THE PERFECT STORM: BANKRUPTCY, CHOICE OF LAW, AND SAME-SEX MARRIAGE

JACKIE GARDINA*

INTRODUCTION

For more than a half a century, courts and commentators have essentially ignored choice of law questions in the federal courts.[1] The Supreme Court's last definitive statement on the issue came over sixty years ago in *Klaxon Co.*

* Associate Professor of Law, Vermont Law School. I would like to thank the following people for their time, insights, and encouragement: Pam Stephens, Kinvin Wroth, Ingrid Michelsen Hillinger, Michael Hillinger, Jeff Morris, Katie Porter, and Judge Colleen Brown. In addition, I want to thank Christopher Ackerman and Erin Barnes for their excellent research skills, including the ability to chase and catch wild geese. And, as always, I must extend a special thanks to Lauren Bassing for finding and lifting my dangling participles.

[1] Choice of law is a body of law that recognizes that "[e]vents and transactions occur, and issues arise, that may have a significant relationship to more than one state, making necessary a special body of rules and methods for their ordering and resolution." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 1 (1971). In short, choice of law methodologies provide a template for choosing between conflicting laws.

v. Stentor Electric Manufacturing Co.,[2] where it held that a federal court sitting in diversity must apply the forum state's choice of law rules to prevent the "accident of diversity of citizenship" from disturbing the "equal administration of justice in coordinate state and federal courts sitting side by side."[3] While the decision has been criticized,[4] it remains black letter law. *Klaxon*, however, left open the question of whether a federal court must apply the forum state's choice of law rules when the court's jurisdiction is based on the presence of a federal question rather than diversity.[5] Over forty years ago, one court labeled the choice of law issue in federal courts "a hornet's nest of open questions."[6] Unfortunately, the description remains just as apt today.

The question of the appropriate choice of law rule in federal question cases is more than academic. There are a variety of federal laws that explicitly or implicitly reference state law.[7] The Bankruptcy Code is perhaps the best example of this intersection of state and federal law; although it is a comprehensive federal statute, it repeatedly points to state law to define the rights and obligations of the debtor and the debtor's creditors.[8] In the absence

[2] 313 U.S. 487 (1941).

[3] *Id.* at 496.

[4] *See, e.g.*, Patrick J. Borchers, *The Origins of Diversity Jurisdiction, The Rise of Legal Positivism, and a Brave New World for* Erie *and* Klaxon, 72 TEX. L. REV. 79, 82 (1993); Scott Fruehwald, *Choice of Law in Federal Courts: A Reevaluation*, 37 BRANDEIS L.J. 21, 21-23 (1998); Donald T. Trautman, *Toward Federalizing Choice of Law*, 70 TEX. L. REV. 1715, 1720-26 (1992).

[5] *See, e.g.*, Int'l Union v. Hoosier Cardinal Corp., 383 U.S. 696, 705 n.8 (1966) ("There is therefore no occasion to consider whether such a choice of law should be made in accord with the principle of [*Klaxon*] or by operation of a different federal conflict of laws rule."); Richards v. United States, 369 U.S. 1, 7 (1962) ("[B]ecause the issue of the applicable law is controlled by a formal expression of the will of Congress, we need not pause to consider the question whether the conflict-of-laws rule applied in suits where federal jurisdiction rests upon diversity of citizenship shall be extended to a case such as this, in which jurisdiction is based upon a federal statute."); D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 456 (1942) ("Whether the rule of the *Klaxon* case applies where federal jurisdiction is not based on diversity of citizenship, we need not decide.").

[6] United States v. Mitchell, 349 F.2d 94, 101 n.5 (5th Cir. 1965).

[7] *See, e.g.*, Samuel A. Donaldson, *The Easy Case Against Tax Simplification*, 22 VA. TAX REV. 645, 681 n.158 (2003) (noting that 116 provisions of the Federal Tax Code contain one or more references to state law); Joel Mendal Overton, II, Note, *Will the Real FSIA Choice-of-Law Rule Please Stand Up?*, 49 WASH. & LEE L. REV. 1591, 1593 (1992) (discussing the split in the circuits regarding the choice of law question under the Foreign Sovereign Immunities Act); Recent Case, A.I. Trade Finance Inc. v. Petra International Banking Corp., *62 F.3d 1454 (D.C. Cir. 1995)*, 109 HARV. L. REV. 1156, 1159-61 (1996) (describing the split in the circuits regarding choice of law questions under the Edge Act).

[8] *See, e.g.*, 11 U.S.C.A. § 522(b)(3)(A) (West Supp. 2006) (explicitly referencing "State or local law"); Butner v. United States, 440 U.S. 48, 54 (1979) (finding that Congress had "generally left the determination of property rights in the assets of a bankrupt's estate to state law"); Thomas E. Plank, *Bankruptcy and Federalism*, 71 FORDHAM L. REV. 1063,

of any overriding federal interest, the Bankruptcy Code attempts to maintain these state-created rights in the process of granting bankruptcy relief.[9]

Choosing the appropriate law is not a simple task. Bankruptcy courts must grapple with both vertical and horizontal choice of law questions.[10] Because a bankruptcy proceeding may implicate either federal rights and obligations under the Bankruptcy Code or state-created rights, or both, a bankruptcy court must first determine whether federal or state law governs the underlying question.[11] The Bankruptcy Code gives courts the power to set aside state law rights during bankruptcy proceedings in many situations.[12] Assuming state law governs the substantive question, however, a bankruptcy court must next determine *which* state's law is applicable. Unfortunately, the Bankruptcy Code contains no clear guidance on this issue, forcing bankruptcy courts to face yet another decision: whether to apply the forum state's choice of law rules, as directed by *Klaxon*, or a distinct federal choice of law rule.[13]

1070-72 & nn.30-35 (2002) (citing provisions of the Bankruptcy Code that reference non-bankruptcy law).

[9] *See Butner*, 440 U.S. at 55; Charles W. Mooney, Jr., *A Normative Theory of Bankruptcy Law: Bankruptcy As (Is) Civil Procedure*, 61 WASH. & LEE L. REV. 931, 989-98 (2004).

[10] Vertical choice of law refers to choosing between the application of federal or state law. In contrast, horizontal choice of law refers to the choice between conflicting state laws. *See* Joseph P. Bauer, *The* Erie *Doctrine Revisited: How a Conflicts Perspective Can Aid the Analysis*, 74 NOTRE DAME L. REV. 1235, 1264-65 (1999).

[11] *See* Niagara Mohawk Power Corp. v. Megan-Racine Assocs. (*In re* Megan-Racine Assocs.), 189 B.R. 562, 568-69 (Bankr. N.D.N.Y. 1995); *In re* Kruse, 35 B.R. 958, 963 (Bankr. D. Kan. 1983).

[12] *See, e.g.*, Cisneros v. Kim (*In re* Kim), 257 B.R. 680, 687 & n.11 (B.A.P. 9th Cir. 2000) ("To the extent that the California exemption law attempts to establish a procedure that overrides the well-settled bankruptcy law regarding the date for determining an exemption, it is preempted."); Bruin Portfolio, LLC v. Leicht (*In re* Leicht), 222 B.R. 670, 680 (B.A.P. 1st Cir. 1998) ("Thus, the conclusion that the Massachusetts law 'conflicts' with the Bankruptcy Code's congressionally-intended operation, and must give way to the Code's preemptive powers, is unavoidable."); Integrated Solutions, Inc. v. Serv. Support Specialties, Inc., 193 B.R. 722, 727 (D.N.J. 1996) ("The Supremacy Clause mandates that where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress', state law must yield." (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941))).

[13] *See* Limor v. Weinstein & Sutton (*In re* SMEC, Inc.), 160 B.R. 86, 89 (M.D. Tenn. 1993); John T. Cross, *State Choice of Law Rules in Bankruptcy*, 42 OKLA. L. REV. 531, 542 (1989). While this Article focuses on the horizontal choice of law issue faced by bankruptcy courts, it also involves a vertical choice of law component. When a bankruptcy court is faced with a horizontal choice of law question, it must determine whether to apply federal or state choice of law rules.

There has been limited scholarly discussion on choice of law questions in bankruptcy,[14] and despite several opportunities, the Supreme Court has failed to provide a choice of law analysis for bankruptcy cases.[15] As a result, bankruptcy courts lack a uniform and coherent framework for addressing choice of law questions. The current split in the circuits regarding the appropriate choice of law rule in bankruptcy illustrates this lack of guidance.[16] The majority of courts apply the forum state's choice of law rules, while a minority of bankruptcy courts devise a distinct federal choice of law rule.[17]

Although previously ignored, choice of law will inevitably take center stage in bankruptcy. It is only a matter of time before bankruptcy courts will have to struggle with how to address property interests that arise as an incident to a same-sex marriage or civil union,[18] thus finding themselves in the middle of a heated choice of law debate.[19] Consider the following scenario:

---

[14] In comparison to other areas of the law, commentators have not written extensively on the issue of choice of law rules in federal courts. Over the last half century, it has been addressed in relatively few articles. *See generally* Robert B. Chapman, *Profoundly Unwise and Even Irresponsible Uncertainty: Some Preliminary Questions as to the Effect of the Defense of Marriage Act on Marital Status in Bankruptcy for Same-Sex Couples Validly Married Under State Law*, 14 J. BANKR. L. & PRAC. 3 (2005); *Conflict of Laws in Bankruptcy: Choosing Applicable State Law and the Appropriate (State or Federal?) Choice-of-Law Rule*, BANKR. L. LETTER, July 2001, at 1 [hereinafter *Conflict of Laws in Bankruptcy*]; Cross, *supra* note 13; Thomas H. Day, *Solution for Conflict of Laws Governing Fraudulent Transfers: Apply the Law That Was Enacted to Benefit the Creditors*, 48 BUS. LAW. 889 (1993); James T. Markus & Don J. Quigley, *Conflict of Laws – Which State Rules Govern?*, AM. BANKR. INST. J., Nov. 1999, at 18; Thomas E. Plank, *The* Erie *Doctrine and Bankruptcy*, 79 NOTRE DAME L. REV. 633 (2004); Note, *Applicability of State Conflicts Rules When Issues of State Law Arise in Federal Question Cases*, 68 HARV. L. REV. 1212 (1955) [hereinafter *Applicability of State Conflicts Rules*].

[15] *See* Vanston Bondholder Protective Comm. v. Green, 329 U.S. 156, 162 (1946).

[16] *See* Bianco v. Erkins (*In re* Gaston & Snow), 243 F.3d 599, 605 & n.6 (2d Cir. 2001) (identifying the split in the circuits and citing cases); *In re* Morris, 30 F.3d 1578, 1581-82 (7th Cir. 1994) (describing disagreement within the circuits but declining to decide the issue). There is also currently a split among the lower courts within the Sixth Circuit. *Compare In re* Wallace's Bookstores, Inc., 317 B.R. 709, 712 & n.3 (E.D. Ky. 2004), *with In re SMEC, Inc.*, 160 B.R. at 89-91.

[17] *See, e.g.*, *In re SMEC, Inc.*, 160 B.R. at 89-90; Ferrari v. Barclays Bus. Credit, Inc. (*In re* Morse Tool, Inc.), 108 B.R. 384, 385 n.1 (Bankr. D. Mass. 1989).

[18] While "civil unions" and "same-sex marriage" appear to differ only in name and in relation to tangible benefits, there is heated debate regarding whether they are indeed equal. In deference to this debate, the two concepts are identified separately throughout the Article. For a discussion of this debate, see Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 VT. L. REV. 15, 16-20 (2000).

[19] Choice of law issues in the context of same-sex marriage and civil unions have been the source of controversy since the Supreme Court of Hawaii first hinted that it might declare Hawaii's marriage statute unconstitutional. Baehr v. Lewin, 852 P.2d 44, 68 (Haw. 1993); *see also* Scott Fruehwald, *Choice of Law and Same-Sex Marriage*, 51 FLA. L. REV.

> In 2000, Vermont residents Ingrid and Judy enter a civil union that, under Vermont law, provides them with all the rights, benefits, and obligations of marriage.[20] Shortly thereafter, they purchase a home and open a joint bank account to which they both contribute. In 2002, Ingrid and Judy move to Florida, but continue to maintain their home in Vermont and to use the joint bank account. In 2005, Ingrid files for bankruptcy in Florida. In her bankruptcy filings, Ingrid declares the Vermont property and the joint banking account as exempt assets because, under Vermont law, the properties are held as "tenants by the entirety."[21] A creditor challenges the exempt status of the property. The creditor correctly argues that Florida law neither recognizes the civil union as valid nor enforces the rights that arise as a result of a purported marriage between persons of the same sex.[22]

If the bankruptcy court applies Vermont law, Ingrid's interest in the real property and the joint bank account are exempt from property of the estate,[23] and therefore not available for distribution to her sole creditors.[24] If the

799, 804-05 (1999); L. Lynn Hogue, *State Common-Law Choice-of-Law Doctrine and Same-Sex "Marriage": How Will States Enforce the Public Policy Exception?*, 32 CREIGHTON L. REV. 29, 37-40 (1998); Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 988-91 (1998); Linda Silberman, *Same-Sex Marriage: Refining the Conflict of Laws Analysis*, 153 U. PA. L. REV. 2195, 2213-14 (2005). While the Supreme Court of Hawaii ultimately ruled that the statute violated the state constitution's equal protection amendment, Baehr v. Miike, 950 P.2d 1234 (Haw. 1997), *aff'g* CIV. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), the voters quickly passed a constitutional amendment allowing marriage to be defined by the legislature as between opposite-sex partners, HAW. CONST. art. I, § 23. However, since then, three states have recognized either civil unions or same-sex marriage. CONN. GEN. STAT. §§ 46b-38aa to -38pp (Supp. 2006); VT. STAT. ANN. tit. 15, §§ 1201-1206 (2002); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003).

[20] VT. STAT. ANN. tit. 15, § 1204.

[21] 11 U.S.C.A. § 522(b)(3)(B) (West Supp. 2006); *In re* Estate of Boardman, 223 A.2d 460, 462 (Vt. 1966) (indicating that a conveyance to husband and wife presumptively creates a tenancy by the entirety).

[22] FLA. STAT. § 741.212 (2006).

[23] 11 U.S.C.A. § 541(a)(1) defines property of the estate as "all legal and equitable interests of the debtor as of the commencement of the case." In the bankruptcy context, the assets of the debtor comprise the property of the estate that will be used to pay the debtor's creditors. 11 U.S.C.A. § 522 allows the debtor to exempt certain property. Exempt assets are not available to pay the debtor's sole creditors. *See* Bell v. Bell (*In re* Bell), 225 F.3d 203, 215 (2d Cir. 2000) ("It is well-settled law that the effect of . . . exemption is to remove property from the estate and vest it in the debtor.").

[24] 11 U.S.C.A. § 522(b)(3)(B) (any interest in property held by tenants by the entirety is exempt from property of the estate to the extent it is exempt from process under applicable nonbankruptcy law). Under Vermont law, creditors of one spouse cannot attach property held by tenants by the entirety. *See In re* Hutchins, 306 B.R. 82, 89 (Bankr. D. Vt. 2004) (citing Cooper v. Cooper, 783 A.2d 430 (Vt. 2001)). In addition, Vermont allows both real

bankruptcy court applies Florida law, however, the protections provided by Vermont law may disappear, allowing Ingrid's creditors to attach her interest in the real property as well as access her contributions to the joint bank account.[25]

As the above hypothetical reveals, a bankruptcy court's decision about which state's law to apply will have a significant impact on both the composition of the estate and the availability of property for distribution to creditors. Whether a bankruptcy court recognizes an individual debtor's interest in property that arises as an incident of a state-sanctioned same-sex marriage or civil union essentially boils down to a choice of law question. Choice of law itself is a complex issue, but in the context of same-sex marriage or civil union it is further complicated by the number of states promulgating "marriage protection" statutes – the so-called "mini-DOMAs" – or espousing a public policy that prevents state courts from recognizing same-sex marriage or civil unions performed in other states.[26] A state's public policy (including that policy's codification in a mini-DOMA) acts as a limitation on the state's choice of law rules.[27] In situations where a forum state's choice of law rules point to application of another state's law, the forum state's public policy or its mini-DOMA can instead require application of its own law.[28]

This Article contends that the forum state's choice of law rule is inapplicable in the bankruptcy context when interpretation and application of the Bankruptcy Code requires reference to state law. In these instances, bankruptcy courts should be free to develop a federal choice of law rule that promotes the federal policies underlying the Bankruptcy Code. This approach will result in the Bankruptcy Code being interpreted by reference to state laws that are consistent with and promote the Code's underlying policies. Importantly, such an approach requires courts to ensure that the parties' rights and obligations are not unnecessarily altered by the bankruptcy process. Likewise, it avoids the situation where a state's public policy dictates which state law should be used to interpret and apply federal law. Under this paradigm, courts would choose the state law that aids a debtor's fresh start

and personal property to be held by tenants by the entirety. *See* Wacker v. Wacker, 49 A.2d 119, 119-20 (Vt. 1946). It is important to note that this does not ensure that the property is saved. Vermont law, similar to most states' laws, provides that the property is not immune from process for joint debts. *See In re* Cerreta, 116 B.R. 402, 405 (Bankr. D. Vt. 1990). Therefore, if Ingrid and Judy have joint debts and a joint creditor files a proof of claim, the property will not be deemed exempt. *See id.*

[25] Florida law declares that marriages and civil unions between persons of the same sex will not be recognized for any purpose in the state and that the state, its agencies, and its political subdivisions may not give any effect to any public act, record, or judicial proceeding respecting a marriage or civil union between persons of the same sex. FLA. STAT. § 741.212(1)-(2) (2006).

[26] *See infra* notes 171-87 and accompanying text.

[27] *See infra* notes 171-87 and accompanying text.

[28] *See infra* notes 171-87 and accompanying text.

upon emergence from bankruptcy, promotes the ratable distribution of available assets among the creditors, and, perhaps most importantly, ensures that the rights of the parties are not unnecessarily undermined by the happenstance of bankruptcy.

To lay the groundwork for this argument, Part I of this Article discusses property interests that arise as an incident to marriage and explains how those interests are treated in bankruptcy. In addition, it describes how the promulgation of the Federal Defense of Marriage Act[29] and the proliferation of state mini-DOMAs influence the recognition and enforcement of marital benefits for same-sex couples.

In Part II, this Article exposes the current chaos in the federal courts regarding the appropriate choice of law rule when a federal court's jurisdiction is not based on diversity. It provides a general overview of choice of law and then explains the profound effect of a state's "public policy" exception on the choice of law analysis. In addition, it describes the current split in the courts and critiques the various approaches that bankruptcy courts have taken when addressing choice of law issues.

Finally, Part III of this Article addresses the potential impediments to a federal choice of law rule, including the Supreme Court's decision in *Erie Railroad Co. v. Tompkins*[30] and its recent federal common law jurisprudence. Part III ultimately concludes that bankruptcy courts are not mandated to apply the forum state's choice of law rules. In place of the forum state's choice of law rule, this Article proposes a federal choice of law, encouraging the courts to apply the state law that best promotes the policies and objectives of the Bankruptcy Code. The proposed federal rule is intended to be forum neutral, emphasizing the federal policy over the interested states' domestic agendas. By focusing on the policies underlying the federal law, the court gives priority to congressional intent when interpreting and applying a federal statute.

I. PROPERTY INTERESTS IN BANKRUPTCY

While bankruptcy law is federal law, it operates in conjunction with state law.[31] Often in bankruptcy, debtors' and creditors' rights and responsibilities will be dictated by state law, and in some cases, by nonbankruptcy federal

[29] Pub. L. No. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 7 (2000)); 28 U.S.C. § 1738C (2000)).

[30] 304 U.S. 64 (1938).

[31] *See* BFP v. Resolution Trust Corp., 511 U.S. 531, 544 (1994) ("Federal statutes impinging upon important state interests 'cannot . . . be construed without regard to the implications of our dual system of government. . . . [W]hen the Federal Government takes over . . . local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit.'" (alterations in original) (quoting Kelly v. Robinson, 479 U.S. 36, 49 n.11 (1986))).

law.[32] For instance, questions relating to the validity and priority of liens against the debtor's property will, for the most part, be established by state law.[33] As a result, a court's interpretation of the Bankruptcy Code will require reference to state law.

A good example of the integration of state and federal law is a bankruptcy court's determination of what comprises "property of the estate."[34] Every bankruptcy begins with the creation of an "estate" that, with limited exceptions, consists of all legal and equitable interests of the debtor at the commencement of the case.[35] Although what constitutes property of the estate is a question of federal law,[36] bankruptcy courts consistently look to state law to determine the existence and scope of a debtor's interest in property.[37] More than twenty-five years ago the Supreme Court recognized that in the absence of an overriding federal interest, there is no reason why property interests should be analyzed differently simply because an interested party is involved

[32] *See* Raleigh v. Ill. Dep't of Revenue, 530 U.S. 15, 20 (2000) ("The 'basic federal rule' in bankruptcy is that state law governs the substance of claims, Congress having 'generally left the determination of property rights in the assets of a bankrupt's estate to state law.'" (citations omitted) (quoting Butner v. United States, 440 U.S. 48, 54, 57 (1979))); Patterson v. Shumate, 504 U.S. 753, 758 (1992) (recognizing that when the term "applicable nonbankruptcy law" is used in the Code it refers to both state and federal law); *Butner*, 440 U.S. at 56 ("[T]he federal bankruptcy court should take whatever steps are necessary to ensure that the mortgagee is afforded in federal bankruptcy court the same protection he would have under state law if no bankruptcy had ensued."); *In re* Roach, 824 F.2d 1370, 1374 (3d Cir. 1987) (stating that the Bankruptcy Code was written with the expectation that it would be applied in the context of state law, which may not be disregarded except when clearly required to effect a federal interest); Lawrence Ponoroff, Understanding the Law of Bankruptcy: A Primer on Basic Bankruptcy Rules, Concepts, and Policies 3 (Mar. 26-28, 2003) (course material, on file with ALI-ABA), *available at* SH042 ALI-ABA 1, at *4 (Westlaw).

[33] *See Raleigh*, 530 U.S. at 20; *Butner*, 440 U.S. at 56; Ponoroff, *supra* note 32, at 3.

[34] 11 U.S.C.A. § 541 (West 2004 & Supp. 2006).

[35] *Id.* § 541(a). Section 541 defines property broadly. In addition to tangible and intangible property acquired before the filing of petition, the estate also includes property that the debtor acquires or becomes entitled to acquire within 180 days of the petition, either by inheritance, as the result of a property settlement or a divorce decree, or as the beneficiary of a life insurance policy. *Id.* § 541(a)(5).

[36] *See In re* Pettit, 217 F.3d 1072, 1078 (9th Cir. 2000) ("Although the question whether an interest claimed by the debtor is 'property of the estate' is a federal question to be decided by federal law, bankruptcy courts must look to state law to determine whether and to what extent the debtor has any legal or equitable interests in property as of the commencement of the case."); Fisher v. Apostolou, 155 F.3d 876, 880 (7th Cir. 1998) ("The nature of a debtor's interest in property is determined by state law, but the question whether the resulting interest should count as 'property of the estate' for § 541 purposes is an issue of federal law." (citation omitted)).

[37] *See Butner*, 440 U.S. at 55.

in a bankruptcy proceeding.[38] The Court surmised that the "[u]niform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy.'"[39]

The estate is the centerpiece of bankruptcy. The property of the estate, minus the property properly exempted,[40] is the property available to satisfy claims of creditors against the debtor.[41] In a Chapter 7 case, the proceeds of the estate are distributed to the creditors;[42] under Chapters 11 and 13, the reorganization plan either vests the estate in the debtor or describes the portion to be distributed to creditors.[43] Consequently, a bankruptcy court's determination of what property is or is not property of the estate is of primary importance to all interested parties.

A. *The Existence and Recognition of Marital Property Interests*

A debtor's legal and equitable interest in property extends to those property interests acquired through marriage.[44] The breadth of these so-called "marital benefits" is well documented: approximately 1,400 legal rights are conferred upon married couples in the United States.[45] Typically these include approximately 400 state benefits and over 1,000 federal benefits,[46] such as the right to the inheritance of jointly-owned real and personal property, the ability to own real and personal property as tenants by the entirety, spousal benefits under Social Security and Medicare, and wrongful death benefits for a surviving spouse.[47] Most of these legal and economic benefits cannot be privately arranged or obtained through contract.[48] Absent a legal marriage, for

[38] *Id.*

[39] *Id.* (quoting Lewis v. Mfrs. Nat'l Bank, 364 U.S. 603, 609 (1961)).

[40] 11 U.S.C.A. § 522.

[41] *Id.* §§ 726, 1141(b), 1327(b).

[42] *Id.* § 726.

[43] *Id.* §§ 1141(b), 1327(b).

[44] *See id.* § 541(a)(2).

[45] ReligiousTolerance.org, Legal and Economic Benefits of Marriage (2001), http://www.religioustolerance.org/mar_bene.htm (citing a 1996 Lambda Legal Defense and Education Fund report). The General Accounting Office has identified 1,138 federal statutory provisions classified in the United States Code in which marital status is a factor in determining or receiving benefits, rights, and privileges. U.S. GEN. ACCOUNTING OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT (2004).

[46] *See supra* note 45.

[47] *See* Turner v. Safley, 482 U.S. 78, 96 (1987) ("[M]arital status often is a precondition to the receipt of government benefits (*e.g.*, Social Security benefits), property rights (*e.g.*, tenancy by the entirety, inheritance rights), and other, less tangible benefits (*e.g.*, legitimation of children born out of wedlock).").

[48] *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955-56 (Mass. 2003).

example, there is no guaranteed joint responsibility to the partner and to third parties (including children) in such areas as child support, debts to creditors, or taxes.[49] In short, these property rights exist only in the context of a legally valid marriage.

A debtor's interest in certain marital benefits is significant in bankruptcy not only for what it might add to the estate,[50] but also for what it removes from the estate.[51] State law protects marital property from creditors by, among other things, granting married persons the ability to hold property as tenants by the entirety, thus removing it from the reach of some creditors.[52] The Bankruptcy Code mirrors these protections. Under the Code, a married individual debtor who files for bankruptcy has the ability to shield certain property from the reach of creditors and to protect a non-debtor spouse from certain creditor collection activities.[53]

A married couple's ability to hold property as tenants by the entirety is key to shielding certain assets from creditors in bankruptcy. As described by the Supreme Court, "[a] tenancy by the entirety is a unique sort of concurrent ownership that can only exist between married persons."[54] The tenancy relies on the legal fiction that two individuals merge at marriage.[55] Neither spouse is considered to own an individual interest in the estate; rather, it belongs to the couple as a single unit.[56] State law generally shields property held as tenants by the entirety from creditors.[57] According to one commentator, "states enacted entirety laws to ensure that, notwithstanding one spouse's financial

[49] *See* A. Mechele Dickerson, *Family Values and the Bankruptcy Code: A Proposal to Eliminate Bankruptcy Benefits Awarded on the Basis of Marital Status*, 67 FORDHAM L. REV. 69, 88 (1998).

[50] Marital status can enhance the composition of the estate. The Code, for example, requires that all interests of the debtor *and the debtor's spouse* in community property become property of the estate. 11 U.S.C.A. § 541(a)(2) (West 2004 & Supp. 2006). In addition, the Code authorizes that any property obtained as a result of a property settlement agreement with the debtor's spouse becomes property of the estate. *Id.* § 541(a)(5)(B).

[51] The Code has several provisions that allow debtors to exempt certain property from the estate property based, in part, on marital status or a familial relationship. *Id.* § 522(a)(2)(B), (d)(1), (d)(6), (d)(9).

[52] A. Mechele Dickerson, *To Love, Honor, and (Oh!) Pay: Should Spouses Be Forced to Pay Each Other's Debts?*, 78 B.U. L. REV. 961, 981 (1998).

[53] 11 U.S.C.A. § 522(b)(3)(B); *see also* Patrick J. Concannon, *Bankruptcy and Tenancy by the Entirety Property: Its Treatment Under the Code and in the Courts*, 58 UMKC L. REV. 501, 507 (1990); Dickerson, *supra* note 52, at 981-82.

[54] United States v. Craft, 535 U.S. 274, 280 (2002).

[55] *Id.* at 281.

[56] *Id.*

[57] *See* Dickerson, *supra* note 49, at 94 n.138; Steve R. Johnson, *After* Drye*: The Likely Attachment of the Federal Tax Lien to Tenancy-by-the-Entireties Interests*, 75 IND. L.J. 1163, 1169-70 & n.42 (2000) (identifying states that disallow the creditor of one spouse to attach property held as tenants by the entirety).

difficulties, a married couple could keep their basic family assets (particularly the family home) and avoid being forced into poverty."[58] The Bankruptcy Code explicitly incorporates these state law protections, allowing individual debtors to exempt property held as tenants by the entirety.[59]

Accordingly, a married couple can be assured that their real, and in some cases personal, property cannot be used to satisfy the debts of one of the spouse's creditors. Under Vermont law, for example, the conveyance of real property to a married couple presumptively creates a tenancy by the entirety.[60] Additionally, any property owned as tenancy by the entirety is exempt from attachment or execution for the debts of one spouse.[61] Thus, if the debtor-spouse files for bankruptcy, he or she can claim the tenancy property as exempt, thus ensuring that the property cannot be reached by his or her creditors and that the non-debtor spouse can be confident the property owned will not be foreclosed upon or partitioned.[62]

The protections provided to married couples lie in sharp contrast to the lack of protections provided to their unmarried counterparts. Generally, an unmarried debtor who cohabits with his significant other cannot shield their jointly owned property from creditors.[63] Although the relationship may mirror a marriage in all other respects, this couple cannot own real or personal property as tenants by the entirety.[64] Instead, the couple would hold the property as tenants in common or joint tenants and, as a general matter, a creditor could attach the debtor's interest in the property.[65] Thus, in bankruptcy, the court's recognition of a valid marriage can drastically affect the composition of the estate.

B. *DOMA and Marital Benefits*

Before a debtor can lay claim to the bevy of marital benefits offered under state and federal law, she must first establish the existence of a valid marriage. Except in rare circumstances, a couple validly married in one state can expect all other states to recognize their marriage and, as a result, can obtain the

---

[58] Dickerson, *supra* note 49, at 95. However, not everyone agrees with that assessment. *See* Robert D. Null, *Tenancy by the Entirety as an Asset Shield: An Unjustified Safe Haven for Delinquent Child Support Obligors*, 29 VAL. U. L. REV. 1057, 1081-83 (1995).

[59] 11 U.S.C.A. § 522(b)(3)(B) (West 2004 & Supp. 2006); *see also* Dickerson, *supra* note 49, at 95 & n.142.

[60] *In re* Estate of Boardman, 223 A.2d 460, 461-62 (Vt. 1966).

[61] *See In re* Spencer, 566 A.2d 959, 964 (Vt. 1989).

[62] 11 U.S.C.A. § 522(b)(3)(B).

[63] Dickerson, *supra* note 49, at 97-98.

[64] *Id.*

[65] Peter M. Carrozzo, *Tenancies in Antiquity: A Transformation of Concurrent Ownership for Modern Relationships*, 85 MARQ. L. REV. 423, 462 (2001).

benefits offered to married couples in the forum state.[66] It is the "place of celebration" rule that generally determines the validity of a marriage.[67] According to this rule, a marriage will be deemed valid if it is valid under the laws of the state in which it was celebrated.[68] In short, the marriage laws and their application in State *A* are given "full faith and credit" in State *B*.[69]

As a general matter, the "place of celebration" rule is a sensible one. The rule is based both on a policy judgment that the state in which a marriage is solemnized is best able to guarantee that the parties freely consented to the union, and "on a broader policy in favor of sustaining the validity of marriages."[70] Moreover, our society is mobile and married persons need to know that their marital status will not vary from state to state.[71]

Like the states, the federal government also relies on the "place of celebration" rule for purposes of bestowing federal marital benefits and adjudicating disputes in the federal courts.[72] In some situations, Congress, or an applicable administrative agency, explicitly identifies state law as the controlling definition of marriage.[73] Moreover, in the absence of controlling federal law, the Rules of Decision Act requires federal courts to apply state

[66] EUGENE F. SCOLES ET AL., CONFLICT OF LAWS § 13.5 (3d ed. 2000). It is important to note that marital benefits are not extra-territorial, that is, they do not "travel" with the couple. Some states, for example, do not recognize tenants by the entirety while Vermont presumes that property transferred to a married couple is held as tenants by the entirety. If a couple validly married in Vermont moves to a state that does not recognize tenants by the entirety and purchases property, they do not have the benefits offered under Vermont law. Thus, while the validity of a marriage is a precondition to obtaining marital benefits, the individual can only obtain the benefits provided under the applicable state law. *See id.* §§ 14.1-.14.

[67] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971).

[68] *See* Fruehwald, *supra* note 19, at 816.

[69] *See* Ralph U. Whitten, *Full Faith and Credit for Dummies*, 38 CREIGHTON L. REV. 465, 476 (2005) ("In a nutshell, marriage involves an issue of full faith and credit to the public acts of other states.").

[70] Ann Laquer Estin, *Toward a Multicultural Family Law*, 38 FAM. L.Q. 501, 502-03 (2004).

[71] Koppelman, *supra* note 19, at 963 ("It would be ridiculous to have people's marital status blink on and off like a strobe light as they jet across the country.").

[72] *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004) (emphasizing that domestic relations are the subject of state law); Battiler v. INS, No. 94-70665, 1996 WL 384872, at *3 (9th Cir. July 9, 1996) (applying place of celebration rule); Gee Chee On v. Brownell, 253 F.2d 814, 817 (5th Cir. 1958) (same).

[73] *See, e.g.*, 8 U.S.C. § 1186a(d)(1)(A)(i)(I) (2000) (identifying the place of celebration as the relevant state for determining validity of marriage); 5 C.F.R. § 831.603 (2006) (defining "marriage," in the context of regulating survivor annuities for civil servants, by reference to the "law of the jurisdiction with the most significant interest in the marital status of the employee"); 20 C.F.R. § 404.345 (2005) (looking to state law to define marital relationship in the context of regulating social security benefits).

law.[74] As a complement to the Rules of Decision Act, the Full Faith and Credit Act directs federal courts to give "full faith and credit" to a State's public acts, judicial proceedings, and non-judicial records.[75] In addition, the Supreme Court recognized that the "whole subject of the domestic relations . . . belongs to the laws of the States and not to the laws of the United States."[76] Thus, if a marriage were valid under the laws of State *A*, the federal government and its courts would assume its validity as well.

The "place of celebration" rule, however, is not necessarily applicable when the marriage is between spouses of the same sex. In 1996, in what some have characterized as an overreaction to the Hawaii Supreme Court's decision in *Baehr v. Lewin*,[77] Congress promulgated the Defense of Marriage Act ("DOMA").[78] In *Baehr*, the Hawaii Supreme Court held that that the Hawaii marriage statute, which requires marriage to be between one man and one woman, discriminated on the basis of sex in possible violation of the Equal Protection Clause of the Hawaii Constitution.[79] Congress viewed the case as a "legal assault against traditional heterosexual marriage laws."[80] To counter this perceived assault, Congress passed DOMA "to defend the institution of traditional heterosexual marriage" and "to protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses."[81]

To achieve these purposes, Congress created two sections: the federal definitions provision and the choice of law provision. The federal definitions provision provides that for federal law purposes the word "marriage" means only a legal union between one man and one woman, and the word "spouse"

[74] 28 U.S.C. § 1652 (2000); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938); *see also* Bond v. Trs. of STA-ILA Pension Fund, 902 F.Supp. 650, 654 (D. Md. 1995) (relying on state law to define marriage because ERISA, 29 U.S.C. § 1055(f), does not specifically do so).

[75] 28 U.S.C. § 1738 (2000); *see also* Chapman, *supra* note 14, at 5-7 (arguing that the Full Faith and Credit Act may require federal courts to recognize same-sex marriages).

[76] *Elk Grove*, 542 U.S. at 12 (quoting *In re* Burrus, 136 U.S. 586, 593-94 (1890)).

[77] 852 P.2d 44 (Haw. 1993); *see also* Stanley E. Cox, *DOMA and Conflicts Law: Congressional Rules and Domestic Relations Conflicts Law*, 32 CREIGHTON L. REV. 1063, 1063 (1999) (arguing that Congress abused its power in enacting DOMA); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1966 (1997) (suggesting that the availability of the public policy exception made DOMA unnecessary).

[78] Pub. L. No. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 7 (2000); 28 U.S.C. § 1738C (2000)).

[79] *Baehr*, 852 P.2d at 68.

[80] H.R. REP. NO. 104-664, at 4 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 2905, 2908.

[81] *Id.* at 2, *as reprinted in* 1996 U.S.C.C.A.N. 2905, 2906.

refers only to a person of the opposite sex.[82] The federal definitions provision essentially guaranteed that any marital benefits provided by federal law would not extend to same-sex couples. Where previously the federal government had looked to state law to define "marriage," after DOMA, "marriage" – at least as it related to the biological sex of the individuals – was defined by federal law.

The choice of law provision dilutes the constitutional requirement of full faith and credit, instead authorizing states to deny full faith and credit "to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws" of that state.[83] Thus, State *B* could refuse to recognize a marriage between two men validly performed in State *A* and thereby deny the couple state benefits based on marital status.

In the wake of DOMA, several states have passed legislation prohibiting the recognition of same-sex marriages performed in other states. Thirty-nine states have passed so-called "mini-DOMA" statutes,[84] and eighteen states have amended their constitutions to define marriage as being between one man and one woman.[85] Like the federal government, these states have guaranteed that

[82] 1 U.S.C. § 7.

[83] 28 U.S.C. § 1738C. *But see* Cox, *supra* note 77, at 1072 (arguing that DOMA is not a true choice of law rule).

[84] ALA. CODE § 30-1-19 (Supp. 2006); ALASKA STAT. § 25.05.013 (2004); ARIZ. REV. STAT. ANN. § 25-101 (2000); ARK. CODE ANN. §§ 9-11-107, -109 (West 2002); CAL. FAM. CODE § 308.5 (West 2004); COLO. REV. STAT. § 14-2-104 (2005); DEL. CODE ANN. tit. 13, § 101 (1999); FLA. STAT. § 741.212 (2006); GA. CODE ANN. § 19-3-3.1 (2004); HAW. REV. STAT. § 572-1 (Supp. 2005); IDAHO CODE ANN. § 32-209 (1996); 750 ILL. COMP. STAT. 5/212 (1999); IND. CODE § 31-11-1-1 (2004); IOWA CODE §§ 595.2, 595.20 (2001); KAN. STAT. ANN. §§ 23-101, -115 (Supp. 2005); KY. REV. STAT. ANN. §§ 402.020, 402.040, 402.045 (LexisNexis 1999); LA. CIV. CODE ANN. art. 3520 (Supp. 2006); ME. REV. STAT. ANN. tit. 19-A, § 701 (1998); MD. CODE ANN., FAM. LAW § 2-201 (LexisNexis 2004); MICH. COMP. LAWS ANN. § 551.271 (West 2005); MINN. STAT. § 517.03 (2005); MISS. CODE ANN. § 93-1-1 (2004); MO. REV. STAT. § 451.022 (Supp. 2004); MONT. CODE ANN. § 40-1-401 (2005); N.H. REV. STAT. ANN. §§ 457:1 to :3 (2004); N.C. GEN. STAT. § 51-1.2 (2005); N.D. CENT. CODE § 14-03-01 (2004); OHIO REV. CODE ANN. § 3101.01 (LexisNexis Supp. 2005); OKLA. STAT. tit. 43, § 3.1 (2001); 23 PA. CONS. STAT. § 1704 (2001); S.C. CODE ANN. § 20-1-15 (Supp. 2005); S.D. CODIFIED LAWS § 25-1-1 (2004); TENN. CODE ANN. § 36-3-113 (2005); TEX. FAM. CODE ANN. § 6-204 (Vernon 2005); UTAH CODE ANN. §§ 30-1-2, -4, 4.1 (Supp. 2005); VA. CODE ANN. §§ 20-45.2 to .3 (2004); WASH. REV. CODE § 26.04.020 (2004); W. VA. CODE § 48-2-603 (Supp. 2005); WYO. STAT. ANN. § 20-1-101 (2005).

[85] ALASKA CONST. art. I, § 25; ARK. CONST. amend. 83, §§ 1-3; GA. CONST. art. I, § IV, para. I; HAW. CONST. art. I, § 23; KAN. CONST. art. 15, § 16; KY. CONST. § 233a; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MISS. CONST. art. 14, § 263A; MO. CONST. art. 1, § 33; MONT. CONST. art. XIII, § 7; NEB. CONST. art. I, § 29; NEV. CONST. art. 1, § 21; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; OR. CONST. art. XV, § 5a; UTAH CONST. art. I, § 29. *But see* Citizens for Equal Prot., Inc. v. Bruning, 368 F. Supp. 2d 980 (D. Neb. 2005) (striking down Nebraska's constitutional amendment because

same-sex couples validly married out of state cannot obtain marital benefits in the forum state.

In sharp contrast, three states have recognized either civil unions or marriages for same-sex partners. In Vermont and Connecticut, same-sex couples may enter into "civil unions," through which the couples obtain all the rights, privileges, and benefits of marriage.[86] In Massachusetts, the Supreme Judicial Court found that the refusal to allow same-sex couples to marry violated the equality provisions of the state constitution.[87] In addition, it issued an advisory opinion to the legislature stating that civil unions would not meet constitutional requirements.[88] As a result, Massachusetts grants marriage licenses to same-sex couples. However, based on a rarely enforced 1913 law, Massachusetts denies marriage licenses to same-sex couples that are not residents of the state.[89]

Four states and the District of Columbia have neither authorized nor prohibited same-sex unions, nor have these states explicitly stated whether they would recognize same-sex marriages or civil unions solemnized in another state.[90] The issue is currently under litigation, however, in California.[91] A trial court judge has found that California's prohibition on same-sex marriage fails both the rational basis and strict scrutiny tests in violation of the state constitution.[92] Likewise, a Maryland state court judge recently determined that a state statute defining marriage as between one man and one woman was unconstitutional.[93] Meanwhile, a New York trial judge's decision that denying

it deprived plaintiffs of the associational rights protected by the First Amendment and the Due Process Clause of the U.S. Constitution).

[86] CONN. GEN. STAT. § 46b-38nn (Supp. 2006) (granting those in a civil union "all the same benefits, protections and responsibilities . . . as are granted to spouses in a marriage"); VT. STAT. ANN. tit. 15, §§ 1201-1206 (2002) (allowing persons in a civil union to "receive the benefits and protections and be subject to the responsibilities of spouses").

[87] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 949 (Mass. 2003).

[88] Opinions of the Justices to the Senate, 802 N.E.2d 565, 572 (Mass. 2004).

[89] MASS. GEN. LAWS ch. 207, § 11 (2004); Cote-Whitacre v. Dep't of Pub. Health, 844 N.E.2d 623, 631 (Mass. 2006) (upholding a century old law that prohibits the issuance of marriage licenses to non-residents whose marriage would not be recognized in their home state).

[90] At this writing, New Jersey, New Mexico, New York, Rhode Island, and the District of Columbia have not yet addressed the recognition of same-sex marriage or civil unions through legislation or a state constitutional amendment. *See* Human Rights Campaign, State Prohibitions on Marriage for Same-Sex Couple (2006), http://www.hrc.org/Template.cfm?Section=Your_Community&Template=/ContentManagement/ContentDisplay.cfm&ContentID=19449.

[91] *In re* Coordination Proceeding, No. 4365, 2005 WL 583129, at *1 (Cal. Super. Ct. Mar. 14, 2005).

[92] *Id.* at *3.

[93] Deane v. Conaway, No. 24-C-04-005390, 2006 WL 148145, at *7 (Md. Cir. Ct. Jan. 20, 2006).

same-sex couples the right to marry violated the state constitution was recently overturned.[94]

The situation, however, is constantly in flux. Court cases challenging the recognition or lack of recognition of same-sex marriages or civil unions are pending in several states,[95] states without mini-DOMAs are contemplating their passage,[96] and several states with mini-DOMA statutes already in place are bolstering their legislation with proposed constitutional amendments.[97] Even Massachusetts now has a constitutional amendment pending that would define a marriage as being between one man and one woman.[98] In addition, the constitutionality of the Federal DOMA is hotly contested.[99] Same-sex couples and the courts adjudicating their rights are caught in a legal limbo. With the stroke of a judicial or legislative pen, property rights that exist today could be gone tomorrow, just as property rights that were denied today could very well exist tomorrow.

The uncertainty on the state level transfers to the bankruptcy courts. Before DOMA, bankruptcy courts, like other federal courts, rarely, if ever, addressed the validity of a marriage during a bankruptcy proceeding. Instead, bankruptcy courts focused on the patchwork of state and federal laws detailing property

[94] Hernandez v. Robles, 805 N.Y.S.2d 354, 363 (App. Div. 2005), *aff'd*, 2006 WL 1835429 (N.Y. July 6, 2006). A New York state court also recently overturned a trial court's ruling that the word "spouse," in New York's wrongful death statute, encompassed a partner in a Vermont civil union. Langan v. St. Vincent's Hosp. of N.Y., 802 N.Y.S.2d 476, 480 (App. Div. 2005).

[95] On December 13, 2005, six couples filed suit in Iowa state court challenging the constitutionally of Iowa's ban on same-sex marriage. Complaint at 1, Varnum v. Brien, No. CV5965 (Iowa Dist. Ct. Dec. 13, 2005), *available at* http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/586.pdf; *see also* Lewis v. Harris, 875 A.2d 259, 262 (N.J. Super. Ct. App. Div. 2005); cases cited *supra* notes 91, 93.

[96] *See, e.g.*, Assemb. 1398, 212th Leg. (N.J. 2006); S.J. Res. 53, 2005 S., 97th Sess. (Wis. 2005). For full, up to date state information, see Human Rights Campaign, http://www.hrc.org (last visited Oct. 1, 2006); National Coalition for the Protection of Children and Families, http://www.nationalcoalition.org/legal/statebystate.html (last visited Oct. 1, 2006).

[97] *See, e.g.*, H. 3133, 116th Gen. Assem. (S.C. 2005); H.J. Res. 1001, Reg. Sess. (S.D. 2005); S.J. Res. 31, 104th Gen. Assem. (Tenn. 2005); H.J. Res. 41, 2006 Reg. Sess. (Va. 2006).

[98] *See* Schulman v. Attorney Gen., 850 N.E.2d 505, 511 (Mass. 2006) (upholding the Attorney General's certification of a petition to amend the state constitution to define marriage as a union between one man and one woman). The Travaglini-Lees Amendment proposes the adoption of "civil unions" instead of "marriage," while the Marriage Protection Amendment proposes defining marriage as between one man and one woman. For a discussion of both amendments, see Massachusetts Family Institute, http://www.mafamily.org/home.html (last visited Oct. 1, 2006).

[99] *See, e.g.*, Paige E. Chabora, *Congress' Power Under the Full Faith and Credit Clause and the Defense of Marriage Act of 1996*, 76 NEB. L. REV. 604, 608 (1997); Kramer, *supra* note 77, at 2007-08.

interests based on marital status.[100] Post-DOMA, and with the proliferation of mini-DOMAs, bankruptcy courts must establish the validity of a marriage between same-sex couples before they can determine the existence and scope of the debtor's property interests.[101] To determine both the validity of the marriage and the availability of marital benefits, bankruptcy judges must grapple with difficult choice of law questions.

II. CHOICE OF LAW IN BANKRUPTCY

As previously noted, *Butner v. United States*[102] instructs bankruptcy courts to look to state law, in the absence of a compelling federal interest, to determine the existence and scope of the debtor's interest in property.[103] Assuming the absence of a compelling federal interest,[104] in situations with multi-state contacts, bankruptcy courts are obliged to first determine *which* state's law to apply. To do so, bankruptcy courts must apply the appropriate choice of law rule. But bankruptcy courts must first decide *which* choice of law rules to apply – the forum state's rule or a distinct federal choice of law rule untethered to the forum state's law.

A. *Choice of Law Generally*

The so-called choice of law rules are intended to help courts navigate circumstances in which more than one state's substantive law applies to a controversy.[105] In theory, choice of law rules provide courts an analytical framework for choosing the most appropriate law to apply to a particular dispute.

---

[100] *See, e.g.*, Boyd v. Robinson, 741 F.2d 1112, 1114 (8th Cir. 1984); Miller v. Walpin (*In re* Miller), 167 B.R. 202, 212 (Bankr. C.D. Cal. 1994); Parrish v. McVay (*In re* Parrish), 144 B.R. 349, 352 (Bankr. W.D. Tex. 1992); *In re* Dunn, 109 B.R. 865, 867-74 (Bankr. N.D. Ind. 1988).

[101] *See, e.g.*, *In re* Mercier, No. 9-03-BK-15259-ALP, 2005 WL 419716, at *2 (Bankr. M.D. Fla. Jan. 5, 2005); *In re* Kandu, 315 B.R. 123, 133 (Bankr. W.D. Wash. 2004).

[102] 440 U.S. 48 (1979).

[103] *Id.* at 55; *see also supra* notes 34-39 and accompanying text.

[104] While some may contend that the Federal DOMA evinces a federal interest in denying recognition to same-sex marriages and civil unions, this argument is flawed. The Federal DOMA was passed, in part, to provide states with the freedom to choose whether they would recognize same-sex marriages or civil unions. *See* H.R. REP. NO. 104-664, at 2 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 2905, 2906. Thus, if a state chooses to offer marital benefits to same-sex couples, the Federal DOMA does not provide a federal court the power to override that decision. Moreover, even if DOMA were read differently, *Butner* has not been interpreted so broadly as to incorporate any federal interest. For the most part, courts will only ignore state law if the state law conflicts with federal bankruptcy policy. *See In re* Monzon, 214 B.R. 38, 47 (Bankr. S.D. Fla. 1997).

[105] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 cmt. a(3) (1971).

Before delving into the choice of law issues in bankruptcy specifically, it will be helpful to sketch out a brief overview of the current state of law which, as one scholar has noted, "lies somewhere between disarray and chaos."[106] Choice of law questions have been more the province of academic hand-wringing than judicial development.[107] As will be discussed below, state choice of law questions involving same-sex marriages and civil unions will be primarily influenced by three issues: the lack of a coherent choice of law analytical framework coupled with an inherent forum state bias; the anemic constitutional jurisprudence surrounding choice of law; and, perhaps most significantly, the so-called public policy exception to choice of law rules.

1. Analytical Frameworks for Choice of Law

As has often been noted, choice of law is an incredibly complex doctrine.[108] The starting point for unraveling this doctrine is the seemingly simple question: which law should a judge apply when resolving an interstate dispute? There are only two possible answers: the local law of the forum or foreign law. How a judge should arrive at the proper answer, however, is still the subject of intense debate, and any attempts by courts and commentators to create a workable methodology have not been terribly successful.[109] In a now famous and oft-quoted statement, Dean Prosser once commented that "[t]he realm of . . . [choice] of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it."[110] It is not the intent of this Article to wade into the swamp and bring order to the chaos; entire treatises have been devoted to that subject.[111] For purposes of this Article, it is sufficient to simply survey the chaos.

There is no uniform choice of law method currently used by state courts. Instead, courts employ a patchwork of theories developed over the last century

---

[106] EDWIN SCOTT FRUEHWALD, CHOICE OF LAW FOR AMERICAN COURTS: A MULTILATERALIST METHOD 1 (2001).

[107] *See, e.g.*, LEA BRILMAYER, CONFLICT OF LAWS, at xiii (2d ed. 1995); SCOLES, *supra* note 66, § 2.15; RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 5 (4th ed. 2001); James E. Westbrook, *A Survey and Evaluation of Competing Choice-of-Law Methodologies: The Case for Eclecticism*, 40 MO. L. REV. 407, 408 (1975).

[108] *See, e.g.*, FRUEHWALD, *supra* note 106, at 1; Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 950-51 (1994); Mark Strasser, *Judicial Good Faith and the* Baehr *Essentials: On Giving Credit Where It's Due*, 28 RUTGERS L.J. 313, 314 (1997).

[109] FRUEHWALD, *supra* note 106, at 1 ("This disorder in choice of law has resulted in state courts employing four different choice of law approaches with numerous material variations.").

[110] William Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

[111] *See generally* BRILMAYER, *supra* note 107; FRUEHWALD, *supra* note 106; SCOLES, *supra* note 66; WEINTRAUB, *supra* note 107.

to arrive at their decisions. According to one choice of law survey, in cases involving torts, states used seven different approaches to arrive at the appropriate choice of law.[112] When the underlying controversy involved a contract the outcome was only slightly better; the survey reported that states employed five different methods.[113]

The majority of the current choice of law methodology emerged in response to the so-called "vested rights" theory.[114] The "vested rights" theory is focused primarily on state sovereignty and respect for territorial boundaries.[115] Which state's law governed the underlying dispute was generally decided by the location of the last act in a transaction or occurrence.[116] Thus, the place of the injury controlled in tort cases while the place of making the contract controlled in contract disputes.[117] This method was intended to be objective and neutral; "it was not concerned with the desirability of the outcome."[118] But it was also incredibly mechanical and formalistic, sometimes leading to absurd results such as applying the law of a state that had only a tenuous or fortuitous connection to the controversy.[119]

To counter the formalism of the traditional approach, scholars and judges began to experiment with other methodologies. Perhaps in reaction to the seeming rigidity of the "vested rights" approach, the emerging methodologies could be recognized by their flexibility.[120] Under each of these new approaches, courts were to look at a variety of factors when determining the appropriate law to apply.[121] While each method adopted its own slant on what was the appropriate law, the flexibility inherent in all the methods allowed a court to choose a law it deemed most appropriate in a given situation even if that meant a court could (and perhaps would) always choose the forum state's law.[122] While these methodologies perhaps rightfully rejected the mechanistic approach of the "vested rights" theory, they also implicitly or explicitly rejected the forum neutrality aspect of the approach as well.[123]

---

[112] Symeon C. Symeonides, *Choice of Law in the American Courts in 1997*, 46 AM. J. COMP. L. 233, 266 (1998).

[113] *Id.*

[114] BRILMAYER, *supra* note 107, at 20-25; FRUEHWALD, *supra* note 106, at 10, 14.

[115] BRILMAYER, *supra* note 107, at 22; FRUEHWALD, *supra* note 106, at 11.

[116] FRUEHWALD, *supra* note 106, at 11; *see also* BRILMAYER, *supra* note 107, at 23.

[117] FRUEHWALD, *supra* note 106, at 11.

[118] *Id.* at 12.

[119] BRILMAYER, *supra* note 107, at 25-26; FRUEHWALD, *supra* note 106, at 12.

[120] BRILMAYER, *supra* note 107, at 5; WEINTRAUB, *supra* note 107, at 5.

[121] FRUEHWALD, *supra* note 106, at 20; WEINTRAUB, *supra* note 107, at 5.

[122] *See* BRILMAYER, *supra* note 107, at 77.

[123] *See id.*; Earl M. Maltz, *The Full Faith and Credit Clause and the First Restatement: The Place of* Baker v. General Motors Corp. *in Choice of Law Theory*, 73 TUL. L. REV. 305, 322 (1998).

The "governmental interest" approach emerged from some of this experimentation.[124] Under this method, a court generally adopts forum law unless it has no interest in employing its own law.[125] Brainerd Currie, the engineer of this method, declared, "'the sensible and clearly constitutional thing for any court to do, confronted with a true conflict of interests, is to apply its own law. In this way it can be sure at least that it is consistently advancing the policy of its own state.'"[126] Accordingly, under this theory, a state can adopt its own law as long as it has an interest in doing so, even if another state has a greater interest in the underlying controversy.[127] While few states have adopted Currie's approach wholesale, it underlies several states' choice of law methodology.[128]

The so-called "better law" approach also emerged from the dissatisfaction with the traditional "vested rights" approach.[129] Under this method, a judge examines the available laws and applies the law that results in the most "just" outcome.[130] Of all the proposed choice of law methods, it is recognized as the most subjective and outcome oriented.[131] In theory, the method is intended to be forum neutral, but states employing this approach usually (and not surprisingly) find their rule to be the better law.[132]

A number of states rely upon the *Restatement (Second) of Conflicts of Laws* ("*Second Restatement*") to solve choice of law riddles.[133] The *Second Restatement* advocates a search for the law of the state with the most significant relationship to the underlying controversy, based in part on the physical contacts with the state.[134] However, the *Second Restatement* also instructs courts to look at a variety of other factors when determining the appropriate law, including the relevant policies of the forum, the protection of justified expectations, and the ease in the determination and application of

[124] FRUEHWALD, *supra* note 106, at 24; *see also* BRILMAYER, *supra* note 107, at 47, 50; WEINTRAUB, *supra* note 107, at 7-9.

[125] FRUEHWALD, *supra* note 106, at 24-25.

[126] *Id.* at 25 (quoting BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 119 (1963)).

[127] BRILMAYER, *supra* note 107, at 50; FRUEHWALD, *supra* note 106, at 25; *see also* Stanley E. Cox, *Razing Conflicts Facades to Build Better Jurisdiction Theory: The Foundation – There Is No Law but Forum Law*, 28 VAL. U. L. REV. 1, 38-39 (1993).

[128] FRUEHWALD, *supra* note 106, at 24.

[129] *Id.* at 27; Borchers, *supra* note 4, at 129-30.

[130] ROBERT A. LEFLAR, AMERICAN CONFLICTS LAW 180-81 (3d ed. 1977).

[131] *See* BRILMAYER, *supra* note 107, at 71-72.

[132] FRUEHWALD, *supra* note 106, at 28 & n.196; Jeffrey L. Rensberger, *Domestic Splits of Authority and Interstate Choice of Law*, 29 GONZ. L. REV. 521, 576-77 (1993/1994).

[133] BRILMAYER, *supra* note 107, at 73-74.

[134] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. c (1971); *see also* WEINTRAUB, *supra* note 107, at 7-8.

law.[135] It then describes specific rules for particular situations.[136] For example, the *Second Restatement* explains that "[i]n an action for personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship . . . to the occurrence and the parties, in which event the local law of the other state will be applied."[137] As is evident by its flexibility, the *Second Restatement* was intended to provide guiding principles rather than definitive direction. It has been described as a blend of the "vested rights" theory and the "governmental interest" theory.[138]

Courts have not confined themselves to these methodologies; hybrid models that draw on the various approaches have also developed.[139] Each of these methods, in some form or another, survives.[140] Even if there were, however, a consensus on the appropriate methodology, it is unlikely that consistency would emerge. Unfortunately, the flexibility that permeates most of the methodologies will result in inconsistency in application. Moreover, courts have shown a distinct forum bias when choosing between the forum state's law and foreign law.[141] Because of the flexibility and inherent forum bias, courts have little incentive to develop a coherent framework.

2. Constitutional Constraints on Choice of Law

The Supreme Court's failure to provide adequate constitutional guideposts for the development of a coherent choice of law analysis only adds to the confusion.[142] While several constitutional provisions have possible relevance to choice of law issues,[143] the Due Process Clause and the Full Faith and Credit Clause are the two cited most frequently.[144] Sadly, the Supreme Court's jurisprudence regarding the relationship between these two provisions

[135] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2).

[136] *See, e.g.*, *id.* §§ 145, 188 (introducing general principles in the context of torts and contracts, respectively).

[137] *Id.* § 146.

[138] *See* BRILMAYER, *supra* note 107, at 73-75.

[139] FRUEHWALD, *supra* note 106, at 31-32.

[140] *Id.* at 37 (identifying the variety of methodologies currently used by courts).

[141] BRILMAYER, *supra* note 107, at 77-79.

[142] *See* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 257 (1992) ("At the constitutional level, the modern Supreme Court has all but abandoned the field.").

[143] BRILMAYER, *supra* note 107, at 130 (identifying five different constitutional provisions that may limit choice of law).

[144] *See, e.g.*, *id.* at 137-49; FRUEHWALD, *supra* note 106, at 79 (stating that the two clauses "place[] strict limits on choice of law and make[] use of other clauses unnecessary").

and choice of law questions is anemic at best.[145] In practice, there are minimal constitutional constraints on choice of law.[146]

According to the Court in *Allstate Insurance Co. v. Hague*,[147] a court's choice of law is constitutional as long as the state whose law is chosen has "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[148] In *Allstate*, the plaintiff's husband died in a motorcycle accident in Wisconsin, the state in which all the parties involved were domiciled at the time of the accident and in which the decedent had obtained his vehicle insurance.[149] At the time of his death the decedent was employed in Minnesota and, following the accident, his wife moved to Minnesota and remarried.[150] As personal representative of her deceased husband's estate, the plaintiff filed an action in Minnesota seeking a declaration that under Minnesota law the $15,000 uninsured motorist coverage could be "stacked," providing a total coverage of $45,000.[151] Allstate claimed that Wisconsin law, which did not allow "stacking," applied to the controversy.[152] The Minnesota court applied Minnesota law on the grounds that Wisconsin's anti-stacking rule was "inimical to the public policy of Minnesota."[153]

The question before the Supreme Court was whether the choice of Minnesota law was constitutional.[154] While the Court accepted that more than one state's law might be applicable to the controversy, it ultimately held that Minnesota had sufficient contacts to allow its law to govern.[155] The Court found three contacts compelling: the decedent had worked in Minnesota and commuted to work from Wisconsin to Minnesota, Allstate did business in Minnesota, and the plaintiff had moved to Minnesota before the litigation.[156] From each of these contacts, the Court identified an "interest" that allowed Minnesota to apply its law.[157] As to the decedent's place of employment, the Court stated, "[e]mployment status is not a sufficiently less important status than residence."[158] As to Allstate's business contacts, the Court observed that Allstate could not be unfamiliar with Minnesota's laws or surprised that

[145] *See* FRUEHWALD, *supra* note 106, at 66.

[146] *See id.*; Laycock, *supra* note 142, at 257-58.

[147] 449 U.S. 302 (1981).

[148] *Id.* at 313.

[149] *Id.* at 305.

[150] *Id.*

[151] *Id.*

[152] *Id.* at 305-06.

[153] *Id.* at 306.

[154] *Id.* at 307.

[155] *Id.* at 307-08, 313.

[156] *Id.* at 313-19.

[157] *Id.*

[158] *Id.* at 317.

Minnesota might apply its own laws.[159] With respect to the plaintiff's residence, the Court noted that Minnesota had an interest in her recovery to ensure she would be able to meet financial obligations and not be forced to seek state assistance.[160] According to the Court, the aggregation of these three contacts permitted selection of Minnesota law.[161]

The Court's analysis has been roundly criticized but it has not altered.[162] The Court has explicitly stated that there is no constitutional compulsion for a "state to substitute the statutes of other states for its own statutes dealing with subject matter concerning which is it competent to legislate."[163] Additionally, the Court permits state courts to be "guided by the forum State's 'public policy' in determining the *law* applicable to a controversy."[164] Accordingly, there are very few constitutional restrictions that would prevent a state from applying its own law to a controversy.[165] To put it mildly, the constitutional boundaries to choice of law questions are porous, if one can perceive the jurisprudence as creating boundaries at all.

3. Public Policy Exception, Mini-DOMAs, and Choice of Law

A state's public policy opposing same-sex marriage or civil unions, and that policy's codification in a mini-DOMA, provides another twist in an already convoluted choice of law framework. Both act as a limitation on a court's choice of law rules.[166] In situations in which a forum state's choice of law rules point to the application of foreign law, the forum state's public policy exception or its mini-DOMA can instead require the application of the forum state's law.[167] Such choice of law limitations serve to geographically cabin the validity of same-sex marriages and civil unions and their related benefits.

---

[159] *Id.* at 317-18.

[160] *Id.* at 319.

[161] *Id.* at 320.

[162] *See, e.g.*, *id.* at 332-40 (Powell, J., dissenting); Laycock, *supra* note 142, at 257-58; Linda Silberman, *Can the State of Minnesota Bind the Nation?: Federal Choice-of-Law Constraints After* Allstate Insurance Co. v. Hague, 10 HOFSTRA L. REV. 103, 104-19 (1981).

[163] Pac. Employers Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 501 (1939).

[164] Baker v. Gen. Motors Corp., 522 U.S. 222, 233 (1998).

[165] *See supra* notes 143-48 and accompanying text.

[166] WEINTRAUB, *supra* note 107, at 104 ("Invoking the concept of 'public policy,' a court can refuse to enforce, as contrary to its own notions of justice and fairness, a rule found in the state designated by the forum's choice-of-law rule."); Kramer, *supra* note 77, at 1972 ("'Public policy' functions as an escape from the usual conflicts rules: Content with its choice-of-law rules in most cases, a court may on occasion find itself asked to apply a law significantly at odds with forum notions of justice or good policy.").

[167] *See* Hogue, *supra* note 19, at 37.

The public policy exception is a judicially created mechanism designed to avoid the application of foreign law.[168] Under this exception, a forum court can refuse to enforce another state's law because the laws are viewed "as contrary to its own notions of justice and fairness."[169] The exception was intended to be construed narrowly under Judge Cardozo's classic formulation that courts should not refuse to apply foreign law unless application of the law "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal [of the forum state]."[170] But even under this strict formulation, a court sitting in a state with a public policy that opposes same-sex marriage and civil unions could refuse to recognize their existence and attendant benefits.

Courts exercise broad discretion when invoking a state's public policy to avoid applying foreign law.[171] In the context of marriage, a state's public policy can be an exception to the usual "place of celebration" rule.[172] Courts can refuse (and have refused) to recognize a marriage celebrated in another state if the marriage violates the forum's public policy.[173] In general, however, courts have been willing to recognize marriages that violate the forum state's public policy if the effects of the marriage on the forum are remote and not harmful.[174] Even at the height of the anti-miscegenation laws, states opposed to interracial marriage recognized the validity of such marriages under certain circumstances.[175] Courts simply have not employed a blanket non-recognition rule when it comes to the validation of marriages.[176] Instead, the application of the exception to marriages appears to depend on the circumstances, or more specifically, on the importance of the contacts with the forum state.[177]

It is unclear whether courts will adopt the same stance when the marriage is between partners of the same sex. The current case law regarding this issue does not provide a clear picture.[178] Given the discretion and flexibility in the

[168] *See* Kramer, *supra* note 77, at 1972; *see also Baker*, 522 U.S. at 233 n.6 (citing Paulsen & Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 969, 980-81 (1956)) (noting the "traditional but dubious" use of public policy in this context).

[169] WEINTRAUB, *supra* note 107, at 104.

[170] Loucks v. Standard Oil Co., 120 N.E. 198, 202 (N.Y. 1918).

[171] *See* Kramer, *supra* note 77, at 1973, 1975.

[172] *See id.* at 1975; Koppelman, *supra* note 19, at 944.

[173] Hogue, *supra* note 19, at 31-32.

[174] *See* Koppelman, *supra* note 19, at 964; Kramer, *supra* note 77, at 1974; *Developments in the Law – The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2036-37 (2003) [hereinafter *Developments in the Law*].

[175] *See* Koppelman, *supra* note 19, at 951-58.

[176] *See id.* at 929, 934; Kramer, *supra* note 77, at 1970 ("[T]he exception is not employed as an overly blunt tool, but is selectively refined in application.").

[177] Hogue, *supra* note 19, at 34-35; Kramer, *supra* note 77, at 1969-70; *Developments in the Law*, *supra* note 174, at 2036-37.

[178] *Compare* Alons v. Iowa Dist. Court, 698 N.W.2d 858, 862 (Iowa 2005) (finding that plaintiffs – several legislators, a pastor, and a church – lacked standing to challenge a decree

public policy doctrine, however, explanations of its past use will probably not matter nor significantly influence a court intent on avoiding the application of foreign law. The public policy exception is readily available for use in voiding same-sex marriages and civil unions performed elsewhere, as well as for ignoring the benefits that arise as a result of the union.

The codification of the public policy exception against same-sex marriage in the so-called mini-DOMAs creates a new wrinkle. Under the judicially created exception, courts were free to interpret the existence and the scope of the state's "public policy" regarding a particular issue, thus leaving its application more pliable.[179] However, a state's decision to pass legislation that explicitly prohibits the recognition of same-sex marriage and/or the benefits derived from such marriage creates a mandate that judges must follow.

To further complicate the issue, the scope of the mini-DOMAs has not yet been tested. While the basic intent of these acts is obvious, the language of the statutes varies widely. Some states simply declare that marriages between persons of the same sex are "void," "prohibited" or "invalid."[180] While the language certainly sends the message that the state will not issue marriage licenses to same-sex couples, it does not clearly delineate the reach of the statute. Other states are more explicit regarding the reach of the statute, speaking both to the marriage (or any relationship between persons of the same sex that purports to be a marriage) and to the incidents of marriage.[181] The Kentucky legislature, for example, not only declared that a marriage between partners of the same sex would be void in the state, but also declared that "[a]ny rights granted by virtue of the marriage, or its termination, shall be unenforceable in Kentucky courts."[182] This additional language would seem to suggest a limitation to the Kentucky choice of law rules that prohibits Kentucky courts from recognizing same-sex marriages within the state *and* from enforcing rights associated with the marriage even if those rights arose under foreign law.

---

that dissolved a Vermont civil union), *with* Fred A. Bernstein, *Gay Unions Were Only Half the Battle*, N.Y. TIMES, Apr. 6, 2003, § 9, at 2 (quoting the Texas attorney general, who argued that a court cannot dissolve a Vermont civil union because "[a] divorce cannot be granted where a marriage never existed").

[179] *See* Kramer, *supra* note 77, at 1973, 1975.

[180] *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-101(C) (2000); ARK. CODE ANN. § 9-11-109 (2002); 750 ILL. COMP. STAT. 5/212(a)(5) (1999); IND. CODE § 31-11-1-1(b) (2004); IOWA CODE § 595.2 (2001); KAN. STAT. ANN. § 23-101 (Supp. 2005); ME. REV. STAT. ANN. tit. 19-A, § 701(1-A) (1998); MISS. CODE ANN. § 93-1-1(2) (2004); MONT. CODE ANN. § 40-1-401(d) (2005); N.H. REV. STAT. ANN. §§ 457:1 to :2 (2004); N.C. GEN. STAT. § 51-1.2 (2005).

[181] *See, e.g.*, ALASKA STAT. § 25.05.013(b) (2004); FLA. STAT. § 741.212(2) (2006); GA. CODE ANN. § 19-3-3.1(b) (2004); KY. REV. STAT. ANN. § 402.045(2) (LexisNexis 1999); TEX. FAM. CODE ANN. § 6.204(c)(2) (Vernon 2005); VA. CODE ANN. § 20-45.2 (2004).

[182] KY. REV. STAT. ANN. § 402.045(2) (LexisNexis 1999).

While the proliferation of mini-DOMAs would appear to make the "public policy" exception unnecessary or redundant, there are at least three reasons the exception is still an important component of the choice of law question. First, some states have not yet codified their position on same-sex marriage and other states are finding their mini-DOMAs either under attack or already declared unconstitutional.[183] In these states, a court may use the public policy exception as a fallback position when faced with a same-sex marriage issue. Second, in states where the mini-DOMA stands on firm ground, the statute has yet to be interpreted in a choice of law context, thus the public policy exception may play an important gap-filler under circumstances in which the statute's language does not encompass the controversy.[184] And third, while it is unlikely that a state court would read the state's mini-DOMA less expansively than it does the public policy exception, this remains both a possibility and an unknown.

B. *Choice of Law Rules in Bankruptcy*

As the previous discussion illustrates, choice of law questions are byzantine at best. Add the context of bankruptcy, with the current lower court confusion regarding *which* choice of law rules to apply, and the complexity only multiplies. If a bankruptcy court sits in a state opposed to the recognition of same-sex marriage, the forum state's choice of law analysis with its attendant public policy or mini-DOMA will require the application of the forum state's law.[185] In that instance, any property interests tied to the validity of the marriage would likely cease to exist.[186] In contrast, under a federal rule, a bankruptcy court would be free to fashion a choice of law rule distinct from the forum state's rule, unconstrained by the state's policies regarding same-sex marriage, and most importantly, consistent with the federal policies underlying the statute.[187]

---

[183] *See supra* note 90; *see also* Citizens for Equal Prot., Inc. v. Bruning, 368 F. Supp. 2d 980, 989-1008 (D. Neb. 2005) (striking down Nebraska's mini-DOMA because it deprived plaintiffs of associational rights protected by the First Amendment, violated the Equal Protection Clause, and created an unconstitutional bill of attainder).

[184] There is a paucity of case law interpreting the scope of mini-DOMAs. *See, e.g.*, Alaska Civil Liberties Union v. State, 122 P.3d 781, 793-95 (Alaska 2005); Deane v. Conaway, No. 24-C-04-005390, 2006 WL 148145, at *4 (Md. Cir. Ct. Jan. 20, 2006); Anderson v. King County, No. 75934-1, 75956-1, 2006 WL 2073138, at *1 (Wash. July 26, 2006). Even fewer cases discuss their practical application. *See, e.g.*, Grough v. Triner, No. 05 CO 33, 2006 WL 1868330, at *1 (Ohio Ct. App. June 28, 2006) (holding that Ohio's DOMA does not prevent courts from issuing domestic violence protection orders to non-married cohabitants).

[185] *See supra* notes 166-87 and accompanying text.

[186] As the previous section illustrates, that is not a foregone conclusion. It is not clear that state courts will automatically deny the incidents to marriage even if the state does not recognize the marriage as valid. *See* Koppelman, *supra* note 19, at 951-58.

[187] *See infra* Part III.

1. The Hornet's Nest

The current confusion in the federal courts regarding whether to apply the forum state's choice of law rules or federal choice of law rules can be traced to the Supreme Court's decision in *Erie Railroad Co. v. Tompkins*.[188] In *Erie*, the Court made the then-radical pronouncement that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."[189] The Court held that the decision was constitutionally compelled because to hold otherwise would be "an invasion of the authority of the State and, to that extent, a denial of its independence."[190] While the Court did not explicitly limit its holding to diversity cases, its reasoning was tied to the lack of uniformity between federal and state courts sitting in the same forum, and the subsequent discrimination prevalent in diversity cases following the Court's decision in *Swift v. Tyson*.[191]

A few years later, the Court decided *Klaxon Co. v. Stentor Electric Manufacturing Co.*,[192] where it concluded that *Erie*'s holding extended not only to state law underlying the controversy, but also to state choice of law rules.[193] To support its conclusion, the Court reasoned that the forum state's rules needed to be applied because "[o]therwise, the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side."[194] According to the Court, "[a]ny other ruling would do violence to the principle of uniformity within a state, upon which the [*Erie*] decision is based."[195]

Following *Klaxon*, a federal court sitting in diversity must apply the whole law of the state, including the state's choice of law rules. While *Klaxon* arguably does not rest on the same constitutional concerns as *Erie*,[196] the Court's decision is, on the surface, a logical extension of the concern for uniform adjudication of state law rights. The "accident of diversity" should no more change the rule regarding *which* state's law should be applied than it would change the state law applied to resolve the underlying dispute.

Because the decision in *Klaxon* was based on the fact that the federal court's jurisdiction was founded on diversity,[197] courts pondered whether it was equally applicable when a federal court's jurisdiction was based on the

[188] 304 U.S. 64 (1938).

[189] *Id.* at 78.

[190] *Id.* at 79.

[191] *Id.* at 75.

[192] 313 U.S. 487 (1941).

[193] *Id.* at 496.

[194] *Id.*

[195] *Id.*

[196] *See* Allstate Ins. Co. v. Menards, Inc., 285 F.3d 630, 636 n.10 (7th Cir. 2002).

[197] *Klaxon*, 313 U.S. at 494.

presence of a federal question.[198] Specifically, the Supreme Court left unanswered whether a federal court was bound by *Klaxon* when interpreting a federal law that incorporated state law by reference, or whether it was free to apply a federal choice of law rule. A year after *Klaxon* was decided, the Court appeared poised to address this question in *D'Oench, Duhme & Co. v. FDIC*.[199] Indeed, the Court in *D'Oench* granted certiorari to address the issue of which choice of law rules were applicable when the jurisdiction of the federal court was not based on diversity.[200] Unfortunately, the Court ultimately determined that "[w]hether the rule of the *Klaxon* case applies where federal jurisdiction is not based on diversity of citizenship, we need not decide."[201]

Five years later, the Supreme Court had the opportunity to address the choice of law issue specifically in the context of bankruptcy.[202] In *Vanston Bondholder Protective Committee v. Green*,[203] the Court answered the question of whether a mortgage bondholder could receive interest on interest if it would result in subordinate creditors receiving a greatly reduced share of the reorganized company.[204] Several states had a stake in the outcome; the first mortgage indenture document was signed in New York with a New York bank as trustee, the debtor was organized under the laws of Delaware, and both the

[198] *Compare* United States v. Henke Constr. Co., 157 F.2d 13, 24 (8th Cir. 1946) (applying *Klaxon* in a federal question case because "[w]hile the present action is brought under a federal statute, it is in the nature of an action on contract and the construction of the federal statute is not involved"), *with* United States v. Certain Parcels of Land, 144 F.2d 626, 629-30 (3d Cir. 1944) (declaring that because it was a federal question the court was "unfettered by any local rule").

[199] 315 U.S. 447 (1942).

[200] *Id.* at 455.

[201] *Id.* at 456.

[202] Bankruptcy jurisdiction is extremely broad. District courts have original and exclusive jurisdiction of all cases under Title 11. *See* 28 U.S.C.A. § 1334(a) (West 2004 & Supp. 2006). They also have exclusive jurisdiction over all property of the estate. *See* § 1334(e)(1). The district court may refer to bankruptcy courts all proceedings arising under or related to a case under Title 11. 28 U.S.C. § 157(a) (2000). Because of this broad jurisdictional reach, bankruptcy courts may decide questions that outside of bankruptcy would be deemed to be "federal questions" because they arise under the laws of the United States, or they may decide issues that would traditionally be heard by a federal court under its diversity jurisdiction grant. Perhaps more importantly, the bankruptcy court's "related to" jurisdiction allows them to hear and decide cases that, outside of bankruptcy, could not have been heard in the federal courts at all. As a result, bankruptcy court jurisdiction cannot be categorized as synonymous with federal question jurisdiction nor can it be declared coterminous with diversity jurisdiction. Bankruptcy jurisdiction is somewhat chameleon-like, changing with the issue before it. For a broad overview of the complexities of bankruptcy court jurisdiction, see generally Paul P. Daley & George W. Shuster, Jr., *Bankruptcy Court Jurisdiction*, 3 DEPAUL BUS. & COM. L.J. 383 (2005).

[203] 329 U.S. 156 (1946).

[204] *Id.* at 159.

debtor's principal place of business and the mortgaged property were located in Kentucky.[205] While both the district and appellate courts agreed that New York law applied, it was not clear that they agreed on how to reach that result.[206] Specifically, the appellate court raised the issue of whether a bankruptcy court was to apply New York law based on a federal choice of law rule or on the choice of law rules of Kentucky (where the bankruptcy court sat).[207]

The *Vanston* Court never explicitly answered the choice of law question. It ultimately determined that the question whether interest on interest was available to the first mortgage bondholder was a question of federal law and not state law.[208] However, the Court did insert intriguing dictum regarding choice of law in bankruptcy.

> A purpose of bankruptcy is so to administer an estate as to bring about a ratable distribution of assets among the bankrupt's creditors. What claims of creditors are valid and subsisting obligations against the bankrupt at the time a petition in bankruptcy is filed is a question which, in the absence of overruling federal law, is to be determined by reference to state law. But obligations, such as the one here for interest, often have significant contacts in many states, so that the question of which particular state's law should measure the obligation seldom lends itself to simple solution. *In determining which contact is most significant in a particular transaction, courts can seldom find a complete solution in the mechanical formulae of the conflicts of law. Determination requires the exercise of an informed judgment in the balancing of all the interests of the states with the most significant contacts in order best to accommodate the equities among the parties to the policies of those states.*[209]

After *Vanston*, courts attempted to discern the meaning behind the Court's dictum. Some heralded it as a green light for the use of federal common law choice of law in bankruptcy cases.[210] Others refused to give it such weight.[211] But sixty years later, the Court has neither explicitly adopted nor explicitly rejected the *Vanston* dictum.

2. The Current Chaos

Without clear guidance from the Supreme Court, lower courts have followed various paths when determining choice of law rules in bankruptcy cases. These approaches can be distilled to three methodologies. In some instances,

---

[205] *Id.* at 159-60.

[206] *Id.* at 160.

[207] *Id.*

[208] *Id.* at 162-63.

[209] *Id.* at 161-62 (citations omitted) (emphasis added).

[210] *See infra* note 213 and accompanying text.

[211] *See infra* note 214 and accompanying text.

the courts blindly apply *Klaxon* with the assumption that the forum's choice of law rules always apply.[212] In other instances, the courts assume that *Klaxon* does not apply when the court's jurisdiction is based on the presence of a federal question and thus look to the dictum in *Vanston*, adopting the *Restatement (Second) of Conflict of Laws* as the federal rule.[213] And finally, a few courts take a less categorical approach, in general applying the forum state's choice of law rules in the absence of an overriding federal interest.[214] Unlike courts applying *Klaxon*, however, these courts at least leave the door open for the adoption of a federal choice of law rule distinct from the forum state's rule.

a) *The* Klaxon *Rule Approach*

The Eighth Circuit's decision in *In re Payless Cashways*[215] exemplifies the approach taken by courts applying *Klaxon* without qualification. With no discussion, the Eighth Circuit declared that "[t]he bankruptcy court applies the choice of law rules of the state in which it sits."[216] Courts that assume the forum's choice of law rules are always applicable rely heavily on the *Klaxon* decision.[217] Many courts have done so, however, without presenting any real basis for their decision. The conclusion that *Klaxon* applies is not as clear or

[212] *See, e.g.*, Amtech Lighting Servs. v. Payless Cashways, Inc. (*In re* Payless Cashways), 203 F.3d 1081, 1084 (8th Cir. 2000); Comdisco Ventures, Inc. v. Fed. Ins. Co. (*In re* Comdisco Ventures, Inc.), No. 04-C-2007, 04-C-2393, 2005 WL 1377856, at *4 (N.D. Ill. June 8, 2005); Carter Enters., Inc. v. Ashland Specialty Co., 257 B.R. 797, 801-02 (S.D. W. Va. 2001).

[213] *See, e.g.*, Lindsay v. Beneficial Reinsurance Co. (*In re* Lindsay), 59 F.3d 942, 948 (9th Cir. 1995) ("In federal question cases with exclusive jurisdiction in federal court, such as bankruptcy, the court should apply federal, not forum state, choice of law rules."); Mandalay Resort Group v. Miller (*In re* Miller), 292 B.R. 409, 413 (B.A.P. 9th Cir. 2003) ("Federal choice of law rules follow the approach of the Restatement (Second) of Conflict of Laws . . . ."); Olympic Coast Inv., Inc. v. Wright (*In re* Wright), 256 B.R. 626, 632 (Bankr. D. Mont. 2000).

[214] *See, e.g.*, Bianco v. Erkins (*In re* Gaston & Snow), 243 F.3d 599, 606 (2d Cir. 2001) ("Before federal courts create federal common law, 'a significant conflict between some federal policy or interest and the use of state law must first be specifically shown.'" (quoting Atherton v. FDIC, 519 U.S. 213, 218 (1997))); Compliance Marine, Inc. v. Campbell (*In re* Merritt Dredging Co.), 839 F.2d 203, 206 (4th Cir. 1988) ("We believe, however, that in the absence of a compelling federal interest which dictates otherwise, the *Klaxon* rule should prevail where a federal bankruptcy court seeks to determine the extent of a debtor's property interest."); FDIC v. Lattimore Land Corp., 656 F.2d 139, 150 n.16 (5th Cir. 1981) (applying the forum's choice of law rule in the absence of an overriding federal policy).

[215] 203 F.3d 1081 (8th Cir. 2000).

[216] *Id.* at 1084.

[217] *See, e.g.*, Koreag, Controle et Revision S.A. v. Refco F/X Assocs. (*In re* Koreag, Controle et Revision S.A.), 961 F.2d 341, 350 (2d Cir. 1992); Aranha v. Eagle Fund, Ltd. (*In re* Thornhill Global Deposit Fund, Ltd.), 245 B.R. 1, 11 n.11 (Bankr. D. Mass. 2000).

as simple as these courts contend.[218] Its applicability outside of diversity cases has never been confirmed, nor does its reasoning easily extend to federal question cases, especially those in which the federal courts have exclusive jurisdiction.[219] Thus, any assumption that *Klaxon* controls must address the significant question of *why* it controls.[220]

The Court in *Klaxon* rested its decision on the need for the "equal administration of justice in coordinate state and federal courts sitting side by side."[221] Some have contended that the *Klaxon* Court's concerns about the uniform application of state law are present in federal question cases when the courts are dealing with a federal statute that implicitly or explicitly incorporates state law.[222] And arguably, this need for uniformity is especially present in bankruptcy. A bankruptcy court can be viewed as an alternative state court.[223] As one commentator noted, "[w]ere it not for the happenstance of bankruptcy, many of the state-law rights that are before a bankruptcy court would be adjudicated either by a state court or by a diversity court."[224] Based on this reasoning and absent a congressional mandate to the contrary, a bankruptcy court must ensure that the result in bankruptcy does not differ substantially from the result that would have been obtained in the absence of bankruptcy.[225] Thus, if one views bankruptcy as simply a procedural vehicle for the adjudication of state law rights, the application of the *Klaxon* rule in bankruptcy makes some sense.[226]

However, to declare that bankruptcy simply adjudicates state rights is an oversimplification. While state laws certainly play an important part in the bankruptcy system, neither Congress nor the courts have hesitated to promote a federal bankruptcy policy over state interests.[227] Congress inserted in the

[218] Cross, *supra* note 13, at 544-45; *see also* SCOLES, *supra* note 66, § 23.15.

[219] Cross, *supra* note 13, at 544-45.

[220] *Id.*

[221] Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941).

[222] Cross, *supra* note 13, at 551.

[223] *See id.* at 535 ("Bankruptcy is best conceptualized as a federal procedure for the adjudication of all claims and interests affecting the estate of a single debtor.").

[224] *Id.* at 572.

[225] *See id.* at 534-35; *see also* Raleigh v. Ill. Dep't of Revenue, 530 U.S. 15, 20 (2000).

[226] Cross, *supra* note 13, at 534-35. Cross does not ultimately conclude that *Klaxon* applies in bankruptcy. Instead, he contends that a bankruptcy court must select the choice of law rules of a state – not necessarily the forum state – whose courts could have heard the dispute outside of bankruptcy. According to Cross, "[t]his restriction ensures that a bankruptcy court will adjudicate the parties' state law rights in accordance with the parties' reasonable expectations." *Id.* at 535. Unfortunately, Cross does not provide a methodology for choosing between the laws of two states both of which could have heard the case.

[227] The most obvious example is the bankruptcy discharge through which a creditor's state law rights are eliminated. *See* 11 U.S.C. § 727(b) (2000). The courts have also recognized that state law may be subordinated to a federal policy or interest. Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 162-63 (1946) ("For assuming,

Bankruptcy Code rights and remedies distinct from and superior to state law.[228] In the context of bankruptcy administration, the Supreme Court has consistently allowed for the application of federal policy over state law.[229] Even in *Butner*, the seminal bankruptcy case regarding the application of state law in bankruptcy, the Supreme Court permitted courts to ignore state law when there was an overriding federal interest in play.[230] The forum state's laws and policies are applicable only to the extent they are consistent with federal law and policies.[231] In the final analysis, a bankruptcy court applies federal law and must ultimately promote congressional intent, *not* the forum state's interest.

The fact that a bankruptcy case may be filed in a federal district court in which no diversity case involving the debtor or creditor could be filed further diminishes *Klaxon*'s applicability.[232] The broad bankruptcy venue provisions allow the bankruptcy court in which the initial petition was filed to hear all bankruptcy proceedings related to the estate regardless of whether those proceedings could have originally been filed in federal court.[233] This consolidation of proceedings avoids piecemeal litigation in various state and federal courts and aids in one of the primary goals of the Code – the expeditious administration of the estate.[234] Additionally, some courts have contended that bankruptcy courts are not constrained by due process in the

arguendo, that the obligation for interest on interest is valid under [state law], we would still have to decide whether allowance of the claim would be compatible with the policy of the Bankruptcy Act. . . . And we think an allowance of interest on interest under the circumstances shown by this case would not be in accord with the equitable principles governing bankruptcy distributions.").

[228] For example, the automatic stay prevents a creditor from pursuing state law remedies once the debtor files for bankruptcy. 11 U.S.C.A. § 362 (West 2004 & Supp. 2006). A debtor's interest in property passes to the trustee regardless of whether the debtor has a right to alienate the interest under state law. *Id.* § 541(c)(1). In addition, the trustee's avoiding powers greatly enhance any rights or remedies a debtor had under state law. *Id.* §§ 544, 545, 547.

[229] *See, e.g.*, Butner v. United States, 440 U.S. 48, 56 (1979); *Vanston*, 329 U.S. at 162.

[230] *Butner*, 440 U.S. at 55-56.

[231] *See, e.g.*, *id.*

[232] Daley & Shuster, *supra* note 202, at 400-01 (discussing the basis of venue jurisdiction in bankruptcy courts); Eric J. Segall, *Article III as a Grant of Power: Protective Jurisdiction, Federalism and the Federal Courts*, 54 FLA. L. REV. 361, 364 (2002).

[233] 28 U.S.C. § 1409(a) (2000).

[234] *See* Publicker Indus. v. United States (*In re* Cuyahoga Equip. Corp.), 980 F.2d 110, 117 (2d Cir. 1992) ("Moreover, the strong bankruptcy code policy that favors centralized and efficient administration of all claims in the bankruptcy court outweighs any similar policy expression found under CERCLA." (citations omitted)); Nike, Inc. v. Nat'l Shoes, Inc. (*In re* Nat'l Shoes, Inc.), 20 B.R. 672, 674 (B.A.P. 1st Cir. 1982) ("In keeping with the purpose of bankruptcy, namely, an economical and expeditious determination of issues, these interlocutory matters should be heard and decided on the merits by the bankruptcy court to which the case has been transferred." (footnote omitted)).

same way as state courts.[235] State courts cannot exercise personal jurisdiction over out-of-state defendants in the absence of sufficient minimum contacts with the forum state.[236] However, bankruptcy courts can rely on nationwide contacts to establish the necessary "minimum contacts"[237] and can employ nationwide service of process.[238] The combination of the liberal venue provisions and nationwide service of process allows bankruptcy courts to entertain state law disputes that the forum courts could never entertain.[239] The indiscriminate application of *Klaxon* in these situations would not replicate the nonbankruptcy state law rights of the parties because, in the absence of the bankruptcy filing, the forum court would not have been an appropriate venue.

In addition, the *Klaxon* Court's concerns about intrastate forum shopping are not present in such a scenario.[240] Interested parties to a bankruptcy petition are not choosing between the state and federal court based on the more favorable law. Bankruptcy courts have exclusive jurisdiction over matters related to the debtor's estate.[241] In fact, given the vast territorial reach of the bankruptcy courts, adherence to *Klaxon* could result in interstate forum shopping in bankruptcy.[242] Debtors, and even creditors in an involuntary case, could seek a forum with the most favorable choice of law rules.[243] Thus, the application of *Klaxon* in bankruptcy could result in the very evil that the Court was trying to prevent.

---

[235] Warfield v. KR Entm't, Inc. (*In re* Fed. Fountain, Inc.), 165 F.3d 600, 601-02 (8th Cir. 1999) (concluding that bankruptcy courts can rely on nationwide contacts to establish personal jurisdiction); *see also* Bellaire Gen. Hosp. v. Blue Cross Blue Shield, 97 F.3d 822, 825-26 (5th Cir. 1996) (applying "nationwide contacts" in an ERISA case). *But see* Peay v. BellSouth Med. Assistance Plan, 205 F.3d 1206, 1211 (10th Cir. 2000) (disagreeing with the view that "nationwide contacts" meet due process requirements). The Supreme Court has declined to decide whether the nationwide contacts approach is constitutional under the Fifth Amendment. *See* Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 103 n.5 (1987); Asahi Metal Indus. v. Superior Court, 480 U.S. 102, 113 n.* (1987).

[236] *See, e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[237] *In re Fed. Fountain, Inc.*, 165 F.3d at 601-02; E. Scott Fruehwald, *The Related to Subject Matter Jurisdiction of Bankruptcy Courts*, 44 DRAKE L. REV. 1, 34 (1995).

[238] FED. R. BANKR. P. 7004(d), (f); Gilchrist v. Gen. Elec. Capital Corp., 262 F.3d 295, 303 (4th Cir. 2001); Jeffrey T. Ferriell, *The Perils of Nationwide Service of Process in a Bankruptcy Context*, 48 WASH. & LEE L. REV. 1199, 1223, 1234 (1991).

[239] *See Conflict of Laws in Bankruptcy*, *supra* note 14, at 5 (observing that the state law case in *In re Gaston & Snow* could never have been litigated in New York absent the bankruptcy filing).

[240] SCOLES, *supra* note 66, § 23.15.

[241] 28 U.S.C. § 157(b)(1) (2000).

[242] *See Conflict of Laws in Bankruptcy*, *supra* note 14, at 5; *see also* SCOLES, *supra* note 66, § 23.15 (explaining that the goal in bankruptcy should be "to eliminate, or at least reduce, interstate forum-shopping, i.e. to achieve the 'geographic uniformity' or [sic] which Justice Frankfurter wrote in *Vanston*").

[243] *See Conflict of Laws in Bankruptcy*, *supra* note 14, at 5.

In the end, the indiscriminate application of *Klaxon* in bankruptcy does not rest on solid reasoning. It appears to be more a rule of convenience than one grounded in logic. It is difficult to draw a straight line between the reasoning in *Klaxon* and its application to bankruptcy.[244] To be sure, there may be situations in which application of the forum state's choice of law rule is appropriate.[245] A bankruptcy court essentially sitting as a diversity court and adjudicating a pure state law claim is one example.[246] But the assumption that this is always the case ignores the primacy of federal interests in the interpretation and application of federal law.

b) *Significant Contacts Test Approach as the Federal Rule*

Some courts ignore the state choice of law rules entirely and rely instead on a federal rule, turning to the *Restatement (Second) of Conflict of Laws* to provide the basis for the rule.[247] While the *Second Restatement* advocates balancing a variety of interests,[248] federal courts have shortened the inquiry to the simple determination of which state has the most significant relationship to the underlying controversy. Courts using this approach apply the law of the state with the most significant or substantial contacts with the parties and the transaction underlying the lawsuit.[249] Under this analysis, a distinct federal rule replaces the state's choice of law rule.

Like their *Klaxon* rule counterparts, the courts that apply the "significant contacts test" in bankruptcy have unfortunately done so with minimal explanation and are not without critics. In part, these courts read *Klaxon* narrowly, concluding that it applies only when a federal court's jurisdiction is

[244] *See* Cross, *supra* note 13, at 544-45.

[245] Plank, *supra* note 14, at 680; *Applicability of State Conflicts Rules*, *supra* note 14, at 1218.

[246] Circumstances in which a court could abstain from hearing a particular proceeding in bankruptcy provide an example of when the application of the forum's choice of law rules may be appropriate. *See* 28 U.S.C. § 1334(c) (2000).

[247] *See* Lindsay v. Beneficial Reinsurance Co. (*In re* Lindsay), 59 F.3d 942, 948 (9th Cir. 1995); Mandalay Resort Group v. Miller (*In re* Miller), 292 B.R. 409, 413 (B.A.P. 9th Cir. 2003).

[248] The Restatement provides that the following factors are to be considered as part of a choice of law analysis: (1) the needs of the interstate and international systems; (2) the relevant policies of the forum; (3) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (4) the protection of justified expectations; (5) the basic policies underlying the particular field of law; (6) certainty, predictability and uniformity of result; and (7) ease in the determination and application of the law to be applied. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

[249] *See* Cong. Talcott Corp. v. Gruber, 993 F.2d 315, 319 n.4 (3d Cir. 1993); Novartis Crop Prot., Inc. v. Am. Crop Servs. (*In re* Am. Crop Servs.), 258 B.R. 699, 703 (Bankr. W.D. Tenn. 2001).

founded in diversity.[250] This reading of *Klaxon*, however, has not been met with universal acclaim.[251] Moreover, given the broad reach of the bankruptcy court's jurisdiction to adjudicate related state law claims, one can certainly argue that there may be instances when the forum state's choice of law rule is the most appropriate. In addition, the courts adopting the significant contacts test bolster their reasoning by pointing to the dictum in *Vanston*, suggesting that a bankruptcy court need not apply the law of the state where it sits.[252] However, the Supreme Court has neither adopted nor rejected the dictum in *Vanston*, leaving reliance on it only speculative.

More importantly, it is not clear that the *Second Restatement* represents the best source for a "federal rule." The *Second Restatement* was written primarily to address choice of law issues involving the application of conflicting state laws.[253] It does not speak to the issue of choosing between state laws when interpreting and applying federal statutes.[254] As a result, the treatise places significant emphasis on examining the various policies underlying the competing state laws.[255] But when a federal court is interpreting and applying a federal law, the federal policies underlying the statute should be superior to a state's domestic agenda.[256] Thus, the *Second Restatement*, in an unmodified form, is ill suited to act as a blanket federal common law rule.

Moreover, bankruptcy law involves the careful balance of state and federal interests.[257] A bankruptcy court's broad jurisdictional reach requires that the court assess whether the controversy before it demands the interpretation and application of the Bankruptcy Code, or if it is simply the adjudication of a state

[250] *In re Lindsay*, 59 F.3d at 948 (declaring that the *Klaxon* rule "does not apply to federal question cases such as bankruptcy"); Crist v. Crist (*In re* Crist), 632 F.2d 1226, 1229 (5th Cir. 1980) ("When disposition of a federal question requires reference to state law, federal courts are not bound by the forum state's choice of law rules, but are free to apply the law considered relevant to the pending controversy.").

[251] Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538, 540 n.1 (2d Cir. 1956); Cross, *supra* note 13, at 547 (stating that federal courts must look to state law where the primary rights being adjudicated are created by state law); *see also* Alfred Hill, *The Erie Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013, 1034-35 (1953).

[252] *See In re* Gibson, 234 B.R. 776, 779 (Bankr. N.D. Cal. 1999).

[253] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 1 cmts. a-b (1971).

[254] *Id.* § 1.

[255] *Id.* § 5 cmt. d ("An important objective in any choice-of-law case is to accommodate in the best way possible the policities [sic] underlying the potentially applicable local law rules of the states involved.").

[256] *See* Vanston Bondholder Protective Comm. v. Green, 329 U.S. 156, 162-63 (1946) ("But bankruptcy courts must administer and enforce the Bankruptcy Act as interpreted by this Court in accordance with authority granted by Congress to determine how and what claims shall be allowed under equitable principles."); *see also* SCOLES, *supra* note 66, § 23.15.

[257] Cross, *supra* note 13, at 547-48; Plank, *supra* note 14, at 637, 639.

law issue in federal court.[258] The application to bankruptcy of the *Erie* doctrine (and its subsequent extension in *Klaxon*) is much more complex than the reasoning employed by these courts suggests. Because the bankruptcy process is saturated by federalism issues, it is important that courts choosing to adopt a federal choice of law rule recognize the limitations on their power to do so.[259] Given the Court's decision in *Erie*, it is not enough for bankruptcy courts to simply point to the basis of their jurisdiction to support overriding state law. These courts completely sidestep the controversy regarding whether and when a federal court may create a federal rule distinct from state law.

c) *Application of the Forum State's Law as the Federal Rule*

In contrast to the other two methodologies, the Second, Fourth, and Fifth Circuits have adopted a more flexible approach. The courts in these circuits recognize the complexities involved in developing a coherent choice of law policy in bankruptcy. All three courts implicitly assume that a federal rule applies when bankruptcy choice of law questions arise.[260] Where each court struggles, however, is in developing a cogent framework for determining the content of the federal rule.

The Fifth Circuit identified the threshold question as being whether, in resolving an issue of state law in a bankruptcy proceeding, a federal court must apply the forum state's choice of law rules, "or may exercise its independent judgment and choose whatever state's substantive law it deems appropriate."[261] The court concluded that a bankruptcy court is not bound by the choice of law rules of the forum state but is "'free to apply the law considered relevant to the pending controversy.'"[262] The court relied largely on the absence of diversity jurisdiction and the Supreme Court's decision in

[258] *See supra* note 202 (providing a brief description of the changing face of bankruptcy court jurisdiction).

[259] Plank, *supra* note 14, at 644-45 (arguing that there are "definite and discernible" limits to Congress' Bankruptcy Power under the Constitution). According to Plank, the federal courts' power to create federal common law is subject to the same limits as Congress. *Id.* at 691-92.

[260] *See* Bianco v. Erkins (*In re* Gaston & Snow), 243 F.3d 599, 606 (2d Cir. 2001); Compliance Marine, Inc. v. Campbell (*In re* Merritt Dredging Co.), 839 F.2d 203, 206 (4th Cir. 1988); FDIC v. Lattimore Land Corp., 656 F.2d 139, 150 n.16 (5th Cir. 1981). While each court decides to apply the forum's choice of law rules, they are not applying the *Klaxon* rule. Instead they are choosing the forum's law as the federal rule. The courts in *Gaston & Snow* and *Lattimore Land* recognized that they were engaging in federal common law making. *In re Gaston & Snow*, 243 F.3d at 601; *Lattimore Land Corp.*, 656 F.2d at 146 & n.13.

[261] Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Dev. Co., 642 F.2d 744, 748 (5th Cir. 1981).

[262] *Lattimore Land Corp.*, 656 F.2d at 149 n.16 (quoting Crist v. Crist (*In re* Crist), 632 F.2d 1226, 1229 (5th Cir. 1980)).

Vanston to reach its conclusion.[263] However, the court noted that "[s]uch an observation need not mean that a federal rule is always applied, and this Court in the bankruptcy context, has also recognized that there may be issues which should be resolved by application of the forum state's choice of law rules even where a federal court, in a federal question case, is free to do otherwise."[264] The court ultimately applied the forum state's choice of law rules, in part because doing so did not interfere with an identifiable federal policy, and, perhaps more significantly, the forum state was the only state with an interest in the case.[265]

Unlike the Fifth Circuit, the Fourth Circuit concluded that "in the absence of a compelling federal interest which dictates otherwise, the *Klaxon* rule should prevail where a federal bankruptcy court seeks to determine the extent of a debtor's property interest."[266] The Fourth Circuit's premise was based on its compatibility with "the model established by *Erie* and *Klaxon*," declaring that "[b]oth those cases make clear that federal law may not be applied to questions which arise in federal court but whose determination is not a matter of federal law."[267] The court ultimately concluded that there was no "overwhelming federal policy that requires us to formulate a choice of law rule as a matter of independent federal judgment" and adopted the choice of law rule of the forum state.[268]

The Second Circuit also starts with the assumption that forum choice of law rules should be employed in the absence of an overriding federal interest.[269] But in contrast to the Fourth and Fifth Circuits, the court based its conclusion primarily on the framework the Supreme Court established for creating federal common law.[270] The court noted that "[b]efore federal courts create federal common law, 'a significant conflict between some federal policy or interest and the use of state law must first be specifically shown.'"[271] The court repudiated a federal interest in national uniformity of choice of law rules, stating that *Klaxon* "rejected the need for uniformity as a justification for displacing state conflicts rules."[272] Nor did the court believe that there was a threat of forum shopping that necessitated a national rule.[273] In clarifying its position, the court cited *Vanston*, noting that the Supreme Court made clear

[263] *Id.*

[264] *Id.*

[265] *See id.*

[266] Compliance Marine, Inc. v. Campbell (*In re* Merritt Dredging Co.), 839 F.2d 203, 206 (4th Cir. 1988).

[267] *Id.*

[268] *Id.*

[269] Bianco v. Erkins (*In re* Gaston & Snow), 243 F.2d 599, 605 (2d Cir. 2001).

[270] *Id.* at 606.

[271] *Id.* (quoting Atherton v. FDIC, 519 U.S. 213, 218 (1997)).

[272] *Id.*

[273] *Id.*

that the "application of a federal rule is not foreclosed by *Erie* where there is a significant federal interest."[274]

While these courts present an arguably more sophisticated and flexible approach to choice of law rule in bankruptcy, the courts' analyses suffer from many of the same flaws as other courts struggling with this issue. Each court assumes, without explanation, that the forum state's choice of law rule is the applicable state rule to be applied in the absence of an overriding federal interest. Other than the Court's decision in *Klaxon*, which, as discussed, has limited applicability to bankruptcy,[275] there is nothing in the Supreme Court's jurisprudence to support the application of the forum state's choice of law rule when a federal statute references state law. As will be discussed in the next section, the courts make a leap in their reasoning that is lacking in support.

More importantly, when a bankruptcy court applies the forum state's choice of law rule, or even an unmodified *Second Restatement* approach, the court is also applying the limitations on the choice of law rules expressed in the state's public policies.[276] This could create situations in which the bankruptcy court's interpretation and application of federal law will be strongly influenced, if not dictated, by the forum state's domestic agenda. To be sure, there will be instances in which the state's public policy and the policies underlying the federal law are in harmony or, at the very least, do not conflict. Regardless, a federal court, when choosing an appropriate state law to aid in the interpretation and application of federal law, should not be swayed by the forum state's domestic agenda. The choice of an appropriate law in this context should be dictated by the federal policy underlying the relevant statute.

d) *Application of the Public Policy Exception*

The current case law does not provide a clear picture of how bankruptcy courts treat the forum state's public policy exception when choosing the appropriate state law. At the very least, bankruptcy courts have recognized that the forum state's public policies could influence the choice of law analysis.[277] In fact, some bankruptcy courts have been willing to comply with the forum state's public policy exception when engaging in the choice of law

[274] *Id.* at 607.

[275] *See* discussion *supra* Part II.B.2.a.

[276] *See* Baker v. Gen. Motors Corp., 522 U.S. 222, 233 (1998); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 5 cmt. b (1971).

[277] *See* LaGuardia Assocs. v. Holiday Hospitality Franchising, Inc., 92 F. Supp. 2d 119, 127 (E.D.N.Y. 2000) (recognizing that New York law will invalidate a choice of law provision if it violates a public policy of the state); *In re* Fraden, 317 B.R. 24, 34 (Bankr. D. Mass. 2004) (recognizing that Massachusetts courts generally enforce choice of law provisions unless in violation of public policy of the state).

analysis.[278] Courts, for example, have invalidated contractual choice of law provisions for violating the public policy of the forum state.[279]

In the context of spendthrift trusts,[280] several courts have relied on the forum state's public policy to refuse to apply the law designated by the trust documents.[281] Section 541(c)(2) of the Bankruptcy Code allows a debtor to exempt from property of the estate assets held in a spendthrift trust if the trust is subject to transfer restrictions under applicable nonbankruptcy law.[282] The court's analysis in *In re Brooks* is a good example of a court's willingness to apply the forum state's public policy exception in the context of bankruptcy.[283] In *Brooks*, the debtor attempted to protect his assets by creating offshore spendthrift trusts.[284] The trust instruments contained a choice of law provision stating that the local law of the country where the trust was located would govern the interpretation of the instrument.[285] When the debtor filed for bankruptcy, a creditor argued that the trusts were unenforceable and thus the trust assets were property of the estate.[286] The debtor argued, among other things, that the trusts were enforceable under applicable nonbankruptcy law, the law of Bermuda and the Channel Islands, where the trusts were located.[287] Therefore, according to the debtor, the trust assets were not property of the

[278] *See* Singer Asset Fin. Co. v. Duboff Family Invs. (*In re* Duboff), 290 B.R. 652, 655 (Bankr. C.D. Ill. 2003).

[279] *See* Sattin v. Brooks (*In re* Brooks), 217 B.R. 98, 101-02 (Bankr. D. Conn. 1998) (applying Connecticut law although documents called for the application of Bermuda and Channel Islands law); McCorhill Publ'g, Inc. v. Barr (*In re* McCorhill Publ'g., Inc.), 86 B.R. 783, 794 (Bankr. S.D.N.Y. 1988) (applying New York law because the interest rate was usurious and violated New York public policy).

[280] Spendthrift trusts are asset protection devices intended to shield an individual's property from the reach of creditors. *See* Justin W. Stark, Comment, *Montana's Spendthrift Trust Doctrine: Analysis and Recommendations*, 57 MONT. L. REV. 211, 212-13 (1996). Section 541(c)(2) excludes a spendthrift trust from the bankruptcy estate if it protects the beneficiary from creditors under applicable state law. 11 U.S.C.A. § 541(c)(2) (West 2004 & Supp. 2006). Generally, under a spendthrift trust, "the right of the beneficiary to future payments of income or capital cannot be voluntarily transferred by the beneficiary or reached by his or her creditors." Shurley v. Tex. Commerce Bank (*In re* Shurley), 115 F.3d 333, 337 (5th Cir. 1997).

[281] *See* Goldberg v. Lawrence (*In re* Lawrence), 227 B.R. 907, 917 (Bankr. S.D. Fla. 1998); *In re Brooks*, 217 B.R. at 101-02; Marine Midland Bank v. Portnoy (*In re* Portnoy), 201 B.R. 685, 700-01 (Bankr. S.D.N.Y. 1996).

[282] 11 U.S.C.A. § 541(c)(2).

[283] *In re Brooks*, 217 B.R. at 101.

[284] *Id.*; *see also* Claudia R. Tobler and Ingrid Michelsen Hillinger, *Asset Protection Devices: Twyne's Case Re-Told*, 9 J. BANKR. L. & PRAC. 3, 41 (1999).

[285] *In re Brooks*, 217 B.R. at 101.

[286] *Id.*

[287] *Id.* at 102.

estate.[288] Ultimately, the court refused to apply the foreign law identified in the trust instrument because doing so would offend the public policy of the forum state.[289] After applying the forum state's law, the court held that the trust assets were property of the estate.[290]

The court started with the presumption that federal courts apply the choice of law rules of the forum state in which they sit.[291] Connecticut was the forum state, and while the court generally respected a settlor's expressed intent regarding choice of law, it refused to do so when the application of the settlor's choice of law would violate a recognized public policy of the state.[292] Relying on Connecticut public policy, the court refused to recognize the trusts as valid.[293] Because the trusts were not enforceable under the forum state's law, the trust assets were property of the estate.[294]

Although the debtor in *Brooks* created the trusts to avoid creditors' claims,[295] making the outcome appropriate, the rationale is unfortunate. By incorporating "applicable nonbankruptcy law" in § 541(c)(2), Congress wanted to guarantee that the parties were afforded the same rights *in* bankruptcy that they would have had outside of bankruptcy.[296] Congress' reference to applicable nonbankruptcy law reflects one of the basic tenets of bankruptcy law – its attempt to ensure that parties do not receive "'a windfall merely by reason of the happenstance of bankruptcy.'"[297] Yet in *Brooks*, the creditors had access to assets in bankruptcy that they likely could not have accessed outside of bankruptcy.[298]

The *Brooks* decision has special significance in the context of property interests that arise as a result of same-sex marriage or civil unions. If a bankruptcy court is in a state with an expressed public policy against same-sex marriage and civil unions (or a mini-DOMA), and the court applies the forum state's choice of law rules (as the *Brooks* court did), it will be forced under the public policy exception not to recognize same-sex marriage, civil unions, or their attendant benefits. Creditors could very well obtain property not

[288] *Id.*

[289] *Id.* at 101-02.

[290] *Id.* at 104.

[291] *Id.* at 101.

[292] *Id.*

[293] *Id.* at 104.

[294] *Id.*

[295] *Id.* at 101.

[296] 11 U.S.C.A. § 541(c)(2) (West 2004 & Supp. 2006).

[297] Butner v. United States, 440 U.S. 48, 55 (1979) (quoting Lewis v. Mfrs. Nat'l Bank, 364 U.S. 603, 609 (1961)); *see also supra* text accompanying notes 37-39.

[298] *See In re Brooks*, 217 B.R. at 101-04. *But see* Gideon Rothschild et al., *Self-Settled Spendthrift Trusts: Should a Few Bad Apples Spoil the Bunch?*, 9 J. BANKR. L. & PRAC. 59, 73 (1999) (pointing out that debtors in cases such as *Brooks* have transferred their assets overseas, where "the determination of a domestic court will have no practical effect").

available outside of bankruptcy,[299] thereby violating one of bankruptcy's central principles.

The example presented in the Introduction is illustrative of the potential problems presented by relying on the forum state's choice of law rules and its public policy exceptions.[300] Because Ingrid and Judy own real property in Vermont as tenants by the entirety, Ingrid has claimed that it is exempt from property of the estate as to her creditors.[301] Assuming the court applies Florida's choice of law rules and its exceptions, it is possible that Ingrid's interest in the real property will not be exempt.[302] According to Florida law, neither same-sex marriages nor civil unions are recognized for any purpose in the state.[303] Perhaps more importantly, the statute instructs courts not to "give effect to any public act, record, or judicial proceeding of any state . . . or any other place or location respecting either a marriage or relationship not recognized [in Florida], or a claim arising from such a marriage or relationship."[304] A court could plausibly interpret this statute to prevent it from recognizing both the civil union and the benefits derived from the relationship under Vermont law. As a result, Ingrid's interest in the real property would become property of the estate, thus making it available to distribution to her creditors. Under this scenario, creditors could have access to property that, outside of bankruptcy, would be unavailable.[305] Additionally, Judy's justified expectation that the property was protected from the reach of Ingrid's creditors would be destroyed.

The outcome is equally unsettling if we change the scenario to involve a cause of action rather than a specific *res*. Assume that David and Mark are married in Massachusetts. While traveling in Connecticut, Mark is killed in an accident. Shortly after the accident, the driver of the other vehicle files for

[299] *See infra* notes 300-07 and accompanying text.

[300] *See supra* text accompanying notes 20-22.

[301] *See* VT. STAT. ANN. tit. 15, § 1204(e)(1) (1999); *see also In re* Estate of Boardman, 223 A.2d 460, 462 (Vt. 1966).

[302] *See* FLA. STAT. § 741.212 (2006).

[303] *Id.* § 741.212(1).

[304] *Id.* § 741.212(2).

[305] Outside of bankruptcy, the scenario would be quite different. Assume a creditor obtained a judgment against Ingrid in a Florida court. To execute the judgment and gain access to property Ingrid may hold in Vermont, the creditor would need to bring his judgment to a Vermont court. Polly J. Price, *Full Faith and Credit and the Equity Conflict*, 84 VA. L. REV. 747, 820 (1998); John E. Sullivan III, *Future Creditors and Fraudulent Transfers: When a Claimant Doesn't Have a Claim, When a Transfer Isn't a Transfer, When Fraud Doesn't Stay Fraudulent, and Other Important Limits to Fraudulent Transfers Law for the Asset Protection Planner*, 22 DEL. J. CORP. L. 955, 1038-39 (1997). The Vermont court would not allow the creditor to access Ingrid's and Judy's home to pay the Florida judgment against Ingrid because, as discussed, under Vermont law the property held as tenants by the entirety is exempt from the process for the debts of one of the spouses. *See supra* note 21 and accompanying text.

bankruptcy in Florida, where he resides. David files a proof of claim for damages based on Mark's death. David's claim is based on his status as Mark's spouse, which under Massachusetts law, and likely Connecticut law as well, would support a wrongful death action.[306] The driver-debtor objects to David's claim, contending that Florida recognizes neither the purported marriage nor any claims arising from the marriage.[307] While the Bankruptcy Code defines "claim" broadly,[308] the viability of a creditor's claim against the estate is generally determined by applicable nonbankruptcy law.[309] The bankruptcy court would be forced to choose between conflicting state laws, since law in Massachusetts and Connecticut would recognize the claim as valid while Florida law would not.[310] If the bankruptcy court applies the forum state's choice of law rules, David's claim will likely not be recognized. Assuming the denial of his proof of claim does not act as res judicata, the debtor's potential liability would not be discharged in the bankruptcy, thus interfering with his "fresh start."[311] On the other hand, if the disallowance of his claim has preclusive effect, David will be estopped from pursuing his claim outside of bankruptcy. [312] Either outcome is troubling.

III. RESOLUTION

As the preceding discussion suggests, a bankruptcy court's use of the forum state's choice of law rules can have unintended and dramatic consequences in the bankruptcy arena. It is disturbing that a state's domestic agenda could dictate *which* state's law the federal court relies upon when interpreting and applying a federal statute. At the choice of law stage, a federal court's primary focus should be on ascertaining the state law that best promotes the policies underlying the federal statute. To avoid the forum bias inherent in the current

[306] *See* CONN. GEN. STAT. §§ 46b-38aa to -38pp (Supp. 2006); MASS. GEN. LAWS ch. 229, § 2 (2004). It is not yet clear if Connecticut would recognize a Massachusetts marriage between same-sex couples as valid with respect to application of Connecticut's wrongful death statute. *See* Op. Conn. Att'y Gen. No. 2005-024 (Sept. 20, 2005), *available at* http://www.ct.gov/ag/cwp/view.asp?A=1770&Q=302438.

[307] FLA. STAT. § 741.212(1)-(2) (2006).

[308] 11 U.S.C.A. § 101(5) (West 2004 & Supp. 2006).

[309] *See In re* Segre's Iron Works, Inc., 258 B.R. 547, 550 (Bankr. D. Conn. 2001).

[310] *See supra* notes 306-09 and accompanying text.

[311] *See* Mirzai v. Kolbe Foods, Inc. (*In re* Mirzai), 271 B.R. 647, 654 (C.D. Cal. 2001) (recognizing that when there is a dismissal without discharge, no preclusive effect is afforded to a disallowance of a proof of claim).

[312] As a general matter, the allowance or disallowance of a proof of claim is a final judgment binding on the parties. *See, e.g., id.* at 653 n.6 (noting situations in which the disallowance of a proof of claim has a preclusive effect in a later suit); Nathanson v. Hecker, 121 Cal. Rptr. 2d 773, 776-77 (Cal. Ct. App. 2002); DiSaia v. Capital Indus., 320 A.2d 604, 607 (R.I. 1974).

choice of law methodologies and the application of a state's public policy, a federal court should apply a federal choice of law rule.

In the bankruptcy context, courts should develop and apply federal choice of law rules in instances when interpretation and application of the Bankruptcy Code requires reference to state law. In choosing the appropriate state law, the courts should choose a rule that best promotes the federal policies underlying bankruptcy. These policies include aiding a debtor's fresh start upon emergence from bankruptcy and the ratable distribution of available assets among creditors.[313] In addition, the courts should strive to maintain the justified expectations of the parties to a transaction so that their rights are not unnecessarily undermined by the "happenstance of bankruptcy." Unless congressionally mandated, a party should not receive more or less than what could have been obtained outside of bankruptcy.[314] Moreover, a federal rule recognized across state boundaries will serve the bankruptcy system's interest in uniformity and predictability of outcome, and will aid in the fair and efficient administration of the bankrupt's estate.[315]

Under this paradigm, the court would undertake a straightforward analysis. Assuming the Bankruptcy Code or other applicable statute lacks a directive regarding choice of law, a court must first determine which states have an interest in the underlying controversy. As a general matter, this stage of the analysis is uncontroversial as courts routinely look to a state's contact with the parties or the underlying transaction.[316] Second, a court must establish whether there is a conflict between the various interested states' laws.[317] If no conflict exists, the court need not specifically "choose" one state's law over another's.[318]

When interested states have conflicting laws, the court must determine which state's law should be applied. To that end, courts should choose the state law that best promotes the Bankruptcy Code's policies and objectives. Importantly, such an approach requires courts to ensure that the parties' rights and obligations are not unnecessarily altered by the bankruptcy process.[319] Likewise, this approach would allow courts to avoid the problems that arise

[313] BFP v. Resolution Trust Corp., 511 U.S. 531, 563 (1994).

[314] *See supra* text accompanying notes 37-39.

[315] *See* Assocs. Commercial Corp. v. Rash, 520 U.S. 953, 965 (1997).

[316] As a constitutional matter, the Supreme Court requires that a state have some connection to the underlying controversy before its law can be applied. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 (1981) ("[T]his Court has traditionally examined the contacts of the State, whose law was applied, with the parties and with the occurrence or transaction giving rise to the litigation.").

[317] *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 838-39 & n.20 (1985) (Stevens, J., concurring).

[318] *Id.*

[319] *See supra* text accompanying notes 37-39.

when a particular state's public policy dictates which state law should be used to interpret and apply federal law.

Like most modern choice of law methodologies, this proposal contains flexibility and requires courts to exercise judgment. Unlike state choice of law rules, the bankruptcy court will exercise its judgment in furtherance of bankruptcy policies rather than advancing the domestic agenda of a particular state. This proposal is further distinguished from state choice of law rules by its rights-based approach.[320] Bankruptcy policies tend to be grounded in the rights of the interested parties to the bankruptcy process rather than the "interests" of the forum state.[321] Bankruptcy places fairness above comity, individual rights above sovereignty.[322] Thus, the appropriate law to be applied will depend upon the balance to be achieved amongst the parties rather than the sovereignty interests of a particular state.

The Supreme Court's decisions in *Erie* and *Klaxon* do not require a different analytical framework. Despite the Supreme Court's decision in *Erie*, the Rules of Decision Act does not dictate the application of the forum state's choice of law rules when a federal court is interpreting and applying federal law.[323] The *Erie* Court held that, "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state."[324] Bankruptcy matters are governed by Acts of Congress. While state law may help define the rights and obligations of the parties, it is the federal court's interpretation of federal law that provides the ultimate rule of decision.[325]

Moreover, as previously discussed, the Supreme Court's concern for "the equal administration of justice in coordinate state and federal courts sitting side by side"[326] does not translate easily to the bankruptcy context. The application of *Erie* and *Klaxon* in the bankruptcy context is undermined by the application of federal law, the exclusive jurisdiction of the bankruptcy court, the far-reaching venue provisions, and the availability of nationwide service of

---

[320] *See* BRILMAYER, *supra* note 107, at 221-24.

[321] *See* Butner v. United States, 440 U.S. 48, 55 (1979).

[322] *See id.*

[323] 28 U.S.C. § 1652 (2000).

[324] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

[325] *See In re* McGee, 353 F.3d 537, 540 (7th Cir. 2003) ("Bankruptcy law depends on, and implements, entitlements defined by state law, but which of these entitlements is subject to discharge or a trustee's avoiding power is beyond state control." (citations omitted)); Demczyk v. Mutual Life Ins. Co. (*In re* Graham Square, Inc.), 126 F.3d 823, 831 (6th Cir. 1997) ("While state law determines the debtor's property interest in the deposit held by [the defendant], 'the extent to which a debtor's interest in property creates property of the estate for turnover purposes is a question of federal law.'" (quoting Amdura Nat'l Distrib. Co. v. Amdura Corp. (*In re* Amdura Corp.), 167 B.R. 640, 644 (D. Colo. 1994))).

[326] Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941).

process.[327] It cannot be said that the bankruptcy court and the forum state court are in any way "coordinate."

Finally, bankruptcy courts are competent to create a federal choice of law rule. The question of competence focuses on the constitutional concerns underpinning *Erie*.[328] To the extent that the constitutional concerns that animated *Erie* still exist, the Court intimated that federal courts could not create federal common law in areas in which Congress had no power to legislate.[329] This proposition is based on the *Erie* Court's declaration that its reading of the Rules of Decision Act was constitutionally compelled.[330] According to the Court, unless the Federal Constitution, treaties, or statutes provide otherwise, the Rules of Decision Act identifies the states as the appropriate source of rights and obligations.[331] As summarized by one commentator, under this theory, "[i]n those areas where Congress itself cannot prescribe laws, it would a fortiori be a usurpation of the powers reserved to the states for the federal judiciary to do so."[332] Thus, before the dictates of *Erie* can be ignored, the court must identify in the Constitution, treaties or statutes of the United States a basis for creating a federal common law.[333]

There is little question that Congress can legislate federal choice of law rules in bankruptcy. Congress has the power under the Constitution to enact laws on the subject of bankruptcy.[334] While Congress' power under the Constitution is not unlimited, it does encompass preempting state laws that interfere with the federally defined goals of bankruptcy.[335] Some courts note that a choice of law provision already exists in the Bankruptcy Code.[336] In

[327] *See supra* notes 221-49 and accompanying text.

[328] *Erie*, 304 U.S. at 79-80.

[329] *See id.*; Thomas M. Merrill, *The Judicial Prerogative*, 12 PACE L. REV. 327, 345 (1992); Plank, *supra* note 14, at 643-44.

[330] *Erie*, 304 U.S. at 79-80.

[331] *Id.* at 78.

[332] Note, *The Competence of the Federal Courts to Formulate Rules of Decision*, 77 HARV. L. REV. 1084, 1086 (1964).

[333] To be sure, this interpretation of *Erie* has not been universally accepted by scholars. Some scholars question whether *Erie* was, in fact, constitutionally compelled. Others contend that the federal courts lack law making power at all. *Compare* MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER 43 (1991), *with* Louise Weinberg, *The Curious Notion that the Rules of Decision Act Blocks Supreme Federal Common Law*, 83 NW. U. L. REV. 860, 867-69 (1989).

[334] U.S. CONST. art. I, § 8, cl. 4.

[335] *See* Butner v. United States, 440 U.S. 48, 55 (1979).

[336] *See* Drenttel v. Jensen-Carter (*In re* Drenttel), 403 F.3d 611, 614 (8th Cir. 2005); Arrol v. Broach (*In re* Arrol), 170 F.3d 934, 936 (9th Cir. 1999). According to these courts, § 522(b)(3)(A) directs bankruptcy courts to apply the state exemption law "at the place in which the debtor's domicile has been located for the 730 days immediately preceding the date of the filing of the petition." 11 U.S.C.A. § 522(b)(3)(A) (West 2004 & Supp. 2006); *In re Drenttel*, 403 F.3d at 614; *In re Arrol*, 170 F.3d at 936.

addition, Congress' power to create federal choice of law rules arguably emanates from the Necessary and Proper Clause.[337] This clause authorizes Congress to promulgate laws needed for the exercise of Congress' enumerated powers.[338] Congress has the power to enact a system of bankruptcy laws, bankruptcy courts, and the rules that govern them.[339] Others have argued that Congress has the power to create choice of law rules under the Full Faith and Credit Clause.[340] Therefore, the constitutional underpinnings of *Erie* would not prohibit federal choice of law rules in bankruptcy.

The only other possible impediment to a bankruptcy court developing a federal choice of law rule is the Supreme Court's federal common law jurisprudence.[341] Because a federal choice of law rule is a species of federal common law, some courts have looked to the Supreme Court's recent decisions regarding the limitations on the creation and content of federal

[337] U.S. CONST. art. I, § 8, cl. 18.

[338] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 324 (1819).

[339] U.S. CONST. art. I, § 8, cl. 4.

[340] *See* Laycock, *supra* note 142, at 332.

[341] *See, e.g.*, Atherton v. FDIC, 519 U.S. 213, 225-26 (1997) (chronicling the "'few and restricted instances' in which this Court has created federal common law" (quoting City of Milwaukee v. Illinois, 451 U.S. 304, 313 (1981))). The Court has limited the creation of federal common law to narrow areas concerning the rights and obligations of the United States, interstate and international disputes implicating the rights of states or the nation's relations with other countries, and admiralty cases. *Id.* The Court also has applied federal common law to fill the interstices of a pervasively federal framework. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 724-25 (2004). This last application of federal law is the one most relevant here.

It should be noted that there is significant academic debate regarding the legitimacy and limits of the development of common law by federal courts. *See generally* George D. Brown, *Federal Common Law and the Role of the Federal Courts in Private Law Adjudication – A (New)* Erie *Problem?*, 12 PACE L. REV. 229 (1992). Some scholars advocate the view that all forms of federal common law are illegitimate, *see id.* at 245, while others contend that the federal courts' power to make law is co-extensive with the powers of the national government, *see id.* at 248. Between these two positions can be found academics who accept that some form of federal common law is legitimate but emphasize a need for limits on the judiciary's power to create and apply that law. *See id.* at 252.

The Supreme Court's jurisprudence appears to track the compromise position. The Court has admitted that "it is much too late to deny that there is a significant body of federal law that has been fashioned by the federal judiciary in the common-law tradition." Nw. Airlines, Inc. v. Transp. Workers Union, 451 U.S. 77, 95 (1981). However, it went on to recognize that "federal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers." *Id.* Thus, despite the academic furor, the Supreme Court has not debated the legitimacy of federal common law. Instead it has worked to define the contexts in which a federal rule of decision can be applied and, more recently, to limit the content of federal common law.

common law.[342] In *Kamen v. Kemper Financial Services*[343] and the cases that followed, the Court instructed lower federal courts to presume that state law should be incorporated as the federal rule of decision.[344] According to the Court, this presumption may only be overcome when "'application of [the particular] state law [in question] would frustrate specific objectives of . . . federal programs.'"[345]

This analysis is consistent with how the Supreme Court addressed the intersection of state and federal law in bankruptcy. In *Butner*, the Court held that property interests should be analyzed according to state law absent an identifiable federal interest.[346] By incorporating state law as the basis for identifying property interests, the Court ensured that interested parties were afforded in federal bankruptcy court the same protection they would have had under state law if no bankruptcy had ensued.[347]

While the Court's holdings clearly instruct federal courts to opt for the state rule when choosing between a federal rule of decision and a state rule of decision, the cases do not explicitly provide a framework for deciding *which* state rule to apply. To be sure, in many instances the Court was simply not presented with the question because either the parties had stipulated to the appropriate law or the source of the state law was obvious.[348] The omission is significant, however. The Supreme Court never cited to *Klaxon*, nor suggested that the forum state's choice of law rules should provide the framework for determining the appropriate state law.

That is not to say that the cases are devoid of clues regarding the direction the Court may take when finally forced to address the issue. Indeed, despite the Court's rhetoric regarding the creation of federal common law, it appears that the Court is employing a distinct federal choice of law rule. The decision in *Atherton v. FDIC*[349] is an example of the Court's nod to the federal courts to develop a federal choice of law rule to address federal laws incorporating state rights. In *Atherton*, the FDIC argued that the federal courts could develop a

[342] *See* PHP Liquidating, LLC v. Robbins (*In re* PHP Healthcare Corp.), 128 F. App'x 839, 843 (3d Cir. 2005); Bianco v. Erkins (*In re* Gaston & Snow), 243 F.3d 599, 606 (2d Cir. 2001); Compliance Marine, Inc. v. Campbell (*In re* Merritt Dredging Co.), 839 F.2d 203, 206 (4th Cir. 1988).

[343] 500 U.S. 90 (1991).

[344] *Id.* at 98; *see also* Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. REV. 895, 981 (1996) (arguing that the *Kamen* presumption represents "a major step in the evolution of the Court's federal common law jurisprudence").

[345] *Kamen*, 500 U.S. at 98 (first and second alterations in original) (quoting United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979)).

[346] Butner v. United States, 440 U.S. 48, 55-56 (1979).

[347] *Id.*

[348] *See, e.g.*, O'Melveny & Myers v. FDIC, 512 U.S. 79, 89 (1994) (observing that the parties had stipulated that if state law governed it would be the law of California); United States v. Little Lake Misere Land Co., 412 U.S. 580, 602-04 (1973).

[349] 519 U.S. 213 (1997).

federal common law standard of care for federally chartered banks.[350] To support its theory, the FDIC pointed to the "internal affairs doctrine," which recognizes that "'only one State should have the authority to regulate a corporation's internal affairs.'"[351] The FDIC asserted that, like corporate governance, the standard of care for officers and directors of federally chartered banks should be regulated by only one law – federal law.[352] The Supreme Court rejected the argument, stating that "[n]othing in that doctrine suggests that the single source of law must be federal."[353]

After rejecting the application of a federal common law standard of care and instructing courts to look to state law, the Court provided guidance on how a federal court might determine the appropriate "single source of law."[354]

> In the absence of a governing federal common law, courts applying the internal affairs doctrine could find (we do not say that they will find) that the State closest analogically to the State of incorporation of an ordinary business is the State in which the federally chartered bank has its main office or maintains its principal place of business. Cf. 61 Fed. Reg. 4866 (1966) (to be codified in 12 C.F.R. § 7.2000) (federally chartered commercial banks may "follow the corporate governance procedures of the law of the state in which the main office of the bank is located").[355]

Thus, the Court gave the lower courts permission to develop a federal choice of law rule to determine the applicable state law.

While *Atherton* provides an example of the Court explicitly opening the door to the creation of a federal choice of law rule, other cases contain instances in which the Court implicitly adopted a federal rule. In *Kamen*, the Court acknowledged that an action involving a violation of the Investment Company Act ("ICA") was governed by federal law, but concluded that the contours of the demand requirement of the Act should be determined by reference to state law.[356] The original action was brought in the United States District Court for the District of Illinois, yet the Court did not reference Illinois choice of law rules, nor did it suggest that *Klaxon* provided the choice of law framework for determining the applicable state law.[357] Instead, the Court simply stated that the applicable state law was the law of the state of incorporation.[358] Arguably, the Court created a definitive federal choice of law rule for determining demand requirements under the ICA.

---

[350] *Id.* at 217.

[351] *Id.* at 224 (quoting Edgar v. MITE Corp., 457 U.S. 624, 645 (1982)).

[352] *Id.*

[353] *Id.*

[354] *Id.*

[355] *Id.*

[356] Kamen v. Kemper Fin. Servs., 500 U.S. 90, 97, 108 (1991).

[357] *Id.* at 107-08.

[358] *Id.* ("We thus discern no policy in the Act that would require us to give the independent directors, or the boards of investment companies as a whole, *greater* power to

Perhaps more important to bankruptcy courts is the Supreme Court's decision in *Butner v. United States*.[359] In *Butner*, the Court granted certiorari to resolve a split in the circuits regarding whether a security interest in property extended to rents and profits derived from the property.[360] The majority of circuit courts that had addressed the issue had resolved the question by reference to state law.[361] A minority of courts had adopted a federal rule of equity.[362] While the Court acknowledged that it was within Congress' power to create a federal statute that defined a mortgagee's interest in rents and profits, it observed that Congress had chosen not to do so.[363] Instead, Congress had "generally left the determination of property rights in the assets of a bankrupt's estate to state law."[364]

While *Butner* is frequently cited for the proposition that a bankruptcy court must determine property interests by reference to state law, what is rarely mentioned is that the Court actually identified, in the context of real property, *which* state law should be applied.[365] The Court phrased the pending question as whether the right to certain rents was to be "determined by a federal rule of equity *or by the law of the State where the property is located*."[366] The parties did not present the question in quite the same manner.[367] And the Court could have addressed the split in the circuits without ever identifying *which* state's law applied. Yet it would appear that the Court created a federal choice of law rule, identifying the appropriate state law as the state where the property is located.

It is not surprising that the Supreme Court's statement in *Butner* regarding the applicable state law has been overlooked given that most states' choice of law rules point to the law where the real property is located. The statement in *Butner* is significant for at least two reasons. First, the Supreme Court did not rely on or even reference the forum state's choice of law rules. Such an omission provides additional evidence that *Klaxon* has little applicability when

block shareholder derivative litigation than these actors possess under the law of the State of incorporation.").

[359] 440 U.S. 48 (1979).

[360] *Id.* at 51-52.

[361] *Id.* at 52.

[362] *Id.* at 53.

[363] *Id.* at 54.

[364] *Id.*

[365] *See, e.g.*, Raleigh v. Ill. Dep't of Revenue, 530 U.S. 15, 20 (2000); Nobelman v. Am. Sav. Bank, 508 U.S. 324, 329 (1993); Burgess v. Sikes (*In re* Burgess), 438 F.3d 493, 510 (5th Cir. 2006); Indian Motocycle Assocs. III v. Mass. Hous. Fin. Agency, 66 F.3d 1246, 1252 (1st Cir. 1995); MNC Commercial Corp. v. Joseph T. Ryerson & Son, 882 F.2d 615, 618-19 (2d Cir. 1989).

[366] *Butner*, 440 U.S. at 49 (emphasis added).

[367] *See* Brief for the Petitioner at 10-11, *Butner*, 440 U.S. 48 (No. 77-1410); Brief for the Respondents at 3, *Butner*, 440 U.S. 48 (No. 77-1410); Brief for the United States, *Butner*, 440 U.S. 48 (No. 77-1410).

a federal court is interpreting federal law.[368] Second, and most important, by ignoring the forum state's choice of law rules, the Supreme Court eliminated the application of the forum state's "public policy exception" to the choice of law analysis.[369] When interpreting federal law by reference to state law, ignoring the state's public policy exception makes good sense. The choice of an appropriate law in this context should be dictated not by state policies, but by the federal policies underlying the statute.

CONCLUSION

A host of unanswered questions regarding choice of law arise in the bankruptcy context as a result of same-sex marriage and civil unions. The current choice of law methodologies employed by courts are ill suited to address this issue in a manner that promotes the underlying policies of the Bankruptcy Code rather than the domestic agendas of individual states. A bankruptcy court's reliance on the forum state's choice of law rules places undue emphasis on the public policies of the forum state, potentially to the detriment of the policies underlying the federal statute.

When a bankruptcy court is interpreting and applying federal law with reference to state law, it should employ a federal choice of law rule. A federal choice of law rule ensures that the federal law will be interpreted in a manner consistent with congressional intent and avoids situations in which the federal law simply becomes a vehicle to promote individual states' policies. The proffered federal rule requires bankruptcy courts to choose a state law that is consistent with the bankruptcy policies, including ensuring that the parties' rights are not unnecessarily altered by the bankruptcy process. For parties whose rights are linked to a same-sex marriage or civil union, such a rule assures that their rights will not be adjudicated solely based on the sex of their partner, unduly altered by the "happenstance of bankruptcy," or subject to the shifting political sands within the forum state.

[368] *See* discussion *supra* Part II.B.1.

[369] *See* discussion *supra* Part II.A.3.