

Testimony of

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Full Faith and Credit,  
Family Law,  
and the Constitutional Amendment Process  
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United States Senate Committee on the Judiciary  
Subcommittee on the Constitution, Civil Rights and Property Rights  
"Judicial Activism vs. Democracy:

What Are the National Implications of the Massachusetts Goodridge Decision  
and the Judicial Invalidation of Traditional Marriage Laws?"

Amending a constitution is serious business. In keeping with the adage "If it's not broken,  
don't fix it," we have the responsibility to question seriously whether there is anything the  
matter with the Constitution as it currently stands before setting out to amend it.

The specific question now facing this Subcommittee is whether one state's decision to  
recognize same-sex marriage demonstrates the need for a constitutional amendment. The  
answer is that there is nothing the matter with the U.S. Constitution that would require an  
amendment defining marriage or specifying the consequences of a marriage in another state.

## 1. Summary

The occasion for today's consideration of a constitutional amendment is a decision by  
Massachusetts' highest court that the Massachusetts state constitution gives same-sex  
couples a right to marry. There is much confusion about what the Massachusetts decision  
means in other states, for instance, if a Massachusetts same-sex couple moves to another  
state after getting married. Given the technical nature of the applicable legal principles -  
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they are part of the legal specialty known as "conflict of laws" - some degree of confusion is  
understandable.

But no one can seriously claim that there is anything the matter with the way that the Full  
Faith and Credit clause already handles such problems. The issues we face today concerning  
the interstate consequences of a marriage are not much different from those faced in  
previous generations, and the Clause has ample flexibility to handle them. For more than  
two centuries the Clause has stood as written, with only occasional legislative elaboration to  
bring it up to date. A constitutional amendment would put an end to the possibility of  
legislative innovation, state or federal. There was nothing the matter with the Full Faith and  
Credit Clause when it was written and there is nothing the matter with it now.

Some people think that the Massachusetts judges were mistaken in their interpretation of  
what the Massachusetts constitution requires. But on its face, this is an insufficient reason to  
adopt a federal constitutional amendment. In a federal system such as ours, it is taken for  
granted that a state court is entitled to interpret its own state law, even if other states think  
the interpretation is mistaken. Passing federal constitutional amendments to correct state  
judges' interpretations of state law radically alters the distribution of decision-making  
authority in the American federal system.

## 2. Full Faith and Credit

The Massachusetts ruling permitting same-sex marriage raises issues about the effect of one  
state's changes in marriage laws in other states. This question does not arise out of any  
defect in the Constitution; it arises out of the structure of the American federal system,

which gives states the right to adopt different laws and to interpret their own state constitutions differently from other states. The Constitution was written deliberately to protect state power to do so, and the approach that the framers of the Constitution adopted is embodied in Article IV's Full Faith and Credit Clause.

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#### a. Full Faith and Credit Generally

The fact that states may differ in their policies or in the interpretation of their constitutions makes it necessary to find some way to harmonize their different choices. Many transactions and legal relationships have connections to several different states. The Full Faith and Credit Clause of Article IV was written for precisely the purpose of reconciling conflicting state decisions. It states:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.<sup>2</sup>

Although the text refers to "public Acts [and] Records" as well as "judicial Proceedings," the Clause has had its main impact in the interstate enforcement of judicial judgments. These are entitled to almost automatic deference in other states; state legislation has always been given less recognition.<sup>3</sup> Less formal legal instruments, such as contracts or (more important here) licenses, have been entitled to less recognition even than legislation.

The Full Faith and Credit Clause unavoidably results in judicial judgments having "extraterritorial" effect. The whole point of the clause is that once a judgment is announced, that judgment will be enforceable in other states. Whether you're talking about a tort judgment or an award in a contract case, the direct consequence of the Full Faith and Credit clause is that one state court - the one that announces the award - gets the opportunity to

2 U.S. CONST. art. IV, § 1.

<sup>3</sup> See *Pacific Employers Insurance Co. v. Industrial Accident Commission*, 306 U.S. 493, 502 (1939) ("[W]e think the conclusion is unavoidable that the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events"); *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935) ("[T]here are some limitations upon the extent to which a state will be required by the full faith and credit clause to enforce even the judgment of another state, in contravention of its own statutes or policy"). In *Hughes v. Fetter*, 341 U.S. 609 (1951), the Supreme Court invalidated on Full Faith and Credit grounds a Wisconsin statute providing that Wisconsin courts would not be open to wrongful-death actions arising in other states. In doing so it specifically recognized that Wisconsin might refuse to enforce a sister-state wrongful-death action if it had a "real feeling of antagonism against wrongful death suits in general." *Id.* at 612. This statement reflects the general recognition that a state is entitled to refuse to recognize another state's law on the grounds of inconsistency with local public policy, but not out of simple hostility to another state's authority.

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impose its will on all the rest, at least for that particular plaintiff and defendant and that particular set of facts. No one thinks that there is anything problematic about this; it is a desirable aspect of our federal system. The alternative is anarchy.

But this wholly unexceptional general principle is now generating opposition in one specific context, namely interstate recognition of marriages. People around the country are asking, "Why should a decision made in Massachusetts about the definition of marriage effectively tie the hands of courts and legislatures in my state?" Their fears are unfounded. First, entering into a marriage is legally more akin to signing a contract or taking out a driver's license than to a full-fledged court case; as will be shown below, marriages have never received the automatic effect given to judicial decisions. They can be refused recognition in other states without offending Full Faith and Credit.

Second, the Full Faith and Credit Clause has never been understood to require recognition of marriages entered into in other states that are contrary to local "public policy." The "public policy" doctrine, which is well recognized in conflict of laws, frees a state from having to recognize decisions by other states that offend deeply held local values.<sup>4</sup> One of the contexts in which it has proven particularly important is family law.

4 *Marchlik v. Coronet Insurance Co.*, 239 N.E.2d 799 (Ill. 1968) (public policy of Illinois forbade direct action against insurance company, even though Wisconsin law applied and Wisconsin allowed the action); *Mertz v. Mertz*, 3 N.E.2d 597 (N.Y. 1936) (public policy of New York forbade interspousal suit in tort, despite Connecticut law allowing such a suit); *Owen v. Owen*, 444 N.W.2d 710 (S.D. 1989) (public policy of South Dakota forbade interspousal suit in tort).

The public policy doctrine's application to judgments is less clear. The Restatement (Second) of Conflict of Laws takes the position that:

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.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 103 (1988). See also, *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935) ("[T]here are some limitations upon the extent to which a state will be required by the full faith and credit clause to enforce even the judgment of another state, in contravention of its own statutes or policy").

As will appear from the discussion below, for purposes of the public-policy doctrine, marriages have not been treated like judgments, but rather have received less recognition even than legislation. Courts have not hesitated to apply local public policy to refuse to recognize marriages entered into in other states.

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#### b. Full Faith and Credit in the Family Law Context

Family law is one of the most difficult and complex subject areas for conflict of laws.

Family-law cases can't be resolved as easily as contract-law disputes; they involve ongoing relationships that may be tied to several different states, and they touch our lives in intimate and important ways. As a matter of existing constitutional law, the conclusion reached by one state is not automatically entitled to recognition by the rest. This is true not only in the context of marriage law, but also for other family-law issues.

One example involves divorce law, an area in which pragmatic solutions have been worked out to accommodate the different interests of the competing states and the opposing parties. Under an approach known as "divisible divorce," the initial divorce might be granted in the state of current residence of the divorcing spouse (usually this was the husband), but property and child-custody decisions had to be made in the state of residence of the wife.

The fact that one state decided to grant a divorce, in other words, was not treated as automatically binding on the others, and the first state lacked the authority to adjudicate certain important aspects of the marriage.<sup>5</sup> In particular, the wife's home state had a right to relitigate any aspects of the divorce that touched on her rights to property<sup>6</sup> and custody over her children.

Child custody was another area in which it was necessary to balance finality of decision making against the need for flexibility. For almost a century, it has been appreciated that child custody awards should not be final and permanent; there has to be some leeway to  
<sup>5</sup> In *Williams v. North Carolina II*, 325 U.S. 226 (1945), the Supreme Court upheld North Carolina's right to prosecute for bigamy two North Carolina domiciliaries who traveled to Nevada to divorce their respective spouses and to then marry one another. The Court held that the Nevada judgment did not preclude North Carolina from examining the validity of the divorce and subsequent re-marriage, nor from prosecuting the individuals in question on bigamy charges.

<sup>6</sup> See, e.g., *Estin v. Estin*, 334 U.S. 541 (1948) (allowing for divisible divorce; state of wife's residence was permitted to adjudicate rights of wife with respect to property, even though divorce was granted in another state); *May v. Anderson*, 345 U.S. 528 (1953) (holding that a state in which the wife was not domiciled or present did not have jurisdiction to make a determination of her custodial rights in a divorce, despite being able to order a divorce); *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957) (state court of residence of husband did not have jurisdiction over the wife and could not extinguish any right she had under the law of state of her residence to financial support from her husband, even though the court could order a divorce).

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modify a judgment.<sup>7</sup> The custodial parent may become unfit or die; if the child develops medical problems the amount of financial support may have to be increased; and so forth.

Where the interests of children are involved, awards have to be modifiable.

But state courts took advantage of the modifiability of other states' child-custody awards to reverse awards in ways that were not in the child's best interests. If the losing parent in a

Texas divorce proceeding seized the children, he or she could run to a Massachusetts court and get a new award. Then the other parent could try to seize the children and take them back to Texas, which would then enter a new judgment. Ultimately, fortunately, the federal government stepped in and passed a rather complicated statute specifying exactly when a custody award was enforceable as written and when it could be modified.<sup>8</sup> All state courts are bound by this statute.<sup>9</sup>

Regarding the precise point at issue here, marriages entered into in one state have never been considered constitutionally entitled to automatic recognition in other states. This is in part because marriages are not like judicial judgments, which are announced only after lengthy formal court proceedings in which both sides are represented by counsel. It is also because of the special importance in American law of family relationships, which (as noted above) makes family law distinctive. Finally, it has always been too easy for people to avoid their home-state law by traveling to another state to take advantage of more lenient marriage laws.<sup>10</sup> For all of these reasons, states have always had greater freedom to re-examine the validity of marriages entered into elsewhere than they have to re-examine the merits of a

<sup>7</sup> See, e.g., *Yarborough v. Yarborough*, 290 U.S. 202, 222 (1933) (Stone, J., dissenting) ("[I]t comes as a surprise that any state, merely because it has made some provision for the support of a child, should, either by statute or judicial decree, so tie its own hands as to foreclose all future inquiry into the duty of maintenance however affected by changed conditions"); *Potter v. Potter*, 278 P.2d 1020 (Colo. 1955) (child support ordered in Texas but modified in California allowed, since child support order was not considered a final judgment); *B.B. v. D.D.*, 18 P.3d 1210 (Alaska 2001) (modification in Alaska of child custody order by Oregon court allowed).

<sup>8</sup> Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A (2004).

<sup>9</sup> U.S. CONST. art. VI, cl. 2.

<sup>10</sup> See, e.g., *Lanham v. Lanham*, 117 N.W. 787 (Wisc. 1908) (plaintiffs, who were prohibited from getting married in Wisconsin because law prohibited marriage within one year of divorce, were married in Michigan and returned to Wisconsin; Wisconsin held that marriage was not valid, since it violated Wisconsin's public policy).

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judicial award in a tort or contract case. The state has a right to take into account its local "public policy."

Among the types of marriages that have been denied recognition are:

? Marriages between cousins, or between uncles and nieces;<sup>11</sup>

? Polygamous marriages;<sup>12</sup> and

? Marriages by an individual who was very recently divorced.<sup>13</sup>

It is obvious that the interstate recognition of same-sex marriages implicates the same legal principles and requires analogous lines of reasoning.

c. Full Faith and Credit and Congressional Power

The example of interstate child custody disputes shows that legislative power has been important in determining the amount of credit legal decisions must be given in other states, particularly in the family-law context. In the child-custody context, the issue proved intractable until a federal statute - 28 U.S.C. § 1738A - was adopted.<sup>14</sup>

This example is not unique. Congress has long recognized the substantive importance of its power to provide for recognition - or nonrecognition - of judgments:

<sup>11</sup> See, e.g., *Osoinach v. Watkins*, 180 So. 577 (Ala. 1938) (marriage between nephew and widow of uncle in Georgia not recognized in Alabama); *In re Estate of May*, 114 N.E.2d 4 (N.Y. 1953) (marriage between uncle and niece in Rhode Island questioned in New York; marriage ultimately considered valid); *Catalano v. Catalano*, 170 A.2d 726 (Conn. 1961) (marriage between uncle and niece in Italy questioned in Connecticut, where such marriages were prohibited; marriage considered invalid); *Petition of Lieberman*, 50 F. Supp. 120 (E.D.N.Y. 1943) (petition for naturalization approved where petitioner married her uncle in Rhode Island and returned to New York, where such marriages were not valid).

<sup>12</sup> See, e.g., *Matter of Darwish*, 14 I & N Dec. 307 (Board of Immigration Appeals 1973) (spouse of U.S. citizen's petition for naturalization denied because she was second wife of her husband, which was valid under Jordanian-Muslim law, because such marriages were against public policy of the United States); *Toler v. Oakwood Smokeless Coal Corp.*, 4 S.E.2d 364 (Va. 1939) (marriage performed and valid in West Virginia questioned in Virginia, where the marriage was considered bigamous; marriage declared void).

<sup>13</sup> See, e.g., *Lanham v. Lanham*, 117 N.W. 787 (Wisc. 1908) (plaintiffs, who were prohibited from getting

married in Wisconsin because law prohibited marriage within one year of divorce, were married in Michigan and returned to Wisconsin; Wisconsin held that marriage was not valid, since it violated Wisconsin's public policy); *Horton v. Horton*, 198 P. 1105 (Ariz. 1921) (marriage celebrated in New Mexico within the one-year time period when remarriage was prohibited in Arizona questioned; validity of marriage questioned but marriage ultimately upheld).

14 Parental Kidnapping Prevention Act of 1980, 28 U.S.C. 1738A (2004).

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? Federal full faith and credit legislation has been used to dismiss attempts by criminals convicted in a state court to go to federal court and demand money damages for alleged violation of their civil rights during their arrest or during court proceedings;<sup>15</sup>

? During the Great Depression, Congress adopted the Frazier-Lemke Act to protect family farms from forced sale during bankruptcy proceedings.<sup>16</sup> It was held to create an exception to the general principle that foreclosure judgments should be final and enforceable in any other court;<sup>17</sup>

? In the 1980s, the Supreme Court turned to the Full Faith and Credit Statute<sup>18</sup> to decide the general preclusive effect of state-court judgments in federal Civil Rights Act cases.<sup>19</sup> The Court also used the Full Faith and Credit Statute to decide how much effect a state court decision should be given in federal antitrust cases.<sup>20</sup>

The 1996 federal Defense of Marriage Act ("DOMA") is another example.<sup>21</sup>

Although some people have expressed skepticism about whether DOMA is constitutional, these are mostly people whose expertise lies outside the area of conflict of laws. Even most lawyers are not fully familiar with the history of congressional implementation of the Full Faith and Credit Clause, and they underestimate the latitude it gives to adopt legislation. Constitutional power to enact such legislation is found in Article IV itself. The last provision in the Full Faith and Credit Clause states:

[T]he Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.<sup>22</sup>

In my view, the federal DOMA falls within Article IV's grant of congressional power.

<sup>15</sup> *Haring v. Prosser*, 462 U.S. 306 (1983) (holding that in an action under 42 U.S.C. § 1983, a federal court must give a state conviction effect under the Full Faith and Credit Statute).

<sup>16</sup> Frazier-Lemke Act, 11 U.S.C. § 203(s) (repealed in 1949).

<sup>17</sup> *Kalb v. Feuerstein*, 308 U.S. 433 (1940).

<sup>18</sup> 28 U.S.C. § 1738 (2004).

<sup>19</sup> *Migra v. Warrant City School Dist. Bd. Of Education*, 465 U.S. 75 (1984).

<sup>20</sup> *Marrese v American Academy of Surgeons*, 470 U.S. 373 (1985).

<sup>21</sup> Defense of Marriage Act, 28 U.S.C. 1738C (2004).

<sup>22</sup> U.S. CONST. art. IV, § 1, cl. 2.

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d. The Constitutional Amendment Strategy

Congress' historic flexibility to adopt legislation on interstate family law would be undercut or sacrificed entirely if the subject of interstate recognition was dealt with by Constitutional amendment. Although today's debate is focused on the alleged need to cut back state lawmaking authority, a constitutional amendment would unavoidably have the additional consequences of restricting federal legislative power. This is both undesirable and unnecessary.

Restricting federal and state legislative power by adoption of a constitutional amendment is undesirable because Congress, as well as the state courts and legislatures, needs to have flexibility to shape the legal rules that govern interstate relations, in order to meet unanticipated developments. A constitutional amendment in this area would not make our legal system more democratic, but less democratic.

Restricting federal and state legislative power by adoption of a constitutional amendment is also unnecessary: We already have a fully worked-out and well-functioning system of interstate judgments enforcement. Such problems as have arisen have been dealt with well by statute. The rarity of such problems is probably due to the fact that our courts have considerable experience dealing with interstate enforcement - including in the admittedly

difficult area of family law - and have worked out realistic and practical solutions. There are solutions to precisely the problems people are worrying about today. The problems preoccupying the proponents of a constitutional amendment are entirely speculative. No one has yet identified a defect in the Full Faith and Credit Clause. The Constitution is working well for us, including in this complicated and controversial area, and it does not need amendment.

## 2. A Federal Constitutional Definition of Marriage

The witnesses for this hearing have not been asked to comment on a particular proposed text for a constitutional amendment. However, it is worth considering whether the

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conclusions arrived at above should be different if an amendment simply provided a federal substantive definition of marriage, rather than addressing the problem of full faith and credit for same-sex marriages directly.

What object would be served by enacting a federal constitutional definition of marriage, if not to eliminate the prospect of interstate enforcement? At stake is what Massachusetts may do within its own borders. Some people are bothered not by the possibility that Massachusetts might impose its definition of marriage on other states, but by the idea that Massachusetts might recognize same-sex marriage for its own domestic purposes. These are the people who support amending the U.S. Constitution to adopt a single, federal, definition of marriage.

In terms of the issue on the table at this hearing - the relationship between democracy, judicial activism, and state marriage laws - the response to these people is obvious. Enabling the other states to impose on Massachusetts their definition of marriage - historically, a quintessentially state-law subject - can hardly be described as democratic. If the relevant principle is to be democracy, then it is for the people of Massachusetts to say what their constitution and statutes should say. It is not for the other forty-nine states to dictate to Massachusetts by federal constitutional amendment what Massachusetts law should be. This premise is the basic principle of federalism, upon which the American constitutional system as a whole depends.

## 4. Conclusion

If the objective is democracy, then federalizing the definition of marriage through adoption of a constitutional amendment is a bad idea. Family law has traditionally been reserved to the states because the impact is experienced locally, and the framers of the Constitution appreciated that decisions on matters of intense local concern should be made at a local level.

All in all, there is no reason for a federal constitutional amendment whose sole purpose is to correct an (arguable) misinterpretation by a state court of a state constitutional provision.

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For purposes of interstate enforcement, the solution is well worked-out and already in place. Nothing about the Full Faith and Credit Clause, or its two-hundred-year history of application, suggests any defect that needs to be remedied by constitutional amendment.