

SYMPOSIUM: INTERJURISDICTIONAL RECOGNITION OF CIVIL UNIONS, DOMESTIC PARTNERSHIPS, AND BENEFITS: ARTICLE: THE DEFENSE OF MARRIAGE ACT AND THE RECOGNITION OF JUDGMENTS

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Text

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Introduction

The federal Defense of Marriage Act ¹ ("DOMA") was enacted by Congress as a reaction to the likelihood that one or more states might legitimize same-sex marriages. DOMA, 1738C, constitutes an amendment to 1738 of title 28 of the United States Code - a law enacted pursuant to the authority granted Congress by the Full Faith and Credit Clause of Article IV of the United States Constitution. ² The purpose of the amendment was to relieve - to the extent allowed by the Constitution - states that do not choose to validate same-sex marriages from any obligation to recognize same-sex unions formed in states that have legitimated them. The obligation to recognize such foreign-state unions might arise either out of one state's obligation to apply the laws of another state in disputes which come before its courts (its "choice of law" obligation) or from one state's obligation to enforce the judgments of a sister state (its obligation to recognize and enforce foreign judgments).

Section 1738 of title 28, at least on its face, purports to govern both obligations. However, for reasons which will be stated and developed below, 1738 has had no bearing on the decisions of the United States Supreme Court in developing choice of law rules. It is arguable, however, that 1738 has defined the obligation to recognize foreign judgments and, therefore, that the changes to 1738 brought about by the enactment of DOMA may have a significant impact on a state's obligation to recognize a foreign judgment based on a same-sex marriage.

[*670] It is the purpose of this article to consider the effect DOMA may have on a state's obligation to enforce a judgment from a sister state. In so doing, for reasons that appear below, I shall also have to consider a state's choice of law obligation. Although my own position is that 1738 merely restates the Constitution's own "full faith and credit" obligation with regard to judgments, ³ I shall set out some possible opposing arguments, explore their

¹ [28 U.S.C. 1738C](#) (2000).

² U.S. Const. art. IV, 1.

³ Compare id. with [28 U.S.C. 1738](#) (2000).

consequences for a state's duty to recognize foreign judgments, and give my reasons for rejecting those arguments and their consequences. Finally, I shall consider some of the circumstances in which the issues discussed may arise.

I. DOMA, Choice of Law, and Some History About Section 1738

Section 1738 was adopted by Congress pursuant to power granted to it by Section 1 of Article IV of the Constitution (the Full Faith and Credit Clause). That Full Faith and Credit Clause provides:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof.⁴

Section 1738 provides the means for authenticating "the Acts of the legislature of any State ... [and the] records and judicial proceedings of any court of any such State."⁵ Then the third paragraph of 1738 states:

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such State ... from which they are taken.⁶

DOMA withdraws 1738's obligation of recognition and enforcement for "any public act, record, or judicial proceeding of any [*671] other State ... respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State ... or a right or claim arising from such relationship."⁷ Of course, no statute can amend the Constitution of the United States.⁸ Thus, although a sister state's judgment recognizing a same-sex marriage may no longer fall within the purview of 1738, it still enjoys the protection afforded by Article IV itself.

I shall begin by contrasting the federal constraints imposed upon the states in making choice of law decisions with those which govern their obligation to recognize and enforce foreign judgments. On its face, the current version of 1738 appears to require the same sort of deference to state laws (the acts of state legislatures) as it does to judgments (judicial proceedings). In other words, it seems to say that the obligations 1738 imposes are applicable equally to choice of law decisions as to the obligation to recognize foreign state judgments. But that is certainly not the case.

The explanation is that the current version of 1738 dates from 1948.⁹ The original version, adopted in 1790 and changed only twice in very minor ways until the 1948 revision, provided the procedure for authenticating "acts of the legislature" and the "records and judicial proceedings of the courts of any state."¹⁰ It concluded as follows:

⁴ U.S. Const. art. IV, 1.

⁵ [28 U.S.C. 1738](#) (2000).

⁶ *Id.*

⁷ [28 U.S.C. 1738C](#).

⁸ [Marbury v. Madison, 5 U.S. \(1 Cranch\) 137, 177 \(1803\)](#) ("It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.").

⁹ [28 U.S.C. 1738](#) (giving date of June 25, 1948).

¹⁰ Act of May 26, 1790, ch. 11, **1 Stat. 122** (1790).

And the said records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken. ¹¹

Note that the last sentence applied only to "records and judicial proceedings," omitting any reference to "acts of the legislature." Professor Brainerd Currie commented upon the omission and the 1948 amendment to 1738:

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The reason for the omission [in the original act] can only be surmised, but the most natural explanation would seem to be that the Congress simply had no idea what to say on the general question of the effect which should be given in one state to the public acts of another. In 1948 the revisers of the Judicial Code presumed to supply the omission by a notably footless piece of draftsmanship. They simply added the word "acts" to the sentence prescribing the effect of records and judicial proceedings, explaining that "this follows the language of Article IV, section 1 of the Constitution." They seem to have been quite oblivious of the fact that there may have been a good reason for the failure of the First Congress to prescribe the effect of public acts. They seem to have had no conception of the difficulties involved in prescribing the effect which ought to be given to the laws of one state in the courts of another. The effect of the revision was to apply to statutes the same formula which the First Congress had prescribed for records and judicial proceedings This formula has proved reasonably workable as to judgments As applied to public acts it is simply unintelligible. Despite the enactment of the revision, the power of Congress to prescribe the effect of public acts remains, for all practical purposes, unexercised. ¹²

Thus, until 1948, no statute purported to define the sort of deference Article IV required one state give to the laws of another. The Supreme Court was guided only by the language of Article IV itself. ¹³ It is important to explore how the Supreme Court has interpreted the reach of Article IV in choice of law cases to determine if there are any lessons we may draw from those decisions which would be applicable to the treatment of judgments.

Choice of law questions arise in such a multitude of circumstances that the Court has had to struggle to define constitutional standards. It made a couple of false starts and has had to modify along the way. The bulk of the cases which led to the current standards were decided before 1948. In 1958, Professor Currie summarized what could be learned from the Court's decades of effort: "[A] state court's choice of law will be upset under the Full Faith and Credit Clause or the Due **[*673]** Process Clause only when the state whose law is applied has no legitimate interest in its application." ¹⁴

Since 1958, the Court itself has summarized the standards imposed by Article IV and the Due Process Clause of the Fourteenth Amendment. In *Allstate Insurance Co. v. Hague*, ¹⁵ with Justice Brennan speaking for a plurality, the Court found that "the lesson ... [from prior opinions] is that for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." ¹⁶

¹¹ *Id.*

¹² Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. Chi. L. Rev. 9, 19 (1958), reprinted in *Selected Essays on the Conflict of Laws* 188, 200-01 (1990) (footnotes omitted).

¹³ See [Order of United Commercial Travelers of Am. v. Wolfe, 331 U.S. 586 \(1947\)](#) (finding that the language of the Full Faith and Credit Clause required the application of a provision in an Ohio contract though it was in conflict with the statute of limitations in the forum state of South Dakota).

¹⁴ Currie, *supra* note 12, at 75, reprinted in *Selected Essays on the Conflict of Laws* 188, 271 (1990).

¹⁵ [449 U.S. 302 \(1981\)](#).

¹⁶ [Id. at 312-13](#).

Applying that standard to the facts in *Allstate*, the Court decided that Minnesota, by applying its own law to an insurance claim, even though there were few and dubious contacts with that state, had not breached its constitutional obligations. ¹⁷ The flexible plurality standard of *Allstate* was adopted by a majority of the Court in *Phillips Petroleum Co. v. Shutts*, ¹⁸ which decided that Kansas had unconstitutionally applied its own law to oil and gas leases in the absence of any interest of Kansas in those leases or in the real property involved. ¹⁹

Section 1738 was not cited in either of these two choice of law cases decided since 1948 (*Allstate* and *Shutts*), apparently affirming Professor Currie's opinion that the application of that section to choice of law problems was "simply unintelligible." ²⁰ The Court relied, instead, upon its prior decisions, and the standard it articulated has been built upon those foundations.

II. A State's Obligation to Recognize and Enforce Judgments

A state's obligations with respect to foreign judgments have been regulated by what is now 1738 since the beginnings of the republic. [*674] Such obligations are much more exacting than those imposed by the Court's choice of law decisions. In *Baker v. General Motors Corp.*, ²¹ Justice Ginsburg, speaking for a majority of the Court, summarized these obligations as follows:

Our precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments. "In numerous cases this Court has held that credit must be given to the judgment of another state although the forum would not be required to entertain the suit on which the judgment was founded." The Full Faith and Credit Clause does not compel "a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." Regarding judgments, however, the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. For claim and issue preclusion (*res judicata*) purposes, in other words, the judgment of the rendering State gains nationwide force.

A court may be guided by the forum State's "public policy" in determining the law applicable to a controversy. But our decisions support no roving "public policy exception" to the full faith and credit due judgments... .

The Court has never placed equity decrees outside the full faith and credit domain. Equity decrees for the payment of money have long been considered equivalent to judgments at law entitled to nationwide recognition. We see no reason why the preclusive effects of an adjudication on parties and those "in privity" with them, i.e., claim preclusion and issue preclusion (*res judicata* and collateral estoppel), should differ depending solely upon the type of relief sought in a civil action. ²²

Justice Ginsburg then noted that the enforcing state does have control over the means of enforcement of sister-state judgments:

¹⁷ [Id. at 313.](#)

¹⁸ [472 U.S. 797 \(1985\).](#)

¹⁹ [Id. at 818-19.](#)

²⁰ Currie, *supra* note 12, at 19, reprinted in *Selected Essays on the Conflict of Laws* 188, 200 (1990).

²¹ [522 U.S. 222 \(1998\).](#)

²² [Id. at 233-34](#) (citations and footnotes omitted). In addition, Justice Ginsburg includes language direct from a treatise: "Although "[a] second state need not directly enforce an injunction entered by another state ... [it] may often be required to honor the issue preclusion effects of the first judgment." [Id. at 234 n.7](#) (quoting 18 Charles Alan Wright et al., *Federal Practice and Procedure* 4467 (1981)).

Full faith and credit, however, does not mean that States must adopt the practices of other States regarding the time, manner, and **[*675]** mechanisms for enforcing judgments. Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the evenhanded control of forum law.

Orders commanding action or inaction have been denied enforcement in a sister State when they purported to accomplish an official act within the exclusive province of that other State or interfered with litigation over which the ordering State had no authority. Thus, a sister State's decree concerning land ownership in another State has been held ineffective to transfer title, although such a decree may indeed preclusively adjudicate the rights and obligations running between the parties to the foreign litigation.²³

DOMA, by excepting certain judgments from the protection of 1738, forces us to answer two questions. First, given that all of the cases defining a state's obligation to recognize and enforce foreign judgments have been decided with 1738 in place, are those obligations, as summarized by Justice Ginsburg, constitutionally mandated or are they merely statutory? Second, if they are at least in part statutorily based, what does the Constitution itself require, and therefore what difference does DOMA make?

A. Constitutionally Mandated or Merely Statutory

Let us consider the first question mentioned above, namely: are our current rules on the recognition of judgments constitutionally mandated or merely statutory? Phrased in another way, does 1738 merely re-state the accepted meaning and consequence of the phrase "full faith and credit" (as applied to judgments) as it was understood before the enactment of that statute, or has it expanded the degree of deference owed by one state to the judgments of another?

Justice Ginsburg, in the excerpt from Baker quoted above, says that the "full faith and credit obligation" (i.e., the constitutional obligation) is "exacting" and that a judgment entered by a court with jurisdiction of persons and subject matter "qualifies for recognition throughout the land" "for claim and issue preclusion (res judicata) purposes."²⁴ The words of Justice Ginsburg, however, do not say that the "recognition" due such judgments is precisely that which is required by 1738.

[*676] Justice Holmes was apparently of the opinion that the statute reflected a constitutional standard, one that preexisted the enactment of 1738. Writing for the majority in *Fauntleroy v. Lum*,²⁵ he stated,

The doctrine laid down by Chief Justice Marshall was "that the judgment of a state court should have the same credit, validity, and effect in every other court in the United States, which it had in the State where it was pronounced, and that whatever pleas would be good to a suit thereon in such State, and none others, could be pleaded in any other court of the United States." [Hampton v. McConnel, 3 Wheat. 234...](#)

... .

We assume that the statement of Chief Justice Marshall is correct. It is confirmed by the Act of May 26, 1790 ... providing that the said records and judicial proceedings "shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are or shall be taken."²⁶

²³ [Id. at 235](#) (citations and footnote omitted) (first, second, and third emphases added).

²⁴ [Id. at 233](#).

²⁵ [210 U.S. 230 \(1908\)](#).

²⁶ [Id. at 236-37](#).

The clear implication of this statement is that the statute merely confirmed a preexisting, well-defined duty of recognition for foreign judgments.

The authority Justice Holmes cited, however, does not quite support him. *Hampton v. McConnel*²⁷ is a one-paragraph opinion containing only three sentences: "This is precisely the same case as that of *Mills v. Duryee*. The court cannot distinguish the two cases. The doctrine there held ... [hereafter is the phrase quoted by Justice Holmes]." ²⁸

Hampton v. McConnel, then, does not answer our question. It refers us to *Mills v. Duryee*.²⁹ That case is one of the earliest to consider the obligation to recognize and enforce judgments. In *Mills*, the plaintiff had recovered a judgment against the defendant in New York and sought to enforce it in the District of Columbia.³⁰ The defendant pleaded *nil debet* (that is, he denied the obligation) but did **[*677]** not deny the existence of the judgment, which he might have done by pleading *nul tiel record* (no such record).³¹ Justice Story, speaking for the Court, cited Article IV and the Act of May 26, 1790 (now 1738) and gave them, together, essentially the same meaning we ascribe to them today. He stated,

Congress have therefore declared the effect of the record by declaring what faith and credit shall be given to it.

It remains only then to inquire in every case what is the effect of a judgment in the state where it is rendered. In the present case ... it is beyond all doubt that the judgment of the Supreme Court of New York was conclusive upon the parties in that state. It must therefore, be conclusive here also.

...

... The right of a Court to issue execution depends upon its own powers and organization.³²

Justice Story's opinion relied heavily upon the statute, not upon any preexisting understanding about the meaning of full faith and credit. In dissent, Justice Johnson argued that a "judgment of an independent unconnected jurisdiction is what the law calls a foreign judgment, and it is every where acknowledged that *nil debet* is the proper plea to such a judgment... . Faith and credit are terms strictly applicable to evidence."³³

That Justice Story relied on the statute in *Mills* does not mean that the statute did not reflect an accepted meaning of the words in Article IV. Was there an established meaning of the phrase "full faith and credit" at the time Article IV was drafted? Was it a term of art familiar to eighteenth-century lawyers? According to Professor Currie, it was not:

So far as appears from the rather extensive literature on this subject, "full faith and credit" was not a term of art with a settled meaning. It is difficult to read into the clause, in its original context, anything more than an injunction to

²⁷ [16 U.S. \(3 Wheat.\) 234 \(1818\)](#).

²⁸ [Id. at 235](#).

²⁹ [11 U.S. \(7 Cranch\) 481 \(1813\)](#).

³⁰ [Id. at 481](#).

³¹ [Id. at 481-82](#).

³² [Id. at 484-85](#) (first emphasis added).

³³ [Id. at 485-86](#) (Johnson, J., dissenting).

render unto Caesar the things which be [*678] Caesar's - without guidance as to how ownership is to be determined in the absence of legislation by Congress.³⁴

Nor does history help us much in understanding the meaning of the term. It appears in the Articles of Confederation, but it is applied only to judgments. The last paragraph of Article IV of the Articles of Confederation provided: "Full faith and credit shall be given in each of these states to the records, acts, and judicial proceedings of the courts and magistrates of every other State."³⁵

In his dissent in *Mills*, Justice Johnson suggests that the phrase had some meaning in the international law of the time.³⁶ James Wilson argued in the Constitutional Convention that Congress should be given power to declare the effect of the article and that without such an authorization "the provision would amount to nothing more than what now takes place among all independent nations."³⁷ It was clear that Wilson, at least, desired something more than that. He and William Johnson also "supposed the meaning [of the committee draft including the phrase from the Articles] to be that judgments in one state should be the ground of actions in other states; and that acts of the legislatures should be included, for the sake of acts of insolvency, etc."³⁸ That is really the extent of the discussion of Article IV in the Constitutional Convention.

B. Requirements of Article IV

If we conclude that the obligation to recognize and enforce foreign judgments (as the Court has defined it) is a product of the statute, what might we say about the requirements of Article IV absent the statute?

The first thing to note is that the reach of 1738 itself has had to be defined by the Court. Section 1738 contains the critical phrase, [*679] "judicial proceedings ... shall have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such State ... from which they are taken."³⁹ One possible interpretation of that phrase is that the court of the enforcing state must sit as if it were a court of the rendering state. That is, the enforcing state might be required to apply at least some, if not all, of the enforcement rules of the rendering state (for example, its statute of limitations). The section has not been so interpreted. As the previous quotation from *Baker* makes clear, an enforcing state may employ its own enforcement rules. Only the rules of preclusion of the rendering state "travel with" the judgment.⁴⁰ Stated another way, the obligation recited in 1738 is that the preclusion rules of the rendering state will prevail if those rules conflict with the preclusion rules of the enforcing state. Section 1738, as thus interpreted, is essentially a federal choice of law statute.

We know what Article IV requires with regard to choice of law.⁴¹ Absent a federal statute, a state may apply its own law if it has an interest in the outcome. If 1738 is a choice of law statute, then to the extent that it is repealed, it

³⁴ Currie, *supra* note 12, at 18, reprinted in *Selected Essays on the Conflict of Laws* 188, 199 (1990) (footnote omitted). Yet in a footnote in the reprinted version of the article, Currie refers to authority "establishing that the phrase, or its equivalent, was indeed a 'term of art,' relating to the effect of ecclesiastical judgments in the common-law courts." *Id. at 199 n.37* (emphasis added) (citation omitted).

³⁵ Articles of Confederation and Perpetual Union art. IV, reprinted in Merrill Jensen, *The Articles of Confederation: An Interpretation of the Social-Constitutional History of the American Revolution 1774-1781*, app. 3, at 263, 264 (1940) (emphasis added).

³⁶ See *supra* text accompanying note 33.

³⁷ Arthur Taylor Prescott, *Drafting the Federal Constitution* 725 (1941).

³⁸ *Id.* at 723-24.

³⁹ [28 U.S.C. 1738](#) (2000).

⁴⁰ [Baker v. Gen. Motors Corp., 522 U.S. 222, 235 \(1998\)](#).

⁴¹ See *supra* Part I.

might be argued that a state may apply its own rules of preclusion to a judgment whenever it has an interest in the outcome. Such a rule would have altered the outcome of the seminal case of *Yarborough v. Yarborough*.⁴² In that case, a South Carolina court was asked to modify a child support order of a Georgia court.⁴³ The beneficiary of that award was, at the time of the suit, a resident of South Carolina and had been so for many years. South Carolina preclusion rules allowed the modification of a child support award.⁴⁴ Georgia preclusion rules did not (at least, they did not allow the modification of an award of the sort involved in this case).⁴⁵ The South Carolina court granted the modification, but the United States Supreme Court, in an opinion by Justice Brandeis, reversed.⁴⁶ South Carolina was obliged to apply the Georgia preclusion rule.⁴⁷ Justice Stone dissented, arguing that South Carolina **[*680]** had an interest (indeed, the paramount interest) in the substantive issues in the case, and that should be decisive.⁴⁸

A second thing to note in considering the possible reach of Article IV without 1738 is that although that section, in one form or another, has been with us since 1790, it has not governed all of the results in the recognition of judgment cases. The Court has decided that 1738 allows an enforcing state to apply its own statute of limitations on judgments, even if doing so would bar a suit on a foreign judgment which could still have been enforced under the statute of limitations in the rendering state.⁴⁹ (A statute of limitations is part of the "time, manner and mechanisms for enforcing judgments" referred to by Justice Ginsburg in *Baker*.⁵⁰) However, it may not create a statute of limitations which discriminates against sister states' judgments. In *Watkins v. Conway*,⁵¹ in a per curiam opinion, the Court stated that:

[Appellant's] complaint is simply that Georgia has drawn an impermissible distinction between foreign and domestic judgments. He argues that the statute is understandable solely as a reflection of Georgia's desire to handicap out-of-state judgment creditors. If appellant's analysis of the purpose and effect of the statute were correct, we might well agree that it violates the Federal Constitution. For the decisions of this Court which appellee relies upon do not justify the discriminatory application of a statute of limitations to foreign actions.⁵²

The Court went on to say that the statute of limitations in question, although treating foreign judgments differently, did not deny full faith and credit because it would enforce the judgment if the judgment creditor took advantage of the rendering state's procedure for renewal of judgments.⁵³

⁴² [290 U.S. 202 \(1933\)](#).

⁴³ [Id. at 204](#).

⁴⁴ See [id. at 209](#).

⁴⁵ See *id.*

⁴⁶ [Id. at 205, 213](#).

⁴⁷ [Id. at 212](#).

⁴⁸ [Id. at 225-27](#) (Stone, J., dissenting).

⁴⁹ [M'Elmoyle v. Cohen, 38 U.S. \(13 Pet.\) 312, 327-28 \(1839\)](#); cf. [Union Nat'l Bank v. Lamb, 337 U.S. 38, 42-43 \(1949\)](#) (citing *M'Elmoyle* favorably).

⁵⁰ [Baker v. Gen. Motors Corp., 522 U.S. 222, 235 \(1998\)](#).

⁵¹ [385 U.S. 188 \(1966\)](#).

⁵² [Id. at 189](#).

⁵³ [Id. at 189-90](#).

Some commentators have suggested that a similar "non-discrimination" rule applies to choice of law decisions as well.⁵⁴ [*681] Traditional choice of law rules include a "public policy" exception.⁵⁵ As Justice Ginsburg pointed out, there has been no public policy exception to the requirement of recognition of judgments.⁵⁶ If 1738 is construed as a choice of law statute, does that mean that repealing it will introduce a "public policy" exception there?⁵⁷ Perhaps, but in a sharply limited context. The question would be whether public policy barred the application of the rendering state's preclusion rules. For a court to deny recognition to a judgment because the foreign substantive law on which it was based is antagonistic to the enforcing state's public policy would essentially be creating different preclusion rules for foreign judgments than would be applied to its own. That would be impermissibly discriminatory.⁵⁸ Treating 1738 as a choice of law statute subject to a non-discrimination rule would not have changed the outcome of one of the landmark cases, *Fauntleroy v. Lum*.⁵⁹ In *Fauntleroy*, Mississippi's own preclusion rules would doubtless have prevented the re-opening of the judgment at issue had it been mistakenly issued by one of its own lower courts and become final. Not only, then, did the Mississippi court fail to apply the preclusion rules of Missouri, it denied the foreign judgment the protection of its own rules on the basis that the outcome was contrary to a strong public policy of Mississippi.⁶⁰ That it could not do.

In short, even if 1738, as a choice of law statute, is not a requirement of Article IV, its repeal in the DOMA context would not leave states unconstrained in their treatment of foreign judgments. Their range of discretion would be expanded but not unlimited. Even if a state were allowed to apply its own rules of preclusion, it could not apply them in a manner discriminatory to foreign judgments nor [*682] create preclusionary rules enforceable for foreign judgments but not to its own.

III. Section 1738 Is Part and Parcel of Article IV

Although the phrase "full faith and credit" may not have been a term of art, nor is its definition provided by an examination of its historical roots, it does not follow that 1738 does not reflect the understanding of the members of the Constitutional Convention about the meaning of Article IV.

One might begin by noting that many of the members of the First Congress (which wrote the precursor to 1738)⁶¹ were delegates to the Constitutional Convention as well.⁶² Making judgments portable was a particular concern to

⁵⁴ See, e.g., David P. Currie et al., *Conflicts of Laws: Cases-Comments-Questions* 345-49 (6th ed. 2001).

⁵⁵ *Id.* at 69-78.

⁵⁶ *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233-34 (1998). The Restatement of the Conflict of Laws suggests that there might, even under current law, be a very limited public policy exception. *Restatement (Second) of Conflict of Laws* 103 (1971). This section has been widely criticized. See, e.g., Albert A. Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for Its Withdrawal*, 113 U. Pa. L. Rev. 1230, 1240 (1965); Charles H. Wilson, *Comment, The Supreme Court's Bill of Attainder Doctrine: A Need for Clarification*, 54 Cal. L. Rev. 212 (1966).

⁵⁷ The constitutionality of the public policy exception has been questioned. See, e.g., Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 *Yale L.J.* 1965 (1997). But see *Sun Oil Co. v. Wortman*, 486 U.S. 717, 728 n.2 (1988) ("escape devices such as the doctrine of public policy").

⁵⁸ See *Watkins v. Conroy*, 385 U.S. 188, 189 (1966).

⁵⁹ 210 U.S. 230 (1908).

⁶⁰ *Id.* at 236-37 (citation omitted).

⁶¹ See *supra* note 10 and accompanying text.

⁶² The first session of the first Congress had acted almost as a second constitutional convention, in which eleven [of the fifty-five] Framers sat as senators ... and eight as representatives" Clinton Rossiter, *1787: The Grand Convention* 301 (Eric F. Goldman ed., 1966).

the lawyers participating in the drafting of our basic documents.⁶³ The reason is clear. Should some states become havens for judgment debtors, the effect on commerce would be substantial. And if defendants successful in defending in one state should face re-litigation if they traveled to another, the effect on freedom of travel, and upon national unity, would also be substantial.

The phrase "full faith and credit" appeared in the Articles of Confederation, but was directed specifically at judgments and said nothing about a state's choice of law obligation,⁶⁴ further emphasizing the concern of the time for the enforcement of judgments. Furthermore, the Articles of Confederation did not give Congress power to legislate about or define the phrase "full faith and credit." I have already pointed out the importance placed by at least one member of the Convention on giving the new Congress that power.⁶⁵ It appears that the Convention was relying on the Congress not only to implement Article IV but also to give it meaning, especially with regard to the recognition of judgments. This the Congress did on May 26, 1790.

[*683] More persuasive than historical arguments or concerns about whether a phrase was a "term of art" is what has followed the adoption of the statute of 1790. Conflict of laws is a subject filled with open-ended questions and ambiguous standards. An exception is the law with relation to the obligations to enforce judgments. While it still has its uncertainties, 1738 has been with us a long time, has provided some clear standards, and has served us well. Indeed, it has done us better service than many provisions clearly contained in the Constitution. Protecting the finality of judgments has provided great benefits to the thousands of people who have been involved in litigation. It is also a necessary ingredient in the preservation of our federal system.

If the Court decides that 1738 does not reflect the meaning of Article IV with regard to judgments, it will be obliged to decide what the meaning of that section is. Surely sister-state judgments, even unpopular ones, may not simply be ignored. I have suggested that without the statute, courts of enforcing states, if they have any interest in the litigation, might be free to substitute their own rules of preclusion to foreign judgments. But they must do so without discrimination and without reference to the law underlying the judgments. This will still make most judgments enforceable. It also will not necessarily fulfill the expectations of the drafters of DOMA. Deciding that 1738 is not mandated by Article IV will raise a great many issues which are now at rest. I do not think the benefit of abandoning 1738 is worth the cost, even to the admirers of DOMA.

IV. The Significance of Context

I have one final point to make. The decision about whether the statute is a reflection of the meaning of the constitutional provision may depend upon the context in which the issue arises. Suppose one partner in a same-sex marriage sues another in tort, the defendant's insurance company asserts interspousal tort immunity, the issue of their marriage is fully and fairly litigated in a state allowing such marriages, and the defendant (the insurance company) wins. Will its victory be honored in another state when the plaintiff tries again in a new jurisdiction? This is only one scenario in which the existence of a same-sex marriage is a material fact but not the only or even central issue. I suggest that the contestants in such a case may not be concerned about the larger social issues. The defendant may simply want to defend his judgment against someone who wants two bites at **[*684]** the apple, and the equities will favor the defendant. Conversely, if the decision is made in the context of the debate about the legitimization of same-sex marriage, society's interest in the finality of judgments may be pushed aside, and the precedent set may serve people like the defendant in the above scenario, and many others who are involved in litigation daily, very poorly.

⁶³ See supra text accompanying notes 36-38.

⁶⁴ See Articles of Confederation and Perpetual Union art. IV, supra note 35 ("Full faith and credit shall be given in each of these states to the records, acts, and judicial proceedings of the courts and magistrates of every other state.").

⁶⁵ See supra note 37 and accompanying text.

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