

## EQUALITY FEDERALISM: A SOLUTION TO THE MARRIAGE WARS<sup>†</sup>

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### ABSTRACT

*Recognizing the power of states to export marriage ceremonies, with whatever legal effect for same-sex marriages, permits a fresh look at the constitutional considerations affecting state voiding powers over same-sex marriages. Using the hypothetical state export of marriage law as a thought experiment, this Article argues that any effort to block the exercise by states of a power to offer marriage ceremony across jurisdictions, or to render all such ceremonies a nullity, would be constitutionally infirm or impractically disruptive of marital repose generally. The experiment*

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† Editor's Note: Since this Article went into production, the Supreme Court granted certiorari in *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *cert. granted*, 81 U.S.L.W. 3072 (U.S. Dec. 7, 2012) (No. 12-144) and *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 81 U.S.L.W. 3116 (U.S. Dec. 7, 2012) (No. 12-307). While not presenting the issue of states' obligation to recognize same-sex marriages, these cases can allow the Court to exercise caution about its institutional competence in marriage law and still to be bold by requiring states to respect the constitutional norm of equality.

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*reveals the thinness of state policy interests in voiding gay marriages.*

*A vision of Legal Normalcy and State Territorial Control accepts legal variety as a normal incident of federalism and choice-of-law principles. Given the status quo, proponents of Legally Mandated Uniformity embrace visions of a constitutional ban on same-sex marriage or a rights-based regime that guarantees a fundamental right to marry in the United States.*

*The depth of equality norms as a public value, the expressive effects of marriage ceremony and portable marital recognition, and the obsolescence of state voiding authority point to a different vision: a stable legal environment of marital status portable to all states, with reduced conflict about the loss of control by states over their normative statements in marriage authorization law. Equality Federalism, with the Equal Protection clause in full partnership with federalism, would allow for a general embrace of equality as a principle of fairness, respect, and hospitality.*

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## INTRODUCTION

Setting: California in the near term. The Law: Prop 8 still applies. Scene: A happy couple (Bob and Bill) stands on California soil and enters a marriage under Vermont law, delivered ceremonially by Skype under a distance marriage statute recently enacted by visionary Vermont legislators. Consequence 1: The couple is married under Vermont law and imported the word marriage to their home state of California. Consequence 2: The couple's Vermont marriage is immediately entitled to all the incidents of a California marriage, except the word marriage. Consequence 3: The ban on the word marriage ends in California. Fact: Words travel, as does law. Consequence 4: The artificiality of state bans on the recognition of "evasive" same-sex marriages becomes obvious and the principled, federalist path toward marriage equality becomes apparent.

The cultural dispute over same-sex marriage oscillates among contested visions of national uniformity and the expectation of a long period of legal variety among the states. The proponents of national uniformity embrace mirror visions of a longed-for repose, one cleansed of gender-variant legal marriage, or one that assures any adult pair the fundamental right to marry anywhere in the United States, under the law of every state. Each side imagines that a national resolution would end the long simmering dispute and usher in a new era of decisive legal consensus.<sup>1</sup>

The choices, as imagined today, are between, on one side, *Legally Mandated Uniformity* and, on the other, *Legal Normalcy and State Territorial Control*, an image of legal variety drawn from conflicts-of-law principles that originated in international law. The result, in the minds of same-sex couples, is a marital world of *Legal Surprise and Shifting Legal Regimes*, accompanied by an all-or-nothing debate about their marriage rights.<sup>2</sup>

This Article proposes a third vision, one propelled by a pragmatic view of the cultural resources for changing an embedded cultural practice and by a call for a deeply skeptical view of the state interests in non-recognition. The normative fulcrum is the basic equality norm that most Americans accept and even champion.<sup>3</sup> The strong-

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<sup>1</sup> Compare Theodore B. Olson, *The Conservative Case for Gay Marriage*, NEWSWEEK (Jan. 8, 2010), available at <http://www.thedailybeast.com/newsweek/2010/01/08/the-conservative-case-for-gay-marriage.html> (arguing that the Supreme Court should validate same-sex marriages based on the valued American principle of equality), with Sherif Gergis et al., *What is Marriage?*, 34 HARV. J.L. & PUB. POL'Y 245, 287 (2010) (asserting that marriage "should be regulated for the common good" of society and traditional families) [hereinafter *What Is Marriage*]. Opposing views of the capacity of the Court to impose a national solution to a moral dispute, and of the role of national solutions in a federalist system, can be found in the plurality opinion for the Court and in Justice Scalia's dissenting opinion in *Planned Parenthood v. Casey*. In their effort to resolve the long-simmering abortion wars, the plurality wrote of their role: "Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 866-67 (1992). Justice Scalia argued that until the issue of abortion was elevated to a national level, "disagreement was being worked out at the state level." *Id.* at 995 (Scalia, J., dissenting).

<sup>2</sup> The debate in California about enacting a constitutional ban on same-sex marriage has been described as using "whetheryoulikeitornot" rhetoric. Melissa Murray, *Marriage Rights and Parental Rights: Parents, the State, and Proposition 8*, 5 STAN J. C.R. & C.L. 357, 369 (2009).

<sup>3</sup> See POST and other citations *infra* note 25.

est support for equality as a guiding principle derives from notions that we are equal in the United States as citizens, wherever we reside.<sup>4</sup> The popular reception of that principle can be placed under pressure by equality mandates from the Supreme Court, particularly insofar as the rule of equality seems difficult to constrain as a legal edict if it affects an institution<sup>5</sup>—marriage—about which the Court lacks a defining jurisprudence.<sup>6</sup> The imposition by the Court of a rights-based change in marriage law does not mesh well with law as a process of accretion, in which principles are slowly developed and embedded in a common, substantially consensual legal culture.<sup>7</sup> Yet a constitutional amendment restrictively defining marriage to exclude same-sex couples is so at odds with the equality norm that its prospects, as a realistic alternative or as a means of ending the cultural clash, are weak. The possible approaches to entire uniformity suffer reasonable objections and formidable obstacles.

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4 This principle has less to do with the right to travel than with the right to be treated equally once residence is established in a state. See, e.g., *Saenz v. Roe*, 526 U.S. 489 (1999) (finding a constitutional right to travel). The direct connection of equality to the right to travel has only *Saenz* as a precedent. *Saenz* did not initiate a newly robust constitutional treatment of the status of a new resident of a state as a specific incident of the right to travel.

5 Robert Post argued in reviewing the 2002 term of the Supreme Court that one possible reason, in its *Lawrence v. Texas* opinion holding a Texas sodomy law unconstitutional, that the Court used due process analysis, subtly infused with equal protection concern about stigma, was the sensitivity, under rational basis review, of labeling proponents of sodomy laws “bigots,” and the problems, under strict scrutiny, of constraining the application of the equality principle to other laws affecting gay people. Using equality logic would require the Court “to intervene into the national controversy over the status of homosexuality . . . .” Robert C. Post, *The Supreme Court 2002 Term, Foreword: Fashioning The Legal Constitution, Culture, Courts, and Law*, 117 HARV. L. REV. 4, 100 (2003). Due process presents the risk of undue court involvement in shaping marriage, with little institutional basis. See *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) (“The due process clause of the Fourteenth Amendment is not a charter for . . . judicial legislation.”).

6 See *infra* Part IV.B.

7 State courts deal with deeper law-making functions as compared with the Supreme Court’s narrower focus on individual rights. The Court, by its institutional calling, reduces marriage to the prism of equality norms rather than the broader policies that state courts have the capacity and the mandate to shape and develop. State courts gain their competence through their function, not from geography. When state courts struggle with finding a core logic for the evolving facts of marital life as formal gender rules fade yet gendered marriage remains, state courts are forced to confront the marriage facts brought before them and to solve problems for which neat solutions are not obvious. See, e.g., Katharine K. Baker, *Homogenous Rules for Heterogenous Families: The Standardization of Family Law When There Is No Standard Family*, 2012 U. ILL. L. REV. 319, 367–68 (2012) (discussing the need for family law to impose arbitrary solutions on property division, child custody, or other “defining” features of families, asserting that advocates for a fundamental right to marriage “must reckon with how much definitional work we have ceded to the state,” and suggesting that recognizing the power of the state to define statuses may “strengthen equality claims to family status”).

The third path to a workable resolution to national stalemate over values is *Equality Federalism*, which draws upon insights into federalism sharpened by a consideration of the constitutional power of states to offer their marriage law to non-residents and even to export marriage ceremonies. States may assert their values in their laws, but they may not seal themselves off from the legal culture of sister states nor should federalism permit states to impose *Legal Surprise and Shifting Legal Regimes* on married same-sex couples. Valid non-recognition rules that protect existing marriages or vulnerable parties to coercive or fraudulent marriages could continue. But, with *Equality Federalism*, rejection of categories of adult couple marriage, where the form is widely authorized, would end. Symbol-laden rejections of marriages would no longer be a permitted form of state control over the validity of marriages contracted legally in another American state. A vision of states' exercising a local moral vision over a distinct, stable, local population and thus justifiably disrupting legal statuses gained through the law of another state is obsolete.

The suggestion that rules allowing states to void marriages are obsolete is not a radical departure from skeptical treatments of the public policy exception to interstate recognition of marriages. Previous treatments, however, rely on parsing doctrine and accept that there is a basis for states to void an "evasive" marriage, meaning a marriage by a couple who travels to enter into a marriage not permitted in the couple's home state and then returns home.<sup>8</sup> By contrast, this Article provides a broad analytic basis for ending the right of states to void same-sex marriages contracted elsewhere. A previous article<sup>9</sup> demonstrates that states may exercise the authority to export their marriage

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<sup>8</sup> See, e.g., Kramer *infra* note 92, at 1999; Sanders *infra* note 89. Many states have rules that render evasive marriages void. See Appendix A for a chart showing the current state-by-state rules, *Appendix A: Effect of Home State's Non-Recognition on Validity of Marriage*, <http://www.law.msu.edu/e-marriage/AppendixA.pdf> (last visited Nov. 27, 2012). See *infra* text accompanying notes 97–100 for a description of the potential effect of such harsh voiding rules on the official recognition by a state that performs an evasive marriage.

<sup>9</sup> Adam Candeub & Mae Kuykendall, *Modernizing Marriage*, 44 U. MICH. J.L. REFORM 735 (2011). For additional writings arising from the E-Marriage project and this article, see Mae Kuykendall, *A Way Out of the Same-Sex Marriage Mess*, N.Y. TIMES, May 24, 2012, at A31; Mae Kuykendall, *Analyzing the Paths to Marriage Equality*, AMERICAN CONST. SOC'Y BLOG (June 4, 2012), <http://www.acslaw.org/acsblog/analyzing-the-paths-to-marriage-equality>; Mae Kuykendall, *Federalism and Same-Sex Marriage in Windsor v. United States: Defusing the Power of NO!*, AMERICAN CONST. SOC'Y BLOG (July 9, 2012), <http://www.acslaw.org/acsblog/federalism-and-same-sex-marriage-in-windsor-v-united-states-defusing-the-power-of-no>; MAE KUYKENDALL, AMERICAN CONST. SOC'Y FOR L. & POL., *Issue Brief: The Converging Logic of Federalism and Equality in Same-Sex Marriage Recognition* (Sept. 2012), available at <http://acslaw.org/publications/issue-briefs/the-converging-logic-of-federalism-and-equality-in-same-sex-marriage-recognition>.

law to couples who never visit the state to use its marriage law. The proposal for “E-Marriage” concedes that a same-sex “distance” marriage would not be valid in a non-recognizing state, but demonstrates that the procedure is a means of conferring marital status where the substance of the marriage is uncontroversial.

A skeptical view of ingrained assumptions about marriage procedure that require the physical presence of a couple for a state official to grant official marriage status directs similarly skeptical attention to the rules allowing states to void the same-sex marriages of their residents.

After introducing the concept that state laws tying marriage procedure to geographical presence by a couple are stale and unsupported, this Article proceeds to investigate the constitutional sturdiness of the hypothetical E-Marriage procedure against attempts by other states or the federal government to stop it from occurring. Exploring the constitutional strength of state power to export marriage ceremony against efforts to prevent it then helps outline the structure of an affirmative argument for subjecting the existing canons of recognition to a searching scrutiny for their compatibility with constitutional norms. The recognition canons, as they are applied to void same-sex marriages with effects outside a couple’s domiciliary state, confront an array of constitutional problems when examined under this shift of analytic focus.<sup>10</sup> Overturning them in their entirety would be a logical extension of overlapping constitutional norms and of our history as a nation.<sup>11</sup>

In this Article, “E-Marriage” functions as the basis for a thought experiment. Exploring the power of states to offer marriage ceremonies outside their state demonstrates that the entrenchment of geographic lines as the sole location for marriage solemnization authority is more myth than reality. Similarly, the related vision of state power to impose destructive non-recognition rules on marriages contracted elsewhere overstates geographic entrenchment of marriage

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<sup>10</sup> See *infra* Part III. For an attempt to discern a pattern and describe the “subtle permutations” in the ad hoc law that arises to resolve issues in “interstate activity,” see Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 495–96 (2008) (undertaking to give “‘horizontal federalism’ the systemic scrutiny typically reserved for vertical federalism” and noting that “parochial efforts by each state to exercise the full scope of its ostensibly insular powers risk infringing the other states’ autonomy, frustrating the others’ legitimate interests, or burdening the others’ citizens”).

<sup>11</sup> Grossman has shown that states have typically moved in the direction of recognition. Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433, 442–44 (2005).

authority.<sup>12</sup> For same-sex marriage, the geographic vision is unmoored from the valid concerns of states to prevent real harms to vulnerable marriage partners by policing non-conforming marriages. The ready acceptance of geographical control as the sum and substance of marriage law prevents the creation of a rational blend of variety in local marriage law *and* uniformity, with attendant predictability in marriage recognition. Local, state, and federal institutions, combining their distinctive roles in the constitutional order,<sup>13</sup> can produce a marriage regime that emphasizes respect for local values and allows same-sex couples to enter marriages that exist within a prevailing legal clarity, sheltering their marriages from official caprice. The thought experiment sweeps to the side artificially stark choices—complete uniformity or chaotic variety and legal surprise—forced by the tension between territorial control of states over marriage and an overarching constitutional system focused on individual rights. The thought experiment additionally provides a means of attaining a helpful agnosticism about the theoretically fraught debates over marriage as status or contract; as a critical foundational unit of society or a flawed means of distributing resources for caregiving; as a noble goal for the gay community or a foolish obsession of the gay rights establishment; and as an expression of natural law or a legal contract responsive to changing needs. And it does it without a reliance on either equal protection doctrine or substantive due process as stand-alone claims free of the complex arguments embedded in

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12 Part IV.A, *infra*, argues that *Loving v. Virginia* is a rejection of a geographic entrenchment of control over marriage, as well as a case about the overarching issue of racial justice. See Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, 6 UNBOUND: HARV. J. LEGAL LEFT 1, 5 (2010) for an arguably overly robust statement of territorial sovereignty over marriage as a status, claiming that the law contract “dissolved interjurisdictional boundaries while marriage cemented them.”

13 See *infra* Part IV. *Equality Federalism*, by combining equality principles with other constitutional norms, partially duplicates comity principles in federalism but raises it to a higher conceptual power. Comity already contains an equality component, but it lacks the mandate suggested here to root out violations of equality that are a poor fit with other constitutional values but not well suited to direct supervision of state law-making. Kramer *infra* note 92. Justice Blackmun wrote about the strong tie of federalism to other constitutional protections:

Federalism, however, has no inherent normative value: It does not, as the majority appears to assume, blindly protect the interests of States from any incursion by the federal courts. Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power. “Federalism is a device for realizing the concepts of decency and fairness which are among the fundamental principles of liberty and justice lying at the base of all of our civil and political institutions.”

Coleman v. Thompson, 501 U.S. 722, 759 (Blackmun, J., dissenting) (quoting William J. Brennan, Jr., *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423, 442 (1961)).



the state's control over marriage and family law. It simply accepts as the working materials and the operative legal fact the existence of same-sex marriage in the United States. It also highlights the baseline values revealed by the constitutional infirmity of a hypothetical effort to contain marriage ceremonies within strict limits of place, and the possibility of popular support for equality as minimal respect for a family's status given legal form by another state.

The uniformity vision and the unending variety vision affecting valid state-blessed marriages revolve around moral and legal abstractions and technical doctrines inherited from an international context. This Article points to a federalist means, combining principle with pragmatic awareness of institutional roles, to end the stalemate over clashing visions.

This Article will proceed by reviewing in Part I, *Separate Visions*, the history of the reaction to same-sex marriage, and setting up the thematic contrast between visions of uniformity and variety. Part II, *Loving's Federalism Meaning*, examines the buried meaning of the iconic case of *Loving v. Virginia*, analogizing physical banishment of the Lovings from Virginia to symbolic banishment of all legal effects of same-sex marriages from a state. It explores a role for equality values in supporting marriage portability, thereby allowing Equality Federalism to support constitutional values of free expression and cultural norms of fairness. Part III, *Exporting Ceremonial Marriage: Constitutional Considerations*, examines the means by which states or the federal government might try to block all export of marriage ceremony, or to render it entirely invalid for all couples. By using distance marriage as a hypothetical vision of marriage geography, Part III thus develops by implication a critical analysis of the engrained assumptions about canons of marriage recognition within our federalist system. Part IV, *Equality Federalism: Precedent and Institutional Structure*, suggests that specific precedent (*Loving v. Virginia*) and federalist structure support the approach of applying equality to strengthen the norm of comity rather than directly encroaching on state supervision of local marriage law. Part V, *Conclusion*, summarizes the strength of *Equality Federalism* as a means of achieving an institutionally and culturally sound resolution to the contested visions of marriage.

## I. SEPARATE VISIONS

For one set of advocates regarding the basic gender format of marriage, a plausible legal regime is one that bars same-sex marriage forever. By contrast, marriage-equality activists and rights liberals find legal plausibility in establishing marriage as a fundamental

right of citizens (and, presumably, legal residents) that cannot be restricted on the basis of gender. These advocates for uniformity wish to end the legal uncertainty that arises from a patchwork of laws governing a critical legal status. The mixed picture of increasing cultural and legal acceptance, met by continuing formidable legal and cultural opposition,<sup>14</sup> is felt by opposing camps to require final, definitive resolution. The differing visions reflect recurring dispositions about rights, social order, and legal variety.

A. *Legally Mandated Uniformity: The Lure of Uniformity*

Proponents of uniformity share a common disposition: the insistence upon a complete resolution, mandated by a legal vehicle capable of generating, and imposing, one national rule. Each side entertains the belief that repose is possible to achieve by foreclosing variation with legal hardwiring that no longer admits of dispute. The rights story presumes forward movement that is consolidated and always maintained. The story of marriage as an essence requiring a restricted constitutional definition presumes that reinstating a core meaning protective of society would be a definitive ending to a period of deviation from basic principles that should guide law and teach citizens.<sup>15</sup> For one side, a lack of national uniformity deprives individuals of rights and undermines common citizenship. For the other side, any same-sex marriage in the United States intolerably damages

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<sup>14</sup> Abby Goodnough, *As Gay Marriage Gains Ground in Nation, New Hampshire May Revoke Its Law*, N.Y. TIMES (Feb. 27, 2012), <http://www.nytimes.com/2012/02/28/us/gay-marriage-law-in-new-hampshire-may-be-revoked.html>. On November 6, 2012, the voters in three states refuted the commonplace argument that recites a record of voter rejections of same-sex marriage in state referenda that define marriage as the union of one man and one woman, and then concludes that "the People" always reject marriage equality when they are able to vote. Voters in Maine, Maryland, and Washington State voted favorably on laws passed by their state legislatures authorizing same-sex marriage, and in Minnesota voters rejected a constitutional amendment to define marriage as heterosexual. In Maine, the voters reversed a 2009 voter rejection of legislation permitting same-sex marriage. Ashley Fetters, *Same-Sex Marriage Wins on the Ballot for the First Time in American History*, THEATLANTIC.COM (Nov. 7, 2012), <http://www.theatlantic.com/sexes/archive/2012/11/same-sex-marriage-wins-on-the-ballot-for-the-first-time-in-american-history/264704/> (listing the wording of each ballot proposal).

<sup>15</sup> Girgis et al., *supra* note 1, at 287 (concluding that marriage law necessarily privileges a morally controversial claim: "Marriage understood as the conjugal union of husband and wife really serves the good of children, the good of spouses, and the common good of society" and, as a result, ". . . marriage uniquely meets essential needs in . . . a structured way [and] should be regulated for the common good . . .").

a core understanding of marriage, and damages the community's citizenship meaning for which marriage is a critical building block.<sup>16</sup>

*1. Uniformity as a Rights-Based Regime*

The standard story of rights is one of gradual expansion of the scope of individuals' fundamental rights against government mistreatment and of a wider circle for equality of persons before the law. Theodore Olson, a conservative enlistee in the legal cause of a rights-based uniformity entitling same-sex couples to be married under the marriage law of each state, has expressed confidence in the efficacy of rights demands to build acceptance, and has cited equality as a basic American commitment. In Olson's words, ". . . veterans of past civil-rights battles found that it was the act of insisting on equal rights that ultimately sped acceptance of those rights."<sup>17</sup> Olson builds his pragmatic claim about the path to acceptance and uniformity on the "bedrock American principle of equality," saying that "[l]egalizing same-sex marriage would . . . represent the culmination of our nation's commitment to equal rights."<sup>18</sup>

Appealing to popular sentiment, Olson draws on a convergence of constitutional doctrines and popular acceptance of a narrative of historical vindication of core American principles when excluded groups demand to be included within constitutional ideals. In Olson's telling, gay marriage will take its place in that typical rights story; a deep common narrative about American exceptionalism that always commands eventual acceptance and hence will carry same-sex marriage into the national consensus favoring equality for all citizens. A common refrain by supporters of the claim to a right to same-sex marriage is, "[i]n fifty years, we will wonder why it took so long,"<sup>19</sup> or, "[h]istory is on our side."<sup>20</sup>

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16 The form of the difference is a classic tension between two strands of liberalism: "moral rights and consequentialist analysis . . ." Randy E. Barnett, *The Moral Foundations of Modern Libertarianism*, in *VARIETIES OF CONSERVATISM IN AMERICA* 58 (Peter Berkowitz ed., 2004) (discussing the contrast between a focus on individual dignity and one emphasizing community interests). See also MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1993). Glendon critiques the form of Supreme Court opinion-writing concerning a rights-based protection for same-sex intimacy as wooden and cliché-ridden, sounding in *Bowers* like "a battle between Yahoos and perverts." *Id.* at 154.

17 Olson, *supra* note 1.

18 *Id.*

19 Editorial, *Let N.Y. Senate Vote on Gay Marriage*, *NEWSDAY*, June 14, 2011, available at <http://www.newsday.com/opinion/let-n-y-senate-vote-on-gay-marriage-1.2957156> ("Make

The equality claim has purchase with conservative and liberal scholars, advocates, and citizens. An early advocate for gay marriage as a remedial approach to a lack of public equality for gay people, long before marriage seemed culturally possible, is the conservative commentator Andrew Sullivan.<sup>21</sup> He argued that marriage law, being the source of a state-provided good, should treat citizens equally.<sup>22</sup> Sullivan argued that laws banning discrimination by private actors introduce social conflict and litigation but the state must not discriminate against gay people in administering marriage law.<sup>23</sup>

The equality norm was rendered linguistically iconic by Justice John Harlan in his *Plessy v. Ferguson* dissent. His formulation has been amenable since then to conservative adoptions of a neutral principle: “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful.”<sup>24</sup> This sense of equality as a bedrock principle is enshrined throughout our constitutional law, both state and federal.<sup>25</sup>

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no mistake: Gay marriage is coming sooner or later, and someday people will wonder why it took so long.”).

20 Proclamation No. 8685, 76 Fed. Reg. 32,853 (May 31, 2011) (“While progress has taken time, our achievements in advancing the rights of LGBT Americans remind us that history is on our side, and that the American people will never stop striving toward liberty and justice for all.”).

21 ANDREW SULLIVAN, *VIRTUALLY NORMAL* (1996). A leading proponent of gay marriage in the academy is Professor Dale Carpenter, who has constructed a Burkean argument for gay marriage as a natural progression supportive of conservative values. The result, however, is one that supports a *practice* of equality. See Dale Carpenter, *A Traditionalist Case for Gay Marriage*, 50 S. TEX. L. REV. 93 (2008).

22 SULLIVAN, *supra* note 21, at 216.

23 *Id.*

24 *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting); see also *Romer v. Evans*, 517 U.S. 620, 623 (1996) (“One century ago, the first Justice Harlan admonished this Court that the Constitution neither knows nor tolerates classes among citizens.” (quoting *Plessy*, 163 U.S. at 559)).

25 Robert Post argues that legal norms of equality are a form of cultural practices that reflect cultural understandings. See ROBERT C. POST ET AL., *PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW* 22–41 (2001). Section 1 of the Fourteenth Amendment to the U.S. Constitution provides in part: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506 (1989) (O’Connor, J.) (referring to “the letter and spirit of a constitutional provision whose central command is equality”); see also JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* 99 (2011) (calling the Equal Protection Clause a “clear principle” and “command of equality”). “[M]any American state constitutions contain provisions condemning equal protection denials by government.” Jeffrey A. Parness, *American State Constitutional Equalities*, 45 GONZ. L. REV. 773, 773–74 (2010) (referring to “some

The formal equality claim, unlike the claim about the critical role that heterosexual marriage plays in the formation of the family and social health, requires little elaboration of a moral theory (except the deep understanding that each of us is equal as citizens and in the eyes of our Creator)<sup>26</sup> to support a vision for uniformity. It requires merely a strong orientation to rights liberalism and to a view of the Constitution's bedrock commitment to equality. Even though the rights claim is mediated through a body of doctrine that invites claims about state interests, and thus about the impact of gay marriage on social health, rights claims are typically subjected to empirical reasoning<sup>27</sup> rather than the larger moral argumentation of the claims about the essence of marriage.<sup>28</sup> The factual holdings of the trial court in *Perry v. Schwarzenegger*, largely accepted by the Ninth Circuit,<sup>29</sup> are an attempt to construct a systematic, evidence-infused model of such rights logic, complemented by means of fact-finding that gives marriage a fixed meaning for constitutional law. On the basis of trial

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American state constitutions [that] contain special equality provisions that go beyond general equal protection and that have no federal counterparts"). Parness surveys the form of the equality provisions in state constitutions, with specific attention to initiatives significant in "replac[ing] stagnant . . . constitutional doctrine that failed to fulfill the distinctive role of state constitutionalism urged by many." *Id.* at 783–84.

- 26 The Declaration of Independence is more than a statement of political theory in its invocation of self-evident truths. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights . . .").
- 27 See *infra* text accompanying note 28 (referring to the empirically-based logic of the Supreme Court's marriage jurisprudence).
- 28 Empirically suggestive, logical examination of claims once readily understood as moral is a feature of Supreme Court jurisprudence on marriage. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978) (rejecting a law barring the issuance of marriage licenses to the non-custodial parent of an indigent child, because the barrier was unlikely to produce more resources for the child, with no discussion of the moral disapproval communicated by the law). One could readily explain the bad moral lesson conveyed by an unrestricted right to reproduce, to abandon the children, and still enjoy full access to the marital status, with the blessing of the state implicated by the issuance of the license. That claim was incompatible with the logic of the Supreme Court's rights jurisprudence. For an explicitly empirical examination of a wife's separate rights, see *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 893 (1992), discussing the spousal notification requirement and legitimate reasons why pregnant women may not wish to inform their husbands of their decisions to abort their child. By contrast, state marriage jurisprudence has many common law and statutory resources with which to shape moral concepts about marriage, insofar as they respect core precepts about individual rights. The Supreme Court, in effect, has only used individual rights logic, for which the Court is institutionally responsible. See GLENDON, *supra* note 16, at 151–58 (using *Bowers* to critique the adequacy of Supreme Court rights reasoning).
- 29 *Perry v. Brown*, 671 F.3d 1052, 1053–54 (9th Cir. 2012).

court evidence,<sup>30</sup> the trial judge rejected all claims to a state interest in keeping marriage uniform in its gender format.<sup>31</sup>

Some communitarian advocates for same-sex marriage rights valorize gay marriage as a site of humane values, good partnerships, gender reform, and social resources for communities<sup>32</sup> to avoid legal argumentation that emphasizes rights and tolerance in a liberal society. Still, the supporting structure for a claim to constitutional marriage rights is rights-based equality logic,<sup>33</sup> with some rhetorical flourishes about the good of marriage. The premise of rights creates a strong logic of universality<sup>34</sup> and of the right of each *individual* in preference to a theory about the marital unit.<sup>35</sup> In the claimed absence of an evidence-based state interest in restricting marriage to opposite-sex couples, there is no conceptual room for any reservation of complete rights of individuals to same-sex marriage, to be solemnized by every jurisdiction, and every clerical functionary, that is empowered to issue marriage licenses.

The universal reach of rights logic has a weak point in the case for marriage as a fundamental right. It is at odds with state control over marriage as a legal institution that the state defines.<sup>36</sup> The analytic

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30 Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 953–92 (N.D. Cal 2010), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012).

31 *Id.* Such use of “facts” has been criticized from the left as dangerously using legal fact-finding to construct “the gay subject,” a category viewed as fraught with risk and infused with instability as a predicate for law. Libby Adler, *Just the Facts: The Perils of Expert Testimony and Findings of Fact in Gay Rights Litigation*, 7 UNBOUND: HARV. J. LEGAL LEFT, 1 (2011). Adler also cites conservative scholar Orin Kerr’s suggestion that the type of facts found in Perry are “constitutional facts” relating to the widely-understood meaning of marriage in the United States and not facts of the sort to which an appellate “would feel compelled to defer.” *Id.* at 2 n.5. Insofar as the Supreme Court has been ill-suited to give entity meaning to marriage, it would seem unlikely to accept an entity meaning propounded in a district court by the litigation process.

32 JONATHAN RAUCH, *GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA* (2004) (providing a conservative argument for the societal good of gay marriage).

33 Linda C. McClain & James E. Fleming, *Respecting Freedom and Cultivating Virtues in Justifying Constitutional Rights*, 91 B.U. L. REV. 1311, 1320–21 (2011) (reviewing communitarian and rights-based arguments, with special attention to the structure of choices for marriage set up by Michael Sandel).

34 Joseph Raz, *Human Rights in the Emerging World Order*, 1 TRANSNAT’L LEGAL THEORY 31, 31 (2010) (describing human rights as “synchronically universal”).

35 For example, the requirement that a husband give his consent to an abortion is unconstitutional because the parties to the marriage have individual rights. See *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 71 (1976) (discussing how no theory of healthy marriages can overcome the individual rights focus).

36 See Baker, *supra* note 7, at 367 (suggesting that the primacy of the state’s role in defining family status may “weaken and strengthen different constitutional claims to family status”).

absence of a robust theory of marriage as an entity, valued by communities for practical and foundational symbolic reasons as a particular and foundational status, is a critical gap in the case for a Supreme Court mandate that sustains persuasive force. Individual rights reasoning, the stronghold of constitutional jurisprudence, may fall short as a claim that every state has a mandate to shape its marriage authorization laws anew in light of the dignitary and practical claims of same-sex couples.

Consider the following: If the Court should decide that the marriage laws of states are a violation of equal protection or of a fundamental right, the Justices must proceed to choose a remedy. One logical option is to enjoin the issuance of marriage licenses until states cure the identified constitutional problem. Each state could then choose either to end state involvement in marriage entirely or to rewrite marriage law in a way that is constitutional.

Issuing a restraining order would have the merit of avoiding the Court's direct involvement in supervising and effectively rewriting state marriage law. As astonishing as the thought of mandating a suspension of the issuance of marriage licenses is, such an action remitting choice to the states would be arguably more cautious than ordering that states issue marriage licenses to same-sex couples, thereby altering an entity supervised by states that contains residual gender patterns. The realization that halting the issuance of marriage licenses is a modest alternative to a mandate prescribing marriage law helps one see the radical nature of a rights-based direct constitutional mandate about marriage law.

But there may be a role for individual rights equality reasoning to attain wide, portable access to marriage—not uniformity, but access. Rights reasoning may open a path to protect state-created marital status as an equality concern and allow the Supreme Court to sidestep the hazards of embracing a view of marriage using the limited legal materials at hand. The Court, if it focuses on access and recognition as an equality issue, could spare the institution the task of promulgating “facts” about marriage purportedly arising from an evidentiary process in litigation or embracing a theory of marriage drawn from historical assertions and assumptions about marriage. Because same-sex marriage is a legal reality in the United States, the Court may rely upon that available constitutional fact to fashion a principled, yet pragmatic, response to the marriage wars. The Supreme Court may simply annex to its jurisprudence the existing state statuses called marriage. The states have done the theoretical and democratic work needed to authorize same-sex marriage. Bonding the equality norm

to an understanding of federalism is a good solution for the Supreme Court to meet the demands of individual rights in a federalist system.

2. *Uniformity by Amendment: One Invariant Model of Marriage Made Constitutional Bedrock*

Since same-sex marriage became a realized social possibility, with an emerging claim on legal principles of equality and fundamental rights reasoning, there has been an effort to countermand extensions into marriage law of individual rights reasoning.<sup>37</sup> The tacks taken have been, first, dismissive arguments in litigation,<sup>38</sup> coupled with strong claims that the legislature should control the definition of marriage. Second, once legislatures began to enact gay marriage laws,<sup>39</sup> claims arose that legislative change to the definition of marriage is a usurpation that must yield to the direct decision of “the People.”<sup>40</sup> The transition from attacks on courts to attacks on legislative power drew on rhetoric suggesting that only popular majorities, acting directly, should have the say over the definition of marriage.<sup>41</sup>

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<sup>37</sup> For an account of the marriage equality movement since 1993 and efforts to oppose same-sex marriage, see generally Michael D. Sant’Ambrogio & Sylvia A. Law, *Baehr v. Lewin and the Long Road to Marriage Equality*, 33 U. HAW. L. REV. 705 (2011). See also GLENDON, *supra* note 16, at 57, 122–23 (noting and critiquing the expansion of the marital-privacy protection in *Griswold v. Connecticut* to an altered protection of individual rights without reference to the attachment to marriage). For a strong dismissal of the possibility that gay marriage is “real” marriage, see John Finnis, *Marriage: A Basic and Exigent Good*, 91 MONIST 388 (2008). For a rejection of equality reasoning about marriage and other human goods on the grounds that it lays claim to an “equality of esteem” and is subject to arbitrary exceptions, see Girgis et al., *supra* note 1, at 249–52.

<sup>38</sup> The arguments drew on the stigma inflicted by *Bowers v. Hardwick*, 478 U.S. 186 (1986), that procreation was a purpose of marriage, and the assumption that tradition was too strong to make gay marriage a plausible legal claim. See *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (reviewing stigma and citing *Bowers*’ noting of the state’s tradition argument); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006) (accepting the procreation argument); see also Sant’Ambrogio & Law, *supra* note 37, at 710 (describing how the State of Hawaii unsuccessfully defended the exclusion of same-sex couples from marriage in 1991 by citing procreation and the promotion of heterosexual parenting as the goals of marriage).

<sup>39</sup> Vermont was the first that did so without pressure from the courts. See VT. STAT. ANN. tit. 15, § 1201 (2010) (defining and establishing a “civil union” as a relationship in which the parties “may receive the benefits and protections and be subject to the responsibilities of spouses”).

<sup>40</sup> Kate Zernike, *Christie Wants Voters to Decide on Gay Marriage*, N.Y. TIMES (Jan. 24, 2012), available at <http://www.nytimes.com/2012/01/25/nyregion/christie-wants-new-jersey-voters-to-decide-on-gay-marriage.html> (discussing the governor’s announcement that the voters should decide on the bill legalizing same-sex marriage).

<sup>41</sup> A supporting argument is that whenever “the People” decide, they reject gay marriage. See John Wagner, *Same-sex marriage headed to ballot in Md.*, WASH. POST (June 7, 2012, 6:34 PM), <http://www.washingtonpost.com/blogs/maryland-politics/post/same-sex-marriage->



The hierarchy of authority moves to a different level with each advance of equality arguments in a branch of government.<sup>42</sup> The improvisational response, always seeking a new redoubt to defend an exclusive meaning for marriage, drew on a sense that any gay marriage, even if legal, was a “moral/imaginative crime.”<sup>43</sup> Whoever commits it must be checked. The ultimate hierarchy of authority cited is natural law, used to demonstrate that “equality” is misapplied to marital forms not in accord with natural law.<sup>44</sup>

The first line of defense was intended to blunt the force of individual rights arguments in such a decisive manner that uniformity might be maintained by consistent rejections in state courts of claims by same-sex couples to a right to marry. The first set of cases required confirmation that the legislature intended only opposite-sex marriages.<sup>45</sup> As the challenges continued and legislatures refined their definitions, the argument for deference to the legislature became more elaborate and detailed, with extensive recitations of state interests in defining marriage according to long tradition.<sup>46</sup> Then, in Hawaii, when the state lost the constitutional argument about gender equality and hence lost judicial deference, the proponents of maintaining marriage as exclusively heterosexual pairings quickly undid the constitutional holding by means of a referendum restrictively de-

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headed-to-ballot-in-md/2012/06/07/gJQAVCn3LV\_blog.html (“No state has ever approved a ballot measure allowing same-sex marriage . . .”). See Fetters, *supra* note 14 (noting recent 2012 elections in Maine, Maryland, and Washington State that approved same-sex marriage and in Minnesota that rejected a constitutional narrowing of the meaning of marriage).

42 The change of the legal strategy of the Obama administration, in which Attorney General Eric Holder informed Speaker John Boehner that the Department of Justice would no longer defend Section 3 of the Defense of Marriage Act (“DOMA”), resulted in an argument that the Executive Branch, through the Department of Justice, was not qualified to reach that legal conclusion. See Charlie Savage & Sheryl Gay Stolberg, *In Turnabout, U.S. Says Marriage Act Blocks Gay Rights*, N.Y. TIMES, Feb. 24, 2011, at A1 (describing fierce conservative reaction).

43 E-mail from Allison Tait to author (Nov. 14, 2011, 7:18 AM) (describing her work in progress) (on file with author).

44 See *supra* note 37 and accompanying text (criticizing equality logic in certain moral argumentation).

45 See *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) (prohibiting marriage between persons of the same sex and citing the traditional institution of marriage between a man and a woman); *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973) (defining the common usage of the term marriage and identifying marriage as a custom which was traditionally between a man and a woman).

46 See *Burns v. Burns*, 560 S.E.2d 47, 49 (Ga. Ct. App. 2002) (citing public policy recognizing marriage only between a man and a woman); *Hernandez v. Robles*, 805 N.Y.S.2d 354, 359 (N.Y. App. Div. 2005) (recognizing that a tradition of defining marriage between a man and a woman is legitimized by public policy supporting procreation, child welfare, and social stability).

fining marriage, a maneuver that established a template for the future.<sup>47</sup>

Because the courts delayed the effectiveness of their holding, no same-sex marriage occurred in Hawaii.<sup>48</sup> For a time, the prospects to prevent states' altering a core gender definition seemed promising. Same-sex marriage, it seemed, could be kept entirely out of the United States by persuading state courts to defer to legislators, using referenda processes to amend state constitutions, and enacting precautionary legislation to block the legal portability of any same-sex marriage that might ever occur. The enactment of the Defense of Marriage Act<sup>49</sup> afforded a strong national policy statement that backed state legislatures in holding the line against same-sex marriage. It also helped establish a negative legal framework in which state courts might be asked to recognize a right to same-sex marriage. In New York, the Court of Appeals relied in part on the fact that same-sex marriages were not portable from state to state to conclude that the benefit of marriage could not be conferred on same-sex couples by the act of the court.<sup>50</sup>

Thus, the combination of judicial deference, legislative inertia, and the federal law restricting marriage portability created a holding pattern that yielded a temporary, potentially unstable uniformity of definition.<sup>51</sup> The holding of the Hawaii Supreme Court was a marker for the risk that judges might apply a broad legal principle to marriage, without restriction derived from a theory of marriage tying the essence of marriage to gender.<sup>52</sup> Because the concern about marriage had to do heavily with a deep aversion to the symbolic effect of any un-gendered marriage,<sup>53</sup> the concern to prevent any legal effec-

47 HAW. CONST. art I, § 23 (originally HB 117) ("The legislature shall have the power to reserve marriage to opposite-sex couples."). See also David Orgon Coolidge, *The Hawai'i Marriage Amendment: Its Origins, Meaning and Fate*, 22 U. HAW. L. REV. 19 (2000) (detailing the history of the Hawaii marriage amendment); Sant'Ambrogio & Law, *supra* note 37, at 720–26 (describing Hawaii as a template for halting state constitutional protection for gay marriage).

48 Carey Goldberg, *Hawaii Judge Ends Gay Marriage Ban*, N.Y. TIMES (Dec. 4, 1996), available at <http://www.nytimes.com/1996/12/04/us/hawaii-judge-ends-gay-marriage-ban.html> ("lawyers for the state quickly sought a stay pending their Supreme Court appeal.").

49 Defense of Marriage Act (DOMA), 1 U.S.C. § 7 (2010).

50 See *Hernandez v. Robles*, 855 N.E.2d 1, 5 (N.Y. 2006) (holding that the decision to recognize same sex marriages is "a question to be addressed by the Legislature").

51 Mae Kuykendall, *The President, Gay Marriage, and the Constitution: A Tangled Web*, 13 WIDENER L.J. 799, 818 (2004) (describing the effect of the Defense Of Marriage Act).

52 See Finnis, *supra* note 37, at 396 ("[T]he sex acts of same-sex partners can[not] be more than fictionally marital.").

53 I use the phrase "un-gendered" to mean a marriage not predicated on the role division suggested by the requirement that the couple be of different sex. Even with egalitarian

tiveness or symbolic importance of any such marriage was strong.<sup>54</sup> While the arguments have developed over time and become nuanced in an effort to demonstrate respectful engagement with the reality of same-sex love,<sup>55</sup> the original reaction was dominated by shock and distaste at the expressive novelty of “purported” marriages and at the presumption of judges, untethered by widely shared cultural views of marriage. The revulsion at the idea was expressed in many contexts, such as withdrawal of a job offer by the Georgia Attorney General from a young attorney who listed a marriage to a woman in her initial employee form,<sup>56</sup> the inclusion in the “Don’t Ask Don’t Tell” regulations of a participation in a “purported” same-sex marriage as a violation of the conduct prohibition measured by expressive acts,<sup>57</sup> and the rapid spread of state referenda aimed at creating state constitutional definitions of marriage that tied the hands of local courts and created an official expressive symbol in law that blockaded any variant meaning of marriage as void and even unthinkable.<sup>58</sup>

The large effort was to create bulwarks against the unmistakable shift in the openness to same-sex marriage as a performative event and a status rooted in law, couple autonomy, or culture. While some claims sounded in arguments about harm to individuals who might enter same-sex relationships, with marriage as an accelerator of harm, most of the opposition was about the intolerable symbolism of an ungendered marriage, one that disrupts the social disapproval of homosexuality, undermines gender roles in marriage, may damage the cultural importance of marriage as the normative site for procreation and child-rearing, and ignores the significance of centuries-long traditions.

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norms for marriage, complementarity between the sexes remains an assumption affecting visions of marriage.

54 MARTHA C. NUSSBAUM, *FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW* 122–23 (2010) (locating civil marriage in the domain of the expressive as an explanation for both the resistance to same-sex marriage and the demand by same-sex couples for nothing less than marriage).

55 *See* Girgis et al., *supra* note 1, at 245, 258–59 (“[I]t is not individuals as such who are singled out—as being less capable of affectionate and responsible parenting, or anything else.”).

56 *Shahar v. Bowers*, 120 F.3d 211 (11th Cir. 1997).

57 *Enlisted Administrative Separations*, U.S. Dep’t of Def. Dir. 1332.14 (Dec. 21, 1993).

58 Resulting codes include IND. CODE ANN. § 31-11-1-1 (West 1999), LA. CONST. art. XII, § 15, ME. REV. STAT. ANN. tit 19-A, § 701 (West 1998). Michigan and other states embedded these prohibitions in their constitutions. *See, e.g.*, MICH. CONST. art. 1, § 25.

The initial reaction was plainly, in part, astonishment,<sup>59</sup> with an accompanying sense that a baseline understanding of a constitutive element of society was coming undone. The disruption to a settled, if unstated, assumption about marriage was seen as radical and threatening. Indeed, aside from the debatable concern for how courts could create a limiting principle should equality, or fundamental rights principles, lead courts to recognize gay marriage,<sup>60</sup> intuitive reactions saw the breach of a gender format of marriage as so unsettling that anything might follow as a cultural meaning of marriage. The most vociferous and heightened images of the conceptual chaos that might follow often made reference to bestiality.<sup>61</sup> This initial response was that the meaning of marriage is anchored in male-female pairings, mainly for reproduction,<sup>62</sup> and *any* departure from that, even without the aid of judges, necessarily created an un-cabined definitional madness. A moral/imaginative crime against marriage,<sup>63</sup> one not literally subject to prosecution but eligible for banishment, had to be blocked.

Even as the opponents of any occurrence of same-sex marriage worked to create an inhospitable environment for a breakthrough, the inevitable began to occur. The first state court to require the state to institute marriage equality was the Supreme Judicial Court of Massachusetts in 2003.<sup>64</sup> Unlike the Vermont Supreme Court, which allowed the legislature to devise a solution vindicating equality without invoking the incendiary “marriage” word, a liberal court finally took the dreaded step of imposing the legal principles of equality and fundamental rights on a state to require same-sex marriage.<sup>65</sup> The legal variety in state schemes for direct democracy created the first instance of a court holding that could not be rapidly reversed with a

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59 JOHN BOSWELL, *SAME-SEX UNIONS IN PREMODERN EUROPE*, at xxv (1994). The setting for a first reaction to the idea of same-sex marriage was a “salient horror of homosexuality characteristic of the West since the fourteenth century.” *Id.* at xxiii. An early bromide, repeated for many years: “God made Adam and Eve, not Adam and Steve.”

60 Justice Scalia captured the unease about judicial reasoning applied to marriage. See *Lawrence v. Texas*, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting) (“One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion.”).

61 The most vivid statement of such a response came from former Senator Rick Santorum, who made an oft ridiculed and denounced comparison of same-sex sexual contact to “man-on-dog sex,” as a reason to maintain criminal prohibitions on same-sex intimacy. *Excerpt from Santorum Interview*, USA TODAY (Apr. 23, 2003, 10:37 AM) [http://usatoday30.usatoday.com/news/washington/2003-04-23-santorum-excerpt\\_x.htm](http://usatoday30.usatoday.com/news/washington/2003-04-23-santorum-excerpt_x.htm).

62 BOSWELL, *supra* note 59, at xxv.

63 E-mail from Tait to author, *supra* note 43.

64 *Goodridge v. Dep’t. of Public Health*, 798 N.E.2d 941 (Mass. 2003).

65 *Id.*

constitutional amendment.<sup>66</sup> Local efforts in Massachusetts encountered a sticky process for initiating a voter referendum to amend the constitution<sup>67</sup> and ended after proponents of a constitutional ban were defeated for re-election. New efforts to restrict marriage rights in the U.S. Constitution became visible again.<sup>68</sup> Gradually, other state courts adopted rights reasoning to mandate marriage equality,<sup>69</sup> and a state legislature finally passed same-sex marriage without the pressure of a court mandate or the obstacle of a veto predicated on voter-passed statute defining marriage narrowly.<sup>70</sup> After dramatic events in California, with opponents of gay marriage undertaking a massive, successful effort to undo a rights-based Supreme Court holding, there was a surprising burst of both court and legislative actions creating a state right to same-sex marriage in several states. The current state of affairs provides an opening for one uniformity vision—that of fundamental rights—to prevail, but potentially creates a backlash from adherents of the other vision of uniformity.<sup>71</sup>

With the passage of time and the relaxation of overt homophobia in the public understanding of same-sex orientation,<sup>72</sup> the arguments about the critical need to reverse the trend toward state variety were increasingly framed with care to show respect for same-sex couples

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66 Pam Belluck, *Massachusetts Gay Marriage Referendum is Rejected*, N.Y. TIMES (June 14, 2007), <http://www.nytimes.com/2007/06/15/world/americas/15iht-15gay-web.6150169.html>.

67 *Id.*

68 *Legal Threats to Traditional Marriage: Implications for Public Policy: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. 1 (2004). Control over the narrative treatment of the marriage-like relationships of gay couples was once again contested in the national legislative arena.

69 *See, e.g.*, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 991 (N.D. Cal. 2010) (declaring Proposition 8 unconstitutional based on the fundamental right to marry found in the Due Process Clause); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (discussing the fundamental right to marry); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (considering various rights involved in allowing same-sex couples to marry).

70 VT. STAT. ANN. tit. 15 § 8 (2009). The California legislature twice passed a gay marriage bill, only to have it vetoed. *See* Jill Tucker, *Schwarzenegger vetoes same-sex marriage bill again*, SF GATE (Oct. 13, 2007), <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/10/12/BAT7SPC72.DTL>.

71 For evidence of the still strong reservoir of opposition to same-sex marriage, see Bob Egelko, *Santorum backs nullifying existing gay marriages*, SF GATE (March 3, 2012), <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2012/03/03/MN3Q1N9EV9.DTL> (quoting Family Research Council predicting backlash from “some sort of sweeping decision . . . which would essentially impose same-sex marriage on every state . . .”).

72 *See, e.g.*, Charles J. Butler, Note, *The Defense of Marriage Act: Congress's Use of Narrative in the Debate Over Same-Sex Marriage*, 73 N.Y.U. L. REV. 841, 860 (1998) (“As the homosexual narrative began prominently featuring gay men and lesbians in relationships similar to heterosexual marriage, the various existing laws and practices that marginalized homosexuals began to come under more scrutiny.”).

and to demonstrate a stepped-up level of sophistication in argumentation.<sup>73</sup> The argument for the danger of severing marriage from biological reproduction by a pair continues to be emphasized.<sup>74</sup> Efforts are made to persuade opinion that the assumption of inevitability, attached to same-sex marriage as the most recent manifestation of a progressive story about the arc of history toward recognizing and consolidating more generous forms of inclusion and rights, is not accurate. Rather, same-sex marriage is portrayed as a wrong turn, an experiment that will cause sufficient harm to community interests to bring recognition that marriage must have a uniform, national, gender-based definition.<sup>75</sup> The recent voice of opposition seeks to revive the first response, in a modulated tone.

### 3. *A Federalist Blend?*

Today, visions of uniformity in marriage law necessarily raise the question of how well the country can tolerate the existence of marriages authorized by a growing number of American states and treated by some other states as nonexistent. If the problem is seen in that pragmatic sense, the solution, at this historic moment, might well best lie with rules limiting, but not stamping out, variety within a federalist system. The recent voices of opposition to same-sex marriage seek to revive the first response in a more skilled and sophisticated way so as to garner public support. No longer are claims against marriage equality couched solely in terms of impending moral decay. Rather, they hinge on the idea that recent court decisions, on both the state and federal levels, are a usurpation of the public's collective right to discuss controversial topics. Such a change in tone and strategy should encourage marriage equality advocates to use other tools to advance their cause in a way that appeals to democratic norms as well. Given the strength of arguments that the Supreme Court should not be the ultimate arbiter of our national life, a federalist approach, drawing upon democratic processes in states to diffuse

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73 See Finnis, *supra* note 37, at 15 (linking support for gay marriage to a general loss of cultural understanding "in the modern culture of marriage"); see also PEOPLE FOR THE AMERICAN WAY, ANTI-GAY POLITICS AND THE RELIGIOUS RIGHT, <http://www.pfaw.org/media-center/publications/anti-gay-politics-and-religious-right> (last visited Oct. 14, 2012) (describing an ad campaign as a reflection of increasing sophistication about framing arguments against gay rights as compassionate).

74 Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261 (1995) (discussing the link to procreation in the restrictive definition of marriage, which persists in current arguments).

75 Girgis et al., *supra* note 1, at 247–48 (arguing that "revisionists" must show what marriage is and are unable to give answers justifying same-sex marriage).

equality norms into the culture of marriage, merits close consideration.

The equality norm, applied to marriage directly by federal courts, privileges a morally contested marriage meaning and provokes a strong reaction. Equality, nevertheless, has strong work to do in achieving a hospitable treatment of a legal status awarded to a couple, while leaving states free to shape statements of marriage norms.

*B. Legal Normalcy and State Territorial Control: The Acceptance of Geography for Mapping Love and Marriage*

Doctrinal analysts, content with legal convention and in spiritual consort with a realist vision of the possible course of legal change, anticipate a protracted period of legal variety and serendipitous challenges by couples who encounter disruptive forms of non-recognition.<sup>76</sup> Such pragmatists, parsing traditional doctrines in standard treatise-influenced analysis, are equable in their expectation of a period of dispute during which states substantially control the definition of marriage within their borders. As authorizing jurisdictions for marriage or as domiciliary jurisdictions for migratory couples and for couples who leave to marry and return to live, states will continue to assert their presumed right to establish marriage policy. Working within a conventional framework, pragmatists regard such a period as a natural incident of three factors: the traditional control by states over marriage, the rules of choice of law as applied to marriage within the federal system, and the low likelihood, or even the imprudence, of a national solution mandated by the Supreme Court in favor of same-sex marriage or by a Constitutional amendment against it.<sup>77</sup> The recent book title, *The Geography of Love . . . The Story in Maps*,<sup>78</sup> captures a normal view of legal logic under the control of place. In this doctrinal world, the cartographer's skills help tell the story of marriage. The extensive rules, gray areas, and fine points of

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<sup>76</sup> Andrew Koppelman, *The Limits of Strategic Litigation*, 17 LAW & SEXUALITY: A REV. OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER LEGAL ISSUES I (2008) [hereinafter Koppelman, *Limits of Strategic Litigation*].

<sup>77</sup> See *supra* text accompanying notes 1–7.

<sup>78</sup> PETER NICOLAS & MIKE STRONG, *THE GEOGRAPHY OF LOVE: SAME-SEX MARRIAGE & RELATIONSHIP RECOGNITION (THE STORY IN MAPS)* (2011). With the holding in *Perry v. Brown* in February 2012, this fact of accepted variety began to be noted more prominently by marriage equality activists and journalistic coverage. Esmé E. Deprez, *State-by-State Laws on Gay Marriage Produce Patchwork Quilt*, BLOOMBERG (Feb. 9, 2012), <http://www.bloomberg.com/news/2012-02-09/state-by-state-decisions-on-gay-marriage-produce-patchwork-quilt-of-rights.html> (referring to rights depending on geography and quoting Evan Wolson saying “we are one country, not 50 separate kingdoms”).

law might make a parlor game, with colored maps and surprise answers to brain teasers if a player lands on the wrong part of the board.<sup>79</sup>

*Legal Normalcy* presumes a period of nominal legal stability, disrupted by accumulating pressures that de-stabilize governing norms with challenges at the less defensible edges of rules that arrogate to states control over what counts as marriage for their law.<sup>80</sup> The analysis is strongly rooted in traditional canonical statements of conflicts-of-law principles within the federalist arrangement in America, with some constitutional law analysis at the margins. The approach is workmanlike and thorough but cautious to a fault. Geography is a given, and its effects on love and marriage<sup>81</sup> are a matter for graphs with attendant footnotes. The assumption of geography as determinative of lives has roots in literalist views of the authority of place.<sup>82</sup> Significantly, renewed scholarly interest in the treatment of evasive marriages unearthed a record of inconsistency and discretion in the treatment of evasive marriages,<sup>83</sup> which belies the moral authority of harsh non-recognition rules.

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79 Legal brainteasers have a history in popular culture as light entertainment. See, e.g., J. K. Newton, *You Be the Judge*, SATURDAY EVENING POST, Oct. 1979, at 98 (presenting the reader with a legal brainteaser). The internet abounds with FAQs on details for same-sex couples about official marriage law, with twists and turns about ground rules for entry, status portability, and exit. See, e.g., *Current Laws: Resources by State/Jurisdiction*, ACLU LGBT PROJECT, <http://gbge.aclu.org/relationships/current-laws-resources-state/jurisdiction> (last visited Jan. 28, 2012).

80 Koppelman, *supra* note 76, at 5 (considering instances in which states that do not otherwise recognize gay marriage would be compelled to recognize out-of-state marriages to avoid bizarre, unfair results).

81 The pairing of love with marriage is not true across culture and time, but it is part of contemporary understandings and romantic myth. BOSWELL, *supra* note 59, at xx.

82 The trial court's recitation in *Loving v. Virginia* is an iconic claim about geography as destiny:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

*Loving v. Virginia*, 388 U.S. 1, 3 (1966). The Kentucky Constitution was revised in 1849 to “ba[r] free blacks from entering the state and ba[n] voluntary emancipation unless the free slaves were immediately exiled from Kentucky.” MICHAEL A. ROSS, JUSTICE OF SHATTERED DREAMS: SAMUEL FREEMAN MILLER AND THE SUPREME COURT DURING THE CIVIL WAR ERA 16 (2003). Assumptions about control over place, and geography as regulatory destiny, are given a pungent description in relation to regulation of the female body. See B. Jessie Hill, *Dangerous Terrain: Mapping the Female Body in Gonzales v. Carhart*, 19 COLUM. J. GENDER & L. 649, 666–68 (2010) (decrying the court's usage of synecdoche and euphemism when talking about a woman's body).

83 *Developments in the Law—The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2037 (2003) (noting court discretions in treatment of evasive marriages, except the case of miscegenation); Lewis A. Silverman, *Vermont Civil Unions, Full Faith and Credit, and Marital*



1. *Critiquing Legal Variety in Same-Sex Marriage Rules in the United States*

The large picture of marriage law from state to state is a picture of repose of married couples. The expectation drew heavily from the image of substantial uniformity in the “Christian world”<sup>84</sup> and relied until recent years on the long unstated assumption of gender dimorphism in all marriages. The goal of repose had as its background the sense that marriage “essentials” were stable in the United States but the subject of “great diversity of view” in “different countries.”<sup>85</sup> States granted repose to marriages contracted elsewhere, while also applying the norm that states could make such exceptions as they deemed necessary to protect their own public policy relating to “Christian” marriage.

At the same time, courts strived for prudence in differentiating between a state’s interests in maintaining its own matrimonial law yet giving some effect to interests that a foreign marriage might create.<sup>86</sup> The governing vision arose from understandings created for international law. International law canons played a small role in the state-to-state understandings in the United States relating to simple differences, such as age requirements and waiting periods after divorce. These canons had relatively little work to do, but they became entrenched in treatises as truncated statements of a principle of state prerogative that sounded more important than the limited function it ever fulfilled in marriage procedure.<sup>87</sup>

The non-recognition rule had a role in the regime of anti-miscegenation law, though actual direct applications of it were rare.<sup>88</sup> As states evolved toward substantial similarity, the rule receded into relative unimportance within the federalist comity among states, until

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*Status*, 89 KY. L.J. 1075, 1091 (2001) (noting variation by states in treatment of evasive marriages in contravention of a post-divorce waiting period); Barbara J. Cox, *Same-Sex Marriage and the Public Policy Exception In Choice-Of-Law: Does it Really Exist?* 16 QLR 61, 74 (1996) (noting variant treatment of evasive underage marriages).

84 Léon Duguit, Comment, *The Concept of Public Service*, 32 YALE L.J. 425, 472 (1923).

85 *Id.* at 471.

86 *Id.* at 474–77 (citing authorities and cases that illustrate the refusal of American courts to adjudicate divorces of marriages that occurred under laws permitting polygamy, combined with the recognition that property interests created by polygamous marriages should not be destroyed or “mischievous results” permitted to arise).

87 HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* (2000).

88 PEGGY PASCOE, *WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 194–96* (2009).

same-sex marriage emerged to undermine a repose in the assumptions of national uniformity.<sup>89</sup> Internationally, the most obvious large difference remained the acceptance by some legal systems of polygamy and its entire rejection in the Western world and the United States.<sup>90</sup> Before the gay rights movement, the canon did no work with respect to the unstated element of the marital definition, sexual dimorphism.<sup>91</sup>

The importation of the assumptions about international law has been criticized in connection with the treatment of same-sex marriages.<sup>92</sup> Indeed, the understanding was casually expressed by early commentators that state prerogatives vis-à-vis other states were subject to constitutional limitations.<sup>93</sup> Such constitutional limitations could take various forms, some relating to the “mischievous results” noted by treatises on international conflicts of law (today, a due process concern),<sup>94</sup> and others later posing a bolder challenge to the fit of earlier visions of the public policy exception with the Americans as “one nation” (a federalism concern).<sup>95</sup>

The primary salient exception, arising internally, to uniformity—miscegenation law—was less a marriage rule than a race rule, and hence did not seem as significant for marital uniformity as for a general racial program. Until that racial program was disrupted, the

89 Steve Sanders, *The Constitutional Right to (Keep Your) Same-Sex Marriage*, 110 MICH. L. REV. 1421, 1441 (2012) (mentioning modern statutes and amendments to state constitutions).

90 The entire rejection was subject to the prudential caveat that some incidents of a marriage contracted under matrimonial law permitting polygamy should be respected. Duguit, *supra* note 84, at 474. Koppelman has written extensively on the breathtakingly broad sweep of the DOMA, the history of recognizing some incidents of disapproved marriages, and the types of overbroad applications of DOMAs that can be challenged. See, e.g., Andrew Koppelman, *Against Blanket Interstate Nonrecognition of Same-Sex Marriage*, 17 YALE J.L. & FEMINISM 205, 208–17 (2005) (discussing the constitutionality of federal DOMA and its interplay with state DOMAs).

91 BOSWELL, *supra* note 59, at xxv (treating heterosexuality as a suppressed parameter of common marriage definition).

92 Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997) (contending that public policy doctrine fails to save marriage inequality from constitutional scrutiny).

93 Duguit, *supra* note 84, at 473 n.16 (“The power of the individual states in this country is limited, of course, by the federal constitution.”).

94 SANDERS, *supra* note 89, at 1441 (constructing a due process argument to require states to recognize the same-sex marriages of new domiciliaries who were married in their previous state of domicile).

95 Kramer, *supra* note 92, at 1989–90. The founding era assumed greater independence among states, with distinct marriage cultures based on religious differences and with the factor of race creating differences. See also Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL RTS. J. 381, 383–89 (2007) (discussing divorce jurisdiction and the Full Faith and Credit Clause).

marriage rule was an expression of a relatively uniform willingness of states to tolerate rules reinforcing Southern Jim Crow laws. It was more about race bias than it was a manifestation of a standard treatment of marital repose. Despite some arguments that the rule of heterosexual-only marriage is a form of maintaining gender supremacy,<sup>96</sup> it differs in origin from a race rule. Race trumped the intuitive, settled expectations of gender dimorphism marriage.

Thus, with the development of a legal regime in the United States of same-sex marriage, the assumption of uniformity has experienced a challenge somewhat unlike any previous vision governing marriage portability. Most marriages of couples whose marriage did not present a symbolic challenge to gender conformity were not policed, whatever the nominal law.<sup>97</sup> Refusal to recognize same-sex marriages arises from a lingering astonishment at changes in gender roles as well as the Western legacy of revulsion at homosexuality.<sup>98</sup> Despite the differing origin, the result becomes similar to the race rule: the law functions as a symbolic regime that disrupts the massive repose most marriages enjoy by using canons of permitting non-recognition nominally aimed at heterosexual couples but little used.<sup>99</sup>

Today, the understanding of the laws by those who apply them, those who may be affected, and states that offer same-sex marriage is weak. Appendix A, previously noted, is a compilation of statutes and case law that apply for each state, including those that offer same-sex marriage. Several states that allow marriage tourism by same-sex couples have recognition norms that would treat the marriages of gay couples from states that void evasive same-sex marriage as void at the moment the ceremony is completed.<sup>100</sup> Statutes of this kind are called “reverse evasion statutes.” The liberality in permitting same-sex marriage tourism is not always supported by a clear understand-

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96 Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 UCLA L. REV. 519 (2001) (analogizing sex discrimination and antigay discrimination).

97 HARTOG, *supra* note 87, at 1–5 (characterizing improvisations of judges and couples in a “changing legal scene”).

98 BOSWELL, *supra* note 59, at xxiii (describing that view of homosexuality as a “salient horror”).

99 PASCOCOE, *supra* note 88, at 1–3 (treating miscegenation law as part of a system of racial supremacy and privileging white couples). Sanders, *supra* note 89, at 1436 (suggesting before the advent of same-sex marriage, the policy exception was rarely used to invalidate a migratory marriage).

100 See Appendix A: *Effect of Home State’s Non-Recognition on Validity of Marriage*, <http://www.law.msu.edu/e-marriage/AppendixA.pdf> (last visited Nov. 27, 2012), and *supra* text accompanying notes 97–102 (describing harsh effects of non-recognition rules in certain states).

ing of what the state is offering. Vermont, again a model for citizen law-makers, explicitly repealed its statute according deference to the voiding by a home state of an evasive marriage.<sup>101</sup> New Hampshire, on the other hand, retains a reverse evasion statute.<sup>102</sup>

## 2. *Visions of Variety and State-Level Uniformity in American Federalism Today*

The application of abstractions about the public policy exception within the United States presents an image of legal stability and uniformity within cohesive cultural silos bounded by the territorial jurisdiction of American states. Such an image portrays continuity in practices that help anchor marriage law to the values of places with a stable population with shared commitments to a basic vision of marriage.<sup>103</sup> There is local control with local effects.

The basic fact that the image confronts is that, instead of uniformity maintained by sovereign bodies that control the legal relations of their citizens in a simple way that clarifies legal relations, we have multiple and shifting legal regimes controlling marriages that have come into formal legal existence under a state's law. Under current law, couples married under the laws of seven American jurisdictions, with some emerging exceptions,<sup>104</sup> are treated by the federal government as legal strangers to one another. When they file taxes, they must file a dummy return for the federal government to allow

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101 VT. STAT. ANN. tit. 15, § 6 (relating to marriages void in state of residence) *repealed* by VT. STAT. ANN. tit. 15, § 12 (2009). *See also* MASS. GEN. LAWS. ANN. ch. 207 § 11 (relating to the voiding of marriages in Massachusetts between non-residents that are contrary to the laws of the state of domicile), *repealed* by MASS. GEN. LAWS. ANN. ch. 216 § 1 (2009).

102 N.H. REV. STAT. § 457:44 (“No marriage shall be contracted in this state 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 state in violation hereof shall be null and void.”).

103 Mae Kuykendall & Adam Candeub, *Symposium Overview: Perspectives on Innovative Marriage Procedure*, 2011 MICH. ST. L. REV. 1 (2011) (presenting the concept of cross-border “E-Marriage”). *See also* Estin, *supra* note 95, at 382 (describing the association of “family” with “local” as untenable, as well as the family’s identification “with specific geographic territories for regulatory purposes”).

104 Four federal courts have recently found Section 3 of the Defense of Marriage Act unconstitutional. *Massachusetts v. U.S. Dept. Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012); *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012); *Pedersen v. U.S. Off. Pers. Mgmt. v. Bipartisan Legal Advisory Group of the U.S. H.R.*, No. 3:10-CV-1750, 2012 WL 3113883 (D. Conn. 2012); *Golinski v. U.S. Office of Pers. Mgmt.*, 781 F. Supp. 2d (N.D. Cal. 2011). *See also In re Balas & Morales*, 449 B.R. 567 (Bankr. C.D. Cal. 2011) (finding an as-applied insufficiency of governmental interest to enforce the Defense of Marriage Act in a bankruptcy proceeding); *supra* note 9 (discussing these cases).

them to report income in the form that other married couples file.<sup>105</sup> When they move to a new state, the marriage that existed in their previous domicile is deemed void. If they travel to marry, the most extreme canons of non-recognition void their marriage ab initio, even in the place of celebration.<sup>106</sup> The commonplace intuition of couples—that they are legally married in the state that purported to marry them—is in fact subject to uncertain and shifting views on the status of an “evasive” marriage, a term created to cover interracial and underage marriages, or remarriages prior to the expiration of a waiting period.<sup>107</sup>

This state of affairs is viewed by legal pragmatists as a routine incident of the norms of marriage creation and recognition. States control the marriage law for their territory. The simple idea is for the state to define the contours of marriage and protect those contours from invasions that alter their form or harm the interests of parties to specific marriages.<sup>108</sup> It is a vision of traditional uniformity anchored by the states as culturally distinct entities but also as under the threat of entry into their territory of mobile marriages, so utterly foreign, that the incidents of marriage status could not be enforced without violence to the core family law and the Christian culture of a state.<sup>109</sup> Before same-sex marriage became a legal fact in the United States, the states enjoyed sufficient uniformity to attract little comment. The sense of an undisturbed uniformity receded once same-sex marriage became a reality. At the same time, the divide between state status

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<sup>105</sup> For review of DOMA’s effect on tax policy, see Patricia A. Cain, *DOMA and the Internal Revenue Code*, 84 CHI-KENT L. REV. 481, 498 (2009) (analyzing Section 3 of DOMA and concluding that “the refusal to recognize same-sex married couples as married for tax purposes is simply irrational”).

<sup>106</sup> See *Appendix A: Effect of Home State’s Non-Recognition on Validity of Marriage*, <http://www.law.msu.edu/e-marriage/AppendixA.pdf> (last visited Nov. 27, 2012), and *supra* text accompanying notes 97–102 (describing harsh effects of non-recognition rules in certain states).

<sup>107</sup> “Trying to state accurately what law states really use to determine validity of a marriage . . . is a more challenging endeavor than might at first appear.” Stanley E. Cox, *Nine Questions About Same-Sex Marriage Conflicts*, 40 NEW ENG. L. REV. 361, 375 (2006). For a critical “legal realist” treatment of territorial assertiveness and other features of pluralism determining the legal effects of marriage, see Halley, *supra* note 12, at 26 (asserting that “marriage is not a steady beam shining in all directions across space and through time: instead it flickers”).

<sup>108</sup> States claim to have interests in using procedure to aid, not to hinder, marriage, except insofar as procedure poses a problem of substance, such as evading a waiting period after a divorce. *Lanham v. Lanham*, 117 N.W. 787 (Wis. 1908) (holding a marriage invalid for evading the one-year waiting period after a divorce because the law expressed public policy concerns). And, of course, American states will not enforce a man’s rights under polygamous law to restrain a wife. Duguit, *supra* note 84, at 474–75.

<sup>109</sup> *Id.*

and federal treatment is seen as a form of uniformity, in that no same-sex marriage is recognized by the federal government.<sup>110</sup> Thus, there is a uniform federal treatment of marriage and a rule allowing states to carve out public policy exceptions to refuse recognition to some marriages, of which the salient example today is same-sex marriage authorized in the United States. The states that authorize same-sex marriage are seen as a further example of a normal rule of state sovereignty, with the legal frailty of the marriages they authorize relegated to a procedurally complex and obscure footnote.

Even though the standard doctrinal approach may advance arguments against the robust use of the public policy exception, and remark on its unique use against same-sex marriage, the fundamental approach is one of accepting as normal a marital regime that is heavily uniform in its core assumptions about the portability of marriage and respectful of “the policy interests” of states in policing portability. Marriage is basically portable, but with exceptions imagined as routine, embedded in standard law, and applicable to a variety of marriages. I have called this a vision of *Legal Normalcy and State Territorial Uniformity*. Except for polygamy and race, however, no other example of variant marriages occupying a distinctive substratum of the population has occurred. Selective application of generic prohibitions, as in incest or underage marriage, may target disfavored religions, but there is no taxonomy of other wholesale exclusions from marriage by means of definitional excision.

By contrast with routine legal normalcy, same-sex married couples confront a picture of *Legal Surprise and Shifting Legal Regimes*. As noted, when same-sex couples travel to marry, they do not know whether the marriage has any legal status anywhere, even at the moment of formalization. States welcome them to participate in marriage ceremonies yet do not emphasize to them any aspect of the likely legal result, which could turn on how harsh the non-recognition rules are in their home state and how much respect the state of celebration gives to the non-recognition rules of the domicile state.<sup>111</sup> Those who allow

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110 William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 STAN. L. REV. 1371 (2012) (exploring the choices presented by the ending of DOMA for visions of uniformity because after DOMA’s repeal the federal government will no longer define marriage as between a woman and man).

111 Websites providing information about New Hampshire marriage rules disclose both that non-residents may marry in a state and that same-sex marriages are permitted. See, e.g., Manchester, New Hampshire, U.S. MARRIAGE LAWS, [http://www.usmarriagelaws.com/search/united\\_states/new\\_hampshire/marriage\\_licenses/manchester/](http://www.usmarriagelaws.com/search/united_states/new_hampshire/marriage_licenses/manchester/) (last visited Mar. 10, 2012) (summarizing the marriage laws in Manchester, New Hampshire, that allow non-residents and same-sex couples to marry).

the ceremonies for out-of-state couples do not coordinate with the judges who apply existing canons of recognition.<sup>112</sup> If the states were selling securities instead of marriage licenses and a marriage tourist welcome, they could face liability for omitting facts necessary to avoid deception.<sup>113</sup> In a transaction bordering on legal theater of the absurd, the District of Columbia cancelled a same-sex couple's marriage certificate upon learning of publicity about their ceremony, which was presided over by an officiant in D.C. through a large-screen connection to their wedding gathering in Dallas.<sup>114</sup> In the letter cancelling the marriage certificate, the District encouraged them to return to D.C. to repeat the ceremony,<sup>115</sup> an invitation to an action that arguably results in the same legal nullity that D.C. asserted was the legal outcome of their distance ceremony. In effect, the District informed them that they had conducted a legally futile ceremony the wrong way and urged them to repeat it for a more effective memorialization of a void marriage. At the same time that this couple was rebuked for their innovative ceremony, traditional couples engaged in similar improvisation and faced no official sanction. Rather, they received happy human interest coverage of the novelty of the way they overcame a barrier of distance, or jailhouse walls, to marry at a distance.<sup>116</sup>

Most couples who travel to marry and then return home must believe that there is some official result that arises from the legal moment in another state. Even if their own state declines to afford recognition to their marriage, they surely believe it has some existence somewhere. Indeed, one of the problems that arises from modern-day "evasive" same-sex marriages is the couples' subsequent inability to divorce. In the world of *Legal Surprise and Shifting Legal Regimes*, gay couples might be informed in one context that their marriage has no existence at all and never did, and may discover in another that they have a legal tie that they cannot sever without relocating for the requisite year to a state that is willing to provide the di-

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112 Appendix A provides a picture of the complexity, which requires matching the rules of the domiciliary state with the rule of the authorizing state. See *Appendix A: Effect of Home State's Non-Recognition on Validity of Marriage*, <http://www.law.msu.edu/e-marriage/AppendixA.pdf> (last visited Nov. 27, 2012).

113 17 C.F.R. § 240.10b-5 (1942).

114 *Gay men fight on after court deems Skype marriage invalid*, CNN U.S. (Dec. 4, 2010), [http://articles.cnn.com/2010-12-04/us/dc.gay.marriage\\_1\\_gay-marriage-marriage-statutes-skype](http://articles.cnn.com/2010-12-04/us/dc.gay.marriage_1_gay-marriage-marriage-statutes-skype).

115 Letter from the Deputy Clerk of the Marriage Bureau, D.C. Superior Court, to Mark Reed-Walkup (Nov. 22, 2010) (on file with author).

116 Amy Buckingham, *Dad Stands in For Soldier Son at Wedding*, OMAHA WORLD HERALD, Mar. 8, 1991, at 44.

orce adjudication.<sup>117</sup> And yet it would be possible, on a strict reading of marriage recognition law, for a state court in a state that recognizes same-sex marriage to rule that there is no marriage, because the marriage was void from the beginning in the domiciliary state, and hence there is no basis to enter a divorce decree. Logical consistency might mandate such a result to a judge who reads the law strictly.<sup>118</sup>

In effect, same-sex couples, and hence individuals who enter same-sex marriages, are located in a world of legal brain teasers that tax the capacity of the best lawyers and lead to differing conclusions about basic legal rights and obligations. For same-sex couples, uniformity, in which their legal status has the same effect in one place as another, is an elusive quest into the minds and varying views of lawyers and judges relying on a set of wooden legal doctrines and supposedly embedded norms of state “policy” as a protectable interest, all ideas developed for an earlier time and place and form of variety.

In some respects, the only vision of variety and uniformity that allows its proponents to be content with the current state of uniformity is that of the legal specialists in conflicts of law. Such specialists, persuaded by the portrait in the common law of the capacity of legal rules to change with new facts, accept a period of slow evolution powered by the accretive effects of litigation challenging the most extreme effects of non-recognition.<sup>119</sup> Some of the “realists” do not believe any total solution will occur, either to suppress all same-sex marriage or to impose a genderless marriage regime through judicial review by the Supreme Court.

One question that arises with any suggestion of forcing the evolution in marriage law to accommodate same-sex pairs is to what degree forward movement would precipitate backlash. The present level of penetration of same-sex marriage into the national consciousness and the legal regime has not created a powerful reaction since the first revelation that a state might one day institute same-sex marriage. The Defense of Marriage Act of 1996 was the culmination of a strong backlash to the first suggestion of a significant challenge to the settled assumption that marriage was, in its essence, a pairing of a man and a woman for reproduction.<sup>120</sup> Since then, there has been success

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117 Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. REV. 1669, 1672–73 (2011) (explaining that in actions to terminate a marital relationship, courts apply their own divorce law).

118 See *supra* Part II.B.1 for a discussion of the non-recognition norms that are still on the books in some states that provide for gay marriage.

119 Koppelman, *Limits of Strategic Litigation*, *supra* note 76, at 1–2.

120 See *supra* Part I.A.2.



in referenda in states to ban same-sex marriage, often in the provisions of the state constitution, but there has been no national movement comparable to the force of the movement to enact a statute restrictively defining marriage for federal law and buttressing the right of states to deny recognition to marriages authorized by the law of another American state.<sup>121</sup>

Thus, one prudential question, empirical in import, is how same-sex marriage might make progress in its legal diffusion throughout the United States without triggering a heavily reinvigorated backlash. The question frames the problem of resolving differing ideas of an ideal legal regime governing marriage, including how legal change that upsets long-standing and deeply held views on critical social building blocks can proceed without a legal eruption that alters the background rules of federalism and the family.

*C. Summarizing the Problematic: A History of Repose and Certainty for Most Marriages, with Limited Exceptions*

For traditional couples, rules on marriage recognition have little contemporary relevance. Couples marry with little thought to state policies or care with formal rules; they travel to marry, if they please, and return home assured of their status. The canons of procedure for marriage protect their marriages with strong presumptions favoring validity, even where the couple errs in some detail.<sup>122</sup> Traditional couples marry and move about with their status in tow. The right of states to apply local policy to decide anew where their marriage fits in

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121 The conflict has shifted to referenda aimed at overturning or blocking a judicial or legislative decision legalizing gay marriage. *See id.*

122 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971) (protecting the justified expectations of the parties). In a desperate, revealing, and sadly amusing attempt to find a means for the Supreme Court to avoid the need for the Court to address a recognition issue involving a cross-racial couple, Justice Burton attempted to seize upon an extreme geographic literalism that had a mild intuitive appeal to the Justice but which was entirely lacking in credibility to Justices who nonetheless chose an avoidance that was also without a legal leg to stand on. The case was *Naim v. Naim*, 87 S.E.2d 749 (Va. 1955), a case in which an Asian man who married a white woman in North Carolina to evade Virginia's anti-miscegenation law, appealed Virginia's ruling, on his wife's petition for an annulment, that the marriage was void for its violation of the Virginia's marital race law. The Court did not want to decide the case immediately after *Brown v. Board of Education*, 347 U.S. 483 (1954), for fear of a massive backlash and greater resistance to the Court's holding that schools must desegregate. Justice Burton suggested that the Court "could dismiss the case on the independent state ground that Virginia required residents to marry within the state—a plainly erroneous reading of Virginia law." MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 322 (2004).

the views of the state on marriage is an abstraction unknown to most couples.

Yet doctrine abounds asserting the capacity of states to apply their policies on marriage to render disapproved marriages void. For the gay marriage case, the doctrine, useless for most purposes in the modern day, fills volumes with treatise-style parsing of a doctrine in relative disuse until gay marriage began to be enacted in some states. The discussion assumes a high degree of stasis in the background assumptions of marriage recognition law, with grave concerns by states guarding their public policy prerogative. Yet with the exception of gay marriage and polygamy, the doctrines address a virtual null set of real-world state concerns. Many of them were aimed at protecting vulnerable young women or protecting vulnerable spouses from absconding spouses who would marry elsewhere. Such paternalistic concerns have faded from the work done by marriage law at the entry point and are mainly the carriers of an abstraction rather than a part of states' concrete legal reality in the administration of marriage law.

The idea of state policies that may permit states to reject marriages of their residents as invalid has its source in conflicts of law principles drawn from international law and, to be sure, from early American racial divides and the early sense that states had sovereign dignity.<sup>123</sup> These principles fall on a point between the general principles of granting repose to marriages contracted pursuant to law where the "operative facts" occur<sup>124</sup> and the claim to a prerogative of a sovereign to administer law in accordance with its fundamental policies.<sup>125</sup> They seek a balance between the importance of repose for marriage and the concern of sovereigns to maintain a basic uniformity in its marriage law, with specific reference in much of the writing to the Christian world's rejection of polygamy. They nonetheless explain that treating a legal relation created in another country as entirely nonexistent for all purposes is not good policy.<sup>126</sup>

In simple terms then, the source of conflicts principles in marriage law is an idea of uniformity derived from a deep difference in fundamental marital regimes between Western countries and coun-

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123 Kramer, *supra* note 92, at 1967. See also Estin, *supra* note 95, at 384–89 (explaining that the cultural clash between the North and South, specifically over divorce as a legal option, led to the decision to entrust family law to the states); Duguit, *supra* note 84, at 471–73 (describing the competing theories for explaining the ground rules for nations to assert public policy limitations on giving effect to marriages contracted in conformity with the law of another nation).

124 Duguit, *supra* note 84, at 473.

125 *Id.*; see also Barnett, *supra* note 16; Glendon, *supra* note 16, at 154; Halley, *supra* note 12.

126 Duguit, *supra* note 84, at 474–75.

tries that authorize polygamy. The sense of a difference in kind is so deep that courts even refused to give effect to the marriage of one man to one woman, where the marriage occurred within a regime of legal polygamy.<sup>127</sup> At the same time, treatise writers maintained the caveat that property interests and the like that incidentally derived from a foreign marriage regime deemed incompatible with the Western world should be honored.<sup>128</sup>

So, the international conflicts-of-law vision of marriage uniformity and variety had as its fulcrum a fundamental and stark contrast between the deep tradition of Western countries and other countries that tolerated polygamy.<sup>129</sup> The principle was applied within the United States to articulate the same kind of sovereign claim over a fundamental marriage regime. Its most salient application was to miscegenation law, a matter perceived as a corollary of a regime of racial supremacy.

The vision of variety and uniformity, in the context of race, was not about the form of marriage but about race purity and separation. Nonetheless, the vision of uniformity that racial separation encouraged in marriage law became implanted in the within-U.S. recitations of conflicts principles for marriage. The abstract statement gained application to certain real concerns, such as minimum age for marriages and waiting periods for remarriage, but were treated with discretion and variation in strictness.<sup>130</sup> Such policies, measured by application, have had a relatively small role in regulating interstate marital uniformity.<sup>131</sup> For miscegenation law, couples had the option of avoiding detection and eluding a confrontation with a symbolic

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127 *Id.* at 475.

128 *Id.* at 475–76.

129 It has been noted that the divide between polygamous regimes and the standard couple marriage is not in fact between Western and non-Western countries, as polygamy has occurred in the United States and even has Biblical examples. Thom Brooks, *The Problem with Polygamy*, 37 PHIL. TOPICS 109, 109 (2007). Nonetheless, the perception at the time the public policy exception was created and maintained was that it served as a bulwark against a form of marriage that offended Western or “Christian” sensibilities. And, it remains the case that Western countries, even the most liberal and tolerant, continue to reject polygamy, thus giving it no cultural roots within the federalist system in the United States. *See* Reference re: Section 293 of the Criminal Code of Canada (2011) BCSC 1588 (Can B.C.S.C.) (holding Canada’s law criminalizing polygamy constitutional).

130 *Lanham v. Lanham*, 117 N.W. 787 (Wis. 1908). It was noted by commentators that the Constitution limited the powers of states in the United States. *See* Duguit, *supra* note 84, at 473 n.16.

131 Sanders, *supra* note 89.

policy statement by the state in which they resided.<sup>132</sup> In the nineteenth century, moreover, states often simply ignored the marriage laws of other states, enabling males to abandon families and remarry without legal check.<sup>133</sup> In the nineteenth century before the Sixteenth Amendment, the critical economic concern of intact couples today regarding their marriages—recognition for federal tax purpose—had no meaning. The collateral effects of non-recognition in a less complex society were of far less import.

Thus, the rhetoric of marriage conflicts law became a symbolic statement of uniformity and a formal claim that states were supervising a coherent and even prudent body of marital law. The truth was one of variety and play in the joints among states, one that couples in the nineteenth century negotiated to achieve their private preferences and beliefs.<sup>134</sup> Today, the legacy of this symbolic claim about a coherent body of law that protects “sovereign” interests in a uniform body of law invades the expectations about the rights of states to reject same-sex marriages contracted outside the state. Conflicts-of-law principles are applied as a form of traditional and normal enforcement of the uniformity vision of marriage regimes in nations and, by extension, in American states. Yet the principles draw their core claims from a small set of real applications in the past and from primary concerns with perceived fundamental differences in the conception of marriage between Western countries and other countries, and a legacy in the United States of a regime of racial separation. At the same time, as one scholar has shown, most aspects at the margins of marriage law, such as waiting periods after divorce and age limits, have moved toward relative conformity from state to state.<sup>135</sup>

Marriage non-recognition rules, and the attendant rhetoric, draw their claim to authority from a forgotten past for which the rules and rhetoric were made, in which they played a marginal role, and in which the main in terrorem effect was enforcing race supremacy.

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132 More notably, courts tended to side with a woman accused of marrying a white man by concealing her race. Bela August Walker, *Fractured Bonds: Policing Whiteness and Womanhood through Race-Based Marriage Annulments*, 58 DEPAUL L. REV. 1, 4–10 (2008).

133 HARTOG, *supra* note 87, at 36–37.

134 *Id.* at 1–5.

135 See Grossman, *supra* note 11, at 442–43.

## II. *LOVING'S* FEDERALISM MEANING: BRINGING MARRIAGE EXILES HOME

Bans on marriages based merely on a socially constructed classification of persons (race and/or sex) are problematic in similar ways. For marriage authorization, they grant marriage bureau clerks an unseemly mandate to launch and resolve an intrusive inquiry into theories of race and gender that are prone to abuse and which diminish the dignity of citizens.<sup>136</sup> For marriage recognition, the ability of couples to avoid such indignities by travel (or by E-Marriage, if it comes into existence) is undermined by the transfer of such an inquiry to the domicile state when the couple seeks recognition of their marriage.

### A. *Denying the Lovings's Marriage, Claiming States' Rights*

The story of Richard and Mildred Loving provides a vivid image of the effects of a ban on recognition, an image that can be viewed in a new lens across time and space. Notably, race is not a neat, fixed category into which all people fit,<sup>137</sup> and neither is sex.<sup>138</sup> In the iconic race and marriage case of *Loving v. Virginia*, the Supreme Court accepted the invitation to make a sweeping invalidation of all racial classification in marriage law. Yet the case concerned a recognition issue and the Lovings were a couple whose legal assignment to a fixed, ascribed category was far from neat. The couple got married in Washington, D.C. and lived in Virginia, which not only refused to provide a ceremonial marriage to them under Virginia law, but went so far as to criminalize their presence in Virginia. Because the Lovings left Virginia to marry in Washington D.C. and returned to Virginia after a short period, the marriage was “evasive” but otherwise unexceptionable as a marriage of two people of childbearing age. While the overriding principle of the Court’s holding in *Loving* was racial equality, thus requiring a sweeping mandate on the basis of individual rights of all persons in the United States, its subtext was necessarily federalism. Its racial meaning overwhelmed its meaning for *marriage federalism*.

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<sup>136</sup> In her landmark book, Peggy Pascoe published a photograph of a clerk ruling, across a counter, that Harry Bridges and Niriko Sawada could not receive licenses to marry because though born in the United States, Ms. Sawada was of Asian descent and Bridges was white. PASCOE, *supra* note 88, at 236.

<sup>137</sup> Walker, *supra* note 132, at 5.

<sup>138</sup> Much scholarly literature addresses the social construction of race and gender.

In *Loving*, the Commonwealth of Virginia began to learn that it could not draw a deep trench between Virginia and the outside world's cultural change. Even when that cultural change was represented by the presence of a marriage Virginia disallowed, Virginia could not draw upon its then culture and race views to maintain its traditional policies affecting marriage and associated hierarchies. Virginia had reason to see its traditional control over marriage as a matter separate from the principles emanating from the Fourteenth Amendment. The Virginia Supreme Court made this argument with force and without apology in *Naim v. Naim*, accepting *Brown v. Board of Education* as law, but coming to rest with confidence on the deep constitutional tradition of state control over all aspects of marriage law.<sup>139</sup> The court asserted that the Fourteenth Amendment did not dislodge the principles of the Tenth Amendment in the "regulation of the marriage relation."<sup>140</sup> The right of the states to remain insular as to the form that marriage might take within its borders was one "safeguarded by that bastion of States' rights, somewhat battered perhaps but still a sturdy fortress in our fundamental law, the tenth section of the Bill of Rights."<sup>141</sup>

*B. Imagining Interracial Marriage, 1958 Caroline County, Virginia*

Imagine transposing in time, place, gender format, and race the opening scene of this Article, in which Bob and Bill marry one another on California soil using Vermont law. Consider instead a ceremony in Caroline County, Virginia, in 1958, between Mildred Jeter and Richard Loving, before family and friends, provided by a liberalized marriage procedure made available by another state. One's imagination, informed by our racial history and by a scent of danger then of such a scene, for all involved, presents a bleak portrait of fear. What kind of emotion might you imagine Mildred and Richard and their friends experiencing in the midst of the marriage celebration in Caroline County? One imagines rank fear of state power aimed at their expression of a legal meaning and at the symbolic moment in which it becomes legal fact. The total control asserted by state marriage bans on formation, ceremonial expression, and legal portability is understood, with this gaze into the past, in its assertion of cultural power backed by legal force. The Lovings could have sought a moment of joy and recognition at home in 1958, but the determination

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139 *Naim v. Naim*, 87 S.E. 2d 749, 756 (Va. 1955), *vacated*, 350 U.S. 891 (1955).

140 *Naim*, 87 S.E. 2d at 756.

141 *Id.*

of Virginia to use marriage as one site for cultural suppression would have asserted a power of complete erasure. The categorical bans, now and in 1958, on an identity constituting couple autonomy, with physical banishment in 1958 re-enforcing the illegality of a state ceremonial blessing in the miscegenation regime, attack the portability of marriage ceremony and status. The attack is on the visibility and publicity that are core purposes of marriage procedures,<sup>142</sup> goals consistent with norms of free expression,<sup>143</sup> and with the federalism precedent buried in *Loving*.

Moreover, the decree of legal non-existence for same-sex couples is the radical legal equivalent of the Lovings's physical banishment from Virginia; both are acts intended to inflict a form of civil death. Indeed, one obvious solution to the voiding of a marriage legal elsewhere is for a couple to leave Virginia, or another voiding jurisdiction, to live in a state that does not undertake a modern form of banishment but rather welcomes gay married couples. Ironically, a married gay couple in Virginia—in Caroline County, indeed—might retrace the Lovings's trek to live, perhaps unhappily, in Washington, D.C., as *marriage exiles*. Modern-day efforts at legal extinguishment of coupled citizens' critical, personal, and legal affiliation, implant a burden of anachronistic custom in modern culture or law. Nor is the difference between travel histories, implicated in the distinction between an evasive or migratory marriage of sufficient moral significance to bear the weight of an effort to void one marriage and recognize another.

The hypothetical enactment of banned official marriage ceremonies in a state that bars same-sex marriage would challenge the assumptions of the Virginia culture in 1958 and in 2012. In both years, Virginia claimed the ability to extinguish unwanted symbols and to excise couples by using a legal wand that makes them strangers to Virginia law and to one another—and unwelcome in Virginia.

Imagining the practical significance today of imported ceremony into Virginia is a useful window into legal banishment of both ceremony and status from a state. Today, a hypothetical imported same-sex marriage ceremony would likely move opinion away from such extravagant conceits and provide concrete benefits. Imported cere-

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<sup>142</sup> Ernest G. Lorenzen, *Marriage by Proxy and the Conflict of Laws*, 32 HARV. L. REV. 473, 476–77 (1919) (noting publicity as a goal of early civil marriage laws).

<sup>143</sup> For an examination of the manner in which expression creates positive externalities, see Brett M. Frischmann, *Speech, Spillovers, and the First Amendment*, 2008 U. CHI. LEGAL F. 301 (2008). For a treatment of marriage as an expressive right, see Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2098 (2005).

monies would have a symbolic impact on the local community that resists the idea of marriage between two people of the same gender and would potentially overcome the revival of an attempt to draw a trench between a state and marriages widely accepted as valid.

They also would have a psychological effect on couples who participate in a ceremony at home, before friends and family, and who insist upon public recognition.<sup>144</sup> Further, the procedure would confer visibility on same-sex marriages of couples who live in states that bar same-sex marriage and allow couples to enjoy a ceremony in their home state before family and friends—as the Lovings never were able to do.<sup>145</sup> In some states that do not confer marriage, the marriage could nonetheless be recognized upon legal solemnization by another state.<sup>146</sup> Finally, imported ceremonies would provide the occasion for a greater legal pressure on the artificiality of the flat marriage recognition bars that purport to treat certain marriages as entirely nonexistent. For states such as California that convert marriages into civil unions with the legal rights of marriage,<sup>147</sup> imported ceremonies

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144 June Carbone, *Marriage as a State of Mind: Federalism, Contract, and the Expressive Interest in Family Law*, 2011 MICH. ST. L. REV. 49, 54 (2011).

145 *Id.*; CAL. FAM. CODE § 308 (c).

146 Several states do recognize same-sex marriages from other states, even while maintaining the barrier in their own marriage law. A reliable count is not easily obtained, as states have a variety of sources of interpretation of their probable treatment of such marriages. The current easily verified list is Rhode Island, Maryland, and Wyoming, with possible openness indicated by the New Mexico Attorney General. See *Appendix A: Effect of Home State's Non-Recognition on Validity of Marriage*, <http://www.law.msu.edu/e-marriage/AppendixA.pdf> (last visited Nov. 27, 2012).

Until their legislatures enacted same-sex marriage, Washington D.C., Maryland, and New York recognized same-sex marriages contracted elsewhere. For a usefully compact and visually accessible compilation of the patterns of authorization and recognition, with specific treatment of the states that do not authorize same-sex marriages, but recognize those made in another state, see NICOLAS & STRONG, *supra* note 78, at 9–13.

147 CAL. FAM. CODE §308(c) (West 2004 & Supp. 2012) (“Notwithstanding any other provision of law, two persons of the same sex who contracted a marriage on or after November 5, 2008, that would be valid by the laws of the jurisdiction in which the marriage was contracted shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from the California Constitution, the United States Constitution, statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses with the sole exception of the designation of ‘marriage.’”). If California used the rule that an evasive same-sex marriage is void at inception, which it does not, it would be a legal absurdity. In a state that allows civil unions, in which the right to a same-sex marriage was held to be fundamental by the Supreme Court of the state, and in which the voters inserted a constitutional amendment by a four percentage point margin, such a result would press the idea of state interests to their most fanciful abstraction in the face of facts about a state’s legal and local culture. In 1998, Koppelman listed thirteen states (and the District of Columbia) as having marriage evasion statutes that render marriages contracted out of state to evade an in-state re-



have the potential to reimport the word marriage despite the nominal bar on the word.<sup>148</sup> If one state enacted distance marriage available to gay couples and the artificiality of the (partial) voiding of its legal status in California were recognized and removed, the pressure for a mandate about California's reservation about the word "marriage" would fade away. The potential ability to import a word into a state is among the simplest gifts of federalism.

In the contest over a word, the logic of a federalist solution for California is strong,<sup>149</sup> just as the logic of a mandate for *Loving* and Virginia was strong. The effect on the Lovings of Virginia's will to preserve a symbol of Virginia culture was so massive and so infected by racism that only a mandate could answer. Yet the larger meaning applies to California and other states that imagine a similar need to preserve a culture against being touched by real life married couples. The cure need not be identical to that in *Loving*, but can, and should, draw on *Loving's* federalism lesson. In part because of *Loving's* stature as a case about race, the repose granted to the received canons of marriage recognition is more firm within our federalist system than should be the case in our contemporary common life as a nation, and less contested than it should be as legal analysis. The background assumptions about states as insular cultural groupings are not empirically valid today, and they have eroded with the application of constitutional norms to family law.<sup>150</sup> Pretending that the Lovings were foreign to Virginia culture was false; Caroline County had a tradition of connection between the races, and the Lovings reflected more than they defied local culture.<sup>151</sup> Today, it is false for states to label

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striction void at inception. Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 923 n.2 (1998).

148 CAL. FAM. CODE § 308(c) (West 2004 & Supp. 2012).

149 The hope for a federalist answer in California is reflected in the approach in *Perry v. Brown* of reaching a narrow holding that only applies to California. *Perry v. Brown*, 671 F.3d 1052, 1096 (9th Cir. 2012). Many commentators have expressed the hope that the case can be confined to California, and not be nationalized. See, e.g., Will Oremus, *A Loving Proposition: Why Gay-Rights Leaders Don't Want Their Big Prop 8 Victory to Go To the Supreme Court*, SLATE (Feb. 9, 2012, 1:03 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2012/02/prop\\_8\\_vs\\_doma\\_which\\_is\\_the\\_better\\_gay\\_rights\\_case\\_for\\_the\\_supreme\\_court\\_single.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2012/02/prop_8_vs_doma_which_is_the_better_gay_rights_case_for_the_supreme_court_single.html).

150 For a strong statement of the Civil War as fundamentally transformative of the Union, with a nationalizing effect, see 1 G. EDWARD WHITE, *LAW IN AMERICAN HISTORY: FROM THE COLONIAL YEARS THROUGH THE CIVIL WAR* 478–83 (2012). For a nuanced view of the effect on family law of constitutional norms, see Estin, *supra* note 95, at 382–83 (indicating that local control of family law is in tension with national citizenship and that the result has been an "extensive infusion of constitutional principles into family law").

151 Steven Boone, *The Loving Story: A Romantic Interracial Landmark*, CHICAGO SUN-TIMES (Feb. 13, 2012), [http://blogs.suntimes.com/demand/2012/02/the\\_loving\\_story\\_a\\_](http://blogs.suntimes.com/demand/2012/02/the_loving_story_a_)

same-sex married couples as foreign to their culture. In all regions of the United States, local cultures produce and support same-sex married couples.<sup>152</sup>

*C. The Meaning of Loving for Equality Federalism Today*

The overriding question now, for marriage, is the means by which the cultural change that is part of the American way of life might spread in connection with same-sex marriage. The approach laid out below blends principled constitutional claims with ideas about practicality, institutional capacity, and core understandings within the citizenry about the equal treatment of and respect for citizens. In particular, the claim is that Americans will more readily accept the principle of fairness if it is presented in the context of respecting newcomers to a state, and hence respecting their existing legal ties, than if it is presented as a basis for controlling how their state awards the marriage designation under its own marriage law. The step of also respecting the status gained by fellow citizens through the common middle class ritual of a “destination wedding” is not so large as one might assume. The notion that a state is entitled to insularity in its marriage law, which is reflected in much that is accepted as hard-wired, reasonable policy variation, has lost the tenacious roots it had when the Virginia Supreme Court spoke with such confidence about our fundamental law. The Virginia views on its marriage licensing law and on both migratory and evasive marriages that violated its miscegenation law lost persuasive legal and cultural power in the United States in the years that followed *Naim v. Naim*.<sup>153</sup> More significant for today’s efforts by states to seal themselves off from the realities of same-sex marriage in the United States, so were Virginia’s views on the work that the Tenth Amendment could do to preserve a distinctive Virginia culture grounded in a complete control over the law of marriage. The moral meaning of race classifications swept away the

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landmark\_interracial\_romance.html (describing Richard Loving’s claim that Caroline County had long had interracial couples). “There’s just a few people in this community,” Richard says. “There’s a few white and a few colored, and as we grew up and they grew up, we all helped one another. It was all mixed together from the start, so it just kept going that way.” *Id.*

152 See Baker, *supra* note 7, at 368 (suggesting that “social norms are not fixed by either time or geography” and hence marriage may be best protected across regions using equality principles).

153 See KLARMAN, *supra* note 122, at 321–468 (describing the Supreme Court’s dread of deciding a miscegenation case shortly after deciding *Brown v. Board of Education* and analyzing the evolution of racial attitudes, backlash in the South, and the changes leading to a racial reform movement in the United States).

power of Virginia to write its own marriage authorization laws with a racial component. But the claim to preserving state culture by rejecting disapproved marriages, valid in another state, was also part and parcel of the claim about the need to insulate Virginia from the meaning of racially mixed marriages. Virginia not only yielded to the imperative of the Equal Protection clause for racial laws, it also rejoined the Union one more time with the holding of *Loving* that a D.C. marriage was valid in Virginia.

Lawyers who attacked miscegenation laws starting in the mid-1950s made a tactical decision not to argue about comity but instead to press forward on the Fourteenth Amendment and the Due Process Clause. The race category held such conceptual power and timely pride of place that it was the stronger line,<sup>154</sup> despite the stakes implicated in seeking a universal mandate for all states to permit previously forbidden marriages. As a result, rules of comity in the area of marriage were not subjected to the merciless glare of their application to interracial marriages. Not being directly confronted, states' rights rhetoric rode through the judicial disruption of miscegenation law untouched and unchallenged as a general principle. The same bromides recited in support of the right of a state to be insular, backstopped in Virginia by criminalization of out-of-state interracial marriages of couples residing in Virginia survived for service in a new culture war. Some of the very declarations of state insularity used as a standard refrain in the state miscegenation briefs continue to attract recitation today in connection with state prerogative in marriage law. These declarations, permitting non-recognition of same-sex marriages, continue to undergird the acceptance of state marriage policy by contemporary scholars and advocates as a given of marriage law and procedure.<sup>155</sup>

That acceptance deserves to be challenged as a remnant of another time, lacking a contemporary purpose. The acceptance paradoxically creates pressure for a resolution that mandates that all states both authorize and recognize same-sex marriages. The assumed futility of a moderated approach in a time of cultural change animates

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154 In the 1950s, both the ACLU and the JACL, groups involved in the legal attacks on miscegenation law, "believe[d] that a decision from the U.S. Supreme Court would provide the most authoritative, the most efficient, and the most economical method of overturning miscegenation laws." PASCOE, *supra* note 88, at 231.

155 The minority of scholars who are otherwise bold in their challenge to conflicts of laws rules as now applied to marriage in the United States accept the rule that permits states to void "evasive" marriages, that is, those marriages that a couple enters into by traveling to avoid a limitation of their home state, and then returning to their home state. See, e.g., Kramer, *supra* note 92, at 1999; Sanders, *supra* note 89, at 1479.

and sustains a more deeply charged cultural clash than a basic, and even bold, re-examination of the fit of marriage recognition conventions with a federalist system. The canons of marriage recognition, as deployed against same-sex marriages, are a fugitive from justice, obscuring a middle path to resolving a cultural clash and helping propel continued conflict.

*Zablocki v. Redhail*, a case constitutionalizing a feature of state marriage law, is a prime example of the pressure non-recognition of evasive marriages has placed on the federal courts to venture into marriage jurisprudence.<sup>156</sup> In a non-race context, the premise that a state marriage rule governed the entire marriage eligibility of a state resident, though he could marry in other states, pushed the Court to make a rule limiting the range of local marriage law options for moral instruction.<sup>157</sup> Thus, the rule allowing states to apply their “policy interests” to migratory and evasive marriages actually creates pressure for a top-down national mandate on state marriage authorization law and increases the constitutionalizing of marriage law. The perverse, unintended, and counter-intuitive effect is to create a basis to limit state flexibility to infuse local marriage law with moral content reflective of sentiment in the state.<sup>158</sup>

### III. EXPORTING CEREMONIAL MARRIAGE: CONSTITUTIONAL CONSIDERATIONS

Analyzing the possibility of states’ expanding the access to their marriage laws using modern technology, and anticipating how other states might attempt to limit the practical value or even availability to their residents of such access, directs attention to the constitutional import of marriage procedure. The legal conventions by which states accord ready recognition to the marriage procedure of other states and hence to the marriages that jurisdictions throughout the world solemnize are due for examination using the magnifying lens of state power to “sell” their law to non-residents.<sup>159</sup> The constitutional considerations surrounding the exercise of such authority in marriage allow for a view of our national marital landscape through a novel and

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156 “Appellee . . . is unable to enter into a lawful marriage in Wisconsin or elsewhere so long as he maintains his Wisconsin residency.” *Zablocki v. Redhail*, 434 U.S. 374, 377 (1978).

157 *Id.* at 387 (disallowing Wisconsin’s effort to condition marriage eligibility on party’s financial responsibility to non-custodial offspring).

158 Carbone, *supra* note 144, at 54. In our article, Adam Candeub and I maintain that states should be encouraged to compete to offer desirable marriage law and procedure. Candeub & Kuykendall, *supra* note 9, at 738.

159 *See supra* text accompanying notes 32–38.

panoramic window on our federalist structure in a world of mobility and technology. This glimpse of the landscape foregrounds constitutional values that inform the analysis of transactions and technologies that challenge territorial logic.<sup>160</sup> Even sophisticated scholars can be momentarily perplexed by the novelty of a proposal to bend territorial assumptions about the physicality and location in time and space of a ceremony.<sup>161</sup>

Four types of opposition intended to prevent distance ceremonies from occurring or having any effect at all as a valid procedure could be offered if a state, especially one with same-sex marriage, should enact a distance marriage statute. The forms might be:

- *No Power Claims*: attacking “distance” marriage statutes as an invalid exercise of state power;
- *State Bans on E-Marriage Ceremonies*: passing state laws against holding such ceremonies in a state hostile to either the E-Marriage model generally or the substance of particular marriages, or regulating them in a fashion that imposes local burdens;
- *Partial Federal Preemption of State Power*: enacting a federal law barring E-Marriage entirely or restricting its recognition; or
- *Flat Refusals to Recognize Any E-Marriage*: using state power to refuse recognition to marriages from another state, based on offense to a claimed state policy on marriage procedure.

Each of these approaches to preventing the operation of an emerging regime of E-Marriage faces serious constitutional barriers. For clarity, the distance-marriage concept, unencumbered by its implicit mission in aid of same-sex marriage, is merely a procedure by which states can confer marriage formalization on couples with no necessary link to the substance of the marriage. A statute permitting remote marriage ceremonies would challenge assumptions about local control, physical presence, tradition, and ceremonial substance; proposed changes, even without disputes over the export of ceremonies for disapproved marriages, would likely face resistance.<sup>162</sup> The

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<sup>160</sup> See e.g., James E. Gaylord, *State Regulatory Jurisdiction and the Internet: Letting the Dormant Commerce Clause Lie*, 52 VAND. L. REV. 1095, 1097 (1999) (discussing the varied “textual locales” of Supreme Court jurisprudence on state legislation with extraterritorial effect, such as efforts to regulate the Internet, with specific reference to the Contracts Clause, the Full Faith and Credit Clause, the Due Process Clause, and the Dormant Commerce Clause). See also *id.* at 1096 (analyzing the threat state regulation of the Internet might pose to the framework of federalism and national coherence).

<sup>161</sup> For a full discussion of the legal logic of E-Marriage, see Candeub & Kuykendall, *supra* note 9.

<sup>162</sup> For an example of resistance to internet versions of important ceremonies, see comments to a piece by Laura M. Holson, *For Funerals Too Far, Mourners Gather on the Web*, N.Y. TIMES (Jan. 24, 2011), <http://www.nytimes.com/2011/01/25/fashion/25death.html> (illustrating the almost atavistically negative response to the migration of critical life events into

likely instinct to block distance marriage from occurring at all, even if the legal effect is null for same-sex marriages, and the constitutional problems with any such suppressive effort, presents a clarifying view of the interests that support the non-recognition rules that affect gay marriages. Efforts, though hypothetical here, at pure suppression of a legal ceremony reveal the poor fit of claims about state interests with the exercise of voiding powers over marriages valid in other U.S. states. The incompatibility of such marriage with local law is abstract at best. Legal measures to impose either local or nation-wide embargoes on E-Marriage are constitutionally tenuous and in tension with constitutional bedrocks of federalism, freedom of expression, and individual rights.<sup>163</sup> Exploration of the reasons provides a base for constructing an affirmative argument for *Equality Federalism*. The neglected but lurking constitutional dimension of marriage procedure, with aggressive claims asserting state insularity from marriage trends, is due for a constitutionally-norm-sensitive scrutiny.<sup>164</sup>

An examination in turn of each hypothetical blocking maneuver to stop the export of marriage ceremony, or all effectiveness for any exported official marriage solemnization, brings to the surface constitutional norms that limit the rejectionist reach of geography-based policy control over the symbolic, officially sanctioned presence in a state of a legal marriage moment that the state wishes to expel.

*A. Argument One: Lack of State Power, or Geography Rules!*

The understanding that states offer their license for local use only is widespread. All fifty states have websites that assert that the license may only be used within state.<sup>165</sup> Even in Arizona, in which marriage licensing is governed by an appellate court opinion that states that Arizona licenses can be used anywhere, clerks recite the standard view.<sup>166</sup> An attorney general's opinion in Alabama makes the asser-

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the venue of distance communication, especially where the internet is the medium). One commenter exclaims: "We are hardly human anymore! What are we becoming?" *Id.* at comment 8.

163 For a discussion of each of these constitutional bedrocks, see *infra* Part III. A-C.

164 Sanders, *supra* note 89.

165 See *Appendix B: Marriage License Validity in Other States*, <http://www.law.msu.edu/e-marriage/AppendixB.pdf> (last visited Nov. 27, 2012). A phone survey of clerks' offices unearthed a universal response that the license can only be used within the state.

166 Candeub & Kuykendall, *supra* note 9, at 753 n.76.

tion that states lack “any authority” to license out-of-state activities, of which a ceremonial marriage using a license is one.<sup>167</sup>

Using modern audio-visual internet technology to export an official marriage ceremony, even if there is no legal effect, challenges initial comprehension. One must underline that the proposal is to export the ceremony and the legal effects—no less and no more—that an official state marriage would have if it took place within the authorizing jurisdiction.<sup>168</sup>

States respect the marriage procedure of other states. If states were to begin looking behind other states’ procedures to issue marriage licenses and perfect them ceremonially, the whole structure of comity and of marriage portability would be disrupted.<sup>169</sup> Despite common retention of certain archaic rules, such as the “website law” noted above, marriage really does not demand “legal magic” or special incantations or uniform practices for states to confer a portable status.

### 1. *Literalist Views of Power*

Nonetheless, the literalism that infects state statutes as drafted—with either explicit statements or glancing assumptions that the marriage license may only be used in state—has affected some official statements. The most literal of the literal readings by officials was issued by the Attorney General of Alabama in reply to a query by a judge concerned because a license he issued was used in an out-of-state church ceremony. The Alabama statute does not explicitly state that the license may only be used in Alabama. As is common, it lists among those eligible to preside in ceremonial marriages “licensed minister[s] of the gospel” in the “Christian church or society of which the minister is a member.”<sup>170</sup> Notably, early scholarly treatments of absentee marriage, where not explicitly authorized by statute, noted

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167 Letter from Bill Pryor, Attorney General of Alabama, to Frank Riddick, Probate Judge (Mar. 19, 1999), *available at* <http://www.ago.alabama.gov/pdfopinions/99-00144.pdf> [hereinafter Pryor Letter].

168 The effect is to create a marriage under the law of the state making it official as well as under the law of any other jurisdiction that does not have a public policy against the substance of the marriage thereby given official status, and which also would not defer entirely to the domicile of the couple, if the domicile is not in the granting jurisdiction. See Goldberg, *supra* note 48 (noting the lack of certainty in recognition rules for marriages).

169 Today, just one state is said to raise a cloud over the validity of proxy marriages. It is not certain how serious the quibble is. Candeub & Kuykendall, *supra* note 9, at 757 n.96. For a discussion of the possible constitutional import of wholesale disruption of a marriage procedure that states authorize, see *infra* Part III.C.

170 ALA. CODE § 30-1-7(a) (1975).

that the states as a rule did not specify a requirement of presence by the couple in the state or together.<sup>171</sup> The learning in these articles has not been consulted by opinion-givers such as Attorney Generals, however.

The Alabama Attorney General's opinion provides a firm answer to the question whether the Alabama officials may license marriages that take place outside of the state:

From your letter, it appears that the license was applied for and issued as required by law and that the minister was qualified to perform the ceremony as required by law, except that his church is in another state. Since *Alabama lacks any authority to license activities that occur outside her borders*, this ceremony performed in Tennessee was not a valid solemnization under Alabama law.<sup>172</sup>

Likewise, Tennessee law provides that “[b]efore being joined in marriage, the parties shall present to the minister or officer a license *under the hand of a county clerk in this state*, directed to such minister or officer, authorizing the solemnization of a marriage between the parties.”<sup>173</sup> This marriage was, thus, also not a valid marriage under Tennessee law.<sup>174</sup>

The opinion is a model of logic in explaining why a marriage solemnized using an Alabama license in Tennessee is not a ceremonial marriage at all, because: 1) “Alabama lacks authority to license activities that occur outside her borders . . .” and 2) Tennessee would not accept a license from Alabama to complete the formalities of a ceremonial marriage. By simple logic, it cannot be either an Alabama or a Tennessee marriage. Alabama lacks authority, and Tennessee did not purport to act.

The logic loses some force, however, because the claim that Alabama lacks authority to license activities that occur outside its borders is entirely unsupported. An argument of “no state power” is belied by specific statutes and case law of other states respecting ceremonial marriage. Further, the boldness of the formalistic logic is softened by the availability of a savings doctrine in Alabama—the opinion explains that the marriage at issue meets the Alabama requirements for a common law marriage.<sup>175</sup> This expedient common law shelter for the vindication of couple intent and ministerial blessing leaves the Attorney General free to engage in conceptual niceties that demand a territorial anchor for state authority over formal marriage.

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171 Candeub & Kuykendall, *supra* note 9, at 784–89.

172 Pryor Letter, *supra* note 167 (emphasis added).

173 TENN. CODE ANN. § 36-3-103(a) (1955) (emphasis added), *cited in* Pryor Letter, *supra* note 167.

174 Pryor Letter, *supra* note 167.

175 *Id.*



Despite the licensing nomenclature, state power over marriage is expansive for facilitating couple affiliation but limited in destructive power based on territory. A marriage “license” is categorically different from use licenses, as it creates an instantly portable status. It is nothing like a license to engage in regulated activities that affect the territory of an issuing authority. The complete inaptness for a “marriage” of a state’s requiring it to be registered in the state in which “it” is located reveals that marriage is an “entity” not really apart from individuals. Foreign corporations register in states as foreign corporations. Marriages simply are. Marriages “travel” as an association of individuals with continuing individual personhood that transcends local regulatory claims over their combined status or its communicative impact. The banishing of a couple from residence in a state because of their disapproved entity status, or lack of “registration,” is contrary to simple understandings about marriage and individual rights. The effort of Virginia to banish the Lovings resonated with race history, not really with marriage history.

It is unclear whether the commonly understood jurisdictional limitation of marriage licenses emerges from a distinct legislative decision to limit state authority by territory or the belief that there is some constitutional limitation. It seems probable that the statements arise from an ingrained assumption about “licenses” or marriage, and not from a careful inspection of the statutes. Likewise, the assumed geographic limitation could simply reflect the pattern of colonial laws, which in turn, improvised variations on Anglican ecclesiastical law.<sup>176</sup> As such, geographic limitations on licensing authority may exist as a mindless repetition of legal form, enacted as the standard procedure by legislatures, strengthened in some minds as a strong rule that might even prevent correction of mistakes by couples,<sup>177</sup> and reinforced even further by an occasional belief by an official that there must be some limit on state power over marriage creation outside a state’s borders.<sup>178</sup> Putting aside such hesitations, the availability

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<sup>176</sup> Candeub & Kuykendall, *supra* note 9, at 772–74.

<sup>177</sup> *Meekins v. Meekins*, 275 S.W. 337, 338 (Ark. 1925).

<sup>178</sup> When Montana had a system of double proxy marriage statute freely available to all comers, state officials developed a sense of unease about state power, leading to a statutory revision. Candeub & Kuykendall, *supra* note 9, at 761 n.114 (citing Maurice Possley, *Marriage by Proxy Booming in Montana*, MONT. LAW., June–July 2007, at 32 (“The purpose of the bill was for the military, and there was a fear that it was being abused. The intention was to modify the law without shutting the door to its highest intentions. Inquiries have come from all [over] the world. . . . There were hundreds and hundreds of requests for information. We decided the law needed to be amended to make it clear and eliminate ambiguity, although I am not sure how Montana has the authority to issue marriage li-

of proxy marriage in five states<sup>179</sup> suggests a reasonably accessible legal understanding that states may license, authorize, or validate a marriage out of state, mixed with a degree of unease, caution, and uncertainty about the source of the authority and, especially, the propriety or prudence of building it into statutes for prospective use by couples.

## 2. *Evidence of Power: Logic, Practicality, Practices*

States do show some signs of taking charge of the task of writing laws for clarity, thus claiming their authority and recognizing the need to provide guidelines and savings doctrines to protect couples' interest in valid marriages.

### a. *Statutory Leniency*

One form of evidence that states have the authority to license an out-of-state marriage are state statutes that explicitly acknowledge the validity of a ceremonial marriage conducted out of state with a license issued by the authorizing state. Virginia and Tennessee have statutory fixes for marriages solemnized outside the state using a license issued within-state. The statutes avoid a locution saying affirmatively that the licenses may be used outside the state, or, more boldly, anywhere. The Tennessee statute states: "If a license issued by a county clerk in Tennessee is used to solemnize a marriage outside Tennessee, such marriage and parties, their property and their children shall have the same status as if the marriage were solemnized in this state."<sup>180</sup> This conferral by the statute of "constructive" presence in Tennessee supports a robust legal treatment of state authority.

Virginia has a similar savings statute looking backward to save marriages in the limited instances where the plan for an out-of-state wedding was entered on the Virginia license. There is no forward-

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censes for an entirely foreign jurisdiction." (internal quotation marks omitted)); Dan Barry, *Trading Vows in Montana, No Couple Required*, N.Y. TIMES, Mar. 10, 2008, at A11 ("We were getting calls from Turkey and the Middle East," recalls Peg Allison, the tolerant district court clerk here in Flathead County. "From people who were definitely not citizens of the United States, and had nothing to do with the military.")).

179 Candeub & Kuykendall, *supra* note 9, at n.25.

180 TENN. CODE ANN. §§ 36-3-103(c)(1)-(2) (1955) (validating all marriages "occurring prior to May 2, 1989" using Tennessee licenses outside the Commonwealth). *See also* VA. CODE ANN. § 20-37.1 (1950) (describing the validation of certain marriages solemnized outside of the Commonwealth).

looking forgiveness in the Virginia statute, like that in the Tennessee statute.<sup>181</sup>

The Virginia and Tennessee statutes demonstrate that states have explicitly placed in statutes a power for licenses issued by the state to be used out of state to create marriages under the marriage laws of the license-issuing states. Both statutes, however, avoid writing simple statutory designs to facilitate the use of marriage licenses out of state. Rather, in the case of Tennessee, the statute uses a locution affording recognition to the marriages, yet avoiding the creation of an affirmative regime for use of the licenses out of state. The statute simultaneously draws upon a theory of a legal moment within Tennessee, thus retaining the fiction that the direct conferral of the status is for marriages solemnized within Tennessee, and promulgates a theory by which the state can treat out-of-state ceremonies as having the same effect as a ceremony in Tennessee. In effect, Tennessee asserts that the “legal moment” when a marriage is solemnized under a Tennessee statute occurs constructively in Tennessee, no matter its actual location, if it is done pursuant to the authority of a Tennessee license.

Massachusetts takes a slightly different tack, setting up a method for recording foreign ceremonial marriages under Massachusetts provisions for marriage recordation.<sup>182</sup> One can marry outside of Massachusetts but receive the benefit of Massachusetts record-keeping for marriages that occur within Massachusetts. In some respects, the provision echoes the ability to “domesticate” a foreign corporation by moving its incorporation to the state of residence. The consequences are different, but the impulse to allow a reformation of an official record of a status created by state law bears some resemblance to moving the incorporation of a business to the state of its main operations.<sup>183</sup> More importantly, it emphasizes the flexibility states have over the creation and official recordation of the legal status of marriage. Recordation of a marriage that occurred elsewhere projects Massachusetts’ power over marriage creation to “domesticate” it for records as a marriage that originated in Massachusetts.<sup>184</sup>

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181 VA. CODE ANN. § 20-37.1 (1950) (“All marriages heretofore solemnized outside this Commonwealth by a minister authorized to celebrate the rites of marriage in this Commonwealth, under a license issued in this Commonwealth, and showing on the application therefor the place out of this Commonwealth where said marriage is to be performed, shall be valid *as if* such marriage had been performed in this Commonwealth.” (emphasis added)).

182 MASS. GEN. LAWS ANN. ch. 46, § 17D (2010).

183 See generally P. John Kozyris, *Corporate Wars and Choice of Law*, 1985 DUKE L.J. 1 (1985) (analyzing the legal components of corporate conflict).

184 See *supra* text accompanying notes 174–75.

The Virginia and Tennessee statutes support the power of states to confer marriage status on persons outside their jurisdiction, but also confirm that the standard reading of the statutes is that the license must be used within the state that issued it. They display a reluctance to design licensing statutes for flexible use. Other statutes leave the matter vague or explicitly provide that the license may only be used in state. The current state of statutes is general neglect of the question, some affirmative statements limiting the use of licenses anywhere except in state, and two statutes that provide a cautious permission for the state to recognize marriage solemnizations that used the license out of state.<sup>185</sup>

*b. Proxy Marriage*

One way that several states have innovated to allow more ready access to marriage is the proxy marriage arrangement. Five states have such a statute. California's statute is distinctive in being written for the benefit of members of the military who are on active service in an active combat zone.<sup>186</sup> Again, the proxy marriage statutes betray a degree of unease by states. Even as they exercise their power to authorize marriages of persons not physically present in the state, they narrowly confine the eligible beneficiaries. Delaware offers proxy marriage to a dying person, where imminent death is attested to by a physician.<sup>187</sup> Texas permits proxy marriage for the military and for prisoners.<sup>188</sup> When California enacted a proxy marriage statute in connection with the Iraq War, the legislative recital emphasized the emergency character of the provision.<sup>189</sup>

The narrow categories to whom the privilege is extended, indicate a timidity by states about their authority, or worries about propriety, with little concern for the equality principle. Why, for example, should prisoners receive aid not offered to someone unable to travel to Texas because of indigency or another obstacle to complete a marriage, perhaps after a long partnership, but permit it for a prisoner? Perhaps the idea is that the state cannot prevent a prisoner from exercising a fundamental right to marry under a governing Supreme

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185 Tennessee and Virginia Statutes: VA. CODE ANN. §20-37.1 (West, Westlaw through End of 2012 Reg. Sess. and End of 2012 Sp. Sess. I.); T.C.A. § 36-3-103(c)(i) (West, Westlaw through end of 2012 Second Reg. Sess.).

186 See Candeub & Kuykendall, *supra* note 9, at 742 n.25.

187 DEL. CODE ANN. tit. 13, § 120 (2010).

188 TEX. FAM. CODE ANN. § 2.006(c)(1)-(2) (2009).

189 CAL. FAM. CODE § 420(b) (2008).

Court holding,<sup>190</sup> and the state prefers for security reasons to make the marriage available by proxy rather than personal presence in the prison of the prisoner's marriage partner.<sup>191</sup> Yet the need by a couple of long standing, not in prison but unable to overcome physical separation for an in-person ceremony at critical juncture in their life, is just as great, and the appeal of such a couple as an object of statutorily rendered equitable protection may be far greater than that of the pairing of two prisoners or a prisoner and a person wishing to marry the prisoner.<sup>192</sup> Perhaps the Supreme Court would say that someone in the "free world,"<sup>193</sup> meaning not in prison, is not being restrained by the state from being married and thus has no rights that a lack of access to distance marriage impairs. There is no formal constitutional violation if those not physically restrained by the state have the formal option to marry, though not the means of being physically present together to meet the formal requirements of state marriage laws.<sup>194</sup> Indeed, because of a deeply ingrained jurisprudential preference, the Supreme Court rejects the notion that a right is impaired if means to exercise it are not provided by the state, or available to one wishing to exercise it.<sup>195</sup>

Thus, Texas may have been moved by an imperative imposed by the combined analysis of the Court's jurisprudence regarding the fundamental right to marry, applicable to a prisoner, and other Court jurisprudence that treats losses resulting from failure of the state to offer help where it could help (but chooses not to) as outside the enforceable norms of the Constitution.<sup>196</sup> Perhaps Texas imagines that its state power to confer marital status on those not present in the jurisdiction grows where the alternative would be, in the prisoner case, to impair another Court-recognized constitutional right, or, in the military cases, to fail to support the needs of troops at war. But, if Texas is unsure of its power to confer marital status on those

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190 *Turner v. Safley*, 482 U.S. 78 (1987).

191 *Id.* at 98.

192 TEX. FAM. CODE ANN. § 2.006(c)(1)–(2) (2009).

193 *Deshaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 201 (1989).

194 The failure of imagination relating to marriage recognition creates similar results.

195 In a series of abortion funding cases, the Court rejected any requirement of public funding for abortions. *See, e.g.* *Harris v. McRae*, 448 U.S. 297 (1980) (holding States participating in Medicaid to be free from a requirement to fund abortions); *Beal v. Doe*, 432 U.S. 438 (1977) (upholding a Pennsylvania statute restricting the federal funding of abortion clinics); *Maher v. Roe*, 432 U.S. 464 (1977) (allowing the Connecticut Welfare Department to limit Medicaid contributions for abortions); *Poelker v. Doe*, 432 U.S. 519 (1977) (upholding the city of St. Louis's decision to publicly fund childbirth services without providing similar funding for abortions).

196 *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

not present in Texas or able to be physically present for a joint ceremony, it can allocate money for sufficient security to permit an in-prison marriage ceremony. If Texas is concerned for the military, it has the option to budget for, and fund, travel for marriage by Texas soldiers. But the military has been the long-standing exception to a lack of energy in extending marriage law to those unable to be present together for a ceremonial marriage. There is a record of statutes passed during World War II to provide for liberalized solemnization procedures<sup>197</sup> and, recently, special treatment in California providing relief for the military.<sup>198</sup> The Texas “double proxy” marriage statute provides relief for members of the military who are both on active duty and for couples where both members are in prison.<sup>199</sup> The California law was passed as an “urgency measure,” which took effect immediately.<sup>200</sup> These statutes demonstrate that states have the power to confer the status of marriage on parties not present in the state nor able to be physically in one another’s presence during the ceremony.

Writers on proxy marriage generally assumed the authority of states within the federal system to create marriages involving a party to the marriage who was outside their jurisdiction, raising only prudential concerns about the advisability of extending the “utility of absentee marriage” to peacetime, when it might be used to evade “police restrictions.”<sup>201</sup> The assumed power arising under common law was in need, one writer suggested, of legislative intervention to pare it back.<sup>202</sup> The notion of police restrictions in respect of marriage has faded considerably, leaving few reasons for states to shrink from a vigorous but carefully designed statutory development of their powers to confer marital status on parties not present in the state. Plainly, reasons to come to the aid of a subset of the population to make marriage accessible does not create power. Rather, such reasons provide the motive and “provide the occasion.” Then, the state draws on existing power.

Contemporary proxy marriage statutes demonstrate the power of a state to create the marital status for those not present in the state. Their selective availability highlights the flaw in state marriage proce-

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197 *Id.* at 6 n.4.

198 CAL. FAM. CODE § 420(b) (2008).

199 TEX. FAM. CODE ANN. § 2.006 (2009).

200 *Id.*

201 Note, *The Validity of Absentee Marriage of Servicemen*, 55 YALE L.J. 735, 753 (1946).

202 *Id.*

dures that needlessly impairs the right to marry for some and fail to treat citizens with equal concern and dignity.<sup>203</sup>

*c. Case Law*

Case law contains more plainly marked road signs and fueling stations for the power of states to validate marriages that occurred outside their jurisdiction. Case law even tends to affirm statutory intent to authorize the use of licenses outside the marriage-granting state, at least if done in honest error.<sup>204</sup> At the same time, some cases draw a line in the sand, strictly limiting any forgiveness for an erring couple, or a member of a couple, who seeks, for some later reason, judicial declaration that a marriage took place.<sup>205</sup> These cases are a tiny, literalist minority. The reasons for courts to opine are not common.<sup>206</sup> Being married is not generally a matter of daily affirmations by officials that call for judicial opinion.<sup>207</sup> Cases come up where heirs wish to cut out a surviving partner from inheritance, or in a divorce action, one party denies that a marriage exists.<sup>208</sup>

The majority of case law on the point validates ceremonial marriages solemnized in the “wrong” state.<sup>209</sup> Except for the rare formal-

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<sup>203</sup> Candeub & Kuykendall, *supra* note 9, at 762; Lillian M. Gordon, *Marriage by Proxy: The Need for Certainty and Equality in the Laws of the American States*, 20 SOC. SERVICE REV. 29, 32 (1946) (lamenting “arbitrary injustice” created by uncertainty and a patchwork of laws). The recent litigation over voting accommodations extended by Ohio only to military personnel explores this very problem of disparate treatment favoring the military over all others in the exercise of a basic right. *Obama for America v. Husted*, No. 2:12-CV-00636 (Oct. 5, 2012) (rejecting state interest in enforcing an earlier deadline for voting by non-military personnel compared with military voters and explaining that, “While there is a compelling reason to provide more opportunities for military voters to cast their ballots, there is no corresponding satisfactory reason to prevent non-military voters from casting their ballots as well”). *See also infra* note 270; *O’Brien v. Skinner* 414 U.S. 524 (1974) (finding a constitutional violation where some but not all pre-trial detainees received absentee ballots).

<sup>204</sup> *See infra* note 213 and text accompanying notes 208–10.

<sup>205</sup> *Id.*

<sup>206</sup> Answering a divorce filing with a denial there was ever a marriage is one context. *See supra* text accompanying notes 203–04.

<sup>207</sup> Koppelman makes a related point in his short note discussing the serendipitous way that attacks on mini-DOMA laws may arise. *See Koppelman, Limits of Strategic Litigation, supra* note 76, at 4. *See also Halley, supra* note 12, at 26 (“the existence of most marriages is never adjudicated”).

<sup>208</sup> The military often has had occasion to decide the matter for benefits. Gordon, *supra* note 203, at 29–32.

<sup>209</sup> Treatises confirm the pattern. *See RESTATEMENT (SECOND) OF CONFLICT OF LAW* § 283i (1988) (“Upholding the validity of a marriage is, as stated in Comment *b*, a basic policy in all states. The fact that a marriage does not comply with the requirements of the state

istic proof by a court that no marriage ever arose because of a mistake by the couple,<sup>210</sup> most courts, at least, see no constitutional problem in validating marriages contracted under one state's laws while the couple is in another state. They also do not dwell on the notion that there is legislative intent to limit their state's authority to license marriages to ceremonies within the state, or to insist upon the procedurally critical importance of the geographic line. Strikingly, in an effort to save a marriage, an Arizona court misread its state marriage evasion code section, issuing an opinion holding that an Arizona license may be used outside of Arizona.<sup>211</sup>

A couple had traveled to Puerto Rico and engaged in a wedding presided over by a minister, who was qualified by the Arizona law to marry a couple. The license that the couple used in Puerto Rico had been issued in Arizona. The court found that the couple had intended in good faith to marry pursuant to Arizona law, and also that they had fully complied with the statutory requirements for a ceremonial marriage conducted under Arizona law.<sup>212</sup>

The opinion combines a misreading of a marriage evasion provision of the licensing section with cases fashioned to rescue a marriage threatened by a ceremonial defect, where the challenge comes from a third party, such as a pension board or heirs after a long marriage. The cases cited support a result, based on vindicating the intent of the parties against efforts to disrupt these expectations. Construing the statute with a broad meaning, the court reached what was most likely a fair outcome for the case at hand.

Despite its flaws in reasoning, the case shows that a commonplace understanding by most people who enter marriages—that one obtains the license and marries in the same state—is not so firmly rooted in judicial understanding. The court used precedents about state power to confer marriage status on distant couples, who acted in good faith but erred, to construe a statute well beyond its limited purpose as a marriage evasion provision. Thus, a sophisticated court concluded that not only did Arizona have the power, but that it had exercised it capaciously, to issue marriage licenses valid for use anywhere in the world. The court transformed the presumption used by courts in favor of a marriage's validity to make the post hoc exception

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where it was contracted should not therefore inevitably lead to the conclusion that the marriage is invalid.").

210 *Meekins v. Meekins*, 275 S.W. 337 (Ark. 1925).

211 *Barbosa-Johnson v. Johnson*, 851 P.2d 866 (Ariz. Ct. App. 1993).

212 *Id.*



into an *ex ante* rule, or to transform a type of forgiveness extended to mistakes by couples into expected routine.

Judicial treatments that protect marriages from ceremonial glitches emphasize party agreement as the core of the marital undertaking.<sup>213</sup> It is reasonable for the state to help the parties, or one of them where no countervailing factor other than ceremonial niceties exists, cure any errors in completing the ceremony for legal recordation.

Doing so affirms state power. Judges who provide the help apply a liberal principle within an existing framework of state power. Common law presumptions in aid of marriage validity assume a degree of territorial fluidity within which courts may shop for a rationale to hold a marriage valid, without concern for issues of state power. Geography can yield to marital facts.

A New York case took a bold step conceptually, treating the geographic location of a wedding ceremony as lacking conceptual significance because the marriage was, jurisdictionally, a New York marital ceremony.<sup>214</sup> The court overcame formidable facts that would halt an Alabama formalist: the marriage ceremony took place in New Jersey, without a license from any state at all. The court held that a religious ceremony held in New Jersey without a license was a marriage validly solemnized under the laws of New York for the creation of marriages. Critically, the court reasoned that New York has made the “public policy decision to favor the validation of marriage over the enforcement of technical requirements.”<sup>215</sup> Blending that reading with the Restatement rule allowing for the state with the greatest interest in the marriage to govern the marriage, the court readily concluded that the couple had entered a New York ceremonial marriage. The court suspended disbelief as to geography: a marriage ceremony conducted in New Jersey without a license was really an authorized New York ceremonial marriage. The court chose to avoid literalisms and to treat the movement of the two individuals in and around the New York area and into New Jersey and back to New York,<sup>216</sup> and reports of consummation, as details lacking legal importance. In effect, the court declined an offer to delve into “canonical” theories of a marriage’s physical essence, geographic or biological. The court had

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213 *Carabetta v. Carabetta*, 438 A.2d 109 (Conn. 1980) (refusing to invalidate a duly solemnized marriage though the couple did not obtain a marriage license).

214 *In re Matter of Farraj*, No. 4803/07 (N.Y. Sup. Ct. Apr. 14, 2009).

215 *Id.*

216 E-mail from Barbara Bean to author (June 2, 2009, 1:00 PM) (on file with author) (describing an earlier New York wedding ceremony performed in a helicopter that may have strayed into New Jersey).

an affinity for a theory of the penetration of law across borders and none for corporeal images of critical crossings.

The court presumably saw, at a high conceptual level, party autonomy and a state role as that of *facilitator, not regulator*, of party-controlled formalities. To the extent that some state role in accurate records plays a continuing and useful role in marriage procedure, the New York court's approach may be less than ideal as a template for marital formalities. It is a good lesson, however, in the non-territorial nature of state power over ceremonial marriage validation, the importance of the state as a facilitator of party intent, and the overdue revision of statutes to pre-authorize flexibility rather than to find a post hoc basis to approve it.

Other cases do not base marriage-validating decisions on the specific law of the state but on general principles favoring the validation of marriages despite errors in solemnization.<sup>217</sup> Hence, courts share in common a willingness to look past the confines of geography to see marriages being created under their state law on the soil of another state. The Arizona court's statutory analysis is questionable, and the New York court's analysis is bold, but the impulse by both courts that marriage ceremonies licensed by one state are exportable to the soil of another state for purposes of solemnization pursuant to that state's authority is right. The court's "reformation" of the Arizona statute points to the future of marriage procedure in the modern world.

### 3. Conclusion: The Power is Plenary and Uncontroversial

Extensive precedent in the area of marriage and other exercises by states of their sovereignty contradict any suggestion of a lack of power.<sup>218</sup> Further, the power of states to effect legal results for interests outside the state is generally uncontested in corporate law. Federalism awards states general powers so long as they do not interfere with commerce, attack a federal law that preempts state law, or run afoul of specific prohibitions of Article 1, Section 10.

Though states limit their use of the power they have, their use of that power in selected cases demonstrates that they possess the power. Such usage raises fairness issues: sound policy should benefit any

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<sup>217</sup> Candeub & Kuykendall, *supra* note 9, at 756 n.90 (providing a string cite to cases where state courts evoked savings doctrines to uphold marriages that did not follow all the statutory requisites).

<sup>218</sup> Michael E. Solimine, *Interstate Recognition of Same-Sex Marriage, The Public Policy Exception, and Clear Statements of Extraterritorial Effect*, 41 CAL. W. INT'L L.J. 105, 125 (2010).

couple facing a burden on their access to marriage. Constitutional norms, and good policy, support a state initiative to modernize the marriage laws and use their power to create statutes that provide for distance marriage.

In simple terms, the power of a state to create statuses outside its borders is a feature of the sovereignty retained by states. That sovereignty is exercised in the typical case immediately inside a state's borders but projected into federal law and into other states as couples move or have legal interests in other states.<sup>219</sup> The unqualified nature of state sovereignty to award marital status can be seen in the invalidation of DOMA by two district courts of differential treatment under federal law of traditional marriages and same-sex marriages.<sup>220</sup> The effort under federal law to block the legal incidents of selected marriages awarded by the sovereign power of Massachusetts was held to violate the sovereignty of Massachusetts where Massachusetts was forced to treat a state married same-sex couple worse than a state married different-sex couple.<sup>221</sup>

DOMA begins its legal negation by implicitly acknowledging the marital status of couples conferred by a state, and then narrowing the meaning of marriage for all federal purposes.<sup>222</sup> State sovereignty was sufficient to create a marriage that was portable—even for federal purposes of definitional negation. Congress did not attempt to undo the legal status or assert a claim that the marriage was a legal nullity, but merely to deny it equal treatment with other marriages under federal law, using the convention of a “defined term,” as used in statutes to fix a meaning that varies from meanings outside the statute itself.<sup>223</sup>

In the context of the affirmative existence of state power, the significant point is that a core assumption of the analysis of DOMA in *Massachusetts v. Department of Health and Human Services*, by Judge Tauro, and Congress, is the simple fact of state sovereignty to authorize an official marriage as a legal status, by the means created by state law

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219 Koppelman, *Limits of Strategic Litigation*, *supra* note 76, at 3 (referring to a 1948 Mississippi case involving land owned there by a black woman in Illinois and going to her white husband by intestacy despite the Mississippi anti-miscegenation law).

220 *Massachusetts v. U.S. Dep't. of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010). See also *Golinski v. U.S. Office of Pers. Mgmt.*, 781 F. Supp. 2d 967 (N.D. Cal. 2011).

221 See *Massachusetts*, 698 F. Supp. 2d at 234.

222 Defense of Marriage Act (DOMA), 1 U.S.C. § 7 (2006).

223 Mae Kuykendall, *An Essay On Defined Terms and Cultural Consensus*, 13 J.L. & POL. 199 (1997) [hereinafter Kuykendall, *Defined Terms and Cultural Consensus*].

for conferring the status under its law. States have a power to solemnize marriages by the means they select.

*B. Argument Two: State Bans (Individual Rights, State Comity)*

Some states might seek to make participating in a remote marriage ceremony on their soil illegal, particularly if the participants are of the same sex. Some jurisdictions have purported to enjoin same-sex ceremonies<sup>224</sup> or to penalize anyone who presides, and, as noted, various state marriage statutes contain criminal penalties for violations of their marriage statutes, such as presiding without a license, failing to record a marriage, or presiding over a marriage which the parties are not eligible to enter.<sup>225</sup>

The preliminary attempt at prosecution of the mayor in New Paltz, New York, who presided over an unauthorized same-sex marriage ceremony, demonstrated that the criminal law has at least auditioned for a minor role in preventing “rogue” ceremonies in states that do not recognize same-sex marriage.<sup>226</sup> The abandonment of the prosecution also demonstrates the shallow rooting in our legal culture for any such use of criminal law.<sup>227</sup> One can imagine fears about the potential for the performance in a state of legally authorized ceremonies that may give social sanction to practices odious under American law, such as abusive types of polygamy originating from abroad and damaging the life chances of women immigrants living in American states.<sup>228</sup> States might contemplate such a protective concern to justify enacting unnecessary laws to prevent marriage ceremonies where the State disapproves, as a matter of public policy, of the marriage.

Such laws confront formidable constitutional impediments. Some existing laws do impose criminal penalties for presiding improperly, such as presiding over a forbidden marriage or without full compli-

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224 *People v. Greenleaf*, 780 N.Y.S.2d 899, 900 (N.Y. J. Ct. 2004) (involving a statute that criminalized the performance of same-sex marriage ceremonies).

225 National Conference of Commissioners on Uniform State Laws, *Uniform Marriage & Marriage License Act* (1911).

226 Thomas J. Lueck, *Police Charge New Paltz Mayor For Marrying Same-Sex Couples*, N.Y. TIMES, Mar. 3, 2004, at B4 (regarding a New York mayor who was criminally charged with a misdemeanor for performing a wedding ceremony for gay couples in violation of state law).

227 Jennifer Medina, *Charges Dropped Against Mayor Who Performed Gay Weddings*, N.Y. TIMES, July 13, 2005, at B5 (detailing the subsequent dropping of charges against mayor in preceding footnote).

228 Nina Bernstein, *Polygamy, Practiced in Secrecy, Follows Africans to New York*, N.Y. TIMES, Mar. 25, 2007, at A1 (regarding the stories of African women who entered into polygamous marriages before immigrating to the United States).

ance with recording or venue obligations and the like.<sup>229</sup> Some of these laws are presumably valid, though surely unenforced and overly emphatic in tone. One catches a whiff of obsolescence. The criminal law lacks a fit with the regulation of ceremonial marriage. Such laws are statutory hyperbole: admonitions to officials to follow their duties or to individuals not to create forbidden marital relationships.<sup>230</sup> They date to the early twentieth century model act<sup>231</sup> and are hence both hangovers from a first drafting effort and, in addition, inapt for application against a marriage ceremony that draws upon, and complies with, the marriage laws of an American state. Bedrock constitutional principles would be violated by a statute purporting to render a legal marriage ceremony a crime.

Nonetheless, a hypothetical effort to use criminal law to bar remote marriage ceremonies from a state tends to elude the statement of simple constitutional principles that would bar it. Such a law would implicitly attack the exercise by another state of a traditional sovereign power by attempting to make criminal the use by a person present in the banning state of the laws of a sister state. No clean doctrine of constitutional law addresses the state comity question directly, but constitutional common sense, of the sort to which the Supreme Court turns on occasion, suggests that such a law is foreign to our traditions.<sup>232</sup> With polygamy, with one striking exception, the prosecutions are directly for coerced marriages to minors.<sup>233</sup>

Since *Loving v. Virginia* ended a strong state claim of authority to enforce a local ideology of marriage on those in residence, no state would attempt to make it criminal to travel to another state to enter a legal marriage, and return, unless the conduct upon returning to the state was itself capable of being made criminal. A marriage to someone of tender years, below the legal age of consent in a state, would invite prosecution upon the return of the couple to reside in a state that makes sex between them a crime.<sup>234</sup> Today, same-sex marriages

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229 See, e.g., Kuykendall, *Defined Terms and Cultural Consensus*, *supra* note 233; *People v. Greenleaf*, 780 N.Y.S.2d 899, 900 (N.Y. J. Ct. 2004) (involving a law that made performance of a marriage without being presented with a marriage license a misdemeanor).

230 Ann Laquer Estin, *Unofficial Family Law*, 94 IOWA L. REV. 449, 476–77 nn.137–38 (2009).

231 National Conference of Commissioners on Uniform State Laws, *Uniform Marriage & Marriage License Act* (1911).

232 *Romer v. Evans*, 517 U.S. 620, 631–32 (1996) (explaining that a law may not “impos[e] a broad and undifferentiated disability on a single named group,” and that such a law may not be “inexplicable by anything but animus toward the class it affects”).

233 Allison Tait, *Polygamy, Publicity, and Locality: The Place of the Public in Marriage Practice*, 2011 MICH. ST. L. REV. 173 (2011) (regarding a Utah prosecution for bigamy).

234 Estin, *supra* note 230 at 476; *supra* note 28.

are legal in several states, and individuals openly travel to the states that authorize them in order to marry and then return home to a state that denies recognition. Despite the widespread non-recognition, no attempt to prosecute the couples is likely.<sup>235</sup>

It should be noted, though, that state statutes do purport to criminalize living in a state after contracting a prohibited marriage in another state. Delaware, for example, imposes a penalty of \$100 or thirty days in prison for entering into a prohibited marriage,<sup>236</sup> which includes both incestuous marriages and marriages “between persons of the same gender.”<sup>237</sup> If a legal resident of Delaware enters into a prohibited marriage in another state and returns to live and cohabit as spouses in Delaware, they are to be punished as though the marriage had been contracted in the state.<sup>238</sup> The form of the statute resembles the Virginia miscegenation statute rendered invalid by the Supreme Court in the 1960s. The statutes seem at best half-hearted. While incest is still disapproved, it is not a social concern over which states exercise vigilance,<sup>239</sup> unless a minor is involved—and then the

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<sup>235</sup> The assurance is not absolute in the minds of some couples. *See, e.g.*, Stacy Forster, *Wisconsin Gay Couples Who Marry Outside State Could Face Penalty*, JSONLINE (July 3, 2008), <http://www.jsonline.com/news/wisconsin/29412299.html> (describing gay couples who are concerned about an obscure criminal law against leaving Wisconsin to enter a forbidden marriage, and returning). The potential sensitivity of a state’s sending its marriage law outside the state to a same-sex couple who never enters the state is interestingly demonstrated by the recent prosecution in Iowa of a court clerk who falsely assured a Florida couple that they could legally marry one another in Iowa without coming to the state for the ceremony. It appears that her motive was financial: she had been ordained online to perform marriages, told the men she could handle their marriage without their being in Iowa, and filed a forged marriage certificate for an Iowa marriage ceremony. Ryan J. Foley, *Iowa court official accused of forging gay marriage certificate*, ESTHERVILLE DAILY NEWS (Oct. 19 2012), <http://www.esterilledailynews.com/page/content.detail/id/259193/Iowa-court-official-accused-of-forging-gay-marriage-certificate.html?isap=1&nav=5012>. The charges against her are two counts of fraud and one count of forgery, which are felonies. *Id.* The heavy charges can be rationalized as a result of her deception, but they also appear to reflect the nervousness of a state such as Iowa about exporting a gay marriage. The clerk, to her partial credit, was attempting fill a gap in access to the market for Iowa marriage law, and to meet a need. Her lawyer comments that the case is one of first impression and has indicated she will plead not guilty.

<sup>236</sup> DEL. CODE ANN. tit. 13 § 102 (West 2010).

<sup>237</sup> *Id.* at § 101.

<sup>238</sup> *Id.* at § 102.

<sup>239</sup> Marriages of first cousins are forbidden in many states, so cousins travel to marry and then return to the state where they were unable to marry. “The couple—she is a second-grade teacher and he builds furniture—held their wedding last summer on a lake near this tiny town in central Pennsylvania. But their official marriage took place a month earlier in Maryland, at Annapolis City Hall, because marriage between first cousins is illegal in Pennsylvania—and in 24 other states, according to the National Conference of State Legislatures—under laws enacted mostly in the 19th century.” Sarah Kershaw, *Shaking off*

concern is sexual abuse rather than marital status.<sup>240</sup> States that ban marriages of same-sex couples do not seem motivated to penalize married same-sex couples, but only to treat their legal union as a nullity. The attempted prosecution of the mayor of New Paltz for presiding over the marriage of a couple ineligible to marry under New York law was based on the idea of an improper use of authority granted to him by his office.<sup>241</sup> Despite the footing of the idea of a penalty in the concept of official duties to which an official may be subject, the prosecution was abandoned.<sup>242</sup>

In *Loving v. Virginia*, discussed above, the Commonwealth of Virginia prosecuted a couple for residing in Virginia after entering an interracial marriage in D.C.; the Supreme Court disposed of the law in one surgical strike that rendered unconstitutional all prohibitions of interracial marriage, meaning that states not only could not make the marriages a crime, but had to issue licenses for interracial couples to marry.<sup>243</sup> With same-sex marriage, the Court has taken an initial step that makes it impossible to prosecute married same-sex couples for their marital conduct.<sup>244</sup> Even if the Court were not prepared to

*the Shame: But even if Science and State Law Approve, Married Cousins Still Face Rebuks*, N.Y. TIMES, Nov. 25, 2009, at D1.

240 In an earlier era, the concern about underage marriage had heavily to do with consummation. A predatory male might gain sexual access to a naïve girl by taking her to a Gretna Green town that tolerated obvious perjury about the parties' qualifications to enter a marriage, gain a license, marry her, and repair immediately to a hotel room. See MARY E. RICHMOND & FRED S. HALL, MARRIAGE AND THE STATE 126–27 (1929). Today, sexual access to minors is unfortunately available without the bother of seduction by marriage.

241 *Supra* note 226.

242 *Supra* note 227.

243 *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.”).

244 *Lawrence* found that the joint opinion in *Planned Parenthood v. Casey* articulated a theory of liberty that was broad enough to incorporate same-sex intimacy:

In explaining the respect the Constitution demands for the autonomy of the person in making [private] choices, [*Casey*] stated as follows: “These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.” Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right.

*Lawrence v. Texas*, 529 U.S. 558 (2003) (Kennedy, J.). See *id.* at 575 (“When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”).

apply *Loving v. Virginia* in full and require states to license same-sex marriages, it is difficult—in truth, impossible—to imagine that the Court would accept a law criminalizing the status of being a couple residing in a state after having been married under the laws of another state.

It is thus also difficult to imagine that the Court would accept a law criminalizing the same couple's participating in a remote marriage ceremony held within the disapproving state. For that matter, it is difficult to imagine a state attempting to criminalize a ceremony that is legal in another state, but, as noted, states do still have on the books statutes that, in form, criminalize returning to the state and "living and cohabiting" as spouses after marrying out of state. Hence, the issue has a breath of life. Given the continuing ferocity of opposition to same-sex marriage, any breath of life can spring into the lungs of some opponents.<sup>245</sup>

Besides common sense constitutional precepts of relative sanity, the First Amendment provides the most directly instructive constitutional barrier to a law criminalizing state-authorized but locally disapproved ceremonies within a state. The analysis is as follows: Same-sex marriage is legal in some states of the United States. The conduct associated with same-sex marriage has constitutional protection. A ceremony celebrating a couple's legal commitment to one another is an expressive act. Therefore, a marriage ceremony, where it does not facilitate criminal activity, is a purely expressive act protected by the First Amendment. The fact that another state affords recognition to the ceremony has no negative effect at all in the state in which it occurs.<sup>246</sup> The fact of its legal recognition elsewhere does not alter the

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<sup>245</sup> A.G. Sulzberger, *Voters Moving to Oust Judges Over Decisions*, N.Y. TIMES, Sept. 25, 2010, at A1 (describing the transformation of merit retention elections into expensive ouster campaigns, with specific reference to the campaign to oust the three judges up for retention in 2010 who voted with a unanimous Iowa Supreme Court to mandate same-sex marriage in Iowa). In Iowa, there has been a call to have voters act on their every-ten-years opportunity to call a constitutional convention, with the purpose of amending the constitution to overturn the unanimous decision of the Iowa Supreme Court. The issue is not on the ballot. Steve Williams, *Iowa GOP Won't Push Gay Marriage Repeal in Next Session*, THE LGBT RIGHTS CAUSE (Nov. 30, 2011), <http://www.care2.com/causes/iowa-gop-wont-push-gay-marriage-repeal-in-next-session.html>.

<sup>246</sup> This aspect of E-Marriage illustrates that the concession made by Dean Kramer in 1997 may concede more than is needed in 2012. Dean Kramer suggests that, if every state were required to recognize same-sex marriages, just one state (in 1997, Hawaii was the concern) could determine the rules for all states. Kramer, *supra* note 92, at 1999 (explaining how a state cannot fail to comply with its ordinary choice-of-law rules just because it disagrees with the policy of another state). With E-Marriage, we see that marriage expression can travel and achieve visibility, and that numerous constitutional precepts protect that expression. Further, the export of corporate law governing internal corporate affairs



fact that the ceremony is core First Amendment expression rather than a form of conduct.

Indeed, the fact that it is an official legal act emanating from another state deepens its First Amendment protected status. No in-state conduct associated with the ceremony or the marriage can be made criminal. Thus, the First Amendment fully protects the right of a couple to enter into a marriage while in one state, pursuant to the marriage laws of another state.<sup>247</sup> This conclusion presumes that no state would authorize a ceremony that facilitates criminal activity, say, a father-marries-underage-daughter ceremony. Indeed, a state with E-Marriage might prudently require the couple to affirm that no aspect of their intended union violates criminal law in their current locations. One state legislator has already commented that the state would adopt the most conservative age limitation in the states, if E-Marriage were actually adopted.<sup>248</sup>

Reviewing black letter First Amendment doctrine is worthwhile, because the heat associated with opposition to same-sex marriage has heavily to do with a desire to suppress expressive ceremonial acts, and with residual shock at the use of the word marriage to describe the unions of same-sex couples.<sup>249</sup> The bans on gay marriage are designed to prevent the expressive meaning of gay marriage from gain-

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gives a state the ability to liberalize the rules by which a corporation operates in states away from that state. So, while it is not an inevitable conclusion that states must recognize same-sex marriages, it is nonetheless apparent that the state interest in refusing recognition is weak. The fact of a marriage's existence in a state is little more intrusive on policy interests of the state than is an imported marriage ceremony.

247 This Article does not opine on measures an American state may take to protect its citizens from participating in marriage ceremonies emanating from a foreign jurisdiction, where the marriage was in deep opposition to accepted norms here that are seen as protective of vulnerable persons. It seems likely that abusive practices are the concern in the United States, not a validation provided by a ceremony emanating from abroad. There has been coverage of the practice of polygamy as a factor in the New York area. The weight of cultural norms brought with emigrating groups seems sufficient to sustain the practice, and legal action would be taken under the usual idea of state power to protect citizens from harm, measured by conduct rather than expression. Further, it would seem likely that purely religious ceremonies of marriage, such as polygamous marriage, would enjoy First Amendment protection under the Free Exercise clause.

248 Representative Bill Lippert, Chair of the Vermont House Judiciary Committee, Roundtable discussion at the MSU College of Law symposium on E-Marriage (Nov. 2010) (explaining that any such enactment would take the most conservative approach to age eligibility).

249 Mae Kuykendall, *Resistance to Same-Sex Marriage as a Story about Language: Linguistic Failure and the Priority of a Living Language*, 34 HARV. C.R.-C.L. L. REV. 385 (1999) ("The [movement against gay marriage] is one of de-authorization of a subset of marriage speech that a significant number of citizens deploy for self-description and that a significant number of their citizens respect and adopt.").

ing currency in a state. The Constitution provides no overt protection through the First Amendment for the right of anyone to marry. But exporting the ceremony of gay marriage does allow for the issue of free expression to be engaged: states can “ban” gay marriage in the sense of refusing to give it legal recognition, but the export of ceremony helps to demonstrate that they may not, in truth, “ban” gay marriage. Reactions that the import of official ceremonies authorized by another state “undermines” local law, even when the marriage still lacks local recognition, would expose the illiberal impulse animating the mini-DOMA laws and the misuse of the “banning” wording.<sup>250</sup> The export of marriage ceremonies by states that permit same-sex marriage would be a means for states to enhance expressive freedoms, using federalism as a teaching device about marriage expression and cultural change as “un-bannable.”

*C. Argument Three: Partial Preemption (Limits on Congressional Power over Marriage Laws in a Federalist System)*

Finally, one can hypothesize federal legislation to restrict state sovereignty over the authorization of marriage. Congress could be urged to prohibit states from conferring marital status on couples not physically present in the authorizing state. Calls to prohibit states from using “absentee marriage” statutes for the purpose of spreading same-sex marriage across jurisdictions could be made.

The same federalism reasons that stopped Congress from enacting legislation to render same-sex marriages entirely void within the states that authorize them<sup>251</sup> stand in the path of federal intervention to control the form of marriage solemnization statutes. The exception might be federal legislation vindicating a federal interest in controlling immigration policy. Even in that instance, the mechanism most compatible with principles of federalism would simply be to ex-

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<sup>250</sup> The hypothetical response to E-Marriage is not entirely hypothetical. News coverage of the E-Marriage idea led to responses by anti-gay-marriage proponents. See, e.g., Rick Haglund, *Will you e-marry me? Law professors propose sweeping changes in state marital statutes*, LEGALNEWS.COM (Feb. 17, 2010), <http://www.legalnews.com/detroit/651400/> (quoting American Family Association of Michigan President Gary Glenn: “It seems a not very cleverly or well-disguised scheme to establish the legal and emotional fiction of so-called homosexual ‘marriage’ in states which truthfully define and legally recognize marriage as only between one man and one woman”). For a full sampling of the blogging and media treatment of the proposal, see also *E-Marriage Project: Michigan State University College of Law*, MICH. STATE UNIV. COLLEGE OF LAW, <http://www.law.msu.edu/e-marriage/> (last visited Mar. 9, 2012) (providing links to blogs and news coverage of E-Marriage).

<sup>251</sup> See *infra* notes 244–46.

tend the current practice of treating “proxy marriages” differently for purposes of federal immigration law.<sup>252</sup>

There is a strong policy accepted by the Supreme Court to regulate the use of family ties as a path to citizenship.<sup>253</sup> Given the policy preference by Congress and constitutional approval by the Court, some sort of limitation on the immigration consequences of marriage by non-resident aliens to U.S. citizens, solemnized by using a remote marriage statute, is surely constitutional. However, such limitations by Congress, in regulating an immigration-sensitive state practice, would be constrained by other constitutional principles. There may be no adequate federal interest to justify limitations on the use of remote marriage statutes by resident aliens,<sup>254</sup> or even by non-resident aliens, given the ability of the government to limit the way such marriages can be used for immigration.

Outside of the immigration context, there is no federal interest in the design of state marriage procedures. A law restricting remote marriage in some way would be the procedural analog to DOMA. Such a law could take three different forms. Specifically, the law could, like Section 1738 of the Defense of Marriage Act, authorize states to deny recognition to remote marriages.<sup>255</sup> Or, in an analog to Section 3 of the Defense of Marriage Act, the law might have a provision withholding federal recognition to remote marriages. The Section 3 provision is now being litigated in a lawsuit against the federal government by the Commonwealth of Massachusetts, discussed *supra*, and has been ruled unconstitutional by the First Circuit.<sup>256</sup> Most radically, the law could ban states from using marriage procedures that allow couples not physically present in the state to marry pursuant to their ceremonial marriage laws. Arguably, Congress could legislate more narrowly on any of these, restricting remote marriage procedures only as to same-sex couples. The latter seems quite unlikely in light of the increasingly tolerant view of gay marriage. While repeal

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252 Candeub & Kuykendall, *supra* note 9, at 747.

253 *Nguyen v. INS*, 533 U.S. 53, 59 (2001) (listing the conditions under which a child born out of wedlock to a citizen father and alien mother may acquire citizenship).

254 *Graham v. Richardson*, 403 U.S. 365, 371 (1971) (explaining that resident aliens are covered by the words of the Equal Protection clause as persons; while the federal government has power to regulate immigration, these powers reach their limit if there is no federal interest).

255 *See supra* note 244.

256 *Massachusetts v. U.S. Dept. Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012).

of anti-gay legislation is difficult to achieve,<sup>257</sup> so might new anti-gay legislation be difficult to enact.

As to the last and most aggressive (but unlikely) possibility, Congress lacks the power to regulate the manner in which a state may exercise its sovereign function of creating marriages. The form taken by the 1996 anti-gay marriage federal legislation demonstrates that Congress has already determined that it lacks such power. The record of the Congressional hearings concerning DOMA reflects a determination to “protect” traditional marriage from the threat posed by official recognition of gay marriage. Much of the Congressional rhetoric cites the importance of preserving traditional marriage by preventing the recognition of gay marriage. This determination is reflected in the portion of the eventual law that defines marriage for all purposes of federal law as being restricted to a union of a man and woman.<sup>258</sup>

DOMA as enacted purports to advance federalism by simply affirming, under the Full Faith and Credit Clause, what some argue the clause already provides: the ability of states, acting on a strong public policy, to refuse to recognize an out-of-state marriage that violates the state’s public policy.<sup>259</sup> Yet the form of the affirmation was criticized as exceeding Congressional power. Professor Laurence Tribe wrote a letter of opinion citing the text of the Tenth Amendment and *United States v. Lopez*.<sup>260</sup> He suggested that the principles of *Lopez* pointed to a serious Constitutional barrier to the form of DOMA: Congress would violate the Tenth Amendment if it legislated on a matter not delegated to it in any provision of the Constitution.<sup>261</sup>

However that might be, the long tradition of state control over licensing procedures, as well as a limited federal interest in preventing

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257 David M. Herszenhorn, *Move to End ‘Don’t Ask, Don’t Tell’ Stalls in Senate*, N.Y. TIMES (Sept. 21, 2010), <http://www.nytimes.com/2010/09/22/us/politics/22cong.html> (reporting on a failed attempt in September 2010 by Democrats to overcome a filibuster that would bring a vote to end “Don’t Ask, Don’t Tell” to the Senate floor).

258 Defense of Marriage Act (DOMA), 1 U.S.C. § 7 (2006) (“[T]he word ‘marriage’ means only a legal union between one man and one woman as a husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”).

259 28 U.S.C. § 1738(c) (2010) (showing that § 3 of DOMA reaffirmed the principle that states did not have to recognize out-of-state marriages that violated public policy: “No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State”).

260 *United States v. Lopez*, 514 U.S. 549 (1995). See also, 142 Cong. Rec. S5931-33 (daily ed. June 6, 1996) (letter of Prof. Laurence Tribe).

261 H.R. Rep. No. 104-664, at 29 (1996).

innovation in marriage ceremonies by states,<sup>262</sup> argues against the constitutional prudence of federal legislation imposing a regulatory patina over state marriage licensing. Not only would such a law be overreaching or redundant, it would unsettle deeply rooted marriage law and procedure. A federal law placing a Section 1738-style cloud over the need for states to recognize remote marriages would throw into doubt marriages that courts now validate applying received conventions about conflicts of law and the primacy of party intent in marriage, and its critical importance to couples. While the current DOMA, which provides that states need not recognize gay marriages, is seen as redundant of the existing Full Faith and Credit Clause and conflict-of-laws interpretations of it,<sup>263</sup> and to that degree potentially congruent with constitutional values, negative legislation about the form marriage solemnization takes would introduce a new factor into the liberal construction of marriage validity and, most critically, would destabilize the *lex loci celebrationis* rule.

Today, most heterosexual marriages that are valid in the state under whose laws they were solemnized are recognized without dispute in other jurisdictions.<sup>264</sup> Any Congressional provision that destabilized that norm would be both unwise and, as with a law to ban remote marriage laws entirely, likely unconstitutional.<sup>265</sup> If Congress enacted any legislation affecting state marriage procedures, such a federal statute would more usefully provide support for state flexibility in enacting marriage laws, by funding the development of modernized model legislation, consortiums for state collaboration, and public/private partnerships to modernize the administration of marriage formalities and the collection of statistics. Any Congressional role in marriage law would best take the form of aiding federalist collaboration, not erecting new barriers to modernizing marriage procedure.

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262 See Candeub & Kuykendall, *supra* note 9, at 751.

263 Kramer, *supra* note 92, at 1975–76 (arguing that the public policy exception in the conflict of laws doctrine allows state courts to rule same-sex marriages as invalid without reliance upon DOMA: “With or without explicit authorization from Congress or state legislatures, courts are relatively free to make an exception to the place of celebration rule for same-sex marriages”).

264 UNIFORM MARRIAGE & DIVORCE ACT § 210, 9A U.L.A. 194 (1998); Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433, 442–44 (2005) (explaining the uniformity of marriage laws throughout the country in 1995 in the absence of a national marriage policy).

265 See *supra* text accompanying notes 246–48 (showing an array of viewpoints, statutes, and cases supporting the idea that Congress ought not to destabilize the norm with regard to state reciprocity of marriages).

#### IV. EQUALITY FEDERALISM: PRECEDENT AND INSTITUTIONAL STRUCTURE

*Equality Federalism* is a timely, sound answer to the unduly stark contested visions of the same-sex marriage question. The thought experiment of imagining the adoption of E-Marriage by a state with same-sex marriage demonstrates the fit of *Equality Federalism* with key components of our constitutional structure and values. *Equality Federalism* encourages federal courts to protect constitutional rights by restricting both the federal government and states from denying effect to legal statuses awarded by the law of a state. Federalism offers a complex state sovereignty that allows states to offer laws to outsiders while maintaining their own state messages about marriage as an entity by withholding (or granting) ceremonial blessings for certain marriages. With federal courts finding unconstitutional the withholding by DOMA of federal recognition of a state-created legal status,<sup>266</sup> the loop comes close to closing on revealing the federalist logic to a third, federalist path to abating the culture clash over same-sex marriage, while protecting individual rights, norms of free expression, and state sovereignty over the creation of portable legal statuses. If the federal government must recognize state marriages and may not deem them nonexistent, the stage is set for recognizing that neither may the states operate a regime that allows for odd sortings of marriages by wooden and largely forgotten legal canons. If the federal government may no longer deem a Vermont marriage by Vermont residents nonexistent, neither should it respect any voiding<sup>267</sup> norms that any state asserts over a same-sex marriage, on any state of facts. The legal path to knowing which marriages the federal government could deem nonexistent,<sup>268</sup> by parsing murky and poorly understood recognition rules in each domicile state of a couple who traveled to marry and the reverse evasion rules of the authorizing state, is not one that fits our federalism. If Congress may not by statute define marriages out of existence for federal law, the states should not function as the mechanism for the federal government to do indirectly what it cannot do directly.

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266 *In re Balas* 449 B.R. 567, 579 (Bankr. C.D. Cal. 2011) (“In the end, the court finds that DOMA violates the equal protection rights of the Debtors as recognized under the Fifth Amendment.”); *Golinski v. U.S. Office of Pers. Mgmt.*, 781 F. Supp. 2d 967, 975 (N.D. Cal. 2011).

267 See *Appendix A: Effect of Home State’s Non-Recognition on Validity of Marriage*, <http://www.law.msu.edu/e-marriage/AppendixA.pdf> (last visited Nov. 27, 2012).

268 This assumes an ending of the restrictive definition of marriage in DOMA.

A counter-intuitive aspect of the right of states to reject “evasive” same-sex marriages, while treating as valid migratory marriages into the state, is that it poses an upside-down Equal Protection problem. A diverse treatment of evasive marriages compared with migratory marriages sorts state citizens who enter same-sex marriages into two classes of citizenship, linked to their travel history. State rules that penalize residents for having a shorter duration of citizenship than comparable others in the state have been held to violate the Citizenship Clause of the Fourteenth Amendment: “That Clause does not provide for, and does not allow for, degrees of citizenship based on length of residence.”<sup>269</sup> Oddly, the distinction between migratory and evasive marriages creates two classes of same-sex couples, married under the law of another state, whose rights vary, to long-term residents’ disadvantage, by length of residence in state. The equality principle and the citizenship definition converge in the Fourteenth Amendment to cast a cloud over treating married couples, who are identical in the format of their marriage, differently based on length of residence in the state, with long residency mandating, in a perverse turn, worse treatment.<sup>270</sup> It seems likely that the practice favors wealthier couples, such as couples who are transferred from one state to another by a corporation, and tends to disadvantage less mobile, less wealthy couples. A rural couple would be less likely to benefit from a more favorable treatment of migratory marriages, compared with evasive marriages, than a couple who moves from one city to another for business reasons.

At least two other scholars have noted this anomaly. In 2005, Tobias Wolff noted the differential treatment and suggested that states

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<sup>269</sup> *Zobel v. Williams*, 457 U.S. 55, 69 (1982).

<sup>270</sup> Concededly, there is an argument that an “evasive” marriage is a form of bad faith and hence can be penalized differently from a good faith migratory marriage. But the differences between a couple who marries in State A, knowing that relocation could disrupt the legal status of a marriage, and one who travels to marry in a state that grants the ceremony and confers the status and who also know there is a hovering cloud but not its size or power, is thin. The difference exists in an abstract world of legal brain teasers, not in the real world occupied by couples who aspire to avail themselves of a legal status available in the United States. It is a difference that has a tinge of rationality but not much relation to real world decisions by same-sex couples who marry. Hence, it bears a slight resemblance to the practice, found unconstitutional, of providing absentee ballots to pre-trial detainees held outside their home county but not within it—another instance of residents penalized for staying close to home. *O’Brien v. Skinner*, 414 U.S. 524, 530 (1974). Moreover, state judges in the past embraced the argument that the purpose of evading the laws of [a domiciliary state] is not a motive that invalidates a marriage. *In re Perez*, 219 P.2d 35, 36 (Cal. Dist. Ct., App. 1950). See *supra* note 203, *Obama for America v. Husted*, No. 2:12-CV-00636 (Oct. 5, 2012) (finding legal protection violations in Ohio early voting rules that accommodated only military voters).

could choose in litigation to support the better treatment of migratory marriages, or in his words, “recent arrivals,” as compared with long-term domiciliaries, who may not marry in-state or leave the state briefly and return with a marriage recognized within the state. States could thus let go of a voiding rule on migratory marriages, while maintaining that the state has an interest in voiding evasive marriages.<sup>271</sup> Wolff urges great care in pulling apart the now-illegitimate reasons for applying non-recognition to migratory marriages, such as dissuading people from moving to the state, and concedes that evasive marriages might be more readily justified on the basis of a traditional disfavor toward such marriages because they manifest “disrespect for forum policies.”<sup>272</sup> By comparison, the approach of elevating the equality principle as the partner doctrine for federalism implants equality reasoning directly into the treatment of any same-sex marriage entered into within an American state. In Wolff’s treatment, pure equality is off point, either because the state is willing to abandon the differential treatment by refusing recognition to all same-sex marriages and thereby claim a concern for evenhanded treatment of same-sex couples, or because the lack of a fundamental right to marry implies a secondary role for equality in federalist reasoning about marriage.

Mark Strasser has also noticed the same discrepancy in treatment of two couples domiciled in the same state but with a different historical relationship to the state that married them.<sup>273</sup> Strasser solves the difference in treatment by emphasizing the “good faith belief and reasonable expectations” of the couple who unexpectedly migrated from the state that married them. The flaw in the analysis is that any same-sex couple is reasonably on notice that the marriage may not be portable. Hence, again, a deeper presence of equality principles in marriage federalism, with particular reference to the distinctive case of same-sex marriage, is the doctrinally sound solution to permitting states to express a normative preference in marriage licensing law but accede to equality norms as well. *Equality Federalism* blows the whistle on differential treatment of similar same-sex couples as lacking sufficient basis when federalism and equality are blended to give protection to a legal status held by couples who fundamentally do not differ.

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<sup>271</sup> Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. PA. L. REV. 2215, 2238–40 (2005).

<sup>272</sup> *Id.* at 2237.

<sup>273</sup> Mark Strasser, *The Privilege of National Citizenship: On Saenz, Same-Sex Couples, and the Right to Travel*, 52 RUTGERS L. REV. 554, 573–74 (2000) (highlighting the discrepancies in how a state may treat two couples with different historical relationships to that state).



“Federalism secures to citizens the liberties that derive from the diffusion of sovereign power,”<sup>274</sup> and its similar infusion with equality principles allows for the weeding out from marriage law of rank illogic.

Precedent and institutional competence combine to form a basis for *Equality Federalism* in same-sex marriage. Supreme Court institutional competence is not challenged by interventions to discipline unequal results from antiquated state practices that treat identical couples differently based on their travel history. The Supreme Court may draw upon a rich blend of constitutional structure, logic, and principle to eradicate the constructed difference between couples who are identical except for their travel history. Similarly, there is institutional competence for the Supreme Court to eradicate different treatment of mobile married couples who are identical except for the sex composition of the pair.

*Lawrence v. Texas*<sup>275</sup> does not create a useful precedent for the Court to mandate full equality in all state marriage licensing law. Using equality principles to stop the illiberal use of criminal law against the intimate lives of citizens has a firmer basis in a conception of the Court’s role in the constitutional order than does a holding by the Court that the equality norm mandates re-writing marriage licensing law in each state. On the other hand, a strong opinion by the Court arguing that the equality norm has no relevance to marriage law would be unfortunate. Ideally, the form that Court deference would take is to federalism (and not to a un-modulated rights-disrespecting majoritarianism), emphasizing gradual but energized change and a modest role for the Court infusing process with constitutional discipline. *Equality Federalism* is an effective path to mutual respect among the states.

#### A. *Loving v. Virginia: Equality Federalism on Steroids*

*Loving v. Virginia* limits a state’s ability to mandate strict local rules defining its culture as distinctive and entitled to maintain its “purity” from contamination by people and citizens from outside the state. *Loving* is a death knell for local control sufficient to veto a consensual union, against a norm of equality, on the basis of a state “way of life”

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274 Coleman v. Thompson, 501 U.S. 719, 759 (Brennan, J., dissenting) (citing William J. Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423, 442 (1961)).

275 Lawrence v. Texas, 539 U.S. 558 (2003).

infused with traditional cultural encodings.<sup>276</sup> It erects a fortress against deeply disruptive forms of voiding marriages, including “evasive” marriages. *Loving* was a glimpse at minimally fair federalist treatment of the common practice of travel to exercise a couple’s autonomous preference for marriage. The Lovings had the benefit of knowing the extent of the hostility to them embedded in Virginia law and being assured that D.C. would respect their “evasionary” marriage ceremony. Today, same-sex couples face greater ambiguities about the system of marriage law across jurisdictions. States offer marriage tourists their ceremony, even as laws remain on their books that void the marriages ab initio.<sup>277</sup> If the assumption that the voiding of evasive marriages by domicile states is an embedded and legally uncontroversial practice, there is no assurance that an Iowa judge, after the recent non-retention of three Supreme Court justices, would not apply a cautious reading of the law,<sup>278</sup> were the matter to arise in Iowa.

In its brief to the Supreme Court in *Loving*, Virginia presented a pre-Civil War conception of federalism as a basis for defending twentieth century insistence on social hierarchy and state insulation.<sup>279</sup> The brief presents a colloquy in Congress concerning the meaning of the Civil Rights Act of 1866, as the forerunner to the Fourteenth Amendment. Fear was expressed in 1866 in Congress that if marriage is a “right,” it is a civil right, and the military power, under provisions of the seventh section of the bill, could be used to enforce a black man’s right to marry a white woman “without respect to the prohibition of the local law.”<sup>280</sup> Such a vision of a world undone, in this instance by a physical incursion of alien law through military presence, bears a resemblance to the enactment of an E-Marriage between two

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276 Stephanie McCurry, *The Soldier’s Wife: White Women, the State, and the Politics of Protection in the Confederacy*, in *WOMEN AND THE UNSTABLE STATE IN NINETEENTH CENTURY AMERICA* 18–20 (Alison M. Parker & Stephanie Cole eds., 2000) (describing the way that the advocates of secession “skillfully evoked the propertied and spatial arrangements of masterhood as yeoman farmers and planters alike understood them in the South”).

277 Iowa law is silent on the matter. Case law indicates that Iowa recognizes any marriage that is legal in the state contracted, but that general rule for incoming marriages might not preclude an Iowa judge from applying the logic of a reverse evasion statute. See *In re Marriage of Reed*, 226 N.W.2d 795, 796 (Iowa 1975) (“I. Under the traditional conflict of laws rule long followed in Iowa, the validity of a marriage is determined by the law of the state in which it was contracted.”).

278 A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, Nov. 4, 2010, at 1 (reporting on the successful vote to remove judges who voted in favor of same-sex marriage).

279 Brief and Appendix on Behalf of the Appellee, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395) [hereinafter Appellee’s Brief].

280 *Id.*

men on the soil of Texas, which met with angry reactions in 2010.<sup>281</sup> In 1866, the tactic of the bill's proponent was first to use the standard argument—still current in 1967—that if the penalty for intermarriage were the same for a black person and a white person, there would be no “discriminations in punishments on account of color.”<sup>282</sup> But the proponent also muddied the issues by refuting the suggestion that marriage was a civil right. Rather, Representative Moulton of Illinois said, “Marriage is a contract between individuals competent to contract it . . . . No one man has a right to marry any woman he pleases.”<sup>283</sup> The colloquy was presented by Virginia in 1967 as a means of proving the intent of the Framers of the Fourteenth Amendment, but in a reading today, it shows an atmosphere somewhat like that in 1996 at the passage of DOMA. There was anxiety about a type of social change that upset existing assumptions about inclusion and exclusion. The anxiety went so far as to require the bill's proponent to explain that a black man would not be empowered to force a white woman to marry him.

The advocates for black equality, and for the liberation of gay people, stood on similarly perilous cultural ground, seeking to deflect the most volatile social confrontations and to buy time for cultural change.<sup>284</sup> The proponents of the Civil Rights Act, themselves immersed in a culture that held ambivalent attitudes about race yet sought to advance racial justice over time, used shifting locutions about the possible meaning of a right “to make and enforce contracts.”<sup>285</sup> Even while giving some explicit assurance that there was no discrimination in anti-miscegenation laws so long as they had even-handed penalties for the races, the proponents smuggled into the legislative record language about the right of individuals to make contracts of marriage and even said that marriage “is a matter of mutual taste, contract, and understanding between the parties.”<sup>286</sup> In 1967, Virginia's combination of anxiety and certitude led it to include the colloquy in its brief, failing to recognize its Clintonesque character of fine distinctions that preserved in the legislative history a statement that marriage is a matter of contract and mutual taste,

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281 See Haglund, *supra* note 250.

282 Appellee's Brief, *supra* note 279.

283 *Id.*

284 Thus, a liberal President, himself not yet comfortable with same-sex marriage, signed a bill that gave cultural reassurance to the intensely fervent opponents of the change they feared was coming. President Clinton signed the bill after having pledged support to gay causes. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

285 See *infra* text accompanying notes 264–65.

286 Appellee's Brief, *supra* note 279.

while buying time for the logic of the Fourteenth Amendment, social change in a single nation bound in a federalist understanding, and the high regard for contract freedom to prevail.<sup>287</sup>

The time for the colloquy's meaning came in 1967. Because race was involved, *Loving* imposed a standard national solution<sup>288</sup> rather than relying on federalism to require Virginia to recognize a marriage contracted elsewhere "as a matter of mutual taste, contract, and understanding between the parties."<sup>289</sup> Indeed, except for race, according to one author, the case is wrongly decided, since Virginia had made clear its intention of invalidating a marriage contracted elsewhere and Virginia policy on recognition allowed for no doubt about its policy.<sup>290</sup> The Lovings were a pure case of evasive marriage intended to avoid a clear local rule. The better view, considering the logic of federalism, may be that even without race the case is rightly decided—requiring Virginia to validate an evasive marriage where the rationale for Virginia's policy was to enforce an arbitrary stipulation about marriage in order to preserve its pre-Civil War culture inviolate. The "Virginia Way" had to give way in a diverse country committed to personal autonomy, free expression, and physical mobility.

Today, without race as a factor, *Loving* can serve as a precedent for invalidating destructive non-recognition rules for same-sex marriages. Race dominates in *Loving twice*, first in leading the Court to impose a national solution, and, second, in obscuring its precedential meaning for federalism.

### B. Institutional Competence Arguments: Allocating Responsibility

In a recent symposium, Dean Erwin Chemerinsky perceived an "inherently limited" ability of state courts to protect constitutional rights.<sup>291</sup> On the basis of institutional competency, he concluded "[i]n every area where I would like to see state constitutional rights develop, I would much prefer to see it accomplished under the United States Constitution, if possible."<sup>292</sup> This argument for institutional

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287 *Allgeyer v. Louisiana*, 165 U.S. 578, 591 (1897) (upholding freedom of contract between citizens in one state and a company in another state).

288 *See Loving*, 388 U.S. at 12 ("Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.").

289 Appellee's Brief, *supra* note 279.

290 Solimine, *supra* note 218, at 125 n.65 ("embarrassingly" concluding that *Loving* was wrongfully decided based on the facts of the case).

291 Erwin Chemerinsky, *Two Cheers for State Constitutional Law*, 62 STAN. L. REV. 1695, 1697 (2010).

292 *Id.* at 1697.

competency differs from the legal process arguments that once were prominent, which counseled for caution by the Supreme Court on the basis of prudential judgments about the capacity of the Court to alter political facts on the ground, particularly those relating to strong cultural norms.<sup>293</sup> The fear was that judicial legitimacy could be a fragile commodity and should not be subjected to risks that would be created by an overly robust role in advancing principles of law. Such arguments were heavily criticized, on the grounds that the primary calling of the federal judiciary is to uphold principles and leave concerns about backlash to the political branches.<sup>294</sup> For numerous reasons, the institutional competency claim about limiting the reach of federal judicial power faded over time, to be replaced by ideas about forms of restraint that could be seen as derived from principle.<sup>295</sup>

In the context in which this Article advances a claim about institutional competency, the claim is not so much about conserving legitimacy but rather about applying principle in the correct domain for federal judicial intervention. The recent federal court rejections of Section 3 of DOMA are principled decisions that attack the infringements DOMA imposes on federalism and on the core concept of equality.<sup>296</sup> The Ninth Circuit's effort in *Perry v. Brown* to avoid reaching a broad conclusion that disallows limitations on marriage eligibility in all states, though a product of a pragmatic concern to preserve the decision from unfavorable review, also accords with the judicial

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293 Laura Kalman, *THE STRANGE CAREER OF LEGAL LIBERALISM* 13–59 (1996) (providing historical examples of instances in which the Court refused to make legal decisions based on cultural trends).

294 *Id.* (explaining that in this view pragmatic calculations about how to manage change weaken the judiciary); *Equality Federalism*, by contrast with the gradualism critiqued in connection with the Court's cautious approach in *Brown v. Board of Education*, 347 U.S. 483 (1954), argues that the Court has the ability to require our federalist structure afford full respect to overlapping constitutional norms. Equality norms have rendered the marriage-voiding rules inapt, and thus unconstitutional, for a form of marriage that has established roots in a growing number of state marriage laws.

295 G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* xvi (2007) (describing the emergence of originalism as a claimed basis for restraint).

296 *Windsor v. United States*, No. 12-2335-cv-(L) (2d Cir. Oct. 18, 2012); *Massachusetts v. U.S. Dep't Health & Human Servs.*, 682 F.3d 1, 10–11 (1st Cir. 2012); *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012); *Golinski v. U.S. Office of Pers. Mgmt.*, 781 F. Supp. 2d 967 (N.D. Cal. 2011); *Pedersen v. U.S. Office Pers. Mgmt. v. Bipartisan Legal Advisory Grp. of the U.S. H.R.*, No. 3:10-cv-1750 (VLB), 2012 WL 3113883 (D. Conn. 2012).

norm of reaching only constitutional issues that are presented and must be decided.<sup>297</sup>

The domain of marriage law is indeed assigned to the states. For that reason, Congress, even at the height of its first reaction to the possibility of state authorized same-sex marriage, acknowledged the limits on its power over state marriage law (even while encroaching upon the domain of state law).<sup>298</sup> Insofar as marriage law is a creature of state legislation and common law traditions,<sup>299</sup> the Court, as does Congress, has reason to minimize forms of scrutiny that require it to supervise marriage law.

The equality norm, applied across the board to state marriage law as a constitutional norm, would have the potential to highlight the absence of a Court jurisprudence on marriage. Issues arise in connection with un-gendering marriage that are surely better handled by states, free of the logic-chopping of the Court that tends to overlook the entity meanings of marriage.<sup>300</sup> However much the Justices may express respect for the deep meanings that marriage carries for all citizens, the use of constitutional logic, based on individual rights rather than entity meanings, is unlikely to be a model of reasoning about marriage that carries the full set of moral meanings embraced within the culture. Such reasoning can best arise from the states, applying their local processes for resolving sensitive issues about an institution over which opinion remains divided. We know, as of this date, that seven jurisdictions have used those local processes to extend marriage rights, to shape the local format in ways sensitive to local concerns,<sup>301</sup> and to supervise the local clerks' offices. Statutes are enacted that follow the guidance of the state courts or of the weight

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297 The "avoidance canon" is explicitly about reading Congressional statutes, when possible, to avoid constitutional issues. But the larger idea is to minimize Court intrusions on decision making by other bodies. For a review of the literature and an argument that a doctrine meant to serve separation of powers may undermine the authority of the Executive Branch against Congress, see William K. Kelley, *Avoiding Constitutional Issues as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 880–81 (2001) (explaining that the federal courts can avoid a deep incursion on state law making by making a more modest constitutional correction of outdated understandings).

298 See *supra* note 104.

299 For an example of an argument favoring equality principles, and thus the application of "heteronormative" rules to same-sex marriage, see Peter Nicolas, *The Lavender Letter: Applying the Law of Adultery to Same-Sex Couples and Same-Sex Conduct*, 63 FLA. L. REV. 97, 99 (2011). See also Peter Nicolas, *Common Law Same-Sex Marriage*, 43 CONN. L. REV. 931 (2011) (asserting that libertarian principles support the right of same-sex couples to have equal access to common law marriage).

300 Mae Kuykendall, *Marriage Jurisprudence* (manuscript available from author).

301 See, e.g., N.Y. DOM. REL. LAW § 10-b (2011) (detailing the religious exception in marriage bill).

of opinion in the state about terminology and the like.<sup>302</sup> However contentious these processes have been, they arise from a set of state bodies that have greater connection to ground-level application of the rules.

In the same symposium in which Dean Chemerinsky reached his favorable view of the federal litigation attacking the constitutionality of Proposition 8, Neal Devins explores the capacity of state courts to assess backlash consequences of their decisions, both within-state and nationwide. Devins talks about the ways that “path-breaking state courts”<sup>303</sup> may learn from one another in gauging backlash consequences and “thereby engage in a national conversation about constitutional rights.”<sup>304</sup> The nature of the conversation has to do with the risks of pressing hard for the equality norm in marriage “when a democracy is in moral flux . . . .”<sup>305</sup>

In focusing on courts,<sup>306</sup> Devins, like Chemerinsky, slights the potential of state legislatures using state sovereignty to effectuate the spread of access and equality norms. The emphasis is on the capacity of courts to assess the political environment in deciding how bold to be, and on the factors that judges consider, including elections, possible referenda reversing a holding through a constitutional amendment, and reputation. The analysis proposes to look at judges as political actors, thus positioning Justices as Representatives.<sup>307</sup>

Changing the emphasis to legislatures aligns Representatives with the work of Justices, and ameliorates the backlash against courts. By now, eleven jurisdictions have enacted same-sex marriage through legislation, with ten proceeding without court pressure.<sup>308</sup> One, Ver-

302 Press Release, Iowa Att’y Gen. Tom Miller, County Recorders must Comply with Supreme Court’s Varnum Decision (Apr. 21, 2009), [http://www.state.ia.us/government/ag/latest\\_news/releases/apr\\_2009/Marrige\\_Stmnt.html](http://www.state.ia.us/government/ag/latest_news/releases/apr_2009/Marrige_Stmnt.html).

303 Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1675 (2010).

304 *Id.*

305 *Id.* at 1683 (quoting a Vermont case by way of Cass Sunstein).

306 *Id.* at 1632 (“State supreme court justices have jurisdiction over a single state, not the entire nation.”).

307 *Id.* at 1664 (citing Melinda Gann Hall, *Justices as Representatives: Elections and Judicial Politics in the American States*, 23 AM. POL. Q. 485, 488 (1995) (listing studies showing politicians fear voters)).

308 A.B. 43, 2007–08 Reg. Sess. (Cal. 2007) (vetoed); A.B. 849, 2005–06 Reg. Sess. (Cal. 2005) (vetoed); CONN. GEN. STAT. ANN. § 46b-20(4) (West 2011); D.C. CODE § 46-401(a) (West 2011); ME. REV. STAT. ANN. tit. 19-A, § 650-A (West Supp. 2009) (repealed by 2009 Maine Ballot Quest 1); H.B. 438, 430th Gen. Assemb. (Md. 2012) (enacted, Ref. Question 6 approved); N.H. REV. STAT. ANN. § 457:1-a (West 2011); N.J. STAT. ANN. § 37:1-31(a) (West 2011) (vetoed by Governor Chris Christie); VT. STAT. ANN. tit. 15, § 8 (West 2011); S.S.B. 6239, 62d Leg., Reg. Sess. (Wash. 2012) (enacted, Ref. 74 approved). The Connecticut

mont, did so more than a decade after the system absorbed the culture shock of the courts' mandating equal treatment for same-sex couples but allowing the "civil union" terminology in place of the word marriage.<sup>309</sup> Legislatures that have accumulated experience with the consequences of innovation in marriage law would be in the best position as institutions—better than state courts or federal courts—to assess the pragmatic possibilities for reforming marriage law to the benefit of marriage law generally but with special significance for gay couples. The needs of same-sex couples can provide the impetus for a broader reformation of statutory marriage procedure, bringing it from its roots in the late nineteenth century to modern day realities and supplying innovation powered by recognition of the role federalism has to play in softening the culture wars while spreading the norm of equality. Insofar as existing state DOMAs stymie legislatures, because the state DOMA purports to void out-of-state marriages, federal courts could re-energize state legislatures by invalidating such extensions of local voter preference into the sovereign power of states to create legal statuses. Today, the state constitutional DOMAs preventing recognition disable legislative deliberation. Were federal courts to end such blockage of federalist experimentation, both judges and legislatures could begin to reason about marriage as an entity, with the responsibility of shaping rules relevant to the needs of married couples resident in the state. The primary marriage law of the state would have broader scope to advance moral discourse about marriage,<sup>310</sup> and the secondary law dealing with existing marriages could give a new purchase on marriage reality.

Given its individual rights focus, the Supreme Court is on the horns of a dilemma. The only means by which the Court could vindicate an understanding of the marital unit by traditionalists, while also mandating same-sex marriage, is to dilute the individual rights approach that dominates its overall jurisprudence. Given its jurisprudence, and its remoteness from the writing of specific law to govern the marital estate, the Court, in effect, lacks institutional compe-

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legislation was pending when the Connecticut Supreme Court held that denial of marriage to same-sex couples was unconstitutional under Connecticut law. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 411–12 (Conn. 2008). The Connecticut legislature quickly passed the legislation. For an update on the status of gay marriage in the states, see Fetters, *supra* note 14.

309 *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999) (mandating equal treatment of same-sex couples by the Vermont Court's voluntary enactment of same-sex marriage in 2010).

310 See Carl E. Schneider, *Moral Discourse and the Transformation of American Family*, 83 MICH. L. REV. 1803 (1985).



tence to write constructively about an entity within its framework of individual rights jurisprudence. If it rejects the individual rights claims, it damages its own jurisprudential framework, but if it accepts them, it harms the cultural meaning associated for many with a critical social unit. Whatever resort the Court might reach within its methods and forms of expression is likely to be damaging to sensitive cultural and legal values.

It is thus possible to question the wisdom of the Court's taking an interpretive stance that imposes a solution favoring same-sex marriage nationally, even while one hopes the Court can avoid an emphatic rejection of the relevance of norms of fairness and respect for same-sex marriages and for the individual rights affected within the developing political evolution of marriage and family law.<sup>311</sup> *Equality Federalism* is the path.

## V. CONCLUSION

Contested visions of the legal status of same-sex marriage assume either total national treatment or the normal operation of conflict-of-law principles to produce legal variety. The constitutional system in which marriages are given state authorization and recognition, however, is one with multiple norms as expressions of personal autonomy, free expression, and state power in a federalist system. These norms infuse marriage ceremony and portability in every dimension of time, place, and conceptual location. The norms around which marriages gain legal status and cultural meaning are not in separate containers. Each state has some vision of marriage as an entity that supports the state's vision of its legal and family culture. Vermont believes deeply in the equality of citizens and in the humane, dignitary value of marriage, while Virginia believes that gendered marriage is the foundation of Virginia culture.<sup>312</sup> Broader constitutional values, derived from our constitutional structure and commitments, infuse the creation of marriages in both geographic locations. These norms support marriage as a form of expression and of the exercise of individual, identity-supporting rights.<sup>313</sup> They also support the capacity of

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<sup>311</sup> For this reason, many proponents of same-sex marriage hope for a resolution of the Prop 8 case short of adjudication by the Supreme Court.

<sup>312</sup> Virginia's preamble to its 2004 Affirmation of Marriage Act cites its obligation to defend marriage "as an institution essential to the common good." H.B. 751, Gen. Assemb., 2004 Sess. (Va. 2004), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?041+ful+HB751>.

<sup>313</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

each state to create legal status supportive of broader constitutional values to be respected within a federalist system.

This Article argues for recognizing the force of overlapping constitutional norms in the legal treatment of the portability of same-sex marriages. Separate visions fail to afford a merited stature to normative redundancy as a constitutional good. *Equality Federalism* takes that conceptual step: blending equality, state normative input, access to a fundamental state-provided affiliation status, federalism, and free expression.

The proposal for *Equality Federalism* utilizes the concept of technology-enabled distance marriage to reveal how artificial prevailing assumptions about geography as an all-encompassing factor in marriage law have become. E-marriage, even if it remains in hypothetical form, is a progressive concept in a broad sense: it challenges stale assumptions and practices that serve little purpose. Further, exploring the idea reinforces and deepens one's grasp on the whole set of constitutional values with which marriage law comports.

By contrast, a nationally mandated rewriting of marriage laws to include same-sex couples serves just one of the norms: equality. While advancing the constitutional commitment to equality, a national court mandate would put pressure on a neat demarcation of equality logic; to say that all couples must receive equal treatment is to embrace a theory of marriage as involving pairs, a theory that the Court lacks might struggle to explain as a well understood and accepted boundary to its logic of rights. Adopting a theory of marriage is unlike anything the Court has done before about marriage as an entity; rather, the Court has had the luxury of relying on unstated assumptions about the core meaning of marriage, without the need to rationalize what its limiting contours might be.<sup>314</sup> If state courts apply

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<sup>314</sup> In *Poe v. Ullman*, 367 U.S. 497, 539–53 (1961), Justice Harlan, dissenting, treats a claim that a ban on the use of contraceptives by a married couple is unconstitutional as “an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual’s personal life[,]” yet assumes that “homosexuality” is a categorically different phenomenon, which the state may ban. Writing before any suggestion that marriage might expand to include a new category of intimacy protected by the Court as a recognition of the protectable liberty interests that he extolled in his dissent in *Ullman*, Harlan was able to assume a stable category that could contain individual rights without challenging, but rather reinforcing, its social meaning as a union for the permitted use of “the sexual powers.” *Id.* at 546. Similarly, *Loving v. Virginia*, 388 U.S. 2 (1966) rested on the rights of individuals but did not challenge the received meaning of marriage; indeed, Virginia’s criminalizing of the marriage was a form of recognizing that the status was marriage. Anti-miscegenation laws did not have the quality of challenging the existence of the concept but of attempting to stop such marriages from being brought into existence

equality logic to the claims of same-sex couples, these courts nonetheless remain a part of the structure of law-making within the state, applying a species of common-law logic within the definitional parameters created by the legislatures of their state. As Devins notes, state courts make law for one state to which they have strong ties to local opinion; one may add to that, they do it in a context that weds them to a system of local law-making over a domain assigned to the states.<sup>315</sup> Their embrace of equality logic, using state constitutional law, is more easily cabined as a form of input into a design controlled by the legislature with input by citizens in referenda. It is readily observable that their holdings have initiated a state-based discourse about marriage, exercising persuasive effects over legislatures and precipitating public debate.<sup>316</sup> The individualistic logic of U.S. Supreme Court precedent on marriage,<sup>317</sup> while a natural fit for its overall jurisprudence in the area of rights, is an awkward fit for a continuing jurisprudence affecting marriage, and for democratic input into a cultural practice. The states, and federalist logic, have a strong basis to claim the preeminent role in modernizing marriage law to fit evolving understandings of family life.

In combination with the ending of Section 3 of DOMA,<sup>318</sup> *Equality Federalism* would afford appropriate dignity to the state-based enactments awarding marital status to same-sex couples, increase the ceremonial and practical value of their marriages to such couples, and allow for a gradual and less traumatic diffusion of equality norms in marriage. *Equality Federalism* provides a third path to local expressive control over state marriage law and state court supervision of the evolving meanings associated with marriage in a changing culture. It permits an allocation of roles among our federalist law-making bod-

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and those who entered them from bringing their marriages into states that wished to ban them. The Court could decide *Loving* without propounding a deep theory of marriage.

<sup>315</sup> Devins, *supra* note 303, at 1678–83.

<sup>316</sup> See *Gay Marriage and Homosexuality*, PEW FORUM ON RELIGION & PUBLIC LIFE, <http://www.pewforum.org/Topics/Issues/Gay-Marriage-and-Homosexuality/> (last visited Mar. 9, 2012). In the local democratic process, the process shows opinion swings, with reversals of steps by legislatures to allow gay marriage. Maine voters repealed same-sex-marriage legislation by referendum. *2009 Elections: Maine Voters Are Latest to Reject Gay Marriage*, WALL ST. J., Nov. 5, 2009, at A4.

<sup>317</sup> See *supra* text accompanying notes 277–79, for a discussion of the poor fit of Supreme Court individual rights logic for the construction of a critical institution with entity meanings. See also GLENDON, *supra* note 16, at 157 (suggesting the Supreme Court lacks a principled basis to limit its privacy jurisprudence and has resorted to “bald assertion” to limit it or expand it).

<sup>318</sup> As noted *supra*, Part 3 has been declared unconstitutional by more than one court. DOMA generally is the subject of a repeal bill in Congress. Respect for Marriage Act, H.R. 1116, S. 598, 112th Cong. (1st Sess. 2011).

ies, in which constitutional principles can be applied while the shaping of a critical institution remains primarily within the domain of the states.

When same-sex marriage first became an imagined possibility, there was anxiety about federalism's power to allow one state to veto the marriage rules of every other state. Even critics of the sweep of DOMA conceded that one state should not be able, as a host for marriage tourists, to veto the marriage policy of all other states.<sup>319</sup> Today, with the increasing spread of state-sanctioned same-sex marriage, this logic has lost force. Counting all states that have an authorization for same-sex marriage, either in effect or in abeyance, U.S. states containing roughly one-third (less without California) of the national population authorize same-sex marriage.<sup>320</sup>

One of the co-sponsors of DOMA has recognized the alteration in facts and has disavowed its fit with federalism and thus the fit of the voiding norms applied to same-sex marriage. Advocating the repeal of DOMA, he has written, "In effect, DOMA's language reflects one-way federalism: It protects only those states that don't want to accept a same-sex marriage granted by another state."<sup>321</sup>

The first reactions to same-sex marriage, reviewed in Section I, energized efforts to quarantine it within any context that might give it an expressive presence. Much of that first reaction has dissipated, even as visions of uniformity persist. The initial assumption that federalism was a means of blocking an unimaginable change has lost persuasive force. Yet the apparatus of denial, placing a statutory exclamation mark on geography as a barrier to marriage mobility, constructed in response to the first astonished glimpse of the future remains insufficiently contested. The genius of federalism lies in its fit with local initiative to advance local values and with the comity among the states that supports a common national life, respect for legal statuses widely granted by other states, and the diffusion of expressive meaning and forms of human connection across the national map. Today, the percentage of the population that lives in a state that licenses same-sex marriages, allowing for uncertainty in some

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319 See Kramer, *supra* note 92, at 1999 ("Hawaii should not be able to dictate marriage law to the rest of the nation, nor can it do so.").

320 See *Appendix C: State Population & Percent of U.S. Population*, <http://www.law.msu.edu/e-marriage/AppendixC.pdf> (last visited Nov. 27, 2012). These numbers are already increasing with the recent electoral successes authorizing same-sex marriage in Maine, Maryland, and Washington State. See Fetters, *supra* note 14.

321 Bob Barr, *No defending the Defense of Marriage Act*, L.A. TIMES (Jan. 5, 2009), <http://www.latimes.com/news/opinion/commentary/la-oe-barr5-2009jan05,0,1855836.story>.

states that are in legal transition, is approaching thirty-three percent. It is now part of our national culture, and is not an alien transplant.

Wyoming gives a glimpse of the future of *Equality Federalism*. It is one of the many states that restrict their marriage-authorizing law to opposite-sex couples. Yet the Senate of Wyoming voted on March 4, 2011, to reject House Bill 74, which would have denied recognition to same-sex marriage and civil unions contracted elsewhere. In the floor debate in a heavily Republican Senate, Senators made repeated and uncompromising reference to the equality norm of the Wyoming Constitution,<sup>322</sup> reflected in the state nickname, the Equality State.<sup>323</sup> Senators appealed both to the Wyoming and United States Constitutions. “This bill does nothing more than to strip away liberties that have been granted by other states,” said Representative Ruth Petroff.<sup>324</sup> “We go from being the Equality State to the Strip-Away-Liberty State.”<sup>325</sup>

The Wyoming debate and outcome demonstrate that equality and other constitutional norms, as well as traditions of neighborliness, support *Equality Federalism* as a solution to the marriage wars.

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<sup>322</sup> WYO. CONST. art. I, § 2.

<sup>323</sup> Aaron LeClair, *Anti-gay Marriage Bill Defeated in Senate*, LARAMIE BOOMERANG (Mar. 3, 2011), <http://www.laramieboomerang.com/articles/2011/03/03/news/doc4d6f23246ab30937837749.txt>.

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

