

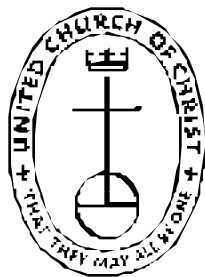
# **THE LAW OF INTERSTATE MARRIAGE RECOGNITION**

## **A Summary of Legal Issues**

**By Evan Wolfson**

**Equal Marital Rights #23**

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# **The Law of Interstate Marriage Recognition**

A Summary of Legal Issues • March 20 1996

Evan Wolfson, Director of the Marriage Project<sup>1</sup>

## **BACKGROUND**

In May 1993, the Hawaii Supreme Court ruled that the State's refusal to issue marriage licenses to same-sex couples under the Hawaii marriage law presumptively violates the state constitution's guarantee of equal protection. *Baehr v. Lewin*, 852 P.2d 44, 58, 68 (Haw. 1993). The Court remanded the case to the trial court for strict-scrutiny review as to whether Hawaii's alleged compelling state interest(s) justify the statute's discrimination, and whether the means furthering the asserted interest(s) are narrowly drawn. *Id.* at 74-75.

The State's attorneys have alleged a variety of compelling interests and claimed that the means furthering those interests are narrowly tailored.<sup>2</sup> My co-counsel Daniel R. Foley of Honolulu and I are hopeful that the plaintiffs will be able to defeat these allegations on remand. Indications are that within the next two years, the Hawaii Supreme Court is likely to follow through on its earlier holding, and will thus uphold a trial court decision ending the "different-sex restriction" on marriage. Equal marriage rights for same-sex couples would then be a reality in the nation's fiftieth state.<sup>3</sup>

Many same-sex couples in and out of Hawaii are likely to take advantage of what would be a landmark victory.<sup>4</sup> 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 recognition of their unions. Despite a powerful cluster of expectations, logistics, rights, constitutional obligations, and federalist imperatives, these questions are likely to arise: Will these people's validly-contracted marriages be recognized by their home states and the federal government, and will the benefits and responsibilities that marriage entails be available and enforceable in other jurisdictions?

We at Lambda believe that the correct answer to these questions is "Yes." To support that answer, there is much common sense and people's general intuitions both to back us up and for us to tap into: marriage is marriage; it's a fundamental human right; if you're married; this is one country.

However, we also know that, as always, lesbians and gay men will have to fight against the tendency of some in politics and the judiciary to create a "gay exception" to even the clearest principle of constitutional law or fairness. Indeed, our religious-political extremist opponents have already launched an aggressive state-by-state backlash, before we have even won the basic freedom to marry others take for granted. Thus, throughout the country, we must now undertake the public education, political organizing, and just plain asking people and groups for support, while preparing, too, for the litigation that will follow.

This summary briefly surveys the legal grounds for gaining nationwide recognition of the marriages same-sex couples contract in Hawaii.<sup>5</sup> These grounds include the U.S. Constitution, the common

law, and statutory law. Because the better answers are on our side—and because the legal battle, as well as people’s serious consideration of what is involved in marriage and respect for the marriages of gay people, are just beginning to take shape—it is important we begin to marshal and mainstream our arguments without ceding ground. On this critical front, we have just begun to fight.

## **I. U.S. CONSTITUTION**

“If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom.”  
Justice Robert Jackson<sup>6</sup>

### **A. The Full Faith and Credit Clause**

The Constitution specifically declares what Americans have come to expect, that this is one country and you do not shed your rights as you cross a state border:

*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.*

U.S. Const., Art. IV. ' 1. Successfully establishing that the Full Faith and Credit Clause requires all states to recognize a marriage legally contracted in another State would yield the most sweeping possible outcome, and, as a constitutional holding, the one most immune from legislative tampering.

We believe that full faith and credit recognition is mandated by the plain meaning of the Full Faith and Credit Clause, and by basic federalist imperatives that unite this into one country and permit us to travel, work, and live in America as we have come to today. Simply put, all Americans, gay and non-gay alike, would be best served by assuring full faith and credit for marriages validly contracted in any U.S. state.

#### **1. Applying the Full Faith and Credit Clause**

Marriage qualifies for recognition under each prong of the Full Faith and Credit Clause, partaking as it does of each of the three categories: public Acts, Records, and judicial Proceedings:

- Creation of a marriage is a “public Act” both because it occurs pursuant to a statutory scheme, and is performed in most states by a public or legally-

designated official, and because the marriage is itself an act—a *res*, a thing or status itself created by a State (which thus acts).

- The marriage certificate is the “Record” of that *res*, recording (with delineated legal effect) that a marriage has been validly contracted, that the spouses have met the qualifications of the marriage statutes, and that they have duly entered matrimony. (Along with marriage certificates, analogous public records of even lesser consequence, ranging from birth certificates to automobile titles, have been accorded full faith and credit).
- Finally, celebrating a marriage is arguably a “judicial Proceeding” in at least those sixteen states in which judges, court clerks, or justices of the peace officiate. Perhaps more important, marriage partakes of important elements of a “judgment,” the state “act” or “judicial Proceeding” that has received with least question the greatest “full faith and credit” from the Supreme Court.<sup>7</sup>

Application of the Full Faith and Credit Clause to require recognition of marriages is consistent with the intent of the Framers and with Supreme Court precedent. The Court has stated that the Full Faith and Credit Clause:

*altered the status of the several states as independent foreign sovereignties, each free to ignore rights and obligations created under the laws or established by the judicial proceedings of the others, by making each an integral part of a single nation, in which rights judicially established in any part are given nation-wide application.*

*Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943).<sup>8</sup>

The Supreme Court has never ruled on the issue of whether marriages must be accorded Art. IV, '1 respect, but state courts and lower federal courts often have, even in instances where the marriages would not be recognized under the laws of the forum state.<sup>9</sup> The Supreme Court's silence on the full faith and credit due marriage reflects, I believe, both the country's history of racism and aversion to interracial marriage,<sup>10</sup> as well as the resultant general neglect of the Clause itself<sup>11</sup>—burdens our adversaries should be forced to carry.

Just like a corporate charter or even a divorce, states must respect marriages lawfully celebrated in other states. Many of us remember the days when people had to travel to Reno to get a legal divorce; even then, other states had to recognize the divorce when they came home.<sup>12</sup> Should out-of-state divorces be recognized, but lawful marriages not?

If the anti-marriage (anti-gay) extremists prevail, those opposing recognition of same-sex couples' validly-contracted marriages ineluctably stand to create a legal and practical nightmare, whereby

Americans have to get a “marriage visa” stamped when they cross a state border, or where they (or their parents) are simultaneously married and unmarried in different reaches of the country.<sup>13</sup> Such a situation is simply untenable, both in terms of federalism and the meaning and expectations around marriage, itself a fundamental right.

For example, imagine if married couples had to worry if their right to inherit from each other remained valid, or their right to make medical decisions for each other (or their children) would be respected, or their family health plan was in force—merely because they chose to move to or visit another state. Imagine the difficulty for a bank in their home state that had loaned money based on a spousal guarantee that was enforceable in that state, only to learn it would not be enforced by a sister state. How could a company maintain coherent personnel policies if its offices were required by conflicting state laws to treat the same employee differently depending on the office in which he or she is working? How could a couple be sure their expectations for social security or veteran’s benefits, child or spousal support, property and insurance rates would be honored? The Full Faith and Credit Clause, the constitutional right to interstate travel, and other federalist provisions prohibit a state from putting individuals in such dilemmas.

## **2. Implementing Statutes Under the Full Faith and Credit Clause**

Congress has implemented the Full Faith and Credit by means of 28 U.S.C. " 1738, 1738A, 1739 (“the Statutes”). Because the Statutes are not part of the Constitution, they can, of course, be altered by Congress.

Section 1738 provides, in part:

*Such Acts, records and judicial proceedings or copies thereof, so authenticated, 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 jurisdiction] from which they are taken.*

This statute is most notable for clarifying that full faith and credit obligations apply to all courts in the United States, thus requiring federal courts also to give complete faith and credit to State acts, records and judicial proceedings.

The Statutes elaborate on the meaning of “full faith and credit” by defining it as the *same* faith and credit given by law and usage in the courts of the state producing the act, record, or proceeding. For example, other states must accord a marriage license issued in Hawaii the same weight and consequence that certificate receives in Hawaii.

The U.S. Supreme Court first applied the principle of according full faith and credit to out-of-state acts, records, and proceedings in the context of judgments. For example, to

determine what full faith and credit judgments should receive “[i]t remains only then to inquire in every case what is the effect of a judgment in the state where it is rendered.”<sup>14</sup>

But full faith and credit is not limited to judgments; over time the Court has extended the same analysis to other acts, records, and proceedings.<sup>15</sup> In each instance, a court in the forum state must accord the act, record, or proceeding the same effect it has in the state where issued.

By statute Hawaii regards a marriage certificate issued pursuant to its marriage law to be prima facie evidence of a validly contracted marriage.<sup>16</sup> Therefore, the courts of all other states must also recognize the certificate as prima facie evidence of a validly contracted marriage.<sup>17</sup>

B. “Conflicts of Law” as an Alternate Analysis

States resisting recognition of same-sex couples’ marriages will probably argue that the Full Faith and Credit Clause does not require them to treat such marriages as an act, proceeding, or record to which they must give effect, but rather allows them to invoke their own marriage laws as applicable. That argument arises because the U.S. Supreme Court has distinguished between the application of the Clause to out-of-state determinations of the legal status, rights, and responsibilities of specific persons, and to choice-of-law decisions in litigation. In my view, the argument is misplaced, as what is at issue is not whose law should not govern, but rather what respect must be accorded a res, a marital status, that the couples now possess and embody.

In this “conflicts of law” context, the Supreme Court has recognized:

*that full faith and credit does not automatically compel a forum state to subordinate its own statutory policy to a conflicting public act of another state; rather it is for this Court to choose in each case between the competing public policies involved.*

*Hughes v. Fetter*, 341 U.S. 609, 611 (1951).

The issues in *Hughes* was whether Wisconsin could, under its wrongful death statute, deny a cause of action to the estate of an Illinois decedent, where Illinois law would have permitted the suit. In ruling that Wisconsin must allow the suit, the Court balanced

*the strong unifying principle embodied in the Full Faith and Credit Clause looking toward maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states*

against the policy of Wisconsin “*against permitting Wisconsin courts to entertain this wrongful death action.*” *Id.* The Court noted that “*if the same cause of action had previously been reduced to judgment, the Full Faith and Credit Clause would compel the courts of Wisconsin to entertain an action to enforce it*” without balancing any policy interest. *Hughes*, 341 U.S. at 612 n.4.

Thus, when asked to recognize an unfulfilled or general right or duty based on another state’s statute or case law (such as the cause of action what would have been available to *Hughes* in Illinois), states may weigh the competing interest before deciding which rule of law to apply. But, when state acts, records, or judicial proceedings have been applied to the facts of a particular case to determine the rights, obligations, or status of specific parties, the other states must give those acts, records or proceedings the same effect they would have at home. The status has been created, the judgment rendered, the record recorded, and rights established—no question of what legal regime may be invoked is pertinent. What is then at stake is protection of the partners and their *res*.

Since a marriage—whether as a certificate, an act, or a judgment-like-*res*—falls into the category of such adjudications or creations, there can be no policy balancing regarding their recognition. That this is the right result is reinforced by the fact that people could easily have a “judgment” outright were Hawaii to accompany its celebration of marriages with a mechanism whereby married couples could speedily obtain, as suggested by *Hughes*, a declaratory judgment of marriage. Couples could then return home with their certificate, their newlywed status, their snapshots, and a court order.<sup>18</sup> Hence, “conflicts” or “choice of law” is not the proper analysis for cases involving marriage, and the marriage laws of the forum State cannot be used to displace an accomplished act (also recorded and “adjudged”) under Hawaii’s marriage law.

### C. Other Constitutional Grounds

A State’s refusal to recognize a marriage validly contracted under the laws of Hawaii would place a direct and tangible obstacle in the path of interstate migration and burden people’s now-not-merely-abstract right to marry, thus implicating other constitutional provisions relating to due process, the right to travel and move freely throughout the nation, equal protection (sex discrimination as well as sexual orientation discrimination), interstate commerce, and privileges and immunities,<sup>19</sup> as well as the fundamental right to marry itself. For example, married couple in Hawaii who wished to travel in or to another state would essentially have to choose between their marriage and their right to travel.

The rights to marry and to have that marriage recognized are of fundamental importance, both in and of themselves,<sup>20</sup> and in part because marital status includes substantial economic and practical protections and benefits, upon which may depend the couple’s

ability to live as they want, raise children as they want, or even subsist. By refusing to recognize a couples' marriage, a State would, for example, "unduly interfere with the right to migrate, resettle, find a new job, and start a new life." *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969);<sup>21</sup> see also *Edwards v. California*, 314 U.S. 160 (1941)<sup>22</sup>; *Crandall v. Nevada*, 73 U.S. 35 (1867).<sup>23</sup>

Whatever cluster of constitutional grounds ultimately proves successful, it is clear that those opposing recognition of same-sex couples' marriages are advocating a position that could do great damage not only to the individual couples and children involved, but also to the institution of marriage, family relationships, and the links and mobility vital to our federal union.<sup>24</sup> For all these reasons, the position that the Constitution mandates full faith and credit for validly contracted marriages is right and should be developed.

## II. THE COMMON LAW

Although there are a number of marriage-recognition decisions invoking the Full Faith and Credit Clause (and none explicitly rejecting it), the vast majority of cases regarding marriage recognition have proceeded under common law. Under that approach, marriages that are validly contracted in one state are given, at least, a strong presumption of validity in all other states. 52 Am. Jur.2d Marriage ' 3 (1970).<sup>25</sup> We must be prepared to make arguments under the common law, although we should not, in doing so, concede the validity of abandoning the Full Faith and Credit Clause and its federalist imperatives.

The rule at common law has been that a marriage valid where contracted (under the "*lex loci contractus*") is valid everywhere (i.e., in the "forum state" or under "*lex fori*").<sup>26</sup> This general rule of course helped obviate the tensions that flow from non-recognition of people's marriages, and thus any need to invoke the Full Faith and Credit Clause. In addition, many states have subscribed to the Uniform Marriage and Divorce Act, or adopted some version of its requirement that all marriages validly contracted in one state will be valid in the forum state.<sup>27</sup>

Under some common law approaches, this general rule contains a disfavored loophole, what I call the "states' rights 'public policy' exception." Under this exception, although there is a presumption for recognition, states may elect not to recognize a marriage that is valid where contracted if recognition would contradict a strong public policy of the forum state or (in the second Restatement's formulation) of the state A which had the most significant relationship to the spouses and the marriage at the time of the marriage.<sup>28</sup> Restatement, Second, Conflict of Law ' 283 (1969).<sup>29</sup>

This states' rights exception arose at least in large part from the historical desire not to have to recognize interracial marriage.

Citing the local "public exception policy"—and ignoring the Full Faith and Credit Clause—forum states have sometimes refused recognition to out-of-state or foreign marriages that either violated the forum's own marriage laws, or would not have been capable of celebration under those laws,

regarding polygamy and bigamy, incest, miscegenation, age, prior divorce, common law marriage, capacity, and proxy marriages. On the other hand, the force of the general rule has often led other courts to recognize marriage that violated the forum's provisions regarding those same subjects.<sup>30</sup>

In keeping with this mixed pattern, some states undoubtedly will recognize same-sex couples' marriages, while others may attempt to deny recognition, invoking states' rights and adducing a public policy out of miscellaneous anti-gay aspects of their law. There are, of course, no legitimate public policies served by telling a couple that they are not married, or withholding equal protection, respect, and treatment.

If they are permitted to pursue this unconstitutional approach, courts would have to determine whether recognition of an out-of-state marriage offends a "strong public policy." They might consider whether the marriage was expressly or impliedly prohibited by local statute or case law,<sup>31</sup> and possibly (if seemingly unconstitutionally) whether such marriages are contrary to "morality," "natural law," the traditions of "Christendom," or "Judeo-Christian teachings."<sup>32</sup> They might consider whether the forum state has somehow adopted (or in a meaningful way countenanced) a strong policy of anti-gay discrimination somehow related to same-sex couples' marriages.

However, given the strong interests in favor of ensuring that marital status enjoy uniform recognition throughout the states—to protect parties from charges of unlawful cohabitation and adultery, to ensure orderly disposition of property in the event of death or divorce, to protect the expectations of the parties—states have generally recognized marriages (even if contrary to state law or public policy), refusing to recognize validly contracted marriages only on grounds of strong local public policy. 52 Am.Jur.2d Marriage " 80, 82 (1970); Restatement, Second, Conflict of Laws ' 283 cmt. b (1969).

When challenged with a claim of "public policy," advocates should respond with the strongest countervailing policy and justice arguments available under the specific circumstances of the case, as well as general arguments. The policy balancing may occur in the context of the specific right, benefit, or responsibility of marriage arising in the litigation, e.g. intestate succession rights, insurance proceeds, tax status, or maintenance. See Restatement, Second, Conflict of Laws, ' 283 (1969). Under this approach, advocates may wish to focus on the policy advantages of recognizing the marriage for purposes of the specific incident (e.g. the orderly disposition of descendent's property in a case of intestate succession), and critical elements related to the parties' expectations and fair reliance interests, as well as on recognition of the status of the marriage itself. We might also argue that the "public policy" is not sufficiently strong, as evidenced by how it is expressed (i.e., as a civil rather than criminal statute, or only by inference from other state laws or policies rather than expressly or on point), or that an analogous "public policy" was disregarded in an analogous (albeit non-gay) case.

The states' rights exception to the common-law rule of presumptive recognition has not actually been invoked in decades, has received sharp, serious, and sustained scholarly criticism, and should,

if necessary, be challenged on constitutional grounds. A product of a shameful past of racism, national disunion, and relatively less mobility, the states' rights exception contradicts the basic premise of federalism that the states cannot treat each other like foreign countries.<sup>33</sup>

### **III. STATUTORY LAW**

The Uniform Marriage and Divorce Act (the Act") effective in at least seventeen states<sup>34</sup> provides that:

All marriages contracted within this State prior to the effective date of the 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 domicile of the parties, are valid in this State.

9A U.L.A., ' 210 (1979). The Act has a great advantage over the common law rule in that its authors explicitly declared:

*The section expressly fails to incorporate the 'strong public policy' exception of the Restatement and thus may change the law in some jurisdictions. This section will preclude invalidation of many marriages which would have been invalidated in the past.*

*Id.*, official comment.

In interpreting the Act an Illinois court stated that:

*Out-of-state marriages are recognized as valid, thereby giving full faith and credit to a sister States's laws, if they were valid when contracted. However, the statute further extends what marriages are valid, even if the marriages were not valid where contracted, if the marriages were subsequently validated, either by the law of the State where contracted or by the law of the State where the parties to the marriage were domiciled. By allowing prohibited marriages to become validated, the purpose of the Illinois statute, i.e., to "strengthen and preserve the integrity of marriage and safeguard family relationships" is furthered.*

Estate of Banks, 1994 III. App. Lexis 265, (App. Ct. III. 5<sup>th</sup> Dist. 1994) (citation omitted, emphasis added).<sup>35</sup>

Given that a significant number, indeed a plurality, of states are thus bound (independent of constitutional obligation) to respect marriages celebrated elsewhere, there are ample federalist arguments in favor of having a clean rule based on people's clear expectations regarding marriage and American union.

## **CONCLUSION**

Most Americans, gay or non-gay, have not yet had to give real thought to the validity or meaning of same-sex couples' marriages and having the equal right to marry. While the initial reaction of many will range from incredulous to hostile, we also have much going for us: the fairness and rightness of respecting family relationships and committed, caring unions; the ability to present these stories in a compelling, positive, warm, and sympathetic manner (asking people how they would resolve this Catch-22); the logic, indeed, imperative of not requiring people to choose between marriage and movement from state to state; the sense that marriage is marriage, and this is one country in which if you are married, you are married; and a number of sound constitutional, statutory, common law, and fairness arguments.

Whether under the Full Faith and Credit Clause, other constitutional provisions, or the common law presumption of recognition, we should not give up on this fight before we have even begun to wage it. And we must begin to wage it, not just through legal preparation, but through public education and political organizing. Above all, we must frame the discussion so as to put forward what works for us, while casting our enemies in their true colors—the same crowd that, hiding behind the banner of "states' rights," has always been hostile to others' equal rights and pursuit of happiness.

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## Endnotes

1. Thanks to *Gregory v. S. McCurdy*, law students Robert Murphy and Camille Massey, and my Lambda colleagues Jon Davidson and Jenny Pizer for their contributions to this legal summary.
2. See, e.g., 1994 Haw. Sess. Laws 217, 1994 Hi. H.B. 2312 (June 1994) (legislature asserts that marriage statute “intended to foster and protect the propagation of the human race through male-female marriages”).
3. Because the case involves state, not federal, constitutional questions, the Hawaii Supreme Court has the final word. There can be no appeal in *Baehr* to the U.S. Supreme Court, nor can the legislature alter the outcome (notwithstanding legislation such as that it adopted in June 1994 reiterating its desire to discriminate), short of a highly unlikely constitutional amendment.
4. As among non-gay Americans, there is a vast demand among lesbians and gay men for the equal right to choose whether and whom to marry. See, e.g., Evan Wolfson, “Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men, and the Intra-Community critique,” 21 N.Y. U. Rev. of L. & Soc. Change 567 (1994-95). Marriage brings with it a host of important legal, economic, and social benefits and protections otherwise largely unavailable to families, no matter how long they have been together or need the protections that come with marriage. *Id.*
5. For fuller discussion of these and other issues, see the material identified in the bibliography of equal marriage rights maintained by Lambda; see also *Evan Wolfson & Gregory v. S. McCurdy*, “‘Let No One Set Asunder’: Full Faith and Credit for the Validly Contracted Marriages of Same-Sex and Different-Sex Couples” (forthcoming); Jennifer Gerarda Brown, “Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage,” 68 S. Cal L. Rev. 745 (1995); Barbara J. Cox, “Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?,” 1994 Wisc. L. Rev. 1033; Joseph W. Hovermill, “A Conflict of Laws and Morals: The Choice of Law Implications of Hawaii’s Recognition of Same-Sex Marriages,” 53 Md. L. Rev. 450 (1994); Deborah M. Henson, “Will Same-Sex Marriages Be Recognized in Sister States?: Full Faith and Credit and Due Process Limitations on States’ Choice of Law Regarding the Status and Incidents of Homosexual Marriages Following Hawaii’s *Baehr v. Lewin*,” 32 U. of Louisville J. of Family L. 551 (1994); Thomas M. Keane, 47 Stanford L. Rev. 499 (1995).
6. *Estin v. Estin*, 334 U.S. 541, 553 (1948) (Jackson, J., dissenting).
7. Experts agree that judgments receive the most immediate, unquestioned full faith and credit. See, e.g., Lea Brilmayer, “Credit Due Judgments and Credit Due Laws: The Respective Roles of Due Process and Full Faith and Credit in the Interstate Context,” 70 Iowa L. Rev. 95, 97 (1984).

8. Magnolia was partially overruled on other grounds. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980).
9. See, e.g., *Parish v. Minvielle*, 217 So.2d 684, 688 (Ct. Of App. La. 1969) (Louisiana does not recognize or permit common-law marriages but must give effect to them when validly contracted in Texas); *Guidry v. Mezeal*, 487 So. 2d 780, 781 (Ct. Of Appeals La. 3<sup>rd</sup> Cir. 1986); *Succession of Rodgers*, 499 So. 2d 429, 495 (Ct. Of Appeals La. 2d. Cir. 1986); *Commonwealth ex rel. Alexander v. Alexander*, 289 A.2d 83, 86 (Pa. 1971) (Jones, J., concurring) (Pennsylvania must give full faith and credit to a Georgia marriage certificate); *Orsburn v. Graves*, 210 S.W.2d 496 (Ak. 1948) (Arkansas must give full faith and credit to validly contracted Texas common-law marriage). Although New York does not recognize common-law marriages, it gives Art. IV ' 1 full faith and credit to marriages that are valid under the laws of other states. *Thomas v. Sullivan*, 922 F.2d 132, 134 (2<sup>nd</sup> Cir. 1990); *Ram v. Ramharack*, 571 N.Y.S.2d 190 (N.Y. Sp. Ct. Queens Cty 1991).
10. See Robert H. Jackson, "Full Faith and Credit—the Lawyer's Clause of the Constitution," 45 Colum L. Rev. 1, 7 (1945) (Full Faith and Credit Clause under-invoked in contexts such as marriage because Athe slavery question and [Jim crow laws] had begun to distort men's view of government and of law. Talk of 'state sovereignty' became involved in the issue.").
11. Id. at 3 (former Supreme Court justice observes that the Full Faith and Credit "[C]lause is a relatively a neglected one in legal literature.... The practicing lawyer often neglects to raise questions under it, and judges not infrequently decide cases to which it would apply without mention of it."). Indeed, the whole idea of enforceable rights is itself relatively new, as is the constitutionalization of family and marriage law, both largely arising since the heyday of non-recognition cases.
12. *Cook v. Cook*, 342 U.S. 126 (1951); *Sherrer v. Sherrer*, 334 U.S. 343 (1951); *William v. North Carolina (I)*, 317 U.S. 287 (1942).
13. Thus, even more than developing any technical legal argument, it is critical that we collect and explain evocative real life examples of how burdensome, or indeed impossible, it would be to have the status of one's marriage, or one's parent's marriage, vary from state to state.
14. *Mills v. Duryee*, 7 Cranch 481, 11 U.S. 481, 484, 5 L.Ed. 411 (1813); see also *Wright v. Georgia R.R. & Banking Co.*, 216 U.S. 420, 429 (1910).
15. See *Chicago & Alton R.R. v. Wiggins Ferry Co.*, 119 U.S. 615, 622 (1887) (holding that "public acts", including plaintiff's corporate charter, must be given same effect as in issuing state).
16. See Haw. Rev. Stat. " 527-1 and 572-13 (c) (1985); see also Conn. Gen. Stat. Ann. ' 46b-35 (1958). For a list of states statutorily prescribing what full faith and credit their marriage

certificates should receive see Evan Wolfson and Gregory v. S. McCurdy, “‘Let No One Set Asunder’: Full Faith and Credit for the Validly Contracted Marriages of Same-Sex and Different-Sex Couples” (forthcoming).

17. Another set of issues may arise if states take the position that people do, on the face of it, appear to be married, and then pass statutes giving benefits to different-sex married couples while denying them to same-sex married couples. Challenges might arise under gender discrimination, sexual orientation, and other equal protect theories, as well as due process and fundamental right to marry theories. Naturally, the fall-out in these battles may also prompt reconsideration of the use of marriage as the unique criterion for access to family benefits and protections.
18. Professor Henson has also noted this point. 32 J. of Family L. at \_\_\_\_\_. There is also an argument to be made regarding the anomaly in requiring states to recognize divorces, but not marriages.
19. U.S. Const., Art. IV, ' 2. See, e.g., Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985).
20. *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 438 (1965); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Turner v. Safley*, 482 U.S. 78 (1987).
21. In *Shapiro v. Thompson*, the Court grounded the right to travel in the Equal Protection Clause and employed strict scrutiny analysis. The Court stated: “Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest.” *Id.* at \_\_\_\_\_. At issue in *Shapiro* were state and federal provisions denying welfare benefits to persons who had not resided within the jurisdiction for at least a year. The requirement both deterred and penalized travel. In addition, none of the government’s reasons were found to be compelling. The Court said that families could not be “denied welfare aid upon which may depend the ability...to obtain the very means to subsist,” solely because they were members of a class which could not satisfy a one-year residency requirement. *Id.* at 627.

In *Dunn v. Blumstein*, the majority declared that “it is irrelevant whether disenfranchisement or denial of welfare is the more potent deterrent to travel. *Shapiro* did not rest upon a finding that denial of welfare actually deterred travel....In *Shapiro* we explicitly stated that the compelling-state-interest test would be triggered by ‘any classification which serves to penalize the exercise of [the right to travel]...’” 405 U.S. 330, 339-340 (1972) (quoting *Shapiro*, *supra*, at 634). The *Dunn* Court overturned Tennessee’s state and local durational residency requirements for voting, and stated “whether we look to the benefit withheld by the classification (the opportunity to vote) or the basis for the classification (recent interstate travel) we conclude that the state must show a substantial and compelling reason for imposing durational residence requirements.” *Id.* at 335. Further, since the residency requirements impinged on the fundamental rights of both voting and travel, they faced a double-barreled

assault of strict scrutiny. Likewise, a State's refusal to recognize same-sex couples' marriages from Hawaii would also impinge upon at least two fundamental rights: the right to marry and the right to travel.

22. *Edwards* involved California's attempt to slow travel into the state by prosecuting citizens who knowingly brought into the state any indigent nonresident. The Supreme Court unanimously upheld the constitutional right to cross state lines, but disagreed on the constitutional provision abridged. The majority relied on the Commerce Clause as prohibiting "attempts...of any single state to isolate itself from difficulties common to all of them...by the single expedient of shutting its gates to the outside." *Id.* at 173. The two concurrences found the Privileges and Immunities Clause of the Fourteenth Amendment to be the applicable constitutional text, and focused on individual rights in finding that right to free movement between states is a right of national citizenship. Mobility, Justice Douglas argued in his concurrence, is basic to any question of freedom of opportunity and to prevent the indigent from seeking new horizons would "contravene every conception of national unity." *Id.* at 181. This takes on even greater force when linked to marriage.

23. In *Sosna v. Iowa*, the Court applied rationality review in upholding a one-year durational residency requirement for divorce. 419 U.S. 393 (1975). In distinguishing previous cases in which durational residency requirements were held invalid, Justice Rehnquist explained that the recent traveler was not "irretrievably foreclosed from obtaining some part of what she sought; her access to the courts was merely delayed." *Id.* The Court's distinction seemed to turn on the perceived significance of the burden on the right to interstate migration. In the Court's view a "mere" one-year's delay in securing a divorce was not a sufficient "penalty" on travel as to merit strict scrutiny. On the other hand, in *Boddie v Connecticut*, the Court held that Connecticut could not, consistent with the obligations imposed by the Due Process Clause, deny access to a divorce court based on ability to pay a fee. 401 U.S. at 380. A State's refusal to recognize a same-sex couple's marriage from Hawaii, would penalize, not merely delay, those individuals who have exercised their right to move freely throughout our country.

24. The best things our opponents have going for them are, of course, (1) people's ignorance and hostility regarding gay issues, and (2) the fact that, as a historical matter, marriage recognition has not largely been treated as a constitutional matter. We must address this latter point by showing (a) the parallels to non-recognition in other circumstances, i.e., race, and (b) the increasing constitutionalization of marriage and other rights. The fact that the Full Faith and Credit Clause was muzzled in the past does not justify its non-invocation in the future, if needed. Cf., e.g., *Puerto Rico v. Branstad*, 483 U.S. 219, 228 (1987) (Court reverses precedent of over a hundred years to reestablish view of federalism less deferential to states' rights).

25. See also, 52 Am. Jur. 2d Marriage ' 80 (1970); Restatement, Second, Conflicts of Laws ' 283 (1969).

26. *Patterson v. Gaines*, 6 How. 550, 12 L. Ed. 553 (1848) and see, e.g., *Franzen v. E. I. Dupont De Nomours*, 146 F.2d 837 (3<sup>rd</sup> Cir. 1944); 52 Am. Jur. 2d Marriage ' 80 n9 (1970); *Krug v. Krug*, 296 So.2d 715 (Ala. 1974).
27. The Uniform Marriage and Divorce Act expressly repudiates any “public policy” exception, and thus precludes invalidation of marriages whether or not they could have been celebrated under the law of the forum state.
28. The distinction between “forum state” and “state with most significant relationship” could actually in theory be pivotal, if the “forum state,” i.e., the state where recognition is being demanded, is not the state that had the most contacts at the time of the marriage (and thus does not have “standing” under the Restatement to invoke the “public policy exception”). In any case, the Second Restatement identifies factors to be considered in evaluating the strength of an asserted public policy, while emphasizing the strong policy in favor or recognition.
29. The First Restatement contains a much more narrowly worded version of the “state’s rights exception,” requiring that a marriage be recognized unless it “not only [is] prohibited by statute but [also] offend[s] a deep-rooted sense of morality predominant in the state.” At least fifteen states follow the First Restatement.
30. As my colleague Matt Coles suggests, this fact sets up a case for a “public policy parity” argument. Where recognition was granted in one analogous case, it must be accorded in another, as the “public policy” purportedly justifying denial of recognition of a same-sex couple’s marriage is no greater than that previously ignored in recognizing some other marriage (i.e., ones that were miscegenous, “evasive,” between parties closely related, etc.). Thus, it is important to be prepared to probe the elements of the claimed “public policy,” distinguishing, for example, between an outright prohibition on same-sex couples’ marriage and a mere tradition of applying a silent statute solely in favor of different-sex couples.
31. The First Restatement requires that there be explicit statutory prohibition.
32. Such language from the cases, of course, betrays the archaic and offensive roots of the states’ rights public policy exception.
33. See Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249, 313 (1992); see also 45 Colum. L. Rev. 1, 27 (1945) (“[i]t is hard to see how the faith and credit clause has any practical meaning as to statutes if the Court should adhere to” the public policy exception); Gary J. Simson, *State Autonomy in Choice of Law: A Suggested Approach*, 52 So. Cal. L. Rev. 61, 70 n.51 (1978) (because it prevents consistent results, public policy exception is inconsistent with Full Faith and Credit Clause); Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage* 3/14/94 DRAFT at 52 n.157 (on file with Lambda) (article also analyzes economic benefits to state celebrating and recognizing same-sex couples’ marriages).

34. See Ariz. Rev. Stat. Ann. ' 25-112 (1991); Ark. Code Ann. ' 9-11-107 (Michie 1993); Cal. Family Code ' 308 (West 1994); Colo. Rev. Stat. Ann. ' 14-2-112 (West 1989); Idaho Code ' 32-209 (1993); Kan. Stat. Ann. ' 23-115 (1992); Ky. Rev. Stat. Ann. ' 402.040 (Michie 1984); Mich. Comp. Laws ' 551.271 (1993); Mont. Code Ann. ' 40-1-104 (1993); Neb. Rev. Stat. ' 42-117 (1992); N.M. Stat. Ann. ' 401.4 (Michie 1993); N.D. Cent. Code ' 14-03-8 (1993); S.D. Codified Laws Ann. ' 25-1-38 (1993); Utah Code Ann. ' 30-1-4 (1993); Wyo. Stat. ' 20-1-111 (1993); *Walker v. Walker*, 44 N.E. 2d 937 (1942); Ind. 50 Op. Att’y Gen. 346 (1967); *Vital v. Vital*, 319 Mass. 185, 65 N.E. 2d 205 (1946). Brown, Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage, 3/14/94 Draft, at 49 n. 143. See also, e.g., Conn. Gen. Stat. Ann. ' 466-28 (1958) (marriages contracted in the foreign country where one or both parties are Connecticut citizens “shall be valid” provided (1) both parties have the legal capacity to marry in Connecticut and the marriage is celebrated in conformity to the law of the country of celebration; or (2) the marriage is celebrated in the presence of an American diplomat by ordained clergy). Hawaii’s analogous statute is entitled “Contracted without the State.” HRS ' 572-3.
35. Similarly, in determining eligibility for social security benefits the U.S. Department of Health and Human Services recognizes as valid a marriage that would be recognized as valid by the courts of the state in which the wage earner was domiciled. *Thomas v. Sullivan*, 922 F.2d 132, 136 (2d Cir, 1990), citing 42 U.S.C. ' 416(h)(1)(A). But see *Adams v. Howerton*, 673 F.2d 1036 (9<sup>th</sup> Cir.), cert. denied, 458 U.S. 1111 (1982) (court says same-sex couple not legally married under state law, nor would INS be obligated to recognize such marriage for purposes of immigration). Because immigration law has changed since *Adams*, because it lacked the benefit of cases such as *Turner and Baehr*, and because it is dicta, the assertions in *Adams* regarding congressional intent, the meaning of marriage, and the government’s obligations are of dubious validity.