SAME-SEX "MARRIAGE" AND THE PUBLIC POLICY DOCTRINE

RICHARD S. MYERS†

INTRODUCTION

The issue we are here to address — interjurisdictional marriage recognition — is of undoubted importance. The underlying issues of how to define marriage and the family are of critical importance to the culture, because the family is the basic unit of society and the state has a compelling interest in promoting marriage and stable family life.¹ The question of interjurisdictional marriage recognition considers the underlying moral and legal issues indirectly, but, as is quite common in conflict of laws, the conflicts question creates a very real pressure to reexamine the underlying moral and legal issues.² So, even though we are not debating head on the question of how to define marriage,³ the answers to the jurisdictional questions we are considering will have important implications for the broader debate about the core moral and legal issues.

There is much at stake in this debate, and accordingly, much need for thoughtful evaluation of the conflicts issues presented. Unfortunately, the law review literature on the conflicts issues has been one-sided.⁴ In this regard, the imbalance in the law review literature on

† Associate Professor of Law, University of Detroit Mercy School of Law. This Essay is a revised version of a talk presented at a Conference on Interjurisdictional Marriage Recognition held at Creighton University School of Law from June 18, 1998 - June 20, 1998. I would like to thank L. Lynn Hogue and Michael E. Solimine for comments on an earlier draft of this Essay.

1. Bradley & George, 84 Geo. L.J. at 320 n.60. See Pope John Paul II, Letter to Families, 23 Origins 637, 647 (1994) ("Only if the truth about freedom and the communion of persons in marriage and in the family can regain its splendor will the building of the civilization of love truly begin and will it then be possible to speak concretely — as the council did — about 'promoting the dignity of marriage and the family.'").

2. "When forum law is embodied in the common law, rather than in a statute, a conflicts case may give the forum a special impetus to reexamine forum law in light of the contrary foreign law. If the forum determines that foreign law is better, the forum should, if possible, change forum law to accord with the better rule of law." Joseph William Singer, Real Conflicts, 69 B.U. L. Rev. 1, 82 (1989) (footnote omitted).


4. See Lynn D. Wardle, Williams v. North Carolina, Divorce Recognition, and Same-Sex Marriage Recognition, 32 Creighton L. Rev. 187 (1998) (surveying the literature). Professor Linda J. Silberman has characterized the literature in this fashion: "Like the commentators on the basic issue [of same-sex "marriage"] itself, these com-
the conflicts issues parallels the imbalance in the literature on the question of whether the Constitution mandates the legalization of same-sex "marriage" and the imbalance on the question of whether the Constitution protects a fundamental right to sexual freedom.

I think this imbalance is beginning to change. For example, Andrew Koppelman’s fine article is a much more careful, nuanced treatment of this issue than was characteristic of the first wave of commentary on the conflicts question. Additionally, this conference — if it achieves its goal of “present[ing] a thorough and balanced exploration of the issues concerning interjurisdictional recognition and enforcement of marriage” — will also contribute to this more careful rethinking.

My topic is same-sex “marriage” and the public policy doctrine. (For reasons that will become clear, I am going to try to avoid using the phrase “public policy exception.”) For obvious reasons, much of the literature on interjurisdictional recognition issues has focused on the public policy doctrine. There are a variety of complicated issues involved. In large part, this is because the public policy doctrine might arise in a variety of different contexts. For example: (1) there is the situation that has received the most attention in the literature, a situation nicely captured by the title of Professor Barbara J. Cox’s article entitled “If We Marry in Hawaii, Are We Still Married When We Return Home?”; (2) there are a host of other more difficult situations involving “same-sex couples who reside in Hawaii who may need to have their status adjudicated in other states;” and (3) there are other situations involving split domicile issues which are “theoretically complex.”

mentators also have a decided tilt in favor of national recognition of same-sex marriage.” Linda J. Silberman, Can the Island of Hawaii Bind the World? A Comment on Same-Sex Marriage and Federalism Values, 16 QUINNIPIAC L. REV. 191, 192 n.5 (1996).


I will focus here on what everyone seems to acknowledge will be the most common case: two individuals of the same sex who travel from their home to a state (Hawaii) that recognizes same-sex “marriage,” get “married,” and then return to their home state where the question of the validity of their “marriage” arises. The answer to this question ought to be quite easy: the home state is not required to recognize such a union by either normal conflicts doctrine or by the Constitution, and in fact there are very legitimate reasons that the home state might well invoke to refuse to recognize such a union. I think the clarity of this answer has been obscured in the literature and I want to defend this simple answer in this Essay.

In this Essay, I will first discuss an issue unrelated to constitutional issues: the use of the public policy doctrine in the marriage recognition context. My conclusion is that there is ample authority for a home state to refuse to recognize a same-sex union entered into in another state if the home state has a sufficiently strong policy against recognizing such unions as marriages. Second, I will consider two constitutional objections to this conclusion. Some argue that invoking the public policy doctrine in this context constitutes unconstitutional discrimination against a sister state. Others suggest that invoking the public policy doctrine in this context would constitute a violation of


12. In this Essay, I am not going to debate this question directly. See Finnis, 42 Am. J. Juris. (forthcoming 1997). My task here is to consider whether a state that agreed with this position could invoke this policy to refuse to recognize a same-sex “marriage” that was entered into in a state that treats such unions as marriages. Obviously, many states have recently gone on record in stating their opposition to being forced to recognize out-of-state same-sex “marriages.” See generally David Orgon Coolidge & William C. Duncan, Definition or Discrimination?, State Marriage Recognition Statutes in the “Same-Sex Marriage” Debate, 32 Creighton L. Rev. 3 (1998) (discussing each state’s legislation that has been considered and/or passed since the decisions in Baehr v. Miike by the Hawaii courts).

I will not discuss the Loving v. Virginia analogy here, which has become a staple in the public policy literature. See, e.g., Cox, 1994 Wis. L. Rev. at 1112 (discussing the Loving analogy). This argument is a guilt by association argument. Many of the old cases involving the use of public policy to refuse to recognize out-of-state marriages involved states’ efforts to refuse to recognize interracial marriages. The argument goes that the refusal to recognize same-sex unions as marriages is basically the same as the refusal to recognize interracial marriages. According to this line of thought, both refusals are motivated by bigotry and religious intolerance, and the prohibitions against treating same-sex unions as marriages will eventually go the way of anti-miscegenation laws, which the Supreme Court held unconstitutional in Loving v. Virginia, 388 U.S. 1, 4, 8-11 (1967). The force of the Loving analogy is beyond the scope of this Essay. For a good treatment, see Wardle, 1996 BYU L. Rev. at 75-82; Richard F. Duncan, From Loving to Romer: Homosexual Marriage and Moral Discernment, 11 BYU J. Pub. L. 1, 2-7 (1998). I do think it is important to note, however, that we ought to evaluate this analogy directly, and not just assume that the disreputable use of public policy in the miscegenation cases has disabled the whole doctrine.
the Establishment Clause. Finally, for reasons set forth below, I think that both of these constitutional objections ought to be rejected.

I. THE PUBLIC POLICY DOCTRINE

It is, of course, hornbook law that a state may invoke its public policy when faced with the claim that it must adhere to the law of another state. As the Supreme Court stated earlier this year in *Baker v. General Motors Corp.*:

> Our precedent differentiates the credit owed to laws... and to judgments... The Full Faith and Credit Clause does not compel "a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate."... A court may be guided by the forum State's "public policy" in determining the law applicable to a controversy.

Public policy has played a large role in the conflicts doctrine relating to marriage recognition. According to the *Restatement (First) of Conflict of Laws*, "a marriage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with." The First Restatement noted an exception to this general rule if the marriage offended the strong policy of the domicile of either party. On this issue, the Second Restatement states the same basic principle. According to the section on validity of marriage in the *Restatement (Second) of Conflict of Laws*:

> (1) The validity of a marriage will be determined by the local law of the state which, with respect to the particular issue,

13. "Congress shall make no law respecting an establishment of religion..." U.S. Const. amend. I.
16. *RESTATMENT (FIRST) OF CONFLICT OF LAWS* § 121 (1934).
17. *Id.* § 132. Section 132 provides:

> A marriage which is against the law of the state of domicil of either party, though the requirements of the law of the place of celebration have been complied with, will be invalid everywhere in the following cases: (a) polygamous marriage, (b) incestuous marriage between persons so closely related that their marriage is contrary to a strong public policy of the domicil, (c) marriage between persons of different races where such marriages are at the domicil regarded as odious, (d) marriage of a domiciliary which a statute at the domicil makes void even though celebrated in another state.

*Id.* Furthermore, comment b to section 132 states:

> Clauses (a), (b) and (c) state respects in which a marriage may offend a strong policy of the domiciliary state. This statement, however, is not intended to be an exclusive enumeration and if a marriage offends a strong policy of the domicil in any other respect, such marriage will be invalid everywhere.

*Id.* § 132 cmt. b.
has the most significant relationship to the spouses and the marriage under the principles stated in § 6.

(2) A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.18

It is clear, therefore, that public policy plays a large role under both the First and Second Restatements' positions with respect to the validity of marriages. It is not surprising that the literature in this area has focused so extensively and so critically on the old public policy exception. I think that the criticisms that have been asserted against the public policy “exception” do not apply in this context, and that there are good reasons for a state to invoke its public policy in the marriage recognition context.

The public policy exception has been criticized over the years. For example, some adherents of the vested rights approach were hostile to the public policy exception for reasons that are, interestingly, echoed by modern critics of the doctrine (such as Professor Larry Kramer). It is easy to see why an adherent of the vested rights approach would not like the public policy exception, and at least in theory the exception had a very limited scope under the First Restatement. According to the First Restatement's version of the exception, “[n]o action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum.”19 To the vested rights proponent, the exception was unduly parochial and went against the idea of the uniform enforcement of vested rights.20 Under the vested rights thinking, the public policy

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19. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 612 (1934). Comment c stated that “[t]he application of this Section is extremely limited. . . . The desirability of uniform enforcement of rights acquired in other states is especially strong among the States of the United States.” Id. § 612 cmt. c.
20. See John K. Beach, Uniform Interstate Enforcement of Vested Rights, 27 YALE L.J. 656, 656-57 (1918) (discussing comity and the public policy exception). John K. Beach’s article is a critique of, among other things, the ideas of comity and the public policy exception. These concepts were intolerable to Beach because they prevented the inevitable outcome of vested rights thinking — in his view, “the uniform enforcement of vested rights is bound to come, not only as a matter of justice, but as a logical corollary of the national unity of the several states. . . .” Beach, 27 YALE L.J. at 657. According to Beach, the rights that became fixed on the occurrence of some event (e.g., the place of the wrong) were equivalent to judgments, and because states cannot assert their public policy to refuse to enforce a judgment they should not be able to assert their public policy to refuse to enforce a vested private right. Id. at 664-65. As one might expect, Beach’s whole thinking about choice of law is inconsistent with modern approaches to the subject, and is inconsistent with longstanding Supreme Court precedent. See Baker, 118 S. Ct. at 663 (distinguishing laws and judgments). Moreover, Beach is considering the use of the public policy doctrine in a context not presented in the marriage recogni-
exception was invoked in a situation in which "[a] claim based on a transaction with all its important contacts in State A is denied enforcement in State B because of the content of State A's law."\textsuperscript{21} According to the proponents of vested rights thinking, rights had sprung into existence upon the occurrence of some event (e.g., the place of the wrong, the place of contracting) in another state, and it was inappropriate to imagine that "local policy should control a situation entirely foreign to the concerns of the forum."\textsuperscript{22} From the vested rights perspective, "the public policy rule understood in this way may deprive a deserving claimant of compensation without the gain of any sensible objective of the forum."\textsuperscript{23}

The public policy exception was not, in practice, used as sparingly as the First Restatement or some classic formulations seemed to suggest.\textsuperscript{24} In fact, the exception was most frequently used as a precursor of modern interest analysis. As Professors Monrad G. Paulsen and Michael I. Sovern explained in their classic article:

The overwhelming number of cases which have rejected foreign law on public policy grounds are cases with which the forum had some important connection. It is apparent, then, that in most cases the choice of local rather than foreign law cannot be regarded simply as a matter of parochialism. The common invocation of the public policy argument to defeat a foreign claim is a denial that foreign law should govern at all and an assertion of the forum's right to have its law applied to the transaction because of the forum's relationship to it.\textsuperscript{25}

\textsuperscript{22} Paulsen & Sovern, 56 COLUM. L. REV. at 971.
\textsuperscript{23} \textit{Id.}
\textsuperscript{24} In \textit{Loucks v. Standard Oil Co.}, Justice Benjamin N. Cardozo stated that courts should not refuse to enforce a right created in a foreign state unless providing a forum "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal." \textit{Loucks} v. Standard Oil Co., 120 N.E. 198, 202 (N.Y. 1918). \textit{Loucks} involved the question of whether a right of action created by a Massachusetts statute that contained a limitation on damages could be enforced in the courts of New York. \textit{Loucks}, 120 N.E. at 198. Although New York did not limit damages, Justice Cardozo (based on this narrow formulation of the public policy exception) decided that public policy did not prevent the New York courts from entertaining the suit. However, Justice Cardozo's narrow approach in \textit{Loucks} did not survive. See \textit{Kilberg v. Northeast Airlines, Inc.}, 172 N.E.2d 526, 528 (N.Y. 1961) (refusing to apply Massachusetts' limit on damages in wrongful death actions in part on public policy grounds). \textit{But see Cooney v. Osgood Machinery, Inc.}, 612 N.E.2d 277, 284-285 (N.Y. 1993) (citing Justice Cardozo's opinion in \textit{Loucks} favorably with regard to the discussion of public policy).
\textsuperscript{25} Paulsen & Sovern, 56 COLUM. L. REV. at 981.
According to this view, “[t]he principal vice of the public policy concepts is that they provide a substitute for analysis. The concepts stand in the way of careful thought, of discriminating distinctions, and of true policy development in the conflict of laws.”

This objection ought to be eliminated under the modern approaches to choice of law, which at least by design, candidly confront the clash of competing interests. In fact, one would think that the public policy exception would not exist at all under the modern approaches. The exception is, however, still considered in cases that use “modern” forms of choice of law, and I would agree that the “exception” is quite troublesome in these contexts.

The first thing to note with respect to interjurisdictional marriage recognition is that public policy is not being invoked in its classic form to defeat a foreign claim when the forum has no connection to the matter at hand. Nor is the doctrine being invoked as a super-safety valve.
at the tag end of a modern policy-oriented approach. In the marriage recognition context, public policy is being invoked in a narrow, targeted way to justify applying forum law to the issue at hand. In this form, public policy is being used in precisely the way described by Paulsen and Sovern. The home state is invoking its public policy to apply its own law in a situation where the forum has important connections to the parties and the "marriage." The doctrine is not being used to refuse to enforce a foreign cause of action or being used in a wildly discretionary manner to avoid the application of foreign law that clearly ought to apply under the normal choice of law rules.

Public policy is here being used in roughly the way that standard interest analysis is used. All the baggage that is associated with the public policy escape device should be irrelevant when determining the validity of a marriage.

In fact, the use of public policy in regard to marriage validity seems closely analogous to perhaps the most common use of public policy in conflicts today. The most common use of public policy today comes not in situations such as the justly criticized opinion by Justice Neely in Paul v. National Life, but in cases involving the validity of choice of law clauses under the Second Restatement's section 187.

30. This would be objectionable if the forum did not have an interest. Silberman, 16 Quinnipiac L. Rev. at 199 n.39.
31. Professor Koppelman notes:

[I]t is possible to make a sympathetic case for the application of the public policy rule to marriages. Any choice-of-law rule implies certain premises about political legitimacy. The premises that states would rely on here seem fairly unproblematic: each state is entitled to govern those who dwell within its territory, and no state is entitled to rule the world. "Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders." "Because marriage is an enduring relationship at the heart of the family structure in society, it is the state in which the parties live as a family that has the most substantial interest." Since each state regulates marriages within its borders, no state ought to have to defer automatically to marriages of its own domiciliaries in another state, because those are marriages in which the foreign state has no legitimate interest. If a state determines, for instance, that its residents must be eighteen years old in order to marry, one may reasonably think that this policy, if it is worth enforcing at all, ought not to be evaded by the insipid device of driving across the border and spending an hour in another state that allows the marriage of twelve-year-olds. If it is claimed that any particular state's marriage restrictions unduly infringe the liberty of its citizens, then the restrictions ought to be discarded wholesale for that reason, not evaded piecemeal by tricks. If same-sex couples are entitled to marry, that right should not be conditional on the ability to afford airplane tickets to Hawaii, however much this might help tourism there! If there is to be a national right to same-sex marriage, it should be because no state has the power to deny such marriages, regardless of the actions of other states.

Koppelman, 76 Tex. L. Rev. at 940-42 (citations omitted).
This section provides that choice of law clauses are enforceable unless one of two exceptions exists. The second exception states that such clauses will not be enforceable if "application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties." This portion of section 187 does not involve the use of the traditional public policy exception. This "exception" is in reality a narrow, targeted invocation of the law of the state with the dominant interest in the issue involved; precisely the type of thing presented by section 283(2). I should note that section 187 is litigated frequently and that although choice of law clauses are typically enforced, the public policy portion of section 187 is seriously considered in many cases and is invoked to invalidate these clauses with some regularity. Professor Borchers, in a recent survey, noted that section 187 "appears to be a nearly universal principle in the United States." More importantly, Professor Borchers concluded that:

[section 187 works well in practice. The large majority of cases enforce choice-of-law clauses without difficulty. Occasionally cases refuse to enforce clauses on the theory that the designated law violates the public policy of the state with the "materially greater interest," and others for reasons apart from the choice-of-law considerations [such as adhesion contracts].

opinion, decided to retain the traditional approach to choice of law, but then invoked the public policy exception to justify refusing to apply the guest statute of Indiana, the place of the wrong. Paul, 352 S.E.2d at 551, 556. A recent article by Professor Symeon C. Symeonides notes that West Virginia is moving closer to abandoning lex loci delecti. Symeon C. Symeonides, Choice of Law in the American Courts in 1997, 46 A.M. J. COMP. L. (forthcoming 1998) (discussing recent West Virginia cases).

34. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971).


This conclusion seems overstated. See Symeon C. Symeonides, Choice of Law in the American Courts in 1996: Tenth Annual Survey, 45 A.M. J. COMP. L. 447, 488-89 (1997) ("Of the more than one hundred 1996 cases that adequately discuss the choice-of-law clause, only six cases have not upheld the clause, finding that the chosen law was contrary to a strong public policy of the state whose law would have been applicable in the absence of choice."); Symeon C. Symeonides, Choice of Law in the American Courts in 1995: A Year in Review, 44 A.M. J. COMP. L. 181, 221 (1996) ("Suffice it to say that choice-of-law clauses are routinely upheld by the vast majority of cases, often without much discussion; for example, of the more than two hundred 1995 cases on the subject, only
This general pattern is about what one would expect in the marriage recognition context, too. Out-of-state marriages would generally be enforced, but the courts could and should be prepared to invalidate such marriages when a sufficiently strong local interest is at stake. In fact, the public policy doctrine would probably be invoked less frequently because there are, at the moment, fewer differences with respect to the basic institution of marriage than there are on basic contract doctrine. 37 (This may change given the developments in Hawaii with respect to same-sex "marriage" and in Louisiana with respect to covenant marriage.)

By invoking this analogy to the use of public policy in connection with section 187, I do not intend to enter the debate about whether marriage ought to be treated as a matter of status or contract. 38 My point is simply that the public policy doctrine with respect to marriage recognition as reflected in section 283(2) (for example) is quite similar in form to the use of public policy in section 187. One might well expect that, in the area of "contract," courts might be more willing to honor choice of law clauses. Yet, as section 187 and the case law show,
courts sometimes invalidate these clauses when a sufficiently strong local interest is at stake. The fact that section 187 is largely uncontroversial (except primarily from those who argue that the courts are too willing to enforce choice of law clauses, or, put differently, that the public policy doctrine is not invoked often enough to invalidate these clauses) suggests that the form of the public policy doctrine in connection with marriage recognition ought not to be regarded as so controversial either.

I think that the critiques of the use of public policy in the marriage recognition context are misplaced, and that if a state chooses to refuse to recognize such unions there is ample support for this position. In fact, I think the conclusion that a state can invoke its public policy to refuse to recognize a same-sex union entered into in another state, if the home state has a sufficiently strong policy against recognizing such unions as marriages, is nearly inescapable. Moreover, I think most sober commentators recognize the force of this conclusion.

II. CONSTITUTIONAL ISSUES

There are two constitutional arguments against this conclusion that I believe are worth considering here. The first is an argument that maintains that invoking the public policy doctrine in this context constitutes unconstitutional discrimination against a sister state.


40. See, e.g., Koppelman, 76 Tex. L. Rev. at 922 ("There is ample precedent for states refusing to recognize marriages of their own residents who marry elsewhere to avoid their home states' marriage restrictions."); Kramer, 106 Yale L.J. at 1976 ("The simple fact is that the public policy exception is readily available for use in nullifying same-sex marriages performed in Hawaii, and it is probably naïve not to expect states to use it."); Silberman, 16 Quinnipiac L. Rev. at 202 ("Therefore, it seems clear ... that the state that is the domicile of the parties at the time of the marriage and immediately following the marriage is free to apply its own prohibition on same-sex marriage without regard to Hawaii's recognition of the marriage.").

41. In this Essay, I will not consider the impact of the Defense of Marriage Act. See Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738). I agree with Professor Silberman that "a proper understanding of the role of choice of law and 'full faith and credit' reveals that states were never under compulsion to recognize out-of-state same-sex marriages and thus, the federal legislation was unnecessary in this respect." Silberman, 16 Quinnipiac L. Rev. at 193.

42. I will not consider here the modest constitutional restriction on a forum's ability to apply its own law that is discussed in cases such as Allstate Insurance Co. v. Hague, 449 U.S. 302, 309, 312 (1981) and Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985). Most people seem to agree that these modest restrictions do not present any constitutional difficulty in the marriage recognition situation I am considering here, i.e., when a same-sex couple travels to a state that allows such unions and then the couple returns home where the validity of their "marriage" arises. See Borchers, 32 Creighton L. Rev. at 147.
The second maintains that invoking the public policy doctrine in this context violates the Establishment Clause.

A. UNCONSTITUTIONAL DISCRIMINATION AGAINST A SISTER STATE?

The first argument is a constitutional argument that has been most fully developed by Professor Kramer. He has argued that "the public policy exception is readily available for use in nullifying same-sex marriages performed in Hawaii, and it is probably naive not to expect states to use it." He further argues:

the public policy doctrine ought to be deemed unconstitutional — not just in same-sex marriage cases, mind you, but across the board. The argument, in a nutshell, is that the Full Faith and Credit Clause prohibits states from selectively discriminating in choice of law based on judgments about the desirability or obnoxiousness of other states' policies.

I think Professor Kramer's argument ought to be rejected. He contends that the public policy doctrine reflects an unconstitutional bias against the laws of other states. It is true that a variety of constitutional doctrines largely prohibit a state from discriminating against sister states. For example, the dormant commerce clause and the privileges and immunities clause are closely connected to full faith and credit. However, in my view, the discrimination these doctrines prohibit is nothing like the invocation of the public policy doctrine in the interjurisdictional marriage recognition context. These doctrines do presumptively prohibit discrimination against out-of-staters, but it is important to focus on the kind of discrimination they treat as presumptively unconstitutional. As the Supreme Court noted 50 years ago, "[the Privileges and Immunities Clause prevents] discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons

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44. Id. at 1966-67.
45. See Borchers, 32 Creighton L. Rev. at 147 (critiquing the application of the Full Faith and Credit Clause differently than Professor Kramer).
46. The dormant commerce clause is the doctrine that interprets the Commerce Clause as not only a grant of power to Congress, but as an implied limit on state power. Although the doctrine has been questioned, it is well-established in Supreme Court case law. See, e.g., West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 209 (1994) (Scalia, J., concurring) (questioning the application of the dormant commerce clause doctrine). But see Camps Newfound/Owatonna v. Town of Harrison, 117 S. Ct. at 1590, 1595-96 (1997) (recognizing the necessity of the dormant commerce clause doctrine).
47. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1.
for it.” The kind of discrimination that is constitutionally suspect is discrimination against out-of-staters, simply because they are out-of-staters. If “there is some reason, apart from their origin, to treat them differently...” then the strong presumption against discrimination is not implicated.

In the interjurisdictional marriage recognition context, the invocation of the public policy doctrine to refuse to recognize a union from another state is nothing like this form of discrimination. The state is not saying “we refuse to recognize this marriage because it is not ours” (because it is foreign). In fact, the conflicts doctrine in both the First and Second Restatements (when considered as a whole, and not simply considering the few situations where the public policy doctrine is invoked to deny recognition) reflects a strong presumption in favor of recognizing out-of-state marriages. The public policy doctrine, it is true, can be invoked to refuse to recognize a union from another state, but the reason is not the place of origin of the marriage. The public policy doctrine is invoked in a narrow, targeted way to apply forum law in a situation where the forum has a good reason to do so. The “bias” — it is quite clear — is not the reflexive prejudice against out-of-staters just because they are out-of-staters. Rather, the decision is made on substantive grounds for reasons other than simply the geographic origin of the marriage, and this decision seems to reflect an appropriate sensitivity for the interests of both states. The constitutional doctrines on which Professor Kramer attempts to rely do not always require a state to defer to the interests of its sister state; a


50. Dormant commerce clause cases such as Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978), are instructive. In Exxon, the Court upheld a Maryland statute that prohibited producers and refiners of petroleum from operating service stations in Maryland. Exxon, 437 U.S. at 119-21. Importantly, for present purposes, the Court found that the statute was not discriminatory, even though “[t]he record established that ninety-eight percent of the stations burdened by the requirement were operated outside the state and that ninety-nine percent of those not burdened were operated by local inhabitants.” Michael E. Smith, State Discrimination Against Interstate Commerce, 74 CAL. L. REV. 1203, 1218-19 (1986). The key to the finding of nondiscrimination was that “the discrimination was between different groups, retail service station operators and producers-marketers, not between groups that were otherwise similarly situated except for their in-state and out-of-state location.” Robert A. Sedler, The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure, 31 WAYNE L. REV. 885, 905 (1985). See also Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) (reaching a decision similar to Exxon); Sedler, 31 WAYNE L. REV. at 904 (discussing Clover Leaf).
point neatly captured by Professor Silberman's question: "Can the Island of Hawaii Bind the World?"51

Professor Kramer’s understanding of the basic constitutional doctrine is similar to my own. We simply disagree about how the principle applies to the public policy doctrine. According to Professor Kramer’s understanding, the anti-discrimination principle is violated when “the forum la[y]s an uneven hand on causes of action arising within and without the forum state. [According to this view, a particular choice of law rule is unconstitutional when] [c]auses of action arising in sister states . . . [are] discriminated against.”52 Professor Kramer then asserts that under this principle the public policy doctrine is unconstitutional. With all due respect, the principle he identifies (again, a principle with which I agree) does not support his conclusion. A state that refuses to recognize a same-sex union is not laying an uneven hand on local and foreign marriages. Rather, it is refusing to recognize those that violate the home state's particularly strong policies. The home state is not discriminating against sister state marriages. The state’s basic stance is to agree to recognize all marriages wherever performed, unless it has a very strong reason not to do so. The reason is not that the home state does not like foreign marriages, simply because they are foreign; the reason is that recognizing the marriage would do violence to some particularly important local policy. Thus, although the home state is generally willing to defer to the foreign state’s understanding of how to define a marriage, it will not do so when important local interests predominate.

Professor Kramer's basic error is in characterizing the forum's choice of law rules with respect to marriage in a way that unfairly

51. See Silberman, 16 QUINNIPAC L. REV. at 191; Defense of Marriage Act: Hearings on S. 1740 Before the Senate Comm. on the Judiciary (July 11, 1996) (statement of Professor Lynn D. Wardle) (arguing that the Defense of Marriage Act “protects the crucial balance of federalism in our constitutional system”).

52. Kramer, 106 YALE L.J. at 1985-86 (quoting Wells v. Simonds Abrasive Co., 345 U.S. 514, 519 (1953)). In Wells, the Court held that Pennsylvania could apply its one-year statute of limitations to dismiss a suit that would have been timely under the two-year statute of limitations of Alabama, the place of the accident. The Court held that Pennsylvania did not violate the anti-discrimination principle articulated in Hughes v. Fetter because “Pennsylvania applies her one-year limitation to all wrongful death actions wherever they may arise.” Wells v. Simonds Abrasive Co., 345 U.S. 514, 519 (1953).

In Hughes, the Court held that it was unconstitutional for Wisconsin to invoke its policy to refuse to recognize a marriage entered into in another state — that home state is applying its law to measure the substantive rights involved.
makes the home state appear to be discriminatory. Professor Kramer states:

[W]hat is forbidden is a state's refusal to apply another state's law, otherwise applicable under forum choice of law rules, on the ground that it promotes a policy the forum finds repugnant. The measure of repugnance in this sense is fixed by the federal Constitution, and states have no business selectively ignoring or refusing to recognize the constitutional laws of sister states because they do not like them. A case that has contacts with another state such that the forum deems it outside the forum's sphere of interest (as defined by forum choice-of-law rules) does not slip back into that sphere because of the content of the other state's law.\footnote{Kramer, 106 Yale L.J. at 1987.}

Note that Professor Kramer characterizes the forum's choice of law rule with respect to marriage exclusively in terms of the "place of celebration" rule. While that is the presumptive rule, it is not the complete picture. The "forum state's choice-of-law rule" with respect to marriage is that it will recognize foreign marriages unless there is some strong local reason not to do so. In the hypothetical we are confronting, the forum is choosing to apply its own law when it has an important interest in doing so. This is not done as a gratuitous slap to out-of-staters. It is simply refusing to adopt a choice of law rule that says it must always subordinate its interest to the place of marriage. This is a narrow, targeted effort—not the sweeping bias against out-of-state laws simply because of their place of origin that the relevant constitutional principles make presumptively illegitimate.

B. ViOLATION OF THE ESTABLISHMENT CLAUSE?

The second argument is also constitutional and, although it is less familiar, I think it will be an important part of these debates.\footnote{See, e.g., David A. J. Richards, Women, Gays, and the Constitution: The Grounds for Feminism and Gay Rights in Culture and Law 444-46 (1998) (arguing that prohibitions against same-sex marriage inappropriately rely on religious grounds); Linda C. McClain, Toleration, Autonomy, and Governmental Promotion of Good Lives: Beyond "Empty" Toleration to Toleration as Respect, 59 Ohio St. L.J. 119, 120 (1998) (arguing that prohibitions against same-sex marriage inappropriately rely on religious grounds).} I have in mind an Establishment Clause argument that would deny a state the power to refuse to recognize a same-sex union because the refusal to recognize could only be based on religious opposition to such unions. Proponents of this argument contend that states are not constitutionally permitted to rely on religious reasons for action.\footnote{There are two related versions of this argument. One asserts that a state has no secular interest in enforcing a religious doctrine. The key then is the ability to identify when a certain view slides from the moral (laws prohibiting murder, for example) to religious (laws prohibiting prayer in school).} I do not believe
that this argument has been made directly in the precise context I am considering here. There is, however, a recent article that argues that DOMA violates the Establishment Clause because DOMA was based on religious motivations. Thus, I suspect the same argument will eventually be made in the public policy context, too. Moreover, the Establishment Clause argument is hinted at in some discussions of the public policy doctrine. These discussions note the natural law origins of the public policy doctrine, and mention that, under certain formulations of this doctrine, a court's determination of whether a marriage was contrary to natural law focused on whether the marriage was "contrary to the law of nature, as generally recognized by Christian nations. . . ." These discussions then suggest that "[a] simple appeal to morality raises troublesome questions about the role of

the purely religious (in Justice Stevens's view, a law protecting the unborn from conception). See infra notes 66-69 and accompanying text. Once we identify a view as exclusively involving religious doctrine (that is, there are no secular rationales for the legislation), then this version of the argument concludes that it violates the Establishment Clause. Michael J. Perry, Religion in Politics: Constitutional and Moral Perspectives 35 (1997). The second version states that a law that would otherwise be valid is unconstitutional if the law's supporters acted from religious motivations. See Edwards v. Aguillard, 482 U.S. 578 (1987) (discussing the Louisiana legislature's "preeminent religious purpose" in enacting a statute forbidding the teaching of evolution unless creation science was also taught). Sometimes these two arguments work together. See James M. Donovan, DOMA: An Unconstitutional Establishment of Fundamentalist Christianity, 4 Mich. J. Gender & L. 335, 338 (1997) (scrutinizing the allegedly unconstitutional intent behind DOMA). Donovan's argument, however, rests not simply on the motivations of DOMA's supporters, but in part on his belief that DOMA embodies a "religious perspective." Donovan, 4 Mich. J. Gender & L. at 350.

There are, of course, Supreme Court cases that seem to support the second argument. The Court has invalidated statutes that lacked a secular purpose. See Richard S. Myers, The Supreme Court and the Privatization of Religion, 41 Cath. U. L. Rev. 19, 51-58 (1991) (discussing the case law on this point). For reasons that I have explained in detail elsewhere, these cases should not be overread. See Myers, 41 Cath. U. L. Rev. at 51-58 (discussing the narrow reach of the Supreme Court's decisions that have held laws unconstitutional based on the view that the laws lacked a secular purpose). The Court's principal concern is not religious motivations, but rather with the character of the legislation enacted. Myers, 41 Cath. U. L. Rev. at 58. The key question is whether the Court regards the legislation as "religious" in nature, and this is the question raised by the first argument cited in the first paragraph of this footnote. In this Essay, I will focus on this argument, which asks whether opposition to treating same-sex unions as marriages can only be understood in religious terms.

56. See Donovan, 4 Mich. J. Gender & L. at 349-53 (discussing the legislative history of DOMA).


58. Strasser, 28 Rutgers L.J. at 348 (quoting Wilson v. Cook, 100 N.E. 222 (Ill. 1912)).
Judeo-Christian religion in dictating outcomes in a pluralistic society. . . ."\(^{59}\)

In my view, this Establishment Clause argument ought to be rejected as well. The argument is sometimes made in cases that are conventionally viewed in substantive due process terms,\(^{60}\) and although it has received a lot of scholarly support\(^{61}\) and support from certain judges,\(^{62}\) a majority of the Supreme Court has rejected the argument.

This topic is quite complex, but I will give a couple of examples of how the Establishment Clause argument has been used in cases that are typically viewed as presenting substantive due process issues. The clearest judicial example is Justice Stevens' opinion in *Webster v. Reproductive Health Services*.\(^{63}\) Justice Stevens concluded that the preamble to Missouri's abortion statute violated the Establishment Clause. The preamble stated that "the life of each human being begins at conception" and that "unborn children have protectable inter-

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60. See Myers, 41 CATH. U. L. REV. at 60-79 (discussing this Establishment Clause argument in the context of cases that are normally viewed in substantive due process terms); Richard S. Myers, *Reflections on the Teaching of Civic Virtue in the Public Schools*, 74 U. DET. MERCY L. REV. 63, 75-82 (1996) (discussing this Establishment Clause argument in the context of cases that are normally viewed in substantive due process terms).

61. See Perry, *supra* note 55, at 82-96 (arguing, for example, that the state may not proscribe homosexual sexual conduct because the only basis for prohibiting such conduct is a religious argument); Richards, *supra* note 54, at 444-46 (arguing, for example, that the state may not proscribe homosexual sexual conduct because the only basis for prohibiting such conduct is a religious argument); Steven G. Gey, *Is Moral Relativism a Constitutional Command?*, 70 IND. L.J. 331, 386-90 (1995) (drawing on Establishment Clause arguments in arguing for the unconstitutionality of morals legislation). But see Myers, 41 CATH. U. L. REV. at 60-79 (discussing and rejecting this position); Myers, 74 U. DET. MERCY L. REV. at 75-82 (discussing and rejecting this position).

62. In an earlier article, I summarized how this argument has influenced certain judges:

[In the context of substantive due process it is important to determine the appropriate role of religiously influenced moral principles in public decision-making on such issues as abortion and homosexual conduct. Here, the privatization thesis works in two ways. First, religiously influenced moral judgments are not taken into account in support of the constitutionality of legislation because such judgments do not constitute "secular" interests that the government may advance. Second, religiously influenced moral judgments are viewed as dispositive of the case against the constitutionality of legislation because it violates the Establishment Clause for "religious" views to be embodied in secular legislation.]

Myers, 41 CATH. U. L. REV. at 23.

ests in life, health, and well-being."64 The preamble required that all Missouri laws be interpreted to provide unborn children with the same rights enjoyed by other persons, subject to the Constitution and Supreme Court precedent. According to Justice Stevens, "the absence of any secular purpose for the legislative declarations that life begins at conception and that conception occurs at fertilization makes the relevant portion of the preamble invalid under the Establishment Clause..."65 This conclusion was based on Justice Stevens' conviction "that the preamble, an unequivocal endorsement of a religious tenet of some but by no means all Christian faiths, serves no identifiable secular purpose."66

More recently, the en banc opinion written for the Ninth Circuit by Judge Reinhardt in an assisted suicide case was based, in part, on the idea that a law prohibiting assisted suicide is an effort to impose religious convictions.67 However, Judge Reinhardt did not rely explicitly on the Establishment Clause. Interestingly, when the assisted suicide cases were before the United States Supreme Court, one amicus brief made the Establishment Clause argument directly. This brief stated:

In adopting a view of physician-assisted suicide that is sponsored by, e.g., the Roman Catholic Church, but not accepted by, e.g., the Unitarian Universalist Association, the Washington and New York assisted-suicide bans, in essence, endorse one religious viewpoint to the exclusion of all others. Such endorsement of religious views runs contrary to the "purposes" and "reasons" behind the Establishment Clause.68

This type of argument is sometimes made with respect to same-sex "marriage."69 According to this view, opposition to same-sex "mar-

65. Webster, 492 U.S. at 501; id. at 566 (Stevens, J., concurring in part, dissenting in part).
66. Id. at 566-67 (Stevens, J., concurring in part, dissenting in part).
67. Compassion in Dying v. Washington, 79 F.3d 790 (9th Cir. 1996) (en banc), rev'd sub nom. Washington v. Glucksberg, 117 S. Ct. 2258 (1997). In Compassion in Dying, Judge Reinhardt's opinion concluded: "Those who believe strongly that death must come without physician assistance are free to follow that creed, be they doctors or patients. They are not free, however, to force their views, their religious convictions, or their philosophies on all the other members of a democratic society, and to compel those whose values differ with theirs to die painful, protracted, and agonizing deaths." Compassion in Dying, 79 F.3d at 839.
69. See, e.g., Richards, supra note 54, at 444-46 (discussing homosexual marriages); Stephen Macedo, Reply to Critics, 84 Geo. L.J. 329, 335 (1995) ("It is inappropriate to carve up basic rights and principles of justice on the basis of reasons and arguments whose force depends on accepting my particular religious convictions.").
riage" is necessarily based on religious intolerance (or, put another way, that there are no secular arguments against recognizing such unions as marriages), and it violates the Establishment Clause for the state to act on this basis. This argument depends on the idea that legislation must be supported by a certain form of secular rationality. There are a variety of responses to this Establishment Clause challenge. First, and most important for present purposes, there is virtually no support for it in Supreme Court precedent. The Court has essentially rejected the argument that legislation must be justified in terms of secular rationality. “The Court continually reaffirms the idea that a moral position should not be regarded as religious simply because it happens to coincide with the tenets of some religious organizations.”

The Court has, without confronting the argument directly, consistently refused to restrict the types of moral arguments that are considered a legitimate part of public debate. In fact, the Court has not insisted that laws be supported by a certain form of secular reasoning. The Court has not insisted that laws be “rational,” at least not if “rationality” is defined in narrow, partisan terms. The Court has adopted a wide understanding that permits the inclusion of a range of

70. See Richards, supra note 54, at 444-46; Perry, supra note 55, at 82-96. Professor Perry focuses mainly on the morality of homosexual sexual conduct, but states that that issue “is at the center of the debate about whether the law should recognize homosexual marriage.” Perry, supra note 55, at 83. Professor Perry also suggests that a denial of recognition to homosexual marriage violates the Fourteenth Amendment. Id. at 37.

71. Professor Gey is perhaps the most prolific proponent of the view that the Constitution specifically embodies a liberal, secular account of rationality. According to Gey, “[t]he Establishment Clause should be viewed as a reflection of the secular, relativist political values of the Enlightenment, which are incompatible with the fundamental nature of religious faith. As an embodiment of these Enlightenment values, the Establishment Clause requires that the political influence of religion be substantially diminished.” Steven G. Gey, Why is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment, 52 U. Pitt. L. Rev. 75, 79 (1990). See Steven G. Gey, Is Moral Relativism a Constitutional Command?, 70 Ind. L.J. 331 (1995) (defending the idea that moral relativism is commanded by the Constitution).

72. Myers, 74 U. Det. Mercy L. Rev. at 81. See also Douglas Laycock, Freedom of Speech That is Both Religious and Political, 29 U.C. Davis L. Rev. 793, 797 (1996) (“The Court has never accepted in any context the view that religious arguments are excluded from or restricted in political debate.”).

73. “The claim that there are rational principles, independent of a metaphysic or a theology, capable of resolving conflicts between groups with competing interests has shown itself to be empty. There are in fact competing and contradictory understandings of rationality and justice, resting on fiduciary formulations which are now rarely examined and whose importance and indeed existence is frequently denied.” Duncan B. Forrester, Beliefs, Values and Policies: Conviction Politics in a Secular Age 5 (1989).
comprehensive moral views, even if some might regard one or more of these comprehensive moral views as religious in some sense.

The real divide is whether the Constitution requires moral relativism (i.e., whether it is proper for the government to enforce moral norms external to the individual), as some commentators argue. This view is not strengthened, however, by labeling the opposing view "religious." The "religious" label is usually invoked for the purpose of discounting a view without having to confront it on its merits.

There is some support in Supreme Court opinions for the view that moral relativism is a constitutional command. The principal support for this position is the joint opinion in Planned Parenthood of Southeastern Pennsylvania v. Casey, in which Justices Kennedy, O'Connor, and Souter stated that "at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." As I suggested in an earlier article, it was not at all clear that these three justices were completely committed to the philosophical liberalism that this statement reflects. The Court's opinion in Washington v. Glucksberg seems to be a decisive refutation of the broad implications of this language in Casey. The Court's opinion in Glucksberg establishes that it is permissible for the state to act on the basis of moral judgments, even

74. See Gey, 70 IND. L.J. at 311.
75. Professor Laycock's analysis, which concludes that the Establishment Clause does not add anything to these debates, is instructive:

If there is a right to abortion or to homosexual marriage or to any particular resolution of some of the other important controversies that seem to motivate much of this debate, such rights are not to be found in the First Amendment or the Establishment Clause, but in rights to autonomy in intensely personal matters. The most plausible source of such rights is the Ninth Amendment, which actually talks about unenumerated rights; the Court has relied on a textually less plausible explanation in the Due Process Clause. These claims of unenumerated personal autonomy rights are deeply controversial, but such rights either exist or they do not. The Establishment Clause is not their source; it does not enumerate these rights.

Laycock, 29 U.C. DAVIS L. REV. at 806-07.
76. See Stephen L. Carter, The Culture of Disbelief 257 (1993) ("Nothing is accomplished by calling one's opponents sectarian zealots.").
77. See Gey, 70 IND. L.J. at 331.
80. Myers, 72 U. DET. MERCY L. REV. at 777-78.
though some might regard that position as having been religiously influenced in some sense.

The Court seems to have definitively rejected the propriety of the Establishment Clause challenge to morals legislation. The Court has accepted a wider understanding of the permissible grounds for state action than the views of some commentators would allow. The Court’s view has the virtue of being more in accord with our country’s history and the experience of most people in contemporary America, neither of which require the rigid separation between “religion” and the public realm that is characteristic of this whole Establishment Clause argument.

Laws denying recognition to same-sex unions should, therefore, be safe from Establishment Clause challenge. The argument against recognizing same-sex “marriages” goes well beyond a simple citation to Biblical sources. There are well-developed moral theories that reject treating such unions as marriages that are more than sufficient to remove any Establishment Clause arguments.

CONCLUSION

My conclusion is straightforward: the home state is not required to recognize the union of a same-sex couple that “marries” in a state that approves such unions. The home state is permitted to invoke its own public policy to refuse to recognize such unions. In addition, the constitutional objections to this conclusion do not withstand scrutiny. Normal conflicts doctrine permits a state to refuse to recognize such

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83. In Washington v. Glucksberg, the Court was quite respectful of the long tradition of laws prohibiting assisted suicide, a tradition that had religious antecedents. See Washington, 117 S. Ct. at 2262-67 (surveying the nation’s history).


A sound principle of public reason for a deliberative democracy would indeed require citizens and policymakers to justify their political advocacy and action by appeal to principles of justice and other moral principles accessible to their fellow citizens by virtue of their “common human reason.” It would, however, exclude no reasonable view in advance of its dialectical consideration “on the merits” in public debate. Nor would it exclude religious views as such. What it would exclude, rather, as grounds of public policymaking generally, are appeals to sheer authority (religious or otherwise) or to “secret knowledge,” or the putative truths revealed only to an elite (or the elect) and not available, in principle, to rational persons as such. A sound principle of public reason would, in short, be very wide. Its goal would be the ‘perfectionist’ one of settling law and public policy in accordance with what is true as a matter of justice, human rights, and political morality generally.

85. See supra note 5 and accompanying text. See also David Orgon Coolidge, Same-Sex Marriage?: Baehr v. Miike and the Meaning of Marriage, 38 S. TEX. L. REV. 1 (1997) (rejecting the treatment of same-sex unions as a “marriage”).
unions — if it wants to take this position — and the Constitution does not preclude a state from so choosing.