The Defense of Marriage Act and the Recognition of Judgments
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The federal Defense of Marriage Act\(^1\) (DOMA) is an amendment to §1738 of Title 28 of the United States Code. Section 1738 was adopted by Congress pursuant to power granted to it by Section 1 of Article IV of the Constitution (the "Full Faith and Credit Clause." ) That section 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.

Section 1738 provides the means for authenticating "The Acts of the legislature of any State....." and "The records and judicial proceedings of any court of any such state....." Then, in its third paragraph, it provides as follows:

"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...as they have by law or usage in the courts of such state...from which they are taken."

DOMA withdraws §1738's obligation of recognition and enforcement for "...any...public act, record or judicial proceeding of any other state...respecting a relationship between persons of the same sex that is treated as a marriage...or a right or claim arising from such a relationship." I am concerned in this paper, with DOMA's effect on a state's obligation to recognize and enforce a sister state's judgment ("judicial Proceeding")

Of course no statute can amend the Constitution of the United States. Thus, although a sister state's judgment recognizing a same sex marriage may no longer fall within the purview of §1738, it still enjoys the protection afforded by Article IV itself. The question I will discuss, then, is: what does Article IV itself require with respect to the recognition of foreign judgments?

I shall begin by contrasting the Federal constraints imposed upon the States in making choice of law decisions with those which govern their obligation to recognize and enforce foreign judgments.

On its face, the current version of §1738 appears to require the same sort of deference to state laws (the acts of state legislatures) as it does to judgments (judicial proceedings.) In other words, it appears to say that the section and the obligations it imposes are applicable equally to choice of law decisions and to the obligation to recognize foreign state judgments. But that is certainly not the case. Why not?

\(^1\) §1738C, Title 28, United States Code
The explanation is that the current version of §1738 dates from 1948. The original version, adopted in 1790 and changed only twice and in very minor ways from then until the ‘48 revision, provided the procedure for authenticating "acts of the legislature," and the "records and judicial proceedings of the courts or any state," and concluded as follows:

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

Note, the last sentence applied only to "records and judicial proceedings," omitting any reference to "acts of the legislature". Professor Brainerd Currie had this to say about the omission and about the 1948 amendment to §1738:

"The reason for the omission [in the original act] can only be surmised, but the most natural explanation would seem to be that the Congress simply had no idea what to say on the general question of the effect that should be given in one state to the public acts of another. In 1948 the revisers of the Judicial Code presumed to supply the omission by a notably footless piece of draftsmanship. They simply added the word "acts" to the sentence prescribing the effect of records and judicial proceedings, explaining that "[t]his follows the language of Article IV section 1 of the Constitution." They seem to have been quite oblivious of the fact that there may have been a good reason for the failure of the First Congress to prescribe the effects of public acts. They seem to have had no conception of the difficulties involved in prescribing the effect that ought to be given to the laws of one state in the courts of another. The effect of the revision was to apply to statutes the same formula which the First Congress had prescribed for records and judicial proceedings.... This formula has proved reasonably workable as to judgments.... As applied to public acts it is simply unintelligible. Despite the enactment of the revision the power of Congress to prescribe the effect of public acts remains, for all practical purposes, unexercised."  

Until 1948, then, no statute purported to define the sort of deference Article IV required one state give to the laws of another. The Supreme Court was guided only by Article IV itself. How has the Supreme Court interpreted the reach of that Article in choice of law cases, and are there any lessons we may draw from those decisions which would be applicable to the treatment of judgements in the absence of statutorily imposed obligations?

Choice of law questions arise in such a multitude of circumstances that the Court has had to struggle to define constitutional standards. It made a couple of false starts, and has had to modify as it has gone along. The bulk of the cases which led to the current standards were

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2 Statutes at Large, Volume 1, P. 122. First Congress, Session II
decided before 1948, and in 1958 Professor Currie summarized what we had learned from the Court’s decades of effort as follows:

"...a state court's choice of law will be upset under the Full Faith and Credit Clause or the Due Process Clause only when the state whose law is applied has no legitimate interest in its application."\(^4\)

Since 1958, the Court itself has summarized the standards imposed by Article IV and the Due Process clause of the Fourteenth Amendment. In *Allstate v. Hague*\(^5\) Justice Brennan, speaking for a plurality of the Court said:

"The lesson [from certain prior opinions] is that for a state's substantive law to be selected in a constitutionally permissible manner, that state must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."

Applying that standard to the facts in *Allstate*, the Court decided that Minnesota, by applying its own law to an insurance claim, had not breached its constitutional obligations, even though there were few and dubious contacts with that state.

This very flexible plurality standard was adopted by a majority of the Court in *Phillips Petroleum v. Shutts*\(^6\) in deciding that Kansas had unconstitutionally applied its own law to oil and gas leases in the absence of any Kansas interest in those leases or in the real property involved.

In neither of these two choice of law cases decided since 1948 (*Allstate* and *Shutts*) was §1738 cited, affirming, apparently, Professor Currie's opinion that the application of that section to choice of law problems was "simply unintelligible." The Court relied, instead, upon its prior decisions, and the standard it articulated has been built upon those foundations.

A state's obligations with respect to foreign judgments have been regulated by what is now §1738 since the beginnings of the republic and are much more exacting than those imposed on its choice of law decisions. In *Baker v. General Motors*,\(^7\) Justice Ginsburg, speaking for a majority of the Court, summarized them as follows:

"Our precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments. ‘In numerous cases this Court has held that credit must be given to the judgment of another state although the forum would not be required to entertain the suit on which the judgment was founded’ Milwaukee County, 299 U.S., at

\(^4\) Ibid, p. 271
\(^5\) 449 U.S 302 (1981)
\(^6\) 472 U.S 797 (1985)
\(^7\) 522 U.S 222 (1998)
277. The Full Faith and Credit Clause does not compel "a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate. ' Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S 493, 501 (1939); see Phillips Petroleum Co. v Shutts, 472 U.S. 797, 818-819 (1985). Regarding judgments, however, the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. For claim and issue preclusion (res judicata) purposes, in other words, the judgment of the rendering State gains nationwide force. See, e.g., Matsushita Elec. Industrial Co. v. Epstein, 516 U.S. 367, 373 (1996); Kremer v. Chemical Constr. Corp., 456 U. S 461, 485 (1982)....

A court may be guided by the forum State's "public policy" in determining the law applicable to a controversy....But our decisions support no roving "public policy exception" to the full faith and credit due judgments. See Estin 334 U.S. at 546. (Full Faith and Credit Clause "ordering submission...even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it.) Fauntleroy v. Lum, 210 U.S. 210 U.S. 230, 237 (1908) (judgment of Missouri court entitled to full faith and credit in Mississippi even if Missouri judgment rested on a misapprehension of Mississippi law)....

The court has never placed equity decrees outside the full faith and credit domain. Equity decrees for the payment of money have long been considered equivalent to judgments at law entitled to nationwide recognition. ... see...A. Ehrenzweig, Conflict of Law , § 51, p.182 (rev. Ed. 19622) (describing as 'indefensible' the old doctrine that an equity decree, because it does not "merge" the claim into the judgment, does not qualify for recognition.) We see no reason why the preclusive effects of an adjudication on parties and those 'in privity' with them, i.e., claim preclusion and issue preclusion (res judicata and collateral estoppel) should differ depending solely upon the type of relief sought in a civil action. [In a footnote Justice Ginsburg quotes from Wright, Miller and Cooper, Federal Practice and Procedure §4467, p. 635 (1981): " Although '[a] second state need not directly enforce an injunction entered by another state...[it] may often be required to honor the issue preclusion effects of the first judgment'"

Justice Ginsburg does note that the enforcing state does have control over the means of enforcement of sister state judgments. She says

Full faith and credit, however, does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the even-handed control of forum law... [Emphasis added]

Orders commanding action or inaction have been denied enforcement in a sister State when they purported to accomplish an official act within the exclusive province of
that other state or interfered with litigation over which the ordering State had no authority. Thus a sister State's decree concerning land ownership in another State has been held ineffective to transfer title...although such a decree may indeed preclusively adjudicate the rights and obligations running between the parties to the foreign litigation...."

It seems to me that DOMA, by excepting certain judgments from the protection of §1738, will force us to answer two questions: 1. Given that all of the cases defining a state's obligation to recognize and enforce foreign judgments have been decided with §1738 in place, are those obligations, as summarized by Justice Ginsburg, constitutionally mandated or merely statutory? 2. If they are, at least in part, statutory, what does the Constitution itself require?

I shall discuss the questions in reverse order because my answers to the second question will help frame the answer to the first question.

If we conclude that the enforcement obligations as the court has defined them to date are a product of the statute, let me propose one line of argument which might follow.

1. It would have been a possible interpretation of §1738 that its phrase: "[judicial Proceedings] shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence [they]... are or shall be taken" could require the court of the enforcing state "to sit as if it were a court of the rendering state," or at least require it to apply some, if not all, of the enforcement rules of that state (its statute of limitations, for example.) The section has not been so interpreted. As the quotation from Baker makes clear, an enforcing state may employ its own enforcement rules. Only the rules of preclusion of the rendering state "travel with" the judgment. (See the next to last paragraph in the Baker excerpt.) The obligation to recognize and enforce means that the preclusion rules of the rendering state will prevail if those rules conflict the preclusion rules of the enforcing state. Section 1738, as interpreted, is essentially a federal choice of law statute.

2. We know what the Constitution requires with regard to choice of law. Absent a federal statute, a state may apply its own law if it has an interest in the outcome. If §1738 is a choice of law statute, then to the extent that it is repealed, a state may apply its own rules of preclusion to a judgment whenever it has an interest in the outcome.

3. Although §1738, in one form or another, has been with us since 1790, it has not governed all of the results in the recognition of judgment cases. The Court has decided that §1738 does not require a state to apply rendering state's statute of limitations on judgments even if doing so would bar a suit on a foreign judgment which could still have been enforced under the statute of limitations in the rendering state. However, it may not create a statute of limitations which discriminates against sister states' judgments. In Watkins v. Conroy, in a Per

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Curiam opinion, the court said:

"[Appellant's] complaint is simply that Georgia has drawn an impermissible distinction between foreign and domestic judgments. He argues that the statute is understandable solely as a reflection of Georgia's desire to handicap out-of-state judgment creditors. If appellant's analysis of the purpose and effect of the statute were correct, we might well agree that it violates the Federal Constitution. For the decisions of this Court which appellee relies upon do not justify the discriminatory application of a statute of limitations to foreign actions."  

The court went on to say that the statute of limitation in question, although it treats foreign judgments differently, does not deny full faith and credit because it would enforce the judgment if the judgment creditor took advantage of the rendering state's procedure for renewal of judgments.

A non-discrimination policy has also been applied to choice of laws decisions. Choice of law

4. Traditional choice of law rules include a "public policy" exception. As Justice Ginsburg pointed out, there has been no public policy exception to the requirement of recognition of judgments. If §1738 is construed as a choice of law statute, does that mean that repealing it, will introduce a "public policy" exception there? The constitutionality of the public policy exception has been questioned. If it is constitutional, then it might well apply. Note, however, the context in which the issue would be raised. The question would be whether public policy barred the application of the rendering state's preclusion rules. Whether a court could deny recognition to a judgment because the substantive law on which it was based is antagonistic to the enforcing state's public policy would be an open question, one likely to be answered in the negative.

It bears noticing that treating §1738 as a choice of law statute subject to a non-discrimination rule would not have changed the outcome of one of the landmark cases,
Fauntleroy v. Lum,\textsuperscript{14} the facts of which were discussed by Justice Ginsburg. In that case, Mississippi’s own preclusion rules would doubtless have prevented the re-opening of the Missouri judgment had it been handed down by a Mississippi court. Not only, then, did the Mississippi court fail to apply the preclusion rules of Missouri, it denied the foreign judgment the protection of its own rules.

In short, even if §1738 is construed as a choice of law statute, its repeal would not leave states unconstrained in their treatment of foreign judgments. Their range of discretion would be expanded but not unlimited. Moreover, even if a state were allowed to apply its own rules of preclusion, it would have to modify those rules carefully and in a non-discriminatory way to realize the purposes of DOMA.

This brings me to the first question mentioned above, namely: are our current rules on the recognition of judgments constitutionally mandated or merely statutory? Phrased another way, is §1738 simply an articulation of what the Article IV itself requires?

Justice Holmes was apparently of the opinion that the statute reflected a constitutional, or at least a pre-existing, standard. Writing for the majority in Fauntleroy v. Lum\textsuperscript{15} he said:

"The doctrine laid down by Chief Justice Marshall was ‘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, and that whatever pleas would be good to a suit thereon in such State, and none other, could be pleaded in any other court of the United States.’ Hampton v. McConnel, 3 Wheat. 234....We assume that the statement of Chief Justice Marshall is correct. It is confirmed by the Act of May 26, 1790, c. 11, 1 Stat. 122...providing that the said records and judicial proceedings shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from which they were taken."

The clear implication of this statement is that the statute merely confirmed a pre-existing duty of recognition for foreign judgments.

The authority he cited, however, does not quite bear him out. Hampton v. McConnel is a one paragraph opinion containing but two sentences:

"This is precisely the same case as that of Mills v. Duryea; the court cannot distinguish the two cases. The doctrine there held was, [hereafter is the phrase quoted by Mr. Justice Holmes.]

As Chief Justice Marshall pointed out, Mills v. Duryea\textsuperscript{16} is a seminal case for the

\textsuperscript{14} 210 U.S. 230 (1908)
\textsuperscript{15} 210 U.S. 230 (1908)
\textsuperscript{16} 7 Cranch 481 (1813)
obligation to recognize and enforce judgments. In *Mills*, the plaintiff had recovered a judgment against the defendant in New York and sought to enforce it in the District of Columbia. The defendant pleaded *nil debit* (that is, he denied the obligation) but did not deny the existence of the judgment (which he might have done by pleading *nulli tien record* (no such record)). Justice Story, speaking for the court, cited Article IV and the act of May 26, 1790 (now §1738) and gave them, together, essentially, the meaning we ascribe to them today. He said:

"Congress have therefore declared the effect of the record by declaring what faith and credit shall be given.

It remains only then to inquire, in every case, what is the effect of a judgment in the state where it is rendered? In the present case...it is beyond all doubt, that the judgment of the supreme court of New York was conclusive upon the parties in that state. It must, therefore, be conclusive here also...

The right of a court to issue execution depends upon its own powers and organization."

Mr. Justice Story's opinion relies heavily upon the statute, and not upon any pre-existing understanding about the meaning of Full Faith and Credit. In dissent, Justice Johnstone argues that "A judgment of an independent unconnected jurisdiction is what the law calls a foreign judgment, and it is everywhere acknowledged, that *nil debit* is the proper plea to such a judgment.... [F]aith and credit are terms strictly applicable to evidence"

But if the authority cited by Justice Holmes does not bear him out, I nonetheless accept his conclusion that §1738 reflects a constitutional standard.

The phrase "full faith and credit" appears in both the Articles of Confederation and the Constitution, and the Articles gave congress no power to enforce the provision, nor to define it or determine its effects. This suggests that there was some common understanding about the meaning or the phrase. According to Professor Currie, that is not the case.

So far as appears from the rather extensive literature on this subject, "full faith and credit" was not a "term of art" with a settled meaning. It is difficult to read into the clause, in its original context, anything more than an injunction to render unto Caesar the things which be Caesar's - without guidance as to how ownership is to be determined in the absence of legislation.17

In a footnote, Currie refers to authority "establishing that the phrase, or its equivalent, was indeed a "term of art" relating to the effect of ecclesiastical judgments in the common law courts." (Emphasis added.)

Nor can we learn much from Americana historical records about the meaning of the phrase. It does seem to me that these records reveal one thing at least: making judgments

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17 Currie, op.cit. P 199.
portable was a particular concern to the lawyers participating in the drafting of our basic documents. The last paragraph of Article 4 of the Articles of Confederation provided:

Full faith and credit shall be given in each of these states to the records, acts, and judicial proceedings of the courts and magistrates of every other state.18 (Emphasis added.)

No reference to the legislation of sister states was included, suggesting that the drafters' principle concern was the effect of judgments across state lines.

In his dissent in Mills (above), Mr. Justice Johnstone suggests that the phrase had some meaning in the international law of the time. James Wilson argued in the Constitutional Convention that congress should be given power to declare the effect of the article and that without such an authorization, "the provision would amount to nothing more than what now takes place among all independent nations."19 It was clear that he, at least, desired something more than that. He and William Johnson also "Supposed the meaning [of the committee draft, including the phrase] to be that judgments in one state should be the ground of actions in other states; and that acts of the legislatures should be included for the sake of acts of insolvency, etc."20 Again, their focus was on giving some teeth to the obligation to recognize judgments.

The reason is clear. Should some states become havens for judgment debtors, the effect on commerce would be substantial. And if defendants successful in one state should face re-litigation if they traveled to another, the effect on freedom of travel, and upon national unity, would be in jeopardy. The needs of a federal union certainly required something more than the deference required among nations by international law.

Perhaps the Convention was relying on the congress not only to implement Article IV but also to give it meaning, especially with regard to the recognition of judgments. This the Congress did on May 26, 1790. And of course, many of the member of the First Congress had been delegates to the Convention as well.

More persuasive to me than historical arguments or concerns about whether a phrase was a "term of art" is what has followed the adoption of the statute of 1790. Conflict of Laws is a subject filled with open ended questions and ambiguous standards. An exception is the law with relation to the obligations to enforce judgments. While it still has its uncertainties, §1738 has been with us a long time, has provided some clear standards and has served us well. Indeed, it has done us better service than a many provisions clearly contained in the Constitution. We sometimes dismiss the "interest in finality" as subordinate to a lot of "substantive" interests. But protecting it has provided great benefits to the thousands of people who have been involved in

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19 Prescott, Arthur Taylor, *Drafting the Federal Constitution* Louisiana State University Press (1941) P. 725

litigation. It is also a necessary ingredient in the preservation of our federal system.

If the Court decides that §1738 does not reflect the meaning of Article IV with regard to judgments, it will be obliged to decide what that meaning is. Surely sister state judgments, even unpopular ones, may not simply be ignored. I have suggested that without the statute, courts of enforcing states (if they have any interest in the litigation) might be free to substitute their own rules of preclusion to foreign judgments. But they must do so without discrimination and without reference to the law underlying the judgments. This will still make most judgments enforceable. But it will also raise a great many issues which are now at rest. I don’t think the benefit of abandoning §1738 is worth the cost.

I have one other point to make. The decision about whether the statute is a reflection of the meaning of the Constitutional provision may depend upon the context in which the issue arises. Suppose one partner in a same sex marriage sues another in tort, the defendant's insurance company asserts interspousal tort immunity, the issue of their marriage is fully and fairly litigated in a state allowing such marriages, and the defendant (i.e., the insurance company) wins. Will its victory be honored in another state when the plaintiff tries again in a new jurisdiction? This is only one scenario in which the existence of a same sex marriage is a material fact but not the only or even central issue. I suggest that the contestants in such a case may not be concerned about the larger social issues. The defendant may simply want to defend his judgment against someone who wants two bites at the apple, and the equities will favor the defendant. Conversely, the decisions may be made in the context of the debate about the larger social policy issues. And the precedent set may serve people like the defendant in my scenario very poorly.