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From Slavery to Same-Sex Marriage: Comity Versus Public Policy in Inter-jurisdictional Recognition of Controversial Domestic Relations

*Lynn D. Wardle*

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I. INTRODUCTION: COMITY VERSUS DOMESTIC POLICY INTEGRITY FOR FAMILY RELATIONS

The creation of new or substantially redefined family relationship forms to include same-sex couples has sparked not only passionate intra-jurisdictional controversy about those domestic public policies, but also enormous inter-jurisdictional controversy about whether (and, if so, under what conditions and subject to what limits) such relationships should be recognized in other jurisdictions. Since 1856...
federalism in family law has been the prevailing rule since the adoption of the Constitution of the United States in 1788, there have been significant differences in the family laws of the American states since the beginning of the nation. Thus, it is not surprising that the American states have taken at least six very different approaches regarding the controversy over whether same-gender family relationships should be legally treated as valid domestic relationships: (1) some states allow same-sex marriage; (2) some do not allow same-sex marriage but have created marriage-equivalent same-sex civil unions (sometimes called domestic partnerships) with essentially all the same legal rights and incidents as conjugal marriages; (3) some do not allow same-sex marriage or marriage-equivalent same-sex unions, but have created limited status categories with (or have extended) some limited benefits and relational incidents to same-sex couples; (4) some states allow same-sex marriage, and/or equivalent civil unions, and/or limited domestic unions with limited benefits, and also allow same-sex partner adoption; (5) some states do not allow same-sex marriage, equivalent civil unions, or limited same-sex unions-or-benefits, but do allow same-sex partner adoption; and (6) some states do not allow same-sex marriage, equivalent civil unions, limited domestic unions with limited benefits, or same-sex partner adoption. All of these different approaches to gay family relations may come into conflict across jurisdictional boundaries. The determination of such conflicts of laws requires resolution of tensions between inter-jurisdictional comity, local interpretations of international law principles, and the strength of local domestic relations policies reflecting the interests of the interested sovereigns, especially the deciding jurisdiction’s sovereign.

As discussed in further detail below, constitutional, statutory or appellate court interpretations of laws in at least eighteen American states permit the formation and existence of at least some family relationships for same-sex couples, including one or more of the

1. See generally LYNN D. WARDLE & LAURENCE C. NOLAN, FUNDAMENTAL PRINCIPLES OF FAMILY LAW 27 (2d ed. 2006) (“[T]here is no such thing as THE family law of the United States of America. Rather, there are two (or fifty-two, depending on your perspective) sets and systems of family law in the United States, varying tremendously in substance, procedures and structures from each other.”).

2. See infra Part III.A.
following: same-sex marriage, marriage-equivalent same-sex civil unions or marriage-equivalent domestic partnerships, limited status and/or benefits for same-sex partners, and, in at least some circumstances, adoption of children by same-sex couples or partners. On the other hand, at least forty-five states have constitutional or statutory prohibitions against same-sex marriage, and at least half of the state legislatures that have addressed the issue of adoption by same-sex partners have prohibited such adoptions.

A thoughtful lawyer recently asked: "[W]hat happens when these different laws collide, for example, when a same-sex couple that married in Massachusetts moves to a state that only recognizes civil unions? . . . What about custody of children? Inheritance? Divorce? The legal term for these questions is 'conflicts of law.'" He predicted: "Such conflicts will dominate future legal arguments


7. See infra Part III.A. For a discussion of the states that allow and prohibit adoption by same-sex partners, see Lynn D. Wardle, The “Inner Lives” of Children in Lesbian Adoption: Narratives and Other Concerns, 18 ST. THOMAS L. REV. 511, 513-15 (2005) (noting that four state statutes bar same-sex adoption, while four allow it, but some state courts have overturned public policies against same-sex partner adoption).


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about same-sex marriage." I agree. The May 2008 California Supreme Court decision in In re Marriage Cases,\textsuperscript{11} legalizing same-sex marriage in California (which, unlike Massachusetts, allows couples from other states to enter into marriages prohibited in their home states\textsuperscript{12}) underscores the significance of this issue since that ruling has, for the first time, opened the door for general interstate exportation of same-sex marriages within the United States.

Controversies about the importation of, interstate and international effects of, and the legal status and consequences in foreign jurisdictions of same-sex marriage, civil unions, domestic partnerships, and gay/lesbian couple or partner adoptions have been increasing in the past decade. Since 1993 when the Hawai'i Supreme Court suggested that it might mandate legalization of same-sex marriage in Hawai'i,\textsuperscript{13} there has been an ongoing debate over the inter-jurisdictional effects of these "new forms of domestic relations," created by same-sex families.\textsuperscript{14} A key concept in those

\begin{enumerate}
\item Id.; see also Lisa M. Cukier, Marriage and Estate Planning Under Goodridge v. DPH, BOSTON B.I., Nov./Dec. 2004, at 14, 14–15 ("What will happen when same-sex couples who marry in Massachusetts vacation out of state, travel between different states, visit out of state relatives, and relocate to a new state? The predictability and portability of marriage can only be approximated for same-sex couples... Many lesbians and gay men question whether there is any truly appreciable benefit to [same-sex] marriage.").
\item 183 P.3d 384 (Cal. 2008).
\item For articles in support of recognition, see Julie A. Greenburg, When Is Same-Sex Marriage Legal—Full Faith and Credit and Sex Discrimination, 38 CREIGHTON L. REV. 289 (2005); and Mark P. Strasser, "Defending" Marriage in Light of the Moreno-Clebourne-Romer-Lawrence Jurisprudence: Why DOMA Cannot Pass Muster After Lawrence, 38
\end{enumerate}
debates is the influence of comity in inter-jurisdictional recognition of relationships that are not permitted in some jurisdictions.

After the Hawai‘i Supreme Court’s *Baehr* decision, the export-import issue regarding same-sex marriage became serious. Many same-sex marriage advocates wrote law review articles asserting that if Hawai‘i, or any other state, legalized same-sex marriage, all other states would be required by the “mandatory comity” of the Full Faith and Credit Clause of the Constitution to recognize same-sex marriage. For example, Deborah M. Henson wrote that “the Supreme Court has allowed far too much laxity with the full faith and credit mandate.” She argued that Article IV, Section 1 should be interpreted to compel other states to recognize same-sex marriage if Hawai‘i or some other state legalizes same-sex marriage. Several other writers in law review and other publications have made similar arguments calling for reading the Full Faith and Credit Clause to require states to recognize same-sex marriages, asserting compulsory recognition and enforcement in all states of “marital


15. While serious, it was not beyond humor. One advocate of same-sex marriage recognition wrote: “After the *Baehr* decision, people joked that ‘[i]f it happens in Hawai‘i, gay and lesbian people will sink the island. . . . We will all arrive the same day, get married, and the island will just go under.’” Cynthia M. Reed, *When Love, Comity, and Justice Conquer Borders: INS Recognition of Same-Sex Marriage*, 28 COLUM. HUM. RTS. L. REV. 97, 115 (1996).


17. Id. at 584–91.

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decrees" recognizing same-sex marriages, or asserting that "[i]f Hawai'i legalizes same-sex marriages, the effects will be felt across the country since other states must recognize gay marriages performed in Hawai'i under the Full Faith and Credit Clause of the U.S. Constitution." Likewise, one of the leading gay-rights advocates (and the successful trial lawyer in Baehr v. Miike), Evan Wolfson, wrote: "[F]ull faith and credit recognition of same-sex marriages is mandated by the plain meaning of the Full Faith and Credit Clause, and by basic federalist imperatives." He further argued: "[I]f you're married, you're married; this is one country, and you don't get a marriage visa when you cross a state border."

Thus, advocates of same-sex domestic relations openly promoted the use of federal law (the Full Faith and Credit Clause and the principle of strict comity as a federal common law choice of law principle) to force unwilling states to recognize same-sex marriages. Not surprisingly, legislators in many states were convinced of the need to respond with legislation to bar the importation of same-sex marriage. Many states (twenty-seven by 2006) enacted statutes expressing unequivocally strong public policy against same-sex marriage.

Congress also acted under its power to declare the interstate "effects" of state laws, records, and judgments. The Defense of Marriage Act (DOMA), enacted by Congress in 1996, prevents the use of federal full faith and credit doctrine or other federal comity or conflicts rules to force any state to recognize same-


sex marriages from other states; it also declares that same-sex marriages will not be recognized for purposes of federal law. However, DOMA does not forbid or prevent any state from voluntarily recognizing same-sex marriage or any other controversial domestic relations. Many profound issues of conflicts law arise concerning contemporary controversial (mostly gay or lesbian) domestic relations, despite the presence or absence of existing federal and state legislation.

Interstate and international conflict of laws issues concerning controversial forms of domestic relationships are not uncommon in American legal history. It is helpful to remember this in the face of the passion and politics surrounding the contemporary controversies over the interstate recognition of new (or redefined old) forms of domestic relations for same-sex relationships today. They have been

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24. Pub. L. No. 104-199, 110 Stat. 2419, § 2 (codified at 28 U.S.C. § 1738C) ("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."); see also id. § 3 (codified at 1 U.S.C. § 7).


26. Developing scholarship seems to confirm earlier analysis that Congress had the proper and constitutional authority to enact DOMA. See Gillian E. Metzger, Congress, Article IV, and Interstate Relations, 120 HARR. L. REV. 1468, 1493-94 (2007) ("Not surprisingly, given the dearth of Effects Clause legislation, little precedent exists on the scope of Congress’s power under that clause, particularly regarding congressional power to contract the credit otherwise due state laws and judgments. The text of Section 1, however, supports reading the Effects Clause in a parallel fashion to Congress’s power under the Commerce Clause, resulting in Congress having authority to enact recognition requirements that might be broader or narrower than those imposed by the courts.").

27. The objection that these are not really “new” forms of family relationships but merely the expansion and extension of old forms to new categories of eligible persons is, at best, merely a semantic quibble. Of course, as to civil unions and domestic partnerships, the quibble is factually and linguistically indefensible—they are new in both form and substance, in label as well as in existence. As to same-sex marriage and gay/lesbian adoption, the incorporation of a pre-existing label (e.g., "marriage" or "adoption") fails to conceal the reality and significance of the nature of the change; it is indisputable that the newly legalized form of the relationships have profoundly altered the historic and ubiquitous understanding of those relationships as they have been known to the law and to society in all prior decades and centuries (and millennia, for marriage), as well as in virtually all cultures, societies, and nations. While the label may be old, the definition of the relationship is undeniably new. Most
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a regular subject of controversy in American conflict of laws jurisprudence throughout the history of our nation. Indeed, at the very time of the founding of our nation, interstate recognition of one particularly notorious form of domestic relations, slavery, was already a deeply divisive issue, resulting in several special provisions being included in the 1787 Constitution of the United States—including some unique choice of law provisions. The litigation that followed led to some of the most incendiary judicial cases decided in the first seventy-five years of our nation’s existence. There have continued to be many other serious contentions over inter-jurisdictional recognition of other controversial family forms.

The tension between comity and domestic policy when a foreign-created controversial relationship is introduced into another jurisdiction is neither novel in the area of family law nor is it insoluble. The recent emergence of a new set of controversial forms of domestic relationships as an outgrowth of the gay rights movement—namely same-sex marriage, marriage-equivalent civil unions, domestic partnerships, and adoptions by gay and lesbian couples and partners (herein collectively “gay family relations”)—and the rejection of interstate importation of such relationships into jurisdictions where they are not permitted are likely not overly threatening to our Union and its legal values when viewed in this historical context. This Article will position the contemporary debate over conflicts of laws issues regarding gay family relations within the long history of public controversies involving inter-jurisdictional recognition of controversial forms of domestic relationships. It will examine the intersection of family law and conflict of laws to ascertain the principles that have guided the resolution of those past controversies, to inform the resolution of current controversies over same-gender marriage, same-sex civil unions and domestic partnership benefits, and gay and lesbian adoptions. It will compare the conflict of laws treatment of similar issues in history with current developments regarding inter-jurisdictional recognition of gay family relations.

Importantly, perhaps, for this Article, the enormous, intense, ongoing controversy surrounding the redefinition of “marriage” and “adoption” to include same-sex couples underscores the novelty and the perceived significance of the change. To attempt to evade the serious questions such changes present by claiming that these are not really “new” forms of those relationships simply denies the reality of the controversy.
This Article seeks first to ascertain the controlling principles used in the past to resolve inter-jurisdictional disputes over controversial domestic relations. It then applies these principles to current inter-jurisdictional conflicts involving recognition of gay family relationships. Finally, it will discuss the tensions, constancies, and changes in this controversial area of conflict of laws.

Part II of this Article reviews the history of interstate recognition of controversial forms of domestic relations. Part II.A begins with interstate issues regarding slavery. Part II.B examines the subsequent controversies concerning interracial marriages and the highly contentious conflict of laws issues that arose concerning inter-jurisdictional avoidance and enforcement of anti-miscegenation laws in the century following the end of the Civil War. In the last half of the nineteenth century, interstate and international recognition of another controversial form of domestic relations, polygamy, produced some interesting Anglo-American judicial decisions about inter-jurisdictional issues that later led to remarkable difficulties—and, ultimately, repudiation—by the middle of the twentieth century; those cases are reviewed in Part II.B.2. Less well-known but similarly divisive cases in the twentieth century involved interstate issues involving evasive marriages of teenagers, which are reviewed in Part II.B.4. Similar conflicts involving consanguinity restrictions on marriage are reviewed in Part II.B.3. In Part II.B.5 historical precedents involving interstate issues concerning controversial forms of adoption, including adoptions of adults generally and adoptions of or by homosexual partners are reviewed. Then, in Part II.C, the principles governing the historical resolution of conflicts involving controversial family relations are discerned and analyzed.

Turning to present times, Part III of this Article provides a brief report and review of reported legal developments involving interstate issues regarding same-sex domestic relations for the twelve years from 1996–2007. Thus, in Part III.A, judicial decisions involving such questions as interstate recognition of same-sex marriages, civil unions, domestic partnerships, and of specific benefits or rights to benefits, as well as obligations or duties that flow from those relations, are noted to illustrate the breadth of contexts in which these conflicts issues arise. The diversity of cases is also illustrated with cases addressing interstate recognition of contracts signed before, during, or upon termination of such relations, in addition to alimony, property division, and related orders concerning rights and
duties flowing from or resulting from those adult horizontal domestic relationships. Additionally, interstate recognition of adoptions by gay and lesbian couples, rights or duties (including custody and visitation), and the incidental aspects or consequences of such parent-child relations (including child support) have also arisen in cases that are cited. In addition to these judicial decisions, positive law statutory developments concerning inter-jurisdictional gay family issues are reviewed in Part III.B, as well as constitutional amendments and provisions that have come into force during this period of time that address inter-jurisdictional gay family issues.

II. POSITIONING CURRENT DEBATES OVER THE IMPORTATION OF CONTROVERSIAL FORMS OF DOMESTIC RELATIONS WITHIN THE HISTORY OF AMERICAN CONFLICTS LAW

A. The Bitter Controversy Over Inter-jurisdictional Recognition of Slavery

Because slavery differs from other domestic relations in several significant ways—including the legalization of force to compel slaves to maintain their oppressed position—direct comparisons between slavery and other controversial domestic relations are obviously not of general application. However, the slavery cases do represent very well the conflict of laws principles that are in tension in and that underlie inter-jurisdictional recognition of controversial domestic relations such as the others discussed in the balance of this Article, including, inter alia, interstate recognition of same-sex family relations today. The inter-jurisdictional recognition of slavery in the United States not only illustrates the development of choice of law principles governing interstate recognition of controversial domestic relations in the United States, but is necessary in understanding these principles. The factors in tension and, especially, the balance between comity and public policy in determining how slavery relationships were recognized in different states sheds light on how states have historically balanced local values and interstate realities.

While today we tend to look back upon slavery as a unique legal aberration, at common law slavery was “a domestic relation” and was
regulated as part of the law of domestic relations. At one time it was agreed that slaves, though lacking in legal status, were considered to be part of the master's domestic family. For example, long before American independence, John Locke explained in his Second Treatise of Government that "a master of a family with all these subordinate relations of wife, children, servants and slaves, [are] united under the domestic rule of a family . . . ."

Likewise, Blackstone wrote that the four great categories of personal relations known in English law were husband and wife, parent and child, guardian and ward, and master and servant.

The tradition of slaves being considered legally as part of the family of the slave-owner dates back at least to Roman times. In Roman law, the family included "all the descendants of a living ancestor, including adopted persons, also the servants and the slaves that were under the legal power (potestas) of the ancestor who was called the paterfamilias." The head of the household, or paterfamilias, controlled the lives and property of all the members of his family, including wives, children, slaves, and certain other relatives and dependents; the slaves were in many ways like sons.

A Roman household might contain four classes of subordinates: slaves, children (both in potestate), women in hand (in manu) and persons in handtake (in mancipio). . . . All of these were in the

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30. John Locke, Two Treatises of Government, e.g. 303–304 (David Wootton ed., Mentor 1993) (1690) ("[a]nd the family is as much a family, and his power as paterfamilias as great, whether there be any slaves in his family or no").
33. Indeed, "in view of the autocratic power of the paterfamilias it is not easy to see much difference in primitive [Roman] law between the positions of son and slaves." B.W. Buckland & Arnold D. McNair, Roman Law and Common Law 26 (2d ed. 1965). "[T]he master had power over the slave (potestas dominica) corresponding to the power of paterfamilias over his son (potestas patria)." Burdick, supra note 32, at 189; see also O.F. Robinson, The Sources of Roman Law 118 (1997) (stating that in matters of private law "the slave could be fitted into the legal treatment of sons, when he was being thought of as being a rational being . . . .").
power of the head of the family who has *dominus* (owner or master) to the slaves, and *pater* to the free.\textsuperscript{34}

The Roman family was an empire within the empire. It was "governed by the *paterfamilias*. The wife, the children, the slaves, the farm-house, the flocks and herds [we]re in his hands."\textsuperscript{35}

The tradition of slaves being considered part of the family survived to some extent in the American colonies. Moreover, some scholars have noted that part of the reason that the Southern States resisted abolitionists’ efforts so vigorously was a corrupted form of the principle that we today call family autonomy or parents’ rights. Southerners viewed abolition as a threat to the integrity and independence of the institution of the family as they knew and understood it.\textsuperscript{36}

Since slavery was a form of "domestic relations," how the issue of inter-jurisdictional recognition of slavery was resolved in Anglo-American law may provide some historical guidance regarding how controversial modern forms of family relations may be treated in conflict of laws. The legal history shows an evolution from a primitive practice of the dominance of the principle of comity to a more mature rule deferring to strong local domestic policy.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{34} Henry John Rozy, 1 Roman Private Law in the Times of Cicero and of the Antonines 52 (Cambridge Univ. Press 1902). See generally id., vol. II, at 52–170 (discussing the Roman family).
\item \textsuperscript{35} Frederick Parker Walton, Historical Introduction to the Roman Law 70 (1920) ("The *paterfamilias* determines who shall belong to the family. . . . He can expel a member from the family. No member of the family but himself can own anything except upon sufferance. They cannot marry without his consent, and even if they are married, he can divorce them. He has the power of life and death over wife and child and grandchild no less than over the slaves or the oxen.").
\item \textsuperscript{36} Hasday, supra note 28, at 1299 (stating that the South opposed abolition because it represented federal intrusion into domestic relations); Kristin A. Collins, Federalism’s Fallacy: The Early Tradition of Federal Family Law and the Invention of States’ Rights, 26 Cardozo L. Rev. 1761, 1844 (2005) (proposed federal regulation of slavery constituted “an ominous threat for slave owners”); Suzanne H. Jackson, Marriages of Convenience, International Marriage Brokers, “Mail Order Brides,” and Domestic Servitude, 38 U. Tol. L. Rev. 895, 917 (2007) (“During congressional debates over the Thirteenth Amendment, southerners in both the House and the Senate raised the terrifying specter that abolishing involuntary servitude would also abolish patriarchal family rights . . . .”).
\end{itemize}
\end{footnotesize}
1. The evolution of the recognition of foreign slaves in English jurisprudence

Prior to the Norman conquest, chattel slavery modeled in Roman law was widespread in Anglo-Saxon England. The Doomsday Book recorded in 1086 that between ten and twenty-five percent of the people of England were slaves.37 The Normans, lacking a tradition of chattel slavery and believing that free men would be more productive, set about emancipating chattel slaves.38 "Though Saxon chattel slavery disappeared within sixty years of the Norman Conquest, many English remained villeins: 'Villeins constituted the major portion of the English population as recorded in Domesday Book.'"39 Villeinage was a form of feudal slavery akin to both serfdom and chattel slavery. Villeins regardant were attached to the land, while villeins in gross were attached to their lord personally. While the legal disabilities of the villein and their similarity to chattel slaves are disputed among historians,40 it is undisputed that villeins could be bought and sold and had no significant rights as against their master.41 Blackstone notes that "if they ran away, or were purloined from [their master, they] might be claimed or recovered by Action, like beasts or other chattels."42

Recent scholarship has identified what may be deemed the first (oldest) slavery-recognition case in English law, decided in the year 1259.43 It may have involved villeinage rather than chattel slavery.44

38. Wise, supra note 37, at 242.
39. Id. (citing DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN WESTERN CULTURE 39 (1966)) (emphasis added).
40. Id. at 242 n.103 (citing competing descriptions of villeinage).
41. See PAUL R. HYAMS, KING, LORDS AND PEASANTS IN MEDIEVAL ENGLAND: THE COMMON LAW OF VILLEINAGE IN THE TWELFTH AND THIRTEENTH CENTURIES 2-3 (Clarendon Press 1980); see also Jonathan A. Bush, The First Slave (And Why He Matters), 18 CARDOZO L. REV. 599, 614 (1997) (showing that the villein was free to all the world except slave to his master).
42. BLACKSTONE, supra note 31, at *92.
43. See CALENDAR OF THE PATENT ROLLS, 43 Henry III, A.D. 1258-1266, at 28 (1910). This is discussed in Bush, supra note 41, at 613-20. Bush, in turn, credits Paul Hyams as the discoverer of Bartholomew's Case. Id. at 616 n.56 (citing HYAMS, supra note 41, at 222 n.2).
One Roger de Lynton, later identified as an Italian, a knight of Apulia, had brought with him to England one Bartholomew, "formerly a Sarcean" who had run away. 45 "Roger had already dispatched his squire to find the fugitive, and he then sought a royal order that all persons should assist his search. That order was granted." 46 Professor Jonathan Bush comments:

From this body of doctrine, the terse report of Bartholomew and Roger impliedly drew five distinct points: 1) that a master was free to travel with his slave, retaining ownership rights during and after the sojourn (the sojourner rule); 2) that foreign or non-Christian status, or both, might justify enslavement (the initial enslavement rule); 3) that conversion to Christianity ("sometime a Saracen" implies presently not a Saracen) need not act to manumit a slave (the conversion rule); 4) that a foreign determination of slave status should be accepted (in England) (the comity rule); and, 5) that once found to be a fugitive according to foreign law, a slave should be returned (the fugitive rendition rule). 47

At this time (the middle of the thirteenth century) in England, villeinage was still permitted and widely practiced. There was no significant conflict between recognition of the status and incidents (including the duty not to run away) of slavery with the domestic law of England. In that context, application of the principle of full comity was non-controversial. Note how the notion of comity, that core principle of modern conflicts law, aided the legal importation (by recognition) of foreign slavery into England. The legal approach of using comity to justify the recognition of imported slaves persisted in England for at least another two centuries, and dominated conflicts law in slavery cases in some American states until the Civil War. 48

Comity is not a neutral principle when it comes to acceptance or rejection of controversial domestic relations, although it has the advantage of sounding neutral, reasonable, and non-political. 49 Thus,

45. Id. at 615.
46. Id.
47. Id. at 617 (emphasis added).
48. See infra Part II.A.2, notes 92–165 and accompanying text.
49. See Bush, supra note 41, at 624–25. "In almost all cases, it thus was possible to argue, and perhaps believe, that whatever status a black man or woman held, it was not the fault of English or colonial law or common law notions of freedom." Id. at 629; see also Joel R. Paul, Comity in International Law, 32 HARV. INT’L L. J. 1, 5 (1991) ("[T]his constellation of
historically, "foremost in the construction of [the] legal rationale for early slavery was a notion of comity." However, there are limits to comity, and over the centuries, the limits of comity regarding slavery in England that emanated from domestic policies were clarified and strengthened.

Several writs could be used to initiate a judicial case to determine whether a person was under the burden of *villeinage*. However, "[a]s the common law presumption in favor of liberty evolved, it became increasingly difficult to prove that someone was a villein. . . . Over hundreds of years jurors . . . began to balk at branding anyone a villein. . . . The last case involving a villein was decided in 1618 with a jury verdict favoring the villein." By the middle of the sixteenth century, the domestic policy of England had changed and slavery (including the domestic version of it, *villeinage*) was strongly disfavored, and had been abolished *de facto* though not formally abolished *de jure*. Indeed, by the end of that century, "villeinage was nearly extinct." As Professor Buckland observed:

50. Bush, *supra* note 41, at 627; see also Paul, *supra* note 49, at 22 ("Significantly, Mansfield, Story, and Porter all embraced the principle of comity in connection with the issue of slavery, the hardest case on which to test any conflicts principle. Comity seemed to be the only reconciliating principle to avoid civil strife. Comity would not compel a free state to apply the law of a slave state over a fugitive slave; neither would comity obligate a slave state to enforce the law of a free state over a recaptured fugitive. If comity left no one satisfied, it seemed to give something to all sides.").

51. See Wise, *supra* note 37, at 244-45. The elimination of *villeinage* slavery may have to do with the growing influence of the *Magna Carta* and the importance of liberty to the identity of Englishmen and to the English political-legal system of rights and government. At the time of *Baildonew's Case* in the middle of the thirteenth century the *Magna Carta* (signed June 15, 1215 at Runnymead, England) was not yet a half-century old, and it had been and would continue to be largely ignored by the Tudor monarchy. However, it became the rallying cry of English constitutionalists during the reign of the Stuarts, and by the middle of the sixteenth century, the prestige and influence of the *Magna Carta* had grown significantly, and its basic principles had become more settled in English law and political philosophy. The *Magna Carta*, signed by King John to settle the Crown's dispute with a group of barons, was largely ignored for centuries, through the Tudor period, but slowly grew in influence until it became the rallying cry of the Stuart-era constitutionalists. A.E. Dick Howard, *Commentary, MAGNA CARTA: TEXT AND COMMENTARY* 3-4 (rev. ed., Univ. Press of Va. 1998).

The strong leaning in favor of liberty which has marked the common law from very early times, by encouraging presumptions of manumission and other pleas which would defeat villein status, ultimately succeeded in so completely undermining that status that, as Holdsworth says, “the law of villein status was never repealed. It simply fell into disuse because the persons to whom it applied had ceased to exist.”

Inversely, as the domestic policy in favor of individual liberty and emancipation strengthened, the comity doctrine favoring recognition of slaves from foreign jurisdictions became weaker, more restricted, and subject to more exceptions than it had been earlier. By the middle of the sixteenth century, it was understood in English law, and English legal commentators had explicitly noted (though it was not beyond dispute), that upon arriving in England, a slave’s status as enslaved would not be recognized or given effect. A line of commentaries from the mid-seventeenth century onward agree.

Thus, three centuries after Bartholomew’s Case, the change in legal policies concerning recognition of slave status imposed in other jurisdictions was shown clearly in Cartwright’s Case, decided in Star Chamber in or about 1567. The brief report notes simply that “one Cartwright brought a slave from Russia, and would scourge him, for which he was questioned; and it was resolved that England was too pure an air for slaves to breathe in.” Professor Bush notes that there is a comity dimension to the Cartwright decision because “Cartwright can be viewed as reasoning that all slaves in England were free, while allowing that slaves [in other jurisdictions] outside of England, even under English masters, even in English colonies, need not be.” Thus, comity was in the background reminding Englishmen that most other jurisdictions in the world did not

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53. BUCKLAND & MCNAIR, supra note 33, at 30.
54. Bush, supra note 41, at 610, (citing THOMAS SMITH, DE REPUBLICA ANGLORUM § 3.8, at 107 (L. Alston ed., Cambridge U. Press 1906) (1583)).
55. Id. at 611 (citing WILLIAM HARRISON, THE DESCRIPTION OF ENGLAND 118 (Georges Edelen ed., 1994) (1577) (“[A]ll note of servile bondage is utterly removed.”)).
56. Van Cleve, supra note 52, at 611–12 (citations omitted).
57. Van Cleve says the case was decided in 1569. Van Cleve, supra note 52, at 614.
58. 2 JOHN Rushworth, Historical Collections 468 (1680), quoted in 1 JOHN C. Hurd, THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES 179 (photo. reprint 1968) (1858), cited in Bush, supra note 41, at 610 n.34.
59. Bush, supra note 41, at 626.
guarantee the full extent of universal liberty that England did. But the subordination of comity in *Cartwright* to the “pure air of England”—the notion that slavery was incompatible with the strong domestic policy in England in favor of recognizing the liberty of all individuals in England—was and remains the critical and the celebrated, overriding principle of the decision.

As a matter of careful briefing, it must be acknowledged that the legal holding of the case must be read narrowly in the context of the facts of the dispute. *Cartwright’s Case* could be read fairly to stand for no more than the narrow holding that the right of a master to cruelly beat his slave, even if that is a lawful incident of the legal status or relationship in the jurisdiction in which the status or relationship was created, will not be recognized in England in the face of strong public policy to the contrary. This would suggest a rather narrow exception to the general rule of comity, and the “pure air” statement might be dismissed as mere dictum. However, the law developed in a broader fashion and the *Cartwright* dictum became the effective rule of law.

The most famous precedent limiting the comity principle came two centuries later when, in *Somerset v. Stewart*, Lord Mansfield in 1772 denied that a master could use force to send his slave from England to Jamaica on the ground that even if African and other nations might enslave their own peoples, “English colonies were nowhere authorized to erect novel, extra-legal institutions like slavery.” The bold decision shows how deeply the idea of individual

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60. See Daniel J. Hulsebosch, *Somerset’s Case at the Bar: Securing the “Pure Air” of English Jurisdiction Within the British Empire*, 13 Tex. Wesleyan L. Rev. 699, 702 (2007) (“English freedom was juxtaposed against colonial slavery [in *Somerset’s Case*] . . . . [The contrast] highlighted the balance of governmental powers within England that preserved liberty, in contrast to the unbalanced executive and discretionary governments that, English residents believed, characterized the colonies.”).

61. *Id.* at 701-02.


liberty had become embedded in the fabric of English self-identity: “England was constituted ideologically—as a place predisposed to championing personal liberty.”  

64. T.K. Hunter, *Transatlantic Negotiations: Lord Mansfield, Liberty and Somerset*, 13 TEX. WESLEYAN L. REV. 711, 712 (2007); *id. at 713* (“While strictly speaking, English soil did not automatically confer or restore a slave’s freedom, the characterization of England’s soil by Englishmen themselves as ‘free’ meant that the presence of a person who challenged his/her continued state of bondage stood in tension with that description—a characterization that was an integral part of common law.”).


66. The report of Mansfield’s ruling spells the slave’s name with both one “m” and two. For a review of the facts and significance of the case, see Hunter, *supra* note 64, at 712 (spelling the Virginian’s name as “Steuart”). *See also id. at 714* (noting that Stuart was a customs officer who bought Somerset in Virginia, took him to Boston, then to London).

67. *Id. at 720* (citing Somerset, 98 Eng. Rep. at 499). Regarding the legality of slavery in Africa, see *infra* note 96.


69. Van Cleve, *supra* note 52, at 625.


Thus to alert abolitionists, a petition for writ of *habeas corpus* on behalf of Somerset was filed by attorneys acting pro bono. 69 It was successfully argued on behalf of the slave that “comity does not require domestic recognition of a foreign rule where great policy inconvenience would follow, and recognition of foreign slavery within England would constitute great inconvenience.”  

Lord Mansfield agreed. The brief report of his opinion, just over 200 words (unofficially recorded), informs that Mansfield ruled:

So high an act of dominion must be recognized by the [positive] law of the country where it is used.

The power of a master over his slave has been extremely different, in different countries. The state of slavery is of such a nature, that it...
is incapable of being introduced on any reasons, moral or political; but only by positive law.

[It's so odious, that nothing can be suffered to support it, but positive law. . . .]

Regarding comity toward another sovereign or the law of another jurisdiction, Mansfield further reasoned, “Whatever inconveniences, therefore, may follow from the decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged.”

Thus, Mansfield invoked four limiting principles to contain and circumvent the comity doctrine in the case of slavery: (1) the principle of vindicating the overriding public policy of the local forum, despite “inconveniences” that may result for the law or affairs in another jurisdiction, (2) the principle that despite (or because of) the wide variety of laws regarding the status and incidents of slavery, no sovereign is required by comity to create a controversial domestic relationship unknown or disallowed in its own territory, (3) the principle that the positive law of the realm controls the recognition issue (inviting Parliament to legislate to settle the issue), and (4) the controlling principle that even if the foreign status of slavery were recognized under conflicts principles prevailing at the time, England need not and would “not recognize the ‘incidents’ of that status that were considered ‘inconvenient’ or penal in the forum jurisdiction.”

Historically, Somerset may not have changed the law very much, and it may actually have decided less than it came to stand for.

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73. Id. at 620–27.
74. Hulsebosch, supra note 60, at 705. Mansfield’s decision in Somerset’s Case “signal[ed] to Parliament that legislation was needed.” Id. at 706. He wished “to make the House of Commons and the common-law courts the center of imperial governance at the expense of the king.” Id.
75. Id. at 704.
76. Professor Van Cleve asserts that “Lord Mansfield’s conflict of laws analysis, his rejection of chattel slavery, and his continuation of ‘near slavery’ in Somerset were relatively predictable under earlier law . . . .” Van Cleve, supra note 52, at 604. Interestingly, Lord Mansfield decided a very similar case while the Somerset case was being tried (over months), liberating a slave under an entirely different doctrine (that the relationship of slavery had been ruptured when master and slaver were captured by a Spanish privateer). Hunter, supra note 64,
Historian George Van Cleve asserts that Somerset would not have been set at liberty in England, but would have had a "near slavery" status of life-indentured servitude in England.\textsuperscript{78}

Most courts and legal authorities during this period [1540-1770] were in broad agreement that: first, the common law did not recognize classical chattel slavery in England; second, the status of slaves who came to England was governed by English law; third, slaves who came to England were no longer subject to chattel slavery, but were not fully emancipated; they were held to a lesser but substantial form of "slavish servitude" that constituted "near slavery."\textsuperscript{79}

Lord Mansfield clearly did not forbid all recognition of foreign slave status in England, nor did he outlaw slavery in England.\textsuperscript{80} Professor Hulsebosch notes that "in the years after Somerset Mansfield repeatedly stated that his decision did not end the servitude of slaves in England and did not affect slavery anywhere else in the British Empire."\textsuperscript{81}

Likewise, the actual holding of Somerset's Case, read narrowly in the context of the facts, was only that one particular incident of the

\textsuperscript{77} See FINKELMAN, IMPERFECT, supra note 62, at 38 ("Just exactly what Somerset decided is still being debated, over two hundred years after Lord Mansfield's opinion.").

\textsuperscript{78} Van Cleve, supra note 52, at 604, 634.

\textsuperscript{79} Id. at 614.

\textsuperscript{80} Sarah H. Cleveland, Foreign Authority, American Exceptionalism, and the Dred Scott Case, 82 CHI-KENT L. REV. 393, 402 (2007) ("The decision itself did not outlaw slavery in England, but it established that English law would not protect enslaved status on English soil . . . . The decision held instead that the status of slavery was not recognized and would not be enforced in England."); Hunter, supra note 64, at 720 ("Was slavery legitimate in England? It was a question Mansfield daced not answer. And so, quite simply, he didn't."); id. at 721 ("Lord Mansfield did not proclaim that all slavery was at an end or that every master who brought his or her slave into England would immediately have the slave declared free by the law. The Chief Justice only ruled on the literal matter at hand which was the summary detention of James Somerset and the prospect of him being taken from the country against his will . . . .").

\textsuperscript{81} Hulsebosch, supra note 60, at 701. He also intriguingly argues that one controlling consideration that shaped the decision was Mansfield's desire to strengthen the jurisdiction of the courts and the power of Parliament to decide such matters, rather than reinforce the power of the King and his ministers to determine such questions. Id. at 706-09. Somerset reflected Mansfield's desire to make the House of Commons and the common-law courts the center of imperial governance at the expense of the king and Privy Council, colonial governors, and the West India lobby." Id. at 706.
master-slave relationship, the master’s right to forcibly compel a slave to leave England and return to slave jurisdiction to be sold, would not be recognized in England in the absence of positive law so compelling and in the face of strong public policy in favor of protecting individual liberty. Thus, Mansfield himself later indicated that *Somerset* “only determined that a Master cannot by force carry his Slave out of England.”

Nevertheless, the *Somerset* decision could be read more broadly, and it was—especially by abolitionists. By definitively rejecting the notion that slavery can be based on natural law or common law principles, and suggesting that it can exist only where allowed by the positive law, Mansfield laid the foundation for the eradication of slavery. *Somerset* quickly came to stand for the notion that there was an exception to the principle of inter-jurisdictional comity for slave status and incidents. *Somerset* was immediately and immensely influential and had wide and enormous effects outside of the courts. The case was widely reported in both England and in the American colonies. At least thirteen British newspapers—and twenty-two out of twenty-four North American colonial newspapers sampled by Bradley—reported the arguments or decision. “The ‘pure air’ remark [of counsel] helped galvanize the [abolitionist]...

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83. Despite Mansfield’s arguably narrow holding, abolitionists read the decision broadly; and eventually their broad reading of the case prevailed and helped to accelerate the spread and speed of the eradication of slavery.

84. Van Cleve, *supra* note 52, at 643 (“By the late eighteenth century, the English Crown has limited legal authority to govern the colonies without Parliament’s acquiescence; therefore, Mansfield’s creation of a positive law framework for slavery in the context of rising abolitionist sentiment laid the groundwork for Parliamentary control of colonial slavery.”); see also ROBERT COVER, JUSTICE ACCUSED, ANTI-SLAVERY AND THE JUDICIAL PROCESS 87 (1975) (“The broad language in *Somerset’s Case* was more important for its ideological than for its practical effect.”).

85. Hunter reports that not long after the court ruled against him in *Somerset*, Stewart received a letter from a friend informing him that his (the friend’s) slave had run away: “He told the Servants that he had rec’d [sic] a letter from his Uncle Sommerset [sic] acquainting him that Lord Mansfield had given them their freedom . . . .” Hunter, *supra* note 64, at 724–25.

86. Van Cleve, *supra* note 52, at 625 n.119.
movement. ... Almost immediately, slaves and abolitionists throughout the British Empire interpreted the Somerset decision as abolishing slavery in England and, possibly, as endangering slavery across the Empire.”

However, as a matter of law, apart from and arguably even more important than Somerset's impact on the general public's perception (or misperception) of the domestic law of slavery, was the impact of Mansfield's opinion upon choice of law doctrine in slavery recognition cases. By expanding and reinforcing the limits to the claim of comity for recognition of slavery, and by upholding the local public policy against that disfavored domestic status against the comity claims for recognition of the domestic status of chattel slavery, even as applied to slaves just temporarily visiting England, Mansfield established the framework for conflicts analysis of slavery in both English and American courts for the next century.

Somerset cited Cartwright as precedent for what today would be called the public policy exception to the general rule of comity for inter-jurisdictional recognition of slavery status. Cartwright, thus, paved the way for and laid the foundation of the influential Somerset's Case. Sergeant Davy, representing the slave Somerset, quoted from Cartwright's Case to support his claim that by setting foot in England, Somerset had become emancipated from his status as a chattel slave, because the very “Soil the Air of England ... makes this [a] part of our Constitution.”

Clearly, long before the American Revolution, English courts definitively affirmed that the local forum's sovereign's rejection (or lack of positive law approval) of the controversial domestic relationship status of chattel slavery prevailed over the countervailing principle of international comity when it came to slaves imported

87. Hulsebosch, supra note 60, at 701.
88. See Bush, supra note 41, at 626 (“It is no coincidence that many of the major European powers, all deeply involved in slavetrading and plantation building, generated legal cases or edicts with ‘free air’ reasoning similar to Cartwright’s, and that nowhere did ‘free air’ reasoning lead to speedy emancipation... The ‘free air’ message was picked up by Chief Justice Holt in a series of cases around 1700...”). Examples of the series of cases are cited at id. at note 84: Smith v. Brown & Cooper, Holt 495, 90 Eng. Rep. 1172, 2 Salk. 666, 91 Eng. Rep. 566 (Q.B. 1702); Smith v. Gould, 2 Ld. Raym. 1274, 92 Eng. Rep. 338, 2 Salk. 666, 91 Eng. Rep. 567 (Q.B. 1706).
89. Van Cleve, supra note 52, at 627 (quoting HENRY MARCHANT, DIARY (R.I. Historical Society MS) 1771-72).
into England, at least as to incidents if not entirely as to status.\textsuperscript{90} Blackstone, writing two decades before the U.S. Constitution was drafted and a decade before the War of Independence, summarized the primacy of domestic policy over comity:

\textit{[T]he law of England abhors, and will not endure, the existence of slavery within this nation\. .\. And now it is laid down, [ ] that a slave or negro, the instant he lands in England, becomes a freeman; that is, the law will protect him in the enjoyment of his person, and his property.}\textsuperscript{91}

2. The evolution of the recognition of foreign slaves in American conflicts jurisprudence

Because of its novel federal composition, and because of strongly held, starkly divergent public policies concerning slavery embodied in the domestic laws of the different states, the United States of America was a fertile breeding ground for inter-jurisdictional conflicts over recognition of slavery during the first eight decades of national existence. The differences in internal domestic policies concerning slavery among the American states were sharp to begin with (sometimes polar-opposite), and they continued to grow throughout this long period of early and adolescent nationhood. "By 1787 slavery was being abolished or had already been ended in six states north of the Mason-Dixon line [Massachusetts, New Hampshire, Vermont, Connecticut, Rhode Island, and Pennsylvania]."\textsuperscript{92} However, slavery was legal and widely practiced in the remaining seven states. By 1860, nearly seventy-five years later, slavery remained legal in fifteen states, the District of Columbia, and some territories,\textsuperscript{93} while slavery had been abolished in the other

\textsuperscript{90.} See, e.g., Bush, supra note 41, at 622–27; Van Cleve, supra note 52, at 625–36.

\textsuperscript{91.} BLACKSTONE, supra note 31, at *424. \textit{Id.} at *423 ("Pure and proper slavery does not, nay cannot, subsist in England . .\. [I]ndeed, it is repugnant to reason, and the principles of natural law . .\. "); see also id. at *104.

\textsuperscript{92.} FINKELMAN, IMPERFECT, supra note 62, at 45.

\textsuperscript{93.} Slavery was legal in Delaware, Maryland, Virginia, Kentucky, Tennessee, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, Arkansas, and Missouri, and was permitted in the District of Columbia and some of the territories including what is now Oklahoma, Nebraska, Utah, Colorado, Nevada, and New Mexico. World Book: Encyclopedia and Learning Resources, Civil War, Geographic Divide, http://www.worldbook.com/wb/Students/content_spotlight/civil_war/geographic (last visited Jan. 8, 2009); A Biography of America, 10, The Coming of the Civil War, http://www.learner.org/biographyofamerica/prog10/maps/ (last visited Jan. 8, 2009).
nineteen states and other federal territories. Thus, interstate conflicts over recognition of slaves and slavery were inevitable and frequent. As the internal policy differences widened—the free states became more abolitionist while the slave states became more determinedly protective of slavery—interstate recognition conflicts became sharper and more volatile.

The evolution of inter-jurisdictional recognition of slavery in America followed the same general pattern and trajectory established in England in *Bartholomew’s Case*, *Cartright’s Case*, and *Somerset’s Case*. The decisions in the northern states moved from stronger comity to weaker comity as internal domestic policy moved from mild opposition to slavery to strong opposition to slavery. Thus, American courts generally applied the principle of comity except and until it conflicted with and was subordinated to strong local public policy.

In American courts during this period, as in England earlier, comity was the dominant (but not absolute) principle and it supported the recognition of foreign slaves. According to Hurd’s influential nineteenth-century American treatise on slavery, slavery was a matter of comity given to a legal status imposed by a foreign sovereign. No less a jurist than John Marshall invoked the doctrine of international comity in 1825 to justify ordering the return of scores of slaves to their Spanish master in *The Antelope*. In addition,

Eleven of the fifteen slave states seceded and joined the Confederacy (excluding Delaware, Maryland, Kentucky, and Missouri).


No principle of general law is more universally acknowledged, than the perfect equality of nations. . . . As no nation can prescribe a rule for others, none can make a law of nations; and this [slave] traffic remains lawful to those whose governments have not forbidden it.

. . . .

It follows, that a foreign vessel engaged in the African slave trade, captured on the high-seas in time of peace, by an American cruiser, and brought in for adjudication, would be restored.

*Id.* Thus, Marshall ordered that between 93 and 166 slaves (determination of the correct number was left for the trial court) be restored to the Spanish ship owner who had purchased them, and from whom they were taken before being seized on the Antelope. *Id.* at 126–27.
comity accepted and facilitated the recognition, and thus the extension, of slavery. "[G]iven the presence of slave jurisdictions in a mixed federal union, comity by its nature tended to be a proslavery argument, supporting at least the main workings of fugitive rendition. As a result, comity became a typical feature of proslavery legal polemics . . . ."\(^{97}\)

The American reliance on comity was not constitutionally required. Apart from the narrow subject of fugitive slaves,\(^{98}\) nothing in the Constitution of the United States required any state to recognize the domestic status or relationship of slavery imposed upon an individual by another state. There is no contemporary whisper or shadow of suggestion that the Full Faith and Credit Clause was understood to oblige any state to recognize or enforce slave status imposed in another state,\(^{99}\) and nothing else in the text of the Constitution hints at any such obligation upon the states.\(^{100}\) And while "[t]he hastily drafted and accepted Fugitive Slave Clause [may have] proved the most vexatious, if not the most important, part of the Constitution directly bearing on slavery,"\(^{101}\) it dealt with only a very small and discrete aspect of interstate slavery conflicts issues.

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It is a mark of how inviting comity was as a doctrine, and perhaps how hollow the alleged respect was for African sovereignty, that Marshall stepped back from requiring bona fide slave status in Africa. Instead, by accepting a presumption rather than actual proof of African slave status and by placing the burden of proof on those Africans who would assert freedom, he allowed for unproven and even erroneous enslavement.


97. Bush, supra note 41, at 622; see also Joel R. Paul, Comity in International Law, 32 Harv. Int'l L.J. 1, 5 (1991) ("The classical [comity] doctrine developed in the United States where it was introduced in large part to avoid confrontation between free and slave states.").

98. U.S. CONST. art. I, § 9 (Fugitive Slave Clause).

99. FINKELMAN, IMPERFECT, supra note 62, at 33 ("If the Full Faith and Credit Clause was meant to give legal recognition to slavery in nonslave states, it is likely that the southerners at the convention would have said something to that effect. The debates in the state conventions provide even less help in interpreting the clause.").

100. The Privileges and Immunities Clause, which required states to give local privileges to nonresidents, did not compel interstate comity. See FINKELMAN, IMPERFECT, supra note 62, at 33–34.

101. FINKELMAN, IMPERFECT, supra note 62, at 26. This clause was proposed less than three weeks before the Philadelphia Convention adjourned and adopted with little debate and without a formal vote. Id. at 26–27; see also JAMES MADISON, NOTES OF THE DEBATES OF THE FEDERAL CONVENTION OF 1787, at 545–54 (Proceedings of Aug. 28–29, 1789).
(involving the return of stolen "property"). Thus, the Constitution did not compel interstate recognition of slavery in any other context except fugitive or runaway slaves.

Moreover, the Founders, both Federalists and Anti-Federalists, emphasized and celebrated the fact that the national government had no power to directly regulate domestic relations under the Constitution. The principle of federalism in family law—that family law falls within the residual sovereign power of the states—has been recognized since 1787. As the Supreme Court expressly acknowledged in 1890: "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States." Thus, the constitutional principle of federalism in family law did not compel comity in conflicts involving interstate recognition of slavery.

While nothing in the text or basic principles of the Constitution mandated comity, or compelled or prohibited interstate recognition of slaves or slavery status by sister states, the authority to resolve the conflict-of-laws issues is provided in the Constitution. The Full Faith and Credit Clause of the Constitution gives Congress "by general Laws [the authority to] prescribe the Manner in which [the] Acts,

102. FINKELMAN, IMPERFECT, supra note 62, at 27 ("At the time . . . fugitive slaves were only a minor concern . . . ."). For a thorough discussion of American fugitive slave cases generally, and the final Supreme Court decision on fugitive slaves in particular, see Earl M. Maltz, Slavery, Federalism, and the Constitution: Ableman v. Booth and the Struggle Over Fugitive Slaves, 56 CLEV. ST. L. REV. 83 (2008).


104. See, e.g., Sosna v. Iowa, 419 U.S. 393, 404 (1975) ("Domestic relations . . . has long been regarded as a virtually exclusive province of the States. Cases decided by this Court over a period of more than a century bear witness to this historical fact."); Barber v. Barber, 62 U.S. 582, 584 (1858) ("We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce . . . ."); id. at 602 (Daniel, J., dissenting) ("The Federal tribunals can have no power to control the duties or the habits of the different members of private families in their domestic intercourse. This power [to regulate domestic relations] belongs exclusively to the particular communities of which those families form parts, and is essential to the order and to the very existence of such communities."). See generally Wardle, supra note 103.

105. In re Burrus, 136 U.S. 586, 593–94 (1890). As recently as 2004 the Court powerfully reaffirmed the constitutional primacy of state law in regulating matters of domestic relations. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12–13 (2004) (reviewing precedents for federalism in family law and noting: "So strong is our deference to state law in this area that we have recognized a 'domestic relations exception' that 'divests the federal courts of power to issue divorce, alimony, and child custody decrees.'" (quoting Ankenbrandt v. Richards, 504 U.S. 689, 703 (1992))).
Records and Proceedings [of other States] shall be proved, and the Effect thereof.\textsuperscript{106} Since 1789, Congress has had the power under this Clause to adopt a choice of law rule mandating strict adherence to a strong comity rule of interstate recognition of slavery, or, on the other hand, absolutely barring interstate recognition of slavery, or some other position. But Congress did not use this power to address the issue of interstate recognition of slavery. The general Full Faith and Credit statute, adopted by the First Congress in 1790\textsuperscript{107} and “essentially unchanged [in] form since its enactment just after the ratification of the Constitution,”\textsuperscript{108} remained the sole congressional rule during this time of interstate conflicts concerning recognition of slaves and slavery.\textsuperscript{109} It simply provided that, in relevant part, “the records and judicial proceedings of the courts of any State . . . shall have such faith and credit given to them in every court of the United States, as they have by law or usage in the courts of the State from whence the records are, or shall be taken.”\textsuperscript{110} It did not address the interstate slavery-recognition issue at all. Congress chose not to exercise its authority to enact a controlling choice of law rule either for civil cases generally or specifically for slave-recognition cases.\textsuperscript{111} In short, neither federal constitutional law nor federal statutory law

\textsuperscript{106} U.S. CONST. art. IV, § 1.

\textsuperscript{107} Act of May 26, 1790, ch. 11, 1 Stat. 122:

That the acts of the Legislatures of the several States shall be authenticated by having the seal of their respective States affixed thereto; that the records and judicial proceedings of the courts of any State shall be proved or admitted in any other court within the United States by attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings shall have such faith and credit given to them in every court of the United States, as they have by law or usage in the courts of the State from whence the records are, or shall be taken.

This Act is now codified at 28 U.S.C. § 1738.

\textsuperscript{108} Allen v. McCurry, 449 U.S. 90, 96 n.8 (1980).

\textsuperscript{109} The subsequent supplementary re-enactment, by Act of Mar. 27, 1804, ch. 56, 2 Stat. 298–299, did not extend the duty to give the same faith and credit to state “Acts” of the legislature of any state (choice of law), either. Congress did not get around to adding “Acts” (choice of law) to the Full Faith and Credit statute until the revision of 1948. Act of June 25, 1948, ch. 646, 62 Stat. 947 § 1738.

\textsuperscript{110} Act of May 26, 1790 (emphasis added).

mandated the application of the pro-slavery-recognition comity principle in interstate slave-recognition cases.

The American reliance on comity in inter-jurisdictional slave-recognition cases derived primarily from English private international law precedents. The conflict of laws principles underlying the English decisions were generally acknowledged and followed in the American colonies and in most of the American states. Inter-jurisdictional slave-recognition cases in America followed the same general principles articulated by Mansfield in *Somerset* and encapsulated by Blackstone. Their general statements and summaries of the English understanding of the international law of inter-jurisdictional recognition of slavery were the basic, and generally the dominant (if inconsistently and imperfectly followed), position of the law in the American colonies and in the independent American states. Although modern legal historians may fault Blackstone and Mansfield for distorting some precedents and suggesting over-broad conclusions, in the nineteenth-century American legal system these English authorities had wide acceptance and persuasive influence. Thus, the British rule of comity with significant exceptions reflecting principles of natural law and dominant internal domestic policy became the general rule followed in the northern states in interstate slave-recognition cases, as well as in many of the slave states.

As noted by Professor Cover, “[d]uring the critical decade of the 1780s, it was almost axiomatic that the operation of normal

113. See, e.g., Van Cleve, *supra* note 52, at 635–42.
114. See *supra* note 86 (noting the wide newspaper dissemination of *Somerset* case); Bernard C. Steiner, *The Adoption of English Law in Maryland*, 8 Yale L.J. 353, 355–56 (May 1899) (explaining Blackstone’s influence in early American legal history). The Supreme Court has observed that: “Blackstone’s Commentaries are accepted as the most satisfactory exposition of the common law of England.” *Schick v. United States*, 195 U.S. 65, 69 (1904). Blackstone’s discussion of the rights of persons was published only eleven years before the Declaration of Independence and was quickly embraced and widely read in the American colonies. Burke commented: “I hear that [booksellers] have sold nearly as many of Blackstone’s ‘Commentaries’ in America as in England.” *Edmund Burke, Speech on Conciliation with the Colonies* (March 22, 1775), *reprinted in The Essential Bill of Rights* 170, 173 (Gordon Lloyd & Margie Lloyd eds., 1998).
115. See, e.g., *Saul v. His Creditors*, 5 Mart. 569, 598 (1a. 1827) (“By the laws of this country, slavery is permitted, and the rights of the master can be enforced. Suppose the individual subject to it is carried to England or Massachusetts;—would their courts sustain the argument that his state or condition was fixed by the laws of his domicile of origin? We know, they would not.”). For a useful description of some of the major slavery cases in American jurisprudence, see generally *Paul Finkelman, Slavery in the Courtroom* (1985).
international’ reciprocity would not lead to the recognition by one state of the slave property of another." 116 For example, one argument for ratification of the Constitution in the South was, as Madison argued in Virginia, that it contained the Fugitive Slave Clause, without which runaway slaves would not be returned. 117 Similarly, the state of Pennsylvania considered it necessary to pass a special law to allow congressmen to keep slaves in the nation’s capital (then Philadelphia), implying that without such special immunity Pennsylvania would apply its domestic law to the slaves’ emancipation. 118

In the free states, courts initially recognized the distinction between bringing a slave into the state and bringing the institution of slavery into the state. As a general rule in the North, “state judges often determined that the mere transit through a free state would not free a slave.” 119 (There were rare exceptions where local policy against slavery was especially strong; for example, the Massachusetts Supreme Court in 1836 followed the Somerset’s Case’s absolute rule and held that slaves became emancipated the moment they entered into the state.) 120 However, “all northern state supreme courts agreed that it was a violation of free-state law if a master allowed a slave to work in a free state, particularly if the master hired the slave out.” 121

This transitory-permanent dichotomy was also the prevailing rule in the South, until shortly before the Civil War. “Courts in Missouri, Kentucky, and Louisiana continued to free slaves who had lived or worked in free jurisdictions. Well after Slave Grace, the Missouri courts continued to liberate slaves who had lived in the North.” 122

116. Cover, supra note 84, at 88; see also id. at 87–91 (reviewing cases from the era indicating that the natural right to liberty would override comity).
117. Id. at 88.
118. Id.
119. Finkelman, Dred Scott, supra note 62, at 17.
121. Finkelman, Dred Scott, supra note 62, at 17.
122. Id. at 21; see also Cover, supra note 84, at 97 (Kentucky, Louisiana, and Missouri led the South in recognizing emancipation by residence in free states). See, e.g., Rankin v. Lydia, 9 Ky. 467, 478 (1820) (recognizing emancipation by fixed residence in a free state, but not by mere temporary sojourn).
Before 1830, only in one state, Pennsylvania, "was even the slightest restriction placed on interstate transit." There, a 1780 law emancipated slaves six months after they arrived in the state. Over the next fifty years, that Pennsylvania rule was expanded, due in no small part to a litigation campaign waged by abolitionists, until, by 1830, "only bona fide travelers and exempt public officials could still bring their slaves into the state [without having them emancipated]." In 1847, the Pennsylvania legislature repealed the six-month period, making automatic emancipation the rule, as it was in England.

In other non-slave states, however, adoption of the alleged *Cartwright-Somerset* rejection of the sojourner principle in favor of immediate emancipation from chattel slavery instantly upon entry into the jurisdiction took a little longer to become fully accepted. Until then it could be argued that comity to sister slave states or, more likely, hospitable notions of courtesy to citizens of slave states traveling in the north with their slaves, tempered application of the instant emancipation rule.

However, a more powerful reason that most northern states did not immediately apply the "pure air," instant-emancipation, broad-reading-of-*Cartwright-Somerset* rule to slaves in the case of visitors, transients, sojourners, immune officials, and other temporary circumstances was not because strict adherence to comity took precedence over internal domestic relations policies in the northern states. Rather, it was because the internal policies of those states

123. FINKELMAN, DRED SCOTT, supra note 62, at 21.
124. Id. at 47–48 (citing 1 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 492–96 (1810)). A 1788 amendment clarified that if the slave owner intended to make Pennsylvania his residence, emancipation of slaves occurred immediately. Id.
125. Id. at 52. The litigation is described id. at 50–69. Pennsylvania's aggressive abolition movement engineered passage of an 1826 Act intended to free Negroes captured as runaways in the state, which was struck down twenty-two years later by the Supreme Court of the United States in an opinion by Justice Story, in *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842).
126. FINKELMAN, DRED SCOTT, supra note 62, at 69.
127. In the other northern states, "before the 1830s no slaves were freed solely on the basis of transit or sojourn." FINKELMAN, IMPERFECT, supra note 62, at 70.
128. On this point, Professor Finkelman sees comity as the controlling principle in the North until 1830, and he sees a later change to give precedence to local, internal anti-slavery policy. See FINKELMAN, IMPERFECT, supra note 62, at 20–100. I agree as to the later policy but, as explained in the text, think the earlier cases also can be explained in terms of giving priority to internal domestic policies of gradual emancipation.
were still unsettled; they were or, until recently, had been in the process of gradual emancipation. Thus, it was a matter of applying to non-residents, the same loose, “gradual emancipation” anti-slavery policy that was, in fact, the internal domestic policy of most northern states. If lingering slavery was internally allowed for residents during the period of gradual emancipation (for example, during the “grandfather” period when new slavery was not permitted, but old slave-relations were protected and recognized), insisting on a strict rule of immediate emancipation for slaves brought into the jurisdiction temporarily was not required to protect local policy either logically or morally. Refusal to emancipate the slaves of temporary visitors was, in fact, an application of the conflicts rule that the same internal, domestic policy or privilege should apply to non-residents as to residents. Thus, the amount of comity given to the foreign status of slavery in the northern states (and expected by southerners bringing their slaves with them to visit those jurisdictions) was inversely commensurate with the strength of the internal public policy banning slavery, as it had been for centuries in England.

Moreover, this approach was not entirely dissimilar to that followed in England after the Somerset decision. In 1827 in The Slave, Grace, the admiralty court distinguished Somerset’s rejection of the sojourner rule and held that if a slave who had resided in England returned with her master to a slave jurisdiction, she lost her emancipation and her domestic (slave) status was again determined by the law of the slave jurisdiction.

By the 1830s, as gradual emancipation matured with the passage of time into complete emancipation (with the death or emancipation of the old slaves) in the free states, their policy toward recognition of slaves coming into the state also changed. “Starting in Massachusetts and spreading to almost all of the North, masters

129. See, e.g., id. at 71–76 (describing New York gradual emancipation laws); id. at 76–77 (describing New Jersey gradual emancipation); id. at 77–79 (describing gradual emancipation in New Hampshire, Vermont, and Maine, where there are few cases and less evidence of comity); id. at 79–82 (describing gradual emancipation in Rhode Island, Massachusetts, and Connecticut); id. at 82–98 (describing gradual emancipation in Northwest Ordinance territories of Ohio, Michigan, Indiana, and Illinois).


were . . . denied even limited transit with slave[s] . . . ." Thus, by or before 1850 most non-slave states fully accepted and applied the broad-reading, "pure air," immediate-emancipation reading of Somerset's Case and rejected the sojourner exception to instant emancipation. Local internal domestic anti-slavery policy of emancipation was applied to determine the status of all foreign slaves (except runaway fugitives) who entered the northern states, even if they were in the state only briefly. This change in policy caused enormous friction between the North and the South. The Southern States cried foul, arguing that the Northern States had abandoned the historic sojourner rule and become more rigidly abolitionist. In fact, the Northern States were continuing to apply the same conflict of laws principle as before—that comity would be given to the foreign status of slavery to the extent to which it was consistent with the internal public policy banning slavery. When slavery became totally eradicated internally in domestic law and fact, that conflicts principle left no room for any principled recognition of foreign slavery, even for slaves only temporarily in the state.

This rejection of the sojourner exception to emancipation reached its most provocative political point in Lemmon v. The People ex rel. Napoleon, in which a family of Virginia slave-owners moving to Texas with their eight slaves took a boat from Virginia to New York City where they transferred to a ship headed directly to New Orleans. While in transit briefly in New York City, a black dock worker obtained a writ of habeas corpus and in 1852 the New York trial court ruled that under New York law, the eight slaves became free the instant their owner brought them into the state. An intermediate appellate court upheld the ruling, as did the New

132. FINKELMAN, IMPERFECT, supra note 62, at 100.
133. Of the "free states" in the North, East, and West, after about 1840, only California, New Jersey, and Illinois showed any continuing tolerance for slaves in transit. Id. at 146, 179.
134. See generally id. at 101-80. The reaction in the South included acceptance of the earlier-rejected rule of The Slave, Grace in southern courts, resulting in re-enslavement or denial of emancipation to Blacks who had lived in the North (not merely visited there), and resort to federal law, The Fugitive Slave Acts and Fugitive Slave Clause, seeking broad interpretation of positive law to protect slave-owning rights in other states. Id. at 179-235.
135. See generally FINKELMAN, IMPERFECT, supra note 62, at 101-312.
136. 20 N.Y. 562 (1860).
137. The People, ex rel. Lewis Napoleon v. Lemmon, 5 Sand. Ch. 681 (N.Y. Ch. 1852).
York Court of Appeals in 1860.\textsuperscript{139} The case was headed for the U.S. Supreme Court (the Taney Court) when it was derailed by the events leading up to the Civil War.\textsuperscript{140}

Joseph Story confirmed the rejection of comity regarding slavery during the height of the slavery crisis in American history, in his landmark English language treatise on Conflict of Laws:

We know, how this point has been settled in England. It has been decided, that the law of England abhors, and will not endure the existence of slavery within the nation; and consequently, as soon as a slave lands in England, he becomes \textit{ipso facto} a freeman, and discharged from the state of servitude. Independent of the provisions of the constitution of the United States, for the protection of the rights of masters in regard to domestic fugitive slaves, there is no doubt, that the same principle pervades the common law of the non slave holding states in America; that is, foreign slaves would no longer be deemed such after their removal thither.\textsuperscript{141}

Story described the obligation of comity as "imperfect" and not required when the foreign status or laws "are deemed oppressive or injurious to the rights or interests of the inhabitants of the latter, or where their moral character is questionable, or their provisions impolitic."\textsuperscript{142} Thus, while the general rule of international comity was that personal capacity or incapacity was to be governed by the law of the domicile of the individual, this was subject, wrote Story, to the general exception that:

Personal disqualifications not arising from the law of nature, but from the principles of the customary or positive law of a foreign country, and especially such as are of a penal nature, are not generally regarding in other countries, where the like disqualifications do not exist. . . . So the state of slavery will not be

\textsuperscript{139} 20 N.Y. 562 (1860).

\textsuperscript{140} \textsc{Finkelman, Dred Scott, supra} note 62, \textit{at} 49.

\textsuperscript{141} \textsc{Joseph Story, Commentaries on the Conflict of Laws} 92–93, \textsuperscript{§} 96 (1834) (emphasis added). \textit{Id.} ("Suppose a person to be a slave in his own country, having no personal capacity to contract there, is he upon his removal to a foreign country, where slavery is not tolerated, to be still deemed a slave? If so, when a Greek or Asiatic, held in slavery in Turkey, would, upon his arrival in England, or in Massachusetts, be deemed a slave and be there subject to be treated as mere property, and under the uncontrollable despotic power of his master. The same rule would exist as to Africans and others, held in slavery in foreign countries.").

\textsuperscript{142} \textit{Id.} at 97, \textsuperscript{§} 104 (emphasis added).
recognized in any country, whose institutions and policy prohibit slavery.\textsuperscript{143}

Likewise, Chancellor Kent, the other great American conflicts authority in the first half of the nineteenth century, agreed that comity would not override strong local public policy regarding the status of persons and their legal incidents.\textsuperscript{144}

Even Chief Justice Marshall, a Virginia slave-owner himself and less ready to embrace legal principles hostile to slavery, agreed that slavery was contrary to natural law (but not to the law of nations).\textsuperscript{145}

In *The Antelope*,\textsuperscript{146} he conceded that slavery originated in force and required positive law to sustain and uphold it, a position not far removed from Mansfield’s statements in *Somerset’s Case*.

Thus, inter-jurisdictional conflicts law and domestic slavery law were closely intertwined throughout Anglo-American legal history.\textsuperscript{147}

The best example of that is the infamous Supreme Court decision in *Dred Scott v. Sandford*,\textsuperscript{148} in which two of the three controlling issues

\textsuperscript{143} Id.

\textsuperscript{144} JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 62 (1826) (“Laws and usages of one state cannot be permitted to prescribe qualifications for citizens, to be claimed and exercised in other states, in contravention to their local policy.”).

\textsuperscript{145} See generally Cleveland, supra note 80, at 408–09.

\textsuperscript{146} 23 U.S. (10 Wheat) 66, 120–23 (1825).

\textsuperscript{147} One interesting example is *Strader v. Graham*, 51 U.S. (10 How.) 82 (1851), in which the controlling question was whether temporary residence of a Kentucky slave in free Ohio and Indiana territory meant that he was a free man on his return to Kentucky. Coming before the Supreme Court of the United States just six years before the *Dred Scott* case, the Court evaded the question by dismissing the case for want of jurisdiction, but in dicta that forecast his opinion in *Dred Scott*, Chief Justice Taney argued that federal law concerning emancipation by temporary residence in a place was not binding on the state courts. Cleveland, supra note 80, at 410–11.

\textsuperscript{148} *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). Many excellent legal and historical scholars have grappled with *Dred Scott* and these issues. See generally AUSTIN ALLEN, ORIGINS OF THE DRED SCOTT CASE 62–64 (2006) (discussing the influence of Story’s Commentaries on the Conflict of Laws on the slavery issue); COVER, supra note 84, at 83–89 (discussing conflict of laws dimensions of slavery in the American courts before the Civil War); DON E. FEHRENBRUCH, THE DRED SCOTT CASE 322–414 (1978) (analyzing the case); id. at 56–67 (discussing conflict of laws dimensions); FINKELMAN, DRED SCOTT, supra note 62; FINKELMAN, IMPERFECT, supra note 62 (tracing history of comity in slave transit in the United States); JOHN CODMAN HURD, THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES (Negro Univ. Press 1968) (1858) (examining, inter alia, private international law in colonial and antebellum America); ROBERT B. SHAW, A LEGAL HISTORY OF SLAVERY IN THE UNITED STATES 253–78 (1991) (discussing emancipation in the northern states, role of going into free jurisdictions); WILLIAM M. WIECEK, THE SOURCES OF ANTI-SLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848, at 31 (1977) (discussing comity and conflicts aspects of slavery jurisprudence before the civil war); Cleveland, supra note 80; Sanford
were conflict of laws issues, including a vexing choice of law issue. In 1846, a black man named Dred Scott, living in St. Louis, Missouri, brought suit in a Missouri state court claiming that he was a free black, not a slave, because his master had taken him from Missouri to Illinois and to the federal territories north of Missouri, where they had lived for over four years. Dred Scott had been the slave of Dr. John Emerson, a surgeon in the U.S. Army, who took him to live on military bases in free jurisdictions including the state of Illinois (for two-and-a-half years) and the federal territory of Wisconsin in what is today Minnesota (for a total of three-and-a-half years). Illinois had abolished slavery, and, under the Missouri Compromise of 1820, Congress had barred slavery in all territories north of Missouri including the Wisconsin Territory. Scott argued that by residing for extended periods in those free jurisdictions he had been emancipated, and that “once free, he was always free.”

The main substantive issue was whether a slave became free, emancipated, by residing in a free state or a federal jurisdiction—an issue of conflict of laws regarding domestic relations status, presumably governed at least in part by federal law that made the territories free. In 1850, a “jury of twelve white men in Missouri” ruled that Scott had been emancipated by his “residence in a free state and a free


149. The other conflicts issue (besides whether residence in a free state or territory emancipated a slave as a matter of federal choice of law binding on the states) was a question of jurisdiction of the federal court—whether Dred Scott was a citizen of Missouri and, thus, whether diversity jurisdiction existed as between Scott and the defendant, a citizen of New York. The importance of the interjurisdictional issues in Dred Scott is suggested by the fact that “when rereading the Dred Scott decision one is struck by the extent to which the Justices relied upon international and foreign legal authority to support their positions.” Cleveland, supra note 80, at 395–96 (noting some scholars correlate citation of foreign authority to “problematic opinions” of the Court) (citations omitted).

150. FINKELMAN, DRED SCOTT, supra note 62, at 1–3. Scott had married his wife, Harriet, while in the Wisconsin Territory, and they had two daughters, Eliza and Lizzie. Eliza “was born on a boat [that was North of Missouri] in the Mississippi River surrounded on one side by the free state of Illinois and on the other side by the free territory of Wisconsin.” Id. at 19. Lizzie was born later, in Missouri. In his lawsuit Scott sought freedom for his wife and children as well. Id. See generally FEHRENBACKER, supra note 148; FINKELMAN, supra note 62.

151. FINKELMAN, DRED SCOTT, supra note 62, at 1–3.

152. FINKELMAN, DRED SCOTT, supra note 62, at v.
From Slavery to Same-Sex Marriage

Two years later, however, overruling twenty-eight years of precedent, the Missouri Supreme Court reversed that decision, citing the growing interstate slavery tensions. Chief Justice Scott (ironically named) noted that “[t]imes are not now as they were when the former decisions on this subject were made.” He meant that since the northern free states had abandoned the sojourner rule and their prior practice of not emancipating slaves who had come only temporarily into the free state, Missouri, a southern slave state, felt compelled to respond by abandoning its prior practice of recognizing the emancipation of southern slaves who had resided or worked in a free state.

Scott next sued in federal court in Missouri, which upheld his right to sue but rejected his claim to freedom. Then Scott took his appeal to the U.S. Supreme Court. In 1857, eleven years after Scott began his legal quest for freedom, the United States Supreme Court, by a vote of seven to two, rejected Scott’s claim. “Chief Justice Roger B. Taney declared that the Missouri Compromise was in fact unconstitutional and that Congress had no power to prohibit slavery in the national territories or to emancipate slaves brought into those territories. Furthermore, Chief Justice Taney went out of his way to assert that African Americans, even if free, could claim no legal protection [as citizens] under the Constitution.”

The Dred Scott decision was, as Professor Alexander Bickel labeled it, a “ghastly error,” and, as Charles Evans Hughes acknowledged, “the Court . . . suffered severely from self-inflicted

153. Id. at 20. “Missouri was one of the most liberal states in the nation on this” issue; between 1824 and 1837, the Missouri Supreme Court had decided eleven cases in favor of the emancipation of slaves who had worked or established residence in a free state. Id. “Courts in Kentucky, Louisiana, and Mississippi also upheld the freedom of slaves who had lived in a free state or territory.” Id.


155. Id. at 586.

156. COVER, supra note 84, at 97 (“Both by legislation and by judicial decision, the Southern approach . . . of recognizing emancipation of slaves by their residence in a free state] was generally reversed in the last ten or fifteen years before the Civil War.”)

157. The full report of the federal case is in Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). For an excellent review of the choice of law analysis of the various justices, see Cleveland, supra note 80, at 428–34.

158. Dred Scott, 60 U.S. at 393.

159. FINKELMAN, DRED SCOTT, supra note 62, at vi.

wounds.” As Professor Lino Graglia has suggested, any judicial decision that leads to a Civil War is not a good decision. Dred Scott overturned settled precedent including a very recent Supreme Court decision that held that each state had the authority to determine the status of persons within its territory, including free states deciding whether non-fugitive slaves visiting or residing there were emancipated, and slave states determining whether or not to liberate slaves who had resided in a free territory. By striking down the Missouri Compromise, whose roots went back to the Northwest Ordinance of 1787, the Dred Scott ruling hurtled the nation towards a bloody Civil War. After that horribly devastating conflict ended, the three major holdings of Dred Scott were overturned by the Thirteenth, Fourteenth, and Fifteenth Amendments.

164. In 1787, prior to the ratification of the Constitution, Congress, acting under the Articles of Confederation, passed the Northwest Ordinance, which "prohibited 'slavery and involuntary servitude' in all of the American territories north and west of the Ohio River," and the following year, Congress, under the new Constitution, ratified the Northwest Ordinance. FINKELMAN, DRED SCOTT, supra note 62, at 8. In 1820, when debate erupted over the slave-or-free status of slaves in states formed from the land acquired by the Louisiana Purchase of 1803 (that had not been part of the United States when the Northwest Ordinance was adopted), the Missouri Compromise of 1820 revised the Ordinance to "forever prohibit[ ]" slavery in all territory acquired by the Louisiana Purchase except in the state of Missouri. Id. at 8-9. When the northern states tried to extend that prohibition of the spread of slavery into territory acquired in the Mexican War, by the Wilmot Proviso, the southern states defeated the Proviso and deadlocked the issue for four years. The deadlock was resolved by the Compromise of 1850, which, inter alia, brought California into the Union as a free state, but allowed slavery in all of the other territory acquired in the Mexican-American War (which included California, New Mexico, Utah, Nevada, and most of Arizona and Colorado). Id. at 9. The Compromise of 1850 also included a harsh new federal fugitive slave law and banned the sale of slaves in the District of Columbia. Id.
B. Other Controversial Domestic Relations Issues in American Conflicts Law

The same general approach characterized the resolution of most conflict-of-laws issues involving inter-jurisdictional recognition of interracial marriage, polygamy, underage marriages, consanguinity, and adoption. Comity was the underlying default position, but it generally yielded when it was shown that recognizing the foreign-created domestic relationship would conflict with strong local public policy.

1. Interstate recognition of interracial marriage

After the adoption of the Civil War Amendments, the interstate controversy regarding recognition of slavery or emancipation ended, but in its place interstate conflicts arose regarding recognition of interracial marriages for another century. Like slavery, interracial marriage was very provocative and aroused very intense passions that sometimes were expressed in state anti-miscegenation laws. Interracial marriages were prohibited in some states but permitted in others, and the list of such states expanded and contracted over time.

As a general rule, states that prohibited interracial marriages declined to recognize interracial marriages that had been lawfully created in other jurisdictions. "Although there were notable exceptions . . . most states with anti-miscegenation laws refused to recognize out-of-state interracial marriages." Conversely, states


that allowed interracial marriage declined to disallow or void such marriages in their jurisdictions even if the parties resided in a state that prohibited the marriage.

However, a more careful review shows that the history of interstate enforcement of sister-state anti-miscegenation laws was actually more complicated, as state courts responded to the recognition-of-interracial-marriage issue “in a wide variety of ways,” as Professor Randall Kennedy has noted. For example, North Carolina and California recognized interracial marriages that were lawfully performed elsewhere even though they, at some time, banned interracial marriage domestically. On the other hand, “a few [states] that did permit interracial marriage nonetheless voided marriages contracted within their borders by persons seeking solely to evade the marital regulations of their home jurisdictions.”

The legal context also influenced the outcome. If the inter-jurisdictional recognition issue arose in the context of an evasive marriage, the public policy implications and the judicial analysis might be different than if the issue arose in the context of a bona-fide change of domicile. “The older miscegenation decisions distinguished between parties who evaded the [anti-miscegenation] laws of their domicile . . . and parties who contracted the interracial marriage while domiciled in a state that did not prohibit such unions.” Professor Andrew Koppelman summarized the evasion

Kennedy, 76 N.C. 251 (1877); State v. Bell, 66 Tenn. 9 (1872); Kinney v. Commonwealth, 71 Va. (30 Gratt.) 858 (1878).


170. See, e.g., Medway v. Needham, 16 Mass. 157 (1819) (recognizing that a prohibited interracial marriage was solemnized for evading Massachusetts couple in Rhode Island); State v. Ross, 76 N.C. 242 (1877) (recognizing interracial marriage of parties residing in South Carolina where legal); KENNEDY, supra note 169, at 232, n.t. But see State v. Kennedy, 76 N.C. 251 (1877) (invalidating, though decided in the same term and by the same court as Ross, an evasive interracial marriage performed in South Carolina for North Carolina residents who immediately returned to North Carolina), discussed in Wallenstein, supra note 167, at 558–60.

171. KENNEDY, supra note 169, at 232 & n.t (citing Comment, Intermarriage with Negros—A Survey of State Statutes, 36 YALE L.J. 858 (1927)).

172. See, e.g., Whittington v. McCaskill, 61 So. 236 (Fla. 1913); Miller v. Lucks, 36 So. 2d 140 (Miss. 1948); Ross, 76 N.C. 242; see also People v. Godines, 62 P.2d 787 (Cal. Ct. App. 1936); Eggers v. Olson, 231 P. 483 (Okla. 1924) (refusing to recognize, for inheritance, interracial marriage).

173. Henson, supra note 16, at 572; see also Koppelman, supra note 166, at 2153 (“The law with respect to evasive marriages is quite clear. . . . Th[e] antievasion principle was applied,
cases as follows: “Despite some early Northern authority to the contrary, Southern courts always invalidated these marriages.” On the other hand, when mixed-race parties domiciled in a state that allowed interracial marriage got married there and later moved to a state that did not allow interracial marriage, stronger policy considerations favored recognition than in the case of evasive marriages. Nonetheless, in the Deep South, the courts split evenly over whether to recognize such imported interracial marriages.

Also distinguishable are what Professor Koppelman calls “extraterritorial” cases, in which the parties have never lived within the state but the marriage is relevant to litigation conducted there.” Some states that would not allow or recognize interracial marriages for purposes of marital cohabitation would recognize interracial marriages for purposes of inheritance. For example, the Mississippi Supreme Court overruled a lower court which had refused to recognize an Illinois interracial marriage and held that the white husband of a deceased black wife was entitled to inherit his wife’s property in Mississippi, even though the couple had been indicted and ordered to leave the state of Mississippi when they had lived together in Mississippi two decades earlier. The court reasoned:

The manifest and recognized purpose of this statute was to prevent persons of Negro and white blood from living together in this state in the relationship of husband and wife. Where, as here, this did not occur, to permit one of the parties to such a marriage to inherit

however, only in cases where the parties were domiciliaries of the forum at the time of the marriage.”

174. Andrew Koppelman, Same Sex Marriage, Choice of Law, and Public Policy, 76 TEX. L. REV. 921, 951 (1998) (hereinafter Koppelman, Policy); see also id. at 952–54 (discussing cases involving an attempt to prohibit interracial marriage).

175. See id. at 951.

176. See Koppelman, supra note 166, at 2154 (comparing State v. Ross, 76 N.C. 242 (1877), with State v. Bell, 66 Tenn. 9 (1872)); Koppelman, Policy, supra note 174, at 955–61 (discussing the same and other cases and statutes).

177. Koppelman, supra note 166, at 2145, 2162–64.

178. KENNEDY, supra note 169, at 234–35 (citing Miller v. Lucks, 36 So. 2d 140 (Miss. 1948)).

179. Id.
property in this state from the other does no violence to the purpose of [the Mississippi miscegenation laws].

Likewise, the content, ideology, and strength of public policies changed over time. As the local domestic policies against interracial marriage weakened and changed, the willingness of courts to recognize interracial marriages increased. Similarly, an absence of interracial marriage and cohabitation criminal penalties influenced the choice of law analysis.

2. Inter-jurisdictional recognition of polygamy

Polygamy is one of two types of marriage which Anglo-American courts historically have deemed to be intrinsically contrary to natural law and not entitled to inter-jurisdictional recognition in states which forbid polygamous marriages, even if contracted in a state in which polygamy is legal. Justice Story listed polygamy and incest as "the only known exceptions" to the general rule that a marriage valid where performed was valid everywhere. The reason he provided was that "Christianity is understood to prohibit polygamy and incest; and therefore no Christian country would recognize polygamy, or incestuous marriages." Modern conflicts of law authorities agree: "In order for the marriage to offend the forum court's sensibilities so deeply, the marriage usually will have to be polygamous, or between persons so closely related that the court

180. Miller v. Lucks, 36 So. 2d 140, 142 (Miss. 1948); see Whittington v. McCaskill, 61 So. 236 (Fla. 1913) (holding that although prohibited in Florida, interracial marriage performed in another state on residents of that state will be recognized in Florida for purpose of inheritance); see also Henson, supra note 16, at 573 ("States seemed most concerned with public policy violations when the interracial couple lived within their borders . . . ."); Wallenstein, supra note 167, at 570-71.

181. See Wardle & Oliphant, supra note 167.

182. This also may explain the decision of the Mississippi courts in the Miller case. The policy forbidding intimate relations between the races was strong in 1923, but it had waned sufficiently by 1948 for the court to allow an interracial surviving spouse to inherit.

183. Henson, supra note 16, at 573 (noting that states were most reluctant to recognize foreign interracial marriages of parties who lived in the state "especially if criminal statutes existed in the state").

184. STORY, supra note 141, at 104.

185. Id.; see also Schofield v. Schofield, 51 Pa. Super. 564 (1911) (holding non-recognition valid because contrary to civilization); Hyde v. Hyde, 1 L.R.P. & D. 130 (U.K. 1866) (holding that marriage that was "potentially polygamous" would not be recognized by allowing divorce petition).
views their marriage with horror." Koppelman correctly notes that historically in the United States, "[t]he public policy exception [to the comity rule of marriage recognition if valid where performed] has been invoked primarily in three contexts: polygamy, incest, and miscegenation." However, as in the case of interracial marriages, the context profoundly shaped the outcome of the cases. Few cases arose in which the recognition of the validity vel non of a polygamous marriage of in-state parties was for the purpose of legitimizing polygamous cohabitation in that jurisdiction. For example, it has long been common for American courts to recognize polygamous marriages for purposes of non-cohabitation incidents such as inheritance. Some cases involved marriages among or with Indians who lived on and off tribal territory—whose tribal law allowed polygamous marriage—implicating the complex and confusing subject of inter-sovereign relations with the Indian nations; most often the marriages were recognized "as valid for purposes of claiming certain incidents of marriage." The recognition of a polygamous wife’s marriage for purpose of allowing her to receive some legal benefit after the death of her husband was another common scenario. Perhaps the most well-known case of this type is In re Dalip Singh Bir's Estate, in which both wives of an immigrant from India were permitted to inherit and divide his estate equally. Reversing the lower court, which had

186. RUSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 5.1, at 309 (5th ed. 2006); see also ROBERT A. LEFLAR ET AL., AMERICAN CONFLICTS LAW § 221, at 610 (4th ed., 1986) ("Polygamous marriage of local domiciliaries would likewise fall under the condemnation of strong social policy in American states, even though they be performed at some place at which they would be valid."); ANDREAS F. LOWENFELD, CONFLICT OF LAWS 749 (2d ed., 1998) (stating that the interjurisdictional marriage recognition "varied widely once one got past prohibitions against bigamy and incest"); EUGENE F. SCOLES ET AL., CONFLICT OF LAWS § 13.9, at 573-77 (discussing "progressive polygamy" of forbidden remarriage after divorce).

187. Koppelman, Policy, supra note 174, at 946.

188. See, e.g., Hallowell v. Commons, 210 F. 793 (8th Cir. 1914) (holding that children of polygamous union nevertheless have the right to inherit as lawful children).

189. Henson, supra note 16, at 564; see also LEFLAR ET AL., supra note 186, at 613–14 (stating that the law of party's tribe governed their marriage status).

190. 188 P.2d 499 (Cal. Dist. Ct. App. 1948) (allowing both wives of a Punjabi immigrant to inherit); see also Royal v. Cudahy Packing Co., 190 N.W. 427 (Iowa 1922) (allowing the second, polygamous wife of a Syrian immigrant to recover a worker's compensation award after he was killed during his employment).
denied recovery on the ground that the marriage violated strong public policy in California, the appellate court held:

The decision of the trial court was influenced by the rule of "public policy"; but that rule, it would seem, would apply only if decedent had attempted to cohabit with his two wives in California. Where only the question of division of property is involved, "public policy" is not affected.\(^\text{191}\)

Likewise, many polygamy-recognition cases have involved premature or improper remarriages of parties who were divorced in jurisdictions that forbade or restricted the marriage of a divorced person to anyone but his or her former spouse, at least for a period of time. The public policy underlying those restrictions is (and was) easily distinguished from the strong public policy against polygamous marriage.\(^\text{192}\) In such cases (and, indeed, in all recognition-of-polygamous-marriage cases), "[t]he controlling issue becomes whether the policy of prohibition, as expressed by the legislative body, is strong enough in regard to the particular issue before the court to prevail over the policies furthered by upholding the marriage."\(^\text{193}\)

3. Interstate marriage recognition and consanguinity restrictions

The other form of marriage said to be universally repugnant and non-recognizable in American conflicts cases and commentary were consanguineous marriages,\(^\text{194}\) sometimes mistakenly called "incestuous" marriages.\(^\text{195}\) But, unlike polygamy, there was some uncertainty about where the line was drawn within which marriages were deemed abhorrent to common decency (or, earlier, to Christianity). As Story noted, "[i]t is difficult to ascertain exactly the point, at which the law of nature, or Christianity, ceases to prohibit

\(^{191}\) In re Dalip, 188 P.2d at 502.

\(^{192}\) See, e.g., SOLES ET AL., supra note 186, at 573-77; LEFLAR ET AL., supra note 186, at 611-12.

\(^{193}\) SOLES ET AL., supra note 186, at 575. "If the statutory language is unmistakable, the court may feel there is little it can do but follow it. However, in most instances, the result in a particular case should, and will in large measure, depend upon which of the competing policies has a greater weight with the court." Id. at 575-76.

\(^{194}\) See supra notes 174-76 and accompanying text.

\(^{195}\) The error is because incest is not a marriage concept or condition, but a criminal concept and condition. The civil marriage restriction was called consanguinity (and, rarely, affinity).
marriages between kindred; and nations are by no means in agreement on this subject.\textsuperscript{196} The modern marriage laws also reflect a degree of disparity in where to draw the line; for example, thirty American states prohibit marriage of first cousins, but twenty allow such marriages.\textsuperscript{197}

Likewise, to put it in modern terms, the degree of intrusion upon the public policy of the second state depends in no small part on the degree of consanguinity of the parties. Thus, in cases of direct lineage (marriage of ancestor and descendant), or brother-sister, most courts have refused to recognize the marriage.\textsuperscript{198} Uncle-niece marriages have often arisen in the context of parties to a religion that allows or makes special dispensation for such marriages and while the cases are split, especially in the religious marriage context, many allow recognition.\textsuperscript{199} The well-known \textit{In re May’s Estate}\textsuperscript{200} upheld an evasive Rhode Island marriage between an uncle and niece of half-blood from New York, despite a New York law prohibiting such; the debate between the majority and dissent focused on whether the internal domestic relations law expressed strong public policy, was intended to bar interstate recognition, and whether the particular marriage was in violation of the core interests of the law.

Ironically, while it is mostly the younger (western) states that prohibit first-cousin marriages, it is the older cases from the older states that tended to decline recognition to first-cousin marriage when prohibited in the second jurisdiction, but the more recent cases tend to accept them as not violative of strong public policy.\textsuperscript{201} Henson notes that the evolution toward recognition of first-cousin marriages generally correlates with the decriminalization of sex between first cousins.\textsuperscript{202} Overall, “[i]nstances where a marriage good where contracted has been declared void at the domicile because of the [kinship] relationship of the parties are in the minority.”\textsuperscript{203} A leading contemporary conflicts treatise summarized the prevailing

\begin{footnotes}
\footnotetext{196}{\textit{Story}, supra note 141, at 104; \textit{see also} id. §§ 115–16, at 105–08.}
\footnotetext{197}{\textit{See} National Conference of State Legislatures, State Laws Regarding Marriage Between First Cousins, http://www.ncsl.org/programs/cyf/cousins.htm.}
\footnotetext{198}{\textit{Lefler et al.}, supra note 186, at 610.}
\footnotetext{199}{Henson, supra note 16, at 567–68.}
\footnotetext{200}{114 N.E.2d 4 (N.Y. 1953).}
\footnotetext{201}{Henson, supra note 16, at 567–68.}
\footnotetext{202}{Id.}
\footnotetext{203}{\textit{Scoles et al.}, supra note 186, at 578.}
\end{footnotes}
and preferred analysis of the consanguineous marriage recognition question as: "Does the local prohibition represent a policy so strong that the court at the domicile will declare the attempted marriage void, instead of applying the usual approach of validating the marriage?" 204

4. Interstate recognition of teenagers' marriages

Cases involving recognition of marriages of teenagers who were too young to marry in the forum, but were of age to marry in the sister state in which they married, are split. 205 But the cases tend to be very context-sensitive. The result reflects such things as how long the parties lived together after the marriage, 206 whether any children were born, whether it is apparent that it was a bad marriage, whether the under-aged party or parties confirmed the marriage upon reaching majority, 207 how young the under-aged party was, 208 whether the domestic statute made underage marriages void or voidable, whether the suit was civil or criminal, 209 who brought the suit, how recent the vintage of the domestic law was, 210 and whether the marriage was evasive. 211 As the Graves case illustrates, "results may be varied on similar sets of facts by reason of the issue in the particular lawsuit." 212

When underage marriages have been upheld, even evasive marriages, it usually has been because the court has looked at the circumstances of the case and determined that they did not threaten

204. Id.
205. See, e.g., State v. Graves, 307 S.W.2d 545 (Ark. 1957) (upholding marriage as not violative of strong public policy); Wilkins v. Zelichowski, 140 A.2d 65 (N.J. 1958) (invalidating marriage where husband was confined in a reformatory, and under aged wife, had not confirmed her marriage after majority); Capasso v. Colonna, 122 A. 378 (N.J. Ch. 1923) (upholding marriage since teenaged wife was only nine months under age, and would have had age capacity to marry in the forum even though she lacked it in the state of celebration); De Fur v. De Fur, 4 S.W.2d 341 (Tenn. 1928) (statutorily increasing age of marriage to reflect strong public policy).
206. Wilkins, 140 A.2d at 65.
207. Id.
208. Capasso, 122 A. at 378.
209. Graves, 307 S.W.2d at 545.
210. De Fur, 4 S.W.2d at 341.
211. This is a consideration, but it is seldom dispositive because most of the underage marriage cases involve evasive marriages.
212. LEFLAR ET AL., supra note 186, at 613.
the core policy of the forum. For example, in State v. Graves,\textsuperscript{213} parents of two teenagers were charged with (and initially convicted of) contributing to the delinquency of a minor for taking their seventeen year-old son and thirteen year-old daughter from Arkansas, where the marriage of a male under eighteen and a female under sixteen years of age was declared by statute to be “absolutely void,”\textsuperscript{214} to Mississippi so that they could contract an evasive marriage. In Mississippi, the couple was old enough to marry with parental consent, which the defendants gave. Noting that such marriages had been upheld for over a century, and that the cases under the new statute were split two-to-one in favor of continuing the practice of recognizing such marriages, the court concluded and held the marriage to be valid.\textsuperscript{215} Despite the “shall be absolutely void” statutory language, the Arkansas Supreme Court declared that “there is no strong public policy in this State requiring the courts to declare that marriages such as the one involved here are void ab initio.”\textsuperscript{216}

The diversity in marital age restriction policies in the American states is exceptional; there are numerous line-drawing differences.\textsuperscript{217} The fact of such variations manifests not only a lack of consensus about the age of marriage policies, but also suggests that the lack of consensus as to such details is relatively unimportant. Modern commentators tend to favor recognition of such marriages in part “because differences in legislative policy reflected in the statutory age variations . . . are usually slight.”\textsuperscript{218}

5. Interstate recognition of prohibited adoptions and other domestic relations

Adoption was not known at common law (it was invented in Massachusetts in 1851), and Parliament did not enact legislation allowing adoption in England until seventy-five years later. Thus, the historic English rule that a domestic relations “status of a kind not

\textsuperscript{213} 307 S.W.2d 545 (Ark. 1957) (upholding teens’ evasive marriage with parental consent).
\textsuperscript{214} Id. at 547 (quoting Ark. Stat. § 55-102).
\textsuperscript{215} Id. at 550.
\textsuperscript{216} Id. at 549.
\textsuperscript{218} SCOLES ET AL., supra note 186, at 579.
recognized by English law will not be recognized as such in England," \(^{219}\) was applied to deny recognition of American (and other jurisdictions') adoptions in England and other British jurisdictions before those jurisdictions had enacted adoption laws. Since then, the same principle has led many Anglo-American jurisdictions to decline to recognize various forms of adoption that were non-existent in the forum, including adult adoptions generally, adoptions of mistresses, etc. \(^{220}\)

The traditional English rule that came to America with the common law was "that 'a status of a kind not recognized by English law will not be recognized as such in England." \(^{221}\) Applying that principle, many state courts declined to recognize sister-state "adult" adoptions in various contexts because the adoption of adults was seen to be a different kind of institution than the lawmakers (or testators or settlors) had in mind when they provided for the inclusion of adopted children in certain statutes (or wills, or trust provisions). \(^{222}\) Similarly, commercial adoptions (baby-selling), and adoptions of lovers (overlapping with adult adoptions) have raised issues about inter-jurisdictional recognition of adoptions. \(^{223}\)

Likewise, the distinction between status and legal incidents is relevant to the inter-jurisdictional recognition issue. \(^{224}\) In adoption cases, as in domestic relations generally, it is possible to recognize a status but deny some or all incidents thereof which deny strong domestic policies of the forum.

[S]ome authority would allow a sister state to refuse to accord the *incidents* of adoption to a relationship established by means of an out-of-state decree violative of local public policy. . . . [T]hese cases might allow a court in the restrictive state to issue orders *inconsistent with the incidents* that out-of-state adoptions would ordinarily entail. For example, *custody is ordinarily an incident* of the parent-child relationship created by adoption; [but] under

\(^{219}\) G.C. CHESHIRE, PRIVATE INTERNATIONAL LAW 147 (4th cd., 1952) (citation omitted).


\(^{222}\) Wardle, supra note 220, at 593–98, 600–09.

\(^{223}\) Id. at 595–96.

\(^{224}\) *Id.* at 597–99; LEFLAR ET AL., supra note 186, at 310.
these cases perhaps a court in the restrictive state could cite this state's strong anti-surrogacy policy to award custody to the surrogate if she seeks to have the child returned even after the issuance of a final out-of-state adoption decree in favor of the semen-provider and his wife.225

C. Prevailing Principles Used Historically for Resolving Conflicts Issues Concerning Controversial Forms of Domestic Relations

As the historical cases involving inter-jurisdictional conflicts concerning recognition of controversial forms of domestic relations illustrate, choice of law principles are constructed "out of the universals of jurisprudence underlying all law," as a matter of "natural law,"226 as well as concern for sovereignty—local first, and then foreign. All of these factors define and constrain the obligations of comity. Thus, there are three over-arching conflicts principles in tension: (1) inter-jurisdictional comity versus (2) principles of natural law (or international law), and/or (3) domestic sovereignty in controlling internal public policy.227 All were (and today still are) valid principles of conflict of laws. While technical conflicts rules, approaches, authorities, analyses, and considerations can be (and often were) invoked to support giving priority to one or the other principle in any given conflict of laws case involving controversial domestic relations, ultimately which of the competing conflicts principles was given precedence usually came down to a matter of the substantive public policy of the domestic forum. Because there was no agreement in the border and southern states that slavery violated the natural law, nor consistency in support of that principle in the northern states (except as a matter of slow progression over time), resort to the natural law was not reliably or generally a dispositive factor. Likewise, the other two natural law exceptions to the presumption of inter-jurisdictional recognition, for polygamy and incest, while not infrequently noted in cases in the eighteenth and nineteenth centuries, have not been generally invoked in recent decades.228 Additionally, in this post-modern era of non-essentialism

226. COVER, supra note 84, at 85.
227. Id. at 85-86.
228. Perhaps that is due to increased communication, education, and travel raising awareness that polygamy is still widely practiced in many nations and societies, and because of
and deconstructionism, natural law arguments have less popular appeal and persuasiveness than they had one hundred and two hundred years ago.

The historical record shows that in most cases, the recognition of controversial foreign domestic relationships came down to a matter of determining if local public policy strongly opposed it, and the extent to which giving comity in the particular facts of context of the specific case and the precise issue it raises would undermine that policy. Distilling the past cases, the critical question is: “How does a court know when to comply with the ordinary practice of comity and when to refrain? Principles and rules of choice of law begin to answer such questions [but]... not without ambiguity and difficulty...”

While the specific resolution of these domestic relations conflicts has varied over time, from issue-to-issue, from state-to-state, and sometimes from case-to-case within states, several prevailing principles emerge. First, protection of the strong domestic relations policy of the forum sovereign is the dominant, controlling consideration. Second, respect for established relations and presumptions in favor of upholding the validity or established relationships were influential considerations. Third, comity, as an underlying principle respecting the equal sovereignty of other jurisdictions, was a persistent (albeit rebuttable) presumption. Fourth, fundamental human rights or “natural law” or “international law” may occasionally influence the analysis, and even may be dispositive, but only in the rare cases is there a strong, unambiguous consensus in support of the principle. Finally, when recognition of a novel form of domestic relations would directly contradict or seriously impair or defy a strong public policy of the forum sovereign regarding domestic relations, that consideration consistently controlled the outcome. Various other conflicts principles could clarify or obfuscate the issues, but they give way to strong forum public policy interests.

the lack of consensus even in our own country concerning exactly where to “draw the line” separating permissible from impermissible kinship for marriage, and because of the acceptance of “sequential polygamy” of divorce-and-another-marriage attendant to adoption of unilateral-no-fault divorce-on-demand in all U.S. states.

229. “Of course, half of the game was determining which rival systems were entitled to respect and acceptance under the comity theory.” Bush, supra note 41, at 628.

230. COVER, supra note 84, at 84–85.
Thus, the American cases involving inter-jurisdictional recognition of slavery, interracial marriage, polygamous marriage, consanguineous marriage, underage marriage, and adoptions show the most important factor predicting and controlling recognition of controversial domestic relationships is the strength of the public policy in the forum against the relationship in question. As the slavery cases show, as domestic public policy changed to more strongly oppose such relations, the courts became less willing to recognize them even if they were validly created in a state where they occurred. On the other hand, as the interracial marriage cases and adult adoption cases show, as the domestic public policy changed in favor of allowing such relationships, courts have shown greater willingness to recognize them from foreign jurisdictions. As many cases demonstrate, especially those involving polygamy, consanguinity, and underage marriage, the factual circumstances, whether the issue involves status or incidents, and whether it would infringe a core or a peripheral concern of the public policy, will influence whether recognition is given.

One additional factor, judicial preference or jurisprudence, clearly has influenced choice of law in inter-jurisdictional recognition cases involving controversial domestic relations. While in some cases strong positive law has left very little room for judicial discretion, it has not in all cases precluded ameliorative analysis based upon a judge's sense of justice. As Professor Robert Cover put it in his classic examination of how judges expanded, followed, or circumvented slavery statutes and precedents: "The courts might still indulge in interstitial preference for liberty but not in the face of clear manifestations of a contrary legislative policy."231 Courts today are more aggressive about incorporating judicial notions of justice into their judgments than they were in the nineteenth century. And the ability, and demonstrated willing propensity, of judges to manipulate choice of laws analysis to avoid application of a rule which the judges dislike or to apply a rule which they prefer is well-known.232 

231. Id.

court professes to use, its actual decisions are more likely to reflect 'judicial intuition' or result-oriented substantive preferences than anything else.\textsuperscript{233} For example, distinguished conflicts scholar Patrick Borchers has noted, "substantive preferences are the most important determinant in tort conflicts cases."\textsuperscript{234}

III. CONTEMPORARY INTER-JURISDICTIONAL ISSUES REGARDING GAY FAMILY RELATIONS

We are beginning to see the emergence of a "bull market" in litigation over conflict of laws issues resulting from the creation in one state of forms of domestic relations (especially for "gay families") that are not allowed in other states into which the parties to such relations seek to import their new legal status and benefits. Since 2000, many American state and federal appellate courts have addressed conflicts issues concerning inter-jurisdictional recognition of same-sex domestic relations in reported cases.\textsuperscript{235} The number,
frequency, rate, and scope of such decisions seems to be increasing every year. 236

A. Judicial Decisions Concerning Interstate Issues Regarding Same-Sex Marriages, Civil Unions, Domestic Partnerships, Adoptions and Their Incidents

The first reported state appellate court ruling or federal court decision on a conflict-of-laws issue resulting from the creation of same-sex domestic relationships created in one state and imported into another state came in 2000. Since that year, as Appendix A shows, there have been nearly two dozen reported state appellate or federal court rulings (and another ten significant other reported opinions) addressing inter-jurisdictional conflicts issues involving attempted importation or exportation of some form of same-sex domestic relationship allowed in one jurisdiction but not (or not clearly) allowed in another. Viewed broadly, ten of the opinions declined recognition of the same-sex domestic relationship, nine granted recognition of the relationships, and two were split. 237 However, looking at cases involving recognition of same-sex marriage or other relationships not permitted in the second state, the picture is not so ambiguous. As Professor Symeonides has noted: “Thus far, the majority of cases have denied such recognition. Indeed, as of the time of this writing, only two lawsuits by same sex partners have found a hospitable forum in another state. However, both suits sought the dissolution of the respective civil unions, and one of them was filed in Massachusetts . . . .” 238

236. Neither I nor my research assistants found any reported appellate court decisions in America before the year 2000 addressing such issues.

237. In Cote-Whiteacre, the Massachusetts Supreme Court upheld the Massachusetts reverse marriage evasion statute as applied to same-sex couples from another state in which such marriages are prohibited, but then it went on to adopt a bizarre test for how to determine if same-sex marriage was prohibited in such states that was blatantly biased in favor of allowing such couples to marry in Massachusetts. Within months, in two subsequent cases, the highest courts of neighboring states of Rhode Island and New York, which the Massachusetts court said were presumed to not prohibit same-sex marriage, disproved the Massachusetts predictions and explicitly declared that same-sex marriages were prohibited in those states. Likewise, in Hensfeld, the court rejected the claim that either a Canadian same-sex marriage or Vermont civil union were sufficient to qualify a same-sex couple for a residential property disability tax exemption, but the court held that under a recently enacted state Domestic Partnership Act the couple would qualify for the exemption.

238. Symeon Symeonides, American Private International Law 523 (2008), available at http://www.iclaws.com/PRIL-USA.pdf (emphasis added); see also Koppelman,
The outcomes of conflicts analysis in litigation over issues concerning same-sex family relations has been summarized recently as follows:

A state is free to apply its own laws to cases in which it has a legitimate interest, provided that the parties against whom the laws are applied are not unfairly surprised. Although a state must recognize a final judgment of another state’s courts, it need not recognize a civil union certificate or birth certificate issued in another state because no judicial process is involved. This is generally accurate, but upon close examination of the cases the picture is somewhat more complex.

The case opinions show that comity has been only seldom mentioned as the dominant consideration in the choice of law analysis of interstate recognition of same-sex marriage and similar domestic relations. Virtually all of the analysis focuses on the meaning, scope, and breadth of the local internal policy of the forum state regarding same-sex family relationships and on whether (or the extent to which) recognition or importation of the foreign status, relationship, or benefits will contradict or undermine the local domestic relations policy. When the court finds that there is strong policy in the forum against legitimizing same-sex domestic relations broadly, or against allowing the specific domestic relationship involved in the case, they are likely to conclude against recognition. Only rarely (and probably mostly in unreported or opinions of trial court [presumably forum-shopped by the plaintiffs]) will a court disregard or try to distinguish a clear domestic relations policy and recognize such relations when domiciles acting in the state could not create the same relationship.

On the other hand, when the court finds that there is a policy generally in favor of same-sex relationships, or no strong policy against allowing the particular same-sex relationship involved in the case, they are generally inclined to uphold and recognize the imported same-sex domestic relationship. Essentially, the courts see

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Handbook, supra note 166, at 2164 ("Thus far, there is little case law on recognition of foreign civil unions, and all of the cases involve evasive marriages.").

no real inter-jurisdictional “conflict” in the case. Then they may speak of comity interests or factors such as validation of existing relations and upholding expectations. They perceive no challenge to the forum sovereignty in recognizing the foreign relationship, nor any loss to any strong forum family law policy.

The most difficult cases are those in which the forum has a strong public policy that seems to be narrowly focused, or the strength of the public policy against such relationships seems equivocal. For example, it may speak of barring (or barring recognition of) same-sex marriage, but not of same-sex civil unions or same-sex partner adoptions. When the domestic relationship at issue in the case is not within the narrow scope of the statute or case rule defining the strong public policy, the court must determine whether a penumbra emanates from the rule that covers the contested relationship. Often the court appears to balance the attenuated strength of any penumbra internal policy against the relationship with competing interests. It is in this kind of “marginal” case that traditional conflicts analysis is most useful and valuable.

B. Positive Law Developments Concerning Inter-jurisdictional Gay Family Issues

There are two, not one, principles underlying the exceptions to the general rule of comity. The first is what Professor Cover labeled “the universals of jurisprudence underlying all law,” or “natural law.” The second is the need to uphold the sovereignty of the second forum embodied in its exceptionally strong public policy relating to a subject of extraordinary importance to the integrity of that state.

It is debatable whether same-sex marriage comes under the first exception. Historically, same-sex marriage would have been deemed contrary to universal justice or natural law. Indeed, mere homosexual relations were generally condemned and often proscribed since Roman times (as well as in some periods of Roman and earlier

240. COVER, supra note 84, at 85.
civilizations), and long were deemed to violate the natural law. The ubiquity of conjugal, male-female marriage and the complete absence of same-sex marriage in history underscores the point that as a matter of universal understanding marriage involved conjugal unions exclusively. That is a view that is still widely held, especially among adherents to religions with a natural law tradition such as Catholicism.

Social mores have changed in the past forty years, however, and it is the current consensus in the most affluent and influential nations that homosexual relations should be fully tolerated and morally-socially accepted. Most of these progressive nations carefully

242. Bowers v. Hardwick, 478 U.S. 186, 192-93 (1986) ("It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. See generally, Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity, 40 U. Miami L. Rev. 521, 525 (1986). Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws."). Bowers was overturned on other grounds by Lawrence v. Texas, 539 U.S. 558 (2003) (noting that recent developments in Europe and America undermine the significance of the historical prohibition of sodomy.).


preserve the distinction between marriage (for conjugal couples only) and same-sex relations (entitled to different but equivalent legal status and benefits), and only six out of 191 sovereign nations have legalized same-sex marriage. \[247\] Still, in the most progressive nations (including the United States), the trend toward acceptance of same-sex unions is strong enough that it may have eroded the notion that they are “universally” or “naturally” condemned.

Whether the second exception applies is a factual question depending on the policy choices made by the policy-makers (sometimes the sovereign people themselves) of a particular jurisdiction. As most American states have adopted by popular vote amendments to the state constitutions expressly banning same-sex marriage, or more, and the vote in favor of such amendments has averaged nearly seventy percent, \[248\] it is clear that the public policy in those states against recognition of same-sex marriage is strong enough to support overriding the general comity rule of marriage recognition. The nature and strength of the public policy concerning same-sex marriage in the remaining states that do not have marriage amendments is less clear, and (barring the convenient invention of some overriding federal constitutional principle mandating protection of conjugal or same-sex marriage) would require more specific, state-by-state examination. However, the reason for non-support of such amendments often is that the public policy in the state against same-sex marriage is so clear from existing statutes and judicial precedents that a constitutional amendment is not necessary. \[249\] It is likely that a finding of strong public policy against recognition would be made in many of those states. But it is also likely that reasonable judges in some states would conclude that recognition of same-sex marriages is not barred by a strong local public policy. \[250\]

\[247\]. See infra App. D.


Because of the complexity and political passion involved in such inter-jurisdictional issues regarding same-sex domestic relations, and because of the importance of forum domestic public policy in resolving the issues, it should come as no surprise that, in addition to judicial clarifications of the common law governing such issues, lawmakers (and citizen-initiative supporters) in most states have enacted positive laws (both statutory and constitutional) delineating and emphasizing the strength of local legal policies regarding same-sex domestic relations. Most positive law has been framed in terms of domestic policy, but some explicit conflicts policies have also been enacted.

By judicial opinion or legislation, a few states have created some form or forms of gay family relations. As Appendix B shows, two states, Massachusetts and California, have legalized same-sex marriage, and both did so by anti-majoritarian judicial decree. Six other states (two acting under judicial compulsion) have by statute created new legal domestic status relationships for same-sex couples that are equivalent to marriage but called something else (usually called "civil unions"). Three additional states and the District of Columbia have extended by legislation only a few specific rights and benefits of marriage to same-sex couples (often called "domestic partner" or "reciprocal beneficiary" benefits), but do not provide

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251. In re Marriage Cases, 183 P.3d 384 (Cal. 2008); Goodridge v. Dept of Pub. Health, 798 N.E.2d 941 (Mass. 2003). However, the former is the subject of a proposed constitutional amendment which, if approved by the votes, will overturn the California decision.

252. The states are California (arguably still allowed after In re Marriage Cases), Connecticut, New Hampshire, New Jersey, Oregon, and Vermont. (In Vermont and New Jersey, the legislation was mandated by a judicial decree.) The Oregon legislation has been enjoined temporarily. It was to take effect in January 2008, but a group of citizens collected signatures to invoke a procedure under the Oregon Constitution that prevents any law passed by the legislature from taking effect until after the people have voted on whether to approve the law, if enough citizens sign petitions invoking that procedure as to a particular law. The petitions on their face contained more than the 55,179 required signatures, but upon review by state election officials, some of the signatures were disqualified and the petitions fell 96 signatures short of the number needed to stop the law from taking effect and to put it on the November 2008 ballot. However, some disappointed petition signers filed suit in federal district court asserting that some signatures were wrongfully disqualified, and the court granted a preliminary injunction so that a hearing could be held in February to consider the evidence. Suzanne Pardington, Judge Halts Civil-Unions Law, THE OREGONIAN, Dec. 29, 2007, at A01.
marriage-equivalent legal status or benefits.\textsuperscript{253} Same-sex couples and partners are allowed to adopt children by statute or appellate decisions in fourteen states.\textsuperscript{254}

On the other hand, as Appendix C shows, thirty-six states have rejected creating any marriage-like legal status or marital benefits for same-sex couples.\textsuperscript{255} Forty-eight American states arguably now recognize marriages as only the union between a man and a woman;\textsuperscript{256} forty-five states by specific statutory or constitutional provisions recognize marriage as only the union of a husband and wife;\textsuperscript{257} and three more states have reached the same conclusion by judicial interpretation of existing statutes.\textsuperscript{258} Twenty-six states have passed constitutional amendments defining marriage as the union of husband and wife,\textsuperscript{259} including eighteen state constitutional amendments that also prohibit creation of marriage-equivalent same-sex civil unions (however labeled). Forty-one states have passed their own "defense of marriage" positive laws (by statute, constitutional amendment, or both) explicitly prohibiting courts from recognizing same-sex marriages performed in other jurisdictions,\textsuperscript{260} and the

\textsuperscript{253} These states are Hawaii, Maine, and Washington.


\textsuperscript{256} The only states that do not bar same-sex marriage by positive law or judicial decision are Massachusetts and New Mexico.

\textsuperscript{257} See infra notes 255–56. Additionally, Maryland, Vermont, Wyoming, and Connecticut have adopted statutory language recognizing marriage as the union of husband and wife. MD. CODE ANN., FAM. LAW § 2-201; VT. STAT. ANN. tit. 15, § 8; WYO. STAT. ANN. § 20-1-101.


\textsuperscript{259} ALA. CONST. amend. 774; ALASKA CONST. art. I, § 25; ARK. CONST. amend. 83; COLO. CONST. art. II, § 31; GA. CONST. art. I, § 4, para. 1; IDAHO CONST. art. III, § 28; KAN. CONST. art. 15, § 16; KY. CONST. § 233A; LA. CONST. art. XII, § 15; MICH. CONST. art. 1, § 25; MISS. CONST. § 263A; MO. CONST. art. 1, § 33; MONT. CONST. art. 13, § 7; NEB. CONST. art. 1, § 29; NEV. CONST. art. 1, § 21; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. 2, § 35; OR. CONST. art. XV, § 5a; S.C. CONST. art. XVII, § 15; S.D. CONST. art. XII, § 9; TENN. CONST. art. XI, § 18; TEX. CONST. art. 1, § 32; UTAH CONST. art. I, § 29; VA. CONST. art. 1, § 15-A; WIS. CONST. art. XIII, § 13.

\textsuperscript{260} This includes the twenty-six marriage amendment states, supra note 259, plus the following 15 states which have adopted statutory marriage recognition acts but no constitutional provision. ARIZ. REV. STAT. ANN. § 25-101 (2007); CAL. FAM. CODE § 308.5

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expression of public policy in the statutes or judicial opinions barring same-sex marriage might have the same effect in most remaining states.261 Adoptions by same-sex couples or partners are explicitly prohibited in seven states.262

The main effect of these positive laws rejecting particular same-sex domestic relations under traditional conflicts analysis is summarized by Professor Peter Hay:

As a strong statement of public policy—stronger than the narrower public policy exception of traditional law—these provisions [state DOMAs] will ordinarily preclude adoption of alternative legal same-sex relationships (such as 'civil unions,' . . . ). They will also likewise lead to a denial of recognition of same-sex legal relationships (particularly, of course, same-sex marriage), validly concluded under applicable law elsewhere, and of the incidents flowing from that status under the other state’s or country’s law.263

I concur in that analysis. Under settled conflicts principles, such respect for the domestic relations policy choice made by the sovereign (people) of a particular state is clearly dispositive in the absence of overriding legitimate federal Constitutional mandates, which are entirely absent in this context. That result is also compelled by the structural importance of federalism in family law in our current American legal system.

Further, however, is the value of these enactments to move the discussion beyond traditional conflicts analysis, with its heavy emphasis on comity and vested rights, and toward a more realistic understanding that these kinds of questions both are and should be (in a democracy) decided primarily as matters of the domestic relations policy of the forum sovereign. The eruption of positive law regarding interstate recognition of same-sex family relationships provides a golden opportunity for the maturation of American

(West 2004); DEL. CODE ANN. tit. 13, § 101 (1999); FLA. STAT. ANN. § 741.212 (West 2005); HAW. REV. STAT. § 572-3 (1999); 750 ILL. COMP. STAT. ANN. 5/212 (West 1999); IND. CODE § 31-11-1-1 (2003); IOWA CODE ANN. § 595.2 (2001); ME. REV. STAT. ANN. tit. 19-A, § 701 (1998); MINN. STAT. ANN. § 517.01 (West 2006); N.H. REV. STAT ANN. § 457:1 to 3 (2004); N.C. GEN. STAT. § 51-1.2 (2007); 23 PA. CONS. STAT. ANN. § 1704 (West 2001); WASH. REV. CODE ANN. § 26.04.020 (West 2005); W.VA. CODE § 48-2-603 (2004).

261. See generally supra notes 248–59 and accompanying text.
262. See generally Wardle, supra note 8, at 513–14.
conflicts of laws and its progression toward greater inclusion of the politically accountable, policy-making legislative branches of our state and national governments in the formulation of contemporary choice of law rules and principles. The current controversies also provide an excellent opportunity for the needed development and clarification of American choice of law in family law.

C. Lessons From Recent Developments Regarding Recognition of Gay Family Relations

These recent developments addressing interstate recognition of gay family relations show the influence of several conflict-of-laws principles that have been used to protect state sovereignty and strong state domestic policies that are relevant to and tied to the history of conflict of laws regarding inter-jurisdictional recognition of controversial domestic relations. First, most states want to decide for themselves, as a matter of local, internal policy, whether or to what extent same-sex domestic relations will be allowed and recognized in the state. They have taken steps to see that this matter is not dictated and decided by other sovereigns. While this position has been most noticeable in the case of opponents of same-sex marriage, who have passed DOMA statutes and similar constitutional provisions to protect that state’s right (as in most states), it is equally evident in the case of supporters of same-sex marriage who have opposed passage of a federal marriage amendment on grounds that the national sovereign should not decide these kinds of issues for Massachusetts, Vermont, California, New Jersey, and other states where law-makers are sympathetic to same-sex domestic relations.

Second, traditional comity principles of deference to status, rights, or benefits deemed to have been “vested” by another sovereign have had little influence in the cases so far. Rather, the priority given to protecting local domestic relations policies has been clearly and consistently the dominant and determinative consideration. However, scholarship advocating greater influence of comity in these cases is growing.264

Third, the debate has centered on whether and to what extent recognition of an imported status, right, incident, or benefit undermines existing internal domestic relations policies of the forum. The litigation often has boiled down to a debate over actual and expected harms to state policies rather than balancing those state interests with the conflicting interests of other jurisdictions. Some respected scholarship has criticized the use of the public policy exception in same-sex marriage recognition cases. Many other respected conflicts scholars have defended the public policy exception.

Fourth, separation of legal form from substance, or incident from label, may be useful for choice of law analysis. For instance, Professor Koppelman has suggested distinguishing among incidents:

A sensible approach would be to distinguish between those incidents that can be conferred by contract, such as those pertaining to inheritance or to making medical decisions for one’s partner, from those that can only be conferred by operation of law, such as the right to file a joint tax return or the right to a homestead exemption. That is a useful suggestion. However, analytically, an even more reasonable approach would be to measure the incident against the public policy embodied in the positive law (and clear appellate precedents) to determine whether recognition of the controversial

265. See, e.g., Kramer, supra note 232; Emily J. Sack, Civil Unions and the Meaning of the Public Policy Exception at the Boundaries of Domestic Relations Law, 3 Ave Maria L. Rev. 497 (2005).

266. See, e.g., Hogue, supra note 14; Myers, Public Policy Doctrine, supra note 241; Myers, Same-Sex “Marriage,” supra note 241. Support for this seems to underlie the Restatement (Second) of Conflict of Laws position. The Restatement (Second) of Conflict of Laws § 283(2) (1971), states the general rule as follows: “A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.” While the Restatement’s proposed “most significant relationship” standard is not accepted by all states, the statement of the general rule of marriage validation and the general public policy exception noted by the Restatement are accepted. As one brief has stated: “Many recent cases reaffirm this principle. As the Virginia Court of Appeals recently noted, ‘no state is bound by comity to give effect in its courts to the marriage laws of another state, repugnant to its own laws and policy.’” Brief of Amici Curiae of the States of Utah, Nebraska and South Dakota at 11–12, Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (No. SJC-08860) (quoting Hager v. Hager, 349 S.E.2d 908, 909 (Va. Ct. App. 1986), citing Toler v. Oakwood Smokeless Coal Corp., 4 S.E.2d 364, 366 (Va. 1939)).

relationship for purposes of the particular incident, whether private-contractual or public-legislative, conforms with or violates the public policy.

Finally, proper responsibility for deciding whether to allow new forms of domestic relations to be created or recognized in the forum is often a consideration; the more controversial the subject, the greater the significance of this factor. The importance of local control and decision is underscored by references in many of these cases to the policy-making function of the legislature or of democratic processes. Judicial deference to and reference to legislative power to decide the issue in a way favorable to embracing new forms of domestic relationships confirms the perception that as to matters of family relationships, domestic policy-making, and not comity, is the controlling consideration.

This is not a novel approach. While most scholarly discussion of the Restatement (Second) Conflict of Laws focuses on the choice considerations of section 6, subsection 2, and the various “most significant relationship” specific applications, the drafter of that influential body of recommendations also gave priority to local policies. For example, section 6, subsection 1 reads: “A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.” 268 Regarding constitutional considerations (such as Full Faith and Credit) and vertical choice of law, the Restatement (Second) also provides:

A judgment rendered in one State of the United States need not be recognized or enforced in a sister State if such recognition or enforcement is not required by the national policy of full faith and credit because it would involve an improper interference with important interests of the sister State. 269

Many leading scholarly advocates of governmental interest analysis have emphasized respect for forum sovereignty. 270 For example, Brainerd Currie, the father of modern governmental interest analysis in choice of law, famously said: “We would be better off without choice of law rules. We would be better off if Congress

269. Id. § 103.
270. Likewise, Professor Brainerd Currie emphasized deference to forum sovereignty in a number of contexts. See, e.g., Brainerd Currie, Notes on Methods and Objectives in the Conflict of Laws, in SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963).
were to give some attention to problems of private law, and were to legislate concerning the choice between conflicting state interests in some of the specific areas in which the need for solutions is serious."271 He suggested, in the meantime, that in choice of law cases: “Normally, even in cases involving foreign elements, the court should be expected, as a matter of course, to apply the rule of decision found in the law of the forum.”272 His approach avoided judicial policy-preference in solving choice of law cases and encouraged judicial respect for the policy choices of the local sovereign.273

Without attempting to oversimplify, it is fair to say that respect for and deference to sovereignty considerations of the forum sovereign have always played a part in sophisticated conflicts analysis, even under the principles of governmental interests analysis. As Professor Paul has explained,

In both the classical and the broader senses, comity rationalizes this tension [between preeminence of local sovereignty and respect for the equality of other sovereigns] in two ways. First, courts often use comity to relate different categories of law and policy, for example at the border of law and public policy, public and private law,

271. Id. at 177, 183–187.
272. Id.
273. Currie further recommended:
2. When it is suggested that the law of a foreign state should furnish the rule of decision, the court should, first of all, determine the governmental policy expressed in the law of the forum. It should then inquire whether the relation of the forum to the case is such as to provide a legitimate basis for the assertion of an interest in the application of that policy. This process is essentially the familiar one of construction or interpretation. Just as we determine by that process how a statute applies in time, and how it applies to marginal domestic situations, so we may determine how it should be applied to cases involving foreign elements in order to effectuate the legislative purpose.
3. If necessary, the court should similarly determine the policy expressed by the foreign law, and whether the foreign state has an interest in the application of its policy.
4. If the court finds that the forum state has no interest in the application of its policy, but that the foreign state has, it should apply the foreign law.
5. If the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has an interest in the application of its contrary policy, and, a fortiori, it should apply the law of the forum if the foreign state has no such interest.

From Slavery to Same-Sex Marriage

domestic and international law, and law and international politics. Rather than fitting squarely into any of these categories, *comity functions as a bridge*. For example, comity may infuse a private-law dispute between the policies of a domestic and a foreign authority with political significance, and thus allow the court to decide the outcome as a choice between competing domestic and foreign public policies. *As a bridge, comity is meant to expand the role of public policy, public law, and international politics in domestic courts.*\(^{274}\)

IV. CONCLUSION: THE ROLE OF CONFLICTS AND THE PRIORITY OF DOMESTIC POLICY

In his 1834 landmark treatise on conflict of laws, Justice Joseph Story acknowledged that "comity is, and ever must be, uncertain. That it must necessarily depend on a variety of circumstances, which cannot be reduced to any certain rule."\(^{275}\) That seems to be one lesson clearly illustrated by the history of how American courts have resolved inter-jurisdictional conflicts involving controversial domestic relations, from English and colonial slavery to contemporary same-sex marriage and similar contentious novel forms of family relationships. The importance of considering "a variety of circumstances" and not "any certain rule" of comity is also manifest in the recent cases involving same-sex family relationships.

It also is clear that, both as a matter of historical treatment of controversial forms of domestic relationships and as well as of recent analysis of conflict of laws issues involving inter-jurisdictional recognition of same-sex domestic relations, the resolution of these issues is primarily a matter of forum sovereign domestic relations policy, rather than of comity or of balancing competing interests. The emphasis on comity that dominated much of conflicts analysis of most other issues during most of the nineteenth and twentieth centuries proved in the past and recent cases involving controversial domestic relationships to be of only marginal relevance to resolution of many family law conflicts issues. Rather, protection of the forum sovereign's domestic relations policy seems to be the first (and often final) principle. Preserving the authority of law-makers to decide novel policy issues including whether or not to allow or recognize

\(^{274}\) Paul, *supra* note 49, at 6–7 (emphasis added).
\(^{275}\) *STORY, supra* note 141, at 29.
new forms of domestic relations flows from that emphasis on forum sovereignty.

There still is a role for traditional conflicts analysis and comity consideration when recognition of the domestic relationship would not significantly impair the local domestic relations policy, or, in rare cases, when the very strong and clearly dominant policies and interests of another sovereign would be seriously damaged with no measurable benefit to those of the local sovereign. In such cases, on the margins, where direct conflict with or serious detrimental impact upon the forum's family law policies is not at risk, traditional conflicts analysis still is very valuable.

In cases where significant domestic relations policies of the forum are directly and substantially implicated, the resolution of questions about the importation into one state of new forms and controversial forms of domestic relationships created in another sovereign is not really a matter of, or appropriate for, conflicts analysis. Rather, "[i]t is, at bottom, a political, even ideological problem. Its resolution will ultimately need to be a political one."276

276. Hay, supra note 239, at 279.
APPENDIX A

State Appellate or Federal Court Decisions Involving Conflicts of Laws Re: Same-Sex Domestic Relationships 2000–07


2001  None

       In re Estate of Gardiner, 42 P.3d 120 (Kan. 2002).
       Russell v. Bridgens, 647 N.W.2d 56 (Neb. 2002).


See also, of note


2007


*Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007).

*Butler v. Adoption Media, LLC*, 486 F. Supp. 2d 1022 (N.D. Cal. 2007).


APPENDIX B

Legal Status of Same-Sex Domestic Relationships
Allowed in the United States
1 July 2008

Same-Sex Marriage Legal: Three (3) U.S. States
(MA, CA, CT)

Same-Sex Unions Equivalent to Marriage Legal:
Six (6) U.S. States
(CA,* CN, NH, NJ, OR, VT)

Same-Sex Unions Registry & Some Benefits:
Four (4) U.S. Jurisdictions
(HI, ME, WA, DC)

Adoption by Same-Sex Couples or Partners Allowed:
Fifteen (15) U.S. Jurisdictions
(CA, CO, CT, DC, IL, IN, ME, MA, NH, NJ, NY, OH, PA, TN, VT)

* = Status of "Domestic Partnerships" in CA after In re Marriage Cases is unclear
## APPENDIX C

### Legal Status of Same-Sex Domestic Relationships

*Prohibited in the United States*

*1 July 2008*

<table>
<thead>
<tr>
<th>Status / Right</th>
<th>States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Same-Sex Marriage Prohibited by Law or Appellate Court Decision</td>
<td>Forty-Eight (48) U.S. States (All but MA, NM)</td>
</tr>
<tr>
<td>Same-Sex Marriage Prohibited by State Constitution Amendment</td>
<td>Twenty-Seven (27) U.S. States (AK, AL, AR, CO, GA, HI, ID, KY, KS, LA, MI, MS, MO, MN, NB, NV, ND, OH, OK, OR, SC, SD, TN, TX, UT, VI, WI)</td>
</tr>
<tr>
<td>Same-Sex Civil Unions Equivalent to Marriage Prohibited by State Constitutional Amendment</td>
<td>Eighteen (18) U.S. States (AL, AR, GA, ID, KS, KY, LA, MI, NB, ND, OH, OK, SC, SD, TX, UT, VI, WI)</td>
</tr>
<tr>
<td>Adoption by Same-Sex Couples or Partners Prohibited</td>
<td>Seven (7) U.S. States (AL, FL, MS, NE, OK, UT, WI)</td>
</tr>
</tbody>
</table>
APPENDIX D

Legal Status of Same-Sex Unions in the World
1 July 2008

PRO:  
Same-Sex Marriage Legal in Six Nations  
The Netherlands, Belgium, Canada, Spain, South Africa*, and Norway (2009)

Same-Sex Unions Equivalent to Marriage Legal in Fourteen Nations  
Denmark, Norway, Sweden, Iceland, Finland, France, Germany, Luxembourg, Slovenia, South Africa*, Andorra, Switzerland, United Kingdom, New Zealand

Same-Sex Unions Registry & Some Benefits in at least Seven Nations  
Argentina, Columbia, Croatia, Czech Republic, Hungary, Israel, Portugal

CON:  
Thirty-seven (37) of 191 Sovereign Nations (19%) Have Constitutional Provisions Explicitly or Implicitly Defining Marriage As Union of Man and Woman  
Armenia (art. 32), Azerbaijan (art. 34), Belarus (art. 32), Brazil (art. 226), Bulgaria (art. 46), Burkina Faso (art. 23), Cambodia (art. 45), Cameroon (art. 16), China (art. 49), Columbia (art. 42), Cuba (art. 43), Ecuador (art. 33), Eritrea (art. 22), Ethiopia (art. 34), Gambia (art. 27), Honduras (art. 112), Japan (art. 24), Latvia (art. 110 - Dec. 2005), Lithuania (art. 31), Malawi (art. 22), Moldova (art. 48), Montenegro (art. 71), Namibia (art. 14), Namibia (art. 14), Nicaragua (art. 72), Paraguay (arts. 49, 51, 52), Peru (art. 5), Poland (art. 18), Serbia (art. 62), Somalia (art. 2.7), Suriname (art. 35), Swaziland Constitution (art. 27), Tajiksistan (art. 33), Turkmenistan (art. 25), Uganda (art. 31),
Ukraine (art. 51), Venezuela (art. 77), Vietnam (art. 64). See also Mongolia (art. 16), Hong Kong Bill of Rights of 1991 (art. 19).

Examples: Article 110 of the Constitution of Latvia now reads: “The State shall protect and support marriage a union between a man and a woman . . . .”

Article 46 of the Constitution of Bulgaria provides: “(1) Matrimony is a free union between a man and a woman . . . .”

Eighty-five (85) nations have substantive constitutional provisions protecting “marriage” and one hundred fifty-one (151) have constitutional provisions protecting “family”

(By Comparison Sodomy Still is Illegal in 67+ Nations and a Capital Offense in 9 Nations: Afghanistan, Iran, Mauritania, Nigeria, Pakistan, Saudi Arabia, Sudan, UAE, Yemen)


* = South Africa law is ambiguous, so it is double-counted.