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

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INTRODUCTION

This Article considers whether a Massachusetts same-sex marriage or a Vermont same-sex civil union is in other states entitled to full faith and credit or to recognition based on some other provision of the United States constitution. This is a moot point if the United States Supreme Court in the future holds that the Fourteenth Amendment's Equal Protection Clause renders un constitutional provisions in the laws of other states that preclude a same-sex couple from marrying. This Article begins with the assumption then, that the United States Supreme Court will not hold that a state's denial of the benefits of marriage — under whatever name, marriage itself or civil union — to a same-sex couple is not a violation of the Equal Protection Clause. Because the Supreme Court has classified marriage as a fundamental right2 or because a ban on same-sex marriage involves gender discrimination,3 the equal protection analysis in the Supreme Court's future decision giving states the option to ban same-sex marriage could well employ a level of review for reasonableness of the classification stricter than any rational basis.4

2 See Turner v. Safley, 482 U.S. 78, 95 (1987); Zablocki v. Redhail, 434 U.S. 374, 680 (1978). In the hypothetical case of the same sex couple, a claim of denial of a fundamental right would fail if marriage were to be defined as a union of persons of the opposite sex. Loving v. Virginia, 388 U.S. 1 (1967), suggests that might ne am improper way to define the institution.
3 See United States v. Virginia, 518 U.S. 515, 533 (equal protection clause demands "exceedingly persuasive" justification for gender-based discrimination). Is there no gender discrimination because men and women are treated equally — each must find someone of the opposite sex to marry? Or is there gender discrimination because the state will not let Mike marry Mark because Mike is a male? The latter way of viewing the state action is more consistent with Loving v. Virginia, 388 U.S. 1 (1967), in my view.
4 If the Court accepts the characterization by the same sex couple of marriage as a fundamental right, the degree of appropriate heightened scrutiny of the state's justification for
This hypothetical approval of anti-gay discrimination by the Supreme Court must be kept in mind in considering how that Court will rule on full faith and credit and related issues that will arise because some states will accept the invitation to ban same sex marriage, while others follow as a matter of state statute or interpretation of a state constitution's equal protection equivalent the steps already taken by Massachusetts and Vermont.

This Article concludes that the Supreme Court will not require the state of domicile of a same-sex couple who formalize a civil union while visiting in Vermont or marry while visiting Massachusetts to recognize in any way, when the couple returns to their domicile state, the status created by Vermont law. This Article also demonstrates that when a same-sex couple who are bona fide domiciliaries of Vermont or Massachusetts "marry" in Massachusetts and later change their domicile to a different state, that state cannot deny the existence of the status created by Vermont or Massachusetts. The reason is that the time of interest for determining a state's eligibility to have its law apply to a marriage or civil union is the moment the state of celebration purports to establish the status. The new domicile has no connections at all to Vermont or Massachusetts at the crucial time and thus under Allstate Insurance Co. v. Hague cannot apply its conflicting status law to the newly-arrived couple.

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denying the right to same sex couples could be drawn from decision such as Carey v. Brown, 447 U.S. 455, 461-62 (1980) (justification for discrimination affecting freedom of speech must be "carefully scrutinized"); Police Department v. Mosely, 408 U.S. 92, 98 (same); Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (discrimination affecting "fundamental right" of interstate travel must be judged not under any rational basis test but by stricter compelling state interest test); Harper v. Virginia State Board of Elections, 383 U.S. 663, 670 (1966) (discrimination affecting fundamental right to vote must be "closely scrutinized").

5 For convenience this Article will speak of same sex couples "marrying" in Vermont because Vermont law provides that parties to a civil union there are subject to all the benefits and responsibilities of lawful marriage. See 15 Vt. Stat. Ann. § 1204, providing that "[p]arties to a civil union shall have all the same benefits under law, whether they derive from a statute, administrative or court rule . . . as are granted to spouses in a marriage." "Marry in Vermont or Massachusetts" is a lot shorter and less awkward than "marry in Massachusetts or unite civilly in Vermont."

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

Article IV, section 1, of the United States Constitution provides:

Full Faith and Credit shall be given in each state to the public Acts, records and judicial Proceedings of every other State. And the Congress may by general laws prescribe the Manner in which such Acts, records and Proceedings shall be proved, and the Effect thereof.

Note that the clause does not apply when one of the involved jurisdiction is the federal government or a territory or of the United States or, unless it is treated as a state under the clause, the District of Columbia. This Article uses the term "Effect proviso" to refer to that part of the Full Faith and Credit Clause authorizing Congress to enact statutes concerning the degree to which one state must apply the laws of another, honor the records of another, and enforce the judgments of another state.

Since 1948, the primary implementing statute, 28 U.S.C. § 1738, has provided, after stating that acts, records, and judicial proceedings may be authenticated:

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

Note that by adding the word "same", section 1738 is clearer than the constitutional clause in defining the faith and credit to be given. Section 1738 is construed to apply when the District of Columbia is one of the jurisdictions involved and also to judicial proceedings of federal courts in every state (they are included in the term "every court within the United States"). Unless the District of Columbia is a state under the Article IV clause, authority to include it in section 1738, as well as authority to apply that section to territories of the United States, is not derived from the constitutional grant in Article IV to prescribe the effect of proving an act, record, or judicial proceeding.

Between 1790 and 1948 the pertinent language of section 1738 was:

And the said records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the court of the state from whence the said records are or shall be taken.

Note the exclusion of "acts" and the inapplicability of the statute when the originating jurisdiction was not a State.
The second implementing statute, 28 U.S.C. § 1739, provides for authentication of "[all] nonjudicial records or books kept in any public office of any State, Territory or Possession of the United states," and then declares:

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

The final pertinent statute is that part of the Defense of Marriage Act (DOMA) dealing with the obligation to recognize same-sex marriages, 28 U.S.C. § 1738C., which provides:

No State territory or possession of the United States, or Indian tribe, shall be required to 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.

II. THE SUPREME COURT HAS HELD THAT THE FULL FAITH AND CREDIT CLAUSE AND SECTION 1738 DO NOT APPLY TO CERTAIN KINDS OF CHOICE OF LAW AND ENFORCEMENT OF JUDGMENT ISSUES

A. Terminology of Full Faith and Credit Analysis

Since "Acts" in the Full Faith and Credit Clause includes common law rules,7 I use the term "law prong" of the clause to refer to its applicability to choice of law questions in judicial or quasi-judicial tribunals. Under the law prong, the tribunal must decide whether a jurisdiction is constitutionally eligible to have its statute or common law rule applied. If only one jurisdiction is so eligible, the law prong requires that law be applied. Law prong issues arise before any government action has formally attached a law to the matter at hand. Section 1738 has had since 1948 a "law prong" that parallels that of the Article IV clause.

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7 See Watson v. Employers Liability Assur. Corp., 348 U.S. 66, 71 (1954) (dictum that common law of contracts of Illinois would be entitled to full faith and credit in other states in case of contract affecting only Illinois interests). If "Acts" in the Article IV clause were construed to exclude common law rules, one state would nevertheless have give credit to common law rules of another just as if the Clause did refer to common law as well as "Acts." due to the Supreme Court's holding that the Fourteenth Amendment's Due Process Clause — which could not be restricted to "acts" but must extend to laws of all kinds -- imposes the same obligations to enforce out-of-state law as the Full Faith and Credit Clause does to "Acts." Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 n. 10 (1981)
Reference in both the constitutional provision and section 1738 to "judicial proceedings" concerns the obligation to honor a judgment entered, in some instances after a law prong decision has been made by the tribunal. For shorter reference I refer to the "judgment prong" of the constitutional clause and section 1738.

"Records" in the constitutional clause refers to non-judicial applications of a law such as by creating a birth certificate, indexing and recording a deed, filing of a security arrangement under the Uniform Commercial Code, and the like. Issuance of a marriage license involves creating a "record" under the clause and section 1739, which implements the records prong of the constitutional clause. What is often called the "return" to the license — the certificate by a judge or cleric that he did marry the licensee — is also a record. The "records prong" of Article IV, section 1, deals with the duty of tribunals in other states to give effect to such records. Section 1738 has no records prong, because reference there to records is to legislative (law prong) and judicial (judgment prong) documents. This has been clear since 1804 when section 1739, specifically dealing with non-judicial records, was enacted.

Whether legal action is ministerial or involves the finding of facts or application of law to facts has little to do with whether it should be classified as a record or a judgment (judicial proceeding). The creation of a record is very often a ministerial act. Sometimes, however, the creator of the record must act as a finder of facts. That is so with respect to marriage licenses. The states charge the official who can issue marriage licenses with the duty to make factual determinations when there is a doubt as to whether an applicant is of age, has actually been divorced as he or she claims, or is barred by consanguinity from marrying the other applicant. In Massachusetts, New Hampshire, and Wisconsin issuance of the marriage license is non-ministerial for the additional reason that a statute imposes on the official the duty to make a choice of law decision, to deny the license on the basis of the eligibility rules of the state of domicile of the applicants.

We may think of the judicial process as non-ministerial, but that is not always so. Entry of judgment based on the concession of the defendant's "Agent" appointed via a cognovit note is a ministerial act, but the resulting is entitled to full faith and credit. Many default judgments


9 See text accompanying notes infra.

10 See text accompanying notes infra.

11 D. H. Overmeyer Co. v. Frick Co, 405 U.S. 174 (1972). Since the obligor is not going to be present when the judgment is entered, consideration, as required by Overmeyer of whether the appointment of the agent to confess judgment was the product of free bargaining or was part of an adhesion contract will take place in the forum asked to enforce the judgment, not in the forum the enters the judgment.
involving no issue as to the amount of damages are ministerial. Although a criminal court judge must determine a guilty plea has been freely entered, usually the process is ministerial and no doubts arise. The judgment that was entitled to full faith and credit in Union National Bank v. Lamb,12 by which an official extended the period of enforceability of a prior judgment, could not have been more ministerial.13

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

"Multi-law matter" refers to a process — judicial or record-making — to which the laws of more than one jurisdiction could constitutionally be applied, i.e., a choice of law can be made. The determination by a state X record clerk as to whether the clerk should accept for filing a deed of land located in state X and in the county where the clerk’s office is located is a multi-law matter if the grantor and grantee are domiciliaries of state Y. X law might make the recordation conclusive of matters that would be subject to attack under Y law.14 "Multi-law case" will be used when only judicial action is involved.

B. The Full Faith and Credit Clause and Section 1978 Do Not Apply to Multi-law Cases

1. The Clause does not compel an absurd result

This Article will conclude that the rules developed for determining the full faith and credit owed to a sister state judgment should apply to marriage records, not the rules applicable when the issue is what law should initially apply. However, most marriage records will be

13 The argument can be made that the new judgment in Lamb was non-ministerial in that it related back and incorporated the findings of fact and application of laws underlying the original judgment. Under that theory, the ministerial nature of creating the marriage license return — the certificate minister or judge who elicits the "I do's" after the issuance of the license — would be acting "ministerially" because his or her action would relate back to the nonministerial creation of the license.
14 Fall v. Estin, 215 U.S. 1 (1909), might require courts of state Y to proceed in personam to, in effect, attack the conclusive effect state X seeks for the deed recorded in X. But the issue of the effect of recordation certainly could arise outside state X.
subject to the judgment prong rules for awards made by workers’ compensation tribunals, and that special rule is built on the Supreme Court’s determination about limitations on the law prong of the Article IV clause (and necessarily also of section 1738 in cases of sister state conflicts). Thus, the limited applicability of the Full Faith and Credit Clause to long prong cases must first be examined.

The United States Supreme Court first observed that the Full Faith and Credit clause and section 1738 could not reasonably be applied to multi-law long prong cases in the 1935 case of Alaska Packers Association v. Industrial Accident Commission.15 An employer contended that California, place of contracting, had to forego applying its workers’ compensation law by giving full faith and credit to that of Territory of Alaska, the place of injury. These contacts made the statutes of both jurisdictions constitutionally eligible to be applied to make an award to the employee.

Noting that Congress had not in section 1738 dealt with the obligation of California to give effect to Alaskan law, the Court examined the language of the Article IV clause, apparently as a possible source of federal common law, since the clause had no application when a federal territory was one of the involved jurisdictions.16 It observed that a literal reading of the clause would require, in a multi-law case, state A to apply the law of B and state B to apply the law of A. Denying each the right to apply its own constitutionally eligible law would be an "absurd result."17 As a result it was "unavoidable that this Court determine for itself the extent to which the statute of one state may qualify or deny rights asserted under the statute of another."18 With the Full Faith and Credit Clause not addressing the issue, the Court’s own solution was that California had the choice of applying its law or yielding to Alaska’s law.

Because *Alaska Packers* did not involve a conflict between laws of sister states, what the Court had to say about the Article IV clause was dictum, but it became holding four years later in *Pacific Employers Insurance Co. v. Industrial Accident Commission*,19 where the two jurisdictions each having law constitutionally eligible to be applied to a workers’ compensation dispute were California (place of injury) and Massachusetts (place of contracting). Section 1738 still did not deal with judgment prong enforcement, and the court considered workers’ compensation tribunals to be essentially judicial in nature. Quoting the "absurd result" passage of Alaska Packers, the Court held:

> [T]he very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means of compelling a state to substitute the statutes of other states for its own

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16 Id at 547.
17 Id.
18 Id.
This Court must determine for itself how far the full faith and credit clause compels the qualification or denial of rights asserted under the laws of one state, that of the forum, by the statute of another state.\textsuperscript{20}

At this point one could conclude that the Full Faith and Credit Clause itself could impose a duty on a state under its law prong only in one-law cases. In multi law-law cases the power of a state to make a choice of law would be found in the concept of a federated union of states — perhaps a constitutional penumbra. The rule chosen by the United States Supreme Court was freedom of a forum to pick the law of any jurisdiction with sufficient contacts, under Due Process analysis, to supply the rule of decision. The Court employed the Fourteenth Amendment Due Process Clause as the basis for distinguishing one-law and multi-law cases in choice of law disputes not between sister states but between a state and a foreign country, as to which the Article IV clause had no application.\textsuperscript{21}

2. Abuse of Freedom-to-Choose Rule Is Not Tolerated

A trio of peculiar cases that seem to overlook the Court's discovery that the Full Faith and Credit Clause made could not apply in the multi-law cases can best be understood as establishing the principle that the Supreme Court will oversee state courts to prevent abuse of the freedom-to-choose rule of \textit{Pacific Employers}. \textit{Broderick v. Rossner}\textsuperscript{22} involved a suit in New Jersey by New York's commissioner of banking against New Jersey-domiciled shareholders of a New York bank to collect a shareholder assessment valid under New York law. A confusing New Jersey statute was construed by the Court as providing that New Jersey shareholders of any corporation could not be held liable for corporate debts except in an action in which all shareholders were joined, an impossibility in the bank commissioner's suit in New Jersey. Relying on the Full Faith and Credit Clause and citing \textit{Alaska Packers} in passing, the Supreme Court held New Jersey could not apply its own law, but not because it lacked contacts required by due process to control the liability of New Jersey domiciliaries. New Jersey could not defeat New York's policy by applying "a local policy . . . of enabling all residents of the State to escape performance of a voluntarily assumed obligation, consistent with morality, to contribute to the payment of the depositors of a bank of another State of which they were stockholders."\textsuperscript{23}

\textit{Broderick} was relied on in the 1947 case, \textit{Order of Commercial Travelers v. Wolfe},\textsuperscript{24} to

\begin{itemize}
  \item \textsuperscript{20} Id at 501. 502.
  \item \textsuperscript{21} See Home Ins. Co. v. Dick. 281 U.S. 397 (1930) (Texas lacked sufficient contacts, assessed at time of making of contract in Mexico, to apply its law to void a provision thereof; Texas had to apply Mexican law).
  \item \textsuperscript{22} 294 U.S. 629 (1935).
  \item \textsuperscript{23} Id at 644.
  \item \textsuperscript{24} 331 U.S. 586 (1947).
\end{itemize}
hold that South Dakota could not apply its statute voiding a six-months-to-sue proviso in a life insurance policy issued to a South Dakota resident by an Ohio fraternal benefit society. The proviso was valid under Ohio law, and the opinion seems to say it was the Full Faith and Credit Clause that required South Dakota to apply that law. The Court assumed that South Dakota had the contacts due process required to regulate the policy bought by its domiciliary but concluded that "[t]he weight of public policy behind the general statute of South Dakota, which seeks to avoid certain provisions in ordinary contracts, does not equal that which makes necessary the recognition of the same terms of membership for members of fraternal benefit societies wherever their beneficiaries may be."

In *Hughes v. Fetter*, decided in 1951, Wisconsin had entered a judgment "on the merits" in favor of defendants in a wrongful death action. All of the parties were from Wisconsin. The death occurred in Illinois. Since Wisconsin was then using the lex loci method of choice of law, plaintiffs relied on the Illinois wrongful death statute. The wrongful death statute of Wisconsin applied by its terms only to deaths in that state. The United States Supreme Court held Wisconsin had to apply Illinois law, absent a bona fide application of the forum non conveniens doctrine, which would not have led to a judgment on the merits for the defendants. The opinion is written as if it were the Full Faith and Credit clause the imposed such a duty.

The Court said *Pacific Employers* would have permitted Wisconsin to apply its own statute to grant recovery. Due process must, then, have allowed Wisconsin to apply its common law of torts, which did not recognize a cause of action for wrongful death. The judgment on the merits for the defendants could only have been based on the state's common law of torts. The key to the United States Supreme Court's holding in *Hughes* is its conclusion that Wisconsin "ha[d] no real feeling of antagonism against wrongful death suits." Thus, the Court in its role of policing application of the freedom-to-choose rule it created for multi-law cases to

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25 Id. at 624. Wolfe's requirement of a weighing of state interests in a multi-law case as opposed to recognizing freedom of choice among constitutionally eligible laws by the forum may have been implicitly overruled in *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 n. 10 (1981), citing *Carroll v. Lanza*, 349 U.S. 408 (1955), for the proposition that the Court had "abandoned the weighing-of-interests requirement."


27 The Court acknowledged that *Hughes* was its first "law prong" case after Congress rewrote section 1738 to extend the "same credit" rule—previously applicable only to records and judgments—to state laws as well. But the Court "found it unnecessary to rely on any changes accomplished by the Judicial Code revision" in deciding *Hughes*. 341 U.S. at 613 n. 16.

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

29 341 U.S. at 612 n 10.

30 See the Wisconsin Supreme Court's opinion, *Hughes v. Fetter*, 42 N.W.2d 452, 453 (1950), stating that "[t]he right to recover for death by wrongful act is purely statutory."

31 341 U.S. at 612 (emphasis added).
which the Full Faith and Credit Clause does not apply will examine whether denial of relief to a litigant is based on a non bona fide application of the contra-public-policy doctrine.\textsuperscript{32}

\textit{Broderick's} result cannot be viewed as an application of the law prong of the Full Faith and Credit Clause. If it were, and if New Jersey rewrote its statute to declare that shareholders were never liable for a corporation's debts absent an express contract to that effect, New York would have to apply that New Jersey law in a suit by the New York bank commissioner in New York courts against New Jersey shareholders over whom New York could get in personam jurisdiction. \textit{Wolfe} cannot be the result of application of the Full Faith and Credit Clause, because if the clause applied to fraternal benefit insurance polices and the litigation were conducted in Ohio, it would require Ohio to apply the constitutionally eligible South Dakota rule. \textit{Hughes} cannot rest on an application of the Full Faith and Credit clause to wrongful multi-law death actions; that would require Illinois, if plaintiff had sued there, to apply the common law of Wisconsin, which Wisconsin did apply. The three decisions are qualifications on the Court's freedom-to-choose rule that the Court finds the constitution implicitly allows it to fashion to in order to regulate sister state relations when the Full Faith and Credit Clause does not do so.

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

The implication of both \textit{Alaska Packers} and \textit{Pacific Employers} was that since the Article IV clause dealt only with one-law cases, Congress, enacting implementing legislation pursuant to effect proviso of the clause, could also deal only with one-law matters. But the issue was open: could Congress displace the Court's own rule for multi-law cases the allowed a court to pick any constitutionally eligible law — with a different approach, such as requiring a state court to weigh the interests of the states whose laws were constitutionally eligible to be applied to the issue before the court and select the law of the state with the greater interest?

What Congress actually did, in 1948, was to amend section 1738 to extend its same-credit rule from matters involving records and judgments to law-prong cases. If the rewritten section 1738 actually did apply to multi-law cases, it would demand what the Supreme Court in \textit{Alaska Packers} and \textit{Pacific Employers} called "absurd results." Where states A and B both had the due process contacts enabling them to provide the governing law for a case, section

\textsuperscript{32} Other Supreme Court cases seem to imply a somewhat similar yet distinct inquiry is to be made: if states X and Y have contacts to an issue sufficient to make the law of each constitutionally eligible to govern the outcome, the forum is to be determined if one state's interest arising out of those contacts is not "legitimate." A finding of illegitimacy requires application of the other state's law. See Nevada v. Hall, 440 U.S. 410, 422 (1979) ("the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." No case bears on what "legitimate" means in this context. It seems unlikely the word be used as a way to say no more than the state's law is not unconstitutional.
1738 would require A to apply B's law and B to apply A's.

The dissenting opinion of Justice Frankfurter in the 1955 case, *Carroll v. Lanza*, 33 raised the question whether the 1948 amendment to had undercut the foundational logic of *Alaska Packers and Pacific Employers*. The plaintiff in *Carroll* was injured in Arkansas while working there under a Missouri employment contract with a subcontractor. He obtained a Missouri workers' compensation award and then sued the prime contractor at common law in Arkansas. Missouri law barred such a suit; Arkansas' did not. Frankfurter wrote in response to the majority's affirmation of a judgment for the injured plaintiff:

[T]he new provision of 28 U.S.C. § 1738 . . . cannot be disregarded. In 1948 Congress for the first time dealt with the full faith and credit effect to be given statutes. The absence of such a provision was used by Mr. Justice Stone to buttress the Court's opinions both in *Alaska Packers* . . . and *Pacific Employers*. . . . Hence if § 1738 has any effect, it would seem to tend toward respecting Missouri's legislation. 34

The majority opinion ignores section 1738, applying *Pacific Employers* as if unchanged by the 1848 revision. This strongly suggests the majority felt that section 1738 does not apply to multi-law cases and cannot do so to the extent the source of power to enact it is the implementing proviso of the Full Faith and Credit clause, which *Alaska Packers* and *Pacific Employers* had treated as inapplicable to multi-law cases. If the majority thought that Congress did have the power to supply a rule of full faith and credit law for multi-law cases but that the absurd same credit test of the 1948 revision was an unconstitutional application of that power, one would have expected some statement to that effect in the majority opinion by Justice Douglas. 35

Subsequently the freedom-to-choose rule was broadly affirmed by *Allstate Insurance Co. v. Hague* 36 and *Phillips Petroleum v. Shutts* 37 without any consideration of whether it was inconsistent with section 1738.

33 349 U.S. 408 (1955).
34 Id at 422.
35 Insofar as the revised section 1738 applies when one of the jurisdictions whose law is eligible is the District of Columbia or Puerto Rico or a territory of the Untied States, the source of Congressional power to legislate is not the full Faith and Credit Clause but with respect to the District the penultimate paragraph of Article II section 8 of the constitution ("to exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may by Cession of particular states . . . become the Seat of Government of the United States) and as to other territories and possession a section's "necessary and proper" clause.
37 472 U.S. 797 (1985), giving section 1738 a "see also" cite after quoting the Full Faith and Credit Clause. Id. at 824 n. 1. *Shutts* strongly indicates that a majority of the Court now accepts the reasoning of the four-justice plurality in *Hague*. See id. at 118-820.
C. The Full Faith and Credit Clause is Held Inapplicable to Workers’ Compensation Awards

The reasoning of *Pacific Employers* was invoked in 1980 in a case holding that the judgments prong of the Full Faith and Credit Clause (and of section 1738) did not apply to a class of judgments; instead a rule created by the United States Supreme Court governed the obligation of a court in one jurisdiction to give effect to this type of judgment. The case was *Thomas v. Washington Gas Light Co.*, and this Article will conclude that its holding applies to many marriage records, while the Full Faith and Credit Clause and implementing statutes including DOMA do not.

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

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

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

A four-justice plurality of the United States Supreme Court held that a tribunal without power to consider possible application of another jurisdiction's constitutionally applicable law.

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38 448 U.S. 261 (1980)

39 The plurality observed: "Although a Virginia court is free to recognize the perhaps paramount interests of another State by choosing to apply that State's law in a particular case, the Industrial Accident Commission does not have that power. Its jurisdiction is limited to questions
could not find authority in Article IV or section 1738 to "entrench[] on the interests of other States" by entering a judicial-type award that would bar the other jurisdiction from vindicating its interest through application of its law to the matter at hand. The solution was to extend the holding of Pacific Employers from law prong cases to some judgment prong cases. The plurality quoted this passage from Pacific Employers: "This Court must determine for itself how far the Full Faith and credit clause compels the qualification or denial of rights asserted under the laws of one state, that of the forum, by the statute of the other state." Then Justice Rehnquist, joined by Justice Marshall in a dissenting opinion, stated: "I also agree completely with the plurality's ultimate conclusion that the rule announced in McCartin represents an unwarranted delegation to the States of this Court's responsibility for the final arbitration of full faith and credit questions." Both the full Faith and Credit Clause and section 1738 do delegate to a state — that which renders the initial judgment — the power to determine how much preclusive effect the judgment will have in other jurisdictions. Thus six justices were in agreement on the rule of the Thomas case that this Article finds applicable to certain marriage records: the Supreme Court, not Congress and not the states, will decide how much credit is to be given.

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

arising under the Virginia Workman's Compensation Act." Id. at 282.

40 Id at 271.

41 Id at 271, quoting 306 U.S. 493, 502. Moved into the judgment prong context, the "statute" referred to at the end of the quotation is the Virginia res judicata statute, not its substantive statute granting lesser benefits than did the law of the District of Columbia.

42 448 U.S. at 291. Industrial Comm'n of Wisconsin v. McCartin, 330 U.S. 622 (1947), was a decision contrary to the dissent's view that the Supreme Court alone could supply the rule governing full faith and credit that would have allowed Virginia to preclude the supplemental award if its res judicata statute barred such a remedy by "unmistakable language."

43 The plurality then proceeded to reverse the judgment of the Fourth Circuit. But nothing in its opinion suggested in any way that the District of Columbia was required to grant a supplemental award. The plurality's reliance on Pacific Employers indicates that the plurality's theory should have given the District freedom to choose whether to grant a supplemental award or accept Virginia's invitation to treat the Virginia award as final. But the Fourth Circuit should have been affirmed on the ground that the District of Columbia tribunal wrongly exercised that
Is the new rule of *Thomas* for judgment prong cases in situations where the tribunal cannot make a choice of law mere dictum? Because one of the contending jurisdictions was the District of Columbia, section 1738 could have applied, although six justices concluded it did not. But the Full Faith and Credit clause was not at issue unless the District of Columbia is a state for purposes of applying it. Two passages from the plurality opinion reveal author Justice Stevens' awareness that it was more obvious that section 1738 applied than that the clause applied as well. Yet the clause is quoted in full and referred to repeatedly in the plurality opinion. As the Sixth Circuit has noted, "[a]lthough the *Thomas* Court cited section 1738, the Court's substantive discussion focused on the full faith and credit clause." Evidence of this is that the second to last sentence of the plurality opinion states: "The Full Faith and Credit Clause should not be construed to preclude successive workmen's compensation awards."

I believe *Thomas* does view the District of Columbia as a state for purposes of applying the Full Faith and Credit clause. The Supreme Court has declared that "whether the District of Columbia constitutes a 'State or Territory' within the meaning of any particular statutory or choice.

What the plurality failed to see is that section 1378 is more than a general statute about full faith and credit matters. Section 1738 has an additional function: it tells the District of Columbia (but not a state) how to exercise the choice that the plurality extended to the District. "Congress has plenary power over the District of Columbia." United States v. Lopez, 514 U.S. 549, 589 n. 3 (1995). Congress can act vis a vis the District in the same way a state's legislature governs affairs of a state. Palmore v. United States, 411 U.S. 389, 397 (1973). Congress in section 1738 directed the District of Columbia workers compensation tribunal that in the *Thomas* matter it was supposed to give the Virginia award the "same full faith and credit" as it had under Virginia law, i.e., a bar to any award of more damages.

44 The reference to "full faith and credit questions" in Justice Rehnquist's opinion would extend to questions arising under section 1738 as well as under Article IV.

45 "Respondent contends that the District of Columbia was without power to award petitioner additional compensation because of the Full Faith and Credit Clause of the Constitution, or more precisely, because of the federal statute implementing that Clause." 448 U.S. at 266. "It has long been the law that "the judgment of a state court should have the same credit, validity and effect in every other court in the United States, which it had in the state where it was pronounced. . . . This rule, if not compelled by the Full Faith and Credit Clause itself . . ., is surely required by 28 U.S.C. § 1738." Id at 270.

46 448 U.S. at 264.


48 Id at 286.

49 In *Elliott* the Sixth Circuit said either this was what *Thomas* did, or else the Supreme Court did not consider the difference in the language of the Article IV clause and section 1738. Supra n. — 766 F.2d at 990 n. 7.
constitutional provision depends on the character and aim of the specific provision involved. 50
The Court cited as support for this Callan v. Wilson, 51 which held that not only the Sixth Amendment jury trial guarantee applied to the District of Columbia, but also section 2 of Article III, providing that trial of all crimes in Article III courts "shall be by jury, and such trial shall be held in the state where the said crimes shall have been committed . . . ." 52 I think the "character and aim" of the Full Faith and Credit Clause requires that District of Columbia courts respect the sovereignty claims of the states to have their laws considered for application in courts of the Districts and their judgments enforced.

In any event, the rule of Thomas that I would apply to some marriage records created by an official without authority to make a choice of law that gives a court in another jurisdiction a choice as to whether to give the record the same credit it has in the jurisdiction that created it is a judge-made rule applicable to a situation to which six justices considered the Article IV clause inapplicable. It certainly applies when the District of Columbia is one of the involved jurisdictions whether or not the District is a state subject to the Full Faith and Credit Clause.

51 127 U.S. 540 (1888).
52 Emphasis added.
III. IN MOST ‘EVASION’ MARRIAGE CASES APPLYING THOMAS BY ANALOGY THE STATE OF DOMICILE OF THE SAME SEX COUPLE WILL BE ENTITLED TO VOID THE MARRIAGE; D.O.M.A. IS USUALLY INAPPLICABLE.

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

The Supreme Court seems to have offered no guidance as to how full faith credit concepts apply to non-judicial records. The few lower courts to comment on this are short on analysis and not consistent. As I noted above, a Record is like a judgment in that when full faith and credit is claimed for it, a governmental actor has already applied a law, usually the law of the jurisdiction where the document is recorded. Usually the creator of the record has no

53 Yacavone v. Bolger, 645 F.2d 1028 (D.C. Cir. 1981), involved the obligation of a federal court to give effect to a state governor's pardon of a convicted criminal, a document the court viewed as a record under section 1739. The court, citing the law prong case of Hughes v. Fetter, 341 U.S. 609 (1951) (discussed in text accompanying n. — supra), declared that that full faith and credit considerations did not require automatic recognition of the pardon. That is, the court applied to the pardon record the freedom to choose theory that Pacific Employers created for choice of law cases. Tindale v. Celebrezze, 210 F. Supp. 912 (S.D. Calif. 1962) considered what credit section 1739 required a federal court to give to a state record consisting of a birth certificate. The court held that the record was entitled to the same respect as a state court judgment. The theses of this Article is that Tindale was right and Yacavone wrong.

54 Not all the rules the Supreme Court has developed in the context of full faith and credit to judgments apply neatly to marriage records. Conflicting marriage records in different states could exist. Suppose Mike marries Mark in Massachusetts when they are both domiciled there. They split. The bisexual Mike takes up domicile in state Y, where he meets and falls for Mary. State Y has enacted a statute providing that all same sex marriages are void. An attorney tells Mike state X views him as never married so he need not divorce Mark to be able to marry Mary. When Mike and Mary apply for a marriage license they do not, because the attorney said they need not, advise the clerk that Mike had gone through a marriage ceremony with Mark in Massachusetts. The pair are wed by a minister. Mike4 dies intestate owning land in state Z. Under the judgment prong case of Treinies v. Sunshine Mining Cp., 308 U.S. 66 (1939), with its last in time rule, Z should recognize Mary as the spouse entitled to an intestate share. But the theory of Treinies is that the court rendering the second judgment that is inconsistent with the first knew about the first and expressly or implicitly decided it was not entitled to full faith and credit, and holding that is now binding whether right or wrong. State Z should instead view Mary's marriage as bigamous and void because, as this Article will demonstrate, state Z must recognize the Massachusetts same sex marriage.

State Y apparently could pass a statute providing that the party to a same sex marriage who takes up domicile in Y can divorce his or her spouse simply by marrying a person of the opposite sex. Under Williams v. North Carolina, 317 U.S. 287, 297-98 (1942), state Y can view the res of the Mike-Mark marriage as present in Y because Mike is now domiciled there. That
power to apply the law of any other jurisdiction, making the *Thomas* case applicable analogy in those instances in which another state had the contacts related to the matter being recorded to have its substantive law applied to it or at least to one or more issues. I believe most records arise out of one-law matters - a birth certificate when the child is born in the state and both parents are domiciled there; the registration of a voter domiciled in the state; recordation of a deed of in-state land conveyed by one domiciliary to another, etc.

But that is not true of "evasion" marriages. Thus, a same-sex couple domiciled in state X, whose law does not permit them to marry may travel to state Vermont, whose law authorizes the marriage (civil union). The law of both states can constitutionally be applied, that of X as the common domicile and of Vermont as the place of making the marriage contract, the place of forming of the civil union. I can find no authority under Vermont law authorizing the official who issues licenses for civil unions to deny the requested license on the basis of state X's ban of same-sex unions.

After the couple marry in Vermont and return to state X, one of them may seek an annulment in the courts of X under state X marriage law. Applying *Thomas* by analogy, the state X court will surely hold that X's interest in regulating the marital status of its domiciliaries is "strong enough" to be declared "overriding" when compared to Vermont's interest. The annulment will be granted. Note that *Thomas* applies because the Full Faith and Credit Clause is inapplicable to this multi-law matter. It should follow that section 1739, enacted to implement the records prong of the Article IV clause, also does not apply. To the extent DOMA was enacted to implement the Full Faith and Credit Clause, it too cannot apply in the annulment action.

Anticipating that state X might not recognize their Vermont civil union, the couple might bring a declaratory judgment action in Vermont before returning to X before a judge who has the jurisdiction to make a choice of law. A Vermont statute provides:

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

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

55 See text accompanying note ___, supra.
In choice of law Vermont employs the method of the Restatement (Second) of Conflict of Laws, under section 283 of which Vermont's civil union statute would validate the "marriage" unless state X were shown to have a "strong public policy" against the marriage. If state X did not have a statutory little DOMA and its courts had reached the conclusion that same sex marriage was not permitted because of references to husband and wife in its marriage laws, the couple might convince the Vermont judge that the state X policy was not strong, especially if state X had enacted a law banning discrimination against gays.

The problem for the couple is the absence in the declaratory judgment action of any person to argue that the state X rule against same sex marriage did reflect a strong policy. I believe the United States Supreme Court would permit state X courts to deny full faith and credit to the judgment on the theory that this non-adversarial opportunity for the Vermont judge to make a choice of law insufficient to make the rationale of *Thomas* inapplicable to the judgment.

There is one reasonable argument that could compel the state of domicile which prohibits same-sex marriage to recognize a same-sex marriage by its domiciliaries celebrated in a state where the marriage is valid. Suppose state Z enacts a statute allowing same-sex marriage but has no provision allowing denial of the license based on the marriage license clerk's determining that domicile law should govern. Suppose a Vermont couple goes to state X, marries, and return to Vermont. Later in this Article I predict that in this situation Vermont would convert the marriage into a civil union, but suppose Vermont were to pass a statute directing its courts to treat as void the same-sex marriage of Vermont couple celebrated in another state.

If the "real interest" test of *Hughes v. Fetter*, created by the Supreme Court as an exception to the freedom-of-choice privilege accorded courts generally in multi-law cases, were also an exception to the privilege given by *Thomas* to a state to deny full faith and credit to a judgment entered by a tribunal lacking the power to consider application of that state's law in a multi-law matter, Vermont should not be able to deny full faith and credit to the record of state Z of the marriage there of the Vermont same-sex couple. Since its civil union statute offers the equivalent of marriage except in name, Vermont has no "real interest" in rejecting the state Z marriage.

Vermont may be the only state with recognition of a relationship so close to same-sex

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58 See Myers v. Langlois, 721 A.2d 129 (Vt. 1998).
59 Restatement (Second)of Conflict of Laws § 2283(2) (1971). I am assuming the court will hold that in comparison to Vermont, state X as the domicile state "had the most significant relationship to the spouses and the marriage at the time of the marriage."
60 Compare the different conclusion reached in this Article with respect to the choice of law powers of a Massachusetts marriage clerk who is directed, in effect, to serve as the adversary for the interest of the domicile state. See n. , infra, and accompanying text.
61 See n. , supra.
marriage that would support a conclusion that it had no "real interest" in denying full faith and credit to the marriage of a couple from the state, which prohibits same sex marriage, celebrated in a state that authorizes such a marriage. Same-sex registered reciprocal beneficiaries under Hawaii law obtain some but not all of the benefits of marriage. Washington has extended its common law doctrine that recognizes a meretricious relationship to same-sex couples. Somewhat like common law marriage, the doctrine create a status that carries with it many of the benefits and obligations of lawful marriage but withholds many significant benefits such as the right of intestate succession extended to a surviving lawful spouse and the right to sue for wrongful death of the survivor's partner. Whether Hawaii and Washington have no "real interest" under Hughes v. Fetter in denying recognition to a couple domiciled in the state who marry in Vermont and return to their state of domicile to reside is at the least problematic.

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

Suppose, however, the state X same-sex couple go not to Vermont for a civil union but to Massachusetts, which is one of three states that authorizes marriage licenses to make a choice of law and to deny the license on the basis of a law of state of domicile, state X, that would render void a same-sex marriage celebrated in that state. The

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64 See William A. Reppy, Jr., Choice of Law Problems Arising When Unmarried Cohabitants Change Domicile, 55 S.M.U. L. Rev. 273, 277-280 (2002) (collecting the benefits and obligations of marriage granted and withheld to persons in a meretricious relationship in Washington). Cf. Langan v. St. Vincent Hospital, infra n. , where a trial court relied on a package of rights New York extends to same-sex unmarried couples not as extensive as those extended in Washington as the basis for giving full faith and credit to a Vermont civil union.
65 The others are New Hampshire and Wisconsin. N.H. Rev. Stat § 457:44 ("No marriage shall be contracted in this state by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this state in violation hereof shall be null and void"); Wisc. Stat. Ann. § 765.04(3) (identical except refers to "State or jurisdiction" and "in violation of this provision").
66 Apparently the Massachusetts marriage license clerk is supposed to imagine a scenario in which his or her counterpart in state X comes to the conclusion that the equivalent of the equal protection clause in state X constitution voids the state X statute barring same-sex marriages. The clerk issues a license to a same sex couple. See Lockyer v. City and County of San Francisco, 95 P.3d 459 (Cal. 2004) (San Francisco clerk does just that on urging of the mayor). A minister then marries the couple, but later one of them seeks an annulment. The issue the Massachusetts clerk must decide now is raised in the court system of state X The Massachusetts clerk must guess the outcome.
two applicable statutes have been construed by a trial court in Massachusetts as also directing denial of the license if the clerk determines that the law of X, the domicile state, simply prohibits a same-sex marriage without indicating if it would label the marriage void. The same trial court opinion discloses that marriage license clerks have been advised by officials at the Massachusetts Department of Public Health and of the registry of Vital Records that the choice of law statutes are valid and must be applied by the clerks. In addition the municipal attorney for each of in four cities and towns in Massachusetts where marriage license clerks, according to published reports, had been ignoring the choice of law statutes and granting licenses to same-sex couples domiciled in a state that bans same-sex marriage received a warning letter from the office of the state's Attorney General. It stated that the actions of the clerks raise significant questions under G. L. c. 207, §§ 11 and/or 12, and before we institute enforcement action, we write to request your immediate explanation of how those actions may be reconciled with those statutes.

67 Section 11 of chapter 207 of the Massachusetts General Laws provides:

No marriage shall be contracted in this common wealth by a party residing and intending to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this commonwealth in violation hereof shall be null and void.

Section 12 of the same chapter states:

Before issuing a license to marry a person who resides and intends to reside in another state, the officer having authority to issue the license shall satisfy himself, by requiring affidavits or otherwise, that such a person is not prohibited from intermarrying by the laws of the jurisdiction where he or she resides.

Note how technically the same sex couple from state X that bans gay marriage can avoid the rule of section 11 by convincing the Massachusetts marriage license clerk they plan to reside after they marry in state Y after the ceremony in Massachusetts. In addition, section 12 literally tells the clerk not to issue the license even if the couple convince him they will reside in Massachusetts after they marry. Each technical reading defeats the purpose of these statutes and ought to be rejected by Massachusetts courts.

68 Cote-Whitacre v. Department of Public Health, 18 Mass. L. Rptr 190, 2004 WL 207557 (Mass. Super, Aug. 18, 2004). The court in effect reads "prohibited " in section 12 as a gloss on "void" in chapter 11. WL printout at p. 7. Some of the state statutes banning same-sex marriage do not state whether a marriage contracted in violation of the statute is void or voidable. The incapacity seems similar to incapacity based on consanguinity, and states invariably classify incestuous marriages as void, so the decision in Cote-Whitacre is probably of little practical significance: the out-of-state ban will meet the terms of both section 11 and 12.

69 Cote-Whitacre, supra n. , WL printout at pp 4-5.

70 Id at p. 5.
The "enforcement action" referred to apparently is a criminal prosecution under section 50 of chapter 207 of the Massachusetts General Laws, which provides:

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

I would expect the United States Supreme Court to hold that the exception created in Thomas to the duty of a state to give full faith and credit to a sister state judgment under the Article IV clause and section 1738 would apply even if the tribunal rendering the judgment had the power to make a choice of law but would not do so sua sponte in cases where all the parties before the tribunal want local law to apply because it benefits them, and not the law of their domicile. That is, the interest of the domicile state in having its constitutionally eligible law considered is protected if a party is benefitted by the law of the domicile state and thus has an interest in raising the choice of law issue. That interest seems almost as effectively protected where the tribunal itself is compelled to consider applicability of the domicile state's law sua sponte, particularly if the official charged with doing so faces a hefty fine and time in prison for failing to do so.

In sum, the issuance of a marriage license to an out-of-state same-sex couple is effectively an adversary proceeding on the matter of choice of law. The interest of the domicile state is protected so that the policy considerations that lead the Thomas court to make an exception to the obligation to give full faith and credit to the award of a workers' compensation tribunal are absent. Unless some other exception to applicability of the judgment prong of the Article IV clause, applies, the marriage record of Massachusetts is entitled to full faith and credit.

Suppose a New York same-sex couple, Amy and Alice, seek a marriage license in Massachusetts and convince the marriage license clerk that the appellate courts of New York would agree with two trial court decisions that have held that statutory ban on same-sex marriage in New York unconstitutional under the New York constitution. The clerk issues them a

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71 See David P. Currie, Full Faith & Credit to Marriages, 1 Greenbag 2d 7, 10 (1997) ("In the ordinary tort or contract case the adversary nature of the proceeding ensures that the party who stands to benefit under the appropriate law has the necessary incentive to insist on its application."

72 People v. Greenleaf, 780 N.Y.S.2d 899 (Justice Ct., Town of New Paltz, Ulster County, 2004); People v. West, 780 N.Y.S.2d 723 (same court).

Alternatively, the New York couple might convince the Massachusetts marriage license clerk that the appellate courts of New York would agree with Langan v. St. Vincent Hospital,
license in good faith, and Amy and Alice are married in Massachusetts. After they return to New York, that state's Court of Appeals renders a decision that the state constitution does not require recognition of same-sex marriage, and after the validity of the Amy-Alice marriage arises in a New York court (e.g., Amy seeks an annulment).

Even though the Thomas exception to the duty to give full faith and credit is inapplicable another exception would seem to apply by analogy: the rule that legal determinations by an administrative tribunal can be denied full faith and credit.\(^\text{73}\) The New York court can hold the marriage void under New York law.

Suppose, however, Amy and Alice give up their New York domicile and take up domicile in state Y before any issue arose about the validity of their marriage in Massachusetts. Now Amy seeks an annulment in state Y, relying on New York law. I believe the purpose of the rule allowing a denial of full faith and credit to the Massachusetts marriage record as the equivalent of an administrative determination never subjected to judicial review is, on the facts of this hypothetical case, solely to protect the interests of New York. It no longer has an interest.\(^\text{74}\) State Y's marriage law, which we can assume bars marriage by a same-sex couple cannot constitutionally be applied, because that state had no connection at all to Amy and Alice when they contracted their marriage.\(^\text{75}\) With the reasons for the administrative law exception no longer in existence, state Y should have to accord full faith and credit to the marriage record of Massachusetts unless DOMA has constitutionally erased that obligation. The record is entitled to the same credit Massachusetts would give it, and that state recognizes no basis for the annulment.

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765 N.Y.S.2d 411 (Suprm. 2003), giving full faith and credit to a Vermont civil union to give standing to the survivor of a deceased civil union partner to sue for wrongful death. The decision was based on New York's recognizing same-sex domestic partnerships for purposes of employment benefits and for succession under rent control laws, granting the right of a same-sex partner to become a co-parent by adopting the partner's child, and protecting gays from discrimination along with other minorities. Langan would apply as much to a Massachusetts same-sex marriage as to the Vermont civil union at issue in the case. The marriage license clerk in Massachusetts could conclude that, although technically the domicile state of the same-sex couple, New York, would hold void a same-sex marriage celebrated there, since its courts will give full faith and credit to a Massachusetts same-sex marriage the policy concerns of the Massachusetts choice of law statutes concerning marriage would be satisfied. I believe this logic would appeal to the Supreme Judicial Court that expressed its concerns for fairness for gay persons in Goodridge v. Department of Public Health, 798 N.S. 2d 941 (Mass. 2003), and Opinion of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).

73 University of Tennessee v. Elliott, 478 U.S. 788, 794-95 (1986). This holding was based on the Court's interpretation of section 1738, which the Court obviously considered as validly implementing the Full Faith and Credit Clause. Thus the rule of Elliott applies also when a party cites the Article IV clause as imposing an obligation to give full faith and credit without citing section 1738.

74 See Restatement (Second) of Conflict of Laws § 238, illus. 2 (1971).

75 See text accompanying note , infra.
Amy seeks.

As for DOMA, numerous articles have been written as to its validity, a large majority concluding for one or more constitutional theories that the statute is unconstitutional in many situations.\(^{76}\) This Article will not rehash them except to say that the argument that the Effects proviso of the Article IV clause does not empower Congress to authorize a state to give zero effect to another state’s marriage, even though the proviso may permit some tinkering with the scope of the full faith and credit obligation, is convincing to me.\(^{77}\)

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\(^{76}\) See the Appendix to this Article. A trial court has held Washington’s "little DOMA" unconstitutional under the privileges and immunities clause of the Washington state constitution, applying strict scrutiny because marriage is a fundamental right. Castle v. State, 2004 WL 1985215 (Wash. Super., Sept. 7, 2004).

\(^{77}\) Insofar as DOMA addresses full faith and credit required for a marriage record of a territory or possession of the United States, which I assume will be construed to include the District of Columbia, the source of Congressional power to act is not the Effects proviso of the Article IV clause but provisions of Article II giving the federal government power to manage those governmental units. The same is true when the issue is what full faith and credit the territories and possession must give to state marriage records. Should Congress permit the District of Columbia, for example, to authorize same sex marriage, it surely has the power to provide that no state or other federal territory or possession need give full faith and credit to such a marriage. Not so clear to me is whether, in light of principles of federalism inherent in the union of states, the power of Congress to act is the supreme legislator of the District and of United States territories and possessions enables it to direct those territories to deny full faith and credit to the laws, records, and judgments of the several states.
IV. A NEW DOMICILE HAVING NO CONNECTION TO THE COUPLE AT THE TIME THEY WED AT HOME MUST RECOGNIZE THE MARRIAGE. D.O.M.A. WILL SELDOM CONSTITUTIONALLY AUTHORIZE NON-RECOGNITION

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

This Article now addresses the full faith and credit issues arising when the same sex couple marry in the state of their domicile, which authorizes the same sex union. This is a one-law matter. Pacific Employers does not apply, nor does the Thomas case, as there is no occasion for making a choice of law. The Full Faith and Credit Clause and section 1739, which implements the Clause with respect to non-judicial records, are both applicable should a full faith and credit question arise respecting the marriage record created. This can occur when the same sex couple, having married while domiciled in Vermont or Massachusetts, later move to state Y and take up domicile there. State Y prohibits same sex marriage. If DOMA is held unconstitutional in its attempt to authorize states to deny full faith and credit to marriage records, they should be treated as are judgments under the Article IV clause and section 1738: no public policy exception permits non-recognition.

Although I have indicated my belief that the Effects proviso of the constitutional clause does not authorize Congress to empower a state to give zero credit to a judgment (and hence to a record that is to be treated like a judgment), at this stage of the Article I will assume the contrary: Congress may by virtue of the Effects proviso approve giving zero faith and credit to a judgment and hence to a marriage record. It may authorize a state that had no connection to the couple at they time they wed to deny full faith and credit, although that state's law banning same sex marriage was never constitutionally eligible to be applied at the time of the marriage because the state had no connections at all to the couple.

I am speaking here of DOMA's approving of non-enforcement in the sense of judicial "hands off" — an action equivalent to refusing to domesticate an out-of-state money judgment so that it can be levied on locally. That kind of action leaves the money judgment as an existing judgment. It does not involve the new domicile, state Y, affirmatively acting as if it dissolved the judgment.

Within the concept of judicial hands-off Y can decline to divorce the couple that have set

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

79 See n. , supra., and accompanying text.

80 See text accompanying note , supra.
up domicile there after marrying in Massachusetts or civilly uniting in Vermont. In effect, State Y is saying no more than "go back to the state that married you to undo what that state created." Likewise, if tortfeasor T, who does not reside in state Y, tortuously kills Amy in state Y, Amy's surviving partner/spouse Alice arguably may suffer a dismissal without prejudice for lack of a relationship to the deceased that gives her standing to recover for wrongful death when she sues T in state Y courts because and the dismissal leaves Alice free to sue elsewhere.

In addition to this kind of judicial hands off, D.O.M.A. could permit state Y to apply to the newly domiciled same sex couple its criminal laws under the principle that marital status does not authorize committing a crime, the same rule applied to married couples who have lived in state X all their lives. Thus, if Lawrence v. Texas had not been decided as it was, state Y could prosecute the same sex married couple for sodomy, if a prosecutor could constitutionally obtain evidence of such conduct by them.

DOMA on its face goes far beyond authorizing the kind of actions that can be considered judicial hands off or neutral application of general laws. It purports to authorize state Y to decline to effectuate any "right or claim arising from such relationship," i.e., a same sex marriage. The rule of Allstate Insurance Co. v. Hague that a state must have contacts to a transaction at the pertinent time of interest in order to regulate is based by the court there on the Fourteenth Amendment Due process clause as much as on the Full Faith and Credit Clause. I cannot believe that the Supreme Court will hold that the Effects proviso of the Article IV clause — the source of Congress's power to enact DOMA insofar as that law addresses full faith and

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81 See Rosengarten v. Downs, 802 A.2d 170 (Conn. App. 2002). It is not clear in this case whether the same sex couple were domiciled in Vermont at the time of their civil union there, however.
84 See State v. Brown, 23 N.E. 747 (Ohio 1890) (no defense to prosecution for uncle-niece incest that the pair were husband and wife by virtue of marriage in another jurisdiction permitting such a union).
85 See text accompanying n. , supra.
86 449 U.S. 302, 308 n. 10 (1981) ("This Court has taken a similar approach in deciding choice-of-law cases under both the Due Process Clause and the Full Faith and Credit Clause").
87 There is a practical reason for this. In law prong cases where the contending jurisdictions are a state and the District of Columbia or a state and Puerto Rico, for example, the Full Faith and Credit Clause has no application to one of the jurisdictions but could apply to the State. It would be awkward if a different test applied to determine the contacts the District or Puerto Rico needed to make its law constitutionally eligible to a case as a matter of due process than the test applied to decide what contacts the state involved in the choice of law dispute needed to make its law constitutionally eligible under the definition of a one-law case supplied by the Full Faith and Credit Clause.
credit disputes between sister states -- entitles Congress to abrogate a limitation on state's power to act the Court has held is demanded by the Due Process Clause of the Fourteenth Amendment.

*Hague* considered appropriate the time of interest for examining state contacts in a commercial contract setting as the time of making of the contract and upheld application of Minnesota law there to a contract made in Wisconsin to insure a Wisconsin automobile driver because Minnesota had two contacts to the contracting parties at the crucial time of interest, augmented by a third arising later.

In the case of the Massachusetts or Vermont same sex couple moving to state Y, the new domicile has zero contacts to the marriage at the only possible time of interest for due process purposes when the issue arises as to whether the couple were lawfully married. Even if Amy seeks in a court in state Y to annul her marriage to Alice in Massachusetts when they were both domiciled there, state Y cannot constitutionally void the marriage contract under its own law, although entitlement to a divorce is determined by the law of the couple's domicile at the time of the divorce action. See also Worthington v. Worthington, 352 S.W.2d 80, 81 (Ark. 1962). Anderson v. Anderson, 238 A.2d 45, 46 (Conn. Super. 1967). California has also held it cannot constitutionally alter the property rights of spouses under the marital property law of a former domicile upon their taking up domicile in California, Estate of Thornton, 33 P.2d 1 (Cal. 1934) but can, when the pair are later divorced while still domiciled in California, award some of the property owned by the husband and award it to the wife, because of the state's public policy interest in seeing that a spouse who loses some rights of support at divorce is not left destitute. Addison v. Addison, 399 P.2d 897 (Cal. 1965).

By similar reasoning state Y courts cannot strip Amy of parental rights vested in her in Massachusetts or Vermont when she and Alice were domiciled there with respect to Alice's child

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88 Wheaton v. Wheaton, 431 P.2d 979, 984 (Cal. 1967) stated that courts "uniformly appl the law of the state in which the marriage was contracted" to decide if it can be annulled, although entitlement to a divorce is determined by the law of the couple's domicile at the time of the divorce action. See also Worthington v. Worthington, 352 S.W.2d 80, 81 (Ark. 1962). Anderson v. Anderson, 238 A.2d 45, 46 (Conn. Super. 1967). California has also held it cannot constitutionally alter the property rights of spouses under the marital property law of a former domicile upon their taking up domicile in California, Estate of Thornton, 33 P.2d 1 (Cal. 1934) but can, when the pair are later divorced while still domiciled in California, award some of the property owned by the husband and award it to the wife, because of the state's public policy interest in seeing that a spouse who loses some rights of support at divorce is not left destitute. Addison v. Addison, 399 P.2d 897 (Cal. 1965).

89 I previously wrote that when the state of initial domicile of a cohabiting couple recognized that they were subject to a contract to share property earned by either and the couple left state A and took up domicile in state B, the new domicile could treat the contract as rescinded under B law. Reppy, supra n. at 311. This was incorrect if the contract made during the domicile in state A was an express contract (which is rare among cohabitants). What I should have written was that if the contract recognized in A was — as is far more common — an implied contract, this was properly viewed as a remedy under A law of no fixed duration, unlike an express contract that would continue according to its term. After the couple move, state B could constitutionally apply its law to hold that the continuation of the couple's conduct did not warrant a remedy by way of implying a contract to share property from that conduct.
conceived with Amy's approval after their lawful same sex marriage on the ground that state Y recognizes no relationship between Amy and Alice's biological child. That would be the equivalent of viewing the marriage as having been annulled upon the change of domicile, which Hague forbids. Likewise, state Y cannot bar Alice's child from inheriting as heir of Amy when Amy dies intestate as a domiciliary of state Y.

Suppose Mike and Mark marry in Massachusetts while domiciled there then change their domicile to state Y, where Mike is arrested on a criminal charge along with codefendant D. At the trial, the judge excludes under the marital privilege incriminating statements D, a male, made to his female spouse. Surely Mike's similar incriminating statements made to Mark must be excluded because of the inability of state Y to view their Massachusetts marriage as annulled when the couple moved to state Y. To send Mike to prison because of the damaging effect of his comments to Mark that the jury is allowed to hear is far removed from an action by state Y that can be classified as judicial hands off.

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

Suppose Mark dies with a will leaving all his estate, including his half interest in the couple's co-owned home in state Y, to husband Mike. State Y has an inheritance tax with a marital exemption but no exemption sufficient to shield Mark's interest in the land from tax if Mark were top be viewed as a legal stranger in his relationship to Mike. Can state X slap a tax lien on the land and foreclose it when time to pay the inheritance tax has passed? Situs of land in a state is the strongest of contacts state Y could have if the time of passing of title is the time of interest for due process analysis of what law is eligible to be applied. But foreclosing on the land is necessarily based on affirmatively treating the marriage of Mike and Mark has having been annulled as soon as they took up domicile in state Y, action Hague forbids.

B The Constitution Can recognize No Exceptions from the Contacts Required by The Due Process Clause Because a Marriage is Incestuous or Bigamous

Mark Strasser agrees with these conclusions of mine and, indeed, would not permit state Y to even take judicial hands-off actions based on state Y’s distaste for the same-sex marital statute. He seems to say, however, that state Y could in effect treat as annulled upon change of domicile to State Y an incestuous brother-sister marriage or a polygamous marriage.\(^90\) I believe those of us who argue that the new domicile state largely must respect the same sex marriage of the newly arrived couple must "bite the bullet" and concede that the new domicile state must deal with incestuous and bigamous marriages in the same manner.

\(^{90}\)Mark Strasser, The Challenge of Same-Sex Marriage 135, 142 (Praeger 1999).
What is at issue is a matter of constitutional power of the state to which the same sex couple have moved after marrying in Massachusetts or Vermont. Under Hague if contacts arising for the first time after an incestuous or polygamous marriage entitle State Y, the new domicile, to treat the marriage as void in every respect, State Y necessarily has that power with respect to a same-sex marriage of Massachusetts or Vermont domiciliaries who move to Y. Apparently no case decided after ratification of the Fourteenth Amendment holds that the Due Process Clause is inapplicable to parties to a polygamous or incestuous marriage. That is not surprising.

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

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91 There is some post-1868 dictum that a state can treat as totally void marriages that are incestuous or polygamous. E.g., Penngar v. State. 10 S.W. 305 (1889) (an "evasion" case on its facts); State v Ross, 76 N.C. 242 (1877). Neither court considers whether there are constitutional issues arising when the new domicile in effect annuls a marriage on the basis of its own marriage law upon the couple's arrival there.

92 See Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (city ordinances unconstitutionally abridged free exercise of religion that practiced rituals of animal sacrifices because particular religion was target). Nothing said about the constitutionality of the federal anti-polygamy statute in effect in the Utah Territory before statehood in Reynolds v United States, 98 U.S.145, 163-167 (1878), is inconsistent with the voiding of an anti-polygamy statute as targeted against Mormons. See also Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890), suggesting that Congress itself was targeting the Mormons because of their belief in polygamy.
V. THE PROCESS OF ISSUANCE OF A MARRIAGE LICENSE IS NOT MINISTERIAL

This Article has shown that a judgment entered by a court is entitled to full faith and credit even if there was no hearing at which facts were determined or the applicable law ascertained. Whether entry of a particular judgment was ministerial is not relevant; what is controlling is that the tribunal have the power in appropriate cases to determine facts and make conclusions of law. Since the rules for full faith and credit applicable to judgments apply to marriage records, it is irrelevant that in a particular case the issuance of a marriage license was a ministerial act. For example, the couple are wrinkled and grey-haired; one applicant is very Black, the other white, very light-skinned and blond. The clerk feels no need to inquire into their age or consanguinity and issues a license. A minister promptly marries the pair. The marriage record is entitled to full faith and credit because the clerk, in other situations, will make findings of fact concerning age, consanguinity, existing marital status, and the like.

Prof David Currie, an excellent conflict of laws scholar, is apparently of the opposite view, taking the position that a record created by a ministerial act should not be treated like a judgment for full faith and credit purposes. In effect, he considers the issuance of a marriage license to be per se a ministerial act. He concedes that

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

Currie is wrong to brush aside as irrelevant the fact that the official issuing marriage license is empowered to "ferret out an impediment." And the ferreting process Currie

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93 See also Lockyer v. City and County of San Francisco, 95 P.3d 459 (Cal. 2004), where the majority opinion uses the term "ministerial" a mind-numbing 68 times in discussing the duties and actions of a marriage license clerk. That does not make it true.

94 David P. Currie, Full Faith And Credit to Marriages, 1 Green Bag 2d 7, 10-11 (1997). This Article does agree with Currie that in the case of evasion marriages by same sex couples, full faith and credit need not be given by the domicile state to the marriage record created in a state where a choice of law decision will not be made in an adversarial context that protects the interest of the domicile state in the marriage law the couple seek to evade. The problem is his test of what kind of record is entitled to recognition under the Article IV clause or section 1739 denies recognition as well in one-law marriage cases where the same sex couple were lawfully married in their domicile when only that state's law could constitutionally apply and then take up domicile in a state that bans same-sex marriage.
acknowledges can resemble a trial. It is simply not ministerial.

Thus a New York marriage statute provides in pertinent part:

The town or city clerk is hereby given full power and authority to administer oaths and may require the applicants to produce witnesses to identify them or either of them and may examine under oath or otherwise other witnesses as to any material inquiry pertaining to the issuance of the license, and if the applicant is a divorced person the clerk may also require . . . the production of a certified copy of the decree of divorce . . . .\textsuperscript{95}

If the town or city clerk shall be in doubt as to whether an applicant claiming to be over eighteen years of age is actually over eighteen years of age, he shall, before issuing such license, require documentary proof . . . .\textsuperscript{96}

A practice commentary in McKinney's says of this statute:

The clerk is not required to accept at face value the statements made and documents proffered by the license applicants. The clerk is invested with a measure of judicial or quasi-judicial authority in the marriage license process. The clerk may make any inquiries which are material in the issuance of the license and may refuse to issue a license, even though the application appeared regular on its face, when questions raised by the clerk resulted in disclosure of facts indicating the existence of a legal impediment to the marriage.\textsuperscript{97}

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

In making a determination as to whether or not the parties are authorized to be married under the laws of this State, the register of deeds may require the applicants for license to marry to present certified copies of birth certificates or such other evidence as the register of deeds deems necessary to the determination. The register of deeds may administer an oath to any person presenting evidence relating to whether or not parties applying for a marriage license are eligible to be married pursuant to the laws of this State.\textsuperscript{98}

\textsuperscript{95} N.Y. Dom. Rel. Law § 15(a)(1).
\textsuperscript{96} Id § 15(b)(2).
\textsuperscript{97} Alan D. Scheniken, Practice Commentaries C15:1.
\textsuperscript{98} N.C. Gen. Stat. § 51-8. See also Del. Code tit. 13, § 120 (officer shall examine applicants under oath to determine no impediment to marriage); Ark. Rev. Stat. §§ 9-11-102(b)(1) (clerk shall obtain "satisfactory proof" of parental consent where applicant is underage), 9-11-209 (applicants shall "prove to the satisfaction of the clerk" they are of age); D.C. Code § 46-410 (clerk has "duty . . . to examine any applicant . . . under oath" on issue of
North Carolina officials who issue marriage licenses have on three occasions asked the state’s attorney general to render a formal opinion providing guidance as to how the marriage statutes are to be applied, hardly consistent with their duties being purely ministerial.

In some states, including North Carolina, the official who issues marriage licenses has incurred a civil fine upon shirking his or her duty to investigate the eligibility to marry of an applicant seeking a license. There are a number of reported cases where a court, usually in a writ of mandamus action, has been asked to review the quasi-judicial decision of a clerk or other official leading to the denial of a license to marry. For example, a New York trial court in a
mandamus proceeding held that a marriage license clerk had exceeded his authority in denying a license on the ground that one of the applicant's Mexican divorce was invalid. But the Appellate Division reversed appellate on the ground the clerk had properly exercised his quasi-judicial authority.

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

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

It was noted above trial court decisions in New York have held the state constitution entitles a same sex couple to marry in New York. If the out-of-state applicants for a marriage license are New Yorkers, it appears the marriage license clerk has to guess whether New York appellate courts would agree. How else can the clerk "satisfy himself" or herself that New York prohibits same sex marriages? There are similar trial court decisions in other states that will require the Massachusetts clerk to guess how the appellate courts will respond.

1957) (clerk denied license to epileptic and certified matter to court pursuant to statute empowered to determine if best interest of epileptic and the public would be suffered by permitting him to marry).

102 Alzman v. Maher, 242 N.Y.S. 8, 9 (Suprm. 1930).
104 See text accompanying n. supra.
105 Cote-Whitacre, supra n. , Westlaw printout at p. 4. See also p. 5.
107 Id.
108 See n. supra.
CONCLUSION

Perhaps the most significant recommendation of this Article is that courts must borrow in deciding what credit is owed to state marriage records the rules for giving full faith and credit under the Article VI clause and section 1738 to judgments rather than the rules for full faith and credit to laws.\textsuperscript{109} The major difference in the two approaches is the wide-spread recognition of the power of a court to refuse to apply on the ground it is contrary to the public policy of the forum the law of the only state that is constitutionally eligible in a particular case (resulting in a dismissal of the suit) along with the equally wide-spread recognition that there is no similar power of a state to refuse to enforce a money judgment from another state because it is based on law that is equally repugnant to the public policy of the forum.

If DOMA is unconstitutional, my theory bars a same sex couple's new state of domicile from taking a judicial hands off approach to the same sex marriage record of the couple's former domicile, where they wed. Those who believe that law prong jurisprudence applies to marriage records must either concede the contrary or urge that the contra public policy doctrine is an unconstitutional aspect of the law prong cases. The other situation where this dichotomy appears involves the obligation to give full faith and credit to a same sex marriage record from Massachusetts where the couple married there to evade a bar in their domicile but moved to a third state before the issue of validity of the marriage arose. By analogy to the Supreme Court's rules developed for judgments, the third state must give full faith and credit to the marriage record of Massachusetts.

Also significant is the theory developed in this Article that DOMA cannot apply, even if constitutional, to disputes as to what credit is owed by one state to the same sex marriage record of another state in situations where both the law of the state of celebration of the same sex marriage and the law of the domicile of the couple can be constitutionally be applied. Instead, rules developed by the Supreme Court apparently as a federal common law of full faith and credit apply. Since the only apparent source of power of Congress to enact DOMA to govern disputes between sister states as to the validity of same sex marriage is the Effects proviso of the Full Faith and Credit Clause, and it does not apply to the marriage record, neither can any statute enacted by Congress to implement the Clause. If the marriage law of the state creating the marriage record does not permit consideration of the law of the domicile, it is \textit{Thomas}, with its weighing of interest test, and not DOMA that may allow the domicile state to void the marriage. It is also quite possible that the freedom of choice \textit{Thomas} gives to the state asked to recognize the same sex marriage is qualified by the "real interest" test of \textit{Hughes v. Fetter}.\textsuperscript{109}

APPENDIX

Articles that conclude DOMA is unconstitutional in whole or in part include or that discuss constitutional issues concerning same sex marriage that relate to DOMA's constitutionality include:

Paige E. Chabora, Congress’ Power under the Full Faith and Credit Clause and the Defense of Marriage Act of 1996, 76 Neb. L. Rev. 604 (1997) (concluding that DOMA an unconstitutional overreach by Congress whether one ascribes to the so-called "ratchet theory"—whereby Congress can only expand full faith and credit—or the author's "procedures theory"—whereby Congress can prescribe the procedural manner by which full faith and credit shall operate).

Stanley E. Cox, DOMA and Conflicts of Law: Congressional Rules and Domestic Relations Conflicts Laws, 32 Creighton L. Rev. 1063 (2002) (stating that DOMA is an unconstitutional exercise of conflicts powers because a) it authorizes unconstitutional use of the public policy exception and, arguably, the conflicts of laws provision; and b) the "effects clause" does not give Congress the power to validate or invalidate acts or judgments based on the content of the state law or judgment).

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

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

Melissa A. Glidden, Federal Marriage Amendment, 41 Harv. J. Legis. 483 (2004) (claiming that DOMA can be challenged as unconstitutional only after the same-sex marriages are recognized by Massachusetts).

Kathy T. Graham, Same-Sex Unions and Conflicts of Law: When 'I Do' May be Interpreted as 'No, You Didn't!', 3 Whittier J. Child & Fam. Advoc. 231 (2004) (saying the DOMA may be unconstitutional if interpreted to give states the option not to enforce the sister-state money judgments).

Jon-Peter Kelly, Note, Act of Infidelity: Why the Defense of Marriage Act is Unfaithful to the Constitution, 7 Cornell J.L. & Pub. Pol'y 203 (1997) (arguing that DOMA fails to satisfy the requirements of five modes of constitutional doctrine articulated by the U.S. Supreme Court, i.e. 1) full faith and credit; 2) substantive due process; 3) equal protection; 4) rational basis review; and 5) the 10th Amendment).

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


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

Seth F. Kreimer, *Territorial and Moral Dissensus: Thoughts on Abortion, Slavery, Gay Marriage and Family Values*, 16 QLR 161 (1996) (contending that the Privileges and Immunities Clause only requires states to insure that visitors to a state be granted the same privileges as the citizens of that state).


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

Note, *Litigating the Defense of Marriage Act: the Next Battleground for Same-Sex Marriage*, 117 Harv. L. Rev. 2684 (2004) (stating the DOMA can be considered by the Supreme Court and that it should be found unconstitutional because its heterosexual-exclusive definition of marriage is motivated by animus and denies homosexuals legal benefits and protections afforded to heterosexuals, thereby running afoul of equal protection principles).

James M. Patten, Comment, *The Defense of Marriage Act: How Congress Said ‘No’ to Full Faith and Credit and the Constitution*, 38 Santa Clara L. Rev. 939 (1998) (arguing that DOMA is unconstitutional because it strays from the Framers' intent and because Congress was never given authority to enhance or circumscribe the FFCC).

Melissa Provost, Comment, *Disregarding the Constitution in the Name of Defending Marriage: The Unconstitutionality of the Defense of Marriage Act*, 8 Seton Hall Const. L.J. 157 (1997) (contending that DOMA's purpose is perpetuate animosity toward homosexuals, so it should not
survive judicial scrutiny because it does not seek to protect a "clear and substantial federal interest." Moreover, Section 3 of DOMA impermissibly intrudes into family and property laws, realms traditionally reserved to states).


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


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


Robert A. Sedler, *The Constitution Should Protect the Right to Same-Sex Marriage*, 50 Wayne L. Rev. 975 (2004) (arguing that the Supreme Court should interpret the Equal Protection Clause to forbid states from unconstitutionally discriminating against same-sex individuals by denying them the fundamental right to marry).

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

Mark Strasser, *DOMA and the Two Faces of Federalism*, 32 Creighton L. Rev. 457 (2002) (stating that DOMA is unconstitutional because it targets a disfavored minority, then articulating the potential fallout if DOMA was not struck down, e.g. the rescission of no-fault divorce, forum-shopping for favorable property and support laws, and refusals to recognize judgments
based on non-overlapping causes of action).


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


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

Evan Wolfson and Michael F. Melcher, Feature, *A House Divided*, 58-JAN Or. St. B. Bull. 17 (1998) (noting that DOMA is unconstitutional because it ignores the Constitutional intent of full faith and credit, violates the principles of equal protection principles and privileges and immunities, infringes on the fundamental rights to marry and travel, and disrupts interstate commerce).