

Full Faith and Conflict of Law:
The Peculiar Legacy of Legal Federalism
by
Sheldon D. Pollack*

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* Sheldon D. Pollack (J.D., University of Pennsylvania, 1986; Ph.D., Cornell University, 1980; B.A., University of Rochester, 1974) is Professor of Law and Political Science at the University of Delaware. He is the author of numerous scholarly articles as well as three academic books: *War, Revenue, and State Building: Financing the Development of the American State* (Cornell University Press, 2009); *Refinancing America: The Republican Antitax Agenda* (SUNY Press, 2003); and *The Failure of U.S. Tax Policy: Revenue and Politics* (Penn State University Press, 1996). The author would like to thank Ajay Mehrotra, Professor of Law at Indiana University, for his helpful comments on an earlier draft of this article.

I. INTRODUCTION

Those political leaders who came to Philadelphia in May 1787 for the Constitutional Convention were bold and imaginative in their vision for a new political regime, but they were not writing on a clean slate as they negotiated the design for a new national government. After all, these were the delegates of the state governments—independent and autonomous political organizations with their own distinct interests and objectives. Because of this, one option *not* on the agenda was the creation of a “unified” or “consolidated” state (in the parlance of late eighteenth-century political thought).¹ By the outbreak of the American Revolution, the die was already cast; the states would be preserved as separate political organizations within the framework of a political union among the several states.² That fateful decision would have profound consequences for the development of the American state—in particular, its judiciary. Under the new constitution crafted by the delegates and subsequently ratified by the state conventions, the national legal system would be comprised of the courts of the thirteen (now fifty) states integrated with the new federal judiciary. Borrowing the term “federalism,” which refers to a political system comprised of subnational

¹ Among the delegates to the Constitutional Conventions, only George Read of Delaware and Alexander Hamilton of New York proposed abolishing the state governments and creating a unified national government. Read declared that *all* of the states “must be done away with.” Quoted in James Madison, *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* (New York: W. W. Norton, 1966), 213 (June 29, 1787). Hamilton favored “extinguishing” the states and “substituting a general Gov[ernment].” Madison, *Notes of Debates in the Federal Convention*, 133–134 (June 18, 1787).

² Long before the outbreak of war and the formal severing of ties with the English crown, the colonial governments enjoyed a considerable degree of political autonomy. By the time of the Revolution, the institutional legacy of several of the colonies of British North America dated back more than a century and a half. This legacy included a tradition of representative legislative bodies and self-governance. In the proprietary colony of Maryland, a representative assembly first convened in 1637. The Massachusetts colony had a long history of local control over its affairs, with widespread participation of the citizenry. The colonial government of the Virginia colony included a representative body, later known as the Virginia House of Burgesses, which first convened in Jamestown in July 1619. This representative body played an important role in the governance of that colony. According to Elkins and McKittrick: “As with the other colonial assemblies in the period prior to about 1760, the House of Burgesses had steadily acquired and assumed a range of prerogatives and powers having to do with finance, military policy, appointments, elections, districting, and public works. Concurrently, it had built up an enormous sense of its own dignity and privileges.” Stanley Elkins and Eric McKittrick, *The Age of Federalism: The Early American Republic, 1788–1800* (New York: Oxford University Press, 1993), 39.

political units (whether called states, provinces, or Länder) enjoying some degree of autonomy and sharing some measure of sovereignty with a national government, the attendant division of the judicial power among the state and federal courts is referred to herein as “legal federalism.” Left unanswered by the Founders was the critical question of *how* the separate, autonomous state and federal courts would be integrated into a unified legal system—and whether that is even possible.

In order to induce the separate states to come together to form a stronger political union, the delegates to the Constitutional Convention were forced to accept the extant division of sovereignty between the national government and the entrenched state governments—a structurally incoherent constitutional arrangement once euphemistically referred to as “dual” or “shared sovereignty.”³ Pragmatic as this decision may have been from the perspective of state building, the sharing of sovereignty among the states and national government had a disruptive effect on the subsequent development of American political institutions by establishing the incoherent lines of authority that characterize the American political system.⁴ This institutional incoherence is reflected in our national legal system, which suffers unique structural flaws attributable to legal federalism. Among these are the endless conflicts of law that result from states enacting their own (different) laws. When the differences in state law are great enough, problems can arise. For instance, in law suits in which the parties are citizens of different states, the forum court must decide which state’s law to follow in adjudicating the underlying legal dispute. The choice is between the law of the forum state

³ “The idea of divided sovereignty, however illogical, it may or may not be, has, in one form or another, characterized American thought from the beginning of the constitutional period up to the present day.” M.J.C. Vile, *The Structure of American Federalism* (London: Oxford University Press, 1961), 25. The concept of sovereignty, which has a long history in political and legal theory, holds that a sovereign state exerts *exclusive* political authority within its territory. A state that is sovereign is not beholden to any higher or external authority. Thus, it is logical (although common in the American political tradition) to speak of “shared” or “dual” sovereignty.

⁴ The distinctive features of the American state are “incoherence and fragmentation in governmental operations” and the “absence of clear lines of authoritative control.” Stephen Skowronek, *Building A New American State: The Expansion of National Administrative Capacities, 1877–1920* (New York: Cambridge University Press, 1982), viii. The internal tension at the heart of our federal constitutional structure is the subject of Michael S. Greve, *The Upside-Down Constitution* (Cambridge: Harvard University Press, 2012).

or that of some other state with significant contacts to the dispute (e.g., the state in which the contract was signed or the tort was committed). Under certain facts and circumstances, a state's choice of law rules can lead the forum court to apply the law of the other state.⁵ That in itself is not necessarily problematic. The problems arise when the other state's law is not just different but actually contrary and repugnant to that of the forum state.⁶ In such cases, must the forum court still apply (and enforce) the other state's law? Tension can arise where states strongly object to the contrary public law of other states. One need only think of the political conflict surrounding the differences in state law pertaining to slavery, abortion, and same-sex marriage.

To be sure, the Founders were acutely aware of the potential problems resulting from conflicting state law and addressed the issue in the Constitution. Article IV, Section 1 requires that states give "full faith and credit" to the public acts, records, and judicial proceedings of the other states—and then delegates to Congress the task of enacting legislation to implement this mandate. Over the course of the next two centuries, Congress and the courts have crafted judicial rules to deal with the most common conflicts of law as they arise in legal disputes. These are the special province of lawyers, judges, and legal scholars. But these are more than just technical judicial rules. In a sense, these are the constitutional operating rules of our federal system of law—"constitutional" in the sense that they serve a *constitutive* function of integrating the separate and autonomous legal systems of the states into a single legal system. In cases involving the most common conflicts of law

⁵ A court may apply and enforce the civil law of another state but never its criminal law. This principle is commonly attributed to dictum from Chief Justice John Marshall. *The Antelope*, 23 U.S. 66, 123; 10 Wheat. 66 (1825) ("The courts of no country execute the penal laws of another"). If a person accused of a crime in Pennsylvania is captured in New York, there will be no trial in New York under Pennsylvania criminal law. That state, however, has a constitutional duty to return the fugitive to Pennsylvania upon proper application by the governor of that state. U.S. Constitution, Article IV, Section 2 ("A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.").

⁶ The most significant example of such a conflict of law involved slavery. It took a special provision of the Constitution (the so-called fugitive slave clause) to require the non-slave states to enforce the law of chattel slavery of the slave states against a fugitive slave in a free state. U.S. Constitution, Article IV, Section 2.

(e.g., those involving differences in the tort or contract law of two states), these rules work well enough. The forum court can follow its own choice of law rules and apply its own tort or contract law to adjudicate the legal dispute before it. Applying the law of the forum state in adjudicating the dispute as opposed to the law of another state can change the outcome of a court's decision, and that will matter very much to the parties to the law suit, but it will not likely raise controversial issues of national import. Likewise, the forum court may apply the law of another state in adjudicating the legal dispute. This too is typically not controversial in itself. But where the legislatures of the separate states adopt significantly different public laws that codify profoundly different public policies, the ordinary judicial rules for resolving conflicts of law (i.e., state choice of law rules) often prove inadequate. Ultimately, the most contentious conflicts of law must be addressed at a higher *political* level—whether by Congress through national legislation that pre-empts state law and imposes uniform national law, by the Supreme Court through constitutional construction, or through the complicated process of constitutional amendment. As we shall see, the historic conflicts of law over slavery, abortion, and same-sex marriage fall into this category.

Certainly, the most contentious conflict of law in American history involved slavery, which was legally sanctioned in some states and prohibited in others. The Founders anticipated the problem and addressed this particular conflict of state law in its own special provision in the Constitution (the so-called fugitive slave clause), which required that *all* states accept and enforce the laws of slave ownership enacted by the slave states. The Founders understood that the contentious conflict of state law over slavery could be fatal to efforts to form a new political union, and in response, they provided a specially tailored (and particularly odious) constitutional solution—nationalizing the enforcement of the law of chattel slavery. For all other conflicts of law, the full faith and credit clause would govern.

As we shall see, the fugitive slave clause merely delayed, rather than resolved the contentious political conflict over slavery. Eventually, the matter was resolved on the battlefields of the Civil War. The full faith and credit clause has also proven incapable of resolving other contentious conflicts of state law that arise from time to time within our system of legal federalism. These reflect deep-rooted cleavages between the citizens of different states that provoke strong emotions. These are cases in which the law of one or more states inflames passions in other states. Falling back on choice of law rules to avoid applying the contentious law of another state often is not enough to mollify those with strong opinions of conscience. Where the opposition is sufficiently provoked, the result can be a political campaign to enact national legislation to over-ride the unpopular law of the outlier states or amend the Constitution (or the Supreme Court's interpretation of it) to impose a uniform national law. This was the case with the contentious conflicts of law over slavery, abortion, and same-sex marriage. The result is a hybrid legal system, with legal federalism and judicial rules to deal with the ordinary conflicts of state law and national political or constitutional solutions for the most contentious and controversial public policies expressed in state law. This hybrid system is the peculiar legacy of legal federalism.

II. THE PECULIAR LEGACY OF LEGAL FEDERALISM

Having adopted a federal structure for the new republic, the delegates to the Constitutional Convention and the state conventions that subsequently ratified the Constitution imposed a peculiar and unique structure on the nation's legal system. Within the federal constitutional structure, the states would retain their separate legal systems (courts and legislatures) and a new federal judiciary would be created. Left unaddressed was how the thirteen separate state court systems and the federal judiciary would be integrated into a unified national legal system. Would the state legal

systems remain autonomous? Would federal law be superior to state law? Where are the boundaries between the separate legal systems of the states? These and a host of other problems inevitably arise in a system of legal federalism.⁷ In legal disputes involving citizens of different states, which state's law will the forum court apply in adjudicating such matter? What deference is owed by a state court to the statutes, common law, and judicial decrees of the other states? In drafting the Constitution, the Founders failed to address (let alone resolve) these complex legal issues—notwithstanding that much the same issues had arisen under the Articles of Confederation during the Confederacy.

Under the new constitutional order, each state retained the authority to make its own law (both statutory and judicial). Conflicts of law result from differences in the laws adopted by the separate states.⁸ If the citizens of the states never left their home states, such conflicts would never materialize in a court of law. But citizens do travel to other states, and businesses do engage in commerce across state lines. There inevitably is contact with the legal systems of the other states—even more so today than in the late eighteenth century. Where such interstate contacts result in a legal dispute, the forum court must decide whether the public records, judicial decisions, judgments, and in the most general sense, the “law” of the itinerant citizen's home jurisdiction “traveled with him” (so to speak) or whether he became subject to the law of the state to which he

⁷ Another issue (beyond the scope of this study) that arises in a system of legal federalism is the question of jurisdiction. In a court of law, the question concerns whether a court in one state has personal (*in personam*) jurisdiction over a defendant who is a citizen of another state. This raises constitutional issues concerning due process, which are determined by reference to the defendant's contacts (*nexus*) with the forum state. Much the same issue arises in determining whether a state has the authority to tax the income of citizens of other states.

⁸ The inconsistency between the laws of the several states is commonly referred to as “horizontal conflict of law” and that between federal and state law as “vertical conflict of law,” while comparable terminology is applied to choice of law issues. See, e.g., Robert L. Felix and Ralph U. Whitten, *American Conflicts Law* (Mathew Bender, 5th ed. 2010), 571: “Horizontal choice of law involves decisions about which state's . . . law is applicable among those having contacts with the parties to the action, the events giving rise to the suit, or both. . . . Vertical choice of law also concerns how state courts determine whether to apply their own law or federal law to suits within their jurisdiction.”

has traveled—just as he would if he traveled to a foreign country.⁹ Ultimately, the question concerns the *effect* that a court must give to the public acts, records, and judicial proceedings of another state in a legal dispute involving diverse parties with interstate contacts. Must the forum court apply and enforce the public acts, records, and judicial proceedings of the sister state or merely acknowledge these as presumptive evidence of the sister state’s official policies and actions? If the law of another state is applied and enforced, when and under what circumstances? This matters only to the extent the other state’s law is different than that of the forum state. The differences can alter the outcome of a legal dispute involving diverse parties with interstate contacts. The Founders clearly recognized that *interstate* conflicts of law would arise in the system of legal federalism they established—just as they had during the Confederacy. The solution they provided in the new Constitution, however, proved woefully inadequate.

A. Interstate Conflict of Law and the Constitution

The first attempt by the delegates to the Constitutional Convention to address the issue of interstate conflicts of law is found in the first draft of a new constitution distributed by the Committee of Detail (the main drafting committee) to the delegates on August 6, 1787. This draft included a provision similar to that included in the so-called Pinckney Plan—a draft constitution presented to the delegates by the Committee on Detail on May 29, 1787.¹⁰ The version in the

⁹ The Constitution mandates that an itinerant citizen shall be granted all the “privileges and immunities” due to citizens of the other states. “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the Several States.” U.S. Constitution, Article IV, Section 2. But that is a different issue—one also attributable to federalism. The privileges and immunities clause holds that a citizen of one state present in another state is entitled to the same legal rights afforded to citizens of the forum state.

¹⁰ The Pinckney plan is mentioned by James Madison in his notes of the Convention. It was not considered by the Committee of the Whole but rather referred to the Committee of Detail, which may have used it as the basis for its draft of a constitution. Madison, *Notes of Debates in the Federal Convention*, 33, Note 36. The Pinckney plan is found in Max Farrand, ed., *The Records of the Federal Convention of 1787* (New Haven: Yale University Press, 1966), 3: 595–609.

August 6th draft provided: “Full faith shall be given in each State to the acts of the legislatures, and to the records and judicial proceedings of the Courts and magistrates of every other state.”¹¹ When this item came up for discussion among the delegates on August 29, Gouverneur Morris (representing Pennsylvania at the Convention) offered an alternative (weaker) version providing that: “Full faith ought to be given in each State to the public records, and judicial proceedings of every other state; and the Legislature shall by general laws, determine the proof and effect of such acts, records, and proceedings.”¹² Significantly, Morris changed “shall” to “ought” and left out any reference to the “acts of the legislatures” of the other states. As such, the obligation of the states to give “full faith” only applied to the records and judicial proceedings of their sister states and was reduced to a recommendation, rather than a binding requirement. On the other hand, Morris’ version mandated that the national legislature enact legislation establishing standards and procedures for the “proof and effect” of the acts, records and judicial proceedings of the other states. This version was sent for review and editing to a select drafting committee—the so-called Third Committee of Eleven.

In its report distributed to the delegates on September 1, 1787, the Committee of Eleven submitted its own version of the constitutional provision. This was modified to expand the obligation to apply to the “public acts” as well as the records and proceedings of a sister state:

Full faith and credit ought to be given in each State to the public acts, Records, & proceedings of every other State, and the Legislature shall by general laws prescribe the manner in which such acts, Records, & proceedings shall be proved, and the effect which

¹¹ This provision was included as Article XVI of the constitution drafted by the Committee of Detail. See Madison, *Notes of Debates in the Federal Convention*, 394; Farrand, ed., *The Records of the Federal Convention of 1787*, 2: 188.

¹² Morris’ alternative draft is found in Madison, *Notes of Debates in the Federal Convention*, 547; Farrand, ed., *Records of the Federal Convention*, 2: 448.

Judgments obtained in one State, shall have in another.¹³

Significantly, the language in the drafting committee's version referred to the state's obligation as "full faith and credit" rather than "full faith." Some have suggested that the original phrase "full faith" was derived from the English law of evidence, which held that a foreign judgment carried weight as evidence of a debt but not conclusive proof.¹⁴ This claim is plausible as the terms "faith" and "credit" refer to the treatment of evidence by the trier of fact in a court of law. Be that as it may, the treatment of a foreign judgment by an English court is distinguishable from the treatment of a judgment of a court in sister state within the same confederation. The latter is neither truly a foreign judgment (i.e., a judgment rendered by the court of a foreign nation) nor a domestic judgment (i.e., a judgment of another court in the same state). It is something distinct. Does the judgment of a sister state have a special status in a system of legal federalism? That is unclear, and the Constitution provides no guidance. It is doubtful that this change in language was made with intent to dramatically alter the meaning of the provision, but we shall never know since no explanation was offered by the Committee or the delegates in their debate on the motion.

It is particularly noteworthy that the Committee's version of the provision included a mandate that the national legislature (Congress) enact legislation prescribing the specific manner under which the public acts, records, and proceedings of the sister state would be "proved" (i.e., authenticated). Under the modified language, the national legislature was required to enact "general laws" establishing the "effect" of a judgment of a court in a sister state. The provision,

¹³ The report is found in Madison, *Notes of Debates in the Federal Convention*, 569; Farrand, ed., *Records of the Federal Convention*, 2: 485.

¹⁴ See, e.g., Ralph U. Whitten, "The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act," 32 *Creighton Law Review* 255, 265 (1998): "The terms 'faith' and 'credit' were generally drawn from the English law of evidence and employed to describe the admissibility and effect of items of proof; this usage is relevant to the early debates over how the words 'faith' and 'credit' were used in the Constitution and the first implementing statute."

however, did not require Congress to legislate with respect to the effect owed to the public acts, records, or judicial proceedings of another state—only with respect to its judgments.

When the delegates commenced to review the Committee’s revised version of the provision, Gouverneur Morris proposed a seemingly minor modification, suggesting that the phrase “which Judgments obtained in one State, shall have in another” be stricken and replaced with “thereof” to conclude the sentence.¹⁵ At first glance, this appears to be only a stylistic revision. However, the change worked an important substantive change, broadening the application of the “effects” clause to apply to “acts, Records, & proceedings” rather than just the more limited category of “Judgments.” James Wilson of Pennsylvania spoke in favor of this change on the grounds that “if the Legislature were not allowed to *declare the effect* [of acts, and not just judgments], the provision would amount to nothing more than what takes place among all Independent Nations [i.e., the discretionary comity (or deference) that is commonly given to foreign law and judgments].”¹⁶ Edmund Randolph of Virginia objected to so expanding the scope and application of the provision beyond judgments, but Morris’s amendment was accepted by the delegates. Under the revised draft both the procedures for authentication as well as the determination of the effect given to the public acts, records, and proceedings of another state would be established by Congress in legislation. At the same time, the Committee’s version expressed only a recommendation that states *ought* to give full faith and credit to the public acts, records, and proceedings of the other states.

¹⁵ Madison, *Notes of Debates in the Federal Convention*, 570; Farrand, ed., *Records of the Federal Convention*, 2: 486, 488. Taking into account Morris’ proposed amendment, the clause would read: “Full faith and credit ought to be given in each State to the public acts, Records, & proceedings of every other State, and the Legislature shall by general laws prescribe the manner in which such acts, Records, & proceedings shall be proved, and the effect thereof.”

¹⁶ Madison, *Notes of Debates in the Federal Convention*, 570; Farrand, ed., *Records of the Federal Convention*, 2: 488. Professor Whitten argues that Wilson’s comment indicates that he believed that unless the legislature was granted the authority to declare the “effect” of the full faith and credit clause, state judgments need not be treated as conclusive by the other states. Whitten, “The Original Understanding of the Full Faith and Credit Clause,” 291.

Following Morris, Madison made a motion for two additional modifications to the language of the provision. First, he proposed changing the phrase “Full faith and credit ought to be given” to “Full faith and credit shall be given.” This modification (“ought” to “shall”) would again make it mandatory (rather than discretionary) that the states give full faith and credit to the public acts, records, and judgments of their sister states. Madison then proposed changing the phrase “the Legislature shall by general laws” to “the Legislature may by general laws.”¹⁷ This second modification would make it discretionary (rather than mandatory) that the national legislature provide guidance with respect to the effect given such public acts, records, and judgments. Both of these were substantive changes that would influence subsequent interpretations of the constitutional provision. If the provision merely recommended that the states respect the public acts, records, and judicial proceedings of a sister state, there could be no basis for contesting a state’s failure to respect such acts, records, or proceedings of a sister state. Moreover, making the provision mandatory meant that the federal courts eventually would have to interpret the meaning of “full faith and credit.” Madison also proposed leaving it to Congress to establish a method to “prove” the acts, records, and judicial proceedings of another state and whether to provide guidance with respect to the “effect” of such acts, records, and proceedings. Without further debate or discussion, the delegates approved both of Madison’s amendments.

With these changes and only minor editing by the Committee of Detail (the main drafting committee), the now familiar language emerged in the final draft of the constitutional provision, subsequently ratified as Article IV, Section 1 of the Constitution of the United States:

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

¹⁷ Madison, *Notes of Debates in the Federal Convention*, 570; Farrand, ed., *Records of the Federal Convention*, 2: 489.

Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.¹⁸

Under this provision, each state must give “full faith and credit” to the public acts, records, and judicial proceedings of its sister states. Congress later could (but was not required to) enact legislation prescribing rules to prove (or authenticate) such acts, records, and proceedings and what effect to give them. In retrospect, we see that important issues were left unresolved with respect to the connection and interplay between the first and second sentences of the clause. Indeed, the provision is an originalist’s nightmare as the history of the debate at the Constitutional Convention reveals virtually nothing about the delegates’ “original meaning” or their “original intent” in using this particular language. Contemporary eighteenth-century usage of the phrase “full faith and credit” in North America likewise reveals little about the meaning of these terms, and the debate in the state conventions during the ratification process is equally unenlightening.¹⁹

As the delegates were no doubt aware, the question of what effect should be given to the public acts and records of another state was not new. The British colonies had struggled to decide what deference was owed by one colony to the acts, records, and judicial proceedings of the legislatures and courts of the other colonies. Of course, to the extent the colonies were not part of a formal confederation, the legal analysis was different.²⁰ Yet, the exact same legal issue arose

¹⁸ U.S. Constitution, Article IV, Section 1.

¹⁹ The classic account of the ratification of the Constitution by the state conventions is Pauline Maier, *Ratification: The People Debate the Constitution, 1787–1788* (New York: Simon & Schuster, 2010).

²⁰ The colonies treated foreign judgments as *prima facie* evidence of a debt, not as a final judgment. The Massachusetts colony was the exception. That colony adopted a statute in 1774 holding that a properly authenticated copy of a judgment for a debt rendered in another colony would be given the same “effect and operation” in Massachusetts as a domestic judgment. Thus, a Massachusetts court would not have to determine the effect given to such judgment in the colony of rendition (a difficult task in the late eighteenth century) but simply give it the same effect as a domestic judgment in Massachusetts. Thus, it was relatively easy to execute in Massachusetts on a judgment of a sister colony. For a discussion of the Massachusetts statute and other colonial statutes dealing with foreign judgments, see Nadelmann, “Full Faith and Credit to Judgments and Public Acts,” at 37–41; Whitten, “The Original Understanding of

during the Confederacy, which was a formal political union. Indeed, the Articles of Confederation contained its own special provision to deal with the issue: “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.”²¹ Unfortunately, the dictates of this provision remained unsettled throughout the duration of the Confederacy as several state courts attempted to decipher its meaning with little success or consistency of interpretation.²²

Significantly, none of the reported cases from this period addressed the question of what effect a state must give to the *statutes* of another state in the Confederacy. That is because the full faith and credit clause in the Articles of Confederation applied only to the “acts” of the “courts and magistrates” of the other states, but not the statutes enacted by the legislatures of the other states. Thus, strictly speaking, the provision in the Articles of Confederation did not address the problem of conflicting law. In fact, all of the cases litigated during the Confederacy concerned a very different and specific issue—the effect owed to a judgment rendered by the judiciary of another state of the Confederacy. The case law held that a judgment of another state must be accepted as *prima facie* evidence of the debt in an action brought by the foreign judgment creditor in the forum

the Full Faith and Credit Clause,” at 274–280; William L. Reynolds and William M. Richman, *The Full Faith and Credit Clause: A Reference Guide to the United States Constitution* (Westport, Conn.: Praeger, 2005), 2–3.

²¹ Articles of Confederation, Article IV. The origins of the full faith and credit clause in the Articles of Confederation are discussed in Kurt H. Nadelmann, “Full Faith and Credit to Judgments and Public Acts: A Historical Analytical Reappraisal,” 56 *Michigan Law Review* 33, 34–36 (1957).

²² The five known reported cases interpreting the scope and application of the full faith and credit clause of the Articles of Confederation involved the question of what effect to give to the judgments of a sister state. These cases are assessed in Whitten, “The Original Understanding of the Full Faith and Credit Clause,” 282–87 (concluding that the cases expressed mixed opinions as to whether the provision dictated that a foreign judgment was of evidentiary value only or required that the judgments of a sister state be given the same status of a domestic judgment); see also Nadelmann, “Full Faith and Credit to Judgments and Public Acts,” at 49–53 (concluding that “these few decisions are insufficient to support any specific construction” of the clause); Reynolds and Richman, *The Full Faith and Credit Clause*, 3 (“None of the few reported decisions involving the Full Faith and Credit Clause in the Articles of Confederation treated the out-of-state judgment as mandating a rule of preclusion. Those cases, rather, treated the clause as a rule of evidence. . . .”); David E. Engdahl, “The Classic Rule of Faith and Credit,” 118 *Yale Law Journal* 1584, 1618 (2009) (concluding that the state courts under the Articles of Confederation took the judgments of sister-states as “full” evidence sufficient to establish a *prima facie* case but “not as conclusive or binding”).

court.²³ The debtor/defendant remained free to challenge the basis for the rendition of such foreign judgment or to dispute the substantive law upon which it had been granted.²⁴ Moreover, none of the courts held that the full faith and credit clause in the Articles of Confederation dictated that the forum state must provide for the direct execution of an out-of-state judgment.²⁵ The judgment creditor first needed to commence a new action in the forum state to obtain a domestic writ of execution to enforce the sister state judgment.

Did the new version of the full faith and credit clause in the Constitution warrant a different interpretation than the comparable provision in the Articles of Confederation? That is not unlikely given that the language of the two provisions was virtually identical. Likewise, there is nothing in the record of the debate at the Constitutional Convention to suggest that a different interpretation was intended. That said, the second sentence of the provision (commonly referred to as the “effects clause”) certainly was new and important. This provision delegates to Congress the authority to declare what *effect* should be given to the public acts, records, and proceedings of another state. The inclusion of the second sentence suggests that the question of how to treat another state’s records, acts, and proceedings was not settled by the first sentence, which merely requires that such acts, records, and proceedings be given “full faith and credit.” The second sentence leaves it to

²³ See Whitten, “The Original Understanding of the Full Faith and Credit Clause,” at 294 (“From English law through the ratification of the Constitution, the evidence is compelling that the first sentence of the Full Faith and Credit Clause did not embody conflict of laws commands directing the states to enforce the statutes, records, and judgments of other states, but merely to admit them into evidence as ‘full’ proof of their own existence and contents, with greater, nonevidentiary effect left for Congress to provide or not as it chose.”).

²⁴ In those cases arising during the Confederacy, the issue was the ability of the defendant (a debtor) to challenge the substantive law upon which the foreign judgment was based. None of these courts held that the full faith and credit clause of Article IV of the Articles of Confederation barred a challenge on the merits of the judgment.

²⁵ To illustrate, a court of common pleas in Philadelphia held that the full faith and credit provision in the Articles of Confederation did not require that “executions might issue in one State upon the judgments given in another,” but rather was “chiefly intended to oblige each state to receive the records of another as full evidence of such acts and judicial proceedings.” *James v. Allen*, 1 U.S. 188, 1 Dall. 188 (Pa. 1786). The exception was the Massachusetts statute of 1774 providing for the direct execution on a judgment of a sister colony.

Congress to prescribe substantive rules with respect to the specific legal “effect” that courts must give to the acts, records, and proceedings of another state. Arguably, the first sentence requires only that a state court respect the authenticated records, acts, and judicial proceedings of another state as *prima facie* evidence (as the courts had construed the full faith and credit clause in the Articles of Confederation), while the second sentence requires that a state court give such authenticated record, act, or proceeding whatever substantive effect may be prescribed by Congress in legislation. That is one plausible reading of Article IV, Section 1—although it must be said, the provision hardly a model of clarity.

Madison admitted this much but believed that the second sentence (the effects clause) salvaged the constitutional provision. The effects clause gave the national legislature the authority to create substantive meaning for what otherwise is an indeterminate mandate for “full faith and credit.” Congress could establish a uniform standard for the effect owed to the acts, records, judgments, and judicial proceedings of the other states, rather than leave it to the federal judiciary or each state to work out its own rules in public statutes or judicial decisions. In *Federalist Number 42* (January 22, 1788), Madison praised the effects clause as additional justification why the delegates to the state conventions should support ratification of the new Constitution:

The power of prescribing by general laws, the manner in which the public acts, records and judicial proceedings of each State shall be proved, and the effect they shall have in other States, is an evident and valuable improvement on the clause relating to this subject in the articles of Confederation. The meaning of the latter is extremely indeterminate, and can be of little importance under any interpretation which it will bear. The power here established may be rendered a very convenient instrument of justice, and be particularly beneficial on

the borders of contiguous States, where the effects liable to justice may be suddenly and secretly translated, in any stage of the process, within a foreign jurisdiction.²⁶

In this revealing epistle, Madison conceded that the full faith and credit clause was “extremely indeterminate” but took solace in that authority was granted to Congress to prescribe the “effect” of the public acts, records, and judicial proceedings of another state. If the constitutional provision had any import, it would come when Congress promulgates substantive rules to resolve this technical glitch in our system of legal federalism.

What Madison and the other delegates to the Convention (as well as many eminent jurists since) failed to comprehend was the difficulty in crafting such constitutional operating rules. Indeed, it may not even be possible to rectify the structural flaws of legal federalism through judicial rules except in the most trivial of cases. This is because there is a fundamental and inherent inconsistency between, on the one hand, preserving the autonomy of the legal systems of the separate states, while on the other hand, requiring each state to give “full faith and credit” to the public acts and judicial proceedings of the other states. These two objectives are contradictory and mutually exclusive within the framework of a national legal system—at least, to the extent the obligation of full faith and credit is interpreted to require that the states *always* apply and enforce the laws of the other states. That simply is not possible in a confederation of autonomous states. Perhaps this is why such a “strong” interpretation of the full faith and credit clause was never adopted by those courts that considered the issue during the Confederacy, nor was it ever suggested by the delegates to the Convention who drafted the new version of the clause. Unfortunately, otherwise thoughtful legal scholars and jurists have underestimated the difficulty in devising judicial rules to integrate the autonomous legal systems of the separate, autonomous states into a

²⁶ James Madison, “The Federalist No. 42,” in James Madison, Alexander Hamilton, and John Jay, *The Federalist Papers* (New Haven: Yale University Press, 2009), 219.

unified, national legal system. For example, Justice Robert Jackson famously proclaimed that the full faith and credit clause “serves to coordinate the administration of justice among the several independent legal systems which exist in our Federation.”²⁷ No doubt, that was the *intention* of the Founders in adding this provision to the Constitution. But neither the Founders nor Justice Jackson ever explained *how* we can “coordinate” and integrate the contrary laws enacted by the separate autonomous legal systems of the states.

Over the years, the Supreme Court has likewise made misleading pronouncements concerning the “purpose” of the full faith and credit clause. Writing for the Court in *Milwaukee County v. M.E. White Co.* (1935), Justice Harlan Stone claimed that the Founders added this clause to the Constitution to “alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation.”²⁸ The historical record reveals no such thing. The Founders did not create a “single nation” with a unitary government, and like the drafters of the Articles of Confederation, they had no clear conception of how to transform the separate legal systems of the states into “integral parts” of a unified legal system in which the state legislatures and courts would remain autonomous within the political confederation. The “indeterminate” constitutional mandate for “full faith and credit” is little more than an acknowledgement of the

²⁷ Jackson made his remarks to the New York City Bar Association in his Benjamin N. Cardozo Lecture of December 7, 1944. Robert H. Jackson, “Full Faith and Credit—the Lawyer’s Clause of the Constitution,” 45 *Columbia Law Review* 1, 2 (January 1945). Jackson referred to the full faith and credit clause as the “Lawyer’s Clause”—undoubtedly because the provision raises procedural questions that are best left to trained lawyers. Jackson’s suggestion that the purpose of the full faith and credit clause was to “coordinate the administration of justice among the several independent legal systems” of the states has been repeated uncritically by other scholars. See, e.g., Terry, “E Pluribus Unum?” at 3105 (“The Full Faith and Credit Clause is an essential tool for welding the states into a unified and integrated country.”). Other justices on the Supreme Court have echoed Jackson’s sentiments. See, e.g., *Hughes v. Fetter*, 341 U.S. 609, 612 (1951) (writing for the majority, Justice Black referred to “the strong unifying principle embodied in the Full Faith and Credit Clause looking toward maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states.”).

²⁸ *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 276–77 (1935) (Justice Stone).

problem—certainly not a solution. At the same time, Stone was reading way too much into Madison’s proposal to make the full faith and credit clause mandatory for the states rather than discretionary. There is no evidence that Madison and his fellow delegates sought to radically transform the federal arrangement or restrict the autonomy of the state courts by changing this one word (“ought” to “shall”) in this one provision. Madison’s own notes of the debate at the Constitutional Convention do not reveal *any* reason for his proposed modification of the text, let alone a conscious effort to radically alter the constitutional structure of the new federal republic.

In any event, imposing an obligation on the states to give full faith and credit to the public acts, records, and proceedings of their sister states has proven highly problematic in practice. On its own, the constitutional provision did not have the effect of making the state courts “integral parts” of a unified national legal system. The fundamental problem remains: we do not know what is dictated by “full faith and credit” in the context of the system of legal federalism established by the Constitution. Several approaches have been suggested as to how to interpret and give practical meaning to the clause; none is satisfactory. Some have compared the problem to that confronting a court adjudicating a legal matter arising under the laws of a foreign nation.²⁹ The Supreme Court itself has employed this analogy on occasion.³⁰ While there are similarities, these are not comparable situations. In cases of *international* conflicts of law wherein citizens of different nations interact and have contacts across international borders, the pertinent issue concerns the effect that should be given to the laws or judgments of a foreign nation. Within the territory of a sovereign nation, only its own laws have binding authority. A court may refer to foreign law for

²⁹ The analogy is considered in Terry, “E Pluribus Unum?” at 3099; Sarah H. Cleveland, “Our International Constitution,” 31 *Yale Journal of International Law* 1, 50–55 (2006).

³⁰ See e.g., *Sun Oil Co. v. Wortman*, 486 U.S. 717, 723–24 note 1 (1988) (suggesting that the original source of the principles expressed by the Founders in the full faith and credit clause may have been international conflicts law or comity). The notion that the conflict of law issue should be resolved in a manner similar to that involving the law of a foreign nation is just what Justice Stone rejected in *Milwaukee County*.

guidance; however, it is free to ignore such law altogether.³¹ The application of foreign law is always a *choice* of the forum court. Whether foreign law is respected depends entirely on the situation. Most cases involving international conflicts of law raise trivial issues, such as: Should French citizens, married under French law, be recognized as married in England by an English court? Should a French court respect the judicial decree of a German court validating a debt owed by the defendant, a German national? Such questions are commonly answered by reference to what is called “the law of nations.” This is customary law that has been described as a “common law of mankind” that combines the accepted “wisdom” of international law, common law, and natural law into “a body of law purporting to represent what many domestic legal systems share in the way of common answers to common problems.”³² Ignoring whether there really is a consensus as to what constitutes the common law of mankind, under the law of nations and the principle of comity (or deference), the courts of one sovereign state generally will recognize and respect the laws of another sovereign state—but not necessarily. Comity is discretionary.³³

Following the dictates of comity and the law of nations, English courts do recognize the civil marriages of French citizens married in France under French law—just as French courts recognize English marriages.³⁴ Courts typically recognize civil judgments and criminal convictions

³¹ Some members of the U.S. Supreme Court (such as Justices Antonin Scalia and Clarence Thomas) refuse to acknowledge or reference foreign law in their opinions and denounce the practice. From their perspective, not only are the decisions of foreign courts not binding precedent, but they may not even be acknowledged. For a critical account of references to foreign law in decisions of the U.S. Supreme Court, see Robert J. Delahunty and John Yoo, “Against Foreign Law,” 29 *Harvard Journal of Law & Public Policy* 291 (2005–2006).

³² Jeremy Waldron, “Foreign Law and the Modern Jus Gentium,” 119 *Harvard Law Review* 129, 132–33 (2005); see also Cleveland, “Our International Constitution,” 10–11.

³³ Joseph Story (then professor of law at Harvard University) defined the “comity of nations” in terms of the “voluntary consent” of one nation to follow the laws of another, except where such foreign laws are contrary or repugnant to its own policy or prejudicial to its national interests. Joseph Story, *Commentaries on Conflict of Law, Foreign and Domestic* (Boston: Hilliard, Gray, and Company, 1834) § 38.

³⁴ Here I ignore recent developments in European union and retain the notion of European states are sovereign in the post–Westphalian sense. In fact, the obligation of a member state of the EU to a fellow member’s law is more analogous to that of a state of the United States applying the law of another state. The states of the EU have resisted the decisions of the European Court of Justice, although less than the American states resisted the decisions of the federal

issued by a foreign court. Nations enter into extradition treaties pursuant to which they agree to return fugitives from the legal system of the other signatory state. But absent such a treaty, nothing compels recognition of foreign law, judicial decrees, judgments, or criminal convictions, and such recognition is withheld whenever the forum court does not respect the legal procedures or public policies followed in the foreign jurisdiction or considers the penalties imposed by the foreign court to be grossly excessive. Consider the convictions of political dissidents in China, North Korea, Iran, Russia, and countless other nations that lack independent judicial systems free from political pressure. The United States and other Western nations very often do not recognize such convictions—especially where they are based on suspect criminal charges (e.g., “hooliganism” in Russia or “counter-revolutionary” behavior in China, North Korea, or Cuba). At the same time, the marriages of foreign nationals from even the most abusive states are routinely respected. In short, courts choose which foreign laws and judicial decrees to respect and which to ignore under the discretionary doctrine of comity.

Whether decided under the law of nations or principles of comity, cases involving international conflicts of law are distinguishable from those in which a court in one state adjudicates a matter arising under the law of another state in the same confederation. The critical difference is that the states in a confederation are not “foreign sovereignties” (as Justice Stone recognized) but rather part of a “single nation.” Yet while the United States is a single nation, it is not a unitary state. Within a unitary state, there are no interstate conflicts of law—the law is the same everywhere within that nation’s territory. But within confederations, the legal systems of the constituent political organizations are autonomous to varying degrees. In our confederation, they

judiciary during the early nineteenth century. For a comparative analysis of resistance to central legal authority in the U.S. and the EU, see Leslie Friedman Goldstein, *Constituting Federal Sovereignty: The European Union in Comparative Context* (Baltimore: Johns Hopkins University Press, 2001), 14–66.

are highly autonomous. Does the principle of comity apply with respect to the laws of another state in such a confederation? Or do the laws of a sister state command some greater respect and authority than that of a foreign nation? If the latter, *what* effect must a court give to the laws of its sister states? As applied to the laws of a sister state, comity would dictate only that a court in one state *ought* to respect the public acts, records, and judicial decrees of the courts of its sister states—not that it *must*. This is akin to the discretionary comity afforded by the colonial courts to the laws and judgments of their sister colonies. This was the principle expressed in the initial draft of the full faith and credit clause—before Madison’s amendment altered it ever so slightly with such significant effect. With this slight textual change, was an entirely different principle intended for resolving interstate conflicts of law? That is unlikely.

B. The Easy Case: Records and Judicial Proceedings

If interstate conflicts are endemic to legal federalism, not all such conflicts are contentious or controversial. Indeed, some can be easily resolved—most particularly, those involving the “records” of a sister state. The first sentence of Article IV, Section 1 of the Constitution requires that states give “full faith and credit” to the public acts, records, and judicial proceedings of the other states. The second sentence of the clause (the effects clause) delegates to Congress the authority to specify in legislation the effect to be given to such acts, records, and proceedings. The First Congress of the United States addressed this issue in legislation enacted in 1790 pursuant to the authority granted by the effects clause. This implementing statute was the Act of May 26, 1790—verbosely titled, “An Act to Prescribe the Mode in Which the Public Acts, Records, and Judicial Proceedings in Each State, Shall Be Authenticated So As to Take Effect in Every Other

State.”³⁵ The first section of the 1790 implementing statute prescribes the official method for authenticating the public acts, records and judicial proceedings of a sister state:

The acts of the legislatures of the several states shall be authenticated by having the seal of their respective states affixed thereto: That the records and judicial proceedings of the courts of any state, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form.³⁶

Pursuant to this section, the public acts of the legislature of a sister state are “proved” by having the state affix its official seal to a copy of such act, while the records and judicial proceedings of the courts of a sister state are authenticated by the attestation of a judicial clerk, the seal of the court, and certification by the relevant judicial official. This much is clear and uncontroversial.

Deciphering the meaning of the second section of the statute has proven more challenging.

The second section of the 1790 Act provides that authenticated records and judicial proceedings must be given the same effect by a state court as by a court in the state of rendition: “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.”³⁷ Several aspects of this provision are noteworthy. First, the statute did not dictate *what* substantive effect such records and judicial proceedings of a sister state court must be given, only that they be given the *same* “faith

³⁵ Act of May 26, 1790, Chap. XI, 1st Cong., 2nd sess. The debates in Congress over the enactment of this statute are recounted in Whitten, “The Original Understanding of the Full Faith and Credit Clause,” 295–327.

³⁶ *Id.*

³⁷ *Id.*

and credit” by the forum court as would be given by a court in the state of rendition.³⁸ Thus, the statute imposes on state courts what may be referred to as a duty of consistent application—that is, consistent with the treatment afforded by a court in the state of rendition. State courts may not craft their own interpretation or give some novel effect to the records or judicial proceedings of the courts of another state. Significantly, the effect to be given is not that given by the forum state to its own records and proceedings, but rather that given by a court in the state of rendition.

Second, the statutory duty is imposed on courts rather than states, whereas the constitutional provision specifically refers to states. The reason for this textual alteration is unknown, but it renders the 1790 implementing statute into a rule of evidence applicable to a court of law—namely, it prescribes the evidentiary effect of a sister state’s judicial records and proceedings in a court of law. Third, this section of the statute (requiring consistent application) was silent with respect to the effect owed to the “legislative acts” of a sister state. The provision references only records and judicial proceedings, although the first section (prescribing the methods of authentication) provides a method for authenticating the legislative acts of a sister state. In other words, the Act of May 26, 1790 did not prescribe *any* rule with respect to the effect owed to the legislative acts of a sister state, only a method for authenticating them. Presumably, the determination of that treatment was left to the courts and legislatures of the various states. Fourth, the implementing statute of 1790 refers to the records of a *court*, whereas Article IV, Section 1 of the Constitution refers to the records of a *state*. The latter is a much broader category that includes non-judicial records of a state office or agency. The 1790 implementing statute only prescribes a rule for giving effect to the judicial records of another state but says nothing about what effect is

³⁸ The statute did not refer to “full faith and credit,” but only “faith and credit.” The language of the statute departs from that of the Constitution in this and other significant ways. The differences are ably summarized by Terry, “E Pluribus Unum?” at 3102, Note 67.

owed to the non-judicial records of another state. Fifth, the statute speaks of a duty of “faith and credit” owed to a sister state’s judicial records and proceedings even though the Constitution expressly authorized Congress to address the “effect” owed to such records and proceedings. As such, the provision seems to be implementing the first sentence of Article IV, Section 1 (the full faith and credit clause) rather than the second (the effects clause). This only adds to the confusion over the relationship between the first and second sentences of this constitutional provision.

The Act of May 26, 1790 was modified slightly in 1804, extending the obligation of “faith and credit” to the records and judicial proceedings of all courts of the United States, including those in its territories and possessions.³⁹ The implementing statute was again modified in 1948, this time substantively, when it was amended to read:

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto. The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form. 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 and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.⁴⁰

³⁹ Act of March 27th, 1804, vol. 7, p. 153, § 2.

⁴⁰ 28 U.S.C. § 1738, amended 62 Stat. 947, ch. 646 (June 25, 1948).

This is how the statute reads today. Significantly, the 1948 amendments expanded the scope of the statute to include the “acts of the legislatures” in addition to the records and judicial proceedings of the courts of a sister state, territory, or possession. Thus, the statute as amended requires that state courts give the acts of the legislature of another state the *same* evidentiary effect as is given by the courts in that other state. As we shall see, this expansion of the scope of the statute raises thorny questions concerning the obligation owed by a court to the statutes of another state. But first, we consider how the statute applies to the records of another state.

The method for authenticating such records is entirely straightforward. Beyond that, the implementing statute requires that authenticated judicial records be given the same “full faith and credit” by the courts in the forum state as is given by “law and usage” in the courts of the state of rendition. Thus, where a judicial record memorializes a final decision on the merits by a court in a sister state, the trier of fact in the forum court must likewise treat such record as *conclusive* evidence rather than as *prima facie* or rebuttable evidence.⁴¹ While the full faith and credit clause applies to the records of another state, both the 1790 and 1948 implementing statutes apply only to judicial records. The same treatment, however, is afforded to non-judicial state records under a separate statute also enacted by Congress in 1948.⁴² Under this second implementing statute, non-judicial records (such as birth certificates and driver’s licenses) also must be given the same “full faith and credit” as is afforded by “law or usage” by the courts in the state of rendition.⁴³ For example, where the record at issue is an authenticated driver’s license issued by the department of

⁴¹ Reynolds and Richman contrast this treatment with that afforded to records under the common law, wherein “the laws and records of foreign sovereigns were treated as questions of fact to be decided by the trier of fact (usually the jury) just as were other factual questions.” Reynolds and Richman, *The Full Faith and Credit Clause*, 13.

⁴² 28 U.S.C. § 1739, amended 62 Stat. 947, ch. 646 (June 25, 1948).

⁴³ Arguably, such treatment is mandated for state records under the broader language of Article IV, which prescribes full faith and credit for the “Records” of “every other state.”

motor vehicles of another state, such record is not just treated as *prima facie* evidence that the individual holds a valid driver's license in the state of rendition but is respected by courts in every other state as a valid driver's license in the forum state—just as it would be by a court in the state of rendition. Similarly, an authenticated birth certificate issued by another state must be treated in the forum state as legal proof of birth—just as it would be by all courts in the state of rendition.⁴⁴

While the treatment of the records and judicial decrees of a sister state is noncontroversial, there are exceptions. Invariably, the controversial cases are those in which the public policy expressed by such record or judicial decree is different than that of the forum state. If the differences in the public policies expressed by the record or judicial decree are significant, they may be considered “contrary” (and perhaps even “repugnant”) to those of the forum state.⁴⁵ As such, the forum court may resist giving them effect. For example, before the spread of no-fault divorce to all the states, there was considerable controversy as to the effect owed to a divorce decree issued by a state with a less stringent standard for granting a decree. Nevada was infamous for granting divorce decrees with a minimal (and easily evaded) residency requirement and no requirement that either spouse demonstrate “cause” for the divorce.⁴⁶ The public policies of those

⁴⁴ The glaring exception seems to be the birth certificate of President Obama. Notwithstanding that the White House has made available an authenticated birth certificate issued by the State of Hawaii for Barack Hussein Obama II, conspiracy theories persist as to whether he is a “natural born Citizen”—an eligibility requirement to serve as president under Article II, Section 1 of the U.S. Constitution. For an account of so-called birther conspiracy theories, see Michael Barkun, *A Culture of Conspiracy: Apocalyptic Visions in Contemporary America* (Berkeley and Los Angeles: University of California Press, 2013), chapter 12 (“Conspiracy Theories About Barack Obama”), 183–88.

⁴⁵ How great the difference must be in order to constitute a “contrary” public policy is uncertain. For example, most states impose a requirement that persons must be 18 years of age to marry (absent parental consent). Suppose that one state lowers the marriage age requirement to 17 years. Is that difference sufficient to constitute a “contrary” public policy? If so, how contrary does a public policy have to be before it becomes “repugnant”? Presumably, a policy that allows a 10 year-old to marry would qualify. In *Wilken's v. Zelichowski*, 26 N.J. 370 (1958), the Supreme Court of New Jersey granted an annulment of a marriage in which the plaintiff was 16 years of age and domiciled in New Jersey. She married a young man also domiciled in New Jersey. The marriage was celebrated in Indiana, whose law permitted 16 year-olds to marry. Justifying its decision, the court noted that New Jersey's law and judicial opinions were strongly opposed to marriage by persons below that state's statutory marriage age of 18 years.

⁴⁶ Nevada has a six-week residency requirement for a divorce (the shortest of any state, and one easily evaded) and will grant a divorce based on “irreconcilable differences.” As such, a divorce decree is considerably easier to obtain in

states that still a showing of cause by the party petitioning for the divorce were undermined by Nevada divorce decrees issued to their citizens on some whirlwind trip to Las Vegas. Despite this obvious conflict of public policies, the federal courts have consistently held that an authenticated Nevada divorce decree (assuming that residency and all other requirements have been satisfied) must be given substantive legal effect—even by those states with the more restrictive standards. For instance, North Carolina refused to recognize divorce decrees granted by Nevada to two citizens of North Carolina who traveled to Las Vegas to be divorced from their respective spouses. Following their return to North Carolina, the two were charged with the crime of bigamous cohabitation on the grounds that they were still married to their respective spouses. The Supreme Court of North Carolina held that the state was not required to respect the Nevada decrees under the full faith and credit clause because of this conflict of public policy. (The court also intimated that the Nevada residency requirement had not been satisfied, but that was not clear.) On appeal, the U.S. Supreme Court held that the Nevada divorce decrees must be respected by North Carolina—just as they would be by a court in Nevada.⁴⁷ This much was mandated by the implementing statute, if not by the Constitution itself. The law of nations likewise favors the recognition of foreign divorces (and marriages) without delving deeply into differences in the law of such foreign jurisdiction—except in extreme cases. The general rule is, a divorce is a divorce; the same for a marriage. But what about the extreme cases? Do not the significant differences in

Nevada than in other states. Prior to the universal acceptance of no-fault divorce, it was common for residents of states with stricter requirements to travel to Las Vegas for a divorce.

⁴⁷ *Williams v. North Carolina*, 317 U.S. 287 (1942). Writing for the majority, Justice Douglas refused to recognize a policy exception to the full faith and credit clause: “When a court of one state, acting in accord with the requirements of procedural due process, alters the marital status of one domiciled in that state by granting him a divorce from his absent spouse, we cannot say its decree should be excepted from the full faith and credit clause merely because its enforcement or recognition in another state would conflict with the policy of the latter.” *Id.*, at 303. The holding assumed that the residency requirement was satisfied and Nevada had personal jurisdiction over *both* parties to the divorce. Where the latter requirement is satisfied, the divorce is referred to as a “bilateral” divorce. The complex rules for how courts treat sister state marriages and the difference between bilateral and “ex parte” divorces are summarized in Siegel, *Conflicts*, 372–91.

the public policies expressed by a Nevada divorce decree provide sufficient grounds for another state to reject such decree within its territorial jurisdiction? With respect to divorce decrees, the federal courts have held otherwise. As we shall see, the result is different with respect to certain marriages celebrated in another state.

Just as there can be controversy with respect to recognizing the judicial records or decrees of a sister state that express contrary public policies, cases may arise with respect to the treatment of non-judicial records that express public policies different from those of the forum state. Where the differences are significant enough, they too might be considered invalid to the extent they express public policies that are repugnant to the forum state. For example, suppose that the department of motor vehicles of one state adopts a policy of issuing driver's licenses to so-called illegal aliens (i.e., non-citizens residing in that state without valid legal authorization). Neighboring states might be reluctant to recognize such licenses as valid within their territory to the extent those states impose a requirement of U.S. citizenship as a precondition for issuing a state driver's license. Is that difference in public policy grounds for refusing to respect out-of-state driver's licenses issued to illegal aliens? That is not clear. Until recently, the qualifications for obtaining a driver's license have been relatively similar from state to state—at least similar enough that states have had no reason to contest driver's licenses issued by their sister states.⁴⁸ Of course, if a person takes up residency in a new state, that state will require him to satisfy its own public policy by obtaining a valid driver's license from the appropriate governmental authority in that state. In any event, it is not the *record* that is controversial but rather the public policies expressed by such record—in this example, the issuance of a driver's license to an illegal alien.

⁴⁸ Beginning with Washington in 1993, and most recently California on January 1, 2015, several states now issue driver's licenses to undocumented aliens—so perhaps the issue soon will be put to the test. See Brittny Mejia and Cindy Carcamo, "Historic Day as Immigrants in U.S. Illegally Begin Getting Driver's Licenses," *Los Angeles Times*, January 2, 2015.

In contrast with records, the obligation owed to a judgment issued by a court in another state was once highly controversial. Recall that the enforceability of such judgments pursuant to the full faith and credit clause in the Articles of Confederation was the subject of considerable litigation, and much the same issue arose under the first years under the new Constitution of 1789.⁴⁹ In the latter cases, the interpretation of the Act of May 26, 1790 also was at issue. Such cases were appealable to the federal courts as they raise a constitutional question.⁵⁰ The first case heard by the U.S. Supreme Court requiring an interpretation of the full faith and credit clause of the Constitution and the Act of March 26, 1790 was *Mills v. Duryee* (1813).⁵¹ This case provides insights into how the early Supreme Court interpreted the dictates of the full faith and credit clause and the 1790 implementing statute.

In *Mills*, the plaintiff was a judgment creditor in an action brought in the Supreme Court of New York—the trial court of general jurisdiction in that state. The underlying claim apparently was breach of contract. The defendant failed to satisfy the judgment and was arrested and jailed in New York, which still allowed for the imprisonment of debtors.⁵² Subsequently released on bail,

⁴⁹ The interpretation of the implementing statute by the lower federal courts as well as various state courts prior to *Mills* is discussed in Whitten, “The Original Understanding of the Full Faith and Credit Clause,” 295–327; see also Reynolds and Richman, *The Full Faith and Credit Clause*, 8–10.

⁵⁰ The Constitution provides that the “judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treatises made, or which shall be made, under their Authority.” U.S. Constitution, Article III, Section 2. Prior to 1875, cases raising federal questions were appealable directly to the Supreme Court but not to the lower federal courts. Jurisdiction over federal questions was conferred on the lower federal courts by the “Jurisdiction and Removal Act of 1875,” ch. 137, 18 Stat. 470 (amended and codified at 28 U.S.C. § 1331). Various interpretations of the jurisdiction of the federal courts in diversity cases are discussed in Charles J. Cooper and Howard C. Nielson, Jr., “Complete Diversity and the Closing of the Federal Courts,” 37 *Harvard Journal of Law & Public Policy* 295, 311–312 (Winter 2014).

⁵¹ *Mills v. Duryee*, 11 U.S. 481; 7 Cranch 481 (1813).

⁵² The imprisonment of debtors in New York and Philadelphia and the deplorable conditions in their debtors’ prisons are recounted in Bruce W. Mann, *Republic of Debtors: Bankruptcy in the Age of American Independence* (Cambridge: Harvard University Press, 2002), 29, 86–102. New York was one of the last states to still allow the imprisonment of debtors, not banning the practice until 1832. Today, there still are circumstances under which a debtor can be jailed. See Jessica Silver-Greenberg, “Welcome to Debtors’ Prison, 2011 Edition,” *Wall Street Journal*, March 17, 2011.

the debtor traveled to the District of Columbia—most likely in an attempt to escape the debt. The judgment creditor brought an action there to enforce the New York judgment. In that action, the defendant/debtor entered a plea of *nil debet* pursuant to which he claimed the right to introduce evidence of a defense based on the discharge or unenforceability of such debt. A plea of *nil debet* was the appropriate plea to challenge a foreign judgment (i.e., a judgment rendered by a court of a foreign sovereign nation) to contest the merits of the judgment. The lower court in the District of Columbia rejected such plea on the grounds that the New York judgment was final in that state, and hence, binding in the District of Columbia. In this respect, the judgment would be treated as a domestic judgment for which the appropriate plea was *nul tiel record* (a plea which required that the original record be produced but did not allow the defendant to challenge the merits of the original claim). The decision of the lower court was upheld by the Circuit Court for the District of Columbia. Like the trial court, the Circuit Court rejected the defendant's claim that the full faith and credit clause dictated only that the foreign judgment must be admitted as *prima facie* (rebuttable) evidence rather than preclusive evidence of the debt. The Circuit Court held that the full faith and credit clause and the Act of May 26, 1790 required that the out-of-state judgment be given the same effect in the District of Columbia as in New York, where it was treated as an enforceable debt that could not be re-litigated or contested by the original parties to the litigation.

On appeal, the U.S. Supreme Court upheld the Circuit Court on the grounds that because the record of the judgment was preclusive evidence of the debt in New York, it must be treated as preclusive evidence of the debt in the District of Columbia (or any other state or territory of the United States).⁵³ Writing for the majority, Justice Joseph Story rejected the defendant's claim that

⁵³ The legal doctrine of preclusion (or *res judicata*) holds that once an issue or claim has been fully litigated and there has been a final decision rendered on the merits, such claim cannot be re-litigated in another civil action involving the same parties. See Robert C. Casad, "Judgments," in Kermit L. Hall, ed., *The Oxford Companion to American Law*

the forum court was only required to treat the record of the New York judgment as *prima facie* evidence of the debt. Significantly, he based his opinion not on the full faith and credit clause but rather on the effects clause and the 1790 implementing statute. As Story put it: “The act [of May 26, 1790] declares that the record duly authenticated shall have such faith and credit as it has in the state Court from whence it is taken [i.e., New York]. . . . Congress have therefore declared the *effect* of the record by declaring what faith and credit shall be given to it.”⁵⁴ Story further stated that “it is manifest . . . that the constitution contemplated *a power in congress* to give a conclusive effect to such judgments.”⁵⁵ This language suggests that Story did not believe that the full faith and credit clause was self-executing or that it mandated that all states must enforce a judgment rendered by a sister state. Rather, his argument holds that the effects clause gave Congress the authority to decide what specific “effect” or obligation was owed to such a judgment by a court in another state—and in the Act of May 26, 1790, as amended, Congress did just that when it prescribed a rule holding that a court in the District of Columbia must give the judgment rendered by a court in New York the same effect as would a court in New York. Based on this reasoning, Story held that an authenticated judgment of a court in a sister state is preclusive evidence of the debt in the forum court under the 1790 implementing statute, rather than the full faith and credit clause. Just as a New York court would treat the record of the New York judgment as *res judicata* and not subject to challenge on the merits, so must a court hold in every other state, territory, and possession of the United States. Of course, this would imply that Congress in its discretion could amend the implementing statute to impose a different result by prescribing a different “effect.”

(New York: Oxford University Press, 2002), 440; see also, “Res Judicata,” in Charles Wright, Arthur Miller, and Edward H. Cooper, *Federal Practice and Procedure* (St. Paul: West Publishing Company, 1981), 18

⁵⁴ *Mills v. Duryee*, at 484.

⁵⁵ *Id.*, at 485.

To be sure, Justice William Johnson was equally adamant that under existing law, the trial court in the District of Columbia was *not* required to treat a sister state’s judgment as preclusive. Writing in dissent (a rarity on the Supreme Court in the early nineteenth century), Johnson argued that the Constitution required no more than that the record of the out-of-state judgment be respected by the trial court as *prima facie* evidence of the debt. He argued that such treatment would satisfy the statutory requirement for faith and credit: “By receiving the record of the state Court properly authenticated as conclusive evidence of the debt, full effect is given to the constitution and the law. . . . For faith and credit are terms strictly applicable to evidence.”⁵⁶ Johnson believed that both the full faith and credit clause in the Constitution and the 1790 implementing statute prescribed a judicial rule of evidence rather than a command for mandatory enforcement of sister state judgments. But his was the minority view, and ever since, the Supreme Court has followed Justice Story’s strong reading of the implementing statute with respect to the enforceability of the judgment of another state.⁵⁷ The sole exception is that states were formerly precluded from recognizing or enforcing tax judgments of another state.⁵⁸ That changed in 1935 when the Supreme Court held that the full faith and credit clause required states to enforce out-of-

⁵⁶ *Mills v. Duryee*, at 486.

⁵⁷ The holding in *Mills* was re-affirmed by Chief Justice Marshall in 1818 when he held 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 in the United States.” *Hampton v. M’Connel*, 16 U.S. 234 (1818). In 1887, the Court seemed to elevate the *Mills* decision from statutory interpretation to a constitutional principle: “Without doubt the constitutional requirement (article 4, 1) that ‘full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state,’ implies that the public acts of every state shall be given the same effect by the courts of another state that they have by law and usage at home. This is clearly the logical result of the principles announced as early as 1813, in *Mills v. Duryee*, . . . and steadily adhered to ever since.” *Chicago & Alton v. Wiggins*, 119 U.S. 615, 622 (1887).

⁵⁸ See, e.g., *Henry v. Sargeant*, 13 N.H. 321, 325 (1843); *State of Colorado v. Harbeck*, 232 N.Y. 71, 83, 133 N.E. 357, 359 (1921). The treatment of foreign and sister state tax judgments is the subject of Samuel D. Brunson, “Accept This as a Gift,” *Tax Notes*, January 26, 2015, 541–43.

state tax judgments—although not foreign tax judgments.⁵⁹

Since *Mills*, the courts have crafted judicial rules consistent with that decision with respect to the effect given to sister state judgments—giving credence to the determination of the liability but still requiring that the non-resident judgment creditor file an action in the forum court before obtaining a writ of execution.⁶⁰ The substantive law underlying the judgment may not be contested, but the decision may be challenged on procedural grounds—e.g., lack of jurisdiction, expiration of the forum state’s statute of limitations, or an allegation of fraud.⁶¹ Once the record of the sister state judgment has been authenticated under the procedures set forth in the implementing statute, the specifics with respect to how such judgment will be enforced is a matter strictly for the forum court. As the Supreme Court has put it: “Full faith and credit . . . does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister state judgment as preclusive effects

⁵⁹ *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935). Foreign tax judgments remain unenforceable in the United States. “U.S. law treats foreign tax judgments differently than any other foreign civil judgment. U.S. courts generally recognize and enforce foreign civil judgments, but the so-called revenue rule excepts U.S. courts from recognizing or enforcing foreign tax judgments.” Brunson, “Accept This as a Gift,” 541.

⁶⁰ *M’Elmoyle v. Cohen*, 38 U.S. 312 (1839): “By the law of 26 May, 1790, the [foreign] judgment is made a debt of record, not examinable upon its merits, but it does not carry with it into another state the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another state, it must be made a judgment there, and can only be executed in the latter as its laws may permit. It must be conceded that the judgment of a state court cannot be enforced out of the state by an execution issued within it.”

⁶¹ A judgment of a sister state also can be barred by the statute of limitations in the forum state even when it has not expired in the state wherein the events giving rise to the action took place. This would constitute a procedural bar to bringing the action in the forum state. See, e.g., *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730 (1988) (holding that the forum state’s “interest in regulating the work load of its courts and determining when a claim is too stale to be adjudicated certainly suffices to give it legislative jurisdiction to control the remedies available in its courts by imposing statutes of limitations.”). Writing for the majority, Justice Scalia stated: “The historical record shows conclusively, we think, that the society which adopted the Constitution did not regard statutes of limitations as substantive provisions, akin to the rules governing the validity and effect of contracts, but rather as procedural restrictions fashioned by each jurisdiction for its own courts.” *Id.* at 726. On this basis, the Court upheld its own prior decisions. See, e.g., *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 516–518 (1953); *Townsend v. Jemison*, 50 U.S. 407, 413–420, (1850); *M’Elmoyle v. Cohen*, 38 U.S. 312, 327–328 (1839). Reynolds and Richman interpret the rule that evolved in light of *Sun Oil* as: “Every state has a statute of limitations on actions brought to enforce judgments, and . . . the statute of the enforcing state can cut off the right to enforce a judgment even though the laws of the rendering state would not.” Reynolds and Richman, *The Full Faith and Credit Clause*, 64.

do; such measures remain subject to the even-handed control of forum law.”⁶² Thus, a judgment creditor cannot directly execute on a sister state judgment; he must first file an action to obtain a writ of execution from a court with jurisdiction in the forum state.⁶³ However, substantive matters previously litigated in the foreign jurisdiction cannot be re-litigated in the forum state—assuming it was a final judgment based on the merits.⁶⁴ This is a compromise position that respects the judgment of a sister state as preclusive, thereby barring further litigation of the substantive issues, but also denies the out-of-state judgment the same status afforded a domestic judgment (i.e., a judgment issued by another court in the forum state)—for which a writ of execution may be issued directly. Of course, a *bona fide* foreign judgment (i.e., a judgment of a court in a foreign nation) need not be given any effect. An authenticated judgment of another state, on the other hand, is not a foreign judgment and must be given substantive legal effect. These judicial rules and procedures are now settled and largely uncontroversial—just as they are for the records of another state. That said, we still must consider whether there *ought* to be exceptions to the rule of preclusion as it applies to out-of-state judgments.

Where both the forum court and the sister state court that rendered the judgment have the same or reasonably similar law, the enforcement of the judgment is not likely to be controversial. All states recognize legal actions for breach of contract and the traditional torts of negligence and battery, and thus, enforcing a sister state judgment with respect to a liability arising out of such an

⁶² See *Baker v. General Motors Corp.*, 522 U.S. 222, 235 (1998), citing *M’Elmoyle v. Cohen*, at 325 (1839) (judgment may be enforced only as “laws [of enforcing forum] may permit”); Restatement (Second) of Conflict of Laws § 99 (1969) (“The local law of the forum determines the methods by which a judgment of another state is enforced.”).

⁶³ In contrast, Congress enacted a statute in 1948 providing that a money judgment rendered by any federal court may be “registered” in any other federal district and shall be given the “same effect as a judgment of the district court where registered and may be enforced in like manner.” 28 U.S.C. § 1963.

⁶⁴ For a discussion of the requirement that foreign judgments must be final (i.e., not still on appeal in the jurisdiction that rendered the judgment) and based on the merits (i.e., not decided on procedural grounds such as lack of jurisdiction or improper venue), see William L. Reynolds, “The Iron Law of Full Faith and Credit,” 53 *Maryland Law Review* 412, 418–421 (1994).

action will not be contentious with respect to the substantive law. The determination of liability for such actions will be based on much the same legal doctrines that are followed by all local courts in the United States. However, the enforcement of some sister state judgments can be highly contentious and controversial. These are judgments arising out of a legal action that is *not* recognized by the forum state and which expresses public policies that are significantly different than those of the forum state—perhaps even contrary and repugnant. For example, some twenty-five states now recognize the tort of “wrongful birth.” This is a new tort pursuant to which the parents of a child born with a genetic disease bring an action alleging that their physician (or other medical personnel) was negligent in failing to warn them of such risk.⁶⁵ The parents as plaintiffs must demonstrate an injury suffered on account of the doctor’s negligent failure to warn. A number of state legislatures, however, have enacted statutes that bar this tort on the grounds that the action expresses public policies that are contrary and repugnant to that state.

Suppose that the plaintiffs bring suit in a state that recognizes such an action, alleging that their physician was negligent in failing to warn them of the high probability of genetic defects afflicting their unborn child. Further suppose that the plaintiffs prevail in such litigation and are awarded a judgment for damages. Before they can execute on the judgment, the defendant leaves the jurisdiction and establishes residency in another state—one that has enacted legislation that bars such a suit. Should the state that recognizes such a suit as contrary and repugnant to its public

⁶⁵ For a description of the tort of wrongful birth, see Mark Strasser, “Misconceptions and Wrongful Births: A Call for a Principled Jurisprudence,” 31 *Arizona State Law Journal* 161 (1999) (“Wrongful birth involves a situation in which the parents of a child born with birth defects allege that the negligence of those charged with prenatal testing or genetic counseling deprived them of the right to make a timely decision regarding whether to terminate a planned pregnancy because of the likelihood that their child would be born physically or mentally impaired.”); Lori B. Andrews, “Torts and the Double Helix: Malpractice Liability for Failure to Warn of Genetic Risk,” 29 *Houston Law Review* 149 (1992); James Bopp Jr, Barry A. Bostrum, and Donald A. McKinney, “The ‘Rights’ and ‘Wrongs’ of Wrongful Birth and Wrongful Life: A Jurisprudential Analysis of Birth Related Torts,” 27 *Duquesne Law Review* 461 (1989). A similar action is recognized in some states for the child with a genetic disease to bring suit against the doctor for “wrongful life” on the theory that the doctor who brought him into life caused the child pain and suffering.

policy be required to enforce the sister state judgment, which reflects a determination of liability for an act that is not recognized as tortious in that state? To do so would effectively compel the state court to enforce the public policy underlying the tort of wrongful birth despite the fact that the legislature of that state had already declared that such a legal action was contrary and repugnant to its public policy.⁶⁶ This would infringe upon the autonomy of the legal system of the forum state. On the other hand, to allow the defendant to avoid the judgment simply by moving to another state with more favorable law would undermine the important constitutive function of integrating the separate legal systems of the states. At the very least, it would reduce the obligation owed under the full faith and credit clause to something closer to the discretionary comity owed to the judgments of a foreign nation.

There is no simple or satisfying answer here—no doubt because a system of legal federalism cannot *both* respect the autonomy of the separate legal systems of the states *and* integrate them into a unified national legal system in which every judgment of every state court is respected and enforceable in every other state. This inconsistency lies at the heart of legal federalism. If one embraces the perspective of Justices Jackson and Stone that the purpose of the full faith and credit clause is to “coordinate” and “integrate” the separate legal systems of the states into one “unified” national legal system, then such differences in public policies likely will be viewed as a secondary concern. The goal will be to maximize the enforcement of sister state judgments. Conversely, if one celebrates the Founders’ decision to adopt a federal constitutional structure in which the preservation of the autonomy of the legal systems of the states was the paramount objective, then an exception will be justified for sister state judgments that establish

⁶⁶ Technically, the forum court is not enforcing the public policy expressed by the action for wrongful birth but only the sister state’s judgment against the defendant’s property located in the forum state. Nevertheless, the forum state may still feel as if it has been forced to recognize the legality of the action.

liability for legal actions that express public policies that are contrary and repugnant to those of the forum state. (Judgments for successful legal actions for wrongful birth would fall into this category.) Maximizing the autonomy of the states and their legal systems will be the guiding principle in devising rules to deal with such conflicts. Truth be told, the language of the Constitution is too vague and indeterminate to give a definitive answer as to which is the “correct” approach—while providing support for both positions. Likewise, the history of the debates at the Constitutional Convention reveals no discernable preference for either principle. That said, Congress in the Act of May 26, 1790 and the Supreme Court in *Mills* have adopted a rule for the consistent application and enforcement of out-of-state judgments, and state trial courts must follow that rule.

In 1908, the Supreme Court specifically addressed the issue of conflicting public policies expressed by a judgment of another state in *Fauntleroy v. Lum*.⁶⁷ In its decision, the Court reaffirmed its prior holding in *Mills v. Duryee* and followed Justice Story’s strong reading of the dictates of the implementing statute with respect to sister state judgments. The facts in *Fauntleroy* were that two residents of Mississippi entered into a futures commodity contract in Mississippi that was illegal under that state’s law as a gambling contract. Thus, the debt arising from a breach of such contract was unenforceable in Mississippi. The matter, however, was brought not before a court but an arbitrator, who found in favor of the plaintiff despite the fact that an action to enforce such a contract would not lie in a Mississippi court. Later, the plaintiff brought an action in Missouri (where the defendant owned property and now resided) to enforce the contract. For reasons unknown, the Missouri court rejected the defendant’s evidence of the illegality of the contract under Mississippi law and granted a judgment in favor of the plaintiff based on the

⁶⁷ *Fauntleroy v. Lum*, 210 U.S. 230 (1908).

arbitrator's award. The plaintiff then took the Missouri judgment back to a court in Mississippi to enforce it there. On appeal, the Supreme Court of Mississippi held, quite reasonably, that the full faith and credit clause did not require the courts of Mississippi to enforce the Missouri judgment as it involved a transaction that had taken place in Mississippi between two residents of Mississippi in violation of the public policy of that state. The Missouri court had correctly followed its own choice of law rules to apply Mississippi law, but it had committed an error of law in construing such law (i.e., with respect to the illegality of the contract). On this basis, the Mississippi Supreme Court refused to enforce the sister state judgment supposedly decided under Mississippi law for an action that the Mississippi courts would have had no authority to enforce had it been brought in a court in Mississippi in the first place.

On appeal, the U.S. Supreme Court reversed the Mississippi Supreme Court, holding that because the judgment was conclusive in Missouri (as it was a final judgment, notwithstanding that the court had made an error of law), it was conclusive in Mississippi under the dictates of the Act of May 26, 1790. Writing for the majority, Justice Holmes held that a sister state judgment cannot be impeached in the forum court based on an error of law committed by the court in the sister state. Notwithstanding that the Missouri court had misconstrued Mississippi law as it applied to two Mississippi residents, the Mississippi court was required to enforce the Missouri judgment, which expressed a public policy contrary to that of the State of Mississippi. The majority held that the Act of May 26, 1790 demanded deference for sister state judgments even where the public policy underlying the action that gave rise to the sister state judgment was contrary to that adopted by the forum state. Based on such rulings, scholars have referred to this treatment of sister state judgments as an "iron law of preclusion."⁶⁸

⁶⁸ William L. Reynolds, "The Iron Law of Full Faith and Credit," 53 *Maryland Law Review* 412 (1994). Professor Reynolds describes the *Fauntleroy* decision as follows: "The Court scarcely could have picked a more striking case to

In *Fauntleroy*, the Supreme Court followed one interpretation of the implementing statute. Indeed, Justice Holmes adopted the strongest possible interpretation—i.e., that the statute imposes a duty to enforce the judgment of a sister state, even where such judgment expresses public policies directly contrary to those of the forum state. Admittedly, this case was an aberration. The Missouri court correctly followed its own choice of law rules, which dictated that Mississippi law should be followed, but then misconstrued Mississippi law on the most relevant and determinative issue. To the extent that the court had interpreted the law of its sister state correctly, the judgment at issue would not have expressed a repugnant public policy but rather the forum state’s own public policy. One would expect that result in all but a handful of aberrational cases such as *Fauntleroy*. Nevertheless, the four dissenting justices on the Supreme Court had a point when they concluded that the sister state judgment should not be enforced under these circumstances. They argued that there is no “moral obligation” to give effect to the judgment of a sister state “when to do so would compel the state in which the judgment was sought to be executed to enforce an illegal and prohibited contract, when both the contract and all the acts done in connection with its performance had taken place in the latter state.”⁶⁹ In other words, they recognized the basis for an exception to the enforcement of a judgment of a sister state that expresses a public policy that offends the forum state. Mississippi certainly had sufficiently strong contacts with the case to justify its decision to apply its own law (correctly interpreted) to the resolution of the legal dispute. The dissenters favored preserving the autonomy of the legal systems of the several states over integrating them into a single, unified national legal system—at least, where the

illustrate the basic principle of sister-state enforcement. Not only did the Missouri court err, but it erred on a question of Mississippi law and thereby frustrated an important social policy of Mississippi. . . . Nevertheless, the Supreme Court held that the Missouri judgment was entitled to full faith and credit in Mississippi—the very state whose policy was being thwarted.” *Id.* at 414.

⁶⁹ *Fauntleroy v. Lum*, 210 U.S. 230, 242 (1908).

enforcement of the judgment at issue would undermine the public policy of the forum state. That said, theirs was the minority view, and the Supreme Court has never recognized such an exception to the preclusive effect of sister state judgments nor has Congress in its implementing statute—although such an exception has been suggested in other dissenting opinions on the Supreme Court.⁷⁰

As we shall see, the tension between these two mutually incompatible objectives (preserving the autonomy of the separate states and the integration of their legal systems) is even greater in cases involving the enforcement of a public act of another state—especially where such public act expresses public policies that are contrary and repugnant to those of the forum state. Here the Supreme Court has hinted at an exception to the effect otherwise owed to another state’s law—and Congress has legislated one.

C. The Difficult Case: A Conflict of Public Law

If Congress and the courts have crafted judicial rules to deal with the treatment of the records and judgments of another state, the more difficult and challenging case involves the effect owed to the public acts of another state. Again, we confront this issue only because the Founders established a confederation in which the autonomous legal systems of the states were preserved within the federal constitutional structure. The result was legal federalism and confusion

⁷⁰ In a case involving the enforceability of a Georgia judgment in South Carolina, Justice Harlan Stone argued in dissent that the Georgia decree did not merit enforcement in South Carolina because it was in conflict with the public policy of South Carolina (the forum state). He was not persuaded that “the full faith and credit clause gives sanction to such control by one state of the internal affairs of another.” *Yarborough v. Yarborough*, 290 U.S. 202, 214 (1933). Stone suggested that there was a basis for an exception to the enforcement of the judgment or judicial decree of a sister state where the public policy of the forum state is contrary to that of the state of rendition: “In the assertion of rights, defined by a judgment of one state, within the territory of another, there is often an inescapable conflict of interest of the two states, and there comes a point beyond which the imposition of the will of one state beyond its own borders involves a forbidden infringement of some legitimate domestic interest of the other.” *Id.*, at 215. Despite the persuasiveness of Stone’s argument, such an exception has never been expressly recognized by the Supreme Court.

concerning the obligation owed by a state to the public acts of another state. Historically suspect statements such as those expressed by Justices Jackson and Stone about how the purpose of the full faith and credit clause was to “coordinate” and “integrate” the states into a “unified” nation provide no practical assistance in answering the relevant question: What effect must be given by a state to the public act of another state? To the extent that states have similar law, this is a less compelling issue. The controversial case is that in which a statute of a sister state expresses public policies that are contrary and repugnant to those of the forum state. Must these statutes also be enforced (i.e., given “effect”) by the forum court? If so, under what circumstances? To mandate such treatment would infringe upon the autonomy of the forum state’s legal system. Conversely, to allow a state to ignore the laws of its sister states would reduce its obligation to discretionary comity, thereby undermining the foundation for a national legal system. Perhaps anticipating this conflict, the sentiment of the delegates to the Constitutional Convention was mixed as to whether public acts should be covered by the full faith and credit clause, or whether to limit its application to out-of-state records, judicial decrees, and judgments.

Notwithstanding such ambivalence, the version of the clause included in the Constitution by the delegates and subsequently ratified by the state conventions does mandate that the states give full faith and credit to the “public acts” of their sister states. Moreover, the 1948 implementing statute specifically requires that state courts give the same effect to the public acts of a sister state as would be given by the courts in that state. Arguably, this too is a rule of evidence applicable to a court of law rather than a mandate to enforce the laws of all the other states all of the time. Under this view, in a legal proceeding a court must interpret and give the same effect to another state’s public acts as would a court in that state—assuming the court has decided under its choice of law rules to apply the law of the other state rather than its own law. Such a reading of the duties

imposed by the full faith and credit clause and the 1948 implementing statute is consistent with the recognition of an exception for *enforcing* (as opposed to merely interpreting) the public acts of a sister state that express public policies that are contrary and repugnant to those of the forum state. As we shall see, given the indeterminate language of the full faith and credit clause, federal courts have recognized such an exception under certain circumstances. In addition, Congress has legislated statutory exceptions to the effect otherwise mandated by the 1948 implementing statute with respect to certain public acts of a sister state. For these, Congress has allowed states to give a different effect or no effect at all. These statutes create limited exceptions to the duty of consistent application otherwise mandated by the 1948 implementing statute.

The delegates to the Constitutional Convention did not view the full faith and credit clause as imposing an immutable obligation on the states to enforce all the public acts of all the other states all of the time. The evidence is that the delegates deemed it necessary to include a separate constitutional provision to impose such a duty of enforcement for one specific body of law that was in direct conflict with that of the majority of the other states. The argument is, the delegates added this second provision to resolve this one particularly contentious conflict of law precisely because they did not believe that the full faith and credit clause imposed a duty to enforce this (or arguably, any) law of another state. This particular conflict of law involved the most odious and contentious of all state law—that which condemned hundreds of thousands of Africans and their progeny to a life of bondage as the personal property of their master. This was the law of chattel slavery.

Slavery was the original sin of America and the most divisive issue that the delegates confronted at the Constitutional Convention. It proved necessary at various junctures of the debates and in specific provisions of the Constitution that the delegates accommodate the “peculiar

institution.”⁷¹ Compromise was necessary with respect to those provisions dealing with the apportionment of representation and direct taxes, the importation of slaves, and the imposition of duties on those slaves that were imported. But by far, the most contentious issue was whether legal rights of ownership in slaves extended beyond the borders of the slave states into those states that prohibited slavery—in other words, whether the legal authorities in free states were required to enforce the slave laws enacted by their sister states. The delegates likely recognized that because the full faith and credit clause was “extremely indeterminate” (Madison’s words) and did not resolve conflicts of law with respect to statutes that expressed contrary public policies (i.e., slavery versus emancipation), it was necessary to provide a separate constitutional provision to specifically deal with the odious and contentious conflict of law over slavery. Their solution was itself odious and contentious—mandatory nation-wide enforcement of the laws of chattel slavery.

1. Slavery and Legal Federalism in the Antebellum Era

Slavery was legal (or at least tolerated) in all thirteen of the British colonies of North America and thereafter in the former colonies that joined together to form the Confederacy of the United States of America.⁷² These were the states that subsequently sent their delegates to the Constitutional Convention in Philadelphia in May 1787. Twenty-five of those delegates (out of the fifty-five in attendance) owned slaves themselves, including the entire delegations from Virginia

⁷¹ Slavery was commonly referred to as the “peculiar institution” in the late eighteenth century. More recently, the term was popularized by historian Kenneth M. Stampp in his important study, *The Peculiar Institution: Slavery in the Antebellum South* (New York: Knopf, 1956).

⁷² Prior to the Revolution, slavery was legal in all thirteen English colonies. Kenneth Morgan, *Slavery and Servitude in Colonial North America: A Short History* (New York: New York University Press, 2000), 77. At the same time, there were significant differences among the colonies in the treatment and use of slaves. For an overview of slavery in the colonies, see Betty Wood, *Slavery in Colonial America, 1619–1776* (Lanham, Md.: Rowman & Littlefield, 2005).

and South Carolina.⁷³ To be sure, numerous delegates were personally opposed to slavery, including several who owned slaves themselves.⁷⁴ But there was no organized antislavery movement yet in North America in the late eighteenth century.⁷⁵ Widespread ownership of slaves persisted into the early years of the new republic. This was indicated in the census of 1790, which listed slaves as residing in every state of the Union, with the exceptions of Vermont and Massachusetts (as well as the “district” of Maine, in which only sixteen slaves were listed as residing in this vast territory).⁷⁶ At the same time, slave ownership was largely concentrated in the Southern states as the border states that also recognized slavery had relatively few slaves. Moreover, the Northern states were beginning to ban the institution. By 1787, four states (Pennsylvania, Connecticut, Rhode Island, and Massachusetts) had already abolished slavery; several states went so far as to grant voting rights and citizenship to free black men.⁷⁷ Other states were considering banning the institution. Because of the emerging opposition to slavery in the North (as well as any extension of slavery into the territories), it was clear to the delegates of the Constitutional Convention that there would be no Union if slavery was expressly sanctioned by the

⁷³ David O. Stewart, *The Summer of 1787: The Men Who Invented the Constitution* (New York: Simon & Schuster, 2007), 68–71.

⁷⁴ A number of delegates who were slave owners eventually released them or freed them under their wills. This included George Washington, Caesar Rodney, John Dickinson. Numerous others were members of anti-slavery societies. The obvious disconnect between owning slaves and participating in a revolution to defend liberty and the rights of man is discussed in Richard Beeman, *Plain, Honest Men: The Making of the American Constitution* (New York: Random House, 2009), 333–35. For an account of the attitude of several prominent Founders toward slavery, see Morgan, *Slavery and Servitude in Colonial North America*, 108–15.

⁷⁵ An organized abolition movement did not begin in the United States until the 1830s. The American Antislavery Society was founded in 1834. Prior to that, there were only local antislavery societies. Seymour Drescher, *Abolition: A History of Slavery and Antislavery* (New York: Cambridge University Press, 2009), 303–06.

⁷⁶ In a nation of 3.89 million persons, 681,000 persons were slaves—nearly 18 percent of the population. Virginia had the largest slave population, with 292,267 slaves, or 39 percent of its population. Bureau of the Census, *A Century of Population Growth: From the First Census of the United States, to the Twelfth, 1790–1900* (Washington, D.C.: Government Printing Office, 1909), Title XIV (“Statistics of Slaves”), 132–33.

⁷⁷ Free blacks were eligible to vote in Maine, Vermont, New Hampshire, and New York. But even in these states, the legal rights of free blacks were suspect. For an account of the surge in the number of free blacks after the Revolution and their legal status, see Peter Kolchin, *American Slavery, 1619–1877* (New York: Hill & Wang, 1993), 80–85.

Constitution. At the same time, in light of Southern sentiments, there would be no Union if the Constitution prohibited slavery. Political reality dictated that there would be compromise and some accommodation of slavery. That much was certain. Federalism turned out to be the perfect institutional arrangement to accommodate that political reality. Federalism allowed the states to join together in a political confederation without ever addressing (much less resolving) the highly contentious and divisive issue of conflicting attitudes and laws concerning slavery.

The issue of slavery was first raised at the Constitutional Convention on August 24 in discussion of the authority of Congress to ban the importation of slaves.⁷⁸ (Notably, the words “slavery” and “slave” are never used in the Constitution itself; instead, there are oblique references to “persons held to service or labor,” or by negative implication, excluding those who were not “free Persons.” But every delegate understood to whom they were referring.⁷⁹) At that time, one of the special drafting committees (the Third Committee of Eleven) distributed a report entitled “Commerce and Slave Trade Compromise” in which constitutional language was proposed authorizing Congress to impose a tax or duty on imported slaves but prohibiting any ban on the further importation of slaves until the year 1800.⁸⁰ When debate commenced the next day, Charles Pinckney of South Carolina moved to postpone the sunset date to 1808—more than twenty years

⁷⁸ Those provisions of the Constitution that deal with (and accommodate) slavery as well as the political compromises entered into by the delegates to the Constitutional Convention are discussed in Paul Finkelman, *Slavery and the Founders: Race and Liberty in the Age of Jefferson* (Armonk, N.Y.: M.E. Sharpe, 2001), 3–33.

⁷⁹ In his seventh debate with Stephen A. Douglas, held in Alton, Illinois on October 15, 1858, Abraham Lincoln argued that this omission of all references to “slavery” and “slaves” was intentional, done so that in some future time “after the institution of slavery has passed from among us,” there would be nothing “on the face of the charter of liberty [i.e., the Constitution] suggesting that such a thing as negro slavery ever existed among us.” He took this as “evidence that the fathers of the Government expected and intended the institution of slavery to come to an end.” Abraham Lincoln, *The Lincoln–Douglas Debates* (Dansville, N.Y.: F. A. Owen Publishing Co., 1918), 140.

⁸⁰ Madison, *Notes of Debates in the Federal Convention*, 522. Such duty on imported slaves could not exceed the “average” duty laid on all imports. For a discussion of the compromise over the taxation of imports and prohibitions on banning the slave trade, see Calvin C. Jillson, *Constitution Making: Conflict and Consensus in the Federal Convention of 1787* (New York: Agathon Press, 1988), 140–50.

into the future.⁸¹ In response, Madison protested that twenty years was too long to suffer “all the mischief” attributable to the “liberty to import slaves.” As Madison put it: “So long a term will be more dishonorable to the National character than to say nothing about it in the Constitution.”⁸² Be that as it may, the delegates swiftly approved Pinckney’s motion, and the prohibition against a ban on prohibiting the importation of slaves was extended to 1808. With only slight modification, this language was inserted in Section 9 of Article I of the Constitution among the various limitations on the powers of the national legislature.⁸³ This particular limitation, however, would expire by its own terms in twenty years, at which time Congress would be free to ban the importation of slaves.⁸⁴ The delegates then reached an historic compromise as to how slaves would be counted for purposes of determining representation in the House of Representatives and the apportionment of direct taxes—the so-called three-fifths rule.⁸⁵

With these thorny issues resolved, the delegates turned to what was perhaps the most divisive issue related to slavery: the legal status of those slaves who traveled or escaped to a free state or territory. This was the invidious conflict of law that plagued the new nation for decades—

⁸¹ Pinckney informed the delegates that “if the Committee should fail to insert some security to the Southern States agst. and emancipation of slaves, and taxes on exports, he shd. be bound by duty to his State to vote agst. their Report.” Quoted in Farrand, ed., *The Records of the Federal Convention of 1787*, 2: 95.

⁸² Madison, *Notes of Debates in the Federal Convention*, 530; Farrand, ed., *The Records of the Federal Convention*, 2: 415.

⁸³ “The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.” U.S. Constitution, Article I, Section 9.

⁸⁴ Pursuant to such constitutional authorization, Congress enacted legislation on March 2, 1807 that banned the slave trade effective January 1, 1808. “An Act to Prohibit the Importation of Slaves” (2 Stat. 426, enacted March 2, 1807).

⁸⁵ The issue of how to count slaves for purposes of apportioning representatives in the House and the allocation of direct taxes was resolved in the Constitution by the compromise of counting slaves as “three-fifths of all other persons,” excluding Indians. U.S. Constitution, Article I, Section 2. James Wilson of Pennsylvania, an ardent opponent of slavery, proposed the three-fifths compromise to the delegates on June 11. See Madison, *Notes of Debates in the Federal Convention*, 103. For a discussion of the political tradeoffs behind the compromise, see Bruce Ackerman, “Taxation and the Constitution,” 99 *Columbia Law Review* 1–58 (January 1999); see also Charles J. Bullock, “The Origin, Purpose, and Effect of the Direct-Tax Clause of the Federal Constitution, I,” 15 *Political Science Quarterly* 217–239 (June 1900); Charles J. Bullock, “The Origin, Purpose, and Effect of the Direct-Tax Clause of the Federal Constitution, II,” 15 *Political Science Quarterly* 452–481 (September 1900).

the fundamental contradiction between the law of the states that sanctioned the ownership of slaves and those that expressly prohibited the institution of slavery. Not coincidentally, the issue was raised as soon as the full faith and credit clause was brought up for discussion on August 28. Charles Pinckney and Pierce Butler (also of South Carolina) moved to insert an additional constitutional provision that would “require fugitive slaves and servants to be delivered up [to their owners] like criminals.”⁸⁶ The two demanded a provision that would specifically mandate full faith and credit (*qua* enforcement) for the laws of chattel slavery in those jurisdictions that did not recognize the institution of slavery. James Wilson of Pennsylvania snidely retorted that such a constitutional provision would oblige the executive of a free state to “deliver up” a fugitive slave at the public expense of his own state. Roger Sherman of Connecticut then objected that this would be no more proper than requiring the public to seize and surrender a “wild horse” that had escaped. This was not exactly an objection based on high moral principles but rather on the more pragmatic grounds that the provision would impose a burden and expense on anyone in a free state who happened to confront an escaped fugitive. Hearing such discord, the delegates agreed to postpone discussion until they could formulate more precise constitutional language governing the legal treatment of slaves who escaped to those jurisdictions that did not recognize slavery.⁸⁷

The next day (August 29), Pierce Butler came back with his infamous solution, moving to insert a second constitutional provision (in addition to the full faith and credit clause) dealing specifically with fugitive slaves. Butler proposed the mandatory enforcement of the laws of slavery (at least, those laws that established ownership) everywhere within the jurisdiction of the United States: “If any person bound to service or labor in any of the United States shall escape into

⁸⁶ Madison, *Notes of Debates in the Federal Convention*, 545; Farrand, ed., *The Records of the Federal Convention*, 2: 443.

⁸⁷ *Id.*

another State, he or she shall not be discharged from such service or labor, in consequence of any regulations subsisting in the State to which they escape, but shall be delivered up to the person justly claiming their service or labor.”⁸⁸ Butler’s motion was promptly accepted by his fellow delegates. Thereafter, the provision was modified only slightly by the Committee of Detail and inserted into Article IV of the Constitution immediately following the full faith and credit clause: “No person held to service or labour in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due.”⁸⁹ This provision, the so-called fugitive slave clause, became part of the U.S. Constitution upon ratification by the state conventions.

The fugitive slave clause expressed the strongest possible version of full faith and credit with respect to this one particular conflict of law. It decreed that the laws of those states that recognized the legal ownership of Africans as chattel property must be enforced against any escaped slave in those states that did not recognize slavery—even in those states that had affirmatively banned slavery.⁹⁰ This extreme result was dictated neither by the law of nations nor the principle of comity. Indeed, under the law of nations as it had evolved in England by 1787, a fugitive slave who made his way to London would *not* have been returned to his master and

⁸⁸ Madison, *Notes of Debates in the Federal Convention*, 552; Farrand, ed., *The Records of the Federal Convention*, 2: 453–454.

⁸⁹ U.S. Constitution, Article IV, Section 2, Clause 3, superseded by the 13th Amendment (ratified December 18, 1865).

⁹⁰ Less appreciated is the reverse case, where the laws of the states that recognized free blacks extended into the South. Under a New York statute from 1840, a free black in New York retained his freedom even in a southern slave state. This required proving one’s status as a free man under New York law in the appropriate legal forum in the slave state—an extraordinarily difficult task, but not impossible. Act of May 14, 1840 (“An Act more effectually to protect the free citizens of this state from being kidnapped or reduced to slavery”), *Laws of New York*, 1840, p. 319. The statute was utilized by Solomon Northrup, a free black from Saratoga who was kidnapped and forced into slavery in Louisiana. After twelve years, Northrup was able to regain his freedom upon proof offered in Louisiana of his status as a free man in New York. Northrup’s ordeal is recounted in his moving memoir, *Twelve Years A Slave* (1853). Free Negroes living in the North such as Northrup were at risk of kidnapping by scoundrels looking for lucrative rewards.

bondage in some foreign nation or colony that recognized the institution of chattel slavery. Legal doctrine in England held that an escaped slave (even one from an English colony wherein slavery was legal) could not be extradited under the laws of England, which itself never recognized slavery.⁹¹ Comparable legal doctrines were recognized in France, which sanctified the so-called Freedom Principle (holding that any slave who set foot on French soil was emancipated).⁹² But the outcome was entirely different in the United States under the express terms of its Constitution. Not only would the escaped slave not find freedom in a free state, the Constitution affirmatively decreed that such fugitive be “delivered” back to his lawful owner—with ownership determined under the laws of the slave state from whence such fugitive had escaped. A slave could not escape the laws of slavery of Alabama, Mississippi, or any of the thirteen other states that recognized slavery by taking refuge in a free state, as the slave laws of his master’s domicile still applied to him. A voyage to London or Paris would have produced an infinitely better result.

Curiously, the object of the fugitive slave clause (speaking in the passive voice) is indeterminate. Who is required to “deliver” the fugitive slave to his rightful owner? That is not specified in the provision, which is not addressed to a particular person or governmental official. Arguably, *any* person who came in contact with an escaped slave was constitutionally obligated to seize and deliver him to his rightly owner, even though the state in which such slave found refuge

⁹¹ In the famous *Somerset* case of 1772, Lord Mansfield ruled that there was neither common law nor positive law supporting slavery in England and Wales (as opposed to many of the English colonies), and therefore, an escaped slave (James Somerset) who had been brought to England from Boston, could not be returned to his owner for transfer to the colony of Jamaica. The Chief Justice’s ruling did not outlaw slavery in England, but it did mean that a fugitive slave could not be detained in England or returned to bondage. For an account of the *Somerset* case, see Seymour Drescher, *Abolition: A History of Slavery and Antislavery* (New York: Cambridge University Press, 2009), 99–105.

⁹² In the 1738 case of *Jean Boucaux v. Verdelin*, the French court followed a comparable doctrine to that subsequently announced by Lord Mansfield in the *Somerset* case. The matter of Jean Boucaux (a slave in Saint Domingue who was brought to France by his master) and the Freedom Principle (which held that a slave who set foot on French soil was emancipated) are discussed in Sue Peabody, *There Are No Slaves in France: The Political Culture of Race and Slavery in the Ancien Régime* (New York: Oxford University Press, 1996), 23–40. As Peabody makes clear, the claim that there *never* were slaves in France and that any slave who set foot on French soil immediately became free is suspect. That said, slavery certainly was illegal in France by the mid-eighteenth century.

did not recognize the institution of slavery. Since all of the Northern states abolished slavery during the 1780s and 1790s, it is fair to say that these states found slavery contrary and repulsive to their public policies. Notwithstanding, the free states (and arguably, their officials and citizens) were constitutionally required to respect (nay, enforce) the laws of chattel slavery of their Southern neighbors. This constitutional provision was necessary because the full faith and credit clause (and later the Act of March 26, 1790) required much less—only that a court in a free state give the same effect to a legal determination or decree issued by a court of law in the state from whence the fugitive had escaped establishing such his status as a slave. Based on this, a court in a free state would only be required to acknowledge that the defendant was a slave in the state from whence he had escaped; the full faith and credit clause certainly did not require that citizens or state officials “deliver” the fugitive slave back to his “owner” upon demand. Furthermore, the law of the free state wherein the fugitive was detained might decree that any slave who set foot on the soil of that state was thereby emancipated (invoking its own Freedom Principle). Arguably, the slave states would be required in return to give full faith and credit to such an emancipation statute, over-riding its own law of slavery. Certainly, the full faith and credit clause did not compel the free states to *enforce* the laws of slave ownership of the Southern states and *return* an escaped slaves to bondage. The fugitive slave clause was necessary to produce the desired result of extradition—i.e., desired from the perspective of slave owners.

The delegates of the Southern delegations must have realized these shortcomings (again, from their perspective) of the full faith and credit clause, foreseeing that this constitutional provision might not be interpreted as requiring that officials and citizens of the free states enforce a decree or legal determination of ownership made by a court pursuant to the slave laws of a slave state—or even worse, interpreting it to require that the slave states must enforce a decree or legal

determination of emancipation by a free state. Were that to happen, the Northern states would be free to reject any request to deliver up an escaped slave and encouraged to emancipate the escaped slave under their own laws. Pinckney and Butler understood the need to include a stronger provision in the Constitution expressly guaranteeing the enforcement of the laws of chattel slavery with respect to “property” that might escape or be transported to a free state. And the South Carolinians got just what they demanded with nary an objection from the delegates of the Northern states, not even from those personally opposed to slavery. With the inclusion of the fugitive slave clause in the Constitution, the Founders mandated that the laws of slave ownership would have the same effect throughout the states of the Union, just as they would in a nation-state with a unitary government—namely, a uniform application and enforcement. The problem is, the United States is not a unitary nation-state, and the laws and public policy of the slave states directly contradicted and were repugnant to those of the free states. Nevertheless, the free states were constitutionally bound to enforce the laws of slave ownership. Such was the price of Union.

If conflict of law is inherent to legal federalism, this surely was the most divisive and intractable of such conflicts. The states could enact legislation to ban slavery within their own territory, but they could not offer emancipation or safe haven to fugitive slaves. In a perverse sense, the law of slave ownership extended into the free states notwithstanding their affirmative decision to ban the institution of slavery. The autonomy of the legal and political systems of the Northern states was compromised by constitutionalizing an extreme version of full faith and credit for the law of chattel slavery. The tension resulting from this contentious conflict of law only increased with attempts to enforce the laws of slavery in the North in reliance on the first federal statute enacted to implement the fugitive slave clause of the Constitution—the Fugitive Slave Act of 1793, officially titled: “An Act Respecting Fugitives From Justice, and Persons Escaping From the

Service of Their Masters.”⁹³ The Senate approved this legislation without a recorded vote, and the House approved the bill on February 5 by a lopsided vote of 48-7. Seven days later, President Washington signed the bill into law. The Slave Act of 1793 provided legal authority to the slave owner or his agent to seize and “arrest” his fugitive slave in any free state or territory and bring such person before a federal judge or state or local magistrate. Upon hearing compelling oral testimony or submission of a written affidavit, the judge or magistrate was required to “give a certificate” that would be respected as “sufficient warrant” for removing the fugitive slave from the free state and returning him to bondage.⁹⁴ The statute imposed a hefty punitive fine of \$500 on anyone who would “knowingly and willingly” obstruct or hinder the slave owner or his agent or anyone who would “rescue,” “harbor,” or “conceal” such person after receiving notice that he or she was a fugitive from slavery.⁹⁵

Not surprisingly, the free states objected to this extraordinary infringement upon the autonomy of their legal systems. Some enacted special statutes demanding extra evidence to demonstrate that the person really was an escaped slaves. Local magistrates commonly resisted enforcing the claims of slave owners or their agents and often refused to issue the “certificates” necessary to transport the slaves back to bondage in the South. All and all, the conflict between the laws of the free and slave states, left unresolved by the compromise and accommodation that paved the way for ratification of the Constitution, was exacerbated by enforcement of the Fugitive Slave Act of 1793. Several circuit court cases decided in the 1820s by Bushrod Washington (a nephew of George Washington who sat on the U.S. Supreme Court and rode the federal circuit) initially

⁹³ “An Act Respecting Fugitives From Justice, and Persons Escaping From the Service of Their Masters,” 1 Stat. 302–305, ch. 7, 2nd Congress, 2nd Session (February 12, 1793).

⁹⁴ *Id.*, Sec. 3, at 302–305.

⁹⁵ *Id.*, Sec. 4, at 305.

applied a strict construction of the statute that effectively prevented the enforcement of the laws of slavery in Pennsylvania. In *Ex Parte Simmons* (1823), Washington denied the application for a certificate of ownership by a resident of South Carolina who brought a slave to Philadelphia as a servant and left him there upon his return to Charleston. Washington held that under a literal reading of the statute, the slave was not a “fugitive” (as he had been brought voluntarily into the state by his master), and hence, the statute provided no relief to his owner who later tried to reclaim him under the authority of the Fugitive Slave Act of 1793.⁹⁶ It is worth noting that the Pennsylvania legislature had enacted “An Act for the Gradual Abolition of Slavery” on March 1, 1780 providing, among other things, that a slave brought into Pennsylvania and residing there for more than six months was thereby emancipated.⁹⁷ Washington did not go so far as to declare the individual at issue a free man, holding only that he could not be delivered back to his owner.

In subsequent cases the federal circuits displayed a greater willingness to enforce the mandate of the Fugitive Slave Act of 1793 to return an escaped slave to his master. These culminated in the important case of *Prigg v. Pennsylvania* (1842) in which the U.S. Supreme Court held that the Pennsylvania act purporting to prohibit the return of fugitive slaves and offer emancipation was unconstitutional and contrary to federal law.⁹⁸ The facts in *Prigg* were that a Negro woman lawfully held in slavery in Maryland escaped to Pennsylvania. At issue was the legality of the attempt to reclaim such slave pursuant to the legal authority granted by the Fugitive Slave Act of 1793. Writing for the majority, Justice Joseph Story (certainly no friend of slavery,

⁹⁶ *Ex Parte Simmons*, 22 F. Cas. 151, 4 Wash. C. C. 396 (Case No. 12,863, Circuit Ct., E. D. Pennsylvania, October 1823);

⁹⁷ The Act of March 1, 1780 prohibited the further importation of slaves into Pennsylvania and the gradual emancipation of existing slaves in Pennsylvania—other than those owned by members of the Congress, which sat in Philadelphia during the Confederacy.

⁹⁸ *Prigg v. Pennsylvania*, 41 U.S. 539 (1842).

having publicly denounced the institution as early as 1819⁹⁹) upheld the supremacy of the Constitution and federal law (i.e., the Fugitive Slave Act of 1793), declaring that the purpose of the fugitive slave clause was to “secure to the citizens of the slave-holding states the complete right and title of ownership in their slaves, as property, in every state in the union into which they might escape. . . .”¹⁰⁰ Story acknowledged that without the fugitive slave clause included in the Constitution, “every non-slave-holding state in the Union would have been at liberty to have declared free all runaway slaves coming within its limits, and to have given them entire immunity and protection against the claims of their masters; a course which would have created the most bitter animosities, and engendered perpetual strife between the different states.” This would have undermined the Southern slave owners’ interest in their “property in slaves.” To avoid this, according to Story, the fugitive slave clause was added to the Constitution “by the unanimous consent of the framers.”¹⁰¹ Under the authority of this clause, the property rights of the slave owner in his slaves (as defined by the laws of the applicable slave state) must be enforced by courts in the free states: “We have not the slightest hesitation in holding, that . . . the owner of a slave is clothed with entire authority in every State in the Union, to seize and recapture his slave, whenever he can do it without any breach of the peace, or any illegal violence.”¹⁰²

Notwithstanding his strongly worded decision in *Prigg*, Story held that the state governments were not bound to carry out any provisions of the Fugitive Slave Act; that duty fell

⁹⁹ Story spoke out against slavery and its extension into Missouri at a town meeting in Salem on December 10, 1819. His speech was reported in the *Salem Gazette*. Story drafted a resolution approved at the meeting and sent to Congress condemning slavery as a moral and political evil. The incident is recounted in R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* (Chapel Hill: University of North Carolina Press, 1985), 166.

¹⁰⁰ *Prigg v. Pennsylvania*, at 611 (J. Story).

¹⁰¹ *Id.*, at 612.

¹⁰² *Id.*, at 613.

exclusively on the national government.¹⁰³ Story also suggested in *obiter dictum* that the legislature of a free state could enact a statute that prohibited its state officials from cooperating with the enforcement of the Fugitive Slave Act of 1793.¹⁰⁴ Story’s loose language left the door open to so-called personal liberty statutes—state laws that prohibited state officials from cooperating in any action to return a fugitive slave. Such statutes were soon adopted in Pennsylvania, Vermont, and seven other Northern states.¹⁰⁵

As a consequence of the enactment of personal liberty statutes and continued resistance to enforcement of the Fugitive Slave Act of 1793, the Southern states intensified their lobbying in Congress to bolster the federal legislation. A number of attempts to enact legislation providing a more efficient mechanism to allow slave owners to reclaim their “property” initially failed, but eventually the Southern states succeeded. Pursuant to the so-called Compromise of 1850 (a package of five legislative measures crafted by Senator Henry Clay to resolve issues relating to slavery and its extension into the new territories), the enforcement mechanism for returning escaped slaves was strengthened under the Fugitive Slave Act of 1850, which now required federal marshals and other governmental officials to arrest any fugitive slave or risk a fine of \$1,000.¹⁰⁶

¹⁰³ “The clause is found in the national constitution, and not in that of any state. It does not point out any state functionaries, or any state action, to carry its provisions into effect. The states cannot, therefore, be compelled to enforce them; and it might well be deemed an unconstitutional exercise of the power of interpretation, to insist, that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted to them by the constitution.” *Id.*, 615–16.

¹⁰⁴ “As to the authority so conferred upon state magistrates, while a difference of opinion has existed, and may exist still, on the point, in different states, whether state magistrates are bound to act under it, none is entertained by this court, that state magistrates may, if they choose, exercise that authority, unless prohibited by state legislation.” *Id.*, 622.

¹⁰⁵ For a detailed account of the *Prigg* case and the personal liberty statutes enacted in the North, see Stanley W. Campbell, *Slave Catchers: Enforcement of the Fugitive Slave Law, 1850–1860* (Chapel Hill: University of North Carolina Press, 1968), 10–12, 170–86.

¹⁰⁶ “Act of September 18, 1850,” 9 Stat. 462–465, ch. 60, 31st Congress, 1st Session (September 18, 1850). For an account of the congressional negotiations behind the Fugitive Slave Act of 1850 as part of the Compromise of 1850, see Campbell, *Slave Catchers*, 15–25.

This was an even stronger violation of the autonomy of the legal systems of the free states—one greatly resented. In defiance, in 1854 the Wisconsin Supreme Court declared the statute unconstitutional. Unsurprisingly, the Supreme Court reversed that decision five years later on the obvious grounds that state courts lacked the authority to overturn a federal statute.¹⁰⁷ Vermont too enacted controversial legislation that forbid its judiciary and public officials from enforcing the despised federal statute.¹⁰⁸ Other New England states responded by enacting their own personal liberty statutes. The conflict of law between the slave states and the free states intensified.

Was it ever possible to resolve the conflict between the autonomy of the legal systems of the states (both free and slave) and the duties imposed on the free states by the fugitive slave clause of the Constitution and its statutory incarnations? Probably not with respect to such a divisive and salient issue as slavery. As Lincoln put it, the nation could not permanently endure “half slave and half free.”¹⁰⁹ That the Union endured so long with such a deep division over such an important issue was possible only on account of the nation’s federal constitutional structure. In the long-run, however, the legal system was unable to cope with the tension and discord resulting from the conflict of law over slavery. The Constitution certainly did not resolve this conflict of law when it mandated that the free states enforce the laws of chattel slavery of the Southern states. In truth, the conflict was resolved on the bloody battlefields of the Civil War. During the war, Congress found a temporary solution when it enacted legislation prohibiting Union military forces from returning

¹⁰⁷ See, e.g., *In re Booth and Rycraft*, 3 Wis 157 (1855). Following a protracted legal dispute, the Wisconsin Supreme Court released Sherman M. Booth, an abolitionist who had been convicted in the U.S. District Court for Wisconsin for violating the Fugitive Slave Act of 1850 by aiding the escape of a fugitive slave. The Wisconsin Supreme Court held that the Act was unconstitutional and the federal district court lacked jurisdiction. On appeal to the U.S. Supreme Court, Justice Taney and the majority upheld the constitutionality of the Fugitive Slave Act of 1850 and ruled that state courts could not overrule or contradict the decisions of the federal courts. *Ableman v. Booth*, 62 U.S. 506 (1859).

¹⁰⁸ Laws of Vermont, 1850, p. 9. The various statutes enacted by the Northern states are summarized in Marion Gleason McDougall, *Fugitive Slaves, 1619–1865* (Boston: Ginn & Company, 1891), 66–67.

¹⁰⁹ Abraham Lincoln, “House Divided Speech at Springfield, Illinois,” (June 16, 1858) in *Abraham Lincoln: Speeches and Writings, 1832–1858* (Library of America: New York, 1989).

escaped slaves to their owners, effectively negating the impact of the Fugitive Slave Act of 1850.¹¹⁰ Soon after the military hostilities ceased, the Thirteenth Amendment was added to the Constitution in December 1865 imposing a national solution and ending this contentious conflict of state law once and for all by banning slavery everywhere within the United States and its territories.¹¹¹ Some four score and twenty years earlier, federalism had accommodated slavery by allowing the slave and free states to join together in a political union by avoiding the burning question of whether the nation would sanction slavery or impose emancipation. With the ratification of the Thirteenth Amendment, the issue of slavery was forever removed from the realm of politics and law. But other contentious conflicts of law remain. These too reflect deep-rooted political and cultural differences among the citizens of the various states and regions of the nation. While certainly less contentious than the conflict of law over slavery, these too can be provocative and difficult to resolve in the absence of consensus with respect to the underlying public policies expressed by the public law of the states.

2. A Public Policy Exception for Public Acts?

The 1948 congressional statute implementing the effects clause of the Constitution requires that a court give the same effect to the authenticated records, decrees, and judgments of another state as would a court in that jurisdiction. This makes sense as records, decrees, and judgments represent a final determination of liability or legal status by the court of rendition. The matter has already been adjudicated and a decision rendered by a legal tribunal in the sister state. Depending

¹¹⁰ “An Act to Make an Additional Article of War Prohibiting the Return of Slaves,” Statutes at Large, Statute II, vol. 12, Chapter XL, 354, 37th Congress, 2nd Session (March 13, 1862).

¹¹¹ U.S. Constitution, Thirteenth Amendment, Section 1: “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” The amendment was ratified by the requisite 27 states on December 6, 1865.

on the nature of the legal action, the defendant has already had his day in court and already been found liable for a tort or the breach of a contract, declared divorced, or licensed to drive an automobile in a sister state, as the case may be. All that is required of the forum court is to accept the authenticated record of such legal determination and give it the same effect as would be given by a court in the sister state. This means enforce the judgment or recognize the divorce decree or driver's license issued by the sister state. As we have seen, the settled rule is that a court can hear challenges to a judgment, record, or judicial decree of a sister state only on limited procedural grounds. The implementing statute precludes re-litigating the merits of a final legal determination of liability by a sister state court. From the perspective of creating a coherent national legal system, this judicial rule makes perfect sense.¹¹²

A comparable rule for the public acts of another state does not. Here we are dealing with cases in which no final judgment has yet been rendered by a court in the sister state. The substantive legal dispute has not yet been adjudicated. Indeed, it is the forum court that will make that legal determination. Moreover, these are cases in which the forum court will be interpreting and applying the law of the other state. This is no easy matter. Certainly, it is more complicated than giving effect to an authenticated record, decree, or judgment of a court in another state. Perhaps this is why the sentiment among the delegates to the Constitutional Convention was mixed as to whether the public acts of a sister state should be included within the scope of the full faith and credit clause along with records, judgments, and judicial proceedings. In the late eighteenth century, it would have been very difficult for a court in one state to obtain accurate knowledge of the laws of another state. Enforcing an authenticated record, decree, or judgment of a sister state is

¹¹² A less robust rule would preserve greater autonomy for the states by casting the federal system as little more than a "league of friendship" among separate, sovereign states wherein no legal effect is given to the judgments, records, or judicial proceedings of a sister state. Such a weak judicial confederacy had its proponents in the late eighteenth century among those "antifederalists" supported the Articles of Confederation and opposed the Constitution of 1787.

much less problematic. That said, the final version of the full faith and credit clause included in the Constitution does apply to the public acts of a sister state, and so Congress and the federal courts have been forced to construct a meaning for such provision, which is hardly self-evident.

One thing is certain. Whatever duty is imposed on a state by the full faith and credit clause, such duty is owed to the “public acts” of its sister states. Thus, we must consider what falls into the category of a public act. No definition is provided in the Constitution or the implementing statute. There is a consensus, however, that the term includes statutes enacted by the state legislatures. The Supreme Court has said as much: “That a statute is a ‘public act’ within the meaning of the [full faith and credit clause] is settled.”¹¹³ The term has also been construed to include the common law of the state courts.¹¹⁴ Thus, the category of public acts includes statutes and common law. With that settled, the inquiry turns to the *nature* of the obligation owed to the statutes and common law of a sister state—and whether there should be an exception to such obligation in the event of conflicting public policies expressed by such public acts. The debates at the Constitutional Convention likewise offer no guidance in this inquiry. In truth, the obligation of a state to the public acts of its sister states was not a matter of great interest to the delegates, whose overriding concern was with the obligation owed to “foreign” (out-of-state) judgments. That remained so throughout the nineteenth century. The obligation of full faith and credit for the statutes and common law of sister states did not attract much attention until much later in the twentieth century.¹¹⁵ The exception was the heightened concern over the obligation owed to the slave laws of

¹¹³ See *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145, 154–55 (1932).

¹¹⁴ For a discussion of the case law holding that public statutes and common law are included in the term, see Reynolds and Richman, *The Full Faith and Credit Clause*, 29–30. Arguably, the term also includes a variety of administrative regulations.

¹¹⁵ “No one paid much attention to the problem of faith and credit to laws (as opposed to judgments) until well into the twentieth century.” Larry Kramer, “Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception,” 106 *Yale Law Journal* 1965, 1977 (1997).

the Southern and border states, but as we have seen, that conflict of law was addressed in its own constitutional provision. With respect to all other conflicts of law, the states are free to craft choice of law rules to determine when to apply the law of the forum state and when to apply the law of a sister state—subject to constitutional oversight by the Supreme Court and the constraints imposed by any statutory rules prescribed by Congress under the authority of the effects clause. Choice of law rules are promulgated by the state judiciaries with input from their state legislatures.

Let us first consider the dictates of state choice of law rules. The choice of law rules followed in the nineteenth century were relatively simple, with little variation from state to state. In tort actions between diverse parties, courts followed the doctrine of *lex loci delicti commissi*.¹¹⁶ In cases involving the enforcement of a contract, courts followed the doctrine of *lex loci contractus*.¹¹⁷ These rules were relatively simple and easy to apply. Where a tort was committed or a contract executed in another state, the forum court would apply the law of that other state—not its own state’s law. This was the result even where the sister state had little interest in the matter or contacts with the parties to the legal action other than being the situs of the tort or the execution of the contract. These rules had the great advantage of providing uniform and predictable (although not necessarily logical) results. By the second half of the twentieth century, states began to abandon these simplistic rules in favor of more complex calculations based on a “weighing” of various factors.¹¹⁸ Under the modern approach, the forum state may determine that it had a greater

¹¹⁶ In choice of law decisions involving an action in tort, the legal doctrine of *lex loci delicti commissi* dictated that the forum court follow the law of the place where the tort was committed (the “place of wrong”). *Restatement of Conflict of Laws* §§ 377–83 (1934).

¹¹⁷ In an action for breach of contract, the legal doctrine of *lex loci contractus* dictates that the law of the place where the contract was executed shall be followed. *Restatement of Conflict of Laws* §§ 332 (1934). That rule was considered overly restrictive by some courts, which also looked to the law of the place of performance and the law intended by the parties.

¹¹⁸ The new multi-factor approach was expressed in the *Restatement (Second) of Torts* § 145 (torts) and § 188 (contracts) and also incorporated into the *Restatement (Second) of Conflict of Laws* § 6, Choice-Of-Law Principles: “(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law. (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include (a) the needs of

connection and more significant contacts to the parties and their legal dispute than its sister state, justifying the application of its own law—even when the tort occurred or the contract was executed in another state. In this respect, a state’s choice of law rules can lead to outcomes directly in contradiction of the “strong” reading of the full faith and credit clause—which mandates the enforcement of all public acts of sister states all of the time. Where the forum court determines that it has sufficient contacts and interests in the legal dispute to justify the application of its own state’s law, the sister state’s law is given *no* faith, *no* credit, and *no* effect. The court follows its own state’s law in the adjudication of the dispute. It makes sense to mandate the enforcement of the records and judgments of the other states, but not its public acts.

So what constitutional obligation is owed by a state to the public acts of a sister state? The clause cannot mean that each state must always apply and enforce the public acts of all the other states all of the time. That would elevate them to a status and authority above its own public acts. To do so would, in the words of the Supreme Court, lead to an “absurd” result: “A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own.”¹¹⁹ For this reason, the Court has rejected the strong reading of the full faith and credit clause with respect to public acts. The prevailing interpretation of this “indeterminate” constitutional requirement holds no more than *if* the forum

the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.” Of course, different courts weighing the same factors can reasonably come to diametrically opposed conclusions as to which state's law should be applied to the legal dispute. The different approaches of the original and second *Restatement of Conflict of Laws* are discussed in William M. Richman and David Riley, “The First Restatement of Conflict of Laws on the Twenty-Fifth Anniversary of Its Successor,” 56 *Maryland Law Review* 1196 (1997).

¹¹⁹ *Alaska Packers Association v. Industrial Accident Commission*, 294 U.S. 532, 547 (1935).

court, in following its state's choice of law rules, determines that another state's public acts are more appropriately applicable to the resolution of a particular legal dispute involving diverse parties with interstate contacts, such court must give "faith and credit" to an authenticated copy of that state's public acts, treating them as conclusive evidence of that state's law and giving such public acts the same "effect" as would a court in the other state, as mandated by the 1948 implementing statute—unless otherwise mandated by a different congressional implementing statute that applies to this specific category of public act. This treatment is mandated by the full faith and credit clause as well as the applicable implementing statutes enacted by Congress under the authority of the effects clause. The states are also subject to constitutional constraints in crafting their choice of law rules, although these are relatively minimal. The Supreme Court requires only that a court demonstrate a "reasonable basis" and "significant forum contacts" justifying its decision to apply its own state's law rather than that of the sister state, which decision must be "neither arbitrary nor fundamentally unfair."¹²⁰

Choice of law rules traditionally have not been thought of as raising constitutional issues, but they do.¹²¹ Indeed, choice of law rules must be included with the full faith and credit clause and the implementing statute as part of the constitutional operating rules of legal federalism. As such, they must conform to the requirements of the full faith and credit clause, give the public acts of the other states whatever effect is prescribed by Congress in legislation, afford due process to the parties in their litigation, and respect the privileges and immunities of citizens of the other states. The added challenge is to craft choice of law rules in the absence of any clear guidance from the

¹²⁰ *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981). Due process requirements are reviewed in Reynolds and Richman, *The Full Faith and Credit Clause*, 18–43.

¹²¹ Laycock perceptively observes: "The continuing error [of modern choice of law scholarship] has been to ignore the constitutional principles that govern choice-of-law questions. . . Choice of law within the United State is inherently constitutional law." Douglas Laycock, "Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law," 92 *Columbia Law Review* 249, 250 (1992).

Constitution, the Supreme Court, or the debates of the delegates to the Constitutional Convention. To say the least, this is no easy task.

Because under the modern approach, courts look to a wide variety of factors in deciding which state's law to apply in cases involving diverse parties, interstate contacts, and a conflict of law, the states are free to include a public policy exception in their choice of law rules—assuming the exception does not violate constitutional standards.¹²² If such an exception is adopted and incorporated into a state's choice of law rules, contrary public policy will be one additional factor that a court will take into account in deciding whether to apply its state's law or that of another state.¹²³ Furthermore, the forum court can always beg out altogether by invoking the legal doctrine of *forum non conveniens* to dismiss the case.¹²⁴ To do so would end the litigation in that state, although the plaintiff would still have the option to bring a suit in the other state, which must have sufficient contacts to establish jurisdiction.¹²⁵

The Supreme Court has lent support to the claim that lesser deference is owed to public acts of a sister state that express public policies contrary to those of the forum state. Writing for the majority in *Hughes v. Fetter* (1951), Justice Black stated: “We have recognized . . . that full faith

¹²² Professor Kramer argues that the public policy exception in choice of law rules is unconstitutional to the extent the forum court discriminates against those laws of a sister state that it finds offensive. His conclusion is based on the assumption that the full faith and credit clause express “purposes” akin to what Justice Jackson assumed—namely, “integrating” and “consolidating” the separate states into a “unified” nation. See Kramer, “Same-Sex Marriage,” 1986–92. Those possessed of a different vision of the clause (e.g., maximizing the autonomy of the legal systems of the states) may reach a different conclusion with respect to the constitutionality of the public policy exception.

¹²³ The differences in public policy must be significant enough to be deemed repugnant to the policies and morals of the forum state. According to Judge Cardozo, the exception to enforcement of a “foreign right” is appropriate where to do so would “violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.” *Loucks v. Standard Oil Co.*, 120 N.E. 98, 2020 (1918). As Kramer notes, “public policy is not violated every time the forum's law differs from that of the place of celebration; otherwise, the exception would swallow the rule.” Kramer, “Same-Sex Marriage,” 1970. The exception should be narrow and applied in only limited and extreme cases.

¹²⁴ Where the forum court lacks sufficient connections to the dispute or there are good reasons not to hear the case, the court can refuse to exercise jurisdiction over the dispute under the doctrine of *forum non conveniens*.

¹²⁵ The sister state may have sufficient contacts with the parties to justify application of its law but still lack sufficient contacts to establish personal jurisdiction over the defendant. In such a case, the plaintiff may very well be out of luck.

and credit does not automatically compel a forum state to subordinate its own statutory policy to a conflicting public act of another state; rather, it is for this Court to choose in each case between the competing public policies involved. The clash of interests in cases of this type has usually been described as a conflict between the public policies of two or more states.”¹²⁶ Of course, in the most extreme conflict of law (that over slavery), it was not possible to adopt a public policy exception for the laws of slavery of another state because the fugitive slave clause of the U.S. Constitution (separate and apart from the full faith and credit clause) mandated universal enforcement of the laws of slave ownership. But for all other conflicts of law, which are governed by the full faith and credit clause and the relevant implementing statute, it is both feasible and sensible for states to craft such an exception in their choice of law rules.¹²⁷ The Supreme Court has recently reaffirmed this principle: “A court may be guided by the forum State’s ‘public policy’ in determining the *law* applicable to a controversy.”¹²⁸ For its part, under the authority of the effects clause, Congress can carve out exceptions to the effect owed to the public acts of a sister state—i.e., authorize states to give no effect to a sister state statute that expresses a public policy that is contrary and repugnant to its own.

How does the effects clause interact with the full faith and credit clause? Can Congress

¹²⁶ See, e.g., *Hughes v. Fetter*, 341 U.S. 609, 611–612 (1951); *Alaska Packers Association v. Industrial Accident Commission*, 294 U.S. 532, 523–524 (1935). Writing for the majority in *Alaska Packers*, Justice Stone noted: “In the case of statutes, the extra-state effect of which Congress has not prescribed, where the policy of one state statute comes into conflict with that of another, the necessity of some accommodation of the conflicting interests of the two states is still more apparent. . . . The conflict is to be resolved, not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight.”

¹²⁷ More recently, the Court reaffirmed the possibility of such an exception in *Franchise Tax Board of California v. Hyatt*, 538 U.S. 488, 494 (2003) (“[o]ur precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments”), citing *Baker v. General Motors Corp.*, 522 U.S. 222, 232 (1998). In *Franchise Tax Board*, the Court ultimately declined the invitation to recognize a *bona fide* public policy exception to the full faith and credit clause on the grounds that it was not presented “with a case in which a State has exhibited a ‘policy of hostility to the public Acts’ of a sister State.” *Id.*, at 499.

¹²⁸ *Baker v. General Motors Corp.*, 522 U.S. 222, 233 (1998).

enact legislation pursuant to the effects clause declaring that the effect owed to the public acts of a sister state is something *less* than full faith and credit? That is doubtful, as Congress cannot by statute modify or negate a clause in the Constitution. Neither can the federal courts. The full faith and credit clause requires that states *always* give full faith and credit (whatever that means) to the public acts of their sister states—no exceptions. The courts do not have the authority to craft a judicial exception to the full faith and credit clause of the Constitution. Congress can, however, prescribe rule in legislation that establishes the “effect” owed to the public acts, records, and judicial proceedings of another state, which is something different than full faith and credit—otherwise the second sentence of Article IV, Section 1 (the effects clause) would be redundant and unnecessary. So the effect given to a sister state statute would seem to be distinct from the obligation of full faith and credit owed to that statute. Congress has the authority under the effects clause to prescribe rules of evidence setting forth *what* effect is owed by a court to the public acts of another state. Furthermore, nothing in the effects clause or elsewhere in the Constitution prohibits Congress from prescribing rules that give a *different* effect to public acts than to records and judgments. Congress also has the authority to prescribe rules giving a different effect to different categories of public acts. There is no constitutional requirement that Congress prescribe a uniform effect for all public acts, although that was the rule Congress chose to adopt in 1948. Congress also has the authority under the effects clause to prescribe a different effect for different public acts, and that includes a lesser effect or no effect at all. There is no constitutional requirement for uniform effect. Congress has exercised this authority several times with respect to specific categories of public acts. Therefore, a state’s choice of law rules and the applicable congressional implementing statute ultimately will determine what effect is given to the law of a sister state, subject to the due process requirements required by the federal judiciary. State courts

are otherwise free to craft their choice of law rules, which may include an exception to applying another state’s law that expresses public policies that are contrary and repugnant to its own.

To be sure, Congress did not provide a public policy exception in the Act of May 26, 1790 or the 1948 implementing statute, instead requiring that a court give the same effect to *all* the public acts of a sister state as would a court in that state. But more recently, Congress has enacted other statutes under the authority of the effects clause prescribing a different effect for specific categories of public acts, records, and judicial proceedings. For example, Congress has promulgated a special rule prescribing the effect owed to child custody determinations, limiting the ability of a court to modify a custody determination issued by a tribunal in another state.¹²⁹ Elsewhere, Congress has prescribed the effect owed to child support orders issued by a court in a sister state.¹³⁰ Congress also has set forth rules for the proof and admission as evidence of various public records.¹³¹ These statutes prescribe a different evidentiary effect for these specific categories of public acts, records, and judicial proceedings than what is otherwise mandated by the 1948 implementing statute (i.e., the same effect as given by a court in the state of rendition). As we shall see, Congress also has enacted legislation that prescribes a special rule for the effect owed to public acts, records, and judicial proceedings of another state respecting a marriage between persons of the same sex—namely, states are free to give *no effect* to such public acts, records, and judicial proceedings.

¹²⁹ “Full Faith and Credit Given to Child Custody Determinations Act,” 28 U.S.C. § 1738A (also known as the “Parental Kidnapping Prevention Act of December 28, 1980”).

¹³⁰ “Full Faith and Credit for Child Support Orders Act,” 28 U.S.C. § 1738B, Pub. L. 103-383 (October 20, 1994).

¹³¹ 28 U.S.C. § 1733 (government records), §§ 1734–1735 (court records), § 1739 (non-judicial records), § 1740 (copies of consular papers), § 1741 (foreign official documents), § 1744 (copies of U.S. Patent and Trademark Office documents), § 1745 (copies of foreign patent documents)

III. ENDURING CONFLICTS OF LAW

The Thirteenth Amendment definitively resolved the most contentious and divisive conflict of law in our nation's history by banning the institution of slavery throughout the United States and its territories. With the ratification of this amendment, the terms of the original political compromise that paved the way for ratification of the Constitution of 1787 were drastically altered, the fugitive slave clause was superseded, and the states were prohibited from enacting specific laws—i.e., those establishing slavery. As a consequence, the autonomy of the legal systems of the states was diminished in this one discrete policy area. Other constitutional amendments subsequently ratified over the course of the next century imposed further restrictions on the autonomy of the legal systems of the states.¹³² Notwithstanding, the states have largely retained their traditional powers as well as most of the autonomy of their legal systems. As a result, the conflicts of law inherent to legal federalism have persisted—albeit conflicts considerably less contentious and divisive than that over the laws of slavery.

Even while the state legal systems have remained largely autonomous, state law itself has become more uniform since the late nineteenth century due to the efforts of successive generations of progressive legal reformers who have pressured state legislatures to adopt various uniform or model statutes.¹³³ For example, commercial contract law for the sale of “goods” is nearly identical

¹³² In subsequent years, constitutional amendments have imposed other restrictions on the autonomy of the legal systems of the states. These have, among other things, prohibited the states from abridging the privileges and immunities of citizens, discriminating against their citizens or restricting their right to vote on the basis of race or sex, or denying voting rights to citizens who have reached the age of eighteen years.

¹³³ Since the late nineteenth century, legal reformers have pressured state legislatures to adopt uniform statutes. The promulgation of uniform model statutes by such organizations as the American Law Institute and the American Bar Association furthered that reformist goal. The Uniform Law Commission of the National Conference of Commissioners on Uniform State Law has promulgated a wide range of uniform statutes with respect to such matters as probate, marriage, divorce, child custody, transfers to minors, as well as the Uniform Commercial Code. State legislatures have adopted model statutes for corporations, partnerships, and limited liability companies—making those areas of law reasonably uniform from state to state. The American Law Institute published a Model Penal Code in 1962. For an account of the uniform state law movement, see John D. Nugent, *Safeguarding Federalism: How States Protect Their Interests in National Policymaking* (Norman: University of Oklahoma Press, 2009), 77–99.

across the nation as all states other than Louisiana (which has a civil code) have adopted Article 2 of the Uniform Commercial Code. Arguably, the common law of the states also has converged over the last century as the legal principles expressed in the most prominent decisions of the most influential state courts have been “borrowed” and followed by other states.¹³⁴ The overall effect is more uniform law from state to state—especially in specific areas of the law (e.g., the law of corporations, partnerships, probate, commercial contracts, marriage, divorce, etc.). To the extent state law is more uniform, there are fewer conflicts of state law. Ironically, the differences in state law that remain reflect the most extreme disparities in public opinion and public policies. Not surprisingly, these generate those contentious conflicts of law that periodically confound and overwhelm our legal system as well as our political institutions—as slavery did.

A. A Constitutional Right to Abortion?

One particularly contentious conflict of law that has confounded our legal and political systems in recent decades concerns the legality of abortion under state law. By the turn of the twentieth century, all of the states had legal restrictions on abortions—in many cases, imposing criminal penalties on both those who performed as well as those who procured the procedure. In the decades that followed, a number of states loosened those restrictions, although the procedure was still widely condemned and prohibited by law in the majority of states. In 1972, the states remained divided over the question of whether abortion should be legal. Thirty states had statutes

¹³⁴ How states borrow legal principles enunciated by the most influential states is illustrated by the law for product liability. An early decision by Judge Cardozo on the Court of Appeals in New York stating a new rule was eventually adopted by all the other states. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916) (eliminating the requirement for privity of contract between the plaintiff and the defendant/manufacture). Likewise, the 1963 decision of the California Supreme Court introducing strict liability in product liability suits was adopted by all states except Massachusetts, which has even stronger legal protections for consumers. *Greenman v. Yuba Power Products*, 59 Cal. 2d 57 (1963) (holding that the plaintiff need not demonstrate negligence on the part of the defendant/manufacture).

that banned the procedure, while sixteen states prohibited abortions but provided for exceptions in cases of rape, incest, or danger to a pregnant woman's health. Only four states had legalized abortion on request.¹³⁵ To say the least, the issue was highly divisive and politically contentious.¹³⁶

After decades of prolonged debate and conflict, the issue eventually came before the U.S. Supreme Court in the case of *Roe v. Wade* (1973).¹³⁷ In a controversial 7–2 decision overturning a Texas statute that prohibited abortions except in the case of rape or incest, the Court held that a woman has a constitutional right to an abortion, subject to the state's legitimate interest in protecting the fetus and the pregnant woman's health.¹³⁸ While modified in subsequent cases involving efforts by states to limit abortion, the general principle enunciated by the Supreme Court in *Roe v. Wade* remains largely intact more than forty years later: a woman has a constitutional right to an abortion until such time as the fetus is viable.¹³⁹ By recognizing a constitutional right to an abortion, the Supreme Court took the matter out of the hands of elected representatives in state legislatures and resolved the conflict of state law over abortion by imposing a uniform “constitutional” solution on the nation. Notwithstanding the Court's decision in *Roe v. Wade* (or perhaps because of it), the issue of abortion remains highly divisive politically and has yet to be

¹³⁵ In 1972, abortion was legal in New York, Washington, Hawaii, and Alaska. Residents of those states that prohibited abortion were free to travel to one of these four states to have the procedure performed there.

¹³⁶ For an informative account of the highly contentious politics of abortion during this period, see James W. Reed, “The Birth Control Movement Before *Roe v. Wade*,” in Donald T. Critchlow (ed.), *The Politics of Abortion and Birth Control in Historical Perspective* (University Park: University of Pennsylvania, 1996), 22.

¹³⁷ *Roe v. Wade*, 410 U.S. 113 (1973) (holding that a woman has a right to an abortion until the viability of the fetus). Justice White wrote a dissenting opinion joined by Justice Rehnquist in the companion case of *Doe v. Bolton*, 410 U.S. 179 (1973). Justice White complained that the majority decision was “an improvident and extravagant exercise of the power of judicial review” that ignored the right of the “people and the legislatures of the 50 States” to exercise their own judgment on this issue. *Id.*, at 222.

¹³⁸ The most detailed account of the political and legal issues leading up to the *Roe v. Wade* decision is David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* (New York: Macmillan Publishing Company, 1994).

¹³⁹ The Supreme Court has allowed certain restrictions on abortion but not others. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (disallowing that section of a Pennsylvania statute that required spousal notification but allowed a 24-hour waiting period, informed consent requirement, and parental consent for minors).

resolved to the satisfaction of either side of the partisan divide.¹⁴⁰ The decision has been soundly criticized by numerous legal scholars who argue that there is scant textual support for the Court in finding a constitutional right to an abortion.¹⁴¹ The decision has been criticized even by those who support abortion on the grounds that the matter should have been left to the political process, with individual state legislatures deciding the legality of the procedure within that state.¹⁴² There is considerable merit to those argument. In any event, we now have a uniform national law for abortion as conflicts of state law remain only to the extent that state legislatures have adopted the aforementioned restrictions permitted by the Court.

B. Conflict of Law Over Same-Sex Marriage

The pre-*Roe* conflict of law over abortion reflected deep-rooted differences in the attitudes and cultural values of the citizens of the various states and regions of the nation. As such, it defied resolution through the traditional judicial rules used to resolve the common conflicts of law—state choice of law rules and the 1948 implementing statute. Aside from the conflict over abortion, perhaps the most contentious conflict of state law in recent decades has been that over the legal status of same-sex marriage. Indeed, both conflicts reflect much the same cleavage that divides Americans over so many social and cultural issues. Because of this, the contentious conflict of state law over same-sex marriage has confounded our legal system in much the same way as the conflict over abortion.

¹⁴⁰ On the forty-second anniversary of the Court's decision in *Roe v. Wade*, annual protest rallies were held in the nation's capital. See, John Bacon and Greg Toppo, "'Roe v. Wade' Turns 42; Thousands March in Protest," *USA Today*, January 22, 2015.

¹⁴¹ John Hart Ely, "The Wages of Crying Sin," 82 *Yale Law Journal* 920, 947 (1973) ("[*Roe v. Wade*] is bad because it is bad constitutional law, or rather because it is not constitutional law and gives almost no sense of an obligation to try to be."); see also John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980).

¹⁴² Jeffrey Rosen, "Worst Choice: Why We'd Be Better off Without *Roe*," *The New Republic*, February 24, 2003, 15.

Under longstanding tradition, marriage in all fifty states was understood as a union of one man and one woman (a “traditional marriage”). But tradition began to erode and public opinion shifted in the 1990s, giving way to a tacit acceptance of same-sex marriage in various regions of the United States.¹⁴³ The result was political pressure and lobbying in various states to change state marriage law and recognize same-sex marriages. The first serious legal challenge to traditional marriage came in May 1993 when the Supreme Court of Hawaii heard a dispute over that state’s statutory prohibition against same-sex marriage.¹⁴⁴ The case was remanded to the trial court to evaluate the various justifications put forth by the state for banning same-sex marriage. Ultimately, the trial court held that the state had failed to offer evidence of a “compelling state interest” in prohibiting same-sex marriage.¹⁴⁵ At the time, it appeared that Hawaii was about to become the first state to recognize same-sex marriage. Before that happened, however, the citizens of Hawaii adopted an amendment to their state constitution authorizing legal restrictions that limited marriage to individuals of the opposite sex, and the legislature quickly amended Hawaiian marriage law to restrict marriage to “one man and one woman.”¹⁴⁶ The controversy in Hawaii dragged on for another ten years, at which time the state legislature again amended its marriage law—this time to allow same-sex marriage.¹⁴⁷

¹⁴³ The dramatic shift in public opinion from 1996 to 2011 in favor of the recognition of same-sex marriage is summarized in Rosalee A. Clawson and Zoe M. Oxley, *Public Opinion: Democratic Ideals, Democratic Practice* (Los Angeles: Sage Publications, Inc., 2nd edition 2013), 297 (“Gallup surveys show that attitudes toward gay marriage have changed dramatically in the last fifteen years.”).

¹⁴⁴ The Supreme Court of Hawaii held that the ban constituted sex discrimination in violation of the Hawaiian state constitution. *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (Hawaii 1993). An earlier case was heard by the Supreme Court of Minnesota in 1971 challenging that state’s statutory prohibition against same-sex marriage on the grounds that it violated the U.S. Constitution, but the court held that the statute did not “offend” any constitutional rights. *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971).

¹⁴⁵ *Baehr v. Miike*, Circuit Court of Hawaii, First Circuit, Civil No. 91-1394 (December 3, 1996).

¹⁴⁶ Haw. Rev. Stat. § 572-1.6 (1994) (repealed 2013).

¹⁴⁷ Hawaii Marriage Equality Act of December 2, 2013, Haw. Rev. Stat. §§ 572-1 to 580-1 (Supp. 2013).

Notwithstanding the delay in Hawaii, the legal contest that began there in 1993 was the opening round of a protracted national debate over the legalization of same-sex marriage—a debate that has not yet been settled. In May 2004, Massachusetts became the first state to legalize same-sex marriage by statute.¹⁴⁸ Other states followed in recognizing same-sex marriage—some by legislative action and some by judicial decree. In response, opponents of this radical change to the traditional definition of marriage began to organize against efforts to legalize same-sex marriage. States enacted legislation and constitutional amendments to restrict marriage to one man and one woman, and at the same time, prohibit same-sex marriages.¹⁴⁹ Eventually, thirty-three states banned same-sex marriage—twenty-six by constitutional amendment and legislation, three by constitutional amendment only, and four by legislation only.¹⁵⁰ The result has been a contentious conflict of state law over same-sex marriage. The tally seems to change from day to day, but currently, some thirty-six states (including Hawaii) and the District of Columbia recognize same-sex marriages, while the rest do not.¹⁵¹

In 1996, Congress joined the fray when it enacted the Defense of Marriage Act (DOMA), which prohibited the recognition of same-sex marriage for federal purposes—even before any state

¹⁴⁸ Massachusetts became the first state to issue marriage licenses to same-sex couples following the decision of the Massachusetts Supreme Court in *Goodrich v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (Mass., Nov. 18, 2003) (holding that denying same-sex couples a marriage license violated the Massachusetts State Constitution). In 2000, Vermont became the first state to enact legislation recognizing civil unions.

¹⁴⁹ Prior to the *Baehr* case in Hawaii in 1993, states did not feel the need to define marriage or limit it to one man and one woman. For instance, the Kentucky Supreme Court considered a case in 1972 brought by two women seeking a marriage license in Kentucky. The court ruled that while Kentucky had neither a statutory definition of “marriage” nor a prohibition against same-sex marriage, the women were not entitled to marry in that state based on common usage of the term. The court held that no constitutional issues were invoked. *Jones v. Hallahan*, 501 S.W.2d 588, 589–590 (Ky. 1973). The state enacted a statutory ban against same-sex marriage in 1998. In 2004, the citizens of Kentucky approved an amendment to the state constitution with a similar prohibition.

¹⁵⁰ Figures cited in Barnes, “Without Hearing, Marriage Question One Step Closer to High Court,” A02; Liptak, “A Steady Path to the Justices,” A1.

¹⁵¹ Taking into account the decision of the Ninth Circuit Court of Appeals in October 2014, some 35 states recognize same-sex marriage. A summary of the legal contests in the various states is found in Robert Barnes, “With Hearing, Marriage Question One Step Closer to High Court,” *The Washington Post* (April 10, 2014), A02; Adam Liptak, “A Steady Path to the Justices,” *New York Times* (February 15, 2014), A1.

actually recognized same-sex marriage.¹⁵² As a consequence of this federal statute, two persons of the same sex who were married under the law of a state that recognizes same-sex-marriage would *not* be treated as married for purposes of federal law and programs.¹⁵³ Constitutional challenges were soon brought against DOMA in the federal courts. One such challenge reached the U.S. Supreme Court on appeal in 2013. In *United States v. Windsor*, a 5–4 majority of the Court overturned Section 3 of DOMA on the grounds that it deprived same-sex couples of the “liberty” and “equality” protected by the due process clause of the Fifth Amendment of the U.S. Constitution.¹⁵⁴ Following the Supreme Court’s decision, agencies of the federal government one by one announced their intention to recognize any same-sex marriage that was lawfully celebrated under the law of any state.¹⁵⁵

In its decision in *Windsor*, the Supreme Court addressed only the status of same-sex marriage for federal purposes and did not opine on the constitutionality of state prohibitions against same-sex marriage. In so avoiding this controversial constitutional question, the Court all but

¹⁵² “In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.” Section 3 (Definition of “marriage” and “spouse”) of Defense of Marriage Act (DOMA), Pub. L. 104–199, 110 Stat. 2419 (September 21, 1996), 1 U.S.C. § 7.

¹⁵³ That would include (among other things) for purposes of federal income taxation, gift and estate taxation, retirement benefits, veterans’ benefits, Social Security, Medicaid, and Medicare.

¹⁵⁴ *United States v. Windsor*, 570 U.S. 12 (2013) (holding Section 3 of DOMA unconstitutional under the due process clause of the Fifth Amendment of the U.S. Constitution). In his dissent, Justice Scalia complained that it was hard to decipher the specific provision of the Constitution that the majority believed was violated by this legislation.

¹⁵⁵ In light of the demise of Section 3 of DOMA, the federal government adopted a policy focusing on the place of celebration to determine whether a couple is married for federal purposes. For example, the Internal Revenue Service issued Revenue Ruling 2013-17, 2013-38 I.R.B. 201 (August 29, 2013) affirming that the marriage law of the place of celebration controls in determining whether a same-sex marriage is valid for purposes of federal income taxation—even if the couple resides in a jurisdiction or country wherein same-sex marriage is not recognized. The General Accounting Office has identified 1,138 federal statutory provisions as of December 31, 2003, in which marital status determines a recipient’s benefits or rights. U.S. General Accounting Office, *Defense of Marriage Act*, GAO/OGC-97-16 (Washington, D.C.: January 31, 1997).

invited further litigation on the issue.¹⁵⁶ Indeed, in the wake of *Windsor*, numerous law suits were filed across the country alleging such violations. As a result, no fewer than seventeen federal district courts have held that state prohibitions against same-sex marriages abridge various rights and protections afforded by the U.S. Constitution—notwithstanding that the Supreme Court itself did not reach that conclusion in *Windsor*.¹⁵⁷ At first, the Supreme Court declined all invitations to revisit the issue, leaving it to the federal appellate courts to decide the matter on a circuit by circuit basis.¹⁵⁸ Initially, all of the Courts of Appeals that addressed the issue came to the same conclusion—state prohibitions against same-sex marriage are unconstitutional.¹⁵⁹ But in November,

¹⁵⁶ This point was made by Justice Scalia, who in his dissent observed that notwithstanding that the Court did not hold prohibitions against same-sex marriage unconstitutional *per se*, the effect of the ruling in *Windsor* was to invite such a ruling—first by lower courts ignoring the limited scope of the *Windsor* decisions, and thereafter by the Supreme Court itself. Scalia sarcastically predicted that given the majority’s denigration of the federal prohibition against recognizing same-sex marriages, it was only a matter of time before the Court would turn its attention to state prohibitions and hold them unconstitutional as well. “In sum, that Court which finds it so horrific that Congress irrationally and hatefully robbed same-sex couples of the ‘personhood and dignity’ which state legislatures conferred upon them, will of a certitude be similarly appalled by state legislatures’ irrational and hateful failure to acknowledge that ‘personhood and dignity’ in the first place. . . . As far as this Court is concerned, no one should be fooled; it is just a matter of listening and waiting for the other shoe.” *United States v. Windsor*, at 36 (Scalia dissent).

¹⁵⁷ Indicative of this trend, Judge Arenda L. Wright Allen of United States District Court for the Eastern District of Virginia held that Virginia’s constitutional ban on same-sex marriage violates the right to equal protection afforded under the Fourteenth Amendment of the U.S. Constitution on the grounds that marriage is a fundamental right. *Bostic v. Rainey*, 970 F. Supp. 2d 456 (February 13, 2014). Implementation of that decision was stayed pending review by the Fourth Circuit Court of Appeals, which subsequently ruled in July that same-sex marriages were legal in Virginia. The U.S. Supreme Court stayed that decision in August 2014. Similar decisions from federal district courts in Utah, Michigan, Oklahoma, Wisconsin, and Texas were also stayed pending appeal. *Bishop v. United States ex rel. Holder*, No. 04-CV-848-TCK-TLW (N.D. Okla. Jan. 14, 2014) (holding that the state’s ban on same-sex marriage violated the Equal Protection Clause of the Fourteenth Amendment); *Kitchen v. Herbert*, No. 2:13-CV-217 (D. Utah Dec. 20, 2013) (holding that the state’s constitutional and statutory ban on same-sex marriage violated the Equal Protection and Due Process clause of the Fourteenth Amendment). A federal judge in Oregon held unconstitutional that state’s ban on same-sex marriage. One day later, a federal judge in Pennsylvania held that state’s prohibition unconstitutional.

¹⁵⁸ As recently as October 6, 2014, the Supreme Court denied certiorari in the Seventh Circuit’s decision in *Wolfe v. Walker*. By so refusing to review the Seventh Circuit’s finding of a constitutional right to same-sex marriage, the Court allowed same-sex marriage to move forward in five additional states.

¹⁵⁹ To date, four federal courts of appeals have held that state prohibitions against same-sex marriages abridge various rights and protections afforded by the U.S. Constitution. The Fourth Circuit Court of Appeals ruled in July 2014 that same-sex marriages were legal in Virginia. On June 25, 2014, the United States Court of Appeals for the Tenth Circuit held that states may not deny same-sex couples the right to marry. In a 2–1 decision, the Tenth Circuit held that such prohibitions violate the 14th Amendment of the U.S. Constitution. *Kitchen v. Herbert*, Docket No. 13-4178 (10th Cir., June 25, 2014). Along with the Fourth and Tenth Circuits, the Seventh and Eleventh Circuits have held constitutional various state prohibitions against same-sex marriage.

2014, the U.S. Court of Appeals for the Sixth Circuit took a contrary position, holding that state prohibitions against same-sex marriage are constitutional.¹⁶⁰ That decision forced the hand of the Supreme Court, which announced on January 16, 2015 that it would take the case from the Sixth Circuit on appeal to settle the split among the federal circuits.¹⁶¹ Hence, the Supreme Court will soon give a definitive ruling as to whether state prohibitions against same-sex marriage violate a constitutional right of same-sex couples to marry.

If the Supreme Court holds that there is a constitutional right to same-sex marriage, the question of whether a state has an obligation to recognize a same-sex marriage celebrated in another state will be rendered moot. The conflict of state marriage law will be resolved. On the other hand, if the Supreme Court upholds the Sixth Circuit in finding that there is *no* constitutional right to a same-sex marriage, then it will be forced to consider whether a state that prohibits same-sex-marriage must recognize a same-sex marriage celebrated in another state. Ever since the first hint that Hawaii or some other state might recognize same-sex marriage, this question has loomed on the horizon. This is yet the most recent example of the kind of contentious conflicts of state law that are endemic to our system of legal federalism.

To be sure, courts and officials never actually apply the marriage law of another state in celebrating a marriage—even where the parties to the marriage have strong connections to the other state (e.g., they are domiciled there). Courts follow their own state’s marriage law in granting

¹⁶⁰ *DeBoer v. Snyder*, Civil Action No. 12-CV-10285 (November, 6, 2014). The Sixth Circuit upheld prohibitions against same-sex marriage in Kentucky, Michigan, Ohio, and Tennessee.

¹⁶¹ On January 16, 2015, the Supreme Court announced that it will hear the four consolidated cases from the Sixth Circuit. *DeBoer v. Snyder*, No. 14-571 [cite]. Legal briefs from counsel are due April 17, 2015, with oral arguments to follow. The briefs will address the following questions: “1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex? 2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?” “Order List: 574 U.S.” *U.S. Supreme Court: SCOTUS Blog*. January 16, 2015. The Court’s decision is expected in July 2015.

marriage licenses and celebrating marriages within their jurisdiction. So this is not a conflict concerning which state's law will be followed in the marriage ceremony or in determining whether to grant a marriage license to a couple; it always will be the law of the forum state. Rather the question concerns the legal effect given by the courts in a state that prohibits same-sex marriage to the official record (i.e., a marriage certificate) of a same-sex marriage celebrated in another state. How this question is answered will determine whether the parties are recognized as married in the forum state. This much we know from the prior analysis: a court must accept an authenticated out-of-state marriage certificate as conclusive evidence that the same-sex couple was married in the state of rendition. This much is mandated by the 1948 implementing statute. This is the easy case involving the "records" of another state. The difficult question is, Must a court in a state that prohibits same-sex marriage recognize an out-of-state same-sex marriage? Based on the conclusions described above, the answer is no.

First, the court could decide that under its state's choice of law rules, it is entitled to apply its own state's law in determining the validity of the marriage—assuming that the forum state has sufficient contacts with the parties to the marriage and satisfies the minimal due process requirements.¹⁶² This will result in non-recognition of the same-sex union. Second, the court can give no effect to the out-of-state same-sex marriage laws where the forum state has a public policy exception for sister state laws that express public policies that are contrary and repugnant to its own. A state that prohibits same-sex marriages surely will be offended by the law of a sister state that recognizes such marriages. Finally, Congress has prescribed a special rule under the authority of the effects clause that deviates from the rule of consistent application otherwise mandated by the 1948 implementing statute, holding instead that states are free to give no effect to a same-sex

¹⁶² See *supra* note 118 and accompanying text.

marriage celebrated in another state.

Congress addressed the question in Section 2 of DOMA, which holds that states are free to give *no* effect to the public acts, judicial proceedings, and records of a sister state that recognize same-sex marriage: “No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State.”¹⁶³ The Effects Clause authorizes Congress to enact legislation prescribing the effect of the public acts of the other states, and pursuant to Section 2 of DOMA, Congress has declared that states need not give any effect to a same-sex marriage celebrated under the marriage law of another state. The provision is broad, and applies to the marriage certificate memorializing a same-sex marriage, a judicial record of such marriage, a divorce decree issued with respect to the dissolution of such a marriage, as well as a settlement agreement entered into pursuant to either a same-sex marriage or its dissolution. Under the authority of Section 2 of DOMA, a state that prohibits same-sex marriage may disregard *any* record, agreement, judgment, or judicial proceeding of any other state that recognizes a same-sex marriage celebrated there. This would include disregarding the record of a judicial proceeding in a sister state for an adoption of a child by a same-sex married couple if the forum state neither recognizes same-sex marriages nor adoptions by same-sex married couples.

Admittedly, this is a harsh and unsettling outcome as a same-sex marriage might be recognized in the state in which it was celebrated but not in another state. This creates the potential for a case of unlawful cohabitation, adultery, or rendering illegitimate any children of the invalid

¹⁶³ Section 2 (“Powers reserved to the states”) of Defense of Marriage Act (DOMA), Pub. L. 104–199, 110 Stat. 2419, 28 U.S.C. § 1738C (September 21, 1996). This federal statute was enacted by Congress before any state had yet recognized same-sex marriage. Notably, it does not forbid states from recognizing same-sex marriages or civil unions.

union.¹⁶⁴ On the other hand, the alternative is barely more unattractive—requiring states that do not allow their own citizens to enter into a same-sex marriage to recognize a same-sex marriage celebrated in another state. Such a rule would encourage same-sex couples to travel to another jurisdiction to be married before returning to their state of domicile. This is what Joseph Story referred to as a “marriage *in transitu*.”¹⁶⁵ To permit this would undermine the public policy of the forum state and allow even a single state that recognizes a different definition of marriage to dictate marriage law for all the other states.¹⁶⁶

Admittedly, there are no easy choices here. Our federal legal system creates confusion, contentious conflicts of law, and unsettling legal outcomes such as this. But the Supreme Court’s interpretation of the constitutional mandate for full faith and credit along with the rule prescribed by Congress in Section 2 of DOMA dictate that the choice of whether to recognize an out-of-state same-sex marriage lies with each state. Of course, the issue will be rendered moot if the Supreme Court holds that state prohibitions against same-sex marriages are unconstitutional. If that happens, this particular conflict of law will be resolved—although probably not to the satisfaction of opponents of same-sex marriage. Furthermore, efforts to adopt a constitutional amendment to reverse such decision are unlikely to succeed.¹⁶⁷ As such, the contentious conflict of law over same-

¹⁶⁴ Joseph Story warned of such “dangerous consequences” that might follow from one state declaring an out-of-state marriage a “nullity, merely because their own jurisprudence would not, in a local transaction, uphold it.” Joseph Story, *Commentaries on Conflict of Law, Foreign and Domestic* (Boston: Hilliard, Gray, and Company, 1834) § 116.

¹⁶⁵ *Id.*, § 192. As opposed to “marriage *in transitu*,” some legal scholars today typically use the term “evasion marriage” to describe this scenario in which the parties come to a state to take advantage of its more favorable marriage law. See, e.g., Linda Silberman, “Current Debates in the Conflict of Laws: Recognition and Enforcement of Same-Sex Marriage,” 153 *U. Pa. L. Rev.* 2195, 2198 (2005). Grossman notes that evasive marriages (“where citizens defy their own state’s restrictions by going elsewhere to marry and then returning home”) exist because “states have traditionally not imposed a residency requirement on marriage as they have on divorce.” Joanna L. Grossman, “Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws,” 84 *Oregon Law Review* 433, 464 (2005).

¹⁶⁶ “Hawaii should not be able to dictate marriage law to the rest of the nation.” Larry Kramer, “Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception,” 106 *Yale Law Journal* 1965, 1999 (1997).

¹⁶⁷ A resolution proposing a constitutional amendment to prohibit same-sex marriage was repeatedly introduced in Congress beginning in 2002. A version of this resolution (H.J.Res.88) was considered in the House in July 18, 2006 but

sex marriage that has inflamed passions for decades will cease—although the passions and controversial are likely to endure.

V. CONCLUSION

Had the delegates to the Constitutional Convention heeded the advice of Alexander Hamilton and George Read, they would have abolished the states as separate, sovereign political entities with autonomous legal systems and instead formed an American national state with sovereignty over all its territory and the authority to promulgate uniform law throughout the nation. The road not taken led to unitary government. Adopting such a constitutional structure would have dictated that the politics of the most controversial public policies would have played out in a very different political arena—i.e., the national legislature. Congress would have been forced to adopt uniform national policies, as opposed to leaving it to the legislatures of the states to adopt their own laws and public policies. For better or worse, the delegates took a different path—the road to federalism. They preserved the states as separate political entities with their own autonomous legal systems and the authority to make their own law, and in doing so, bestowed upon us legal federalism—with all the conflicts of law to which it is heir.

Little thought was given by the Founders to the question of how to integrate the separate legal systems of the various states with the new federal judiciary into a single, unified national legal system. Within such a system of legal federalism, how should a state court treat the records, public acts, and judicial proceedings of the other states in the confederation? The Constitution mandates “full faith and credit,” but otherwise provides no guidance—other than with respect to conflicting state laws over slavery. For all other cases, Congress was delegated the authority to

was defeated by a vote of 236 to 187. See Kate Zernicke, “House GOP Lacks Votes for Amendment Banning Gay Marriage,” *New York Times*, July 19, 2006, A17.

prescribe rules setting forth the “effect” that must be given to the records, public acts, and judicial proceedings of the other states.

As we have seen, Congress has exercised this discretionary authority from time to time to promulgate rules for resolving the conflicts of law that plague our system of legal federalism. The Act of May 26, 1790 and the 1948 implementing statute prescribe a uniform rule setting forth the effect owed to the records and judicial proceedings of another state—namely, the same effect as would be given by a court in the state of rendition. This rule of consistent application works reasonably well with for dealing with sister state records, decrees, and judgments—although problematic cases still can arise in which a record, decree, or judgment of another state expresses public policies that are contrary and repugnant to those of the forum state. Notwithstanding, the implementing statute sets forth a strict rule requiring that such records, decrees, and judgments be given the same effect as would be given by a court in the state of rendition. This rule makes sense because a court in the sister state has already rendered a substantive decision in the legal dispute. This judicial decision is memorialized in the record, decree, or judgment. The parties to the dispute cannot be allowed to escape the court’s determination of liability or legal status merely by traveling to another state within the confederation with more favorable law. Such a rule furthers the goal of integrating the separate state legal systems into a unified national legal system while only minimally infringing on the autonomy of the legal systems of the states.

It is more difficult, however, to craft a rule prescribing the effect owed to the “public acts” (i.e., statutes and common law) of the other states. These are cases wherein a final determination of liability has not yet been rendered and the forum court may be required to apply and enforce the law of another state in adjudicating the legal dispute. Until the twentieth century, other than with respect to the laws of slavery, the treatment of the public acts of a sister state was a much less

compelling issue than the enforcement of sister state judgments and judicial decrees. Where conflicts of law arose, they were routinely resolved by the states under their traditional choice of law rules, which determine whether to apply the law of a sister state or that of the forum state by looking to the situs of the tort, the execution of the contract, or the state wherein the marriage at issue was celebrated. In the twentieth century, these choice of law rules were supplanted by a more complicated rule to make the determination of applicable law. Furthermore, Congress enacted legislation in 1948 that expanded the scope of the implementing statute to apply to the “public acts” (e.g., statutes and common law) of a sister state, requiring that when a court applies a public act of a sister state, it must give the same effect to such public act as is given by a court in the state of rendition. More recently, Congress has enacted legislation prescribing a special effect to be given to specific categories of sister state law. Perhaps the most controversial of such legislation is Section 2 of DOMA, which allows states to give no effect to the laws, records, or decrees of a sister state that pertain to same-sex marriage.

Collectively, state choice of law rules, the Act of May 26, 1790, the 1948 implementing statute, and the other statutes enacted by Congress under the authority of the effects clause of the Constitution collectively constitute the operating rules for resolving the conflicts of law that arise in our system of legal federalism. Choice of law rules may also include a public policy exception permitting a court to follow its own state’s law where that of a sister state expresses public policies that are contrary and repugnant to its own. But where the court determines that the sister state’s law should be applied, Congress has generally mandated that the forum court give the laws of a sister state the same effect as would a court in that state. The glaring exception is the marriage law of another state that recognizes same-sex marriages. Here Congress has prescribed a different and controversial rule.

To say that these rules are complicated and that legal federalism generates uncertainty and contention is an understatement. With incoherent lines of authority and overlapping legal jurisdiction, our system of legal federalism is presently struggling with the contentious conflict of law over same-sex marriage—just as it did with the conflicts of law over slavery and abortion. It took brute military power and a constitutional amendment to resolve the former and a controversial mandate from the Supreme Court to resolve the latter. Our national legal system is ill-equipped to resolve such contentious conflicts of law in the absence of a consensus of opinion on the underlying policy issue. The result is a hybrid legal system wherein the more mundane conflicts of law are resolved through the routine application of state choice of law rules and the 1948 implementing statute enacted by Congress, while the truly divisive and most contentious conflicts of law are resolved through national legislation that preempts state law or amending (or reinterpreting) the Constitution to provide a uniform national legal rule. Alas, this is the peculiar legacy of our system of legal federalism.