FULL FAITH AND CREDIT FOR DUMMIES

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I. INTRODUCTION

The purpose of this article is to summarize the history and current interpretation of the Full Faith and Credit Clause of the United States Constitution.1 Because the article is based on a presentation at a conference on interjurisdictional recognition of same-sex marriages, it will pay particular attention to the application of the Full Faith and Credit Clause to marriage issues. Section II of the article will briefly summarize the history of full faith and credit jurisprudence and demonstrate how that history explains some apparent anomalies in the modern administration of the clause. Section III will discuss the contemporary interpretation of the clause. Section IV will examine how the modern interpretation of the clause bears on issues of marriage. Section IV will also examine the Defense of Marriage Act ("DOMA")2 and how that act affects the recognition in each state of same-sex marriages performed in other states. Section V will conclude with some general remarks about the probability of the historical or modern interpretation of the Full Faith and Credit Clause having any bearing on the result of the constitutional debate over restrictions on same-sex marriage.

One word of caution is in order. As its title indicates, this article is intended to describe the basics of full faith and credit jurisprudence rather than to be a detailed exposition of the historical or modern jurisprudence of the clause.3 I have written numerous articles on the core issues of the interpretation of the Full Faith and Credit Clause, as well as on the application of the clause to interjurisdictional recognition of marriage and other domestic relations issues.4 Putting it

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1. U.S. Const. art. IV, § 1. The article is prompted by the decision of the Massachusetts Supreme Judicial Court in Goodrich v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003), invalidating restrictions on same-sex marriage under the Massachusetts Constitution.


3. Thus, the title is not intended as an insult to any particular individual or group, though some of the statements made about the clause in the popular media would eminently justify some seriously derogatory remarks, which I hope to make as we go along.

bluntly, there is nothing new here because there is nothing new to say. Therefore, those who wish a more elaborate exposition of the historical or modern full faith and credit jurisprudence, including the massive literature spawned by the same-sex marriage issues over the last eleven years, will have to consult other sources.5

II. A CONCISE HISTORY OF THE FULL FAITH AND CREDIT CLAUSE

The text of the Full Faith and Credit Clause provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."6 The history of the clause indicates that the first sentence was designed to give only a minor evidentiary command to the states. Translated into modern parlance, the first sentence of the clause commanded that the public acts (or statutes), non-judicial records, and judicial proceedings (or judgments) of each state had to be admitted into evidence as conclusive proof of their own existence and contents—i.e., as proof that such a statute, record, or judgment actually existed and dealt with the matters contained in the (properly authenticated) copy of the statute, record, or judgment presented to the court that was being asked to recognize it. The first sentence did not command that any particular effect be given to the statute, record, or judgment; nor did it contain conflict-of-laws or jurisdictional commands to the states concerning the statutes, records, or judgments of other states.7 The evidence also

5. Much of the literature through 1998 is cited in Whitten, Doma, supra note 4. The literature specifically applicable to same-sex marriage is largely adversarial rather than objective, and nothing written since 1998 adds anything to the general understanding of the issues under the clause, either as applied to marriage or as applied to any other issue. Two recent symposia will provide a reasonable picture of the current literature. See Symposium, Same-Sex Marriage Symposium Issue, 18 B.Y.U. J. PUB. L. 273-693 (2004); Symposium, The Right to Marry: Making the Case to go Forward, 13 WIDENER L. J. 691-877 (2004).


7. The evidence for the original understanding includes the fact that the words "faith" and "credit" were terms of evidence drawn from English law, that the Full Faith and Credit Clause of the Articles of Confederation, which was more limited than the constitutional clause, was interpreted in the fashion described in the text, that the first
indicates that the significant power being granted to the national government in the clause was granted in the second sentence to Congress in the form of the power to declare the effect that state statutes, records, and judgments had to be given in other states.\(^8\)

For over a century after its creation, the case law under the Full Faith and Credit Clause developed under the first implementing statute enacted by Congress under the clause. That statute, enacted in 1790, remained essentially the same until 1948, when it was amended into its present form. As originally enacted, the statute provided:

That the acts of the legislatures of the several states shall be authenticated by having the seal of their respective states affixed thereto: That the records and judicial proceedings of the courts of any state, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken.\(^9\)

The first part of this statute provides how state statutes and judicial records and proceedings are to be authenticated so that they may be admitted into evidence in other states. The last sentence employs the words faith and credit, which also appear in the first sentence of the constitutional clause, and the use of these terms gave rise to an extensive debate over whether Congress was attempting in the statute to declare the non-evidentiary effect that state judicial records and proceedings were to have in other states. Most courts and judges considering the question concluded that Congress was \textit{not}, in the "such faith and credit phrase," attempting to declare a non-evidentiary effect for state judgments in other states. To these courts, it was absurd to suppose otherwise, because the words "faith" and "credit" were understood as evidentiary terms, and for Congress to use them in an attempt to declare the non-evidentiary effect that state judgments

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sentence of the clause was treated as unimportant in the debates in the constitutional convention and the ratification literature, and that a majority of cases and judges discussing the first implementing statute to the Full Faith and Credit Clause discussed the first sentence in this fashion. See, e.g., Whitten, \textit{Doma, supra} note 4, at 266-332; Whitten, \textit{Choice of Law: Full Faith and Credit, supra} note 4, at 12-56.


9. 1 Cong. Ch. 11, May 26, 1790, ch. 11, 1 Stat. 122.
should have in other states would be to use the words in a sense different than they had been used in the first sentence of the Full Faith and Credit Clause of the Constitution. For example, Chief Justice John Marshall stated for the United States Circuit Court in Peck v. Williamson:

To us it appears very clear that the constitution makes a pointed distinction between the faith and credit, and the effect, of a record in one state when exhibited in evidence in another. With respect to the former, the Constitution is peremptory that it must have full faith and credit; with respect to the latter, it provides that Congress may prescribe the effect thereof. Unless Congress had prescribed its effect, it should be allowed only such as it possesses on common-law principles. In our opinion Congress have not prescribed its effect. To suppose that they have is to believe that they use the words “faith and credit” in a sense different from that which they have in the clause of the Constitution upon which they were legislating.

Despite a majority view in favor of the narrower “evidentiary meaning” of the implementing statute, the United States Supreme Court in Mills v. Duryee held that the last sentence of the implementing statute meant that the courts of every state had to give the same effect to the judgments of other states as the latter would have in the courts of the state that rendered them. However, the Court did not in Mills contradict in any way the evidentiary understanding of the first sentence of the clause.

In the remainder of the nineteenth century, the law of interstate judgment enforcement developed in accord with the interpretation of the implementing statute in Mills. Significantly, however, the “such faith and credit” command of the statute applied only to state judicial records and proceedings, not state public acts, or statutes. Thus, states were not required by the implementing statute to give any effect to the statutes of other states. Even more significantly, no case until 1887 even suggested that the first sentence of the Full Faith and Credit Clause required any effect (other than the evidentiary effect

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10. See Whitten, Doma, supra note 4, at 297-327 (discussing the early state and lower federal court decisions interpreting the implementing statute); Whitten, Choice of Law: Full Faith and Credit, supra note 4, at 41-49 (same).
11. 19 F. Cas. 85 (C.C. N.C. 1813).
12. Peck v. Williamson, 19 F. Cas. 85 (C.C. N.C. 1813)
13. 11 U.S. (7 Cranch) 481 (1813).
14. See Whitten, DOMA, supra note 4, at 327-29 (discussing Mills).
15. Mills was undoubtedly wrong. For a discussion of the correct interpretation of the implementing statute, see Whitten, DOMA, supra note 4, at 330-32; Whitten, Choice of Law: Full Faith and Credit, supra note 4, at 52-53.
described above) to be given to state statutes in other states, and no case until the twentieth century actually held that a non-evidentiary effect had to be given to state public acts in other states. If the first sentence of the clause had been originally understood to embody conflict-of-laws commands to the states concerning the statues of other states (as it has been interpreted in the twentieth century), the understanding surely would have surfaced much earlier than it ultimately did. The fact that the Supreme Court came so late to this interpretation of the first sentence is, therefore, powerful evidence that the Court has incorrectly expanded the clause beyond its originally understood boundaries.

When the Court first got around to requiring that states give effect to the statutes of other states in the twentieth century, it was initially inclined to incorporate the “territorial rules” of the vested rights system of conflict of laws into the clause. The Court's approach “evolved” from this territorial position to a balancing approach in which it weighed the interests of the concerned states in having their law applied. This approach, in turn, was ultimately displaced by the modern approach discussed in the next section of this article, under which a state is allowed to apply its own law to a case (as opposed to the statute of another jurisdiction) any time it has sufficient contacts with the parties or events giving rise to suit to give it a legitimate interest in doing so.

Although the Court's contemporary interpretive approach to the first sentence of the clause is minimalist in nature, it nevertheless goes further than the history of the clause will support. Even so, there is little chance that the Court will return to the original meaning of the clause. The main value of the history of full faith and credit is, therefore, to explain why the Court has arrived at the interpretation that it has with different portions of the clause. The history is also valuable to refute certain kinds of modern arguments for an expanded scope of the first sentence of the clause that are framed in historical

16. See Whitten, DOMA, supra note 4, at 343-45 (discussing the Supreme Court decision in Chicago & Alton R.R. v. Wiggins Ferry Co., 119 U.S. 615 (1887)).
17. See id. at 345-46.
18. See Whitten, Choice of Law: Full Faith and Credit, supra note 4, at 5-7 (discussing the early cases).
19. See id. at 7. The expansion of the Full Faith and Credit Clause was undertaken under the leadership of Justice Brandeis. The Story of Brandeis's efforts is well described in Edward A. Purcell, Brandeis and the Progressive Constitution 151-53, 183, 184, 303 (2000).
20. See Whitten, Choice of Law: Full Faith and Credit, supra note 4, at 7-9 (discussing the Court's halting approach toward the “legitimate state interest” test in a variety of cases).
terms. Although the parties making these arguments would doubtless recoil in horror at any notion that they support an interpretive method grounded in original intent, they nevertheless often state their arguments in a manner that is explicitly historical. When they do this, they never perform a detailed historical examination of the clause to support their arguments, because they cannot. They do, however, sometimes lift certain pieces of the history out of context in order to make an adversarial point. The history summarized above is valuable in helping to assess where they err.

One result that sometimes seems anomalous to modern observers of the Full Faith and Credit Clause is that the Court has required more vigorous enforcement by states of the judgments of other states than it has required to other states' statutes. For example, in its most recent decision on full faith and credit to state public acts, the Supreme Court noted that:

"[o]ur precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments." Baker v. General Motors Corp., 522 U.S. 232 (1998). Whereas the full faith and credit command "is exacting" with respect to "[a] final judgment . . . rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment," id., at 233, it less demanding with respect to choice of laws. We have held that 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." Sun Oil v. Wortman, 486 U.S. 717, 722 (1988) (quoting Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 501 (1939)).

Although the Court in this passage recognizes that the law of full faith and credit to judgments and the law of full faith and credit to public acts has developed differently, it is clear that it has no idea why this is so, because it has never undertaken an examination of the history of the Full Faith and Credit Clause to determine the reason for the difference. The above summary of the history of the clause makes it clear that the reason why full faith and credit to judgments and public acts has developed differently is that the law of judgments developed under the first implementing statute, which did not include state public acts within its "such faith and credit" command. This

21. See Whitten, DOMA, supra note 4, at 346-91 (discussing these arguments in conjunction with the debate over the constitutionality of DOMA).
22. See id.
24. See supra note 9 and accompanying text (quoting the first implementing statute).
fact, combined with the fact that the first sentence of the Full Faith and Credit Clause did not give any choice-of-laws commands to the states, assured that the states were not required to give any effect to the statutes of other states by force of the clause for over a century, and then only when the Supreme Court lost sight of, or chose to ignore, the original meaning of the clause.

A similar problem exists with the modern implementing statute. In the 1948 revision of the Judicial Code, the wording of the first implementing statute was amended to include state statutes within the command of the statute:

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

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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.25

The Revisers' Notes to this provision stated: "[a]t the beginning of the last paragraph, words 'such acts' were substituted for 'And the said.' This follows the language of Article IV, section 1 of the Constitution . . . . Changes were made in phraseology."26 Given the interpretation that the Supreme Court had placed on the "same faith and credit" language of the original statute in the Mills case, discussed above,27 the command that the revisers of the statute thought they were giving is, to put it politely, not clear. As the late Professor Brainerd Currie wrote, the formula of the statute "has proved reasonably workable as to judgments, although even in that connection it has not been free from difficulty. As applied to public acts it is simply unintelligible."28 For example, the Mills interpretation, as applied to state statutes, seems to require that, at least in a multi-state controversy, the statutes of State X may only be applied if the suit is brought in the courts of another state and the statutes of the latter may only be

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27. See supra note 13 and accompanying text (discussing Mills).
applied if the suit is in the courts of State X, a nonsensical proposition. The end result is that the Supreme Court has, sensibly, ignored the implementing statute in public acts cases, with the consequence, as stated by Professor Currie, that “power of Congress to prescribe the effect of public acts remains, for all practical purposes, unexercised.” Again, the history summarized above reveals that the failure of the Revisers to comprehend the original meaning of the Full Faith and Credit Clause, as well as their failure to appreciate that the Mills’ “same effect” command as to judgments could not intelligibly be given with regard to state statutes, rendered their amendment meaningless.

One final illustration of the value of the history appears in the quotation, above, from the Supreme Court’s latest decision on full faith and credit to state public acts. Recall that the Court stated that its jurisprudence “differentiates the credit owed to laws (legislative measures and common law) and to judgments.” In fact, there is every reason to believe that state common law rules were not included within the command of the first sentence of the Full Faith and Credit Clause at all (the Supreme Court has never actually held otherwise, despite the suggestion in the quoted passage). The view that common law rules are included within the command of the first sentence of the clause proceeds from the modern understanding that the sentence gives choice-of-law commands to the states with regard to public acts. If the clause does this, it would be anomalous if the clause did not also give similar commands to the states with regard to common law rules. However, if the first sentence is understood as it was originally, as giving only an evidentiary command, the anomaly disappears. For the problems of evidence, or proof, that existed with regard to state judgments, public acts, and general records in the late eighteenth century did not exist with common law rules. With regard to statutes, judgments, and general records, some sort of authenticated copy was necessary for a foreign judgment, statute, or record to be admitted into evidence in the courts of another state. However, common law rules were proved by parol testimony. The result is that the problems of evidence that were the concern of the drafters of the

32. See supra note 23 and accompanying text.
34. See Whitten, Choice of Law: Full Faith and Credit, supra note 4, at 18, 57-58.
clause did not exist with common-law rules, and their omission from the command of the first sentence is, therefore, not anomalous in this light.\textsuperscript{35}

In summary, even if one adopts, as the Supreme Court has, an interpretive method that does not require adherence to the original understanding of the boundaries of the Full Faith and Credit Clause, the history summarized above is useful in explaining why the interpretation of the clause evolved the way in which it did, as well as in explaining certain apparent anomalies in the clause, such as the omission of common law rules from its scope. Because the "pull of history is an important legitimating force" in law,\textsuperscript{36} this may make it inconvenient, indeed, for non-originalist interpreters to argue for inclusion of matters in the clause that they favor from a policy standpoint. Perhaps this is why the Supreme Court has never considered the history of the Full Faith and Credit Clause in its modern decisions.

III. CONTEMPORARY INTERPRETATION OF THE FULL FAITH AND CREDIT CLAUSE

Today, the first sentence of the Full Faith and Credit Clause is one of the two principal constitutional provisions restricting the states' power to apply their law to cases involving multi-state elements, the other being the Due Process Clause of the Fourteenth Amendment.\textsuperscript{37} In Allstate Insurance Co. v. Hague,\textsuperscript{38} a majority of the Supreme Court agreed that the test was the same under both clauses for determining whether a state could constitutionally apply its own law to a case. The test is whether the state has a sufficient contact or aggregation of contacts creating state interests that would make the application of its law neither arbitrary nor fundamentally unfair.\textsuperscript{39} However, in Sun Oil v. Wortman,\textsuperscript{40} the Court held that the Allstate test only applied to "nontraditional" choice-of-law rules. When a state is applying a traditional choice-of-law rule—i.e., one that was ac-

\textsuperscript{35} The original understanding would also produce the omission of common-law rules from the power of Congress to declare their effect in the second sentence. This may seem more of a problem in terms of the original meaning than the omission from the evidentiary command of the first sentence, since the power of Congress to declare effect extends to more than evidentiary effects. Nevertheless, there may be other reasons, grounded in the views of the framers about the nature of the common law, that would make the omission of common-law rules from the second sentence sensible as well. See Whitten, Choice of Law: Full Faith and Credit, supra note 4, at 59 n.288 (quoting Moffat Hancock, Torts in the Conflict of Laws 22 (1942) & Max Rheinstein, The Constitutional Bases of Jurisdiction, 22 U. Chi. L. Rev. 775, 813-14 (1955)).

\textsuperscript{36} See Whitten, DOMA, supra note 4, at 394.

\textsuperscript{37} U.S. Const. amend. XIV.

\textsuperscript{38} 449 U.S. 302 (1981).

\textsuperscript{39} See id. at 312-13, 332.

\textsuperscript{40} 486 U.S. 717 (1988).
cepted at the time that the Full Faith and Credit and Due Process Clauses were ratified and whose acceptance has continued into the present—the choice-of-law rule is validated by its historical pedigree without regard to the Allstate test.

Allstate and Sun Oil place only modest restrictions on a state’s ability to apply its law to a case rather than the law of another state.\footnote{41} Furthermore, in its latest “public acts” decision under the Full Faith and Credit Clause, the Court has given a strong indication that it will not tighten the restrictions on state choice-of-law power under the clause. In Franchise Tax Board of California v. Hyatt,\footnote{42} a Nevada citizen filed suit against the Franchise Tax Board of California (“CFTB”) in a Nevada state court, seeking compensatory and punitive damages against CFTB for allegedly tortious acts committed in the course of an attempted tax collection. CFTB contended, among other things, that the Nevada courts were obligated to give full faith and credit to the statutory immunity that California had conferred on its public employees and public agencies for both negligent and intentional torts. The Nevada Supreme Court granted immunity to CFTB for negligence as a matter of “comity,” but refused to grant immunity for intentional torts.

The Supreme Court affirmed, refusing to create a “new rule” requiring that a state court extend full faith and credit to another state’s statutorily conferred immunity when a refusal to do so would interfere with a state’s capacity to fulfill its own sovereign responsibilities.\footnote{43} The Court cited the Allstate test with approval and concluded that Nevada had sufficient contacts to justify the application of its law based on the occurrence of injury to a Nevada citizen residing in the state and the occurrence of some of the allegedly tortious conduct in the state.\footnote{44} The Court also refused to return to the process of balancing

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\item \footnote{41} See Allstate Ins. Co. v. Hague, 449 U.S. 302, 332 (1981) (Powell, J., dissenting). There are some ambiguities in both cases, especially in Allstate, that might cause the Court to apply the tests in the cases differently in future cases. However, the differences are of no consequence to the discussion that follows, as they do not involve any significant expansion of the two clauses. Expansion of the clauses would require a significant departure from the tests articulated in the cases, an expansion that the Supreme Court is capable of, but such a development is not within my poor powers of prediction. Those desiring more complete discussions of the possible different applications of the test may see Luther L. McDougall, III, et al., American Conflicts Law § 53 (5th ed. 2001); Ralph U. Whitten, U.S. Conflict-of-Laws Doctrine and Forum Shopping, International and Domestic (Revisited), 37 Tex. Int'l L.J. 559, 576-79 (2002); Ralph U. Whitten, Domestic Partnerships, supra note 4, at 1250-55.
\item \footnote{42} 538 U.S. 488 (2003).
\item \footnote{43} In an earlier decision, Nevada v. Hall, 440 U.S. 410 (1979), the Court refused to require California to give full faith and credit to Nevada’s statutorily conferred cap on damages in suits against the state in a tort suit arising out of an automobile accident in California between a Nevada state employee and a California citizen.
\item \footnote{44} See Franchise Tax Bd., 538 U.S. at 494-95.
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state interests, described above, that had characterized some of its earlier cases:45

Our past experience with appraising and balancing state interests under the Full Faith and Credit Clause counsels against adopting CFTB's proposed new rule. Having recognized . . . that a suit against a state in a sister State's court "necessarily implicates the power and authority" of both sovereigns . . . the question of which sovereign interest should be deemed more weighty is not one that can be easily answered. Yet petitioner's rule would elevate California's sovereignty interests above those of Nevada, were we to deem this lawsuit an interference with California's "core sovereign responsibilities." We rejected as "unsound in principle and unworkable in practice" a rule of state immunity from federal regulation under the Tenth Amendment that turned on whether a particular state governmental function was "integral" or "transitional." . . . CFTB has convinced us of neither the relative soundness nor the relative practicality of adopting a similar distinction here.46

The tone of Franchise Tax Board does not offer much hope to those who would prefer a more expansive interpretation of the Full Faith and Credit Clause,47 although, as with the Court's other opinions, there is always some ambiguity, and therefore room for argument to the contrary.48 Nevertheless, the adherence to the Allstate

45. See supra notes 18-20 and accompanying text.
46. Franchise Tax Bd., 538 U.S. at 498.
47. See also supra note 23 and accompanying text (quoting Franchise Tax Bd.).
48. See id. at 499 ("[w]e are not presented here with a case in which a State has exhibited a 'policy of hostility to the public Acts' of a sister State"). This statement indicates that a "policy of hostility" toward another state's statute might violate the Full Faith and Credit Clause. However, the Court did not indicate how to distinguish between hostility and disagreement, the latter of which presumably exists any time there is a difference between the laws of two states that would be constitutionally permissible. The Court cited Carroll v. Lanza, 349 U.S. 408, 413 (1955), as support for the above-quoted statement; Carroll does contain a reference to the "policy of hostility" factor, citing as primary authority the case of Hughes v. Fetter, 341 U.S. 609 (1951) (and an earlier similar case, Broderick v. Rosner, 294 U.S. 629 (1935)). Hughes has sometimes been read broadly as a case interpreting the Full Faith and Credit Clause to prohibit discrimination against the law of another state on the grounds that it violates the public policy of the forum. See Larry Kramer, Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception, 106 YALE L.J. 1965, 1980-87 (1977). However, this view has been persuasively refuted by Dean Borchers. See Patrick J. Borchers, Baker v. General Motors: Implications for Interjurisdictional Recognition of Non-Traditional Marriages, 32 CREIGHTON L. REV. 147, 153-54, 167-71 (1998). See also Whitten, DOMA, supra note 4, at 373-75 (evaluating Kramer's historical references). In addition to the arguments made by Dean Borchers, it should be observed that some commentators view Hughes as having reached an incorrect result. See RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 635-37 (4th ed. 2001). Furthermore, Hughes involved a refusal to apply either the wrongful death act of the forum, which was the domicile of all the parties, or of Illinois, where the accident occurred. It did not involve
case, coupled with the Court's repeated statements that a state is not compelled to substitute the statutes of other states for its own statutes dealing with the same subject matter, leaves little room, as a matter of authority, for expansion of the clause.

IV. APPLICATION OF THE FULL FAITH AND CREDIT CLAUSE TO MARRIAGE ISSUES

In this section, it will be helpful to clarify the issues concerning full faith and credit to same-sex marriage by initially considering the application of the first sentence of the Full Faith and Credit Clause to those issues without considering the effect of DOMA, and then considering whether the latter statute changes the results under the clause and, if so, how. However, as a preliminary matter, it is important to consider which part of the Full Faith and Credit Clause's first sentence is applicable in a case involving interjurisdictional recognition of marriage. That is, are we speaking of full faith and credit to a "public act," a "record," or a "judicial proceeding" when we consider recognition of marriages performed in other states?

In a nutshell, marriage involves an issue of full faith and credit to the public acts of other states. Marriage is sanctioned and regulated by statute in every state. The regulation of marriage by the states includes limitations on who can marry whom, including age limits, the degree of consanguinity within which marriages are permitted, residency requirements for marriage, and, of course, the permissible gender of parties to marriages. Even in situations in which, as in Massachusetts, the state's highest court invalidates a statutory restriction on state constitutional grounds, the issue remains one of full faith and credit to the public act regulating marriage with the constitutionally offensive restriction now eliminated. Although this seems obvious to one familiar with full faith and credit jurisprudence, odd arguments are sometimes made that in the case of marriage the interjurisdictional issue concerns full faith and credit to a record or a judicial proceeding.

The notion that interjurisdictional marriage recognition concerns full faith and credit to a record seems to rely on the notion that the application of the forum's law instead of the conflicting law of another state. Under the Allstate test, Wisconsin, the forum in Hughes, clearly had the contacts necessary to apply its own wrongful death statute in preference to that of Illinois (hypothetically supposing that the two differed in a significant way).

49. See Luther L. McDougal, III, et al., American Conflicts Law § 205 (5th ed. 2001) (discussing the differences in marriages restrictions among the states in the context of the "public policy" exception in conflicts law).

marriage license procured by the wedded parties is what is entitled (or is not entitled) to full faith and credit. A moment’s reflection, however, should indicate that a license, whether a marriage license or any other sort, is simply evidence of some right or privilege granted by the laws of a state. Doubtless no state would refuse such an evidentiary effect to a marriage license issued to a same-sex couple in another state. It is a substantial additional step, however, to argue that the license must be given the same effect, in the sense of granting the same rights or privileges, in the forum state as in the state where the license was issued. If this were the case, and if State X were to issue a license to carry a concealed weapon to someone in State X, all other states would have to allow the licensee to carry a concealed weapon within their borders also as a matter of full faith and credit. Similarly, if State Y decided to issue driver’s licenses to ten-year olds, all other states would also have to allow State Y ten-year old licensees to drive within their borders as a matter of full faith and credit. These examples could be multiplied infinitely.

51. In a recent article in the Wall Street Journal, Professor Lea Brilmayer seemed to assume this was so:

Longstanding precedent from around the country holds that a state need not recognize a marriage entered into in another state with different marriage laws if those laws are contrary to strongly held local public policy. The “public policy doctrine,” almost as old as this country’s legal system, has been applied to foreign marriages between first cousins, persons too recently divorced, persons of different races, and persons under the age of consent. The granting of a marriage license has always been treated differently than a court award, which is indeed entitled to full interstate recognition. Court judgments are entitled to full faith and credit but historically very little interstate recognition has been given to licenses.

Lea Brilmayer, Full Faith and Credit, WALL STREET JOURNAL, March 9, 2004, at A16 (emphasis added). I note here that, although I disagree with Professor Brilmayer about what full faith and credit is being requested for in marriage cases, I have no disagreement with the central point of her argument that the Full Faith and Credit Clause does not require a state to recognize a marriage performed in another state that is contrary to the former’s strong public policy. See also Whitten, DOMA, supra note 4, at 389-90 (discussing the position of the Lambda Legal Defense and Education Fund that full faith and credit to marriage licenses would require recognition of same-sex marriages performed in other states).

52. See also Whitten, DOMA, supra note 4, at 389-90 (discussing this same point). I hate to introduce even more complicating features to the debate, but those who contend that marriage concerns full faith and credit to a record (the marriage license) might enhance their argument by making it under 28 U.S.C. § 1739 (2000), which is the implementing statute that specifically deals with state and territorial nonjudicial records. Like the general implementing statute, it states in the last sentence that “such records” (authenticated as earlier provided in the statute) “shall have the same full faith and credit in every court and office within the United States . . . as they have . . . in the courts or offices of the State . . . from which they are taken.” The argument would be that just as the “same full faith and credit” language in the general implementing statute requires the same substantive effect to be given to judgments of state courts as they would receive in the state where they are rendered, so does § 1739 require the same substantive effect to be given to a marriage license rendered in a state as it would have
A second notion, afflicting at least one member of the press, but fortunately (so far) not by any lawyers that I am aware of, is that the issue of full faith and credit to Massachusetts same-sex marriages is an issue of full faith and credit to a judicial proceeding. What judicial proceeding would that be? Why to the Goodridge decision, in which the Massachusetts Supreme Judicial Court invalidated restrictions on same-sex marriage in Massachusetts' law under the Massachusetts' Constitution. This idea, of course, suffers from the same flaws as the idea that the issue in interjurisdictional marriage cases is one of full faith and credit to the marriage license. As a simple matter of evidence, the Full Faith and Credit Clause is unnecessary to assure that every state will treat the decision of the Supreme Judicial Court in Goodridge as the highest evidence of the meaning of the Massachusetts Constitution. Every court within the United States would do this under the common law doctrine of stare decisis. However, to argue that the Full Faith and Credit Clause requires that every state grant the same rights to persons as the Massachusetts Supreme Judicial Court has granted to them does not follow from any decision of the Supreme Court of the United States or any other court, as far as I am aware. To illustrate the difficulties that this would cause, we may again resort to the hypothetical situations described above. Assume that the State X Supreme Court interprets the right to bear arms provision of its constitution to require that the state issue licenses to carry concealed weapons in the state. This would mean that the Full Faith and Credit Clause would require other states to give full faith and credit to the "judicial proceeding" so holding and allow persons having such rights in State X to carry concealed weapons within the borders of the other states. Similarly, if State Y held that the age discrimination provision of its constitution requires that ten-year olds be allowed to drive automobiles in the state, full faith and credit to the judicial proceeding would require all other states to allow ten-year olds where issued. As we will see, however, this interpretation of § 1739, even assuming it is plausible, has been modified by DOMA. See infra note 73.

53. See Paul Greenberg, Not So Fast Mr. President (March 1, 2004), available at http://www.townhall.com/columnists/-paulgreenberg/printpg20040301.shtml. Greenberg, in discussing the effect of Massachusetts same-sex marriages under the Full Faith and Credit Clause, declares: "[a] decision by the Supreme Judicial Council [sic] of Massachusetts certainly sounds like a judicial proceeding. Which means a marriage there between husband and husband, wife and wife, would apply in every other state."


55. This should be distinguished from the similar theory that when marriages are performed by judges, they are "judicial proceedings" entitled to full faith and credit in other states and the notion that same-sex partners married in a state can then obtain declaratory judgments from the same state's courts that they are married, thus producing a judgment that would be entitled to full faith and credit in another state. I have discussed these notions in Whitten, DOMA, supra note 4, at 390.
olds from State X to drive there also. Among other interesting questions about this idea is why, e.g., Massachusetts gets to control. That is, if some other state supreme court has rejected same-sex marriage rights under its constitution, why does Massachusetts not have to give that decision full faith and credit, especially as to same-sex citizens of the other state who seek to be married in Massachusetts?

I hope that enough has been said to convince the reader that the issue of concern in interjurisdictional marriage enforcement cases is full faith and credit to state public acts, but I am doubtful. The subject of same-sex marriage has produced a seemingly endless set of preposterous ideas about why the Full Faith and Credit Clause requires states to give effect to marriages performed in other states. The subject seems to invite ideas that run counter to the most elementary notions of American jurisprudence, not to mention logic. Nevertheless, I will proceed on the theory that the Supreme Court's "public acts" cases under the clause are the relevant body of authority.

A. APPLICATION OF THE FIRST SENTENCE OF THE CLAUSE TO MARRIAGE

The best way to explore the issue of full faith and credit to same-sex marriage is through a series of hypothetical situations that might occur when such marriages are performed in Massachusetts and subsequently come into issue in other states. I should note that the hypothetical situations that I will posit are similar or identical to those presented by Dean Borchers in his article in this symposium. This is because the typically expected core situations under the clause have become well known over the past eleven years, since the same-sex marriage debate began picking up steam. However, the approach I take to the analysis of the issue will include application of the original meaning of the clause to the situations, as well as the modern cases. I believe the reader will conclude that Dean Borchers and I are essentially in agreement on the modern issues.

Assume first that S-1 and S-2, who are citizens of State X where same-sex marriage is not legal, travel to Massachusetts and are there married. They then return to State X, and S-1 dies intestate. Under

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56. See generally id. 375-91 (discussing a variety of arguments). See also Patrick J. Borchers, The Essential Irrelevance of the Full Faith and Credit Clause to the Same-Sex Marriage Debate, 38 CREIGHTON L. REV. 353, 358 (2005) (discussing recent cases).
57. See Borchers, supra note 56, at 357.
58. This may or may not be possible. Massachusetts has a residency restriction that on its face would prevent this from occurring. However, the requirement is not a durational requirement, but is keyed to whether the nonresidents seeking to marry are prohibited from marrying by the jurisdiction where they reside. MASS. GEN. LAWS ANN. ch. 207, § 12 (West 1998), states:
the laws of intestate distribution in State X, if S-1 and S-2 are validly married, S-2 would inherit S-1's estate. If they are not validly married, S-1's brother will inherit the estate. S-2 contends in the State X probate proceeding that State X must treat the Massachusetts marriage as valid under the Full Faith and Credit Clause. Assume further that State X follows the traditional approach of the first Restatement of Conflict of Laws. Under this approach, a marriage is valid if it is valid under the law of the state where the marriage was performed, unless it is contrary to the strong public policy of the forum state. At the choice-of-law stage, therefore, the State X probate

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

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

Because this is stated in terms of the marriage restrictions of the nonresident's state of residency, it would include restrictions on same-sex marriages that exist in the latter states. However, if restrictions on same-sex marriage in Massachusetts law are invalid under the Massachusetts Constitution, it seems likely that the Massachusetts Supreme Judicial Court would also hold it unconstitutional to enforce other states' same-sex marriage restrictions in Massachusetts. Recent news reports indicate that Massachusetts officials have not enforced these restrictions in cases of heterosexual marriage, and that at least some of them do not intend to enforce the restrictions in cases of same-sex couple from other states. Even if the residency requirement were a durational requirement, it might not void a marriage performed in contravention of its requirements. The marriage might simply be voidable at the behest of one of the parties, but not void in an action in which the validity of the marriage is challenged by a third person. Note also that if same-sex marriage restrictions are not unconstitutional under the federal Constitution's provisions other than the Full Faith and Credit Clause, such as the Due Process or Equal Protection Clauses of the Fourteenth Amendment, an issue of Full Faith and Credit to the statutory restrictions of other states in Massachusetts would arise. This kind of issue might include a provision of the other state designed to prevent evasion of the state's marriage restrictions by peripatetic partners. For example, Massachusetts itself has a statute treating marriages performed in other states as void when they involve Massachusetts residents who contract the marriage in violation of Massachusetts marriage restrictions. See MASS. GEN. LAWS ANN. ch. 207, § 10 (West 1998). If another state has this same kind of provision, it is possible to argue that Massachusetts owes the provision full faith and credit, though it is difficult to imagine how the issue would procedurally be raised in Massachusetts except in an action there for an annulment.

59. See RESTATEMENT OF CONFLICT OF LAWS §§ 121, 132 cmt. b, 134 (1934). Note that if the state follows the rule of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(1) (1971), the problems would be similar because the RESTATEMENT (SECOND) provides that the validity of a marriage is determined by the law of the state that has the most significant relationship to the parties at the time of the marriage. Thus, if a marriage is valid where contracted, but violates the strong public policy of another state that has the most significant relationship to the spouses and the marriage at the time of the marriage, the marriage, in theory, will treated as invalid by every state following the most significant relationship approach. See id. § 283(2). Therefore, because S-1 and S-2 were domiciled in State X at the time of the marriage, the state of the most significant relationship would be State X. If State X views same-sex marriages as contrary to its strong public policy, the state will not recognize the marriage under the most significant relationship approach of the RESTATEMENT (SECOND).
court would have to determine (1) whether the marriage between S-1 and S-2 is valid in Massachusetts where it was performed and (2) if so, whether the illegality of same-sex marriage in State X prevents recognition of the marriage under the strong public policy exception to the general rule of recognition. If the court finds that the marriage is valid in Massachusetts, but violates the strong public policy of State X, would the Full Faith and Credit Clause require that State X nevertheless recognize the marriage?

Under the original meaning of the first sentence of the clause discussed in Section II, above, the answer is clearly no, since under that interpretation, the first sentence gives no conflict-of-laws commands to the states at all. Under the modern cases, the answer is also no. In the first place, the Supreme Court’s decision in the Sun Oil case, discussed in Section III, might allow State X to refuse recognition of the marriage if the first Restatement of Conflict of Laws rule is found to have been accepted at the time the Full Faith and Credit Clause was ratified and the acceptance of the rule has continued into the present. However, even if this is not so, the Allstate decision, also discussed in Section III (and which applies to nontraditional choice-of-law rules), would allow State X to refuse recognition to the marriage, because the domicile of S-1 and S-2 in State X at the time of the marriage is a sufficient contact to create a legitimate state interest on the part of State X in applying its own marriage restrictions to the parties. The same would be true under any other choice-of-law approach that State X might follow and that would result in application of the invalidating rule of State X rather than Massachusetts.

Assume now that S-1 and S-2 are domiciled in Massachusetts at the time that they are married and that they move to State X several years later because their employment takes them there. S-1 then dies intestate as in the first example. State X again holds the marriage.

60. This might bring into play the issue of the effect of the Massachusetts residency requirements discussed supra in note 58, but the mere fact that the marriage was contracted in violation of a residency requirement might not make it subject to attack in Massachusetts by a stranger to the marriage.

61. The mere fact that State X does not allow same-sex marriages does not automatically mean that such a marriage would violate the strong public policy of the state. The present of a state DOMA provision in the State X statutes or constitution might make it more likely that the State X courts would find the marriage in violation of the state’s strong public policy, but the public policy exception operates with sufficient fluidity to make it impossible to predict what a given court will do. See, e.g., Luther L. McDougal, III, et al., American Conflicts Law § 205 (5th ed. 2001) (discussing the variation among the states in application of the public policy exception in marriage cases).

62. Cf. Whitten, Domestic Partnerships, supra note 4, at 1261-73 (discussing the application of a number of choice-of-law approaches to domestic partnerships by analogy to marriage).
invalid as a matter of its strong public policy. The result is, in all respects, the same as in the first example. Under the original meaning of the first sentence of the Full Faith and Credit Clause, no conflict-of-laws commands are given to State X that would require it to apply Massachusetts law under any circumstances. If State X's conflict-of-laws rule is held to be within the *Sun Oil* test, the rule is valid without regard to State X's contacts with the parties. If State X's conflict-of-laws approach falls instead within the *Allstate* test, the parties' newly acquired domicile in State X would, again, provide sufficient contacts creating legitimate state interests on the part of State X in applying its invalidating rule to the marriage.63

One point that should not be ignored in the above discussion is that same-sex couples married validly in Massachusetts may be expected to have better luck obtaining recognition of their marriages under the states' choice-of-law systems than by attempting to force recognition through the Full Faith and Credit Clause. It is true that in some states, such as Nebraska, constitutional or statutory provisions may prohibit recognition of same-sex marriages performed in other states.64 In others, however, such marriages may simply be unauthorized, and the state's courts may not find same-sex marriages performed elsewhere to violate any "strong public policy" of the state. Furthermore, at the constitutional level, the inability to force recognition under the Full Faith and Credit Clause does not mean that restrictions on same-sex marriage might not be found invalid under some other constitutional restriction, such as the ever-expanding general right of privacy enforced against the states through the Due Process Clause of the Fourteenth Amendment or the Equal Protection Clause of the same amendment.

One final example will help clarify the analysis in the next subsection of the effect of DOMA on the issues surrounding full faith and credit to same-sex marriage. Assume that S-1 and S-2 are a same-sex couple residing in State Y who are validly married there. D, a citizen of State X, enters State Y and kills S-1 negligently. Assume for purposes of simplicity that D has no liability insurance that would cover S-1's death. S-2 qualifies as S-1's administrator and files suit against D in a State Y court under the State Y wrongful death statute. Under that statute, S-2 will be able to recover greater damages as a surviving

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63. *See* Borchers, supra note 56, at 357 (analyzing the issues similarly).

64. *See* NEB. CONST. art. I, § 29 (adopted 2000): "Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska."
spouse than if S-1 had not been married. The State Y court validly asserts long-arm jurisdiction over D, but D does not appear in the action. The State Y court renders a large damage judgment in the action against D by default. S-2 then takes the judgment to State X and seeks enforcement of it there against D. In the absence of DOMA, this judgment would be controlled by the modern successor to the 1790 implementing statute to the Full Faith and Credit Clause, and State X would be obliged to give the judgment the same effect as it would have in State Y where it was rendered. There is no general public policy exception under the general implementing statute. Therefore, even if State X has a strong public policy against same-sex marriages, it could not refuse to enforce the judgment under that policy. As discussed below, however, DOMA may change the “same effect” rule of the general implementing statute in same-sex marriage cases.

B. THE EFFECT OF DOMA

In 1996, Congress enacted the so-called “Defense of Marriage Act,” or DOMA, to address arguments that the Full Faith and Credit Clause would require states to recognize and enforce same-sex marriages performed in other states. The act provides:

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

If the discussion in the preceding portions of this article about the meaning of the first sentence of the Full Faith and Credit Clause is accepted as accurate, most of DOMA is unnecessary. Full faith and credit issues concerning marriage have to do with the public acts portion of the clause. Under the Supreme Court’s public acts jurispru-

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65. This would be a typical result under wrongful death statutes that measure damages by the pecuniary loss of support to the survivors of the decedent. See Dan B. Dobbs, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION 671 (2d Students' Edition 1993).

66. Under the factual suppositions of this example, it would not be relevant whether the judgment was rendered by default or after full litigation in which D challenged the validity of the marriage of S-1 and S-2.

67. See Baker v. General Motors, 522 U.S. 222, 233 (1998): “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.” Id.


dence, the states do not currently have to give effect to same-sex marriages performed in other states, as long as they have contacts with the parties or the marriage that give rise to state interests in applying their own law. 70 One would thus have to come up with a real-life situation in which a state with no contacts or interests in doing so nevertheless refuses to recognize a same-sex marriage performed in another state. It is difficult in the extreme to do this. 71 Perhaps Congress feared there would be such cases, or perhaps it feared that the Supreme Court might change the interpretation of the first sentence of the clause as applied to public acts and was attempting to use the power given in the second sentence to declare the effect of same-sex marriages in other states as a means of forestalling this. If the latter is the purpose of the statute, Congress would have to be acting on the theory that it could employ the power given in the second sentence to subtract from the "effect" that the Supreme Court might hold that the first sentence requires. This theory is plausible, but it would not inevitably be acceptable to the Supreme Court. 72 Nevertheless, for the theory to have any practical operation, the Court would first have to substantially expand the obligation of the states to enforce statutes of other states under the first sentence of the clause. Otherwise, DOMA would not subtract from the mandate of the first sentence. 73 The result would be that in each of the first two examples

70. Of course, the same would be true under the discussion of the original meaning of the clause in Section II, supra, since the original understanding of the clause did not include conflict-of-laws commands to the states in the first sentence at all. The early cases interpreting the clause, also discussed in Section II, might or might not require recognition of same-sex marriages of other states. When the Court was incorporating the territorial rules of the vested rights system, the result would presumably have been the same as under the Sun Oil rule, discussed in the preceding subsection, which would presumably allow the states to refuse recognition to marriages under the public policy exception. When the Court was balancing state interests, it might have weighed the interests of the state where the marriage was contracted more heavily than the enforcing state, but it might not. In any event, however, the discussion of the Franchise Tax Board case indicates that the Court is unlikely in the extreme to return to the balancing approach. See supra text accompanying note 46.

71. See Borchers, supra note 56, at 357 (2005).

72. Unsurprisingly, arguments have been made that the power given in the second sentence to declare the effect does not allow Congress to subtract from "rights" conferred by the first sentence. See Whitten, DOMA, supra note 4, at 375-85 (discussing these and other arguments).

73. Note that the same is true if, contrary to the earlier observations in this article, marriage concerns full faith and credit to state records—i.e., the marriage certificate—rather than to public acts. For this to matter, the Supreme Court would have to interpret the "records" portion of the first sentence of the clause to require that states give more effect to records than it requires them to give to public acts of other states. This, again, is an eventuality that seems unlikely in the extreme. With regard to the argument based on 28 U.S.C. § 1739 (2000), supra note 52, however, DOMA would modify the command of the latter statute as well as the command of the general implementing statute with regard to judicial proceedings, 28 U.S.C. § 1738 (2000).
in the preceding subsection (concerning intestate distribution of a deceased same-sex spouse's estate), DOMA does not change the law in any respect.

The one way in which DOMA may have altered the previous law concerns state judgments. To the extent that DOMA provides that states need not give effect to "judicial proceedings" of other states "respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such a relationship," it might well modify the command of the general implementing statute that states give the same effect to the judgments of other states as those judgments would receive in the state where they were rendered. Thus, in the third example given in the preceding subsection concerning the judgment in a wrongful death case, it is possible to interpret DOMA as providing that State X need not give any effect to the judgment because it "respects" a same-sex relationship that is treated as a marriage by State Y. Alternatively, because the level of damages awarded in the action are based on the fact that S-1 is survived by a spouse, DOMA might be interpreted to allow State X to refuse enforcement of the judgment to the extent that it awarded a higher level of damages than would have been possible had the parties not been married.74

These interpretations of DOMA are not inevitable, of course. The statute is ambiguous on what constitutes a "judicial proceeding . . . respecting a relationship between persons of the same sex that is treated as a marriage." An interpretation is possible that would limit DOMA's command to judicial proceedings that directly concerned the marital relationship itself, such as actions for maintenance and support or for divorce. When the same-sex marriage debate first began, some commentators, recognizing that the Supreme Court's judgments and public acts jurisprudence differed, made the argument that same-sex partners could get married in a state that recognized their right to do so and then file a declaratory judgment action to confirm their marriage in the same state, thus producing a judgment that would have to be given effect under the general "same effect" command of the implementing statute.75 Among other things, these arguments failed to explain how a court in the state where the marriage was performed could be expected to bind non-parties to the declaratory judgment proceeding that were not subject to jurisdiction in the state. Nevertheless, the arguments may have caused Congress to insert the "judicial

74. This fact would be relevant to the operation of the statute only if the Court were to read into DOMA a requirement that restricted its operation in some fashion, such as a requirement that the judgment-enforcing state have a legitimate interest in rejecting the judgment.

75. See Whitten, DOMA, supra note 4, at 390-91 (discussing these arguments).
proceedings” command into DOMA. It would probably be better to limit the interpretation of DOMA to such bogus attempts to transform a public acts case into a judgments case, but it is unclear whether the courts will read the statute in this limited fashion.

V. CONCLUSION

Whatever disagreement there may be about the details of the analysis that appears in this article, I believe that there is a general consensus among teachers of Conflict of Laws that the same-sex marriage controversy raises an issue of full faith and credit to the public acts of other states. I believe that there is also a consensus that the Full Faith and Credit Clause as currently interpreted does not require states to give effect to same-sex marriages performed in other states. Of course, there may be no consensus that this is the way that the first sentence of the Full Faith and Credit Clause should be interpreted, a matter I discuss below. However, if I am correct about how the issue is viewed among those most expert in the area, this raises an interesting question: what accounts for the peculiar resilience of the idea that the clause clearly has the effect of requiring recognition of same-sex marriages performed in other states?

I believe there are at least two reasons for the persistence of the idea. One is simple ignorance. This reason applies to non-lawyers who comment on the clause, particularly journalists, but it also, unfortunately, applies to lawyers who know little or nothing about con-

76. See id. at 391 and legislative history there cited.

77. If DOMA is not interpreted narrowly, same-sex spouses may find that, in certain circumstances, they have lost some rights that they had before they married. Consider adoption. Some states permit same-sex partners to adopt children, even though they are not married. Other states do not permit two single persons to adopt the same child. In the former states, if same-sex partners validly adopt a child, the adoption proceeding produces a judgment that is currently subject to the general implementing statute and must be given effect in other states insofar as the change of the child’s status is concerned. See generally Whitten, Adoption supra note 4. However, if the same-sex partners are married, and if the marriage is an essential predicate for an adoption in a state, DOMA may apply to allow other states to refuse recognition to the judgment of adoption.

78. I have already given one example of a journalist badly misunderstanding the clause. See supra note 53. The examples could be multiplied almost infinitely, but consider only the following, taken from Dennis E. Powell, Gay Divorcees? (May 11, 2004), available at nationalreview.com/comment/powell200405100900.asp. (I pick this example because it is not entirely unperceptive.) Mr. Powell’s commentary is devoted to the problems incident to a divorce proceeding in New York between two same-sex persons who entered into a civil union in Vermont. After exploring the difficulties involved in the fact that New York does not recognize civil unions, he explores whether New York is obligated to recognize Vermont’s civil union statute and grant the divorce anyway. He states:

Article IV, Section 1 of the U.S. Constitution, in its “full faith and credit” clause, specifies that states must recognize the laws of other states and the results thereof. Congress passed the Defense of Marriage Act in 1996 specifi-
lict of laws or the Full Faith and Credit Clause. In the case of non-lawyers, particularly journalists of all stripes, they have acquired, from some source, the idea that the clause will have the absolute effect of requiring recognition of same-sex marriages in other states and have accepted it uncritically. They may or may not have read the language of the clause, but even if they have, they seem generally to view it through twenty-first century glasses and find it plausible that the words carry the meaning that their source has informed them that it has. The reasoning process they employ is not very sophisticated, even for non-lawyers, and it is difficult to excuse it, especially from journalists whose job it is to investigate the facts of the stories they report in order to inform the public accurately.

In the case of lawyers, often very prominent ones, the same reasoning process is inexcusable. For lawyers have the technical ability to research the issues upon which they comment. They also have the skill and training necessary to understand the important kinds of distinctions drawn in cases that produce legitimate differences in results. For example, they have the ability, even in the absence of extensive historical research, to understand that the issue in same-sex marriage

\[ \text{Id.} \]

This passage is a curious mixture of accuracy and inaccuracy. It is accurate that DOMA may not apply to civil unions and that, even if it does, it does not require New York to reject Vermont’s civil union statute. It is also accurate that it would be up to the defendant to raise the DOMA issue and that it is “unlikely” that a judge would raise it on his or her own motion, since that would be to treat it as a limit on the court’s subject-matter jurisdiction, which it surely is not. However, it is not true that if DOMA is not raised the “case” would be “tried” under the Full Faith and Credit clause. The Full Faith and Credit Clause objection would have to be raised by a party, since it is also not a subject-matter jurisdiction objection. The plaintiff would be the party to raise it, but if the plaintiff did raise it, the DOMA reply would most certainly be in the case as well. Finally, and most important, it certainly is misleading, given the discussion in this article, to suppose that states “must recognize the laws of other states and the results thereof” without qualification.
cases is one of full faith and credit to state public acts, rather than to records or judicial proceedings. They also have the ability to understand that the Supreme Court's decisions on full faith and credit to judgments are different than its decisions on full faith and credit to public acts. Therefore, even if they do not understand the historical reasons for the difference in the precedents, they should be able to avoid improperly conflating them.

Unfortunately, even lawyers whose intellect, training, and experience is unquestionably of the highest order often fail miserably to decipher the jurisprudence of the Full Faith and Credit Clause. Furthermore, they do so in ways that sometimes run counter to the general ideological viewpoint they espouse. One notable example of this is the treatment by former Judge Robert Bork of the Full Faith and Credit Clause in his book *Slouching Toward Gomorrah.* Judge Bork, in commenting on the Hawaii Supreme Court's invalidation of same-sex marriage restrictions under the Hawaii Constitution, stated:

Though a large majority of Hawaiians as well as citizens of other states oppose homosexual marriage, the likely outcome of the Hawaii case may very well become the law of every state in the union. Article IV, Section 1 of the United States Constitution states: "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."

The first part of that sentence almost certainly means that, if the Hawaii court rules as expected, other states must accept marriages between homosexuals performed in Hawaii. The Supreme Court has previously held that a state must accept a divorce performed in another state although the law and the policy of the objecting state prohibited such divorces. Homosexuals presumably could marry in Hawaii and settle in Utah as spouses no matter what the citizens of either Hawaii or Utah thought about the matter.

In this passage, Judge Bork makes the simplistic error of confusing full faith and credit to judgments with full faith and credit to pub-

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79. Dean Borchers has made this same point in his paper in this symposium. See Borchers, supra note 56, at 358 (2005).
81. See Baehr v. Lewin, 852 P.2d 44 (Haw. 1993). *Baehr* was the case that essentially initiated the same-sex marriage debate in the United States, including the debate over the effect of the Full Faith and Credit Clause on the issue.
82. BORK, supra note 80, at 112.
lic acts. The divorce cases of which he writes involved full faith and credit to judgments.\(^{83}\) As discussed earlier in this article, judgments and public acts cases have developed differently under the Full Faith and Credit Clause, primarily due to the inclusion of the former in and the exclusion of the latter from the first implementing statute.\(^{84}\) Why would a scholar of such repute—one whose general thesis is hostile to judicial activism—not bother to understand more carefully the jurisprudence of the area about which he is writing? The answer may lie in the second, and more fundamental, reason why neither non-lawyers nor lawyers pay much attention to full faith and credit jurisprudence. Indeed, the second reason may explain why the ignorance about the clause is so pervasive.

The second reason is that neither the history nor the current interpretation of the Full Faith and Credit Clause will probably influence the ultimate interpretation of the clause on the same-sex marriage issue. The reality is that the Supreme Court is not a court of law in any traditional sense and never has been. It is a high-level policy making body that will, if five of its members choose to do so, invalidate restrictions on same-sex marriage by hook or crook, regardless of whether the existing precedents or history justify doing so.\(^ {85}\) In other words, law, including precedent, does not matter much to the Court. This may be why no one, whether journalist or legal commentator, makes much of an effort to research the intricacies of the Full Faith and Credit Clause. Why do a lot of research when it will not matter to the ultimate result anyway?


\(^{84}\) See supra notes 12-31 and accompanying text.

\(^{85}\) Thus, in another statement omitted from the quote above from Judge Bork's book, he opines that the only way to avoid the outcome of states being required by the first sentence of the clause to recognize same-sex marriages performed in other states is through the power given to Congress in the second sentence of the clause to declare the effect of state public acts, records, and judicial proceedings in other states. He then adds:

The Supreme Court might uphold congressional legislation stating that a Hawaiian same-sex marriage does not require other states to accord that marriage legitimacy in their territories. The Court's response is in some doubt because it has recently shown a tendency to view homosexuality as a matter of required moral indifference.

Bork, supra note 80, at 112.

The second sentence of this quote, followed by Bork's discussion and criticism of the case of Romer v. Evans, 517 U.S. 620 (1996), indicates that Bork believes the issue will likely be resolved by the Court's policy preferences rather than any process of interpretation. In other words, why bother to research extensively the boring subject of full faith and credit when traditional legal materials such as precedent will play no part in resolution of the controversy (Romer invalidated a Colorado constitutional restriction on protective legislation for homosexuals).
Of course, there may be prudential reasons that influence the Court toward restraint in the same-sex marriage controversy, even if a majority of the justices wish to invalidate the restrictions on gays’ ability to marry. In fact, I believe that there are reasons apart from existing precedent why the Court might not invalidate state restrictions on same-sex marriage under any constitutional clause, and additional reasons why, if it does choose to invalidate those restrictions, it will do so under some provision other than the Full Faith and Credit Clause.

The prudential reasons why the Court might decide not to invalidate same-sex marriage restrictions at all concern the possibility of a constitutional backlash. As I understand the news reports, a majority of Americans disapprove of same-sex marriage, but are not sure that they want to amend the Constitution in anticipation of a Supreme Court decision that would validate it. Therefore, even if five members of the Court would like to legalize same-sex marriage by constitutional fiat, they might be unwilling to do so for fear of creating a backlash that would produce a constitutional amendment to overrule them. A secondary reason is that the members of the Court may judge, as I do, that even in the absence of elimination of restrictions on same-sex marriage by judicial decision, it will be legal in most states in ten to fifteen years (I base this conclusion on my unscientific judgment that the rising generation possesses more tolerant attitudes toward gay marriage than older generations).

With regard to the Full Faith and Credit Clause specifically, the Court may understand, or come to understand, that an interpretation of the clause requiring states to recognize the validity of same-sex marriages from other states would have implications for many other kinds of cases. There is a good reason why the Court abandoned the experiment early in the twentieth century in which it attempted to read the clause more expansively. To be effective, the balancing approach by which the Court tried to do this would have required Supreme Court review of virtually every conflict-of-laws decision made by the state courts. To expand the obligations of the states under the Full Faith and Credit Clause today, the Court would, in effect, have to create a coherent set of conflict-of-laws commands to implement through the first sentence of the clause. This would be difficult indeed, because since the Court’s abortive balancing approach to the clause gave way to its current minimalist approach in public acts cases, no one has discovered any way to construct such a set of commands. This is partially because the subject of Conflict of laws is gen-

86. See supra text accompanying notes 18-20 for a description of the balancing experiment.
erally a mess, but it surely must also be partly due to the prior experience of the Court with a more expansive approach to the clause in public acts cases. Even the most arrogant of the Justices, therefore, may view entry into this area with trepidation.

However, if the Supreme Court is likely to be motivated only by prudential considerations in determining whether to invalidate restrictions on same-sex marriage, the reader may wonder what purpose there is in writing this (and other articles) on the history or the modern interpretation of the clause. Good question. I confess that I was reluctant to participate in this conference at all and even more reluctant to write yet again another article on the Full Faith and Credit Clause. As I stated earlier in the article, there is nothing new here, because there is nothing new to be said. For it is apparent that articles like this have no influence whatsoever on the debate over whether the clause does or does not affect the same-sex marriage issue. This is so, because either no one is listening (or reading) or, if they are, no one cares one way or the other why the clause has evolved the way it has or what result the Court's precedents, applied straightforwardly, might produce. The clause has become purely an adversary's tool and will remain so until the same-sex marriage controversy subsides. My only hope is that, if the Court decides to invalidate restrictions on same-sex marriage in the states, it does so under some constitutional provision other than the Full Faith and Credit Clause. For that clause, in its second sentence, does still have potential utility in resolving the current chaos in conflict of laws. If the Court uses the clause as a means of requiring recognition of same-sex marriages in other states, it is difficult to imagine how it could do so without seriously impairing an important, though as yet generally unused, congressional tool with which to reform American conflicts law.


88. I note, however, that this is not a prediction of what the Court will or will not do. One can only predict the outcome of rational processes, and this does not accurately describe the Supreme Court’s jurisprudence, at least when it is pronouncing on matters of intense social or cultural interest.

89. See supra notes 4-5 and accompanying text.