

Full Faith & Credit to Marriages

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WHEN HAWAII'S SUPREME COURT let it be known that it was about to legalize marriages between members of the same sex,¹ it made headlines across the country. Not only had this unprecedented decision enormous implications for Hawaii itself; there was much speculation about its effect on the marriage laws of other states. For Article IV, § 1 of the federal Constitution requires each state to give "full faith and credit ... to the public acts, records, and judicial proceedings of every other state." Hopes and fears were voiced that this provision might

enable single-sex couples to evade the restrictive laws of their own states by traveling to Hawaii to get married, since it seemed to require other states to respect the Hawaii ceremony.²

Congress panicked, hastily enacting a law purporting to absolve states of any obligation to accept single-sex marriages contracted elsewhere.³ In so doing, in addition to troublesome overbreadth issues,⁴ it raised a more fundamental constitutional question. For although Article IV, § 1 contains a clause expressly empowering Congress to "prescribe ...

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1 *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993). See also *Baehr v. Muike*, CIV No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996) (holding the statutory ban on such marriages unconstitutional).

2 That Hawaii now seems on the brink of reversing this decision by constitutional amendment does not diminish the significance of the question; it will recur in one form or another so long as states continue to regulate marriage.

3 110 Stat. 2419, 28 U.S.C. § 1738c (Sep. 21, 1996):

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

4 See Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 2000 (1997).

the effect” of each state’s “public acts, records, and judicial proceedings” in another, it begins by requiring that those acts, records, and proceedings be given “full faith and credit.” The relation between these two provisions is disputed and murky, but the Supreme Court held as early as 1813 that the statute requiring “full faith and credit” to such proceedings gave judgments the same preclusive effect everywhere as they had in the state that rendered them.⁵ If Article IV itself requires respect for Hawaii marriages, Congress cannot provide otherwise; like § 5 of the fourteenth amendment, the “effects” clause gives authority only to implement the constitutional provision, not to amend it.⁶

But the full faith and credit clause does not require other states to permit Hawaii to regulate the marital status of their citizens.

It would be wondrous strange if it did. The idea behind Article IV is to promote interstate harmony by requiring the states to be good neighbors. The privileges and immunities clause forbids one state to treat another’s citizens as foreigners. The extradition and full faith and credit clauses require the states affirmatively to assist one another in the enforcement of their judgments and laws. Underlying both of these clauses is a fundamental principle of federalism: Each state has the right to regulate its own internal affairs.

The marital status of Illinois citizens is none of Hawaii’s business. Illinois has its own marriage laws, reflecting its legislative judgment as to what marriage is all about and who should be permitted to enter into it with whom. Illinois does not permit marriages between persons under the age of sixteen, or between brothers and sisters, or between people

who are already married to someone else. Nor does it permit marriages between persons of the same gender.⁷

That decision may be wise or foolish, but it is not unconstitutional.⁸ It is a decision that Illinois should be able to make for its own citizens in a federal system.

But, you say, there is precedent for permitting one state to make laws for the entire country. Everyone knows that corporations everywhere are governed by Delaware law and that, before other states liberalized their divorce laws, Nevada ran a cottage industry in undermining them. Therefore, the argument goes, there is nothing novel in concluding that Hawaii can foist its own ideas of marriage off on unconsenting sister states.

Of course it is far from obvious that Hawaii, or any other state that might legalize homosexual unions, would *wish* to impose its ideas on other states. It might well choose to follow the example of Illinois, which, out of respect for the interests of other states in regulating their own affairs, invalidates a purported Illinois marriage that contravenes the laws of the parties’ home state and demands an inquiry into those laws before a license can be issued.⁹ No clause of the Constitution *requires* one state to trample gratuitously on the interests of another.¹⁰

But if Hawaii did choose to subsidize its tourist industry by offering certificates of legitimacy to single-sex couples from Yonkers and Baton Rouge, neither the Delaware nor the Nevada analogy would afford it the slightest support. The corporate and divorce exceptions are weird enough to begin with, but they remain exceptions; they do not justify permitting Hawaii or any other state to make mar-

5 *Mills v. Duryee*, 11 U.S. 481 (1813).

6 See *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997); Kramer, *supra* note 4, at 1999-2007.

7 750 ILL. COMP. STAT. ANN. 5/201, 5/203(1), 5/212(a)(1), (2), (5).

8 Cf. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

9 750 ILL. COMP. STAT. ANN. 5/217, 5/218.

10 See *Sosna v. Iowa*, 419 U.S. 393, 407 (1975); *Conner v. Elliott*, 59 U.S. 591, 594 (1856).

riage law for the whole United States.

The Supreme Court has never said that other states must allow their citizens doing business within their borders to incorporate under Delaware law. That is a choice the states have made for themselves. In effect they have elected to give local businesses the opportunity to choose between Delaware's *laissez faire* system of corporate governance and their own more paternalistic rules protecting the rights of individual shareholders. If states want to do that, there is nothing in the Constitution to stop them. But that does not mean they are *required* to do so.

Illinois does not take the same nonchalant attitude toward evasion of its marriage laws as it does toward Delaware incorporation. Like other states, Illinois is happy in most cases to recognize marriages valid under the law of the place they are celebrated.¹¹ When citizens of other states are involved, Illinois seldom has any reason to tell them what their marital status is, though it might wish to reserve the right to regulate their conduct within its borders. Even when Illinois citizens marry in other states, Illinois has no reason to object unless the union offends its public policy. Some years ago, however, the Illinois legislature adopted the Uniform Marriage Evasion Act, which denies recognition to any marriage contracted by Illinois citizens outside the state in contravention of the limitations imposed by Illinois law.¹² It is hard to see how it could have

done otherwise if it believed in its own restrictions. And thus the corporate cases provide no basis for Illinois recognition of single-sex marriages contracted by its residents in Hawaii.¹³

The divorce case is more troublesome, for there the Supreme Court did make it possible for Nevada to inflict its libertarian views on other states against their will. But it did so only because of the special status of judicial proceedings under the full faith and credit clause.

The Court made clear in *Williams v. North Carolina* that Nevada had no right to divorce North Carolina citizens. Domicile, the Court said in an opinion that went even further than respect for the home state's interest demanded, was a *jurisdictional* predicate of authority to grant a divorce.¹⁴ But divorce was a judicial proceeding, and the principle of finality embodied in the familiar law of *res judicata*, the Court declared in the later case of *Sherrer v. Sherrer*, demanded that there be an end to litigation.¹⁵ Once there has been an opportunity to contest them, even jurisdictional questions are normally foreclosed; the costs of relitigation outweigh the benefits of correcting an occasional erroneous decision.¹⁶

In *Sherrer* the Supreme Court applied this reasoning unblinkingly to divorces over an unanswerable dissent that pointed out the incongruity of equating divorce cases with ordinary judicial proceedings.¹⁷ To require an interested state to recognize the judgment of a disinter-

11 750 ILL. COMP. STAT. ANN. 5/213.

12 750 ILL. COMP. STAT. ANN. 5/216. In addition, the general provision for recognition of foreign marriages contains an explicit exception for those "contrary to the public policy of this State," § 5/213, and a new § 5/213.1 makes clear that "[a] marriage between 2 individuals of the same sex" is contrary to public policy.

13 For an excellent examination of the state choice-of-law aspects of single-sex marriage (with enlightening analogies to earlier cases involving interracial unions) see Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, TEX. L. REV. (forthcoming 1998).

14 325 U.S. 226 (1945). For Nevada to divorce North Carolinians pursuant to *North Carolina* law would arguably promote, not frustrate North Carolina policy.

15 334 U.S. 343 (1948).

16 See *Durfee v. Duke*, 375 U.S. 106 (1963).

17 334 U.S. 343; see also *Johnson v. Muelberger*, 340 U.S. 581 (1951).

ested one that subverts its legitimate public policy is to compromise the basic principle that each state has the right to regulate its own affairs.¹⁸ It is acceptable, if at all, only on the hypothesis that there be an adequate opportunity to protect the state's interest in the original proceeding – reinforced by the possibility of review by the impartial Supreme Court.¹⁹

In the ordinary tort or contract case the adversary nature of the proceeding ensures that the party who stands to benefit under the appropriate law has the necessary incentive to insist on its application. There was no such guarantee in a divorce case, where as often as not both parties were hell-bent on frustrating a rule that denied them the right to reorder their lives as they saw fit.²⁰

Since the reason for the normal deference to foreign judgments does not apply to consent divorces, the Supreme Court ought to have made an exception for them. But in the case of Hawaii marriages, the rule does not apply at all. For marriage, unlike divorce, is not a judicial proceeding.

Yes, marriage ceremonies are often performed by judges. But not everything judges do is judicial. Whether a marriage is celebrated by a judge, a cleric, or a bureaucrat is immaterial; not even in form is it an adversary

proceeding. The ritual inquiry whether anyone has objections is sometimes retained, and once in a great while it must ferret out an impediment. But there are no pleadings, no trials, briefs, or oral arguments; there is no judgment and no opinion. Marriage is not even quasi-judicial; it is a purely *administrative* proceeding analogous to the grant of a building permit or a corporate charter. And no court in the country, so far as I have been able to discover, has ever required a state to give conclusive effect to an administrative order of this nature.²¹

The absence of precedent is no accident. When efforts were made during the Jacksonian era to require one state to recognize corporations created by another, reliance was placed on the privileges and immunities clause of Article IV. Although the Constitution required that full faith and credit be given to “records” as well as judicial proceedings, and although the implementing statute accorded nonjudicial records the same “full faith and credit” elsewhere as they had at home,²² it never occurred to anyone to suggest that the full faith and credit provision required that one state's charter (whether legislative or administrative) be binding on another. If a Delaware corporation did business in Illinois, that was because Illinois law said it could, not be-

18 See *Fauntleroy v. Lum*, 210 U.S. 230, 238 (1908) (White, C.J., dissenting).

19 28 U.S.C. § 1257(a).

20 See David P. Currie, *Suitcase Divorce in the Conflict of Laws*, 34 U. CHI. L. REV. 26 (1966).

21 Workers' compensation proceedings, which the Court has held entitled to such respect, are adversary and quasi-judicial; it cannot be determinative whether a state chooses to label its tribunal an agency or a court. *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 443 (1943); *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980). Decisions declining to give professional licenses extraterritorial effect include *State v. Rosenkrans*, 30 R.I. 374, 75 A. 491 (1910), and *Louisiana Bd. of Pharmacy v. Smith*, 226 La. 537, 548, 76 So.2d 722, 726 (1954). See also *Alabama v. Engler*, 85 F.3d 1205, 1208-09 (6th Cir. 1996) (refusing to give binding effect to a Governor's order refusing extradition). One trial court, without discussion, recently declared itself prepared to give full faith and credit to a foreign common-law marriage. Since such marriages by definition involve neither “records” nor “judicial proceedings,” the court properly went on to say it was really contemplating application of foreign law to uphold the marriage; and it proceeded to determine for itself whether the requirements of that law had been met. *Ram v. Ramharack*, 150 Misc. 2d 1009, 571 N.Y.S.2d 190 (1991).

22 2 Stat. 298, 299, § 1 (1804) (now codified at 28 U.S.C. § 1739).

cause of anything in Delaware law. For the dominant understanding was that the laws of one state had no force in another. No one seemed to think that a corporate charter was entitled to the same binding effect as a judicial judgment.²³

It is easy enough to see why. For the considerations that require that foreign judgments be given conclusive effect do not apply to garden-variety administrative actions.

Administrative acts are normally not conclusive even in the state where they are performed. There may be time limits for attacking permits and licenses in court, but they are typically subject to judicial challenge. So, most pertinently, are marriages. Illinois is by no means alone in providing for annulment of marriages the parties had no right to contract.²⁴ Hawaii, not surprisingly, has a similar provision. Although Hawaii's statute mentions only six grounds for annulment (and identity of gender is not among them), its predecessor was held not to disturb the preexisting equitable power to annul an illegal marriage.²⁵ Thus, even if foreign marriages were entitled to the same preclusive effect as foreign judgments, it seems probable that an Illinois court could raise the question whether it was proper for Hawaii to marry Illinois citizens on the basis of Hawaii law. For the same question would very likely be open to a Hawaii court in an annulment proceeding, and the Constitution requires that other states give a judgment only the same conclusive effect it enjoys at home.²⁶

But the ubiquity of annulment proceedings proves more than that application of even the strictest standard of full faith and credit might not require Illinois to accept a Hawaii mar-

riage without investigating its legality. It demonstrates that the states themselves do not consider marriage entitled to the same conclusive effect as divorce, and we have already seen why. To insulate an administrative order from judicial reexamination in the absence of a meaningful opportunity – even in theory – to contest the order in the original proceeding would be difficult to reconcile with the rule of law.

That is why the courts have never read the full faith and credit clause or its implementing statute to give binding force to administrative orders that are not quasi-judicial. That is why the question in interstate marriage cases has been not full faith and credit to foreign records but the applicability of foreign law. And while both Constitution and statute require respect for foreign legislation as well as foreign judgments, their demands are less exacting in the case of laws, for the same reason we have seen before.

When a judicial judgment has been rendered, the paramount policy of finality requires that it be respected; the place to correct errors is in the initial proceeding and on direct review. When there is no judgment, to require each state to apply the other's law would make no sense at all. Absent a final adjudication, the purpose of the clause is not finality; it is to help allocate legislative authority so as to further the federal principle that each state has the right to manage its own affairs. Consequently, modern decisions never require one state with a legitimate interest in applying its own law to defer to the laws of another; there is not the slightest chance the Supreme Court would hold Illinois without power to invalidate the marriage of Illinois citizens who went

23 See *Bank of Augusta v. Earle*, 38 U.S. 519 (1839); Gerard C. Henderson, *THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW* ch. 6 (1918).

24 750 ILL. COMP. STAT. ANN. 5/301(4).

25 See HAW. REV. STAT. § 580-21; *Sakaihara v. Sakaihara*, 26 Haw. 89 (1921); *Leong v. Leong*, 29 Haw. 770, 795 (1927) (dictum).


26 *Kovacs v. Brewer*, 356 U.S. 604 (1958).

to Hawaii to evade its laws.²⁷

That is not all. If Hawaii had a legitimate interest of its own in the marital status of Illinois citizens, under modern Supreme Court decisions it could apply its own law as well; whether the parties were married would depend upon which state first rendered a judgment in the matter. That would presumably be the case if one party were from Illinois and the other from Hawaii. This solution is untidy and incomplete, but the Court cannot square the circle; its jurisprudence is a confession of incapacity to come up with satisfactory reasons for finding such a case any more the business of one state than of the other.²⁸

But Hawaii *has* no legitimate interest in the marital status of Illinois citizens as such. That is not to say it must punish them for engaging in acts within its boundaries that would be prohibited in Illinois – any more than that Hawaii can license its citizens to violate the laws of Illinois when they go there. It is to say it is none of Hawaii's business what Illinois

citizens do in Illinois. The Supreme Court unmistakably confirmed that much when it held that Nevada could not divorce North Carolinians in the *Williams* case.²⁹ The Court has since made clear that for a disinterested state to meddle with the affairs of another state both denies full faith and credit to the latter's laws and deprives the losing party of liberty or property without due process of law.³⁰

Enough. The full faith and credit clause is designed to promote interstate harmony, not to destroy it. Its purpose is to make it easier for a state to regulate its own affairs, not to enable it to fiddle with the affairs of others. There are plenty of tough issues about the application of the clause, but the case of Illinois citizens who go to Hawaii to evade restrictive marriage laws does not raise them. The answer to the old question whether the island of Tobago can make laws for the whole world is still No; and neither can the islands of Hawaii, unless other states are willing to let them. 

27 *Pacific Employers Ins. Co. v. Industrial Acc. Comm'n*, 306 U.S. 493 (1939). Professor Kramer notwithstanding, I see neither in the purposes of the constitutional provision nor in more recent decisions applying it any basis for concluding that an interested state must employ any particular form of words in order to decide a case according to its own conception of public policy. See *Crider v. Zurich Ins. Co.*, 380 U.S. 39 (1965); *Pearson v. Northeast Airlines*, 309 F.2d 553 (2d Cir. 1962); Kramer, *supra* note 4, at 1980-99. As for the "equality component" of full faith and credit, see Kramer, *supra* note 4, at 1980, citing *Hughes v. Fetter*, 341 U.S. 609 (1951), Illinois does not discriminate against out-of-state marriages; if it can distinguish between heterosexual and homosexual unions contracted at home, it can make the same distinction when they are contracted abroad.

28 See *Pacific Employers*, 306 U.S. 493.

29 See note 14.

30 *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).