Territoriality and Moral Dissensus: Thoughts on Abortion, Slavery, Gay Marriage and Family Values

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TERRITORIALITY AND MORAL DISSENSIUS: THOUGHTS ON ABORTION, SLAVERY, GAY MARRIAGE AND FAMILY VALUES

By Seth F. Kreimer*

I. INTRODUCTION

A house divided can sometimes claim virtues and I am on record praising those claims. Five years ago, as a supporter of women’s right to choose abortion, I contemplated the possible demise of Roe v. Wade. At the time, it appeared that an emerging conservative majority on the Supreme Court would free state legislatures of constitutional restraint, leaving a state by state patchwork of abortion legislation reminiscent of the years immediately before Roe. I explored the degree to which restrictive states would be able to interfere with efforts of women to take advantage of the regime of their more liberal neighbors.

In that context, territorial limitation of state legislative jurisdiction was a boon to liberty. I argued that there were reasons both of precedent and policy favoring a system in which states would be free to adopt moral norms binding within their borders, but not free to export them. Territoriality had the virtue of consistency with the American

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3. In the context of abortion, the most relevant precedent was Bigelow v. Virginia, 421 U.S. 809 (1975), where the Court overturned the conviction of a Virginia newspaper for running an ad regarding the availability of New York abortion. The Court commented:

The Virginia Legislature could not have regulated the advertiser’s activity in New York, and obviously could not have proscribed the activity in that State . . . . Neither could Virginia prevent its residents from traveling to New York to obtain those servic-
tradi\ons of moral pluralism combined with free interstate travel and national citizenship. It had the advantage of corresponding to commonsense perceptions of law linked to a straightforward explanation of legal authority. And, most important to advocates of reproductive freedom, it gave women some measure of choice as to the law which governed them; escape from an oppressive legal context was available to knowledgeable women who could raise the price of a round trip bus ticket.4

If the right to punish moral deviations were limited to a state’s own territory, women would not enter neighboring states carrying the abortion legislation of their home state with them like a ball and chain. As long as at least a few states retained abortion rights, those rights would be potentially available to women elsewhere in the country.

As it turns out, my territorial enthusiasm, while shared by the Supreme Court in at least one recent case,5 has been of secondary importance in the area of abortion rights. Roe was in fact reaffirmed in Planned Parenthood v. Casey, and for most women, the “due burdens” which Casey sanctions have not been so onerous that in most cases “migratory abortion” has been a necessary option.6 In the areas where

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4. The escape route was far from perfect, for it depended on access to both information about extraterritorial opportunities and the capacity to take advantage of them. This meant that women who were young, poor or uninformed were often unable to take advantage of the escape route. See, e.g., James Shelton, ET AL., Abortion Utilization: Does Travel Distance Matter, 8 FAMILY PLANNING PERSPECTIVES 260, 262 (1976) (finding a negative correlation between abortion rates and distance from abortion facilities strongest for black teenagers); NANNETTE J. DAVIS, FROM CRIME TO CHOICE 199 (1985) (“Out of state travel costs prevented most poor minorities from using the new abortion broker arrangements [before Roe]”).


state regulations in fact verge on the prohibitive—regulation of young women's abortion rights—extraterritorial abortions have softened the regime.7

No interesting issue ever truly dies, and this symposium presents the issue of territoriality with the emotional polarities reversed for me, for sometimes oppression consists not in binding individuals unwillingly, but in refusing to allow them to bind themselves. Politically, religiously, and morally, I see the availability of same-sex marriage as an unambiguous good. Politically, same-sex marriage provides a means of affirming loving relationships, building family stability in the midst of an increasing unstable social context, and acknowledging the equal entitlement of gay and lesbian citizens to recognition as members of the American polity. Religiously, I happen to be a member of one of the denominations that celebrates same-sex unions.8 Morally, the refusal to allow celebration of such marriages, and a fortiori, the refusal to recognize marriages celebrated elsewhere strikes me as a gratuitously cruel act of hostility toward gays and lesbians.

Yet I realize my views are far from universal, and these commitments exist in practical tension with my sense of the territorially limited moral jurisdiction of states in the American polity. One of the virtues of a territorial federalism is precisely that it allows conflicting communities of commitment to coexist within a single national polity, while allowing individuals to move fluidly among them. On issues of fundamental life choices, America has often been a house divided, with the individual citizens entitled to decide the rooms in which they wish to live.

The principle of territoriality establishes that Georgia cannot pros-

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8. See Shabar v. Bowers, 70 F.3d 1218, 1222-23 (11th Cir. 1995), vacated and reh'g granted, 78 F.3d 499 (11th Cir. 1996) (challenging a discharge of state employee who married her lesbian partner in a Reconstructionist Jewish ceremony, observing that Reconstructionist Judaism "regards same sex marriages as acceptable and desirable") (rev'd en banc, 1997 U.S. App. LEXIS 13069 (11th Cir. 1997); see id. at *60 (Tjoflat, J., concurring) (acknowledging position of Reconstructionist Jews); id. at *64-67 (Godbold, J., dissent) (acknowledging position of Reconstructionist Jews).
execute its own gay and lesbian citizens for their sexual activities during visits to California. But it also allows Georgia to define as obscene and prohibit materials—however acceptable in California—which California residents may seek to distribute within Georgia itself. Indeed, part of the implicit power of the plaintiffs’ case in Romer v. Evans9 was that the Colorado Constitutional Amendment eviscerated the ability of local communities to set their own moral agenda.

If I was right that even without Roe, Pennsylvania could not seek to export its moralistic prohibitions to New Jersey by punishing Pennsylvania citizens for seeking abortions guaranteed by the New Jersey Constitution, why should Hawaii be able to export its celebration of same-sex marriages to Pennsylvania? If pregnant women did not carry personal law with them like a ball and chain into a new state, why should gay and lesbian couples be able to bear it like a souvenir shield on returning from a more welcoming jurisdiction?

II. CONFLICT OF LAWS: THE RULE OF UNIVERSAL VALIDITY AND PUBLIC POLICY

One answer could arise from black letter conflict of laws doctrine. The abortion problem involves one set of conflicts principles, while marriage validity is governed by quite different maxims. It has often been thought dubious for one state to enforce the penal statutes on conduct in another jurisdiction, and even in the loosest modern conflicts analysis a state has some claim to impose a basic moral order on actions within its borders. By contrast, the standard conflict of law doctrines regarding personal status are quite different; hornbook law holds that marriages valid in the jurisdiction where they are celebrated are, in the normal course of events, valid everywhere.10 In a mobile society where a web of personal entitlements grows from marital status, the personal hardships associated with marriages that fade in and out of existence as the partners pass state boundaries counsel strongly in favor of universal recognition of locally valid marriages.

10. E.g., Loughran v. Loughran, 292 U.S. 216, 223, 225 (1934) (Brandeis, J.); RESTATEMENT (SECOND) OF CONFLICT OF LAWS (2d) Section 283(2) (1971). For an early and influential case invoking the principle on behalf of a New York couple seeking to avoid a New York statutory prohibition of remarriage after divorce by marrying in New Jersey, see Ponsford v. Johnson, 19 F. Cas. 9 (S.D.N.Y. 1847) (No. 11,266), followed in Van Voehls v. Brintnall, 86 N.Y. 18 (1881). See also State v. Shames, 69 Vt. 403 (1897) (same: in the absence of explicit statutory prohibition of extraterritorial remarriage after divorce, marriage valid at the place of contracting will be recognized).
Other things being equal, this doctrine could easily tip the balance in states that have no other binding law on the subject. Indeed, in the parallel situation of inter-racial marriages before Loving v. Virginia,\textsuperscript{11} even some southern courts invoked the doctrine of universal validity to permit recognition of interracial marriages contracted in other states, but impermissible under local law.\textsuperscript{12} In a state where hostility to same-sex relationships is not already embodied in statute, it might be reasonable to expect this position to carry the day, particularly if local statutes incorporate the presumption in favor of marital validity. State courts which already have creatively interpreted their domestic relations laws to recognize the reality of same-sex relationships in the context of adoption or visitation disputes\textsuperscript{13} are particularly likely to read their

\textsuperscript{11} 388 U.S. 1 (1967).
\textsuperscript{12} Miller v. Lucks, 203 Miss. 824 (1948) (recognizing extraterritorial interracial marriage of non-domiciliaries for estate administration purposes); State v. Ross 76 N.C. 212 (1877) (dismissing bigamy prosecution); Stevenson v. Gray, 56 Ky. (17 B. Mon.) 193 (1856); Whittington v. McGaskill, 65 Fla. 162 (1913) (recognizing interracial marriage between Kansas residents for estate administration purposes). See also Pearson v. Pearson, 51 Cal. 120 (1875) (recognizing marriage contracted between Utah residents before moving to California, where interracial marriage was prohibited); Medway v. Needham, 16 Mass 156, 159-60 (1819) (recognizing interracial marriage contracted by Massachusetts residents extraterritorially).

In some of these states, however, the courts, while willing to recognize interracial marriages contracted between domiciliaries of other states were unwilling to allow their own domiciliaries to evade domestic prohibitions. See, e.g., State v. Kennedy, 76 N.C. 251 (1876) (refusing to recognize interracial marriage contracted between North Carolina residents in South Carolina); cf. In re Takahashi’s Estate, 129 P.2d 217, 220 (Mont. 1942) (construing statutory prohibition on recognition of extraterritorial interracial marriage to apply only to marriage contracted by Montana residents seeking to evade prohibition).

domestic conflicts law in light of the presumption of marital validity.

In an optimistic scenario, therefore, we might hope that in the short run the symbolic exclusion of same-sex marriages from local celebration would suffice to placate the forces hostile to such relationships, at the same time that ease of interstate travel could allow couples who seek marriage to achieve it. In the longer run a growing number of same-sex marriages solemnized extraterritorially could dilute the fear of the perceived "unnatural" nature of those relationships with day to day contact. This was, arguably, the path of the law with respect to divorce. For a substantial period of time in the mid-twentieth century, low-visibility availability of migratory divorces and other facilitative devices coexisted in equilibrium with officially restrictive domestic divorce laws in a workable ideological compromise. After a generation of experience with the normalization of divorce, no-fault swept the country.

But optimism in this case may be the triumph of hope over experience. The "migratory divorce" compromise depended on the relative unobtrusiveness of the practice combined with tacit official receptiveness. The issue of same-sex marriages is anything but unobtrusive. Rather than emerging in a series of incremental evasions, it is bursting on the national scene in the mantle of dramatic state constitutional activism. Same-sex marriage has not rested quietly in the recesses of low-level judicial practice, but has been drawn to the center of national partisan politics. Republicans pronounced the issue of same-sex marriage as a litmus of family values in the 1996 presidential election,

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14. See, e.g., Max Rheinstein, MARRIAGE STABILITY, DIVORCE AND THE LAW 51-105 (1972) (arguing that "cooperation of courts has made it possible for the great bulk of divorces to be obtained upon the ground of mutual consent which is frowned upon by the official law of every state of the union"); id. at 253-57 (arguing that the "make-believe" is an "indispensable part" of a viable compromise on an issue of "ultimate value").

15. Even on the divorce front, of course, my colleague Barbara Woodhouse has emphasized that "fault" has not been universally exiled from divorce proceedings, and there is now a growing enthusiasm for re-injecting it where it has been absent. See Barbara Bennett Woodhouse, Sex, Lies and Dissipation: The Discourse of Fault in a No Fault Era, 82 GEO. L.J. 2525 (1994). Still, the availability of the option of divorce is today far closer to the Nevada of the 1950's than to New York of that era.

16. RHEINSTEIN, supra note 11 at 253-57 (arguing that "the process would not have unrolled in the limelight of publicity").
Democrats acceded, and an increasing number of states have adopted statutes that explicitly preclude the recognition of same-sex marriages. Analysis of the probable results of Hawaii’s ultimate adoption of same-sex marriages, therefore, must proceed on the assumption that in a number of states, hostile legislatures will embody a refusal to recognize same-sex marriages in statute.

Once a strong ideological position is embodied in a positive state statute, the doctrines of comity are unlikely to carry the day unaided, for wherever it is initially celebrated, marriage is an ongoing personal relationship in which the state of ultimate domicile is likely to assert a strong interest. If we want to imagine an equilibrium in which states are impelled by reasons of comity to accept within their borders ongoing relationships to which they are ideologically opposed, the closest historical parallels are not comforting.

The historical record of conflicts doctrine dating from the wrenching national dispute over slavery gives one indication that stable extra-territorial recognition of a controversial personal status is unlikely. Despite the effort to accommodate differences between commitments to slavery and freedom, American doctrine has been that ultimately each state has authority over the personal status of those domiciled within its boundaries. Where one jurisdiction is willing to regard the status conferred by another jurisdiction as “odious,” recognition has been denied.

In the 19th century, the struggle over slavery was a crucible in which the clash of moral visions between states forged conflict of laws doctrine. Early in the century, it was not uncommon for state courts to defer to the moral commitments of sister states. States accorded extra-territorial recognition to status decisions at odds with the forum state’s public policy. Freedmen who attained their status by legitimate residence in free states retained freedom on return to some slave jurisdictions. Slaves traveling with their masters in free states, or even sojourning with them for brief periods of time were treated

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17. E.g., Violet and William v. Stephens 16 (5 Litt. Sel. Cas.) 147 (1812) (recognizing Pennsylvania statute granting freedom to Pennsylvania slave as effectively altering status of former slaves returned to Kentucky). See, e.g., Rankin v. Lydia, 9 Ky. (2 A.K. Marsh) 467, 476 (1820) (holding that freedom becomes vested by seven years of Indiana residency is the leading case). Because freedom is a natural right, “[i]f these rights are once vested in ... any other portion of the United States, can it be compatible with the spirit of our confederated government to deny their existence in any other part?” Id. at 188.

Louisiana had an equally strong line of cases, ended by statute in 1846. See ROBERT COVER, JUSTICE ACCUSED 96 (1975); PAUL FINKELMAN, AN IMPERFECT UNION 206-11 (1981). See generally id. at 188-90 (reviewing the “numerous cases [in which] the courts of the slave states respected the power of free states to liberate slaves”). Id. at 188.
as retaining their slave status.\textsuperscript{18}

But these accommodations were matters of interstate comity adopted ultimately at the discretion of the forum, and as the willingness to accede to divergent moral visions decayed, so did comity. From the founding of the republic, it had been clear to all concerned that the recognition of the master-slave relationship could not be imposed extraterritorially against the policy of the receiving state. The impetus for the inclusion of the Fugitive Slave Clause in Article IV was the understanding that in its absence, a free state would be entitled to treat a slave who escaped to its territory as free pursuant to local law.\textsuperscript{19}

As the controversy over slavery grew more bitter in the years before the Civil War, comity dissolved and the Constitution was held to impose no limit on the rights of both free and slave states to pursue their own moral visions within their borders. The Supreme Court announced that because "every State has an undoubted right to determine the status, or domestic and social condition, of the persons domiciled within its territory," slave states bore no obligation to recognize a status of freedom acquired in free states.\textsuperscript{20}

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\textsuperscript{18}Thus, Pennsylvania, New Jersey and New York during the early part of the 19th century granted statutory periods of protection to the interest of slave-owners passing through their jurisdictions. See Paul Finkelman, An Imperfect Union, 46, 76 (1981). Ohio by judicial interpretation recognized the servile status of slaves passing through its jurisdiction, \textit{Id.} at 89-92; as did Indiana, \textit{e.g.}, Sewell's Slaves 3 Am. Jur. 404, 404-07 (1830); Illinois, \textit{e.g.}, Willard v. People, 5 Ill. (4 Scam.) 461 (1843); and California, \textit{e.g.}, \textit{Ex Parte Archy}, 9 Cal. 147 (1858).

\textsuperscript{19}The text of the Clause provides that no slave escaping to a free state shall "in consequence of any law or Regulation therein, be discharged from" slavery. At the Virginia ratifying convention, Madison adduced as a point in favor of the proposed constitution that the Fugitive Slave Clause altered the legal status quo. "At present, if any slave escapes to any of those states where slaves are free, he becomes emancipated by their laws; for the laws of the slaveholding state are inadmissible to one another in this respect." Johnathan Elliot, Debates on the Adoption of the Federal Const. 453 (1974). See, Robert Cover, Justice Accused 88 (1975); Paul Finkelman, An Imperfect Union 27-28 (1981); Prigg v. Pennsylvania 41 U.S. 539, 612 (1842) ("It is manifest from this consideration, that if the Constitution had not contained this clause, every non-slaveholding state in the Union would have been at liberty to have declared free all runaway slaves coming within its limits . . . .") \textit{Id.}

\textsuperscript{20}Strader v. Graham, 51 U.S. 82, 93-94 (1850). Justice Taney stated that this sovereign prerogative was limited "in so far as the powers of the States in this respect are restrained, or duties and obligations imposed upon them, by the Constitution of the United States." Id. At 93. In dealing with the status of Kentucky slaves who had, by Ohio law attained freedom from their sojourn in Ohio, however, he held that:

There is nothing in the Constitution of the United States that can in any degree control the law of Kentucky upon this subject. And the condition of the negroes, therefore, as to freedom or slavery, after their return, depended altogether upon the laws of that State, and could not be influenced by the laws of Ohio. \textit{Id.} At 93-94.

In the Kentucky courts, \textit{Strader} marked a limitation of the comity accorded to free states
Equally, free states claimed authority to grant liberty within their borders to slaves who lawfully passed into their jurisdiction even temporarily. In *Lemmon v. People*, the earliest of these cases, 21 the Kentucky Court, however, distinguished the seven years of residence at issue in *Rankin* from the temporary visit at issue in *Strader*. See *Tom Davis, (of color)*, v. *Tingle*, 47 Ky. (8 B. Mon.) 539 (1848) (freedom vested where slave lived in Ohio long enough to establish domicile).

The theme recurs in Taney's opinion in *Dred Scott v. Sanford*, 60 U.S. 393, 460 (1856) (holding that effect of Scott's Illinois residency was to be determined by the laws of Missouri and giving effect to Missouri's refusal to recognize the freedom conferred by Illinois). Justice Nelson's concurring opinion set forth at greater length the proposition that just as the free states could exercise "complete and absolute power over" the status of individuals within their boundaries to free slaves, the "sovereign character of the States of the Union" gave Missouri authority to decide whether or not to recognize the freedom granted by the laws of Missouri when Dred Scott crossed its borders. *Id.* at 458-67.

For other cases denying recognition to liberty granted by free states, see, e.g., *Mitchell v. Wells*, 37 Miss. 235 (1859) (refusing to recognize New York munimissum for estate administration purposes even though former slave was New York resident); *Liza v. Pissant*, 7 La. Ann. 80, 81-83 (1852) ("It rests with each state to establish and regulate the domestic relations of its inhabitants. A state may prohibit slavery within its limits but this imposes no obligation on other states to hold the conditions of persons domiciled there as extinguished by reason of a presence in the State to which the relation is not recognized.").

21. The earliest of these cases, *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193 (1836), held that by entering Massachusetts, a Louisiana master and slave became "subject to all its municipal laws" and hence "entitled [only] to the privileges which those laws confer." The master was, therefore, not entitled to assert dominion over the slave. See, e.g., *Jackson v. Bulloch*, 12 Conn. 38 (1837) (freeing slave of sojourning slave-owner); *Anderson v. Peolindexter*, 6 Ohio 523, 631 (1856) ("Kentucky can not, by the law of comity, demand of this state an abrogation of its constitution and municipal laws, to promote any of its own peculiar institutions . . . nor can Ohio make any such demand of Kentucky.").

22. *Id. at 562 (1860).*

23. *Id. at 607 (1860).*

24. *Id. at 608-09. Cf. id. at 598-99* (argument by counsel that recognition of foreign status is limited by municipal law, and analogizing refusal to recognize incestuous or polygamous marriages lawful in a foreign domicile).
Considerations of comity might counsel in favor of recognizing status extraterritorially, but the final decision in cases of moral conflict rested with the domestic polity.

Like the comity accorded to free or slave status before the Civil War, the black letter rule of extraterritorial marriage recognition, after all, has an exception for marriages that are antithetical to strong local policy, and in cases of strong moral dissensus, the authority of local polities has been vindicated in the past.

After the Civil War, the most dramatic example of interstate moral conflict spawned by the tragic history of American slavery suggests again that doctrines of comity would not be sufficient to require an unwilling state to recognize foreign same-sex marriages. In the era before Loving v. Virginia, some states which prohibited interracial marriages recognized such marriages if contracted in a permissive jurisdiction. But another line of authority took advantage of the standard conflicts doctrine to refuse such recognition either on the basis of explicit statutory direction, or the court’s perception of public policy. Indeed,

25. See, e.g., RESTATAMENT (SECOND) CONFLICT OF LAWS § 283(2) and cmt. k (1971) (stating that the validity of a marriage which is valid where celebrated can be defeated by “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”); JOSEPH STORY, COMMENTARIES ON CONFLICT OF LAWS § 131.

26. The Uniform Marriage Evasion Act is testimony to one set of efforts to preclude domiciliaries from taking advantage of looser foreign laws; common law conflicts cases have similarly vindicated local policy on occasion. See e.g., Williams v. Oates, 27 N.C. 535 (1845) (refusing to recognize extraterritorial marriage by state domiciliary contracted after divorce); State v. Penn, 47 Wash. 561 (1907) (refusing the same).

27. Cases refusing to accord recognition rested on two sets of arguments:

1) Each state has sovereign power to refuse to allow activities contravening its public policy within its jurisdiction, and cohabitation in interracial marriages violates “public policy and good morals.” See, e.g., State v. Bell, 7 Tenn. 7, 8 (1872) (interracial marriage celebrated by out of state domiciliaries who move into Tennessee); State v. Tutty, 41 F. 753 (S.D. Ga. 1889) (upholding Georgia fornication conviction of interracial couple married in District of Columbia); Kinney v. Commonwealth, 71 Va. 369, 370 (1878) (policy against “unnatural alliances” between races was “one upon which social order, public morality and the best interests of both races depend”); In re Takashahi’s Estate, 129 P.2d 217, 220 (Mont. 1942) (stating the “rule of comity does not require that a state shall sanction within its own borders that which is repugnant to its own law.”); Succession of Gabisco, 44 So. 438, 441 (La. 1910) (Marriage contracted “in contravention of public policy and good morals” in another state is an “absolute nullity.”); see Toler v. Oakwood Smokeless Coal Corp., 173 Va. 425 (1939) (West Virginia marriage celebrated under the assumption that previous husband was dead, valid in West Virginia, held void in Virginia, because of statutory mandate, dictum: same rule applies to interracial marriages); Jackson v. Jackson, 82 Md. 17, 30 (1896) (dictum) (interracial marriages prohibited by statute are “absolutely void here” though “valid elsewhere”).

2) The state of domicile has the power to prevent evasion by its domiciliaries of its laws regarding marriage validity, see, e.g., Greenhow v. James, 80 Va. 636 (1885); State v. Kennedy,
Mildred Jeter and Richard Loving, the protagonists in *Loving v. Virginia*, were an interracial Virginia couple whose marriage in the District of Columbia led to their prosecution upon their return home. They were remitted to the Equal Protection Clause by the failure of interstate comity.

### III. Full Faith and Credit and National Union

The general doctrines of comity, of course, do not function unaided, for the Constitution obligates states to grant “full faith and credit” to the public acts and judgments of the other states in the Union. It was precisely to provide the acts and judgments of the states of the new republic with more recognition than the comity afforded to foreign nations that Article IV was drafted. The question, however, is whether “full faith and credit” adds binding power to the arguments for extraterritorial recognition of same-sex marriages.

#### A. Status, Article IV and Choice of Law

As I noted earlier, the understanding of the founding generation was that full faith and credit did not require extraterritorial recognition of a personal law of status acquired in one state when a resident trav-

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76 N.C. 232 (1877) (interracial marriage between North Carolina domiciliaries celebrated in South Carolina held void, although a contemporaneous case recognized a marriage contracted among South Carolina domiciliaries. “A law like this of course would be very idle if it could be avoided by merely stepping over an imaginary line.”); *Dupre v. The Executor of Boulard*, 10 La. Ann. 411, 412 (1855) (refusing to recognize extraterritorial interracial marriage for purposes of estate administration in order to avoid “evasion of the laws”); Kinney v. Commonwealth, 71 Va. (30 Gratt.) 458, 466 (1878) (to recognize extraterritorial marriages would allow “both races” by “stepping across an imaginary line, to bid defiance to the law”); Stevens v. United States, 146 F.2d 120, 123 (10th Cir. 1944) (Oklahoma domiciliaries “cannot evade” prohibition of interracial marriage by marriage in Kansas); *Eggers v. Olson*, 231 P. 483, 485 (Okla. 1924) (holding that Oklahoma residents could not evade prohibition of interracial marriage by extraterritorial celebration).

28. 388 U.S. 1 (1967). The Loving’s predecessors in the Supreme Court, Han Say Nairn and Ruby Nairn were Virginia residents who had been married in North Carolina in an effort to evade Virginia’s prohibition. See *Nairn v. Nairn*, 197 Va. 734 (1956).

29. See *Milwaukee County v. M.E. White Co.* 296 U.S. 268, 276-77 (1935) (“The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of others, and to make them integral parts of a single nation . . . .”); *Cf. 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 488 (rev. ed. 1937) (“Mr. Wilson remarked, that if the Legislature were not allowed to declare the effect the provision would amount to nothing more than what now takes place among all Independent Nations.”). In *Sun Oil Co. v. Wortman*, 486 U.S. 717, 723 (1988), Justice Scalia reads this comment to suggest that in the absence of Congressional action, the Framers intended the Full Faith and Credit Clause to “be interpreted against the background of” rules of international comity.
eled to another. If it had, the Fugitive Slave Clause's prohibition of "discharge from service" by "law or regulation" would have been unnecessary. Indeed, where the slave-owners sought to invoke the Full Faith and Credit Clause to protect the bonds established by slave states against interference when a slave legitimately reached free soil, such efforts were unsuccessful.\textsuperscript{30}

In the aftermath of the Civil War, the Court regularly denied that the Constitution permitted, much less required the extraterritorial effect of state authority.\textsuperscript{31} The Full Faith and Credit Clause did not require other states to recognize extraterritorial effect as a matter of deference to state sovereignty\textsuperscript{32} and the Privileges and Immunities Clause did not mandate it as a matter of individual right. The tone is captured by the reaction of the Court to the claim that a corporate charter could claim extraterritorial recognition as of right: "If... the provision[s] of the Constitution could be construed to secure to citizens of each State in the other States the peculiar privileges conferred by their laws, an extra-territorial operation would [thus] be given to local legislation utterly destructive of the independence and the harmony of the States."\textsuperscript{33} Given this construction of the Privileges and Immunities Clause, it is not surprising that the full faith and credit claims raised on behalf of extraterritorial recognition of interracial marriages were similarly unsuccessful.\textsuperscript{34} \textit{Loving v. Virginia}, after all, was analyzed as an

\begin{footnotesize}
\textsuperscript{30} See e.g., Anderson v. Poindexter, 6 Ohio St. 622, 631 (1856) ("Kentucky cannot, by the law of comity, demand of this state an abrogation of its constitution and municipal laws, to promote any of its own peculiar institutions... nor can Ohio make any such demand of Kentucky."). But cf. id. at 675 (Bartley, C.J., dissenting) (arguing that full faith and credit requires recognition of slave status in transit).

\textsuperscript{31} See, e.g., Pennoyer v. Neff, 95 U.S. 714 (1878); Allgeyer v. Louisiana, 165 U.S. 578 (1897).

\textsuperscript{32} See, e.g., Huntington v. Attrill, 146 U.S. 657 (1892).


\textsuperscript{34} E.g., \textit{Ex Parte Kinney}, 14 F.Cas. 602 (E.D. Va. 1879); cf. Toler v. Oakwood Smokeless Coal Corp., 173 Va. 425 (1939) (West Virginia marriage celebrated under the assumption that previous husband was dead, valid in West Virginia, held void in Virginia, despite full faith and credit claim, (dictum); same rule applies to interracial marriages).
\end{footnotesize}
equal protection and substantive due process case, not a claim to full faith and credit for the Lovings' District of Columbia marriage.

Much of this analysis is admittedly contained in old cases, and a series of revolutions in choice of law and constitutional analysis have occurred since those cases were decided. However, the core of the Supreme Court's modern analysis of interstate conflicts law seems at least as inhospitable to recognition of Hawaiian same sex marriages in the face of legislative hostility on the part of the receiving state. The most recent authoritative formulation of the obligations of faith and credit outside of the realm of judicial decrees holds that the "modest restrictions" of Article IV require that in order to impose its own law a state must "have a significant contact or significant aggregation of contacts such that choice of its law is neither arbitrary nor fundamentally unfair."35 Whatever else one might say about a state which refuses to recognize a marriage celebrated extraterritorially by its domiciliaries, it is hard to claim that the state lacks significant contacts with the couple it is attempting to sunder, or that there is any unfair surprise in the attempt to assert jurisdiction.36

B. Migratory Divorce and "Domicile"

What, then, of the possibility of looking to the more robust full faith and credit granted to judgments of other states?37 The problem of recognition of judgments does not figure prominently in the legacy of race relations, but in litigation over the moral dissensus surrounding


Subsequently in Sun Oil Co. v. Wortman, 486 U.S. 717 (1988), Justice Scalia advanced the more controversial rule that a "subsisting tradition" of conflict rules was per se valid under full faith and credit analysis. Id. at 728 n.2.

36. Professor Koppleman suggests in his article Same Sex Marriage and Public Policy: The Miscegenation Precedents, 16 QUINNI PIAC L. REV. 105 (1996), that the courts of a state which is neither the present or past domicile of same sex Hawaiian marital partners would violate constitutional choice of law constraints if it failed to recognize the marital status of litigants before it. This might be true if the forum's connection with the litigants and transaction were so slight as to render its choice of its own hostile law arbitrary; and there may be symbolic effect to be gained by strategically engineering such suits. But this approach offers relatively little short-term solace to couples who seek to import Hawaiian marriages to their own domicile, or even Hawaiian couples who seek to migrate after establishing Hawaiian domicile.

divorce the issue of full faith and credit to judgments is central. The most recent turn of the doctrine could provide a basis for recognition of Hawaii’s same-sex marriages.

In the era following World War II, the Supreme Court interpreted the Full Faith and Credit Clause to obligate states to recognize at least some extraterritorial changes in marital status antithetical to their local law. Thus, in *Williams v. North Carolina*, the Court held that full faith and credit would preclude North Carolina’s bigamy prosecution for marital cohabitation after an ex parte divorce and remarriage in Nevada if the parties’ two month sojourn in Nevada established “domicile.” So, too, in *Sherer v. Sherer*, the Court required Massachusetts to recognize a contested Florida divorce of a resident of Massachusetts who migrated to Florida for a year and returned to Massachusetts two months after her divorce and remarriage, in the teeth of a Massachusetts statute precluding recognition. Justice Frankfurter’s dissent complained that the result permitted “the States with the laxest divorce laws to impose their policies upon all other States.” In response, while recognizing “the importance of a State’s power to determine the incidents of basic social relationships into which its domiciliaries enter,” the Court determined that:

> the full faith and credit clause is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent sovereign states into a nation. If in its application, local policy must at times be required to give way, such is part of the price of our federal system.

Thus, even a strongly held policy preference was not grounds for failing to grant full faith and credit to a litigated judgment.

39. After a second trial, the Supreme Court upheld the prosecution because of a determination that Nevada domicile had not been established. See *Williams v. North Carolina*, 325 U.S. 226 (1945).
40. 334 U.S. 343 (1948).
41. *Id.* at 366. More colorfully, he worried that the opinion would “endow with constitutional sanctity a Gresham’s Law of domestic relations.” *Id.* at 367.
42. *Id.* at 355. See *Coe v. Coe*, 334 U.S. 378 (1948) (requiring Massachusetts to recognize Nevada divorce granted after four months of residence to husband who later returned to Massachusetts); see also *Cook v. Cook*, 342 U.S. 126 (1951) (requiring Vermont to recognize Florida divorce obtained by Virginia resident after sojourn in Florida); *Johnson v. Muelberger*, 340 U.S. 581 (1951) (requiring New York to recognize contested Florida divorce of New York resident, despite the fact that in collateral attack it was shown that the Florida ninety day residency requirement had not been met).
An effort to use these cases as a wedge for recognition of Hawaii's same-sex marriages, however, faces substantial difficulties. The migratory divorce cases began with the premise that "[e]ach state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders," and that once reduced to judgment, decrees exercising that power over domiciliaries are "valid throughout the union." There are thus two initial technical problems with attempting to apply these cases to the prospect of "migratory same-sex marriages"—or indeed, any evasionary marriage.

First, the power to determine marital status in the migratory divorce cases is limited to domiciliaries; even the quickest of "quickie" Nevada divorces required a six week residency and a declaration of domiciliary intent. For Pennsylvania residents seeking to import a Hawaii marriage after a Hawaiian honeymoon there is likely to be at least substantial debate about the relevant "domicile." Parties to contested extraterritorial divorces and their privies have been held to be bound to implausible findings about transient "domiciles," but many of the legal effects sought by same-sex marital partners—such as tax status and social welfare benefits—will involve a hostile home state which is hardly a party to the marriage.

Just as North Carolina successfully contested the jurisdiction of Nevada to divorce the subjects of its bigamy prosecution in *Williams v. North Carolina,* we can expect hostile states to contest vigorously Hawaii's jurisdiction to establish the marital status of domiciliaries who return to seek tax or social welfare benefits from their original home state.

Second, the extraterritorial divorce cases take advantage of the powerful full faith and credit extended to litigated final judgments, and

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44. Id. at 301.
45. At one point, Utah went even further, asserting jurisdiction to divorce couples where one member "wished to become" a Utah resident. See *Nelson Blake, The Road to Reno* 122 (1962); Richard J. Aaron, *Mormon Divorce and the Statute of 1852: Questions for Divorce in the 1980's,* 8 J. Contemp. L. 5, 23-26 (1982). Where neither of the parties was a Utah resident, however, the divorces were vulnerable to attack in other jurisdictions. See *Hood v. State,* 56 Ind. 263 (1877) (viewing Utah divorce of non-resident as assault on the sovereignty of neighboring states); *State v. Armington,* 25 Minn. 29 (1878) (refusing to recognize Utah divorce of two Minnesota residents); *Hardy v. Smith,* 136 Mass. 328 (1884) (refusing to recognize Utah divorce of two Massachusetts residents).
46. *Cf. Restatement (Second) of Conflict of Laws,* § 74 cmt. b (1971) (denying jurisdiction via third party estoppel "has no relevance to the question whether a state may prosecute for bigamy, or for unlawful cohabitation, a person who has obtained a divorce in a state which had no judicial jurisdiction to grant it").
47. 325 U.S. 226 (1945).
it is far from clear that then issuance of marriage certificates can be regarded as a judgment. These obstacles could conceivably be overcome by sufficiently creative transient couples and a sufficiently sympathetic Hawaii judiciary seeking to generate judgments binding on the receiving state. But a determined receiving state is not without gambits of its own.

48. Assuming a cooperative Hawaii judicial system, an expedited declaratory judgment action against the partners' home state seeking a declaration of marital status and Hawaiian domicile could arguably serve the purpose. In an earlier em, Professor Ehrenzweig suggested that declaratory judgments entered in more liberal states could establish the marital status of interstate couples who sought to enter states with miscegenation prohibitions. Albert A. Ehrenzweig, Miscegenation in the Conflict of Laws: Law and Reason Versus the Restatement Second, 45 CORNELL L. Q. 659, 662 (1960).

Assuming the home state "does business" in Hawaii sufficient to grant personal jurisdiction cf. Nevada v. Hall, 440 U.S. 410 (1979), in the face of a stream of Pennsylvania residents seeking to establish Hawaii marriages, Pennsylvania would be faced with the prospect of either hiring permanent local counsel to contest the issue of domicile or acceding to Hawaii's marital judgments.

49. Opponents of same-sex marriage at the federal level, moreover, have not ignored the fact that the majesty generality of the Full Faith and Credit Clause is followed by a delegation to Congress of authority "by general Laws [to] prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1. The so-called "Defense of Marriage Act" provides that no state shall "be required to give effect" to a foreign law or judgment "respecting a relationship between persons of the same-sex that is treated as a marriage." Act of Sept. 21, 1996, Pub. L. No. 104-199, 1996 U.S.C.C.A.N. (110 Stat. 2419) (to be codified at 28 U.S.C. § 1738C).

Professor Tribe is on record proposing that the enforcement clause "includes no congressional power to prescribe that some acts, records and proceedings that would otherwise be entitled to full faith and credit under the Full Faith and Credit Clause as judicially interpreted shall instead be entitled to no faith or credit at all." 142 CONG. REC. S5991-92 (daily ed. June 6, 1996) (letter by Professor Laurence H. Tribe to Senator Edward M. Kennedy).

Professor Tribe's position is in some tension with a line of dicta suggesting that the Supreme Court would welcome and defer to Congressional action delineating the reach of the full faith and credit obligation. See e.g., Sun Oil Co. v. Wortman, 486 U.S. 717, 728 (1988) (suggesting that Congress could designate particular issues as "substantive" for choice of law purposes); Williams v. North Carolina, 325 U.S. 226, 266 (1945) (Black, J., dissenting); Sherrill v. Sherrill, 334 U.S. 343, 352 n.18 (1948) (alluding to Congressional power to legislation); id. at 364 n.13 (Frankfurter, dissenting) (suggesting that Congress could alter full faith and credit accorded to divorce decrees); Yarborough v. Yarborough, 290 U.S. 202, 215 n.2 (1933) (Stone, J., dissenting) (expanding or contracting clause at the direction of Congress); Robert H. Jackson, Full Faith and Credit—the Lawyer's Clause of the Constitution, 45 COLUM. L. REV. 1, 21-24 (1945).

Some legislative history likewise points to a co-equal role for Congress in delineating the reach of the full faith and credit obligation. Madison claimed (Federalist No. 42, at 387) that the unadorned full faith and credit obligation inherited from the Articles of Confederation was "extremely indeterminate," and Congressional power to prescribe effect constituted an "evident and valuable improvement . . . . " THE FEDERALIST NO. 42 (James Madison). See 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 488-89 (rev. ed. 1937) ("Doc. Johnson thought the amendment as worded would authorize the General Legislature to declare the effect of the Legislative acts of one state, in another state."); Douglas Laycock, Equal Citizens of Equal
Assuming for the moment that a receiving state is required to recognize same-sex marriages as "marriages" when the couple enters its borders, it can still seek to exercise its own sovereign authority over what follows from that status in two ways. First, just as the legal mechanism of divisible divorce—in which states treated some legal incidents of marital dissolution as following from an ex parte extraterritorial divorce, while denying others—followed from migratory divorce,\(^50\) it is not difficult to imagine a state which is obliged to recognize same-sex marriages as "marriages" responding by dividing the perquisites of marriages and vesting the more appealing ones in heterosexual unions.\(^51\)

Second, and more importantly, a hostile receiving state, even if initially compelled to recognize an extraterritorial marriage, can invoke its own authority over its new domiciliaries prospectively. A sufficiently intransigent receiving state could statutorily decree "divorce" for same-sex couples who choose ultimately to come to reside in within its borders. To be sure, legislative divorce is no longer the norm,\(^52\) but the 19th century precedent upholding legislative divorce against due process attack has been regularly cited as good evidence of the authority of states over marriage within their boundaries.\(^53\)

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and Territorial States: The Constitutional Foundations of Choice of Law, 92 COLUM. L. REV. 249, 297-98 (1992) (arguing that omission of language in prior draft that "operation shall be binding in other states, in all cases to which it may relate, and which acts are within the cognizance and jurisdiction of the State . . . " implied that the final clause "presupposed choice-of-law rules and left detailed specifications of those rules to the courts or to Congress").

The better attack, it seems to me, is a claim that the Defense of Marriage Act is not the type of "general" law contemplated by the constitutional text, perhaps bolstered by a reference to the equal protection principles of Romer v. Evans, 116 S. Ct. 1620 (1996).

50. See, e.g., Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957) (recognizing Nevada divorce as terminating marriage but not obligation of support); Estin v. Estin, 334 U.S. 541 (1948) (holding that a Nevada divorce binds the world as to bigamy and bastardy, but not support); Kreiger v. Kreiger, 334 U.S. 555 (1948); Hudson v. Hudson, 53 Cal. 2d 735 (extraterritorial divorce did not affect obligation of support).


Such reservations of perquisites for heterosexual unions would, of course, be subject to challenge under the equal protection clause. But if Romer v. Evans does not prohibit states from refusing to perform same-sex marriages generally, it is not clear why it should prohibit imposing second class status on such marriages as the state is compelled to recognize.

52. Indeed, it is prohibited by a number of state constitutions. See NELSON BLAKE, THE ROAD TO RENO 56 (1962) (reporting that by 1867, at least 33 state constitutions specifically prohibited legislative divorce).

53. See Maynard v. Hill, 125 U.S. 190 (1888) (approving Oregon legislative divorce without notice to wife where husband had immigrated to Oregon, wife had remained in Ohio); Williams v. North Carolina, 317 U.S. 287, 296 (1942) (citing Maynard). While the Oregon legislature acted at
If there is a constitutional obstacle to these responses, it does not flow from the Full Faith and Credit Clause or the structure of the Union. Depending on where the Court ultimately comes to rest on the equal protection rights of gays and lesbians, such gambits might be subject to challenge under the rather murky principles of Romer v. Evans. But such attacks put the rabbit into the hat. If a refusal to recognize fully or an effort to dissolve same-sex marriages celebrated in other states is an invidious denial of equal protection, it is hard to see why the initial decision to deny access to matrimony domestically is not equally invidious. In any event, such attacks are addressed at greater length by others. I want to explore another line of analysis which could facilitate recognition of some same sex couples as families even if the federal courts do not establish discrimination on the basis of sexual orientation as constitutionally invidious.

IV. A MODEST PROPOSAL
A. The Rights of Travel and Migration

The United States was established with a heritage of free interstate travel and migration. The Articles of Confederation provided protection for “free ingress and regress to and from any other state.” Although the explicit textual protection did not survive in haec verba in the Constitution, from early in the country’s history, courts have recognized the right to travel among the states of the union as one of the privileges and immunities of national citizenship under Article IV, and the facility

the request of the husband in Maynard, the divorce was imposed against the will of the wife, and there was no suggestion in the opinion that an involuntary annulment would not have been equally within the legislative power.

Although Justice Curtis, dissenting in Scott v. Sanford, 60 U.S. 393, 599 (1856) (Curtis, J., dissenting), had suggested that abrogation of a marriage upon immigration would violate the constitutional prohibition on impairments of contracts, the Court specifically rejected the claim that marital unions can invoke contract clause protection. Maynard, 125 U.S. 287 (1888); Hunt v. Hunt, 131 U.S. App. cix (1879). See also Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 517, 628 (1819) (Contract clause “never has been understood to restrict the general right of the legislature to legislate upon the subject of divorces.”).

54. Article IV of the Articles of Confederation provided:

The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State...
of interstate migration has become a staple of our national identity. Indeed, it was precisely the proposition that African Americans recognized as citizens in a free state would have the right to retain that status when traveling in slave states that impelled Justice Taney in *Dred Scott v. Sandford* to reject so forcefully the possibility of citizenship for the descendants of slaves.

The reversal of *Dred Scott* by the birthright citizenship and the Privileges and Immunities Clauses of the Fourteenth Amendment guaranteed that African Americans, like other citizens, were constitutionally entitled to travel among the states. The citizenship clause of the Fourteenth Amendment was intended to overturn *Dred Scott*, and overturn the regime under which states excluded free blacks and abolitionists. By granting birthright citizenship in the nation and residency-based citizenship in the states, the Framers of the Fourteenth Amendment insured that the right to travel between states could no longer be denied to blacks or other disfavored residents because they were not "citizens." By prohibiting state abridgment of the privileges and immunities clause of the Fourteenth Amendment, states would protect Blacks, as well as Whites, in their freedom to move and travel across the country, without restriction by the States and their political subdivisions.

55. In *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3,230), Justice Washington had identified the "right of a citizen of one state to pass through, or to reside in other state, for purposes of trade, agriculture, professional pursuits, or otherwise . . ." as one of the privileges and immunities protected by Article IV of the Constitution. See *United States v. Wheeler*, 254 U.S. 281, 297-98 ("Undoubtedly the right of citizens of the States to reside peacefully in, and to have free ingress into and egress from the several states [against both their own and other states] . . .", fused into one by *Article IV Section 2*); *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1870) ("the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation . . ."); *Paul v. Virginia*, 73 U.S. (8 Wall.) 168, 180 (1869) (Privileges and Immunities clause "gives . . . [citizens of each state] the right of free ingress into other States, and egress from them.").

56. *Dred Scott*, 69 U.S. (19 How.) at 416-417,23 (citizenship "would give . . . [them] the right to enter every other State whenever they pleased . . .").


The denial of the opportunity to move freely throughout the land was one of the badges of servitude imposed on the slave . . . and, in ratifying the Fourteenth Amendment the people intended that the privileges and immunities clause of that Amendment would protect Blacks, as well as Whites, in their freedom to move and travel around the country, without restriction by the States and their political subdivisions.

See also, e.g., *PAUL FINKLEMAN, AN IMPERFECT UNION* 342-43 (1981). Stating that:

In making the freedmen citizens of the states in which they resided, the amendment . . . required that the individual states recognize the rights of citizenship and therefore grant comity to blacks entering from other states. No longer could a southern state imprison a free black sailor from the North or indeed, prohibit free blacks from entering their domain.

59. It was clear to all concerned that the status of citizenship would entail a right to inter-
munitions of citizenship, the Fourteenth Amendment provided an explicit federal protection for interstate travel and migration.

Thus, the Court was on solid historical ground in the Slaughter-House Cases when it announced that the right to interstate travel was a "privilege and immunity" of national citizenship protected by the Fourteenth Amendment. The Court further recognized that the Fourteenth Amendment established the national privilege that "a citizen of the United States can, by his own volition, become a citizen of any State of the Union by a bona fide residence therein, with the same rights as other citizens of that state."

Since the Slaughter-House Cases, the Court has viewed the right to migrate as an essential part of the federal structure. As Justice
O'Connor commented:

It is difficult to imagine a right more essential to the Nation as a whole than the right to establish residence in a new State. Just as our federal system permits the States to experiment with different social and economic programs . . . it allows the individual to settle in the State offering those programs best tailored to his or her tastes. 64

As members of this federal system, states are not entitled to discriminate against or deny new comers political or economic benefits on the basis of the exercise of their constitutional right to migrate from another state, or to penalize them for exercising that right. 65

With this background, at least for gay couples who have been married as Hawaii domiciliaries, are there constitutional objections to a system by which states other than Hawaii exact a forfeiture of marital status as the price of migration? Justice Black in Williams v. North Carolina maintained that a rule allowing North Carolina to refuse to recognize a Nevada divorce in a domestic prosecution for bigamy was effectively a prosecution for exercising "their constitutional right to pass from a state in which they were validly married into another state which refuses to recognize their marriage. Such a consequence runs counter to the basic guarantees of our federal union." And in the era before the Civil War, slaves freed in Northern states invoked the right to interstate travel as protection against the imposition of Southern laws

185 (Jackson, J., concurring) ("Rich or penniless. Duncan's citizenship under the Constitution pledges his strength to the defense of California as a part of the United States and his right to migrate to any part of the land he must defend is something she must respect under the same instrument"); Williams v. Fears, 179 U.S. 270, 274 (1900) ("Undoubtedly the right . . . ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment . . ."); Twining v. New Jersey, 211 U.S. 78, 97 (1908) ("right to pass freely from state to state" is a privilege of national citizenship); Paul v. Virginia, 75 U.S. 168, 180 (1869) (Article IV gives citizens of each state "the right of free ingress into other States, and egress from them") quoted with approval in Hicklin v. Orbeck, 437 U.S. 518, 524 (1978); Baldwin v. Montana Fish and Game Comm'n, 436 U.S. 371, 380 (1978); United States v. Wheeler, 254 U.S. 281, 295 (1920); Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 78 (1920); Blake v. McClung, 172 U.S. 239, 250 (1898).

64. Zobel, 457 U.S. at 76-77 (O'Connor, J., concurring).


Sosna v. Iowa, 419 U.S. 393 (1975), permitted Iowa to defer the opportunity to obtain a divorce for one year after taking up residency, though not to deny it entirely.

when they ventured south, even as slave-owners invoked the right to interstate travel to protect their dominion over their slaves, established by the laws of their home states, against interference from the laws of the states which they visited.

Justice Black’s claim, however, was voiced in dissent, and the often-rejected claims of the slave-owners and freedmen never extended beyond claim for a right of passage through hostile territory. In the general case I am afraid a federal system which vests domestic relations power in the states means precisely that migrants sacrifice legal advantages in their state of origin when they seek to exercise their rights to travel or migrate.

The price of obtaining the benefits of a new state citizenship is leaving behind the benefits of the old. Even for visitors from other states, the Privileges and Immunities Clause of Article IV has long been interpreted only “to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.” In more recent cases involving interstate migration, discriminatory denial of economic or political entitlements to newcomers where the same rights were granted to long time residents formed the gravamen of the complaints. But if Pennsylvania’s long-term resident cannot obtain the benefits of same-sex marriage, there is no apparent discrimination against an immigrant from Hawaii who is subject to the same rule.

B. The Right to Travel and Family Values

The analysis thus far treats the issue as a denial of legal entitlements as to which individuals migrating from Hawaii and Pennsylvania residents are similarly situated. The fact, however, is that an exercise of Pennsylvania’s authority to deny recognition to marriages of unconventional immigrants as they cross its boundary involves more than a refusal to recognize an abstract legal capacity. For Hawaiian emigrants, the denial of marital recognition means rending a family bond which has already been established. If courts recognize that the question is whether there is a right to migrate as an existing family, the

67. The only case which came close to establishing a right to permanently migrate was Justice Taney’s opinion in Dred Scott, which is hardly a congenial precedent.
analysis does a different aspect. We might call this the "family values" approach.

To put the strongest case, assume a same-sex couple who have raised children in Hawaii moves to Pennsylvania, and the biological parent dies. Would Pennsylvania be entitled to treat the children as wards of the state and the surviving spouse as a stranger to the children she has raised as a lawful parent in Hawaii? There is certainly precedent suggesting that a refusal to recognize a family unit in such circumstances raises constitutional doubts. The destruction of a long-standing family unit is an evil that demands justification. The imposition of that evil as a consequence of migration is in tension with both the mobility of national citizenship conferred by the Fourteenth Amendment and the federal structure, as well as the proposition that a state may not penalize the exercise of those rights.

It is reasonably clear that the effort to dismember an existing family initially recognized by domestic law would require justifications more substantial than a mere policy preference for alternative living arrangements by the state. This constitutional protection is not limited to families whose existence is initially sanctioned by law. In Stanley v. Illinois, the children of Joan and Peter Stanley, an unmarried couple who raised their children jointly for 18 years, were determined to be wards of the state upon the death of their mother. The state claimed

70. See M.L.B. v. S.L.J., 117 S. Ct. 555, 564-65 (1996) ("Choices about marriage, family life, and the upbringing of children are... sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard or disrespect; interest in retaining existing parent-child relationship is "commanding, indeed, far more precious than any property right."); Santosky v. Kramer, 455 U.S. 745 (1982) (requiring clear and convincing evidence for termination of parental rights). Cf. Smith v. Org of Foster Families, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring) ("If the State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt the State would have intruded impermissibly...") quoted with approval in Quillen v. Wolcon, 434 U.S. 246, 255 (1978); Lehr v. Robertson, 463 U.S. 248, 258 (1983) ("The relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection.").

In some states, state constitutional guarantees provide additional protection. See, e.g., Simmons v. Simmons, 900 S.W. 2d 682 (Tenn. 1995) (statutory attempt to impose grandparent visitation on adoptive family violates state constitution's right to family autonomy); Brooks v. Parkerson, 454 S.E.2d 769 (Ga. 1995) cert. denied 116 S.Ct. 377 (1995) (statutory grandparents visitation statute invalid under state constitution as applied to families where there is no threat of harm to the child); Beagle v. Beagle, 678 So.2d 1271 (Fla. 1996) (quoting Beagle v. Beagle, 654 So.2d 1260, 1263 (1995) (Florida's constitutional protection of privacy invalidated statutory efforts impose grandparent visitation over parental objections whether the child "lives in a loving, nurturing home with both parents, a loving home headed by a working mother whose erstwhile husband deserted the family or with a loving father devastated by a divorce not of his asking.").

71. 405 U.S. 645 (1972).
that by defining the unmarried father—Peter, an Illinois resident—not to be a “parent,” it could ignore the existing relationship between father and children. The Court, however, declared “the interest of a man in the children he has sired and raised undeniably warrants deference, and absent a powerful countervailing interest, protection.” Justice White acknowledged that “family relationships unlegitimized by a marriage ceremony . . . [involve family] bonds . . . as warm, enduring, and important as those arising within a more formally organized family unit.”

Mr. Stanley was entitled to invoke constitutional protection for his family on the basis of both his on-going care taking relationship and biological bonds. Subsequent cases hold that biology is not sufficient to establish constitutional protection for the parent-child relationship, but that the crucial element is full commitment to the responsibilities of parenthood. A father whose connections with his biological child are not solemnized by marriage, but who nonetheless “grasps the opportunity” to develop a relationship with his children, and “accepts . . . responsibility for the child’s future,” is entitled to “enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child’s development.” One whose relationship remains merely “potential,” rather than “developed” can claim no constitutional protection.

Certainly, in the case of same sex couples who have married and established families with children in Hawaii, the parent-child relationships are as “warm, enduring and important” as those within a “developed” non-marital family of different sexes. Indeed, the same sex parents have sought legal recognition for the relationship by seeking the “protection . . . provided by the laws that authorize formal marriage.” Under existing law, a state that sought to ignore a biological parent-child relationship because of hostility to the law under which

72. Id. at 651-2.
74. Lehr v. Robertson, 463 U.S. 248, 262 (1982); see also Quillioin v. Walcott, 434 U.S. 246 (1978) (denial of unmarried biological father’s right to veto adoption did not violate constitution, where father had made no effort to establish relationship with children); Caban v. Mohammed, 441 U.S. 380 (1979) (denial of unmarried biological father’s right to veto adoption violated equal protection; father had established relationship with children); id. at 397 (Stewart, J. dissenting) (constitutional protection requires “enduring relationships”); id. at 414 (Stevens, J., dissenting) (developed relationship could warrant constitutional protection).
75. Id.
76. Lehr, 463 U.S. at 263.
marriage was solemnized would be on dubious constitutional ground. The question is whether, in the absence of biological connections, the prior legal recognition of the family unit in another state, combined with an on-going care taking relationship is sufficient to invoke constitutional protection.

One building block is Smith v. Organization of Foster Families for Equality and Reform,77 where the Court "assumed" that foster parents—who had no biological connection with the children entrusted to their care—could invoke a protected liberty interest in the ongoing relationship. Justice Brennan commented that:

"The importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children... At least where a child has been placed in foster care as an infant... and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family."

By this measure, an existing legally recognized family with same-sex parents clearly partakes of the family values that invoke constitutional protection when they migrate to a new state.

Likewise, in Michael H. v. Gerald D.,78 Justice Scalia's plurality opinion upheld California's decision to prefer legally sanctioned relationships to biological ties. California's domestic relations law excluded a biological father from parental rights where the mother sought to invoke the presumption of paternity arising out of her on-going legal marriage with another man. Justice Scalia read prior federal precedent to accord constitutional protection to "relationships that develop within

78. Id. at 844 (quoting Wisconsin v. Yoder, 406 U.S. 205, 231-33 (1972)). See also Smith, 431 U.S. at 846:

It is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state-law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic human right.

In the case of a same-sex relationship of the sort we are discussing, of course, there is no competing claim on the part of a biological parent, and the family can invoke the sanction of another state's law.

the unitary family," typified by a "marital family." He relied on a tradition of protecting "the marital family" against the claims of outsiders, the "aversion to declaring children illegitimate," combined with the importance of protecting a "extant marital family" to uphold California's decision to exclude the biological father from parental rights. Despite its impact on the interests of the biological father and his child, California was free to preserve the "integrity of the traditional family unit."

Again, if the Court recognizes the importance of protecting a legally constructed "marital" family against the disruption by a biological, but non-marital parent, it should recognize the magnitude of the loss imposed where a same sex "marital family" formally established in Hawaii is subjected to the penalty of dissolution upon migration.

In the case of a Hawaiian emigrant family with children, moreover, the argument for recognition is strengthened by the interests of children who will lose the legal relationship to one of the only two parents they have ever known because of the receiving state's refusal to recognize the existence of an existing marital family. A child who is deprived of legal recognition of one of two parents suffers significant deprivation. Where one parent dies or a current marital relationship dissolves the effects of non-recognition could be traumatic.

While the parents themselves could avoid the threat of a Pennsylvania dissolution by remaining in Hawaii, the children involved have no such choice. To deprive them of existing family ties because of

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80. Id. at 123.
81. Id. at n.3.
82. Id. at 124.
83. Michael H., 491 U.S. at 125.
84. Id. at 129.
85. Id. at 130. At least one New York court has applied similar reasoning against a biological father who, as a sperm donor, had previously waived parental rights, and now sought to establish his paternity with respect to a child who had been raised in a family by a lesbian couple. See In re Thomas S. v. Robin Y., 599 N.Y.S.2d 377, 382 (Fam.Ct. 1993) (observing that the child viewed the biological father as an "outsider attacking her family") rev'd, 618 N.Y.S.2d 356 (App. Div. 1994) stay granted, 85 N.Y.2d 925 (1995).
their parents' decision to migrate is at odds with the constitutional stricture against imposing burdens on children because of their parents' actions. Thus, the Court has regularly invalidated "classifications that burden illegitimate children for the sake of punishing the illicit relations of their parents, because 'visiting this condemnation on the head of an infant is illogical and unjust.'"87 Likewise, the court in Plyler v. Doe88 was unwilling to sanction the exclusion of the children of illegal immigrants from public schools; while "[their] parents have the ability to conform their conduct to societal norms, and presumably the ability to remove themselves from the State's jurisdiction, the children... can affect neither their parents' conduct nor their own status."89 Like non-marital children, children of same-sex couples face potential social difficulties even in the absence of state discrimination triggered by their parents' actions. Like the children of illegal immigrants, they stand liable to be deprived of parental relationships not because of what they have done, but because of who their parents are; indeed what their parents have done was entirely legal in their previous state of residence.

This focus on "family values" is more than an exercise in hypothetical construction. While relatively few same-sex couples from Hawaii are likely to emigrate with their children to the mainland in the next few years, other jurisdictions have begun to recognize same-sex couples as parents without Hawaii's constitutional fanfare.90 For the more numerous families that have established their households in these states in contemplation of continued legal relationships, the disruptive potential of exclusionary legislation is equally severe. Where one state's laws establish family units involving same-sex couples precisely in order to provide both tangible and psychic benefits to children of stable families,91 to deprive children of those benefits because of their

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89. Id. at 220 (quoting Trimble v. Gordon, 433 U.S. 762, 770 (1977)).


91. See, e.g., In re M.M.D. & B.H.M., 662 A.2d 837, 857 (D.C. App. 1995) (allowing adopt-
parents’ decision to migrate to a new state raises constitutional objections of the first order.

I realize, of course, that this is hardly an airtight legal argument. On one front, it is clear that the Court has thus far invoked the value of the "marital family" as a method of justifying government decisions, rather than a basis for challenging them. Justice Scalia has cautioned, for a plurality, against "turn[ing] around" the approval in Michael H. of "favored treatment" of traditional family relationships into "a constitutional requirement that [a] State [must] recognize [the primacy of those relationships]." 92 Establishing the premise that a legally recognized non-biological family that has developed intimate emotional linkages has a constitutional interest in remaining intact requires extrapolation from current doctrine.

On a second front, the recognition of a constitutional interest does not mean that interest will prevail. States are, in appropriately severe cases, entitled to dismember even traditional families in the interests of protecting children. The family values argument puts directly at issue the factual premise that it is a grave deprivation to sunder children’s relationship with their non-biological parent in a same-sex marriage. The premise is not likely to go unchallenged, for there are certainly states that will maintain that gays and lesbians are per se unfit parents. This, indeed, is the primary argument advanced in the most recent round of litigation in Hawaii on behalf of the state’s supposed “compelling interest” in denying recognition to same-sex marital unions.93

But this challenge is, it seems to me, an opportunity. Unlike the appropriate definition of “marriage,” the issue of what hurts children can be joined on a basis which both is susceptible to concrete proof and allows advocates to dramatize the human costs of non-recognition. I am not sure what proof would disabuse a judge of an intuition that “marriage” is by definition the union of a man and a woman; it is quite clear, however, how to present evidence that children are in pain.94


93. See Baehr v. Miike, No. CIV. 91-1394, 1996 WL 694235, at *3 (Haw. Cir. Ct. Dec. 3, 1996) (state claims interest in promoting “optimal development of children is inconsistent with same-sex marriage); see id. at *18 (holding state has failed to establish any adverse effect on children).

94. In the era of miscegenation statutes, judges professing deep hostility to interracial cohab-
The extant studies suggest that the state will have a hard case to make, and it will rapidly become clear the extent to which animosity toward gays and lesbians is at work.

The argument from family values has the virtue of focusing attention on the real human costs associated with a denial of recognition to extraterritorial same-sex marriages. If there is something wrong with these denials, it is not primarily an affront to Hawaii’s sovereign interests. It is the practical cruelty of dismembering a family that has been legally joined, and the denial of equal respect in refusing to acknowledge a legally sanctioned relationship on the basis of invidious animus. Relatively rarely can constitutional intervention establish loving relationships, but the argument from family values at least provides the hope of focusing on the reasons to prevent the states from extinguishing loving families which already exist.