

The Constitution Requires Us to Recognize What, When They do What?

An Essay on Full Faith and Credit,
Same-Sex Marriage, and Modern Journalism

By Ralph U. Whitten*

I. Introduction



Professor Whitten

The late U.S. Supreme Court Justice Robert H. Jackson called the Full Faith and Credit Clause¹ the “Lawyer’s Clause of the Constitution.”² After almost two decades of studying and writing about the Clause, I have concluded that Justice

Jackson was correct. Only lawyers could have written a constitutional provision that confuses everyone as much as the Full Faith and Credit Clause has over the years. The latest myth about the Clause is that it will require each state to give effect to same-sex marriages performed in Hawaii, if the Hawaii Supreme Court declares the state’s prohibition on such marriages invalid later this year.³ The idea is that same-sex partners living per-

manently in, say, Nebraska, will, after the Hawaii prohibition is invalidated, be able to travel to the Aloha State, get married, and return to Nebraska, where the Full Faith and Credit Clause will require Nebraska’s courts to treat the marriage as valid because it was valid in Hawaii where it was performed. Presumably (though the arguments here become somewhat vague), the same-sex spouses would then be entitled to all the

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¹ U.S. Const. art. IV, § 1.

² See Robert H. Jackson, *Full Faith and Credit—The Lawyer’s Clause of the Constitution*, 45 Colum. L. Rev. 1 (1945).

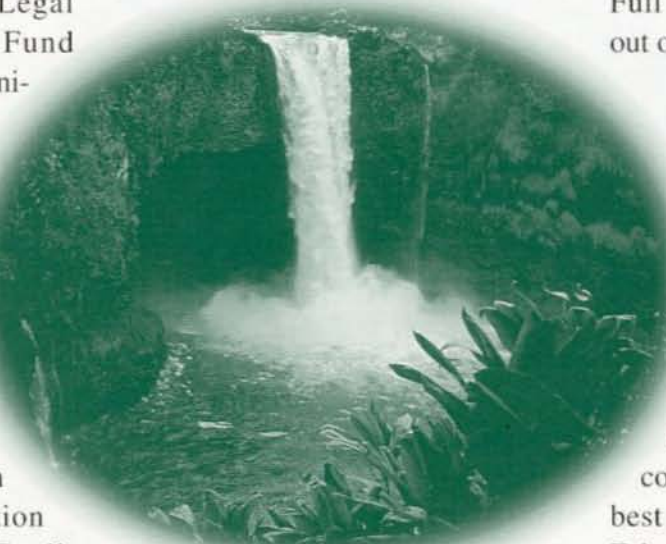
³ See *Baehr v. Lewin*, 852 P.2d 44 (Hawaii 1993). By the time this is published in the fall of 1996, the Hawaii trial court to which the case has been remanded will probably have ruled on the validity of the marriage prohibition under the Hawaii Constitution, although the Hawaii Supreme Court may not yet have reviewed the case.

privileges and benefits now possessed by different-sex spouses under the law of the state where they are domiciled.

This latest notion about the Full Faith and Credit Clause originated in a campaign to validate same-sex marriage by the Lambda Legal Defense and Education Fund (hereafter Lambda), the organization which is conducting the litigation in Hawaii to overturn the state's prohibition on same-sex marriage. If Lambda is successful, the second stage of its litigation strategy is to obtain recognition of valid, same-sex Hawaiian marriages in other states through litigation under the Full Faith and Credit Clause (plus some other constitutional and nonconstitutional theories not pertinent here) that will eventually wind up in the U.S. Supreme Court.⁴

The idea spawned by the Hawaiian litigation has recently taken the country by storm, appearing in the emphatic declarations of a variety of distinguished, though sometimes hysterical, commentators in newspapers and magazines of great prominence. I will discuss below a few of these declarations, as well as the reasons why they are entirely untrue under current law and are not likely to become true under any interpretation of the Full Faith and Credit

Clause that a sane U.S. Supreme Court is apt to make. In a nonpartisan spirit, I will further suggest to any advocates of same-sex marriage who are reading this article how they might win recognition for their Hawaiian unions in



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Nebraska and perhaps other states. Before proceeding to this discussion, however, I should make one thing perfectly clear. The pros and cons of same-sex marriage have been widely discussed in print in 1995 and 1996,⁵ but my interest is not in whether same-sex marriage

is good or bad. I am entirely indifferent to whether the states authorize marriage between people of the same sex, between people of different sexes, between different species, or between people and inanimate objects. I just want the Full Faith and Credit Clause left out of it.

II. Journalism and the Full Faith and Credit Clause

The idea that the Full Faith and Credit Clause requires the states to recognize the validity of marriages performed in other states is not new. I first saw it confirmed as settled law by the best legal mind in journalism on February 24, 1984:

MARRIAGE RECOGNIZED IN ONE STATE IS VALID IN OTHERS

Dear Abby: When "Kathleen" asked you if because her son and his first cousin had gone to another state to marry, then returned to live in Massachusetts, would they be living in sin in Massachusetts, you replied, "A valid marriage is valid in every state."

Then Elaine Trudeau, the registrar in the Registry of Vital Records in Boston, challenged your statement with "Wrong! Not in Massachusetts!"

Your response: "Mea culpa. Mea maxima culpa."

For the record, Abby: Article IV, Section 1, of the Constitution of the United States

⁴ The strategy is described in a legal memorandum entitled "Winning and Keeping Equal Marriage Rights: What Will Follow Victory in *Baehr v. Lewin*? A Summary of Legal Issues" (February 16, 1996), written by Evan Wolfson, Director of the Marriage Project and lead counsel in *Baehr*. It is an interesting question whether the validity of Hawaiian marriages concerns a "public act," a "record," or a "judicial proceeding." The Lambda memorandum assumes it might be all three, at least in states where a judicial officer performs marriages! I will assume throughout the remainder of this essay that the issue concerns the effect to be given to the "public acts" (statutes) of a state in other states, since marriages are authorized by statute in every state and *Baehr* would, presumably, invalidate a restriction in a statute.

⁵ See, e.g., William N. Eskridge, Jr., *The Case for Same-Sex Marriage* (1996); *Let Them Wed*, *The Economist*, Jan. 6th-12th, 1996, at 13; Jonathan Rauch, *For Better or Worse?*, *The New Republic*, May 6, 1996, at 18.

clearly and unequivocally states: "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."

Thus a marriage valid in any state is valid in all states; and public officials who deny this are violating their constitutional oaths, which according to Article VI, paragraphs 2 and 3, take precedence over all state law and constitutions.

[Abby's reply]:
As I told Ms. Trudeau, "I learned a lesson today. When it comes to law, never assume anything."⁶

Abby should not have retracted so quickly. Trudeau was entirely correct. Even at the time she wrote, the controlling U.S. Supreme Court authorities did not support the reader's interpretation, and the Court's decisions have, if anything, undermined that interpretation even more since 1984. In fact, no interpretation the Court has ever made of the Full Faith and Credit Clause would support the reader's understanding of the Clause. Nor, for reasons that should be apparent, is the Court likely to interpret the Clause broadly enough to require that other states validate Hawaiian marriages (same-sex or otherwise).

Strangely, however, as in the case of the reader's intimidation of Dear Abby, otherwise intelligent people seem to don their late twen-

tieth-century glasses, look at the Clause, tilt their heads and, without reference to precedent or reflection upon the consequences, say something like, "Boy, this must



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mean each state must recognize the laws of other states." Thus, Martin Mawyer, President of the Christian Action Network, declares with horrified confidence:

A decision against Hawaii in the Baehr case will affect the laws of every state in the nation. Homosexual couples from the mainland will fly to Hawaii, get married and return to their home

states. At which point the Full Faith and Credit clause of the U.S. Constitution will force federal, state, and local governments and businesses to recognize the couples as legally married and confer upon them all the benefits and recognition of traditionally married couples.⁷

Mawyer's overwrought statement is typical in the precision with which it describes the operation of the Full Faith and Credit Clause. My favorites, however, are two columns by William Safire. I frequently agree with Safire's columns, and his position on the meaning of the Full Faith and Credit Clause is far from unique, having also been taken by many other commentators in both print and on television. I choose Safire's columns to review only because he authors books on language⁸ and, therefore, ought to know better than to write things on technically worded legal provisions about which he obviously knows nothing. I read Safire's first column in the March 19, 1996, *Omaha World Herald*.⁹ After commenting on the impending Hawaii decision, he stated:

What is upsetting Americans in the other 49 states (not to mention the great majority of Hawaiians) is the possible extension of this ruling throughout the nation by virtue of the "full faith and credit" clause of the U.S. Constitution. That says plainly that each state must recognize "public acts, records, and

⁶ *Dear Abby*, Omaha World Herald, Feb. 24, 1984.

⁷ Omaha World Herald, Jan. 10, 1996, Op-ed Page.

⁸ See William Safire, *On Language* (1981); William Safire, *What's the Good Word?* (1982).

⁹ *Tinkering Further With Marriage*, at 11.

judicial proceedings of every other state."¹⁰

Plainly? Well, no, the Full Faith and Credit Clause says nothing "plainly," and nowhere does the Clause use the word "recognize." It says "full faith and credit shall be given." Where Safire gets the idea that "full faith and credit shall be given" means "recognize" is, to say the least, unclear. Tsk, tsk.

Safire's second column¹¹ was even worse. Safire first discussed recent legislative action in Hawaii rejecting a ban on the licensing of marriages between persons of the same sex. He then opined that this legislative action makes it more likely that Judge Kevin Chang (the Hawaii trial judge now considering the case) will declare the existing Hawaiian prohibition on same-sex marriage invalid. He then stated:

No longer can defenders of one-man, one-woman marriage claim that the institution is being threatened by hyperactivist judges. One state's duly elected representatives have just paved the way, and under the U.S. Constitution's "full faith and credit" clause, a judicial proceeding held in one state is to be honored in all states.

What judicial proceeding is Safire talking about? Does he simply mean to say that the Hawaiian "judicial proceeding" holding

same-sex marriages valid will allow such marriages to take place in Hawaii, and that the Full Faith and Credit Clause will then require other states to "recognize" the marriages? If so, he is saying the same thing he said in his first column, and he still has not done his homework. But if he means to say that other states will have to "honor" the Hawaiian case as *precedent* in interpreting their own constitutions, he has really gone off the deep end. No one, not even the Lambda Legal Defense and Education Fund, has suggested that the Full Faith and Credit Clause means this. In any event, ambiguity like this from a man who values precise language is unseemly. Shame, shame, Mr. Safire.

III. The Straight Poop About Full Faith and Credit: I Kid You Not

Here is the way the Full Faith and Credit Clause works, past and present. First, the words "faith" and "credit" were terms drawn from the English law of evidence. A substantial body of historical data indicates that the Full Faith and Credit Clause of the Constitution was designed only to require directly that states admit

properly authenticated public acts, records, and judicial proceedings of other states into evidence as conclusive proof that such acts, records, or proceedings existed and dealt with the matters that they recited, but *not* to require that any particular effect be given to the acts, records, and proceedings. However, in the second sentence of the Clause, Congress was given substantial power to declare the effect that public acts, records, and judicial proceedings should have in other states.¹² The proof of this "historical (or original) meaning" is complex, and I will not revisit it here, because I have dealt with it extensively elsewhere.¹³ Moreover, even if this originalist view of the Full Faith and Credit Clause is wrong or irrelevant, the modern interpretation of the Clause also does not support the broad interpretations in the preceding subsection.

The Supreme Court did not even suggest that the Full Faith and Credit Clause required the states to *apply* the laws of other states until 1887,¹⁴ and the Court did not actually get around to implementing the suggestion until the twentieth century.¹⁵ At first, the Court seemed to incorporate the traditional territorial rules of conflict of

¹⁰ Emphasis mine.

¹¹ *Same-Sex Marriage Getting Closer*, Omaha World-Herald, April 30, 1996, at 10.

¹² As this is being written, Congress is poised to exercise its power to eliminate the same-sex marriage controversy. In the "Defense of Marriage Act," the Senate and House are about to provide that "[n]o State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . ." See S. 1740, 104th Cong., 2d Sess. § 2 (1996); H. R. 3396, 104th Cong., 2d Sess. § 2 (1996). President Clinton has promised to sign the Act if it is passed. See, e.g., Todd S. Purdum, *President Would Sign Legislation Striking at Homosexual Marriages*, N.Y. Times, May 23, 1996, at A1. Predictably, however, the prospect of this statute has given rise to even more bogus constitutional arguments. See note 26, *infra*.

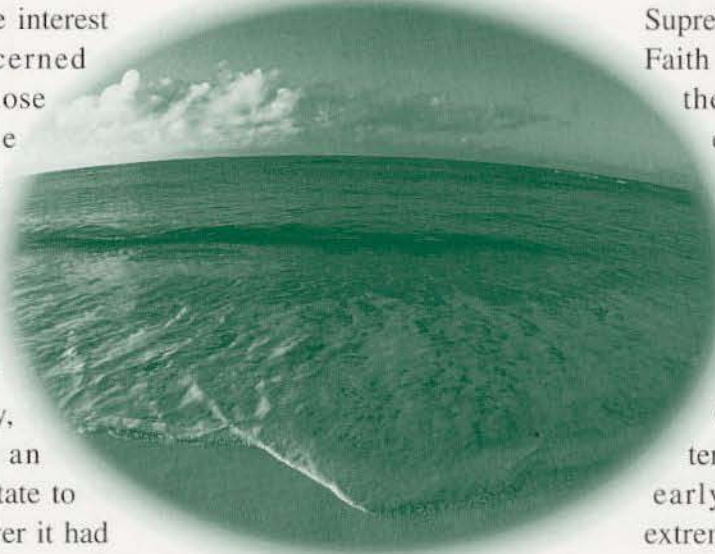
¹³ See Ralph U. Whitten, *The Constitutional Limitations on State Choice of Law: Full Faith and Credit*, 12 *Memph. St. L. Rev.* 1 (1981) (hereafter *Whitten Choice of Law*); Ralph U. Whitten, *The Constitutional Limitations on State Court Jurisdiction: A Historical-Interpretive Reexamination of the Full Faith and Credit and Due Process Clauses (Part I)*, 14 *Creighton L. Rev.* 499 (1981).

¹⁴ See *Chicago & Alton Railroad v. Wiggins Ferry Co.*, 119 U.S. 615, 622 (1887) (dictum).

¹⁵ See Whitten, *Choice of Law*, *supra* at 5.

laws into the Full Faith and Credit Clause;¹⁶ those rules essentially reflected the notions of territorial sovereignty and “vested rights” prevalent at the time in both choice of law and judicial jurisdiction. Later, the Court moved to an analysis that identified the interest of the potentially concerned states and “balanced” those interests to determine which state had the stronger interest.¹⁷ Under this approach, the Full Faith and Credit Clause required the law of the state with the stronger interest to apply. Finally, the Court adopted an approach that allowed a state to apply its own law whenever it had a legitimate interest in doing so.¹⁸ The Court had arrived at the latter approach as early as 1939 and included more and more cases within this interpretation as time passed. In *Allstate Insurance Co. v. Hague*,¹⁹ a substantial majority (seven) of the Court agreed that the test of a state’s power under both the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of the Constitution is that the state have sufficient contacts with the parties or events to give it a legitimate interest in applying its law to the case. Thus, even if another state has an even stronger interest, the

Clause does not require the forum to apply the law of the more strongly interested state. Since *Allstate*, the Court has modified this test in only one respect.²⁰ In *Sun Oil v. Wortman*,²¹ the Court



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held that if a state is applying a conflict of laws rule that was accepted at the time the Full Faith and Credit and Due Process Clauses were ratified (*i.e.*, a “traditional” conflict of laws rule), the rule is *per se* valid and the interest

analysis of *Allstate* is not used to determine whether the state must apply the law of another state.

The remarkable thing is that the proponents of same-sex marriage cannot win under any of the approaches ever used by the Supreme Court to interpret the Full Faith and Credit Clause. Should the Court return to a narrow evidentiary interpretation of the Clause (concededly unlikely), the Clause would obviously not be interpreted to require that a state give any effect to another state’s law. If the Court should return to the territorial approach of the cases early in this century (also extremely unlikely), the same-sex marriage proponents still cannot win. The traditional territorial rule is that a state will recognize as valid a marriage performed in another state, *unless* to do so would be abhorrent to the state, violate natural law, violate the state’s strong public policy, etc. Thus, a state could refuse to recognize a same-sex Hawaiian marriage because the marriage violates the state’s strong public policy. If the Court should, instead, return to the balancing approach of the cases immediately following the territorial era, the state of the marital domicile would surely be held to have the strongest interest in

¹⁶ See Whitten, *Choice of Law*, *supra*, at 5-7.

¹⁷ See *id.* at 7-9.

¹⁸ See *id.* at 7-10.

¹⁹ 449 U.S. 302 (1981).

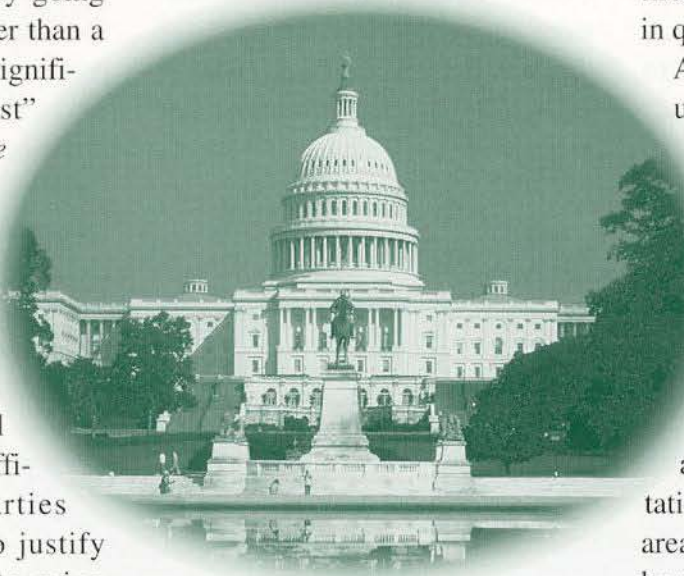
²⁰ In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the Court employed the *Allstate* test to invalidate Kansas’ choice of its own law to govern claims with which it had no significant contacts, under circumstances where Kansas law conflicted with the laws of states that did have significant contacts with the claims.

²¹ 486 U.S. 717 (1988).

applying its law to determine whether its citizens can or cannot be married. After all, under the “suitcase wedding” scenario, the same-sex partners are living permanently in a state whose laws they are trying to evade by going to Hawaii to wed. If, rather than a balancing test, the bare “significant contacts-state interest” approach of the *Allstate* case is applied (as will be the case if a state uses a “nontraditional” conflict of laws analysis to evaluate the validity of a foreign marriage), the state of the marital domicile will surely be held to have sufficient contacts with parties domiciled in the state to justify applying its law to determine whether they can marry. Finally, if a state applies the traditional conflict of laws rule described above and that rule is held to have been accepted at the time the Full Faith and Credit Clause was ratified, the rule will be *per se* valid and the state can refuse to recognize a Hawaiian same-sex marriage under the public policy exception to the rule.²²

So what authority does Lambda rely on for the second stage of its litigation strategy? First, it relies on obsolete Supreme Court decisions that do not deal with marriage and are, in any event, not the controlling authority today. In fact, Lambda’s memorandum

describing its litigation strategy²³ does not even cite *Allstate* or *Sun Oil*, which are the latest, controlling cases under the Full Faith and Credit Clause. Lambda does cite a few state and lower federal court



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cases which declare that the Full Faith and Credit Clause requires states to honor marriages validly performed in other states.²⁴ The problem is, the cases all make bald statements that this is true (like the newspaper commentators), cite the Full Faith and Credit Clause with-

out any other authority (except an occasional case also containing an unsupported statement), and employ no reasoning to show how a myriad of other problems under the Clause could be avoided under the interpretation of the case in question.

And there’s the rub. To win under the Full Faith and Credit Clause, the proponents of same-sex marriage must persuade the Supreme Court to interpret the Clause more broadly than it has ever been willing to do in the past. But there is good reason the Court has arrived at a minimalist interpretation of the Clause. Consider the area of marriage alone. Every state has laws prohibiting incestuous marriages. However, the states disagree at the margin about the kinds of relationships that are incestuous. So, assume two people are domiciled in a state that prohibits them from marrying because they are too closely related. They go to another state that allows them to marry, marry, and then return to the first state to live. Most states will treat the marriage as valid, even though it would be invalid if it had been performed in those states. But this is true only at the margins (e.g., an uncle marrying a niece). If the relationship between the parties is too close, other states would not recognize the marriage—e.g., suppose State

²² I note, in passing, that all the current treatises on the subject of Conflict of Laws recognize the power of each state to control issues of marriage concerning the state’s domiciliaries. So do the Restatements (First) and (Second) of Conflict of Laws. None of these sources even remotely suggests that the Full Faith and Credit Clause has anything to do with the question whether a marriage performed in another state should or must be considered valid by the state of the marital domicile.

²³ See note 4, *supra*.

²⁴ See, e.g., *Parish v. Minvielle*, 217 S0.2d 684 (La. Cl. App. 1969).

X legalizes marriages between fathers and daughters. Are we to suppose that the Full Faith and Credit Clause should be interpreted in a way that would require another state to treat as valid incestuous marriages performed validly in State X, but which go to the core of the other state's objection to incest? What then if State Y legalizes polygamous marriages? Would another state have to treat as valid polygamous marriages between its domiciliaries just because the marriages were performed in State Y?

Outside the marriage area the problems get even worse. Consider all the differences in licensing laws existing between the states that might be governed by a precedent requiring the states to recognize same-sex marriages performed elsewhere. For example, suppose State Z licenses veterinarians to practice medicine on humans. Do other states have to grant the same privileges to their own citizen veterinarians who go to State Z and obtain medical licenses there? If the answer is, "Of course not; one state doesn't have the right to determine the qualifications for professionals who wish to ply their trade in another state," why, then, does Hawaii have the right to determine when the citizens of other states can be validly married?

Of course, just because a proposition is not supported by prece-

dent or reason does not mean the Supreme Court will not adopt it as constitutional law. But the same-sex marriage controversy is an unlikely case for a broad interpretation of the Constitution. The Court wouldn't have time to consider all the petitions for certiorari that would result from a holding in favor of the same-sex marriage proponents. The Court surely



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understands the chaos such a holding would produce.

IV. How They Can Win

Nevertheless, there are ways that the proponents of same-sex marriage might win recognition of their Hawaiian marriages in other states. First, they might win in a

number of states under the traditional conflict of laws rule. That is, many state courts may not consider same-sex marriages to be contrary to their public policy or otherwise abhorrent or contrary to natural law. Times have changed. In addition, some states may have replaced the traditional conflict of laws rule with a "modern" interest-analysis-based conflicts approach, such as that of the *Restatement (Second) of Conflict of Laws* or a similar system. Under many of these modern conflict of laws approaches, the state courts might be willing to validate Hawaiian same-sex marriages. Also, some states, such as Nebraska, have dealt with the problem of foreign marriages by statute.

Nebraska Rev. Stat. § 42-117 provides:

All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, shall be valid in all courts and places in this state.

Note that this statute contains no public policy or other exception. Thus, the Nebraska Supreme Court might feel bound by the text of this statute and precedents interpreting it²⁵ to validate a Hawaiian same-sex marriage.

Finally, Congress has power under the second sentence of the Full Faith and Credit Clause to declare the "effect" that a state's public acts, records, and judicial proceedings shall have in other states. The conventional view of

²⁵ See, e.g., *State v. Haml*, 87 Neb. 189, 126 N.W. 1002 (1910).

this power is that Congress may enact nationwide conflict of laws rules binding on the states. Thus, if a uniform, national solution to this problem is considered essential, the proponents of same-sex marriage could focus their efforts on the national political arena.²⁶

V. Conclusion

History and precedent are all against the proponents of same-sex marriage as far as the Full Faith and Credit Clause is concerned. Therefore, if Lambda loses the second stage of its litigation, it will be no surprise. What I worry about is that Lambda will lose, and then the media, along with the gay community, will begin loudly condemning the Supreme Court as “conservative,” “right wing,” “reactionary,” “insensitive to the rights of gays,” or _____ (you fill in the blank). That at least is the typical reaction these days when an interest group loses a battle before the Court. Such a reaction would be all the more shameful, given that the primary controlling test under

the Full Faith and Credit Clause—the significant contacts, state interest test of the *Allstate* case—was adopted by a majority of seven judges, including Justice William Brennan (author of the plurality opinion in *Allstate*), Justices White, Marshall, and Blackmun, who made up the remainder of the plurality, and Justices Powell, Chief Justice Burger, and Justice Rehnquist, who agreed with the plurality about the test to be applied, but disagreed about its application to the facts of the case. Thus, seven justices, covering the entire spectrum of judicial philosophy, agreed that a minimalist test should control the states’ obligations under the Full Faith and Credit Clause. This fact alone should, but probably won’t, give potential critics of the Court reason to pause. But if the critics react as I predict, responsible lawyers, committed to the rule of law, should not allow them to go unchallenged.

What if I am wrong and the Court *does* interpret the Full Faith

and Credit Clause to require the states to treat Hawaiian same-sex marriages as valid? I would consider such a decision incorrect as a matter of history, precedent, and practicality. Even so, it would be nothing to get excited about. Under the conventional understanding of the Full Faith and Credit Clause, Congress has the power to override the Court’s decision by declaring the “effect” that Hawaiian marriages shall have in other states.²⁷ Thus, the political process is available to override any decision that runs counter to the strong sentiments of a majority of the American people. If the political process cannot immediately be employed to correct the decision, it will be unfortunate; but if the majority feels strongly enough about the issue, they can elect representatives who will ultimately reach the desired result. And if a majority of Americans do not feel strongly enough about the issue to do this, then perhaps, after all, we deserve to be governed by a “bevy of Platonic Guardians.”²⁸

²⁶ As observed in Note 12, *supra*, Congress, in the “Defense of Marriage Act,” is about to do the opposite of what is suggested in the text accompanying this note. This has led Professor Eskridge to argue that Congress would be acting unconstitutionally in so doing! Why? Because, according to him, the first sentence of the Full Faith and Credit Clause contains “constitutional rights” that Congress would be taking away in the Act by exercising its power to declare the “effect” of same-sex marriages under the second sentence. This would be anomalous, because no other constitutional provision guaranteeing constitutional rights allows Congress to reduce the scope of the rights guaranteed. Eskridge buttresses this argument with an exceedingly superficial and blatantly misleading historical description of the framing of the Full Faith and Credit Clause, among other superficial and blatantly misleading statements. See William Eskridge, *Credit is Due*, *The New Republic* June 17, 1996, at 11. Eskridge thus argues that the second sentence of the Full Faith and Credit Clause only allows Congress to declare the effect of state laws when Congress does so consistently with some hypothetical content of the Clause. Of course, the constitutional anomaly Eskridge purports to discover disappears once one understands the complete and accurate history of the Full Faith and Credit Clause. An accurate history reveals that the first sentence of the Clause was designed to be narrower than the second sentence. The first sentence was intended to give only a narrow evidentiary command, while the broader and more significant power to declare effect was given to Congress in the second sentence. See Whitten, *Choice of Law*, *supra* note 12 (for a complete analysis of the history of the Full Faith and Credit Clause). Interestingly, however, even giving Eskridge a good bit more than he is due, his argument is lacking. For he does not discuss the existing Supreme Court decisions interpreting the Clause, which would establish the current content of the clause. As demonstrated in section III of this essay, those decisions define a content for the first sentence of the Clause that is clearly consistent with Congress’ exercise of power in the “Defense of Marriage Act.” Of course, Eskridge, like Lambda, is probably counting on an expansion of the Clause’s interpretation in some “dynamic” fashion. See generally William N. Eskridge, Jr., *Dynamic Statutory Interpretation* (1994).

²⁷ As observed in Note 12, Congress, perhaps anticipating a broad decision from the Court, is moving to deal with the problem under the “Defense of Marriage Act,” which President Clinton has promised to sign. However, as observed in Note 26, arguments are already being made that the Act exceeds Congress’ power under the second sentence of the Full Faith and Credit Clause. If the latter arguments succeed, amendment of the Constitution would clearly be in order—Article III of the Constitution, that is.

²⁸ See L. Hand, *The Bill of Rights* 73 (1958).