

**CONFLICTS ORIGINALISM:
THE “ORIGINAL CONTENT” OF THE FULL FAITH AND CREDIT
CLAUSE AND THE COMPULSORY CHOICE OF MARRIAGE LAW**

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I. INTRODUCTION

*Acts of pardon, marriage, and divorce, made in one country,
are received and binding in all countries.*

—Supreme Court of Pennsylvania (1788)¹

The Full Faith and Credit Clause has been left seriously underenforced as a constitutional constraint on state choice of law. Despite its vigorous implementation in requiring recognition of the judgments of sibling states, the Clause has been applied to require very little deference to the laws of sibling states, even though the term “public Acts” appears right alongside “judicial Proceedings” in the text of the provision.² As applied by the Supreme Court today, the Clause allows a forum state to disregard the conflicting law of any sibling state as long as the forum has some colorable stake in applying its own law. Respect for even a weighty interest of a sibling state is left almost entirely to the voluntaristic vagaries of comity, usually impelled by mere forum altruism or enlightened self-interest but only rarely by constitutional mandate.

The Court is reluctant to enforce the Clause more fully in the choice-of-law context because of past struggles in doing so. The Court fears it lacks sufficient, objective guidance from which to derive enforcement criteria. At the same time, however, the Court has acknowledged that the Framers understood the Clause to place meaningful constraints on state choice of law and has even indicated a methodology for identifying this “original content” of the Clause.³ The missing element is an effort to use that methodology to identify this original content with sufficient certainty to give the Court adequate guidance to enforce the Clause more fully. Beginning to fill that gap is what I propose to undertake here.

Examining choice-of-law disputes as to the validity of marriages, I attempt to employ the methodology endorsed by the Court itself in an effort to establish that the original content of the Clause can be identified sufficiently for judicial use in resolving at least some conflicts questions. Marriage conflicts seemed a good prospect for testing the possibilities. Obviously, they have been the subject of much recent interest amid the debates over same-sex marriages. But it is not the controversy that necessarily makes marriage conflicts a good prospect for studying the originalist methodology. They are a good candidate because they were among the first subjects that English courts addressed when they began to develop conflicts principles. There is also a sense that jurists had reached some degree of consensus on the resolution of marriage conflicts

¹ Millar v. Hall, 1 U.S. (1 Dall.) 229, 232 (Pa. 1788).

² U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”).

³ Sun Oil Co. v. Wortman, 486 U.S. 717, 724 n.1 (1988).

around the time the Constitution was adopted. Marriage conflicts also provide a good test because they often present genuinely hard questions as to whether choice-of-law primacy should go to the place where a marriage was celebrated or the community to which a bride or groom belongs.

The methodology endorsed by the Court for discerning the original content of the Full Faith and Credit Clause is challenging. It requires examination of early modern sources from around Europe. It is not for the faint of heart. But as I will endeavor to demonstrate, real, useful results may be out there for the uncovering. My inquiry here will show that it is possible, with a high degree of confidence, to articulate at least some principles that likely formed the original content of the Full Faith and Credit Clause. The principles that emerge in this instance call for a forum state to apply the marriage-validating law of the sibling state where the nuptials at issue were celebrated, unless (1) the ostensible marriage is a type that is almost universally disallowed, or (2) at least one of the parties to the ostensible marriage hails from the forum and celebrated the marriage out-of-state in deliberate evasion of an invalidating restriction of the forum's marriage law.

The remainder of this article has five parts. Part II examines the possibility of an originalist approach to choice-of-law constraints under the Full Faith and Credit Clause. Part III clarifies the choice-of-law question presented by marriage conflicts. Part IV examines early modern Continental sources in an effort to identify their approach to marriage conflicts. Part V surveys Anglo-American sources to see if any consensus existed when the Clause was adopted. Part VI sums up the results of the historical inquiry and considers what they mean for developing full-faith-and-credit constraints on state choice of law in the context of marriage conflicts.

II. THE CONCEPT OF "ORIGINAL CONTENT"

An originalist approach to the Full Faith and Credit Clause as it relates to state choice of law centers on the concept of the Clause having an "original content." This concept refers to the idea that the Clause absorbed and imposed on an interstate basis the rules of international conflicts law as they existed when the Constitution was adopted in the late 1780s. In *Sun Oil Co. v. Wortman*,⁴ the Supreme Court itself articulated this idea and even provided cues as to the proper methodology for identifying this original content in particular situations. The methodology entails the use of early modern European and American sources to identify pre-existing conflicts principles.

⁴ 486 U.S. 717 (1988).

A. *The Clause as a Constraint*

The constitutional command to give “Full Faith and Credit” to the “public Acts” of sibling states might bear any of three meanings. It might always require a forum state to apply the conflicting law of a sibling state, it might never require it, or it might sometimes require it. The last reading, the situational one, is the prevailing view.

The first alternative is absurd. An absolutist command would always require either state in a two-state conflict to eschew its own law and apply the law of the other state.⁵ This total ban on ever choosing the forum’s own law would blindly subordinate the forum’s own policy to that of the other state in every instance of conflict. It also would always make a choice of law depend arbitrarily on the happenstance of forum, which would produce systemic incoherence and enable forum-shopping by rendering uniformity in choice of law constitutionally forbidden. This anti-forum reading cannot be correct. The Clause cannot always require subordination to the law of another state.

The second alternative, though more arguable, has not prevailed. It is true that, without ever mandating a choice of law, *faith* and *credit* could mean only that true copies of sibling laws must be received into evidence as conclusive proof of the existence of the laws they purport to represent. Despite some respectable academic support for this view,⁶ it has never gained prevalence.

Instead, the third alternative, the situational one, has commanded the greatest support. The Court’s view has always been that the Clause sometimes does require a forum to apply sibling law.⁷ This interpretation has also commanded the greater scholarly support.⁸

⁵ See *Pac. Emp’rs Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493, 501 (1939). In a conflict involving more than two states, this interpretation would require the articulation of rules for deciding which sibling state’s law a forum would have to choose. In those instances, the interpretation would not even have the merit of simplicity.

⁶ Ralph U. Whitten, *The Constitutional Limitations on State Choice of Law: Full Faith and Credit*, 12 MEM. ST. U.L. REV. 1, 3 (1981); cf. Kurt H. Nadelmann, *Full Faith and Credit to Judgments and Public Acts: A Historical-Analytical Reappraisal*, 56 MICH. L. REV. 33, 79–80 (1957) (arguing that the command never requires choice of sibling law in cases of “real conflict”).

⁷ See *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 494–95 (2003); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 823 (1985); *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 516 (1953); *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 156 (1932); *Converse v. Hamilton*, 224 U.S. 243, 260–61 (1912); *Chi. & A.R. Co. v. Wiggins Ferry Co.*, 119 U.S. 615, 622 (1887).

⁸ See, e.g., 1 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 541, 550, 563 (1953); William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 39–42 (1963); Harold W. Horowitz, *Toward a Federal Common Law of Choice of Law*, 14 U.C.L.A. L. REV. 1191, 1200–05 (1967); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 289–310 (1992); Max Rheinstein, *The Constitutional Bases of*

It also seems the most consistent with the expectation of the Framers, who seemingly did set out to constrain state choice of law. The 1787 Convention rejected a draft of the Clause that would have left states with the same discretion in interstate matters that nations have in international matters to disregard conflicts rules and ignore the laws of other sovereigns.⁹ Amendments to the draft empowered Congress to impose federal constraints¹⁰ and made the Clause self-executing instead of hortatory.¹¹ The latter change seemingly obliged courts to develop constraints on state choice of law when Congress fails to act,¹² as it mostly has.

Rather than re-litigate this basic question, I accept the prevailing view here and proceed from the premise that the Clause sometimes requires a forum state to choose the law of a sibling state.

B. *Judicial Reluctance*

Despite the general ascendancy of this view, the challenge has been to develop criteria for deciding when a forum has to apply sibling law. Although the Framers seemingly understood the need,¹³ they omitted the criteria—apparently content to leave the matter to existing conflicts law or congressional regulation. Because Congress has not generally acted,¹⁴ the task of applying the Clause to state choice of law has fallen to the Court, but the problem of developing criteria has vexed the Court to the point of near abdication.

Jurisdiction, 22 U. CHI. L. REV. 775, 787–88 (1955). See generally James D. Sumner, Jr., *The Full-Faith-and-Credit Clause—Its History and Purpose*, 34 OR. L. REV. 224 (1955) (assessing the intended application of the Clause to multistate transactions and occurrences).

⁹ See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 488 (Max Farrand ed., 1911) [hereinafter FARRAND] (“Mr. Wilson remarked, that if the Legislature were not allowed to *declare the effect*[,] the provision would amount to nothing more than what now takes place among all Independent Nations.”).

¹⁰ See *id.* at 489 (Morris amendment).

¹¹ See *id.* (“On motion of Mr. Madison, ‘ought to’ was struck out, and ‘shall’ inserted . . .”).

¹² See Laycock, *supra* note 8, at 301. But see Nadelmann, *supra* note 6, at 73 (arguing that “the view that the clause was designed to convey . . . to the courts of one state a constitutional command that they apply, whatever their own law, the legislative acts of another state, finds no support in the intentions of the drafters, including Morris”).

¹³ 2 FARRAND, *supra* note 9, at 448 (quoting a proposal to make sibling law “binding in every other State, in all cases to which it may relate, and which are within the cognizance and jurisdiction of” the sibling state).

¹⁴ But see Full Faith and Credit for Child Support Orders Act, 28 U.S.C. § 1738B(h) (2013) (child support orders); Defense of Marriage Act (DOMA) § 2, 28 U.S.C. § 1738C (2013) (same-sex marriages). The latter provision was arguably unconstitutional, even before the Court recognized in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), that same-sex couples have a fundamental right to marry. See *United States v. Windsor*, 133 S. Ct. 2675, 2693–94 (2013) (invalidating a different section of DOMA partly on the basis of the Act’s anti-gay legislative history).

After the issue lay dormant for more than a century, the Court began to develop significant full-faith-and-credit constraints on state choice of law in the early 20th century. It required a forum to apply the law of the state of incorporation in determining the liability of stockholders of an insolvent company¹⁵ and then in determining the rights and duties of members of a fraternal benefit society.¹⁶ Though technically citing due process, the Court also began to restrict the ability of a forum to override the law of the sibling state where a contract was made or was to be performed.¹⁷ Commentators wondered whether these lines of authority presaged the emergence of general constitutional constraints on state choice of law.¹⁸

It did not. When the Court tried to extend constraints to state choice of law in workers' compensation, the process ran aground. The Court's first effort, *Bradford Electric Light Co. v. Clapper*,¹⁹ resulted in only a fact-specific balancing of the competing interests of the states implicated in the conflict.²⁰ A second effort, *Alaska Packers Ass'n v. Industrial Accident Commission*,²¹ weakened even that balancing approach by adding a strong presumption that a forum state's choice to disregard sibling law and apply its own law is constitutional.²² Finally, in *Pacific Employers Insurance Co. v. Industrial Accident Commission*,²³ the 1939 turning point, the Court abandoned the balancing method altogether. Instead, the Court held that the Full Faith and Credit Clause does not "compel[] a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate."²⁴ In other words, as long as the forum state had a colorable basis for choosing its own law, the fact that a sibling state might have had a greater stake in the matter became constitutionally irrelevant. The sole

¹⁵ See *Broderick v. Rosner*, 294 U.S. 629, 643–44 (1935); *Converse v. Hamilton*, 224 U.S. 243, 261 (1912).

¹⁶ See *Sovereign Camp of the Woodmen of the World v. Bolin*, 305 U.S. 66, 75 (1938); *Modern Woodmen of Am. v. Mixer*, 267 U.S. 544, 551 (1925); *Supreme Council of the Royal Arcanum v. Green*, 237 U.S. 531, 541–44 (1915); see also *Order of United Commercial Travelers of Am. v. Wolfe*, 331 U.S. 586 (1947) (adhering to rule).

¹⁷ See *Hartford Accident & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 149–50 (1934); *Aetna Life Ins. Co. v. Dunken*, 266 U.S. 389, 399 (1924); *N.Y. Life Ins. Co. v. Dodge*, 246 U.S. 357 (1918); *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 160–61 (1914).

¹⁸ See, e.g., Oliver P. Field, *Judicial Notice of Public Acts Under the Full Faith and Credit Clause*, 12 MINN. L. REV. 439, 451 & n.33 (1928); Hessel E. Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468, 481–83 (1928).

¹⁹ 286 U.S. 145 (1932).

²⁰ *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 495 (2003).

²¹ 294 U.S. 532 (1935).

²² *Id.* at 547–48.

²³ 306 U.S. 493 (1939).

²⁴ *Id.* at 501.

question going forward was whether a forum state that had applied its own law had legislative “competence”—that is, jurisdiction—over the issue in conflict.

What ultimately emerged was a feeble test for establishing such competence. Not fully articulated until the Court’s 1981 decision in *Allstate Insurance Co. v. Hague*,²⁵ this test allows a forum state to apply its own law as long as the forum has “a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”²⁶ This test allows a forum to ignore sibling law in all but the extreme circumstances in which a forum tries to apply its own law to a dispute having no meaningful contact with the forum.²⁷ The result is close to the very outcome that the Framers rejected: sweeping discretion to ignore sibling law in interstate matters.

Although this test almost certainly leaves the Clause seriously underenforced, the Court has been reluctant to develop more vigorous constraints on state choice of law. In its most recent decision, *Franchise Tax Board v. Hyatt*,²⁸ the Court reaffirmed its retreat, describing the older balancing approach as having “quickly proved unsatisfactory.”²⁹ Emphasizing the lack of “guiding standards of a legal character,”³⁰ the Court was unwilling to resume the process of balancing state interests “[w]ithout a rudder to steer” it.³¹ As if to emphasize the reluctance, *Hyatt* even involved a forum’s disregard of a sibling state’s doctrine of sovereign immunity, something this Court has otherwise protected rather aggressively.³²

²⁵ 449 U.S. 302 (1981).

²⁶ *Id.* at 312–13 (plurality opinion).

²⁷ *See Phillips Petrol. Co. v. Shutts*, 472 U.S. 797 (1985); *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178 (1936); *see also Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) (using Due Process Clause).

²⁸ 538 U.S. 488 (2003).

²⁹ *Id.* at 495.

³⁰ *Id.* at 496 (quoting Robert H. Jackson, *Full Faith and Credit—The Lawyer’s Clause of the Constitution*, 45 COLUM. L. REV. 1, 16 (1945)).

³¹ *Id.* at 499.

³² *See, e.g., Alden v. Maine*, 527 U.S. 706 (1999). Indeed, the reluctance is so great—and the current test so weak—that one could almost characterize the Court as treating full-faith-and-credit constraints on state choice of law as a non-justiciable “political question.” *See Baker v. Carr*, 369 U.S. 186, 217 (1962) (noting a “lack of judicially discoverable and manageable standards” as a basis for invoking the political question doctrine). *Compare also id.* at 217 (“textually demonstrable constitutional commitment of the issue to a coordinate political department”), *with U.S. CONST. art. IV, § 1* (granting Congress power to legislate the “Effect” of giving full faith and credit).

C. Originalist Guidance

Despite the Court's reluctance, it has not closed the door entirely to stronger full-faith-and-credit constraints on state choice of law. It rejected the constraint proposed in *Hyatt* on its individual merits³³ without foreclosing entirely the possibility of additional constraints beyond the *Allstate* minimum. It may be, however, that only an originalist theory could satisfy the Court.

The desire expressed in *Hyatt* for "guiding standards"³⁴ echoed language from the Court's previous encounter with the subject. In *Sun Oil Co. v. Wortman*,³⁵ the Court had similarly resisted choice-of-law constraints that would leave judges "with no compass to guide us beyond our own perceptions of what seems desirable."³⁶ A proposed constraint seemingly must give judges the desired "rudder"³⁷ or "compass"³⁸ in deciding that a forum has unconstitutionally refused to choose the law of a sibling state.

Wortman suggests that an originalist theory may be the only possibility. There, a majority refused to accept another proposed constitutional constraint on state choice of law, but it nevertheless hinted that the principles of international conflicts law that existed when the Constitution was adopted might provide the foundation for developing workable constraints.³⁹ The Clause, in the majority's view, "made conflicts principles enforceable as a matter of constitutional command rather than leaving enforcement to the vagaries of the forum's view of comity."⁴⁰ In that way, conflicts principles of the era constitute the "original content" of the Clause.⁴¹ As such, they might supply the desired "rudder"⁴² or "compass"⁴³ for enforcing the Clause more vigorously as a constraint on state choice of law. The basic question in a particular case, however, would be what conflicts rule prevailed as to the relevant issue when the Constitution was adopted in 1788.

³³ *Hyatt*, 538 U.S. at 498.

³⁴ *Id.* at 496.

³⁵ 486 U.S. 717 (1988).

³⁶ *Id.* at 728.

³⁷ *Hyatt*, 538 U.S. at 499.

³⁸ *Wortman*, 486 U.S. at 728.

³⁹ *See id.* at 723.

⁴⁰ *Id.* at 723 n.1 (citing *Estin v. Estin*, 334 U.S. 541, 546 (1948)).

⁴¹ *Id.* at 724 n.1.

⁴² *Hyatt*, 538 U.S. at 499.

⁴³ *Wortman*, 486 U.S. at 728.

D. Originalist Methodology

A methodology for identifying that original content is also inferable from *Wortman*. The Court cited Justice Story's circuit opinion in *Le Roy v. Crowninshield*⁴⁴ as "indisputably correct" in its identification of framing-era conflicts principles relevant to the *Wortman* decision itself.⁴⁵ *Le Roy* thus presents an approved methodology.

There, Story relied on a variety of authorities. He cited early American court decisions, English court decisions, influential Dutch conflicts thinkers, Scottish commentators, and Continental specialists in commercial law.⁴⁶ Observing that civilian jurists were divided on the specific issue he was investigating, Story chose to rely on what he regarded as "the ablest of foreign jurists and courts."⁴⁷ He gave particular weight to two Dutch conflicts thinkers and to English jurists.⁴⁸ Significantly, Story said that he thought their rule was less preferable than an alternative that he favored but that he felt bound by their conclusion.⁴⁹ He saw himself as discovering conflicts law as it existed, not formulating it as he preferred it to be.

The reach beyond American sources was a product of necessity. Although there are some pre-Constitutional decisions by American courts on choice of law,⁵⁰ they fall far short of establishing a comprehensive body of law. The same is true of English courts. Notwithstanding some notable pre-1787 decisions,⁵¹ the development of English conflicts law largely occurred after 1790,⁵² after the U.S. Constitution was adopted. Instead, early modern principles of conflicts law derive primarily from the works of Continental jurists, whom scholars conventionally classify as belonging to one of three chronological schools of so-called statist thought: Italian, French, and Dutch.⁵³ The Dutch school proved to have the greatest influence on English

⁴⁴ 15 F. Cas. 362 (C.C.D. Mass. 1820) (No. 8269) (Story, J.) (collecting U.S. cases and analyzing foreign authorities).

⁴⁵ *Wortman*, 486 U.S. at 723.

⁴⁶ *Le Roy*, 15 F. Cas. at 365.

⁴⁷ *Id.*

⁴⁸ *Id.* at 371.

⁴⁹ *Id.*

⁵⁰ Laycock, *supra* note 8, at 307 n.340 (collecting cases).

⁵¹ See *Holman v. Johnson* (1775) 98 Eng. Rep. 1120 (K.B.); 1 Cowp. 341; *Robinson v. Bland* (1760) 96 Eng. Rep. 141 (K.B.); 1 Black. W. 256; *Scrimshire v. Scrimshire* (1752) 161 Eng. Rep. 782 (Cons.); 2 Hag. Cons. 395.

⁵² A.E. Anton, *The Introduction into English Practice of Continental Theories on the Conflict of Laws*, 5 INT'L & COMP. L.Q. 534, 539-40 (1956).

⁵³ See FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 11-21 (spec. ed. 2005). See generally 1 ARMAND LAINÉ, INTRODUCTION AU DROIT INTERNATIONAL PRIVÉ [INTRODUCTION TO PRIVATE INTERNATIONAL LAW] (Paris, F. Pichon 1888),

conflicts law, partly by way of its prior influence on Scottish conflicts law and through the specific intermediation of Lord Mansfield, a Scotsman who served as Lord Chief Justice from 1756 to 1788.⁵⁴

In *Wortman*, the Court itself bolstered that methodology by examining American decisions during the early national period. Those decisions “looked without hesitation” to international conflicts law and that they “uniformly” reached the same conclusion on the precise issue as Story did in *Le Roy*.⁵⁵ The Court also noted the treatise of Chancellor Kent,⁵⁶ which first appeared in the 1820s,⁵⁷ but stopped short of treating Story’s own 1834 conflicts treatise as an originalist source.⁵⁸

This guidance provides a sketch of the proper methodology for use in identifying the original content of the Full Faith and Credit Clause. This methodology should likewise govern the present search for the original content of the Clause as it may constrain state choice of law in determining the validity of marriages.

III. MARRIAGE RECOGNITION AS A CHOICE-OF-LAW QUESTION

If the Full Faith and Credit Clause sometimes mandates state choices of law as a matter of its original content, then it might sometimes require a forum state to “recognize” a marriage that was ostensibly formed in a sibling state. Despite a popular misconception to the contrary, this kind of marriage recognition arises as a choice-of-law question. Before seeking to identify any constitutional duties that the original content of the Full Faith and Credit Clause may place on a forum state in recognizing an out-of-state marriage, it will be useful to clarify how marriage recognition arises as a choice-of-law question in the first place. What kind of full-faith-and-credit issues would an original content need to address in the context of nuptial conflicts?

A. *Understanding the Choice-of-Law Question*

A civil marriage is a legal relation. Whether a forum state regards it as validly existing depends on the application of law to facts. But when the nuptial

<https://goo.gl/VERLp2>; 2 LAINÉ, *supra*, (1892), <https://goo.gl/220m15>; Max Gutzwiller, *Le Développement Historique de Droit International Privé*, 29 RECUEIL DES COURS 287 (1929); E.-M. Meijers, *L'Histoire des Principes Fondamentaux du Droit International Privé a Partir du Moyen Age, Spécialement dans l'Europe Occidentale*, 49 RECUEIL DES COURS 543 (1934).

⁵⁴ See generally Anton, *supra* note 52; D.J. Llewelyn Davies, *The Influence of Huber's De Conflictu Legum on English Private International Law*, 18 BRIT. Y.B. INT'L L. 49 (1937).

⁵⁵ *Sun Oil Co. v. Wortman*, 486 U.S. 717, 724 (1988).

⁵⁶ *Id.* at 726.

⁵⁷ 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW (1826).

⁵⁸ JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1834).

facts have contacts with more than one state, it may make a difference which state's law applies to the facts in determining their legal effect. Determining whether a valid marriage has arisen from a set of nuptial facts may require a choice of law—specifically, a choice between the marriage laws of the states having contacts with the nuptials.

A set of nuptial facts comprises a number of factual elements. Most obviously, there are the people who have ostensibly wed. *Connubiants* they may be called, as calling them spouses would presuppose a legal conclusion as to the validity of their nuptials. An additional factual element is that the connubiants will have concluded their nuptials in some manner. The nuptials may have been formal, involving a license and a solemnization performed by an officiant before witnesses, or the nuptials may have been informal, entailing only an unlicensed exchange of vows by the connubiants themselves. Other factual elements include the connubiants' knowledge or intent at the time of the nuptials as well as their behavior afterwards, such as living together or holding themselves out publicly as spouses. Any of these factual elements and still others could be relevant in determining whether the nuptials resulted in a legally valid marriage under the law of a particular state.

A multistate problem may arise because a set of nuptial facts may have meaningful contacts with more than one state. The locus contact is one. It refers to the occurrence of a significant event, such as the exchange of vows, in a particular place. What I call the *domus* contact is another meaningful one.⁵⁹ It refers to the fact that a relevant party, such as a connubiant, belongs to a particular polity, usually identified by domicile in Anglo-American conflicts law. A third type of contact is the situs contact. It refers to the location of a thing, including a relationship,⁶⁰ in a particular state. Here, the situs would be the state where the connubiants' post-nuptial relationship is centered, sometimes called the "matrimonial domicil[e]."⁶¹ A final contact is the forum contact. It refers to the adjudication of a dispute, such as the validity of an ostensible marriage, in a particular state's court, including a federal court.⁶²

⁵⁹ I use the generic Latin term *domus* to remain agnostic as to whether this contact is defined by domicile, residence, citizenship, or some other connecting factor. In this regard, I note that the drafters of the forthcoming *Third Restatement* have proposed to substitute habitual residence for domicile. RESTATEMENT OF THE LAW THIRD: CONFLICTS § 2.01 cmt. a (AM. LAW INST., Preliminary Draft No. 1, 2015).

⁶⁰ Cf. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2)(d) (AM. LAW. INST. 1971) (providing that the contacts to be taken into account in tort conflicts include "the place where the relationship . . . between the parties [in a tort case] is centered"); *id.* § 188(2)(d) (providing that the contacts to be taken into account in contract conflicts include "the location of the subject matter of [a] contract").

⁶¹ *Haddock v. Haddock*, 201 U.S. 562, 571 (1906).

⁶² A federal court must generally apply the conflicts law of the state in which it sits. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (extending the rule of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), to conflict of laws).

Here, the forum is the state where the court that is called upon to determine the validity of an ostensible marriage sits. When these contacts are arrayed among more than one state, the nuptials present a multistate fact pattern.

Determining the legal validity of such multistate nuptials may require a choice among the marriage laws of the states having contacts with them. The marriage laws of those states may diverge in meaningful respects. The nuptials might have been too informal for validity under the law of one state but sufficiently formal under the law of another.⁶³ The connubians might have been ineligible to wed under the law of one state but perfectly eligible under the law of another.⁶⁴ If the divergence would be outcome-determinative—that is, lead to different legal conclusions as to whether the nuptials produced a valid marriage—a meaningful conflict of laws exists. Determining the validity of the nuptials will require a choice among the marriage laws of the implicated states.

When called upon to adjudicate the question as a forum, each state must make that choice of law for itself. Conflicts law is forum law. The courts of each forum must follow the conflicts law of the state in which they sit,⁶⁵ including its principles for resolving interstate conflicts as to the validity of an ostensible marriage. Unless the parties are bound by claim or issue preclusion, the fact that a court of one state has made a particular choice of law does not bind the courts of other states to make the same choice of law in determining the validity of the same set of multistate nuptials. Without the Full Faith and Credit Clause to place some limit on state choice of law, each forum makes the choice-of-law decision and the determination of validity anew and independently.

This decentralized process enables the peculiar problem of the “limping marriage.”⁶⁶ Because each state must make its own choice of law, different states may make different choices as to the same connubians and the same set of nuptials. States making one choice and applying one state’s law may conclude that the nuptials resulted in a valid marriage, while states making a different choice and applying a different state’s law may conclude that the same nuptials were legal nullities that produced no valid marriage. The result is a severe systemic dysfunction, in which the same connubians are

⁶³ The principal example of this divergence among the states is the continued authorization of “common law” marriage—that is, the formation of a marriage by the personal exchange of vows without a license or solemnization—in about ten states. *Common Law Marriage by State*, NCSL (Aug. 4, 2014), <http://www.ncsl.org/research/human-services/common-law-marriage.aspx> [hereinafter *Common Law Marriage*].

⁶⁴ Notable examples of this divergence include differences in the degree of kinship necessary for voiding a marriage and varying ages of consent for marriage. 1 HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 2.9, at 156–59, § 2.10, at 171–73 (2d ed. 1987) (discussing degrees of kinship and ages of consent).

⁶⁵ *Klaxon*, 313 U.S. at 496.

⁶⁶ Torben Sverré Schmidt, *The Incidental Question in Private International Law*, 1992-II RECUEIL DES COURS 305, 319.

simultaneously understood as validly married in the view of some states but as not validly married in the view of other states. The marital status of such connubians may literally switch on and off as they cross from one state into another from the perspective of each state. Indeed, a person deemed married in one state but single in another may lawfully marry another spouse in the eyes of the latter state, resulting in a kind of “progressive polygamy” in which the person is simultaneously married to different people and has different legal families in different states.⁶⁷ As long as different states have different marriage laws, the only way to avoid “limping marriages” and the systemic dysfunctions that accompany them is by ensuring that every state make the same choice of law in determining the validity of the same set of multistate nuptials. Because conflicts law is state law, however, achieving that kind of uniformity in the resolution of the same nuptial conflict can be elusive. The Full Faith and Credit Clause could perform a useful function in mandating at least some conflicts uniformity in this area of the law.

The popular misconception about so-called marriage recognition is that no choice of law is necessary. The mistaken assumption is that the law of the locus where the nuptials took place automatically determines their legal effect and that the only question for other states is whether to “recognize” a marriage that has been validly formed in the locus.⁶⁸ Not so. Although a wedding officiant may rhetorically invoke the “power vested in me” by the locus state, no actual choice of law is usually made at the time of the nuptials, at least in the United States. In fact, licensing agents typically have no authority to perform any conflicts analysis so as to deny a marriage license based a determination that the proposed marriage would be invalid under the “proper law” that should govern its validity.⁶⁹ In the American system, the choice of law is almost

⁶⁷ STORY, *supra* note 58, § 124, at 117.

⁶⁸ For an example of even an outstanding lawyer formerly harboring this misconception, see Memorandum from Evan Wolfson, Dir., Marriage Project, Lambda Legal Def. & Educ. Fund, Inc., Winning and Keeping Equal Marriage Rights: What Will Follow Victory in *Baehr v. Lewin*?: A Summary of Legal Issues (Mar. 20, 1996), reprinted in *Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 14 (1996). There, the author incorrectly argued that

what is at issue [in so-called marriage recognition] is not whose law should govern, but rather what respect must be accorded a *res*, a marital status, that the couples now possess and embody. . . . The status has been created . . . and rights established—no question of what legal regime may be invoked is pertinent.

Id. at 21–22. To determine the legal effect of nuptials under another state’s law, Wolfson erroneously supposed, would be “to displace an accomplished act.” *Id.* at 23. But the act is not “accomplished” as a valid legal act until some state’s law is applied to it, which cannot be done until one determines which state’s law should be applied.

⁶⁹ *But see* Cote-Whitacre v. Dep’t of Pub. Health, 844 N.E.2d 623, 632–34 (Mass. 2006) (describing former effort by Massachusetts to have its licensing agents deny marriage licenses to same-sex applicants who were from states that did not allow them to marry).

always made “indirectly”—that is, after the fact—if the validity of the nuptials ever subsequently arises in court.⁷⁰ The mere fact that nuptials happened—even if licensed, solemnized, and recorded by the locus—does not mean that any proper authority has determined that the law of the locus should determine the legal effect of the nuptials or has affirmed their legal validity under it.⁷¹ The issue is not about “recognizing” a thing that already conclusively exists; the issue is about determining whether the thing, a legally valid marriage, has arisen from the nuptial facts by deciding what law applies to those facts.

The indirect process of making the choice of law may be disquieting. It means that an ostensible marriage resting on multistate nuptials that present a conflict of laws may go years or even decades without a determination of validity, if the validity is ever actually determined at all. If the issue of such a marriage’s validity does arise in litigation, only then will the choice of law be made. It will be made, moreover, by a court of whatever state happens to be the forum for the litigation and according to whatever conflicts rules that state has adopted. So-called marriage recognition is a matter of answering a choice-of-law question that has remained open since the nuptials and has been deferred, potentially for decades. Lying next to each other in the nation’s cemeteries, in fact, is an untold number of ostensible spouses whose multistate nuptials were invalid under the proper choice of law but were never tested in court.

B. *Making the Choice of Law*

Part of clarifying how so-called marriage recognition is a choice-of-law question involves identifying how the choice tends to be made. States have different stakes in having their laws chosen, and the choice presents a forum with certain dilemmas and implicates other policy considerations. There nevertheless is some consensus among American forums about how to approach nuptial conflicts. Knowing how forums tend to deal with nuptial conflicts helps to elaborate the kind of full-faith-and-credit challenges that might arise under an original-content theory.

The different states that have contacts with a multistate set of nuptials will have different stakes in having their marriage law chosen and used to assess the validity of the nuptials. Being the locus, the place where the nuptials take place, generally gives a state a stake in regulating the *formalities* of the

⁷⁰ LENNART PÅLSSON, MARRIAGE AND DIVORCE IN COMPARATIVE CONFLICT OF LAWS: GENERAL PART, SPECIAL PART § 265, at 169–70 (1974) [hereinafter PÅLSSON, FORMALITIES] (describing the difference between “direct” and “indirect” approaches); LENNART PÅLSSON, MARRIAGE IN COMPARATIVE CONFLICT OF LAWS: SUBSTANTIVE CONDITIONS § 2, at 3 (1981) [hereinafter PÅLSSON, SUBSTANTIVE CONDITIONS] (same).

⁷¹ Even if the locus itself made a choice of law in favor of its own law, conflicts law is forum law, so other forums, unless compelled by claim or issue preclusion, need not defer to that choice of law made by the locus.

nuptials—that is, how a legal act within its borders should be done.⁷² An example is whether the locus permits “common law” marriage or strictly requires a license and solemnization.⁷³ In contrast, being the *domus*, the polity to which the connubians belong, generally gives a state a stake in regulating the *material conditions* for a valid marriage—that is, whether the connubians are eligible to marry.⁷⁴ Examples would include the extent to which the *domus* permits consanguineous or teenage marriages.⁷⁵ Being the *situs*, the location of the marital relationship, generally also gives a state a similar stake as the *domus*, as the marriage will be “lived out” there.⁷⁶ Lastly, being the forum—that is, the state whose courts are adjudicating the question of validity—generally gives a state a stake only in having its procedural rules applied to the conduct of the litigation. A forum is nevertheless likely to have a stronger stake for another reason: It is likely to be the place where a dispute has arisen and thus the state whose law is being summoned to bestow some marital right, benefit, or duty—an incident of marriage—upon the connubians. That could conceivably give the forum⁷⁷ a stake in having its marriage-formation law applied to determine the validity of the nuptials themselves. These competing stakes obviously bear on the choice of law.

As these distinctions intimate, the need to make a choice among marriage laws triggers a fundamental dilemma in conflicts law, a dilemma between territorialism and tribalism.⁷⁸ Territorialism gives primacy to geography and favors choosing locus law because it is the law of the place within whose borders certain acts transpired.⁷⁹ Tribalism, in contrast, gives primacy to community and favors choosing *domus* law because it is the law of the people to whom parties belong.⁸⁰ The question is which has a greater stake in determining the validity a couple’s nuptials: the place where the formative

⁷² RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 cmt. c, f (AM. LAW INST. 1971). I use the word “stake” as a deliberately looser concept than a “governmental interest” under interest analysis.

⁷³ See generally *Common Law Marriage*, *supra* note 63.

⁷⁴ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 cmt. c.

⁷⁵ See CLARK, *supra* note 64, § 2.9, at 156–59, § 2.10, at 171–73.

⁷⁶ Because the *situs* of the relationship is defined by the post-nuptial *domus* of the connubians, we may simplify the analysis and focus exclusively on the *domus*. This simplification omits the cases in which connubians from one state establish their matrimonial domicile in a different state immediately following their nuptials.

⁷⁷ Technically, this would not be the forum state but the *causa* state—that is, the state whose law has been chosen as the one to regulate whatever legal incident of marriage is at issue. That state will often also be the forum. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 284.

⁷⁸ See LEA BRILMAYER, CONFLICT OF LAWS § 1.1.3, at 19 (2d ed. 1995) (identifying the dilemma between privileging personal and territorial contacts as endemic to choice of law).

⁷⁹ See Laycock, *supra* note 8, at 316–17.

⁸⁰ *Id.*

acts were done or the polity to which the couple belongs and to which their marriage contributes or from which it detracts.

Distinctions among state laws and policies also lead to a second dilemma, one between parochialism and cosmopolitanism. The basic issue is a forum's willingness to displace its own law in order to accommodate the diverse laws and policies of sibling states. When a sibling state has a greater stake in regulating certain nuptials or a certain aspect of them, a forum might nevertheless cling parochially to its own marriage law, a disposition that is likely to exacerbate such systemic dysfunctions as limping marriages. Alternatively, a forum could be more cosmopolitan in its outlook and less fixated on its own policies. It could make the choice of law with a greater willingness to accommodate the diverse laws and policies of its sibling states, particularly those having greater stakes in the matter than the forum does. As the locus or *domus* typically has a greater stake in regulating the nuptials themselves than the forum does, the forum's insistence upon applying its own law often reflects a parochial disregard for the stronger claim of a sibling state to have its law applied. At the same time, a forum may have profound objections to a sibling state's policy, so the forum could legitimately feel that accommodating a sibling policy would be asking too much and intruding too deeply into the forum's own sovereign prerogatives.⁸¹

Conflicts factors other than policy distinctions and state concerns are also potentially relevant in making the choice of law,⁸² and they tend toward the choice of locus law. The private interests of the connubians may be especially weighty. The connubians may have expected the validity of their nuptials to be determined by the law of the locus, or they may at least have expected that the nuptials would be deemed valid. The latter expectation can be fulfilled in most cases by choosing locus law, for a licensing agent will have at least preliminarily tested their eligibility to marry under that law at the time of the nuptials. They also will usually have complied with whatever formalities the locus required, so the nuptials should at least be formally valid, even if problems of materiality exist. Choosing locus law also likely serves an interest in judicial efficiency, for it is likely, on average, to be easier to identify the locus where the nuptials took place than the *domus* to which a connubiant belonged, especially if domicile is the test. Perhaps for some of the same reasons, there has also been a sense that choosing locus law is more likely to achieve interstate uniformity in the resolution of a nuptial conflict and thus minimize the problem of limping marriages.⁸³ Courts may also make the choice

⁸¹ See Linda J. Silberman, *Can the Island of Hawaii Bind the World? A Comment on Same-Sex Marriage and Federalism Values*, 16 QUINNIPIAC L. REV. 191, 196–203 (1996).

⁸² For other relevant factors, see RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2).

⁸³ This is true as an interstate matter because American forums tend to choose locus law, but achieving international uniformity would require American forums to confront the reality that

of law with an eye toward the substantive value of affirming the validity of an ostensible marriage, if feasible, and choosing locus law seems, on average, most likely to advance that goal of substantive justice.

In much of the world, this mixture of considerations produces two different conflicts rules for making a choice among marriage laws. Most foreign forums distinguish between nuptial conflicts involving material conditions and those involving mere formalities. When the conflict involves some material impediment to marriage, many foreign forums choose *domus* law and allow the views of a connubiant's polity to prevail in deeming the nuptials valid or invalid. Community prevails over geography, even with the additional conflicts policies that weigh in favor of locus law. Only when a conflict involves mere formalities do most foreign forums clearly choose locus law and give primacy to geography over community.⁸⁴ The general result is tribalism for material conditions but territorialism for formalities.

American forums, in contrast, have a more territorialist bent. At least as a general rule, American forums tend to choose locus law regardless whether a conflict involves material conditions or mere formalities.⁸⁵ In his landmark conflicts treatise, for example, Justice Story declared the "general principle" to be that the validity of a "marriage is to be decided by the law of the place, where it is celebrated."⁸⁶ Whether that choice resulted in affirming the validity of the nuptials or rejecting it was irrelevant: "If valid there, [a marriage] is valid every where. . . . If invalid there, it is equally invalid every where."⁸⁷ In Story's articulation, the rule called simply for choosing locus law in marriage conflicts and treating marriage laws as territorial, regardless whether the conflict involved material conditions or mere formalities and regardless whether the rule led to validation or invalidation.

But the latter distinction—the substantive outcome—has sometimes proved relevant to American courts and commentators. There is less American consensus as to the soundness of the locus rule when it would lead to the invalidation of an ostensible marriage because the nuptials contradicted the law of the locus where they transpired. One of the most widely used formulations of the American rule is actually an outcome-specific half-rule: "[A] marriage *valid* where celebrated is valid everywhere"⁸⁸ It may be more accurate to

most of the world's jurisdictions choose *domus* law in resolving conflicts as to the material validity of marriages. See *infra* text accompanying note 84.

⁸⁴ See PÅLSSON, SUBSTANTIVE CONDITIONS, *supra* note 70, § 3, at 4; PÅLSSON, FORMALITIES, *supra* note 70, §§ 8–50, at 5–25 (formalities).

⁸⁵ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(1).

⁸⁶ STORY, *supra* note 58, § 113, at 103–04; see also *In re May's Estate*, 114 N.E.2d 4, 6 (N.Y. 1953).

⁸⁷ STORY, *supra* note 58, § 113, at 104.

⁸⁸ *Dunham v. Dunham*, 44 N.E. 841, 848 (Ill. 1896) (emphasis added); accord CAL. FAM. CODE § 308 (amended 2014); CAL. CIV. CODE § 63 (1872) (repealed 1992); *Cote-Whitacre v.*

describe the rule as not simply a locus rule but, in such outcome-specific terms, as a locus-validation rule.⁸⁹ Support has been weaker for its converse, a locus-invalidating rule, under which locus law would be applied to invalidate nuptials even though they were consistent with the law of the *domus*. A serious full-faith-and-credit question might be whether either of these rules, particularly the locus-validation one, is constitutionally required. Is a forum constitutionally forbidden to adopt a *domus* rule, even when conflicts involve material conditions? After all, much of the world today would use the *domus* rule in resolving conflicts as to material conditions.

Even though usually applied in American forums, moreover, this locus-validation rule is not absolute. Rather, it is subject to a public policy exception that may also prompt a forum to disregard the law of a sibling locus. This exception can be conceptualized in two different ways. On one view, the exception overrides locus law in favor of forum law and thus accommodates a forum's objection to a marriage.⁹⁰ On the other view, the exception overrides locus law in favor of *domus* law and thus accommodates a strong objection of a connubiant's home state to his or her marriage.⁹¹ The *Second Restatement* essentially endorses only this second version.⁹² It functions as a kind of limited renvoi, in which the forum defers to the refusal of the home state to accept the

Dep't of Pub. Health, 844 N.E.2d 623, 654 (Mass. 2006) (Marshall, C.J., concurring) (same-sex marriage); *Bucca v. State*, 128 A.2d 506, 508 (N.J. Super. Ct. Ch. Div. 1957) (uncle-niece marriage); *Osoinach v. Watkins*, 180 So. 577, 579 (Ala. 1938) (nephew's marriage to uncle's widow); *Leefeld v. Leefeld*, 166 P. 953, 954 (Or. 1917) (first-cousin marriage); *Pennegar v. State*, 10 S.W. 305, 306 (Tenn. 1889) (post-divorce marriage); *Kinney v. Commonwealth*, 71 Va. 858, 868 (1878) (interracial marriage); *Boyer v. Dively*, 58 Mo. 510, 511 (1875) (customary marriage among Indians); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2); RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 121 (AM. LAW INST. 1934).

⁸⁹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (endorsing use of the locus-validation rule "unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage"); *see also* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 121 ("[A] marriage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with."); JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE § 125, at 97 (1852) ("[A] marriage valid by the local law where it is celebrated . . . is good everywhere."); 2 KENT, *supra* note 57, at 78 (1827) ("[A] marriage valid by the law of the place where it is made, is valid every where.").

⁹⁰ *See, e.g., Commonwealth v. Lane*, 113 Mass. 458, 463 (1873).

⁹¹ *See, e.g., In re Stull's Estate*, 183 Pa. 625, 630 (1898).

⁹² RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (endorsing use of locus-validation rule "unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage"); *see also* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 132 (stating that "a marriage which is against the law of the state of domicile of either party . . . will be invalid everywhere" in specified circumstances).

validity of the nuptials under the locus law.⁹³ The first version, in favor of the forum, is simply a privileging of parochialism. In either case, a second major full-faith-and-credit question is whether a forum is constitutionally prohibited from invoking either version of this public policy exception.

To a significant extent, the two full-faith-and-credit questions that American practice is most likely to present in the context of nuptial conflicts converge into one overarching inquiry: Under what circumstances, if any, does the original content of the Full Faith and Credit Clause support a constitutional mandate that would require a forum state to choose the marriage law of a sibling state that was the locus of the nuptials or the *domus* of the connubiants?

C. *Conflicts Patterns*

A full-faith-and-credit question would be most likely to arise in either of two types of nuptial fact patterns. The existence of a locus contact, a *domus* contact for each connubiant, and a forum contact make for a variety of permutations in the possible distribution of contacts among two or more states. But two types of distributions stand out as the most likely to give rise to nuptial conflicts. To simplify the inquiry, other possibilities may be set aside.

The first of these conflict patterns is the *evasion* scenario.⁹⁴ It is the most common pattern found in nuptial conflicts in American decisions. In its simplest form, the evasion scenario arises in a two-state conflict, in which one state is the forum and the *domus* of both connubiants, while the sibling state is the locus where the nuptials took place. The law of the first state disallows the type of marriage, while the locus permits it. Under this scenario, the connubiants, who are not allowed to marry in their home state, travel to the locus and have their nuptials there before immediately returning home. Sometimes, the home state, which is also the forum, will choose the law of the locus and affirm the validity of the evasive marriage. Sometimes, however, it will not. The question is whether the original content of the Full Faith and Credit Clause would ever support a constitutional mandate to choose the law of the sibling locus and stop the home-state forum from choosing its own law to deem the nuptials void. A less common variation on the evasion scenario is what might be called the *outrange* scenario, in which connubiants could have validly married under the law of the *domus* but travel elsewhere and have their nuptials in a locus under whose laws the nuptials are not actually valid. This is the scenario that has raised the question whether the simple locus rule applies in cases of locus-invalidation of the nuptials.

⁹³ Hans W. Baade, *Marriage and Divorce in American Conflicts Law: Governmental-Interests Analysis and the Restatement* (Second), 72 COLUM. L. REV. 329, 355 (1972).

⁹⁴ The classification scheme adopted here is a modification of one developed during the debates of same-sex marriages. See Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2144–46 (2005).

The second of the conflict patterns is the *chauvinism* scenario. In its simplest form, this scenario also arises in a two-state conflict, in which one state is the forum, while the sibling state is the *domus* and locus. The type of marriage is permitted in the sibling state, where the connubians live and where their nuptials took place. The forum, however, does not permit the type of marriage and refuses to choose the law of the sibling state and affirm the marriage's validity—hence, the “chauvinism” label. This type of case can arise in a range of situations, but they all involve the connubians coming into contact with the forum in some way and ending up in litigation there. The strongest situation in the forum's defense is one in which the connubians actually move to the forum sometime after their nuptials. This *migratory* situation involves a post-nuptial change in the *domus* contact, which shifts to the forum after the fact of the nuptials. A second situation would be one in which the connubians merely visit or pass through the forum and somehow become embroiled in litigation there. This *visitor* situation does not involve any post-nuptial change in any of the contacts; rather, it involves the additional transient contact with the forum. A final situation would be one in which the connubians had no physical presence in the forum but nevertheless became embroiled in litigation there as a result of some additional contact, such as inheriting land that is situated in the forum. In this *extraterritorial* situation, as with the visitor one, there is no post-nuptial change in any of the nuptial contacts. The question is whether, in any of these situations, the original content of the Full Faith and Credit Clause would ever support a constitutional mandate to choose the marriage law of the sibling state and stop the forum from choosing its own law (or invoking its own public policy) to deem the nuptials void.

Although these scenarios are defined by the particular distribution of contacts, that is not likely to be the only relevant consideration. It may be highly relevant, for example, whether the nuptial conflict involves a material condition or mere formalities. It may also be relevant whether the particular case presents a question of pure status or is one in which a connubian is seeking an incident of marriage, one likely to be derived from forum law. It may be relevant whether the choice of law would affirm or reject the validity of the nuptials. The other conflicts factors, such as the private interests of the parties, judicial efficiency, or the avoidance of systemic dysfunctions, may bear on the inquiry as well.⁹⁵ The historical sources may not be sufficient to provide complete guidance as to the original content of the Full Faith and Credit Clause with respect to all of these variables, and that possibility will bear on the feasibility of an original-content theory. These variables are nevertheless the ones most likely to be present in the kind of nuptial conflicts to which the theory would have to apply.

⁹⁵ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2).

IV. CONTINENTAL COMMENTARY ON MARRIAGE CONFLICTS

Identifying the original content of the Full Faith and Credit Clause as it relates to the choice of marriage law is traceable to early modern Continental commentary on conflicts law. The methodology endorsed by the Court in its *Wortman* decision included the conflicts thinkers in the Dutch school as well as Continental specialists in the relevant substantive area of law.⁹⁶ The same methodology works for marriage conflicts, but it requires a deeper historical reach.

Although the same Dutch conflicts thinkers are also key figures in the marriage inquiry, the consideration of Continental specialists in the field of marriage also implicates the first of the three early modern schools of conflicts thought: the Italian school. Because regulation of marriage was often committed to ecclesiastical authorities, the dominant specialist in the early modern period was a Jesuit canonist, Tomás Sanchez (1550–1610), whose 1602 treatise on marriage included a highly influential essay on marriage conflicts.⁹⁷ Although a Spaniard, Sanchez's conflicts analysis derived from the Italian school. His essay is particularly relevant, as it demonstrably influenced English ecclesiastical courts,⁹⁸ which drew upon the Italian school more generally as well. Both the Italian and the Dutch schools are potentially relevant to the identification of the original content of the Full Faith and Credit Clause as to marriage conflicts.⁹⁹ In examining these sources, I turn first to the Italian school, including the work of Sanchez, and then review the two leading conflicts thinkers of the Dutch school, before offering a closing note on Scottish conflicts thought.

A. *The Italian School*

The Italian approach to conflicts emerged among the city-states in medieval northern Italy. Having gained a measure of autonomy from the Holy Roman Empire, these states adopted local laws that supplanted the underlying body of Roman law.¹⁰⁰ The Italian approach developed as a way of resolving the conflicts that resulted from these divergent local laws. It came to dominate conflicts thinking into at least the 17th century. The leading figure of the Italian

⁹⁶ See *supra* text accompanying notes 46–48.

⁹⁷ 1 THOMAS [TOMÁS] SANCHEZ, DISPUTATIONUM DE SANCTO MATRIMONII SACRAMENTO [OF DISPUTATIONS ON THE SACRED SACRAMENT OF MARRIAGE] lib. 3, disp. 18, at 263–70 (Venice, Juntae 1625) (1602), <https://goo.gl/NZO6aU>.

⁹⁸ See *Scrimshire v. Scrimshire* (1752) 161 Eng. Rep. 782, 788–89 (Cons.); 2 Hag. Con. 395, 412–13 (placing principal reliance on Sanchez).

⁹⁹ The second of the three early modern schools, the French one, had little direct impact on the Anglo-American law of marriage conflicts.

¹⁰⁰ See 1 LAINÉ, *supra* note 53, at 98, 101.

school is Bartolus de Saxoferrato (1314–1357). His work synthesized and elaborated the opinions of predecessors into a highly influential conflicts regime.¹⁰¹ Although neither Bartolus nor other prominent members of the Italian school discussed marriage conflicts, their framework influenced Sanchez and others who did.

1. The Foundational Views of Bartolus

Although Bartolus did not address marriage conflicts, it is possible to extrapolate general support for the choice of locus law in resolving them. The extrapolation is all but indisputable in the case of nuptial formalities. As to material conditions, it is less certain but still sound. In addition, nothing in Bartolus's approach supported the idea of exceptions to the choice of locus law, although that lack of support owed partly to the nature of his approach. In any event, Bartolus gave the locus solution a strong foundation in Continental conflicts thought.

Bartolus proceeded from a premise that local laws have only an insular scope such that they do not apply to multistate disputes. If a dispute had a significant non-local component—such as a party from a foreign *domus*, an act done in a foreign locus, or a thing located in a foreign situs—Bartolus presumed that the local laws of none of the foreign states applied.¹⁰² Applying the law of one would prejudice the legislative power of any other state having a significant contact with the dispute.¹⁰³ The result was a presumptive lacuna, excluding the application of all local laws, and that lacuna would be filled by applying the underlying Roman law as a body of general law that transcended the individual states.

The choice-of-law question was whether a particular legal issue came within an exception to this presumption of insularity. The analysis comprised two types of inquiries. First, Bartolus considered whether a local law might apply to outsiders as well as locals, thus giving it a territorial scope in that it would apply to anyone doing acts inside the enacting state.¹⁰⁴ Second, Bartolus considered whether a local law might have extraterritorial force or effect.¹⁰⁵ In

¹⁰¹ BARTOLUS, *De Summa Trinitate* [*On the Supreme Trinity*] ¶¶ 13–51, in COMMENTARIA IN PRIMAM CODICIS PARTEM [COMMENTARIES CONCERNING THE FIRST PART OF THE CODE] fols. 5–9 (Lyon 1552) (1471), <https://goo.gl/eckPzQ>, translated in J.A. Clarence Smith, *Bartolo on the Conflict of Laws* (pts. 1 & 2), 14 AM. J. LEG. HIST. 157, 247 (1970) [hereinafter BARTOLUS, in Smith]; see also BARTOLUS ON THE CONFLICT OF LAWS (Joseph Henry Beale trans., 1914).

¹⁰² 1 LAINÉ, *supra* note 53, at 102.

¹⁰³ See BARTOLUS, in Smith, *supra* note 101, ¶ 41, at 254–55.

¹⁰⁴ *Id.* ¶ 13, at 174 (“This is a good place to consider two matters, first whether local legislation extends to non-subjects . . .”).

¹⁰⁵ *Id.* (“This is a good place to consider two matters, . . . secondly whether the effect of such legislation extends beyond the legislators’ territory.”).

particular, a law of a person's *domus* might apply to its people when doing acts in a foreign locus, thus giving the law a tribal scope.¹⁰⁶ Either possibility would amount to an exception to the presumption of pure insularity and would allow a local law to apply to at least some multistate disputes.

Although Bartolus never discussed marriage conflicts, he articulated a number of conflicts principles in other contexts that might bear on the resolution of marriage conflicts. They merit a quick overview.

Formalities. One of the clearest and simplest conflicts principles that Bartolus adopted concerned the formalities necessary for a legal act. In discussing contractual as well as testamentary formalities, he said simply that one "must always look to the place of acting."¹⁰⁷ A locus law regulating formalities should apply to all acts done in the locus, whether done by outsiders or locals,¹⁰⁸ and a formalities law of an actor's *domus* should not apply elsewhere.¹⁰⁹ Acts validly done according to the law of the locus, moreover, should have effect everywhere.¹¹⁰ Laws regulating formalities were an exception to Bartolus's concern that one state not prejudice the legislative power of another state by regulating people or things in the other state. Formalities, he explained, were merely about how an act is done, not whether it may be done.¹¹¹ The same act could have been done in the other state, so long as the actor complied with local formalities.¹¹² The result was that Bartolus endorsed and largely settled debate about the classical rule known as *locus regit actum*, the locus regulates (the formal aspects of) an act.

Contractual Materiality. Bartolus adopted a similar rule as to the regulation of the material aspects of contracts. With respect to what he called "the enforcement of the rights arising out of the contract," Bartolus opined that the applicable law should be the law of the locus where the contract was made.¹¹³ This locus rule applied as long as the issue concerned not a matter of performance but "a matter arising from the nature of the contract" or, in other words, a claim "for relief from prejudice arising out of the contract itself at the time of the contract."¹¹⁴ Notably, this rule applied even to contracts transferring title to land, even though the actual transfer might have to be done at the situs

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* ¶ 32(2), at 181.

¹⁰⁸ *Id.* ¶ 14, at 174, 175, ¶ 24(3), at 179.

¹⁰⁹ *Id.* ¶ 32(2), at 181, ¶ 36, at 248.

¹¹⁰ *Id.* ¶ 37, at 249–50.

¹¹¹ *Id.* ¶ 41, at 254–55.

¹¹² *Id.*

¹¹³ *Id.* ¶ 13, at 174, ¶ 16, at 174–75.

¹¹⁴ *Id.* ¶¶ 13–19, at 174–77.

of the land.¹¹⁵ Bartolus did not explain how he squared this principle with his concern about one state not prejudicing the legislative power of another.

Testamentary Capacity. In discussing contracts, Bartolus oddly did not specifically address capacity to contract, but he did discuss testamentary capacity when he turned to wills. Bartolus was clear and definitive in saying that a locus law should not apply to the capacity of an outsider doing acts there.¹¹⁶ Trying to grant capacity to a person from another state would prejudice the legislative power of the person's *domus*.¹¹⁷ On the other hand, the person's *domus*, while capable of granting him additional capacity at home, could not expand his capacity beyond the general law with respect to acts done outside the *domus*.¹¹⁸ Otherwise, the *domus* would be prejudicing the legislative power of the locus. The result was that no state, by local laws, could expand a person's capacity in making a will outside his home state beyond the capacity granted by the general Roman law.¹¹⁹ A different principle, however, applied to restrictions on capacity. If a person's *domus* used a local law to restrict his capacity below what he possessed under the general law, that restriction had force outside the *domus* if it was "benevolent" but not if it was "malignant."¹²⁰ Benevolent restrictions were those seeking to protect a person from himself, while malignant restrictions subordinated a person's interests in order to advantage someone else.¹²¹ It is not clear why restricting the capacity of one's people to do acts in other states did not trigger Bartolus's concern that the *domus* would be prejudicing the legislative power of the locus.

Change of Personal Status. Bartolus briefly touched on conflicts concerning a change of personal status. He opined that a parent could emancipate a minor under the law of the locus where the act was done, even if that law was more lenient than the law of the family's *domus*.¹²² The reason, however, was because Bartolus characterized emancipation as a matter of mere formalities.¹²³ The personal status of minority and the concept of emancipation themselves derived from the underlying general law. If a state were actually creating new material rules for status changes—or, presumably, creating a novel personal status—its local law would not apply to outsiders, nor would the status have force or effect elsewhere.¹²⁴

¹¹⁵ See *id.* ¶ 16, at 174–75.

¹¹⁶ *Id.* ¶ 26, at 179–80.

¹¹⁷ *Id.* ¶ 41, at 254–55.

¹¹⁸ *Id.*

¹¹⁹ *Id.* ¶ 41, at 254.

¹²⁰ *Id.* ¶ 33, at 182–83.

¹²¹ Compare *id.* ¶ 33(1), at 181, with *id.* ¶ 33(3), at 182–83.

¹²² *Id.* ¶ 35, at 248.

¹²³ *Id.* ¶ 35, at 248, ¶ 41, at 254–55.

¹²⁴ See *id.* ¶ 41, at 255.

Forum Override. Bartolus did not appear to contemplate any notion of a forum state overriding the otherwise applicable law of another state based on some public policy objection. There were certain issues that he opined should be determined by forum law, specifically court procedure and contractual remedies when parties failed to specify a single place of performance.¹²⁵ But he did not hint at the possibility of a forum resorting to its own public policy as an override with respect to issues not within the province of forum law.

Although neither Bartolus nor other secular conflicts theorists in the Italian school discussed marriage conflicts, one or more of these conflicts principles developed in another legal context could be extended or adapted to marriage conflicts. An obvious candidate is the *locus regit actum* principle for resolving conflicts as to the formalities necessary for a legal act. It could be extended to nuptial acts. The challenge, however, was deciding which, if any, of these principles might provide a basis for resolving conflicts involving material conditions on marriage. An obvious candidate, the rule for resolving contracts conflicts, would also favor the choice of locus law. But extrapolating, instead, from Bartolus's rules for testamentary capacity would complicate matters because of the distinction between benevolent and malignant restrictions on capacity.

2. The Spanish Canonists

The earliest significant commentary on marriage conflicts appeared in Spain at the end of the 16th century. The impetus was a 1563 decree of the Council of Trent, which resulted in divergent restrictions on informal marriages in Western Europe. Tomás Sanchez attempted to synthesize these views with the conflicts principles of Bartolus. This 1602 fusion would influence the resolution of marriage conflicts for the rest of the early modern period, including in the ecclesiastical courts of England.

i. The Tridentine Decree

The main reason why Bartolus and others had not already commented on marriage conflicts is that there was not much opportunity for such conflicts to arise. Centuries earlier, the Catholic Church had acquiesced in the view that, as a matter of divine law, a valid marriage arises from the mere exchange of vows by connubians—however informally or secretly and whether done with or without the intermediation of a priest.¹²⁶ These marriages were subject to church discipline, but they were not invalid.¹²⁷ Local variation in nuptial

¹²⁵ *Id.* ¶ 15, at 174, 175, ¶ 18, at 175.

¹²⁶ R.B. OUTHWAITE, CLANDESTINE MARRIAGE IN ENGLAND, 1500–1850, at 3–5 (1995).

¹²⁷ *Id.* at 4–6.

regulations, then, could not give rise to conflicts as to the actual validity of an ostensible marriage.¹²⁸

The absence of conflicts changed following the 1563 decree of the Council of Trent. Seeking to crack down on clandestine marriages—a concept that included elements of secrecy, elopement, exploitation of minors, and denial of clerical authority—the Council resolved to go beyond mere church discipline and declare such marriages void. Its decree declared marriages invalid if they were not formally celebrated in the presence of the parish priest and at least two witnesses.¹²⁹ In an apparent effort to skirt the settled proposition that, as a matter of divine law, the mere exchange of vows established a valid marriage, the Council approached the issue of validity obliquely by purporting to deny connubians themselves the *capacity* to exchange vows informally.¹³⁰ The idea seemed to be to render the connubians' consent ineffectual without directly challenging the assertedly divine proposition that informal marriages are valid.

While none of these propositions would have given rise to marriage conflicts, a final provision of the decree did. It declared the decree itself effective only on a parish-by-parish basis following its publication in each parish.¹³¹ As it turned out, entire regions of Catholic Europe simply refused to publish the decree, thus denying it effectiveness there.¹³² The restrictions on informal marriages took effect in some places but not in others.¹³³ Conflicts problems involving itinerant connubians were a result.

The principal concern was the legal effect of informal nuptials concluded in places where the decree was not in effect by connubians from places where it was. Could those connubians effectively evade the decree's restrictions by concluding their nuptials in a locus where the restrictions had not been received? That was the primary question that Spanish canonists, including Sanchez, addressed.

ii. *Initial Responses to the Question*

The initial responses of Spanish canonists to the conflicts generated by the Tridentine decree against clandestine marriages were less than impressive. These canonists did not explicitly rely on Bartolus or other members of the

¹²⁸ David E. Engdahl, *The Canonical and Metaphysical Background of the Classic Dutch Marriage Conflicts Rule*, 15 NETH. INT'L L. REV. 42, 42–48 (1968).

¹²⁹ THE CANONS AND DECREES OF THE SACRED AND OECUMENICAL COUNCIL OF TRENT 197 (J. Waterworth ed. & trans., 1848), <https://goo.gl/fvu4OC>.

¹³⁰ *Id.*

¹³¹ *Id.* at 199.

¹³² Engdahl, *supra* note 128, at 47–48.

¹³³ *Id.*

Italian school. They seemed to rely mainly on the text of the decree itself and a trite analogy to fasting on religious holidays.

One canonist adopted a *domus* rule for resolving these conflicts. In an analysis comprising only a couple of sentences, Enrique Henríquez (1536–1608) reasoned that the decree bound connubiants everywhere on Earth the moment it was published at their *domus* because it attached to them personally.¹³⁴ They could avoid the restrictions only by actually changing their *domus* before their nuptials to a polity that had not published the decree.¹³⁵ Otherwise, the restrictions applied to connubiants even if they were completely unaware of the publication of the decree at their *domus* because they had been “taken captive by infidels in triremes.”¹³⁶

Another Spanish canonist, Pedro de Ledesma (1544–1616),¹³⁷ disagreed with Henríquez. He gave the issue a slightly less superficial treatment and leaned far more heavily toward the law of the locus than the *domus*. Although his analysis was more extensive, it was still not explicitly grounded in conflicts commentary.

Ledesma regarded a couple of propositions as certain. A valid marriage would arise if connubiants from a place without the Tridentine restrictions concluded their nuptials informally in that place or in another place without the restrictions,¹³⁸ but not if they tried to conclude their nuptials in a place with the Tridentine restrictions.¹³⁹ This latter situation was the outrage scenario, in which connubiants have their nuptials beyond the range of their permissive

¹³⁴ HENRICUS HENRIQUEZ [ENRIQUE HENRÍQUEZ], ALTERA PARS SUMMAE THEOLOGIAE MORALIS [A FURTHER PART OF THE SUM OF MORAL THEOLOGY] lib. 11, cap. 3, § 8, at 964 (Salamanca, Joannis Ferdinandez 1593), <https://goo.gl/6aoBUv> (opining that the decree bound individuals “principaliter ratione personarum” and referring to domicile).

¹³⁵ *Id.* (opining that “migrants into a region or parish, where that decree of the Council of Trent was never promulgated (as regarding captives, in lands of infidels where they have the intent of remaining, and they acquire a domicile) are able to contract marriage without a priest” (author’s trans. of the sentence beginning, “At migrantes in regionem”).

¹³⁶ *Id.* (author’s trans.).

¹³⁷ PETRUS [PEDRO] DE LEDESMA, TRACTATUS DE MAGNO MATRIMONII SACRAMENTO [TREATISE ON THE GREAT SACRAMENT OF MARRIAGE] q. 45, art. 5 *fine*, at 197–99 (Salamanca, Joannes & Andreas Renaut 1592) (1590), <http://goo.gl/lkmqgX> (beginning with the paragraph that opens, “Est ultimum dubium”).

¹³⁸ *Id.* at 197 (“The first certainty is that a marriage celebrated by those [people] who dwell in those provinces and regions is valid even if it should take place without a priest and witnesses, if that marriage is celebrated in those places.” (author’s trans. of the sentence beginning, “Primum certum est”).

¹³⁹ *Id.* (“I said in conclusion, ‘if it is celebrated in those provinces and places,’ however, because if it is celebrated in other provinces and regions, in which the Council of Trent and especially that decree is promulgated and accepted, the marriage will be null, if it should take place without a priest and witnesses, because that decree ought to be observed in those places.” (author’s trans. of the sentence beginning, “Dixi autem in conclusione”).

domus law in a locus that does not allow their type of marriage.¹⁴⁰ In Ledesma's view, if the connubiants' *domus* did not impose the Tridentine restrictions, a simple locus rule applied: An informal marriage would be valid everywhere if formed in a locus without the restrictions but invalid everywhere if formed in a locus with the restrictions.¹⁴¹ He would adopt both the locus-validation and locus-invalidation versions of the locus rule.

The opposite fact pattern, however, was the real focus of Ledesma's inquiry. What was the result when connubiants from a place that imposed the Tridentine restrictions concluded their nuptials informally in a place that did not impose the restrictions? It was this evasion scenario that drew his attention.¹⁴² For Ledesma, one thing about that scenario was certain: The evasive, informal nuptials would never qualify as a valid marriage back in the connubiants' home state or in any other state that had adopted the Tridentine restrictions,¹⁴³ a condition which profoundly limited the validation of marriages under his approach. Because of this condition, his narrow question was only whether the nuptials might be regarded as valid in states that did not bar informal marriages. The possible answers were that such nuptials would be either invalid everywhere or valid only in the locus and in other places allowing informal marriages. Ledesma immediately ruled out the possibility of universal validity, so evasive informal nuptials could produce, at most, only a limping marriage.¹⁴⁴

Ledesma ultimately did not even go that far in conceding validity to such nuptials. In general, he did accept that informal nuptials concluded in a locus without the Tridentine restrictions by connubiants from a place with the restrictions would be regarded as valid in places without those restrictions.¹⁴⁵

¹⁴⁰ See *supra* Part III.C.

¹⁴¹ See LEDESMA, *supra* note 137, at 197.

¹⁴² *Id.* (beginning with the paragraph that opens, "Tota autem difficultas est").

¹⁴³ Ledesma dismissed this possibility of validity by explaining that

[t]he doubt is whether [such connubiants] are able to contract a marriage without a priest and witnesses, so that that marriage is valid in those places in which the Council is *not* promulgated or accepted. This [qualifier] is added, in view of the fact that *it is a certainty that where the Council is accepted and promulgated, that marriage is in no respect valid.*

Id. (emphases added) (author's trans. of the passage beginning, "Dubium est, an possint contrahere matrimonium").

¹⁴⁴ *Id.* For a discussion of the problem of the limping marriage see *supra* text accompanying note 66.

¹⁴⁵ Ledesma articulated this principle in a two-step process. First, he concluded that connubiants who linger in a place without the Tridentine restrictions, but who have no intent to change their domicile, could validly conclude informal nuptials in that place, notwithstanding the law of their home state. In his words,

If some [people] from other provinces might visit those [provinces] in which the Council of Trent is not promulgated, while they may dwell in those

Because the nuptials would not be regarded as valid in the *domus* of the connubiants, however, a limping marriage would arise. But Ledesma recognized an important exception that significantly narrowed the scope of this validation of such nuptials: No valid marriage would arise in the view of any state at all if the connubiants had sought out the lenient locus in order to evade the formalities required by their home state. In that case, their nuptials would be *in fraudem legis* and void everywhere.¹⁴⁶ In sum, only informal nuptials that were unintentionally evasive would give rise to a valid marriage in states that allowed informal marriages, but even in that case, the marriage would be a limping one deemed valid only in places that had not received the Tridentine restrictions.

Ledesma's justifications for his scheme were thin. He rested the general rule in favor of limping validity on two grounds. The first was simply the old adage, "When in Rome, do as the Romans do."¹⁴⁷ Although this idea of adhering to the law of the locus was equivalent to the *locus regit actum* rule of the Italian school, Ledesma cited no conflicts thinker for it. The second ground was a trite analogy to fasting on holy days. Ledesma cited another prominent canonist, Martín de Azpilcueta Navarro (1491–1586), for the notion that a person should comply with the fasting customs of the locus in which he found himself at meal time, not the customs of his *domus*.¹⁴⁸ As for the *in fraudem*

[places] and actually might be detained, a marriage celebrated by such [people] without a priest and witnesses is valid.

Id. at 198 (author's trans. of the sentence following "Secunda conclusio"). Ledesma then further concluded that even connubiants who visited such a place could validly conclude informal nuptials there. Again, in his words,

If some [people] from other regions and provinces may go to those places, in which the Council not be heeded and they be there as if guests, and if without fraud and deceit they make it and may enter into a marriage without a priest and witnesses, the marriage will be valid.

Id. (author's trans. of the sentence following "Tertia conclusio"). In Ledesma's view, then, whether the connubiants merely visit or linger in the locus, their informal nuptials concluded there would be valid there, notwithstanding the restrictive law of their *domus*.

¹⁴⁶ Ledesma concluded that if a connubiant from a place that had adopted the Tridentine restrictions "might visit those parts or regions [in which it had not been adopted] in order that he might enter into a marriage without a priest and witnesses *in fraudem legis* . . . , I opine that such a marriage is null." *Id.* at 198 (author's trans. of the sentence following "In hujus expositionem sit prima conclusio").

¹⁴⁷ *Id.* ("Si fueris Romae, Romano vivito more.").

¹⁴⁸ *Id.* (appearing in the paragraph beginning, "Secundo arguitur"); see MARTÍN DE AZPILCUETA NAVARRO, ENCHIRIDION SIVE MANUALE CONFESSARIORUM ET POENITENTIUM [HANDBOOK OR MANUAL OF CONFESSORS AND PENITENTS], cap. 23, § 120, at 581 (Antwerp, Christophorus Plantinus 1575) (1566), <http://goo.gl/PhSyvU>. In the source that Ledesma cited, Navarro had opined that a mortal offense would be committed by any person

[w]ho eats from meats, or from other prohibited foods in another region even in that time, that it should be lawful for him to eat from them in his [region]: just as, on the contrary, he does not commit a moral offense should he eat from them in a region, which he transits, or in which he delays, although in

legis exception, Ledesma merely said that marriage should be undertaken “only in grace” and that “fraud and deceit should protect no one.”¹⁴⁹

iii. *Sanchez*

Addressing himself to the same conflicts questions arising from the Tridentine decree, Tomás Sanchez took the earlier commentary by Spanish canonists and attempted to fuse it with his understanding of the theory of Bartolus and the Italian school. It was this work that influenced the resolution of marriage conflicts for the ensuing two centuries.

Sanchez began by identifying the usual two kinds of conflicts questions that the Tridentine restrictions produced. The problem, he explained, was whether nuptials were valid in either of two situations: (1) when connubiants from a polity without the restrictions concluded their nuptials informally in a place that had received the restrictions or (2) when connubiants from a polity with the restrictions concluded their nuptials informally in a place that had not received the restrictions.¹⁵⁰ The first situation presented the outrage scenario, and the second the evasion scenario. Sanchez observed at the outset that, in either case, the answer depended on whether the connubiants were bound either by the law of the locus in which they acted or by the law of the *domus* from which they hailed.¹⁵¹

His essay replicated the overall structure of Bartolus’s conflicts analysis in asking, first, whether the locus law applies to outsiders and, second,

his [region] it should not be lawful for him [to do so]. For instance, a Navarrese and a Portuguese eating from the rear [i.e. intestines] of animals in Castile on the Sabbath day, do not commit a moral offense, although in their countries it be not lawful for them [to do so]. A Castilian, however, doing the same in Portugal or Navarre, should commit a moral offense

Id. (author’s trans.). Ledesma did not address the obvious difference between doing a one-time act, such as eating, and entering into a lifelong legal relation affecting personal status, such as a marriage.

¹⁴⁹ LEDESMA, *supra* note 137, at 198 (author’s trans. of phrases “solum gratia” and “fraus & dolus nemini patrocinentur” in the paragraph beginning, “In hujus expositionem sit prima conclusio”).

¹⁵⁰ Stating the questions in reverse order, Sanchez explained,

The problem . . . is—when inhabitants of places where the Tridentine decree binds remove to places where it does not bind or, conversely, [when] inhabitants of places where it does not bind remove to a place where it does bind—whether they may be held to enter into a marriage in the presence of the parish priest and witnesses.

SANCHEZ, *supra* note 97, lib. 3, disp. 18, ¶ 2, at 264 (author’s trans.).

¹⁵¹ *Id.* (asking “whether foreigners be held by the laws of the place through which they transit or of their domicile while they are absent” (author’s trans.)).

whether their *domus* law has extraterritorial force inside the locus.¹⁵² These were the two grand divisions in Bartolus's essay.¹⁵³

The first of the general questions was whether the law of the locus where a person acts applies if the person is an outsider temporarily present in the locus. Sanchez's answer was generally consistent with Bartolus's concern about not prejudicing the legislative power of one state by applying another state's law to a multistate fact pattern. Sanchez said the general rule was that the locus law did not apply to an outsider when that law conflicted with the law of the outsider's *domus*.¹⁵⁴ Explicitly citing Bartolus's endorsement of the *locus regit actum* rule with respect to contractual formalities, however, Sanchez recognized an exception in the case of locus laws regulating contractual formalities.¹⁵⁵ He reasoned that an outsider is bound by those locus laws on the theory "that every contract gains a forum in the place of the contract."¹⁵⁶

The other overarching question was whether the law of an outsider's *domus* had extraterritorial force so that it might apply inside the borders of the locus to an act done by the outsider there.¹⁵⁷ The general answer was no. Sanchez relied on the reasoning of Spanish canonists that a person was not bound by the religious fasting rules of his *domus* when eating in a foreign locus.¹⁵⁸ He did not rely on Bartolus in reaching this conclusion, as Bartolus had opined that a *domus* law benevolently restricting personal capacity did have extraterritorial force.¹⁵⁹ With these general principles established, Sanchez turned to marriage conflicts.

The first of the marriage conflicts—the outrange scenario—was by far the less important of the two. The question was whether connubiants from a

¹⁵² In Sanchez's words, the questions were, first, "whether foreigners are held to the laws and customs of the place through which they transit," and, second, "whether they are held to the laws of their domicile, while they are absent from that [place]." *Id.* (author's trans.).

¹⁵³ See *supra* text accompanying notes 104–05.

¹⁵⁴ See SANCHEZ, *supra* note 97, lib. 3, disp. 18, ¶ 6, at 265 ("[W]ayfaring and sojourning foreigners [are] not to be bound by the laws and customs of the place through which they transit or in which they are found by way of lodging . . . when those [laws and customs] do not bind at their domicile." (author's trans.)). Sanchez recognized that if the laws of the locus and the *domus* were the same, the common rule could be applied without concern for whether locus law was being applied to a foreigner or *domus* law in a foreign locus. *Id.*

¹⁵⁵ *Id.* ¶ 10, at 266 ("The first [exception] is the extent of the formalities of a contract, for all sojourning and wayfaring foreigners are held to heed the formalities required in contract by the laws and customs of the town in which [the contracts] are entered into . . ." (author's trans.)).

¹⁵⁶ *Id.* (author's trans.).

¹⁵⁷ *Id.* ¶ 17, at 267 ("The second question [is] whether foreigners coming together in another place by way of transit and lodging, be held, while absent from their own domicile, to heed the laws and customs of their domicile, if in that place, in which [the foreigners] are found, [the laws and customs] do not bind." (author's trans.)).

¹⁵⁸ See *id.* ¶ 19, at 267.

¹⁵⁹ See *supra* text accompanying notes 120–21.

polity that still allowed informal marriages could go to a locus that had adopted the Tridentine restrictions and nevertheless validly enter into an informal marriage there.¹⁶⁰ Sanchez said no, as had Ledesma, whom he cited approvingly.¹⁶¹ Consistent with his overall regime, Sanchez reasoned that the Tridentine restrictions of the locus applied to the connubians and rendered the attempt at an informal marriage there void. While a locus law that conflicts with a *domus* law would not generally apply to an outsider doing an act in the locus, locus laws regulating formalities were an exception.¹⁶² In reaching this conclusion, Sanchez had implicitly characterized the Tridentine restrictions as matters of mere formality, not materiality. At least to that extent, his conclusion also amounted to adoption of a locus-invalidation rule.

The more significant scenario was the second one: the evasion scenario. It is the far more common scenario, the one involving elopements to evade a formal, public wedding. It was the scenario in which connubians from a polity that had adopted the Tridentine restrictions went to a locus that still allowed informal marriages and concluded their nuptials informally there before returning home.¹⁶³ Sanchez resolved this type of conflict in a way that affirmed the validity of these evasive nuptials,¹⁶⁴ and he was even rather aggressive in doing so. Sanchez applied his general conflicts principles but, in this instance, reasoned in the alternative.

First, he applied the principle that had emerged from the second of his overarching questions: The law of a person's *domus* has no extraterritorial force and thus cannot bind that person when doing acts in a foreign locus. The fact that the *domus* of a connubiant had received the Tridentine decree and imposed its restrictions could have no extraterritorial effect on nuptials concluded informally outside that state.¹⁶⁵ On this view, it made no difference

¹⁶⁰ SANCHEZ, *supra* note 97, lib. 3, disp. 18, ¶ 25, at 268 (“Whether if inhabitants of places, in which the Tridentine decree voiding clandestine marriages, is not received, should remove to other towns by way of transit, and of lodging, where the decree binds that town, be able to validly to contract marriage without a parish priest, and witnesses, according to the laws of their own domicile.” (author’s trans.)). The argument in support of validity, Sanchez noted, was that foreigners are generally not bound by locus law and that such marriages would be valid under the law of the foreigners’ *domus*. *Id.*

¹⁶¹ *Id.* ¶ 26, at 268 (“What ought to be said, nevertheless, is, that marriage [is] to be void.” (author’s trans.)).

¹⁶² *Id.* (invoking the exception to the inapplicability of locus law for laws prescribing contractual formalities).

¹⁶³ *Id.* ¶ 27, at 269 (asking “whether if inhabitants of places at which the Tridentine decree binds, should they come together in that [place], where it does not bind, be able to enter into marriage conformably to the law of that place, without the parish priest, and witnesses” (author’s trans.)).

¹⁶⁴ *See id.* ¶ 28, at 269.

¹⁶⁵ *Id.* (“Foreigners absent from the domicile [are] not to be held by laws of that domicile, if contrary ones be in force in the place where they are found.” (author’s trans.)).

whether the restrictions were characterized as formalities or as personal incapacities. Either way, they were grounded in *domus* law, and *domus* law had no force in a foreign locus.

But this strong version of the proposition that *domus* law had no extraterritorial force was questionable. Sanchez undoubtedly realized that it was in some tension with Bartolus and the Italian school. Indeed, Sanchez expressly conceded the possibility that *domus* law might be held to apply in this scenario.¹⁶⁶ Bartolus had opined that benevolent restrictions on personal capacity, imposed by *domus* law, actually did follow a person into a foreign locus and bind the person even there.¹⁶⁷ Declaring a person incapable of eloping to conclude a private, informal marriage would quite arguably have fit Bartolus's notion of a benevolent restriction on capacity—that is, a paternalistic imposition designed to protect a person from himself by incapacitating him. On that view, Henríquez might have been consistent with Bartolus if the Tridentine restrictions could be characterized as matters of capacity and as benevolent.

Perhaps sensing that vulnerability, Sanchez offered a second, alternative rationale for rejecting the *domus* theory of Henríquez. This alternative rested on the principle that emerged from the first of Sanchez's overarching questions: The law of the locus did not apply to an outsider doing acts in the locus, unless the locus law is one that regulates formalities.¹⁶⁸ Sanchez now more explicitly characterized the Tridentine restrictions as matters of form, not capacity, and thus within the exception in favor of applying locus law to outsiders. In the type of evasive marriage conflict contemplated in this scenario, the law of the locus allows informal marriages, and that law, Sanchez reasoned, should apply to connubiants who go into the locus and conclude their nuptials informally there.¹⁶⁹ While the Tridentine decree itself described the restrictions as limitations on personal capacity, that description seemed to be designed to allow the voiding of informal marriages without disturbing the Church's previously accepted position that informal marriages were valid as a matter of divine law.¹⁷⁰ It did not appear to have anything to do with the resolution of multistate conflicts, which it is not clear that the Council of Trent even contemplated. In substance, moreover, the

¹⁶⁶ *Id.* (“We might have thought [foreigners] shall be bound by the laws of the domicile” (author's trans.)).

¹⁶⁷ *See supra* text accompanying note 120.

¹⁶⁸ *See supra* text accompanying note 155.

¹⁶⁹ SANCHEZ, *supra* note 97, lib. 3, disp. 18, ¶ 28, at 269. He wrote,

[A]s to the formality to be used in contracts, only the laws of the place in which a contract has been concluded are observed. The place, however, where this marriage is formed, does not require that formality of a parish priest and witnesses for the validity of a marriage, since the Tridentine decree does not bind there.

Id. (author's trans.).

¹⁷⁰ *See* LEDESMA, *supra* note 137, at 197.

restrictions themselves were quite arguably formalities: requiring a priest—as an officiant—and two witnesses. They were about how nuptials were to be concluded, not whether the parties were eligible to marry. In support, Sanchez relied on Ledesma to the extent he had concluded that locus law should apply to nuptials that were not deliberately evasive.¹⁷¹

Of course, Sanchez knew that Ledesma and other Spanish canonists would have invalidated any nuptials that were deliberately evasive of *domus* law,¹⁷² which could amount to most of the nuptials fitting the evasion scenario. After noting a couple of their rationales, Sanchez rejected the *in fraudem legis* exception: “[T]his limitation displeases me, and I think it is lawful that [connubiants] might visit that country [where the Tridentine decree has not been adopted], so they might be able to contract marriage freely without a parish priest and witnesses.”¹⁷³ He offered a series of reasons: (1) the exercise of a right cannot be fraud; (2) bad intention does not impair the marriage itself; and (3) marriage is beneficial, not wrongful.¹⁷⁴ Implicit in these rationales was something of a substantive policy favoring the validation of marriages whenever feasible. On that basis, Sanchez rejected the *in fraudem legis* exception.¹⁷⁵

With the foregoing propositions and distinctions, Sanchez reasoned his way to applying locus law to affirm the validity of even deliberately evasive nuptials, but his reasoning contained some significant limitations. It fell far short of establishing a simple locus-validation rule, such as “a marriage valid where celebrated is valid everywhere.” He regarded locus law as applicable to nuptials only when the issue was one of formalities.¹⁷⁶ He made clear his view that the application of locus law in that instance was an exception to a general principle against applying locus law to nuptials concluded by connubiants from other states. As he articulated it, the exception in favor of locus law would *not*

¹⁷¹ *Id.*; see *supra* text accompanying note 145.

¹⁷² SANCHEZ, *supra* note 97, lib. 3, disp. 18, ¶ 29 (collecting authorities).

¹⁷³ *Id.* (author’s trans.) (“[D]isplicet mihi haec limitatio, & credo licet adirent eo fine, ut possent liber[e] absque parochio, & testibus contrahere, esse ratum matrimonium.”).

¹⁷⁴ *Id.*

¹⁷⁵ See *Steele v. Braddell* (1838) Milw. Ecc. Rep. 1, 33–34 (Ir.) (describing rejection of *in fraudem legis* exception by Sanchez). There has been some misunderstanding on this important point. Professor David E. Engdahl seems to have misread what is admittedly a difficult text in attributing the opposite view to Sanchez. Engdahl, *supra* note 128, at 52. The language that Engdahl quotes as endorsing the *in fraudem legis* exception was actually a passage in which Sanchez was summarizing the argument of Ledesma and others: “They somewhat limit this opinion [that locus law applies to nuptial formalities]” SANCHEZ, *supra* note 97, lib. 3, disp. 18, ¶ 29 (“Limitant aliqui hanc sententiam”). Sanchez describes himself as displeased with the exception and rejects it later in the same passage. *Id.* In some editions of his work, his statement of repudiation begins a new paragraph, but in other editions, it is buried in the middle of a very lengthy paragraph and is easily overlooked.

¹⁷⁶ See *supra* text accompanying notes 168–69.

apply to conflicts involving material conditions on the validity of marriage. Although Bartolus had also applied locus law to the materiality of contracts, not just their formalities, Sanchez did not appear to embrace that proposition as an analogy. His alternative rationale in favor of applying locus law to affirm the validity of evasive informal marriages was that issues of formalities triggered the special exception in favor of locus law.¹⁷⁷

Indeed, lurking behind the essay was a complicated understanding of the law applicable to issues of capacity. Sanchez distinguished between different kinds of incapacities. “[W]hen an incapacity is established absolutely and simply, it follows alongside the person wherever [he is] going; when it is established by way of law . . . , it does not follow the person, except as long as he is in a place, in which that law has binding force.”¹⁷⁸ What exactly Sanchez meant by the distinction between “absolute and simple” incapacities and “legal” ones is unclear. It could be that he had in mind a distinction between natural law and positive law. One can imagine that there were some incapacities—such as certain consanguinity restrictions—that he was not willing to risk undermining by way of a locus-validation rule.

An additional, significant limitation on Sanchez’s reasoning was his heavy reliance on the wording of the Tridentine decree in rejecting the arguments against applying locus law to validate evasive nuptials. Sanchez repeatedly noted that the decree declared itself inapplicable outside the places that had received it.¹⁷⁹ That basis would not be available for limiting the reach of a *domus* law that lacked such a disclaimer and, if applied, would void particular nuptials.

Lastly, a foundation of Sanchez’s reasoning, sometimes only implicit, was a substantive policy value in favor of affirming the validity of nuptials whenever feasible. That value was most explicit in his justifications for rejecting the *in fraudem legis* exception. Persuasiveness of his conclusions depend in part on acceptance of that substantive value as a basis for resolving marriage conflicts.

In the decades that followed publication of Sanchez’s analysis, his nuances and distinctions may have withered away. What apparently emerged in this period, perhaps also influenced directly by Bartolus’s broad locus rule for resolving contracts conflicts, was a simple locus rule. Whether a conflict involved material conditions or formalities seemed to lose relevance, along with any distinction between locus-validation and locus-invalidation.¹⁸⁰ What

¹⁷⁷ See *supra* text accompanying note 155.

¹⁷⁸ SANCHEZ, *supra* note 97, lib. 3, disp. 18, ¶ 30 (author’s trans.).

¹⁷⁹ E.g., *id.* ¶ 27, at 269 (reaching this conclusion “because the Tridentine decree does not bind” outside a place where it was published).

¹⁸⁰ Ellison Kahn, *Appendix: Jurisdiction and Conflict of Laws in the South African Law of Husband and Wife*, in H.R. HAHLO, *THE SOUTH AFRICAN LAW OF HUSBAND AND WIFE* 529, 586–87 (4th ed. 1975).

endured, however, was the question whether an evasion exception should be adopted.

B. *The Dutch School*

Marriage conflicts became a topic of significant debate again in the Netherlands in the 17th century. The Dutch school of conflicts thought emerged then among the provinces of the Netherlands. Although Dutch jurists had initially inherited the Italian approach,¹⁸¹ the emergence of the concept of sovereignty in international law produced a new school of conflicts thought. Its primary exponents, Johannes Voet (1647–1713)¹⁸² and Ulrik Huber (1636–1694),¹⁸³ sought to harmonize the application of foreign law with the notion of absolute territorial sovereignty. The mediating factor was the concept of comity. Their work—particularly that of Huber—profoundly influenced Anglo-American conflicts law. With respect to marriage conflicts, it generally carried forward the emphasis on locus law.

1. Structural Premises

The Dutch approach to conflicts rested on three premises about state power and laws. These premises—strict territorialism, absolute sovereignty, and qualified comity—are defining features of the Dutch approach and distinguish it from the Italian approach and others. Huber famously presented the premises as three maxims.

Strict Territorialism. The first maxim was strict territorialism. In Huber’s words, “The laws of every sovereign authority have force within the boundaries of its state, and bind all subject to it, *but not beyond.*”¹⁸⁴ In contrast to the Italian approach, there would be no overarching inquiry into the extraterritorial force of a law. The Dutch approach repudiated any notion of a

¹⁸¹ 1 LAINÉ, *supra* note 53, at 396–97 (discussing Everard and Peckius). Before the emergence of a distinctive Dutch school, Dutch conflicts thought came under the influence of the French school. *Id.* at 395, 397–408.

¹⁸² 1 JOHANNES VOET, THE SELECTIVE VOET bk. 1, tit. 3–4 app., at 97 (Percival Gane trans., 1955) [hereinafter VOET, TRANSLATED COMMENTARY] (translating 1 JOHANNIS [JOHANNES] VOET, COMMENTARIUS AD PANDECTAS [COMMENTARY ON THE PANDECTS] lib. 1, tit. 3–4 app., at 49 (A. Maurice ed., Paris, Gauthier Fratres 1829) (1698) [hereinafter VOET, LATIN COMMENTARY], <https://goo.gl/SIIzOm>).

¹⁸³ ULRICUS HUBERUS [ULRIK HUBER], *De Conflictu Legum [On the Conflict of Laws]*, in PRAELECTIONES JURIS ROMANI ET HODIERNI, PARS II [PRELECTIONS ON ROMAN AND MODERN LAW, PART 2] lib. 1, tit. 3 app., at 23 (Leipzig, Gleditschius 1707) (1689) (alternatively referred to as PRAELECTIONUM JURIS CIVILIS, TOMI III), <https://goo.gl/zMcBaL>, translated in Davies, *supra* note 54, at 64 [hereinafter HUBER, in Davies].

¹⁸⁴ HUBER, in Davies, *supra* note 183, § 2, at 65 (emphasis added).

state's law attaching to a person and, of its own force, binding him everywhere.¹⁸⁵

Absolute Sovereignty. The second maxim eliminated the other overarching question in the Italian approach: whether a locus law applied to an outsider. In the words of Huber's second maxim, "Those are held to be subject to a sovereign authority who are found within its boundaries, whether they be there permanently or temporarily."¹⁸⁶ There would be no need to determine whether a locus law regulated formalities in order to determine whether it came within an exception under which it applied to outsiders. All locus laws applied to outsiders present in the locus.

Qualified Comity. Strictly territorial laws might be consistent with sovereignty, but they would quickly make interstate commerce and other endeavors impractical. The solution to that problem was comity—the key concept which truly distinguished the Dutch approach. Huber captured the idea in his third maxim: "Those who exercise sovereign authority so act from comity that the laws of each nation[,] having been applied within its own boundaries[,] should retain their effect everywhere so far as they do not prejudice the power or rights of [the other] state or its subjects."¹⁸⁷ The laws of other states do not have force within the boundaries of a sovereign, but the sovereign may choose to let them have effect within its boundaries. Comity harmonized choice of law with absolute territorial sovereignty.

To be sure, Huber and Voet disagreed about the operation of comity in at least two respects. First, Huber regarded its use as required by customary international law as a result of the tacit consent of nations, but Voet viewed it as a policy tool, which was backed, at most, by practical necessity, equity, and moral duty.¹⁸⁸ This interesting disagreement is moot in the full-faith-and-credit context. As the United States Supreme Court put it in *Sun Oil Co. v. Wortman*, the Full Faith and Credit Clause "made conflicts principles enforceable as a matter of constitutional command rather than leaving enforcement to the vagaries of the forum's view of comity."¹⁸⁹

¹⁸⁵ See *id.*; 1 VOET, TRANSLATED COMMENTARY, *supra* note 182, bk. 1, tit. 3–4 app., § 5, at 100, §§ 7–8, at 101–07 (translating 1 VOET, LATIN COMMENTARY, *supra* note 182, lib. 1, tit. 3–4 app.).

¹⁸⁶ HUBER, *in Davies*, *supra* note 183, § 2, at 65; *accord* 1 VOET, TRANSLATED COMMENTARY, *supra* note 182, bk. 1, tit. 3–4 app., § 5, at 100 (translating 1 VOET, LATIN COMMENTARY, *supra* note 182, lib. 1, tit. 3–4 app.).

¹⁸⁷ HUBER, *in Davies*, *supra* note 183, § 2, at 65; *accord* 1 VOET, TRANSLATED COMMENTARY, *supra* note 182, bk. 1, tit. 3–4 app., § 1, at 98, § 12, at 111 (translating 1 VOET, LATIN COMMENTARY, *supra* note 182, lib. 1, tit. 3–4 app.).

¹⁸⁸ See Hessel E. Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 9 (1966). Compare HUBER, *in Davies*, *supra* note 183, § 2, at 65–66, with 1 VOET, TRANSLATED COMMENTARY, *supra* note 182, bk. 1, tit. 3–4 app., § 12, at 111, § 16, at 115 (translating 1 VOET, LATIN COMMENTARY, *supra* note 182, lib. 1, tit. 3–4 app.).

¹⁸⁹ 486 U.S. 717, 723 n.1 (1988) (citing *Estin v. Estin*, 334 U.S. 541, 546 (1948)).

They also disagreed about the soundness of reducing comity to a formula. As Huber's third maxim indicates, he sought to articulate a single standard for its use, whereas Voet resisted reducing its use to "fixed rules."¹⁹⁰ That is not to say that Voet endorsed the use of comity on a purely ad hoc basis; Voet just thought it more advisable to develop principles in a more nuanced and contextualized manner.¹⁹¹

2. Voet

Voet's conflicts regime accepted the prevailing regime, which had grown out of the Italian approach, of classifying statutes as real, personal, or mixed. Real statutes were said to apply territorially and personal ones tribally, while the applicable scope of mixed statutes remained in some dispute. This distinction obviously had less salience in Voet's approach because he regarded all statutes, "in strict law,"¹⁹² as being purely territorial and having no inherent force outside their enacting states. But as a matter of comity, a forum might choose to give the law of another state effect within its borders, and Voet retained the tripartite classification scheme in discussing the role of comity. Rather than articulate a general standard for regulating the operation of comity, he left consideration of the issue to his discussion of particular legal topics within the tripartite division¹⁹³ and, sometimes, even to his analysis of specific legal issues.¹⁹⁴

Real statutes, for Voet, were those that primarily regulated things, even if they also happened to mention people.¹⁹⁵ When the things were land or other immovables, the fact that real statutes, like all statutes, had a strictly territorial scope was fine in Voet's view. A forum would not use comity to allow immovables in its territory to be regulated by the statute of another state.¹⁹⁶

Personal statutes, for Voet, were those that primarily regulated people, even if they also happened to mention things. In his view, these statutes "deal mainly with the universal or almost universal status, condition, capacity or incapacity of a person."¹⁹⁷ In keeping with the premises of the Dutch school,

¹⁹⁰ 1 VOET, TRANSLATED COMMENTARY, *supra* note 182, bk. 1, tit. 3–4 app., § 16, at 115 (translating 1 VOET, LATIN COMMENTARY, *supra* note 182, lib. 1, tit. 3–4 app.).

¹⁹¹ *Id.*

¹⁹² *Id.* § 5, at 100.

¹⁹³ *Id.* §§ 12–15, at 111–15.

¹⁹⁴ *See, e.g.*, 4 VOET, TRANSLATED COMMENTARY, *supra* note 182, bk. 28, tit. 1, § 44, at 652–54 (translating 3 VOET, LATIN COMMENTARY, *supra* note 182, lib. 28, tit. 1, § 44, at 201, <https://goo.gl/FYyZGy>) (discussing testamentary capacity).

¹⁹⁵ 1 VOET, TRANSLATED COMMENTARY, *supra* note 182, bk. 1, tit. 3–4 app., § 3, at 99 (translating 1 VOET, LATIN COMMENTARY, *supra* note 182, lib. 1, tit. 3–4 app.).

¹⁹⁶ *Id.* § 6, at 100–01, § 12, at 111.

¹⁹⁷ *Id.* § 2, at 98–99.

Voet rejected the longstanding view that personal statutes attached to people and somehow had inherent force to bind people outside the enacting state. Like any other statute, a personal statute was strictly territorial in force.¹⁹⁸ Territorial means, in this instance, that when a person's *domus* is also the forum, it can apply its own personal statute to that person's acts, whether done inside the state or elsewhere.¹⁹⁹ When the person is an outsider with a *domus* elsewhere, a forum might use comity to allow the law of his *domus* to regulate him in the forum, but Voet declined to articulate any general rule for the application of comity to personal statutes. Instead, he preferred to deal with the question on an issue-specific basis.²⁰⁰

Mixed statutes, the final class, constituted a narrow set of statutes for Voet. They were only those statutes that primarily prescribed "the shape, manner, order and formalities of acts, either judicial or extra-judicial, which have to be done by persons in and about things."²⁰¹ Like the other kinds of statutes, Voet viewed mixed statutes as having strictly territorial force, meaning they applied, of their own force, only to acts done in the enacting state.²⁰² But when a forum is dealing with an act done in another state, Voet took the position that the forum should use comity to give effect to the formalities regulations of the locus where the act was done. In other words, the forum should apply locus law.²⁰³ In this way, Voet harmonized the longstanding *locus regit actum* rule, as applied to formalities, with the concept of absolute territorial sovereignty.

At least with respect to mixed statutes, Voet added two nuances. First, a forum need not, by comity, apply a locus regulation of formalities to an act if a person deliberately evaded a formalities rule of his domicile. Comity should not be used to facilitate an act done *in fraudem legis*, at least not to the extent of affecting things situated in the person's *domus*.²⁰⁴ Second, if a forum happens to be the *domus* of a person doing an external act or the situs of a thing about which an external act is done, the forum may refrain from extending comity to an invalidating locus law and affirm the validity of the external act by applying a validating forum law.²⁰⁵

In using Voet's approach to resolve marriage conflicts, his version of the tripartite scheme for classifying statutes requires a distinction between marriage conflicts involving mere nuptial formalities and those involving

¹⁹⁸ *Id.* § 7, at 101–03.

¹⁹⁹ *See id.* § 9, at 107.

²⁰⁰ *Id.* § 16, at 115.

²⁰¹ *Id.* § 4, at 99–100.

²⁰² *See id.* § 10, at 108–09.

²⁰³ *See id.* § 13, at 112.

²⁰⁴ *Id.* § 14, at 113.

²⁰⁵ *Id.* § 15, at 114.

material conditions on validity. The former clearly involve mixed statutes in his regime, and the latter clearly do not.

In light of Voet's treatment of mixed statutes, a conflict involving nuptial formalities would be resolved according to the *locus regit actum* rule, unless one of Voet's exceptions applied. A forum generally should give comity to the formalities rule of an external locus where the nuptials took place.²⁰⁶ If, however, the nuptials involved the deliberate evasion of a connubiant's *domus* law or if they avoided a statutory mandate of the forum as to extrastate nuptials, the forum should not apply the validating law of the extrastate locus. Invalidating the nuptials under forum law is appropriate. In fact, Voet reached precisely that result on both grounds in a specific case. There, nuptials were concluded outside Holland by a connubiant from Holland without first publishing his banns—that is, a public notice of the impending nuptials—in Holland. A decree of that state expressly required Hollanders to publish banns at their *domus*.²⁰⁷ Voet did not regard the applicability of a validating locus law as absolute even in the case of formalities. In light of his second nuance with respect to mixed statutes, moreover, Voet presumably would have endorsed a forum-*domus*'s refusal to apply an *invalidating* locus law to extrastate nuptials that were consistent with the law of the forum-*domus*.

How Voet would have resolved marriage conflicts involving material conditions is less certain because he did not specifically address the issue. It would be necessary to extrapolate conclusions as to a general rule as well as any exceptions to it.

Which general conflicts solution Voet would choose is unclear for two reasons. First, it is not entirely clear how Voet would have classified a law regulating material conditions. Presumably, it would not be a mixed statute, as it seemingly would not involve the “shape, manner, order [or] formalities” of the nuptials.²⁰⁸ If such a law were characterized as regulating status or capacity, it would probably come within the personal category; otherwise, it would be a real statute, with the marriage itself as the thing being primarily regulated.²⁰⁹ Second, it is not clear what conflicts rule he would adopt under either classification. Voet declined to articulate a conflicts rule for personal statutes.

²⁰⁶ 4 VOET, TRANSLATED COMMENTARY, *supra* note 182, bk. 23, tit. 2, § 85, at 128 (translating 2 VOET, LATIN COMMENTARY, *supra* note 182, lib. 23, tit. 2, § 85, at 614, <https://goo.gl/jcSngC>).

²⁰⁷ *Id.* § 4, at 37–38 (translating 2 VOET, LATIN COMMENTARY, *supra* note 182, lib. 23, tit. 2, § 4, at 569, <https://goo.gl/kXnfbC>).

²⁰⁸ 1 VOET, TRANSLATED COMMENTARY, *supra* note 182, bk. 1, tit. 3–4 app., § 4, at 99–100 (translating 1 VOET, LATIN COMMENTARY, *supra* note 182, lib. 1, tit. 3–4 app.).

²⁰⁹ *Cf.* 4 VOET, TRANSLATED COMMENTARY, *supra* note 182, bk. 28, tit. 1, § 44, at 652–53 (translating 3 VOET, LATIN COMMENTARY, *supra* note 182, lib. 28, tit. 1, § 44, at 201, <https://goo.gl/FYyZGy>) (appearing to classify laws regulating testamentary capacity as real statutes and applying the law of situs to capacity to devise immovables and the law of the *domus* to capacity to bequeath movables).

Although applying *domus* law might seem an obvious choice, Voet did not foreclose the choice of locus law because he never addressed the issue.²¹⁰ Even under a real classification, moreover, he might apply the law of the situs of the thing—perhaps the matrimonial domicile as the situs of the marital relationship—or the locus law.²¹¹ Voet's acceptance of the *mobilia sequuntur personam* rule, a *domus* rule, for conflicts involving title to movable property indicated some willingness to choose a law other than that of the situs in resolving even conflicts involving real statutes.

The nature of any exceptions that Voet might adopt may be somewhat clearer. Since he accepted an evasion exception even with respect to mere formalities, Voet would surely approve of that exception in the case of evading the law of the *domus* in order to avoid a material condition. The same would presumably be true of a statutory conflicts mandate. For the same reasons that Voet approved of forum validation of transactions concluded without compliance with locus formalities, he might well be expected to approve the same saving alternative in the case of material conditions on the validity of marriage, at least when the forum is the *domus* or situs—that is, matrimonial domicile. There is also a strong basis for inferring that Voet would withhold comity from an extrastate law validating polygamous or consanguineous nuptials within the Levitical degrees. In a purely intrastate case, he maintained that, in contrast to marital restrictions grounded in civil law, a state could not grant dispensations from restrictions grounded in divine law.²¹² It seems highly unlikely that he would regard a state as having any greater power to use comity to give effect to an extrastate law authorizing such marriages.

In the end, Voet provided only partial guidance in the resolution of marriage conflicts. For those involving mere formalities, his solution was clear. With respect to marriage conflicts involving material conditions, it also may be reasonably possible to extrapolate what kind of exceptions he would endorse. But on the critical question of a general rule for resolving conflicts involving material conditions, Voet's conflicts regime offered too many alternative possibilities for extrapolation of a general principle with certainty. The fact that he discussed marriage conflicts but limited his analysis to formalities may

²¹⁰ See CHRISTOPHER F. FORSYTH, PRIVATE INTERNATIONAL LAW 263 n.18 (4th ed. 2003).

²¹¹ Cf. 3 VOET, TRANSLATED COMMENTARY, *supra* note 182, bk. 22, tit. 1, § 6, at 701 (translating 2 VOET, LATIN COMMENTARY, *supra* note 182, lib. 22, tit. 1, § 6, at 499–500, <https://goo.gl/tXUb8Z>) (opining that usury is determined by the law of the locus of the contact, including the intended locus of payment); 2 VOET, TRANSLATED COMMENTARY, *supra* note 182, bk. 12, tit. 1, § 29, at 784 (translating 2 VOET, LATIN COMMENTARY, *supra* note 182, lib. 12, tit. 1, § 29, at 86–87, <https://goo.gl/q5e2Bs>) (opining that the right of the creditor to reclaim the principal on a loan after receipt of interest payments is determined by the law of the locus of the contract, including the intended locus of payment).

²¹² 4 VOET, TRANSLATED COMMENTARY, *supra* note 182, bk. 23, tit. 2, §§ 37–38, at 72–73 (translating 2 VOET, LATIN COMMENTARY, *supra* note 182, lib. 23, tit. 2, §§ 37–38, at 586–87, <https://goo.gl/Bwqhou>).

suggest that he was ambivalent as to the proper resolution of conflicts involving material conditions. Although undoubtedly aware of the prevailing locus rule, he avoided overthrowing it, even as he may have questioned its merits in the case of material conditions.²¹³

3. Huber

In contrast to Voet's partial guidance, Huber was the first Dutch conflicts thinker to develop a near-complete regime for resolving marriage conflicts. He developed a set of general principles from his three maxims about state power and comity. From these principles and maxims he derived an influential conflicts rule for resolving marriage conflicts as well as two exceptions to that rule.

i. General Principles

Unlike Voet, Huber did not purport to use the tripartite classification of statutes, but he did articulate different general principles corresponding roughly to that division. Although the prevailing conflicts regimes tended to prioritize the "real" category and marginalize the "mixed" category, which focused on acts as the subject of regulation,²¹⁴ Huber, in contrast, gave primacy to a focus on acts and minimized the "real" concept. His general principles for resolving conflicts involving the regulation of acts had broad application in his regime,²¹⁵ while his general principles relating to persons as well as things occupied a more marginal position.²¹⁶ Whereas prevailing regimes were thing-centered and tended to elevate the law of the situs where things were located, Huber's regime was act-centered and emphasized the law of the locus where acts were done.

For resolving conflicts characterized as involving the regulation of acts, Huber articulated a general principle and an exception, both derived from his three maxims.²¹⁷ The principle had two parts. The first part was a locus-validation rule: "[A]ll transactions and acts, both in Court and out of Court,

²¹³ It would not be until after the adoption of the United States Constitution that a Dutch conflicts commentator, Dionysius van der Keessel (1738–1816), would clearly repudiate the prevailing locus rule as to material conditions by endorsing the choice of *domus* law for determining the capacity of a connubiant to marry. Kahn, *supra* note 180, at 587.

²¹⁴ See 1 LAINÉ, *supra* note 53, at 323–37 (describing the approach of the founder of the prevailing French school as assimilating "mixed" statutes to "real" ones and drastically limiting the class of "personal" statutes).

²¹⁵ HUBER, in Davies, *supra* note 183, §§ 3–11, at 66–74 (articulating various conflicts rules emphasizing the locus of acts).

²¹⁶ *Id.* §§ 12–15, at 74–78 (articulating a few rules relating to "personal qualities" and the situs of land).

²¹⁷ See *supra* text accompanying notes 184–87.

whether *mortis causa* or *inter vivos*, properly executed according to the law of a particular place are valid even where a different law prevails, and where if done in like manner, they would not be valid.”²¹⁸ The second part was merely the symmetrical opposite of the first. It was a locus-invalidation rule: “transactions and acts executed in any place contrary to the law of that place, as they are in their origin invalid, cannot be valid anywhere.”²¹⁹ Taken together, these two propositions stated a simple conflicts rule: The validity of an act should be determined by the *lex loci actus*, the law of the place of the act. It made no difference, Huber added, whether the actor was domiciled at the locus or was an outsider “delayed in that very place for a while.”²²⁰ Either way, the law of a locus was to control the validity of an act done in its borders.

The exception to this locus principle was established by Huber’s third maxim, which generally articulated the limit of comity. As he restated it in connection with the locus rule, the exception provided that “if the rulers of another people would suffer a serious inconvenience [as a result of applying locus law], they would not be bound to give [use and] effect to such acts and transactions, in accordance with the limitation of the third maxim.”²²¹ The analogous phrase in the third maxim itself was that the laws of a locus should be given effect “so far as they do not prejudice the power or rights of [the other] state or its subjects.”²²² At least as stated in this context, however, the exception was not stated symmetrically. It contemplated overriding a validating application of locus law, not an invalidating one. The exception did not appear to contemplate, as Voet had, the possibility of setting aside locus law in order to affirm the validity of an act that would be deemed invalid under locus law.²²³ It may be that Huber simply thought there was no possibility of inconvenience or prejudice to the forum if the law of the locus deemed a foreign act void. But he seemed to have had a deeper objection to using non-locus law to validate an act that the locus law would invalidate, given his observation that acts done in such a locus “are in their origin invalid” and thus “cannot be valid anywhere.”²²⁴

In the rest of his essay, Huber gave a number of examples of the prejudice exception. These examples indicate that the exception was primarily concerned with the prevention of evasion, which Huber even once called “the

²¹⁸ HUBER, *in Davies*, *supra* note 183, § 3, at 66.

²¹⁹ *Id.*

²²⁰ *Id.* at 66–67.

²²¹ *Id.* at 67.

²²² *Id.* § 2, at 65.

²²³ *Id.* § 4, at 67 (opining that a will made without complying with locus formalities is invalid everywhere, including in the forum where the property was situated, even though it complied with forum formalities); *id.* at 68 (opining that a contract for the sale of goods prohibited in the locus is unenforceable anywhere, although an action for unjust enrichment may lie).

²²⁴ *Id.* § 3, at 66.

basis of the exception to the third maxim.”²²⁵ Comity, which Huber regarded as mandatory under customary international law, did not require a forum to give effect to an act done elsewhere in evasion of its law. The exception could be triggered either by a person from the forum doing an act in another state in evasion of the law of the forum-*domus*²²⁶ or by doing an act in another state so as to evade a forum law that was applicable to a related act done in the forum-locus.²²⁷ Merely being the forum alone was not enough to trigger the prejudice exception.²²⁸ Rather, the forum was to assert the exception only when the forum’s own law was evaded, not merely when the law of some other jurisdiction was evaded. The exception existed to allow the forum to protect only itself from evasion. Huber specifically observed that an evasive act will be deemed valid at the locus and everywhere else but the forum, even if it would not be valid under forum law.²²⁹ In other words, a forum was not to invoke the prejudice exception in order to avoid facilitating the evasion of another state’s law. Huber did suggest, however, that a locus might have a kind of reverse-comity obligation to prevent an outsider from concluding an act under its laws in evasion of his *domus* law.²³⁰

ii. Marriage Conflicts

Huber expressly grounded his resolution of marriage conflicts in his maxims as well as his general principles for conflicts concerning the validity of acts.²³¹ He articulated a conflicts rule applicable to most marriage conflicts, identified exceptions to it, and provided useful illustrations.

The conflicts rule itself was a familiar application of his general *lex loci actus* principle. In Huber’s words, the rule for resolving conflicts as to the validity of a marriage was “[i]f it is lawful in the place where it is contracted

²²⁵ *Id.* § 6, at 69.

²²⁶ *Id.* § 8, at 71–72 (giving two examples of evasive nuptials which would not be recognized at the forum-*domus*); *id.* § 13, at 75–76 (discussing evasion of forum restriction on capacity by unemancipated minor of forum).

²²⁷ *Id.* § 6, at 69 (discussing evasion of forum criminal process by defendant who committed crime there but fled and obtained acquittal elsewhere); *id.* § 5, at 68 (stating that a contract for the sale of goods made in a locus where the goods are legal, but for delivery in a forum where the goods are not, will trigger the exception such that the forum will refuse to enforce the contract as contrary to its law and convenience); *id.* § 11, at 73–74 (stating that when a contract made in one state is incompatible with one made in the forum, the forum will enforce the one made in the forum).

²²⁸ *Id.* § 11, at 74.

²²⁹ *Id.* § 13, at 75–76.

²³⁰ *Id.* § 8, at 72.

²³¹ *Id.* at 71–72.

and celebrated, it will be valid and effectual everywhere.”²³² In short, if the nuptials satisfied locus law, they would result in a valid marriage everywhere.

Several features of Huber’s rule merit attention. It was not symmetrical. It did not address outrange conflicts in which nuptials are invalid under locus law, only those in which they are valid. Nor did Huber supplement it with a rule for addressing those conflicts. The omission was curious because Huber’s general *lex loci actus* principle was symmetrical, providing that if an act was invalid under locus law, it was invalid everywhere.²³³ With respect to contracts and wills, moreover, Huber rejected the saving alternative of applying the law of the *domus* or situs to validate an act that was not valid under locus law.²³⁴ Why Huber omitted the negative case in this context is unclear; it was not an unknown conflict pattern, as Sanchez had addressed it.²³⁵ Perhaps Huber was unprepared to reject outright the possibility of a saving alternative to locus law in the context of marriage, but because he did reject that possibility with respect to contracts and wills, the better view may be that he simply did not view the outrange scenario worth addressing. The evasion scenario was far more practically significant.

Another feature of Huber’s marriage rule was that it drew no distinction between mere formalities and material conditions. That distinction had been significant to both Sanchez and Voet. Huber, however, had explicitly rejected that distinction in applying his general *lex loci actus* principle to contracts,²³⁶ and he adhered to that position with respect to marriages.²³⁷ The extension of the rule to material conditions was clearly intentional, as only one of Huber’s marriage illustrations involved a formalities conflict.²³⁸ It was a consequence of Huber’s shift to an act-focused regime and away from one, like Voet’s, which relegated formalities to a narrow class of “mixed statutes.” Huber’s rule applied to the nuptial act, whether the conflict involved formalities or material conditions.

Huber provided a couple of examples to illustrate the operation of his locus-validation rule in non-evasive, chauvinism scenarios. One example involved connubians from Huber’s home province, Friesland, who concluded their nuptials informally there, in compliance with locus law.²³⁹ Even though the nearby province of Holland no longer permitted informal marriages, Huber concluded that, “without question,” Holland would deem the Frieslanders

²³² *Id.* at 72.

²³³ *See supra* text accompanying note 219.

²³⁴ HUBER, *in Davies, supra* note 183, §§ 4–5, at 67–68.

²³⁵ *See supra* text accompanying note 161.

²³⁶ HUBER, *in Davies, supra* note 183, § 5, at 68.

²³⁷ *Id.* § 8, at 71.

²³⁸ *Id.* (using nuptials concluded without a church ceremony as an example).

²³⁹ *Id.*

validly married and eligible to assert spousal property rights from their Friesland home.²⁴⁰ This illustration appeared to involve the extraterritorial version of a chauvinism scenario.²⁴¹

Huber's second example was similar, even though it presented the tougher case of the migratory version of that scenario²⁴² and a conflict as to material conditions. In that example, Huber postulated connubiants from the Duchy of Brabant validly celebrating a consanguineous, avuncular marriage there under a papal dispensation and then migrating to Friesland, which prohibited such marriages.²⁴³ Again, he opined that Friesland would deem the marriage valid, even though Friesland had subsequently become the new *domus* of the spouses.²⁴⁴ The locus law of Brabant had no force in Friesland, not even by virtue of Brabant's status as the *domus* of the connubiants at the time of the nuptials. But Friesland would extend comity to Brabant's law.²⁴⁵ It did not matter that the avuncular marriage violated Friesland law, as long as it did not involve evasion or some other prejudice to Friesland.²⁴⁶

Huber offered two other examples to illustrate the operation of the prejudice exception to comity. Both examples involved deliberate evasion of *domus* law. First, he modified his consanguinity example by having a man from Friesland take his niece to Brabant, celebrate evasive nuptials there under the same papal dispensation, and then immediately return home.²⁴⁷ As the forum as well as the *domus* of the connubiants, Friesland would invoke the prejudice exception to comity, refuse to give effect to the locus law of Brabant, and deem the evasive avuncular marriage void.²⁴⁸ Huber's other example was similar, but it involved underage connubiants from Friesland, who eloped to the German province of Eastern Friesland, which did not require the consent of their guardians for a valid marriage.²⁴⁹ Upon their return home to Friesland, which did require guardian consent, their nuptials would likewise be deemed void for evasion.²⁵⁰

One element of Huber's analysis was unique in that it had no analog or foundation in the rest of his conflicts essay. This element was his articulation of another exception. His locus-validation rule for marriage conflicts would apply

²⁴⁰ *Id.*

²⁴¹ *See supra* Part III.C.

²⁴² *See supra* Part III.C.

²⁴³ HUBER, *in Davies, supra* note 183, § 8, at 71.

²⁴⁴ *Id.*

²⁴⁵ *See id.*

²⁴⁶ *See id.* at 71–72.

²⁴⁷ *Id.* at 71.

²⁴⁸ *Id.* at 71–72.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

“unless [the type of marriage] is too revolting.”²⁵¹ Huber’s example was a marriage that is consanguineous in the second degree—that is, a sibling marriage—if it ever happened to be permitted anywhere.²⁵² He clearly distinguished this “abhorrence” exception from the prejudice exception to comity, leaving the basis for this exception somewhat unclear. Two hints may have been his references to such a marriage being incestuous by the law of nations and being unlikely to be permitted anywhere.²⁵³ The intimation was that this exception derived independently from customary international law, alongside what he regarded as the duty of comity.²⁵⁴ Reflecting the influence of Hugo Grotius (1583–1645), the influential Dutch pioneer of public international law, Huber understood the law of nations as “that law which has acquired binding force through being observed by the whole human race or the greater part of it.”²⁵⁵ If comity derived from the law of nations, as Huber believed, then it presumably would not require a forum to recognize a kind of marriage that itself contravened the law of nations. A crude test would be whether it was a type of marriage that few, if any, nations allowed. The exception was manifestly narrow, for Huber did not invoke it in his own examples involving avuncular marriages, which are one degree of kinship beyond sibling marriages.

Taken together, the two Dutch thinkers were significantly consistent with the focus on locus law that had emerged from the work of Sanchez and Bartolus. Although Voet did not address conflicts involving material conditions, and Huber did not address the outrange scenario, neither offered any affirmative hint of straying from a simple locus rule. In other words, Voet did not advocate a *domus* rule for conflicts involving material conditions, and Huber did not repudiate the locus-invalidity rule in the outrange scenario. What both thinkers significantly did do, however, was endorse the use of an evasion exception to deny validity to nuptials had in evasion of a restriction of *domus* law, the exception that Sanchez had rejected.

²⁵¹ *Id.* at 71.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.* at 71–72.

²⁵⁵ 1 ULRIC HUBER, *HEEDENSDAEGSE RECHTSGELEERTHEYT* [JURISPRUDENCE OF MY TIME], bk. 1, ch. 2, § 22 (Amsterdam, Gerrit de Groot en Zoon en Petrus Schouten, 5th ed. 1768) (1686), <https://goo.gl/fPuq11>, translated in 1 ULRIC HUBER, *THE JURISPRUDENCE OF MY TIME* 5–6 (Percival Gane trans. 1939); see 2 HUGO GROTIUS, *DE JURE BELLI AC PACIS: LIBRI TRES* [ON THE LAW OF WAR AND PEACE: THREE BOOKS] 44 (Francis W. Kelsey trans., Oxford Univ. Press 1925) (1625) (defining the law of nations as “the law which has received its obligatory force from the will of all nations, or of many nations”).

C. Scotland

Before turning to Anglo-American law, a brief postscript on Scottish law is in order. In *Le Roy*,²⁵⁶ Justice Story had regarded two Scottish jurists as persuasive sources on early modern conflicts principles: Lord Henry Home Kames (1696–1782)²⁵⁷ and John Erskine (1695–1768).²⁵⁸ With respect to marriage conflicts, however, neither provided useful guidance. Erskine does not appear to have addressed the topic at all. Although Kames briefly mentioned marriage conflicts as to formalities, his equity solution would not be compatible with the Full Faith and Credit Clause in any event. His view was that the forum should not apply the law of any state²⁵⁹ but should apply “the law of nature,”²⁶⁰ which in his view required only the informal exchange of consents between the parties. In other words, Kames proposed adopting a substantive rule of marriage law instead of choosing the specific law of any of the implicated states. Complying with the formalities law of the locus would evidence the requisite consent, but failure to comply with it or any other law would not establish that the nuptials were void. “[J]ustice requires,” he concluded, “that a marriage be held good [in the forum], though not formal according to the law of the country where it was made, provided the will and purpose of the parties to unite in marriage clearly appear.”²⁶¹ Story himself seemed to recognize that neither Kames nor Erskine provided useful guidance on marriage conflicts. He ignored them in his 1834 treatise and relied, instead, on the 19th-century decision of a Scottish court.²⁶² In the absence of useful guidance from early modern Scottish commentators, the most relevant Continental sources remain Sanchez, Voet, and Huber.

V. EARLY MODERN ANGLO-AMERICAN LAW

The final stage of the originalist review involves early modern Anglo-American conflicts law. Although the sources are not extensive, they do shed considerable light on the understanding of marriage conflicts on both sides of the Atlantic at the time the Constitution was adopted. These sources also tend to converge on the locus rule and the evasion exception.

²⁵⁶ *Le Roy v. Crowninshield*, 15 F. Cas. 362, 364 (C.C.D. Mass. 1820) (No. 8269).

²⁵⁷ See generally LORD HENRY HOME KAMES, *PRINCIPLES OF EQUITY* bk. 3, ch. 8 (2d ed. 1767).

²⁵⁸ See generally JOHN ERSKINE, *AN INSTITUTE OF THE LAW OF SCOTLAND* (2d ed. 1785); JOHN ERSKINE, *THE PRINCIPLES OF THE LAW OF SCOTLAND* (6th ed. 1783).

²⁵⁹ KAMES, *supra* note 257, at 546.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² STORY, *supra* note 58, §§ 109–12.

A. England

Although English courts were barely beginning to develop conflicts law by 1788, one of the first topics they took up was marriage conflicts. Ultimately driven by a statutory effort to discourage clandestine marriages,²⁶³ an effort similar the Tridentine decree on the Continent, English courts drew upon both the Italian and Dutch schools in seeking solutions to marriage conflicts. A close reading of sources discloses significantly more guidance than might first seem possible.

1. Late Emergence of English Conflicts Law

England was quite late in developing a body of conflicts law.²⁶⁴ With a unitary system of government, it lacked significant internal conflicts.²⁶⁵ Law courts also initially declined jurisdiction over cases with foreign elements because jurors were supposed to bring their personal knowledge of the local dispute to bear.²⁶⁶ Instead of developing a body of conflicts law, England developed separate institutions to deal with multistate cases. Admiralty courts administered maritime law, which was regarded as transnational and thus free of conflicts.²⁶⁷ Equity courts or special commissions administered the law merchant and public international law as other transnational bodies of law.²⁶⁸ Ecclesiastical courts had primary jurisdiction over the validity of marriages²⁶⁹ and, through English civilians (as opposed to common lawyers), administered the king's ecclesiastical law.²⁷⁰ That law was transnational at least in the sense of having derived from Continental canon law.²⁷¹ The law courts left multistate cases to these courts or to foreign courts,²⁷² and each English court

²⁶³ See generally OUTHWAITE, *supra* note 126.

²⁶⁴ See generally Alexander N. Sack, *Conflicts of Laws in the History of the English Law*, in 3 LAW: A CENTURY OF PROGRESS, 1835–1935, at 342 (Alison Reppy ed., 1937); AALS, SELECTED READINGS ON THE CONFLICT OF LAWS 1 (Maurice S. Culp ed., 1956) (reprinting an edited version of Sack's article).

²⁶⁵ Sack, *supra* note 264, at 343–44.

²⁶⁶ *Id.* at 344–46.

²⁶⁷ *Id.* at 353–56.

²⁶⁸ *Id.* at 349–52, 356–57.

²⁶⁹ See *Ilderton v. Ilderton* (1793) 126 Eng. Rep. 476, 481 (C.P.); 2 H. Bl. 145, 155.

²⁷⁰ 1 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 363, 364–65 (1903).

²⁷¹ Before the English Reformation, the ecclesiastical courts administered canon law as a common law of the Catholic Church throughout Europe. *Id.* at 354, 355, 358. After the English Reformation, the canon law became the ecclesiastical law of the Church of England, *id.* at 360, and it retained most of the doctrines of the Catholic Church, *id.* at 363.

²⁷² Sack, *supra* note 264, at 343–56.

administered its own body of substantive law, whether national or transnational, without a body of conflicts law.²⁷³

During the 17th century, the law courts assumed jurisdiction over some cases having foreign elements, but they still applied English common law. Having decided that jurors could find facts based on evidence instead of personal knowledge,²⁷⁴ the law courts assumed jurisdiction over some cases having foreign elements, but they still applied English common law. During the same time, the common law absorbed the law merchant and public international law, both of which retained their transnational conceptions.²⁷⁵ By the end the century, the jurisdiction of the admiralty courts had also been limited to disputes arising on the high seas or to those of a truly maritime nature.²⁷⁶ Into the mid-18th century, the law courts nevertheless still declined jurisdiction over purely foreign cases and those with insufficient English contacts to justify application of the common law.²⁷⁷ English courts did, however, develop a practice of recognizing the judgments of those courts as a matter of comity.²⁷⁸

Then, in the decades before the American Revolution, English courts, spiritual as well as temporal, finally began making isolated forays into conflicts law. English courts only engaged fully in developing a body of English conflicts law after 1790, which obviously post-dated the adoption of the Full Faith and Credit Clause in the United States. Two 18th-century periods, immediately preceding the adoption of the United States Constitution, are relevant to the full-faith-and-credit inquiry. The first is defined by Lord Hardwicke's tenure as Lord Chief Justice from 1733 to 1737 and then as Lord Chancellor from 1737 to 1756.²⁷⁹ The second period is defined by Lord Mansfield's tenure as Lord Chief Justice from 1756 to 1788.²⁸⁰

2. Hardwicke Period (1733–1756)

The Hardwicke period saw two major developments in marriage conflicts. The first was the 1752 decision of an ecclesiastical court in a case called *Scrimshire v. Scrimshire*,²⁸¹ in which the judge, Sir Edward Simpson,

²⁷³ *Id.* at 356–57.

²⁷⁴ *Id.* at 347.

²⁷⁵ *Id.* at 375–77.

²⁷⁶ *Id.* at 385.

²⁷⁷ *Id.* at 358–66.

²⁷⁸ *Id.* at 379–85.

²⁷⁹ See JOSEPH HAYDN, THE BOOK OF DIGNITIES 357 (Horace Ockerby ed., London, W.H. Allen & Co., 3d ed. 1894).

²⁸⁰ *Id.* at 370.

²⁸¹ (1752) 161 Eng. Rep. 782 (Cons.); 2 Hag. Cons. 395.

reputedly consulted Hardwicke,²⁸² and which Hardwicke at least ratified after the fact.²⁸³ The second was the enactment of a law, at Hardwicke's urging, to restrict clandestine marriages in England. It set the stage for decades of marriage conflicts in the succeeding Mansfield period and beyond.

i. The Scrimshire Decision

Scrimshire was an action between two English connubiants who had concluded their nuptials irregularly in France. The bride sued for restitution of conjugal rights, essentially seeking to have the ostensible marriage adjudged valid. The nuptials had been clandestine in almost every way. The connubiants were underage and proceeded without parental consent. Although the wedding was witnessed, it was held in private and was performed by an unauthorized priest.²⁸⁴ When the mother of the groom learned of the nuptials, she sought an annulment in France.²⁸⁵ It was eventually granted by the Parlement of Paris,²⁸⁶ the country's highest court at the time.²⁸⁷ A couple of months before the French judgment, the bride had filed this action in the ecclesiastical court of London.²⁸⁸ Under French law, the ostensible marriage was void, while under English law, it was irregular, but arguably valid.²⁸⁹ The English court nevertheless applied the law of France, as the locus, and ruled the ostensible marriage void.²⁹⁰ In doing so, it was one of the first English courts to conduct a significant choice-of-law analysis and apply foreign law.²⁹¹

Hardwicke himself had maintained for a while that an English court had the power to make a choice of law and apply foreign law. Indeed, as early

²⁸² See *Middleton v. Janverin* (1802) 161 Eng. Rep. 797, 800 (Arches); 2 Hag. Cons. 437, 446.

²⁸³ *Butler v. Freeman* (1756) 27 Eng. Rep. 204, 205 (Ch.); Amb. 301, 303. Although the reporter attributes the decision to the Court of Delegates instead of the Consistory Court, the reference was undoubtedly to *Scrimshire*. See also *Middleton*, 161 Eng. Rep. at 801; 2 Hag. Cons. at 446 (same supposition).

²⁸⁴ *Scrimshire*, 161 Eng. Rep. at 783, 785–86; 2 Hag. Cons. at 396, 403–04.

²⁸⁵ *Id.* at 787; 2 Hag. Cons. at 409.

²⁸⁶ *Id.* at 788; 2 Hag. Cons. at 410.

²⁸⁷ The court refused to give preclusive effect to the French court's invalidation of the marriage, *id.* at 783; 2 Hag. Cons. at 396–98, perhaps because the invalidity was not established by an ecclesiastical court, see *Roach v. Garvan* (1748) 27 Eng. Rep. 954, 955 (Ch.); 1 Ves. Sen. 157, 159 (holding that the validity of a marriage established directly by a judgment of a foreign ecclesiastical court would be deemed preclusive on English courts but not validity that was established only incidentally by the judgment of a foreign temporal court).

²⁸⁸ *Scrimshire*, 161 Eng. Rep. at 788; 2 Hag. Cons. at 410.

²⁸⁹ *Id.* at 786; 2 Hag. Cons. at 404–05.

²⁹⁰ *Id.* at 792; 2 Hag. Cons. at 421–22.

²⁹¹ See *Anton*, *supra* note 52, at 540–41.

as 1744, he had already articulated a locus rule for resolving marriage conflicts. In *Omichund v. Barker*,²⁹² he used it as an analogy in justifying the admissibility of depositions given by Hindu witnesses in India under oaths sworn to non-Christian gods. Although the opinion was reported inconsistently, he articulated either an unqualified locus-validation rule for marriage conflicts²⁹³ or a formalities-specific locus rule.²⁹⁴ Either way, he had sufficient confidence in some form of the locus rule to rely on it as a premise for reaching a more controversial conclusion on a different topic.

Scrimshire would provide a vehicle for establishing that principle as an actual holding of an English court with the requisite jurisdiction, but it has at least one significant limitation as a precedent. It was not an evasion case; it was an outrage case. The nuptials were invalid under the law of the locus where they took place. *Scrimshire* involved an effort to adopt the saving alternative of *domus* law in lieu of the invalidating law of the locus. The question was whether the English forum should apply English law, as the *domus* law, in order to affirm the validity of the French nuptials.²⁹⁵ Simpson (and Hardwicke) nevertheless provided a thorough analysis that provides some guidance beyond the outrage scenario.

Counsel for the ostensible bride pressed a domicile rule in arguing that French law did not apply.²⁹⁶ He contended that French law would not apply unless the connubiants were domiciled in France, and he insisted that neither of them was.²⁹⁷ Applying a locus rule, he warned, would mean that the rights of English domiciliaries, including rights over land in England, would be governed by France, “which is not to be endured.”²⁹⁸ Both connubiants were English nationals and domiciliaries by birth, and there were strong arguments that neither had established a domicile of choice in France at the time of the nuptials.²⁹⁹

Simpson rejected the theory and adopted a strong locus rule, applying even when the result was to invalidate the nuptials. The validity of foreign marriages, he reasoned, was to be determined “according to the laws of the

²⁹² There are three distinct reports of this decision. *Omichund v. Barker* (1744) 125 Eng. Rep. 1310 (Ch.); Willes 538; *Omichund v. Barker* (1744) 22 Eng. Rep. 339 (Ch.); 2 Eq. Cas. Abr. 397; *Omychund v. Barker* (1744) 26 Eng. Rep. 15 (Ch.); 1 Atk. 22.

²⁹³ *Omichund*, 22 Eng. Rep. at 349; 2 Eq. Cas. Abr. at 411 (“So Marriages good in their own Countries, are good all over the World; and what is good Evidence of them there, is allowed here.”).

²⁹⁴ *Omychund*, 26 Eng. Rep. at 33; 1 Atk. at 50 (“So in matrimonial cases, they are to be determined according to the ceremonies of marriage in the country where it was solemnized.”).

²⁹⁵ *Scrimshire*, 161 Eng. Rep. at 784; 2 Hag. Cons. at 399.

²⁹⁶ *Id.* at 786; 2 Hag. Cons. at 406.

²⁹⁷ *Id.* at 786; 2 Hag. Cons. at 405.

²⁹⁸ *Id.* at 787; 2 Hag. Cons. at 407.

²⁹⁹ *Id.* at 786; 2 Hag. Cons. at 405–07.

country in which they are formed.”³⁰⁰ The basis of his rule is perhaps more notable than the rule itself. Although it was something of a hybrid, it was ultimately grounded more in the Italian school than in the Dutch school of conflicts thought.

The clearest element of Dutch-inflected reasoning nevertheless came at the outset of Simpson’s analysis. He dismissed the objection that applying locus law would somehow involve France in governing English people or land.³⁰¹ “[U]ndoubtedly,” he emphasized, “no law or statute in France can bind subjects of England who are not under its authority.”³⁰² In applying the law of France, as the locus, “the rights of English subjects cannot be said to be determined by the laws of France, but by those of their own country, which sanction and adopt this rule of decision.”³⁰³ French law had no extraterritorial force, but it could be given effect in England at England’s option. Simpson was espousing Dutch premises about absolute territorial sovereignty, and although he did not use the word comity, his emphasis on the forum choosing to apply foreign law clearly echoed Huber and Voet.³⁰⁴ From that point forward, however, Simpson’s analysis drew almost exclusively from the Italian school.

He retreated almost immediately from the strong statement of absolute territorial sovereignty. First, Simpson felt compelled to justify France’s application of its marriage law to nuptials concluded within its territory. For Huber and Voet, the answer was absolute territorial sovereignty, but not for Simpson. Instead, he quoted German conflicts thinker Andreas Gaill for two propositions: (1) that a formalities regulation of the locus “binds even non-subjects” and (2) that a party “gains a forum in the place of the contract.”³⁰⁵ Both were Italian-school justifications for the formalities exception to the principle that locus law does not bind outsiders unless they intended to become domiciliaries of the locus. Gaill cited Bartolus and other Italian statisticians for the first proposition,³⁰⁶ and the second one is exactly how Sanchez had justified the formalities exception.³⁰⁷ Indeed, Gaill has been classified as a member of the Italian school.³⁰⁸ Simpson ended the passage by explaining that France could

³⁰⁰ *Id.* at 787; 2 Hag. Cons. at 407–08.

³⁰¹ *Id.*; 2 Hag. Cons. at 407.

³⁰² *Id.*

³⁰³ *Id.*; 2 Hag. Cons. at 408.

³⁰⁴ *Id.* at 790; 2 Hag. Cons. at 416 (grounding decision in part on “the practice of nations”).

³⁰⁵ *Id.* at 787; 2 Hag. Cons. at 408.

³⁰⁶ ANDREAS GAILL, PRACTICARUM OBSERVATIONUM [PRACTICAL OBSERVATIONS] lib. 2, obs. 123, at 548–49 (Colonia Agrippina (Cologne), Joannes Gymnicus 1592) (citing Bartolus, Baldus, and Salicet, among others), <http://goo.gl/RN7pK7>.

³⁰⁷ SANCHEZ, *supra* note 97, lib. 3, disp. 18, ¶ 10 (“[E]very contract gains a forum in the place of the contract.”).

³⁰⁸ 1 LAINÉ, *supra* note 53, at 409–10.

exercise judicial jurisdiction over the nuptials and apply French law to them only so long as the connubians continued to “reside” in France.³⁰⁹ So much for absolute territorial sovereignty.

When Simpson turned to resolution of the actual marriage conflict, the reliance on the Italian approach was even clearer. The principal authority on whom he relied was Sanchez,³¹⁰ and he seemed to adopt Sanchez’s general Italian approach. Quoting Sanchez, Simpson explained that outsiders are not bound by the law of the locus in which they act, except for laws regulating formalities.³¹¹ He then quoted Sanchez’s resolution of the outrage scenario: that the nuptials are invalid because locus law applies under the formalities exception.³¹² In dicta, he even endorsed Sanchez’s resolution of the evasion scenario, on the theory that *domus* law never applies in the locus.³¹³ Simpson did not even mention the evasion exception,³¹⁴ which Voet and Huber endorsed, but Sanchez rejected.

Although Simpson included two quotations from Voet’s work,³¹⁵ neither was meaningful. Each merely articulated a locus rule for marriage conflicts involving formalities—the same *locus regit actum* rule that everyone from Bartolus to Huber endorsed. Notably, however, Simpson declined to follow Voet in resolving the very conflict at issue in *Scrimshire*. In outrage cases, like *Scrimshire* itself, Voet had endorsed the saving alternative: applying *domus* or situs law to validate an act that had not complied with the formalities law of the locus.³¹⁶ Actually using Voet’s conflicts regime would have led Simpson to apply English marriage law and affirm the validity of the *Scrimshire* nuptials. Not only did Simpson not follow Voet’s solution, but he even quoted an additional commentator, Joachim Mynsinger, for the explicit repudiation of the saving theory.³¹⁷ Indeed, Voet had quoted that very same passage from Mynsinger and explicitly disagreed with it.³¹⁸ Mynsinger, incidentally, was a German contemporary of Gaill and has also been classified

³⁰⁹ *Scrimshire*, 161 Eng. Rep. at 787; 2 Hag. Cons. at 412–14.

³¹⁰ *Id.* at 788–89; 2 Hag. Cons. at 412–13.

³¹¹ *Id.*

³¹² *Id.* at 789; 2 Hag. Cons. at 413.

³¹³ *Id.* at 789; 2 Hag. Cons. at 413–14.

³¹⁴ *Id.* at 789–90; 2 Hag. Cons. at 413–16.

³¹⁵ *Id.* at 789; 2 Hag. Cons. at 414–15.

³¹⁶ 1 VOET, TRANSLATED COMMENTARY, *supra* note 182, bk. 1, tit. 3–4 app., § 15, at 114 (translating 1 VOET, LATIN COMMENTARY, *supra* note 182, lib. 1, tit. 3–4 app.).

³¹⁷ *Scrimshire*, 161 Eng. Rep. at 789, 789 n.†; 2 Hag. Cons. at 414, 414 n.†.

³¹⁸ 1 VOET, TRANSLATED COMMENTARY, *supra* note 182, bk. 1, tit. 3–4 app., § 15, at 114 (translating 1 VOET, LATIN COMMENTARY, *supra* note 182, lib. 1, tit. 3–4 app.).

to the Italian school.³¹⁹ The quotations of Voet appear to be little more than a Dutch veneer over an Italian analysis.

Indeed, the Dutch veneer was quite flimsy, as Simpson did not even mention Huber.³²⁰ One explanation for the omission of Huber might be straightforward. In formulating his rule for resolving marriage conflicts, Huber did not address the outrage scenario, which was at issue in *Scrimshire*. That explanation is not fully satisfying, however, because Huber's marriage rule simply derived from his maxims and general principles for resolving conflicts involving the regulation of acts. One of Huber's two general principles had been that an act invalid under locus law is invalid everywhere.³²¹ That principle would have supported Simpson's holding in *Scrimshire*. Even though Huber himself did not apply the principle to the outrage marriage scenario,³²² nothing would have prevented Simpson from doing so. Huber's principles actually came closer to supporting Simpson's result than Voet's did, as Voet specifically disapproved of the result Simpson reached in the outrage scenario. Simpson seemed to be affirmatively avoiding Huber, despite opening with starting premises that echoed Huber's maxims.

In any event, Simpson may have been less persuaded by any of these conflicts thinkers and more by the final rationale that he himself offered. Simpson's most original contribution to the analysis of marriage conflicts was his closing rationale in favor of his strong locus rule. It was a policy rationale that relied on no Dutch or Italian jurist. It was simply that choosing locus law avoids the grave systemic dysfunction of limping marriages, including the possibility of progressive polygamy.³²³ Simpson emphasized the "infinite mischief and confusion" that would accompany a system in which the same person was deemed married in one state but single in another or, worse, married to one person in one state but married to a different person in another state, with children of each relationship.³²⁴ Avoiding that systemic dysfunction made it imperative that "there should be one rule of determining in all nations" whether a couple's ostensible marriage is valid.³²⁵ Simpson believed the locus rule was capable of achieving that systemic uniformity.³²⁶ This policy rationale, more than conflicts commentary, may have been the true basis of his decision.

³¹⁹ 1 LAINÉ, *supra* note 53, at 409.

³²⁰ *Scrimshire*, 161 Eng. Rep. at 789; 2 Hag. Cons. at 413–15.

³²¹ HUBER in Davies, *supra* note 183, § 3, at 66.

³²² *Id.* § 8, at 71.

³²³ *Scrimshire*, 161 Eng. Rep. at 790–91; 2 Hag. Cons. at 416–19. For a discussion of limping marriages and progressive polygamy, see *supra* text accompanying notes 66–67.

³²⁴ *Scrimshire*, 161 Eng. Rep. at 790–91; 2 Hag. Cons. at 416–19.

³²⁵ *Id.* at 791; 2 Hag. Cons. at 419.

³²⁶ *Id.*

ii. “His” Marriage Act

Hardwicke’s second contribution to marriage conflicts was more inadvertent. By securing the enactment of an eponymous law to invalidate clandestine marriages in England,³²⁷ he prompted a surge of evasive elopements to Scotland³²⁸ or across the English Channel. Dubbed “Gretna Green marriages” for the Scottish border town that became a notorious locus for them, they created marriage conflicts that kept English courts busy for decades.³²⁹ In his last year as Lord Chancellor, Hardwicke even confronted the problem himself.

Lord Hardwicke’s Marriage Act of 1753,³³⁰ as the law was commonly known, was an English analog to the Tridentine decree. It required weddings to be witnessed³³¹ and made it a felony to solemnize nuptials outside a church or without either a license or publication of banns.³³² It allowed parents to invalidate banns after publication³³³ and required their consent for a license.³³⁴ Noncompliant nuptials were declared “null and void to all intents and purposes whatsoever.”³³⁵ Like the Tridentine decree, however, a geographical limitation produced marriage conflicts. The Act expressly exempted nuptials “solemnized” in “Scotland” or “beyond the seas,”³³⁶ so it applied only when England or Wales was the locus. It thus created a nice question whether nuptials concluded in evasion of it were nevertheless valid.

A sub-issue was how the restrictions should be characterized for conflicts purposes. In contrast to the Tridentine decree, the Act did not expressly mention capacity or purport to bind English connubians elsewhere, but the restrictions were not clearly limited to formalities. The requirement of parental consent for a license arguably addressed whether, not how, nuptials were to be celebrated, perhaps rendering parental consent a material

³²⁷ OUTHWAITE, *supra* note 126, at 75–97.

³²⁸ EDWARD COKE, FRANCIS HARGRAVE & CHARLES BUTLER, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: OR, A COMMENTARY UPON LITTLETON* *79b n.1 (1788) (cited in court opinions of the era as “Co. Litt. 79b”).

³²⁹ OUTHWAITE, *supra* note 126, at 132–35.

³³⁰ 26 Geo. 2 c. 33.

³³¹ *Id.* § 15.

³³² *Id.* § 8.

³³³ *Id.* § 3 (banns rendered “absolutely void” by parental objection).

³³⁴ *Id.* § 11 (declaring a licensed marriage without parental consent “absolutely null and void to all intents and purposes whatsoever”).

³³⁵ *Id.* § 8.

³³⁶ *Id.* § 18.

condition.³³⁷ The reported conflicts cases tended to involve underage elopements.

Although lacking the ecclesiastical courts' primary jurisdiction over the validity of marriage,³³⁸ Hardwicke still took a hard line against nuptials concluded in evasion of the Act. In *Butler v. Freeman*,³³⁹ he entertained a contempt petition against a connubiant and her "accomplice" for whisking a young heir to Antwerp for evasive nuptials with him. His estate was under a protective equity decree in England.³⁴⁰ Hardwicke endorsed the locus rule of *Scrimshire* in opining that, as in that case, the nuptials might have been invalid for failing to satisfy even the formalities rules of the locus.³⁴¹ But that question was not within his jurisdiction; it was rightly pending before an ecclesiastical court on a nullity petition.³⁴² Before Hardwicke was the contempt petition. Despite acknowledging that the nuptials were not within the scope of the Act because of "a door open in the statute,"³⁴³ he twice referred to them as the first instance of an "offence" under the Act.³⁴⁴ As such, he insisted, they "required a severe punishment to prevent a second."³⁴⁵ He kept the connubiant in jail for contempt for seven months in an effort to coerce her to appear in the ecclesiastical proceeding, which she was declining to do.³⁴⁶ Although Hardwicke was a judge of equity, not law, his disregard of the statutory exemption was aggressive. One interpretation could be that he thought an English forum should apply an evasion override and decline to apply the locus law. Still, he did not articulate that theory or even mention the word "evasion."³⁴⁷ Neither had *Scrimshire*, and its heavy reliance on Sanchez implied a rejection of the evasion exception.³⁴⁸

³³⁷ Most forums characterize it that way. PÅLSSON, FORMALITIES, *supra* note 70, § 409.

³³⁸ See *Roach v. Garvan* (1748) 27 Eng. Rep. 954, 955 (Ch.); 1 Ves. Sen. 156, 159.

³³⁹ (1756) 27 Eng. Rep. 204, 205 (Ch.); Amb. 301, 303.

³⁴⁰ *Id.* at 204; Amb. at 301.

³⁴¹ *Id.* at 206; Amb. at 303. The evidence conflicted as to whether the Antwerp nuptials had followed Anglican or Dutch rites.

³⁴² *Id.*; Amb. at 304; see also *Herbert v. Herbert* (1819) 161 Eng. Rep. 737, 737 (Cons.); 2 Hag. Cons. 263, 263 (citing 1756 ecclesiastical case called *Buller v. Dolben*). Dolben had been the maiden name of the connubiant before Hardwicke in *Butler*. *Butler*, 27 Eng. Rep. at 204; Amb. at 302.

³⁴³ *Butler*, 27 Eng. Rep. at 204; Amb. at 302.

³⁴⁴ *Id.* at 204, 205; Amb. at 302, 304.

³⁴⁵ *Id.* at 205; Amb. at 304.

³⁴⁶ The issue became moot when the young man came of age and the parties got married (again). *Id.*; see also *Robinson v. Bland* (1760) 97 Eng. Rep. 717, 719 (K.B.); 2 Burr. 1078, 1080.

³⁴⁷ *Butler*, 27 Eng. Rep. at 205; Amb. at 304.

³⁴⁸ See *supra* text accompanying notes 310–14.

3. Mansfield Period (1756–1788)

As Hardwicke stepped down as Lord Chancellor, Lord Mansfield coincidentally assumed the office of Lord Chief Justice of King’s Bench. During his three decades of service, Mansfield laid a thin foundation for the subsequent development of conflicts law in the law courts. He lacked the jurisdiction, however, to do more than opine on one of the era’s greatest conflicts questions, the validity of the Gretna Green marriages that Lord Hardwicke’s Marriage Act had unleashed.³⁴⁹ Eventually, the highest ecclesiastical court answered that question, accepting the marriages as valid. But it did so without opinion. Efforts to explicate that decision garnered recurrent attention throughout the remainder of the Mansfield period—and beyond.

i. Mansfield’s Dictum

The conflicts foundation of Mansfield may have been thin, but it was clearly Dutch and, specifically, Huberian. The starting point was Mansfield’s 1760 decision in *Robinson v. Bland*.³⁵⁰ There, he adopted Huber and Voet’s solution to a contracts conflict³⁵¹ and described the result as “established ex comitate et jure gentium.”³⁵² Fifteen years later, as the American Revolution was breaking out, Mansfield decided another contracts case and adopted another of Huber’s propositions.³⁵³ A process had begun, but conflicts law in the law courts still remained rudimentary.³⁵⁴

It was in *Robinson* that Mansfield nevertheless reached out to opine on the Gretna Green problem. His law courts had no greater jurisdiction over marriage conflicts than Hardwicke’s equity courts did,³⁵⁵ but the issue came up

³⁴⁹ *Ruding v. Smith* (1821) 161 Eng. Rep. 774, 776 n.† (Cons.); 2 Hag. Cons. 371, 376 n.† (“It appears . . . that soon after the Marriage Act many instances had occurred of persons going into Scotland to evade the restrictions of that Act.”).

³⁵⁰ There are two distinct reports of this decision. *Robinson v. Bland* (1760) 96 Eng. Rep. 141 (K.B.); 1 Black. W. 256; *Robinson v. Bland* (1760) 97 Eng. Rep. 717 (K.B.); 2 Burr. 1077.

³⁵¹ *Robinson*, 96 Eng. Rep. at 141; 1 Black. W. at 258–59; *accord Robinson*, 97 Eng. Rep. at 718; 2 Burr. at 1078–79.

³⁵² *Robinson*, 96 Eng. Rep. at 141; 1 Black. W. at 258 (“established by comity and the law of nations”).

³⁵³ *Holman v. Johnson* (1775) 98 Eng. Rep. 1120 (K.B.); 1 Cowp. 341; *see also* *Walker v. Witter* (1778) 99 Eng. Rep. 1 (K.B.); 1 Dougl. 1 (dealing with recognition of judgments); *Mostyn v. Fabrigas* (1774) 98 Eng. Rep. 1021 (K.B.); 1 Cowp. 161 (dealing with tort conflict).

³⁵⁴ *Rafael v. Verelst* (1776) 96 Eng. Rep. 621, 622–23 (C.P.); 2 Black. W. 1055, 1058 (Lord de Grey, CJ) (“Crimes are in their nature local, and the jurisdiction of crimes is local. And so as to the rights of real property, the subject being fixed and immoveable. But personal injuries are of a transitory nature, and sequuntur forum rei.”).

³⁵⁵ *See Ilderton v. Ilderton* (1793) 126 Eng. Rep. 476, 481 (C.P.); 2 H. Bl. 145, 155.

incidentally. Although *Robinson* was about the validity in England of gambling debts undertaken in France, counsel for the creditor invoked the validity of Gretna Green marriages as an analogy.³⁵⁶ Mansfield took the opportunity to comment on the question in a notable digression. He agreed that, in general, “a marriage in a foreign country must be governed by the law of that country where the marriage was had,”³⁵⁷ but he cautioned about relying on that locus rule in the case of Gretna Green marriages. “They may come under a very different consideration,”³⁵⁸ he warned; “Huber puts a parallel case, and determines expressly against it.”³⁵⁹ Mansfield disclaimed giving an opinion but said, “I only mention it, to hinder by-standers from taking those arguments for granted.”³⁶⁰ He noted Hardwicke’s opinion in *Butler*.

Mansfield was correct about Huber’s example but perhaps not about its application to Gretna Green marriages. Huber had indeed cited the elopement of minors without parental consent to illustrate his marriage rule. He said that the connubiants’ *domus* would invoke the evasion exception to comity and treat the nuptials as void, even though other states, including the locus, would treat the nuptials as valid.³⁶¹ The fact pattern was the same as the Gretna Green problem, but only in the subset of cases involving minors and the lack of parental consent. In a Gretna Green case involving adults, where the conflict involved only formalities, Huber’s guidance was less clear. He had given an example of a conflict involving an informal marriage and said other states should treat it as valid, but it also was not evasive. Perhaps more to the point, Huber’s illustration involving eloping minors had not involved a *domus* statute that, like Lord Hardwicke’s Act, expressly exempted nuptials concluded outside the *domus*. Nor, for that matter, had Voet’s example. The statutory exemption made the Gretna Green problem tougher than the illustrations used by Huber and Voet. Still, Huber and Voet were dead Dutchmen, and the very living Lord Chief Justice of England had just waved a caution flag about any assumption that Gretna Green marriages were valid in England.

Even apart from the substance of Mansfield’s digression, the exchange itself was telling in another respect. The assertion by counsel of an analogy to marriage recognition in an ordinary contracts case indicated the strength with which the locus rule was assumed to apply to marriage conflicts. That assertion was consistent with other indications to the same effect, including Lord Hardwicke’s similar invocation of marriage validation as an analogy in

³⁵⁶ *Robinson*, 96 Eng. Rep. at 142; 1 Black. W. at 259.

³⁵⁷ *Robinson*, 97 Eng. Rep. at 718; 2 Burr. at 1079–80.

³⁵⁸ *Id.* at 719; 2 Burr. at 1080.

³⁵⁹ *Robinson*, 96 Eng. Rep. at 142; 1 Black. W. at 259.

³⁶⁰ *Id.*

³⁶¹ See *supra* text accompanying notes 249–50.

Omichund.³⁶² When, in 18th-century England, one wanted to bolster an argument that an English court should apply locus law—whether for the enforceability of a gambling debt or the admissibility of a Hindu oath—a go-to analogy was the validation of foreign nuptials using the locus rule.

ii. *Compton v. Bearcroft*

In 1769, the validity of Gretna Green marriages finally reached the court with the jurisdiction to give a definitive answer. The High Court of Delegates, which was the highest ecclesiastical court short of the monarch, affirmed the validity of one of the marriages in *Compton v. Bearcroft*.³⁶³ The decision gave a definitive answer—yes—but it did not clarify the controlling conflicts principles because the rationale remained unknown.

The court itself was a monstrosity. Concocted as a substitute for appeals to the Pope at the time of the English Reformation,³⁶⁴ it was an ad hoc creature assembled anew for each case.³⁶⁵ It usually comprised three junior common law judges and three civilian practitioners.³⁶⁶ Quality was a problem: “The Judges in each case being different, the uniformity of decision is not so well preserved; and it not being the practice of the Court to deliver or explain the grounds of its judgment, the principles on which they are founded are not

³⁶² See *supra* text accompanying notes 292–94.

³⁶³ *Compton v. Bearcroft* (1768) (Del.), reported in FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 114 (London, W. Strahan & W. Woodfall, 4th ed. 1785) (1772) [hereinafter BULL. N.P.], <https://goo.gl/7YdPdV>. American courts or reporters during the early national period tended simply to cite this source as “Bull. N.P.” or equivalent without recognizing that the pagination differed slightly from edition to edition. Compare, e.g., *Inhabitants of Medway v. Inhabitants of Needham*, 16 Mass. (15 Tyng) 157, 159 n.4 (1819) (citing “Bull. N.P. 114” in court opinion), with *Jackson v. Jackson*, 1 Johns. 424, 428 n.‡ (N.Y. Sup. Ct. 1806) (citing “Buller’s N.P. 113” in argument of counsel). In the English reports, *Compton* is also discussed, albeit somewhat inconsistently, in *Harford v. Morris* (1776) 161 Eng. Rep. 792, 795 (Cons.); 2 Hag. Cons. 423, 430, *Middleton v. Janverin* (1802) 161 Eng. Rep. 797, 799 & n.* (Arch.); 2 Hag. Cons. 437, 443–44, 444 n.*, and in *Ruding v. Smith* (1821), 161 Eng. Rep. 774, 775–76 (Cons.); 2 Hag. Cons. 371, 374–77 (reporting arguments of counsel). There is even some disagreement as to its date of decision. Compare BULL. N.P., *supra*, at 114 (reporting Dec. 1, 1768), with, e.g., *Middleton*, 161 Eng. Rep. at 800 n.(a); 2 Hag. Cons. at 444 n.(a) (reporting Feb. 4, 1769).

³⁶⁴ THE SPECIAL AND GENERAL REPORTS MADE TO HIS MAJESTY BY THE COMMISSIONERS APPOINTED TO INQUIRE INTO THE PRACTICE AND JURISDICTION OF THE ECCLESIASTICAL COURTS OF ENGLAND AND WALES 9 (1832) [hereinafter ECCLESIASTICAL REPORTS], <http://goo.gl/QfTjXE>.

³⁶⁵ *Id.*

³⁶⁶ *Id.* at 9–10. See, e.g., *Harford*, 161 Eng. Rep. at 797; 2 Hag. Cons. at 436 (enumerating all twelve members of the court for that appeal). For some reason, the *Compton* court had only five members, and only two were civilians. See *Middleton*, 161 Eng. Rep. at 800 n.(a); 2 Hag. Cons. at 444 n.(a).

sufficiently ascertained.”³⁶⁷ Simple competence was another problem. Poor pay meant being staffed by junior civilians, on whom the common law judges had to rely.³⁶⁸

The court was abolished in 1832, but not before rendering the definitive Mansfield-era judgment on marriage conflicts and doing it without opinion. The full report of the decision was one complex sentence—“The appellant and respondent, both English subjects, and the appellant being under age, ran away without the consent of her guardian, and were married in Scotland; and on a suit brought in the spiritual court to annul the marriage, it was holden that the marriage was good.”³⁶⁹ Deliberately evasive, underage nuptials concluded informally by English connubians in Scotland (or elsewhere) were valid. There was no reported rationale as to why.

Maybe the rationale was the obvious one. Perhaps the Delegates simply used the strong locus rule from *Scrimshire* to choose the marriage law of Scotland and, as *Scrimshire* may have foreshadowed,³⁷⁰ refused in principle to adopt the evasion exception, despite its implicit endorsement by Hardwicke and Mansfield. That is precisely how Sanchez resolved the closely analogous conflicts triggered by the Tridentine decree.³⁷¹ His reasoning had even rested on the decree’s inclusion of an explicit geographical restriction that was functionally identical to the one in Hardwicke’s Act.³⁷² Given the manifest appeal of Sanchez to Simpson in *Scrimshire*, this theory seems like a strong possibility, but it was not the only one. Alternative interpretations of *Compton* appeared during the remainder of the Mansfield period and beyond. One case, in which an alternative appeared, merits discussion for what it may help to elucidate about *Compton* itself.

iii. *The Domicile Theory*

A significant alternative theory challenged even the supposition that *Compton* rested on a locus rule. Although seemingly iconoclastic, the theory must be taken seriously. It was put forward by Sir George Hay, counsel for the petitioning bride in *Scrimshire*. Later, as an ecclesiastical judge, he had rendered the very lower court decision that the Delegates affirmed, at least as to its result, in *Compton*. His opinion articulating the domicile theory was also intricately reasoned and quite impressive.

³⁶⁷ ECCLESIASTICAL REPORTS, *supra* note 364, at 10.

³⁶⁸ 1 HOLDSWORTH, *supra* note 270, at 375.

³⁶⁹ *Compton v. Bearcroft* (1768) (Del.), *reported in* BULL. N.P., *supra* note 363, at 114.

³⁷⁰ *See supra* text accompanying note 314.

³⁷¹ *See supra* text accompanying notes 168–69.

³⁷² *See supra* text accompanying note 179.

It appeared in *Harford v. Morris*,³⁷³ which he decided in 1776.³⁷⁴ The case involved the 12-year-old, illegitimate daughter of Lord Baltimore.³⁷⁵ She had been induced to accompany one of her guardians to conclude her nuptials with him in the Austrian Netherlands and, again, in Denmark.³⁷⁶ Her other guardians petitioned to have the nuptials voided on the alternative grounds that the nuptials were (1) procured by force and fraud, (2) void under Hardwicke's Act as evasive, and (3) void under the law of each locus.³⁷⁷ Hay affirmed the validity of the nuptials.³⁷⁸

In rejecting the first ground, he illustrated an understanding that English ecclesiastical courts were bound, in addition to English law, by a narrow, supranational body of substantive marriage law, which he called the "general law."³⁷⁹ Force would void a marriage under this law, as would incest or any other impediment under the "law of nations."³⁸⁰ Being extremely underage would as well.³⁸¹ He found none of the restrictions applicable as a factual matter.³⁸² The reasoning clearly echoed Huber's understanding that there exists a supranational "abhorrence" exception in the law of marriage conflicts, whether characterized as natural law, customary international law, or both.

In rejecting the other two grounds, Hay articulated a sophisticated domicile principle. While acknowledging that courts could choose and apply foreign law in an appropriate case, he did not deem this an appropriate case. In his view, a mere transit through a foreign state was not enough to justify the application of its marriage law, even to nuptials concluded there.³⁸³ For that law to attach, the connubiant must intend to form a new domicile in the locus or, at the very least, have some sort of established residence there.³⁸⁴ This theory obviously required him to distinguish *Scrimshire*, which he did on the unpersuasive ground that Simpson's opinion had rested on a finding that the connubiants there had become French domiciliaries or established residents.³⁸⁵

³⁷³ 161 Eng. Rep. 792 (Cons.); 2 Hag. Cons. 423, *vacated*, (1781) 161 Eng. Rep. at 797 (Del.); 2 Hag. Cons. at 436, *rev'd* (1784) 161 Eng. Rep. at 797 (Del.); 2 Hag. Cons. at 436.

³⁷⁴ *Id.*

³⁷⁵ *Id.* at 792; 2 Hag. Cons. at 423.

³⁷⁶ *Id.* at 793; 2 Hag. Cons. at 424.

³⁷⁷ *Id.*; 2 Hag. Cons. at 424–25.

³⁷⁸ *Id.* at 797; 2 Hag. Cons. at 435–36.

³⁷⁹ *Id.* at 793; 2 Hag. Cons. at 425.

³⁸⁰ *Id.*

³⁸¹ *Id.* at 794; 2 Hag. Cons. at 428.

³⁸² *Id.* at 793–94; 2 Hag. Cons. at 426–28.

³⁸³ *Id.* at 795; 2 Hag. Cons. at 431.

³⁸⁴ *Id.*

³⁸⁵ *Id.*; 2 Hag. Cons. at 431–32.

Simpson had done no such thing.³⁸⁶ It is more likely that Hay was rhetorically revising *Scrimshire*, in which he himself had promoted the domicile theory as an advocate.

Finally, Hay contended that under the law of the domicile (England) the nuptials were valid.³⁸⁷ Evasion of Hardwicke's Act was not a problem. Although he was skeptical of the very concept of an evasion exception,³⁸⁸ he rejected its application on the basis of the Act's express geographical restriction.³⁸⁹ Yet if Hardwicke's Act did not apply, but the nuptials were governed by the law of the English domicile, what English law applied? Hay's answer was the English law that underlay Hardwicke's Act and that had been overridden by it in relation to nuptials taking place in England itself.³⁹⁰ In other words, the underlying body of pre-amended English ecclesiastical law still governed nuptials concluded abroad by English domiciliaries.³⁹¹ Under that prior law, clandestine marriages were irregular but valid. This theory, moreover, is what he claimed was the basis of the Delegates' decision in *Compton*.³⁹²

Reading Hay's opinion in the context of Dutch conflicts theory, one might fairly wonder if he were some sort of crackpot. Actually, it is true that two years after rendering this decision, Hay became mentally ill and committed suicide.³⁹³ But this opinion was not the work of a madman; it was the work of an Italian statist. His principles were not Dutch-derived but were right out of Bartolus and Sanchez, though without attribution to either. Sanchez's first general principle was that the law of the locus does not bind an outsider unless the outsider intends to establish a new domicile at the locus.³⁹⁴ Hay agreed. Sanchez followed Bartolus, however, in recognizing an exception to that rule for locus laws regulating formalities.³⁹⁵ Avoiding that exception, Hay apparently did not characterize the issue in *Harford* as one of formalities, for he did not even mention the longstanding *locus regit actum* rule. Under the Italian approach, a material condition might not be subject to locus regulation, which is consistent with Hay's conclusion in *Harford*.³⁹⁶ Even Hay's technique of

³⁸⁶ See *supra* text accompanying notes 297–300.

³⁸⁷ *Harford*, 161 Eng. Rep. at 796; 2 Hag. Cons. at 434.

³⁸⁸ *Id.* at 793; 2 Hag. Cons. at 425.

³⁸⁹ *Id.* at 794–95; 2 Hag. Cons. at 429–30.

³⁹⁰ *Id.* at 795; 2 Hag. Cons. at 430.

³⁹¹ *Id.*

³⁹² *Id.*

³⁹³ *Hay, George (1715–78)*, THE HIST. OF PARLIAMENT, <http://www.histparl.ac.uk/volume/1754-1790/member/hay-george-1715-78> (last visited Nov. 5, 2015).

³⁹⁴ See *supra* text accompanying notes 154–57.

³⁹⁵ See *supra* text accompanying notes 154–57.

³⁹⁶ See *supra* text accompanying notes 166–67.

resorting to the underlying body of English ecclesiastical law to fill the lacuna created by the inapplicability of locus law and by the declared inapplicability of Hardwicke's Act was exactly how Bartolus filled a statutory lacuna.³⁹⁷ Bartolus's underlying body of law just happened to be Roman law instead of English ecclesiastical law. Hay's opinion makes perfect sense as an 18th-century use of the Italian approach to conflicts, transposed onto the English legal system. In that deeper sense, Hay was methodologically consistent with *Scrimshire*, disagreeing only with how Simpson had applied the Italian approach.

The implications of Hay's opinion on the interpretation of *Compton* are not entirely clear. Although the Delegates had apparently affirmed a decision by Hay in *Compton*, the Delegates reversed his decision in *Harford* and voided the marriage.³⁹⁸ Again, there was no opinion, but there are some intriguing hints. The government, which was litigating the petition on behalf of the girl, appears not to have contested Hay's conclusion that the underlying ecclesiastical law applied if the validity of the nuptials were to be determined by *domus* law.³⁹⁹ The government did challenge Hay's rejection of both the force-and-fraud and locus theories.⁴⁰⁰ The Delegates vacated Hay's opinion several years before rendering their own decision, suggesting that his reasoning struck them as incorrect even before they had figured out their theory of the case. The strong implication is that the Delegates found Hay's rejection of the locus rule manifestly incorrect, even if they were not yet sure how to apply it themselves. A final clue comes from the resolution that the Delegates ultimately adopted. They reputedly invalidated the *Harford* nuptials solely on the force-and-fraud ground and deliberately avoided the choice-of-law issue.⁴⁰¹ The lone holdout on the latter ground was said to be Sir James Eyre,⁴⁰² which may actually be quite significant.

It is important to understand who Eyre was. At the time of his service as a delegate for this appeal, he was a judge of the Exchequer court and later became Chief Justice of Common Pleas.⁴⁰³ He was not an English civilian⁴⁰⁴

³⁹⁷ See *supra* text accompanying note 103.

³⁹⁸ *Harford v. Morris*, 161 Eng. Rep. 792 (Cons.); 2 Hag. Cons. 423, *vacated*, (1781) 161 Eng. Rep. at 797 (Del.); 2 Hag. Cons. at 436, *rev'd* (1784) 161 Eng. Rep. at 797 (Del.); 2 Hag. Cons. at 436.

³⁹⁹ *Id.*

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

⁴⁰² *Id.*

⁴⁰³ HAYDN, *supra* note 279, at 376, 382, 385.

⁴⁰⁴ CHARLES COOTE, *SKETCHES OF THE LIVES AND CHARACTERS OF EMINENT ENGLISH CIVILIANS* 144 (1804).

and was appointed as a delegate in this matter as a common-law judge.⁴⁰⁵ It is exceedingly unlikely that, as the lone holdout on the choice-of-law issue, Eyre—a non-civilian among civilians—thought that the Delegates should embrace Hay’s Italian statutism. Vastly more likely is that Eyre was the lone holdout on the choice-of-law issue because—as a common-law judge—he thought the Delegates should adopt Huber’s regime, including the evasion exception, as promoted by England’s then-top common-law judge, Lord Mansfield. Indeed, apropos of nothing, the evasion exception coincidentally received a random notation a few years later as a footnote to a report of one of Eyre’s own opinions.⁴⁰⁶ If Eyre was the lone holdout because he wanted to invoke the evasion exception, as seems probable, it would mean that the rest of the Delegates—and there were 11 others in that case—did not. They may have entirely rejected it in principle, or they may have rejected its application because of the statutory geographical restriction in Hardwicke’s Act. Either way, it would mean, at the very least, that all the Delegates, including Eyre, accepted the application of the locus rule as a prima facie matter. Extrapolating, the same may have been true in *Compton* as well.

Anticlimactically, one final source indicates that the better view of *Compton* is the most obvious one: that the Delegates applied a locus rule and repudiated the very concept of an evasion exception.⁴⁰⁷ The source is again Sir James Eyre. In 1795, Eyre decided *Phillips v. Hunter*.⁴⁰⁸ There, an English domiciliary went to Pennsylvania and recovered a debt from an English bankrupt without complying with English bankruptcy laws.⁴⁰⁹ In rejecting the evasion exception, Eyre penned this lament:

Lord Mansfield tried what he could make of this proposition, that a British subject should not be allowed to contravene the statute law of the land, in one of the strongest cases that can be imagined of wilful contravention, the case of marriage contracted abroad, by English subjects withdrawing themselves from England, for the express purpose of contravening the statute law respecting marriages, *and he failed altogether*.⁴¹⁰

Nearly a decade after participating as a Delegate in the *Harford* appeal, Eyre apparently gave up on the evasion exception. There is no hint in this lament that the problem was with a specific geographical restriction in Hardwicke’s

⁴⁰⁵ *Harford*, 161 Eng. Rep. at 797; 2 Hag. Cons. at 436.

⁴⁰⁶ *Ilderton v. Ilderton* (1793) 126 Eng. Rep. 476, 477 n.(a) (C.P.); 2 H. Bl. 145, 147 n.(a).

⁴⁰⁷ *But see* *Middleton v. Janverin* (1802) 161 Eng. Rep. 797, 799 n.* (Arch.); 2 Hag. Cons. 437, 444 n.* (proposing a highly formalist interpretation of *Compton*).

⁴⁰⁸ (1795) 126 Eng. Rep. 618 (C.P.); 2 H. Bl. 402.

⁴⁰⁹ *Id.* at 618; 2 H. Bl. at 402.

⁴¹⁰ *Id.* at 623; 2 H. Bl. at 412 (emphasis added) (footnote omitted).

Act. The great Mansfield himself had tried to establish the exception as part of English conflicts law in the most compelling of circumstances, yet even he “failed altogether.” The better view of *Compton* and *Harford* is that the Delegates accepted the locus rule but repudiated the very concept of an evasion exception. Indeed, like Sanchez, they may well have done it with a substantive eye toward affirming the validity of nuptials whenever feasible, or they may have been motivated by a desire to avoid the systemic dysfunction of the limping marriage, the same policy objective emphasized earlier in *Scrimshire*.⁴¹¹

B. *United States*

American reception of the Old World learning completes the story that yields the original content of the Full Faith and Credit Clause. Only a fragmentary understanding crossed the Atlantic, but it was enough. Gretna Green marriages hung over the limited debate, which was framed as a choice between Mansfield’s perceived acceptance of the evasion exception and the Delegates’ presumed rejection of it. The exception itself became the site of tension between singular respect for Huber’s conflicts regime, which included the exception, and discomfort at the prospect of the limping marriages that the exception would create. But American judges were not mere transcribers; they brought their own insights and creativity to the endeavor.

1. The Locus-Validation Rule

Huber’s locus-validation rule was accepted without question by the American bench and bar throughout the early national period.⁴¹² In contrast to the experience in both the Netherlands and England, there was no suggestion that material conditions for the validity of a marriage might be determined generally by *domus* law. As in England, the earliest acknowledgements of the rule came not in actual marriage cases but in cases where the marriage rule was used as an analogy. That acknowledgement of the rule was telling. It indicated, as it had in England, that the American bench and bar regarded the rule as sufficiently incontrovertible for use as an analogy.

⁴¹¹ English courts eventually adopted a *domus* rule for resolving conflicts as to the material conditions for a valid marriage, but that development did not occur until the time of the American Civil War. See *Brook v. Brook* (1861) 11 Eng. Rep. 703; 9 H.L.C. 193; *Mette v. Mette* (1859) 164 Eng. Rep. 792 (Prob.); 1 Sw. & Tr. 416; DICEY’S CONFLICT OF LAWS 759–61 (J.H.C. Morris ed., 6th ed. 1949).

⁴¹² There is also some American authority in the early national period for recognizing the validity of a marriage based on a prior out-of-state judgment holding it valid. *Wray v. Reily*, 30 F. Cas. 652, 652 (C.C.D.C. 1808) (No. 18,059).

The first of these analogical uses of the rule appeared while ratification of the Constitution itself was underway. In *Millar v. Hall*,⁴¹³ the Pennsylvania high court cited the recognition of out-of-state marriages as an analogy in its decision to recognize a discharge of debt under another state's insolvency act. Pennsylvania's noted Chief Justice, Thomas McKean, proceeded from the premises of the Dutch school. He explained that although "the laws of a particular country, have in themselves no extra-territorial force, no coercive operation," it was nevertheless true that, "by the consent of nations, they acquire an influence and obligation, and, in many instances, become conclusive throughout the world."⁴¹⁴ McKean then explained that "[a]cts of pardon, marriage, and divorce, made in one country, are received and binding in all countries."⁴¹⁵ Although he did not attribute these ideas to a source, it was obviously Huber, probably by way of Mansfield.⁴¹⁶ McKean's views lacked the reserve of Voet, the statutory insularity of Sanchez and Kames, or the domicile preference of Hay.

Another significant use of the marriage rule as an analogy came in 1810 and bore the same import. In *Greenwood v. Curtis*,⁴¹⁷ the Massachusetts high court used the locus-validation rule as an analogy in accepting the validity of foreign agreements for the delivery of slaves. As with McKean, Chief Justice Theophilus Parsons also proceeded from the premises of the Dutch school. It was "upon principles of national comity," he explained, that foreign contracts that were contrary to forum law might nevertheless be enforced.⁴¹⁸ It would be like recognizing marriages. Parsons observed that "marriages . . . prohibited by the law of one state, and not of another, if celebrated where they are not prohibited, would be holden valid in a state where they are not allowed."⁴¹⁹ As in *Millar*, this statement specifically reflected Huber's locus-validation rule,⁴²⁰ not entirely consistent with the more qualified views of Voet. Parsons even offered a locally relevant example: "As, in this state, a marriage between a man and his deceased wife's sister is lawful, but it is not so in some states, such a marriage celebrated here would be held valid in any other state, and the parties

⁴¹³ 1 U.S. (1 Dall.) 229 (Pa. 1788).

⁴¹⁴ *Id.* at 232; *see also id.* at 232–33 ("[M]utual conveniency policy, the consent of nations, and the general principles of justice form a code which pervades all nations, and must be every where [sic] acknowledged and pursued.").

⁴¹⁵ *Id.* at 232.

⁴¹⁶ *Id.* at 230 (noting citation of *Robinson v. Bland* (1790) 96 Eng. Rep. 141 (K.B.); 1 Black W. 256, by counsel).

⁴¹⁷ 6 Mass. (5 Tyng) 358 (1810).

⁴¹⁸ *Id.* at 377.

⁴¹⁹ *Id.* at 379.

⁴²⁰ *See supra* text accompanying note 232.

entitled to the benefits of the matrimonial contract.”⁴²¹ Parsons obviously had great confidence in the rule, using it here to justify the controversial enforcement of slavery contracts two years after Congress had banned such foreign commerce.

Later, when actual marriage conflicts began arising, resort to the rule seemed almost reflexive. In *Inhabitants of Dalton v. Inhabitants of Bernardston*,⁴²² the Massachusetts high court dispensed with an unidentified objection to recognizing a Vermont marriage for purposes of forum law: “It can make no difference where the marriage was solemnized, whether within or without the commonwealth, provided it be such a marriage as our laws will recognize”⁴²³ In *Le Breton v. Nouchet*,⁴²⁴ the Louisiana high court accepted the validity of a marriage celebrated by its domiciliaries in Mississippi Territory to evade a requirement of parental consent. Tellingly, no one even contested its validity,⁴²⁵ and the court proceeded to use Huber’s principles to decide that the marriage acquired the matrimonial property regime of the domicile.⁴²⁶ Given Louisiana’s civilian and non-English background, the court’s reception of Huber’s principles was notable.⁴²⁷

The sense of reflexive acceptance was the same in the first major marriage-conflicts case. In *Inhabitants of Medway v. Inhabitants of Needham*,⁴²⁸ the Massachusetts high court affirmed the validity of an interracial marriage that domiciliaries of Massachusetts Bay had celebrated evasively in Rhode Island before 1770.⁴²⁹ The party challenging the validity of the marriage, solely on evasion grounds, did not contest the locus rule itself.⁴³⁰ Likewise, Chief Justice Isaac Parker devoted exactly one sentence to applying the rule: “[I]t is a principle adopted for general convenience and security, that a marriage, which is good according to the laws of the country where it is entered into, shall be valid in any other country.”⁴³¹ Significantly, the case concerned a material condition for validity—race—but nothing indicated any consideration

⁴²¹ *Greenwood*, 6 Mass. (5 Tyng) at 379.

⁴²² 9 Mass. (8 Tyng) 201 (1812).

⁴²³ *Id.* at 203.

⁴²⁴ 3 Mart. (o.s.) 60 (La. 1813).

⁴²⁵ *Id.* at 73.

⁴²⁶ *Id.* at 66–71; accord *Decouche v. Savetier*, 3 Johns. Ch. 190, 211 (N.Y. Ch. 1817) (per Kent, Ch.) (applying Huber’s principles to conflict as to matrimonial property regimes); see HUBER, in *Davies*, *supra* note 183, §§ 9–10, at 72–73.

⁴²⁷ The decision anticipated *Saul v. His Creditors*, 5 Mart. (n.s.) 569 (La. 1827) (definitively rejecting civilian statutism as basis of conflicts law).

⁴²⁸ 16 Mass. (15 Tyng) 157 (1819).

⁴²⁹ *Id.* at 158, 159.

⁴³⁰ *Id.* at 158.

⁴³¹ *Id.* at 159.

of a domicile rule or even addressed Voet's hesitancy as to so-called personal statutes. Parker apparently regarded the locus-validation rule as incontestable, for he provided no discussion or authority to support it.⁴³²

Marriage decisions in the 1820s followed the same pattern. In *Dumaresly v. Fishly*,⁴³³ the Kentucky high court stated without elaboration or authority that the validity of a marriage "must, no doubt, be decided by the laws of" the place of celebration.⁴³⁴ In *Inhabitants of West Cambridge v. Inhabitants of Lexington*⁴³⁵ and *Putnam v. Putnam*,⁴³⁶ the Massachusetts high court again confronted marriage conflicts involving a material condition for validity—in these cases, post-divorce remarriage. In both, the court focused exclusively on the evasion exception and presumed without comment that the locus-validation rule was the law.⁴³⁷ In *Fornhill v. Murray*,⁴³⁸ Chancellor Theoderick Bland of Maryland similarly devoted one sentence to applying the locus rule in the face of a conflict as to formal validity. "[A]ccording to the law of nations," he explained, the marriage, which had been validly celebrated without a religious ceremony in Ireland, "must be held to be a valid marriage here; for otherwise the rights of mankind would, in this respect, be in a most precarious and uncertain condition."⁴³⁹ Straying slightly from the pattern, Bland did at least cite a mixture of English and Scottish precedents in support of the rule.⁴⁴⁰

Lack of access to source material would seem to explain American reception of the locus rule without even considering a *domus* alternative. Although Americans had access to some English, Scottish, and Continental sources, there were serious gaps and limitations. Nor were the constraints on access random. The gaps and limitations would have tended to mask the debate between choosing locus or *domus* law.

Although it is apparent that the American bench and bar had access the ideas of Huber in the early national period, the same was not true of the works of other Continental jurists.⁴⁴¹ As late as 1836, their works, though generally

⁴³² *Id.* His discussion focused exclusively on exceptions to the rule.

⁴³³ 10 Ky. (3 A.K. Marsh.) 368 (1820).

⁴³⁴ *Id.* at 369. The case did not involve an actual conflict of laws.

⁴³⁵ 18 Mass. (1 Pick.) 506 (1823).

⁴³⁶ 25 Mass. (8 Pick.) 433 (1829).

⁴³⁷ *Id.* at 434–35; *West Cambridge*, 18 Mass. (1 Pick.) at 510–12.

⁴³⁸ 1 Bland 479 (Md. Ch. 1828).

⁴³⁹ *Id.* at 485.

⁴⁴⁰ *Id.* at 485 n.(v).

⁴⁴¹ Even in the case of Huber, access was apparently limited. Reflecting a perception of keen interest among the bench and bar, A.J. Dallas included a rudimentary English translation of Huber's conflicts essay in the third volume of the *United States Reports*, published in 1799. *Emory v. Grenough*, 3 U.S. (3 Dall.) 369, 370 n.* (1797).

available in Edinburgh, were still not readily available even in London.⁴⁴² Much less were they likely available in Boston, New York, or Philadelphia in the early national period. In preparing his 1834 treatise on the conflict of laws, Justice Story gained access to many of these Continental works only because of a recent bequest to Harvard by Samuel Livermore, a prominent New Orleans attorney who had written his own tract on conflicts a few years earlier.⁴⁴³

In addition to the Continental works, the output of English ecclesiastical courts was another major American blind spot during this period. Although this material was apparently circulating informally among London civilians, reports of such key cases as *Scrimshire* and *Harford* were not generally published in England until 1822,⁴⁴⁴ let alone accessible across the Atlantic. An American review of that first compilation of ecclesiastical reports noted in 1827 that

[u]ntil very recently, there have been no regular reports of the adjudications of the English ecclesiastical courts. Hence our common law courts, though possessing a great part of their jurisdiction, have not been able to acquire much knowledge of their practice, or to derive much assistance from their learning and wisdom.⁴⁴⁵

An exception was the publication of a book-length report of the decision in *Dalrymple v. Dalrymple*,⁴⁴⁶ but that case was not decided until 1811.⁴⁴⁷ By the time these ecclesiastical materials became more widely available in the 1820s, courts had already begun laying down basic principles.

The American bench and bar did have two sources to which they consistently recurred. One was the skeletal summary of *Compton v.*

⁴⁴² Anton, *supra* note 52, at 536.

⁴⁴³ Rodolfo De Nova, *The First American Book on Conflict of Laws*, 8 AM. J. LEGAL HIST. 136, 136 n.1 (1964); see 1 SAMUEL LIVERMORE, DISSERTATIONS ON THE QUESTIONS WHICH ARISE FROM THE CONTRARIETY OF THE POSITIVE LAWS OF DIFFERENT STATES AND NATIONS (1828).

⁴⁴⁴ 2 JOHN HAGGARD, REPORTS OF CASES ARGUED AND DETERMINED IN THE CONSISTORY COURT OF LONDON iii (1822). *Scrimshire* and *Harford* do not appear to have been cited in America before 1827. 2 KENT, *supra* note 57, at 79 (citing both *Scrimshire* and *Harford*); see also *United States v. Jennegen*, 26 F. Cas. 606 (C.C.D.C. 1830) (No. 15,474) (citing *Scrimshire* for the first time); *Commonwealth v. Lane*, 113 Mass. 458, 466 (1873) (citing *Harford* for the first time).

⁴⁴⁵ *Reports of Cases Argued and Determined in the Consistory Court of London*, 2 AM. Q. REV. 70, 71 (1827) (book review).

⁴⁴⁶ *Dalrymple v. Dalrymple* (1811) 161 Eng. Rep. 665; 2 Hag. Cons. 54 (recognizing informal marriage of English officer while stationed in Scotland).

⁴⁴⁷ JOHN DODSON, A REPORT OF THE JUDGMENT, DELIVERED IN THE CONSISTORIAL COURT OF LONDON, ON THE SIXTEENTH DAY OF JULY, 1811, BY THE RIGHT HONOURABLE SIR WILLIAM SCOTT, CHANCELLOR OF THE DIOCESE, IN THE CAUSE OF DALRYMPLE THE WIFE, AGAINST DALRYMPLE THE HUSBAND (1811).

Bearcroft,⁴⁴⁸ lacking any indication of the debate as to the undisclosed ground of decision. This source simply reported the barest of facts and concluded, “[I]t was holden that the marriage was good.”⁴⁴⁹

The other source did not go much further. Citing Mansfield’s opinion in *Robinson v. Bland*,⁴⁵⁰ the source noted that “the validity of such marriages was once questioned.”⁴⁵¹ It continued, by explaining that although “in general marriages are governed by the law of the country in which they are celebrated,” it was nevertheless “doubted, whether the *lex loci* ought to be applied to a case accompanied with circumstances so strongly marking the intent to evade the law of England.”⁴⁵² The source concluded, however, that “this point seems now fully settled in favour of the Scotch marriages, by a late decision of the court of arches, which was afterwards confirmed in the court of delegates.”⁴⁵³ The source then proceeded to express mild disapproval of that outcome and offered a vigorous defense of Huber’s essay as a practical guide for resolving conflicts problems.⁴⁵⁴

One can see how American courts could have assumed that the locus rule was incontrovertible—and the evasion exception all but rejected. Only in 1827 did Kent’s Commentaries begin to reveal the greater complexity to a wide American audience.⁴⁵⁵ By then, however, the development of the American law of marriage conflicts was already underway.⁴⁵⁶

2. Exceptions to the Rule

The real debate in American courts in the early national period focused not on the locus-validation rule, which was unquestionably accepted, but on the potential exceptions to it. Typically working within Huber’s framework, American courts generally accepted his prejudice limitation on comity and, in

⁴⁴⁸ *Compton v. Bearcroft* (1768) (Del.), reported in BULL. N.P., *supra* note 363, at 114.

⁴⁴⁹ *Id.* at 114.

⁴⁵⁰ (1760) 96 Eng. Rep. 141 (K.B.); 1 Black. W. 256.

⁴⁵¹ COKE, HARGRAVE & BUTLER, *supra* note 328, at *79b n.1.

⁴⁵² *Id.*

⁴⁵³ *Id.*

⁴⁵⁴ *Id.*

⁴⁵⁵ A note published in 1817 by a South Carolina reporter of decisions cited the 1811 *Dalrymple* decision for the proposition that “the law of the country, where the marriage was contracted, must govern, though one of the contracting parties may have been domiciled in another country.” *Vaigneur v. Kirk*, 2 S.C. Eq. (2 Des. Eq.) 640, 644 n.* (1808).

⁴⁵⁶ New York Justice Esek Cowen endorsed the locus-validation rule with a natural law exception in his 1825 digest of conflicts principles and cases. See *Andrews v. Herriot*, 4 Cow. 508, 512 n.(a) (N.Y. Sup. Ct. 1825) (“[A] contract of marriage, though it would be invalid by our law, will yet be held valid here, if so by the law of the country where celebrated, unless indeed it be incestuous by the law of nature.”).

particular, his evasion exception to the general *lex loci actus* principle. In the marriage context, however, reluctance became apparent. American courts foresaw the problems associated with limping marriages, problems that the evasion exception would create. Aware of the debate over the exception in England, they resisted adopting it. The strength of Huber was nevertheless apparently such that American courts needed a way to resist the evasion exception without contradicting Huber. The Massachusetts high court ultimately fashioned a revealing synthesis.

The early decisions in which courts used marriage conflicts as an analogy endorsed some version of Huber's limitation on comity without question. In *Millar*, Chief Justice McKean paused before recognizing the out-of-state discharge of debt to observe that it had not been received in evasion of forum law.⁴⁵⁷ He also added that recognizing the discharge of debt would not prejudice the "independence and sovereignty" of the forum.⁴⁵⁸ Although he did not specifically link the exception back to marriage, his reasoning had proceeded from the assumption that recognition of the discharge was analogous to recognition of a marriage.⁴⁵⁹ Certainly, nothing indicated that marriage was immune from this limitation on comity.

The *Greenwood* decision,⁴⁶⁰ involving slavery contracts, went further toward recognizing Huber's specific exceptions to his marriage rule. One was the evasion exception. Chief Justice Parsons implicitly acknowledged that exception in noting that each of the slavery contracts at issue "was made abroad, by persons not citizens of the commonwealth."⁴⁶¹ The only theory under which their domicile in the forum would have been relevant was an evasion theory. In addition to evasion, Parsons even more clearly accepted Huber's other exception, the exception for marriages whose example would be "pernicious and detestable."⁴⁶² Analogizing to marriage, Parsons explained that a forum would not enforce a foreign contract if it "would exhibit to the citizens of the state an example pernicious and detestable."⁴⁶³ The language clearly echoed Huber. So did additional language, as Parsons went on to use Huber's own example of a marriage that should be denied recognition everywhere under this "abhorrence" exception: "[I]f a foreign state allows of marriages incestuous by the law of nature, as between parent and child, such marriage could not be

⁴⁵⁷ *Millar v. Hall*, 1 U.S. (1 Dall.) 229, 233 (Pa. 1788) (stating it did not "arise *in fraudem legis*").

⁴⁵⁸ *Id.*

⁴⁵⁹ *Id.* at 232.

⁴⁶⁰ *Greenwood v. Curtis*, 6 Mass. (5 Tyng) 358 (1810).

⁴⁶¹ *Id.* at 380.

⁴⁶² *Id.* at 378.

⁴⁶³ *Id.*

allowed to have any validity here.”⁴⁶⁴ The one evident divergence was that Huber had grounded this exception in the “law of nations,” not the “law of nature.”⁴⁶⁵ Otherwise, Parsons endorsed both the evasion and “abhorrence” exceptions.⁴⁶⁶

At roughly the same time, however, a previously unmentioned decision began to show the competing concern about limping marriages. In *Jackson v. Jackson*,⁴⁶⁷ Judge Ambrose Spencer of the New York Supreme Court confronted not an actual marriage conflict but a near proxy for it: a question of divorce recognition. In an opinion that was as significant for what it left undecided as for what it decided, Spencer adopted Huber’s evasion exception, but he showed notable circumspection about using it in the marriage context.

Presaging a two-century saga over New York’s restrictive divorce laws,⁴⁶⁸ *Jackson* involved a New York woman who went to Vermont for about six months in an effort to secure a divorce and who then sought to enforce the out-of-state alimony decree back in New York.⁴⁶⁹ Although her ostensibly former husband had fully participated in the Vermont proceedings, his attorney leveled a sweeping attack against any recognition of the divorce. Citing Huber, Kames, Mansfield, and others, he urged Spencer to deny recognition to the divorce itself on grounds of evasion, public policy, inherent lack of sovereignty to grant the divorce, and the asserted narrowness of the true comity doctrine.⁴⁷⁰

In a particularly notable passage, the putative ex-husband’s attorney challenged the validation of Gretna Green marriages in *Compton*. “[W]e shall probably be told of the *Scotch marriages*,” he interjected, “and the decisions which have taken place in relation to them.”⁴⁷¹ Tellingly, he went on to say that “the court will recollect the history of those marriages, and the diversity of opinions which have been entertained as to their effect.”⁴⁷² Notwithstanding the general unavailability of ecclesiastical reports in the United States, this passage makes clear that American lawyers were sufficiently familiar with the

⁴⁶⁴ *Id.*; see also *id.* at 379 (“naturally unlawful”).

⁴⁶⁵ HUBER, in *Davies*, *supra* note 183, § 8, at 82.

⁴⁶⁶ See also *Inhabitants of Dalton v. Inhabitants of Bernardston*, 9 Mass. (8 Tyng) 201, 203 (1812) (noting that state would recognize marriage celebrated elsewhere “provided it be such a marriage as our laws will recognize”).

⁴⁶⁷ 1 Johns. 424 (N.Y. Sup. Ct. 1806).

⁴⁶⁸ See, e.g., N.Y. DOM. REL. LAW § 170(7) (2015) (adopting no-fault divorce); *Rosenstiel v. Rosenstiel*, 16 N.Y.2d 64 (1965) (recognizing transient Mexican divorce of New Yorkers); *Van Voorhis v. Brintnall*, 86 N.Y. 18, 25 (1881) (recognizing evasive post-divorce remarriage of New Yorkers).

⁴⁶⁹ *Jackson*, 1 Johns. at 424–25.

⁴⁷⁰ *Id.* at 426–29.

⁴⁷¹ *Id.* at 428 (punctuation modified).

⁴⁷² *Id.*

controversial validation of Gretna Green marriages to make passing reference to it in argument.

Significantly, Spencer spurned the invitation to rule broadly. He held narrowly that the woman could not seek to recover in New York based on an alimony judgment that she had evaded the state's divorce laws to obtain.⁴⁷³ Citing English decisions building upon Mansfield's conflicts opinions in *Robinson* and *Holman*, Spencer held that "[i]t may be laid down as a general principle, that when ever an act is done *in fraudem legis*, it cannot be the basis of a suit in the courts of the country whose laws are attempted to be infringed."⁴⁷⁴ In going to Vermont for a divorce, the ex-wife had "acted with a view of evading our laws," so "it would be attended with pernicious consequences, to aid this attempt to elude them," he ruled.⁴⁷⁵ There was no monetary recovery for the ex-wife, and the case was dismissed.

Spencer deliberately avoided the more fundamental question whether the divorce itself was valid. "We are not called on, in the present case," he said, "to pronounce on the legal effect of the divorce granted by the Supreme Court of Vermont."⁴⁷⁶ The English decisions were adequate to support the proposition that a New York court would not aid the enforcement of the evasive alimony decree, "without going beyond the point now submitted."⁴⁷⁷ Although Huber had not discussed divorce, he had shown little reluctance to apply his evasion exception to either a foreign marriage⁴⁷⁸ or a foreign criminal acquittal resulting from "an escape into a neighbouring country and feigned proceedings."⁴⁷⁹ In the case of an evasive marriage, he had even said that the locus was itself to blame for abetting the evasive nuptials,⁴⁸⁰ much as Vermont had done by entertaining the divorce action in this case. But Spencer no doubt confronted the same "mischiefs" as Simpson had in *Scrimshire* if people were deemed husband and wife in one state while being legal strangers elsewhere.⁴⁸¹ Huber's

⁴⁷³ He held that she had not formed a new domicile in Vermont. *Id.* at 432.

⁴⁷⁴ *Id.* at 433 (citing *Clugas v. Penaluna* (1791) 100 Eng. Rep. 1122 (C.P.); 4 T.R. 466; *Briggs v. Lawrence* (1789) 100 Eng. Rep. 673 (C.P.); 3 T.R. 454). Those English decisions were not about either marriage or divorce. They were suits by English domiciliaries to recover on foreign contracts that facilitated the smuggling of illegal goods into England. The opinions turned on the status of the plaintiffs as English domiciliaries, who were aiding in the evasion of English law.

⁴⁷⁵ *Id.* at 432.

⁴⁷⁶ *Id.* (emphasis omitted).

⁴⁷⁷ *Id.* at 433.

⁴⁷⁸ HUBER, *in Davies*, *supra* note 183, § 8, at 72.

⁴⁷⁹ *Id.* § 6, at 69.

⁴⁸⁰ *Id.* § 8, at 71.

⁴⁸¹ Under Huber's approach, the evasion rationale for denying recognition to the Vermont divorce would not be available to other states, whose laws the ex-wife had not evaded. *Id.* § 13, at 75–76 (opining that an evasive will by a minor would be valid in third states whose laws had not been evaded).

evasion exception prevailed in general, but the sobering specter of limping marriages exerted real countervailing force.

The specter of limping marriages may also have played a role in *Le Breton v. Nouchet*,⁴⁸² the 1813 Louisiana decision involving a conflict as to the applicable matrimonial property regime. Litigation of the case proceeded on the assumption that the marriage—an underage evasive marriage without parental consent—was valid. The court made a point of noting that “[n]o question has been made, as to the validity of this marriage.”⁴⁸³ The party who would have benefited from challenging the validity of the marriage was the mother of the deceased thirteen-year-old girl who had eloped. The mother apparently avoided challenging the validity of the marriage,⁴⁸⁴ and the court itself was willing to oblige in deciding the matrimonial property issue without questioning the validity of the marriage. What made that willingness notable was that, in deciding the property issue, the court was already required to find—and did find—the very facts that also would have justified rejecting the marriage itself as evasive. The court was fully aware that the marriage was evasive but indulged the parties in tacitly recognizing it as valid. One suspects that the court was content to avoid grappling with the evasion exception and its prospect of creating limping marriages.

The tension between Huber’s evasion exception and the problems associated with limping marriages came to a head in a trio of Massachusetts decisions beginning in 1819. All three were written by Chief Justice Isaac Parker, who worked through the tension. Apparently unable to resist the weight of Huber as the exponent of conflicts principles, Parker ultimately fashioned a synthesis. He both accepted Huber’s evasion exception as a correct statement of comity principles and avoided the problems with limping marriages by validating evasive marriages anyway.

The trio of decisions all involved marriages celebrated by Massachusetts domiciliaries outside the state in manifest evasion of Massachusetts law. The first, *Inhabitants of Medway v. Inhabitants of Needham*,⁴⁸⁵ involved a marriage between a white woman and a biracial man in Rhode Island. The other two decisions, *Inhabitants of West Cambridge v. Inhabitants of Lexington*⁴⁸⁶ and *Putnam v. Putnam*,⁴⁸⁷ involved marriages in New Hampshire and Connecticut, respectively, in evasion of a Massachusetts ban on post-divorce remarriages by parties who were guilty of adultery in their first marriages. In none of the cases did the party challenging the validity of the

⁴⁸² 3 Mart. (o.s.) 60 (La. 1813).

⁴⁸³ *Id.* at 73.

⁴⁸⁴ *Id.* at 63–66 (argument of counsel).

⁴⁸⁵ 16 Mass. (15 Tyng) 157 (1819).

⁴⁸⁶ 18 Mass. (1 Pick.) 506 (1823).

⁴⁸⁷ 25 Mass. (8 Pick.) 433 (1829).

marriage contest the general locus rule. The disputes centered exclusively on the evasion exception.

Parker understood the problems resulting from limping marriages but struggled to resist the pull of Huber's articulation of the evasion exception. At first, in *Medway*, he did not hesitate to disregard the exception in order to validate the evasive interracial marriage.⁴⁸⁸ His attitude changed markedly, however, when the court confronted the post-divorce remarriage in *West Cambridge*. In *Medway*, Parker had anticipated and addressed the prospect of evasive marriages that were closely incestuous by acknowledging Huber's "abhorrence" exception,⁴⁸⁹ but that alternative exception would not apply to post-divorce remarriages. Instead, Parker initially avoided giving full effect to one of those marriages by recognizing it only for the limited purpose of establishing the legitimacy of the couple's children, the actual issue in the case.⁴⁹⁰ Despite strongly suggesting that such a marriage would not be recognized for the benefit of the spouses,⁴⁹¹ Parker grudgingly relented when that question subsequently arose in *Putnam*. Refusing to validate a post-divorce remarriage celebrated in evasion of Massachusetts law, he reasoned, would require the overruling of *Medway*, which Parker was not willing to do.⁴⁹² Clearly displeased, he validated the post-divorce remarriage but invited the legislature to regulate the matter.⁴⁹³

In addition to the wavering reaction to evasive marriages, Parker also struggled to escape Huber's evasion exception in another respect. Parker generally favored the exception outside the context of marriage. He was not willing to enforce ordinary contracts that were made elsewhere in evasion of domiciliary law. Applying the exception to evasive commercial contracts but not to evasive marriages, however, would create a tension in the law because Parker understood marriage as "assimilated" to contract.⁴⁹⁴ He felt compelled to distinguish the validation of evasive marriages.⁴⁹⁵ He did so by emphasizing that the validation of evasive marriages rested on unique policy considerations. It protected children from the "bastardization" that would result from voiding the marriages of their parents, and it avoided the "public mischief" that would

⁴⁸⁸ 16 Mass. (15 Tyng) at 159.

⁴⁸⁹ *Id.* at 161.

⁴⁹⁰ *West Cambridge*, 18 Mass. (1 Pick.) at 511–12.

⁴⁹¹ *Id.* at 511.

⁴⁹² *Putnam*, 25 Mass. (8 Pick.) at 435.

⁴⁹³ *Id.* The legislature obliged, perhaps going farther than Parker intended. It banned evasive marriages that were interracial as well as those that were post-divorce or consanguineous. MASS. REV. STAT. ch. 75, § 6 (1836).

⁴⁹⁴ *West Cambridge*, 18 Mass. (1 Pick.) at 509.

⁴⁹⁵ *Putnam*, 25 Mass. (8 Pick.) at 435; *Inhabitants of Medway v. Inhabitants of Needham*, 16 Mass. (15 Tyng) 157, 160 (1819).

arise from the “loose state” of people cohabitating under limping marriages.⁴⁹⁶ The fact nevertheless remained that Parker was departing from Huber in this instance, despite generally adhering to the work of this “celebrated jurist and civilian.”⁴⁹⁷ He seemed to regard the isolated departure as appearing unprincipled.

To some extent, he tried to justify the departure as a matter of adhering to English precedent. Seemingly unaware of the English debate over the proper interpretation of *Compton*, Parker rested the *Medway* opinion strongly on the proposition that the High Court of Delegates had repudiated the evasion exception.⁴⁹⁸ He even imputed his own policy rationales to the Delegates.⁴⁹⁹ Still, Parker seemed to be trying hard to justify the departure from Huber, indicating the apparent weight of Huber’s essay as a conflicts source.

The tension between Huber’s articulation of the evasion exception and the potential problems resulting from limping marriages ultimately impelled Parker to attempt a synthesis. It was already implicit in *Medway*, where he characterized the isolated departure from Huber’s regime as “founded on principles of *policy*.”⁵⁰⁰ Denying validation to an evasive marriage, he explained, “would produce greater inconveniences than those attempted to be guarded against.”⁵⁰¹ But it was not until a decade later in *Putnam* that Parker made the synthesis overt. The court would validate evasive marriages “not merely on account of comity, *for that would not be offended* by declaring null a contract made in violation of the laws of the State in which the parties lived, by evasion, but from *general policy*.”⁵⁰² Parker accepted both Huber and evasive marriages. Comity did not require validation of evasive marriages, but the forum would choose to validate them anyway, as a matter of its own policy *beyond* comity. Huber correctly stated the rule of international comity, but Massachusetts would choose to go beyond it in validating evasive marriages.⁵⁰³

Parker’s synthesis was telling. *Medway* and *Putnam* went further than any decisions during the early national period in actually validating evasive marriages. If any decisions of the period were going to support an inference that the American bench and bar thought comity required the validation of evasive marriages, it was those decisions. Yet they expressly preclude any such

⁴⁹⁶ *Putnam*, 25 Mass. (8 Pick.) at 435; *Medway*, 16 Mass. (15 Tyng) at 159–61.

⁴⁹⁷ *Medway*, 16 Mass. (15 Tyng) at 159.

⁴⁹⁸ *Id.* at 159–60. Parker’s language manifestly echoed the note in Hargrave’s Coke on Littleton: “This, it seems, has been doubted in *England* [see the case of *Robinson v. Bland*]; but it was settled in the Court of Delegates, in a question upon a Scotch marriage.” *Id.* at 159.

⁴⁹⁹ *Putnam*, 25 Mass. (8 Pick.) at 435.

⁵⁰⁰ *Medway*, 16 Mass. (15 Tyng) at 160 (emphasis added).

⁵⁰¹ *Id.* at 159.

⁵⁰² *Putnam*, 25 Mass. (8 Pick.) at 434–35 (emphases added).

⁵⁰³ See also *Harding v. Alden*, 9 Me. 140, 146 (1832) (adopting Massachusetts synthesis).

inference. Earlier decisions had accepted Huber's evasion exception in passing or had disclosed a competing discomfort at the prospect of limping marriages. Parker accommodated both ideas by accepting the evasion exception as part of the comity doctrine and then finding an alternative basis—altruistic forum policy—on which to validate evasive marriages in order to avoid the problem of limping ones. His synthesis rendered even the strongest validation decisions of the period consistent with the view that Huber's evasion exception was accepted as part of the comity doctrine, notwithstanding the validation of evasive marriages in *Compton*. Huber and Mansfield prevailed as to comity, but *Compton* prevailed as to the locus-validating result on other grounds.

VI. THE ORIGINAL CONTENT AS TO MARRIAGE CONFLICTS

Having now surveyed the relevant historical sources, the question is whether any conclusions may be drawn about the original content of the Full Faith and Credit Clause as it applies to marriage conflicts. Any such conclusions depend on the sufficiency of the evidence to provide the Court with reliable guidance.

A. Preliminary Considerations

Before seeking to derive the original content of the Full Faith and Credit Clause as it relates to state choice of law in marriage conflicts, a few preliminary considerations are in order.

1. Function of the Full Faith and Credit Clause

First, it is important to keep in mind the appropriate function of the Full Faith and Credit Clause as it relates to state choice of law. To the extent that early modern sources permit the derivation of conflicts principles as part of the original content of the Clause, the Clause does not affirmatively establish those principles as a comprehensive choice of law scheme. Rather, the text of the Clause makes clear that it is only a partial check on the permissibility of state choice-of-law decisions. It sometimes obliges a forum state to choose and apply the law of a sibling state, and the principles constituting the original content prescribe situations to which the obligation attaches. A failure to apply the law of a sibling state when it is constitutionally required would violate the Clause, but applying sibling law when it is not constitutionally required does not appear to violate it. The Clause is simply not written in terms of mandating a forum state to disregard sibling law and apply its own law in an appropriate case. It guards *against* disregard of sibling states, but does not appear to prohibit altruistic subordination of a forum's own law and policy in voluntarily choosing to go beyond the requirements of the Clause in applying sibling law. While a failure to apply sibling law may violate the Clause, a choice to apply

sibling law cannot, except perhaps where the forum has chosen to apply the wrong sibling state's law.

2. Weight of Sources

A second threshold consideration is how much weight to give the various early modern sources in seeking to derive the original content of the Full Faith and Credit Clause. This consideration is particularly important to the extent that the early modern sources conflict as to a particular rule or exception. From the Spanish canonists to the English courts, it is worth determining at the outset how much weight each source should generally receive.

The canonists who preceded Sanchez, such as Ledesma, should receive little to no consideration. They made no effort to ground their reasoning in general conflicts principles. Rather, their trite analyses rested on the peculiar text of the Tridentine decree, vacuous analogies to fasting on holy days, and other trivial considerations. To the extent that they agree with other sources, they provide little additional force, and to the extent that they disagree with other sources, their limited analyses should preclude their views from prevailing.

Sanchez, in contrast, merits significant weight. Although he was not a conflicts thinker, he did endeavor to ground his analysis in the prevailing conflicts principles of Bartolus and the Italian approach. His analysis was lengthy and thorough, even though it was not comprehensive. As a subject matter specialist on marriage, his tract on marriage conflicts proved highly influential for more than a century. Indeed, it manifestly influenced English ecclesiastical courts in the 18th century. Because Sanchez's analysis rested on the Italian approach to conflicts, however, it merits somewhat less weight than later sources that are grounded in approaches more compatible with the American legal system. Sanchez's analysis was also less than comprehensive, obscurely nuanced at points, and, to some extent, dependent on the text of the Tridentine decree. These factors also reduce its relevance or usefulness.

The Dutch thinkers, Voet and Huber, are clearly entitled to great weight. They were primary influences on both English and American conflicts law. Story himself regarded them as the ablest of the foreign conflicts jurists. As between the two, Huber seems clearly to have commanded greater respect in the early Anglo-American conflicts law, and his approach was freer than other approaches from the previous regime of resolving conflicts by classifying statutes as real, personal, or mixed.

English sources are obviously a weighty source as the most immediate progenitor of American law, but they present something of a dilemma in this particular context. Mansfield and Hardwicke were clearly the leading lights of the era on conflicts matters, but neither had primary jurisdiction over marriage conflicts. On the other hand, the ecclesiastical courts had primary jurisdiction over those conflicts, but the quality—and even coherence—of their decisions is more limited. Any real divergence among these sources, however, concerned

the evasion exception, and the law courts seemed to have accepted defeat on that issue by the time the Constitution was adopted, so it should be possible to sidestep the tradeoff between authority and quality.

The derivation of originalist conflicts principles, then, should focus centrally on English sources as well as Huber and, to a somewhat lesser extent, Voet, with Sanchez providing significant but secondary supplemental authority. Lastly, of course, American sources provide confirmatory evidence of what the American bench and bar understood in the years after the adoption of the Constitution.

3. Leniency of Construction

The extent to which these sources can provide a basis for deriving an original content of the Full Faith and Credit Clause depends, in part, on how strictly or liberally the Clause's mandate should be construed. How much evidence in support of an early modern conflicts principle should be sufficient to justify adoption of a constitutional constraint on state choice of law?

Arguments cut either way. On the one hand, enforcement of the command curtails the sovereign prerogative of a state to decide for itself which law to apply in its own courts in multistate cases. Deference to state prerogatives would support strict construction and thus greater historical certainty before imposing a full-faith-and-credit mandate. On the other hand, the very purpose of the Clause was to "alter[] the status of the several states as independent foreign sovereignties, each free to ignore rights and obligations created under the laws or established by the judicial proceedings of the others, by making each an integral part of a single nation."⁵⁰⁴ The Court enforces the Clause very vigorously in the parallel context of judgment-recognition, notwithstanding the significant curtailment of state prerogatives. The Court's reluctance to enforce the Clause in the choice-of-law context has had less to do with deference to state prerogatives than with the perceived absence of judicially manageable standards and a reluctance to engage in a subjective balancing of state interests. Grounding the derivation of limitations in historical sources should, in theory, provide the Court with the more objective "rudder" or "compass" that makes the exceedingly strict construction that now prevails less necessary.

B. Derivation of the "Original Content"

The central inquiry is whether these historical sources, properly weighted, provide sufficient guidance as to the original content of the Full Faith and Credit Clause to give the Court a sufficient "rudder" or "compass" to place any constitutional constraints on state resolutions of marriage conflicts. It is

⁵⁰⁴ Hughes v. Fetter, 341 U.S. 609, 612 n.9 (1951).

helpful to consider general choice-of-law rules and any exceptions to those rules separately.

1. General Rules

Because some of the sources distinguished between situations in which the application of locus law would result in validating a marriage from those in which it would result in invalidating a marriage, separate consideration of those issues is warranted. In fact, the historical sources support different conclusions as to these two issues.

i. Locus-Validation

The early modern sources provide a sound foundation for concluding that the original content of the Full Faith and Credit Clause included a locus-validation rule for resolving marriage conflicts. Whatever exceptions the various sources endorsed, they converged on the affirmative general rule of recognition: that a marriage valid under the law of the locus where celebrated should be regarded as valid everywhere. There was only isolated support for a competing *domus* rule at the time the Constitution was adopted. While the support for a locus-validation rule was overwhelming in the case of formalities, there was sufficient support even in the case of material conditions to conclude that this rule should be applied, as a matter of original content, in the latter context as well as the former.

Formalities. Every early modern source worthy of serious weight clearly endorsed the choice of a validating locus law in conflicts involving marital formalities. Sanchez adapted Bartolus's view that the sufficiency of legal formalities should be determined by locus law, and that was true regardless whether the formalities were valid or invalid under the locus law.⁵⁰⁵ Voet reached a similar conclusion,⁵⁰⁶ categorizing regulations of marital formalities as "mixed statutes" and explicitly endorsing a locus-validation rule for resolving conflicts involving them.⁵⁰⁷ Huber adopted the same view without even singling out formalities for separate analysis.⁵⁰⁸ English sources seemingly took the same view,⁵⁰⁹ as did American courts.⁵¹⁰ The only notable dissenter was Hay,⁵¹¹ whose effort to adopt a domicile rule in the English

⁵⁰⁵ See *supra* text accompanying notes 155, 161, 168.

⁵⁰⁶ See *supra* text accompanying notes 202–03.

⁵⁰⁷ See *supra* text accompanying note 206.

⁵⁰⁸ See *supra* text accompanying note 232.

⁵⁰⁹ See *supra* text accompanying notes 293, 358.

⁵¹⁰ See *supra* text accompanying notes 413–56.

⁵¹¹ See *supra* text accompanying note 384.

ecclesiastical courts seems to have gained no traction. The major early modern sources clearly converged on the locus-validation rule in conflicts involving marital formalities. Even were the Full Faith and Credit Clause's original content to be strictly construed, this rule should prevail as a constraint on state choice of law.

Material Conditions. The case is somewhat less clear with respect to conflicts involving material conditions on the validity of a marriage, but the significant weight of authority favors acceptance of the locus-validation rule in this context too.

Huber explicitly endorsed that rule and drew no distinction between formalities and material conditions in terms of its applicability, at least as a prima facie matter.⁵¹² Mansfield expressly followed Huber,⁵¹³ and Hardwicke⁵¹⁴ seemed to do so at least implicitly.

Quite arguably, the Court of Delegates reached the same conclusion.⁵¹⁵ Although it did not provide an explicit rationale for affirming the validity of Gretna Green marriages, one of the key conflicts involving them was the lack of parental consent. That issue is best characterized as a material condition. It is true that English courts later characterized it as a matter of formalities, but the basis seems merely to have been as a way to distinguish *Compton* and allow for adoption of a *domus* rule for material conditions in the middle of the 19th century. Still, it is hard to be entirely certain what general rule the Delegates adopted.

Crucially, American courts uniformly accepted the locus-validation rule as a given, without any evidence of second-guessing.⁵¹⁶ They may have been over-reading *Compton*, but they also were clearly influenced by Huber, Mansfield, and Hardwicke. They regarded the rule as so established that they used it as the basis for analogies for justifying similar conclusions in more controversial settings. It seemed beyond serious contention.

Against this endorsement of the rule are a few silent or dissenting sources. Voet fits the first category. He declined to articulate any general principle for resolving conflicts involving "personal statutes," did not explicitly classify regulations of the material conditions necessary for a valid marriage as "personal statutes,"⁵¹⁷ and avoided articulating any rule for resolving marriage conflicts other than those involving formalities.⁵¹⁸ Drawing a defensible

⁵¹² See *supra* text accompanying notes 232, 236.

⁵¹³ See *supra* text accompanying note 358.

⁵¹⁴ See *supra* text accompanying note 293.

⁵¹⁵ See *supra* text accompanying note 406.

⁵¹⁶ See *supra* text accompanying notes 413–56.

⁵¹⁷ See *supra* text accompanying note 200.

⁵¹⁸ See *supra* text accompanying notes 209–11.

inference from his silence or from what he said about other kinds of conflicts is not realistically possible.

Sanchez is best regarded as a dissenting source, but even that interpretation is contestable. In articulating general principles for resolving conflicts, he viewed formalities as a Bartolus-inspired exception to a general rule against applying locus law,⁵¹⁹ but he also rejected the application of *domus* law in any instance, leaving a probable lacuna.⁵²⁰ As an alternative, he insisted upon characterizing the Tridentine restrictions as formalities, despite the language of the decree, in order to resolve conflicts involving them under locus law, using the formalities exception.⁵²¹ Sanchez seemed to sense that resolving conflicts involving material conditions was challenging and recognized that some might argue for the application of *domus* law in at least some situations, as Bartolus had with respect to benevolent restrictions on testamentary capacity.⁵²² Sanchez's primary conclusion, as drawn from his general principles, was that neither locus law nor *domus* law applied.⁵²³ His view obviously would not support reading either a locus or *domus* rule into the Full Faith and Credit Clause. It is possible that the Delegates followed him and resolved the Gretna Green conflicts on some technical ground that avoided the question.

A *fair* construction of the Full Faith and Credit Clause would accept the locus-validation rule in the case of material conditions based on the weight of the authorities. The paramount influence of Huber on American courts, either indirectly or by way of Mansfield, as well as the locus rule that American courts attributed to *Compton*, however accurately, provide a quite strong foundation for accepting the rule as part of the original content of the Clause even with respect to material conditions. American courts were so confident in it as a rule of law that they repeatedly resorted to it as an analogy for supporting their resolution of conflicts in other contexts, including contexts equivalent to issues of material conditions, such as the validity of slaving contracts. A strict constructionist could decline to accept the locus-validation rule as part of the original content on the basis of the silence of Voet, the dissent of Sanchez, and the indeterminacy of the Delegates. But it pretty clearly contradicts how early American courts perceived the law. Even a strict constructionist could conclude that Voet's silence and Sanchez's uncertainty are not significant enough to overcome Huber, Mansfield, Hardwicke, and the manifest certainty of early American courts on this point.

⁵¹⁹ See *supra* text accompanying note 155.

⁵²⁰ See *supra* text accompanying note 157.

⁵²¹ See *supra* text accompanying note 505.

⁵²² See *supra* text accompanying notes 166–67.

⁵²³ See *supra* text accompanying notes 154–58.

The better view is that the original content of the Full Faith and Credit Clause included the locus-validation rule for resolving marriage conflicts, whether the conflicts involve mere formalities or material conditions. That general rule might have exceptions, but its status as a general rule seems to have a firm foundation in early modern sources.

ii. Locus-Invalidation

The same is not true of the locus-invalidation rule: the rule that locus law should be applied even if it leads to invalidation of a marriage in the outrage scenario. Although English ecclesiastical courts⁵²⁴ and Sanchez⁵²⁵ clearly supported a locus-invalidation rule, the other sources did not. Huber was ambiguously silent,⁵²⁶ and early American courts had little to say about it. Voet explicitly opposed such a rule, at least in the case of formalities.⁵²⁷ Given the manifest significance of Huber as an influence and the relative silence of early American courts, it would probably be best not to regard the support for a locus-invalidation rule as sufficient to establish it as part of the original content of the Clause notwithstanding Sanchez and *Scrimshire*. The Clause thus probably does not embody the principle that a locus is constitutionally required to apply the law of a sibling locus if doing so would result in the invalidation of a marriage. The Clause does *not* mandate the negative principle that, in the outrage scenario, a marriage void where celebrated is void everywhere.

2. Exceptions

As important as identifying general rules is identifying any exceptions to them. In contrast to the analysis of general rules, however, the question is not whether there is sufficient affirmative support for reading an exception into the original content. The ultimate constitutional question is whether the Clause mandates the choice of a sibling state's law. Where there is sufficient uncertainty whether an exception has been rejected by the early modern sources, the better approach is to leave room *for* the exception and to decline to impose a choice of law mandate in the face of one of these potential exceptions. An exception is not itself the choice-of-law rule; rather, it goes toward establishing the limits of any mandated choice-of-law rule. Based on the sources, the original content of the Clause should not be read to mandate choice of a sibling state's marriage law in situations in which the exceptions articulated by Huber would apply.

⁵²⁴ See *supra* text accompanying notes 300, 341.

⁵²⁵ See *supra* text accompanying note 161.

⁵²⁶ See *supra* text accompanying note 233.

⁵²⁷ See *supra* text accompanying note 205.

i. Evasion

The first of these exceptions was the one most discussed in the early modern sources: the evasion exception. There was enough support for it to avoid interpreting the Full Faith and Credit Clause as mandating the locus-validation rule in situations in which the evasion exception would apply. But there is at least one significant limit to the scope of that exception.

Support for the evasion exception was mixed but significant. The preeminent authority, Huber, clearly endorsed it,⁵²⁸ as did Voet.⁵²⁹ In addition, Hardwicke,⁵³⁰ Mansfield,⁵³¹ and the English temporal courts preferred it.⁵³² Early American courts, crucially, agonized over whether to recognize it.⁵³³ Only Sanchez clearly rejected the evasion exception,⁵³⁴ and English ecclesiastical courts probably did as well.⁵³⁵ There is simply too much genuine lack of consensus and even ambivalence about the issue to construe the Full Faith and Credit Clause as mandating a locus-validation rule in cases of evasion. Limiting the locus-validation rule in that context is obviously a significant limitation on the mandate, as many marriage conflicts cases involve evasion.

There is nevertheless a significant limitation on the scope of the evasion exception itself. The issue is which state is entitled to invoke it. The preeminent Dutch thinkers agreed that only the victim of the evasion—the *domus* whose law was evaded by one of its people—could invoke the exception when the state also happened to be the forum. Voet made the point explicit in describing the exception in the case of formalities. Huber did so in contexts other than marriage,⁵³⁶ but his discussion of marriage conflicts also implicitly presumed it. The most Huber said to the contrary was that a locus perhaps should not permit connubians to celebrate their nuptials evasively in its territory,⁵³⁷ but he did not say that those nuptials would be void everywhere or even in the locus. All he clearly said was that the *domus* was entitled to disregard them. He made explicit in other legal contexts that states other than the *domus* were not permitted to invoke the evasion exception.⁵³⁸ Mansfield

⁵²⁸ See *supra* text accompanying note 221.

⁵²⁹ See *supra* text accompanying note 207.

⁵³⁰ See *supra* text accompanying note 346.

⁵³¹ See *supra* text accompanying note 359.

⁵³² See *supra* text accompanying note 410.

⁵³³ See *supra* text accompanying notes 457–503.

⁵³⁴ See *supra* text accompanying note 173.

⁵³⁵ See *supra* text accompanying note 407.

⁵³⁶ See *supra* text accompanying notes 226–29.

⁵³⁷ See *supra* text accompanying note 230.

⁵³⁸ See *supra* text accompanying note 229.

hewed closely to the Dutch thinkers, so he presumably would have articulated the evasion exception in the same way.

To find support for a broader application of the evasion exception, one has to go all the way back to Ledesma,⁵³⁹ who is not a significant source in any event. In his view, evasive nuptials would not give rise to a valid marriage anywhere. Every forum, in other words, could invoke the evasion exception on behalf of a third state that is the *domus*. This conclusion followed from Ledesma's notion that evasion was deceitful,⁵⁴⁰ so connubiants should not gain any benefit from their immoral act *anywhere*. But Ledesma's support for his regime was flimsy, reflecting little or no engagement with even contemporaneous conflicts thought. The Dutch theory, moreover, rested on the very different rationale that giving effect to an evasive act would prejudice the forum whose law was evaded,⁵⁴¹ not that there was some universal ethic against giving effect to evasive acts based on some sort of moral objection. The exception was merely about allowing the evaded state to protect itself.

Consistent with the Dutch formulation, any evasion exception that limits the locus-validation rule as part of the original content of the Full Faith and Credit Clause should not be deemed to extend to any forum that was not also the *domus* of at least one of the connubiants at the time of the nuptials. While the original content would not preclude the *domus* from invoking the evasion exception, it would require any other state to abide by the locus-validation rule notwithstanding the evasion of some other state's law.

ii. Abhorrence

Support for some sort of abhorrence exception seemed uniform. Huber clearly endorsed it,⁵⁴² and there was good evidence that Voet⁵⁴³ and Sanchez⁵⁴⁴ would have as well. English ecclesiastical courts endorsed it in *Harford*⁵⁴⁵ as did the Massachusetts Supreme Judicial Court in more than one opinion.⁵⁴⁶ It seems plain that no locus rule should be made mandatory in the case of a marriage deemed abhorrent, but again, the scope of the exception is significant. In contrast to the evasion exception, the abhorrence one seemed available to any forum, without regard to the forum's other contacts with the connubiants or the nuptials. But the exception was sharply limited to those types of marriages

⁵³⁹ See *supra* text accompanying note 145.

⁵⁴⁰ See *supra* text accompanying note 149.

⁵⁴¹ See *supra* text accompanying notes 204, 226.

⁵⁴² See *supra* text accompanying note 251.

⁵⁴³ See *supra* text accompanying note 212.

⁵⁴⁴ See *supra* text accompanying note 178.

⁵⁴⁵ See *supra* text accompanying note 380.

⁵⁴⁶ See *supra* text accompanying notes 463, 489.

that were universally or nearly universally forbidden, at least among some relevant universe of states—such as “civilized” nations, in the old language.⁵⁴⁷ Parent-child marriages and sibling marriages are two explicit examples in the sources. Huber demonstrated that he would not have applied the exception to avuncular marriages, as they were not universally prohibited.⁵⁴⁸ If the set of relevant states were limited to Western nations or, in the full-faith-and-credit context, to the states of the Union, one could include polygamy in this exception. Perhaps a marriage involving an extremely young child might also fit the exception. That suggestion appeared in *Harford*.⁵⁴⁹ It is hard to think of another example that would fit.⁵⁵⁰

3. Resulting Principle

The historical evidence seems sufficient to support the following principle as part of the original content of the Full Faith and Credit Clause: A forum state must apply the marriage-*validating* law of the sibling state where the nuptials were celebrated, unless (1) the marriage is nearly universally prohibited or (2) the forum is a *domus* whose law was evaded by at least one of the connubians. The sources that culminate in this principle give the Court a sufficient “rudder” or “compass” for construing the Full Faith and Credit Clause to impose a choice-of-law mandate to the extent of this principle.

C. *Import in Specific Cases*

If the Full Faith and Credit Clause were construed to embody the foregoing principle as a constitutional constraint on state choice of law in the context of marriage conflicts, the effect would not be revolutionary, but it would alter the outcome of some cases. Considering the effects in a few situations will illustrate the impact.

⁵⁴⁷ See *supra* text accompanying note 255.

⁵⁴⁸ See *supra* text accompanying note 251.

⁵⁴⁹ See *supra* text accompanying note 381.

⁵⁵⁰ Although same-sex marriages might once have qualified, the Supreme Court’s decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), by invalidating state bans on same-sex marriages, eliminated interstate conflicts with respect to these marriages. Even before *Obergefell*, more than a dozen states and similar number of Western nations had already authorized same-sex marriages, a number which would have weighed strongly against subjecting these marriages to the abhorrence exception under the test of near-universal prohibition.

1. Material Evasion

Perhaps the most well-known case in all of marriage recognition is *In re May's Estate*,⁵⁵¹ in which the New York Court of Appeals famously recognized an evasive avuncular marriage celebrated by two of its residents in Rhode Island under a special statutory exemption for Jewish connubians. Because the nuptials were clearly evasive, the originalist full-faith-and-credit mandate would not have applied in that case. New York voluntarily recognized the marriage by choosing to apply locus law, but the Full Faith and Credit Clause would not have mandated that result in the face of the clear evasion. New York could have chosen to apply its own law and treat the Rhode Island nuptials as void had it chosen to do so.

More interesting, however, is what the originalist full-faith-and-credit mandate would require of other states. The *May's Estate* rule is one of the most liberal recognition rules in the country. Other states have sometimes invoked public policy exceptions to refuse to recognize avuncular marriages. When they are the *domus* of at least one of the connubians, there would be nothing unconstitutional in doing so. When they are not a *domus*, however, the Full Faith and Credit Clause would mandate interstate recognition. If any other state but a *domus* were the forum, the general locus-validation rule would be constitutionally mandatory, as the marriage was valid under the law of the Rhode Island locus. The evasion exception would not be available, even though the connubians evaded New York law, because they did not evade the law of the other state now hypothetically tasked with making the choice of law. The abhorrence exception would also be unavailable, as the rejection of avuncular marriages is not nearly universal. The result would be national uniformity in the recognition of the marriage with the lone exception of the *domus* potentially withholding recognition, although New York did not choose to do so in *May's Estate*.⁵⁵² If the *domus* chose to disregard the nuptials and treat the marriage as void, a significant problem of “limping” would exist, but the problem would at least be contained to the *domus*. The couple would not face a checkerboard of recognition and denial of recognition around the country.

2. Formal Evasion

An evasion scenario can also involve the mere formalities of marriage. Many marriage conflicts, in fact, involve claims that connubians have concluded an informal, “common-law” marriage while visiting a state that

⁵⁵¹ 114 N.E.2d 4 (N.Y. 1953).

⁵⁵² Technically, the Clause would not require a Rhode Island court to make any particular choice of law either. The Clause speaks only to the situation in which a forum has declined to apply the law of a sibling state. It does not speak to instances in which a forum should apply its own law or should be forbidden to choose the law of a state other than itself.

allows such marriages. States typically apply the law of the locus and recognize the marriage if it met the requirements for a valid “common law” marriage under the law of the locus, although often the claimed nuptials do not meet those criteria. Illinois, however, has adopted a particularly aggressive stance toward “common law” marriages concluded by its own citizens in other states. Its aggressive rejection of these marriages would be unconstitutional in most situations under an originalist interpretation of the Full Faith and Credit Clause.

*Lynch v. Bowen*⁵⁵³ is perhaps the clearest example. There, a couple from Illinois never formally celebrated their nuptials anywhere, even though there was no apparent material impediment to their marrying. They nevertheless had lived together for 40 years and had three children together. When the male partner died, his 65-year-old surviving partner sought a widow’s benefit from Social Security. The connubians had once spent ten days visiting Pennsylvania, where, it was assumed for argument’s sake, they had informally exchanged marital vows without a license or solemnization.⁵⁵⁴ The informal nuptials were consistent with Pennsylvania law, which then allowed common-law marriages,⁵⁵⁵ but they were inconsistent with Illinois law, which had banned such marriages.⁵⁵⁶ Moreover, under Illinois’ version of the Marriage Evasion Act, which the courts had construed strictly, the Pennsylvania nuptials, even if they happened and even if they were valid under locus law, were deemed void by the Illinois domicile.

Assuming the nuptials ever actually happened, which is a serious factual question, that refusal to choose Pennsylvania law would be unconstitutional under the originalist mandate proposed here. The general rule would be constitutionally obligatory, so an Illinois court would be required to choose and apply Pennsylvania’s permissive law because Pennsylvania was the locus. The evasion exception could apply in theory because the connubians

⁵⁵³ 681 F. Supp. 506 (N.D. Ill. 1988). The case was before a federal court, but in deciding a state-law question, a federal court must apply the conflicts law of the state in which it sits. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

⁵⁵⁴ *Lynch*, 681 F. Supp. at 507. The couple also took brief trips to other jurisdictions that authorized common law marriage, but the couple made two trips to Pennsylvania, including the longest one. I have focused exclusively on Pennsylvania in order to simplify discussion of the case as an illustration.

⁵⁵⁵ *Buradus v. Gen. Cement Prods. Co.*, 52 A.2d 205, 207–08 (Pa. 1947). Later, in 1957, informal marriages arguably gained some statutory standing in Pennsylvania. *In re Miller*, 448 A.2d 25, 32–33 (Pa. Super. Ct. 1982). In 2005, however, Pennsylvania prospectively abolished the common law marriage, 23 PA. CONS. STAT. § 1103 (2015), after a lower court purported to abolish the doctrine by way of judicial reform of the common law. *PNC Bank Corp. v. Workers’ Comp. Appeal Bd. (Stamos)*, 831 A.2d 1269 (Pa. Commw. Ct. 2003); *see also Stackhouse v. Stackhouse*, 862 A.2d 102 (Pa. Super. Ct. 2004) (acquiescing in judicial abolition but barring retroactive application).

⁵⁵⁶ 750 ILL. COMP. STAT. 5/214 (2015) (“Common law marriages contracted in this State after June 30, 1905 are invalid.”).

were residents of the Illinois forum, but there was no indication anywhere in the fact pattern that the connubians had deliberately gone to Pennsylvania in order to conclude their nuptials without having to conform to the ceremonial requirements of Illinois law. As the early modern sources discussed the evasion exception, it required deliberate evasion of *domus* law, not the mere happenstance of getting married under the conflicting law of another state. Absent evidence of deliberate evasion, the extension of the marriage evasion act to this marriage would unconstitutionally deny full faith and credit to Pennsylvania law. As in the case of *May's Estate*, moreover, other states would be constitutionally required to choose Pennsylvania law in any event without any possibility of an evasion exception.

3. Chauvinism Scenarios

In addition to cases of evasion, marriage conflicts also arise, though less commonly, in what I have termed the chauvinism scenarios, in which a forum state that was neither the *domus* nor the locus nevertheless invokes some “public policy exception” and refuses to recognize a marriage that was valid under the law of the locus. These denials of recognition would be unconstitutional under the proposed mandate in the absence of abhorrence.

The less controversial of these scenarios would involve visitor or extraterritorial marriages. In these situations, connubians become embroiled in litigation in a forum state as a result of either temporarily passing through the state or somehow acquiring an interest, such as a land interest, that is connected with the forum. Under the proposed mandate, the general locus-validation rule would apply. The forum would be constitutionally obliged to recognize the out-of-state marriage. Because the forum is not the *domus*, its law was not evaded in the formation of the marriage, so the evasion exception is unavailable. Unless the marriage is of a type that is nearly universally banned, the abhorrence exception would not be available either. This solution would achieve complete interstate uniformity in the recognition of such marriages.

The tougher chauvinism scenario would involve migratory marriages. This scenario arises when a marriage was valid according to the locus and *domus* of the connubians at the time the nuptials took place, but the connubians later permanently relocate to a state that does not itself allow the type of marriage and that attempts to withhold recognition. The conflicts question is basically a choice-of-time issue. Should the post-nuptial change of *domus* alter the validity of the nuptials? The early modern sources almost never discuss this scenario, but there is one significant exception. Huber explicitly reasoned that the new *domus* should recognize the migratory marriage that was valid where the connubians originally lived and celebrated their nuptials. The post-marital change of residence, in other words, should have no effect on the validity of the marriage. While that lone source may not be definitive, even though Huber was the preeminent source for early American courts, the principle still might merit constitutionalization. The Supreme Court itself has

been skeptical of the power of a forum state to use a post-event change of residence as the basis for invalidating a transaction that had no connection to the state at the time the transaction was concluded.⁵⁵⁷ Although the transaction at issue was not a marriage, the forum's lack of any contemporaneous contact with the transaction made the choice of forum law unconstitutional even without the adoption of an originalist full-faith-and-credit mandate. Strictly speaking, however, it would be hard to rest the constitutionalization of a marriage-specific principle on Huber alone, even in the face of silence among all the other early modern sources. What may be possible, however, is to determine whether early modern conflicts thinkers generally repudiated the idea of using post-event contacts to reassess the validity of concluded transactions.

D. Policy Assessment

Although deriving the original content of the Full Faith and Credit Clause as it applies to the resolution of marriage conflicts does not necessarily depend on any assessment of the resulting conflicts policy, the acceptability of the proposal, realistically, will depend on some assessment of the resulting conflicts policy.⁵⁵⁸ The conflicts principles that may be derived as the original content of the Clause do not differ enormously from the principles articulated by the *Second Restatement of Conflicts*. The most significant difference between the two sets of principles involves a relatively minor difference in the necessary trade-offs between competing policy considerations.

The general rule derived as the original content is the same as the general rule adopted in the *Second Restatement*.⁵⁵⁹ Both endorse the locus-validation rule, so the same policy considerations identified in the *Second Restatement* as supporting the general rule articulated there will equally support the same general rule as a full-faith-and-credit command. The general rule serves a systemic interest in preventing limping marriages by furthering the uniform resolution of marriage conflicts in whatever forum they arise.⁵⁶⁰ It accommodates the probable expectation of the connubians that the legal effect of their nuptials would be determined by the law of the locus where they took place as well as the expectation that the nuptials resulted in a valid marriage.⁵⁶¹ The general rule also serves the goal of administrability, as the locus where nuptials took place is, in the run of cases, likely to be an easier contact to

⁵⁵⁷ *John Hancock Mut. Life. Ins. Co. v. Yates*, 299 U.S. 178, 182–83 (1936).

⁵⁵⁸ *But see supra* text accompanying note 49 (noting that Justice Story viewed himself as discovering, not formulating, conflicts law in accepting a rule with which he explicitly disagreed as a matter of policy).

⁵⁵⁹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (AM. LAW INST. 1971).

⁵⁶⁰ *Id.* § 283(1) cmt. b.

⁵⁶¹ *Id.*

identify than the *domus* of each connubiant.⁵⁶² Because the locus-validation rule results in a choice of law that affirms the validity of the nuptials, the general rule also advances the basic, substantive policy of marriage law, which is to endeavor to affirm the validity of a marriage if possible.⁵⁶³ In the case of formalities, the rule also likely calls for selection of the law of the state having the greatest interest in having its law applied to issues of form: the locus.⁵⁶⁴ What the general rule sacrifices in the case of either the *Second Restatement* or the original content is the superior interest of the *domus* in controlling the material conditions under which its people may marry,⁵⁶⁵ an interest accommodated to some extent by exceptions to the general rule.

The most significant difference between the principles derived as the original content of the Clause and the principles articulated in the *Second Restatement* concerns the exceptions to the general rule. The *Second Restatement* articulates a public policy exception that counsels a forum state to override the locus-validation rule if the *domus* would refuse to validate the nuptials in question under the law of the locus.⁵⁶⁶ This exception accommodates the general rule's disregard of the governmental interest of the *domus*.⁵⁶⁷

The exceptions derived as the original content of the Clause are similar to the public policy exception but not coextensive. The abhorrence exception would function similarly to the public policy exception. In extreme cases, such as polygamy and nuclear kinship, both exceptions would permit every forum in the country to override the law of any locus state that might ever permit such a marriage, as long as a trend in favor of authorizing such marriages does not arise in too many states to justify application of the abhorrence exception. In these extreme cases, either exception accommodates the interest of not only the *domus* but of every state in withholding validity from these extreme nuptials.

In less extreme cases, where the abhorrence exception would not be available, the *Second Restatement's* public policy exception would diverge significantly from the original content's remaining exception: the evasion exception. Whereas the public policy exception would counsel every state to override the validating law of the locus if the *domus* would do so, the evasion exception would permit only the *domus* itself to override locus law when the *domus* happened also to be the forum. No other state would be permitted to invoke the evasion exception, so all of them would be constitutionally compelled to recognize the validity of a marriage that the *domus* refuses to

⁵⁶² *Id.* § 283(2) cmt. h.

⁵⁶³ *Id.* § 283(1) cmt. b.

⁵⁶⁴ *Id.* § 283(2) cmt. f.

⁵⁶⁵ *Id.* cmt. h.

⁵⁶⁶ *Id.* § 283(2).

⁵⁶⁷ *Id.* cmt. j.

accept. The evasion exception, then, does not accommodate any governmental interest that the *domus* may have in having its law applied to invalidate the nuptials outside its borders. The evasion exception also indulges greater incidence of limping marriages by forbidding disinterested third states from following the *domus* in overriding locus law and denying validity to a marriage deemed invalid at the *domus*. This problem is somewhat more limited than it might first appear because the *domus* would be constitutionally permitted to invoke the evasion exception only in cases of actual, deliberate evasion, not by the *domus*'s mere disdain for locus law. Still, the original content would leave greater room for limping marriages than would the principles of the *Second Restatement* if applied uniformly.

There are, however, countervailing considerations that favor the original content's restriction of the availability of the exception to only the *domus* and only in cases of deliberate evasion. While the limited availability of the evasion override sacrifices uniformity and thus the systemic interest in avoiding limping marriages in a way that the public policy exception of the *Second Restatement* does not, it simultaneously advances other conflicts policies better than the *Second Restatement* principles do. Specifically, it more strongly favors the interest of the connubians in the validation of their marriage.⁵⁶⁸ By forbidding other states from invoking a public policy override, the original content's narrow exception for evasion induces the application of locus law to recognize marriages as valid in every state but the *domus*. Connubians gain broader mandatory validation of their nuptials than under the public policy exception of the *Second Restatement*, even though the ability of the *domus* to disregard their nuptials means, with respect to that one state, their marriage will be a limping one. For similar reasons, the evasion exception advances more strongly than the *Second Restatement*'s the basic, substantive policy of seeking to affirm the validity of a marriage by limiting the ability to override locus law to only the *domus*. The net result is that under the original content's evasion exception, connubians gain greater interstate validation of their nuptials at the cost of enduring marriages that limp unrecognized in their home state. The recent experience with same-sex marriages, however, indicates that this is a tradeoff that many connubians find acceptable. "Protecting" a couple from the burden of a limping marriage by, instead, allowing their marriage to be disregarded everywhere is a backhanded benefit at best. What really gets sacrificed under the original content is the governmental interest of the *domus* in having its invalidating law follow its connubians and invalidate their marriage everywhere. To that extent, the evasion exception of the original content privileges the interest of the connubians in validation over the interest of their *domus* in having their nuptials disregarded outside its borders. The public policy exception of the *Second Restatement* establishes the opposite

⁵⁶⁸ *Id.* (noting the tradeoff between connubiant and *domus* interests).

hierarchy,⁵⁶⁹ one privileging the *domus* interest in invalidation over the connubians interest in validation. To say the least, it is difficult to conclude that the *Second Restatement* has clearly made the superior tradeoff in this regard.

To the extent that the principles derived as the original content of the Full Faith and Credit Clause are comparable or superior to those of the *Second Restatement* in advancing and balancing established conflicts policies, they are superior to the *Second Restatement* principles in another respect. If entrenched as the original content of the Clause and enforceable against forum states, the principles are more resistant to poorly conceived, parochial subversion than is true of the forum self-policing of the *Second Restatement*. Again, the recent experience with same-sex marriage is instructive. In a reactionary wave of lawmaking, the vast majority of states adopted blanket policies of non-recognition of same-sex marriages. But this reaction was extreme.⁵⁷⁰ It ignored the various conflict patterns in which marriage conflicts arise⁵⁷¹ and paid no attention to the weight of the forum's stake in imposing its invalidating rule onto an out-of-state marriage. The blanket rule of nonrecognition was far more parochial than even the position that segregationist states adopted toward out-of-state interracial marriages.⁵⁷² If entrenched as a constitutional mandate, however, the cosmopolitan, validation-favoring principles of the original content would forestall such reactionary extremism, even as it would still permit the *domus* to adhere to its invalidating policy with respect to its own resident connubians within its own borders. The principles of the original content would dramatically contain the severe problem of limping marriages that existed in the case of the extreme reaction against any recognition of same-sex marriages by many chauvinistic states having little or no contact with the connubians or their nuptials.

In the final analysis, then, not only can originalist principles for resolving marriage conflicts be derived from historical sources but those principles seem at least as viable, if not superior to, the principles articulated in the *Second Restatement*. They are more connubiant-favoring and validation-favoring, and, as constitutional commands, would be far less vulnerable to reactionary and dysfunctional override than the principles of the *Second Restatement*.

VII. CONCLUSION

“If there is one thing that the people are entitled to expect from their lawmakers,” Justice Jackson once observed, “it is rules of law that will enable

⁵⁶⁹ *Id.*

⁵⁷⁰ Koppelman, *supra* note 94, at 2143–44.

⁵⁷¹ *See supra* Part III.C.

⁵⁷² *See* Koppelman, *supra* note 94, at 2150–51.

individuals to tell whether they are married and, if so, to whom.”⁵⁷³ One might have thought that the Framers would have expected the Full Faith and Credit Clause to provide some assurance on that point. In fact, they may well have. They expected the Clause to impose meaningful constraints on state choice of law, and they expected those constraints to derive from then-existing conflicts principles. The Supreme Court agrees with both of those propositions. The historical evidence indicates rather clearly that those conflicts principles included, at the very least, the rule that a forum should apply the marriage-validating law of the locus where a marriage was celebrated, as long as the marriage is not abhorrent or evasive. That is what the Full Faith and Credit Clause requires. Enforcing that mandate can go far toward addressing the problem of the limping marriage.

⁵⁷³ *Estin v. Estin*, 334 U.S. 541, 553 (1948) (Jackson, J., dissenting).