courts of other states. The Court will not apply the *Thomas* case by analogy in this context.

In dealing with both Vermont and Massachusetts same-sex marriages, the Court will not use its penumbra powers to avoid enforcing § 1739 according to its terms, which direct sister states to treat the marriage record as they would a judgment and not to treat the validity of the marriage as raising a choice of law question. Thus *Pacific Employers* is inapplicable. With no exception to the Full Faith and Credit Clause operating, the effect proviso of the Clause empowers Congress to legislate concerning interstate recognition of marriage. If DOMA is constitutional when applied to sister-state enforcement of evasion marriages, § 1739 is superseded, allowing courts in sister states to deny full faith and credit to such same-sex marriages in the evasion context.

V. A NEW DOMICILE HAVING NO CONNECTION TO THE SAME-SEX COUPLE AT THE TIME THEY LAWFULLY MARRY IN

THEIR DOMICILE STATE MUST RECOGNIZE THE MARRIAGE;
DOMA WILL NOT CONSTITUTIONALLY AUTHORIZE
NONRECOGNITION

A. *The State of New Domicile Lacks Contacts at the Pertinent Time of Interest Required by the Due Process Clause*

This article now addresses the full faith and credit issues arising when the same-sex couple marries in the state of its domicile, which authorizes the same-sex union.²⁵⁵ This is a one-law matter. *Pacific Employers* does not apply, nor does the *Thomas* case, as there is no occasion for making a choice of law. The Full Faith and Credit Clause and § 1739, which implements the Clause with respect to nonjudicial records, are both applicable should a full faith and credit question arise respecting the marriage record created. This can occur when the same-sex couple, having married while domiciled in Vermont or Massachusetts, later moves to state *X* and takes up domicile there. State *X* prohibits same-sex marriage. In litigation in the courts of state *X*, the new domicile, the validity of the Vermont or Massachusetts marriage is placed at issue.²⁵⁶ This could be an annulment suit, a suit by the survivor of the couple for wrongful death of the other, an action for refund of state income tax paid in protest of a regulation barring same-sex couples from income splitting, or some other action.

Although I have indicated my belief that the effect proviso of the Article IV Clause does not authorize Congress to empower a state to give zero credit to a marriage record of another state's judgment (any more than it authorizes Congress to permit a state to refuse all credit to a judgment based on the existence of a same-sex marriage),²⁵⁷ at this stage of this article I will assume the contrary: Congress may by virtue

255. Since the laws of Massachusetts and Vermont on same-sex marriage are substantively identical on the issue of capacity of persons of the same sex to marry, the analysis is the same in the situation where a Vermont same-sex couple goes to Massachusetts to marry; where a Massachusetts same-sex couple goes to Vermont to be civilly united; and where a man from Vermont and a man from Massachusetts (or women from each of the two states) are married in either of those states. Each of these marriages is a one-law matter.

256. For simplicity in this section of the article, I will henceforth deal in the text with same-sex couples who marry in Massachusetts and then move to state *X*. The reader should appreciate that the analysis would be the same if the former domicile where a couple married was Vermont.

257. See *supra* note 200 and accompanying text.

of the effect proviso—if that were the only constitutional provision to be considered—approve giving zero faith and credit to a marriage record of another state concerning a same-sex couple, even though the record has been proved in accordance with § 1739.²⁵⁸

On the other hand, if I am wrong to view the marriage validity issue as one to be decided under § 1739 concerning the effect of proving a marriage record, and it is instead one of choice of law, Congress has no power under the effect proviso of the Article IV Clause to legislate with respect to how a sister state dealing with a same-sex marriage issue makes its choice of law. That is so because *Pacific Employers* established that the Full Faith and Credit Clause has nothing to do with choice of law in a case where two states each have contacts that permit application of their law to the facts concerning a legal issue; and, as we saw in the analysis of *Thomas*, where the Court refused to apply § 1738, if the Article IV Clause's command to give full faith and credit does not apply in a given situation, neither does the effect proviso concerning the power of Congress to legislate apply.

However, even if I am misreading § 1739, in the change-of-domicile context the issue of the validity of a marriage simply cannot be one of choice of law. That is so because the new domicile state had no contacts to the marriage at the pertinent time of interest for due process purposes. That DOMA on its face purports to tell states they can apply their own law in such cases is irrelevant. The Due Process Clause of the Fifth Amendment must be violated by an act of Congress purporting to authorize a state to violate the Due Process Clause of the Fourteenth Amendment. In other words, due process considerations trump Congress's exercise of the effect proviso of the

258. Congress relied on the effect proviso in enacting section 2 of DOMA: “[T]his situation presents an appropriate occasion for invoking our congressional authority under the second sentence of the Full Faith and Credit Clause to enact legislation prescribing what (if any) effect shall be given by the States to the public acts, records, or proceedings of other States relating to homosexual ‘marriage.’” H.R. REP. NO. 104-664, at 25 (1996). Congress found that “[t]he Effects Clause is an express grant of authority to Congress to enact legislation to ‘prescribe’ the ‘effect’ that ‘public acts, records, and proceedings’ from one State shall have in sister States.” *Id.* at 26; accord *SCALES ET AL.*, *supra* note 48, § 13.20 (DOMA is “[b]ased on Congressional authority to define the effect of the full-faith-and-credit command of the Constitution.”).

Section 2 of DOMA also applies to any “territory, or possession of the United States, or Indian tribe.” 28 U.S.C. 1738C (2000). I do not mean to suggest that the effect proviso of the Article IV Clause was the source of power that permitted Congress to include these governmental entities.

Article IV Clause. Specifically, the new domicile state, having had no connections at all to the Massachusetts marriage at the time it was contracted, cannot apply its own law to annul the marriage or effectively annul it by causing harm to either of the spouses through affirmative state action that is based on the nonexistence of the same-sex marriage. If the new state of domicile is to act affirmatively, it must either give full faith and credit to the marriage record of Massachusetts or, if the issue is one of choice of law, apply Massachusetts law, recognizing that the matter before it is a one-law matter. The new domicile, state *X*, cannot constitutionally apply its own law to annul the Massachusetts same-sex marriage or to treat it as annulled in litigation collateral to annulment.

B. *Action Constituting a Judicial Hands-Off of the Marriage Is Permissible*

In speaking of the new state of domicile's effectively treating the Massachusetts marriage as annulled, I mean to distinguish actions by the courts of the new domicile state that can be considered a "judicial hands-off" of the marriage. That is, I am assuming for purposes of argument here that DOMA may constitutionally authorize²⁵⁹ a limited area of nonrecognition by state *X* of the same-sex marriage of the couple newly arrived there from Massachusetts—action by the state equivalent to refusing to domesticate an out-of-state money judgment so that it can be levied on locally. That kind of action leaves the money judgment as an existing judgment. It does not involve state *X*'s purporting to declare the judgment invalid or affirmatively entering a new judgment not consistent with the earlier one. What state *X* can do with regard to the same-sex marriage by way of judicial hands-off is consistent with the original understanding of the contra-public-policy doctrine in the choice of law area. If the forum applied its standard choice of law rule to select the law of state *Y*, only to discover that *Y*'s law would grant a recovery the forum considered to

259. Without DOMA a state court can, consistent with the requirements of the Due Process Clause, employ its own public policy to take through adjudication a "hands-off" policy by avoiding application of constitutionally eligible law, even though it could not affirmatively apply its own law due to lack of contacts. DOMA's "authorization" is not at all necessary.

be contrary to its public policy, the forum would dismiss the action; it would not apply some other law to extinguish the claim sued on.²⁶⁰

Within the concept of judicial hands-off, the courts of state *X* can decline to divorce the couple that has set up domicile there after marrying in Massachusetts.²⁶¹ In effect, state *X* is saying no more than “go back to the state that married you to undo what that state created.” Likewise, if tortfeasor *T*, who does not reside in state *X*, tortiously kills Amy in state *X*, a wrongful death suit against *T* in the courts of state *X* brought by Amy’s surviving spouse Alice, whom she married in Massachusetts before the couple changed domicile to state *X*, can be dismissed without prejudice based on Alice’s lack of the relationship to the decedent required by state *X*’s law to confer standing to recover for wrongful death. Such a dismissal is harmful to Alice in that it causes her to have wasted effort and money in bringing the aborted suit, but she is free to sue *T* in his or her home state.²⁶²

In addition to this kind of judicial hands-off, due process considerations might permit state *X* to apply to the newly domiciled same-sex couple its criminal laws concerning an action involving two people that would be legal if they were married, but would be a crime if they were not.²⁶³ Thus, if *Lawrence v. Texas*²⁶⁴ had not been decided as it was, state *X* perhaps could prosecute the same-sex married

260. See William A. Reppy, Jr., *Codifying Interest Analysis in the Torts Chapter of a New Conflicts Restatement*, 75 IND. L.J. 591, 613 n.104 (2000).

261. See *Rosengarten v. Downes*, 802 A.2d 170 (Conn. App. Ct. 2002) (refusing to dissolve a Vermont civil union). It is not clear in this case whether the same-sex couple was domiciled in Vermont at the time of the civil union there. If the two were Connecticut domiciliaries involved in an evasion marriage, the theory of the decision could be “we want to apply our law to you two, but the proper action is annulment, not divorce.”

262. If the statute of limitations had run there, the dismissal might not qualify as judicial hands-off of the Amy-Alice marriage unless it was conditioned on *T*’s waiving the *Y* statute of limitations when later sued by Alice in *T*’s state of domicile. In addition, if it is very clear to the state *X* court at the time it dismisses Alice’s suit against *T* that the courts of *T*’s home state would treat her marriage to Amy as void, entry of a dismissal would constitute judicial hands-off only in a highly technical sense, in that Alice would be left with no remedy, no tribunal to turn to that would recognize her marriage so that she would have standing to sue for wrongful death.

263. Analogy could be drawn to *Employment Division v. Smith*, 494 U.S. 872 (1990). That is, if a state can use the criminal sanction via a general law without exemptions to compel a party to sacrifice his unusual religious beliefs, such a law could be used to compel a party to sacrifice the benefits of his or her unusual marriage.

264. 539 U.S. 558 (2003).

couple for sodomy, if a prosecutor could constitutionally obtain evidence of such conduct.²⁶⁵

1. *The Hague Case and Determining the Pertinent Time of Interest for Assessing Contacts Required by the Due Process Clause*

DOMA, however, on its face goes far beyond authorizing the kind of state actions that can be considered judicial hands-off or neutral application of general laws. It purports to authorize state *X* to decline to effectuate any “right or claim arising from such relationship,”²⁶⁶ that is, a same-sex marriage. The rule of *Allstate Insurance Co. v. Hague*²⁶⁷ that a state must have contacts to a transaction at the pertinent time of interest in order to regulate the matter is based by the Supreme Court on the Fourteenth Amendment Due Process Clause as much as on the Full Faith and Credit Clause.²⁶⁸ I cannot believe that the Supreme Court will hold that the effect proviso of the Article IV Clause—the source of Congress’s power to enact DOMA insofar as that law addresses full faith and credit disputes between sister states—entitles Congress to abrogate a limitation on a state’s power to act that the Court has held is demanded by the Due Process Clause of the Fourteenth Amendment.

Hague considered the appropriate time of interest for examining state contacts in a commercial contract setting to be the time of making of the contract and upheld application of Minnesota law to a contract made in Wisconsin to insure a Wisconsin automobile driver, because Minnesota had two contacts to the contracting parties at the

265. See *State v. Brown*, 23 N.E. 747 (Ohio 1890) (no defense to prosecution for uncle-niece incest that the pair were husband and wife by virtue of marriage in another jurisdiction permitting such a union); see also *State v. Bell*, 66 Tenn. 9 (1872).

266. 28 U.S.C. § 1738C (2000). For the rest of DOMA, see *supra* text accompanying note 20.

267. 449 U.S. 302, 308 n.10 (1981) (“This Court has taken a similar approach in deciding choice-of-law cases under both the Due Process Clause and the Full Faith and Credit Clause.”).

268. There is a practical reason for this. In law prong cases where the contending jurisdictions are a state and the District of Columbia or a state and Puerto Rico, for example, the Full Faith and Credit Clause has no application to one of the jurisdictions but could apply to the state. It would be awkward if, under the definition of a one-law case supplied by the Full Faith and Credit Clause, the test applied to determine the contacts which the District or Puerto Rico needed to make their laws constitutionally eligible to a case as a matter of due process were different from the test applied to decide what contacts the state involved in the choice of law dispute needed in order to make its law constitutionally eligible.

crucial time of interest, augmented by a third arising later.²⁶⁹ The issue in *Hague* was a matter of interpretation—how much the insurer had to pay under certain facts²⁷⁰—not the more central question of whether the contract was totally void *ab initio*, as state *X* wishes to declare respecting the same-sex marriage contracted in Massachusetts of a couple who have changed their domicile to state *X*. It is possible that the Supreme Court could evolve to the position that due process requires more contacts for a state to void a contract than to control operation of only one of its terms.²⁷¹ It is inconceivable to me that this area of the law will evolve to substantially weaken *Hague* so that a state having no contacts when a contract is made can totally void it—rather than engaging in some limited regulation of it—based on subsequently arising contacts.²⁷²

In the case of the same-sex couple who married in Massachusetts while domiciled there and then moved to state *X*, the new domicile

269. *Id.* at 313-20.

270. *See id.* at 305-07.

271. Justice Stevens, in the portion of his concurrence in *Hague* addressing due process considerations, is of that view. He would require greater contacts to a state to support application of its law to a contract in a manner “that frustrates the justifiable expectations of the parties.” *Id.* at 327. Most contracting parties likely have far greater expectations that their contract is not totally void than they do as to how a particular provision is going to be interpreted.

272. This reasoning is not logically limited to a state’s attempt to apply its law to eliminate the status—lawfully attached by the law of a prior domicile—of a person who takes up domicile in the second state where the status, like marriage, arose out of a contract. I consider *Hermanson v. Hermanson*, 887 P.2d 1241 (Nev. 1994), an unconstitutional decision, although the due process issue of time of interest under *Hague* was not presented to the Nevada court. A child (C) had been born to mother (M) while she was married to husband (H), while the couple was domiciled in California. *Id.* at 1244. California law made H the legal father of C even though he was not the biological father and had not consented to another man’s impregnating his wife. *Id.* at 1243-44. M took C to Nevada and established a new domicile for them there. *Id.* at 1243. In a Nevada divorce action the trial court granted H “joint legal custody of [C] and extensive visitation rights,” applying California law to determine the relationship between H and C. *Id.* The Nevada Supreme Court reversed on the ground that the Nevada law of status applied and Nevada law did not conclusively presume that a husband cohabiting with his wife when she became pregnant was the father of the child, as did California. *Id.* at 1245-46. Even without considering right to travel issues, the decision seems wrong insofar as it implicitly looked to the time of M’s divorce, when C was eight years old, as the time for examining contacts to C which would enable a state to determine his status vis à vis one who claimed to be his father. The constitutionally mandated time of interest was the moment of C’s birth. The decision could also be very unfair to C in a practical sense. For example, H’s California father may have set up a trust to pay each of “my grandchildren” one million dollars at age twenty-one. Surely the Nevada court’s judgment stripped away C’s status as the settlor’s grandchild as much as it stripped him of a father.

has zero contacts to the marriage at the only time of interest relevant to determining whether their marriage is void. If Amy asks a court in state *X* to annul her marriage to Alice, which occurred in Massachusetts when they were both domiciled there, state *X* cannot constitutionally void the marriage contract under its own law²⁷³ that same-sex marriages are void. State *X* cannot do this any more than it can declare void under state *X* law a commercial contract made in state *Y* by the promisor and promisee—both then domiciliaries of state *Y*—to be performed in state *Y* and supported by consideration recognized under state *Y* law simply because both parties have now

273. Although none discuss the constitutional power of a forum asked to annul the marriage of couples wed in other states who now live in the forum state, all the reported cases dealing with the change of domicile situation and a marriage that would be void in the forum but valid in the former domicile (which is also the place of celebration) state that the law of the latter state is to be applied. *Whealton v. Whealton*, 432 P.2d 979, 981, 984 (Cal. 1967) (couple wed in Maryland), stated that courts “uniformly apply the law of the state in which the marriage was contracted” to decide if it can be annulled, although entitlement to a divorce is determined by the law of the couple’s domicile at the time of the divorce action. *See also* *Worthington v. Worthington*, 352 S.W.2d 80, 81 (Ark. 1962) (couple wed in Oklahoma); *Anderson v. Anderson*, 238 A.2d 45, 46 (Conn. Super. Ct. 1967) (couple wed in New York).

When the issue is “whether there *ever was a valid marriage*[,] [i]t is quite natural that the courts should look to the law of the state of celebration for the answer to this question.” Frederic P. Storke, *Annulment in the Conflict of Laws*, 43 MINN. L. REV. 849, 867 (1959). In the change of domicile context as opposed to the evasion marriage situation, Storke could find no annulment decision departing from his rule. In one collateral attack case discussed by Storke where the issue was standing of a woman to sue for workers’ compensation for the on-the-job death of her alleged husband, the forum did not apply the law of the place of celebration. *Id.* at 867-68 (citing *Toler v. Oakwood Smokeless Coal Corp.*, 4 S.E.2d 364 (Va. 1939)). The marriage would have been voidable according to the law of the state of celebration, but the court followed forum law to hold the marriage void. *See Toler*, 4 S.E.2d at 367-68. In *Capasso v. Colonna*, 122 A. 378, 379 (N.J. Ch. 1923), the court applied the law of the forum—the domicile of both spouses at the time—to deny annulment of a New York marriage that was voidable there. However, the facts as stated imply that the couple were also New Jersey domiciliaries when they married and did not realize that the marriage of a seventeen-year-old did not require parental consent in New Jersey but did in New York. *Id.* at 378. *See also Anonymous v. Anonymous*, 85 A.2d 706, 710 (Del. Super. Ct. 1951), where a Delaware man married in New York a New York woman and the couple at once established Delaware as their marital domicile. The court applied Delaware law to deny the husband an annulment under New York law that made the marriage voidable due to fraud by the wife.

Cook v. Cook, 104 P.3d 857, 858-59 (Ariz. Ct. App. 2005), stated in dictum that it would accept a statutory directive from the Arizona legislature to apply Arizona law to void the marriage of first cousins who married in their Virginia domicile (where such a marriage is valid) before taking up domicile in Arizona. The due process problem of lack of any contacts by Arizona to the marriage at the time it was contracted was not alluded to.

moved to state *X*, whose law would find no valid consideration on the facts.²⁷⁴

By similar reasoning, state *X*'s courts are constitutionally barred (unless acting in a judicial hands-off role) from treating the same-sex marriage as if it had been annulled. For example, if Amy and Alice split up after moving from Massachusetts to state *X* but neither seeks an annulment, state *X* must recognize the marriage in litigation between them in its courts concerning child visitation rights. State *X*

274. In contract cases, the Supreme Court has established that one party's taking up domicile in the forum state after the contract has been made is not a sufficient contact to make the law of the new domicile eligible in the determination of its validity. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 820 (1985); *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178, 179 (1936); *Home Ins. Co. v. Dick*, 281 U.S. 397, 408 (1930). If *Hague* is serious about requiring that the state have at least some contact to a contract when it is made to make its law on the validity of the contract constitutionally eligible for application, the fact that both parties moved after-the-fact to the forum would not authorize its courts to void the contract under forum law.

I previously wrote that when the state of initial domicile of a cohabiting couple recognized that they were subject to a contract to share property earned by either and the couple left that state and took up domicile in another state, the new domicile could treat the pooling contract as rescinded under its law that viewed such contracts as tainted by immorality. See *Reppy, supra* note 213, at 311-12. This was correct if the contract made before the change of domicile was implied rather than express. That is because analysis of what rights the original domicile state grants under an *implied* contract will disclose no actual contract rights recognized during the existence of the cohabiting relationship; "implied contract" is merely the jurisdiction's name for a remedy for division of property when the relationship ends. In this situation the second domicile state almost always applies its own law; and for purposes of assessing its power to do so under the Due Process Clause, contacts to a state existing at the time of the division of property suffice. See William A. Reppy, Jr., *Conflicts of Law Problems in the Division of Marital Property* §§ 10.02[3], [6], in 1 VALUATION & DISTRIBUTION OF MARITAL PROPERTY (MB 1984).

What I wrote in the article on cohabiting couples was wrong in part if the contract was express. What I should have stated was that if, while the couple remained cohabiting in the new domicile, an action was filed seeking affirmative relief based on the contract, a court of the new domicile could decline to grant it under the theory of judicial hands-off even though the court could not hold the contract rescinded as immoral under its own law. A suit seeking damages or specific performance for breach of an express pooling-of-gains during the cohabitants' ongoing relationship has never been brought so far as reported decisions reveal. All of the reported cases in the change-of-domicile context involve one cohabitant relying on the contract at the dissolution of the relationship. At this point the new domicile can treat the contract as irrelevant unless it specifically dealt with division of property on termination of the relationship, as opposed to just shared ownership. The new domicile would apply its own division law, just as it would ignore the divorce law and division-of-property law of the former domicile had the couple been lawfully married there. Compare *In re Thornton's Estate*, 33 P.2d 1 (Cal. 1934) (at the moment of change of domicile to California that state cannot convert a husband's earnings, which were separately his under the law of his former domicile, into California community property), with *Addison v. Addison*, 399 P.2d 897 (Cal. 1965) (at divorce in California its courts can take such separate property of the husband who changed his domicile and, under California division-of-property law, award it to the wife).

cannot strip Amy of parental rights vested in her in Massachusetts when she and Alice were domiciled there with respect to Alice's child, conceived, with Amy's approval, after their lawful same-sex marriage, on the ground that state *X* recognizes no relationship between Amy and Alice's biological child. That would be the equivalent of viewing the marriage as having been annulled upon the change of domicile, which *Hague* forbids. Likewise, state *X* cannot bar Alice's child from inheriting as heir of Amy when Amy dies intestate as a domiciliary of state *X*.²⁷⁵

Suppose Paul and Patrick, known as Pat, marry in Massachusetts when domiciled there and then move to state *X*, where they establish a new domicile. Thereafter Paul is accepted as a student at the State University of *X* and applies for use of a suite in the married-student housing facility. On the form where he is to list his spouse, Paul enters the name "Pat Johnson" and the date of their Massachusetts wedding. The *X* University agent assumes Pat is Patricia and assigns housing to the couple. On learning, after the couple takes possession of their unit, that Pat is Patrick, a suit is brought in a state *X* court to evict them on the ground they are not married and hence not eligible to reside in the facility. To evict them by applying state law of validity of marriage would violate *Hague* by indirectly treating the marriage as annulled despite no contacts by state *X* to the marriage at the time a law had to be applied to make it valid or invalid.

Suppose Mark is injured and hospitalized at a county hospital in state *X* under such circumstances that only a spouse, parent, or child is permitted to visit. For state *X* to affirmatively evict Mike—who married Mark when they were Massachusetts domiciliaries—from the hospital room also seems to me to be treating the couple as if state *X* had annulled their marriage, which it cannot do. That is, the time of interest for applying a *Hague* analysis to this state action is actually the time of marriage, and not the time of Mike's hospital visitation.

Finally, suppose Mark dies with a will leaving all his estate, including his half interest in the couple's co-owned home in state *X*, to husband Mike. State *X* has an inheritance tax with a marital

275. Putting aside the problem that an unexpected change in legal theory can deny a litigant due process (and raise a possible equal protection issue), as a matter of picking an eligible law under *Hague*, the state *X* court could saddle Alice and her child with Massachusetts law that was less favorable to her than the law of state *X* on the degree to which she was entitled to visitation, and impose on the child an inheritance under Massachusetts law, which could be less generous to the child than the inheritance that state *X* law would recognize.

exemption, but no exemption sufficient to shield Mark's interest in the land from tax if Mark were to be viewed as a legal stranger in his relationship to Mike. Can state *X* slap a tax lien on the land and foreclose it for nonpayment when time to pay the inheritance tax has passed? Situs of land in the state is the strongest of contacts state *X* could have if the time of attachment of the lien or the time of passing of title at the foreclosure sale is the appropriate time of interest for due process analysis of what law is eligible to be applied. But foreclosing on the land is necessarily based on affirmatively treating the marriage of Mike and Mark as having been annulled as soon as they took up domicile in state *X*, an action *Hague* forbids. Mike should be able to claim the spousal inheritance tax exemption.²⁷⁶

In sum, the Fourteenth Amendment Due Process Clause frequently is going to require the new domicile to give full faith and credit to the same-sex Massachusetts marriage of the new domicilairies because DOMA cannot authorize state action that is unconstitutional.²⁷⁷

276. On the other hand, there will be some instances where the courts of state *X* can indirectly treat a same-sex marriage as annulled under the marriage validity law of state *X* despite a total lack of contacts to the marriage at the pertinent time of interest. *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 724 (1988) (holding that a forum may apply its own statute of limitations even when the applicable substantive law is that of another jurisdiction). Suppose Mark (who along with spouse Mike moved to state *X*, after marrying in Massachusetts while domiciled there) is arrested in state *X* on a criminal charge along with codefendant *D*. At the trial, the judge excludes under the marital privilege incriminating statements made by *D*, a male, to his female spouse. The court allows in evidence similar incriminating statements made by Mark to Mike. Mark is convicted, *D* acquitted. There is no due process error. *Hague* contacts are not required for a forum to apply its procedural laws. *See id.* Some states view an evidentiary privilege as procedural. *See* People v. Carter, 110 Cal. Rptr. 324, 326-27 (Ct. App. 1973). *See generally* RESTATEMENT OF CONFLICT OF LAWS §§ 596-97 (1934). Although many states now do not classify an evidentiary privilege as a procedural matter, the governing law is that of the place of communication, which is state *X* in the hypothetical case above. *See* Gonzales v. State, 45 S.W.3d 101, 105 (Tex. Crim. App. 2001) (applying RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139 (1971)). The United States Supreme Court holding hypothesized at the beginning of this article should mean there is also no violation of the Equal Protection Clause of the Fourteenth Amendment in making Mike testify, but not *D*. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 138 (1971).

277. If state *X* can constitutionally annul the Massachusetts marriage or treat it as annulled in collateral litigation, then Massachusetts can constitutionally retaliate by enacting a reciprocity statute. It could provide that Massachusetts law treats as annulled the marriage of any persons moving to Massachusetts if the state in which they were married does not give full faith and credit to the Massachusetts marriage of all Massachusetts couples who take up domicile in that state. Of course the huge majority of the new arrivals in Massachusetts could regain marital status by marrying anew in Massachusetts. That would be a bit of a burden, and there would be a few married persons delighted to take advantage of the "instantaneous divorce" the

C. *The Constitution Can Recognize No Exceptions from the Contacts Requirement of the Due Process Clause Because a Marriage Is Incestuous or Bigamous*

Mark Strasser, a prolific commentator on same-sex marriage, agrees with my conclusion that, when same-sex couples who marry in Massachusetts when domiciled there change their domicile to state *X*, that state must recognize the marriages.²⁷⁸ In the same book, he seems to say, however, that state *X*, having no contacts to the married persons except that they moved there recently, could employ state *X* law to annul or treat as annulled in collateral litigation the bigamous or incestuous marriage of the parties, although the marriage was valid where contracted and was not an evasion marriage.²⁷⁹ In effect, he reads into the Fourteenth Amendment Due Process Clause an exception that makes the analysis of *Allstate Insurance Co. v. Hague* inapplicable to marriage contracts that are polygamous or that are widely considered to be incestuous. I believe those of us who argue that the new domicile state largely must respect the same-sex marriage of the newly arrived couple must “bite the bullet” and concede that the new domicile state must deal with incestuous and bigamous marriages in precisely the same manner.

What is at issue is a matter of the constitutional power of the state to which the parties in an unusual marriage move. If contacts to a marriage that arise in a state only after the marriage has lawfully been contracted elsewhere entitle the courts of that state, the new domicile state, to annul under its law a bigamous or incestuous marriage, similar contacts must entitle it as a matter of constitutional power to annul a same-sex marriage.

Apparently no case decided after ratification of the Fourteenth Amendment holds that the Due Process Clause is inapplicable to parties to a polygamous or incestuous marriage.²⁸⁰ That clause applies to “any person.” Parties to these marriages are persons.

reciprocity statute would provide. Its enactment would at least apply a bit of pressure on other states to recognize same-sex Massachusetts marriages when Massachusetts couples change domicile.

278. See generally MARK STRASSER, *THE CHALLENGE OF SAME-SEX MARRIAGE* (1999).

279. *Id.* at 135, 142.

280. There is some post-1868 dictum that a state can treat as totally void marriages that are incestuous or polygamous. *E.g.*, *Commonwealth v. Lane*, 113 Mass. 458, 463 (1873) (on the ground that such marriages are “deemed contrary to the law of nature as generally recognized

Suppose a court holds unconstitutional the Utah statute banning polygamous marriages, finding that it is targeted against the Church of Jesus Christ of Latter-Day Saints.²⁸¹ A license is then issued in Utah to a man to marry a second wife, the marriage is celebrated in Utah, and later the threesome moves to state *X*. Suppose the Massachusetts Supreme Judicial Court holds that closely related persons have a right to marry if they establish that they cannot procreate. Thereafter, two elderly sisters, domiciliaries of Massachusetts, marry there and later change their domicile to state *X*. As a matter of the constitutional power of state *X* to treat the marriage as annulled under state *X*'s law upon the couple's arrival there, these fact patterns cannot be distinguished from that pattern involving the same-sex couple coming from Massachusetts. If *Lawrence v. Texas* is not extended to sister-sister sex or *ménage à trois sex*, criminal prosecutions of the new arrivals may be possible if evidence of sexual activity by the spouses is lawfully obtained, but the incestuous and polygamous marriages cannot be annulled as being void under state *X* law.

in Christian countries"); *State v. Ross*, 76 N.C. 242, 246 (1877); *Pennegar v. State*, 10 S.W. 305 (Tenn. 1889) (by a court dealing with an evasion marriage). There is no reason to believe any of the courts in stating the dictum had considered the due process problem of the forum's lack of timely contacts to the marriage.

281. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (holding that city ordinances unconstitutionally abridged free exercise of religion that practiced ritual animal sacrifices because particular religion was the target). Nothing said about the constitutionality of the federal anti-polygamy statute in effect in the Utah Territory before statehood in *Reynolds v. United States*, 98 U.S. 145, 162-67 (1878), is inconsistent with the voiding of an anti-polygamy statute as targeted against Mormons. See also *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890) (suggesting that Congress itself was targeting the Mormons because of their belief in polygamy). A different argument for creating a right of polygamous marriage can be based on the liberty of association theory of *Lawrence v. Texas*. See Alyssa Rower, *The Legality of Polygamy: Using the Due Process Clause of the Fourteenth Amendment*, 38 FAM. L.Q. 711 (2004); see also Joseph Bozzuti, Note, *The Constitutionality of Polygamy Prohibitions After Lawrence v. Texas: Is Scalia a Punchline or a Prophet?*, 43 CATH. LAW. 409 (2004); Note, *I Now Pronounce You Husband and Wives: Lawrence v. Texas and the Practice of Polygamy in Modern America*, 11 WM. & MARY J. WOMEN & L. 131 (2004).

There are apparently ample potential plaintiffs in Utah, which has pockets of active polygamists, who could bring suit to have the current anti-polygamy law of Utah held unconstitutional. Harry D. Krause, *Marriage for the New Millennium: Heterosexual, Same Sex—Or Not at All?*, 34 FAM. L.Q. 271, 289 (2000) (also noting that there are polygamists in Arizona, Idaho, Montana, and Nevada).

CONCLUSION

In the case of evasion marriage by same-sex partners from state *X* who go to Massachusetts or Vermont to marry and then return home, the domicile state can deny recognition of the marriage if DOMA is constitutional. If DOMA is unconstitutional and the Massachusetts or Vermont record of the marriage is proved in the domicile state under § 1739, that state must give full faith and credit to the marriage, as § 1739 compels the courts to treat marriage records as they treat sister-state judgments, denying the court freedom to approach the validity issue as one of choice of law.

The fact that a Vermont marriage license clerk cannot make a choice of law and deny a license based on the interests of the domicile state probably will not cause the Supreme Court to exercise its power, under the penumbra of the Full Faith and Credit Clause, to fashion a rule that will displace § 1739, since that Court demands full faith and credit for divorce decrees from courts that will not make a choice of law and will ignore the interests of the marital domicile. Nor will the Court exercise its penumbra power to make § 1739 inapplicable to a Massachusetts same-sex marriage record when a Massachusetts marriage license clerk has made a bona fide,²⁸² albeit erroneous, determination that the domicile state does not prohibit same-sex marriages.

In the situation where same-sex couples domiciled in Massachusetts or Vermont marry there and subsequently change their domicile to another state, state *X*, DOMA has limited application, assuming it is authorized by the effect proviso of the Article IV Clause. DOMA permits the courts of the new domicile to dismiss cases under a theory of judicial hands-off that § 1739, not restricted by DOMA, would not permit. State *X* had no contacts to the marriage contract at the appropriate time of interest under the due process considerations mandated by *Allstate Insurance Co. v. Hague* and hence cannot apply its own law to annul the marriage or treat it as annulled.

Unfortunately for same-sex couples, it is a statute, § 1739, which requires states that ban same-sex marriage to treat the official record

282. Absent such a bona fide determination, the analysis of the credit owed the Massachusetts record in the evasion marriage context is the same as that for Vermont's same-sex marriage record.

of a Vermont or Massachusetts marriage as a judgment, precluding the courts of such a state from treating the issue of validity of such a marriage as a matter of choice of law in the evasion marriage context. Congress can amend § 1739 to make it inapplicable to marriage records, and the same anti-gay animus of Congress that produced DOMA suggests it is likely to do so. But no act of Congress can override due process principles that preclude a state, which had no contacts to the same-sex marriage when it was contracted, from annulling it under its own law forbidding same-sex marriage when the same-sex couple takes up domicile there.

SUGGESTED SUPPLEMENTAL READINGS

For those interested in additional reading on this topic, the following articles conclude that DOMA is unconstitutional, in whole or in part, or discuss issues concerning same-sex marriage that relate to DOMA's constitutionality:

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 (1997) (DOMA is an unconstitutional overreach by Congress whether one subscribes to the so-called "ratchet theory," whereby Congress can only expand full faith and credit, or the author's "procedures theory," whereby Congress can prescribe the procedural manner by which full faith and credit shall operate).

Stanley E. Cox, *DOMA and Conflicts Law: Congressional Rules and Domestic Relations Conflicts Law*, 32 CREIGHTON L. REV. 1063 (1999) (DOMA is an unconstitutional exercise of conflicts powers because (a) it authorizes unconstitutional use of the public policy exception and, arguably, the conflicts of laws provision; and (b) the "effects clause" does not give Congress the power to validate or invalidate acts or judgments based on the content of the state law or judgment).

James M. Donovan, *DOMA: An Unconstitutional Establishment of Fundamentalist Christianity*, 4 MICH. J. GENDER & L. 335, 338 (1997) (in passing DOMA Congress was "motivated by fundamentalist Christian ideology," thereby transgressing the "forbidden line between the secular and the religious").

Scott Fruehwald, *Choice of Law and Same-Sex Marriage*, 51 FLA. L. REV. 799 (1999) (suggesting an alternative to DOMA, i.e., that when there is a conflict of laws on marriage, the law of the state of domicile should prevail).

Melissa A. Glidden, *Recent Developments: Federal Marriage Amendment*, 41 HARV. J. ON LEGIS. 483 (2004) (DOMA can be challenged as unconstitutional now that same-sex marriages are recognized by Massachusetts).

Kathy T. Graham, *Same-Sex Unions and Conflicts of Law: When "I Do" May Be Interpreted as "No, You Didn't,"* 3 WHITTIER J. ON CHILD & FAM. ADVOC. 231 (2004) (DOMA may be unconstitutional if interpreted to give states the option not to enforce sister-state money judgments).

Jon-Peter Kelly, Note, *Act of Infidelity: Why the Defense of Marriage Act Is Unfaithful to the Constitution*, 7 CORNELL J.L. & PUB. POL'Y 203 (1997) (DOMA fails to satisfy the requirements of several constitutional doctrines articulated by the U.S. Supreme Court: (1) full faith and credit; (2) substantive due process; and (3) equal protection rational basis review).

Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1 (1997) (the choice-of-law provision in section 2 of DOMA, which allows states to ignore the marriages of same-sex couples performed in other states, is unconstitutional and thereby invalidates the entire act, because it injures a targeted class to an extent that one must infer unconstitutional intent).

Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921 (1998) (implying that DOMA is unconstitutional in that it permits states to ignore valid "judicial proceedings" of other states in contravention of traditional, constitutionally-required respect for full faith and credit).

Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997) (the contra-public-policy doctrine violates the Full Faith and Credit Clause because it runs counter to the underlying purpose of the Constitution, undermines the concept of full faith and credit, and has resulted in conflicting precedent).

Seth F. Kreimer, *Territoriality and Moral Dissensus: Thoughts on Abortion, Slavery, Gay Marriage and Family Values*, 16 QUINNIPIAC L. REV. 161 (1996)

(arguing that the Privileges and Immunities Clause requires states to insure that visitors to a state are granted the same privileges as the citizens of that state).

Kafahni Nkrumah, Note, *The Defense of Marriage Act: Congress Re-Writes the Constitution to Pacify Its Fears*, 23 T. MARSHALL L. REV. 513 (1998) (Congress was not empowered to add or subtract from the Full Faith and Credit Clause; thus, DOMA represents an unconstitutional commandeering of the Clause, which was adopted to bind separate states into a cohesive whole, not to constitutionalize the denial of rights to a subset of citizens).

Note, *Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*, 117 HARV. L. REV. 2684, 2684 (2004) (DOMA is unconstitutional because its heterosexual-exclusive definition of marriage is "motivated by animus" and denies homosexuals legal benefits and protections afforded to heterosexuals, thereby running afoul of equal protection principles).

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 (1998) (DOMA is unconstitutional because it strays from the Framers' intent and because Congress was never given authority to circumscribe the Full Faith and Credit Clause).

Melissa A. Provost, Comment, *Disregarding the Constitution in the Name of Defending Marriage: The Unconstitutionality of the Defense of Marriage Act*, 8 SETON HALL CONST. L.J. 157 (1997) (DOMA's purpose is perpetuate animosity toward homosexuals, so it should not survive judicial scrutiny because it does not seek to protect a "clear and substantial federal interest"; DOMA impermissibly intrudes into family and property laws, realms traditionally reserved to states).

Barbara A. Robb, *The Constitutionality of the Defense of Marriage Act in the Wake of Romer v. Evans*, 32 NEW ENG. L. REV. 263 (1997) (DOMA is an unconstitutional violation of the equal protection requirement of the Fifth Amendment Due Process Clause given the Supreme Court's ruling in *Romer*).

Christopher Rizzo, *Banning State Recognition of Same-Sex Relationships: Constitutional Implications of Nebraska's Initiative 416*, 11 J.L. & POL'Y 1 (2002) (DOMA does not permit a state to refuse to recognize as valid legal instruments any contracts entered into by same-sex couples before they entered its territory).

Melissa Rothstein, *The Defense of Marriage Act and Federalism: A States' Rights Argument in Defense of Same-Sex Marriages*, 31 FAM. L.Q. 571 (1997) (DOMA is unconstitutional because it empowers states to ignore judgments issued in other states).

Scott Ruskay-Kidd, Note, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435, 1435 (1997) ("historical and structural analysis of the Full Faith and Credit Clause," along with "basic principles of federalism," militates against Congressional abrogation, partial or otherwise, of full faith and credit).

Brett P. Ryan, *Love and Let Love: Same-Sex Marriage, Past, Present, and Future, and the Constitutionality of DOMA*, 22 U. HAW. L. REV. 185, 222 (2000) (DOMA is a "per se violation of the Equal Protection Clause" because it imposes a far-reaching and undifferentiated disability on an insular group).

Robert A. Sedler, *The Constitution Should Protect the Right to Same-Sex Marriage*, 49 WAYNE L. REV. 975 (2004) (the Supreme Court should interpret the Equal Protection Clause to forbid states to unconstitutionally discriminate against same-sex individuals by denying them the fundamental right to marry).

Jennie R. Shuki-Kunze, Note, *The "Defenseless" Marriage Act: The Constitutionality of the Defense of Marriage Act as an Extension of Congressional Power Under the Full Faith and Credit Clause*, 48 CASE W. RES. L. REV. 351, 354 (1998) (DOMA is an "unprecedented" and "unconstitutional" extension of congressional power that will negatively affect the law of conflicts, the "institution of marriage," and family law).

Mark Strasser, Baker *and Some Recipes for Disaster: On DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence*, 64 BROOK. L. REV. 307 (1998) (Congress overreached its power in amending the Full Faith and Credit Clause).

Mark Strasser, *DOMA and the Two Faces of Federalism*, 32 CREIGHTON L. REV. 457 (1998) (DOMA is unconstitutional because it targets a disfavored minority).

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) (DOMA violates bill of attainder

guarantees by singling out an identifiable group and saddling that group with a disability that does not serve non-punitive purposes).

Mark Strasser, *Loving the Romer out for Baehr: On Acts in Defense of Marriage and the Constitution*, 58 U. PITT. L. REV. 279, 279 (1997) (highlights all of the author's arguments about why DOMA should fail; e.g., it fails to serve its alleged purpose, is motivated by animus, discriminates against a defined group, and encourages the disunity that the Full Faith and Credit Clause is designed to prevent; the article also notes that DOMA will negatively impact public policy by promoting bigotry, harming "innocent individuals," and providing easy ways for some to avoid the responsibilities of marriage).

Mark Strasser, *Some Observations About DOMA, Marriages, Civil Unions, and Domestic Partnerships*, 30 CAP. U. L. REV. 363 (2002) (pointing out the similarities between the classification of same-sex marriages under DOMA and the classification of homosexuals at issue in *Romer v. Evans*, and arguing that DOMA fails to satisfy even rational basis scrutiny).

Kristian D. Whitten, *Section Three of the Defense of Marriage Act: Is Marriage Reserved to the States?*, 26 HASTINGS CONST. L.Q. 419 (1999) (DOMA violates the Tenth Amendment ban on federal invasion into state affairs by improperly restricting states' ability to define marriage).

Evan Wolfson & Michael F. Melcher, *Constitutional and Legal Defects in the "Defense of Marriage" Act*, 16 QUINNIPIAC L. REV. 221, 221 (1996) (DOMA is an unconstitutional assault on federal-state balance envisioned by the Framers; DOMA will lead to unfair burdens on legally married individuals whose marital status will vary from "day to day, state to state, or agency to agency").

Evan Wolfson & Michael F. Melcher, Feature, *A House Divided*, 58 OR. ST. B. BULL. 17 (1998) (DOMA is unconstitutional because it ignores the constitutional intent of full faith and credit, violates the principles of equal protection and privileges and immunities, infringes on the fundamental rights to marry and travel, and disrupts interstate commerce).