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Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws

Isaac and Mag Kennedy, a black man and a white woman, were convicted of fornication—sex between unmarried persons—in North Carolina in 1876.¹ Though they had legally married in South Carolina, the trial judge refused to acknowledge their marriage since they had intentionally evaded their home state’s prohibition on interracial marriage.² In the same month, and before the same judge, Pink and Sarah Ross, another interracial couple, were also indicted for fornication, despite having married in South Carolina.³

On appeal to the North Carolina Supreme Court, however, these two couples met with opposite results. The Kennedys’ convictions were upheld because “when the law of North Carolina declares that all marriages between negroes and white persons shall be void, this is a personal incapacity which follows the parties wherever they go *so long as they remain domiciled in North Carolina.*”⁴ North Carolina’s miscegenation law, the Court explained, “would be very idle if it could be avoided by merely stepping over an imaginary line.”⁵

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¹ See *State v. Kennedy*, 76 N.C. 251, 251 (1877) (describing trial court proceedings).

² See *id.*

³ See *State v. Ross*, 76 N.C. 242, 242 (1877) (describing trial court proceedings).

⁴ *Kennedy*, 76 N.C. at 252 (emphasis added).

⁵ *Id.* at 252-53.

But the Rosses met with a better fate. At the time of their marriage, both were legally domiciled in South Carolina and only after solemnizing their union did they migrate to North Carolina.⁶ Because of the “obligations of comity to our sister States,” the Court decreed that the South Carolina union be honored, “[h]owever revolting to us and to all persons . . . such a marriage may appear.”⁷

That the North Carolina Supreme Court was faced with two such similar cases during one term reflects the real and ongoing conflicts produced by longstanding disagreements among states about the regulation of marriage. That the cases were decided differently reflects the compromise of the era: while states were free to disregard marriages validly celebrated in another state, principles of comity often, but not always, counseled toleration.

This history and those principles are important to remember as the United States revisits the problem of non-uniform marriage laws for the first time in decades. With the 2004 legalization of same-sex marriage in Massachusetts,⁸ there is now a significant variation in state marriage laws. While a few other states may soon follow,⁹ for now Massachusetts is the only American state in which same-sex couples may legally marry.¹⁰

While non-uniform marriage laws and the conflicts they engender are not new, the most significant disagreements among states about marriage law were resolved by the last third of the twentieth century. Thus, the recent introduction of same-sex marriage in a single state has disrupted a period of relative calm. In prior eras, states had routinely struggled with marriage recognition

⁶ *Ross*, 76 N.C. at 243. Pink Ross had been a longstanding resident of South Carolina, and his domicile became hers by operation of law when they married. *Id.* at 242.

⁷ *Id.* at 246-47.

⁸ See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

⁹ See *infra* notes 54-56 for a discussion of currently pending cases.

¹⁰ 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 (2003) (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 *Goodridge*, 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 5000 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.

questions that arose because of sometimes stark disagreements about impediments to marriage. Age, race, degree of relation, and disabilities imposed upon divorce were the subjects that produced the most significant variations in state marriage laws.

Conflicts 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 the principle of comity, which was reflected, among other places, in the rules governing conflict of laws. Those rules 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 celebrating 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. Recognition was sometimes extended to marriages that were evasive or even, as reflected in the court’s language in *State v. Ross*, 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 at the time of their marriage and later moved to another state. One might also have conjectured that evasive same-sex marriages might be recognized

in some states, under some circumstances, though not 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 state did not fully accept the couple’s right to live as “married” within its borders.

Enter Hawaii. Hawaii *almost* legalized same-sex marriage in the early 1990s, producing widespread concern about the effect such a development might have 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 to this concern, 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, their state constitutions, or both, to ban same-sex couples from marrying within the state and, in many 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.

The misapprehension about full faith and credit, and the purported ability of a single state to dictate marriage policy for the nation, was more than a harmless tangent, however. It fueled a modern response that has obscured a longstanding tradition of state respect for each others’ marriage laws and the flexible approach to interstate marriage recognition that came with it. In protecting themselves from a myth, states have lost the ability to *grant* recognition to a particular prohibited marriage or an incident of it, a right they exercised considerably more often historically than the right to refuse recognition. The traditional, more sensible approach to recognition, which permits consideration of competing interests like the expectations of the parties, the impact of non-recognition on the couple’s children, as well as the

strength and validity of the state's interest in refusing recognition to a particular union under particular circumstances or to same-sex unions generally, is thus precluded in most jurisdictions by the modern regime.

This Article 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 re-examines the traditional recognition principles against the modern same-sex marriage landscape. This Part also considers 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 guide courts in analyzing questions of interstate marriage recognition. The Article concludes by urging a more flexible, nuanced approach to marriage recognition, one that would more faithfully honor a longstanding historical tradition of comity among states.

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 marriages¹¹ and

¹¹ See, e.g., CHESTER G. VERNIER, 1 AMERICAN FAMILY LAWS: A COMPARATIVE STUDY OF THE FAMILY LAW OF THE FORTY-EIGHT AMERICAN STATES, ALASKA,

consanguineous marriages within a certain degree.¹² Most states expressly prohibited the insane from marrying,¹³ and “imbeciles” were also forbidden to marry.¹⁴

Other restrictions were common, but not universal. Many states restricted marriages by individuals with certain diseases, including, most commonly, epilepsy, venereal disease, and tuberculosis.¹⁵ 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.¹⁶ All but

THE DISTRICT OF COLUMBIA AND HAWAII (TO JAN. 1, 1931) § 46, at 214 (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. 126, 12 Stat. 501 (1862) (repealed 1910) (criminalizing polygamy); *see also* Reynolds v. United States, 98 U.S. 145 (1878) (holding bans on polygamy constitutional).

¹² *See* VERNIER, *supra* note 11, § 38, at 173-74 (“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 rules. *See, e.g.*, R.I. GEN. LAWS § 36-415-4 (1938) (permitting 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 Bible’s Book of Leviticus. *Leviticus* 18:6-18. First cousins are relatives of the fourth degree and are thus permitted to marry one another under the biblical restriction. *See* JESSE DUKEMINIER *et al.*, WILLS, TRUSTS, AND ESTATES 79 (7th ed. 2005) (reprinting the Table of Consanguinity, which illustrates degrees of kinship).

¹³ *See* VERNIER, *supra* note 11, § 41, at 189 (noting that the greatest 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) (describing state regulation of the insane with respect to marriage and reproduction). 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* VERNIER, *supra* note 11, § 42, at 197.

¹⁴ 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.”).

¹⁵ *See id.* at 200-01; *see also* VERNIER, *supra* note 11, § 43, at 200 tbl.XIV (providing a compilation of state marriage restrictions based on disease). Noting the justification for disease restrictions, Vernier commented that “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.” *Id.* at 199.

¹⁶ Kansas, for example, once 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 14, at 210-11; *see also* VERNIER, *supra* note 11, § 40, 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. *See*

twelve states banned interracial marriage at some point in history,¹⁷ and two-thirds of those retained such a ban at least into the middle of the twentieth century.¹⁸ There were variations in incest laws as well. A substantial minority of states did not ban first-cousin marriages.¹⁹ Nearly half the states prohibited some marriages based on relationships of affinity (by marriage).²⁰ 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.²¹

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,²² 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 to take advantage of more lenient marriage laws and then returning home. Again, in 1931, seventeen states expressly forbade the practice.²³

The non-uniformities among states were thus real. As one commentator noted about the state of marriage laws in 1919:

MORLAND, *supra* note 14, at 210-13 (compiling a chart of state statutes on marriage rules respecting age).

¹⁷ See Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 82 WASH. U. L. Q. 611, 627-28 & n.84 (2004).

¹⁸ See VERNIER, *supra* note 11, § 44, at 206-09 tbl.XV (compiling miscegenation statutes existing in thirty states in 1931).

¹⁹ See *id.* § 38, at 174 (“Twenty-nine jurisdictions prohibit the marriage of first cousins, a view upon which there is considerable controversy.”).

²⁰ See *id.* § 39, at 183 (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 14, at 219; see also, e.g., R.I. GEN. LAWS §§ 36-415-1 to -2 (1938) (prohibiting, among others, a marriage to one’s wife’s mother or husband’s father).

²¹ See VERNIER, *supra* note 11, § 60, at 296 (noting that thirty-six states had “placed conditions and limitations on the right to remarry after absolute divorce”). Lifetime remarriage restrictions were typically reserved for defendant-spouses in divorces 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 other spouse).

²² See VERNIER, *supra* note 11, § 26, at 106-08 tbl.IV (comparing state-law tabulations in five contemporaneous treatises).

²³ See *id.* § 45, at 209; see also MARY E. RICHMOND & FRED S. HALL, *MARRIAGE AND THE STATE* 370-71 app. B (1929) (identifying eighteen states in 1928 that prohibited evasive marriage).

“After all these years of endeavor and experimentation, look at the diversity—the chaos even—of laws!”²⁴ These differences in marriage laws gave rise to conflicts and periodic quests for 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.”²⁵ Encouraging uniformity of marriage and divorce laws was among the Conference’s primary original objectives and remained central to its mission for nearly a century.²⁶

Despite concern about the degree of variation among states and at least a modicum of public upset with evasive marriage practices, NCCUSL 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 neighbors’ laxer ones, 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 NCCUSL to draft a uniform marriage law as well.²⁷ But NCCUSL demurred, preferring to tackle the more contentious issue of migratory divorce first.²⁸ 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).²⁹ If a particular impediment renders a marriage void, it is, in effect, a marriage prohibition. The Act also proposed a one-year waiting

²⁴ See RICHMOND & HALL, *supra* note 23, at 202.

²⁵ REPORT OF PROCEEDINGS OF THE FIRST CONFERENCE OF THE STATE BOARDS OF COMMISSIONERS FOR PROMOTING UNIFORMITY OF LAW IN THE UNITED STATES 3 (1892).

²⁶ 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 . . .”).

²⁷ *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*].

²⁸ *Id.* Migratory divorce, the parallel to evasive marriage, was the term used to describe the practice of going to a state for the purpose of obtaining a divorce on terms or under circumstances one’s home state would not permit.

²⁹ *Id.* at 124-25 (*An Act to Make Uniform the Law Regulating Annulment of Marriage and Divorce*, § 1 (a)-(g)) (withdrawn 1928).

period between an initial and final decree of divorce, which also, in effect, imposes a restriction on marriage (or at least remarriage).³⁰ The 1907 Act was adopted by only three states, however, and thus met a fate similar to contemporaneous laws establishing uniform rules of divorce.³¹

NCCUSL returned to the question of marriage regulation in 1911 when it promulgated the Uniform Marriage and Marriage License Act.³² 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 celebrated.³³ It also made licensure and solemnization a requirement for a valid marriage, which was designed to eliminate common law marriage in adopting jurisdictions.³⁴ But again, this act was adopted in only two states and thus had little effect on the overall state of uniformity of marriage laws.³⁵

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 of a license, and made all license applications a matter of public record. NCCUSL's interest in establishing uniform laws on these topics derived from the:

[W]ell-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

³⁰ See *id.* at 128-29 § 17.

³¹ See HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS 103RD YEAR 1347-54 tbl.IV (1994) [hereinafter 1994 HANDBOOK] (recording the status and adoption history of all uniform acts promulgated by the Conference). 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 27, at 133. This Act was only adopted by a single state. See 1994 HANDBOOK, *supra*, at 1348 tbl.IV.

³² See 9 U.L.A. 187 (1923) (withdrawn 1943).

³³ See *id.* at 198-200 §§ 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.* at 202-203 §§ 7-8.

³⁴ See *id.* at 191 § 1, 217 § 23.

³⁵ 1994 HANDBOOK, *supra* note 31, at 1351 tbl.IV.

license in the adjoining state.³⁶

The prefatory note explained that other aspects of uniformity, which had been sought in the 1911 act, were no longer as desirable. The minimum age for marriage, for example, might reasonably differ from state to state because of “varying social conditions throughout the country.”³⁷ This Act was adopted in only a single state,³⁸ proving NCCUSL’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.³⁹ Not one ever became law. Marriage laws in the United States 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 had unwittingly aligned to create virtually uniform marriage laws. Arguably the most important development was the Supreme Court’s 1967 decision in *Loving v. Virginia*,⁴⁰ 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.⁴¹ Together, these changes led states to eliminate marriage prohibitions that were rooted in concerns about the passage of undesirable genetic traits and to gradually increase the minimum age for marriage.

A snapshot of state marriage laws circa 1995 reveals a remarkably uniform system, especially remarkable given the lack of federal control or national marriage policy and the repeated failure of historical efforts to secure uniformity among state laws

³⁶ HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS FIFTY-NINTH YEAR 242 (1950) (Prefatory Note to *Unif. Marriage License Application Act* (withdrawn 1966)).

³⁷ *Id.*

³⁸ See 1994 HANDBOOK, *supra* note 31, at 1347 tbl.IV.

³⁹ See Stein, *supra* note 17, at 627-41 (summarizing proposed amendments).

⁴⁰ 388 U.S. 1 (1967).

⁴¹ See generally FRIEDMAN, *supra* note 13, at 56-60.

through voluntary cooperation. All states continued to prohibit marriages that were bigamous, were incestuous closer than the fourth degree, or involved a minor below a certain age.

Variations persisted, though, on the permissibility of marriages between first cousins⁴² and common law marriages.⁴³ But other variations had lessened significantly. Most if not all restrictions on marriages by affinity had been abolished.⁴⁴ All but a handful of states by then permitted marriage without parental consent at age eighteen; the remaining few had set the age at twenty-one.⁴⁵ With parental consent, most states permitted minors to marry at age sixteen, sometimes even earlier in the case of pregnancy.⁴⁶ Only one state continued to differentiate between males and females for marriage age.⁴⁷ Only a handful of states still imposed a remarriage waiting period following divorce.⁴⁸

⁴² Twenty-five states prohibit first cousins from marrying altogether. *See, e.g.*, N.H. REV. STAT. ANN. §§ 457:1, 2 (2004). Eighteen permit them to marry without limitation. *See, e.g.*, ALASKA STAT. § 25.05.021 (2004) (prohibiting marriage when the parties are “more closely related . . . than the fourth degree of consanguinity,” which does not include first cousins). Seven states permit first cousins to marry subject to certain conditions. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-101 (2000) (permitting first cousins to marry only if both are sixty-five years old or older or if one or both first cousins are under sixty-five years old, with judicial approval based on proof that one of the cousins is unable to produce).

⁴³ Today, ten states and the District of Columbia permit couples to contract common law marriages. Seven additional states either grandfather in common law marriages contracted before a certain date or recognize them for additional purposes. *See* National Conference of State Legislatures, Common Law Marriage, <http://www.ncsl.org/programs/cyf/commonlaw.htm>.

⁴⁴ *See* UNIF. MARRIAGE AND DIVORCE ACT 9A U.L.A. 161 (amended 1973) (Prefatory Note) (noting trend toward abolishing all restrictions based on affinity).

⁴⁵ *See* Guide to Legal Impediments to Marriage for 57 Registration Jurisdictions (Feb. 10, 2005), at <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).

⁴⁶ *See, e.g.*, ARK. CODE ANN. § 9-11-103 (West 2004) (permitting court to grant permission for marriage below the minimum age when the female is pregnant or has given birth). Texas still permits marriage by non-parent fourteen-year-olds with parental consent. *See* TEX. FAM. CODE ANN. § 2.102 (Vernon 1998).

⁴⁷ *See* ARK. CODE ANN. § 9-11-102 (West 2004) (permitting a male who is seventeen years old and a female who is sixteen years old to contract for marriage with written consent of a parent or guardian).

⁴⁸ *See, e.g.*, ALA. CODE §§ 30-2-8, 30-2-10 (2004) (prohibiting parties to a divorce from marrying, except to each other, within sixty days of when the judgment is entered and permitting a court to deny either party the right to remarry permanently); CAL. FAM. CODE §§ 2339, 2341 (West 2004) (imposing a six-month waiting period for remarriage after divorce and denying the right to remarry pending appeal of a divorce judgment if the appealing party specifically objects to the termination of the marriage status).

A few states maintained other idiosyncratic restrictions, such as Nebraska, which did not permit anyone “afflicted with a venereal disease” to marry,⁴⁹ or Tennessee, which prohibited issuance of a license to a couple if either party is drunk at the time of application.⁵⁰ Same-sex marriage had not made its mark in the public conscience yet, and, thus, most state statutes were silent on the subject.⁵¹ No state affirmatively authorized same-sex marriage, but very few expressly precluded it.⁵²

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.⁵³ Lower courts in New York,⁵⁴ Washington,⁵⁵ and California⁵⁶ have held that a ban on same-sex marriage violates their respective state constitutions.⁵⁷ If those

⁴⁹ NEB. REV. STAT. § 42-102 (2004).

⁵⁰ TENN. CODE ANN. 36-3-109 (2004).

⁵¹ Compare, e.g., IDAHO CODE § 32-201(1) (1990) (“Marriage is a personal relation arising out of a civil contract to which the consent of the parties capable of making it is necessary.”), with IDAHO CODE § 32-201(1) (2004) (“Marriage is a personal relation arising out of a civil contract *between a man and a woman*, to which the consent of parties capable of making it is necessary.”) (amendment effective 1996).

⁵² Wyoming was one of the only states to expressly mention gender in its marriage statute before the modern era. See WYO. STAT. § 20-1-101 (1957) (“Marriage is a civil contract between a male and a female person to which the consent of the parties capable of contracting is essential.”)

⁵³ See *supra* notes 8-10.

⁵⁴ See *Hernandez v. Robles*, 794 N.Y.S.2d 579 (Sup. Ct. 2005) (declaring the 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. *Hernandez v. Robles*, 796 N.Y.S.2d 577 (2005).

⁵⁵ See *Anderson v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Super. Aug. 4, 2004) (invalidating same-sex marriage ban under state constitution). *Anderson* was argued before the state’s highest court on March 8, 2005.

⁵⁶ *In re Council Coordination Proceeding*, Special Title [Rule 1550(c)], Marriage Cases, No. 4365, 2005 WL 583129 (Cal. Super. Ct. 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).

⁵⁷ Lower courts in three other states – Hawaii, Alaska, and Oregon – struck down their respective state’s ban on same-sex marriage, but each was overridden by a subsequent amendment to the state constitution. See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *Bess v. Ulmer*, 985 P.2d 979 (Alaska 1999); *Li v. State*, 2004 WL 1258167 (Or. Cir. Apr. 20, 2004). In the last two years, lower courts in several other states have rejected similar challenges to same-sex marriage bans. See *Standhardt v. Superior Court*, 77 P.3d 451 (Ariz. Ct. App. 2003); *Lewis v. Harris*, 875 A.2d 259 (N.J. Super. Ct. App. Div. 2005); *Seymour v. Holcomb*, 790 N.Y.S.2d 858 (N.Y. Sup. Ct. 2005); *Shields v. Madigan*, 783 N.Y.S.2d 270 (N.Y. Sup. Ct. 2004); *Samuels v.*

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.⁵⁸ Internationally, Belgium and the Netherlands have permitted same-sex marriage for several years,⁵⁹ and both Canada and Spain have recently authorized it.⁶⁰

II

SAME-SEX MARRIAGE AND THE MODERN REACTION TO NON-UNIFORMITY

While the legalization of same-sex marriage in one American state is certainly a noteworthy development, the steps taken in opposition to same-sex marriages are in some ways more remarkable. Spurred first by the fear that Hawaii *might* legalize same-sex marriage in the early 1990s,⁶¹ and later by the reality that

N.Y. State Dept. of Health, No. 1967-04 (N.Y. Sup. Ct. 2004). Earlier cases had rejected similar claims, though generally without serious discussion of any constitutional challenge. *See, e.g.*, *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973) (“In our view, however, no constitutional issue is involved.”); *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971) (upholding denial of marriage license to same-sex couple), *appeal dismissed*, 409 U.S. 810 (1972) (appeal dismissed “for want of a substantial federal question”).

⁵⁸ In Vermont, the state 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 VT. STAT. ANN. tit. 15, §§ 1201-07 (2004). Without judicial pressure, Connecticut adopted a civil union law comparable to Vermont’s in April 2005. *See* 2005 CONN LEGIS. SERV. 05-10 (West). In California, the legislature expanded its domestic partnership status as of January 1, 2005 to be equivalent to marriage in most respects. *See* CAL. FAM. CODE § 297.5 (West 2004).

⁵⁹ *See* Herma Hill Kay, *Same-Sex Divorce in the Conflict of Laws*, 15 KING’S C. L.J. 63, 74 (2004) (discussing same-sex marriage developments on the international front).

⁶⁰ *See An Act Respecting Certain Aspects of Legal Capacity for Marriage for Civil Purposes*, S.C. 2005, c. 33 (adopted July 21, 2005); *see also* Reference re Same-Sex Marriage, 3 S.C.R. 698 (2004) (approving, in an advisory opinion, the constitutionality of a proposed bill to legalize same-sex marriage). Even without the benefit of a federal law, same-sex couples could already marry in Canada by virtue of provincial court decisions invalidating the ban on same-sex unions. *See, e.g.*, *Halpern v. Canada* (Attorney General), 65 O.R. 3d 161 (Ct. App. 2004) (ordering the immediate issuance of marriage licenses to same-sex couples in Toronto). Spain adopted a law legalizing same-sex marriage, effective July 3, 2005. *See Proyecto De Ley Por la que se modifica el Codigo Civil en materia de derecho a contraer matrimonio*, 121/000018 (Jan. 21, 2005).

⁶¹ *See generally* Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 930-31 (1998) (summarizing legal developments in Hawaii on the issue of same-sex marriage).

Massachusetts *did* legalize same-sex marriage, an entirely new, and historically unprecedented, statutory and constitutional framework was erected.

A. *The Defense of Marriage Act and State Analogs*

Congress launched the formal 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.⁶² Section two amends the Full Faith and Credit Act to exempt same-sex marriages from recognition under principles of full faith and credit.⁶³ This amendment states that:

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.⁶⁴

The essence of section two is to protect states against compelled recognition of same-sex marriages from other states 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. In this view, DOMA leaves the matter to each state individually, to determine for itself.”⁶⁵ The federal neutrality, Wardle argued, would permit states to recognize same-sex marriages or not as they saw fit.⁶⁶

Technically speaking, this characterization of DOMA is true. 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

⁶² See Defense of Marriage Act, Pub L. No. 104-199, § 3(a), 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2000)).

⁶³ See *id.* § 2(a) (codified at 28 U.S.C. § 1738C (2000)).

⁶⁴ See *id.* This second provision purports to derive authority from the “effects” clause, discussed *infra*.

⁶⁵ See *Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution*, 104th Cong. 178 (1996) [hereinafter *Hearing on H.R. 3396*] (statement of Lynn D. Wardle, Professor of Law, Brigham Young University School of Law).

⁶⁶ See *id.*

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 not take proactive measures to protect themselves, they would be compelled to recognize same-sex marriages from other states.⁶⁷ Congress thus facilitated, even if it did not mandate, dissent among the states.⁶⁸

States embraced DOMA's "offer" in large numbers by adding express anti-same-sex marriage provisions, so-called "mini-DOMAs," to their state codes or constitutions. As of October 2005, forty-four states explicitly prohibit same-sex marriage by statute or constitutional amendment.⁶⁹ Thirty-eight of those states also refuse to recognize a same-sex marriage validly celebrated elsewhere,⁷⁰ and eleven of the thirty-eight refuse recognition not only to the marriage itself, but also to all claims and rights arising out of it or any related contract.⁷¹ Several states prohibit not only same-sex marriage, but also alternative statuses like civil unions and domestic partnerships as well.⁷² There are thus only six

⁶⁷ See *infra* text accompanying notes 79-86.

⁶⁸ Cf. 142 CONG. REC. S10076-04 (daily ed. Sept. 9, 1996) (statement of Herma Hill Kay, Dean, University of California, Berkeley School of Law) (noting that DOMA "does not facilitate sister state relations," but rather "approv[es] dissent among the states").

⁶⁹ See, e.g., ARIZ. REV. STAT. ANN. § 25-101(C) (2000) ("Marriage between persons of the same sex is void and prohibited."). For a complete listing of current state laws regarding same-sex marriage, see www.hofstra.edu/samesexchart. Between 1999 and 2005, eighteen states enacted constitutional amendments banning same-sex marriage. Those states are: Alaska, Arkansas, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Michigan, Missouri, Mississippi, Montana, Nebraska, North Dakota, Nevada, Ohio, Oklahoma, Oregon, and Utah. At least fifteen additional states have such amendments currently pending or under consideration in the legislature or awaiting voter approval.

⁷⁰ See, e.g., ALA. CODE § 30-1-19(e) (1998) ("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."). The six states that ban same-sex marriage but do not expressly prohibit recognition are: Connecticut, Hawaii, Maryland, South Carolina, Vermont, and Wyoming.

⁷¹ The eleven states are: Alaska, Arkansas, Florida, Georgia, Kentucky, Louisiana, Minnesota, Missouri, Texas, Virginia, and West Virginia. (This list includes states that bar recognition "for any purpose.") 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." KY. REV. STAT. ANN. § 402.045 (1)-(2) (West 2004).

⁷² See, e.g., KAN. CONST. art. XV, § 16 ("Marriage shall be constituted by one man and one woman only. . . . No relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage."). A provision in the Nebraska Constitution, stating that the "uniting of two persons of the

states left without an explicit statutory or constitutional ban on same-sex marriage,⁷³ and in at least three of the six the state's highest court or attorney general has interpreted the current statutes, though silent on the issue, to prohibit same-sex marriage.⁷⁴

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.⁷⁵ Although the State of Hawaii failed on remand to prove a compelling justification for excluding same-sex couples from civil marriage,⁷⁶—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 Hawaii legislature the power to ban same-sex marriage, which it subsequently did.⁷⁷

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

same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska," NEB. CONST. art. I, § 29, was recently invalidated by a federal district court on constitutional grounds. See *Citizens for Equal Protection, Inc. v. Bruning*, 368 F. Supp. 2d 980, 1009 (D. Neb. 2005).

⁷³ Those states are: Massachusetts, New Jersey, New Mexico, New York, Rhode Island, and Wisconsin.

⁷⁴ See N.Y. Op. (Inf.) Att'y Gen. No. 2004-1 (Mar. 3, 2004) ("We conclude that the Legislature did not intend to authorize same-sex marriages."); N.M. Att'y Gen. Advisory Letter (Feb. 20, 2004) ("New Mexico statutes, as they currently exist, contemplate that marriage will be between a man and a woman."); see also *Georgina G. v. Terry M.*, 516 N.W.2d 678, 680 n.1 (Wis. 1994) (noting that the existing marriage law, 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 Press Release, State of Rhode Island, Department of Attorney General, Attorney General Lynch's statement concerning same-sex marriage (May 17, 2004), available at <http://www.riag.state.ri.us/public/pr.php?ID=209>. An intermediate court of appeals in New Jersey has held that a ban on same-sex marriage does not violate the state constitution, *Lewis v. Harris*, 875 A.2d 259 (N.J. Super. Ct. App. Div. 2005), but the ruling will be appealed to the state's highest court.

⁷⁵ 852 P.2d 44, 59-67 (Haw. 1993).

⁷⁶ See *Baehr v. Miike*, CIV No. 91-1394, 1996 WL 694235, at *21 (Haw. Cir. Ct. Dec. 3, 1996), *aff'd*, 950 P.2d 1234 (Haw. 1997).

⁷⁷ See HAW. CONST. art. I, § 23 (adopted 1998) ("The legislature shall have the power to reserve marriage to opposite-sex couples."). The legislature later specified that a marriage "shall be only between a man and a woman." HAW. REV. STAT. § 572-1 (Supp. 2004).

was naturally drawn there, given the social importance of the same-sex marriage issue, but the intensity of the focus was fueled by the intervening debate about and enactment of DOMA in 1996.⁷⁸

Hawaii's impact on both federal, and eventually state law, was exacerbated by the perceived full faith and credit threat. The assumption that recognition of Hawaii same-sex marriages by other states would be both compelled and automatic, initially asserted primarily in student law review notes⁷⁹ and media reports,⁸⁰ was shared by both opponents and proponents of same-sex marriage.⁸¹ 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 from an exported marriage policy, and provided powerful rhetoric to trigger legislative reactions.

Within the specific context of DOMA, the assertion gave op-

⁷⁸ See Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

⁷⁹ See Patrick J. Borchers, Baker v. General Motors: *Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147, 152-53 (1998) [hereinafter Borchers, Baker v. General Motors] (noting that the "expansive argument" about full faith and credit was "advanced mostly in student writing and the popular press"); Patrick J. Borchers, *The Essential Irrelevance of the Full Faith and Credit Clause to the Same-Sex Marriage Debate*, 38 CREIGHTON L. REV. 353 (2005) [hereinafter Borchers, *Essential Irrelevance*] (describing the assertion as proof that "[s]ometimes ideas gain momentum through repetition"). Professor Larry Kramer published an article in 1997 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. 1965, 1980-92 (1997). Even this narrower view, however, is not shared by most scholars.

⁸⁰ See, e.g., Editorial, *The Freedom to Marry*, N.Y. TIMES, Apr. 7, 1996, at 10 ("The backlash against same-sex marriages is driven by social intolerance, but it also poses an ominous challenge to the nation's Federal system of laws, and the basic requirement in the U.S. Constitution that states give 'full faith and credit' to the legal actions taken by other states."); Melissa Healy, *House Backs Curbs on Gay Marriages*, L.A. TIMES, House July 13, 1996, at 1 ("Under the 'full faith and credit' clause of the U.S. Constitution, each state is obliged to recognize marriages performed legally in any other state."); George de Lama, *Hawaii May Lead Way On Same-Sex Marriage*, CHI. TRIB., May 15, 1994, at 21 ("Traditionally, states recognize marriages and other legal acts conducted in other states under the full-faith and credit provision of the Constitution.")

⁸¹ See Borchers, Baker v. General Motors, *supra* note 79, at 185 ("[B]oth the proponents and opponents of same-sex marriage have apparently assumed that the Clause has a large role in [the same-sex marriage] question.").

ponents 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 to 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:

[S]uch 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].⁸²

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.”⁸³ 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 was] invested with by the voters.”⁸⁴ 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.”⁸⁵

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 rele-

⁸² 142 CONG. REC. S10100 (1996) (statement of Sen. Lott) (emphasis added).

⁸³ 142 CONG. REC. H7272 (1996) (statement of Rep. McInnis).

⁸⁴ *Hearing on H.R. 3396, supra* note 65, at 52 (statement of Rep. Terrence Tom, Hawaii State House of Representatives).

⁸⁵ 142 CONG. REC. H7481 (1996) (statement of Rep. Mink).

vant played an important role as well. Representative Largent captured the lurking concern:

Quite simply, the legal ramifications of what the State court of Hawaii is about to do cannot be ignored. If the State court in Hawaii legalizes same-sex marriage, homosexual couples from other states around the country will fly to Hawaii and marry. These same couples will 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.⁸⁶

These predictions about the likely behavior of same-sex couples were not unjustified. Same-sex marriage activists indeed conceived of this exact scenario as part of the broader strategy to obtain marriage rights nationwide.⁸⁷ 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 legal nationwide recognition of their marriage unions.⁸⁸

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 that the Full Faith and Credit Clause would leave states defenseless to the demands.⁸⁹

⁸⁶ 142 CONG. REC. H7276 (1996) (statement of Rep. Largent). DOMA’s senate sponsor, Senator Nickles, concurred: “[i]t 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.” 142 CONG. REC. S10100, S10103 (1996) (statement of Sen. Nickles).

⁸⁷ Borchers, *Baker v. General Motors*, *supra* note 79, at 149-50 (“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.’”).

⁸⁸ Evan Wolfson, *Fighting to Win and Keep the Freedom to Marry: The Legal, Political, and Cultural Challenges Ahead*, NAT’L J. OF SEXUAL ORIENTATION L. 259, 262 (1995), available at <http://www.ibiblio.org/gaylaw/issue2/wolfson.html>.

⁸⁹ *See, e.g.*, 142 CONG. REC. H7480, H7484 (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.

B. *Full Faith and Credit and Marriage Laws*

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.⁹⁰ The legal predicate, however, was at best exaggerated, at worst a complete fiction. The thrust of DOMA in congressional rhetoric was to alleviate the ostensibly 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."⁹¹ 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."⁹² 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.⁹³

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 marriages. Indeed, the specter 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.⁹⁴ Historical conflicts over mi-

⁹⁰ 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 note 246.

⁹¹ U.S. CONST. art IV, § 1.

⁹² See 28 U.S.C. § 1738 (2000).

⁹³ See, e.g., Borchers, *Baker v. General Motors*, *supra* note 79, 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.")

⁹⁴ See, e.g., *Baker v. General Motors Corp.*, 522 U.S. 222, 233 (1998); see also

gratory 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*,⁹⁵ that states were compelled to recognize divorces from every state, provided certain minimal due process requirements were met.⁹⁶ But marriage, unlike divorce, is neither a judgment nor the product of a judicial proceeding.

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."⁹⁷ 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."⁹⁸ 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, in which case even those minimum requirements do not apply.⁹⁹

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").

⁹⁵ 317 U.S. 287 (1942) (*Williams I*) (ruling that North Carolina must recognize a divorce granted by a Nevada court to two North Carolina residents).

⁹⁶ 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, 239 (1945) (*Williams II*). The force of *Williams I* was further undermined by *Estin v. Estin*, 334 U.S. 541 (1948), a case in which the Court held that while a New York court had to honor a Nevada divorce with respect to determining the marital status of the parties, it did not have to relieve the plaintiff-husband from the incidental obligations of separation previously adjudicated by a New York court.

⁹⁷ *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 516 (1953).

⁹⁸ *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 I*, 317 U.S. at 298 (principles of full faith and credit "do[] not require one state to substitute for its own statute . . . the conflicting statutes of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events") (quoting *Pacific Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 502 (1939)); *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.").

⁹⁹ See, e.g., *Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on*

Regardless of the explanation, the historical practice and precedent for over 200 years has been to decide questions of marriage recognition without invoking full faith and credit principles to supply the answer.¹⁰⁰ 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.¹⁰¹ 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.”¹⁰²

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 strong public policy of the state.¹⁰³ Although states must

the Judiciary, 104th Cong., 42-43 (1996) [hereinafter *Hearing on S. 1740*] (statement of Cass R. Sunstein, Professor of Law, University of Chicago) (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 79, at 1987-90; Kay, *supra* note 59, 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”).

¹⁰⁰ *Cf.* JACKSON, *supra* note 99, at 23 (noting that “[q]uestions of faith and credit in matrimonial relations have usually come up only as to the effect of judgments”). Exceptions to this characterization are virtually nonexistent, and cases that do invoke full faith and credit principles with respect to marriage recognition tend to do so without analysis. *See, e.g.,* Wyble v. Miniville, 217 So. 2d 684, 688 (Ct. App. La. 1969) (“Louisiana does not recognize or permit the contracting of commonlaw marriages in this state, but we are obliged to give effect to such marriages when they are validly contracted in another state. This is commanded by the full faith and credit clause”)

¹⁰¹ *See infra* text accompanying notes 134-86 (detailing historical approach to marriage recognition).

¹⁰² JACKSON, *supra* note 99, at 30; *see also 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.”).

¹⁰³ *See generally* Koppelman, *supra* note 61 (arguing that the Full Faith and Credit Clause does not mandate recognition of out-of-state marriages in all circumstances); F.H. Buckley & Larry E. Ribstein, *Calling a Truce in the Marriage Wars*, 2001 U. ILL. L. REV. 561, 603-06 (2005) (arguing that the Constitution does not restrain the right of a state to refuse enforcement to a marriage celebrated else-

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 the marriages those laws permit.

Assuming a particular marriage ban is not itself unconstitutional,¹⁰⁴ courts have thought themselves free to refuse recognition to an out-of-state marriage if necessary to protect a state's strong public policy.¹⁰⁵ Indeed, one of the first appellate cases brought seeking out-of-state recognition of a Vermont civil union, *Rosengarten v. Downes*,¹⁰⁶ followed this approach. The *Rosengarten* court considered but rejected the plaintiff's claim that his Vermont civil union status must be granted full faith and credit by Connecticut courts.¹⁰⁷ The court interpreted Article IV to require recognition only if consistent with the "forum's own interest in furthering its public policy."¹⁰⁸ A federal court in Florida rejected a similar claim, made in reference to a Massachusetts marriage.¹⁰⁹

where); Borchers, *Essential Irrelevance*, *supra* note 79 (arguing that full faith and credit principles do not require states to recognize marriages from other states); Jeffrey L. Rensberger, *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); Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STANFORD J. OF CIV. RIGHTS & CIV. LIBERTIES 32 (forthcoming 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=697862 (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. See Brief as Amici Curiae of Professors of Conflict of Laws and Family Law, *Cote-Whitacre v. Dep't of Pub. Health*, No. SJC-09436 (Mass. Mar. 11, 2005).

¹⁰⁴ 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. See *Loving v. Virginia*, 388 U.S. 1 (1967). Likewise, were the Supreme Court to hold bans on same-sex marriage unconstitutional, a state could not refuse recognition to them either.

¹⁰⁵ See JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 113a (8th ed. 1883) (noting the power of states to refuse recognition for marriages "positively prohibited by the public law of a country from motives of policy"); see generally 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.").

¹⁰⁶ 802 A.2d 170, 174-75 (Conn. App. Ct. 2002).

¹⁰⁷ *Id.* at 179.

¹⁰⁸ *Id.* at 178.

¹⁰⁹ See *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1303 (M.D. Fla. 2005) (rejecting full faith and credit claim). The trial court in *Langan v. St. Vincent's Hospital*, 765 N.Y.S.2d 411, 419 (N.Y. Sup. Ct. 2003), *rev'd*, No. 2003-04702, slip op. (N.Y. App. Div. Oct. 11, 2005), discussed *infra* notes 248-55, refers to "full faith and credit and

Although a federal court recently invalidated Nebraska's mini-DOMA, it did so on grounds unrelated to full faith and credit. The Court in *Citizens for Equal Protection, Inc. v. Bruning*,¹¹⁰ 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 Amendment, and the Bill of Attainder Clause.¹¹¹ Had the provision *merely* refused recognition to same-sex marriages elsewhere, the opinion implies such a provision would have been found valid.¹¹²

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.¹¹³ Others argued that if the Full Faith and Credit Clause 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, these same commentators 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."¹¹⁴ Noted constitutional law scholar Cass Sunstein agreed, testifying that DOMA is "probably either pointless or unconstitutional."¹¹⁵

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. *Salucco v. Alldredge*, 17 Mass. L. Rptr. 498 (Mass. Super. Ct. 2004) (mem.).

¹¹⁰ 368 F. Supp. 2d 980 (D. Neb. 2005).

¹¹¹ *Id.* at 989, 1005.

¹¹² *Id.* at 1008.

¹¹³ 142 CONG. REC. H7276 (daily ed. July 11, 1996) (statement of Rep. Nadler).

¹¹⁴ 142 CONG. REC. H7277 (daily ed. July 11, 1996) (statement of Rep. Studds).

¹¹⁵ *Hearing on S. 1740*, *supra* note 99, at 44 (statement of Cass R. Sunstein). Much of the discussion of DOMA had this flavor. As Professor Patrick Borchers describes the debate about DOMA: "[i]ts proponents alternately claimed that it

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.”¹¹⁶ Constitutional law expert Laurence Tribe also noted that, with respect to marriages that had traditionally been denied recognition, “the proposed federal legislation would be entirely redundant and indeed altogether devoid of content.”¹¹⁷

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.”¹¹⁸ Wardle *was* concerned that gay married couples would seek to compel recognition under principles of full faith and credit, but he did not believe they would succeed.¹¹⁹ Noted conflicts and family law scholar Herma Hill Kay submitted a letter to Senator Dianne Feinstein 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.”¹²⁰ The irrelevance of full faith and credit was brushed to the side,

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, *Baker v. General Motors*, *supra* note 79, at 179-80 (citations omitted).

¹¹⁶ *Hearing on S. 1740, supra* note 99, at 44 (statement of Cass R. Sunstein). Sunstein argued that states have always had 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.” *See id.* at 45.

¹¹⁷ 142 CONG. REC. S5931 (daily ed. June 6, 1996) (statement of Sen. Kennedy, quoting a letter from Laurence H. Tribe, Professor of Constitutional Law, Harvard Law School).

¹¹⁸ *Hearing on H.R. 3396, supra* note 65, at 179 (statement of Lynn D. Wardle) (testifying that it would not “violate . . . the Constitution for a 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”)

¹¹⁹ *See id.*

¹²⁰ 142 CONG. REC. S10100, S10102 (daily ed. Sept. 10, 1996) (statement of Sen. Kennedy, quoting letter from Herma Hill Kay).

however, and DOMA was signed into law by a ready-and-waiting President Clinton fewer than four months after it had first been introduced.¹²¹

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.¹²²

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.¹²³

Part of the justification for the proposed Amendment was the possibility that DOMA might be declared unconstitutional.¹²⁴ Were that to happen, its supporters argued, then states would, once again, be compelled by the Full Faith and Credit Clause to recognize a same-sex marriage licensed by a sister state. The FMA, if enacted, would avoid the full faith and credit questions raised by a state like Massachusetts by forcing it to reverse course. If no state can constitutionally legalize same-sex marriages, then no state is put in the position of being compelled to recognize them. Thus, once again, the focus of Senate debate was about the full faith and credit implications of states legalizing same-sex marriage, complicated by the purported likelihood that

¹²¹ See 104 Bill Tracking H.R. 3396.

¹²² See, e.g., President George W. Bush, Remarks by the President: President Calls for Constitutional Amendment Protecting Marriage (Feb. 24, 2004), available at <http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html> (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).

¹²³ Federal Marriage Amendment, S.J. Res. 40, 108th Cong. (2004) (introduced by Sen. Allard).

¹²⁴ See, e.g., 150 CONG. REC. S7871, S7872 (daily ed. July 7, 2004) (statement by Sen. Allard) (noting concern about uncontrollable "activist judges").

DOMA might someday be invalidated.¹²⁵

But since the FMA has yet to make any substantial progress towards enactment,¹²⁶ same-sex marriage opponents have 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.¹²⁷ As with DOMA, the factual predicate for the MPA is not implausible. Couples will, and indeed already have,¹²⁸ challenged the validity of DOMA and its state analogs on full faith and credit grounds.¹²⁹

The legal predicate—that DOMA could be declared invalid—

¹²⁵ See 150 CONG. REC. S7903, 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.”); *id.* at 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).

¹²⁶ Cf. President George W. Bush, State of the Union Address 2005 (Feb. 2, 2005), available at <http://www.whitehouse.gov/news/releases/2005/02/20050202-11.html> (“I support a constitutional amendment to protect the institution of marriage.”).

¹²⁷ The MPA specifically provides: “No court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or determine any question pertaining to the interpretation of section 1738C of this title or of this section.” Marriage Protection Act of 2003, H.R. 3313, 108th Cong. (2003). The MPA passed the House by a vote of 233-194, 150 CONG. REC. H6580, 6612 (daily ed. July 22, 2004), but was never introduced in the Senate.

¹²⁸ Until Massachusetts began to permit same-sex couples to marry, no one had standing to challenge DOMA. Thus, to date, only a handful of cases have been filed.

¹²⁹ Plaintiffs in the first such case filed a complaint in Florida seeking a declaration that the federal Defense of Marriage Act and the Florida law prohibiting recognition of same-sex marriages are both invalid. Among other claims, the plaintiffs alleged 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.” *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1303 (M.D. Fla. 2005) (quoting plaintiffs’ complaint). Plaintiffs in *Morrison v. Sadler*, 821 N.E.2d 15, 19 (Ind. Ct. App. 2005), made a similar argument when asking a court in Indiana to recognize their Vermont civil union. On appeal, however, plaintiffs dropped their recognition claim, see *id.* at 19 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. Cf. *Cook v. Cook*, 104 P.3d 857, 863 n.6 (Ariz. Ct. App. 2005) (deeming full faith and credit argument waived on appeal in case testing the validity of a prohibited first-cousin marriage from out of state).

is also not implausible. Some scholars have argued that DOMA is invalid because it exceeds Congress' authority under the Full Faith and Credit Act,¹³⁰ or, more persuasively, because it violates principles of due process and equal protection guaranteed by the Federal Constitution.¹³¹ 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 IMPORTANCE OF COMITY

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 they were much more inclined to do historically than to refuse it. The rush to judgment by Congress and the states preempted a full and fair discussion not only about the proper role, if any, of full faith and credit principles, 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 the secondary literature.

A. *The General Rule of Recognition*

Varied marriage laws gave rise to predictable conflicts about the portability of marriage.¹³² The principle of comity—"cour-

¹³⁰ See, e.g., Kramer, *supra* note 79, at 1987-90 (arguing that the Full Faith and Credit Clause does not permit states to reject laws of other states since "[t]he 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"); cf. 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, 1041 (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).

¹³¹ See, e.g., Note, *Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*, 117 HARV. L. REV. 2684 (2004) (arguing that DOMA violates both equal protection and due process guarantees contained in the Federal Constitution).

¹³² See JOSEPH R. LONG, *LAW OF DOMESTIC RELATIONS* 85 (1905) ("Every nation and every state and territory of the Union have their own peculiar laws regulating

tesy among political entities”¹³³—was the historical touchstone for analyzing marriage recognition questions.¹³⁴ All jurisdictions followed some version of *lex loci contractus* in evaluating the validity of a marriage.¹³⁵ Under this general rule, often referred to as the “place of celebration” rule, a marriage was valid everywhere if valid where celebrated,¹³⁶ and, concomitantly, void everywhere if void where celebrated.¹³⁷ 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.”¹³⁸ Enforcement of this general rule was called for by “public policy, common morality, and the comity of nations.”¹³⁹

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

this important institution, and the differences in these laws have given rise to many cases in conflict of laws.”); JAMES SCHOULER, *LAW OF THE DOMESTIC RELATIONS* 46 (2d ed. 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.”).

¹³³ See BRYAN A. GARNER, *A DICTIONARY OF MODERN LEGAL USAGE* 174 (2d ed. 1995).

¹³⁴ See, e.g., SCHOULER, *supra* note 132, at 47 (describing the rule of recognition as “the rule of comity”).

¹³⁵ This rule originated with Joseph Story, who stated in his treatise on conflicts that “[t]he general principle certainly is . . . that . . . marriage is to be decided by the law of the place where it is celebrated.” See STORY, *supra* note 105, § 113.

¹³⁶ See, e.g., IRVING BROWNE, *ELEMENTS OF THE LAW OF DOMESTIC RELATIONS AND OF EMPLOYER AND EMPLOYED* 12 (2d ed., rev. 1890); LONG, *supra* note 132, at 86 (“A marriage valid where celebrated is valid everywhere, and, conversely, a marriage invalid where celebrated is invalid everywhere.”); MORLAND, *supra* note 14, at 16 n.59 (collecting state cases reflecting the place of celebration rule); WALTER C. TIFFANY, *HANDBOOK ON 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 . . .”).

¹³⁷ See, e.g., JOEL PRENTISS BISHOP, *1 COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE* 307 (6th ed., rev. 1881) (stating that “if the transaction is not regarded by the law there prevailing as a marriage, it will not be deemed such in any other country”); SCHOULER, *supra* note 132, at 49 (“A marriage invalid where celebrated is as a rule invalid everywhere.”).

¹³⁸ FLETCHER W. BATTERSHALL, *THE LAW OF DOMESTIC RELATIONS IN THE STATE OF NEW YORK* 7-8 (1902) (describing prevalence of general rule of recognition).

¹³⁹ See SCHOULER, *supra* note 132, at 47.

have been contracted within the forum state, there were certain well-established exceptions.

1. *Categorical Exceptions*

The first categorical exception to the rule of recognition, the so-called "universal" exception, was reserved for marriages thought to violate natural law.¹⁴⁰ Polygamous and certain incestuous marriages fell into that category,¹⁴¹ though not all incestuous marriages fit the bill.¹⁴² According to one 1896 treatise, "no court in this country would uphold . . . an incestuous marriage between brother and sister, though they might be valid in the country in which they were entered into."¹⁴³ Marriages between ancestor and descendant were also universally taboo.¹⁴⁴ Since all states prohibited this narrower class of incestuous marriages, there were few if any cases refusing recognition to a marriage on those grounds.¹⁴⁵ The incest cases that did arise tended to involve uncle-niece or cousin marriages, which were arguably justifiable either because religious law permitted them¹⁴⁶ or because,

¹⁴⁰ 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"); TIFFANY, *supra* note 136, at 46 (stating that marriages will not be recognized by a state if it is "opposed to the morality, religion, or municipal institutions").

¹⁴¹ See LONG, *supra* note 132, 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"); MORLAND, *supra* note 14, at 20 (noting that polygamous and "incestuous or unnatural marriages" will "not be upheld"); see also 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 all Christendom").

¹⁴² See, e.g., *Commonwealth v. Lane*, 113 Mass. 458, 464 (1873) (noting with approval a prior Massachusetts case recognizing an English marriage between aunt and nephew on the principle that the place of celebration rule should still apply to "marriages not naturally unlawful, but prohibited by the law of one state, and not of another").

¹⁴³ See LONG, *supra* note 132, at 88 (noting that the exception for incestuous marriages "includes only persons in the direct line of consanguinity and brothers and sisters"); TIFFANY, *supra* note 136, at 46.

¹⁴⁴ See P.H. Vartanian, Annotation, *Recognition of Foreign Marriage as Affected by Policy in Respect of Incestuous Marriages*, 117 A.L.R. 186, 190 (1938) (noting that the incest exception includes direct line ancestors and descendants and brothers and sisters).

¹⁴⁵ See *id.* 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 . . .").

¹⁴⁶ See, e.g., R.I. GEN. LAWS § 36-415-4 (1938) (creating exception for certain prohibited marriages for any "which shall be solemnized among the Jews, within the

although prohibited, they were not abhorrent because of the relative distance of the relation.¹⁴⁷

With respect to polygamous marriages, the main issue was whether to recognize *potentially* polygamous unions—a 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 within the exception.¹⁴⁸ Some courts and commentators also considered marriage by an “imbecile” to be within the natural law exception.¹⁴⁹ Despite the vehement opposition to interracial marriages,¹⁵⁰ however, they were seldom considered to fall in this category.¹⁵¹

The second categorical exception to the place-of-celebration rule involved legislative enactments specifically declaring certain marriages invalid or void as against public policy.¹⁵² This positive

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 inhibitions of natural law.”

¹⁴⁷ See, e.g., *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, 1029-30 (Neb. 1911) (permitting man to be charged with bigamy even though first “marriage” was to first cousin in violation of domicile law); *Mazzolini v. Mazzolini*, 155 N.E.2d 206, 209 (Ohio 1958) (recognizing marriage of first cousins prohibited in Ohio, but celebrated in Massachusetts).

¹⁴⁸ See P.H. Vartanian, Annotation, *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).

¹⁴⁹ See, e.g., *True v. Ranney*, 21 N.H. 52, 56 (1850) (refusing to apply place of celebration rule to recognize marriage by an imbecile); SCHOULER, *supra* note 132, at 48 (noting an exception to the place of celebration rule for “marriages of such as are mentally and physically incapable”); TIFFANY, *supra* note 136, at 46 (“Nor will the *lex loci* prevail if it recognizes as valid a marriage entered into by an imbecile.”).

¹⁵⁰ See generally Andrew Koppelman, *Same-sex Marriage and Public Policy: The Miscegenation Precedents*, 16 QUINNIPIAC L. REV. 105 (1996).

¹⁵¹ 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”); cf. VERNIER, *supra* note 11, § 44, 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 product of local prejudice and of local effort to protect the social and economic standards of the white race.”).

¹⁵² See, e.g., BATTERSHALL, *supra* note 138, at 17; LONG, *supra* note 132, at 88-89 (noting exception for “marriages which have been declared by statute to be void

law exception provides the origin for the notion of a “public policy exception” to marriage recognition.¹⁵³ 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 states disagreed, predictably, as to which marriages were sufficiently odious to violate public policy.¹⁵⁴

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.”¹⁵⁵ All states agreed that “where 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

because contrary to the public policy of the state”); MORLAND, *supra* note 14, at 20 (noting, as an exception to the place of celebration rule, “[m]arriages which the legislature of a state has declared shall not be allowed any validity because they are contrary to the policy of its law”); *see also* Commonwealth v. Graham, 31 N.E. 706, 707 (Mass. 1892) (noting an exception to the place of celebration rule if the state “statutes declare such a marriage void”); Van Voorhis v. Brintnall, 86 N.Y. 18 (1881); RESTATEMENT (FIRST) OF CONFLICT 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”).

¹⁵³ It is often described as an exception to full faith and credit for marriages, but, within this particular context, it is better understood as an exception to the general common law principles of recognition.

¹⁵⁴ *See, e.g.*, LONG, *supra* note 132, 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).

¹⁵⁵ Lanham v. Lanham, 117 N.W. 787, 788 (Wis. 1908) (emphasis added); *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 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, wherever celebrated, will be void.”); *see also* MORLAND, *supra* note 14, 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.”).

held void by the courts.”¹⁵⁶

The Uniform Marriage Evasion Act (UMEA), promulgated in 1912, dealt, as the title implies, solely with evasive marriages.¹⁵⁷ 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.”¹⁵⁸ By way of example, the NCCUSL Commissioners mentioned marriage “with *particeps criminis*, or 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.¹⁵⁹ 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.”¹⁶⁰ Five states adopted the UMEA,¹⁶¹ but several others adhered to its principles either in an alternative statutory form or through case law.¹⁶²

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 statutory 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

¹⁵⁶ PROCEEDINGS OF THE TWENTY-SECOND ANNUAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 127 (1912) (annotation to UMEA § 1) [hereinafter 1912 PROCEEDINGS]; see also LONG, *supra* note 132, 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).

¹⁵⁷ See 1912 PROCEEDINGS, *supra* note 156, at 127 (annotation to UMEA § 1). Evasion laws differed in whether they required both parties to be behaving evasively, or only one. NCCUSL opted for a law invalidating a marriage if either party was evading his or her home state’s laws. See *id.*

¹⁵⁸ *Id.*

¹⁵⁹ See *id.* at 127-28.

¹⁶⁰ *Id.* at 128.

¹⁶¹ 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 31, at 1351 tbl.IV (noting that UMEA was withdrawn in 1943 and superseded by § 210 of the Uniform Marriage and Divorce Act of 1970).

¹⁶² See, e.g., VERNIER, *supra* note 11, § 45 (listing eighteen jurisdictions with marriage evasion laws on the books in 1931); Koppelman, *supra* note 61, at 923 n.2 (collecting modern evasion statutes).

few.”¹⁶³ 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 category of marriages.¹⁶⁴ 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,¹⁶⁵ and several states followed suit.¹⁶⁶ But others departed from the English approach and required express language directly addressing the recognition question before refusing to acknowledge an out-of-state marriage.¹⁶⁷ 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.¹⁶⁸

¹⁶³ VERNIER, *supra* note 11, § 45, at 210.

¹⁶⁴ See, e.g., *In re Loughmiller's Estate*, 629 P.2d 156, 161 (Kan. 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 (Neb. 1910) (intent to preclude recognition “cannot be inferred”); *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.”).

¹⁶⁵ *Brook v. Brook*, 9 H.L. Cas. 193 (1861); see also UNIF. MARRIAGE EVASION ACT, 9 U.L.A. 225 (1923) (withdrawn 1943) (annotation) (noting that the English rule was followed in California, Georgia, Louisiana, North Carolina, Pennsylvania and Tennessee).

¹⁶⁶ See, e.g., *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); *Maurer v. Maurer*, 60 A.2d 440 (Pa. 1948) (refusing to recognize evasive marriage in violation of lifetime remarriage restriction even though Pennsylvania law did not address extraterritorial effect by statute).

¹⁶⁷ See, e.g., *Commonwealth v. Lane*, 113 Mass. 458 (1873); *In re Miller's Estate*, 214 N.W. 428 (Mich. 1927) (finding statutory declaration that first-cousin marriages were “void” insufficient to preclude recognition); *Van Voorhis v. Brintnall*, 86 N.Y. 18 (1881).

¹⁶⁸ *In re May's Estate*, 114 N.E.2d 4, 6 (N.Y. 1953) (emphasis added); cf. *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).

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 Caucasian 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.”¹⁶⁹ Prohibiting both interracial and common law marriages was not unusual for the time, but it was far from universal. Yet Arizona, which prohibited both, had no statute declaring that it would refuse to recognize either such marriage from another state.

2. *Semi-Categorical Exceptions*

In addition to the categorical exceptions, other patterns of recognition were 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.¹⁷⁰ The two North Carolina cases discussed above are indicative of this compromise.¹⁷¹

But this approach was not universal, and even evasive interracial marriages were sometimes upheld. The leading case for this

¹⁶⁹ ARIZ. REV. STAT. §§ 63-107, 63-111 (1939); see also STATUTES OF ALL STATES AND TERRITORIES WITH ANNOTATIONS ON MARRIAGE – ANNULMENT – DIVORCE 23-24 (Frank J. Indovina & John E. Dalton eds., 1945).

¹⁷⁰ See P.H. Vartanian, Annotation, *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 domicile of the parties at the time of its celebration in another state in which it was valid, in evasion of the law of their domicile, the parties intending to return and having returned to their original domicile, 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 14, at 18-19.

¹⁷¹ See *State v. Kennedy*, 76 N.C. 251 (1877); *State v. Ross*, 76 N.C. 242 (1877). On the strength of state public policies against interracial marriage, see Koppelman, *supra* note 150, at 109; see also Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2151 (2005) (noting the existence of criminal penalties for miscegenation in many states).

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.¹⁷² While many courts and commentators criticized this ruling, some expressly approved and followed it.¹⁷³ 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 place¹⁷⁴

Other types of marriages met with an even greater likelihood of recognition. Common law marriages were routinely recognized in states that prohibited them by statute.¹⁷⁵ Exceptions to this general approach existed in some jurisdictions for evasive common law marriages,¹⁷⁶ and several jurisdictions refused recognition if the marriage was formed through short-term or transient contacts with the validating state.¹⁷⁷ But, in general, states

¹⁷² See, e.g., 16 Mass. 157, 159 (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").

¹⁷³ 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).

¹⁷⁴ TIFFANY, *supra* note 136, at 45; see also SCHOULER, *supra* note 132, 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.")⁰

¹⁷⁵ See, e.g., *Mission Ins. Co. v. Indus. Comm'n*, 559 P.2d 1085 (Ariz. Ct. App. 1976) (non-evasive common law marriage contracted in Kansas valid in Arizona); *Doyle v. Doyle*, 497 S.W.2d 846 (Mo. Ct. App. 1973) (recognizing common law marriage contracted in Kansas despite statutory prohibition in Missouri); *Mott v. Duncan Petroleum Trans.*, 414 N.E.2d 657 (N.Y. 1980) (recognizing common law marriage contracted in Georgia).

¹⁷⁶ See, e.g., *Grant v. Superior Ct.*, 555 P.2d 895, 897 (Ariz. Ct. App. 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; an intentionally "evasive" common law marriage is thus possible.

¹⁷⁷ See, e.g., *Lynch v. Bowen*, 681 F. Supp. 506 (N.D. Ill. 1988); *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); *Goldin v. Goldin*, 426 A.2d 410 (Md. Ct. Spec. App. 1981); *Laikola v. Engi-*

were quite receptive to common law marriages, even though many of them had abolished the practice by statute for their own citizens.¹⁷⁸ 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,¹⁷⁹ unless the restricting state had a statute specifically ascribing extraterritorial effect to such restrictions.¹⁸⁰

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 in recognition questions were not necessarily susceptible to general rules.¹⁸¹ Across a variety of impediments, the procedural posture in which the recognition question was presented was relevant to the outcome. For

neered Concrete, 277 N.W.2d 653 (Minn. 1979) (refusing to recognize a common law marriage contracted during transient contacts with another state). *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).

¹⁷⁸ See MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA (1985) (describing the rise and fall of common law marriage in the nineteenth century).

¹⁷⁹ 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* Succession of Hernandez, 46 La. Ann. 962 (1894); Van Voorhis v. Brintnall, 86 N.Y. 18 (1881); State v. Shattuck, 69 Vt. 403 (1897); Frame v. Thormann, 79 N.W. 39 (Wis. 1899); TIFFANY, *supra* note 136, 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).

¹⁸⁰ LONG, *supra* note 132, 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"); *see also* Loughran v. Loughran, 292 U.S. 216, 223 (1934) (refusing to give extraterritorial effect to a "mere statutory prohibition" on remarriage for an adulterer following divorce). Bishop suggests that if the marriage restriction was temporary, to leave room for an appeal from a divorce decree, then a remarriage might not be honored. BISHOP, *supra* note 137, at 306.

¹⁸¹ See, e.g., MORLAND, *supra* note 14, at 20 (noting that non-age marriages from a foreign jurisdiction "have been held void in state of domicile"); *See also* E.H. Schopler, Annotation, *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 should recognize marriages that were validly celebrated in one state but would not have been in the forum state because of "nonage"); Vartanian, *supra* note 144 (noting the mixed authorities on the question of whether to recognize an evasive marriage that was not incestuous in the eyes of "Christendom" but defined as incestuous by the domiciliaries' state law).

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."¹⁸² 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 more likely to be granted.¹⁸³

In other procedural postures, other forces were at work. When the validity of a marriage was relevant after the death of one of the parties such as 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, parties to polygamous unions celebrated abroad, to inherit equal shares from their shared husband's estate despite noting the state's strong public policy against polygamy and its general refusal to recognize such unions.¹⁸⁴ 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.¹⁸⁵ Courts in many states thus gave effect to certain "incidents" of a marriage, such as the right to inherit a spousal share, even though unwilling to recognize the marriage per se, an approach that has earned support from modern conflicts scholars.¹⁸⁶

¹⁸² *Wilkins v. Zelichowski*, 140 A.2d 65, 69 (N.J. 1958).

¹⁸³ See *Borchers, Baker v. General Motors*, *supra* note 79, at 156-57 (noting the "uphill battle" faced by most third-parties launching collateral attacks on prohibited marriages from out of state).

¹⁸⁴ See *In re Dalip Singh Bir's Estate*, 188 P.2d 499, 502 (Cal. Ct. App. 1948).

¹⁸⁵ See *Miller v. Lucks*, 36 So.2d 140, 142 (Miss. 1948); see also *In re Lenherr's Estate*, 314 A.2d 255 (Pa. 1974) (permitting wife, married evasively in violation of remarriage restriction, to claim a marital exemption from an inheritance tax).

¹⁸⁶ See, e.g., *SCOLES ET AL., CONFLICT OF LAWS* § 13.2 at 546 (3d ed. 2000) (noting

C. Interests Supporting a Historical Pro-Recognition Approach

Traditionally, the desire to avoid illegitimizing children of a marriage—by declaring the marriage invalid or void—played an important role in rulings on recognition.¹⁸⁷ Before the widespread adoption of statutes to the contrary, children born to a marriage that was declared void might be rendered illegitimate.¹⁸⁸

The expectations of the parties themselves played an important role, too. As Justice Jackson once stated, “[i]f 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.”¹⁸⁹ 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.”¹⁹⁰ Marriages typically survived state lines, and individuals thus ordered their lives on that assumption.¹⁹¹

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:

[I]ntroducing distinctions as to the designs and objects and motives of the parties, to shake the general confidence in such

that courts, recently, “have begun to recognize that the enjoyment of different incidents of marriage involves different policies[.] Consequently, a uniform reference to a single state to resolve all choice-of-law questions involving marriage cannot be expected.”); Kay, *supra* note 59, at 71 (discussing the “incidents” approach to conflict of laws); Koppelman, *supra* note 61, at 984-85; *see also* Charles W. Taintor, II, *Marriage in the Conflict of Laws*, 9 VAND. L. REV. 607, 614-16 (1956).

¹⁸⁷ *See, e.g.,* *Medway v. Needham*, 16 Mass. 157 (1819) (bemoaning the tragic effect on children of invalidating their parents’ marriage).

¹⁸⁸ *See, e.g.,* JOSEPH R. CLEVINGER, *ANNULMENT OF MARRIAGE* § 417 at 452 (1946) (“By statutes the children of a marriage annulled upon any authorized ground are either deemed legitimate children or may be adjudged the legitimate children, of either or both parents.”).

¹⁸⁹ *Estin v. Estin*, 334 U.S. 541, 553 (1948) (Jackson, J., dissenting).

¹⁹⁰ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 cmt. h (1971).

¹⁹¹ BISHOP, *supra* note 137, 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.”); LONG, *supra* note 132, 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.”).

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.¹⁹²

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, for example, about "legalized polygamy," in which a person is married in one state but technically 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.¹⁹³

D. *Contemporary Theories of Recognition*

Taken together, interstate recognition cases reveal a long history during which "American courts have shown substantial, but not unlimited, tolerance for marriages invalid under their law."¹⁹⁴ The virtual uniformity of state marriage laws in the modern era has meant that relatively few cases were litigated in the 1970s-1990s. But, still, the general rule of recognition 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.¹⁹⁵ 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 First Restatement of Conflict of Laws, adopted in 1934, mirrors many of the rules described in the preceding Parts of this Article. Its general rule, embodied in section 121, is that "a mar-

¹⁹² STORY, *supra* note 105, at 215.

¹⁹³ See LONG, *supra* note 132, at 98; see also BISHOP, *supra* note 137, at 310 (noting that refusing recognition to a marriage valid elsewhere could lead to an "international polygamy, more detestable than any purely municipal one ever known").

¹⁹⁴ Borchers, *Baker v. General Motors*, *supra* note 79, at 156. The conventional rules were acknowledged, with apparent approval, by the Supreme Court in *Loughran v. Loughran*, 292 U.S. 216 (1934) ("Marriages not polygamous or incestuous, or otherwise declared void by statute, will, if valid by the law of the State where entered into, be recognized as valid in every other jurisdiction.").

¹⁹⁵ WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS 362 (2d ed. 1993).

riage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with.”¹⁹⁶ Though the comments note that it is the parties’ domicile that “ultimately creates” marital status, the validity of that characterization depends on the general recognition states give to one another’s marriages.¹⁹⁷ Only in “rare cases,” the comments note, do states refuse to play along, thereby undermining the domiciliary state’s ability to determine status.¹⁹⁸

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 domicile 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.¹⁹⁹

Section 132 incorporates common exceptions for polygamous marriage, “incestuous marriage between persons so closely related that their marriage is contrary 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.”²⁰⁰ These exceptions acknowledge “the paramount interest of the domiciliary state in the marital status” by protecting against offense of “a strong policy of the domiciliary state.”²⁰¹ 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.²⁰²

The First Restatement was thus both narrower and broader than the general approach taken by courts at the time it was adopted, but the touchstone principles overlapped considerably. It was less tolerant than a jurisdiction following a pure rule of evasion, since the Restatement contemplated non-recognition for non-evasive marriages if they were “odious” to a state’s policy.²⁰³

¹⁹⁶ See RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 121 (1934).

¹⁹⁷ See *id.* § 121 cmt. d.

¹⁹⁸ *Id.*

¹⁹⁹ See *id.* § 131. The comment to this provision notes that if an individual changes his domicile, the ban from the original domicile state will be inapplicable. See *id.* § 131 cmt. a.

²⁰⁰ *Id.* § 132.

²⁰¹ *Id.* § 132 cmts. a & b.

²⁰² See *id.* § 121 cmt. g.

²⁰³ Comment c to section 132 states that “a marriage, to be odious as the word is

At the same time, it contemplated recognition of evasive marriages as long as they did not run afoul of any other exception.²⁰⁴ But, in general, the First Restatement lives up to its name and mirrors the common law principles that had developed during the previous century.

The Second Restatement of Conflict of Laws, adopted in 1971, departs structurally 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*."²⁰⁵ In most cases, the state with the most significant relationship to the parties and their union at its creation will be the parties' then current domicile.²⁰⁶ This approach, described by Professor Andrew Koppelman as the "[s]ettling it [o]nce and for [a]ll" approach,²⁰⁷ 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, on this view, is sufficient to characterize a marriage as "evasive" such that refusal of recognition would be appropriate. The comments to section 283 note that the two most important choice-of-law factors

used in this Section, must not only be prohibited by statute but must offend a deep-rooted sense of morality predominant in the state." *Id.* § 132 cmt. c.

²⁰⁴ Comment e notes that a marriage evasion law would fall under the positive law exception. *See id.* § 132 cmt. e.

²⁰⁵ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(1)-(2) (1971) (emphasis added).

²⁰⁶ *See Singer, supra* note 103 ("[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 Cox, supra* note 130, at 1090-91. Scholars have also argued that when a married couple has only transient contacts with a state, that state does not have a significant enough interest in the marriage 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 61, at 988.

²⁰⁷ *See Koppelman, supra* note 61, at 981 (comparing and contrasting different possible approaches to the question of marriage recognition). This approach has been expressly adopted in roughly half the states. *See id.*

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.²⁰⁸

Other theories of conflict of laws—notably those offered by Professor Brainerd Currie²⁰⁹ and Professor Robert Leflar²¹⁰—support an approach similar to that found in the Second Restatement, one that generally favors recognition but recognizes the ability of a state to override based on a strong public policy objection. What all contemporary theories share, putting aside some technical differences, 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 (UMDA),²¹¹ 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,” “an uncle and a niece,” or “an aunt and a nephew.”²¹² The UMDA “eliminates most of the traditional marriage prohibitions and, consistent with the national trend, eliminates all affinity prohibitions.”²¹³ The Act also speaks to the validity of common law marriages, but gives two provisions as alternatives for an adopting state to consider, one

²⁰⁸ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 cmt. b (1971).

²⁰⁹ See BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963).

²¹⁰ See Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966).

²¹¹ See UNIF. MARRIAGE & DIVORCE ACT §§ 201-206 (amended 1973), 9A U.L.A. 175 (1998). (The UMDA was later downgraded to a “Model” act and is thus now termed the Model Marriage and Divorce Act.) This act expressly authorizes proxy marriages, which many states at the time disallowed. See UNIF. MARRIAGE & DIVORCE ACT § 206 cmt. (amended 1973). 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, and only three of those expressly adopted any part of section II, which laid out the provisions on marriage. See UNIF. MARRIAGE & DIVORCE ACT (amended 1973), 9A U.L.A. 159 (1998).

²¹² UNIF. MARRIAGE & DIVORCE ACT § 207(a) (amended 1973). The incestuous relationships covered by this provision included relationships of the half and whole blood, and, for siblings, ancestors and descendants, relationships of adoption. It carves out an exception for aunt-nephew or uncle-niece marriages that take place within “aboriginal cultures.”

²¹³ *Id.* § 207 cmt.

that validates such marriages, and one that does not.²¹⁴ The choice reflects the ongoing disagreement among states about the validity of this type of marriage.

The UMDA's rule of marriage recognition is broader than either the common law or restatement approach:

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.²¹⁵

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."²¹⁶

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."²¹⁷ 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."²¹⁸ 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.²¹⁹

While these various sources of law or theory vary with respect to the relative importance they place on domicile versus the place of celebration, and the degree to which they would factor

²¹⁴ See *id.* § 211 (providing alternatives "A" and "B").

²¹⁵ *Id.* § 210.

²¹⁶ *Id.* § 210 cmt.

²¹⁷ *Id.* The comment notes that the UMEA is expressly disapproved by NCCUSL and should be repealed by any jurisdiction that adopts the UMDA because of the obvious inconsistency.

²¹⁸ *Id.* § 201 cmt.

²¹⁹ In addition, the more politically charged portion of the UMDA 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.

in evasive behavior, each replicates the historically flexible and tolerant approach to interstate marriage recognition.

IV

RECOGNITION OF SAME-SEX MARRIAGE: SOME OBSERVATIONS ABOUT THE MODERN LANDSCAPE

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 Part combines conventional rules and modern statutes to consider how states might address the recognition questions they will inevitably face.²²⁰ The patchwork of state statutes and constitutional provisions leaves only a handful of states in which the common law recognition principles are likely to come into play. 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.²²¹ 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-eight states have a statutory or constitutional provision sufficient to justify a rule of automatic non-recognition.²²² 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.”²²³ Ohio law provides that “[a]ny 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 recog-

²²⁰ For other useful treatments of modern interstate marriage recognition questions, see Kay, *supra* note 59, at 78-80 and Koppelman, *supra* note 171, at 2143.

²²¹ See *supra* text accompanying notes 152-69.

²²² See *supra* notes 69-71 and accompanying text.

²²³ ALA. CODE § 30-1-19(e) (1998).

nized by this state.”²²⁴ 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.²²⁵ In *Wilson v. Ake*, a federal district court in Florida refused to recognize a Massachusetts same-sex marriage for Florida or federal law purposes.²²⁶ 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.

The states that do not explicitly ban same-sex marriage at all would obviously not meet the terms of the positive law exception. But, arguably, neither would the six states that ban same-sex marriage without explicitly addressing the question of recognition.²²⁷ Of those states, only South Carolina declares a same-sex marriage “void,”²²⁸ a term that was interpreted in some jurisdictions, historically, to deny recognition to out-of-state marriages of the specified type.²²⁹ Thus, based solely on this one exception, only a handful of states could grant recognition to a same-sex marriage from Massachusetts if they were to apply the traditional rules.

Two modern developments merit discussion, however. 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.²³⁰ 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 nonrecognition of same-sex marriage . . . would be an extraordinary rule. There is no evidence that any of the legislatures that recently acted gave

²²⁴ OHIO REV. CODE ANN. § 3101.01(C)(2) (West Supp. 2005).

²²⁵ See FLA. STAT. ANN. § 741.212(1) (West 2005) (“Marriages between persons of the same sex entered into in any jurisdiction . . . are not recognized for any purpose in this state.”).

²²⁶ 354 F. Supp. 2d 1298, 1303-04, 1309 (M.D. Fla. 2005).

²²⁷ See *supra* note 70 (listing states).

²²⁸ See S.C. CODE ANN. § 20-1-15 (Supp. 2004) (“A marriage between persons of the same sex is void ab initio and against the public policy of this State.”).

²²⁹ See *supra* text accompanying notes 163-69.

²³⁰ See *supra* text accompanying notes 205-08.

any thought to how extraordinary it would be.”²³¹

Second, the positive law obstacles to same-sex marriage recognition could be undone by a ruling that they violate the Federal Constitution. Depending on the justification, a ruling that DOMA 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, 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 *Romer v. Evans*.²³² In *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.²³³ DOMA, as well as every recently enacted state law targeting same-sex marriage, could be invalidated under this precedent.²³⁴

Both federal and state anti-same-sex marriage laws could also fall to a challenge under *Lawrence v. Texas*,²³⁵ which invalidated Texas’ ban on same-sex sodomy. The broader principle at issue in *Lawrence*—the right of adults to engage in consensual intimate relationships—could be interpreted to preclude states or Congress from banning same-sex marriage.²³⁶

So far, this line of argument has been unsuccessful. The plaintiffs in *Wilson*, discussed above, unsuccessfully challenged the

²³¹ Koppelman, *supra* note 61, at 929-30.

²³² 517 U.S. 620 (1996).

²³³ *Id.* at 634.

²³⁴ See, e.g., Koppelman, *supra* note 125 (arguing that DOMA is unconstitutional under *Romer*).

²³⁵ 539 U.S. 558 (2003).

²³⁶ See, e.g., Joanna L. Grossman, *The Consequences of Lawrence v. Texas*, FINDLAW’S WRIT, July 8, 2003, at <http://writ.news.findlaw.com/grossman/20030708.html>. Cases invoking *Lawrence* to challenge other laws relating to sex and intimate relationships have met with mixed results. Compare *Martin v. Zihlerl*, 607 S.E.2d 367 (Va. 2005) (invalidating criminal ban on fornication), with *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004) (upholding Florida’s ban on adoption by homosexuals).

constitutionality of DOMA. The court concluded that DOMA was a valid exercise of Congress' power under Article IV to prescribe the "effect" a state's public act would have in other states. Otherwise, the court cautioned, "a single State could mandate that all the States recognize bigamy, polygamy, marriages between blood relatives or marriages involving minor children."²³⁷

Under the traditional framework, one might also argue that same-sex marriage, like incest and polygamy, violates "natural law," a category of marriage typically exempted from the place-of-celebration rule.²³⁸ Structurally, many states ban same-sex marriage within the same provision as their ban on incest.²³⁹ And undoubtedly the vehemence of sentiment against same-sex marriage in many states is comparable to, if not greater than, that against at least some incestuous marriages.

Yet three modern considerations make it difficult to imagine a court applying the natural law exception to same-sex marriage. First, the exception was squarely rooted in religious beliefs—described explicitly as marriages in violation of "Christendom."²⁴⁰ A court today could hardly justify refusing recognition to a marriage because of such a violation, without running seriously afoul of the Establishment Clause.²⁴¹

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. Several states have done exactly that by retaining a general rule of recognition subject to an exception just for same-sex

²³⁷ *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1304 n.6 (M.D. Fla. 2005). As discussed above, a federal court in Nebraska did strike down a mini-DOMA, but the core ban on same-sex marriage might well have survived if the statute hadn't swept so broadly. See *Citizens for Equal Protection, Inc. v. Bruning*, 368 F. Supp. 2d 980 (D. Neb. 2005).

²³⁸ See *supra* text accompanying notes 140-51.

²³⁹ See, e.g., ARIZ. REV. STAT. ANN. § 25-101 (2000) (including only incestuous and same-sex marriages under the heading "[v]oid and prohibited" marriages).

²⁴⁰ See, e.g., LONG, *supra* note 132, at 87 (describing polygamous and incestuous marriages as "repugnant to the moral sense of Christendom").

²⁴¹ See Singer, *supra* note 103 ("[I]f 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.").

marriages.²⁴²

Third, this exception was given life in part by the universality of bans on the marriages it covered.²⁴³ 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 statute banning it.²⁴⁴ 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.²⁴⁵ However, since Massachusetts is currently refusing to issue marriage licenses to non-resident couples under its reverse marriage evasion law,²⁴⁶ 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 non-

²⁴² See, e.g., ARK. CODE ANN. § 9-11-107(a)-(b) (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 in this state.”); *id.* § 9-11-107(b) (“This section shall not apply to a marriage between persons of the same sex.”).

²⁴³ Treatises often referred to the “universal exceptions” when describing the general refusal to recognize polygamous and incestuous marriages from other states.

²⁴⁴ See *supra* text accompanying note 155.

²⁴⁵ See *supra* text accompanying note 205.

²⁴⁶ See Pam Belluck, *Romney Won't Let Gay Outsiders Wed in Massachusetts*, N.Y. TIMES, Apr. 25, 2004, § 1, at 1; see also MASS. ANN. LAWS ch. 207, § 11 (Lexis Nexis 2003) (prohibiting non-residents from marrying in Massachusetts “if such marriage would be void if contracted” in their home state). A challenge to the validity of the evasion law is currently pending before the Massachusetts Supreme Judicial Court. See *Cote-Whitacre v. Dep't of Pub. Health*, No. SJC-09436 (argued October 6, 2005).

DOMA states.²⁴⁷ In that scenario, conventional principles suggest that the marriage *should* be granted full recognition. That exact scenario has yet to be presented to a court, but undoubtedly will be in the future.

A strong case for recognition is presented in *Langan v. St. Vincent's Hospital*.²⁴⁸ There, the plaintiff sought recognition as a "spouse" for purposes of standing to sue under New York law for the alleged wrongful death of his same-sex partner, with whom he had established a civil union in Vermont.²⁴⁹ The landscape in New York is favorable for a recognition claim since there is no constitutional or statutory provision banning recognition, nor even one explicitly banning same-sex marriage. The trial court began its analysis by noting New York's adherence to the "place of celebration" rule,²⁵⁰ and observing the limited exceptions to the rule for marriages involving incestuous or polygamous marriages.²⁵¹ Citing many examples of New York's protection for same-sex couples and gays and lesbians individually,²⁵² 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."²⁵³ 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."²⁵⁴ The trial court's decision was recently reversed by an intermedi-

²⁴⁷ See Borchers, *Essential Irrelevance*, *supra* note 79, at 357 ("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."); Koppelman, *supra* note 171, at 2153-54 (treating "'migratory' marriages" as the best case scenario for recognition); see also Borchers, *Baker v. General Motors*, *supra* note 79, at 171 ("Most courts will probably recognize same-sex marriages under these circumstances, even if they generally would not validate such marriages."); 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).

²⁴⁸ 765 N.Y.S.2d 411 (N.Y. Sup. Ct. 2003), *rev'd*, No. 2003-04702, slip op. (N.Y. App. Div. Oct. 11, 2005).

²⁴⁹ See *id.*

²⁵⁰ *Id.* at 414.

²⁵¹ *Id.*

²⁵² Examples include the lack of a mini-DOMA, statutes banning sexual orientation discrimination, a New York City 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.

²⁵³ *Id.* at 418.

²⁵⁴ *Id.*

ate appellate court, which refused to even consider the principles of marriage recognition since the status presented was a civil union rather than a marriage *per se*.²⁵⁵

The trial court's approach, if reinstated by New York's highest court, could be used to support a full-recognition principle, since the justification for the recognition was rooted primarily in the fact that New York lacks a public policy against same-sex marriage. That result 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.²⁵⁶

A narrower "incidents" approach to recognition was used historically to validate marriages that were obviously abhorrent to the forum state, including not only interracial marriages, but also the universally objectionable polygamous and incestuous ones. Under current law, an incidents approach is statutorily barred in the eleven states that explicitly refuse to recognize any claim, right, or incident arising out of a prohibited same-sex marriage.²⁵⁷ The other twenty-seven states that expressly address recognition of out-of-state marriages 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.²⁵⁸ The twelve 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.²⁵⁹ In at least one of those states, the attorney general has issued an opinion stating that particular incidents of a same-sex marriage will be recog-

²⁵⁵ See *Langan v. St. Vincent's Hosp.*, No. 2003-04702, slip op. (N.Y. App. Div. Oct. 11, 2005).

²⁵⁶ See 2004 N.Y. Op. (Inf.) Att'y Gen. 1, 34 (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."). The Attorney General for Rhode Island drew a similar conclusion in an official statement. See Press Release, State of Rhode Island, Department of Attorney General, Attorney General Lynch's statement concerning same-sex marriage (May 17, 2004), available at <http://www.riag.state.ri.us/public/pr.php?ID=209> ("This Office's review of Rhode Island law suggests that Rhode Island would recognize any [same-sex] marriage validly performed in another state unless doing so would run contrary to the strong public policy of this State.").

²⁵⁷ See *supra* note 71.

²⁵⁸ See *supra* notes 69 & 70.

²⁵⁹ See *supra* notes 70 & 73. Massachusetts would presumably recognize a same-sex marriage from anywhere, though the state code has not been amended to incorporate same-sex marriages.

nized in the state.²⁶⁰

While there are few rulings regarding out-of-state recognition of a Massachusetts same-sex marriage,²⁶¹ the slightly larger body of cases on recognition of Vermont civil unions shows mixed results with the incidents approach. 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,²⁶² and, since eighty-five percent of Vermont civil unions have been entered into by non-residents,²⁶³ many unhappy civil union partners have sought relief in their home states.

In the first such case, *Rosengarten v. Downes*,²⁶⁴ 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 jurisdiction over matters involving "dissolution of marriage" and a civil union, even under Vermont law, is not a "marriage."²⁶⁵ Although the case technically turned on an interpretation of the jurisdiction statute, the underlying issue of recognition was inextricable.²⁶⁶ 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]."²⁶⁷ Since the court viewed Connecticut's public policy to be inconsistent with same-sex marriage generally, it refused to exercise jurisdic-

²⁶⁰ See Connecticut Op. Att'y Gen. (Aug. 2, 2004) (opining that a same-sex marriage from Massachusetts can be recognized for purposes of changing one's surname on a driver's license and registration).

²⁶¹ See *supra* text accompanying notes 225-26.

²⁶² VT. STAT. ANN. tit 15., § 592 (1989). The residency must have continued for a year before a final decree can be granted. *Id.*

²⁶³ See Fred A. Bernstein, *Gay Unions Were Only Half the Battle*, N.Y. TIMES, Apr. 6, 2003, § 9, at 2.

²⁶⁴ 802 A.2d 170 (Conn. App. Ct. 2002).

²⁶⁵ *Id.* at 174-75. 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 263; see generally Kay, *supra* note 59 (discussing *Rosengarten*).

²⁶⁶ See *Rosengarten*, 802 A.2d at 175.

²⁶⁷ *Id.* at 177. On the legal issues surrounding dissolution of same-sex unions generally, see Kay, *supra* note 59 (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).

tion over a petition to dissolve a same-sex union. The court failed to consider the possibility that it might recognize an out-of-state union for some purposes, such as dissolution, without fully accepting it.

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.²⁶⁸ This result was not surprising, since the case came after the ruling in *Goodridge v. Department of Public Health*²⁶⁹ 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."²⁷⁰ 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.²⁷¹ A judge in Texas had done likewise,²⁷² but vacated the ruling because of pressure from the state's attorney general to avoid recognition of the couple's relationship.²⁷³

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.²⁷⁴ The court's ruling relied in part on the fact that a civil union, under Vermont law, is not a "civil marriage," but also on the Georgia statute explicitly

²⁶⁸ Mass. L. Rptr. 498, 511 (Mass. Super. Ct. Mar. 19, 2004).

²⁶⁹ 798 N.E.2d 941 (Mass. 2003).

²⁷⁰ See Bernstein, *supra* note 263.

²⁷¹ See Frank Santiago, *Judge Revises His Ruling on Lesbians' Divorce*, DES MOINES REGISTER, Dec. 31, 2003, at 3B.

²⁷² See *Divorce-Homosexuality-Civil Union-Full Faith and Credit*, 30 FAMILY L. REP. (BNA) 1094 (Dec. 23, 2003).

²⁷³ See Bernstein, *supra* note 263.

²⁷⁴ See *Burns v. Burns*, 560 S.E.2d 47, 49 (Ga. Ct. App. 2002).

refusing recognition to an out-of-state same-sex marriage.²⁷⁵

The trial court's approach in *Langan*, discussed above, could alternatively be 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.²⁷⁶

The potential for unilateral dissolution of parental status presents a very strong argument in favor of permitting at least incidental recognition of same-sex unions, regardless of a state's policy against the union itself. A state's refusal to recognize, for example, an adoption or other parent-child relationship validly created in another state, can wreak havoc on a child's or her parents' lives.²⁷⁷

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.²⁷⁸ 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

²⁷⁵ See *id.*; see also GA. CODE ANN. § 19-3-3.1 (2004).

²⁷⁶ See 765 N.Y.S.2d at 419 (noting that the legislative purpose of the wrongful death law, to compensate the "person most likely to have expected support and to have suffered pecuniary injury" would be served by recognizing a civil union partner as a "spouse" for this purpose).

²⁷⁷ See S. Mitra Kalita, *Vt. Same-Sex Unions Null in Va., Judge Rules*, WASH. POST, Aug. 25, 2004, at B1 (reporting on refusal by county court to recognize a parent-child relationship created by virtue of a Vermont civil union); see also Naomi Cahn, *Between Two Mommies: When Gay Unions Dissolve, Children Bring Special Complications*, LEGAL TIMES, Feb. 28, 2005, at 22 (considering the portability of parental status for children born within same-sex relationships). A lawsuit pending in federal court is challenging a recently enacted Oklahoma law that prohibits recognition of "an adoption by more than one individual of the same sex from any other state or foreign jurisdiction." See *Finstuen v. Edmondson*, No. CIV-04-1152-C (W.D. Okla. 2004) (challenging the validity of OKLA. STAT. tit. 10, § 7502-1.4 (2001)).

²⁷⁸ See Koppelman, *supra* note 61, at 929-30.

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.²⁷⁹ Today, however, a state cannot constitutionally criminalize sodomy or fornication under *Lawrence v. Texas*.²⁸⁰ Thus, one of the traditional justifications for refusing to honor forbidden marriages—that by doing so a state could prohibit the only lawful form of sexual intimacy—no longer applies. States are also precluded, under current interpretations of the right to travel, from adopting laws in order to deter disfavored groups from entering the state.²⁸¹ State laws refusing to recognize valid same-sex marriages from other jurisdictions risk running afoul of that constitutional principle as well.²⁸² 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 Article, have been unfortunate in several ways. The misapprehension about the meaning of full faith and credit and the specter of compelled recognition led states to adopt extraordinary, historically unprecedented rules. Those rules, both overly broad and ambiguous in scope, mean that most states cannot voluntarily recognize same-sex marriages, even in a case where the state has no interest in denying recognition.

Categorical 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 comity and interstate respect in the mar-

²⁷⁹ See Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. PA. L. REV. 2215, 2218 (2005).

²⁸⁰ See, e.g., *Martin v. Zihel*, 607 S.E.2d 367, 370 (Va. 2005) (invalidating criminal ban on fornication under the principles of *Lawrence v. Texas*).

²⁸¹ See *Saenz v. Roe*, 526 U.S. 489, 499 (1999) (noting that the constitution does not permit states to adopt rules “for the purpose of inhibiting the migration” of the poor to the state); *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969) (“[T]he purpose of deterring the in-migration of indigents . . . is constitutionally impermissible.”).

²⁸² See Wolff, *supra* note 279, at 2237.

riage context. 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 non-DOMA states have the opportunity to borrow the lessons of history as they craft their response to the modern version of an age-old question.