COMMENT

CHOICE OF LAW IN SAME-SEX MARRIAGE

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INTRODUCTION

Marriage is all around us. While in many respects, marriage is an intimate relationship between individuals, it is also a public institution that allows the surrounding governing body to regulate reproduction, families, and communities within its borders.[1] The individuals within and affected by

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1 Marital status informs adoption, custody, medical decisionmaking, taxation, inheritance, survivors' benefits, health insurance, Social Security, and even criminal sanctions, to name a few. *See* United States v. Windsor, 570 U.S. 744, 772-74 (2013); Obergefell v. Hodges, 576 U.S. 644, 669-70 (2015). *See generally* Maggie Gallagher, *What Is Marriage For? The Public Purposes of Marriage Law*, 62

marriage must therefore navigate a web of laws, norms, responsibilities, and rituals that may collectively define the ethos of the state exercising authority over them.[2]

States have therefore long claimed a strong interest in regulating the relationships within their borders.[3] But states' authority over marriage within their borders has diminished.[4] The federal regulation of same-sex marriage[5] undeniably constitutes a significant feature of this diminishment.

The emergence of same-sex marriage as a legal possibility in the late 1990s roused concerns from the public, legislators, and academics that states would lose autonomy over which pairings of its citizens could validly be married. Namely, states that would not recognize same-sex marriage performed within their own borders wondered whether they would be compelled to recognize same-sex marriages validly performed out of state.[6]

This concern raises the paradigmatic choice-of-law question: when the laws of two states exercising regulatory authority conflict, which state's law should govern?[7] Despite existing doctrine designed to resolve this question

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LA. L. REV. 773 (2002) (surveying perspectives about marriage as both private and public relationships).

2 *See generally* Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901 (2000) (arguing that marriage can be described as a bundle of social norms).

3 *See* Brian H. Bix, *State of the Union: The States' Interest in the Marital Status of Their Citizens*, 55 U. MIA. L. REV. 1, 6-14 (2000) (identifying states' direct and indirect interests in marriage); Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1821 (1995) ("From the earliest days of the Republic . . . family law has unquestionably belonged to the states."); *cf.* Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1297 (1998) ("The family serves as the quintessential symbol of localism."); United States v. Lopez, 514 U.S. 549, 564-65 (1995) (holding several times that the Commerce Clause power does not reach family law).

4 *See* Hasday, *supra* note 3, at 1319-70 (tracing the post-Reconstruction era history of the federal assertion of authority over family law).

5 Throughout this Comment, I refer only to "same-sex" marriage, "gay rights," and "gay and lesbian" people. Because the relevant movements—both social and legal—essentially considered only cisgender gay and lesbian relationships, use of these terms is meant to be specific to the scope of the debate rather than exclusive of members of the LGBTQ+ community often overlooked in legal paradigms of family. *See* Katie Eyer, *Transgender Constitutional Law*, 171 U. PA. L. REV. 1405, 1412–13 (2023) (pointing out that nonbinary, genderfluid, and other gender-nonconforming individuals are often excluded from the ambitions of sexuality-related civil-rights impact litigation).

6 *See infra* Section I.A.

7 Paradigmatic, perhaps, but also simplified. *See* Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 280 (1990) (describing the choice-of-law question in multistate cases as a two-step process, first asking whether there is in fact a conflict of laws and, if so, then resolving this "true conflict") [hereinafter Kramer, *Rethinking Choice of Law*]; KERMIT ROOSEVELT III, CONFLICT OF LAWS 1-2 (3d ed. 2022) (breaking down the choice-of-law analysis into two steps: determining scope and then, if necessary, priority). The answer to this question with respect to same-sex marriage recognition has been visited repeatedly. *See generally, e.g.*, Note, *In Sickness and in Health, in Hawaii and Where Else?: Conflict of Laws and Recognition of Same-Sex Marriage*, 109 HARV. L. REV. 2038 (1996); Joseph W. Hovermill, *A Conflict of Laws and Morals: The Choice of Law Implications of Hawaii's Recognition of Same-Sex Marriages*, 53 MD. L. REV. 450 (1994); Brian H. Bix, *State Interests in Marriage, Interstate Recognition, and Choice of Law*, 38 CREIGHTON L. REV. 337 (2005); Barbara J.

between the states themselves,[8] the polarized moral imperatives, political positions, and social movements around same-sex marriage prompted an attempt at the federal level to answer the question through legislation.

Such legislation first came in 1996 in the form of the Defense of Marriage Act (DOMA),[9] which in part permitted states to refuse to recognize same-sex marriages validly performed out of state.

Then, after commentators debated at length questions about how same-sex marriage fit, did not fit, or should fit into choice-of-law doctrine,[10] the Supreme Court handed down *Lawrence v. Texas*,[11] *United States v. Windsor*,[12] and *Obergefell v. Hodges*.[13] In doing so, the Court circumscribed choice of law by finding that states must permit same-sex couples in their respective jurisdictions to marry on substantive-due-process and equal-protection grounds. It isn't surprising that gay-rights advocates would fight for recognition of fundamental rights and an end to discrimination rather than lobby Congress to make certain favorable choice-of-law rules; they were, after all, in part fighting a moral battle in addition to a legal one.[14] But while this result was a victory for broader social change, the choice-of-law queries went unanswered.

In 2022, new legislation, the Respect for Marriage Act (RFMA),[15] formally repealed DOMA and prohibited states from refusing to recognize same-sex marriages validly performed out of state. Both were exercises of Congress's authority under the Effects Clause, and both purported to settle the choice-of-law issue.[16]

Cox, *Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033; Scott Fruehwald, *Choice of Law and Same-Sex Marriage*, 51 FLA. L. REV. 799 (1999); Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921 (1998); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997) [hereinafter Kramer, *Same-Sex Marriage*]; Linda Silberman, *Same-Sex Marriage: Refining the Conflict of Laws Analysis*, 153 U. PA. L. REV. 2195 (2005).

8 *See infra* Section II.B.

9 Pub. L. 104-199, 110 Stat. 2419 (1996) (repealed 2022).

10 *See infra* Section I.A.

11 539 U.S. 558 (2003).

12 570 U.S. 744 (2013).

13 576 U.S. 644 (2015).

14 *See* Charles J. Butler, Note, *Defense of Marriage Act: Congress's Use of Narrative in the Debate Over Same-Sex Marriage*, 73 N.Y.U. L. REV. 841, 872-78 (1998) (arguing that a prominent narrative opponents of same-sex marriage employed was that gay and lesbian people and relationships were inherently immoral and perverse).

15 Pub. L. 117-228, 136 Stat. 2305 (2022).

16 *See* H.R. REP. NO. 104-664, at 27 (1996) ("Section 2 [of DOMA] does mean that the Full Faith and Credit Clause will play no role in [a state's] choice of law determination, thereby improving the ability of various States to resist recognizing same-sex 'marriages' celebrated elsewhere. This, the Effects Clause plainly authorizes Congress to do."); Respect for Marriage Act, Pub. L. 117-228, § 4, 136 Stat. 2305 (2022) (assuring "full faith and credit to any public act, record,

Today, RFMA is technically the operating law. But given *Lawrence*, *Windsor*, and *Obergefell*, why consider choice of law at all? "Choice of law arbitrates values."[17] A court's decision as to whose law should govern is ultimately a judgment on which state's values—and which party's rights—are given priority.[18] While choice-of-law analyses are not being conducted in the courts today with respect to same-sex marriage recognition after *Windsor* and *Obergefell*, the newness of RFMA as federal social policy and as contributing to the choice-of-law regime with respect to marriage makes these inquiries particularly apposite.[19] More broadly, engaging with the underlying choice-of-law system allows us to investigate which states' values are given priority, how choice-of-law values inform that prioritization, the relationship between state interests and federal authority, and how or whether existing choice-of-law regimes can accommodate the desire to achieve social change on a national scale.

So, this Comment attempts such an investigation.[20] At a high level, this Comment considers the effects and implications of federal legislation over an

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or judicial proceeding of any other State pertaining to a marriage between 2 individuals, on the basis of the sex . . . of those individuals").

17 *See* Fruehwald, *supra* note 7, at 799; *see also* Koppelman, *supra* note 7, at 926-27.

18 Choice-of-law rules determine parties' rights. *See generally* Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448 (1999) (describing choice-of-law regimes as being relative to rights). *Cf.* Kramer, *Rethinking Choice of Law*, *supra* note 7, at 278-79 (contemplating a rights-based approach to choice of law); Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1277-79 (1989) (same); Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191, 1192-94 (1987) (same).

19 Those who fear the reversal of *Obergefell* following *Dobbs v. Jackson Women's Health*, 142 S. Ct. 2228 (2022), may also find it urgent to understand the underlying rules. *See* James Esseks, *Here's What You Need to Know About the Respect for Marriage Act*, ACLU (July 21, 2022), https://www.aclu.org/news/lgbtq-rights/what-you-need-to-know-about-the-respect-for-marriage-act [https://perma.cc/5UM4-7UNQ] (explaining that the Congress responded to *Dobbs* by passing the RFMA to ensure interstate recognition of same-sex marriages).

20 A note on what this Comment does *not* attempt to do: this Comment excludes major discussion about the incidents of marriage, the differences between migratory and evasive marriages, other matters of family law, and substantive due process and equal protection. These topics are, without a doubt, inevitable contingencies of the topic of marriage—and they do appear somewhat as relevant—but for purposes of narrowing in on the tension between local and national policy, they are outside the scope of this Comment. For the same reasons, this Comment also largely excludes analysis of states' "mini-DOMA" statutes. Finally, this Comment does not question the dignity, value, or desirability of same-sex and queer couples and marital unions. Nor does it ask whether same-sex or queer couples should be allowed to live in certain jurisdictions at all. In excavating the choice-of-law systems that have inhered in the same-sex marriage landscape over the years, I ask the "proper question," as advanced by Professor Wolff: "[G]iven that gay couples from other states may relocate and move freely within the jurisdiction, does it make sense to give no effect to their validly celebrated marriages, with all the attendant disruption to property interests, custodial arrangements, and long-term planning that such a refusal will entail? Or does it make more sense to give effect to those relationships in ways that preserve reasonable expectations and avoid hardship, even when doing so diverges from the choices that the local jurisdiction has made about the options available

institution traditionally regulated and resolved by the states. But more narrowly, this Comment asks how both DOMA and RFMA impacted then-existing choice-of-law regimes with respect to marriage: How did DOMA and RFMA fit into, disrupt, or affirm these existing paradigms? What are the implications of these assertions of federal authority for state autonomy? How do these two laws compare in advancing desirable choice-of-law values? And what role do they play in the battlegrounds of this politically and socially consequential subject?

Part I recounts the history leading up to DOMA and then the change in tides at the turn of the millennium through *Lawrence*, *Windsor*, *Obergefell*, and RFMA. The abbreviated account is set out for a few reasons. First, it provides context for how the choice-of-law debate around same-sex marriage—especially regarding Full Faith and Credit—even began. Second, it illuminates the operating same-sex marriage choice-of-law regime at a given time. Finally, this history lays out the stakes: caught between the political infighting and doctrinal debates are the rights that will govern the very real lives of same-sex couples.

Part II asks, What did DOMA and RFMA actually do as choice-of-law rules and in what ways did or didn't they settle the choice-of-law issue? This Part starts by considering what a choice-of-law system should ideally do. What are the desirable qualities of a rights-allocating scheme, especially in the context of marriage and domestic relations? Then, it examines the traditional choice-of-law rules for marriage as a "control" against which DOMA and RFMA can be compared as variables. It will revisit the Full Faith and Credit debate from which DOMA emerged, the force of the domicile and place of celebration under each statute, and the statutes' impacts on federalism. The goal of this Part is to determine which regime produced the more desirable choice of law and, in doing so, peel away the constitutional holdings that have obfuscated DOMA and especially RFMA as choice-of-law regimes.

Finally, Part III contemplates the larger political and social context in which choice of law operates. Having compared the desirability of DOMA and RFMA as choice-of-law regimes, the Part attempts to reconcile them with movements for social change on a national level, the values of which do not always align with those of choice of law.

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to its own domiciliaries?" Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. PA. L. REV. 2215, 2249 (2005).

I. SAME-SEX MARRIAGE: LITIGATION AND LEGISLATION

A. *From* Baehr *to DOMA*

DOMA was passed in a time of panic. When the Supreme Court of Hawaii in 1993 held in *Baehr v. Lewin* that a prohibition on same-sex marriage was unconstitutional absent a compelling reason,[21] the entire country appeared to mobilize.[22] On one side, many gay-rights advocates celebrated the outcome, finding the decisions revolutionary in their potential for the future of gay marriage.[23]

On the other side, however, *Baehr* signified something quite different. In Hawaii, a bicameral disdain toward the decision was clear when the Hawaiian House Judiciary Committee emphasized that the purpose of marriage was "to regulate and encourage the civil marriage of those couples who appear, by virtue of their sex, to present the biological possibility of producing offspring from their union[24] and the Hawaiian Senate Judiciary Committee condemned the Hawaii Supreme Court for impermissibly engaging in legislative policymaking.[25]

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21 *See* Baehr v. Lewin, 852 P.2d 44, 68 (Haw. 1993) (remanding the compelling-reason question); *see also* Baehr v. Miike, CIV No. 91-1394, 1996 WL 694235, at *21-22 (Haw. Cir. Ct. Dec. 3, 1996), *aff'd*, 950 P.2d 1234 (Haw. 1997) (finding on remand that there was no such compelling reason).

22 Press coverage of the *Baehr* decisions went far beyond the archipelago. *See, e.g.*, Joan Biskupic, *Ruling by Hawaii's Supreme Court Opens the Way to Gay Marriages*, WASH. POST (May 6, 1993, 8:00 PM), https://www.washingtonpost.com/archive/politics/1993/05/07/ruling-by-hawaiis-supreme-court-opens-the-way-to-gay-marriages/93408809-3d3f-48bd-926a-c49f8df5ad93/ [https://perma.cc/EU89-66FK]; Carey Goldberg, *Hawaii Judge Ends Gay-Marriage Ban*, N.Y. TIMES (Dec. 4, 1996), https://www.nytimes.com/1996/12/04/us/hawaii-judge-ends-gay-marriage-ban.html [https://perma.cc/BSU5-E9KE]; Bettina Boxall, *Hawaii Court Revives Suit on Gay Marriages*, L.A. TIMES (May 7, 1993, 12:00 AM), https://www.latimes.com/archives/la-xpm-1993-05-07-mn-32389-story.html [https://perma.cc/BR2A-WZD7]; *For Better or for Worse*, NEWSWEEK (May 23, 1993, 8:00 PM), https://www.newsweek.com/better-or-worse-193408 [https://perma.cc/7BWR-HXWB].

23 *See* JASON PIERCESON, COURTS, LIBERALISM, AND RIGHTS: GAY LAW AND POLITICS IN THE UNITED STATES AND CANADA 112 (2005) (describing the positive, albeit surprised, response to *Baehr* from gay and lesbian advocates).

24 *Id.*

25 *Id.* at 112-13. Similar sentiments were expressed about the Hawaii Supreme Court on the mainland. *See, e.g.*, Charles Krauthammer, *Election-Year Diversion?*, WASH. POST. (May 30, 1996, 8:00 PM), https://www.washingtonpost.com/archive/opinions/1996/05/31/election-year-diversion/5e67b4c5-0617-4e1b-adb4-5d3a81fecf90/ [https://perma.cc/4WNE-3YSV] ("[Same-sex marriage] is about to be enacted into law by three willful unelected judges . . . . With high courts creating rights and throwing out laws on the basis of judicial whim and popular mood, it seems perfectly reasonable [for Congress to pass DOMA]."); Eric Schmitt, *Senators Reject Both Job-Bias Ban and Gay Marriage*, N.Y. TIMES (Sept. 11, 1996), https://www.nytimes.com/1996/09/11/us/senators-reject-both-job-bias-ban-and-gay-marriage.html [https://perma.cc/KT4X-CSQL] (quoting then-Republican Senate Majority Leader Trent Lott, who argued that "[DOMA] is a pre-emptive measure to make sure that a handful of judges, in a single state, cannot impose a radical social agenda upon the entire nation"); Don Feder, *Rule by*

But the Hawaii state-court judgment seemed even more consequential beyond the archipelago. On the mainland, anxiety about the possibility of nationwide recognition of same-sex marriage that *Baehr* seemed to threaten brewed among opponents of same-sex marriage. In particular, opponents were concerned that the Full Faith and Credit Clause[26] would pose a constitutional bar against states' refusals to recognize same-sex marriages and by extension impinge on those states' public policies.[27] If Full Faith and Credit did indeed command recognition of same-sex marriages performed and made valid in other states,[28] they worried, what were the implications of states losing their authority to regulate marriage, a prerogative left traditionally to the states? Would states be obligated to treat same-sex marriages the same way they would heterosexual couples, regardless of their own policies on marriage? That is, as Linda Silberman asked, "[Did] Hawaii's imprimatur on same-sex marriage effectively impose a national policy of recognition of same-sex marriages?"[29]

Refusing to answer in the affirmative, states began passing legislation.[30] Though the language would differ, the general principles these marriage-

Judges' Whim Is Not Democracy, BOS. HERALD, Dec. 11, 1996, at 35 (accusing the Hawaii Supreme Court of failing to recognize Hawaii's "interest in preserving civilization").

26 *See* U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.").

27 *See* David W. Dunlap, *Fearing a Toehold for Gay Marriages, Conservatives Rush to Bar the Door*, N.Y. TIMES, Mar. 6, 1996, at A13; *see also* sources cited *infra* note 28.

28 And many commentators have argued that it did or, at least, should. *See, e.g.*, Deborah M. Henson, *Will Same-Sex Marriages Be Recognized in Sister States?: Full Faith and Credit and Due Process Limitations on States' Choice of Law Regarding the Status and Incidents of Homosexual Marriages Following Hawaii's* Baehr v. Lewin, 32 U. LOUISVILLE J. FAM. L. 551, 589 (1994) (advocating for an understanding of the Full Faith and Credit Clause that would require states to recognize same-sex marriages entered into in other states where such marriages are valid); Mark Strasser, Baker *and Some Recipes for Disaster: On DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence*, 64 BROOK. L. REV. 307, 308 (1998) ("[T]he Full Faith and Credit and Due Process Clauses must be understood to: (1) preclude the passage of DOMA [and] (2) prevent states from refusing to recognize marriages valid in the states of celebration and domicile at the time of the marriage . . . ."); *cf.* Habib A. Balian, Note, *'Til Death Do Us Part: Granting Full Faith and Credit to Marital Status*, 68 S. CAL. L. REV. 397, 401 (1995) (proposing that the Full Faith and Credit Clause "may require each state to recognize the marital decrees of other states"). Many others have emphatically disagreed. *See infra* note 129–131.

29 Linda J. Silberman, *Can the Island of Hawaii Bind the World? A Comment on Same-Sex Marriage and Federalism Values*, 16 QLR 191, 192 (1996); *see also* William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1431 (1993) (pointing out the question of the scope of spousal benefits as an important issue collateral to same-sex marriage).

30 *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-101 (1996) ("Marriage between persons of the same sex is void and prohibited."); DEL. CODE ANN. tit. 13, § 101(a) (1996) (prohibiting marriages between persons of the same gender); IDAHO CODE § 32-209 (1996) (declaring same-sex marriages void as a matter of public policy); 750 ILL. COMP. STAT. ANN. 5/213.1 (West 1996) (declaring

recognition statutes[31] sought to realize were widely shared. By 1998, all thirty marriage-recognition statutes passed post-*Baehr* clarified that marriages validly performed in-state could only be between a man and a woman, some referring explicitly to "only a man and a woman"[32] and some opting to also expressly prohibit marriage between persons of the same sex.[33] Still others made sure to do both.[34] These "mini-DOMA" statutes also spoke to the states' policies regarding recognition of *out-of-state* marriages, with a majority explicitly refusing to recognize out-of-state same-sex marriages.[35] Statutes that were particularly thorough also spelled out a refusal to recognize any incidents of same-sex marriages performed validly in other states.[36] Notably, at least fifteen of the thirty statutes passed by 1998 used the "magic words '*public policy*.'"[37]

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marriages between persons of the same sex as contrary to public policy); MO. REV. STAT. § 451.022 (2001) (same); S.C. CODE ANN. § 20-1-15 (1996) (declaring same-sex marriages void *ab initio* and contrary to public policy); S.D. CODIFIED LAWS § 25-1-1 (1996) (defining marriage as "between a man and a woman"); UTAH CODE ANN. § 30-1-4.1 (West 2004) (establishing as the policy of the state "to recognize as marriage only the legal union of a man and a woman"); VA. CODE. ANN. § 20-45.2 (1997) (prohibiting recognition in Virginia of marriages between persons of the same sex). Bills that successfully became law tended to pass by large margins. *See* David Orgon Coolidge & William C. Duncan, *Definition or Discrimination?: State Marriage Recognition Statutes in the "Same-Sex Marriage" Debate*, 32 CREIGHTON L. REV. 3, 7 & n.31, 8 & n.36, 9 & n.41 (1998) (finding that the state marriage bills that became law in 1996 and 1997 passed by a margin of least 70% in both chambers).

31 These have also been referred to as "anti-recognition statutes," "anti-gay initiatives," or "anti-marriage laws." Coolidge & Duncan, *supra* note 30, at 14.

32 Coolidge & Duncan, *supra* note 30, at 11; *see, e.g.*, S.D. CODIFIED LAWS § 25-1-1 (1998) ("Marriage is a personal relation, between a man and a woman . . . ."), *held unconstitutional by* Rosenbrahn v. Daugaard, 61 F. Supp. 3d 862 (D.S.D. 2015), *aff'd*, 799 F.3d 918 (8th Cir. 2015).

33 Coolidge & Duncan, *supra* note 30, at 11; *see, e.g.*, IDAHO CODE § 32-209 (1996) ("All marriages contracted without this state . . . are valid in this state, unless they violate the public policy of this state. Marriages that violate the public policy of this state include . . . same-sex marriages . . . ."), *held unconstitutional by* Latta v. Otter, 771 F.3d 456 (9th Cir. 2014).

34 Coolidge & Duncan, *supra* note 30, at 11; *see, e.g.*, MO. REV. STAT. § 451.022(1), (4) (1996) ("It is the public policy of this state to recognize marriage only between a man and a woman. . . . A marriage between persons of the same sex will not be recognized for any purpose in this state even when valid where contracted."), *held unconstitutional by* Lawson v. Kelly, 58 F. Supp. 3d 923 (W.D. Mo. 2014).

35 Coolidge & Duncan, *supra* note 30, at 12; *see, e.g.*, ALASKA STAT. § 25.05.013 (1996) ("A marriage entered into by persons of the same sex . . . that is recognized by another state or foreign jurisdiction is void in this state . . . ."), *held unconstitutional by* Hamby v. Parnell, 56 F. Supp. 3d 1056 (D. Alaska 2014).

36 Coolidge & Duncan, *supra* note 30, at 12; *see, e.g.*, MINN. STAT. ANN. § 517.03(4)(b) (West 1998) ("A marriage entered into by persons of the same sex . . . that is recognized by another state or foreign jurisdiction is void in this state and contractual rights granted by virtue of the marriage or its termination are unenforceable in this state.") (current version at MINN. STAT. ANN. § 517.03 (West 2020)).

37 Coolidge & Duncan, *supra* note 30, at 12; *see, e.g.*, TENN. CODE ANN. § 36-3-113(c) (1996) ("Any policy, law or judicial interpretation that purports to define marriage as anything other than the historical institution and legal contract between one (1) man and one (1) woman is contrary to

Baehr struck a political nerve at the federal level as well. The U.S. House of Representatives was forthcoming about the intention behind its proposal of DOMA as well as the bill's conception as a direct response to *Baehr*.[38] It had captured all of the concerns advanced by same-sex marriage opponents, promising to fulfill the goals of (1) "defend[ing] the institution of traditional heterosexual marriage" and (2) "protect[ing] the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses."[39]

Within three years of *Baehr*, Congress passed the Defense of Marriage Act, both limiting federal recognition of marriage to that between a man and a woman and permitting states to refuse to recognize same-sex marriages that were legally granted under the laws of other states.[40] Supporters of the bill expressed both nonchalance about the policies the bill would promote[41] and urgency as to its necessity in keeping courts and litigation in check.[42]

B. *From* Windsor *to RFMA*

As the millennium turned, the same-sex marriage war continued in the courts and in the legislatures. Despite an inclination in the state legislatures

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the public policy of Tennessee."), *held unconstitutional by* Obergefell v. Hodges, 576 U.S. 644 (2015). For an expansion on the "public policy" invocation, see *infra* Section II.B.

38 *See* H.R. REP. NO. 104-664, at 2 (1996) ("H.R. 3396 is a response to a very particular development in the State of Hawaii. . . . The prospect of permitting homosexual couples to 'marry' in Hawaii threatens to have very real consequences both on federal law and on the laws (especially the marriage laws) of the various States."); *see also id.* at 2-3 ("[I]t is critical to understand the nature of the orchestrated legal assault being waged against traditional heterosexual marriage by gay rights groups and their lawyers.").

39 *Id.* at 2. Looming large above the same-sex marriage debate were the larger post-Stonewall activist movement and the AIDS epidemic. Although Stonewall marked a pivotal moment of mobilization for gay-rights activism, AIDS and the associated stigma that emerged in the early 80s proved a formidable challenge. It would be naïve to deny that the "AIDS panic" was not in the public consciousness during the same-sex marriage debate. *See* Janet Holland, Caroline Ramazanoglu & Sue Scott, *AIDS: From Panic Stations to Power Relations Sociological Perspectives and Problems*, 24 SOCIO. 499, 503 (1990) (describing public responses to the threat of AIDS as a "moral panic" as entailing not only a fear of AIDS itself but also a fear of a society so perverse that it could produce AIDS); *see also* Bowers v. Hardwick, 478 U.S. 186, 208 (1986) (Blackmun, J., dissenting) (describing Georgia's justification for its anti-sodomy law as including a concern about sodomy "spreading communicable diseases"), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

40 *See* Defense of Marriage Act, Pub. L. No. 104-119, 110 Stat. 2419 (1996), *invalidated by* United States v. Windsor, 570 U.S. 744 (2013).

41 *See* 142 CONG. REC. S4869 (daily ed. May 8, 1996) (statement of Sen. Nickles) ("This bill says that marriage is the legal union between one man and one woman as husband and wife, and spouse is a husband or wife of the opposite sex. There is nothing earth-shattering there.").

42 *See id.* (highlighting the "challenge from courts, lawsuits and an erosion of values" as threats to the status quo).

to narrow marriage validity, state *courts* in a small number of states began to broaden it. In 1999, the Vermont Supreme Court held that excluding same-sex couples from the incidents of marriage laws in Vermont violated the state's constitution and compelled the state legislature to address this wrong by either legalizing same-sex marriage or allowing domestic partnerships.[43] From 2000 to 2009, the state supreme courts of Massachusetts, California, Connecticut, and Iowa found that their state constitutions required same-sex couples the opportunity to marry.[44]

Gay-rights issues also reached the U.S. Supreme Court. In 2003, Justice Kennedy held that anti-sodomy laws infringed on individuals' due-process (and perhaps equal-protection) rights[45] in *Lawrence v. Texas*.[46] Meanwhile, as same-sex marriage opponents in Congress repeatedly sought to resuscitate a Federal Marriage Amendment to the Constitution,[47] same-sex marriage supporters introduced the Respect for Marriage Act for the first time in 2009 with ambitions to repeal DOMA.[48]

All this set the stage for the Supreme Court to consider the constitutionality of section 3 of DOMA in *United States v. Windsor*.[49] Section 3 limited, for the purposes of federal law, the meaning of "marriage" to "only a legal union between one man and one woman as husband and wife" and of

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43 *See* Baker v. Vermont, 744 A.2d 864, 867 (Vt. 1999).

44 *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003); *In re* Marriage Cases, 183 P.3d 384, 400 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I § 7.5 (2008), *invalidated by* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 927-28 (N.D. Cal. 2010); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 412 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862, 906-07 (Iowa 2009).

45 *See* Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 52 ("*Lawrence* was rooted in the Due Process Clause, not the Equal Protection Clause. But it defies belief to say that it is not, in a sense, an equal protection ruling . . . . In many places [of the opinion], the Court suggested that equality, and a particular sort of moral claim, were pivotal to the outcome."); *see also* Laurence H. Tribe, Lawrence v. Texas*: The Fundamental Right That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004) ("[*Lawrence* and other substantive due-process rulings create] a narrative in which due process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix.").

46 539 U.S. 558, 578-79 (2003); *see also* Sunstein, *supra* note 45, at 70 (concluding that, since *Lawrence* intimates a fundamental right, its holding would make a prohibition on same-sex marriage hard to justify); Tribe, *supra* note 45, at 1947 (predicting same-sex marriage rights would follow *Lawrence* just as miscegenation rights followed *Brown*).

47 During the 2000s and 2010s, the idea of a Federal Marriage Amendment, which would constitutionally define marriage as a union between a man and a woman, was introduced in Congress many times, though never with success. *See generally* H.R.J. Res. 93, 107th Cong. (2002); H.R.J. Res. 56, 108th Cong. (2003); S.J. Res. 26, 108th Cong. (2003); S.J. Res. 40, 108th Cong. (2004); H.R.J. Res. 106 (2004); S.J. Res. 1, 109th Cong. (2005); H.R.J. Res. 88, 109th Cong. (2006); H.R.J. Res. 89, 110th Cong. (2008); S.J. Res. 43, 110th Cong. (2008); H.R.J. Res. 51, 113th Cong. (2013); H.R.J. Res. 32, 114th Cong. (2015).

48 H.R. 3567, 111th Cong. (2009).

49 570 U.S. 744, 746 (2013).

"spouse" "only to a person of the opposite sex who is a husband or a wife."[50] Under such a provision, "[DOMA] force[d] same-sex couples to live as married for the purpose of state law" where same-sex marriage was recognized "but unmarried for the purpose of federal law."[51] Finding this provision "unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution,"[52] the Court struck down section 3. But *Windsor* did not strike down section 2, which continued to permit states to retain the force of their own recently enacted marriage-recognition statutes.[53]

Justice Kennedy in both *Lawrence* and *Windsor* employed a mosaic of constitutional principles in sometimes muddy ways. Like *Lawrence*, *Windsor* appeared to employ a "double helix" approach, seemingly threading due-process and equal-protection concerns into a single rejection of government "animus."[54] Though Justice Kennedy stopped just short of clearly finding a fundamental right to marriage, he referred often to the "dignity" of marriage,[55] citing *Lawrence* as standing for the proposition that "[p]rivate, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form 'but one element in a personal

50 Defense of Marriage Act, Pub. L. No. 104-119, § 3, 110 Stat. 2419 (1996) (repealed 2022).

51 *Windsor*, 570 U.S. at 772.

52 *Id.* at 774. What this really means as to the precise holdings of and analytic frameworks applied to *Windsor* is not exactly clear. *See id.* at 799 (Scalia, J., dissenting) ("Lord, an opinion with such scatter-shot rationales as this one (federalism noises among them) can be distinguished in many ways."); *see also* Mark Strasser, United States v. Windsor *and Interstate Marriage Recognition*, 60 S.D. L. REV. 409, 411-14 (2015) (attempting with difficulty to clearly delineate the seemingly many holdings and rationales of *Windsor*).

53 *Windsor*, 570 U.S. at 752; *see* Defense of Marriage Act, Pub. L. No. 104-119, § 2, 110 Stat. 2419 (1996) (repealed 2022).

54 *See* Tribe, *supra* note 45, at 1897-98 ("[I]n American life and law . . . due process and equal protection, far from having separate missions or entailing different inquiries, are profoundly interlocked in a legal double helix."). *Windsor* explicitly invokes both constitutional principles. *See* 570 U.S. at 770 (referring expressly to "animus" as part of determining the propriety of disparate treatment of a politically unpopular group); *id.* at 769 ("[DOMA] violates basic due process and equal protection principles applicable to the Federal Government.").

55 *See, e.g.*, *Windsor*, 570 U.S. at 768 ("[T]he State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import . . . . [The question is] whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment."); *id.* at 770 (referring to DOMA's "interference with the equal dignity of same-sex marriages"); *id.* at 769 ("[New York State's recognition of same-sex marriage] is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages.").

bond that is more enduring,'" [56] and subsequently found DOMA "unconstitutional as a deprivation of . . . liberty."[57]

Two years later, such a fundamental right was confirmed by *Obergefell v. Hodges*,[58] clearly rendering section 2 of DOMA unenforceable. In addition to finding that "the Constitution . . . does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex" [59] on, yet again, combined equal protection–due process grounds,[60] Justice Kennedy in *Obergefell* held that a fundamental right to marry implies that the Constitution also requires states to recognize same-sex marriages validly performed in other states.[61] In the end, the interstate same-sex marriage recognition problem was resolved with the Fourteenth Amendment, avoiding altogether the choice-of-law questions posed after *Baehr*.

The Respect for Marriage Act, after having been introduced several times since 2009,[62] successfully made its way through both houses of Congress and was signed into law by President Biden on December 13, 2022,[63] partly in response to fears of *Obergefell*'s potential reversal in light of *Dobbs v. Jackson Women's Health Organization*.[64] The text of RFMA expressly repeals DOMA, recognizes marriage for purposes of federal law as between two individuals, and mandates that states recognize same-sex marriages validly performed out of state.[65]

While for the most part, RFMA has been celebrated as a reassuring codification of same-sex marriage recognition, activists have questioned the

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56 *Id.* at 769 (citing Lawrence v. Texas, 539 U.S. 558, 567 (2003)); *see also* Peter Nicolas, *Fundamental Rights in a Post-*Obergefell *World*, 27 YALE J.L. & FEMINISM 331, 340 (2016) ("*Obergefell* rather clearly describes *Lawrence* as falling within the Court's line of cases recognizing a fundamental right to 'intimate association.'").

57 *Windsor*, 570 U.S. at 774.

58 576 U.S. 644, 680-81 (2015).

59 *Id.* at 680.

60 For more on this doctrinal mystery, see generally Mark P. Strasser, Obergefell*'s Legacy*, 24 DUKE J. GENDER L. & POL'Y 61 (2016).

61 *Obergefell*, 576 U.S. at 680-81.

62 *See generally* S. 598, 112th Cong. (2011); H.R. 1116, 112th Cong. (2011); S. 1236, 113th Cong. (2013); H.R. 2523, 113th Cong. (2013); S. 29, 114th Cong. (2015); H.R. 197, 114th Cong. (2015).

63 Domenico Montanaro, *Biden Signs Respect for Marriage Act, Reflecting His and the Country's Evolution*, NPR (Dec. 13, 2022, 4:36 PM), https://www.npr.org/2022/12/13/1142331501/biden-to-sign-respect-for-marriage-act-reflecting-his-and-the-countrys-evolution [https://perma.cc/P8WJ-PXDX].

64 Though the *Dobbs* majority expressly said that its decision with respect to substantive due process and abortion did not in any way affect *Obergefell*'s holding, abortion supporters have not found solace in this assurance, especially in light of Justice Thomas's concurrence in which he urges reconsideration of *Obergefell* and other major substantive due process cases. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301-02 (2023) (Thomas, J., concurring) (describing the *Obergefell* decision as "demonstrably erroneous").

65 Respect for Marriage Act, Pub. L. 117-228, § 4, 136 Stat. 2305 (2022).

adequacy of RFMA. They argue that, because RFMA neither requires states to allow same-sex couples to marry nor explicitly extends its protections to trans and nonbinary people, Congress should do more,[66] especially as LGBTQ+ rights continue to be threatened in other ways.[67]

* * *

This recounting of the arc of same-sex marriage in the United States offers three observations: First, the desire for social change on a national scale inevitably prompts litigation designed to reach the Supreme Court to change doctrine at a constitutional level and bring about uniform application of relevant laws at the state level. Second, as a result of this constitutional litigation, what was always thought of as a choice-of-law problem (interstate marriage recognition) was ultimately addressed by a constitutional solution (substantive due process).[68] Third, finding substantive due-process and equal-protection rights, at least in some cases, can preclude playing out a possible choice-of-law regime.

II. CHOICE OF LAW IN THE SAME-SEX MARRIAGE STORY

The politics and litigation around same-sex marriage have added substantial new texture to the underlying choice-of-law landscape with respect to marriage. As we will see, traditional marriage-recognition rules have persisted through the First and Second Restatements—analytical regimes that are otherwise quite distinct. This underlying infrastructure

66 *See, e.g.*, Caroline Anders, *The Respect for Marriage Act Is Progress, but LGBTQ Advocates Say It's No Obergefell*, WASH. POST (Dec. 7, 2022, 11:45 AM), https://www.washingtonpost.com/politics/2022/12/07/respect-marriage-act-is-progress-lgbtq-advocates-say-its-no-obergefell/ [https://perma.cc/8QT8-9ZSY] ("RFMA is not a one-to-one replacement for the Obergefell ruling"); Esseks, *supra* note 19 (referring to RFMA as "quite limited").

67 *See, e.g.*, Shawna Mizelle, *Republicans Across the Country Push Legislation to Restrict Drag Show Performances*, CNN (Feb. 5, 2023, 11:09 AM), https://www.cnn.com/2023/02/05/politics/drag-show-legislation/index.html [https://perma.cc/XC5D-BZEY] (discussing bills seeking to restrict or prohibit drag show performances).

68 This phenomenon has also been observed by Rebecca Aviel. *See* Rebecca Aviel, *Faithful Unions*, 69 HASTINGS L.J. 721, 722-23 (2018) ("[W]hen a controversy over marriage reaches a certain point of national salience, the Court . . . goes directly to the substantive Fourteenth Amendment principles . . . ."); *see also* David D. Meyer, *The Constitutionalization of Family Law*, 42 FAM. L.Q. 529, 529 (2008) (discussing the emergence of a "language of rights" in family law following a series of Supreme Court rulings); Mary Anne Case, *Feminist Fundamentalism and the Constitutionalization of Marriage*, *in* FEMINIST CONSTITUTIONALISM: GLOBAL PERSPECTIVES 48, 48 (Beverly Bains, Daphne Barak-Erez & Tsvi Kahana eds., 2012) (arguing that more recent disputes "at the intersection of constitutional and family law" have foregrounded sexual-orientation nondiscrimination, and assessing what feminist fundamentalism might bring to these disputes).

remains largely intact. But within the particular context of same-sex marriage, federal constitutional and statutory provisions now play uniquely significant roles.

This Part will examine three same-sex marriage choice-of-law regimes: (1) the traditional rule, (2) DOMA, and (3) RFMA. The traditional rule sets, in a way, the control group—the existing set of underlying rules. This Part then treats DOMA and RFMA as "variables" altering that existing structure and assesses how each, as an independent choice-of-law regime, does or does not advance desirable choice-of-law values.

A. *Choice-of-Law Desiderata*

This comparative project first requires defining at the outset what exactly makes a good choice-of-law system. The history of choice-of-law doctrine will tell you how widely the pendulum has swung,[69] but a determination of ambitions for a workable choice-of-law system at least as it applies to marriage will do well to orient us.

The matrix of desirable choice-of-law values has remained relatively stable, though the level of priority given to any one set may have changed over time. In the vested-rights approach—also called the "traditional" or "territorial" approach—the "right" answer was inherent in and inevitable to the conduct or transaction;[70] so systemic factors like certainty, predictability, administrability, and uniformity were easily met, while considerations of states' policies, interests, and fairness fell by the wayside.[71] The Second Restatement, on the other hand, aimed to thoroughly consider states' interests and fairness and was thus more likely to produce a sensible result, but often at the expense of practical concerns.[72] Professor Roosevelt has categorized these, aptly, as "systemic" and "right-answer" factors.[73]

Systemic factors are relatively easy to identify. Predictability, administrability, and uniformity are concerned with how the outcome of a choice-of-law analysis is determined.[74] Choice of law is not simply an intellectual puzzle for scholars and students; it is also a legal analysis that

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69 For histories of the doctrinal development of American choice of law, see Roosevelt, *supra* note 18, at 2454-71 (considering the theories of medieval Europe, the early English approach, then developments in American law); Brilmayer, *supra* note 18, at 1281-85 (discussing Joseph Beale's theory of vested rights); Kramer, *Rethinking Choice of Law*, *supra* note 7, at 278 (arguing that Brainerd Currie's interest analysis is slipping as the dominant choice of law theory).

70 ROOSEVELT, *supra* note 7, at 5-7.

71 *Id.* at 32.

72 *Id.* at 84-88.

73 *Id.* at 31.

74 *Id.* at 32.

courts and parties must be able to understand and apply. Systemic factors are crucial to a workable choice-of-law regime.

Right-answer factors are more complicated. For a long time, the right answer depended on the assumption that states have a greater interest in protecting their own citizens than those out of state.[75] This premise of interest analysis has since been critiqued thoroughly on a number of bases.[76] But in family law, and particularly in marriage, the "state to which [one] belongs"[77] almost certainly has an exclusively internal interest. The basis for a state's interest in the marital status of citizens within their borders is precisely that the married couple, the couple's familial choices, and the community they are a part of will all largely be within that state's borders.

State interests with respect to historically "disfavored" marriages (including miscegenation, incest, marriage involving minors, and same-sex marriage) have traditionally been explicitly concerned with preserving a certain morality within the state's borders and keeping unpopular couples outside them.[78] In the absence of *Lawrence*, *Windsor*, and *Obergefell*, states that would have otherwise opposed same-sex marriage would have likely continued to assert these interests as being worthy of vindication.

In marriage, then, right-answer factors are less about competing interests between two states and more about how a selfish state should prioritize its interests against individuals who wish to resist them with rights granted elsewhere. Many right-answer factors are captured by section 6(2) of the Second Restatement:

> (a) the needs of the interstate and international systems;
> (b) the relevant policies of the forum;
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;
> (d) the protection of justified expectations;
> (e) the basic policies underlying the particular field of law . . . .[79]

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75 This is the premise of Professor Currie's interest analysis. *See generally* Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958).

76 *See, e.g.*, Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 392 (1980) ("Interest analysis merely substitutes one set of metaphysical premises for another, leaving the body of conflicts law with a remedy every bit as distressing as the disease it was designed to cure.").

77 BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 83, 86, 103, 141 n.53 (1963).

78 Some of these interests include "a desire to exclude certain sexual couplings or romantic relationships entirely from their borders," "a desire to express the moral disapproval with which the state regards the disputed relationship," and "a desire to dissuade couples in the disfavored relationship from migrating to the state in the first place." Wolff, *supra* note 20, at 2216.

79 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2).

These factors all together attempt to accommodate and maximize the realization of relevant state policies and fairness to parties. The demands of Second Restatement analysis are perhaps "indigestible" and "dizzying,"[80] but an earnest application would arguably produce results that both hold states to their word about the priority of their interests and are constitutionally sound.[81]

Finally, because we are interested in the relationship between federal legislation and local policy, we should consider whether federalism should be an ideal worth maximizing.[82] The Supreme Court has many times maintained that family law is an area definitively for the states—rather than for Congress—to regulate.[83]

On one hand, state autonomy is exactly what gay-rights advocates fought against. Federalism's respect for state autonomy has the potential to protect the socially regressive policies advanced by the states.[84] And if a public-policy exception would be a basis to always apply forum law when it came to marriage recognition, such a forum-preference rule seems inconsistent with horizontal federalism as well.[85]

But on the other, perhaps the "whiffs of federalism" wafting through *Windsor*[86] contributed to striking down improper federal policies that would

80 Roosevelt, *supra* note 18, at 2466.

81 *See id.* at 2466 n.95, 2533-34.

82 Some scholars very much think so. *See, e.g.*, Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745, 747 (1995) (arguing that federalism would advance Hawaii's tourism revenue, since couples would flock to be married there).

83 *See, e.g.*, United States v. Lopez, 514 U.S. 549, 564 (1995) (holding several times that the Commerce Clause power does not reach family law); Hillman v. Maretta, 569 U.S. 483, 490-91 (2013) ("The regulation of domestic relations is traditionally the domain of state law. There is therefore a 'presumption against pre-emption' of state laws governing domestic relations . . . ." (internal citations omitted); *Ex parte* Burrus, 136 U.S. 586, 593-94 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States.").

84 *Cf.* Laurence H. Tribe & Joshua Matz, *An Ephemeral Moment: Minimalism, Equality, and Federalism in the Struggle for Same-Sex Marriage Rights*, 37 N.Y.U. REV. L. & SOC. CHANGE 199, 206-12 (2013) (surveying the complex relationship between federalism and progressive social change and ultimately cautioning gay-rights advocates from relying too optimistically on principles of federalism to challenge regressive *federal* policies because of their potential to be used to uphold regressive *state* policies).

85 Such a forum-preference rule may also be unconstitutional. *See* Kramer, *Same-Sex Marriage*, *supra* note 7, at 1989-92 (arguing that the public-policy doctrine violates the Full Faith and Credit Clause). *But see* Nevada v. Hall, 440 U.S. 410, 422 (1979) ("[T]he Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy.").

86 United States v. Windsor, 570 U.S. 744, 817 (2013) (Alito, J., dissenting); *see id.* at 794 (Scalia, J., dissenting) (deriding the majority's employment of "amorphous federalism"). *But see id.* at 768 (Kennedy, J.) ("[I]t is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance. The State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism.").

compete with and ultimately undermine states' policies.[87] Preservation of state autonomy and sovereignty, after all, advances minority rule and "promotes choice, competition, participation, experimentation, and the diffusion of power."[88]

Ultimately, advancing federalism seems consistent with the goals of modern choice of law. Like choice of law, federalism is a system of authority allocation in and of itself.[89] And federalism, too, seeks to preserve individual states' interests, honor their policies, and arguably even ensure fairness.[90] As long as American choice of law must function within a federalist system, repudiating federalism as a choice-of-law value leads to decisions like *Obergefell*, which "solved" the choice-of-law problem simply by eliminating the possibility of interstate conflict rather than by establishing a system that would sensibly and accurately disentangle it—a decapitation to cure a headache.[91] Substantive uniformity may arguably be good for progressive social change,[92] but it eliminates choice from choice of law altogether.

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87 *See generally* Brief of Federalism Scholars as *Amici Curiae* in Support of Respondent Windsor at 3, United States v. Windsor, 570 U.S. 744 (2013) (No. 12-307) (asserting that DOMA is not within Congress's powers, because it usurps states' equal sovereignty and states' decisionmaking power regarding domestic relations); *see also* Tribe & Matz, *supra* note 84, at 206-10 (describing a litigation strategy employed in *Windsor* that involved appealing to some of the Justices' idea of constitutional federalism).

88 Heather K. Gerken, *Federalism All the Way Down*, 124 HARV. L. REV. 4, 6 (2010) [hereinafter Gerken, *Federalism All the way Down*]; *see also* Tribe & Matz, *supra* note 84, at 206-07 ("[S]tates and local governments can serve as vital laboratories of experimentation for new visions of liberty and equality. . . . State legislatures, executives, and courts may be more receptive to progressive arguments than their federal counterparts, and changes in a small number of states may seem less threatening than national change . . . ."). For other convincing arguments for federalism's virtues for progressives, see generally Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099 (2005) and Richard C. Schragger, *Cities as Constitutional Actors: The Case for Same-Sex Marriage*, 21 J.L. & POL. 147 (2005).

89 *See* Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1498, 1514 (1994) (discussing the legal complexities arising from the fact that "[t]he problem of federalism is, above all, a problem of *allocation*").

90 That choice of law is constrained by due process is undeniable. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 320 (1981) (holding that a state's choice of law must be "neither arbitrary nor fundamentally unfair"). But whether due process has anything to do with federalism is unsettled. *Compare, e.g.*, World-Wide Volkswagen Corp. v Woodson, 444 U.S. 286, 294 (1980) ("[T]he Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment."), *and* Lea Brilmayer, *Interstate Federalism*, 1987 B.Y.U. L. REV. 949, 975 (arguing that interstate federalism should constrain unwanted state coercion on defendants), *with* Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1120-33 (1981) (arguing that federalism is wholly irrelevant to due process).

91 *See* ROOSEVELT, *supra* note 7, at 39.

92 *See infra* Part III.

A choice-of-law regime that advances systemic factors, right-answer factors, and federalism is a choice-of-law regime whose allocation of authority determines parties' rights in a fair and practical way.

B. *The Traditional Rule and the Public-Policy Exception*

The traditional rule for interstate marriage recognition has been that the validity of a marriage granted in the state in which it was celebrated is portable to other states.[93] Even after the choice-of-law revolution in which many states abandoned traditional territorial rules for modern inquiries into "interests,"[94] "significant relationships,"[95] "comparative impairment,"[96] or "choice-influencing considerations,"[97] states continued to use this *lex loci celebrationis* rule.[98]

The exceptions to the general rule reflect this. The most common is the public-policy exception. Generally, the public-policy exception is invoked by a court when the forum's choice-of-law rules direct it to apply foreign law but their application would "violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal" in the forum.[99] The justifications used to invoke the exception must rise to this level of offensiveness. Though its propriety and constitutionality have come into question,[100] it is a tool that courts have considerable latitude to use in different ways and to different ends.[101] In marriage recognition, this exception is largely invoked in two ways.[102]

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93 *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 121 (1934).

94 CURRIE, *supra* note 77, at 90.

95 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

96 William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 33 (1963).

97 Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 279-82 (1966).

98 *See* Kramer, *Same-Sex Marriage, supra* note 7, at 1968-76 (explaining that "every state recognizes the validity of a marriage valid where it was celebrated" except in a few specific situations).

99 *See* Loucks v. Standard Oil. Co., 120 N.E. 198, 202 (N.Y. 1918).

100 *See generally* Kramer, *Same-Sex Marriage*, *supra* note 7. *See also* John K. Beach, *Uniform Interstate Enforcement of Vested Rights*, 27 YALE L.J. 656, 662 (1918) ("It seems clear that the mere enforcement of a cause of action which has arisen under the laws of a sister state cannot offend public morals.").

101 Sometimes, "the extent and nature of the contacts between the parties, the litigation, and the forum plainly bear on whether the public policy exception is applied." Kramer, *Same-Sex Marriage*, *supra* note 7, at 1974. Application of this exception in practice also undermines its propriety. Though the proper outcome of a public-policy exception should be dismissal on jurisdictional grounds, courts today tend to use the exception to justify applying forum law—a situation especially prevalent in marriage cases. *See id.* at 1973-74.

102 Other exceptions and escape devices exist, but for purposes of this Comment, only the public-policy exception will be addressed here. For examples of other exceptions, see sources cited in Kramer, *supra* note 7, at 1991 n.103.

First, a marriage that is valid where celebrated may not be recognized if the state where recognition is sought finds the marriage offensive to its public policy. [103] This rule has persisted through the First and Second Restatements.[104]

Second, a marriage that offends the public policy of the state with the most significant relationship to the marriage at the time it was celebrated—usually, the couple's domicile—will be invalidated.[105] The "most significant relationship" is the conceptual core of the Second Restatement.[106] The "most significant relationship" standard ensures that policies and interests of all relevant states and parties are considered.[107] It's not hard to imagine why the domicile would claim an interest: it is the state that will ultimately regulate the incidents of a couple's marital status. [108] And "[b]ecause each state possesses a great interest in the marital relationships within its borders, each state has traditionally been sovereign to decide for itself who should be able to occupy these relationships."[109]

In practice, the public-policy exception will be used to apply forum law and refuse recognition of the marriage in question.[110] Skepticism about its use is not unfounded. Its use is widely discretionary and has the potential to swallow the rule. Defenders of the exception would argue, however, that the exception allows states to vindicate their own legitimate interests[111] and that the exception is invoked because the forum has some relationship or interest in the outcome of the case.[112]

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103 ROOSEVELT, *supra* note 7, at 218.

104 *Compare* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 134 ("If any effect of a marriage created by the law of one state is deemed by the courts of another state sufficiently offensive to the policy of the latter state, the latter state will refuse to give that effect to the marriage."), *with* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 ("A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.").

105 ROOSEVELT, *supra* note 7, at 217.

106 The heart of what makes up the "most significant relationship" can be summed up by the factors set forth in section 6 of the Second Restatement. RESTATEMENT (SECOND) OF CONFLICT OF LAWS intro. note.

107 *See* ROOSEVELT, *supra* note 7, 84-86.

108 *See* Rosenstiel v. Rosenstiel, 209 N.E.2d 709, 712 (1965) ("The State or country of true domicile has the closest real public interest in a marriage . . . .").

109 Balian, *supra* note 28, at 400; *see also* Sherrerr v. Sherrerr, 334 U.S. 343, 354-56 (1948) (recognizing the "vital" interest that states have in divorce litigation).

110 *But see supra* note 101 (noting that a "proper" use of the public-policy exception would be dismissal on jurisdictional grounds).

111 *See* David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 183 (1933).

112 *See* Monrad G. Paulsen & Michael I. Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 969, 981 (1956). *Compare* Mertz v. Mertz, 3 N.E.2d 597, 599-600 (N.Y. 1936) (invoking the public-policy exception to apply forum law to give the plaintiff a claim where the

In marriage, the forum in which the status of the marriage is disputed most likely does have a strong interest. Though the traditional rule is that the state where the marriage was celebrated dictates the validity of the marriage, out of the three possible states with potential interest in the marriage,[113] the domicile likely has the biggest interest, especially if the couple is domiciled there for a long time.[114] Beyond the contention that states inherently have an interest in establishing the marriage prohibitions within their borders, if a state's interest in regulating marriage within its borders is to regulate a long-term relationship with long-term legal and societal implications, it is surely the domicile that is primarily responsible for those implications.[115]

Despite the vulnerability to overuse and misuse, this feature of the public-policy exception makes sense. Especially if courts are likely to invoke the public-policy exception only when it claims a real interest and where the

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forum was the plaintiff's and the defendant's domicile), *with* Holzer v. Deutsche Reichsbahn-Gesselschaft, 14 N.E.2d 798, 800 (N.Y. 1938) (declining to use the public-policy exception to avoid applying the law of Nazi Germany in the forum state of New York because the parties had no contacts with the forum).

113 Professor Roosevelt identifies the three states, without overlaps, as "the state of celebration, the state with the most significant relationship at the time of celebration, and the state where recognition is sought." ROOSEVELT, *supra* note 7, at 217 n.2. I think it fair to argue that "the state with the most significant relationship" essentially refers to the state of domicile, see *id*. at 217 ("The reference to the most significant relationship is the indeterminate language of the Second Restatement, but it generally means the domicile of the parties, if they share a domicile and intend to maintain it after marriage, or the domicile of one party if the spouses intend to reside there."), and further that the domicile and the state where recognition is sought very often overlap, see *infra* notes 115, 117–118 and accompanying text.

114 *See Developments in the Law: Constitutional Constraints on Interstate Same-Sex Marriage Recognition*, 116 HARV. L. REV. 2028, 2037 (2003) ("Domicile, then, is the paramount 'interest-creating contact' between a state and a marriage."); PETER HAY, PATRICK J. BORCHERS, SYMEON C. SYMEONIDES & CHRISTOPHER A. WHYTOCK, CONFLICT OF LAWS § 13.8, at 577 (6th ed. 2018) ("[A]s the continuing marriage relationship is undertaken and expectations develop, the state most significantly concerned and related would seem to be the couple's intended domicile."); *see also In re* Marriage of Reed, 266 N.W.2d 795, 796 (Iowa 1975) (applying the choice-of-law rules of the state in which the couple had resided the longest). *But see* Susan Frelich Appleton, *Leaving Home? Domicile, Family, and Gender*, 47 U.C. DAVIS L. REV. 1453, 1501 (2014) (suggesting that same-sex marriage, by necessarily subverting the gendered foundations for domicile's centrality in domestic relations law, may erode those foundations); *infra* Part III (advocating for a more contemporary understanding of domicile in this context).

115 An approach that has been attempted in the courts and contemplated in scholarship is an incidents-based approach to marriage recognition. Note that disputes over marriage recognition "almost exclusively concern[] questions regarding the incidents of the relationship" rather than the recognition in and of itself. *See* HAY ET AL., *supra* note 114, § 13.3, at 567. Even if the state in which recognition is sought is not the domicile, the state providing for the incident likely has a connection and interest in the outcome related to that incident. The incidents-based approach would consider marriage recognition only with respect to the incident being sought, with attention not only to the public policy of the forum in general with respect to marriage, but also to the underlying policy of the incident sought. *See, e.g.*, *In re* Estate of Lenherr, 314 A.2d 255, 258-59 (Pa. 1974) (finding that a marriage that violated a state law prohibiting marriage after a divorce resulting from adultery was nonetheless valid for purposes of a marital exemption to inheritance tax).

difference with foreign law is one of substantive policy rather than of degree,[116] a choice-of-law system should aim in part to vindicate the policies of the state that has the biggest stake in the outcome. As to this goal, the public-policy exception succeeds.

But the public-policy exception may be bad for uniformity. Marriage-recognition disputes almost always arise out of a claim for an incident of marriage.[117] If public-policy exceptions are invoked on an incident-by-incident basis depending on the policy behind the incident and the state's interest in advancing the policy, couples would be forced to "relitigate their marital status repeatedly as they request recognition of their marriage for each incident."[118] Under this kind of regime, the status of a couple's marriage would be fragmented, resulting in an inconsistent mosaic of just some claims.

If instead states exercised blanket nonrecognition regardless of the incident sought, predictability would certainly be less elusive—especially if states' mini-DOMA statutes were clear and reliable indicators of a state's public policy toward same-sex marriage.[119]

How the public-policy exception implicates federalism at first glance seems unclear. The state in which recognition is sought—often the domicile—can exercise autonomy by advancing its own interests. But it doesn't seem consistent with principles of horizontal, interstate federalism that states should be able to flatly reject a sister state's policies just because it doesn't like them.[120] But it is convincing to argue that, where federalism is concerned, state autonomy vis-à-vis federal authority that would seek to displace it is at greater stake than state autonomy vis-à-vis sister-state autonomy. While interstate federalism may rightly be considered "undertheorized"[121] or treated "with considerably less seriousness,"[122] it is also true that interstate relations are expressly regulated by Congress and enforced by the Supreme Court to be more closely knit under numerous constitutional provisions.[123] Federal–

116 *See* Kramer, *Same-Sex Marriage*, *supra* note 7, at 1970 ("[C]ourts in many states recognize that some differences are more matters of degree than of fundamental policy.").

117 *See supra* note 115 (noting that an incidents-based approach to marriage recognition has been contemplated in the courts due to this fact).

118 Cox, *supra* note 7, at 1063 n.168.

119 *See supra* notes 30–37 (discussing multiple state codes that express a clear vision of that state's public policy toward same-sex marriage).

120 Horizontal federalism can be described as "how the existence of multiple states limits the power of each when interacting with the others or with the others' citizens." Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 501 (2008); *see also* Brilmayer, *supra* note 90, at 975 (noting the inherent offense of a state imposing its power on the citizen of another state in the arena of civil liberties).

121 Erbsen, *supra* note 120, at 495.

122 Brilmayer, *supra* note 90, at 949.

123 Examples include the Full Faith and Credit, Privileges and Immunities, Extradition, Guarantee, and Commerce Clauses. *See* Kramer, *Same-Sex Marriage*, *supra* note 7, at 1986-87 & n.91.

state relations, on the other hand, implicate a structural-constitution principle that fundamentally resists federal authority and uniformity that would threaten states' inherent sovereignty, minority rule, and localized interests. State–state relations may trigger other constitutional concerns,[124] but as far as federalism as a choice-of-law value is concerned, the public-policy exception is consonant with it.

C. *DOMA*

Recall that the impetus behind DOMA was a fear of the Full Faith and Credit Clause's mandates.[125] The fear (or hope) was that the Full Faith and Credit Clause would require states that would otherwise prohibit their same-sex couples from marrying to recognize valid same-sex marriages performed out of state.[126] If this was true, regardless of whether state courts would use the traditional public-policy exception or their state's mini-DOMA to refuse to recognize a marriage, such a refusal would be unconstitutional. During the oral arguments for *Obergefell*, several Justices seemed to think that Full Faith and Credit was at least relevant, pressing counsel to be persuasive of the opposite.[127] And this theory had traction with at least some academics weighing in on the topic.[128]

But others have ardently argued that Full Faith and Credit is wholly irrelevant to marriage recognition.[129] These commentators point out that marriages are not *judgments* of the kind that fall within the scope of full faith and credit. Unlike divorce, which culminates in a court-rendered judgment, marriage licenses and certificates are "laws" that have not historically been

124 *See infra* notes 125–135 and accompanying text.

125 *See supra* notes 26–29 and accompanying text.

126 Andrew Koppelman has argued that this was largely the result of popular media repeating this claim. ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES 117 (2006). Clearly, though, Congress also acted in response to this purported possibility. *See generally* H.R. REP. NO. 104-664 (1996). Professor Aviel has also cautioned that same-sex marriage advocates, including Professor Koppelman, may have had strategic reasons to quash the claim, hoping to suppress panic-induced action from same-sex-marriage opponents. Aviel, *supra* note 68, at 729 n.28.

127 *See* Transcript of Oral Argument at 26, Obergefell v. Hodges, 576 U.S. 644 (No. 14-556) (2015) ("What about Article IV? I'm so glad to be able to quote a portion of the Constitution that actually seems to be relevant. 'Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State.' Now, why doesn't that apply?").

128 *See supra* note 28 (comparing arguments made by various scholars regarding the applicability of the Full Faith and Credit Clause to same-sex marriage recognition).

129 *See* Ralph U. Whitten, *Full Faith and Credit for Dummies*, 38 CREIGHTON L. REV. 465, 479 (2005) ("The subject of same-sex marriage has produced a seemingly endless set of preposterous ideas about why the Full Faith and Credit Clause requires states to give effect to marriages performed in other states."); *see also* Patrick J. Borchers, *The Essential Irrelevance of the Full Faith and Credit Clause to the Same-Sex Marriage Debate*, 38 CREIGHTON L. REV. 353 (2005).

required to be given full faith and credit.[130] In the absence of a true binding *judgment*, states are free to rely on their own choice-of-law systems, application of forum law being among the possible outcomes.[131]

This is convincing. It is established that "the Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'"[132] Thus, the only constraint the Full Faith and Credit Clause imposes on marriage-recognition laws is that a state may apply its own law only if it has significant contacts creating state interests.[133] If a same-sex couple validly married in State A moved with an intent to stay to State B where same-sex marriage offends State B's public policy, State B has at least some contact with the couple, as it is now the couple's new domicile.[134] And as its new domicile, State B surely has an interest in regulating a relationship within its borders.[135]

The Full Faith and Credit Clause itself should be thought as having almost no bearing on DOMA with respect to marriage.

Section 2 of DOMA—the statute's choice-of-law provision—doesn't seem to do much more (or less) than the public-policy exception beyond codifying it. Since states would still be empowered to rely on their public policy regarding same-sex marriage to grant or refuse recognition, the systemic, right-answer, and federalism characteristics of the traditional rule with the public-policy exception apply here as well. And any doubts about the constitutionality of the public-policy exception are put to rest under section 2, a legitimate exercise of Congress's powers under the Effects Clause.

D. *RFMA*

Section 4 of RFMA is the antipode of section 2 of DOMA. Where DOMA did not require any state to recognize same-sex marriage performed validly out of state, RFMA mandates such recognition.[136] RFMA notably

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130 WILLIAM L. REYNOLDS & WILLIAM M. RICHMAN, THE FULL FAITH AND CREDIT CLAUSE: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 124 (2005). *But cf.* Balian, *supra* note 28, at 401 (arguing that marital *decrees* should be given effect as judgments under the Full Faith and Credit Clause). For a take on DOMA's unique impact on divorces, which are considered legal judgments, see KOPPELMAN, *supra* note 126, at 123-24.

131 *Cf.* Nevada v. Hall, 440 U.S. 410, 422 (1979) (upholding the public-policy exception to the application of laws but not judgments).

132 Baker v. Gen Motors Corp., 522 U.S. 222, 232 (1998) (quoting Pac. Emps. Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 501 (1939)).

133 *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 320 (1981).

134 *See* Patrick J. Borchers, Baker v. General Motors*: Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147, 170-71 (1998).

135 *See supra* notes 113–115 and accompanying text.

136 Respect for Marriage Act, Pub. L. 117-228, § 4, 136 Stat. 2305 (2022).

does not require states to permit same-sex marriage within their own borders—just that states honor existing same-sex marriages.

RFMA obviously mandates uniformity. That uniformity also facilitates maximum predictability and administrability. Because the celebration of a marriage occurs at a single moment in time within one state, parties and courts need consider only that state's law.[137]

DOMA and the public-policy exception empowered states—and in particular domiciles—to advance their own public policies. And because a couple's domicile is often the most interested state, DOMA and the traditional rule both generally lead to the "right answer."[138]

RFMA works differently. Though RFMA preempts interstate marriage recognition, whether a couple can get married in the first place is still up to the state of celebration. By requiring states to recognize any validly performed same-sex marriage, RFMA advances the public policy of the state of celebration rather than that of the state of domicile.[139]

Giving more weight to the place of celebration over the domicile seems further from the "right answer." Consider a same-sex couple domiciled in State A, which does not issue marriage licenses to same-sex couples. This couple goes to State B to be validly married. When they return home, RFMA would require State A to recognize their marriage. As long as State A remains the couple's domicile, State A would be compelled to advance the policies of State B with respect not only to the validity of the marriage, but also the regulation of its incidents. Whether one agrees with the public policy of either state, giving effect to the policies of State B—an uninterested state—and eschewing those of State A—the most interested state—do not maximize the right-answer factors that make up a good choice-of-law regime.[140] Put differently, it makes more sense to use a personal connecting factor (domicile) rather than a territorial one (place of celebration) to govern issues relating to persons and their relationships.[141]

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137 *See* William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 STAN. L. REV. 1371, 1417 (2012) (observing that marriage as a long-term legal relationship informing thousands of other legal issues makes systemic factors particularly desirable).

138 *See supra* subsections II.B–C.

139 *See* Appleton, *supra* note 114, at 1503 ("[P]ost-*Windsor*, the place of celebration is competing with the domicile as the touchstone for marriage validity, regardless of any strong public policy the domicile might have articulated.").

140 *But see* Baude, *supra* note 137, at 1418 (suggesting that a place-of-celebration rule is superior to a domicile rule since domicile can be manipulated in a way that place of celebration cannot).

141 Professor Roosevelt identifies "personal" and "territorial" connecting factors as relevant to matters of choice of law in torts depending on the nature of the issue. ROOSEVELT, *supra* note 7, at 110. This framework, which is advanced in the upcoming Third Restatement, provides a useful perspective through which to assess which choice of law is the "right answer" for purposes of marriage recognition. See *id.* for more.

For similar reasons, section 4 of RFMA as a choice-of-law regime also does not advance federalism.[142] The national policy imposed by RFMA prevents states from fully regulating an area of law so fundamentally local and traditionally within the states' exclusive prerogative. RFMA compels not only federal policy but also sister-state policy on states that have enjoyed autonomy in this area.

E. *The Better Choice of Law*

Between the traditional rule and DOMA, there are hardly any differences.[143] In general, the choice-of-law regime under DOMA advances many, if not most, choice-of-law desiderata. Like the public-policy exception, DOMA may undermine predictability. But overall, the strength given to the domicile and the espousal of federalism suggests that the choice of law under DOMA would produce an outcome that is sensible, taking into account individual state policies and the policies underlying the substantive law at hand.

RFMA, by contrast, would empower Congress to set a national choice-of-law rule at the expense of states' marriage-recognition policies. Though uniform, clear, and predictable, RFMA awkwardly favors a territorial connecting factor over a personal connecting factor to govern issues relating to people and their relationships. And in doing so, it robs states of their interest in regulating the relationships at home within their borders and instead forces them to bow to both federal and sister-state policy.

Between DOMA and RFMA, perhaps counterintuitively or—to some—regrettably, DOMA seems to be the better choice-of-law regime.

III. CONFLICT OF VALUES

Choice-of-law values, legislative values, and personal values are difficult to align. Same-sex marriage and LGBTQ+ rights in general involve personal, moral beliefs about human rights, dignity, and liberty[144]—perhaps even more so than any legal justification. So, while on paper, the same-sex marriage debate could be characterized as a choice-of-law problem, in the real world, it is much more. When fundamental rights and dignity are at stake, people will

142 *But see* Lynn D. Wardle, *Section Three of the Defense of Marriage Act: Deciding, Democracy, and the Constitution*, 58 DRAKE L. REV. 951, 984-85 (2010) (arguing that RFMA does not violate federalism because it does not define substantive state definitions of marriage).

143 DOMA perhaps has the advantage of constitutional clarity under the Full Faith and Credit Clause, but whether that is true may depend on who you ask. *See supra* Section II.C.

144 This is true for both advocates and opponents of same-sex marriage. *See* Butler, *supra* note 14, at 850-63 (discussing the shifting depictions of same-sex relationships across time as reflections of cultural and moral norms).

turn to the Constitution for sweeping guarantees, not to Congress to make sensible choice-of-law rules that could preserve the autonomy of states who would deny those rights. When attempting to institute change, "everything turns on the ultimate outcome."[145] No advocate of progressive social change—or an advocate of the contrary, for that matter—will cast aside an opportunity to zealously defend a fundamental right in exchange for avoiding any potential sacrifices to a robust choice-of-law doctrine.

There are three primary routes by which people may seek social change on a national level: formal constitutional amendment, informal constitutional amendment, and legislative action. Despite glimmers of the possibility of a relevant formal constitutional amendment through either the Federal Marriage Amendment or the Equal Rights Amendment, [146] a formal constitutional amendment is, today, nearly impossible and accordingly not on advocates' list of priorities.[147]

The outcome of *Obergefell* is an example of an informal constitutional amendment. Without altering the actual text of the Equal Protection or Due Process Clauses, the Supreme Court essentially amended them to include rights for same-sex couples.[148] Informal amendment is exactly the kind of decapitation to cure a headache that is dismissive of choice of law. Although supporters of same-sex marriage would prefer guaranteed rights across the board over rules for how to allocate state authority, we have seen even as recently as last term that even those seemingly earned constitutional rights are subject to a fickle Supreme Court.[149] When those federal constitutional rights are suddenly stripped away, the choice of law rests on the rules that lie dormant underneath.

DOMA and RFMA are evidence that the political process does not seem that much more attentive to choice of law. Though DOMA and RFMA did contain choice-of-law provisions, the superfluousness of DOMA suggests that it can fairly be characterized as a political statement rather than a working

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145 David L. Chambers, *Couples: Marriage, Civil Union, and Domestic Partnership*, *in* CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS 303 (John D'Emilio, William B. Turner & Urvashi Vaid eds., 2000).

146 *See supra* note 47 and accompanying text. The possibility of an Equal Rights Amendment has continuously flickered in progressives' collective ambitions since its introduction in the 70s. *See, e.g.*, S.J. Res. 4, 118th Cong. (2023).

147 *See* Jill Lepore, *The United States' Unamendable Constitution*, NEW YORKER (Oct. 26, 2022), https://www.newyorker.com/culture/annals-of-inquiry/the-united-states-unamendable-constitution [https://perma.cc/XLX6-JJD2] (describing how the U.S. Constitution was not mean to be amended easily and finding that today its amendment rate is among the lowest in the world).

148 *See* Heather Gerken, *The Hydraulics of Constitutional Reform: A Skeptical Response to* Our Undemocratic Constitution, 55 DRAKE L. REV. 925, 929, 930 n.23 (2007) (describing informal amendment as law that is binding, often through judicial interpretation, without actually changing the text of the Constitution through political actors).

149 *See supra* note 64.

choice-of-law rule. And while RFMA more clearly changes the underlying rule, it fails to meaningfully advance desirable choice-of-law values.[150]

Why don't any of these major modes of national social change seem to advance choice-of-law values or develop robust choice-of-law doctrine?[151] What is it about choice of law that appears irreconcilable with the outcomes same-sex marriage proponents seek?

It would be convenient to pin it all on federalism. Federalism, as we have seen, operates in a manner similar to choice of law. And much of what it can be characterized to promote is shared with modern choice-of-law values. But federalism is not the whole story.[152] Even if, as in RFMA, a choice-of-law regime does not advance federalism, issues beyond state autonomy exist. For example, the crucial issue around domicile versus place of celebration as the better locus cannot be attributed to federalism.

Federalism is often invoked to mean "states' rights," when it is, more broadly speaking, simply the constitutional project of striking the right balance between federal and state authority to ultimately facilitate interdependence.[153] Choice of law, on the other hand, is a pursuit that inherently divides rather than consolidates. It is interested in determining where one sovereign's authority ends and another's begins, not coalescing disparate minority voices into a complex but unified national identity.[154] Choice of law seems inconsistent with "the constitutional commitments to national union and national citizenship."[155]

How can progressives maximize both choice-of-law values and national social change? I offer two areas of potential.

One possibility is specific to the context of marriage. The "right answer" to marriage recognition, I have argued, should probably center around the

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150 *See supra* Section II.D.

151 Same-sex marriage is not the only area where choice of law seems to be an obstacle to the pursuit of justice, rights, or claims. Certifying class actions requires clearing the difficult hurdle of finding a single law to govern all claims. *See* Phillips Petrol. Co. v. Shutts, 427 U.S. 797, 821-22 (1985) (finding the application of Kansas law to all claims in the class action untenable). But perhaps in the complex litigation space, the MDL provides a meaningful alternative. *See* Andrew D. Bradt, *Something Less and Something More: MDL's Roots as a Class Action Alternative*, 165 U. PA. L. REV. 1711, 1715-19 (2015) (describing the MDL as having of fewer limitations than a class action). For a theoretical take on types of conflicts and their relationships to justice broadly, see Arthur Taylor von Mehren, *Choice of Law and the Problem of Justice*, 41 L. & CONTEMP. PROBLEMS 27, 27 (1977).

152 *See also supra* notes 87–88 and accompanying text (complicating the relationship between progressive gay-rights advocacy and federalism).

153 *See* Gerken, *Federalism All the Way Down*, *supra* note 88, at 7-8 (describing federalism, when removed from the "shadow" of sovereignty, as "promot[ing] voice, not exit; integration, not autonomy; interdependence, not independence").

154 *Id.*

155 *See* Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451, 463 (1992).

domicile. But perhaps modernizing our understanding of the domicile as it has been applied to marriage undermines this longstanding pillar of domestic relations.

Professor Appleton has traced the history of the domicile in domestic-relations law and has found that it is repressive and gendered in unexpected ways. While we think of domicile as the "home," it can also espouse both a state's desire to control or punish sexual transgressions or deviations and a serious underappreciation for women's agency with respect to the home beyond mere caretaking.[156] In an age where people and families are increasingly mobile, diverse, and equitable, contemporary reinforcement of the domicile also (in)advertently reinforces those norms.[157]

Professor Appleton invites us to use same-sex marriage—arguably, an inherently gender-subversive union—as an opportunity to rethink the domicile.[158] Perhaps an updated understanding of the domicile and marital relations could provide fruitful insight into what a state's interests as to marriage are today, given that traditional understandings of gender have largely been left in the past. If the domicile as it has been understood is not so important after all, then the choice-of-law values that RFMA can be characterized to have ignored should be reconsidered.

A second possibility applies more broadly. If the Full Faith and Credit Clause seeks to constrain choice of law by limiting how much a state can be fractured from a sister state, perhaps we should look also to the Constitution for a way to limit how much a state can be fractured from the union as a whole.

At least three constitutional provisions may, individually or together, constrain choice of law in a way that preserves "the constitutional commitments to national union and national citizenship."[159] Professor Kreimer has indicated that the Commerce Clause, the Privileges and Immunities Clause of Article IV, and the Privileges or Immunities Clause of the Fourteenth Amendment together constitute an extratextual scheme of national citizenship that makes up a fundamental part of American federalism.[160] Perhaps a structural argument for national citizenship may constrain the degree to which choice of law would otherwise treat states simply as individual sovereigns rather than as part of a larger system of

156 Appleton, *supra* note 114, at 1464-69.

157 *See id.* at 1472-86.

158 *Id.* at 1456-57.

159 *See* Kreimer, *supra* note 155, at 463.

160 *See id.* ("[F]ederalism does not entail a moral Balkanization, in which competing moral agendas seek without restraint to conquer foreign territories; it should not be a system in which citizens carry home-state law with them as they travel, like escaped prisoners dragging a ball and chain.").

governance and source of rights. A national-citizenship principle may narrow the gap between choice of law and national social change.

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The political and moral agita around same-sex marriage and gay rights has understandably led advocates to finding legal solace in the form of nationally recognized fundamental rights. And while the Constitution certainly may contain such rights, it is choice of law that ultimately arbitrates them. When the system of allocating rights underlying those rights is overlooked, they exist in a state of suspension, subject to sudden reversal and lacking a foundation upon which to fall back. We should be more attentive to the strength of that foundation.