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## Issue Brief

# The Converging Logic of Federalism and Equality in Same-Sex Marriage Recognition

By Mae Kuykendall

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# The Converging Logic of Federalism and Equality in Same-Sex Marriage Recognition

By Mae Kuykendall\*

Federalism is a powerful engine of change, permitting experimentation by states, thus spreading innovation and allowing local normative input into local institutions. But federalism is also a part of the glue binding the nation into one whole, with states respectful of legal statuses created in other states. State “sovereignty” allows states to create experiments with which other states may not interfere. The Supreme Court interprets and serves as a correcting force for state regulations and laws that impose an extra-territorial effect on the laws of other states.<sup>1</sup> Such a process allows experimentation and protects the cohesiveness of a unified nation, in which citizens in a mobile society may be assured of consistent expectations without regard to differences among the states about policy choices.

Federalism has emerged as a testing ground for determining what role equality principles will play in deciding the marriage rights of same-sex couples and in encouraging the movement toward the acceptance of same-sex marriage.<sup>2</sup> Recent federal court decisions underline the adaptive capacity of federalism: lower federal courts have carved out new protections for same-sex marriages from adverse treatment under federal law<sup>3</sup> and the Ninth Circuit has developed a fact-intensive approach specifically rejecting California’s withdrawal of marriage terminology from provisions in California law yet retaining all the rights of marriage for same-sex couples.<sup>4</sup> In contexts limited to the form and effect of specific denials of legal status to marriages, analysis under the Equal Protection Clause plays a role in paring back on adverse treatments of same-sex marriage. More states have changed their marriage laws to authorize same-sex marriage.<sup>5</sup> There is, thus, a basis for optimism about the benefits – measured enhancement of equality and softening of conflict which a federalist path to gradual social change can provide. But the extent to which federalism and equality do and will serve as accelerators of change is unclear, as is the probable pace of change. There is still no clear command for states to respect the marital status created by other states for same-sex couples. Federalism as national glue is playing a weak role in family law. More of the energy federalism releases could be harnessed to direct state judicial attention, in the evolving context of same-sex marriage, to the gendered rules of marriage and to support stable expectations for married couples.

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\* Professor of Law, Michigan State University College of Law, Visiting Professor, University of Michigan, Fall 2012. This Issue Brief is a result of extensive scholarly work on the marriage question over a period of time. The most recent longer article from the project is *Equality Federalism: A Solution to the Marriage Wars*, 15 U. PENN. J. CON L. (forthcoming). Mary Elizabeth Oshei provided invaluable research and editorial help, for which I thank her.

<sup>1</sup> James E. Gaylord, *State Regulatory Jurisdiction and the Internet: Letting the Dormant Commerce Clause Lie*, 52 VAND. L. REV. 1095, 1097 (reviewing constitutional provisions used by the Supreme Court to discipline state legislation that imposes an extraterritorial effect).

<sup>2</sup> Jane S. Schacter, *Splitting the Difference: Reflections on Perry v. Brown*, 125 HARV. L. REV. F. 72, 74 (2012) (suggesting that “federalist incrementalism,” which preceded *Perry* and avoids seeking a national mandate for same-sex marriage, is equality-enhancing over time).

<sup>3</sup> See *infra* note 6.

<sup>4</sup> *Perry v. Brown*, 671 F. 3d 1052 (9th Cir. 2012).

<sup>5</sup> See *infra* note 8 and accompanying text.

Without equality in a full partner role, federalism does not energize marriage law or encourage responsiveness to changing patterns of living. It can slight civility. More modestly, federalist tools, supplemented by equality analysis, help judges construct methods to check some adverse treatment of same-sex marriage rights.<sup>6</sup> The recent federal court cases using such tools illustrate the potential as well as the limitations of federalism when not partnered with principles of equality.<sup>7</sup> These cases provide a glimpse at how a fusion of equality and federalism could become a powerful force for respecting and strengthening both values. The potential of federalism in a deep partnership with equality is the subject of this Issue Brief.

Part I of this Issue Brief presents an account of the current state of the law governing the rights of same-sex couples to legal marriage within the premises of federalism, with specific reference to marriage portability. The picture is a mixed one of moderate progress, combining long-term social change with the incrementalism that federalism fosters. Over time federalism has produced greater marriage equality for same-sex couples while states retain primary control over defining and recognizing marriage.

Part II addresses the limitations of the current logic of federalism in fostering a gradual path to marriage equality. The progress toward same-sex marriage access and equality is heartening. Yet so long as federalism is understood as a bargain allowing some states to create same-sex marriages, and other states to void them, marriage equality is an oxymoron.

Finally, part III of this Issue Brief proposes that the Supreme Court infuse marriage federalism with the strong medicine of general equality jurisprudence. Strong state policy interests once rationalized non-recognition of marriages, based on a disapproval of the immutable identity of the spouses, as in the instance of miscegenation. That understanding of equality within federalism is from another day. Doctrinal relics of the past need not prevent a federalist solution to modern-day inequalities that disrupt and disrespect mainstream family ties.

## I. Marriage Federalism in Transition

### A. The Concept of Federalism

First, let us examine federalism in “*status quo*” and, as recent cases might encourage, its further development in marriage law affecting same-sex couples. Depending on how you do the count, eight states and the District of Columbia now issue licenses to same-sex couples for marriage under state law.<sup>8</sup> Notably, most of those states permit out-of-state couples, including

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<sup>6</sup> Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. PA. L. REV. 2215 (2005) (providing a set of guidelines for identifying state interests that are legitimate in light of constitutional rights jurisprudence affecting same-sex relationships).

<sup>7</sup> Four federal courts have recently found Section 3 of the Defense of Marriage Act, discussed *infra* text accompanying notes 13-14, unconstitutional. *Massachusetts v. U.S. Dept. Health & Human Serv.*, 682 F. 3d 1 (1st Cir. 2012); *Windsor v. United States*, 833 F. Supp.2d 394 (S.D.N.Y. 2012); *Golinski v. U.S. Office of Pers. Mgmt.*, 781 F. Supp. 2d (N.D. Cal. 2011); *Pedersen v. U.S. Off. Pers. Mgmt. v. Bipartisan Legal Advisory Group of the U.S. H.R.*, No. 3:10-cv-1750 (VLB) 2012 WL 3113883 (D. Conn. 2012).

<sup>8</sup> Connecticut, Iowa, Maryland, Massachusetts, New Hampshire, New York, Vermont, Washington, and Washington, D.C. have same-sex marriage on the books, either from court action or legislative action, or a

same-sex couples, to marry during a brief visit to the state, in addition to providing marriage rights for their own residents.<sup>9</sup> Many states deny all recognition to marriages of couples of the same sex.<sup>10</sup> A few states do not authorize same-sex marriages, but nonetheless recognize the legal status for couples who have married in another state and are domiciled in the state.<sup>11</sup> Normally because marriage creates property interests, federal law would defer to the state's classification of the interest.<sup>12</sup> Because of the Defense of Marriage Act ("DOMA"), however, same-sex marriage has the unusual distinction of having no standing in the federal law as a property-related state legal status.<sup>13</sup> Specifically, Section 3 of DOMA provides that in determining the meaning of any aspect whatever of federal law, the word "marriage" only refers to the union of a man and a woman and "spouse" only refers to a person of the opposite sex who is a husband or wife.<sup>14</sup> So for the special case of same-sex marriage, the federal government treats a legal status that confers state property rights as having no existence insofar as the usual federal benefits that go with marital status are concerned.

The result of the state *status quo* is that all same-sex couples, if able and willing to travel to marry in a state that authorizes same-sex marriage, are able to receive some part of the benefits of marriage. For these couples, such benefits consist of the gratification of a state-authorized ceremony even if the marriage is not "portable" to their home state,<sup>15</sup> and, for a much

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combination. The Maryland and Washington state laws are on hold pending voter initiatives to cancel them. Maine had same-sex marriage that voters canceled, but a vote is pending to reinstate same-sex marriage.

<sup>9</sup> New Hampshire is an exception, with a strong "reverse evasion statute." N.H. REV. STAT. ANN. § 457:44 (2012) ("No marriage shall be contracted in this state by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this state in violation hereof shall be null and void."). If every state had such a statute, the effect would be a purist state-by-state treatment of same-sex marriage, confining the ceremonial benefits of a wedding to state residents and drawing a marriage fence around each state, "walling in and walling out" same-sex marriages. But such a flat rule would be at odds with the tradition that allows couples to fall in love and marry where and when they wish. By licensing-driven convention and marriage-friendly customs, weddings are local yet marriage has no fixed tie to place—marriages are generally portable, and it is a status that stays with the couple, regardless of location.

<sup>10</sup> For a recent chart showing which states deny recognition to same-sex marriages, see ALISON M. SMITH, CONG. RESEARCH SERV., RL 31994, SAME-SEX MARRIAGES: LEGAL ISSUES, Table 1. State Statutes Defining "Marriage," 30-32 (2012), available at <http://www.fas.org/sgp/crs/misc/RL31994.pdf>.

<sup>11</sup> Some states have provisions that seem to permit recognition of either evasive or migratory marriages, although the recognition granted to evasive marriages is subject to doubt. N.M. STAT. ANN. § 40-1-4 (West 2012). See also N.M. Op. Att'y Gen. No. 11-01, 2011 WL 111243 (2011). The Maryland Attorney General's opinion recognizes the ambiguity in discerning between evasive and migratory marriages. 95 Md. Op. Att'y Gen. 50 (2010), <http://www.oag.state.md.us/Opinions/2010/95oag3.pdf> (indicating that courts might be "least sympathetic to [grant] recognition of the marriage" for evasive marriages, but Maryland has never had a statute specifically denying recognition, and "factual inquiry required to distinguish 'evasive' marriages from others might" be "impractical."). An attempt to give a precise enumeration of the states that recognize out-of-state marriages, either evasive or migratory, is frustrated by the ambiguity in how various provisions should be and are construed. See *supra* note 10 for an effort at compilation.

<sup>12</sup> Abraham Bell & Gideon Parchomovsy, *Of Property and Federalism*, 115 YALE L.J. 72, 72 & n.1 (2005) ("Property law in the United States is largely the domain of the states, not the federal government.").

<sup>13</sup> Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 and 28 U.S.C. § 1738C).

<sup>14</sup> *Id.*

<sup>15</sup> A recent film about the weddings of a couple who married in every state that authorized same-sex marriage, before their own state of New York enacted a marriage reform taking out the gender requirement in marriage licensing law, attests to the significance for couples of such legal ceremonies. Kayla Webley, *Married & Counting: One Gay Couple, Seven Weddings*, TIME, Aug. 8, 2012, [3](http://entertainment.time.com/2012/08/08/married-</a></p></div><div data-bbox=)

smaller number, both the ceremony and a claim to the status itself in their state of residence. For those who enjoy a legally recognized marriage in their state of residence, they receive the same in-state benefits as other couples. In this sense, federalism has already achieved some measure of relief for same-sex couples who aspire to marriage for practical protections or to be given a state stamp of approval. It is part of the legal landscape of the United States. However, this approach presents limitations.

An optimistic interpretation of a measured state-to-state federalism, which combines deference to state policies on marriage with an anticipated ending of DOMA, depicts a spreading emergence of same-sex marriage in individual states and an increasingly positive national environment.<sup>16</sup> In this picture, federalism allows breathing space for equality-enhancing but fact-and-state-specific judicial interventions to deflect the rankest of unjust treatments of same-sex couples.<sup>17</sup> In recent work,<sup>18</sup> I challenge that sanguine but patient view of progress for its accepting the premise of incremental federalist medicine as the single alternative to a Supreme Court holding establishing same-sex marriage as a fundamental right. I argue there, as I do here, that the Supreme Court can and should energize federalism, informed directly by equal protection, by requiring states to recognize same-sex marriages created in other states, without exception.<sup>19</sup>

#### B. Equality as a Central Player

In a symposium article in 2005, Tobias Wolff urged a period of careful parsing by state courts of the exact interests states then had in non-recognition.<sup>20</sup> He argued that many interests that once would have been cited by states to argue against same-sex marriage have been ruled out through a series of decisions. These decisions include the Supreme Court's protection of same-sex intimacy,<sup>21</sup> a ruling that imposes a rule against animus-based laws reflecting the moral views of the state majority that affect disfavored minorities,<sup>22</sup> and a decision reinforcing the right to travel from state to state under the Privileges and Immunities Clause.<sup>23</sup> In 2005, Wolff envisioned a period in which state courts would apply these new rulings on a case-by-case basis to pare away state interests used to rationalize non-recognition that are no longer constitutionally supportable.<sup>24</sup>

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counting-one-gay-couple-seven-weddings-countless-happy-tears/ (“For any gay couple to get married at this point in our history makes a statement, but what they are doing . . . there’s something aggressively joyful about it,” says Vince, the officiant of the New Hampshire wedding, in the film.”).

<sup>16</sup> Such an approach is consistent with the depiction by Schacter of recent trends in litigation. Schacter, *supra* note 2.

<sup>17</sup> *Id.*; see also Wolff, *supra* note 6.

<sup>18</sup> Mae Kuykendall, *Equality Federalism: A Solution to the Marriage Wars*, 15 U. PENN. J. CON. L. (forthcoming 2012); Mae Kuykendall, *A Way Out of the Same-Sex Marriage Mess*, N.Y. TIMES, May 24, 2012 at A31.

<sup>19</sup> *Id.*

<sup>20</sup> Wolff, *supra* note 6, at 2216.

<sup>21</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>22</sup> *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>23</sup> *Saenz v. Roe*, 526 U.S. 489 (1999). See Wolff, *supra* note 6, at 2216 (treating the legitimacy of various state interests as being “in serious doubt” after these cases).

<sup>24</sup> See Wolff, *supra* note 6, at 2216.

My vision bears a family resemblance to Wolff's reliance on state court judges, except that I propose that the Supreme Court require that states incorporate a robust principle of equal protection directly into the recognition rules written by the states. The first step in a new robustness for equality principles in recognition rules would be to require every state to treat all same-sex marriages domiciled in the state as marriages under the state's marriage law. A focus on equality principles isolates same-sex marriage conceptually from marriages that states reasonably choose not to recognize, such as marriages involving some form of bad conduct by the parties,<sup>25</sup> or marriages that lack any rooting anywhere in American law.<sup>26</sup>

Such a move by the Court would allow state courts to put aside recondite arguments about whether marital status exists and instead use their judicial resources to sort out whether marriage law should be doctrinally identical for both traditional marriages and same-sex marriages, or whether there are any defensible reasons for not treating all aspects of marriage identically under Equal Protection jurisprudence.<sup>27</sup> I argue that infusing the treatment of marriage with a principle of equality, in a strong alliance with federalism, allows states to remain the laboratory for writing and judging marriage law. Such a resolution would justify the deference of federal courts to the primary role of states in family law and would accelerate the pace of change, releasing the energies of state courts to focus on real-world issues that may arise within all marriages.

Let's consider, though, what might be the specific features of a more gradualist federalist approach that delivers some progress for same-sex couples but allows variation in their rights. How does the general picture sort out for differently situated couples? What are the positive features of the status quo, assuming possible federal recognition and state responsibility for creating and recognizing same-sex marriages? What are the downsides for these couples and what does it say about our shared values?

As noted, the benefit of a gradualist federalist approach, such as exists now and has been described by Schacter,<sup>28</sup> is that any same-sex couple in the United States, if not ineligible by kinship or age and if the pair has adequate means, may participate in a legal marriage ceremony in an American state. So states retain their desired control over which marriages to license, and couples have the ability to make use of the laws in a chosen state. Until 2003, no ceremony uniting a same-sex couple in a marriage pursuant to the law of a state could occur anywhere in the United States.<sup>29</sup> Since that time, couples have been able to travel to participate in a legal ceremony that carries significance for them. This positive development coexists with a proviso: couples who marry out-of-state in order to avoid local laws prohibiting same-sex marriage, as a general rule, have their marriages rendered void by their state of domicile and face a poorly

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<sup>25</sup> Lewis A. Silverman, *Vermont Civil Unions, Full Faith and Credit, and Marital Status*, 89 Ky. L.J. 1075, 1091 (2000-01) (discussing evasive marriages in contravention of a post-divorce waiting period).

<sup>26</sup> See *infra* text accompanying note 60.

<sup>27</sup> Peter Nicolas, *The Lavender Letter: Applying the Law of Adultery to Same-Sex Couples and Same-Sex Conduct*, 63 FLA. L. REV. 97 (2011) (arguing that equality principles require the application of adultery laws to same-sex couples and same-sex conduct).

<sup>28</sup> See Schacter, *supra* note 2.

<sup>29</sup> *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003).

understood and uncertain patchwork of laws.<sup>30</sup> So, their marriages are invested with personal meaning reinforced by state participation and with a public significance, despite being widely understood as legal nullities. By comparison, same-sex couples who marry in their state of residence and remain there receive all the rights that their state offers to same-sex couples. Further, in an exception to the general rule, some couples who marry in their state of residence and later relocate to a state that does not authorize same-sex marriages, may nonetheless receive marriage recognition from their new state of residence.<sup>31</sup> For example, Maryland has for some time recognized as valid same-sex marriages contracted in another jurisdiction, and Maryland continues to recognize such marriages while a referendum<sup>32</sup> is pending to veto a recently enacted law that would expand the state's marriage licensing laws to include same-sex couples. So a couple can travel from Baltimore to Boston, marry, and return to Baltimore with full recognition by the state of Maryland as a married couple. Because of DOMA, however, no same-sex marriage valid within the state of a couple's domicile will attain the significant federal benefits other married couples enjoy by virtue of the same state legal status.

As a result of the combination of federal and state law barring recognition of same-sex marriages, same-sex couples miss out on benefits other married couples obtain merely by virtue of their legal status. Specifically, for now, they miss out on every benefit extended by the federal government to married couples.<sup>33</sup> As previously explained, Section 3 of DOMA declares that no marriage other than between a man and woman is a marriage for purpose of any federal law anywhere in the federal code.<sup>34</sup> That means certain married couples cannot file joint tax returns as married couples. They cannot pass on Social Security benefits upon death or sponsor an immigrant spouse for residence in the United States. Military spouses receive no death benefits.

And, with the prevailing assumptions about federalism, they miss out on one standard feature of marriage: portability. If a couple relocates from a domicile in which they received an official state stamp of approval for their relationship—a marriage—to a domicile where same-sex marriage is prohibited, the new state domicile has the power to void the marriage. And many states do exactly that. Though traditionally a migratory marriage is treated with more generosity than evasive marriages, the strong “DOMA”-like statutes passed by individual states tend to use sweeping language that seems to call for the state's total non-recognition for any purpose of

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<sup>30</sup> States have a patchwork of conflicts of law rules. Many states have enacted constitutional amendments generally banning gay marriage. For a simple, straightforward explanation of these rules, see Wolff, *supra* note 5, at 2241. See also Michael E. Solimine, *Interstate Recognition of Same-Sex Marriage, The Public Policy Exception, and Clear Statements of Extraterritorial Effect*, 41 CAL. W. INT'L. L. J. 105 (2010) (explaining the variations in conflicts of law principles affecting marriage). The harshest treatment of so-called “evasive marriages” by an authorizing state is illustrated by the “reverse evasion statute” of New Hampshire, a state with same-sex marriage. N.H. REV. STAT. § 457:44 (1979) (“No marriage shall be contracted in this state by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this state in violation hereof shall be null and void.”).

<sup>31</sup> See *supra* note 11 and accompanying text.

<sup>32</sup> John Wagner, *Same-sex marriage headed to ballot in Md.*, WASH. POST (June 7, 2012, 6:34 PM ET), [http://www.washingtonpost.com/blogs/maryland-politics/post/same-sex-marriage-headed-to-ballot-in-md/2012/06/07/gJQAVCn3LV\\_blog.html](http://www.washingtonpost.com/blogs/maryland-politics/post/same-sex-marriage-headed-to-ballot-in-md/2012/06/07/gJQAVCn3LV_blog.html).

<sup>33</sup> See U.S. GOV'T. ACCOUNTABILITY OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT (2004), <http://www.gao.gov/new.items/d04353r.pdf> (identifying 1,138 rights and privileges afforded to married couples under the United States Code).

<sup>34</sup> 1 U.S.C. § 7.

same-sex marriage.<sup>35</sup> These state DOMA's deploy state control over their own marriage law to invalidate a same-sex marriage; section 2 of the federal-level DOMA was passed by Congress with the goal of reinforcing the state's power, already being exercised under choice-of-law principles,<sup>36</sup> to reject out-of-state marriages.<sup>37</sup> Section 3 of DOMA, as noted above, takes same-sex marriages out of the definition of marriage in federal law.<sup>38</sup> Even if section 3 of DOMA were repealed or held unconstitutional by the Supreme Court, a subsequent move by a married same-sex couple to a state that rejects the validity of all same-sex marriages would cause the loss of all federal marriage benefits that the couple enjoyed in the state that treated their marriage as a legal marriage. Some same-sex couples would have a *de facto* tax on their mobility, rendering them less able than other couples to relocate for economic betterment or other factors.<sup>39</sup>

### C. Equality Principle and Federal Courts

In fact, the inequality at the federal level created by DOMA may be ending soon. In an unbroken string of victories in federal courts, couples challenging the cancellation of their marriages for federal purposes have prevailed. Conspicuously, they have prevailed in a unanimous First Circuit opinion,<sup>40</sup> in a well-reasoned Southern District of New York opinion,<sup>41</sup> in a district court opinion in Connecticut,<sup>42</sup> and in a bankruptcy court holding.<sup>43</sup> Affirming companion district court opinions in cases brought by the Commonwealth of Massachusetts and seven same-sex couples, the First Circuit relied primarily on principles of equal protection, but also made an overt appeal to principles of federalism that allow each state to make its marriage law.<sup>44</sup> The Court observed, importantly for future debate and litigation, that the question "couples issues of equal protection and federalism."<sup>45</sup>

Here is the critical federalism passage in the opinion:

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<sup>35</sup> The better view is that there should be a presumption in favor of construing the provision, unless it is entirely without ambiguity, as only directed to prevent gay couples from claiming a right to marry under state law but not denying recognition to marriages legally contracted in another state. *See* Wolff, *supra* note 8, at 2241, (describing the Clear-Statement Rule adopted by some courts to mitigate provisions voiding certain kinds of marriages).

<sup>36</sup> *See* Solimine, *supra* note 30.

<sup>37</sup> Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 and 28 U.S.C. § 1738C).

<sup>38</sup> *Id.*

<sup>39</sup> Couples even worry about the possible effect and regret the symbolism of non-recognition in nearby states where their status lacks recognition. The couple who married in every state that granted them marriage rights, finally marrying in their home state of New York, felt a sense of vulnerability: "But even on one of the happiest days of their lives, after the ceremony, the couple remarks how perplexing it is that they had just hosted another beautiful wedding, but if they were to get in their car and drive across a bridge to New Jersey they would no longer be married. *See* Webley, *supra* note 15.

<sup>40</sup> *Massachusetts v. U.S. Dept. Health & Human Serv.*, 682 F.3d 1 (1st Cir. 2012).

<sup>41</sup> *Windsor v. United States*, 833 F. Supp.2d 394 (S.D.N.Y. 2012).

<sup>42</sup> *Pedersen v. U.S. Office of Pers. Mgmt.*, No. 3:10-cv-1750 (VLB), 2012 WL 3113883 (D. Conn. 2012). *See* Joanna Grossman, *The Defense of Marriage Act (DOMA) Takes Another Bullet: How Can It Survive?*, JUSTIA'S VERDICT (Aug. 7, 2012), <http://verdict.justia.com/2012/08/07/the-defense-of-marriage-act-doma-takes-another-bullet>, for a lucid and thorough analysis of the opinion in *Pedersen*.

<sup>43</sup> *Golinski v. U.S. Office of Pers. Mgmt.*, 781 F. Supp. 2d (N.D. Cal. 2011).

<sup>44</sup> *Massachusetts*, 682 F.3d at 7.

<sup>45</sup> *Id.*



[M]any Americans believe that marriage is the union of a man and a woman, and most Americans live in states where that is the law today. One virtue of federalism is that it permits this diversity of governance based on local choice, but this applies as well to the states that have chosen to legalize same-sex marriage. Under current Supreme Court authority, Congress' denial of federal benefits to same-sex couples lawfully married in Massachusetts has not been adequately supported by any permissible federal interest.<sup>46</sup>

The opinion by the First Circuit panel addresses the weight of the federal interest using equal protection analysis.<sup>47</sup> The panel notes that it may not apply “heightened scrutiny” because Supreme Court precedent<sup>48</sup> regarding the level of scrutiny afforded sexual orientation precludes it.<sup>49</sup> Rather, the panel cites numerous cases in which the Supreme Court has held state laws to violate equal protection, using rational basis review.<sup>50</sup> The common factors are that the group burdened has been “historically disadvantaged or unpopular, and the statutory justification seemed thin, unsupported or impermissible.”<sup>51</sup>

Such equal protection cases have had to do with legislation aimed at keeping “hippie communes” from receiving food stamps,<sup>52</sup> a local zoning ruling denying a zoning variance to a home for the mentally disabled,<sup>53</sup> and an odd state constitutional amendment designed to prevent any jurisdiction anywhere in the state from protecting gay people from discrimination on the basis of their sexual orientation.<sup>54</sup> The Supreme Court gives such laws an especially skeptical look without announcing that classifications affecting such persons will henceforth be subject to

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<sup>46</sup> *Id.* at 16. There is a risk that this federalism interpretation will become iconic in marriage equality. While it acknowledges that the Supreme Court has the power to shape new law, it sets up a powerful rhetorical appeal, available in future litigation, in favor of a view of federalism as a “hands-off” bargain among sovereign entities. See text *infra* accompanying notes 60-68 for further discussion.

<sup>47</sup> *Id.* at 3.

<sup>48</sup> See 16B AM. JUR. 2d *Constitutional Law* § 857 n.4 (2012). Standard rational basis scrutiny is the level of scrutiny sought by lawyers defending a law or rule that is being attacked as a violation of the Equal Protection Clause. In economic cases, but also in cases where the Court does not find intentional discrimination, rational basis review has been seen as virtually certain to result in a finding favorable to the law’s constitutionality. See Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1077 (2011). The rationale is that much law does not need judicial oversight to protect the interests of citizens from legislative majorities, since the political process provides adequate protection on the basis of equal access and political compromise. See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* 719 (3d ed. 2009). Rational basis is thus highly deferential to lawmakers and to government actions, allowing made-up reasons to carry the day if they are remotely plausible. See, e.g., *U. S. R. R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980). Heightened, or intermediate, scrutiny requires that a law advance an important governmental interest in a way that is substantially related to that interest. See *Craig v. Boren*, 429 U.S. 190, 197 (1976). Strict scrutiny requires a compelling governmental interest, and the law must be narrowly tailored to achieve that interest. See *Korematsu v. United States*, 323 U.S. 214, 216-18 (1944). If there is an approach to achieve the interest that is less burdensome to the interest affected, or what judges call a less restrictive alternative, the law fails.

<sup>49</sup> *Massachusetts*, 682 F.3d at 4.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 5.

<sup>52</sup> *U.S. Dep’t of Agriculture v. Moreno*, 413 U.S. 528 (1973).

<sup>53</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

<sup>54</sup> *Romer v. Evans*, 517 U.S. 620 (1996).

a form of heightened scrutiny. Thus, the Court imposes a discipline on laws that carry an odor of especially weak justification and a relatively easy-to-discern motive to harm, or treat with insufficient regard, an unpopular group. However, where new laws do not provide indicia of suspicion in the form of red flags filled with the winds of possible bias and poor rationales, these decisions leave open the possibility for legislatures to deal with these categories without triggering heightened judicial scrutiny. The Supreme Court has never labeled such cases or has announced that such a distinctive form of review exists. Even if it does exist, there has been no statement that this form of review has special resonance for cases about gay rights. Undoubtedly for that reason, in her *Windsor* opinion, Judge Jones of the Southern District of New York took pains to disclaim any use of rational basis “with bite,” only applying standard rational basis scrutiny and finding the law to have no rational basis.<sup>55</sup>

The First Circuit, and, with greater caution, the Southern District of New York, thus combine tools used by the Supreme Court in equal protection analysis with a view of states as having a primary role in the making of marriage law.<sup>56</sup> Blending the two ideas, these courts find the *federal* interests in invading a state domain by disregarding state-authorized marriages licensing laws to render all same-sex marriages a nullity for federal law, far too thin, or nonexistent, to justify the inequality caused by DOMA’s across-the-board definitional death sentence for state-created marriages.<sup>57</sup>

So far so good for an advocate of gay marriage rights. While the First Circuit emphasizes that precedent does not permit the panel to hold that gay marriage is a fundamental right, it usefully applies equal protection analysis to invalidate a federal law that burdens gay marriage as a category. In this regard, federal courts are coalescing around similar reasoning on the meaning of federalism for state prerogatives in marriage law vis-à-vis Congress.<sup>58</sup> Federal courts agree that Congress must accept for federal law the marriage law of the states rather than fashion one independent of the various states’ laws authorizing marriages, and equality reasoning plays a role in reaching a conclusion about federalism.

## II. The Gap in Equality and Federalism Reasoning in the DOMA cases: A Slow Pace for Change

The emphasis placed on federalism by the First Circuit as enabling a “diversity of governance based on local choice”<sup>59</sup> leaves a gap in the path by which same-sex marriage could become available and valid for all same-sex couples in the United States, wherever located. The First Circuit treats the right of some states to *authorize* same-sex marriages under their law as the equivalent of other states’ rights to *exclude* gay marriage.<sup>60</sup> Seemingly, the opinion means a fairly straight-forward, “What’s good for the goose is good for the gander.” Some states can create gay marriage, and some states can ban gay marriage entirely. They can, in effect, *unmarry* couples.

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<sup>55</sup> *Windsor v. United States*, 833 F. Supp.2d 394, 402 (S.D.N.Y. 2012).

<sup>56</sup> *Massachusetts*, 682 F.3d at 7-8.

<sup>57</sup> See *supra* text accompanying note 14.

<sup>58</sup> See also *In re Balas*, 449 B.R. 567 (C.D. Cal. 2011).

<sup>59</sup> *Massachusetts*, 682 F. 3d at 16.

<sup>60</sup> *Id.*

That seeming equivalency is wrong. Instead, one simple but complicated-sounding legal reason refutes this argument, supported by general logic about federalism, equality, and legal orderliness and fairness.

#### A. The Legal Point: Creation and Voiding of Same-Sex Marriage

The simple, legal-sounding point is premised on the difference between the state interest in not *creating* same-sex marriages and the state interest in *voiding* marriages created in other states.<sup>61</sup> There is a discernible difference between a state's interests in concluding there is no right to same-sex marriage under its marriage licensing statutes and the interests of another jurisdiction in deciding what treatment to give a marriage authorized by a state. This is what the First Circuit recognized when it held that the federal government cannot void same-sex marriages for federal purposes even where same-sex marriage is not a fundamental right. That is, the view that a state does not have an obligation under fundamental rights analysis to authorize same-sex marriages does not mean that the status is so insubstantial that anything follows in terms of the treatment of that status by a different jurisdiction. Once a state authorizes a same-sex marriage, the marriage acquires real legal substance – it is not a vaporous apparition.

Thus, we come to the legal point. By voiding the legal substance created by another state, the non-recognition of same-sex marriage has *extra-territorial* effect. For the novice in law, one might believe that a state that creates a same-sex marriage that then “travels” with a couple intending to reside in another state is imposing an extra-territorial effect on that other state. But, in law, the extra-territorial effect is the opposite. By cancelling a marriage made by another state, the voiding state is reaching out and imposing adverse effects outside the state, including, should Section 3 of DOMA be found unconstitutional, the cancellation of federal benefits.<sup>62</sup>

This effect is especially strong for couples who marry in Massachusetts as domiciliaries, live there for 10 years or so, and then move to Texas. Under the theory that each state can say who is married, because that's the federalism bargain, Texas can cancel a 10-year marriage with three children, two dogs, and a gerbil. Texas can and will cancel a marriage whatever the impact on the couple's welfare. If one of the couple is severely ill and needs the health benefits of the other, Texas law still cancels the marriage. There is no concern either for the impact on the life expectancy of someone's spouse or for any child's possible loss of parental guidance and affection. This result is a little easier to stomach for an *evasive* marriage,<sup>63</sup> where a couple travels to Massachusetts from Texas, marries and returns to Texas, and is told they are not properly married.

#### B. Federalism, Equality, Legal Orderliness, and Fairness

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<sup>61</sup> Some authors argue that a due process violation occurs when a state voids the same-sex marriage of a couple who relocates from a state that recognizes the marriage of the couple. See Steve Sanders, *The Constitutional Right to (Keep Your) Same-Sex Marriage*, 110 MICH. L. REV. 1041 (2012). One weakness in this approach is that couples who marry in the United States are on notice of this lack of portability.

<sup>62</sup> See *supra* text accompanying notes 38-39.

<sup>63</sup> See generally MARY E. RICHMOND & FRED S. HALL, MARRIAGE AND THE STATE 187-204 (1929).

The easy assumption that Texas’s right to reject an evasive marriage makes sense takes us to the general logic about federalism, equality, and legal orderliness and fairness. While we may agree that Texas should be able to reject evasive marriages that create harm to one of the parties, or which have no legal presence in the United States in any state, same-sex marriages have attained a stature in the United States that renders them unique.<sup>64</sup> The dogmatic voiding by states of marriages of two people legally competent to marry has implications for federalism, equality, and legal orderliness and fairness that are not raised by the rejection of underage marriages or marriages that do not occur under the law of any American state. Thus, contesting the reasonableness and fairness of voiding evasive same-sex marriages brings us back to the possible difference between a state interest in declining to authorize same-sex marriages and a state interest in voiding them. Such a concern with fairness within this special marriage context also requires that we contest part of the reasoning of the First Circuit – the idea of a federalism bargain that gives one state a license to cancel out-of-state same-sex marriages in exchange for the right of another state to create them, with the federal government respecting both state actions as “diversity of governance based on local choice.”<sup>65</sup>

Contesting the First Circuit’s rhetoric requires applying their own skeptical analysis (of the federal interest in cancelling state marriages for federal purposes) to the state interest in voiding same-sex marriages made in another state. As a reminder, even absent section 3 of DOMA, a state’s ability to cancel a marriage under its own laws would put many couples back into the same situation they currently face under section 3: It would cancel spousal Social Security benefits, tax-filing status, military death benefits, and spousal immigration rights.<sup>66</sup>

The extra-territorial effect, in a mobile society, demonstrates that the state interest in such a radical act is paper thin, indeed nonexistent. For the cancellation of a 10-year marriage that winds up located in a strong anti-gay-marriage state, the disproportion between any state interest in declaring the marriage nonexistent and the impact on the couple and their children, if any, of the harsh voiding dogma is large. Voiding is in extreme opposition to the protective rules for other marriage pairings. Marriages are traditionally subject to a strong presumption favoring their validity; judges apply canons of construction to save them from possible legal infirmities associated with failure to observe formalities in forming them.<sup>67</sup> The policy rationales are numerous, including protection of children and preventing the opportunistic resort by a spouse to a formalistic claim, especially after years of marriage, that there is not a marriage and hence no obligations at all. A wealthy spouse who wishes to disrupt a long-term marriage in Massachusetts could game the system by moving to a non-recognizing state and thus complicate adjudication of support and other obligations; while a judgment in the home state might ultimately be required to be enforced as a judgment under Full Faith and Credit,<sup>68</sup> there are perverse incentives introduced into the ground rules for the marriages of same-sex couples. Subjecting some state marriages to the vagaries of varying state laws and the possible bad faith of a spouse is not an effective defense of marriage, but a step in diluting its social meaning and prestige. So long as states help maintain marriage as a social good, the overall legal environment

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<sup>64</sup> See *supra* note 8 for a listing of states that authorize same-sex marriage.

<sup>65</sup> *Massachusetts*, 682 F.3d at 16.

<sup>66</sup> See U.S. GOV’T. ACCOUNTABILITY OFFICE, *supra* note 33.

<sup>67</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971).

<sup>68</sup> U.S. CONST. art. IV, § 1.

should properly reinforce, not undermine, its status as a formative relationship promoting stability for family health. Equality principles and humane policy support protection of marital family units from disruption justified by thin claims of state interest.

The concept of a "federalism bargain" is flawed. Such a view treats the provision of marriage rights to a significant subset of the citizenry in support of dignity and legal stability as the federalist equivalent of state-mandated cancellation of long-standing marriages. The purported equivalency of two such radically different acts toward citizens is insufficiently reasoned and is even indifferent to the vital interests of Americans and their families. Federalism and equality are stronger partners than can be depicted in such a picture of a "fair bargain," with a harmonious equipoise of humane policy and arbitrary disruption viewed as a perfect *federalist* equity. An abstract equity for narrow state preferences lacks the constitutional or moral force to supersede the deeply entrenched ideal of equality for citizens.

Similarly, the refusal to recognize a marriage created through travel and immediate return to a domicile, in a single nation that contains numerous states that authorize such marriages, is an arrogant rejection of many marriages and would, absent DOMA, have a negative extra-territorial effect. Without DOMA, the primary effect of the refusal would be to prevent federal recognition of a same-sex marriage; in practical terms, it would cause harm to marital interests outside the state. Any valid state interest simply lacks weight when compared to the potential harm inflicted.

The couple will still be present in the state, with the expressive meaning of the marriage status that a state conferred. The couple will still assert rights and press for forms of recognition. Indeed, a Texas couple who married in D.C. demanded that the Dallas Morning News include their marriage in the paid wedding announcements.<sup>69</sup> After a period of resistance based on the state law denying recognition to gay marriages, and offering only inclusion in civil union announcement section, the paper relented.<sup>70</sup> It now prints same-sex wedding announcements.<sup>71</sup>

The eventual printing of the Texas wedding announcement illustrates the sense of neighborliness that the question of recognition can release, by comparison with the frequent reaction to a demand for state law to be rewritten to authorize same-sex marriage. Even in a period of raucous public discourse enabled by the internet and political polarization, civility often prevails in interactions that feel person-to-person. Denial of a courtesy to a newcomer or a neighbor, if it takes the form of an insistent refusal to honor or acknowledge that person's legally contracted marital status, becomes a breach of fair play and equal respect. American civility lays

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<sup>69</sup> See Michael Jones, *Hey Dallas Morning News: Same-Sex Marriage Announcements Belong in the Weddings Section*, CHANGE.ORG (Aug 20, 2012), <http://www.change.org/petitions/hey-dallas-morning-news-same-sex-marriage-announcements-belong-in-the-weddings-section>.

<sup>70</sup> John Wright, *Dallas Morning News Confirms That It Will Publish Same-Sex Marriage Under Weddings*, DALLASVOICE.COM (July 1, 2011), <http://www.dallasvoice.com/dallas-morning-news-confirms-publish-same-sex-marriages-weddings-1081987.html>.

<sup>71</sup> Dani Heffernan, *Wedding Announcement for Gay Couple Printed in Dallas Morning News*, GLAAD (July 18, 2011), <http://www.glaad.org/comment/2820>; Frederick W. Rayner & David S. Gebhart, *Wedding Announcement*, THE DALLAS MORNING NEWS, Jan. 15, 2012, <http://www.legacy.com/celebration/dallasmorningnews/celebrations-announcement.aspx?n=frederick-william-rayner&aid=155470531>.

claim to a common culture around which surprising courtesies can arise between nominal adversaries.<sup>72</sup>

The local response to mobile same-sex couples also illustrates that there is a gap between a state's interest in not creating same-sex marriages, and its interest in denying their existence. Lawyers argue that, if the Supreme Court were willing to say there is no state interest in refusing to recognize a same-sex marriage, there would be no state interest in refusing to authorize a same-sex marriage.<sup>73</sup> Common sense belies that legal argument, as does the willingness of even conservative states to recognize out-of-state gay marriages. The key example is Wyoming, where Republican legislators appealed to the state motto, the Equality State, to argue against and vote down a proposed law that would refuse recognition to gay marriages made in other states.<sup>74</sup>

### III. Equality Federalism: A Path to Marriage Fairness

#### A. Federalism Principles

If there is a disposition in some states, and in politics, to distinguish what state law will facilitate, and what the state will accept from another state, there is also room for the Supreme Court to see a different interest at play in state marriage licensing law and rules that void same-sex marriages. Clearly, some conservative state lawmakers perceive a difference between writing local marriage law to express local understanding as compared with using their voiding powers that actually harms the material interests of couples.<sup>75</sup> Federal courts can likewise construct a judicial scale to measure differing interests as a support for differing legal constructs affecting marriage.

In constructing such a scale, the judicial methodology on which federal district and circuit court judges place reliance in Equal Protection jurisprudence, in light of precedents created by the Supreme Court, is to apply the correct level of judicial scrutiny to test the law against constitutional principles.<sup>76</sup> The standard summary of the Supreme Court's development

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<sup>72</sup> The extreme example in our history is the frequency of amicable interactions between Northern and Southern soldiers during the Civil War, in which their common attachment to the abstract ideals and the cultural life of the United States allowed them to fraternize with real affection for one another, despite their opposed readings of abstract ideals such as freedom. REID MITCHELL, *CIVIL WAR AND SOLDIERS: THEIR EXPECTATIONS AND THEIR EXPERIENCES* 36-38 (1988) (discussing "the enemy encountered" and describing the effect of "reduc[ing] phantoms to flesh and blood" and recognizing the common "Americanness" of enemies imagined as monstrous savages). Differing understandings by soldiers of abstractions about threats to freedom lost salience in one another's presence as "the common humanity of the enemy" became apparent. *Id.* at 38.

<sup>73</sup> Several of my colleagues have made this argument to me, with one adding the pragmatic prediction that after a period of states move one by one to grant same-sex marriage rights, the Supreme Court will, in the manner of its decision to sweep away laws against interracial marriage, "mop up the rest." Email from Brian Kalt to Mae Kuykendall (May 24, 2012, 9:24:44 PM) (on file with author).

<sup>74</sup> Aaron LeClair, *Anti-gay Marriage Bill Defeated in Senate*, LARAMIE BOOMERANG (Wyo.), Mar. 3, 2011, <http://www.laramieboomerang.com/articles/2011/03/03/news/doc4d6f23246ab30937837749.txt>. The bill was deemed in conflict with a state constitutional provision: WY. CONST. art. I, § 2.

<sup>75</sup> "This bill does nothing more than to strip away liberties that have been granted by other states," said Rep. Ruth Petroff. "We go from being the Equality State to the Strip-Away-Liberty State." LeClair, *supra* note 74.

<sup>76</sup> The University of Missouri at Kansas City School of Law has a website that provides basic summaries of constitutional doctrine. For a useful tutorial concerning levels of judicial scrutiny, see Doug Linder, *Levels of*

of levels of judicial scrutiny is that it is three-tiered.<sup>77</sup> Because lawyers feel most comfortable using clearly distinct categories given a stamp of approval by the Supreme Court, lawyers organize their arguments to courts to persuade judges to choose and then apply favorably for their client one of the commonly-known levels of scrutiny: rational basis, intermediate or heightened scrutiny, and strict scrutiny.<sup>78</sup>

The neat separation of equal protection into three separate categories has critics.<sup>79</sup> Most of these critics, among whom have been Supreme Court justices writing in opinions, argue that the tiers of review obscure the interests affected by placing too much weight on the initial choice of the tier to be used, with insufficient care in describing the precise nature of the interest and the burden placed on it.<sup>80</sup> Justice Marshall argued strongly for a sliding scale that was sensitive to the interests implicated in light of their connection to core constitutional protections.<sup>81</sup> In effect, such a critique argues that tiers of review weaken judicial oversight of laws that deny equal treatments to citizens. In the context of race, Barnes and Chemerinsky further develop the view that Equal Protection jurisprudence is weakened by the three-tiers approach to judicial oversight.<sup>82</sup>

As explained above, the Supreme Court occasionally engages in a more elaborate form of rational basis review known generally as rational basis with bite.<sup>83</sup> When this occurs, the Court's analysis is very fact specific.<sup>84</sup> The Court looks at a particular law burdening a group, and at the

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*Scrutiny Under the Equal Protection Clause*, EXPLORING CONSTITUTIONAL CONFLICTS, <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/epscrutiny.htm> (last visited Aug. 8, 2012).

<sup>77</sup> *Id.*

<sup>78</sup> 16B AM. JUR. 2D *Constitutional Law* § 857 n.4 (2012) (“When a court finds that a classification system treats similarly situated persons differently and so implicates equal protection, it must determine which level of scrutiny should be employed to evaluate the constitutionality of that classification: (1) the rational basis test to determine whether a statutory classification bears some reasonable relationship to a valid legislative purpose; (2) the heightened scrutiny test to determine whether a statutory classification substantially furthers a legitimate legislative purpose; or (3) the strict scrutiny test to determine whether a statutory classification is necessary to serve some compelling state interest.”).

<sup>79</sup> For discussions over time of these critical views, see Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L. J. 161, 163-65 (1984); Suzanne B. Goldberg, *Equality without Tiers*, 77 S. CAL. L. REV. 481, 518-27 (2004); Barnes & Chemerinsky, *supra* note 48, at 1077-87.

<sup>80</sup> Barnes & Chemerinsky, *supra* note 48, at 1079-80.

<sup>81</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez* - 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting) (arguing the Court jurisprudence revealed a “spectrum of standards” in Equal Protection jurisprudence that “clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending . . . on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.”)

<sup>82</sup> Barnes & Chemerinsky, *supra* note 48, at 1077-87.

<sup>83</sup> Kenji Yoshino explains that “[t]he claim that the canon has closed on heightened scrutiny classifications must be tempered by acknowledging the Court's use of a more aggressive form of rational basis review.” Even though the Court itself has not labeled the offshoot of rational basis ‘with bite,’ it is commonly understood this way.” Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 757 (2011) (“[A]cademic commentary has correctly observed that ‘rational basis review’ takes two forms: ordinary rational basis review and ‘rational basis with bite review.’”).

<sup>84</sup> For example, in *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), Justice White carefully reviews the several rationales, including the location of a proposed home for the mentally disabled on a 100-year flood plain, for denying a zoning variation and found them wanting in light of facts about other zoning variations that were granted.

claimed need for the law, and reaches a skeptical view of the law. In effect, the Court concludes that the law really is irrational.

Laws banning same-sex marriage should invite similar treatment. The general practice by states of completely voiding same-sex marriages is, concededly, a little different than a single law motivated by the dislike, for example, of hippies,<sup>85</sup> because different states created the form of non-recognition individually and at different times. But much of the spread of an intensified statement of non-recognition happened in a relatively compressed time period that began when Hawaii appeared on the verge of marrying same-sex couples.<sup>86</sup> The process reappears even today, with the recent harsh North Carolina law<sup>87</sup> that strives to cover nearly every base in order to reject any form of union, from whatever source, between people of the same sex.

The laws take relatively similar forms, and often are embedded in state constitutions.<sup>88</sup> While voters vote for them, the laws are often drafted by anti-gay advocacy groups, who write and campaign for laws that may well be far more extreme than the voters would actually demand.<sup>89</sup> Many people vote to affirm that, in their understanding, marriage is heterosexual and that their state law should continue to express that view. Few voters likely understand the more esoteric parts of the laws, which have to do with a complex body of law called “conflicts of law.” Indeed, conflicts of law is so complex that one scholar stands out for his mastery of the ins and outs of conflicts of law in connection with marriage.<sup>90</sup>

The prevalence of strong bans enacted by referendum brings us into the presence of the barest claim to raw majority control, one that comes without any reasoned basis, or, at best, “justification that seems thin, unsupported or impermissible.”<sup>91</sup> Again, as noted, the referenda texts are written by strong anti-gay groups who seize a sledge hammer to smash all hope for gay

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<sup>85</sup> See *supra* text accompanying note 53.

<sup>86</sup> *Baehr v. Lewin*, 582 P.2d 44 (Haw. 1993). Hawaii voters then passed by referendum a state constitutional amendment banning same sex marriage. HAW. CONST. art I, § 23 (originally HB 117).

<sup>87</sup> N.C. CONST. art. XIV, § 6 (“Marriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State.”).

<sup>88</sup> See e.g., *id.*; MICH. CONST. art. I, § 25 (“[T]he union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.”).

<sup>89</sup> See Martha Waggoner, *Amendment One, North Carolina Gay Marriage Ban, Passes Vote*, HUFFINGTON POST (May 8, 2012), [www.huffingtonpost.com/2012/05/08/amendment-one-north-carolina\\_n\\_1501308.html](http://www.huffingtonpost.com/2012/05/08/amendment-one-north-carolina_n_1501308.html) (indicating that the amendment broadly applies to all unmarried couples, and could have negative unintended consequences for victims of domestic violence). See also Speaker Brian Brown, Eagle Forum San Diego Convention 2012, <http://www.efsdsdconvention2012.com/BrianBrown.html> (last visited Aug. 9, 2012) (biography claiming credit for placing Prop 8 on the ballot in California and variously describing anti-marriage activities aimed at same-sex couples in Maine, New Jersey, New York, Maryland, Rhode Island, New Hampshire, Minnesota, and North Carolina).

<sup>90</sup> The academic expert, without peer, is Andrew M.M. Koppelman, whose writings on the subtleties of non-recognition, and the possible avenues to chip away at those applications that go past a point of defensibility under current understandings, are extensive and authoritative. See, e.g., Andrew Koppelman, *The Limits of Strategic Litigation*, 17 LAW & SEXUALITY 1 (2008); ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES (2006); Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143 (2005); Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921 (1998); Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1 (1997).

<sup>91</sup> *Gill v. U.S. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010).



couples who find themselves within the borders of a state.<sup>92</sup> If the average scholar is daunted by the subject of conflicts of law conventions, one might pause at treating with the deference due the law-making process the majoritarian vote to enact an extreme state DOMA law or constitutional amendment. Concededly, some rejections of same-sex marriages that came into legal existence outside a state are part of preexisting, or legislature-enacted state law, but there are fine points about whether explicit statements disavowing gay marriages should be read to also require non-recognition.<sup>93</sup> Most non-recognition law is either ill-considered voter initiatives written by extreme forces, or an obsolete overhang from an era when there were no same-sex marriages and the rules were little applied to any marriage.<sup>94</sup>

## B. Potential Pathways to Same-Sex Marriage

In the First Circuit opinion, there is a subtle yet powerful convergence of federalism principles and equality principles. The result is a repudiation of the federal interest in withholding federal marriage status from state-created marriages. A similar convergence is possible to create national gay marriage without declaring same-sex marriage a fundamental right that all states must enact and administer. The Supreme Court need only recognize that strong non-recognition norms, classifying for negative treatment marriages created by numerous sister states and accepted culturally by increasing numbers of citizens, do not have a sufficient rationale to justify the harm they do to interests outside the state. At the same time, the Court could decide, as a prudential matter, to leave the writing of state marriage law to the states.

The Court need not decide whether same-sex marriage is a fundamental right under substantive due process or whether equality principles require an end to state rules barring same-sex couples from receiving a state marriage license; the Court can foreclose the need to respond to any demand that it articulate a limiting principle for other hypothesized variants on traditional marriage. The Supreme Court can rather recognize that marriage exists in the American states and apply strong equality principles within the context of comity among the states. With such an approach, the judicial workload for folding in equality principles to the legal marriages in their states would fall to state judges given a charge to adapt marriage law. These judges, with a strong concern for equality principles, could accommodate changing understandings of family and citizenship with which states must grapple.<sup>95</sup> Where the reach of the equality principle could be arguable, state judges could play the common law role of gradually developing an evolving legal understanding of core guiding principles. If a state court makes a call that is plainly antithetical to equality principles, such as not allowing a same-sex spouse to inherit by intestacy, a district court could quickly remedy the problem. But the primary judicial forum for working through the equality principle, enunciated as applicable to same-sex marriage status, would be that of state judges in family court and state appeals courts. Rather than hearing arguments about the threshold question of marital status, state judges could consider how equality rules affect existing marriages that lack the component of differing genders.<sup>96</sup> State court energy could be

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<sup>92</sup> See *supra* text accompanying note 95.

<sup>93</sup> Wolff, *supra* note 6, at 2241.

<sup>94</sup> Sanders, *supra* note 61, at 1436-38.

<sup>95</sup> Wolff, *supra* note 6, at 2216.

<sup>96</sup> See, e.g., Nicolas, *supra* note 27.

directed to more productive questions that arise in connection with American marriages, and could set aside a fruitless use of judicial resources debating existential imponderables.

If the Court took that tack, the worst injustices and dignitary harms would be averted while permitting some role for local choice and releasing judicial energies to focus on real-world family problems.

#### IV. Conclusion

Family and marriage law is a special case in the federalism process. Today, this body of law reflects the nation's lingering willingness to allow experimentation, *and* permits states to disrespect, on the basis of distaste for gender identity of the adult pairs, marital statuses created by other states. Family and marriage law is also special in that marriage, though a common term widely used and understood, is increasingly a mystery in its gender logic and in its power to define the contours of a legal status that combines individuals into a legal unit. State courts are working through the gender logic of the marriage "essentials," in a range of contexts. So, even as we all know what marriage is, the courts are working to rationalize, and in some respects to *redefine*, the institution in a society with evolving beliefs about gender roles and marriage internal arrangements. State legislatures and state courts are providing needed deliberation and policy in light of changing patterns and meanings of equality and the purposes of marriage.

As the states struggle to adjust marriage law to a changing world of sex equality, same-sex marriage incongruously remains, in the prevailing understanding of federalism, a minority practice lacking the real marital substance that mandates: a) state judicial protection of the marriages of similarly situated opposite-sex couples; and b) for such marriages, an additional shield of protective constitutional doctrine. The different weight attached to an identical legal status, depending on the identity of the members, is wholly at odds with norms of equality contained in the Fourteenth Amendment and in opposition to law's function as a source of order and stability. No other ascribed identity of two spouses would be subject to such a view of the federalist deal as a fair bargain.<sup>97</sup> Nor does treating the marital aspirations and marital status of some couples as subject to disruption by factors external to the marriage serve the interests of family unity and respect for marriage. A society committed to the equality of persons under the law may not treat marriages with such disdain. To ensure a fairer treatment of marriage, equality is needed as a strong partner to federalism, not merely an occasional helper.

To be fair, some of the resistance to gay marriage is based on sincerely motivated views that traditional marriage should have a special status because it's good for society. Marriage advocate David Blankenhorn recently acknowledged, however, that many who oppose same-sex marriage are simply anti-gay.<sup>98</sup> Because of the prevalence of anti-gay bias in some opposition to same-sex marriage, Blankenhorn ended his advocacy against same-sex marriage.<sup>99</sup> Yet Blankenhorn maintained his view that society benefits from traditional marriage and, in an ideal

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<sup>97</sup> See *supra* text accompanying note 48 for the Southern District's use of a federalist bargain rationale positing a tradeoff between states' rights both to create and to destroy marriages.

<sup>98</sup> David Blankenhorn, Op-Ed., *How My View on Gay Marriage Changed*, N.Y. TIMES, June 22, 2012, [http://www.nytimes.com/2012/06/23/opinion/how-my-view-on-gay-marriage-changed.html?\\_r=1&ref=opinion](http://www.nytimes.com/2012/06/23/opinion/how-my-view-on-gay-marriage-changed.html?_r=1&ref=opinion).

<sup>99</sup> *Id.*

world free of animus, it would have a special status because it's good for society. Without adopting that view, one may yet conclude that state control over the writing of marriage law may properly reflect views about the good of marriage, even in the absence of an empirical proof. At the same time, the rejection of marriages created elsewhere has a strong association with animus and has no discernible purpose in today's mobile population traveling and relocating within one nation and one culture. Even if one generously credits the intense opposition to same-sex marriage recognition as benign in intent, the lack of ability in litigation to present an empirically sound<sup>100</sup> or logically plausible reason, the reliance on a view of states as islands of marriage sovereignty,<sup>101</sup> and the implicated indifference to family welfare,<sup>102</sup> support an ending to a state license to kill healthy marriages.

Might a constitutional partnership between equality and federalism permit federal courts to end wholesale state rejections of a common marital status yet stay out of the state marriage licensing laws? By making astute use of a Constitution structured around individual rights and state prerogative, can the Supreme Court fashion a constructive, defensible compromise? Such an outcome would conserve court resources, avoid a high-octane confrontation with state officials, and restore the orderly treatment of a critical family-protective legal status.

The Court, or as Justice Brennan would remind us, five justices will decide the matter. Putting before them a path to vindicating federalism, ideals of equality, and social peace surely has much to recommend it.

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<sup>100</sup> Perry v. Schwarzenegger, 704 F. Supp.2d 921, 953-91 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012).

<sup>101</sup> See *supra* Part II.B.

<sup>102</sup> Sanders, *supra* note 61, at 1421, 1450 (“If two people who were once married are suddenly rendered legal strangers to one another, property rights are potentially altered, spouses disinherited, children put at risk, and financial, medical, and personal plans and decisions thrown into turmoil.”).