

ARTICLES

BEYOND DOMA: CHOICE OF STATE LAW IN FEDERAL STATUTES

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The Defense of Marriage Act (DOMA) has been abandoned by the executive and held unconstitutional by courts, so it is time to think about what will be left in its place. Federal law frequently asks whether a couple is married. But marriage is primarily a creature of state law, and states differ as to who may marry. The federal government has no system for deciding what state's law governs a marriage, though more than a thousand legal provisions look to marital status, more than a hundred thousand same-sex couples report being married, and many of those marriages ultimately cross state lines. Unless a federal choice-of-law system is designed, DOMA's demise will lead to chaos.

*This Article argues that such a system can and should be designed. Because the underlying choice-of-law problem is ultimately a problem of statutory interpretation, Congress can and should replace DOMA with a clear choice-of-law rule. Failing that, federal courts can and should develop a common law rule of their own—they are not (and should not be) bound by the Supreme Court's decision in *Klaxon Co. v. Stentor Electric Manufacturing Co.* The Article further argues that different institutions should solve the problem differently: If Congress acts, it should recognize all marriages that were valid in the state where they took place. If, instead, the courts create a common law rule, they should recognize all marriages that are valid in the couple's domicile.*

The implications of this argument run far beyond the demise of DOMA. In all areas of what is here called "interstitial law," federal interpretive institutions

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can and should devise a set of choice-of-law rules for federal law that draws upon state law, and what set of rules is proper may well depend on who adopts them.

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INTRODUCTION

The Defense of Marriage Act (DOMA) may be gone soon, and it is time to think about what will be left in its place. On February 23, 2011, Attorney General Eric Holder announced that the administration would no longer defend the constitutionality of section 3 of DOMA—which defines marriage, for purposes of federal law, to exclude same-sex couples—because “Section 3 of DOMA, as applied to legally married same-sex couples, . . . is . . . unconstitutional.”¹

1. Letter from Eric H. Holder, Jr., U.S. Attorney Gen., to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011) [hereinafter DOMA Letter], available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>. The letter was required by 28

Holder explained that the administration would keep enforcing DOMA for now. But suppose that DOMA is indeed repealed or definitively invalidated. If so, federal law will no longer define marriage as being between one man and one woman. What *will* define marriage, and what will that definition be?

Under the Holder view, marriage will be defined by reference to state law, because “Section 3 of DOMA may not be constitutionally applied to same-sex couples whose marriages are legally recognized under state law.”² This seems sensible enough. If DOMA is gone, state law is the logical place to turn to see whether a couple is validly married. But Holder did not specify *which* state’s law is relevant, and the choice matters. Some states allow same-sex couples to marry; others do not. Some states recognize foreign same-sex marriages; others do not. There are many same-sex marriages, and many of them cross state lines: according to the last census, more than 130,000 same-sex couples describe themselves as married,³ and every year at least 1.5% of the general population moves from one state to another.⁴

When a marriage crosses state lines—for example, when a same-sex couple marries in one state and later moves to another—it is not obvious which state’s law should control. Should it be the place where the marriage was celebrated? Where the couple lived at the time? Where they live now? Something else? It turns out that there are several different approaches to answering this choice-of-law question, and it is not clear which one the administration expects courts to use. Amidst the heat and light generated by the administration’s actions, the actual meaning of its position has been ignored.

This Article attempts to solve the question left open by the possible demise of DOMA, and thereby solve a much broader problem of federal choice of law: How should the federal government decide what state’s law applies when a federal statute incorporates state law? Much has been written about state conflicts doctrines generally (what I call first-order conflicts) and conflicts over same-sex marriage specifically. But remarkably little has been written about the *second-order* conflicts problem of how the *federal* government should make choices among state laws. Henry Hart and Paul Mishkin discussed the general

U.S.C. § 530D(a)(1)(B)(ii) (2006) (“The Attorney General shall submit to the Congress a report of any instance in which the Attorney General or any officer of the Department of Justice . . . determines . . . to refrain (on the grounds that the provision is unconstitutional) from defending or asserting, in any judicial, administrative, or other proceeding, the constitutionality of any provision of any Federal statute . . .”).

2. DOMA Letter, *supra* note 1.

3. Press Release, U.S. Census Bureau, Census Bureau Releases Estimates of Same-Sex Married Couples (Sept. 27, 2011), *available at* <http://2010.census.gov/news/releases/operations/cb11-cn181.html>.

4. *See Annual Geographical Mobility Rates, by Type of Movement: 1947-2009*, U.S. CENSUS BUREAU 2-4 (May 2010), <http://www.census.gov/population/socdemo/migration/tab-a-1.pdf>.

choice-of-law problem, but did not propose how to solve it.⁵ More recent articles focus on one narrow slice of federal law, such as bankruptcy⁶ or immigration,⁷ or else fail to observe the serious choice-of-law problem in the first place.⁸

DOMA's possible demise provides occasion to examine this problem. Without DOMA, federal law will turn to state law to determine when a same-sex marriage is valid, forcing the federal courts to wade into the disputes over marriage and choice of law. Because of the large number of mobile same-sex marriages and federal laws that refer to marital status, those choice-of-law cases will be numerous. And because of the wide divergence in state marriage laws, those conflicts will be difficult to dodge.

I argue that the problem can be resolved. Ideally, the political branches would replace DOMA with a clear choice-of-law rule. But there is reason to doubt that will happen. Alternatively, federal courts can and should create a federal common law rule. I further argue that *how* these institutions should solve the choice-of-law problem depends on *which* institution does so. Congress should pass a law providing that a marriage is valid for purposes of federal law if it was valid in the state where it occurred. If Congress doesn't act, the courts should hold a couple to be married if the couple's home state does. The differing rules reflect the differing roles of these institutions.

This resolution goes beyond the marriage context. In proposing a solution to the DOMA problem, I aim to make two contributions to choice-of-law doctrine more broadly. Fifty years ago, Henry Hart asked:

When Congress does remit matters to state law . . . does it have the power to say which state's law? If, as almost invariably happens, it has not said expressly which state law is to govern, should the federal courts work out a federal

5. See Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 498 (1954); Paul J. Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 806 (1957); see also Note, *Applicability of State Conflicts Rules When Issues of State Law Arise in Federal Question Cases*, 68 HARV. L. REV. 1212, 1228 (1955) (noting the problem and discussing "four relevant considerations" in crafting a solution in any given substantive area).

6. See Robert B. Chapman, *Profoundly Unwise and Even Irresponsible Uncertainty: Some Preliminary Questions as to the Effect of the Defense of Marriage Act on Marital Status in Bankruptcy for Same-Sex Couples Validly Married Under State Law*, 14 J. BANKR. L. & PRAC. 3 (2005); John T. Cross, *State Choice of Law Rules in Bankruptcy*, 42 OKLA. L. REV. 531 (1989); Jackie Gardina, *The Perfect Storm: Bankruptcy, Choice of Law, and Same-Sex Marriage*, 86 B.U. L. REV. 881 (2006).

7. See Scott C. Titshaw, *The Meaning of Marriage: Immigration Rules and Their Implications for Same-Sex Spouses in a World Without DOMA*, 16 WM. & MARY J. WOMEN & L. 537 (2010).

8. See Mark Strasser, *The Legal Landscape Post-DOMA*, 13 J. GENDER RACE & JUST. 153, 176-77 (2009).

answer? Or should they leave it to the plaintiff, within the limits of the applicable venue and process requirements, to determine the answer for himself?⁹

Hart lamented that “[t]his distinct and vital aspect of the problem of a federal law of conflict of state laws the Supreme Court has scarcely yet noticed.”¹⁰

This Article attempts to answer those questions. Typically, they have been addressed as if they were an extension of the conflicts questions that arise in diversity jurisdiction. I argue that they are better understood as statutory interpretation questions, though they are still questions that borrow concepts from conflicts. From this framework, I argue that Congress can and should provide choice-of-law rules when it chooses to rely on state law. I further argue that if it does not, the federal courts should indeed “work out a federal answer” through a federal common law of conflicts, rather than turning to the law of the forum state. (Put in conflicts jargon, the argument is that the *Klaxon* rule¹¹ does not and should not be extended to federal question cases.) A further point is that institutional role matters. Congress solves conflicts problems differently than courts do because it is free to implement a broad range of policy goals through conflicts doctrine, while courts have a more limited role of filling in the gaps between Congress’s choices.

All of these principles apply to all instances of what I call (following Hart) “interstitial law.” Interstitial law is federal law that in turn relies upon concepts already created by state law, so called because of Hart’s declaration that much of federal law is “interstitial law, assuming the existence of, and depending for its impact upon, the underlying bodies of state law.”¹² While much of this Article focuses on federal statutes that rely upon marriage specifically, DOMA’s demise is really just a case study. The framework established here will apply more broadly to the many other areas of interstitial law. The DOMA episode also provides a case study for the ability of conflicts to provide a stable set of rules as a backdrop for broader public law disputes—and the consequences when it fails to do so.

Parts I through III are largely descriptive. Part I introduces DOMA and shows that it could be invalidated or repealed while state bans on same-sex marriage remain. Part II discusses the different methods state courts have used for choosing what law governs a marriage (which I call first-order choice of law). Part III discusses the different second-order methods federal courts have used for choosing a state’s law. Parts IV through VII are largely normative. Part IV argues that the so-called second-order choice-of-law problem is ultimately a problem of statutory interpretation, with the consequence that Con-

9. Hart, *supra* note 5, at 536.

10. *Id.*

11. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

12. Hart, *supra* note 5, at 498. Some have argued that there are important differences between “borrowing” or “incorporating” state law, and treating it as “antecedent” to federal law. See Radha A. Pathak, *Incorporated State Law*, 61 CASE W. RES. L. REV. 823, 834-56 (2011). I borrow Hart’s terminology in part to transcend this debate.

gress may fix it as it likes. Part V examines the role of the courts if Congress does not act, and argues that federal courts can and should develop a federal common law of conflicts. Part VI argues that different federal institutions should solve this problem differently—Congress by recognizing the law of the state of celebration, courts by recognizing the law of the couple’s domicile. Part VII expands these conclusions to other areas of interstitial law, and discusses the role of conflicts doctrine in making public-law federalism work.

I. DOMA

A. Section 3

As many people know from filing their taxes or receiving federal benefits, federal law frequently deals with marital status. Married couples can file joint tax returns, and pay different tax amounts from unmarried couples.¹³ Students’ federal financial assistance depends on their family’s financial situation.¹⁴ Federal employees can seek health benefits for their families.¹⁵ A 2004 report update from the U.S. General Accounting Office tallied 1138 federal statutory provisions that turn on marital status.¹⁶ Some, perhaps most, of these provisions benefit couples who marry. Others (such as the so-called tax “marriage penalty,” or the financial-aid provisions) usually burden them.¹⁷

Federal officials don’t generally issue marriage licenses,¹⁸ and there is no single overarching provision of the U.S. Code that defines what a marriage is—except section 3 of DOMA. It provides that:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.¹⁹

13. 26 U.S.C. § 1 (2006); *id.* § 6013(a), (c).

14. *See* 20 U.S.C. §§ 1090-1091; Tara Siegel Bernard, *For Children of Same-Sex Couples, a Student Aid Maze*, N.Y. TIMES, Oct. 14, 2011, at B1.

15. 5 U.S.C. §§ 8905(a), 8956(a).

16. U.S. GEN. ACCOUNTING OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT (2004), available at <http://www.gao.gov/new.items/d04353r.pdf> (updating U.S. GEN. ACCOUNTING OFFICE, GAO/OGC-97-16, DEFENSE OF MARRIAGE ACT (1997)). For explication of these and other examples, see *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374, 379-83 (D. Mass. 2010); and *Massachusetts v. United States Department of Health & Human Services*, 698 F. Supp. 2d 234, 239-44 (D. Mass. 2010).

17. *See* Lawrence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 TAX L. REV. 1, 1 (2000); Bernard, *supra* note 14.

18. To the extent that officers of the District of Columbia and the territories are federal officers, *see* *Wise v. Withers*, 7 U.S. (3 Cranch) 331, 336 (1806), they are of course an exception. *E.g.*, D.C. CODE § 46-410 (2011).

19. 1 U.S.C. § 7.

This part of DOMA is codified in Chapter 1 of Title 1 of the U.S. Code, the chapter designated for global statutory definitions. Chapter 1 is what provides that “words importing the masculine gender include the feminine as well”; that “‘oath’ includes affirmation”; and that the phrase “‘insane person’ . . . shall include every idiot, lunatic, . . . and person non compos mentis.”²⁰ DOMA sits alongside these more quotidian definitions making a major rule of federal marriage law. It cuts across the entire U.S. Code (and the Code of Federal Regulations and other compilations of administrative law), defining marriage to exclude same-sex marriages even if they would otherwise be recognized under state law.²¹

B. *DOMA’s Possible Demise*

DOMA may not remain enforceable for long. Three district courts have already concluded that section 3 violates equal protection.²² One of them has been affirmed on appeal, with the court noting that “only the Supreme Court can finally decide this unique case.”²³ A federal bankruptcy court in California—in an order signed by *twenty* of its judges—has declared DOMA unconstitutional.²⁴ And a federal appellate judge—acting in his capacity as an administrator of benefits for the federal public defender’s office—has also declared section 3 to be unconstitutionally discriminatory.²⁵ With the executive branch agreeing that the statute is unconstitutional, it seems reasonable to expect that more courts will follow suit. (DOMA has other provisions—pertaining, for ex-

20. 1 U.S.C. § 1; cf. Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 YALE L.J. 1898, 1924 n.82 (2011) (noting that § 1 “covers only the simplest interpretive conventions”); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 97 n.91 (2000) (calling these definitions “largely insignificant”).

21. DOMA’s definition is also more emphatic than some of these other statutory definitions, which apply only “unless the context indicates otherwise.” 1 U.S.C. § 1; *accord* Rowland v. Cal. Men’s Colony, 506 U.S. 194, 199-201 (1993); First Nat’l Bank v. Missouri, 263 U.S. 640, 657 (1924). DOMA contains no such caveat. *See* 1 U.S.C. § 7.

22. *Dragovich v. U.S. Dep’t of the Treasury*, No. 10-01564, 2012 WL 1909603 (N.D. Cal. May 24, 2012); *Golinski v. U.S. Office of Pers. Mgmt.* 824 F. Supp. 2d 968, 974, 1002-03 (N.D. Cal. 2012); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 396 (D. Mass. 2010) (Tauro, J.). Technically DOMA has been held to violate the “equal protection component” of the Due Process Clause of the Fifth Amendment, *see Golinski*, 824 F. Supp. 2d at 1002, because the Equal Protection Clause itself is inapplicable to the federal government.

23. *Gill v. Office of Pers. Mgmt.*, No. 10-2207, slip op. at 11 (1st Cir. May 31, 2012).

24. *In re Balas*, 449 B.R. 567 (Bankr. C.D. Cal. 2011); cf. Susan E. Hauser, *More than Abstract Justice: The Defense of Marriage Act and the Equal Treatment of Same-Sex Married Couples Under Section 302(a) of the Bankruptcy Code*, 85 AM. BANKR. L.J. 195, 197-98 (2011) (defending *Balas*).

25. *In re Levenson*, 587 F.3d 925 (9th Cir. 2009); *In re Levenson*, 560 F.3d 1145 (9th Cir. 2009). The enforceability of such orders was at issue in *Golinski v. United States Office of Personnel Management*, 781 F. Supp. 2d 967 (N.D. Cal. 2011), though that issue might ultimately be rendered academic by the same judge’s conclusion that DOMA is indeed unconstitutional, *see Golinski*, 824 F. Supp. 2d at 1002-03.

ample, to interstate recognition of marriage—that have also been constitutionally controversial. But the administration has only abandoned section 3.²⁶)

The invalidation of DOMA would not necessarily lead to the invalidation of *state* laws that forbid same-sex marriage, however. Suppose that courts accept the administration's contention that discrimination on the basis of sexual orientation should be subject to "a heightened standard of scrutiny."²⁷ A court might distinguish between state marriage statutes and DOMA in two ways. One way is reliance on tradition: a court might conclude that longstanding tradition at the state level justifies the preservation of the separate institution of marriage, but that DOMA does not reflect a similar tradition, because prior to DOMA the federal government largely relied on state definitions of marriage. The other possibility is legislative history. Under heightened scrutiny, a court must look at the legislature's "actual justifications for the law," not merely "hypothetical rationales, independent of the legislative record."²⁸ This means that the constitutionality of a law depends on why it was enacted. The actual justifications given for DOMA's restrictions on same-sex marriage might differ from those proffered historically in many states.²⁹

Courts may also distinguish DOMA and state statutes under rational-basis scrutiny. Courts that have invalidated DOMA for its lack of a rational basis³⁰ have distinguished it from state marriage laws. For example, Judge Tauro, of the District of Massachusetts, found DOMA to violate principles of equal protection, asserting that "there exists no fairly conceivable set of facts that could ground a rational relationship between DOMA and a legitimate government objective."³¹ The court bolstered that conclusion with its assertion that "the subject of domestic relations is the exclusive province of the states" and that when state marriage laws have "varied from state to state throughout the course of history," the federal government has traditionally "recogniz[ed] as valid for federal purposes any heterosexual marriage which has been declared valid pursuant to state law."³² By contrast, it might be possible to uphold state marriage laws in light of their long history. Even scholars who are skeptical of the role of

26. For simplicity's sake, I will frequently use "DOMA" when I mean to refer specifically to section 3.

27. DOMA Letter, *supra* note 1; *see also* Defendant's Brief in Opposition to Motions to Dismiss at 18, *Golinski*, 824 F. Supp. 2d 968 (No. 10-257) [hereinafter U.S. Golinski Brief].

28. DOMA Letter, *supra* note 1 (citing *United States v. Virginia*, 518 U.S. 515, 533, 535-36 (1996)); *see* U.S. Golinski Brief, *supra* note 27, at 18-20.

29. *See* DOMA Letter, *supra* note 1 (discussing DOMA's legislative record).

30. *E.g.*, *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 396 (D. Mass. 2010); *see also In re Balas*, 449 B.R. 567, 574 n.5 (Bankr. C.D. Cal. 2011) (concluding that the justifications actually offered for DOMA would "fail[] even the lowest standard of constitutional scrutiny (rational basis)").

31. *Gill*, 699 F. Supp. 2d at 387 (footnote omitted) (quoting *Medeiros v. Vincent*, 431 F.3d 25, 29 (1st Cir. 2005)).

32. *Id.* at 391. The court did not discuss the second-order conflicts problem.

tradition in justifying discriminatory statutes concede that the tradition-based justification for state marriage laws is “sufficiently plausible to satisfy at least the most deferential standard of rational basis review.”³³ State marriage laws have such a tradition. DOMA may not.³⁴

The First Circuit’s decision in *Gill*—the first Court of Appeals decision on the constitutionality of DOMA—is illustrative. The court declined the administration’s invitation to apply heightened scrutiny, but also applied something greater than rational basis review.³⁵ It found the equal protection challenge to DOMA “uniquely reinforced by federalism concerns.”³⁶ It thus held DOMA unconstitutional, even after concluding that it was limited to rationales “that do not presume or rest on a constitutional right to same-sex marriage.”³⁷

In other words, there is a federalism angle to the legal attacks on DOMA. Federal law borrows state marriage law for nearly every question of marital validity *except* the validity of same-sex marriages.³⁸ Just as in *Romer v. Evans*,³⁹ the decision to single out that one issue for different structural treatment might be found unconstitutional. Indeed, many of DOMA’s critics have articulated the attack in federalist terms.⁴⁰ The plaintiffs’ appellate brief in *Gill*

33. Kim Forde-Mazrui, *Tradition as Justification: The Case of Opposite-Sex Marriage*, 78 U. CHI. L. REV. 281, 309 (2011).

34. For a defense of DOMA against arguments based on tradition and federalism, see Lynn D. Wardle, *Section Three of the Defense of Marriage Act: Deciding, Democracy, and the Constitution*, 58 DRAKE L. REV. 951, 973-85 (2010).

35. *Gill v. Office of Pers. Mgmt.*, No. 10-2207, slip op. at 13-15 (1st Cir. May 31, 2012).

36. *Id.* at 19-23.

37. *Id.* at 12.

38. See David B. Cruz, *The Defense of Marriage Act and Uncategorical Federalism*, 19 WM. & MARY BILL RTS. J. 805, 824 (2011) (“Section 3 leaves in place state marriage definitions for federal purposes regardless of how young or old a putative spouse is. It leaves in place state marriage definitions regardless of what diseases or genetic conditions a person might have. It leaves in place state marriage definitions regardless of how closely related the two spouses might be. But if a state marriage definition embraces a same-sex couple, section 3 means that the federal government will suddenly and across-the-board refuse to use the state definition.”). *But see* Wardle, *supra* note 34, at 973-82 (arguing that federal law has frequently provided its own definition of marriage). DOMA also denies federal recognition to a marriage of more than two persons, which no state currently authorizes; it has no effect, however, on bigamy (one person with multiple two-person marriages).

39. 517 U.S. 620 (1996).

40. See Cruz, *supra* note 38, at 815-23; Evan Wolfson & Michael F. Melcher, *Constitutional and Legal Defects in the “Defense of Marriage” Act*, 16 QUINNIPIAC L. REV. 221, 231-39 (1996); see also *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234, 249 (D. Mass. 2010) (Tauro, J.) (invalidating DOMA under the Tenth Amendment); 142 CONG. REC. H7481 (daily ed. July 12, 1996) (statement of Rep. Mink); Mark Strasser, *DOMA’s Bankruptcy* 30 (July 2011) (unpublished manuscript), available at http://works.bepress.com/mark_strasser/22 (noting arguments against DOMA that “would leave state same-sex marriage bans unscathed,” as well as other arguments against DOMA that “would seem equally applicable to state same-sex marriage bans”); cf. *The West Wing*:

repeatedly emphasized that “a state’s decision to exclude same-sex couples from marrying . . . is not the issue. The issue is whether *Congress* was constitutionally justified in refusing to treat *already married same-sex couples* as married”⁴¹ Even DOMA’s author has argued that it should be repealed because it “is simply incompatible” with “federalism and the primacy of state government over the federal.”⁴² There is a real possibility that courts will strike down DOMA without striking down all state statutes that forbid same-sex marriages.

There is another way that DOMA might fall while state marriage laws do not: congressional action. Congress might well repeal DOMA before the courts definitively opine on its constitutionality, just as it recently repealed the statute banning the openly gay from serving in the military.⁴³ Some courts had countenanced constitutional challenges to the ban on gay service members, and that may have catalyzed repeal efforts.⁴⁴ One could imagine a similar path for DOMA, and there have been proposals to repeal it,⁴⁵ though the political reality is that the courts will likely be consigned to deal with DOMA on their own for a while longer.

Any of these scenarios will pose the choice-of-law problem discussed in this Article—that is, how federal law decides whether a same-sex couple is married. All of these scenarios are also consistent with the legal theory articulated by the Attorney General. Holder’s letter went out of its way to note that while section 3 of DOMA is unconstitutional, *state* laws that limit marriage to opposite-sex couples are *not necessarily* similarly invalid. The letter refers three times to those “legally” wed “under state law,”⁴⁶ thus presupposing that there could be state laws that made same-sex marriages illegal. Similarly, the administration’s first federal court brief attacking DOMA’s constitutionality complained that the statute “distinguish[ed] among couples who are already legally married in their own states”⁴⁷ and relied substantially on DOMA’s failure

The Supremes (NBC television broadcast Mar. 24, 2004) (showing fictional conservative jurist criticizing DOMA on federalism grounds).

41. Brief of Plaintiffs-Appellees Nancy Gill, et al. and Plaintiff-Appellee/Cross-Appellant Dean Hara at 2, *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, No. 10-2204 (1st Cir. Oct. 27, 2011) [hereinafter Gill Brief]; *see also id.* at 55-59 (emphasizing this point).

42. *See* Bob Barr, *Wedding Blues*, L.A. TIMES, Jan. 5, 2009, at A13.

43. *See* Don’t Ask Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.

44. *See* WILLIAM D. ARAIZA & DAN WOODS, UNDERSTANDING THE REPEAL OF DON’T ASK DON’T TELL: AN IMMEDIATE LOOK AT POLICY CHANGES ALLOWING GAYS AND LESBIANS TO OPENLY SERVE IN THE MILITARY 6-7, 15 (2011) (attributing momentum to Log Cabin Republicans v. United States, 716 F. Supp. 2d 884 (C.D. Cal. 2010)).

45. *See* sources cited *infra* note 177.

46. DOMA Letter, *supra* note 1.

47. U.S. Golinski Brief, *supra* note 27, at 4 n.3.

to recognize valid state law marriages.⁴⁸ The administration may eventually argue that state same-sex marriage bans are unconstitutional, but it has not done so yet. Indeed, in his heralded remarks on same-sex marriage, President Obama explained that while he “personally . . . think[s] same-sex couples should be able to get married,” he thought it was “a mistake to try to make what has traditionally been a state issue into a national issue.”⁴⁹

In discussing these scenarios of DOMA’s demise, I mean to put to one side the core controversy over whether there is a constitutional right to same-sex marriage.⁵⁰ That controversy is surely important, but its importance has eclipsed the other legal issues tied up with DOMA’s likely destruction. Understanding the choice-of-law problems that lie beyond DOMA should be important to both sides. And, of course, it is quite possible that courts will ultimately uphold DOMA,⁵¹ or invalidate it on more far-reaching grounds, and will eventually hold that states must recognize same-sex marriage.⁵²

Whatever the ultimate fate of constitutional claims to same-sex marriage, there will be a critical period of time when this choice-of-law problem exists, possibly a long one.⁵³ Courts are striking down DOMA *now*, but those same courts are not simultaneously holding that all states must recognize same-sex marriages. The conflicts problem may also have relevance for the current litigation over DOMA: For one thing, if a couple is not validly married under the relevant state law, they may not have standing to challenge DOMA in the first place.⁵⁴ For another, the appellate briefs in *Gill* invoked conflicting visions of how, absent DOMA, federal law will ascertain when same-sex couples are married.⁵⁵ Even beyond same-sex marriage, there are important implications for

48. *Id.* at 20-22.

49. See Interview by Robin Roberts with Barack Obama (May 9, 2012) (transcript available at abcnews.go.com/Politics/transcript-robin-roberts-abc-news-interview-president-obama/story?id=16316043).

50. This Article is thus in the tradition of Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 933 (1998). See also ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES, at xi-xii (2006) [hereinafter KOPPELMAN, DIFFERENT STATES].

51. See, e.g., *Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861, 879-80 (C.D. Cal. 2005), vacated for lack of standing, 447 F.3d 673 (9th Cir. 2006); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1301, 1309 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123, 148 (Bankr. W.D. Wash. 2004).

52. See, e.g., *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff’d on narrower grounds*, *Perry v. Brown*, 671 F.3d 1052, 1063 (9th Cir. 2012).

53. Cf. Akhil Reed Amar, *Race, Religion, Gender, and Interstate Federalism: Some Notes from History*, 16 QUINNIPIAC L. REV. 19, 26 n.20 (1996); Pamela S. Karlan, *Introduction: Same-Sex Marriage as a Moving Story*, 16 STAN. L. & POL’Y REV. 1, 9 (2005).

54. See *Smelt*, 447 F.3d at 683-84; Strasser, *supra* note 40, at 7.

55. Brief for Intervenor-Appellant the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 46-47, *Gill v. Office of Pers. Mgmt.*, Nos. 10-2204, 10-2207, 10-2214 (1st Cir. Sept. 22, 2011) [hereinafter House Brief]; *Gill* Brief, *supra* note 41, at 43; see *infra* notes 316-17 and accompanying text.

other, similar federal choice-of-law problems. As this Article will discuss, federal courts have disagreed for decades on how to apply federal law that incorporates state law rules. That problem predates DOMA and will outlast it, and solving it is important in its own right.

II. FIRST-ORDER CONFLICTS: MARRIAGE AND STATE CHOICE OF LAW

It may have seemed simple enough to say that the federal government would rely on same-sex “marriages . . . legally recognized under state law.”⁵⁶ But *which* state’s law governs is surprisingly complicated. As Justice Scalia has put it, “the diversity among the States in choice-of-law principles has become kaleidoscopic,”⁵⁷ and that is particularly true of marriage.

This Part briefly sketches the disagreements among states on the choice-of-law rules affecting marriage, especially same-sex marriage. Subparts A and B describe the common conflicts between the place where the marriage was “celebrated” and the place where the couple lives or will live. Subpart C then sketches the existing doctrines—the First Restatement, the Second Restatement, interest analysis, etc.—for resolving these first-order conflicts. Finally, Subpart D shows why the Full Faith and Credit Clause, which might seem to resolve these conflicts, does not do so. The point of this Part is not to exhaustively catalog the state conflicts over recognizing foreign same-sex marriages, but to convey the breadth of the disarray, which feeds into the second-order conflicts problem discussed afterwards.⁵⁸

A. *Celebration v. Domicile*

Consider this example: A same-sex couple travels to state *A*, which happily marries them. (In conflicts parlance, state *A* is called “the state of celebration.”) But the couple does not live there. They came from their permanent home in state *B*, which does not allow same-sex couples to marry. (In conflicts parlance, state *B* is often called “the state of domicile.”) The couple returns home. Are

56. DOMA Letter, *supra* note 1.

57. *Ferens v. John Deere Co.*, 494 U.S. 516, 538 (1990) (Scalia, J., dissenting).

58. This Article does not delve into how states determine who is a man and who is a woman, or when they recognize gender determinations made by other states. Those complicated issues deserve thorough treatments of their own. *See, e.g.*, Julie A. Greenberg, *When is a Same-Sex Marriage Legal? Full Faith and Credit and Sex Determination*, 38 CREIGHTON L. REV. 289, 295-307 (2004); Shana Brown, Note, *Sex Changes and “Opposite-Sex” Marriage: Applying the Full Faith and Credit Clause to Compel Interstate Recognition of Transgendered Persons’ Amended Legal Sex for Marital Purposes*, 38 SAN DIEGO L. REV. 1113, 1128-55 (2001); *see also* David B. Cruz, *Sexual Judgments: Full Faith and Credit and the Relational Character of Legal Sex*, 46 HARV. C.R.-C.L. L. REV. 51 (2011). It suffices for this Article to observe that the disarray over recognizing same-sex marriage is even worse for individuals whose sex is in dispute.

they married? Is their marriage governed by the law of the state of celebration, or the law of their state of domicile?

As a practical matter, the law of state *A*, the state of celebration, will usually be in favor of the marriage. After all, the parties are unlikely to get a marriage license there if the license cannot lawfully issue.⁵⁹ Recent history provides occasional exceptions—like the City of San Francisco’s attempt to issue same-sex marriage licenses despite the California Supreme Court’s eventual conclusion that local officials could not do so⁶⁰—but these exceptions are rare. Usually, state officials won’t break the law to issue licenses.

What about state *B*? Its reaction may vary. Until last summer, for example, New York did not permit same-sex couples to marry.⁶¹ But if a New York couple traveled to Massachusetts to get married, New York courts recognized the marriage, holding that while “[t]he Legislature may decide to prohibit the recognition of same-sex marriages solemnized abroad,” it had not done so, and “[u]ntil it does . . . such marriages are entitled to recognition in New York.”⁶² The decisions followed the spirit of *In re May’s Estate*, a famous New York case that allowed a couple to travel to Rhode Island to evade New York’s consanguinity laws.⁶³ Thus, New York allowed the law of the state of celebration to control.

So too do a handful of other states. Maryland’s Attorney General concluded that state law likely required it to recognize same-sex marriages from other jurisdictions, even when same-sex couples could not get married in Maryland.⁶⁴ Rhode Island’s Attorney General has issued a similar opinion, interpreting state law to recognize foreign same-sex marriages.⁶⁵ So has New Mexi-

59. Thanks to Lea Brilmayer for this point.

60. See *Lockyer v. City & Cnty. of S.F.*, 95 P.3d 459, 495 (Cal. 2004) (declaring same-sex marriages licensed by San Francisco “void and of no legal effect from their inception”); see also Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1748, 1764-65 (2005); Sylvia A. Law, *Who Gets to Interpret the Constitution? The Case of Mayors and Marriage Equality*, 3 STAN. J. C.R. & C.L. 1, 5-14 (2007).

61. *Hernandez v. Robles*, 805 N.Y.S.2d 354, 361 (App. Div. 2005), *superseded by* Marriage Equality Act, 2011 N.Y. Sess. Laws 95 (McKinney).

62. *Martinez v. Cnty. of Monroe*, 850 N.Y.S.2d 740, 743 (App. Div. 2008); see also *Godfrey v. Spano*, 920 N.E.2d 328, 337 (N.Y. 2009) (avoiding the question); *In re Estate of Ranfile*, 917 N.Y.S.2d 195, 195 (App. Div. 2011) (following *Martinez*); *Lewis v. N.Y. State Dep’t of Civil Serv.*, 872 N.Y.S.2d 578, 584 (App. Div. 2009) (same).

63. *In re May’s Estate*, 114 N.E.2d 4, 6-7 (N.Y. 1953); see also Gary J. Simson, *Beyond Interstate Recognition in the Same-Sex Marriage Debate*, 40 U.C. DAVIS L. REV. 313, 326-55 (2006) (discussing *May’s Estate*).

64. Marriage—Whether Out-of-State Same-Sex Marriage That Is Valid in the State of Celebration May Be Recognized in Maryland, 95 Op. Md. Att’y Gen. 3 (2010), *available at* <http://www.oag.state.md.us/Opinions/2010/95oag3.pdf>.

65. See Letter from Patrick Lynch, R.I. Attorney Gen., to Jack R. Warner, Comm’r, R.I. Bd. of Governors for Higher Educ. (Feb. 20, 2007), *available at* <http://www.glad.org/uploads/docs/cases/cote-whitacre-et-al-v-dept-public-health/ri-ag-statement.pdf>.

co's.⁶⁶ It is not certain that the courts in those states will agree,⁶⁷ but these opinions illustrate the possibility of a state's recognizing foreign same-sex marriages without authorizing them at home.⁶⁸

In contrast to these states, many other states that do not celebrate same-sex marriages have also enacted laws that explicitly refuse to recognize such marriages performed elsewhere. Alabama, for example, refuses to "recognize as valid any marriage of parties of the same sex . . . regardless of whether a marriage license was issued."⁶⁹ Many other states have similar prohibitions.⁷⁰ If a same-sex couple lives in such a state (state *B*), and travels to a state (state *A*) where same-sex marriage is recognized, and marries there, their domicile will not recognize the marriage when they return home.

The result can be a real conflict. If state *A*'s law applies, the couple's marriage is valid, because it complied with all of the basic requirements of the law of state *A*. But if state *B*'s law applies, the couple's marriage is invalid, because state *B*'s law refuses to recognize it. It then becomes outcome determinative which state's law applies. And even if one anticipates that state *A*'s courts will apply *A*'s law and state *B*'s will apply *B*'s, it is not clear what a third state is supposed to do, let alone a federal court faced with a choice between the two states.

The legislature of state *A* might decide to try to avoid such conflicts with state *B* preemptively. At the time it decided to recognize same-sex marriage, for example, Massachusetts had a statute (dating back to 1916) which provided that "[n]o marriage shall be contracted in this commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction."⁷¹ But Massachusetts repealed the statute in 2008.⁷² Only a handful of states have similar laws, and on-

66. Are Same-Sex Marriages Performed in Other Jurisdictions Valid in New Mexico?, Op. N.M. Att'y Gen. No. 11-01 (2011), available at <http://97.65.186.35/pdf/4%20Jan%2011-Rep.%20A1%20Park-Opinion%2011-01%5B1%5D.pdf>.

67. See, e.g., *Chambers v. Ormiston*, 935 A.2d 956, 972-73 (R.I. 2007) (Suttell, J., dissenting).

68. See also *Christiansen v. Christiansen*, 253 P.3d 153, 154 n.1 (Wyo. 2011) (leaving foreign-recognition question undecided); Michael E. Solimine, *Interstate Recognition of Same-Sex Marriage, the Public Policy Exception, and Clear Statements of Extraterritorial Effect*, 41 CAL. W. INT'L L.J. 105, 136, 141 (2010) (noting that Wyoming law lacks a "a clear statement against the validity of a same-sex marriage celebrated outside the enacting jurisdiction").

69. ALA. CODE § 30-1-19(e) (2011).

70. A recent article counted thirty-eight such states. Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433, 447 (2005). Another survey counted forty. KOPPELMAN, DIFFERENT STATES, *supra* note 50, at 8.

71. MASS. GEN. LAWS ch. 207, § 11 (2006) (repealed 2008); see also *Cote-Whitacre v. Dep't of Pub. Health*, 844 N.E.2d 623, 632 (Mass. 2006) (Spina, J., concurring) (quoting section 11).

72. Act of July 31, 2008, §1, 2008 Mass. Acts 1014.

ly one state that issues same-sex marriage licenses does (New Hampshire).⁷³ There are thus frequent conflicts between one state's attempt to celebrate a marriage and another state's refusal to recognize it.

B. *Migratory and Visiting Marriages*

Those conflicts have even more severe practical effects—and face a murkier legal framework—in the case of so-called migratory marriages. Consider this new scenario. This time the same-sex couple lives in state *A*, which permits same-sex marriages. They marry there. But ultimately they decide to move to a new state (state *B*) together, where same-sex marriages are not performed. What happens to their marriage?

As before, there are several states that would recognize such a marriage. Maryland, Rhode Island, and New Mexico would likely recognize such a marriage even if the couple had *never* lived in state *A*.⁷⁴ They are even more likely to do so if state *A* had the closest connection to the couple at the time of the marriage. But, as discussed above, many states have laws stating that same-sex marriages celebrated abroad will not be recognized, period. These laws appear to extinguish the couple's marriage upon their arrival in state *B*, no matter how long it had previously been recognized elsewhere.

Indeed, some states have interpreted their laws in this fashion. Consider the fate of J.B. and H.B., two men whose real lives match our example. They lived in Massachusetts and married there in 2006, then relocated to Texas two years later.⁷⁵ Alas, J.B. then sought a divorce from his spouse in Texas divorce court. The trial court took jurisdiction over the case, but the state of Texas intervened and got a writ of mandamus from the Texas Court of Appeals. The Texas appeals court held that a same-sex couple could not be treated as married in Texas, and hence could not divorce. The court simply observed that the “Texas Constitution provides that “[m]arriage in this state shall consist only of the union of one man and one woman,”” and that the “rule contains no exceptions for marriages performed in other jurisdictions.”⁷⁶ Any same-sex marriage must be abandoned at the Texas border.⁷⁷ And yet—though the Texas court did not

73. See N.H. REV. STAT. ANN. § 457:44 (2011); see also Jeffrey A. Redding, *Slicing the American Pie: Federalism and Personal Law*, 40 N.Y.U. J. INT'L L. & POL. 941, 995 (2008) (noting that Vermont, New Hampshire, Illinois, and Wisconsin have similar anti-evasion statutes); An Act to Protect Religious Freedom and Recognize Equality in Civil Marriage, § 12, 2009 Vt. Adv. Legis. Serv. 3 (LexisNexis) (effective Sept. 1, 2009) (repealing Vermont's anti-evasion statute).

74. See *supra* text accompanying notes 64-67.

75. *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 659 (Tex. App. 2010).

76. *Id.* at 669 (alteration in original) (quoting TEX. CONST. art. I, § 32(a)).

77. Perhaps in Louisiana too, according to dicta in *Ghassemi v. Ghassemi*, 998 So. 2d 731 (La. Ct. App. 2008), which noted that “the Louisiana Legislature has not expressly outlawed marriages between first cousins regardless of where they are contracted, as it has em-

dwell on this fact—the couple’s marriage almost certainly *remained* valid back in Massachusetts, and the couple “likely . . . continue[d] to accrue rights and responsibilities vis-à-vis each other by virtue of their status as spouses.”⁷⁸ Thanks to the conflict between Texas and Massachusetts, J.B. and H.B. had two marital statuses simultaneously.⁷⁹

It is not yet clear whether all states will interpret their anti-recognition laws that broadly. Andrew Koppelman, for example, argues that they should not. Drawing upon the history of similarly worded statutes (from interracial marriage cases), Koppelman argues that most of these statutes should be construed to apply only to “evasion cases”—i.e., to couples who were already residents of the state but traveled elsewhere to be married—not to “void” the marriages of couples who visit or move to the state.⁸⁰

Koppelman is surely correct that invalidating preexisting marriages is strong medicine. Others have called it inconsistent with “relevant polices [sic] of . . . [the] states, the protection of justified expectations, and certainty and predictability,”⁸¹ and even argued that it is unconstitutional.⁸² If those considerations cause some states to interpret their anti-recognition statutes more narrowly, that is yet another way in which state treatment of interstate marriages will vary.

Finally, consider the visiting marriage. Our same-sex couple once again lives in state *A*, and marries there. State *A* remains their permanent domicile. But one or both members of the couple still travel occasionally throughout the country, occasionally interacting with other states’ legal systems. If one spouse earns income elsewhere and files a state tax return, that state must decide whether he files separately or jointly. Other states might also have to decide whether a visiting couple can exercise parental or property rights that their home state allows. If one spouse is injured elsewhere, that state must decide if the other spouse can make medical decisions; if one spouse is killed elsewhere,

phatically done in the case of purported same-sex marriages.” *Id.* at 747 n.31 (emphasis omitted).

78. Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. REV. 1669, 1683 (2011).

79. *See id.* at 1683-89; *see also id.* at 1679-83 (noting that couples generally can only seek a divorce in the state where one of them lives); Judith M. Stinson, *The Right to (Same-Sex) Divorce*, 62 CASE W. RES. L. REV. (forthcoming 2012), available at <http://ssrn.com/abstract=1926660>.

80. *See* KOPPELMAN, DIFFERENT STATES, *supra* note 50, at 137-40.

81. Linda Silberman, *Same-Sex Marriage: Refining the Conflict of Laws Analysis*, 153 U. PA. L. REV. 2195, 2205 (2005) (arguing that the applicable law in such circumstances should be the law of the state in which the couple was domiciled when they were married).

82. Steve Sanders, *The Constitutional Right to (Keep Your) Same-Sex Marriage: Why the Due Process Clause Protects Marriages That Cross State Lines, Even If Conflict of Laws Cannot*, 110 MICH. L. REV. (forthcoming 2012), available at <http://ssrn.com/abstract=1903386>; accord MARK STRASSER, SAME-SEX UNIONS ACROSS THE UNITED STATES 193-94 (2011).

that state must decide whether the other spouse can retain custody and bring the child home.⁸³

The state's more fleeting connection to a visitor's marriage might provide yet another reason for anti-recognition states to read their anti-recognition provisions more narrowly. It is already a burden to tell a couple that they cannot relocate to another state without sacrificing their marriage; to tell them that they cannot visit is even more extreme. But, once more, it is not clear that the plain texts of the anti-recognition statutes will permit any narrowing interpretation.

C. *Resolving Conflicts of Law*

As the examples demonstrate, a marriage can easily interact with the laws of multiple states, and these interactions can give rise to a conflict of state laws. Each of those states must decide whether to apply its own law or another's to the controversy. And in many situations a third state can also be called upon to adjudicate the conflict, in which case it must figure out how to pick as well. There are many different theories for deciding which state's law to apply. Once again, the point is not to catalog them exhaustively, but just to show that there is no dominant view of how to mediate among the interests of the celebrating state, the domiciliary state, and other states.

One of the oldest theories of conflicts still in common currency is set forth in the First Restatement of Conflict of Laws, reported in 1934 by Joseph Henry Beale.⁸⁴ Section 121 of the First Restatement says: "Except as stated in §§ 131 and 132, a marriage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with."⁸⁵ Section 132 says: "A marriage which is against the law of the state of domicil of either party, though the requirements of the law of the state of celebration have been complied with, will be invalid everywhere" (even in the state of celebration!) if it is a "marriage of a domiciliary which a statute at the domicil makes void even though celebrated in another state."⁸⁶ Taken together, these rules make the law of the state of celebration the default, while giving a broad role to the parties' domicile to overrule the law of the state of celebration.

Indeed, while section 132 is phrased as an exception to section 121, it is the kind of exception that potentially consumes the rule.⁸⁷ State *B* has the power to invalidate any marriage imported from another state, so long as it passes a

83. See KOPPELMAN, *DIFFERENT STATES*, *supra* note 50, at 72-73.

84. RESTATEMENT (FIRST) OF CONFLICT OF LAWS (1934).

85. *Id.* § 121.

86. *Id.* § 132. Section 132 also provides—less relevantly—that the marriage is void if it is a "(a) polygamous marriage, (b) incestuous marriage between persons so closely related that their marriage is contrary to a strong public policy of the domicil, (c) marriage between persons of different races where such marriages are at the domicil regarded as odious." *Id.*

87. See generally Perry Dane, *Whereof One Cannot Speak: Legal Diversity and the Limits of a Restatement of Conflict of Laws*, 75 *IND. L.J.* 511, 512-14 (2000).

“statute” which “makes [such marriages] void even though celebrated in another state.”⁸⁸ State *A*’s authorization to marry controls only if state *B* lets it. Thus, the Restatement declares, “[t]he rule stated in [section 132] recognizes the paramount interest of the domiciliary state in the marital status.”⁸⁹ In conflicts between state *B* and state *A*, *B* should win.

The Second Restatement—reported in 1971 and intended to provide a more flexible, less formalistic approach to conflicts—describes a different approach. It states in section 283(1): “The validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage under the principles stated in § 6.”⁹⁰

That section 6, in turn, describes the Second Restatement’s overarching approach to choice of law. It instructs each court to “follow a statutory directive of its own state on choice of law,” if there is one.⁹¹ If not, states are to take into account seven incommensurate factors ranging from the “relevant policies” of the forum state and “other interested states” to the “justified expectations” of the parties, “ease in the determination and application of the law to be applied,” and “certainty, predictability and uniformity of result.”⁹² A comment emphasizes: “Protection of the justified expectations of the parties is a basic policy underlying the field of marriage.”⁹³

On top of that test, the Second Restatement adds in section 283(2): “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.”⁹⁴ This part of the Second Restatement produces several puzzles, including the relationship between sec-

88. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 132.

89. *Id.* § 132 cmt. a; see also Joseph H. Beale et al., *Marriage and the Domicil*, 44 HARV. L. REV. 501, 529 (1931) (“[T]he decisions . . . show one underlying principle: control over the marital status rests with the domicil.”). The Restatement is arguably ambiguous about which domiciles have such veto power. Some scholars have suggested that only the domicile “at the time of the marriage” has the power to veto marriages that it views as abhorrent. See, e.g., Mark Strasser, *For Whom Bell Tolls: On Subsequent Domiciles’ Refusing to Recognize Same-Sex Marriages*, 66 U. CIN. L. REV. 339, 344 (1998). Others have understood the First Restatement more broadly. See, e.g., Monrad G. Paulsen & Michael I. Sovern, “Public Policy” in the Conflict of Laws, 56 COLUM. L. REV. 969, 994-95 & n.90 (1956); *accord* State v. Bell, 66 Tenn. 9 (1872).

90. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(1) (1971).

91. *Id.* § 6(1).

92. *Id.* § 6(2).

93. *Id.* § 283 cmt. b.

94. *Id.* § 283(2). Some have suggested that the domicile will have the most significant relationship “in most cases.” Grossman, *supra* note 70, at 474. Others think the test lets the court pick any “one of the following potential candidates: (1) the domicile of either party at the time of the marriage, (2) the state of celebration, and (3) the state where the couple plans to live after the marriage.” Strasser, *supra* note 89, at 352.

tions 283(1) and 283(2). What if the state with the “most significant relationship” under section 283(1) is different from “the state where the marriage was contracted” or the “state which had the most significant relationship . . . at the time of the marriage”?⁹⁵ Even if it were entirely clear what it meant, the Second Restatement’s approach has not brought much clarity to conflicts either. There are plenty of states that do not purport to follow it,⁹⁶ and even among those states that *do* purport to follow the Second Restatement generally, there is little consistent adherence to the specifics.⁹⁷

Another approach is so-called “interest analysis,” an academic theory which has found some favor in the courts. Like the Second Restatement, it rejects the formalism of the First Restatement in the service of finding the states who have an “interest” in regulating any particular situation. It is not entirely clear how interest analysis would resolve interstate disputes over marital status. Some commentators have suggested that it would generally favor the law of the state of celebration, while allowing a subsequent domicile to veto the marriage if it spoke clearly.⁹⁸ Others have suggested that interest analysis limits the choice of law to states whose interest existed at the time of the marriage—namely, “the domicile(s) of the parties, the state where the marriage takes place, and the place where the couple plans to live *at the time of the marriage*.”⁹⁹

Scholars have suggested other approaches too, such as Andrew Koppelman’s application of Doug Laycock’s suggestion that “a clean solution to the question of a marriage’s existence would be to rely, in all cases, on the law of the parties’ domicile.”¹⁰⁰ Domiciles would never recognize foreign marriages that were forbidden at home, and they would invalidate such marriages if the couple moved there later. This is not a solution that many states have adopted—and again, the point is that state choice of law is in chaos, not that any one solution is good or bad.

95. Compare RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(1), with *id.* § 283(2).

96. See Symeon C. Symeonides, *Choice of Law in the American Courts in 2009: Twenty-Third Annual Survey*, 58 AM. J. COMP. L. 227, 231-32 (2010).

97. Patrick J. Borchers, *Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note*, 56 MD. L. REV. 1232, 1233 (1997); see also *id.* (“The result, which will surprise no one who has closely followed American conflicts doctrine, is that citation to the *Second Restatement* is often little more than a veil hiding judicial intuition.”); Douglas Laycock, *Equal Citizens of Equal States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 253 (1992) (“Trying to be all things to all people, [the Second Restatement] produced mush.”).

98. See Grossman, *supra* note 70, at 475; see also Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. PA. L. REV. 2215, 2243-44 (2005) (suggesting that courts demand a clear legislative statement before assuming that a state intended to extinguish marriage of a couple that migrates to the state).

99. Strasser, *supra* note 89, at 375-76.

100. KOPPELMAN, *DIFFERENT STATES*, *supra* note 50, at 89 (discussing Laycock, *supra* note 97, at 323).

Finally, it is worth clarifying that there is also a relatively novel body of doctrine related to the so-called “effects” or “incidents” of marriage. As Larry Kramer has summarized it: “There was a time when courts treated marriage as a simple yes-or-no, up-or-down proposition: A marriage was either valid, in which case it was valid for all purposes, or it was not, in which case it was invalid for all purposes.”¹⁰¹ But some more modern decisions in some states have “been willing to draw finer lines,” applying one rule “to the question of validity” and a different rule “for particular ‘incidents’ of being married.”¹⁰² Thus, a court that disapproved of a foreign marriage might hold that a couple’s marriage was valid in the abstract, but that they still were not allowed to adopt a child, cohabit together, or receive government-granted spousal benefits in the state.¹⁰³ Or contrariwise, a court might generally refuse to recognize a marriage but still grant access to a particular incident of marriage, like the right to divorce.¹⁰⁴

Many academics have encouraged this approach,¹⁰⁵ but for now only a little need be said about it. For purposes of federal choice of law, state *status* is what counts. To the extent they borrow from state law, the federal statutes ask who is married, not whether the couple happens to get one or another benefit under state law. If the inquiry into state status is abandoned, federal courts must either find some way to borrow from state incidents instead (which is difficult, because there will not always be an analogy between the state and federal “incident”), or else reject the use of state law altogether.¹⁰⁶ This approach of disaggregating marriage into its incidents thus brings little clarity to the federal marital choice-of-law problem.

D. *Full Faith and Credit*

Resolving the conflict between different states’ marriage and marital recognition laws is the kind of federalism problem that one might reasonably

101. Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1971 (1997).

102. *Id.*

103. *See, e.g.*, F.H. Buckley & Larry E. Ribstein, *Calling a Truce in the Marriage Wars*, 2001 U. ILL. L. REV. 561, 591, 599.

104. *See, e.g.*, Danielle Johnson, Comment, *Same-Sex Divorce Jurisdiction: A Critical Analysis of Chambers v. Ormiston and Why Divorce Is an Incident of Marriage That Should Be Uniformly Recognized Throughout the States*, 50 SANTA CLARA L. REV. 225, 252-53 (2010).

105. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 284 cmt. c (1971); Johnson, *supra* note 104, at 252-53; Willis L.M. Reese, *Marriage in American Conflict of Laws*, 26 INT’L & COMP. L.Q. 952, 956-57, 965-66 (1977) (written by the reporter of the Second Restatement); *see also* KOPPELMAN, DIFFERENT STATES, *supra* note 50, at 91-96; LARRY E. RIBSTEIN & ERIN A. O’HARA, THE LAW MARKET 164-66 (2009); Buckley & Ribstein, *supra* note 103, at 597-99.

106. On the latter, see Part III.C below.

expect to be solved by federal law. State recognition policies can have major consequences for other states, but no single state is in a position to create a sensible set of rules governing interstate recognition. And, indeed, federal law does provide *some* guidelines, but not enough to eliminate the chaos.

The Constitution provides that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.”¹⁰⁷ The Full Faith and Credit Clause has sometimes been cited by those who urge that states have a duty to recognize marriages from other states.¹⁰⁸ But that clause has generally not been interpreted to extend as broadly to legislative rulings (like those concerning which marriages are valid) as it does to judicial judgments (like specific custody orders that might be premised on those marriages).¹⁰⁹ Moreover, even if one thinks that marriages are entitled to full faith and credit as “public Acts, Records, and judicial Proceedings,”¹¹⁰ the Full Faith and Credit Clause empowers *Congress* to decide what “effect” those acts, records, and proceedings shall have,¹¹¹ and Congress has explicitly provided (in a separate section—section 2—of DOMA) that states are not required to recognize same-sex marriages from other states.¹¹²

On top of that, states have traditionally invoked a “public policy” exception to resist implementing foreign laws that their legislatures find particularly objectionable.¹¹³ The many state statutes that deny recognition to foreign same-sex marriages are intended in part as a legislative expression of such policy.

107. U.S. CONST. art. IV, § 1.

108. See, e.g., Robert L. Cordell II, *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, 271 (1994); 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, 584-91 (1994); Mark Strasser, *Loving the Romer out for Baehr: On Acts in Defense of Marriage and the Constitution*, 58 U. PITT. L. REV. 279, 281-83 (1997); Wolfson & Melcher, *supra* note 40, at 221-26.

109. See *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998) (“Our precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments.”); see also David P. Currie, *Full Faith & Credit to Marriages*, 1 GREEN BAG 2d 7, 8-9 (1997); cf. *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330 (Va. Ct. App. 2006) (applying full faith and credit to a custody judgment related to a same-sex marriage).

110. U.S. CONST. art. IV, § 1.

111. Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201, 1206 (2009) (“[T]he only self-executing portion of the Clause was evidentiary in nature: it obliged states to admit sister-state records into evidence but did not mandate the substantive effect those records should have. The real significance of the Clause was the power it granted to Congress to specify that effect later.” (footnote omitted)).

112. 28 U.S.C. § 1738C (2006).

113. See *Baker*, 522 U.S. at 233.

Section 2 of DOMA¹¹⁴ is expressly intended to ratify such policies (if any ratification were needed).

Thus, the federal rules of interstate full faith and credit do not provide much constraint on the issue of same-sex marriage. They leave that largely to conflicting state laws. To be sure, there are scholars who decry this state of affairs, suggesting that the Full Faith and Credit Clause must be interpreted more robustly and that invocations of contrary “public policy” by Congress and the states are unconstitutional.¹¹⁵ But that is not the only view,¹¹⁶ and it is not yet the law. And to constitutionally eliminate the major interstate conflicts, courts would have to simultaneously hold: (1) that the Full Faith and Credit Clause requires interstate recognition of marriages of its own force, (2) that Congress cannot (pursuant to the Full Faith and Credit Clause) alter that recognition rule, and (3) that this rule cannot be affected by the public policy exception that states have long exercised. Whatever the merit of those contentions, they are far from current doctrine.¹¹⁷ The Full Faith and Credit Clause has not made this problem go away.

III. SECOND-ORDER CONFLICTS: THE ROLE OF FEDERAL COURTS

As we have seen, state laws differ as to which marriages may be celebrated, and state laws further differ on the choice-of-law question of which of the various states’ laws governs the recognition of a given marriage. I have called this state choice-of-law question the “first-order” question. Difference of opinion on this first-order question would not matter to federal courts if they had a consistent method of dealing with it—either by choosing some state’s first-order method or by imposing a method of their own. When a federal court is required to apply state law, its method for dealing with this problem—different state laws and different “first-order” state choice-of-law rules—is the “second-order” question.

Federal courts have established a second-order conflicts rule for diversity cases, but they do not have one in federal question cases. This Part discusses what they have done so far to muddle through. Subpart A shows how federal courts have tried to avoid the choice-of-law question. Subpart B describes the

114. 28 U.S.C. § 1738C.

115. *E.g.*, Kramer, *supra* note 101, at 2003.

116. *See, e.g.*, Patrick J. Borchers, Baker v. General Motors: *Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147, 167-72 (1998); Richard S. Myers, *Same-Sex “Marriage” and the Public Policy Doctrine*, 32 CREIGHTON L. REV. 45, 56-59 (1998); Sachs, *supra* note 111, at 1206-08; Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255, 261 (1998).

117. One scholar also argues that the Due Process Clause requires states to recognize many marriages performed elsewhere. *See Sanders, supra* note 82, at 5. As with the full faith and credit arguments, it suffices for present purposes to note that this theory has not yet caught on, and chaos therefore still prevails among the states.

Klaxon approach of adopting the forum state's choice-of-law rules. Subpart C describes the federal common law of conflicts, whereby courts create their own rules for choosing state law. Subpart D discusses the courts that have abandoned state law altogether.

A. *Avoiding the Problem*

Federal courts have confronted marital choice-of-law issues before—long before same-sex marriage was legally recognized. Their decisions are instructive, but they do not provide a decisive answer to the choice-of-law problem. In practice, it frequently proved unnecessary for a federal court to actually choose a state's law because the relevant states' marriage laws were not that different on the issue in question, and therefore all would end up treating the marriage the same way—or at least the federal court could convince itself of this. The issue simply escaped definitive resolution.

The Ninth Circuit's decision in *Tatum v. Tatum*,¹¹⁸ issued more than fifty years ago, provides an example. A postal clerk and veteran named Erwin Tatum died, leaving his widow entitled to the proceeds of his federal life insurance policy.¹¹⁹ The question for the court was who was his widow. Erwin had married two women—first Mattie, the mother of his four children, and later Bertha.¹²⁰ But he did not divorce Mattie until years after he and Bertha celebrated their marriage.¹²¹ So the fate of Erwin's \$4000 life insurance policy turned on questions of bigamy, separation, common law marriage, and choice of law.

The court summarized (and dodged) the choice-of-law dilemma as follows:

The parties have assumed without discussion that the question of appellant's marital status is to be determined by the law of California. The answer is not that crystal clear. . . .

. . . .
. . . Conceivably, this court could refer to the law of either Arizona, Texas, or California to determine this question. However, an analysis of the authorities in each state leads us to conclude that regardless of which law is applied, appellant cannot prevail. Thus, it is unnecessary to decide whether one of the aforementioned alternatives is the exclusive governing law, or whether a choice exists, and if so, how the selection is to be made.¹²²

118. 241 F.2d 401 (9th Cir. 1957).

119. *Id.* at 403-04.

120. *Id.* at 404.

121. He also apparently "resumed marital relations" with Mattie for a five-month period during his marriage with Bertha. *Id.*

122. *Id.* at 405.

Despite recognizing the need for clarity on the choice-of-law issue, the court escaped the case without deciding anything about it.¹²³ Alas, that is emblematic of other cases from the era.¹²⁴

Other federal courts managed to avoid selecting a choice-of-law doctrine by deciding that the choice was so obvious that no real choice-of-law theory was necessary. It is not that every state had the same *substantive* law, it is just that every plausible theory of conflicts would end up picking the same state. For example, in *De Sylva v. Ballentine* the Supreme Court was asked to decide whether illegitimate children counted as “children” under the Copyright Act.¹²⁵ The Court aptly noted that “there is no federal law of domestic relations, which is primarily a matter of state concern,” and it concluded that state law applied.¹²⁶ Thus, the Court explained, “[t]his raises [the] question[] . . . to what State do we look[?] . . . The answer to the . . . question, in this case, is not difficult, since it appears from the record that the only State concerned is California, and both parties have argued the case on that assumption.”¹²⁷ The Court did not even discuss the debate over what theory of conflicts to use. It just skipped to what it thought was the obvious answer.¹²⁸

But such avoidance was not always possible, and surely it will not always be possible in the future. In some cases, two states will both have connections to the disputed relationship but have markedly different laws about that relationship. At that point, precedent will no longer provide a sure guide. Federal courts that *did* resolve the marital choice-of-law issue followed different approaches, as the next three Subparts show.

B. Klaxon: *State Law, State Choice of Law*

*Erie Railroad Co. v. Tompkins*¹²⁹ ended the rule of *Swift v. Tyson*¹³⁰ and provided that state law and state judicial doctrine—not federal courts’ exposi-

123. What happened to Bertha? The court concluded that her putative marriage to Erwin was invalid because he was still married to Mattie at the time, and that Bertha had not satisfied the requirements for common law marriage after Erwin and Mattie divorced. It added, with obvious disapproval: “Despite her knowledge of the overlapping marriages, appellant did nothing to rectify the situation, although she did remark to Mattie on one occasion that she was going to have Erwin sent to prison for bigamy.” *Id.* at 411.

124. *See, e.g.*, *Powell v. Rogers*, 496 F.2d 1248, 1249-51 (9th Cir. 1974) (declining to decide between California and Nevada); *Albina Engine & Mach. Works v. O’Leary*, 328 F.2d 877, 878 (9th Cir. 1964) (declining to decide between Idaho and Oregon). *But see Huff v. Dir., Office of Pers. Mgmt.*, 40 F.3d 35, 39 (3d Cir. 1994) (finding it unnecessary to decide between Pennsylvania and Texas, but concluding that Pennsylvania law would apply).

125. 351 U.S. 570 (1956).

126. *Id.* at 580.

127. *Id.* at 581.

128. The (ultimately victorious) respondent had argued that California law controlled because it was the domicile. Brief for Respondent at 41, *De Sylva v. Ballentine*, 351 U.S. 570 (1956) (No. 529), 1956 WL 89071. The Court did not mention this analysis.

129. 304 U.S. 64 (1938).

tion of the general common law—govern in federal diversity cases. *Klaxon*¹³¹ is the choice-of-law sequel to *Erie*, holding that “in diversity cases the federal courts must follow conflict of laws rules prevailing in the states in which they sit.”¹³²

The question in *Klaxon* was whether to apply a New York interest statute to a diversity case filed in federal court in Delaware. The Third Circuit applied the New York statute “apparently . . . from the court’s independent determination of the ‘better view’ without regard to Delaware law.”¹³³ The Supreme Court reversed, explaining:

We are of opinion that the prohibition declared in *Erie R. Co. v. Tompkins* against such independent determinations by the federal courts, extends to the field of conflict of laws. The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware’s state courts. Otherwise, the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side. Any other ruling would do violence to the principle of uniformity within a state, upon which the *Tompkins* decision is based.¹³⁴

Klaxon explicitly applies only “in diversity cases.”¹³⁵ The federal marriage issues DOMA is concerned with are federal questions. It is not clear whether *Klaxon* should apply to such cases, and the Supreme Court has repeatedly declined to decide whether or not it does.¹³⁶ Some lower courts have applied *Klaxon* to federal question cases, concluding that “[t]he ability of the federal courts to create federal common law and displace state created rules is severely limited,” and that federal common law is therefore inappropriate.¹³⁷ Others have applied *Klaxon* to at least particular areas of federal jurisdiction, such as bankruptcy, concluding that it “will enhance predictability in an area where

130. 41 U.S. (16 Pet.) 1 (1842).

131. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

132. *Id.* at 494.

133. *Id.* at 495-96 (discussing *Stentor Electric Manufacturing Co. v. Klaxon Co.*, 115 F.2d 268 (3d Cir. 1940)).

134. *Id.* at 496 (footnote and citations omitted).

135. *Id.* at 494.

136. *See Richards v. United States*, 369 U.S. 1, 7 (1962) (“[W]e need not pause to consider the question whether the conflict-of-laws rule applied in suits where federal jurisdiction rests upon diversity of citizenship shall be extended to a case such as this, in which jurisdiction is based upon a federal statute.”); *D’Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 456 (1942) (“Whether the rule of the *Klaxon* case applies where federal jurisdiction is not based on diversity of citizenship, we need not decide.”); *see also Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 26 n.3 (1988); *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 705 n.8 (1966); *McKenzie v. Irving Trust Co.*, 323 U.S. 365, 371 n.2 (1945).

137. *In re Gaston & Snow*, 243 F.3d 599, 606 (2d Cir. 2001).

predictability is critical.”¹³⁸ Whether *Klaxon* should be so extended is one of the central unanswered questions of second-order choice of law.

C. *The Federal Common Law of Conflicts: State Law, Federal Choice of Law*

There are alternatives to *Klaxon*. Even if a court still wants to apply state law, it could choose state law in a different way—not by incorporating a particular state’s choice-of-law rules, but by applying some *federal* choice-of-law rule to choose among the states. Because no such federal rule has been codified by Congress, it would have to be generated as a matter of federal common law.

A number of federal courts have done just that. For example, a few years after *Tatum v. Tatum* sidestepped the choice-of-law rules governing the Federal Employee Group Life Insurance Act, the Fourth Circuit faced a similar problem under the same statute.¹³⁹ Ernest Brinson married a woman named Clara in North Carolina, moved with her to Virginia, divorced her there “*a mensa et thoro*,” and left for North Carolina.¹⁴⁰ (Clara remarried and stayed in Virginia.) When Ernest died, Clara argued that their putative divorce was merely a legal separation (thus invalidating her putative remarriage too) and that she was still Ernest’s widow. The Fourth Circuit noted that it was “faced at the onset with a choice of law problem,” and recounted the Ninth Circuit’s non-solution in *Tatum*.¹⁴¹ But unlike the Ninth Circuit, the Fourth had previously created a federal rule—“that the law of an insured’s domicile at the time of his death governs” the validity of the marriage.¹⁴² (That meant North Carolina, and it meant that Clara lost.)¹⁴³

A much more recent case from the Sixth Circuit also applied federal common law.¹⁴⁴ That drama centered around Douglas Durden, who married a woman named Ann Linzy in Ohio and lived with her from 1966 to 1982, until his abusiveness drove her to leave him and move to Tennessee. Six years into his marriage with Ann, Douglas had also begun a relationship with another woman, Rita Marshall, fathering a child with her and ultimately marrying her in

138. *In re Merritt Dredging Co.*, 839 F.2d 203, 206 (4th Cir. 1988); see also *A.I. Trade Fin., Inc. v. Petra Int’l Banking Corp.*, 62 F.3d 1454 (D.C. Cir. 1995) (federal jurisdiction under the Edge Act); Cross, *supra* note 6, at 543-45 (cataloging reliance on *Klaxon*).

139. See *Brinson v. Brinson*, 334 F.2d 155 (4th Cir. 1964).

140. *Id.* at 157.

141. *Id.* at 158 (discussing *Tatum v. Tatum*, 241 F.2d 401 (9th Cir. 1957)).

142. *Id.* (citing *Grove v. Metro. Life Ins. Co.*, 271 F.2d 918 (4th Cir. 1959)).

143. The Fourth Circuit did not discuss what would have happened under Virginia law. Cf. *Gloth v. Gloth*, 153 S.E. 879, 886 (Va. 1930) (“[W]hen a divorce a mensa et thoro is decreed there is no severance of the marriage bond. The marital status is not affected thereby; and the parties remain husband and wife, though authorized by the decree to live in separation.”).

144. *DaimlerChrysler Corp. Healthcare Benefits Plan v. Durden*, 448 F.3d 918 (6th Cir. 2006).

Las Vegas. Douglas swore that he had divorced Ann many years before in Tennessee; Ann swore not, and no court had a record of such a divorce. Douglas eventually died, leaving the two women to squabble over his ERISA-governed Chrysler pension plan, which belonged to his legal wife.¹⁴⁵

That squabble in turn hinged on choice of law. The pension plan stated that Michigan law would apply to such a dispute.¹⁴⁶ The district court applied Michigan law, and concluded that Rita was the one entitled to inherit Douglas's benefits.¹⁴⁷ But things are different in Ohio. "Contrary to the rule adopted in Michigan, Ohio places the burden of proof on the second spouse to demonstrate that the first marriage was dissolved."¹⁴⁸ The Sixth Circuit concluded that the federal common law (which it found in the Second Restatement) governed the dispute, overrode the plan's choice of law, and demanded the application of Ohio's law instead of Michigan's. Under Ohio law, Rita could not prove that Ann and Douglas had ever divorced, and Ann was therefore entitled to the benefits.¹⁴⁹

The common law approach to choice of law is popular among circuits that have refused to extend *Klaxon*,¹⁵⁰ and some academics have endorsed it, albeit without fully discussing its complexities.¹⁵¹ Yet, as some of the common law cases demonstrate, different courts have chosen different common law rules for different statutes. Indeed, some have even chosen different common law rules for the same statute. As the Ninth Circuit observed in *Tatum*, under the National Service Life Insurance Act alone, "some would view the law of the place of marriage as controlling, others would be guided by the law of the domicile of the parties, either at the time of the marriage, or when the alleged claim accrues, [and] another court has declined to resolve the matter."¹⁵² So those inclined to reject *Klaxon* in favor of federal common law must still figure out *what* common law rule they favor.¹⁵³

145. The facts in this paragraph are all recounted in *DaimlerChrysler. Id.* at 920-21.

146. *Id.* at 921.

147. *Id.*

148. *Id.* at 926 (citing *Indus. Comm'n v. Dell*, 135 N.E. 669 (Ohio 1922)).

149. *Id.* at 928. My view is that the case was wrongly decided. See *infra* notes 265-70 and accompanying text.

150. See *Berger v. AXA Network LLC*, 459 F.3d 804, 809-10 (7th Cir. 2006); *Med. Mut. of Ohio v. DeSoto*, 245 F.3d 561, 570 (6th Cir. 2001); *Gluck v. Unisys Corp.*, 960 F.2d 1168, 1179 n.8 (3d Cir. 1992); *Edelmann v. Chase Manhattan Bank, N.A.*, 861 F.2d 1291, 1294 & n.14 (1st Cir. 1988); see also *In re Lindsay*, 59 F.3d 942, 948 (9th Cir. 1995) (considering federal common law to be specially appropriate in bankruptcy).

151. See *Chapman, supra* note 6, at *8-9; *Gardina, supra* note 6, at 923.

152. *Tatum v. Tatum*, 241 F.2d 401, 405 (9th Cir. 1957) (citing *Lembcke v. United States*, 181 F.2d 703 (2d Cir. 1950); *United States v. Snyder*, 177 F.2d 44 (D.C. Cir. 1949); *Muir v. United States*, 93 F. Supp. 939 (N.D. Cal. 1950); *Hendrich v. Anderson*, 191 F.2d 242 (10th Cir. 1951)); see also *Yarbrough v. United States*, 341 F.2d 621, 623-24 (Ct. Cl. 1965) (noting that the law of the place of celebration applies under the Civil Service Retirement Act).

153. See *infra* Part VI.B.

D. Borax: *Federal Law, No Conflicts*

There is an alternative to both of these approaches to picking one of the state laws of marriage: refusing to incorporate state law at all. Instead, whether a couple is treated as married for purposes of a given statute could be treated as an independent question of federal law.

No federal circuit has fully embraced this approach, but there are elements of it in several decisions. For example, the courts have developed a partly federal definition of marriage in the immigration context, which the Ninth Circuit case of *Adams v. Howerton* summarized this way: “Cases . . . indicate that a two-step analysis is necessary to determine whether a marriage will be recognized for immigration purposes.”¹⁵⁴ The first step is still the marriage’s validity “under state law.”¹⁵⁵ But even where that is satisfied (as it was assumed to be in *Howerton*),¹⁵⁶ courts must decide “whether the state-approved marriage qualifies” under federal immigration law.¹⁵⁷ Employing this second step, the *Howerton* court rejected an allegedly valid same-sex marriage from Colorado, concluding that as a matter of *federal* definition, “[t]he term ‘marriage’ ordinarily contemplates a relationship between a man and a woman,” even if that marriage is valid under state law.¹⁵⁸ To the extent that a federal court skips ahead to the second step to invalidate a marriage, it avoids the choice-of-state-law problem entirely.

A stronger version of that approach may be present in the Second Circuit’s decision in *Estate of Borax v. Commissioner*: Herman Borax, a New Yorker, divorced his wife *ex parte* in Chihuahua, Mexico, and then, “to no one’s surprise,” remarried.¹⁵⁹ Because of the unfairness to Herman’s first wife, a New York court held the divorce invalid,¹⁶⁰ but Herman and his new wife continued to file joint tax returns (and deduct alimony payments) until the IRS tried to stop them.¹⁶¹ On (posthumous¹⁶²) appeal of that dispute, the Second Circuit sided with Herman and his new wife, concluding that the Mexican divorce (and hence his new marriage) was valid for *federal* tax purposes even if *New York*

154. 673 F.2d 1036, 1038 (9th Cir. 1982).

155. *Id.*

156. The couple “obtained a marriage license from the county clerk in Boulder, Colorado, and were ‘married’ by a minister.” *Id.* The Ninth Circuit observed that at the time “Colorado statutory law . . . neither expressly permit[ted] nor prohibit[ed] homosexual marriages” and found it “unnecessary” to decide either way. *Id.* at 1039.

157. *Id.* at 1038.

158. *Id.* at 1040; see also Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1672-73 (2007); Titshaw, *supra* note 7, at 588-600 (sharply criticizing *Howerton*).

159. *Estate of Borax v. Comm’r*, 349 F.2d 666, 668 (2d Cir. 1965).

160. *Borax v. Borax*, 119 N.Y.S.2d 819 (Sup. Ct. 1953).

161. *Estate of Borax*, 349 F.2d at 668-69.

162. *Id.* at 669 n.1 (noting Herman’s death during litigation).

thought otherwise.¹⁶³ Significantly, the court did not suggest that Herman's divorce or remarriage were valid under state law. It couldn't, since the New York courts had already held the divorce *invalid* and that judgment would likely be preclusive in other states as well.¹⁶⁴ While the exact basis for the Second Circuit's ruling was somewhat hard to tease out, it appeared to rest its decision purely on questions of federal tax policy. As the court put it, "The test would not be whether the divorce would be declared invalid in every state, but rather whether the divorce frustrated the revenue purposes of the tax laws."¹⁶⁵

To be sure, the Second Circuit might not really have meant that federal marriage can be disentangled from state law, or that the purpose of the tax laws justified treating a legally invalid divorce as if it were valid. Perhaps the Court simply thought that the legality of a divorce should be judged by the law of the place of divorce—even if that place was Chihuahua, Mexico. But *Borax* has certainly inspired scholars to vigorously defend the federal-definition view. David Currie, for example, has defended its approach at length, arguing:

What is important . . . is that the question is . . . basically one of tax law, not of conflicts. . . . Whether right or wrong, *Borax* is a healthy decision from the point of view of the conflict of laws, for the court recognizes that statutory terms such as 'husband and wife' do not necessarily require a determination of the validity of the foreign divorce.¹⁶⁶

For Currie, the question is whether it is good federal policy for a particular couple to file jointly or deduct alimony, not how that couple's status matches up to state law. Similarly, Willis Reese wrote:

Error is likely to be committed if it is assumed without investigation and without thought that a word bears the same meaning in every statute in which it appears. Such words as marriage, widow, surviving spouse, etc., do not constitute exceptions to this rule. They need not inexorably be interpreted to refer to a marriage that is valid under the law of a particular State.¹⁶⁷

IV. CHOICE OF LAW IN FEDERAL LEGISLATION

If same-sex marriage is to be left to the states, as the administration proposes,¹⁶⁸ federal courts must know which states' laws to look to. Perhaps the

163. *Id.* at 672-73, 675-76.

164. *Id.* at 676 (Friendly, J., dissenting) (discussing preclusion); *Borax*, 119 N.Y.S.2d at 820.

165. *Estate of Borax*, 349 F.2d at 672; *see also id.* at 676 ("We found it consonant with the tax purposes to recognize this divorce, and hence . . . the second marriage . . ."); David P. Currie, *Suitcase Divorce in the Conflict of Laws*: Simons, Rosenstiel, and *Borax*, 34 U. CHI. L. REV. 26, 74 (1966) ("*Borax* rejected the Tax Court's position that only those legally married may file joint returns. Judge Marshall thought legality irrelevant to tax policy . . .").

166. Currie, *supra* note 165, at 75; *see also id.* at 26 ("The Australians are dead right: divorce ought to be a federal question.").

167. Reese, *supra* note 105, at 965.

168. *See supra* notes 1-2, 27-29, and accompanying text.

administration assumed that the choice-of-law question would be relatively straightforward. But as the previous Part has demonstrated, there is no established marital choice-of-law rule in the federal courts. The next two Parts attempt to shed light on that problem, and in the process to clarify the framework for “interstitial” federal law more generally.

This Part discusses the legislative nature of the choice-of-law problem. It first establishes that what is called a choice-of-law problem in this context is ultimately a form of statutory interpretation, and then discusses the important consequence that Congress (or coordinated agency action) can solve it.

A. *Choice of Law as Statutory Interpretation*

To understand how to solve the problem created by DOMA’s impending doom it helps to understand that it is, at bottom, a problem of federal statutory interpretation. Recall that DOMA operates by effectively amending a thousand different legal provisions that invoke marital status.¹⁶⁹ The federal government has no cause to “recognize” marital status—under state law or otherwise—in the abstract. It ascertains who is married only to the extent it is required to under another statutory or regulatory rule. Thus, with or without DOMA, interpreters must decide: who does this statute refer to when it refers to married couples?

Federal courts “choose” state law as part of an answer to that statutory interpretation question. Aside from DOMA, the U.S. Code contains few clues about how to determine when a marriage is valid. By contrast, states have developed a thick body of law (both statutory and decisional) on the validity of marriages. So it is understandable that federal courts turn to state law to lend meaning to the federal law (and that the administration invoked state law as the backdrop governing same-sex marriage in the absence of DOMA). A choice-of-law rule is necessary for state law to completely resolve the meaning of the federal statute. Otherwise, as we have seen, a federal court will not know which state’s law to apply when those laws differ in a relevant respect.

Thus, what courts have been calling a choice-of-law problem when federal law incorporates state law categories is really just a two-part statutory-interpretation problem: Federal law contains an undefined term whose meaning is ordinarily a legal category. To figure out the meaning of that category, one must first decide *whether* state law is relevant, and if it is, *which* state’s law. (This statutory interpretation problem can exist not only in the thousand statutes incorporating state marriage law, but whenever federal law incorporates state law.)

169. Cf. Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 253 (1995) (“RFRA operates as a sweeping ‘super-statute,’ cutting across all other federal statutes (now and future, unless specifically exempted) and modifying their reach.”); *supra* text accompanying note 16.

Several things follow from understanding that this so-called choice-of-law problem is really a problem of statutory interpretation. One somewhat technical point is that state courts are equally bound by the federal choice-of-law rule—it travels with the federal statute. So, for example, if parties end up in state court litigating an ERISA question that turns on a couple's marital status, the court should not simply look to whether its own state's law would recognize the couple's marriage. It should decide which state's marriage law to use on the basis of *federal* interpretative principles. States should be following federal methods of statutory interpretation when interpreting federal statutes,¹⁷⁰ so they should follow the federal "choice-of-law" rule in such scenarios because it is simply a rule of statutory interpretation. (This is not to say, however, that states must do what their federal circuit does—just that they must follow federal law, however it is authoritatively derived.)

Another technical implication is that it is not quite accurate to ask—as others have shorthanded it—whether *Klaxon's* choice-of-law rule applies in "federal question" cases.¹⁷¹ A federal question is a basis for federal jurisdiction; there can be federal statutory interpretation questions even where there is no federal question jurisdiction.¹⁷² The proper way to phrase the question is to ask whether *Klaxon* applies when interpreting a *federal statute* that relies upon state law—a scenario that usually, but not always, occurs in suits grounded in federal question jurisdiction.

Finally, perhaps the most important implication is that Congress has total authority to solve the so-called choice-of-law problem. It is generally accepted that "definition of legislative terms must, as an original matter, be an incident of the legislative power," because Congress's power to decide what the statute says entails the power to do so through the use of definitions.¹⁷³ It follows that Congress can decide which states' laws are incorporated by its statutes, because those rules are simply a form of definition—of defining more precisely what Congress meant in referring to the state law term.

B. *A Congressional Choice-of-Law Rule*

I have just argued that congressional resolution of the choice-of-law problem is possible; it is also desirable. Congress should decide what law governs marriage for federal purposes. Such a provision could cut across all of the regulatory and statutory definitions and provide a uniform and predictable approach. For example, Congress might replace DOMA's definition of marriage

170. Anthony J. Bellia Jr., *State Courts and the Interpretation of Federal Statutes*, 59 VAND. L. REV. 1501, 1553-54 (2006); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2108 (2002); see also Gluck, *supra* note 20, at 1960-68 (noting, and lamenting, inconsistent treatment of this issue).

171. See, e.g., Gardina, *supra* note 6, at 883.

172. *Merrell Dow Pharm. v. Thompson*, 478 U.S. 804, 807-09 (1986).

173. Rosenkranz, *supra* note 170, at 2105.

with one saying that in determining the meaning of any law or regulation, the word “marriage” means a marriage that is recognized as valid in the state where the marriage was celebrated, or one that is recognized as valid in a state where one of the parties is domiciled.

Congress has made such determinations on occasion. Veterans’ benefits based on marriage, for example, are awarded “according to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued.”¹⁷⁴ Similarly, the Social Security Act provides that marital status determinations will be made by reference to the law of the parties’ domicile.¹⁷⁵ Both of these statutes predate (and are partly eclipsed by) DOMA, but might apply again if it is repealed.¹⁷⁶ Congress should go further, providing a single, clear rule to regulate marriage wherever it interacts with the federal code.

To Congress’s credit, some of the more recent proposals to repeal DOMA would have provided a choice-of-law rule in its stead. The bills would have provided federal recognition for any marriage that was valid in the state where it was celebrated (or “in the case of a marriage entered into outside of any State,” it would have been valid “if the marriage [was] valid in the place where entered into *and* the marriage could have been entered into in a State”¹⁷⁷). Thus, these bills endorsed a strong version of the law of the place of celebration, with a very narrow public policy exception. Only a marriage from abroad is subject to the public policy exception, and only if that marriage would be unavailable to residents of *every* state in the union.

Of course, those measures have not passed, but whatever one thinks of the substance of the proposed choice-of-law rules, Congress is the best institution to provide them. Congressional action provides a clear, stable, *ex ante* rule for determining a couple’s marital status—whether on a statute-by-statute basis or across all statutes at once.¹⁷⁸ It can solve the marital choice-of-law problem for

174. 38 U.S.C. § 103(c) (2006). The statute does not say what to do when those two states conflict.

175. 42 U.S.C. § 416(h)(1)(A)(i).

176. According to 1 U.S.C. § 108, “Whenever an Act is repealed, which repealed a former Act, such former Act shall not thereby be revived unless it shall be expressly so provided,” but it is not clear that § 108 applies to DOMA’s *implied* repeal of the preceding statutes. Compare *Ventura Cnty. v. Barry*, 262 P. 1081, 1082 (Cal. 1927) (finding analogous state statute applies to implied repeal), with *People ex rel. Hoyne v. Sweitzer*, 107 N.E. 902, 908 (Ill. 1915) (finding analogous state statute does not apply to implied repeal), and *City of Hannibal v. Guyott*, 18 Mo. 515, 520 (1853) (same). Section 108 would also be inapplicable if DOMA were judicially invalidated rather than repealed. Cf. Lars Noah, *The Executive Line Item Veto and the Judicial Power to Sever: What’s the Difference?*, 56 WASH. & LEE L. REV. 235, 243 n.42 (1999).

177. Respect for Marriage Act of 2009, H.R. 3567, 111th Cong. (2009) (emphases added). Later, similar bills include: Respect for Marriage Act of 2011, H.R. 1116, 112th Cong. (2011); Respect for Marriage Act of 2011, S. 598, 112th Cong. (2011).

178. For my argument that Congress should provide a single, cross-cutting rule, see notes 241-43 below and accompanying text.

all areas of federal law. If one of the proposals passes, it will have plain democratic legitimacy. Congressional action could also have broader aspirations: For example, it could even try to eliminate all federal rules that turn on marital status.¹⁷⁹

All the same, it would be a mistake to count on congressional action. One can certainly imagine that after DOMA, the chaos that would reign in the federal courts would earn congressional attention.¹⁸⁰ But every generation apparently believes its circumstances are special and will move Congress to act. For example, it has been nearly twenty years since Michael Gottesman diagnosed state choice-of-law doctrines as “chaotic producers of waste and unfairness” and declared that it was “time for Congress to enact a statute or series of statutes declaring federal choice of law rules for categories of disputes that arise frequently in multistate contexts.”¹⁸¹ While Gottesman acknowledged “two hundred years of congressional inaction,”¹⁸² he argued that we were (in 1991) “nearing the critical moment at which past practice will be abandoned.”¹⁸³ In particular, Gottesman thought that a rise in product liability cases against corporations would cause them to successfully lobby for uniform choice-of-law rules at least in that area. Yet that never happened. And if there has been no congressional action on a choice-of-law issue with such high economic stakes (and such powerful interests threatened), there is little reason to believe that same-sex marriage’s interaction with federal law will be the cutting edge of legislative action.

One possibility worth noting is that Congress could provide a choice-of-law rule as a method of political subterfuge. Rather than providing a rule out of desire for stability, clarity, and interstate harmony, Congress might use choice of law to covertly further its own views on same-sex marriage.¹⁸⁴ For example, a Congress that wished to make marital benefits available to same-sex couples without great fuss might provide that marriage for federal purposes would be

179. See NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 123-45 (2008); Toni Robinson & Mary Moers Wenig, *Marry in Haste, Repent at Tax Time: Marital Status as a Tax Determinant*, 8 VA. TAX REV. 773, 852 (1989) (advocating that tax law be “purged of distinctions based on marital status”).

180. See Stephen T. Black, *Same-Sex Marriage and Taxes*, 22 BYU J. PUB. L. 327, 351-52 (2008) (predicting optimistically that Congress would feel obligated to “restore rationality” to the tax code if DOMA were gone).

181. Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 1-2 (1991).

182. *Id.* at 28; accord RIBSTEIN & O’HARA, *supra* note 105, at 47-48; Larry Kramer, *On the Need for a Uniform Choice of Law Code*, 89 MICH. L. REV. 2134, 2144 n.23 (1991) (“[G]etting choice of law onto the national agenda in Congress is unrealistic.”); Michael W. McConnell, *A Choice-of-Law Approach to Products-Liability Reform*, 37 PROC. ACAD. POL. SCI., no. 1, 1988, at 90 (1988).

183. Gottesman, *supra* note 181, at 28.

184. Of course it is true that Congress is a collective body that may not have a single view on same-sex marriage. I refer to Congress’s “views” as shorthand for the various forms of collective intent, desire, or policy that can coherently be attributed to Congress.

judged by the law of the place of celebration. Same-sex marriages will usually satisfy this requirement, because the couple will of course usually marry in a jurisdiction that permits them to.¹⁸⁵ Or alternatively, a Congress that was hostile to same-sex marriage might respond to DOMA's demise by enacting a more restrictive choice-of-law rule—perhaps one that would recognize same-sex marriage only if it was permitted by the law of the place of celebration *and* the law of both parties' domiciles, and perhaps any other interested state. If it is true that choice of law is of much lower salience than substantive law (as Congress's indifference to the former might imply), then meddling with a choice-of-law rule might provide a low-profile way for Congress to push federal policy in its preferred direction.

In Part VI, I provide my own proposal for how Congress *should* act. Whether Congress will ultimately choose to do so—or act at all—is a prediction that is beyond the scope of this Article. Indeed, the expertise necessary to make that prediction probably lies in the domain of political strategy, not scholarly analysis.¹⁸⁶ I hope that it suffices to say that while congressional action is possible, it is not certain, and that even if it does come, it may not come for a while. So it is worthwhile to examine the alternatives to legislation.

C. *Regulatory Choice of Law*

In the face of congressional inaction, administrative agencies might fill the gap instead. Congress frequently fails to legislate the pesky implementing details of the statutes it passes, and agencies fill the gap by issuing regulations to which the courts might defer. As with congressional choice of law, there is some precedent for administrative choice-of-law determinations with respect to marriage. For example, in the 1940s, under the National Service Life Insurance Act (a predecessor to the benefits statute at issue in *Tatum* and *Brinson*), the Administrator of Veterans Affairs had promulgated regulations providing that marriages be proved “according to the law of the place where the parties resided at the time of marriage, or at the time and place where the parties resided when rights to compensation or pension accrued.”¹⁸⁷ As with the current benefits statute, the regulation did not fully resolve the choice-of-law problem, since it provided no guidance for choosing between the time-of-marriage residence and the time-of-accrued-right residence. But all the same, federal courts at the

185. *But see* sources cited *supra* note 60 (discussing unlawful same-sex marriages celebrated in San Francisco).

186. *Cf.* Adrian Vermeule, *Political Constraints on Supreme Court Reform*, 90 MINN. L. REV. 1154, 1172 (2006) (“A plausible division of labor is that the reformer should deliberately ignore political feasibility; she should simply propose first-best plans and programs and then let politics itself filter the feasible from the infeasible.”).

187. 38 C.F.R. § 3.49(a) (1949), *quoted in* *United States v. Snyder*, 177 F.2d 44, 47 (D.C. Cir. 1949).

time upheld the regulation, and apparently found it helpful in guiding their choice of law.¹⁸⁸

Agencies can also create law through administrative adjudications rather than regulation. In *Howerton*, the court noted that the Board of Immigration Appeals judged the validity of a marriage by looking to the law of the state where it was celebrated,¹⁸⁹ a rule apparently employed by immigration authorities, with some exceptions, for most of the twentieth century.¹⁹⁰ Other administrative rulings and adjudications have sprung up from time to time—for example, in tax¹⁹¹ and in workers' compensation.¹⁹² But they have never attempted to thoroughly resolve the conflicts problem, and they have not always arisen in circumstances meriting deference.

While agency resolution has some of the virtues of congressional resolution, it also may be inadequate to solve the post-DOMA choice-of-law problem. There is no single federal agency in charge of marriage. As discussed above, DOMA cuts a swath through thousands of different statutes and regulations within the jurisdiction of many different administrative bodies—the Social Security Administration, the Internal Revenue Service, the Board of Immigration Appeals, and more. Each body would presumably have to separately provide its own marital choice-of-law rules, and those rules might differ, just as the Bureau of Immigration Affairs and the Veterans Administration provided different choice-of-law rules in their respective fields. That could mean that a couple is married for purposes of some federal statutes but not others, potentially leading to odd conflicts.¹⁹³ Courts may well conclude that Congress generally intended marriage to have a uniform meaning throughout the U.S. Code,¹⁹⁴ and hence not to leave it up to uncoordinated agency action.¹⁹⁵ Deference is more likely in the event of *coordinated* agency action.¹⁹⁶

188. See, e.g., *Barrons v. United States*, 191 F.2d 92, 94 (9th Cir. 1951); *Snyder*, 177 F.2d at 47.

189. *Adams v. Howerton*, 673 F.2d 1036, 1038-39 (9th Cir. 1982).

190. See generally *Titshaw*, *supra* note 7, at 557-95.

191. *Von Tersch v. Comm'r*, 47 T.C. 415, 419 (1967) (citing Rev. Rul. 58-66, 1958-1 C.B. 60, for proposition that the law of the domicile controls); cf. Patricia A. Cain, *DOMA and the Internal Revenue Code*, 84 CHI.-KENT L. REV. 481, 513-14 & n.170 (2009) ("Although the rule is not clearly and completely stated in the Internal Revenue Code, or in the regulations, it is generally assumed that for tax purposes, a couple will be considered as married if they are legally married in the state of domicile.")

192. *Ryan-Walsh Stevedoring Co. v. Trainer*, 601 F.2d 1306, 1315 (5th Cir. 1979) (overturning "new guidelines" established by the Benefits Review Board).

193. For more discussion of the importance of a uniform marital status, see notes 241-43 below and accompanying text.

194. See *infra* note 264 and accompanying text.

195. Cf. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000); *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 516-17 (1988).

196. See Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012).

Regulatory uniformity would have to be accomplished through executive branch coordination. One possible vehicle for such coordination is the Office of Information and Regulatory Affairs (OIRA)—an agency within the Office of Management and Budget that coordinates the actions of other agencies and “has emerged as an enduring, major, but insufficiently appreciated part of the national government.”¹⁹⁷ Whether through OIRA, or otherwise, the executive branch might be able to coordinate a coherent policy of marital choice of law.¹⁹⁸

As with the likelihood of legislative response, I can only speculate about whether a centralized regulatory response is in fact likely. Recent assessments describe “White House involvement, whether through OIRA or other offices,” as “uneven and unsystematic,”¹⁹⁹ or alternatively as strong but nonetheless “declining” over time.²⁰⁰ To be sure, the administration has already taken an interest in the problem of DOMA, which might indicate more than the usual willingness to coordinate related agency action, but one can never be certain which issues will successfully capture the President’s attention and political capital.

As with congressional action, regulatory resolution of the conflicts problem seems desirable, but uncertain. So far as I am aware there has been no general regulatory attempt to promulgate conflict-of-laws rules for the other occasions when federal law interacts with state law. Marriage may be no different. The demise of DOMA might make such regulation more necessary, but that is no guarantee that it will be supplied.

V. FEDERAL CHOICE OF LAW IN THE FEDERAL COURTS

It seems at least somewhat likely that neither Congress nor administrative agencies will codify conflicts rules for federal statutes that rely on state marital status. In that event, the task of interpreting that universe of statutes will fall to the courts. In every case in which federal marital status is at issue, they must decide what law controls marital status.

197. Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 16 (1995); see also Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986); Paul R. Verkuil, *Welcome to the Constantly Evolving Field of Administrative Law*, 42 ADMIN. L. REV. 1, 2 (1990) (“This shift to central political control under OMB is the administrative law story of the decade.”).

198. See generally Freeman & Rossi, *supra* note 196 (detailing methods of coordination).

199. Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 94 (2006).

200. Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 846 (2003).

In a sense, this is nothing new. As we have seen, federal courts have confronted this very problem for many years for every issue of marital status that is not already controlled by DOMA. But as we have also seen, it is not a problem that they have solved. Federal appellate courts differ markedly in their approach to these second-order conflicts problems in general, and have also not agreed on an approach for marriage specifically. Perhaps they will unify behind an approach once DOMA is repealed or invalidated. If not, the Supreme Court may find itself forced to intervene.

It is reasonable to wonder whether resolution is really needed. After all, if federal courts have somehow been muddling through without definitive agreement for so long, why will that lack of uniformity suddenly become so much less tolerable?

But the federal disagreement over same-sex marriage after DOMA will be different in degree from prior second-order choice-of-law issues. Courts frequently avoided resolving the second-order choice-of-law problem in the past by either construing the states' laws to be similar, or concluding that one state's law would likely qualify as definitive under almost any method. In the same-sex-marriage context, without DOMA, that will be more difficult. The conflict over the legality of same-sex marriage is sharp, so there will rarely be a plausible way to suggest that the two laws are similar. There are a lot of same-sex marriages, and many of them cross state lines.²⁰¹ So in many cases, there will be two states with competing claims to apply their own law, because same-sex couples usually marry in states that recognize their marriage, but many states to which they might later move or travel refuse to recognize same-sex marriages regardless of where they are performed. If even a tiny fraction of those couples end up in federal court, these cases will recur far more often than they ever have in the past.²⁰²

If courts do recognize the need to consider or reconsider the second-order choice-of-law problem, that still leaves the question of *how*. My view is that federal courts should turn to what they have called the "federal common law" of conflicts if there is no statutory or regulatory choice-of-law provision. This is not because the common law approach is so obviously satisfying, but rather because the two viable alternatives are so flawed. This Part therefore proceeds in slightly unorthodox order, first discussing the *Borax* and *Klaxon* doctrines and explaining why they should not be used to solve the second-order choice-of-law problem, and then defending the legitimacy of the remaining contender—the so-called "federal common law" approach.

201. *See supra* notes 3-4 and accompanying text.

202. *See* PETER HAY ET AL., CONFLICT OF LAWS § 13.20, at 657 (5th ed. 2010) (predicting that state disagreement about same-sex marriage "will give rise to many conflicts problems").

A. *Against Borax*

Recall that one approach to the chaos of choosing state law, the doctrine inspired by *Borax*, is simply to abandon state law in the first place and replace it with a federal definition. This is inconsistent with the approach proposed by the administration, which says that a same-sex marriage will be respected for federal purposes if, but only if, it is valid under state law.²⁰³ And there are good reasons for the administration's rejection of *Borax*—both formal and practical. As a formal matter, words like “marriage” or “spouse” *do* appear to require the federal court to investigate the law of a particular state. What distinguishes marriage from other emotional, financial, and sexual relationships is largely its ceremonial formality.²⁰⁴ To be sure, such ceremonies are sometimes celebrated outside of the government's purview, but the most sensible and intuitive referent for a *law* that refers to marriage is to *laws* that create or recognize marriage. As the Supreme Court said in *De Sylva*, in our system, those are state laws.²⁰⁵

There are also practical problems with the *Borax* approach. Imagine trying to create a federal definition of marriage that is disconnected from state law. If the definition categorically excludes same-sex marriage, even when valid under state law, there is little point in (or rationale for) holding DOMA unconstitutional in the first place. Such a federal rule would not be an attempt to work out the implications of the administration's position. It is simply a rejection of that position.

Nor can federal courts easily adopt the opposite rule, recognizing all same-sex couples as married regardless of state law. As a practical matter, how will federal courts know whether a same-sex couple is married if no such marriages are lawfully recognized by the state? It is true that state courts have occasionally followed the Second Restatement in recognizing marriages as valid even if they were invalid where they were celebrated,²⁰⁶ but only for those with strong connections to the forum state, and never on a widespread scale. So adoption of this solution might require broader institutional reform—creating a new brigade

203. *See supra* notes 46-49 and accompanying text.

204. The exception is common law marriage, an institution in general disfavor today. *See* Jennifer Thomas, Comment, *Common Law Marriage*, 22 J. AM. ACAD. MATRIM. LAW. 151, 151 (2009).

205. *See De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956) (“[T]here is no federal law of domestic relations.”).

206. *Donlann v. Macgurn*, 55 P.3d 74, 77-78 (Ariz. Ct. App. 2002); *McPeck v. McCardle*, 888 N.E.2d 171, 175-76 (Ind. 2008); *In re Estate of Murnion*, 686 P.2d 893, 899 (Mont. 1984); *In re Farraj*, 900 N.Y.S.2d 340 (App. Div. 2010); *In re Estate of Shippy*, 678 P.2d 848, 850-51 (Wash. Ct. App. 1984). *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 cmt. i (1971); John C. Williams, Annotation, *Recognition by Forum State of Marriage Which, Although Invalid Where Contracted, Would Have Been Valid If Contracted Within Forum State*, 82 A.L.R.3d 1240 (West 2012) (collecting cases).

of federal employees to issue federal marriage licenses in such states,²⁰⁷ or resurrecting the institution of common law marriage for these purposes despite its general demise at the state level.²⁰⁸ It would be hard for courts to do that simply in the name of interpreting the recurring phrase “marriage” in federal statutes.²⁰⁹

That leaves an intermediate approach—the one actually championed by *Borax*’s defenders—in which federal courts and administrators decide on an ad hoc, all-things-considered basis whether same-sex couples can be “married” for purposes of each of the thousand federal laws implicating marriage. That is simply unworkable. The approach Reese and Currie championed would have been bad enough at the time they proposed it—when purposivist statutory interpretation was in its heyday and when marriage laws were comparatively uniform. But in the intervening years, federal courts have moved away from free-wheeling policy-based interpretation of statutory texts, and the gulf between the marriages recognized in different states has grown. The case-by-case federal court creation of a federal definition of marriage that *Borax* and *Howerton* envision would not extricate the federal government from the same-sex marriage conflict nor to help litigants predict their status.

To be sure, there is a limited but important sense in which the independent federal assessment is inevitable. Surely there are some laws we can imagine that would use the word “marriage” in such an idiosyncratic context that they wouldn’t be incorporated by federal law—imagine a state that for some mysterious reason used the word “marriage” to describe all contractual relationships of any kind. Indeed, in *De Sylva* the Supreme Court conceded that “a State would [not] be entitled to use the word ‘children’ in a way *entirely strange* to those familiar with its ordinary usage” before adding that “at least to the extent that there are permissible variations in the ordinary concept of ‘children’ we deem state law controlling.”²¹⁰ But the whole premise of a world where DOMA is invalidated or repealed is that it is at least “permissible” for the federal government to use the word marriage to include state-sanctioned same-sex marriages. So we are inside the zone of state law, not on the periphery where an independent rule might be required.

Not for nothing has the *Borax/Howerton* approach been criticized as “removed from our expertise”²¹¹ and repeatedly held to be inconsistent with fed-

207. Cf. Hillel Y. Levin, *Resolving Interstate Conflicts over Same-Sex Non-Marriage*, 63 FLA. L. REV. 47, 91-92 (2011) (predicting, tentatively, a system of federally-celebrated civil unions).

208. Cf. Peter Nicolas, *Common Law Same-Sex Marriage*, 43 CONN. L. REV. 931 (2011) (arguing that common law marriages provide unique advantages to same-sex couples).

209. For a discussion of whether Congress should adopt a federal marriage policy even if the courts cannot do so on their own, see Part VI.A below.

210. 351 U.S. at 581 (emphasis added).

211. *Kahn v. INS*, 36 F.3d 1412, 1419 (9th Cir. 1994) (Kozinski, J., dissenting).

eral law.²¹² State law is and should be an integral part of determining a couple's marital status, and the task of federal courts should be figuring out how to synthesize and select among those laws, not reinventing the institution at the federal level.

B. *Against Klaxon*

The more promising but ultimately unworkable alternative to federal common law is the *Klaxon* doctrine, under which federal courts would apply the choice-of-law rules of the state where the district court sits (as they currently do in diversity cases decided under *Erie*). There is some logic to extending *Klaxon*. The argument might go like this: most courts and commentators agree that *Erie* “applies to ‘state law issues’ in federal question cases as well” as in diversity.²¹³ (Puzzlingly, the Supreme Court appears not to have weighed in.²¹⁴) And if *Klaxon* follows directly from *Erie*, it makes sense that *Klaxon* would apply in federal question cases too.²¹⁵

But at a legal level, this logic breaks down. For one thing, *Klaxon* does not follow directly from *Erie*.²¹⁶ *Erie* tells federal courts to apply some state's law rather than making general law; but *Klaxon* does not simply say that federal courts should apply *some* state's choice-of-law rules. It requires federal courts to use the rules of a *particular* state—a state chosen because of the policies underlying diversity jurisdiction.

Those policies do not apply as directly to cases interpreting federal law, and in fact there are two decisive reasons not to extend *Klaxon* to such cases. The first is the different role of forum-shopping. *Klaxon* was justified by a desire for equality between diverse and nondiverse cases in a given state. “Otherwise, the accident of diversity of citizenship would constantly disturb equal

212. See *Ryan-Walsh Stevedoring Co. v. Trainer*, 601 F.2d 1306, 1313-14 & n.6 (5th Cir. 1979) (collecting cases).

213. Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 912 n.141 (1986); *accord* *Camacho v. Tex. Workforce Comm'n*, 445 F.3d 407, 409 & n.1 (5th Cir. 2006); *First S. Fed. Sav. & Loan Ass'n of Mobile, Ala. v. First S. Sav. & Loan Ass'n of Jackson Cnty., Miss.*, 614 F.2d 71, 73 (5th Cir. 1980); *Maternally Yours, Inc. v. Your Maternity Shop, Inc.*, 234 F.2d 538, 540 n.1 (2d Cir. 1956); Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 408 n.122 (1964); Adam N. Steinman, *What Is the Erie Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 311 (2008).

214. *Cf. Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 164 n.2 (1987) (Scalia, J., concurring) (“[N]either [*Erie*] nor the Rules of Decision Act scholarship underlying it . . . remotely established that that statute applies only in diversity cases.”). *But see* *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 465-73 (1942) (Jackson, J., concurring) (arguing that *Erie* is limited to diversity cases).

215. See *In re Gaston & Snow*, 243 F.3d 599, 607 (2d Cir. 2001) (applying *Klaxon* in reliance on the Second Circuit's ruling in *Maternally Yours*).

216. *Cf. Ruhlin v. N.Y. Life Ins. Co.*, 304 U.S. 202, 208 n.2 (1938) (treating the *Klaxon* rule as an open question after *Erie* was decided).

administration of justice in coordinate state and federal courts sitting side by side.”²¹⁷ But *Klaxon* embraces a different form of inequality. Different federal courts across the country will choose different law to apply to the same dispute.²¹⁸

In diversity, no approach can ensure horizontal uniformity between all federal courts considering an issue and vertical uniformity between all courts (state and federal) sitting in a given state. The question is which type of inequality to embrace. *Klaxon* concluded that it was better to retain uniformity between courts in a given state, noting that inequality from state to state was *already* a necessary cost of diversity jurisdiction.²¹⁹ The *Klaxon* rule replicates that inequality, but it does not make it worse.

In federal question cases, things are different. Recall that state courts must follow *federal* choice-of-law rules in interpreting the words in federal statutes.²²⁰ So *whatever* the federal choice-of-law rule, there will be vertical uniformity between federal and state courts in a given state. Horizontal uniformity is also thought to be important when a nationwide federal statute is at issue, and by abandoning *Klaxon*, it is possible to have that too. A rule that (unlike *Klaxon*) is not forum-dependent will produce both horizontal and vertical uniformity.

The second, even more important, reason to limit *Klaxon* to diversity cases is that *Klaxon* provides no guidance to the executive branch outside of litigation. *Klaxon* is a juricentric decision. It tells “federal courts” to do what state courts would do in the state where the federal district court is located.²²¹ But when no litigation has begun, there is no federal district court, so *Klaxon* cannot say what to do. This problem comes up rarely in diversity cases because the executive is seldom called upon to execute state law in the absence of a federal law issue. But it is a huge issue with federal law because the executive is the primary enforcer of federal law, including law pertaining to marriage. It is the executive who initially decides who receives federal benefits, or whose taxes are improperly filed. Often those determinations go unchallenged, and when they are challenged, it is in a separate judicial proceeding that takes the executive decision as a starting point.

217. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); *see also* *Lembcke v. United States*, 181 F.2d 703, 707 (2d Cir. 1950) (“[W]here [diversity] is the basis of jurisdiction it is inadmissible that there should be one rule of state law for litigants in the state courts and another for litigants who bring the same question before the federal courts sitting within the state.”).

218. *Klaxon*, 313 U.S. at 496.

219. *Id.*

220. *See supra* note 170 and accompanying text.

221. *Klaxon*, 313 U.S. at 494 (emphasis added); *see also id.* at 496 (“The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware’s state courts.”).

If *Klaxon* controlled, the executive would have to guess in which district litigation might eventually be filed before it could figure out which law to apply. Frequently, there will be no determinate answer. A single executive action might well produce multiple plaintiffs, who could plausibly bring suit in different states. *Klaxon* would produce different answers in each suit.²²² Even a single plaintiff might well have a choice about where to file suit, and in such a case, the plaintiff can always choose a jurisdiction *precisely because* it will yield a choice-of-law rule different from the one the executive applied. Because of the court-focused nature of the *Klaxon* rule, no matter how the executive chooses law under *Klaxon*, that choice is almost guaranteed to be wrong if the plaintiff wants it to be.

Nor could the executive adopt a modified version of *Klaxon* by applying the law of the state in which *the executive officer* sits. The Supreme Court has rejected attempts to “modif[y]” *Klaxon* in the past.²²³ And this modification would make the accident of the location of an administrative office control the outcome of the case—a result that is implausible and arbitrary even by choice-of-law standards—and would grant peculiar import to the internal assignment of administrative work. It would also produce a potential mismatch when the executive officer’s action is challenged in federal court, if the federal court sat in a different state than the officer did. Any choice-of-law rule that causes the executive and the courts to disagree even when they apply the rule *correctly* is a bad rule. *Klaxon* should thus be limited to diversity jurisdiction, where it began.²²⁴

Once *Klaxon* is analyzed through the lens of DOMA, the problem of having a juricentric conflicts doctrine is revealed. Conflicts doctrines that produce sensible results in the private law context cannot always survive exposure to the policies of public law.

C. *The Legitimacy of a “Federal Common Law” Solution*

Because neither *Klaxon* nor *Borax* is a tenable solution to federal choice of law, federal courts should instead apply what they have called the federal common law of conflicts. Applying generally accepted choice-of-law principles, federal courts should articulate the best rule they can for filling in the statutory gap left by Congress’s failure to provide a choice-of-law rule of its own.

222. *See id.* at 496.

223. *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 4 (1975) (per curiam).

224. Some modern scholars have criticized *Klaxon*, suggesting that it is a bad decision even in its original context of diversity cases. *See* Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79, 117-23 (1993); Laycock, *supra* note 97, at 282; Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 567 (2006). I am agnostic about that question, and my argument for limiting *Klaxon* can assume that it was correct in its original context.

Yet some question the legitimacy of this sort of federal common law. For example, when the Second Circuit announced that it was abandoning the common law approach to federal choice of law, it did so because it thought “[t]he ability of the federal courts to create federal common law and displace state created rules is severely limited.”²²⁵ Similarly, the D.C. Circuit declared that even in federal cases, federal courts may not “craft a choice-of-law rule out of whole cloth.”²²⁶

These courts are wrong to be so skeptical of the so-called federal common law approach to choice of law. For one thing, there is an important sense in which even *Klaxon* is an embodiment of a federal common law approach to choice of law, not a rejection of it. State *substantive* law applies where federal law does not. That is what *Erie* says,²²⁷ that is what the Rules of Decision Act says.²²⁸ But the Rules of Decision Act (quoted by *Erie*) explicitly reserves the nonsubstantive question of “where [state laws] apply.”²²⁹ For *that* determination—what state laws apply where—choice of law is inevitable.²³⁰ Where no choice is dictated by federal law and where states do not agree, there is no alternative to federal common law.

At most, federal common law skeptics might subscribe to part of *Klaxon*’s rule—the part that requires federal courts to use some state’s choice-of-law rules, rather than looking only to the state’s substantive law (this is called looking to the state’s “whole law”).²³¹ But one could well imagine other choices about which state’s choice-of-law rules to use—*Klaxon*’s particular choice is far from inevitable. So federal common law skeptics should not be able to object to a law that makes a different choice of whole law—for example, the choice-of-law rules of the state of domicile. *Klaxon*’s rule to use the forum state’s whole law is just as much of a federal common law choice.

But the federal common law skeptics are wrong for a much deeper reason, too. The “federal common law” used to choose what state’s law a federal statute relies on is nothing like the sort of federal common law prohibited by *Erie*. There is no prohibition on this sort of federal common law in interpreting statutes.

A nearly unanimous opinion by Justice Ginsburg last Term summarized the doctrine well:

225. *In re Gaston & Snow*, 243 F.3d 599, 606 (2d Cir. 2001).

226. *A.I. Trade Fin., Inc. v. Petra Int’l Banking Corp.*, 62 F.3d 1454, 1464 (D.C. Cir. 1995).

227. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

228. 28 U.S.C. § 1652 (2006).

229. *Id.* See generally Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 51-54 (2011) (surveying the possible meaning of this caveat).

230. Cf. James Y. Stern, Note, *Choice of Law, the Constitution, and Lochner*, 94 VA. L. REV. 1509, 1509 (2008) (“[C]hoice of law is the starting point in any legal analysis . . .”).

231. See Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979, 980 (1991).

“There is no federal general common law,” *Erie R. Co. v. Tompkins* famously recognized. In the wake of *Erie*, however, a keener understanding developed. *Erie* “[le]ft to the states what ought be left to them,” and thus required “federal courts [to] follow state decisions on matters of substantive law appropriately cognizable by the states.” *Erie* also sparked “the emergence of a federal decisional law in areas of national concern.” The “new” federal common law addresses “subjects within national legislative power where Congress has so directed” or where the basic scheme of the Constitution so demands.²³²

In particular, the Court noted, under the new, “‘specialized federal common law,’” “federal courts may fill in ‘statutory interstices,’ and, if necessary, even ‘fashion federal law.’”²³³

Similarly, as Caleb Nelson has chronicled, even after *Erie*, federal courts continue to articulate common law rules “to fill gaps in federal statutes or to handle issues that arise in enclaves of pure federal common law.”²³⁴ Such lawmaking is consistent with *Erie* and with the “severe[] limit[s]”²³⁵ on federal lawmaking so long as it concerns issues that “are genuinely within the federal domain.”²³⁶

There are some legitimate debates about the scope of this new form of federal common law.²³⁷ But it should be hard to dispute that deciding *which* state’s law Congress has chosen to rely upon is “genuinely within the federal domain.”²³⁸ It is a subject on which Congress *could* provide a clear answer, and it is a subject on which state law cannot provide an answer by itself precisely because it is disputed which state’s law governs. Deciding what state’s law Congress has chosen to rely upon—even by resort to common law principles—is a necessary part of a federal court’s job.

VI. CHOOSING LAW

The preceding two Parts have laid out what *framework* different federal institutions can use to solve the federal choice-of-law problem left by DOMA’s demise. But that leaves the question of what *rule* they should actually use. As

232. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2535 (2011) (alterations in original) (citations omitted) (quoting Friendly, *supra* note 213, at 405, 422).

233. *Id.* (quoting Friendly, *supra* note 213, at 405, 421).

234. Nelson, *supra* note 224, at 568 (emphasis omitted).

235. *In re Gaston & Snow*, 243 F.3d 599, 606 (2d Cir. 2001).

236. Nelson, *supra* note 224, at 565.

237. See, e.g., Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 758-59 (2010) (canvassing disagreement).

238. Nelson, *supra* note 224, at 565; accord *Am. Elec. Power*, 131 S. Ct. at 2535 (describing the question as “within national legislative power” (quoting Friendly, *supra* note 213, at 422)).

this Part will detail, the latter question cannot be answered categorically. The proper rule depends on which institution imposes it.²³⁹

A. *Statutory Rules for Marriage*

Suppose that Congress²⁴⁰ is willing to respond to the federal choice-of-law problem, either in the course of repealing DOMA itself, or in response to judicial action. There are at least three choices Congress must make in crafting its response: (1) it must choose whether to have a single transsubstantive rule for all federal laws concerning marriage or instead to have different rules for different laws; (2) it must decide whether to incorporate state law or create a new federal definition, unrelated to state law; and (3) it must decide which state's law (if state law is used) or what non-state rule it will use.

First: As a theoretical matter, a single transsubstantive rule better reflects the nature of marriage. Marriage creates a new legal relationship from which countless other rules flow. It is not something that can be replicated through a set of contracts. Rather, the Supreme Court has called it “something more than a mere contract,”²⁴¹ something that “involves declarations of status.”²⁴² Many scholars have said the same.²⁴³ One important aspect of this is that it is something you are or aren't, and it provides a single answer to the question where it is relevant. The federal rule should reflect this reality, and it should aim to make the marriage rule a single rule rather than a multiplicity of different ones.

This theory also makes sense at a more practical level. Multiple federal rules for marriage would add massively to the complication of writing the law and, more importantly, to living under it. Moreover, having different choice-of-law rules for different statutes can mismatch statutes that were meant to work together. For instance, the total benefit package due to the spouse of a deceased veteran or federal employee will likely be calculated under the assumption that the spouse would simultaneously be eligible for social security, spousal benefit programs, and the like. Splitting up the choice of marital law for each statute

239. For more on institutional role and interpretive method, see ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* 63-85 (2006).

240. I do not further discuss the separate hypothesis of *agency* creation of a federal choice-of-law rule, which I suspect would follow along similar lines.

241. *Maynard v. Hill*, 125 U.S. 190, 210-11 (1888).

242. *Ankenbrandt v. Richards*, 504 U.S. 689, 716 (1992) (Blackmun, J., concurring).

243. *See, e.g.*, Samuel L. Bray, *Preventive Adjudication*, 77 U. CHI. L. REV. 1275, 1306, 1308-09 (2010); Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1766 (2005); Marsha Garrison, *Marriage: The Status of Contract*, 131 U. PA. L. REV. 1039, 1041 (1983) (reviewing LENORE J. WEITZMAN, *THE MARRIAGE CONTRACT: SPOUSES, LOVERS, AND THE LAW* (1981)); *see also* Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453, 454-90 (1998) (marriage cannot be replicated through simple contract). In contrasting status and contract I do not mean to invoke the issue of when and how the parties should be able to terminate the marriage. *See* Stinson, *supra* note 79, at 10-11.

can undermine those calculations. Such conflicts are generally pointless and avoidable. There might be rare occasions where some other, statute-specific policy (like ERISA's primacy for plan documents) justifies deviating from this presumption, but generally, to the extent Congress wants to have different rules for different statutes, it can do that by having different substantive *rules*; it need not pack them into the definition of marriage.

As for the second choice: Congress should also continue to rely upon state law to determine the validity of a marriage, as it has done for marital status determinations (other than the same-sex issue) in the past. Marital validity implicates issues of age, consent, relationship, residence, capacity, divorce, and more. Congress can avoid the administrative difficulty of regulating each of these issues by devolving it to the state level.

Relying on state law also gently vindicates federalism. Henry Hart taught us that federal law should be "interstitial," filling in the gaps between predominant state law.²⁴⁴ This was in keeping with James Madison's promise that the federal government's powers would be "few and defined," and "exercised principally on external objects," while the states' powers would be "numerous and indefinite."²⁴⁵

The arguments for federalism are doubtless familiar, and they are true here. If it turns out that a single vision of marriage is the most persuasive in state courts and legislatures, then federal law will bear that out—that single vision will be reflected in the state laws Congress relies upon. In contrast, if multiple visions of marriage continue to hold sway, then each one can potentially be reflected at the federal level. As one scholar claimed when defending the enactment of DOMA's full faith and credit provisions, "Whatever one's view on the merits of the social question, the advantages of using the 'laboratories of democracy' provided by our decentralized, 50-state system, to test the results, before moving to a new national definition of marriage, should [be] apparent."²⁴⁶ And of course they are subject to the caveat that if the Federal Constitution is best read as imposing a single rule for this or any aspect of marriage, state (and hence federal) law will naturally bear that out.²⁴⁷ But any such constitutional norms should be enforced through forthright constitutional interpretation, not through the kind of top-down mandate reflected in DOMA.

244. Hart, *supra* note 5, at 498.

245. THE FEDERALIST NO. 45, at 241 (James Madison) (George W. Carey & James McClellan eds., 2001).

246. Letter from Michael W. McConnell to Senator Orrin Hatch (July 10, 1996), reprinted in *The Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong. 57 (1996).

247. Compare *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 991-1003 (N.D. Cal. 2010) (holding that laws forbidding same-sex marriage violate fundamental rights and equal protection), with *Perry v. Brown*, 671 F.3d 1052, 1083, 1096 (9th Cir. 2012) (affirming on narrower grounds).

As readers will expect, the most difficult question is the third: which state's law, exactly, Congress should turn to. Much as one might like to separate structure and substance, it is not entirely possible here. In practice, following only the law of the place of celebration will lead to more widespread recognition of same-sex marriage than would following the law of the parties' current domicile. Most couples choose to marry someplace where their marriage is recognized,²⁴⁸ but may have less opportunity to choose where they *live* on that basis. (Those who seek truly results-oriented rules need not stop there; one could imagine creating choice-of-law rules such as "follow the most restrictive state that has had minimum contacts with the marriage" or "follow the most permissive state that has had minimum contacts with the marriage.")

On balance, I think that Congress should pass the choice-of-law rule contained in H.R. 1116, the Respect for Marriage Act: the marriage is valid if valid in the state where it was celebrated (or, if not from a state, if valid in the place it was celebrated and in *some* state).²⁴⁹ The rule is good because it promotes predictability and stability, which are *especially* desirable in the context of marriage. As discussed above, marriage is not simply the resolution of a single legal issue, but a meta-legal issue designed to frame the resolution of a thousand other legal issues.²⁵⁰ Marriage is also a substantially enduring relationship. Marriages can generally be terminated, to be sure, but they are terminated under carefully regulated circumstances with rules for fights over property, finances, and children. Married couples expect that, legal quirks aside, when they marry they will remain married unless and until they formally divorce. Same-sex couples may not have the same guarantees with respect to state law, but at least with respect to nationwide federal law, they can and should.²⁵¹

Of course, one can agree with the objectives I have described here without necessarily coming to the same conclusion. The goal of stability and orderly representation is served fairly well by *any* rule that relies on facts known at the time of celebration. Thus one might argue that Congress should instead adopt a rule that looks to the conflicts law of the couple's *domicile* when they married. Many couples have the ability to travel to a state that will recognize their marriage,²⁵² but it is harder for couples to manipulate their domicile for marriage-related reasons, so a domicile-based rule might be less susceptible to a certain kind of manipulation. This rule is also in keeping with some readings of the

248. See *supra* notes 59-60 and accompanying text.

249. Respect for Marriage Act of 2011, H.R. 1116, 112th Cong. (2011).

250. See Bray, *supra* note 243, at 1306-09 (discussing the need for certainty about legal statuses).

251. Scholars and advocates are fond of citing Justice Jackson's dissent in *Estin v. Estin* for this point. 334 U.S. 541, 553 (1948) (Jackson, J., dissenting) ("If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom.").

252. Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745, 780-97 (1995).

First and Second Restatements,²⁵³ although very few states have actually adopted it as their choice-of-law rule for same-sex marriages.

On balance, however, I think it is an inferior rule. While it may be less subject to forum-shopping at the time the couple decides to marry, it is subject to a different form of manipulation. Because a couple's domicile turns on facts about their intent to move and to remain, it is subject to post hoc manipulation; the couple can later recharacterize their intent, to make their marriage valid or invalid as they wish. By contrast, the place-of-celebration rule forces the couple to make a single choice at the time of their marriage (they will usually choose for it to be valid) rather than giving the opportunity to claim it valid or invalid later. (Recall that marriage is in some legal contexts a benefit and in others a burden.²⁵⁴) Bad faith aside, the domicile-at-the-time-of-marriage rule is for similar reasons significantly harder to adjudicate. It turns not just on a single easily ascertainable fact, but a muddle of facts that are harder to consistently determine.

Lynn Wardle also objects to the bill's proposed rule on the grounds that it "is substantively biased to circumvent state policies that do not allow or recognize same-sex marriage," and will sometimes lead to federal recognition of a marriage "in defiant disregard" of what the couple's domiciliary state would do.²⁵⁵ It is true that the place-of-celebration rule will probably lead to more recognition, and that it gives the domicile a diminished role. The same complaints, in reverse, could be made about Wardle's apparent preference for the domicile. There is no getting around the "substantive[] biase[s]" caught up in the conflicts rule, and that is all the more reason that the decision is ultimately up to Congress.

B. *Common Law Rules for Marriage*

Suppose Congress does not act after DOMA's demise, leaving courts to figure out what common law choice-of-law rules govern the validity of a marriage. There is no such rule already established. There is no clear consensus rule among state courts for federal courts to adopt as their own. Perhaps a plurality of courts and federal tribunals start with the Second Restatement of Conflicts,²⁵⁶ but others do not.²⁵⁷ Even those that do regularly turn to the Second Restatement also rely on choice-of-law decisions from non-Restatement circuits, declaring them "part of the body of federal common law" regardless of

253. *See supra* notes 89, 95, and accompanying text.

254. *See supra* note 17 and accompanying text.

255. Wardle, *supra* note 34, at 983-84.

256. Nelson, *supra* note 224, at 541.

257. *Id.* at 541-42; *see also supra* Part III.A.

their consistency with the Restatement.²⁵⁸ Moreover, the Second Restatement's approach is so open-ended that even among jurisdictions that purport to follow it, there is much disagreement about what it requires.²⁵⁹

The underlying policy concerns are also contestable. It may well be that many people's (and many judges') views about what rule should control have more to do with their attitude toward state laws forbidding same-sex marriage than with neutrally defensible principles.²⁶⁰ Those who see same-sex marriage as a fundamental right naturally resist the idea that state law can cause it to wink out of existence even once a couple has been married for years.²⁶¹ Those who think refusal to recognize same-sex marriage is an entirely legitimate exercise of state sovereignty are more likely to think that the federal government should credit the public policy objections of a new domicile.²⁶² If eliminating DOMA was supposed to keep federal courts out of the debate over the legitimacy of same-sex marriage, a federal law of marital conflicts seems to thrust them right back in.

Precisely because of this contestation, courts must proceed differently from legislatures. While Congress can create choice-of-law rules by *legislating* them, the courts can create them only by *interpreting* what Congress has done. One does not have to be Justice Scalia²⁶³ to agree that a federal common law rule does not mean "the statute we would have written if we were in Congress." Rather, common law is supposed to fill in the gaps between the laws Congress has adopted.

Like Congress, the courts must decide whether to have a single transsubstantive common law rule for all federal laws concerning marriage or instead to have different rules for different laws. While courts have resisted a categorical presumption that a single word means the same thing throughout

258. *DaimlerChrysler Corp. Healthcare Benefits Plan v. Durden*, 448 F.3d 918, 922-23 (6th Cir. 2006); *see also* *Med. Mut. of Ohio v. deSoto*, 245 F.3d 561, 570 (2001), *cited in* Nelson, *supra* note 224, at 541 n.192.

259. Nelson, *supra* note 224, at 542; *see also supra* note 97.

260. Indeed, many of those who have read drafts of this Article have tended to regard one choice-of-law solution as obviously superior—but there has been wide disagreement on which solution this is!

261. *See, e.g.,* KOPPELMAN, *DIFFERENT STATES*, *supra* note 50, at 17 ("It would be ridiculous to have people's marital status blink on and off like a strobe light as they jet across the country.").

262. *See, e.g.,* Jeffrey L. Rensberger, *Interstate Pluralism: The Role of Federalism in the Same-Sex Marriage Debate*, 2008 BYU L. REV. 1703, 1801.

263. *Cf. James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment) ("I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law. But they make it *as judges make it*, which is to say *as though* they were 'finding' it—discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be.").

the U.S. Code,²⁶⁴ such a presumption is sensible here because of marriage's transsubstantive status.

To be sure, there might be individual federal statutes that should be treated as exceptions to the transsubstantive choice-of-law rule. Of course, to the extent Congress has chosen a particular choice-of-law rule, that rule would control. And in some borderline cases, where a statute is sufficiently close to having a specific congressionally-mandated choice of law, courts might properly apply that choice as well. One likely example of such a statute is ERISA. Recall that in *DaimlerChrysler*, the Sixth Circuit thought that the federal common law of conflicts authorized it to disregard a different choice-of-law determination provided by the ERISA plan.²⁶⁵ But just a few years after that case, the Supreme Court unanimously held that plan administrators must "hew[] to the directives of the plan documents" rather than circumventing them with court-invented common law rules,²⁶⁶ and the Sixth Circuit had already been following that plan-documents rule for years.²⁶⁷ This doctrine went unmentioned in *DaimlerChrysler*, though a dissenting judge criticized the majority for "not tak[ing] into account the overriding purpose and policy of uniformity behind the ERISA statute or behind the interpretation of ERISA benefits contracts."²⁶⁸ Other courts also appear to have been confused about the extent to which they should follow ERISA choice-of-law provisions that incorporate state law terms.²⁶⁹ In light of the plan-documents doctrine established by the Supreme Court, the better rule for ERISA cases is to follow a marital choice-of-law rule required by the plan documents.²⁷⁰

264. See, e.g., *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595 n.8 (2004) ("The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against." (quoting Walter Wheeler Cook, "*Substance*" and "*Procedure*" in the *Conflict of Laws*, 42 *YALE L.J.* 333, 337 (1933)).

265. *DaimlerChrysler Corp. Healthcare Benefits Plan v. Durden*, 448 F.3d 918, 928 (6th Cir. 2006), discussed in more detail above at notes 144-50 and accompanying text.

266. *Kennedy v. Plan Adm'r for Dupont Sav. & Inv. Plan*, 555 U.S. 285, 300 (2009).

267. See *McMillan v. Parrott*, 913 F.2d 310 (6th Cir. 1990) (cited in *Dupont*, 555 U.S. at 304).

268. *DaimlerChrysler*, 448 F.3d at 928-29 (Merritt, J., dissenting).

269. See *Buce v. Allianz Life Ins. Co.*, 247 F.3d 1133, 1148 & n.6 (11th Cir. 2001) (noting some disagreement with *Prudential Insurance Co. of America v. Doe*, 140 F.3d 785 (8th Cir.1998); *Morton v. Smith*, 91 F.3d 867 (7th Cir.1996); and *In re Sears Retiree Group Life Insurance Litigation*, 90 F. Supp. 2d 940 (N.D. Ill. 2000)); see also *id.* at 1153-54 (Barkett, J., concurring); *id.* at 1154-55 (Carnes, J., concurring in the result).

270. In contrast, I am more skeptical of those who have treated bankruptcy jurisdiction as a separate category for purposes of the *Klaxon*/choice-of-law problem. Some say that *Klaxon* should be especially applicable to bankruptcy. See *In re Merritt Dredging Co.*, 839 F.2d 203, 206 (4th Cir. 1988); *accord* Note, *supra* note 5, at 1227-28. Others say that it should be especially *inapplicable* there. See *In re Lindsay*, 59 F.3d 942, 948 (9th Cir. 1995); *accord* Chapman, *supra* note 6, at *8-9; Gardina, *supra* note 6, at 923. I see little evidence that Congress intended bankruptcy to be a special case either way.

For reasons already explained, federal courts cannot and should not create a federal definition of marriage out of the cloth of statutory interpretation. Rather, they can and should apply state law. That leaves the important questions of which state's law to apply and whether to apply that state's *substantive* law or instead its *whole* law (including choice of law). This is where institutional role kicks in.

Federal courts should follow the whole law of the parties' domicile. As we have seen, marital conflicts doctrine has in large part been an attempt to mediate between the interests of the state of the parties' domicile and the state where the marriage was celebrated. Different states have subscribed to different theoretical approaches about how to mediate between those interests. But the federal government does not *have* an approach of its own, so courts must borrow the whole law of some state that does.²⁷¹ The state best situated to mediate between those interests is the parties' current domicile. As we have seen, the parties' current domicile will sometimes choose to recognize a marriage that would not be valid there, and sometimes it will decide that its preference is so strong that it invalidates the marriage entirely. By relying on the choice-of-law rules of the marital domicile, the federal government comes as close as possible to taking itself out of the equation. Federal courts should therefore treat parties as married if their home state—their domicile—treats them that way.²⁷²

This is not the rule that I advocate Congress adopt. But federal courts are differently situated. Courts must take their policy cues from Congress. Congress can provide its own cues. A world without DOMA and with no further congressional direction presupposes that the federal government can and should minimize its own role in recognizing marriage. It does that best by not trying to mediate between the interests of competing states on its own, but rather by pre-selecting a state as mediator.

What is more, the domicile-based doctrine is consistent with the scattered statutory provisions that govern marital choice of law for veterans' and social security benefits.²⁷³ The Social Security Act provides that spousal-status determinations turn on the law "of the State in which [the] insured individual is domiciled,"²⁷⁴ and the veterans' benefits statute similarly turns on "the law of the place where the parties resided."²⁷⁵ To the extent there are any congress-

271. For some of the reasons for using a state's whole law, see *Richards v. United States*, 369 U.S. 1, 10-15 (1962).

272. As others have noted, occasionally two spouses will have different domiciles. KOPPELMAN, DIFFERENT STATES, *supra* note 50, at 90; Laycock, *supra* note 97, at 325. Finding the appropriate marital domicile in such a case (the more permissive, the more restrictive, the older, the more expensive) strikes me as a solvable detail. Perhaps the rule could be borrowed from one of the existing federal rules based on domicile.

273. See *supra* notes 174-75.

274. 42 U.S.C. § 416(h)(1)(A)(i) (2006).

275. 38 U.S.C. § 103(c). The veterans' benefits statute looks to where the parties resided "when the right to benefits accrued" (or, alternatively, when they were married), *id.*, so it does not fit perfectly into this scheme. It is a separate, and interesting, question how courts

sionally imposed guideposts, they point in the direction of domicile.²⁷⁶ A different common law solution would create inconsistency with those provisions, and it is therefore better propagated by Congress.

To be sure, such a solution will not be the simplest one to administer. It will not always be clear what a state's stance on recognizing out-of-state same-sex marriages is, especially if one finds the state anti-recognition statutes ambiguous, or subject to narrow construction. But if the issue remains one of continuing importance in federal court, it will likely remain one of continuing importance in state court as well, and federal courts generally defer to state court construction of state law.²⁷⁷ If a state's courts haven't decided yet, and a federal court doesn't wish to figure it out on its own, it can also certify a question to those courts.²⁷⁸ At any rate, common law rules should not always maximize clarity at the expense of other considerations.

There are other details to flesh out as well. For example, in international cases—marriages by couples that have no American domicile at all—my views are even more tentative, but again I think that the domiciliary solution makes the most sense. With little other congressional guidance, federal courts should look to the whole law of the couple's foreign domicile. To be sure, extending the domestic conflicts rule to foreign domiciliaries might result in federal courts recognizing some marriages which are very different from those created here, such as polygamous marriages. But whatever one thinks of polygamy, I do not think that point is fatal. For one thing, American courts actually have recognized polygamous marriages, at least for some purposes.²⁷⁹ More importantly, if recognizing such foreign marriages really is seen as unacceptable,

should deal with this federal conflicts problem when it intersects with a right that vests over time or at a particular time. *Cf.* Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1286 (1989). For example, immigration proceedings related to marriage can take several years, and one might question whether federal courts should have to reinquire into a couple's marital status if their domicile changes during that period.

276. The arguable exception is a provision of the Immigration and Nationality Act that requires those petitioning for spousal permanent residence to attest that their marriage was "entered into in accordance with the laws of the place where the marriage took place." 8 U.S.C. § 1186a(d)(1)(A)(i)(I). Perhaps this provision could justify carving out a special rule for some immigration cases, like ERISA cases. *See supra* notes 265-69 and accompanying text. I, however, am inclined to see it as an antifraud measure rather than a choice-of-law hint. *But see* Titshaw, *supra* note 7, at 558 (acknowledging that this section is not a definition or a choice-of-law provision, though arguing that it reflects congressional approval for the place-of-celebration rule).

277. *See generally* Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459, 1495-517, 1535-44 (1997) (comparing different theories of deference).

278. *Id.* at 1544-63 (discussing and praising certification).

279. *See* KOPPELMAN, DIFFERENT STATES, *supra* note 50, at 29-32 (collecting cases recognizing polygamous marriages by Native Americans); *see also* Scott Titshaw, *Sorry Ma'am, Your Baby Is an Alien: Outdated Immigration Rules and Assisted Reproductive Technology*, 12 FLA. COASTAL L. REV. 47, 95 n.221 (2010) (collecting Board of Immigration Appeals decisions).

Congress can always provide a statutory solution like the one I describe above.²⁸⁰ It is better for the courts to leave such objections to Congress than to wade into the field themselves without guidance.

VII. BEYOND DOMA

A. *Interstitial Law*

This Article has analyzed the specific case of federal laws that rely upon the state-defined institution of marriage. But there are other instances of what I—following Henry Hart—call “interstitial” law.²⁸¹ Some are regulatory: For example, federal bankruptcy law frequently turns on “‘property’ and ‘interests in property’” which “are creatures of state law.”²⁸² Federal tax law places similar reliance on state property and other commercial rights.²⁸³ Social security relies not only on the state law of marriage, but also on state domestic relations law.²⁸⁴ Some courts rely on state law in adjudicating claims under CERCLA.²⁸⁵ Others are criminal: federal habeas deadlines turn on prior events under state law,²⁸⁶ and federal law’s reliance on prior convictions under state law is the subject of endless litigation.²⁸⁷ Some are territorial: In federal enclaves, the Assimilative Crimes Act incorporates the criminal law of the state “in which such place is situated.”²⁸⁸ In 1971, President Nixon ordered military bases to follow the abortion law of the state where they were located.²⁸⁹ And there are more.²⁹⁰

280. I am assuming, tentatively again, that Congress has not done so already. Congress has historically passed several laws disfavoring polygamy, and while many have been repealed, *see, e.g.*, Act of June 25, 1948, ch. 645, § 21, 62 Stat. 683, 864 (repealing territorial antipolygamy offenses previously codified at 18 U.S.C. § 513 (1946)), some have not, *see* 8 U.S.C. § 1182(a)(10)(A) (“Any immigrant who is coming to the United States to practice polygamy is inadmissible.”). Thanks to Kent Olsen for research on this point.

281. Hart, *supra* note 5, at 498.

282. *Barnhill v. Johnson*, 503 U.S. 393, 398 (1992).

283. *See* Paul L. Caron, *The Role of State Court Decisions in Federal Tax Litigation: Bosch, Erie, and Beyond*, 71 OR. L. REV. 781, 782-83 (1992); Covey T. Oliver, *The Nature of the Compulsive Effect of State Law in Federal Tax Proceedings*, 41 CALIF. L. REV. 638, 639 (1953); Note, *supra* note 5, at 1216-17.

284. *See, e.g.*, 42 U.S.C. § 416(h)(2)(A) (2006); *see also* *Astrue v. Capato*, No. 11-159, 2012 WL 1810219 (U.S. May 21, 2012) (discussing § 416(h)(2)(A)).

285. Michael Carter, Comment, *Successor Liability Under CERCLA: It’s Time to Fully Embrace State Law*, 156 U. PA. L. REV. 767 (2008).

286. *See, e.g.*, *Jimenez v. Quarterman*, 555 U.S. 113, 120-21 (2009).

287. *E.g.*, *Sykes v. United States*, 131 S. Ct. 2267 (2011); *United States v. Hayes*, 555 U.S. 415 (2009); *Nijhawan v. Holder*, 557 U.S. 29 (2009).

288. 18 U.S.C. § 13(a). The enclaves are defined in 18 U.S.C. § 7, and the scheme was upheld in *United States v. Sharpnack*, 355 U.S. 286, 294-97 (1958).

289. *Statement About Policy on Abortions at Military Base Hospitals in the United States*, 3 PUB. PAPERS 500 (Apr. 3, 1971); *see* Linda Greenhouse & Reva B. Siegel, *Before*

This is a good thing. Interstitial lawmaking is a reflection of federalism, and federalism provides a structure for pluralism. Federalist political theorists argue that decentralized government provides a framework for individuals and communities to flourish.²⁹¹ Tocqueville observed that “[i]n large centralized nations the lawgiver is bound to give the laws a uniform character which does not fit the diversity of places and of mores.”²⁹² Interstitial law is an attempt to accommodate that diversity by having federal law take on less of that “uniform character.”

It may seem odd to praise interstitial law as promoting federalism. After all, if local decisionmaking is so great, why tolerate the federal overlay at all? On the flipside, if the topic is one that requires federal action, why hitch that federal action to state law, thereby creating what Chief Justice Marshall dismissed as “a dependence of the government of the Union on those of the States . . . which might disappoint its most important designs”?²⁹³

The response is that interstitial law is a form of compromise. It is a nod, on the one hand, to the fact that very few subjects—if any—are “truly local,” in the sense that no federal intervention is permissible or desirable.²⁹⁴ Yet it aspires to maintain aspects of that localism where doing so is possible. Interstitial law is also, of course, subject to overriding federal limitations. So if the underlying state laws are ultimately held unconstitutional, the federal system will invalidate them and no longer defer to them.

Sometimes interstitial law concerns high-salience issues that are the subject of vicious interstate contestation. In such a case, interstitial law can serve the coordinating or supervising function of the federal government without entirely embroiling the federal government in the merits of the case.

Same-sex marriage, of course, is one such example. Scholars have written about the virtues of federalism in family law.²⁹⁵ Popular writers have also argued that states should each be able to decide for themselves whether to allow same-sex marriage,²⁹⁶ and DOMA’s author has called for repealing DOMA

(and After) *Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2053-54 (2011).

290. For more, see *Sharpnack*, 355 U.S. at 294-96; Mishkin, *supra* note 5, at 804 n.29, 816-20; Pathak, *supra* note 12, at 834-47; Note, *supra* note 5, at 1222-29.

291. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 320-23 (1974).

292. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 161 (J.P. Mayer ed., George Lawrence trans., Harper & Row 1988) (1835).

293. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 424 (1819).

294. See Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 643-56 (2001).

295. Buckley & Ribstein, *supra* note 103, at 566, 601; Michael E. Solimine, *Competitive Federalism and Interstate Recognition of Marriage*, 32 CREIGHTON L. REV. 83, 84-96 (1998).

296. E.g., Jonathan Rauch, *Saying No to “I Do,”* WALL ST. J., Dec. 27, 2004, at A8; David B. Rivkin Jr. & Lee A. Casey, *Conservatives: Keep Gay Marriage out of the Courts*, N.Y. TIMES, Nov. 17, 2006, at A31 (“[T]he question of who may marry and under what con-

and returning to interstitial federal law on that very basis.²⁹⁷ To be sure, it may not be possible for the federal government to *truly* extricate itself from the conflict, because (as we have seen) contestation over the structural rules is hard to completely separate from substance. At the same time, the two can be separated at least somewhat—so that any contestation at the national level need not immediately replicate the full extent of the state contest.

The very different context of slavery might provide another example of high-salience interstitial law. Until the passage of the Thirteenth Amendment, states decided whether to be “slave” or “free,” and states decided how a person’s status could be changed—for example, by traveling through (or to) a new territory.²⁹⁸ But federal law necessarily interacted with the state slave regime. For instance, the Constitution expressly dealt with fugitive slaves, providing that a slave who escaped to a free state could not be “discharged from such Service or Labour” by any “Law or Regulation therein,” and requiring free states to honor the owner’s request to “deliver[] up” an escaped slave.²⁹⁹

The Fugitive Slave Clause was interstitial—the clause applied only to those *actually* “held to Service or Labour,”³⁰⁰ in marked contrast to the Extradition Clause, which applied to all those “charged” with crime.³⁰¹ So application of the federal rule required a determination of whether the target was a slave or not—the subject of two fugitive slave statutes and plenty of litigation. Federal judges certainly did not extricate themselves from the issue of slavery: the fugitive slave acts were controversial,³⁰² provoking a near-insurrection in Wiscon-

ditions has been the province of the state legislatures. And it should have remained that way.”); Steve Chapman, *A Federalist Case for Gay Marriage*, REASON (Apr. 27, 2009), <http://reason.com/archives/2009/04/27/a-federalist-case-for-gay-marr>; see also Franklin Foer, *The Joy of Federalism*, N.Y. TIMES, Mar. 6, 2005, § 7 (Book Review), at 12 (canvassing other such arguments).

297. Barr, *supra* note 42.

298. Compare *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193, 207 (1836) (holding a slave is made free if travelling with master “staying some time, but not acquiring a domicile here”), with *Rankin v. Lydia*, 9 Ky. (2 A.K. Marsh.) 467, 477 (1820) (finding the Northwest Ordinance frees the slaves of residents alone, not to those “of the traveler or sojourner”), and *Lewis v. Fullerton*, 22 Va. (1 Rand.) 15, 15 (1821) (holding that a slave passing through a free state “for a mere transitory purpose . . . does not thereby acquire a right to freedom”). For further discussion, see also ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 87-99 (1975) (discussing these and other cases); PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, COMITY* 89, 103-125, 187-200 (1981); Bruce E. Boyden, *Constitutional Safety Valve: The Privileges or Immunities Clause and Status Regimes in a Federalist System*, 62 ALA. L. REV. 111, 148-50 (2010). See generally *Strader v. Graham*, 51 U.S. (10 How.) 82 (1851) (leaving this dispute to state law).

299. U.S. CONST. art. IV, § 2, cl. 3.

300. *Id.*

301. U.S. CONST. art. IV, § 2, cl. 2.

302. See, e.g., *Jones v. Van Zandt*, 46 U.S. (5 How.) 215, 229-30 (1847); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 617-18 (1842). For criticism, see AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 262-63 (2005).

sin,³⁰³ and that is without getting into the (non-interstitial) issue of slavery in the territories.³⁰⁴ Yet the interstitial nature of federal law nonetheless allowed many federal officials to skirt the core controversies much of the time—for better or worse.

But interstitial law exists in less salient areas, as well. As Hart observed:

Federal tax law, for example, can say what state-created interests are to be taxed, and can characterize them in any way it chooses; but it cannot create the interests. Similarly, federal bankruptcy law can dissolve state-created interests in any way it thinks equitable; but it is hard to see how it can create, or recognize in liquidation, interests which never had any existence under state law.³⁰⁵

Interstitial law allows federal courts to sidestep technical, complicated issues where federal law provides inadequate guideposts for reliable decisionmaking. In such cases, it is not that interstitial law outsources political controversy; it is simply that it outsources complexity.³⁰⁶

Some have criticized interstitial law in various contexts—suggesting, for example, that it is inconsistent with the Constitution’s reference to “uniform” federal bankruptcy laws,³⁰⁷ or that it is “difficult and expensive” to adjudicate state legal status as part of a social security determination.³⁰⁸ To the extent those arguments draw on a view that interstitial law is anomalous or without benefits, I think that view is mistaken. Interstitial law is a valuable part of our federal system.

It is worth adding two caveats about conditions that are likely necessary for such interstitial law to work reliably. One is that the importance of the federal aspect of the law must not be too great in relation to that of the state aspect. The goal is to make federal law account for a state’s choices, not to put the state in *control* of federal law. Nobody suspects, for example, that states will opportunistically modify or redefine their own definitions of marriage purely in order to affect the scope of federal benefits—the nonfederal aspects of marriage are too important.

303. See *In re Booth*, 3 Wis. 1 (1854) (attempting to nullify the Fugitive Slave Act), *rev'd* *Ableman v. Booth*, 62 U.S. (21 How.) 506, 526 (1859); see also COVER, *supra* note 298, at 186-89 (discussing surrounding controversy); CARL B. SWISHER, *THE TANEY PERIOD 1836-64*, in 5 *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 653-75 (Paul A. Freund ed., 1974) (same); Jeffrey Schmitt, Note, *Rethinking Ableman v. Booth and States' Rights in Wisconsin*, 93 VA. L. REV. 1315, 1323-42 (2007) (same).

304. Culminating, of course, in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 452 (1857). See generally DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTROM 1829-1861*, at 133-56, 195-200 (2005).

305. Hart, *supra* note 5, at 535 (footnote omitted).

306. See Michael C. Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. PA. L. REV. 103, 133-38 (2008).

307. Daniel A. Austin, *Bankruptcy and the Myth of "Uniform Laws,"* 42 SETON HALL L. REV. (forthcoming 2012) (manuscript at 62-64), available at <http://ssrn.com/abstract=1967905>.

308. Brief in Opposition at 14, *Astrue v. Capato*, No. 11-159 (U.S. May 21, 2012), 2011 WL 5014750 (cert. granted).

A related condition is that interstitial law generally relies on the state treating federal and state law alike. To see why, consider the recent litigation between Wyoming and the federal government over Wyomingites' firearms rights.³⁰⁹ Federal law provides that domestic violence misdemeanants lose the right to carry a gun.³¹⁰ Domestic violence misdemeanors tend to be state law crimes, so the federal law is a form of interstitial law—it depends on state criminal categories to define the scope of the federal ban. Federal law also allows misdemeanants to regain their right to use a gun if their conviction is “expunged or set aside” under state law.³¹¹ Apparently unhappy with the reach of the federal ban, Wyoming passed a law setting up special-purpose expungements of these misdemeanors, which expunged the convictions *only* “for the purposes of restoring any firearm rights lost.”³¹² The Bureau of Alcohol, Tobacco, and Firearms was unimpressed and rejected these special-purpose expungements, and the Tenth Circuit ultimately upheld the ATF's position.³¹³ Statutory niceties aside, it is easy to see why: Under Wyoming's position, federal law would not have been borrowing a general rule of state law so much as delegating authority over firearms entirely to the state. Or as the United States' brief put it, the Wyoming statute was an attempt to “circumvent the Brady Act's background check requirement by treating as an ‘expungement’ an action that purports only to remove federal firearms disabilities with no accompanying state-law consequences.”³¹⁴

B. *Conflicts and Federalism*

Aside from the mechanics of Hart's interstitial law, there is a lesson for the field of conflicts more broadly. The uncertain or contested state of modern conflicts doctrine makes it hard for the field to do its job.

Conflicts cases are about boundaries—both territorial boundaries, and more generally the boundaries between different entities' lawmaking authority. Other substantive legal areas implicitly rely on conflicts doctrine whenever they allocate decisionmaking authority to a particular level, assuming that conflicts doctrine will sort out *which* entity at that level has authority. As we have seen, the proposal to leave marriage to state law assumes a relatively well-settled answer about *which* state.

309. See generally *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236 (10th Cir. 2008).

310. 18 U.S.C. § 922(g)(9) (2006).

311. 18 U.S.C. § 921(a)(33)(B)(ii).

312. WYO. STAT. ANN. § 7-13-1501(a) (2008). That proviso was eliminated after the Tenth Circuit's decision. See *Firearm Ownership—Domestic Violence Offenses*, 2009 Wyo. Sess. Laws 154.

313. *Crank*, 539 F.3d at 1244-49.

314. Brief of United States at 19, *Crank*, 539 F.3d 1236 (No. 07-8046), 2007 WL 4732294.

In conflicts, however, the answers are frequently *not* well settled. Modern conflicts doctrines are frequently more like standards than rules, diminishing the relevance of bright lines (like state borders) and instead emphasizing connections, interests, and expectations. But this is not just about rules and standards. It is frequently doubted *which* rule or standard should obtain, and even when a given state settles on one rule or standard, there is no guarantee that *other* states will agree. The point of conflicts doctrine is to resolve apparent disputes between different laws. When states apply different doctrines they do not resolve the dispute but instead push it up a level. Borders aren't bright lines any more if the territory is disputed; domicile doesn't work if the states define it differently, and general frameworks like the First or Second Restatements don't work if the states pick different ones, or apply them differently. As we have seen, layering other institutions, like the federal courts, on top of this disagreement exacerbates the problem even further.

To be sure, some conflicts doctrines are less messy than others. DOMA happens to present a perfect storm of unclear rules, institutional disagreement, and unclear institutional authority. Yet many other areas present at least some of these problems. And of course *every* field of law must confront a certain degree of uncertainty and disagreement. But the uncertainty and disagreement in conflicts doctrine is unusually problematic. It is not just that conflicts is unusually confused—though I suspect it is—it is that conflicts occupies a special, “meta” role.

Perhaps all law is a tool for social ends. Conflicts is a meta-tool, a tool for the ends of other legal doctrine. Whatever the optimal level of uncertainty in substantive doctrines, the meta-uncertainty of conflicts doctrine skews those doctrines toward chaos. And it does so in a way unlikely to be useful to anybody, introducing more chaos in cases that happen to develop connections to multiple jurisdictions. As a practical matter, whatever ends one wants a given domestic law to serve, unsettled conflicts doctrine makes it harder for that law to serve them. If a law sacrifices fairness for clarity, it is undermined when conflicts takes away the clarity that was the entire point of the sacrifice. And if a law makes the reverse decision, by choosing an open-ended standard, the factors to which it gives weight might be different from those that are unpredictably applied in cases of conflict. The problem with meta-uncertainty is not just that it diminishes certainty overall, but that it deprives lawmakers of the assurance that their chosen way to resolve each individual problem will be effectuated. For any substantive end, there is a special interest in keeping the plumbing clear.³¹⁵

Uncertainty in the law means freedom for the courts. There is surely a temptation to embrace this freedom, to use the flexibility of conflicts doctrine to reach a result that seems fair for the individual case. I hope the lesson of DOMA shows that flexibility has costs. Conflicts is not just an esoteric tool for

315. Thanks to Steve Sachs for discussions of several of these points.

individual private law cases, or a subfield of civil procedure; it is an implicit premise of much of federalism, and hence of much of public law.

When the rules are uncertain *ex ante*, then they will be clouded by politics and narrow instrumentalism in every case. Federalism may or may not be desirable for any given issue, but if any kind of devolution is to be possible, conflicts doctrine is what enables it.

Public law has largely ignored conflicts as a field. And in an ideal world, it would be able to. Conflicts doctrine would quietly resolve the edge cases of federalism, and public law could proceed to the seemingly more important business of governing our nation. But conflicts doctrine is not set up to do that now, and public lawyers cannot afford to ignore it.

CONCLUSION

In briefing the constitutionality of section 3 of DOMA before the First Circuit's decision in *Gill*, both sides briefly adverted to the choice-of-law problems likely to arise without DOMA. The defenders of the statute argued that DOMA was needed because otherwise "confusion would arise regarding same-sex couples who marry in a state or foreign country where such marriages are permitted but reside in a state that does not recognize foreign same-sex marriages."³¹⁶ The challengers responded that the problem was nothing new: "Federal agencies must often address far more complicated differences among the domestic relations laws of the states The suggestion that they would be unable to do the same thing for married same-sex couples . . . defies belief."³¹⁷ Perhaps unsurprisingly, the truth is someplace in between. The court's opinion did not discuss the issue, but it cannot be avoided forever. The demise of DOMA will unleash federal choice-of-law problems that have evaded resolution for years. But ultimately the problems can and should be resolved.

More broadly, DOMA's demise may in fact be an opportunity for creative destruction: the framework for solving the DOMA problem applies more broadly to all instances of federal laws that draw upon state law. Federal institutions can and should devise a set of choice-of-law rules, and what set of rules is proper will depend on which institution adopts them. Congress has generative power, while federal courts have only interpretive power. Congress can sweep aside existing choice-of-law rules and replace them with the policies of its choosing. Courts must work within existing guideposts, and justify their work on more neutral grounds.

Finally, DOMA provides a lesson about the ignored field of conflicts of law. Public law treats conflicts as a technical backwater, assuming that whatever substantive federalism decisions are made can be executed by the relevant

316. House Brief, *supra* note 55, at 46-47.

317. Gill Brief, *supra* note 41, at 43.

conflicts rule. That is not always so; indeed, it is often not so. Perhaps that can be changed. Until then, public law ignores conflicts at its own peril.