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INTRODUCTION

Choice of law arbitrates values. When a court chooses one state's law over another's, it is not only determining the rule of decision, it is deciding

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which state's values it should adopt. How should a court make such a decision? Should it select the rule it thinks is the fairest? Should it adopt its law? Or, should it remain neutral in the choice of law process and employ the law of the jurisdiction with the closest connection to the controversy?

Guidance in making this choice appears in recent Supreme Court cases that comprise a new approach to the constitutional relation of governmental units. Judge Wilkinson has proclaimed that our constitutional jurisprudence is in a new period of judicial activism—one in which judges are structural referees.[1] The hallmark of this new judicial activism "is an interest in reviving the structural guarantees of dual sovereignty [vertical federalism]."[2] Judge Wilkinson has declared that "[t]aken as a whole, the[se] decisions preserve Congress as an institution of broad but enumerated powers, and the states as entities having residual sovereign rights."[3]

Unlike the other two periods of judicial activism in this century,[4] the new judicial activism is substantively neutral. That is, "the cases of the present era cannot be seen as single-mindedly promoting the interests of a particular constituency."[5] Judge Wilkinson has added that "[a]s a matter of oxen, the gored are determined by infringements upon our federal system, not by judicial disdain for enacted policies."[6] Thus, "[i]n the present period, the preservation of federalism values—not the maintenance of *laissez faire*—is the binding principle."[7]

Unlike the two earlier periods of judicial activism which "attempted to remove the subject matter of those cases from political debate altogether, . . . the present jurisprudence of federalism is purely allocative, standing for the simple proposition that the Constitution does not cast states as mere marionettes of the central government."[8] In other words, "[t]his jurisprudence removes no substantive decision from the stage of political

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1. *See* Brzonkala v. Virginia Polytechnic Inst., 169 F.3d 820, 889-96 (4th Cir.) (Wilkinson, J., concurring), *cert. granted*, Brzonkala v. Morrison, 68 U.S.L.W. 3177 (1999).

2. *Id.* at 893. The cases cited by Judge Wilkinson to illustrate the common thread of contemporary judicial activism include the federalism cases cited later in this Article. *See infra* note 92 and accompanying text.

3. *Brzonkala*, 169 F.3d at 893.

4. The other two periods were the *Lochner* Era at the beginning of the century and the Warren Court-Early Burger Court Era. *See id.* at 890-92. In the *Lochner* Era, courts struck down progressive legislation on substantive due process grounds ("liberty of contract") and commerce clause grounds. *See id.* at 890-91. In the Warren Court-Early Burger Court Era, the Court found "new substantive rights in the Constitution and down played that document's structural mandates." *Id.* at 891-92.

5. *Id.* at 893.

6. *Id.* at 894.

7. *Id.*

8. *Id.* at 895.

debate."[9] Thus,

> [s]tates remain free after [*New York v. United States*] to reach regional solutions to their hazardous waste problems, after [*United States v. Lopez*] to criminalize the act of bringing a firearm within a school zone, after *Printz* voluntarily to cooperate with federal law enforcement efforts, and after today's decision to provide civil remedies to women who are battered or raped. No court blocks the path of legislative initiative in any of these substantive areas.[10]

Judge Wilkinson summed up the new judicial activism as follows: "Instead of aggressively pursuing substantive preferences, this court validates a structural principle found throughout the Constitution. . . . Federalism is the shining gem cut by the Founders. It remains the chief contribution of America to democratic theory and the structural guarantor of liberty and diversity for the American people."[11]

This Article argues that the new judicial activism that Judge Wilkinson has discerned in recent cases on vertical federalism also should apply to other areas where the Constitution sets structural lines, and specifically to horizontal federalism—the relation of the states. If the Court is going to give the states more authority, it also needs to protect a state's sovereignty from overreaching by other states. Choice of law is thus an area that affects state sovereignty. When a judge is making a choice of law decision, that judge is "polic[ing] the structural lines inherent" in the Constitution's provisions concerning the relations of the states and the separation of powers.[12] In making this choice, the judge should respect these lines and refrain from making substantive choices or adopting parochial law because it is forum favoring. In other words, choice of law should be substantively and forum neutral.

The Supreme Court has recently recognized the importance of the structural lines of horizontal federalism in *BMW of North America v. Gore*.[13] In this case, the Supreme Court struck down an Alabama trial court's punitive damages award on due process grounds.[14] Part of the constitutional problem was that Alabama had calculated the award based on the defendant's conduct in other states, including states in which its conduct was not illegal.[15] In doing so, Alabama had failed to recognize "the

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9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. 116 S. Ct. 1589 (1996).
14. *See id.* at 1604.
15. *See id.* at 1597.

need to respect the interests of other States."[16] According to the Court, "It follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasor's lawful conduct in other States."[17]

The treatment of same-sex marriage in a multistate setting presents an opportunity to explore how choice of law should deal with state values in relation to the structural lines discussed above.[18] With the possibility that at least one state will legalize same-sex marriage,[19] proponents of same-sex marriage have advocated using choice of law to extend same-sex marriage to other jurisdictions.[20] On the other hand, opponents of same-sex marriage have vehemently opposed such efforts, and have proposed employing the public policy exception to avoid recognizing such marriages.[21] This Article

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16. *Id.*

17. *Id.*

18. Lynn Wardle has called the controversy concerning same-sex marriage "one of the most significant issues in contemporary American family law." Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 3. She has added that "[p]resently it is one of the most vigorously advocated reforms discussed in law reviews, one of the most explosive political questions facing lawmakers, and one of the most provocative issues looming before American courts." *Id.*

19. The controversy over same-sex marriage began when the Hawaii Supreme Court ruled that Hawaii's marriage law discriminated on the basis of sex under the Hawaii Constitution by not allowing same-sex couples to marry. *See* Baehr v. Lewin, 852 P.2d 44, 48 (Haw. 1993). The court remanded the case to determine whether the state could meet its burden of showing a compelling interest for refusing to allow same-sex couples to marry. *See id.* at 68. The state lost on remand. *See* Baehr v. Miike, Civ. No. 91-1394, 1996 WL 694235, at *21 (Haw. Cir. Ct. Dec. 3, 1996). In November 1998, ballot initiatives in Hawaii and Alaska overturned state court decisions legalizing same-sex marriage in those states. *See Vermont Hears Same-Sex Marriage Arguments*, BOSTON GLOBE, Nov. 19, 1998, at B4. In the meantime, the Vermont Supreme Court is expected to render a decision concerning the right of same-sex couples to marry in the near future. *See* Lois R. Shea, *Same-Sex Marriage Hopes Go North; Vermont's Highest Court to Get Gay Couple's Case*, BOSTON GLOBE, Nov. 17, 1998, at B1. Lawrence Tribe has stated that there is a good chance the same-sex couple will win. *See id.*

20. *See* Barbara J. Cox, *Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033, 1102-03; Deborah M. Henson, *Will Same-Sex Marriages Be Recognized in Sister States?: Full Faith and Credit and Due Process Limitations on States' Choice of Law Regarding the Status and Incidents of Homosexual Marriages Following Hawaii's* Baehr v. Lewin, 32 U. LOUISVILLE J. FAM. L. 551, 599 (1993-94); Robert L. Cordell, II, Note, *Same-Sex Marriage: The Fundamental Right of Marriage and an Examination of Conflict of Laws and the Full Faith and Credit Clause*, 26 COLUM. HUM. RTS. L. REV. 247, 264-65 (1994); Note, *In Sickness and in Health, in Hawaii and Where Else?: Conflict of Laws and Recognition of Same-Sex Marriages*, 109 HARV. L. REV. 2038, 2040-41 (1996); Thomas M. Keane, Note, *Aloha, Marriage? Constitutional and Choice of Law Arguments for Recognition of Same-Sex Marriages*, 47 STAN. L. REV. 499, 507-08 (1995).

21. *See* L. Lynn Hogue, *State Common-Law Choice-of-Law Doctrine and Same-Sex "Marriage": How Will States Enforce the Public Policy Exception?*, 32 CREIGHTON L. REV. 29, 43-44 (1998); Raymond B. Marcin, *Natural Law, Homosexual Conduct, and the Public Policy*

rejects both approaches on the ground that they are not substantively neutral, and it argues that courts should determine choice of law for same-sex marriages in a non-political manner.

One of the problems in the debate over same-sex marriage is that the current choice of law rule for marriages is an atavistic remnant of an outmoded conception of choice of law. The usual choice of law rule for the validity of a marriage is that a state will recognize a marriage if it is valid at the place of celebration, unless the marriage conflicts with the forum's public policy.[22] This Article advocates that it be replaced by a new rule that selects the law of the state with the closest connection to the validity of the marriage—usually, the couple's domicile.[23] This author believes that this rule respects state sovereignty as set out in the Constitution, while still being fair to individuals.

Part I of this Article will examine suggested solutions to conflicts of law and same-sex marriage. It will begin with the proposals of advocates of same-sex marriage who want to employ choice of law to extend same-sex marriage to states that do not have it as a matter of substantive law. It will continue with the views of those who oppose using choice of law to force same-sex marriage on a state in which same-sex marriage is against public policy. It will also discuss recent statutes enacted to counter the possibility that some state might legalize same-sex marriage, including state statutes and the Defense of Marriage Act (DOMA).[24] Part II will examine the traditional choice of law rule for the validity of marriages, and it will argue that both the traditional rule and the public policy exception should be abandoned. Part III will present a new approach to choice of law for the validity of marriages, based on a choice of law method this author has previously developed. Finally, Part IV will discuss whether a state has to bestow the normal incidents of marriage on a same-sex marriage celebrated in another state under choice of law principles or the Full Faith and Credit Clause.[25]

Exception, 32 CREIGHTON L. REV. 67, 67-69 (1998); Richard S. Myers, *Same-Sex "Marriage" and the Public Policy Doctrine*, 32 CREIGHTON L. REV. 45, 65 (1998); *see also* Joseph W. Hovermill, *A Conflict of Laws and Morals: The Choice of Law Implications of Hawaii's Recognition of Same-Sex Marriages*, 53 MD. L. REV. 450, 453-54 (1994) (concluding "that a court should not refuse to recognize a homosexual marriage performed legally in another state unless the state legislature has clearly stated a public policy to the contrary").

22. *See* EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS § 13.5 (2d. ed. 1992).

23. *See infra* notes 202-04 and accompanying text.

24. 28 U.S.C. § 1738(c).

25. U.S. CONST. art. IV, § 1.

I. CHOICE OF LAW AND SAME-SEX MARRIAGE: A POLITICAL DEBATE

A. *Using Choice of Law to Extend Same-Sex Marriage to Other States*

Advocates of same-sex marriage have proposed using choice of law to extend same-sex marriage to states that have not legalized such marriages.[26] These advocates believe that "the right to marry will drastically impact the lesbian and gay civil rights movement."[27] Moreover, "[t]he equal dignity afforded to homosexual relationships if marriage were an option probably would go further to eradicate the deep-seated prejudice against homosexuals and their families than any other type of legal reform."[28] In addition, some believe that legalizing same-sex marriage "would disrupt the traditional gendered definition of marriage as a power hierarchy for homosexuals and heterosexuals alike, thereby producing a widespread socio-cultural impact stretching beyond merely the lesbian and gay population and providing a model of egalitarian, intimate relationships."[29]

Barbara Cox discusses various choice of law methods and finds "significant general support for validation of our couple's same-sex marriage . . . under each approach."[30] However, she views better law approaches—approaches that supposedly select the more just rule—as particularly promising.[31] While only a few states have adopted this method, she declares that "it could be beneficial for advocates to argue that, when considering the policy considerations or governmental interests behind various statutes or public policies [with other conflicts approaches], courts should conclude that recognizing same-sex marriage is the better public policy."[32] In other words, she believes that all the modern methods "leave the judge in a position to reach the result that they believe is best."[33]

Accordingly, the key for Cox is to show why the state's law that validates same-sex marriages is the best law.[34] Professor Cox, "recognizing that results are important," argues

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26. *See supra* note 20 and accompanying text.
27. Cox, *supra* note 20, at 1038.
28. Henson, *supra* note 20, at 557.
29. *Id.*
30. Cox, *supra* note 20, at 1097.
31. *See id.* at 1099-1117.
32. *Id.* at 1099.
33. *Id.* at 1100.
34. *See id.* at 1101.

> for applying the various choice-of-law theories in a better manner to resolve these disputes. In these cases, the better result would be to recognize the same-sex marriage. Such a result is better because it eliminates age-old discrimination based on prejudice and misunderstanding, and because it eliminates overzealous state interference with and condemnation of a most personal and intimate relationship. Thus, same-sex marriage should not violate forum public policy.[35]

A related argument for recognizing the validity of same-sex marriages in other states is that choice of law should reflect an emerging policy over a regressive one and that it should avoid anachronistic or aberrational rules.[36] Professor Cox asserts "that if the argument were presented by proponents urging validation of same-sex marriage, courts might be inclined to recognize [the law of a state that authorizes same-sex marriage] and validate the marriage, because that law is more enlightened and progressive."[37] She points out that

> [s]ame-sex couples are the only adults, other than those who violate some additional statutory proscription, who are not freely permitted to marry the partner of their choice. Restricting marriage to opposite-sex couples can also be seen as merely continuing "the vestige of a creed outworn" or "a remnant of early common law."[38]

Most importantly, she believes the trend is toward recognizing same-sex relationships, "as seen from the passage of consenting adults statutes, repeal of sodomy statutes, and provision of domestic partner benefits."[39]

Professor Cox also compares the restrictions on same-sex marriage to miscegenation statutes.[40] She declares that "[s]odomy and miscegenation statutes violate the equal protection clause for the same reason: Beyond the immediate harm they inflict upon their victims, their purpose is to support a regime of caste that locks some people into inferior social positions at birth."[41]

While Professor Cox has presented some persuasive normative arguments for changing state substantive law on same-sex marriage, her

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35. *Id.*
36. *See id.* at 1104-05.
37. *Id.* at 1110.
38. *Id.* at 1109.
39. *Id.*
40. *See id.* at 1110-16.
41. *Id.* at 1112 (quoting Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145, 147 (1988)).

contentions do not support using choice of law for that end. First, she advocates employing choice of law to skirt state substantive law. As will be shown in more detail below, choice of law should not be used to force a state to adopt the values of another state in regulating the relationships of its domiciliaries in its territory; such an outcome misconstrues the Full Faith and Credit Clause of the United States Constitution. Second, Professor Cox misunderstands the judicial role in our legal system. It is not a judge's role to change the law when the judge disagrees with the legislature (assuming the law is constitutional) because such a choice infringes upon the separation of powers. As Justice Kennedy has declared, "The Framers of our Government knew that the most precious of liberties could remain secure only if they created a structure of Government based on a permanent separation of powers."[42]

Professor Cox also misconstrues how the better rule approach works in practice. Generally, when a court uses the better rule approach, it adopts forum law.[43] While, as Professor Cox points out, there are notable exceptions, such exceptions tend to concern non-controversial subjects and archaic laws, such as guest statutes and survival statutes.[44] More importantly, there is no reason to assume that a judge will find the law of a state that authorizes same-sex marriage to be the better rule when only a small minority of states have such a rule. While many states are moving toward greater recognition of gay and lesbian rights, this trend has not yet encompassed the legalization of same-sex marriages.[45] In other words, while an argument can be made that a rule is more progressive, this does not mean that a judge will adopt it in a choice of law setting, particularly if there is a strong sentiment in the forum against it. Similarly, while it can be argued that a rule is outdated or archaic, it is doubtful that a court will accept this argument as long as only a handful of states have rejected the supposedly archaic rule.

One problem with proposals like Professor Cox's is that they are mainly normative. She raises some persuasive arguments concerning choice of law and same-sex marriage, but, if one disagrees with the normative aspects of her thesis, there is little left of her proposal. Deborah Henson avoids this problem by arguing that the Full Faith and Credit

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42. Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring).

43. *See* SCOLES & HAY, *supra* note 22, at 29-30.

44. *See, e.g.*, Schlemmer v. Fireman's Fund Ins. Co., 730 S.W.2d 217, 219 (Ark. 1987); Bigelow v. Halloran, 313 N.W.2d 10, 12-13 (Minn. 1981).

45. Professor Duncan has observed that since *Baehr*, a "national conversation has resulted in a reaffirmation by acclamation of the traditional concept of marriage as a unique two person community 'defined by sexual complementarity.'" Richard F. Duncan, *"They Call Me 'Eight Eyes'": Hardwick's Respectability, Romer's Narrowness, and Same-Sex Marriage*, 32 CREIGHTON L. REV. 241, 248 (1998).

Clause, like the Due Process Clause,[46] mandates the recognition of same-sex marriage.[47]

Henson asserts that states could be required to recognize same-sex marriage under the Full Faith and Credit Clause in the same way that they are required to recognize out-of-state divorces and adoption and legitimation decrees.[48] While a marriage is not a judgment like a divorce, a marriage might be a record, which is also covered by the Full Faith and Credit Clause.[49] She declares that

> no one would quibble with the assertion that marriage, regulated by state statutes, confers many private rights and benefits upon those who enter its sanctified doors. Therefore, the act of marriage and subsequent civil effects that flow from the act should be subject to full faith and credit protection in the same way as occurs in the case of divorce.[50]

As Henson admits, there is no law supporting her suggestion that marriages are "records."[51] In fact, a marriage is not a record, but a "public act,"[52] that is, the marriage law of another state. More importantly, there is no authority that says the Full Faith and Credit Clause requires that a marriage must be given the same full faith and credit as a judgment, regardless of whether it is a record or an act. Divorces and adoption and legitimation decrees are judgments that have been adjudicated by a court. However, a marriage "is a purely administrative proceeding analogous to the grant of a building permit or a corporate charter."[53] Courts have generally not required other states to give binding recognition under the Full Faith and Credit Clause to similar documents, such as a pharmacist's license,[54] a dentist's license,[55] or a law license.[56] Similarly, when a state has to recognize a foreign corporation, the recognition is required by the

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46. U.S. CONST. amend. XIV.

47. *See* Henson, *supra* note 20, at 554-55.

48. *See id.* at 589.

49. *Id.* at 586-87. The text of the Full Faith and Credit Clause appears *infra* note 85 and accompanying text.

50. Henson, *supra* note 20, at 587.

51. *See id.* at 586-87.

52. *See* Patrick J. Borchers, Baker v. General Motors: *Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147, 153 (1998). In addition, one cannot argue that a marriage is a judgment because there is no judicial action and no controversy being litigated. *See id.* at 164-67.

53. David P. Currie, *Full Faith & Credit to Marriages*, 1 GREEN BAG 7, 10 (1997).

54. *See* Louisiana Bd. of Pharmacy v. Smith, 76 So. 2d 722, 726 (La. 1954).

55. *See* State v. Rosenkrans, 75 A. 491, 500 (R.I. 1910), *aff'd*, 225 U.S. 698, 698 (1912).

56. *See* Kirkpatrick v. Shaw, 70 F.3d 100, 102 (11th Cir. 1995); *In re* Tocci, 600 N.E.2d 577, 582 (Mass. 1992).

commerce clause[57] (which does not apply to marriages), not the Full Faith and Credit Clause.[58] Thus, it is hard to argue that a marriage must be given the same status as a court adjudication.

This author is troubled by the suggestion that the Full Faith and Credit Clause, which is intended to protect state sovereignty, might be used to force another state's values on a state that is more interested in a marriage. This would happen if parties could go outside their domicile for a few hours to get married, then return to their home proclaiming that their domicile must acknowledge a marriage which, in the parties' domicile, would be illegal. The Full Faith and Credit Clause was intended to protect a state's sovereignty when it is the most interested state, not when it has only a tenuous connection to the circumstances,[59] and courts should respect this constitutional line. As mentioned above, the Supreme Court asserted in *Gore* that a state cannot impose its policies on its neighbors; a state is limited by "the need to respect the interests of other States."[60]

Henson also contends that states must recognize the validity of same-sex marriages celebrated in other states under the due process clause.[61] She argues that

> enacting legislation or deciding cases based on majoritarian morality is specious at best. First, the prevailing moral code changes with the times, as the recent national divorce reform from fault-based to no-fault divorce illustrates. Second, majoritarian morality is simply an inequitable and illogical basis on which to support lawmaking that pertains to such an important and personal institution as marriage.[62]

Henson tries to distinguish *Bowers v. Hardwick*,[63] which held that there is no due process right to homosexual conduct,[64] on the ground that "being homosexual is not merely a matter of performing certain sexual activities."[65] She asserts that "while perhaps not protecting certain homosexual conduct, [the Due Process Clause] does protect lesbians' and

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57. U.S. CONST. art. I., § 8.

58. *See* Allenberg Cotton Co. v. Pittman, 419 U.S. 20, 29-34 (1974); SCOLES & HAY, *supra* note 22, at 921-22; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 311 cmt. b (1971) [hereinafter SECOND RESTATEMENT].

59. As Professor David Currie has pointed out, the Clause's purpose "is to make it easier for a state to regulate its own affairs, not to enable it to fiddle with the affairs of others." Currie, *supra* note 53, at 11-12.

60. BMW of N. Am. v. Gore, 116 S. Ct. 1589, 1597 (1996).

61. *See* Henson, *supra* note 20, at 591-98.

62. *Id.* at 595.

63. 471 U.S. 186 (1986).

64. *See id.* at 189-91.

65. Henson, *supra* note 20, at 595.

gay men's liberty and property rights."[66] She concludes that

> [s]tatutes that deny homosexuals the right to marry and decisions upholding these statutes, implicate due process challenges precisely because they deprive a distinct minority group from access to rights and benefits reserved exclusively to married couples. . . . Depriving homosexuals of the freedom to organize their own families and the freedom to enjoy the rights and benefits which make a family more stable and secure, is a liberty infringement. Depriving them specifically of the attendant economic rights constitutes state interference with lesbian and gay couples' constitutionally protected property rights in violation of the Due Process Clause.[67]

Henson's due process argument is problematic because it is unlikely that the Supreme Court will hold that the failure of a couple's domicile to recognize the validity of a same-sex marriage celebrated elsewhere violates due process when that state can criminalize homosexual conduct under *Bowers*. Choice of law simply is not a promising device to circumvent *Bowers*. While Henson may be right that due process is broader than *Bowers*, the Supreme Court has not interpreted liberty infringement and protection of property rights in the manner she advocates. Similarly, her argument that a legislature should not make law based on majority morality is misguided.[68] Majority rule is the essence of democracy, and a legislature can make any law it wants as long as it does so within constitutional bounds. Accordingly, unless the Supreme Court overrules *Bowers*, the Due Process Clause does not prevent a couple's domicile from refusing to recognize the validity of a same-sex marriage celebrated in another state.

In sum, this author mainly disagrees with arguments by advocates of same-sex marriage on the grounds that choice of law should not be used for substantive change and that one state should not be able to force its value system on another more interested state through choice of law.[69] In other words, these proposals are ignoring the structural lines of horizontal federalism embedded in the Constitution.

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66. *Id.* at 597.

67. *Id.* at 597-98.

68. However, whether it should on normative grounds is another question. *See generally* Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479 (1989) (considering whether criminal law should be used to enforce conventional ethics).

69. Professor Hogue has asserted that proponents of same-sex marriage have "radically tilted the deliberative playing field of scholarship." Hogue, *supra* note 21, at 36 (citing Wardle, *supra* note 18, at 18).

B. *Opponents of Using Choice of Law to Extend Same-Sex Marriage to Other States*

Several scholars have argued that states can use the public policy exception to refuse to recognize same-sex marriages celebrated in other states.[70] This author disagrees with those scholars on the same ground that he disagreed with advocates of same-sex marriage—that choice of law should not be used to obtain substantive results and that choice of law should respect the horizontal federalism lines in the Constitution.

Professor Hogue, one of the opponents of requiring states to recognize same-sex marriage, writes:

> What remains clear is that the longstanding practice of states in refusing recognition to unions it finds unacceptable is both salutary and constitutional. It protects the interests of the forum in maintaining the integrity of a fundamental element of civil society—the traditional marriage between a man and a woman—and upholds a major tenant of federalism by preserving the field of domestic relations both appropriately and historically for states.[71]

Professor Hogue continues:

> Although some may dismiss such a line of analysis under the epithet of so-called "homophobia," I persist in believing that a well-grounded distaste for particular conduct that is viewed as morally objectionable by a majority within a democratic society—and hence proscribable under the police power in the same way that other socially undesired conduct such as drug use or prostitution is banable—is not a product of unreasoned fear, as the term suggests but rather of proper moral reservation.[72]

Professor Marcin takes the above argument a step further and contends that a state can refuse to recognize a same-sex marriage on natural law grounds, like those found in the writings of Saint Thomas Aquinas.[73] He asserts that "[w]ith our current widespread societal acceptance of the premise that God is irrelevant to public moral thinking, we find ourselves wallowing in a sea of moral relativism."[74]

While this author agrees that a state has the authority to regulate public

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70. *See supra* note 21.
71. Hogue, *supra* note 21, at 35.
72. *Id.* at 36.
73. *See* Marcin, *supra* note 21, at 68.
74. *Id.* at 80.

morality (within constitutional bounds), I do not think that choice of law is the proper mechanism for doing so. In addition, as I will demonstrate in the next Part, I believe that the public policy exception is unconstitutional.[75]

Not satisfied with using the public policy exception to avoid recognizing same-sex marriages, approximately thirty states have passed statutes in reaction to the possibility that at least one state will legalize same-sex marriage.[76] These statutes "clearly state that only marriages between a man and a woman may be validly performed in-state."[77] More importantly, most of the statutes declare that the state will not acknowledge foreign marriages between same-sex couples.[78] A few of the statutes also specifically refuse to give the incidents of marriage to such unions.[79] For example, after defining a marriage as "a civil contract between a man and a woman,"[80] Minnesota's statute states:

> (a) The following marriages are prohibited:
>
> . . . .
>
> (4) a marriage between persons of the same sex.
>
> (b) A marriage entered into by persons of the same sex, either under common law or statute, that is recognized by another state or foreign jurisdiction is void in this state and contractual rights granted by virtue of the marriage or its termination are unenforceable in this state.[81]

While this author questions whether states should pass such statutes, the states undoubtedly have the power to do so under the United States Constitution, especially considering *Bowers*.[82] The key question for this Article, then, is when do these statutes apply under choice of law principles? I will deal with this question in Parts III and IV below.

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75. *See infra* notes 147-76 and accompanying text.

76. *See generally* David Orgon Coolidge & William C. Duncan, *Definition or Discrimination? State Marriage Recognition Statutes in the "Same-Sex Marriage" Debate*, 32 CREIGHTON L. REV. 3, 9-13 (1998) (explaining that 15 of the 30 state statutes invoke the words "public policy").

77. *Id.* at 11.

78. *See id.* at 12.

79. *See id.*

80. MINN. STAT. § 517.01 (Supp. 1999).

81. MINN. STAT. § 517.03 (Supp. 1999).

82. I will discuss the constitutionality of a state's treatment of same-sex marriage in greater depth in connection with the incidents of marriage in Part IV. *See infra* notes 262-93 and accompanying text. Whether any of these statutes are unconstitutional on state constitutional grounds is beyond the scope of this Article.

Afraid that state statutes refusing to recognize same-sex marriages were not enough to prevent states from being forced to acknowledge such marriages, opponents of same-sex marriage lobbied Congress to pass a statute preventing such an outcome. Congress passed such a statute in 1996 by enacting DOMA:

> 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.[83]

If this statute is constitutional, it would allow states to refuse to recognize same-sex marriages celebrated in other states and to decline to bestow the incidents of marriage on such marriages under *any* circumstances. This author, however, believes that DOMA is unconstitutional because Congress lacked the authority to pass the Act under the Full Faith and Credit Clause.[84] The Full Faith and Credit Clause 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,

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83. 28 U.S.C. § 1738(c).

84. Numerous other scholars concur. *See* 142 CONG. REC. S5931-33 (daily ed. June 6, 1996) (letter from Professors Laurence H. Tribe & Ralph S. Tyler, Jr.); Paige E. Chabora, *Congress' Power Under the Full Faith and Credit Clause and the Defense of Marriage Act of 1996*, 76 NEB. L. REV. 604, 649 (1997); Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 974 (1998); Evan Wolfson & Michael F. Melcher, *Constitutional and Legal Defects in the "Defense of Marriage" Act*, 16 QUINNIPIAC L. REV. 221, 222-26 (1996); *see also* Mark Strasser, *DOMA and the Two Faces of Federalism*, 32 CREIGHTON L. REV. 457, 457 (1998) (stating that DOMA undermines the unity of the Full Faith and Credit Clause); Melissa Rothstein, Comment, *The Defense of Marriage Act and Federalism: A States' Rights Argument in Defense of Same-Sex Marriages*, 31 FAM. L.Q. 571, 578-82 (1997) (discussing that limiting the Full Faith and Credit Clause is inconsistent with the enactment history). *But see* Jeffrey L. Rensberger, *Same-Sex Marriages and the Defense of Marriage Act: A Deviant View of an Experiment in Full Faith and Credit*, 32 CREIGHTON L. REV. 409, 456 (1998) (concluding that DOMA is a valid exercise of Congress's power under the Effects Clause); Lynn D. Wardle, Williams v. North Carolina, *Divorce Recognition, and Same-Sex Marriage Recognition*, 32 CREIGHTON L. REV. 187, 223 (1998) (stating that Congress had constitutional authority to enact DOMA); Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 225, 391-92 (1998) (concluding that DOMA is constitutional based on a historical understanding of the Full Faith and Credit Clause).

and the Effect thereof.[85]

The argument that Congress had the power to pass DOMA is based on the second sentence, the so-called "Effects" Clause.[86] However, what those who make this argument are ignoring is that the first sentence of the Full Faith and Credit Clause uses the word "shall," which means that full faith and credit is mandatory.[87] Therefore, Congress cannot limit the scope of the first sentence by using its authority under the Effects Clause.

This textualist reading of the first sentence is supported by its history. Professor Kramer has observed that

> Madison moved successfully to substitute "shall" for "ought" in the Full Faith and Credit [Clause,] and "may" for "shall" in the Effects Clause. It thus appears that a deliberate decision was made to make the basic requirement of full faith and credit mandatory and to give Congress discretionary power to enforce it.[88]

Thomas v. Washington Gas & Light Co.[89] also supports this conclusion:

> [W]hile Congress clearly has the power to increase the measure of faith and credit that a State must accord to the laws or judgments of another State, there is at least some question whether Congress may cut back on the measure of faith and credit required by a decision of this Court.[90]

Similarly, it is unlikely that the Framers intended to give Congress the power under the Effects Clause that it used in enacting DOMA. As Professor Tribe has declared, to

> claim that a law licensing States to give no effect at all to a specific category of "Acts, Records and Proceedings" is a

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85. U.S. CONST. art. IV, § 1.

86. *See, e.g.*, Rensberger, *supra* note 84, at 456; Wardle, *supra* note 84, at 223; Whitten, *supra* note 84, at 255.

87. *See, e.g.*, BLACK'S LAW DICTIONARY 1375 (6th ed. 1990) ("As used in statutes, contracts, or the like, this word is generally imperative or mandatory."); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2085 (1971) ("[W]ill have to: must.").

88. Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 2004 (1997) (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 488-89 (Max Farrand ed., rev. ed. 1966) (James Madison, Sept. 3, 1787)); *see also* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 292 (1992).

89. 448 U.S. 261 (1980).

90. *Id.* at 273-74 n.18.

> general law prescribing "the effect" of such acts, records and proceedings . . . is a play on words, not a legal argument. . . . The reason is straightforward: Power to specify how a sister-state's official acts are to be "proved" and to prescribe "the effect thereof" includes no power to decree that, if those acts offend a Congressional majority, the[y] need to be given no effect whatsoever by any state that happens to share Congress's substantive views.[91]

In addition, the Supreme Court has recently been taking a narrower view of Congress's authority to enact legislation, especially in the cases cited by Judge Wilkinson.[92] One commentator has compared Congress's limited power under the Effects Clause with its limited power under the Enforcement Clause of the Fourteenth Amendment, concluding that "the restrictions on Congress's power is the same under both clauses and that the Effects Clause gives Congress no power to weaken the imperative of full faith and credit."[93]

This scholar's argument is especially relevant in light of the Court's recent decision in *City of Boerne v. Flores* (one of the cases cited by Judge Wilkinson), which held that Congress lacked the power to enact the Religious Freedom Restoration Act of 1993 ("RFRA") under the Enforcement Clause of the Fourteenth Amendment.[94] Congress passed RFRA in response to a Supreme Court case that had rejected a free exercise claim brought by members of the Native American Church who were denied unemployment benefits when they lost their jobs because they had used peyote, an illegal drug, during a religious service.[95] RFRA states that

> Free exercise of religion protected
>
> (a) In general

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91. 142 CONG. REC. S5932 (daily ed. June 6, 1996).

92. *See* City of Boerne v. Flores, 117 S. Ct. 2157, 2160 (1997); Printz v. United States, 117 S. Ct. 2365, 2384 (1997) (ruling that a portion of the Brady bill was unconstitutional); United States v. Lopez, 514 U.S. 549, 551 (1995) (ruling that Congress did not have the power under the commerce clause to outlaw handgun possession near schools); New York v. United States, 505 U.S. 144, 149 (1992); *see also* Alden v. Maine, 119 S. Ct. 2240 (1999); College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219 (1999); Florida Prepaid Postsecondary Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199 (1999); Saenz v. Roe, 119 S. Ct. 1518 (1999); Seminole Tribe v. Florida, 517 U.S. 43 (1996); Brzonkala v. Virginia Polytechnic Inst., 169 F.3d 820, 820 (4th Cir. 1999).

93. Chabora, *supra* note 84, at 635-39.

94. *See Boerne*, 117 S. Ct. at 2160.

95. *See id.* at 2160 (citing Employment Division v. Smith, 494 U.S. 872 (1990)).

> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering the compelling governmental interest.[96]

In *Boerne*, a church wanted to enlarge its building.[97] The city council had passed an ordinance authorizing its Historic Landmarks Commission to prepare a preservation plan regarding proposed historic landmarks and districts, and which required that the Commission pre-approve any changes to historical landmarks or buildings in the district.[98] When the church applied for a building permit, city officials denied the permit under the ordinance.[99] The church challenged the permit denial on various grounds, including RFRA.[100]

The Court held RFRA to be unconstitutional because Congress lacked the power to enact it.[101] In passing RFRA, Congress had relied on Section 5 of the Fourteenth Amendment, which states that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[102] In considering the constitutionality of RFRA, Justice Kennedy declared that "[u]nder our Constitution, the Federal Government is one of enumerated powers."[103] He noted that "[l]egislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is."[104] Justice Kennedy then added, "If Congress could define its

96. 42 U.S.C. § 2000b-1 (1994).

97. *See Boerne*, 117 S. Ct. at 2160. RFRA is applicable to all levels of government. 42 U.S.C. § 2000b-3(a).

98. *See Boerne*, 117 S. Ct. at 2160.

99. *See id.*

100. *See id.*

101. *See id.* at 2162-72.

102. *Id.* at 2162 (quoting U.S. CONST. amend. XIV, § 5).

103. *Id.*

104. *Id.* at 2164; *see also* Saenz v. Roe, 119 S. Ct. 1518, 1529 (1999) (stating "§ 5 grants

own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.'"[105] Consequently, "[s]hifting legislative minorities could change the constitution and effectively circumvent the difficult and detailed amendment process contained in Article V."[106]

The principles from *Boerne* concerning RFRA also apply to DOMA. In changing the scope of the Full Faith and Credit Clause, Congress altered the meaning of the clause and changed what "full faith and credit" means—that states can now give or deny full faith and credit based on subjective preferences. Accordingly, Congress amended the Constitution without following article V.

While this author believes that DOMA is unconstitutional, it will be shown in Part III below that the Full Faith and Credit Clause will generally not require a couple's domicile to recognize a same-sex marriage celebrated in another state. However, other states will have to recognize same-sex marriages under the Full Faith and Credit Clause when the marriage was celebrated in the couple's domicile.[107]

II. CRITICISMS OF THE CURRENT CHOICE OF LAW RULE ON THE VALIDITY OF MARRIAGE AND THE PUBLIC POLICY EXCEPTION

The current choice of law rule on the validity of marriages is a marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized unless it violates a strong public policy of the forum.[108] *Osoinach v. Watkins*[109] presents a typical example of this rule and the public policy exception. In *Osoinach*, an alleged widow had petitioned an Alabama court for letters of administration for her deceased husband's estate.[110] The deceased's relatives opposed the petition on the ground that she was not the widow.[111] The couple, who were uncle and niece, had gone from their Alabama domicile, which forbad such persons to marry, to Georgia, which allowed such marriages, to wed.[112] After consummating the marriage, they returned to Alabama and lived as

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Congress no power to restrict, abrogate, or dilute these guarantees") (citing Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1996)).

105. *Boerne*, 117 S. Ct. at 2168.

106. *Id.*

107. I will deal with whether a state has to bestow the incidents of marriage on same-sex unions celebrated in other states in Part IV.

108. *See supra* note 22 and accompanying text.

109. 180 So. 577 (Ala. 1938).

110. *See id.* at 578.

111. *See id.*

112. *See id.*

husband and wife for many years.[113]

The court held the marriage *void ab initio*.[114] The court declared that

> [i]t is a general rule of law that a marriage valid where celebrated is valid everywhere. But this general rule, like other rules of law, is not without its exceptions. Of course, a marriage which is contrary to the law of nature as generally recognized in Christian countries is void everywhere, and so a marriage which the law-making power has declared void, either in express terms or by necessary implication, shall not be allowed any validity.[115]

An Alabama statute made marriages between uncle and niece incestuous, and another statute made such marriages a crime.[116] Consequently, the marriage was void, and it conferred no property rights upon the alleged widow.[117]

While the public policy exception is an important part of the traditional rule, it is usually employed only in cases where the public policy is very strong, such as cases of incest or polygamy.[118] As Justice Cardozo declared concerning the principle, courts "do not close their doors, unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."[119] For example, a domicile's courts generally uphold the validity of a marriage when the parties are below the age of consent in the domicile but of a legal age to marry in the state of celebration.[120] Similarly, although New York does not have common law marriage, it recognizes common law marriages that were created in other states.[121]

While the traditional choice of law rule is long-standing, it is time to reevaluate its reasonableness. First, the rule originated in a period in which the concept of choice of law was very different from that of today. Second, the rule selects the law of a jurisdiction that may have a tenuous connection to the marriage. Finally, the public policy exception, which is an integral part of the rule, is unwise and is of dubious constitutionality.

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113. *See id.*

114. *See id.* at 581.

115. *Id.* at 579 (citing Pennager v. State, 10 S.W. 305 (Tenn. 1889)).

116. *See id.*

117. *See id.* at 581.

118. *See* 2 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 129.1, at 678 (1935); SCOLES & HAY, *supra* note 22, at 438, 444, 450-51; SECOND RESTATEMENT, *supra* note 58, § 283, cmts. j-k.

119. Loucks v. Standard Oil Co., 120 N.E. 198, 202 (1918).

120. *See* SCOLES & HAY, *supra* note 22, at 451-52.

121. *See* Ram v. Ramarack, 571 N.Y.S.2d 190, 191 (Sup. Ct. 1991).

The traditional rule for the validity of a marriage became ensconced in American law at a time of highly mechanical rules of choice of law, which have largely been rejected today. Choice of law in the nineteenth and early twentieth centuries was based on a rigid territorialism: Justice Story had written that "every nation possesses an exclusive sovereignty and jurisdiction within its own territory."[122] Thus, it "would be wholly incompatible with the equality and exclusiveness of the sovereignty of any nation, that other nations should be at liberty to regulate either persons or things within its territories."[123]

Joseph Beale, the major proponent of the territorial approach to choice of law,[124] thought a state had exclusive jurisdiction within its borders, but no authority outside its boundaries.[125] Thus, Beale believed the location of a single, significant event within a jurisdiction, usually the last act, determined which state's law would control.[126] For example, the law of the place of the injury governed in tort cases, while the law of the place of the making of the contract applied in contract cases.[127] Under this system, rights and other obligations "vest" at the applicable time and place under the governing state's law, and courts in other states must enforce the vested right or obligation.[128]

Beale's system contained mechanisms for the avoidance of the harsh outcomes that might result from the rigid application of these territorial rules. One such device was the public policy exception: despite the rule of vesting mentioned above, a state did not have to employ another state's law if adopting that law was against a strong public policy of the forum.[129]

The "conflicts revolution" has largely rejected Beale's mechanical rules and the theoretical foundation of those rules.[130] Realist scholars in the

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122. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 18, at 19 (1st ed. 1834).

123. *Id.* § 20, at 21.

124. *See* SCOLES & HAY, *supra* note 22, at 13-14.

125. *See* 1 BEALE, *supra* note 118, § 1.6, at 6; *see also id.*, § 4.12, at 46.

126. *See* RESTATEMENT OF THE LAW OF CONFLICT OF LAWS § 377 (1934) [hereinafter FIRST RESTATEMENT]. Joseph Beale was the principle author of the FIRST RESTATEMENT.

127. *See id.* §§ 332, 377.

128. *See* 2 BEALE, *supra* note 118, § 384.1, at 1298; 3 BEALE, *supra* note 118, § 73, at 1967-69. "'A right having been created by the appropriate law, the recognition of its existence should follow everywhere. Thus an act valid where done cannot be called in question anywhere.'" 3 BEALE, *supra*, at 1969 (quoting 3 BEALE, SUMMARY OF THE CONFLICT OF LAWS §§ 1-5 (1902)). Beale derived his notion of vested rights from the English theorist A.V. Dicey. *Cf.* SECOND RESTATEMENT, *supra* note 58, § 73; A.V. DICEY, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS 22 (1896); *see also* J.H. Beale, Jr., *Dicey's "Conflict of Laws,"* 10 HARV. L. REV. 168 (1896-97) (discussing recognition of rights among territories).

129. *See* FIRST RESTATEMENT, *supra* note 126, § 612.

130. For a history of the conflicts revolution, see Scott Fruehwald, *A Multilateralist Method of Choice of Law*, 85 KY. L.J. 347, 352-65 (1996-97). *See also* FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 88-150 (1993).

1920s and 30s criticized Beale's approach on the grounds 1) that it did reflect the law in practice;[131] 2) that the rules were mechanical;[132] 3) that courts select law based on policy, not territory;[133] and 4) that it was nonsensical to create a right that must be enforced by other jurisdictions, then permit a state to refuse to recognize that right based on public policy.[134] Beginning in the 1950s and 60s, courts began to move away from Beale's territorial method in favor of approaches that looked to see which jurisdiction was the "center of gravity" or had the "most significant relationship" to the case;[135] that determined whether the forum had an interest in applying its law;[136] or that decided which state's law was the "better" rule.[137] Today, almost all scholars have rejected Beale's approach to choice of law. In addition, only fifteen states retain some version of Beale's system, and those states that use his rules have renounced the vested rights part of his method.[138]

The conflicts revolution, however, bypassed choice of law rules on marriage. The rule in use today is basically the same one employed by Justice Story and Joseph Beale. Beale's rule on the validity of marriage, like his other rules, was based on territory. It adopted the law of the place of the last act, the place of celebration of the marriage.[139] Beale considered a marriage to be like a contract,[140] and the law governing a contract was that of the place of the making of the contract.[141] As with any of his rules, Beale's rule governing marriages was subject to the public policy exception.[142]

As was true of Beale's rules on torts and contracts, there is little reason to retain his rule on the validity of marriage. The place of the last act—the place of the celebration of the marriage if it is different from the couple's

131. *See* Walter W. Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457, 459-60 (1924).

132. *See id.*; David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 208 (1933).

133. *See, e.g.*, Ernest G. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736, 743-45, 748-50 (1924).

134. *See id.* at 746-47.

135. *E.g.*, Auten v. Auten, 124 N.E.2d 99, 102 (N.Y. 1954).

136. *See, e.g.*, Huratado v. Superior Court, 522 P.2d 666, 669 (Cal. 1974); Reich v. Purcell, 432 P.2d 727, 729-30 (Cal. 1967); Babcock v. Jackson, 191 N.E.2d 279, 283 (N.Y. 1963).

137. *See, e.g.*, Heath v. Zellmer, 151 N.W.2d 664, 672 (Wis. 1967); Clark v. Clark, 222 A.2d 205, 209 (N.H. 1966).

138. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 1996: Tenth Annual Survey*, 45 AM. J. COMP. L. 447, 459-60 (1997).

139. *See* 2 BEALE, *supra* note 118, § 121.2, at 669; *see also* FIRST RESTATEMENT, *supra* note 126, § 134, at 201.

140. *See* 2 BEALE, *supra* note 118, § 121.2, at 668-69.

141. *See id.*, § 311.1, at 1044-46.

142. *See id.*, § 129.1, at 678.

domicile—is usually not the most significant connection to a marriage. In most instances, the parties' domicile will be the most important connection. The parties' domicile has a strong interest in regulating their domiciliary's marriages, while the state of celebration has little interest in the parties once they return home. One of the lessons of the choice of law revolution is that courts should consider state interests in deciding choice of law.[143] The traditional rule ignores the state with the strongest interest in the marriage in favor of a state that has a much weaker connection to it.

Similarly, one of the reasons for the rejection of the place of the last act rule for torts and contracts was that the place of the last act might be fortuitous.[144] Say, for example, a Florida couple is driving to Maine. While in Rhode Island, a state in which the couple has never been before, the wife is injured due to her husband's negligence. Florida, allows torts suits between spouses, but Rhode Island has spousal immunity.[145] Because the last act occurred in Rhode Island, Rhode Island's rule would apply, even though the place of the accident was fortuitous and the couple had no connection with Rhode Island.

Similarly, a person from New York and a person from Alabama negotiate a contract in Alabama. The Alabaman makes an offer in Alabama, but the New Yorker is unsure whether she wants to accept. While driving through Georgia, she calls the Alabaman on her cell phone to accept the offer. Under Beale's approach, because the last act—the acceptance—was made in Georgia, Georgia law governs the contract, despite the fact that Georgia has no real connection to the contract.

The current rule for the validity of marriages produces similar results. A couple from Virginia, who have never been to Kentucky before, goes to Kentucky because they are too young to marry in Virginia. Under the place of celebration rule, their marriage would be valid, regardless of the fact that they have no significant connection with Kentucky.

While it is true that the parties went to Kentucky voluntarily, this should not change the result. It is a rule of conflicts that, when a contract is made in another place so as to evade the law of the state of performance, courts will not uphold the validity of the contract.[146] Should a "marriage contract" be treated differently?

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143. *See* BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 182-83 (1963).

144. *See id.* at 87-88, 132-34, 138-39, 180-81.

145. The hypotheticals in this paper do not necessarily reflect current state law.

146. *See* Young v. Mobil Oil Corp., 735 P.2d 654, 656-57 (Or. Ct. App. 1987) (stating: "If parties to a contract could circumvent the workers compensation laws by choosing the law of another jurisdiction to govern their agreement, the statutory scheme would break down, thereby causing injury to the public welfare."); SECOND RESTATEMENT, *supra* note 58, § 187, 202(2) ("When performance is illegal in the place of performance, the contract will usually be denied enforcement."); *see also id.*; 16 AM. JUR. 2D *Conflict of Laws* § 92 (1998).

In sum, the choice of law rule for the validity of marriages that upholds marriages when they are valid in the place of celebration is a vestige of an antiquated choice of law system that has been generally abandoned in other areas. Moreover, it ignores the interest of the state that usually has the most interest in applying its law—the couple's domicile. Finally, the traditional rule produces fortuitous results in many cases.

The exception to the traditional rule—that a state may refuse to enforce another state's law when that state's law is inimical to a strong public policy of the forum—is also problematic for both practical and constitutional reasons.[147] As mentioned previously, realist scholars criticized Beale's approach to choice of law because it created a rule that states must follow, then allowed states to ignore that rule based on public policy.[148] Professor Lorenzen declared, "The doctrine of public policy in the Conflict of Laws ought to have been a warning that there was something the matter with the reasoning upon which the rules to which it was an exception were supposed to be based."[149] The same reasoning applies to the traditional marriage rule and the public policy exception. It seems absurd to have a rule that requires a forum court to follow the law of the state of celebration, except when the law of that state is against the state's public policy. Instead of following Beale's convoluted approach, would it not be easier and more reasonable to change the choice of law rule to one that adopts the domicile's marriage law?[150]

The public policy exception also gives judges too much discretion, unless they are acting under a clear statutory mandate. There is a clear danger that, when a judge finds another state's law violates the forum's public policy, she is using her own values to make the decision.[151] In addition, the outcome may depend on which judge a litigant draws; a different judge may apply different values.

More important is the fact that the public policy exception contravenes the Full Faith and Credit Clause, the most important clause regulating the relationship of the states.[152] When a court employs the traditional rule, it is stating that it believes that the other state's law governs, but that it will

147. The public policy exception originated in customary international law, and all states have adopted it without considering its validity in a federal union subject to the Full Faith and Credit Clause and other constitutional provisions. *See* Kramer, *supra* note 88, at 1971-72; Laycock, *supra* note 88, at 313.

148. *See* Lorenzen, *supra* note 133, at 746-47.

149. *Id.* at 747.

150. I will develop this idea in greater depth below in connection with the public policy exception and the Full Faith and Credit Clause. *See infra* notes 160-70 and accompanying text.

151. This is especially true when a controversial issue like same-sex marriage is involved.

152. Other scholars have argued that the public policy exception violates the Full Faith and Credit Clause. *See* Kramer, *supra* note 88, at 1966-67; Laycock, *supra* note 88, at 313. The Full Faith and Credit Clause is set out in full above. *See supra* note 85 and accompanying text.

not adopt that law because it is against the forum's public policy. This failure to use the other state's law when it should apply it according to its own mandate violates the Full Faith and Credit Clause. Independent nations do not have to give *any* credit to a foreign nation's laws, and when they do so they are using "comity . . . the principle that courts of one state or jurisdiction will give effect to laws and judicial decisions of another state out of deference and mutual respect rather than out of duty."[153] However, the Full Faith and Credit Clause "substituted a command for the earlier principles of comity" for American states, and it compels them to give full faith and credit to the statutes and case law of other states.[154]

To permit a state to ignore the law of a sister state based on public policy renders the Full Faith and Credit Clause meaningless. Professor Kramer has declared that "[i]t is difficult to think of a justification more at odds with the principal mission of the Clause."[155] Similarly, Douglas Laycock thinks the Full Faith and Credit Clause places strong limitations on a state's power to reject another state's law:

> A state does not owe some credit, partial credit, or credit where it would be wholly unreasonable to deny credit, which seems to be the Supreme Court's current interpretation. Rather, each state owes *full* faith and credit to the law of sister states. *Full* faith and credit is what a state accords its own law. . . . Thus, the Clause is most plausibly read as requiring each state to give the law of every other state the same faith and credit it gives its own law—to treat the law of sister states as equal in authority to its own.[156]

Some scholars have argued that the public policy exception does not violate the Full Faith and Credit Clause because a state has a legitimate interest in applying its law. For example, Professor Myers has written that "[t]he home state is invoking its public policy to apply its own law in a situation where the forum has important connections to the parties and the 'marriage.'"[157] Similarly, Professor Hogue has declared that

> [p]ublic policy is so integral a part of the decision of a state as to who can be married, to whom and under what circumstances, that no state can dictate the terms of that relationship for another. Only overarching national goals,

153. Smith v. Fireman's Ins. Co., 590 A.2d 24, 27 (Pa. Super. Ct. 1991).

154. Baker v. General Motors Corp., 118 S. Ct. 657, 663 (1998) (citing Estin v. Estin, 334 U.S. 541, 546 (1948)).

155. Kramer, *supra* note 88, at 1986.

156. Laycock, *supra* note 88, at 296 (footnote omitted).

157. Myers, *supra* note 21, at 52.

> such as constitutionally compelled color-blindness in the treatment of individuals by the government, can override a state's ordering of these relationships.[158]

Professor Hogue also has asserted that the public policy exception is constitutionally protected: "The public policy exception, which protects states against the application of foreign laws that are repugnant to the principles upon which the forum state is grounded, is rooted in principles of federalism and the protection of sovereignty which inheres in the Tenth Amendment."[159]

The main problem with the argument that a state can employ the public policy exception when it has a legitimate state interest is that *its* choice of law rules establish that the other state's law is the proper law. In essence, the state is saying that we should be applying the other state's law, but we are not going to because we disagree with the law's content. This the Full Faith and Credit Clause forbids.[160]

On the other hand, if a state changed its choice of law rule to adopt the rule of the state with the closest connection to the controversy, there would be no problem.[161] Then, the state could apply its rule when it was most closely connected to the controversy—when it truly had a legitimate interest in employing its law. The Full Faith and Credit Clause does not forbid a state from adopting its law when it is the state most closely connected to the facts.[162]

Alexander v. General Motors[163] illustrates the advantages of using choice of law directly to further a state's interest, rather than employing the public policy exception to do so indirectly to retain an antiquated choice of law rule.[164] In *Alexander*, a Georgia resident, who was injured while driving in Virginia, brought a products liability action in Georgia against the car's manufacturer based on strict liability.[165] The trial court had

158. Hogue, *supra* note 21, at 37 (footnotes omitted).

159. *Id.* (footnote omitted).

160. Professor Kramer has asserted that "[t]he argument, in a nutshell, is that the Full Faith and Credit Clause prohibits states from selectively discriminating in choice of law based on judgments about the desirability or obnoxiousness of other states' policies." Kramer, *supra* note 88, at 1966-67. Consequently, "whatever choice-of-law rule or approach a state adopts, it cannot alter its willingness to apply foreign law based solely on the substantive policy of the other state." *Id.* at 1967.

161. Professor Kramer has pointed out that "we should distinguish between two kinds of laws: those that promote a state's objectives by defining the parties' substantive rights in particular ways, and those that promote a state's objectives by withholding from state courts the power to entertain claims based on other states' laws." *Id.* at 1983.

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

163. 478 S.E.2d 123 (Ga. 1996).

164. *See id.*

165. *See id.*

granted the manufacturer partial summary judgment because Georgia adhered to Beale's approach to choice of law, and there was no strict products liability action under Virginia law, the place of the accident.[166] The court of appeals affirmed on the ground that Virginia's law did not offend Georgia's public policy.[167]

The Georgia Supreme Court reversed, declaring that the court of appeals missed "the crucial point that Georgia's public policy of shifting to manufacturers the burden of loss caused by defective products is effectuated by precisely those 'somewhat different methods.'"[168] The Court declared, "Virginia law and Georgia law are radically dissimilar in terms of the burden placed on persons seeking recompense for injuries caused by defective products."[169]

The court would have been better off rejecting Beale's place of the accident rule, rather than using the public policy to manipulate choice of law. Georgia could have directly applied its strict liability rule to a case involving a Georgia resident who bought an automobile in Georgia. Instead, it created great uncertainty as to when it will use the public policy exception; there is no moral dilemma in using a negligence rule, rather than a strict liability rule, in a torts case.[170] Consequently, one must wonder whether Georgia will employ the public policy exception whenever another state's law is different from its own, thus, substituting forum-favoring choice of law for the last act rule, without having formally changed its rule.

It appears the Supreme Court has recently upheld the constitutionality of the public policy exception *in dicta*.[171] However, in *Baker*, the Court relied on *Nevada v. Hall*,[172] which did not involve the public policy exception.[173] Rather, that case stood for the proposition that the Full Faith and Credit Clause does not require a state to ignore its statutes and give effect to another state's statutes, as long as the state has a legitimate public policy in applying its laws.[174] The Court in *Hall* declared that

166. *See id.*

167. *See id.*

168. *Id.* at 124.

169. *Id.*

170. Professor Kramer has noted that "[a]t least among states of the United States, very few laws that are also constitutional can fairly be characterized as violating 'fundamental principles of justice.'" Kramer, *supra* note 88, at 1972-73. Thus, "[t]he measure of repugnance in this sense is fixed by the federal Constitution, and states have no business selectively ignoring or refusing to recognize the constitutional laws of sister states because they do not like them." *Id.* at 1987.

171. *See Baker*, 118 S. Ct. at 664.

172. 440 U.S. 410 (1979).

173. *See id.* at 422.

174. *See id.* at 421-24.

> the full faith and credit clause [sic] does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events.[175]

In other words, the case involved a positive rule, rather than an exception.

In addition, one can argue that California had the closest connection to the controversy in *Hall*. The case involved whether Nevada's sovereign immunity applied in a case brought by a California resident against Nevada when a Nevada-owned vehicle collided with the plaintiff's car on a California highway.[176] California law should probably govern in a case involving an accident occurring on California roads between a California resident and a non-resident.

In sum, this author believes that the traditional rule for the validity of marriages should be abandoned. In addition, the public policy exception in choice of law should be unconstitutional despite dicta in *Baker* because it interferes with the horizonal federalism lines of the Constitution.

III. A NEUTRAL SOLUTION TO CHOICE OF LAW AND SAME-SEX MARRIAGE

A. *Normative Criteria for a Choice of Law Rule for Same-Sex Marriage*

The above has demonstrated the problems with the approaches of both the advocates of same-sex marriage who want to use choice of law to bring same-sex marriage to states that have not adopted it and the opponents of same-sex marriage who want to use choice of law as a shield against same-sex marriage. The problem common to both approaches is that they attempt to use choice of law for substantive change in violation of the lines drawn by the Constitution. As stated earlier, choice of law is not the proper mechanism for substantive change; substantive change should be made in substantive law.

This author advocates that courts should deal with choice of law problems in same-sex marriage in the same manner that they deal with all choice of law problems. The validity of same-sex marriages does not require a different choice of law approach just because same-sex marriages are controversial.

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175. *Id.* at 422-23 (quoting Pacific Employers Ins. v. Industrial Accident Comm'n, 306 U.S. 493, 502 (1939)).

176. *See id.* at 412.

This author thinks that a choice of law method should meet the following normative requirements:

1. Choice of law should be grounded in positive law;
2. Choice of law should be substantively neutral;
3. Choice of law should be forum neutral;
4. Choice of law should be predictable;
5. Choice of law should be fair to individuals; and
6. Choice of law should reflect the relevant states' interests.[177]

This author believes that these criteria balance the structural lines drawn by the Constitution with the need to protect individual rights.

First, a court should not apply a state's law to a controversy when the lawmaker did not intend the law to encompass that situation. For example, a state would not have intended to extend its strict products liability rule to cases where the product is manufactured, bought, and used outside that state, and involving no state domiciliaries. Similarly, a state would usually not have meant its marriage validity laws to encompass a marriage celebrated in another state involving foreigners.

Second, a choice of law rule for the validity of marriage should be substantively neutral. As stated earlier, choice of law in general should be content neutral. The role of choice of law is to select the law of the most appropriate jurisdiction, not to decide which state's law is better. When courts adopt the better rule they sometimes use the law of a jurisdiction with a tenuous connection to the dispute. In addition, people cannot conform their behavior to the law when the law to be used depends on which judge they might draw.

The controversy concerning choice of law and the validity of same-sex marriages illustrates the problems with using choice of law to attain substantive goals. If the right to have a same-sex marriage recognized by a court depends on the substance of that right, then whether that right is valid will hinge on the judge's view of same-sex marriage. This is not a decision for a judge to make on a case by case basis during the choice of law process; rather, the state legislature should make that decision as a matter of substantive policy.[178]

Third, the validity of a marriage should not differ depending on the jurisdiction in which a party files suit or tries to get the marriage recognized. A marriage should either be valid or invalid everywhere.

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177. For more information on this author's normative approach to choice of law, see Fruehwald, *supra* note 130, at 365-75.

178. Legislatures, not judges, should make policy determinations. *See* RONALD DWORKIN, LAW'S EMPIRE 242-44 (1986).

Under the traditional rule that allows a public policy exception, one state might recognize a marriage while another might not. Considering the mobility of modern society, such a rule is unworkable.

Fourth, predictability is an important choice of law value. Persons should be able to predict the applicable law so that they can comply with it. Predictability is especially important in connection with marriage. Persons need to know whether their marriage is valid to be able to plan their lives, their living arrangements, their responsibilities to their partner, their relationships to their children, the disposition of their property upon their death, etc. A choice of law rule for marriage that depends on the content of the rule or the forum in which the suit is filed is unpredictable.

Fifth, fairness to individuals is of paramount importance for choice of law. A choice of law method should not impose the law of a state on a person when the state has little or no connection to the dispute. This is not a problem for parties to a same-sex marriage when a court enforces the law of the state of celebration to recognize the validity of the marriage because the parties voluntarily went to that state to be married.[179] However, it might be unfair to a person who might inherit from one of the same-sex partners.

Fairness to individuals is also implicated when a state refuses to recognize a same-sex marriage based on the law of a jurisdiction with a tenuous connection to the situation. A state should not be able to refuse to recognize a right when that state has little connection with the controversy, even if recognizing that right violates a strong state public policy.

Finally, state interests should be respected during the choice of law process. Each state has its own values, and as long as those values do not violate the Constitution, other states should respect them. A state's values are not respected when one state tries to force its values on another state through choice of law when the controversy is local to the state whose values are being ignored. This would occur if choice of law rules force a couple's domicile to acknowledge the validity of a same-sex marriage when the couple's domicile does not allow such marriages. A couple's domicile has a strong interest in regulating the marriages of its domiciliaries, while the state of the celebration has little interest in governing the marriages of couples who live in other states. Thus, a couple's domicile should not be forced to adopt the values of a state with only a tenuous connection to the marriage. As Representative Campbell noted:

> While California recognizes opposite-sex marriages from Hawaii, the recognition of same-sex marriages is, for better or worse, a more significant departure from California's existing

179. When a party wants to end a same-sex marriage, there is a possibility that that person will argue that the marriage is invalid, rather than face the consequences of divorce.

> public policy. It should be adopted or not by vote of California's Legislature or by the people directly through initiative, not by the action of a justice of the peace in another state.[180]

Some scholars will disagree with the above on the ground that a state's refusal to recognize a same-sex marriage is parochial and even biased. However, states have the authority to select whatever values they want as long as that choice does not violate the United States Constitution. "[T]he states stand on an equal level or plane under our constitutional system,"[181] and they "are equal to each other in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself."[182] Forcing one state's values on another state through choice of law contravenes the structure of our federal system. As one observer has noted, "When the law applied is different from that of the community where a substantial portion of the litigation-creating occurrence took place, that community's consensus on the appropriate legal consequences is frustrated."[183]

Similarly, allowing communities to have differing values is one reason to have subdivisions of a national state. Professor Kreimer has written that

> [o]ne of the virtues of a territorial federalism is precisely that it allows conflicting communities of commitment to coexist within a single national polity, while allowing individuals to move fluidly among them. On issues of fundamental life choices, America has often been a house divided, with the individual citizens entitled to decide the rooms in which they wish to live.[184]

This is true even when those values are controversial. As Justice Scalia

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180. Tom Campbell, *Perspectives on Same-Sex Marriages*, LOS ANGELES TIMES, July 12, 1996, at B9.

181. Wisconsin v. Michigan, 295 U.S. 455, 462 (1935) (citing Wyoming v. Colorado, 259 U.S. 419, 465 (1922)).

182. Skiriotes v. Florida, 313 U.S. 69, 77 (1941).

183. James R. Pielemeier, *Why We Should Worry About Full Faith and Credit to Laws*, 60 S. CAL. L. REV. 1299, 1336 (1987); *see also* Currie, *supra* note 53, at 8 (stating "the marital status of Illinois citizens is none of Hawaii's business"); Linda J. Silberman, *Can the Island of Hawaii Bind the World? A Comment on Same-Sex Marriage and Federalism Values*, 16 QUINNIPIAC L. REV. 191, 204 (1996) ("Domiciliaries and residents of other states are subject to the mores of their communities, and the marriage blessing of authorities in Hawaii should not alter those community norms.").

184. Seth F. Kreimer, *Territoriality and Moral Dissensus: Thoughts on Abortion, Slavery, Gay Marriage and Family Values*, 16 QUINNIPIAC L. REV. 161, 163 (1996).

observed in his dissenting opinion to a Supreme Court decision that struck down a Colorado constitutional amendment that forbad giving special protections to gays or lesbians:

> The Court has mistaken a Kulturkampf for a fit of spite. The constitutional amendment before us here is not the manifestation of a "'bare . . . desire to harm'" homosexuals, but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores . . . through use of the laws. That objective, and the means chosen to achieve it, are not only unimpeachable under any constitutional doctrine hitherto pronounced . . . ; they have been specifically approved by the Congress of the United States and by this Court. . . .
>
> Since the Constitution of the United States says nothing about this subject, it is left to be resolved by normal democratic means. . . . This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that "animosity" toward homosexuality is evil.[185]

The above principles also apply to the opposite situation. If the state with the closest connection to a marriage legalizes that marriage and the marriage does not violate the Constitution, another state should not be able to invalidate that marriage on the ground that the other state has a different value system. Therefore, when the state of celebration and the couple's domicile are the same, that state has the closest connection to the marriage. Other states, therefore, must recognize that marriage and respect the marriage state's sovereignty.

B. *Constitutional Criteria for a Choice of Law Rule for Same-Sex Marriage*

The above criteria are normative, and while they can provide guidance to a court in forming a choice of law rule for same-sex marriage, they are not binding on any court. However, this author believes that content and forum neutrality are required by the United States Constitution. While the current constitutional restraints on choice of law are minimal,[186] several scholars, including this Article's author, have argued that the Constitution places greater constraints on choice of law than the Supreme Court

185. Romer v. Evans, 116 S. Ct. 1620, 1629 (1996) (Scalia, J., dissenting) (citations omitted).

186. The current standard is that a "[s]tate 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." Allstate Ins. Co. v. Hague, 449 U.S. 302, 313 (1981).

currently recognizes.[187] These constraints appear mainly in the Due Process and Full Faith and Credit Clauses.[188] The Due Process Clause protects individual liberty, while the Full Faith and Credit Clause draws the structural lines that govern the relationship of the states.

The Due Process Clause limits a state's authority over the individual and protects individual liberty.[189] This author believes that to implement the Due Process Clause fully, a court should undertake a two step analysis of a state's choice of law.[190] First, the court must determine whether a state can extend its law to a controversy without violating due process. This constraint is minimal; a significant contact to the controversy will suffice.[191] The second step is more rigorous: If another state's law might also be applicable to the facts under the first step (meaning a true conflict exists), then the court must decide whether adoption of the first state's rule satisfies due process in light of the other law's claim to application. This writer thinks that when a court employs a state's law when another state's law has a significantly closer connection to the facts, it has violated due process.

What justifies the above due process standard for choice of law? First, this author believes that a person has a due process right not to have the law of a state with a tenuous connection to that person's actions applied to those actions when the law of a state with a significantly closer connection could be employed. Is it fair that when a person conforms his conduct to the law of the state that is most closely connected to a situation that a court could adopt another state's law because that law is forum law or because the judge subjectively thinks the other state's law is substantively more just? Second, the current due process standard allows a person to be subject to inconsistent laws, and it is a basic principle of our judicial

187. *See* Scott Fruehwald, *Constitutional Constraints on State Choice of Law*, 24 U. DAYTON L. REV. 40, 41 (1998); Terry S. Kogan, *Toward a Jurisprudence of Choice of Law: The Priority of Fairness over Comity*, 62 N.Y.U. L. REV. 651, 654 (1987); Laycock, *supra* note 88, at 249; *see also* Peter Hay, *Full Faith and Credit and Federalism in Choice of Law*, 34 MERCER L. REV. 709, 711 (1983); Pielemeier, *supra* note 183, at 1299; Gene R. Shreve, *Choice of Law and the Forgiving Constitution*, 71 IND. L.J. 271, 271 (1996).

188. A few scholars have found constitutional constraints in the Constitution's antidiscrimination clauses—Article IV's Privileges and Immunities Clause and the Fourteenth Amendment's Equal Protection Clause, and the Commerce Clause. *See, e.g.*, John Hart Ely, *Choice of Law and the State's Interest in Protecting its Own*, 23 WM. & MARY L. REV. 173, 192-200 (1981); Laycock, *supra* note 88, at 249. However, this author thinks that use of these clauses is unnecessary because of the constraints placed on state choice of law by the Due Process and Full Faith and Credit Clauses.

189. *See* Fruehwald, *Constitutional Constraints*, *supra* note 187, at 56-63; Kogan, *supra* note 187, at 694 n.230.

190. *See* Fruehwald, *Constitutional Constraints*, *supra* note 187, at 60-61, 69-70.

191. This step is basically the same as current law. *See Allstate*, 449 U.S. at 313.

system that a person not be subject to inconsistent laws.[192] When a person is subject to inconsistent laws, that person cannot conform his or her conduct to the law because the person lacks notice of what constitutes unlawful conduct, an unfair result that violates due process.[193] Finally, without stricter due process constraints on state choice of law, a person could be exposed to unfair choice of law without political redress. The Due Process Clause should protect a person from being *unfairly* subjected to a state's law when that person is not a member of that community—when that person lacks the right to vote or otherwise affect the political process.[194]

This author believes that "[t]he Full Faith and Credit Clause places similar constraints on choice of law."[195] As mentioned above, the court's current interpretation of full faith and credit constraints on choice of law is minimal.[196] However, this author questions why the Court has given such a limited reading to constraints on state choice of law under the Full Faith and Credit Clause. Courts should "refrain from being textually selective" in constitutional interpretation.[197] As Judge Wilkinson has pointed out, "[h]ow one clause can be robust and the other anemic is a mystery when both clauses, after all, are part of our Constitution."[198] Placing greater structural limitations on the states is particularly important in light of the new judicial activism, which gives states greater authority than previously.[199]

While a state should not have to adopt another state's law whenever

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192. *See* LON L. FULLER, THE MORALITY OF LAW 39 (1964); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).

193. *See* BMW of N. Am. v. Gore, 116 S. Ct. 1589, 1598 (1996). Douglas Laycock has averred that "[p]eople cannot obey the law unless they know it; they cannot know the law unless they know which law to learn. If I am to know the law that governs an act or transaction, I must be able to identify, before I act, the one state empowered to govern." Laycock, *supra* note 88, at 319.

194. Similarly, Terry Kogan has declared that

> when a state seeks to apply its law to a person who has no affiliation with the state that can justify application of that state's law . . . , an individual is asked to comply with a state's law when the individual has no political obligation to do so. The state is seeking to exercise sovereign power that it was not given by the Constitution. Constitutional concerns for fairness constrain this fundamental overstepping by a state.

Terry S. Kogan, *supra* note 187, at 699-700.

195. Fruehwald, *supra* note 187, at 72; *see also* Laycock, *supra* note 88, at 296.

196. *See supra* note 191 and accompanying text.

197. Brzonkala v. Virginia Polytechnic Inst., 169 F.3d 820, 894 (4th Cir. 1999).

198. *Id.* at 895.

199. This seems to be what the Court was doing in *Saenz*, where the Court breathed new life into the largely dormant Privileges and Immunities Clause of the Fourteenth Amendment. *See* Saenz v. Roe, 119 S. Ct. 1518, 1525-28 (1999).

that other state's law has a colorable claim to application, the opposite is also true: a state should not be able to ignore another state's law when the other state has a stronger connection to a controversy. The Supreme Court has recently declared that the purpose of the Full Faith and Credit Clause

> was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.[200]

The only way to fulfill this purpose is for a state to apply its law when it has the closest connection to a controversy, and to yield its sovereignty and adopt the law of another state when that other state has a significantly closer connection to the situation. As Justice Jackson observed, "[a]nything taken from a state by way of freedom to deny faith and credit to law of others is thereby added to the state by way of a right to exact faith and credit for its own."[201]

The traditional choice of law rule for the validity of marriages violates the above constitutional standard. When the laws of the state of the celebration of a marriage and the state of the couple's domicile differ, the couple's domicile will usually have a significantly closer connection to the marriage because that is where the couple lives. Thus, use of the law of the celebration state will violate both the Due Process and Full Faith and Credit Clauses. As stated above, it is unfair to an individual to have the law of a state with a tenuous connection to an occurrence govern that occurrence. Similarly, ignoring a state's sovereignty by refusing to apply its laws when it has a significantly closer connection to the controversy violates the Full Faith and Credit Clause, particularly when the state whose laws are being ignored is the couple's domicile.

The public policy exception also violates this standard. It is unfair to the individual that the law of the state with the closest connection to a dispute does not govern that dispute solely because a court feels that employing that law is against the public policy of a state with a tenuous connection to the case. As stated above, the public policy exception also violates the Full Faith and Credit Clause. It is an infringement upon state sovereignty and, consequently, the Full Faith and Credit Clause, for a state to use its law to further its parochial interests in a case that has a

200. Baker v. General Motors Corp., 118 S. Ct. 657, 663 (1998); *accord*, Milwaukee County v. M.E. White Co., 296 U.S. 268, 277 (1935).

201. Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 33 (1945).

significantly closer connection to another jurisdiction because the other state's law clashes with the first state's public policy.

C. *A Neutral Choice of Law Rule for the Validity of Same-Sex Marriage*

This author has developed a neutral method of choice of law that satisfies both the normative and constitutional criteria set forth above.[202] Under this approach, a court should identify the legal relations created by the states whose laws might govern the facts and, when two or more states create legal relations that apply to the facts (a true conflict), choose the state's law that has the closest connection to the controversy.

In the first step, a court should identify every legal relation that might encompass the dispute. However, the court should not use just any state law that might be relevant; the judge must establish each law's scope—whether the lawmaker intended the law to cover the situation. The judge must determine whether the law has only intrastate applicability or whether the lawmaker intended the law to extend beyond the state's borders, and, if so, under what circumstances.

In determining a law's scope, the judge should try to discern the legislature's actual intent. If this is not possible (which will often be the case), the judge should attempt to establish the legislature's constructive intent by examining the law's purpose.

The second step—determining which state has the closest connection to a dispute when two or more states' laws might govern—is both quantitative and qualitative; it is a rigorous approach that requires a court to analyze connections *carefully*. First, the court uses only those connections that are relevant to the issue being decided. For example, the fact that a North Dakota resident owns business property in California is irrelevant in a lawsuit involving a traffic accident occurring in California that is unrelated to the property's ownership. In addition, some connections are more significant than others. For instance, the fact that a family is domiciled in Oregon is a more important connection when the issue concerns whether interspousal tort immunity applies than the fact that the accident happened in Illinois.

Under the first step of this method, both the state of celebration and the party's domicile could employ their laws to determine the validity of a marriage. The state of celebration could apply its law because a state intends its marriage laws to regulate marriages that take place within its borders. Similarly, the party's domicile could adopt its law because it intends its marriage laws to govern its domiciliaries' marriages. Thus,

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202. *See* Fruehwald, *supra* note 130, at 375-401; Scott Fruehwald, *Choice of Law in Federal Courts: A Reevaluation*, 37 BRANDEIS L.J. 21, 49-57 (1998-99).

when a marriage occurs outside the couple's domicile, both the marriage state and the domiciliary state have meant that their laws govern the validity of the marriage, so a true conflict exists, and the court must go on to step two of the method.

Step two of the method would require a court to adopt the law of the couple's domicile when determining the validity of a marriage in most instances. When a couple lives in one state, but goes to another state to marry, the domicile state has the closest connection to the controversy because the domicile is where the parties will live, the domicile will regulate the continuing status of the marriage, and the domicile will provide or withhold the incidents of marriage.[203] Thus, when a couple leaves their domicile to be married in a state that authorizes same-sex marriage, then returns to their domicile which does not, their marriage is invalid.

The above method, however, will require states to recognize the validity of same-sex marriages in certain circumstances, such as when the parties marry in their domicile and their domicile authorizes same-sex marriages. As Professor Kramer has noted, "There is an obvious difference between a couple that recently married outside a state to evade that state's marriage restrictions and a couple that moved into the state after living together for twenty years in a place that recognized their union."[204] Not recognizing such a marriage frustrates the parties' reasonable expectations (that all states in a federal union will recognize a marriage of many years that was legal in the couple's domicile when they married) and, thus, violates the Due Process Clause. Moreover, a state refusing to acknowledge a marriage under these circumstances had no interest in the marriage at the time of celebration, and, accordingly, that state could not adopt its law under the Full Faith and Credit Clause. Part IV of this Article will explore the implications of this outcome for the incidents of marriage.

As mentioned above, this author's method of determining choice of law for same-sex marriages satisfies the normative and constitutional criteria discussed earlier. Adopting the law of the state with the closest connection to the controversy will ensure that the choice of law rule for the validity of a marriage is grounded in positive law. As stated above, both the state of celebration and the couple's domicile can extend their laws to determine the validity of a marriage. It is doubtful that any other state will be able to apply its law to this issue because it is unlikely that another state has a

203. I will discuss the incidents of marriage in Part IV below. *See infra* notes 230-94 and accompanying text.

204. Kramer, *supra* note 88, at 1970; *see also* Mark Strasser, *For Whom* Bell *Tolls: On Subsequent Domiciles' Refusing to Recognize Same-Sex Marriages*, 66 U. CIN. L. REV. 339, 341-42 (1998).

significant connection to the validity of a marriage other than the domicile or celebration states.

Using the law of the state with the closest connection to a marriage to establish the validity of that marriage is substantively and forum neutral. This author's method does not consider the law's content (other than its scope) in making the choice of law decision; rather, it selects law based on significant connections in the same way it does with any other type of law. Similarly, the outcome under this method does not depend on where the case is filed because the method is forum neutral.

Because choice of law under this method is content and forum neutral, it is predictable. Choice of law will not depend on an idiosyncratic judge's view of which law is the best, nor will it hinge on the forum in which the case is litigated. In fact, choice of law for the validity of marriages should be particularly predictable because the couple's domicile will usually have the closest connection to the marriage.

The method is also fair to individuals. Individuals usually expect that the law with the closest connection to their conduct will regulate their conduct. In the case of a marriage, it should not surprise a couple that their domicile's law governs their marriage. While a couple may want to use another state's law to validate their marriage, it is not unfair to expect persons to live under their domicile's democratically-enacted laws (assuming those laws are constitutional).

The above method respects the interests of the relevant states. The couple's domicile has the most interest in regulating their domiciliaries' marriages. While the state of celebration may have an interest in marriages performed within its boundaries, its interest is not as strong as the state where the couple intends to live. Finally, while other states may not want to recognize the validity of same-sex marriages, their interests should yield to the state that is more closely connected to the marriage—the domicile or the celebration state. The interests of the other states will be respected when they have the greatest interest in applying their laws—when they have the closest connection to the dispute.

It is obvious that a choice of law method that adopts the law of the state with the closest connection to the marriage will satisfy the proposed constitutional requirement that a state not adopt the law of a state when another's state's law has a significantly closer connection to the dispute. Such a method also satisfies due process. As stated above, parties will not be surprised when their domicile's law controls the validity of their marriage, and it is not unfair for persons to be governed by their home state's law. Similarly, the Full Faith and Credit Clause is satisfied because the law of the state with the closest connection to the situation is adopted.

D. *Other Possible Solutions to Choice of Law and the Validity of Same-Sex Marriage*

Professor Kramer has suggested that other modern conflicts systems could be used in place of the traditional choice of law rule for the validity of marriages.[205] However, problems exist with the major modern methods when applied to the validity of marriages. The four major choice of law methods that courts use today are 1) Beale's *First Restatement* approach,[206] 2) the *Second Restatement* approach,[207] 3) Brainerd Currie's governmental interest analysis method,[208] and 4) the better rule approach.[209] The *First Restatement* approach, which uses the traditional rule, was rejected above.[210] The *Second Restatement* rule is similar: "A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage."[211] While this rule does not permit a state with a tenuous connection to a dispute to reject the validity of a marriage on public policy grounds, it shares the remainder of the *First Restatement*'s flaws.

Brainerd Currie's governmental interest analysis is a forum-favoring method of choice of law that basically comprises a two-step analysis.[212] First, a court must determine which states have an "interest" in adopting their laws.[213] A court does this by establishing whether a state has a relation to the case that provides a legitimate basis for it to assert an interest in the application of its policy.[214] Second, if two or more states have an interest in applying their laws (a true conflict), then the court should adopt forum law.[215]

Under Currie's method, the validity of a marriage will usually depend on which state adjudicated the validity. First, both the place of celebration and the couple's domicile have an interest in the validity of a marriage. The place of the marriage has an interest in marriages that are celebrated

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205. *See* Kramer, *supra* note 88, at 1998-99.
206. *See* FIRST RESTATEMENT, *supra* note 126, § 377.
207. *See* SECOND RESTATEMENT, *supra* note 58, § 311.
208. *See* CURRIE, *supra* note 143.
209. *See* JUENGER, *supra* note 130, at 191-237; ROBERT A. LEFLAR, AMERICAN CONFLICTS LAW 197-222 (3d ed. 1977).
210. *See supra* notes 108-76 and accompanying text.
211. SECOND RESTATEMENT, *supra* note 58, § 283(2).
212. *See* CURRIE, *supra* note 143, at 183-84.
213. *See id.*
214. *See id.*
215. *See id.*

in its territory, while a couple's domicile has an interest in regulating its domiciliaries' marriages. Since there is a true conflict, the court will select forum law.[216]

The rule for marriages under Currie's system violates both the normative and constitutional criteria set forth above. First, the choice of law for the validity of marriages under Currie's method is not forum neutral; the outcome will hinge on the jurisdiction in which the validity of the marriage is adjudicated. The validity of a marriage, however, should not depend on choice of forum. As stated above, parties need to know whether a marriage is valid, and such a rule destroys the predictability of marriages. Second, Currie's method is unfair to the parties. While Currie's method is usually plaintiff favoring because the plaintiff usually chooses the forum, it may not be in connection with marriages because the parties will often be forced to litigate the incidents of marriage in their current domicile. Moreover, third parties, such as persons who might inherit from a member of the same-sex couple, would have the outcome of his or her case depend on choice of forum. Finally, Currie's method does not correctly consider the interests of the states. While the first step of his method is based on state interests, its forum-favoring second step allows a state's law to govern any time a state has a colorable interest, even if another state has a much stronger interest that should prevail.[217]

Currie's method in general and the result of his method for the validity of marriages should be unconstitutional.[218] The automatic choice of forum law whenever there is a true conflict violates both the Due Process Clause and the Full Faith and Credit Clause. As stated above, this author believes that an individual has a due process right not to have the law of a state with a tenuous connection to a controversy govern his or her conduct, which is often the result under Currie's forum-favoring method. In addition, the unpredictability of Currie's system deprives an individual of notice of what

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216. *See id.* at 184.

217. Currie said of his method that

> [t]here remains the stubborn fact that under any conceivable conflict-of-laws method the interests of one state will be sacrificed to those of another whenever there is conflict. The only virtue of the method proposed here is that it at least makes the choice of interests on a rational and objective basis: the forum consistently applies its own law in case of conflict, and thus at least advances its domestic policy.

Id. at 169. This author, however, believes his method better protects the interests of the states. *See supra* notes 202-04 and accompanying text.

218. For a discussion of the constitutionality of Currie's method in general, see Fruehwald, *supra* note 187, at 77-82. Douglas Laycock comes to a similar conclusion. *See* Laycock, *supra* note 88, at 274-88, 310-12.

conduct is legal or illegal, as is required by the Due Process Clause.[219] Deborah Henson points out that "[p]arties make emotional and financial plans of the most serious nature in reliance upon their marital status, and this factor could have devastating effects upon the children of the parties or children of any parties they may subsequently remarry."[220]

The outcome under Currie's approach for the validity of marriages also violates the Full Faith and Credit Clause. Under a forum-favoring approach, a state can adopt its law and ignore another's state's law, even when that other state has a significantly closer connection to the marriage. Such a result ignores the sovereignty of the state most interested in the dispute, a result that violates the Full Faith and Credit Clause.[221]

The better rule approach also contravenes the normative and constitutional criteria set forth above.[222] First, the better rule approach is sometimes not grounded in positive law. There is no requirement under the better rule approach that a court choose a law that the lawmaker intended to apply to the controversy; all that is required is that the court select the better rule. Thus, the approach invokes "a general common law not derived from any sovereign."[223] Since in a modern world all law must be positive law, the better rule approach is unacceptable, particularly with the validity of a marriage, which depends on statutes for its existence.

Second, a better rule approach is deliberately not substantively neutral. This lack of substantive neutrality leads to the problems noted in Part I, where one side argues that their rule is the better rule and the other side that theirs is. However, there is no objective criteria to determine whether recognizing or not recognizing same-sex marriages is the better rule. As Professor Laycock has declared, "There is no higher authority, no lawgiver in the sky, empowered to decide which state's laws is better."[224] Such a choice is a policy decision that should be made by the legislature, not a judge who lacks the tools and authority to make this decision.[225] Third, as

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219. *See* BMW of N. Am. v. Gore, 116 S. Ct. 1589, 1598 (1996); *see also* Fruehwald, *supra* note 187, at 71, 80-81, 84-85. "It is said that one of emperor Nero's nasty practices was to post his edicts high on the columns so that they would be harder to read and easier to transgress." Scalia, *supra* note 192, at 1179.

220. Henson, *supra* note 20, at 575.

221. *See supra* notes 195-201. As Professor Laycock has declared, "[e]liminating forum preference altogether is the only constitutional solution." Laycock, *supra* note 88, at 311.

222. There are many variations on the better rule approach. For example, Professor Leflar's method looks at several factors other than the better rule, while Professor Juenger uses only the better rule. *See* JUENGER, *supra* note 130, at 88-150; LEFLAR, *supra* note 209, at 197-222. Since most better rule approaches, including Leflar's, use the better rule as the deciding criteria, the differences among the better rule methods are not significant for this analysis.

223. Laycock, *supra* note 88, at 312.

224. *Id.*

225. *See* DWORKIN, *supra* note 178, at 243-44 and accompanying text.

noted above,[226] since judges normally find their state's law to be the better law, the better rule approach is usually not forum neutral.

Fourth, because the outcome under the better rule approach depends on the judge who is deciding the case, this approach is not predictable. Such unpredictability is unfair to litigants. In addition, while justice in an individual case is important, as noted above, so is a party's right to know the applicable law before the fact.[227]

Finally, the better rule approach shows no respect for the states' interests. Under this approach, all that matters is some abstract, supposedly universal sense of justice. However, "[i]f each state is equal in authority to the other forty-nine, then no state is required to conform its law to that of the others, or to follow the trend that other states find more in keeping with the times."[228] Accordingly, this approach ignores the reality of political subdivisions and the fact that those political subdivisions may have differing values.

The better rule approach to the validity of marriages is also unconstitutional under both the Due Process and Full Faith and Credit Clauses.[229] First, this approach often permits the law of a state with a tenuous connection to a dispute to govern that dispute, thus violating the Due Process Clause. Permitting the law of a state with a tenuous connection to a marriage and the incidents of that marriage to control is obviously unacceptable. Equally important, the approach's arbitrariness and lack of predictability contravenes due process to an even greater extent than does Currie's forum-centered system; at least under Currie's method, one could determine the applicable law once the forum was established. As mentioned above, the need for predictability is especially acute in connection with marriages.

Similarly, better rules methods violate the Full Faith and Credit Clause. The lack of respect for states' interests and sovereignty mentioned above in connection with the normative criteria disregards the existence of the Full Faith and Credit Clause. While one might argue for the better rule when only independent nations are involved, the Full Faith and Credit Clause precludes a better rule method for American states because of the need to respect other states' sovereignty and laws. This is particularly true when a state's values are contravened, as might be true if a couple's domicile was forced to accept a same-sex marriage when the couple spent only a few hours in the state of celebration.

In sum, this author believes that the major existing choice of law

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226. *See supra* note 43 and accompanying text.

227. *See supra* note 219 and accompanying text.

228. Laycock, *supra* note 88, at 312.

229. For a discussion of the constitutionality of better rule methods in general, see Fruehwald, *supra* note 187, at 82-85; Laycock, *supra* note 88, at 312-15.

systems do not offer a solution to the validity of same-sex marriage or marriage in general. While this writer does not claim that his method is the only possible one, this author does contend that a choice of law rule concerning the validity of same-sex marriage should be substantively and forum neutral in order not to infringe on a state's right to decide its own values within constitutional limitations.

IV. CHOICE OF LAW AND THE INCIDENTS OF MARRIAGE

As demonstrated above, a state will have to recognize same-sex marriages celebrated in a couple's domicile even if the state does not recognize such marriages and even if such marriages are against that state's public policy. In such a circumstance, does a state have to give the incidents of marriage to the same-sex marriage?[230] As Barbara Cox has pointed out, "We will then ask our employers to enroll us as a married couple for health insurance, ask our lawyer to write our wills as a married couple, apply for marital discounts at our health clubs, move into a single-family neighborhood, file joint tax returns as a married couple, and perhaps change our names."[231] As the dissent in *Baehr* observed this "will have far-reaching and grave repercussions on the finances and policies of the

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230. A detailed discussion as to whether the federal government will or must provide benefits to same-sex couples is beyond the scope of this Article on state choice of law. A section of DOMA precludes giving federal benefits to same-sex couples:

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

1 U.S.C. § 7 (1996). Thus, under DOMA, federal benefits extend only to heterosexual couples, even if a same-sex couple's home state has recognized their union.

Some advocates of same-sex marriage have argued that this section of DOMA is unconstitutional. *See* Andrew Koppleman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1, 4-5 (1997); Christopher T. Nixon, *Should Congress Revise the Tax Code to Extend the Same Tax Benefits to Same-Sex Couples as Are Currently Granted to Married Couples?: An Analysis in Light of Horizontal Equity*, 23 S. ILL. U. L.J. 41, 63 (1998); Christopher J. Hayes, Note, *Marriage Filing Jointly: Federal Recognition of Same-Sex Marriages Under the Internal Revenue Code*, 47 HASTINGS L.J. 1593, 1623-25 (1996); Kevin H. Lewis, Note, *Equal Protection after* Romer v. Evans*: Implications for the Defense of Marriage Act and Other Laws*, 49 HASTINGS L.J. 175, 178 (1997); Barbara A. Robb, Note, *The Constitutionality of the Defense of Marriage Act in the Wake of* Romer v. Evans, 32 NEW ENG. L. REV. 263, 265-341 (1997). This author, however, believes that this part of DOMA is constitutional for the same reasons that states can deny the incidents of marriage to same-sex couples married in other states without violating the Constitution. *See infra* notes 262-93 and accompanying text.

231. Cox, *supra* note 20, at 1040.

governments and industry of this state and all the other states in the country."[232]

The state incidents of marriage include taxation advantages, inheritance rights, health benefits, the right to enter into pre-marital agreements, post-divorce rights, child custody rights, spousal support, real property rights, the right to recover for the wrongful death of a spouse, workers compensation rights, consortium claims, and the right to cohabitate.[233] Robert Cordell has declared that

> there are a multitude of advantages and privileges that come with marital status in this country. Even for everyday activities in our society, like renting a car (the spouse of the renter is automatically covered on the rental agreement) or announcing an engagement and impending marriage in the newspaper, the right to marriage is extremely important.[234]

Judge Posner, however, has observed that the incidents of a traditional marriage may not translate well to a same-sex marriage: "These incidents of marriage were designed with heterosexual marriage in mind, more specifically heterosexual marriages resulting in children. They may or may not fit the case of homosexual marriage; they are unlikely to fit it perfectly."[235]

Modern choice of law generally recognizes that courts can apply different states' laws to different issues in the same lawsuit (dépeçage).[236] Such an approach is proper "when the choice-influencing considerations differ as they apply to different issues."[237] Is dépeçage proper for the validity of a marriage and the incidents of that marriage?

While courts have often applied the same state's law to both the validity and incidents of a marriage, some scholars have advocated that courts should evaluate marital status on an issue by issue basis.[238] For example,

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232. Baehr v. Lewin, 852 P.2d 44, 74 (Haw. 1993) (Heen, J., dissenting); *see also* RICHARD A. POSNER, SEX AND REASON 313 (1992) ("Authorizing homosexual marriage would have many collateral effects, simply because marriage is a status rich in entitlements.").

233. *See* Grace Ganz Bloomberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1126 (1981); Cordell, *supra* note 20, at 255-57; Henson, *supra* note 20, at 556-57.

234. Cordell, *supra* note 20, at 257 (citations omitted).

235. POSNER, *supra* note 232, at 313.

236. *See* SECOND RESTATEMENT, *supra* note 58, § 195; LEFLAR, *supra* note 209, at 195; SCOLES & HAY, *supra* note 22, at 35.

237. LEFLAR, *supra* 209, at 221-22.

238. *See, e.g.*, Hans W. Baade, *Marriage and Divorce in American Conflicts Law: Governmental-Interests Analysis and the Restatement (Second)*, 72 COLUM. L. REV. 329, 356-57 (1972); David E. Engdahl, *Proposal for a Benign Revolution in Marriage and Marriage Conflicts Law*, 55 IOWA L. REV. 56, 103-16 (1969); J. David Fine, *The Application of Issue-Analysis to*

Professor Engdahl has written that

> [i]n a conflicts setting, the villain of the piece appears as the principle of universality . . . [t]he principle of universality requires as its prerequisite a certain conceptualization of marriage—the view that the status "marriage" even for the purposes of a single system of law is a unitary *tertium quid* distinct from the rights, duties, capacities or incapacities which are premised upon it. . . . If this conceptualization of marriage is unsound, then . . . the universality principle must be unsound[,] . . . the fundamental error of this conception . . . is the failure to recognize that even within a single system the same word, "marriage, . . . " in the law is not one, but many [conceptions]. . . . On this view, it is erroneous to collect all the rights attributed to "marriage" and regard them as a single status; for the classes of persons upon which these several rights are conferred are not the same.[239]

A frequent practice in the courts when considering whether to grant a marital incident to a marriage that contravenes state policy is to determine whether the prohibition against the marriage is strong enough in relation to the particular issue to prevail over the contravailing policy upholding marriage and related policies, such as not relieving one from an obligation solemnly entered in to, long-standing family expectations, and the legitimacy of children born of the union.[240] For example, a marriage which might be valid for succession might be invalid in an annulment suit.[241]

For instance, *In re Dalip Singh Bir's Estate*[242] concluded that a state's policy against polygamous marriages was not strong enough to overcome a widow's right to share in her husband's estate.[243] In this case, the deceased died leaving two wives, who he had married legally in India.[244] The two widows jointly petitioned the court to award them one half share each in the deceased's estate, as legal widows of the deceased.[245] The trial court held that since allowing the second wife a share would violate California's public policy against polygamy, only the first wife could

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Choice of Law Involving Family Law Matters in the United States, 26 LOYOLA L. REV. 31, 295-320 (1980); Willis L. M. Reese, *Marriage in American Conflicts Law*, 26 INT'L & COMP. L.Q. 952 (1977).

239. Engdahl, *supra* note 238, at 106-08 (footnotes omitted).

240. *See* SCOLES & HAY, *supra* note 22, at 448.

241. *See* Reese, *supra* note 238, at 961.

242. 188 P.2d 499 (Cal. App. 1948).

243. *See id.* at 502.

244. *See id.* at 499.

245. *See id.*

take.[246] An appellate court reversed on the ground that the policy against polygamous marriages applied only to cohabitation with two wives in California and not to the descent of property.[247] The court concluded that "'[p]ublic policy' would not be affected by dividing the money equally between the two wives, particularly since there is no contest between them and they are the only interested parties."[248]

Similarly, *In re Estate of Lenherr*[249] balanced Pennsylvania's policy forbidding certain marriages against the policy favoring uniformity of results in connection with the validity of marriages.[250] The issue in *Lenherr* was whether a Pennsylvania court would recognize a West Virginia marriage for the purpose of the marital exemption to the Pennsylvania Inheritance Tax, which allows a spouse to inherit from the other spouse without imposition of the tax.[251] The couple had previously been married to other persons in Pennsylvania, and both their divorce proceedings had named the other as having had an adulterous relationship with each other.[252] Under Pennsylvania law (section 169), a husband or wife who has been guilty of adultery may not marry the person with whom that person committed adultery during the life of the former spouse.[253] Consequently, the couple went to West Virginia, which allowed such unions, to be married, and they returned to Pennsylvania to live as husband and wife.[254] The Commonwealth contended that based on the aforementioned statute, it should not recognize the marriage for the purpose of the marital exemption.[255]

The court noted that, although the marriage was forbidden under Pennsylvania law, there was a strong policy favoring uniformity of results in relation to marital status.[256] The court declared "[i]n resolving that conflict, we must realize that the strength of the policy behind section 169 ... is [not] so strong that it must be given extraterritorial effect in this case, thereby destroying the uniformity of result which is so desirable in a case concerning the recognition of a marriage that is valid in the state where it was contracted."[257] The court noted that the strength of the policy against certain marriages hinges on the incident of the marriage being

246. *See id.*
247. *See id.* at 502.
248. *Id.*
249. 314 A.2d 255 (Pa. 1974).
250. *See id.* at 258.
251. *See id.* at 256.
252. *See id.*
253. *See id.* at 257.
254. *See id.*
255. *See id.* at 256.
256. *See id.* at 257-58.
257. *Id.* at 258.

adjudicated.[258] The court thought that section 169 was intended not as a penalty upon the adulterous parties, but "to protect the sensibility of the injured spouse" because the provision was limited to the injured spouse's lifetime.[259] Accordingly, the court felt that the policy behind section 169 was not furthered by denying the marital exemption because denying the exemption could neither deter the adulterous conduct nor spare the injured spouse from the effrontery of the marriage.[260]

Although I have argued elsewhere that some choice of law systems sometimes improperly split legal relations that the lawmaker meant to belong together,[261] I believe that if the appropriate lawmaker intended to separate the validity of the marriage from the incidents of marriage, it is proper for a court to apply different states' laws to different issues relating to a marriage. In addition, this author can find no constitutional reason to prohibit separating the validity of a marriage from the incidents of marriage.[262] Some will argue that the Equal Protection Clause forbids such separation—the state is giving benefits to one group, heterosexual married couples, while denying them to a similarly-situated group, homosexual married couples. However, since homosexuals are not a protected group,[263] a court will apply rational basis analysis to this question and probably find that there is a rational basis for the different treatment.

The Supreme Court has declared that "the Equal Protection Clause requires only a rational means to serve a legitimate end."[264] It has similarly asserted that "[i]f the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'"[265] The rational basis test does not even require the legislature to state the statute's purpose. As Justice Rehnquist explains,

> Where, as here, there are plausible reasons for Congress' actions, our inquiry is at an end. It is, of course, "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision," because this Court has

258. *See id.*

259. *Id.*

260. *See id.* at 259.

261. *See* Fruehwald, *supra* note 130, at 367.

262. In addition, Linda Silberman has written that "while a state might be constitutionally prohibited from applying its own law when it has no interest, a new domiciliary state *does* have a relationship with parties justifying the application of its own rules when determining to whom it will extend benefits." Silberman, *supra* note 183, at 203 (footnote omitted).

263. *Cf.* Bowers v. Hardwick, 478 U.S. 186, 190 (1986).

264. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442 (1985).

265. United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 175 (1980) (citing Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911)).

> never insisted that a legislative body articulate its reasons for enacting a statute.... The "task of classifying persons for ... benefits ... inherently requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line," and the fact that the line might have been drawn different at some points is a matter of legislative, rather than judicial, consideration.[266]

Denying the incidents of marriage to same-sex couples can be justified on several grounds. First, a state may be upholding what it considers to be the traditional institution of marriage. As Professor Wardle has asserted, "[B]ecause the [heterosexual] relations themselves are uniquely valuable they are given the preferred status and label of marriage."[267] Similarly, as *Singer v. Hara*[268] declared, "[A]lthough . . . married persons are not required to have children or even to engage in sexual relations, marriage is so clearly related to the public interest in affording a favorable environment for the growth of children that we are unable to say that there is not a rational basis upon which the state may limit the protection of its marriage laws to the legal union of one man and one woman."[269] While some may consider the above to be unfair or unwise, it still constitutes a rational basis for such a classification. As stated earlier, a court cannot look at the wisdom of legislation as long as it has a rational basis. Second, a state may be allocating limited benefits by using traditional categories. Representative Weldon stated during the debate on DOMA: "I think it would be wrong to take money out of the pockets of working families across America and use those tax dollars to give Federal acceptance and financial support to same-sex marriages."[270] Third, while a state may not want to criminalize homosexual conduct, it may not want to put its stamp of approval on it by giving the incidents of marriage to same-sex marriages. Saying that a state should not criminalize certain conduct is not the same as saying a state should extend benefits to that conduct.[271] Finally, a state may feel that it should not force employers to pay benefits to a new group of beneficiaries because it may cause those employers economic hardship.

Some may argue, however, that the right to marry is a fundamental right so a court should evaluate any restriction on the right to marry or the right to obtain the incidents of marriage under strict scrutiny. The Supreme

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266. *Id.* at 179 (citations omitted).

267. Wardle, *supra* note 18, at 39 (footnote omitted).

268. 522 P.2d 1187 (1974).

269. *Id.* at 1197.

270. 142 Cong. Rec. H7493 (daily ed. July 12, 1996) (statement of Rep. Weldon).

271. *See* POSNER, *supra* note 232, at 311-12 ("To say that an act is not a crime is not to commend it.").

Court has held that marriage is a fundamental right, at least in some circumstances. After striking down a Virginia miscegenation statute on equal protection grounds in *Loving v. Virginia*,[272] the Supreme Court also found the statute invalid on due process grounds, declaring that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[273] *Zablocki v. Redhail*[274] reaffirmed that marriage is "of fundamental importance to all individuals."[275] The Court then asserted that marriage is a part of the right to privacy recognized in *Griswold v. Connecticut*.[276] However, the Court also declared that "we do not mean to suggest that every state regulation which relates in any way to the incidents or prerequisites for marriage must be subjected to rigorous scrutiny."[277]

The problem with arguing that same-sex marriage is a fundamental right is that the courts in the above cases were talking about heterosexual marriages; the couples involved in those cases were heterosexual couples. Even if the cases were speaking in broad terms, they were talking about traditional marriages. As *Baker v. Nelson*[278] declared, "there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex."[279] While proponents of same-sex marriage argue that defining marriage as a union between a man and a woman is circular reasoning,[280] the fact remains that this is the traditional meaning of marriage, and there is no reason to assume that the Court had any other definition in mind when it used the term. For example, *Webster's Dictionary* defines marriage as "the state of being united to a person of the opposite sex as husband or wife . . . the mutual relation of husband and wife."[281] Similarly, the *Oxford English Dictionary* defines marriage as "the condition of being a husband and wife. "[282] The definition of marriage as being heterosexual is the same in the law:

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272. 388 U.S. 1 (1966).

273. *Id.* at 12.

274. 434 U.S. 374 (1978).

275. *Id.* at 384; *see also* Turner v. Safley, 482 U.S. 78, 94-99 (1987).

276. *See Zablocki*, 434 U.S. at 384-85 (citing Griswold v. Connecticut, 381 U.S. 479 (1965)).

277. *Id.* at 386.

278. 191 N.W.2d 185 (Minn. 1971).

279. *Id.* at 187 (holding that denial of a marriage license to a same-sex couple did not violate the Constitution); *see* Singer v. Hara, 522 P.2d 1187, 1191-92, 1196 (stating that "[a]ppellants were not denied a marriage license because of their sex; rather, they were denied a marriage license because of the nature of marriage itself"); Wardle, *supra* note 18, at 38-39.

280. *See, e.g.*, William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1495 (1993).

281. WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1384 (3d ed. 1971); *see also* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1102 (3d ed. 1992) ("[T]he legal union of man and woman as husband and wife.").

282. THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 180 (2d ed. 1971).

> "[M]arriage" may be defined as the civil status of one man and one woman, capable of contracting, united by contract and mutual consent for life, for the discharge, to each other and to the community, of the duties legally incumbent on those whose association is founded on the distinction of sex.[283]

One court has even refused to grant a marriage license to a male and a post-operative male to female transsexual on the ground that the criteria for marriage is biological.[284]

Finally, it would be hard to reconcile *Zablocki*'s assertion that marriage is covered under the right of privacy with *Bower*'s holding there is no constitutional right of privacy for homosexual conduct, if marriage included same-sex marriage. *Zablocki* expanded on marriage as part of the right to privacy:

> It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. . . . [I]t would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society. . . . Surely, a decision to marry and raise a child in a traditional family setting must receive equivalent protection. And, if appellee's right to procreate means anything at all, it must imply some right to enter the only relationship in which the state of Wisconsin allows sexual relations legally to take place.[285]

Considering the reference to procreation, childbirth, childrearing, and traditional family relationships in the above, it is hard to argue that the

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283. 55 C.J.S. *Marriage* § 2 (1998); *see also* BLACK'S LAW DICTIONARY 972 (6th ed. 1990) ("Legal union of one man and one woman as husband and wife.").

284. *See In re* Landrach, 513 N.E.2d 828 (Ohio Prob. Ct. 1987). The court cited an English case, which stated,

> Having regard to the essentially heterosexual character of the relationship which is called marriage, the criteria must, in my judgment, be biological, for even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in a person with male chromosomes, male gonads and male genitalia, cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage.

Id. at 832 (citing Corbett v. Corbett, 2 W.L.R. 1306, 1324-25 (P. 1970)).

285. *Zablocki*, 434 U.S. at 386.

right of privacy applies to same-sex marriages, which lack these characteristics.

Some scholars have argued that denying the right to marry or the incidents of marriage to same-sex couples is unconstitutional under *Romer v. Evans*.[286] In *Romer*, the Court struck down a Colorado referendum that amended that state's constitution to preclude all legislative, executive, or judicial action at any level of government that is designed to protect the status of persons based on their homosexual, lesbian, or bisexual orientation, conduct, practices, or relations on the ground that the amendment failed the rational basis test under the equal protection clause.[287] The main reason the amendment failed the rational basis test was that it was too broad and that this sheer breadth indicated an animus to the class it affected.[288] Justice Kennedy declared:

> It is at once too narrow and too broad. It identifies persons by a single trait and then denied them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence.[289]

He continued that "Amendment 2, however, in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justification that may be claimed for it."[290]

Romer probably has no effect on whether a state may withhold the incidents of marriage from a same-sex couple. First, such state laws lack the overbreadth of the amendment in *Romer*. As Professor Duncan has declared, "Marriage laws do not target a class of persons and deny that class the opportunity to protect itself politically against a limitless number of discriminatory harms and exclusions."[291] Professor Duncan has also pointed out that "[v]arious Justices expressed concern that under the Amendment homosexuals would be helpless to protect themselves against exclusions from public libraries, police protection, and even life-saving

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286. 116 S. Ct. 1620 (1996). *See* Koppleman, *supra* note 230, at 1; Jon-Peter Kelly, Note, *Act of Infidelity: Why the Defense of Marriage Act Is Unfaithful to the Constitution*, 7 CORNELL J. L. & PUB. POL'Y 203, 247-49 (1997); Lewis, *supra* note 230, at 175-78; Robb, *supra* note 230, at 299-341.

287. *See Romer*, 116 S. Ct at 1628-29.

288. *See id.* at 1627.

289. *Id.* at 1628.

290. *Id.* at 1628-29.

291. Duncan, *supra* note 45, at 251.

treatment at public hospitals."[292] Significantly, those "ineligible to marry are not forbidden from using the political process to change the marriage laws."[293] Second, state marriage laws denying the incidents of marriage to same-sex couples who were married in other states do not withdraw a right from same-sex couples; they never had the right to the incidents of marriage in that state. Finally, as was demonstrated above, there are several reasonable justifications under the rational basis test for denying the incidents of marriage to same-sex couples.[294]

Despite the above, this writer contends that states should grant certain incidents of marriage to same-sex couples, such as the right of succession and the right to make medical decisions for same-sex partners who are unable to do so themselves, because such benefits do not significantly impinge on a state's policy against same-sex marriages and they are costless to the state. However, this argument is a normative one; as stated above, there is nothing that requires a state to bestow the incidents of marriage on a same-sex couple.

Other scholars have asserted the impracticality of having different rules for the validity and incidents of marriage. For example, Professor Cox has stated that "if our [same-sex] couple is denied the opportunity to determine their 'universal' marital status for all incidents of marriage, they must relitigate their marital status repeatedly as they request recognition of their marriage for each incident. This is an untenable prospect and would be unacceptable for other couples."[295] While Professor Cox's argument has some persuasiveness, again, it is a normative argument that cannot be used to force a state to give the incidents of marriage to same-sex couples.

In sum, this author believes that a state can deny the incidents of marriage to a same-sex couple married elsewhere under both choice of law criteria and constitutional constraints. It is a part of state sovereignty to decide who receives the benefits of a state's laws and dollars, as long as the decision is made within constitutional limits.

CONCLUSION

This Article has argued that state choice of law for same-sex marriage should follow the principles of the new structural approach to constitutional adjudication and make the choice of law selection based on content and forum neutral criteria. Accordingly, this author has proposed that the choice of law rule for the validity of same-sex marriages should be that, when two states' laws could apply, a court should choose the law of

292. *Id.* at 250.
293. *Id.* at 251.
294. *See supra* notes 266-70 and accompanying text.
295. Cox, *supra* note 20, 1063 n.168.

the state that has the closest connection to the validity of the marriage. Thus, when the state of celebration authorizes same-sex marriages, but the couple's domicile does not, the domicile does not have to recognize the validity of the marriage because it has the closest connection to the marriage. However, when the state of celebration and the couple's domicile is the same and that state has legalized same-sex marriage, other states will have to recognize that marriage. Because a state can separate the validity of a marriage from the incidents of a marriage, a state does not have to give its incidents of marriage to a same-sex couple who were married in another state.

While this author believes that states should grant gays and lesbians greater rights under principles of liberal toleration, that decision is left up to each individual state under the structure of our federal union and our Constitution. Although some may disagree with the results under this Article's methodology, it is true to the concept of neutrality of the new judicial activism. As Judge Wilkinson declared: "If one remains attentive to the pitfalls of the past, the present jurisprudence holds the promise to be an enduring and constructive one, for its aims and means differ significantly from those of prior eras."[296]

296. Brzonkala v. Virginia Polytechnic Inst., 169 F.3d 820, 893 (4th Cir. 1999).