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*** THIS SECTION IS CURRENT THROUGH 106-170, APPROVED 12/17/99 ***

TITLE 1. GENERAL PROVISIONS
CHAPTER 1. RULES OF CONSTRUCTION

1 USCS § 7 (1999)

§ 7. Definition of "marriage" and "spouse"

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

HISTORY: (Added Sept. 21, 1996, P.L. 104-199, § 3(a), 110 Stat. 2419.)



Mary L. Smith
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To: Edward W. Correia/WHO/EOP@EOP
cc:
Subject: statement

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

September 20, 1996

STATEMENT BY THE PRESIDENT

Throughout my life I have strenuously opposed discrimination of any kind, including discrimination against gay and lesbian Americans. I am signing into law H.R. 3396, a bill relating to same-gender marriage, but it is important to note what this legislation does and does not do.

I have long opposed governmental recognition of same-gender marriages and this legislation is consistent with that position. The Act confirms the right of each state to determine its own policy with respect to same gender marriage and clarifies for purposes of federal law the operative meaning of the terms "marriage" and "spouse".

This legislation does not reach beyond those two provisions. It has no effect on any current federal, state or local anti-discrimination law and does not constrain the right of Congress or any state or locality to enact anti-discrimination laws. I therefore would take this opportunity to urge Congress to pass the Employment Non-Discrimination Act, an act which would extend employment discrimination protections to gays and lesbians in the workplace. This year the Senate considered this legislation contemporaneously with the Act I sign today and failed to pass it by a single vote. I hope that in its next Session Congress will pass it expeditiously.

I also want to make clear to all that the enactment of this legislation should not, despite the fierce and at times divisive rhetoric surrounding it, be understood to provide an excuse for discrimination, violence or intimidation against any person on the basis of sexual orientation. Discrimination, violence and intimidation for

that reason, as well as others, violate the principle of equal protection under the law and have no place in American society.

-30-30-30-

28 USCS § 1738C printed in FULL format.

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*** THIS SECTION IS CURRENT THROUGH 106-170, APPROVED 12/17/99 ***

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART V. PROCEDURE
CHAPTER 115. EVIDENCE; DOCUMENTARY

28 USCS § 1738C (1999)

§ 1738C. Certain acts, records, and proceedings and the effect thereof

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.

HISTORY: (Added Sept. 21, 1996, P.L. 104-199, § 2(a), 110 Stat. 2419.)

NOTES:

RESEARCH GUIDE

Law Review Articles:

Landever. The constitutional arguments for and against the Defense of Marriage Act, 11 Am J Fam L 23, Spring 1997.

Fisk. ERISA preemption of state and local laws on domestic partnership and sexual orientation discrimination in employment, 8 UCLA Women's L J 267, Spring/Summer 1998.

Wardle. DOMA: protecting federalism in family law, 45 2 Fed Law 30, February 1998.

**Proposition 22 in California
Q&A
February 25, 2000**

Q: What is the Administration's position on Proposition 22 in California which would allow California to decline to recognize same-sex marriages performed in another state?

A: I do not know if the Administration has taken a position on this specific ballot measure in California. The President does support more equal treatment for domestic partners, and has fought hard to combat discrimination against gays and lesbians. But he has said that he does not support formal recognition of marriage between persons of the same sex.

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ARTICLE: SAME-SEX MARRIAGES AND THE DEFENSE OF MARRIAGE ACT: A DEVIANT VIEW OF
AN EXPERIMENT IN FULL FAITH AND CREDIT

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* Professor of Law, South Texas College of Law.

SUMMARY:

... This article examines the interplay between two provisions, one statutory (the Defense of Marriage Act), and the other constitutional (the Full Faith and Credit Clause). ... Rather than asking whether a domiciliary state such as State A violates the Full Faith and Credit Clause by not recognizing a same-sex marriage celebrated in Hawaii, is not the more obvious question whether Hawaii is acting unconstitutionally in applying its own law to allow the marriage of two persons domiciled in states that disallow same-sex marriages? Hawaii may apply its law only if it has a significant contact or aggregation of contacts with the parties or the litigation creating state interests. ... For now, it suffices to observe that in this first hypothetical there is no Hawaiian judgment that the couple is married, that the problem is simply one of choice of law - not res judicata - between Hawaii and State A, and that State A clearly has interests sufficient to apply its own law. ... Today, of course, the domicile of one or more of the parties in the forum is not only relevant to the full faith and credit question, it appears to decisively support the conclusion that the domiciliary state may apply its own law. ...

TEXT:

[*410]

INTRODUCTION

This article examines the interplay between two provisions, one statutory (the Defense of Marriage Act), and the other constitutional (the Full Faith and Credit Clause). The Defense of Marriage Act provides:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship. n1

-Footnotes-

n1. 28 U.S.C. 1738C (1998).

-End Footnotes-

The Full Faith and Credit Clause 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. n2

-Footnotes-

n2. U.S. Const. art. IV, 1.

-End Footnotes-

From its inception, the Defense of Marriage Act ("Act") has drawn criticism from commentators. n3 One particular criticism is that the Act violates the Full Faith and Credit Clause: it is argued that the constitution, in the first sentence of the Full Faith and Credit Clause, which requires that "Full Faith and Credit shall be given" to sister-state law, sets a floor of interstate enforceability of sister-state laws and judgments. While Congress is granted certain power under the second sentence of that same clause - it may "prescribe" the "Effect" of sister-state law and judgments - the critics argue that Congress may not diminish the faith and credit established in the first sentence. The critics contend that to the extent the Defense of Marriage Act attempts to lower that floor, to allow states to give less faith and credit [*411] to sister-state law and judgments than the first sentence of the clause requires, it is an improper attempt to amend the constitution by legislation. n4

-Footnotes-

n3. See Larry Kramer, Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception, 106 Yale L.J. 1965 (1997); Cass R. Sunstein, Foreword: Leaving Things Undecided, 110 Harv. L. Rev. 4, 101 n.492 (1996); Andrew M. Jacobs, Romer Wasn't Built in a Day: The Subtle Transformation in Judicial Argument Over Gay Rights, 1996 Wis. L. Rev. 893, 969 n.213 (1996); Devjani Mishra, The Road to Concord: Resolving the Conflict of Law over Adoption by Gays and Lesbians, 30 Colum. J.L. & Soc. Probs. 91, 126 n.200 (1996); Cynthia M. Reed, When Love, Comity, and Justice Conquer Borders: INS Recognition of Same-Sex Marriage, 28 Colum. Hum. Rts. L. Rev. 97, 127 (1996). In addition to the law reviews, many law professors criticized the Act in letters and testimony to Congress. See Letter from Herma Hill Kay to Senator Dianne Feinstein (June 14, 1996); The Defense of Marriage Act: Hearing on S. 1740 Before the Senate Comm. on the Judiciary, 1996 WL 387312 (July 11, 1996) (statement of Cass R.

Sunstein); Letter of Laurence H. Tribe to Senator Edward M. Kennedy, 142 Cong. Rec. S5931-01 (daily ed. June 6, 1996). See also infra note 6 (citing authority analyzing the Defense of Marriage Act and the Full Faith and Credit Clause).

n4. See infra note 6 and accompanying text.

- - - - -End Footnotes- - - - -

Given the frequency with which such views are stated, my understanding of the Defense of Marriage Act is deviant: I believe that the Act is within Congress' power and that it is a largely sensible solution to the problems of interstate federalism. It must be admitted, however, that the Act does take us in some new directions, and to that extent it is experimental. While I could imagine a better version of the Act, on the whole I believe the experiment to be a success.

This article will first explain the argument that the Defense of Marriage Act violates the Full Faith and Credit Clause. In the course of doing so, I will explain why arguments against the Act based on equal protection or substantive due process are largely irrelevant. The article then considers, in Parts II, III, and IV, a series of three hypothetical cases, explaining why in each case the Defense of Marriage Act is a constitutional exercise of power by Congress under the "Effect" clause. The first two hypotheticals involve only a conflict between Hawaiian law and the law of another state that does not recognize same-sex marriages. These are relatively easy cases for the Defense of Marriage Act, for the Act appears here to allow to states no more power to disregard sister-state law than they already have. The third hypothetical is harder, because it involves not just conflicting Hawaiian law, but a Hawaiian judgment that two people are married. It is this application of the Defense of Marriage Act that is experimental, for it changes the law on interstate recognition of judgments. By changing the prior law under the Full Faith and Credit Clause, this phase of the Act clearly draws into question the extent of Congress' power to regulate full faith and credit.

I. THE ARGUMENTS AGAINST THE DEFENSE OF MARRIAGE ACT

The Defense of Marriage Act has been challenged as exceeding the power granted to Congress under the Effect clause. n5 It has also been argued that the Act discriminates against gays. By treating gay marriages differently than heterosexual marriages, the Act is said to violate equal protection or substantive due process. Furthermore, the [*412] Defense of Marriage Act has been challenged as unwise as a matter of family law policy.

- - - - -Footnotes- - - - -

n5. It is clear that Congress based its authority to enact the Defense of Marriage Act on the Effect clause of the Full Faith and Credit Clause. See Defense of Marriage Act: Hearings on S. 1740 Before the Senate Comm. on the Judiciary, 104th Cong. 18 (1996) (statement of Senator Don Nickles) ("The Defense of Marriage Act invokes Congress's constitutional authority, under Article IV, section 1, to 'prescribe the effect' that shall be given to... public acts, records, and judicial proceedings.").

- - - - -End Footnotes- - - - -

A. Full Faith and Credit

The argument against the Defense of Marriage Act based on the Full Faith and Credit Clause has been made by, among others, Lawrence Tribe. Tribe writes:

The basic point is a simple one: The Full Faith and Credit Clause authorizes Congress to enforce the clause's self-executing requirements insofar as judicial enforcement alone, as overseen by the Supreme Court, might reasonably be deemed insufficient. But the Full Faith and Credit Clause confers upon Congress no power to gut its self-executing requirements, either piecemeal or all at once.... The text of the Full Faith and Credit Clause 'leaves no real doubt that its self-executing reach, as authoritatively determined by the Supreme Court, may not be negated or nullified, in whole or in part, under the guise of legislatively enforcing or effectuating that clause.' n6

-Footnotes-

n6. See 142 Cong. Rec. S5931-01 (daily ed. June 6, 1996) (Letter from Professor Tribe to Senator Kennedy). Variations on this same argument abound in the literature. I have quoted Professor Tribe only because of his stature and because he sets out the argument succinctly. For some of the others making this argument, see Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 *Tex. L. Rev.* 921, 974 (1998) ("It is doubtful that Congress has the power thus to nullify the self-executing force of the Full Faith and Credit Clause."); 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 (1998) ("It is unlikely that the Framers intended to provide Congress with a 'negative' power under the Clause."); Michael J. Kanotz, Comment, *For Better or For Worse: A Critical Analysis of Florida's Defense of Marriage Act*, 25 *Fla. St. U. L. Rev.* 439, 460 (1998) ("Congress may not promulgate legislation that effectively dismisses this constitutional mandate."); Melissa Rothstein, *The Defense of Marriage Act and Federalism: A States' Rights Argument in Defense of Same-Sex Marriages*, 31 *Fam. L.Q.* 571, 580-81 (1997) ("The Full Faith and Credit Clause has never been used by Congress to nullify state judgments. It only allowed Congress to establish how to procedurally prove that an act or judgment occurred in another state and how to then give it full faith and credit."); 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, 209-10 (1997) ("The lesser power of prescribing the effect of full faith and credit simply cannot contain the greater power of negating full faith and credit altogether."); Scott Ruskay-Kidd, Note, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 *Colum. L. Rev.* 1435, 1450-57 (1997); Heather Hamilton, Comment, *The Defense of Marriage Act: A Critical Analysis of Its Constitutionality Under the Full Faith and Credit Clause*, 47 *DePaul L. Rev.* 943, 973-79 (1998); Evan Wolfson & Michael F. Meicher, *A House Divided: An Argument Against the Defense of Marriage Act*, 58 *Or. St. B. Bull.* 17, 18-20 (1998); 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, 955-56 (1998); Rex Glensy, Note, *The Extent of Congress' Power Under the Full Faith and Credit Clause*, 71 *S. Cal. L. Rev.* 137, 165 (1997); 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, 199-200 (1997); Evan Wolfson & Michael F. Melcher, *Doma's House Divided: An Argument Against the Defense of Marriage Act*, 44 Fed. Law. 30, 31-32 (1997); Julie L. B. Johnson, Comment, The Meaning of "General Laws": The Extent of Congress's Power Under The Full Faith and Credit Clause and the Constitutionality of the Defense of Marriage Act, 145 U. Pa. L. Rev. 1611, 1641 (1997); Mark Strasser, *Loving the Romer Out for Baehr: On Acts in Defense of Marriage and the Constitution*, 58 U. Pitt. L. Rev. 279, 301 (1997).

- - - - -End Footnotes- - - - -

[*413]

The United States Supreme Court has also noted the problem in an unrelated context:

While Congress clearly has the power to increase the measure of faith and credit that a State must accord to the laws or judgments of another State, there is at least some question whether Congress may cut back on the measure of faith and credit required by a decision of this Court. n7

- - - - -Footnotes- - - - -

n7. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 n.18 (1980) (plurality opinion).

- - - - -End Footnotes- - - - -

This argument against the Defense of Marriage Act based on the Full Faith and Credit Clause rests upon three premises. The first premise concerns the first sentence of the Full Faith and Credit Clause, which states that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." n8 According to this first premise, the Constitution contains a self-executing restriction on a state's ability to apply its own law in the face of competing law or a competing judgment from another state. That is, it is assumed that wholly apart from any legislation under the Effect clause, full faith and credit commands that a state shall on occasion apply the law or enforce a judgment of another state. The second premise concerns the relationship between the two sentences that comprise the Full Faith and Credit Clause. According to the second premise, the self-executing command of full faith and credit (the first sentence) is a mandatory floor of interstate enforceability. n9 Congress has power under the second sentence to "prescribe" the "Effect" of "Acts, Records and Proceedings." n10 But, it is argued, this power allows Congress only to grant greater faith and credit than is required by the self-executing command of the constitution; Congress may not by legislation lower the command of full faith and credit set out in the first sentence of the Full Faith and Credit Clause. The third, and final, premise involves the application of these principles to the Defense of Marriage Act and the prior case law under the self- executing Full Faith and Credit Clause. The Defense of Marriage Act [*414] is read by its critics as lowering the floor, as

allowing states to ignore sister-state law and judgments in cases that would have previously required faith and credit to that sister-state law under the self-executing command of full faith and credit. Each of the three premises are subject to challenge.

- - - - -Footnotes- - - - -

n8. U.S. Const. art. IV, 1.

n9. I will use the term "self-executing Full Faith and Credit Clause" or similar language to refer to the judicial interpretations of full faith and credit issued under the authority of the first sentence of the Full Faith and Credit Clause independent of any legislation.

n10. U.S. Const. art. IV, 1.

- - - - -End Footnotes- - - - -

The first premise is questionable as a historical matter. As Ralph Whitten has demonstrated both in his paper at this conference and in previous writings, n11 much of the historical evidence suggests that the first sentence of the Full Faith and Credit Clause was to provide only for an evidentiary effect: the intent was that laws, records, and judgments of sister-states must be received into evidence. This reading resolves the problem of how to read a self-executing command in the first sentence of the Full Faith and Credit Clause together with a grant of legislative authority in the second sentence. The first sentence, under this view, is not a self-executing command concerning the effect of sister-state law and judgments. The purpose of the Effect clause is to allow Congress to supplement this minimal force given to sister-state law by providing in legislation for a more conclusive "effect" than is created by a mere evidentiary rule.

- - - - -Footnotes- - - - -

n11. See Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 *Creighton L. Rev.* 255 (1998); Ralph U. Whitten, *The Constitutional Limitations on State Choice of Law: Full Faith and Credit*, 12 *Mem. St. U. L. Rev.* 1 (1981); Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part One)*, 14 *Creighton L. Rev.* 499 (1981).

- - - - -End Footnotes- - - - -

Despite the weight of Whitten's attack on a self-executing Full Faith and Credit Clause, I shall not challenge the first premise because it is too well entrenched in the case law. n12 Very early on, in 1790, Congress passed legislation pursuant to the Effect clause, which has provided, in more or less the same language ever since, that each state shall give the "same full faith and credit" to sister-state laws and judgments "as they have by law or usage in the courts of such State... from which they are taken." n13 In many subsequent full faith and credit cases, the Court could have relied exclusively on the statute, but it has frequently relied instead on the Full Faith and Credit Clause of the Constitution. Thus, these cases stand for the proposition contained in the first premise, that the first sentence of the Full Faith and

Credit Clause is self-executing. n14

-Footnotes-

n12. It should also be noted that others have read history differently. Professor Ralph Whitten relies extensively on the contemporaneous usage of the phrase "faith and credit" as carrying only an evidentiary force. Professor Douglas Laycock takes a different view, relying on the drafting history of the Full Faith and Credit Clause. Laycock concludes that the drafting history reveals the first sentence of the Clause was to be self-executing. See Douglas Laycock, Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law, 92 Colum. L. Rev. 249, 292 (1992) ("On the question whether there exists a self-executing obligation to give full faith and credit to sister-state acts, this is about as clear a drafting record as one can hope to find."). Laycock also reads the history of the usage of the phrase "faith and credit" differently than Whitten. See Laycock, 92 Colum. L. Rev. at 304-05.

n13. See 28 U.S.C. 1738 (1998). Cf. Act of May 26, 1790, ch. 11, 1 Stat. 122 (codified at 28 U.S.C. 1738).

n14. For example, in *Fauntleroy v. Lum*, the Court held that Mississippi violated full faith and credit when it declined to honor a Missouri judgment on the ground that the judgment violated Mississippi's public policy. *Fauntleroy v. Lum*, 210 U.S. 230 (1908). The Court discussed the full faith and credit statute, but it also stated that the "validity of [the Missouri] judgment, even in Mississippi, is, as we believe, the result of the Constitution as it always has been understood." *Fauntleroy*, 210 U.S. at 237-38 (emphasis added).

Similarly, in *Bradford Electric Light Co. v. Clapper*, the Court relied exclusively on the constitutional command of full faith and credit in holding that New Hampshire had to apply the worker's compensation statute of Vermont. *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 159 (1932). The point was not mere dicta in *Clapper*, for the version of the full faith and credit statute in effect at that time failed to include "acts." The Court thus had to rely on a self-executing constitutional command of full faith and credit to bind New Hampshire to the application of the Vermont act. See *Thomas*, 448 U.S. at 273 n.18 ("Congress' power in this area is not exclusive, for this Court has given effect to the Clause beyond that required by implementing legislation.").

-End Footnotes-

It is the second and third premises that I wish to challenge directly. Taking them in reverse order, many of the things that the Defense of Marriage Act allows states to do are in fact not forbidden by prior cases construing the Full Faith and Credit Clause. Thus, in many applications of the Defense of Marriage Act, Congress has not lowered the floor of interstate enforceability set by a self-executing Full Faith and Credit Clause. These are the easy cases for the Defense of Marriage Act, because in these cases the Act really does not change the law. As to the second premise - that Congress may not lower the floor of full faith and credit - the Act poses more difficult problems, for in some of its applications (principally in the area of judgments) it does appear to change the rules of full faith and credit previously set out in construing the self-executing Full Faith and Credit Clause. These cases require one to examine

the power of Congress under the Effect clause.

Before leaving this topic, it is worth considering what is meant by calling a provision of the constitution "self-executing." Of course, no written word, in a constitution or elsewhere, is truly self-executing. It is always necessary to have some body to interpret the words and to say how they apply to a particular matter. Saying that a provision of the constitution is self-executing states in a metaphysical fashion the more tangible truth: the judiciary has been entrusted with the interpretation of the provision in question. In the context of full faith and credit, stating that the first sentence of the Full Faith and Credit Clause is self-executing means nothing more than that the job of determining when a state must apply the law of another state falls to the [*416] judicial branch, chiefly to the Supreme Court. As the Supreme Court recently said in the context of the Fourteenth Amendment:

The Fourteenth Amendment confers substantive rights against the States which, like the provisions of the Bill of Rights, are self-executing.... The power to interpret the Constitution in a case or controversy remains in the Judiciary.
n15

- - - - -Footnotes- - - - -

n15. *City of Boerne v. Flores*, 117 S. Ct. 2157, 2166 (1997) (emphasis added) (citation omitted).

- - - - -End Footnotes- - - - -

Of course, some provisions of the constitution are held not to be self-executing, such as most grants of subject matter jurisdiction in Article III of the Constitution. Again, the significant consequence of concluding that these provisions are not self-executing is that it is for Congress to provide for subject matter jurisdiction of the federal courts by statute. While the point may seem obvious, it is important to get out on the table the core issue of judicial versus legislative control of the area of full faith and credit. The theme of judicial superiority is one which we shall return to later. It suffices for now to note that the premise of a self-executing Full Faith and Credit Clause impervious to legislation keeps Congress out of the full faith and credit arena and keeps the judiciary in control.

B. Policy, Equal Protection, and Substantive Due Process

The Defense of Marriage Act is also attacked as unconstitutionally discriminating against gays. It is argued that it violates the Equal Protection Clause or interferes with fundamental rights in violation of substantive due process. n16 A related argument is that the Act is unwise as a matter of family law policy. This argument posits that instead of allowing non-recognition, the better policy is to allow same-sex marriages and encourage their interstate recognition. n17 While it is not my purpose to discuss the merits of these constitutional and policy arguments, it is important to understand that this is more than a mere disclaimer of interest in the topic. Instead, I have ex

[*417] cluded them because they are irrelevant to the validity Defense of Marriage Act.

-Footnotes-

n16. Evan Wolfson & Michael F. Meicher, Constitutional and Legal Defects in the "Defense of Marriage" Act, 16 Quinnipiac L. Rev. 191 (1996); Kelly, 7 Cornell J.L. & Pub. Pol'y at 233-49.

n17. See Thomas M. Keane, Note, Aloha, Marriage? Constitutional and Choice of Law Arguments for Recognition of Same-Sex Marriages, 47 Stan. L. Rev. 499 (1995); Barbara J. Cox, Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?, 1994 Wis. L. Rev. 1033 (1994); James Trosino, Note, American Wedding: Same-Sex Marriage and the Miscegenation Analogy. 73 B.U. L. Rev. 93 (1993); Habib A. Balian, Note, 'Til Death Do Us Part: Granting Full Faith and Credit to Marital Status, 68 S. Cal. L. Rev. 397 (1995); Note, In Sickness and in Health, in Hawaii and Where Else?: Conflict of Laws and Recognition of Same-Sex Marriages, 109 Harv. L. Rev. 2038 (1996).

-End Footnotes-

1. The Irrelevance of Policy Arguments in Favor of Same-Sex Marriages

To understand why this surprising statement is true, one must remember that the Defense of Marriage Act attempts to provide a solution - albeit a minimalist one - to a conflict of laws problem. Conflict of laws problems occur when different states have different conceptions of the best solution to a given legal problem and therefore have different laws. If all states had the same law on the question of same-sex marriages, then there would be no conflict of laws problem upon which the Defense of Marriage Act might operate and the Act would be irrelevant. Thus, we need worry about the Defense of Marriage Act only if different states have different laws.

Remembering that the Defense of Marriage Act arises in a conflict of laws situation makes the substantive arguments about the wisdom of granting same-sex marriages irrelevant. If all states have the same law, then the question of which state's law to apply in a given case becomes irrelevant (except as a theoretical question) because the outcome of the case is unaffected. Although this observation seems stunningly obvious, it is sometimes forgotten. n18 The principal consequence for those engaged in a choice of law analysis is that one must enter into the problem under the assumption that it cannot be solved immediately by appeals to the courts or legislatures to reach the "correct" substantive result. Such appeals have been made and rejected, or else we would not have a conflict of laws problem.

-Footnotes-

n18. For an example of an author having forgotten this fundamental problem of orientation in the literature on same-sex marriages, see Note, 109 Harv. L. Rev. at 2045 ("The traditional arguments against same-sex marriages do not offer sufficiently strong public policy grounds for rejecting valid same-sex marriages under this exception.").

- - - - -End Footnotes- - - - -

It is certainly a solution to the problem of same-sex marriages to get Hawaii and all other states to agree on the proper family law policy in this area, for that would end the conflict of the laws. However, this solution is not a choice of law solution but a substantive one. If the prospects for a uniform policy in this area were favorable, if one could say with confidence that very soon all states will have identical laws on the matter of same-sex marriages, then the choice of law question of which state's law to apply to a same-sex marriage would be irrelevant (except as a theoretical question) because the outcome of the case is unaffected. But, of course, just the opposite is true; there is currently a substantial lack of uniformity of the wisdom of allowing same-sex marriages. This lack of a consensus makes the interstate [*418] choice of law topic addressed here relevant and the substantive solution irrelevant.

None of which is to say that the problem of same-sex marriages is intractable. Sooner or later, as is the case with all - or nearly all n19 - legal problems, a consensus will emerge and we will have substantive uniformity. That has been the course with women's contractual disability, guest statutes, and the other historical grist for the choice of law enterprise. If one looks at the areas upon which choice of law has operated in the past, it becomes apparent that choice of law, at least choice of law among the American states, serves to plane over the rough edges created by the temporary lack of uniformity that is bound to occur among different states in a federal system. It is important to bear always in mind the ephemeral nature of choice of law as we examine same-sex marriages. Adopting a particular choice of law solution does not mean that parties with multistate facts will forever be subject to that solution. It means instead that they will be until such time as we have attained substantive uniformity and the existence of multistate facts becomes irrelevant, except as a theoretical question.

- - - - -Footnotes- - - - -

n19. For an example of a law that persists in being different from nearly every other state, see La. Rev. Stat. Ann. 22:655 (West 1995) (providing for a direct action by an injured person against a liability insurance carrier).

- - - - -End Footnotes- - - - -

2. The Irrelevance of Equal Protection and Due Process Rights to Same-Sex Marriage to the Conflict of Laws Problem

We need not worry whether the Defense of Marriage Act violates equal protection or substantive due process. The same point made above as to the substantive policy concerns applies equally here. If the Defense of Marriage Act represents illegal anti-gay discrimination, then the conflict of laws problem that the Act addresses disappears. If it is true that the Act violates equal protection or substantive due process, then it must also surely be true that state laws that ban same-sex marriages likewise violate the same constitutional principles. It would require an exceedingly fine distinction to hold that states do not violate equal protection principles when they discriminate against gay couples in denying same-sex marriages but that Congress does violate equal protection when it acts to allow states to further lawful discrimination.

Therefore, if the Defense of Marriage Act is unconstitutional under an equal protection or substantive due process argument, the Act is at once also irrelevant, for each state would also be required to treat same-sex marriages on an equal footing with heterosexual ones. The nation would have substantive uniformity by the force of the con [*419] stitution. Given substantive uniformity, the Defense of Marriage Act simply loses the purpose it was enacted to perform. I will for that reason have little to say on these subjects. Later, I will briefly return to the relevance of equal protection and substantive due process, for it turns out that analysis under those provisions might provide useful information for the full faith and credit analysis we will later undertake. n20

-Footnotes-

n20. See infra notes 94-103 and accompanying text.

-End Footnotes-

II. AN EASY CASE: THE SUITCASE WEDDING

In what I have identified above as the third premise n21 of the full faith and credit attack upon the Defense of Marriage Act, the critics of the Act argue that it attempts to change by legislation the constitutional rules of full faith and credit. But in a great many of the potential applications of the Act, it merely ratifies that states may continue to do what they are already allowed to do under the self-executing Full Faith and Credit Clause. These are then the easy cases for the defenders of the Act, for here the Act is innocuous.

-Footnotes-

n21. See supra note 10 and accompanying text.

-End Footnotes-

In Section II, I will use the following hypothetical: Suppose two persons of the same sex, both lifelong domiciliaries of State A, desire to be married. The law of State A, let us suppose, restricts marriage to persons of different sexes and declares that same-sex marriages are against its public policy. To avoid this problem, the couple travels to Hawaii for three days. The couple is married and enjoy a two-day honeymoon. The newlyweds immediately return to State A and live together as if married. Litigation then occurs in State A raising the question whether they are in fact married. For purposes of this problem, we need not worry about the nature of the litigation or how the issue of the marriage arises.

A. The Constitutional Test for Applying Forum Law in Choice of Law Cases

The Defense of Marriage Act would allow State A to apply its own law in this case and conclude that the couple are not married. The Act provides that "no State... shall be required to give effect to any public act... of any other State... respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State." n22 In so providing, has Congress lowered the floor of interstate enforceability below that mandated by the self-executing Full Faith and Credit Clause? Stated differently, if there

never was a [*420] Defense of Marriage Act, does the self-executing Full Faith and Credit Clause allow State A to apply its own law and conclude that there is not a valid marriage? If State A could apply its law absent the Defense of Marriage Act, then it hardly violates full faith and credit for Congress to codify the result previously obtained.

-Footnotes-

n22. See 28 U.S.C. 1738C (Supp. 1998).

-End Footnotes-

The clear answer to the question is that the self-executing Full Faith and Credit Clause would allow State A to apply its own law in a hypothetical case such as this. Under the modern case law, a state may apply its own law if it has "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." n23 This test is easily satisfied on the facts of the hypothetical by the domicile of the parties to the marriage in State A, both before and after the marriage ceremony. This much is surely established by Williams v. North Carolina, n24 in which the Court held that the state of domicile of either spouse has the power to change marital status by granting a divorce. Because the case involves domiciliaries of State A, that state has an interest in applying its own law.

-Footnotes-

n23. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985) (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981)).

n24. 317 U.S. 287 (1942).

-End Footnotes-

This result is fortified by Allstate Insurance Co. v. Hague. n25 In Hague, a case involving an insurance dispute, the United States Supreme Court allowed Minnesota to apply its own law based on the contacts that the decedent had worked in Minnesota and that his widow had moved to Minnesota after his death. n26 These contacts are weaker than those involved in the hypothetical under discussion, and serve to demonstrate that the self-executing Full Faith and Credit Clause imposes only minimal restrictions on a state's ability to apply its own law. Because State A could apply its own law in this case wholly apart from the Defense of Marriage Act, the Act clearly does not here lower any supposed floor of interstate enforceability.

-Footnotes-

n25. 449 U.S. 302 (1981).

n26. Allstate Ins. Co. v. Hague, 449 U.S. 302, 305, 313, 318-19 (1981).

-End Footnotes-

Rather than asking whether a domiciliary state such as State A violates the Full Faith and Credit Clause by not recognizing a same- sex marriage celebrated

in Hawaii, is not the more obvious question whether Hawaii is acting unconstitutionally in applying its own law to allow the marriage of two persons domiciled in states that disallow same-sex marriages? Hawaii may apply its law only if it has a significant contact or aggregation of contacts with the parties or the litigation creating state interests. n27 In the case of two domiciliaries of State A who take a jaunt to Hawaii, Hawaii has no such contacts or inter [*421] est. n28 It is hard then to see how a state that disallows same-sex marriages would violate the Constitution by not giving an effect to Hawaiian law that Hawaii itself may not lawfully claim. If this is true, then Congress commits no error in allowing State A to ignore Hawaii's unconstitutional application of its own law.

- - - - -Footnotes- - - - -

n27. See supra note 23 and accompanying text.

n28. The statement in the text is true, unless one accepts what I shall later describe as non-consequentialist interests. See infra notes 90-105 and accompanying text.

- - - - -End Footnotes- - - - -

B. Not a Judgment But a Ministerial Act

A marriage is not a judgment for full faith and credit purposes. The fact that a marriage is not a judgment has important implications for the Defense of Marriage Act. Because the marriage is not a "judicial proceeding" under the Full Faith and Credit Clause, the conflict in this hypothetical case is between Hawaiian statutory law and the statutory law of State A, or, in the words of the Full Faith and Credit Clause, between the "Acts" of one state and the "Acts" of another. n29 It is in this context that the Supreme Court has set out the minimal full faith and credit restrictions identified above: A state may apply its own law if it has a contact creating an interest, which State A clearly does. n30 In contrast, in the context of judgments, the Full Faith and Credit Clause is thought to be more exacting: the second forum must generally enforce the first forum's judgment. n31

- - - - -Footnotes- - - - -

n29. The Full Faith and Credit Clause has been interpreted to cover common law rules of decisions as well as statutory decisions. See Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 *Geo. L.J.* 1, 25-27 (1991). When I refer to the full faith and credit given to "Acts," I intend to refer to state rules of decision whether embodied in a statute or a common law rule.

n30. See supra note 23 and accompanying text.

n31. See infra notes 143-50 and accompanying text.

- - - - -End Footnotes- - - - -

A marriage ceremony is not a judgment, but (truly) a "ministerial" act. n32 Despite a great deal of nonsense that has been written to the contrary, n33 all

of the hallmarks of a judicial proceeding are missing. There is neither adversariness nor a neutral decisionmaker with the power to grant or deny relief. n34 Indeed, there is no decisionmaker empowered to decide what law to apply, a factor which the Supreme Court has relied upon to deny full faith and credit in another context. n35 The Supreme Court has also held that findings of administrative agencies are entitled to full faith and credit only if the proceedings were sufficiently judicial in nature, a limitation that would exclude marriages. n36 Finally, the marriage lacks the characteristics of a judgment even in Hawaii. Suppose that a man and woman presented themselves for marriage, were married, but it later turned out that the "woman" was in fact 14 years old at the time of the marriage or was the first cousin of the man. Would this marriage be unassailable as a judgment in Hawaii? Of course not. It could be annulled [*423] in that state. n37 Lacking finality in Hawaii, the marriage has no greater effect in other states.

-Footnotes-

n32. See David P. Currie, *Full Faith & Credit to Marriages*, 1 Green Bag 2d 7, 10 (1997) ("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."); Kelly, 7 Cornell J.L. & Pub. Pol'y at 216 ("Traditionally, a marriage has never been considered the type of 'legal judgment' entitled to full faith and credit because the state's only role in the proceeding is to issue a marriage certificate.").

n33. See Wolfson & Melcher, 44 Fed. Law. at 32 ("Marriages should be granted at least the level of faith and credit accorded to judgments."); Kanotz, 25 Fla. St. U. L. Rev. at 439; Beth A. Allen, Comment, *Same-Sex Marriage: A Conflict-of-Laws Analysis for Oregon*, 32 Willamette L. Rev. 619 (1996).

n34. See *American Fidelity Fire Ins. Co. v. Paste-Ups Unlimited, Inc.*, 368 F. Supp. 219, 225-26 (S.D.N.Y. 1973) (in concluding that a writ of garnishment is not a judgment for full faith and credit purposes, the court lists the characteristics of a judicial proceeding as including a "formal decision rendered in a controversy where the parties have been given notice of the proceedings with an opportunity to be heard; the exercise of discretion or judgment; and something more than merely 'the act of the law, invoked by the parties, in executing [their] agreement'").

n35. See *Thomas*, 448 U.S. at 282-83. In *Thomas*, the Court stated:

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.... Typically, a workmen's compensation tribunal may only apply its own State's law. In this case, the Virginia Commission could and did establish the full measure of petitioner's rights under Virginia law, but it neither could nor purported to determine his rights under the law of the District of Columbia. Full faith and credit must be given to the determination that the Virginia Commission had the

authority to make; but by a parity of reasoning, full faith and credit need not be given to determinations that it had no power to make. Since it was not requested, and had no authority, to pass on petitioner's rights under District of Columbia law, there can be no constitutional objection to a fresh adjudication of those rights.

Id.

n36. See *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966) ("When an administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose."). The Restatement of Judgments likewise gives res judicata effect to administrative findings only if they entail "the essential elements of adjudication," which are listed as:

(a) Adequate notice to persons who are to be bound by the adjudication, as stated in 2;

(b) The right on behalf of a party to present evidence and legal argument in support of the party's contentions and fair opportunity to rebut evidence and argument by opposing parties;

(c) A formulation of issues of law and fact in terms of the application of rules with respect to specified parties concerning a specific transaction, situation, or status, or a specific series thereof;

(d) A rule of finality, specifying a point in the proceeding when presentations are terminated and a final decision is rendered; and

(e) Such other procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions.

Restatement (Second) of Judgments 83 (1982).

n37. See Currie, 1 Green Bag 2d at 7-12.

- - - - -End Footnotes- - - - -

The normal rules of res judicata and due process illustrate another flaw with the notion that a marriage is a judgment and is thus immune from later attack. Even if a marriage were considered a judgment, it would be binding only on those who were parties or in privity with the parties. n38 This is the limited effect of a Hawaiian judgment both in Hawaii and in other states. Moreover, the Due Process Clause prohibits binding persons to a judgment when they lacked notice

and an opportunity to be heard. n39 There is an exception to this rule for representative litigation. One not a party may be bound if a proper representative was a party, as is the case in class actions. But this exception cannot possibly apply, because at a minimum the representative must have common interests with the person to be bound. n40 Even if a marriage is a judgment, no one is present to argue against the marriage. Thus, those who in later litigation attack the validity of the marriage are not bound by the Hawaii marriage ceremony.

- - - - -Footnotes- - - - -

n38. See *Martin v. Wilks*, 490 U.S. 755, 761 (1989) (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)) ("One is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.").

n39. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

n40. See *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940).

- - - - -End Footnotes- - - - -

Finally, if marriages are to receive the protection under full faith and credit that is accorded judgments, the Supreme Court really missed the boat in *Williams v. North Carolina* ("Williams I"). n41 In *Williams I*, the Court held that Nevada, to which one of the spouses had moved after leaving the state of matrimonial domicile, could assert jurisdiction over the marriage and grant a divorce. n42 If a marriage from another state is to be treated as a judgment, it would be assailable in another state only on the grounds upon which it could be attacked at home. But the whole point of *Williams I* is, of course, that Nevada had more lax divorce laws than other states. A marriage thus can be attacked in other states on grounds not available in the rendering state. This is a great deal less than the protection that is given to judgments.

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n41. 317 U.S. 287 (1942).

n42. See *Williams v. North Carolina*, 317 U.S. 287, 298-99 (1942) (*Williams I*).

- - - - -End Footnotes- - - - -

We shall return to the question of the Defense of Marriage Act and judgments as we work through the series of hypotheticals. For now, it suffices to observe that in this first hypothetical there is no Hawaiian judgment that the couple is married, that the problem is simply one of choice of law - not *res judicata* - between Hawaii and State A, and that State A clearly has interests sufficient to apply its [*424] own law. Since State A need not honor the Hawaiian marriage under the self-executing Full Faith and Credit Clause, Congress has not in this application of the Defense of Marriage Act given any less effect to sister-state law than this required by that Clause.

C. A Final Puzzler: The Reverse Suitcase Problem

Before leaving the question of whether State A may decline to honor a Hawaii marriage consistent with full faith and credit, let me put a slight variation on the principal hypothetical considered above. Suppose now that a Hawaiian same-sex couple goes to State A for three days and seeks to be married, after which they plan to return to Hawaii. They either seek injunctive relief from a court of State A to require that a marriage license be issued to them or they find someone willing to perform the service in State A and the marriage is challenged in litigation in State A. Must State A apply Hawaiian law?

Such a result was beyond the wildest dreams of the promoters of same-sex marriage. The thought was that at least the trip to Hawaii was needed. But if full faith and credit requires State A to honor a marriage of two locals performed in Hawaii, why wouldn't it also require State A to perform a marriage locally for two Hawaiians? If anything, there is a weaker case for not applying Hawaiian law in the reverse suitcase problem, given the lack of State A domiciliary connections. The interest of State A in denying the marriage is less than obvious, because the only conceivable effects of the marriage will be felt in Hawaii.

Nonetheless, I believe State A need not provide a forum for the creation of the same-sex marriage. n43 But the reason it need not do so is not because it has a legitimate right to control the affairs of the parties, for they are not from State A. State A need not perform the rite because of its public policy against same-sex marriages. Not every occasion of a forum applying its own law need be justified by resort to a concern about consequences that will be felt within the state. Although I will develop the concept more fully later, n44 this hypothetical shows (at least if you agree that State A need not apply Hawaii law here) that states also have interests that do not depend for their application on the presence of local parties or effects. It is precisely such interests - those that do turn on the presence of local parties or [*425] events - that in the past have often fallen under the label of public policy in the context of state courts closing their doors to foreign law.

- - - - -Footnotes- - - - -

n43. Professor Kramer argues that the public policy exception is unconstitutional as a discrimination against sister-state law. See Kramer, 106 Yale L.J. at 1965. Professor Kramer's reasoning would lead to the startling conclusion that State A would have to perform the marriage in this case; otherwise, it would be discriminating against sister- state law.

n44. See infra notes 90-105 and accompanying text.

- - - - -End Footnotes- - - - -

Finally, note that the effect of invoking public policy in this case is simply to allow the forum to decline to act. State A is not saying that the parties cannot be married anywhere, only that this state will not lend its hand to assist them. The effect of deciding a case on the basis of public policy is akin to dismissing a case on the grounds of forum non conveniens. This minimal effect does not deny full faith and credit. The reverse suitcase problem shows why State A need not grant a marriage to two Hawaiians. The next section discusses whether a court of State A must recognize ostensibly valid Hawaiian

marriages.

III. A SOMEWHAT HARDER CASE: THE HAWAIIANS GO EAST

One might object to the preceding hypothetical that it was indeed an easy case - too easy. It was very easy because the parties to the marriage were domiciliaries of State A both before and after the marriage. Well then, let us make the hypothetical a little more interesting. Suppose: (1) only one of the parties is from State A, or (2) the couple was domiciled in State A before, but not after, the marriage, or (3) their residency in Hawaii extended for several months or years. Is the Defense of Marriage Act constitutional in those cases as well?

Rather than walk painstakingly through all the possible variations, let me bound the problem by moving immediately to a case even harder for the Defense of Marriage Act than those intermediate hypotheticals. In the case assessed in this section, I again find that the Defense of Marriage Act allows no more power to states to ignore sister-state law than they already have under the self-executing Full Faith and Credit Clause. Again, the third premise identified above n45 fails here and the Defense of Marriage Act is valid.

- - - - -Footnotes- - - - -

n45. See supra notes 7-11 and accompanying text.

- - - - -End Footnotes- - - - -

The facts of this hypothetical are as follows: Two domiciliaries of Hawaii of the same sex meet in that state and are there married. They continue to live in Hawaii for several years. They then move to State A, which we shall again assume bans same-sex marriages. Litigation in State A draws into question whether they are married. Let us assume, for example, that the couple sues the state to be allowed to file a joint state income tax return or that one spouse dies intestate in State A and the question is whether the other gets a surviving spouse's share. Must State A uphold the marriage? Again, the Defense of Marriage Act would allow State A to decline to do so. Does the [*426] Act in this case attempt to lower the floor of full faith and credit commanded by the self-executing Full Faith and Credit Clause?

A. The Presence of an Interest

The answer again is that State A may apply its own law even absent the Defense of Marriage Act. As discussed above, State A has no Hawaii judgment to deal with and the case presents only a problem of choice of law. In terms of full faith and credit, the case involves a conflict between "Acts" of one state and "Acts" of another and the question is whether State A must subordinate its laws to those of Hawaii.

The test under the self-executing Full Faith and Credit Clause remains whether there are contacts between the litigation and State A that create interests in that state. Again the test is easily satisfied here because State A is the new domicile of the parties. n46 This case is a little harder for State A because the domicile of the parties in Hawaii at the time of the marriage gave Hawaii an interest in seeing them married. This same fact serves to lessen the

interest of State A, because it was first connected with the case only after the marriage. Moreover, the continued residence of the couple in Hawaii after their marriage creates a strong expectations argument on their behalf. If State A does not recognize the marriage at this late date, the settled understanding of the couple will be undone. But these are just some interests among many. The question under full faith and credit in a choice of law case is not whether State A has the strongest interest, but whether it has an interest. And State A does have an interest because the same-sex couple now lives there.

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n46. See Linda J. Silberman, Can the Island of Hawaii Bind the World? A Comment on Same-Sex Marriage and Federalism Values, 16 Quinnipiac L. Rev. 191 (1996) (stating that the "new domiciliary state does have a relationship with the parties justifying the application of its own rules when determining to whom it will extend benefits").

- - - - -End Footnotes- - - - -

B. After-Acquired Domicile

The only colorable objection to the application of the law of State A in this hypothetical is that the Supreme Court has on occasion spoken of the impermissibility of a state applying its own law on the basis of a change of domicile by one of the parties after the event in question. n47 The case most frequently cited for this proposition is John Hancock Mutual Life Insurance Co. v. Yates. n48 In Yates, the plaintiff [*427] sued an insurance company for the benefits of a life insurance policy covering her husband. The policy had been written in New York at a time when the plaintiff and her husband both lived in that state. n49 After the husband's death in New York, the plaintiff moved to Georgia, whose law was more favorable to her. n50 The Supreme Court held that Georgia could not apply its own law. n51

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n47. See Mark Strasser, For Whom Bell Tolls: On Subsequent Domiciles Refusing to Recognize Same-Sex Marriages, 66 U. Cin. L. Rev. 339, 376 (1998) ("A domicile acquired years after the marriage had taken place would simply have had no interest in the marriage at the time it was celebrated and thus application of its law would be fundamentally unfair.").

n48. 299 U.S. 178 (1936).

n49. John Hancock Mutual Life Ins. Co. v. Yates, 299 U.S. 178, 179 (1936).

n50. Yates, 299 U.S. at 181.

n51. Id. at 182.

- - - - -End Footnotes- - - - -

While Yates is often described as a case holding that after-acquired domicile may not be the basis for applying state law, the better reading of the case is

that the Court, under the sway of the then dominant territorialism - which had an almost exclusive focus on the location of things and events - did not care at all about the plaintiff's domicile at any point in the case. n52 This is the same Court that a few years earlier in the landmark case of *Home Insurance Co. v. Dick*, n53 stated that "the fact that [the Plaintiff's] permanent residence was in [the forum] is without significance." n54 It is in this light that we should read the Court's statement in *Yates* that "there was no occurrence, nothing done, to which the law of Georgia could apply." n55 Today, of course, the domicile of one or more of the parties in the forum is not only relevant to the full faith and credit question, it appears to decisively support the conclusion that the domiciliary state may apply its own law. n56

-Footnotes-

n52. See Jeffrey L. Rensberger, *Who Was Dick: Constitutional Limitations on State Choice of Law*, 1998 *Utah L. Rev.* 37, 51 n.98 (1998). See Moffatt Hancock, *The Effect of a Post-Occurrence Change of Domicile upon a Choice of Law Determining the Validity of Other-Insurance Clauses in an Accident Policy*, 7 *Dalhousie L.J.* 653, 683 (1983) (noting that Ms. Yates' domicile in Georgia was "without significance"); Louise Weinberg, *Conflicts Cases and the Problem of Relevant Time: A Response to the Hague Symposium*, 10 *Hofstra L. Rev.* 1023, 1027-29 (1982) (arguing that the Yates court believed plaintiff's domicile to be irrelevant whenever it first arose).

n53. 281 U.S. 397 (1930).

n54. *Home Ins. Co. v. Dick*, 281 U.S. 397, 408 (1930).

n55. *Yates*, 299 U.S. at 182.

n56. This is subject to a potential limitation. See *infra* note 77 and accompanying text for this discussion.

-End Footnotes-

Nonetheless, the Court in *Allstate Insurance Co. v. Hague* n57 characterized the Court's holding in *Yates* as holding "that a postoccurrence change of residence to the forum State - standing alone - [is] insufficient to justify application of forum law." n58 This language suggests that, in our hypothetical, State A could not apply its law because its only connection comes through a "postoccurrence change of resi [*428] dence." Such a conclusion would have important consequences for interstate recognition of marriage. If the *Yates* principle is good law and applies in the manner suggested above, then same-sex marriages created in Hawaii would have to be recognized in other states, so long as the couple - or perhaps one of them - was originally from Hawaii or lived there long enough to establish a domicile. Any later relocation by one of the spouses would be a "postoccurrence change of residence" that must be discounted under *Yates*. The net effect would be to recreate for same-sex marriages the pattern that has prevailed in divorce cases since *Williams I.* n59 One seeking a divorce that is prohibited by his own state's law may evade that state law by establishing domicile in another state. Likewise, if the after-acquired domicile argument is accepted, one seeking a same-sex marriage who is prohibited from doing so by his own state's law may obtain one by going to Hawaii long enough to establish a domicile.

-Footnotes-

n57. 449 U.S. 302 (1981).

n58. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 311 (1981). Although the opinion quoted was only a plurality opinion, the dissenting Justices joined in the characterization of *Yates* as debarring the use of after-acquired domicile. See *Hague*, 449 U.S. at 334 (Powell, J., dissenting).

n59. See *Williams I*, 317 U.S. at 287.

-End Footnotes-

The after-acquired domicile argument ultimately fails for three reasons. First, the case law support for a limitation on after-acquired domicile as a basis of choice of law is weak. Second, the same-sex marriage problem is more closely analogous to another line of cases in which the Supreme Court has allowed the forum to apply its own law based upon a change in domicile. Third, the rationale underlying the prohibition on using after-acquired domicile as a basis of choice of law does not apply in the context of same-sex marriages.

Regarding the case law, the case that states the after-acquired domicile principle - *Hague* - does not apply it. A plurality upheld the application by Minnesota of its own law to an insurance dispute that was structurally similar to *Yates*: The insurance policy (in this case, automobile insurance) was written in Wisconsin on a car licensed there to Mr. Hague, who lived in that state. n60 After his death in a Wisconsin car accident, his wife moved to Minnesota, a state whose law allowed a more liberal recovery on the insurance policy. n61 Despite the similarity to *Yates*, Minnesota was allowed to apply its own law. n62 According to the plurality, the *Yates* principle did not mean that after-acquired domicile could not be counted as a contact, but only that after-acquired domicile was insufficient "standing alone" to justify the application of forum law. n63 Thus, because Minnesota had other contacts, the after-acquired domicile of Ms. Hague could also be counted.

-Footnotes-

n60. *Hague*, 449 U.S. at 305.

n61. *Id.* at 306.

n62. *Id.* at 320.

n63. *Id.* at 311.

-End Footnotes-

[*429] Among the problems with this analysis is that the other contacts relied upon by the plurality were meaningless. During his lifetime, Mr. Hague commuted to and worked in Minnesota, n64 while the Defendant, Allstate Insurance Co., did unrelated business in Minnesota. n65 But it is hard to see what makes these contacts relevant to the case. Supposing Mr. Hague had been a fan of the Minnesota Vikings football team, that would in a sense be a contact with

Minnesota, but it is not a relevant contact because nothing in Minnesota is affected by whether an out of state fan is covered by an out of state insurance policy. Likewise, the fact that Hague worked in Minnesota is irrelevant. No recovery would go to the Minnesota employer, nor was the action against a tortfeasor who might be deterred from negligently injuring other Minnesota workers. The only contact in the case that makes any sense is the after-acquired domicile of Ms. Hague. Minnesota would be interested in seeing that a widow living within its borders gets more rather than less from the insurance proceeds. Moreover, the Supreme Court limited its reliance on the other contacts, stating that it was not deciding whether the other two contacts were in themselves sufficient to allow the application of Minnesota law; rather it was their combination with the after-acquired domicile (which, remember, is supposed to be insufficient standing alone) that justified Minnesota in applying its own law. n66

-Footnotes-

n64. *Id.* at 313-15.

n65. *Id.* at 313, 317.

n66. *Id.* at 320 & n.29.

-End Footnotes-

As applied, then, the prohibition against basing choice of law on after-acquired domicile is narrow. After-acquired domicile may be counted as a contact, so long as it is not the only contact. The other contacts need not be strong; indeed, they need not be sufficient in themselves to satisfy full faith and credit. In the context of same-sex marriages, if the couple has moved to State A, they surely will then have other contacts. At the least, one of them will work in the state. Employment unrelated to the suit was counted as the necessary additional contact in Hague. It should suffice in the context of same-sex marriages as well.

Second, the rationale underlying the limitation against using after-acquired domicile is inapplicable to the problems raised in the hypothetical. As noted above, the only sensible contact in Hague was the after-acquired domicile of Ms. Hague. One might wonder why there should be any doubt about the right of Minnesota to apply its law when the result would benefit a local citizen. The core assumption of interest analysis is that states have laws to protect people, and the people with which a state is properly concerned are its own domiciliar [*430] ies. n67 Ms. Hague falls within the class of persons that Minnesota has a right to protect. n68 But there might, nonetheless, be doubt about the right of Minnesota to apply its own law to benefit Ms. Hague, because to allow such a result would be an open invitation to forum-shopping. n69 Allowing the Plaintiff to decide the result of the case by relocating not only gives her an unfair advantage, it also upsets the expectations of the Defendant, who had no reason to expect that the law of the state to which the Plaintiff moved would govern the transaction. While Minnesota certainly had legislative jurisdiction over the Plaintiff in Hague, that's not the problem. The problem is the state's legislative jurisdiction over the Defendant. n70 The Defendant has done nothing to bring itself within the sphere of that state's governance. It has neither engaged in any activity there nor knowingly dealt with a citizen of that state. Perhaps for these reasons the plurality in Hague made a point of characterizing

Ms. Hague's move to Minnesota as "bona fide" and not motivated by forum shopping. n71

- - - - -Footnotes- - - - -

n67. See, e.g., Patrick J. Borchers, *New York Choice of Law: Weaving the Tangled Strands*, 57 *Alb. L. Rev.* 93, 107 (1993) ("Currie's fundamental axiom was the personal law principle which ascribed great weight to the parties' domiciles.").

n68. Weinberg, 10 *Hofstra L. Rev.* at 1028.

n69. See *Hague*, 449 *U.S.* at 337 (Powell, J., dissenting) ("If a plaintiff could choose the substantive rules to be applied to an action by moving to a hospitable forum, the invitation to forum shopping would be irresistible."); Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 *U. Chi. L. Rev.* 440, 461 (1982) ("A sense of unfairness in permitting the after-acquired residence to expand the obligations of the defendant - a taint of retroactivity - troubled the Hague Court...."); David P. Granoff, *Comment, Legislative Jurisdiction, State Policies and Post-Occurrence Contacts in Allstate Insurance Co. v. Hague*, 81 *Colum. L. Rev.* 1134, 1147 (1981) ("If a plaintiff can effectively designate the law to be applied by altering his residence, forum-shopping becomes inevitable.").

n70. See Lea Brilmayer, *Conflict of Laws* 232-63 (2d ed. 1995); Laycock, 92 *Colum. L. Rev.* at 251; Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 *Yale L.J.* 1277, 1297-1319 (1989); James A. Martin, *The Constitution and Legislative Jurisdiction*, 10 *Hofstra L. Rev.* 133 (1981-82); James A. Martin, *Constitutional Limitations on Choice of Law*, 61 *Cornell L. Rev.* 185 (1976).

n71. See *Hague*, 449 *U.S.* at 319 n.28.

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The concern about forum-shopping, however, does not apply to the same-sex marriage problem I am discussing. In *Hague* and in *Yates*, the persons who moved were benefited by the law of their new states. In this context, it is sensible to be concerned about forum shopping. But in our hypothetical, the parties have moved away from the state whose law favored them to a state with unfavorable law. In such a case there should be no impediment to the state of the new domicile furthering its own interests by applying its law. n72 Whatever motivated their relocation, it was certainly not forum shopping. Moreover, the concern that the Defendant is exposed to hostile law by the unilateral act of its opponent disappears because the law of the Plaintiff's [*431] new domicile is in fact not hostile to the Defendant. The only persons burdened by the law of the new domicile are the ones that chose to live there, and a state clearly has the power to burden its domiciliaries. n73 Simply put, by moving, the Plaintiffs have put themselves within the legislative jurisdiction of the state of their new domicile, and the Defendant is not complaining about that law. For that reason, the state of after-acquired domicile of a same-sex couple may validly apply its own law and not recognize the marriage.

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n72. See *Miller v. Miller*, 237 N.E.2d 877 (N.Y. App. 1968).

n73. See *Rensberger*, 1998 Utah L. Rev. at 82.

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But (modifying our hypothetical) what if the opponent of the same-sex couple was the one that moved to State A? The same-sex couple would then be in a position to complain that their opponent's unilateral act cannot bring them within the legislative jurisdiction of State A. They did nothing to bring the law of State A upon themselves. But this variation on the problem turns out not to be so hard, because the opponent of the same-sex couple almost certainly moved from another state that, like State A, prohibited same-sex marriages. The only other states that are even considering same-sex marriage are Vermont and Alaska. n74 The after-acquired domicile in State A adds nothing new to the case because the law of the former domicile was the same. The same-sex couple is no worse off under the law of the new domicile than the old. n75 Remember, too, that the limitation on using the law of an after-acquired domicile is narrow: it may be used if there are other contacts. n76

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n74. See David Orgon Coolidge & William C. Duncan, Definition or Discrimination? State Marriage Recognition Statutes in the "Same-Sex Marriage" Debate, 32 Creighton L. Rev. 3 (1998); Lynn D. Wardle, DOMA: Protecting Federalism in Family Law, 45 Fed. Law. 30, 32 (1998).

n75. Cf. *Reich v. Purcell*, 432 P.2d 727, 730 (Cal. 1967) (noting that of three states involved in the case, two had the same law).

n76. See *Hague*, 449 U.S. at 311.

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In addition, the problem of a party's changing of domicile upsetting the expectations of his opponent, arises only in a case in which the fact of marriage serves as a defense to a cause of action asserted by the party who has moved to State A. Outside the context of spousal immunity, it is hard to come up with such a case. The only situation in which I could foresee the after-acquired domicile doctrine prohibiting a state from applying its own law is highly unlikely to arise. Suppose that one party to the same-sex marriage no longer wishes to be married. He therefore moves to a state that prohibits same-sex marriages, say Utah, to take advantage of that state's law, which is now favorable to him, and sues for a declaratory judgment that the marriage is invalid. Could same-sex marriage partners get a "Utah divorce" in this fashion, reminiscent of Nevada divorces of a generation [*432] ago? This case does present the problematic configuration of a stay-at-home party benefited by his own state's law (the party to the marriage that wishes to stay married and remains in Hawaii) and a party moving to the forum who is benefited by that state's law. Applying the law of State A looks unfair to the Hawaiian spouse and like an award for forum shopping for the other. But why, one might ask, would the unhappy spouse not simply sue for divorce in Hawaii under Hawaiian law? The only scenario in which the case could arise is one in which Hawaii would not allow a divorce. One would have to assume that Hawaii would have the liberal

policy of allowing same-sex marriages and the conservative one of requiring fault in divorce or perhaps enacting a covenant marriage law. n77 We would have to assume that the other state, say Utah, would bar same-sex marriages but have a more liberal divorce policy than Hawaii. It seems safe to say that such a configuration of state laws and a same-sex marriage partner willing to move to Utah to achieve this result is sufficiently unlikely to trouble us.

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n77. See generally Katherine Shaw Spaht, 32 Creighton L. Rev. (forthcoming 1999).

-End Footnotes-

Finally, another line of cases that deal with party mobility support the power of states to not recognize same-sex marriages. For example, in *Clay v. Sun Insurance Office, Ltd.*, n78 the insured bought a policy covering personal property while living in Illinois, but subsequently moved to Florida, where a loss covered by the policy occurred. n79 The policy contained a clause requiring suits on the policy to be brought within twelve-months of the loss. n80 Such a clause was invalid in Florida, the new domicile of the Plaintiff, but was valid in Illinois. n81 Despite the fact that Florida's first contact with the case was after the contract was created, the Supreme Court found "no difficulty whatever under either the Full Faith and Credit Clause or the Due Process Clause." n82 The Court reasoned that the case involved "an ambulatory contract on which suit might be brought in any one of several States." n83 Moreover, the subject matter of the contract, personal property, was inherently mobile: the insurer had "knowledge that [the Plaintiff] could take his property anywhere in the world he saw fit without losing the protection of his insurance." n84

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n78. 377 U.S. 179 (1964).

n79. *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179, 180 (1964).

n80. *Clay*, 377 U.S. at 180.

n81. *Id.* at 181.

n82. *Id.*

n83. *Id.*

n84. *Id.* at 182 (quoting *Clay*, 363 U.S. at 221 (Black, J., dissenting)).

-End Footnotes-

The limitation on relying on after-acquired domicile was not a problem in *Clay* because the change of domicile was not "after" the [*433] events in question. It occurred after the contract was made, but before the loss covered by the policy. At one time, under the vested rights approach, the Supreme Court interpreted full faith and credit to bind the parties to the law of the place where the contract was made, without regard to later events. The decision in

Clay changes the outcome for problems of this kind, modernizing full faith and credit to rest on temporally flexible state interests, not on a notion that rights irrevocably vest at the time of a contract.

Same-sex marriages pose much the same problem as this kind of contract case. Hawaii may by its law create a relationship between two persons (a contract or a marriage) that for purposes of its law is binding. But because it cannot assure that the relationship will remain local, it cannot bind other states from asserting interests that first arise after the creation of the relationship. Nor can it promise to the parties that their relationship will be everywhere treated the same as it is in Hawaii. Any kind of marriage - same-sex or otherwise - has long been subject to defeasment in another state with different divorce law to which one of the parties has moved. That is the thrust of Williams I for traditional marriages. Allowing consideration of the interests of a later-acquired domicile treats same-sex marriages no worse than traditional ones.

C. Tweaking the Hypothetical to Lessen the State's Interests (to Zero)

The hypothetical considered thus far has the same-sex couple married in Hawaii and then moving to State A. One can of course make the hypothetical progressively harder by changing the facts to lessen the connections with State A. Instead of having the same-sex couple move to State A permanently, suppose one of them has only a temporary job assignment in State A, or that one or both of them is a college student in that state. How low may we take the State A contacts and still be able to apply State A law under the self-executing Full Faith and Credit Clause?

An attempt to lower the connections with State A to generate a case in which the Defense of Marriage Act violates the self-executing Full Faith and Credit Clause is bound to fail for two reasons. First, in any variation of the hypothetical, State A is the forum. Because State A is the forum, there must be some reason that the suit was properly brought in that state. These reasons will always, or almost always, provide State A with the contacts that it needs in order to apply its law. Second, even if we suppose a case in which State A truly has no contacts that count for choice of law, but nonetheless has personal jurisdiction, I believe State A may still apply its law to further non-consequentialist policies.

1. A Forum Will (Almost) Always Have Choice of Law Contacts

The general question considered in this section is whether the forum may apply its own law not recognizing same-sex marriages when there has been a Hawaiian marriage but no Hawaiian judgment. In answering this question, we should bear in mind that litigation is not dispersed among states arbitrarily. Two factors limit the forums in which a suit will be brought. First, there are legal limitations: the doctrines of personal jurisdiction and forum non conveniens. Because of these limitations, the case will usually not be in a court of State A unless State A has some contacts with the parties or the underlying events. The contacts that create personal jurisdiction - local parties or events - will most often also suffice as contacts to allow the forum to apply its own law. n85

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n85. See Stanley E. Cox, *The Interrelationship of Personal Jurisdiction and Choice of Law: Forging New Theory Through Asahi Metal Industry Co. v. Superior Court*, 49 *U. Pitt. L. Rev.* 189, 193-94 (1987). According to Cox:

While expanding the number of fora available to a plaintiff, modern specific jurisdiction analysis actually reduces the likelihood that a defendant will improperly have forum law applied to his case. If a defendant can be hauled into court only in fora where his contacts are litigation related, then it is virtually impossible that the forum law applied to his case could violate his legitimate expectations.

Cox, 49 *U. Pitt. L. Rev.* at 193-94.

Significantly, the only recent occasion of the Supreme Court striking down state choice of law was in the context of a class action. See *Shutts*, 472 *U.S.* at 797. In such a case one might properly have cases (that is, claims of some class members) wholly unrelated to the forum. The entire class action is litigated in the forum because of the named representative's forum connections. The class action device was the only reason that the claims to which Kansas could not apply its own law in *Shutts* were in that state's courts.

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Second, wholly apart from legal doctrine, there must be some reason that the Plaintiff has chosen State A as the forum. While law professors may find it useful to imagine odd arrays of forums, parties, and substantive law, in the real world litigants pick a forum for some reason. They sue where they live, where the Defendant may easily be served with process, where the Defendant's assets are, or where the litigation would be convenient because of access to local evidence. Again, most of the factors that influence forum selection also create an interest in the forum: if the suit is brought in State A because the party opposing the same-sex marriage has connections with that state, the state will have an interest in not burdening that party with liability based upon recognition of same-sex marriages. If the suit is brought in State A because the same-sex couple has some residential connections there making it convenient to sue in that state, State A [*435] will have an interest due to the presence of the same-sex couple within the state.

Admittedly, litigants often choose a forum based on favorable substantive law, a forum selection factor that does not translate into a choice of law contact. That is, a Plaintiff may choose to sue in a state that has no connection to the Defendant, himself, or the underlying events simply because of the Plaintiff-favoring law of that state. But states that deny same-sex marriages do not have Plaintiff-favoring law. The same-sex couple would not choose to sue in State A in order to pursue that kind of forum shopping. Because of this, it is hard to imagine why the same-sex couple would ever choose to sue in State A, a state with unfavorable law, unless there was a strong allure to that state because of other substantial connections with the case. The allure of State A might be that the same-sex couple has substantial residential connections there, making it a convenient forum. But if that is true, then State

A will have an interest in applying its own law. Perhaps the couple lacks State A connections. However, they cannot get jurisdiction over the Defendant in their home state (Hawaii), so they must run him to ground in State A. But if Hawaii has no personal jurisdiction over the Defendant, then we must assume that the Defendant engaged in no activity in Hawaii. For the same-sex couple to have had a transaction with an opponent who has no Hawaii connections, they must perforce have reached out beyond their own borders - beyond the enclave where same-sex marriages are recognized - to enter into it, else the Defendant would have Hawaii contacts and be subject to Hawaii's jurisdiction.

In short, if the litigation is in State A, then there must be contacts with that state both to provide for personal jurisdiction and to make State A a sensible forum to have been chosen. These connections will then usually suffice to establish an interest in State A in applying its own law.

2. The Zero Contact Case, Consequentialism, and Public Policy

Despite the unlikelihood of a wholly unconnected forum, I can imagine a case in which State A has jurisdiction but has no apparent connection for choice of law purposes. Suppose again that both spouses to the same-sex marriage were Hawaiian domiciliaries before the marriage and that after the marriage they continued to live in that state. One spouse works for an employer that grants health benefits to employees and their spouses. Despite the Hawaiian marriage, the employer refuses to pay for the employee's same-sex spouse's medical costs. The Chief Executive Officer of the employer is in State A for three days to attend a conference. While there, he is served with pro [*436] cess by an attorney for the Hawaiian same-sex couple. Jurisdiction is supplied by the transient n86 presence of the Defendant, although one must still puzzle at why the same-sex couple chose to sue in State A.

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n86. See *Burnham v. Superior Court of Cal.*, 495 U.S. 604 (1990). Note that some courts have concluded that Burnham does not apply to corporate Defendants. See *Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 182-83 (5th Cir. 1992).

- - - - -End Footnotes- - - - -

We now have chased down the problem of full faith and credit and choice of law for same-sex marriages. In this case, the contact that counts for jurisdiction (service within the state) does not count for choice of law. State A has no contact with the case other than being the forum. Under the self-executing Full Faith and Credit Clause, State A might not be able to apply its own law to this case. If that is true, then the Defense of Marriage Act may be invalid as an attempt to lower the mandatory floor of full faith and credit.

The test under the Full Faith and Credit Clause asks whether State A has contacts creating state interests. For the most part, the Supreme Court has looked for a particular type of interest, an interest in avoiding or encouraging some consequence that might occur locally. Examples of interests that are tied to consequences are assuring that a locally injured person receives compensation in order that he may be better able to reimburse medical creditors, n87 applying the forum's shorter statute of limitations to protect its own judiciary from having to litigate stale claims, n88 and providing compensation for a worker

injured in the state in order to provide for dependents. n89 In each case, the reason that the state wants to apply its law is to achieve (or avoid) certain ends that will result from the application of its rule.

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n87. See *Watson v. Employers Liab. Assurance Corp., Ltd.*, 348 U.S. 66, 72 (1954).

n88. See *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730 (1988).

n89. See *Carroll v. Lanza*, 349 U.S. 408, 413 (1955) ("The State where the tort occurs certainly has a concern in the problems following in the wake of the injury. The problems of medical care and of possible dependents are among these....").

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This approach to the law has been appropriately characterized as consequentialist or instrumentalist. n90 It views the purpose of the law as not to achieve a result that is appealing or just in and of itself; rather, lawmakers enact laws to prevent discrete harms or to achieve certain good results. Tort damages are conceived as serving to deter tortfeasors from future bad conduct, or perhaps to compensate injured persons so that they will not become a charge upon the state. When such an approach is taken, state interests are determined by where the consequences to be sought or avoided will be felt. In the context of same-sex marriage, the Hawaiian couple suing in State A could plausibly argue that because they do not live in State A and have no plans to live there, the consequences of same-sex marriage that State A seeks to avoid by its laws will not be felt in State A. Although State A perhaps wants to protect families, granting health benefits to a Hawaiian same-sex spouse from a Defendant who is not from State A will in no way impact upon the well-being of any State A family.

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n90. Brilmayer, *supra* note 70, at 224-32; Joseph William Singer, *Choice of Law: How It Ought to Be*, 48 *Mercer L. Rev.* 831, 833 (1997) (noting that some suggest "that the only reason states impose damages on their residents is to alter their behavior and encourage investment in safety; it presumes that choice-of-law analysis should be relentlessly consequentialist").

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If consequentialism were all that mattered, the foregoing analysis would be decisive under the self-executing Full Faith and Credit Clause. However, a state may have interests other than consequentialist ones. n91 The context of same-sex marriages provides a nice example of consequentialist and non-consequentialist policies. Those who favor same-sex marriages do so for two types of reasons. The first fits within consequentialist reasoning: Gays are denied the benefits (or consequences) that follow from marriage, such as health insurance, rights to intestate succession, and hospital visitation rights. n92 Marriage, under this argument, is a means to an end. But there are other types of arguments made for same-sex marriages. Some in the gay rights community argue for marriage as a

valuable good in its own right. Allowing gay marriages would signify the full acceptance of homosexuals into civil society. n93 This is not sought so that other good things will happen, but as an end in itself. This latter type of argument does not rest upon a consequentialist basis.

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n91. A number of commentators have taken this position in contexts quite separate from same-sex marriages. Lea Brilmayer argues for a non-consequentialist approach to choice of law that focuses on the political rights of the person burdened by the application of forum law. See Brilmayer, *supra* note 90, at 240-53. Joseph Singer argues that the modern category of "false conflicts" grossly oversimplifies the choice of law process. Courts purport to make truly hard problems go away by focusing exclusively on consequentialist policies and ignoring moral ones. See Joseph William Singer, *Real Conflicts*, 69 *B.U. L. Rev.* 1, 35-39 (1989). See also Joseph William Singer, *A Pragmatic Guide to Conflicts*, 70 *B.U. L. Rev.* 731, 741-42, 749 (1990) (discussing moral policies); Singer, 48 *Mercer L. Rev.* at 833 (stating that "choice-of-law analysis should be relentlessly consequentialist"). Quite recently, Louise Weinberg has taken a fresh look at the pre-civil war slave emancipation cases. She concludes that it "is a mistake to suppose that moral argument does not figure in the decision of cases." Louise Weinberg, *Methodological Interventions and the Slavery Cases; or, Night-Thoughts of a Legal Realist*, 56 *Md. L. Rev.* 1316, 1326 (1997).

n92. See David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 *Mich. L. Rev.* 447 (1996).

n93. See Andrew Sullivan, *Virtually Normal: An Argument About Homosexuality* 185 (1995). In his book, Sullivan states:

Gay marriage is not a radical step; it is a profoundly humanizing, traditionalizing step. It is the first step in any resolution of the homosexual question - more important than any other institution, since it is the most central institution to the nature of the problem, which is to say, the emotional and sexual bond between one human being and another. If nothing else were done at all, and gay marriage were legalized, ninety percent of the political work necessary to achieve gay and lesbian equality would have been achieved. It is ultimately the only reform that matters.

Id.

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[*438] Those opposed to same-sex marriages likewise argue from both consequentialist and non-consequentialist bases. For example, among the consequentialist arguments are that same-sex marriages undermine the family and conflicts with the state interest in child welfare. n94 It is not my purpose to argue that one or the other of the consequentialist positions - for or against same-sex marriage - is correct, but simply to note that they proceed from a common assumption about the purpose of a state in either granting or prohibiting

same-sex marriage: the state, it is assumed, is principally worried about the effects of same-sex marriages.

-Footnotes-

n94. See Germaine Winnick Willett, Note, Equality Under the Law or Annihilation of Marriage and Morals? The Same-Sex Marriage Debate, 73 Ind. L.J. 355, 361 (1997).

-End Footnotes-

But there are also non-consequentialist arguments against same-sex marriages. To appreciate these arguments, it is instructive to return to the question of whether the Defense of Marriage Act violates either the Equal Protection Clause or substantive due process. Earlier, I showed why I believe that arguments against the Defense of Marriage Act on these grounds are largely irrelevant: if the Act violates these constitutional requirements, then so do state laws denying same-sex marriages and the game is up. n95 I would now like to indulge the opposite assumption and see what consequences follow.

-Footnotes-

n95. See supra note 20 and accompanying text.

-End Footnotes-

Let us assume that states do not deny equal protection or violate substantive due process when they deny a same-sex marriage. What predicates are implied by such a finding? To pass equal protection analysis, the distinction drawn by the state must be based on a legitimate state interest. n96 Likewise, for substantive due process, state laws denying same-sex marriages must have a rational basis. n97 We thus know that if there is any choice of law problem for the Defense of Marriage Act to address (that is, if it is constitutionally legitimate for states to have different laws on the matter), then states necessarily have an interest in and a rational basis for denying same-sex marriages. Because the test under the self-executing Full Faith and Credit Clause also looks for state interests, the Defense of Marriage Act cannot possibly violate the Full Faith and Credit Clause. The same interest that was found to support the state's denial of same-sex marriages under an equal protection or due process attack suffices under full faith and credit to allow the state to apply its own law. n98

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n96. See *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

n97. See *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

n98. See generally Weinberg, 49 U. Chi. L. Rev. at 440 (comparing constitutional restrictions on choice of law to the minimal scrutiny review imposed in other contexts).

-End Footnotes-

The foregoing analysis needs one refinement. The nature of the inquiry under equal protection or substantive due process is whether [*439] it is ever legitimate to apply the state law in question. Full faith and credit asks a different question. It asks whether, assuming a state law valid in general, the state is interested in applying its law to this particular case. Both sets of inquiries concern interests, but the former operates on a more generalized level while the latter is case specific. But despite this difference in orientation in the two inquiries, there remains a useful carryover from equal protection and substantive due process to full faith and credit. This is because of the nature of the interest that may be used to justify states in denying same-sex marriages. n99

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n99. This, of course, assumes that states are legally justified in denying same-sex marriages. If they are not, we need not worry about the Defense of Marriage Act because every state will allow same-sex marriages.

-End Footnotes-

The kind of interest that may justify the denial of same-sex marriages under an attack on equal protection or substantive due process grounds is a non-consequentialist interest. n100 In *Bowers v. Hardwick*, n101 the Supreme Court rejected the argument that a state prohibition on sodomy violated substantive due process. n102 The Court's reasoning did not rest on assumptions about the consequences of sodomy:

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n100. In some areas of scholarship, the term "deontological" seems to be preferred. Here, I use "non-consequentialist" because this is the more common usage in the conflict of laws community.

n101. 478 U.S. 186 (1986).

n102. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

-End Footnotes-

Respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. n103

-Footnotes-

n103. *Bowers*, 478 U.S. at 196 (emphasis added).

-End Footnotes-

What implications does Bowers have for the hypothetical under consideration? I have noted the argument that State A lacks an interest in applying its law in some cases because no consequences of the marriage would be felt in State A. But that argument assumes that a state may assert only consequentialist interests. If, on the other hand, a state may legitimately assert non-consequentialist interests, we could conclude that State A has an interest in this case despite the absence of any local consequence. This is so because State A might ban same-sex marriages not to prevent consequences but as an end in itself.

[*440] Both proponents and opponents of same-sex marriage see gay marriages as a sign of social approval. The difference is that the proponents of same-sex marriage think society should affirm homosexuals, while the opponents of same-sex marriage want to withhold that approval. At bottom, the ground that separates the two camps is indeed a moral one. n104 Recognition of that fact clarifies the kind of policy that a state that denies same-sex marriages is pursuing. A proper understanding of the state policy in question helps to determine whether a state should be made to apply another state's law. n105 States always have an interest in their morality-based laws despite the absence of local effects, n106 because those policies do not turn upon the presence of local effects. n107

-Footnotes-

n104. See Koppelman, 76 *Tex. L. Rev.* at 926 ("The controversy over same-sex marriage is a battle between two competing moral visions.").

n105. This is the core of what interest analysis has added to choice of law.

n106. Setting up morality-based laws as inherently non-consequentialist is admittedly overbroad, for some conceptions of morality rest upon a consequentialist, or utilitarian, base. The point I wish to make is that at least some portion of the laws we commonly think of as being morally based are in fact non-consequentialist. The conflation of moral and non-consequential laws is done merely to simplify.

n107. For a discussion of a state's ability to apply its own law to assert moral interests on an important limitation, see *infra* notes 113-19 and accompanying text.

-End Footnotes-

This is so unless states may not assert non-consequentialist interests for purposes of full faith and credit. May states in fact rely on non-consequentialist interests? I believe the answer clearly must be yes, for several reasons. First, saying that a state may not assert non-consequentialist interests has the effect of reading the consequentialist view of the law into the text of the Full Faith and Credit Clause. This is entirely implausible. The consequentialist view of the law has its origins in twentieth century American legal thought, in particular, legal realism. n108 It is the product of a particular time and a particular intellectual environment. n109 That view of the law resides in a different century than the Full Faith and Credit Clause. It is horribly anachronistic to attribute consequentialism to the drafters of the constitution. n110

-Footnotes-

n108. See Brilmayer, supra note 90, at 37 ("It is an important tenet of legal realism that legal decisions are to be made according to the policies underlying the relevant legal rules.").

n109. Id. at 35.

n110. One cannot help but be reminded of the Supreme Court's enshrinement of the vested rights approach to choice of law into full faith and credit in the early part of this century. See *Hartford Accident & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930); *New York Life Ins. Co. v. Dodge*, 246 U.S. 357 (1918). That too was anachronistic, and it failed.

-End Footnotes-

Second, the Full Faith and Credit Clause has previously been interpreted to allow for the assertion of non-consequentialist interests. Prior to interest analysis, vested rights was the dominant approach, [*441] both as a matter of common law and constitutionally. As Lea Brilmayer has pointed out, the vested rights approach was in fact based on the protection of "rights" without regard for where the consequences of state law would be felt; as such, the vested rights approach - which was once the sole permissible basis of choice of law - is itself non-consequentialist. n111 Indeed, the refusal of the vested rights approach to consider the consequences of applying a given state's law was the principal criticism in the legal realist's assault. Today's full faith and credit case law has moved beyond the limitations of the vested rights approach to legitimize interest analysis. But the modern cases have never suggested that a state employing the vested rights approach violates the constitution. n112 The Full Faith and Credit Clause thus can accommodate a state that wishes to pursue non-consequentialist interests.

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n111. See Brilmayer, supra note 90, at 225-26.

n112. See *Wortman*, 486 U.S. at 728-29 ("Long established and still subsisting choice-of-law practices that come to be thought, by modern scholars, unwise, do not thereby become unconstitutional.").

-End Footnotes-

Third, the foregoing analysis of non-consequentialist interests is, in simpler terms, the invocation of a forum's public policy. Choice of law rules have long included the power of a state to refuse to apply the law of another state on the ground it is odious. n113 The long tradition of this choice of law rule itself speaks to its validity. n114 And the kind of public policy being invoked here is the mildest form of that doctrine. Public policy was traditionally used as a defensive measure by the forum when faced with an unpalatable foreign cause of action. If the law of another state is deeply offensive to the forum, the forum would obviously want to avoid applying it so that its courts are not made to be instruments of injustice. But the application

of forum law is also problematic if the forum is not connected to the case. Faced with the dilemma of odious sister-state law and inapplicable forum law, courts quite sensibly avoided both by dismissing the case. n115 The dismissal was not on the merits; Plaintiff was free to try again elsewhere. This contrasts with the more modern use of public policy as a guise for interest analysis. Under the modern approach, the forum not only rejects the other state's law, it also decides the case on the merits using forum law. n116 This latter approach is appropriate only if the forum is connected so that its consequentialist policies come into play and produce state interests. In the context I am here considering, the forum [*442] lacks any connection to the case and only a dismissal could be justified.

-Footnotes-

n113. See *Clapper*, 286 U.S. at 160.

n114. See supra note 112 and accompanying text.

n115. See Koppelman, 76 *Tex. L. Rev.* at 936; Kramer, 106 *Yale L.J.* at 1973-74.

n116. See *Kilberg v. Northeast Airlines*, 172 N.E.2d 526, 527 (1961).

-End Footnotes-

The structure of the Defense of Marriage Act guarantees that state courts will use only the less intrusive type of public policy (a mere dismissal with Plaintiff left free to sue elsewhere). The Act provides that a "judicial proceeding" need not be given effect if it is "respecting" a same-sex marriage. n117 While critics of the Act have focused on that language as allowing courts to ignore a Hawaiian judgment upholding a same-sex marriage, they forget that the Defense of Marriage Act is not unidirectional. The same language would allow Hawaii to disregard a judgment from State A "respecting" (i.e. not recognizing) a same-sex marriage. Thus, a Plaintiff turned down in State A is guaranteed not to be foreclosed by full faith and credit from trying again elsewhere, n118 and a state such as State A is therefore powerless to decide the case on the merits against the same-sex marriage. n119

-Footnotes-

n117. 28 U.S.C. 1738C (1998).

n118. See *Clapper*, 286 U.S. at 160. This assumes that the validity of the same-sex marriage is beneficial to the Plaintiff. If the validity of the same-sex marriage were essential to a defense, invoking public policy does not lead to a mere dismissal not on the merits. It leads to a judgment. It is thus questionable whether the public policy doctrine should be applied when a defense turns on a same-sex marriage. The language of the Defense of Marriage Act suggests that it may be inapplicable to defenses. It allows a state to disregard sister-state actions "respecting a relationship" that purports to be a same-sex marriage and also to ignore any "claim or right arising from such relationship." See 28 U.S.C. 1738C (1998) (emphasis added). Notably, the Act does not specifically allow a state to ignore a defense arising out of a same-sex marriage.

n119. I could also point out another basis of support for a non-consequentialist approach to full faith and credit. The consequentialist argument comes down to the proposition that a state cannot rationally have interests that are not tied to the effects of legal rules. This jurisprudential approach is not constitutionally required elsewhere. As seen above, non-consequentialist arguments are acceptable under substantive due process analysis. See *Bowers*, 478 U.S. at 186. Moreover, our own Constitution is unambiguously understood as expressing moral values. If, for example, a conclusive empirical study revealed that integrated education did not significantly advance educational achievement for minorities, would anyone seriously contend that *Brown v. Board of Education* would be overruled? Surely the constitutional opposition to segregation must rest on a non-consequentialist, moral argument. For a discussion of the Supreme Court's approach to moral interests, see Barbara J. Flagg, "Animus" and Moral Disapproval: A Comment on *Romer v. Evans*, 82 Minn. L. Rev. 833 (1988).

- - - - -End Footnotes- - - - -

After the passage of the Defense of Marriage Act, some have suddenly discovered that after all these years the invocation of a state's public policy violates full faith and credit as discrimination against sister-state law. n120 There are several problems with this suggestion.

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n120. See *Kramer*, 106 Yale L.J. at 1971-80; *Koppelman*, 76 Tex. L. Rev. at 942-43.

- - - - -End Footnotes- - - - -

First, it is unsupported by the cases on which it purports to rest. The argument against public policy stems from a strained reading of *Hughes v. Fetter*. n121 In that case, the Supreme Court reversed a state [*443] court that had entered a judgment adverse to the Plaintiff in a wrongful death case on the sole ground that the death occurred in another state. n122 But *Hughes* in no way involved a forum declining to allow a foreign cause of action that it found substantively disagreeable. Instead, as the Court noted, the forum had "no real feeling of antagonism against wrongful death suits in general. To the contrary, a forum is regularly provided for cases of this nature, the exclusionary rule extending only so far as to bar actions for death not caused locally." n123 The Court framed the issue as not involving the usual "clash of interests... between the public policies of two or more states." n124 As clarified by later cases, the problem in *Hughes* was that the state "laid an uneven hand on causes of action arising within and without the forum state. Causes of action arising in sister states were discriminated against." n125

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n121. 341 U.S. 609 (1951).

n122. *Hughes v. Fetter*, 341 U.S. 609, 610 (1951).

n123. *Hughes*, 341 U.S. at 612.

n124. *Id.* at 611-12.

n125. See *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 518-19 (1953).

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As applied to the Defense of Marriage Act, Hughes creates no problems. That statute does not allow a state to "lay an uneven hand" on foreign law. A state declining to honor a same-sex marriage would not be treating a Hawaiian marriage any differently than it would a domestic same-sex marriage. Instead, the state would treat foreign and domestic same-sex marriages alike. The discrimination in Hughes was against a sister-state cause of action on the simple ground that it was from another state. Under the Defense of Marriage Act, states would deny validity to a marriage because of the content of the law supporting the marriage, not because of where the marriage arose.

In addition, the authority of a state to deny enforcement of sister-state law on public policy grounds has long been recognized by the Supreme Court. A Plaintiff may be denied a cause of action in a state "because the enforcement of the right conferred would be obnoxious to the public policy of the forum." n126 The Restatement of Conflict of Laws likewise allows a state to dismiss a case rather than apply obnoxious sister-state law. n127 Cases applying the public policy exception when the forum has absolutely no connection to the case are indeed rare, n128 but that is true because, as noted above, a state is rarely chosen as a forum unless it has something to do with the case. n129 In any event, courts have long asserted a power to dismiss a case solely on the grounds of the other state's law's repugnance, wholly apart from any consequentialist interest.

- - - - -Footnotes- - - - -

n126. *Clapper*, 286 U.S. at 160.

n127. See Restatement (Second) of Conflict of Laws 90 (1971) ("No action will be entertained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum.").

n128. One can find cases in which the forum had a connection, but under the prevailing choice of law methodology that contact was irrelevant. During the vested rights era, the parties' domiciles were irrelevant. An action on a contract created and to be performed in another state was thus unconnected to the forum in any legally relevant way, even if the Plaintiff was a local. While we might today say that the forum had an interest, the courts of the vested rights era would regard the forum as having no relevant connection. Yet, the Supreme Court validated the invocation of public policy in such cases. See *Union Trust Co. v. Grosman*, 245 U.S. 412, 416-17 (1918).

n129. See *supra* note 85 and accompanying text.

- - - - -End Footnotes- - - - -

This section has demonstrated that a Hawaiian marriage is little protected by

the Full Faith and Credit Clause. The Defense of Marriage Act merely allows a state to do what it could do in the absence of the Act: apply its own law not recognizing the marriage when it has an interest in doing so. Simply by virtue of the contacts with the case that made it the forum, the state will usually have an interest. Even in the relatively bizarre case of a same-sex couple choosing to sue in a state with inhospitable law when that state has no tangible connections with the dispute, the state would be allowed to further its non-consequentialist interests through the assertion of its public policy.

IV. A REALLY HARD CASE: THE HAWAIIAN JUDGMENT

The foregoing review of what I have called the easy cases demonstrates that in many applications, the Defense of Marriage Act affords states no more power to disregard sister-state law than they already enjoy. In the somewhat harder cases - those not involving a local domiciliary - a state's failure to honor a same-sex marriage may be justified by what I have called non-consequentialist interests. But we move now to the really hard cases: those in which a Hawaiian court has entered a judgment that two people are married. It is in these cases that the Defense of Marriage Act is an experiment. This is so because, prior to the Defense of Marriage Act, a state had to enforce sister-state judgments even though they offend state policies of a fundamental order. The issue here goes to the third premise articulated above. n130 Does Congress have power to lower the floor of full faith and credit from that set out by the self-executing Full Faith and Credit Clause?

-Footnotes-

n130. See supra notes 10-11 and accompanying text.

-End Footnotes-

A. The Nature of the Hawaiian Judgment

Before analyzing the full faith and credit effect of a Hawaiian judgment, one must consider what kind of a case is going to lead to a Hawaiian judgment that a same-sex couple is validly married. Just [*445] how is it that the Hawaiian court had occasion to pass upon the marriage in question? What kind of suit can we anticipate? These questions are important because a careless assumption about the nature of the litigation in Hawaii can cause the analysis to overlook limitations other than full faith and credit on the efficacy of the Hawaiian judgment.

One may suppose that the couple in question, having celebrated their marriage in Hawaii but wisely looking ahead to questions of the portability of the marriage, seek to confirm the effect of their marriage rite by a declaratory judgment. It is this judgment that is then relied upon in F<2> n131 to establish their marriage under the Full Faith and Credit Clause. But this suit has one obvious defect: it lacks a Defendant. The suit consists of one putative spouse suing the other for a declaration that the marriage is valid when neither is contending that the marriage is invalid. The "defending" spouse offers no opposition, and the marriage is declared valid. For several reasons, we need little concern ourselves about the interstate effect of such a proceeding. n132

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n131. I will use F<2> to refer to the second forum, and assume that it does not recognize same-sex marriages.

n132. Despite the obvious problems with relying on such a suit to create a binding judgment in F<2>, many commentators (with little analysis) have urged the validity and efficacy of such suits. See, e.g., Rebecca S. Paige, Comment, Wagging the Dog - If the State of Hawaii Accepts Same-Sex Marriage Will Other States Have To?: An Examination of Conflict of Laws and Escape Devices, 47 Am. U. L. Rev. 165, 174 (1997) (arguing that full faith and credit attaches to such a judgment).

- - - - -End Footnotes- - - - -

The first is a matter of justiciability. In the federal system, as in nearly all state court systems, a court may not proceed to a judgment without a "case or controversy." While the law of justiciability is sometimes quite nuanced, the hypothetical declaratory action under consideration is clearly not a case or controversy. When there is no adversariness between the parties, the result of the litigation is obviously a sham. It should carry no more weight than a statement by the parties that they both wish to be declared married. Consequently, a Hawaiian court, if it properly heeds its own limitations under state law, would dismiss the case. n133 Moreover, even if the Hawaiian court proceeded to a judgment, such a judgment need not be honored under the Full Faith and Credit Clause because (like the marriage ceremony itself) n134 it would not qualify as a "judicial proceeding." n135

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n133. Hawaii's constitution does not in terms restrict its courts to cases and controversies, but the Hawaiian courts have imposed justiciability requirements on themselves. See *Trustees of Office of Hawaiian Affairs v. Yamasaki*, 737 P.2d 446, 447 (Haw. 1987) ("The use of 'judicial power to resolve public disputes in a system of government where there is a separation of powers, should be limited to those questions capable of judicial resolution and presented in an adversary context.'").

n134. See supra notes 30-42 and accompanying text.

n135. See *Fidelity Nat. Bank & Trust Co. of Kansas City v. Swope*, 274 U.S. 123, 130 (1927); *Ktsanes v. Underwood*, 560 F.2d 790, 792 (7th Cir. 1977); *City of Yakima v. Aubrey*, 931 P.2d 927 (Wash. Ct. App.), rev. denied, 940 P.2d 654 (Wash. 1997); *Teare v. Committee on Admissions*, 566 A.2d 23, 28 (D.C. Cir. 1989); William A. Fletcher, The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions, 78 Calif. L. Rev. 263 (1990); Brian A. Stern, An Argument Against Imposing the Federal "Case or Controversy" Requirement on State Courts, 69 N.Y.U. L. Rev. 77 (1994).

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[*446] The second problem with using such suits to irrevocably establish the validity of the marriage is that as a matter of due process a judgment can only bind parties or those in privity with the parties. n136 Such a proceeding, setting aside justiciability concerns, would bind only the same-sex spouses, thus creating, I suppose, a form of same-sex covenant marriage. n137

Non-parties may be bound if they are adequately represented and some form of notice is given. n138 But a bare minimum requirement for adequacy of representation is that the representative argues the same position as the person to be bound. n139 In the hypothesized declaratory judgment suit, there is no one present advocating against the marriage. Therefore, a judgment in the suit could not bind absentees who seek to oppose the judgment in later litigation.

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n136. See Restatement (Second) of Judgments 34, 41 (1982).

n137. See Katherine Shaw Spaht, 32 Creighton L. Rev. (forthcoming 1999).

n138. See Shutts, 472 U.S. at 811-12.

n139. See Hansberry, 311 U.S. at 39-44.

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Given the patent defects with a declaratory judgment, I will use a more substantial problem. Let us suppose that the same-sex couple sued in Hawaii for some benefit of marriage, such as health insurance. The Defendant was ordered to provide coverage. Thereafter, the employee is transferred to F<2>. At this point the employer discontinues coverage of the same-sex spouse. The same-sex couple then sues in F<2> seeking to enforce (by issue preclusion) the Hawaiian judgment's determination that coverage is required. Or we might suppose a car accident in Hawaii. A same-sex spouse is killed. In Hawaii litigation, the survivor recovers for loss of consortium. Because the Defendant lacks local assets, the Hawaiian judgment is then sued upon in F<2>.

B. Why This is a Hard Case

Despite the historical evidence that Professor Ralph Whitten presents, n140 the Supreme Court, for better or worse, has committed us to a self-executing Full Faith and Credit Clause. We have examined above the application of that command to choice of law problems. There, the command of full faith and credit is weak; but in the context of judgments, full faith and credit is robust. The usual understanding of the full faith and credit owed to a judgment is that F<2> must give sister-state judgments the same effect they would have in the rendering state. Unlike the choice of law situation, F<2> thus may not simply rely on local policies to avoid the effect of a sister-state judgment.

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n140. See Whitten, 32 Creighton L. Rev. at 255.

- - - - -End Footnotes- - - - -

The textual basis for this elevated treatment of judgments is unclear. The constitution commands full faith and credit both to "judicial proceedings" and to "Acts" (which is now interpreted to include not only statutory law but also common law decisions n141). The general full faith and credit statute, section 1738, does seem to set out the test that sister-state judgments must be given the same effect in F<2> that they have in F<1>, but again the language of the

statute addresses both judgments and choice of law problems with the same formula:

-Footnotes-

n141. See supra note 29.

-End Footnotes-

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. n142

-Footnotes-

n142. See 28 U.S.C. 1738 (1998).

-End Footnotes-

Fauntleroy v. Lum n143 is the paradigm case for the full faith and credit requirement as applied to judgments. n144 In Lum, two residents of Mississippi entered into a contract in cotton futures in that state. n145 Mississippi treated such contracts as gambling contracts. They were not only unenforceable, it was a misdemeanor to enter into them. n146 The Plaintiff managed to serve process on the Defendant while he was temporarily in Missouri. n147 The Missouri courts gave judgment to the Plaintiff notwithstanding the obvious applicability of Mississippi law that should have produced a judgment for the Defendant. n148 Perhaps not surprisingly, the Mississippi courts declined to enforce the Missouri judgment when the Plaintiff sued on it in Mississippi. n149 The Supreme Court reversed. n150

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n143. 210 U.S. 230 (1908).

n144. Fauntleroy v. Lum, 210 U.S. 230, 233-34 (1908).

n145. Lum, 210 U.S. at 233-34.

n146. Id.

n147. Id. at 238-39.

n148. Id. at 234.

n149. Id.

n150. Id. at 238.

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The decision in *Lum* is a useful starting point for the Defense of Marriage Act for two reasons. First, it relies on the constitution for its result. Although Justice Holmes' opinion discusses the full faith and credit statute, it concludes that the "validity of [the Missouri] judgment, even in Mississippi, is, as we believe, the result of the Constitution as it always has been understood." n151 Thus, the Court's opinion in *Lum* stands for the proposition that there is a self-executing com [*448] mand in the Full Faith and Credit Clause as to judgments that mirrors the language of section 1738. On this point Holmes quotes Justice Marshall on full faith and credit "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." n152 The Court's decision in *Lum* is also important to the Defense of Marriage Act because it clearly establishes that a mistake in F<1>, even one that violates strong F<2> policies, is no ground to disregard F<1>'s judgment.

- - - - -Footnotes- - - - -

n151. *Id.* (emphasis added).

n152. *Id.* at 236 (quoting *Hampton v. M'Connell*, 16 U.S. (3 Wheat) 234, 235 (1818)). Interestingly, Justice Marshall did not specify whether this result followed from the full faith and credit statute or directly from the Constitution. He decided the case on the authority of *Mills v. Duryee*. *Hampton*, 16 U.S. (3 Wheat.) at 235. *Mills* in fact had relied on the statute, not the constitution. *Mills*, 11 U.S. (7 Cranch) 481, 484 (1813) ("Congress have therefore declared the effect of the record by declaring what faith and credit shall be given to it.").

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When one moves from choice of law to judgments, the case for the Defense of Marriage Act becomes harder. Without the Defense of Marriage Act, the holding in *Lum* would require F<2> to honor a Hawaiian judgment even though it conflicts with a profound policy of F<2>. But the Defense of Marriage Act attempts to alter that outcome. For the Defense of Marriage Act to be valid, Congress must have the authority to substantively alter the otherwise prevailing rules of full faith and credit under the Constitution. It is the question of Congress' power to do so that we shall now turn.

C. The Textual Puzzle of Full Faith and Credit

The answer provided by the Full Faith and Credit Clause regarding that question is puzzling. The first sentence appears to enact standards enforceable against states: they "shall" give full faith and credit to sister-state law and judgments. The drafting history suggests that the mandatory language was no accident. An earlier draft stated that full faith and credit "ought" to be given to sister-state law and judgments, but this was amended exactly to make the requirement mandatory. n153 But if the first sentence is self-executing, then what does one make of the second sentence, which apparently grants power to Congress to determine the interstate effect of state laws and judgments? n154 If Congress can truly prescribe the interstate effect of state laws and judgments, then the mandatory "shall" of the first sentence is nugatory. On the other hand,

if states truly are required by [*449] the mandatory language of the first sentence to give a certain quantum of faith and credit to sister state laws and judgments, then the grant of power to Congress is illusory.

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n153. Laycock, 92 Colum. L. Rev. at 292.

n154. Daniel A. Crane, The Original Understanding of the "Effects Clause" of Article IV, Section 1 and Implications for the Defense of Marriage Act, 6 Geo. Mason L. Rev. 307, 323 (1998) (noting the tension between the two sentences of the Full Faith and Credit Clause).

-End Footnotes-

There are several ways to harmonize these two sentences. First, as noted above, the problem disappears if the first sentence is read to do no more than set forth a required evidentiary effect of sister-state law and judgments. Under this reading, the power to determine what choice of law and res judicata rules apply in interstate cases is granted in the second sentence, not the first. Moreover, there is historical evidence of the usage of the phrase "faith and credit" to support this construction. n155 This approach resolves the problem by increasing the force of the second sentence at the expense of the first. Alternatively, some solve the problem by reducing the force of the second sentence. Such arguments assert that Congress was granted only the power to increase full faith and credit in the second sentence; the first sentence remains as a self-executing floor. n156 This is the second premise I have identified above in the position taken by those who argue that Congress has exceeded its authority under the Effect clause of the second sentence in enacting the Defense of Marriage Act. A third approach is to admit that the first sentence is self-executing in the absence of legislation, but that it was meant only to provide a default rule to apply until Congress exercised its power under the second sentence. n157

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n155. See supra note 11 and accompanying text for a discussion of the views of Professor Whitten.

n156. See supra note 6 and accompanying text.

n157. For commentators taking this approach, see Laycock, 92 Colum. L. Rev. at 298, 300-01, 333-34; Crane, 6 Geo. Mason L. Rev. at 324.

-End Footnotes-

For reasons that I will explain below, I believe that this third approach is the most sensible. It does the least violence to the language of the Full Faith and Credit Clause. Moreover, there are problems with the other two approaches. The evidentiary approach may well be historically sound, but too much case law now exists declaring that there is a self-executing full faith and credit command in the first sentence. The second approach, that the Effect clause gives Congress the power only to increase but not to decrease the quantum of faith and

credit set out in the first sentence, proves to be impossible to administer (as I shall show in the next section).

D. Not a Floor, But a Seesaw

The argument against the Defense of Marriage Act is that Congress may only increase faith and credit. The Defense of Marriage Act violates that principle by giving less effect to judgments than they en [*450] joy under the self-executing Full Faith and Credit Clause. Such a position is untenable.

The Full Faith and Credit Clause protects not only judgments, but also "Acts" as well. Cases like Lum represent the traditional approach to problems of faith and credit to judgments, providing generally that they may not be questioned in F<2>. But Lum involves not only a problem of how much faith and credit to give to a judgment, it also involves the interstate effect to be given to a statute. The effect of the ruling in Lum was that the Mississippi statute that forbade dealing in cotton futures was given less effect than it would have had were Mississippi free to ignore the Missouri judgment. Lum thus increases the faith and credit given to a judgment, but this comes at the cost of decreasing the faith and credit given to a statute.

This tension between Acts and judgments is inherent in the Full Faith and Credit Clause, because it commands that faith and credit be given to both judgments and Acts. But, as Lum illustrates, it is impossible to do both. Either the judgment of F<1> or the law of F<2> will fall to the other. A similar problem has been noted in the context of choice of law cases - i.e., cases where there is no judgment. As the Supreme Court explained, a literal approach to full faith and credit in choice of law cases would mean that each state must give faith and credit to, and apply the law of, the other state:

Literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own. n158

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n158. *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532, 547 (1935).

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It has been less well recognized that this same phenomenon occurs in cases involving judgments as well.

Consequently, it makes no sense to say that Congress cannot legislate to decrease full faith and credit, for any legislation necessarily will decrease the interstate effect of either a law or a judgment. Indeed, the Supreme Court's self-executing full faith and credit cases do precisely the same thing as the Defense of Marriage Act. They decrease faith and credit to an Act in order to

give greater faith and credit to a judgment. Any adjustment of full faith and credit involves not an increase or decrease of faith and credit, but a shift. In choice of law cases, we might shift the faith and credit from one state to another. In judgment cases, the shift is between the judgment of F<1> and the law of F<2>. Thus, the Defense of Marriage Act can be said not to [*451] decrease the faith and credit given to the judgments of F<1>, but to increase the faith and credit given to the law of F<2>. n159

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n159. Increasing the effect given to legislative acts would have been clearer had Congress been less reticent and enacted a more typical choice of law rule. Such a rule could have provided, for example, that the validity of a marriage was determined by its agreement with the law of one or both spouses. Instead, the Defense of Marriage Act takes an approach suggested by interest analysis: let each forum apply its own law.

-End Footnotes-

This analysis exposes what I believe to be a pro-judiciary bias in both the arguments against the Defense of Marriage Act and in the pre-Defense of Marriage Act law of full faith and credit. Critics of the Act complain about the denigration by the Act of judgments of states that recognize same-sex marriages, emphasizing the role of the judiciary. But they have little concern for the denigration of the legislative policy choices made by the F<2> that would be undermined by enforcing the F<1> judgment. Likewise, the traditional approach to full faith and credit taken in cases such as Lum assumes that judicial activity is somehow constitutionally superior to legislative activity. Judicial activity is given the highest order of faith and credit, but this comes at the expense of the legislative branch. In Lum, the Missouri court was allowed to exert its authority extra-territorially in a way that the Missouri legislature would never be allowed to do. But nothing in the text of the Full Faith and Credit Clause supports this precedence of judicial precedents. The Defense of Marriage Act works to rectify this imbalance in the discrete context of same-sex marriages. As a policy matter, one might argue that after a judgment the interests of finality are so great that they supersede concerns about protecting the integrity of legislative acts. However, that is an argument of policy, not constitutional law. And as I shall show, Congress sensibly could make, and in several instances already has made, specific exceptions to the finality policy.

The power of Congress to increase the faith and credit given to legislative activity at the expense of judgments may be illustrated by considering the result if Congress acted similarly in other contexts. The facts of Lum are suggestive. Suppose that Congress disliked the result in Lum, and passed legislation along the following lines:

Any judgment in any court within the United States that improperly fails to apply the law of a sister-state under the standards of the Full Faith and Credit Clause as set out by the Supreme Court need not be recognized in any other court within the United States.

Or suppose that Congress believed that the treatment of divorce in *Williams v. North Carolina*, n160 which held that the state of one spouse's new domicile could grant a divorce that is entitled to full [*452] faith and credit, unduly undermined the family law policies of the state of matrimonial domicile. n161 Congress therefore legislates that the state of matrimonial domicile need not honor a judgment of divorce of another state. Such statutes would, like the Defense of Marriage Act, give less effect to F<1>'s judgment than it would have under the self-executing Full Faith and Credit Clause - but it also preserves the integrity of F<2>'s substantive law.

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n160. 317 U.S. 287 (1942).

n161. *Williams v. North Carolina*, 317 U.S. 287, 303 (1942) (Williams I).

-End Footnotes-

If Congress does not have the power to say in discrete areas that judicial proceedings will be put in line behind legislative acts, then it is hard to explain *Kalb v. Fuerstein*. n162 In *Kalb*, a farmer who had filed a bankruptcy petition had nonetheless lost his farm through a state foreclosure proceeding. n163 He had not raised the automatic stay issue in the state court, and the judicial sale had been completed. He later challenged the sale, arguing that it violated the bankruptcy laws. n164 The case presents the same concerns about judicial error interfering with legislative policy as *Lum*, except that in *Kalb* the concerns about finality were even stronger. Allowing the collateral attack would not merely undo a money judgment (as in *Lum*), but would require the unwinding of a judicial foreclosure and the removal of a bona fide purchaser from the farm. Notwithstanding these concerns, the Supreme Court held that the collateral attack must be allowed. It found in the bankruptcy code's automatic stay an implied exception to full faith and credit. n165 *Kalb* thus stands for the proposition that Congress may choose to increase the efficacy of legislative activity at the expense of judgments. n166 Cases since *Kalb* have understood that case the same way, for they have asked whether a given statute constituted an implied partial repeal of section 1738. n167 Such a question makes sense only if Congress has the power to carve out certain judgments for less faith and credit. That is exactly what the Defense of Marriage Act does.

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n162. 308 U.S. 433 (1940).

n163. *Kalb v. Fenerstein*, 308 U.S. 433, 435-36 (1940).

n164. *Kalb*, 308 U.S. at 438.

n165. *Id.* at 438-39.

n166. It makes no difference that the legislative policy in *Kalb* was of federal origin. If the Defense of Marriage Act is unconstitutional by interfering with the self-executing Full Faith and Credit Clause, it would not matter that Congress has substantive power under another part of the

constitution. That is, Congress cannot validly use its bankruptcy power in a way that violates the Full Faith and Credit Clause any more than it could enact a bankruptcy law that violates the Equal Protection Clause.

n167. See *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 380 (1996); *Marrese v. American Academy of Orthopedic Surgeons*, 470 U.S. 373, 381 (1985).

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Another instance of Congress creating an exception to the normal operation of full faith and credit is the Interstate Child Support Act. The leading case on the interstate enforceability of child support or [*453] ders is *Yarborough v. Yarborough*. n168 In *Yarborough*, a minor had sued in her home state of South Carolina to increase the amount of child support entered earlier by a Georgia court. n169 The state courts granted the relief over the objection of the father. n170 Normally, child support orders are modifiable in F<1>, and hence F<2> may also modify them - that gives the same effect to the judgment as it would receive at home. In *Yarborough*, however, Georgia courts had made a lump sum support order that was not subject to modification. n171 The Supreme Court held that South Carolina could not modify the award:

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n168. 290 U.S. 202 (1933).

n169. *Yarborough v. Yarborough*, 290 U.S. 202, 204 (1933).

n170. *Yarborough*, 290 U.S. at 204-05.

n171. *Id.* at 208.

- - - - -End Footnotes- - - - -

[The father] has fulfilled the duty which he owes her by the law of his domicile and the judgment of its court. Upon that judgment he is entitled to rely. It was settled by *Sistare v. Sistare* that the full faith and credit clause applies to an unalterable decree of alimony for a divorced wife. The clause applies, likewise, to an unalterable decree of alimony for a minor child. n172

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n172. *Id.* at 212-13 (citations omitted).

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Notwithstanding *Yarborough*, in 1994 Congress enacted the Interstate Child Support Act. It provides that a child support order is modifiable in F<2> if the rendering state "no longer is the child's State or the residence of any individual contestant." n173 This is not the same rule as *Yarborough*, which made

F<1>'s order immune from attack. Yet Yarborough rested on the Full Faith and Credit Clause. In making an "unalterable decree" of child support modifiable, Congress is assuming a power to alter the default rules of full faith and credit.

-Footnotes-

n173. See 28 U.S.C. 1738B(e) (2) (A) (Supp. 1998).

-End Footnotes-

In addition to these legislative exceptions to full faith and credit, the Supreme Court has created a number of its own. A state need not honor a judgment of another state that transfers title to land within F<2>. n174 Neither need it honor another state's anti-suit injunction. n175 Quite recently the Supreme Court has held that a state need not honor another state's judgment that would "control courts elsewhere by precluding them, in actions brought by strangers to the... litigation, from determining for themselves what witnesses are competent to testify and what evidence is relevant and admissible in their search for the truth." n176 The Supreme Court's willingness to make these exceptions shows that concerns for finality may sometimes be out [*454] weighed by other policies. The Court's creation of exceptions to full faith and credit also undercuts the argument that the Full Faith and Credit Clause sets an inviolate standard untouchable by Congress.

-Footnotes-

n174. See *Fall v. Eastin*, 215 U.S. 1 (1909).

n175. See *James v. Grand Trunk W. R.R. Co.*, 152 N.E.2d 858, 867 (Ill. 1958); *Baker v. General Motors Corp.*, 118 S. Ct. 657, 665 (1998) (dicta).

n176. See *Baker*, 118 S. Ct. at 666.

-End Footnotes-

E. The Legislative versus the Judiciary: Power and Competence

I have noted at several points the tension between the judicial and legislative branches that underlies the Defense of Marriage Act. At the most obvious level, the tension arises over which body has control over full faith and credit. Saying that the first sentence of the Full Faith and Credit Clause is self-executing is another way of saying that the judiciary gets to determine questions of full faith and credit. More subtly, the tension between the judicial and legislative branches is not just about who gets to write the rules, but about the content of the rules. The traditional treatment of full faith and credit gives a higher status to judicial activity at the expense of legislative activity. The Defense of Marriage Act attempts to alter this preference in a particular context. This phase of the Act is clearly experimental. Is it a good idea? Time will tell, but one may make some preliminary assessments.

As to the question of authority to set the rules of full faith and credit, I welcome the participation of Congress. Indeed, I think that legislation is essential in this area. I am forced to agree with Brainerd Currie that the

choice of law problem is, in the end, beyond the capacity of judges. n177 The differences between states that wish to honor same-sex marriages and those that do not is profound. It rests on opposing views of morals and on what relationships are good and healthy for people and society. Talking about "interests" as if this was a matter for technocrats to adjust obscures the deepness of the chasm that separates us. The normal process of balancing interests that is the milkfood of judicial activity is impossible here.

-Footnotes-

n177. See Brainerd Currie, *Selected Essays on the Conflict of Laws* 272 (1963). I thus join the list of commentators who have entreated for legislative solutions. See Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 *Geo. L.J.* 1, 16-19 (1991).

-End Footnotes-

Additionally, it is not just the substance of the law that states disagree about, it is also the nature of the law. Arguments for one or another state having authority over a given dispute often rest on differing conceptions of jurisprudence, of the reasons for which a state may legitimately apply its law. n178 Is the Supreme Court willing to write consequentialism into the Constitution? Is it willing to write [*455] deontological conceptions of the law (or formalism, or natural law for that matter) out of the Constitution? Unless the Supreme Court is willing to fix a single jurisprudence in the Constitution that all states must follow (a prospect I think none of us should find dear if we are intellectually honest), no answers can be expected from that quarter. The fundamental nature of the jurisprudential disagreements between the states and the inability of courts to solve them explains why we have the reigning disorder in choice of law. There are no correct answers here, only negotiated solutions.

-Footnotes-

n178. It has been wisely observed that conflict of laws is "applied jurisprudence." See Andreas F. Lowenfeld, *Revolt Against Intellectual Tyranny*, 38 *Stan. L. Rev.* 1411 (1986).

-End Footnotes-

In recognition of that fact, Congress is a sensible place to look for a resolution. It is too much to expect states to agree on the wisdom of same-sex marriages or on the deeper jurisprudential considerations. But we might hope that the states together can work out an arrangement satisfactory to most, if not all, states. The Congress is a place for such negotiation. Admittedly, some states will not get their first choice. But that is always a risk in any negotiated solution. The concern that Congress might unfairly treat individuals raises different issues. But individuals are already protected from improper action by Congress under equal protection principles. Gay rights advocates may argue that equal protection has been insufficiently protective of gays. But if that is true, then let's fix equal protection rather than taking out frustrations on full faith and credit.

As to the content of the rules, I believe Congress could have done better. In

the choice of law context (where there has been only a marriage and no Hawaiian judgment), the Defense of Marriage Act seems perfectly sensible in its attempt to avoid suitcase weddings - i.e., those in which a local same-sex couple seek to avoid their own state's law by taking a three day trip to Hawaii. Ratifying the power of states to allow them to not recognize a marriage between Hawaii domiciliaries is more questionable. But even here I find the policy of the Defense of Marriage Act supportable. Requiring states to honor same-sex marriages between Hawaiian domiciliaries would inevitably lead to problems of sham domicile, just as it did in the divorce cases from the middle part of this century. Congress quite reasonably may wish to avoid a repetition of that episode. Thus, allowing non-recognition of same-sex marriages between Hawaiian domiciliaries can be justified as a bright line rule to avoid evasion of state law barring same-sex marriages by the use of a sham domicile. It can also be justified as an effort to allow states to express their moral interests, even in a case which will create no local consequences.

It is in the area of judgments that I believe Congress may have mis-stepped. I do believe that the current law of full faith and credit has overemphasized the value of the finality of judicial decisions at the [*456] expense of legislative policy. A narrow statute designed to reassert the power of legislatures in a particular context seems unobjectionable. But the cases in which such an exception make the most sense are those in which the judgment was most clearly in error and the legislative policy most clearly upset. A version of the Defense of Marriage Act that sought to avoid, in the context of same-sex marriages, the result of *Lum* - where the judgment ignored the law that everyone agreed should govern - would raise far fewer objections than the actual Act, which does not distinguish between the credit due to sound judgments and questionable ones. I could imagine a narrower, smaller version of the Defense of Marriage Act that would achieve most of its ends but at the same time create fewer problems. Such legislation would target judgments that affirm same-sex marriages between domiciliaries of a state that bars such marriages.

I could also imagine another Defense of Marriage Act that is more robust. This variant would go further toward enforcing legislative policy by providing a choice of law rule. The current Act gives less effect to judgments, but gives only a little more effect to legislative policy. Congress could cement legislative policy more fully by saying, for example, that a marriage is valid only if it is valid under the law of the domicile of both parties to the marriage. It could go further than this and say that any judgment that fails to apply this choice of law rule is not entitled to full faith and credit. Such a rule would give national effect to the legislative policy of the chosen state (in this example, the state of domicile). The current Act fails to achieve this because it does not require any state to apply any particular state law. Such variations might well reflect a better balance between allowing states to enforce their legitimate legislative policies and the concerns of finality, and allowing parties to have more certainty in their transactions. But, it must be remembered, that which is constitutional is far broader than that which is wise.

V. CONCLUSION

The Defense of Marriage Act is constitutional. It is a valid exercise of Congress' powers under the Effect clause of the Full Faith and Credit Clause. The policy of the Act allows states to assert their moral interests and also rectifies the imbalance that has traditionally existed between the faith and