

BETWIXT AND BETWEEN RECOGNITION: MIGRATING SAME-SEX MARRIAGES AND THE TURN TOWARD THE PRIVATE

BRENDA COSSMAN*

I

INTRODUCTION



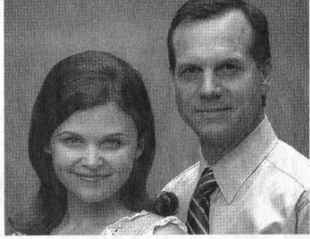
One Sunday morning, a slightly odd “wedding announcement” appeared in the Style section of the *New York Times*.¹ It was an announcement that caught a number of regular readers a little off-guard, destabilizing us, even if only for a few seconds. The announcement was actually three announcements: Barbara Dutton and Bill Henrickson, Nicolette Grant and Bill Hendrickson, and Margene Heffman and Bill Henrickson, each of whom were to be married in Utah that evening. It quickly became clear, if after momentary disorientation, that this was an advertisement for the premier of *Big Love*, HBO’s drama series on polygamy.² Bill Henrickson, played by Bill Paxton, has three wives—Barb, Nicki, and Margene—and seven children in suburban Salt Lake City. The idea is that the Henricksons—all eleven of them—are just an “average, normal polygamist family.” And they seem very normal indeed, at least in contrast to the world from which they have broken away: Juniper Creek, a grim, fundamentalist compound ruled by the messianic prophet, Roman Grant, with his fourteen wives, thirty-one children, and 187 grandchildren. In comparison, the Henricksons do look like an average suburban family, with average, suburban family problems—just more of them.

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1. *Advertisement*, N.Y. TIMES, Mar. 12, 2006, at ST13.
2. *Big Love* (HBO television series).

WEDDING			ADVERTISEMENT
<p>Barbara Dutton, Bill Henrickson</p>	<p>Nicolette Grant, Bill Henrickson</p>	<p>Margene Heffman, Bill Henrickson</p>	
			
<p>Barbara Dutton and Bill Henrickson are due to be married this evening in Sandy, Utah.</p> <p>The bride and bridegroom, both 43, graduated from Brigham Young University, where they met.</p> <p>Miss Dutton is a substitute schoolteacher in the Sandy School District, a suburb of Salt Lake City, Utah.</p> <p>The bride is the daughter of Mrs. Ellen Dutton of Lehi, Utah and the late Mr. Lloyd Dutton, of West Jordan, Utah. Mr. Dutton spent two decades as Pagination Manager for the <i>Deseret Morning Star</i>. Mrs. Dutton, a homemaker, serves her Church as a member of the Society of Charitable Women general board and Orchids adviser in her community.</p> <p>Mr. Henrickson is founder and CEO of Henrickson's Home Plus, a home improvement retail store in Sandy, Utah. He will cut the ribbon on a second location later this week.</p> <p>The groom is the son of Mr. Frank Harlow and Ms. Lois Henrickson, both of Juniper Creek, Utah. Mr. Harlow is a self-employed entrepreneur. Ms. Henrickson owns and operates Eagle Gas, an automobile service station in her hometown.</p> <p>The wedding will take place tonight at 10pm, only on HBO®.</p>	<p>Nicolette Grant and Bill Henrickson are due to be married this evening in Sandy, Utah.</p> <p>Miss Grant, 28, is a homemaker with prior experience in the healthcare field. She specialized in in-home hospice care for cancer patients.</p> <p>The bride is the daughter of Mr. Roman Grant and Mrs. Adaleen Grant of Juniper Creek, Utah. Mr. Grant is the head of the United Effort Brotherhood, an investment company with holdings in a variety of financial and business ventures. Mrs. Grant performs administrative and secretarial work for the UEB.</p> <p>Mr. Henrickson is founder and CEO of Henrickson's Home Plus, a home improvement retail store in Sandy, Utah. He will cut the ribbon on a second location later this week.</p> <p>The groom is the son of Mr. Frank Harlow and Ms. Lois Henrickson, both of Juniper Creek, Utah. Mr. Harlow is a self-employed entrepreneur. Ms. Henrickson owns and operates Eagle Gas, an automobile service station in her hometown.</p> <p>The wedding will take place tonight at 10pm, only on HBO®.</p>	<p>Margene Heffman and Bill Henrickson are due to be married this evening in Sandy, Utah.</p> <p>Miss Heffman, 23, graduated from The Salon Institute in Salt Lake City, Utah. After gaining employment experience in both customer service and childcare, she now manages household affairs as a homemaker.</p> <p>The bride is the daughter of Mr. Randall Heffman of Rose Hill, Kansas and Mrs. Ginger Kozlowski of Ogden, Utah. Mr. Heffman travels the country as a flatbed line haul driver for the Pope Trucking Company based in Tulsa, Oklahoma. Mrs. Kozlowski is a cage cashier at the Barbary Coast Hotel and Casino in Las Vegas, Nevada and was named Employee of the Month in August 2002.</p> <p>Mr. Henrickson is founder and CEO of Henrickson's Home Plus, a home improvement retail store in Sandy, Utah. He will cut the ribbon on a second location later this week.</p> <p>The groom is the son of Mr. Frank Harlow and Ms. Lois Henrickson, both of Juniper Creek, Utah. Mr. Harlow is a self-employed entrepreneur. Ms. Henrickson owns and operates Eagle Gas, an automobile service station in her hometown.</p> <p>The wedding will take place tonight at 10pm, only on HBO®.</p>	

The parallels between *Big Love's* representation of polygamy and contemporary debates around same-sex marriage are too obvious to miss. The show's producers are two gay men who, rather than recoil in horror from the association between same-sex marriage and polygamy, provocatively ski down the slippery slope.³ This is apparent from the show's inception, performed in the mock wedding announcements in the *New York Times*. The style section of the *New York Times* began announcing gay unions in 2002—two years before same-sex marriage became a legal reality anywhere in the United States.⁴ The mock announcement plays on a similar gap between the cultural and legal recognition of marriage, using the power of the cultural to present marriage as real in the here and now, even in the absence of legal recognition. It is the most public

3. The question of a slippery slope between same-sex marriage and polygamy is a subject of considerable controversy. Opponents of same-sex marriage argue that recognizing the former will lead inevitably to recognition of the latter. See, e.g., George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J. L. & POL. 581, 628–31 (1999). Proponents of same-sex marriage often argue that it is possible to distinguish between the two forms of marriage and that the recognition of same-sex marriage does not lead inevitably down a slippery slope to polygamy. See, e.g., Hema Chatlani, *In Defense of Marriage: Why Same-Sex Marriage Will Not Lead Us Down a Slippery Slope Toward the Legalization of Polygamy*, 6 APPALACHIAN J.L. 101, 128–32 (2006); James M. Donovan, *Rock-Salting the Slippery Slope: Why Same-Sex Marriage Is Not a Commitment to Polygamous Marriage*, 29 N. KY. L. REV. 521 (2002); Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501, 1615–18 (1997).

4. *Times Will Begin Reporting Gay Couples' Ceremonies*, N.Y. TIMES, Aug. 18, 2002, at 130. The first announcement appeared on September 1, 2002, announcing the union of Daniel Gross and Steven Goldstein. See *Weddings/Celebrations; Daniel Gross, Steven Goldstein*, N.Y. TIMES, at 912. When the *New York Times* began to run these announcements, the Netherlands had already become the first country to recognize same-sex marriages in 2001. Belgium and Canada followed in 2003.

performance of the public performance of marriage, riffing on the power of the *New York Times* wedding announcements—which are, after all, an ultimate sign of societal status.

There are many parallels between same-sex marriage and polygamy. Polygamy has long been one of the bogeymen of the law of conflicts. The law of recognizing marriages celebrated abroad has often been articulated to specifically disallow the recognition of polygamous marriages. Although the general principle was one of place-of-celebration, that is, a marriage was recognized as valid if it was valid in the place where it was celebrated, an exception was made for polygamy.⁵ Polygamy long operated as a trope of the public-policy exception to the common-law place-of-celebration rule, deployed to justify, in the most obvious way, the need for such an exception.⁶ Today, it is same-sex marriage that is occupying this trope, becoming the new bogeyman in the law of conflicts. Indeed, it arguably occupies an even more ominous space, since same-sex marriage has been legalized in at least one state in the country, and civil unions have been recognized in several others.⁷

Yet the shadow of polygamy lingers, now in the guise of a slippery slope: same-sex marriage becomes the obvious example of the need for a public-policy exception—“if it is not a legitimate exception, what is?”—leading in turn to the fear of the ultimate trope, polygamy. Opponents to same-sex marriage repeatedly raise the slippery-slope argument: that its recognition will lead inexorably to recognizing polygamy and other abominations, like incest and

5. As the RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 132 (1934) stated,

A marriage which is against the law of the state of domicile of either party, though the requirements of the law of the state of celebration have been complied with, will be invalid everywhere in the following cases: (a) polygamous marriage, (b) incestuous marriage between persons so closely related that their marriage is contrary to a strong public policy of the domicile, (c) marriage between persons of different races where such marriages are of the domicile regarded as odious

6. According to Koppelman, the cases “involved subsequent marriages of parties who had obtained divorces, at a time when divorced persons were often forbidden to remarry. . . . [C]ases occasionally arose involving polygamous or potentially polygamous marriages contracted abroad. With few exceptions, courts recognized these marriages.” Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 947–48 (1998).

It is, at the same time, a rather paradoxical trope of the exception, since polygamy was never legalized by any American state. As Koppelman notes in *Recognition and Enforcement of Same-Sex Marriage: Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, “the public policy exception to marriage recognition has been invoked primarily in three contexts: polygamy, incest, and miscegenation.” 153 U. PA. L. REV. 2143, 2148–49 (2005) [hereinafter *Interstate Recognition*]. However, in his view, polygamy and incest have been “misnomers,” since “[n]o state ever recognized polygamy. Nor did any state ever violate ‘the core instances of the incest taboo by legalizing parent-child or sibling marriages; the incest cases involved marriages between first cousins, aunts and nephews, uncles and nieces, or even more remote relations.’” *Id.* at 2149.

7. In *Goodridge v. Dep’t of Pub. Health*, 298 N.E.2d 941 (Mass. 2003), the Massachusetts Supreme Court held that the opposite-sex restriction on marriage was unconstitutional, and gave the state legislature 180 days to take appropriate action. Governor Mitt Romney ordered town clerks to begin issuing marriage licenses on May 17, 2004. Vermont, New Jersey, Connecticut, and New Hampshire have recognized civil unions.

bestiality.⁸ Conversely, as liberal scholars seek to make the case for the interjurisdictional recognition of same-sex marriage, they, too, must negotiate this slippery slope. But they do so through denial, avoiding the association like the plague and insisting that the monogamous nature of marriage can, and will, hold.⁹ Just as in *Big Love*, same-sex marriage is never more than one degree of separation from polygamy.

Though much more could be said of these tropes in the fraught relationship between same-sex marriage and polygamy, my intention in raising the association in the context of *Big Love* is somewhat different. I am interested in the relationship between legal and cultural recognition, or, more specifically, in the gaps and fissures that may exist somewhere in between. My focus is on “migrating marriages”¹⁰—that is, same-sex marriages or civil unions entered in one jurisdiction that migrate to another and seek recognition, calling upon the private law of conflicts. These migrating-marriage cases have not been particularly successful in obtaining legal recognition. But, as I argue in this article, these migrating-marriage cases cannot be measured in terms of the legal outcome of the conflicts dispute alone. Rather, these cases can be seen through the lens of the *New York Times* mock announcement and *Big Love*, in which marriages are produced as culturally real in the here and now, even when legal recognition remains elusive. The movement of such marriages from the ethos of the media toward the private law of conflicts—while sometimes directed at a private remedy between two private parties—is, like the wedding announcements, a very public gesture seeking to advance the temporal and geographic reality of same-sex marriage. In the process, these migrating marriages and their turn to conflicts place same-sex marriage in a kind of state of liminality, betwixt and between recognition and nonrecognition. The sections that follow explore the rise of conflicts as a site of same-sex-marriage politics and the way in which these migrating-marriage cases are implicated in the politics of recognition, producing same-sex marriage as culturally—if not always legally—real, in the here and now.

8. This association between same-sex marriage and polygamy was made repeatedly by opponents of same-sex marriage during the Congressional debates over the Defense of Marriage Act (DOMA). See David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53, 53 (1997).

9. See Chatlani, *supra* note 3, at 128–32. However, not all proponents of same-sex marriage disavow the association. See, e.g., Chambers, *supra* note 8, at 53.

10. I use the term “migrating marriages” to describe the full range of traveling marriages and civil unions, that is, marriages and unions that are entered into in one jurisdiction, and for a variety of reasons, then travel to another jurisdiction where some legal recognition is sought. My terminology deviates from some of the more standard descriptions in the law of marriage recognition, which distinguishes between “evasive marriages” and “migratory” or “mobile marriages.” Evasive marriages are those whose parties travel out of state for the specific purpose of avoiding their own state’s marriage prohibitions, then return to their home state after the marriage. Migratory marriages are those whose parties were legally married in their home state, but subsequently move to a state in which their marriage is not recognized. According to several authorities, evasive marriages are not valid, while migratory marriages are sometimes valid. See, e.g., Koppelman, *Interstate Recognition*, *supra* note 6, at 2152–59; Linda Silberman, *Same-Sex Marriage: Refining the Conflict of Laws Analysis*, 153 U. PA. L. REV. 2195, 2198–208 (2005).

II MIGRATING MARRIAGES

The law of conflicts has, over the last fifteen years, become a hot spot in same-sex-marriage law and politics in the United States. A debate over interstate recognition of same-sex marriage was sparked by the Hawaii Supreme Court decision in *Baehr v. Lewin* suggesting that the ban on same-sex marriage might be unconstitutional.¹¹ Although the court did not strike down the ban in this case, the ruling started a panic about the interjurisdictional domino effect of one state's recognition of same-sex marriage. The fear was that the Full Faith and Credit Clause of the Constitution¹² would compel other states to recognize Hawaii's same-sex marriages.¹³ Congress passed the Defense of Marriage Act (DOMA), which defined marriage for federal purposes as the union of a man and a woman, and amended the Full Faith and Credit Clause to exempt same-sex marriage from recognition under its principles.¹⁴ Individual states followed suit, with forty states passing mini-DOMAs defining marriage in opposite-sex terms, and expressly refusing to recognize same-sex marriages validly celebrated in another jurisdiction.¹⁵ Alongside these political

11. *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993), superseded by constitutional amendment, HAW. CONST. art. I, §23 (amended 1998). In this case, the Hawaii Supreme Court held that the ban on same-sex marriage triggers strict scrutiny and therefore that the ban must further compelling state interests and must be narrowly tailored to avoid unnecessary violations of constitutional rights. The question whether there was a compelling state interest was remanded. It was, however, this conclusion—that the ban on same-sex marriage *might* be unconstitutional—that set off the ensuing panic. On remand, in *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), the Court held that the state had failed to sustain its burden of establishing a compelling state interest. The decision was, however, effectively overruled when in 1998, Hawaiian voters approved a constitutional amendment approving that marriage be reserved to opposite-sex couples. HAW. CONST. art. I, §23 (amended 1998).

12. U.S. CONST. art. IV, § 1.

13. See Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433, 449 (2005), citing Patrick J. Borchers, *Baker v. General Motors: Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147, 152–53 (1998) (noting that “[the] full faith and credit [argument] was ‘advanced mostly in student writing and the popular press’”). As Grossman notes,

[f]or proponents, the claim represented both wishful thinking and a component of their strategy to gain marriage rights nationwide. For opponents of same-sex marriage generally, this assertion galvanized forces, imposed time pressure on states to protect themselves from an exported marriage policy, and provided a powerful rhetoric to trigger legislative reactions.

Id. Many conflicts scholars have argued that this full-faith-and-credit fear was entirely misplaced, since the clause as interpreted by the courts has never compelled a state to recognize a marriage of another state. Koppelman writes, for example, that

[t]he clause requires states only to recognize other states' judgments rendered after adversarial proceedings. There is almost no authority for the proposition that full faith and credit applies to marriage, and there is a great deal of authority to the contrary, indicating that states may decline to recognize foreign marriages when those marriages are contrary to the strong public policy of the forum state.

Interstate Recognition, *supra* note 6, at 2146–47.

14. 28 U.S.C. § 1738C (2000).

15. See Koppelman, *Interstate Recognition*, *supra* note 6, at 2165–94 for a review of the state statutes barring same-sex marriage. The Full Faith and Credit Clause—and in turn, DOMA—apply only as between U.S. states, not between the U.S. and other countries. Therefore, it is applicable only to marriages that migrate between U.S. states, not to those that cross national borders.

developments has been a veritable explosion of conflicts scholarship on the question of interstate and (to a lesser degree) international recognition of same-sex marriage. Liberal and progressive scholars, with a kind of revitalized energy, have sought to deploy the tools of their trade to help same-sex marriages migrate from their place of celebration to the rest of the country.¹⁶

Individuals have begun to bring these migrating marriages to court. There are three types of cases so far: dissolution, legal incidents, and precedential recognition. The dissolution cases present a classic conflict-of-laws problem. Parties married in a jurisdiction that recognizes same-sex marriage (Massachusetts or Canada) or civil unions (Vermont), are now domiciled somewhere else and want to dissolve the marriage. But the state of their current domicile does not recognize same-sex marriage. The question becomes whether the courts of the state will recognize the marriage for the purposes of dissolving it, that is, of granting a divorce. In *Salucco v. Alldredge*, a Vermont civil union was dissolved in Massachusetts.¹⁷ In *M.G. v. S. G.*, a West Virginia court dissolved a Vermont civil union.¹⁸ Other dissolution cases have been less successful. Connecticut courts have refused to dissolve a Vermont civil union¹⁹ and a Massachusetts marriage.²⁰ In a more mixed result, in *Gonzalez v. Greene*, a New York court refused to recognize a same-sex marriage entered into by two New York residents in Massachusetts, noting that, according to Massachusetts

16. See, e.g., Barbara J. Cox, *Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033 (1994) (arguing that faithful application of choice-of-law principles is necessary to end discrimination against same-sex marriages); Stanley E. Cox, *Nine Questions About Same-Sex Marriage Conflicts*, 40 NEW ENG. L. REV. 361 (2006) (proffering nine questions about same-sex marriage and conflict of laws and concluding that the Defense of Marriage Act should be overruled as an unconstitutional violation of the Full Faith and Credit Clause); Stanley E. Cox, *Red States, Blue States, Marriage Debates*, 3 AVE MARIA L. REV. 637 (2005) (arguing that sensible policy dictates that states should not, and perhaps constitutionally cannot, undermine the marital policies of other states); Koppelman, *Interstate Recognition*, *supra* note 6 (surveying the body of law governing recognition of same-sex marriages); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997) (arguing that the Full Faith and Credit Clause requires states to honor other states' policies without discriminating in choice of law based on judgments about those policies); William A. Reppy, Jr., *The Framework of Full Faith and Credit and Interstate Recognition of Same-Sex Marriages*, 3 AVE MARIA L. REV. 393 (2005) (analyzing the federal statute that requires states to give full faith and credit to the records of other states and concluding that this statute compels states to recognize the same-sex marriages and civil unions of other states). Some argued that either DOMA or the public-policy exception to the law-of-celebration rule in conflicts, or both, are unconstitutional. Others argued in favor of a more nuanced approach that applies the "well-developed body of law on the question of whether and when to recognize extraterritorial marriages that are contrary to the forum's public policy." Koppelman, *Recognition and Enforcement of Same-Sex Marriage*, *supra* note 6, at 2144.

17. No. 02E0087GC1, 2004 WL 864459 (Mass. Super. Ct. Mar. 19, 2004).

18. See Barbara J. Cox, *Using An "Incidents of Marriage" Analysis When Considering Interstate Recognition of Same-Sex Couples' Marriages, Civil Unions, and Domestic Partnerships*, 13 WIDENER L.J. 699, 738–42 (2004) (discussing *In re M.G. v. S.G.*).

19. See *Rosengarten v. Downes*, 802 A.2d 170 (Conn. App. Ct. 2002) (holding that because civil unions are not treated as family matters, the court does not have jurisdiction to dissolve them and that the Full Faith and Credit Clause is not implicated because the plaintiff had sufficient contacts in Connecticut to apply Connecticut law).

20. See *Lane v. Albanese*, 39 Conn. L. Rptr. 3 (Conn. Super. Ct. 2005) (dismissing the case for lack of subject-matter jurisdiction).

law, marriages entered by nonresidents were not valid; the court nonetheless did enforce a separation agreement negotiated between the cohabiting parties.²¹

There are also several dissolution cases in which third parties have sought to challenge the dissolution of Vermont civil unions. In these cases, the private dimension of the dissolution remedy was contested on the basis of the public interest in the nonrecognition of same-sex marriage. For example, in *KJB v. JSP*, the dissolution of a Vermont civil union was unsuccessfully challenged by a group of politicians and citizens.²² In Texas, the Attorney General intervened after a district court dissolved a Vermont civil union, stating that state courts did not have jurisdiction to do so.²³ The decision was then vacated, and the Texas legislature passed a law stating that civil unions would not be recognized in the state.

In a second set of cases, parties to a marriage or a civil union seek to have its legal incidents enforced in another jurisdiction. In these cases, private parties seek to invoke the law of conflicts to obtain a public or private right attached to marriage; the validity of the marriage is an incidental question.²⁴ The courts have mostly refused to recognize same-sex marriages and civil unions for any such purposes. For example, the courts have denied recognition of Vermont civil unions for a wrongful-death suit²⁵ and a claim for employment health benefits²⁶ and denied recognition of Canadian same-sex marriages for a disabled

21. *Gonzalez v. Green*, 831 N.Y.S.2d 856 (Sup. Ct. 2006) (citing MASS. GEN. LAWS ANN. ch. 207, § 11 (2008)) (“No marriage shall be contracted in this commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this commonwealth in violation hereof shall be null and void.”). This provision was upheld by the Massachusetts Supreme Court in *Cote-Whitacre v. Department of Public Health*, 844 N.E.2d 623 (Mass. 2006) (finding that the statute is constitutional because both state residents and nonresidents are treated alike).

Several dissolution cases are ongoing. In *Chambers v. Ormiston*, a same-sex couple that was married while domiciled in Massachusetts subsequently moved to Rhode Island and sought a divorce. The Rhode Island Family Court asked the Supreme Court whether it had jurisdiction to grant the divorce, and the Supreme Court remanded the case to the Family Court with a series of factual questions that needed to be determined. *Chambers v. Ormiston*, 916 A.2d 758 (R.I. 2007). In *O’Darling v. O’Darling*, the Oklahoma Supreme Court was asked to review a divorce unknowingly issued to a same-sex couple who had married in Toronto. In this case, the Tulsa Special District Judge issued the divorce decree without realizing that the couple was of the same sex. The divorce had not been contested, and the judge routinely approved it based on the court papers, in which the parties’ first names appeared only as initials. See *State Litigation Notes*, LESBIANGAYLAWNOTES 233 (Arthur S. Leonard ed., Dec. 2006).

22. The Iowa district court judge issued a revised opinion, stating that he did not have jurisdiction to dissolve a civil union under state law, but that he could provide relief under his equitable jurisdiction. The petitioners maintained their challenge to the amended decree, but the Iowa Supreme Court subsequently dismissed their petition on the basis that they lacked standing. *Alons v. Iowa Dist. Court*, 698 N.W.2d 858 (Iowa 2005).

23. See Cox, *supra* note 18, at 736 (discussing *In re R.S. and J.A.*).

24. EUGENE F. SCOLES ET AL., CONFLICT OF LAWS § 13.3 (4th ed. 2004).

25. *Langan v. St. Vincent’s Hosp.*, 802 N.Y.S.2d 479 (N.Y. App. Div. 2005).

26. *Martinez v. County of Monroe*, No. 05/00433 (N.Y. July 27, 2007). Although Martinez is appealing the ruling, the union representing Martinez succeeded in having domestic partnerships recognized in its new contract, and since January 1, 2006, Martinez’s partner has been receiving health benefits. See *N.Y. Court Rejects Comity Claim for Canadian Same-Sex Marriage*, LESBIANGAYLAWNOTES 233 (Arthur S. Leonard ed., September 2006).

veteran's exemption claim²⁷ and a joint bankruptcy claim.²⁸ Only one case to date has recognized a Vermont civil union, but this recognition came at the behest of a Vermont court involved in a complex interjurisdictional wrangle: in *Miller-Jenkins v. Miller-Jenkins*, the Vermont Supreme Court recognized a Vermont civil union for the purposes of determining parentage in a Virginia custody dispute.²⁹ The Virginia Court of Appeals subsequently remanded the case to trial court, with the instruction to extend full faith and credit to the custody-and-visitation order of the Vermont court.³⁰

In the third type of case, parties to a marriage or civil union seek state recognition of their marriage or civil union for the purposes of precedential recognition. Unlike the first and second types of case, in which the parties are seeking a very particular right or benefit (divorce in the first, a particular state marriage benefit in the second), here the plaintiffs are seeking recognition of their marriage for the purposes of all rights and responsibilities associated with marriage.³¹ This is a very public gesture, a public performance of same-sex marriage that deploys the tools of the law of conflicts. There is only one such case to date: *Wilson v. Ake*,³² in which the plaintiffs, Reverend Nancy Wilson and Paula Schoenwether, sought recognition of their Massachusetts marriage license in Florida. When the clerk refused, they sought a declaratory judgment asking the Florida District Court to declare both DOMA and the Florida marriage unconstitutional. They argued, *inter alia*, that DOMA exceeded congressional power under the Full Faith and Credit clause. The court disagreed and dismissed their case.³³

A glance at the scoreboard in these admittedly early days of migrating-same-sex-marriage cases suggests that the obvious trend is one of nonrecognition. The courts are overwhelmingly taking the position that if their states do not recognize civil unions or same-sex marriage, then they will not recognize Vermont, Massachusetts, or Canadian unions. These early results also suggest that the distinction between "evasive" and "migratory marriages" may not be that helpful in predicting recognition. Most of the cases to date have involved evasive marriages, that is, marriages whose parties travel out of state to get married or enter civil unions because their own state does not allow them to do so. Yet very few of these courts have even engaged the distinctions

27. *Hennefeld v. Township of Montclair*, 22 N.J. Tax 166 (2008).

28. *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004).

29. *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2006).

30. *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330 (Va. Ct. App. 2006).

31. Moreover, these plaintiffs are seeking not only recognition in the "here and now," but a court order that would qualify for a full-faith-and-credit claim in the rest of country, thus attempting to secure recognition in the "there and then."

32. 354 F. Supp. 2d 1298 (M.D. Fla. 2005).

33. *Id.* According to the court, the plaintiff's mistaken approach to the Full Faith and Credit Clause would allow one state to effectively create national policy. The court noted further that "[u]nder Plaintiff's interpretation of the clause, a single State could mandate that all the States recognize bigamy, polygamy, marriages between blood relatives or marriages involving minor children." *Id.* at 1304 n.6.

between evasive and migratory marriages.³⁴ But, perhaps more significantly, the more general tendency seen in the cases is the short shrift given to the principles of conflict of laws. Many refer—often in the most cursory way—to a full-faith-and-credit claim made by the parties, but dismiss the relevance of the clause on the basis of either DOMA or the public-policy exception, or both.³⁵ Very few cases even raise the principle of comity, and none actually apply it.³⁶ Although the conflicts scholars produce sophisticated arguments about the principles of the law of conflicts, the courts by and large ignore these doctrinal disputes and arguments, deciding the cases on the basis of a state’s stated opposition to same-sex marriage. Rather than be hidden beyond the technicalities of conflict rules, the underlying politics of same-sex marriage is virtually dispositive.

III

ANTINOMIES OF NONRECOGNITION

Annelise Riles has described the turn toward the private as “a turn away from concerns with culture, politics, [and] history,” and a turn “towards legal

34. One of the plaintiffs in *Miller-Jenkins* raised an evasive-marriage argument, submitting that the civil union should not be recognized as valid because it was in violation of a Vermont law prohibiting residents of Vermont from traveling to another state to enter a legal union that is void in Vermont, then returning to Vermont to force recognition. Initial Brief of Petitioner-Appellant at 7, *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2006) (No. 454-11-03 Rddm). Lisa Miller argued that the same rule would apply to “non-residents [traveling to] Vermont to enter into marriages considered void in their home state.” *Id.* However, the Vermont Supreme Court disagreed, reasoning that if the Vermont civil-union law had intended to exclude nonresidents, it would have done so explicitly as in the marriage law. *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 964–65 (Vt. 2006).

35. In *Rosengarten, Lane v. Albanese, Miller-Jenkins*, and *Wilson*, the courts all affirm the public-policy exception to full faith and credit. *Rosengarten v. Downes*, 802 A.2d 170, 178 (Conn. App. 2002) (“The [Full Faith and Credit] clause . . . obligate[s] the forum State to take jurisdiction and to apply foreign law, subject to the forum’s own interest in furthering its public policy.”) (emphasis added); *Lane v. Albanese*, 39 Conn. L. Rptr. 3, 4 (Conn. Super. Ct. 2005) (“With respect to marriage, the public policy exception [to the Full Faith and Credit Clause] would permit a state to decline to honor a marriage contracted in another state if it violates the public policy of the reviewing state.”); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1303–04 (M.D. Fla. 2005) (“Florida is not required to recognize or apply Massachusetts’ same-sex marriage law because it clearly conflicts with Florida’s legitimate public policy of opposing same-sex marriage.”); *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 962 (Vt. 2006) (“[I]n no instance does DOMA require a court in one state to give full faith and credit to the decision of a court in another state. Its sole purpose is to provide an authorization *not* to give full faith and credit in the circumstances covered by the statute.”).

36. Of the reported cases, the court in *Langan v. St. Vincent’s Hospital* simply concluded, with virtually no discussion, that the principles of comity did not apply. See *Langan v. St. Vincent’s Hosp.*, 802 N.Y.S.2d 479, 479 (N.Y. App. Div. 2005). In both *In re Kandu*, 315 B.R. 123, 133–34 (Bankr. W.D. Wash. 2004), and *Hennefeld v. Township of Montclair*, 22 N.J. Tax 166, 178–84 (2008), the courts briefly discussed comity, but refused to apply it to the Canadian same-sex marriages. It is significant that these are the only two cases involving foreign marriages, and they could not be resolved within a Full Faith and Credit–DOMA framework. Yet, ultimately, the result was similar—evidencing little engagement with the principles of comity, and no recognition of the marriage. The only exception to the passing dismissal of its relevance is seen in the dissenting opinion in *Langan*, in which the judge would have recognized the civil union on the principle of comity. See *Langan*, 802 N.Y.S.2d at 483–86 (Fisher, J., dissenting).

technology”³⁷ In the context of same-sex marriage, what is remarkable—that is, worthy of being remarked upon—is the extent to which this turn remains so transparently in the service of culture, politics, and history. The turn toward the private, in both conflicts scholarship and litigation, is part of a recognition strategy. The scholars who argue in favor of the interjurisdictional recognition of same-sex marriages are deploying the technical tools of their trade to advance a pro-same-sex marriage politics, a liberal politics of recognition and equality.³⁸ Their opponents—the scholars who argue against any interjurisdictional recognition of same-sex marriage—are, conversely, deploying their technical tools in the service of a conservative politics of the traditional family. Both sides wear their recognition or nonrecognition politics on their sleeves, notwithstanding the attempt to dress them up in more technical clothes.³⁹

The plaintiffs in the migrating-marriage cases might be distinguished from the advocacy scholarship, since they might be framed as seeking a private or individualized remedy to a private dispute. Yet they, too, are engaged in these political contestations of same-sex-marriage recognition—some by design, and others by circumstance. Some—particularly those in the recognition cases—are explicitly seeking to advance the cultural and legal legitimacy of same-sex marriage. Reverend Nancy Wilson and Paula Schoenwether were involved in a very political battle, challenging the constitutionality of DOMA and Florida marriage law for the purpose of having their Massachusetts marriage recognized. A judgment in their favor would also trigger a full-faith-and-credit claim to have their marriage recognized by other states outside of Florida.⁴⁰ Wilson, the Moderator of the Universal Fellowship of Metropolitan Community Churches, and Schoenwether, her partner of twenty-eight years, have long been involved in gay-and-lesbian rights. Their battle was very explicitly one intended to advance same-sex-marriage rights.⁴¹

37. Annelise Riles, *Collateral Knowledge: Legal Reason in the Global Financial Markets* (book manuscript on file with author).

38. Not all of these conflict scholars argue in favor of blanket recognition of migrating same-sex marriage, but at a minimum they argue in favor of some recognition in some circumstances. They depend, for example, on an interest analysis or on an incidents-of-marriage analysis, or on both. Alternatively, or in addition, the scholars depend on whether the marriage is evasive, migratory, or visitor, or two or three of these categories together. See, e.g., Grossman, *supra* note 13; Koppelman, *Interstate Recognition*, *supra* note 6; Silberman, *supra* note 10.

39. It is also worth noting that the rush to conflicts has included many who are not conflicts scholars by trade, but who have followed same-sex marriage politics onto the terrain of conflicts of laws, using it as a site of advancing (or conversely, blocking) same-sex-marriage recognition. This explicitly political objective may explain the politics-over-technologies tone of much of this scholarship.

40. The Full Faith and Credit Clause has never been understood to compel one state to recognize another state's marriage. Rather, as Koppelman's *Interstate Recognition of Same-Sex Marriages and Civil Unions*, *supra* note 6, at 2146, notes, “the clause requires states only to recognize other states' judgments rendered after adversarial proceedings.” This case was an attempt to obtain a judgment that recognized the marriage, as a judgment would therefore trigger the recognition requirements of the Clause.

41. See, e.g., Melissa Followell, *Gay Florida Couple Submit Federal Lawsuit*, GAY CHRISTIAN NEWS, July 23, 2004, <http://www.a-gay-christian-testimony.com/GayRights07-23-04C.html> (last visited

Other plaintiffs may have found themselves in the cultural and political battlefield more by circumstance than by design. Ironically, those seeking dissolution of their marital status are effectively forced to litigate the validity of their marriages in the first place. Yet, for at least some of the plaintiffs, dissolution was an important, indeed vital, part of recognition. One woman, who entered into a civil union in Vermont and subsequently sought dissolution in New Jersey, wrote,

Why bother getting a legal dissolution? . . . Talking to a friend, I struggled to put into words why it felt so vital. It wasn't for financial reasons: we had no children, no joint property. "Why, not suing for dissolution would invalidate the whole thing," she said wisely. And that was it, the word I was searching for. I would not invalidate our civil union by agreeing that it didn't count.⁴²

For her, the legal recognition of divorce was part of the process of relationship recognition, in terms of both the legal incidents that might be attached, and the sheer power of recognition:

I still believe that marriage will bring most of us incredible blessings. But when our marriages don't work, I hope we insist on proper divorces, with lawyers and judges in our courts, because we deserve to honor our unions with this validation too. We deserve help breaking up households and navigating custody of children. Just as we insist on the right to marry, we have to demand that the legal system help us dissolve our unions when we have to. Because these are not empty ceremonial gestures we are making in Vermont and Massachusetts and Oregon and San Francisco. Our marriages count.⁴³

Although some of the plaintiffs in the dissolution cases may simply have been seeking a legal remedy,⁴⁴ ensuring that they are free from the status and limitations of marital status, at least some of the plaintiffs brought their cases with the cultural battlefield of same-sex marriage very much in mind.

The conflicts scholars and plaintiffs alike can be seen to be engaged in a project of producing same-sex marriage in the here and now. It is an example of

June 1, 2008) (including plaintiffs' discussion of their lawsuit). It was, however, a controversial political battle not endorsed by gay-and-lesbian organizations. See, e.g., Ann Rostow, *Florida Suit Challenges Federal Marriage Law*, THE ADVOC., July 21, 2004, available at <http://www.planetout.com/news/article.html?date=2004/07/21/1> (last visited Feb. 2, 2008) (including the comments of Kate Kendall of the National Center for Lesbian Rights); Kavan Peterson, *Florida Lawyer Seeking Gay Marriage Limelight*, Stateline.org (Aug. 17, 2005), available at <http://legalminds.lp.findlaw.com/list/queerlaw/frm05746.html> (last visited Feb. 2, 2008) (detailing the comments of Matt Foreman, Executive Director of the National Gay and Lesbian Task Force).

42. Kathy Anderson, *My Vermont Divorce*, THE ADVOC., Sept. 28, 2004, at 10.

43. *Id.*

44. This is perhaps even more arguable in relation to those litigants seeking a legal incident of marriage—a bankruptcy benefit, a disability pension, a wrongful-death claim, a parentage claim. These plaintiffs were each seeking some kind of marital recognition, often in a time of difficulty. For example, in both *Langan v. St. Vincent's Hosp.*, 802 N.Y.S.2d 479, 479 (N.Y. App. Div. 2005), and *In re Kandu*, 315 B.R. 123, 133–34 (Bankr. W.D. Wash. 2004), the plaintiff's same-sex partner had died, with the former trying to bring a wrongful-death suit, and the latter seeking bankruptcy protection. In *Miller-Jenkins*, the former couple was involved in a bitter custody dispute, and the nonbiological mother was desperately seeking recognition of her parentage. *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2006). Although these plaintiffs may be forced to litigate the validity of their marriages and are thereby indirectly dragged into the fray of marriage recognition, their interests appear to be much more of material benefit than of symbolic recognition.

the politics of the present—that is, the way in which same-sex marriages are no longer part of an imagined future, but are becoming part of the present.⁴⁵ The discursive strategy is one of producing same-sex marriage as real in the present, by taking a same-sex marriage and trying to expand its recognition beyond its place of celebration. The legal cases each do this, even if just a little, even when they fail. When a court dissolves a marriage or civil union, that relationship is recognized as having been real.

But even when a court refuses to recognize the legal validity of the same-sex marriage or civil union, it is forced to recognize and perform the “speakability” of same-sex marriage.⁴⁶ Judith Butler, in connecting the “domain of the sayable” with subjectivity, argues that “[t]o embody the norms that govern speakability in one’s speech is to consummate one’s status as a subject of speech.”⁴⁷ Butler further argues that prohibition in the form of censorship is often contradictory, speaking the very thing that it seeks to prohibit. “The regulation that states what it does not want stated thwarts its own desire Such regulations introduce the censored speech into public discourse, thereby establishing it as a site of contestation, that is, as the scene of public utterance that it sought to preempt.”⁴⁸

With each utterance of a migrating marriage, same-sex marriage is constituted as coherent—speakable—part of the domain of the sayable, although its materiality may be spatially deferred: it exists somewhere else. The courts in these cases are forced to recognize the validity of a Vermont civil union in Vermont, or a Massachusetts same-sex marriage in Massachusetts, or a Canadian same-sex marriage in Canada. These marriages and civil unions are reiterated as real, as of the present, even if this temporal reality is geographically confined. It is the antinomical moment: nonrecognition becomes a form of recognition. Indeed, the migrating-marriage cases are themselves a kind of performative act, enacting that which they seek to name or have recognized. The dual act of marrying and migrating is then followed by a third moment of seeking legal recognition for that which has already occurred. The law may—or more often than not does—refuse this legal recognition. But when this act of refusal occurs on the terrain of conflict of laws, it is itself an acknowledgement of the act of marriage that has come before. The marriage is real, just not in the here and now, but in the there and then. The marriages migrate, even if only in the imagination: it is migration that can now be imagined in law, even if it is not actually recognized by the courts as legally valid within their geographic and jurisprudential jurisdiction.

45. See BRENDA COSSMAN, *SEXUAL CITIZENS: THE LEGAL AND CULTURAL REGULATION OF SEX AND BELONGING* (2007).

46. See generally JUDITH BUTLER, *EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE* 133 (1997) (discussing the “domain of the sayable” in constituting subjectivity).

47. *Id.*

48. *Id.* at 130 (emphasis omitted).

Those who oppose the recognition of same-sex marriage seem to recognize, at least implicitly, this migration of the imaginary and its significance in producing same-sex marriage as real in the present. In *KJB v. JSP*, the Iowa divorce case, Congressman Steve King—one of the petitioners who unsuccessfully challenged the validity of the divorce decree—issued the following statement: “Unicorns, leprechauns, gay marriages in Iowa—these are all things you will never find because they just don’t exist. But perhaps Judge Neary would grant divorces to unicorns and leprechauns too.”⁴⁹ In this quote, Congressman King is engaging the imaginary to preempt its migration. Scorn and ridicule become the discursive strategy for denying even the possibility of a politics of the present. The gap between legal and cultural recognition is performed in reverse: legal recognition of same-sex marriage is met with its cultural repudiation.

The same-sex-marriage conflicts cases can be seen to parallel the *New York Times* wedding announcements’ long-term inclusion of same-sex commitment ceremonies, civil unions, and marriages.⁵⁰ These announcements are part of a cultural politics constituting same-sex marriages as real in the here and now. Many of the “wedding” announcements that are published are of commitment ceremonies entered in jurisdictions such as New York that do not recognize same-sex marriage or civil unions.⁵¹ It is not legality that these announcements are announcing; it is the cultural legitimacy of the unions, a cultural legitimacy that is enhanced by affirmation in the *New York Times*. Many other announcements are those of migrating marriages, with couples traveling to Vermont to enter civil unions or Canada to enter same-sex marriages, and then returning home again. With these migrating-marriage announcements, the legal recognition is more ambiguous and geographically displaced; the marriage is not legally recognized in their domiciled state (often but not always New York), but it is recognized somewhere else.⁵² This geographical dislocation, alongside the cultural recognition of the union, in turn casts a shadow over the failure to be legally recognized at home.

Consider the announcement of the marriage of Thea Spyer and Edith Windsor.⁵³ The announcement follows the standard form convention, beginning with: “Thea Clara Spyer and Edith Schlain Windsor were married in Toronto on Tuesday. Justice Harvey Brownstone of the North Toronto Family Court

49. Press Release, Congressman Steve King, King Reacts to Lesbian Divorce in Sioux City, (Dec. 12, 2003), available at http://www.house.gov/list/press/ia05_king/pr_031212.html (last visited May 13, 2008).

50. See *supra* note 4 and accompanying text.

51. See, e.g., *Wedding Announcement, Thea Spyer, Edith Windsor*, N.Y. TIMES, May 27, 2007, at 914.

52. The governor of New York has since directed all state agencies to recognize same-sex marriages performed in other jurisdictions. Jeremy W. Peters, *New York to Back Same-Sex Unions From Elsewhere*, N.Y. TIMES, May 29, 2008, at A1. A lawsuit seeking to block the governor’s directive has been subsequently brought. Jeremy W. Peters, *Suit Seeks to Block State Policy on Same-Sex Union*, N.Y. TIMES, June 4, 2008, at B3.

53. *Id.*

officiated . . .” In the paragraphs that follow, we are told that Dr. Spyer is 75, and Ms. Windsor is 77, and that they have been together for forty years. The final paragraphs read,

Dr. Spyer, who has become a quadriplegic as a result of advanced multiple sclerosis, said of the weekend, and her time spent with Ms. Windsor: “It was a feeling of complete delight in being with her. I had a real sense of ‘I’ve landed in my life.’”

That was 40 years ago.

Dr. Spyer had the help of three aids who traveled with her to Canada to officially marry Ms. Windsor, ending an engagement that began in 1967.⁵⁴

The announcement and, more generally, the wedding, garnered broad media attention.⁵⁵ The coverage emphasized the age of the parties, the longevity of their relationship, and, above all, the declining health of Spyer. In a *Globe and Mail* article, Ms. Windsor was quoted as saying, ““On one occasion recently it looked like it was going to be very close to the end We just said—We’re running out of time.””⁵⁶ The article explicitly tied their wedding ceremony to the broader politics of same-sex marriage in the United States, noting that 1,597 American couples have traveled to Toronto to wed since same-sex marriage became available there in June 2003. It also noted that the wedding was organized by Brendan Fay, founder of the New York-based Civil Marriage Trail project, which has assisted same-sex couples get married in Canada.⁵⁷

The *New York Times* wedding announcements provide a fascinating forum where couples like Spyer and Windsor can emerge—however temporarily—as the poster children of same-sex marriage. Their wedding may have been a small, intimate affair. And they no doubt married for the meaning it produced in their own private lives. But the wedding announcement in the *New York Times* transformed their intimate ceremony into a very public affair, and a very political intervention into the cultural contestations over same-sex marriage.⁵⁸ Their long-term relationship, their advanced age, and Dr. Spyer’s declining health together produced an image of dignity long denied. It is a kind of politics of sentimentality, producing an imaginary of same-sex marriage that not only exists in the present, but that is emotionally compelling. Moreover, the migratory dimension of this marriage is deployed to heighten its poignancy:

54. *Id.*

55. See, e.g., Best New York Times Lesbian Wedding Notice Ever: Thea Spyer & Edith Windsor, Posting of Michael Petrelis to The Petrelis Files, <http://mpetrelis.blogspot.com/2007/05/best-ny-times-lesbian-wedding-notice.html> (May 29, 2007, 11:56 PST) (describing the announcement as “the most emotionally moving and terrific human story of all the gay and lesbian New York Times wedding announcements ever to hit the pages of the Gray Lady”).

56. Siri Agrell, *A 40-Year Wait for Wedded Bliss*, *GLOBE & MAIL*, May 31, 2007, at L1.

57. *Id.*

58. The couple was not new to the world of same-sex marriage politics. Ms. Windsor was a long-time activist: in 2005 she became a “marriage ambassador” trained by Empire State Pride, a program designed to educate the public about the realities of gay-and-lesbian families and to lobby for same-sex-marriage rights. Chris Lombardi, *Ambassadors Are Representing the Face of Marriage*, *VILLAGER*, (June 13–19, 2007), available at http://www.thevillager.com/villager_215/ambassadorsare.html (last visited Feb. 2, 2004).

look at the lengths to which these couples must go in order to marry before they die. Spyer and Windsor's migrating marriage is an emotionally charged intervention in the politics of same-sex marriage, signifying the multitude of reasons that same-sex marriage is right, and that New York's failure to recognize it is wrong. The cultural space of the wedding announcement produces both a powerful image of same-sex marriage in the here and now and, at the same time, a powerful denunciation of its absence.

Migrating marriages, and the early cases in which these marriages are being contested, occupy a space not unlike *Big Love* and its mock wedding announcement, which plays precisely on the gap between law and culture, and between legal and cultural recognition. The *New York Times* wedding announcement produces the latter without requiring the former. Same-sex marriages become real but not legal in the here and now, producing same-sex marriage in a kind of liminal space, somewhere in between cultural recognition and legal nonrecognition. Yet, their cultural recognition is constitutive of the very thing that seeks legal recognition; cultural marriages then set out to become legal marriages, sometimes by deploying the tools of conflicts, but often simply by constituting same-sex marriage as real within the cultural imaginary. *Big Love* plays on an even more decisive gap: polygamous marriages are not legal—in Utah or anywhere else in the country. Yet the point and the poignancy of the show is to depict a “real-life” family. Bill Hendrickson and his three wives struggle with all of the daily trials of contemporary family life: parenting, finances, intimacy, and sex. The sympathetic portrayal of their family is as culturally real, although it suffers by virtue of its nonlegal recognition.

IV

CONCLUSION: TOWARDS LIMINALITY

Same-sex couples are getting married. Some seek to travel from here to there and then seek legal recognition of these marriages here. They are forced onto the terrain of the law of conflicts as they seek dissolution, legal incidents, or more general recognition. But, when same-sex marriage is involved, we cannot even pretend to treat the terrain as purely private. This is not a zone of autonomous individuals who can freely pick and choose their own laws with effect in their home states; this is not a zone where such individuals can even seek to mimic this discourse. It is a zone where states remain sovereign and where individuals must submit to their higher law. Conflict scholars may be seeking to transform same-sex marriage contestations into choice-of-law analysis, deploying the technical tools of the trade. But their strategic gesture has not translated into a discursive shift from politics to legal technologies. Migrating same-sex marriages remain resolutely political, and the turn to conflicts does little to obscure or obviate the underlying normative stakes.

Given the transparency of these politics, it may be more productive to approach the strategic gesture of these conflicts scholars and conflicts cases as a deeply cultural strategy that requires an analysis of the relationship between

legal strategy and the production of cultural meaning. Sometimes, private litigants are simply seeking an individual remedy; they want to get out of their marriage, or they desperately need a legal incident of marriage, such as bankruptcy protection. But, the turn toward the private is at the same time part of the politics of producing same-sex marriage in the present, through the dual and sometimes dueling strategies of legal and cultural recognition. And even those parties who simply want out of their marriages get caught up in these politics of recognition. It is, moreover, a politics that cannot be measured in terms of winning or losing on the legal question of interstate recognition. These marriages are migrating, with or without legal recognition, and each legal moment reiterates their representational reality, even if only somewhere else.

Conflict of laws is implicated, in ways that cannot be fully appreciated from inside the traditional doctrinal and policy concerns of the discipline, in this liminality of same-sex marriage—that is, in producing same-sex marriage in a state of ambiguity and transition where borders are fluid, disorienting, and not fully crossed. Same-sex marriage is neither recognized nor unrecognized, but lives in the gap between cultural and legal nonrecognition. Indeed, the migrating-marriage cases play a unique role in producing this liminal state and place of same-sex marriage: conflicts-of-laws is called upon when marriages try to cross borders. The courts may be deploying conflicts of laws in a kind of border patrol, refusing legal passage, yet they cannot prevent its seepage into the cultural imagination on the other side brought on by each of the legal challenges. These migrating-marriage cases challenge the traditional confines of doctrinal or policy approaches to conflicts, suggesting that we cannot fully grasp this strategic turn toward the private without attention to these contestations, deferrals, and reversals of cultural meaning.