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The Missing Ingredient: How Oft-Overlooked Modern Conflict of Laws Principles Will Dictate the Reach of Same-Sex Marriage in America

Alexander V. Maugeri
alexander.maugeri@gmail.com

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**THE MISSING INGREDIENT: HOW OFT-OVERLOOKED MODERN
CONFLICT OF LAWS PRINCIPLES WILL DICTATE THE REACH
OF SAME-SEX MARRIAGE IN AMERICA**

ALEXANDER V. MAUGERI*

With the start of same-sex marriage in New York, fifteen U.S. states and the nation's capital now celebrate a form of homosexual union, whether marriage, civil union or domestic partnership. Litigants and scholars—both in favor of and opposed to these legal statuses—have routinely claimed that in the absence of state-level Defense of Marriage Acts, these relationships must be recognized by other states for the full range of purposes including adoption, health and welfare benefits, taxes, and alimony, unless those states have a public policy to the contrary. They claim this consequence follows because of the long-standing American legal rule that “a marriage valid where celebrated is valid everywhere.” This article challenges this conventional account by arguing that this “place of celebration” rule—though the law—only tells half the story. That rule does require that a state recognize an out of state same-sex marriage or civil-union as valid, but it does not answer whether a litigant may claim the various rights and privileges that a forum state confers in connection with its own marriages, unions, or partnerships. Same-sex legal relationships are new, but state-by-state variation in emoluments that flow from the institution of marriage are not. Ever since the conflict of laws revolution, most state courts have used modern choice of law rules to adjudicate claims to the incidents stemming from interstate variation in traditional marriage. Bringing this analysis to bear on the same-sex jurisprudence reveals that, if precedents are applied faithfully, the practical reach of same-sex legal relationships throughout the fifty states will be more measured than proponents hope and than opponents fear.

* A.B., 2007, Princeton University, *magna cum laude*, Woodrow Wilson School of Public & International Affairs; J.D., 2011, *cum laude*, Harvard Law School. Law clerk to Hon. Leslie H. Southwick, U.S. Court of Appeals for the Fifth Circuit, Aug. 2011–Aug. 2012. The author wishes to thank Jack L. Goldsmith III., the Henry L. Shattuck Professor of Law at Harvard Law School, for supervising this article and for awakening him to the field of conflict of laws through the course *Law and the International Economy*. The author also benefited from a correspondence with Andrew M. Koppelman, the John Paul Stevens Professor of Law at Northwestern University Law School, during the preliminary research for this article. The views expressed herein should be attributed only to the author in his individual capacity.

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Of all the legal issues surrounding same-sex marriage, constitutional challenges tend to capture the lion's share of popular and media attention. A prime example is the 2010 case of *Perry v. Schwarzenegger* in which former Solicitor General Ted Olson and attorney David Boies, opposing counsel in *Bush v. Gore*,¹ succeeded in persuading a California federal district judge that the "Equal Protection Clause renders Proposition 8," defining marriage as a union of a man and a woman,² "unconstitutional under any standard of review."³ Yet, thus far, only a few federal trial courts have acceded to this view that the U.S. Constitution prevents state governments and Congress from limiting marriage and its associated benefits to heterosexual unions.⁴ Even if some federal courts of appeals ultimately agree, that perspective will not become the "Law of the Land"⁵ unless Supreme Court Justice Kennedy goes much further than he did when he authored *Lawrence v. Texas* in 2003,⁶ the Court unexpectedly promulgates a

1. 531 U.S. 98 (2000).

2. Throughout this article the term "traditional marriage" is used to refer to the state solemnized union of a man and a woman.

3. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010). The Governor and Attorney General of California refused to defend the Proposition. On appeal, the United States Court of Appeals for the Ninth Circuit explained it would reach the "merits of the constitutional questions presented only if [the] Proponents have standing." *Perry v. Schwarzenegger*, 628 F.3d 1191, 1195 n.3, 1197 n.5 (9th Cir. 2011). The Ninth Circuit certified the case to the California Supreme Court for it to decide whether the sponsors of Proposition 8 have an "interest that is created and secured by California law" that might satisfy the injury in fact requirement for U.S. CONST. art. III standing. *Id.* at 1196. In answer, the California Supreme Court held that when "public officials who ordinarily defend a challenged state law . . . decline to do so, . . . the California Constitution and the relevant provisions of the Elections Code" authorize the official proponents of the voter initiative to assert the state's interest. *Perry v. Brown*, 2011 WL 5578873, *29 (Cal. Nov. 17, 2011). Presumably, the Ninth Circuit will now conclude that the sponsors have U.S. CONST. art. III standing.

4. See *infra* notes 48–52 and accompanying text.

5. U.S. CONST. art. VI.

6. 539 U.S. 558 (2003). In *Lawrence*, Justice Kennedy based his opinion for the Court invalidating a Texas ban on homosexual sodomy on the substantive due process doctrine. He wrote, "[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter: The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id.* at 578 (citing *Planned Parenthood of Southwestern Pa. v. Casey*, 505 U.S. 833, 847 (1992)). Marriage and its emoluments are quintessentially public and thus do not obviously implicate *this conception* of substantive due process, anchored in privacy. Cf. Sherif Girgis, Robert P. George & Ryan T. Anderson, *What is Marriage?*, 34 HARV. J.L. & PUB. POL'Y 245, 283 (2010) [hereinafter *What is Marriage?*] ("[L]egal recognition [of same-sex relationships] has nothing to do with whether homosexual acts should be banned or whether anyone should be prevented from living with anyone else. [The] debate is not about anyone's private behavior. Instead, public recognition of certain relationships and the social effects of such recognition are at stake."); *Witt v. Dept. of the Air Force*, 527 F.3d 806, 814 (9th Cir. 2008) (identifying *Lawrence* as a case concerning the

fundamental right to same-sex marriage,⁷ or even more improbably declares that sexual orientation is a suspect classification akin to race and national origin.⁸ Barring those doctrinal shifts, the most significant legal contest over same-sex marriage will not involve matters of constitutional law at all.

About 1,500 times each year American courts face a multi-jurisdictional controversy that requires them to determine which sovereign's law should

“right to engage in private, consensual, homosexual conduct”). *But see In re Golinski*, 587 F.3d 901, 904 (9th Cir. 2009) (implying that *Lawrence* could apply to the government's denial of public benefits, with the caveat that “[t]he bounds of *Lawrence*'s holdings are unclear”).

Though Justice Kennedy could marshal his *Romer v. Evans*, 517 U.S. 620 (1996), decision to invalidate same-sex marriage legislation under the Equal Protection Clause, three factors make that course of action unlikely. First, he declined a similar invitation in *Lawrence*. *See Lawrence*, 539 U.S. at 574–75. Second, even were Justice Kennedy to turn to equal protection, he may be influenced by Justice O'Connor's *Lawrence* concurring opinion. Writing separately, she explained that because

[Texas] law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as . . . *preserving the traditional institution of marriage*.

Id. at 585 (O'Connor, J., concurring in the judgment) (emphasis added). Third, *Romer* invalidated the referendum at issue because voters purportedly had enacted it due to “animosity toward” homosexuals. *Romer*, 517 U.S. at 634–35. Conversely, a case can be made that “traditional marriage laws were not devised to oppress those with same-sex attractions.” *What is Marriage?*, *supra*, at 249 n.10.

7. In invalidating a ban on interracial marriage the Supreme Court, in *Loving v. Virginia*, recognized a fundamental right to marry in the Due Process Clause. 388 U.S. 1, 12 (1967). Yet, this substantive due process holding plainly relates to heterosexual marriage. *See id.* (“Marriage is . . . fundamental to our very existence and survival.”); *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (“[A] decision to marry and raise the child in a traditional family setting must receive” fundamental right status); *Turner v. Safley*, 482 U.S. 78, 95–96 (1987) (reasoning that *Zablocki* applied to inmate marriage, in part, because most would be “fully consummated”); *see also Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861, 879 (C.D. Cal. 2005), *vacated*, 447 F.3d 673 (9th Cir. 2006) (concluding that the “fundamental due process right to marry does not include a fundamental right to same-sex marriage” because *Loving* did not grant “the unrestricted right to marry whomever one chooses”). *But see Perry*, 704 F. Supp. 2d at 994 (citing *Zablocki*, 434 U.S. at 388) (“Because [same-sex] plaintiffs seek to exercise their fundamental right to marry, their claim is subject to strict scrutiny.”). Additionally, the Supreme Court has made clear that judicial expansions under substantive due process should be limited to rights “objectively, deeply rooted in this Nation's history and tradition” and that courts must “exercise the utmost care whenever asked to break new ground” as to fundamental rights. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). One Ninth Circuit judge recently admonished a district court for failing to follow this “‘established method’ of substantive due process analysis” in its invalidation of Don't Ask, Don't Tell. *Log Cabin Republicans v. United States*, Nos. 10-56634, 10-56813, 2011 WL 4494225, at *5 (9th Cir. Sept. 29, 2011) (O'Scannlain, J., concurring specially). The *Perry* decision sidestepped the *Glucksberg* limitation by defining marriage as “committed relationships” without regard to the historical context of gender or procreation.

8. *See infra* note 50 and accompanying text (discussing equal protection).

apply.⁹ The majority of those cases ask judges to decide among the laws of the fifty states as litigants either travel or engage in commercial or other transactions across state-lines.¹⁰ Over time through the common law process, state courts have developed precedential methodologies, so-called choice of law (or conflict of law) rules to guide their decisions of what law should apply.¹¹ It is this somewhat arcane discipline—not the equal protection or substantive due process issues that draw headlines—that will dictate the reach and effect of same-sex marriage among the fifty states. Specifically, state courts will decide a multiplicity of choice of law cases in which same-sex litigants seek to have a particular benefit, right, or amalgam of rights associated with their domestic partnership, civil union, or marriage granted *recognition and legal effect* by states *other than* the one that celebrated their legal relationship.

These controversies are sure to arise because of the diversity of state policies toward conferring these statuses and benefits, as well as the diversity of statutory and state constitutional rules for the recognition of foreign¹² same-sex statuses.¹³ Today six states and the District of Columbia celebrate same-sex marriages,¹⁴ while another nine permit individuals to enter into either civil unions or domestic partnerships complete with *full, or nearly full*, martial

9. SYMEON C. SYMEONIDES, WENDY C. PERDUE & ARTHUR T. VON MEHREN, *CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL* 4 (2d ed. 2003) [hereinafter SYMEONIDES ET AL.].

10. *Id.*

11. These legal rules (also referred to as “principles of comity”)—as distinct from the substance of the law (*i.e.*, elements of a tort, requirements for an enforceable contract, or the statutory age of majority)—dictate when “the courts of one sovereign should be prepared to apply the law of another sovereign.” *Id.* at 3.

12. This article follows the common convention of referring to both out-of-state and international law as “foreign,” while referring to the law of the state where the court is located as “forum law.”

13. As discussed in Part II *infra*, not every state Defense of Marriage Act or Amendment (“DOMA”) contains an interstate non-recognition rule. Many simply do not confer same-sex marriage and/or unions as a matter of domestic policy. *See infra* notes 21–22 and accompanying text.

14. New York began officiating same-sex marriages on July 24, 2011 pursuant to legislation approved by a narrowly divided state Senate at the urging of the Governor. Nicholas Confessore & Michael Barboro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. TIMES, June 25, 2011, at A1. The other jurisdictions with same-sex marriage are Connecticut (May 2008 judicial decision), Iowa (April 2009 judicial decision), Massachusetts (Nov. 2003 & Feb. 2004 judicial decisions), New Hampshire (June 2009 legislation), Vermont (May 2009 legislation) and the District of Columbia (Dec. 2009 legislation). *Same-Sex Marriage, Civil Unions and Domestic Partnerships*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=16430> (last updated July 14, 2011).

benefits.¹⁵ A number of other states provide a smattering of same-sex benefits that fall considerably short of the privileges associated with traditional marriage.¹⁶ Similar to other aspects of common law that can be overridden by statute, judicial choice of law rules can be displaced by the passage of a popular referendum, legislative act, or state constitutional amendment.¹⁷ In that vein, twenty-eight states have statutory or constitutional choice of law rules that withhold recognition for out-of-state same-sex marriages.¹⁸ Of that group the statutory or constitutional provisions of twenty states purport to deprive partnerships and unions celebrated out of state of any *domestic effect*. In each of these states courts will face the task of ruling on the interplay between these positive law enactments and the state's judge-made conflict of laws precedents.¹⁹

Yet more daunting still, will be the job of judges when a state lacks a statute entirely or when the enacted statute does not address the particular form of out of state legal relationship. As an illustration, consider the State of Iowa (which celebrates same-sex marriages): it expressly recognizes out of state *marriages* yet leaves unanswered how courts should assess the validity of out of state *partnerships, unions* and other homosexual *benefits*.²⁰ Approximately

15. The states offering civil-unions are Delaware, Hawaii, Illinois, New Jersey, and Rhode Island. *Same-Sex Marriage, Civil Unions and Domestic Partnerships*, *supra* note 14. Through domestic partnerships, California, Oregon, Nevada, and Washington State provide roughly the full panoply of benefits ordinarily associated with marriage. *Id.* Hawaii's Governor signed a civil union bill into law on Feb. 23, 2011, and the state will start offering unions in January 2012. *Hawaii Gov. Signs Civil Unions Bill*, Advocate.com, http://www.advocate.com/News/Daily_News/2011/02/23/Watch_Civil_Unions_in_Hawaii/ (last visited Aug. 3, 2011).

16. *See, e.g.*, Maine, ME. REV. STAT. tit. 18-A, §§ 1-201, 2-102, 2-103, 3-203, 5-309, 5-311, 5-404, 5-405, 5-410 (2010); Maryland, MD. CODE ANN., HEALTH-GEN. §§ 6-101, 6-201, 6-202, 6-203 (LexisNexis 2009); Colorado, COLO. REV. STAT. §§ 15-22-101, 15-22-102, 15-22-104, 15-22-105 (2009); Monica Davey, *Civil Unions Approved in Illinois*, N.Y. TIMES, Dec. 2, 2010, at A19.

17. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1) (1971) ("A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law,"); *see also* Joseph W. Singer, *Same Sex Marriage, Full Faith and Credit and the Evasion of Obligation*, 1 STAN. J. C.R. & C.L. 1, 15 (2005) (noting that under WASH. REV. CODE § 26.04.020 (2009), Washington Courts are explicitly ordered to disregard a same-sex marriage created and recognized in another jurisdiction); ANDREW KOPPELMAN, *SAME SEX, DIFFERENT STATES* 137-48 (2006) (discussing the scope and reach of such statutory and constitutional rules).

18. DOMAWATCH.ORG, <http://www.domawatch.org/index.php> (last visited Aug. 3, 2011) (thirty-seven states have a DOMA of some variety).

19. *See infra* Part II for an analysis of how courts may approach legislative choice of law rules.

20. IOWA CODE § 595.20 (2009).

six states have not enacted any same-sex *choice of law* provision,²¹ and the statutory or constitutional choice of law provision of roughly thirteen others only pertains to same-sex marriage.²² Consequently, cases will arise in which these judges will need to rely exclusively on the state's prevailing common law choice of law doctrine.

It is clear that:

[T]he established rule in American law regarding recognition of marriages contracted out of the jurisdiction has been to apply the law of the state of celebration to determine whether a marriage was valid, subject to the exception that, if the out-of-state marriage violates a strong public policy of the forum, courts of the forum state will refuse to recognize the validity of the marriage.²³

Nearly universally, scholars and litigants recite this principle and then proceed to debate whether a given state has such a public policy objection and whether non-recognition on that basis would be legally permissible, or normatively, warranted.²⁴

Yet this article demonstrates that to proceed in the analysis directly from “validity” to “public policy” would be a *fundamental legal error* according to the modern jurisprudence of the vast majority of states. That approach is only warranted in the handful of states that still adhere to the traditional choice of law approach called *lex loci*.²⁵

21. This group includes New Jersey, New Mexico, Maine, Maryland, Minnesota, North Carolina, Rhode Island, and Wyoming. DOMAWATCH.ORG, <http://www.domawatch.org/index.php> (last visited Aug. 3, 2011).

22. Arizona, Colorado, Indiana, Iowa, Mississippi, Missouri, Montana, North Carolina, Nevada, *likely* Oregon (*see infra* note 100), Pennsylvania, Tennessee, and West Virginia. DOMAWATCH.ORG, <http://www.domawatch.org/index.php> (last visited Aug. 3, 2011). Additionally, in New Jersey the statute law is silent as to foreign marriages though there is express recognition for civil unions and domestic partnerships. *New Jersey*, DOMAWATCH.ORG, <http://www.domawatch.org/stateissues/newjersey/index.html> (last visited Aug. 3, 2011).

23. Lynn Wardle, *DOMA: Protecting Federalism in Family Law*, 45 FED. LAW. 30, 32 (1998) (citing ROBERT A. LEFLAR ET AL., *AMERICAN CONFLICTS LAW* § 221 (4th ed. 1986)); *see also* KOPPELMAN, *supra* note 17, at 86; Singer, *supra* note 17, at 14 (“[M]arriage 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 . . .”).

24. Wardle, *supra* note 23, at 32.

25. *See, e.g.*, Brief of Amicus Curiae The National Legal Foundation, *Burns v. Burns*, 253 Ga. App. 600 (2002) (No. A01A1827), *available at* <http://www.nlf.net/Activities/briefs/burns.htm> (“Georgia follows the original *Restatement (First) of Conflict of Laws* (1934) approach of *lex loci* in contracts and tort cases, . . . and has also followed this approach in recognizing marriages. . . . [Thus,] [t]he *First Restatement* § 121 supports the general principle of *lex loci*, argued by [appellant], that a marriage that is valid where contracted is valid everywhere.”); *see also infra* notes 129–134 and accompanying text (defining the contours of *lex loci*).

Starting in 1954 with New York, courts openly began to abandon this traditional rule: first in contracts,²⁶ and then for torts.²⁷ By 1977, over twenty-five states had transitioned to new judicial choice of law principles,²⁸ and in 2003, only eleven states still adhered to traditional rules, with at least four wavering in their commitment to that method.²⁹ The shift was so dramatic it came to be known as the conflict of laws “revolution.”³⁰ Judicial precedent from this modern era reveals that courts in states that had overruled the traditional approaches retained the marital-celebration rule only, at most, for the question of validity.³¹ When faced with claims for the incidents associated with heterosexual marriage and other statuses—such as the rights of an adopted child,³² paternity for custody purposes,³³ or the tax treatment of spousal property transfers³⁴—courts applied the modern rule of decision that was appropriate based on how the conflicts revolution had changed their jurisprudence.³⁵

26. *Auten v. Auten*, 124 N.E.2d 99, 101–02 (N.Y. 1954).

27. *Babcock v. Jackson*, 191 N.E.2d 279, 281–83 (N.Y. 1963).

28. SYMEONIDES ET AL., *supra* note 9, at 117.

29. *Id.* at 300–01 (Map 2. Contracts).

30. *Id.* at 113.

31. *Compare* *Seth v. Seth*, 694 S.W.2d 459, 462 (Tex. App. 1985) (holding that RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) “criteria, and not the place of celebration test, should be applied to determine choice of law in a marriage . . . context.”) (emphasis added), with *In re Estate of Chase*, 515 N.Y.S.2d 348, 349 (N.Y. App. Div. 1987) (relying on the 1910 Court of Appeals’ *lex loci* precedent only for the question of the validity of the status of adoptions, and not for the incidental questions).

32. *Chase*, 515 N.Y.S.2d at 349.

33. *Hermanson v. Hermanson*, 887 P.2d 1241, 1244 & n.2 (Nev. 1994) (eschewing, as “a traditional conflict of laws approach,” the rule that the law of the domicile at the time of the child’s birth governs the child’s paternity status, the court instead used the modern approach under which “the state whose law is applied must have a substantial relationship with the transaction”).

34. *In re Estate of Lenherr*, 314 A.2d 255, 258 (Pa. 1974) (applying a hybrid modern approach that analyzes both “significant contacts” and rival “governmental interests” to validity of marriage for the purpose of characterizing property).

35. The conflicts rules often referred to under the appellation “Different Incidents, Different Outcomes,” see KOPPELMAN, *supra* note 17, at 91–94, constitutes a dramatically different theory from that which this article asserts is most defensible in light of the judicial choice of law precedent of most states. The “Different Incidents” theory is most notably espoused by Deborah Henson, 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 (1994) (declaring that “today, courts have little justification for denying claims for the incidents of [same-sex] marriage”), and critiqued by Barbara Cox, see Barbara J. Cox, *Using an “Incidents of Marriage” Analysis When Considering Interstate Recognition of Same-Sex Couples’ Marriages, Civil Unions, and Domestic Partnerships*, 13 WIDENER L.J. 699 (2004) (asserting that Henson’s approach insufficiently accommodates and promotes interstate

It is the principal contention of this article that for judges interested in faithfully applying precedent, questions concerning the recognition of incidents³⁶ pertaining to same-sex unions, marriage and partnerships need to be resolved with reference to the jurisdiction's prevailing modern choice of law principle—as opposed to the “place of the celebration” maxim.³⁷

This article proceeds in five parts. Part I situates the concept of judicial choice of law rules in the context of the normative and legal controversies surrounding the interstate recognition of same-sex relationships, including those pertaining to the federal Defense of Marriage Act.³⁸ Part II explains when and how state constitutional amendments, legislative enactments and

same-sex recognition). Henson's “different incidents approach” is a twist on the conventional view (critiqued in this article) that place of celebration governs validity as well as incidents, unless there is a contrary public policy. Henson, *supra*, at 560–61. Henson's twist is that she posits that to avoid recognizing any given incident the forum state must have a policy against the enjoyment of that particular incident. *Id.* at 566. In other words, a generalized policy against same-sex legal relationships would not displace the place of celebration rule in litigation over incidents. Henson's view represents a diluted vision of the public policy exception. *Id.* at 555, 581 (“This Article reviews the application of the public policy exception in past choice-of-law cases involving unpopular forms of marriages This loophole . . . must be narrowed to reflect changing societal attitudes which tend toward greater tolerance for alternative family structures.” “[C]ourts have little justification for denying claims for the incidents of marriage . . .”).

Conversely, this author's article seeks to explore the implications of New York University Professor of Law Linda Silberman's explanation that a state's “own policy against same-sex marriage may be such that it chooses [as a matter of domestic substantive law] not to privilege the relationship with any economic benefits, or it may decide that it only wants to withhold specific attributes, for example, the right to adopt.” Linda Silberman, *Same-Sex Marriage: Refining the Conflict of Laws Analysis*, 153 U. PENN. L. REV. 2195, 2206 (2005). This article contends that there is strong precedential authority for courts to use the choice of law principles developed after the conflicts revolution, originally fashioned in tort and contract, for incidents of same-sex unions and marriages. See *infra* Part III.A–B.

36. These incidents “include family dissolution, adoption, domestic violence, liability for family expenses, taxation, health-care decision making, inheritance, the right to sue for wrongful death, eligibility for [state] welfare benefits, health insurance, and homestead rights” KOPPELMAN, *supra* note 17, at 94. The Supreme Court has used the term “incidents of marriage” to refer “to the receipt of government benefits (*e.g.*, Social Security benefits), property rights (*e.g.*, tenancy by the entirety, inheritance rights)” and other privileges for which “marital status often is a precondition.” *Turner v. Safley*, 482 U.S. 78, 96 (1987).

37. *But see* Scott Fruehwald, *Choice of Law and Same-Sex Marriage*, 51 FLA. L. REV. 799, 819 (1999) (asserting, without citation, that “[t]he conflicts revolution . . . bypassed choice of law rules on marriage. The rule in use today is basically the same one employed by Justice Story and Joseph Beale. . . . It adopted the law of the place of the last act, the place of celebration of the marriage.”). Fruehwald's conclusion—as well as the failure by scholars and litigants to note the approach of modern choice of law to incidents—may be attributable to the fact that as to *marital validity* the Restatement (Second) and Restatement (First) counsel substantially the same approaches. See Singer, *supra* note 17, at 14.

38. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006)).

popular referendums bind the courts by displacing common law judicial choice of law principles. Part III seeks to demonstrate how the judicial rejection of traditional choice of law principles, combined with the influence of the Restatement (Second) of Conflicts, revolutionized the approach of most state courts to the *incidents of traditional marriage*. This part sets forth the article's central argument that, in order to comport with precedent, incidents of same-sex marriage need to be determined based on the forum's modern choice of law rule. Part IV.A surveys case law on interstate recognition of same-sex marriage and civil unions and offers general conclusions about how certain fact patterns are being, and should be, resolved. Across the modern choice of law states,³⁹ the evidence reveals that courts recognize that the inquiry as to incidents is analytically distinct from the question of a union's or marriage's validity.⁴⁰ Part IV.B considers the special issues raised by the incident of divorce—both with respect to foreign judgments and the question of whether a court should entertain petitions for dissolution of same-sex relationships. Finally, the article concludes in Part V by offering reflections on the implication of the foregoing analysis on the effect of the proposed marriage amendment to the U.S. Constitution and the reach of same-sex marriage.

I. ORIENTING JUDICIAL “CHOICE OF LAW” RULES IN THE LANDSCAPE OF NORMATIVE AND LEGAL SAME-SEX CONTROVERSIES

A. *Legal Background*

The modern history of interstate same-sex relationships began with the 1993 Hawaii Supreme Court decision in *Baehr v. Lewin*.⁴¹ The *Baehr* court held that the state law, which permitted only opposite gender couples to marry,⁴² violated the Hawaii State Constitution.⁴³ The decision prompted a significant political and legal controversy in which proponents of same-sex marriage argued that states *should* as a policy matter, or *must* as a matter of U.S. Constitutional law,⁴⁴ recognize other states' same-sex marriages (and civil unions). Congress responded by enacting the Defense of Marriage Act

39. This term refers to the roughly forty states affected by the conflicts revolution. *See supra* text accompanying notes 29–30.

40. *See infra* Part III.B.

41. 852 P.2d 44 (Haw. 1993).

42. *Id.* at 48–49, 48 n.1 (interpreting HAW. REV. STAT. § 572-1 (1985)).

43. *Id.* at 59–63. The court applied precedent on gender discrimination and did not hold that homosexuals were a “suspect class” nor did it recognize a “right to same sex marriage.” *Id.* at 580 & n.33.

44. *See generally infra* notes 48, 69 and accompanying text.

(“DOMA”) in 1996.⁴⁵ The legislation has two main provisions. First, DOMA Section 3 “defines marriage for purposes of federal law as the union of a man and a woman.”⁴⁶ This provision specifies that the terms “marriage” and “spouse” in the U.S. Code only pertain to unions between a man and a woman; its effect is that the thousands of legal incidents conferred on traditional spouses are *not extended* for the purposes of *federal* law to those individuals in civil unions or same-sex marriages.⁴⁷ Section 3 has been widely regarded as compatible with the equal protection principles embedded in the Fifth Amendment to the U.S. Constitution.⁴⁸ In this area, the Supreme “Court has fashioned a framework of tiered scrutiny . . . [by which] [h]eightedened scrutiny generally results in the invalidation of state action . . . [while] rational basis review generally results in the validation of state action.”⁴⁹ And, all nine courts of appeals that have considered whether equal protection required strict or otherwise heightened scrutiny have “declined to treat homosexuals as a suspect class.”⁵⁰ Though a few district court judges have invalidated Section 3

45. Defense of Marriage Act, *supra* note 38; *see generally*, Robert P. George, *The 28th Amendment*, NAT’L REV., July 23, 2001, <http://www.nationalreview.com/articles/211452/28th-amendment/robert-p-george> (discussing the Defense of Marriage Act).

46. George, *supra* note 45.

47. *See Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 395–96 (D. Mass. 2010) (explaining that these definitions “as set forth by DOMA, are incorporated into at least 1,138 different federal laws”).

48. *See, e.g.*, KOPPELMAN, *supra* note 17, at 131–33 (acknowledging that “an equal protection challenge to the definition provision of DOMA, standing alone, would be a hard case[.]” although suggesting the provision might be “impermissibly discriminatory” and “rest[] on a bare desire to harm a politically unpopular group”). Unlike the Fourteenth Amendment that applies to the States, the Fifth Amendment has no Equal Protection Clause. *Cook v. Gates*, 528 F.3d 42, 60 n.11 (1st Cir. 2008) (citing *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)). Nonetheless, “the due process clause has been interpreted to include an equal protection component.” *Id.*

49. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 755–56 (2011).

50. *Lofton v. Sec’y of Dept. of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004); *accord* *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 572 (9th Cir. 1990) (“homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny under the equal protection component of the Due Process Clause”), *enforced*, *Witt v. Dep’t of the Air Force*, 527 F.3d 806, 821 (9th Cir. 2008) (determining that the *High Tech* “holding was not disturbed by *Lawrence*, which declined to address equal protection”); *Citizens for Equal Prot. v. Brunning*, 455 F.3d 859, 866 (8th Cir. 2006); *Nabozny v. Podlesny*, 92 F.3d 446, 458 (7th Cir. 1996); *Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 292–94 (6th Cir. 1997); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004) (“Neither the Supreme Court nor [the Fifth Circuit] has recognized sexual orientation as a suspect classification or protected group”); *Veney v. Wyche*, 293 F.3d 726, 732 (4th Cir. 2002); *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008) (declining to read either *Romer* or *Lawrence* “as recognizing homosexuals as a suspect class for equal protection purposes”); *Steffan v. Perry*, 41 F.3d 677, 685 (D.C. Cir. 1994) (en banc).

under the highly deferential rational basis standard of review,⁵¹ these opinions can fairly be classified as outside the legal mainstream.⁵² Against the “substantial circuit court authority,” the Obama Justice Department presently is seeking to persuade district judges, and ultimately the Court of Appeals for the Second Circuit, that the equal protection analysis should feature “heightened scrutiny” for any “classification based on sexual orientation.”⁵³ Even if these efforts prompt a circuit-split, the odds are remote that the Supreme Court will place homosexuality alongside race or gender as a suspect or quasi-suspect classification.⁵⁴

51. *Gill*, 699 F. Supp. 2d at 387 (invalidating DOMA Section 3 under rational basis review); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010) (same); *cf.* *Dragovich v. U.S. Dep’t of the Treasury*, 764 F.Supp.2d 1178, 1190 (N.D. Cal. 2011) (denying government’s motion to dismiss because “Plaintiffs have sufficiently stated a claim that section three of the DOMA bears no rational relationship to a legitimate governmental interest.”); *In re Golinski*, 587 F.3d 901, 903–04 (9th Cir. 2009) (Ninth Circuit deploying the canon of constitutional avoidance to interpret benefits statute relative to “hard question” of whether “DOMA’s sweeping classification has a proper legislative end”); *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010) (companion case to *Gill* in which the same trial judge ruled that DOMA also violated the Tenth Amendment and the Spending Clause, U.S. CONST. art. I, § 8).

52. *See, e.g.*, Letter from Eric Holder, Jr., U.S. Att’y Gen., to John Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> (explaining that the Obama Administration “has defended Section 3 in jurisdictions where circuit courts have already held that classifications based on sexual orientation are subject to rational basis review”); 156 CONG. REC. S6613 (daily ed. Aug. 3, 2010) (statement of Sen. Kyl) (criticizing the district court decision in *Gill* as “judicial activism”); *cf.* *Heller v. Doe*, 509 U.S. 312, 320 (explaining that the “legislature that creates [a classification] need not actually articulate at any time the purpose or rationale supporting its classification. Instead, a classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” (citations omitted) (internal quotation marks omitted)).

53. Letter from Eric Holder, Jr., *supra* note 52; *see also What is Marriage?*, *supra* note 6 (discussing animus and equal protection).

54. Perhaps the most compelling reason to think that the Supreme Court will not rule as such is Justice Kennedy’s majority opinion in *Romer v. Evans*, 517 U.S. 620 (1996). There he opted to apply rational basis scrutiny (albeit a variant) to a classification concerning sexual orientation. It is true that in addition to legislative distinctions implicating suspect classifications, the Supreme Court also applies strict scrutiny under the Equal Protection Clause when a classification “burdens a fundamental right.” *Vacco v. Quill*, 521 U.S. 793, 799 (1997). Yet, because “this provision creates no substantive rights,” an equal protection route to heightened scrutiny is nearly foreclosed by the Court’s *Glucksberg* opinion for the same reasons we would not expect the Court to announce a new substantive due process right to same-sex marriage. *Id.*; *see also What is Marriage?*, *supra* note 6; *Lofton*, 358 F.3d at 816–18 (in light of *Glucksberg*, first deciding to be “particularly hesitant to infer a new fundamental liberty interest” concerning homosexuality under substantive due process and *second* carrying the absence of such as interest into its equal protection determination that state law limiting adoption to heterosexual parents “burden[ed] no fundamental right”); *but cf. Witt*, 527 F.3d at 817–18 (concluding that substantive due process

Congress's second concern in enacting DOMA was that courts might interpret the Full Faith and Credit Clause (found in Article IV, Section 1 of the U.S. Constitution)⁵⁵ to mandate interstate recognition of Hawaiian (or future states') same-sex marriages.⁵⁶ To that end, the legislation provides "that no state is required to recognize another state's same-sex marriage."⁵⁷ This aspect of DOMA assumes *arguendo* that full faith and credit would mandate out-of-state recognition of marital status and its incidents,⁵⁸ and purports to use Congress's power under the Article IV Effects Clause "to make exceptions to the Full Faith and Credit Clause."⁵⁹

Scholars disagree about whether Congress has this power. Professors Lynn Wardle and Gillian Metzger both argue that DOMA's choice of law provision—both with regard to the status and incidents of marriage, and with regard to judgments—is within Congress's authority, and that the law does not offend Article IV.⁶⁰ By contrast, Professor Joseph Singer argues that the existing precedent from the Supreme Court on the dormant Commerce Clause—and the same Article IV precedent analyzed by Wardle—suggest that Congress cannot "pass a law decreasing the obligations states have to give Full Faith and Credit to the laws and judgments of other states."⁶¹

claims that fall within the ambit of *Lawrence* call for "a heightened level of scrutiny," although not strict scrutiny). The *Witt* decision does not directly contradict the analysis of this author or of the Eleventh Circuit if *Lawrence*'s application is confined (properly) to laws burdening private homosexual conduct. *Cf. What is Marriage?*, *supra* note 6.

55. 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.").

56. Singer, *supra* note 17, at 35 (making the case that full faith and credit compels just that).

57. George, *supra* note 45, at 33.

58. *See generally* Singer, *supra* note 17, at 35.

59. George, *supra* note 45, at 33. DOMA also invites states to extend non-recognition to other state's judgments pertaining to same-sex relationships. *Id.* Many scholars who perceive DOMA as superfluous (*i.e.*, states can adopt any marriage recognition rule they choose with or without it), do contend that non-recognition of judgments is unconstitutional. *See, e.g.*, KOPPELMAN, *supra* note 17, at 117–23 (arguing that although "[s]tates have always had the power to decline to recognize marriages from other states, and they have been exercising that power for centuries[,] . . . DOMA plainly alters preexisting law . . . with respect to judgments.").

60. Wardle, *supra* note 23, at 33; Lynn D. Wardle, Williams v. North Carolina, *Divorce Recognition, and Same-Sex Marriage Recognition*, 32 CREIGHTON L. REV. 187, 220, 226 (1998) (concluding that DOMA is "consistent with the principles established in the Williams[, I and II,] cases"); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1533–34 (2007) (analyzing Article IV in terms of vertical and horizontal constitutional structure and determining that DOMA "represents a rational regulation of interstate relations that accords with the terms of the Effects Clause and with principles of federalism.").

61. Singer, *supra* note 17, at 35–44. Singer animates his contention, in part, with analogies to two "other cases in which the Supreme Court has identified a single state whose law is entitled to recognition by other states . . ." *Id.* at 35. The first case is *Williams v. North Carolina*, 317

Whether Congress can alleviate obligations under the so-called Effects Clause of Article IV,⁶² is likely an academic matter though. Although Singer additionally posits that the U.S. Constitution requires all states to adhere to a *lex loci celebrationis* rule for marriage and its incidents,⁶³ no federal court and virtually no state court⁶⁴ has ever interpreted the Full Faith and Credit Clause in that manner.⁶⁵ Additionally, the Supreme Court, in *Sun Oil. Co. v. Wortman*, held that “[t]he Full Faith and Credit Clause does not compel a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.”⁶⁶ In light of the substantial likelihood that states are not constitutionally constrained from using

U.S. 287 (1942) (“Williams I”), holding that the Constitution requires states to recognize divorce judgments of other states. The second case is *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), a case that Singer argues, “came very close to holding that the [dormant] Commerce Clause prohibits applying any law other than the law of the place of incorporation to determine the voting rights of [corporate] shareholders . . .” Singer, *supra* note 17, at 41; *but see* KOPPELMAN, *supra* note 17, at 118–20 (disagreeing that the “full faith and credit clause . . . constrain[s] states’ power to fashion choice of law rules” except with respect to the *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), due process minimum contacts requirement).

62. U.S. CONST. art IV, § 1 (“And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.”).

63. Singer, *supra* note 17, at 35 (contending that the Full Faith and Credit Clause when “construed in light of other constitutional norms, including . . . the Commerce Clause, the constitutional right to travel, the Takings Clause, the First Amendment, and the fundamental right to marry” arguably imposes a “place of celebration [choice of law] rule”).

64. KOPPELMAN, *supra* note 17, at 185 n.11 (discussing a few Louisiana state intermediate appellate courts interpreting Article IV in this fashion). Yet, in *Maradiago v. Castle*, Nos. 07-9414, 07-9437, 2008 WL 4681383, at *2–3 (E.D. La. Oct. 31, 2008), a federal district court reasoned that even under Louisiana’s unique interpretation of the Full Faith and Credit Clause, a statutory “strong public policy,” such as state’s DOMA, would nonetheless defeat any imperative to recognize a foreign same-sex marriage.

65. *See* KOPPELMAN, *supra* note 17, at 118 (“[T]he full faith and credit clause has never been much of a constraint on states’ power to fashion choice of law rules.”); *see also The Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong., 2d Sess. 44 (1996) (statement of Cass R. Sunstein, Professor of Jurisprudence, Univ. of Chi.) (testifying that the “clause has never been understood to bind the states” to “recognize marriages that violate their policies and judgment.” “For [over] two hundred years states have worked out issues of this kind on their own.”); *cf. infra* Part III (describing the approach of modern choice of law jurisdictions to marital incidents).

66. 486 U.S. 717, 722 (1988) (quoting *Pacific Employers Ins. Co. v. Industrial Accident Comm’n*, 306 U.S. 493, 501 (1939) (internal quotation marks omitted); *see also* LEA BRILMAYER & JACK GOLDSMITH, *CONFLICT OF LAWS: CASES AND MATERIALS* 392 (5th ed. 2002) (“[*Sun Oil v. Wortman* must surely make one thing even clearer: that with regard to the issue of whether an adequate nexus exists for application of local law, the due process and full faith and credit limits are identical.”).

any choice of law rules they wish, this article assumes the point for the purpose of most of its analysis and conclusions.⁶⁷

B. Normative Background

The legal contests concerning same-sex marriage and civil unions arise in the context of a pitched ethical battle between defenders of traditional marriage,⁶⁸ and those who contend that states have no rational, non-discriminatory justification for withholding these statuses or their incidents from same-sex couples.⁶⁹ When a forum court confronts the question of whether to recognize the benefits and privileges conferred by another jurisdiction, the litigants likely will have, publicly or in briefing, made appeal to the two sides of the moral debate. However, presumably, legal scholars with affinities for and against recognition all share the aspiration articulated by conflict of laws scholar Andrew Koppelman: “Whatever external political pressures courts may face, they will always, one hopes, feel some obligation to just do their jobs *and follow the law*.”⁷⁰

After surveying the judicial opinions on interstate recognition, since the advent of same-sex unions in 2000 in Vermont⁷¹ and the 2004 inauguration of

67. *But see infra* Part IV.B (analyzing the possibility of full, faith and credit complications with respect to DOMA’s invitation to states not to recognize same-sex judgments).

68. *See, e.g.*, Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301 (1995); John Finnis, *The Good of Marriage and the Morality of Sexual Relations*, 42 AM. J. JURIS. 97 (1997) (Finnis, George, and Bradley articulate what is known as a “New Natural Law” ethical critique); Maggie Gallagher, *Normal Marriage: Two Views*, in MARRIAGE AND SAME SEX UNIONS : A DEBATE 13, 21 (Lynn Wardle et al. eds., 2003) (articulating perceived consequentialist harms from the perspective that “children do just fine in whatever family forms their parents choose to create, and that babies are irrelevant to the public purposes of marriage.”); *What is Marriage?*, *supra* note 6, at 245 (explaining the conjugal union of man and woman as the *raison d’etre* for marriage).

69. *See, e.g.*, Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261 (1995); Andrew Koppelman, *The Decline and Fall of the Case Against Same-Sex Marriage*, 2 U. ST. THOMAS L.J. 5 (2004).

70. *See* KOPPELMAN, *supra* note 17, at 137; Andrew Koppelman, *Interstate Recognition of Same-Sex Marriage and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2144 n.7 (2005) (remarking that “it is, of course, possible that courts will be so hostile to same-sex couples that they will refuse to recognize same-sex marriage under any circumstances.”); *cf.* George, *supra* note 45, at 34 (expressing concern that the theories of activists promoting same-sex marriage will be accepted on a political basis by “socially liberal federal judges”).

71. *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999) (holding that the state constitution compelled the legislature to enact a legal regime equivalent to that of traditional marriage or same-sex marriage). Ultimately the legislature decided to enact civil unions with full marital benefits. VT. STAT. ANN. tit. 15, §§ 1201–1207 (2009).

same-sex marriage in Massachusetts,⁷² it is clear that most judges—even those in state high courts with authority to do otherwise—do not express an intension to craft new choice of law principles for questions pertaining to same-sex marriage and civil unions. Instead, virtually all the decisions evince a desire to apply existing conflict of laws precedent⁷³—typically referred to by those courts as “principles of comity.”⁷⁴

Therefore, much of the scholarship is not directly responsive to the situation in which judges find themselves—either because the works analyze the issues at a very high level generality,⁷⁵ or because they weave descriptive analysis together with normative prescription.⁷⁶ The goal of what follows is to make a modest contribution to the literature by describing the appropriate contours and applications of choice of law principles that follow from precedent, in a sampling of states that typify the major choice of law methodologies followed today in the states.⁷⁷

72. *Goodridge v. Dep’t of Public Health*, 798 N.E.2d 941, 969–70 (Mass. 2003) (requiring, together with Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004), that the state start issuing same-sex marriages).

73. For a non-exhaustive list of cases engaging choice of law (comity) principles see, for example, *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 971 (Vt. 2006) (applying Restatement (Second) of Conflict of Laws § 287 (1971) and Vermont’s center of gravity choice of law precedent); *B.S. v. F.B.*, 883 N.Y.S.2d 458 (N.Y. Sup. Ct. 2009); *Martinez v. Monroe*, 850 N.Y.S.2d 740 (N.Y. App. Div. 2008); *Hennefeld v. Township*, 22 N.J. Tax 166 (N.J. Tax Ct. 2005); *Chambers v. Ormiston*, 935 A.2d 956 (R.I. 2007) (Suttell, J., dissenting); *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wa. 2004). In other controversies such as in *Rosengarden v. Downes*, 802 A.2d 170 (Conn. App. Ct. 2002), and *Burns v. Burns*, 560 S.E.2d 47 (Ga. Ct. App. 2002), common law conflicts principles were heavily briefed, but the court did not have occasion to reach that analysis because of, respectively, a lack of jurisdiction and an express state DOMA.

74. JOSEPH H. BEALE, 1 A TREATISE ON THE CONFLICT OF LAWS 53 (1935) (“[Comity] is employed merely as the title of the subject commonly called the Conflict of Laws; so that the phrase, a ‘foreign right is recognized by comity,’ means simply that by the Conflict of Laws recognition is given to it.”); see also *infra* note 114 (discussing the multiple meanings of comity).

75. See, e.g., Silberman, *supra* note 35, at 2206 (noting, without elaboration, that “[a] second state to which [a] couple moves . . . under its own law . . . can, after measuring its interest as compared to that of the other state, determine whether it is willing to confer the particular benefit.”); KOPPELMAN, *supra* note 17, at xv, 94 (contending that “ordinary choice of law analysis should continue to govern” incidents of marriage, but warning that he is “not predicting what courts will do in these cases”); Singer, *supra* note 17, at 24 (implying the possibility of forum non-recognition under the “incidental question” doctrine).

76. Silberman, *supra* note 35, at 2197 (“offer[ing] a normative analysis for [same-sex] conflict-of-laws issues . . .”); Barbara Cox, *Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Get Home?*, 1994 WIS. L. REV. 1033, 1080 (1994) (alerting advocates for same-sex recognition that “it could be possible, but potentially dangerous, to argue that a court should consider . . . [its] prior choice-of-law decisions . . .”). But see KOPPELMAN, *supra* note 17.

77. Part III and IV *infra* analyze: (1) Rhode Island as a representative of a traditional (*lex loci*) jurisdiction, (2) New York and Pennsylvania (with additional cases from Texas, Montana,

II. DISPLACING JUDICIAL CHOICE OF LAW & THE PUBLIC POLICY EXCEPTION

As noted above, states have enacted, by legislation and popular referendum, a multiplicity of constitutional amendments and statutes—commonly referred to as state DOMAs—on the subject of same-sex marriages and unions.⁷⁸ To a degree, probably unbeknownst to many of the voters (and perhaps some legislators) who enacted these sources of positive law, the particular language chosen will determine whether a state DOMA merely has domestic effect, or whether it constitutes a “choice of law rule” that displaces judicial common law for the purpose of interstate recognition. The canonical 1878 case of *Milliken v. Pratt* is relevant here because it sets forth the bedrock principle that animates the existence of choice of law. *Milliken* explains that conduct that is:

[E]xpressly prohibited by the statutes of the state in which [a] suit is brought . . . is not necessarily nor usually deemed so invalid . . . [such that] its courts will refuse to entertain an action on [it, if the conduct occurred] abroad in a state the laws of which permit it.⁷⁹

Whether a state will “entertain such an action”—in other words, follow the foreign substantive law—depends entirely on the jurisdiction’s choice of law rule. Thus, the forum’s substantive law does not govern unless that forum’s choice of law rules point towards forum law.

The conceptual challenge for interpreting state DOMAs is that some were undoubtedly enacted only to alter (or reaffirm) the status of marriage and unions under domestic law,⁸⁰ while others were aimed at codifying a non-

and Illinois) are examined as *modern* followers of a hybrid approach that includes evaluating rival “governmental interests” and measuring “significant contacts,” or “grouping of contacts” with the jurisdictions, and (3) Vermont as a state that principally uses a “significant contracts analysis,” also known as a “center of gravity” choice of law rule. This article does not consider the Restatement (Second)—standing alone—as an approach, because “[s]ome states use the Restatement as a camouflage for a ‘grouping of contacts approach,’ while others use the Restatement’s banner to implement their hybrid modern approach (*i.e.*, PA, NY), and finally others use only the Restatement’s most “general, open-ended and flexible sections of the Restatement (such as §§ 145, 187, and especially § 6)” SYMEONIDES ET AL., *supra* note 9, at 299–300.

78. Domawatch.org, a program of the Alliance Defense Fund, maintains an online database of most of the state level developments. *See also* KOPPELMAN, *supra* note 17, at 137–46 (setting forth Koppelman’s interpretation of the legal consequence of most State DOMAs).

79. *Milliken v. Pratt*, 125 Mass. 374 (1878); *see also* SYMEONIDES ET AL., *supra* note 9, at 3 (“With minor exceptions in its formative period, [conflict of law] adopted the premise that, in appropriate cases, the courts of one sovereign should be prepared to apply the law of another sovereign.”).

80. *See, e.g.*, KOPPELMAN, *supra* note 17, at 138–39 (observing that some DOMAs were enacted in response to “[a]n application for a marriage license by same-sex couples, who [argued] that there was nothing in the statutes restricting marriage to opposite-sex couples”); *cf.* Hernandez

recognition choice of law rule for same-sex relationships officiated out-of-state.⁸¹ It is beyond the scope of this article to scrutinize the text and enactment history of each state DOMA, but *three* general characterizations about how the judicial choice of law rules are affected are warranted.

First, states such as Louisiana and Texas have explicitly adopted non-recognition choice of law rules for the validity and incidents of all foreign same-sex relationships.⁸² Louisiana courts, consistent with the state's civil law tradition, follow a choice of law rule for marriage and all other statuses found in the civil code.⁸³ It provides, under the heading "Conflict of Laws—Marriage," that "[t]he status of a natural person and the incidents and effects of that status are governed by the law of the state whose policies would be most seriously impaired if its law were not applied to the particular issue."⁸⁴

Yet, the state has a different choice of law rule for same-sex marriages and unions celebrated abroad; the code contains a non-recognition rule for foreign "purported marriage[s] between persons of the same sex."⁸⁵ This principle is explicitly reinforced in the Louisiana Constitution which states, "[a] legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman."⁸⁶

Texas similarly accomplishes total non-recognition by virtue of a statutory rule. The statute reads:

The state or an agency or political subdivision of the state may not give effect to a . . . right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction.⁸⁷

In states such as these—with language that makes specific reference to foreign marriages—any prior statutory or common law choice of law principle is

v. Robles, 855 N.E.2d 1, 5–6 (N.Y. 2006) (finding the suggestion that some *amici* had made, that New York's statute could be "read to permit same-sex marriage, . . . untenable").

81. See *infra* Part III. For reasons that are explained in Part III, this article does not adopt Koppelman's *per se* (categorical) distinction between evasive and migratory marriages. As discussed in Part III, how a state handles lawsuits for incidents in both these scenarios will depend on the facts of the case and the particular contours of that state's modern choice of law rule.

82. LA. CIV. CODE ANN. art. 3519 (2010); Tex. FAM. CODE ANN. § 6.204 (West 2009).

83. LA. CIV. CODE ANN. art. 3519 (2010).

84. *Id.* Were Louisiana not a follower of the Napoleonic Code this provision would be found in judicial common law precedent rather than Article 3519 of the Civil Code.

85. *Id.*

86. LA. CONST. art. XII, § 15.

87. TEX. FAM. CODE ANN. § 6.204 (West 2009).

clearly displaced.⁸⁸ Additionally, state DOMAs that declare certain foreign same-sex relationships “void” or “prohibited” often should be given the same effect as DOMAs that explicitly reference choice of law or other state’s unions and marriages.⁸⁹

Second, some states such as Georgia aim to achieve foreign non-recognition through the invocation of “public policy.”⁹⁰ It is well established that though public policy “is not measured by individual notions of expediency and fairness,” it “is found in the State’s Constitution [and] statutes”⁹¹ It has come to be defined as situations in which applying foreign law “would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.”⁹² A new law

88. See also ARIZ. REV. STAT. ANN. § 25-112 (2010) (“Marriages valid by the laws of the place where contracted are valid . . . except marriages that are void and prohibited by § 25-101.”). “Marriage between persons of the same sex is void and prohibited.” ARIZ. REV. STAT. ANN. § 25-101 (2010). New Hampshire, on the other hand, recognizes same sex marriages. See N.H. REV. STAT. ANN. §§ 457:1– 457:3 (2010).

89. See, e.g., 750 ILL. COMP. STAT. 5/212 (2006) (“The following marriages are prohibited . . . a marriage between 2 individuals of the same sex.”). However, courts should scrutinize the enactment history of these DOMAs carefully to distinguish those addressed to foreign same-sex relationships, and those solely concerned with establishing a domestic prohibition on same-sex unions and marriages. This parsing is necessary because sometimes domestic statutes have “literal catholicity,” which “if taken at face value” would transform them into choice of law rules. SYMEONIDES ET AL., *supra* note 9, at 551; cf. *In re May’s Estate*, 114 N.E.2d 4, 6 (N.Y. 1953) (“Although the New York statute . . . declares to be incestuous and void a marriage between an uncle and a niece . . . it is important to note that the statute does not by express terms regulate a marriage solemnized in another state, where . . . the marriage was . . . legal.”). *May’s* was a traditional approach case that undertook that analysis to determine if the legislature had displaced the “place of celebration rule” (*i.e.*, dubbed, in the case, as the “positive law exception”). See *infra* notes 288–295 and accompanying text (discussing *May’s* relevance to same-sex incidents).

90. *Burns v. Burns*, 560 S.E.2d 47, 49 (Ga. Ct. App. 2002) (citing GA. CODE ANN. § 19-3-3.1 (2010)).

91. *Schultz v. Boy Scouts of Am., Inc.*, 480 N.E.2d 679, 688 (N.Y. 1985); see also *Cooney v. Osgood Machinery, Inc.*, 612 N.E.2d 277, 284 (N.Y. 1993) (“[P]ublic policy may be found in the State Constitution, statutes and judicial decisions”).

92. *Loucks v. Standard Oil Co.*, 120 N.E. 198, 202 (N.Y. 1918). This use of public policy not to enforce foreign laws on the grounds that their substance is repugnant or “odious” has been criticized by Professor Koppelman in the interstate context on the grounds that “no [U.S.] state can have a legitimate interest in deliberately subverting the operation of laws of other states.” KOPPELMAN, *supra* note 17, at 26. Koppelman would, however, sanction a state’s non-recognition of certain repugnant laws from other nations. He argues that a public policy exception to the laws of a Nazi regime, or the “racial laws of [apartheid] South Africa, the religious laws of Iran[, or] the sexually discriminatory laws of Saudi Arabia” would be justifiable. *Id.* at 23–24. This author appreciates no principled distinction between those public policy exceptions and a state’s deep-rooted desire not to legitimize same-sex marriage, except in degree, and thus does not share Koppelman’s view. See *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O’Connor, J., concurring) (stating that “preserving the traditional institution of marriage” is a

or constitutional amendment pertaining to public policy should in all situations successfully displace the working of the common law rule in a traditional Restatement (First) of Conflict of Laws (1931) jurisdiction. Those jurisdictions use *lex loci celebrationis* not just for marital *validity* but also for *incidents*.⁹³ To illustrate, Georgia, unlike the majority of states with which this article is principally concerned,⁹⁴ follows this Restatement (First) approach.⁹⁵ Accordingly, the Georgia Supreme Court had no trouble, in *Burns v. Burns*, concluding that “even if Vermont had purported to legalize same-sex marriages, [they] would not be recognized in Georgia” by virtue of its statutory DOMA that declares it to be “the public policy of Georgia to recognize the union only of man and woman.”⁹⁶

In a modern choice of law state, whether a public policy will prompt non-recognition of incidents will depend on whether the forum’s common law choice of law rule retains the public policy exception. In a jurisdiction such as New York, a public policy DOMA—were it ever to be passed—would function to invalidate foreign same-sex marriages.⁹⁷ In *Cooney v. Osgood Machinery*, New York’s highest court—the Court of Appeals—concluded that even under its “modern choice of law doctrine, [there can be] resort to the public policy exception . . .”⁹⁸ Conversely, in Montana—another modern choice of law jurisdiction—the state supreme court has held that the state *does not* “recognize a ‘public policy’ exception that would require application of Montana law even where Montana’s choice of law rules dictate application of the laws of another state . . .”⁹⁹

“legitimate state interest” so long as it goes “beyond mere moral disapproval of an excluded group”); *cf.* *Barnes v. Glen Theatres*, 501 U.S. 560, 575 (1991) (Scalia, J., concurring) (explaining that “society prohibits . . . certain activities . . . because they are considered, in the traditional phrase, ‘*contra bonos mores*,’ *i.e.*, immoral.”).

93. It is an open question whether it is appropriate for a court to invalidate a union or an incident on the grounds of a public policy exception in the absence of a statutory or constitutional DOMA. For the argument that it is appropriate see generally, Brief of Amicus Curiae Governor Donald L. Carcieri, *Chambers v. Ormiston*, 935 A.2d 956 (2007) (No. 06-340-M.P.). For the counterargument see KOPPELMAN, *supra* note 17, at 20–27.

94. *See infra* Part III.B.

95. *Griggs v. Harris*, No. C79-2219, 1981 U.S. Dist. Lexis 18366 (N.D. Ga. Jan. 12, 1981).

96. 560 S.E.2d 47, 49 (Ga. Ct. App. 2002) (citing GA. CODE ANN. § 19-3-3.1 (2010)) (internal quotation marks omitted).

97. As discussed *supra* note 14, New York presently celebrates same-sex marriages within the state.

98. 612 N.E.2d 277, 285 (N.Y. 1993). As a formal matter, “the public policy exception should be considered only after the court has first determined, under choice of law principles, that the applicable substantive law is *not the forum’s law*.” *Id.* at 284 (emphasis added).

99. *Phillips v. General Motors Corp.*, 995 P.2d 1002, 1015 (Mont. 2000) (“Considerations of public policy are expressly subsumed within the most significant relationship approach” of the Restatement (Second) of Conflicts of Law); *see also* BRILMAYER & GOLDSMITH, *supra* note 66, at

Third, state DOMAs that merely proscribe the issuance of domestic same-sex marriages do not constitute a choice of law rule and thus the existing common law judicial doctrines should remain intact.¹⁰⁰ This is also the case with respect to same-sex unions for the approximately twenty states without a stated choice of law rule or public policy towards these relationships. All states in this category are in the conflict of laws situation described by *Milliken*—the conduct is proscribed domestically but permitted abroad.¹⁰¹ Politically, these DOMAs (if statutory in nature) likely were passed to preempt state courts from using statutory interpretation to compel celebration by the forum of marriages or unions in order to reverse or preclude the state supreme court from “mandating recognition of same-sex relationships.”¹⁰² The best known example of the latter was the constitutional reversal of *Baehr v. Lewin* “[i]n 1998 [by] the people of Hawaii [affirming] the heterosexual character of marriage.”¹⁰³

III. PRECEDENTIAL & THEORETICAL SUPPORTS FOR ANALYZING “INCIDENTS” UNDER MODERN CHOICE OF LAW PRINCIPLES

A. *Comity vs. “Comity of Nations”*

Hennefeld v. Township of Montclair, a 2005 decision by the New Jersey Tax Court, will help introduce the appropriate analysis by modern choice of law jurisdictions.¹⁰⁴ Then, as now, New Jersey followed a modern approach to conflicts that “combin[es] [governmental] interest analysis with the

326–27 (suggesting that Montana’s approach is more sensible assuming that the public policy exception may only be invoked by the state with the most substantial interest in the case).

100. See, e.g., WYO. STAT. ANN. § 20-1-101 (2010) (a 1977 provision predating the interstate recognition controversy); WYO. STAT. ANN. §20-1-111 (2010) (the state follows its *lex loci* rule for tort and contract for marriage’s validity); WASH. REV. CODE. § 26.04.010 (2011) (“Marriage is a civil contract between a male and a female”); OR. CONST. art. XV, § 5a (“It is the policy of Oregon, and its subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage.”) (emphasis added). The conclusion that Oregon’s Constitutional Amendment is purely domestic (as opposed to a choice of law rule declaring foreign marriages void) is based on two considerations: *first*, the court’s discussion of the Amendment in *Li v. Oregon*, 110 P.3d 91 (Or. 2005) (en banc), and *second*, on the fact that the constitutional provision was passed in response to local counties officiating same-sex weddings based on their interpretations of state statutes.

101. See *supra* note 79 and accompanying text.

102. KOPPELMAN, *supra* note 17, at 139.

103. George, *supra* note 45, at 32; HAW. REV. STAT. § 572-3 (2010) (Hawaii’s DOMA, though superseding *Baehr*’s constitutional interpretation, is silent on the issue of out-of-state same-sex recognition for either unions or marriages).

104. 22 N.J. Tax 166 (N.J. Tax Ct. 2005). The particular holding of the case is now moot in New Jersey because of the New Jersey Supreme Court’s decision in *Lewis v. Harris*, 908 A.2d 196, 220 (N.J. 2006), requiring civil unions with full marital benefits as a matter of equal protection under the State Constitution.

Restatement (Second).”¹⁰⁵ The plaintiffs in *Hennefeld* were two gay men who had married in Canada.¹⁰⁶ They sought to be recognized “as spouses” for the purpose of filing their New Jersey State tax return.¹⁰⁷ In analyzing whether to recognize the international marriage, the tax court relied on the Supreme Court precedent of *Hilton v. Guyot*¹⁰⁸ that pertains to “comity of nations.”¹⁰⁹ In denying the plaintiff’s claim, the tax court relied on a principle from *Hilton* that “as a general matter, the laws of one nation do not have force of effect beyond its borders.”¹¹⁰ Utilizing this rationale was deeply flawed and illustrates the need for judges to carefully discern “the meaning of the [word comity] in a particular case [precedent]” before relying on it.¹¹¹ As renowned conflict of laws scholar Joseph Beale explained in 1935, “the word comity [can] be a very ambiguous term.”¹¹² Comity is frequently a label for a state’s choice of law rule,¹¹³ yet in other contexts it can refer to any of several different principles pertaining to the extraterritorial application of another nation’s law.¹¹⁴

105. SYMEONIDES ET AL., *supra* note 9, at 300–01.

106. *Hennefeld*, 22 N.J. Tax at 172–73. The men also had a Vermont civil union but the court held that New Jersey’s statute only pertained to marriages and thus this legal relationship was irrelevant. *Id.*

107. *Id.* at 176–77. Tracing its lineage back to a remark by Justice Marshall in *The Antelope*, 23 U.S. 66, 123 (1825), it has historically been the practice of American state courts to adhere to a policy of blanket non-recognition with respect to other states’ “penal laws.” Robert A. Leflar, *Extrastate Enforcement of Penal and Government Claims*, 46 HARV. L. REV. 193, 195 (1932). Many courts—as the Supreme Court recently discussed in *Pasquantino v. United States*, 544 U.S. 349, 369–70 (2005)—by extension, also decline all recognition of “foreign revenue laws.” BRILMAYER & GOLDSMITH, *supra* note 66, at 172. Under a slight variation of the facts of *Hennefeld*, such that the plaintiff argued that a provision of his home state’s tax law should apply in the forum, this foreign “revenue law rule” might apply in lieu of ordinary choice of law rules. Koppelman poses a hypothetical in which “a person from Connecticut who is in a civil union there works in New York City.” KOPPELMAN, *supra* note 17, at 111. He concludes that the “[Connecticut civil-union] should be recognized for purposes of computing his or her [New York State] tax deductions.” *Id.* Because New York State ascribes to the revenue law non-recognition principle, *City of Philadelphia v. Cohen*, 184 N.E.2d 167, 169 (N.Y. 1962), it might decline to give effect to the Connecticut deduction on this ground. However, most of the foreign revenue law cases involve a foreign sovereign seeking to collect another state’s taxes or prosecute a foreign state tax evader, so whether to give effect to a foreign deduction may be beyond the reach of the rule and instead be subject to the ordinary choice of law analysis.

108. 159 U.S. 113, 163 (1895).

109. *Hennefeld*, 22 N.J. Tax at 178.

110. *Id.*

111. SYMEONIDES ET AL., *supra* note 9, at 19.

112. *Id.*

113. Even then, a court in a non-traditional jurisdiction must be certain that the case is from the modern conflicts era.

114. Comity may refer, as in *Hilton v. Guyot*, to process by which a U.S. court decides whether to recognize a foreign nation’s judgment. SYMEONIDES ET AL., *supra* note 9, at 816–

The tax court explained that it applied the *Hilton* standard because the federal bankruptcy case *In re Kandu*¹¹⁵ had done so in a factually analogous situation.¹¹⁶ In *Kandu*, two lesbian woman married in Canada claimed they were eligible to file jointly under a U.S. bankruptcy code provision affording spouses this privilege.¹¹⁷ Though *Kandu* was indeed quite similar, the tax court erred in relying on it because of the difference between it—a state court applying state choice of law principles—and the U.S. bankruptcy court considering a conflict between a foreign nation’s law and federal law. It is well-established that U.S. federal courts—mimicking the practice of most foreign countries—will not consider “displacing [their] otherwise applicable public law with that of [another] [n]ation.”¹¹⁸

State courts, by contrast, have no such prohibition. Instead, they apply the same choice of law methodologies whether confronted with a conflict with another U.S. state’s law, or another nation’s law.¹¹⁹ Simply put, precedent dictates that a state court adjudicating a case pertaining to recognition of a

17. The term comity can also refer to the interpretative cannon, the “presumption against extraterritoriality,” as deployed in *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 258 (1991), and discussed in *Hartford Fire Insurance, Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting) (“[P]rescriptive comity’ [is] the respect sovereign nations afford each other by limiting the reach of their laws.”). BRILMAYER & GOLDSMITH, *supra* note 66, at 759. Additionally, international comity is a descriptor sometimes used for the so-called “Charming Betsy” cannon that “an act of [C]ongress ought never to be construed to violate the law of nations if any other possible construction remains.” SYMEONIDES ET AL., *supra* note 9, at 552.

115. *In Re Kandu*, 315 B.R. 123, 133 (Bankr. W.D. Wash. 2004). *In re Kandu* concluded that “[b]ecause the British Columbia policy and the United States policy concerning marriage directly conflict, this Court must prefer its own laws finding DOMA controlling in this case.” *Id.* at 133–34.

116. *Hennefeld v. Twp. of Montclair*, 22 N.J. Tax 166, 178 (2005).

117. *Id.* at 180 (noting that the federal Defense of Marriage Act made clear that U.S. law did not consider same-sex marriages to be married).

118. Phillip McConnaughay, *Reviving the “Public Law Taboo” in International Conflict of Laws*, 35 STAN. J. INT’L. L. 255, 256 (1999) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 401–03 (1987)) (“[U]rg[ing] the extension of . . . interest balancing principles to public law generally.”); *see also*, BRILMAYER & GOLDSMITH, *supra* note 66, at 742–43 (describing this phenomenon but raising questions about its justifications).

119. It should be observed that a federal court effectively takes the posture of a state court when it sits in diversity jurisdiction. *See generally*, BRILMAYER & GOLDSMITH, *supra* note 66, at 565–625 (discussing the implications of *Erie v. Tompkins*, 304 U.S. 64 (1938), and its progeny). On such an occasion pursuant to *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941), the federal forum will adopt the conflict of law rule of the state court in whose jurisdiction the court sits. BRILMAYER & GOLDSMITH, *supra* note 66, at 578. Consequently, a federal court in diversity will have the same approach to conflicts with the law of another nation as that of state courts. A secondary error with the court’s reliance on *Hilton* is that the case, post-*Erie*, at most, “enunciates a rule of federal common law . . . not binding on the states.” SYMEONIDES ET AL., *supra* note 9, at 820.

same-sex Canadian marriage should analyze it identically as a same-sex Massachusetts marriage or Vermont civil union.¹²⁰

A final observation about comity is necessary before proceeding to analyze the state case law on heterosexual marriage. As the New York Court of Appeals opined in *Loucks v. Standard Oil Co.* (1918), “the misleading word ‘comity’ has been responsible for much of the trouble.”¹²¹ This term:

[H]as been fertile in suggesting a discretion unregulated by general principles. The sovereign in its discretion may refuse its aid to the foreign right. From this it has been an easy step to the conclusion that a like freedom of choice has been confided to the courts. *But that, of course, is a false view.*¹²²

The *Loucks* court did not mean that choice of law was *not* a field of judge made common law, but instead it sought to convey that the decision to apply a foreign jurisdiction’s law, in any particular case, was not commended to “the pleasure of the judges, to suit [their] independent notion[s] of expediency or fairness.”¹²³ In considering whether to apply a Massachusetts wrongful death statute to an accident that had occurred in Massachusetts, the *Loucks* court reasoned that it must consider “death statutes in their relation to the general body of private international law¹²⁴ . . . and apply the same rules applicable to other torts”¹²⁵ Noting that the prevailing choice of law rule of the day

120. See, e.g., *Beth R. v. Donna M.*, 853 N.Y.S.2d 501 (N.Y. Sup. Ct. 2008) (applying New York choice of law—*albeit inappropriately* because it relied on case law that pre-dated the conflict’s revolution—to the issue of recognition of a Canadian same-sex marriage for the incident of divorce); *C.M. v. C.C.*, 867 N.Y.S. 2d 884 (N.Y. Sup. Ct. 2008) (similarly analyzing a claim for divorce on the basis of a Massachusetts same-sex marriage); see also, SYMEONIDES ET AL., *supra* note 9, at 537 (explaining that in state cases such as *Babcock v. Jackson*, 12 N.Y.2d 473 (1963), “the foreign [country] dimension of the conflict did not have a bearing on either the outcome or the choice-of-law methodology utilized[.]”). See also *infra* note 174 and accompanying text.

121. *Loucks v. Standard Oil Co. of N.Y.*, 120 N.E. 198, 201 (1918); cf. BEALE, *supra* note 74, at 53 (explaining “that the phrase, a ‘foreign right is recognized by comity,’ means simply that by the Conflict of Laws recognition is given to it.”).

122. *Loucks*, 120 N.E. at 202 (emphasis added) (citations omitted). More recently Rhode Island’s Attorney General described comity “not [as] a rule of law, but rather, a *courtesy or practicality* based on a regard for the law of a foreign state.” Letter from Patrick Lynch, R.I. Att’y Gen., to Jack R. Warner, Comm’r of R.I. Bd. of Governors for Higher Educ. (Feb. 20, 2007), available at http://www.glad.org/uploads/docs/advocacy/RIAttorneyGeneral_State_ment.pdf. Though his analysis goes on, properly, to follow the state’s choice of law precedent, this quote provides a contemporary example of how “comity” can be a siren’s song—imperiling incautious scholars or judges.

123. *Loucks*, 120 N.E. at 202.

124. Private International Law is the original term for conflict of law or choice of law. It continues to this day to be used in European jurisprudence. Arthur Taylor von Mehren, Comment, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 350, 351, 355–56 (1974).

125. *Loucks*, 120 N.E. at 202.

was that “[a] tort committed in one state creates a right of action that may be sued upon in another,”¹²⁶ the court appropriately applied Massachusetts law.¹²⁷ That was New York’s common law as of 1918. *As courts confront similar conflict of law problems today,*¹²⁸ *what general principle of “private international law” should guide them?* It is to that inquiry we now turn.

B. Modern ‘Heterosexual Marriage’ Jurisprudence as Authority for Resolving Today’s Same-Sex Litigation

This article follows the usual convention of using the term *traditional* to refer to the choice of law methodology codified in 1934 by Joseph Beale when he drafted the Restatement (First) of the Law, Conflict of Laws for the American Law Institute.¹²⁹ The traditional system was based on the idea of territorialism coupled with “vested rights.”¹³⁰ In general, the law of a state prevails throughout that state’s boundaries;¹³¹ but “[a] right having been created by the appropriate law, the recognition of its existence should follow everywhere. Thus an act valid where done [could not] be called in question anywhere.”¹³² In the substantive areas of tort and contract, the basic rules—*lex loci delicti* and *lex loci contractus*, respectively—governed. For the most part, a contract’s validity was guided by the location of the contract’s formation; in tort law, the forum adopted “the law of the place of the wrong.”¹³³ For marriage, the concept was similar. The *lex celebrationis* rule provided that: “a marriage [was] valid everywhere if the requirements of the marriage law of the state where the contract of marriage [took] place [had been] complied with.”¹³⁴

126. *Id.* at 200.

127. *Id.* at 202.

128. *See, e.g.,* Langan v. St. Vincent’s Hosp. of N.Y., 802 N.Y.S.2d 476, 477 (N.Y. App. Div. 2005) (noting a same-sex individual sought New York recognition of the right Vermont had conferred upon him to recover for wrongful death by virtue of his Vermont civil-union with the decedent). Part III *infra* analyzes this case in detail.

129. SYMEONIDES ET AL., *supra* note 9, at 13; *ALI Overview: Creation*, THE AMERICAN LAW INSTITUTE, <http://www.ali.org/index.cfm?fuseaction=about.creation> (last visited Aug. 12, 2011) (explaining that the ALI was founded in 1923 by a group of legal professionals including Supreme Court “Chief Justice and former President William Howard Taft, future Chief Justice Charles Evans Hughes, and former Secretary of State Elihu Root” to help resolve uncertainties in “principles of the common law”).

130. SYMEONIDES ET AL., *supra* note 9, at 19.

131. *Id.*

132. JOSEPH H. BEALE, 3 A TREATISE ON THE CONFLICT OF LAWS 1969 (1935).

133. *See* SYMEONIDES ET AL., *supra* note 9, at 35 (describing that “the law of the place of [contractual] performance (*lex loci solutionis*) determin[ed] . . . the manner, time, place, and sufficiency of performance [as well as] permissible excuses for non-performance.”); *id.* at 20–23 (noting various approaches were adopted to “identify” the place of the tort).

134. RESTATEMENT (FIRST) OF CONFLICTS OF LAWS § 121 (1934); *see, e.g.,* True v. Ranney, 21 N.H. 52, 52 (N.H. 1850) (“[T]he validity of a contract of marriage depends on the *lex loci*

Additionally, as has been widely acknowledged elsewhere, a policy notion that there was a unique “desirability [to] uniformity [on] the question [of] the validity of a marriage”—so that cohabitants and their offspring could be sure of their status when they traveled and relocated—also motivated the traditional rule.¹³⁵

Though protecting the couple’s expectation was a motivation behind the traditional rule, it would be inaccurate to conclude that this rationale dictated the outcomes. In *Farah v. Farah*, Virginia—a traditional choice of law state to this day¹³⁶—refused to recognize a marriage performed in Pakistan on the grounds that, just as “[a] marriage that is valid under the law of the state or country where it is celebrated is valid in Virginia, . . . [a] marriage that is void where it was celebrated is void everywhere.”¹³⁷ The marriage had been performed according to Islamic practice, which included the signing of a religious marriage contract, a promise to pay a dowry, and the designation of proxies who had gone to England and performed the necessary religious rituals on the couple’s behalf.¹³⁸ Finally, when the so-called proxy marriage was complete, the couple had a reception with their family in Pakistan.¹³⁹ After those steps, it is difficult to imagine that the couple did not believe themselves to be husband and wife. And yet, the court concluded that because under Pakistani law (the place of celebration) the woman was ineligible to marry—by virtue of her membership in “a controversial Muslim sect”—Virginia would not recognize the marriage for the purpose of divorcing the couple and dividing their assets, now in America.¹⁴⁰

Also, likewise under *lex celebrationis*, a forum court could decline to recognize a marriage when one or both of the spouses temporarily traveled to another state in order to evade a domestic law that would bar their marriage. The Restatement (First) Section 132 accomplishes this by providing that “a marriage which is against the law of the domicil [sic] of either party, though the requirements of the place of the celebration have been complied with, will be invalid.”¹⁴¹ One commentator explained Section 132 as “recogniz[ing] in the

contractus.”); cf. *Black v. Powers*, 628 S.E.2d 546, 554–55 (Va. Ct. App. 2006) (applying the law of the Virgin Islands, where a prenuptial contract was drawn up, rather than Virginia law—the forum in which relief was sought).

135. 52 AMERICAN JURISPRUDENCE 932 (2d ed. 1970). However, that argument was developed in the context of a relatively polar dichotomy. The alternative—before modern theories pertaining to ‘interests’ and ‘contacts’ developed—was that the law of the forum would govern and a marriage could be extinguished for all purposes.

136. SYMEONIDES ET AL., *supra* note 9, at 301–02.

137. 429 S.E.2d 626, 629 (Va. Ct. App. 1993).

138. *Id.* at 627.

139. *Id.* at 627–28.

140. *Id.* at 629.

141. RESTATEMENT (FIRST) OF CONFLICTS OF LAWS § 132 (1934).

domicile an absolute power, exercisable by statute or otherwise, to control for any reason the validity of its people's marriages celebrated anywhere."¹⁴² In *Wilkins v. Zelichowski*, a New Jersey couple traveled to Indiana to obtain a marriage that they could not have secured in their home state because they were both under the age of majority.¹⁴³ The woman then sought an annulment under a provision of New Jersey law directed at New Jersey marriages. The lower courts had denied relief "on the ground that the marriage was valid in Indiana and should therefore, under principles of the conflict of laws, not be nullified by a New Jersey court . . ."¹⁴⁴ In explaining its reversal, the Supreme Court stated that:

The marriage status both in its creation and destruction is of great importance not only to the individual, *but also to the state where he makes his home*. And while the law of the place where the ceremony is performed has an interest in the validity of the ceremony, it has none in the intrinsic validity of the status, unless the status is to be enjoyed there.¹⁴⁵

Wilkins and *Farah* are instructive because they demonstrate that even under the vested rights regime of the Restatement (First), forum states had several doctrinal opportunities to assert their own policies—any contrary expectations of the couple or contrary interest of the celebration state notwithstanding. Nonetheless, the place of celebration rule did have considerable effect in the mine-run of cases. It meant that couples domiciled in a foreign state could freely migrate from the place of marital celebration to other states and have their unions recognized for essentially all purposes. When the marriage violated a deep-seated public policy, the forum state could deny recognition.¹⁴⁶ For example, in *State v. Ross*, North Carolina did not

142. Perry Dane, *Whereof One Cannot Speak: Legal Diversity and the Limits of a Restatement of Conflict of Laws*, 75 IND. L.J. 511, 513 (2000). "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 . . . of the parties' domicile at the time of the marriage . . ." Singer, *supra* note 17, at 14. This "public policy" did not have to be a strong public policy or abhorrence; instead a mere prohibition domestically by the laws of the domicile of either spouse would suffice. *See, e.g.*, RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 132 illus. 2 (1934) (stating that if A (domiciled in State Y) and B (domiciled in State Z) marry in neutral State X that permits their union, but State Z would have prohibited the marriage in its territory then "the marriage is invalid and will be so held when its validity comes into question in X, Y, Z, or a fourth state." (emphasis added)).

143. 140 A.2d 65, 65 (N.J. 1958).

144. *Id.* at 66.

145. *Id.* at 68 (emphasis added) (citations and internal quotation marks omitted).

146. In what is generally thought to be the canonical statement of the scope of the public policy exception the New York Court of Appeals in *Loucks* stated: "We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home. . . . [Courts] do not close their doors, unless help would violate some fundamental principle of justice,

invoke public policy regarding an incident stemming from an interracial marriage—the inheritance of spousal property—despite labeling the union “revolting to us and to all persons.”¹⁴⁷ The *Ross* Court explained that it perceived “[t]he most prominent if not the only known [public policy] exceptions to [*lex celebrationis* as] those marriages involving polygamy and incest,” and declined to agree with the state Attorney General that “a marriage between persons of different races [was] as unnatural and as revolting as an incestuous one”¹⁴⁸

Prominent conflict of laws scholar Andrew Koppelman has advanced the argument that the most a forum can do *justifiably*, in the direction of non-recognition, is “draw[] the line” as the *Ross* Court did. In other words, he posits that if a marriage does not qualify as an evasion case,¹⁴⁹ then the law of the place of celebration must govern its validity and incidents such as inheritance.¹⁵⁰ He marshals a number of “miscegenation” precedents (which he divides into three groups) in support of this argument. For the first group, the so-called “evasion” cases, he concedes that they embody a majority approach—non-recognition—in the same vein as *Wilkins* considered above.¹⁵¹ The second group consists of cases in which the interracial couple never cohabited in the forum state. These cases are said to be clear candidates for recognition.¹⁵² The third group consists of “migratory” interracial marriages. According to the place of celebration rule, he concludes that if the marriage was celebrated either (1) by domiciliaries of the state of celebration, or (2) former domiciliaries of the forum who at the time of marriage had no intention to return,¹⁵³ then the couple “should be able to move anywhere and take the marriage with them.”¹⁵⁴ He then notes how the Southern courts “were split about the status of migratory marriages, though they tended to recognize them.”¹⁵⁵ The split though was over the scope and dimension of the public policy exception.¹⁵⁶

some prevalent conception of good morals, some deep-rooted tradition of the common weal.”
Loucks v. Standard Oil Co. of N.Y., 120 N.E. 198, 201–02 (N.Y. 1918).

147. 76 N.C. 242, 246 (N.C. 1877).

148. *Id.* at 245–46.

149. KOPPELMAN, *supra* note 17, at 43.

150. *See supra* note 142 (discussing RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 132).

151. KOPPELMAN, *supra* note 17, at 37–39.

152. *Id.* at 39–42.

153. *Id.* at 42–47.

154. *Id.* at 42–43; *Vlandis v. Kline*, 412 U.S. 441, 454 (1973) (“[T]he domicile of an individual is his true, fixed and permanent home and place of habitation. It is the place to which, whenever he is absent, he has the intention of returning.”) (citation omitted).

155. KOPPELMAN, *supra* note 17, at 49.

156. *Id.* at 48–49.

The so-called majority approach (recognition) is thought to be typified by cases such as *Ross* and *Bonds v. Foster*.¹⁵⁷ *Ross* concerned a black woman who, originally a North Carolina resident, reestablished domicile in South Carolina so that she could legally marry a white man. After the marriage and the elapse of time, the couple moved to North Carolina, and when the husband later died, the court upheld the marriage *for the purpose of* the wife's ability to inherit from him.¹⁵⁸ *Foster* involved a white man and slave woman who cohabitated in Ohio and met the requirements for a common law marriage.¹⁵⁹ The couple later moved to Texas which, unlike Ohio, had a law prohibiting interracial marriage.¹⁶⁰ The court held that it would recognize the marriage *for the purpose of* immunizing the wife's property from liquidation to pay off creditors.

Conversely, the minority approach (non-recognition) Koppelman posits is embodied by *State v. Bell*.¹⁶¹ That case involved an interracial couple from Mississippi who married there legally but later migrated to Tennessee. The husband was successfully prosecuted for fornication, and the courts refused to recognize the Mississippi marriage as a defense. The court justified its decision by determining that miscegenation was most offended in the case of migratory cohabitation. Generally speaking, the Southern courts were less willing to deviate from the law of the place of the celebration for incidents than for laws that proscribed cohabitation in their boundaries.¹⁶² This insight *may* be instructive for modern courts trying to judicially determine how deeply held a policy exception must be to justify non-recognition.¹⁶³ However, as noted

157. *Id.* at 44.

158. *Id.* at 28–29; *see generally* *State v. Ross*, 76 N.C. 242, 143 (N.C. 1877).

159. *Bonds v. Foster*, 36 Tex. 68, 70 (Tex. 1871).

160. KOPPELMAN, *supra* note 17, at 44–45. The case does not fall within Section 132 (“evasion”) because, although the wife had once been a North Carolina domiciliary, she established a *bona fide* new domicile in South Carolina (which permitted interracial marriage) “without an intent to return with [her husband]” to North Carolina.” *Ross*, 76 N.C. at 143.

161. KOPPELMAN, *supra* note 17, at 46 (discussing *State v. Bell*, 66 Tenn. 9, 10–11 (Tenn. 1872)).

162. *Cf. Henson*, *supra* note 35, at 564 (1994) (suggesting that a “public policy against polygamous *cohabitation*, had that been a factor, would have been held to be strong enough to invalidate the marriage.”).

163. KOPPELMAN, *supra* note 17, at 49. Of course the comparison is ethically and legally problematic because miscegenation laws served no rational purpose, *see Loving v. Virginia*, 388 U.S. 1, 11 (1967), while limits on same-sex marriage have been substantiated under rational basis review by federal and state courts. *See, e.g., Wilson v. Ake*, 354 F. Supp. 2d 1298, 1308 (M.D. Fla. 2005); *Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861, 879 (C.D. Cal. 2005); *Hernandez v. Robles*, 855 N.E.2d 1, 10 (N.Y. 2006); *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 677–78 (Tex. Ct. App. 2010). For a moral critique not borne of animus, *see George & Bradley, supra* note 68; *Finnis, supra* note 68.

above,¹⁶⁴ and as explained below, the analytical framework used in miscegenation cases and other traditional jurisdictions applying *lex celebrationis* constitutes a pre-modern approach that is analytically distinct from “the Restatement (Second) rule.”¹⁶⁵

The traditional approach originally “had an almost universal following in the United States,” but over time courts began to express dissatisfaction with, and practice “evasion from[,] the . . . system of the first Restatement.”¹⁶⁶ New York was the first state to experiment with explicit departures from the First Restatement.¹⁶⁷ With *Auten v. Auten* (1954), the New York Court of Appeals rejected *lex loci contractus* and applied the rule that the law “of the place with the most significant contacts with the matter in dispute” should govern.¹⁶⁸ Instead of applying the law of the place where the parties had drawn up a marital separation agreement—New York—the court applied English law because England continued to be the domicile of the wife and her children from the marriage.¹⁶⁹ In *Haag v. Barnes* (1961), the Court of Appeals affirmed the *Auten* approach and determined that the law of the “center of gravity”—not the law where contracted—should govern the interpretation of a child support agreement.¹⁷⁰

Unlike some states such as Vermont, which concluded that a “grouping of contacts”¹⁷¹—as in *Barnes* and *Auten*—should be their definitive modern rule,¹⁷² New York “evolved” further and incorporated parts of a theory known as “governmental interest analysis.”¹⁷³ As first conceived by Brainerd Currie, this theory dictated that each court was to assess its state’s policy interest (*i.e.*

164. *Supra* notes 17–29 and accompanying text.

165. *But see* KOPPELMAN, *supra* note 17, at 42–43; Henson, *supra* note 35, at 560–61 (explaining the Restatement (Second) as a place of the celebration rule with a public policy exception).

166. SYMEONIDES ET AL., *supra* note 9, at 113.

167. *Id.* at 117. This process was heavily influenced by Professor Walter Wheeler Cook with a series of essays in the 1920s and a seminal critique of the traditional approach published in 1942—“The Logical and Legal Bases of Conflict of Laws.” BRILMAYER & GOLDSMITH, *supra* note 66, at 181.

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

169. *Id.*; *see also* SYMEONIDES ET AL., *supra* note 9, at 117.

170. *Haag v. Barnes*, 175 N.E.2d 441, 443 (N.Y. 1961).

171. *Id.* at 444; *Auten*, 124 N.E.2d at 102.

172. *Barnes*, 175 N.E.2d at 443.

173. *Myers v. Langlois*, 721 A.2d 129, 130–31 (Vt. 1998) (Supreme Court of Vermont applying the Restatement (Second) in a manner that prioritizes “center of gravity” and “grouping of contacts”); *see also* SYMEONIDES ET AL., *supra* note 9, at 301–02 (observing the variation in modern approaches between Vermont [classic Restatement (Second) state] and New York [a so-called hybrid modern state]).

an educated guess about legislative intent) in applying its law to the fact scenario presented in the case.¹⁷⁴

In an opinion that invoked a variety of academic writings on modern conflict of laws, the Court of Appeals in *Babcock v. Jackson* rejected *lex loci delicti* for torts.¹⁷⁵ Noting that “[t]he traditional choice of law rule, embodied in the original Restatement of conflict of laws and until recently unquestioningly followed in this court,” the Court of Appeals held that this vested rights doctrine “ha[d] . . . been discredited [for] fail[ing] to take account of underlying policy considerations [sic] in evaluating the *significance to be ascribed to the circumstance that an act had a foreign situs*”¹⁷⁶ Ultimately, New York synthesized the holding of *Babcock* on the one hand, and *Auten* and *Barnes* on the other, in what has been labeled a “Combined-Modern” approach.¹⁷⁷ In 1993, the Court of Appeals summarized the state’s modern choice of law jurisprudence in *Matter of Allstate Ins. Co. (Stolarz)*.¹⁷⁸ The *Stolarz* Court stated, in “contract cases . . . involv[ing] only the private economic interests of the parties . . . [t]he ‘center of gravity’ or ‘grouping of contacts’ choice of law theory [is] applied”¹⁷⁹ However, “[t]here are . . . instances where the policies underlying conflicting laws in a contract dispute are readily identifiable and reflect strong governmental interests, and therefore should be considered.”¹⁸⁰ The court went on to apply both approaches to the question of what law should govern an automobile contract on the theory that “highly regulated as it is, [it] may implicate both the private economic interests of the parties and governmental interests in the enforcement of its regulatory scheme.”¹⁸¹

This “revolution”¹⁸² in choice of law doctrine called for a different analysis for marital incidents. As early as 1933, the Supreme Court had observed, in *Yarborough v. Yarborough*, that “[w]ithout denying the validity of a marriage in another state, the privileges flowing from marriage may be subject to the local law.”¹⁸³ This principle was, in fact, recognized dating back

174. *Babcock v. Jackson*, 191 N.E.2d 279, 283 (N.Y. 1963); see also SYMEONIDES ET AL., *supra* note 9, at 127.

175. Albert A. Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377, 388 (1966).

176. *Babcock*, 191 N.E.2d at 281 (emphasis added).

177. SYMEONIDES ET AL., *supra* note 9, at 302.

178. 613 N.E.2d 936, 938–39 (N.Y. 1993).

179. *Id.* at 939.

180. *Id.*

181. *Id.*

182. SYMEONIDES ET AL., *supra* note 9, at 113 (stating that the term revolution, while “hyperbolic,” is “a shorthand description for the American search for new ways of resolving conflicts problems.”).

183. *Yarborough v. Yarborough*, 290 U.S. 202, 218 n.10 (1933) (Stone, J., dissenting) (citing—as support for this principle—the interracial marriage case discussed *supra*, *State v. Bell*,

to English common law. In *Somerset v. Stewart* (Court of King's Bench) (1772), Judge Lord Mansfield “adopt[ed] the relation” of slavery but “without adopting it in all its consequences.”¹⁸⁴ Mansfield declined to grant the affirmative operation of English law to the detention of a slave, while noting that by contrast, a “[c]ontract for sale of a slave [was] good” in England.¹⁸⁵ Yet, as discussed above, under the traditional approach, the only “escape” for the forum from the strict “*unthinking*”—to quote from *Babcock*—deference to the place of the celebration was to invoke a strong countervailing public policy.¹⁸⁶ This was a blunt instrument though, and courts applied it unpredictably. As one scholar stated in 1956, “[t]he principal vice of the public policy concept[] is that it provides a substitute for analysis. [It] stand[s] in the way of careful thought, of discriminating distinctions and, of true policy development in the conflict of law.”¹⁸⁷ After jurisdictions adopted modern rules, they began to apply those new principles, innovated in tort and contract, to the incidents of marriage and of other statuses, such as paternity and adoption.

In response to the conflict revolution, the American Law Institute began drafting the Restatement (Second) in 1953.¹⁸⁸ Texas adopted a variant of the Restatement (Second)'s “most significant contacts” approach in 1984 with *Duncan v. Cessna Aircraft Co.*¹⁸⁹ The Texas Supreme Court concluded that *lex loci delicti* and *lex contractus* “sacrifice[d] just and reasoned results for . . . mechanistic decision making.”¹⁹⁰ In its place, the court held that the state would follow the “general principles stated in [Restatement (Second)] § 6”¹⁹¹ [that it concluded] produc[ed] reasoned choice of law decisions grounded in those specific governmental policies relevant to the particular substantive

that had invoked a public policy exception to the traditional rule for marriage to prevent the cohabitation of an interracial couple).

184. (1772) 98 Eng. Rep. 499, 510 (K.B.).

185. *Id.*

186. *Supra* note 174 and accompanying text.

187. Monrad Paulsen & Michael Sovern, “*Public Policy*” in *the Conflict of Laws*, 56 COLUM. L. REV. 969, 1016 (1956).

188. SYMEONIDES ET AL., *supra* note 9, at 141 (noting that its author, Professor Willis Reese, “was a member of the new school of conflicts though, although not of its revolutionary branch.”).

189. *See generally* *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (1984); *see also* SYMEONIDES ET AL., *supra* note 9, at 300 (explaining that states that *make § 6 the centerpiece* of their modern analysis (such as Texas) have much more “general, open-ended” choice of law jurisprudence than many of the other states that also invoke the Restatement (Second) for contact counting or hybrid approaches of contacts and governmental interest (as envisioned by Currie)).

190. *Duncan*, 665 S.W.2d at 421.

191. These principles include, *inter alia*, “(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] (d) the protection of justified expectations.” *Id.* at 420 n.5.

issue.”¹⁹² The very next year in *Seth v. Seth*, a Texas court stated that in light of *Duncan and Gutierrez* (a case abandoning *lex loci delicti*) “Section 6 criteria, and not the place of celebration test, should be applied to determine choice of law in a marriage or divorce context.”¹⁹³ This application of modern rules to marital incidents was not unique to Texas; in fact, states throughout the nation dealt with a variety of status incidents in this manner. This practice was not driven simply by the courts either—the new Restatement specifically called for a new approach to marriage.

An element that stayed essentially the same was the principle that evasive marriages need not be recognized anywhere. The original Restatement § 132 dealt with this in terms of domicile, and the Restatement (Second) § 283 explained that a marriage was invalid if it violated the public policy of the “state which had the most significant relationship to the spouses and the marriage at the time of the marriage.”¹⁹⁴ In virtually all cases the new wording would not make a difference since the state of the parties’ domicile would typically be the state with the most significant relationship.¹⁹⁵ The language about marital validity that had appeared in the original § 121 was repeated nearly verbatim: “a marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized.”¹⁹⁶ This fact may explain why most scholars have erroneously suggested that “[t]he conflicts revolution . . . bypassed choice of law rules on marriage.”¹⁹⁷ However, as a leading text on conflicts notes, “[t]he Restatement (Second) draws a distinction between questions of ‘pure’ status . . . on the one hand, and the ‘incidents’ or effects of such status on the other hand.”¹⁹⁸

[T]he Restatement’s rules on the status of marriage (§ 283) . . . clearly tilt toward the validity of marriage . . . and are based on the premise that a person’s status should not change by the mere movement from one state to another. *In contrast, the Restatement’s rules on the incidents of these statuses (§§ 284, 288) do not contain such a tilt.* They are based on the premise that, while the

192. *Id.* at 421.

193. *Seth v. Seth*, 694 S.W.2d 459, 462 (Tex. App. 1985). In fact, the *Seth* court actually went further and declared that Restatement (Second) would apply to the validity of the marriage ceremony itself. *Id.* However, as discussed below in the text, the Restatement (Second) advises a separation of incidents and validity. Courts in other jurisdictions such as New York, Vermont, and Pennsylvania hew more closely to the teachings of the Restatement on marriage, in their modern jurisprudence.

194. SYMEONIDES ET AL., *supra* note 9, at 429.

195. KOPPELMAN, *supra* note 17, at 17–20; 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, 194 (1996) (concluding same).

196. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971).

197. Fruehwald, *supra* note 37, at 819; see KOPPELMAN, *supra* note 17, at 17 (implying the same).

198. SYMEONIDES ET AL., *supra* note 9, at 431.

status itself should not be altered by movement from one state to another, *the incidents of status may well be affected by such a movement.*¹⁹⁹

This distinction between status and incidents is one that modern choice of law courts take seriously. In quoting introductory notes from the Restatements (Second) on Conflicts, a 1985 Washington State court remarked that:

In law, a status can be viewed from two standpoints. It can be viewed as a relationship which continues as the parties move from state to state, or it can be viewed from the standpoint of incidents which arise from it. . . .

On occasion, the courts are faced with a question of pure status, namely whether, as a general proposition, there is a marital, or a legitimate, or an adoptive relationship between the parties It is clear, however, that questions involving the incidents of a status arise more frequently²⁰⁰

In keeping with this typology, an *en banc* Washington Supreme Court, in 1997, applied its “most significant relationship” rules to the “marital incident” of how a deceased husband’s assets should be divided between his first wife and his third wife.²⁰¹ The State of Texas had celebrated the union of the husband and the first wife, while the man had remarried in Washington without divorcing his first wife.²⁰² Under the law of the celebration, the first wife had a claim to one-fourth of all his property, including a two-million dollar lottery award.²⁰³ Under Washington law, the third marriage *de facto* invalidated any prior marriages and the first wife thus inherited nothing.²⁰⁴ The court identified genuinely rival state interests in the application of Texas or Washington law. Texas had a policy of “respecting the sanctity of the marriage relationship and ensuring the support of both spouses within that marriage.”²⁰⁵ Washington, contrastingly, provided that a wife should not benefit from community property rules when she and her husband had separated and been estranged such that “there is no ‘community.’”²⁰⁶ Applying Restatement § 6 and the specific provision dealing with the

199. *Id.* (noting that “Section[] 284 . . . provide[s] that, when a marriage is valid under the law applicable to it under § 293, . . . the forum ‘usually’ gives the same incidents to such a status as the forum’s law provides. The word ‘usually’ implies that the forum may choose not to accord certain of those incidents, or to accord certain incidents . . .”). It is also instructive to note that, according to Section 283, comment h, the drafters—in repeating the celebration rule for validity—had in mind that the “differences among the marriage laws of various states usually involve only minor matters of debatable policy rather than fundamentals.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 cmt. h (1971).

200. *In re Estate of Cook*, 698 P.2d 1076, 1078 (Wash. Ct. App. 1985).

201. *Seizer v. Sessions*, 940 P.2d 261, 265 (Wash. 1997).

202. *Id.* at 263.

203. *Id.* at 266.

204. *Id.*

205. *Id.*

206. *Id.*

acquisition of movable marital property (§ 258), the court reasoned that Washington law, not the law of celebration, should apply.²⁰⁷ Other jurisprudence on which the court was briefed had held that “[t]he need to resolve conflicting claims to property situated in Washington and belonging to a deceased Washington resident provides Washington with a dominant interest.”²⁰⁸

Another modern case, *Hermanson v. Hermanson* from Nevada, applied the state’s choice of law rules from contract²⁰⁹ to a divorce decree predicated on another status—legal paternity or legitimacy—that was traditionally governed by a choice of law principle analogous to that of “marital celebration”—“law of the child’s birthplace.”²¹⁰ Key to the court’s determination that Nevada had “[more] significant contacts” than the birth-state of California, was that “California’s only relationship with [the] litigation [was] that [the child] was born there” and the parents “resided there during the three years that they cohabitated.”²¹¹

A 1974 case, *In re Estate of Lenherr*, similarly applied its modern choice of law principles to a marital incident after separating the issue of status.²¹² However, *Lenherr* has been repeatedly miscast by scholars writing about same-sex marriage.²¹³ According to Deborah Henson, for example, the *Lenherr* approach asks courts to determine whether the interests of the couple and the celebrating state trump, or outweigh, the interest of forum state.²¹⁴

The methodology of *Lenherr* is not as Henson has described. Pennsylvania is one of approximately six so-called hybrid modern states whose

207. *Sessions*, 940 P.2d at 268.

208. *In re Estate of Shippy*, 678 P.2d 848, 851 (Wash. Ct. App. 1984).

209. *Hermanson v. Hermanson*, 887 P.2d 1241, 1244 (Nev. 1994) (citing *Ferdie Sievers & Lake Tahoe Land Co., Inc. v. Diversified Mtg. Investors*, 603 P.2d 270, 273 (Nev. 1979)).

210. *Id.* at 1244 n.2 (noting that a place of birth test “reflect[ed] a traditional conflict of laws approach which Nevada has rejected . . .”).

211. *Id.* at 1244.

212. 314 A.2d 255, 258 (Pa. 1974).

213. See, e.g., KOPPELMAN, *supra* note 17, at 92–94; Henson, *supra* note 35, at 555–56; Cox, *supra* note 35, at 725–29. Typically *Lenherr* is grouped together with *In re Dalip Singh Bir’s Estate*, 188 P.2d 499 (Cal. Dist. Ct. App. 1948). Yet, their respective analyses are quite different. *In re Dalip Singh* is a First Restatement case in which the court opts not to deploy a public policy objection to inheritance of a wife from a polygamous marriage. 188 P.2d at 502. This approach closely parallels that of *State v. Bell*, 66 Tenn. 9 (Tenn. 1872), *Yarborough v. Yarborough*, 290 U.S. 202 (1933), and *Somerset v. Stewart*, (1772) 98 Eng. Rep. 499 (K.B.) (which separated the incident from validity, as *Yarborough* suggested and *Bell* did, but found English public policy to be offended by the incident).

214. Henson, *supra* note 35, at 566. Henson suggests that the case’s approach calls on the court to balance “the forum state’s policy against same-sex marriage . . . in relation to the particular incident of marriage at issue; e.g., inheritance by [a] surviving spouse . . .” *Id.* Her personal view is that in terms of inheritance, the forum’s interest would not prevail, but with respect to the adoption of children, it would. *Id.*

modern choice of law principle synthesizes “governmental interest analysis” with “a contacts or center of gravity” test.²¹⁵ The issue was whether a second wife could receive an inheritance tax-free on the grounds that it came from her husband.²¹⁶ After carrying on an affair with a married man, the woman had sought to marry him.²¹⁷ Pennsylvania had a statute prohibiting “the marital partner guilty of adultery from marrying his or her paramour during the lifetime of the former spouse[,]” and another law that prohibited the issuance of a marital license for such a marriage.²¹⁸ First, the State Supreme Court did a contact analysis and found that they decisively pointed to Pennsylvania: both husband and wife “were residents of Pennsylvania before and after their West Virginia marriage.”²¹⁹ Then the court, in its interest analysis, interpreted the Pennsylvania law in question not as “a penalty upon the parties who failed to recognize the sanctity of the former marriage vow,” but rather as a statute “intended to protect the sensibilities of the injured spouse.”²²⁰ Conversely, West Virginia had an interest in recognizing a marriage validly celebrated in that state.²²¹ In other words, in the parlance of Currie—the architect of interest analysis—“the court [found] that one state ha[d] an interest in the application of its policy in the circumstances of the case, and the other [State] ha[d] none.”²²² In that situation, Currie wrote that the court “should apply the law of the only interested state,” which is what the *Lenherr* Court did by applying West Virginia law.²²³ *Lenherr* suggests that had the Pennsylvania statute barred remarriage to one’s paramour indefinitely—rather than only so long as the offended spouse lived—then the case’s holding would have been the reverse.²²⁴ That difference would have meant that the marriage was invalid in the eyes of the Pennsylvania court and thus the inheritance would have been taxed.

Because the result in *Lenherr* permitted tax-free inheritance, which is what the foreign law counseled, it has been used by writers to further the argument

215. SYMEONIDES ET AL., *supra* note 9, at 302 (Table 6), 303 (characterizing Pennsylvania as following “a combination of interest analysis and the Restatement (Second)”).

216. *Lenherr*, 314 A.2d at 256.

217. *Id.* at 256–57.

218. *Id.* at 257.

219. *Id.* at 258.

220. *Id.*

221. *Id.*

222. BRILMAYER & GOLDSMITH, *supra* note 66, at 218 (citing David F. Cavers et al., *Comments on Babcock v. Jackson: A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212, 1242–43 (1963)).

223. Cavers et al., *supra* note 222, at 1242; *see also* Padula v. Lilan Properties Corp., 84 N.Y.2d 519 (N.Y. 1994) (declining to apply New York law, even though New York had the most significant contacts, because prior case law had established that New York had no governmental interest in the regulation of construction safety out of state).

224. *Lenherr*, 314 A.2d at 258–59.

that at a minimum, courts ought to recognize the incidents of marriage “for some purposes, even when they may be unwilling to recognize the status for all purposes.”²²⁵ They champion an incidents approach as a compromise between the recognition of status and total non-recognition; Koppelman has described it as an attempt “to consider the administrative question without resolving the normative one.”²²⁶ However, in the choice of law context the reasoning is as important, if not more important, than the holding. Though same-sex advocates may favor the outcome of *Lenherr*, it is key not to lose sight of the fact that its result hinged on the court’s interpretation of the policy underlying the Pennsylvania law. Had Pennsylvania been thought to have a governmental interest in applying its law, the court would then have faced a “true conflict” of laws—defined by Currie as “a conflict between the legitimate interests of the two states.”²²⁷ Currie recommended that a court in that situation “should apply the law of the forum.”²²⁸ However, this pro-forum bias has not been generally accepted in hybrid modern jurisdictions. Instead, states typically follow the method of the New York Court of Appeals in *Ehrlich-Bober & Co. v. University of Houston*. The *Ehrlich-Bober* Court applied Texas law in a situation in which both Texas and New York had genuine governmental interests because Texas had the “most significant contacts.”²²⁹ Because Pennsylvania’s choice of law rule is essentially the same as New York’s,²³⁰ Pennsylvania presumably would have applied its own law based upon a contacts rationale.

An incident that most clearly illustrates the appropriate reasoning for choice of law controversies surrounding same-sex marriage is that of spousal standing to sue for death or injury of a legal partner. The case of *Langan v. St. Vincent’s* (2005) has received considerable attention and criticism. It held that a New York domiciliary, Neal Spicehandler, could not maintain an action for the wrongful death of his legal partner, John Langan—another New York domiciliary—with whom he had previously entered into a Vermont civil union.²³¹ Koppelman has critiqued the majority opinion for putting dispositive weight on the fact that the couple had a civil union and the Vermont Supreme Court and legislature “went to great pains to expressly decline to place civil

225. Cox, *supra* note 35, at 729; *see also* SYMEONIDES ET AL., *supra* note 9, at 431; *cf.* Silberman, *supra* note 35, at 2195 (characterizing Cox’s *Incidents of Marriage* article as “far from neutral”).

226. KOPPELMAN, *supra* note 17, at 92.

227. BRILMAYER & GOLDSMITH, *supra* note 66, at 218.

228. *Id.*

229. The case identified “serv[ing] administrative convenience” as the interest of Texas and “administer[ing] a . . . commercially sophisticated body of law” as that of New York. *Ehrlich-Bober & Co., Inc. v. Univ. of Houston* 49 N.Y.2d 574, 575, 581 (N.Y. 1980).

230. *See supra* notes 61, 210 and accompanying text.

231. *Langan v. St. Vincent’s Hosp. of N.Y.*, 802 N.Y.S.2d 476, 477 (N.Y. App. Div. 2005).

unions and marriage on an identical basis.”²³² This critique is well founded as that was indeed “the wrong question to ask”²³³ because Vermont law granted full marital emoluments to its same-sex couples.²³⁴ Koppelman is also correct that “[h]aving decided that Vermont law was applicable, the court should then have asked, what would Vermont do in this situation?”²³⁵ However, what has escaped much scholarly attention is that the majority did not conduct a typical choice of law analysis to arrive at the “decision” that Vermont law was applicable.

The *St. Vincent's* partial concurrence²³⁶ illustrates a more rigorous application of New York choice of law precedent which abounds in the area of wrongful death. In disagreeing that New York was “bound to afford the plaintiff the right to sue for wrongful death because the doctrine of comity requires recognition of the ‘spousal rights’ he derives from the laws of Vermont,” the Judge astutely declared that “th[e] case is not about marriage.”²³⁷ Instead, the concurrence notes that when the “incidents [of a civil status] conflict with New York law, our courts will generally decide whether to give them effect by looking to . . . choice of law principles.”²³⁸ After noting that “New York has long chosen, as a matter of comity, to recognize a marriage considered valid in the place where it was celebrated,” the Judge explained that “recognition of a civil status validly created outside of New York does not . . . imply that [New York] will give effect to all of the legal incidents of that status conferred by the foreign jurisdiction that created it.”²³⁹

The clearest proof that this framework, and the concurrence’s subsequent analysis, is legally correct is that it closely parallels prior choice of law jurisprudence, both on wrongful death and on incidents of personal status. In reaching the threshold determination that incidents ought to be separated from the question of status, *St Vincent's* relies on *Matter of Chase* (1987)²⁴⁰—a modern case concerning the inheritance rights of children from their natural parents after adoption. In denying the right to inherit, the court found that although precedent dating back to 1910 illustrated that “New York, by the law of comity, must recognize [the childrens’] status as adopted,” the right to

232. *Id.* at 479; KOPPELMAN, *supra* note 17, at 100.

233. KOPPELMAN, *supra* note 17, at 100.

234. *Langan*, 802 N.Y.S.2d at 480–81.

235. KOPPELMAN, *supra* note 17, at 100.

236. The opinion by Judge Fisher is reported as a dissent because, though he determined that New York law should apply, he would have invalidated that law on equal protection grounds. *Langan*, 802 N.Y.S.2d at 486, 490 (Fisher, J., dissenting).

237. *Id.* at 484, 480.

238. *Id.* at 484–85.

239. *Id.* at 484.

240. *In re Estate of Chase*, 515 N.Y.S.2d 348, 349 (N.Y. App. Div. 1987).

inherit should be governed by New York law, not Rhode Island which issued the adoption decree, since “Rhode Island ha[d] no [other] contacts with [the] case” and “New York was the domicile of decedent and New York ha[d] a strong interest in enforcing its statute regarding the inheritance rights of adopted children.”²⁴¹

Matter of Chase relies in part on the Restatement (Second) and is consonant with other status cases such as the Nevada case of *Hermanson* and the Pennsylvania decision of *In re Lenherr*.²⁴² On the issue of wrongful death, the concurrence contrasted the traditional result obtained in *Wooden v. Western* (1891),²⁴³ with a modern wrongful death case of *Padula v. Lilian Properties* (1994).²⁴⁴ *Wooden* involved whether a New York court should apply Pennsylvania law which gave a widow standing to sue for wrongful death, or a New York law that did not. Because the accident occurred in Pennsylvania, the court applied the principle of *lex loci* and allowed the widow’s suit to proceed.²⁴⁵ Today the jurisprudence is more complex; but perceiving *St. Vincent’s* as a same-sex marriage case obscures the genuine issue, which is which state—New York or Vermont—has a greater connection to the parties and the union (or marriage), such that its substantive law should apply. The *St. Vincent’s* Court concluded that because both members of the same-sex couple were New York domiciliaries, the defendant hospital was a New York business and the accident occurred in New York, that “New York certainly has the most significant contacts with the case and, therefore, the stronger interest in applying the provisions of its own wrongful death law.”²⁴⁶

In the *St. Vincent’s* case, the couple clearly “evaded” New York law since they were New York residents before and immediately after their Vermont civil union. As discussed above, some theorists have suggested that *it is the evasion* that is the key factor that authorizes New York to decline to apply Vermont law on the facts of *St. Vincent’s*.²⁴⁷ However, when the case is

241. *Id.* at 349–50. The governmental interest identified was that case law indicated the intent of the New York domestic relation law was “to sever all ties between the adopted child and his or her natural family.” *Id.* at 350. Rhode Island had a governmental interest as well but the “significant contacts” pointed to New York and thus New York law governed—and the child was denied inheritance. *Id.* at 350.

242. See *supra* note 209, 212 and accompanying text.

243. *Wooden v. Western N.Y. & P.R. Co.*, 26 N.E. 1050, 1051 (N.Y. 1891).

244. *Padula v. Lilarn Properties Corp.*, 644 N.E.2d 1001, 1002 (N.Y. 1994).

245. *Wooden*, 26 N.E. at 1051.

246. *Langan v. St. Vincent’s Hosp. of N.Y.*, 802 N.Y.S.2d 476, 485–86 (N.Y. App. Div. 2005) (Fisher, J., dissenting).

247. KOPPELMAN, *supra* note 17, at 102–06. Recall also that Koppelman posits that a place of celebration rule with a public policy exception is the “modern” Restatement (Second) test for marriage and its incidents. By virtue of this, Koppelman suggests that a state like New York may not be permitted to decline to recognize even in an evasion context because of the absence of a State DOMA. *Id.* at 103.

oriented in the extant choice of law jurisprudence, it becomes clear that *evasion* is not dispositive, but rather that the holding of *St. Vincent's* follows logically from an “interest and contact analysis” for a hybrid modern state such as New York.²⁴⁸ The distinction between that analysis and arriving at the result because it is an “evasion” case (similar to § 132) may at first seem merely academic. However, which reasoning is used is outcome determinative in “migratory cases”—when a couple “contracted a marriage [or union] that was valid where they lived and subsequently moved to a state where it was prohibited. An example would be a same-sex couple who lived in Massachusetts when they married and later moved to Pennsylvania.”²⁴⁹ It appears quite likely that the *St. Vincent's* concurrence would have applied New York law to Langan’s suit even if he and his partner had migrated from Vermont to New York. This stems from the fact that the couple had clearly decided to establish their married life in New York, as well as from the conclusion that Vermont had not expressed a governmental interest in having its wrongful death provision carry extraterritorial effect. The latter judgment might seem surprising; however *St. Vincent's* cites a New York case, *Padula v. Lilarn Properties*, which bears out the pragmatic principle that states do not typically seek to regulate standards of care or conduct outside their borders.²⁵⁰

IV. INCIDENTS OF SAME-SEX MARRIAGE ACROSS DIVERGENT CHOICE OF LAW JURISDICTIONS

A. *How Cases Should Be and Are Being Decided*

If the fact pattern of *St. Vincent's* were modified such that the couple had been Vermont domiciliaries merely passing through New York, then it seems clear that virtually any modern jurisdiction—without a statutory or Constitutional DOMA²⁵¹—would have applied Vermont law to their situation.

248. See Memorandum from Douglas F. Gansler, Md. Att’y Gen., to Hon. Richard S. Madaleno, Md. Senate 47 (Feb. 23, 2010), available at www.washingtonpost.com/wp-srv/metro/documents/95oag3.pdf (questioning whether Maryland’s Court of Appeals would adopt Koppelman’s analytical categories for foreign marriages); see also *infra* Part IV.A. which discusses the approach that hews closely to precedent in other types of choice of law jurisdictions (i.e., Vermont’s “pure contacts” and Rhode Island’s “traditional”); Letter from Patrick Lynch, *supra* note 122 (analyzing *Ex Parte Chace*, 58 A. 978 (R.I. 1904), to conclude same).

249. KOPPELMAN, *supra* note 17, at 106.

250. *Padula v. Lilarn Properties Corp.*, 644 N.E.2d 1001, 1002 (N.Y. 1994) (quoting *Cooney v. Osgood Machinery, Inc.*, 612 N.E.2d 277, 280 (N.Y. 1993) (“[T]he law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior in its borders.”)).

251. See *supra* Part II. Of course, a public policy exception could too result in non-recognition. See *supra* note 97 and accompanying text.

An analogous fact pattern from the 1988 case of *Nelson v. Hix*, concerning the right of a wife to sue her husband for a tort injury, illustrates the point.²⁵² *Nelson* concerned a Canadian couple who had been married there and was visiting relatives in Illinois.²⁵³ On the trip, the husband was driving a vehicle, with his wife as a passenger, and had an accident causing serious injuries to both.²⁵⁴ The wife sued the husband and he pled interspousal immunity under Illinois law—the place where the accident had occurred.²⁵⁵ In deciding whether Illinois law should bar the suit or whether it should proceed under Canadian law, the Illinois Supreme Court, considering § 145 (governing torts) and § 6 of the Restatement (Second), concluded that “the domicile of the parties and the place where their marital relationship was centered is . . . more important to a resolution of the issue than where the accident and injury occurred.”²⁵⁶ The prioritizing of domicile as one of the most salient contacts lends further support to the observation made above, that had the couple in *St. Vincent’s* migrated to New York, then New York law appropriately would have governed the wrongful death suit.²⁵⁷ *Nelson* not only illustrates how an application of ordinary choice of law precedent will protect same-sex couples while they travel throughout the country, but it also illustrates a common-sense principle that the place of the parties’ domicile and the state of the marital relationship are the “most significant contacts.”²⁵⁸ As the case explained, the “[s]tate of domicile . . . has the primary responsibility for establishing and regulating the incidents of the family relationship.”²⁵⁹

The Vermont Supreme Court in *Miller-Jenkins v. Miller-Jenkins* properly held that its modern choice of law rules should apply to the incident of parental visitation rights stemming from a same-sex civil union.²⁶⁰ Vermont uses a version of the Restatement (Second) for choice of law questions, focusing on the state where the case’s “center of gravity” or “grouping of contacts” is located.²⁶¹ The case involved a custody dispute between the biological mother of a child and her same-sex partner with whom she had a Vermont civil

252. 522 N.E.2d 1214, 1214 (Ill. 1988).

253. *Id.*

254. *Id.*

255. *Id.* at 1215.

256. *Id.* at 1217.

257. See text accompanying notes 233–259.

258. Singer, *supra* note 17, at 26. “[I]t 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.” *Id.*

259. *Nelson*, 522 N.E.2d at 1218 (internal quotation marks omitted).

260. 912 A.2d 951, 971 (Vt. 2006).

261. SYMEONIDES ET AL., *supra* note 9, at 301–302 (Map 1, 2 & Table 6); see also Myers v. Langlois, 721 A.2d 129, 130 (Vt. 1998) (cited in *Miller-Jenkins*, 912 A.2d at 971).

union.²⁶² The biological mother had received an exclusive custody order in Virginia, while the other woman had invoked a federal law—the Parental Kidnapping Prevention Act (“PKPA”) designed to avert interstate jurisdictional battles over children—to receive a joint-custody order from a Vermont court.²⁶³ The biological mother argued, *inter alia*, that the other woman’s parental status, with respect to the incident of custody, should be governed by Virginia law—a state that neither recognized nor permitted such unions.²⁶⁴ The court followed 1998 precedent that involved whether Vermont or Canadian law should govern an automobile accident, and determined that Vermont law should apply to the parental status, meaning that it would be recognized.²⁶⁵

Thus, to summarize, a “grouping of contacts” jurisdiction—such as Vermont—will essentially resolve same-sex incident controversies in the same manner as hybrid modern jurisdictions discussed above, such as Pennsylvania and New York. However, contacts analysis can lead to more predictable results, *ex ante*, because it only demands that a court “count contacts,” and then determine which is most significant to the controversy. As the New York Court of Appeals explained, the “‘grouping of contacts’ choice of law theory . . . enables the court to identify which law to apply without entering into the difficult, and sometimes inappropriate, policy thicket.”²⁶⁶ Although conflicts scholars have noted that for complex tort and contract disputes, contacts analysis *rarely is dispositive*²⁶⁷ because the parties’ domicile and their marital home state are so obviously “significant contacts,” the appropriate outcome is far more evident when choice of law principles are applied to same-sex incidents.²⁶⁸

A different and far less complex analysis is appropriate for traditional jurisdictions without a statutory or constitutional DOMA.²⁶⁹ Rhode Island is

262. *Miller-Jenkins*, 912 A.2d at 955–56.

263. *Id.* at 957.

264. *Id.* at 971.

265. *Id.* In reaching that conclusion, it put conclusive weight on the congressional requirement for state court jurisdiction under the PKPA. Effectively it determined that if a state met Congress’ requirements to issue a PKPA order, then by virtue of that, it became “the state with the most significant relationship to [the] child custody or visitation dispute.” *Id.*

266. *Allstate Ins. Co. v. Stolarz*, 613 N.E.2d 936, 939 (N.Y. 1993).

267. *See, e.g., Phillips v. General Motors Corp.*, 995 P.2d 1002 (Mont. 2000). *Phillips* is a tort case in which the contacts pointed towards at least three states, with none being obviously decisive: the accident involved Montana domiciliaries, the defective vehicle had crashed in Kansas, it was manufactured in Michigan, and had been sold in North Carolina. *Id.* at 1005, 1011.

268. *See, e.g., supra* text accompanying notes 248, 259 (discussing *Langan v. St. Vincent’s* and *Nelson v. Hix*).

269. This could be salient in Rhode Island, Wyoming, New Mexico, and Maryland. SYMEONIDES ET AL., *supra* note 9, at 301. Many of the other “traditional” choice of law states have statutory or constitutional DOMAs in place.

such a state,²⁷⁰ and in *Chambers v. Ormiston*, its Supreme Court confronted the question of whether to recognize a valid Massachusetts same-sex marriage for the purpose of granting a divorce.²⁷¹ Litigants and amici on both sides of the case agreed that “the well-settled rule of law [for Rhode Island] . . . remain[ed] that the validity of a marriage is determined by the law of the place where celebrated.”²⁷² As Symeonides notes in his text on conflicts, Rhode Island follows the traditional conflict of laws approach.²⁷³ This conclusion flows from a 1904 case, *Ex Parte Chace*.²⁷⁴ Therefore, the analysis that this article has heretofore critiqued as inappropriate in light of the modern conflicts revolution—(1) whether the marriage was valid where celebrated; and if so, (2) whether it violates a fundamental public policy—is *entirely apt for Rhode Island*, a traditional choice of law state. Based upon an analysis like that Virginia deployed in the 1993 case of *Farah v. Farah*,²⁷⁵ Rhode Island should have recognized the Massachusetts marriage’s validity and all its incidents.²⁷⁶ This is not to suggest, however, that the *Chambers* majority was wrong to dismiss the case. The Rhode Island Supreme Court was correct that “the common law concept of ‘comity’ . . . do[es] not come into play if the court lacks jurisdiction over the case before it.”²⁷⁷ The Connecticut Appellate

270. SYMEONIDES ET AL., *supra* note 9, at 300 (the author also states that Rhode Island “appear[s] ready to abandon [the approach] on the first available opportunity.”). However, because *Chambers* did not reach the question and the dissent stated that in terms of marriage, the traditional rule was “well-settled,” this article treats Rhode Island as a traditional choice of law state.

271. 935 A.2d 956, 956 (R.I. 2007). The special complexities regarding divorce as an incident are discussed in Section IV.B *infra*.

272. *Id.* at 972 (Suttell, J., dissenting); *see, e.g.*, Brief of Amicus Curiae National Legal Foundation on a Certified Question of Law, *Chambers v. Ormiston*, 935 A.2d 956 (R.I. 2007) (No. 06-340); Brief of Amicus Curiae Gay & Lesbian Advocates & Defenders on a Certified Question of Law from the Family Court, *Chambers v. Ormiston*, 935 A.2d 956 (R.I. 2007) (No. 06-340), available at <http://www.glad.org/work/cases/chambers-v-ormiston/>.

273. SYMEONIDES ET AL., *supra* note 9, at 300.

274. *Ex Parte Chace*, 58 A. 978 (R.I. 1904). *Ex Parte Chace* concerned the standing of a man’s putative wife to petition for his release on a writ of habeas corpus. *Id.* at 978. The adult husband had, prior to his marriage, been given a legal guardian “on the ground that from [lack] of discretion in managing his estate, he was likely to bring himself to want.” *Id.* at 979. Under Rhode Island law an individual under “guardianship” could not marry, but the man faced no such disability in Massachusetts where he and a woman celebrated their marriage. *Id.* Based upon *lex celebrationis* the Rhode Island Supreme Court recognized the marriage and permitted the petition to proceed. *Id.* at 982.

275. *See supra* notes 136–140 and accompanying text.

276. *See* Letter from Patrick Lynch, *supra* note 122 (analyzing *Chace*, 58 A. 978, to conclude same). *But see* Part IV.B. *infra*, discussing a forum’s ability to use forum law with respect to the incident of divorce.

277. *Chambers*, 935 A.2d at 963 n.14. The court concluded, as a matter of statutory interpretation, that the family court, as “a court of limited jurisdiction[.]” was incompetent to entertain the same-sex action. *Id.* at 958. As a result, the *Chambers* majority declined to reach

Court—before the state Supreme Court declared same-sex marriage a constitutional right²⁷⁸—similarly declined to reach the choice of law issue because of the limited jurisdiction of the adjudicating court.²⁷⁹

New York courts confronted a number of same-sex incident cases that merit examination. *Langan v. State Farm Insurance Co.*, involving the same plaintiff as in *St. Vincent's*, posed the question—this time before the Supreme Court, Third Appellate Department—whether New York or Vermont law should govern a claim for worker's compensation for a same-sex spouse.²⁸⁰ In deciding to apply New York law, the court appropriately relied on the *St. Vincent's* concurrence rather than the flawed approach of the majority opinion.²⁸¹ The *State Farm* court held that “[a]lthough we may recognize the civil union status of claimant and decedent as a matter of comity, we are not thereby bound to confer upon them all the legal incidents of that status recognized in the foreign jurisdiction that created the relationship.”²⁸² This is not merely an accurate explanation of the state's conflicts jurisprudence; the statement elucidates the policy-making flexibility that modern choice of law rules offer with regard to same-sex marriage and union incidents. In the view of the *State Farm* Court “the extension of benefits entails a consideration of social and fiscal policy more appropriately left to the legislature.”²⁸³

Regardless of one's opinions on the appropriate division of authority between the judiciary and the legislative and executive branches, it is demonstrably true that modern choice of law jurisdiction will lead to a more nuanced and calibrated approach to the incidents of same-sex marriage and unions. For example, after *State Farm* and *St. Vincent's*, same-sex couples domiciled in New York cannot sue for wrongful death. The legislature did not act to alter that result until it implicitly did so by broadening marriage to include same-sex couples.²⁸⁴ Conversely, in other areas, state officials had conferred recognition of incidents through the exercise of their policy-making authority. To illustrate, the State Comptroller had decided to extend spousal

either the choice of law issues that had been heavily briefed, or the U.S. Constitutional issues of Full Faith and Credit. *Id.* at 963 n.14. It is beyond the scope of this article to conclude whether the jurisdictional holding was correct as a matter of Rhode Island law. Although the disposition of *Chambers* is similar to *B.S. v. F.B.* (*infra* note 309) and the other cases discussed *infra*, its reasoning is radically different because, for courts without subject matter jurisdiction, questions about which substantive law to apply are rendered moot.

278. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 407 (Conn. 2008).

279. *See generally* *Rosengarten v. Downes*, 802 A.2d 170 (Conn. App. Ct. 2002).

280. 849 N.Y.S.2d 105, 107–08 (N.Y. App. Div. 2007).

281. *Id.*

282. *Id.*

283. *Id.*

284. *See* Marriage Equality Act, 2011 N.Y. Sess. Laws ch. 95 (McKinney) (effective July 24, 2011).

benefits to out-of-state employees with valid foreign same-sex marriages.²⁸⁵ Also recall that, before being rendered moot by judicial determination,²⁸⁶ New Jersey legislators had opted to grant some civil union benefits, but to a less extensive degree than that conferred by Vermont. By contrast, in a traditional choice of law jurisdiction (*i.e.*, Rhode Island), same-sex incidents will either receive wholesale recognition, or be completely denied by virtue of a deep seated public policy exception.

Other same-sex cases in New York mostly have concerned the incident of divorce²⁸⁷ and rely on jurisprudence citing back to a well known 1953 Court of Appeals decision, *In re May's Estate*, that predates the conflict revolution.²⁸⁸ When *May's* articulated the place of celebration rule, it cited the Restatement (First), Beale's Treatise, and several cases from the 1880s as authority.²⁸⁹ Without any reference to the intervening conflicts revolution, in 2008, the *Martinez v. County of Monroe* court applied language from *May's*, to hold that the plaintiff's Canadian same-sex marriage must be recognized by her public employer for the purpose of spousal health benefits.²⁹⁰

Subsequent pre-legalization cases misguidedly followed suit,²⁹¹ including a 2008 case—*C.M. v. C.C.*²⁹²—that recognized a Massachusetts same-sex marriage for the purpose of divorce, without engaging New York State's hybrid interest and contacts choice of law principles. The *C.M.* court purported to distinguish *St. Vincent's* and *State Farm* on the grounds that those

285. *Godfrey v. DiNapoli*, 866 N.Y.S.2d 844, 845 (N.Y. Sup. Ct. 2008). Additionally, the New York Governor decided to recognize Canadian and other state same-sex marriage for the purposes of various benefits within his discretion. *Golden v. Patterson*, 877 N.Y.S.2d 822, 825 (N.Y. Sup. Ct. 2008).

286. *Lewis v. Harris*, 908 A.2d 196, 220–21 (N.J. 2006).

287. As with the discussion of *Chambers*, this discussion does not consider the possibility of eschewing ordinary choice of law analysis for the incident of divorce and applying forum law. A discussion of a possible justification for such an approach is discussed *infra* Part IV.B.

288. See *In re May's Estate*, 114 N.E.2d 4 (N.Y. 1953) (*Auten v. Auten* would be handed down the following year); BRILMAYER & GOLDSMITH, *supra* note 66, at 57–65 (situating *May's* with a 1908 Wisconsin decision and other Restatement (First) decisions on marriage); see also *Leszinske v. Poole*, 798 P.2d 1049, 1053 (N.M. Ct. App. 1990) (relying on *May's Estate* for the rule that “a marriage valid when and where celebrated is valid anywhere.”). New Mexico still adheres to the traditional approach for both contracts and tort conflicts of law. SYMEONIDES ET AL., *supra* note 9, at 301–02.

289. *May's Estate*, 114 N.E.2d at 6.

290. 850 N.Y.S.2d 740, 742 (N.Y. App. Div. 2008).

291. See, e.g., *Beth R. v. Donna M.*, 853 N.Y.S.2d 501 (N.Y. Sup. Ct. 2008). Interestingly, in 2009 New York's high court declined to bless the reasoning of these lower courts in adhering to *May's*, finding it “unnecessary to reach [the] argument that New York's common-law marriage recognition rule is a proper basis for the challenged recognition of out-of-state same-sex marriages.” *Godfrey v. Spano*, 13 N.Y.3d 358, 377 (N.Y. 2009).

292. 867 N.Y.S.2d 884, 886 (N.Y. Sup. Ct. 2008).

cases involved a civil union rather than a marriage.²⁹³ Yet, as should be clear by now, that distinction is immaterial, and at the time these cases should have been resolved with reference to modern choice of law rules.²⁹⁴ As several conflicts scholars critically wrote regarding *May's*, it is fair to say that these modern New York cases “have[] . . . missed the real point . . . [since] the ultimate issue [is not] the validity of the marriage.”²⁹⁵

In addition to *May's*, some of these cases rely on both modern and traditional cases concerning the common law marriages to support their holdings. The 2001 case of *In re Landolfi*—decided by the Second Appellate Department (the same court as *Langan v. St. Vincent's*)—illustrates that the *lex loci* rule lives on in New York regarding “common law” marriages. These are marriages that do not involve a “celebration,” and are typically recognized after a given period of spousal cohabitation. As alluded to earlier, the genesis of the place of marital celebration rule was the notion that form should not trump substance in terms of interstate recognition. The Restatement (Second) § 283 states that:

the state where the marriage was celebrated, or, in the case of a common law marriage, the state where the parties cohabitated while holding themselves out to be man and wife, is the state which will be usually be primarily concerned with the question of formalities. . . . If the requirements of [that] state have been complied with, the marriage will not be held invalid in other states for lack of the necessary formalities²⁹⁶

As the Restatement continues, “[w]hether a marriage can be created without formal ceremony is a question relating to formalities . . . [and] a marriage without ceremony is commonly called a common law marriage.”²⁹⁷ In other words, a common law marriage is the quintessential example of mere formal variation with which states are not thought to be concerned, and thus those precedents should not be conflated with those pertaining to other marriage and status cases. As a prominent conflict of laws scholar has observed, cases involving common law marriages “are irrelevant to the same-sex marriage debate because they involve formal rather than substantive marriage conditions. Formal marriage conditions do not elicit strong public policy objections.”²⁹⁸

293. *Id.* at 887 n.2.

294. *Supra* note 193 (discussing *Seth v. Seth*); see also Dawson-Austin v. Austin, 920 S.W.2d 776 (Tex. App. 1996), *rev'd on other grounds*, 968 S.W.2d 319 (Tex. 1998).

295. BRILMAYER & GOLDSMITH, *supra* note 66, at 68.

296. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 cmt. f (1971) (emphasis added).

297. *Id.* cmt. g.

298. KOPPELMAN, *supra* note 17, at 185 n.11 (emphasis added) (distinguishing Louisiana common law marriage cases from a Full Faith and Credit analysis regarding same-sex marriage).

B. Possible Complexities Regarding the Incident of Divorce

Until now, this article has not addressed the unique issues concerning divorce because that discussion was previously of only academic interest for two reasons. *First*, the judicial opinions concerning the entertaining of divorce proceedings have not distinguished it as an incident meriting a special analysis.²⁹⁹ *Second*, once a party has secured a divorce judgment or decree in one state—unlike in terms of marital status—the Full Faith and Credit Clause demands full recognition.³⁰⁰ However, the federal DOMA invites states to decline recognition of such judgments pertaining to same-sex relationships, and various states have exercised that putative authority. Because of the plethora of constitutional issues, anything beyond a cursory sketch of the pertinent issues would be beyond the scope of this article.

1. Entertaining Divorce Actions

Preliminarily, while most states encountering divorce regarding same-sex marriage have engaged in either the modern analysis, discussed throughout this article, or a traditional *lex loci celebrationis* methodology—there is a *third way* that might be more appropriate. As Restatement (Second) § 285 notes, “the local law of the domiciliary state in which the action is brought will be applied to determine the right to divorce.”³⁰¹ Comment *a* explains that:

The same considerations which give a state judicial jurisdiction to divorce a domiciliary make it appropriate for the state to apply its local law to determine the grounds upon which the divorce shall be granted.³⁰² The local law of the forum determines the right to divorce, not because it is the place where the action is brought but because of the peculiar interest which a state has in the marriage of its domiciliaries.³⁰³

As Symeonides explains, the question of “[w]hich state’s law should govern the right to obtain a divorce . . . for the last three decades of the 20th Century, had lost much of its relevance in the United States as state divorce laws gradually converged at the lowest common denominator.”³⁰⁴ However, with the emergence of a multiplicity of laws regarding same-sex marriages and civil unions—the question again arises.

299. See *Chambers v. Ormiston*, *Seth v. Seth*, and *C.M. v. C.C* discussed *supra*.

300. BRILMAYER & GOLDSMITH, *supra* note 66, at 641, 701–21.

301. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 285 (1971).

302. Simply stated, in a number of decisions, including *Williams v. North Carolina* (II), 325 U.S. 226, 229 (1945), the high court has held that “judicial power to grant a divorce . . . is founded on domicile.” SYMEONIDES ET AL., *supra* note 9, at 772. In essence, this means that either marital party may obtain an *ex parte* divorce from any state in which he or she establishes domicile.

303. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 285 cmt. a (1971).

304. SYMEONIDES ET AL., *supra* note 9, at 430 (emphasis added).

Can a state without domestic same-sex marriage, for example, decline to entertain a divorce action, not on the grounds that choice of law principles necessitate the application of forum law, but merely because forum law does not create a cause of action for same-sex divorce, or for the dissolution of a union or partnership? In *Williams v. North Carolina* (1942), the Supreme Court implicitly sanctioned that practice by not disturbing the State of Nevada's application of its divorce law to a marriage celebrated in North Carolina.³⁰⁵ In line with Restatement (Second) § 285 and *Williams*, "American courts virtually always apply forum law in divorce actions."³⁰⁶ Comparing the 2006 New York case *Gonzalez v. Green*³⁰⁷ with another New York case from 2009, *B.S. v. F.B.*,³⁰⁸ illustrates the uncertainty about the appropriate method for determining what law to apply.³⁰⁹ The question in *B.S.* was "whether a civil union contracted in the state of Vermont may be dissolved by way of a matrimonial proceeding commenced in New York."³¹⁰ In *Gonzalez*, the court faced "an 'Action For A Divorce'" concerning a Massachusetts same-sex marriage by two New York domiciliaries.³¹¹ The *Gonzalez* court granted the defendant's Order to Show Cause for summary judgment, which "dismissed plaintiff's [divorce] action for failure to state a cause of action."³¹² The court arrived at that conclusion by immediately applying New York Domestic Relations Law § 170, without explanation.³¹³ Contrastingly, in *B.S.*, the court remarked that "[t]he dissolution cases present the classic conflict-of-laws problem" and applied the precedent of *St. Vincent's*, focusing on the fact that the two parties petitioning for the divorce were both New York domiciliaries.³¹⁴ Based on that analysis, the court applied New York law and found that—although a comparable Vermont statute would have permitted dissolution³¹⁵—

305. 317 U.S. 287, 292–93 (1942).

306. DAVID VERNON, LOUISE WEINBERG, WILLIAM REYNOLDS & WILLIAM RICHMAN, *CONFLICT OF LAWS: CASES, MATERIALS AND PROBLEMS* 819 (2d ed. 2002) (observing further that "the revolution in choice of law theory . . . bypassed altogether the field of divorce.").

307. 831 N.Y.S.2d 856 (N.Y. Sup. Ct. 2006).

308. 883 N.Y.S.2d 459, 461 (N.Y. Sup. Ct. 2009). The cases discussed *supra* in notes 287–294 and the accompanying text are in line with the typical approach in same-sex dissolution cases typified by *B.S. v. F.B.*—which is to treat divorce identically to how the court would approach other incidents.

309. *See B.S.*, 883 N.Y.S.2d at 461.

310. *Id.* at 462.

311. *Gonzalez*, 831 N.Y.S.2d at 858.

312. *Id.* at 858–59.

313. *Supra* note 306 and accompanying text.

314. *B.S.*, 883 N.Y.S.2d at 463–64.

315. VT. STAT. ANN. tit. 15, § 1204 (2010).

New York Domestic Relations Law § 170 did not authorize the dissolution of a civil union.³¹⁶ Consequently the suit was dismissed.³¹⁷

While the result of *Gonzales* and *B.S.* would be identical under either a “choice of law” approach or immediate application of forum law—one can imagine at least two scenarios in which the methodology chosen could change the disposition. *First*, both parties in a same-sex couple could be visiting a state for the requisite period under local law to be eligible for divorce (but without having established domicile there). *Second*, the methodology applied could be dispositive in an *ex parte* situation in which the plaintiff is a domiciliary of the forum but the court’s choice of law analysis determines that on balance the most significant interests or contacts favor another state.³¹⁸ However, as Symeonides has observed, under a pre-*Williams* regime the only forum capable of granting divorce was the state of celebration (*i.e.* “the matrimonial domicile”).³¹⁹ In other words, the forum and the state of celebration were *one in the same*. It is an open question whether it is intellectually sound to continue to apply the law of the forum or whether the choice most consistent with logic and precedent is to treat the availability of divorce like any other incident. *Ex parte* and non-domiciliary cases have not yet arisen in the courts, but as the number of same-sex marriages and unions increases, whether forum law is *always applied*, or only when dictated by the jurisdiction’s modern choice of law principle, will become increasingly important.

316. *Id.* at 464. The court’s statutory interpretation focused on the distinction between “marriage” (the word in N.Y. DOM. REL. LAW § 170 (McKinney 2004)) and “civil union”; yet one would expect that a divorce action regarding a same-sex marriage would statutorily be barred on the same grounds. *Cf. Hernandez v. Robles*, 855 N.E.2d 1, 6 (N.Y. 2006) (concluding that despite the “Domestic Relations Law, which govern[s] marriage, nowhere say[ing] in so many words that only people of different sexes may marry each other, . . . New York’s statutory law clearly limits marriage to opposite-sex couples.”).

317. *B.S.*, 883 N.Y.S.2d at 467. The court suggested that the couple might re-file their family court petition in the New York Supreme Court. *Id.* That forum, the Judge intimated, although likewise unable to entertain a divorce action, and possibly unable to officially dissolve their union, might be able to use equitable authority to help resolve their affairs (*i.e.* property settlements). *Id.*; *cf. Salucco v. Aldredge*, No. 02E00876c1, 2004 WL 864459 (Mass. Super. Mar. 19, 2004) (suggesting similar). However, this solution still presumes that New York Law (*i.e.* case law on judicial equitable power) would apply and thus does not shed light on the choice of law analysis.

318. Of course, if both parties have moved their domicile to the forum (a “bilateral divorce”) then the result under modern choice of law principles would likely point to forum law—thus rendering the question academic. Additionally, the issue might be salient in traditional choice of law states without a DOMA, because if the notion that forum law should govern a divorce action is valid, then those traditional states could decline the incident of divorce even though they would be compelled based on *lex loci* principles to recognize all other same-sex incidents.

319. SYMEONIDES ET AL., *supra* note 9, at 430.

2. Judgments Concerning Divorce³²⁰

“As a general matter, the full faith and credit guarantee has been interpreted to require that each state must treat the judgment of a sister state as it would be treated in the state in which the judgment was rendered.”³²¹ Therefore, divorce judgments from one state are generally enforceable in any state. As Restatement (Second) § 117 summarizes, “[a] valid judgment rendered in one State of the United States will be recognized and enforced in a sister State even though the strong public policy of the latter State would have precluded . . . the original claim.”³²² Thus, not only does choice of law doctrine not have a place in the analysis, but the fundamental public policy exception is not available. As a result, if same-sex couples obtain judgments in the context of divorce or dissolution proceedings, other states would be constitutionally compelled to award them recognition.³²³ However, as noted above, the federal “DOMA [purports to] relieve the states of a duty to enforce judgments related to same-sex marriages.”³²⁴

In the context of a “sustained evaluation of the congressional role in horizontal federalism,” Professor Gillian Metzger, writing in the Harvard Law Review, concludes that DOMA, as applied to judgments, “fall[s] within Congress’s [constitutional] power” under the Effects Clause of Article IV.³²⁵ Another scholar, David Currie, takes the position that DOMA is unconstitutional as applied to judgments.³²⁶ Even if DOMA were repealed or struck down as unconstitutional, states would *nonetheless* continue to be free to apply their common law, statutory, or constitutional choice of law principles as individuals bring their “migrating marriages and civil unions to court . . . [and] they seek divorces, dissolutions and they seek benefits.”³²⁷

320. This article does not consider the possibility of declaratory judgments. For an insightful discussion of the issues concerning the use of this mechanism to avoid conflict of law analysis and to “prevent states from refusing to recognize [same-sex] marriages,” see MARK STRASSER, *THE CHALLENGE OF SAME-SEX MARRIAGE: FEDERALIST PRINCIPLES AND CONSTITUTIONAL PROTECTIONS* 115 (1999). As Strasser notes, these judgments cannot easily be used as an end-run around choice of law principles because there must be a genuine legal controversy. *Id.* at 116.

321. *Id.* at 102.

322. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 117 (1971).

323. Under the Uniform Enforcement of Foreign Judgments Act, parties are able to avoid filing a new action to enforce an out-of-state judgment. “Under the Act, the holder of a properly authenticated judgment from one jurisdiction may file the judgment in another jurisdiction with the clerk of the court. Once filed . . . the judgment is then treated as a local judgment.” *Id.* at 723.

324. BRILMAYER & GOLDSMITH, *supra* note 66, at 688.

325. Metzger, *supra* note 60, at 1475, 1535.

326. David P. Currie, *Full Faith and Credit to Marriages*, 1 GREEN BAG 7, 8 (1997).

327. *B.S. v. F.B.*, 883 N.Y.S.2d 459, 463 (N.Y. Sup. Ct. 2009). See *supra* notes 59–67 and accompanying text (explaining the likely irrelevance of DOMA’s inter-state provisions).

V. THE SCOPE OF SAME-SEX MARRIAGE AND UNIONS AND THE QUESTION OF
A FEDERAL MARRIAGE AMENDMENT

Unless the Supreme Court were to rule that the Constitution demands that states issue same-sex marriage licenses, the issue of a federal marriage amendment will continue to implicate significantly choice of law considerations.³²⁸ In 2004, President Bush endorsed the Marriage Protection Amendment and the House and Senate held votes on it. The Amendment read:

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.³²⁹

This proposed constitutional amendment has been reintroduced several times and most recently in the 112th Congress in 2011.³³⁰ As described by one of its lead drafters, it would only extinguish same-sex marriage from states where it exists due to *judicial action*,³³¹ while leaving state legislatures, or the people through referendums, free to enact it.³³² Therefore, were the amendment to be ratified, same-sex marriage would continue in New Hampshire, New York, Vermont, and Washington D.C., while it would be eliminated in the three states where courts mandated its institution.³³³

As to any jurisdiction that democratically enacted same-sex marriage, the Marriage Protection Amendment would act as a blanket non-recognition choice of law rule.³³⁴ Therefore, every state—much like Georgia and Texas

328. Were the Court to pronounce such a constitutional right, the resulting national uniformity (*i.e.*, 50 state celebration of same-sex marriages) would moot the choice of law issues.

329. Carl Hulse, *Senators Block Initiative to Ban Same-Sex Unions*, N.Y. TIMES, July 15, 2004, at A1.

330. Marriage Protection Amendment, H.R. Res. 45, 112th Cong. (2011). The 2011 proposed amendment contained the language “any union other than the union of a man and a woman” instead of the “upon unmarried couples or groups” language in the 2004 version. *Id.* Though other amendment texts exist, see, for example, H.R.J. Res. 37, 111 Cong. (2009), this article considers only the 2004 version because more information is available concerning it, and it is presumably the most politically viable text since it is the only version to ever have come to a congressional vote.

331. See Robert George, *The 28th Amendment*, NATIONAL REVIEW, July 23, 2001 at 32 (“The second sentence seeks to prevent the judicial abuse of statutory or constitutional law to force the extension of marriage to include non-marital relationships.”).

332. *Id.* (“The Amendment is intended to return the debate over the legal status of marriage to the American people—where it belongs.”).

333. *Supra* note 14; see U.S. CONST. art. VI (“This Constitution . . . shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”).

334. U.S. CONST. art. VI.

today³³⁵—would be compelled to deny recognition to “martial status [and] legal incidents”³³⁶ of other states’ same-sex marriages.

While the decision to constitutionally reverse the judgment of the states with judicial same-sex marriage is a normative and political issue beyond the scope of this article, proponents and opponents of the amendment ought to appreciate how (if enacted) it would alter the landscape from what this article has argued is counseled by existing state precedent.³³⁷

In terms of choice of law, the amendment’s effect would be relatively modest. Though it would reverse the rule in traditional states without a statutory or constitutional DOMA—there are extremely few such states.³³⁸ By contrast, most states follow a modern choice of law approach, and for them, the effect would be limited. Generally speaking, these jurisdictions—should they follow the approaches argued for in this article—will recognize most incidents (even when they are not available in the forum) when one or both of the same-sex plaintiffs are domiciliaries of the state where the union or marriage was celebrated. This is because, ordinarily, the *grouping of contacts* or *governmental interests* tests will point to the state where the couple makes their permanent home. Conversely, these modern choice of law states are unlikely to recognize same-sex incidents after an out-of-state couple takes up domicile in the forum, for the same reason.³³⁹ Therefore, the only effect of the Marriage Protection Amendment would be to foreclose recognition when a couple temporarily travels, but does not relocate, to a state without same-sex marriage or civil unions.³⁴⁰

The fact that the contours of access to same-sex incidents would be similar from a nationwide perspective with or without the amendment³⁴¹ highlights that, notwithstanding the calls for new normatively laden choice of law rules, a faithful obeisance to existing precedent will result in an outcome more respectful of democratic-choice than advocates on the right posit, and more rational and fair than advocates of the left fear.

335. *Supra* note 87 and accompanying text.

336. *Supra* note 329 and accompanying text.

337. *Supra* note 69 and accompanying text.

338. *See, e.g., Issues by State*, DOMA WATCH, available at <http://www.domawatch.org/state/issues/index.html> (last visited Jan. 12, 2011). Rhode Island would be in this category *but for the Chambers* decision as to subject matter jurisdiction. *Chambers v. Ormiston*, 935 A.2d 956, 967 (R.I. 2007).

339. The treatment of these “migratory” cases is the single biggest difference between the approach that Koppelman suggests and that which this article suggests follows from modern choice of law precedent. *See* KOPPELMAN, *supra* note 17, at 86; *supra* Part III.

340. Marriage Protection Amendment, *supra* note 330.

341. *Id.*