


1-1-1998

State Common-Law Choice-Of-Law Doctrine and Same-Sex "Marriage": How Will States Enforce the Public Policy Exception?

L. Lynn Hogue

Georgia State University College of Law, lhogue@gsu.edu

Follow this and additional works at: https://readingroom.law.gsu.edu/faculty_pub

 Part of the [Civil Rights and Discrimination Commons](#), [Human Rights Law Commons](#), [Law and Society Commons](#), and the [Sexuality and the Law Commons](#)

Recommended Citation

L. Lynn Hogue, Symposium, State Common-Law Choice-Of-Law Doctrine and Same-Sex "Marriage": How Will States Enforce the Public Policy Exception?, 32 Creighton L. Rev. 29 (1998).

This Article is brought to you for free and open access by the Faculty Publications at Reading Room. It has been accepted for inclusion in Faculty Publications By Year by an authorized administrator of Reading Room. For more information, please contact mbutler@gsu.edu.

STATE COMMON-LAW CHOICE-OF-LAW DOCTRINE AND SAME-SEX "MARRIAGE": HOW WILL STATES ENFORCE THE PUBLIC POLICY EXCEPTION?

PROFESSOR L. LYNN HOGUE†

*[H]omosexual marriage is an oxymoron.*¹

INTRODUCTION

Public policy is an important determinant of choice of law,² customarily applied as an exception to a general rule that foreign law applies to a dispute because of a forum choice-of-law rule that directs a foreign rule's application.³ The practice of excusing compliance with otherwise-applicable foreign law has particular pertinence in the case of marriage laws which are themselves rich in public policy concerns for the institution itself,⁴ for the rearing of children, if any, born of the union,⁵ and for the regulation of family property, including its application to the support of family members⁶ and its transmission at death.⁷

† Professor of Law, Georgia State University College of Law, A.B., William Jewell College, 1966; M.A., University of Tennessee, 1968; Ph.D., 1972; J.D., Duke University, 1974. The author is a member of the Bars of Arkansas, Georgia, and North Carolina and serves as General Counsel of the Southeastern Legal Foundation, a conservative, public interest law firm in Atlanta, Georgia. Grateful acknowledgment is made for the help of my research assistant Ms. Louann Yeattes, a third-year law student at Georgia State University who assisted with the documentation of this article, and for the support of Dean Janice C. Griffith for the faculty research grant which facilitated its completion.

1. Richard F. Duncan, *Homosexual Marriage and the Myth of Tolerance: Is Cardinal O'Connor A "Homophobe"?*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 587, 589 (1996).

2. See *Loucks v. Standard Oil Co. of N.Y.*, 120 N.E. 198 (N.Y. 1918); Paulsen & Sovern, "Public Policy" in *Conflict of Laws*, 56 COLUM. L. REV. 969 (1956).

3. See generally *Alexander v. General Motors*, 478 S.E.2d 123 (Ga. 1996) (applying Virginia law on products liability selected by the generally applicable choice-of-law rule of *lex loci delicti* and holding that it violated Georgia's public policy of allowing recovery against manufacturers of defective products); *Intercontinental Hotel Corp. v. Golden*, 203 N.E.2d 210 (N.Y. 1964) (holding that a New York public policy against gambling did not preclude enforcement of a gambling debt incurred in Puerto Rico).

4. Robert F. Drinan, *What are the Rights of the Involuntary Divorcee? Reflections on Divisible Divorce*, 53 KY. L.J. 209 (1965).

5. See, e.g., Katherine Shaw Spaht, *For the Sake of the Children: Recapturing the Meaning of Marriage*, 73 NOTRE DAME L. REV. 1547 (1998) (analyzing the roles of law, family, marriage, and community).

6. See, e.g., Stephanie Bienvenu Laborde, *Louisiana Divorce Reform: For Better or For Worse?*, 50 LA. L. REV. 995, 997 (1990) (noting that there are "important public

Recently, in *Baker v. General Motors Corp.*,⁸ the United States Supreme Court affirmed the constitutionality as well as the continuing vitality of the public policy doctrine in choice of law. Although states are bound by the Full Faith and Credit Clause⁹ to enforce judgments, they are free through their forum choice-of-law rules to decide whether or not to apply foreign law to a dispute properly before the court.¹⁰

This article will first consider the common-law principles of marriage recognition and the important role played by the public policy exception which allows states to refuse recognition to foreign marriages which violate the public policy forum. Next, attention is paid to the difficulties in administering the public policy exception and the particular problems experienced with foreign marriage recognition. The constitutional underpinnings of the public policy exception is the next topic. The analysis concludes with a consideration of two paradigm cases widely read by conflicts students — *In re May's Estate*¹¹ and *In re Dalip Singh Bir's Estate*¹² — which illustrate that the public policy exception will not be invoked to avoid enforcing foreign marriages unless they directly implicate conduct by the parties which violates the deeply held moral values of the forum. Homosexual unions will likely be held violative of a state's public policy if an end of the litigation is to establish the licitness of venereal acts between homosexuals in a "same-sex union," as distinguished from incidental issues between the parties, so long as the state does not deprive its courts of jurisdiction over such matters altogether.

policies supporting the requirement of proof of fault for a party to obtain a divorce in less than one year").

7. See, e.g., Mary F. Radford & F. Skip Sugarman, *Georgia's New Probate Code*, 13 GA. ST. U. L. REV. 605, 661 (1997) (analyzing public policy as it relates to probate matters).

8. 118 S. Ct. 657 (1998).

9. The Full Faith and Credit Clause states:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. CONST. art IV, § 1.

10. See *Baker v. General Motors Corp.*, 118 S. Ct. 657, 663-64 (1998) ("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' [citing *inter alia* *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493 (1939)]). Regarding judgments, however, the full faith and credit obligation is more exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land.").

11. 114 N.E.2d 4 (N.Y. 1953).

12. 188 P.2d 499 (Cal. Ct. App. 1948).

COMMON-LAW PRINCIPLES OF MARRIAGE RECOGNITION

Recognition of foreign marriages is largely governed by the principle that if valid where performed or celebrated, they are valid everywhere unless violative of the public policy of the forum.¹³ This rule has a long history collected in both the First¹⁴ and Second Restatements¹⁵ of Conflict of Laws and drawn, of course, from the general

13. See, e.g., *Hesington v. Estate of Hesington*, 640 S.W.2d 824, 826 (1982) (declaring that Missouri would not recognize a common-law marriage purported to be contracted in Oklahoma, where such marriages were valid, in a case of two Missouri residents who temporarily left Missouri, consummated their marriage in Oklahoma, and returned immediately to Missouri, where common-law marriages violated the forum's expressed public policy). Some states provide for this result by statute. See CAL. CIV. CODE ANN., § 63 (West 1998); IDAHO CODE ANN. § 32-209 (1997); KAN. STAT. ANN. § 23-115 (1997); KY. REV. STAT. ANN. § 402.040 (Michie 1984); NEB. REV. STAT. § 42-117 (Revised 1995); N.M. STAT. ANN. § 40-1-4 (Michie 1994); S.D. CODIFIED LAWS § 25-1-38 (Michie 1992); UTAH CODE ANN. § 30-1-4 (1995).

14. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 134 (1934).

15. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1969). According to the Restatement:

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.

Id. Comments *j* and *k* clarify the operant policy considerations:

[A] marriage which meets the requirements of the state where the marriage was contracted will everywhere be recognized as valid except when to do so would violate the strong policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage. To date, a marriage has been held invalid in such circumstances only when it violated a strong policy of a state where at least one of the spouses was domiciled at the time of the marriage and where both made their home immediately thereafter.

Id. § 283 cmt. *j*, *k*. Determination of the potency of a forum policy sufficient to vitiate a foreign marriage is based primarily on "explicit statute or judicial precedent." Absent such authority, the commentators speculate that "the only rules that the forum would be likely to find embody a sufficiently strong policy of [the forum] to warrant invalidation of an out-of-state marriage are rules which prohibit polygamous marriages, certain incestuous marriages [e.g., "where the persons involved were in so close a relationship as brother and sister and perhaps uncle and niece"], or the marriage of minors below a certain age." *Id.* § 283 cmt. *k*. As a practical matter, express statutes in several states would add homosexual marriages to this list (see, e.g., ALASKA STAT. § 25.05.013 (Michie 1997); IDAHO CODE § 32-209 (1997); ME. REV. STAT. ANN. tit. 19-A, § 701 (West 1997)), although it is likely that in states lacking such statutory prohibitions, judges would find enough in the common law to justify a public policy against recognizing homosexual unions as a "marriage." E.g., *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) ("[T]o claim that a right to engage in [consensual sodomy] is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious.").

practice of states.¹⁶ The public policy exception, like conflicts rules generally, is a product of the common law.¹⁷

The public policy exception has not been without its critics. Professors Paulsen and Sovern offer this apt and blunt critique of the limitations of the public policy exception:

The most troublesome use of public policy comes when it is employed as a cloak for the selection of local law to govern a transaction having important local contacts. Resort to the concept is beguilingly easy and does not demand the hard thinking which the careful formulation of narrower, more realistic, choice of law rules would require. Most of the critics have argued for a narrowing of the area in which opinions resort to public policy. They contend that foreign transactions will otherwise be judged according to "local fancies" and subjected to judicial parochialism We urge that courts make the proper distinctions. We urge that courts take a second look and ask, "In what sense are we applying the public policy doctrine?" If judges honestly put the question whether the foreign law is barbarous in its provisions or frightfully unjust in the particular case, few cases will provide an affirmative answer. If a judge sees that, in a given case, public policy doctrine substitutes for choice of law, he should address himself directly to questions concerning choice of law policy.

* * *

The 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.¹⁸

Sadly, such criticism, valid when it was published in the mid-1950s, remains true today. State courts have persisted in offering little in the way of a satisfactory doctrinal foundation for the public-policy exception.¹⁹ Scholars have shown limited interest in the

16. See, e.g., *In re Takahashi's Estate*, 129 P.2d 217, 220 (Mont. 1942) (stating that a miscegenation marriage between Japanese and Caucasian residents prohibited by the Montana forum statute should not be recognized even when solemnized in Washington where such marriages were legal); *In re Vetas' Estate*, 170 P.2d 183, 185 (Utah 1946) (voiding a common-law marriage contracted out-of-state by Utah residents).

17. An exception is Louisiana, which has codified its conflicts law. See LA. CIV. CODE ANN. art. 3515 (West 1998).

18. Paulsen & Sovern, 56 COLUM. L. REV. at 1016.

19. E.g., *Paul v. National Life*, 352 S.E.2d 550 (W. Va. 1986). In *Paul*, after rejecting various modern approaches to choice of law in favor of the traditional resort to place of injury in tort cases, the court concluded:

[W]e remain convinced that the traditional rule, for all of its faults, remains superior to any of its modern competitors. Moreover, if we are going to manipulate conflicts doctrine in order to achieve substantive results, we might as well

exception, and, as noted above,²⁰ it is generally taught in law schools as an example of an escape device to evade application of an unsavory result compelled by a robust application of a straightforward rule.²¹ Notwithstanding this lack of scholarly attention, state court judges assure that the exception continues to be an important part of the law of conflicts. Indeed, it may never assume the sort of principled contours that would make it acceptable to modern critics. Yet the exception is an important aspect of federalism, as noted below,²² because states find it an essential tool to protect their courts from odious foreign rules.

PROBLEMS WITH ADMINISTERING THE PUBLIC POLICY EXCEPTION

Alexander v. General Motors Corp., Inc.,²³ a products liability case decided by the Georgia Supreme Court in 1996, nicely illustrates the problems in applying the public policy exception, particularly the difficulties that arise from a paucity of precedent. In *Alexander*, the court held that Georgia's rule of *lex loci delicti* did not apply to an injury occurring in Virginia, because Virginia products liability law, which did not provide for strict liability, was contrary to public policy of Georgia. Instead, the court held that Georgia's statute imposing strict liability on manufacturers²⁴ would apply.²⁵ In crafting a successful brief and oral argument in that case, I found that the only recent case applying the exception²⁶ was a worker's compensation decision from

manipulate something we understand . . . [and thus] reaffirm our adherence to the doctrine of *lex loci delicti*.

* * *

[However, t]oday we declare that automobile guest passenger statutes violate the strong public policy of this state in favor of compensating persons injured by the negligence of others.

Paul, 352 S.E.2d at 556. For a discussion of the role of federal courts in shaping conflicts law in diversity cases and the resultant problems, see L. Lynn Hogue, *Law in a Parallel Universe: Erie's Betrayal, Diversity Jurisdiction, Georgia Conflict of Laws Questions in Contracts Cases in the Eleventh Circuit, and Certification Reform*, 11 GA. ST. U. L. REV. 531 (1995).

20. See *supra* note 3 and accompanying text.

21. E.g., CRAMTON ET AL., *CONFLICT OF LAWS* 69-79 (5th ed. 1993).

22. See *infra* note 37 and accompanying text.

23. 478 S.E.2d 123 (Ga. 1996).

24. *Alexander v. General Motors Corp., Inc.*, 478 S.E.2d 123, 124 (Ga. 1996).

25. *Alexander*, 478 S.E.2d at 124.

26. See, e.g., *Southern Ry. Co. v. Robertson*, 66 S.E. 535 (Ga. Ct. App. 1909) ("It is well recognized that where the tort is committed in one state, and suit is brought on account of it in the courts of another state, the plaintiff's right of action and the substantive law applied to the transaction will be controlled exclusively by the *lex loci delicti*, so far as the same is not repugnant to the public policy of the state where the suit is brought, or is not forbidden recognition by the courts of that state by reason of some

the Georgia Court of Appeals, *Karimi v. Crowley*,²⁷ which was only tenuously tangent with the facts of *Alexander*. In resolving the case, the court in *Alexander* effectively shirked its common-law responsibility and added nothing in the way of doctrinal clarification to the area.

Georgia law remains as impoverished as I found it when I took up my client's cause: public policy exists, but the considerations which govern its application remain vague.²⁸ It is difficult to overstate the tragedy of such missed opportunities, because instances of the public policy doctrine's application arise so seldom that opportunities for clarification in the law should not be lost. I mention this to suggest the pervasive and persisting problems with respect to the public policy exception in state law. Nonetheless, the public policy exception remains a valuable and enduring part of the law of conflicts and one which has particular relevance to the matter of inter-jurisdictional marriage recognition.

PROBLEMS WITH FOREIGN MARRIAGES

Common-law applications of the public policy exception have not invariably led to the nonrecognition of apparently repugnant or odious foreign marriages (marriages substantially dissimilar to those practiced in the forum state such as plural or incestuous marriages).²⁹ In fact, the usual result in cases where recognition of a foreign marriage is sought is recognition of the marriage, not invalidation. This compassionate — or more precise, nuanced — application of the public policy exception has given proponents of legitimizing so-called same-sex marriages³⁰ apparent cause for hope that such homosexual unions

other principle of private international law."). Other, older cases are similarly unilluminating.

27. *Karimi v. Crowley*, 324 S.E.2d 583 (Ga. Ct. App. 1984) (declaring that Georgia's public policy of affording an exclusive remedy in workers' compensation cases trumped *lex loci delicti* with respect to the claim of a worker injured in Alabama under whose law recovery against the general contractor would be allowed). See also L. LYNN HOGUE, CONFLICT OF LAWS IN GEORGIA § 4-1, § 9-2 (1995) (discussing *Karimi*).

28. See, e.g., *Tuggle v. Helms*, 499 S.E.2d 365, 369-70 (Ga. Ct. App. 1998) (McMurray, J., dissenting) (illustrating the vague application of public policy).

29. See, e.g., *In re Dalip Singh Bir's Estate*, 188 P.2d 499 (Cal. Ct. App. 1948) (analyzing a plural marriage and declaring that "under the laws of California and the public policy thereof, only the first wife of decedent can be recognized as his legal widow"); *In re May's Estate*, 114 N.E.2d 4 (N.Y. 1953) (analyzing a marriage between an uncle and his niece). See also Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921 (1998) (discussing public policy as it relates to polygamous and incestuous marriages).

30. I am not persuaded by the argument that same-sex relationships are in any sense a "marriage" irrespective of the efforts of Hawaiian judges to make them so. See *Baehr v. Miike*, Civ. No 31-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996) (holding a state statute prohibiting same-sex couples from marrying unconstitutional), *aff'd*, 950 P.2d 1234 (Haw. 1997) (unpublished table decision).

will or should enjoy similar treatment at the common law. This analysis will show that anticipation to be illusory. What remains clear is that the longstanding practice of states in refusing recognition to unions it finds unacceptable is both salutary and constitutional.³¹ It protects the interests of the forum in maintaining the integrity of a fundamental element of civil society — the traditional marriage between a man and a woman³² — and upholds a major tenant of federalism by preserving the field of domestic relations both appropriately and historically for states.³³

Same-sex “marriage” recognition, however, presents problems which are different in kind from those presented in other choice-of-law applications of the public policy exception. Outside of the context of domestic relations, for example, the degree of dissimilarity and a consequent odium attached to foreign law is simply not present. Common-law applications of the public policy exception generally involve

31. Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997) (arguing that the public policy exception is unconstitutional because it discriminates against out-of-state marriages). Where such discrimination is well grounded, as in a refusal to enforce morally repugnant law (as opposed to judgments), it is constitutional. *Baker*, 118 S. Ct. at 657; Richard S. Myers, *Same-Sex “Marriage” and the Public Policy Doctrine*, 32 CREIGHTON L. REV. 45 (1998).

32. The Catholic Catechism is illustrative:

Sexuality is ordered to the conjugal love of man and woman. In marriage the physical intimacy of the spouses becomes a sign and pledge of spiritual communion. Marriage bonds between baptized persons are sanctified by the sacrament.

Sexuality, by means of which man and woman give themselves to one another through the acts which are proper and exclusive to spouses, is not something simply biological, but concerns the innermost being of the human persons as such. It is realized in a truly human way only if it is an integral part of the love by which a man and woman commit themselves totally to one another until death.

CATECHISM OF THE CATHOLIC CHURCH 2360-61 (1994). Similarly:

The matrimonial covenant, by which a man and a woman establish between themselves a partnership of the whole of life, is by its nature ordered toward the good of the spouses and the procreation and education of offspring; this covenant between baptized persons has been raised by Christ the Lord to the dignity of a sacrament.

CODE OF CANON LAW Can. 1055, § 1 (Lat.-Eng. ed. 1983). Although it is clear from context that under canon law only a marriage between a man and a woman is licit, in view of the effort, for example in Hawaii, to legalize “same-sex” unions some qualification of the language of Canon 1058 (“All persons who are not prohibited by law can contract marriage.”) may be warranted. See also ALASKA STAT. § 25.05.011 (Michie 1997); ARK. CODE ANN. § 9-11-109 (Michie 1997); FLA. STAT. ch. 741.212 (1997); GA. CODE ANN. § 19.3-3.1 (Supp. 1998); LA. CIV. CODE ANN. art. 86 (West 1998); 23 PA. CONS. STAT. § 1102 (1997).

33. See *Barber v. Barber*, 62 U.S. (21 How.) 582 (1858). See generally Michael Ashley Stein, *The Domestic Relations Exception to Federal Jurisdiction: Rethinking an Unsettled Federal Court Doctrine*, 36 B.C. L. REV. 669 (1995) (describing “the history of the domestic relations exception to federal jurisdiction from its origin in *Barber v. Barber*”).

merely enough dissimilarity in the respective laws to produce different outcomes with no moral opprobrium attached.

Proponancy of recognition of same-sex unions has raised the stakes and precipitated conflicts doctrine into the culture wars³⁴ and, as Lynn Wardle has demonstrated, radically tilted the deliberative playing field of scholarship.³⁵ My hope is to clarify why the nuanced and compassionate common-law applications of the public policy exception which worked well in other types of marriage recognition cases have no application to same-sex unions. Although some may dismiss such a line of analysis under the epithet of so-called "homophobia," I persist in believing that a well-grounded distaste for particular conduct that is viewed as morally objectionable by a majority within a democratic society — and hence proscribable under the police power³⁶ in the same way that other socially undesired conduct such as drug use or prostitution is banable³⁷ — is not a product of unreasoned fear, as the term suggests, but rather of proper moral reservation. As Judge Robert Bork has wisely observed: "Moral objection to homosexual practices is not the same thing as animus, unless all disapprovals based on morality are to be disallowed as mere animus. Modern liberalism tends to classify all moral distinctions it does not accept as hateful and invalid."³⁸

A number of states have adopted statutes regulating the recognition of same-sex unions.³⁹ Those statutes will control in states which have them. In instances in which a state lacks a statute, the common

34. See, e.g., Jennifer Gerarda Brown, *Extraterritorial Recognition of Same-Sex Marriage: When Theory Confronts Praxis*, 16 QUINNIPIAC L. REV. 1 (1996); Larry Kramer, *The Public Policy Exception and the Problem of Extra-Territorial Recognition of Same-Sex Marriages*, 16 QUINNIPIAC L. REV. 153 (1996); Rebecca S. Paige, Comment, *Wagging the Dog — If the State of Hawaii Accepts Same-Sex Marriage Will Other States Have To?: An Examination of Conflict of Laws and Escape Devices*, 47 AM. U. L. REV. 165 (1997) (analyzing *Baehr v. Miike*, the Full Faith and Credit Clause, and conflict of laws rules).

35. Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 18 (1996).

36. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (stating that "States' traditional police power is defined as the authority to provide for the public health, safety, and morals, and such a basis for legislation has been upheld") (citing *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973)).

37. See *Brache v. County of Westchester*, 507 F. Supp. 566, 572 (S.D.N.Y. 1981) (declaring that it is within the county government's police power to curtail illicit drug use) (citing *Robinson v. California*, 370 U.S. 660 (1962) (criminalizing the addiction to narcotics)).

38. ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 113 (1996).

39. See ALASKA STAT. § 25.05.013 (Michie 1997); ARK. CODE ANN. § 9-11-109 (Michie 1997); IDAHO CODE § 32-209 (1997); IND. CODE ANN. § 31-11-1-1 (Michie 1998); ME. REV. STAT. ANN. tit. 19-A, § 701 (West 1997); S.C. CODE ANN. § 20-1-15 (1997).

law (through the public-policy exception) will continue to supply the appropriate rule.

CONSTITUTIONAL UNDERPINNINGS OF THE PUBLIC POLICY EXCEPTION

The public policy exception, which protects states against the application of foreign laws that are repugnant to the principles upon which the forum state is grounded, is rooted in principles of federalism⁴⁰ and the protection of sovereignty which inheres in the Tenth Amendment.⁴¹ The rationale for federalism's willingness to allocate the power to decide issues of domestic relations to more than one state is well described in *Williams v. North Carolina*,⁴² in which the Court concluded:

No State can assume comprehensive attention to the various and potentially conflicting interests that several States may have in the institutional aspects of marriage [because] to do so would impair "the proper functioning of our federal system." The necessary accommodation between the right of one State to safeguard its interest in the family relation of its own people and the power of another State to [do the same — e.g., in *Williams II* to "grant divorces"] can be left to neither State.⁴³

Public policy is so integral a part of the decision of a state as to who can be married, to whom and under what circumstances, that no state can dictate the terms of that relationship for another. Only overarching national goals, such as constitutionally compelled color-blindness in the treatment of individuals by the government,⁴⁴ can override a state's ordering of these relationships.⁴⁵

40. See, e.g., *Wilcox v. Niagara of Wis. Paper Corp.*, 965 F.2d 355, 365 (7th Cir. 1992) ("Under the principles of federalism dictated by *Erie v. Tompkins*, our job is at an end when we conclude (as we have) that the plain teaching of Wisconsin law commands recognition of the public policy exception. . . .").

41. The Tenth Amendment to the Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. CONST. amend. X.

42. *Williams v. North Carolina*, 325 U.S. 226, 232 (1945) (*Williams II*).

43. *Williams II*, 325 U.S. at 232.

44. *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that marriage restrictions based solely on race violate the Equal Protection Clause of the Fourteenth Amendment of the Constitution).

45. *Sosna v. Iowa*, 419 U.S. 393 (1975) (holding a one-year durational residence requirement for divorce constitutional). In *Sosna*, the Court concluded that the requirement . . . furthers the State's parallel interests in both avoiding officious intermeddling in matters in which another State has a paramount interest, and in minimizing the susceptibility of its own divorce decrees to collateral attack. A State such as Iowa may quite reasonably decide that it does not wish to become a divorce mill. . . .

Sosna, 419 U.S. at 407.

States are free to apply their own law (in cases over which they have jurisdiction) and, thus, are free to disregard the laws of sister states which compete for application.⁴⁶ This rule may be overcome when Congress sets a different norm by requiring full faith and credit to a sister state's law.⁴⁷ When Congress has not acted, however, the authority of states to apply their own law according to their own choice-of-law rules remains robust.⁴⁸

Judges and commentators have suggested a variety of constitutional limitations on a state's freedom to apply its own law to a case properly before it (or, if you will, to disregard foreign law because it violates the public policy of the forum). Most important among these is the Fourteenth Amendment's due process requirement that the forum bear a constitutionally sufficient nexus with the subject matter of the litigation.⁴⁹ Once this hurdle is cleared, states remain free to choose law.

46. *Baker*, 118 S. Ct. at 664 ("A court may be guided by the forum State's 'public policy' in determining the law applicable to a controversy.").

47. 28 U.S.C. § 1738(a) (Supp. 1998) (The Parental Kidnapping Prevention Act). According to the Supreme Court:

The Parental Kidnapping Prevention Act (PKPA or Act) imposes a duty on the States to enforce a child custody determination entered by a court of a sister State if the determination is consistent with the provisions of the Act. In order for a state court's custody decree to be consistent with the provisions of the Act, the State must have jurisdiction under its own local law and one of five conditions set out in § 1738A(c)(2) must be met. Briefly put, these conditions authorize the state court to enter a custody decree if the child's home is or recently has been in the State, if the child has no home State and it would be in the child's best interest for the State to assume jurisdiction, or if the child is present in the State and has been abandoned or abused. Once a State exercises jurisdiction consistently with the provisions of the Act, no other State may exercise concurrent jurisdiction over the custody dispute, § 1738A(g), even if it would have been empowered to take jurisdiction in the first instance, and all States must accord full faith and credit to the first State's ensuing custody decree.

Thompson v. Thompson, 484 U.S. 174, 176-77 (1988). For an analysis of the road not taken by the Supreme Court in *Thompson* with respect to whether the PKPA should furnish an implied cause of action in federal court to determine which of two conflicting state custody decisions is valid, see L. Lynn Hogue, *Enforcing the Full Faith and Credit Clause: Congress Legislates Finality for Child Custody Decrees*, 1 GA. ST. U. L. REV. 157 (1985).

48. *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) (declaring that neither national unity nor foreign state sovereignty — interests represented by the Full Faith and Credit and Due Process Clauses — are threatened by the forum state's application of the "better rule" conflicts principle).

49. See *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) (holding that the application of forum law to a case with no forum contacts violated due process); *Baker*, 118 S. Ct. at 663-64 ("A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land."). See also *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988) (holding that due process does not bar the former state from applying its statute of limitations to substantive claims governed by the law of the different state). The opinion in the *Dick* case has received significant revisionist attention. See Jeffrey L. Ren-

Other barriers have been posited, but these prove less formidable. Justice Brandeis, for example, objected to a forum's rejection of a foreign defense based on public policy grounds:

A State may, on occasion, decline to enforce a foreign cause of action. In so doing, it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere. But to refuse to give effect to a substantive defense under the applicable law of another State . . . subjects the defendant to irremediable liability. This may not be done.⁵⁰

This public policy concern has attracted the attention of other commentators as well.⁵¹

Professor Douglas Laycock has argued that any choice-of-law rule that allows the forum to prefer its own law merely because it is its own is incompatible with fundamental principles of federalism.⁵² Such a preference for forum law frustrates the orderly "rule of law" since "no person can know [prospectively] the law that governs his conduct. . . ."⁵³ Such objections, insofar as they do not rise to the threshold of the due process clause discussed above, should be: (1) trumped by the more robust principle of federalism; (2) embraced by the Tenth Amendment; and (3) bolstered by the domestic relations exception (discussed elsewhere)⁵⁴ that preserves important matters of family definition to the states.⁵⁵

Similarly, Professor John Hart Ely has questioned the constitutionality of interest analysis, a choice-of-law technique that allows fo-

sberger, *Who Was Dick? Constitutional Limitation on State Choice of Law*, 1998 UTAH L. REV. 37 (1998); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (holding that the application of the forum law to all members of a class was "sufficiently arbitrary and unfair" so as to violate due process).

50. See *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 160 (1932).

51. See Brainard Currie & Herma Schreter, *Unconstitutional Discrimination in the Conflict of Laws; Privileges and Immunities*, 69 YALE L.J. 1323 (1960), reprinted in BRAINARD CURRIE SELECTED ESSAYS ON THE CONFLICT OF LAWS 445 (1963). The United States Supreme Court has rejected the notion that slight variations in the rights accorded residents and non-residents in state courts violates the privileges and immunities clause. See U.S. CONST. art. IV, § 2; *Canadian N. Ry. Co. v. Eggen*, 252 U.S. 553, 562 (1920) ("[T]he constitutional requirement is satisfied if the nonresident is given access to the courts of the state upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens.").

52. Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 310-11 (1992).

53. Laycock, 92 COLUM. L. REV. at 337.

54. See *supra* note 30 and accompanying text.

55. See *Sosna v. Iowa*, 419 U.S. 393 (1975) (holding that the state's interest in marriage dissolution trumps an individual's interest in a more expeditious divorce).

rum policy preferences to displace foreign law.⁵⁶ This barrier has proven no more formidable than the others. States remain free to invoke the public policy exception as the United States Supreme Court has recently affirmed.⁵⁷ Thus, the subject is properly the province of state law.

THE PUBLIC POLICY EXCEPTION AND THE COMMON-LAW

In the context of marriage recognition, common-law applications of the public policy exception depend on the particular issue before the court. Consider, for example, two conflicts casebook chestnuts: *In re May's Estate*⁵⁸ and *In re Dalip Singh Bir's Estate*.⁵⁹ Brief attention to these two cases clarifies the issue.

In *May's Estate*, two New Yorkers, Sam and Fannie May, uncle and niece, were married in Rhode Island because, under the law of New York, their marriage would have been incestuous and void and would have exposed them to criminal liability. They presumably chose Rhode Island because it had a statutory exception for "any marriage which shall be solemnized among the Jews, within the degrees of affinity or consanguinity allowed by their religion."⁶⁰ The May's were married in 1913 at the home of a Jewish rabbi and two weeks later returned to New York where they lived together as husband and wife until Fannie's death in 1945. After Fannie's death, a daughter of the May's — a wannabe bastard of sorts — brought an action alleging that her parents' Rhode Island marriage was invalid because of the impediment of consanguinity. The issue of the marriage's validity arose in the context of a challenge to Sam May's right to letters of administration. The Surrogate ruled against Sam May, but that ruling was reversed by the appellate division and affirmed by the New York Court of Appeals. The court of appeals' approach to the application of the public policy exception is typical:

[M]arriage . . . between persons of the Jewish faith whose kinship was not in the direct ascending or descending line of consanguinity and who were not brother and sister—we conclude . . . was not offensive to the public sense of morality to a degree regarded generally with abhorrence and thus was not within the inhibitions of natural law. . . .⁶¹

56. See John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981).

57. See *Baker*, 118 S. Ct. at 657.

58. 114 N.E.2d 4 (N.Y. 1953).

59. 188 P.2d 499 (Cal. Ct. App. 1948).

60. *In re May's Estate*, 114 N.E.2d 4, 7 (N.Y. 1953).

61. *May's Estate*, 114 N.E.2d at 14-15.

The court attached significance to the conformity of the marriage with Jewish religious law and to the fact that the marriage was expressly lawful in Rhode Island.

The second case, *Dalip Singh Bir's Estate*, presented the problem of how to address the inheritance rights of two putative, surviving spouses of a polygamous marriage contracted in India where such marriages were allowed. The California Court of Appeals concluded that California public policy did not preclude recognition of the marriage for inheritance purposes and allowed the two wives to share equally in the proceeds of the estate.

Proponents of same-sex marriage will cite *May's Estate* and *Dalip Singh Bir's Estate* as indicative of how states should recognize marriages performed elsewhere that would violate state law (if originally performed within the forum state). However, both cases fail with their treatment of the apparent issue of recognizing what would otherwise be a marital union against public policy — incestuous in the first case, polygamous in the second. In fact, the issue of the validity of the marriage is in reality collateral to the issues of administration of the decedent's estate or the disposition of property after the death of one of the married parties. Service as an administrator and inheritance are both incidents of marriage which are tendered for resolution as choices of law. But in both cases, the fact of spousal death no doubt blunts any moral concern by society and by the court about the underlying immoral conduct. This is so because the cause for offense, the repugnant conduct — the incest and the polygamy — has disappeared with the death of a spouse and the end of the marriage. The morally opprobrious conduct is all in the past; the cause for societal outrage is merely tangential to the resolution of a more mundane legal problem. Moreover, because some of the principals are now deceased, there is less (arguably nothing) to be gained by a punitive vindication of the public policy. Enforcement would not have a deterrent effect on the conduct of others.

These two cases are typical of the problem. Marriage has many incidents beyond licit sexual congress — a spousal share of the marital estate upon the death of a spouse, pension rights, health and insurance benefits, to mention a few. Adjudication of these incidents may raise the necessity of resolving the validity of the marriage and, in turn, triggers the application vel non of the public policy exception. So long as the adjudication of the incident does not compel the court to bless an odious union, public policy will not be a bar.

Two proponents of the recognition of same-sex unions as marriages have published extensive canvasses of the common-law practices of courts in applying the public policy exception. Barbara Cox in

her 1996 study,⁶² and more recently Andrew Koppelman,⁶³ analyze *May's Estate*, and *Dalip Singh Bir*, and numerous other cases. What Cox and Koppelman find is a pattern that simply mirrors our paradigm cases. Beyond that, Cox concluded:

[Courts] clearly believe that they are justified in rejecting their own choice-of-law rules in order to refuse recognition to a validly contracted marriage [i.e., one valid at the place of marriage]. *But they have been quite reluctant to use the exception and quite liberal in recognizing marriages celebrated in other states.*⁶⁴

In other words, the public policy exception is available as a device to invalidate foreign marriages, but it is not invariably used. What follows in both articles is a supposed parade of horrors — a refusal to apply the public policy exception to the following cases which results in a validation for some purposes of the marriage. Cox concluded that courts failed to invoke the public policy exception to invalidate under-age marriages, miscegenous marriages, polygamous marriages, bigamous marriages, common law marriages, and incestuous marriages all violative of the law of the forum adjudicating the case. Koppelman's list, even though more extensive, is similar. He, too, concludes that a "blanket rule of nonrecognition . . . is very nearly unheard of in the United States."⁶⁵ And the conclusion urged upon the reader is that, because exceptions are made in all of these instances, many of them stark affronts to forum law and policy, the sting of the law's rebuke expressed in the public policy exception which stands ready to invalidate same-sex unions will (or should) similarly be stayed. Such is unlikely to be the case, however, if the incident of the same-sex putative marriage sought to be vindicated is licit venereal acts. This is particularly true in states, such as Georgia, which prohibit even consensual homosexual conduct⁶⁶ and is likely to be so even in states which tolerate it by decriminalizing homosexual conduct.

In states which have adopted anti-recognition statutes such as Georgia's,⁶⁷ which is typical, other incidents as well will be disposed of

62. See Barbara Cox, *Same-Sex Marriage and the Public Policy Exception in Choice-of-Law: Does It Really Exist?*, 16 QUINNIPIAC L. REV. 61 (1996).

63. See Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921 (1998).

64. Cox, 16 QUINNIPIAC L. REV. at 61 (emphasis added).

65. Koppelman, 76 TEX. L. REV. at 962.

66. See GA. CODE ANN. § 16-6-2 (1998) ("A person commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another."). The Supreme Court upheld section 16-6-2 in *Bowers v. Hardwick*, 478 U.S. 186 (1986).

67. Georgia's anti-recognition statute provides:

because the state courts lack jurisdiction to adjudicate rights "arising as a result of or in connection with [same-sex unions]." ⁶⁸

Therefore, the opinions in *May's Estate* and *Dalip Singh Bir's Estate* hold the key. A distinction can be made where the resolution of an issue about the validity of a marriage concerns only an incident of marriage, for example, regarding a widow or widower, and the matter is not one "regarded generally with abhorrence and thus . . . not within the inhibitions of natural law. . . ." ⁶⁹ What about cases in which the degree of moral opprobrium is strong because of the presence of abhorrent conduct? In those cases, the public policy exception is likely to assure short shrift to supplicants for same-sex unions.

CONCLUSION

The future of homosexual unions will be determined, in the end, by state legislatures and courts. State courts will rely principally on the public policy exception to avoid enforcement of foreign "same-sex unions." The Full Faith and Credit Clause and one of its implementing provisions, the Defense of Marriage Act, will also play roles; although because neither is the subject of this essay, I leave them for others in this Symposium to address. I remain unpersuaded by arguments that DOMA is unconstitutional. ⁷⁰ *Baker*, of course, will play no role, as Dean Patrick Borchers demonstrates in his Symposium article, ⁷¹ other than to allow use of the public policy exception.

Reflective analysis reveals that state common-law doctrine will be no more helpful to proponents of recognizing same-sex unions than are the anti-recognition statutes adopted in a number of states. The exception persists as a basis for rejecting foreign marriages which in-

(a) It is declared to be the policy of this state to recognize the union only of man and woman. Marriages between persons of the same sex are prohibited in this state.

(b) No marriage between persons of the same sex shall be recognized as entitled to the benefits of marriage. Any marriage entered into by persons of the same sex pursuant to a marriage license issued by another state or foreign jurisdiction or otherwise shall be void in this state. Any contractual rights granted by virtue of such license shall be unenforceable in the courts of this state and the courts of this state shall have no jurisdiction whatsoever under any circumstances to grant a divorce or separate maintenance with respect to such marriage or otherwise to consider or rule on any of the parties' respective rights arising as a result or in connection with such marriage.

GA. CODE ANN. § 19-3-3.1 (1998). Furthermore, Georgia law provides: "No marriage license shall be issued to persons of the same sex." GA. CODE ANN. § 19-3-30 (1998).

68. GA. CODE ANN. § 19-3-3.1(b) (1998).

69. *May's Estate*, 114 N.E.2d at 4.

70. *E.g.*, Paige E. Chabora, *Congress' Power Under the Full Faith and Credit Clause and the Defense of Marriage Act of 1996*, 76 NEB. L. REV. 604 (1997) (declaring that DOMA is unconstitutional).

71. Patrick J. Borchers, *Baker v. General Motors: Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147 (1998).

volve present conduct as an incident that the forum finds objectionable. In sum, states will enforce the public policy exception to same-sex "marriages" contracted out of state in the same way that they have treated other odious foreign marriages involving abhorrent conduct.