

Same-Sex Marriage and Conflict of Law: The “Other” Constitutional Issue

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TABLE OF CONTENTS

I. INTRODUCTION	477
II. A DUTY OF FULL FAITH AND CREDIT?	485
A. <i>Early Interpretations of the Duty of Faith and Credit</i>	486
B. <i>The Public Policy Exception to Choice of Law Rules</i>	490
III. TREATMENT OF “FOREIGN MARRIAGES”	492
IV. CONCLUSION	500

I. INTRODUCTION

A constitutional issue of great significance has confounded our political and legal systems in recent decades. This involves the legal status afforded same-sex marriage. Under longstanding tradition, marriage in all fifty states consisted of a union of one man and one woman (a “traditional marriage”). But tradition began to erode in the 1990s, giving way to a tacit acceptance of same-sex marriage in various regions of the United States.¹ The shift in public attitude, which reflects deep-rooted political and religious divisions, has resulted in decades of unsettled and conflicting law with respect to the legal status of same-sex unions, with some states recognizing same-sex marriages and others prohibiting them. As such, the courts have been confronted with a profound and contentious conflict of state marriage law. How the constitutional and judicial rules traditionally used to resolve variations in state law have been employed to

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1. The dramatic shift in public opinion from 1996 to 2011 in favor of the recognition of same-sex marriage is summarized in ROSALEE A. CLAWSON & ZOE M. OXLEY, PUBLIC OPINION: DEMOCRATIC IDEALS, DEMOCRATIC PRACTICE 297 (2d ed. 2013) (“Gallup surveys show that attitudes toward gay marriage have changed dramatically in the last fifteen years.”).

resolve this particularly contentious conflict of state marriage law is the subject of this article.

The first serious legal challenge to the longstanding policy of restricting marriage to one man and one woman came in May 1993 when the Supreme Court of Hawaii heard a dispute over that state's statutory prohibition against same-sex marriage.² The court held that the ban constituted sex discrimination in violation of the Hawaiian state constitution.³ The case was remanded to the trial court to evaluate the various justifications put forth by the state for banning same-sex marriage. Ultimately, the trial court held that the state had failed to offer evidence of a "compelling state interest" in prohibiting same-sex marriage.⁴ At the time, it appeared that Hawaii was about to become the first state to recognize same-sex marriage. Before that happened, however, the citizens of Hawaii adopted an amendment to their state constitution authorizing legal restrictions that limited marriage to individuals of the opposite sex. Soon after, the Hawaiian legislature amended that state's marriage law to restrict marriage to "one man and one woman."⁵ The controversy in Hawaii dragged on until December 2013, when the state legislature once again amended its marriage law—this time to allow same-sex marriage.⁶

Notwithstanding the long delay in Hawaii, the opening round of the dispute there triggered a national debate over the legalization of same-sex marriage.⁷ In a relatively short time, several states came to legalize same-sex marriage—the first being Massachusetts in May 2004.⁸ Other states followed suit. When the issue was first raised in Hawaii in 1993, few could have imagined that little more than twenty years later, some thirty-six states (including Hawaii) and the District of Columbia would recognize same-sex marriages.⁹ But opponents of

2. The legal challenge in Hawaii is recounted in JAMES PIERCESON, *SAME-SEX MARRIAGE IN THE UNITED STATES: THE ROAD TO THE SUPREME COURT AND BEYOND* 93-100 (2013). An earlier case was heard by the Supreme Court of Minnesota in 1971 challenging that state's statutory prohibition against same-sex marriage on the grounds that it violated the U.S. Constitution, but the court held that the statute did not "offend" any constitutional rights. *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971).

3. *Baehr v. Lewin*, 530, 852 P.2d 44, 67 (Haw. 1993).

4. *Baehr v. Miike*, Circuit Court of Hawaii, First Circuit, Civil No. 91-1394 (Dec. 3, 1996).

5. Haw. Rev. Stat. § 572-1.6 (1994) (repealed 2013).

6. Hawaii Marriage Equality Act of December 2, 2013, Haw. Rev. Stat. §§ 572-1 to 580-1 (Supp. 2013).

7. Pierceson, *supra* note 2, at 95 ("The decision [of the Hawaiian Supreme Court in 1993] triggered the first serious and sustained debate on same-sex marriage in the country.").

8. In May 2004, Massachusetts became the first state to issue marriage licenses to same-sex couples following the decision of the Massachusetts Supreme Court in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (2003), which held that denying same-sex couples a marriage license violated the Massachusetts State Constitution. In 2000, Vermont became the first state to enact legislation recognizing civil unions.

9. See Curtis Skinner, *Alabama federal judge declines to lift gay marriage order*, REUTERS, Mar. 17, 2015, <http://www.reuters.com/article/2015/03/17/us-usa-gaymarriage-alabama-idUSKBN0MD0T920150317> (noting that same-sex marriages "are now allowed in 36 states and the District of Columbia"). With the decision of the Ninth Circuit Court of Appeals in October 2014, the ground was laid for thirty-five states to recognize same-sex marriage. On January 6, 2015, Florida became the thirty-sixth state to permit same-sex couples to marry when a stay of an earlier decision from August 2014 expired.

this profound change to the traditional definition of marriage did not sit idly by.¹⁰ Where it was once assumed that marriage consists of a union of one man and one woman, states now enacted legislation and constitutional amendments to specifically include such a definition, and to expressly prohibit same-sex marriages.¹¹ Eventually, thirty-three states banned same-sex marriage—twenty-six by constitutional amendment and legislation, three by constitutional amendment only, and four by legislation only.¹² The result was a contentious conflict of state law over the legal status of same-sex marriage.

In 1996, Congress joined the fray when it enacted the Defense of Marriage Act (DOMA), which prohibited the recognition of same-sex marriage for federal purposes—even before any state actually recognized same-sex marriage. Section 3 of DOMA provided that: “In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”¹³ As a consequence of this federal statute, two persons of the same sex who were married under the law of a state that recognized same-sex-marriage would *not* be treated as married for purposes of federal law and programs. That would include (among other things) for purposes of federal income taxation, gift and estate taxation, retirement benefits, veterans’ benefits, Social Security, Medicaid, and Medicare.¹⁴ The legislation was supported by veto-proof biparti-

A summary of the legal contests in the various states is found in Robert Barnes, *With Hearing, Marriage Question One Step Closer to High Court*, WASH. POST, Apr. 10, 2014, at A02; Adam Liptak, *A Steady Path to the Justices*, N.Y. TIMES, Feb. 15, 2014, at A1. On January 12, 2015, a federal district court held that South Dakota’s statutory and constitutional bans on same-sex marriage violated the U.S. Constitution, but the judge stayed the decision pending appeal. See *South Dakota: Ban on Gay Marriage Is Struck Down*, N.Y. TIMES, Jan. 13, 2015, at A18. The same result was reached by a federal district court in Alabama, with that decision stayed (for two weeks) pending appeal before the U.S. Court of Appeals for the Eleventh Circuit.

10. Arguably, the countermovement had the unintended consequence of increasing public acceptance of same-sex marriage. See Michael C. Dorf & Sidney Tarrow, *Strange Bedfellows: How an Anticipatory Countermovement Brought Same-Sex Marriage into the Public Arena*, 39 LAW & SOC. INQUIRY 449, 449–73 (2014).

11. Prior to the *Baehr* case in Hawaii in 1993, states did not feel the need to define marriage or limit it to one man and one woman. For instance, the Kentucky Supreme Court considered a case in 1972 brought by two women seeking a marriage license in Kentucky. The court ruled that while Kentucky had neither a statutory definition of “marriage” nor a prohibition against same-sex marriage, the women were not entitled to marry in that state based on common usage of the term. The court held that no constitutional issues were invoked. *Jones v. Hallahan*, 501 S.W.2d 588, 589–90 (Ky. Ct. App. 1973). The state enacted a statutory ban against same-sex marriage in 1998. In 2004, the citizens of Kentucky approved an amendment to the state constitution with a similar prohibition.

12. Figures cited in Barnes, *supra* note 9; Liptak, *supra* note 9. Many of these state bans were subsequently overturned by the federal courts.

13. 1 U.S.C. § 7.

14. The many complexities of choice of law involving the recognition of same-sex marriage for federal purposes in a post-DOMA world are discussed in William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 STAN. L. REV. 1371 (2012).

san majorities in both houses of Congress and signed into law by the Democratic president, Bill Clinton.¹⁵ Notwithstanding the initial support for DOMA, constitutional challenges soon reached the federal courts as supporters of same-sex marriage organized to advance their position. In 2013, one such challenge was heard by the U.S. Supreme Court. In *United States v. Windsor*,¹⁶ the Court found for the plaintiff and overturned Section 3 on the grounds that it deprived same-sex couples of the “liberty” and “equality” protected by the due process clause of the Fifth Amendment of the U.S. Constitution.¹⁷ Following the Court’s decision, various agencies of the federal government one by one announced their intention to recognize any same-sex marriage that was lawfully celebrated under the law of any state.¹⁸

In its decision in *Windsor*, the Supreme Court addressed only the status of same-sex marriage for federal purposes and did not opine on the constitutionality of state prohibitions against same-sex marriage. In so avoiding this highly controversial constitutional question, the Court all but invited further litigation on the issue.¹⁹ Indeed, in the wake of *Windsor*, numerous lawsuits were filed across the country alleging such violations. Eventually, federal district courts in twenty-seven states would hold that state prohibitions against same-sex marriages abridge various rights and protections afforded by the U.S. Constitution—notwithstanding that the Supreme Court itself did not reach that conclusion in *Windsor*.²⁰ At first, the Supreme Court declined all invitations to revisit the

15. The House Report for DOMA declared that “it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage The effort to redefine ‘marriage’ to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage.” H. R. Rep. No. 104–664, at 12–13 (1996). For an interesting account of why Clinton supported DOMA and signed the bill into law, see PRISCILLA YAMIN, *AMERICAN MARRIAGE: A POLITICAL INSTITUTION* 100 (2012); see also Richard Socarides, *Why Bill Clinton Signed the Defense of Marriage Act*, *THE NEW YORKER*, Mar. 8, 2013.

16. 133 S. Ct. 2675 (2013).

17. *Id.* at 2693 (holding § 3 of DOMA unconstitutional under the due process clause of the Fifth Amendment to the United States Constitution” Fifth Amendment to the U.S. Constitution). In his dissent, Justice Scalia complained that it was hard to decipher the specific provision of the Constitution that the majority believed was violated by this legislation. *Id.* at 2705–07 (Scalia, J., dissenting).

18. In light of the demise of Section 3 of DOMA, the federal government adopted a policy focusing on the place of celebration to determine whether a couple is married for federal purposes. For example, the Internal Revenue Service issued Revenue Ruling 2013–17, 2013–38 I.R.B. 201 (Aug. 29, 2013), affirming that the marriage law of the place of celebration controls in determining whether a same-sex marriage is valid for purposes of federal income taxation—even if the couple resides in a jurisdiction or country wherein same-sex marriage is not recognized. The General Accounting Office has identified 1,138 federal statutory provisions as of December 31, 2003, in which marital status determines a recipient’s benefits or rights. U.S. GOV’T ACCOUNTABILITY OFFICE, *GAO/OGC-97-16, DEFENSE OF MARRIAGE ACT* (1997).

19. This point was made by Justice Scalia, who in his dissent observed that notwithstanding that the Court did not hold prohibitions against same-sex marriage unconstitutional *per se*, the effect of the ruling in *Windsor* was to invite such a ruling. *Windsor*, 133 S. Ct. at 2709–10 (Scalia, J., dissenting).

20. Indicative of this trend, Judge Arenda L. Wright Allen of the United States District Court for the Eastern District of Virginia held that Virginia’s constitutional ban on same-sex marriage violates the right to equal protection afforded under the Fourteenth Amendment of the U.S. Constitution on the grounds that marriage is a fundamental right. *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D.Va. 2014).

issue, leaving it to the federal appellate courts to decide the matter on a circuit by circuit basis.²¹ Initially, all of the Courts of Appeals that addressed the issue came to much the same conclusion—state prohibitions against same-sex marriage are unconstitutional.²² But in November 2014, the U.S. Court of Appeals for the Sixth Circuit took a contrary position, holding that state prohibitions against same-sex marriage are constitutional.²³ Soon thereafter, the Supreme Court announced on January 16, 2015 that it would take the case from the Sixth Circuit on appeal to settle the split among the federal circuits.²⁴ Hence, we soon will have a definitive ruling by the Supreme Court as to whether state prohibitions against same-sex marriage violate a constitutional right of same-sex couples to marry.

This constitutional issue, which has received considerable attention in the press, will soon be decided by the Supreme Court. If the Court holds that there is a constitutional right under the Fourteenth Amendment to same-sex marriage, the second constitutional issue under consideration (i.e., the legal obligation imposed on a state by the Fourteenth Amendment with respect to a same-sex marriage celebrated in another state) will be rendered moot. The Court is not likely to wrestle with a thorny constitutional question that no longer needs to be addressed. On the other hand, if the Court finds that there is *no* constitutional right to a same-sex marriage, then it will be required to consider whether a state that prohibits same-sex-marriage is constitutionally mandated under the Fourteenth Amendment to recognize a same-sex marriage celebrated in another state. Either way, it will be a shame if the Court never takes up the issue of conflicting state law, which has broad implications for the operation of our federal system of law and government. This issue merits far greater attention than it has

21. As recently as October 6, 2014, the Supreme Court denied certiorari in the Seventh Circuit's decision in *Wolf v. Walker*, No. 14-278, *cert. denied* (U.S. Oct. 6, 2014). By so refusing to review the Seventh Circuit's finding of a constitutional right to same-sex marriage, the Court allowed same-sex marriage to move forward in five additional states.

22. To date, four federal courts of appeals have held that state prohibitions against same-sex marriages abridge various rights and protections afforded by the U.S. Constitution under the Fourteenth Amendment. For example, in a 2–1 decision, the Tenth Circuit held that such prohibitions violate the Fourteenth Amendment. *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014). The Fourth Circuit Court of Appeals ruled in July 2014 that same-sex marriages were legal in Virginia. On June 25, 2014, the United States Court of Appeals for the Tenth Circuit held that states may not deny same-sex couples the right to marry. Along with the Fourth and Tenth Circuits, the Seventh and Eleventh Circuits have declared unconstitutional various state prohibitions against same-sex marriage.

23. *See DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014). The Sixth Circuit upheld prohibitions against same-sex marriage in Kentucky, Michigan, Ohio, and Tennessee—thereby reversing the decisions of the federal district courts in these four states.

24. On January 16, 2015, the Supreme Court announced that it will hear the four consolidated cases from the Sixth Circuit in *DeBoer v. Snyder*. Legal briefs from counsel are due April 17, 2015, with oral arguments to follow. The briefs will address the following questions: “1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex? 2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?” *DeBoer v. Snyder*, SCOTUS-BLOG, <http://www.scotusblog.com/case-files/cases/deboer-v-snyder/>. The Court's decision is expected in July 2015.

received to date. Indeed, from many perspectives, the question of conflicting state marriage law is more interesting than the high-profile question of whether there is a constitutional right to same-sex marriage.

There is one other possible outcome of the forthcoming constitutional decision. If the Supreme Court finds that the Fourteenth Amendment does not require states to recognize out-of-state same-sex marriages, the lower courts will be left to wrestle with the perplexing question of how to resolve the contentious conflict of state marriage law that results from the inconsistent treatment of same-sex marriage among the states. This issue also raises thorny constitutional questions—just not under the Fourteenth Amendment. Rather, resolution of the conflict of state marriage law will be decided under one of the most misunderstood provisions in the U.S. Constitution—Article IV, Section I. This seemingly simple provision holds: 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.²⁵

Unfortunately, the dictates of Article IV, Section I are not easily discerned—neither in general nor in specific cases of conflicting state law. The general question is: what constitutional obligation does a state have to enforce the law of another state? The specific question concerns whether a state that prohibits same-sex marriage has an obligation under Article IV, Section I to recognize a same-sex marriage lawfully celebrated in another state. If so, what does that obligation entail?

There is a significant divergence of opinion with respect to the dictates of this cryptic constitutional provision. Ostensibly, the first sentence of Article IV, Section I (the so-called Full Faith and Credit Clause) mandates “full faith and credit” everywhere in the United States for all the public acts of every state. Does this mean that a state must recognize a same-sex marriage celebrated in a sister state? Several federal courts (but not the Supreme Court) have answered this question in the affirmative—although based on the Fourteenth Amendment rather than Article IV, Section I.²⁶ Curiously, the judge did not even mention the Full Faith and Credit Clause, nor did he declare unconstitutional Kentucky’s

25. U.S. CONS. art. IV, § 1.

26. For example, a federal district judge in Kentucky recently held unconstitutional that state’s prohibition against the recognition of same-sex marriages celebrated in another state on the grounds that the ban violates the equal protection clause of the Fourteenth Amendment of the U.S. Constitution. *Bourke v. Beshear*, 996 F. Supp. 2d 542, 553-54 (W.D. Ky.) *rev’d sub nom.* *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014) *cert. granted sub nom.* *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015) *and cert. granted sub nom.* *Tanco v. Haslam*, 135 S. Ct. 1040 (2015) *and cert. granted*, 135 S. Ct. 1040 (2015) *and cert. granted sub nom.* *Bourke v. Beshear*, 135 S. Ct. 1041 (2015). Similar decisions were issued by district courts in Ohio and Tennessee. *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 995 (S.D. Ohio 2013) *rev’d sub nom.* *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014) (holding that Ohio’s constitutional and statutory ban on the recognition of same-sex marriages validly performed out-of-state violated the 14th Amendment).

own prohibition against same-sex marriages.²⁷ This emphasis on constitutional rights and disregard of the obligation of states to give “full faith and credit” to the marriage laws of their sister states is common and widespread—and serves only to muddy the waters.²⁸

Notwithstanding the widespread failure to consider the dictates of Article IV, Section I to the question of the recognition of sister-state same-sex marriages, a compelling argument can be made that this provision is directly applicable. At the same time, the analysis herein suggests that the Full Faith and Credit Clause is a constitutional rule of evidence that requires no more than that a court in one state accept an authenticated record of a same-sex marriage celebrated in another state as conclusive evidence that the same-sex couple was legally married in the other state. This is something much less than a mandate to recognize an out-of-state same-sex marriage as valid in the forum state. However, given the significant divergence of opinion and lack of clarity over the meaning of Article IV, Section I, it is useful to consider what obligations and duties are imposed on the states by the Full Faith and Credit Clause. Furthermore, we need to consider the impact of the second sentence of Article IV, Section I—the so-called Effects Clause. This constitutional provision grants Congress the authority to prescribe rules setting forth the “effect” that states must give to the public acts, records, and proceedings of the other states. As we shall see, Congress exercised this authority in 1790 and 1948—and then again in 1996 when it enacted Section 2 of DOMA, which was *not* overturned by the Supreme Court’s holding in *Windsor*.²⁹ In this statutory provision, Congress decreed that states are free to give *no effect* to another state’s public acts, records, and judicial proceedings that recognize same-sex marriage.³⁰ Giving no effect would seem to be a lesser obligation than giving full faith and credit to a

27. The plaintiffs in the case were same-sex couples married in other states, and as such, were not seeking to marry under Kentucky’s marriage law. Oddly, the decision never referred to the Article IV, Section 1 of the U.S. Constitution or Section 2 of DOMA, which, as we will see, are highly relevant to the issue.

28. When it appeared that Hawaii would become the first state to recognize same-sex marriages, numerous commentators (erroneously) concluded that the Full Faith and Credit Clause required that other states must recognize such marriages. Rebecca S. Paige, Comment: *Wagging the Dog—If the State of Hawaii Accepts Same-Sex Marriage Will Other States Have To?* 47 AM. U. L. REV. 165, 166–67, 167 n. 4 (1997) (“To date, numerous law review articles have lauded the legal recognition of same-sex marriage, proffering that the correct application of conflict of laws rules all but ensures that once one state recognizes same-sex marriage, other states will be required to recognize out-of-state same-sex marriages.”). The conflation of constitutional rights with the problem of conflict of laws persists. See, e.g., Steve Sanders, *The Constitutional Right to (Keep Your) Same-Sex Marriage*, 110 MICH. L. REV. 1421, 1424 (2012) (arguing that a same-sex married couple has a significant “liberty interest” under the Fourteenth Amendment—distinct from a constitutional right to marry—in “keeping” their marriage in a state that does not recognize such marriages”).

29. *United States v. Windsor*, 133 S. Ct. 2675, 2695–96 (2013) (holding Section 3 of DOMA unconstitutional under the due process clause of the Fifth Amendment of the U.S. Constitution).

30. 28 U.S.C. § 1738C (1996) (“No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State.”).

sister state's marriage law. How do we reconcile these two seemingly contradictory mandates?³¹

Given the confusion, the goal here is to provide clarification as to what is entailed by the duty of full faith and credit in a political system in which individual states have the authority and autonomy to make their own laws—specifically, with respect to same-sex marriage. To be sure, there are many other complex and interesting constitutional and moral issues that arise with respect to same-sex marriage, but these are beyond the scope of this study. The focus here is solely on the question of whether a state has a constitutional obligation under Article IV, Section I to recognize a same-sex marriage celebrated in another state. Ever since the first hint that Hawaii or some other state might recognize same-sex marriage (whether by an act of the legislature or a ruling of the state judiciary), this constitutional question has loomed on the horizon. To date, the federal judiciary and the national legislature have given contradictory responses. If some federal judges have assumed that every state must recognize every same-sex marriage from another state, Congress has prescribed a very different statutory rule—granting authority to the states to disregard an out-of-state same-sex marriage. Where a state exercises this option, the result is non-recognition of the marriage at issue. As we shall see, a state court can reach much the same substantive result under traditional choice of law rules by applying its own state's law in a determination of the validity of a same-sex marriage celebrated in a sister state. Likewise, a state may give no effect to another state's marriage law if it has a public policy exception for public acts of another state that express public policies that are contrary and repugnant to its own. A state that prohibits same-sex marriages likely will be “offended” by the contrary law of a sister state that recognizes such marriages.

To be sure, state officials never follow the marriage law of another state in celebrating a marriage—even where the parties to the marriage have strong connections to the other state (e.g., they are domiciled there). State officials look to their own state's marriage law in deciding whether to grant marriage licenses within their jurisdiction.³² So this is not a conflict concerning which state's law will be followed in the marriage ceremony or in determining whether to grant a marriage license to a couple; it always will be that of the forum state.

31. This conflict has led some commentators to assume that all of DOMA must be unconstitutional. See, e.g., Heather Hamilton, *The Defense of Marriage Act: A Critical Analysis of Its Constitutionality Under the Full Faith and Credit Clause*, 47 DEPAUL L. REV. 943, 973 (1998) (concluding that Section 2 of DOMA is an unconstitutional violation of the Full Faith and Credit Clause).

32. In an unusual case involving the legal status of same-sex marriage in the State of Alabama, local state probate judges and other officials were recently ordered by the Alabama Supreme Court to follow Alabama law (which prohibits same-sex marriage) when issuing marriage licenses within the state—this notwithstanding the ruling of a federal district judge in Alabama that Alabama's same-sex marriage prohibition violates the 14th Amendment to the U.S. Constitution. The Alabama Supreme Court has indicated that it would be bound by a ruling of the U.S. Supreme Court but not one of a federal district court. See Sandhya Somashekhar, *Same-Sex Marriages Halt Again in Alabama*, WASH. POST, Mar. 5, 2015, at A8.

Rather the question concerns the legal effect given by the courts in a state that prohibits same-sex marriage to the official record (i.e., a marriage certificate) of a same-sex marriage celebrated in another state. How this question is answered will determine whether the couple is recognized as married in the forum state. This is where the confusion lies. Of course, one would think that after more than two hundred years of experience dealing with the peculiarities of our federal legal system, we would have settled rules to deal with such conflicts of state marriage law—especially considering that marriage is such a longstanding and universal social institution. Alas, the law is anything but settled with respect to same-sex marriage.

II. A DUTY OF FULL FAITH AND CREDIT?

The question whether a state that prohibits same-sex marriage must recognize a same-sex marriage celebrated in another state arises only because the U.S. Constitution preserved the states as separate “sovereign” political organizations within the framework of the new confederation they established.³³ That fateful decision would have profound consequences for the development of the American legal system. Under the Constitution, the national legal system would be comprised of the courts of the thirteen (now fifty) separate states along with the new federal judiciary. Left unanswered by the Founders was the critical question of *how* these autonomous courts would be integrated into a single, unified national legal system. The problem is, states commonly enact laws that conflict with those of other states. In legal disputes wherein the parties are citizens of different states, the forum court must decide which state’s law to follow in adjudicating such dispute. The choice is between the law of the forum state or that of some other state with which the parties had significant contacts (e.g., the state where the parties signed a contract, the alleged tort was committed, or the marriage at issue was celebrated). In some cases, the forum state’s choice of law rules will lead a court there to apply the civil law of another state.³⁴ But what if the other state’s law is not just different but is actually contrary and repugnant

33. At the Constitutional Convention, only two delegates openly argued in favor of abolishing the states and creating a “consolidated” government. Those were George Read and Alexander Hamilton. In Robert Yates’s transcription of the proceedings, Hamilton declares that “all federal governments are weak and distracted” and that to avoid “the evils deductible from these observations, we must establish a general and national government, completely sovereign, and annihilate the state distinctions and state operations.” 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 297, 463 (Max Farrand ed., rev. ed. 1966).

34. A court may apply and enforce the civil law of another state but never its criminal law. This principle is commonly attributed to dictum from Chief Justice Marshall in *The Antelope*, 23 U.S. 66, 123, 10 Wheat. 66 (1825) (“The courts of no country execute the penal laws of another”). If a person accused of a crime in Pennsylvania is captured in New York, there will be no trial in New York. That state, however, has a constitutional duty to return the fugitive to Pennsylvania upon proper application by the governor of that state. *See* U.S. CONS., art. IV, § 2 (“A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.”).

to that of the forum state?³⁵ Must the forum court still apply (and enforce) the other state's law in adjudicating the matter at issue?

A. Early Interpretations of the Duty of Faith and Credit

The matter of how a state court should treat the contrary law of the other states was recognized as problematic from the earliest days of the new Republic—i.e., during the period of the Confederacy of the United States (1776–1789). The Articles of Confederation (the constitution of the Confederacy) included a “full faith and credit” clause to deal with this problem of integrating the separate legal systems and laws of the states. The language of this provision was nearly identical to that subsequently adopted in the Full Faith and Credit Clause in the Constitution, but the earlier version addressed only the question of what obligation is owed to the “records, acts and judicial decrees of the courts and magistrates” of the other states.³⁶ The provision in the Articles did not apply to the public acts (statutes and common law) of the other states—only its records, acts and judicial decrees. In contrast, drafters of the Full Faith and Credit Clause employed broad language that expanded the scope of the provision to apply to the public acts of the other states. That clause mandates that each state give “full faith and credit” to the “public acts” (along with the records and judicial proceedings) of the other states. The clause also grants Congress the discretionary authority to enact legislation prescribing rules to “prove” (i.e., authenticate) the public acts (as well as records and proceedings) of another state and declare the “effect” that must be given to them. The inclusion of the second sentence suggests that the question of how to treat the public acts of another state was not settled by the first sentence, which only vaguely requires that states afford them “full faith and credit.” The second sentence leaves it to Congress to prescribe rules setting forth the specific legal “effect” that must be given to such public acts of another state. Arguably, the provision as a whole requires no more than that a court accept the duly authenticated public acts, records, and judicial proceedings of a sister state as conclusive evidence in a judicial inquiry, and thereafter, give the sister state's public acts, records and proceedings whatever substantive legal effect might be prescribed by Congress in legislation.³⁷

To say the least, Article IV, Section I is no model of clarity. No less an authoritative figure than James Madison believed that the Full Faith and Credit

35. The most significant example of such a conflict of law involved slavery. It took a special provision of the Constitution (the so-called fugitive slave clause) to require the non-slave states to enforce the law of chattel slavery of the slave states against a fugitive slave in a free state. U.S. CONST., art. IV, § 2.

36. ARTICLES OF CONFEDERATION of 1777, art. IV (“Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State.”). The origins of the full faith and credit clause in the Articles of Confederation are discussed in Kurt H. Nadelmann, *Full Faith and Credit to Judgments and Public Acts: A Historical Analytical Reappraisal*, 56 MICH. L. REV. 33, 34–36 (1957).

37. This argument is more fully developed in Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255 (1998).

Clause was “too indeterminate” to have *any* meaning. He argued, however, that under the authority of the Effects Clause, Congress could salvage the provision by prescribing substantive rules setting forth how states should treat the public acts, records, and judicial proceedings of another state.³⁸ Indeed, the First Congress of the United States addressed this matter in the Act of May 26, 1790.³⁹ This statute first established the official method for authenticating the public acts, records and judicial proceedings of another state.⁴⁰ The statute then declared that records and judicial proceedings so authenticated must be given the same legal effect by a state court as would be given by a court in the state of rendition: “And the said records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken.”⁴¹ The statute did not dictate the specific substantive effect that must be given to the records and judicial proceedings of a sister state court—only that they be given the same “faith and credit” by the forum court as would be given by a court in the state of rendition.⁴²

Pointedly, the 1790 implementing statute was silent with respect to the effect owed to the “legislative acts” of another state. The Act of May 26, 1790 did not prescribe *any* rule with respect to the effect to be given to the legislative acts of another state, only a method for authenticating such public acts. The implementing statute was modified slightly in 1804, extending the obligation of “faith and credit” to the records and judicial proceedings of all courts of the United States,

38. James Madison et. al., *The Federalist Papers—The Federalist No. 42* at 219 (New Haven: Yale University Press, 2009) (“The power of prescribing by general laws, the manner in which the public acts, records and judicial proceedings of each State shall be proved, and the effect they shall have in other States, is an evident and valuable improvement on the clause.”). The delegates’ “original understanding” of the Effects Clause as well as Madison’s reservations concerning the Full Faith and Credit Clause are discussed in Daniel A. Crane, *The Original Understanding of the ‘Effects Clause’ of Article IV, Section 1 and Implications for the Defense of Marriage Act*, 6 GEO. MASON L. REV. 307 (1998).

39. Act of May 26, 1790, ch. 11, 6 Stat. 122 (“An Act to Prescribe the Mode in Which the Public Acts, Records, and Judicial Proceedings in Each State, Shall Be Authenticated So As to Take Effect in Every Other State.”). The debates in Congress over the enactment of this statute are recounted in Whitten, *supra* note 37, at 295–327.

40. Act of May 26, 1790, ch. 11, 6 Stat. 122 (“The acts of the legislatures of the several states shall be authenticated by having the seal of their respective states affixed thereto: That the records and judicial proceedings of the courts of any state, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form.”).

41. *Id.*

42. The statute did not refer to “full faith and credit,” but only to “faith and credit.” The language of the statute departs from that of the Constitution in this and other significant ways. See Pamela K. Terry, Note, *E Pluribus Unum? The Full Faith and Credit Clause and Meaningful Recognition of Out-of-State Adoptions*, 80 FORDHAM L. REV. 3093, 3102 (2012) (summarizing the differences between the statutory and Constitutional provisions).

including those in its territories and possessions.⁴³ But the statute remained silent with respect to the obligation owed to the public acts of the other states.

In 1948, Congress enacted a new version of the implementing statute. Like its predecessor, the 1948 statute provides the official method for authenticating the public acts, records, and proceedings of the other states.⁴⁴ Thereafter, the statute prescribes a rule with respect to the effect that must be given by a court to such authenticated documents—including the public acts of another state: “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 State, Territory or Possession from which they are taken.”⁴⁵ This is the rule in effect today. Significantly, it applies to the authenticated “acts of the legislatures” of the states (or “copies thereof”), not just the records and judicial proceedings of another state, territory, or possession. The 1948 statute requires that a court in the forum state give an authenticated act of the legislature of a sister state the *same* “full faith and credit” as is given by the courts in the state of rendition. As such, the statute sets forth a judicial rule of evidence prescribing the legal effect that must be given by a court in one state to the authenticated record of a public act of the legislature of another state.⁴⁶

What obligation is owed to the public acts of a sister state under the 1948 statute? That is not clear on the face of it. One thing is certain, neither the Full Faith and Credit Clause nor the 1948 statute has been interpreted by the federal courts to require that each state must always enforce the public acts of all the other states all the time. Such a rule would require a state to enforce every other state’s law to the exclusion of its own—even where the sister state’s law expresses public policies that are contrary and repugnant to its own. Carried to its logical conclusion, such a rule would, in the words of the Supreme Court, lead to an “absurd” result: “A rigid and literal enforcement of the Full Faith and Credit Clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own.”⁴⁷ This interpretation would require that the forum court apply another state’s law whenever it

43. Act of Mar. 27, 1804, § 2, 7 Stat. 153.

44. 28 U.S.C. § 1738, *amended* by 62 Stat. 947, ch. 646 (June 25, 1948) (“The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto. The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.”).

45. *Id.*

46. That the rule is included in Title 28 of the U.S. Code (“Judiciary and Judicial procedure”) as a rule of “evidence” for documents suggests that Congress viewed the provision as just that—a judicial rule of evidence.

47. *Alaska Packers Ass’n v. Industrial Accident Comm’n*, 294 U.S. 532, 547 (1935).

conflicts with its own law. That would be a bizarre and unprecedented approach to resolving conflicts of law. Not surprisingly, the Supreme Court has rejected this strong reading of the Full Faith and Credit Clause—at least with respect to public acts.⁴⁸

As opposed to this “rigid and literal” reading of the Full Faith and Credit Clause (i.e., the “strong” interpretation), it is possible to craft a more pragmatic interpretation consistent with the text of the Constitution as well as precedent. Such a view holds that *if* a court determines under its choice of law rules that another state’s public acts are applicable to the resolution of a particular legal dispute involving diverse parties with interstate contacts, such court must give “faith and credit” to the authenticated records of the public acts of the sister state by treating them as conclusive evidence of that state’s law. Thereafter, in adjudicating such legal dispute, the court must give such authenticated public acts the same “effect” (e.g., the same meaning and application) as would a court in the state of rendition. In other words, if a court decides under its choice of law rules to apply the law of another state, it cannot impose its own interpretation on the other state’s law, but rather must give the relevant statute the same meaning and effect as would a court in the state of rendition. The implementing statutes enacted by Congress under the authority of the Effects Clause and state choice of law rules will determine whether to apply the law of another state in adjudicating a legal dispute, and if it is applied, what effect to give to such law. As such, the implementing statutes enacted by Congress under the authority of the Effects Clause and state choice of law rules function as the operating rules of our federal system of law—effectively integrating the different (and conflicting) law of the various jurisdictions into a single national legal system. To be sure, the states are subject to constitutional constraints in crafting their choice of law rules, but these are relatively minimal. The Supreme Court requires only that a court demonstrate a “reasonable basis” and “significant forum contacts” justifying its decision to apply its own state’s law rather than that of the sister state, which decision must be “neither arbitrary nor fundamentally unfair.”⁴⁹

48. This strong reading of the Full Faith and Credit Clause has been applied by the Supreme Court to the judgments of a sister state. *Mills v. Duryee*, 11 U.S. (7 Cranch) 481 (1813) (holding that because the record of the judgment at issue would be preclusive evidence of the debt in New York, it must be treated as preclusive evidence of the debt in the District of Columbia or any other state or territory of the United States). The holding in *Mills* was re-affirmed by Chief Justice Marshall in 1818 when he held that “the judgment of a state court should have the same credit, validity, and effect in every other court in the United States which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States.” *Hampton v. M’Connel*, 16 U.S. 234 (1818). With respect to the enforcement of foreign judgments, Professor Reynolds refers to the clause as an “iron law of preclusion.” William L. Reynolds, *The Iron Law of Full Faith and Credit*, 53 MD. L. REV. 412 (1994).

49. Courts look to a variety of factors in deciding which state’s law to apply in cases in which there are diverse parties, interstate contacts, and a conflict of law. The Supreme Court has settled on a minimalist approach in its review of choice of law rules—one in which a state satisfies the constitutional requirement for due process merely by demonstrating a “reasonable basis” and “significant forum contacts” justifying the decision to follow the forum state’s own law, which decision must be “neither

Accordingly, if a state's choice of law rules dictate in favor of applying the law of another state, the forum court must give that state's law whatever effect is prescribed by Congress in legislation (including no effect), affording the parties those minimal constitutional protections mandated by the Supreme Court.

B. The Public Policy Exception to Choice of Law Rules

There is one additional judicial rule to consider with respect to the obligation of one state to enforce the public acts and judicial decrees of another jurisdiction. States commonly recognize a so-called public policy exception in their choice of law rules.⁵⁰ Under this rule, state courts need not follow the law of another state if it expresses public policies that are contrary and repugnant to those of the forum state.⁵¹ If such an exception is recognized in a state's choice of law rules, contrary public policy will be one additional factor that a court must take into account in deciding whether to apply its state's law or that of a sister state.⁵² The Supreme Court has held that lesser deference is owed to the public acts of a sister state that express public policies contrary to those of the forum state. Writing for the majority in *Hughes v. Fetter* (1951), Justice Black stated:

We have 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. The clash of interests in cases of this type has usually been described as a conflict between the public policies of two or more states.⁵³

arbitrary nor fundamentally unfair." *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981). The due process requirements are reviewed in WILLIAM L. REYNOLDS & WILLIAM M. RICHMAN, *THE FULL FAITH AND CREDIT CLAUSE: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 18-43 (Westport, Conn.: Praeger, 2005).

50. The public policy exception is recognized in both the first and second Restatements of Conflict of Laws. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 90 (1971) (recognizing public policy exception); RESTATEMENT OF CONFLICT OF LAWS § 612 (1934) (precluding suits "upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum").

51. The differences in public policy must be significant enough to be deemed repugnant to the policies and morals of the forum state. According to Judge Cardozo, the exception to enforcement of a "foreign right" is appropriate where to do so would "violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal." *Loucks v. Standard Oil Co. of N.Y.*, 120 N.E. 198, 202 (N.Y. 1918).

52. Under the modern approach, a court may determine that the forum state had a greater connection and more significant contacts to the legal dispute and the parties than another sister state, justifying the application of its own law—even when the tort occurred or the contract was executed in another state. See RESTATEMENT (SECOND) OF TORTS §§ 145, 188 (expressing the new multi-factor approach as applied to torts and contracts, respectively); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (as applied to choice-of-law principles). Of course, different courts weighing the same factors can reasonably come to diametrically opposed conclusions as to which state's law should be applied to the legal dispute.

53. *E.g.*, *Hughes v. Fetter*, 341 U.S. 609, 611-12 (1951); see also *Williams v. North Carolina*, 317 U.S. 287, 296 (1942) ("Nor is there any authority which lends support to the view that the full faith and credit clause compels the courts of one state to subordinate the local policy of that state, as respects its

More recently, the Supreme Court has reaffirmed this principle: “A court may be guided by the forum State’s ‘public policy’ in determining the *law* applicable to a controversy.”⁵⁴

To summarize: the Full Faith and Credit Clause does not require courts to always apply and enforce all of the public acts of the other states all of the time. Indeed, there are cases in which Congress has authorized states to give *no* effect to the public acts of a sister state. These are cases wherein the forum court decides to apply its own state’s law under its choice of law rules. Furthermore, a state’s choice of law rules may include a public policy exception for the law of another state that is contrary and repugnant to that of the forum state—thereby justifying the forum court to favor its own law over that of the other state. Accordingly, a state’s choice of law rules determine what effect a state shall give to the public acts of another state—the options being applying the law of the other state or giving it no effect. Moreover, under the authority of the Effects Clause, Congress may prescribe rules setting forth the effect owed by a court to the public acts of another state. Congress so spoke in 1948 when it prescribed a rule holding that when a court applies the public acts of another state, it must give them the *same* effect as would a court in that other state.

While Congress adopted a broad rule in 1948 requiring that a court give the same effect to the public acts of a sister state as would a court in the state of rendition, such treatment is not mandated by the Constitution. It was the choice of Congress to prescribe that particular rule. But Congress has the authority to prescribe a *different* effect owed to specific categories of public acts—and that includes a lesser effect or no effect. There is no constitutional requirement that Congress prescribe a uniform effect for all public acts, although that was the rule that Congress adopted in 1948. More recently, Congress has enacted various statutes prescribing a different effect for specific categories of public acts, records, and judicial proceedings of a sister state. For example, Congress has promulgated a special rule prescribing the effect owed to child custody

domiciliaries, to the statutes of any other state.”); *Alaska Packers Ass’n v. Industrial Accident Comm’n*, 294 U.S. 532, 547 (1935) (“In the case of statutes, the extra-state effect of which Congress has not prescribed, where the policy of one state statute comes into conflict with that of another, the necessity of some accommodation of the conflicting interests of the two states is still more apparent The conflict is to be resolved, not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight.”).

54. *Baker v. General Motors Corp.*, 522 U.S. 222, 233 (1998); *see also Nevada v. Hall*, 440 U.S. 410, 422 (1979) (“the Full Faith and Credit Clause does not require a State to apply another State’s law in violation of its own legitimate public policy.”). More recently, the Court reaffirmed the constitutionality of such an exception for contrary public acts (as opposed to out-of-state judgments that might offend the forum state). *See Franchise Tax Board of California v. Hyatt*, 538 U.S. 488, 494 (2003) (citing *Baker*, 522 U.S. at 232). In *Franchise Tax Board*, the Court ultimately declined the invitation to recognize a *bona fide* public policy exception to the full faith and credit clause on the grounds that it was not presented “with a case in which a State has exhibited a ‘policy of hostility to the public Acts’ of a sister State.” *Id.* at 499.

determinations, thereby limiting the ability of a court to modify a custody determination issued by a tribunal in another state.⁵⁵ Similarly, Congress has prescribed the effect owed to child support orders issued by a court in a sister state.⁵⁶ Congress has also prescribed rules for the proof and admission as evidence of various public records from other states.⁵⁷ These statutes all prescribe a *different* evidentiary effect for these specific categories of public acts, records, and judicial proceedings than what is otherwise required by the general rule set forth in the 1948 statute (i.e., the *same* effect as given by a court in the state of rendition). Likewise, in 1996 Congress enacted Section 2 of DOMA, which prescribes a special rule for the effect owed to public acts, records, and judicial proceedings of another state respecting a marriage between persons of the same sex—namely, states are free to give *no effect* to such public acts, records, and judicial proceedings.⁵⁸ We now must consider the application of these complex rules to the treatment of a same-sex marriage celebrated in another state.

III. TREATMENT OF “FOREIGN MARRIAGES”

Notwithstanding the confusion over the legal status of a same-sex marriage celebrated in another state, we do have settled rules for dealing with “foreign marriages” (i.e., a marriage celebrated in another country). We also have settled rules for dealing with “traditional domestic marriages” (i.e., a marriage between one man and one woman) celebrated in another state. Courts and legal scholars have considerable experience dealing with such marriages. Indeed, the topic is a staple of the curriculum in courses on civil procedure taught in law schools across the nation. There are good reasons for this. Marriage is a unique, historic, and ubiquitous institution that raises unusual and interesting legal issues. Under the common law, marriage is recognized as a private contract—but a contract imbued with special meaning and legal status by virtue of public statutes and a public license.⁵⁹

Complicating the matter, marriage also is a religious institution that expresses deep-rooted moral principles and customs. Not surprisingly, marriage law that reflects significantly different customs and moral principles than those of the forum state can result in a highly contested matter. That said, the rules crafted

55. Full Faith and Credit Given to Child Custody Determinations Act, 28 U.S.C. § 1738A (2012) (also known as the Parental Kidnapping Prevention Act of December 28, 1980).

56. 28 U.S.C. § 1738B (2012).

57. 28 U.S.C. § 1733 (2012) (government records), §§ 1734–1735 (court records), § 1739 (non-judicial records), § 1740 (copies of consular papers), § 1741 (foreign official documents), § 1744 (copies of U.S. Patent and Trademark Office documents), § 1745 (copies of foreign patent documents).

58. *See* 28 U.S.C. § 1738C.

59. Janet Halley describes the different aspects of marriage as both a legal status and a relationship defined by contract: “Is marriage contract or status? *Should it be* contract or status? These questions loom large in U.S. legal discussions of the institution Marriage is status, but with elements of contract.” Janet E. Halley, *What is Family Law?: A Genealogy Part I*, 23 *YALE J.L. & HUMAN.* 1, 6–7 (2011).

over the years are adequate to deal with the recognition (or rejection) of a traditional marriage celebrated in a foreign jurisdiction or another state. The recent legalization of same-sex marriage, however, has disrupted the social consensus and challenged many of the assumptions that underlie these seemingly settled legal rules.

With respect to foreign marriages, there is widespread agreement that a marriage's validity should be determined under the law of the country in which the marriage was celebrated.⁶⁰ Comity and the so-called law of nations dictate that a marriage valid under the law of a foreign jurisdiction (as well as contracts entered into pursuant to such a marriage respecting the mutual rights and obligations of the parties) should be given legal effect in other nations. There are exceptions to this treatment, however. Most notably, a foreign marriage may be deemed invalid based on objections to public policies or moral (e.g., religious) principles expressed in such foreign nation's marriage law that contradict and offend those of the forum nation. In his classic treatise *Commentaries on Conflict of Law, Foreign and Domestic*, Joseph Story observed that certain foreign marriages need not be recognized by other nations to which the married couple travels:

The general principle certainly is, . . . marriage is to be decided by the law of the place, where it is celebrated. If valid there, it is valid everywhere The most prominent, if not the only known exceptions to the rule, are those respecting polygamy and incest; those positively prohibited by the public law of a country, from motives of public policy; and those celebrated in foreign countries by subjects entitling themselves under special circumstances to the benefit of the laws of their own country.⁶¹

This principle remains an integral component of choice of law rules as applied to foreign marriages: the validity of foreign marriages should be determined under the law of the country in which the marriage was celebrated, but such foreign marriage law need not be respected where it strongly offends the moral principles of the forum nation or is contrary and repugnant to significant public policies expressed in the marriage law of the forum nation.

Non-recognition also may be warranted where the parties to the marriage are citizens and domiciles of the United States who traveled to and celebrated their marriage in a foreign nation specifically to obtain some legal benefit not otherwise available to them under domestic law. Examples would include traveling to a foreign nation with a lower marriage age to avoid a statutory

60. "As a general matter, every state recognizes the validity of a marriage valid where it was celebrated (i.e., where the marriage contract was made)." Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 Yale L.J. 1965, 1969 (1977) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971)).

61. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC (1834), § 113, 103–104.

requirement with respect to the minimum age for a domestic marriage, or marrying a second wife in a nation that permits polygamy, and then returning to the United States. Another obvious example is two American citizens domiciled in a state that does not recognize same-sex marriage traveling to a foreign country to celebrate a same-sex marriage and then returning home to the United States.⁶² This is what Story referred to as a “marriage *in transitu*.”⁶³ Foreign marriages *in transitu* are open to challenge in the jurisdiction of domicile. Minor differences in the foreign nation’s law, however, are ignored for the sake of preserving the marital relationship and avoiding the negative consequences that could follow from non-recognition of a marriage (e.g., potentially creating a case of unlawful cohabitation, adultery, or rendering illegitimate any children of the invalid union).⁶⁴

Much the same principles apply in determining the validity of a traditional domestic marriage celebrated in another state. The settled rule is *lex loci celebrationis*—the validity of a marriage is governed by the law of the state in which the marriage was celebrated.⁶⁵ Minor differences in state marriage law should be ignored to avoid the “most dangerous consequences” that would follow should the forum state declare a sister state marriage a “nullity, merely because their own jurisprudence would not, in a local transaction, uphold it.”⁶⁶ Notwithstanding the general rule of comity for another state’s marriages, there are exceptions—just as there are with foreign marriages. These are cases in which the other state’s marriage law expresses significant differences in public policies or moral principles. As with foreign marriages, examples include differences in family relations between the parties to the marriage (e.g., allow-

62. This is precisely what the same-sex couple did in the marriage at issue in *United States v. Windsor*, 133 S. Ct. 2675 (2013). The parties to the marriage were domiciled in New York, which did not then recognize same-sex marriages. They traveled to Ontario, Canada, to be married in 2007. *Id.* at 2682. The legal status of the marriage in New York was not at issue—only its status for federal purposes. New York subsequently amended its marriage law to recognize same-sex marriages performed in other jurisdictions, and then to permit same-sex marriages in that state. See Marriage Equality Act, 2011 N.Y. Laws 749 (codified at N.Y. DOM. REL. Law Ann. §§ 10–a, 10–b, 13).

63. *Id.* § 192. As opposed to “marriage *in transitu*,” some legal scholars today use the term “evasion marriage” to describe this scenario in which the parties come to a state to take advantage of its more favorable marriage law. See, e.g., Linda Silberman, *Current Debates in the Conflict of Laws: Recognition and Enforcement of Same-Sex Marriage*, 153 U. PA. L. REV. 2195, 2198 (2005). Professor Grossman notes that evasive marriages (“where citizens defy their own state’s restrictions by going elsewhere to marry and then returning home”) exist because “states have traditionally not imposed a residency requirement on marriage as they have on divorce.” Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433, 464 (2005).

64. “Recognition will be denied only if the foreign marriage violates the basic public policy of the forum.” Reynolds & Richman, *supra* note 49, at 124.

65. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971) (“A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.”); see also DAVID D. SIEGEL, CONFLICTS IN A NUTSHELL 371 (2d ed. 1994).

66. Story, *supra* note 61, § 116.

ing first cousins to marry) and acceptance of polygamy.⁶⁷ Likewise, there always have been differences in age requirements for marriage among the states.⁶⁸ Where the differences in state marriage law are significant enough, the forum court may refuse to recognize the validity of the marriage.⁶⁹

To be sure, there are many subtleties of the marriage relationship that complicate the matter of determining which state's law to apply in determining the validity of a domestic marriage celebrated in another state. A marriage is not like a tort or contract whose situs can be readily determined by reference to the location of the wrongful act or the execution of the contract. Nor is a marriage like real property, which cannot be moved across state borders, such that the applicable law with respect to ownership can be determined by the situs of the property. A marriage is a legal status that can be readily transported from one state to another.⁷⁰ In determining the applicable marriage law in a legal matter involving diverse parties and significant contacts with a sister state, there are a variety of factors to consider—most important, where the marriage was celebrated and the domicile of the parties.⁷¹ But the location of the marriage ceremony and the domicile of the parties need not be the same. As Story queried:

What is to be deemed in the sense of the rule the true matrimonial domicile? Is it the place, where the actual marriage is celebrated? Or where the contract of the marriage is entered into? Or where the parties are domiciled, if the

67. States have refused to recognize marriages celebrated in other states based on differences in consanguineous relationships. See *Osoinach v. Watkins*, 180 So. 577, 581 (Ala. 1938) (refusing to recognize a marriage celebrated in Georgia that violated Alabama's statute prohibiting marriage between a nephew and his uncle's widow). Polygamy was illegal in many states when Story authored his *Commentaries on the Conflict of Laws*, but the practice was not universally prohibited by the states until the mid-nineteenth century. Even then, it was practiced in the Utah territory among the followers of Joseph Smith, the founder of the Church of Jesus Christ of Latter-Day Saints (informally known as Mormons). Utah was denied statehood by Congress until it enacted a constitution that prohibited polygamy. See UTAH CONST. art. III, § 1 (prohibiting polygamous marriages in Utah).

68. See Grossman, *supra* note 63, at 437-38 ("American states maintained a variety of restrictions on marriage throughout the nineteenth and first half of the twentieth centuries . . . 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.").

69. See *Catalano v. Catalano*, 170 A.2d 726, 728-29 (Conn. 1961) (holding that out-of-state marriage violated Connecticut marriage law prohibiting incestuous marriages between an uncle and his niece, and therefore was invalid in Connecticut). In *Wilkins v. Zelichowski*, 26 N.J. 370, 378 (1958), the New Jersey Supreme Court granted an annulment of a marriage of two young citizens who married in Indiana to avoid the age-limit requirements of New Jersey (their state of domicile both before and after their marriage in Indiana) on the grounds that "the strong public policy of New Jersey requires that the annulment be granted."

70. See Halley, *supra* note 59, at 1 (discussing this peculiar quality of marriage as a legal status).

71. See Siegel, *supra* note 65 ("If the law of the ceremony state, although different from the domicile's, is not so different as to shock the domicile's sensibilities unduly, the domicile is likely to uphold the marriage when it gets the question.").

marriage is celebrated elsewhere? Or if the husband or wife have different domicils, whose is to be regarded?⁷²

The easy case is where both parties to the marriage are domiciled in the same state and the marriage ceremony is performed in that state. The difficult case is where the parties leave the state (or states) of domicile to be married in another state. Such a domestic marriage *in transitu* is subject to challenge where the parties specifically traveled to the sister state to take advantage of its more favorable marriage laws—for instance, where two parties travel to another state (and reside there long enough to satisfy that state’s residency requirement) for the sole purpose of marrying under that state’s more favorable marriage law (e.g., in recognizing same-sex marriage).⁷³ If the parties remain as residents of the state wherein the marriage ceremony was performed, there is no problem as they are in a valid marriage there. Problems arise, however, if they return to the original state of their domicile and that state has a contrary policy with respect to same-sex marriage. Indeed, this is the problem under consideration here: Will a same-sex couple that was married in a state that recognizes same-sex marriage (say, Hawaii) be recognized as in a valid marriage in the state of domicile if it expressly prohibits same-sex marriage (say, Alaska)? The subtleties and complexities of this legal question (attributable to our federal legal system) are seldom fully appreciated by partisans engaged in the boisterous and contentious contemporary political debate over same-sex marriage.⁷⁴

So under these settled rules, must a state recognize a same-sex marriage celebrated in another state? Under the theory that U.S. citizens are not entitled to benefit from a marriage *in transitu*, the state of domicile (Alaska) would have legitimate grounds for *not* recognizing the same-sex marriage celebrated in Hawaii where the parties were citizens of Alaska who had traveled to Hawaii for the specific purpose of avoiding the Alaskan prohibition against same-sex marriages. Likewise, if Alaska has a public policy exception in its choice of law rules, that too would provide valid grounds for applying Alaskan law in determining whether there is a valid marriage in that state, and thereby treating the marriage celebrated in Hawaii as invalid in Alaska.⁷⁵ Differences over

72. STORY, *supra* note 61, § 191.

73. The example of a domestic marriage *in transitu* that Story approvingly cites was a case involving a couple domiciled in Louisiana who traveled to Mississippi in order to benefit from that state’s lower minimum age of 13 years for marriages without the consent of the bride’s parents. *See id.* §§ 180–82 (discussing *Le Breton v. Nouchet*, 3 Mart. (o.s.) 60 (La. 1813)).

74. As Professor Kramer perceptively observed, questions surrounding the enforcement of a sister state same-sex marriage “are more complicated than partisans on either side of the issue seem to have realized.” Kramer, *supra* note 60, at 1966.

75. In those few cases in which a court considered the issue, non-recognition of an out-of-state same-sex marriage based on the public policy exception was affirmed. *See, e.g.*, *Rosengarten v. Downes*, 802 A.2d 170, 174–75 (Conn. App. Ct. 2002) (affirming a Connecticut court’s decision to decline jurisdiction over a Vermont civil union on the basis that Vermont’s marriage law was contrary to that of Connecticut with respect to same-sex marriage); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1303 (M.D. Fla. 2005) (rejecting claim that the Full Faith and Credit Clause required Florida to recognize a

same-sex marriage (recognition versus prohibition) surely are significant enough to constitute a contrary and repugnant statute warranting non-recognition under the public policy exception. This is not just a minor difference over marriage requirements (such as a one-year difference in the age requirement for marriage). Same-sex marriage fundamentally alters an established social and legal institution by changing the definition of who is eligible to marry.

Of course, these facts present the most extreme case, and hence, the easiest case to decide. Suppose the facts are slightly different: the same-sex couple from Alaska has a *bona fide* intention of permanently relocating to Hawaii, the marriage is celebrated in Hawaii under Hawaiian marriage law, and the couple establishes Hawaii as their new domicile. Obviously, they are in a valid marriage in Hawaii. The married same-sex couple, however, later decides that the move was a mistake—perhaps because they cannot bear the endless succession of sunny days in Hawaii.⁷⁶ If the couple thereafter returns to reestablish their domicile in Alaska, is their marriage valid there under these facts?

Strictly speaking, this was not a domestic marriage *in transit*. There was no improper motive or any attempt to benefit in Alaska from Hawaii's more favorable marriage law—just a change in plans after the marriage. Does the validity of the marriage in Alaska depend on the “intention” of the parties at the time of the marriage ceremony? That certainly would be a difficult standard to apply in practice. Is the amount of time spent domiciled in Hawaii relevant? If so, how long must the couple reside in Hawaii before the marriage is no longer subject to challenge in Alaska? These are difficult questions with no clear answers.

That said, a court in Alaska would be on defensible grounds in invoking the exception in its choice of law rules for sister state laws that express public policies that are contrary and repugnant to its own. That would provide grounds for refusing to apply Hawaiian marriage law in determining the validity of the marriage in Alaska. In so doing, Alaska would apply its own marriage law, and thereby give no effect to a same-sex marriage celebrated in Hawaii—whatever the parties' intention at the time they traveled to Hawaii for the marriage ceremony and no matter how long they were domiciled there. Of course, this would produce just those “dangerous consequences” of which Justice Story so appropriately warned. The same-sex couple domiciled and married in Hawaii might not be in a valid marriage following their relocation to Alaska—perhaps not even when traveling through a state such as Alaska that prohibits same-sex marriage. Arguably, the same result would apply to a settlement agreement executed in Hawaii pursuant to a Hawaiian divorce decree dissolving a same-sex marriage celebrated there. Of course, a court in a state such as Alaska might

Massachusetts same-sex marriage and acknowledging that Florida had the right to reject Massachusetts law that was contrary to its own).

76. As Goethe observed: “Alles in der Welt l’ässt sich ertragen, nur nicht eine Reihe von schönen [“Everything in the world is bearable, except a series of lovely days.”] Anthony Lejeune (ed.), *The Concise Dictionary of Foreign Quotations* 131 (Chicago: Fitzroy Dearborn Publishers, 2001).

respect a Hawaiian divorce decree and the attendant settlement agreement on the grounds that it dissolves, rather than celebrates a same-sex marriage. Dissolving a same-sex marriage and dividing the marital assets might be viewed as in harmony with the forum state's public policy against same-sex marriage. Likewise, a court-approved settlement agreement might be viewed as more in the nature of a judgment or judicial proceeding issued by a court in the sister state, which must be given preclusive effect.

In any event, divorce decrees and property settlements for divorcing same-sex couples are not likely to be controversial; recognition of same-sex marriage is. If a same-sex marriage must be accepted as valid in those states that prohibit such marriages, the public policies expressed in the marriage law of those states will be seriously undermined. Moreover, if only one state recognized same-sex marriage, the same untenable result would follow. As was once the case with divorce in Las Vegas, the state with the least stringent standard would become the jurisdiction of choice for same-sex marriages *in transitu*. As one prominent scholar observed when it appeared as if Hawaii would become the first state to recognize same-sex marriages, "Hawaii should not be able to dictate marriage law to the rest of the nation."⁷⁷ The same applies to *any* state that recognizes same-sex marriage. To allow such a result neither makes sense nor is it mandated by the Full Faith and Credit Clause.

Nevertheless, it is highly undesirable to have marriages that are valid in one state held invalid in another. The same-sex couple will find little consolation in knowing that this outcome can be avoided by remaining forever in Hawaii or only traveling and residing in other states that recognize same-sex marriage. Perhaps they will just need to live with the unsettling consequences—they are married in Hawaii but their marriage may not be recognized by a court in Alaska or any other state that prohibits same-sex marriage.⁷⁸ Under normal conditions, the issue should not arise merely in the course of traveling through another state that does not recognize same-sex marriages—but it could.⁷⁹ In addition, some states that prohibit same-sex marriage may voluntarily afford comity to such a marriage notwithstanding their own contrary marriage law. A court also might decide to apply the law of another state that recognizes such marriages—for instance, in determining rights with respect to property located

77. Kramer, *supra* note 60, at 1999.

78. There are comparable cases of legal status varying from state to state. For example, someone may be licensed to practice law in one state but not in another. A court in Alaska will give "full faith and credit" to a judicial proceeding in Delaware that certifies an individual as licensed to practice law in Delaware, but Alaska need not permit that person to practice law in Alaska unless he meets that state's own licensing requirements. Technically, such person is a "lawyer" in Delaware but not in Alaska. Perhaps same-sex couples likewise will be recognized as married in Delaware but not in Alaska.

79. Even if the same-sex couple was to cohabit in a state that does not recognize same-sex marriage, there should be no legal issues to the extent that the Supreme Court has held that prohibitions against cohabitation and sexual relations between "unmarried" persons of the same sex are unconstitutional. *See generally* Lawrence v. Texas, 539 U.S. 558 (2003) (holding the Texas sodomy law unconstitutional).

in the other state.⁸⁰ Be that as it may, patchwork recognition of a same-sex marriage will invariably produce unsettling and undesirable consequences.⁸¹

One additional factor must be taken into account in the determination of the legal status of a same-sex marriage celebrated in a sister state. Under the authority of the Effects Clause, Congress specifically addressed in Section 2 of DOMA the question of what effect must be given by the states to the public acts, judicial proceedings, and records of a sister state that recognizes same-sex marriage. In a departure from the treatment otherwise prescribed by the 1948 implementing statute, Congress set forth a different rule in Section 2 of DOMA, providing that states are free to give *no* effect to the public acts, judicial proceedings, and records of a sister state that recognize same-sex marriage: “No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State.”⁸²

The Effects Clause authorizes Congress to enact legislation prescribing the effect of the public acts of the other states, and pursuant to Section 2 of DOMA, Congress has declared that states need not give any effect to a same-sex marriage celebrated under the marriage law of another state. The provision is broad, and applies to the marriage certificate memorializing a same-sex marriage, a judicial record of such marriage, a divorce decree issued with respect to the dissolution of such a marriage, as well as a settlement agreement entered into pursuant to either a same-sex marriage or its dissolution. Under the authority of Section 2 of DOMA, a state that prohibits same-sex marriage may disregard any record, agreement, judgment, or judicial proceeding of any other state that recognizes a same-sex marriage celebrated there. Arguably, this authorizes a state to disregard an adoption of a child by a same-sex married couple recognized by a sister state if the forum state does not recognize

80. For instance, suppose a same-sex couple is married in a state that recognizes same-sex marriages—say, New York. The married parties own real property in New York as tenants by the entirety. They subsequently move to Texas, which recognizes neither same-sex marriage nor tenancy by the entirety. Later, one of the “spouses” dies. In a legal dispute adjudicated in Texas, a court will apply New York law to determine the survivor’s rights in the property in New York. As such, the Texas court will likely find that the survivor is the sole owner of the property as the surviving spouse of a marriage that Texas does not recognize and the surviving tenant of a form of property ownership that Texas does not recognize. Alternatively, suppose the couple remains in New York and one spouse dies intestate. The decedent owned property in Texas. A court in Texas would likely award legal rights in the property to the surviving “spouse” in New York despite not recognizing the marriage in Texas.

81. Problems also might arise where the same-sex married couple acquires real property in another state—one that prohibits such marriages. If one of the spouses dies, the law of the state wherein the real property is located will be applied by a court determining the various parties’ rights in such property. Will the surviving “spouse” be recognized as married to the decedent for purposes of determining whether the property was held in the entirety? For purposes of a spousal exemption for realty transfer taxes? For purposes of determining which party inherits the property if the decedent died intestate? The risk is the court might treat the survivor of the union as an unrelated person.

82. 28 U.S.C. § 1738C. This federal statute was enacted by Congress before any state had yet recognized same-sex marriage. Notably, it does not forbid states from recognizing same-sex marriages or civil unions.

same-sex marriages or adoptions by same-sex married couples. Surely this is an undesirable result, although the alternative is hardly more attractive—requiring states that do not allow their own citizens to enter into a same-sex marriage to recognize a same-sex marriage celebrated in another state. Such a rule would encourage same-sex marriages *in transit* and undermine the public policy of the forum state.

Admittedly, there are no easy choices here. Our federal legal system creates confusion, contentious conflicts of law, and unsettling legal outcomes such as this. But the Supreme Court's pragmatic interpretation of the constitutional mandate for full faith and credit along with the rule prescribed by Congress in Section 2 of DOMA dictate that the choice of whether to recognize an out-of-state same-sex marriage lies with each state. True, the entire issue will be rendered moot if the Supreme Court holds that state prohibitions against same-sex marriages violate the Fourteenth Amendment. But even if that happens, the full faith and credit issue will persist as long as the states are free to enact laws that conflicts with those of another state.

IV. CONCLUSION

Our federal judiciary is now considering whether state prohibitions against same-sex marriage violate fundamental rights granted by the U.S. Constitution. A related and equally challenging constitutional question has received much less attention. This concerns whether states have an obligation to recognize a same-sex marriage celebrated in another state—even if the forum state prohibits such unions. Ostensibly, Article IV, Section I of the Constitution addresses this question when it mandates “full faith and credit” for the public acts of another state. The dictates of this constitutional provision, however, are vague and indeterminate, giving rise to conflicting interpretations of the meaning of the provision.

That said, the Supreme Court has never held that the Full Faith and Credit Clause requires states to enforce the law of all the other states all of the time to the exclusion of their own law—especially where the sister state's law expresses public policies that are contrary and repugnant to those of the forum state. To the contrary, the Court has held that this would lead to the “absurd” result that a state would be forced to follow the law of all other states instead of its own law. That is not mandated by the Full Faith and Credit Clause. At the same time, the Effects Clause authorizes Congress to prescribe rules providing what effect a state must give to the public law of another state, and in Section 2 of DOMA, Congress has authorized states to give no effect to the public acts of another state with respect to same-sex marriage. Thus, the choice belongs to each state whether to recognize the contrary marriage law of another state.

Admittedly, this conflict of law over same-sex marriage is particularly contentious and problematic, leading us to ask whether there is something that distinguishes the conflict of same-sex marriage law from the more mundane conflicts of law that are routinely resolved through the application of the forum

state's choice of law rules. Arguably, there is. For one thing, in cases where the laws of two states express contrary and conflicting public policies, there typically is no direct contact or intersection between those laws. For example, the possession and use of small quantities of marijuana is now legal in several states (e.g., Colorado), while other states continue to prohibit both possession and use (e.g., Texas). But those states that prohibit marijuana never have an occasion to give "effect" to the law of a state that has legalized marijuana. Colorado law does not apply in a case involving the use or possession of marijuana in Texas, even if the accused is a citizen of Colorado, and conversely, a citizen of Texas who possesses or consumes marijuana in Colorado is not breaking the law of Texas.

Along the same lines, a citizen of Utah (a state that does not allow gambling) who travels to a jurisdiction where gambling is legal (e.g., Las Vegas) is not violating the law of Utah when he gambles in a casino in Las Vegas. To the extent the gambling "stays in Las Vegas," the citizen of Utah does not violate Utah law. Similarly, a state that prohibited abortion prior to 1973 may have been "offended" by abortions lawfully performed in another state, but the conflicting laws never came into direct conflict with each other to the extent an abortion was performed in a jurisdiction wherein such procedure was legal—even where the abortion was performed on a citizen of another state who travelled there specifically for the abortion because the medical procedure is not lawful in the state of her domicile.

One reason the conflict of law over same-sex marriage is so contentious is because the conflicting public policies can come into direct contact with each other. State marriage law defines a legal status that can be transported by a same-sex couple to a state that does not recognize such marriages. When a same-sex marriage is transported to a state that does not recognize such marriages, the conflict of law is most direct and contentious. In such a case, the sister state's marriage law (or its certification of the legal status of the marriage) may be challenged. When the operating rules of our federal legal system (i.e., the Full Faith and Credit Clause, the Effects Clause, and state choice of law rules) are applied in such a case of conflicting state marriage law, we will experience those "dangerous consequences" of which Joseph Story warned—i.e., the marriage of the same-sex couple may not be recognized in the forum state. Citizens of one state are free to travel to another state, bringing their marriages with them, but when they do, the operating rules of our federal legal system can produce the unsettling result that they are not married in that jurisdiction.

The intractable conflict of law over same-sex marriage illustrates the problems and complexities that result from the decision of the Founders to establish a federal legal system in which the states make their own law. States have different public policies on such matters as abortion and same-sex marriage because their citizens have different opinions and moral values. These public policies are expressed in the state's public law, which may conflict with that of

another state. In legal disputes involving diverse parties and interstate contacts, the forum court will need to decide whether to follow the other state's law or its own in resolving the legal dispute before the court. This decision may require a determination of the legal status of the same-sex marriage in the forum state. As we have seen, the Constitution does not require that a state recognize the conflicting marriage laws of another state within its jurisdiction.

Traditional choice of law rules provide grounds for not applying the laws of another state that express public policies that are contrary and repugnant to those of the forum state. This applies to a same-sex marriage celebrated in another state. If the forum state prohibits same-sex marriages, that is a difference significant enough to justify not recognizing a same-sex marriage celebrated in another state. Moreover, Congress has exercised its authority under the Effects Clause and prescribed a rule in Section 2 of DOMA with respect to the "effect" owed to a same-sex marriage celebrated in a sister state—namely, states are free to give no effect to the public acts, records, and judicial proceedings of another state with respect to a marriage between individuals of the same sex. The federal district courts have largely ignored this constitutional issue—focusing instead on whether various provisions in the Constitution establish a right to same-sex marriage. Such an approach gives short shrift to the Effects Clause of the Constitution, Section 2 of DOMA, state choice of law rules (including their public policy exemptions), and all the state constitutions and statutes that prohibit same-sex marriage.

Until the Supreme Court settles the split among the federal circuits by deciding whether there is a constitutional right to same-sex marriage, we will have to live with conflicting state marriage law concerning same-sex unions. Of course, even if the Court resolves this particular conflict of law by constitutionalizing same-sex marriage, other contentious conflicts of state law will remain—and new contentious conflicts of state law will surely arise in the future. To the extent that states enact statutes and public policies that express deep-rooted moral values and principles, contentious conflicts of law inevitably will arise. Conflicting laws dealing with slavery, abortion, and same-sex marriage are but the most historically significant examples. Because there are contentious conflicts of law such as these, guidance from the Court concerning the obligation of one state to the laws of another state would be useful for dealing with this peculiar idiosyncrasy of our federal legal system. Unfortunately, that guidance is unlikely to be forthcoming so long as the federal judiciary focuses exclusively on whether there is a constitutional right to same-sex marriage. The other constitutional issue—that of a court's obligation to recognize a same-sex marriage celebrated in another state—merits the Court's attention as well.