RESURRECTING COMITY: REVISITING THE PROBLEM OF NON-UNIFORM MARRIAGE LAWS

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Introduction

For the first time in decades, there is a significant variation in state marriage laws, created by the legalization of same-sex marriage in Massachusetts.1 While a few other states may soon follow,3 for now, Massachusetts is the only American state in which same-sex couples may legally marry.2

Non-uniform marriage laws and the conflicts they engender are not new. To the contrary, states historically disagreed about many aspects of domestic relations laws, and, in particular, about marriage prohibitions. But today, a single state’s departure from the norm has produced a flurry of activity nationwide, involving all levels and branches of government, and has played a surprisingly prominent role in state and federal politics. That multifaceted response was animated, in large part, by a legal misapprehension—that the Full Faith and Credit Clause of the federal constitution compels states to recognize same-sex marriages from sister states unless they erect obstacles to avoid it—that has obscured a longstanding tradition of state respect for each other’s marriage laws and a flexible approach to interstate marriage recognition.

Historically, states have struggled with marriage recognition questions that arose because of longstanding disagreements about impediments to marriage. Bans on interracial marriage were once common, for example, but never universal. Minimum age requirements for marriage always varied considerably from state to state. All states restricted some incestuous marriages, but differed, sometimes considerably, in their treatment of marriages between more distant relatives or individuals related by marriage rather than blood. Conflicts thus arose when couples married in one state and then sought recognition of their union in another—whether because they moved to a new state, had contracted an “evasive” marriage in another state in violation of their home state’s laws, or had some transient contact with a state to which validity of their marriage was relevant. Those conflicts were resolved, by and large, according to principles of comity, which were reflected in the established rules governing conflict of laws. Those rules

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2 Massachusetts was, and still is, one of the states with gender-neutral marriage laws on the books. See Mass. Gen. Laws ch. 207 §§ 1-9 (listing impediments to marriage). The court in Goodridge, however, concluded that the existing statute was not intended to encompass same-sex marriage despite the lack of an explicit prohibition on the practice. See 798 N.E.2d at 953. Although the legislature never amended the relevant statutes to conform to the ruling in Goodridge, clerks began issuing valid marriage licenses to same-sex couples on May 17, 2004. See Pam Belluck, Hundreds of Same-Sex Couples Wed in Massachusetts, N.Y. TIMES, May 18, 2004, at A1. Over 6000 same-sex couples, mostly female, have married since then. See Ginia Bellafante, Even in Gay Circles, The Women Want the Ring, N.Y. TIMES, May 8, 2005, at I1.

3 See infra note x for a discussion of currently pending cases.
dictated that states should generally recognize marriages that were valid where celebrated – the so-called “place of celebration” rule -- unless doing so interfered with an important public policy or interest of the destination state. The “public policy” objection was embodied in categorical exceptions for polygamous and incestuous marriages and for marriages that violated a state’s “positive law”. State statutes banning marriage evasion – the term used to describe the practice of obtaining a marriage outside of one’s home state because of less restrictive laws – were the prime example of such positive laws.

Applied to specific marriages, the general rule and its exceptions meant that states often accorded recognition to marriages that they would not themselves permit, including, sometimes, to marriages that were evasive or even obviously abhorrent to the state’s own policies. Non-evasive interracial marriages, for example, were routinely recognized in states that banned miscegenation; underage marriages were recognized for a variety of ad hoc reasons whether they were evasive or not; and disfavored marriages of all kinds were often recognized for limited purposes, particularly if cohabitation within the prohibiting state was not contemplated or possible.

A decade ago, one might have applied these principles to a hypothetical situation involving same-sex marriage in Massachusetts and concluded that a same-sex marriage from one state would certainly be recognized if it was celebrated by a couple who legitimately resided in Massachusetts and later moved to another state. One might also have concluded that evasive same-sex marriages might be recognized in some states, though not as predictably so. Finally, one might have expected that the “incidents” of such a marriage would be recognized for limited purposes like inheritance rights in many states, even if the right to cohabit within the state as a married couple was not.

Enter Hawaii. Hawaii almost legalized same-sex marriage in the early 1990s, producing widespread fear about the effect of such a development on other states. The focal point of the controversy was the widely held (or at least widely articulated) belief that if same-sex marriages were legally celebrated in Hawaii, the Full Faith and Credit Clause of the federal constitution would compel every other state to recognize those unions. In response, Congress enacted the Defense of Marriage Act, which defined marriage to include only heterosexual unions for federal law purposes and amended the Full Faith and Credit Act to provide that states need not recognize same-sex marriages from sister states. Within a decade, four-fifths of the states had accepted Congress’ invitation and either amended their marriage laws or their state constitutions to ban same-sex couples from marrying within the state and, in most of those states, to explicitly refuse recognition to an out-of-state same-sex marriage, even if valid where celebrated.

This vast legal structure was erected, however, to prevent a problem that historically did not exist. The Full Faith and Credit Clause had never been understood to compel one state to recognize another state’s marriage without regard to its own laws and policies. To the contrary, states have always had, and freely exercised, the right to refuse recognition to out-of-state marriages. What many states have lost through the erection of these positive law barriers, however, is the right to grant recognition to a particular prohibited marriage or an incident of it, a right exercised considerably more often, historically, than the right to refuse.

This paper explores the forces that propelled this harsh, inflexible approach to marriage recognition and the unprecedented terrain we now face. Part I first considers the variation among state marriage laws in the early, modern, and ultra-modern periods.
It then, in Part II, examines the anti-same-sex marriage structure erected in response to the potential legalization of same-sex marriage in the 1990s, with a particular focus on the role played by full faith and credit principles in animating the statutory and constitutional reform movement and shaping its contours. Part III reconsiders the traditional approach to marriage recognition, which combined a pro-recognition general rule with standard exceptions to protect state interests, and the typical justifications for it. Part IV examines the traditional recognition principles against the modern same-sex-marriage landscape. This part looks at whether states that have enacted barriers to recognition have done so successfully, given historical requirements that the intent to refuse recognition be clear and unmistakable. And, for states with no identifiable barrier to recognition of a same-sex marriage from another state, it considers how the traditional principles might and have guided courts in analyzing recognition questions.

I. Non-Uniformity of Marriage Laws

A. Early Variations in Marriage Laws

American states maintained a variety of restrictions on marriage throughout the nineteenth and first half of the twentieth centuries. All states imposed some restrictions on marriage based either on the capacity of the individual or the nature of the union, and many of the restrictions were more or less universal. For example, all states prohibited polygamous marriages \(^4\) and consanguineous marriages within a certain degree. \(^5\) Most states expressly prohibited the insane from marrying; \(^6\) “imbeciles” were likewise forbidden to marry. \(^7\)

Other restrictions were common, but not universal. Many states restricted marriages by individuals with certain diseases, including, most commonly, epilepsy,

\(^4\) See Chester G. Vernier, 1 American Family Laws: A Comparative Study of the Family Law of the Forty-Eight American States, Alaska, the District of Columbia and Hawaii 214 § 46 (1931) (“Bigamous marriages are both criminally and civilly condemned by all fifty-one of the American jurisdictions.”) These state bans were reinforced, and, in some cases, induced by a strong federal policy against polygamy. See, e.g., Morrill Act, ch. 125, 12 Stat. 501 (1862) (banning polygamy in the United States); see also Reynolds v. United States, 98 U.S. 145 (1878) (holding bans on polygamy constitutional).

\(^5\) See Vernier, supra note x, at 173-74 § 38 (“Upon the subject of marriages prohibited because of consanguinity, all fifty-one of the American jurisdictions have statutes. Moreover, surprising as it may seem, there is, up to a certain point, a laudable degree of uniformity in the statutes.”) At a minimum, states prohibited individuals from marrying ancestors, descendants, or siblings. Most also banned aunt-nephew and uncle-niece unions, though some made exceptions for such marriages if sanctioned by recognized religious dictate. See, e.g., R.I. Gen. Laws tit. 24, ch. 243, §§ 4, 9 (1953) (maintaining an exception to the incestuous marriage prohibition for any marriage “which shall be solemnized among the Jews, within the degrees of affinity or consanguinity allowed by their religion”). The most common definition of incest prohibits relatives closer than the fourth degree from marrying, which derives from the Book of Leviticus. [full cite] First cousins are relatives of the fourth degree, see Table of Consanguinity, and are thus permitted to marry one another under the biblical restriction.

\(^6\) See Vernier, supra note x, at 188 § 41 (noting that the only dispute among states with respect to insanity was whether it should render a marriage void or voidable); see also Lawrence M. Friedman, Private Lives: Families, Individuals, and the Law 53 (2004). States did not generally prohibit marriage based on physical incapacity (impotence), but most permitted the other party to seek an annulment on that basis. See id. at 197.

\(^7\) See Vernier, supra note x, at 199 – 203 § 43 (“In any case of such a nature it is difficult to see how a marriage participated in by such a diseased person can fail to have disastrous results both for the parties themselves and their families, and for society”); John W. Morland, Keezer on the Law of Marriage and Divorce 198 (3d ed. 1946) (“No insane person or idiot is capable of contracting a marriage.”)
venereal disease, and tuberculosis. All states had age requirements, but there was significant variation in both the minimum age to marry and the minimum age to marry without parental consent. All but twelve states banned interracial marriage at some point in history, and two-thirds of those retained such a ban at least into the middle of the twentieth century. There were variations in incest laws as well. A substantial minority of states did not ban first-cousin marriages, nearly half the states prohibited some marriages based on relationships of affinity (by marriage). Several also imposed restrictions on remarriage following divorce, either in the form of a waiting period or, more severely, a complete ban during the lifetime of the innocent spouse.

In addition, states had substantial disagreement on two procedural rules that directly affected the validity of marriage. First, states were split on whether a marriage could be formed without licensure and solemnization—a common-law marriage. As of 1931, roughly half of the states permitted common-law marriage, but many of the remaining states had expressly abolished the practice sometime in the previous half-century. Second, states varied in their stance on marriage evasion—the practice of marrying out of state solely because of more lenient marriage laws and then returning home. Again, in 1931, seventeen states expressly forbade the practice.

As one commentator noted about the state of marriage laws in 1919: “After all these years of endeavor and experimentation, look at the diversity—the chaos even—of laws!” These differences in marriage laws gave rise to conflicts and periodic quests for

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8 See Morland, supra note x, at 200-01 Tbl. XIV; see also Vernier, supra note x, at 200-03 (providing compilation of state marriage restrictions based on disease).
9 Kansas, for example, permitted a 12-year-old female to marry with parental consent, while Arizona would not permit her to marry until age 16. See Morland, supra note x, at 210-11; see also Vernier, supra note x, at 187 (noting “considerable variation in the age standard adopted by the various states”). In almost every state, the age requirements differed for males and females; females could generally marry two to three years younger than their male counterparts could. See Morland, supra note x, at 210-12 (compiling chart of state statutes on marriages rules respecting age).
11 See Morland, supra note x, at 214-15; Vernier, supra note x, at 206-09 (compiling miscegenation statutes existing in thirty states in 1931).
12 See Vernier, supra note x, at 174 § 38 (“Twenty-nine jurisdictions prohibit the marriage of first cousins, a view upon which there is considerable controversy”).
13 See id. at 183 §39 (noting the American departure from English law, under which “relationship by affinity was an impediment to marriage to the same extent and in the same degree as consanguinity”); Morland, supra note x, at 219; see also, e.g., R.I. Gen. Laws § 4155-58 (1923) (prohibiting, among others, a marriage to one’s wife’s mother or husband’s father).
14 See Vernier, supra note x, at 296 § 60 (noting that thirty-six states had “placed conditions and limitations on the right to remarry after absolute divorce). Lifetime remarriage restrictions were usually limited to defendant-spouses in a divorce premised on adultery. See, e.g., In re Lenherr’s Estate, 314 A.2d 255, 257 (Pa. 1974) (considering extraterritorial effect of Pennsylvania’s law banning remarriage by adulterer during lifetime of the spouse).
15 See Vernier, supra note x, at Table. IV 106-08 (comparing state-law tabulations in five contemporaneous treatises).
16 See id. at 209 § 45; see also Mary E. Richmond & Fred S. Hall, Marriage and the State 370 app. B (1929) (identifying eighteen states, in 1929, that forbid evasive marriage).
17 See Richmond & Hall, supra note x, at 202.
greater uniformity. When the National Conference of Commissioners on Uniform State Laws (NCCUSL) was founded in 1892, its goal was to seek “greater unanimity of law throughout the country in those matters in which such unanimity is both desirable and possible.”

Encouraging uniformity of marriage and divorce laws was one of the Conference’s primary objectives. That remained a goal for nearly a century, but a perpetually elusive one.

Despite frustration with the degree of variation among states and at least a modicum of public upset with evasive marriage practices, the Conference mostly sidestepped the question of marriage impediments in its early acts. Although many states shared the frustration of having their strict standards undermined by their laxer neighbors, they were, by and large, unwilling to agree to a more uniform approach.

The National Congress on Uniform Divorce Laws, which convened in Philadelphia in 1906 and produced a draft uniform divorce law, urged the Conference to draft a uniform marriage law as well. But the Conference demurred, preferring to tackle the more contentious issue of migratory divorce first. The 1907 Act to Regulate the Law of Annulment of Marriage and Divorce did, nonetheless, indirectly regulate marriage in two ways. First, it prescribed uniform grounds for annulment of marriage, which reflect the defects that render a marriage void (bigamy or incest) or voidable (impotency, fraud, insanity, or non-age). If a particular impediment renders a marriage void, it is, in effect, a marriage prohibition. The Act also proposed a one-year waiting period between an initial and final decree of divorce, which also, in effect, imposes a restriction on marriage (or at least remarriage).

The 1907 Act was adopted by only three states, however, and thus met a fate similar to the one met by contemporaneous laws establishing uniform rules of divorce.

The Conference returned to the question of marriage regulation in 1911 when it promulgated the Uniform Marriage and Marriage License Act. This Act was mainly procedural. It provided detailed mechanisms for verifying the eligibility of the parties to a marriage and permitted third parties greater opportunity to object before marriages were

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18 REPORT OF PROCEEDINGS OF THE FIRST CONFERENCE OF THE STATE BOARDS OF COMMISSIONERS FOR PROMOTING UNIFORMITY OF LAW IN THE UNITED STATES 3 (1892).
19 See id. at 10 (“Marriage and Divorce: There is probably no question on which there is greater general necessity to have uniformity of law than this. . .”).
20 Report of the Committee on Marriage and Divorce, in PROCEEDINGS OF THE SEVENTEENTH ANNUAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 122 (1907) [hereinafter 1907 Report].
21 See id.
22 See id. at 124 (An Act to Make Uniform the Law Regulating Annulment of Marriage and Divorce, § 1 (a) – (g)).
23 See id. at 128 § 17.
24 See HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS 103RD YEAR at 1347 Table IV (1994) [hereinafter 1994 HANDBOOK].
25 In 1907, the Conference had also adopted An Act Providing for the Return of Marriage Statistics, which required counties in an adopting state to collect a variety of data points about each marriage, including the race, age, and occupation of the parties, as well as the number of prior marriages and divorces for each spouse. See 1907 Report, supra note x, at 19. This Act was only adopted by a single state. See 1994 HANDBOOK, supra note x, at 1347 Table IV.
26 PROCEEDINGS OF THE TWENTY-FIRST ANNUAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1911).
celebrated. It also made licensure and solemnization a requirement for a valid marriage, which was designed to eliminate common-law marriage in adopting jurisdictions. But, again, this act was adopted in only two states. A 1950 uniform act, the Uniform Marriage License Application Act, was also primarily procedural. It adopted a waiting period between application and issuance of a marriage license, required a blood test as a prerequisite to issuance, and made all license applications a matter of public record. The Conference’s interest in establishing uniform laws on these topics derived from the “well-known fact that at present, where a state having rigid requirements regarding the issuance of licenses in these respects adjoins a state in which the requirements are more lax, there is a tendency towards avoidance of the more rigid requirements by crossing the state line and obtaining a marriage license in the adjoining state.” The prefatory note explained that other aspects of uniformity, which had been sought in the 1911 act, were not as desirable. The minimum age for marriage, for example, might reasonably differ from state to state because of “varying social conditions throughout the country.” This Act was adopted in only a single state, proving the Conference’s long-term interest in standardizing marriage laws to be uniformly unsuccessful.

Throughout this period, there were other attempts to create uniformity, including numerous attempts to amend the federal Constitution either to ban certain types of marriages outright (polygamous and interracial ones) or to give Congress the authority to set national marriage policy. Not one ever became law. Marriage laws thus remained remarkably non-uniform well into the twentieth century.

B. Modern Variations in Marriage Laws

The differences that had been so pronounced in the first half of the twentieth century all but disappeared in the second half. A number of independent forces unwittingly aligned to create virtually uniform marriage laws. Arguably the most important development was the Supreme Court’s 1967 decision in Loving v. Virginia, which held anti-miscegenation laws unconstitutional. During the same era, the eugenics movement in which several marriage restrictions were rooted fell out of favor, and cultural attitudes about children evolved. Together, these changes led states to eliminate marriage prohibitions that were rooted in concerns about the passage of undesirable genetic traits and to gradually raise the minimum age for marriage.

A snapshot of state marriage laws circa 1990 reveals a remarkably uniform system, especially remarkable given the lack of federal control or national marriage policy and the repeated failure of efforts to secure uniformity among state laws through

27 1911 Act at 251 §§ 5, 6. The act imposed a criminal penalty for unlawful issuance of a license or for making a false statement about any fact relating to competency to marry. See id. §§ 7, 8.
28 See id. at §§ 1, 23.
29 See 1994 HANDBOOK, supra note x, at 1347 Table IV.
31 Id.
32 See 1994 HANDBOOK, supra note x, at 1347 Table IV.
33 See also Stein, supra note x, at 15-21.
34 388 U.S. 1 (1967).
35 See generally FRIEDMAN, PRIVATE LIVES, supra note x, at 57-60.
voluntary cooperation. All states continued to prohibit marriages that were bigamous, incestuous within the third degree, or involved a minor below a certain age.

Variations persisted, though, on the permissibility of marriages between first-cousin and common-law marriage. But other variations had lessened significantly. Most if not all restrictions on marriages by affinity had been abolished. All but a handful of states by then permitted marriage without parental consent at age eighteen; the remaining few had set the age at 21. With parental consent, most states permitted minors to marry at age 16, sometimes even earlier in the case of pregnancy. Only one state continued to differentiate between males and females for marriage age. Only a handful of states still imposed a waiting period after divorce before remarriage is possible.

A few states maintained other, idiosyncratic restrictions such as Nebraska, which did not permit anyone “afflicted with a venereal disease” to marry, or Tennessee, which prohibited issuance of a license to a couple if either party is drunk at the time of application. Same-sex marriage had not made its mark in the public conscience yet, and, thus, most state statutes were silent on the subject. Only a few states explicitly defined marriage involving one man and one woman, and no state statute explicitly authorized same-sex marriage.

C. Recent Variations in Marriage Laws

Fast-forward a decade to the present day, in which the marriage landscape has dramatically changed. Same-sex marriage is now legal in Massachusetts. Lower courts

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36 Twenty-four states prohibit first cousins from marrying altogether. See, e.g., N.H. REV. STAT. ANN. §§ 457:1, 2 (2005). Twenty-six states permit them unconditionally. See, e.g., ALASKA STAT. § 25.05.021 (prohibiting marriage when the parties are “more closely related than the fourth degree of consanguinity,” which does not include first cousins). Six permit first cousins to marry subject to certain conditions. See, e.g., ARIZ. REV. STAT. § 25-101 (permitting first cousins to marry only “if both are 65 years old or older or if one or both first cousins are under 65 years old, with judicial approval based on proof that one of the cousins is unable to produce”).

37 Roughly one-third of the states continued to permit common-law marriage.


39 See Guide to Legal Impediments to Marriage for 57 Registration Jurisdictions (July 30, 2004), http://www.mass.gov/dph/bhsre/rvr/impediments1%20.pdf (indicating that every state but six allows both men and women to marry without parental consent at the age of eighteen).

40 See ARK. CODE ANN. § 9-11-103 (2004) (permitting court to grant permission for marriage below the minimum age when the female is pregnant or has given birth). Only Texas permits marriage by non-parent fourteen-year-olds with parental consent. See TEX. FAM. CODE § 2.102.

41 See, e.g., ARK. CODE ANN. § 9-11-102 (permitting a male who is 17 years old and a female who is 16 years old to contract for marriage with written consent of a parent or guardian); HAW. REV. STAT. § 572-1.6 (2003) (permitting a 15-year-old to marry with court approval).

42 See, e.g., ALA. CODE §§ 30-1-8, 30-1-10 (2004) (prohibiting parties to a divorce from marrying (except to each other) within 60 days of when the judgment is entered and permitting a court to deny either party the right to remarry permanently); CAL. FAM. CODE § 300 (imposing a six-month waiting period for remarriage after divorce and denying the right to remarry pending appeal of a divorce judgment).


45 See, e.g., IDAHO CODE § 32-201(1) (2004) (“Marriage is a personal relation arising out of a civil contract between a man and a woman”).

46 See supra note x.
in New York, Washington, and California have held that a ban on same-sex marriage violates the respective state constitutions; if those rulings survive appeal, same-sex marriages could become legal in those states as well. Vermont, Connecticut, and California provide same-sex couples with a civil status equivalent to marriage. Internationally, Belgium and the Netherlands permit same-sex marriage, and both Canada and Spain are likely to authorize it shortly.

II. Same-Sex Marriage and the Modern Reaction to Non-Uniformity

In some ways, the developments opposing same-sex marriage have been even more remarkable than those supporting it. Spurred first by the fear that Hawaii might

47 See Hernandez v. Robles, No. 103434/2004 (N.Y. Sup. Ct. Feb. 4, 2005) (declaring state constitution to require that same-sex couples be permitted to marry). In Hernandez, the defendant attempted to appeal directly to the state’s highest court, but the request was denied.


49 In re Marriage Cases, Judicial Council Coordination Proceeding No. 4365 (Super. Ct. San Francisco Mar. 14, 2005) (tentative decision) (holding that state ban on same-sex marriage and ban on recognition of same-sex marriages from other states both violate the state constitution).


51 In Vermont, the Supreme Court’s decision in Baker v. State, 744 A.2d 864, 886 (Vt. 1999) led to the adoption of An Act to Create Civil Unions, which creates a status different from civil marriage only in name. See 15 V.S.A. § 1201 et seq. (2004). Connecticut adopted a civil union law, comparable to Vermont’s, in April, 2005. See 2005 CT. ALS 10 (2005). In California, the legislature expanded the status of domestic partner as of January 1, 2005 to be equivalent to marriage in almost every respect. See CAL. FAM. CODE § 298.5 (2005).


legalize same-sex marriage in the early 1990s,\textsuperscript{54} and later by the reality that Massachusetts did legalize same-sex marriage in 2003, an entirely new statutory framework was woven by Congress and a substantial majority of the states.

A. The Defense of Marriage Act and State Analogs

Congress launched the anti-same-sex marriage response with its passage of the Defense of Marriage Act (DOMA) in 1996. DOMA does two basic things. Section Three of the Act defines marriage for federal purposes as a union between a man and a woman.\textsuperscript{55} Section Two amends the Full Faith and Credit Act to exempt same-sex marriages from recognition under principles of Full Faith and Credit.\textsuperscript{56} This amendment states that

\begin{quote}
No state, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.
\end{quote}

The essence of Section Two is to protect states against compelled recognition of same-sex marriages from out of state under full faith and credit principles. Professor Lynn Wardle has argued that DOMA “establishes clearly a ‘hands-off’ federal position – that federal authority will not be manipulated to compel states to take either a pro- or contra-same-sex marriage position. Thus, it leaves the matter to each individually, to determine for itself.”\textsuperscript{58} The federal neutrality, he argued, “would permit states to recognize same-sex marriages or not as they saw fit.”\textsuperscript{59} Standing alone, this characterization of DOMA is not inaccurate. Although DOMA refuses federal recognition to same-sex marriages contracted anywhere, it does not require states to follow the same course. However, the general misapprehension about the operation of full faith and credit principles, reinforced by the debate over DOMA and the media reports about Hawaii and its potential impact on the rest of the nation, led states to believe that if they did take proactive measures to protect themselves, they would be compelled to recognize same-sex marriages from another state.\textsuperscript{60} In the face of an impending significant non-uniformity, Congress thus acted to encourage dissention rather than unification among the states.\textsuperscript{61}

States, in large numbers, accepted DOMA’s offer, by adding express anti-same-sex marriage provisions, so-called “mini-DOMAs,” to their state codes or constitutions. As of March 2005, forty-three states explicitly prohibit same-sex marriage by statute or

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\item \textsuperscript{55} See Defense of Marriage Act § 3(a) (codified at 1 U.S.C. § 7 (2004)).
\item \textsuperscript{56} See id. at §2(a) (codified at 28 U.S.C. § 1738C (2004)).
\item \textsuperscript{57} See id. The second provision purports to derive authority from the “effects” clause.
\item \textsuperscript{58} Testimony of Lynn Wardle, supra note x, at 19
\item \textsuperscript{59} Id.
\item \textsuperscript{60} See supra text accompanying notes x – x.
constitutional amendment. Thirty-seven of those states also refuse to recognize a same-sex marriage validly celebrated elsewhere, and nine of the thirty-seven refuse recognition not only to the marriage itself, but also to all claims and rights arising out of it or any related contract. At least two states prohibit not only same-sex marriage, but legally recognized civil unions or domestic partnerships as well. There are thus only six states left without an explicit statutory or constitutional ban on same-sex marriage, and in two of the six the state’s highest court or attorney general has interpreted the current statutes, though gender neutral, to prohibit same-sex marriage.

The animating force behind the first wave of federal and state anti-same-sex-marriage statutes was the belief that Hawaii was on the cusp of legalizing same-sex marriage. The Hawaii Supreme Court had held in 1993, in *Baehr v. Lewin*, that refusing to permit same-sex couples to marry was a form of sex discrimination that should be given strict scrutiny under the state constitution. Although the state of Hawaii failed on remand to prove a compelling justification for excluding same-sex couples from civil marriage, -- a result that would have led to the legalization of same-sex marriage -- the outcome was eventually mooted by an amendment to the state constitution giving the Hawaiian legislature the power to ban same-sex marriage, which it subsequently did.

Even though same-sex marriage never materialized in Hawaii, the state’s impact on the national landscape was tremendous. As *Baehr* proceeded on remand, all eyes were on Hawaii. Attention was naturally drawn there, given the social importance of the same-

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62 See, e.g., ARIZ. REV. CODE § 25-101(C) (2004) (“Marriage between persons of the same sex is void and prohibited.”)
63 See, e.g., CODE OF ALA. § 30-1-19(e) (2004) (“The State of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license was issued.”)
64 The Kentucky code, for example, states not only that a “marriage between members of the same-sex which occurs in another jurisdiction shall be void in Kentucky,” but also that “[a]ny rights granted by virtue of the marriage, or its termination, shall be unenforceable in Kentucky courts.” See K.R.S. § 402.045 (1), (2) (2004). The eight other states are: Alaska, Florida, Georgia, Kentucky, Louisiana, Minnesota, Missouri, Virginia, and West Virginia.
65 See NEB. CONST. ART. 1, § 29; KANSAS CONST. __ (adopted 2005). The Nebraska provision was recently invalidated by a federal district court on constitutional grounds. See Citizens for Equal Protection, Inc. v. Bruning, No. 4:03CV3155 (D. Neb. May 12, 2005).
66 Those states are: Massachusetts, New Jersey, New Mexico, New York, Rhode Island, and Wisconsin.
67 See N.Y. Att’y Gen. Informal Op. No. 2004-1 (Mar. 3, 2004); see also Georgina G. v. Terry M., 516 N.W.2d 678, 680 n.1 (Wis. 1994) (noting that existing statute, which refers to “husband” and “wife” prohibits same-sex marriage). Rhode Island also has a “clean” slate, but the state’s attorney general declined the opportunity to opine on whether the state’s marriage law could be interpreted to permit or prohibit same-sex marriage. See State of Rhode Island, Department of Attorney General, Press Release, *Attorney General Lynch’s statement concerning same-sex marriage*, May 17, 2004. An intermediate court of appeals in New Jersey has held that a ban on same-sex marriage does not violate the state constitution see Lewis v. Harris, No. A-2244-03T5 (N.J. App. Div. June 14, 2005), but the ruling will be appealed to the state’s highest court.
70 See HAW. CONST. art. I, § 23 (adopted 1998) (“The Legislature shall have the power to reserve marriage to opposite-sex couples.”) The legislature exercised the power of the amendment and specified that a marriage “shall be only between a man and a woman.” See H.R.S. § 572-1 (2003).
sex marriage issue, but the intensity of the focus was fueled by the intervening debate about and enactment of the federal Defense of Marriage Act (DOMA) in 1996.  
Hawaii’s impact on both federal and, eventually state law was exacerbated by the perceived full faith and credit threat. This idea that recognition of Hawaii same-sex marriages by other states would be both compelled and automatic, initially asserted primarily in student law review notes and media reports, was made by both opponents and proponents of same-sex marriage. For proponents, the claim represented both wishful thinking and a component of their strategy to gain marriage rights nationwide. For opponents of same-sex marriage generally, this assertion galvanized forces, imposed time pressure on states to protect themselves, and provided powerful rhetoric to trigger legislative reactions. 
Within the specific context of the Defense of Marriage Act, the assertion gave opponents the ability to argue for passage of the law on grounds of federalism -- to stop Hawaii’s purported ability to export its national marriage policy over the objection of sister states over their ardent objections -- rather than having to assume an express anti-gay-rights or even a pro-traditional-marriage platform. In the debate over DOMA, the full faith and credit claim provided the legal predicate necessary to justify Congressional intervention. Senator Trent Lott, for example, argued that if a decision affected only Hawaii, we could leave it to the residents of Hawaii to either live with the consequences or exercise their political rights to change things. But a court decision would not be limited to just one State. It would raise threatening possibilities in other States because of [the Full Faith and Credit Clause].

Many other voices in Congress echoed Lott’s observation about Hawaii’s imperialist power. Representative McInnis warned that: “What this country does not want is for one State out of 50 States, that is, specifically the State of Hawaii, to be able to mandate its wishes upon every other state in the Union.” To “run the risk that a single judge in Hawaii may re-define the scope of legislation throughout the other forty-nine states,” cautioned Hawaii State Legislator Terrence Tom, a witness before a Congressional subcommittee, would be “a dereliction of the responsibilities Congress

72 Patrick Borchers, Baker v. General Motors: Implications for Inter-Jurisdictional Recognition of Non-Traditional Marriages, 32 CREIGHTON L. REV. 147, 152-53 (1998); see also Borchers, Essential Irrelevance, supra note x, at 353 (describing the assertion as proof that “[s]ometimes ideas gain momentum through repetition”). Professor Larry Kramer published a scholarly article arguing that full faith and credit affects interstate marriage recognition, but he does not take the view that recognition is automatic. He argues, instead, that because there is an equality aspect to Full Faith and Credit, a state cannot single out same-sex marriages for non-recognition. See Larry Kramer, Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception, 106 YALE L.J. 1987, 1980 (1997). Even this narrower view, however, is not shared by most scholars.
73 See Borchers, supra note x, at 185 (“both the proponents and opponents of same-sex marriage have apparently assumed that the Clause has a large role in [the same-sex marriage] question”).
was invested with by voters.”\textsuperscript{76} Section Two of DOMA responds directly to this perceived “threat” by encouraging states to ignore same-sex marriages celebrated in Hawaii.

Those who opposed DOMA did not necessarily disagree with the characterization of the effect of full faith and credit on same-sex marriages. The late Representative Patsy Mink, for example, agreed “laws of one State must be given ‘full faith and credit’ by every other State,” but insisted that “Congress should not be enacting any bill to declare otherwise.”\textsuperscript{77}

The imminence of the threat was a recurring theme in the debate over DOMA, but the legal predicate was only half the story. The factual predicate necessary to make the legal predicate relevant played an important role as well. Represented Largent captured the lurking concern:

Quite simply, the legal ramifications of what the State Court of Hawaii is about to do cannot be ignored. Couples will fly to Hawaii, marry, and then go back to their respective States and argue that the full faith and credit clause of the U.S. Constitution requires their home State to recognize their union as a marriage.\textsuperscript{78}

These predictions about the likely behavior of same-sex couples was not entirely unjustified. Same-sex marriage activists indeed conceived of this exact scenario as part of the broader strategy to obtain marriage rights nationwide.\textsuperscript{79} Oft cited by members of Congress in the debate over DOMA was a memo authored by Evan Wolfson, director of the Marriage Project of the Lambda Legal Defense and Education Fund, which stated: “Many same-sex couples in and out of Hawaii are likely to take advantage of what would be a landmark victory. The great majority of those who travel to Hawaii to marry will return to their homes in the rest of the country expecting full recognition of their unions.”\textsuperscript{80} This “plan” was cited frequently in Congressional debates and galvanized support for the idea that Hawaii’s same-sex marriages would be immediately and relentlessly thrust upon other states – and the Full Faith and Credit Clause would leave states defenseless to the onslaught.\textsuperscript{81}

\section*{B. Full Faith and Credit and Marriage Laws}


\textsuperscript{77} 142 CONG. REC. H. 7481 (July 12, 1996) (statement of Rep. Mink).

\textsuperscript{78} 142 CONG. REC. H. 7276 (July 11, 1996) (statement of Rep. Largent). DOMA’s senate sponsor, Don Nickles, concurred: “It has become clear that advocates of same-sex unions intend to win in the lawsuit in Hawaii and then invoke the Full Faith and Credit Clause to force the other 49 states to accept same-sex unions.” Statement of Sen. Nickles, S. 1740, July 11, 1996.

\textsuperscript{79} See Borchers, \textit{supra} note x, at 149 (“The Clause was seized upon almost immediately by advocates of same-sex marriages to argue that if a same-sex couple were to get married in Hawaii, every other state would have to treat the couple as married because a marriage is a “public Act” or “Record” or “judicial proceeding.””).

\textsuperscript{80} EVAN WOLFSON, FIGHTING TO WIN AND KEEP THE FREEDOM TO MARRY: THE LEGAL, POLITICAL, AND CULTURAL CHALLENGES AHEAD (available at http://www.ibiblio.org/gaylaw/issue2/wolfson.html).

\textsuperscript{81} See, e.g., 142 CONG. REC. 7484 (July 12, 1996) (statement of Rep. Sensenbrenner). The same argument was made about the impact of Hawaii’s marriage laws on federal law, only there, the point was more salient. Since federal statutes and rules routinely defer to state definitions of “marriage” and “spouse” in assigning federal burdens and benefits, it might well have been more automatic in some contexts for a Hawaii same-sex marriage to earn federal, as opposed to interstate, recognition.
Since same-sex marriage never became legal in Hawaii, it is hard to assess the accuracy of the factual predicate upon which DOMA was based. The legal predicate, however, was at best exaggerated, at worst a complete fiction. The thrust of DOMA in Congressional rhetoric was to alleviate the existing, binding obligation of states under the Full Faith and Credit Clause to recognize each other’s marriages. Article IV of the federal constitution provides that “Full Faith and Credit shall be given in each state to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” Pursuant to the second sentence, the “Effects Clause,” Congress enacted the Full Faith and Credit Act, a federal statute designed to implement the constitutional mandate. The Act provides that acts, records, and judicial proceedings “shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State . . . from which they are taken.” Technically speaking, DOMA amended the Full Faith and Credit Act to make clear that same-sex marriages need not be given any effect under either the Clause or the statute. Of course, the same was almost certainly true before DOMA.

Historically speaking, over the long history of variations among and conflicts between state marriage laws, full faith and credit principles have never been understood to compel one state to recognize another’s marriage. Indeed, the spectre of the clause has hardly been raised in the context of marriage recognition. One explanation for this is that the Supreme Court has reserved the “exacting” obligations of full faith and credit for final judgments in judicial proceedings. Historical conflicts over migratory divorce, perennially more hard-fought and contentious than conflicts over evasive marriage, ground to a halt, in fact, through the Supreme Court’s insistence on these “exacting” obligations. The Court held, in its 1942 decision in *Williams v. North Carolina*, that states were compelled to recognize divorces from every state provided certain minimal due process requirements were met. But marriage is neither a judgment nor the product of a judicial proceeding.

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82 Even though Massachusetts has since legalized same-sex marriage, the behavior patterns of same-sex couples still cannot be measured because Massachusetts has refused to issue marriage licenses to non-residents under its marriage evasion law. See infra text accompanying notes x – x.
83 U.S. CONST. art IV.
85 See, e.g., Borchers, supra note x, at 180 (“To the extent that DOMA provides that states are under no constitutional obligation to recognize a marriage license issued by another state to a same-sex couple, it is an utterly unremarkable statute. In fact, it was utterly unnecessary.”).
86 See, e.g., Baker v. General Motors Corp., 522 U.S. 222, 233 (1998); see also Fauntleroy v. Lum, 210 U.S. 230, 234 (1908) (requiring Mississippi to give full faith and credit to a Missouri judgment to enforce a futures contract despite a Mississippi statute declaring that such a contract “shall not be enforced by any court”).
87 317 U.S. 287 (1942) (*Williams I*) (ruling that North Carolina must recognize a divorce granted by a Nevada court to two North Carolina residents).
88 See id. at 319. The Court’s original ruling was softened some by a later ruling in the same case, which allowed North Carolina to make its own determination as to whether Nevada’s jurisdictional requirements had been met. See Williams v. North Carolina, 325 U.S. 226, 229 (1945) (*Williams II*). It was undermined further by *Estin v. Estin*, 334 U.S. 541 (1948), a case in which the Court held that while a New York had to honor a Nevada divorce with respect to determining the marital status of the parties, it did not have to
For state law not embodied in judgments, full faith and credit principles set only “certain minimum requirements which each state must observe when asked to apply the law of a sister state.” The minimum requirements, discussed in detail below, are simply that a state may choose not to defer to another state’s law as long as it has “a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.” An alternative explanation for the lack of full faith and credit analysis in questions of marriage recognition is that marriage is not an “act” within the meaning of the Full Faith and Credit Clause, principles, in which case it does not operate even to set minimum requirements.

Regardless of the explanation, the historical practice and precedent for over two hundred years has been to decide questions of marriage recognition without invoking full faith and credit principles to dictate the answer. Courts instead have applied either general principles of comity or specific conflict of laws principles to determine whether to grant or refuse recognition to a prohibited out-of-state marriage. The fact that the Full Faith and Credit Clause has not been invoked in the marriage context does not mean that it could not be. It might be, as Justice Robert Jackson speculated in a 1945 address, that “[g]enerosity in applying foreign law no doubt has forestalled pursuit of many questions as constitutional ones under the full faith and credit clause.”

Indeed, much paper has been devoted to the subject in the last decade, but most scholars agree, as a matter of constitutional theory and interpretation, that states are not compelled under the Full Faith and Credit Clause to honor a marriage that undermines a

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90 Phillips Petroleum v. Shutts, 472 U.S. 797, 818 (1985) (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981); see also Williams v. North Carolina, 317 U.S. 287, 298 (1942) (principles of full faith and credit “do[] not ordinarily require [a state] to substitute for its own law the conflicting laws of another state, even though that law if of controlling force in the courts of that state with respect to the same persons and events”); Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 436 (1943) (“[E]ach of the states of the Union has constitutional authority to make its own law with respect to persons and events within its borders.”); Phillips Petroleum, 472 U.S. at 823 (“[I]n many situations a state court may be free to apply one of several choices of law.”)
91 See, e.g., Defense of Marriage Act: Hearings Before the Senate Committee on the Judiciary, 104th Cong., S. 1740 (July 11, 1996) (statement of Cass R. Sunstein) (considering various explanations for the prior lack of application of full faith and credit principles to marriages). But see ROBERT H. JACKSON, FULL FAITH AND CREDIT: THE LAWYER’S CLAUSE OF THE CONSTITUTION 19 (1945) (noting that the “Constitution by use of the term ‘public acts’ clearly includes statutes”). One issue never addressed in the debate over DOMA is the possibility that foreign countries might recognize same-sex marriages as well. Full faith and credit principles clearly do not apply to such marriages. See Kramer, supra note x, at 1987-90; Kay, supra note x, at 74 (noting that states “are free to grant or deny recognition to foreign country same-sex marriages simply by invoking its local public policy on a case-by-case basis without fear of contrary direction from the Full Faith and Credit Clause”).
92 Cf. JACKSON, supra note x, at 23 (noting that “[q]uestions of faith and credit in matrimonial relations have usually come up only as to the effect of judgments”); see also text accompanying notes x – x infra (detailing historical approach to marriage recognition). Exceptions to this characterization are virtually nonexistent. But see Succession of Hernandez, 46 La. Ann. 962 (1894).
93 See infra text accompanying notes x – x.
94 JACKSON, supra note x, at 30; see id. at 29-30 (“The states themselves have sought in general to attain a greater measure of uniformity in private law than Congress or the federal courts have sought to impose.”)
strong public policy of the state.\textsuperscript{95} Although states must honor divorces they abhor, because of the strict approach to full faith and credit in the context of judgments, they need not necessarily honor states laws, or marriages that those laws permit.

Assuming a particular marriage ban is not itself unconstitutional,\textsuperscript{96} courts have thought themselves free to refuse recognition to an out-of-state marriage if necessary to protect a state’s strong public policy.\textsuperscript{97} Indeed, one of the first appellate cases brought seeking out-of-state recognition of a Vermont civil union, \textit{Rosengarten v. Downes},\textsuperscript{98} followed this approach. The \textit{Rosengarten} court considered but rejected the plaintiff’s claim that his Vermont status must be granted Full Faith and Credit by Connecticut courts.\textsuperscript{99} The court interpreted Article IV only to require recognition if consistent with the “forum’s own interest in furthering its public policy.”\textsuperscript{100} A federal court in Florida rejected the same claim, made in reference to a Massachusetts marriage.\textsuperscript{101} Although a federal court recently invalidated Nebraska’s mini-DOMA, it did so on grounds unrelated to full faith and credit. The Court in \textit{Citizens for Equal Protection, Inc. v. Bruning},\textsuperscript{102} held that the state’s broad constitutional amendment, which refuses recognition to a same-sex relationship in any form, violated the First Amendment, the Fourteenth

\textsuperscript{95} \textit{See generally} Koppelman, \textit{supra} note x (arguing that Full Faith and Credit does not mandate recognition of out-of-state marriages in all circumstances); F.H. Buckley & Larry E. Ribstein, \textit{Calling a Truce in the Marriage Wars}, 2001 U. ILL. L. REV. 561, 603-06 (arguing that the Constitution does not restrain the right of a state to refuse enforcement to a marriage celebrated elsewhere); Borchers, \textit{supra} note x (arguing that Full Faith and Credit does not require states to recognize marriages from other states); Jeffrey L. Rensberger, \textit{Same-Sex Marriages and the Defense of Marriage Act: A Deviant View of an Experiment in Full Faith and Credit}, 32 CREIGHTON L. REV. 409 (1998); Singer, \textit{supra} note x, at ___ (noting that it is “a hard case to make under conventional principles of constitutional law” that one state must recognize a same-sex marriage from another state). The irrelevance of full faith and credit to marriage recognition questions is currently being pressed in a case before the Massachusetts Supreme Judicial Court challenging the validity of the state’s marriage evasion law. \textit{See Brief Amicus Curiae of Professors of Conflict of Laws and Family Law, Cote-Whitacre v. Dep’t of Public Health, No. SJC-9436}. 96 A state could not, for example, refuse recognition today to an interracial marriage on grounds of a public policy against it because such a policy would violate the Fourteenth Amendment. Likewise, were the Supreme Court to hold bans on same-sex marriage unconstitutional, a state could not refuse recognition to them either.

\textsuperscript{97} \textit{See generally} \textit{GEORGE W. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS} 262 (1937) (“[M]ost courts have felt free to hold a marriage invalid when it runs counter to what is regarded as a particularly strong policy at the domiciliary forum.”); see also \textit{JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS} § 113a (8th ed. 1873) (noting the power of states to refuse recognition for marriages “positively prohibited by the public law of a country from motives of policy”).

\textsuperscript{98} 802 A.2d 170, 174-75 (Ct. App. Conn. 2002).

\textsuperscript{99} \textit{Id.} at 179.

\textsuperscript{100} \textit{Id.} at 386.

\textsuperscript{101} \textit{See} Wilson v. Ake, 354 F. Supp. 2d. 1298 (2005) (rejecting Full Faith and Credit claim). The court in \textit{Langan v. St. Vincent’s Hospital}, 765 N.Y.S. 2d 411, 419 (N.Y. Sup. Ct. 2003), discussed \textit{infra}, refers to “full faith and credit and comity” as the justifications for recognizing a Vermont civil union. But nothing in the reasoning or citations suggests that the clause itself was being invoked to compel recognition. Likewise, a trial court in Massachusetts has suggested in dicta that the Full Faith and Credit Clause might require states to recognize out-of-state marriages unless they have a strong public policy against the union. But since the court was weighing recognition of a civil union rather than a marriage, it refused to apply those principles. \textit{Salucco v. Aldredge}, 17 Mass. L. Rptr. 498 (Mass. Super. Ct. Mar. 19, 2004)

\textsuperscript{102} No. 4:03CV3155 (D. Neb. May 12, 2005).
Amendment, and constituted an unlawful Bill of Attainder.\textsuperscript{103} Had the provision merely refused recognition to same-sex marriages elsewhere, the opinion implies such a provision would have been found valid.\textsuperscript{104}

Why did something essentially irrelevant to the issue of marriage recognition become the focal point of the debate? Voices on the floor of Congress did raise the point that full faith and credit has never been instrumental to marriage recognition cases. Representative Nadler, for example, pointed out that states traditionally possessed the ability to refuse recognition to certain out-of-state marriages, and decried DOMA as “a fraud on the American people” for suggesting otherwise.\textsuperscript{105} Others argued that if Full Faith and Credit does apply to marriage, then DOMA is unconstitutional since Congress does not have the power unilaterally to amend a provision of the constitution. And if it does not apply, they argued, the statute accomplishes nothing. Representative Studds suggested, for example, that DOMA is: “absolutely meaningless. Either under the Constitution the States already have that right, in which case we do nothing, or they do not, in which case we cannot do anything because it is a constitutional provision.”\textsuperscript{106} Noted constitutional law scholar Cass Sunstein agreed, testifying that DOMA is “probably either pointless or unconstitutional.”\textsuperscript{107} He described the scenario in which couples from all over the country would fly to Hawaii, fly home and successfully demand recognition under the Full Faith and Credit clause as “unlikely, for the full faith and credit clause has never been understood to bind the states in this way.”\textsuperscript{108} Laurence Tribe also noted that, with respect marriages that had traditionally been denied recognition, “the proposed federal legislation would be entirely redundant and indeed altogether devoid of content.”\textsuperscript{109}

Other academics testifying before Congress expressed similar views – that states would not in fact be required to recognize marriages under full faith and credit principles, particularly if the state had a significant stake in the relationship and a strong public policy against the particular union. Professor Lynn Wardle, for example, testified that a “state constitutionally could refuse to recognize the same-sex marriage if it chose to do so, or it could recognize the same-sex marriage, if it chose to do so. The Full Faith and Credit Clause would not compel the state either way.”\textsuperscript{110} Wardle did warn of the factual

\textsuperscript{103} Id. at __.
\textsuperscript{104} Id. at __.
\textsuperscript{107} Defense of Marriage Act: Hearings Before the Senate Committee on the Judiciary, 104th Cong., S. 1740 (July 11, 1996) (statement of Cass R. Sunstein). Much of the discussion of DOMA had this flavor. As Professor Patrick Borchers describes the debate about DOMA: “Its proponents alternately claimed that it would do nothing and that it would do something. Its opponents alternately claimed that it would do nothing and that it would do something.” Borchers, \textit{supra} note x, at 179-80 (citations omitted).
\textsuperscript{108} Defense of Marriage Act: Hearings Before the Senate Committee on the Judiciary, 104th Cong., S. 1740 (July 11, 1996) (statement of Cass R. Sunstein). Sunstein argued that states have always exceptions to a general policy of recognition, and “[t]here is no Supreme Court ruling to the effect that this view violates the full faith and credit clause.” \textit{See id.}
\textsuperscript{109} 142 CONG. REC. S5931-01 (June 6, 1996) (written statement of Laurence H. Tribe).
\textsuperscript{110} \textit{See}, e.g., \textit{Defense of Marriage Act: Hearings on H. R. 3396 Before the Subcomm. on the Constitution}, 104th Cong. (May 15, 1996) (statement of Lynn V. Wardle). In his testimony, Wardle states that he does not believe it would “violate the full faith and credit clause of article IV, Section I of the Constitution for a
predicate – that proponents would seek to compel recognition under principles of full faith and credit – but did not believe their claims would be successful. Noted conflicts and family law scholar Herma Hill Kay submitted a letter stating that the “usual conflict of laws doctrine governing the recognition of a marriage performed in another state is that the state where recognition is sought need not recognize a marriage that would violate its public policy.”

The irrelevance of full faith and credit was brushed to the side, and DOMA was signed into law by a ready-and-waiting President Clinton fewer than four months after it had first been introduced.

Beyond DOMA, the purported “threat” posed by full faith and credit principles has played other roles in legislative and public policy debates. The fear of a domino effect was renewed in 2003 when the Massachusetts Supreme Judicial Court, in its Goodridge decision, gave the legislature 180 days to make same-sex marriage available in the state. President Bush reiterated calls for an amendment to the federal constitution to ban same-sex marriage and, in doing so, alluded to the full faith and credit problem.

Only now, the threat is articulated somewhat differently: it exists only if DOMA is successfully challenged. Were that to happen, opponents claimed, then states would, once again, be compelled by the Full Faith and Credit Clause to recognize a same-sex marriage recognized by a sister state. The Senate thus introduced and debated the Federal Marriage Amendment (FMA), which provided that:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.

The debate over the FMA involved different arguments than the DOMA debates eight years earlier, but the underlying premise was the same: the Full Faith and Credit Clause gives one state the potential to dictate marriage policy for the nation. Thus the focus of the FMA debate was the possibility or even likelihood that DOMA would be invalidated by a court, leaving states again vulnerable to the wrath of full faith and credit.

second state to refuse to recognize a same-sex marriage legalized in Hawaii when the second state has a strong public policy against same-sex marriage . . . ”

111 See Testimony of Wardle, supra note x.


113 See 104 Bill Tracking H.R. 3396.

114 President Bush continues to voice these concerns to justify an amendment to the federal constitution banning same-sex marriage. See, e.g., Remarks by the President, President Calls for Constitutional Amendment Protecting Marriage, Feb. 24, 2004 (calling for a constitutional amendment at least in part to prevent full faith and credit principles from mandating recognition of same-sex marriages by states other than Massachusetts).

115 See, e.g., id. (noting concern about uncontrollable behavior of an “activist judge”).


117 See 150 CONG. REC. S7925 (daily ed. July 12, 2004) (statement of Sen. Brownback) (“Federal judges will likely rule DOMA unconstitutional under the doctrine of full faith and credit, and marriages recognized in one State will be required to be recognized in all”); 150 CONG. REC. S7925 (statement of Sen. Santorum); see also Andrew Koppelman, Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional, 83 IOWA L. REV. 1 (1997).
But since the FMA has yet to make any substantial progress towards enactment,\(^{118}\) same-sex marriage opponents sought other means to insulate states from compelled recognition of Massachusetts’ marriages. The House of Representatives passed the Marriage Protection Act (MPA) shortly after the FMA failed to reach a vote in the Senate in July 2004. If enacted into law, the MPA would strip federal courts, including the Supreme Court, of jurisdiction to hear any case relating to DOMA or the MPA itself.\(^{119}\) As with DOMA, the factual predicate for the MPA is not implausible. Couples will, and indeed already have,\(^{120}\) challenged the validity of DOMA and its state analogs and have argued that full faith and credit principles compel states to recognize same-sex marriages from other states.\(^{121}\)

The legal predicate – that DOMA could be declared invalid – is also not implausible. Some scholars have argued that DOMA is invalid because it exceeds Congress’ authority under the Full Faith and Credit Act,\(^{122}\) or, more persuasively, because it violates principles of due process and equal protection guaranteed by the federal constitution.\(^{123}\) But even without DOMA, the underlying full faith and credit principles are still unlikely, for the reasons discussed above, to come into play.

III. The Traditional Approach to Marriage Recognition: The Principle of Comity

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\(^{120}\) Until Massachusetts began to permit same-sex couples to marry, no one had standing to challenge DOMA.

\(^{121}\) Plaintiffs in the first filed case, Nancy Wilson and Paula Schoenwether, filed a complaint in Florida seeking a declaration that the federal defense of marriage act and the state law prohibiting recognition of a same-sex marriage are invalid. Among other claims, the plaintiffs alleged in their complaint that the federal and state laws precluding recognition of their marriage violated the Full Faith and Credit Clause of the Federal Constitution. “[O]nce Massachusetts sanctioned legal same-gender marriage, all other states should be constitutionally required to uphold the validity of the marriage,” the plaintiffs argued. Wilson v. Ake, 2005 U.S. Dist. LEXIS 755, at *7 (2005) (quoting plaintiffs’ complaint). Plaintiffs in Morrison v. Sadler, 2005 Ind. App. LEXIS 75 (Jan. 20, 2005) made a similar argument in asking a court in Indiana to recognize their Vermont Civil Unions. On appeal, however, plaintiffs dropped their recognition claim, id. at *4 n.2, and challenged only the validity under the Indiana constitution of the state statutes prohibiting them from entering into a same-sex marriage in Indiana. See also Cook v. Cook, 104 P.3d 857, 864 n. 6 (Ariz. App. 2005) (deeming full faith and credit argument waived on appeal in case testing recognition of prohibited first-cousin marriage from out of state).

\(^{122}\) See Kramer, supra note x, at 1987-90 (arguing that the Full Faith and Credit Clause does not permit states to reject laws of other states since “the central object of the Clause was, in fact, to eliminate a state’s prideful unwillingness to recognize other states’ laws or judgments on the ground that these are inferior or unacceptable”); see also Barbara Cox, Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?, 1994 Wis. L. Rev. 1033 (arguing that states are constitutionally obligated to honor same-sex marriages because validation serves the “better rule of law”). On the meaning of the “effects” clause, see generally Douglas Laycock Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law, 92 COLUM. L. REV. 249 (1992).

In reacting to the threat of same-sex marriage, states protected themselves from a hypothetical risk of compelled recognition, but at a substantial cost. Most states also lost the ability to grant recognition in individual cases, something, historically, they were much more inclined to do than refuse it. The rush to judgment by Congress and the states preempted a full discussion not only about the proper role of full faith and credit principles – a conversation that has yet to occur -- but also about how states ought to approach the marriage recognition questions raised by the legalization of same-sex marriage in one or more jurisdictions. This section considers the traditional treatment of marriage recognition by American courts, state legislatures, and in treatises.

A. The General Rule of Recognition

Varied marriage laws gave rise to predictable conflicts about the portability of marriage. The principle of comity—“courtesy among political entities”—was the historical touchstone for analyzing marriage recognition questions. All jurisdictions followed some version of lex loci contractus in evaluating the validity of a marriage. Under this general rule, often referred to as the “place of celebration” rule, a marriage was valid everywhere if valid where celebrated, and, concomitantly, void everywhere if void where celebrated. It was, according to a 1902 treatise on domestic relations, “the universal practice of civilized nations, [that] the permission or prohibition of particular marriages, of right belongs to the country where the marriage is to be celebrated.” Enforcement of this general rule was called for by “public policy, common morality, and the comity of nations.”

B. Exceptions to the General Rule of Recognition

While the place-of-celebration rule generally meant that out-of-state marriages would be recognized, even if they could not have been contracted within the forum state, there were certain well-established exceptions.

1. Categorical Exceptions

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124 See James Schooler, Law of the Domestic Relations 46 (1874) (“In England, such cases do not often come before the courts; but with us they are very common, the more so as each State adopts its own system concerning marriage and divorce.”); Joseph R. Long, Law of Domestic Relations (1905) (Every nation and every state and territory of the Union have their own peculiar laws regulating this important institution, and the differences in these laws have given rise to many cases in conflict of laws.”)
126 See, e.g., Schooler, supra note x, at 47 (describing the rule of recognition as “the rule of comity”).
127 This rule originated with Joseph Story, who stated in his treatise on conflicts that “the general principle certainly is . . . that . . . marriage is to be decided by the law of the place where it is celebrated.” See Story, supra note x, at § 113.
128 See, e.g., Long, supra note x, at 86 (“A marriage valid where celebrated is valid everywhere, and, conversely, a marriage invalid where celebrated is invalid everywhere.”); Morland, supra note x, at 16 n.59 (collecting state cases reflecting place of celebration rule); Walter C. Tiffany, Handbook of the Law of Persons and Domestic Relations 45 (1896) (“It is well settled that, as a general rule, the validity of a marriage is to be determined by the law of the place where it is entered into.”); Browne on Domestic Relations 12 (2d rev. ed. 1890).
129 See, e.g., Joel Prentiss Bishop, 1 Bishop on Marriage and Divorce 307 (1881) (“if the transaction is not regarded by the law there prevailing as a marriage, it will not be deemed such in any other country); Schooler, supra note x, at 48 (“A marriage invalid where celebrated is as a rule invalid everywhere.”). F.W. Battershall, The Law of Domestic Relations of the State of New York 17 (1902) (summarizing principle enunciated in Haviland v. Halstead, 34 N.Y. 643 (1866))
130 See Schooler, supra note x, at 46-47.
The first categorical exception to the rule of recognition, the so-called “universal” exception, was reserved for marriages thought to violate natural law. Polygamous and certain incestuous marriages fell into that category, though not all incestuous marriages fit the bill. According to one 1896 treatise, “no court in this country would uphold a bigamous marriage or an incestuous marriage between brother and sister, though they might be valid in the country in which they were entered into.” Marriages between ancestor and descendant were also universally taboo. Since all states prohibited this narrower class of incestuous marriages, there were few if any cases refusing recognition to a marriage on those grounds. The few cases that did arise tended to involve uncle – niece marriages, which were arguably justifiable either because Jewish law permitted them or because, although prohibited, they were not abhorrent because of the distance of the relation.

With respect to polygamous marriages, the main issue was whether to recognize potentially polygamous unions – the first marriage celebrated under laws that would permit subsequent ones – or only marriages that were in fact polygamous. There were few cases testing the principle, but those few suggest that only actual polygamy fell

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132 See, e.g., Commonwealth v. Graham, 31 N.E. 706, 707 (Mass. 1892) (citing as an exception to the general rule of recognition a marriage “deemed contrary to the law of nature, as generally recognized in Christian countries”); see also TIFFANY, supra note x, at 46 (stating that marriages will not be recognized by a state it is “opposed to its morality, religion, or municipal institutions”); HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 74 (1968) (noting the exception to the place of celebration rule if they were “incestuous according to the general consent of fall Christendom”).

133 See MORLAND, supra note x, at 20 (noting that polygamous and “incestuous or unnatural marriages” will “not be upheld”); LONG, supra note x, at 87 (noting an exception for “marriages repugnant to the moral sense of Christendom, of which the only recognized examples are polygamous and incestuous marriages”).

134 See, e.g., Commonwealth v. Lane, 113 Mass. 458 (1873) (noting with approval a case in Massachusetts recognizing an English marriage between aunt and nephew on the principle that the place of celebration rule should apply to “marriages not naturally unlawful, but prohibited by the law of one state, and not of another”).

135 See TIFFANY, supra note x, at 46; LONG, supra note x, at 88 (noting that the exception for incestuous marriages “includes only persons in the direct line of consanguinity and brothers and sisters”); see also Commonwealth v. Lane, 113 Mass. 458 (1873).

136 See P.H. Vartanian, Recognition of Foreign Marriage as Affected by Policy in Respect of Incestuous Marriages, 117 A.L.R. 186, 190 (1938) (noting that exception applies to incestuous marriages “according to the standards of morality generally prevailing in Christendom,” which includes direct line ancestors and descendants and brothers and sisters).

137 See Vartanian, supra note x, at 187 (“No case has been found, decided in the United States, in which nonrecognition of a marriage valid by the lex loci, but made incestuous by the local law of the state in which its validity is brought into question. . . .”).

138 See, e.g., R.I. GEN. LAWS tit. 24, ch. 243, §§ 4, 9 (1953) (creating exception for certain prohibited marriages for any “which shall be solemnized among the Jews, within the degrees of affinity or consanguinity allowed by their religion”). The New York Court of Appeals, in In re May’s Estate, 114 N.E.2d 4, 7 (N.Y. 1953), refused to apply the universal incest exception to an uncle-niece marriage validly celebrated under this Rhode Island statute since it “was not offensive to the public sense of morality to a degree regarded generally with abhorrence and thus was not within the prohibitions of natural law.”

139 See, e.g., Mazzolini v. Mazzolinni, 155 N.E.2d 206, 209 (Ohio 1958) (recognizing marriage of first cousins prohibited in Ohio but celebrated in Massachusetts); Etheridge v. Shaddock, 706 S.W.2d 395, 396 (Ark. 1986) (upholding evasive first-cousin marriage celebrated in Texas); Staley v. State, 131 N.W. 1028, 1029-1030 (Neb. 1911) (permitting man to be charged with bigamy even though first “marriage” was to first cousin in violation of domicil law).
within the exception. \textsuperscript{140} Despite the vehement opposition to interracial marriages \textsuperscript{141} they were seldom conceived of as part of this category. \textsuperscript{142} Some courts and commentators did, however, include marriage by an “imbecile” within the natural law exception. \textsuperscript{143}

The second categorical exception to the place-of-celebration rule involved legislative enactments specifically declaring certain marriages invalid or void as against public policy. \textsuperscript{144} This exception provides the origin for the notion of a “public policy exception” to marriage recognition. \textsuperscript{145} As conventionally understood, it referred to a public policy expressly declared by statute as opposed to a general public policy of the state. Courts and legislatures tended to agree that such an exception should be recognized, but disagreed, predictably, as to which marriages violated “public policy.” \textsuperscript{146}

The most common application of this exception concerned evasive marriages – where citizens defy their own state’s restrictions by going elsewhere to marry and then returning home. (Evasive marriages exist because states have traditionally not imposed a residency requirement on marriage as they have on divorce.) As one court noted, a state “has the power to declare that marriages between its own citizens contrary to its established public policy shall have no validity in its courts, even though they be celebrated in other states, under whose laws they would ordinarily be valid.” \textsuperscript{147} All states agreed that “where the

\textsuperscript{140} See P.H.V., Recognition of Foreign Marriage as Affected by the Conditions or Manner of Dissolving it Under the Foreign Law, or the Toleration of Polygamous Marriages, 74 A.L.R. 1533, 1534-35 (1931).

\textsuperscript{141} See generally Andrew Koppelman, Same-Sex Marriage and Public Policy: The Miscegenation Exception, 16 QUINNIPIAC L. REV. 105 (1996).

\textsuperscript{142} See, e.g., Medway v. Needham, 16 Mass. 157, 161 (1819) (distinguishing interracial marriages, which were prohibited by the Massachusetts code, from other prohibited marriages that “would tend to outrage the principles and feelings of all civilized nations”); Vernier, supra note x, at 204-05 (“The peculiarly geographic distribution of statutes prohibiting racial intermarriage forces one to conclude . . . that such legislation is not based primarily upon physiological, psychological, or other scientific bases, but is for the most part the produce of local prejudice and of local effort to protect the social and economic standards of the white race.”)

\textsuperscript{143} See, e.g., Schouler, supra note x, at 48 (noting an exception to the place of celebration rule for “marriages of such as are mentally and physically incapable”); Tiffany, supra note x, at 46 (“Nor will the lex loci prevail if it recognizes as valid a marriage entered into by an imbecile.”); True v. Ranney, 21 N.H. 52 (1850) (refusing to apply place of celebration rule to recognize marriage by an imbecile).

\textsuperscript{144} See, e.g., Long, supra note x, at 88-89 (noting exception for “marriages which have been declared by statute to be void because contrary to the public policy of the state”); Battershall, supra note x, at 17; see also Van Voorhis v. Britnell, 86 N.Y. 18 (1881); see also Morland, supra note x, at 20 (noting, as an exception to the place of celebration rule, “Marriages which the legislature of a state has declared shall not be allowed any validity because they are contrary to the policy of its law”); Restatement (First) of Conflicts of Laws § 132(d) (1934) (permitting refusal of recognition for the “marriage of a domiciliary which a statute at the domicil makes void even though celebrated in another state”); see also Commonwealth v. Graham, 31 N.E. at 707 (noting an exception to the place of celebration rule if the state “statutes declare such a marriage void”).

\textsuperscript{145} It is often described as an exception to full faith and credit, but it is more properly understood as an exception to the general common-law principles of recognition.

\textsuperscript{146} See, e.g., Long, supra note x, at 89 n.10 (noting that northern states might be more inclined to validate a prohibited interracial marriage because of the fewer numbers of them, while a southern state might form a public policy against recognition because of the greater threat).

\textsuperscript{147} Lanham v. Lanham, 117 N.W. 787, 788 (Wis. 1908) (emphasis added) (exempting from recognition “marriages which the lawmaking power of the forum has declared shall not be allowed validity on grounds of public policy”); see also Wilson v. Cook, 100 N.E. 222 (Ill. 1912) (“[W]here a state has enacted a statute lawfully imposing upon its citizens an incapacity to contract marriage by reason of a positive policy of the
The statute expressly declares that a marriage contracted in another state in evasion of its prohibitions shall be void with the same effect as though contracted in the state of domicile, such marriage will be held void by the courts.”

The Uniform Marriage Evasion Act, promulgated in 1912, dealt, as the title implies, solely with evasive marriages. Certain marriage impediments were uniform across the United States and thus could not be avoided simply by crossing state lines. The uniform law was thus not concerned with “marriages against the law of nature,” but rather with marriages “against the public policy of any state.” By way of example, the Commissioners mentioned marriage “with particeps criminis, with a minor without parental consent, or within a specified time after entry of final decree in divorce, or between a white and a colored person” as restrictions that might produce an evasive marriage elsewhere. The evasion statute was designed to “give full effect to the prohibitory laws of each state by making void all marriages contracted in violation of such prohibitions.” Five states adopted the UMEA, but others adhered to its principles either in an alternative statutory form or through caselaw.

For non-evasive marriages, though, states disagreed about the applicability of the positive law exception to specific prohibited marriages. None took the position that a mere prohibition of a particular type of marriage meant that a court could not grant recognition to the same type of marriage if it was validly celebrated elsewhere. As Joseph Vernier wrote in 1931, “[m]arriages are prohibited for many reasons but are void for few.” To invoke this exception, courts generally required “clear and unmistakable expression in the statute” of the legislature’s intent to deny recognition to the particular state for the protection of the morals and good order of society against serious social evils, a marriage contracted in disregard of the prohibition of the statute, where celebrated, will be void.”; People v. Steere, 151 N.W. 617, 618 (Mich. 1915) (noting an exception from the place of celebration rule for “marriages prohibited from motives of public policy by the public law of the state or country in which they are questioned”).

PROCEEDINGS OF THE TWENTY-SECOND ANNUAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 12 (1912) (annotation to UMEA § 1) [hereinafter 1912 Proceedings]; see also LONG, supra note x, at 91 (noting the view of some courts that an evasive marriage is invalid only if there is a state law expressly providing for that treatment).

See 1912 Proceedings, supra note x, at 127 (Annotation to UMEA § 1). Evasion laws differed in whether they required both parties to be behaving evasively, or only one. The Conference opted for a law invalidating marriages if either party was evading his or her home state’s laws. See id. § 1

Id. at 127.

Id. at 127-28.

Id. at 128.

See 9 U.L.A. at 224, 225 (1923) (noting adoption of UMEA by Illinois, Louisiana, Massachusetts, Vermont, Wisconsin); see also 1994 HANDBOOK, supra note x, at 1350 Table. 4 (noting that UMEA was withdrawn in 1943 and superseded by § 210 of the Uniform Marriage and Divorce Act of 1970).

See, e.g., VERNIER, supra note x, at 209-13 (listing eighteen states with marriage evasion laws on the books in 1931); see also Koppelman, supra note x, at 923 n.2 (collecting modern evasion statutes). See also MORLAND, supra note x, at 18 (“When persons residing in one state, in order to evade the statutes as to prohibited marriages, and with the intention of returning to reside in that state, go into another state and there have the marriage solemnized and afterwards return to and reside in the original state, the marriage is void and may be annulled.”).

VERNIER, supra note x, at 210-11.
category of marriages. But a split developed as to whether a law declaring a particular 
type of marriage to be “void” was sufficient to bring it within the exception, or whether 
the law expressly had to establish a rule of non-recognition. An early English case took 
the former view, and several states followed suit. But others, like New York, 
departed from the English approach and required express language directly addressing 
the recognition question before refusing to acknowledge an out-of-state marriage. As 
the New York Court of Appeals affirmed in 1953: “We regard the law as settled that, 
subject to two exceptions presently to be considered, and in the absence of a statute 
expressly regulating within the domiciliary State marriages solemnized abroad, the 
legality of a marriage between persons . . . is to be determined by the law of the place 
where it is celebrated.”

The latter approach diminished the scope of the positive law exception 
considerably. Most state codes did not explicitly address the proper treatment of 
prohibited marriages solemnized elsewhere and thus could not effectively block 
recognition of the marriages prohibited within their own borders. The Arizona code in 
1939, for example, stated that the “marriage of a person of Caucaison blood with a 
Negro, Mongolian, Malay, or Hindu shall be null and void” and that a “marriage may not 
be contracted by agreement without marriage ceremony.” Prohibiting both interracial 
and common-law marriages was not unusual for the time, but it was far from universal. 
One-third of the states at that time permitted either or both types of marriages. Yet 
Arizona, which did not approve either form of marriage, had no statute declaring that it 
would refuse to recognize such a marriage from another state.

2. Semi-Categorical Exceptions

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156 See, e.g., Pennegar v. State, 10 S.W. 305, 309 (Tenn. 1899) (“It is not always easy to determine what is 
a positive state policy,” since not every provision “of a statute prohibiting marriage, under certain 
circumstances, or between certain parties, is indicative of a state policy” for recognition purposes); Lanham 
v. Lanham, 117 N.W. 787, 788 (Wis. 1908) (observing that when a state gives it laws “extraterritorial 
effect” by refusing to recognize marriages from elsewhere, the “intention to give such effect must, 
however, be quite clear”); In re Loughmiller’s Estate, 629 P.2d 156, 161 (1981) (granting recognition to 
evasive first-cousin marriage since Kansas statute did not expressly address applicability of its prohibition 
to out-of-state marriages); State v. Hand, 126 N.W. 1002, 1002-03 (1910) (intent to preclude recognition 
“cannot be inferred”).

157 Brook v. Brook, 9 H of L. Cases 195 (date); see also 11 Clark and Finnelly 85; see also Unif.
MARRIAGE EVASION ACT, 9 U.L.A. 225 (1923) (annotation) (noting that the English rule was followed in 
California, Georgia, Louisiana, North Carolina, Pennsylvania and Tennessee).

158 See, e.g., Maurer v. Maurer, 60 A.2d 440 (Pa. Super. 1948) (refusing to recognize evasive marriage in 
violation of lifetime remarriage restriction even though Pennsylvania law did not address extraterritorial 
effect by statute); Laikola v. Engineered Concrete, 277 N.W.2d 653, 656 (Minn. 1979) (observing that a 
statute’s declaring a marriage “void” is sufficient to preclude recognition of such a marriage from another 
jurisdiction under the public policy exception).

159 See, e.g., Van Voorhis v. Brintnall, 86 NY 18 (1881); Commonwealth v. Lane, 113 Mass. 458 (1873); In 
re Miller’s Estate, 214 N.W. 428 (1927) (declaring that first-cousin marriages were “void” was insufficient 
to preclude recognition).

160 In re May’s Estate, 114 N.E.2d 4, 6 (N.Y. 1953) (emphasis added); Catalano v. Catalano, 170 A.2d 726 
(Conn. 1961) (refusing recognition to non-evasive, uncle-niece marriage under statute interpreted to mean 
that foreign marriage could only be recognized if it could have been contracted in Connecticut).

161 Ariz. Rev. Stat. §§63-107, 63-111 (1939); see also Statutes of all States and Territories on 
In addition to the categorical exceptions to the place of celebration rule, other patterns of recognition are discernible. Evasive marriage behavior was often relevant to these patterns, even in the absence of an express anti-evasion statute that would bring it within the positive law exception discussed above. Interracial marriages, for example, were often denied recognition if they were evasive in character, but validated if they were non-evasive, even though in both cases the marriage was expressly prohibited by the destination state’s marriage law.\textsuperscript{162} The Supreme Court of North Carolina, for example, recognized a non-evasive interracial marriage celebrated in South Carolina by a couple who lived there but moved to North Carolina a few months after the wedding.\textsuperscript{163} Although the court described the marriage as “revolting to us,” it gave effect to the general place of celebration rule because of the “obligations of comity to our sister States.”\textsuperscript{164} Yet, an evasive interracial marriage was denied recognition by the same court that same year.\textsuperscript{165}

But this approach was not universal, and even evasive interracial marriages were sometimes upheld. The leading case for this view was Medway v. Needham, an 1819 case in which the Supreme Judicial Court of Massachusetts upheld a marriage even though the parties had left their home state of Massachusetts specifically to avoid its anti-miscegenation law and then returned immediately after marrying in neighboring Rhode Island.\textsuperscript{166} Many courts and commentators criticized this ruling, some expressly approved and followed it.\textsuperscript{167} One nineteenth-century treatise noted, for example, that: “It has even been held, in most states, that where the parties go out of the state in which they live, for the purpose of evading its laws . . . the marriage will not be held invalid on their return into the state, if it is valid in the state or country in which it took place.”\textsuperscript{168} But other noted conflicts scholars, including Kent and Story, supported the result in Medway.\textsuperscript{169}

Other types of marriages met with an even greater likelihood of recognition. Common-law marriages were routinely recognized in states that prohibited them by

\textsuperscript{162} See P.H. Vartanian, Recognition of Foreign Marriage as Affected by Local Miscegenation Law, 3 A.L.R. 2d 240, 242 (1949) (“[B]y the great weight of authority an intermarriage between races prohibited by the law of the domicil of the parties at the time of its celebration in another state in which it was valid, in evasion of the law of their domicil, the parties intending to return and having returned to their original domicil, will not be recognized there, but will be treated as void the same as if it were contracted in the state.”); see also Morland, supra note x, at 18-19.

\textsuperscript{163} See State v. Ross, 76 N.C. 242 (1877).

\textsuperscript{164} Id. at 246-47.

\textsuperscript{165} See State v. Kennedy, 75 N.C. 251 (1877) (finding the inability to marry a person of a different race to be “a personal incapacity which follows the parties wherever they go so long as they remain domiciled in North Carolina”). On the strength of state public policies against interracial marriage, see Koppelman, The Miscegenation Precedents, supra note x, at 109.

\textsuperscript{166} See, e.g., Medway v. Needham, 16 Mass. 157 (1819) (concluding that a marriage would be recognized if lawful where solemnized “even when it appears that the parties went into another state to evade the laws of their own country”).

\textsuperscript{167} See, e.g., Pearson v. Pearson, 51 Cal. 120, 125 (1875) (recognizing interracial marriage celebrated in Utah despite California statute declaring such marriage a nullity if performed there).

\textsuperscript{168} See Tiffany, supra note x, at 45; see also Schouler, supra note x, at 47 (“Even when parties leave their own State or country, for the express purpose of evading the legal requirements, marry abroad, and then return, the marriage is to be sustained.”).

\textsuperscript{169} [add cites]
statute. Exceptions to this general approach existed in some jurisdictions for evasive common-law marriages, and several jurisdictions refused recognition if the marriage was formed through short-term or transient contacts with the validating state. But, in general, states were quite receptive to common-law marriages, even though many of them had abolished the practice by statute for their own citizens. Remarriages following divorce in violation of the granting state’s restriction were almost always recognized if the remarriage was contracted in a jurisdiction other than the one imposing the restriction unless the restricting state had a statute specifically declaring such an out-of-state remarriage void.

For other marriage categories, such as the marriage of a minor without parental consent or the marriage of two individuals with a relationship of affinity, the results on the recognition question were mixed. Across a variety of impediments, the procedural


171 See, e.g., Grant v. Superior Ct., 555 P.2d 895, 897 (Ct. App. Ariz. 1976) (noting that place-of-celebration rule would apply to common-law marriages unless they were evasive). Contrary to popular conceptions of common-law marriage, there is no specified time a relationship must last to qualify. A common-law marriage can be contracted in permitting jurisdictions by simply intentionally acting married for a brief time.

172 See, e.g., Laikola v. Engineered Concrete, 277 N.W.2d 653 (Minn. 1979) (refusing to recognize a common-law marriage contracted during transient contacts with another state); Goldin v. Goldin, 426 A.2d 410 (Ct. Spec. App. Md. 1981) (same); Lynch v. Bowen, 681 F. Supp. 506 (N.D. Ill. 1988) (same); Etienne v. DKM Enterprises, 136 Cal. App. 3d 487 (1982) (refusing to recognize common-law marriage contracted during brief visits to Texas despite a California statute expressly stating that a common-law marriage validly contracted elsewhere is valid in California); but see Albina Engine & Machine Works v. O’Leary, 328 F.2d 877 (9th Cir. 1964) (holding that common-law marriage contracted by Oregon residents in Idaho during brief visits to the state is valid in Oregon).


174 See Commonwealth v. Lane, 113 Mass. 458, 471 (1873) (recognizing remarriage from New Hampshire even though husband had been barred from remarrying for life because of his adultery in a prior marriage); see also Frame v. Thomann, 79 N.W. 39 (1899); Van Voorhis v. Brinnall, 86 N.Y. 18 (1881); State v. Shattuck, 69 Vt. 403 (1897); Succession of Hernandez, 46 La. Ann. 962 (1894); see also Tiffany, supra note x, at 46 (noting that remarriage restrictions imposed on parties after a divorce were “not necessarily taken into consideration in another”). But see Pennegar v. State, 10 S.W. 305, 309 (Tenn. 1899) (invalidating remarriage in violation of restriction because of a “distinctive state policy” designed to protect the innocent spouse and avoid a transgression of public decency).

175 LONG, supra note x, at 95 (noting “every presumption is against the intent of the legislature to make such restrictions] operative beyond the limits of the state” unless “the statute expressly so provides”). Bishop suggests that if the marriage restriction was temporary, to leave room for an appeal from a divorce decree, than a remarriage might not be honored. See id.

176 See Morland, supra note x, at 20 (noting that non-age marriages from a foreign jurisdiction “have been held void in state of domicili”). The Restatement (First) of Conflicts of Laws declared exceptions to the place of celebration rule for interracial marriages if the domicil state would consider them “odious”, § 132(c), and for some marriages in violation of another state’s ban on remarriage following divorce, § 131. See also E.H. Schopler, Conflict of Laws as to Validity of Marriage Attacked Because of Nonage, 71 A.L.R.2d 687 (1960) (cataloguing cases decided over the course of several decades about whether states
posture in which the recognition question was presented was relevant to the outcome. For example, when one party sought to have the out-of-state marriage annulled, the alignment of the party’s and state’s interest against recognition often propelled that outcome. The question of recognition with respect to marriages prohibited because of non-age was often raised when one party sought to annul an out-of-state, underage union. Courts in such cases tended to deny recognition (by granting annulments) so as, in the words of the Supreme Court of New Jersey, “to reduce the tragic consequences of her immature conduct and unfortunate marriage.”

In such a situation, the state’s interest in applying its own law (rather than the law of the place of celebration) to determine marital status of its domiciliaries was actually aligned with one party’s interest, even though opposed to the other’s interest. When third-parties attacked the validity of the marriage, however, over the objection of one or both spouses, recognition was likely to be granted.

In other procedural postures, a pro-recognition force was at work. When the validity of a marriage was relevant after the death of one of the parties – say, in a probate or wrongful death proceeding – the state’s interest in preventing cohabitation by a couple prohibited from marrying was non-existent. In California, for example, an appellate court permitted two wives to inherit equal shares from their shared husband’s estate – polygamous unions celebrated abroad—despite noting the state’s strong public policy against polygamy and its general refusal to recognize such unions. In the same vein, a Mississippi court in 1948 permitted the surviving spouse of an out-of-state, interracial marriage to inherit from her husband’s estate under the rules of intestate succession, even though such a relationship contravened the state’s public policy. Courts in many states thus gave effect to certain “incidents” of a marriage even though unwilling to recognize the “marriage” per se, an approach that has earned support from modern conflicts scholars.

Taken together, interstate recognition cases reveal that “American courts have shown substantial, but not unlimited, tolerance for marriages invalid under their law.” Prior to the legalization of same-sex marriage, the virtual uniformity of state marriage laws meant that relatively few cases were litigated in the 1970s – 1990s. But, still, the
general rule has held strong, leading a modern conflicts treatise to note the
“overwhelming tendency” in the United States to grant recognition to marriages valid
where performed.\footnote{William M. Richman & William L. Reynolds, Understanding Conflict of Laws § 119, at 398
(3d ed. 2000).}

**C. The First Restatement Approach**

The First Restatement of Conflict of Laws, adopted in 1934, mirrors many of the
rules described in the preceding two sections. Except as otherwise specified, its general
rule, embodied in section 121, is that “a marriage is valid everywhere if the requirements
of the marriage law of the state where the contract of marriage takes place are complied
with.”\footnote{See Restatement (First) of Conflict of Laws § 121 (1934).} Though the comments note that it is the parties’ domicil that “ultimately
creates” marital status, because states generally give effect to one another’s marriages,
they do “create” marital status for their own domiciliaries.\footnote{Id. cmt. d.}

Only in “rare cases,” the comments note, do states refuse to play along.\footnote{Id.}

The “rare cases” are embodied in exceptions to the Restatement’s general rule.
Section 131 states that a remarriage in violation of a post-divorce ban from the domicil
state will be valid everywhere unless the time for appeal of the divorce has not passed or
the statute forbidding remarriage has been interpreted to have extraterritorial effect.\footnote{Id. § 131. The comment to this provision notes that if an individual changes his domicil, the ban from the original domicil state will be inapplicable. Id. cmt. a.}

Section 132 incorporates the remaining standard exceptions: polygamous
marriage, “incestuous marriage between persons so closely related that their marriage is
counter to a strong public policy of the domicil,” interracial marriage “where such
marriages are at the domicil regarded as odious,” and marriages “which a statute at the
domicil makes void even though celebrated in another state.”\footnote{Id. § 132 cmts. a, b.} This listing of
exceptions “recognizes the paramount interest of the domiciliary state in the marital
status” by protecting against offense of “a strong policy of the domiciliary state.”\footnote{Id. § 121 cmt. g.}

The First Restatement does not expressly incorporate a marriage evasion rule, though it notes in the comments that a state may independently choose to adopt one alongside the other provisions.\footnote{Comment c states that “a marriage, to be odious as the word is used in this Section, must not only be prohibited by statute but must offend a deep-rooted sense of morality predominant in the state.” See id. § 132 cmt. c.}

The First Restatement was thus both narrower and broader than the general
approach taken by courts at the time it was adopted. It was less tolerant than a
jurisdiction that followed a pure rule of evasion, since the Restatement contemplated non-
recognition for those non-evasive marriages that were “odious” to a state’s policy.\footnote{Id. At the same time, it contemplated recognition of evasive marriages that did not run afoul of}
any other exception. But, in general, the First Restatement lives up to its name and mirrors the common law principles that had developed during the previous century.

D. Modern Approaches to Recognition

Although the historical traditions with respect to marriage recognition were hardly the product of a coherent, theoretical framework, they are, in broad brush, replicated by modern conflict of laws theories and doctrines. The Second Restatement of Conflict of Laws, adopted in 1971, departs from the First Restatement’s approach, though not necessarily to different effect in many cases. Section 283 states that the validity of a marriage should be determined by the state with the “most significant relationship to the spouses and the marriage,” and that a marriage that is valid where celebrated is valid everywhere “unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.”

In most cases, the state with the most significant relationship to the parties and the relationship at its creation will be the parties’ current domicile. This approach, described by Professor Andrew Koppelman as the “settling it once and for all” approach, gives states broad discretion to refuse recognition to evasive marriages, but not to refuse recognition to non-evasive marriages of which they simply disapprove. It also narrows the evasion exception to include only those marriages that were both evasive and violative of the state’s strong public policy. Thus not every difference in state law is sufficient to characterize a marriage as “evasive” and refuse recognition on that basis. The comments to section 283 note that the two most important choice-of-law factors in the marriage context are protecting the justified expectations of the parties and implementing the “relevant policies of the state with the dominant interest” in the issue.

Other theories of conflict of laws – notably those offered by Professor Brainerd Currie and Professor Robert Leflar -- support an approach similar to that found in the Second Restatement, which generally favors recognition but recognizes the ability of a state to override based on a strong public policy objection. What all contemporary

192 Comment e notes that a marriage evasion law would fall under the positive law exception. See id. § 132 cmt. e.
194 See Joseph William Singer, Same-Sex Marriage, Full Faith and Credit, and the Evasion of Obligation, 1 STAN. J. CIV. RIGHTS & CIV. LIB. (forthcoming 2005) (“[I]t is elementary conflict of laws reasoning that the current domicile of the parties is almost certain to be the state that has the most significant relationship with the parties and the transaction.”); see also Barbara J. Cox, Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home, 1994 WIS. L. REV. 1033, 1090-91 (1994). Scholars have also argued that when a marriage has only transient contacts with a state, that state does not have a significant enough interest to deny recognition. Thus when one spouse is killed while passing through a state, the state should not be permitted to refuse to recognize the surviving spouse for wrongful death purposes even if it generally prohibits the particular marriage. See Koppelman, supra note x, at 988; see also Laycock, supra note x.
195 See Koppelman, supra note x, at 981 (comparing and contrasting different possible approaches to the question of marriage recognition). This approach has been adopted in roughly half the states. See id.
197 See BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963).
Theories share is the view that the decision whether to recognize a prohibited out-of-state marriage is fact-dependent, complicated, and generally not amenable to categorical rule.

The Uniform Marriage and Divorce Act, adopted in 1970 and amended in 1973, the only uniform marriage act still urged for adoption, adopts an even more pro-recognition approach. It establishes a uniform set of impediments and a rule of marriage recognition. Section 207 defines only two categories of prohibited marriages: a “marriage entered into prior to the dissolution of an earlier marriage of one of the parties;” and a marriage between “an ancestor and a descendant,” “a brother and a sister” and “a marriage between an uncle and a niece or between an aunt and a nephew.”

Consistent with the “national trend,” the act “eliminates most of the traditional marriage prohibitions . . . and eliminates all affinity prohibitions.” The Act also speaks to the validity of common law marriages, but gives two provisions as alternatives for an adopting state to consider, one that validates such marriages, one that does not. This reflects the continued disagreement among states about the validity of this type of marriage.

The rule of marriage recognition is embodied in section 210 of the UMDA, and expands on both the common-law and restatement approaches. “All marriages contracted within this State prior to the effective date of this Act, or outside this State, that were valid at the time of the contract or subsequently validated by the laws of the place in which they were contracted or by the domicil of the parties, are valid in this State.” Simply put, this provision adopts a strict version of the “place of celebration” rule that states had always followed, but expressly denounces the “public policy” exception that had developed along with it. According to the official comment, this section “codifies the emerging conflicts principle that marriages valid by the laws of the state where contracted should be valid everywhere, even if the parties to the marriage would not have been permitted to marry in the state of their domicil.”

The UMDA intentionally departs from the Second Restatement approach, which incorporates a public policy exception that at least covers evasive marriages, and does so with the expectation that the rule “will preclude invalidation of many marriages which would have been invalidated in the past.” While the UMDA does define marriage as being “between a man and a woman,” the comment to this provision notes simply that marriage is defined “[i]n accordance with established usage.”

199 See Unif. Marriage and Divorce Act §§ 201-06. The Act expressly authorizes proxy marriages, which many states at the time disallowed. See id. § 206 cmt. The UMDA, like the uniform marriage and divorce acts that had come before, was basically a failure in terms of the number of adoptions. Only eight states adopted any substantial part of the Act, see id. at 1351 Table IV, and only three of those expressly adopted any part of section II, which laid out the provisions on marriage.

200 See id. § 207(a). The incestuous relationships covered by this provision included relationships of the half and whole blood and, for siblings, ancestors and descendants, relationships of adoption as well. It also carves out an exception for “aboriginal cultures” with respect to aunt-nephew or uncle-niece marriages.

201 See id. § 201 cmt.

202 See id. § 211 (providing alternative “A” and “B”).

203 See id. § 210.

204 See id (comment).

205 See id. The comment notes that the UMEA is expressly disapproved by the Conference and should be repealed by any jurisdiction that adopts the UMDA because of the obvious inconsistency.

206 See id. § 201 cmt.
Although the UMDA’s approach is staunchly pro-recognition, it was promulgated during a period of virtual uniformity of state marriage laws. Its drafters thus did not have to grapple with the kind of significant non-uniformity we face today.\textsuperscript{207}

\textbf{E. Historical Justifications for Pro-Recognition Policies}

Traditionally, the desire to avoid illegitimating children of a marriage – by declaring the marriage invalid or void – played an important role in rulings on recognition.\textsuperscript{208} Before the widespread adoption of statutes to the contrary, children born to a marriage that was declared void were rendered illegitimate.\textsuperscript{209}

The expectations of the parties themselves played an important role, too. As Justice Jackson once stated, “If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom.”\textsuperscript{210} The Second Restatement notes the “strong inclination to uphold a marriage because of the hardship that might otherwise be visited upon the parties and their children.”\textsuperscript{211} Marriages typically survived state lines – and individuals thus ordered their lives on that assumption.\textsuperscript{212}

Another set of concerns relates to the protection of either party against unilateral dissolution. Leading conflicts expert Joseph Story supported a blanket rule of recognition, because the “minor inconveniences” of recognition were outweighed “by introducing distinctions as to the designs and objects and motives of the parties, to shake the general confidence in such marriages, to subject the innocent issue to constant doubts as to their own legitimacy, and to leave the parents themselves to cut adrift from their solemn obligations when they may become discontented with their lot.”\textsuperscript{213}

When marital status (and, because of the potential lack of biological connection, parental status) can change by crossing a state line, a number of unintended consequences can result, some of which are probably more offensive to a state’s public policy than the marriage itself. Refusal of recognition can sometimes lead to perverse results. One concern is about “legalized polygamy,” in which a person married in one state but single and eligible to marry again across state lines, is alluded to by many treatises as a further justification for the place of celebration rule.\textsuperscript{214}

\textsuperscript{207} In addition, the more politically charged portion of the UDMA related to divorce since it urged all states to adopt the relatively new no-fault approach to divorce, which represented a significant break with historical tradition.

\textsuperscript{208} See, e.g. Medway v. Needham, 16 Mass. 157 (1819) (bemoaning the tragic effect on children of invalidating their parents’ marriage).

\textsuperscript{209} Cite.

\textsuperscript{210} Estin v. Estin, 334 U.S. 541, 553 (1948) (Jackson, J., dissenting).

\textsuperscript{211} \textit{Restatement (Second) Conflict of Laws} § 283 cmt. h.

\textsuperscript{212} \textit{Bishop}, supra note x, at 307 (“Marriage being, unlike divorce, approved and favored in every country, if, at any place where parties may be, whether transiently or permanently there, they enter into what by the law of the place is a marriage, they will be holden everywhere else, as well as there, to be husband and wife.”); \textit{Long}, supra note x, at 86 (“The well-being of society, the legitimacy of offspring, and the disposition of property alike demand that one state or country shall recognize the validity of marriages contracted in other states or countries, according to the laws of the latter, unless some positive statute or pronounced public policy of the particular state demands otherwise.”)

\textsuperscript{213} \textit{Story}, supra note x.

\textsuperscript{214} See \textit{Long}, supra note x, at 98; see also \textit{Bishop}, supra note x, at 310 (noting the consequence of refusing recognition to a marriage valid elsewhere could lead to an “international polygamy, more detestable than any purely municipal one ever known”).

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IV. Recognition of Same-Sex Marriage: A Guide for the Pink States

The current American landscape, blanketed with heterosexual definitions of marriage, anti-same-sex-marriage-recognition provisions, and sporadic, left-over anti-evasion provisions, predetermines the question of marriage recognition in many, but not all jurisdictions. This section first combines conventional rules and modern statutes to consider how states might address the recognition questions they will inevitably face. This analysis leads to a map of “pink states”—those that do not ban same-sex marriage expressly or, if they do, do not address the recognition question directly. In those states, recognition of same-sex marriages is both possible and perhaps even likely.

As discussed above, the conventional approach to recognition presumptively honored out-of-state marriages, but permitted states to refuse recognition in certain circumstances. The positive law exception, for example, permitted states to refuse recognition to sister state marriages when a statute or constitutional provision precluded it.\footnote{See supra text accompanying notes x – x.} Traditionally understood, this exception applied only if the legislature had unmistakably expressed its intent not only to prohibit a particular type of marriage, but also to deny recognition to such a union celebrated elsewhere. Under this formulation, thirty-seven states have a statutory or constitutional provision sufficient to justify a rule of automatic non-recognition.\footnote{See supra note x.} Alabama law, for example, states that it “shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction.”\footnote{ Ala. Code § 30-1-19(d) (2004).} Ohio law provides that “any marriage entered into by persons of the same sex in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state.”\footnote{Ohio Rev. Code Ann. § 3101.01 (C)(2) (2005).} Indeed, the only case seeking full recognition of a same-sex marriage from Massachusetts that has been decided so far was in Florida, a state with a broadly worded rule of non-recognition.\footnote{See supra text accompanying notes x – x.} In Wilson v. Ake, a federal district court in Florida refused to recognize a Massachusetts same-sex marriage for Florida or federal law purposes.\footnote{2005 U.S. Dist. LEXIS 755 (2005).} Statutes like these are much more direct than those of an earlier era and hard to circumvent if one applies a positive law exception to the rule of recognition. But arguably, the six states that explicitly ban same-sex marriage without addressing the question of recognition would not meet the terms of this exception to the general place-of-celebration rule.\footnote{See supra note x (listing states).} (Nor would the states that do not explicitly ban same-sex marriage at all.)\footnote{See supra note x.} Only one of the six – South Carolina – declares a same-sex marriage “void,”\footnote{See S.C. Code Ann. § 20-1-15 (2004) (“A marriage between persons of the same sex is void ab initio and against the public policy of this State.”)} which was interpreted in some jurisdictions, historically, to deny recognition to out-of-state marriages of that type.\footnote{See supra text accompanying notes x – x.} A second of the six, Texas, does not
address recognition, but does prohibit evasive marriages.\textsuperscript{225} That statute could be used as a “positive law” obstacle to recognition for a couple who went to Massachusetts solely to marry. Thus, under the traditional rules, only a handful of states could grant recognition to a same-sex marriage from Massachusetts based solely on this one exception.

Two modern developments merit discussion. First, the notion that a state can declare certain marriages invalid regardless of where the parties were domiciled at the time the marriage was celebrated is entirely inconsistent with the Second Restatement’s approach to conflict of laws.\textsuperscript{226} This does not render these enactments invalid, but it does reveal how extraordinary the mini-DOMAs really are and what a departure they mark from conventional concepts of comity and conflicts. As Professor Koppelman has noted before these statutes had been enacted in most jurisdictions: “[b]lanket non-recognition of same-sex marriage . . . would be an extraordinary rule. There is no evidence that any of the legislatures that recently acted gave any thought to how extraordinary it would be . . . ”\textsuperscript{227}

Second, the positive law obstacles to same-sex marriage recognition could themselves be undone by a ruling that they violate the federal constitution. Depending on the justification, a ruling that the federal Defense of Marriage Act is unconstitutional may or may not have a ripple effect. If the Supreme Court were to hold that DOMA was invalid because it exceeded Congress’ power under the Full Faith and Credit Clause,\textsuperscript{228} states would presumptively still have the power to deny recognition under conventional principles of comity and conflicts. If, on the other hand, DOMA fell to a challenge rooted in either equal protection or due process principles, then presumably most or all blanket recognition rules at the state level would fall as well. Consider, for example, the Supreme Court’s ruling in \textit{Romer v. Evans}.\textsuperscript{229} In \textit{Romer}, the Court invalidated, under equal protection principles, a Colorado referendum prohibiting municipalities from granting rights against sexual orientation discrimination. The Court held that a statute “born of animosity” toward a particular group could not survive even the most lenient form of constitutional scrutiny.\textsuperscript{230} DOMA, as well as every recently enacted state law targeting same-sex marriage, could be invalidated under this precedent. Both federal and state anti-same-sex marriage laws could also fall to a challenge under \textit{Lawrence v. Texas},\textsuperscript{231} which invalidated Texas’ ban on same-sex sodomy. The broader principle at issue in \textit{Lawrence} – the right of adults to engage in consensual intimate relationships – could be interpreted to preclude states or Congress from banning same-sex marriage.\textsuperscript{232}

So far, this line of argument has been unsuccessful. The plaintiffs in \textit{Wilson}, discussed above, unsuccessfully challenged the constitutionality of DOMA. The court concluded that the Act was a valid exercise of Congress’ power under Article IV to

\begin{itemize}
\item \textit{See} \textit{supra} text accompanying notes x – x.
\item \textit{See} Professor Laurence Tribe.
\item 517 U.S. 620 (1996).
\item 517 U.S. 620, 634 (1996).
\item 539 U.S. 558 (2003).
\end{itemize}
prescribe the “effects” a state’s public act would have in other states. The court characterized the plaintiff’s interpretation of Full Faith and Credit as meaning that “a single state could mandate that all the States recognize bigamy, polygamy, marriages between blood relatives or marriages involving minor children.”

Under the traditional framework, one might also argue that same-sex marriage, like incest and polygamy, violates “natural” law, a category typically exempted from the place-of-celebration rule. Structurally, many states ban same-sex marriage within the same provision as their ban on incest. And undoubtedly the vehemence of sentiment against same-sex marriage in many states is comparable if not greater than that against at least some incestuous marriages.

Yet three modern considerations make it difficult to include same-sex marriage into the traditional “natural law” exception. First, the exception was squarely rooted in religious beliefs—described explicitly as marriages in violation of “Christendom.” A court today could hardly justify refusing recognition to a marriage because of such a “violation,” without running seriously afoul of the Establishment Clause. Second, the Supreme Court’s ruling in Lawrence v. Texas questioned the ability of a state to rely on morality to justify withholding important rights from classes of citizens. While the reach of Lawrence is far from settled, it may be interpreted to prevent a state from exempting a single class of marriages from a general rule of recognition based solely on moral repugnance. Third, this exception was given life in part by the universality of bans on the marriages it covered. States rarely, if ever, were asked to recognize polygamous marriages or marriages between ancestors and descendants or brothers and sisters because no American state permitted them to occur. Today, the emerging protection for same-sex marriage – albeit piecemeal and scattered – defies the universality characteristic of the marriages traditionally subject to the exception. That one state allows such marriages, and that several others may do so in the near future, means that same-sex marriage is no longer considered universally taboo. At the same time, the traditional “universal” exceptions continue to be, within the United States, universal.

In addition to the positive and natural law exceptions, evasive marriage behavior traditionally played a role in many recognition cases whether or not there was a specific

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234 See supra text accompanying notes x – x.
236 See, e.g., LONG, supra note x, at 87 (describing polygamous and incestuous marriages as “repugnant to the moral sense of Christendom,”).
237 See Singer, supra note x, at ___ (“if the government interest [in opposing same-sex marriage] is in establishing a particular religious definition of marriage . . ., then asserting this moral interest to justify nonrecognition would seem to be prohibited by the Establishment Clause”).
238 There are several states that retained a statutory place-of-celebration rule and simply created an exception for same-sex marriages. See, e.g., ARK. CODE ANN. § 9-11-107(a) (2004) (“All marriages contracted outside this state which would be valid by the laws of the state or country in which the marriages were consummated and in which the parties then actually resided shall be valid in all the courts of this state”); § 9-11-107(b) (“This section shall not apply to a marriage between persons of the same sex”).
239 Treatises often referred to the “universal exceptions” when describing the general refusal to recognize polygamous and incestuous marriages from other states.
The statute banning it. The second Restatement approach, which permits a state to refuse recognition based on public policy grounds only if it has the most significant connection to the relationship at the time of the marriage, seems to support non-recognition for evasive marriages, absent significant countervailing factors. However, since Massachusetts is currently refusing to issue marriage licenses to non-resident couples under its marriage evasion law, the role of evasion in same-sex marriage recognition might at least momentarily elude testing.

The best scenario for recognition would involve a non-evasive marriage where the couple originally resides in Massachusetts and then, unrelated to marriage laws, moves to one of the pink states. In that scenario, conventional principles suggest that the marriage should be granted full recognition. That, indeed, is the scenario reflected in the one case granting recognition to a Vermont Civil Union. Not surprisingly, it comes from a state, New York, with no constitutional or statutory provision banning recognition, nor even one explicitly banning same-sex marriage. The trial court in Langan v. St. Vincent’s Hospital recognized Neal Spicehandler as a “spouse” for purposes of standing to sue for a hospital’s alleged malpractice that led to his civil union partner’s wrongful death under New York law. The court began its analysis by noting New York’s adherence to the “place of celebration” rule and observing the limited exceptions to the rule for marriages involving incestuous or polygamous marriages. Citing many examples of New York’s protection for same-sex couples and gays and lesbians individually, the court concluded that New York has no public policy against same-sex marriage and thus no basis for refusing recognition under “principles of full faith and credit and comity.” The court also noted that its conclusion “advances the concept that citizens ought to be able to move from one state to another without concern for the validity or recognition of their marital status.”

240 See supra text accompanying note x.
241 See supra text accompanying note x.
243 See Patrick J. Borchers, The Essential Irrelevance of the Full Faith and Credit Clause to the Same-Sex Marriage Debate, 38 CREIGHTON L. REV. 353, 357 (2005) (“Perhaps the best case that could be made for a constitutional duty to apply the celebration state’s law would involve a couple genuinely domiciled in a state allowing same-sex marriages and then becoming involved in litigation in a state that does not allow them.”); see also Borchers, supra note x, at 171 (“Most courts will probably recognize same-sex marriages under these circumstances, even if they generally would not validate such marriages.”); see also Mark Strasser, Loving the Romer out for Baehr: On Acts in Defense of Marriage and the Constitution, 58 U. PITT. L. REV. 279, 280 (1997) (describing non-evasive same-sex marriage as the best case for recognition).
245 See id. at 455. Langan has been pending before the New York appellate division for more than two years.
246 Id. at 414.
247 Id. at 415.
248 Examples include the lack of a mini-DOMA, statutes banning sexual orientation discrimination, a NYC ordinance permitting domestic partners to register, and a state statute permitting recovery by same-sex surviving partners of 9/11 victims. Id. at 415-16.
249 Id. at 418.
recognition, since the justification for the recognition was rooted primarily in the fact that New York lacks a public policy against same-sex marriage. The result in *Langan* is supported by an opinion of the state’s attorney general concluding that while current New York law does not permit same-sex couples to marry, its precedents dictate that a same-sex marriage from elsewhere should be recognized.

A narrower “incidents” approach to recognition could conceivably be used in the same states, and even in some states with express non-recognition rules. This approach was used historically to validate marriages that were obviously abhorrent to the forum state, including not only interracial marriages, but also polygamous and incestuous ones. Under current law, only six of the thirty-seven states that do not permit recognition of a same-sex marriage explicitly refuse to recognize any claim, right, or incident arising out of a prohibited same-sex marriage. The other thirty-one states decree that a same-sex marriage will not be “valid” or “recognized,” but do not explicitly negate the possibility that an *incident* of it might be recognized.

The thirteen states that do not address recognition of out-of-state same-sex marriages at all might also employ this approach on a case-by-case basis in place of full recognition.

In two of those states, the attorney general has issued an opinion stating that particular incidents of a same-sex marriage will be recognized in the state.

While there is only one ruling regarding out-of-state recognition of a Massachusetts same-sex marriage, the slightly larger body of cases on recognition of Vermont civil unions shows mixed results with the “incidents” approach. Under this approach, states may recognize same-sex unions for some purposes but not others, depending on the particular policy considerations presented by different contexts. The existing rulings regarding the validity of Vermont civil unions have dealt mostly with the question of divorce—whether a party to a civil union can seek a divorce outside of Vermont. Vermont requires a six-month period of residency as a prerequisite for filing a petition for divorce, and, since eighty-five percent of Vermont civil unions have been entered into by non-Vermonters, many unhappy civil union partners have sought relief in their home states. In the first such case, *Rosengarten v. Downes*, a Connecticut trial court dismissed the plaintiff’s petition for divorce for lack of subject matter jurisdiction. The appellate court upheld the dismissal, since the governing statute provides for

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250 *See* 2004 N.Y. Att’y Gen. Op. 1, 16-17 (Mar. 3, 2004) (“Consistent with the holding of the only state court to have ruled on this question, New York law presumptively requires that parties to such unions must be treated as spouses for purposes of New York law.”)

251 *See supra* note x.

252 *See supra* note x.

253 Massachusetts would presumably recognize a same-sex marriage from anywhere, though the state codes has not been amended to incorporate same-sex marriages.


255 *See infra* text accompanying notes x – x.

256 15 V.S.A. § 592 (2004). The residency must have continued for a year before a final decree can be granted.

257 *See* Fred A. Bernstein, *Gay Unions Were Only Half the Battle*, N.Y. TIMES (April 6, 2003) (noting that, as of 2003, eighty-five percent of Vermont civil unions had been contracted by non-residents).
jurisdiction over matters involving “dissolution of marriage” and a civil union, under Vermont law, is not a marriage. Although the case technically turned on an interpretation of the jurisdiction statute, the underlying issue of recognition was inextricably tied in. On that score, the court noted a Connecticut statute declaring the “public policy” against same-sex unions, and concluded that “because the legislature expressly refused to endorse or authorize such unions it could not have intended civil unions to be treated as family matters [for jurisdictional purposes].” Since the court viewed Connecticut’s public policy to be inconsistent with same-sex marriage generally, it refused to exercise jurisdiction over a petition to dissolve a same-sex union (albeit not a marriage per se). This court refused to separate the question of whether same-sex couples could marry in Connecticut from the question whether a Connecticut court should recognize an out-of-state union for some purposes.

Courts in other states, however, have granted recognition to Vermont civil unions at least for the limited purpose of dissolving them. In Salucco v. Aldredge, a Superior Court judge in Massachusetts drew on its equity jurisdiction to dissolve the parties’ civil union. This result was not surprising, since the case came after the ruling in Goodridge v. Department of Public Health in a state with a clear public policy in favor of protecting same-sex relationships. But trial judges in states without such a favorable landscape have issued similar rulings, without any discussion about jurisdiction or the broader question of recognition. A judge in West Virginia, for example, granted dissolution based on “irreconcilable differences,” noting only that the parties were “in need of a judicial remedy to dissolve a legal relationship created by the laws of another state.” A judge in Iowa issued a similar ruling, although it substituted a second version of the ruling that deleted any reference to recognizing the civil union. A judge in Texas had done likewise, but vacated the ruling because of pressure from the state’s attorney general to avoid recognition of the couple’s relationship.

The willingness of states to recognize Vermont civil unions for some or all purposes has been tested in a few contexts other than divorce, again with mixed results. A Georgia appellate court, for example, ruled in Burns v. Burns that a woman was not “married” to her civil union partner for purposes of measuring her compliance with an order specifying that visitation with her children would not be allowed when she was cohabitating with an adult to whom she was not legally married. The court’s ruling relied in part on the fact that a civil union, under Vermont law, is not a “civil marriage,”

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258 Rosengarten v. Downes, 802 A.2d 170, 174-75 (Ct. App. Conn. 2002). The Supreme Court of Connecticut agreed to review the appellate court’s decision, see 806 A.2d 1066 (Conn. 2002), but the question was mooted by the death of one of the parties. See Bernstein, supra note x; see generally Kay, supra note x (discussing Rosengarten).

259 See Rosengarten, 802 A.2d at 175.

260 Id. at 177. On the legal issues surrounding dissolution of same-sex unions generally, see Kay, supra note x (analyzing issues raised by efforts to dissolve same-sex marriages, domestic partnerships, and civil unions in jurisdictions other than the one where it was formed).


263 See In re KJB and JSP, NO. CDCD 119660 (Woodbury County Dist. Ct., Iowa Nov. 14, 2003).


265 See Bernstein, supra note x.

but also on the Georgia statute explicitly refusing recognition to an out-of-state same-sex marriage. 267

The result in Langan, discussed above, could be alternatively used to support an “incidents” approach to recognition as well, since the specific purposes of the wrongful death law were important to the court’s decision to grant recognition and may not have compelled the same result in a different context. 268

**Conclusion**

States with a bar to interstate recognition of same-sex marriage should reconsider the wisdom of such an approach, given the unprecedented nature of blanket non-recognition and the hardship that may be wrought in an individual case in which a compelling case for recognition is presented. 269 The more immediate concern, however, is with states without such a bar, in which the recognition question is certain to be raised in the near future. Several interests in favor of recognition may be implicated in such a case.

Although many states have a deep desire to avoid recognizing same-sex marriages, many of the justifications historically used to justify non-recognition of disfavored marriages are no longer permissible. As Professor Tobias Wolff has pointed out, marriage bans often came in tandem with criminal laws against cohabitation or fornication. Together, these laws prevented disfavored couples from having any lawful relationship. 270 Today, however, a state cannot constitutionally criminalize sodomy or fornication under *Lawrence v. Texas*. 271 Thus one of the traditional justifications for refusing to honor interracial marriages – that by doing so a state could prohibit the only lawful form of sexual intimacy – no longer applies. States also are precluded, under current interpretations of the right to travel, from adopting laws in order to deter disfavored groups from entering the state. 272 State laws refusing to recognize valid same-sex marriages from other jurisdictions risk running afoul of that constitutional principle as well. 273 The strong interests in favor of recognition are thus subjected to very meager counterweights. While the UMDA was passed long before the same-sex marriage debate began in earnest, its approach to marriage recognition is at least worth revisiting.

The legal developments in the same-sex marriage context, many of which are recounted in this paper, have been unfortunate in several ways. The misapprehension
about the meaning of full faith and credit and the spectre of compelled recognition led states to adopt extraordinary, historically unprecedented rules. Those rules, both overly broad and ambiguous in scope, mean that states cannot voluntarily recognize same-sex marriages, even in a case where the state has no interest in denying recognition.

Blanket non-recognition of same-sex marriage defies both the modern approach to conflict of laws and the historical approach to marriage recognition. History in this context teaches the workability of a case-by-case approach and shows the value states once placed on interstate marriage recognition. Tolerance of disfavored marriages was an important and widespread value, which was honored by a strong general rule of marriage recognition. But the traditional rules also made room for states to assert their individuality and unique values and to deny recognition to avoid contravening a strong public policy of the state. A broad rule of recognition – whether based on the place of celebration or the place of domicile -- preserves the values of comity, uniformity, and the portability of marital status. Greater attention to history might have produced more sensible rules of recognition than the ones we now face. Even so, the pink states have the opportunity to borrow the lessons of history as they craft their response to the modern version of an age-old question.