

# Is the Full Faith and Credit Clause Still “Irrelevant” to Same-Sex Marriage?: Toward a Reconsideration of the Conventional Wisdom

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## INTRODUCTION

For more than a century, and continuing through this summer’s landmark same-sex marriage decision in *United States v. Windsor*,<sup>1</sup> the Supreme Court has characterized marriage as something “sacred,”<sup>2</sup> “the most important relation in life,”<sup>3</sup> “one of the ‘basic civil rights of man,’ fundamental to our very existence and survival,”<sup>4</sup> a “status of immense import,”<sup>5</sup> and something essential to an individual’s “personhood and dignity.”<sup>6</sup>

If marriage is indeed as special, even unique, in our legal tradition as the Supreme Court says it is, then it would seem reasonable to assume that once a state has created a marriage, other states should be bound to recognize and respect it. Fifteen states (as of this writing) plus the District of Columbia now authorize same-sex marriages.<sup>7</sup> But thirty-three other states maintain so-called mini defense of marriage acts (or “mini-DOMAs”),<sup>8</sup> which are generally understood not only to prohibit the creation of same-sex marriages, but also to prohibit recognition of such marriages from other jurisdictions.<sup>9</sup> To the extent these mini-DOMAs effectively

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1. 133 S. Ct. 2675 (2013).

2. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

3. *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

4. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)).

5. *Windsor*, 133 S. Ct. at 2692.

6. *Id.* at 2696.

7. The states are California, Connecticut, Delaware, Hawaii, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Rhode Island, Vermont, and Washington. Same-sex marriage takes effect in Illinois on June 1, 2014. *Where State Laws Stand*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/where-state-laws-stand>.

8. *See id.* Freedom to Marry counts thirty-four such states, but that includes Hawaii, which has marriage equality but retains a constitutional provision authorizing the state legislature to restrict marriage to opposite-sex couples.

9. Although there appear to be no known instances of a mini-DOMA state willingly recognizing an existing same-sex marriage from another state, Michael Solimine has noted that not all mini-DOMAs are clear or explicit about their intended effect on such marriages. *See* 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, 106

nullify the marriages of same-sex couples who migrate from one state to another, they are a violation of the couples' civil rights and dignity, as well as an affront to the states that created the marriages in the first place. Does the Constitution have any role to play in preventing such mischief?

Article IV, Section 1 provides in pertinent part that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other state."<sup>10</sup> The Supreme Court has described the Full Faith and Credit Clause as "a nationally unifying force" that "altered the status of the several states as independent foreign sovereignties, each free to ignore rights and obligations created under the laws . . . of the others."<sup>11</sup> On this understanding, the applicability of full faith and credit to the interstate recognition of marriage seems appropriate and sensible.

But there exists an entrenched conventional wisdom that the Full Faith and Credit Clause actually is "irrelevant to the question of whether one state must recognize another state's marriage."<sup>12</sup> Marriage, according to this conventional wisdom, is simply another subject for ordinary lawmaking—no different from things like workers' compensation, insurance regulation, gas royalties, or fishing licenses—where each state gets to decide policy for itself. The Supreme Court's current Full Faith and Credit Clause jurisprudence prescribes minimal interstate effect for "acts"—that is, ordinary statutory policies—on the principle that a state should not be required "to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate."<sup>13</sup> States can apply each other's laws as a matter of comity if they choose, but nothing in the Constitution forces them to do so.

And so, according to mainstream conflict of laws scholars, if a same-sex couple marries in Iowa, then later pulls up stakes and moves to a state like Indiana which considers their marriage "void,"<sup>14</sup> that's just tough luck: Marriage "has always been nearly exclusively a matter of state law," and "[n]othing about the same-sex marriage debate changes this, despite the frequent invocation of the Full Faith and Credit Clause as if it were an all-encompassing rule of the transportability of such relationships across state lines."<sup>15</sup> Adherents to the conventional wisdom tend to make this point with rather smug certitude, portraying anyone who assumes differently as something close to a dimwit.<sup>16</sup>

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(2010).

10. U.S. CONST. art. IV, § 1.

11. *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943).

12. Patrick J. Borchers, *The Essential Irrelevance of the Full Faith and Credit Clause to the Same-Sex Marriage Debate*, 38 CREIGHTON L. REV. 353, 353 (2005).

13. *Baker v. General Motors Corp.*, 522 U.S. 222, 232 (1998) (quoting *Pacific Emp'rs Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501 (1939)).

14. IND. CODE ANN. § 31-11-1-1 (West 2008) (declaring same-sex marriages "void . . . even if the marriage is lawful in the place where it is solemnized").

15. Borchers, *supra* note 12, at 363.

16. *See, e.g.*, ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES 117–18 (2006) ("For some years now, the press has fecklessly repeated the claim that the full faith and credit clause will require every state to recognize same-sex marriages. Legal scholars have had to say, over and over, that this is a fundamental misconception."); 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

Nevertheless, in this Essay, I urge a reconsideration of this conventional wisdom. As the distinguished family law scholar Joanna Grossman has observed, “[t]he fact that the Full Faith and Credit Clause *has not* been invoked in the marriage context does not mean that it *could not* be.”<sup>17</sup> In a nutshell, my argument is that (1) marriage is *sui generis* as a legal subject, a principle that was underscored by the Court’s recent decision in *Windsor*; (2) accordingly, it misunderstands, even trivializes, marriage to assume that the Supreme Court would and should apply the same rules to marriage that it has applied to things like workers’ compensation and insurance regulation; and (3) there is a national interest in uniformity of marital status which supports use of the Full Faith and Credit Clause to prevent states from denying married couples the full benefit of their legal unions in every jurisdiction. As I demonstrate later in this Essay, I would apply this rule to “migratory,” but not “evasive,” marriages.<sup>18</sup>

To be clear, I am not saying that the Full Faith and Credit Clause obviously has required interstate recognition of valid marriages all along and that other commentators simply have been too obtuse to realize it. The Supreme Court has never spoken to the matter,<sup>19</sup> and in the absence of guidance from a constitutional court, doctrine is what the scholars and commentators say it is. Rather, I am suggesting that *a good argument can (and should) be made* for applying full faith and credit to marriage; the question remains open for judicial resolution, and so it should not be regarded as settled. My goal is to point out what I regard as serious

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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.”); Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. PA. L. REV. 2215, 2222 n.18 (2005) (“As conflicts scholars must explain with increasing frequency, the decision by one state to give effect to a marriage performed in another state is a matter of comity, not constitutional or federal mandate.”).

17. Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433, 454 (2005) (emphasis in the original); see also Gene R. Shreve, *Choice of Law and the Forgiving Constitution*, 71 IND. L.J. 271, 271 (1996) (observing that the Full Faith and Credit Clause “can easily be read to protect nonforum state interests . . . that are disrupted by parochial state conflicts decisions”).

18. In this Essay, I am essentially arguing that full faith and credit for marriage recognition should track the modern conflict-of-laws “place of celebration rule,” which allows an exception for evasive marriages. See *infra* notes 40–41 and accompanying text. This seems sensible because migratory and evasive marriages involve different balances of the equities, both for the states and the individuals involved. Viewing the matter through the prism of horizontal federalism and states’ obligations to each other, as I do here, there is strong justification for a rule that prevents State A from undoing a good-faith marriage that occurred in State B while the spouses were domiciled in State B and properly governed by its laws. A couple who marries in an equality state and later migrates to a mini-DOMA state has become vested in their marriage and acquired a justifiable expectation that it should continue. By contrast, an evasive marriage, where the parties leave their domicile briefly to procure a marriage that their home state would not license, is essentially an act of civil disobedience protesting the home state’s prohibition on the right to marry in the first instance. Such a situation presents a weaker constitutional case for forcing the home state to recognize a marriage to which it objects.

19. Nor has any federal circuit court. At least one federal district court has rejected a full faith and credit argument for interstate recognition of a same-sex marriage. *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1303–04 (M.D. Fla. 2005).

flaws in the conventional wisdom and to encourage some fresh thinking in light of *Windsor* and the present-day realities of same-sex marriage.

This is an especially appropriate time for reconsideration because the United States faces a large and completely unprecedented national problem of interstate marriage recognition.<sup>20</sup> With fifteen marriage-equality states and thirty-three mini-DOMA states creating a nationwide patchwork of marriage recognition, same-sex couples who move from one state to another (as many naturally will for employment, educational, or personal reasons) “face the prospect of wrenching disruption in their lives, loss of parental and property rights, and an array of other problems and indignities, large and small, that a rational legal regime should not tolerate.”<sup>21</sup> As a writer in the *Huffington Post* asked recently, “Would this mean that divorce could be achieved simply by moving across a state line? If one spouse lived in a state permitting gay marriage and the other did not, would the former be married and the latter unmarried?”<sup>22</sup> This status quo is untenable because it will breed “legal chaos, and does not comport with the dignity the Supreme Court requires for gay marriage.”<sup>23</sup> A vigorous dialogue on these questions also shines a spotlight on a major question the Court did not address in *Windsor*: Is section 2 of the Federal Defense of Marriage Act (DOMA),<sup>24</sup> which purports to authorize mini-DOMA states to deny legal effect to same-sex marriages from other jurisdictions if they so choose, also unconstitutional?<sup>25</sup>

As evidenced by *Windsor* itself, the mainstreaming and growing acceptance of same-sex marriage—which is occurring at a pace that almost no one had predicted—is catalyzing both political change and legal innovation. Our assumptions about marriage, family, party politics,<sup>26</sup> public opinion,<sup>27</sup> and the

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20. Prior to *Loving*, many states, of course, outlawed interracial marriages. Yet there were surprisingly few judicial decisions addressing interstate recognition of such marriages. See KOPPELMAN, *supra* note 16, at 35–50. And so that issue sheds no light on the applicability of full faith and credit to marriage.

21. Steve Sanders, *The Constitutional Right to (Keep Your) Same-Sex Marriage*, 110 MICH. L. REV. 1421, 1425 (2012).

22. Joseph B. Kadane, *Gay Marriage Is Coming to a State Near You*, HUFFINGTON POST (July 9, 2013, 10:40 AM), [http://www.huffingtonpost.com/joseph-b-kadane/full-faith-and-credit-clause-gay-marriage\\_b\\_3562038.html](http://www.huffingtonpost.com/joseph-b-kadane/full-faith-and-credit-clause-gay-marriage_b_3562038.html).

23. *Id.*

24. Defense of Marriage Act, Pub. L. No. 104-199, § 2, 110 Stat. 2419 (1996), codified at 28 U.S.C. § 1738C (2006) (“No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.”).

25. See *infra* Part V.

26. See John Avlon, *The Pro-Freedom Republicans Are Coming: 131 Sign Gay-Marriage Brief*, DAILY BEAST (Feb. 28, 2013, 1:30 PM), <http://www.thedailybeast.com/articles/2013/02/28/the-pro-freedom-republicans-are-coming-131-sign-gay-marriage-brief.html> (reporting that 131 prominent Republicans had signed an amicus brief to the Supreme Court “arguing that marriage is a fundamental right that should not be denied to gay and lesbian Americans”).

27. See, e.g., *Growing Support for Gay Marriage: Changed Minds and Changing*

Constitution itself<sup>28</sup> are all being revised, and while this happens, “the work of protecting contemporary American families is work the federal courts must not avoid.”<sup>29</sup> Under these circumstances, there is no reason why the “lawyer’s clause of the Constitution”<sup>30</sup> should be immune from reconsideration.<sup>31</sup>

### I. WHY DOES IT MATTER?

In striking down section 3 of DOMA and holding that the federal government may not refuse to recognize same-sex marriages,<sup>32</sup> *Windsor* was an important milestone for advocates of marriage equality. Given the country’s rapid movement toward accepting same-sex marriage and the proliferation of post-*Windsor* lawsuits challenging state mini-DOMAs,<sup>33</sup> isn’t it inevitable that the Supreme Court will soon drop “the other shoe,”<sup>34</sup> as Justice Scalia put it, and mandate marriage equality nationwide? Isn’t it largely an academic question whether the Full Faith and Credit Clause requires one state to recognize another state’s same-sex marriage? The answer to the first question is yes, but because no one can say how far off in the future that decision is, I suggest that the answer to the second question is no.

The issue of the constitutionality of state marriage bans was teed up for the Court this past term in *Hollingsworth v. Perry*,<sup>35</sup> but the Court ducked the issue on standing grounds. No justices in either the majority or the dissent disclosed how they felt about the merits of the case (though during oral argument, Justice

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*Demographics*, PEW RESEARCH CTR. (March 20, 2013), <http://www.people-press.org/2013/03/20/growing-support-for-gay-marriage-changed-minds-and-changing-demographics/> (observing that “[t]he rise in support for same-sex marriage over the past decade is among the largest changes in opinion on any policy issue over this time period”).

28. See Daniel O. Conkle, *Evolving Values, Animus, and Same-Sex Marriage*, 89 IND. L.J. 27, 42 (2013) (predicting that “we are fast approaching” the time when a constitutional right to same-sex marriage will emerge “supported by evolving national values”).

29. Meredith Johnson Harbach, *Is the Family a Federal Question?*, 66 WASH. & LEE L. REV. 131, 139 (2009).

30. Robert H. Jackson, *Full Faith and Credit—the Lawyer’s Clause of the Constitution*, 45 COLUM. L. REV. 1, 1 (1945).

31. Although my purpose in this Essay is to explore the applicability of the Full Faith and Credit Clause to marriage in light of *Windsor*, I have previously argued that the Fourteenth Amendment’s Due Process Clause independently prohibits mini-DOMA states from voiding, nullifying, or otherwise failing to give legal effect to valid same-sex marriages that migrate from other states. See Sanders, *supra* note 21. I argue that a person who legally marries in her state of domicile, then migrates to another state that becomes her new domicile, has a significant liberty interest in the ongoing existence of her marriage. This liberty interest creates a right of marriage recognition that prevents a mini-DOMA state from effectively divorcing her by operation of law.

32. See Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419 (1996), codified at 1 U.S.C. § 7 (2006).

33. Nan Hunter, *Which States Are Now Facing Marriage Lawsuits?*, THE BILERICO PROJECT (Aug. 1, 2013, 12:30 PM), [http://www.bilerico.com/2013/08/which\\_states\\_are\\_now\\_facing\\_marriage\\_lawsuits.php](http://www.bilerico.com/2013/08/which_states_are_now_facing_marriage_lawsuits.php) (discussing marriage lawsuits ongoing or planned in Arkansas, Hawaii, Illinois, Kentucky, Michigan, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, and Virginia).

34. *United States v. Windsor*, 133 S. Ct. 2675, 2710 (2013) (Scalia, J., dissenting).

35. 133 S. Ct. 2652 (2013).

Sotomayor indicated she might prefer to let the question of state gay marriage laws “perk” for a while longer in the lower courts).<sup>36</sup>

So we must proceed on the likelihood that constitutionally mandated marriage equality for the entire country is some years off. Until same-sex couples receive a constitutional right to *get* married, there are good reasons to focus on the ability of already-married couples to *remain* married. While the number of marriage equality states will continue growing up to a point, a hard core of red states will remain opposed to either granting or recognizing same-sex marriages. As the lawsuits and legislative battles play out, tens of thousands of gay and lesbian couples will suffer uncertainty and the possibility of losing their marital status if they move to the wrong state.<sup>37</sup> Reviving the Full Faith and Credit Clause in this context provides a modest, incremental solution to an obvious injustice while letting the larger marriage questions “perk.” If two people who were once married are effectively rendered legal strangers to one another because they move from a marriage-equality state to a mini-DOMA state, “property rights are potentially altered, spouses disinherited, children put at risk, and financial, medical, and personal plans and decisions thrown into turmoil.”<sup>38</sup> As I have argued, “[t]his is a serious problem of both constitutional law and federalism, and it deserves a central place in the landscape of marriage equality litigation going forward.”<sup>39</sup>

## II. THE CONVENTIONAL WISDOM

In theory, conflict of laws doctrine calls on all states to recognize each other’s marriages except for those that are “evasive” (that is, where a couple briefly leaves their domicile state to procure a marriage they could not get back home).<sup>40</sup> Specifically, a marriage’s validity is supposed to be determined by the law of the place where the marriage was celebrated, not the subsequent domicile.<sup>41</sup> This place-of-celebration rule “confirms the parties’ expectations, it provides stability in an

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36. Transcript of Oral Argument at 64, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144) (quoting Justice Sotomayor).

37. See Brief for Gary J. Gates as Amicus Curiae Supporting Respondent at 25, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) (estimating that there were 114,000 same-sex couples in the United States who were married); *Supreme Court Rulings Strike Down DOMA and Prevent Enforcement of California’s Proposition 8*, WILLIAMS INST. (June 26, 2013), <http://williamsinstitute.law.ucla.edu/press/press-releases/supreme-court-rulings-26-jun-2013/> (estimating 76,000 married couples live in states that recognize the union and 38,000 live in states that do not).

38. Sanders, *supra* note 21, at 1450. For additional discussion of the harms from non-recognition of marriages, see *id.* at 1450–51 nn.188–90 and accompanying text.

39. Steve Sanders, *Next on the Agenda for Marriage Equality Litigators...*, SCOTUSBLOG (June 26, 2013, 5:40 PM), <http://www.scotusblog.com/2013/06/next-on-the-agenda-for-marriage-equality-litigators/>.

40. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971) (“A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.”).

41. *Id.*

area where stability (because of children and property) is very important, and it avoids the potentially hideous problems that would arise if the legality of a marriage varied from state to state.”<sup>42</sup> As one federal court observed more than sixty years ago, the “policy of the civilized world[] is to sustain marriages, not to upset them.”<sup>43</sup>

But for same-sex marriages, mini-DOMA states simply thumb their noses at this principle. Abusing the so-called “public policy exception” to the place of celebration rule, which is only supposed to apply to evasive marriages,<sup>44</sup> they have abandoned the comity required by a sensible choice of law regime and made “protection” of their own marriage policies “the first (and often final) principle.”<sup>45</sup> Several conflicts and constitutional scholars have argued that it is unjust for a mini-DOMA state to effectively nullify a non-evasive marriage that migrates from another state.<sup>46</sup> But full faith and credit minimalists defend such parochialism by insisting that states “are free to disregard the laws of sister states which compete for application,”<sup>47</sup> basically because they have always been allowed to do so. States are allowed to discriminate against marriages they disapprove of because there is no constitutional rule to prevent the “chaotic results” that can occur when choice of law is left “almost entirely in the hands of state courts.”<sup>48</sup>

In the midst of all this, the Constitution’s Full Faith and Credit Clause sits there, seemingly with nothing to do—*because it has never been asked to do anything*. Scholars aligned with the conventional wisdom cannot argue that the Supreme Court’s decisions have affirmatively foreclosed the idea that the Constitution could override state parochialism and enforce the sensible place-of-celebration rule that

42. WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS 398 (3d ed. 2002).

43. *Madewell v. United States*, 84 F. Supp. 329, 332 (E.D. Tenn. 1949).

44. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971). For more on states’ abuse of the public policy exception, see Sanders, *supra* note 21, at 1435–41.

45. Lynn D. Wardle, *From Slavery to Same-Sex Marriage: Comity Versus Public Policy in Inter-jurisdictional Recognition of Controversial Domestic Relations*, 2008 B.Y.U. L. REV. 1855, 1919 (2008).

46. See, e.g., Stanley E. Cox, *Nine Questions About Same-Sex Marriage Conflicts*, 40 NEW ENG. L. REV. 361, 377–79 (2006) (arguing that the public policy exception is unconstitutional and observing that “[i]f it is not intolerable that a couple can be married and not married at the same time, it is at least supremely frustrating”); Andrew Koppelman, *Against Blanket Interstate Nonrecognition of Same-Sex Marriage*, 17 YALE J.L. & FEMINISM 205, 208 (2005) (observing that such a rule “produces absurd and cruel results,” is inconsistent with federalism, and likely violates equal protection); Linda Silberman, *Same-Sex Marriage: Refining the Conflict of Laws Analysis*, 153 U. PA. L. REV. 2195, 2214 (2005) (arguing that “[s]tates with ‘defense of marriage’ acts should not further their own policies at the expense of the legitimate interests of other states and the reasonable expectations of the parties” and that “states that choose to prohibit same-sex marriage should not undermine the rights of newly-arriving couples from established marriages in other states”).

47. L. Lynn Hogue, *State Common-Law Choice-of-Law Doctrine and Same-Sex “Marriage”*: *How Will States Enforce the Public Policy Exception?*, 32 CREIGHTON L. REV. 29, 38 (1998).

48. Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1978 (1997).

conflicts doctrine prescribes because the Court has never considered the applicability of full faith and credit to marriage. Moreover, nothing in the Constitution “creates a public policy exception to the full faith and credit mandate. The development of this exception has come solely from the common law . . . .”<sup>49</sup>

Mainstream conflicts scholars derive their understanding about marriage and full faith and credit from the sparse decisions the Court has rendered in other contexts about what limitations the Constitution places on a forum court’s decision to apply its own law, rather than the law of another interested state, to an interstate conflict.<sup>50</sup> Starting in the 1930s, the Court reasoned that, where “acts” are concerned, the Full Faith and Credit Clause does not require State A to give up its ideas about public policy in deference to State B unless State B has a much stronger interest in the matter. In *Alaska Packers Ass’n v. Industrial Accident Commission*,<sup>51</sup> a 1935 case which concerned workers’ compensation statutes, the Court observed:

To the extent that California is required to give full faith and credit to the conflicting Alaska statute, it must be denied the right to apply in its own courts a statute of the state, lawfully enacted in pursuance of its domestic policy. . . . A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own.<sup>52</sup>

The Court said much the same thing four years later in *Pacific Employers Insurance Co. v. Industrial Accident Commission*,<sup>53</sup> another workers’ compensation case, when it reasoned that a state should not be required “to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.”<sup>54</sup>

Jumping ahead more than forty years, the Court held in *Allstate Insurance Co. v. Hague*,<sup>55</sup> an insurance coverage dispute, that a forum’s application of its own law, rather than the law of another interested state, was “neither arbitrary nor fundamentally unfair” under the Fourteenth Amendment’s Due Process Clause as long as the forum state had a “significant aggregation of contacts” (which the Court did not define more precisely) with the parties or occurrence in the litigation.<sup>56</sup> It is generally recognized that the full faith and due process tests have merged into one single test.<sup>57</sup> In practice, this undemanding test has rendered full faith and credit

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49. Emily J. Sack, *The Retreat From DOMA: The Public Policy of Same-Sex Marriage and a Theory of Congressional Power Under the Full Faith and Credit Clause*, 38 CREIGHTON L. REV. 507, 523 (2005).

50. See, e.g., Borchers, *supra* note 12, at 355–57 (discussing the cases I describe herein).

51. 294 U.S. 532 (1935).

52. *Id.* at 545, 547.

53. 306 U.S. 493 (1939).

54. *Id.* at 501.

55. 449 U.S. 302 (1981) (plurality opinion).

56. *Id.* at 308.

57. See *Sun Oil Co. v. Wortman*, 486 U.S. 717, 729–30 n.3 (1988); *id.* at 735 n.2

essentially “meaningless” for statutes.<sup>58</sup> In a 1988 case involving gas royalties, the Court went so far as to suggest that a state “choice-of-law practice[]” may be permissible under full faith and credit as long as it is “long established and still subsisting.”<sup>59</sup>

Translating this permissiveness to marriage recognition, mainstream conflicts scholars note that “[s]tate courts have long refused to recognize marriages that violate their public policy even if the marriage was validly celebrated elsewhere.”<sup>60</sup> Indeed, “it is hard to imagine a . . . close constitutional question” on the matter, they say, because the mere fact that the married couple lives in a mini-DOMA state provides more than enough “interest” and “contact” to satisfy the modern test.<sup>61</sup> And in the curious world of the Court’s modern full faith and credit jurisprudence, the very senescence of state practices seems to insulate them from constitutional accountability.<sup>62</sup>

Other scholars have put additional glosses on the conventional wisdom, but these all come down, in one way or another, to policy arguments that attempt to explain and justify the status quo.<sup>63</sup> States’ parochial insistence on applying their own anti-same-sex marriage policies to valid migratory marriages from other states is, according to this view, simply “the unavoidable cost[] of federalism’s commitment to diverse state policies on matters about which people strongly disagree.”<sup>64</sup> Be that as it may, arguments that explain and defend the status quo can be met with other arguments that take better account of present-day legal and social realities,<sup>65</sup> as well as the most recent thinking of the Supreme Court.

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(Brennan, J., concurring in part and concurring in the judgment); *Allstate*, 449 U.S. at 308 n.10 (plurality opinion).

58. Scott Fruehwald, *Constitutional Constraints on State Choice of Law*, 24 U. DAYTON L. REV. 39, 63 (1998).

59. *Sun Oil*, 486 U.S. at 728. The Court has provided a much different rule for judgments, as opposed to statutes. For judgments, the full faith and credit obligation is “exacting” and admits of “no roving public policy exception.” *Baker v. General Motors Corp.*, 522 U.S. 222, 223 (1998) (internal quotation marks omitted). There is currently disagreement among the circuits (generated by cases involving same-sex couples) regarding how this principle applies to adoption decrees. *Compare* *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007) (holding that a state may not refuse to recognize adoptions by same-sex couples granted by courts in other states), *with* *Adar v. Smith*, 639 F.3d 146 (5th Cir. 2011) (en banc) (holding that full faith and credit for judgments is a rule of *res judicata* for state courts but did not require a state agency to “execute” the judgment by issuing a revised birth certificate reflecting the child’s new parents).

60. Borchers, *supra* note 12, at 357.

61. *Id.* at 356–57.

62. *See supra* note 59 and accompanying text.

63. *See, e.g.*, Mark D. Rosen, *Why the Defense of Marriage Act is Not (Yet?) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors that Determine What the Constitution Requires*, 90 MINN. L. REV. 915, 984–99 (2006) (rejecting arguments that the Full Faith and Credit Clause should require states to recognize each other’s marriages); Lynn D. Wardle, *Williams v. North Carolina, Divorce Recognition, and Same-Sex Marriage Recognition*, 32 CREIGHTON L. REV. 187, 233 (1998) (opining that a “wise Supreme Court will not try to . . . force interstate harmony regarding same-sex marriage”).

64. Rosen, *supra* note 63, at 999.

65. *See supra* notes 21–23, 37–39 and accompanying text.

## III. MARRIAGE ACCORDING TO THE SUPREME COURT

The critical premise of the conventional wisdom is that marriage belongs in the same constitutional basket as workers compensation, insurance regulation, and gas royalties.<sup>66</sup> It assumes that a marriage license is comparable to “a fishing, hunting or law license.”<sup>67</sup> Such “legislative enactments and licenses” get no mandatory recognition under full faith and credit because every state is entitled to its own ideas on such matters.<sup>68</sup> But can these assumptions be reconciled with the way the Supreme Court actually has described marriage and decided marriage cases? I suggest they cannot, and this point is the crux of why I believe the conventional wisdom should be reconsidered. With all due respect to full faith and credit minimalists, marriage is simply not analogous for constitutional purposes to a state “decid[ing] to issue driver’s licenses to ten-year olds” and expecting other states to honor them.<sup>69</sup> An argument that the Supreme Court ought to apply full faith and credit to marriage should begin not with what the Court has held in other contexts, but with the nature of marriage itself.

Marriage in American law is *sui generis*, a presumptively permanent status from which there can be no exit without adjudication and the state’s permission through a divorce proceeding. It is a “unique institution” that “triggers legal rights, responsibilities, and benefits not afforded to unmarried persons, pursuant to a compact that is public and social in nature.”<sup>70</sup>

More than a century ago, the Supreme Court observed that marriage is “something more than a mere contract.”<sup>71</sup> “Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities.”<sup>72</sup> Marriage, the Court said, “is the foundation of the family and of society, without which there would be neither civilization nor progress. . . . ‘the purest tie of social life, and the true basis of human progress.’”<sup>73</sup> Some things about marriage have, of course, changed since the late nineteenth century—the law today gives greater respect to the spouses’ privacy and autonomy to conduct the marriage as they see fit, and divorce is much easier to obtain—but marriage remains singular in its profound personal consequences and social meaning.<sup>74</sup>

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66. See, e.g., Whitten, *supra* note 16, at 479 (stating that the author “proceed[s] on the theory that the Supreme Court’s ‘public acts’ cases under the clause are the relevant body of authority”).

67. Borchers, *supra* note 12, at 358. Elsewhere in his article, Professor Borchers acknowledges that marriages “are not like fishing licenses” in the sense that with the latter, “one needs a new one in each new state and with each new season.” *Id.* at 354.

68. Wolff, *supra* note 16, at 2222 n.18; accord Whitten, *supra* note 16, at 476–77.

69. Whitten, *supra* note 16, at 477.

70. 52 AM. JUR. 2D *Marriage* § 1 (2011).

71. *Maynard v. Hill*, 125 U.S. 190, 210–11 (1888).

72. *Id.* at 211.

73. *Id.* at 211–12 (quoting *Adams v. Palmer*, 51 Me. 480, 484–85 (1863)).

74. Indeed, one measure of marriage’s special status is how tenaciously the opponents of equality are fighting to keep gays and lesbians out of it.

Even before *Windsor*, marriage was at the center of some of the Court's most important decisions about the Constitution's meaning. In *Meyer v. Nebraska*,<sup>75</sup> which expanded substantive due process beyond the economic realm to encompass other forms of individual liberty, the Court ranked the freedom to marry alongside the rights to "establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."<sup>76</sup> In *Griswold v. Connecticut*,<sup>77</sup> the wellspring of the constitutional right of privacy, the Court called marriage "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred."<sup>78</sup> Marriage, it said, promotes "a way of life," "a harmony in living," and "a bilateral loyalty," making it "an association for as noble a purpose as any involved in our prior decisions."<sup>79</sup> In *Loving v. Virginia*,<sup>80</sup> which invalidated laws against interracial unions and struck a critical blow against America's legal and social apartheid, the Court stressed that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."<sup>81</sup> And in *Turner v. Safley*,<sup>82</sup> which invalidated a prison restriction on inmate marriage, the Court noted that marriages are "expressions of emotional support and public commitment."<sup>83</sup> For many people, it noted, marriage has "spiritual significance," and marital status "often is a precondition to the receipt of government benefits (e.g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimation of children born out of wedlock)."<sup>84</sup>

*Windsor*, the Court's first decision dealing with same-sex unions, underscored the significance the Court has long attributed to marriage. It emphasized that "marriage is *more* than a routine classification for purposes of certain statutory benefits"<sup>85</sup> (an observation that seems to undermine the conventional wisdom that marriage is no different than any other statutory licensing scheme). Rather, the Court said, marriage is a legal "status"<sup>86</sup> that embodies "a far-reaching legal acknowledgement of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community."<sup>87</sup> The solemnization of a marriage by the state "confer[s] . . . a dignity and status of immense import" and

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75. 262 U.S. 390 (1923).

76. *Id.* at 399.

77. 381 U.S. 479 (1965).

78. *Id.* at 486.

79. *Id.*

80. 388 U.S. 1 (1967).

81. *Id.* at 12 (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)).

82. 482 U.S. 78 (1987).

83. *Id.* at 95.

84. *Id.* at 96.

85. 133 S. Ct. at 2692 (emphasis added).

86. *Id.*

87. *Id.*

provides the couple with “recognition, dignity, and protection” under the law.<sup>88</sup> Moreover, the granting of a marriage license is “the foundation of the State’s broader authority to regulate the subject of domestic relations with respect to the ‘[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.’”<sup>89</sup>

Besides underscoring the unique legal and social position of marriage, *Windsor* also characterized it as a dynamic institution, one that demonstrates how law can discard the narrow understandings of the past and adapt, through an “evolving understanding of the meaning of equality,”<sup>90</sup> to new legal and social realities. The growing acceptance of same-sex marriage, the Court said, reflects “a new perspective, a new insight.”<sup>91</sup> If this new insight about marriage carried enough constitutional weight to require section 3 of DOMA’s invalidation, it is not so far-fetched to believe that it can also help revise our thinking about full faith and credit.

To be sure, there was an important theme in *Windsor* of vertical federalism—that is, the relationship of the federal government to the states—whereas my concern here is horizontal federalism: the relationship of the states to each other. Although the Court declined to decide *Windsor* on Tenth Amendment or other explicit federalism grounds, using equal protection and due process principles instead, it observed that “the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations” because states have the primary responsibility for family law.<sup>92</sup> The Court also referred to an observation in *Williams v. North Carolina*<sup>93</sup>—the case that established the principle of full faith and credit for divorce decrees—that “[e]ach state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders.”<sup>94</sup>

The question of interstate marriage recognition was not presented or decided in *Windsor*, but like the Court’s opinion, the arguments I advance here are confined to “lawful marriages”<sup>95</sup> that already exist. And as I have argued elsewhere,<sup>96</sup> the above-cited passage from *Williams* should not be read as a license for one state to nullify a non-evasive marriage from another state. Recall that *Williams* overturned *Haddock v. Haddock*,<sup>97</sup> which involved a man who had been validly divorced in one state but was still legally married in another—what the Court characterized as “the ‘most perplexing and distressing complication[] in the domestic relations of many citizens in the different states,’”<sup>98</sup> and essentially the same situation many same-sex couples face today.

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88. *Id.*

89. *Id.* at 2691 (quoting *Williams v. North Carolina*, 317 U.S. 287, 298 (1942)).

90. *Id.* at 2693.

91. *Id.* at 2689.

92. *Id.* at 2691.

93. 317 U.S. 287 (1942).

94. *Windsor*, 133 S. Ct. at 2691 (quoting *Williams*, 317 U.S. at 298).

95. *Id.* at 2696.

96. Sanders, *supra* note 21, at 1469–71.

97. 201 U.S. 562, 564–65 (1906).

98. *Williams*, 317 U.S. at 299 (quoting *Dunham v. Dunham*, 44 N.E. 841, 847 (Ill.

In *Williams*, the Court had also observed that there was no authority for “the view that the full faith and credit clause compels the courts of one state to subordinate the local policy of that state, as respects its domiciliaries, to the statutes of any other state.”<sup>99</sup> This passage provides support for the principle that evasive marriages should not receive full faith and credit. But with migratory marriages, even if the new state of domicile has an interest in the marriage that satisfies the token requirements of current full faith and credit jurisprudence, framing the question as solely a contest between states fails to account for the strong interests of the couple in the ongoing existence of their marriage.<sup>100</sup> In the 1940s, it might have seemed unremarkable to observe that a state could assert “pervasive control . . . over marriage . . . within its own borders.”<sup>101</sup> But in the wake of more recent decisions like *Griswold*, *Loving*, and *Windsor*, marriage is today understood as a locus of individual liberty, private ordering, and personal dignity.<sup>102</sup> The trivial amount of full faith and credit the Court has prescribed for other statutory matters is inadequate to protect the profound personal as well as societal interests the Court has ascribed to marriage.

Although the Full Faith and Credit Clause is a federalism-regulating provision of the Constitution, not a rights-creating provision, one of its purposes was to establish that states were not “free to ignore rights and obligations created under the laws” of their co-equal sister sovereigns.<sup>103</sup> In divorce cases like *Williams*, “the Supreme Court acted on the view that the Constitution demanded a more coherent and unified national approach to the divorce problem than what Congress or the states had been able to achieve.”<sup>104</sup> Such a coherent and unified national approach is necessary today for marriage. Where state parochialism impedes a matter of national importance, states must bow to the requirements of full faith and credit, for, as the Court also said in *Williams*, “[s]uch is part of the price of our federal system.”<sup>105</sup>

#### IV. THE NATIONAL INTEREST IN UNIFORMITY OF MARITAL STATUS

Up to this point, I have sought to demonstrate (1) that current doctrine on the Full Faith and Credit Clause’s applicability to marriage essentially just restates a principle of virtually unchecked state control over choice-of-law questions like marriage recognition; (2) that this doctrine is in tension with the understanding about marriage that has been provided by Supreme Court jurisprudence—including, most recently, *Windsor*; and (3) that the contemporary legal and practical realities of same-sex marriage require us to rethink this question. The Full Faith and Credit Clause is appropriately applied where there is an important “national

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1896)).

99. *Id.* at 296.

100. *See Sanders*, *supra* note 21, at 1445–52.

101. *Williams*, 317 U.S. at 300.

102. *See Sanders*, *supra* note 21, at 1427–32.

103. *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943).

104. Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL RTS. J. 381, 431 (2007).

105. *Williams*, 317 U.S. at 302.

interest” in a “uniform nationwide rule,”<sup>106</sup> and where “we must lift [conflict-of-laws] questions above the control of local interest” in favor of “wider considerations arising out of the federal order.”<sup>107</sup> In this Part, I conclude by sketching a few arguments about why there is a national interest in uniformity of marriage recognition—or, more precisely, a national interest in foreclosing discriminatory exceptions to a policy of uniform marriage status that is already well established.

I am not, of course, the first commentator to question the conventional wisdom about marriage and full faith and credit. Brian Bix has observed that “marriage is something more than the question of which state’s laws should apply to some case before the court.”<sup>108</sup> Rather, it is a “status conferred by . . . an authorized official,” different from a hunting or fishing license because “we usually do not think of our marital status as rights and duties that apply only within a confined geographical area.”<sup>109</sup> Nor am I the first to argue that the Full Faith and Credit Clause could be used to prevent states from carving out an exception for gay and lesbian couples to the established default rule of interstate marriage recognition.<sup>110</sup> Pointing to states’ abuse of the public policy exception on same-sex marriage, Larry Kramer has argued that full faith and credit makes the exception unconstitutional.<sup>111</sup> Shawn Gebhardt has argued that marriage licenses should be understood as executive status records, and that such status records “should receive the same ironclad full faith and credit protection as” judgments.<sup>112</sup> And Joseph Singer has argued that full faith and credit “must be construed in light of other constitutional norms,” including the fundamental right to marry, the First Amendment, and the right to travel.<sup>113</sup>

Perhaps the most famous expositor of the Full Faith and Credit Clause, Justice Robert Jackson, did not appear to doubt that the Clause could be applied to marriage recognition. In a famous 1945 article on the Clause, Jackson noted simply that the question had arisen only in the context of judgments, and went on to observe that “[t]he whole issue of faith and credit as applied to the law of domestic

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106. EUGENE F. SCOLES, PETER HAY, PATRICK S. BORCHERS & SYMEON C. SYMEONIDES, *CONFLICT OF LAWS* 170–71 (4th ed. 2004).

107. Jackson, *supra* note 30, at 28.

108. Brian H. Bix, *State Interests in Marriage, Interstate Recognition, and Choice of Law*, 38 CREIGHTON L. REV. 337, 344 (2005); *see also* Sack, *supra* note 49, at 524 (“[A]n existing marriage is not a law, and involves stronger interests than a determination of which law to apply to an as-yet-undecided matter.”).

109. Bix, *supra* note 108, at 344.

110. In addition to the other scholarship discussed in this paragraph, see generally, for example, 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 (1993–94).

111. *See generally* Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997).

112. Shawn Gebhardt, Comment, *Full Faith and Credit for Status Records: A Reconsideration of Gardiner*, 97 CAL. L. REV. 1419, 1421 (2009).

113. Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. C.R. & C.L. 1, 35 (2005).

relations is difficult, and the books of the Court will not be closed on it for a long time, if ever.”<sup>114</sup>

As a general matter, Jackson suggested the Court had been too timid about full faith and credit. He argued that “[w]here there is a choice,” the Clause should be used to “meet the needs of an expanding national society for a modern system of administering, inexpensively and expeditiously, a more certain justice.”<sup>115</sup> Drawing on the writings of Justice Benjamin Cardozo, Jackson urged that interpretation of the Full Faith and Credit Clause be informed by common-law judicial principles. Two of those principles are that “certainty and order are themselves constituents of the welfare which it is our business to discover,”<sup>116</sup> and that “[o]ne of the most fundamental social interests is that law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or favor.”<sup>117</sup> Both of these principles support using full faith and credit to assure the stability and dignity of same-sex marriages.

It is actually unnecessary for me to argue that there is a national interest in uniformity of marriage recognition because that principle is already established in American legal practice and has been validated by countless legal authorities and commentators. As an 1891 marriage law treatise observed:

[F]or the peace of the world, for the prosperity of its respective communities, for the well-being of families, for virtue in social life, for good morals, for religion, for everything held dear by the race of man in common, it is necessary there should be one universal rule whereby to determine whether parties are to be regarded as married or not[.]<sup>118</sup>

As one state high court has put it, “uniformity in the recognition of the marital status” is important “so that persons legally married according to the laws of one State will not be held to be living in adultery in another State, and that children begotten in lawful wedlock in one State will not be held illegitimate in another.”<sup>119</sup> Another has said “there is a strong policy favoring uniformity of result” in marital status because “[i]n an age of widespread travel and ease of mobility, it would create inordinate confusion and defy the reasonable expectations of citizens whose marriage is valid in one state to hold that marriage invalid elsewhere.”<sup>120</sup> It could be noted as well that the *lex loci contractus* approach of the place-of-celebration rule is an oddity in modern conflicts doctrine, which emphasizes the analysis of relative state interests.

All of this suggests that defenders of the conventional wisdom about full faith and credit and marriage are incorrect when they assert that “American law

114. Jackson, *supra* note 30, at 14.

115. *Id.* at 24.

116. *Id.* at 25 (quoting BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 79 (1924)).

117. *Id.* (quoting BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 112 (1921)).

118. 1 JOEL PRENTISS BISHOP, *NEW COMMENTARIES ON MARRIAGE, DIVORCE, AND SEPARATION* § 856 (1891).

119. *Henderson v. Henderson*, 87 A.2d 403, 408 (Md. 1952).

120. *In re Lenherr's Estate*, 314 A.2d 255, 258 (Pa. 1974).

pointedly has not adopted” the position that “marriage ought to be a matter of national uniformity.”<sup>121</sup> It is more accurate to say that, up until now, there has been little need to *enforce* this principle through federal law because, in Justice Jackson’s words, “[g]enerosity in [states] applying [each other’s] law . . . has forestalled pursuit of many questions as constitutional ones under the full faith and credit clause.”<sup>122</sup>

Given that American law recognizes the desirability of uniform marital status, my argument, then, is that the Supreme Court should reinvigorate the Full Faith and Credit Clause to prevent states from creating discriminatory exceptions to a default policy of marriage recognition.<sup>123</sup> Among the national interests that support such use of the Clause are:

(1) *Protecting individual rights and liberty against coercive and discriminatory state power.* Marriage and family life were once understood as matters of localism and strict government control, but today they are predominantly understood in terms of private ordering, autonomy, and individual rights.<sup>124</sup> The clear direction in marriage law at both the state and federal levels has been toward eliminating invidious and unjustified discrimination—as *Windsor* demonstrates. Yet the very framework of choice-of-law analysis inherently favors state interests over individual rights.<sup>125</sup> Similarly, the *Allstate* doctrine “stresses state interests over individual liberty interests, contravening the purpose of the Due Process Clause” on which it is based, “the protection of individual liberty.”<sup>126</sup>

Commentators who defend the status quo of full faith and credit have given inadequate consideration to the harms inflicted on individuals. As much or more so than federal non-recognition, the current patchwork of interstate marriage recognition (to quote *Windsor*) “demeans” same-sex couples, “divests” them of “the duties and responsibilities that are an essential part of married life,” “humiliates” their children, and signals that “their marriage is less worthy than the marriages of others.”<sup>127</sup> Such “interference with the equal dignity of same-sex marriages” forces couples to “have their lives burdened, by reason of government decree, in visible and public ways.”<sup>128</sup>

(2) *Maintaining the integrity of horizontal federalism.* In *Windsor*, the Court said that “[b]y creating two contradictory marriage regimes within the same State, [section 3 of] DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper

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121. Rosen, *supra* note 63, at 997.

122. Jackson, *supra* note 30, at 18.

123. Inevitably, questions will arise in response to this argument about whether states would have to recognize marriages that involve incest or polygamy. These concerns are unfounded, as I have explained elsewhere. See Sanders, *supra* note 21, at 1435–38. In any case, before the advent of same-sex marriage, the public policy exception to marriage recognition had largely fallen into disuse. *Id.* at 1436–37.

124. *Id.* at 1427–32.

125. See *id.* at 1443–45.

126. Fruehwald, *supra* note 58, at 57.

127. United States v. Windsor, 133 S. Ct. 2675, 2693–96 (2013).

128. *Id.* at 2693–94.

to acknowledge and protect.”<sup>129</sup> But if that is so, then why is it rational to have two contradictory marriage-recognition regimes in the same *country*, forcing same-sex couples to live as married for the purpose of one state’s law but unmarried for the purpose of another state’s law? Moreover, our current situation is actually a “one-way federalism: It protects only those states that don’t want to accept a same-sex marriage granted by another state.”<sup>130</sup> A workable federalism regime should mean that Indiana cannot undermine Iowa’s public policy by voiding migratory marriages that Iowa had created for its own domiciliaries.

American states “do not and cannot stand in the same relation to each other as they do to foreign countries,” as Mark Strasser has observed.<sup>131</sup> Thus, if we are concerned about a sensible scheme of horizontal federalism, mere “comity,” a concept from international law, “is simply too weak a standard” when an important nationwide interest is at stake.<sup>132</sup> The United States in 2013 may be an amalgam of red states and blue states, but it cannot be credibly argued that their “legal and cultural traditions” are “fundamentally different” enough to justify the harms that are inflicted when states refuse to recognize each other’s marriages.<sup>133</sup> With the exception of same-sex unions, American marriage laws have become “remarkably uniform.”<sup>134</sup> And when forced to defend their mini-DOMAs in court, no state has asserted that same-sex marriage is some sort of affirmatively harmful *malum*. Rather, the argument of choice has been that restricting marriage to heterosexuals is necessary to encourage “responsible procreation.”<sup>135</sup> Incentivizing opposite-sex couples to procreate responsibly may or may not be a legitimate reason for favoring one type of couple over another in who may *obtain* a marriage license, but it seems an odd justification for nullifying the legal rights and responsibilities of an already-married couple.

If mandatory recognition under the Constitution is limited to migratory, rather than evasive, marriages, as I think it should be, there can be no objection that mini-DOMA states must be protected, as some commentators have suggested, from “aggressive sister-states that seek to export their same-sex marriages into the law, policy, and territorial jurisdiction of other states.”<sup>136</sup> Couples who have married in good faith have a right to argue that their reliance interest in the ongoing existence of their

129. *Id.* at 2694.

130. Bob Barr, Op-Ed, *No Defending the Defense of Marriage Act*, L.A. TIMES (Jan. 5, 2009), [http://www.latimes.com/news/opinion/commentary/la-oe-barr5-2009jan05\\_0,1855836.story](http://www.latimes.com/news/opinion/commentary/la-oe-barr5-2009jan05_0,1855836.story).

131. Mark Strasser, *For Whom Bell Tolls: On Subsequent Domiciles’ Refusing To Recognize Same-Sex Marriages*, 66 U. CIN. L. REV. 339, 372 (1998).

132. *Id.*

133. *Id.* at 373.

134. Grossman, *supra* note 17, at 442.

135. Jeffrey Rosen, *The Laughable Argument Against Gay Marriage*, THE NEW REPUBLIC (March 26, 2013), <http://www.newrepublic.com/article/112778/supreme-court-gay-marriage-case-2013-laughable-argument>. For a decision accepting this rationale, see, for example, *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006).

136. Lynn D. Wardle, *Who Decides? The Federal Architecture of DOMA and Comparative Marriage Recognition*, 41 CAL. W. INT’L L.J. 143, 177 (2010).

marriage outweighs the mini-DOMA state's interest in denigrating the marriage.<sup>137</sup> As Larry Kramer has put it, "[t]he measure of repugnance" of law "is fixed by the federal Constitution, and states have no business selectively ignoring or refusing to recognize the constitutional laws of sister states because they do not like them."<sup>138</sup> To characterize the growing acceptance of same-sex marriage as a "threatening condition[]"<sup>139</sup> that requires bolstering, not challenging, the status quo is simply a manifestation of the sort of anti-gay animus the Court repudiated in *Windsor*.

(3) *Ensuring the right to travel and take up residence in a new state.* Justice O'Connor once observed that "[i]t is difficult to imagine a right more essential to the Nation as a whole than the right to establish residence in a new State."<sup>140</sup> A meaningful right to travel should prevent a person from having to choose between, say, "a great job opportunity" in a mini-DOMA state, and retaining one's legally married status.<sup>141</sup> As one commentator observes, marital domicile "may change several times over the course of [a] marriage . . . . Does each state where the marriage is lived out have the right to determine what the couple can or cannot do and what the implications of their relationship are?"<sup>142</sup> Under the conventional wisdom that rests on the minimal constitutional constraints of *Allstate v. Hague*, "the answer would seem to be yes."<sup>143</sup>

(4) *Aligning full faith and credit for all marital status.* Divorce gets strong protection under full faith and credit because every divorce involves a court judgment, and unlike statutes, judgments get the strongest measure of full faith and credit.<sup>144</sup> Yet this justification has become more about form than substance. The doctrine of full faith and credit for divorce was established before the rise of no-fault divorce, when marriage dissolution necessarily involved some allegation of fault and thus adversarial litigation. Today, the vast majority of divorces are no-fault, and ninety-five percent are granted based on out-of-court settlement agreements.<sup>145</sup> And so the reason for treating divorce and marriage differently under full faith and credit has become largely a matter of formalism rather than a principled distinction based on the Clause's meaning and purposes.

## V. IS SECTION 2 OF DOMA UNCONSTITUTIONAL?

Recall that in section 2 of DOMA, Congress used its power to "prescribe . . . the [e]ffect" of full faith and credit<sup>146</sup> such that no state "shall be required to give effect to

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137. See Sanders, *supra* note 21, at 1469–77.

138. Kramer, *supra* note 48, at 1987.

139. Wardle, *supra* note 136, at 177.

140. Zobel v. Williams, 457 U.S. 55, 76–77 (1982) (O'Connor, J., concurring in the judgment).

141. Mark Strasser, *Unity, Sovereignty, and the Interstate Recognition of Marriage*, 102 W. VA. L. REV. 393, 404 (1999).

142. Cox, *supra* note 46, at 376–77.

143. *Id.* at 377.

144. See *supra* note 59 and accompanying text.

145. Jeff Landers, *The Four Divorce Alternatives*, FORBES.COM (Apr. 24, 2012, 11:03 AM), <http://www.forbes.com/sites/jefflanders/2012/04/24/the-four-divorce-alternatives/>.

146. U.S. CONST., art. IV, § 1.

any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State.”<sup>147</sup> Andrew Koppelman has argued that section 2 is unconstitutional under the Equal Protection Clause because its “invidious purpose” and manifestation of a “bare desire to harm a politically unpopular group” go “well beyond anything necessary to ensure that each State can define for itself the concept of marriage.”<sup>148</sup> If I am correct that the Constitution can and should require states to recognize each other’s same-sex marriages, such a holding necessarily would invalidate section 2 under full faith and credit as well, since “[o]nce the Court ha[s] exercised its power to interpret the requirements of the Full Faith and Credit Clause, congressional legislation that contradicts the Court’s interpretation would be beyond Congress’s authority.”<sup>149</sup>

While I admire the power of Professor Koppelman’s argument, I suggest that full faith and credit is the better approach. Whereas invalidating section 2 under the Equal Protection Clause would require an explanation of why it is still acceptable under equal protection for states to refuse to *license* same-sex marriages, doing so under full faith and credit underscores that it is possible to distinguish for constitutional purposes between marriage creation and marriage recognition. As I explained earlier in this Essay,<sup>150</sup> there are good reasons for doing so.

#### CONCLUSION

The view that the Full Faith and Credit Clause has no relevance to marriage has hardened into conventional wisdom which many commentators repeat uncritically. It rests on an assumption that marriage is no different than any other subject of state statutory law, together with the principle that the Constitution must remain hands-off where states sharply disagree on a matter of policy that has traditionally been within their realm to determine. I have sought to demonstrate that both of these propositions are contestable. The Constitution can and should be used to temper state parochialism when it threatens harm to both individual rights and the sensible functioning of our federal system.

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147. Defense of Marriage Act, Pub. L. No. 104-199, § 2, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (2006)).

148. Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1, 24, 32 (1997) (quotation marks and footnote omitted).

149. Sack, *supra* note 49, at 531.

150. See *supra* notes 32–39 and accompanying text.