



Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation

Citation

Joseph William Singer, Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation, 1 Stan. J. C.R. & C.L. 1 (2005).

Permanent link

<http://nrs.harvard.edu/urn-3:HUL.InstRepos:3138408>

Terms of Use

This article was downloaded from Harvard University's DASH repository, and is made available under the terms and conditions applicable to Other Posted Material, as set forth at <http://nrs.harvard.edu/urn-3:HUL.InstRepos:dash.current.terms-of-use#LAA>

Share Your Story

The Harvard community has made this article openly available.
Please share how this access benefits you. [Submit a story](#).

[Accessibility](#)

SAME SEX MARRIAGE, FULL FAITH AND CREDIT, AND THE EVASION OF OBLIGATION[†]

Joseph William Singer*

[W]e may safely assume that this state has no policy interest in maintaining within its borders a sanctuary for fleeing debtors.¹

Pacific Gamble Robinson Co. v. Lapp
Washington Supreme Court (1980)

INTRODUCTION

I begin writing this Article one week before May 17, 2004—the magic day when same sex couples will legally marry for the first time in U.S. history. Of course, many same sex couples have already married in the United States. They have done so in churches and synagogues that had performed religious marriage ceremonies for them. What is new is that such marriages will be recognized by the Commonwealth of Massachusetts as conferring the civil status of marriage with its attendant legal rights and obligations, and those who do not want religious ceremonies—or whose religions forbid such marriages—will be free to marry in civil ceremonies conducted by justices of the peace or city clerks. I live in Massachusetts in the City of Cambridge, a city whose officials are so supportive of this joyful event that they plan to open city hall at one minute after midnight on the morning of May 17 to allow couples to apply for licenses the very second it becomes lawful to do so.² For someone like myself, who agrees with the recent decision of the Supreme Judicial Court authorizing same sex marriage and who believes that denial of the right to

[†] © 2005 Joseph William Singer.

* Professor of Law, Harvard Law School. Thanks and affection go to Martha Minow, Jerry Kang, Todd Rakoff, Mark Strasser.

1. *Pacific Gamble Robinson Co. v. Lapp*, 622 P.2d 850, 856 (Wash. 1980).

2. Joanna Weiss & Lisa Kocian, *Cambridge Plays Host to a Giant Celebration*, BOSTON GLOBE, May 17, 2004, at A1.

marry a person of one's choosing violates so many provisions of the Constitution that it is hard to count them all, these events are nothing short of thrilling.

Such sentiments, however, are far from universal, even within the Commonwealth of Massachusetts. After all, three justices on the Supreme Judicial Court of the Commonwealth of Massachusetts dissented in the historic ruling in *Goodridge v. Department of Public Health*.³ A bill of address has been filed in the Massachusetts legislature (the General Court) to impeach the four justices who formed the *Goodridge* majority.⁴ The Massachusetts legislature, sitting as a constitutional convention, has passed a proposed amendment to the state constitution that would ban same sex marriages while enshrining civil unions in the Massachusetts Constitution with all the legal incidents of civil marriage except the right to call such relationships "marriages"⁵—a perplexing principle to enshrine in a state constitution that must satisfy federal constitutional guarantees of equal protection of the laws, the free exercise of religion, and the prohibition against establishment of religion. Both presidential candidates in this election year voiced opposition to same sex marriage.⁶ On Election Day, November 2, 2004, eleven states adopted constitutional amendments or initiative proposals to amend state law to ban recognition of same sex marriages and, in eight of the eleven states, civil unions as well.⁷ The issue may even have affected the outcome of the presidential election.⁸ The United States itself has enshrined in its statutes a so-called "Defense of Marriage Act"⁹ on the theory that allowing same sex marriages to be recognized by sovereign bodies presents an undefined harm to

3. 798 N.E.2d 941 (Mass. 2003); *see also* Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).

4. Raphael Lewis, *Foes of Gay Marriage Try Long Shot—Bill Seeks To Remove Four of SJC's Justices*, BOSTON GLOBE, Apr. 20, 2004, at B1.

5. "It being the public policy of this Commonwealth to protect the unique relationship of marriage in order to promote, among other goals, the stability and welfare of society and the best interest of children, only the union of one man and one woman shall be valid or recognized as a marriage in Massachusetts. Any other relationship shall not be recognized as a marriage or its legal equivalent." House Bill No. 3190, passed by Massachusetts Constitutional Convention, Mar. 29, 2004. The amendment must be passed by the next legislature and then approved by voters at a referendum before it can become the law of Massachusetts.

6. Elisabeth Bumiller (with Carl Ulse), *Same-Sex Marriage: The President—Bush Backs Ban in Constitution on Gay Marriage*, N.Y. TIMES, Feb. 25, 2004, at A1; Sheryl Gay Stolberg, *Democratic Candidates Are Split on Issue of Gay Marriages*, N.Y. TIMES, July 16, 2003, at A1.

7. The states were Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Oregon and Utah. Civil unions were denied recognition in Arkansas, Georgia, Kentucky, Michigan, North Dakota, Ohio, Oklahoma, and Utah. *See* Joan Vennochi, *Was Gay Marriage Kerry's Undoing?*, BOSTON GLOBE, Nov. 4, 2004, at A15.

8. *Id.*

9. 28 U.S.C. § 1738c.

the “institution” of marriage. Marriage is presumably under attack, not by the many couples who get divorced or the many men who commit spousal abuse and violence, but by the small percentage of the population which seeks to add marriage to the list of possible commitments that couples may choose to make with each other.

This occasion is a fitting one to mark in the inaugural issue of a new law journal devoted to civil rights and civil liberties. Marriage may be deemed either a civil liberty or a civil right; one often sees mention of the “freedom to marry”¹⁰ or the “fundamental right”¹¹ to marry in connection with arguments about the basis for same sex marriage. There is nothing wrong with this analysis; I have previously written in this vein.¹² But I want to talk about marriage from a different perspective. Rights are important; indeed they may be central. But there is something important missing when we focus on rights and liberties alone. What is missing is talk about obligations. I want to talk, not about the right to marry, but about the obligations that go along with civil marriage.¹³ The topic of same sex marriage is only partly about civil rights and liberties; from the standpoint of the law, it is, more fundamentally, about obligations. And it behooves a journal dedicated to the exposition of the meaning and content of civil rights and civil liberties to pay attention to the obligations that make such rights and liberties meaningful.

I am a teacher of property law and conflict of laws and the subject of marriage concerns both. There are only a handful of law professors like myself who teach this combination of courses. They generally do so for reasons similar to my own: I was hired to teach property law twenty years ago and was asked to cover the conflict of laws course. The subjects have very little overlap, but it turns out that in the area of family law, the overlap is of fundamental importance. It has been a long time since there has been such interest in the ordinarily esoteric field of conflict of laws or that most-obscure constitutional provision called the Full Faith and Credit Clause. For the first time in many years, there is widespread interest in the question of whether these new Massachusetts marriages will be recognized or should be recognized by other states whose laws either do not authorize or which formally prohibit same sex marriages.

10. Yvonne Abraham & Rick Klein, *Free To Marry: Historic Date Arrives for Same-Sex Couples in Massachusetts*, BOSTON GLOBE, May 17, 2004, at A1 (“free to marry”).

11. Kathleen Burge, *SJC Peppers Lawyers on Same-Sex Marriage*, BOSTON GLOBE, Mar. 5, 2003, at A1 (“The exclusion of the plaintiffs from marriage . . . violates the fundamental right that these plaintiffs enjoy with all others in this commonwealth.”); Patricia A. Cain, *Imagine There’s No Marriage*, 16 QUINNIPIAC L. REV. 27, 30-40 (1996).

12. Joseph William Singer, *Pay No Attention to that Man Behind the Curtain: The Place of Better Law in a Third Restatement of Conflicts*, 75 IND. L.J. 659, 664-66 (2000).

13. See Martha Minow, *All in the Family and in All Families: Membership, Loving, and Owing*, in SEX, PREFERENCE, AND FAMILY: ESSAYS ON LAW AND NATURE 249-76 (David M. Estlund & Martha C. Nussbaum eds., 1997) (exploring what family members owe one another).

I have long had an interest in this complicated subject, and I have previously suggested reasons why states might be constitutionally obligated to recognize marriages that are valid where celebrated.¹⁴ I will restate some of those arguments here. However, I want to approach the subject from a somewhat new perspective. The standard way of presenting the question focuses on the obligations of the states—or the lack thereof—to recognize out-of-state marriages that are void at home. Those obligations are ordinarily said to arise because the couples whose marriages are valid where celebrated are said to have a right to have their marriages respected in other states. The center of attention in this analysis, as well as the focus of coverage in the national press, is the right to marry and the rights that are denied to same sex couples who wish to marry but who are prevented from doing so by restrictive state marriage laws. In the multi-state context, the focus is on the claim that couples whose marriages are valid where celebrated have a right to have their marriages respected in other jurisdictions, pursuant to the Full Faith and Credit Clause of the Constitution.¹⁵

The focus on the parties' rights is often matched by an analysis of state sovereignty that considers the legitimate relations among equal sovereigns in a federal system. On one hand, it is argued that other states have a duty in a federal system to recognize marriages that are concededly valid in Massachusetts; failure to do so is said to deny adequate respect for the sovereignty of Massachusetts. The opposite argument suggests that Massachusetts has no power to export its minority rule to the rest of the United States. While Massachusetts may choose to make family law for couples who reside in Massachusetts, it cannot export its unusual laws to other states because those states have an equal right to determine the law governing family relationships for families situated within their borders.¹⁶

There is something askew in this analysis. Focusing on the claimed right to marry or the rights that go along with a valid marriage and the obligation of states to recognize a marriage that is valid where celebrated distorts our understanding of what is implicated in the choice to recognize—or to fail to recognize—foreign marriages. It is true that marriage confers a status that creates legal rights.¹⁷ They include, for example, the right to visit one's spouse

14. Singer, *Pay No Attention*, *supra* note 12.

15. See U.S. CONST. art. IV, § 1 ("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.").

16. See Linda Silberman & Karin Wolfe, *The Importance of Private International Law for Family Issues in an Era of Globalization: Two Case Studies—International Child Abduction and Same-Sex Unions*, 32 HOFSTRA L. REV. 233 (2003).

17. Cain, *supra* note 11 (discussing the rights and obligations of marriage including property rights, support obligations, and child support); David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447 (1996) (describing the legal consequences of marriage); WILLIAM N.

in the hospital and to make medical decisions for him or her when necessary, the right to inherit a spouse's property, the right to file tax returns as a married couple with the resultant tax benefits (and burdens), the right to move in with a spouse who has signed a valid lease. But marriage is only partly about rights. It is, more fundamentally, about obligations.¹⁸ After all, marriage is not just an ordinary contract; it is a status conferred by state officials who issue a license and conduct a ceremony in which they state: "By the authority invested in me by the Commonwealth of Massachusetts, I hereby declare you to be married." This status is a fixed one under state law which the parties cannot escape on their own; the only way to become unmarried once one has taken on the obligations of marriage is to file a civil lawsuit to petition a court to grant a divorce. Married couples assume an obligation to love and support each other (in conventional vows) for better or for worse, for richer or poorer, in sickness and in health till death do them part. The obligation of mutual support is usually manifested in the legal system at the time of divorce through alimony or by equitably distributing the property acquired during the marriage. It also becomes salient at the death of one of the spouses when property is passed on via any number of methods: either intestate inheritance, a will, or by operation of a homestead law or a community property or statutory share statute that guarantees the surviving spouse a share of the deceased spouse's property at the time of death.

Obligations are evident as well when we consider the legal relations between married couples and their children.¹⁹ We might focus on the rights of both parents to act as the guardians of their children, to be with them in the hospital when they are ill, to make decisions for them. But again, what seems more fundamental is that parents have obligations to care for their children, to see that they are well and provided for, to do the joyous work of being a father or a mother. When a married couple has children, they are both responsible for supporting the children; when a parent dies, the survivor has the hard job of caring for the children alone, both financially and emotionally.

The obligations of marriage are ones that most undertake willingly, lovingly, joyously. However, there are times—and they are more frequent than we would like—when spouses and parents shirk their obligations. At such times, the legal system may intervene to force them to do what they should do—what they are legally obligated to do.

The question of whether other states will recognize same sex marriages performed in Massachusetts is thus only partly a question of whether the rights

ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 66-67 (1996) (listing some of the legal benefits of marriage).

18. See Robert Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, in NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 239 (Martha Minow et al. eds., 1992).

19. Cain, *supra* note 11 (discussing the rights and obligations of marriage including property rights, support obligations, and child support).

of couples married in Massachusetts will be recognized and protected elsewhere. It is as much or more a question of whether those who marry in Massachusetts will be held to the obligations which they have undertaken or whether the other states in the Union will help such individuals evade those obligations. The refusal to recognize Massachusetts same sex marriages may constitute a choice by one state to allow an individual to escape obligations imposed by the law of another state. Thus the question may not be only whether individuals have a right to have their Massachusetts marriages recognized elsewhere or whether Massachusetts has the power to impose its marriage law on the nation but whether those who undertake the obligations of marriage in Massachusetts may, unlike other married couples, escape those obligations simply by relocating to another state.

The question of how states in a federal system should respond to marriages celebrated elsewhere that violate their public policy is a complicated one. An argument premised on the fundamental right to marry or an equal protection claim under the federal Constitution would avoid such questions.²⁰ Unfortunately, this solution does not appear to be imminent. It is thus essential that we face squarely the arguments on both sides of this debate about whether states have a constitutional obligation to recognize same sex marriages validly performed elsewhere. We must also face the fact that states which choose not to recognize Massachusetts same sex marriages are choosing not only to deny rights to couples validly married here in Massachusetts but are enabling individuals to evade their legal obligations under Massachusetts law. Such states are, in effect, establishing themselves as havens for the unscrupulous, as refuges for fugitives from justice. In the guise of determining their own family law, they may be enabling spouses and parents to evade their obligations.

In Part I below, I will describe a general model of the relation between contract and obligation. This model is premised on a spectrum of obligation from illegal contracts (for which one can be punished merely for entering into them) to voidable contracts (which one is free to make but which may not be legally enforceable) to enforceable contracts. Enforceable contracts themselves range from those from which one can escape with few penalties, to those that are enforced by substantial damages, as well as to those that are specifically enforced. I will then canvass the types of reasons that courts and legislatures give when they refuse to allow or to enforce contractual arrangements.

In Part II, I will extend the analysis to choice of law issues that arise in the context of marriage. A variety of choice of law issues can arise regarding recognition of out-of-state marriages but the two most prominent situations are (1) marriages by Massachusetts domiciliaries who later move to another state and (2) marriages by nonresidents of Massachusetts who seek to avoid their home state's restrictive laws by going to Massachusetts to celebrate their

20. See, e.g., Mark Strasser, *Lawrence and Same-Sex Marriage*, 69 BROOK. L. REV. 3 (2004).

marriages and then immediately returning home. I will address each of these situations in turn, first by analyzing the traditional rules governing conflict of laws in the marriage area and then comparing those rules to the treatment given to other sorts of contracts.

I will then conclude in Part III by addressing the meaning and applicability of the Full Faith and Credit Clause as it applies to same sex marriages and to the federal and state Defense of Marriage Acts, as well as some thoughts about the proposed Federal Marriage Amendment.

I. CONTRACT AND OBLIGATION

We often talk about freedom of contract and then ask what circumstances justify the legal system in limiting our freedom to enter contracts. The right to marry fits in this framework; we ask whether same sex couples are free to marry or whether such marriages are prohibited. This way of framing the issue is misleading, as the legal realists have taught us.²¹ It is misleading because “freedom of contract” suggests a conception of liberty from state power. However, the legal system does not merely allow contracts to be made; it ordinarily enforces them to one degree or another. Enforcement is not merely a matter of liberty; it involves authorizing one individual to conscript state officials to force the other party to do what she promised to do or pay damages to compensate for the failure to so act. When contracts are enforced, state power is exercised at the behest of one party to control the behavior of another or to force a redistribution of property from one to the other as a penalty for breach of contract.

The legal realists taught us to focus on the actual legal consequences of allowing (or not allowing) contracts. Those consequences include the possibility of punishment for entering the contract, the possibility of freedom from sanction for entering the contract, the possibility of being penalized financially for breaking one’s promise, and the possibility of being physically coerced to do what one promised to do.²² When we talk about freedom of contract we may therefore be describing one of at least five different conceptions or issues: (1) legality and illegality; (2) voidability; (3) enforceability by damages; (4) enforceability by specific performance; and (5) regulation of contract terms by imposition of mandatory or nondisclaimable terms.

21. See AMERICAN LEGAL REALISM (William W. Fisher, III, et al. eds., 1993).

22. Morris Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933); Robert Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943); Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

A. Legality

First, freedom of contract may refer to the ability to enter into an agreement without facing legal penalties for doing so. Sometimes the state identifies particular contracts as illegal in the sense that the mere fact that one entered into the agreement may subject participants to civil remedies or criminal penalties. Contracts that are illegal in this sense include, for example, contracts to sell illegal drugs, contracts of slavery, contracts to sell human organs, conspiracies to commit murder or other crimes, anticompetitive contracts under the antitrust laws, deceptive or fraudulent consumer contracts, including contracts for the sale of goods or services and insurance contracts in particular. We are not free to enter these agreements because we face penalties if we do so and state officials catch us doing so. Freedom of contract in this sense means freedom from retribution by the state for making the agreement.

Why might states make certain contracts illegal? The two major reasons are to protect the rights of one of the parties or to protect the legitimate interests of third parties who may be affected by the agreement. We may prohibit a contract to protect one of the parties from exploitation or bad treatment by the other party; treble damages in consumer protection laws, civil rights remedies for contracts of slavery, and contracts to sell harmful and illegal drugs are examples of such protective limits on free contract. We may also prohibit a contract because we are relatively sure that both parties will come to regret having entered the agreement or because the very nature of the agreement is offensive and harmful to the parties even if they do not realize the harm the agreement may cause. In such cases, we presume that the parties would not have entered the agreement if they had perfect information. Slavery contracts may be an example of such agreements; they are clearly harmful to one (indeed, both) of the parties and it may or may not be legitimate to find that individuals with better information would change their views about the humanity of the victims of slavery such that they would come to realize that slavery is an abomination and that the victim in no way deserved to be treated as if she were not a human being. In addition to protecting the legitimate interests of one or both parties to the agreement, we prohibit and punish certain contractual arrangements because of the substantial harm they are likely to cause to third parties. Examples of such agreements include monopolistic contracts or criminal conspiracies.

As applied to same sex marriage, freedom of contract in this first sense would mean that individuals may agree to marry without being subject to penalties for doing so.²³ In fact, after *Lawrence v. Texas*,²⁴ our legal system

23. Compare *Lawrence v. Texas*, 539 U.S. 558 (2003) (unconstitutional to criminalize consensual sexual relations between adults of the same sex) with *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (state attorney could be fired for entering religious marriage ceremony with another woman).

24. 539 U.S. at 558.

protects the right of individuals to enter marriage arrangements of their own choosing; indeed the First Amendment's Free Exercise Clause may require the states to allow individuals to marry in religious ceremonies or even in nonreligious commitment ceremonies. At the same time, the existing marriage laws may well prohibit public officials from officiating at marriages of same sex couples if such marriages are "prohibited" in the state in which the official acts and derives her power. When we speak about the freedom to marry, we are generally not talking about freedom in the sense of a Hohfeldian privilege²⁵ to engage in the ceremony (except in the case of a public official who may be prohibited from officiating at the ceremony). Couples are free to make commitments to each other by using private agreements; the issue of the right to marry that concerns us here is the question of state recognition that results in some sort of enforcement by the state.

B. Voidability

If one is free to contract in this first sense (free from punishment for engaging in consensual acts of agreeing to marry), we reach a second issue. If such a contract is made, will it be legally enforceable? It is perfectly logical and perhaps sensible to create a system in which individuals are free to make contracts and are also free to break them. Contracts need not be legally enforceable to be useful in either private or commercial life. In fact, in our legal system, many contracts are lawful (in the sense of not being prohibited) but are nonetheless not enforceable. Such contracts include, for example, voidable contracts such as contracts made by minors or surrogate mother contracts (in most states).²⁶ Voidable contracts may be made but they may also be repudiated by one or both parties. If a surrogate mother contract is voidable, this means that the parties are perfectly free to enter those arrangements without fear of punishment for violating the laws against baby selling; however, the surrogate mother is entitled to repudiate the arrangement for a certain time period after the birth of the child.

Another example is far more pervasive. If a contract is enforceable only by an award of damages, and the rules in force impose a duty to mitigate damages on the promisee, and if the promisee can "cover" by obtaining substitute performance at the same price elsewhere, then the damages will be zero or close to zero. If we adopt Holmes's bad man theory of the law,²⁷ then although we say such contracts are enforceable, we are actually not enforcing the

25. Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913); Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975.

26. See, e.g., *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

27. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

contract. If we limit both enforceability to a damages remedy (rather than ordering specific performance by requiring the promisor to do what she promised to do) and the damages remedy to the actual loss given the promisee's ability (and duty) to mitigate damages, then—where the actual loss is zero—there is no penalty for breach of contract. It is as if we have said, “you are free to make this kind of contract and, under these circumstances, you are also perfectly free to break it with no legal repercussions.”

In the same sex marriage context, this would mean allowing the parties to marry—as well as recognizing the legal incidents of marriage as long as the parties voluntarily adhere to those obligations but allowing the parties to get out of the arrangement with no legal sanction of any kind. In the usual divorce, there may be alimony and equitable distribution of property awarded by the court. Allowing the marriage to be sundered without penalty (and without the need for court judgment) would dissolve the marriage relationship but not order any redistribution of property between the parties. Another example where this may occur is in the context of a premarital agreement in which the parties agree not to share their property at divorce; if such an agreement is enforceable (a big if) then the parties are free to end the marriage relationship with no legal consequences of any kind other than the loss of the benefits and obligations that would have gone along with being married.

C. Enforceability by Damages

The third model is enforceability by damages. In this case, the imposition of damages is intended either to discourage breach or to encourage it as long as the promisor is willing to pay an amount of damages that either makes the promisee whole or comes as close as the legal system is willing to go in making the promisee whole. No damage judgment fully compensates the victim of a broken promise; it measures the harm either by the market value of what was lost (or even less if there is a duty to mitigate damages) rather than the asking price of the promisee (what the promisee would ask in compensation before agreeing to tear up the contract). And some promises include value that cannot be compensated in the form of money; in such cases, damages can never make the promisee whole.

In the same sex marriage context, enforcement by damages would include the ordinary financial responses to divorce including alimony and equitable distribution of property. This response is based on the idea that parties who marry are voluntarily undertaking financial obligations to each other both during the marriage and at divorce or death. We enforce the marriage agreement by redistributing the parties' property, either during the marriage in a lawsuit for maintenance or when the relationship ends through divorce or death. The right to marry is therefore not just the freedom to obtain the rights of married couples; the right to marry is the right to take on and to benefit by obligations to one's spouse—obligations that are enforceable by a court of law.

Obligations that are legally enforceable are ones that the parties cannot escape without the consent of the other party and possibly without the consent of a state official in the form of a judge.

D. Specific Performance

The fourth meaning of freedom of contract would identify “contract” as the right to state enforcement of the mutual promises, not by damages, but by specific performance. In such a case, freedom of contract means not only the liberty to enter the arrangement and the right to enforce it, but the right to enforce it by insisting that the promisor do what she promised to do. This right would be backed up by state power in the form of an injunction whose violation would send the violator to prison for failure to obey a valid court order.

In the context of marriage, injunctive relief ordinarily only applies to such considerations as child custody and visitation rights, orders to transfer title to a home from one party to another, orders to sell the family home. Since the era of no fault divorce, our system does not order the parties to remain married. We may order the parties to stay away from each other, but in no fault states, courts do not force individuals to remain married.²⁸

E. Regulation of Contract Terms Through Mandatory or Nondisclaimable Terms

If a contract is enforceable either by damages or specific performance, we face a final important question. I noted earlier that some contracts are illegal in the sense that parties who enter into them can be punished by the legal system for merely entering those agreements. However, some illegal contract terms will not result in sanctions against the parties; they are merely unenforceable. In some cases, the courts will strike them out of the contract, enforcing the rest of the terms of the agreement; in other cases, courts will rewrite the agreement to include terms that are mandatory but that contradict the will of the parties as expressed in their oral or written agreement. Mandatory contract terms include, for example, the implied warranty of habitability in residential rental agreements, the right to be protected from unconscionable terms in a contract, and the right to safe workplace conditions under federal and state statutes. In the marriage context, mandatory terms include the duty to refrain from domestic violence, statutory share statutes that prevent spouses from completely disinheriting each other, and limitations on enforceability of unfair premarital agreements.

This review of contracts remedies teaches us that freedom of contract is not

28. This is apparently still possible in New York. Leslie Eaton, *A New Push To Loosen New York's Divorce Law*, N.Y. TIMES, Nov. 30, 2004, at A1 (New York court refuses to grant a divorce to a couple that cannot show fault).

just about freedom to make mutually beneficial arrangements; it sometimes involves the right to call on the state to order one party to do what she promised to do or to pay damages as a penalty for failing to do what she promised to do. A contract freely entered into winds up imposing obligations enforceable by coercive state power. Family relationships may go beyond this and involve the assumption of obligations imposed by family law regardless of one's intent to assume those obligations. Property professors like me often characterize contract enforcement as the creation of a property right in expectations; the promisee has a right to have the promisor do what she promised to do or to pay the fair market value equivalent of the promise.²⁹ She has, in effect, a vested right to the promised performance or its equivalent market value.

If one has a right to marry, then the marriage relationship itself is not unlawful (conception #1). But the right to marry means more than this. Unless the parties have entered an enforceable premarital agreement that waives all the obligations of marriage, the marriage will result in legally enforceable obligations, some of which may be enforced by ordering the parties to pay money or share property and some of which will be enforceable by ordering the parties to act in a certain way with regard to the other party.

A state that refuses to recognize an out-of-state marriage is therefore not only denying the parties the rights that go along with marriage. It is refusing to enforce the marriage contract by awarding damages or imposing injunctive relief. This is tantamount to adopting conception #2: the marriage is lawful in the sense that the parties will not go to jail merely because they got married in Massachusetts but it is not enforceable by damages (conception #3) or injunctive relief (conception #4). Rather it is voidable (conception #2). The parties are free to marry in Massachusetts but they will not be held to that agreement in other states. If a marriage would create enforceable obligations in Massachusetts, the decision of another state to ignore those obligations could have the effect of helping individuals escape the obligations arising under Massachusetts law. It may be the case that one of the parties may return to Massachusetts to seek enforcement of the marriage obligations. However, the rules of personal jurisdiction may prevent Massachusetts from asserting power over a nonresident spouse to order redistribution of property.³⁰ In such a case, nonrecognition would enable the nonresident spouse to escape the obligations incumbent upon him or her under Massachusetts law.

It becomes relevant to ask whether we ordinarily allow individuals to avoid their contractual obligations by relocating elsewhere or by choosing to opt out of the mandatory obligations associated with the marriage relationship.

29. Of course the duty to mitigate damages substantially alters this model, suggesting that the courts do not consider the right to have performance as equivalent to a property right—or if they do think of it as a property right, they consider it a defeasible property right (one that can be destroyed by facts that occur after the creation of the right).

30. *Estin v. Estin*, 334 U.S. 541 (1948).

II. CHOICE OF LAW GOVERNING CONTRACTS AND MARRIAGE

A. *Two Forms of Evasion*

In the marriage context, a huge number of issues may generate conflict of laws problems. Two general types of cases come to the forefront. In the first type of case, a couple domiciled in Massachusetts gets married there and some years later moves to another state. In this case, the couple has a significant relationship with the state of Massachusetts at the time of their marriage; at that time, it would in fact be unconstitutional to apply the law of any other state to determine the validity of their marriage. Would this subsequent move to another state change the status of their marriage? This case is a strong one for protecting the reliance interests of the couple that married in Massachusetts and had reasonable expectations that their marriage would be valid. In the second type of case, a couple domiciled outside Massachusetts comes to Massachusetts to get married, celebrates the marriage in Massachusetts, and immediately returns home to a state that does not recognize the marriage. This case involves evasion of the couple's restrictive home state law and it is harder to argue that Massachusetts has the right to impose its marriage law on the state where they live simply because they celebrated their marriage in the state of Massachusetts. Because the two cases are quite different, I will deal with them separately, first by describing the usual rules governing conflict of laws and marriage and then comparing those rules to the rules governing other types of contractual arrangements.

B. *The Massachusetts Couple that Moves Elsewhere After Marriage*

The first scenario concerns a couple domiciled in Massachusetts that gets married in Massachusetts, stays in Massachusetts for a substantial period, and then relocates to another state that does not recognize their marriage. Assume Anne and Lily live in Cambridge, Massachusetts. They marry on May 17, 2004, and three years later move into a house that Anne inherited from her father. They continue living in Cambridge for seven more years. They each bear one child using artificial insemination. Then in 2014, after ten years of living together as a married couple in Cambridge, they decide to move to Seattle because Lily's mother lives there and has become ill. Anne sells the house in Cambridge and Anne and Lily move to Seattle to live with Lily's mom, Miriam. They move into Miriam's house. Anne invests the proceeds of the sale of the house previously owned by her in bonds and money market accounts. They continue to live together for three more years. Marital discord arises and in 2017, they separate. Lily sues Anne in state court in Washington to obtain a divorce. What rights, if any, does each party have?

If they had stayed in Massachusetts, Lily would have been able to sue

Anne and obtain a divorce, changing their status from married to unmarried, and Lily would also have been able to sue for equitable distribution of the property acquired during the marriage.³¹ She would have been able to seek child support. However, they are now both domiciled in Washington state and under Washington law, the Massachusetts marriage is void.³² The traditional common law rule, embodied in the First Restatement of Conflict of Laws (1934) was that the validity of a marriage is governed by the law of the place where it is celebrated unless it violates the public policy either of the parties' domicile at the time of the marriage or of the state that is asked to recognize the marriage.³³ The Second Restatement of Conflict of Laws, adopted in 1971, alters this rule by providing that marriages should be governed by the law of the state that has the "most significant relationship" with the parties and the marriage; this state will ordinarily be either the place of celebration or the domicile of the parties.³⁴ The Second Restatement clarifies that a marriage that is valid where contracted should be recognized everywhere unless it violates the "strong public policy" of the state that had the most significant relationship with the parties at the time of the marriage; while the commentary states that the place of celebration may well be the state that has the most significant relationship with the parties and the marriage, the domicile of the parties may also be deemed the most interested state. Thus, as with the First Restatement, the Second Restatement authorizes the state where the parties are domiciled at the time of the marriage to refuse recognition for the marriage that violates the domicile's strong public policy, even if the marriage is valid where celebrated.³⁵

Although the public policy exception was rarely employed and was becoming less used over time,³⁶ it has been statutorily revived in the context of

31. MASS. GEN. LAWS ch. 208, § 34 (2004).

32. On August 4, 2004, Superior Court Judge William Downing declared the Washington state laws that deny the right of same sex couples to marry unconstitutional as deprivations of due process of law under Article 1, § 3 of the Washington Constitution. *Andersen v. King County*, 2004 WL 1738447 (Wash. Sup. Ct. Aug. 4, 2004). If this ruling were to be upheld on appeal, then both Washington and Massachusetts would recognize the legal validity of same sex marriages and the conflict of laws described in this Article would disappear as to couples moving between those two states. Of course the issues would remain for couples from both those states in relation to their contacts with other jurisdictions.

33. RESTATEMENT OF CONFLICT OF LAWS §§ 121, 132, 134 (1934) (place of celebration rule with exception when marriage violates stated public policies of domicile of parties or of another state that is asked to recognize validity of marriage).

34. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971) (marriage governed by law of state which, with respect to particular issue, has "most significant relationship" to spouses and marriage unless marriage violates "strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage").

35. *Id.* § 283, cmt. j.

36. Barbara J. Cox, *Same-Sex Marriage and the Public Policy Exception in Choice-of-Law: Does It Really Exist?*, 16 QUINNIPIAC L. REV. 61, 67-74 (1996).

same sex marriage with the passage of state statutes in two-thirds of the states that expressly declare marriage to be a contract between a man and a woman and/or expressly declare that the state will not recognize foreign same sex marriages as valid.³⁷ Washington statutes provide that marriages between two persons of the same sex are “prohibited” and that a marriage that is prohibited in Washington will not be recognized as “valid” in Washington even if it is “recognized as valid in another jurisdiction.”³⁸ Moreover, the federal Defense of Marriage Act (DOMA) explicitly authorizes Washington to ignore (1) the Massachusetts law authorizing same sex marriages; (2) the Massachusetts “record” of the couple’s marital status;³⁹ and (3) any Massachusetts court judgments “respecting a relationship between persons of the same sex that is treated as a marriage under the laws of [Massachusetts] or a right or claim arising from such relationship.”⁴⁰

Under Washington law, plaintiffs may file for divorce if they are domiciled in Washington and if they are married.⁴¹ If granted a divorce, the court may award alimony and order equitable distribution of property acquired during the marriage.⁴² However, under Washington statutes, Lily and Anne are *not* married, and Washington courts are therefore explicitly ordered to disregard the marriage that was created and recognized under Massachusetts law.⁴³

Assuming the federal DOMA is constitutional, the Washington nonrecognition statute is constitutional, and Lily has a problem. If she wants a divorce, she must relocate to Massachusetts and establish domicile there,⁴⁴ and under *Williams v. North Carolina* (*Williams I* and *Williams II*),⁴⁵ the Massachusetts courts will then have jurisdiction to grant her a divorce—even though Anne, the defendant, does not live in Massachusetts.⁴⁶ However,

37. See Web site of National Gay and Lesbian Task Force (containing a U.S. map showing states with Defense of Marriage Laws or Anti-Marriage Constitutional Amendments), at <http://www.thetaskforce.org/downloads/marriagemap112204.pdf> (last visited Apr. 5, 2005).

38. WASH. REV. CODE § 26.04.020. *But see* Andersen v. King County, 2004 WL 1738447 (Wash. Sup. Ct., Aug. 4, 2004) (holding statute unconstitutional).

39. See U.S. CONST. art. IV, § 1 (“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.”) (emphasis added).

40. 28 U.S.C. § 1738c.

41. WASH. REV. CODE §§ 26.09.020 to .030.

42. *Id.* §§ 26.09.080 to .090.

43. *Id.* § 26.04.010 (Marriage “is a civil contract between a male and a female”); *id.* § 26.04.020(1)(c) (“Marriages . . . are prohibited (c) when the parties are other than a male and a female.”).

44. *Id.* ch. 208, § 4; *Williams v. North Carolina*, 325 U.S. 226 (1945) (*Williams II*); *Williams v. North Carolina*, 317 U.S. 287 (1942) (*Williams I*).

45. *Williams II*, 325 U.S. at 226; *Williams I*, 317 U.S. at 287.

46. Some courts find continuing jurisdiction for a period of time after a domiciliary

because Anne is not domiciled in Massachusetts, the Massachusetts courts still lack jurisdiction to award alimony or equitable distribution of property, under the Supreme Court's ruling in *Estin v. Estin*.⁴⁷ To do that, Lily would have to return to Washington and seek to have the Washington courts first recognize the divorce judgment of the Massachusetts courts and then grant equitable distribution of the property acquired during the marriage. However, the federal DOMA (if constitutional) authorizes Washington courts to refuse to recognize the validity of the original marriage under Massachusetts law and the subsequent divorce judgment premised on the marriage. In fact, DOMA also authorizes Washington to refuse to recognize any "right or claim arising from [a] relationship" that is treated as a marriage under Massachusetts law. The 1998 Washington law that defined marriage as a contract between a man and a woman and explicitly announced a refusal to recognize foreign same sex marriages as valid specifically references the federal DOMA in its Statement of Findings and Intent, including DOMA's permission to ignore any foreign judgments premised on same sex marriages.⁴⁸

If the federal DOMA is constitutional and if the Washington statutes are similarly constitutional, then several consequences follow. First, although Lily and Anne are not married under Washington law, they remain married in Massachusetts. Thus, if Lily were to fall in love with a man and marry him in Washington, she would be married to Bob in Washington and married to Anne

leaves the state. RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 4.20 (4th ed. 2001).

47. 334 U.S. 541.

48. 1998 WASH. LAWS ch. 1, § 1 states:

Finding:

(1) In P.L. 104-199; 110 Stat. 219, the Defense of Marriage Act, Congress granted authority to the individual states to either grant or deny recognition of same-sex marriages recognized as valid in another state. The Defense of Marriage Act defines marriage for purposes of federal law as a legal union between one man and one woman as husband and wife and provides that a state shall not be required to give effect to any public act or judicial proceeding of any other state respecting marriage between persons of the same sex if the state has determined that it will not recognize same-sex marriages.

(2) The legislature and the people of the state of Washington find that matters pertaining to marriage are matters reserved to the sovereign states and, therefore, such matters should be determined by the people within each individual state and not by the people or courts of a different state.

1998 WASH. LAWS ch. 1, § 2 states:

Intent:

(1) It is a compelling interest of the state of Washington to reaffirm its historical commitment to the institution of marriage as a union between a man and a woman as husband and wife and to protect that institution.

(2) The court in *Singer v. Hara*, 11 Wn. App. 247 (1974) held that the Washington state marriage statute does not allow marriage between persons of the same sex. It is the intent of the legislature by this act to codify the *Singer* opinion and to fully exercise the authority granted the individual states by Congress in P.L. 104-199; 110 Stat. 219, the Defense of Marriage Act, to establish public policy against same-sex marriage in statutory law that clearly and definitively declares same-sex marriages will not be recognized in Washington, even if they are made legal in other states.

in Massachusetts. If Lily ever returns to Massachusetts, she could be guilty of bigamy under Massachusetts law and remains obligated to support Anne as well as Anne's child. To change from being married to unmarried, Lily would have to relocate to Massachusetts, establish domicile there, and then sue Anne for divorce, something she is entitled to do under *Williams I*.⁴⁹ If Anne does not appear in the Massachusetts courts, Anne can contest the fact that Lily was domiciled in Massachusetts in a subsequent proceeding in Washington, which is free to determine that Lily did not change her domicile to Massachusetts (something she is entitled to do under *Williams II*), thereby finding the divorce to be invalid.⁵⁰

Second, even if Lily is able to establish domicile in Massachusetts and obtain a divorce, the Massachusetts courts' jurisdiction over defendant Anne extends only to the termination of the marriage, under *Williams I*. However, because Anne no longer lives in Massachusetts, has not had a domicile there for a significant period of time,⁵¹ is not present there, and has not consented to personal jurisdiction there, the Massachusetts courts lack personal jurisdiction over Anne sufficient to grant equitable distribution of the property acquired by the parties during their marriage.⁵² To obtain equitable distribution, Lily has to return to Washington, sue Anne there, try to get the Washington courts to recognize the Massachusetts marriage at least to the extent of recognizing the Massachusetts divorce judgment, and then seek to have the Washington court apply either Massachusetts law or Washington law to order equitable distribution of the property acquired by the parties during the marriage. However, as noted earlier, if the Washington statute prohibits recognition of the marriage and also prohibits recognition of the Massachusetts divorce judgment (because it is predicated on a valid Massachusetts marriage), then no property distribution can occur because Washington does not recognize the marriage or the divorce judgment as valid.

Third, Lily could try to get the Washington courts to order a common law equitable remedy of imposing a constructive trust on the parties' property and dividing it equitably, not because they had a valid marriage, but because they had an express or implied contract to share their property and to equitably distribute it if they separate and because a failure to equitably distribute their property would result in unjust enrichment.⁵³ Washington has done this in the

49. 317 U.S. at 287.

50. *Williams II*, 325 U.S. at 226.

51. WEINTRAUB, *supra* note 46.

52. *Armstrong v. Armstrong*, 350 U.S. 568 (1956) (Black, J., concurring) (holding that although Florida could grant plaintiff husband divorce over wife, who was no longer domiciled in Florida, it had no jurisdiction to determine questions of alimony or property distribution given wife's domicile in Ohio and her lack of contacts with Florida).

53. *Vasquez v. Hawthorne*, 33 P.3d 735 (Wash. 2001) (remanding to determine whether survivor of same sex couple had equitable right to some or all of deceased partner's property); *Connell v. Francisco*, 898 P.2d 831 (Wash. 1995) (equitable distribution of

case of unmarried male-female couples and has suggested that such a remedy might be available in the case of a same sex couple.⁵⁴ However, there is an impediment to creating common law equitable rights here; Washington statutes declare in a forthright manner that same sex marriages violate Washington public policy. It arguably violates Washington policy to allocate property rights on the basis of a marriage relationship that is not only unrecognized but also “prohibited” in Washington. Although no court has yet construed the Washington DOMA to require this result, it would be a permissible interpretation of the law. Thus, even if a court wanted to create such an equitable remedy, the Washington state statutory version of the Defense of Marriage Act may deprive the Washington courts of the power to impose a common law remedy.

In fact, Lily may not be able to obtain a divorce or property distribution at all. Washington state does not consider her to be married, but this changes in no way the fact that she is still married in Massachusetts and that if either she or Anne returns there, Massachusetts will consider them married. Married partners have a duty of mutual support. Because the Supreme Court has also validated “tag” jurisdiction,⁵⁵ Anne cannot return to Massachusetts without risking being served with a summons by Lily when she steps off the plane to face either a lawsuit for separate maintenance or for divorce. However, as long as Anne avoids going to Massachusetts (or otherwise establishing sufficient ties there to create general jurisdiction), Lily has no power to obtain property that she would otherwise own under the divorce laws of Massachusetts.

As long as she avoids going to Massachusetts, Anne has successfully evaded her obligations under Massachusetts law as a spouse and Lily is entirely without any remedy. Since they are not married, Anne may also not be liable for child support in Washington either. After all, Lily’s child is not Anne’s child if they are not married, and they are not married under Washington law. Because they are not married, Anne is a legal stranger to Lily’s child. Anne has walked out on Lily and Lily’s child (who is also Anne’s child under the law of Massachusetts) with no obligations of any kind—other than the need to stay out of Massachusetts.

In the male-female marriage context, states uniformly refuse to allow a married partner to escape completely the financial obligations of marriage merely because both parties relocate to another state. There are choice of law issues, however, that arise in this context. For example, choice of law issues often arise when a couple moves from a separate property state to a community property state. When couples divorce in separate property states (where

property of unmarried male-female couple); *Gormley v. Robertson*, 83 P.3d 1042 (Wash. Ct. App. 2004) (ordering equitable distribution of property of unmarried same sex couple upon separation).

54. *Vasquez*, 33 P.3d 735; *Connell*, 898 P.2d 831; *Gormley*, 83 P.3d 1042.

55. *Burnham v. Superior Court*, 495 U.S. 604 (1990).

property earned during the marriage is owned by the one who earned it), their property is subject to equitable distribution on divorce. When couples divorce in community property states, the property earned during the marriage is community property (jointly owned by both spouses) and is subject to equitable division on divorce with similar results. However, community property states traditionally defined community property as property earned during marriage while present in a community property state. Property earned while resident in a separate property state was not community property. Thus a couple that lived for forty years in a separate property state (such as Massachusetts) and moved to a community property state (such as Washington state) and divorced one year later would have earned only one year of community property. Because the property earned in Massachusetts is separate property and separate property is not generally equitably distributed on divorce in a community property state, the amount that is subject to distribution is very small. Distribution of this small amount violates the policy of both states. If the couple had lived and divorced only in Massachusetts, a marriage of forty years would likely result in equal distribution of the property acquired during the marriage; the same result would obtain if they had lived all their lives in Washington. The fact of migration from Massachusetts to Washington thus causes a result neither state wants. For this reason, the courts and legislatures invented the concept of “quasi-community property” which treats separate property earned in a separate property state as community property when one of the parties files for divorce.⁵⁶ Washington state statutes avoid this problem by authorizing the equitable division of both community and separate property with the same result.⁵⁷

How does this result compare to contractual situations that arise outside the marriage context? In *Pacific Gamble Robinson Co. v. Lapp*,⁵⁸ a married man entered into a loan contract in Colorado. He defaulted on that contract and moved with his wife to Washington. Under Colorado law, the contract was valid and the promisee had a valid claim for breach of contract. There is no question that the only law that could constitutionally apply to the contract was Colorado law since at the time the contract was made, Colorado was the only state with any relevant contacts with the parties and the transaction and the subsequent move of one of the contracting parties to another state could in no way alter the vested rights of the promisee under Colorado law.⁵⁹ However, when the promisee sued in Washington state court, it sought to attach the husband’s earnings to pay off the debt.

56. See, e.g., *Cameron v. Cameron*, 641 S.W.2d 210 (Tex. 1982); *Addison v. Addison*, 399 P.2d 897 (Cal. 1965). But see *Estate of Hanau v. Hanau*, 730 S.W.2d 663 (Tex. 1987) (refusing to recognize quasi-community property for purposes of inheritance).

57. WASH. REV. CODE § 26.09.080.

58. 622 P.2d 850 (Wash. 1980), *overruled on other grounds by* *Haley v. Highland*, 12 P.3d 119 (Wash. 2000).

59. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

The difficulty was that this violated Washington law at the time⁶⁰ because the husband's future earnings in Washington were community property owned equally by husband and wife and which could not be attached to pay off a debt that both spouses did not undertake jointly. Under Colorado law, the creditor could indeed attach the husband's earnings to pay off his separate debt. The Washington Supreme Court held that the creditor could attach the husband's future earnings in Washington state because holding otherwise would enable the husband to skip out on his concededly valid Colorado obligations merely by relocating to Washington, and Washington did not want to be a harbor for residents of other states fleeing their valid financial and contractual obligations.⁶¹

The importance of this ruling is discussed in the *Lapp* dissent. Although Judge Horowitz conceded that the defendant had valid contractual obligations and that Colorado law was the only law that could apply to those obligations, he nevertheless would have applied Washington law to the issue in the case, depriving the creditor of the power to attach the husband's future Washington earnings to pay off the valid Colorado debt. The question of what funds are available to satisfy the judgment is traditionally an issue of procedure governed by the law of the forum that is asked to enforce or satisfy the judgment—in this case, Washington. Moreover, under Washington community property law, the husband's future earnings in Washington are jointly owned by the wife and not subject to attachment for the husband's separate debts. If recent immigrants to Washington are treated the same as long term residents, then this new Washington wife had the right to share equally in property acquired during the marriage in Washington state. Depriving her of that right because she used to live in a state that did not protect her rights to property acquired during the marriage would deny her the benefits of the equality rights guaranteed to women under Washington marital property law. Nor is this unfair to the creditor because this was an unsecured debt and the creditor would have recovered nothing had the debtor died or gone bankrupt. The right to collect the judgment was always contingent on the debtor being able to pay.

The majority however rejected these arguments and by a vote of 6 to 1 forced the husband to pay off his out-of-state debt out of his future Washington earnings, despite the fact that this violated Washington marital property law and policy. Why? Colorado had an interest in “prevent[ing] the flight of debtors to other states to avoid payment of otherwise legitimate debts”⁶² and because “this state has no policy interest in maintaining within its borders a sanctuary for fleeing debtors.”⁶³ Nor could this result be surprising to the promisor who “could not justifiably believe that the obligation could be fairly avoided by the

60. Washington law was later changed. *Haley*, 12 P.3d at 119.

61. *Pacific Gamble*, 622 P.2d at 855-56.

62. *Id.* at 855.

63. *Id.* at 856.

device of removing to a state where [his] wages would not be subject to the debt.”⁶⁴

Now it is true that movement by a married couple to another state may often work to *increase* their obligations. In the ordinary contracts case, movement of both parties to another state generally will not alter their contractual obligations; the fact that both parties have moved to another state may give that state an interest in their welfare but it does not alter the parties’ expectations that the law of the place where the contract was made would apply. One exception to this principle is a case in which the new domicile finds the contract to be exploitative or fundamentally unfair. If enforcement of the contract violates the public policy of the new domicile, that state may choose not to enforce the contract on the grounds that movement of both parties to the new domicile constitutes a legitimate form of submission to the rules of a new sovereign that has an interest in regulating their relationship. For example, a couple married in California with a valid premarital agreement that denies one spouse any property rights on divorce may be subject to the regulatory law of New Jersey once the couple moves there, and the couple may face a ruling by the court at their new domicile that denies enforcement to the premarital agreement if their new domicile at the time of divorce (New Jersey) deems the contract fundamentally unfair.

This was arguably the situation in the leading case of *Allstate Insurance Co. v. Hague*,⁶⁵ which upheld the power of Minnesota to apply its law of insurance contracts to a contract made in Wisconsin when the insurance company did business in both states, the insured worked in Minnesota, and the wife of the insured (who would benefit from the policy after his death) moved to Minnesota after the death of the insured, making Minnesota the common domicile of both parties. Minnesota found Wisconsin’s anti-stacking policy to be a form of fraud under which the insured paid three premiums for uninsured motorist coverage and received only one payment. Minnesota therefore applied its own contract policy to allow stacking, requiring three payouts rather than one, to protect its new domiciliary from what it saw as fundamentally unfair contract terms.

While the court at the new forum may increase the contractual obligations of one of the parties, it is less likely for the court to let the parties out of their contractual obligations entirely just because they have jointly moved to another jurisdiction. For example, it is unlikely that a court will enforce a premarital agreement that is valid under the law of the domicile (and forum) at the time of divorce if the contract was made at the place of celebration and that state would have deemed the contract unconscionable. It is likely, in other words, that movement from one domicile to another will increase the parties’ obligations

64. *Id.*

65. 449 U.S. 302.

but not decrease them.⁶⁶ This can occur, in rare cases, however, if the new domicile views the very existence of the contract as exploitative. For example, a prostitution contract enforceable in Nevada may not be enforceable in another state where both parties have moved. However, even in a prostitution case, although a court will certainly reject a request for specific performance, it might well require payment for services that have already been rendered in a state that finds those services lawful. If the parties were located in Nevada at the time of the contract, and the contract was lawful under Nevada law, it would be unconstitutional to apply the law of any state other than Nevada to the contract, and a court hearing a lawsuit in another state to enforce the Nevada contract may well be obligated to hear the case and apply Nevada law.⁶⁷ Service contracts are almost never specifically enforced in any event to avoid involuntary servitude, and the failure to pay for previously provided services might itself be viewed as a form of exploitation. To fail to require one person to pay for services rendered results in unjust enrichment even if the court at the new domicile would rather that contract not have occurred at all.

In any event, it has not been the tradition in U.S. history for states to refuse to recognize out-of-state marriages when the couples come to court at their new domicile to seek a divorce. Under the “incidental question” doctrine, the courts have traditionally recognized marriages created in another state where the matter at bar relates solely to property disputes incidental to the relationship at divorce or death, rather than claims by the parties seeking to have their spousal relationship recognized in the forum state.⁶⁸

In the same sex marriage context, exploitation appears not to be an issue. The parties are both adults and they have a constitutional right to engage in sexual relations with each other and, under Massachusetts law, a fundamental right to marry. This case is different from those involving underage marriages

66. *Cf. id.* (increasing the contractual obligations of an insurance company when one contracting party moved to another state where the insurance company also did substantial business when the husband was employed in that state and the injury could easily have happened there); see also Andrew Koppelman, *Same-Sex Marriage and Public Policy: The Miscegenation Precedents*, 16 QUINNIAC L. REV. 105 (1996) (arguing that state DOMAS should be interpreted to authorize recognition of out-of-state same sex marriages at least as to marriages of persons domiciled in Massachusetts at time of celebration when they travel to other states and as to incidental questions such as inheritance that do not involve cohabitation in the forum).

67. *Allstate Ins.*, 449 U.S. 302 (courts may not apply the law of a state that has no significant contact with the parties and the transaction or occurrence); *Hughes v. Fetter*, 341 U.S. 609 (1951) (Full Faith and Credit Clause prohibits court from refusing to hear a case based on the law of another state).

68. WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, *UNDERSTANDING CONFLICT OF LAWS* § 119[c] (3d rev. ed. 2003); see 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, 581-82 (1994) (arguing that states should recognize legal incidents of marriages that are valid where celebrated).

where one state may have an interest in preventing what it sees as exploitation of a younger person by an older person,⁶⁹ or possible exploitation resulting from polygamy. The same sex marriage context does not raise issues of exploitation. Thus the first major reason for regulating contracts appears to be missing in the same sex marriage context. The states that refuse to recognize same sex marriages do not justify their refusal on the ground of preventing exploitation.

These states and the federal government have justified their refusal to recognize same sex marriages on the ground that such marriages cause externalities.⁷⁰ Yet it has never been quite clear how same sex marriages undermine the institution of marriage. If one views marriage as a desirable type of relationship, then recognizing same sex marriages arguably supports the institution of marriage by suggesting that marriage is normative, i.e., that people should get married and that it applies to both gay and straight couples. This reasoning has caused some gay and lesbian advocates to eschew promoting same sex marriage on the ground that other models of association are just as valuable or even to be preferred. Of course, if one views the male-female marriage relationship as the bedrock of civilization, then presenting the option of choosing a same sex partner may undermine that institution by letting people know they can choose a different model of family life. This will arguably undermine traditional marriage if it induces people who would otherwise marry persons of the opposite sex to choose to marry persons of the same sex. But this will only happen, of course, assuming that heterosexuality is very fragile and that once people know they can choose same sex partners, they will choose to do so in droves. However, there is no evidence that heterosexuality is so fragile. People have been choosing same sex partners when marriage was not available and the knowledge of such relationships has not caused a large number of otherwise straight people to choose to become gay. Of course, this has undoubtedly happened in some cases where individuals who are bisexual may choose same sex partners once it becomes socially acceptable to do so.

Perhaps the real worry is not that allowing same sex marriage will promote homosexuality, but that recognition of same sex marriage may both give such relationships a government stamp of legitimacy and increase its *social* acceptability, whether permanently in a marriage relationship or in some other kind of relationship. In other words, the externality that appears to be present here is a governmental interest in inducing individuals to see certain sexual and familial relationships as legitimate and others as suspect. This interest is

69. See *State v. Graves*, 307 S.W.2d 545 (Ark. 1957) (deciding whether to recognize underage marriage that was valid at place of celebration).

70. One example of a state's refusal to recognize another state's law in order to avoid negative externalities is a state's refusal to enforce a noncompetition contract clause when an individual moves to another state where enforcement of the clause may impede competition at the new domicile.

essentially a moral one. The problem, of course, is that this government interest has been undermined by the reasoning of *Lawrence v. Texas*.⁷¹ If individuals have a fundamental constitutionally protected liberty interest in engaging in intimate relationships of a sexual nature with adults of their same sex, there would seem to be no legitimate state interest in discouraging such relationships. Alternatively, if the government interest is in establishing a particular religious definition of marriage (given that some religions celebrate—in both senses of the word—same sex marriages), then asserting this moral interest to justify nonrecognition would seem to be prohibited by the Establishment Clause.

Finally, even if the state at the new domicile has an interest in refusing to recognize the out-of-state marriage because it sees negative externalities in doing so, it is crucial to see that the refusal to recognize the legal incidents of the marriage allows one of the parties to escape economic and legal obligations that remain valid under the law of the place of celebration and which could be vindicated there should the parties ever return to that state. The question then becomes whether the new domicile in a state like Washington has sufficiently strong interests in refusing to recognize the Massachusetts marriage to allow the contracting parties to escape their obligations which are concededly valid under the law of Massachusetts and which could be vindicated and legally enforceable should the parties ever return to Massachusetts. The incidental question doctrine has generally been employed to allow recognition of an out-of-state marriage in such situations precisely because the forum's public policy is not strong enough to justify depriving a spouse of rights to inheritance when a spouse dies or equitable distribution of property when the couple divorces.

Both in the marital context and the contractual context outside marriage, the relocation of both contracting parties to another state has not historically relieved them of their contractual obligations validly entered into in another jurisdiction when that jurisdiction was the only one constitutionally empowered to regulate the agreement at the time they made it. The only exceptions are contracts that are exploitative and whose performance or enforcement at the new domicile would have adverse externalities. However, same sex marriages are not exploitative and the only adverse externalities are based on government interests that amount to nothing more than moral or religious views about which types of relationships should be called "marriages." Alternatively, the interest is in discouraging lifelong commitments between partners who, after *Lawrence*, have a constitutionally protected liberty interest in their intimate relationship. These government interests are either weak or illegitimate as reasons to refuse to recognize the marriage. In the absence of a legitimate government interest in avoiding exploitation or adverse externalities, it has traditionally been deemed unconstitutional for a court at the new forum to refuse to recognize obligations that arose under a valid contract made in another state. Such a refusal would allow one individual to walk away

71. 539 U.S. 558 (2003).

completely from valid contractual obligations that would remain enforceable at the place of contracting. Of course, the federal Defense of Marriage Act (DOMA), if constitutional, authorizes exactly this kind of evasion of obligation.

C. The Out-of-State Couple that Celebrates Their Marriage in Massachusetts

The case is different for the couple from a state like Washington that goes to Massachusetts to get married and then immediately returns home to Washington.⁷² For one thing, the marriage may not even be valid under Massachusetts law. Massachusetts adopted the Uniform Marriage Evasion Act in 1913 and one part of that law (sometimes called the Reverse Evasion Act) prohibits individuals from marrying in Massachusetts if the parties reside in another state and their marriages “would be void if contracted” in that state.⁷³ The constitutionality of this statute is in doubt in this case because the Massachusetts same sex marriages are premised on a finding that denying the right to marry a person of the same sex violates both equal protection and due process guarantees in the state constitution. Thus a statute that would otherwise admirably defer to the ability of other states to govern marriages of their own domiciliaries⁷⁴ may itself be unconstitutional under the *Goodridge* ruling. Governor Romney announced his intention to enforce this law by asking for proof of residency before issuing a marriage license for same sex couples.⁷⁵ The Reverse Evasion Act has now been challenged in court in at least two lawsuits—one brought by thirteen city and town clerks and another by eight gay and lesbian couples.⁷⁶ The first of these cases has already resulted in a

72. See Mark Strasser, *Baker and Some Recipes for Disaster: On DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence*, 64 BROOK. L. REV. 307 (1998) (arguing that the Full Faith and Credit Clause requires recognition of marriages valid where celebrated if the parties were domiciled in that jurisdiction at the time of celebration); Mark Strasser, *For Whom the Bell Tolls: On Subsequent Domiciles' Refusing To Recognize Same-Sex Marriages*, 66 U. CIN. L. REV. 339 (1998) (arguing that states must recognize same sex marriages of couples domiciled at place of celebration but are not constitutionally obligated to recognize marriages of couples who seek to evade their home state's restrictive marriage laws by marrying in another state that would validate their marriage).

73. MASS. GEN. LAWS. ch. 207, § 11 (2004).

74. See Silberman & Wolfe, *supra* note 16.

75. To avoid charges of discrimination, Governor Romney ordered city and town clerks to also seek proof from all marriage license applicants from other states (including male-female couples) that their home states do not have laws that would disable them from marrying. Shaun Sutner, *Law Can Regulate Same-Sex Marriage: Judge Lets Stand Statute from 1913*, TELEGRAM & GAZETTE (Worcester, Mass.), Aug. 19, 2004, at A1.

76. See http://www.glad.org/GLAD_Cases/index.shtml#civilrights (last visited Apr. 5, 2005) (Johnstone v. Reilly) (suit filed by thirteen city and town clerks); Cote-Whitacre v. Dep't of Public Health, 18 Mass. L. Rep. 190 (Super. Ct. 2004) (suit by eight gay and lesbian couples); Yvonne Abraham, *Two Lawsuits To Challenge 1913 Law: GLAD Calls Law Discriminatory*, BOSTON GLOBE, June 17, 2004, at B5; Pam Belleck & Katie Zezima, *Suits To Fight Ban on Some Gay Marriages*, N.Y. TIMES, June 17, 2004, at A22.

ruling by the trial judge upholding the 1913 law while criticizing it.⁷⁷

Assuming a Washington couple could get married in Massachusetts without first obtaining residence in Massachusetts, the case to force Washington to recognize the Massachusetts marriage is much harder than it is in the case of a long time couple from Massachusetts. The Washington couple is clearly attempting to avoid the restrictive Washington law merely by stepping across the border. If two people in Washington try to enter a contract that violates Washington statutory or common law policy, it will be void if it is intended to be performed in Washington. The fact that they step across the border and sign the contract in a state that would validate the contract will change nothing. Although the First Restatement had a fairly rigid place of the making rule, no state today would allow the mere fact of signing the agreement in another state to allow the parties to evade the regulatory law of the state where the parties reside and where the contract is intended to be performed. The parties may enter a contract with a choice of law provision that chooses the law of another state to govern their agreement, but under the generally followed Second Restatement of Conflict of Laws, a choice of law clause will not be enforced if the state whose law is chosen is not the state with the most significant relationship with the parties and the transaction and if the law of the chosen state violates a fundamental public policy of the state that does have the most significant relationship with the parties and the transaction as long as that state has a materially greater interest in applying its law than does the state whose law was chosen in the contract.⁷⁸

In this case, it is elementary conflict of laws reasoning that the current domicile of the parties is almost certain to be the state that has the most significant relationship with the parties and the transaction. That is because the transient connection with Massachusetts does not give Massachusetts a greater interest in applying its law than the state where the parties reside, especially when the state of their residence has a firm public policy denying the parties the right to enter a contract of this kind.

However, Section 6 of the Second Restatement of Conflict of Laws defines the factors to consider in determining which state has the most significant relationship with the parties and the transaction. Those factors include:

- (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

The factors that favor Washington law are (b) and possibly (d) and (e). Washington state policies (factor (b)) strongly disfavor recognition of same sex

77. Sutner, *supra* note 75.

78. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (1971).

marriages. It can also be argued that, because same sex marriage is such a minority position that the “basic policies underlying the field” of marriage law (factor (e)) limit marriage rights to male-female couples. Although the parties may claim to have justified expectations based on their Massachusetts marriage, it can be argued that those expectations are not “justified” because the parties’ connection with Massachusetts is so transient and they have no right to fly to Massachusetts to get married and evade the regulatory laws of their home state, which declare such marriages void. One could also argue that marriage policy is emotional, controversial, and central to a community’s form of life and that the needs of the interstate and international systems (factor (a)) are best served by letting states determine the marital status of their own residents and eschewing the power to export their marriage policies to residents of other states.⁷⁹

However, an equal number of these factors do favor recognition of Massachusetts law.⁸⁰ First, factor (f), “certainty, predictability and uniformity of result,” is more likely to be achieved by a place of celebration rule than a place of domicile rule.⁸¹ It is often hard to tell what a person’s domicile is while the place of the marriage ceremony is absolutely certain. How long must a person live in Massachusetts to be a domiciliary? A statute may answer this question, but a court in Washington that wishes to discourage evasion of its marriage laws may conclude that the parties did not change their domicile to Massachusetts even if they stay there a year if it appears that the parties intended to return to Washington after their Massachusetts marriage all along. And Washington may choose to apply its own definition of domicile rather than that of Massachusetts to determine whether a domicile was established in Massachusetts. To the extent we need an answer to the question of whether the parties are married, a place of celebration rule gives much more predictability in a multistate system than a domicile rule. For the same reason “ease in the determination and application of the law to be applied” under factor (f) would be far better served by choosing a place of celebration rule than a domicile rule.

Second, although it can be argued that the parties’ expectations that they would be married may be deemed unjustified, the opposite can be argued as well under factor (d).⁸² If the Massachusetts version of the Uniform Marriage

79. See Silberman & Wolfe, *supra* note 16.

80. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283, cmt. j (1971) (noting that place of celebration is arguably state with “dominant interest in the determination” of validity of marriage and that application of this law will generally promote “justified expectations” of parties, while acknowledging that the domicile of parties at time of marriage may have “an interest sufficiently great to justify the invalidation of a marriage which meets the requirements of the state where it was contracted”).

81. *Id.* cmt. h (“The validity of a marriage is of utmost concern to the parties and their children; so the choice of the applicable law should be simple and easy in application and should point to the law most likely to have been consulted by the parties”).

82. *Id.* cmts. h, j (noting that the justified expectations of the parties support a place of celebration rule, although this factor may be outweighed by the strong policy interests of the

Evasion Act is unconstitutional (and Massachusetts is obligated under the state constitution to extend the same marriage rights to nonresidents as to Massachusetts residents), then the nonresident parties who celebrate their marriage in Massachusetts are indeed married under Massachusetts law and nothing that Washington does can change that. Thus they certainly do have expectations based on their marriage that would be valid if they moved to Massachusetts. And if Washington law applies to them, they are both married (under Massachusetts law) and not married (under Washington law). The protection of justified expectations factor in section six of the Second Restatement is usually interpreted as favoring freedom of contract to vindicate the expectations of the parties based on their commitments to each other. If it is important for there to be a single answer to the question of whether they are married (and I will argue below that this is the case), then the Second Restatement strongly points to application of Massachusetts, not Washington, law.

Third, what are Massachusetts's policy interests under factor (b)?⁸³ Massachusetts does have an interest in validating marriages celebrated there and allowing its married couples to travel to other states. If the only Massachusetts marriages that are respected in other states are those of couples domiciled in Massachusetts at the time of marriage, then all Massachusetts couples face some risk that their marriages will be declared void in other states if there is some question of their domicile—a question that is very common. Thus, although Washington has a strong interest in applying its policy to Washington couples who seek to evade restrictive Washington law by marrying in Massachusetts, Massachusetts has an equal interest in validating marriages celebrated there both for Massachusetts residents and nonresidents whose marriages will be recognized should they ever come back to Massachusetts. Recall also that marriage is not an ordinary contract. It is based on a license issued by the state and solemnized in a ceremony in which someone says, "By the authority invested in me by the Commonwealth of Massachusetts, I hereby declare you to be spouses." The resulting status cannot be sundered without a court judgment because the status confers both rights and obligations which the parties cannot slough off without a judge determining that the arrangements ending the marriage comply with Massachusetts public policy, including obligations of child support and division of property. Massachusetts has continuing interests in having couples married there carry out their marital obligations.

Fourth, although Massachusetts law is a minority rule, there has long been

parties' domicile).

83. *Id.* cmt. h. ("there is a strong inclination to uphold a marriage because of the hardship that might otherwise be visited upon the parties and their children"); *id.* cmt. j ("Upholding the validity of marriages is a basic policy in all states" and noting that the place of celebration may well be the "state with the dominant interest in the determination" of whether the marriage is valid).

a presumption in favor of the validity of marriage.⁸⁴ It may not be an exaggeration to say that the traditional choice of law rule was not a place of celebration rule but a presumption of validity rule—recognizing marriages as valid if valid *either* at the place of celebration or at the domicile.⁸⁵ It can be argued therefore that application of Massachusetts law better accords with the basic policies underlying the field of law (factor (e)).

Finally, the “needs of the interstate and international systems” are arguably better served by a place of celebration rule, both because that rule is more predictable and because a contrary rule would discourage Massachusetts couples from traveling or engaging in commerce in other states. In addition, the possibility of moving to another state and acquiring an additional spouse (one under Washington law and one under Massachusetts law) may create numerous further complications. Suppose Lily is married to Anne in Massachusetts but to Josh in Washington. Lily owns real property in Cape Cod and holds money market accounts in a New York bank. After Lily’s death, who is considered the surviving spouse? Does Anne get the Massachusetts house and Josh get any property not located in Massachusetts? The needs of the interstate and international systems are better served by having a single clear answer to the validity of marriage and a place of celebration rule is the only one that will do the job.

Attempting to identify the state that has the “most significant relationship” with the parties and their marriage is not easy, especially in our example of a couple from Washington who goes to Massachusetts to marry, then returns to Washington, where the marriage is void. On one hand, the current domicile (Washington) has perhaps the strongest connection to the parties at the time the divorce is sought. On the other hand, Massachusetts clearly had a significant connection to the parties and the transaction at the time of the marriage ceremony. Moreover, because it is important to know whether one is or is not married and because movement among the states of the Union is important to interstate commerce and because justified expectations arise from the presence of a marriage that is concededly valid in one state, the needs of the interstate system push heavily towards validating marriages that are valid under the law of the place where celebrated. If that is so, the factors pushing toward Massachusetts as the applicable law may outweigh the factors pushing toward Washington, making Massachusetts the state with the most significant relationship with the parties and the transaction.

Even if we find that Washington has the most significant relationship with the parties and the transaction at the time of the divorce, then the Second Restatement of Conflict of Laws requires us to ask whether Washington has a materially greater interest than Massachusetts and whether the Washington policy is “fundamental.” It is not clear how Washington’s interest is greater

84. *Id.* cmts. h, j.

85. RICHMAN & REYNOLDS, *supra* note 68.

than Massachusetts's interest. Washington wishes to determine the marital status of its residents and Massachusetts wishes other states to recognize the validity of marriages conducted there, especially for Massachusetts domiciliaries, and if Massachusetts marriages can be ignored if the parties were not domiciled in Massachusetts at the time of the marriage, this may put many Massachusetts marriages in doubt. Moreover, it is not clear why Washington policy is "fundamental." Same sex relationships used to be criminalized, but they have not been criminalized in many states for a long time and after *Lawrence v. Texas*⁸⁶ it is unconstitutional to do so. Other void marriages that violate fundamental public policies remain criminal, such as incestuous and bigamist marriages. If the policy is one of moral condemnation alone, this interest appears insufficient to justify the refusal to recognize the Massachusetts marriage.⁸⁷ If it is based on adoption of a particular religious creed, this may violate the Establishment Clause because it endorses a particular set of religious practices and refuses to respect others.

That being said, this is a much harder case for recognizing the validity of the Massachusetts marriage under traditional conflict of laws analysis than our earlier case of the marriage of a long time Massachusetts couple. However, the thesis of the Article is that things may look different if we focus on obligations rather than rights. If the Uniform Marriage Evasion Act is repealed or declared unconstitutional, then the Massachusetts marriage is clearly valid in Massachusetts even if the couple is domiciled in Washington at the time of celebration. This means that the parties have obligations to support each other and each other's children under Massachusetts law.⁸⁸ If the parties were ever to be found in Massachusetts, one spouse could serve the other with a summons, obtain a divorce, and seek distribution of property and child support. This means that there are valid obligations under Massachusetts law should the Massachusetts courts ever get jurisdiction over the parties. One might even argue that marrying in Massachusetts should be tantamount to acquiescence in personal jurisdiction in Massachusetts courts to enforce the obligations that go along with marriage. In any event, when we consider the obligations that go along with marriage, this case begins to look more like our first case. A defendant in a lawsuit in Washington will hide behind Washington law, claiming that there is no marriage so there are no obligations. The plaintiff will try to claim that there are obligations that persist under Massachusetts law. If the Washington court does not listen, then just as in our first case, Washington will have aided one of the spouses in evading her persisting obligations under foreign law.

86. 539 U.S. 558 (2003).

87. *Id.*

88. See Seth F. Kreimer, *Territoriality and Moral Dissensus: Thoughts on Abortion, Slavery, Gay Marriage and Family Values*, 16 QUINNIPIAC L. REV. 161, 182-89 (1996) (discussing the issue of child support in the context of interstate recognition of same sex marriage).

III. FULL FAITH AND CREDIT FOR SAME SEX MARRIAGES

A. *Constitutionality of the Public Policy Exception*

Because of the federal Defense of Marriage Act (DOMA) and the state DOMAs, the question now is not whether there should be a domicile rule for marriage validity or whether there should be a public policy exception to the place of celebration rule. Rather, the question is whether the public policy exception is constitutional. Various arguments have been made to interpret the Full Faith and Credit Clause to require states to recognize marriages that are valid where celebrated even though those marriages violate the forum's public policy.⁸⁹ Some of them rest on the justifications for the place of celebration rule or a substitute choice of law rule that chooses the law that would validate the marriage. As William Richman and William Reynolds note, "the validation rule confirms the parties' expectations, it provides stability in an area where stability (because of children and property) is very important, and it avoids the potentially hideous problems that would arise if the legality of the marriage varied from state to state."⁹⁰ The difficulty with this line of argument is that the traditional approach (applying the law of the place of celebration or choosing the law that validates the marriage) was always limited by the proviso that such laws would not be applied if they violated a strong policy of the parties' domicile or another state that is asked to recognize the marriage.⁹¹ The public policy exception, although much criticized,⁹² is part of our legal tradition. Under Justice Scalia's reasoning in *Sun Oil Co. v. Wortman*,⁹³ a traditional choice of law rule is almost automatically constitutional.

89. See Henson, *supra* note 68; Evan Wolfson & Michael F. Melcher, *Constitutional and Legal Defects in the "Defense of Marriage" Act*, 16 QUINNIPIAC L. REV. 221 (1996).

90. RICHMAN & REYNOLDS, *supra* note 68; see also Henson, *supra* note 68 ("Because marriage is a long continuing relationship, there normally is a need that its existence be subject to regulation by one law without occasion for repeated re-determination of the validity. Human mobility ought not to jeopardize the reasonable expectations of those relying on an assumed family pattern. Consequently, the courts will usually look to a law deemed to be appropriately applicable to the parties at the time the relationship is begun.").

91. See Kreimer, *supra* note 88; Linda J. Silberman, *Can the Island of Hawaii Bind the World? A Comment on Same-Sex Marriage and Federalism Values*, 16 QUINNIPIAC L. REV. 191 (1996).

92. The Uniform Marriage Evasion Act, passed in only a few states (Illinois, Vermont, Wisconsin, and Massachusetts), denied recognition to a marriage if the couple married outside their home state and the marriage was void at home even if valid where celebrated. Barbara Cox, *Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033, 1074. This Act was withdrawn by the Commissioners on Uniform State Laws as inconsistent with the policies promoting marriage validation under the Uniform Marriage and Divorce Act which did not have a public policy exception. Cox, *Same-Sex Marriage and the Public Policy Exception*, *supra* note 36; Cox, *Same-Sex Marriage and Choice of Law*, *supra*.

93. 486 U.S. 717 (1988).

Even if we assume that the Court would reject this automatic analysis and substitute the interest analysis of *Allstate Insurance Co. v. Hague*⁹⁴ to determine the constitutionality of the Washington DOMA⁹⁵ (and perhaps the federal DOMA),⁹⁶ it is still a hard case to make under conventional principles of constitutional law that Washington is constitutionally required to recognize Massachusetts same sex marriages under the Full Faith and Credit Clause. This is because family law is local and the law of the parties' domicile normally determines their marital rights both during the marriage and at divorce.⁹⁷ A couple that moves to Washington cannot be unfairly surprised that its rights are governed by the law of their new domicile. Nor could Washington couples be surprised that Washington will not recognize an out-of-state marriage that violates its public policy. Our legal tradition, in other words, has generally allowed the law of the parties' current domicile to determine their marital property rights as well as many other rights associated with the marriage relationship, such as the interspousal privilege and rights to sue for loss of consortium.⁹⁸ A number of scholars have argued that the Full Faith and Credit Clause, with or without DOMA, does not require states to recognize same sex marriages valid where celebrated.⁹⁹

On the other hand, some scholars, such as Barbara Cox, have argued that the Full Faith and Credit Clause obligates states to recognize marriages that are valid where celebrated because validation of same sex marriage promotes the better rule of law.¹⁰⁰ In my view, this argument provides a weak legal basis for a constitutional requirement of recognition of same sex marriages because the Full Faith and Credit Clause has never been interpreted to require states to apply the "better rule of law" and it is unlikely the current Court would accept this reading of the Full Faith and Credit Clause. The law has in fact been going in the opposite direction; states generally have broad powers to apply their laws to disputes before their courts as long as they have significant contacts with the case giving them legitimate interests in applying their law and application of

94. 449 U.S. 302.

95. See Timothy Joseph Keefer, *DOMA as a Defensible Exercise of Congressional Power Under the Full-Faith-and-Credit Clause*, 54 WASH. & LEE L. REV. 1635 (1997) (defending the constitutionality of DOMA as an exercise of Congress's power to determine the "Effects" of foreign laws and judgments).

96. The federal DOMA raises quite different issues because the Full Faith and Credit Clause gives Congress powers to determine the "effect thereof" of state laws, records, and judgments. See Evan Wolfson & Michael F. Melcher, *The Supreme Court's Decision in Romer v. Evans and Its Implications for the Defense of Marriage Act*, 16 QUINNIPIAC L. REV. 217 (1996); Wolfson & Melcher, *supra* note 89.

97. See Silberman & Wolfe, *supra* note 16.

98. Kreimer, *supra* note 88.

99. See, e.g., Jeffrey L. Rensberger, *Same-Sex Marriages and the Defense of Marriage Act: A Deviant View of an Experiment in Full Faith and Credit*, 32 CREIGHTON L. REV. 409 (1998).

100. Cox, *Same-Sex Marriage and Choice of Law*, *supra* note 92, at 132.

their law is not fundamentally unfair to any party.¹⁰¹ Under this standard, established in *Allstate Insurance Co. v. Hague*,¹⁰² the Constitution has been interpreted to allow states to consider the better rule of law but not to require this.

Other scholars, such as Larry Kramer and Stanley Cox, have taken the opposite position and argued that states cannot refuse to recognize an out-of-state marriage simply because they disagree with the policy of the other state.¹⁰³ In effect, this proposal is that states cannot constitutionally consider which law they think is better in making choice of law determinations. This argument is similarly weak in my view partly because the Supreme Court has explicitly recognized and implicitly authorized use of better law as a criterion in making choice of law determinations¹⁰⁴ and partly because promoting substantive justice is a rational aim; when two states have substantial interests in applying their law and application of either law is not unfair to either party, then choosing to apply the law that the forum views as more just is rational because there is insufficient reason to apply what the forum sees as a worse rule of law.¹⁰⁵ In addition, the Second Restatement explicitly adopts a form of the better law criterion when it authorizes states to consider the “basic policies underlying the particular field of law.”¹⁰⁶ As I have explained in earlier articles, this is better law under a different name.¹⁰⁷ Further, the reigning theory of conflict of laws—the most significant relationship test—requires courts to determine the “relative strength” of the interests of the affected states, and this determination will always, in part, be based on judgments about how fundamental the state policies underlying those laws are; such judgments rest, in part, on substantive views about the justice and fairness of the respective

101. *Allstate Ins.*, 449 U.S. 302.

102. *Id.*

103. Stanley E. Cox, *DOMA and Conflicts Law: Congressional Rules and Domestic Relations Conflict Law*, 32 CREIGHTON L. REV. 1063 (1999) (arguing that Congress may not choose a substantive rule it prefers to determine when Full Faith and Credit are given to state laws or judgments); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997).

104. In *Allstate Insurance Co. v. Hague*, 449 U.S. 302, the Supreme Court upheld the ruling of the Minnesota Supreme Court, which applied its law partly because it viewed its law as “better” than Wisconsin law. *See id.* at 306.

105. Singer, *Pay No Attention*, *supra* note 12; Joseph William Singer, *Justice and the Conflict of Laws*, 48 MERCER L. REV. 831 (1997); Joseph William Singer, *Conference on Jurisdiction, Justice, and Choice of Law for the Twenty-First Century: Case Four: Choice of Law Theory*, 29 NEW ENG. L. REV. 692 (1995); Joseph William Singer, *Facing Real Conflicts*, 24 CORNELL INT’L L.J. 197 (1991); Joseph William Singer, *A Pragmatic Guide to Conflicts*, 70 B.U. L. REV. 731 (1990); Joseph William Singer, *Real Conflicts*, 69 B.U. L. REV. 1 (1989).

106. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(e).

107. Singer, *Facing Real Conflicts*, *supra* note 105, at 201-03 (1991); Singer, *A Pragmatic Guide*, *supra* note 105, at 745-46; Singer, *Real Conflicts*, *supra* note 105, at 45-46.

state laws. Such a view, for example, underlies the current fashion for upholding choice of law clauses; they are thought to protect the justified expectations of the parties by applying the law the parties agreed to govern their arrangements, and allowing the parties freedom of contract is thought to be better than presuming that the highest regulatory standard applies.

The issue is complicated by the fact that we have two very different traditions under the Full Faith and Credit Clause.¹⁰⁸ States are generally free to apply any law they like as long as the state whose law is applied has some significant contact with the parties and the transaction or occurrence giving that state a legitimate interest in applying its law; the sole caveat to this principle is that application of that state's law must not be fundamentally unfair to the party bound by it.¹⁰⁹ However, the Supreme Court has required states to enforce the final court judgments of other states with almost no exceptions, even if those judgments violate the strong public policy of the forum.¹¹⁰ This strong requirement for recognition of judgments makes the state and federal DOMAs especially vulnerable to the extent that they authorize the several states to ignore Massachusetts court judgments premised on the existence of a same sex marriage. Significantly, it may mean that the DOMAs are unconstitutional to the extent that they authorize Washington state to ignore a valid Massachusetts divorce judgment that is brought to Washington for enforcement in a lawsuit for division of property or child support.

The argument for requiring respect for Massachusetts marriages is harder to support based on historical interpretations of the Full Faith and Credit Clause. It appears to be covered by the *Allstate* rule that allows states to apply their own marriage laws to their own domiciliaries given the legitimate interests of the states in regulating the marital relations of their own residents. The issue is complicated, however, by the fact that a marriage is not just a question of choice of law. A marriage is a status conferred by the state and evidenced by a public "record" that can only be undone by a court judgment. Thus, the refusal of a Washington court to recognize a Massachusetts same sex marriage does not mean that the couple is not married in Massachusetts. A Washington judgment finding the couple to be unmarried under Washington law, and thus not entitled to a divorce in Washington, would not prevent one of the parties from moving to Massachusetts, establishing domicile there, and then bringing a divorce action in Massachusetts. The fact that marriage is a status that can be lawfully created in Massachusetts makes the case different from an ordinary civil dispute involving a choice of law question.

108. See Silberman, *supra* note 91 (arguing that this difference explains why states are bound to respect Nevada divorce judgments but not bound to respect Massachusetts marriages); see also Beth A. Allen, *Same-Sex Marriage: A Conflict-of-Laws Analysis for Oregon*, 32 WILLAMETTE L. REV. 619, 669-75 (1996) (explaining complexities of Full Faith and Credit Clause as applied to marriage).

109. *Allstate Ins.*, 449 U.S. 302.

110. *Fauntleroy v. Lum*, 210 U.S. 230 (1908).

In my view, there are two strong arguments for requiring recognition of same sex marriages under the Full Faith and Credit Clause. The first argument is that the Full Faith and Credit Clause must be construed in light of other constitutional norms, including those underlying the Commerce Clause, the constitutional right to travel, the Takings Clause, the First Amendment, and the fundamental right to marry.¹¹¹ Even if none of these clauses or constitutional rights is sufficient in itself to impose a rigid place of celebration rule, the combination is arguably powerful. Second, the marriage case is analogous to other cases in which the Supreme Court has identified a single state whose law is entitled to recognition by other states even if this allows that one state to export its law to the whole country. Those cases include the mandated recognition of Nevada divorces in *Williams I*¹¹² and the mandated recognition of Delaware corporate law in *CTS Corp.*¹¹³ and in *Edgar v. MITE*.¹¹⁴

Consider the following facts. The couples that married in Massachusetts on May 17, 2004, and the days and weeks following May 17, 2004, will have a hard time moving anywhere else. They are married in Massachusetts but if they move to Washington, they will not be considered married there. If Lily gets a job offer in Seattle, she may well turn it down because she cannot take her family with her and keep her status of being married. Under the dormant Commerce Clause there is a negative effect on interstate commerce.¹¹⁵ She also has a right to travel.¹¹⁶ Of course, she is free to travel and be treated the same as other same sex couples in Washington, but there is an argument that she has the right to be treated like other *married* (meaning male-female) couples in Washington. If Anne dies without writing a will, Lily will not be able to inherit Anne's property as a surviving spouse; Anne's property instead will go to her other heirs. There is an argument that this effects a taking of property without just compensation given the fact Lily *is* a surviving spouse under Massachusetts law.¹¹⁷ Then there is the distinction made between same sex and male-female couples that the Massachusetts Supreme Court struck down as violating fundamental equality principles. Even if Washington couples have no right to marry, it is another matter to refuse to recognize a marriage that is valid under the law of the place where the marriage took place and where the parties were domiciled at the relevant time. And finally, the choice to deny recognition appears to be based on a particular religious view: To the extent this enshrines

111. John Sauer, *The Full Faith and Credit Clause, Reverse Incorporation, and Interstate Recognition of Same-Sex Marriages* (2004) (manuscript in possession of author); *Developments in the Law: III. Constitutional Constraints on Interstate Same-Sex Marriage Recognition*, 116 HARV. L. REV. 2028 (2003).

112. 317 U.S. 287.

113. 481 U.S. 69.

114. 457 U.S. 624 (1982).

115. *Id.*

116. *Saenz v. Roe*, 526 U.S. 489 (1999); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

117. *Babbitt v. Youpee*, 519 U.S. 234 (1997).

one set of religious views of marriage in state law, it implicates the Establishment Clause, and to the extent it limits the ability of those whose religions authorize same sex marriages to marry and have their marriages recognized, it implicates free exercise rights.¹¹⁸

The upshot of all this is that the norms underlying the Full Faith and Credit Clause, in combination with a variety of other constitutional principles, weigh heavily in the direction of requiring recognition of Massachusetts marriages, to promote the free exercise of religion, to prevent the endorsement of a particular religion, to prevent state encroachment on the right to travel and interstate commerce, and to promote equal protection of the laws between Massachusetts married couples (including same sex couples) and those located elsewhere, such as Washington.

The second argument for compelled recognition of Massachusetts same sex marriages is based on the Full Faith and Credit Clause itself, as well as on the need in an interstate system to have a single answer to the question of whether one is or is not married. Problems arise in a federal system if one is both married and unmarried at the same time. Those problems are less evident if one focuses on the claim that a couple has a right to have a valid marriage recognized elsewhere; they become more salient when one focuses on the obligations that go along with marriage. This salience arises from the problem of inconsistent legal obligations. This problem led the Supreme Court to its ruling in *Williams I*.

In *Williams I*,¹¹⁹ the Supreme Court, in effect, said that Nevada had a sovereign right to determine the marital status of its residents. Thus, the North Carolina resident who moved to Nevada had the right to have the Nevada courts define her marital status even if her husband had never been in Nevada. There was no personal jurisdiction over the husband, and allowing the Nevada courts to hear the case would ordinarily constitute an unconstitutional violation of his due process rights. The Supreme Court allowed this to happen, even though it could not conclude that Nevada's interest in applying its marriage and divorce law was superior to that of North Carolina.¹²⁰ It did so because the plaintiff's domicile was thought to be a sufficient connecting factor to allow

118. While most religions limit marriage to male-female couples, same sex marriages have been performed by the Unitarian Universalist Church and some Reform Jewish congregations. See Central Conference of American Rabbis (CCAR), Resolution on Same Gender Officiation, Mar. 2000, <http://data.ccarnet.org/cgi-bin/resodisp.pl?file=gender&year=2000> (last visited Apr. 5, 2005) (supporting the right of Reform Jewish rabbis to affirm same sex relationships through appropriate Jewish rituals); Unitarian Universalist Association, *Support of the Right To Marry for Same-Sex Couples: 1996 Resolution of Immediate Witness*, <http://www.uua.org/actions/immediate/96same-sex.html> (last visited Apr. 5, 2005) (urging member congregations to affirm worth of same sex couples and to support legalization of same sex marriages).

119. See Cox, *Same-Sex Marriage and Choice of Law*, *supra* note 92.

120. *Williams I*, 317 U.S. at 296 ("It is difficult to perceive how North Carolina could be said to have an interest in Nevada's domiciliaries superior to the interest of Nevada.").

Nevada to apply its law and because of the strong interests that states have in determining the marital status of their residents.¹²¹ Justice Douglas explained:

Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders. The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of commanding problems in the field of domestic relations with which the state must deal. Thus it is plain that each state, by virtue of its command over its domiciliaries and its large interest in the institution of marriage, can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent.¹²²

At first blush, this argument suggests that, in our hypothetical with Anne and Lily, Washington state has a strong interest in determining the marital status of its domiciliaries and it would not therefore be required to defer to Massachusetts law on this subject either because the same sex couple was married in Massachusetts or because the couple lived in Massachusetts at the time of the marriage. However, this conclusion is unwarranted.

Professor Deborah Henson has suggested that *Williams I*, properly interpreted, requires the states to recognize same sex marriages that are valid where celebrated.¹²³ I agree with her. Remember that *Williams I* creates an exception to *International Shoe*.¹²⁴ In general, a court cannot take jurisdiction over a defendant unless the defendant has minimum contacts with the forum. This principle is based on the Due Process Clause and is intended to protect the fundamental constitutional rights of the defendant. In *Williams I*, the defendant husband had never been in Nevada. Under ordinary constitutional principles, he is not subject to suit in Nevada and has a right to remain married under the law of North Carolina which would not grant the wife the right to a divorce. What justifies allowing Nevada to change the North Carolina husband's marital status from being married to being unmarried simply because his wife moved to Nevada?

It is not an answer to say that Nevada has strong interests in the marital status of its residents (such as the wife) because North Carolina has equally strong interests in the marital status of its domiciliary (the husband). It may be true that the wife had a constitutional right to travel to North Carolina and to be treated like other Nevada residents. After all, because they had a right to change their status from being married to being unmarried under Nevada's (close to) no fault divorce law, she should not be denied those same rights.¹²⁵ But it is equally true that the husband had a right to stay in North Carolina, and it is peculiar indeed to have the unilateral move of the wife to North Carolina

121. *Id.* at 298.

122. *Id.* at 298-99.

123. Henson, *supra* note 68.

124. 326 U.S. 310 (1945).

125. *Saenz v. Roe*, 526 U.S. 489 (1999); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

without his consent alter this right. Indeed, in a closely analogous case, the Supreme Court held in *Kulko v. Superior Court*¹²⁶ that California had no personal jurisdiction over a nonresident husband in a child support suit simply because he had given permission for his children to live with his wife at her new residence in California, if the husband had never been there. In that case, the children traveled to California as part of a visitation agreement and the Supreme Court's ruling was partly based on the conclusion that finding personal jurisdiction over the father in California based solely on the father's agreement that the children live with the mother in California "would discourage parents from entering into reasonable visitation agreements."¹²⁷ This meant that, in cases of ambiguity in procedural rules, the Supreme Court suggested resolving the issue in a way that avoided perverse incentives. Might such perverse incentives include the incentive to walk away from one's marital obligations?

If Nevada and North Carolina had equal interests in applying their law and it would ordinarily violate the husband's due process rights to subject him to suit in a state in which he has never been, why did the Supreme Court let Nevada export its lax divorce standards to the rest of the country? The answer is that the Court was so convinced that a single answer was needed to the question of whether the parties were or were not married. The Court noted that "[a] husband without a wife, or a wife without a husband, is unknown to the law."¹²⁸ The Court believed that it is crucial to have a single answer to the question of whether a person is or is not married in a federal union. Why is that?

But if one is lawfully divorced and remarried in Nevada and still married to the first spouse in North Carolina, an even more complicated and serious condition would be realized. We would then have what the Supreme Court of Illinois declared to be the "most perplexing and distressing complications in the domestic relations of many citizens in the different States." *Dunham v. Dunham*, 162 Ill. 589, 607. Under the circumstances of this case, a man would have two wives, a wife two husbands. The reality of a sentence to prison proves that that is no mere play on words. Each would be a bigamist for living in one state with the only one with whom the other state would permit him lawfully to live. Children of the second marriage would be bastards in one state but legitimate in the other. And all that would flow from the legalistic notion that where one spouse is wrongfully deserted he retains power over the matrimonial domicile so that the domicile of the other spouse follows him wherever he may go, while, if he is to blame, he retains no such power.¹²⁹

One might interpret this paragraph as holding that the crucial connecting factor for constitutional purposes is current domicile. That would be a mistake.

126. 436 U.S. 84 (1978).

127. *Id.* at 93.

128. *Williams I*, 317 U.S. at 299.

129. *Id.* at 299-300.

Domicile was the predicate for the ruling in *Williams I* because domicile was the connecting factor that gave Nevada an interest in allowing its new resident to alter her marital status, granting her a court judgment that then was exported to North Carolina despite its being based on a law that violated North Carolina's strong public policy. The *policy basis* for allowing Nevada to do this was the belief that it was absolutely essential in a federal system for there to be a single answer to the question of a person's marital status and that one should not be married or unmarried as one travels through the country. I have already rehearsed some of the fact situations, other than those mentioned in *Williams I*, that demonstrate the wisdom of this principle. They include, for example, questions about inheritance, child support, and property rights. These are questions about rights, but they are also questions of obligations. Because the Court was convinced that a person must either be married or unmarried rather than married in one state and unmarried in another—or worse, married to one person in one state and married to another in another state—it let one spouse choose to go to Nevada, choose to be domiciled there, choose to be governed by Nevada law, and then made all other states constitutionally obligated to recognize her divorce, despite North Carolina's interest in protecting its domiciliary, the husband, from divorce, and despite the fact that at the time of this ruling, Nevada's lax divorce policy was a minority position and directly contradicted the policy of most states, including North Carolina, of limiting the availability of divorce.¹³⁰

The Court noted the objection that such a rule allowed Nevada to export its unusual policy to other states and commented that the opposite ruling would allow North Carolina to export its policy to Nevada.

It is objected, however, that if such divorce decrees must be given Full Faith and Credit, a substantial dilution of the sovereignty of other states will be effected. For it is pointed out that under such a rule one state's policy of strict control over the institution of marriage could be thwarted by the decree of a more lax state. But such an objection goes to the application of the Full Faith and Credit clause to many situations. It is an objection in varying degrees of intensity to the enforcement of a judgment of a sister state based on a cause of action which could not be enforced in the state of the forum. Mississippi's policy against gambling transactions was overridden in *Fauntleroy v. Lum*, 210 U.S. 230 (1908), when a Missouri judgment based on such a Mississippi contract was enforced by this Court. Such is part of the price of our federal system.¹³¹

It would be odd if the Constitution required the several states to recognize

130. The first no fault divorce law was passed by California and became effective on January 1, 1970. Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CAL. L. REV. 2050-55 (2000). In the 1940s, "Nevada solidified its position as the nation's leading capital of migratory divorce, shortening its residence requirements and expanding its grounds for divorce." *Id.* at 2039.

131. *Williams I*, 317 U.S. at 302.

Nevada divorces but allowed states to ignore Massachusetts marriages. If there is no constitutional problem in having a person be married in one state and unmarried in another (or married to someone else) then the policy basis of *Williams I* falls away and the case should be overruled. That does not appear to be in the cards and for good reason. If the wife in *Williams I* could not alter her marital status from married to unmarried, even though she now was a bona fide domiciliary of Nevada, then North Carolina would be exporting its restrictive divorce laws to Nevada, a result that is as troubling as allowing Nevada to export its lax divorce laws to North Carolina. Similarly, requiring the plaintiff to sue where the defendant is may give the defendant control over the applicable law. The current compromise allows the plaintiff to choose to get divorced by relocating to a state that allows this to occur while protecting the defendant from property, alimony, child custody, and child support judgments by requiring the plaintiff to sue the defendant at the defendant's domicile.

As far as I can tell, the only rational justification underlying this compromise is that the wife who moved to Nevada had a fundamental constitutional right to alter her marital status from being married to being unmarried. Her move to a free state that allowed her to escape what had become an oppressive legal relationship both gave the free state sovereign powers over her and allowed it to extend its sovereignty over the absentee husband as well. In effect, the Court ruled that he and his home state of North Carolina had no right to force the rest of the country to require her to remain married to him. Once Nevada ended her status as a married person, North Carolina—and all other states—were bound to recognize that change, *despite the fact that Nevada's liberal divorce policy violated the strong public policy of every other state in the nation at the time*.

In the same sex marriage context, the traditional rule has been that states are free to ignore a marriage that is concededly valid where celebrated because they disagree with that state's public policy. In the past, courts have sometimes applied this public policy exception to deny recognition of out-of-state marriages. However, until the recent hysteria associated with same sex marriage, the public policy exception was fast becoming obsolete. Even in its heyday, courts generally eschewed application of the public policy exception when the parties were domiciled at the place of celebration at the time of marriage, had relied on their marriage being valid, and one of the parties would be left without support upon death or divorce.¹³²

Marriage is not an ordinary contract; it is a status that confers multiple (perhaps hundreds) of legal consequences—some of them rights but most of them obligations. No one appears to be arguing that Massachusetts has no right to confer marital status on its own residents (absent of course a federal constitutional amendment). No one appears to be arguing that the mere move of

132. See, e.g., Cox, *Same-Sex Marriage and the Public Policy Exception*, *supra* note 36, at 115; Koppelman, *Same-Sex Marriage and Public Policy*, *supra* note 66, at 122.

a Massachusetts couple out of Massachusetts will alter the couple's status under Massachusetts law. The only argument on the table is whether marital status should change as such couples travel from state to state. Under the reasoning of *Williams I*, we should want a single answer to the question of whether the parties are married. Given the conceded constitutional power of Massachusetts to marry such couples, the only conclusion we can draw is that other states should be constitutionally obligated to recognize such marriages.

It is a harder case to argue that nonresident couples who marry in Massachusetts have a right to have their marriages recognized in their home states.¹³³ This appears to allow evasion of one's home state law. But here too, our constitutional tradition appears to allow this. In the usual case, a choice of a foreign law to govern a contract will not be enforceable if it violates the law of the state whose law would otherwise apply to the contract. However, in a case where it is crucial to have a single law govern an ongoing status—as I have argued is the case with marriage (and as the Supreme Court has actually ruled in *Williams I*)¹³⁴—then it is reasonable to fix the constitutional principle by requiring application of the law of the state that actually conferred the status if that state has the constitutional power to do so (as Massachusetts concededly does).¹³⁵ When it is important for there to be a clear answer as to the status of the parties, it also makes sense to pick the law of a state that is easy to determine. In this case, the place of celebration is much easier to identify than the domicile of the parties.

The Court has accepted these principles in the case of the law governing the “internal affairs” of corporations. It came very close to holding that the Commerce Clause prohibits applying any law other than the law of the place of incorporation to determine the voting rights of shareholders, the legal relations between shareholders and managers, etc.¹³⁶ The Court required other states to defer to the law of the place of incorporation to govern the internal affairs of corporations partly because that is the state that created the legal entity,¹³⁷

133. Anthony Dominic D'Amato, Note, *Conflict of Laws Rules and the Interstate Recognition of Same-Sex Marriages*, 1995 U. ILL. L. REV. 911 (arguing that same sex marriages of couples domiciled in state where marriage is validly celebrated must be recognized by other states, but that couples that are not domiciled in the place of celebration have no right to have their marriages recognized at home when they are evading restrictive marriage laws of their residence).

134. *But see* Kreimer, *supra* note 88 (arguing that *Williams I* does not require recognition of foreign same sex marriages).

135. I am putting aside for now the existence of the Marriage Evasion Act in Massachusetts.

136. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987); *Edgar v. MITE Corp.*, 457 U.S. 624 (1982); *McDermott v. Lewis*, 531 A.2d 206 (Del. 1987); P. John Kozyris, *Corporate Wars and Choice of Law*, 1985 DUKE L.J. 1.

137. “A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was

partly because that state has strong interests in regulating the ongoing obligations inherent in the corporate form,¹³⁸ partly because that state has the legitimate power to create corporations than can operate in other states, and partly because the place of incorporation rule is far more predictable than any alternative rule (such as applying the law of the corporation's "domicile" wherever that is, or its "principal place of business" or its corporate headquarters or its "seat"—the solution generally used in Europe).¹³⁹ The crucial argument however, was the need to prevent "inconsistent regulation by different States."¹⁴⁰ Corporations cannot function if they are governed by different sets of voting rules as to shareholders located in different states. The Court effectively required all states to defer to Delaware to govern corporate law when corporations chose to incorporate there. As in the divorce context, the Court gave parties the freedom to choose the law that would govern them when the Court believed it was essential in a united country to have a single clear answer to the question of defining the parties' continuing obligations to each other.

If we apply this reasoning to the same sex marriage context, we can see that it supports the policy argument in *Williams I* that it is necessary to determine whether a person is married and to whom. Finding a person married to one person in Massachusetts and either unmarried or married to another person in Washington state would result in a variety of complex and inconsistent legal obligations. To return to an earlier hypothetical, if Lily marries Anne in Massachusetts and marries Josh in Washington, owning property in and out of Massachusetts, then who inherits what property upon Lily's death? Under Washington law, Josh inherits, unless Washington chooses to apply the law of the situs of the real property to govern its distribution. However, application of Massachusetts law to distribute real property located in Massachusetts may be proscribed in the case of a same sex marriage because of Washington's DOMA. Under Massachusetts law, Anne inherits Lily's property. It is true that, unlike the corporate context, it is possible for whatever

created." *CTS Corp.*, 481 U.S. 69 (quoting *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 636, 4 L. Ed. 518 (1819)).

138. "A State has an interest in promoting stable relationships among parties involved in the corporations it charters, as well as in ensuring that investors in such corporations have an effective voice in corporate affairs." *Id.* at 91.

139. "This beneficial free market system depends at its core upon the fact that a corporation—except in the rarest situations—is organized under, and governed by, the law of a single jurisdiction, traditionally the corporate law of the State of its incorporation." *Id.* at 86; see Note, *In Sickness and in Health, in Hawaii and Where Else?: Conflict of Laws and Recognition of Same-Sex Marriages*, 109 HARV. L. REV. 2038 (1996) (making this argument).

140. *Id.* at 89; see also *Edgar*, 457 U.S. at 645 ("The internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands.").

court that hears the case to issue a ruling that may be honored in all jurisdictions. However, the federal DOMA, if constitutional, undermines even this bit of clarity because it authorizes the states to ignore *even the judgments* of other states if they are premised on a same sex marriage. The result really could be inconsistent state judgments and inconsistent legal obligations.

The place of celebration rule is far, far clearer than a rule that allows application of the law of the “domicile” of the parties. It is far clearer in terms of allowing the parties to know what their rights are than a rule that allows courts to apply their own forum-based policies. And it protects the parties to marriage from having their marital partners skip out on those obligations when the couple chooses to relocate to another state. Now it could be that a spouse could hold her spouse to those obligations by seeking equitable remedies. In fact, Washington law *may* allow this. However it may not. If it does allow such remedies while denying the remedies associated with divorce, then it is denying divorce-related remedies simply because it does not want to call the relationship a marriage. If that is the only difference, then we are either facing an establishment of religion problem or we return to the moral condemnation interests that were viewed as insufficient in *Lawrence v. Texas* to treat homosexuals differently from heterosexuals.¹⁴¹ Either way the arguments for ignoring the obligations inherent in the Massachusetts marriage are insufficient.

B. Does the “Effects Clause” Give Congress Power To Undermine Full Faith and Credit?

The final consideration is whether Congress has the power to authorize the states to ignore Massachusetts same sex marriages and Massachusetts court judgments premised on same sex marriages under its constitutional power to determine the “effects” of state “Acts, Records, and judicial Proceedings.”¹⁴² If it does, then everything I have said in this Article is moot. Professor Lynn Wardle has forcefully argued that the two *Williams v. North Carolina* cases strongly support recognizing Congressional power under the Effects Clause to authorize states to refuse to recognize Massachusetts same sex marriages.¹⁴³

141. 539 U.S. at 571 (“Our obligation is to define the liberty of all, not to mandate our own moral code.”); *Romer v. Evans*, 517 U.S. 620 (1996) (moral disapproval insufficient to justify discriminatory treatment); Wolfson & Melcher, *supra* note 96.

142. U.S. CONST. art. IV, § 1 (“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.”); see Keefer, *supra* note 95 (defending constitutionality of DOMA as exercise of Congress’s power to determine “effects” of foreign laws and judgments).

143. See Lynn D. Wardle, *Williams v. North Carolina, Divorce Recognition, and Same-Sex Marriage Recognition*, 32 CREIGHTON L. REV. 187 (1998). But see Henson, *supra* note 68 (arguing that *Williams I* requires the states to recognize marriages that are valid where celebrated).

My interpretation of the *Williams* cases above suggests a different result.

There is no question that Congress can *increase* the Full Faith and Credit due to state laws and judgments. One of the major exercises of this power is the Parental Kidnapping Prevention Act (PKPA)¹⁴⁴ that requires the states to recognize, and not relitigate, child custody determinations made by courts that conform to the dictates of the PKPA, which generally gives jurisdiction to the home state of the child.

The problem here is that, in passing DOMA, Congress chose to pass a law *decreasing* the obligations states have to give Full Faith and Credit to the laws and judgments of other states. Before the federal DOMA, it was fixed constitutional law that states must enforce the final *judgments* of other states even if those judgments violate the forum's strong public policy, even if they purport to apply the law of the forum, and even if they get the law of the forum wrong.¹⁴⁵ To allow Congress to reverse this principle is to allow a statute to repeal part of the Constitution. After all, Article IV, Section 1 of 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." Congress is given the power to "prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

If the Effects Clause gives Congress the power to decree that states may deny Full Faith and Credit to the laws and judgments of other states, then it has the power to repeal the Full Faith and Credit Clause merely by passing a statute. In other areas of constitutional law, the Court has firmly rejected this approach. For example, although property rights are generally defined by state law, the Court has refused to allow states to pass laws subjecting property to extensive regulation and thereby immunize themselves from regulatory takings claims.¹⁴⁶ It would similarly deny the power to Congress to alter property rights by federal statute and thus repeal obligations inherent in the Takings Clause. It has therefore been argued that Congress may ratchet *up* duties to give Full Faith and Credit to the laws and judgments of other states but may *not* ratchet those obligations *down*.¹⁴⁷

144. 28 U.S.C. § 1738A.

145. *Fauntleroy v. Lum*, 210 U.S. 230 (1908).

146. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

147. Wolfson & Melcher, *supra* note 89; see also Walter W. Cook, *Powers of Congress Under the Full Faith and Credit Clause*, 28 YALE L.J. 421, 432-35 (1919) (suggesting this view). But see Jeffrey L. Rensberger, *Same-Sex Marriages and the Defense of Marriage Act: A Deviant View of an Experiment in Full Faith and Credit*, 32 CREIGHTON L. REV. 409 (1998) (arguing that federal DOMA is constitutional under Congress's power under Effects Clause). Rensberger has collected citations to articles that make the ratchet-up argument to the effect that Congress cannot decrease the Full Faith and Credit owed to acts, records, and judgments. They include a letter by Professor Larry Tribe to Senator Edward Kennedy. See 142 CONG. REC. S5931-01 (daily ed. June 6, 1996) (Letter from Professor Tribe to Senator Kennedy) ("The basic point is a simple one: The Full Faith and Credit Clause authorizes Congress to enforce the clause's self-executing requirements insofar as

Without taking a position on the ratchet up/ratchet down issue (although I agree with those who argue that Congress cannot ratchet down Full Faith and Credit¹⁴⁸), I want to argue that the principles underlying the divorce and corporations cases apply here as well. It is necessary for there to be a single answer to the question of whether a couple is or is not married. In the context of Nevada divorces, the Court accepted that proposition. That was the policy

judicial enforcement alone, as overseen by the Supreme Court, might reasonably be deemed insufficient. But the Full Faith and Credit Clause confers upon Congress no power to gut its self-executing requirements, either piecemeal or all at once. . . . The text of the Full Faith and Credit Clause 'leaves no real doubt that its self-executing reach, as authoritatively determined by the Supreme Court, may not be negated or nullified, in whole or in part, under the guise of legislatively enforcing or effectuating that clause.'"). Rensberger's list, contained at 32 CREIGHTON L. REV. at 412 n.6, also includes the following articles: Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 974 (1998) ("It is doubtful that Congress has the power thus to nullify the self-executing force of the Full Faith and Credit Clause."); Jennie R. Shuki-Kunze, Note, *The "Defenseless" Marriage Act: The Constitutionality of the Defense of Marriage Act as an Extension of Congressional Power Under the Full Faith and Credit Clause*, 48 CASE W. RES. L. REV. 351 (1998) ("It is unlikely that the Framers intended to provide Congress with a 'negative' power under the Clause."); Michael J. Kanotz, Comment, *For Better or for Worse: A Critical Analysis of Florida's Defense of Marriage Act*, 25 FLA. ST. U. L. REV. 439, 460 (1998) ("Congress may not promulgate legislation that effectively dismisses this constitutional mandate."); Melissa Rothstein, *The Defense of Marriage Act and Federalism: A States' Rights Argument in Defense of Same-Sex Marriages*, 31 FAM. L.Q. 571, 580-81 (1997) ("The Full Faith and Credit Clause has never been used by Congress to nullify state judgments. It only allowed Congress to establish how to procedurally prove that an act or judgment occurred in another state and how to then give it Full Faith and Credit."); Jon-Peter Kelly, Note, *Act of Infidelity: Why the Defense of Marriage Act Is Unfaithful to the Constitution*, 7 CORNELL J.L. & PUB. POL'Y 203, 209-10 (1997) ("The lesser power of prescribing the effect of Full Faith and Credit simply cannot contain the greater power of negating Full Faith and Credit altogether."); Scott Ruskay-Kidd, Note, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435, 1450-57 (1997); Heather Hamilton, Comment, *The Defense of Marriage Act: A Critical Analysis of Its Constitutionality Under the Full Faith and Credit Clause*, 47 DEPAUL L. REV. 943, 973-79 (1998); Evan Wolfson & Michael F. Meicher, *A House Divided: An Argument Against the Defense of Marriage Act*, 58 OR. ST. B. BULL. 17, 18-20 (1998); James M. Patten, Comment, *The Defense of Marriage Act: How Congress Said "No" to Full Faith and Credit and the Constitution*, 38 SANTA CLARA L. REV. 939, 955-56 (1998); Rex Glensy, Note, *The Extent of Congress' Power Under the Full Faith and Credit Clause*, 71 S. CAL. L. REV. 137, 165 (1997); Melissa A. Provost, Comment, *Disregarding the Constitution in the Name of Defending Marriage: The Unconstitutionality of the Defense of Marriage Act*, 8 SETON HALL CONST. L.J. 157, 199-200 (1997); Evan Wolfson & Michael F. Melcher, *DOMA's House Divided: An Argument Against the Defense of Marriage Act*, 44 FED. LAW. 30, 31-32 (1997); Julie L.B. Johnson, Comment, *The Meaning of "General Laws": The Extent of Congress's Power Under The Full Faith and Credit Clause and the Constitutionality of the Defense of Marriage Act*, 145 U. PA. L. REV. 1611, 1641 (1997); Mark Strasser, *Loving the Romer Out for Baehr: On Acts in Defense of Marriage and the Constitution*, 58 U. PITT. L. REV. 279, 301 (1997).

148. See, e.g., Strasser, Baker, *supra* note 72 (arguing that Full Faith and Credit Clause gives Congress power to increase but not to decrease Full Faith and Credit due to state judicial proceedings and that clause requires recognition of marriages valid where celebrated if parties were domiciled in that jurisdiction at time of celebration).

basis of *Williams I*. It is necessary for there to be a single law on the question of the status of the parties. In the context of Delaware corporations, the Court accepted that proposition. That was the holding of *Edgar v. MITE* and *CTS Corp.* In cases where it is essential to have a single law apply, to avoid inconsistent regulations, then the Constitution should be interpreted to require deference to the law of a single jurisdiction to determine the rights of the parties. If this is so, Article IV of the Constitution does not grant Congress the power to declare Lily and Anne married in Massachusetts and unmarried everywhere else. This conclusion follows if for no other reason than the fact that the new Massachusetts marriages impose continuing obligations on the parties. Nothing other states can do can change those obligations unless they recognize these Massachusetts marriages before granting a divorce. That means, however, that they must recognize same sex marriages before they can dissolve them. Merely ignoring the Massachusetts marriages will not alter the parties' status within Massachusetts. They will continue to have the obligations of married couples if they return to Massachusetts. Only a rule that requires recognition of marriages that are valid where celebrated will avoid the problem of inconsistent obligations, promote interstate commerce and the right to travel, and treat same sex couples as equal persons before the law.

C. The Federal Marriage Amendment

Resolutions have been introduced into both the House of Representatives and the Senate to amend the United States Constitution to prohibit same sex marriages.¹⁴⁹ Those resolutions would amend the Constitution to provide:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution nor the constitution of any state, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

This amendment is (perhaps intentionally) ambiguous. On one hand, it could be construed to allow state legislatures to adopt laws providing for same sex marriage while disabling judges from interpreting the federal or state constitutions to require that they recognize such marriages. Alternatively, it could mean that no state has the power to recognize same sex marriages even for its own residents and even if adopted by the state legislature or the people of the state. One thing is clear however; if adopted, this provision would allow states to refuse to recognize same sex marriages validly performed in other jurisdictions.

Those who oppose same sex marriage favor this amendment despite the existence of the federal DOMA and equivalent laws or constitutional provisions in the vast majority of states because of fears that judges will overturn those laws and either require same sex marriage or require the recognition of such

149. 108 H.J. Res. 56, 108 S.J. Res. 26.

marriages celebrated elsewhere.¹⁵⁰ Both those who favor same sex marriage and those who favor civil unions but not same sex marriage have often argued that a Federal Marriage Amendment is unnecessary because the Constitution currently allows states to refuse to recognize same sex marriages celebrated elsewhere.¹⁵¹ It is arguably unnecessary because courts have traditionally allowed the states to refuse to recognize marriages celebrated elsewhere that violate their public policy and nothing in the Constitution prevents this traditional practice from subsisting.

In this Article, I have not denied the fact that this tradition exists; it does. I have argued, however, that it is based on a flawed reading of the Constitution and the Full Faith and Credit Clause in particular. Because marriage creates continuing obligations based on a status that can only be changed through court action and because it is important for individuals to know whether, and to whom, they are married, so that they can fulfill these important continuing obligations, it should be possible for a married couple to remain married if they visit or move to another state.

The Federal Marriage Amendment has been proposed partly because of fears that the Constitution may be interpreted as I have argued that it should be interpreted; in other words, the amendment is intended to protect states from being required to recognize the validity of these new Massachusetts same sex marriages. Opponents of same sex marriage know that federal law (in the form of the Defense of Marriage Act) currently authorizes the states to refuse recognition to Massachusetts same sex marriages; they want a federal constitutional amendment because they fear that a court may strike this statute down as unconstitutional. Proponents of same sex marriage have tried to ease their fears by suggesting that this is unlikely to occur; DOMA enacts into law a longstanding tradition that authorizes states to refuse recognition to foreign marriages that violate their public policy. Those proponents will not welcome the argument I have made here; if I am right, then a constitutional amendment indeed is required if the states want the authority to ignore marriages validly celebrated elsewhere. They may fear that my argument will make passage of the Federal Marriage Amendment more likely.

I have several responses to these fears held by same sex marriage proponents. First, if the Federal Marriage Amendment is intended to validate the federal Defense of Marriage Act by authorizing the states to deny recognition to same sex marriages validly celebrated elsewhere, then its adoption would do nothing more than make DOMA constitutional. Yet to

150. "We applaud state amendments; we'll fight for 50 of them, but without a federal marriage amendment, the courts will still try to overrule them." Deborah Bulkeley, *Same-Sex Nuptials in Danger*, DESERET MORNING NEWS (Salt Lake City), Nov. 1, 2004 (quoting Tom McClusky, director of government affairs for the Family Research Council).

151. Cf. John Chase, *A Big Split over Abortion, Stem Cells; Polar Opposites Wage Campaign for U.S. Senate*, CHI. TRIB., Oct. 4, 2004, at CN1 (Senate candidate Barack Obama arguing that Defense of Marriage Act is unnecessary).

forestall this amendment, they suggest conceding that DOMA is constitutional. If the DOMA is unconstitutional, and if opponents of same sex marriage enact the Federal Marriage Amendment and thereby make DOMA constitutional, the result will be that states are authorized to deny recognition to same sex marriages celebrated elsewhere. Yet this is the same result that obtains under current law if one believes that DOMA is constitutional. The worry may be that a declaration that the states must recognize same sex marriage will result in a backlash which will result in a constitutional amendment allowing the states to refuse recognition to same sex marriages celebrated elsewhere. If this were to occur, we would be back at square one. I see no reason to concede to the suggestion that DOMA is constitutional just to avoid an amendment that would have no other effect but to make it constitutional.

Second, and more troublesome, is the worry that such a constitutional amendment would not only validate DOMA but deny states like Massachusetts the power to recognize same sex marriages for their own citizens. If the Federal Marriage Amendment is intended to prevent same sex marriages anywhere, including in states that choose to recognize such marriages, then its purpose goes far beyond the purpose of DOMA. In such a case, debate about whether to outlaw civil marriage for same sex couples even in states that wish to recognize such marriages would involve arguments beyond those I have addressed here.

Third, and perhaps most troublesome, the proposed Federal Marriage Amendment might mean that states are allowed to recognize same sex marriages for their own citizens but only if those marriages are validated by legislation or state constitutional amendment. Such an amendment would overturn the *Goodridge* decision, invalidate the same sex marriages that have already occurred in Massachusetts, and relegate to the legislature the task of amending state law to formally validate such marriages. The problem with this argument is that the legislatures, and the people, already have the power to protect themselves from meddlesome court decisions. We have seen laws and constitutional amendments passed in almost forty states banning recognition of same sex marriages; Congress itself passed the federal Defense of Marriage Act. If the public is as opposed to same sex marriage as these statistics suggest, it should be a simple matter to pass constitutional amendments across the nation.

Should that occur, the only remaining issue would be whether a judge would do as I have suggested and rule that the federal Defense of Marriage Act violates the Constitution. If the purpose of the Federal Marriage Amendment is to validate DOMA, I see no reason to concede its constitutionality merely to prevent an amendment that would make it constitutional. However, if the purpose of the Federal Marriage Amendment is to prevent Massachusetts from recognizing same sex marriages until the legislature and/or the people express support for such an outcome, I can only say that we in Massachusetts already have that power. The Massachusetts General Court has passed a proposed constitutional amendment that would ban same sex marriage (but allow civil

unions).¹⁵² This amendment can become law if the legislature passes it a second time and it is then approved by the voters of the Commonwealth of Massachusetts. The fate of same sex marriage is already in the hands of the voters in the Massachusetts. We do not need the Federal Marriage Amendment to give the issue back to the voters.

What the proponents of the Federal Marriage Amendment want is the right to impose the burden of persuasion on proponents of same sex marriage, requiring us to convince others to agree that such marriages should be allowed. The Supreme Judicial Court of Massachusetts has reversed the burden of persuasion, placing the burden on opponents of same sex marriage to convince both the state legislature and the general public to reverse the *Goodridge* decision. Now that we have many lawfully married same sex couples in the Commonwealth of Massachusetts, it is not clear that strong support remains to reverse the *Goodridge* decision; it is especially not clear that support remains retroactively to alter the legal status of these couples whose deliriously happy faces appeared for weeks in the local press. Now, as lawyers know better than anyone else, the burden of persuasion matters, enormously. The proponents of the Federal Marriage Amendment are absolutely right on that score. However, this question is separate from the question of whether valid same sex marriages should be recognized in other states.

Given the importance of the continuing obligations of marriage and the need for a clear answer as to whether one has those obligations, and to whom, I remain convinced that the Constitution that made us into the United States of America requires marriages valid where celebrated to be recognized elsewhere in this nation. There is no reason to defer to what I see as the currently unconstitutional principles of DOMA to avoid a constitutional amendment that would recognize DOMA as constitutional and thereby not only confine Massachusetts couples to the Bay State if they want to retain their marriage rights but authorize them to skip town, move to other states, and evade their obligations under Massachusetts law to their spouses and children.

CONCLUSION

Many people in the United States feel passionately that same sex marriages should not be recognized by the state and that any such marriages that are valid under the law of another state should have no legal force outside the borders of that other state. The federal Defense of Marriage Act enshrines this principle as the law of the land. But the Full Faith and Credit Clause was intended to knit us together as one nation. The Supreme Court explained in 1935:

The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore

152. House Bill No. 3190, passed by Massachusetts Constitutional Convention, Mar. 29, 2004.

obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.¹⁵³

Marriage involves obligations as well as rights and Justice Joseph Story recognized in his treatise on conflict of laws the difficulty in allowing married partners to “cut [themselves] adrift from their solemn obligations when they may become discontented with their lot.”¹⁵⁴ The “intensely practical considerations”¹⁵⁵ implicated in the need to either be married or unmarried counsel strongly for requiring all states to honor and enforce the obligations inherent in the marriage relationship rather than helping married partners escape those obligations.

153. *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277 (1935).

154. JOSEPH STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* 215 (8th ed. Melville Bigelow 1883) (quoted in Koppelman, *Same-Sex Marriage and Public Policy*, *supra* note 66).

155. *Williams I*, 317 U.S. at 301; *see also* Jon-Peter Kelly, Note, *Act of Infidelity: Why the Defense of Marriage Act Is Unfaithful to the Constitution*, 7 CORNELL J.L. & PUB. POL’Y 203 (1997).