

## Part II

### CONSUMER BANKRUPTCY

#### SAME-SEX MARRIAGES IN BANKRUPTCY: A PATH OUT OF THE PUBLIC POLICY QUAGMIRE

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Can a bankruptcy court sitting in a state that voids a marriage between two individuals of the same-sex, recognize that marriage and more importantly, the incidences of marriage, in bankruptcy? Whatever decisions are rendered by the Supreme Court in *United States v. Windsor*<sup>1</sup> and *Perry v. Hollingsworth*,<sup>2</sup> the Court will not answer this question. While both cases involve the recognition of same-sex marriage, neither case directly addresses § 2 of the Defense of Marriage Act<sup>3</sup> — the provision that authorizes states to refuse to recognize valid same-sex marriages performed in other states as well as the claims, rights and judgments arising from those marriages. Nor will the cases speak directly to the 37 state laws that currently do so.<sup>4</sup> Until the Supreme Court examines DOMA § 2, the uncertainty surrounding the interstate recognition of marriages will continue to invade bankruptcy courts for the foreseeable future.

Up to this point the bankruptcy courts have had little difficulty balancing the interstitial nature of bankruptcy in the context of heterosexual unions. When it comes to the recognition of marriage and its attendant rights and obligations, bankruptcy courts have relied on the Supreme Court's command in *Butner v. United*

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<sup>1</sup>See *U.S. v. Windsor*, 133 S. Ct. 786, 184 L. Ed. 2d 527 (2012) (granting certiorari).

<sup>2</sup>See *Hollingsworth v. Perry*, 133 S. Ct. 786, 184 L. Ed. 2d 526 (2012) (granting certiorari).

<sup>3</sup>28 U.S.C.A. § 1738C.

<sup>4</sup>See *infra* Part I.B.2.

*States*<sup>5</sup> and looked to state law to determine both the legality of the marriage as well as the existence of rights that arise as a result of the union.<sup>6</sup> Bankruptcy courts have ruled on the validity of marriages in a wide array of circumstances from determining the scope of the debtor's exemptions<sup>7</sup> to ruling on the existence of a fraudulent transfer<sup>8</sup> to establishing the propriety of a creditor's lien.<sup>9</sup> Whether a debtor is or was married can be the difference between, among other things, whether property is protected from a creditor's reach or whether a debt is dischargeable.<sup>10</sup>

Rarely have the bankruptcy courts been asked or required to examine conflicting state domestic relations laws when ruling on the validity of a marriage. In those few reported cases where the parties' marriages were prohibited under the forum state law, the state law explicitly recognized prohibited marriages if they were valid where performed.<sup>11</sup> Nor has any bankruptcy court, as of yet, addressed the questions raised by DOMA § 2. Can a bankruptcy court treat as a valid a marriage that the forum state's law declares invalid? Can the court recognize the incidences of marriage if the forum state law either implicitly or explicitly prohibits such recognition? Is the court required to follow the public policy of the forum state or is the court free to ignore it?

This article attempts to answer these questions. Part I sets the stage for the discussion, describing DOMA § 2 and the myriad

<sup>5</sup>*Butner v. U.S.*, 440 U.S. 48, 99 S. Ct. 914, 59 L. Ed. 2d 136, 19 C.B.C. 481, Bankr. L. Rep. (CCH) P 67046 (1979).

<sup>6</sup>See, e.g., *In re Blankenship*, 133 B.R. 398, 400 (Bankr. N.D. Ohio 1991) ("Because the power to regulate domestic relations belongs to the state, the Court must look to state law to determine the marital status of [the parties]."); *In re Cohen*, 2012 WL 400715, \*1 n.2 (Bankr. D. N.M. 2012); *In re Bakkar*, 2009 WL 3068192, \*3 (Bankr. D. N.J. 2009).

<sup>7</sup>See *In re Cohen*, 2012 WL 400715, \*1 n.1 (Bankr. D. N.M. 2012).

<sup>8</sup>See *In re Blankenship*, 133 B.R. at 402.

<sup>9</sup>*In re Nakamura*, 2008 WL 191811, \*3-4 (Bankr. D. Idaho 2008) (Bankr. D. Idaho).

<sup>10</sup>See, e.g., *In re Bakkar*, 2009 WL 3068192, \*4 (Bankr. D. N.J. 2009); *In re Veneziale*, 267 B.R. 695, 699-700 (Bankr. E.D. Pa. 2001).

<sup>11</sup>*Blankenship*, 133 B.R. at 400 (acknowledging that while Ohio does not allow for proxy marriages it will recognize proxy marriages if performed in a state where such marriages are valid.). But see *In re Mercier*, 2005 WL 419716, \*2 (Bankr. M.D. Fla. 2005) ("Even assuming, without conceding, that the monthly \$800 paid by the State of Oregon was pursuant to an order of a court, it could not have been entered in connection with a separation agreement or divorce decrees for the simple reason that Ms. Foster was never the spouse of the Debtor, even if the laws of the State of Oregon recognized same sex marriages which, of course, are not recognized in the State of Florida.").

state laws regarding same-sex relationships. This part first describes Congress' limited intent when it promulgated § 2, as well as the potential due process implications of an overly broad interpretation of the statute. What becomes evident is that Congress never intended nor was it authorized to allow states to impose a blanket non-recognition rule on all same-sex unions.

After reviewing state laws that recognize same-sex unions, the article next places the marriage prohibition statutes in an historical context, describing the narrow construction state courts have traditionally given such statutes even during the miscegenation era. Significantly, state courts have never applied a blanket non-recognition rule, instead engaging in a fact dependent analysis that allows for the recognition of out-of-state marriages even if prohibited in the forum state. A state's narrow construction of its statute both avoided any conflict of law problems and sidestepped potential due process concerns. If the marriage and attendant rights can be recognized under both states' laws then there is not a true conflict.

In the event a true conflict exists, Part II describes the proper choice of law rule in bankruptcy and promotes a modified Restatement (Second) of Conflicts "most significant relationship" test as the appropriate test in marriage cases. The "most significant relationship" test allows courts to engage in a fact-dependent analysis that is sensitive to the due process concerns raised in any conflict analysis. The test would also allow courts to promote the federal policies underlying bankruptcy rather than any one state's policy regarding same-sex unions.

Finally, the article applies the test to several hypotheticals, demonstrating how it can best meet the policies underlying bankruptcy without impinging on a state's expressed public policy regarding same-sex relationships.

## I. Setting the Stage

### A. The *Other* DOMA Provision, § 2

Although it has not been widely discussed or litigated, the federal DOMA contains a provision that states:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory,

possession, or tribe, or a right or claim arising from such relationship.<sup>12</sup>

The so-called choice of law provision does two things. First, it gives permission to states to reject marriages validly performed in other states. As will be discussed more fully below, thirty-eight states have statutes or constitutional amendments prohibiting marriages between same-sex couples and in most instances also refusing to recognize such marriages performed in other states.<sup>13</sup> Under these statutes, State B could refuse to recognize a marriage between two men validly performed in State A and arguably deny the couple state benefits based on marital status.

But perhaps more significantly, DOMA § 2 creates an exception to the Full Faith and Credit Clause. The Clause states that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”<sup>14</sup> Congress arguably exercised its power under the so-called “effects clause” when it passed DOMA and granted states the power to reject “judicial proceedings of any other State.”<sup>15</sup> Under this provision, State B could, in theory, refuse to recognize a property distribution or domestic support order issued by a court in State A.

Although the Supreme Court has yet to rule on whether Article IV allows Congress to provide an exception to the Full Faith and Credit Clause which gives “no effect” to judicial proceedings of other states, or whether other constitutional provisions may prevent a state from rejecting a valid judgment from a sister state,<sup>16</sup> Congress appeared to recognize its limited authority in this area. In its Committee Report, the House of Representatives articulated the narrow purpose behind § 2 as it relates to the recognition of court judgments.

But the Committee would emphasize two points regarding Section 2’s application to judicial orders. First, as with public acts and re-

<sup>12</sup>28 U.S.C.A. § 1738C.

<sup>13</sup>See *infra* note Part I.B.2.

<sup>14</sup>U.S. Const. art. IV.

<sup>15</sup>See generally, Andrew Koppelman, *DUMB and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 Iowa L. Rev. 1, 15–18 (1997) (discussing the constitutionality of this provision).

<sup>16</sup>See generally, Mark Strasser, *The Legal Landscape Post-DOMA*, 13 J. Gender Race & Just. 153 (Fall 2009) (discussing the potential issues raised by Congress’ decision to create an exception to the FFCC).

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cords, the effect of Section 2 is merely to authorize a sister State to decline to give effect to such orders; it does not mandate that outcome, and, indeed, given the special status of judicial proceedings, the Committee expects that States will honor judicial orders as long as it can do so without surrendering its public policy against same-sex marriages. Second, and relatedly, if-notwithstanding a sister State's policy objections to homosexual marriage—there is some constitutional compulsion (whether under the Due Process Clause or otherwise) to give effect to a judicial order, Section 2 obviously can present no obstacle to such recognition.<sup>17</sup>

As of this writing, the lower courts have not found that DOMA § 2 raises constitutional concerns in the marriage context.<sup>18</sup> The cases challenging DOMA § 2, however, all involve plaintiffs seeking to have a marriage license—not court judgments—recognized in their home states.<sup>19</sup> As will be discussed more fully below, states traditionally have had the authority to reject marriages that contradict a strong public policy of the forum state,<sup>20</sup> although no state has enforced a blanket non-recognition rule.<sup>21</sup> The cases do not purport to answer some of the more difficult questions regarding Congress' authority to create an exception to the Full Faith and Credit Clause for court judgments. Nor do the cases address the more nuanced question regarding a couple that changes domicile from a state that recognizes their marriage to a state that does not; a couple temporarily visiting a state that prohibits their marriage; or a couple that has no connection to the forum state other than litigation currently in its courts.<sup>22</sup>

Answers to these questions cannot be found in the text of

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<sup>17</sup>H.R. Rep. 104-664, 664, 104th Cong., 2nd Sess. 1996, 1996 WL 391835, 1996 U.S.C.C.A.N. 2905 (Leg.Hist.), pp. 28–29.

<sup>18</sup>See *Smelt v. County of Orange*, 447 F.3d 673, 684 (9th Cir. 2006); *Bishop v. Oklahoma ex rel. Edmondson*, 447 F. Supp. 2d 1239, 65 Fed. R. Serv. 3d 1206 (N.D. Okla. 2006), rev'd on other grounds in part, 333 Fed. Appx. 361 (10th Cir. 2009); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1304, 1 A.L.R. Fed. 2d 611 (M.D. Fla. 2005).

<sup>19</sup>*Smelt v. County of Orange*, 447 F.3d 673, 684 (9th Cir. 2006); *Bishop v. Oklahoma ex rel. Edmondson*, 447 F. Supp. 2d 1239, 65 Fed. R. Serv. 3d 1206 (N.D. Okla. 2006), rev'd in part, 333 Fed. Appx. 361 (10th Cir. 2009); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1304, 1 A.L.R. Fed. 2d 611 (M.D. Fla. 2005).

<sup>20</sup>Restatement (First) Conflict of Laws, §§ 121, 132 (1934); Restatement (Second) Conflict of Laws, § 283 (1971).

<sup>21</sup>Infra Part I.B.2.

<sup>22</sup>See generally Julia Halloran McLaughlin, *DOMA and the Constitutional Coming Out of Same-Sex Marriages*, 24 Wis. J. L. Gender & Soc'y 145, 185 (Spring 2009) (addressing constitutionalist of DOMA in a variety of constitutional context including FFCC).

DOMA § 2. Congress did not dictate what States should do but only identified what they could do. In doing so, Congress appeared to intend only to codify what it understood to be the State's pre-existing power—the authority to refuse to apply a foreign state's law when it contradicted the state's public policy in limited circumstances.<sup>23</sup> In describing its understanding of the existing legal landscape, the Committee Report states:

The general rule for determining the validity of a marriage is *lex celebrationis*—that is, a marriage is valid if it is valid according to the law of the place where it was celebrated. States observing that rule would, of course, presumptively recognize as valid a same-sex “marriage” license from Hawaii.

There is, however, an important exception to the general rule, well captured by the relevant section of the Restatement of Conflicts:

“A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state *which had the most significant relationship to the spouses and the marriage at the time of the marriage.*”

It is thus possible that a State, confronted with a resident same-sex couple possessing a “marriage” license from Hawaii, could decline to recognize that “marriage” on the grounds that to do so would offend that State's “strong public policy.”<sup>24</sup>

The House Report identified an important temporal limitation on a State's ability to refuse to recognize an otherwise valid marriage. Specifically, the state seeking to invalidate a marriage must be the state with the most significant relationship with the couple at the time of the marriage. This limitation is entirely consistent with the pre-existing understanding of how state courts interpreted and implemented their previous state marriage prohibition statutes.<sup>25</sup>

By articulating such a narrow construction, Congress sought to avoid any potential constitutional violations. The Supreme Court has opined that for a state to apply its own laws, its contacts with the underlying transaction must be more than minimal.<sup>26</sup> In

<sup>23</sup>H.R. Rep. 104-664, 664, 104th Cong., 2nd Sess. 1996, 1996 WL 391835, 1996 U.S.C.C.A.N. 2905 (Leg.Hist.), at 8 (emphasis added).

<sup>24</sup>H.R. Rep. 104-664, 664, 104th Cong., 2nd Sess. 1996, 1996 WL 391835, 1996 U.S.C.C.A.N. 2905 (Leg.Hist.), at 8 (emphasis added).

<sup>25</sup>See, e.g., *Whittington v. McCaskill*, 65 Fla. 162, 61 So. 236 (1913); *State v. Fenn*, 47 Wash. 561, 92 P. 417, 419 (1907).

<sup>26</sup>*Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818, 105 S. Ct. 2965, 86 L. Ed. 2d 628, 2 Fed. R. Serv. 3d 797 (1985) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313, 101 S. Ct. 633, 66 L. Ed. 2d 521 (1981) (plurality opinion))



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the absence of such contacts, the state has no legitimate interest in applying its laws. Even when a forum state's law embodies a strong public policy, the Court has required an interest analysis. As the Court opined, "The State has a legitimate interest in applying a rule of decision to the litigation only if the facts to which the rule will be applied have created effects within the State, toward which the State's public policy is directed. To assess the sufficiency of asserted contacts between the forum and the litigation, the court must determine if the contacts form a reasonable link between the litigation and a state policy."<sup>27</sup>

Congress does not have the authority, nor did it purport to remove this basic due process limitation when it passed DOMA § 2.<sup>28</sup> Bankruptcy courts should approach any same-sex marriage question with this constitutional limitation in mind. A party may be forced to participate in a bankruptcy case filed in a forum far removed from and with little interest in the underlying dispute.<sup>29</sup> Outside the marriage context, bankruptcy courts have been sensitive to the constitutional implications of the choice of law analysis. In *In re McAllister*,<sup>30</sup> a bankruptcy court sitting in Alabama questioned the propriety of applying the Alabama garnishment law to a dispute centered primarily in North Carolina. The court noted the constitutional issues raised by the lack of connection between Alabama and the garnishment request.

In this case, the only apparent contact that Alabama has with the debt owed by the North Carolina garnishee to the debtor/defendant is the fact that the debtor/defendant once lived in this state, and while living here, filed the bankruptcy case which underlies this adversary proceeding. The choice of Alabama law to determine whether or not that debt is subject to process of garnishment may not, therefore, be constitutionally proper.<sup>31</sup>

Most courts have successfully avoided the constitutional

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(There must be "a significant contact, or significant aggregation of contacts, creating state interests, such that [a state's] choice of law is neither arbitrary nor fundamentally unfair.").

<sup>27</sup>*Allstate Ins. Co. v. Hague*, 449 U.S. 302, 334, 101 S. Ct. 633, 66 L. Ed. 2d 521 (1981) (plurality opinion).

<sup>28</sup>H.R. Rep. 104-664, 664, 104th Cong., 2nd Sess. 1996, 1996 WL 391835, 1996 U.S.C.C.A.N. 2905 (Leg.Hist.), at 8.

<sup>29</sup>See Jackie Gardina, *The Bankruptcy of Due Process: Nationwide Service of Process, Personal Jurisdiction and the Bankruptcy Code*, 16 Am. Bankr. Inst. L. Rev. 37, 58 (2008) (discussing the broad reach of bankruptcy court jurisdiction and venue provisions on interested parties).

<sup>30</sup>*In re McAllister*, 216 B.R. 957, 973-974 n.14 (Bankr. N.D. Ala. 1998).

<sup>31</sup>*McAllister*, 216 B.R. at 973-974.

concerns raised in *McAllister* by identifying the state with the most significant interest in the underlying dispute.<sup>32</sup> Even when courts are applying the forum state law based on an expressed public policy, there is an identifiable and significant connection between the forum state, the dispute and the public policy at issue.<sup>33</sup> Accordingly, while DOMA § 2 is written broadly, Congress' authority and intent call for a significantly more restricted interpretation of both § 2 and the state laws passed in its wake.

## B. Overview of State Laws

As noted above, DOMA § 2 only purports to give states the authority to reject marriages validly performed elsewhere in limited circumstances; it does not mandate that states prohibit same-sex unions nor does it (or could it) prohibit States from recognizing such unions. States have taken different approaches to addressing legal unions between same-sex couples, the rights arising out of those unions and how they are dissolved. Each approach brings with it a number of potential complications, especially when it comes to the interstate recognition of the union and concomitant rights. But this is not a new problem. States have always had differing domestic relations law and courts have successfully navigated these conflicting laws and public policies in the past. As the below overview illustrates, states have always interpreted their statutes in the shadow of the Due Process Clause and with sensitivity to our interstate system of governance.

### 1. Relationship Recognition

As of May 2013, twelve states—Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington—as well as the District of Columbia and three Native American tribes—have legalized same-sex marriage, representing 15.7% of the U.S.

<sup>32</sup>See, e.g., *Home Ins. Co. v. Dick*, 281 U.S. 397, 407–08, 50 S. Ct. 338, 74 L. Ed. 926, 1930 A.M.C. 981, 74 A.L.R. 701 (1930) (rejecting application of TX law because the state lacked any connection to the underlying transaction); *In re American Metrocomm Corp.*, 274 B.R. 641, 659, 47 Collier Bankr. Cas. 2d (MB) 979 (Bankr. D. Del. 2002); *In re Fineberg*, 202 B.R. 206, 219 (Bankr. E.D. Pa. 1996); *In re Revco D.S., Inc.*, 118 B.R. 468, 501, 20 Bankr. Ct. Dec. (CRR) 1545, 24 Collier Bankr. Cas. 2d (MB) 91 (Bankr. N.D. Ohio 1990).

<sup>33</sup>See, e.g., *In re Zukerkorn*, 484 B.R. 182, 192–93 (B.A.P. 9th Cir. 2012); *In re Baum*, 386 B.R. 649, 658 (Bankr. N.D. Ohio 2008); *In re Portnoy*, 201 B.R. 685, 699–700 (Bankr. S.D. N.Y. 1996).



population.<sup>34</sup> In addition, there are 18,000 legally married same-sex couples in California.<sup>35</sup> And depending on the Supreme Court's decision in *Perry*, California could re-join these ranks as well.<sup>36</sup>

In addition, another eight states, California, Colorado, Hawaii, Illinois, Nevada, New Jersey, Oregon, and Rhode Island provide the equivalent of state-level spousal rights to same-sex couples.<sup>37</sup> Partners who enter into these relationships are generally entitled to the same legal obligations, responsibilities, protections, and benefits that state law provides to married spouses. In addition, Wisconsin provides domestic partner registries but without all the rights and obligations afforded to spouses under state law.<sup>38</sup>

To further complicate matters, within the foregoing states where either marriage or spousal rights are recognized for same-sex couples, some states will recognize the marriages, civil unions

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<sup>34</sup>Conn. Gen. Stat. §§ 46b-20-46b-38i (2010); Iowa Code § 595.2 (defining marriage as between a man and a woman) overturned by *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); Mass. Gen. Laws. ch. 207 § overruled by *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003); 19-A Me. Rev. Stat. § 650-A (2013); 2 Md. Code § 2-201 (2013); 26 Rev. Code Wa. § 26.04.010 (effective Dec. 6, 2012); N.H. Rev. Stat. Ann. §§ 457:1 to 457:3 (2010); Vt. Stat. Ann. Tit. 15 § 8 (2010); Council B. 18-0482, 18th Council Period (D.C. 2009); New York A-8529-2011 (amending domestic relations law to allow for marriage between persons of the same sex). The Coquille Tribe (Oregon), The Suquamish Tribe (Washington) and the Little Traverse Bands of Odawa Indians (Michigan) have all approved same-sex marriages. See John Flesher, Michigan Native American Tribal Chairman Signs Gay Marriage Bill, Huff. Post, Mar. 15, 2013 available at [http://www.huffingtonpost.com/2013/03/15/michigan-native-american-tribe-gay-marriage-bill\\_n\\_2884373.html](http://www.huffingtonpost.com/2013/03/15/michigan-native-american-tribe-gay-marriage-bill_n_2884373.html).

In early May, both Delaware and Minnesota passed marriage equality laws that will go into effect in summer 2013. See James Nash, Delaware Legislature Passes Bill to Allow Same-Sex Marriage, Bloomberg News, May 7, 2013 available at <http://www.bloomberg.com/news/2013-05-07/delaware-legislature-passes-bill-to-allow-same-sex-marriages.html>; Emma Margolin, Marriage Equality in Minnesota: A Gay Right's Victory in the Midwest, May 13, 2013, available at <http://tv.msnbc.com/2013/05/13/marriage-equality-in-minnesota-a-gay-rights-victory-in-the-midwest/>.

<sup>35</sup>*Strauss v. Horton*, 46 Cal. 4th 364, 93 Cal. Rptr. 3d 591, 207 P.3d 48 (2009), as modified, (June 17, 2009) (upholding the validity of Proposition of 8 but also holding that marriages performed before vote remained valid marriages under state law).

<sup>36</sup>See *Hollingsworth v. Perry*, 133 S. Ct. 786, 184 L. Ed. 2d 526 (2012).

<sup>37</sup>Cal. Fam. Code § 297.5 (West 2006); Co Rev. Stat. § 14-15-101 (Effective May, 1 2013); Hawaii Act 001 (2011); 750 Ill. Comp. Stat. 75/20 (2011); Nev. Rev. Stat. § 122a.200 (2010); N.J. Stat. Ann. § 37:1-31 (West 2010); Or. Rev. Stat. § 106.340 (2010); R.I. Gen. Laws § 15-3.1.

<sup>38</sup>Wis. Stat. §§ 770.1 to 10 (2010).

or domestic partnerships properly performed or registered in another state, but not all states will honor all forms of relationship recognition.<sup>39</sup> States may change the status of a relationship — a couple who is legally married in one state may be deemed domestic partners in a state with that designation. For example, in California, the Marriage Recognition and Family Protection Act<sup>40</sup> currently creates a two-tier recognition of out of state marriages. The Act explicitly recognizes marriages of same-sex couples performed out-of-state prior to November 5, 2008. The bill also explicitly recognizes marriages of same-sex couples performed out-of-state after that date as carrying all the same rights and responsibilities of spouses although without the designation of

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<sup>39</sup>For example, New York, Vermont, and the District of Columbia recognize out of jurisdiction marriages, civil unions or domestic partnerships between persons of the same sex. *Martinez v. County of Monroe*, 50 A.D.3d 189, 850 N.Y.S.2d 740, 42 Employee Benefits Cas. (BNA) 2692, 102 Fair Empl. Prac. Cas. (BNA) 1146 (4th Dep't 2008); *Martinez Decision on Same-Sex Marriages*, Op. Governor Advisor David Nocenti 1 (2008) available at <http://www.abcnyc.org/pdf/memo.pdf>; Recognition of Out-of-State Same Sex Marriages in Vermont, Op. Gen. Council. 1 (2007) available at <http://www.leg.state.vt.us/WorkGroups/FamilyCommission/Appendix%20J.pdf>; Vt. Stat. Ann. Tit. 15 § 8 (2010); D.C. Code § 46-405.01 (2010). Iowa, Maryland, and Massachusetts, will recognize out of jurisdiction marriages but will not recognize other forms of relationship recognition. *Varnum v. Brien*, 763 N.W.2d 862, 906-907 (Iowa 2009); Drew A. Cumings-Peterson, *Out-of-State Civil Unions in Iowa After Varnum v. Brien: Why the State Should Recognize Civil Unions as Marriage*, 96 Iowa L. Rev. 297, 314 (2010) (noting state recognition of out of state relationship recognition still an open question); *Whether Out-of-State Same-Sex Marriage That is Valid in the State of Celebration may be Recognized in Maryland*, 95 Op. Att'y Gen. 4 (2010) available at <http://www.oag.state.md.us/Opinions/2010/95oag3.pdf>; *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941, 968-969 (2003) (holding a failure to recognize same sex marriages violates the Massachusetts constitution). According to the Massachusetts Secretary of State Massachusetts will recognize out of state marriages and civil unions but not domestic partnerships although such partnerships are recognized in certain municipalities. While California, New Jersey, and Oregon will recognize out of jurisdiction marriages, civil unions, or domestic partnerships as valid civil unions or domestic partnerships only. Cal. Family Code §§ 299.2, 308 (West 2010); Recognition in New Jersey of Same-Sex Marriages, Civil Unions, Domestic Partnerships and Other Government-Sanctioned, Same-Sex Relationships Established Pursuant to the Law of Other States and Foreign Nations, 3-2007 Op. Att'y Gen 1 (2007) available at <http://www.nj.gov/oag/newsreleases07/ag-formal-opinion-2.16.07.pdf>; Or. Rev. Stat. §§ 106.310, 106.340 (2010). Domestic partnerships are recognized in Oregon but the constitution states that “[i]t is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage.” Or. Const. art. XV § 5(a).

<sup>40</sup>Cal. Fam. Code § 378 (West 2009).

marriage.<sup>41</sup> Some states do not provide automatic recognition. Instead, a couple with a legally recognized union in one state will need to take affirmative steps to be legally recognized in another state.<sup>42</sup> In addition, states with no relationship recognition or prohibition statutes may recognize marriages performed in other states.<sup>43</sup> Finally, some states explicitly prohibit same-sex marriage but the underlying statutes do not address other forms of relationship recognition, leaving open the possibility that while marriages will not be recognized civil unions or domestic partnerships may.<sup>44</sup>

The various labels assigned to same-sex unions create confusion at the federal level as well.<sup>45</sup> It remains an open question how relationships other than marriage will be treated under federal law or how the pending Supreme Court decision on both DOMA and California's Proposition 8 might influence their validity. Even if the Supreme Court declares DOMA § 3 unconstitutional, it is unclear whether couples who have legally recognized unions other than marriage will be treated as married for purposes of federal law. Few federal courts have spoken directly to the question at issue and the Executive Branch has given mixed signals.<sup>46</sup>

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<sup>41</sup>Cal. Fam. Code § 378 (West 2009).

<sup>42</sup>For example, domestic partnerships are recognized in Oregon but the constitution states that “[i]t is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage.” Or. Const. art. XV § 5(a). A couple will need to register as domestic partners under Oregon law, their marriage, civil union or domestic partnership from another state will not be automatically recognized.

<sup>43</sup>11-01 Op. Att’y Gen. 1 (2011) available at <http://www.democracyfornewmexico.com/files/4-jan-11-rep.-al-park-opinion-11-01.pdf>.

<sup>44</sup>See, e.g., Ariz. Rev. Stat. Ann. § 25-112 (West 2000) (language addresses only marriage); Ga. Code. Ann. § 19-3-3.1 (2004) (same); Idaho Code § 32-209 (Michie 1996) (same); Kan. Stat. Ann. § 23-115 (2003) (same); Mich. Comp. Laws Ann. § 551.272 (West 2004) (same).

<sup>45</sup>See *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 871 (C.D. Cal. 2005), aff’d in part, vacated in part, remanded, 447 F.3d 673 (9th Cir. 2006) (concluding domestic partnership is not marriage for purposes of DOMA); *Bishop v. Oklahoma ex rel. Edmondson*, 447 F. Supp. 2d 1239, 65 Fed. R. Serv. 3d 1206 (N.D. Okla. 2006), rev’d on other grounds in part, 333 Fed. Appx. 361 (10th Cir. 2009) (couple to a civil union not married for purposes of DOMA).

<sup>46</sup>See generally Jackie Gardina, *Bankruptcy and the Unresolved DOMA Questions*, 22 J. Bankr. L. & Prac. 2 Art. 1 (Feb. 2013). Perhaps more significantly, how the Supreme Court treats laws that discriminate based on sexual orientation could have a significant effect on the sustainability of state laws that offer an alternative to marriage as well as those that prohibit it. If the

## 2. Relationship Prohibition

There are currently thirty-seven states with statutes or constitutional amendments (or both) prohibiting marriages between same-sex couples and, in some instances, explicitly refusing to recognize marriages validly performed in other states as well as any rights arising from those marriages.<sup>47</sup> These prohibitions, so-called “mini-DOMAs,” prohibit or void the marriage of same-sex couples in the state or affirmatively identify a marriage between one man and one woman as the only marriage with legal validity within the state. The laws can be broken into three categories. The first category involves states that restrict the state’s ability to recognize same-sex marriages between couples

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Court were to declare § 3 unconstitutional on equal protection grounds regardless of the level of scrutiny, then every state law that purports to exclude same-sex couples from marriage is vulnerable, including those that offer a “separate but equal” status. The Court could also declare § 3 unconstitutional but split on the reasoning with some Justices signing onto an equal protection rationale and others adopting a federalism approach. The latter scenario would arguably strengthen the State’s authority to provide a different legally recognized relationship status for same-sex couples.

<sup>47</sup>See Ala. Const. art. 1, § 36.03, Ala. Code 1975, § 30-1-19 (2004); Alaska Const. Art. 1, § 25 (amended 1999); Alaska Stat. Ann. § 25.05.013 (2004), Ariz. Const. art. XXX, § 1; Ariz. Rev. Stat. Ann. § 25-101 (West 2000); Ark. Const. amend. LXXXI (amended 2004); Ark Code. Ann. § 9-11-109 (Michie 2002); Fla. Const. art. 1, § 27, Fla. Stat. Ann. § 741.212 (West 2004); Ga. Const. art. 1, § 4, ¶ 1(amended 2004); Ga. Code Ann. § 19-3-3.1 (2004); Idaho Const. art. III, § 28; Idaho Code Ann. § 32-209 (Michie 1996); Ind. Code Ann. § 31-11-1-1 (West 1999); Kan. Const. art. XV, § 16 (amended 2005) Kan. Stat. Ann. § 23-101 (2003); Ky.Const. § 233A (amended 2004); Ky.Rev. Stat. Ann. § 402.045 (Michie 1999); La. Const. art. XII, § 15 (amended 2004); La. Civ. Code Ann. art. 3520 (1999); Mich. Const. art.1, § 25 (amended 2004); Mich. Comp. Laws. Ann § 551.272 (West 2006); Miss. Const art. XIV, § 263A (amended 2004); Miss. Code Ann. § 93-1-1 (1999); Mo. Const. art. 1, § 33 (amended 2004); Mo. Ann. Stat. § 451.022 (West 2003); Mont. Const. art. XIII, § 7 (amended 2004); Mont. Code Ann. § 40-1-401 (West 2009); Neb. Const. art. 1, § 29 (amended 2000); Neb. Rev. Stat. § 42-117 (2009); Nev. Const. art. 1, § 21 (amended 2002); N.C. Const. art. XIV, § 6 (amended 2012); N.C. Gen. Stat. Ann. § 51-1.2 (2009); N.D. Const. art. XI, § 28 (amended 2004); N.D. Cent. Code Ann. § 14-03-01 (2009); Ohio Const. art. XV, § 11 (amended 2004); Ohio Rev. Code Ann. § 3101.01 (West 2005); Okla. Const. art. II, § 35 (amended 2005); Okla. Stat. Ann. tit. 43, § 3.1 (West 2009); Or. Const. art. XV, § 5a (amended 2004); 23 Pa. Cons. Stat. Ann. § 1704 (West 2009); S.C. Const. art. XVII, § 15, S.C. Code Ann. § 20-1-15 (West 2009); S.D. Const. art. XXI, § 9; S.D. Code Ann. § 25-1-38 (Michie 1999); Tenn. Const. art. XI, § 18; Tenn. Code Ann. § 36-3-113 (2001); Tex. Const. art. I, § 32, Tex. Fam. Code Ann. §§ 1.101 & 6.204 (2003); Utah Const. art. 1, § 29; Utah Code Ann. §§ 30-1-2, 30-1-4 & 30-1-4.1 (2005); Va. Const. art. I, § 15-A; Va. Code Ann. § 20-45.2 (Michie 2004); Wisc. Const. art. XIII, § 13; Wisc. Stat. Ann. § 765.21; W.Va. Code Ann. §§ 48-2-602, 48-2-603 & 48-7-111 (Michie 2004); Wyo. Stat. Ann. § 20-1-101 (Michie 2003).

validly performed in other states.<sup>48</sup> The second category encompasses the first and explicitly refuses to recognize rights arising from those marriages.<sup>49</sup> A third category includes the first two categories and also refuses to enforce *judgments* that involve a same-sex married couple.<sup>50</sup> The statutory language varies from state to state, however, making generalizations about the statutes difficult. Nonetheless, marriage prohibition statutes are not new and insight can be gleaned from cases interpreting these older statutes.

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<sup>48</sup>See, e.g., La. Const. art. XII, § 15 (“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.”); Fla. Stat. Ann. § 741.212(1) (West 2006) (“Marriages between persons of the same sex entered into in any jurisdiction, whether within, or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign . . . are not recognized for any purpose in this state.”); Ohio Rev. Code Ann. § 3101.01(C)(2) (West 2006) (“Any marriage entered into by persons of the same sex in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state.”).

<sup>49</sup>See, e.g. Alaska Stat. § 25.05.013 (2004); (“A marriage entered into by persons of the same sex, either under common law or under statute, that is recognized by another state or foreign jurisdiction is void in this state, and contractual rights granted by virtue of the marriage, including its termination, are unenforceable in this state.”) Minn. Stat. Ann. § 517.03 (West 2006) (“A marriage entered into by persons of the same sex, either under common law or statute, that is recognized by another state or foreign jurisdiction is void in this state and contractual rights granted by virtue of the marriage or its termination are unenforceable in this state.”); Ky. Rev. Stat. Ann. § 402.045(2) (LexisNexis 2006) (“Any rights granted by virtue of [a same-sex] marriage, or its termination, shall be unenforceable in Kentucky courts.”); Va. Code Ann. § 20-45.2 (West 2005) (“A marriage between persons of the same sex is prohibited. Any marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable.”). Arkansas has a modified version of the language that is a bit clearer, referring to “contractual or other rights” granted by virtue of the marriage license, but it remains obscure what the reference to contract is intended to accomplish. Ark. Code Ann. § 9-11-208(c) (2006) (“Any marriage entered into by persons of the same sex, where a marriage license is issued by another state or by a foreign jurisdiction, shall be void in Arkansas and any contractual or other rights granted by virtue of that license, including its termination, shall be unenforceable in the Arkansas courts.”). But see Ark. Code Ann. § 9-11-208(d) (2006) (“[N]othing in this section shall prevent an employer from extending benefits to persons who are domestic partners of employees.”).

<sup>50</sup>Ga. Const. art. 1, § 4, cl. 1(b); Fla. Stat. Ann. § 741.212(2) (West 2006); Ohio. Rev. Code Ann. § 3101.01(C)(4) (West 2006); Tex. Fam. Code Ann. § 6.204(c)(1) (Vernon 2006); W. Va. Code Ann. § 48-2-603 (LexisNexis 2006).



a. The Full Faith and Credit Act

The first two categories—state laws that purport to void legal marriages and state laws that propose to invalidate rights arising from these marriages—will be troublesome in bankruptcy proceedings. The third category—state laws purporting to reject judgments—should not. Bankruptcy courts will not only be free to uphold valid state court judgments recognizing a same-sex union and any rights or obligations associated with it, they are in fact required to do so.

DOMA § 2 appears to create an exception to the Full Faith and Credit Clause and authorizes states, through statute, to refuse to recognize judgments from sister states regarding same-sex marriages.<sup>51</sup> But the provision applies only to states and does not speak to the authority of federal courts to do the same. Instead, federal courts remain bound by the Full Faith and Credit Act.<sup>52</sup> The Act requires that federal courts give preclusive effect to state court judgments if the state court in which it was rendered would give it preclusive effect.<sup>53</sup> This is true even if the forum state would not entertain the suit.<sup>54</sup> The Supreme Court has been refreshingly clear on the matter.

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; that considerations of policy of the forum which would defeat a suit upon the original cause of action are not involved in a suit upon the judgment and are insufficient to defeat it.<sup>55</sup>

The Court stressed this point again more recently when it emphatically stated “But our decisions support no roving ‘public policy exception’ to the full faith and credit due *judgments*.”<sup>56</sup>

Consistent with Supreme Court pronouncements, bankruptcy courts have enforced judgments from sister state courts even when sitting in a state that would not enforce the underlying

<sup>51</sup>28 U.S.C.A. § 1738C.

<sup>52</sup>28 U.S.C.A. § 1738.

<sup>53</sup>See *Durfee v. Duke*, 375 U.S. 106, 109, 84 S. Ct. 242, 11 L. Ed. 2d 186 (1963).

<sup>54</sup>See *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277, 56 S. Ct. 229, 80 L. Ed. 220 (1935).

<sup>55</sup>*Milwaukee County*, 296 U.S. at 277.

<sup>56</sup>*Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 233, 118 S. Ct. 657, 139 L. Ed. 2d 580 (1998) (emphasis in the original).



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obligation.<sup>57</sup> In *In re Leroux*,<sup>58</sup> a casino filed a claim to obtain payment on a gambling debt. The casino had obtained a default judgment in a New Jersey court before the debtor filed for bankruptcy in Massachusetts.<sup>59</sup> The debtor argued that the claim should be disallowed because such debts were unenforceable in Massachusetts as against public policy.<sup>60</sup> Although the court recognized that Massachusetts public policy precluded enforceability of the debt, the court disagreed that Massachusetts law was applicable. After quoting the Full Faith and Credit Act, it stated, “[u]nder the statute, I must give the New Jersey judgments the same preclusive effect in this Court that New Jersey would provide.”<sup>61</sup> The court ignored Massachusetts law and focused solely on whether the New Jersey elements of *res judicata* were met.

In the context of marriage, a Utah bankruptcy court came to the same conclusion when it considered a judgment that assumed the validity of a marriage.<sup>62</sup> Relying on the *Rooker-Feldman* doctrine as well as collateral and judicial estoppel, the court prevented a debtor from attempting to discharge a state court ordered support payment.<sup>63</sup> The debtor argued that his former partner was not legally his “spouse” under Utah law and therefore any debt he owed her pursuant to a state court divorce decree was dischargeable.<sup>64</sup> Although the couple had never obtained a valid marriage license, in the underlying divorce proceedings the debtor did not challenge the state court’s jurisdiction to issue a divorce decree and in his answer to the divorce complaint he admitted the couple was husband and wife.<sup>65</sup>

With this background, the court first determined that under the *Rooker-Feldman* doctrine it was precluded from revisiting the question of whether the debtor was legally married. “Because

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<sup>57</sup>See *In re Kaid*, 472 B.R. 1, 8, 67 Collier Bankr. Cas. 2d (MB) 1566 (Bankr. E.D. Mich. 2012); *In re Leroux*, 216 B.R. 459, 467–68 (Bankr. D. Mass. 1997). See, also, *In re Smith*, 66 B.R. 58, 59 (Bankr. D. Md. 1986), order aff’d, 77 B.R. 33 (D. Md. 1987) (citing *Fauntleroy v. Lum*, 210 U.S. 230, 28 S. Ct. 641, 52 L. Ed. 1039 (1908)).

<sup>58</sup>*In re Leroux*, 216 B.R. 459 (Bankr. D. Mass. 1997).

<sup>59</sup>*In re Leroux*, 216 B.R. at 466.

<sup>60</sup>*In re Leroux*, 216 B.R. at 466.

<sup>61</sup>*In re Leroux*, 216 B.R. at 467.

<sup>62</sup>*In re Johnson*, 473 B.R. 447, 455 (Bankr. D. Utah 2012).

<sup>63</sup>*In re Johnson*, 473 B.R. at 455–457.

<sup>64</sup>*In re Johnson*, 473 B.R. at 453.

<sup>65</sup>*In re Johnson*, 473 B.R. at 455.

there is a final state court decision in which an essential element of the judgment was implicit that the parties were former spouses, this Court cannot now determine that the parties are not ‘former spouses.’ ”<sup>66</sup> Second, the court concluded that the debtor was collaterally estopped from arguing that his former partner was not his spouse because that issue had been decided in a previous litigation.<sup>67</sup> While the court never explicitly cited to the Full Faith and Credit Act, it performed the relevant preclusion analysis. Finally, the court held that the debtor was judicially estopped from asserting a position contrary to the one he held throughout a previous litigation.<sup>68</sup>

When addressing the recognition of judgments, the bankruptcy courts need not get tangled in the forum state’s policy decisions regarding same-sex marriage and its attendant rights and obligations. Federal courts are bound by the Full Faith and Credit Act *not* the forum state’s law. In those situations where the Act applicability is uncertain, courts may look to the *Rooker-Feldman* doctrine or judicial estoppel principles to hold parties to the positions they maintained in previous proceedings and to prevent them from asserting a different position simply because their interests have changed.

#### b. Validity of Marriage and Attendant Rights

The Full Faith and Credit Act only applies in situations where there has been a previous court judgment. It does not address circumstances where the party is legally married in one state but is seeking recognition of that marriage and the rights that arise from it in a bankruptcy court that is sitting in a state that denies such recognition. The analysis of this second question is complicated by the fact that the current state statutes regarding same-sex unions are vague and ambiguous.<sup>69</sup> Few states have had the opportunity to define the scope of their statutes.

Bankruptcy courts should not assume, however, that a state would interpret its statute to void same-sex unions regardless of the circumstances. It bears emphasizing that a blanket non-

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<sup>66</sup>In re Johnson, 473 B.R. at 455.

<sup>67</sup>In re Johnson, 473 B.R. at 455.

<sup>68</sup>In re Johnson, 473 B.R. at 455.

<sup>69</sup>See Andrew Koppelman, *The Difference the Mini-DOMAs Make*, 16 Loyola U. Chi. L.J. 265 (Winter 2007) (discussing the variations and overly broad language in state laws).

recognition rule is unprecedented.<sup>70</sup> Courts have traditionally construed marriage statutes and the public policy they embody narrowly. Even in the highly charged miscegenation era, when state statutes went so far as to criminalize interracial unions, the courts did not impose an all or nothing approach.<sup>71</sup> Although the same public policy concerns were expressed about interracial marriages that are now voiced about same-sex marriages, southern states were willing to limit the scope of their statutes in particular circumstances. Both within and outside the miscegenation context, courts have shown flexibility in construing and applying relevant marriage prohibition statutes to achieve equitable results that are consistent with due process concerns and relevant conflict of law limitations.<sup>72</sup>

At their core, these state statutes are simply codified choice of law rules expressing the strong public policy of the forum state. When determining the validity of a marriage courts have traditionally applied the “place of celebration rule” which holds that a marriage is valid everywhere if it is valid in the place of celebration.<sup>73</sup> The Restatement (Second) of Conflicts of Law § 283 provides a widely adopted exception to this rule that allows the state with the most significant relationship to the spouses and the marriage at the time of the marriage to invalidate the marriage if it violates a strong public policy of the forum state.<sup>74</sup>

The exception to the rule addresses so-called evasive marriages where parties domiciled in a state that prohibits their union travel to another state to get married and return to their home

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<sup>70</sup>Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. Pa. L. Rev. 2143, 2152 (June 2005) (hereinafter *Handbook for Judges*); Andrew Koppelman, *Same Sex Different States*, p. 70–71 (arguing that a blanket non-recognition rule has four fatal flaws: produces absurd results; is inconsistent with the rights of citizens within a federal system; violates the rights to equal protection; and cannot be justified under even the most conservative public policy).

<sup>71</sup>Koppelman, *Handbook for Judges*, 153 U. Pa. L. Rev. at 2152.

<sup>72</sup>See, e.g. *State v. Fenn*, 47 Wash. 561, 92 P. 417, 418 (1907) (“The power of the state to declare void marriages contracted beyond its borders, at least where such marriages are contracted by its own citizens in violation of its laws, cannot be denied.”); *State v. Kennedy*, 76 N.C. 251, 1877 WL 2697 (1877) (finding marriage between a black man and a white woman domiciled in North Carolina, but contracted in South Carolina, in violation of the laws of North Carolina, was void in North Carolina, though valid in South Carolina).

<sup>73</sup>Restatement (Second) Conflict of Laws § 283 (1971).

<sup>74</sup>Restatement (Second) Conflict of Laws § 283(2).

state seeking recognition of the marriage.<sup>75</sup> Because the forum state was the state with the most significant relationship with the couple at the time they were married, that state could void the marriage.<sup>76</sup> As noted earlier, this same limited exception was articulated in the House Report supporting DOMA § 2.<sup>77</sup> Citing this limitation, courts consistently refused to recognize evasive marriages.

Outside the evasive marriage context, the courts have been more constrained in their approach, recognizing the narrowness of the exception as well as the limitations of their own power. In *State v. Fenn*, the Washington Supreme Court considered whether a woman could be charged with bigamy under the forum state's law. In rejecting the application of Washington law, the court opined:

If the statute should be construed to avoid marriages contracted in other states by citizens of other states who never owed allegiance to our laws, it is the most drastic piece of legislation to be found on the statute books of any of our states. As we have shown, the general rule is that the validity of a marriage is determined by reference to the law of the place where contracted. An exception to the general rule is sometimes made in favor of the law of the domicile of the parties. But a statute declaring marriages void, regardless of where contracted and regardless of the domicile of the parties, would be an anomaly and so far reaching in its consequences that a court would feel constrained to limit its operation, if any other construction were permissible.<sup>78</sup>

Even the Supreme Court weighed in on the reach of a state's law that sought to prohibit marriages of non-domiciliaries. In

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<sup>75</sup>Restatement (Second) Conflict of Laws § 283, comment c (So the state where the spouses were domiciled before the marriage and where they make their home immediately thereafter has an obvious interest in the application of a rule forbidding the marriage of persons within certain degrees of relationship). Many state statutes explicitly codify this exception, declaring void any marriage where the parties traveled to another state to avoid the marriage prohibition in the forum state.

<sup>76</sup>*State v. Fenn*, 47 Wash. 561, 92 P. 417, 418 (1907) (“The power of the state to declare void marriages contracted beyond its borders, at least where such marriages are contracted by its own citizens in violation of its laws, cannot be denied.”); *State v. Kennedy*, 76 N.C. 251, 1877 WL 2697 (1877) (finding marriage between a black man and a white woman domiciled in North Carolina, but contracted in South Carolina, in violation of the laws of North Carolina, was void in North Carolina, though valid in South Carolina).

<sup>77</sup>H.R. Rep. 104-664, 664, 104th Cong., 2nd Sess. 1996, 1996 WL 391835, 1996 U.S.C.C.A.N. 2905 (Leg.Hist.), at 8.

<sup>78</sup>*State v. Fenn*, 47 Wash. 561, 92 P. 417, 419 (1907).

*Loughran v. Loughran*,<sup>79</sup> the Court addressed the question whether the District of Columbia's prohibition of the remarriage of a divorced person could invalidate a valid second marriage under Florida law and deny a woman dower in the District. Examining the language of the District's statute, the Court concluded "Section 966 is not extraterritorial in its operation. It does not purport to prohibit remarriage outside the District; and no other statute denies dower to a widow because by remarrying elsewhere she had disregarded the prohibition contained in section 966 . . . Nor does it in terms declare the remarriage void."<sup>80</sup> Based on this narrow reading of the statute, the Court determined the marriage was valid, even though prohibited by statute in the District. Thus, the plaintiff was entitled, as an incident of that marriage, to dower in the property within the District.<sup>81</sup>

Even those statutes that explicitly void marriages performed in other states may not void them in all situations. Miscegenation cases are the most helpful precedent for assessing how states with laws that purport to "void" marriages may treat same-sex unions properly performed in other states. Southern state courts were willing to apply a foreign state's law to validate an interracial marriage that contravened the forum state's law when the couple had married elsewhere and then migrated to the forum state. For example, in *Whittington v. McCaskill*<sup>82</sup> the Florida Supreme Court recognized the validity of a marriage between a white man and a black woman even though Florida had both a state statute and constitutional amendment declaring such marriages "null and void."<sup>83</sup> The court noted that the parties had not resided in Florida at the time of the marriage nor had they left Florida with the intent of evading the marriage prohibition statute.<sup>84</sup> In *State v. Ross*,<sup>85</sup> the Supreme Court of North Carolina recognized a marriage between a black man and a white woman despite a North Carolina law declaring such marriages void as against public policy.<sup>86</sup> The court articulated the dominant view regarding the application of the "public policy exception" to the place of celebration rule:

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<sup>79</sup>*Loughran v. Loughran*, 292 U.S. 216, 54 S. Ct. 684, 78 L. Ed. 1219 (1934).

<sup>80</sup>*Loughran*, 292 U.S. at 266.

<sup>81</sup>*Loughran*, 292 U.S. at 225.

<sup>82</sup>*Whittington v. McCaskill*, 65 Fla. 162, 61 So. 236 (1913).

<sup>83</sup>*Whittington*, 61 So. at 236.

<sup>84</sup>*Whittington*, 61 So. at 236.

<sup>85</sup>*State v. Ross*, 76 N.C. 242, 1877 WL 2696 (1877)

<sup>86</sup>*Ross*, 76 N.C. at 245.

If we are right in our conception of the question presented, to-wit; whether a marriage in South Carolina between a black man and a white woman *bona fide* domiciled there and valid by the law of that State, must be regarded as valid in this State when the parties afterwards migrate here? We think that the decided weight of English and American authority requires us to hold that the relation thus lawful in its inception continues to be lawful here.<sup>87</sup>

State courts were also likely to recognize a prohibited marriage when the parties never lived in the forum but where the marriage was relevant to litigation in the forum. In *Miller v. Lucks*,<sup>88</sup> the Mississippi Supreme Court decided whether to recognize the inheritance right of a widower whose wife owned property within the state but whose interracial marriage was “unlawful and void” under the Mississippi constitution and statute.<sup>89</sup> The couple, Pearl and Alex Miller, were married and domiciled in Illinois when Pearl died. At the time of her death, Pearl owned property in Mississippi and Alex asserted a right to the property.<sup>90</sup> The court acknowledged that Mississippi’s laws did not have extra-territorial effect nor would recognition of the marriage implicate the stated purpose behind the statute—to prevent cohabitation of black and white couples. Accordingly the court held “[w]hat we are requested to do is simply to recognize this marriage to the extent only of permitting one of the parties thereto to inherit from the other property in Mississippi, and to that extent it must and will be recognized.”<sup>91</sup>

Similarly, courts recognized that a forum’s states laws could not inhibit a couple’s right to temporarily visit the state. In *Ex parte Kinney*,<sup>92</sup> an otherwise harsh opinion, a Virginia court acknowledged the state could not exclude interracial couples domiciled elsewhere nor enforce its prohibition laws on non-domiciliaries. “That such a citizen would have the right of transit with his wife through Virginia, and of temporary stoppage, and of carrying on any business here not requiring residence, may be

<sup>87</sup>Ross, 76 N.C. at 245; see also *Garcia v. Garcia*, 25 S.D. 645, 127 N.W. 586 (1910) (validating a marriage between first cousins although it would have been void if contracted within the state of South Dakota).

<sup>88</sup>*Miller v. Lucks*, 203 Miss. 824, 36 So. 2d 140, 3 A.L.R.2d 236 (1948).

<sup>89</sup>Miller, 36 So. 2d at 141.

<sup>90</sup>Miller, 36 So. 2d at 141.

<sup>91</sup>Miller, 36 So. 2d at 142.

<sup>92</sup>*Ex parte Kinney*, 14 F. Cas. 602, No. 7825 (C.C.E.D. Va. 1879).



conceded because there are privileges following a citizen of the United States . . . ”<sup>93</sup>

Although there are not many examples, this same constrained approach to statutory interpretation can also be seen in the same-sex union context. First, as noted earlier, Congress seemed to only consider the prospect of evasive marriages when it promulgated § 2 of DOMA.<sup>94</sup> Section 2 was intended to confirm that states were not required to recognize evasive marriages; a power that the Committee acknowledged existed at common law before Congress passed DOMA.<sup>95</sup> It did not purport to address the recognition issues raised by litigation affecting non-domiciliary couples, couples who change their domicile, or couples temporarily visiting the state. Moreover, Congress was careful to recognize the limits of its authority, acknowledging that there may be constitutional constraints on a blanket non-recognition rule.

Second, the few state courts that have interpreted their domestic relations law outside the evasive marriage context have done so narrowly. Before Maryland authorized marriages between same-sex couples, the Maryland Court of Appeals held that valid out of state same-sex marriages were cognizable in the state for purposes of the state’s divorce law.<sup>96</sup> Although Maryland law at the time provided that “only a marriage between a man and a woman is valid in this State,” the court held that it did not preclude the recognition of marriages validly performed in another jurisdiction.<sup>97</sup> The court reasoned that if the Legislature had intended to prevent recognition of foreign same-sex marriages it would have done so expressly and clearly as other states had done in their domestic relations law.<sup>98</sup>

Likewise, the Supreme Court of Wyoming granted a divorce between two women validly married in Canada even though the

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<sup>93</sup>Ex Parte Kinney, 14 F. Cas. at 602.

<sup>94</sup>H.R. Rep. 104-664, 664, 104th Cong., 2nd Sess. 1996, 1996 WL 391835, 1996 U.S.C.C.A.N. 2905 (Leg.Hist.), pages 6–10.

<sup>95</sup>House Report at 9 (“It is thus possible that a State, confronted with a resident same-sex couple possessing a ‘marriage’ license from Hawaii, could decline to recognize that ‘marriage’ on the grounds that to do so would offend that State’s ‘strong public policy.’ ”).

<sup>96</sup>See *Port v. Cowan*, 426 Md. 435, 447, 44 A.3d 970 (2012).

<sup>97</sup>*Port*, 426 Md. at 448.

<sup>98</sup>*Port*, 426 Md. at 448–449.

two women could not have been married in Wyoming.<sup>99</sup> The court reasoned that granting a divorce would not “lessen the law or policy in Wyoming against allowing the creation of same-sex marriages. A divorce proceeding does not involve recognition of a marriage as an ongoing relationship.”<sup>100</sup> The Texas Court of Appeals affirmed the jurisdiction of the family court to grant a divorce between a same-sex couple despite a state law that prohibited any state agency from giving “effect to right or claim to any legal protection, benefit, or responsibility asserted as result of same-sex marriage.”<sup>101</sup> The court recognized that the law could be interpreted narrowly:

One could argue, for example, that section 6.204 did not prohibit the trial court’s actions because divorce is a “benefit” of state residency, rather than a “legal protection, benefit, or responsibility” resulting from marriage. One could also argue that under the plain language of section 6.204 the trial court is only prohibited from taking actions that create, recognize, or give effect to same-sex marriages on a “going-forward” basis, so that the granting of a divorce would be permissible.<sup>102</sup>

As the preceding discussion illustrates, bankruptcy courts sitting in a forum with marriage prohibition laws should not assume that the forum state would impose a blanket non-recognition rule. State courts have traditionally adopted a narrow interpretation of such laws, evidencing both implicit and explicit awareness of constitutional limitations and issues of comity. Before a bankruptcy court assumes a conflict of law problem exists, it should carefully examine the statute to determine if it can harmonize the recognition of the marriage and attendant rights with the underlying statute and policies.

## II. Choice of Law in Bankruptcy

### A. The Case for a Federal Choice of Law Rule

To the extent a bankruptcy court cannot avoid a conflict of two states’ domestic relations law—one that recognizes the marriage as valid and one that treats the marriage as void—the court will need to determine which state’s law to apply. The question is whether a bankruptcy court sitting in a state that prohibits rec-

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<sup>99</sup>*Christiansen v. Christiansen*, 2011 WY 90, 253 P.3d 153, 76 A.L.R.6th 703 (Wyo. 2011).

<sup>100</sup>*Christiansen*, 253 P.3d at 156.

<sup>101</sup>*State v. Naylor*, 330 S.W.3d 434, 441 (Tex. App. Austin 2011), petition for review filed, (Mar. 21, 2011).

<sup>102</sup>*Naylor*, 330 S.W.3d at 441.

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ognition of same-sex marriage is required to apply the forum state's domestic relations statute to void the marriage and the rights and obligations inherent in the relationship. The short answer is no.

As noted earlier, the question whether a marriage is valid is a choice of law question. When a state court ignores the traditional "place of celebration rule" and applies a contrary state law to void the marriage, the court is relying on an exception to the rule that authorizes the forum state to refuse to apply foreign law that violates an expressed public policy. But a state's public policy exception should only come into play in limited circumstances—when the state has a significant relationship with the parties or the underlying transaction.<sup>103</sup> In the absence of that relationship, the forum state lacks a legitimate basis for applying its law and doing so implicates due process.<sup>104</sup>

To avoid an inappropriately broad application of state's public policy exception in bankruptcy, bankruptcy courts can and should adopt a federal choice of law rule that promotes the underlying policies of the Bankruptcy Code and stays true to the Court's rationale in *United States v. Butner*.<sup>105</sup> The Court in *Butner* did not command blind adherence to or application of the forum state's law but rather mandated application of state law generally to protect the justified expectations of the parties and to ensure that the parties' rights and obligations were not unnecessarily altered by a bankruptcy filing.<sup>106</sup> *Butner* never purported to address which state law should be applied only that state law should be applied.

A federal choice of law rule will allow a bankruptcy court to balance the broad range of policies at stake in any bankruptcy filing—from Congress' expressed and implied intent in the Code, to the Supreme Court's rationale in *Butner*, to the various state

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<sup>103</sup>*Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818, 105 S. Ct. 2965, 86 L. Ed. 2d 628, 2 Fed. R. Serv. 3d 797 (1985) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313, 101 S. Ct. 633, 66 L. Ed. 2d 521 (1981) (plurality opinion)) (There must be "a significant contact, or significant aggregation of contacts, creating state interests, such that [a state's] choice of law is neither arbitrary nor fundamentally unfair.").

<sup>104</sup>See, e.g., *Home Ins. Co. v. Dick*, 281 U.S. 397, 407–08, 50 S. Ct. 338, 74 L. Ed. 926, 1930 A.M.C. 981, 74 A.L.R. 701 (1930); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 334, 101 S. Ct. 633, 66 L. Ed. 2d 521 (1981) (plurality opinion).

<sup>105</sup>*Butner v. U.S.*, 440 U.S. 48, 55, 99 S. Ct. 914, 59 L. Ed. 2d 136, 19 C.B.C. 481, Bankr. L. Rep. (CCH) P 67046 (1979).

<sup>106</sup>*Butner*, 440 U.S. at 55. See also, Jackie Gardina, *The Perfect Storm: Bankruptcy, Choice of Law, and Same-Sex Marriage*, 86 B.U. L. Rev. 881, 929 (2005).

policies at issue, to the equities of the case. Unlike application of the forum state's choice of law rule, which would invariably require application of the forum state law in cases involving an expressed public policy prohibiting the recognition of marriage and its rights and obligations, a federal choice of law rule provides the court with the authority to look beyond the forum state's public policy.

Bankruptcy courts have the authority to create a federal choice of law rule. In areas where Congress can prescribe laws, the federal courts have a concomitant, albeit more limited, power to create federal common law.<sup>107</sup> There is a little question that Congress could mandate a particular choice of law rule in bankruptcy. Indeed it did just that in section 523(b)(3)(A) when it required bankruptcy courts to apply different state exemption laws in different circumstances.<sup>108</sup> While courts have questioned whether certain exemption laws have extra-territorial application, no court or commentator has questioned Congress' authority to insert a choice of law rule in the Code.<sup>109</sup> Nor has any court or commentator seriously questioned the authority of bankruptcy courts to supplant the forum state's choice of law rule with a federal rule when warranted.<sup>110</sup>

While the Supreme Court has yet to directly address the question regarding the appropriate choice of law rule in bankruptcy, it has implicitly endorsed a federal rule.<sup>111</sup> In the oft-cited case,

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<sup>107</sup>See William Baude, *Beyond DOMA: Choice of Law in the Federal Statutes*, 64 *Stan. L. Rev.* 1371, 1396 (June 2012); Jackie Gardina, *The Perfect Storm: Bankruptcy, Choice of Law, and Same-Sex Marriage*, 86 *B.U. L. Rev.* 881, 924–25 (2005).

<sup>108</sup>11 U.S.C.A. § 523(b)(3)(A) (2006).

<sup>109</sup>See *In re Jevne*, 387 B.R. 301, 303, 59 *Collier Bankr. Cas.* 2d (MB) 838 (Bankr. S.D. Fla. 2008) (and cases cited therein).

<sup>110</sup>Even the Second Circuit jurisprudence, which directs bankruptcy courts to apply the forum state's choice of law rule, does not hold that the bankruptcy courts lack the authority to adopt a federal choice of law rule rather than bankruptcy courts should only do so if there is a strong federal policy at stake. See *In re Gaston & Snow*, 243 F.3d 599, 607, 37 *Bankr. Ct. Dec.* (CRR) 181 (2d Cir. 2001). The Second Circuit's subsequent decision in *In re Coudert Bros. LLP*, 673 F.3d 180, 186, 56 *Bankr. Ct. Dec.* (CRR) 23 (2d Cir. 2012) does not undermine this position.

<sup>111</sup>*Atherton v. F.D.I.C.*, 519 U.S. 213, 117 S. Ct. 666, 136 L. Ed. 2d 656 (1997); *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 67 S. Ct. 237, 91 L. Ed. 162 (1946).

SAME-SEX MARRIAGES IN BANKRUPTCY: A PATH OUT OF THE PUBLIC POLICY QUAGMIRE

*Vanston Bondholder Protective Comm. v. Green*,<sup>112</sup> the appellate court raised the question whether the bankruptcy court was to apply New York law based on a federal choice of law rule or the choice of law rules of Kentucky, the forum state.<sup>113</sup> The Court never answered the question because it concluded the underlying substantive issue was a question of federal law, but it did insert some helpful dicta:

But obligations, such as the one here for interest, often have significant contacts in many states so that the question of which particular state's law should measure the obligation seldom lends itself to simple solution. In determining which contact is the most significant in a particular transaction, courts can seldom find a complete solution in the mechanical formulae of the conflicts of law. Determination requires the exercise of an informed judgment in the balancing of all the interests of the states with the most significant contacts in order best to accommodate the equities among the parties to the policies of those states.<sup>114</sup>

The circuit courts remain split on whether to apply the state choice of law rule or a distinct federal rule in bankruptcy.<sup>115</sup> Courts that have applied the forum state's choice of law rule have cited the Supreme Court's decision in *Klaxon Co. v. Stentor Elec. Mfg. Co.*<sup>116</sup> where the Court held that a federal court sitting in diversity must apply the forum state's choice of law rules.<sup>117</sup> Other courts have expressed an abundance of caution about creating federal common law in the absence of a compelling federal interest.<sup>118</sup> Still other courts have adopted a federal choice of law

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<sup>112</sup>*Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 67 S. Ct. 237, 91 L. Ed. 162 (1946).

<sup>113</sup>*Vanston*, 329 U.S. at 160.

<sup>114</sup>*Vanston*, 329 U.S. at 161–162.

<sup>115</sup>Compare *In re Coudert Bros. LLP*, 673 F.3d 180, 187–88, 56 Bankr. Ct. Dec. (CRR) 23 (2d Cir. 2012) (state choice of law rules applicable) with *In re Lindsay*, 59 F.3d 942, 948, 27 Bankr. Ct. Dec. (CRR) 646, 33 Collier Bankr. Cas. 2d (MB) 1574, Bankr. L. Rep. (CCH) P 76579 (9th Cir. 1995) (federal choice of law rules applicable).

<sup>116</sup>*Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477, 49 U.S.P.Q. 515 (1941).

<sup>117</sup>See *In re Merritt Dredging Co., Inc.*, 839 F.2d 203, 205, 1988 A.M.C. 2339, 5 U.C.C. Rep. Serv. 2d 900 (4th Cir. 1988).

<sup>118</sup>See *In re Gaston & Snow*, 243 F.3d 599, 607, 37 Bankr. Ct. Dec. (CRR) 181 (2d Cir. 2001).

rule in bankruptcy, citing *Vanston* for support and emphasizing the federal nature of bankruptcy.<sup>119</sup>

Upon close examination, reliance on *Klaxon* is misplaced. First, bankruptcy court jurisdiction is not based on diversity. Even when the courts are applying state law, they are doing so in the shadow of federal law and policies. Second, the policies animating the Court's decision in *Klaxon* are not necessarily relevant in bankruptcy. In *Klaxon* the Court sought to prevent the "accident of diversity" from disturbing the "equal administration of justice in coordinate state and federal courts sitting side by side."<sup>120</sup> The bankruptcy courts, however, are not "coordinate" state courts. Indeed, bankruptcy upends state law in many respects, preventing creditors from pursuing state law remedies and altering certain state law rights. Finally, the threat of forum shopping is non-existent—at least as it was meant in *Klaxon*. Unlike parties to a diversity suit, debtors cannot choose between state or federal court. A debtor is required to file in federal court<sup>121</sup> and, in the vast majority of consumer cases proper venue is likely to be limited to the state in which the person was domiciled for at least 180 days preceding the petition.<sup>122</sup> To the extent forum shopping is a reality in consumer cases, a bankruptcy court's decision to use the forum state choice of law rule rather than a distinct federal rule would, ironically, trigger the concerns animating *Klaxon*. A spouse or former spouse intent on shedding the rights and obligations associated with marriage need only move to a state that refuses to recognize that marriage to avoid them.

And whatever benefits there may be to a cautious approach to developing a federal choice of law rule, they are absent here. In the same sex marriage context, a federal choice of law rule is both appropriate and indeed the best way to protect the unique federal policies underlying bankruptcy and to promote *Butner*'s rationale. If courts were to blindly apply a forum state's law regarding same-sex relationships it would, in some instances, undermine the justified expectations of the parties and allow debtors or creditors to avoid rights and obligations that in the absence of bankruptcy could not be avoided. An outcome directly counter to what the Court sought to achieve through *Butner*.

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<sup>119</sup>*In re Lindsay*, 59 F.3d 942, 948, 27 Bankr. Ct. Dec. (CRR) 646, 33 Collier Bankr. Cas. 2d (MB) 1574, Bankr. L. Rep. (CCH) P 76579 (9th Cir. 1995).

<sup>120</sup>*Klaxon*, 313 U.S. at 469.

<sup>121</sup>28 U.S.C.A. § 1334(a).

<sup>122</sup>28 U.S.C.A. § 1408(a). To be sure, in the Chapter 11 context forum shopping between circuits remains a distinct possibility.



SAME-SEX MARRIAGES IN BANKRUPTCY: A PATH OUT OF THE PUBLIC POLICY QUAGMIRE

A federal rule avoids the potentially unconstitutional, inequitable and bizarre results that could emerge if a bankruptcy court were to apply the forum state law. Imagine a scenario where a same-sex spouse files a loss of consortium claim for an accident that occurred in Vermont, a state that recognizes the marriage and the claim.<sup>123</sup> The potentially liable party, however, files for bankruptcy in Florida, a state that prohibits recognition of the relationship and any right or claim arising from that relationship.<sup>124</sup> If the bankruptcy court were to apply Florida law to determine the enforceability of the claim,<sup>125</sup> it would bump against the limits of due process. Florida has no legitimate interest in applying its law to the underlying litigation.

Such an approach is not without precedent. A number of courts have allowed claims for gambling debts incurred in other states even though the forum state refuses to recognize such debts.<sup>126</sup> In *In re Jafari*, the bankruptcy court disallowed a Nevada casino's claims against the debtor because they were unenforceable under Wisconsin law.<sup>127</sup> The district court reversed. Despite Wisconsin's strong public policy regarding gambling debts, the court concluded that Nevada, not Wisconsin, law applied.

The undisputed facts show that Jafari was in Las Vegas when he requested and received the credit-line increases that gave rise to the casinos' claims against him. Thus, the contracts were negotiated and executed in the state of Nevada. Moreover, the casinos do business in Nevada, which was precisely the reason that Jafari traveled there on numerous occasions. Nevada has an interest in insuring that entities that do business and enter into contracts within its borders are able to rely on the bargains they strike. In contrast, Wisconsin's only contact with the contracts was that Jafari happened to live in Wisconsin at the time he entered into the agreements.<sup>128</sup>

As the brief excerpt suggests, the court was sensitive to both the justified expectations of the parties to the transaction at the time it was made and the potential constitutional implications of applying Wisconsin law to a controversy in which Wisconsin had a limited connection.

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<sup>123</sup>Vt. Stat. Ann. Tit. 15 § 8 (2010).

<sup>124</sup>Fla. Ann. § 741.212 (West 2006).

<sup>125</sup>11 U.S.C.A. § 502(b)(2).

<sup>126</sup>See *In re Bill Hionas*, 361 B.R. 269, 275 (Bankr. S.D. Fla. 2006) (and cases cited therein); *In re Simpson*, 319 B.R. 256 (Bankr. M.D. Fla. 2003).

<sup>127</sup>*In re Jafari*, 385 B.R. 262, 267–68 (W.D. Wis. 2008).

<sup>128</sup>*In re Jafari*, 385 B.R. at 267–68.

Courts have primarily relied on the Restatement (Second) of Conflicts of Law as the federal common law choice of law rule.<sup>129</sup> The relevant Restatement provision regarding marriage provides that “the validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage.”<sup>130</sup> The rationale behind this rule echoes the concerns expressed by the Supreme Court in *Butner*.<sup>131</sup> The comments place primary importance on “protecting the justified expectations of the parties” which “gives importance in turn to the values of certainty, predictability and uniformity of result.”<sup>132</sup> The analysis requires courts to look beyond the forum state law and ask whether the forum state has an interest in the underlying issue sufficient to warrant application of its own law—or more specifically its public policy regarding same-sex relationships.<sup>133</sup> If the connection is attenuated or another state has a greater interest in the underlying dispute or transaction, then the court should not apply the forum state law.

## B. Illustrations

The following examples involving an “incident” of marriage illustrate how courts might navigate a potential conflict of law situation using the “significant relationship” test. The conflict will arise most frequently when a party’s marital status defines the rights and obligations that she owes or that are owed to her. The analysis is unaffected by whether the bankruptcy court is sitting in a state that recognizes the union or a state that voids the union. The analysis is untethered to any particular state’s public

<sup>129</sup>See, e.g., *In re Vortex Fishing Systems, Inc.*, 262 F.3d 985, 994, 38 Bankr. Ct. Dec. (CRR) 96, 46 Collier Bankr. Cas. 2d (MB) 1415, Bankr. L. Rep. (CCH) P 78496 (9th Cir. 2001), opinion amended and superseded, 277 F.3d 1057 (9th Cir. 2002) (“Federal choice of law rules follow the approach of the Restatement (Second) of Conflict of Laws.”); *In re Symons Frozen Foods Inc.*, 432 B.R. 290, 297 (Bankr. W.D. Wash. 2010).

<sup>130</sup>Restatement (Second) Conflict of Laws § 283.

<sup>131</sup>Restatement (Second) Conflict of Laws § 283, comment b.

<sup>132</sup>Restatement (Second) Conflict of Laws § 283, comment b; see also *In re Farraj*, 23 Misc. 3d 1109(A), 886 N.Y.S.2d 67 (Sur. Ct. 2009), order aff’d, 72 A.D.3d 1082, 900 N.Y.S.2d 340 (2d Dep’t 2010) (protecting the justified expectations of the parties that their marriage was valid and that intestate inheritance rights applied).

<sup>133</sup>See *In re Jafari*, 569 F.3d 644, 650 (7th Cir. 2009) (finding Wisconsin lacked sufficient relationship with dispute and affirming the application of Nevada law despite Wisconsin’s strong public policy); *In re Miller*, 292 B.R. 409, 413, 41 Bankr. Ct. Dec. (CRR) 57 (B.A.P. 9th Cir. 2003).

policy allowing the courts to be guided by broader policies and concerns.

1. Tenants by the Entirety

Section 522(b)(3)(B) states that a debtor can claim as exempt any property that the debtor had an interest in as “tenants by the entirety”—an interest that assumes the existence of a valid marriage—if it is exempt from process “under applicable law.”<sup>134</sup> The Code does not specify “the applicable law” and bankruptcy courts have been faced with scenarios where a debtor is domiciled in a state that does not recognize the entirety interest, yet the property is located in a state that does. Courts have consistently held that the “applicable law” in such a scenario is the law of the state where the property is located, not the debtor’s domicile.<sup>135</sup> This is in line with the Restatement (Second) approach as well. Under section 244, courts are directed to the local law of the state where the property is located.<sup>136</sup>

There is no reason why the outcome should differ because the exemption arises as a result of a same-sex marriage and the debtor has filed for bankruptcy in a state that prohibits the marriage and attendant rights. For example, assume a same-sex couple legally married in Vermont that owns a Vermont home as tenants by the entirety, but is forced to relocate to Florida for employment purposes. One spouse files for bankruptcy in Florida and lists the Vermont property as exempt. A creditor objects to the exemption, correctly arguing that Florida prohibits recognition of the marriage and any rights arising from it.

Although Florida has expressly prohibited its courts from recognizing any right arising from the legal recognition of a same-sex union,<sup>137</sup> application of Florida in this scenario would be inappropriate. Florida has neither a connection to nor an interest in the property. Perhaps more importantly, its expressed public policy is not impeded by the recognition of the debtor’s exemption. The debtor and the nondebtor spouse have a justified expectation that the property is exempt and the creditor would not have been able to access the property outside of bankruptcy to satisfy the debtor’s individual debts.

<sup>134</sup>11 U.S.C.A. § 522(b)(3)(B).

<sup>135</sup>See, e.g., *In re McNeilly*, 249 B.R. 576, 581 (B.A.P. 1st Cir. 2000); *In re Garrett*, 435 B.R. 434, 455 (Bankr. S.D. Tex. 2010); *In re Hayden*, 41 B.R. 21, 23, 12 Bankr. Ct. Dec. (CRR) 272 (Bankr. E.D. Ky. 1983).

<sup>136</sup>Restatement (Second) Conflicts of Law § 244 (1971).

<sup>137</sup>Fla. Stat. Ann. § 741.212(1) (West 2006).

The analysis would be the same if the couple owned a home in Florida but filed for bankruptcy in Vermont. If the debtor claimed an exemption to the property, the Restatement (Second) would point to Florida law. Although Florida has a tenancy by the entirety statute,<sup>138</sup> Florida law does not recognize the couple as married and as a result the exemption would not apply. While the Vermont bankruptcy court is free to recognize the marriage and rights and obligations associated with it in other circumstances within the bankruptcy case, Florida law is applicable to the exemption issue. In the absence of the bankruptcy filing, creditors could access the property to satisfy the debts of either spouse and the couple had no expectation that the Florida exemption law would apply to them.

What is significant to note is that the choice of law analysis did not rest on Florida's public policy prohibiting recognition of same-sex marriages. The analysis rightly focused on which state had the most significant relationship with the underlying issue—in this case the exemption of property. To allow a state's public policy to trump all other considerations is simply unsupported and contrary to how courts have approached conflict of law issues in the past.<sup>139</sup> It also ignores the constitutional limits to any choice of law analysis.

## 2. Claim Allowance

Section 502(b) directs bankruptcy courts to disallow any claim if it is “unenforceable against the debtor” under applicable law.<sup>140</sup> As noted earlier, if a creditor's claim has already been reduced to judgment the bankruptcy court is bound by the Full Faith and Credit Act.<sup>141</sup> In all other instances, the court must determine the “applicable law.”<sup>142</sup> Like the exemption example, the bankruptcy court should use the Restatement (Second) as guidance and apply

<sup>138</sup>See *In re Daniels*, 309 B.R. 54, 56 (Bankr. M.D. Fla. 2004).

<sup>139</sup>See, e.g., *In re Bill Hionas*, 361 B.R. 269, 275 (Bankr. S.D. Fla. 2006) (and cases cited therein); *In re Simpson*, 319 B.R. 256 (Bankr. M.D. Fla. 2003). Accord, *Home Ins. Co. v. Dick*, 281 U.S. 397, 407–08, 50 S. Ct. 338, 74 L. Ed. 926, 1930 A.M.C. 981, 74 A.L.R. 701 (1930); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 334, 101 S. Ct. 633, 66 L. Ed. 2d 521 (1981) (plurality opinion).

<sup>140</sup>11 U.S.C.A. § 502(b)(1).

<sup>141</sup>See *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277, 56 S. Ct. 229, 80 L. Ed. 220 (1935).

<sup>142</sup>See *In re Holliday*, 2011 WL 2518845, \*2 (Bankr. D. Idaho 2011) (applying federal choice of law rules to determine “applicable law” under 502(b)(1)); *In re Guevara*, 409 B.R. 442, 449, 62 Collier Bankr. Cas. 2d (MB) 1027 (Bankr. S.D. Tex. 2009).

the law with the most significant relationship to the underlying dispute.

If the forum state has only a tangential connection to the underlying claim then it has no legitimate basis for applying its law. For example, assume a same-sex spouse were to file a loss of consortium claim in a bankruptcy case filed in Florida based on an accident that occurred in Massachusetts where the couple is domiciled. A loss of consortium claim, like tenants by the entirety, assumes a spousal relationship. The debtor could object and point to Florida's expressed prohibition against recognizing any rights or claims arising from a same-sex relationship.

The Restatement (Second) instructs courts to look to the local law of the state with the most significant relationship to the tort, paying close attention to the place where the injury occurred, the place where the conduct giving rise to the injury occurred and the domicile of the parties.<sup>143</sup> Under this analysis, Massachusetts law would be the "applicable law." Not only is Massachusetts the state where the tort occurred, but it is also the state in which the "marriage is domiciled" and thus has the greatest interest in the marital relationship.<sup>144</sup> In this scenario, the fact that the debtor filed the petition in a Florida bankruptcy court should have little influence in the analysis. If it did, the forum shopping concerns raised in *Klaxon* would be implicated and courts would be allowing the forum state tail to wag the federal bankruptcy dog.

The outcome could be quite different, however, if the spouse filed a loss of consortium claim in a bankruptcy case filed in Massachusetts based on an accident that occurred in Florida where the couple was domiciled. In this scenario, it would appear Florida has the most significant relationship with the underlying tort and subsequent injury to the spousal relationship. While Florida recognizes loss of consortium for injury to a spousal relationship, it does not recognize the same-sex couple as spouses. Mas-

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<sup>143</sup>See Restatement (Second) Conflicts of Law § 145.

<sup>144</sup>See *Avis Rent-A-Car Systems, Inc. v. Abrahantes*, 559 So. 2d 1262 (Fla. 3d DCA 1990) (holding that the trial court erred by denying the loss of consortium claims of wives whose husbands were injured on the Cayman Islands, based on a finding that Cayman law did not permit the cause of action); see also, e.g., *Hartley v. Dombrowski*, 744 F. Supp. 2d 328, 77 Fed. R. Serv. 3d 1014 (D.D.C. 2010) (for loss of consortium claims, the District of Columbia applies the law of the state where the marriage is domiciled; thus, in a case involving a Pennsylvania married couple, a claim resulting from surgery in Maryland, and a surgeon who was licensed and whose professional corporation did business in the District of Columbia, the court held that the law of Pennsylvania, the couple's domicile, governed the loss of consortium claim).

sachusetts would be no more free to ignore Florida law than Florida is free to ignore Massachusetts law in the previous scenario.

To be sure, these examples identify the “easy” cases where the relationship between the forum state and the underlying issue is attenuated at best. They are intended to illustrate only that the bankruptcy courts should not alter the traditional conflict of law analysis to accommodate a particular state’s public policy regarding same-sex unions. A federal choice of law rule that focuses first on determining which state has the most significant relationship with the issue will allow courts to place federal bankruptcy policies, constitutional limitations and the equities of the case<sup>145</sup> before any one state’s policies.

### Conclusion

Bankruptcy courts are not writing on a clean slate as they grapple with the recognition of same-sex unions and attendant rights. States have always had differing domestic relations statutes, including statutes that declared void or even criminalized certain marriages. Bankruptcy courts need not break new ground. While the interstate recognition of same-sex marriage will continue to be troubling, especially for bankruptcy courts sitting in states that disfavor such marriages, the courts can be guided by well-established precedent. Bankruptcy courts should take the same cautious approach that courts have always taken when voiding marriages valid in the place of celebration. A blanket non-recognition rule has never been accepted and indeed would raise serious constitutional concerns. When conflicts are unavoidable, courts should not allow a forum state’s domestic relations public policy to dictate the recognition of rights and obligations in bankruptcy. By adopting a federal choice of law rule, courts can sidestep the public policy debate regarding same-sex unions and consider the full range of policies present in bankruptcy.

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<sup>145</sup>See *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 161–162, 67 S. Ct. 237, 91 L. Ed. 162 (1946).