Baude on Choice of State Law in U.S. Federal Statutes

William Baude, who is a fellow at Stanford Law School, has posted Beyond DOMA: Choice of State Law in Federal Statutes on SSRN. The abstract reads:

> *The Defense of Marriage Act has been abandoned by the executive and held unconstitutional by courts, so it is time to think about what will be left in its place. Federal law frequently asks whether a couple is married. But marriage is primarily a creature of state law, and states differ as to who may marry. The federal government has no system for deciding what state's law governs a marriage, though more than a thousand legal provisions look to marital status, more than a hundred thousand same-sex couples report being married, and many of those marriages ultimately cross state lines. Unless a federal choice of law system is designed, DOMA's demise will lead to chaos.*
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> *This paper argues that such a system can and should be designed: Because the underlying choice-of-law problem is ultimately a problem of statutory interpretation, Congress can and should replace it with a clear choice-of-law rule. Failing that, federal courts can and should develop a common law rule of their own – they are not (and should not be) bound by the Supreme Court's decision in Klaxon v. Stentor Electric. The paper further argues that different institutions should solve the problem differently: If Congress acts, it should recognize all marriages that were valid in the state where they took place. If, instead, the courts create a common-law rule, they should recognize all marriages that are valid in the couple's domicile.*
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> *The implications of this argument run far beyond the demise of DOMA. In all areas of what is here called "interstitial law," federal interpretive institutions can and should devise a set of choice-of-law rules for federal law that draws upon state law, and what set of rules is proper may well depend on who adopts them.*

The paper is forthcoming in the *Stanford Law Review*.