The issue of the interjurisdictional recognition of same-sex marriages and quasi-marital statuses is of major cultural significance. Aside from the life issues (abortion, euthanasia, assisted suicide, and the status of the human embryo), the underlying issues of how to treat these same-sex relationships are the most significant social issues of our time. As the Catechism of the Catholic Church states: “The family is the original cell of social life. It is the natural society in which husband and wife are called to give themselves in love and in the gift of life. Authority, stability, and a life of relationships within the family constitute the foundations for freedom, security, and fraternity within society…. Accordingly, the importance of the family for the life and well-being of society entails a particular responsibility for society to support and strengthen marriage and the family.”

In the conflicts setting, the underlying moral issues are primarily addressed indirectly, but it is oft-noted that the conflicts setting can create real pressures to reexamine the underlying moral questions. The answers to the conflicts issues that are the subject of this conference will, then, have considerable importance for the broader moral debate.

Here, despite the importance and the difficulty of the core issues, the conflicts issues involved are relatively straightforward. I will address the issue in the context that is the most troublesome for states around the country that adhere to a more traditional
understanding of these social issues: to what extent will states such as Massachusetts or Vermont or California be able to export their innovations in this area. The most serious case for states such as Ohio (where I grew up) or Michigan (where I now live) is whether a same-sex couple from one of these states who enters into a same-sex relationship (a marriage, a civil union, or a domestic partnership) in a state where such relationships are legal and then returns to the state where the couple resides will be able to have the relationship enforced. This is the issue suggested, for example, by the title of Professor Barbara Cox’s well-known Wisconsin Law Review article—“If we marry in Hawaii, are we still married when we return home?” I will address this issue in the marriage context, and also in the context of quasi-marital statuses.

I will begin by discussing the conflicts issues. The public policy doctrine affords states the freedom to refuse recognition to same-sex marriages or to civil unions and domestic partnerships. To the extent these quasi-marital statuses are treated as marriages, the public policy doctrine provides adequate support for the refusal to recognize these relationships, if a state chooses to adopt a policy of non-recognition. To the extent these relationships are treated as contracts, public policy similarly affords support for the refusal to recognize these relationships. I will then consider a variety of constitutional objections to these conclusions.

In this context, the choice of law issue is clear. It is well-established that a marriage is not a judgment and surely the same conclusion would apply to quasi-marital statuses. So, we are considering the full, faith, and credit a state owes to the law of a sister state. Here, it is quite clear that full, faith, and credit principles do not require states to honor laws of other states when their public policy would be offended by so doing.
Very recent Supreme Court cases establish this principle clearly. In Baker v. General Motors Corp., for example, the Supreme Court reaffirmed the well-established distinction between the way in which full, faith and credit operates when dealing with laws as opposed to judgments. With regard to laws, “Full Faith and Credit does not compel ‘a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.’” With regard to judgments, the Court stated that “the full faith and credit obligation is exacting.” The Court further stated “a court may be guided by the forum State’s ‘public policy’ in determining the law applicable to a controversy….But our decisions support no roving ‘public policy exception’ to the full faith and credit due judgments.” In actuality, Baker narrowed the duties that courts owe even to the judgments of sister states. Its importance here, however, is in its reaffirming that states are entitled to rely on their own public policy to justify applying their own law in the face of the contrary policies of their sister states.

Franchise Tax Board v. Hyatt (2003) is even clearer on this point and I think it is worthwhile spending a few minutes on this case. Hyatt involved a dispute over state income taxes between the Franchise Tax Board of California (CFTB) and Gilbert Hyatt. CFTB alleged that Hyatt had underpaid his California income taxes and imposed assessments and penalties, both of which were challenged by Hyatt in an administrative proceeding in California. While this process was ongoing, Hyatt (who had allegedly changed his residency from California to Nevada) filed a suit against CFTB in Nevada state court alleging that CFTB had committed certain intentional torts and negligent acts during the course of the California proceedings. CFTB sought dismissal of the Nevada suit in part on the ground that California sovereign immunity law required the dismissal
of the action. The Nevada Supreme Court held that the negligence claims ought to have been dismissed but that the intentional tort claims should proceed to trial.

In so holding, the Nevada Supreme Court refused to apply California’s law of sovereign immunity. In applying principles of comity, the Nevada Supreme Court dismissed the negligence claims because Nevada afforded its agencies the same protection from suit and therefore applying California’s immunity law would not violate Nevada’s policy. The court took a different view of the intentional tort claims. As the United States Supreme Court summarized this holding, “Because Nevada ‘does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts committed in the course and scope of employment,’ the [Nevada] Court held that ‘Nevada’s interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister states’ government employees’ should be accorded greater weight ‘than California’s policy favoring complete immunity for its taxation agency.’”

In Hyatt, the United States Supreme Court affirmed and held that the Constitution did not require Nevada to give full faith and credit to California’s sovereign immunity law. In so holding, the Hyatt Court reaffirmed the language in Baker that full faith and credit “is less demanding with respect to laws” than it is with respect to judgments. It reaffirmed that “the Full faith and Credit Clause does not compel ‘a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.’” Nevada was “competent to legislate” on the matter under review because Nevada had constitutionally adequate contacts to apply its own law to an intentional tort that allegedly injured a Nevada citizen within the state of Nevada.

The United States Supreme Court rejected the view that Nevada should be
prevented from interfering with California’s “‘capacity to fulfill its own sovereign responsibilities.’” The Court explained that it had abandoned the balancing of interest approach reflected in cases such Alaska Packers, and instead had moved to an approach that permits a state to apply its own law even in the face of “‘the contrary law of another.’” In Hyatt, the Court rejected the argument that it should create a new rule to protect “core sovereignty” interests of the state whose law was not applied. The Court explained that it was disinclined to “elevate California’s sovereignty interests above those of Nevada….” The Court unanimously concluded: “we decline to embark on the constitutional course of balancing coordinate States’ competing sovereign interest to resolve conflicts of laws under the Full Faith and Credit Clause.”

These cases do not involve marriage or quasi-marital statuses to be sure. The cases do, however, set forth the basic principle that would govern under the context under review at this conference.

With regard to marriage, Baker and Hyatt support the principle set forth in the Restatements of Conflict of Laws. For example, section 283 of the Second Restatement provides: “(1) The validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage under the principles stated in section 6. (2) A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid 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.” This principle gives states adequate authority for the refusal to honor a same-sex marriage from Massachusetts. A state that wanted to assert its public policy to refuse
to recognize a Massachusetts same-sex marriage would be able to do so.

Modern critics of this position sound a lot like adherents to the most rigid vested rights approach to choice of law, even though these critics would presumably not have much to say in favor of the vested rights approach in other contexts. According to these modern critics, the place of celebration rule is viewed as sacred. Departures from the place of celebration rule, especially through the invocation of the “public policy exception,” are viewed with great suspicion.

In this context, the “public policy exception” label is, in reality, a misnomer. The approach of both Restatements (although phrased in terms that appear to use public policy as an exception) is just a choice of law rule to justify the invocation of forum law. And, in the context presented here, this is done when the forum certainly has an interest in the application of its own law.

Contrary to the view expressed by the modern critics, it is not at all troublesome that the forum is expressing disagreement with the substantive content of the law of Massachusetts. That is what happened in Hyatt, and Justice O'Connor, speaking for a unanimous Court, was completely untroubled by that conclusion. The forum (Nevada) just had a different view of the proper substantive law (and in fact this is what happens in every true conflict case), and the Court didn’t have any trouble permitting the forum to prefer its own resolution of the substantive issue involved. This is something states are permitted to do in our federal system.

In marriage area, this conclusion is clear as a matter of normal conflicts doctrine. This is, for example, the conclusion reached by scholars such as Professor Lea Brilmayer in her testimony before the Senate Judiciary Committee in March of 2004. There,
Professor Brilmayer, who is not typically regarded as a member of the religious right, stated: “Marriages entered into in one state have never been considered constitutionally entitled to automatic recognition in other states. This is in part because marriages are not like judicial judgments, which are announced only after lengthy formal court proceedings in which both sides are represented by counsel. It is also because of the special importance in American law of family relationships, which …makes family law distinctive. Finally, it has always been too easy for people to avoid their home-state law by traveling to another state to take advantage of more lenient marriage laws. For all of these reasons [Professor Brilmayer concluded], states have always had greater freedom to re-examine the validity of marriages entered into elsewhere than they have to re-examine the merits of a judicial award in a tort or contract case. The state [, she concluded,] has a right to take into account its local ‘public policy.’”

I think the same conclusion follows for quasi-marital statuses. To the extent these statuses are treated as marriages, the principles noted above give states—that wish to do so—the right, for example, to dissent from Vermont’s recognition of a “Civil Union.” To the extent these quasi-marital statuses are treated as contracts, the same conclusion applies.

I believe that the most relevant contract analogy is to the treatment of contractual choice-of-law clauses. I may be alone in this because I think there is very little treatment of this in the literature on the recognition of same-sex marriages or quasi-marital statuses.

The dominant approach to the enforceability of contractual choice-of-law clauses is to presume that such clauses are enforceable, subject to the public policy of the forum state. For example, in J.S. Alberici Construction Co. v. Mid-West Conveyor Co., the
Delaware Supreme Court refused to enforce a choice of law clause that would have permitted a contractor to enforce an indemnification agreement for the contractor’s own negligence. Mid-West, the general contractor, was a Delaware corporation with its corporate headquarters in Kansas. Mid-West had been hired by Chrysler, a Delaware corporation with its corporate headquarters in Michigan, to work on a refurbishing project at an assembly plant in Newark, Delaware. Mid-West hired various subcontractors, including Alberici, which was a Missouri corporation with its headquarters in Missouri. The contract contained a choice of law clause in favor of Kansas law and Kansas law would enforce such an indemnification agreement. The Delaware court noted that it generally honors choice of law clauses, but that it will not do so if this is repugnant to the public policy of Delaware. Because a Delaware statute contained an explicit statement that such a clause “is against public policy and is void and unenforceable,” the Delaware court refused to enforce the indemnification provision. The court concluded: “we find this statutory language compels the conclusion that enforcing Kansas law on this issue would be clearly repugnant to the public policy of Delaware.”

The Supreme Court of Georgia took a similar approach in a case involving a non-compete agreement. Convergys Corp. v. Keener. The court applied this basic principle: “The law of the jurisdiction chosen by parties to govern their contractual rights will not be applied by Georgia courts where application of the chosen law would contravene the policy of, or would be prejudicial to the interests of, this state.” The court continued: “Covenants against disclosure, like covenants against competition, affect the interests of this state, namely the flow of information needed for competition among businesses, and...
hence their validity is determined by the public policy of this state.” Under this approach, the court refused to apply a choice of law clause that selected Ohio law. The employment contract had been entered into in Ohio by an Ohio resident for work that began in Ohio. The employee later moved to Illinois where most of his work was performed. The employee left his employ with the Ohio company and moved to Georgia where he began work with a competitor of his former employer. The Georgia court in Keener refused to honor the Ohio choice of law clause and applied Georgia law to invalidate the non-compete agreement.

Courts more frequently approach these issues by applying section 187 of the Restatement of Conflict of Laws. (See Application Group, Inc. v. Hunter Group, Inc., Cal Ct. App. 1998.) Section 187 provides that the law chosen by the parties will be applied unless “(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties’ choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state with a materially greater interest than the chosen state in the determination of the particular issue and which…would be the state of the applicable law in the absence of an effective choice by the parties.” In the AGI case, the California court refused to enforce a choice of law clause (in favor of Maryland law) that would have resulted in upholding a non-compete clause in an employment contract. The court acknowledged that it was presented with a true conflict but ended up preferring the interest of California over the interests of Maryland because the court concluded that California had a materially greater interest and that enforcement of the contract under Maryland law would be contrary to a fundamental policy of California.
The basic idea reflected in these cases is a strong emphasis on private ordering, or put another way a strong respect for freedom of contract. The tough issues only arise when the issue is one that the parties couldn’t resolve by an explicit contractual provision. Yet, despite this, section 187 permits the parties to accomplish the same result through a choice of law clause, except when a strong public policy is implicated. I should note that in most of the cases involving choice of law clauses the courts enforce these clauses. My purpose in mentioning a couple of modern examples of the refusal of courts to enforce these clauses based on the public policy of the forum is to note that the methodology of invoking local public policy as “an exception” to the presumptive choice of law rule is alive and well.

The courts’ approach in these contractual choice-of-law cases is much like the approach reflected in the Restatement’s approach to judging the validity of marriages. There is presumptively a strong respect for private ordering, which the parties achieve in this context by traveling to a state with a more favorable law. States are generally willing to respect this outcome (states express this deference to the parties’ choice by adopting as a presumptive choice of law rule that the place of celebration will govern) but states reserve the right to invoke their public policy when the state’s important interests are implicated. I should note that in the marriage context a state ought to be regarded as having an even stronger interest in invoking its policy with regard to how to define marriage. States have always been regarded as having a strong interest in the institution of marriage, and this interest would seem to be stronger than the state’s general interest in freedom of contract that is reflected by the presumptive rule favoring the enforceability of contractual choice-of-law clauses.
Therefore, if a quasi-marital status is treated as a contract, then a 187-like solution could be invoked to permit a state—that wished to do so—to refuse to honor this attempt to evade forum law. As a matter of normal conflicts doctrine, there is no problem with this resort to the public policies of the forum, as can be seen by the overwhelming adoption of section 187.

Because I think the conclusions expressed above are so well settled as a matter of conflicts law, many scholars have tried to develop constitutional challenges to these conclusions. There are four main arguments. The first is an argument that is most associated with Professor Larry Kramer. He has argued that the public policy exception is unconstitutional because it reflects unconstitutional discrimination against the laws of a sister state. The other three arguments are not really attacks on the conflicts doctrine. They are in reality attacks that are primarily leveled against the constitutionality of a state invoking certain policies as a direct manner. So, some argue that reserving marriage to heterosexuals violates (1) the establishment clause, (2) substantive due process, and/or (3) equal protection. These arguments are sometimes invoked in the recognition context because it ought to be unconstitutional for a state to rely on an unconstitutional public policy as a basis for refusing to recognize the law of a sister state.

In the time allotted today, I will only consider the first of these four arguments, since that is the only argument that is unique to the conflicts aspects of the issue. In his Yale Law Journal article, Professor Kramer made the following argument: “the public policy doctrine ought to be deemed unconstitutional—not just in same-sex marriage cases, mind you, but across the board. The argument, in a nutshell, is that the Full Faith and Credit Clause prohibits states from selectively discriminating in choice of law based
on judgments about the desirability or obnoxiousness of other states’ policies.” I think this argument is entirely without merit.

The first thing to note about Professor Kramer’s argument is that it is inconsistent with the Hyatt case discussed above. There, you’ll recall, the Supreme Court approved of a Nevada decision to apply its own public policy on the sovereign immunity issue presented even in the face of California’s contrary policy. Nevada was candidly, and the United States Supreme Court recognized this explicitly, disagreeing with the substantive judgment of California on the sovereign immunity issue presented. The Supreme Court was completely untroubled by this conclusion, and in fact, reaffirmed in clear terms that states are permitted to do precisely that as long as the issue is one on which the state is competent to legislate. The “competency to legislate” turns on the state satisfying the very lenient standard set forth in Allstate Insurance Co. v. Hague and Phillips Petroleum Co. v. Shutts. In the context under discussion here, where an out-of-state marriage or civil union or domestic partnership is under review in a state where the parties have their home, this standard would be easily satisfied.

It is quite clear, therefore, that Professor Kramer’s view is inconsistent with a unanimous Supreme Court decision of last year (2003). Moreover, Professor Kramer’s argument is inconsistent with basic constitutional doctrine dealing with the type of “discrimination” that is prohibited. As I stated several years ago in an article critiquing Professor Kramer’s position, “[t]he kind of discrimination that is constitutionally suspect is discrimination against out-of-staters, simply because they are out-of-staters. If ‘there is some reason, apart from their origin, to treat them differently…’ then the strong presumption against discrimination is not implicated.” The refusal to recognize a same-
sex relationship is nothing like this form of prohibited discrimination. The state is not refusing to honor such a relationship because it is “foreign,” the state is expressing substantive disagreement with the other state’s law in a situation where the second state has an interest in so doing. As Hyatt and other cases make clear, there is nothing unconstitutional about a state taking this view.

My conclusions are straightforward. A home state is not required to recognize a same-sex relationship (of whatever type) that is created by a state that approves of any of these relationships. The home state is permitted to invoke its own public policy to refuse to recognize such relationships. Basic conflicts doctrine permits a state to do so—if the state exercises the freedom to do so—and the Constitution does not preclude a state from so choosing.